

THE PENNSYLVANIA STATE UNIVERSITY
SCHREYER HONORS COLLEGE

DEPARTMENT OF POLITICAL SCIENCE

THE INFLUENCE OF THE PRESIDENT ON SOLICITOR GENERAL SUCCESS IN
UNITED STATES SUPREME COURT DECISIONS

STEPHANIE WILUSZ
SPRING 2016

A thesis
submitted in partial fulfillment
of the requirements
for baccalaureate degrees
in Political Science and Philosophy
with honors in Political Science

Reviewed and approved* by the following:

Michael Nelson
Assistant Professor of Political Science
Thesis Supervisor

Gretchen Casper
Associate Professor of Political Science
Honors Adviser

* Signatures are on file in the Schreyer Honors College.

ABSTRACT

As an important actor in the United States Supreme Court, scholars have long known that the Solicitor General has an important influence on the Supreme Court's decision making process. However, despite many previous studies, the reasons for why the Office of the Solicitor General is so successful before the Court and how this success varies has remained largely unknown. This research contributes to this knowledge by studying how the success rates of the Solicitor General vary across different presidential administrations. By applying established theories of presidential power to all Supreme Court cases heard during the 1979 to 2007 terms, the research examines a factor of Solicitor General success otherwise ignored in the literature: whether the Court is more likely to give deference to the Office of the Solicitor General when the presidential administration is more powerful or vested in a particular case. These findings contribute to the literature by focusing on the variance in the success rates of the Solicitor General. By studying whether the Court is more likely to defer to the Solicitor General as an extension of the executive branch, when the president is more powerful or interested in a case, this research can also contribute to the literature on the separation of powers and if the Supreme Court is influenced by public opinion. The findings suggest that the Court is more likely to defer to the Solicitor General's preferences during times of war when the president is more powerful, and also when the issue of the case is of particular importance to the current presidential administration.

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ACKNOWLEDGEMENTS

I would like to thank The Pennsylvania State University and the Schreyer Honors College for the opportunity to further my knowledge through the completion of this thesis. In addition, I would like to thank Dr. Michael Nelson for serving as my thesis supervisor. Without his guidance and support throughout the entire process, this thesis would not have been possible. I would also like to thank Dr. Michael Berkman and Dr. Gretchen Casper for the additional advice that helped this thesis to be successful.

Chapter 1

Introduction

The Solicitor General is the advocate for the U.S. government before the Supreme Court, but the fact that office's nickname is the "10th justice" shows that the Solicitor General's role is more than that of the typical litigant. The office maintains a unique position because it is housed within the executive branch, and also maintains close ties with the judicial branch due to the nature of its job. However, its relationship with the Court is even more complex than that. The Solicitor General enjoys a higher than usual success rate in its own cases, and is even asked by the Court to participate in around two dozen cases a year in which the government is not even involved.

But why is the success rate of the Solicitor General so high? Is this office creating an unfair bridge between the branches that the president is able to use to push his policy agendas through the Court? And if so, does the president have more influence in some cases and situations than in others?

This would appear to be the case in a recent observation about the Solicitor General under the Obama administration. Although Solicitor General Donald Verrilli Jr. was able to win some major cases like that of the health care overhaul, it would appear that the Court is now ignoring his advice more and more often – even in situations when they asked for it first. In fact, the Court has disregarded the advice they sought of Verrilli in more than one third of the cases in the 2014 term, and the Solicitor General's success rate has dropped to around 70%. This is a

10% decrease from the average rates of success of the office under the Clinton or Bush administrations (Sherman, 2015).

Since the Solicitor General is undoubtedly an important actor in Supreme Court decision making, understanding this role's influence is necessary to increasing the understanding of the Supreme Court and its relationship with the executive branch. The following research will attempt to explain the factors that make the Solicitor General more successful, and in particular, how this success varies according to the presidential administration at the time. This research will see whether the Solicitor General is more successful due to a higher level of deference being afforded to the executive branch when the president has a high level of political capital, when the case is heard during a time of war, or when the case is of particular importance to the presidential administration.

Chapter 2

Literature Review

Overall Theories of Success

The Solicitor General is a major actor in the U.S. Supreme Court, and the position has such a high level of success and influence before the Court it has even been frequently referred to as the “tenth justice” (Caplan, 1987). However, despite its importance and the long history of literature studying the position, the influence of the Solicitor General largely remains a mystery. There are five prevailing theories that are typically offered as explanations for the success of the Office: the tenth justice, the repeat player, the ideological actor, the selection, and the separation of power theories. These theories look at the unique position of the Office of the Solicitor General, and its ample resources, to attempt to explain how the Solicitor General decides which cases to pursue, how the Solicitor General decides which position to adopt in a case the Office has decided to enter, and why the Office is so successful at every stage of the process (Black and Owens, 2012). In what follows, the five theories will be addressed in detail, along with the previous literature’s support for each theory.

The “Tenth Justice” or Agent of the Court Theory

The tenth justice theory refers to the Solicitor General being called the “Tenth Justice,” due to the position’s close relationship with the justices. This theory suggests that the Office has

close ties to the judiciary, particularly the Supreme Court, despite being housed within the executive branch (Caplan, 1987). The success of the Solicitor General is then attributed the office's close relationship with the Court. Caldeira and Wright (1988) claim that this success comes from the Office of the Solicitor General's institutional legitimacy which it gains from acting as a gatekeeper for agenda setting at the certiorari stage by screening petitions and filtering out cases not seen as worthwhile. This institutional legitimacy allows the Office of the Solicitor General to develop a reputation as the "consummate professional," and be held to the highest standards by the Court. Through its professionalism and striving to meet its high standards, the Solicitor General can then be viewed as an actor that the justices can trust to standardize the law while respecting the other branches and institutions. This relationship then seems to translate into a higher success rate for the Office of the Solicitor General since the Court values, trusts, and sometimes even relies on the Solicitor General (Black and Owens, 2012).

This relationship and institutional legitimacy is furthered through the Supreme Court's use of the calls for views of the Solicitor General (CVSG), where the Office gives impartial opinions on the law and continues to play a vital role in the agenda setting process (Caldeira and Wright, 1988). Additionally, this relationship is influential at other stages as well, since it has been shown that issued opinions often have language directly from the briefs and oral arguments of the Solicitor General (Johnson, Wahlbeck, and Spriggs, 2006). As further indication of this theory, Wohlfarth (2009) shows that with the absence of apparent objectivity, the Solicitor General's success rate decreases.

