
Party, Ideology, or Situational Constitutionalism? Explaining the Supreme Court's Separation of Powers Jurisprudence

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Separation of powers debates during the Obama presidency have provided further support for the notion that political actors' positions on separation of powers issues are driven by unprincipled "situational constitutionalism." This paper examines the extent to which the fluidity that has characterized political actors' positions on separation of powers issues also characterizes Supreme Court voting behavior on separation of powers issues. Building upon scholarship analyzing Supreme Court voting behavior in cases implicating presidential powers, it examines the votes of Supreme Court justices across the full range of separation of powers controversies decided since 1968. Testing the expectations of situational constitutionalism against competing attitudinal, political regimes, and strategic voting models, it finds that situational constitutionalism explains the voting behavior of Supreme Court justices only in cases involving constitutional conflicts between Congress and the president. In cases involving conflicts between the judiciary and either of the elected branches, voting behavior reflects consistent preferences rooted in ideology that are neither contingent upon the partisan implications of decisions nor simply tactical attempts to expand the Court's power.

I. Introduction

Prior to 1968, the body of precedent relating to the distribution of national powers consisted of a relatively small number of decisions mostly delivered three decades earlier in response to the expansion of the federal government during the New Deal. However, beginning in 1969 in response to expansive claims of executive authority by the Nixon administration, the Court began what has been widely described as a "...striking revitalization of separation of powers case law" (Calabresi 2004). Yet in spite of the Court's renewed focus on the separation of powers, scholars that have closely examined the Court's recent separation of powers jurisprudence have criticized it for failing to adhere consistently to either of the two general

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standards of review that had been relied upon over the course of the Court's history to decide such cases: formalism and functionalism. Rather than explicitly adopt either of these approaches, the Court's post-1968 jurisprudence has been characterized as "...vacillating...between using a formalistic approach to separation of powers issues...and a functional approach" without articulating any sort of unifying principle to explain the inconsistency (Strauss 1987). For this reason, the Court's separation of powers jurisprudence has often been characterized as series of insincere tactical commitments motivated more by partisanship than by constitutional principles. Such characterizations are quite consistent with analyses of the behavior of actors in the elected branches of government with regard to the question of the distribution of national power (see for example Piper 1994). Partisan actors in Congress and the presidency have regularly been portrayed as engaging in "situational constitutionalism," or the tendency of political actors to "...adopt expansive understandings of the power of the institutions they currently hold and constricted understandings of the institutions that are held by their opponents...commitments [that] may sometimes change on a moment's notice" (Whittington 2007).

The contours of recent political debates on separation of powers issues have provided ample evidence for such conclusions. In particular, partisan debates on the constitutional balance of power between Congress and the president during the Obama presidency have been in many ways a mirror image of those during the Bush presidency, which in turn represented a reversal in many ways of those that characterized Clinton presidency. While Republicans have taken the lead in challenging Barack Obama's assertions of constitutional authority to conduct warrantless domestic surveillance, use executive orders to circumvent the legislative process, selectively enforce federal law, and launch military action in Libya without congressional

approval, they were consistently supportive of George W. Bush's even more expansive assertions of constitutional authority in the "War on Terror" and in the domestic sphere (see for example Tanenhaus 2008; Friedersdorf 2011; Hecl 2011). This embrace of executive power followed on the heels of Republican efforts to resist Bill Clinton's efforts to conduct foreign policy without congressional input, particularly his undeclared war in Kosovo, which several Republican members of Congress attempted to enjoin through litigation (see for example Fisher 2000).

Situational constitutionalism has also permeated debates regarding judicial power. Although Republicans have since the 1960s been consistent critics of "liberal activism" by federal courts, they have also become increasingly comfortable with judicial activism in pursuit of conservative ends as long periods of Republican control of the presidency have made the federal judiciary a more conservative institution. Thus, as this consolidation of judicial power unfolded, constitutional scholars associated with the Republican Party, such as Robert Bork and Antonin Scalia, began to argue that judicial deference to the elected branches is not necessarily a virtue (see for example Bork 1971; Bork 1990; Scalia 1989). Instead, they maintained that whether judges should overturn democratically enacted policies must turn exclusively on whether those policies comport with the original understanding of the Constitution and that judges should act assertively to protect constitutional values against the elected branches, particularly when the latter seek to violate the principles of federalism, private property rights, or rights to religious liberty. The migration of these views to the Supreme Court is indicated by the unprecedented lack of deference to Congress of the Rehnquist Court in particular. Between 1986 and 2005, the Rehnquist Court struck down 37 federal statutes, or approximately 1.94 statutes each year. This can be compared to 32 statutes, or 1.88 statutes per year, between 1969 and 1986

under the Burger Court, 23 federal statutes, or 1.43 per year, between 1953 and 1969 under the Warren Court, and 17 statutes, or 0.74 per year between 1930 and 1953 under the Hughes, Stone, and Vinson Courts (Epstein, Segal, Spaeth, and Walker 2007). This turnabout has led liberal critics who lionized the activism of the Warren Court to denounce the Rehnquist and Roberts Courts for a lack of respect for Congress and failure to understand the institutional role of the judiciary (see for example Keck 2004).

However, there is also reason to suspect that, despite the analytical incoherence of the Court as a whole and the opportunistic stances of many political actors, the behavior of individual members of the Court in separation of powers cases is not as unprincipled as the conventional wisdom suggests. As the following sections illustrate, numerous issues implicating the separation of powers have acquired consistent partisan and ideological overtones that have transcended changes in the political fortunes of the parties. It may therefore be expected that these cleavages have found their way to the Court and that justices' voting behavior is less sensitive to the immediate political context than is widely thought. While issues relating to the scope of inherent executive power vis à vis Congress and the judiciary have been major sources of partisan conflict during the "War on Terror," these contemporary sources of political polarization have far deeper roots than the dramatic recent increase in attention to these issues would suggest. Thus, this paper both reviews the significant extent to which the parties have staked out consistent positions regarding the separation of powers as well as analyzes the impact of this development upon the Court by testing the expectations of the competing decision-making models in the separation of powers context. This analysis demonstrates that while some of these patterns of political polarization with regard to the separation of powers have migrated to the Court, it may be more accurate to speak of them as ideological divisions rather than as

partisan divisions.

