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## ARTICLE

### THE DECLINE OF SUPREME COURT DEFERENCE TO THE PRESIDENT

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*According to entrenched conventional wisdom, the president enjoys considerable advantages over other litigants in the Supreme Court. Because of the central role of the presidency in the U.S. government, and the expertise and experience of the solicitor general's office, the president usually wins. However, a new analysis of the data reveals that the conventional wisdom is out of date. The historical dominance of the president in the Supreme Court reached its apex in the Reagan administration, and has declined*

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steadily since then. In the Obama administration, the presidency suffered its worst win rate—barely 50%. After documenting this trend, we discuss possible explanations. We find evidence that the trend may be due to the growing self-assertion of the Court and the development of a specialized, private Supreme Court bar. We find no evidence for two other possible explanations—that the trend is due to greater executive overreaching than in the past, or to ideological disagreements between the Court and recent presidents.

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Scholars of presidential power agree that the presidency is an extraordinarily powerful institution, and that it is a far more powerful institution today than it was in the past. During most of the nineteenth century, the presidency was largely an administrative institution that took orders from Congress. Aside from the earliest presidents, who helped set precedents for presidential power, only Andrew Jackson and Abraham Lincoln, in both cases acting in unusual conditions, exercised significant power. All of this changed in the twentieth century. Theodore Roosevelt, Woodrow Wilson, and Franklin Roosevelt turned the presidency into an administrative and foreign policy powerhouse, while Congress and the Judiciary were shoved to the side. After World War II, the “imperial presidency” was consolidated.<sup>1</sup> The modern imperial president determines domestic policy using powers delegated by Congress, and

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<sup>1</sup> We borrow the term “imperial presidency” from ARTHUR SCHLESINGER, JR., *THE IMPERIAL PRESIDENCY*, at vii-viii (1973), who uses it as a metaphor for “the appropriation by the presidency . . . of powers reserved by the Constitution and by long historical practice to Congress.” See generally Stephen Skowronek, *The Conservative Insurgency and Presidential Power: A Developmental Perspective on the Unitary Executive*, 122 HARV. L. REV. 2070, 2087 (2009) (“[The progressives] constructed an office in which incumbents would be duty-bound to assume political leadership of the nation on an ongoing basis. Each was individually charged to test his skills in keeping national opinion mobilized behind great public purposes and to overcome thereby the constitutional obstacles in its path.”).

implements it using the vast federal bureaucracy.<sup>2</sup> A standing army and foreign service bureaucracy enable the president to dominate foreign relations.<sup>3</sup>

Law professors have traced the growth of presidential power in legal doctrines that have been put into place by the courts. The Supreme Court initially resisted the creation of an administrative state controlled by the president. It struck down broad delegations of policymaking and judicial power from Congress to the executive branch in the 1930s.<sup>4</sup> But it reversed itself after Roosevelt threatened to pack the Court. In recent decades, the Court further expanded the president's power by, among other things, requiring courts to defer to regulators' reasonable interpretations of the law and to their evaluations of the facts.<sup>5</sup>

The Court has also either approved of, or declined to block, the president's expansion of power to conduct foreign relations.<sup>6</sup> A range of doctrines require courts to defer to the president's interpretation of treaties, to block private litigants from challenging national security policies, and to stay out of "political" disputes between Congress and the president, which presidents typically win.<sup>7</sup> In the view of some scholars, the only legal check on the president's power to conduct foreign relations is Congress's power to withhold funds, which is often impractical.<sup>8</sup>

Political scientists also agree that the president's power is vast—in domestic and foreign relations alike. Terry Moe and William Howell, for example, emphasize the ways in which constitutional norms and ordinary politics give the president advantages in conflicts with the other branches of government. Politically, as the focus of public attention, the president can rally the public to his side. And constitutionally, as the leader of the bureaucracy, the president often has the "power of unilateral action": he can implement a policy, then force Congress to respond.<sup>9</sup> For example, despite the formal legal constraints

<sup>2</sup> See BRUCE ACKERMAN, *THE DECLINE AND FALL OF THE AMERICAN REPUBLIC* 43 (2010).

<sup>3</sup> See ERIC A. POSNER & ADRIAN VERMEULE, *THE EXECUTIVE UNBOUND* 185 (2010).

<sup>4</sup> See, e.g., *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 529 (1935) (citing *Panama Ref. Co. v. Ryan*, 293 U.S. 388, 421 (1935)) ("[T]he Constitution has never been regarded as denying to Congress the necessary resources of flexibility and practicality, which will enable it to perform its function in laying down policies and establishing standards while leaving to selected instrumentalities the making of subordinate rules within prescribed limits . . . [but] the wide range of administrative authority which has been developed by means of them, cannot be allowed to obscure the limitations of the authority to delegate, if our constitutional system is to be maintained."); *Crowell v. Benson*, 285 U.S. 22, 50-54 (1932) (allowing administrative adjudication of private rights though providing for de novo review by an Article III court).

<sup>5</sup> See *Chevron, U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 865-66 (1984). See generally ADRIAN VERMEULE, *LAW'S ABNEGATION* (2016).

<sup>6</sup> See, e.g., *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 320 (1936) (recognizing the "plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations").

<sup>7</sup> See Eric A. Posner & Cass R. Sunstein, *Chevronizing Foreign Relations Law*, 116 *YALE L.J.* 1170, 1200-01 (2007).

<sup>8</sup> See, e.g., JOHN C. YOO, *THE POWERS OF WAR AND PEACE* 15 (2005).

<sup>9</sup> Terry M. Moe & William G. Howell, *The Presidential Power of Unilateral Action*, 15 *J. L. ECON. & ORG.* 132, 138 (1999) ("[P]residents are particularly well suited to be first-movers . . . [i]f they

embodied in the War Powers Act,<sup>10</sup> the president can commit military forces abroad and then dare Congress to defund them, which it rarely does. Congress and the courts are slow-moving, decentralized institutions which labor under the public eye. The president commands a hierarchy which enables him to move swiftly, secretly, and decisively. A skillful president uses this advantage to circumvent legal constraints imposed by the other branches.

The president's extraordinary power gives him significant advantages in disputes with private litigants. The executive branch litigates in the Supreme Court far more frequently than any other person or entity. It benefits from an expert, experienced Supreme Court litigator—the solicitor general (SG). And, independent of the power of the president's legal arguments, the Court may be reluctant to rule against the president. The president is a uniquely powerful figure as an embodiment of the will of the people in a democracy. He may refuse to comply with the Court's judgments if he disagrees with them. And the president, working with Congress, has the legal means to retaliate against the Court if it does not do his bidding—by restricting its jurisdiction and limiting the funding of the Judiciary, for instance.

If the presidency is enormously powerful—if it benefits from numerous legal doctrines that require deference, and can maneuver around others because of its political advantages—then one would expect the president to prevail in the Court with great frequency.<sup>11</sup> This view is consistent with empirical political science literature finding consistently high success rates of the president in the Supreme Court.<sup>12</sup> During his years in office, Franklin Roosevelt won almost two-thirds of his 850 cases; Ronald Reagan did even better, prevailing nearly 80% of the time. Some commentators worry about the president's success, while others applaud it,<sup>13</sup> but neither side questions the dominating force that is the executive branch.

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want to shift the status quo by taking unilateral action on their own authority, whether or not that authority is clearly established in law, they can simply do it . . . . [t]he other branches are then presented with a fait accompli . . . .”)

<sup>10</sup> See 50 U.S.C. §§ 1541–1548 (2012) (limiting the president's ability to send armed forces into combat abroad absent a declaration of war by Congress, statutory authorization, or an attack on the United States).

<sup>11</sup> As we discuss later in Part II, selection effects can mute this impact. If a doctrine greatly favors the president, then private litigants may adjust their behavior rather than challenge him and lose. However, selection effects will not eliminate the effect of doctrine in normal conditions. For a lucid explanation, see generally Daniel Klerman & Yoon-Ho Alex Lee, *Inferences from Litigated Cases*, 43 J. LEGAL STUD. 209 (2014), which explores the impact of selection effects on plaintiff win rates with respect to unbiased predictions about trial outcomes.

<sup>12</sup> See, e.g., REBECCA MAE SALOKAR, *THE SOLICITOR GENERAL* 22–30 (1992).

<sup>13</sup> These contrary positions seem related to views of the Court's role in our democracy. To some commentators, the Court should defer to the wishes of the people as expressed by their elected representatives. See, e.g., JEREMY WALDRON, *LAW AND DISAGREEMENT* 15 (1999). To others, it should be aggressive, monitoring Congress and the president to ensure that they do not intrude into individual or state rights. See, e.g., RONALD DWORKIN, *LAW'S EMPIRE* 2 (1988). The former view would favor a high presidential win rate, and the latter would not—putting aside selection effects.

However, we have discovered that the president's success rate in the Supreme Court peaked during the Reagan administration and has declined steadily since then. George H.W. Bush's win rate was 70%; Bill Clinton's was 63%; George W. Bush's was 61%; and Barack Obama's was 52%. This until-now unknown trend raises significant questions, and may force us to rethink the deeply entrenched academic assumption about the rise of presidential power. Is it possible that presidential power reached its apex in the Reagan administration, and has diminished since then? Or is something else going on?

Law professors who take for granted presidential dominance in the Court may be overly influenced by formal doctrine. There is some evidence that the *Chevron* doctrine has been applied opportunistically—when a majority of the Court agrees with the president and not when it disagrees with him.<sup>14</sup> There is also, as a matter of formal doctrine, some indications that in recent years the Supreme Court and the lower courts have begun to cut back on deference to the president, both in foreign relations<sup>15</sup> and in domestic administration.<sup>16</sup> It is also possible that scholars of all types have focused on salient events while disregarding the more humdrum business of governing. Clinton, for example, went to war in Serbia in defiance of Congress, but also failed to implement key elements of his domestic agenda, like health care reform, and instead adopted the Republican Congress's conservative agenda as his own. This allowed him to declare political victory while actually implementing policies—like welfare reform—that he did not champion, at least initially. George W. Bush used executive power aggressively against Al Qaeda, but also, to an extent that has often been downplayed by scholars, relied for authority on an enormous amount of new legislation enacted by Congress while succumbing to congressional pressure over coercive interrogation and other policies where there was disagreement. Obama's most important accomplishments were legislative—the stimulus bill, the Dodd-Frank Act, and the Affordable Care Act—and took place when Democrats controlled both houses of Congress. Through the rest of his presidency, he fought a rearguard action to protect these accomplishments, and

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<sup>14</sup> See William N. Eskridge, Jr. & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from Chevron to Hamdan*, 96 GEO. L.J. 1083, 1091 (2008) (finding “a strong association between judicial ideology and the likelihood of liberal or conservative agency interpretations prevailing”); see also Thomas J. Miles & Cass R. Sunstein, *Do Judges Make Regulatory Policy? An Empirical Investigation of Chevron*, 73 U. CHI. L. REV. 823, 825-26 (2006) (“[T]he application of the *Chevron* framework is greatly affected by the judges’ own convictions.”).