The Repeat Player Theory

The repeat player theory suggests that the Office of the Solicitor General's success comes from its frequent interactions with the Court. This is advantageous because the Office is able to anticipate repeated litigation, which means that there are relatively low stakes in any one case. Additionally, since the Office has significant resources, long-term interests can be pursued, whereas other litigants are more limited. This guarantee of future interactions means that the Solicitor General has an extra incentive to provide the Court with credible information, which the Court expects (Galanter, 1974).

It is thought that the Office of the Solicitor General is also able to play the odds and litigate strategically to become more likely to win. Since the Solicitor General appears before the Court more than any other litigant, they are more familiar with the information justices desire in cases and therefore know how to successfully craft an appealing written and oral argument. This is important since McGuire (1995) finds that attorneys that are more experienced than their oppositions are more likely to win their case, which also applies to the Office of the Solicitor General (McGuire, 1998; Szmer and Ginn, 2013). Additionally, the Office of the Solicitor General is not constrained by the same financial limitations as private sector attorneys and has access to the expertise of agencies within the government, which gives the Office yet another advantage (Songer, Sheehan, and Haire, 1999).

Although logical, this theory is contested. McGuire (1998) claims that litigation experience is the only advantage of the Solicitor General, and concludes that the Office's role and influence is largely overstated. However, Black and Owens (2012) find that the Solicitor General is more likely to win even when compared to attorneys with similar experience and resources. Additionally, attorneys currently working in the Office of the Solicitor General have

been found to have a higher success rate than attorneys that previously worked in the Office but no longer work there (Black and Owens, 2012).

The Ideological Actor Theory

The ideological actor theory states that the Solicitor General, and the justices on the Court, are ideological actors. Additionally, the Solicitor General was selected by the president in order to serve as an ideological bridge for the president to move their policy agendas through the courts. Therefore the Solicitor General - and the president's goals - are more likely to succeed when the Solicitor General is aligned ideologically with a majority of the justices (Bailey, Kamoie, and Maltzman, 2005; Meinhold and Shull, 1998).

While there is also empirical evidence for this theory, studies have focused almost entirely on the submission of amicus curiae briefs while ignoring the more numerous cases in which the government is a party (Bailey, Kamoie, and Maltzman, 2005). Additionally, it has been shown that when the Solicitor General becomes too politicized by focusing on being the ideological representative of the president, the Office's legitimacy is damaged and the Solicitor General will be less successful in its future interactions with the Court (Wohlfarth, 2009). Finally, there has even been some discrepancy about the importance of ideological agreement between the Solicitor General and the justices, since Black and Owens (2009) found that justices of ideological agreement and disagreement follow the Solicitor General's recommendations the same amount of time.

The Selection Theory

The selection theory states that the Solicitor General's high rates of success are due to the Office only participating in cases they are likely to win. This theory discounts all other theories of success or influences, and instead credits the Solicitor General's success entirely with good strategy. The empirical support for this theory is limited and has mainly come from statements from former Solicitors General, such as SG Erwin Griwold saying the "last thing the Office wants to do is risk an important legal question on a poor case that has bad facts" (Black and Owens, 2012). Therefore, it is thought that the Office is less likely to file a cert petition if they do not think there is a strong chance of victory, and will wait for a more favorable case dealing with a similar legal issue to arise. However, this does not apply to cases in which the Solicitor General does not submit a petition, but is still involved (Black and Owens, 2012). Although this is a logical theory, it is difficult to prove since it is almost impossible to operationalize the intentions of the Office of the Solicitor General, and therefore this theory remains mere speculation.

The Separation of Powers Theory

The separation of powers theory refers to potential constraints on judicial decision-making, and claims that justices care about legislative and executive preferences since they rely upon Congress and the president to protect, fund, and execute their decisions. The justices are aware of their interdependence, and therefore will anticipate how Congress and the president will respond to decisions, while sometimes adopting positions they would not otherwise in order to make policy that is more favorable to these branches (Begara, Richman, and Spiller 2003; Segal, 1997). This is done to avoid potential political repercussions undoing judicial policies and

hurting the Court's legitimacy (Epstein, Knight, and Martin, 2001). Examples of legislative repercussions would be Congress initiating and supporting constitutional amendments to overturn judicial decisions, altering the Court's composition, reducing the Court's budget, stripping the Court of jurisdiction, or even impeaching justices (Black and Owens, 2012). The executive branch can act against the Court by refusing to enforce decisions, creating their own executive policies, or publically speak out against decisions to mobilize interest groups and the public against the Court (Black and Owens, 2012).

This theory explains the Solicitor General's high level of success by citing the role of the Office of the Solicitor General as an agent of the executive branch that advocates the president's preferences, which the Court is influenced by and highly values. In fact, it has even been found that the Court is more likely to invite the Solicitor General to participate when the justices believe they need the executive branch's support to enforce their decisions because they perceive the presidential administration as holding an abundance of political capital (Johnson, 2003). However, with the exception of Johnson's (2003) finding that justices are more likely to call for the views of the Solicitor General when the Court sees the president as particularly powerful, there is little empirical evidence for this theory and a true absence of studies finding whether this influences the Court's decisions.

Chapter 3

Theories and Hypotheses

As the previous literature shows, the Office of the Solicitor General is undoubtedly an important actor in judicial-decision making and enjoys a high success rate. However, the reason for this success is largely unknown. The five theories above present plausible arguments with empirical evidence, but fall short of providing a comprehensive and all-encompassing theory. And, although the Solicitor General's success may be attributed to a combination of factors, these theories are rarely tested simultaneously. Moreover, and perhaps more importantly, studies involving the separation of powers theory do not fully investigate the Solicitor General's success as a product of the position being an agent of the president. This omission is surprising given the vast literature in presidential politics about the importance of presidential bargaining power and presidential power more generally. This research will fill this gap by studying the president's influence over the Court. I examine whether the Solicitor General's success at the decision-making stage varies according to perceived presidential power and policy issue holding constant existing theories of Solicitor General success.

Hypothesis 1

As the Separation of Powers theory suggests, judicial-decision making can be influenced by the justices giving deference to the policy preferences of the president in certain cases. Scholars suggest that the judicial branch is aware of its dependence on the executive branch: the

judiciary needs the executive branch to implement and to enforce their decisions, and it also wishes to avoid any possible political repercussions that would damage the legitimacy of the judicial branch (Begara, Richman, and Spiller 2003; Segal, 1997; Epstein, Knight, and Martin, 2001). Furthermore, since the Court would be considering the president's preferences in order to avoid repercussions, it would follow that the Court would be more likely to take the president's preferences into consideration when the presidential administration has the political capital and power to successfully challenge the Court.

