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Courts and Executives

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Abstract

William Howard Taft was both our twenty-seventh president and the tenth Chief Justice of the U.S. Supreme Court – the only person to have ever held both high positions in our country. He once famously commented that "presidents may come and go, but the Supreme Court goes on forever" (Pringle 1998). His remark reminds us that presidents serve only four-year terms (and are now limited to two of them), but justices of the Supreme court are appointed for life and leave a legacy of precedent-setting cases after departing the High Court. Of course, presidents also leave a legacy of important decisions, not the least of which being their appointment of federal judges. [*excerpt*]

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CHAPTER 21

COURTS AND EXECUTIVES

JEFFREY L. YATES AND SCOTT BODDERY

WILLIAM HOWARD Taft was both our twenty-seventh president and the tenth Chief Justice of the U.S. Supreme Court—the only person to have ever held both high positions in our country. He once famously commented that “presidents may come and go, but the Supreme Court goes on forever” (Pringle 1998). His remark reminds us that presidents serve only four-year terms (and are now limited to two of them), but justices of the Supreme Court are appointed for life and leave a legacy of precedent-setting cases after departing the High Court. Of course, presidents also leave a legacy of important decisions, not the least of which being their appointment of federal judges.

Just as presidents cast an influence on the federal judiciary and the direction of American legal policy-making through judicial appointment (and other means), federal judges help shape the Constitutional parameters and contours of the executive branch, as well as its powers and policies, through their jurisprudence. From the High Court’s rebuke of president Harry Truman’s assertion of executive power in the *Steel Seizure Case* to President Barack Obama’s “calling out” the Supreme Court regarding the *Citizens’ United* ruling on the First Amendment rights of corporations—the relationship and interactions between the two primary institutions are important, at times volatile, and always intriguing.

Although executive-courts phenomena lend themselves well to empirical investigation and scholarship they are perhaps understudied relative to other topics in American politics and law. This is unfortunate as these interactions and related policy outcomes provide fruitful lines of inquiry for scholars interested in the dynamics of American government and law.

In this chapter we examine and analyze empirical studies addressing the intersection of courts and executives and explore multiple aspects of the dynamics and nuances involved in direct and indirect interactions between these two federal branches. In the section that follows we explore the literature on the formal powers of the president and how courts have shaped and adjusted the legal authority and reach of the president. We further investigate how executives can influence legal policy through less direct pathways such as agenda-setting. In the next section we consider how presidents have helped

shape the landscape of American law through the appointment of judicial actors and the politics of the federal judicial selection process. Finally, we address the president's legal arm—the Solicitor General's Office—and investigate the office's influence on Supreme Court policy-making.¹

DEFINING THE EXECUTIVE: COURTS ON THE FORMAL POWERS OF THE PRESIDENT

The Constitutional foundations of the executive and judicial branches are not set forth in a tremendous amount of detail. Time and practice have helped inform our understanding of the relationship. Although the judiciary was originally considered the 'least dangerous branch' that wielded 'neither the purse nor the sword' (Hamilton 1788), the power dynamics between the executive and the judicial branch have emerged over time as more balanced and nuanced than these early assertions might have portended. Prominent in most scholars' minds is Chief Justice John Marshall's positioning of the Supreme Court as the ultimate interpreter of the Constitution in *Marbury v. Madison* (1803) through his jousting with President Thomas Jefferson. Knight and Epstein (1996) explain that the confrontation between Jefferson and Marshall highlight well the fluid and incremental process whereby democracy is institutionalized. They further note:

The major long-term consequence of the Jefferson-Marshall interaction was a restructuring of the institutional division of labor among the branches ... The Supreme Court's authority for judicial review emerged, not because of some complex intentional design and not because of some brilliant strategic move by Marshall in the face of overwhelming political opposition, but merely because it was politically viable at the time. The lesson for contemporary efforts to institutionalize democracy through constitutional design is that such efforts are merely the first, and tentative, steps in an ongoing political game.

