

THE SUCCESS OF FORMER SOLICITORS GENERAL IN PRIVATE PRACTICE: COSTLY AND UNNECESSARY?

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INTRODUCTION

Litigants at the United States Supreme Court spend considerable amounts of money to hire the best lawyers. The purported reason why, of course, is obvious: higher quality lawyers are more likely to achieve victory. With the stakes so high in so many Supreme Court cases, litigants hire the best. When it comes to locating the best, litigants often look to attorneys who once worked in the Office of the Solicitor General (OSG). The Solicitor General (SG) is the attorney for the United States in the Supreme Court. The SG and attorneys in the OSG litigate nearly every Supreme Court case that involves the United States. Their successes are well known. So, when OSG attorneys leave the office and hang out their shingles in private practice, people notice.

Given their reputations, former OSG attorneys command considerable legal fees in the private sector. For example, in 2015, former SG Paul Clement charged \$1,350 per hour for his legal services.¹ In 2013, former SG Ted Olson charged \$1,800 per hour for his.² Former deputy and assistant SGs also charge huge fees. Former Assistant SG Lisa Blatt earns considerable legal fees commensurate with her reputation as one of the top Supreme Court litigators,³ as

1. RYAN C. BLACK & RYAN J. OWENS, *THE SOLICITOR GENERAL AND THE UNITED STATES SUPREME COURT: EXECUTIVE BRANCH INFLUENCE AND JUDICIAL DECISIONS* (2012); see also Staci Zaretsky, *Federal Judge Says Paul Clement Isn't Special Enough to Command Insane Hourly Rates*, ABOVE THE L. (Apr. 6, 2015, 1:43 PM), <http://abovethelaw.com/2015/04/federal-judge-says-paul-clement-isnt-special-enough-to-command-insane-hourly-rates/> [https://perma.cc/Q66A-3MDH].

2. David Lat, *New Data on Hours, Billing Rates, and Corporate Legal Spending*, ABOVE THE L. (Jan. 10, 2013, 4:27 PM), <http://abovethelaw.com/2013/01/new-data-on-hours-billing-rates-and-corporate-legal-spending/> [https://perma.cc/U5U5-DHYV].

3. Tony Mauro, *Leading Supreme Court Advocate Leaves SG's Office*, THE BLT: THE BLOG OF LEGAL TIMES (May 15, 2009, 12:26 PM), <http://legaltimes.typepad.com/blt/2009/05/leading-supreme-court-advocate-leaves-sgs-office.html> [https://perma.cc/79BH-8N5P]; Marisa M. Kashino, *2011-2012 Top Lawyers: Supreme Court Lawyers*, WASHINGTONIAN (Dec. 30, 2011), <http://www.washingtonian.com/articles/people/2011-2012-top-lawyers-supreme-court-lawyers/>

does former Deputy SG Maureen Mahoney.⁴ When he left private practice to join the D.C. Circuit, Chief Justice John Roberts walked away from a million-dollar-a-year salary.⁵ Litigants pay these charges because they believe former OSG attorneys will achieve victory at the High Court. They know the right arguments to make; they know what justices want to see; and they know how to deliver. Or so the argument goes.

The central question we address in this Article is whether former OSG attorneys are more likely to win their cases than attorneys who never worked in the OSG and, consequently, whether litigants spend their money wisely when they pay extra to hire former OSG attorneys. Asked simply, are these attorneys more effective than other attorneys who never worked in the OSG? If so, it may be worth spending the extra money to retain them; if not, litigants might more profitably spend their resources elsewhere.

So there is no confusion about our results, we state them here. *The Supreme Court is no more likely to rule in favor of former OSG attorneys than other attorneys.* When we compare attorneys who have similar levels of Supreme Court experience, similar resources, and other characteristics that are similar, former OSG attorneys are no more likely to win than attorneys who never worked in the OSG. In short, a party who has the choice of hiring two otherwise identical attorneys need not spend extra money to retain counsel who once worked in the OSG.

This Article unfolds in four parts. In Part I, we examine literature on the effects of attorney representation, focusing on recent scholarship that analyzes legal briefs and oral argumentation. In Part II, we specifically discuss former OSG attorneys. We discuss what scholars know (or think they know) about SG success and how those features might translate later to *former* OSG success in private practice. Building on these works, we then lay out our testable hypothesis. In Part III, we explain our dataset and provide background on some of the more specialized measures we employ.

index.php [https://web.archive.org/web/20150924052107/http://www.washingtonian.com/articles/people/2011-2012-top-lawyers-supreme-court-lawyers/index.php].

4. Kim Eisler, *Big Guns: Washington's Top 30 Lawyers* (2007), WASHINGTONIAN (Dec. 1, 2007), <http://www.washingtonian.com/articles/people/big-guns-washingtons-top-30-lawyers-2007/> [https://web.archive.org/web/20150919203254/http://www.washingtonian.com/articles/people/big-guns-washingtons-top-30-lawyers-2007/].

5. Linda Greenhouse, *Chief Justice Advocates Higher Pay for Judiciary*, N.Y. TIMES (Jan. 1, 2007), http://www.nytimes.com/2007/01/01/us/01scotus.html?_r=0.

We also discuss the matching methodology we use to identify whether former OSG attorneys are more likely to be successful at the Court. In Part IV, we present our empirical results.

I. THE IMPORTANCE OF QUALITY REPRESENTATION IN UNITED STATES SUPREME COURT CASES

Perhaps it should come as no surprise, but empirical research has shown that attorneys play an important role in Supreme Court decision making. Higher quality attorneys tend to win their cases. Lower quality attorneys tend to lose theirs. For example, McAtee and McGuire point out that despite the Court's shift to the right in the last two decades, "carefully crafted legal arguments have successfully limited that conservatism" in a host of areas.⁶ They find that lawyers with greater experience generally are more likely to win their cases.⁷ In a similar vein, McGuire argues that attorneys with greater experience are more likely to win their cases when pitted against attorneys with less experience.⁸ As he put it, "the litigation experiences of the counsel who represent [parties] are a significant determinant of judicial outcomes."⁹

Just what it is about attorney experience that translates into success is unclear: Is it the ability to craft better arguments? The knowledge of what justices want to hear (and then providing it)? The knowledge of what cases are ripe for review? On these questions, the literature is largely unclear. What is clear, though, is that characteristics tied to attorney quality tend to correlate with success.¹⁰ And, as we discuss more fully below, this success can be traced to the brief writing stage and to the oral argument stage.

A. Attorneys, Quality Brief Writing, and Supreme Court Success

Recent research shows that the quality of merits briefs can influence how the Supreme Court decides cases. Attorneys who

6. Andrea McAtee & Kevin T. McGuire, *Lawyers, Justices, and Issue Salience: When and How Do Legal Arguments Affect the U.S. Supreme Court?*, 41 *LAW & SOC'Y REV.* 259, 260-61 (2007).

7. *See id.* at 275.

8. Kevin T. McGuire, *Repeat Players in the Supreme Court: The Role of Experienced Lawyers in Litigation Success*, 57 *J. POL.* 187, 187 (1995).

9. *See id.*

10. *See* Paul J. Wahlbeck, *The Life of the Law: Judicial Politics and Legal Change*, 59 *J. POL.* 778 (1997).

write higher quality briefs are more likely to win their cases. We examine the empirical scholarship on brief writing and the conditions under which briefs appear to influence justices. All this, of course, is to show that better lawyering can win cases and to provide context to the central question whether former OSG lawyers are more likely than other lawyers to win their cases.

A number of recent studies have examined how attorney briefs might influence the Supreme Court. Justin Wedeking provides an excellent study that highlights the importance of brief writing.¹¹ He examines whether attorneys use “frames” strategically to influence the dimension on which the High Court evaluates cases.¹² “Frames are defined as a small collection of related words that emphasize some aspect of an issue at the expense of others.”¹³ Wedeking uses content analysis software to measure the most important words in case documents (e.g., cert petitions, party merits briefs, and amicus briefs) and to reveal certain “frames.”¹⁴ He finds that under certain conditions, a lawyer’s frame can increase or decrease his or her likelihood of winning.¹⁵

Long and Christensen likewise explore how the use of intensifiers (i.e., words such as clearly, obviously, and very) in parties’ briefs might influence their chances of success.¹⁶ They examine a sample of federal and state appellate briefs and find that when lawyers insert more intensifiers into their briefs, they are less likely to win.¹⁷ To be sure, the study is limited to civil cases and a small set of word choices (only twelve intensifier words).¹⁸ Nevertheless, the work does suggest that briefs may correlate with lawyer success before the High Court.

In one of the most recent studies on the role of briefs before the High Court, Black, Owens, Hall, and Ringsmuth find that the language of briefs can convey information about an attorney’s credibility, which, in turn, influences his or her chances of success.¹⁹

11. Justin Wedeking, *Supreme Court Litigants and Strategic Framing*, 54 AM. J. POL. SCI. 617 (2010).

12. *See id.*

13. *Id.* at 617.

14. *See id.* at 629.

15. *See id.* at 627.

16. Lance N. Long & William F. Christensen, *Clearly, Using Intensifiers Is Very Bad—Or Is It?*, 45 IDAHO L. REV. 171 (2008).

17. *See id.* at 171.

18. *Id.* at 181.

19. Ryan C. Black, Matthew E.K. Hall, Ryan J. Owens & Eve Ringsmuth, *The Role of Emotional Language in Briefs Before the U.S. Supreme Court*, J.L. &

They discover that “[j]ustices are more likely to vote for parties whose briefs eschew emotionally charged language.”²⁰ Specifically, an attorney who abstains from emotional language in a brief is more likely to win justices’ votes than an attorney who employs such language.²¹ “For petitioners, using minimal emotional language is associated with a 29% increase in their probability of capturing a justice’s vote. For respondents, the effect is even greater; using minimal emotional language is associated with a 100% increase in their probability of winning a justice’s vote.”²² As the authors see it, attorneys who use emotionally charged language lose credibility in the eyes of the justices—and become less likely to capture their votes.²³

It should come as no surprise that many people argue the SG—and lawyers from the OSG—understand these results and, therefore, write briefs using the “correct” language. For example, Pam Corley employs plagiarism software to analyze whether the Court “borrows” language from party briefs and, if so, how much.²⁴ Her argument is that attorneys writing quality briefs might be able to influence the content of the Court’s opinions and the content of law.²⁵ The data generate interesting results. Justices borrow more language from the SG’s briefs than from other briefs.²⁶ Justices also borrow more from Washington-elite attorneys and attorneys with more experience.²⁷

B. Attorneys, Quality Oral Arguments, and Supreme Court Success

The literature is also clear that attorney quality at oral argument influences whether the attorney wins or loses a case. Perhaps the clearest findings to this effect come from Johnson, Wahlbeck, and Spriggs.²⁸ The method they employ to analyze the effect of oral

CTS. (forthcoming 2016), <http://ssrn.com/abstract=2703875> [<https://perma.cc/SR2F-ESDW>].

20. *Id.* (manuscript at 2).

