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PRESIDENTIAL RHETORIC

Toward the Supreme Court



The authors introduce new data on the intensity and tone of presidential rhetoric toward the Supreme Court from 1929-2011, analyze the determinants of aggregate rhetoric, and discuss ways these data can aid in the study of executive-judicial relations.

by **BETHANY BLACKSTONE** and **GREG GOELZHAUSER**

Responding to a question about how he would “guarantee health care to the uninsured” if the Supreme Court invalidated the Affordable Care Act, President Obama said in part: “Ultimately, I’m confident that the Supreme Court will not take what would be an unprecedented, extraordinary step of overturning a law that was passed by a strong majority of a democratically elected Congress.”¹ Many perceived President Obama’s remarks as an attack on the Court. House Judiciary Committee Chair Lamar Smith (R-TX) criticized President Obama for “threatening [and] trying to intimidate the Supreme Court,”² for example, and Senate Minority Leader Mitch McConnell

(R-KY) suggested that President Obama aimed to “delegitimize the Court.”³ After the Supreme Court upheld the core of the Affordable Care Act in *National Federation of Independent Business v. Sebelius*,⁴ Republican presidential candidate Mitt Romney suggested that President Obama “was trying in every way he possibly could to signal that if the Supreme Court didn’t go along with him on Obamacare that it would be a very conflict-filled summer, and he got what he wanted.”⁵

President Obama’s rhetorical “attack” on the Supreme Court is not unprecedented. President Jackson famously delivered a lengthy message vetoing a rechartering of

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1. President Barack Obama, News Conference with President Felipe de Jesus Calderon Hinojosa of Mexico and Prime Minister Stephen Harper of Canada (April 2, 2012).

2. Alicia M. Cohn, *GOP Lawmaker Warns Obama Against “Threatening” the Supreme Court*, The Hill: Blog Briefing Room (Apr. 3, 2012, 12:30 PM), <http://thehill.com/blogs/blog-briefing-room/news/219633-gop-congressman-warns-obama-not-to-intimidate-supreme-court-on-health-care-decision>.

3. Ed O’Keefe, *Mitch McConnell to Obama: “Back Off” the Supreme Court*, 2CHAMBERS: INSIDE THE 112TH CONGRESS (Apr. 5, 2012, 3:39 PM), http://www.washingtonpost.com/blogs/2chambers/post/mitch-mcconnell-to-obama-back-off-the-supreme-court/2012/04/05/gIQAoc2vxS_blog.html.

4. 132 S. Ct. 2566 (2012).

5. Henry J. Reske & Ronald Kessler, *Romney: Obama Comments Pressured Supreme Court*, NEWSMAX, June 29, 2012.

the Second Bank of the United States in 1832, advancing a limiting view of the Supreme Court's power to settle constitutional questions and narrowly reading its landmark decision upholding the constitutionality of the Bank in *McCulloch v. Maryland*.⁶ In the 1930s, President Roosevelt also famously employed rhetoric while attacking the Supreme Court, during his Court-packing campaign in response to decisions invalidating state and federal economic legislation. But presidential rhetoric regarding the Supreme Court has not always been negative. President Eisenhower, for example, repeatedly defended the Court's power to settle constitutional questions in the aftermath of *Brown v. Board of Education*.⁷ And President Obama applauded the Court's decision upholding the Affordable Care Act in *Sebelius*, calling it a "victory for people all over this country."⁸

While not without its limitations,⁹ rhetoric is a powerful tool in the president's arsenal of unilateral powers.¹⁰ Scholars have established that presidents routinely use rhetoric as part of their interactions with Congress.¹¹ However, much less is known about presidents' use of rhetoric toward the judiciary. The small existing literature focuses primarily on presidents going public to support lower court¹² and Supreme Court¹³ nominations. Other studies explore how a president's general policy statements in specific areas such as criminal justice influence the Court's decision making at the agenda setting¹⁴ and merits¹⁵ stages.