II. Academic Perspectives on the Supreme Court and the Separation of Powers

In part due to the aforementioned inconsistencies in the Court's recent separation of powers jurisprudence, behavioral research on Supreme Court decision-making has frequently ignored the political/attitudinal dimensions of separation of powers cases, an omission reflective of a more general underestimation of the ideological valence of cases dealing with structural issues and the tendency of scholarship conceptualizing judicial decision-making as structured by politics and/or ideology to focus on more overtly ideological areas of the law (such as criminal justice, freedom of speech, or economic liberty) where "liberal" and "conservative" positions are more readily identifiable. Instead, the structural features of the Constitution have often been characterized as ideologically neutral "legal structures." For example, Segal and Spaeth's (1993) classic work on Supreme Court decision-making ignores the separation of powers almost entirely and discusses federalism only to suggest that it is a tactical commitment used by justices to advance other policy goals. Even separation of powers decisions implicating judicial power, while analyzed by Segal and Spaeth, are dismissed as the products of instrumental allegiances used by justices "...to rationalize, support, or justify their substantive policy concerns" (1993). Perhaps even more surprisingly, scholars who adopt strategic approaches toward Supreme Court decision-making have also largely disregarded the Court's separation of powers cases. While "separation of powers games" have attained considerable popularity, these have focused broadly upon the formal and informal interactions between the judiciary and the political branches of government in a system with a separation of powers rather than specifically upon cases implicating the

distribution of power among the three branches. This despite the fact that strategic models are consistent with the assumption that judges will generally seek to expand their institutional power regardless of the substance of the policies promoted and the fact that “soft strategic choice” analyses have been prominent in the study of judicial power in other countries (see for example Ginsburg 2003; Hirschl 2004).

Most importantly, the relatively small but prominent body of scholarship that has focused specifically upon separation of powers cases has, despite illuminating a number of important regularities in the separation of powers jurisprudence of both the United States Supreme Court and lower federal courts, neglected to address the question of whether judicial behavior in this context reflects situational constitutionalism or consistent partisan/ideological fault lines and focused instead primarily upon legal variables (King and Meernik 1999) and/or focused narrowly upon cases adjudicating the scope of presidential power (Ducat and Dudley 1989; Yates and Whitford 1998) or upon more specific jurisprudential issues (such as judicial activism and restraint and judicial deference to agencies’ statutory interpretations in administrative law cases) with significant implications for the separation of powers (see for example Staudt, Epstein, Wiedenbeck, Lindstadt, and Vander Wielen 2005; Miles and Sunstein 2006; Harriger 2011) rather than upon separation of powers cases generally. Nonetheless, the linkages found, for example, between partisanship and ideology and views regarding the constitutional scope of presidential power and deference to administrative agencies suggests a need for a more comprehensive analysis examining whether such consistent partisan/ideological cleavages can also be found in other types of separation of powers controversies.

Given that judges are less likely to adopt purely tactical positions than are elected policymakers and are likely to be more consistent in the positions they embrace, this appears

likely to be the case. In particular, the institutional dynamics that structure judicial behavior are quite different from those in the elected branches and these are likely to make judges more principled in their commitments (see for example Clayton and Gillman 1999). As Whittington (2007) explains:

Having embraced broad theories of inherent presidential powers, judges are unlikely to hedge them simply because they are being exercised by oppositional presidents. Given the precedent-setting effects of judicial decisions, the Court cannot readily afford to ignore the long-term implications of its decisions affecting the current occupant of a government office. The judiciary cannot so easily reverse course when a more friendly figure occupies the Oval Office, and thus must hold the line when executive-legislative battles spill over into the courtroom.

Moreover, there is reason to believe that these principled commitments mirror commitments by political actors, commitments that for these actors have co-existed uneasily with their frequent embraces of situational constitutionalism. In the brief history that follows I demonstrate how consistent patterns of political polarization with regard to separation of powers issues cast doubt upon assumptions that the separation of powers is an ideologically and politically neutral “legal structure” and suggest the need for a closer examination of the ideological underpinnings of Supreme Court voting patterns across the full range of separation of powers controversies.

III. Recurring Partisan Patterns in Separation of Powers Debates

Although evidence of situational constitutionalism abounds, there are also a number of consistent threads in the parties’ recent stances on separation of powers issues that make simple generalizations inappropriate. These began to assume their present form following the 1968 election, an election in which a new political order began to take shape insofar as the Democratic and Republican parties began to espouse divergent positions on a number of new cleavage issues including federalism and the separation of powers (see for example Clayton and Pickerill 2004).

In particular, the Nixon administration represented a marked departure from the partisan pattern with regard to the separation of powers set by previous administrations during the New Deal regime. While it had been Democrats Franklin Roosevelt and Harry Truman who had substantially augmented the power of the presidency in relation to Congress through, for example, Roosevelt's successful pursuit of emergency authority during the Great Depression and World War II and Truman's unilateral involvement of the United States in the Korean War, the only Republican to serve as president during this era, Dwight Eisenhower, deliberately sought to restore the pre-New Deal balance of power between the branches by avoiding unilateral actions with regard to the use of military force and seeking consensus with Congress even when he believed that he possessed the constitutional authority to act independently (Fisher 1991). These differences in presidential leadership were reflective of deeper and more general partisan fault lines with regard to the issue of separation of powers as during this period it was largely liberal Democrats who viewed the president as the sole actor able to circumvent entrenched interests and act directly on behalf of the people and advocated expansive functionalist readings of the constitutional scope of executive power such as the "stewardship" theory (see for example Nelson 1995; Thomas and Pika 1996) while it was largely conservative Republicans, in particular figures such as Senator Robert "Mr. Republican" Taft, who advocated more narrow and formalistic readings (Fisher 1991). It therefore signaled a realignment of the parties' traditional postures when in both the domestic and international spheres the Nixon administration espoused an unprecedentedly broad view of executive power and launched a concerted effort to increase the power of the president in relation to Congress and the judiciary.

In the domestic arena this involved pioneering what has been termed the "administrative presidency" strategy, attempting to block the enforcement of the anti-poverty and civil rights

statutes that had been passed as part of the “Great Society” by centralizing administrative policymaking in the White House (Nathan 1975), and impounding funds appropriated by Congress on a scale that “...set a precedent in terms of magnitude, severity, and belligerence” (Fisher 1991). This effort also extended to foreign affairs, where Nixon’s aggressive conduct of the Vietnam War, in particular his secret bombing campaigns and expansion of the conflict into Cambodia and Laos, posed a direct challenge to congressional prerogatives by clearly contravening the spirit of congressional authorizations of the war (Fisher 2004). Nixon’s attempts to expand executive authority vis à vis the courts represented no less of a departure from traditional Republican restraint as he ordered unauthorized wiretaps and mail openings and relied upon a novel and expansive conception of executive privilege to attempt to obstruct judicial inquiry into the Watergate scandal.

