THE SUPREME COURT, THE SOLICITOR GENERAL, AND THE SEPARATION OF POWERS

TIMOTHY R. JOHNSON
University of Minnesota

Supreme Court justices attempt to rule as closely as possible to their policy preferences, but their decisions are not unconstrained. Rather, justices pay attention to the preferences of other actors—including those external to the Court. Whereas most scholars focus on the relationship between the Court and Congress, this article focuses on the relationship between the Court and the executive. Specifically, it argues that justices seek information about how the administration wants them to act because, like Congress, it can sanction the Court for making decisions that diverge from administration policies. Certainly this information can be gathered in a number of ways, but this article argues that when not readily available, justices can obtain it by inviting the solicitor general to appear before the Court as amicus curiae. The findings provide the first systematic evidence that justices actively seek information about the preferences of other actors during their decision-making process.

Keywords: *Supreme Court; separation of powers; solicitor general; amicus curiae; executive/judiciary relations*

When the U.S. government is not a party to a case before the Supreme Court, it can still make its preferences known to the justices by participating as amicus curiae. In this capacity, solicitors general may submit briefs at their discretion (Supreme Court Rule 37.4). This discretionary participation suggests that the president wants to make his preferences known to the Court, especially when a case is an "agenda" issue for the administration (Salokar, 1992, pp. 134-142).

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Sometimes, however, the Court seeks to obtain information about the administration's position even when the solicitor general does not voluntarily file as amicus. In these cases, the justices themselves may request that the solicitor general participate by issuing the following order: "The Solicitor General is invited to file a brief in this case expressing the views of the United States" (Stern, Gressman, Shapiro & Geller, 1993, p. 381). This invitation is not considered optional, and "all solicitors general have tacitly acknowledged" this fact (Salokar, 1992, p. 142). Invitations, however, are rare; between 1953 and 1986, the Court invited the government to participate at the merits stage an average of only 2.15 times per term (Gibson, 1997).[1] The puzzle is when, and under what circumstances, does the Court invite the solicitor general to participate as amicus?

In this article, I provide one explanation by testing the hypothesis that the Supreme Court is more likely to invite the solicitor general to participate when the justices believe they might be sanctioned for making decisions that are inconsistent with how the executive branch wants them to act. In so doing, I compare cases of when the Court invites the solicitor general to file as amicus curiae against those when an invitation is not issued.

This article makes two explicit contributions to the separation-of-powers literature. First, this literature usually focuses on the relationship either between the president and Congress (Bond & Fleisher, 1990; Bowles, 1987; Edwards, 1990; Light, 1999) or between the Court and Congress (Eskridge, 1991a, 1991b; Gely & Spiller, 1990; Martin, 1997; but see Martin, 2001). Thus, this analysis significantly increases scholarly understanding of interinstitutional relationships at the federal level because it focuses on the relationship between the Court and the president. Second, existing literature often assumes that justices have complete information about how Congress and the president want them to act. I argue that this is not the case and provide systematic evidence that justices actively seek information about the preferences of the current administration. In so doing, I delineate explicit conditions under which the justices should be and are concerned with how the current administration wants them to act. The findings shed light on the Court's decision-making process as well as on the way that U.S. federal institutions interact with one another.

THEORETICAL FOUNDATIONS

Supreme Court justices attempt to rule as closely as possible to their most preferred goals, but their decisions are not unconstrained (Epstein & Knight, 1998a; Eskridge, 1991b; Maltzman, Spriggs, & Wahlbeck, 2000). Rather, as they pursue policy goals, justices pay attention to the preferences of actors who are external to the Court—especially those of the current Congress and administration. As Epstein and Knight (1998a) point out, "To create efficacious law—that is, policy that the other branches will respect and with which they will comply—justices must take into account the preferences and expected actions of these government actors" (p. 138). In other words, justices on the Supreme Court act strategically when dealing with the other branches. This section provides a theory of how inviting the solicitor general to participate as amicus can help the justices learn what the administration's preferences are, why they must be cognizant of such preferences, and when the Court is likely to issue these invitations.

THE INVITATION TO PARTICIPATE

Existing literature demonstrates the informational role that amicus briefs play in the Supreme Court's decision-making process (Caldeira & Wright, 1988; Epstein & Knight, 1998b; Epstein & Kobylka, 1992; Songer & Sheehan, 1993; Spriggs & Wahlbeck, 1997). In particular, Epstein and Knight (1998b) argue that amici curiae provide the justices with information about the preferences of other actors. Furthermore, Caldeira and Wright (1988) posit that "amicus curiae participation by organized interests provides information, or signals—otherwise largely unavailable" (p. 1112). For my purposes, signals about the preferences of the executive branch might come directly from the administration through amicus briefs filed by the solicitor general.