Presidents may devote space in their rhetorical agendas to the Supreme Court for a variety of reasons. As an initial matter, presidents might attempt to influence specific agenda setting or merits decisions pending before the Court. More generally, presidents might want to encourage broad shifts in judicial behavior. Presidents may use rhetoric to encourage the Court to take a more active or limited role in a particular policy area or to put pressure on the Court to show more deference to the elected branches

of government. Rhetoric might also be a useful tool for undercutting or enhancing the Court's diffuse support and store of institutional legitimacy. The use of rhetoric can also serve as a signal of the president's willingness to enforce the Court's judgments. Just as members of Congress engage in position taking through the proposal of Court-curb-ing legislation,¹⁶ presidents may use rhetoric to reflect public attitudes concerning the Court or to rally the public for or against the Court.

We contribute to the study of executive-judicial relations by describing presidential use of rhetoric concerning the Supreme Court. Unveiling original data on the intensity and tone of all presidential rhetoric toward the Court from 1929-2011, we show that the use of presidential rhetoric directed at the Court has varied considerably across presidents. In addition to our descriptive overview, we offer an analysis of the determinants of aggregate presidential rhetoric

toward the Court. Our theoretical argument rests on the assumption that presidents have limited space on their rhetorical agendas. As a result, rhetorical attention to the Court should vary in accordance with the cost of production. We contend that the cost of production depends on aspects of the political environment and presidential familiarity with the law. Our results suggest that presidents refer to the Court less often during war and more often during elections and years with Supreme Court vacancies. We also find that lawyer-presidents, who are likely to have a greater familiarity with the law and operations of the Supreme Court, refer to the Court more often than non-lawyer-presidents.

Capturing the intensity and tone of presidential rhetoric toward the Supreme Court has important implications for the burgeoning literature on executive-judicial relations.¹⁷ We conclude by discussing a variety of ways that scholars interested in

6. 17 U.S. 316 (1819); Andrew Jackson, Veto Message, July 10, 1832.

7. 347 U.S. 483 (1954).

8. President Barack Obama, Remarks on the United States Supreme Court Ruling on the Affordable Care Act (June 28, 2012).

9. GEORGE EDWARDS, ON DEAF EARS: THE LIMITS OF THE BULLY PULPIT (2003).

10. See e.g., SAMUEL KERNELL, GOING PUBLIC: NEW STRATEGIES OF PRESIDENTIAL LEADERSHIP (2007); ANDREW B. WHITFORD AND JEFF YATES, PRESIDENTIAL RHETORIC AND THE PUBLIC AGENDA: CONSTRUCTING THE WAR ON DRUGS (2009); and B. DAN WOOD, THE POLITICS OF ECONOMIC LEADERSHIP: THE CAUSES AND CONSEQUENCES OF PRESIDENTIAL RHETORIC (2007).

11. See e.g., BRANDICE CANES-WRONE, WHO LEADS WHOM? PRESIDENTS, POLICY, AND THE PUBLIC (2006); George C. Edwards & B. Dan Wood, *Who Leads Whom? The President, Congress, and the Media*, 93 AM. POL. SCI. REV. 327 (1999); Matthew Eshbaugh-Soha, *How Policy Conditions the Impact of Presidential Speeches on Legislative Success*, 91 SOC. SCI. Q. 415 (2010).

12. Lisa M. Holmes, *Presidential Strategy in the Judicial Appointment Process: "Going Public" in Support of Nominees to the U.S. Courts of Appeals*, 35 AM. POL. RES. 567 (2007); Lisa M. Holmes, *Why "Go Public?" Presidential Use of Nominees to the U.S. Court of Appeals*, 38 PRES. STUD. Q. 110 (2008).

