

Rally-Around-the-Flag and the Supreme Court:
Judicial Decision-Making during Times of War or Crises

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Conventional wisdom suggests that in times of war the President and Congress have a tendency to curtail civil rights and civil liberties, often in the name of national security. Two general camps regarding the Supreme Court's actions during these times indicate very different roles for the Court. In one view the Court stands as a protector of minority rights, ensuring that government regulations and actions during times of war do not blatantly violate the protections and freedoms embedded in the Constitution. On the other hand, as a coordinate branch of government, the Court must adhere, at least on some level, to the will and wishes of the President and Congress, especially in the safeguarding of the nation's borders. Rallies during times of crises or war are, generally, sudden shifts in public opinion. As such, in an effort to maintain its perceived legitimacy, the Court may be responsive to public opinion, which generally supports restrictions of civil rights and liberties in times of war or international crisis. With examples such as the *Korematsu v. United States* (1944) and even the restriction of free speech rights during the Cold War's zenith, we know that the justices do sometimes defer to the actions of majoritarian institutions during times of war and in the name of national security.

Unfortunately, empirical evidence in the examination of wartime effects on the Supreme Court has been sparse with few exceptions (e.g., Epstein et al. 2005); few—if any—studies have focused on the impact that war time may have on the choices justices make. This paper seeks to resolve both these issues by asking and answering two general lines of inquiry. First, are the justices impacted by the rally-around-the-flag effect? Second, if the rally-around-the-flag hypothesis is true for the Court, meaning they too restrict civil rights and liberties in times of war, does this effect impact all justices? In other words, are liberals, who arguably should stand as protectors of civil liberties and rights, constrained by the presence of a war? Or, is the rally-around-the-flag simply a phenomenon that occurs because it is fostered and perpetuated by conservatives who may already prefer a more conservative outcome? That is to say, does war present those with conservative policy preferences the opportunity to maximize their utility—namely restrict civil liberties and rights—in the name of national security?

We employ a multilevel model where the justices' choices (level-1) are *nested within* cases (level-2). Thus, we are able to test in an empirically rigorous manner the ability of war time to affect and impact—significantly and systematically—the choices justices make. Moreover, we are able to parcel out whether the rally-around-the-flag phenomenon is one that is sparked and perpetuated by only those that prefer conservative outcomes or whether war actually *constrains* all the justices, liberal and conservative alike. Overall, we find that those justices most likely to be swayed by (moderates) and those most likely to resist (liberals) the rally effect are systematically and significantly moved during times of war. Unfortunately, such constraint should not be overstated or overemphasized. The change, on average, in the probability of a liberal vote during times of war or crisis with a rally effect is small (about a 3 percent decrease for both moderates and liberals). Rather than shifting with the coordinate branches of

government in a rally effect, we find more evidence of direct deference when the federal government participates at the Supreme Court. Within our framework of meaningful constraint, we see a large shift in the liberal justices' votes when the federal government, taking a conservative position, participates as a litigant in a given case; furthermore, conservatives appear constrained, meaningfully, when the federal government files an amicus brief arguing a liberal position.

The Supreme Court, Public Opinion, and the Rally-Around-the-Flag Effect

There are several reasons why public opinion operates as a direct, external constraint on the choices justices make. First, with neither the power of the purse nor the sword, the Court is reliant on the coordinate branches of government; the Court has no ability to carry out its decisions without the support of the legislature or the executive. In what has been deemed rational anticipation (Stimson et al., 1995), the Supreme Court must anticipate the reactions to their decisions by the other branches. The way to do so is indeed to adhere to public opinion, which is something the two popularly elected branches must already do. Second, as a corollary, deviation too far and for too long from public opinion can indeed lead to a tenuous position where public support for the institution of the Supreme Court may decrease, as was the case with the Four Horsemen striking down much of the New Deal legislation before the switch in time that saved the nine. Third, as Bickel (1962) notes, the Court must rest its decisions on great and widely accepted principles, especially if it stands against a coordinate branch of government. If the Court has the support of public opinion on its side, the legislature and the executive theoretically should adhere to the Court's decisions. Fourth, the justices themselves have noted that public standards—ever-evolving and changing—serve as guides for their decisions. For example, they have noted in their opinions that the justices will look to public opinion regarding the standards for cruel and unusual punishment. Given the inability to carry out their decisions without the help of the other branches of government, it makes intuitive sense that public opinion may indeed be a factor in the decisions handed down by the justices.

Previous empirical examinations of public opinion's influence on Supreme Court decision-making, however, have come up with mixed results. Some fall victim to the common problem of examining the question of public opinion's impact on the Supreme Court: small sample (Mishler and Sheehan, 1996)¹. Even when supportive empirical evidence¹ was found, the results were either attacked on modeling and specification grounds (see Mishler and Sheehan, 1993 and a response from Norpoth and Segal, 1994), or the influence has been scant and quite small (i.e., Flemming and Wood, 1997

In times of crisis or war, however, public opinion is somewhat different; it is drastic, sharp and quick. The rally-around-the-flag effect (Mueller, 1973), where the President experiences a sudden jump in

¹ They examine the five most moderate justices serving a minimum of 12 terms from 1953 to 1992. By selecting justices' term liberalism scores, the result is problematically small sample, where the time series range from an n of 11 to 23, which is hardly appropriate for maximum likelihood estimation that includes an autoregressive parameter.

public approval of executive performance, comes with support of and even calls for increasing national security; with this shift in public opinion often comes restrictions on civil liberties and civil rights.