Certainly, information about how the current administration wants the Supreme Court to act is readily available when the government is a party in a case or when the solicitor general chooses to file as amicus

curiae.[2] Often, however, the government is not involved in either capacity. Indeed, even when the administration is not a litigant and a case can be considered one of its priorities (Light, 1999), the government voluntarily files amicus briefs in only 8% of all cases (Gibson, 1997). In the remaining 92% of cases (whether or not they are on the administration's agenda), the justices might still want information about the preferences of the executive branch; they can obtain it by inviting the solicitor general to participate as amicus curiae (Stern et al., 1993, p. 563). As Stern et al. (1993) argue,

> Such an invitation reflects the fact that some governmental interest might be involved in a case, an interest that is not represented by the private litigants. Or the question involved might be of sufficient public concern that the views of the government are felt to be relevant to the Court's consideration of the case. (p. 381)

Thus, when the justices want to be clear about where the administration stands on an issue, and the solicitor general does not voluntarily file, they are likely to issue an amicus invitation.[3]

One might wonder why the Court would ever issue an invitation—if the solicitor general can participate as amicus curiae without an invitation from the Court, the justices would learn about the administration's preferences whenever the solicitor general deemed it necessary to provide such information. In other words, because of Rule 37.4, one could argue that the administration does not care about the outcome of cases in which the solicitor general does not voluntarily file, and therefore, the justices do not have to be concerned with how the president will react to their decisions in these cases. However, a norm exists that stops the solicitor general's office from participating of its own volition in too many cases. As former solicitor general Rex Lee (1986) argues, "It is a mistake to file in too many [cases]," because in so doing "the ability of the Solicitor General to serve any of the president's objectives would suffer" (pp. 599-600). Salokar (1992) agrees and notes that solicitors general must not "become involved in so many cases that the Court should begin to expect the government's views, and as a result, give them less weight" (p. 141). Therefore, there are times when the administration might really want to file an amicus

brief but believes that filing will damage the reputation of the solicitor general's office.

The key point for my theory, then, is that the solicitor general's office must weigh its reputation against the policy it could achieve by filing in a particular case. As one former assistant solicitor general argued,

> The question is whether you lose some of that credibility by filing briefs in cases where it is clear to everybody, including the Court, that the only interest is political, political in the sense that this is this administration's philosophy. (Salokar, 1992, p. 14)

To put it another way, the decision to participate as amicus curiae is essentially a bidding game for the solicitor general. Although a plethora of cases exist in which the administration wants its views known to the justices, the solicitor general knows that he cannot express these views in every case. At the same time, the solicitor general knows that the Court does issue invitations in some cases when the solicitor general does not choose to participate. As such, this dynamic can be understood as a game in which the solicitor general and the Court work together to ensure that the justices know the administration's views even when the government does not voluntarily participate as amicus curiae.

Overall, given that the solicitor general's office often does not voluntarily participate as amicus curiae, the justices issue invitations to solicit the administration's views. This is consistent with what solicitors general themselves say about amicus invitations. For instance, Rex Lee argues that "the Court may have . . . wanted to know what impact the case would have on the government" (as cited in Salokar, 1992, p. 144). Others in the solicitor general's office explicitly suggest that the Court ask for their help because the justices sometimes cannot figure out the federal interest (Salokar, 1992, p. 143). These accounts are also consistent with Epstein and Knight's (1998a) conception of the strategic model. That is, invitations appear to be explicit requests by the Court for information about the executive branch and its policy goals.[4]

EXECUTIVE SANCTIONS AND THE COURT

Generally, Supreme Court justices account for how the executive branch might react to decisions and sometimes issue invitations for the solicitor general to provide this information because the president can sanction the Court in a number of ways if he, or an agency, does not agree with its decisions.[5] I focus on three sanctions that might come into play. First, although executive agencies have the power to enforce the Court's decisions, they do not have to do so. As Epstein and Walker (1998) note, "The bureaucracy can assist the Court in implementing its policies, or it can hinder the Court by refusing to do so, a fact of which the justices are well aware" (p. 43). Although scholars debate about whether the president fully controls the bureaucracy and is able to use it for his political advantage, Moe (1982) demonstrates that presidents have some control over independent commissions. Thus, even though a president might not be able to unilaterally order an agency to disregard a Court decision, the threat is real; it has been carried out in the past. For instance, Wasby (1994) notes that the Reagan administration had a policy of "nonacquiescence" (p. 330) for judicial decisions that it disliked, especially in social security cases.

Although the president might not have absolute control over the bureaucracy, he can personally sanction the Court by refusing to enforce its decisions. The most oft-cited example of this behavior is President Jackson's response to a Court decision that he particularly disliked: "John Marshall has made his decision, now let him enforce it" (Ducat, 1996, p. 110). Other confrontations demonstrate that the president can and does judge whether the Court has made the right decision. For instance, President Jackson vetoed a bill that established a national bank, even after the Court declared such an entity constitutional (Wasby, 1994). Several years later, President Lincoln defied the Taney Court by refusing to release an alleged traitor, imprisoned while the right of habeas corpus was suspended, even though the Court ordered him to do so (Wasby, 1994). This concern about enforcement is not relegated to the 19th Century. Rather, Ducat (1996) notes Justice Frankfurter's concern when the Court decided *Brown v. Board of Education* (1954): "Nothing could be worse from my point of view than for this Court to make an abstract declaration that segregation is bad and then have it evaded by tricks."

