

Confronting the Court:

The Supreme Court, the Confrontation Clause, and the Ways They Interact

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## Introduction

On August 5th of 1999, Kenneth Lee was stabbed in his home by Michael Crawford. To police and at his trial for assault, Mr. Crawford argued he only stabbed Lee to protect his own wife from Lee, who was attempting to rape her. When attorneys for the state of Washington played a pre-recorded statement from Crawford's wife, however, the jury learned this may not have been true. Crawford was convicted of that assault, and his years of appeals in both the Washington state court and United States federal court systems began (*Crawford v. Washington* 2004). At issue were eighteen words taken from the Sixth Amendment to the Constitution: "In all criminal trials, the accused shall enjoy the right . . . to be confronted with the witnesses against him" (1 *Annals of Cong.* 1789). When the Supreme Court heard this case in the October Term of 2003, they asked the parties how exactly these words, the Confrontation Clause, affected Crawford through the playing of a pre-recorded statement that did not allow his attorneys the opportunity to cross examine the speaker. Were his rights violated? Was the statement reliable under previous Supreme Court precedent? Did it matter for Crawford's trial as a whole?

When the Supreme Court released its opinion in *Crawford v. Washington*, the nine Justices ultimately decided that Crawford's Confrontation Clause rights had been violated. However, in so deciding, the Court re-wrote years of precedent on the strength of the Clause, adding new doctrinal tests and hoops to the eighteen words that actually exist in the Constitution. No longer were statements from witnesses not present in court generally inadmissible. Instead, statements could be testimonial, they could be made in preparation for a trial, and they could be made to numerous types of state officials, all which determine what rights a defendant has to be confronted by those statements and by those who made them (*Crawford v. Washington* 2003).

This case is emblematic of the Supreme Court's long and, at times, rocky history with the Confrontation Clause. Since 1879, when the Supreme Court heard its first case claiming a violation of the Confrontation Clause (*Reynolds v. United States* 1879) to the most recent landmark case of *Crawford v. Washington*, the Court has interpreted, expanded, and retracted the definition of "confrontation" with seemingly little rhyme or reason. Behind the confusing mess of shifting precedents and the shadowy, secretive veil of the Supreme Court as an institution, there lies some explanation to the question, "Why does the Court decide Confrontation Clause cases the way they do?" This paper seeks to examine the variables hiding beneath each case the Supreme Court hears, including the ideological split between liberal or conservative decisions at the lower appellate court level, the Chief Justice whose Court heard the case, and the year the case was decided. By examining the effects of these variables on Supreme Court's ideological decision, both as a whole and solely on a subset of Confrontation Clause cases, one may be able to shed light on the Court and provide context for the inconsistent right to confrontation.

Admittedly, the Supreme Court does not spend the majority of its time hearing cases about the Confrontation Clause. With a Court that chooses to hear around eighty cases per year and with thousands of constitutional and legal issues on which to make determinations, the Confrontation Clause may seem like a drop in the Supreme Court's bucket (Liptak 2009). Nevertheless, it is a vital right of the accused in the United States, one that protects criminal defendants from conviction by second-hand statements from unreliable sources that the defendant might never be able to attack through cross-examination (Pettys 2009). The subject has been the fertile grounds for discussions in law review articles and other scholarly works for years, with each new landmark case on the subject sparking debates across the country among legal minds. While many use the advent of a new Confrontation Clause precedent, like *Crawford*

v. *Washington*, to talk about the effect of that case, few have sought to determine what patterns might exist that influence the outcome in Confrontation Clauses cases as a whole.

There has, however, been much written in isolation about the variables this paper seeks to examine together. For instance, modern political commentators have taken an interest in discussing the Ninth Circuit Court of Appeals, which covers much of the geographic west coast, as a particularly liberal court while the Fifth Circuit Court of Appeals, which covers Texas and other Southern states, is considered especially conservative (Broscheid 2011). These variations in the ideological direction among the thirteen different Courts of Appeals (eleven numerical and geographical Circuits, the D.C. Circuit, and the Federal Circuit) often provide the most recent legal opinion before the Supreme Court when the case travels through the federal court system.

