

Repeat Players:

A Reexamination of Litigator Experience at the Supreme Court

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Abstract

McGuire (1995) states that experienced litigators alone affect the Supreme Court decision-making process. Unfortunately, the measure used to arrive at such a conclusion is in part over-inclusive—including cases argued *after* the case in question—and under-inclusive—ignoring cases argued *before* the case in question. This then leaves doubt as to whether litigator experience matters. Using data from the *U.S. Supreme Court Judicial Database* and improved measures of litigator experience, I retest McGuire's hypotheses and find that the relationship between litigator experience and success at the Supreme Court does not appear. Moreover, I find that the success of the Solicitor General is not an artifact of greater litigation experience.

The strong basis for accepting the dominance of legal and policy goals in the Court has deterred scholars from considering directly the impact of other motivations on the justices.

Lawrence Baum (1997, 56)

There have been many studies and applications of theory to the internal factors influencing the Supreme Court decision-making process. This line of research has focused on how justices decide based on their conceptions of their roles in the judiciary (Gibson 1978) or determined mainly on their attitudes and policy preferences (Rohde and Spaeth 1976; Segal and Spaeth 1993, 2002) or as policy seekers acting within the constraints of the institution itself (Maltzman, Spriggs and Wahlbeck 2000) and within the other branches of government (Epstein and Knight 1998).

This is not to say that the efforts to answer Baum's plea for explaining the other possible factors that help justices make their choices are paltry. Much work has been done to detail influences such as public opinion (Mishler and Sheehan 1993, 1996; Flemming and Wood, 1997), pressure groups and organized interests (Caldeira and Wright 1988; Epstein and Rowland 1991; McGuire and Caldeira 1993), executive influence and the Solicitor General (Segal 1988, 1990; McGuire 1998), direct parties (Ulmer 1985; Sheehan, Mishler and Songer 1992; Songer and Sheehan 1992; Songer, Kuersten and Kaheny 2000), and lawyers and oral arguments (McGuire 1993a, 1993b, 1995, 1998; Johnson 2001; Johnson, Wahlbeck and Spriggs 2006).

The purpose of this study is to reexamine the role of litigator experience and its impact on Supreme Court cases. The existence of internal factors—such as ideology and specific case facts—playing a major role on the judicial process is not in doubt. I concur with George and Epstein (1992) that legal and extra-legal factors together predict most

accurately the outcomes of Supreme Court decisions. Here, I consider but one of the possible factors that may influence the decision making process of the justices on the Supreme Court. Simply put, I hope to answer the question: do repeat litigators matter?

Repeat Litigants and the Supreme Court

The conventional wisdom is that repeat players in the judicial process have a distinct advantage over those who would be considered “one-shotters” because of the inequities of time, expertise and resources. As a result, it is the repeat player not the one-shotter, who can afford to purchase the more experienced, more specialized legal services. As Galanter (1974) noted, “Not only would the RP [repeat player] get more talent to begin with, but he would on the whole get greater continuity, better record-keeping, more anticipatory or preventive work, more experience and specialized skill in pertinent areas, and more control over counsel” (114).

Also, as previous research has pointed out, the distinction must be drawn between repeat parties and repeat counsel (McGuire 1995). Although there is often a strong relationship between the two, both types of repeat players bring a different set of resources and experience to the table. The very nature of the Supreme Court and its place within the judicial system places a positive value on the litigator herself. Under the Court’s ability of discretionary review, litigation expertise on its own has been shown to have a positive effect on the probability of a grant of certiorari in specific areas of the law or according to specific types of litigators—for example, obscenity (McGuire and Caldeira 1993). During the agenda setting process, the Court is dependent on the information regarding the legal issues as well as the possible political ramifications and consequences (McGuire 1998).¹

Furthermore, McGuire (1993a, 1993b) argues that there exists a group of lawyers—connected by a common link of elite legal education, Supreme Court experience, and common geography—within the Washington community that achieves greater success due to prior experience arguing before the Court. The difference comes from actual, personal Supreme Court interaction.

Beyond certiorari and the agenda setting process, litigators play a key role when representing their clients at the nation's highest court. Oral arguments at the Court provide a challenge to most attorneys; with more justices (9) asking questions than the standard (3) of lower federal appellate courts, the difference in size along with the strict time limit of thirty minutes often causes a reshuffling of an attorney's arrangement of arguments. If a justice asks a question that may not be in the order of the prepared presentation, a litigator may indeed find it difficult or even unimaginable to ask one of the brightest legal minds to wait.

As for the substantive differences between the Supreme Court and other courts during oral arguments, many litigators notice the Court's willingness to hear and consider the possible repercussions—political, social, and economical—and consequences for public policy beyond simple legality of the issues (McGuire 1993a). Also, research has also shown that the information dispensed by counsel during oral arguments (Johnson 2001) and the quality of the litigator's performance (Johnson, Wahlbeck and Spriggs 2006) can and does influence the Court's decision. This influence, however, is dependent on the credibility of counsel and the content of her argument (Galanter 1974; McGuire 1993a, 1993b), which prior Court litigation experience fosters.

Thus, it has been assumed that repeat players—direct party and litigator—matter; it may indeed be considered the conventional wisdom that those with prior experience will achieve greater success than those without in the nation’s highest court. The imbalance is a case of the “haves” getting a larger share than the “have-nots”.