These actions led to interbranch confrontations with strong partisan overtones as the Democrats in control of Congress responded to Nixon’s aggrandizements of power with the War Powers Resolution of 1973, placing significant new restrictions upon the president’s ability to commit troops to combat, and the Impoundment Control Act of 1974, establishing the Congressional Budget Office and limiting executive impoundments. Most notably, efforts by Democrats to restrain what they viewed as an increasingly imperial presidency and reassert congressional prerogatives would continue even after their party recaptured the White House, with the Foreign Intelligence Surveillance Act, which placed sweeping new restrictions on presidential use of intelligence agencies, and the Ethics in Government Act, establishing an independent counsel’s office for investigating allegations of misconduct in the executive branch, both enacted during the Carter administration.

This cleavage would persist as subsequent Republican presidents continued to pursue

President Nixon's expansive vision of executive power. The post-1968 Republican Party's constitutional commitment to a powerful presidency was perhaps best articulated in a series of White House and Justice Department memoranda issued during the Reagan administration. These most significantly included the 1986 Justice Department memo *Separation of Powers: Legislative-Executive Relations*, which harshly criticized congressional encroachments upon executive power in the wake of Watergate and the Vietnam War and articulated the unitary executive theory (United States Department of Justice Office of Legal Policy 1986). Reagan's successor George H.W. Bush adopted much the same posture, opposing reauthorization of the independent counsel statute and maintaining during the Persian Gulf War that he had independent authority to conduct military operations against Iraq without congressional approval (Savage 2007; Fisher 2004). Similarly, while George W. Bush's attempts to augment the power of the presidency have often been characterized as an opportunistic response to the events of September 11th, 2001, the Bush administration had adopted an aggressive strategy aimed at expanding executive authority and weakening Congress even before the attack on the World Trade Center (Fisher 2004). This broad view of executive power had several distinctive manifestations that built upon efforts of previous Republican presidents, most notably Bush's unparalleled use of signing statements to delineate how legislation is to be construed by the executive branch (issuing more during his first term than had been issued by all previous U.S. presidents combined), his unprecedented claims to control of executive branch information, and his assertions of inherent authority to conduct the "War on Terror" (van Bergen 2006; Savage 2007).

In contrast, the three Democratic presidents who have served since 1968 have exhibited a somewhat different conception of the scope of presidential power. Jimmy Carter signed both the

Foreign Intelligence Surveillance Act and the Ethics in Government Act into law and was the only president to acknowledge the constitutionality of the War Powers Act while the Clinton administration was similarly characterized as "...cautious in its assertion of executive power, with...more respect for congressional prerogatives" (Rosen 2006; see also Kassop 2002). Moreover, the Republican Party's commitment to a stronger presidency and Democratic resistance to it continued in several important respects even during the coexistence of the Clinton presidency and Republican control of Congress. For example, one of the items in the Contract with America that the Republican leadership succeeded in passing was the Line Item Veto Act of 1996 and congressional Republicans also generally acquiesced in President Clinton's unauthorized deployment of troops to Bosnia and even attempted, albeit unsuccessfully, to repeal the War Powers Act. Consistent with post-1968 partisan fault lines, most Democrats in Congress opposed both efforts despite holding the presidency at the time. Moreover, although Barack Obama has embraced many of the controversial war powers seized by his Republican predecessor and taken a number of actions that have reflected an expansive view of executive power, his rhetoric as a candidate in 2008 was much more attuned to base Democratic sensibilities on the issue, claiming that his background as a constitutional law professor meant that unlike George W. Bush he would "...actually respect the Constitution" (Rokita 2012).

An even more significant indicator of the extent to which the expansion of executive power at the expense of Congress that has been pursued by Republican presidents and codified in constitutional law by the justices they have placed on the Supreme Court is reflective of the values of the New Right regime can be found in national party platforms. As previous research such as Clayton and Pickerill's (2004) examination of references to federalism in party platforms has illustrated, platforms have served as important venues for articulating competing

constitutional visions on structural issues such as the separation of powers. Thus, the degree to which the Democratic and Republican parties have officially adopted contrasting positions on the issue is indicative of whether situational constitutionalism or genuine constitutional vision is at work. Conducting a content analysis of the national platforms of the two parties from the 1968 through the 2012 presidential election, references to the distribution of national powers were identified and coded. References were coded as either pro-executive (encompassing references expressing opposition to alleged encroachments upon presidential authority and/or alleged congressional aggrandizements of power as well as references expressing support for policies that would confer power upon the president traditionally viewed as legislative or judicial in nature) or pro-congressional (encompassing references expressing opposition to alleged encroachments into the legislative sphere and/or alleged presidential aggrandizements of power as well as references expressing support for policies that would grant Congress power in areas traditionally viewed as administrative or judicial in nature). For example, references to eliminating congressional restrictions on the conduct of intelligence collection, to curtailing corruption in Congress by applying the independent counsel law to Congress, and to granting the president line item veto authority were coded as pro-executive while references to greater congressional involvement in decisions regarding the use of military force, to opposing the use of broad claims of executive privilege to bar access to information, and to granting Congress greater oversight of the enforcement of the law by administrative agencies were coded as pro-congressional.

[Figures 1-2 about here]

Examining the results, it is clear that, as expected, the post-1968 Republican Party has consistently espoused an expansive view of executive power and supported policies that would

institutionally strengthen the presidency vis à vis Congress. The Democratic Party, on the other hand, has both devoted relatively less attention to the issue and been somewhat less consistent in its posture, although, as expected, it has generally favored a stronger legislative branch. At the same time, there is also evidence of situational constitutionalism insofar as the Democratic Party either ceased its rhetorical support for Congress or actually made statements supporting a stronger executive branch in some respects in each of the years in which a Democrat held the presidency. Similarly, the Republican Party's string of consistently pro-executive rhetoric was sandwiched between strongly pro-congressional rhetoric in 1968, when Republicans had controlled the presidency for a mere eight years out of the previous 36, and 2012, when demographic trends suggested that Democratic control of the presidency was not merely the temporary aberration that it had been in the past.