13. Charles Cameron & Jee-Kwang Park, *Going Public When Opinion in Contested: Evidence from Presidents' Campaigns for Supreme Court Nominees, 1930-2009*, 41 PRES. STUD. Q. 442 (2011); Timothy R. Johnson & Jason M. Roberts, *Presidential Capital and the Supreme Court Confirmation Process*, 66 J. POL. 663 (2004); Glen Krutz, Richard Fleisher & Jon Bond, *From Abe Fortas to Zoe Baird: Why Some Presidential Nominations Fail in the Senate*, 92 AM. POL. SCI. REV. 871

(1998); John Anthony Maltese, *Speaking Out: The Role of Presidential Rhetoric in the Modern Supreme Court Confirmation Process*, 25 PRES. STUD. Q. 447 (2005).

14. Jeff Yates, Andrew B. Whitford & William Gillespie, *Agenda Setting, Issue Priorities and Organizational Maintenance: The U.S. Supreme Court, 1955 to 1994*, 35 BRIT. J. POL. SCI. 369 (2005).

15. JEFF YATES, POPULAR JUSTICE: PRESIDENTIAL PRESTIGE AND EXECUTIVE SUCCESS IN THE SUPREME COURT (2002).

16. TOM S. CLARK, THE LIMITS OF JUDICIAL INDEPENDENCE (2011).

17. Michael Bailey, Brian Kamoie & Forrest Maltzman, *Signals from the Tenth Justice: The Political Role of the Solicitor General in Supreme Court Decision Making*, 49 AM. J. POL. SCI. 72 (2004); RYAN C. BLACK & RYAN J. OWENS, THE SOLICITOR GENERAL AND THE UNITED STATES SUPREME COURT (2000); Clifford J. Carrubba & Christopher Zorn, *Executive Discretion, Judicial Decision Making, and Separation of powers in the United States*, 72 J. POL. 812 (2010); Kevin T. McGuire, *Explaining Executive Success in the U.S. Supreme Court*, 51 POL. RES. Q. 505 (1988); Chris Nicholson & Paul M. Collins, Jr., *The Solicitor General's Amicus Curiae Strategies in the Supreme Court*, 36 AM. POL. RES. 382 (2008); RICHARD L. PACHELLE, JR., BETWEEN LAW AND POLITICS: THE SOLICITOR GENERAL AND THE STRUCTURING OF RACE, GENDER, AND REPRODUCTIVE RIGHTS LITIGATION (2003); Jeffrey A. Segal, *Amicus Curiae Briefs by the Solicitor General during the Warren and Burger Courts: A Research Note*, 41 WESTERN POL. Q. 135 (1988); REBECCA MAE SALOKAR, THE SOLICITOR GENERAL: THE POLITICS OF LAW (1992); Patrick C. Wohlfarth, *The Tenth Justice? Consequences of Politicization in the Solicitor General's Office*, 71 J. POL. 224 (2009).

Last Thursday I described in detail certain economic problems which everyone admits now face the Nation. For the many messages which have come to me after that speech, and which it is physically impossible to answer individually, I take this means of saying "thank you."

Tonight, sitting at my desk in the White House, I make my first radio report to the people in my second term of office.

I am reminded of that evening in March, four years ago, when I made my first radio report to you. We were then in the midst of the great banking crisis.

Soon after, with the authority of the Congress, we asked the Nation to turn over all of its privately held gold, dollar for dollar, to the Government of the United States.

Today's recovery proves how right that policy was.

But when, almost two years later, it came before the Supreme Court its constitutionality was upheld only by a five-to-four vote. The change of one vote would have thrown all the affairs of this great Nation back into hopeless chaos. In effect, four Justices ruled that the right under a private contract to exact a pound of flesh was more sacred than the main objectives of the Constitution to establish an enduring Nation.

excerpt from: Fireside Chat On "Court-Packing" (March 9, 1937)
—Franklin Delano Roosevelt



institutional interactions between the president and Supreme Court can make use of these data to evaluate the extent to which presidential rhetoric related to the Supreme Court affects Supreme Court decision making, public support for Court-announced policies, and the likelihood that Congress considers legislative proposals to limit the Court's power. Our data collection strategy is also a general one that can be applied to the study of other institutional relationships.

