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Former Roberts Court Clerks' Success Litigating Before the Supreme Court

Adam Feldman*

ABSTRACT

Former Roberts Court clerks frequently appear before the Supreme Court. This Article examines whether former Roberts Court clerks have a litigating advantage before their former bosses. The main finding is yes, but only under certain circumstances. Generally, former Roberts Court clerks have about an even chance of receiving votes from the Justices for or against the positions they argue. When they argue positions ideologically aligned with their former Justices, though, they enhance their chance of success above this fifty percent threshold.

Supreme Court clerkships lead to lifelong bonds between Justices and clerks, as well as between the clerks themselves. Take for example Justice Brennan's law clerks. Periodically they would meet for a reunion that one clerk described as "a large extended family coming together."¹ In this way, clerkships create unique connections between individuals in an otherwise extremely well-guarded institution.

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¹ Stephen Wermiel, *Justice Brennan and His Law Clerks*, 98 MARQ. L. REV. 367, 385 (2014).

How well guarded? There are no cameras allowed in the courtroom, decisions may be unsigned, and proceedings aside from oral arguments are held outside of the public eye. Outside of the Justices themselves, Supreme Court clerks are the only group of individuals that provide input into Supreme Court decisions. Clerks work alongside the Justices, oftentimes helping to choose the cases the Court hears, drafting bench memos, and in some instances, drafting portions of the Court's opinions.²

Current Supreme Court clerkships typically last only a year and then the former clerks must decide on their career path. Former Supreme Court clerks often can expect large signing bonuses if they choose to move into legal practice,³ and for a good reason: they tend to graduate the top in their class from the highest ranked law schools in the nation.⁴ Even with signing bonuses exceeding \$200,000, recently the law firm of Jones Day hired ten former Supreme Court clerks to its practice in a single year.⁵

Aside from their academic achievements, Supreme Court clerks bring to firms the intimate knowledge that they have gained by working so closely with a Justice and the Court.⁶ This knowledge and

² See H. W. PERRY, DECIDING TO DECIDE: AGENDA SETTING IN THE UNITED STATES SUPREME COURT 43–60 (2009) (providing anecdotal accounts from clerks on their roles in helping to choose the cases the Justices grant on writ of certiorari); ARTEMUS WARD & DAVID L. WEIDEN, SORCERERS' APPRENTICES: 100 YEARS OF LAW CLERKS AT THE UNITED STATES SUPREME COURT 3–4 (2006) (describing how the Justices use bench memos to derive questions for oral arguments and in conferences when coming to their decisions in the cases); Jeffrey S. Rosenthal & Albert H. Yoon, *Judicial Ghostwriting: Authorship on the Supreme Court*, 96 Cornell L. Rev. 1307, 1309 (2010) (describing the Justices' differing practices regarding the extent of opinion drafting that they delegate to their clerks).

³ See TODD C. PEPPERS, COURTIER OF THE MARBLE PALACE: THE RISE AND INFLUENCE OF THE SUPREME COURT LAW CLERK 2 (2006) (describing law firm signing bonuses for former Supreme Court clerks).

⁴ See Todd C. Peppers & Christopher Zorn, *Law Clerk Influence on Supreme Court Decision Making: An Empirical Assessment*, 58 DEPAUL L. REV. 61 (2008) (showing that the majority of Supreme Court clerks come from “top-five” law schools).

⁵ See Martha Neil, *Jones Day Hires 10 US Supreme Court Clerks, 'A Stunningly Large Number,' Law Prof Says*, ABA Journal (Nov. 2, 2015), http://www.abajournal.com/news/article/jones_day_hires_10_clerks_from_us_supreme_court.

⁶ This potential advantage may function similarly to prior federal judicial experience, where we see “circuit effects” in which certain justices are likely to affirm decisions from their prior circuits. See Lee Epstein et al., *Circuit Effects: How the Norm of Federal Judicial Experience Biases the Supreme Court*, 157 U. PENN. L. REV. 833, 873 (2009) (“With only a few exceptions, Justices who served on the circuits behave in a significantly different manner toward their former court relative to all others.”).

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the insights they may have gleaned on the Court's inner workings make them an invaluable commodity, especially to firms that litigate before the Supreme Court.