The Republican Party's support for a more powerful executive branch encompassed a broad range of policy areas that closely tracked both the interbranch clashes that have occurred since the Nixon administration as well as many of the disputes that have reached the Supreme Court. The most frequently mentioned policy proposal for strengthening the presidency was the party's support for the line item veto, which made its first appearance in the 1984 platform with the declaration that the party thought it desirable that the president be empowered to veto individual items in authorization and appropriation bills and was subsequently mentioned in each Republican platform through 2008. Another item which received frequent mentions was the party's opposition to congressional oversight of intelligence agencies, which was first articulated in 1980 with the statement that "...we will seek the repeal of ill-considered restrictions sponsored by Democrats which have debilitated U.S. intelligence capabilities while easing the intelligence collection and subversion efforts of our adversaries" and repeated in similar terms in

1984, 1988, 1996, and 2004. Also receiving considerable attention were proposals to increase presidential control over the executive branch by consolidating or eliminating independent agencies. Describing existing arrangements as the result of “...whim, bureaucratic fighting, and the caving of the Democratic Congress to special interest demands,” these proposals appeared in 1972, 1976, and 1980. In contrast, the most frequent theme related to separation of powers to appear in Democratic platforms was the party’s support, beginning in 1972, for “...greater sharing with Congress of real decisions on issues of war and peace and providing Congress with the information and resources needed for a more responsible role,” which was reiterated in virtually every subsequent election during which a Republican occupied the White House.

What this very brief historical review suggests is that despite ample evidence that political actors’ positions on separation of powers issues are often driven by tactical considerations, the parties’ positions on these issues have also featured certain consistent themes that have not been dependent upon their control of particular branches of government. This raises the question of whether the same tension between opportunism and principle can also be found on the Supreme Court, where institutional norms and longer time horizons should incline justices toward a more consistent approach. The following section outlines the major models Supreme Court decision-making and how they may offer insight into this matter.

IV. Decision-making Models

A. Partisan Loyalty Model

The partisan loyalty model represents the view that Supreme Court decision-making in separation of powers cases is best described as situational constitutionalism, the observed tendency of political actors to “...adopt expansive understandings of the power of the institutions

they currently hold and constricted understandings of the institutions that are held by their opponents” (Whittington 2007). Thus, it is the interaction between the partisanship of a justice and the partisanship of those controlling the branches of government whose power is at issue that the partisan loyalty model would predict to be the most relevant factor in predicting justices’ votes in separation of powers cases. Therefore, two hypotheses would follow from this view of the Court’s behavior:

H₁: In cases involving Congress and the president, justices will be significantly more likely to support the branch controlled by their own party when the two branches are controlled by different parties.

H₂: In cases involving the judiciary and either Congress or the president, justices will be significantly more likely to support either Congress or the president when those branches are controlled by the justice’s party than when they are not.

B. Political Regimes Model

As the Republican Party comprised the bulwark of the national governing coalition for most of the period under consideration and has as an organization (if not at the individual level) articulated a relatively clear and consistent constitutional vision with regard to the separation of powers, the political regimes model of Supreme Court decision-making would appear to have considerable potential leverage in explaining the Court’s separation of power jurisprudence. Building upon Robert Dahl’s (1957) work explaining the congruence between Supreme Court decision-making and the core policy preferences of national governing coalitions, the political regimes model posits that political regimes implement their programs not only through legislative but also through judicial channels and pursue judicial selection strategies that result in

justices being appointed to the Court who share the regime's general constitutional vision (see for example Clayton and Pickerill 2004). Thus, justices appointed by Republican presidents during the period of Republican and conservative political dominance at the national level that is commonly referred to as the New Right political regime would be expected to share the party's distinctive views on the separation of powers whereas justices appointed by Democratic presidents during this period (as well as Republican appointees placed on the Court during the New Deal regime, when the G.O.P. generally positioned itself as an opponent of the aggrandizements of presidential power engaged in by Democratic administrations) would be expected to hold contrasting constitutional values with regard to the separation of powers. On the other hand, justices appointed by Democratic presidents during the New Deal regime would also appear to be inclined to hold views with regard to the separation of powers relatively similar to New Right justices, particularly with regard to executive power, given the aforementioned broad readings of presidential power espoused by Democratic presidents from Roosevelt through Johnson.

While scholars have disagreed on precisely which national election represented the critical election that ushered in the New Right regime, it was the Nixon presidency that heralded the break with previous Republican administrations with regard to support for a more powerful presidency. Therefore, the political regimes model would expect pre-1968 Democratic appointees and post-1968 Republican appointees to the Court to have distinctively pro-executive views vis à vis other appointees regarding the constitutional balance of power between the president and Congress. However, it would expect positions on judicial power to be more mixed. On the one hand, both pre-1968 Democratic appointees and post-1968 Republican appointees would likely be less favorably disposed toward judicial power vis à vis the executive

branch than other appointees given the expansive interpretations of the constitutional scope of executive power of New Deal era Democratic presidents in general and the previously discussed attempts of New Right era Republican presidents to limit judicial supervision of the activities of the executive branch in particular. On the other hand, the political regimes model would expect a less distinct pattern on the issue of judicial power vis à vis Congress. While opposition to judicial activism and encroachment upon the powers and prerogatives of the political branches of government has been one of the ideological cornerstones of the post-1968 Republican Party, the posture of the New Deal era Democratic Party was much less consistent. In particular, New Deal Democrats were divided between proponents of judicial restraint who believed that the major threat to American constitutionalism was judicial tyranny and proponents of judicial activism who believed that the courts should be used to promote liberal ends. These political divides were reflected in jurisprudential divides on the Supreme Court between justices such as Felix Frankfurter and Hugo Black (see for example Feldman 2010). Thus, the political regimes model would expect the following:

H₁: In cases involving Congress and the president, Democratic justices appointed prior to 1968 and Republican justices appointed after 1968 will be significantly more likely to support the president.

H₂: In cases involving the judiciary and the president, Democratic justices appointed prior to 1968 and Republican justices appointed after 1968 will be significantly more likely to favor the president over the judiciary.

H₃: In cases involving the judiciary and Congress, Democratic justices appointed prior to 1968 and Republican justices appointed after 1968 will not differ significantly as a group from other justices.