Data Collection Strategy

We introduce a comprehensive database of presidential rhetoric concerning the Supreme Court between 1929-2011—a period spanning parts of 14 presidencies. Unlike previous studies, we focus on rhetoric that specifically refers to the Supreme Court rather than issues that may interest the Court or particular nominees.

To obtain information on presidential rhetoric concerning the Court, we searched the *Public Papers of the Presidents* for the phrase "Supreme Court."¹⁸ The *Public Papers of the Presidents* database is a comprehensive collection of messages, news conferences, statements, speeches, and other public deliveries of U.S. presidents since Herbert Hoover. After securing all documents referencing the Supreme Court, we read through each entry and counted the number of sentences concerning the Court. Because our interest is on the president's treatment of the Court as an institution, we do not include references to specific nominees and justices in our data.¹⁹ In addition to measuring the frequency of rhetoric concerning the Supreme Court, we content-analyzed sentences to capture the president's tone. Specifically, each sentence was coded as

positive, negative, or neutral toward the Court.²⁰ The following sections detail each category of rhetorical sentiment.

Positive Rhetoric

Positive presidential rhetoric regarding the Supreme Court comes in a variety of forms. One type of positive rhetoric expresses respect for the Court as an institution. In 1932, for example, President Hoover declared that "[t]he Supreme Court of the United States represents the summit of eminence in the legal profession. It likewise stands as an equal with the Congress and the Presidency in the solemn responsibility of exercising the highest powers of government on this Earth." Hoover continued: "Without its prestige, without its independence, without its wisdom and power, [economic expansion] could not have been effected except at tremendous costs of injury to our people and of excessive disturbance to our political equilibrium."²¹ In 1980, President Carter spoke in a similarly positive way about the Court, noting that "when local school boards and mayors, State legislatures and Governors, Presidents and the Congress have not been willing to give the rights to Americans that had been withheld, the United States Supreme Court has been the final bulwark of freedom."²²

Supreme Court decisions can also spark positive presidential rhetoric.

18. The database is available at <http://www.presidency.ucsb.edu/ws>. Data are incomplete prior to 1929. We also searched the database for references to the "High Court," but there was only one reference to the Supreme Court as an institution using this phrase (without also mentioning "Supreme Court") during our sample period.

19. We also excluded references to state and foreign supreme courts.

20. To verify the reliability of our coding scheme, we double-coded a random sample of 100 documents (about 5% of our sample) that included 623 sentences. Our frequency of inter-agreement was very high (96%). We calculated Cohen's kappa, a measure of observer agreement that adjusts for the frequency with which coders would agree by chance. Cohen's kappa was 0.92,

which exceeds Popping's 0.80 threshold for high overall reliability. Popping, *On Agreement Indices for Nominal Data*. In *SOCIOMETRIC RESEARCH: VOLUME 1, DATA COLLECTION AND SCALING* (W. E. Saris & I. N. Gallhoffer, eds., 1988). While there is some disagreement about the appropriate minimum score that indicates an acceptable level of reliability, 0.80 is a conservative threshold. Landis and Koch characterize Cohen's kappa greater than 0.80 as "almost perfect." J. R. Landis and G. G. Koch, *The Measurement of Observer Agreement for Categorical Data*, 33 *BIOMETRICS* 159 (1977).

21. President Herbert Hoover, Address to the American Bar Association (October 12, 1932).

22. President Jimmy Carter, Remarks to the National Association for the Advancement of Colored People (July 4, 1980).

ric. After the Court decided *Gratz v. Bollinger*²³ and *Grutter v. Bollinger*,²⁴ two landmark rulings on affirmative action, President George W. Bush released a statement that read in part: "I applaud the Supreme Court for recognizing the value of diversity on our Nation's campuses. ...Today's decisions seek a careful balance between the goal of campus diversity and the fundamental principle of equal treatment under the law."²⁵ Similarly, President Clinton released a statement declaring that he was "very pleased with today's Supreme Court decision" in *Washington v. Glucksberg*,²⁶ which refused to declare access to assisted suicide a protected liberty interest under the Fourteenth Amendment's Due Process Clause, adding that the decision was "a victory for all Americans."²⁷