21. *Id.*

22. *Id.*

23. *Id.* (manuscript at 27).

24. Pamela C. Corley, *The Supreme Court and Opinion Content: The Influence of Parties’ Briefs*, 61 POL. RES. Q. 468, 471 (2008).

25. *Id.* at 469.

26. *Id.* at 476; *see also* BLACK & OWENS, *supra* note 1, at 104.

27. Corley, *supra* note 24, at 476.

28. 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, 108-09 (2006).

argument quality on a litigant's likelihood of winning is quite clever. They analyzed the private records of former Justice Harry A. Blackmun.²⁹ Justice Blackmun, it turns out, kept notes on all the attorneys who appeared at oral argument before him.³⁰ The majority of these notes consisted of things like the questions asked by the justices and where the attorney went to law school.³¹ But Justice Blackmun also kept notes on how the attorney performed.³² More importantly, he privately "graded" each attorney.³³

Justice Blackmun's notes on attorney performance were varied—and interesting. Consider a few examples.³⁴ In *United States v. Sells Engineering, Inc.* (81-1032), Justice Blackmun wrote: "He [respondent's attorney] does all he can to lose this case."³⁵ In *Whalen v. United States* (78-5471), he wrote: "He [petitioner's attorney] does not do well."³⁶ On the other hand, in *Kellogg Co. v. Herrington* (82-825), Justice Blackmun observed a good performance by the respondent's attorney, Robert E. Williams. In fact, he wrote: "I am now more sympathetic to respondent."³⁷ In *Fuentes v. Shevin* (70-5039), he commented on a Deputy Attorney General from Florida: "He . . . persuades me but he will not persuade all the others."³⁸

After examining Justice Blackmun's ratings of the attorneys, Johnson and his coauthors found that quality oral arguments were strongly correlated with a greater probability of victory for that party.³⁹ That is, attorneys who Justice Blackmun rated as having done a better job were more likely to win their case—and this result held even while controlling for instances in which Justice Blackmun

29. *Id.* at 104.

30. *See id.* at 99-100.

31. *See id.* at 102.

32. *Id.* at 99-100.

33. *See id.*

34. These examples all come from Timothy R. Johnson, *The Digital Archives of Justices Blackmun and Powell Oral Argument Notes*, U. OF MINN. (2009), <http://www.polisci.umn.edu/~tjohnson/oanotes.php> [<https://perma.cc/SY6R-9VAN>].

35. *Id.* (follow "1982 Term, Blackmun" hyperlink; then follow "81-1032" hyperlink).

36. *Id.* (follow "1979 Term, Blackmun" hyperlink; then follow "78-5471" hyperlink).

37. *Id.* (follow "1983 Term, Blackmun" hyperlink; then follow "82-825" hyperlink).

38. *Id.* (follow "1971 Term, Blackmun" hyperlink; then follow "70-5039" hyperlink).

39. Johnson, Wahlbeck & Spriggs, *supra* note 28, at 108.

might simply be ideologically inclined (or disinclined) to give the attorney a good grade.⁴⁰

Justices have made similar remarks about the usefulness of quality oral argument. For example, Chief Justice Rehnquist once stated: “[I]f an oral advocate is effective, how he presents his position during oral argument *will* have something to do with how the case comes out.”⁴¹ Justice Antonin Scalia has made similar remarks: “What often happens . . . is that the judge is undecided at the time of oral argument (the case is a close one), and oral argument makes the difference.”⁴² In his treatise on Appellate Practice and Procedure, Martineau argues: “Today, judges take advantage of oral argument to explore with the attorneys particular difficult legal or factual points in the case; failure to satisfy the judges on that point may result in an adverse decision.”⁴³

These and other studies on brief writing and oral argument suggest that attorney quality can lead to a higher probability of victory for the party with the better lawyer. But the question remains: in general, which lawyers are better? Can we identify *ex ante* which lawyers are of higher quality than others? Many litigants and Court watchers say yes, and they point to former OSG attorneys as their examples. And clients put their money where their mouths are by paying former OSG lawyers large legal fees to represent them. Are these fees warranted? We will get to that question shortly. But, before we do so, we must first discuss the Office of the Solicitor General.

II. THE OFFICE OF THE SOLICITOR GENERAL, FORMER OSG ATTORNEYS, AND QUALITY LAWYERING

It makes sense that clients and Court watchers believe former OSG attorneys are more likely to win their Supreme Court cases than other attorneys. After all, attorneys who argue on behalf of the OSG appear to win more cases than other attorneys. There are many reasons why current OSG attorneys are so influential. In what follows, we provide background on the OSG. Second, we provide

40. *Id.*

41. WILLIAM H. REHNQUIST, *THE SUPREME COURT, HOW IT WAS, HOW IT IS* 276-77 (1987).

42. ANTONIN SCALIA & BRYAN A. GARNER, *MAKING YOUR CASE: THE ART OF PERSUADING JUDGES* 139 (2008).

43. ROBERT J. MARTINEAU, *CASES AND MATERIALS ON APPELLATE PRACTICE AND PROCEDURE* 404 (1987).

data on OSG success before the High Court. Third, we provide a brief overview on the possible reasons why the OSG wins so often—and explain how those theories might also predict future success for these attorneys. Fourth, we provide data and a discussion on former OSG attorneys who participate before the Court.

A. Background on the OSG⁴⁴

The Solicitor General supervises and conducts the federal government's litigation in the United States Supreme Court and is intricately involved in every stage of the government's appellate litigation.⁴⁵ The office is composed of three levels of attorneys in a structure that resemble a triangle.⁴⁶ At the base—the widest part of the triangle—are the assistant SGs.⁴⁷ There are roughly twenty assistant SGs at any one time.⁴⁸ They are generalists (i.e., tend not to specialize in any one area of the law) and are the first to take on a case.⁴⁹ That is, they are generally the first in the office to write the briefs in a case. They are professionals who tend to serve the office across presidential administrations.⁵⁰ Above them are the deputy SGs.⁵¹ There are four deputies, each of whom is a specialist in a select area or areas of the law.⁵² They review and revise the first drafts of briefs (written by the assistant SGs) and make recommendations to the SG.⁵³ With the exception of the principal deputy, who is a political appointee, the deputies are also non-ideological professionals who often serve across presidential administrations.⁵⁴ The SG sits atop the triangle.⁵⁵ The SG is nominated by the President, confirmed by the senate, and serves at the pleasure of the President.⁵⁶ The SG is always an attorney with a

44. Much of this discussion comes from BLACK & OWENS, *supra* note 1.

45. See generally RICHARD L. PACELLE, JR., BETWEEN LAW & POLITICS: THE SOLICITOR GENERAL AND THE STRUCTURING OF RACE, GENDER, AND REPRODUCTIVE RIGHTS LITIGATION (2003).

46. See BLACK & OWENS, *supra* note 1, at 16.

47. *Id.*

48. PACELLE, *supra* note 45, at 38.

49. *See id.*

50. *See id.*

51. *See id.*

52. *See id.*

53. *See id.*

54. *See id.*

55. *See id.*

56. See Pacelle, *supra* note 45, at 9, 47.

distinguished legal record who also has a strong political connection to the President in office.⁵⁷

The SG serves two major functions. First, she represents the interests of the United States at the Supreme Court.⁵⁸ When a case gets to the High Court, lawyers in the SG's office write the briefs and present oral arguments.⁵⁹ As Baum argues, lawyers in the SG's office "do the bulk of the government's legal work in Supreme Court cases, including petitions for hearings, the writing of briefs, and oral argument."⁶⁰

Second, the SG coordinates the United States' legal position before the Supreme Court.⁶¹ That is, the SG decides which cases the United States will appeal when it loses its cases in the lower federal courts.⁶² If the government loses a case in a circuit court, it cannot appeal that loss to the Supreme Court without the SG's permission.⁶³ So, "if an agency loses a decision in a circuit court . . . and believes that decision was wrong, it can only file an appeal with the Supreme Court if the SG permits it to do so . . ." ⁶⁴ (And, if the SG allows an appeal, OSG lawyers do the bulk of the work.) By choosing the cases and the issues the government will pursue before the Supreme Court, the SG can exercise control over the types of cases appealed by the government to the Court and set the administration's policy in the courts.⁶⁵

The SG also decides whether the United States will file an *amicus curiae* brief in any case involving the United States.⁶⁶ "If the government is not involved in a case, the SG can inform the Court of its views."⁶⁷ "The government can file an *amicus* brief at either the agenda stage or at the merits stage of a case."⁶⁸ "When the

57. BLACK & OWENS, *supra* note 1, at 16.

58. *Id.* at 20.

59. *Id.* at 22-23.

60. LAWRENCE BAUM, *THE SUPREME COURT* 84 (11th ed. 2013).

61. BLACK & OWENS, *supra* note 1, at 20.

62. The SG also decides whether, when the United States loses in a circuit court, the federal government will petition the circuit for rehearing *en banc*. *See id.*

63. *Id.*

64. *Id.*

65. *Id.* at 21.

66. *Id.*

67. *Id.*; *see also* SUP. CT. R. 37 (stating the United States can file an *amicus curiae* brief at its discretion, without satisfying the normal requirement placed on other groups to obtain the permission of the parties). By coordinating the cases in which the government files *amicus* briefs, the SG gains further leverage over its legal message.

68. BLACK & OWENS, *supra* note 1, at 21.

government files an amicus brief with the Court, it is able to present its views on a case, and the broader policy consequences of a decision in the Court, despite the fact that it is not a named party in the suit.⁶⁹ In such cases, the government can make its policy wishes clear to the Court.

The SG's coordination function also allows the SG—and, thus, the executive branch—to get behind one agency at the expense of another. That is, “[w]hen two agencies conflict over the [appropriate] policy . . . , the SG, by selecting which will be the official government position, can clarify the government's position for the Court and for the agencies.”⁷⁰ Former SG Rex Lee summarized the SG's gatekeeping power well when he stated:

“If we've got the [F.C.C.] on one side of an issue and the Commerce Department on the other, and I decide that the government's over-all [*sic*] interest is better served by the F.C.C. . . . that means we'll take the F.C.C.'s position to the Supreme Court, and the Commerce Department won't go there at all.”⁷¹

So, OSG attorneys represent the United States before the Supreme Court. In that capacity, OSG attorneys behave much like other attorneys: they write briefs and deliver oral arguments to try and persuade the justices. At the same time, the OSG also serves an important coordinating function for the United States. The office centralizes the government's appellate strategy. OSG attorneys, in short, have their hands in nearly everything appellate related. And, in

69. *Id.* at 21-22.

70. *Id.* at 21.