Thus, the variable of the ideological direction of the lower court's decision may shed light on the nature of the Supreme Court opinion's ideological direction. When a Court of Appeals issues its decision in any given case, there is almost always a written opinion containing the reasoning and application of the decision. These opinions contain, as one could argue all things in the law do, political hints or ideologies, allowing individual case opinions to be categorized as "liberal" or "conservative." By categorizing such ideologies in lower court opinions, researcher Andreas Broscheid discovered even more convincing evidence that different Courts of Appeals across the country have different political biases (2011). Beyond that, however, this variable can describe how an individual case was politically predisposed before entering the Supreme Court's chambers. Should some kind of tendency to overturn cases from a certain Court of Appeals exist, as Roy Hofer argues for the American Bar Association's journal *Landslide*, having data on the individual political ideology of the lower court's decision can help determine what variable here actually impacts Confrontation cases (2010).

Once the case reaches the Supreme Court, however, a few additional factors may influence the outcome besides the mere facts of the given case. For one, the political and ideological makeup of the nine-member Supreme Court may affect final decisions (Epstein, Martin, Quinn, and Segal 2007). Justices are people with their own personal political beliefs, as are the Presidents who nominate them to their seat on the highest bench in the land. Thus, it is reasonable to think that sometimes these personal political views may interject into the decisions of the Court. By examining the Supreme Court's opinions in the same way that others have examined lower court opinions, this paper might determine if a political bias exists in the Supreme Court against the expansion of Confrontation Clause rights.

Related to the variable of Court ideology is the variable of Chief Justice. When a presiding Chief Justice dies or retires from the bench, a kind of power vacuum emerges, due in large part to the responsibilities of the Chief Justice both at argument and in conference to vote on the case. Given the role of the Chief Justice is assigning majority opinions (when he or she is in the majority vote on the Court), who it was that presided over and assigned any case, including Confrontation cases, may impact how they ultimately get decided (Bickel 1986). More than that, the Chief Justice also begins the voting in conference, which could sway undecided and more junior Justices to follow his or her ideological suit. Though more theoretical in nature, it is important to survey the possible effects of Chief Justice on the result of Confrontation cases.

Finally, as the Confrontation Clause has aged and the society it protects grown more mature, so too has the Supreme Court itself. A decrease in the number of cases over time indicates, perhaps, the reluctance of the modern Court to take decisive action on a wide range of issues like Confrontation (Liptak 2009; Perry 1991). By examining the year or Court term that a given case was argued and decided in, this paper hopes to determine why the history of the

protections of the Confrontation Clause seem to have withdrawn from their peak in the 1960s to their present state (Pettys 2009).

Ultimately, the impact of these variables on Confrontation Clause cases may be minimal at best. Even so, the relevant literature on the inner workings of the Supreme Court suggests there is more at play in the deciding of a single case than just the facts of that case (Perry 1991). With these variables modeled correctly against a dataset of a sizeable sample of Supreme Court cases and an acceptable subset of those cases which deal with the Confrontation Clause, this paper may be the first to uncover evidence that the Court treats Confrontation Clause cases differently than other kinds of constitutional or legal issues.

### **Data and Hypothesis**

The data used to examine these issues comes from the United States Supreme Court Judicial Database, an exhaustive examination of all cases in the Supreme Court between 1953 and 1997 (Spaeth 1999). This dataset contains 11,611 individual observations, of which one was removed from the set used in this paper for an apparent coding error across a number of variables. Upon examination of this unusual observation, including numerous searches for the case caption attached to the observation in the Supreme Court's annual reports, I could find no indication that the case actually existed. In such circumstances and noting that the apparent coding errors, if removed, would have a minimal impact compared to the remaining 11,610 cases that did not suffer such extreme coding errors, I decided to remove the single case from the dataset used for this research.

These remaining 11,610 observations take the form of individual cases brought to the Supreme Court during the years between 1953 and 1997. As such, the unit of analysis of the set is the individual case, which includes cases brought of oral argument before the Court and

petitions and appeals brought to the Court yet not argued orally. These data were collected by Harold Spaeth, of Michigan State University, and a number of his own students (though he is quick to note that the students only partially coded variables like docket number and date of decision, which require no interpretation). Many of the remaining variables required the investigators to make decisions about the political ideological (liberal, conservative, or not ideological) of Court opinions, individual votes, and lower court decisions. For these variables, Spaeth himself collected data and refers to prior work on the attitudinal model, performed by himself and Jeffrey Segal in 1993.