Measuring Litigator Experience

To examine this assumption that litigation expertise matters, McGuire (1995) specifically tests the role of litigation experience and success at the Supreme Court and finds a positive relationship between them while controlling for a plethora of other factors that may play a role in the decision making process. In examining the decisions on the merits from 1977 to 1982, he uses the *United States Reports* for the names of those lawyers who have argued before the Supreme Court. His measure of experience for a given litigator in any case between 1977 and 1982 is the sum or total of all cases argued between 1977 and 1982. This static measure is both over-inclusive—including cases argued *after* the case in question—and under-inclusive—ignoring cases argued *before* the case in question. As justification, he states that this measure of litigation experience at time t is “a good predictor of experience at times $t-1$ and $t+1$ ” (McGuire 1995, 191), which does not make intuitive sense. It should be the case that a litigator should have less experience at the beginning of his career and more towards the end of it.

Thus, as conceded in McGuire (1995), this measure of litigator experience is incomplete. Probably due to lack of time and resources for a more accurate count, the measure of attorney experience is held constant for the entire period, suggesting—as he admits—that “lawyers with multiple appearances are assumed to have more experience than they actually had at the time of the case” (McGuire 1995, 191n 4). Furthermore, his

measure also cannot account for improvement of expertise and whether or not it actually correlates with increasing success arguing before the Court. To counter this, McGuire supposes that keeping a running tally from the start of the time frame, where all lawyers for their first case in the examined period (i.e., 1977) would be awarded an experience level of “0” would be faulty as well, as it would discount all previous experience.² But, this does beg the question: why not count those cases as well?

In sum, McGuire’s examination of litigator experience contains three questionable decisions. First, by using the summation of the number of cases argued in the time period examined, he ignores all prior experience. Second, the static nature of his measure creates an inability to account for the effect of increasing experience. Third, this static measure includes cases argued after the instant case. Moreover, the final analysis in McGuire (1995) collapses the experience of a litigator into a trichotomous variable. The measure developed in this paper will seek to solve all these problems.

[Insert Table 1 about here]

The hypothetical data in Table 1 helps illustrate the point that McGuire’s measure fails to take into account prior experience for a litigator.³ Because his coding strategy is subject to the time period and the number of years he examines, the true experience of a litigator and hence its effect on the final Court decision may indeed be masked from the final analysis. Note in Table 1 that cumulative experience and McGuire’s measure of litigator experience yield different results. Comparing each litigator’s experience had they argued at the end of each term, it is apparent that not only is McGuire’s measure static, but also ignores the number of cases argued before the time period examined. Whereas the prior experience measure indicates that Litigator 1 has more experience

when taking into account the full summation of his experience, McGuire's actually places the experience advantage in the opposite direction. He is correct in his assumption that his measure under-estimates litigator experience (1998, 514n9), but failing to take into account the prior experience may even lead to contradictory findings.

The lack of a solid measure leaves doubt as to the validity of McGuire's conclusions that litigation experience matters significantly in the justices' decision-making process. This measurement should also lead one to question McGuire's (1998) claim that the overwhelming influence of the Solicitor General's Office is based upon litigation experience and not its special status as the legal arm of the executive branch. Filling this void is imperative in shedding light on litigators' impact on the choices justices make and the rulings that are handed down from the nation's highest court. Do the elite lawyers, as McGuire puts it, really matter? Does the experience of a litigator make a significant difference at the Supreme Court? And if so, what does this say about the imbalance of the "haves" and the "have-nots"?

Hypotheses

Because of the short-comings mentioned above, I retest McGuire's (1995) analysis of attorney experience to further probe whether litigator expertise plays an integral role in the Supreme Court decision-making process. The repeat player literature (e.g., Galanter 1974; McGuire and Caldeira 1993; George and Epstein 1992) indicates among other things that the more interaction one has with the Court the more likely she is to achieve success in the process. If McGuire (1995) is right, litigation experience at the Supreme Court will have a positive relationship with the probability of winning a case. I predict that:

Litigator Experience Hypothesis: Litigators with more experience arguing before the Supreme Court are more likely to win cases.

Furthermore, research has also shown the importance of the Solicitor General's Office and other federal attorneys in influencing the final decisions (Galanter 1974; Ulmer 1985; McGuire 1998). The federal government is a distinct and constant repeat player and the counselors from the Solicitor General's Office, because they represent the interests of the United States, acquire more experience than non-federal attorneys. The litigators of Solicitor General's Office and the federal government as a whole have more experience appearing before the Supreme Court (Segal 1988, 1990) and achieve greater degrees of success (Sheehan, Mishler and Songer 1992; McGuire 1998).⁴

McGuire (1998), through an application of his previous measures of litigator experience, concludes that the United States' success at the Supreme Court is determined by the expertise and experience of the attorneys that represent the federal government. He writes "the results suggest that, notwithstanding the conventional wisdom, there is nothing distinctive about the solicitor general's influence. Thus, existing explanations regarding the solicitor general's institutional prestige appear to overstate the importance of the executive's role in the Court" (505). Despite McGuire's findings and because of the other studies examining federal and executive influence⁵, I propose the opposite. The federal government represents the interests of another branch and that distinct place as a litigant should not be diluted by counsels' experience. With a new measure that can account for and distinguish between litigation experience and the actual role of the federal government, we have an opportunity with this data to clarify not only the

relationship between the Court and the executive branch, but also the efficacy of federal litigator experience in the decision-making process. From this, I predict:

Federal Litigant Hypothesis: Litigators from the Solicitor General's Office will have greater degrees of success even after controlling for prior experience.

Beyond litigation experience, a number of other factors should influence the likelihood that a party will win. First, by filing an amicus brief through the Solicitor General, the United States in cases where it is not an actual party can alert the Court to its policy preferences for a given issue. Segal (1988, 1990) shows varying levels of success for different presidential offices and Solicitors General, but looked at as a whole, the Solicitor General when filing amicus curiae briefs seems to have a definitive influence on the Supreme Court decision-making process. As a result, I hypothesize:

Solicitor General Amicus Curiae Hypothesis: If the Solicitor General files an amicus brief, the party supported by the brief will enjoy more success than the opposition.