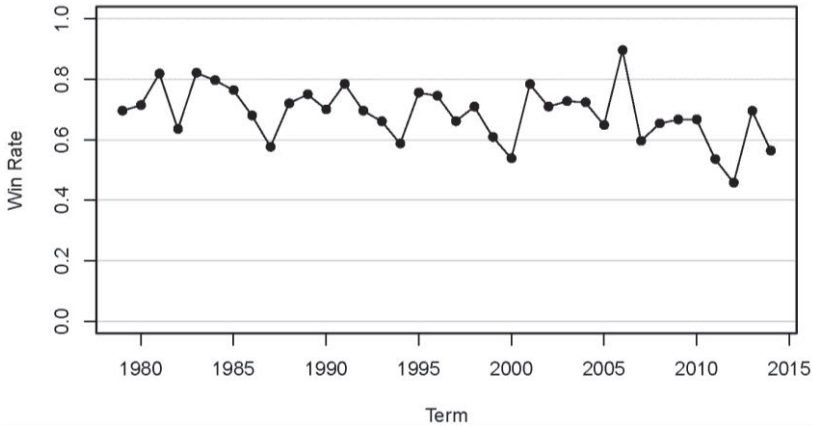
71. See John A. Jenkins, *The Solicitor General's Winning Ways*, 69 A.B.A. J. 734, 738 (1983). It should be noted that infrequently the SG will allow independent agencies to argue their own cases and pursue appeals without the SG's express permission. Chamberlain, for example, points out that SG Griswold had an agreement with the National Labor Relations Board that cases dealing with standard administrative law issues would go through the OSG while labor law cases requiring more technical knowledge could be argued by NLRB counsel. Ronald S. Chamberlain, *Mixing Politics and Justice: The Office of the Solicitor General*, 4 J.L. & POL. 379, 388 (1987). On the whole, however, the SG coordinates all of the government's activities before the Court. Indeed, the Court itself has affirmed its support of the SG's coordination function. See, e.g., *The Gray Jacket*, 72 U.S. (5 Wall.) 370, 371 (1866); *The Confiscation Cases*, 74 U.S. (7 Wall.) 454, 458-59 (1868); *United States v. Throckmorton*, 98 U.S. 61, 70 (1878); *United States v. San Jacinto Tin Co.*, 125 U.S. 273, 279 (1888); *FEC v. NRA Political Victory Fund*, 513 U.S. 88, 96 (1994). For more on this, see Seth P. Waxman, “*Presenting the Case of the United States as It Should Be*”: *The Solicitor General in Historical Context*, 2 J. SUP. CT. HIST. 3 (1998).

so doing, they acquire significant skills and experience they can later use should they go into private practice.

B. OSG Success Before the Court

Lawyers from the OSG win most of their cases before the Court. As Figure 1 shows,⁷² the OSG has won roughly 60-70% of its cases during the time period under analysis. The OSG reached a peak point—and least in the modern era—in 2006, when it won 90% of its cases.

Figure 1
PERCENT OF ALL CASES WON BY THE OSG

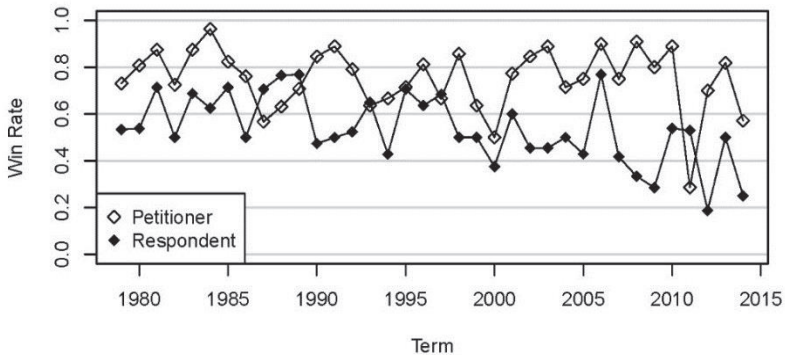


In Figure 2 below we turn our attention to cases where the OSG appears before the Court as a party to a case. As the figure makes clear, the OSG's success varies by whether it is appearing as petitioner or respondent. As in all cases before the Court, it helps to be the petitioner. When the United States appears in a case as the petitioner, the Court is more likely to side with it. As petitioner, the United States has won the majority of its cases, save for the latter part of the Obama administration. But even then, the SG recovered quickly and won 60-80% of its cases. As respondent, the numbers are slightly worse—especially in recent years. Since the Supreme Court reverses around 65% of the cases it hears these days, one

72. The data for Figures 1-3 include all orally argued cases (i.e., both signed and per curiam opinions).

would expect the OSG would win about 35% of its cases.⁷³ But it has performed better than that. Again, with the exception of very recent years, the OSG as respondent has won, overall, with the probability of a coin flip.

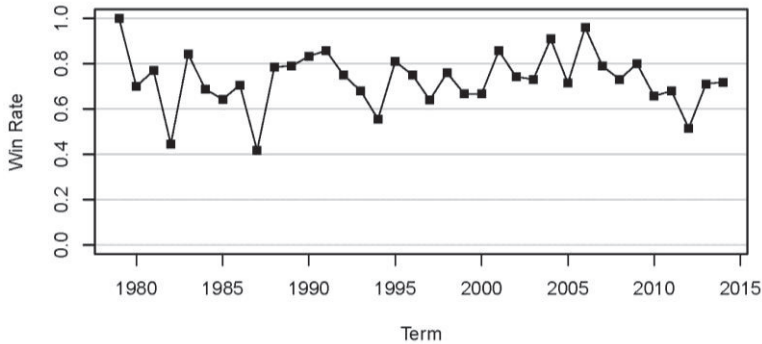
Figure 2
PERCENT OF CASES WON BY THE OSG AS PETITIONER OR RESPONDENT



As *amicus curiae*, the OSG’s success rate before the Court is even higher. As Figure 3 shows, with an average of roughly 70%, the OSG observes significant success as an *amicus*. When the OSG weighs in and recommends the Court rule a certain way, the Court often rules that way. Simply put, whether the OSG appears as a friend of the Court or as a party to the case, OSG attorneys usually taste victory. No wonder people expect former OSG attorneys to be uniquely influential.

73. See SUP. CT. DATABASE, <http://supremecourtdatabase.org/> [<https://perma.cc/Z3Q6-WL4M>] (last visited Mar. 15, 2016).

Figure 3
PERCENT OF CASES IN WHICH THE SUPREME COURT SIDED WITH THE PARTY SUPPORTED BY THE OSG AS AMICI



C. Reasons for OSG Success and How They Might Translate to Former OSG Success

There are a number of possible reasons why the OSG wins so often. We have discussed and tested those theories more extensively elsewhere, so we only briefly reiterate them here. Scholars point to two general attributes of OSG success: attributes that are unique to the office and do not travel with the attorney when he or she leaves the OSG and those that are particular to the individual attorney and would therefore travel with the attorney when he or she leaves the OSG.

1. *Attributes Unique to the OSG*

Some scholars argue that the OSG wins so often because of the government's resource advantages. When the United States litigates a case, it has more resources at its disposal than most litigants ever could amass. OSG attorneys can use the expertise of executive branch agencies. It can refer back to winning arguments the office has made over decades of practice. And, of course, while the office has a budget, OSG attorneys are not subject to the same financial restrictions as private parties. With all these resources, then, the office becomes more likely to win than other attorneys.

Another explanation for OSG success focuses on the OSG's unique professional relationship with the Court. It argues that OSG attorneys succeed so often because they are consummate professionals. Though the SG is a presidential appointee, the office

has considerable obligations to the Court as well. As Deputy SG Michael Dreeben once stated: “[T]he Solicitor General owes a duty of unflinching candor to the Court.”⁷⁴ The OSG appeals only those cases that are worthy of High Court review. The practice of confession error also supports the professionalism theory. When the United States wins a case in a lower federal court on grounds that the OSG believes have turned out to be erroneous, an OSG lawyer will inform the Court the decision should be vacated and remanded for reconsideration, though the government prevailed. This signals to the Court that the OSG is an honest broker of facts and can be trusted.

A third explanation for OSG success argues that the OSG wins so often because justices are simply inclined, as government actors, to support the federal government. Justices must render decisions in an interdependent environment where they work with Congress and the President. When they interpret federal statutes and regulations, justices try to give effect to the wishes of Congress and the executive. When they decide constitutional questions, they often desire the views of the executive branch in terms of how easy or difficult it will be to implement possible policies. If justices see themselves as part of the same team as the government, it is no wonder they often side with the OSG.

2. Attributes That Travel with Attorneys

The theories above tie OSG success to attributes unique to the office itself. There are, however, other arguments that explain OSG success as a function of the attributes of individual lawyers—and these attributes would travel with the lawyer after he or she leaves the OSG.

Some scholars argue the OSG wins so often because the SG can select which cases to appeal and which ones not to appeal.⁷⁵ The SG, and attorneys within the office, can predict which cases are likely to be winners and which ones are likely to be losers. By choosing to move forward only with the winners, the OSG selects cases wisely. The end result is that the office has a high success rate.

74. Duke Univ. Sch. of Law, *Lecture with Michael Dreeben, Criminal Deputy Solicitor General at the U.S. Department of Justice*, YOUTUBE (Nov. 2, 2010), <http://www.youtube.com/watch?v=EmeHI4TryIw> [<https://perma.cc/8AVU-HWZ3>].

75. See, e.g., Chris Nicholson & Paul M. Collins, Jr., *The Solicitor General's Amicus Curiae Strategies in the Supreme Court*, 36 AM. POL. RES. 382 (2008).

A selection effect explains OSG success. Of course, if an OSG attorney knew what made for “good” cases while working in the OSG, we suspect that attorney could take that knowledge with him or her when in private practice.

Other scholars argue that the OSG wins so often because its lawyers are more experienced before the High Court than the lawyers against whom they argue.⁷⁶ They know the types of information justices desire in cases. They “know how to construct able written and oral presentations . . . [and understand] which style and substance of argument may be most influential in different circumstances.”⁷⁷ Over time, these attorneys acquire important insight into the justices themselves and the types of arguments justices accept, which, in turn, leads them to be more successful. So, for example, McGuire finds that attorneys who are more experienced than their opposing counsel are more likely to win their cases.⁷⁸ And when attorney experience is accounted for, he finds that OSG attorneys are no more likely to win than other experienced attorneys.⁷⁹ So, if this is the case, we would expect experience to matter for former OSG attorneys in private practice.

Finally, and most important for our immediate purposes, many argue that the OSG wins so often because it hires the best, most skilled attorneys.⁸⁰ For example, Salokar argues “[t]he members of the solicitor general’s office, both the political appointees and the small corps of career civil servants, are some of the best attorneys in our nation.”⁸¹ Many of these attorneys once clerked for federal circuit court judges and Supreme Court justices, and most of them graduated from the best law schools in the country.⁸² Indeed, former SG Charles Fried once explained the qualifications he looked for in hiring attorneys to work in the OSG:

They have largely to do with very acute analytical and writing abilities, which are demonstrated, first of all, by very high academic records, then, also, by clerkships, appellate court clerkships. And in many, many instances, about half our lawyers are former Supreme Court clerks. And

76. See Kevin T. McGuire, *Explaining Executive Success in the U.S. Supreme Court*, 51 POL. RES. Q. 505 (1998).

77. ROBERT SCIGLIANO, *THE SUPREME COURT AND THE PRESIDENCY* 183 (1971).

78. McGuire, *supra* note 8, at 187.

79. *Id.* at 188.