Positive rhetoric is not necessarily complimentary. Presidents can express respect for the Supreme Court as an institution, thereby adding to its prestige and store of institutional legitimacy, while remaining ambivalent or even opposed to particular decisions. President Eisenhower regularly took this tack with respect to implementation of the Court's decision in *Brown* declaring segregated school facilities unconstitutional. Asked during a press conference whether he "endorse[d] the finding of the Supreme Court on segregation or merely accept[ed] it," Eisenhower responded: "The Constitution is as the Supreme Court interprets it; and I must conform to that and do my very best to see that it is carried out in this country."²⁸ And after the Court invalidated the Little Rock School Board's plan to further delay integration in *Cooper v. Aaron*,²⁹ Eisenhower issued a statement declaring in part that "[i]t is incumbent upon all Americans, public officials and private citizens alike, to recognize their duty of complying with the rulings of the highest court in the land. Any other course, as I have said before, would be fraught with grave consequences to our nation."³⁰

Negative Rhetoric

President Roosevelt's assault on the Supreme Court while promoting his Court-packing plan is perhaps the best-known episode of a president employing negative rhetoric against the Court. During his Fireside Chat in March 1937, President Roosevelt attacked the Court head-on: "We have...reached the point as a Nation where we must take action to save the Constitution from the Court and the Court from itself. We must find a way to take an appeal from the Supreme Court to the Constitution itself. We want a Supreme Court which will do justice under the Constitution—not over it."³¹ Roosevelt also regularly singled out Supreme Court precedents in speeches in an effort to encourage popular discontent and congressional action. Referring to the Court's decision in *Hammer v. Dagenhart*³² invalidating a child labor law under the Commerce Clause, for example, Roosevelt proclaimed that the decision "laid down a rule of constitutional law which has ever since driven into impractical distinctions and subterfuges all attempts to assert the fundamental power of the national government over interstate commerce."³³

Although President Roosevelt's attacks on the Supreme Court are perhaps the best known, he was not alone in condemning the institution for its decisions. President Reagan, for example, was vehemently opposed to the Court's opinion in *Roe v. Wade*³⁴ establishing a constitutional right for pregnant women to terminate a pregnancy during the first two trimesters. In 1988, Reagan issued a proclamation that read in part: "Among the

tragic and unspeakable results [since *Roe* was decided] have been the loss of life of 22 million infants before birth; the pressure and anguish of countless women and girls who are driven to abortion; and a cheapening of our respect for the human person and the sanctity of human life."³⁵ More recently, during his State of the Union Address in 2010, President Obama made headlines for criticizing the Supreme Court's decision in *Citizens United v. Federal Election Commission*³⁶ invalidating federal limitations on corporate campaign finance. On the day the Supreme Court decided *Citizens United*, President Obama released a statement reading in part: "With its ruling today, the Supreme Court has given a green light to a new stampede of special interest money in our politics. It is a major victory for big oil, Wall Street banks, health insurance companies, and the other powerful interests that marshal their power every day in Washington to drown out the voices of everyday Americans."³⁷

Neutral Rhetoric

Neutral rhetoric is a residual category for language concerning the Supreme Court that cannot be classified as positive or negative. Some of this rhetoric involves presidents referring generally to Supreme Court nominations. For example, responding to presidential candidate Ronald Reagan's promise to nominate the first female Supreme Court justice, President Carter said that he was "not going to make a campaign promise to name any particular kind of person to the Supreme Court on my first appointment."³⁸ Further-

23. 539 U.S. 244 (2003).

24. *Id.*

25. President George W. Bush, Statement on the Supreme Court Decision on the Michigan Affirmative Action Cases (June 23, 2003).

26. 521 U.S. 702 (1997).

27. President Bill Clinton, Statement on the Supreme Court Decision on Physician-Assisted Suicide (June 26, 1997).

28. President Dwight D. Eisenhower, News Conference (September 5, 1956).

29. 358 U.S. 1 (1958).