The dataset, thus, is expansive across time and issue, collecting a wide range of cases from a Court that experienced noticeable turnover in the forty-four years in which data were collected. This, along with the expertise of Mr. Spaeth on the subject of Supreme Court political attitudes and actions, gives the dataset a certain strength. Nevertheless, the dataset is vulnerable to criticism about its weaknesses. For one, relying solely on Mr. Spaeth to code variables regarding political directions of case votes, even with a reliability check, could yield considerable disagreement over whether a case has a certain political direction at all. Further, Spaeth's choice to alphanumerically code nearly all variables in the dataset makes running the normal array of statistical tests nearly impossible without first transforming the data into a numerical-only form. As such, the composition of certain variables exposes them to later coding errors, the type which I have worked diligently to avoid yet may still exist. Altogether, though, the dataset is a strong and vast look into the political mind of the Court, broken down by individual cases over more than forty years.

For my specific model from this dataset, I sought first to determine how the variables of the ideological direction of the lower court's opinion, the Chief Justice whose Court decides the

case, and the Court term impacted the variable of the ideological direction of the Supreme Court's opinion for the entire 11,610 case dataset. Then, I attempted to determine how all those same variables affected the Court's ideological direction within the subset of cases dealing with the issue (another variable in the dataset) of Confrontation. By comparing the effect of these given variables on the ideological direction of the Court's opinion both in general and in the specific subset of Confrontation Clause cases, I hoped to determine if the Court approached Confrontation cases with a particular ideological frame and if that frame could have an impact on the ever-changing definition of "confrontation." For an overview of variables, see *Figure 1*.

For my model's dependent variable, I have selected the ideological direction of the Supreme Court's decision, called "DIR" in the dataset. This variable is nominal, with a value of "0" describing a non-ideological case opinion, a "1" describing a liberal case opinion, and a "2" describing a conservative case opinion. As noted above, this variable was coded solely by Spaeth using his knowledge of the attitudinal model, which may be a source of weakness in the variable. However, given the dataset and codebook's explanation that these ideological decisions were made by first listing a number of specific positions on general issues of criminal procedure, civil rights and liberties, economic activity, governmental power, and federalism and then coding a given case's opinion as either supporting or rejecting that position, the variable gains more legitimacy as a valid indicator of the Court's political position in a given case. Since this measure focuses only on the majority opinion of the Court, which constitutes the Court's decision, it does exclude the ideological direction of the minority on a given case, which could defy expectation and contain useful information about the ideological division of the Court on a given issue. Ultimately, though, I predict that this variable will accurately reflect the Court's



ideological vote at the level of a given case and will be affected, as herein detailed, by each of the variables below.

The variable which identifies the ideological direction of the lower court's decision, called "LCTDIR" in the dataset, is coded in the same way as the previously mentioned variable "DIR," and thus shares in its strengths and weaknesses. I expect that cases which have a liberal direction in the lower court will have a conservative direction in the Supreme Court and that cases with a conservative direction in the lower court will have a liberal direction in the Supreme Court. This belief stems both from literature involving the known reversal rates of the various Federal Circuit Courts of Appeals and from literature which describes the Supreme Court's political tendencies in selecting cases for review (Hofer 2010; Perry 1991). While there are certainly a number of factors that influence how the Court makes its docket and decides its cases, it would not surprise most observers to see that the Court may intentionally select cases that it seeks to overturn from lower courts (as Perry argues) and that the result is a somewhat predictable percentage of cases overturned from each Court of Appeals (as Hofer notes).

The variable of Chief Justice whose Court decided the individual case, not surprisingly called "CHIEF" in the dataset, is another nominal variable, this time with four possible values: a "0," which notes a case decided in the absence of a Chief Justice (because of retirement or death when the case was decided), a "1," which notes the Chief to be Justice Earl Warren, who presided from 1953 to 1969, a "2," which notes the Chief to be Justice Warren Burger, who presided from 1969 to 1986, and a "3," which notes the Chief to be Justice William Rehnquist, who presided from 1986 to through the conclusion of the data-gathering for this set (Bickel 1986). The variable accurately measures the sitting Chief and does not seem to suffer any weaknesses, beyond the possibility of a rare coding error. I expect that, when Chief Justice

Warren presides over a given case, there is a greater likelihood the ideological direction of that case will be liberal. As the Warren Court is widely regarded in relevant literature to be the last Court with a liberal reputation, this hypothesis does not seem unreasonable (Cloud 2005).