80. See, e.g., REBECCA MAE SALOKAR, *THE SOLICITOR GENERAL: THE POLITICS OF LAW* 33 (1992).

81. *Id.*

82. *Id.*

then a certain amount of experience in doing, at a lesser level, I suppose, the kind of work that they would have to do in our office. . . . [A]ltogether we try to get a picture of the person in terms of their analytic and writing abilities.⁸³

Others agree. Carter Phillips, a former assistant SG, once stated: “The office has great success in getting A-plus lawyers who work hard without an ax to grind.”⁸⁴ Lazarus argues that these high-quality attorneys “know how to write briefs for [the Court], how to utilize precedent, and how to . . . exploit opportunities.”⁸⁵ In her interviews with law clerks, Kelly Lynch quoted one as saying that the OSG has a “well deserved reputation for excellent written and oral advocacy.”⁸⁶

Perhaps because they are so highly skilled, OSG attorneys have a tremendous record before the Supreme Court. And so it is perhaps no surprise that over time, more and more former OSG attorneys have become involved as private lawyers in litigation before the Court. If they are so skilled, they should carry those skills with them when they leave the OSG. That is, they should be as successful in private practice as they were while working in the OSG.

In what follows, we examine how former OSG attorneys have become more active, followed with an examination of whether their increased involvement translates into victories for the parties they represent.

D. Former OSGs Before the High Court

Throughout history, a number of former SGs have gone on to litigate as private attorneys before the High Court. For example, John W. Davis argued 139 cases as a private lawyer after leaving the OSG; Charles Evan Hughes, Jr., (in between stints on the Supreme Court) practiced before the Court; and Thomas Thacher frequently litigated before the High Court as well.⁸⁷

In recent years, former OSG attorneys have become even more involved with cases before the Court. Lazarus points out that this

83. *Id.* at 58.

84. PACELE, *supra* note 45, at 38.

85. Richard J. Lazarus, *Advocacy Matters Before and Within the Supreme Court: Transforming the Court by Transforming the Bar*, 96 GEO. L.J. 1487, 1497 (2008).

86. Kelly J. Lynch, *Best Friends? Supreme Court Law Clerks on Effective Amicus Curiae Briefs*, 20 J.L. & POL. 33, 47 (2004).

87. Lazarus, *supra* note 85, at 1497.

change began with former SG Rex Lee.⁸⁸ After Lee left the OSG, he went to work for the law firm Sidley Austin.⁸⁹ And during the High Court's next full term, Lee appeared in six cases.⁹⁰ His behavior signaled to others that former OSG lawyers could profitably represent private parties before the Court.⁹¹

Competing law firms soon reached out to other former OSG lawyers.⁹² Mayer, Brown, and Platt actually hired a number of attorneys away from the OSG—and two of the attorneys they hired were then deputy Solicitors General.⁹³ The law firm's hiring practices soon earned it the nickname, "The Shadow Solicitor General's Office."⁹⁴ Not to be outdone, Kirkland and Ellis soon hired Kenneth Starr to head up a Supreme Court practice.⁹⁵ Hogan and Hartson later hired John Roberts after his stint as Principal Deputy SG.⁹⁶ In 2002, WilmerHale hired former SG Seth Waxman who, in turn, hired a number of former OSG attorneys.⁹⁷ Eventually, former OSG lawyers spread throughout private practice like fall leaves strewn across the lawn.

These lawyers increasingly appeared at the High Court over time. As Figure 4 shows, there has been an awakening in former OSG attorneys before the High Court. While the number of total yearly cases decided by the Court has clearly decreased over time,⁹⁸ former OSG lawyer participation has increased substantially. In the 1980s, the Court decided well over 100 cases per term. In four terms, the justices actually decided over 140 cases. Today, however, that number is halved. The Court hears and decides roughly seventy cases per term. The reason why is somewhat unclear,⁹⁹ yet what is clear is that former OSG attorneys are involved with an increasing percentage of the Court's docket.

Today, former OSG attorneys are involved in nearly half the cases on the Court's docket. And the trend seems to be toward

88. *Id.* at 1498.

89. *Id.*

90. *Id.*

91. *See id.*

92. *Id.* at 1499.

93. *Id.*

94. *Id.*

95. *Id.*

96. *Id.* at 1499-1500.

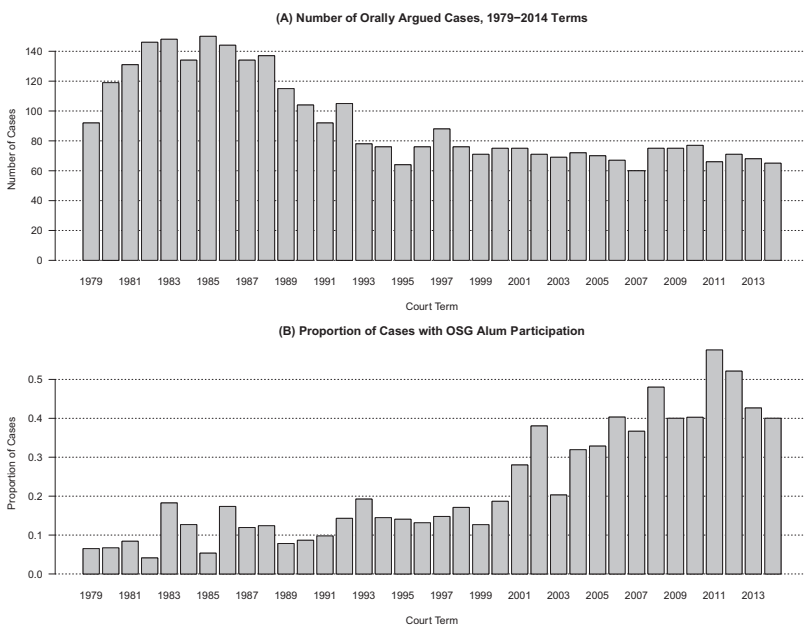
97. *Id.* at 1500.

98. Ryan J. Owens & David A. Simon, *Explaining the Supreme Court's Shrinking Docket*, 53 WM. & MARY L. REV. 1219 (2012).

99. *Id.* at 1226.

greater participation. During the 1980s roughly 10% of the Court’s cases involved an OSG alumnus. Even during the 1990s, that percentage hovered between 10% and 20%. Beginning around 2000, however, the percentage skyrocketed first to 30%, then to 40%, and then upward even to 50%. And while the last few Court terms have seen a return to roughly 40%, former OSG attorneys today are a substantial percent of the lawyers who argue before the Court.

Figure 4
THE NUMBER OF ORALLY ARGUED CASES (PANEL A) &
THE PROPORTION OF THOSE CASES WITH PARTICIPATION BY A FORMER
MEMBER OF THE OSG (PANEL B)



Still, the question remains: Do these former OSG attorneys influence justices to a greater degree than attorneys who never worked in the OSG? The empirical evidence on this question is thin and mixed. On the one hand, at least one scholar argues that former OSGs largely influence the *agenda-setting stage*—that is, what cases make it to the Supreme Court’s docket. As Lazarus states: “[T]he [Supreme Court] Bar heavily influences which cases the Justices take because the Court is heavily dependent on skilled advocates to provide them with the information they need to decide whether certiorari is warranted.”¹⁰⁰ These lawyers know what the justices (or, more appropriately, their law clerks) are looking for at the agenda stage and craft briefs with that in mind.¹⁰¹ As a consequence, they are much more likely to see their certiorari petitions granted than other lawyers. Given their experience before the Court, former OSG attorneys are well positioned to set the Court’s agenda.

Some argue that former OSG attorneys are similarly successful at the merits stage. For example, in Lynch’s interviews with Supreme Court law clerks, 88% said they read briefs filed by expert attorneys (which we take to include many former OSG attorneys) more closely than those by less expert attorneys.¹⁰² Similarly, as we stated earlier, Corley uses plagiarism software to discover that the Court borrows more language in its opinions from briefs filed by experienced attorneys, and former OSG attorneys tend to be among the most experienced.¹⁰³ McGuire also suggests that attorneys who are more experienced than their opposition are more likely to win.¹⁰⁴

Yet, other studies find that former OSG attorneys are no more likely to win their cases than similar attorneys who never worked in the OSG. Perhaps most relevant is the recent book on the Solicitor General by Black and Owens.¹⁰⁵ They employ matching methods to determine whether former OSGs are more likely to win their cases than similar attorneys who never worked in the OSG.¹⁰⁶ Their results show that former OSG attorneys are no more likely to win.¹⁰⁷ Still, the Black and Owens analysis is limited in one critical way: it is time bound. The authors examine attorney success from the 1979–2007

100. Lazarus, *supra* note 85, at 1523.

101. *See id.* at 1523-24.

102. Lynch, *supra* note 86, at 56; *see also* Corley, *supra* note 24, at 476.

103. *See* Corley, *supra* note 24, at 474-76.

104. McGuire, *supra* note 8, at 187.

105. *See generally* BLACK & OWENS, *supra* note 1.

106. *Id.* at 81-89.

107. *Id.* at 85.

terms.¹⁰⁸ Since 2007, however, the Supreme Court bar has changed dramatically. Former OSG attorneys are more active in High Court cases than they were during the original Black and Owens study. Indeed, as Figure 4 showed, every term after 2007 observed the same or a larger percentage of former OSG lawyers than before 2007. Simply put, the bar has changed so the results may have changed. Thus, the question must be re-examined. We, therefore, test the following hypothesis: *Attorneys who once worked in the Solicitor General's office are more likely to win their cases than similarly qualified attorneys who never worked in the office.*

III. MATCHING, DATA, AND METHODS

We examine whether former OSG attorneys are more likely to win their cases than other attorneys by determining whether, in the absence of the former OSG, the Court's decision would look the same as its decisions when the former OSG participates. Stated a bit differently, does the presence of an attorney who previously worked for the OSG *cause* that side to be more likely to win? The "gold standard" approach to addressing such a question would undoubtedly be to conduct an experiment.¹⁰⁹ That is, given unlimited resources and no pesky restrictions on the use of human subjects, we would take a large number of cases to be decided by the Supreme Court and then randomly divide them into treatment and control groups.

The treatment group would receive a former OSG attorney to represent it. The control group, by contrast, would be assigned an attorney who never worked in the OSG to represent it. So long as our sample was sufficiently large, the powers of randomization would neutralize the potential impact of all known (and unknown) confounding variables. That is, former OSG attorneys and non-former OSG attorneys would both be assigned to cases that had "easy" facts as well as "tough" facts. Similarly, they would both be assigned in approximately equal proportion to cases with large (or small) amounts of involvement by outside interests in the form of amicus curiae briefs. Given randomization, we could attribute any differences we observed between the treatment and control groups to

108. *Id.* at 77.

109. See LEE EPSTEIN & ANDREW D. MARTIN, AN INTRODUCTION TO EMPIRICAL LEGAL RESEARCH 1-9, 193 (2014).

the treatment effect (i.e., the fact that a former OSG attorney argued the case).¹¹⁰

Although it never hurts to dream, alas, such a design is impossible. As a result, social scientists have generally taken two, nonmutually exclusive approaches to trying to make causal inferences: the use of multiple regression and matching.