Beyond refusing enforcement, the administration can support anti-Court action in Congress if the president or an agency disagrees with the justices' policy choices (Baum, 1995, p. 159). Two examples illustrate this tactic: President Roosevelt's Court-packing plan in response to the justices' continued rejection of the administration's New Deal policies, and President Jefferson's involvement in forwarding the impeachment of Samuel Chase (Rehnquist, 1992, pp. 22-23). Finally, presidents and their advisors can publicly criticize the Court if they disagree with its decisions (Baum, 1995, p. 159), or they can fail to support it for decisions with which they disagree. Baum (1995) argues that President Reagan and his Justice Department often used the former strategy, whereas President Eisenhower used the latter tactic.

In general, although rarely invoked by the executive branch, the sanctions delineated here might decrease the Court's power as the ultimate arbiter of the law. It is easy to see why. If an administration refuses to enforce the justices' decisions, then the Court is impotent to make or affect policy. Similarly, public criticism or anti-Court measures can erode the Court's legitimacy. Thus, Supreme Court justices must, on occasion, account for how the executive branch might react to their decisions, and ensure that they do not stray too far, too often from its preferred policy goals. In other words, justices "act strategically, anticipating the wishes of the executive branch, and responding accordingly to avoid a confrontation" (Epstein & Walker, 1998, p. 43).

SANCTIONS, INVITATIONS, AND PRESIDENTIAL POLITICAL CAPITAL

The question, however, is, When will the Court seek information about the preferences of the executive branch and specifically issue invitations to do so? My theoretical argument focuses on the president's power, or what Light (1999) calls *political capital*. For Light, a president's strength is composed of partisan support in Congress, his approval ratings, and his margin of victory in the most recent election (p. 32). When each of these factors increases, the president gains political capital and is, therefore, more likely to garner congressional support for his domestic agenda.

Although Light's (1999) argument speaks directly to the relationship between the president and Congress, a similar argument can be

made about the relationship between the executive branch and the Court. Just as the president is more successful at fulfilling his domestic agenda when he has more political capital, the administration should be more successful at influencing the Supreme Court's decisions when the president is politically strong. In other words, justices know that an administration with a strong president is more likely than an administration with a weak president to sanction the Court, because the former has more political capital to expend. Thus, administrations with stronger chief executives should be more successful at ensuring that the justices do not stray too far, too often, from executive policy objectives.

More specifically, Light's (1999) measures of political capital parallel the sanctions delineated in the previous section. For instance, when the president enjoys high public approval ratings, he is more likely to consider not enforcing Court decisions that are contrary to the administration's policy goals. He is also more likely to publicly criticize the Court when he enjoys high levels of public support. That is, when the public supports the president, he can put pressure on the Court. This conforms to the literature that finds an indirect effect of public opinion on the choices justices make (Marshall, 1989; Mishler & Sheehan, 1993, 1996). A similar argument applies to the president's use of anti-Court action in Congress. When the president has strong support on Capitol Hill, he is more likely to utilize Congress to force the Court to take action consistent with the administration's policy objectives. Generally, it is easier for the executive and the legislative branches to coordinate their efforts against the Court when the president has strong party support in Congress.

Overall, a gap exists in our understanding of the relationship between the executive branch and the Court. This gap needs to be filled because it has become increasingly clear that justices consider how the administration wants them to act when making decisions. Furthermore, past solicitors general argue that the Court explicitly uses amicus invitations for this purpose. Invitations to participate, then, might be strategic tools that help justices decide cases in line with their own preferences while avoiding sanctions from the administration.

HYPOTHESES

Based on the theoretical foundation, my general hypothesis is that the Supreme Court is more likely to invite the solicitor general to participate as amicus when the president possesses high levels of political capital. Specifically, I posit that these invitations are tied to five key factors of presidential power.

First, conventional wisdom suggests that the president is strongest when he has strong party support in Congress (Bond & Fleisher, 1990; Edwards, 1990; Light, 1999). That is, when the president enjoys high levels of support in Congress, he has more power to forward anti-Court measures, and the administration is less likely to face retribution from Congress if the president, or an agency, refuses to enforce the Court's decisions. This leads me to the

> *Congressional support hypothesis:* The Supreme Court should issue more amicus invitations to the solicitor general when the president has support in both the Senate and the House of Representatives.

Second, when the president enjoys high public approval ratings he is more powerful, and the Court should, therefore, be more willing to defer to the preferences of the executive branch. Indeed, when a president is more powerful he should be more willing to sanction the Court for decisions with which he disagrees. This leads me to the

> *Public support hypothesis:* Amicus invitations to the solicitor general should be more frequent when the president enjoys high public approval ratings.

Third, incumbent presidents know that they have less capital during election years and, therefore, often try to postpone debate on certain issues until after an election (Brace & Hinckley, 1992, p. 46; Cameron, Cover, & Segal, 1990). Therefore, I hypothesize the

> *Election year hypothesis:* Invitations to the solicitor general should be more prevalent in years without a presidential election.

Fourth, several scholars (Bond & Fleisher, 1990; Brace & Hinckley, 1992) suggest that the executive branch is strongest during a president's honeymoon period. In this time period Congress often defers to policies on the president's agenda, and the Senate usually confirms initial cabinet nominees with little controversy (although there are exceptions). Given these findings, I hypothesize the

Honeymoon period hypothesis: The Court should invite the solicitor general to participate as amicus more often during a president's first year in office.