Although it has been shown in most cases that a wide variety of different, third party amicus curiae briefs do play a role in helping to determine the Court's agenda (McGuire and Caldeira 1993), amicus curiae briefs shaping the final votes of the justices have found mixed results. At the state supreme court level, amicus curiae briefs were found to increase the probability of success for a given litigant (Songer and Kuersten 1995) as well as counteract the inequities of resources for disadvantaged (Songer, Kuersten and Kaheny 1993). Whereas Songer and Sheehan (1993) find no evidence that amicus curiae briefs influence the final decision for the Supreme Court, Collins (2004) concludes that third party participation does indeed matter. But, despite the conflicting conclusions, I predict:

Amicus Curiae Hypothesis: parties with a greater number of amicus curiae briefs supporting their cause will increase their chances of winning.

Again, repeat players are comprised of two pieces—one being the actual litigator and the other being the direct party which the lawyer represents. Who the parties are matters just as much as who speaks for them during oral arguments (McGuire 1995). Although concluding that the changing complexion of the Court and its ideology plays a more integral part in judicial decision-making and the eventual outcome, Sheehan, Mishler and Songer (1992) find differential degrees of success for different direct parties.⁶ These categorizations of litigant status were determined by the amount of resources and advantages it is presumed to have, which falls into a hierarchical measure of the “haves” and the “have-nots” with the federal government at the top and poor individuals at the bottom. The ordinal scale suggests that parties with more resources should experience greater degrees of success because of their ability to procure and secure more experienced legal expertise and services.⁷ As a consequence of these findings, I suggest:

Litigant Status Hypothesis: Direct parties higher on this status hierarchy will more often experience success.

Data and Methods

Examining all orally argued cases during the 1994 to 2003 terms⁸, I will reconstruct McGuire’s (1995) test of repeat litigator experience. Gathering data from searches on Lexis/Nexis for each attorney’s name and then counting each case the litigator ever argued for a party previously in front of the Supreme Court⁹, I have a measure that can account for previous experience prior to the time period examined as

well as account for increasing experience for each litigator as they continue to argue before the Supreme Court.¹⁰

While the litigator experience model seemingly requires an accurate count of the litigator's cumulative experience at the time of the given case, the model does not suggest the functional form of the relationship. For example, Deputy Solicitor General Wallace has orally argued 114 cases before the Supreme Court, which is the count of prior litigator experience and the measure used for the first case he argues in the time period examined¹¹; his next case would have a prior experience measure of 115. Unfortunately, this litigator also represents an outlier in the data; the litigator on the petitioner side has a mean of 5.4 with a standard deviation of 13.7 while respondents' have 4.7 with 13.6, respectively.¹² In order to account for this, the log of the difference in litigator experience was used as the main independent variable in the analysis. The justification for such a manipulation can be found in two places. First, taking the log of the difference of experience helps alleviate the problem of skewed results in a regression due to data outliers. And, secondly, one could make the argument that there is a diminished returns relationship between litigator experience and probability of obtaining a favorable decision. It can be strongly suggested that the experience gained between zero and three cases argued before the Supreme Court has a much greater impact than that gained from 35 to 38. Nevertheless, as shown below, the results I find are robust to a variety of different measurement strategies.

Data were gathered from the *U.S. Supreme Court Judicial Database* (N=704).¹³ The dependent variable is whether the outcome of the case favors the petitioner or the respondent. As for other variables involved in this analysis, amicus curiae briefs were

counted through searches on Lexis/Nexis, which also identified whether the Solicitor General filed a brief and, if so, for which side.¹⁴ The actual measure of amicus briefs and their effectiveness was subtracting the total number briefs filed in favor of the petitioner by the total number on the respondent side.

As done in McGuire (1995), I use Sheehan et al's (1992) categorizations of litigant status—which again were based upon assumptions of the amount of a party's resources—on an ordinal scale ranging from 1 to 10 (see Sheehan, Mishler and Songer 1992, 470n1 for exact details of their coding scheme)¹⁵; the actual measure of litigant status was the difference between the two. Furthermore, the category of “federal government” and its corresponding measure of 10 can also serve as an indicator and measure of a federal attorney or the presence of the Solicitor General representing that party.

Studies have shown that the ideology of the justices matters (Rohde and Spaeth 1976; Segal and Spaeth 2002) along with other internal (Maltzman, Spriggs and Wahlbeck 2000) and external constraints (Epstein and Knight 1998). Similarly and once again, Sheehan et al (1992) find the ideological composition of the Court mattered a great deal more than the litigant status. For this study of litigator experience, the control for ideology was the direction of the lower court decision—liberal or conservative—which assumes for this time period a conservative Court. Cases where the lower court handed down a liberal decision were coded as 1, 0 otherwise; furthermore, with a lower court liberal decision, it is safe to say that the ideology of the petitioner has a higher probability to be the opposite, or—simply put—conservative. With this in mind, conservative

petitioners should win more often than liberal petitioners. Note as well that there was no membership change on the Supreme Court during this period.

Analyses

The results of the logit regression are presented in Table 2. Overall, the model performs well with about an 11 percent reduction of error and about 65 percent correctly predicted.¹⁶ While I am not specifically interested in the control variables, the party advantage variable, the amicus briefs advantage variable and the Solicitor General urging reversal variable are all significant.¹⁷ The coefficient for the lower court direction is in the right direction, but fails to achieve significance; the same goes for the Solicitor General filing an amicus brief in favor of the respondent. The predicted probabilities for the model are also presented in Table 2 for all variables whose coefficients were at least twice the size of the standard errors.