The variable for Court term, labelled “TERM,” is an interval level measure which uses the last two digits of the calendar year in which the Supreme Court’s term began to identify the timing of the case relative to other cases. It should be noted, however, that this variable is not a precise measure of the year in which the case was actually decided. Instead, the Court operates on an unusual calendar which begins with the start of the Court’s term on the first Monday in October and continues until the beginning of June in the following year, when the Court usually concludes its business. Since the Court uses this “October Term” system instead of a standard calendar to mark significant yearly events in the Court, I too will use this variable as a measure of time. The unusual reality that a case decided, for example, in March of 1985 would register in TERM as an “84” aside, the variable is accurate, though not checked for accuracy, as it was computer generated and not the result of Spaeth or his students’ efforts. I predict that, as the term increases and time moves closer to the present, there may not be a noticeable impact on the ideological direction of decisions in the overall dataset, but there will be a shift towards more conservative Confrontation Clause opinions in the limited subset of the dataset as the make-up of the Court moved to the political right over time (Bickel 1986; Totenberg 2008).

Finally, to accomplish my second analysis on the limited set of cases dealing with the Confrontation Clause, the variable “ISSUE” becomes relevant. An additional nominal measure, this variable contains 265 legal issues presented in the facts of the case, falling under a number of umbrellas like criminal procedure, property rights, and due process. As Spaeth coded this variable by looking at what legal issues the Court said a given case concerned, there is a strong

likelihood that the legal issue coded for is what the Court was truly considering in its opinion. Certainly this variable is still vulnerable to Spaeth's interpretations of the Court's statements on the matter, though these interpretive variations are unlikely to have a sizeable impact on the dataset as a whole. To arrive at the appropriate subset of the dataset that deals solely with Confrontation Clause cases, I created a new variable called "newISSUE," in which I recoded all cases with ISSUE = 110 (the code in Spaeth's variable for Confrontation) to a 1 and all other values for ISSUE to a 0. This created a dichotomous variable of, essentially, Confrontation or not Confrontation, which I later used to limit my sample.

### **Empirical Analysis and Discussion**

I began my investigation into the subject by producing a series of frequency tables for my above discussed variables, see *Figure 2* through *Figure 5*. Because the vast majority of my variables do not represent numerical values or otherwise have interval and ratios measures that lend themselves to a more complete battery of statistical measures, the frequency table is the most accurate way to summarize relevant information about them.

For the variable "DIR," I started my analysis by creating a new variable, "newBIDIR," and recoded missing values from the original variable into asterisks, producing fourteen missing cases. I then recoded cases which appeared as "non-ideological" in this variable into missing cases, which changed 181 such cases into missing data. This allowed the variable "newBIDIR" to operate simply as a political measure of the Supreme Court's opinion in each given case, either coded as a "0" for a conservative opinion or a "1" as a liberal opinion." The exclusion of non-ideological cases was necessary to facilitate the use of a logistic regression for my final model and would have a negligible impact on the validity of my data, as my hypothesis concerns only how political cases at the Supreme Court are affected by my variables, not those which are

inherently non-ideological issues at hand. I then ran a frequency table for “newBIDIR,” producing *Figure 2* below. The table indicates that there are just below 8% more cases with conservative opinions from the court than there are cases with liberal opinions in this dataset. While a small discrepancy, it does lend credence to the idea that the Chief Justice may impact the ideological direction of the given case’s opinion, as more cases were decided under conservative Chiefs than under the single liberal Chief Justice, Earl Warren (see *Figures 4 to 6*).

To examine the variable describing the ideological direction of the lower court’s opinion, I first created a new variable labelled “newBILCTDIR” and recoded missing values to an asterisk, removing any numerical effect they may present in a frequency table. Ultimately, this produced no missing values, though not every case was assigned to a “liberal” or “conservative” ideology; instead, 199 were marked as “not ideological.” To resolve this issue and make the variable compatible with the logistic regression demanded by these kinds of variables, I recoded these 199 “not ideological” variables into missing data, excluding them as non-political from this variable which I meant to demonstrate only political Court decisions. I then recoded the remaining data such that a “0” in the “newBILCTDIR” variable corresponds to a conservative lower court opinion, while a “1” in that variable corresponds to a liberal lower court opinion. This created a dichotomous variable that examines only the political nature of a case’s opinion, either as conservative or liberal, at the lower court stage. I then produced a frequency table for this newly recoded variable.