When the nation is involved in an international conflict, many aspects of American life change. International conflict exerts an effect not only on American's daily lives, but also on the American political landscape (e.g., Hetherington and Nelson, 2003). While public opinion has seen a wealth of literature and research examining its effects on Supreme Court decision-making, the effect of international conflict on the behavior of the Supreme Court, however, suffers from a poverty of empirical examinations with the few exceptions (i.e., Epstein et al., 2005).

In regards to the Court's role during times of war or crises, there are two very different arguments. One side suggests the Court, like other government institutions, will support the suppression of rights and liberties in the name of national security. As a coordinate branch of government, the Court appears to adhere to the wishes of the other two branches; moreover, while the Constitution speaks of expanding powers for the Executive and the Legislative branches in emergencies, crises, or war, it is silent with references to the Court in these instances. This silence, according to some, suggests that the Court should offer much discretion to other branches. Additionally, the Court may in fact be influenced by public opinion; the rally-around-the-flag effect is indeed a form of public opinion, public opinion which may indeed favor restricting civil rights and liberties when there is a perceived threat to national or personal security (Davis and Silver, 2004).

On the other side, the Court stands as the protector of minority rights against a possibly tyrannical majority. This conception is obviously based on the idea that the Court, being institutionally insulated with no electoral accountability and the security of life tenure, is designed by the Framers to ensure government regulations and actions during war times do not blatantly violate the protections and freedoms embedded in the Constitution. Moreover, with no electoral accountability, there should not necessarily be a need to adhere to public opinion or popular sentiment—no matter how sharp, quick or sudden. As Bickel (1962) might argue, the Court grounds its decisions on general, accepted and great principles. Susceptibility to the ebbs and flows of public opinion would make the Court a majoritarian institution. While both sides warrant support and have merit, there have been few empirical examinations regarding the Court's role during these times.

Standing out as the only empirical analysis regarding war or crisis time on the Supreme Court, Epstein et al. (2005) set out to examine cases heard by the Court that involved civil rights or civil liberties claims during the 1941 to 2001 terms. Utilizing a nonparametric matching framework², the authors, paradoxically, find that war affects only cases unrelated to the war; non-war related cases decided during

² For a discussion of the intuition behind and specific description of nonparametric methods, see Epstein et al (2005), pages 62 – 69, and footnote 268 (page 62) for additional references on nonparametric matching.

war time have a significantly higher probability of a conservative decision during war time than peace time, but there is no statistically significant difference between these periods for cases directly related to a war. The authors suggest that this paradox is best explained by an alternate theory of Court decision-making during war time: “[W]hen cases are directly related to the war, the traditional liberal-conservative...dimension...becomes less meaningful. For cases that are directly related to the war or conflict, the Court seeks to shift responsibility towards Congress and the Executive” (74).

Heterogeneity in the Preference/Behavior Relationship

While the work of Epstein et al. (2005) is groundbreaking for its strict empirical analysis of crisis effects on the Court’s handling of war/non-war related cases, the discussion focuses on the Court in an aggregate sense: the Court does appear to be more conservative in times of war and crisis, which Epstein et al. qualify. The discussion of the rally-around-the-flag effect generally centers on the curtailing of rights and liberties by each branch of government. But, a missing component is an attempt to determine if this impact of war or crisis is due to the actions of those who would prefer an outcome similar to that the war evinces (i.e. curtailing rights and liberties), or if it is the actions of those generally predisposed *against* such outcomes that drives the impact of war, suggesting these latter justices vote in accordance with public opinion or the coordinate branches of government. Phrasing this discussion in terms of the Supreme Court, how does war or crisis impact the very choices individual justices make? We seek to address this issue here.

In general, we seek to add to the discussion of war and crisis, but not necessarily by finding evidence that the Court evinces more conservative decisions in the name of national security. Instead, we seek to determine whether the rally around the flag is similar for all justices and whether this impact suggests meaningful influence on the choices justices make. Specifically, we ask: are liberals—who arguably should stand as protectors of civil liberties—constrained in their decision making during war, or is a Court rally-around-the-flag effect simply a phenomenon that occurs because it is fostered by conservatives, who may arguably prefer a more conservative outcome, regardless of the “nature of the times”? If the impact of war is to be a meaningful constraint on the choices justices make, we argue that it must affect those that would not prefer more conservative decisions. In other words, the true test of influence on decision making is not whether justices vote to curtail rights and liberties; rather, in order for the rally around the flag effect to be meaningful it must get justices to curtail rights *in spite* of their policy preferences or ideology.