[Insert Table 2 about here]

What the results reveal, while holding all other variables constant at their means and modes, is that a swing from the minimum value in the difference of amicus briefs filed to the maximum value filed in support of the petitioner increases the likelihood of receiving a favorable decision by more than 80 percent. This by far, according to the results presented, is the strongest effect of our significant coefficients. Along the same lines, having the Solicitor General and, therefore, the federal government filing an amicus brief in support of the litigant increases that party's chances of winning by 17 percent, *ceteris paribus*. As for the party advantage, a swing from the minimum to the maximum in terms of the advantage of resources yields about a 22 percent increase in the likelihood of receiving a favorable decision from the nation's highest court.¹⁸

In sum, almost all of the other coefficients are in the predicted direction and achieve significance except the main independent variable of litigator experience. Surprisingly, the logged difference of cumulative experience achieves marginal significance, but is unfortunately in the wrong direction. This runs completely counter to the conclusions in McGuire (1995) that the experience of litigators matter.

One possible explanation for the current finding is that it depends on the particular measurement strategy I use. After all, the litigator-experience model does not provide the precise functional form. To test this, I rerun the model using nine alternative ways of measuring differences in attorney experience including the difference of the logged values as well as the difference in the raw values of litigator experience.

[Insert Table 3 about here]

It can be argued that the logged difference is only testing one possible facet of how litigator experience may impact the likelihood of success at the Supreme Court. Perhaps litigator experience does not have a diminished returns relationship as I hypothesized above.¹⁹ The raw values from the difference of petitioner and respondent experience were calculated and estimated as well (Model 2). Moreover, a concern regarding the influence of possible outliers in the data may be raised. In order to account for this, I even truncated the experience measure at 30; for all cases where the difference in experience was greater than the absolute value of 30, the value of litigator experience was recoded to equal 31 or -31 depending on the direction of experience advantage (Model 3).²⁰ The results from both the raw values and truncated models of litigator experience are the same—litigator experience fails to achieve statistical significance under conventional standards. Also, I estimated a model with experience parceled out—

petitioner and respondent experience both as independent variables (Model 4). Neither matters. Next, perhaps the proportion of experience matters; a model was estimated using the difference in the logs of petitioner and respondent experience arguing before the nation's highest court (Model 5). This did not matter either. In sum, as Table 3 evidences quite well, the robustness of the cumulative experience measure failing to achieve statistical significance in the predicted direction is clear. Regardless of the way it is specified, the finding holds: the effect of litigator experience on the likelihood of success at the Supreme Court is not statistically different than mere chance.

Next, I employ the McGuire (1995) measurement strategy on my data (Model 6). In order to test this, the summation of times a litigator orally argued before the Supreme Court between the 1994 and 2003 terms was taken and applied to each lawyer as a measure of experience. An ordinal variable for litigation experience was constructed for each case and coded "1" if the attorney representing the petitioner had more experience in the time period examined, "0" if both were equal, and "-1" if the respondent had orally argued more often during this natural court. The usage of a trichotomous static measure yields a coefficient seen in Table 3 that is in the predicted direction and highly significant at about the .01 level. The logit results are indeed in line with the McGuire (1995) findings—litigator experience, according to this method of coding, matter. Thus, it is possible that if the trichotomous measure is indeed the proper functional form, the McGuire (1995) measure picks up something important notwithstanding the problems of a static measure.

There indeed can be two possible explanations for the significance in using the McGuire (1995) measure. First, the difference between the McGuire (1995) and my

findings are due to the interval measures used in the logit analysis. Noting that for my original model in Table 2, I used a continuous variable of the logged difference of litigation experience. Perhaps the true relationship of litigator experience is indeed ordinal. Second, another hypothesis could be that the over- and under-inclusive static measure is a better measure than actual experience.

In order to test the first hypothesis, I also constructed a model using an ordinal variable similar to trichotomous static measure but based on my measure of prior litigator experience, which includes cases argued before the time period examined, but not those cases argued afterward. Taking into account a given lawyer's prior experience, the variable was coded "1" if the attorney representing the petitioner had more prior experience, "0" if they were equal and "-1" if the respondent had the advantage of orally arguing more times before the Supreme Court. As seen in Table 3 (Model 7), the result of using the ordinal variable is very similar to the logged difference of litigator experience in the fact that it suggests the relationship between experience and the probability of receiving a favorable decision is not significantly different than mere chance. The failure of the cumulative trichotomous measure to achieve statistical significance refutes the argument that the true relationship of litigator experience and success at the nation's highest court is simply ordinal in nature.

In order to test the second possible explanation which argues that perhaps the over- and under-inclusive measure is indeed a better one, I estimated a model using the difference of litigator experience based on the raw values of the static measure (Model 8). In addition, I estimated another logistic regression using the log of the difference of static litigator experience (Model 9). Both measures fail to achieve statistical significance

under traditional standards. Thus, it is only the intersection of the static measure with the ordinal measure that yields support for the litigator experience model.

If all the measures were equal, the weight of the evidence would argue against confirmation of the litigator experience model. But, the case against the model is stronger than even this, as the measures do not appear equal. While it is possible to make an argument in favor of the ordinal measure over the other functional forms, it is far more difficult to conclude that the over- and under-inclusive static measure is superior to the cumulative measures of actual experience at the time the case was argued. Though the case is not 100 percent certain, the evidence strongly suggests that the more experienced litigators are not more likely to win at the Supreme Court.