The resulting table, *Figure 3*, shows that there are roughly 20% more cases that arrive at the lower court with a conservative decision than a liberal decision. When compared to the above noted roughly 8% increase in conservatively decided cases at the Supreme Court, the over 20 percentage point advantage to conservatively decided cases is a drastic change. This would

suggest something more is at play than the facts of an individual case; were both the Supreme Court Justices and lower court judges only interested in the law as it applies to the present facts, then one could well conclude that one group of jurists doesn't truly know the law. Perhaps instead, some factor hides behind the change in the ideological direction of Supreme Court decisions, one which may present itself more or less profoundly in a subset of Confrontation Clause cases.

To better deal with the variable of Chief Justice in a logistic regression model, I created three new variables, each meant to describe whether or not one of the three above-noted Chiefs presided over a given case: "WARCOURT," "BURGCOURT," and "REHNCOURT." These variables recoded all cases where another Chief presided into a "0" and the remaining cases where the given Chief did preside into a "1." Thus, for example, "BURGCOURT" describes with a "0" the cases presided over by a Chief Justice who is not Justice Burger, while a "1" describes cases over which Justice Burger did preside. *Figures 4 to 6* show the frequency tables for these variables. Unsurprisingly, Chief Justice Burger presided over the most cases, which corresponds to the length of time he was on the bench. In isolation, these frequency tables do not present much interesting information about Confrontation or the ideological outcome of cases, but it is interesting to note the liberal reputation of the Warren Court, which makes up only 30.89% of cases included in the dataset (Totenberg 2008).

The final frequency table, for variable "newISSUE," is the product of the work described above to create a dichotomous variable that discerns if a given case deals with a claim about the Confrontation Clause or not. *Figure 7*, then, provides that seventy-two Confrontation cases exist in this dataset, little more than half a percent. Nevertheless, as these cases may experience the impact of other variables more or less intensely as the whole set of cases, this variable is still an

important addition to my model. As the dichotomous nature of the variable allows that cases without a specific legal issue raised are effectually equal to cases without a Confrontation Clause issue raised, the variable contains no missing cases.

As for the variable “TERM,” a more statistical approach can be taken. Since the data in the variable deals with the year, measured by Court term, in which the given case was decided, the data is at an interval level and can be examined using a more thorough battery of summary statistics. *Figure 8* contains those statistics, of which a few are important to note. Primarily, as shown by the minimum and maximum values, the earlier Court term which this dataset examines is 1953, while the latest is 1997. Further, given the mean value of roughly 75.345, I can assume the data is very slightly skewed towards the later terms (as the midway point between the start and end dates of this dataset’s collection period would be October Term 1975). This means the Court heard a very few more cases in the later years of the dataset than the earlier years. The impact of this skew, however, is likely to be unnoticeable on the data as a whole. Additionally, this variable’s standard deviation suggests that the majority of cases were heard within a period of twenty-two years, consistent with a fairly regular distribution of cases per year. For variable “TERM,” a total of thirteen missing values exist, which likely have no impact on calculations performed using this variable.

For my testable model, I chose to use a logistic regression, with independent variables “newBILCTDIR,” “WARCOURT,” “BURGCOURT,” and “TERM” and dependent variable “newBIDIR.” I chose to exempt “REHNCOURT” for this model first to avoid the problem of collinearity that emerged when running the model with all three Chief Justice variables in place and second because Rehnquist presided over the smallest number of cases in this dataset. Thus, it was a somewhat natural choice to exclude “REHNCOURT” from the final model, and I doubt

the absence of this particular variable will be much felt from the model, which I explain further below. This model is most beneficial because the data contained in this particular set has little to no real value in terms of numbers. For example, consider the variable “newBIDIR.” Here, a “0” denotes a Supreme Court opinion with a conservative ideology, and a “1” denotes a similarly situated opinion with a liberal ideology. It would be meaningless, mathematically and scientifically, to conclude that a liberal opinion subtracted from a liberal opinion yields a conservative opinion, as their strict numerical representations may suggest. Instead, as almost all of my variables are nominal variables (“TERM” being the one interval-level variable that breaks this trend) and they all have only two possible values, it makes the most sense to run a logistic regression, which can easily deal with bivariate data in a logical way.

The resulting logistic regression, included below as *Figure 9*, contains a few pieces of notable information. First, the model indicates that I can reject the null hypothesis that none of the independent variables tested have any relationship to the dependent variable tested. As the Chi<sup>2</sup> test shows, I can safely assume there is no statistical probability that these variables would interact this way as a matter of chance. Instead, the regression asserts that there is likely at least one variable with a statically significant relationship to the ideological direction of the Supreme Court’s opinion hidden in the mix.