Fifth, Light (1999) argues that presidents have more capital to expend in Congress when they win their elections by wide margins. For instance, President Johnson enjoyed more capital than did President Kennedy because he won the 1964 election by a much larger margin than did Kennedy in 1960. As with the other measures of capital, I argue that a similar logic applies to the relationship between the president and the Court. Thus, I hypothesize the

Margin of victory hypothesis: Invitations to the solicitor general should be more prevalent as the president's margin of victory in the most recent election increases.

In addition to these variables that specifically tap the president's political capital, I expect the Court to respond to the relative importance of a case. Specifically, given the likely impact of politically important cases, the justices are more likely to want to be clear about the administration's stand on them. In short, because the stakes are higher in salient cases, ensuring that the Court does not stray too far from the president's preferences becomes particularly important. As such, I hypothesize the

Case salience hypothesis: The Court is more likely to issue invitations to the solicitor general in cases of greater salience.

DATA AND METHOD

To test these hypotheses, I utilize data from several sources but rely primarily on Gibson's United States Supreme Court Judicial Database, Phase II: 1953-1993 (1997). Gibson's data are the first to include variables about all amici curiae participation and position-taking before the Supreme Court. More important for this analysis is the fact that these data also include cases when the solicitor general participates as amicus curiae at the request of the Court. Thus, this database provides a unique opportunity to test hypotheses concerning the strategic use of invitations.

I analyze every formally decided case from 1953 through 1985 (N = 3,778).[6] The dependent measure is whether the Court invites the solicitor general to participate as amicus curiae in a given case (1 = an invitation was issued; 0 = otherwise). Normally, logit analysis is an appropriate modeling choice for a dichotomous, dependent variable. However, invitations to the solicitor general are quite rare, which might be a problem when modeling this phenomenon because logistic regression underestimates the probability of a rare event occurring (King & Zeng, 2001a, 2001b; Tomz, King, & Zeng, 1999). In other words, the coefficient estimates in rare events are biased downward, which affects the constant term and the remaining coefficients as a result. Given this problem, Tomz et al. (1999) propose a correction that lowers the mean square error of a model. Although this solution is effective in many contexts, it is particularly useful "when the number of observations is small (under a few thousand) and the events are rare (under 5% or so)" (King & Zeng, 2001b, p. 158). Because my data meet these conditions, I employ this technique in conjunction with Stata 7.0 (Tomz et al., 1999).[7]

To determine whether invitations are issued only in specific types of cases, I conducted two separate analyses on this variable. First, one might expect the Court to seek the administration's views only on issues of presidential power, policies important to the current president, or procedural issues about which the solicitor general can help the Court decide. Table 1 indicates that this is not the case, as no particular issue area dominates this variable. The most invitations, 20%, occur in civil rights and voting rights, whereas about 10% of the invitations are issued in federal preemption cases. Thus, although two

TABLE 1
Invitations by the Court to the Solicitor General by Issue Area (1953-1985)

Issue Category	*Number of Cases With Invitations*
Criminal rights	5
Civil rights/voting rights	15
Aliens/Native Americans	4
Poverty law	3
Campaign spending	1
Due process	2
Attorney fees	1
Unions	6
Antitrust	2
Election of remedies/liability	2
State tax	3
Federal securities regulation	1
Arbitration	1
Federal consumer protection	1
Patent copyright	2
Railroad	2
Comity	1
Justiciability	1
Supreme Court jurisdiction	1
Original jurisdiction	1
Review of nonfinal order	1
Federal state ownership dispute	1
Federal preemption	8
Intergovernmental tax immunity	1
Marital property	1
State tax	1
State boundary dispute	1
Nonreal property dispute between states	2
Miscellaneous	3
Total	74

issue categories have significantly more invitations, the Court seems to offer invitations across the issue spectrum defined in Gibson's (1997) database.

Second, one might question whether invitation cases are different from cases in which the solicitor general decides to file an amicus brief without an invite. My analysis indicates that there is also little difference among the characteristics of cases with invitations, cases with no

solicitor general participation, and cases in which the solicitor general chooses to participate. For instance, 21% of all cases without the solicitor general are complex, 22% of cases in which the solicitor general participates voluntarily are complex, and 23% of cases with invitations fall into this category. Second, only 3% of all cases in which the solicitor general participates are reargued (regardless of how it joined the case). Finally, although 8% of the cases are on the president's agenda when the solicitor general volunteers to participate, 6% are in this category when the Court invites the administration's participation. In short, there is little systematic difference between invitation cases and cases in which the solicitor general's office joins a case on its own.