C. Attitudinal Model

The attitudinal model builds upon the work of the legal realist movement and argues that the law itself is fundamentally indeterminate and insufficient to provide definitive answers to most legal disputes, particularly the types of disputes on the Supreme Court's docket, leaving justices with only their personal ideology and policy preferences to rely upon (Segal and Spaeth 1993). It posits that the institutional position of the Supreme Court so insulates its decisions from override and its members from retaliation that justices can freely cast votes that are a direct reflection of these preferences without regard for external political and contextual factors. Thus, attitudinalists argue, references in opinions to constitutional and legal considerations must be seen for what they are: post-hoc rationalizations for votes cast on ideological grounds.

In the context of separation of powers cases, as attitudinalists have traditionally maintained that because justices are motivated primarily by ideological considerations and will vote for the outcome closest to their ideal point in ideological space, they would expect that justices will tactically side with the branch of government controlled by the political actor or actors most ideologically proximate to them in order to facilitate the enactment of policies consistent with their preferences. Thus, the expectations of the attitudinal model, due to the fact that its proponents have generally discounted the idea of structural issues such as the separation of powers possessing any inherent ideological content, are similar to those of the partisan loyalty model, with the only difference being that it views ideology rather than partisanship as the relevant consideration. Therefore, as traditionally presented, the attitudinal model would make the following predictions:

H₁: In cases involving Congress and the president, justices will be significantly

more likely to support the branch that is most ideologically proximate to them.

*H*₂: In cases involving the judiciary and either Congress or the president, justices will be significantly more likely to support either Congress or the president when they are ideologically proximate to the justice.

D. Strategic Model

Finally, the strategic model holds that while justices are ideologically motivated, they are constrained from engaging in the type of sincere voting predicted by the attitudinal model by the ability of the elected branches of government to override and/or obstruct the enforcement of their decisions. Thus, the strategic model predicts that justices will vote for the outcome that is likely to induce the best response from the political branches (Epstein and Knight 2000; Sala and Spriggs 2004). As a result, according to proponents of the strategic model, whether a decision by the Court reflects the balance of the sincere preferences of its members is contingent upon the relative positions of the preferences of Congress and the president in ideological space. In particular, if the preferences of Congress and the president are sufficiently distant from those of the Court, decisions reflecting the Court's sincere preferences are likely to induce a hostile reaction that may jeopardize the efficacy of those decisions. Confronted with such a political environment, a Court behaving in a manner consistent with the expectations of the strategic model will pragmatically compromise its preferences in the direction of those of Congress and the president (see for example Gely and Spiller 1990; Eskridge 1991). Applied to the separation of powers context, this suggests that a Court (and by extension the justices comprising it) that is relatively proximate in ideological space to Congress or the president may have more leeway to reach decisions contrary to the institutional interests of Congress or the president insofar as its

decisions are generally less likely to be perceived by those branches as ideologically incongruent. Conversely, a Court that is relatively distant in ideological space from Congress or the president may be more constrained in its separation of powers jurisprudence insofar as any decisions that it reaches that are contrary to the institutional interests of Congress or the president are particularly likely to be viewed through a lens of ideological hostility. Therefore, whereas the attitudinal model posits a linear relationship between the ideological proximity of a branch of government and the likelihood of a justice voting in favor of the institutional prerogatives of that branch, the strategic model posits a more complex curvilinear relationship. Specifically:

H₁: Justices will be most likely to support Congress or the president when those branches are highly proximate ideologically and the probability of support will decrease as those branches become more distant ideologically until reaching a trough at the point at which the ideological distance is so great that sincere expressions of judicial preference are to the left or to the right of the indifference point of Congress or the president in ideological space. Beyond this point, the likelihood of support for Congress or the president will increase as justices seek to accommodate congressional or presidential preferences and avoid political backlash.

V. Data and Methods

In order to test these competing propositions, all of the votes cast in the Supreme Court's decisions addressing the constitutional distribution of power between Congress, the president, and the federal judiciary delivered between the appointment of Chief Justice Burger in 1969 and the Court's 2013 decision in *Clapper v. Amnesty International* were analyzed. These consisted

of a total of 888 votes cast in 83 cases adjudicating separation of powers issues (some cases presented multiple separation of powers issues and therefore contributed multiple sets of votes) identified via a LexisNexis search. While the discretionary docket of the Supreme Court and the disinclination of its justices to decide cases likely to produce policy inconsistent with their preferences often makes drawing conclusions regarding the Court's behavior on the basis of the cases it elects to decide problematic (Epstein and Segal 1997), this is less of a concern in the separation of powers context. As the Court has historically been equally solicitous of avoiding conflict with Congress and the president, it has generally been reluctant to avoid cases that powerful government actors want it to resolve, particularly when such desires are formally communicated by the solicitor general (Epstein and Knight 2000). Thus, given the unique political salience of separation of powers controversies and the fact that solicitor general either participated directly or filed an amicus brief in nearly 90% of the cases analyzed, the difference between the universe of potential cases and the universe of decided cases is likely less significant with regard to separation of powers cases than with regard to other areas of the law.

As each separation of powers case presented a choice to each of the justices to favor the interests/prerogatives of one branch of the federal government over those of another, each vote was coded on the basis of which two branches were in conflict and which of the two branches involved the justice voted for in that particular case. Thus, the dependent variable used to analyze conflicts between the president and Congress was the dummy variable *vote for president over Congress*. Cases coded as representing this type of conflict included cases arising from attempts by Congress to control the execution of its laws (such as *Bowsher v. Synar*, *Buckley v. Valeo*, and *I.N.S. v. Chadha*) or to abrogate presidential privileges and immunities (such as *Nixon v. Administrator of General Services*) as well as cases arising from attempts by presidents to

exercise de facto legislative authority (such as *Clinton v. City of New York*) or to take action normally requiring congressional approval in the absence of explicit authorization (such as *Dames & Moore v. Regan*). The dependent variable used to analyze conflicts between the president and the judiciary was the dummy variable *vote for president over judiciary*. Cases coded as representing this type of conflict included cases arising from attempts by presidents to rely upon their power as commander in chief to deny or restrict access to the courts (such as *Boumediene v. Bush*, *Hamdan v. Rumsfeld*, *Hamdi v. Rumsfeld*, and *Rasul v. Bush*) or to invoke the separation of powers to immunize themselves and/or other officers of the executive branch from judicial scrutiny (such as *Clinton v. Jones* and *United States v. Nixon*) as well as cases arising from judicial oversight of executive branch administrative agencies (such as *Chevron v. Natural Resources Defense Council*). Finally, the dependent variable used to analyze conflicts between the judiciary and Congress was the dummy variable *vote for judiciary over Congress*. Cases coded as representing this type of conflict included controversies (such as *Allen v. Wright*) over whether granting standing would exceed the judiciary's Article III mandate to adjudicate cases and controversies by allowing it to adjudicate generalized grievances properly the domain of Congress and cases arising from attempts by Congress to overturn the Supreme Court's constitutional decisions (such as *City of Boerne v. Flores* and *Dickerson v. United States*) or to assign the adjudication of certain types of cases to non-Article III courts (such as *Commodity Futures Trading Commission v. Schor*) or otherwise infringe upon judicial independence (such as *United States v. Hatter*). Other types of conflicts between the judiciary and Congress included cases arising from attempts by members of Congress to invoke congressional privileges and immunities to avoid judicial scrutiny (such as *Gravel v. United States*).