This Article assesses whether clerks that served during the Roberts Court have a litigating advantage in the Supreme Court. Well over 400 individuals have clerked for a Supreme Court Justice since John Roberts assumed his post as Chief Justice of the Supreme Court.⁷ As these clerks completed their clerkships, they created a large pool of potential attorneys.

But do these former clerks make for more successful Supreme Court litigators? There are several reasons to suspect that the answer is yes, including the two I mentioned above. It is also true that the Justices chose their clerks out of a large body of potential candidates, which may indicate that they were attractive to particular Justices. Finally, because many former clerks worked in the cert pool,⁸ and interacted with the Justices in other ways, they had opportunities to get to know Justices other than their direct boss.⁹

Numerous scholarly articles and books have explored the relationship between Supreme Court Justices and their clerks.¹⁰ But

⁷ See JUDICIAL YELLOW BOOK SERIES; for full list of Supreme Court clerks over time see *List of Law Clerks of the Supreme Court of the United States*, WIKIPEDIA (2017), https://en.wikipedia.org/wiki/List_of_law_clerks_of_the_Supreme_Court_of_the_United_States (last visited Jan 5, 2017).

⁸ See Perry, *supra* note 2 at 42 (describing the cert pool as a system designed to aggregate resources of multiple Justices' chambers to review cert petitions).

⁹ See *id.* at 56 (providing a clerk's explanation of how a pool memo is written for an audience composed of all of the Justices in the cert pool).

¹⁰ Several books provide insight into the Justices' private and work life through anecdotes shared by former clerks. See, e.g., BOB WOODWARD & SCOTT ARMSTRONG, *THE BROTHERS: INSIDE THE SUPREME COURT* (2011) (providing clerks' first person accounts of working for Supreme Court Justices). While there are a few law reviews articles that examine the relationship between Justices and their clerks. See, e.g., David J. Garrow, *Lowest Form of Animal Life?: Supreme Court Clerks and Supreme Court History*, 84 *Cornell L. Rev.* 855 (1999) (reviewing works examining Supreme Court clerks as well as providing additional examples of clerks interactions with the Justices); Ryan C. Black, Christina L. Boyd & Amanda C. Bryan, *Revisiting the Influence of Law Clerks on the US Supreme Court's Agenda-Setting Process*, 98 *MARQ. L. REV.* 75 (2014) (examining cert pool memos from the 1986 through 1993 terms), there are also a handful of political science articles that focus on the role of Supreme Court clerks. See, e.g., Kelly J. Lynch, *Best Friends? Supreme Court Law Clerks on Effective Amicus Curiae Briefs*, 20 *J.L. & POL.* 33 (2004) (providing Supreme Court clerks' assessments of amicus briefs); Corey Ditslear & Lawrence Baum, *Selection of Law Clerks and Polarization in the US Supreme Court*, 63 *J. POL.* 869 (2001) (looking at the relationship between Supreme Court judicial ideology and clerk selection based on clerks' prior clerkships in lower courts).

these works tend to focus on the clerks' background and their service on the Court. There is surprisingly little written about life after the clerkship.¹¹ Studies examining the success of the U.S. Solicitor General (SG) before the Supreme Court,¹² may shed light on clerks' potential advantages as litigators.

On the one hand, because each SG during the Roberts Court years clerked for a Supreme Court Justice,¹³ they, like other former clerks, have personal relationships with the Justices.¹⁴ Both sets of individuals also are entrusted with helping the Justices come to their decisions.¹⁵ On the other hand, SGs have an institutional advantage as litigators that other former clerks lack because they work for the federal government.¹⁶ This advantage is well-documented, especially at the certiorari stage.¹⁷ When non-SG former clerks try cases before the Court they lack this same institutional connection of the OSG.¹⁸

¹¹ A rigorous search for existing literature on the subject led to only one result. Karen O'Connor & John R. Hermann, *Clerk Connection: Appearances Before the Supreme Court by Former Law Clerks*, 78 JUDICATURE 247 (1994) (providing empirical analyses of clerks' law practice before the Supreme Court by looking at the frequency with which former clerks appear as counsel).

¹² See generally *infra* notes 11–12.