This conceptualization of heterogeneity in the preference/behavior relationship is not new to political science (e.g., Martin 2001; Bartels, 2006). When policy preferences are in line with a given constraint—whether public opinion or the coordinate branches of government, there should be an accentuation of the impact of policy preferences in the eventual outcome. Acceptance of this argument

also raises one other question: In times of war, what happens when policy preferences run counter to that of Congress, the President, or public opinion? Will justices be constrained? The true test of constraint is when justices vote in line with the coordinate branches of government or public opinion *in spite* of their policy preferences.

This discussion of constraint is prominent in the literature on Congressional party politics. Meaningful constraint can be summarized by the differences in constrained and sincere voting behavior. Krehbiel (1993; 2000) examines influence by the parties on legislative behavior. He argues that significant party effects are only supported when individual legislator behavior supports party policy objective independent of individual preferences. Pushing this notion further suggests party influence is only substantively meaningful when the party can induce legislator behavior that is counter to the legislator's policy preferences. If policy preferences of both the party and the legislator are congruent – and thus independently predict congruent outcomes – one cannot differentiate between sincere or constrained behavior. While there has been much debate as to how to measure such influence and to what degree partisan politics affect the choice legislators make (e.g., Groseclose and Stewart, 1998; Ansolabehere, Snyder and Stewart, 2001; Snyder and Groseclose 2000; McCarty, Poole and Rosenthal, 2001), the underlying if not outright assumption is that the search for constraint must be in those instances where actors are ideologically divergent.

For the justices at the Supreme Court, this conception of constrained and unconstrained decision-making has been discussed in the separation of powers models. The ongoing debate between Spiller and his coauthors (1993, 2003) and Segal and Spaeth (2002) highlights the importance in distinguishing between sophisticated, or strategic, and sincere, or ideological, behavior. While Spiller and Gely (1993) argue and suggest that the justices are indeed constrained by Congress, their model fails to distinguish between the two types of behavior (Segal and Spaeth, 2002). Based off a switching regression, it could very well be the case that sincere voting drives the findings of congressional influence on the choices justices make. Again, for significant impact on judicial decision-making to occur, it must be evinced in the behavior of those who would prefer an opposing outcome.

We argue here that justices must vote to restrict civil liberties during times of war *in spite* of their policy preferences in order for war's influence to be substantively meaningful. If not, war simply becomes a reinforcing element in sincere voting and therefore consistent with what the attitudinal model would already predict. If, as conventional wisdom suggests, times of war or crisis cause—dare we say constrain—the justices to support restrictions of civil liberties and rights, these effects are the “result” of the crises only to the degree that the crises have caused the individual justices to support this restriction in spite of their own personal policy preference; if a justice is generally supportive of limiting civil rights and liberties, the war's “effect” is simply consistent with personal policy preference and has not induced

any behavior contrary to or in spite of those preferences. Similarly, the so called rally-effect often experienced during international crises (Mueller, 1973; Hetherington and Nelson, 2003) exerts a significant effect only to the extent it “pulls” justices towards a given decision in spite of their preferences.

Hypotheses

Thus, while previous work on Supreme Court decision-making during war or crisis has been sparse, existing previous research (Epstein et al, 2005) suggests the Court is more likely to decide cases in a conservative manner during times of war (although, as noted previously, this effect is limited to cases unrelated to the war). While this research has examined the Court’s aggregate decisions, there has been little if any examination of how war or crisis affects justice level decision-making. This paper seeks to address this oversight, but we contend that war, crisis, or a rally effect exerts a significant effect only to the extent the these circumstances make justices support decision in spite of their personal preferences.

Furthermore, given the individual level heterogeneity of decision-making, these effects may not be present or consistent across ideological dispositions of justices. In other words, liberals may be constrained by the effects of war or crisis, but conservatives may not. Because conservative justices, by definition, prefer conservative decisions, and war/rally effects increase the Court’s propensity for conservative decisions (Epstein et al, 2005), there are two plausible hypotheses emerge. First, the conception of heterogeneity in the preference behavior relationship suggests that there may indeed be an accentuation of sincere voting behavior in times of war that may reinforce the policy preferences of a given justice. As such, we would expect increasing sincere voting on the part of conservatives in times of war or crisis. Alternatively, conservatives, while already wanting to vote conservatively, cannot exceed past some critical point. In other words, if one were already extremely conservative, there may indeed be no more room to evince more conservative voting, even in times of war or crisis. In these instances, policy preferences and reinforcing effects from war or crisis would predict similar outcomes. Thus, we offer:

Conservative Justice Hypothesis 1: On average, Conservative justices should vote significantly more conservatively in times of war or crisis.

Conservative Justice Hypothesis 2: On average, conservative justices should not significantly vote more conservatively during times of war or crisis.

If war or crises are to exert meaningful influence on the choices justices make, this effect must be observed from justices disposed towards liberal decisions. In other words, liberal justices should vote more conservatively during times of war in spite of their ideology. Thus, we predict:

Liberal Justice Hypothesis: Liberal justices should vote significantly more conservatively during times of war or crisis, *ceteris paribus*.