Political capital of a president can be measured by looking at the president's approval rating, since the popularity of a president can be seen as a source of bargaining power (Neustadt, 1991; Ostrander, 2015; Yates and Whitford, 1998; Johnson, 2003). Previous studies demonstrate that presidential approval ratings are a source of influence on Congress and the Court.

Additionally, higher presidential approval increases the likelihood of the justices inviting the Solicitor General to participate. Thus, it may be the case that presidential approval also can influence the Court's decisions (Brace and Hinckley, 1992; Rivers and Rose, 1985; Johnson, 2003).

The Solicitor General is an agent of the executive branch, and solicitors general are responsive to the policy preferences of their appointing president (Meinhold and Shull, 1998). Since the Solicitor General's role is that of an advocate for the president's preferences, the justices should be most influenced by the Solicitor General when the presidency is perceived as particularly powerful. Therefore, it may be the case that the Office of the Solicitor General enjoys a higher success rate when the current presidential administration is more popular. Thus:

Hypothesis 1: The success rate of the Solicitor General is higher when the current presidential administration has a high approval rating.

Hypothesis 2

Literature on presidential power has found that the power of any one president is not static, and instead fluctuates depending on current events. This “two presidencies” thesis asserts that a president’s power is most extensive when dealing with foreign and military affairs (the power to command) and less extensive when dealing with domestic matters (the power to persuade) (Wildavsky, 1966; Neustadt, 1990; Yates and Whitford, 1998). This theory also extends to other branches of government looking to the president in times of war, and perhaps even amending their usual actions and decisions to address the preferences of the president and the unique priorities that war demands. Indeed, the Court makes more conservative decisions regarding rights and civil liberties in order to address the national security threats that war creates (Epstein, 2005).

Therefore, since the Separation of Powers theory argues that justices will give deference to the president when the president is more powerful and dealing with a foreign or military affair such as a war, it follows that the justices will be more likely to be influenced by the president when the case is heard during a time of war (Yates and Whitford, 1998; Ducat and Dudley, 1989; Epstein, 2005). Since the justices are aware that the president’s power is most extensive during these times, they may be more likely to look to the Solicitor General for cues on the president’s policy preferences in such a situation. This would suggest that the Office of the Solicitor General is more successful when a case is heard during a time of war for the country, even after controlling for the president’s popularity. Thus:

Hypothesis 2: The success rate of the Solicitor General is higher during times of war.

Hypothesis 3

As it has been theorized above, it may be the case that Solicitor General enjoys a higher success rate when the president is particularly powerful. This additional power could come from two different sources – a high public approval rating or the country being in a time of war. However, in both situations, the justices of the Court may give deference to the preferences of the president to avoid potential political repercussions and to maintain its legitimacy (Neustadt, 1991; Ostrander, 2015; Yates and Whitford, 1998; Johnson, 2003). These two factors are not necessarily independent of each other. Indeed, when a presidential administration has both a high approval rating and is serving during a time of war, the president's would be the most powerful and the Court would be most willing to give deference to the president's preferences. Therefore, I anticipate an interactive relationship between presidential approval and war time cases; the Court should be most likely to look to the Solicitor General in these cases, and the Solicitor General should be the most successful when both of these conditions are met. Thus:

Hypothesis 3: The Solicitor General is most successful during times of war when the current presidential administration has a high approval rating.

Hypothesis 4

While presidents have traditionally enjoyed more deference from other branches when dealing with foreign or military issues, other political factors may account for additional deference in domestic issues. It is thought that the Court considers the preferences of the president when the president has enough power to negatively affect the Court's decision in some way thereby damaging the Court's legitimacy. However, it may also be the case that the president is also willing to refuse to cooperate with the Court when the policy issue of a case is

of utmost importance to the administration, such as a case dealing with an issue of executive power.

To this end, scholars have argued that four policy issues are particularly important to all presidential administrations: civil rights, issues with the first amendment, criminal procedure, and economic activity (Meinhold and Shull, 1998). A case dealing with such an issue of importance to the presidential administration could make the president more willing to attempt to challenge the Court. Since the Court would be aware of the president's heightened interest increasing the chances of potential repercussions, the justices may be more willing to look to the Solicitor General in such cases to learn of the president's preferences. Therefore, this may result in a higher success rate for the Solicitor General when the Court is hearing cases of importance to the presidential administration. Thus:

Hypothesis 4: The success rate of the Solicitor General is higher in cases of particular importance to the presidential administration.

Chapter 4

Data

The data for this study come from the research of Black and Owens, the Supreme Court Database, and the American Presidency Project. The dependent variables for this study concern the success of the Solicitor General's office before the United State Supreme Court, and the independent variables include both those necessary to assess the hypotheses outlined above as well as those necessary to represent the five major existing theories of success for the Solicitor General.

The four hypotheses are tested at two levels of analysis: the case level and the justice-vote level. In other words, this study examines both whether increased presidential power leads the Solicitor General to win more cases as well as whether increased presidential power leads the Solicitor General to win the votes of more individual justices. The data are inclusive of all orally argued Supreme Court cases decided between the 1979 and 2007 terms, which is 2,837 cases. Using logistic regression analysis, these data will be analyzed in a series of models addressing the hypotheses outlined above.

Solicitor General Success

One dependent variable in this research is the success rate for the Solicitor General, measured as whether or not the side supported by the Solicitor General receives a favorable outcome for the case. These data come from the research of Black and Owens (Black and Owens, 2012). The variable is coded as "0" for cases where the side represented by the Solicitor General lost, and "1" where the side represented by the Solicitor General won. Between the 1979

and 2007 terms, there are 473 cases supported by the Solicitor General¹ that received an unfavorable outcome, and 732 cases supported by the Solicitor General that received a favorable outcome.