¹³ Paul Clement, Solicitor General from 2004 through 2008 clerked for Justice Scalia, Gregory Garre, Solicitor General from 2008 through 2009 clerked for Justice Rehnquist, Justice Kagan, Solicitor General from 2009 through 2010 clerked for Justice Marshall, Donald Verrilli, Solicitor General from 2011 through 2016 clerked for Justice Brennan, and current Solicitor General Ian Gershengom clerked for Justice Stevens.

¹⁴ See, e.g., *supra* note 1 (depicting Justice Brennan's former clerks meeting for reunions with the Justice); see also Michael A. Bailey, Brian Kamoie & Forrest Maltzman, *Signals from the Tenth Justice: The Political Role of the Solicitor General in Supreme Court Decision Making*, 49 AM. J. POLIT. SCI. 72, 73 (2005) (describing the S.G.'s role as "a unique position amongst the justices").

¹⁵ See REBECCA MAE SALOKAR, *THE SOLICITOR GENERAL: THE POLITICS OF LAW* 161 (1992) (describing the importance of trust shared between the Justices and the Solicitor General); see also Ward & Weiden, *supra* note 2, at 207 (mentioning the amount of trust the Justices place in their law clerks often epitomized by allowing clerks to draft opinions).

¹⁶ See Ryan C. Black & Ryan J. Owens, *A Built-in Advantage: The Office of the Solicitor General and the US*, 66 POL. RESEARCH Q. 454, 462 (2013) ("[w]e believe that OSG success likely stems from the office's longstanding relationship with the Court and with the professionalism its attorneys display.").

¹⁷ See Adam Feldman & Alexander Kappner, *Finding Certainty in Cert: An Empirical Analysis of the Factors Involved in Supreme Court Certiorari Decisions from 2001-2015*, 61 VILL. L. REV. 795, 828 (2017) (showing the SG's success rate at cert and how this exceeds the success of other experienced attorneys).

¹⁸ The SG is often referred to as the tenth Justice because of the dual role as advocate and as purveyor of information to the Court. See generally SALOKAR, *supra* note 11. Recent

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Former clerks, especially recent ones, may also lack “repeat player” status. Though it is true that many of the repeat players before the Roberts Court served as clerks, they may be better known to the justices through their many appearances before the Court. Then there are the many repeat players who never clerked at the Supreme Court level, including former Solicitor General litigator Seth Waxman and Supreme Court regular Lisa Blatt.¹⁹ The lack of a Supreme Court clerkship has not prevented Blatt and Waxman from emerging as two of the most successful appellate practitioners and recognized names in modern Supreme Court practice.

Although some of the evidence suggests the possibility of a clerkship litigation advantage, the converse may also be true. While clerks may have formed a relationship with their Justice, this trusting relationship does not necessarily extend to a bond between the former clerk and any of the other Justices. So too, many of those who litigate before the Supreme Court are experienced practitioners and are already elite attorneys.²⁰ Recent former clerks' relational advantage may be counteracted by the clerk's lack of practical lawyering experience, especially when combined with the experience of their opposing counsel. The bottom line is that although a Supreme Court clerkship should provide a lawyer with an advantage over a similarly situated lawyer without one, the extent of this advantage is unclear.

The sample of cases I analyze consist of instances where former Roberts Court clerks (clerking between the 2005 through 2015

law grads may also work in the Department of Justice as Bristow Fellows which can further entrench their relationship with both the OSG and the Justices. *See* Patricia A. Millett, *We're Your Government and We're Here to Help: Obtaining Amicus Support from the Federal Government in Supreme Court Cases*, 10 J. APP. PRAC. & PROCESS 209 (2009) (explaining how Bristow Fellows are former federal law clerks who are responsible for responding to cert petitions where the Department of Justice is the opposing party).

¹⁹ *See People, WILMERHALE*, https://www.wilmerhale.com/seth_waxman/ (last accessed Mar. 21, 2017); *see also People, ARNOLD & PORTER*, <http://www.arnoldporter.com/en/people/b/blatt-lisa-s> (last accessed Mar. 21, 2017). Both Blatt and Waxman's bios mention they clerked at the federal appeals court level—Blatt for then Judge Ruth Bader Ginsburg and Waxman for Judge Gesell.