Moderate justices—those who show no clear trend towards either ideological pole—are perhaps the most likely to be influenced by the effects of war/crisis and rally effects. Simply put, because they lie in the middle of the ideological spectrum, these justices are generally likely to have policy preferences that fall between their colleagues towards the tails of the ideological distribution. However, precisely because they “preside” in the middle, these justices may be the most influenced by some exogenous event that “tips the scales” toward one of the ideological spectrums. Thus:

Moderate Justice Hypothesis: Moderate justices should vote significantly more conservative during times of war or crisis, *ceteris paribus*.

It is important to note, however, that rally effects are not independent of wars or crises; in other words, the categories are not mutually exclusive. Take, for example, a hypothetical case decided in the aftermath of the September 11th attacks *and* while the rally effects of that attack still resonated in presidential approval polls. In this particular instance, the case would have been decided during *both* a crisis and a rally effect. We believe this “overlap” of mechanisms holds important implications for our study. In particular, we believe this “overlap” is critical if rally effects are to significantly impact individual justices’ decision making. Given the divergent findings of previous studies of the impact of public opinion on the Court (discussed above), we are agnostic about the direct impact of a given rally effect; if the rally effect does exert some significant direct impact on the justices, we believe it will generally pull them in the conservative direction, but we do not strongly hold this effect will be significant or substantial. However, we believe there is a significant and substantial *conditional* impact of a rally effect, present only when the rally overlaps with a war or crisis. In other words, when the rally coincides with an external event that acts to constraint certain justices, the rally effect should act in such a manner to magnify the effects of such a constraint; absent the constraining external event, however, a rally effect may represent little more than public opinion and its questionable effects on justice level decision-making. Thus, we hypothesize:

Conditional Rally Effect Hypothesis: Liberal justices should vote significantly more conservatively when a rally effect coexists with a war and or crisis, *ceteris paribus*.

Data and Methods

In order to test the hypotheses stated above, we examine all civil rights and civil liberties cases decided from 1941 to 2001, employing the Epstein et al. (2005) data. The dependent variable is dichotomous, coded 1 if the justice voted liberally in a given case, 0 otherwise. We opt to use hierarchical modeling (Raudenbush and Bryk, 2002; Skrondal and Rabe-Hesketh, 2004), nesting justice’s votes (level-1) *within* cases (level-2). While we could have nested the data within one more level (year), several of the key indicators such as crisis and rally effects do not span an entire year period or overlap partly in one year and partly in the next. Thus, we choose to nest the justices’ votes within cases only. After coding of

the relevant variables discussed below, the model had 28,837 votes nested within 3,323 cases. The structural model can be written as follows:

$$\begin{aligned}
 \text{(Level-1 equation)} \quad & \textit{Liberal Vote}_{ij} = \pi_{0j} + \pi_{1j}\textit{Liberal Justice}_{ij} + \pi_{2j}\textit{Conservative Justice}_{ij} + e_{ij} \\
 \text{(Level-2 equations)} \quad & \pi_{kj} = \beta_{k0} + \beta_{k1}\textit{War/Crisis}_j + \beta_{k2}\textit{Rally Effect}_j + \beta_{k3}\textit{War/Crisis}_j * \textit{Rally Effect}_j \\
 & + \beta_{k4}\textit{War Case}_j + \beta_{k5}\textit{Conservative U.S. Litigant}_j + \\
 & \beta_{k6}\textit{Liberal U.S. Litigant}_j + \beta_{k7}\textit{S.G. files Conservative Amicus Brief}_j + \\
 & \beta_{k8}\textit{S.G. files Liberal Amicus Brief}_j + r_{kj}
 \end{aligned}$$

where k ranges from 0 to 2. Please note that we have specified random parameters in each of the level-2 equations. r_{0j} , which is the random component, is to control for unobserved heterogeneity in the response, while r_{1j} and r_{2j} are specified to control for unobserved causal heterogeneity of ideology. Ideology of the justice is measured via the Segal-Cover scores for perceived ideology of the justice at the time of nomination (Segal and Cover, 1989).³ For simplicity in interpretation of the cross-level interactions, we specify two dummy variables. For the variable *Liberal Justice*, justices one standard deviation more liberal than the term mean, based on the Segal-Cover scores, are coded 1, 0 otherwise. Justices one standard deviation more conservative than the term mean are coded 1, 0 otherwise, for the variable *Conservative Justice*. We expect *Liberal Justice* to have a positive relationship with the dependent variable, which again is whether the justice voted liberally in a given case; the reverse is true for *Conservative Justice*. Thus, the excluded category for the ideological dummies is those justices that are the three (comparatively) moderate justices on the Court for a given term.⁴ Note that, as the excluded category, the effects for moderate justices are the baseline effects found in the random intercept (π_{0j}).