However, the four independent variables in the model can account for roughly 4.5% of the variation in the dependent variable of “newBIDIR,” as highlighted by the Pseudo-R<sup>2</sup> test. This means that the ideological direction of the lower court’s opinion, the presence of either Chief Justice Warren or Chief Justice Burger as presiding Justice in the case, and the term in which the case was decided explain just shy of 5% of the changes seen in the ideological direction of the Supreme Court’s decision. This is a rather small amount of variation accounted

for, and does not speak volumes for the importance of these variables. Further, only half of the variables in the model are actually statistically significant enough to influence this variation in a meaningful way. Only “newBILCTDIR” and “WARCOURT” produced values for their z tests which suggest I can reject the null hypothesis that these variables do not, by themselves, influence the dependent “newBIDIR” variable. This means that only the ideological direction of the lower court’s opinion and the presence of Chief Justice Warren as presiding Justice impact the ideological direction of the Supreme Court’s opinion. For only one of the two tested Chiefs to influence the opinion seems unusual, as I have no reason to believe that Justice Warren would have any more influence on the Court’s opinion than Justice Burger. Nevertheless, there is a decidedly significant relationship between “WARCOURT” and “newBIDIR” and between “newBILCTDIR” and “newBIDIR.”

For the variable indicating whether Justice Warren presided over the case, the relationship is a positive one. Indeed, this regression suggests that the presence of Justice Warren presiding over the case increases the odds that the case will ultimately be decided with a liberal opinion. This is consistent with the Warren reputation for being a liberal Court (Totenberg 2008). However, I would expect that the variable for the Court’s term would also reflect some kind of statistically significant relationship, were Justice Warren’s presence really so impactful on the ideological direction of the Court’s opinion. If Warren’s 1950s and 60s Court was really as liberal as touted in some literature, it would logically follow that the higher the Court’s term year, the lower the likelihood of a case having a liberal opinion (as a higher “TERM” value means a greater distance from Warren’s influence). Were “TERM” a statistically significant part of the variation in “newBIDIR,” that logic would prove true; all the same, it is not.



As for the variable indicating the ideological direction of the lower court's opinion, the relationship is quite the opposite from the relationship between Warren and Supreme Court ideological direction. A given case, with a liberal opinion at the lower court, is likely to get a conservative opinion at the Supreme Court, and vice versa. Put differently, as cases in the dataset switch from having a conservative lower court opinion to having a liberal lower court opinion, the chances of the Supreme Court's opinion following suit are low. This is consistent with the literature surrounding reversal rates from the Courts of Appeals, and suggests that the Supreme Court may function, as Bickel asserts, with no small degree of political motivation (1986). Indeed, it is no surprise that this variable proves to be statically significant and in this direction, though the magnitude to which the Supreme Court is really interested in overturning the ideological opinions issued from courts below it remains something this dataset cannot reveal.

Far more interesting than this first logistic regression, examining all available cases in the dataset together, is the second logistic regression I ran, meant specifically to pull out information on the subset of Confrontation cases. This regression, included below as *Figure 10*, examines the same variables in the same order, repeating the command by sorting the data through the variable "newISSUE" first. This created two regression tables (*Figures 10a* and *10b*, respectively) which show first the effects of these variables on 11,339 cases in the dataset that do not raise Confrontation Clause claims before the Court and second on seventy-one cases in the dataset that do raise such Confrontation Clause claims (one Confrontation case had a "not ideological" coding in both "LCTDIR" and "DIR," which removed it from examination in this regression). These resulting regressions contain far more fascinating information than the regression for the entire dataset did.

*Figure 10a* looks, on its face, much like *Figure 9*, and for good reason. Without the small number of Confrontation cases added into the examination, the results between the first and second regression are virtually unchanged. Still only “newBILCTDIR” and “WARCOURT” have a statistically significant effect on “newBIDIR,” and the total variation captured by this regression is less than 5%. For this reason, my interpretation of this data does not vary from my interpretation included for *Figure 9*.

Where the difference lies is in *Figure 10b*. This regression, which examines the effects of “newBILCTDIR,” “WARCOURT,” “BURGCOURT,” and “TERM” on “newBIDIR” for only the seventy-one available cases that raise a Confrontation Clause issue, varies meaningfully and drastically from the previous two regressions. First, like the other regressions, the results of the Chi<sup>2</sup> test indicate that at least variable in the model has a statistically significant effect on “newBIDIR,” and that I can reject the null hypothesis to the contrary. Dramatically unlike the other regressions is the result of the Pseudo-R<sup>2</sup> test, which shows that nearly 40% of the variation in “newBIDIR” can be explained by the model. This is an almost ten-fold increase in the variation explained, and rises to an impressive amount of variation explained the model.