Scholars have most commonly employed multiple-regression models to examine substantively interesting questions empirically.¹¹¹ That is, they fit the appropriate type of regression model to the data (e.g., linear regression when the dependent variable is continuous; logistic regression when it is dichotomous).¹¹² This model includes a number of independent variables designed to explain variation in the dependent variable.¹¹³ Most importantly, it includes the key variable of interest—in our case, whether an attorney formerly worked in the OSG. To guard against the harm of potential confounding variables, the models also include control variables.¹¹⁴

Such models, however, do not permit causal inferences unless one assumes that nature has randomly assigned individuals to the treatment and control groups and that the two groups are otherwise similar in all relevant respects. That is, one must assume that the data are “balanced” among the values of the independent variable for the treatment and control group. In our case, for example, this would imply that we could assume that the distribution of the values for our independent variables is the same for former OSG attorneys and attorneys who never worked there. For a large percentage of applied research questions, this assumption is likely dubious. For ours, based on the results we discuss below, that assumption would be plainly wrong.

To overcome the problems associated with fitting standard parametric models to imbalanced data, researchers have increasingly turned to matching methods. One important study, for example, applied matching methods to investigate whether a judge’s sex causes different outcomes in the U.S. Courts of Appeal.¹¹⁵ After matching circuit court panels and cases on as many relevant

110. We borrow a significant portion of this discussion from BLACK & OWENS, *supra* note 1.

111. See EPSTEIN & MARTIN, *supra* note 109, at 193.

112. See *id.* at 195-97.

113. *Id.* at 195.

114. *Id.*

115. Christina L. Boyd, Lee Epstein & Andrew D. Martin, *Untangling the Causal Effects of Sex on Judging*, 54 AM. J. POL. SCI. 389 (2010).

dimensions as possible, the authors looked to determine if an otherwise identical circuit court panel rules differently in a case simply because a woman serves as a judge on it (but not on the other panel).¹¹⁶ They found a slight difference in sex discrimination cases.¹¹⁷ Another study used matching methods to examine whether the presence of war causes Justices to restrict civil liberties.¹¹⁸ They found that it does, but not in the way commonly expected.¹¹⁹ These studies illustrate how matching can allow scholars to overcome limitations caused by imbalanced data and enhance the quality of the inferences researchers made by social scientists.

The theory behind matching is intuitive. The analyst takes the data she has collected on the topic of interest and then matches observations such that the values of covariates in the *treatment group* and *control group* are as close as possible to each other. Observations that do not match across groups are discarded. In other words, the goal is to retain data such that the treatment group is identical to the control group, with the only difference between the two being the presence of the treatment. In that sense, matching can be thought of as a kind of post hoc experimental design.

The most intuitive matching technique, of course, is called “exact matching.” Here, the analyst “matches a treated unit to all of the control units with the same covariate values.”¹²⁰ That is, the analyst identifies the treatment and then seeks out exact matches among the control group. Consider Table 1 below. Let us assume we have a former OSG attorney who has previously argued ten cases before the Court. If we applied an exact matching approach, we would need to find a non-former OSG attorney who also previously has argued ten cases before the Court—no more, no less. We would then compare the success rates of those attorneys who were former OSG attorneys against those that never worked for the OSG. If we observed differences between the two groups, we could infer that those differences were the result of the attorney having formerly worked in the OSG.¹²¹

116. *Id.* at 393.

117. *Id.* at 406-07.

118. Lee Epstein et al., *The Supreme Court During Crisis: How War Affects Only Non-War Cases*, 80 N.Y.U. L. REV. 1 (2005).

119. *Id.*

120. MATTHEW BLACKWELL ET AL., CEM: COARSENEDED EXACT MATCHING IN STATA 2 (Feb. 22, 2010), <http://gking.harvard.edu/files/cem-stata.pdf> [<https://perma.cc/S57R-7VQ2>].

121. Note the assumption that there is no omitted variable bias. *Id.*

Table 1
EXACT MATCHING SCENARIO

Hypothetical Covariates	Treatment (Former OSG Attorney)	Control (Non-OSG Attorney)
Experience	10 cases	10 cases
Distance From Court	3.2	3.2
Petitioner Status	Petitioner	Petitioner

That approach would be simple enough—until we had to account for multiple covariates. At that point, multi-dimensionality (also called the “curse of dimensionality”) makes exact matching intractable. To return to our example, if we wanted to examine the causal effect of our treatment while simultaneously controlling for attorney experience, ideological distance between the attorney and the Court, and whether the attorney was arguing on behalf of the petitioner or respondent, we would quickly reduce the number of exact matches between the treatment and control groups. We would need to find former OSG attorneys and non-former OSG attorneys with precisely the same characteristics. And unfortunately, it is unlikely we would observe many (if any) exact matches, especially if we insisted upon conducting matching without replacement.¹²²

We therefore capitalize on innovations and improvements that make matching even more accessible and user-friendly. In particular, we turn to an approach called “Coarsened Exact Matching” (CEM) to preprocess our data.¹²³ With coarsened exact matching, the researcher becomes empowered to apply his or her substantive expertise to define tolerable levels of imbalance within the data. Reconsider, from the table above, the role of attorney experience. To be sure, this is a critically important control variable. One of the key features of an attorney who has worked in the OSG’s office is that she has likely argued a number of cases before the Supreme Court.

122. Matching without replacement specifies that an individual treatment group observation will only be matched once, with an otherwise identical control group observation. See Elizabeth A. Stuart, *Matching Methods for Causal Inference: A Review and a Look Forward*, 25 STAT. SCI. 1, 9 (2010). When one matches with replacement, by contrast, a treatment observation can be recycled and used as the match for multiple control group observations. *Id.* The latter approach increases the number of matched pairs, but has potential costs that one must consider. See *id.*

123. For a full technical exposition of these methods, see Stefano M. Iacus, Gary King & Giuseppe Porro, *Multivariate Matching Methods That Are Monotonic Imbalance Bounding*, 106 J. AM. STAT. ASS’N 345 (2011); Stefano M. Iacus, Gary King & Giuseppe Porro, *Causal Inferences Without Balance Checking: Coarsened Exact Matching* 20 POL. ANALYSIS 1 (2012).

Indeed, in the data we use below, each member of the OSG who argues before the Court does so an average of roughly thirteen times. As others have argued, failure to account for experience could lead us to conclude erroneously that an attorney's alumnus status with the OSG make her more likely to win when, in fact, it might just be tapping into her experience advantage.¹²⁴

Experience is clearly important, but must we insist upon an exact match in experience levels between our treatment and control group? Or, is it plausible that we can clump attorneys into different bins based on their *approximate* level of experience? A difference clearly exists between someone who has never argued at all versus someone who has at least one appearance. Among those who have argued, we probably also have good reason to believe that an attorney with but a single previous appearance is at a comparative disadvantage against someone with five appearances, who, in turn, is probably at a disadvantage against someone else with twenty appearances. But, at some point, the marginal advantage of greater experience disappears altogether.

An example of two attorneys from our data illustrates. Paul D. Clement argued over forty cases before the Court while he was a deputy SG, the actual SG, and then in private practice. SG Donald B. Verrilli has argued around thirty cases between his appointment in 2011 and the end of the Court's 2014 term. Does that difference of ten cases really amount to a sizable advantage for Clement over Verrilli were they to square off? Our intuition says no. The benefit of CEM is that it allows us to capture that intuition, improve balance in our data, and retain the largest number of observations possible to enhance our statistical power.

Table 2 provides an example of what CEM looks like in practice. Here, rather than demanding an exact match on attorney experience, we allow for some coarsening to occur. In particular, we now compare the success of two attorneys who both argued a substantial number of cases before the Court. We also allow some wiggle room in terms of the nature of the attorneys' ideological distance from the Court—they are both somewhat far away ideologically from the justices, which is to say they are likely to face a challenge in terms of winning. Turning to the "Petitioner Status" variable, note that we do *not* allow any coarsening to appear here. For a variable that takes on a limited number of values and where it does not seem appropriate to pool those values together, the analyst

124. See McGuire, *supra* note 76.

is able to require that exact matches occur for such measures. Given the Court's tendency to reverse lower courts (i.e., vote for the petitioner), forcing such a match is substantively necessary (and relatively costless in terms of data loss).

Table 2
COARSENEDED EXACT MATCHING SCENARIO

Hypothetical Covariates	Treatment (Former OSG Attorney)	Control (Non-OSG Attorney)
Experience	10 cases	12 cases
Distance From Court	3.2	2.9
Petitioner Status	Petitioner	Petitioner

Finally, lest this seem like much ado about nothing, consider what might happen if one were to proceed with the raw, unbalanced data. We portray this scenario in Table 3 below. We suggest a comparison that is essentially “apples and oranges” in terms of the level of differences between the two observations. We have a former OSG attorney who has an experience advantage, ideological congruence with the Court, and the benefit of being the petitioner. This individual is squaring off against an attorney with little experience, who is making an argument that is ideologically incongruent with the Court, and represents the respondent in a case. The former OSG attorney seems much more likely to win; if we were to allow such comparisons to exist, we might risk concluding her victory was due to her being an OSG alumnus when, in fact, it could have been any of those *other* advantages she had going for her.

Table 3
UNMATCHED SCENARIO

Hypothetical Covariates	Treatment (Former OSG Attorney)	Control (Non-OSG Attorney)
Experience	10 cases	1 cases
Distance From Court	3.2	6.2
Petitioner Status	Petitioner	Respondent

The foregoing illustrates both the risk of analyzing unbalanced data and how CEM can allow researchers to address this concern while still preserving the largest amount of data for his or her analysis. We turn next to describing how we apply matching to address the question of whether former OSG attorneys enjoy unique influence over the Supreme Court.

A. Matching the Data: Former OSG Attorneys and Non-Former OSG Attorneys

To test whether former OSG attorneys are more likely to win their cases than similar non-former OSG attorneys, we collected all orally argued Supreme Court cases decided between the Court's 1979 and 2014 terms (N=3,336). We downloaded the oral argument transcript in each case from LexisNexis and identified each attorney who appeared at oral argument. Across the 3,336 cases, we observed 7,993 attorney appearances distributed over approximately 4,345 unique attorneys. Because our focus is on whether former OSG attorneys influence the Court, our unit of analysis is each attorney in each case. Therefore, we started with 7,993 potential observations and began to match the data, seeking to ensure that our treatment cases were as similar as possible to our control cases.

We matched cases on a host of characteristics that likely influence litigant success but are nonrandomly distributed between former members of the OSG and non-former OSG attorneys. In particular, we examine many of the factors we discussed above (in re: SG success): attorney experience, net resource advantage, amicus curiae briefs (both supporting and opposing), petitioner status, an attorney's ideological compatibility with the justices, and surrogates for the quality of a side's case.