²⁰ *See* Kevin T. McGuire, *Repeat Players in the Supreme Court: The Role of Experienced Lawyers in Litigation Success*, 57 J. POL. 187, 89 (1995) (arguing that a lawyer's experience litigating in the Supreme Court is an asset both for understanding the Justices and for developing credibility before the Court).

Supreme Court Terms) litigated before the Court during the same period.²¹ This amounts to 137 cases in which Roberts Court clerks represented a party on the merits and participating in oral arguments. It also creates a diverse sample of representation ranging from attorneys from the United States Office of the Solicitor General (OSG), attorneys representing city and state government officials in states like Texas and cities such as San Francisco, to representatives of large corporations such as Teva Pharmaceuticals and Hartford Life Insurance.

I explore whether the Justices voted for the side represented by their former clerks. The main finding is that former Roberts Court clerks can be quite successful if they properly leverage their knowledge of their former bosses.

DATA AND METHODS

The population used in this Article's analysis includes the Justices' votes in the 137 cases in which Roberts Court clerks represented parties on the merits through the 2015 Supreme Court Term. Therefore, each observation is a Justice's vote for or against a particular former clerk in a case. The main outcome of interest is the Justices' support for former clerks as measured by their votes on the merits.

I also include several control variables that also may explain the justices' votes. To take into account participation OSG, I include the variables *OSG Against* and *OSG Backed*. *OSG Against* is a dummy variable coded 1 if the OSG represented the party opposing the former clerk. *OSG Backed* = 1 if the clerk worked in the OSG.

The next variable controls for the importance of the case. I include this variable on the assumption that in important cases, the Justices are less likely to focus on their relationships with former clerks.²² To control for importance, the variable *Political Salience* = 1 in instances where the case was mentioned on the front page of the *New*

²¹ Based on an original data collection for this Article.

²² This hypothesis is premised on similar findings with different actors. FORREST MALTZMAN, JAMES SPRIGGS & PAUL WAHLBECK, CRAFTING LAW ON THE SUPREME COURT: THE COLLEGIAL GAME (2000) 36, 37 (showing that the Justices are less likely to be influenced by other Justices views in cases deemed important or salient).

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York Times the day after the Court delivered the decision.²³

Beyond case importance, I code for alignment between the position taken by the clerk and the justice's ideological predisposition. I include this variable because when a former clerk argues a position that does not ideologically align with their former employer Justice's preferences, the former clerk may not fare as well as when their preferences align. To measure alignment, I began with the Justices' Martin-Quinn (MQ) Scores by Supreme Court Term.²⁴ I coded the ideological position of the litigating former-clerk based on the decision direction of the lower court as it appears in the United States Supreme Court Database.²⁵ I then looked to see if the ideological direction of a Justice's MQ Score for a Term (negative for liberal or positive for conservative) corresponded with the ideological direction of the former clerk's argument. I coded *Ideological Alignment* as 1 when the ideological direction of the former clerk and the former clerk's Justice were the same. I also coded *Justice of Clerk* as 1 when the attorney in an observation previously clerked for the Justice whose vote is the object of the observation.

I coded *Opponent Clerk* as 1 in any situation where the opposing counsel in an observation was also a clerk (whether for a Roberts Court Justice or prior to Justice Roberts joining the Court). Finally, owing to the petitioning party's inherent advantage from the certiorari,²⁶ I code a variable *Petitioner* as 1 for each instance where the clerk in the observation represented the petitioning party.

ANALYSIS

²³ See generally Lee Epstein & Jeffrey A. Segal, *Measuring Issue Salience*, 44 AM. J. POL. SCI. 66 (2000) (creating and validating a measure of case salience). I updated the data through the 2015 Term's cases.

²⁴ See Andrew D. Martin & Kevin M. Quinn, *Dynamic Ideal Point Estimation Via Markov Chain Monte Carlo for the U.S. Supreme Court, 1953–1999*, 10 POL. ANALYSIS 134 (2002) (detailing how the ideal points are generated on a term-by-term basis).

²⁵ See Timothy R. Johnson, Paul J. Wahlbeck & James F. Spriggs II, *The Influence of Oral Arguments on the U.S. Supreme Court*, 100 AM. POL. SCI. REV. 99, 106 (2006) (employing this strategy for allocating a policy position to the litigator).