The Solicitor General

These findings thus call into question whether the Solicitor General's success is due solely to greater litigation experience (McGuire 1998). In order to clarify between the effects of executive influence and litigator experience on Supreme Court decision-making, I created a new model in an attempt to disentangle the two by examining cases where the federal government is a litigant (N=258). First, the dependent variable was changed to a dichotomous relationship coded "1" if the federal government wins and "0" otherwise. The key independent variable of litigation experience is the federal litigator's prior experience subtracted by the experience of the opposing litigator. A control variable was added for whether or not the federal party was the petitioner, which was coded "1" and "0" respectively. As for amicus curiae briefs filed in a case, the variable was based on the difference from subtracting briefs filed in support of the federal government by the number filed in support of the other party. The party advantage

variable was simply the assumed level of resources of the non-federal litigant based on the Sheehan, Mishler and Songer (1992) coding strategy mentioned above, which suggests a negative relationship between the opposing party's resources and the likelihood of the federal government obtaining a favorable decision.

[Insert Table 4 about here]

Presented in Column I of Table 4, the results are quite surprising where the only coefficient to achieve significance is the variable for whether the United States is the petitioner or not. The party advantage and amicus advantage variables are in the predicted direction but are indistinguishable from chance. Also, the litigator experience fails to achieve significance once again.²¹ The constant, although not significant, is worth mentioning. Its large and positive nature suggests that when all independent variables are held constant, the federal government has quite a large advantage at the Supreme Court. Coupled with the government winning over 60 percent of its cases (163 out of 269) where it is a given party, the lack of amicus briefs, party resources/status and litigator experience making major contributions in the final decision of the Court is much more supportive of the idea that the federal government has a distinct, preferential place as a litigant. Furthermore, from this data, and unlike McGuire's claim, the Solicitor General's impact is not a mere artifact of greater litigation experience.

As shown in Column II of Table 4 (N=448), without the federal government as a party in the data set, the chances of the "haves" coming out ahead at the Supreme Court are no different than mere chance. While the amicus briefs advantage variable and instances where the Solicitor General's Office files an amicus brief achieve significance,

the party advantage variable virtually disappears. Litigation experience once again is insignificant when removing cases where the federal government is a litigant.

Based on the two models presented above, there are two evident conclusions that can be drawn from the data. First, the two models are strongly suggestive of the fact that the Supreme Court is supportive of the federal government whenever it is a litigant regardless of the resources of the other party; the insignificance in Column I supports this. And because significance disappears in regards to the party advantage variable when the federal government is no longer present in the data set, we are more confident in stating that the foundation of the party advantage variable rests heavily on the success of the federal government's ability to win favorable decisions from the Court. Secondly and clearly supporting the federal litigant hypothesis mentioned above, the findings here indicate a necessity to revise previous conclusions regarding the role of federal litigators in the success of the government at the Supreme Court. With federal litigators' prior experience making no significant difference in the final decisions of the case, we need to rethink the place of experience as an indication of a given lawyer's ability to achieve success.

Conclusion

Admittedly, there is a caveat to the results presented in this paper. My findings could indeed be just an artifact from the time period examined. Perhaps, with a more ideologically based and divided Court such as this one, one could still make the suggestion that litigators matter less now than in previous Courts and time periods. With no change in membership of the Court during the years of 1994 to 2003, we arguably have a stable ideological composition of decision makers to study, but the conclusions

can be dependent and therefore generalizable only to this natural Court. Further research, if this problem truly is to be alleviated and remedied, must focus on earlier periods to see if the findings hold with different justices determining the final outcome of cases.

The results, however, from this examination have expanded upon several previous works while also presenting evidence that there indeed needs to be a revision of the conclusions drawn by some others. First, there is strong evidence for our amicus briefs hypothesis stating that the number of briefs filed in support of a given case matters. As the data indicate in this examination, the greater the gap between amicus briefs for the parties grows, so increases the probability that the litigant with more organized support will win. In repeated tests and different models, the variable remains in the predicted direction and significant suggesting that organized interests acting as third party participants matter.

Furthermore, the marked success of the Solicitor General in filing amicus briefs is clear and very robust. In every model, the variable indicating the Solicitor General filing in support of reversal achieves strong significance, indicating that the legal arm of the executive branch does indeed matter. Elaborating a bit further, in the time period examined here, the Solicitor General's Office filed 173 amicus briefs urging reversal and the petitioner received a favorable decision in 133 of those cases giving us a success rate of about 76 percent. As for filing amicus briefs urging affirmance, the Solicitor General enjoyed a much more anemic 47 percent success rate when supporting respondents (N=92). Mirroring Segal's (1988) findings from 1953 to 1982, the Solicitor General simply through amicus briefs has significant influence—taken as a whole—on the final outcome of a given case supporting the winning side 66 percent of the time. This finding

suggests that the legal arm of the executive branch does indeed exert much influence on the Court's decision-making process.

The data collected and presented here has given us the opportunity to disentangle federal success as a litigant and the role of litigator experience in the final outcome of cases argued before the Supreme Court. At first glance, the litigant status hypothesis finds strong support in our initial model presented in Table 2, which is quite similar to that of the McGuire (1995) findings. The results indicated that as the gap between status and resources of the litigants increases, the more advantaged party should have a higher probability of receiving a favorable outcome from the Court. Through a more in depth look at the possible causes for this finding, two examinations, where one isolated and the other removed federal litigants, paint a very different picture. In both instances, the party status variable, although in the predicted direction, failed to achieve significance. The only thing driving the status variable to significance was the presence of the federal government as a party to a case. At the Supreme Court, the dominance of the haves over the have-nots is not as prominent as one would conclude from the results in Column I; the analysis suggests that the federal government has a distinct place as a litigant and the Court recognizes that stature.