1. *Attorney Experience*

According to some, attorneys win when they are more experienced than their opponents.¹²⁵ This theory holds that experienced attorneys gain insight through frequent contact with the Court.¹²⁶ They acquire relevant information they can use later to win cases.¹²⁷ They develop closer relationships with justices, which they can also use to their advantage (in terms of knowing what arguments justices want to hear).¹²⁸ Such lawyers are more informed as to the questions the Court recently reviewed, legal issues of particular interest to particular justices, and pending cases on the Court's

125. See *id.*; Kevin T. McGuire, *Lawyers and the U.S. Supreme Court: The Washington Community and Legal Elites*, 37 AM. J. POL. SCI. 365 (1993); McGuire, *supra* note 8.

126. See McGuire, *supra* note 76, at 509.

127. See *id.* at 509-10.

128. See *id.*

docket that may affect the disposition of the current case.¹²⁹ These experienced lawyers know how to compile effective written and oral presentations.¹³⁰ As Lazarus states:

Because they immerse themselves in the work of the Court, the [experienced] attorneys of the Solicitor General's Office, unlike many of their opposing counsel, become completely familiar with the Justices and their precedent, including their latest concerns and the inevitable cross-currents between otherwise seemingly unrelated cases that would be largely invisible to those who focus on just one case at a time. They are also comfortable at the lectern, for the simple reason that they have been there often before at least as co-counsel, if not lead counsel, presenting argument[s]. They work hard as repeat litigants to establish their credibility with the Justices.¹³¹

Consequently, we matched on the amount of previous experience each attorney enjoyed when arguing before the Court. That is, we sought to ensure that our treatment group attorneys had as much experience before the Court as our control group attorneys. To measure attorney experience, we calculated the number of total prior cases each attorney in our sample orally argued before the Supreme Court prior to the case at issue.¹³² Our measure, then, is dynamic, looking backward from each case to the totality of the lawyer's previous oral argument experience. As we note above, while CEM allows the user to specify a set of values to pool, in working with these data we have generally found that the automated binning executed by the software results in a great reduction of imbalance. This also allows the coarsening to be sensitive to unique characteristics of a specific treatment/control dataset. For example, the initial level of imbalance between an OSG attorney and a non-OSG attorney is significantly greater than when we compare the OSG's participation as a party versus its participation as amicus curiae. Accordingly, because our overriding goal is to maximize balance across the treatment and control group, we allow the CEM

129. Bruce J. Ennis, *Effective Amicus Briefs*, 33 CATH. U. L. REV. 603, 605 (1984).

130. SCIGLIANO, *supra* note 77, at 183.

131. Lazarus, *supra* note 85, at 1497.

132. We examined each attorney's oral argument experience rather than his presence on a brief or status as counsel of record for two reasons. First, oral argument experience has already been established as a reasonable measure of attorney experience. *See, e.g.*, Johnson, Wahlbeck & Spriggs, *supra* note 28, at 100. Second, as McGuire points out, the United States Reports do not consistently record which attorneys were on the briefs in a case, but *do* consistently record the identity of the attorney who orally argued the case. *See* McGuire, *supra* note 76, at 512 n.4.

software to construct the bins for this and all other variables described below. In any event, our substantive effects are consistent if we manually coarsen the data (but with the caveat that we retain greater imbalance in the data).

We measure two different variations of experience. First, we start by including the amount of experience for the attorney who is arguing before the Court. To this value we also add the experience of any additional attorneys who appear at oral argument as an amicus participant. We take this step to control for the possibility that while a specific attorney might be an oral argument novice, the presence of a veteran advocate as amici who also supports the novice's side could help tip the scales towards victory in a case.¹³³ Second, because the argument process is an adversarial one, we also include the cumulative amount of experience possessed by attorneys on the opposing side. The basic intuition here is that the likelihood of a seasoned veteran winning in a case should be higher when he is squaring off against a side represented by first timers as opposed to frequent Supreme Court litigators.

2. *Net Resource Advantage*

Some scholars have argued that parties win when they have resource advantages. Not surprisingly, studies have shown that parties with more resources fare better before the High Court.¹³⁴ Galanter, for example, found that resource-advantaged litigants fared better than “one-shotters” because they use their resources to stack the deck in their favor.¹³⁵ They tend to hire better lawyers who can conduct more extensive research.¹³⁶ They engage the services of

133. Our results are substantively unchanged if we treat these two initial quantities separately. This is likely due to the high correlation between the measures.

134. Paul M. Collins Jr., *Lobbyists Before the U.S. Supreme Court: Investigating the Influence of Amicus Curiae Briefs*, 60 POL. RES. Q. 55 (2007) [hereinafter Collins, *Lobbyists Before the U.S. Supreme Court*]; Paul M. Collins Jr., *Friends of the Court: Examining the Influence of Amicus Curiae Participation in U.S. Supreme Court Litigation*, 38 LAW & SOC'Y REV. 807 (2004) [hereinafter Collins, *Friends of the Court*]; Joel B. Grossman, Herbert M. Kritzer & Stewart Macaulay, *Do the “Haves” Still Come Out Ahead?*, 33 LAW & SOC'Y REV. 803 (1999).

135. Marc Galanter, *Why the “Haves” Come Out Ahead: Speculation on the Limits of Legal Change*, 9 LAW & SOC'Y REV. 95, 98-100 (1974); see also Donald Songer, Ashlyn Kuersten & Erin Kaheny, *Why the Haves Don't Always Come Out Ahead: Repeat Players Meet Amici Curiae for the Disadvantaged*, 53 POL. RES. Q. 537, 540 (2000).

136. See Songer, Kuersten & Kaheny, *supra* note 135, at 540.

better expert witnesses who thereby create more influential trial court records.¹³⁷ They can anticipate legal challenges to their actions and inoculate themselves against those challenges by creating “comprehensive litigation strateg[ies].”¹³⁸ Stacking the deck provides these resource-rich players a formidable advantage.

Accordingly, we also match attorneys on resource advantage to avoid inferring a special OSG advantage that might simply be a function of its resource advantages when compared to other attorneys. To match on litigant resources, we follow the trend among scholars and rank order litigants along a sliding continuum.¹³⁹ We follow the approach of Collins¹⁴⁰ and assign each petitioner and respondent to one of ten potential categories, which we present in ascending order of resources: poor individuals (=1), minorities (=2), nonminority individuals (=3), unions or interest groups (=4), small businesses (=5), businesses (=6), corporations (=7), local governments (=8), state governments (=9), and the U.S. government (=10). We then subtract the ranking for the opposing side from the ranking for the side being supported by a specific attorney, which identifies the relative differential between the two sides.¹⁴¹ Positive (negative) scores reflect cases in which the attorney’s side (opposing side) was advantaged.

137. *See id.*

138. Donald R. Songer, Reginald S. Sheehan & Susan Brodie Haire, *Do the “Haves” Come Out Ahead over Time? Applying Galanter’s Framework to Decisions of the U.S. Courts of Appeals, 1925-1988*, 33 LAW & SOC’Y REV. 811, 812 (1999).

139. *See, e.g.*, Ryan C. Black et al., *Emotions, Oral Arguments, and Supreme Court Decision Making*, 73 J. POL. 572, 575 (2011); Ryan C. Black & Christina L. Boyd, *US Supreme Court Agenda Setting and the Role of Litigant Status*, 28 J. L. ECON. & ORG. 286, 291 (2010); Collins, *Lobbyists Before the U.S. Supreme Court*, *supra* note 134, at 60; Collins, *Friends of the Court*, *supra* note 134, at 819; Songer, Sheehan & Haire, *supra* note 138, at 817; Reginald S. Sheehan, William Mishler & Donald R. Songer, *Ideology, Status, and the Differential Success of Direct Parties Before the Supreme Court*, 86 AM. POL. SCI. REV. 464, 465 (1992); Donald R. Songer & Reginald S. Sheehan, *Who Wins on Appeal? Uppercuts and Underdogs in the United States Courts of Appeals*, 36 AM. J. POL. SCI. 235, 242 (1992).

140. Collins, *Friends of the Court*, *supra* note 134, at 819; PAUL M. COLLINS, JR., *FRIENDS OF THE SUPREME COURT: INTEREST GROUPS AND JUDICIAL DECISION MAKING* (2008).

141. An alternative approach would involve matching on the rank of the attorney’s side and the opposing side. We opted to match on the differential for two reasons. First, we believe the *difference* in resources is more important than the actual *identity* of the parties. Second, when we try to match on the identity of the parties, we are unable to retrieve enough matches to make meaningful inferences.

3. *Amicus Briefs*

A host of studies suggest that amicus curiae briefs influence the choices justices make.¹⁴² Collins shows that, after holding all else constant, the petitioner's probability of victory increases roughly 6% simply because of the presence of a few supportive amicus briefs.¹⁴³ Spriggs and Wahlbeck show that the Court often adopts language of amicus curiae briefs in its opinions.¹⁴⁴ Paul Wahlbeck shows that amicus support often influences legal change.¹⁴⁵ As such, we believed it important to control for their presence. Using data provided by Collins, which we updated for the 2002–2007 terms, we created a variable that measured the number of amicus briefs supporting each attorney's side, which we then used in the CEM algorithm.¹⁴⁶

4. *Petitioner Status*

The modern Court tends to reverse the cases it reviews.¹⁴⁷ Since there is a built-in bias towards reversing lower court decisions, we thought it empirically prudent to level the playing field by matching petitioner attorneys against other petitioner attorneys and respondent attorneys against other respondent attorneys. As such, we matched cases based on whether the attorney—including those that appeared as amicus curiae—represented (or supported) the petitioner or the respondent.

5. *Ideological Distance from the Court*

A different view of attorney success examines the ideological agreement between the attorney and the Court. A large portion of judicial decision making turns on the ideological preferences of

142. See COLLINS, *supra* note 140; Collins, *Friends of the Court*, *supra* note 134; McGuire, *supra* note 8, at 193.

143. Collins, *Friends of the Court*, *supra* note 134, at 822; see also COLLINS, *supra* note 140.

144. James F. Spriggs, II & Paul J. Wahlbeck, *Amicus Curiae and the Role of Information at the Supreme Court*, 50 POL. RES. Q. 365, 373 (1997).

145. See Wahlbeck, *supra* note 10.

146. Paul M. Collins, Jr., *Amici Curiae and Dissensus on the U.S. Supreme Court*, 5 J. EMPIRICAL LEGAL STUD. 143, 153–60 (2008).

147. See H.W. PERRY, JR., *DECIDING TO DECIDE: AGENDA SETTING IN THE UNITED STATES SUPREME COURT* (1991); Jan Palmer, *An Econometric Analysis of the U.S. Supreme Court's Certiorari Decisions*, 39 PUB. CHOICE 387, 396 (1982).

justices.¹⁴⁸ As such, we determined for each attorney in each case in our sample his ideological distance from the Court median. Following previous research,¹⁴⁹ we determined, first, the ideological direction of the lower court decision as reported in the Supreme Court Database.¹⁵⁰ If that decision was liberal (conservative) we coded the petitioner as making a conservative (liberal) argument. If the petitioner's argument was conservative, we coded Ideological Distance as the Court median's ideal point, as estimated by Martin and Quinn.¹⁵¹ If the argument was liberal, we coded Ideological Distance by multiplying the Court median's Martin-Quinn score by -1.