<sup>15</sup> See Ganesh Sitaraman & Ingrid Wuerth, *The Normalization of Foreign Relations Law*, 128 HARV. L. REV. 1897, 1924-35 (2015); see also Harlan Grant Cohen, *The Death of Deference and the Domestication of Treaty Law*, 2015 BYU L. REV. 1465, 1466-67 (“[T]he Roberts Court has been methodically whittling away the deference it traditionally granted to political branches in foreign relations . . .”).

<sup>16</sup> See, e.g., *Michigan v. EPA*, 135 S. Ct. 2699, 2712 (2015) (striking down an EPA regulation because the EPA did not adequately consider costs). Skepticism about judicial deference to administrative determinations by the Executive has been growing in the conservative legal community and is likely shared by Justices Thomas and Gorsuch. See generally, e.g., PHILIP HAMBURGER, *IS ADMINISTRATIVE LAW UNLAWFUL?* (2014).

used regulatory powers to make incremental changes that Congress refused to legislate in the areas of climate regulation and immigration.

Of course, one could make the opposite argument by focusing on the successes and downplaying the failures. Maybe we should count Obama as powerful because he was able to issue climate regulations, enter the Paris climate treaty, and refuse to deport many thousands of unauthorized immigrants in defiance of Congress. Scholars often disagree about whether the president is very powerful or very weak.<sup>17</sup> The real problem is methodological: how exactly do we measure presidential power?

In this Article, we measure presidential power by looking at the president's win rate in the Supreme Court. This measure is obviously only partial, and is subject to a number of limitations that we discuss below. But it has a major advantage, which is that it is easily determined and compared across presidents. After presenting more historical background in Part I, in Part II we explain our data and present our main findings. In Part III, we turn to possible explanations for our results.

We examine four such explanations. The first is that the Supreme Court has become a more powerful and self-confident institution in recent decades. Commentators have argued that the Court has become more "activist" over the years, in the sense of more willing to strike down statutes.<sup>18</sup> If so, it is possible that an activist Court would also rule against the president more frequently. We find some evidence consistent with this theory.

Next, we investigate the possibility—widely discussed in the press and the academic literature—that presidents have become more aggressive. If so, then it is possible that even without changing its traditional pro-president doctrine, the Court may have ruled against the president with greater frequency because the president's actions have violated legal norms with greater frequency. However, we do not find evidence for this theory.

Third, we examine the possibility that recent presidents have done poorly in the Court because they happen to have faced Supreme Court justices who are ideologically predisposed against them. We can eliminate this explanation as inconsistent with the data.

Finally, we consider the possibility that presidents have done poorly because of the growth of a specialized Supreme Court bar, which has

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<sup>17</sup> See, e.g., Richard H. Pildes, *Law and the President*, 125 HARV. L. REV. 1381, 1404-08 (2012).

<sup>18</sup> See, e.g., Adam Liptak, *How Activist Is the Supreme Court?*, N.Y. TIMES (Oct. 12, 2013), <http://www.nytimes.com/2013/10/13/sunday-review/how-activist-is-the-supreme-court.html> [<https://perma.cc/7AZW-546C>].

eliminated the advantage previously enjoyed by the SG's office (OSG).<sup>19</sup> We find evidence for this explanation.

## I. PRESIDENTS IN THE SUPREME COURT

History is full of reports of presidents complaining about the Supreme Court. The country's third president, Thomas Jefferson, attacked Chief Justice Marshall's iconic decision in *Marbury v. Madison*, even though Marshall ruled in Jefferson's favor:

The court determined at once that, being an original process, they had no cognisance [sic] of it; and there the question before them was ended. But the Chief Justice went on to lay down what the law would be, had they jurisdiction of the case: to wit, that they should command the delivery . . . . Yet this case of *Marbury* and *Madison* is continually cited by bench and bar, as if it was settled law, without any animadversion on it, being merely an obiter dissertation of the Chief Justice.<sup>20</sup>

Responding to yet another opinion delivered by the Chief Justice, President Andrew Jackson reportedly declared: "Well: John Marshall has made his decision: *now let him enforce it!*"<sup>21</sup> In Lincoln's first inaugural address he took aim at the infamous *Dred Scott* decision—as "an agitated Chief Justice Roger Taney looked on, trembling with rage."<sup>22</sup>

The list does not end there. Teddy Roosevelt was not shy about asking Congress to overturn decisions of the Court<sup>23</sup> or even criticizing the justices. Of Oliver Wendell Holmes, his appointee and formerly good friend, Roosevelt

<sup>19</sup> For an example of a recent argument along these lines, see Richard J. Lazarus, *Advocacy Matters Before and Within the Supreme Court: Transforming the Court by Transforming the Bar*, 96 GEO. L.J. 1487 (2008).

<sup>20</sup> Letter from Thomas Jefferson to William Johnson 6 (June 12, 1823), <http://hdl.loc.gov/loc.mss/mtj.mtjbibo24682> [https://perma.cc/FV2P-NY22].

<sup>21</sup> See Edwin A. Miles, *After John Marshall's Decision: Worcester v. Georgia and the Nullification Crisis*, 39 J. S. HIST. 519, 519 (1973).

<sup>22</sup> Jeffrey Rosen, *POTUS v. SCOTUS*, NEW REPUBLIC (March 16, 2010), <https://newrepublic.com/article/73788/potus-v-scotus> [https://perma.cc/R8GF-L6S2]; see Abraham Lincoln, First Inaugural Address 8-10 (Mar. 4, 1861), <http://hdl.loc.gov/loc.mss/ms000001.mss301899.0773800> [https://perma.cc/ZG3W-Z6SE] ("[T]he candid citizen must confess, that if the policy of the government, upon vital questions, affecting the whole people, is to be irrevocably fixed by decisions of the Supreme Court, the instant they are made, in ordinary litigation between parties . . . the people will have ceased to be their own rulers, having . . . practically resigned their government into the hands of that eminent tribunal.")

<sup>23</sup> See, e.g., Theodore Roosevelt, Sixth Annual Message (Dec. 3, 1906), <http://www.presidency.ucsb.edu/ws/?pid=29547> [https://perma.cc/GTN8-2A92] ("The first purely income-tax law was past [sic] by the Congress in 1861, but the most important law dealing with the subject was that of 1894. This the court held to be unconstitutional . . . . The decision of the court was only reached by one majority. It is the law of the land . . . . Nevertheless, the hesitation evidently felt by the court as a whole in coming to a conclusion, when considered together with the previous decisions on the subject, may perhaps indicate the possibility of devising a constitutional income-tax law which shall substantially accomplish the results aimed at.")

said: “I could carve out of a banana a judge with more backbone.”<sup>24</sup> Theodore’s cousin, Franklin, famously went much further, responding to decisions invalidating his New Deal programs by proposing a plan to enlarge the Court with justices of his own choosing. Truman claimed that the Court could not take away his power to seize the steel mills;<sup>25</sup> Clinton said that the Court’s invalidation of the line-item veto amounted to “a defeat for all Americans;”<sup>26</sup> Obama called out the justices for their decision in *Citizens United*.<sup>27</sup>

And yet scholars tell us that these and other instances of Court-bashing are the exceptions; that in fact presidents do quite well in the Court. According to Scigliano, “throughout its history the [executive branch] has won most of its cases in the Supreme Court, and at a level of success which has not varied by very much from one period to another.”<sup>28</sup> From an analysis of the Eisenhower through Reagan administrations, Salokar reports “the United States enjoys unrivaled success.”<sup>29</sup> Black and Owens assert that the president’s modern-day representative in the Supreme Court—the SG—not only wins an “astonishing” percentage of its Supreme Court cases, but also influences the Court.<sup>30</sup>

The president’s success before the Court is reflected not only in his win rate. It is also reflected in doctrinal formulations that the Court has adopted over the years. These doctrines, often called “deference doctrines,” require courts to treat the president more favorably than typical private parties. The most famous of these is the *Chevron* doctrine, which requires courts to defer to

<sup>24</sup> Kermit L. Hall, *Judicial Independence and the Majoritarian Difficulty*, in THE JUDICIAL BRANCH 60, 77 (Kermit L. Hall & Kevin T. McGuire eds., 2005).

<sup>25</sup> See MAEVA MARCUS, TRUMAN AND THE STEEL SEIZURE CASE 176–77 (1977) (reporting Truman’s remarks at a post-oral argument press conference: “The President has the power, and [Congress and the Courts] can’t take it away from him . . . Nobody can take it away from the President, because he is the Chief Executive of the Nation, and he has to be in a position to see that the welfare of the people is met.”).

<sup>26</sup> Helen Dewar & Joan Biskupic, *Court Strikes Down Line-Item Veto*, WASH. POST (June 26, 1998), <http://www.washingtonpost.com/wp-srv/national/longterm/supcourt/stories/wp062698.htm> [<https://perma.cc/79RW-XJH8>].

<sup>27</sup> See President Barack Obama, Remarks by the President in State of the Union Address (Jan. 27, 2010), <https://obamawhitehouse.archives.gov/the-press-office/remarks-president-state-union-address> [<https://perma.cc/3GY3-P2RR>] (“With all due deference to separation of powers, last week the Supreme Court reversed a century of law that I believe will open the floodgates for special interests—including foreign corporations—to spend without limit in our elections. I don’t think American elections should be bankrolled by America’s most powerful interests, or worse, by foreign entities. They should be decided by the American people. And I’d urge Democrats and Republicans to pass a bill that helps correct some of these problems.”).

<sup>28</sup> ROBERT SCIGLIANO, THE SUPREME COURT AND THE PRESIDENCY 177 (1971).

<sup>29</sup> SALOKAR, *supra* note 12, at 30.