30. President Dwight D. Eisenhower, Statement by the President on the Duty of Compliance With Supreme Court Decisions (October 1, 1958).

31. President Franklin D. Roosevelt, Fireside Chat (March 9, 1937).

32. 247 U.S. 251 (1918).

33. President Franklin D. Roosevelt, Message to Congress on Establishing Minimum Wages and Maximum Hours (May 24, 1937).

34. 410 U.S. 113 (1973).

35. President Ronald Reagan, Proclamation 5761: National Sanctity of Human Life Day (January 14, 1988).

36. 558 U.S. 310 (2010).

37. President Barack Obama, Statement on the United States Supreme Court Ruling on Campaign Finance (January 21, 2010).

38. President Jimmy Carter, Remarks at a Democratic National Committee Fund-raising Luncheon (October 15, 1980).

more, neutral rhetoric can involve miscellaneous statements mentioning the Court in passing, such as President Kennedy analogizing a proposed administrative procedure to the writ of certiorari, which, he said, "Succeeded in clearing up the overburdened docket of the Supreme Court."³⁹

The Production of Rhetoric by Presidents

Presidents delivered 6,142 sentences concerning the Supreme Court from 1929-2011. Figure 1 displays the distribution of rhetoric during the sample period in total and disaggregated by tone. The plots in the first row include rhetoric of all types (positive, negative, and neutral). Rows 2, 3, and 4 are restricted to include positive rhetoric, negative rhetoric, and neutral rhetoric respectively. The left-hand column plots show the number of sentences of each type for each year in the sample. To facilitate comparisons across presidents, the right-hand column plots annual averages for each type of rhetoric for each president in the sample.

Presidents delivered an average of 74 sentences on the Court per year with a standard deviation of 122 sentences. Not surprisingly, President Roosevelt delivered the most rhetoric in any single year with 914 sentences in 1937 during his Court-packing campaign. More surprising, perhaps, is that Roosevelt also delivered the least rhetoric in a year, with zero sentences directed at the Court in 1942. The plot reporting average sentences by president for total rhetoric (row 1, column 2) reveals that President Ford averaged more annual references to the Supreme Court than any other president at 193 sentences per year. Presidents Obama (143 sentences), Roosevelt (131 sentences), and Clinton (100 sentences)

also directed an average of at least 100 sentences per year toward the Supreme Court. Presidents Hoover (14 sentences), Johnson (22 sentences), and Truman (24 sentences) averaged the fewest number of sentences directed toward the Court per year.

The plots in Row 2 display the intensity of positive rhetoric. Presidents directed an average of 23 positive sentences (standard deviation 26) toward the Court per year with Presidents Clinton (62 sentences), Ford (41 sentences), Kennedy (39 sentences), and George W. Bush (36 sentences) standing out with the highest averages. Presidents are critical in their statements regarding the Court more often than they are positive. Presidents average 38 negative sentences (standard deviation 117) per year. Presidents Obama (128 sentences), Roosevelt (121 sentences), and Ford (111 sentences) averaged the most negative rhetoric directed at the Supreme Court per year. Neutral references to the Court are less frequent than either positive or negative rhetoric. Presidents average 13 neutral sentences per year (standard deviation 19).

Explaining Aggregate Rhetorical Intensity

What explains the intensity of presidential rhetoric toward the Supreme Court? Our theoretical argument begins with the assumption that presidents have limited space on their rhetorical agendas. The public has a limited ability and inclination to absorb presidential communications. At some point additional presidential communications are likely to be treated as noise by audiences and ignored at a comparatively high rate. To the extent that presidents value public and press attention to their communications, we expect them to act as if their agenda space is constrained at the margin, even if it is theoretically possible to deliver another speech or issue another press release. For example, in order to preserve the signaling value of such addresses, we would not expect

presidents routinely to insist on making televised addresses during prime time.