6. *Case Quality: Lower Court Disagreement and Conflict Case*

We also control for the quality of the case. We suspect that the underlying quality of the case could lead some lawyers to win more than others. Accordingly, we match on two measures of case quality. First, we examine whether a judge in the lower court dissented. Most circuit court cases do not observe dissents because dissent is costly.¹⁵² It requires time and effort of the dissenting judge; it also makes life more difficult for the majority opinion writer. Forcing busy colleagues to respond to a dissent can impose social costs on the dissenter. As such, we suspect that judges are more likely to dissent when the losing party presents a high-quality argument. Thus, we code whether (=1) or not (=0) there was a lower court dissent in the case. Second, we examine whether the lower courts conflicted over the proper interpretation of the law. When the lower courts conflict, it signals that there are multiple reasonable outcomes in a case. That is, each party might have a strong argument. These cases should be distinguished from those without conflict, where the

148. See generally Jeffrey A. Segal & Harold J. Spaeth, *THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED* (2002).

149. Johnson, Wahlbeck & Spriggs, *supra* note 28, at 106.

150. See *Current Dataset: 2015 Release 01*, SUP. CT. DATABASE (Aug. 17, 2015), <http://supremecourtdatabase.org/data.php?s=1> [<https://perma.cc/7BJH-6PGG>].

151. 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).

152. See LEE EPSTEIN, WILLIAM M. LANDES & RICHARD A. POSNER, *THE BEHAVIOR OF FEDERAL JUDGES: A THEORETICAL AND EMPIRICAL STUDY OF RATIONAL CHOICE* 255 (2013).

outcome seems clearer. Thus, we code for whether (=1) or not (=0) there was conflict among the lower courts.¹⁵³

IV. EMPIRICAL METHODS AND ANALYSES

Our dependent variable takes on a value of 1 if the side an attorney represents wins and 0 if it loses. Our key independent variable of interest is a binary indicator for whether an observation was assigned to the treatment (=1) or control (=0) group. In what follows, we describe and present results for a series of treatment/control pairings. For each pairing, we pre-processed our data using CEM and then estimated a logistic regression model on the matched data. Following the recommendation of Ho and his coauthors, we include each pre-treatment variable as a regressor in our models to reduce the effects of any remaining imbalance in the data.¹⁵⁴ Using these parameter estimates, which we report in the appendix, we then conducted simulations to generate predicted probabilities (and confidence intervals) for each treatment effect. We derived such probabilities from a hypothetical attorney who otherwise had a 50% probability of winning her case. The values plotted, then, show the change in the probability of winning for such a coin-flip attorney who is in the treatment group as opposed to the control. We portray these results graphically in the three panels of Figure 5 below.

Starting with Panel A, we ask whether *current* members of the OSG are distinctly more successful than attorneys who are neither currently nor previously affiliated with the OSG. Although our main question in this Article is about the impact of *former* members of the OSG, this initial comparison is still important. Though the basic relationship of OSG success has already been documented in the literature,¹⁵⁵ we have expanded the data on which that initial finding was based by nearly 20%, including roughly 400 new instances of

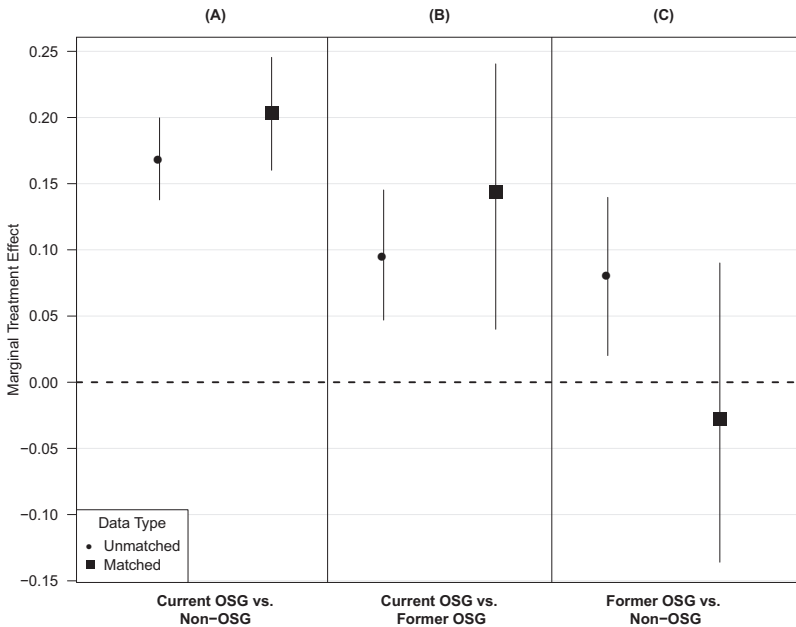
153. We obtain data for both these measures by looking to the Supreme Court Database. The Database, of course, codes whether the Court referenced the presence of a dissent below or the presence of conflict. In our context, this “selection effect” is likely beneficial because it highlights those cases that seem to be of higher quality.

154. Daniel E. Ho et al., *Matching as Nonparametric Preprocessing for Reducing Model Dependence in Parametric Causal Inference*, 15 POL. ANALYSIS 199 (2007).

155. See BLACK & OWENS, *supra* note 1; see also Ryan C. Black & Ryan J. Owens, *A Built-In Advantage: The Office of the Solicitor General and the U.S. Supreme Court*, 66 POL. RES. Q. 454 (2013).

when an OSG attorney appeared before the Court. Perhaps more importantly, however, these revised data also include about 900 instances of non-OSG attorneys, which provide more potential high-quality matches. This is significant because, as we note above, attorneys from the OSG enjoy a number of potential advantages, not the least of which is an abundance of experience.

Figure 5
DOTPLOT OF TREATMENT EFFECT FOR THREE TREATMENT/CONTROL
COMPARISONS



In each of the above panels, the circle points indicate the results from an unmatched analysis (analogous to the scenario depicted above in Table 3). The square points show the results from the matched analysis (e.g., Table 2 from above). The vertical whiskers denote 95% simulation intervals (two-tailed).

As the panel makes clear, we continue to find substantial evidence of current OSG influence—even after pairing OSG attorneys with others who are similar in all respects but for their affiliation with the OSG. To wit, if a non-OSG attorney has a 50% chance of winning her case, we estimate that an otherwise identical attorney from the OSG has about a 70% chance of winning simply because she is affiliated with the OSG. This is a substantial effect both in terms of absolute change (i.e., +20%) as well as an

impressive relative effect (i.e., +40%). In short, we continue to find evidence that the OSG influences the High Court.

Panel B takes a step closer towards our main question of interest. Here, we pit OSG attorneys against former OSG attorneys. The value of this comparison is that it provides us with a unique opportunity to control for something that, while undoubtedly important, is difficult to measure: attorney quality. The OSG is incredibly selective in whom it employs, choosing only attorneys with the strongest education credentials and work experience. It should come as no surprise, for example, that of the 133 unique OSG attorneys who appear in our data, fully 52% of them (i.e., 69) had previously clerked for a Supreme Court justice. By limiting our control group to former OSG attorneys, we raise the bar of finding real evidence of the OSG's influence. At the same time, by comparing the magnitude of the OSG's advantage between non-former OSG attorneys and former OSG attorneys, we can gain valuable knowledge about whether former OSG attorneys might be stronger than those who never worked there.

The results from Panel B support both of these ideas. First, we find that even when paired with former OSG attorneys, current OSG attorneys are more likely to win. The estimated treatment effect is about 0.14, which is to say that in a coin-flip situation, an OSG attorney would be expected to win nearly two-thirds of the time, which is a relative increase of about 28%. At the same time, and consistent with the idea that former OSG attorneys *are* somehow unique, we observe that the size of the OSG's advantage appears to shrink a bit (i.e., $0.20 > 0.14$).

Finally, in Panel C, we examine how former OSG attorneys fare when compared to attorneys who never worked in the OSG. To reiterate, we continue to match on all the covariates identified above, which include things like attorney experience, case quality, and the number of outside interests both supporting and opposing the case. To the extent that it is possible, then, we have ensured that the only remaining difference between these two groups of attorneys is that one group is former OSG attorneys and the other is not.

The points within the panel reveal a very interesting pair of results. Though we have not made much of it until now, our figure provides two distinct effect estimates. The circle within each panel comes from the unmatched data. That is to say, it is derived as though we were unaware of matching and the dangers of imbalance, and simply estimated our standard logistic regression model on the full data. In the previous two panels, the result from the unmatched

analysis largely aligned with matched result. When we compare former OSG attorneys versus non-former OSG attorneys, however, we see a clear disconnect in conclusions. In particular, when using the full unmatched data, we estimate a modest—but statistically significant—positive effect for being a former OSG attorney. A non-OSG attorney with a 0.50 probability of winning would anticipate roughly a 0.08 gain in that probability if she were an OSG alum. This is a relative increase of about 16%. *But, drawing this conclusion would be wrong.* When we employ a more appropriate methodology (i.e., matching) and achieve greater balance between these two types of attorneys,¹⁵⁶ the apparent former OSG attorney advantage disappears. The point estimate becomes statistically insignificant.¹⁵⁷ We find no systematic evidence that former OSG attorneys are any more (or less) likely to win than other similarly experienced and situated attorneys.

Do former OSGs enjoy a unique advantage over other attorneys? Our analysis, which incorporates data from over thirty-five terms of Supreme Court decision making, says no. In the formal parlance of statistical hypothesis testing, this is to say that we *fail* to reject the null hypothesis that a difference in winning propensity exists between these two populations (i.e., former OSG attorneys and non-former OSG attorneys). Having made this conclusion, two possibilities exist. First, it could be the case that we are right and there's really no difference between these two types of attorneys. Second, it could be that a difference *does* actually exist, but our study was not sufficiently large to uncover it. This is called a Type II error.¹⁵⁸

156. The initial level of imbalance in this analysis is quite large. The multivariate L1 value for the unmatched data is 0.60. For the matched data it is just 0.13—a relative reduction of more than 75%. The analogous values for the other two analyses are (unmatched/matched): 0.51/0.06 (Current OSG vs. Non-OSG), 0.58/0.13 (Current OSG vs. Former OSG).

157. The two-tailed p-value on the effect is 0.63, which puts it very far away from conventional levels of statistical significance (i.e., 0.05 or, more liberally, 0.10). Indeed, a p-value of 0.20 or greater is a commonly used threshold for accepting the null hypothesis. Timothy R. Johnson, James F. Spriggs II & Paul J. Wahlbeck, *Passing and Strategic Voting on the U.S. Supreme Court*, 39 LAW & SOC'Y REV. 349, 368 n.31 (2005) (citing HUBERT M. BLALOCK, JR., SOCIAL STATISTICS 161 (2d ed.1979)).