(1996: 113–14)

Certainly *Marbury* helped solidify judicial review power for the Court, but legal institutions remain dependent on executive branch actors to implement and bring to policy fruition their legal edicts. This fact makes direct interactions between courts and executives—in which courts rule on the powers of the executive—especially intriguing. The somewhat uncomfortable nature of this situation is highlighted by the situation the High Court faced in *U.S. v. Nixon* in which, during oral arguments before the justices, President Nixon's counsel vacillated when directly asked if the executive would comply with an order from the Court (to turn over information). In an interview years later, former justice Lewis Powell noted, "one has to wonder what would have happened if Nixon had said what President Jackson said on one occasion, 'You have your decree, now enforce it.' We had 50 'police' officers, but Nixon had the First Infantry Division"

(Powell 1995: 173). Of course, Nixon did in fact follow the Court's ruling and such a confrontation was ultimately avoided.

Assessments of the appropriate scope and reach of presidential power and action have varied considerably, even among those who have held the position. William Howard Taft's view of the executive role was one of constraint. He opined:

The true view of executive functions ... is, as I conceive it, that the President can exercise no power which cannot be fairly and reasonably traced to some specific grant of power or justly implied and included within such grant as proper and necessary.

(Biskupic and Witt 1997: 169)

On the other end of the spectrum rests the view of Theodore Roosevelt that the executive stands as an active steward of the public well-being and, as such, must be free to have far-reaching powers. He argued that:

Every executive officer ... was a steward of the people ... My belief was that it was not only his right but his duty to do anything that the needs of the nation demanded unless such action was forbidden by the Constitution or by the laws ... In other words, I acted for the public welfare ... whenever and in whatever manner was necessary, unless prevented by direct constitutional or legislative provision.

(1997: 170)

Judicial assessments of the parameters of presidential power have led to productive lines of research. Early treatments of the limits of executive authority focused on formal Constitutional provisions and Court opinions on the reach of the executive with the general consensus being that the president has fared well over time and has generally been afforded greater deference in foreign policy and defense matters relative to domestic policy concerns (e.g. Corwin 1984; Rossiter 1951; Schubert 1957; Scigliano 1971). As the study of both the presidency and the judiciary progressed, scholars endeavored to provide more social-science-oriented approaches to assaying courts' treatment of the limits of executive power.

In 1989 Ducat and Dudley's seminal study on the topic systematically examined federal district court cases pertaining to core aspects of presidential legal concerns—the lawful reach of executive power and relevant limits. In assessing the decisions of district court judges they found that there were indeed “two presidencies” in executive power jurisprudence—consistent with Aaron Wildavsky's (1966) broader thesis on the U.S. presidency and Justice Sutherland's majority opinion analysis of the domestic-foreign policy contextual aspects of the law of presidential power in *United States v. Curtis-Wright Export Corp.* (1936).

Ducat and Dudley found that in cases involving foreign policy the executive was afforded much more deference by district court judges than in domestic policy cases. In break out analyses, they found that theoretically interesting political factors such as a presidents' prestige (public approval levels), whether a judge was appointed by the

president whose powers were at issue, and the specific type of power involved helped to explain executive success in domestic cases, but that none of these considerations mattered in foreign policy litigation outcomes before the district courts. Regarding this distinction, Ducat and Dudley concluded that “presidential leadership on the home front depends upon his persuasive power backed by his public prestige. In this area, district court judges have not acted much differently from other officeholders with whom the president deals” (1989: 116).

Their study design was later extended to U.S. Supreme Court justice voting by Yates and Whitford (1998) who advanced alternative measurement and specification strategies. Their study confirmed Ducat and Dudley’s primary finding that the president is afforded more deference in foreign policy presidential power cases (but cf. King and Meernik 1999; Clark 2006) and they also found that justices’ votes were influenced by justices’ ideological preferences and upward trends in presidents’ public approval. More recently, Robinson (2012) examined High Court justices’ votes in an updated data set of presidential power cases and found that justices’ background socialization, more specifically justice executive branch experience and the length of that experience, were associated with voting outcomes that favor deference to the president when core powers are at issue.

Certainly, differences of opinion exist on the proper scope and limits of executive power. Construction of a doctrinal matrix that makes sense of courts’ jurisprudence on presidential power has been a popular scholarly endeavor (e.g. Chemerinsky 1983), but perhaps one that appropriately considers historical and political context rather than strictly legal considerations. In the section that follows, we turn our attentions to executive–court interactions that have less to do with addressing the formal powers of office and more to do with battles over policy and the direction of U.S. governance and policy-making.