INDEPENDENT VARIABLES

The model includes several independent variables, six of which measure the political power of the president and executive branch. They, along with the control variables, are summarized in Table 2. First, I include two measures to determine the president's power to forward anti-Court action in Congress. In the Senate, I calculate the president's ideological distance from the filibuster pivot—the greater the distance, the less likely the president will be able to push anti-Court measures in the Senate.[8] For the House, I simply calculate the percentage of seats held by the president's party.[9]

Third, to account for the popularity of the president as well as for indirect public opinion effects, I use Edwards's (1990) measure of presidential approval. There were several ways that this variable could be measured, but I settled on approval during the month prior to the Court's term. Although a month-to-month measure is intuitive, the majority of cases are docketed toward the beginning of the term, so this measure is appropriate.[10]

Fourth, I create a dummy variable to capture whether the Court term includes an election year. Cases in terms that include a presidential election take on a value of 0, whereas cases in terms without such an election are coded 1. This is also a difficult variable to measure because Court terms overlap presidential election years as well as nonelection years. Because I know when cases were argued before the Court, I utilize the calendar year for this variable. During the 1959

TABLE 2
Variables Affecting the Supreme Court's Decision to Invite Amicus Participation by the Solicitor General's Office (1953-1985)

Variable	*Mean*	*Minimum*	*Maximum*	SD	*Hypothesized Direction*
Does the Court ask the solicitor general to participate?	0.02	0.00	1.00	0.13	
Distance of president from Senate filibuster pivot	0.28	0.12	0.47	0.10	–
Percentage of House seats held by president's party	0.47	0.15	0.68	0.13	+
Presidential approval prior to current Court term	53.42	30.00	79.00	11.15	+
Case occurs in nonelection year	0.74	0.00	1.00	0.44	+
Case occurs in president's first year	0.26	0.00	1.00	0.44	+
Case salience	0.00	–0.94	10.22	0.99	+
President's margin of victory in most recent election	8.95	0.00	23.16	8.34	+
Ideological distance between president and Court median	0.19	0.00	0.46	0.12	+
Case has multiple legal provisions	0.21	0.00	1.00	0.41	+
Case was reargued	0.02	0.00	1.00	0.15	+
Case issue on president's agenda	0.06	0.00	1.00	0.24	+

SOURCE: Light (1999); Gibson (1997); Edwards (1990); Epstein, Segal, Spaeth, and Walker (1996); Wayne, O'Brien, Cole, Mackenzie, and Mackenzie (1996).
NOTE: Because of missing values, the *N* for the final model is 3,778.

October term, for example, cases argued beginning in January 1960 are considered in an election year. Likewise, all cases heard from October to December 1960 (the 1960 October term for the Court) are also in the election year.[11] I take a similar tack for the other remaining political capital variables. Fifth, I include a variable to determine whether a Court term encompasses the first year of a president's term in office. Cases heard during these years are coded 1 and 0 otherwise. Sixth, I include a measure of the president's margin of victory in the most recent presidential election (Light, 1999).

Finally, to determine whether more invitations are issued in high-profile cases, I control for the political salience of a case (Maltzman et al., 2000, p. 46). Like Maltzman and his colleagues (2000), I argue that a good measure of political salience is the number of amicus briefs filed in a case. However, given that amicus participation has dramati-

cally increased over the terms included in my sample, I calculated term-specific *z* scores to determine whether a case had more amicus filings than the average case heard during a term. Thus, this variable is composed of the *z* score for each case.[12]

I also include several control variables to test competing hypotheses. To test the attitudinal explanation (Segal & Spaeth, 1993) that invitations are more likely to be issued when the president is ideologically aligned with the Court, I calculate the absolute ideological distance between the president and the issue-specific median justice. This variable indirectly tests the hypothesis that the president's most important influence on the Court is the power to appoint like-minded justices to the bench. For the president, I employ DW-NOMINATE scores, and for the Court I use the percentage of cases in which the median justice voted liberally for each issue area per term.[13] Both measures are scaled from 0 to 1 so that they are comparable.

Case characteristics might also lead the Court to invite the solicitor general's participation. First, the Court might be more likely to issue invitations in complicated cases. This follows Drew Days's argument that the Court often asks for the solicitor general's help in multidimensional cases (Pacelle, 2003). As such, I include a variable that measures whether a case covers multiple legal provisions. Cases with multiple legal dimensions are coded 1 and 0 otherwise. Similarly, cases might be reargued because they are complicated (Hoekstra & Johnson, in press), which means that justices might be more likely to ask for the solicitor general's expertise in these cases. Thus, I include a dummy variable that is coded 1 for reargued cases and 0 for all other cases. Additionally, I determine whether the justices are more likely to ask for the solicitor general's input in cases that are on the president's agenda. To do so, I match agenda items from each president included in the sample (Light, 1999) with the issue of each case in the sample. Cases that match items on a president's agenda are coded 1, whereas all other cases are coded 0.

RESULTS

The results of the analysis are presented in Table 3, and they are compelling.[14] When the president's party controls more seats in the

TABLE 3
Rare Event Logistic Regression Model of Supreme Court's Decision to Invite Amicus Participation by the Solicitor General (1953-1985)

Variable	*Coefficient*	*Robust* SE	*Significance (one-tailed test)*	*Expected Direction?*
Constant	–7.82	1.38	.00	
Presidential capital				
Distance of president from Senate filibuster pivot	1.16	1.62	.24	No
Percentage of House seats held by president's party	3.24	1.22	.00	Yes
Presidential approval prior to current Court term	0.03	0.01	.04	Yes
Case occurs in nonelection year	0.83	0.37	.01	Yes
Case occurs in president's first year	0.33	0.31	.15	Yes
President's margin of victory in most recent election	–0.03	0.02	.04	No
Case salience	0.49	0.07	.00	Yes
Controls				
Ideological distance between president and Court median	–0.29	1.16	.40	No
Case has multiple legal provisions	–0.01	0.33	.48	Yes
Case was reargued	0.17	0.79	.41	Yes
Case issue on president's agenda	0.22	0.57	.35	Yes