<sup>30</sup> RYAN C. BLACK & RYAN J. OWENS, THE SOLICITOR GENERAL AND THE UNITED STATES SUPREME COURT 25 (2012); see also Michael A. Bailey et al., *Signals from the Tenth Justice: The Political Role of the Solicitor General in Supreme Court Decision Making*, 49 AM. J. POL. SCI. 72, 83 (2005) (“The solicitor general’s influence should be seen in political terms. He is more likely to persuade his ideological allies, and all justices are less likely to be suspicious of him when he takes positions that seem to be against his ideological predispositions.”).



the Executive's interpretation of a statute that is "reasonable."<sup>31</sup> In practice, this means that when an ambiguous statute is open to a range of interpretations, the executive branch is permitted to choose the interpretation that is legally binding. By contrast, in a dispute between private parties, the court determines the correct interpretation of an ambiguous statute. Other doctrines require courts to defer, within limits, to other executive determinations, such as factfinding by regulators when they issue rules, factfinding in administrative hearings, and the refusal to prosecute criminals or enforce regulations.<sup>32</sup>

Another group of doctrines obliges courts to defer to the president in cases touching on national security and foreign affairs. These rules require deference to treaty interpretations, the president's judgment as to whether foreign countries pose threats and other factfinding, and the decision to recognize a foreign state, among others.<sup>33</sup>

What has accounted for the president's dominance before the Court? One can imagine many possible theories. For clarity, we group them into categories based on the incentives of the relevant parties—the justices, the president, and private litigants.<sup>34</sup>

#### A. *The Justices*

The justices might be biased in favor of the president (or, more generally, the executive branch) and against private litigants. One reason for a pro-presidential bias is that justices may fear retaliation from the president if they consistently rule against him. Despite life tenure, the justices have good reason to be sensitive about the president's attitude toward them. The president can propose or support legislation that limits their power—like Franklin Roosevelt's Court-packing plan, or the jurisdiction-stripping provisions enacted during Reconstruction. The president's support is also needed for routine legislation that funds the courts and raises salaries. Justices might also fear the delegitimizing effects of public

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<sup>31</sup> See *Chevron, U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 866 (1984).

<sup>32</sup> For a historical examination of the evolution of these doctrines, see generally Reuel E. Schiller, *The Era of Deference: Courts, Expertise, and the Emergence of New Deal Administrative Law*, 106 MICH. L. REV. 399 (2007).

<sup>33</sup> See Posner & Sunstein, *supra* note 7, at 1200-02 (“[C]ourts . . . usually give weight to the executive’s interpretation of a treaty. They defer absolutely to the executive’s decision whether to recognize a foreign state. And even when the executive and Congress come into conflict about the extent of their respective foreign relations responsibilities, in most instances courts effectively defer to the executive by refusing to decide on the merits because of concerns about justiciability.” (footnotes omitted)); see also Curtis A. Bradley, *Chevron Deference and Foreign Affairs*, 86 VA. L. REV. 649, 650 (2000) (“Courts generally have . . . giv[en] substantial and sometimes absolute deference to the executive branch in foreign affairs cases.”).

<sup>34</sup> By “private litigants,” we mean anyone who opposes the executive branch in the Supreme Court. Most “private litigants” are private persons or corporations, but for our purposes we use the term to also encompass state governments, Congress, foreign sovereigns, and related entities outside the executive branch.

criticism of the Court by the president—and in the extreme, refusal to comply with an order (the Andrew Jackson example<sup>35</sup>).

Judicial bias in favor of the president can also be given a more positive explanation. Justices might trust the executive branch more than private litigants. They might believe that the executive branch deserves some degree of trust or respect simply because it is a coequal branch of government, or because (unlike private litigants) the executive branch presumably tries to act in the public interest rather than in someone's private interest. Justices might also trust the executive branch because it appears repeatedly before the Court, and therefore has strong incentives to be honest.

Justices are all nominated by the president, and presidents therefore play a role in determining who they are. While the lion's share of attention has been given to presidents' incentives to nominate persons who are ideologically compatible,<sup>36</sup> presidents might also favor justices who are generally sympathetic to the executive branch. Indeed, while Democratic and Republican presidents choose ideologically dissimilar justices,<sup>37</sup> they are likely to agree on pro-Executive justices because both types of presidents want justices to rule in favor of the executive branch. Some evidence supports this hypothesis. Many justices have served as prosecutors and other types of lawyers in the executive branch; hardly any justices have been public defenders.<sup>38</sup>

### B. *The President*

The justices may rule in favor of the president not because the justices are biased in favor of the president, but because the president brings stronger cases to the Court than private litigants do. As noted above, the president may feel that he can obtain the benefit of the doubt from the Court on hard and important cases as long as his lawyers consistently make good arguments to the Court and (relatedly) never bring weak cases. The president—and other relevant officers of the executive branch—might also pay a political price if they lose in the Court, and so refrain from bringing cases they are likely to lose.

The president also benefits from representation by the OSG, which specializes in Supreme Court litigation. Because of the expansive reach and influence of the executive branch, it appears before the Court far more than

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<sup>35</sup> See *supra* text accompanying note 21.

<sup>36</sup> See, e.g., Lee Epstein & Eric A. Posner, *Supreme Court Justices' Loyalty to the President*, 45 J. LEGAL STUD. 401 (2016).

<sup>37</sup> See, e.g., JEFFREY A. SEGAL & HAROLD J. SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED* 127 (2002) ("A rational President will wish to nominate someone with views as close to his as possible . . .").

<sup>38</sup> See also Rob Robinson, *Executive Branch Socialization and Deference on the U.S. Supreme Court*, 46 LAW & SOC'Y REV. 889, 907-15 (2012) (finding "clear evidence that prior executive branch experience correlates with an increased likelihood of supporting the president's preferred position").

any other entity or person. The prestige of the office attracts experienced and talented lawyers, including graduates from the best law schools.<sup>39</sup>

As Richard Lazarus points out, it is not only sheer talent that explains the success of attorneys in the OSG. It is also their deep knowledge and familiarity with the Court:

Because they immerse themselves in the work of the Court, the attorneys of the Solicitor General's Office, unlike many of their opposing counsel, become completely familiar with the Justices and their precedent, including their latest concerns and the inevitable cross-currents between otherwise seemingly unrelated cases that would be largely invisible to those who focus on just one case at a time. They are also comfortable at the lectern, for the simple reason that they have been there often before at least as co-counsel, if not lead counsel, presenting argument. They work hard as repeat litigants to establish their credibility with the Justices. They know how to write briefs for that audience, how to utilize precedent, and how to anticipate problems and exploit opportunities.<sup>40</sup>

So if the OSG has better information about the likely outcome in the Supreme Court than the private litigant does, then the SG can drop weak cases, or make narrower arguments as necessary, to enhance its win rate.<sup>41</sup>

This theory suggests another implication of significance. If the OSG seeks to maintain credibility with the Court so that the Court continues to trust it, then the SG has a strong incentive to settle weak cases and pursue only strong cases. Consider, for example, a dispute between the IRS and a taxpayer that turns on an arcane point of tax law. Because the OSG cares about the Supreme Court's opinion of it, the SG might seek certiorari after losing in a court of appeals only if it believes that the law is on its side. The private litigant will continue litigating even if the SG is correct as long as the private litigant thinks that the magnitude of the possible award is large enough to justify a less than 50% chance of winning.

Moreover, if the private litigant loses in the court of appeals, it will seek certiorari if the probability of winning multiplied by damages exceeds litigation costs. As long as those damages are high, and litigation costs are relatively low (which, as we explain, they usually are), the private litigant will seek certiorari even for a relatively weak case. The private litigant, unlike the SG, does not incur any additional reputational cost from losing a weak case before the Court because the private litigant is not a repeat player before the Court.

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<sup>39</sup> See SALOKAR, *supra* note 12, at 33.

<sup>40</sup> Lazarus, *supra* note 19, at 1497.

<sup>41</sup> For an alternative theory of how the SG influences the Court—by signaling the president's ideological views—see generally Bailey et al., *supra* note 30.

There is yet another related reason why the executive branch may have a high win rate. Because of its vast size, the executive branch is frequently a party to numerous redundant or partially redundant cases that involve the same issue. In the recent controversy over the Trump travel ban order, for example, different private litigants pursued dozens of cases in different courts against the president.<sup>42</sup> Subject to certain limitations and procedural constraints, the Justice Department (usually acting on the advice of the SG) enjoys discretion as to which adverse judgment to appeal. It can therefore choose the weakest opinion or the opinion based on the least sympathetic facts. By contrast, private litigants are very rarely in this position. This is another reason why the president's win rate should be high, and indeed explains why the president's win rate is higher when he is a petitioner choosing to bring a case to the Court than when he is a respondent forced to defend whatever case a private litigant happens to persuade the Supreme Court to hear.<sup>43</sup>

### C. *The Private Litigants*

If either the justices are biased in favor of the executive branch, or the executive branch benefits from superior lawyers, the question arises why the litigants on the other side don't settle more often. After all, litigation is expensive and a loss in the Supreme Court might be embarrassing. If private litigants settled their weaker cases, then they would not do as badly in the Supreme Court as the historical data indicates.

However, there are several reasons for thinking that private litigants will seek review in the Supreme Court, or defend themselves before the Court, even when their probability of victory is slim. First, the expected benefit may well exceed the cost of litigation, even if the probability of prevailing is low, since the cost of Supreme Court litigation is not high. There is no factfinding and most of the legal arguments are developed at lower levels. For many private litigants, the benefit—in terms of damages or other remedies—if they prevail in the Supreme Court may be considerable. Meanwhile, the executive branch may be unwilling to settle such cases because of the political difficulty of paying a large settlement in a weak case, or a bureaucratic unwillingness to settle cases because of possible adverse precedential effects, or a desire to enhance its reputation with the Court by winning another case.

Second, many litigants seek symbolic victories rather than money damages. Public interest groups like the Sierra Club and business groups like

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<sup>42</sup> See Josh Gerstein, *Trump Travel Ban Lawsuits Pile Up*, POLITICO (Feb. 9, 2017), <https://www.politico.com/story/2017/02/donald-trump-travel-ban-lawsuits-234828> [<https://perma.cc/49ND-LK6R>].

<sup>43</sup> See Epstein & Posner, *supra* note 36, at 411 (noting an average presidential success rate of 75% when petitioner and 55% when respondent).

Business Roundtable please their donors by bringing difficult-to-win-cases for the sake of vindicating an important principle. They also might benefit from the news value of appearing before the Supreme Court, which would enhance their reputation with the public.