THE “LESS FORMAL” POWERS: INTER-BRANCH DEFERENCE, PERSUASION, AND POTENTIAL THREAT

The executive and judiciary have multiple pathways of interaction, but one of the more interesting occurs when the executive’s bureaucratic arm—the federal agencies—appear before the courts, most notably, before the U.S. Supreme Court. The federal bureaucracy provides the president with one of the most effective means of implementing their desired policy changes since most legislation affords a good degree of implementation discretion by the agencies. Further, policy scholars argue that federal agencies have become more “politicized” over time as executives are held accountable by the public, yet sometimes find their policy goals thwarted by Congress. In contrast, the federal agencies provide perhaps a more receptive avenue for effecting the type of change on which executives will stake their re-election and legacy aspirations (e.g. Moe 1991). The acknowledged proposition that presidents attempt to make their policy mark through

agencies is outlined well in one of the Court's opinions, authored by Justice William Rehnquist:

The agencies' changed view of the standard seems to be related to the election of a new President of a different political party ... A change in administration brought about by people casting their votes is a perfectly reasonable basis for an executive agency's reappraisal of the costs and benefits of its programs and regulations.

(*Motor Vehicle Manufacturing Association v. State Farm Mutual Insurance*, 463 U.S. 59 (1983))

Of course, the courts are responsible for reviewing agency action and thus presidents must deal with judicial monitoring of their policy implementation agents. Federal agency litigation in the Supreme Court has long been a topic of interest to judicial politics scholars, with most studies finding that they fare pretty well, overall. Traditional social science accounts of the federal agency experience before the High Court often focused on the type of agency involved—social versus economic—with the thesis being that social agencies handled more salient or volatile concerns and were likely to fare worse.

Sheehan (1990) argued persuasively that this distinction was not as important as the ideological direction of the agency's position relative to the ideology of the Court. In follow-up work he found that the distinction between independent and executive agency mattered, with independent agencies—often quasi-judicial in character and typically more removed from executive politics—winning more before the Court (Sheehan 1992). However, he again found that the biggest driver of agency success in such litigation was ideology—when agencies (executive or independent) were bringing cases that were antagonistic to the Court's aggregate policy preferences, they fared worse. Yates (1999) added a nuance to this thesis, finding that justices' votes on agencies that were more proximate to the president (cabinet-level agencies vs. independent agencies) were conditioned on presidential public standing (i.e., public approval). Justices' votes on agencies were also found to be influenced by the type of subject matter they dealt with—agencies charged with foreign policy concerns fared better than those whose work focused on domestic matters.

Finally, Richards, Smith, and Kritzer (2006) added an interesting wrinkle to the Supreme Court's treatment of federal agencies story by evaluating the impact of jurisprudential regimes on agency Court outcomes. Specifically, they were interested in the effect of the Court's decision in *Chevron U.S.A. v. Natural Resources Defense Counsel, Inc. et al.* (467 U.S. 865 (1984)) on justices' subsequent voting in agency cases. In *Chevron*, the Court addressed the issue of what should be the proper amount of deference that courts should afford to the statutory interpretations of federal agencies. The majority opinion, authored by Justice John Paul Stevens, set forth the Court's standard for doing so in the absence of clear congressional intent:

If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather,

if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.

(467 U.S. 842-3)

Richards et al. found that even though judicial ideology or attitudes still did much to explain justice voting, the Court's adjustment in legal regime (standard of review) on agency cases has a substantively interesting effect on justices' propensity to afford deference to agencies. Moreover, consistent with the *Chevron* holding, this deference was constrained in cases in which Congress's intent was more clear and in cases dealing with rule-making (hence involving higher stakes) (2006: 456-62).

Another important dynamic in U.S. Supreme Court-executive relations is issue attention and agenda-setting. Executive branch influence on Supreme Court case selection is addressed in our discussion on the Solicitor General, but here we are interested in broader-level matters regarding issue attention and problem-solving focus. Those who study governance have appropriately acknowledged the centrality of problem and issue attention and agenda-setting for policy-making. Institutions identify and pursue issues, or social/economic problems and engage in complex cue-taking relationships.