For *War/Crisis*, the variable is dichotomous and coded 1 if the case was decided during a time of international crisis or war, 0 otherwise.⁵ In regards to *Rally Effect*, the variable is coded 1 if the President received a 10 plus percentage bump in presidential approval, 0 otherwise. *War Case*, is coded 1 if the case finds its genesis in the actual war, 0 otherwise; please note, Epstein et al. (2005) pay special care to code this variable as cases that are directly related to the war. Cases where the controversy began prior to the war or where the controversy began during peacetime do not count. Rather, those cases which are a direct result of the war or could “plausibly” have an impact on fighting the war are coded war cases. In the coding of a war case, no attention was paid to when the case was orally argued or decided. Examples of a war case would include draft cases, war protest cases and takings for military purposes.

³ Using a vote-based measure such as the Martin-Quinn scores (Martin and Quinn, 2002) poses a potential tautology problem and we reserve the robustness check of our analyses and results employing the Martin-Quinn scores for future iterations of this paper.

⁴ Please note that we tried several specifications of the dummy variable construction (including specifying those justices that are one standard deviation away from the mean of a given term) as well as employing the continuous measure where the Segal-Cover score is centered at .5. The substantive results do not change.

⁵ Please see Epstein et al. (2005) for an exact discussion of the coding of *War/Crisis*, *Rally Effect*, and *War Case*.

Lastly, we also control for instances where the federal government participates as a litigant or files an amicus brief. While there is often contention as to what case-level variables impact the decision-making process of the justices, previous research concludes that the Supreme Court defers to the executive and the federal government when either participating as a litigant (i.e., Segal, 1990; Sheehan et al., 1992; Ulmer, 1985) or filing an amicus curiae brief (i.e., Segal 1988). *Conservative U.S. Litigant* is a dummy variable coded 1 if the federal government is participating in a case as a litigant taking a conservative position, 0 otherwise.⁶ *Liberal U.S. Litigant* is coded 1 if the U.S. government advances a liberal position as a litigant, 0 otherwise. *S.G. files Conservative Amicus Brief*, is a dummy variable coded 1 if the Solicitor General files a third party brief arguing for a conservative outcome, 0 otherwise. *S.G. files Liberal Amicus Brief*, is another dummy variable coded 1 if the Solicitor General urges for a liberal outcome, 0 otherwise.

First, let us consider the baseline—moderate justices. As the *Moderate Justice Hypothesis* argues, these justices are most likely to be swayed by public sentiment and the coordinate branches of government. In other words, moderate justices should subscribe and be susceptible to the rally effect and therefore vote more conservatively. As such, the directionality of *War/Crisis* and *Rally Effect* should, according to our theory, be negative for these justices. Moreover, if the rally effect does indeed impact the choices justices make, the *Conditional Rally Effect Hypothesis* argues that public opinion (tapped by *Rally Effect*) in the context of decision-making during wartime (*War/Crisis*) should, together, accentuate a given justice’s propensity to vote conservatively. To test this hypothesis, the interaction between *War/Crisis* and *Rally Effect* should also be significant and negative.

Furthermore, these justices, by their very nature, also evince greater deference to the coordinate branches of government. Whether the federal government participates as a litigant or the Solicitor General files an amicus brief, the directionality of the coefficient should evince such deference. Therefore, when the federal government advances a liberal opinion, the expectation is that it should have a positive relationship to the dependent variable; that is, the justice should vote more liberally. When the federal government takes a conservative position—as a litigant or through amicus participation – the relationship should be negative; in other words, the moderate justice should vote more conservatively in these instances, *ceteris paribus*.

For conservative justices, recall that we advance two plausible hypotheses for the impact of war or crisis. First, it might possibly accentuate the impact of ideology, which would suggest that the cross-

⁶ We base the ideological position of the federal government and the solicitor general based on the directionality of the lower court decision. From the Spaeth U.S. Supreme Court Judicial Database, we assume that when the lower court decision was liberal and the federal government is the petitioner, the U.S. is a litigant pushing for a conservative decision; the reverse also holds. When the lower court decision was liberal and the federal government is the respondent, we assume the federal government is taking a conservative position ideologically.

level interaction between *Conservative Justice* and *War/Crisis* would be negative and significant. Alternatively, it might just be that conservatives already have a propensity to vote conservatively and will simply vote consistently with their ideology in times of war or crisis. In this instance, and supportive of *Conservative Justice Hypothesis 2*, the cross-level interaction between *Conservative Justice* and *War/Crisis* should be insignificant. In order to test the *Conditional Rally Effect Hypothesis*, the three-way, cross-level interaction between *Conservative Justice*, *War/Crisis* and *Rally Effect* should be negative and significant if subscribing to *Conservative Justice Hypothesis 1* or negative and insignificant if subscribing to *Conservative Justice Hypothesis 2*.