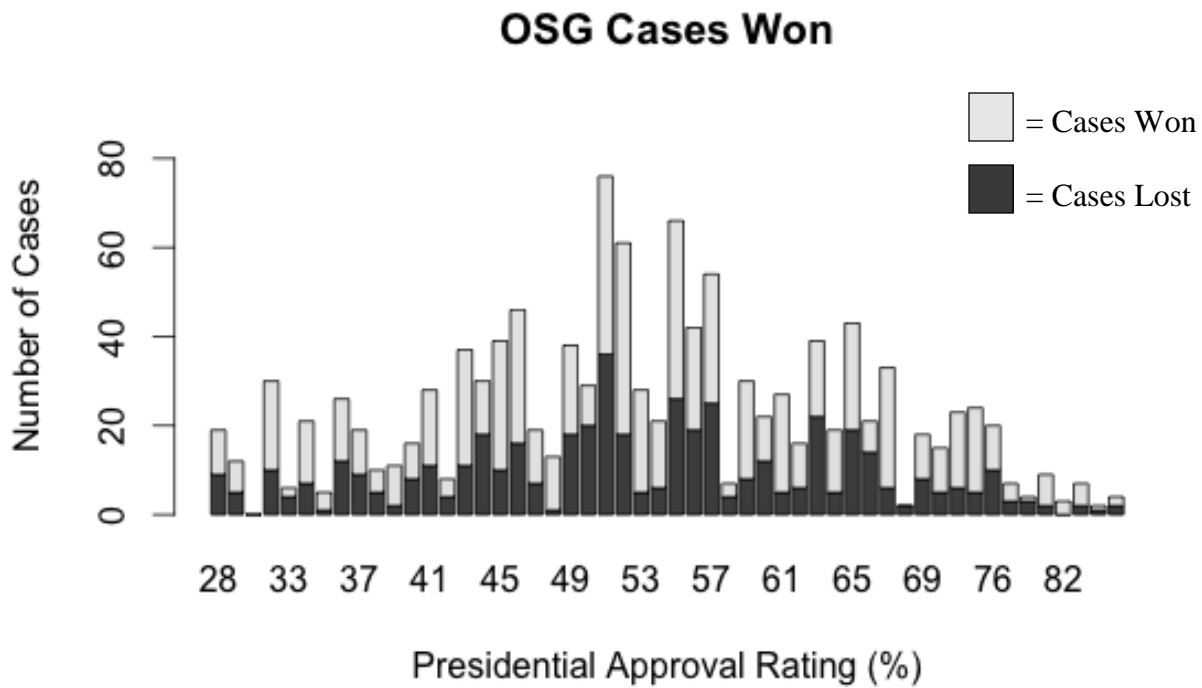
The second dependent variable in this research is whether or not the Solicitor General wins an individual justice-vote. This variable comes from the Supreme Court Justice-Centered Database, combined with the Black and Owens data. This variable is coded as (0) if the vote is not in favor of the Solicitor General and as (1) if the vote is in favor of the Solicitor General. For the cases heard between the 1979 and 2007 terms, there were 4,778 unfavorable votes and 7,040 favorable votes for the Solicitor General.

Presidential Political Capital

The first variable used to measure the political capital of the presidential administration is the president's approval rating. Recall the hypothesis that the success of the Solicitor General increases with the public approval rating of the current president. These data were self-collected from the American Presidency Project, which provided data adapted from the Gallup Poll on presidential popularity. For each president that served between November 1979 and June 2008, the last recorded rating for each month was used. In the instances that there were no recorded data for a month, the data from the previous month were repeated until a new monthly rating was recorded, and when two presidents served during the same month, the data for the president with the ending term were used for that month. This resulting variable has a range of 28% to 87% approval, with an average approval rating of 53.41% for all presidents during this time. Figure 1 further explores the relationship between the numbers of cases the Solicitor General won across

different presidential approval ratings. Figure 1 further explores the relationship between the numbers of cases the Solicitor General won across different presidential approval ratings. As shown in Figure 1, although the Solicitor General appears to win a high percentage of the cases when the president has high approval ratings, the Solicitor General wins the most cases when the president has average approval ratings. This is logical since moderate approval ratings are the most common so most cases would be heard during these circumstances.

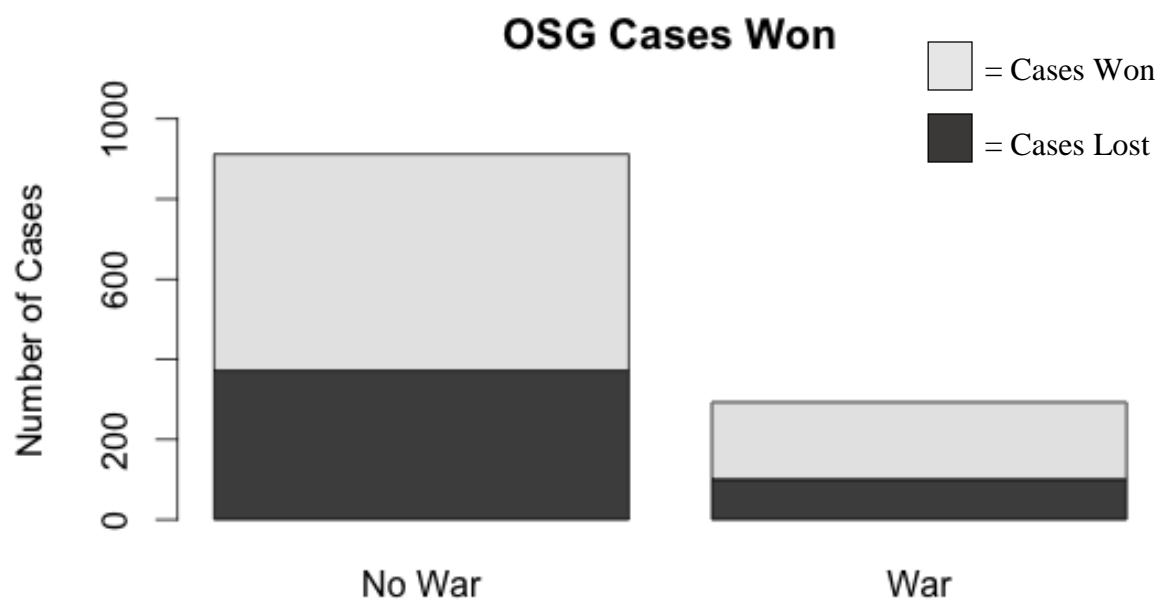
Figure 1: OSG Cases Won by Presidential Approval Rating



Times of War

The second hypothesis suggests that the Solicitor General will win more often in times of war. A variable was coded for whether the country was in a time a war when the decision for the case was made, which tests for whether the Solicitor General has a higher success rate during times of war. This variable follows the measures used by Epstein (2005) and only includes the Gulf War, the War in Afghanistan, and the Iraq War as happening during between the 1979 and 2007 term. The dates used for these wars come from the International Crisis Behavior Project and are: Gulf: 1/16/91 – 4/11/91; Afghanistan: 10/07/01 – 12/31/14; and Iraq: 3/20/03 – 5/01/03 (Epstein, 2005). The variable is coded as no war (0) or war (1) during these times according to the month and year, with a month being coded as having a war (1) if the war started or ended at any time during that month. Out of all of the cases during the 1979 – 2007 terms, 522 were heard during a time of war, or 18.4% of the data. Of these 522 cases heard during a time of war, the Solicitor General won 192 and lost 101. The relationship between the numbers of cases the Solicitor General won during times of war in comparison to cases won not during a time of war is further explored in Figure 2. Figure 2 shows that although most cases are not heard during a time of war, the Solicitor General appears to win a higher percentage of the cases that are heard during war times.