Compare ordinary litigation between private parties—for example, a creditor sues a debtor for \$100,000, where legal costs are likely to be much higher than that. The creditor and debtor have a strong incentive to settle in order to avoid legal costs. That means that only the most difficult cases will be resolved by a court, suggesting that the win rate for the plaintiff should be about 50%.<sup>44</sup> By contrast, in cases between private parties and the executive branch that reach the Supreme Court, legal costs are likely to matter very little. As explained above, they are not high for private parties, and the executive branch does not fully internalize legal costs, which are instead borne by taxpayers, giving it weak incentives to settle as well. If the executive branch acts in a bureaucratic manner—it always defends itself, and litigates any plausible case as a plaintiff—while the private litigant will litigate weaker cases because of the high monetary or symbolic stakes, then a pro-president win rate is predictable.

\* \* \*

There are other possible explanations for high presidential win rates but they are less robust than the explanations described so far. For example, imagine a setting in which the court of appeals judges are mostly Republicans, the justices are mostly Democrats, and the president is a Democrat. (This pattern could also occur in reverse, of course.) It is possible that the executive branch loses many cases in the courts of appeals, but then enjoys a high win rate in the Supreme Court, since the justices are more closely aligned with the president's ideology than the lower courts' judges are. But this theory—and others like it—cannot account for the consistent pattern of high executive branch win rates over history because the theory assumes a state of affairs that occurs only episodically.<sup>45</sup>

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<sup>44</sup> This is the famous hypothesis advanced by George L. Priest & Benjamin Klein, *The Selection of Disputes for Litigation*, 13 J. LEGAL STUD. 1, 12-13 (1984), recently discussed and elaborated by Daniel Klerman & Yoon-Ho Alex Lee, *The Priest-Klein Hypotheses: Proofs and Generality*, 48 INT'L REV. L. & ECON. 59 (2016).

<sup>45</sup> Yet another possibility is that courts of appeals tend to be more opposed to the power of the executive branch than the Supreme Court. Perhaps the Supreme Court is more conscious of the risks of interbranch conflict if the executive branch loses too frequently in Court. We cannot test this theory because we lack presidential win rates in the courts of appeals over the relevant time period and for all the relevant cases. Prior work indicates that presidential win rates for agency decisions—involving different agencies and different time periods—range from 58% to 66%. See, e.g., Martha Anne Humphries & Donald R. Songer, *Law and Politics in Judicial Oversight of Federal Administrative Agencies*, 61 J. POL. 207, 215 tbl.1 (1999); Thomas J. Miles & Cass R. Sunstein, *The Real World of Arbitrariness Review*, 75 U. CHI. L. REV. 761, 767 (2008); David H. Willison, *Judicial Review of Administrative Decisions: Agency Cases before the Court of Appeals for the District of Columbia, 1981-1984*, 14 AM. POL. Q. 317, 321 tbl.2 (1986). These numbers are roughly comparable

## II. THE CONVENTIONAL STORY MEETS DATA

To assess the conventional story of presidential success in the Court, we used the U.S. Supreme Court Database<sup>46</sup> as a foundation for our own original dataset of cases of concern to each of the modern-day presidents, beginning with Franklin Roosevelt and covering all orally argued cases (excluding per curiam opinions) decided between the 1932 and 2016 terms (through the Obama administration).<sup>47</sup> In total, our dataset covers thirteen presidents and eighty-five Court terms.<sup>48</sup>

This procedure, though systematic and reliable, has its limits. Because the Supreme Court Database identifies only the lead parties, cases in which the United States or an executive actor was a party but not the lead party were improperly excluded.<sup>49</sup> Moreover, in some cases one government agency was pitted against another, making it difficult to classify the president as the winner or loser. To address these problems, we took the additional step of determining whether the SG or the attorney general (AG) represented the petitioner or the respondent. We collected the data for the 1932–1945 and 2002–2015 terms,<sup>50</sup> and we used Professor Collins's data for the 1946–2001 terms.<sup>51</sup>

This step allowed us to identify cases in which the United States or executive actors/agencies were not the lead parties. We were also able to deal with cases in which the federal government was on both sides. If the AG or SG represented the United States, a federal agency, or various executive actors, our rule was to code based on the AG's or SG's position (i.e., to reverse or affirm).

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to the presidential win rate in the Supreme Court, so even if they are generalizable, they do not suggest a higher level of skepticism about executive power in the courts of appeals than in the Supreme Court.

<sup>46</sup> This database, created by Professor Spaeth and maintained by Washington University School of Law, tracks and classifies every vote by a justice in all argued cases from 1791 to the present day, with periodic updates to capture the most recent decisions. For more, or to access the most recent version of the database, see *The Supreme Court Database*, WASH. U. L., <http://supremecourtdatabase.org/index.php> [<https://perma.cc/FL7B-KSHW>].

<sup>47</sup> Thus our study includes 2016 term cases decided while Obama was in office but excludes decisions after Trump became president. Similarly, we exclude the forty-six cases from the 1932 term relating to Hoover. To define a case of concern to the president, we used the *petitioner* and *respondent* variables in the U.S. Supreme Court Database. These variables allowed us to identify cases in which the United States, an executive actor (e.g., the attorney general or the president himself), or a federal agency was a party. We also checked the *issue* value 130015 (executive authority vis-a-vis congress or the states) and *lawSupp* values involving provisions of Article II.

<sup>48</sup> For more details on this dataset, and to see insights gleaned from an earlier version in previous work, see Epstein & Posner, *supra* note 36, at 408–10.

<sup>49</sup> And, for cases from 1932–1935, we relied on the current version of the legacy Supreme Court Database, which covers only the first docket in decisions in which the Court consolidated petitions under one *U.S. Reports* citation, thus potentially excluding other cases in which the Government was a party.

<sup>50</sup> We conducted Lexis searches for “attorney general” or “solicitor general,” and went through each case to avoid false positives.

<sup>51</sup> Paul M. Collins, Jr., *The U.S. Supreme Court Amicus Curiae Database, 1946–2001*, UNIV. MASS. AMHERST (2008), <https://dropbox.com/s/top4gmajbjm16PG/AC%20Data%201946-201946-2001.zip?dl=1> [<https://perma.cc/8A4F-BB45>].

If the AG/SG did not represent the agency (as was the case for the Interstate Commerce Commission in the 1940s) or the president (in say, *Clinton v. Jones*<sup>52</sup>), or the United States or the AG/SG did not enter the case as *amicus curiae*, then we coded the president's position as the same as the executive actor. If the AG/SG filed an amicus brief opposed to the agency's position, we coded the president's position based on the AG/SG recommendation, not the agency's. In other words, the AG/SG was our tiebreaker.

Following these rules, we created variables indicating whether the "president" (a combination of U.S./agency/executive actor) was the petitioner or respondent. We refer to these as "president cases." (We identified the specific president in office based on the date of the Court's decision.)

Overall, there are 3799 of these cases (32,624 votes) in our dataset<sup>53</sup>—or 41.9% of all orally argued cases during the 1932–2016 terms.<sup>54</sup> These figures are not surprising; scholars have long noticed the outsized role of the government in Supreme Court litigation.<sup>55</sup>

Even so, there appears to be some downward trend in the data, as Figure 1 shows. Setting aside variation within administrations (note the minimum and maximum range lines in the figure<sup>56</sup>), the president's participation as a party in Supreme Court litigation has declined from 52% during the FDR, Truman, and Eisenhower administrations to 36% from Kennedy through Obama.<sup>57</sup> President-by-president, term-by-term, and case-by-case regressions all confirm a statistically significant decline. For example, the predicted probability of the president being a party in a case in the 1952 term is nearly 0.50.<sup>58</sup> Fifty years later, in 2002, the probability drops to 0.32.<sup>59</sup>

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<sup>52</sup> In that case, Clinton was represented by his personal attorney, Robert S. Bennett; the acting solicitor general Walter Dellinger "argued the cause for the United States as *amicus curiae* urging reversal." See 520 U.S. 681, 683 (1997).

<sup>53</sup> Though a search following the above guidelines yields 3799 cases, in sixteen of those cases the Supreme Court Database codes the "winning party" as "unclear." We exclude those cases from our analysis of the president's win rate, decreasing the total to 3783. Note too that we do not include post-Obama cases in these counts.

<sup>54</sup> According to the Supreme Court Database, this denominator equals 9067.

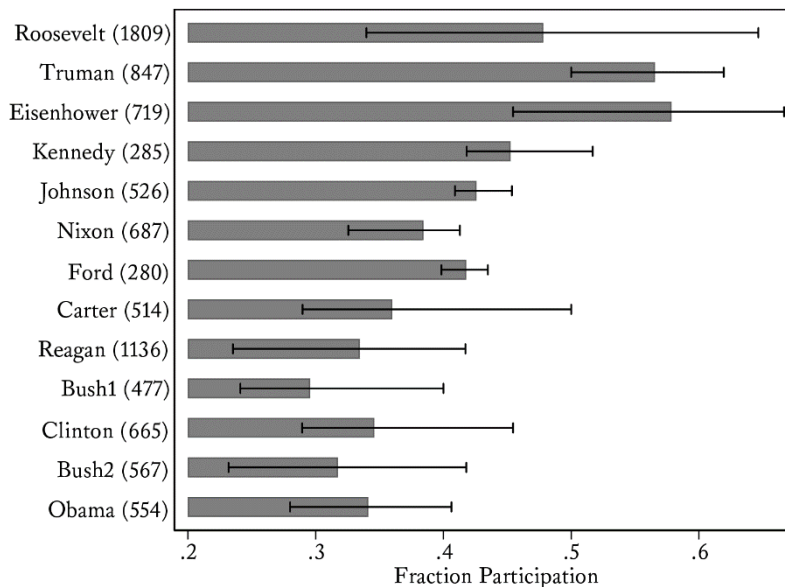
<sup>55</sup> See generally, e.g., sources cited *supra* note 14.

<sup>56</sup> See also Epstein & Posner, *supra* note 36, at 410–11 (attributing the variations in the absolute number of presidential appearances to the varying lengths of an administration and the declining number of cases on the Court's plenary docket).

<sup>57</sup> The difference is statistically significant at the 0.01 level.

<sup>58</sup> 0.47, with a 95% confidence interval of [0.45, 0.50], as based on a logistic regression of whether the president was a party in the case on term, with standard errors clustered on term or the sitting president.

<sup>59</sup> The 95% confidence interval is [0.30, 0.35].