Valid $N = 3{,}778$

House ($p = .00$), when he enjoys high public approval ratings ($p = .04$), when a Court term does not include an election year ($p = .01$), and when a case is highly salient ($p = .00$), invitations are significantly more likely to be issued to the solicitor general. The honeymoon period variable is in the right direction, but it does not reach an acceptable level of statistical significance. Finally, note that the president's margin of victory in the most recent election and the distance of the president from the filibuster pivot are signed incorrectly.[15] Despite these two unexpected results, these data indicate that Supreme Court

justices are generally able to differentiate between strong and weak administrations.[16]

None of the alternative explanations has an impact on the Court's decision to invite the solicitor general to participate. Of particular note, the ideological congruence between the Court and the president (an appealing alternative hypothesis) fails to predict when invitations are likely to be issued to the solicitor general. This variable is signed incorrectly and is not even marginally significant, which indicates that the president's potential support on the Court has little influence over whether the solicitor general is invited to appear as amicus curiae. Furthermore, neither the complicated nature of a case nor the fact that it includes an agenda issue for the president plays a significant role in the Court's decision to issue such an invitation. This is even stronger evidence that this decision is a strategic one for the justices.

Because it is difficult to interpret the substantive effects of the coefficients in Table 3, Table 4 delineates the predicted probabilities of the Court's decision to invite the solicitor general to appear as amicus. When all of the variables are held at their sample mean or modal values, the probability of such an invitation is only .01. In other words, invitations really are rare events. Using this baseline, I compare the predicted probabilities for strong and for weak presidents. Interestingly, none of the presidential capital variables, in isolation, has a large substantive effect on the Court's decision to invite the solicitor general to participate as amicus curiae. For instance, when all of the variables are held at their sample mean or mode, and party support in the House is at its maximum (68%), the probability of an invitation being issued only increases to 2%. Similarly, when presidential approval is at its maximum (79%), the probability also reaches only 3%.

However, considering realistic combinations of these variables yields clear substantive effects. For instance, if a president has high approval ratings (e.g., Kennedy enjoyed 79% approval before the 1961 term began), if the Court term does not include an election year, and if the president enjoys a high level of party support in the House then this probability jumps to .05. Although this is still a small probability, it is a five-fold increase from the baseline. This suggests that the president's political strength does affect the justices' desire to learn about the administration's preferences. Furthermore, when the above factors hold and the case is politically salient, the probability jumps to

TABLE 4

Predicted Probabilities That the Supreme Court Invites the Solicitor General to Participate as Amicus Curiae (1953-1985)

Condition	*Description*	p (y = *1)*	*95% Confidence Interval*
All variables held at sample mean or mode		.01	.01 to .02
President the strongest	Strong party support in House = .68 (maximum); nonelection year; presidential approval = 79% (maximum)	.05	.02 to .15
President the strongest and salient case	Strong party support in House = .68 (maximum); nonelection year; presidential approval = 79% (maximum); salient case	.16	.07 to .28
President the weakest	Strong party support in House = .24 (minimum); election year; presidential approval = 30% (minimum)	.00	.00 to .01
President the weakest and not salient case	Strong party support in House = .24 (minimum); election year; presidential approval = 30% (minimum); not a salient case	.00	.00 to .01

NOTE: The predicted probabilities are computed using the RELOGIT estimates from Table 2. Continuous variables are held constant at their mean values and dummy variables are held constant at their modal values.

16%. In short, the substantive effect of my key variables is clear: When the president is strong, and the justices know the case might be particularly important to the administration, the Court is much more likely to issue an invitation.

The opposite effect holds when the administration is politically weak, which further supports my argument. The probability of an invitation occurring during a presidential election year, when there is weak party support in the House, and when the president suffers from low approval ratings (e.g., Carter was at 30% during the 1979 term) is less than 1%. The fact that no amicus curiae briefs are filed in a case does not drop this probability any lower. In short, it is the political strength of an administration that has the greatest effect on the decision to invite the solicitor general's participation.

CONCLUSION

Supreme Court justices need to account for how the executive branch wants them to act when making decisions. If they do not, then they risk having sanctions leveled against the Court in the long run. Although it is sometimes easy to obtain this information, there are cases when the government does not participate or when the president's public statements are unclear. As such, there are times when the Supreme Court invites the solicitor general to present the government's position so the justices can ensure that they have information about the administration's preferences. The key finding is that invitations are most likely to occur when the administration holds an abundance of political capital. This has implications for the literature that addresses the separation of powers and the relationship between the Court and public opinion.

First, the findings add further weight to the notion that to make adequate predictions about justices' behavior, scholars should consider how the Court interacts with the other branches of government (Cohen & Spitzer, 1994; Ferejohn & Weingast, 1992; Gely & Spiller, 1990). As Martin (1997) argues, "The Supreme Court decides disputes in light of the facts of the case vis-à-vis the ideological attitudes and values of the justices, and the political context" (p. 23). What Martin and most separation-of-powers scholars assume, however, is that political

context mainly means the president's preferences or the preferences of the pivotal member of Congress.