Figure 2: OSG Cases Won During Time of War

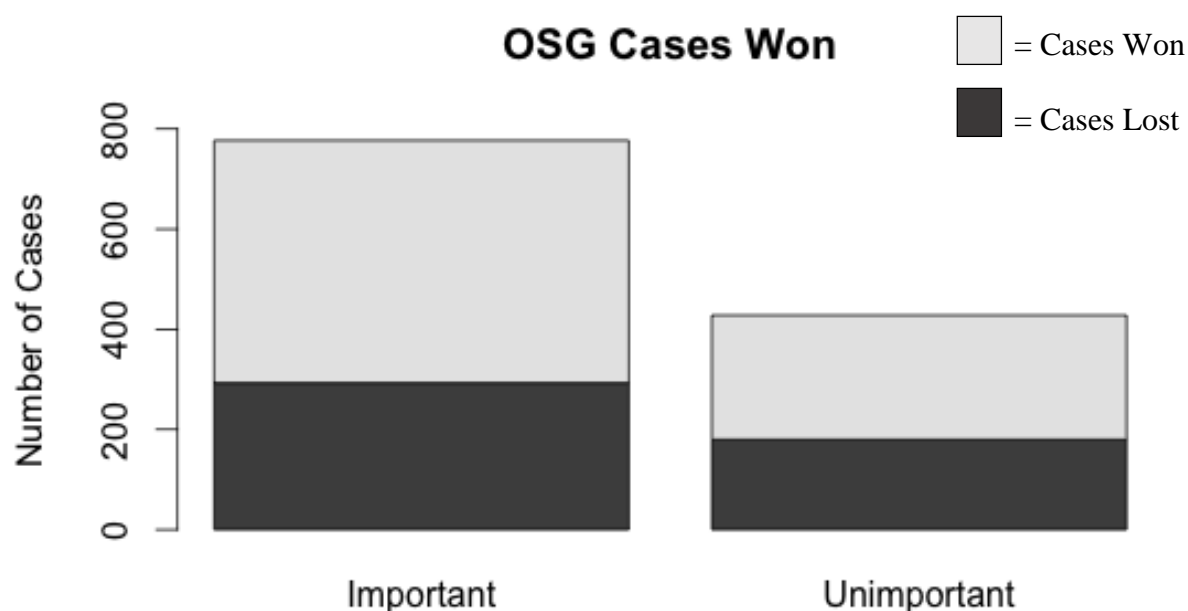


Cases of Importance

The final hypothesis holds that the Solicitor General should be more successful on issues of importance to the presidential administration. Cases with policy issues of importance to the presidential administration are coded according to their issue area. This variable tests if the Solicitor General has a higher success rate in cases of presidential importance. The issue areas of the cases are coded as either unimportant (0) or important (1), with important cases being considered those with issues of civil rights, first amendment, criminal procedure, or economic activity. The data for these variables are from the Supreme Court Database, and for all the cases between 1979 and 2007 there were 1895 cases with issues important to the presidential administration and 942 cases with unimportant issues. Of the important cases, the Solicitor

General won 484 cases and lost 293 cases. The relationship between the numbers of cases won by the Solicitor General in cases of importance in comparison to cases not of importance are shown in Figure 3. As Figure 3 shows, most cases that are heard involve issues of importance to the presidential administration, and the Solicitor General also appears to win a slightly higher percentage of these important issue cases.

Figure 3: OSG Cases Won on Issues of Importance to Presidential Administration



Litigation Advantage

The analysis includes a number of control variables. The following variables address the success of the Solicitor General as a product of attorneys in the Office of the Solicitor General having more experience and resources. Each of the variables comes from the research of Black

and Owens, which was collected through transcripts of the oral argument of each case from LexisNexis. These variables account for other factors contributing to the success of the Solicitor General by addressing the Repeat Player theory. The first variable is the total oral argument experience of the side supported by the Solicitor General, and is calculated as the number of total prior cases each supporting attorney has argued before the Supreme Court prior to the case at issue. For each of the cases considered, the experience ranges from 0 cases to 166 cases previously argued before the Supreme Court with the average experience being 20.18 cases. The oral argument experience for the opposing side was calculated the same way and is also included as an additional control variable. This variable demonstrated that attorneys on the opposing side had less experience since the range for this variable was 0 to 72 cases, with the average number of cases previously argued before the Supreme Court being 2.24 cases.

In order to consider the potential resource advantages of the Office of the Solicitor General and whether the Solicitor General's success is a function of this advantage, there is also a variable created for the overall resource advantage for the Solicitor General's side. The resource advantage of a litigant is assumed based on the status of the litigant and where they fall in one of ten potential categories. The categories in ascending order of assumed resources are poor individuals, minorities, nonminority individuals, unions or interest groups, small businesses, businesses, corporations, local governments, state governments, and the U.S. government. These categories are placed on an index ranging from 1 for the weakest category to 10 for the strongest. Since the variable accounts for the net resource advantage, the opposing side is then subtracted from the side supported by the Solicitor General. For the time frame being observed, this variable ranges from -8 to 9, and has an average advantage score of 0.61 per case.

Another variable that accounts for a potential advantage is the number of supporting amicus briefs per case. This variable measures the net number of amicus briefs supporting a particular attorney's side by subtracting the number of briefs for the opposing side. The data for this variable have a range of -33 to 31 net briefs, with an average of 0.039 briefs.

Ideological Distance

In order to ensure that the Solicitor General's success is not just a product of their ideology aligning with the justices, the variable of ideological distance was introduced to determine the ideological compatibility of the Office of the Solicitor General with the median justice on the Court. This variable addresses the Ideological Actor theory that attributes the Solicitor General's success to their ideological congruence with the Court. The data for this variable comes from the research of Black and Owens, who created the measure by first determining the direction of the lower court decision through the Supreme Court Database and then coding the petitioner as liberal (conservative) if the decision was conservative (liberal). Then, if the petitioner's argument was coded as conservative, the ideological distance was coded as the Court median's ideal point from its Martin Quinn score. And if the petitioner's argument was coded as liberal, the ideological distance was coded as the Court's median idea multiplied by -1 (Black and Owens, 2012). For the data covering the cases in this time frame, the average ideological distance is 0.142, with a range of -1.016 to 1.016.