The Supreme Court's issue agenda has long been a topic of interest for legal and social science scholars. As Pacelle (1991), Perry (1991), and others have noted, the High Court's selection of issues to adjudicate from the thousands of petitions for certiorari it receives is one of the most important decisions that it makes. Of course, the president's time, resources, and political capital to expend on issues is also finite and involves opportunity costs. Executive or Supreme Court identification and recognition of a social or economic concern gives it public validation and promotion as an important matter that all political actors must either address or risk becoming less relevant in the arena of public debate. How these two primary institutions come to choose what broad issues and problems to focus their attentions on has been a recurring research question (e.g. Caldeira 1981; Pacelle 1991; Cohen 1997; Hill 1998; Flemming, Wood, and Bohte 1997; Edwards and Wood 1999; Yates, Whitford, and Gillespie 2005). Studies testing whether these two branches of the federal government actually influence each other's issue attentions have been more rare.

Whether primary federal institutions (president, Congress, and Supreme Court) and the general public (systemic) are related and affect one another was the central question addressed by Flemming, Wood, and Bohte (1997). They employed vector autoregression methods to assess macrodynamic shifts in attention to policy issues. Their areas of interest were civil rights, civil liberties, and environmental issues. They found that the Court's focus on civil rights and civil liberties influenced the executive's attention to those policy matters, but that there was no such effect with regard to environmental concerns. In contrast, they found that presidential attention to all three policy issues had no influence on Court attentions. Presidents' issue attentions were also affected by Congress (civil liberties and environmental) and system (public) emphasis (environmental) whereas Court issue priorities were influenced by Congress' (civil liberties and civil rights) issue attention.

Later work has found that High Court attentions (to criminal justice policy issues) is influenced by expressed presidential issue emphasis (Yates, Whitford, and Gillespie 2005) and that executive issue priorities are influenced by Court issue agenda signaling (Yates and Whitford 2005). Certainly, future research might explore the stream of issues that compete for the attentions of government institutions and the public and media stage. As social media becomes increasingly pervasive, the battle over what public concerns gain the eyes and ears of public leaders becomes more complex and perhaps is influenced not only by the relevant actors and institutions themselves, but also by the manner in which communication takes place.

Finally, a river of scholarly research has explored the possibility that political institutions and their actors operate in a sophisticated, forward-thinking manner, in that they anticipate the potentially threatening or contrarian reactions of other relevant policy actors and adjust their policy decisions accordingly. Of course, two of those political institutions (and their policy-making actors) are the judicial and executive branches. Studies exploring this rational choice approach to explaining institutional political phenomena are plentiful and typically consider the executive and judiciary as part of a larger game that also includes Congress and the public (e.g. Eskridge 1991; Epstein and Knight 1998; Segal 1997; Martin 2001; Curry, Pacelle, and Marshall 2008; Lindquist and Corley 2011).

However, Baum (2006) asserts that, on balance, the empirical findings of these studies supporting the existence of such strategic actions are decidedly mixed. He further argues convincingly that parsing such effects from alternative judicial motivations can be problematic and that there are theoretical and pragmatic concerns with the proposition of systemic threat driving judges' decisions. Still, he leaves the door open to the possibility of such strategic action by judges, noting: "Undoubtedly some judges at some times act on their fear of negative consequences from displeasing other branches. Yet their incentives to take this course are limited in important respects, and by no means do judges automatically bend under pressure. Action to avoid or defuse conflict with other branches is episodic, and it may be exceptional as well" (2006: 81). Baum's concerns about the viability of a systemic impact on judicial actions are noteworthy, however Epstein and Knight (1998) and others have made a convincing case that Supreme Court justices at least consider and discuss (with each other) the potential reactions of other branches to Court action on occasion.