²⁶ See LEE EPSTEIN & JACK KNIGHT, *THE CHOICES JUSTICES MAKE* 122 (1998) (describing "aggressive grant[s]" as a regular practice when the Justices grant cases on cert to reverse lower courts' decisions on the merits).

Clerkships may lead to former clerks' distinct advantages when litigating before their prior employer Justice.²⁷ Based on this possibility, prior to analyzing the importance Roberts Court clerkships across Justices, I review the relative importance of prior clerkships to the Justices by examining the frequency with which they voted for their former clerks in the dataset.²⁸

As there are 123 instances of Justices voting in cases where former clerks litigated the cases and the Justices voted for their former clerks in sixty-one of these observations, there is an approximately 50% support rate. There is substantial variation in both the number of cases the Justices heard in this set and in the Justices' relative support rate for their former clerks. Justice Scalia voted in the most cases with his former clerks with twenty-five and voted in favor of his former clerks in 14, or 56% of these instances. Justice Alito had the greatest support rate for his former clerks at 80% but this is with only five total observations.

But we must be very careful in interpreting Table 1. First, for many justices the n is so small that the percentages are virtually meaningless (a single case could shift them one way or the other); and second, the raw data do not control for the many other factors that we know affect voting. Table 2 corrects for the latter, displaying the results of the multivariate analysis.

The regression shows predictable results as well as some that may be surprising.²⁹ To better understand the regression results, Table 3 shows the substantive effects of the significant variables. This table lists the difference in the likelihood that a Justice will vote for the clerk of interest in the observation based on the presence of the attribute in the variable (e.g. whether the clerk was the petitioner in a case or not). To calculate these values all other variables aside from the variable of interest are set to their mean values. Since the values for the substantive effects only show the likelihood of the variable's

²⁷ See, e.g., *supra* note 6.

²⁸ This analysis includes 123 observations as the remaining observations do not have a vote from the clerk's Justice in the case. This includes instances such as with Justice Stevens' and Souter's clerks where the Justices were already retired but their former clerks tried cases in the observation or when a former Justice hired the clerk to the Court.

²⁹ The significance levels remain the same when clustering by issue area instead of clustering by Justice.

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effects within a range of error that differs by variable, the 95% confidence intervals also provided in Table 3 bound a range of possible values for the variables' effects with 95% confidence of their accuracy.

Looking at these variables' effects, *OSG Against's* negative significance conveys that the when one of these attorneys opposed the OSG, the likelihood that a Justice would vote for them declined. Since *OSG Backed* and *OSG Against* are mutually exclusive, they cannot both occur in the same case. Thus, in cases where *OSG Against* is coded as 1, the OSG cannot support the clerk in the observation.

The one unexpected finding is the negative significance of *OSG Backed*. The Justices often vote in favor of positions held by the OSG.³⁰ This likely shows that based on the high quality of the non-former clerk litigators in this sample, there is no visibly added benefit to garnering the OSG's support.

Legal Salience is significant in the negative direction. This shows that when dealing with more important cases, the Justices were less likely to vote in favor of former clerks' positions. By contrast, *Petitioner* is positive and significant, as predicted.

An important finding from this model is that *Ideological Alignment* is significant and moves in a positive direction. This shows that the Justices were more likely to vote for former clerks' positions when the clerks' arguments were ideologically aligned with their former employer Justices' preferences. Estimating the substantive effects based on whether or not the former clerk argued the position ideologically aligned with the preferences of their former employer Justice presents another interesting finding. The likelihood that a Justice would vote for the former clerk increased from 51 to 56% when the clerk argued an ideological position that aligned with the former clerk's Justice.

Although the finding that ideological compatibility is correlated with a Justice's vote is not unique to clerks, it is unique as a factor motivating the Justices to vote in favor of a particular litigant.

The findings for a logit regression of petitioner success in a

³⁰ See, e.g., Kevin T. McGuire, *Explaining Executive Success in the U. S. Supreme Court*, 51 POL. RESEARCH Q. 505 (1998).

selection of 134 cases (which corresponds to 1,205 Justices' votes) from the 2013–2015 Terms led to much more predictable results and provide a point of comparison.