Figure 1: Fraction of Cases with Presidential Involvement<sup>60</sup>

These patterns are interesting. A possible explanation is that most of the institutional growth of the federal government took place from the New Deal through the 1970s. Since then, while the federal government has continued to expand in terms of budget and employment, there has been less innovation like the creation of new agencies, and hence less need for judicial consideration of novel issues. But we do not want this issue to obscure the major takeaway: even in the face of declining participation rates, presidents remain major players in Supreme Court litigation. Over the course of the terms in our study, for example, they participated in nearly double the number of cases of all fifty of the states combined.<sup>61</sup>

<sup>60</sup> The number in parentheses is the total number of cases the Court decided when the president was in office, whether he participated or not. The bars show the (weighted) mean level of participation for each president. The capped lines show the minimum and maximum participation fractions for each term that the president was in office. Minimums and maximums exclude terms in which the sitting president participated in fewer than ten cases. For example, we exclude Kennedy's one case in the 1963 term when we calculated the minimum and maximum fractions, though the one case is included in Kennedy's mean. For purposes of calculating minimum and maximum fractions, the number of Supreme Court terms included is thirteen for Roosevelt; nine for Eisenhower; eight for Truman, Reagan, Clinton, George W. Bush, and Obama; six for Nixon; five for Johnson; four for Carter and George H.W. Bush; three for Kennedy; and two for Ford.

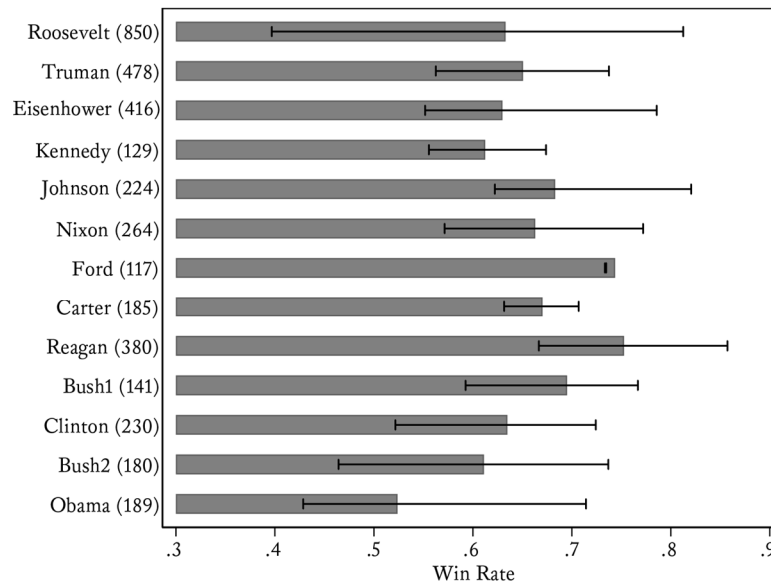
<sup>61</sup> 3797 versus 2102, or 41.9% versus 23.2%.



### III. PRESIDENT WIN RATES

Do the data also confirm the conventional story about presidential success in the Court? To begin to answer this question, we calculated the win rate for each president, that is, the number of decisions in favor of the president divided by the number of decisions in which the president was involved.<sup>62</sup> Figure 2 summarizes the raw data.

Figure 2: Fraction of Decisions in Favor of the President<sup>63</sup>



On the one hand, the data suggest that the long line of scholarship is right: “Like the Green Bay Packers of the 1960s, the SG rarely loses.”<sup>64</sup> Over the

<sup>62</sup> We show the fraction of decisions. The correlation between decisions for the president and votes for the president is 0.93.

<sup>63</sup> The number in parentheses is the total number of cases in our dataset that the Court decided when the president was in office and for which the Supreme Court Database codes the winner. *See supra* note 53. The bars show the (weighted) mean win rate for each president. The capped lines show the minimum and maximum fractions for each Supreme Court term that the president was in office. Minimums and maximums exclude terms in which the sitting president participated in fewer than ten cases. For this reason, Ford’s maximum is less than his average success because he won seven of eight cases in the 1976 term (87.5%). For purposes of calculating minimum and maximum fractions, the number of Supreme Court terms included is thirteen for Roosevelt; nine for Eisenhower; eight for Truman, Reagan, Clinton, George W. Bush, and Obama; six for Nixon; five for Johnson; four for Carter and George H.W. Bush; three for Kennedy; and two for Ford.

<sup>64</sup> BLACK & OWENS, *supra* note 30, at 23.

course of the eighty-four terms and thirteen presidents in our dataset, presidents prevailed in nearly two-thirds of their cases (and captured 61% of all votes).<sup>65</sup> By comparison, the states won significantly fewer of their cases during the same period (just over half).<sup>66</sup>

Based on these data, we understand why some commentators blame Obama for his administration's poor showing; they say the Court merely pushed back on aggressive executive policymaking.<sup>67</sup> But Figure 2 suggests another possibility: Obama was just the latest victim of a Court growing less and less deferential to the executive branch. In fact—and low as it may be—Obama's win rate is not significantly lower than George W. Bush's in a statistical sense.

Figure 3, which plots the data by term, confirms the secular downward trend.<sup>68</sup> Pre- and post-term logistic regressions of whether the president won on term, clustered on term, help us pinpoint its start.<sup>69</sup> From the regressions we learn that the trend is relatively flat until the 1981 term—coinciding with Reagan's second year in office—when it begins to creep up significantly. Increases in the president's win rate continue through the 1986 term, Reagan's penultimate,<sup>70</sup> with the onset of the downward trend around the 1990 term (George H.W. Bush's third Supreme Court term) and in full swing by 2000 (George W. Bush's first term). Put more precisely, the predicted probability of a president winning in a 1980 term case is over 0.77;<sup>71</sup> by 1990, it drops to 0.70,<sup>72</sup> though remains above the mean predicted value of 0.66.<sup>73</sup> But in 2000, the

<sup>65</sup> 65.2% of 3783 cases.

<sup>66</sup> 53.3% of 2102 cases.

<sup>67</sup> See, e.g., Oliver Roeder, *Despite this Week's Victories, Obama Has Struggled at the Supreme Court*, FIVETHIRTYEIGHT (June 26, 2015, 2:44 PM), <http://fivethirtyeight.com/datalab/despite-this-weeks-victories-obama-has-struggled-at-the-supreme-court/> [<https://perma.cc/TU8M-S764>] (“Obama has been aggressive in getting his agencies to do his bidding because he hasn’t had much luck getting Congress to do it.”); Ilya Shapiro, *Obama Has Lost in the Supreme Court More than Any Modern President*, FEDERALIST (July 6, 2016), <http://thefederalist.com/2016/07/06/obama-has-lost-in-the-supreme-court-more-than-any-modern-president/> [<https://perma.cc/FSM6-ZVV5>] (“[T]he reason this President has done so poorly at the high court is because he sees no limits on federal—especially prosecutorial—power and accords himself the ability to enact his own legislative agenda when Congress refuses to do so.”).

<sup>68</sup> Again, we show the fraction of decisions. The correlation between decisions and votes is 0.90. We also exclude the 2016 term because of its small number of “Obama” cases.

<sup>69</sup> We estimated regressions of the president's win rate (or whether the president won or not) on term (since 1960), each term moving forward. We adapted this strategy from Lee Epstein et al., *The Changing Dynamics of Senate Voting on Supreme Court Nominees*, 68 J. POL. 296 (2006).

<sup>70</sup> In the 1988 term, Reagan was a party in only four of thirty-four cases of concern to the president; the remaining thirty were under George H.W. Bush.

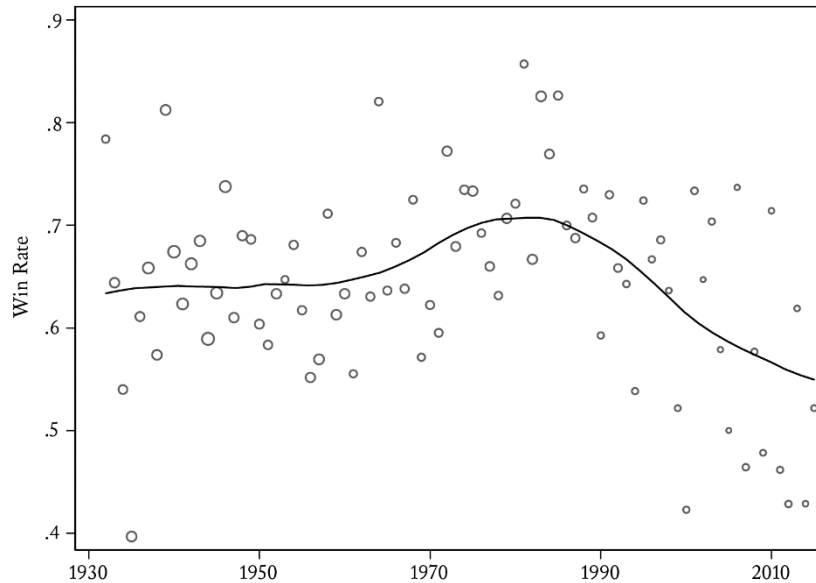
<sup>71</sup> This and the predictions that follow *infra* in notes 72–75 are from a logistic regression of whether the president won on term, clustered on term, from the 1980 term forward. The 95% confidence interval is [0.73, 0.81].

<sup>72</sup> The 95% confidence interval is [0.67, 0.73].

<sup>73</sup> The 95% confidence interval is [0.63, 0.69].

predicted fraction falls to 0.62;<sup>74</sup> in 2015, Obama’s last full Supreme Court term, the president’s projected probability of victory is actually below 0.50.<sup>75</sup>

Figure 3: Fraction of Decisions in Favor of the President, 1932–2015<sup>76</sup>



#### IV. EXPLANATIONS FOR THE DOWNWARD TREND

The president is no longer as dominant in the Supreme Court as he was three decades ago. Why? Several possibilities come to mind: (i) greater ideological distances between the Court’s center and recent presidents; (ii) more aggressive assertions of executive power by presidents since Reagan; (iii) a more aggressive or “activist” Court regardless of the ideology of the president; or (iv) the emergence in the late 1980s of a specialized Supreme Court bar of equal or even higher quality than the president’s lawyers, such that the president’s win rate has declined as the quality of this group has increased.<sup>77</sup>

<sup>74</sup> The 95% confidence interval is [0.59, 0.65].

<sup>75</sup> The exact figure is 0.48, with a 95% confidence interval of [0.42, 0.54].