Considering the limited space on presidents' rhetorical agendas, we expect rhetorical intensity toward the Court to vary in accordance with the cost of production. The cost of production, in turn, depends on aspects of the political environment and presidential familiarity with the law. While some aspects of the political environment may facilitate communications concerning the Supreme Court (e.g., elections), others (e.g., war) may increase the opportunity cost of focusing on the Court. We outline our expectations in more detail below. We then present an analysis of the production of aggregate presidential rhetoric toward the Supreme Court from 1929-2011.

Expectations

Presidents are likely to talk more about the Supreme Court in years in which a vacancy arises. Filling Supreme Court vacancies is among the most important presidential tasks. Although our rhetoric data exclude comments about specific nominees that do not discuss the institution generally, presidents often talk about the Court as an institution during periods of turnover. President Nixon, for example, regularly spoke about the Court as an institution while discussing his nomination philosophy more generally. On one occasion Nixon said, "It is the judge's responsibility and the Supreme Court's responsibility to interpret the Constitution and interpret the law, and not to go beyond that in putting his own socioeconomic philosophy into decisions in a way that goes beyond the law, beyond the Constitution."⁴⁰

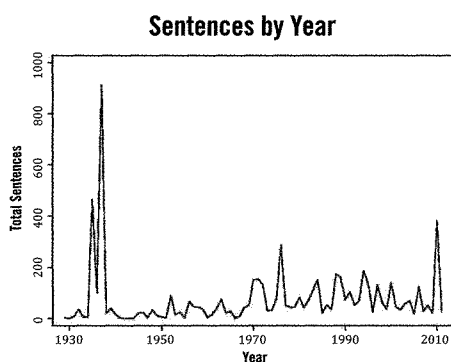
Vacancy Hypothesis: Presidents will produce more rhetoric toward the Supreme Court during years when a vacancy arises.

Another consequence of the importance of filling Supreme Court vacancies for presidents is that potential openings are regularly a point of emphasis in presidential

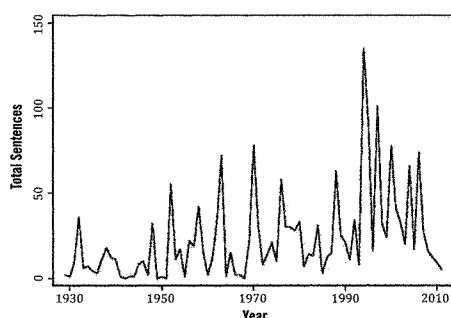
39. President John F. Kennedy, Special Message to the Congress on the Regulatory Agencies (April 13, 1961).

40. President Richard Nixon, Remarks at an Informal Meeting with Members of the White House Press Corps on Judge Haynsworth's Nomination to the Supreme Court (October 20, 1969).