My findings suggest that political context also includes the justices' perception of the likelihood that the president will sanction the Court. As my theory suggests and the findings demonstrate, a president without the political capital to sanction the Court will be less likely to use such a tactic. Indeed, although Supreme Court justices need to be concerned with the president's preferences, if the administration does not possess the political power to sanction the Court, then the justices should be less worried about straying from how the administration wants them to act. Thus, measures of political context should also include the political capital enjoyed by the current administration or by the controlling party in Congress.

An even more important implication focuses on the assumption made by much of this literature (Martin, 1997, being a key exception) that justices have complete and perfect information about the administration's preferences (Cohen & Spitzer, 1994; Eskridge, 1991a, 1991b; Ferejohn & Weingast, 1992; Gely & Spiller, 1990). In contrast, my theory points out that justices might not always have complete and perfect information about how the president wants them to act. At the same time, the findings provide evidence that a mechanism exists for Supreme Court justices to obtain this information when the information they do possess is imperfect and incomplete. In other words, the findings are systematic evidence that justices actively seek out information about the administration's preferences in cases when such information is not readily available. If this information were not available, the justices would have a much harder time making decisions that satisfy their own preferences as well as the president's preferences. For these reasons, this article makes a key contribution to the separation-of-powers literature.

Furthermore, the findings here contribute to the literature that focuses on the relationship between public opinion and Supreme Court decision making. It is clear that when the president's approval rating increases, the Court is more willing to seek out the administration's views of a case. This comports with the literature that finds both a direct and an indirect link between public opinion and the Court's decisions. This is an equally important finding because few studies

have provided evidence that justices think and care about how the public might react to their decisions.

At the end of the day, this article indicates that Supreme Court justices strategically utilize invitations to the solicitor general by accounting for the strength of the administration when determining whether they want additional information about how it wants them to act. Specifically, when the president is weak, the justices are less inclined to seek out information about the executive's policy objectives. This has clear implications for our understanding of the relationship between the Court and the president as well as for our more general understanding of strategic interaction between institutions. That is, actors are more likely to account for other actors' preferences when they are strong rather than weak.

NOTES

1. The informal norm on the Court is that an invitation will be made at the request of any three justices (Stern, Gressman, Shapiro, & Geller, 1993, p. 563). Note that the solicitor general is actually invited many more times than this number reflects because the Court issues invitations at the certiorari stage as well (Salokar, 1992). However, for two main reasons, I only analyze cases when the solicitor general is invited to participate at the merits stage. First, as Spriggs and Wahlbeck (1997) note, it is at the merits stage when policy is set, so I am more interested in this part of the decision-making process. Second, data are much more difficult to obtain about solicitor general participation at the certiorari stage, and they are not included in the Gibson (1997) data set. Although there is little written about the actual timing of invitations, Stern and colleagues (1993) indicate that the justices either discuss doing so during conference and then vote at the same time, or the discussion and voting take place via internal memoranda after certiorari has been granted in a case.

2. Clearly, the solicitor general represents the views of the president and administration. For instance, Meinhold and Shull (1998) demonstrate that the solicitors general are responsive to the ideological preferences of the presidents who appoint them. Furthermore, Deen, Ignagni, and Meernik (1998) argue that the solicitor general "is generally viewed as responsible for advancing the President's agenda in the legal system" (p. 4). Pacelle (1999) agrees with this assessment and suggests that even though solicitors general are independent, "Most . . . believe it is proper to use the office to contribute to the President's broader agenda" (p. 2). Empirically, Epstein and Walker (1998) demonstrate that President Clinton's solicitor general (Drew Days III) rewrote at least four briefs that had already been filed by President Bush's solicitor general to reflect the preferences of the new administration.

3. Of course, the justices can do so through other means as well. For instance, Martin (1997) points out that because the president is so high profile, justices can learn about his preferences by following his public statements.

4. Despite this intuition, scholars who have studied this phenomenon argue that the Court's invitations are often meant simply to provide the justices with additional legal arguments and

information about a case (Salokar, 1992). Pacelle (1999) posits that invitations are best viewed as instances when the Court seeks help from the top lawyers in the country. He suggests that in most cases of invited participation, "The [Solicitor General] serves as an officer of the Court, rather than as an advocate" (p. 12). Elsewhere, Pacelle (2003) argues that in landmark cases, the Court might issue invitations to figure out what the office wants them to do. In other cases, however, he suggests that the administration has no interest in the case and so acts only as a fifth clerk. The problem is that neither of these analyses tests the propositions, nor do they provide systematic accounts of when and why invitations are issued.

5. Note that this theory does not hinge on the fact that the justices fear being punished in any one particular case. Rather, consistent with the strategic model (Epstein & Knight, 1998a), my theory rests on the idea that the justices want to ensure that they do not upset the executive in too many cases. As such, they have an incentive to invite the solicitor general's participation if the government has not explicitly made its views known in a case.

6. I use the U.S. citation instead of the docket number as the unit of analysis. I do so because in consolidated cases, the solicitor general is only invited to appear once rather than for each docketed case. Additionally, I exclude all cases that were not orally argued (thus eliminating all summary judgment cases). Accounting for both of these factors decreases the universe of cases from 7,157 to 4,236. Additionally, I exclude all 413 Rule 37.4 cases (those when the solicitor general files as amicus without an invitation from the Court) because the Court would have no opportunity to invite the solicitor general's participation. I also exclude cases in which the United States is a party to the case. Finally, several cases are excluded from the final analysis due to missing values. These values include 7 cases with missing values in the case complexity variable and 38 cases in which the issue area is miscellaneous, so I cannot determine the ideological distance between the president and the Court. After accounting for these factors, the total cases analyzed equals 3,778.