<sup>76</sup> The hollow circles are the win rates for each term weighted by the number of cases in which the president was a party: the smaller the circle, the fewer the total cases. The black line is a LOESS smoothing line for the fraction of decisions in favor of the president.

<sup>77</sup> See, e.g., Lazarus, *supra* note 19, at 1497 (“Beginning first slowly in 1985, . . . and then quickly accelerating, a private Supreme Court Bar capable of replicating the expertise of the Solicitor General’s Office began to develop.”); Joan Biskupic et al., *At America’s Court of Last Resort, A Handful of Lawyers Now*

In what follows we “explore” each hypothesis. We emphasize explore because our goal here is not to reach conclusions with any known degree of certainty (that is, conclusions based on a proper statistical analysis). It is rather to begin to separate the plausible from the implausible. This is a worthwhile undertaking because the explanations have different implications for future administrations. Imagine that recent presidents were especially ideologically remote from pivotal justices. If so, the trend we observed in Figures 2 and 3 could be fleeting should the next president have an opportunity to “move the median” of the Court.<sup>78</sup> Now suppose that the Court is simply responding, perhaps appropriately, to aggressive assertions of executive power based on strained interpretations of the Constitution and of statutes. Were future presidents to act less aggressively, their win rate might bounce back. Alternatively, if the Court has become more aggressive toward the president, we want to ask why, and also whether the Court should be encouraged to return to its earlier practice of deference. Finally, if the quality of the president’s lawyers and his opponents’ lawyers are now roughly equivalent, today’s low success rate could be self-sustaining or drop even further.

#### A. Ideological Divergence

To social scientists, especially political scientists, “it’s all politics, stupid” supplies the answer to the puzzle of variation of ideological outcomes in the Supreme Court,<sup>79</sup> and this logic would seem to apply to presidential success rates as well. On this account, when the ideology of the median justice of the Court and the ideology of the president are distant, the president will be less likely to prevail. If this explanation is correct, then the post-Reagan trend against the president would not reflect the Court’s attitude to executive power as such, but instead a growing ideological divergence between the president and the Court.

There are several ways to explore this explanation. Here we use the Judicial Common Space, a simple and time-tested route.<sup>80</sup> The general idea is to place presidents and the Court in the same left–right, or liberal–conservative policy space. To locate the president, we use Professor Poole’s Common Space scores,

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*Dominates the Docket*, REUTERS (Dec. 8, 2014, 10:30 AM), <http://www.reuters.com/investigates/special-report/scotus> [<https://perma.cc/8FFH-65MG>] (“[A]n elite cadre of lawyers has emerged as first among equals, giving their clients a disproportionate chance to influence the law of the land.”).

<sup>78</sup> See, e.g., Lee Epstein & Tonja Jacobi, *Super Medians*, 61 STAN. L. REV. 37, 89 (2008) (“Because the median, as the swing vote, determines the outcome in any close case, the question of how to ‘move the median’ has become paramount—especially when it comes to the appointment of Justices.”); Keith Krehbiel, *Supreme Court Appointments as a Move-the-Median Game*, 51 AMER. J. POL. SCI. 231, 238 (2007) (“Viewed dynamically, the move-the-median framework also illustrates how an equilibrium appointment to fill a proximal vacancy, which is not immediately policy-consequential, nevertheless sets up a larger-than-otherwise-possible change when the next distal vacancy occurs.”).

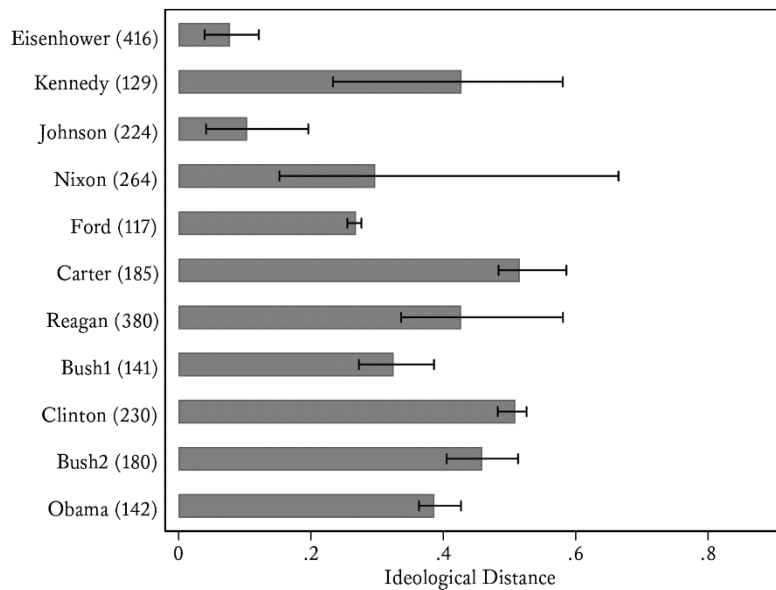
<sup>79</sup> See, e.g., SEGAL & SPAETH, *supra* note 37, at 227-29.

<sup>80</sup> For an explanation of the Judicial Common Space and its utility, see generally Lee Epstein et al., *The Judicial Common Space*, 23 J. L. ECON. & ORG. 303 (2007).

available for the eleven most recent presidents in our dataset (Eisenhower to Obama).<sup>81</sup> For the Court, we use the Martin–Quinn scores of the (most likely) median justice, normalized to ensure compatibility with the presidents’ scores.<sup>82</sup> These scores end with the 2013 term.

To assess the hypothesis that the president enjoys greater support from the Court as the distance decreases, we compute the ideological distance as the absolute difference between the president’s and the median justice’s score. Figure 4 provides the raw data for the last eleven presidents.

**Figure 4: Ideological Distance Between the President and the Court’s Median Justice<sup>83</sup>**



On the surface, ideology could provide an explanation of variation in the president’s success, or even the downward trend. The ideological distances

<sup>81</sup> See COMMON SPACE DATA, <http://voteview.com/readmeb.htm> [<https://perma.cc/8N2D-2D3Z>].

<sup>82</sup> For the Martin–Quinn scores, see *Measures*, MARTIN–QUINN SCORES, <http://mqscores.berkeley.edu/measures.php> [<https://perma.cc/F89P-AYJU>]. For the transformed scores, see *The Judicial Common Space*, LEE EPSTEIN: RESEARCH, <http://epstein.wustl.edu/research/JCS.html> [<https://perma.cc/XC99-EGZX>].

<sup>83</sup> The bars show the (weighted) mean absolute ideological distance for each president. The capped lines show the minimum and maximum distance for each term that the president was in office. Minima and maxima exclude terms in which the sitting president participated in fewer than 10 cases. For instance, we exclude Kennedy’s one case in the 1963 term when we calculated the minimum and maximum distances, though the one case is included in Kennedy’s mean. Obama’s data are through the 2013 term.

for the last three presidents were all significantly above the mean. But so was the ideological distance for Reagan—and he had a high win rate. More generally, the correlation between win rate and ideological distance is negative, as we would expect, but modest (.15); and a regression of the win rate for each term on ideological distance shows no statistically significant relationship between the two. Very roughly, it seems that earlier presidents were usually liberal (by modern standards) and so was the Court. Since the 1970s, presidents have become more polarized—Democrats are more liberal and Republicans are more conservative—while the Court has remained somewhere in the middle (though more conservative than in the earlier period). Ideological clashes may have resulted in fewer victories for the president, but if so, the difference over time was small.

Of course, it is possible that the low correlation between outcomes and ideological distance reflects intra-president variation, reflecting changes in the composition of the Court that the mean masks (see the capped lines in Figure 4). Nixon is an extreme example. For the 32 cases in his first term (1968), the mean distance between Nixon and the Court is the largest (0.66) in our dataset; by 1971 it was below the mean (0.22) and it fell even lower in 1972 (to .15). But this variation has limited explanatory power.

The upshot is that ideology may provide a partial explanation for variation in presidential performance. But we doubt it tells the whole story.

### B. *Executive Overreach*

From the Court's perspective, executive overreach means that an executive action exceeds the legal or constitutional limits of the Executive's power. Commentators have in recent years argued that President Obama<sup>84</sup> and President George W. Bush<sup>85</sup> have overreached in this sense, and that the Court has ruled against them for this reason. These claims reflect longstanding anxieties that over the course of history the Executive has accumulated too much power, along with an assertion (or possibly hope) that the Court has finally begun to push back. Generalizing from these ideas, we hypothesize that the post-Reagan trend against presidents does not reflect a change in how the Court decides cases, but a separate causal trend of executive overreach: each post-Reagan president overreaches more than the prior president. Applying a

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<sup>84</sup> See *supra* note 67 and accompanying text.

<sup>85</sup> See, e.g., David Cole, *Why the Court Said No*, NY REV. BOOKS (Aug. 10, 2006), <http://www.nybooks.com/articles/2006/08/10/why-the-court-said-no/> [<https://perma.cc/426R-S9D4>] (discussing *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006), and concluding “[t]hat the Court then broke away from its history of judicial deference to security claims in wartime to rule against the President . . . suggests just how troubled the Court’s majority was by the President’s assertion of unilateral executive power”).

doctrinal standard that did not change over time, the Court then necessarily ruled against each succeeding president at a higher rate.

To investigate this theory, we count up executive orders, which are documents that presidents use to direct subordinates in the executive branch to take actions. This measure of executive overreach is admittedly imperfect. Executive orders are of varying significance, and some are more controversial than others. Truman's order to seize the steel mills,<sup>86</sup> for example, falls on the controversial side; Obama's order to change the name of the "National Security Staff" to the "National Security Council staff"<sup>87</sup> far less so. Moreover, presidents do not always use executive orders to accomplish their goals. Obama's controversial immigration orders—DACA and DAPA—took the form of directives issued by the Department of Homeland Security (at Obama's behest) rather than executive orders.<sup>88</sup> Still, scholars have used executive order counts to measure executive power,<sup>89</sup> and we shall do the same. Table 1 presents the data for the presidents.<sup>90</sup>

Table 1: Executive Orders

President	Years in Office	Executive Orders	
		Total	Average Per Year <sup>91</sup>
Roosevelt	12.2	3721	307
Truman	7.78	907	117
Eisenhower	8	484	61
Kennedy	2.84	214	75
Johnson	5.17	325	63
Nixon	5.55	346	62
Ford	2.45	169	69
Carter	4	320	80
Reagan	8	381	48
Bush 1	4	166	42
Clinton	8	364	46
Bush 2	8	291	36
Obama	8	276	35
Median <sup>92</sup>		381	63

<sup>86</sup> Exec. Order No. 10,340, 17 Fed. Reg. 3139 (Apr. 10, 1952).