There also exists the possibility that presidents are influenced by either the persuasion or potential threat of judges. Certainly executives react to judicial action and, in fact, use the "bully pulpit" regularly to discuss judicial matters. Perhaps the most memorable instance of this in recent years was President Obama's state of the union rebuke of the High Court's decision in *Citizens United v. Federal Election Commission*. But how often does the executive actually address such matters in public rhetoric? Blackstone and Goetzhauser (2014) explore presidential rhetoric regarding the U.S. Supreme Court. They analyze such rhetoric from 1929 to 2011 and find that presidents delivered over six-thousand sentences concerning the High Court during that time, for an average of seventy-four sentences a year. Presidents' gave an average of twenty-three positive

statements regarding the Court per year and thirty-eight negative statements (critical of the Court or its actions) with the balance being described as neutral.

Thus, we can at least surmise that presidents pay relatively close attention to the Court and its dealings and regularly expend valuable public-speaking time discussing it. But executive branch action is often employed through agency action and the Court regularly rules on such actions. Hence, scholars studying the intersection of Court jurisprudence and presidential policy implementation make a strong argument that the Supreme Court (and lower courts) wield a viable tool in influencing the course of executive branch governance through judicial decisions. For example, Spriggs (1996) finds that federal agencies did adjust their policy-making in response to decisions made by the Court, but that the degree to which they adjusted their actions was influenced by the specificity of the Court's majority opinion, among other important considerations.

THE POWER OF APPOINTMENT—CAN PRESIDENTS MOLD THE JUDICIARY?

In announcing his 2009 appointment of now associate justice Sonia Sotomayor, President Obama began his public statement by observing “of the many responsibilities granted to a president by our Constitution, few are more serious or more consequential than selecting a Supreme Court justice. The members of our highest court are granted life tenure, often serving long after the presidents who appointed them.”² His remark outlines well the profound policy implications of presidential Court appointments. Historically, such presidential appointments have reflected a mix of personal and professional motivations by the executive as well as concerns over the reality of the ideological politics surrounding such important decisions (Epstein and Segal 2005).

Of course, such appointments must pass the gauntlet of Senate confirmation, but the power of appointment provides presidents with the opportunity to potentially make substantively significant inroads on the character of policy-making within the judicial branch of government. In this section we first examine the politics of U.S. Supreme Court selection and how presidential appointment decisions may impact the High Court's policy-making. We then turn to the lower federal courts, exploring the dynamics of staffing the nation's federal district and intermediate appellate courts and the policy implications of these choices. Finally, we consider diversity and policy outcomes that have resulted in the lower courts through presidential appointment decisions.

The federal Constitution's provisions regarding how Supreme Court justices are selected underwent a number of revisions and were the topic of much debate by the Founders. While some favored a legislatively driven selection mechanism, others preferred one tilted toward the executive—and in the end they settled on the Article II (section 2) language granting the president the power to nominate and, “by and with the advice of the Senate” to appoint “judges of the Supreme Court.” Though the role of

the Senate and the appropriate bases for confirmation decisions have been a subject of debate, the executive has largely been successful in getting nominees confirmed for the nation's High Court.

To consider the first step of this process (nomination choice), we turn to Moraski and Shipan's (1999) oft-cited study on the dynamics of executive nominations to the High Court. They explored nominations to the Court from 1949 to 1994 and postulated that presidents acted in a forward-thinking, strategic manner in choosing who to nominate. Their empirical findings revealed that presidents were cognizant of the relative preferences and ideological character of both the Senate and continuing members of the Court and that in certain contexts their nomination choices were influenced by these considerations. Thus, political concerns cast an influence on who ultimately ascends the Court before a single confirmation vote is cast in the Senate.

Once a president has nominated a potential justice for the Court, they often engage in the process of "selling" their choice to both the Senate and the public. Maltese (1995) maintains that the "selling" of Supreme Court nominees has changed over time as modern presidents increasingly "go public" with their preferred judicial candidates, as opposed to earlier executives. He notes, "for many years presidents felt that it was inappropriate to comment publicly on their Supreme Court nominees. To do so would be to stoop to 'politics' in a process that was supposed to be untainted by political considerations" (1995: 447). He argues that the executive's increased willingness to speak publicly about their candidates is likely part of a broader "public presidency" phenomenon. It also likely reflects the increasing attention that politicians pay to media concerns and public sentiment.