Petitioner

The variable of petitioner status is included to account for any advantage that comes from being the petitioner of a case, since it is known that petitioners usually have the advantage before the Supreme Court. This variable also comes from the research of Black and Owens, and tells the petitioner status of the Solicitor General in a case. The variable is coded as (0) if the Solicitor General was not the petitioner in a case, and as (1) if the Solicitor General was the petitioner in the case. For the cases heard between the 1979 and 2007 terms, there were 932 cases where the Solicitor General was the petitioner and 611 cases where the Solicitor General was not the petitioner.

Justice Variables

In order to address any possible variation at the justice level, separate models were run testing the likelihood of a justice voting in favor of the Solicitor General. Additionally, several variables were added to account for certain justice characteristics and behaviors.

Also included in the justice-level models are variables to account for characteristics of a justice that may influence his or her voting. One of these variables is the variable of the Appointing President. This variable measures whether the justice's appointing president is the current president (1) or not the current president (0), and was included in order to see if a justice is more likely to defer to the Solicitor General and the presidential administration's wishes when the justice's appointing president is still in office. For these data, there were 23,363 votes of justices when their appointing president was no longer in office, and 4,713 votes of justices when their appointing president was still in office.

A second variable that was included to account for justice voting behavior is the President and Justice Ideological Distance. This variable measures the ideological distance between the justice and the current president (using Judicial Common Space scores) in order to account for a justice being more likely to vote in favor of the Solicitor General when the justice is ideologically close to the current president. For the span of these data, the average ideological distance is 0.546 with higher values indicating more ideological disagreement. This variable has a range of 0.003 to 1.255.

Chapter 5

Data Analysis

The data collected from the 1979 to 2007 Supreme Court terms are used to run three models testing for variation in Solicitor General success rates.

Before examining the evidence for each of the hypotheses, we first examine the estimated effects for the control variables. In support of previous literature it was found that the success of the Solicitor General is also contingent on whether the Solicitor General is the petitioner and the amicus support and resource status of the Office of the Solicitor General, which is shown in Table 1 and Table 2. However, contrary to some previous literature, the experience level of the Solicitor General and the opposing attorney, were insignificant in Table 1. Likewise, Table 1 also shows that ideological distance was an insignificant factor. Interestingly, ideological distance and opposing attorney experience were significant factors at the justice level in Table 2.

These findings provide support for some, but not all, of the previous theories of Solicitor General success. The theory with the most support from this research was the Repeat Player Theory. Since this theory focuses on the advantage the Solicitor General receives from its repeated interaction with the Court, the finding that the Solicitor General's success was contingent on the amicus support and resource status of the Office of the Solicitor General provided support for this theory. However, the level of experience for the Solicitor General and the opposing attorney being found to be insignificant in the models in Table 1 was not in support of this theory, since the theory suggests that experience level matters. Additionally, the finding in Table 1 that the ideological distance was insignificant did not provide support for the Ideological

Actor Theory, since this theory asserts that ideological agreement leads to higher success. However, both opposing attorney experience and ideological distance were found to be significant at the justice-vote level in Table 2, and therefore provided limited support for the Repeat Player and Ideological Actor Theories. The Agent of the Court Theory and Selection Theory were not explored during this research, since this research focused on the outcome of the case at the decision-making stage, and both of these theories focus almost exclusively on the Solicitor General's influence on agenda setting at the certiorari stage.

The main focus of this research is the Separation of Powers Theory. Support for this theory will be discussed through the evidence found for the following hypotheses regarding the Solicitor General's role as an agent of the executive branch. By examining factors of the presidential administration that lead to increased Solicitor General success, potential constraints on the judicial decision-making process that are imposed by the executive branch can be determined.

Table 1: Logistic Regression for Model 1 and Model 2. (The unit of analysis is the case.)

Dependent variable:		
----- Solicitor General Success		
	Model (1)	Model (2)

Presidential Approval Rating	0.002 (0.009)	0.011 (0.011)
Time of War	0.811*** (0.301)	2.195** (1.107)
Important Issue	0.461** (0.220)	0.464** (0.220)
Petitioner Status	7.130*** (0.610)	7.210*** (0.619)
OSG Amicus Support	0.127*** (0.032)	0.130*** (0.032)
OSG Resource Status	-0.110*** (0.034)	-0.108*** (0.034)
Opposing Side Experience	0.003 (0.019)	0.00004 (0.020)
OSG Experience	-0.003 (0.004)	-0.003 (0.004)
Ideological Distance	0.218 (0.190)	0.206 (0.192)
Approval Rating*War Year		-0.025 (0.019)
Constant	-5.236*** (0.788)	-5.798*** (0.894)

Observations	1,205	1,205
Log Likelihood	-327.366	-326.495
Akaike Inf. Crit.	674.733	674.990
=====		
Note:	*p<0.1; **p<0.05; ***p<0.01	

Table 2: Logistic Regression for Model 3. (The unit of analysis is the justice-vote.)

Dependent variable:	

Justice Votes in Favor of OSG	

Presidential Approval Rating	-0.001 (0.002)
Time of War	0.431*** (0.056)
Important Issue	0.170*** (0.048)
Appointing President	0.098 (0.070)
President and Justice Ideological Distance	-0.455*** (0.064)
Petitioner Status	2.635*** (0.051)
OSG Amicus Support	0.046*** (0.007)
OSG Resource Status	-0.046*** (0.006)
Opposing Side Experience	-0.013*** (0.003)
OSG Experience	-0.001 (0.001)
Ideological Distance	-0.047 (0.043)
Constant	-1.159*** (0.126)

Observations	11,818
Log Likelihood	-6,169.479
Akaike Inf. Crit.	12,362.960
=====	
Note:	*p<0.1; **p<0.05; ***p<0.01

Hypothesis 1

The first hypothesis asserts that the success rate of the Solicitor General is higher when the current presidential administration has a high level of political capital, which is measured by presidential approval ratings. As the logit regression run for Model 1 in Table 1 shows, although a higher presidential approval rating is associated with increased success of the Solicitor General, this relationship is so slight and the standard of error is so large that it is insignificant and unable to support the hypothesis.

The relationship between presidential approval ratings and the success of the Solicitor General is further explored through Table 3. Using this same model, predicted probabilities¹ were calculated for high and low presidential approval using the number for the third and first quartile range of the data as measures of high and low respectively. This shows that the Solicitor General is only 0.44% more likely to win when the president has high approval ratings, and this marginal difference further illustrates the lack of effect of presidential approval ratings on Solicitor General success. Therefore, there is no evidence from either model to support the hypothesis that the success rate of the Solicitor General is higher when the current presidential administration has a high level of political capital.