Recall our previous discussion regarding meaningful constraint. Here, with conservative justices, we have the opportunity to test for constraint, induced by the federal government, on the choices justices make. When the federal government advances a conservative position either as a litigant or through amicus participation, we still are rather agnostic, and a similar hypothesis holds as to the effects of war or crisis for federal government deference when advancing a conservative position. However, when the federal government argues for a liberal position, will conservative justices behave in a manner consistent with their policy preferences, or will they vote adhering to the directionality of the federal government's position in spite of judicial ideology? We suggest that in order for federal government constraint to be meaningful, the latter must occur. In other words, conservative justices will vote more liberally because the federal government advances such a position. As such, the coefficients for the cross level interaction of *Conservative Justice* and *Liberal U.S. Litigant* as well as the interaction between *Conservative Justice* and *S.G. files Liberal Amicus Brief* should be positive and significant. If this is the case, the federal government exerts a direct and substantively meaningful constraint, at least with respect to the choices conservative justices make.

Turning to liberal justices, the expectation is that liberal justices—if war or crisis is to serve as a meaningful constraint—should vote more conservatively in these instances. Therefore, we expect the coefficient for the cross-level interaction between *Liberal Justice* and *War/Crisis* to be negative. Moreover, the *Conditional Rally Effect Hypothesis* argues that the rally effect should accentuate the constraint placed on liberal justices and their decision-making processes. As such, we should observe a negative and significant coefficient for the three-way interaction between *Liberal Justice*, *War/Crisis* and *Rally Effect*.

As with conservative justices, we have another instance to test for meaningful constraint on the choices liberal justices make. While we are slightly agnostic as to the effect of the federal government when it advances a liberal position, we do expect the cross-level interactions between *Liberal Justice* and *Liberal U.S. Litigant* and *Liberal Justice* and *S.G. files Liberal Amicus Brief* to be positive; under these instances, the impact of ideology should be accentuated—therefore the coefficients should be significant

and positive—or have no real effect. In the latter instance, the coefficient, we expect, should be positive but indistinguishable from zero. Where the interesting test of constraint should come into play is when the federal government advances a position counter to that of a given justice. In this discussion, it is when the federal government takes a conservative position. Here, when the federal government supports a conservative position, liberal justices should vote more conservatively. This effect should be significant, suggesting a systematic and substantively meaningful influence on the choices justices make. Therefore, the cross-level interactions of *Liberal Justice* with *Conservative U.S. Litigant* and *S.G. files Conservative Amicus Brief* should be negative and significant.

Results and Discussion

[Insert Table 1 here]

We estimate the multilevel model using full penalized quasi-likelihood.⁷ The results appear in Table 1. Please note that the variance component for the intercept is significant which suggests that there is a good amount of unobserved causal heterogeneity between cases. Moreover, the variance components for both the random coefficients for liberal and conservative justices are not significant. This actually makes intuitive sense and is reassuring when considering the predictive power of ideology on Supreme Court decision-making. By modeling ideology along with the cross-level interactions, we are capturing much of the heterogeneity and variation across cases.

Now we turn to the discussion of the substantive results. As Table 1 indicates, moderate justices do not appear to vote more conservatively under instances of war or crisis and rally effect independently. We cannot reject the null that either coefficient is statistically distinguishable from zero under a one-tailed test. What is most interesting is that *Conditional Rally Effect Hypothesis* finds support among moderates. The predicted probability of a liberal vote for moderates decreases 3 percent when making decisions during wartime and under the rally-around-the-flag effect.⁸ Moreover, this difference between the predicted probabilities from the baseline and situations when a rally effect occurs alongside a war of crisis is roughly the same whether the case had its genesis in the war or not. Tables 2 and 3, presented below, depict the full list of predicted probabilities.

[Insert Tables 2 and 3 here]

With respect to conservatives, we find support for *Conservative Justice Hypothesis 2*. Under one-tailed tests, the cross-level interactions of *Conservative Justice* with *War/Crisis* or *Rally Effect* are insignificant. The *Conditional Rally Effect Hypothesis*, however, finds some support: the coefficient for the three-way, cross-level interaction is in the predicted direction but does not achieve statistical significance. In other words, conservative justices do not vote more conservatively more often in times of

⁷ Estimation was completed using HLM6 using a logit link.

⁸ We will discuss this rather miniscule result below.

war. Even when generating predicted probabilities for these insignificant coefficients, the change is miniscule (about a tenth of a percent change in the likelihood of a liberal vote) at best; this anemic movement holds whether or not a given case finds its genesis from the war. In sum, conservative justices seem unmoved by the rally around the flag effect, consistent with *Conservative Justice Hypothesis 2*.

For liberal justices, we find evidence that they do indeed vote more conservatively during times of war or crises, supportive of the *Liberal Justice Hypothesis*. Moreover, the impact of wartime or crisis time decision-making is indeed accentuated by the presence of a rally effect for the President. When both are present for liberal justices, the predicted probabilities suggest a decrease of about 3 percent in the likelihood of a liberal vote. The result is significant, supportive of the *Conditional Rally Effect Hypothesis*. More importantly, at first glance, there does appear to be a systematic, significant and substantively meaningful constraint on the choices liberal justices make. In other words, liberal justices, who should not prefer to vote conservatively, do vote conservatively more often, on average, against what their ideologies would predict. The results suggest liberal judges vote conservatively when both wartime and crises are present and that effect is accentuated by popular sentiment supporting the President. These results suggest liberal justices are indeed constrained.