<sup>87</sup> Exec. Order No. 13,657, 79 Fed. Reg. 8823 (Feb. 14, 2014).

<sup>88</sup> See *Texas v. United States*, 787 F.3d 733, 743-44 (5th Cir. 2015) (describing the background and implementation of DACA and DAPA), *aff'd by an equally divided Court*, 136 S. Ct. 2271 (2016).

<sup>89</sup> *E.g.*, KENNETH R. MAYER, WITH THE STROKE OF A PEN (2002).

<sup>90</sup> These data are from Gerhard Peters & John T. Woolley, *Executive Orders*, AM. PRESIDENCY PROJECT, <http://www.presidency.ucsb.edu/data/orders.php> [<https://perma.cc/7QTK-7V5Q>].

<sup>91</sup> Averages are rounded.

<sup>92</sup> We show the median instead of the mean since FDR's numbers are so extreme.

At first glance, there does not appear to be a strong relationship between win rates and the number of executive orders (or their length in pages, which we also looked at). FDR issued far more executive orders than any other president, yet his win rate is about average. Obama issued the fewest, but he has the worst win rate in our dataset.

Various statistical analyses confirm the lack of a meaningful relationship between this measure of executive aggression and win rates—including logits of whether the president won or not on the measures (with and without FDR; and clustering on president), and regressions of the win rate on the measures (again with and without FDR).<sup>93</sup> Last but not least, the correlation between win rates and the average number of orders is a positive 0.20—not negative as we might expect.

There were many controversies about executive overreach during the last two administrations.<sup>94</sup> Yet we find no evidence that the Court ruled more frequently against presidents who engage such overreach. This could be due to the weakness of executive orders as a measure of presidential aggressiveness, but the results dovetail with intuition and conventional wisdom. Of all the presidents in our dataset, Franklin Roosevelt and Ronald Reagan were clearly the most assertive. Roosevelt created the modern administrative state and threatened to pack the Court. Reagan initiated a mirror revolution in favor of deregulation, which resulted in numerous political and legal clashes. Yet these two presidents enjoyed above-average win rates.

### C. *A More Aggressive Supreme Court*

The mirror-image explanation is that the Court, not the Executive, has become more aggressive. According to this theory, the Court no longer defers to the president on matters to which it deferred in the past. A parallel debate concerns the Court's ideological activism. Critics argue that justices on the Court have become too enthusiastic about striking down statutes, often based on ideological disagreement rather than on the correct application of constitutional norms.<sup>95</sup>

The critics have not tried to offer a systematic explanation for why the Court has become more “activist,” usually instead blaming individual justices for exceeding the bounds of the judicial role. But explanations are easy to imagine. One explanation, for example, is that as political polarization has increased and

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<sup>93</sup> We exclude FDR in some regressions because of his unique position as the founder of the modern administrative state.

<sup>94</sup> See *supra* notes 67, 85, and accompanying text.

<sup>95</sup> See, e.g., THOMAS M. KECK, *THE MOST ACTIVIST SUPREME COURT IN HISTORY* 200 (2004); CASS R. SUNSTEIN, *RADICALS IN ROBES* 41-50 (2009); Tom Wicker, *Forward to THE REHNQUIST COURT* 7-8 (Herman Schwartz ed., 2002). *But see* Liptak, *supra* note 18 (noting the Warren, Burger, and Rehnquist Courts invalidated statutes at a greater rate than the Roberts Court).



thrown the political branches into gridlock,<sup>96</sup> the public has placed more faith in the Supreme Court, and in turn enhanced the self-confidence of the justices. Another possibility is that because a polarized Congress can rarely act with unity, the Court need not worry that Congress will retaliate against it except in unusual cases of unified government.<sup>97</sup>

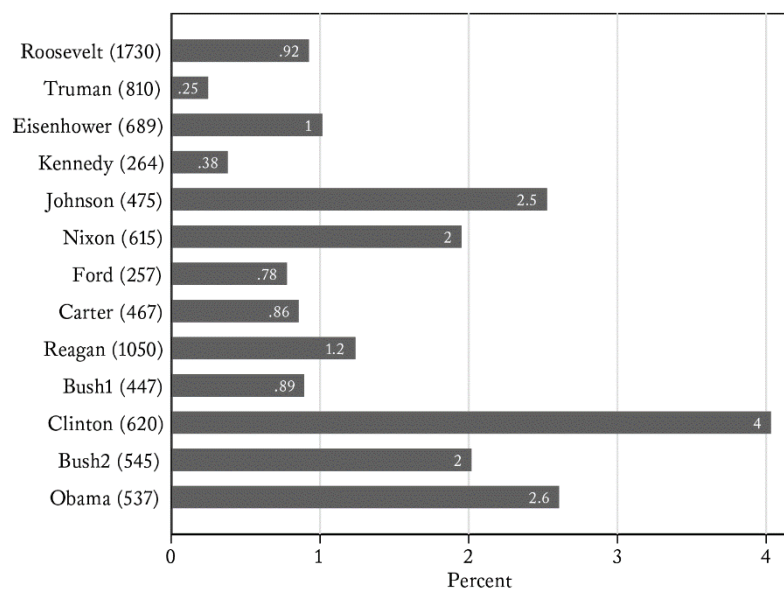
A similar argument could explain why the Court has become more activist in the sense of anti-Executive. Controversies about executive power have damaged public confidence in the Executive, allowing the Court to assert itself with less fear of retaliation. Another explanation is that with increasing polarization and gridlock between Congress and the executive branch, political retaliation against an overreaching Court by those branches becomes less credible.

To explore these ideas, we use as a measure of judicial “activism” the rate at which the Court strikes down federal statutes every term. If the Court has a strong conception of its role as a guarantor of constitutional values, it will act aggressively against Congress as well as against the Executive, and so will strike down federal statutes just as it rules against the Executive. Figures 5 and 6 provide the data.

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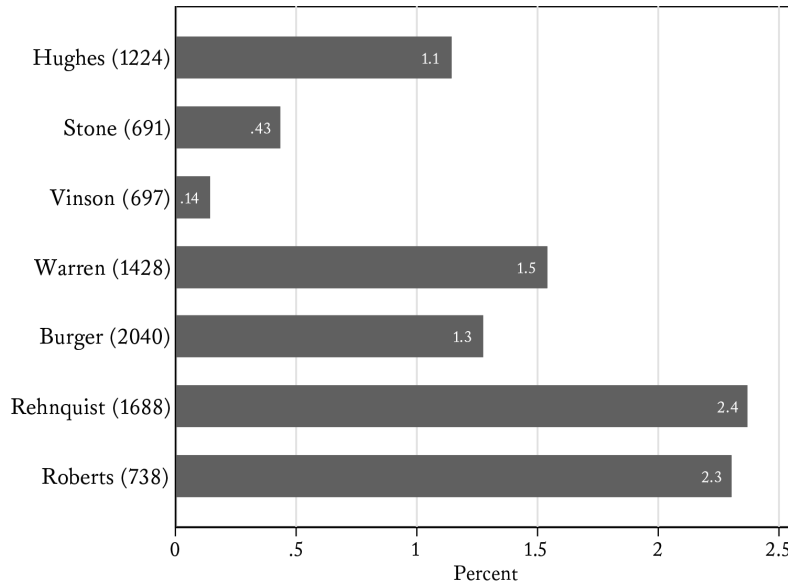
<sup>96</sup> See Richard H. Pildes, *Why the Center Does Not Hold: The Causes of Hyperpolarized Democracy in America*, 99 CALIF. L. REV. 273, 326 (2011), for a recent history.

<sup>97</sup> See, e.g., Richard L. Hasen, *End of the Dialogue? Political Polarization, the Supreme Court, and Congress*, 86 S. CAL. L. REV. 205, 233-42 (2013). Hasen focuses on congressional overrides of the Court’s interpretation of statutes, but the argument can be extended to standard types of retaliations—like jurisdiction-stripping or limits on funding, for example.

Figure 5: Percentage of All Cases Invalidating Federal Laws by President<sup>98</sup>

<sup>98</sup> The horizontal axis displays the number of federal law invalidations (as identified in the U.S. Supreme Court Database) as a percentage of all orally argued cases for a president, excluding per curiam decisions and cases in which the Court invalidated a state or local law. The parentheses contain the number of orally argued cases.

Figure 6: Percentage of All Cases Invalidating Federal Laws by Chief Justice Era<sup>99</sup>



These figures provide some suggestive evidence for the “activist Court” hypothesis. Figure 5 shows the rate of statutory invalidation by president. There is a definite post-Reagan trend toward more frequent invalidation, and a weaker trend over the longer term—interrupted by a period of activism during the Johnson and Nixon administrations. Figure 6 shows the rate of statutory invalidation by chief justice–era. The trend toward greater statutory invalidation is evident in this panel as well.<sup>100</sup>

While the data must be taken with many grains of salt,<sup>101</sup> it is consistent with the view, expressed by many authors, that the Supreme Court has

<sup>99</sup> The horizontal axis displays the number of federal law invalidations (as identified in the U.S. Supreme Court Database) as a percentage of all orally argued cases for a chief justice–era, excluding per curiam decisions and cases in which the Court invalidated a state or local law. The parentheses contain the number of orally argued cases.

<sup>100</sup> We also looked at public opinion surveys in order to see whether the Court may have been influenced by the level of public approval for the Court or the president; we detected no pattern. For these surveys, see *Presidential Approval Ratings—Gallup Historical Statistics and Trends*, GALLUP NEWS, <http://news.gallup.com/poll/116677/presidential-approval-ratings-gallup-historical-statistics-trends.aspx> [<https://perma.cc/D58X-UZHJ>]; *Supreme Court*, GALLUP NEWS, <http://news.gallup.com/poll/4732/supreme-court.aspx> [<https://perma.cc/R3QG-3RX5>].

<sup>101</sup> One complication is that while the Roberts Court has struck down federal statutes at a higher rate than many earlier courts, it has also taken fewer cases, so that the absolute number of statutes that have been struck down does not stand out as much. See Keith E. Whittington, *The Least Activist Supreme*

become significantly more self-confident and powerful over the years. It turns out that the Court has exercised that power not only to strike down federal statutes, but also to block executive actions.