The independent variables employed included variables specifically relevant to each of

the models being tested as well as a number of control variables. To test for situational constitutionalism, the interaction between the partisanship of the president and of the majority party in each house of Congress at the time of each decision and the partisanship of each justice participating in the decision (using the partisanship of the president that appointed them as a proxy measure) was recorded. The partisan relationship between the justice and the current president was coded using the dummy variable *same party president* while the partisan relationship between the justice and the current Congress was coded using the dummy variables *same party Congress* and *different party Congress* (divided control was the excluded reference category). The variables used to test the political regimes model were the dummy variables *New Deal/New Right justice*, which captured whether or not the justice was a pre-1968 Democratic appointee or post-1968 Republican appointee and *New Right justice*, which simply captured whether or not the justice was a post-1968 Republican appointee. In order to test the attitudinal model, measures of the ideology of each justice as well as of the president and Congress at the time of each decision were taken. First dimension Common Space Nominate scores were used to measure presidential ideology as well as the ideology of the pivotal members of the House and Senate (see Poole 1998). Consistent with the theory of median dominance in congressional policymaking, the Common Space scores of the median member of the House and the median member of the Senate were used as the measure of the ideology of the pivotal member of each house and then averaged to produce a composite measure of congressional ideology at the time of each decision. For a measure of judicial ideology in the same ideological space, Epstein, Martin, Segal, and Westerland's (2007) Judicial Common Space scores were used. The ideological distance between the justice and Congress and the justice and the president, measured in terms of the absolute value of the difference between their respective Common Space scores

for that term, was then calculated for each vote cast. Finally, the strategic model and its hypothesis of a curvilinear relationship between the ideological distance between a justice and either Congress or the president and the likelihood of a vote being cast in favor of that branch's institutional prerogatives was tested by creating quadratic terms squaring these distances.

While considerable endogeneity among the variables used to test these models might be anticipated, the variables capturing justices' partisanship, regime cohort, and ideology in fact measure quite distinct underlying constructs. As Table 1 illustrates, the ideology of justices varies considerably not only among justices of the same political party but also among justices of the same political party appointed in the same era. Even among New Right Republicans, the subset of justices that one would expect to be the most ideologically homogeneous, the full ideological spectrum, from liberals such as John Paul Stevens and David Souter to centrists such as Anthony Kennedy and Sandra Day O'Connor to conservatives such as Antonin Scalia and Clarence Thomas, is represented. Similarly, both the Republicans and the Democrats appointed prior to 1968 run the gamut from highly liberal justices such as Republican appointee William Brennan and Democratic appointee William Douglas to conservative leaning centrist justices such as Republican appointee John Harlan and Democratic appointee Byron White. It is only the limited cohort of the four post-1968 Democratic appointees that displays the anticipated ideological homogeneity. Thus, being a Republican, even a New Right Republican, is no guarantee that a justice is a conservative just as being a Democrat is no guarantee that a justice is a liberal.

[Table 1 about here]

Additionally, other potentially significant variables were included as controls. In order to control for the possibility that Democratic appointees and Republican appointees may have

consistent and distinct preferences with regard to the separation of powers regardless of their ideology, cohort, or partisan/ideological relationship to the branches of government whose power is being litigated, the partisanship of each justice was captured by creating the dummy variable *Republican justice*. Furthermore, as the importance of partisanship, regime values, and/or ideology in structuring judicial behavior is likely to be accentuated in particularly significant cases, the dummy variable *important case* was created to capture case salience. Employing Maltzman and Wahlbeck's (1996) operationalization, case salience was measured in terms of the number of amicus briefs filed by third parties on the merits of the case, with each case in which a disproportionately large number of such briefs were filed (in excess of one standard deviation above the mean) classified as an important case. Given the disproportionate success enjoyed relative to other litigants by the solicitor general as a repeat player before the Court, whether the solicitor general participated in the case (by delivering an oral argument on behalf of one of the parties in the case and/or filing an amicus brief) was noted for each case by creating the dummy variable *solicitor general participation*. Moreover, as a number of scholars (see for example Calabresi 2004) have attributed differences in justices' approaches to separation of powers cases to differences in their backgrounds (in particular the service of a number of justices in presidential administrations prior to joining the Court), whether a justice had previous experience serving in the executive branch was noted by creating the dummy variable *executive branch experience*. Also taken into consideration was whether the Court was affirming or reversing the lower court's decision, as the Court's limited docket space has produced a natural bias toward reversing the relatively small number of decisions it is able to review (Segal and Spaeth 1993). Finally, as the salience of partisanship and/or ideology is likely to be affected by the relative strength of the constitutional arguments offered by the opposing parties in each case, the dummy

variable *unanimous decision* was created in order to isolate cases that are relatively unambiguous legally and therefore theoretically offer less latitude for partisan and/or ideological factors to come into play.

VI. Results

The regression models were estimated using binary logistic regression. A model was estimated for each of the three types of interbranch conflict using the variables relevant to each of the decision-making models with regard to that conflict type as well as relevant control variables. The results of the three regression models are reported in Tables 2 – 4. The results indicate that the explanatory power of models of Supreme Court decision-making in the separation of powers context is contingent upon the type of interbranch conflict.

[Tables 2-4 about here]

In conflicts between Congress and the president, there was evidence of both partisan and ideological loyalty as well as evidence of separation of powers issues possessing inherent ideological valence. In particular, justices were significantly more likely to side with Congress when their party had complete control of Congress and significantly *less* likely to side with Congress when there was a large amount of ideological distance between themselves and the congressional median. However, there was also evidence of deeper principles driving voting behavior insofar as more conservative justices were on balance consistently more pro-executive than more liberal justices. In a similar vein, unanimity and affirming lower court decisions also proved to be significant predictors of votes in favor of the president in these cases. The fact that the Court was more likely to favor the president in its unanimous decisions and to favor the president in cases in which it may be engaging in aggressive grants of certiorari suggests,

somewhat contrary to the expectations of the partisan loyalty and attitudinal models, a general pro-executive bias on the part of the Court regardless of which party has held the presidency.