As for that group of variables, this time only one is a statically significant contributor to that explained variation: the ideological direction of the lower court’s opinion. Where previously the presence of Justice Warren played a significant role in the model, this regression shows that only “newBILCTDIR” rises to the level necessary to be statistically significant. As expected, the odds ratio indicates that, when cases switch from having conservative to liberal lower court opinions, the Supreme Court’s opinion is likely to move the opposite direction. This suggests that, when it comes to Confrontation, the Supreme Court has taken an especially keen interest in the political elements behind any given case. In fact, this model seems to suggest that by

knowing the political nature of the lower court's opinion, a trained observer could guess about 40% of the time how the Supreme Court will decide the case, ideologically speaking. This would be a remarkable departure from common wisdom that suggests both that it is almost impossible to tell what the Supreme Court is thinking and that the Court considers the facts of the case before arriving at conclusions, political or otherwise.

### **Conclusion**

Ultimately, this data has some notable limitations. The appearance of only seventy-one usable Confrontation cases in my final model means these conclusions suffer deeply from problems of internal validity. Without having more cases to examine in this kind of model, there simply isn't a way to confirm whether the Court treats Confrontation cases in a significantly different way. Further, because the only interesting conclusions that can be drawn from these results are limited to those seventy-one Confrontation cases, these results will likely not translate well into other kinds of cases. In fact, the model itself demonstrates this by showing that, when considering all cases together, these four independent variables hardly have a noticeable effect on the dependent variable. Nevertheless, the magnitude of the difference in variation between the whole dataset and the Confrontation subset is certainly worth noting, and the decidedly profound impact that the ideological direction of the lower court's opinion seems to have on the Supreme Court's opinion in this subset seems telling. With a more comprehensive dataset, more observations of Confrontation cases, and more time to examining the underlying facts at issue within each individual Confrontation case included in this model, I would feel comfortable concluding that the Court does in fact treat Confrontation as a more political issue than the average issue raised on appeal. Until these conditions are met, though, there will remain some mystery in exactly how the Supreme Court confronts the Confrontation Clause.

## Appendix

*Figure 1: Summary of Variables*

Variable	Measurement
newDIR	Bivariate created to describe ideological direction of Supreme Court opinion. 0= Conservative, 1= Liberal
newBILCTDIR	Bivariate created to describe ideological direction of lower court opinion. 0= Conservative, 1= Liberal
WARCOURT	Bivariate created to describe whether Earl Warren was Chief Justice at the time each case was decided. 0= Not Chief, 1= Was Chief
BURCOURT	Bivariate created to describe whether Warren Burger was Chief Justice at the time each case was decided. 0= Not Chief, 1= Was Chief
REHNCOURT	Bivariate created to describe whether William Rehnquist was Chief Justice at the time each case was decided. 0= Not Chief, 1= Was Chief
TERM	Interval variable describing in which Supreme Court Term a given case was decided. Values equal to last two digits of Term start year.
newISSUE	Bivariate created to isolate cases raising Confrontation Clause issues from all other cases. 0= Not Confrontation, 1= Confrontation.

*Figure 2: Frequency Table of newBIDIR*

Ideological Direction of SCOTUS Decision	Frequency	Percentage	Cumulative Percentage
<b>Conservative</b>	6,153	53.90%	53.90%
<b>Liberal</b>	5,262	46.10%	100%
<b>Totals</b>	11,415	100%	100%

*Figure 3: Frequency Table of newBILCTDIR*

<b>Ideological Direction of Lower Court Decision</b>	<b>Frequency</b>	<b>Percentage</b>	<b>Cumulative Percentage</b>
<b>Conservative</b>	6,872	60.22%	60.22%
<b>Liberal</b>	4,539	39.78%	100%
<b>Totals</b>	11,411	100%	100%

*Figure 4: Frequency Table of WARCOURT*

<b>Was Warren Chief Justice When Case Decided?</b>	<b>Frequency</b>	<b>Percentage</b>	<b>Cumulative Percentage</b>
<b>Not Warren</b>	8,015	69.11%	69.11%
<b>Warren</b>	3,582	30.89%	100%
<b>Totals</b>	11,597	100%	100%