Finally, this examination of litigator experience has yielded nothing in support of the previous conclusions suggesting that litigator experience matters. This is not to say that the quality of the litigator does not matter. The results presented here make no claim as to whether quality of the oral arguments or the crafting of the briefs to the Court makes any impact whatsoever. In fact, one can only possibly conclude that litigation experience does not appear to significantly determine the outcome on the final decision the Supreme

Court hands down. My results are mildly consistent with those of Johnson et al (2006). Mildly, because while they also find no impact (indeed, negative impact) of attorney experience, they do so after controlling for (Justice Blackmun's perception of) attorney quality. McGuire's argument is that experience serves as an indicator of litigator quality and expertise, but it is not clear he would expect attorney experience to matter if he had controlled for quality.

In every one of the models using a more consistent and valid measure of cumulative experience, the difference between the experience of the two litigators either failed to achieve statistical significance or was marginally significant in the wrong direction. Where we sampled only cases with the federal government as a litigant, the cumulative experience of the litigator mirrored all the other models, which lends much to the argument that federal success at the Supreme Court is not necessarily found in the previous experience of the litigator, but rather from the government's place as another branch parallel to that of the judiciary. There is no support found here for the argument that litigator experience makes a difference significantly greater than mere chance in the Court's final decision. And as a result, perhaps it can be suggested that the haves—at least at the Supreme Court—do not have a larger share than the have-nots.

Notes

¹ Watson (2004) punctuates this point by finding that litigators do indeed matter in whether a Court decides to hear a case. In examining the influences of *in forma pauperis* petitions to the Supreme Court, she finds that *pro se* petitioners, litigants who opt to represent themselves in a given case, are less likely to be placed on the Court's agenda. The sole presence of an attorney representing a litigant signals—at minimum—a higher likelihood of viability and legitimacy to the petition for certiorari.

² McGuire (1998) constructs a similar measure in his analysis of executive success in Supreme Court decisions. In this study, he takes the tally that he had in his 1995 study, which is closely examined in this paper, and divides each attorney's summed experience by the number of years in the study, which happens to be six. This constructed average score is debatably an improvement on the previous study, but obviously still lacks accuracy because of its static nature which still ignores all prior experience arguing before the Supreme Court.

³ To distinguish the measurement techniques of litigator experience, I will from time to time refer to my method as a measure of prior experience or cumulative experience. Moreover, the measurement strategy used in McGuire (1995) will also be referred to as the trichotomous static measure.

⁴ Songer and Sheehan (1992) note the same federal government advantage in the United States Court of Appeals. Songer and Haire (1992) in looking at obscenity cases at the Court of Appeals as well, find varying degrees of success for litigants much like Sheehan et al. (1992), but also a distinct advantage for the federal government. They find that the predicted probability of a vote supporting a defendant when opposed by the federal

government decreases to 6.7%, which is daunting when compared to the 25.3% likelihood when a defendant faces a local government opponent (977-8).

⁵ Segal (1990), in detailing the Supreme Court's support for the solicitor general, writes that "while strategic decisions and the quality of legal arguments may have some affect on support for the solicitor general, deference to the executive is a stronger explanation for the solicitor's success" (149).

⁶ Despite finding that the changing membership of the Court and the subsequent ideologies matter, we have a distinct opportunity—as will be mentioned below—to examine a comparatively stable period of membership. With no changing membership from 1994-2003, this natural court represents a chance to examine the stability of party status among members of the Rehnquist Court.

⁷ Looking at success rates at the United States Court of Appeals, Songer and Sheehan (1992) find that "upperdog" litigants—those with more resources—win much more frequently than the underdogs. For the State Supreme Courts, Farole Jr. (1999) uncovers the same pattern lending support to other studies suggesting the "haves" coming out ahead (e.g., Galanter 1974; Wheeler et al. 1987).

⁸ The reason for selecting this time period is that it is recent and one of the longest running periods of a natural court, where composition of members did not change. This allows for continuity of ideology and internal influences on the Court's decision-making processes throughout my data set.

⁹ Cases where the attorney filed briefs, but did not argue were not counted in the final tally. In order for an accurate measure of the credibility and litigation experience, the

attorney must have prior experience in interacting with the justices personally through oral argument.

¹⁰ In cases where multiple attorneys represented a given party, the litigator with more prior experience was chosen for that unit of analysis. If the unselected attorney had argued another case in later, the case where she was excluded was still taken into account for the tally of previous experience.

¹¹ The rather large experience that Deputy Solicitor General Wallace has would have been lost in McGuire's original test of repeat litigant experience. For a man who served the Department of Justice for 30+ years, the magnitude of his experience arguing before the Court would not have been captured in a summation of just 6 years of his tenure. For this time period, the measure of his experience would have been 13, which is seemingly just a shadow of the actual number of times he argued before the Supreme Court. McGuire (1998) admits this; he writes "my method appears to understate the impact of that experience" (514n9). Furthermore, McGuire suggests that the *U.S. Reports* only the names of the lawyers, which leaves a researcher with an inability to determine whether "James Smith" from one case is the very same "James Smith" from another case (McGuire 1998). I do indeed make this uniform assumption that a lawyer identified as "James Smith" in one case is the very same "James Smith" in another. Also, I made every attempt to obtain all previous cases for individuals who have alternative titles such as Deputy Solicitor General Wallace. Searches were made for both "Lawrence G. Wallace" and "Lawrence Wallace" to ensure that cases where he argued before the court representing a litigant other than the federal government. Admittedly, this does add error

into the litigator experience measure, but still captures prior experience, which is completely unaccounted for in previous examinations.