On the other hand, ideology proved to be the only variable used to test the competing models that was significant in the context of interbranch conflicts involving the judiciary. Notably, however, it was ideology itself and not partisanship or ideological distance that was significant, casting further doubt upon attitudinalists' traditional assumption that separation of powers issues lack ideological valence. Most importantly, not only was ideology significant, its effect paralleled the general fault lines of conflict regarding the separation of powers between Democrats and Republicans that have emerged since 1968 despite the fact that, as previously discussed, there is considerable independence between ideology and partisanship in the context of the membership of the Supreme Court. Specifically, more conservative justices were inclined to favor the president over the judiciary, paralleling post-1968 Republican support for an executive branch less constrained by judicial oversight. At the same time, they also tended to favor Congress over the judiciary, paralleling the other major strand of post-1968 Republican thought regarding the separation of powers: opposition to judicial activism and usurpation of the policymaking function of the political branches of government. However, as in cases involving conflicts between Congress and the president, the *New Deal/New Right justice* variable failed to achieve statistical significance. This was the case even when the *New Deal/New Right justice* variable was replaced with a variable isolating only post-1968 Republican appointees in order to account for the likelihood that pre-1968 Democratic appointees represented a less homogeneous cohort with regard to separation of powers issues than post-1968 Republican appointees. This suggests that the apparent divergence in Democratic and Republican perspectives on the separation of powers may reflect deeper political trends that have not necessarily been confined

within party lines given the relative ideological heterogeneity of American political parties. It is also of note that justices were significantly more likely to cast votes favoring the judiciary over both the president and Congress in particularly important cases, indicating that strategic models of judicial behavior that assume that justices will generally seek to expand their institutional power regardless of the substance of the policies that are thereby promoted in individual cases may have considerable explanatory power in some respects.

However, there was no direct evidence of strategic voting behavior on the part of the justices. When introduced into the equation as replacements for the variables measuring ideological distance, the quadratic terms squaring these distances failed to attain statistical significance and marginally reduced the fit of each of the three models, reducing the R^2 of the first model from 0.30 to 0.28, of the second from 0.38 to 0.37, and of the third from 0.12 to 0.11. Similar results were obtained when cubic terms modeling an even more complex curvilinear relationship between ideological distance and voting behavior were used. While the strategic model is perhaps best tested at the aggregate rather than at the individual level insofar as it is the Court as a whole that the elected branches of government are reacting to, this analysis of individual-level voting behavior certainly did not provide any evidence that this is indeed what is occurring.

VII. Conclusion

While behavioral scholarship on Supreme Court decision-making has paid insufficient attention to the separation of powers and all too often assumed judicial decisions in this area simply reflected tactical commitments, these results indicate that this is not necessarily the case and that more general conclusions can be drawn from existing scholarship illustrating the ideological

valence of cases involving executive power insofar as other separation of powers issues have also acquired quite consistent ideological valence that are not contingent upon particular political parties being in control of particular branches of the federal government. Nonetheless, there is also a substantial basis in fact underlying the conventional wisdom, as situational constitutionalism appears to play a major role in cases involving conflicts between the two elected branches of the federal government. As the stimuli of partisanship and ideology are at their maximum in such cases, this is perhaps not entirely surprising. However, in cases involving conflicts between the judiciary and either of the elected branches, members of the Court have on the whole neither engaged in simple strategic expansion of their own institutional power nor in simple favoritism toward co-partisans. Perhaps even more notably, they have also not engaged in faithful transmission of regime values. In particular, despite the Republican Party's articulation of a relatively clear and consistent set of principles relating to the separation of powers, the apparent divisions along ideological lines among New Right justices make it inappropriate to speak of them as a distinctive or cohesive cohort with regard to separation of powers issues. Therefore, although strengthening the institutional power of the presidency and curbing judicial activism on the courts have been among the core values of the modern Republican Party, its embrace of these values may simply reflect the general conservatism of its membership rather than represent a phenomenon inherent to the party itself. This would explain the fact that among justices with similar ideological profiles, there were no significant differences in voting behavior in terms of regime cohort. Liberals, regardless of partisanship or appointment period, adopted a distinctive approach to questions of judicial power in relation to Congress and the president while conservatives, regardless of partisanship or appointment period, adopted a contrasting approach. Thus, the source of the pronounced post-1968

differences in the postures of the two major political parties with regard to the separation of powers appear to be attributable to broader changes in the issue positions associated with liberal and conservative political identifications that transcend party lines and predate 1968. While the meanings of the terms “liberal” and “conservative” have been certainly quite variable historically and their application to positions regarding the separation of powers issues is no exception (as, for example, support for an expansive construction of inherent executive power under the Constitution would not have been considered a conservative stance at any previous time in American history), it is nonetheless noteworthy that the infusion of such structural issues with consistent ideological valence is not simply a recent phenomenon.