Overall these results conform to expectations, especially when we account for the conditional impact of rally effects in accentuating the constraint placed on liberals and moderates by war and rally effects. These justices do indeed tend to vote more conservatively while conservative justices (those who would obviously prefer such an outcome) seem unmoved and vote consistently with what their ideologies would predict. In sum, it appears that the aggregate Court movement in the conservative direction during times of war is driven not by conservative justices but rather the changing voting patterns of those most likely to be swayed by (moderates) and those most likely to resist (liberals) conservative national trends.

While these conclusions are supported by our empirical results, a closer examination of the generated predicted probabilities suggests these conclusions should not be overstated or overemphasized; while liberals and moderates do move in a conservative direction, this move is rather minute and not substantial. Thus, while the results achieve statistical significance, the actual impact of these significant results is, at best, small: a shift of three percentage points in the predicted probabilities of voting a certain way does not appear to be very much at all.

[Insert Table 4 here]

Rather than drastically shifting with popular sentiment, we find evidence that the Supreme Court justices do indeed show deference to the coordinate branches of government. In line with previous research (i.e., Segal, 1988, 1990) we find support for the idea justices are constrained in their decision-making when the federal government advocates a given position for a case. This work differs from previous work in that we specifically sift out for constraint on the choices individual justices make. In

other words, can the federal government induce deference on the part of the justices that would not prefer an outcome similar to the outcome preferred by the federal government?

In Table 4, which presents the predicted probabilities, we find some evidence suggesting that when the federal government advances a position counter to policy preferences the justices do seem to defer to the coordinate branch of government. First, let us consider again consider the baseline—moderate justices. As we noted, in terms of war or crises time decision-making, moderates—by their very nature—should be the justices most likely to defer. We find these justices are swayed in the government’s direction when the US is a party to the case and advocates a conservative outcome. The shift from decision-making absent the presence of the federal government to a context where they advance a conservative position leads to a 20 percent decrease in the likelihood of a liberal vote. When the Solicitor General files an amicus brief advocating a conservative or a liberal position, the effect is a 25 percent decrease in the predicted probability of a liberal vote or a 17 percent increase in the predicted probabilities. As anticipated, moderates do indeed defer to the federal government when it participates at the nation’s highest court.

While the effects are not as consistent for liberals or conservatives, we do find evidence that the federal government does exert meaningful influence on the choices justices make. Liberals are significantly less likely to vote in a manner consistent with their ideology when the US is a party to the case advocating a conservative position; conservatives are significantly less likely to vote consistent with their ideology when the Solicitor General files an amicus brief advocating a liberal position. The results of Table 4 suggest that federal participation may constrain even ideological justices. Where the predicted probabilities are not significant, they are in the right direction. In particular, given the relatively high/low probability of a liberal vote for liberal/conservative justices, there is little room to move further towards the extreme when the government advocates an outcome consistent with these justices’ ideological predispositions. However, when the government advocates a position contrary to those predispositions, the justices are often moved in that direction. These movements, when statistically significant, are quite substantial as well: liberals are almost 20 percent less likely to vote liberally when the US is a direct party advocating a conservative outcome, while conservatives are more than twice as likely (24.4 percent compared to 49.9 percent) to vote liberally when the Solicitor General files an amicus brief advocating a liberal outcome. These results suggest that justices often show deference to the other branches of the federal government, and, in general, that deference is observed through substantively meaningful constraint.

Conclusion

This paper sought to determine to what degree, if any, Supreme Court justices were constrained in their decision-making by a myriad of factors, including times of war, rally effects, and federal

participation in the cases before the Court. While the idea of constrained judicial decision-making is not new (e.g., Epstein and Knight, 1998), we examined a heretofore often neglected set of circumstances (war and rally effects) employing a hierarchical model which allowed us to nest justices within cases to account for unobserved heterogeneity across groups of justices and casual heterogeneity in the case-level factors. Utilizing this framework, we found that times of war or crisis do exert statistically significant effects on moderate and liberal justices, increasing the former's propensity to vote liberally while increasing the latter's propensity to vote conservatively. However, when war coexists with a rally effect, these effects are attenuated, returning the justice's probabilities of voting in a liberal direction levels near their baseline. Thus, although these justices appear to "rally around the flag," the effect is very small, producing shifts of only about three percent. Conservatives, likely due to their predisposition to decide cases in a conservative direction, are unaffected by these factors.