¹² Summary statistics regarding variables used in the analyses as well as a matrix of correlations are available from the author upon request.

¹³ Split-decision cases were double coded because it offers instances where the both the petitioner and respondent win and lose. Along the same line of logic, cases with cross-petitioners and respondents were counted as well. Cases with multiple dockets or issues were refined to one unit of analysis if all things else in the case were equal.

¹⁴ Amicus curiae briefs that preferred or supported neither side (or if there was no clear indication of support) were excluded from the final tally; where the United States indicated no clear direction, the category was coded as if no amicus brief had been filed.

¹⁵ The ten point break down of the resource hypothesis, as Sheehan et al. (1992) describe it, are as follows: from least amount of resources to most, 1 for poor individuals, 2 for minorities, 3 for individuals, 4 for unions, 5 for small businesses, 6 for businesses, 7 for corporations, 8 for local governments, 9 for state governments, 10 for the federal government. The actual measure is the petitioner status minus the respondent's. Similar to McGuire (1995) and Sheehan et al (1992), some parties such as political action committees and non-profits did not fit into the categories. Here, those cases, because of the party status was ambiguous, were dropped from the analysis. Furthermore, in criminal proceedings, the convicted or accused criminals were plentiful in the data. To account for the numerous individuals seeking favorable decisions from the Court in regards to civil liberties claims, I coded convicted or accused criminals as "1" if they

filed *in forma pauperis* petitions. If no such petition was filed, convicted criminals were coded “2” and accused criminals were coded “3” in the data set.

¹⁶ Please note that robust standard errors are presented here to adjust for possible heteroscedasticity. After performing a White Test on the linear probability model, our χ^2 test statistic was 70.003 where $\chi^2_{(23, .05)} = 36.415$. The Breusch-Pagan test confirms this with a test statistic of χ^2 equal to 8.81 with a p-value of .003. Heteroscedasticity exists, as far as using OLS is concerned, in the model and is accounted for by using robust standard errors. Furthermore, because of the lack of a direct test for heteroscedasticity when using a logistic regression, models were estimated using a heteroscedastic probit where different combinations of variables were used to specify the error variance function. Variables tested included litigator experience, party resources, federal participation, lower court ideological direction and amicus briefs filed. Please note that litigator experience did achieve statistical significance in the stochastic term when specified with party advantage and lower court direction, but tests of the stochastic term specification of this function or any other combination never achieved statistical significance under traditional standards. In other words, we could not reject the null hypothesis that the stochastic term was equal to zero, which suggests that if heteroscedasticity exists, it is minor and would not greatly bias or change the substantive interpretations of the results presented in this paper.

¹⁷ For his examination of the time period of 1977 to 1982, McGuire (1995) suggested that his similar finding of significance of the party status variable, which is the same method employed in this paper, is due to the justices being “simply ideologically disposed toward the ‘haves’ at that time” (193n9). The implications of the significance of this variable in

this paper will be discussed below in conjunction with the analysis of federal litigator experience.

¹⁸ The implications of this result will be discussed in more detail below.

¹⁹ In order to properly work with negative values as well as 0 in the original measurement strategy presented in Table 2, the minimum value of the difference between the petitioner and the respondent cumulative experience (-125) was taken into account and a constant, where $k=125.1$, was added to each value of the litigator experience variable prior to taking the log. Admittedly, this shifts our distribution, but does not significantly affect the final results of the logit model. Other constants, where $k=125.0001$ & $k=127$, were tested and the results do not change.

²⁰ Several other manipulations of the data also were tested in order to determine whether or not the data outliers significantly changed the results of the analysis to follow. Logits were used with and without the extreme outliers, where measures of experience were greater than thirty and fifty. Also, I even truncated the measure at 51 for all litigators that had more than 50 cases argued; there are 50 cases where the absolute difference between petitioner and respondent experience was equal to 51. In sum, the results hold despite the removal or recoding of the data outliers, which lend strong support for the inclusion of highly experienced litigators such as Deputy Solicitor General Wallace in the final logit models.

²¹ As a robustness check, I also estimated logit models with the raw values and the trichotomous variable based on the cumulative experience measures of litigator experience. The substantive results do not change in comparison with the litigator experience measures used in the models presented in Table 4.

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Table 1. Hypothetical Comparison of Cumulative Experience & McGuire (1995) Measure

<i>McGuire -based (Terms)</i>	<i>Actual Time (Terms)</i>	<i>Litigator 1's cases argued per term</i>	<i>Cumulative Experience*</i>	<i>McGuire's Measure</i>	<i>Litigator 2's cases argued per term</i>	<i>Cumulative Experience*</i>	<i>McGuire's Measure</i>
	1	2			0		
	2	0			0		
	3	2			0		
	4	2			0		
	5	0			0		
	6	1			0		
1	7	0	7	3	2	2	5
2	8	0	7	3	1	3	5
3	9	1	8	3	0	3	5
4	10	0	8	3	1	4	5
5	11	1	9	3	0	4	5
6	12	1	10	3	1	5	5
<i>Actual Experience Measures for Litigators 1 and 2</i>		10			5		
<i>Actual Experience Difference Between Litigator Experience^a</i>				10 - 5 = 5			
<i>McGuire's Measure Difference Between Litigator Experience^b</i>				3 - 5 = -2			

^a Assuming this is the line of data for the final case in the data set for both litigators in the time period examined (terms 7-12 in actual terms and 1-6 in McGuire's), the scores would be obtained from subtracting petitioner's actual experience by respondent's actual experience. For the purposes of this chart, we assume litigator 1 is the petitioner.