Table 3: Predicted Probability of OSG Success According to Presidential Approval Ratings

Predicted Probability of Solicitor General Success	
High Presidential Approval	Low Presidential Approval
91.86%	91.42%

¹ All predicted probabilities use the Solicitor General as petitioner and either the mean or modal value for each other variable – except the variable being explicitly tested in the hypothesis, and then the value used is stated in the text. The calculated probabilities in Table 3, Table 4, and Table 6 used the logit regression for Model 1 shown in Table 1. The calculated probabilities in Table 5 used the logit regression for Model 2 shown in Table 1. The calculated probabilities in Table 7 and Table 8 used the logit regression for the model shown in Table 2.

Hypothesis 2

The second hypothesis asserts that the success rate of the Solicitor General is higher during times of war. In order to test this hypothesis, this research looked at cases that were heard during a time the country involved in a major war, and then determined whether or not the Solicitor General won these cases. The results shown in Table 1 support the hypothesis. As Model 1 in Table 1 shows, the variable for time of war has a high level of significance for increasing the success of the Solicitor General.

The relationship between time of war and Solicitor General success is further explored in Table 4. Predicted probabilities were calculated for this model in order to determine how much the likelihood of the Solicitor General succeeding increases during a time of war. The probabilities show that the Solicitor General is 4.43% more likely to win when the case occurs during a time of war. This data therefore support the hypothesis that the success rate of the Solicitor General is higher during times of war.

Table 4: Predicted Probability of OSG Success During Times of War

Predicted Probability of Solicitor General Success	
Time of War	Not Time of War
96.14%	91.71%

Hypothesis 3

The third hypothesis asserts that the Solicitor General is most successful during times of war when the current presidential administration has a high level of political capital. In order to

test this hypothesis, a second model (Model 2 in Table 1) was estimated to see if the approval rating of a president increases the success of the Solicitor General more during times of war. The results shown in Table 1 for Model 2 do not support this hypothesis. Contrary to the idea that the Solicitor General would enjoy higher success when presidential approval ratings were high during times of war, the data actually showed the opposite effect. Although the standard of error is too high for it to be statistically significant, the Solicitor General actually had a slightly lower rate of success when the presidential administration was popular during times of war.

This relationship between presidential approval ratings during times of war and Solicitor General success is further explored in Table 5. Predicted probabilities were calculated for high presidential approval ratings and low presidential approval ratings both during times of war and not during times of war. High and low presidential approval used the values for the third and first quartile range of the data respectively. Contrary to the expected results, the Solicitor General's success rate actually decreased by 1.24% when the presidential administration had high approval ratings during a time of war. However, when it was not a time of war, high presidential approval ratings correlated with a 2.51% increase in Solicitor General success. Although it was previously found that high presidential approval ratings had little to no effect on the Solicitor General's chance of success, these results suggest that high presidential approval actually decreases the Solicitor General's success when it is a time of war. However, when it is not a time of war, high approval rates appear to increase the Solicitor General's success by an insignificant amount. Therefore, it is clear from the predictions that the data do not support this hypothesis.

Table 5: Predicted Probability of OSG Success According to Presidential Approval During Times of War

Predicted Probability of Solicitor General Success		
	Time of War	Not Time of War
High Presidential Approval	95.77%	92.45%
Low Presidential Approval	97.01%	89.94%

Hypothesis 4

The fourth hypothesis asserts that the success rate of the Solicitor General is higher in cases of particular importance to the presidential administration. In order to test this hypothesis, the models in Tables 1 and 2 include a variable that indicated which cases concerned with issues of importance the president. The results shown in Table 1 support the hypothesis. As Model 1 in Table 1 shows, the variable for a case with an important issue is significant factor for increasing the likelihood of Solicitor General success.

The relationship between cases with issues of importance and Solicitor General success is further explored in Table 6. Predicted probabilities were calculated for cases with important issues and cases with issues unimportant to the presidential administration. The probabilities show that the Solicitor General is 4.24% more likely to win when the case being heard is about an issue of importance to the presidential administration. The data therefore support the hypothesis that the success rate of the Solicitor General is higher in cases of particular importance to the presidential administration.

Table 6: Predicted Probability of OSG Success when Issue of Importance to Presidential Administration

Predicted Probability of Solicitor General Success	
Important Issue	Unimportant Issue
91.71%	87.47%

Justice Variation

The findings at the justice-vote level provide additional support for Hypothesis 2 and Hypothesis 4. In Table 2, the results of the model find that an individual justice is also more likely to vote in favor of the Solicitor General during times of war and when the issue of the case is of importance to the presidential administration. Therefore, these two hypotheses are well supported since the same findings occurred on two different levels of data.

The experience of the attorney on the opposing side was also found to be significant at the justice level. This suggests that attorney experience is an additional factor that is creating variation in success at the justice-vote level that is not also found at the case level.

Although the ideological distance between the petitioner and the Court median was insignificant at the case level, the ideological distance between the president and the justices was a significant factor at the justice-vote level. This result could suggest that the justices are more interested in the ideological preferences of the president than the ideological direction of the case being argued by the petitioner. In Table 7 and Table 8, the relationship between ideological distance, war time, and case issues of importance is further explored.

Table 7 shows the predicted probability of a justice voting in favor of the Solicitor General during times of war when the justice is either in ideological agreement or disagreement

with the president. Ideological agreement and ideological disagreement respectively use the first and third quartile range for the variable of ideological distance. This table shows that an individual justice is 4.08% more likely to vote in favor of the Solicitor General during a time of war when a justice is in ideological agreement with the current president, and 5.35% more likely to vote in favor of the Solicitor General when a justice is in ideological agreement not during a time of war. This shows additional support for Hypothesis 2 by showing the Solicitor General is more likely to get the votes of justices during times of war, but also shows further variation since even during a time of war ideological distance between the justice and president will either increase or decrease the Solicitor General's success. Additionally, it suggests that ideological agreement is slightly less important during a time of war.

Table 7: Predicted Probability of OSG Success at Justice-Vote Level During Times of War According to Ideological Distance

Predicted Probability of Solicitor General Success		
	Time of War	Not Time of War
Ideological Agreement	86.71%	80.91%
Ideological Disagreement	82.63%	75.56%

Table 8 shows the predicted probabilities for a justice voting in favor of the Solicitor General when the case is an issue of importance according to the ideological distance of the justice and the president. The table shows support for Hypothesis 4 since a justice is more likely to vote in favor of the Solicitor General when the case is an important issue, but then also shows further variation in success according to ideological distance. This table shows that a justice is 5.35% more likely to vote in favor of the Solicitor General in a case with an important issue

when the justice is in ideological agreement with the president, and 5.87% when the justice and president are in ideological agreement in a case with an unimportant issue. Although this finding suggests that ideological agreement matters slightly less in cases with important issues, it also shows that a justice is more likely to vote in favor of the Solicitor General during a case with an unimportant issue than in a case with an important issue when the justice and president are in ideological disagreement.