158. A Type I error, by contrast, occurs when the researcher rejects the null hypothesis even though it is true. Because we fail to reject the null hypothesis, there is no chance that we have committed this error.

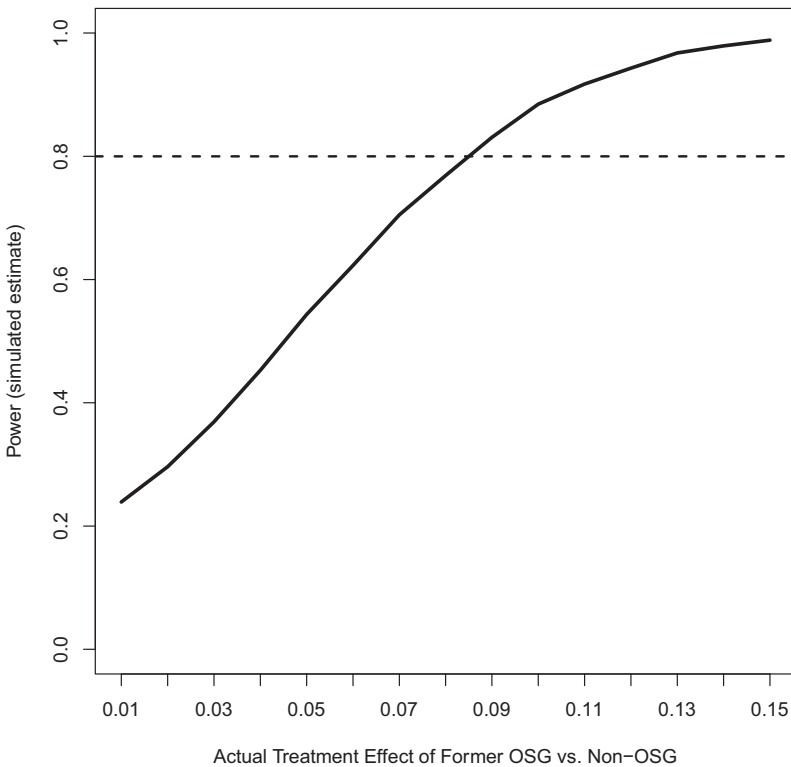
How likely is it that we've made such a mistake? The probability of a Type II error depends on two factors: (1) how big of an effect size do we wish to recover, and (2) with what level of reliability do we wish to recover it? Conditional on these two values, we can determine, via a power analysis, whether the sample size in a study was sufficient to find an effect, given that one did actually exist.

We use simulations to conduct our power analysis. We start by taking 729 draws from a binomial distribution with a known probability of success of 0.53. The number 729 corresponds to the number of observations in the control group in our matched sample. We choose 0.53 as it corresponds to the overall win rate in our data. We then take 125 draws from a second binomial distribution. Here, however, we iteratively vary the known probability of success from 0.54 to 0.68, which is to say we add 0.01, 0.02, . . . , 0.15 to the baseline win rate. This represents the potential advantage of being a former OSG attorney. With these two samples in hand, we simply conduct a difference-in-proportions test to see if a significant difference exists. We then repeat this entire process a large number (i.e., 10,000) of times to smooth out any idiosyncrasies arising from a particular sample.

Figure 6 below plots the results of these simulations. Along the x-axis, we show the magnitude of the difference in win probabilities that existed in the samples we calculated. For example, 0.01 means that we took 125 random draws from a binomial distribution where the probability of success in any single draw was 0.54, which is 0.01 greater than the baseline value of 0.53. The y-axis then reports the proportion of the 10,000 simulations where we recovered a statistically significant difference between the two samples.¹⁵⁹ This is the power of such a study. The critical thing to bear in mind here is that an actual difference *did* exist between the two samples.

159. We use a one-tailed p-value of 0.20 to make this determination. We choose this value since it is the threshold identified above in an earlier footnote for accepting the null hypothesis.

Figure 6
POWER ANALYSIS RESULTS



The x-axis presents the size of a simulated difference between the former OSG attorney and someone who never worked there. E.g., 0.05 means that an OSG alum enjoys a 0.05 boost in winning over someone who never worked there. The y-axis shows the likelihood that a study with our specific sample sizes would be able to recover this difference. We generated these estimates by repeating a simulation procedure 10,000 times. See text for additional details.

Unsurprisingly, the power to detect small differences is weak. For example, we would only be able to detect a treatment effect of 0.01 about 24% of the time we conducted such an analysis. As the effect size increases, however, so too does our ability to capture it. A 5% difference in the chances of winning between a former OSG attorney and a non-OSG attorney would be captured by our analysis a majority (54%) of the time. As one would expect, just like common thresholds exist for deciding to reject or accept the null hypothesis, researchers have also proposed an analogous value for statistical

power, with 0.80 being the most commonly used value.¹⁶⁰ For the power analysis reported above, the 0.80 power level corresponds to a treatment effect of 0.085, which, coincidentally, is nearly identical to the exact value of the unmatched treatment effect we found above. This allows us to say, with a good deal of confidence, that if the unmatched effect actually did exist, that we would still be able to detect and document it in the matched data we have used. At the same time, of course, prudence demands that we concede that a small advantage experienced by former OSG attorneys might exist and our study simply lacked the power in order to recover it. If a former OSG attorney's real win rate was actually 0.56 compared to non-OSG attorney's rate of 0.53, then our study would reveal that just below 40% of the time. So, although we cannot say that absolutely no difference exists between former OSG attorneys and their non-OSG counterparts, any differences are likely to be so small as to be unimportant substantively.

CONCLUSION

Former OSG attorneys appear before the Court now more than ever in recent history. They can rely on their experience before the Court. They are highly skilled. They are likely to know what it takes to win. And so they command attention—and large legal fees. But are they more likely to win their cases than similar attorneys who never worked in the OSG? Our results say no. Of course, we should point out that we do not seek to diminish the skills of former OSG attorneys. That is not our point; far from it. Rather, we simply seek to determine whether they are more successful than other high-quality attorneys.

That OSG attorneys are just as successful as other similar attorneys suggests three important things. First, it suggests that there is indeed something unique about the OSG. Whatever cache an attorney has with the Supreme Court while working for the OSG seems to evaporate the moment they leave that office. This speaks volumes about the unique importance of the OSG.

Second, the results suggest that OSG attorneys do not learn anything “proprietary” about the Court while they are there. They gain experience and skills that non-OSG attorneys can also gain.

160. See, e.g., JACOB COHEN, *STATISTICAL POWER ANALYSIS FOR THE BEHAVIORAL SCIENCES* 16-17 (1988).

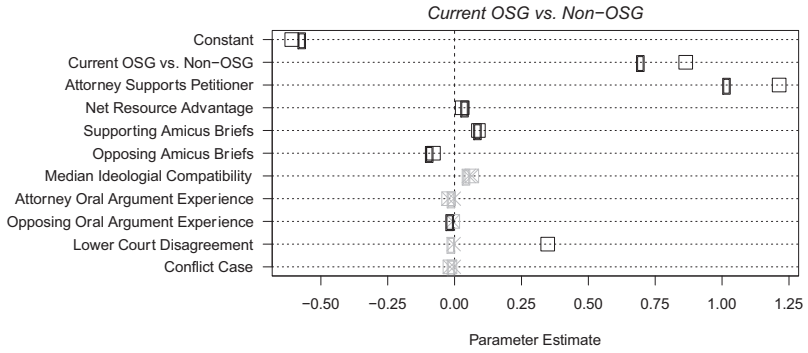
They do not appear, however, to learn anything unique about the justices that outsiders could not learn.

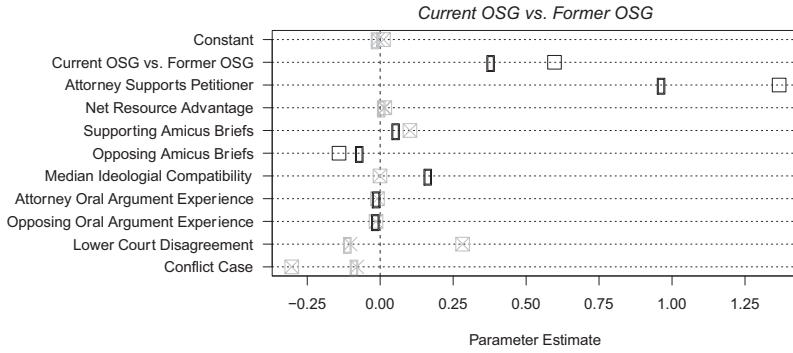
Third, the results suggest that if litigants pay extra money to hire former OSG attorneys, they might more profitably spend their resources elsewhere. That is, if they pay a premium for former OSG attorneys, they might be spending too much. Former OSG attorneys are skilled and successful, to be sure. But it does not appear that they are any more likely to win their cases than attorneys with similar experiences and characteristics who never worked in the OSG. Assuming litigants can locate such attorneys, and we suspect they can with a little research, they might be able to secure equally strong representation for potentially a cheaper price tag.

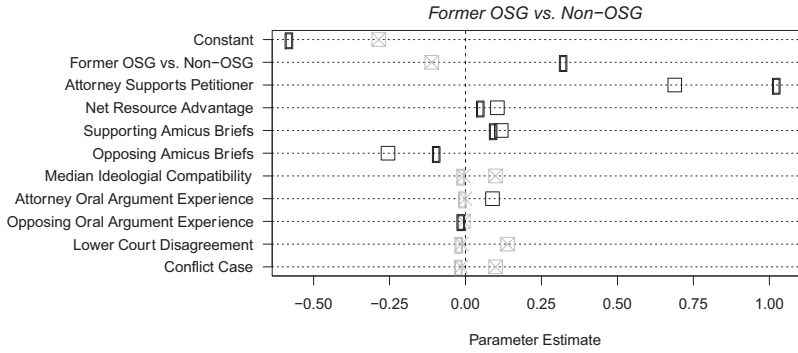
We hope scholars continue to examine the influence of particular kinds of attorneys before the Court. For example, one area of scholarship might look at former Supreme Court law clerks before the High Court. It is possible that such attorneys have inside information about justices that other attorneys do not have. Alternatively, they might not be any more successful than non-clerks, an outcome that would complement our findings here. Similarly, future studies could examine the influence of former Solicitors General themselves. One might also compare former agency attorneys against other attorneys in complex litigation. Finally, scholars might examine the influence of attorneys in the federal circuits, where they arguably matter more. By so doing, we can further understand the role of attorneys in the federal appellate system.

APPENDIX REGRESSION PARAMETER ESTIMATES

The three figures below present parameter estimates from the logistic regression models described earlier in the Article. The point shape corresponds to the type of data used for the model, with circles showing estimates for the full, unmatched data and squares providing estimates for the matched data (i.e., the same as the figures with the marginal effects that appear above). We use point shading and the presence of an “X” to identify which variables are (or are not) statistically significant. Light gray with an “X” means the variable is not significant at the 0.05 level (two-tailed test). Black without an “X” means the variable has a two-tailed p-value of 0.05 or smaller.









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