Here while *Ideological Alignment* is also positive and significant, so is *OSG Backed*. The different drivers of Justices' votes when former clerks are litigators highlights the singular importance of ideological computability in such instances.

DISCUSSION

Former Roberts Court clerks are frequent litigators before the Supreme Court as they appeared in 134—or 18%—of the 757 Supreme Court cases that were orally argued and where signed, written opinions were issued during the time period examined in this Article. This Article examined the unique question of whether former Roberts Court clerks have a litigating advantage before the Roberts Court Justices. Using an original measure to test this relationship, the main finding is yes, but only under certain circumstances. Former Roberts Court clerks tend to have a near-even chance of receiving votes from the Justices for or against the positions they argue, even when they work within the OSG—an institution that typically leads to higher rates of litigant success. Only when they argue positions ideologically aligned with their former Justices do they enhance their chance of success above this 50% range.

Two questions remain for future research. First, why does this ideological component make a difference when other factors (such as OSG support) that lead to litigation advantages do not? Second, how can former clerks leverage their personal knowledge of the Justices to their advantage? Looking at what clerks learn through the clerkship process may provide a potential answer. Clerks gain specific insight about how their former bosses reason and think. This may make for more effective arguments when they litigate similar positions before the Justices. If this is the case, learning the effective construction of these particular arguments may be one of the greatest benefits former clerks receive from clerking for a Roberts Court Justice.

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Table 1 Justices' Voting Support for Former Clerks

| Justice | Votes for Clerk | Clerk Appearances with Justice | Vote for Clerk Rate |
|----------------|----------------------------|---|--------------------------------|
| Stevens | 2 | 5 | 0.40 |
| O'Connor | 0 | 0 | NA |
| Scalia | 14 | 25 | 0.56 |
| Kennedy | 6 | 17 | 0.35 |
| Souter | 0 | 1 | 0.00 |
| Thomas | 13 | 20 | 0.65 |
| Ginsburg | 7 | 17 | 0.41 |
| Breyer | 9 | 16 | 0.56 |
| Roberts | 6 | 13 | 0.46 |
| Alito | 4 | 5 | 0.80 |
| Sotomayor | 0 | 4 | 0.00 |

Table 2: Logit Estimates for Roberts Court Justices' Support for Former Clerks, 2005-2015

| | Vote For Clerk | |
|-----------------------|----------------|----------|
| OSG Against | -1.085*** | (0.155) |
| OSG Backed | -0.410*** | (0.109) |
| Political Salience | -0.540 | (0.343) |
| Ideological Alignment | 0.206** | (0.0765) |
| Justice of Clerk | -0.0753 | (0.143) |
| Opponent Clerk | -0.0760 | (0.0589) |
| Petitioner | 1.158*** | (0.141) |
| Constant | -0.0528 | (0.119) |
| <i>N</i> | 1193 | |

Robust standard errors in parentheses clustered by Justice

* $p < 0.05$, ** $p < 0.01$, *** $p < 0.001$

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Table 3: Substantive Effects of Key Variables with 95% Confidence Intervals

| | Likelihood of Vote for Clerk | 95% Confidence Interval | |
|----------------------------------|------------------------------|-------------------------|-----|
| OSG Against | | | |
| Not Against | 56% | 50% | 62% |
| Against | 30% | 23% | 38% |
| OSG Backed | | | |
| Not Backed | 58% | 54% | 61% |
| Backed | 48% | 39% | 56% |
| Ideological Compatibility | | | |
| Not Compatible | 51% | 44% | 57% |
| Compatible | 56% | 50% | 61% |
| Petitioner | | | |
| Respondent | 41% | 34% | 49% |
| Petitioner | 69% | 64% | 74% |

Table 4: Logit Estimates for Roberts Court Justices' Support for Petitioners

| | Vote for Petitioner | |
|-----------------------|---------------------|---------|
| Petitioner Win | 3.434*** | (0.332) |
| OSG Against | 0.128 | (0.271) |
| OSG Backed | 1.018*** | (0.157) |
| Political Salience | -0.393 | (0.202) |
| Ideological Alignment | 1.233*** | (0.280) |
| Constant | -2.188*** | (0.200) |
| <i>N</i> | 1205 | |

Robust standard errors in parentheses clustered by Justice

* p<.05, ** p<.01, *** p<.001