*Figure 5: Frequency Table of BURGCOURT*

<b>Was Burger Chief Justice When Case Decided?</b>	<b>Frequency</b>	<b>Percentage</b>	<b>Cumulative Percentage</b>
<b>Not Burger</b>	6,230	53.72%	53.72%
<b>Burger</b>	5,367	46.28%	100%
<b>Totals</b>	11,597	100%	100%

*Figure 6: Frequency Table of REHNCOURT*

<b>Was Rehnquist Chief Justice When Case Decided?</b>	<b>Frequency</b>	<b>Percentage</b>	<b>Cumulative Percentage</b>
<b>Not Rehnquist</b>	8,949	77.17%	77.17%
<b>Rehnquist</b>	2,648	22.83%	100%
<b>Totals</b>	11,597	100%	100%

*Figure 7: Frequency Table of newISSUE*

<b>Central Issue of Case</b>	<b>Frequency</b>	<b>Percentage</b>	<b>Cumulative Percentage</b>
<b>Not Confrontation</b>	11,538	99.38%	99.38%
<b>Confrontation</b>	72	0.62%	100%
<b>Totals</b>	11,610	100%	100%

*Figure 8: Descriptive Statistics of TERM*

<b>Variable</b>	<b>Observations</b>	<b>Mean</b>	<b>Standard Deviation</b>	<b>Minimum</b>	<b>Maximum</b>
<b>TERM</b>	11,597	75.34526	11.54093	53	97

**Figure 9: Logistic Regression of newBIDIR by newBILCTDIR, WARCOURT, BURGCOURT, and TERM**

<b>newBIDIR</b>	<b>Odds Ratio</b>	<b>Standard Error</b>	<b>z value</b>	<b>P &gt;  z </b>	<b>95% Confidence Interval</b>	
<b>newBILCTDIR</b>	.7193641	.0288282	-8.22	0.000	.6650239	.7781446
<b>WARCOURT</b>	2.411229	.327409	6.48	0.000	1.847813	3.146436
<b>BURGCOURT</b>	1.094565	.0820158	1.21	0.228	.9450634	1.267716
<b>TERM</b>	.9922944	.0042875	-1.79	0.073	.9839265	1.000733
<b>Constant</b>	1.270163	.4977728	0.61	0.542	.5892184	2.738058

Observations: 11,410  
LR Chi<sup>2</sup>(4): 701.94

Probability > Chi<sup>2</sup>: 0.0000  
Pseudo R<sup>2</sup>: 0.0446

**Figure 10: Logistic Regression of newBIDIR by newBILCTDIR, WARCOURT, BURGCOURT, and TERM when sorted by newISSUE**

**Figure 10a: Not Confrontation**

<b>newBIDIR</b>	<b>Odds Ratio</b>	<b>Standard Error</b>	<b>z value</b>	<b>P &gt;  z </b>	<b>95% Confidence Interval</b>	
<b>newBILCTDIR</b>	.7264716	.029178	-7.96	0.000	.6714767	.7859707
<b>WARCOURT</b>	2.398651	.3273969	6.41	0.000	1.835628	3.134363
<b>BURGCOURT</b>	1.100657	.0828045	1.27	0.202	.9497613	1.275527
<b>TERM</b>	.992079	.0043041	-1.83	0.067	.983679	1.000551
<b>Constant</b>	1.286714	.5093706	0.64	0.522	.5949797	2.782672

Observations: 11,339  
LR Chi<sup>2</sup>(4): 687.61

Probability > Chi<sup>2</sup>: 0.0000  
Pseudo R<sup>2</sup>: 0.0439

*Figure 10b: Confrontation*

<b>newBIDIR</b>	<b>Odds Ratio</b>	<b>Standard Error</b>	<b>z value</b>	<b>P &gt;  z </b>	<b>95% Confidence Interval</b>	
<b>newBILCTDIR</b>	.0222691	.0275983	-3.07	0.002	.0019625	.2527001
<b>WARCOURT</b>	1.77317	3.91643	0.26	0.795	.0233716	134.5282
<b>BURGCOURT</b>	.2054202	.3202058	-1.02	0.310	.0096784	4.359962
<b>TERM</b>	.1.044201	.0995092	0.45	0.650	.8662981	1.258639
<b>Constant</b>	.0904936	.7572357	-0.29	0.774	6.82e-09	1200416

Observations: 71  
LR Chi<sup>2</sup>(4): 38.25

Probability > Chi<sup>2</sup>: 0.0000  
Pseudo R<sup>2</sup>: 0.3983



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