Taking this line of reasoning a step further, Johnson and Roberts (2004) explored the determinants of presidential "selling" of Supreme Court nominees via public rhetoric. They analyze the content of presidential statements on nominees from 1949 to 1994 and focus on three primary types of statements: 1) those espousing the nominee's qualifications, 2) those claiming that the public favors the nominee, and 3) those encouraging the Senate to act fairly and quickly. As might be expected, most of the presidents' public comments concerned promoting the nominee's qualities and qualifications (followed by statements pressuring the Senate and then claims regarding public opinion). They found that ideological conflict with the Senate (distance between nominee and Senate filibuster pivot; distance between Court median and filibuster pivot; and distance between president and filibuster pivot) led to increased rhetoric on nominees by presidents. Such rhetoric was also influenced by the president's relative public prestige (popular presidents were less likely to go public), nomination timing, and Senate delay on confirmation. But did these executive appeals to the public have an effect on Senate confirmation outcomes? Johnson and Roberts found that presidents' rhetorical efforts did in fact have a payoff as such statements cast a meaningful influence on senators' votes on Supreme Court nominees.

It is likely that executives' public campaigns for High Court candidates are here to stay, as such battles over nominations increasingly end up getting played out in the media and social forums. Of course, the success of presidents' nominees before the

Senate can turn on a number of executive-oriented factors, beyond presidential rhetoric. For instance, even though presidents with high public approval are by no means assured of Senate success, their nominees do, on average, fare better before the Senate than those of less popular presidents (Epstein and Segal 2005: 108). Future research might do well to consider the relevant political context and presidents' personal motivations in such nomination/confirmation scenarios. For example, presidents who have previously experienced a failed or divisive nomination may be more apt to make concessions on their next appointment attempt. In similar vein, Senate confirmations may be less salient and accordingly less volatile in times in which media and public attention are drawn to other compelling political or social events that compete with confirmation hearings for social agenda space.

The attention and tumult over Supreme Court selection leads many to wonder what impact, if any, such personnel decisions have on U.S. legal policy. Do executives leave a lasting policy legacy through their Supreme Court appointments? Historical accounts provide anecdotal evidence of executive policy success as well as some presidents' bitter disappointments in their appointees (Epstein and Segal 2005). Gates and Cohen (1988) found that presidents generally enjoyed policy agreement with the justices they appointed in the area of racial equality cases. In a subsequent study, Segal, Timpone, and Howard (2000) assayed this general premise, examining presidents' appointments to the Court from 1937 to 1994. They were not only concerned with overall president-appointee policy agreement, but whether such agreement fluctuated over time—the idea being that justices' policy druthers might approximate their appointing presidents' preferences early on, but then “drifted” over time. Using a measure of presidential ideology derived from a survey of political scientists, they find general concordance between presidents and their appointed justices in civil liberties and economic cases. However, such agreement disintegrated over time, with executive–justice concordance dissipating after the first four years of justice tenure on the High Court in civil liberties cases and after ten years of judicial service in economic cases.

Krehbiel (2007) argued that presidents could make significant policy gains through Supreme Court appointments, but his empirical findings suggested that the political circumstances necessary to effectuate such an impactful judicial appointment rarely presented themselves. In a more recent study Epstein, Landes, and Posner found that Supreme Court justices exhibited substantial “ideological divergence” from their appointing presidents over time, with these effects being mitigated by executives' choice of justices who had prior government service. They found similar ideological divergence effects concerning executive nominations to the U.S. Courts of Appeals (2013: 119–22). Given that average life spans are increasing and many justices serve as long as health permits, this drifting of justices' voting (from presumed orientation during appointment and confirmation) has caused some to question the democratic nature of High Court policy-making as the electoral connection becomes more tenuous (Sharma and Glennon 2013).