7. The ReLogit program "estimates the same logit model as the logit command, but with an estimator that gives a lower mean square in the presence of rare events data for coefficients, probabilities, and other quantities of interest" (Tomz, King, & Zeng, 1999, p. 1). I also estimated the model using the more familiar logit command. Note that the results of either estimation procedure are substantially similar—neither my substantive interpretation nor levels of statistical significance are affected by the decision. Because the ReLogit technique is more appropriate given the distribution of my data, I chose to present those results.

8. Krehbiel (1998) supports this operationalization when he argues that the senator located at the filibuster pivot is key to the legislative process. I employ DW-NOMINATE scores because they are directly comparable with scores across Congresses. A case could be made that I should use Poole and Rosenthal's Common Space scores (1998) instead of the DW-NOMINATE scores. However, I am more comfortable with the DW-NOMINATE scores because they are based on a 3-year trend of a legislator's votes, and therefore can change over time, whereas the Common Space scores are static. That is, each legislator has one score that is used for his or her entire career. Theoretically, the dynamic nature of the DW-NOMINATE scores is more appealing. Additionally, given that these two measures correlate at .94 or higher for all Houses and Senates (see http://voteview.uh.edu/page2a.htm), the DW-NOMINATE scores are just as effective as the Common Space scores.

9. I tried several other operationalizations for these variables, and all produced similar results. These included the percentage of seats held by the president's party in both houses of Congress combined, the percentage of seats in each individual chamber, the president's legislative victories in each chamber, and a dummy variable for divided government. Although I am confident that any of these measures could be appropriate, the two I employ are the most theoretically pleasing.

10. Stern and colleagues (1993) support this tactic when they argue that the Court disposes of the greatest number of petitions for certiorari at the beginning of the term (p. 575). For instance, in the 1991 term, the justices considered almost 1,400 petitions in the initial conferences.

11. I use the date of argument rather than the date of the decision because I am modeling the Court's behavior prior to making a decision. That is, I am interested in the decision-making process prior to oral arguments.

12. Certainly the reader could argue that this variable leads to circular reasoning. That is, more amicus participation means the case is more salient when the dependent variable actually measures amicus participation itself. However, the theoretical justification for testing the salience hypothesis is that when more amici curiae participate, the justices are more likely to view the case as important. In turn, when they see both this signal and that the government is not yet involved in the case, the justices should be more likely to issue an invitation, because I would expect them to want the administration's views in salient, rather than typical, cases. Given that other measures of salience are post hoc—meaning they measure salience after a case has been argued (see, e.g., Epstein & Segal, 2000)—I am willing to risk a circular argument in favor of an ex ante measure. Note, however, that using Epstein and Segal's (2000) measure produces very similar results. Thus, my choice of the amicus measure is purely theoretical. Finally, note that the count of amicus participation excludes the solicitor general because I would not want this measure on both sides of the equation.

13. Note that I tried other operationalizations of this variable. Specifically, I calculated the number of justices I would expect to be ideologically aligned with the president. To do so, I determined whether the president was a Democrat (Republican). I then calculated the percentage of justices who voted liberally (conservatively) more than 50% of the time for each issue area. I used this percentage as the measure of ideological compatibility between the president and the Court. Doing so does not change the results. That is, this variable is also in the wrong direction and statistically insignificant. Thus, I am even more confident that the ideological congruence between the president and the justices does not affect the Court's propensity to invite the solicitor general's participation.

14. The reader should be aware of two points about the model. First, King and Zeng's (2001b) RELOGIT output does not provide goodness of fit measures. However, when I ran the model with a normal LOGIT estimation, the results were identical (although with negatively biased coefficients, as King & Zeng suggest), and the log-likelihood ratio was 60.35 ($df = 11$). This is statistically significant ($p = .00$), which means the model as a whole performs well. Second, because I have clear expectations about the directionality of the relationship between the dependent and independent variables, I use one-tailed tests throughout the analysis. This follows Blalock (1979), who explains that "whenever direction has been predicted, one-tailed tests will be preferable" (p. 163).

15. Because these two variables are signed in the wrong direction, the reader might think that I should use the more stringent two-tailed test for them. Even using this standard, neither reaches statistical significance. Indeed, for margin of victory, $z = .07$, and for the distance from the filibuster, $z = .47$.

16. Given that I use multiple indicators of presidential capital, the reader might wonder whether collinearity affects my results. It clearly does not, as the highest pairwise correlation between these variables (the filibuster distance and a president's margin of victory in the most recent election) is only –.39. Thus, I am confident that collinearity does not affect my model.

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Timothy R. Johnson received his Ph.D. from Washington University in St. Louis in 1998. His research interests include judicial behavior, Supreme Court decision making, Supreme Court oral arguments, executive/judiciary relations, U.S. district court decision making, the impact of norms and rules on judicial behavior, and third-party politics.