However, all groups of justices are, to some degree, constrained by the preferences on the federal government; when the government participates either as a direct party to the case or files a third-party amicus brief, justices predisposed to rule in a direction opposite of that advocated by the federal government are significantly more likely to defer to the government's position than when the government does not participate in a case. This effect is particularly robust for moderate justices, but is also present for conservative and liberal justices as well. Furthermore, unlike times of war, the federal government's participation exerts a significant and substantial effect on the choices justices make, altering their propensity of voting liberally anywhere from 17 to 25 percent. Taken together, these results suggest liberal and moderate justices are only slightly constrained by war and public opinion, but all groups of justices are significantly and substantially constrained by the preferences of the federal government.

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Table 1. Estimates for Judicial Decision-Making under Times of War/Crisis

Variables	Coefficient	Rst Std Error	p-value
<u>Moderates (Baseline)</u>			
<i>War/Crisis</i>	0.321	0.084	0.000
<i>Rally Effect</i>	0.280	0.175	0.111
<i>War/Crisis X Rally Effect</i>	-0.717	0.246	0.004
<i>War Case</i>	0.467	0.182	0.011
<i>U.S. Litigant-Conservative</i>	-0.781	0.080	0.000
<i>U.S. Litigant-Liberal</i>	0.135	0.183	0.461
<i>Solicitor General Files Amicus Brief-Conservative</i>	-1.037	0.127	0.000
<i>Solicitor General Files Amicus Brief-Liberal</i>	0.769	0.170	0.000
<u>Liberals</u>			
<i>Liberal Justice</i>	1.515	0.067	0.000
<i>War/Crisis</i>	-0.339	0.093	0.000
<i>Rally Effect</i>	-0.353	0.207	0.088
<i>War/Crisis X Rally Effect</i>	0.579	0.289	0.045
<i>War Case</i>	-0.106	0.185	0.567
<i>U.S. Litigant-Conservative</i>	-0.334	0.088	0.000
<i>U.S. Litigant-Liberal</i>	-0.355	0.210	0.092
<i>Solicitor General Files Amicus Brief-Conservative</i>	0.481	0.168	0.005
<i>Solicitor General Files Amicus Brief-Liberal</i>	-0.143	0.228	0.531
<u>Conservatives</u>			
<i>Conservative Justice</i>	-1.461	0.062	0.000
<i>War/Crisis</i>	0.227	0.098	0.020
<i>Rally Effect</i>	0.184	0.184	0.317
<i>War/Crisis X Rally Effect</i>	-0.289	0.264	0.274
<i>War Case</i>	0.360	0.230	0.117
<i>U.S. Litigant-Conservative</i>	-0.019	0.093	0.836
<i>U.S. Litigant-Liberal</i>	0.267	0.216	0.218
<i>Solicitor General Files Amicus Brief-Conservative</i>	-0.070	0.150	0.640
<i>Solicitor General Files Amicus Brief-Liberal</i>	0.361	0.165	0.028
<i>Constant</i>	0.328	0.057	0.000
<i>Variance Component--Intercept</i>	2.789		0.000
<i>Variance Component--Liberal Slope</i>	0.399		>.500
<i>Variance Component--Conservative Slope</i>	0.346		>.500
<i>Number of Justices Votes</i>	28837		
<i>Number of Cases</i>	3323		

Note: Estimation was completed using Full Penalized Quasi-Likelihood via HLM6.

Table 2. Predicted Probability of Liberal Decision (non-war cases)

<i>Justice Ideology</i>	<i>Baseline</i>	<i>War/Crisis</i>	<i>Rally</i>	<i>War/CrisisXRally</i>
<i>Liberal</i>	.863	.861	.854	.834
<i>Moderate</i>	.581	.657	.647	.553
<i>Conservative</i>	.244	.358	.339	.245

Baseline represents cases absent war, crisis, and rally effects.

Cell entries are predicted probability of a liberal decision

All entries are based on non-war cases.

Table 3. Predicted Probability of Liberal Decision (war cases)

<i>Justice Ideology</i>	<i>Baseline</i>	<i>War/Crisis</i>	<i>Rally</i>	<i>War/Crisis X Rally</i>
<i>Liberal</i>	.901	.899	.894	.878
<i>Moderate</i>	.689	.753	.746	.664
<i>Conservative</i>	.424	.560	.539	.426

Baseline represents cases absent war, crisis, and rally effects.

Cell entries are predicted probability of a liberal decision

All entries are based on war-related cases.

Table 4. Federal Government as Participant

<i>Justice Ideology</i>	<i>Baseline</i>	<i>US Cons</i>	<i>US Liberal</i>	<i>SG Cons</i>	<i>SG Liberal</i>
<i>Liberal</i>	.863*	.674*	.835	.784	.922
<i>Moderate</i>	.581*	.389*	.614	.330*	.750*
<i>Conservative</i>	.244*	.126	.325	.096	.499*

Cell entries are predicted probabilities of a liberal decision. "US Cons" indicates the US is a direct party and took a conservative position. "US Liberal" indicates the US is a direct party and took a liberal position. "SG Cons" indicates the Solicitor General filed an amicus brief advocating a conservative position. "SG Liberal" indicates the Solicitor General filed an amicus brief advocating a liberal position. Significant relationships, based on the coefficients are denoted by an asterisk.