High Court judicial selections garner plentiful media attention and can provide high political drama. However, it is arguably the case that greater cumulative policy inroads

are made by presidents through their lower federal court appointments. Presidents' may not experience the level of scrutiny on these nominations as they do with regard to the High Court, however political dynamics still persist in lower court selections. Consternation over executive nominations and delay in confirmations of lower federal court judges have increased in recent decades (Scherer 2005). Presidents appear to be ready, willing, and able to bring the bully pulpit to bear in promoting such lower court nominations. Holmes (2008) finds that presidents have increasingly gone public on behalf of their lower court nominees over time and explains that this trend may be part of a strategy aimed at elite interests rather than simply securing the confirmation of nominees. She notes:

The context of these references does not always appear to be aimed toward shifting mass public attitude toward a nominee or securing confirmation for that specific individual. Rather, presidents often utilize these nominees in public discourse to achieve other goals, including appealing to organized groups, women and minorities, or partisan campaign supporters.

(2008: 119–20)

One aspect of the lower court selection process that is less relevant for the Supreme Court (at least since President Eisenhower) has been executive use of recess appointments to place jurists on the federal bench. Graves and Howard (2010) examine all judicial appointments made during Senate recess from 1789 to 2004. They find that presidents' use of recess appointments has declined substantially since the administration of President Kennedy as Senate recesses have grown shorter. Further, presidents use such appointments in a political strategic fashion and active presidents are more apt to take advantage of recess opportunities for appointment (2010: 650). Finally, there is also some evidence to suggest that presidents act strategically in their nomination of lower court judges—carefully timing their nominations (relative to the date of vacancy) in order to facilitate a nominee-friendly confirmation environment—with certain institutional constraints, of course (Massie, Hansford, and Songer 2004).

Appointments to the lower federal courts provide presidents with substantial opportunities to influence the law as trial and intermediate appellate courts represent the final disposition for the vast majority of litigated matters. But, are those opportunities actually realized in lower court policy-making? Rowland, Songer, and Carp (1988) examined the policy-making of the nominees of presidents Nixon, Reagan, and Carter in criminal justice cases. They found important differences among the appointed justices, both in the federal district courts and in the courts of appeals, with Reagan's judges deciding cases significantly more conservatively than Carter's judges (with Nixon falling between the two). Goldman (1997) suggests that presidents have competing goals in appointing lower court judges, with some presidents focusing on partisan considerations (e.g., gaining political capital) as others were primarily interested in shaping the ideological contours of the federal judiciary.

Certainly, some executives were mainly interested in advancing personal goals (e.g., increasing gender and racial diversity). A host of studies have addressed the latter proposition regarding diversity.³ Kimel and Randazzo (2012) assay the appointment propensities of recent presidential administrations (William Clinton, George W. Bush, and Barack Obama) and address how these presidents' nomination policies have impacted diversity in the federal lower courts. They find that Obama nominated more minorities for the bench (35 percent) than Clinton (24 percent) or Bush (17 percent) as well as the most female jurists (46 percent, with Clinton at 29 percent and Bush at 22 percent). Examining a subset of nominees for which ideological scores were available, they find that Obama's nominees were more moderate than either the Bush or Clinton nominee's scores—suggesting that Obama pursued a rather pragmatic approach to diversifying the federal lower courts. All three presidents enjoyed fairly high levels of confirmations success for their nominations, with Clinton being the most successful overall (81 percent confirmed), followed by Bush (78 percent) and Obama (74 percent). Finally, Collins (2009, 2010) demonstrates that presidents can significantly change the partisan makeup of the U.S. Courts of Appeals through appointment, and, accordingly, the policy-making jurisprudence of the intermediate court.

THE PRESIDENT'S LAWYER—THE SUPREME COURT AND THE SOLICITOR GENERAL

We would certainly be remiss if we did not discuss the storied relationship between the High Court and the president's legal arm, the Office of the Solicitor General (OSG). The OSG is a creature of the Federal Judiciary Act of 1870 which created both the Department of Justice and the OSG. This act came in response to a burgeoning workload that had been heaped upon the Attorney General as the nation and its legal issues expanded and other attempts to solve the workload issue had proven problematic (Black and Owens 2012: 11–14). The OSG is the primary legal advocate for the executive branch and U.S. government before the Supreme Court. Its duties with regard to the nation's High Court include, among others: a) the selection of cases for petitioning for certiorari (when the United States is a direct litigant); b) representing the United States on the merits of the case (again, when the United States is a direct litigant); c) drafting and filing *amicus curiae* when the government is an interested party; d) authorizing other interested actors to submit *amicus curiae* briefs (when the United States is a direct litigant) (Salokar 1992).