Table 8: Predicted Probability of OSG Success at Justice-Vote Level when Issue of Importance According to Ideological Distance

Predicted Probability of Solicitor General Success		
	Important Issue	Unimportant Issue
Ideological Agreement	80.91%	78.15%
Ideological Disagreement	75.56%	72.28%

Chapter 6

Conclusion

Overall, the data support some of the hypotheses and not others. The first hypothesis that presidential approval ratings lead to higher Solicitor General success is largely unsupported since presidential approval ratings are not significant. The second hypothesis that the Solicitor General is more successful during times of war is supported by the data, and accounted for a 4.43% increase in Solicitor General success. It should be noted that although this percentage seems marginal, there are other factors that account for success before the Supreme Court. Most notably, the variable of petitioner status accounts for most of the success since it is known that petitioners are significantly more successful before the Supreme Court. Also, other variables such as amicus support and the resource status of the litigant attribute to increased success. Therefore, there is only a limited amount of variation left to be explained by this research, which makes a 4.43% increase of success more substantial. The third hypothesis that presidential approval ratings would lead to higher Solicitor General success during times of war was not only unsupported by the data, but was also proven to have the opposite effect. Finally, the fourth hypothesis that cases with issues of importance to the president would lead to a higher success rate for the Solicitor General was supported, and accounted for a 4.24% increase in Solicitor General success.

Other additional findings from the data were that contrary to popular belief and much of the literature, the oral argument experience of the attorney and the ideological distance between the attorney and the Court were insignificant as factors contributing to Solicitor General success.

Finally, by running an additional model at the justice-vote level, further support was found for Hypothesis 2 and Hypothesis 4, since it was found that individual justices are also more likely to vote in favor of the Solicitor General during times of war and when the presidential administration is interested in the issue of the case. Additionally, it was found that ideological agreement between the justice and the president was an influential factor at the justice-vote level by increasing the likelihood of the Solicitor General's success.

These results contribute to the literature on theories of Solicitor General success by showing that the Court is more likely to defer to the Solicitor General during times of war or when the presidential administration is interested in the issue of the case. However, through investigating the Solicitor General's success as a product of the position being an agent of the president, this research can also contribute to the literature on presidential power by showing the president's increased influence over the Court during a time of war or when the issue of the case is important to the presidential administration. This has implications for the separation of powers by showing that the Court is more likely to defer to the executive branch when current events or other circumstances give additional power to the president. However, this research is unable to tell if the Court's deference is due to a circumstance where the country's priorities may change, such as during a time of war, or because the Court fears possible political repercussions from a particularly powerful presidency.

This research was limited by certain factors. The research was only able to study cases decided between the 1979 and 2007 terms due to data limitations, which then limited the numbers of cases heard during a time of war since only the Gulf War, War in Afghanistan, and Iraq War were considered. Due to the limited time span, this research also had very few cases where the Solicitor General was not acting as the petitioner. Since the petitioner of a case is

more likely to receive a favorable outcome from the Court, this only allowed for a limited amount of variation in success left to explain. Additionally, this research focused on the overall outcome of a case and final justice-votes. Therefore, the research does not address any influence or increased success the Solicitor General may have during agenda setting at the certiorari stage. Finally, since a president's approval rating is the highest at the start of their term, and the cases a Solicitor General is advocating are from the past presidential administrations, there is a mismatch between the current president's approval rating and the Solicitor General's cases. This could have hindered the research's ability to study how the president's approval rating affects the Solicitor General's success.

Future research could benefit from an expanded time span in order to include more cases in which the Solicitor General was involved during times of war, and cases in which the Solicitor General was not acting as petitioner. Also, this research could be extended to other stages of the Court's decision-making process as well. The theories presented in this research and the overall literature would benefit from additional research studying if the Solicitor General is also more influential and successful at the agenda setting stage during times of war and when the issue of the case is of importance to the presidential administration.

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ACADEMIC VITA
Stephanie Rae Wilusz
stephwilusz@gmail.com

Education:	Schreyer Honors College The Pennsylvania State University, University Park, PA Bachelor of Arts in Political Science Bachelor of Arts in Philosophy (Justice, Law, and Values Option) Minor in International Studies <ul style="list-style-type: none">Honors Thesis: The Influence of the President on Solicitor General Success in U.S. Supreme Court Decisions	Graduation: May 2016
	University of Kent, Canterbury, United Kingdom Studied International Politics and Philosophy	September 2014-December 2014
Relevant Experience:	Office of Congressman Keith Rothfus, Johnstown PA Congressional Intern <ul style="list-style-type: none">Worked in constituency serviceActed as a liaison between constituents and government agenciesAssisted in completing constituent casework resolving governmental issuesCommunicated with constituents regarding their concerns about the districtAttended events with the Congressman and his staff	May 2014-September 2014
	Penn State Department of Political Science, University Park PA Research Assistant <ul style="list-style-type: none">Currently collecting data from federal budgets to research responsiveness to federal agenciesPreviously assisted with two research projects in the study of political scienceCollected and coded data from newspapers on the perception of immigrants and immigration reform with respect to cultural differencesResearched data on education reform and government responsiveness to public opinion regarding reform initiatives	June 2015-August 2015 January 2016-Current
Involvement/Leadership:	Penn State Global Brigades , Member of Executive Board and Volunteer <ul style="list-style-type: none">Involved in the Human Rights DivisionCreated informational workshops and legal clinics to promote human rights	August 2012-May 2014
	Penn State Fencing Club , Competitive Athlete and Safety Officer Penn State Blue and White Alumni Society , Member	August 2012-Current August 2013-Current
Additional Employment:	Randy's BiLo Grocery Store, Windber PA Customer Service, Cashier, Stocker <ul style="list-style-type: none">Employed over four years to save money for the cost of college	August 2010-August 2012 May 2013-August 2013 May 2014-August 2014
Honors:	Penn State Academic Excellence Scholarship Recipient Merchant Family Undergraduate Scholarship Fund Recipient Tracy Winfree McCourtney Scholarship in the College of the Liberal Arts Recipient Penn State Thomas D. Fulton Scholarship Recipient Penn State Hintz Honors Scholar in Liberal Arts Scholarship Recipient National Society of Collegiate Scholars, Member	2012-2016 2015-2016 2015-2016 2015-2016 2013-2014 2013-Current