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Figure 1

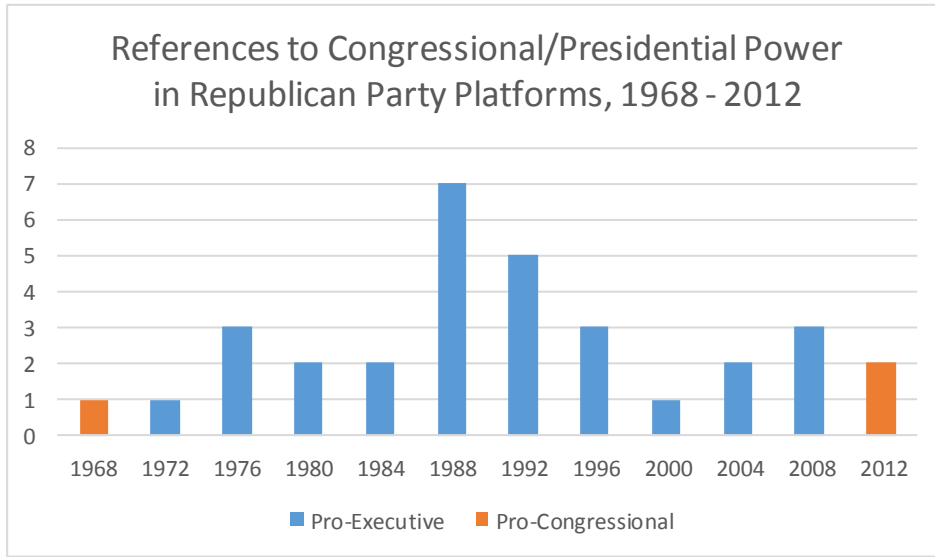


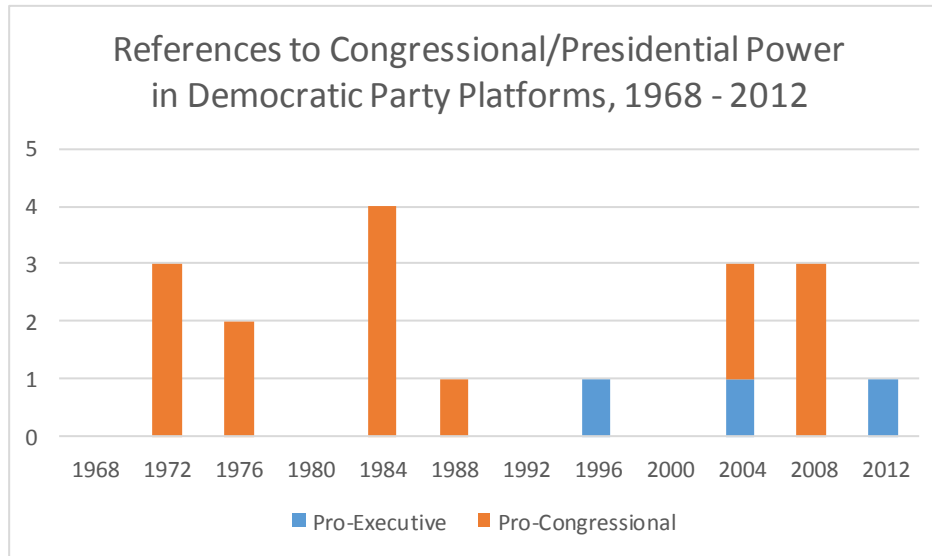
Figure 2

Table 1: Partisanship, Appointment Period, and Ideology of Justices Serving 1969 – 2012

<i>Justice</i>	<i>Party</i>	<i>Post-1968 Appointment?</i>	<i>Ideology</i>
William Douglas	Democratic	No	−0.81
Thurgood Marshall	Democratic	No	−0.63
Hugo Black	Democratic	No	−0.09
Byron White	Democratic	No	0.06
Ruth Bader Ginsburg	Democratic	Yes	−0.34
Stephen Breyer	Democratic	Yes	−0.29
Sonia Sotomayor	Democratic	Yes	−0.03
Elena Kagan	Democratic	Yes	−0.01
William Brennan	Republican	No	−0.61
Potter Stewart	Republican	No	0.03
John Harlan	Republican	No	0.06
John Paul Stevens	Republican	Yes	−0.42
David Souter	Republican	Yes	−0.31
Harry Blackmun	Republican	Yes	−0.17
Sandra Day O'Connor	Republican	Yes	0.15
Lewis Powell	Republican	Yes	0.15
Anthony Kennedy	Republican	Yes	0.16
Warren Burger	Republican	Yes	0.37
John Roberts	Republican	Yes	0.47
Samuel Alito	Republican	Yes	0.51
William Rehnquist	Republican	Yes	0.51
Antonin Scalia	Republican	Yes	0.54
Clarence Thomas	Republican	Yes	0.66

Table 2: Logistic Regression Predicting Justices' Votes in Congress v. President Cases[^]

<i>Variable^{^^}</i>	<i>Estimate</i>	<i>Std. Error</i>	<i>Wald</i>
Same party Congress	-1.80	0.65	7.56*
Different party Congress	-0.69	0.56	1.50
Same party president	-0.92	0.48	3.73
New Deal / New Right justice	0.33	0.58	0.32
Republican justice	-0.26	0.74	0.13
Conservative ideology	1.63	0.79	4.20*
Ideological distance from Congress	2.47	1.07	5.33*
Ideological distance from the president	0.43	0.56	0.58
Important case	-0.10	0.50	0.04
Executive branch experience	-1.06	0.67	2.50
Affirm lower court	1.32	0.46	8.40**
Unanimous decision	1.60	0.40	15.91***

-2 Log Likelihood = 184.75***

R² = 0.30

* p < 0.05

** p < 0.005

*** p < 0.0005

[^] 1 = vote for president

^{^^} Solicitor general participation was not included because it was constant for all cases in this subset

Table 3: Logistic Regression Predicting Justices' Votes in Judiciary v. President Cases[^]

<i>Variable</i>	<i>Estimate</i>	<i>Std. Error</i>	<i>Wald</i>
Same party president	0.28	0.33	0.73
New Deal / New Right justice	0.24	0.46	0.27
Republican justice	0.80	0.52	2.29
Conservative ideology	0.92	0.61	4.39*
Ideological distance from the president	-0.14	0.49	0.08
Important case	-0.84	0.36	5.42*
Solicitor general participation	2.73	0.54	25.77***
Executive branch experience	0.65	0.44	2.17
Affirm lower court	-1.81	0.37	23.89***
Unanimous decision	0.09	0.35	0.06

-2 Log Likelihood = 277.42***

R² = 0.38

* p < 0.05

*** p < 0.0005

[^] 1 = vote for president

Table 4: Logistic Regression Predicting Justices' Votes in Congress v. Judiciary Cases[^]

<i>Variable</i>	<i>Estimate</i>	<i>Std. Error</i>	<i>Wald</i>
Same party Congress	0.12	0.33	0.13
Different party Congress	0.24	0.29	0.66
New Deal / New Right justice	-0.22	0.34	0.42
Republican justice	0.13	0.29	0.21
Conservative ideology	-1.04	0.29	12.44***
Ideological distance from Congress	0.08	0.51	0.02
Important case	0.79	0.37	4.69*
Solicitor general participation	0.12	0.27	0.21
Affirm lower court	-0.17	0.22	0.58
Unanimous decision	-0.74	0.26	7.90*

-2 Log Likelihood = 471.63***

R² = 0.12

* p < 0.05

*** p < 0.0005

[^] 1 = vote for judiciary