To say that the OSG occupies a curious place in U.S. law and politics would be an understatement. The Court relies on the OSG to provide reliable and informative views (e.g., submission of *amicus curiae* briefs). At the same time, the Solicitor General (SG) is an executive appointee and even though SGs can and do depart from presidents' policy views in their role, studies typically find a congruence between the OSG's positions

and executives' preferences, as we might intuitively surmise (e.g. Yates 2002; Black and Owens 2012). On this "dual identity" dynamic, President Ronald Reagan's SG, Rex Lee, commented that:

On the one hand, I am a presidential appointee, a part of the president's team. I very much believe in the president's program and I want to do what I can to help advance it ...
On the other hand, I am also an officer of the Court. And the relationship between the solicitor general and the Supreme Court is one that knows no counterpart.

(Witt 1986: 120)

Lee's comment prompts the question of whether the OSG carries special influence with the Court. A number of rationales for such possible influence have been posited—deference to the executive branch; reputation and credibility that have been developed over time; and resource advantages, to name a few. Undoubtedly, the OSG has had tremendous success before the Court along multiple dimensions—certiorari petition outcomes, on the merits outcomes, and amicus activity—as a bevy of studies on the matter have confirmed (e.g. Caplan 1987; Salokar 1992; Segal 1990; Zorn 2002; Pacelle 2003; Black and Owens 2012). But does this success necessarily demonstrate that the OSG carries any special influence or sway with the nation's High Court? Are there perhaps other considerations that may lead to its success?

One consideration is legal experience. McGuire (1998) makes a convincing argument that much of the SG's success in the U.S. Supreme Court is due to differential levels of experience in litigating cases before the High Court—the SG has, in the typical situation, more experience than opposing counsel—and accordingly, wins more often. In similar fashion, Zorn (2002) makes the case that the SG's success before the Court can be partially attributed to the OSG's meticulous and strategic selection of the cases it chooses to argue before the Court (from the relatively large pool of cases that could be pursued). On the other hand, Black and Owens (2012) use a case-matching strategy to assess SG fortunes before the Court that takes into account some of these considerations (e.g., attorney experience) and conclude that the SG does carry unique influence with the Court across a number of dimensions. They reason that the credibility of the OSG as an informative, reliable, and principled officer of the Court is key to this relationship. Wohlfarth's (2009) study provides some support for this proposition. He finds that the SG wins less before the Court when its litigation efforts become more politicized. Suffice it to say, these research efforts are certainly not the end of this debate and scholars will certainly continue to investigate the roots of the OSG's success with the nation's High Court.

As presidents continue to push the parameters of presidential power in an attempt to appease the sometimes unreasonable demands of the citizenry to promote the public well-being, interactions with courts will likely increase—both in number and in salience. The U.S. Supreme Court is also increasingly perceived by the public as a political, rather than purely policy-neutral, institution. Thus, matters such as presidential judicial appointments and the OSG's activities before the High Court will likely find themselves more and more as the media's top news stories.

With this in mind, the dynamics between executives and courts bring to bear some of the fundamental questions of our Constitutional tradition—what is the place of each of these institutions in guiding the direction of U.S. life? To what degree does each provide a meaningful check on congressional power in the policy arena? And what happens regarding policy enforcement when the president and the Court strongly disagree? These questions and others offer rich opportunities for further scholarship as we strive to better understand how U.S. political power is shared and policy made.

NOTES

1. We focus here on studies involving the interplay between the American president and the federal courts (primarily the U.S. Supreme Court). We acknowledge that an intriguing, but relatively limited, literature addresses interactions between state executives and courts (e.g. Schorpp 2012; Johnson 2014).
2. http://www.whitehouse.gov/the_press_office/Remarks-by-the-President-in-Nominating-Judge-Sonia-Sotomayor-to-the-United-States-Supreme-Court.
3. Kimel and Randazzo (2012) provide a useful review of the many studies commenting on political concerns that may influence the development of diversity on the federal bench.

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