#### D. Higher Quality Opponents

Many experts speculate that the president wins (or at least used to win) so frequently because of the high-quality lawyers who represent him in OSG.<sup>102</sup> To be sure, not all members of that office are especially talented; in fact, some have been notoriously inept. Lincoln Caplan reports that Franklin Roosevelt's first SG, J. Crawford Biggs, was so "unqualified for the job" that the justices sent word to the president that he should not allow Biggs "to argue again if the Administration wanted to win any cases before the Court."<sup>103</sup> For the most part, though, SGs and the members of their teams have been of such uniformly high quality that even critics of the Obama administration do not blame the office for the president's poor record. As one put it,

To be clear, I'm not saying that the government's lawyers are sub-par. Solicitor General Don Verrilli and his predecessors (including Kagan herself) are very well respected, and their staffs are populated by people who graduated at the top of elite law schools and clerked on the Supreme Court. If they're not qualified to represent the government, nobody is.<sup>104</sup>

If the quality and expertise of the president's lawyers have not changed since the 1930s, what has? Lazarus suggests that the counsel opposing the president are now so skilled that they have offset the president's usual advantages.<sup>105</sup> Lazarus finds that for most of the twentieth century—the majority of the terms covered in our study—very few expert "repeat player" attorneys regularly argued before the Court.<sup>106</sup>

No longer. "Beginning . . . in 1985, . . . a private Supreme Court Bar capable of replicating the expertise of the [SG]'s office began to develop."<sup>107</sup> Sidley Austin apparently got the ball rolling in 1985 when it hired former SG Rex Lee to create a Supreme Court and appellate practice. Other large private sector firms followed suit, hiring other former SGs and attorneys with OSG experience. They have

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*Court in History? The Roberts Court and the Exercise of Judicial Review*, 89 NOTRE DAME L. REV. 2219, 2226-27 (2014). One can imagine arguments that either variable (absolute or relative) is a better measure of judicial activism. We would also need, ideally, to control for the importance of the statute.

<sup>102</sup> See, e.g., Lazarus, *supra* note 19, at 1492-97.

<sup>103</sup> LINCOLN CAPLAN, *THE TENTH JUSTICE* 13 (1987).

<sup>104</sup> Shapiro, *supra* note 67.

<sup>105</sup> Lazarus, *supra* note 19, at 1545-46; see also Biskupic et al., *supra* note 77 (noting most members of the private Supreme Court bar have OSG experience).

<sup>106</sup> Lazarus, *supra* note 19, at 1492.

<sup>107</sup> *Id.* at 1497.

been joined by spin-off firms and even tiny operations devoted to Supreme Court advocacy.<sup>108</sup> Regardless of the firms' size, many of the attorneys are OSG alumni or former Supreme Court clerks,<sup>109</sup> suggesting a revolving door of sorts. Just as executive agency officials move between their jobs and the businesses they once regulated, so too do former clerks and OSG members.

Lazarus argues that this new elite Supreme Court bar is so good that the OSG's "virtual monopoly . . . over Supreme Court advocacy" has disappeared.<sup>110</sup> If he is correct, we would expect to see the president losing more cases than he did in the days when opposing counsel were almost all one-shot players. The explanation is not just that the OSG no longer has superior expertise; it could also be that the specialized bar, as lawyers who repeatedly appear before the Court, cares about its reputation as much as the OSG cares about its own. If the specialized bar screens out weak cases, then the private litigant win rate should increase (and the president's win rate should decline).

Existing studies offer mixed support for this explanation. Professor McGuire's study of the 1977–1982 terms—before the emergence of the new elite Supreme Court bar—hints at its merit, concluding the SG's advantage came from his litigation experience.<sup>111</sup> Lazarus, however, critiques McGuire's study on several grounds,<sup>112</sup> and a more recent analysis by Black and Owens suggests that even after controlling for relevant factors like attorney expertise, SG lawyers have a 0.14 greater predicted probability of winning their case than similarly experienced attorneys.<sup>113</sup> But this study too has its problems: notably, it covers only the 1979–2007 terms; and it matches the SG and its opponents only on the attorney and not on the law firm, ignoring Lazarus's argument that "someone . . . presenting her first argument but who is affiliated with an organization of [experienced] attorneys" will be the beneficiary of the organization's collective wisdom.<sup>114</sup> The Black and Owens approach also would have missed cases in which a first-time arguer paired up with a professional Supreme Court litigator. Such was the case in *Menominee Indian Tribe of Wisconsin v. United States*, in which an Oregon firm represented

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<sup>108</sup> *Id.* at 1498–1501.

<sup>109</sup> *See id.*; *see also* Biskupic et al., *supra* note 77.

<sup>110</sup> Lazarus, *supra* note 19, at 1491–92.

<sup>111</sup> Kevin T. McGuire, *Explaining Executive Success in the U.S. Supreme Court*, 51 *POL. RES. Q.* 505, 522 (1998).

<sup>112</sup> Lazarus, *supra* note 19, at 1544–45 nn.236–37 (noting his "intuition based on involvement in literally hundreds of cases before the Court . . . that McGuire's analysis significantly overstates the extent to which litigation experience eliminates the distinct impact that the Solicitor General's Office has on the Court's decision").

<sup>113</sup> BLACK & OWENS, *supra* note 30, at 81–89.

<sup>114</sup> Lazarus, *supra* note 19, at 1502.

the petitioner but Paul Clement, a former SG and the quintessential example of a specialized Supreme Court lawyer, was on the firm's brief.<sup>115</sup>

In Table 2, we compare the president's opponents in two terms—1985 (right before the rise of the specialized Supreme Court bar) and 2015 (30 years later).

Table 2: Comparison of Attorneys in the 1985 and 2015 Terms<sup>116</sup>

	1985 Term (46 Cases)	2015 Term (23 Cases)
One or More Prior Arguments	26.1%	52.2%
One or More Prior Briefs	47.8%	87.0%
Former Clerk or OSG Attorney	8.7%	30.4%
Major Firm/Organization on Brief	28.3%	60.9%

Our data confirm Lazarus's observation that the composition of the Supreme Court bar has changed radically over the last three decades. In the 1980s, most attorneys opposing the president were one-shot players with little inside knowledge of the ways of the Court. Lazarus, for example, found that 76% of lawyers arguing in the 1980 term were first-timers;<sup>117</sup> we find much the same for the 1985 term (74%). By 2000, the percentage had reduced to 59% in Lazarus's data;<sup>118</sup> and by 2015, to only 48% in ours.

The question, though, is whether the increases in quality and experience in opposing counsel help account for the decline in the president's win rate. As it turns out, some of the indicators of quality might do just that. The president prevailed in 80% of the cases when his attorney faced a first-time litigator but in only 58% when his opponent had argued before; the data are similar for prior briefs (89% versus

<sup>115</sup> 136 S. Ct. 750, 753 (2016).

<sup>116</sup> For all rows, the difference between the figures for 1985 and 2015 is statistically significant at  $p < 0.05$ . The first three rows focus on the attorney who argued the case; the last row counts any major firms or organizations on the brief. Major firms/organizations include repeat-player interest groups (e.g., ACLU, AFL-CIO, NAACP LDF, Pacific Legal Foundation, and Public Citizen Litigation Group) but exclude governments, public defenders, law school clinics, and regional legal services. "One or more prior briefs" includes both amicus and merits briefs.

<sup>117</sup> Lazarus, *supra* note 19, at 1520.

<sup>118</sup> *Id.*

62%). In logit regressions controlling for term, the quality measures exert a positive, though not statistically significant, effect on the president's win rate.

Other than reporting these (promising) results, we cannot say more without further analysis. First, our sample size is quite small; second, the data are so severely imbalanced that they beg for the sort of matching analysis that Black & Owens conducted (though with more attention to the lawyers and firms, as we noted above); third, we note differences in kind between the lawyers of today and yesterday. For example, in the 1985 term, groups and movement lawyers tended to represent their own interests; today, many seem to hire big firms to do the work for them. Finally, we lack a theory of judicial behavior that would account for the importance of lawyering in the Supreme Court.

## V. CONCLUSION

Presidents used to dominate in the Supreme Court; they no longer do. They now do no better than other litigants. Our major goal has been to expose and document this change, which we suspect will be a matter of debate and discussion for some time to come.

Among the possible explanations for the post-Reagan decline in presidential win rates, two turn out to be promising. The first is that the Court has become more aggressive over the last three decades. As its institutional self-confidence grew, it became increasingly willing to defy the Executive as well as Congress. The second is that a specialized Supreme Court bar has emerged, nullifying the advantage to the president formerly conferred by the OSG.

Each explanation raises additional questions. If the Court has become more aggressive, why now? A possible answer traces this development to polarization. Polarization in the public has led to polarization in Congress, which has caused gridlock. In order to break the gridlock, presidents have engaged in controversial unilateral actions, which have both invited pushback from the Court and weakened the presidency's political standing. With the political branches hobbled, the Court does not fear retaliation if it rules against them, as it has in the case of statutory challenges and executive actions.

This theory also raises questions about whether the Court is fulfilling its judicial function. On one view, the Court's aggressiveness toward the president reinforces worries about an out-of-control, imperial Judiciary that hobbles executive action and legislation alike. But critics of executive power are more likely to conclude that the Court has risen to the challenge of the imperial presidency.

The Supreme Court bar theory also raises questions. One is the question of timing. Why didn't a specialized bar emerge in the 1970s, or 1960s, or earlier? With such high stakes in Supreme Court litigation, private parties—particularly businesses—should be willing to shell out big money to hire the best lawyers. But this may be the explanation: the enormous pay gap between government

lawyers and private lawyers did not open up until the 1980s. Before then, government lawyers faced a smaller inducement to enter the private sector.<sup>119</sup>

And what should we make of this phenomenon? Does the development of the private bar overcome an unfair advantage in the OSG, one that allowed the executive branch to win cases that it should have lost? Or are the conscientious but underpaid and overworked bureaucrats in the OSG now outmatched by hired guns? We should also worry about the emergence of a revolving door in the legal community. Lawyers who in the past made a career in government after serving as Supreme Court clerks and SG lawyers now rotate into the private sector where they use their taxpayer-funded expertise to defeat their former employer.

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<sup>119</sup> On the financial incentives for government lawyers to take positions in private law firms, see Richard T. Boylan & Cheryl X. Long, *Salaries, Plea Rates, and the Career Objectives of Federal Prosecutors*, 48 J.L. & ECON. 627, 629 (2005) (highlighting anecdotal evidence “that private law firms assign premiums to lawyers who have worked for the government”).