^b McGuire's measure of litigation experience is the summation of the time period examined. For litigator 1 and 2, it would be a constant of 3 and 5, respectively, for each case that the litigators argued during McGuire terms 1-6.

* This is a side-by-side comparison of the actual prior experience measure and McGuire's measure of litigator experience had each attorney litigated against one another at the end of each of the hypothetical terms.

Table 2. Predicted Probabilities of the Likelihood of the Petitioner Winning^d

<i>Variables</i>	<i>Logit Estimates</i>	<i>Min</i>	<i>Mean</i>	<i>Max</i>	<i>Predicted Change</i>
Lower Court Decision	.124 (.200)				
Solicitor General Amicus Brief Urging Reversal	.820*** (.221)	.608		.779	.171
Solicitor General Amicus Brief Urging Affirmance Party Advantage	-.339 (.240)				
Amicus Briefs Advantage	.053** (.017)	.489	.608	.711	.222
Litigator Experience^a	.064** (.026)	.042	.608	.856	.814
Constant	-.468 (.286)				
N	2.542 (1.398)				
Pseudo R²	704				
Correctly Predicted (%)	.060				
Reduction of Error (%)^b	65.34				
	11.69				

Note: N=704. The total number of number of cases was actually 749 (petitioner wins 455 times; 294 for the respondent), but cases were dropped due to vagueness of the party variable (see footnote 11 above). The dependent variable is coded "1" if the decision favors the petitioner, "0" otherwise.

^a Litigator Experience is the logged difference of the prior experience between the petitioner and the respondent

^b The Reduction of Error was calculated as follows: 100 X (% correctly predicted - % in the modal category)/(1 - % in modal category).

^d When calculating each predicted probability, all other variables were held at their means and modes. Logit was used.

* $p < .05$; ** $p < .01$; *** $p < .001$

Table 3. Comparison of Litigator Experience Measures^c

<i>Model</i>	<i>Variables</i>	<i>Coefficient (Robust Std Errors)</i>
1	Cumulative Litigator Experience (Logged Difference)	-.468 (.286)
2	Cumulative Litigator Experience (Raw Values) ^d	-.005 (.004)
3	Cumulative Litigator Experience (Truncated Raw Values) ^d	-.009 (.008)
4	Cumulative Petitioner Prior Experience (Logged) ^a	-.043 (.076)
4	Cumulative Respondent Prior Experience (Logged) ^a	-.008 (.074)
5	Cumulative Litigator Experience (Difference of the Logs) ^b	.003 (.031)
6	Trichotomous Static Litigator Experience (McGuire 1995) ^c	.335** (.119)
7	Cumulative Litigator Experience (Trichotomous Measure) ^c	.049 (.112)
8	Static Litigator Experience (Raw Values) ^d	.014 (.011)
9	Static Litigator Experience (Logged Difference of Raw Values) ^e	.067 (.149)

Note: N=704. The dichotomous dependent variable is coded "1" if the decision favors the petitioner, "0" otherwise.

^a These two variables are just the logged values of the petitioner's experience and the respondent's experience. A constant, $k=1$, was added to each so that there would be no values that would be undefined when taking the log; another constant where $k=.1$ was specified and the substantive results do not change. Raw values were also attempted and the substantive results do not change as well. The coefficients and standards errors were obtained from placing both in the logistic regression instead of the logged difference specification in the model presented in Table 2.

^b This variable was estimated by first adding a constant, $k=.1$, to petitioner experience and respondent experience, logging each variable, and then taking the difference (logged petitioner experience minus logged respondent experience).

^c Values of the other coefficients from each of these specifications are available from the author upon request.

** $p < .01$

Table 4. Models of Only Federal Litigants and Excluding Federal Litigants

<i>Variables</i>	(I) <i>Model of Only Federal Litigants (Rob. Std. Err.)</i>	(II) <i>Model Excluding Federal Litigants (Rob. Std. Err.)</i>
Lower Court Decision	—	.265 (.272)
Federal Government Petitioner	.574** (.262)	—
Solicitor General Amicus Brief Urging Reversal	—	.815*** (.255)
Solicitor General Amicus Brief Urging Affirmance	—	-.377 (.268)
Party Advantage^b	-.049 (.047)	.015 (.026)
Amicus Briefs Advantage^c	-.011 (.056)	.114** (.041)
Litigator Experience^a	-.376 (.293)	-1.915 (1.978)
Constant	1.651 (1.081)	9.531 (9.225)
N	258	448
Pseudo R²	.0222	.0797
Correctly Predicted (%)	64.73	70.76
Reduction of Error (%)	10.50	20.26

Note: The dependent variable in Column I (N=258) is coded “1” for decisions favoring the federal government and “0” otherwise. For the model excluding federal litigants in Column II (N=448), the dichotomous dependent variable is coded “1” if the decision favors the petitioner, “0” otherwise.

^a Litigator experience in Column I is the logged difference of the prior experience between the federal litigator and the opposing party. In the model presented in Column II, litigator experience is the logged difference of the prior experience between the petitioner and the respondent.

^b Because the federal government’s party advantage variable will always be a value of 10 in Column I, the party advantage variable is simply the measure of the opposing party’s resource/status. For Column II, the party advantage variable is the difference from subtracting petitioner party status by respondent party status.

^c Amicus advantage in Column I is determined by subtracting briefs filed in favor of the federal litigant minus briefs in support of the opposing party. In Column II, the variable is determined by amicus briefs filed in support of the petitioner subtracted by the number of briefs in support of the respondent.

** $p < .01$; *** $p < .001$