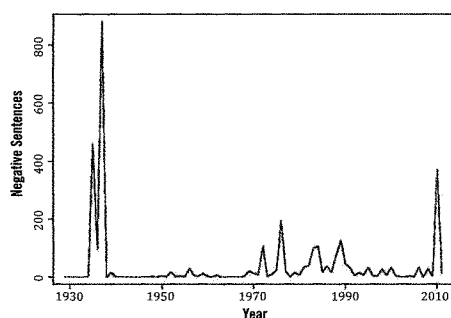
Total Rhetoric



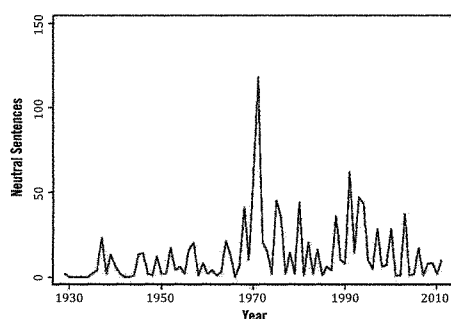
Positive Rhetoric



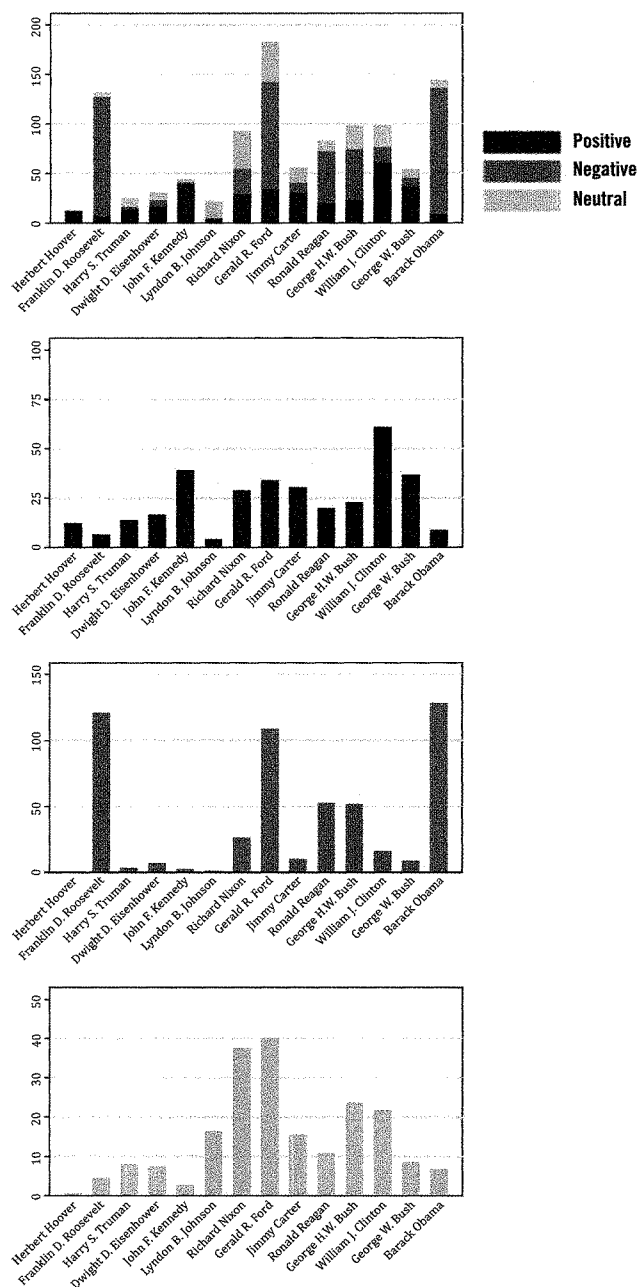
Negative Rhetoric



Neutral Rhetoric



Average Sentences per Year by President



elections.⁴¹ During his 2012 reelection campaign, for example, President Obama mentioned the Supreme Court at 12 different campaign rallies in July alone.⁴² Notably, attention to the Supreme Court is not limited

41. Richard Funston, *The Supreme Court and Critical Elections*, 69 AM. POL. SCI. REV. 795 (1975); William Lasser, *The Supreme Court in Periods of Critical Alignment* 47 J. POL. 1174 (1985); DONALD GRIER STEPHENSON, JR., CAMPAIGNS AND THE COURT: THE U.S. SUPREME COURT IN PRESIDENTIAL ELECTIONS (1999);

William G. Ross, *The Supreme Court as an Issue in Presidential Campaigns*, 37 J. SUP. CT. HIST. 322 (2012).

42. Data comes from searching the *Public Papers of the Presidents* for the phrase "Supreme Court." July 2012 is the last month for which data are currently available.

to incumbent presidents seeking reelection. Outgoing presidents also regularly talk about the Supreme Court leading up to an election. For example, President Clinton referenced the Supreme Court at 27 different campaign stops in the month leading up to the 2000 election.⁴³

Election Hypothesis: Presidents will produce more rhetoric toward the Supreme Court during presidential election years.

Presidents should be expected to focus less on the Supreme Court when dealing with major domestic or international issues. Two issues that stand out as particularly important for presidents and the public, and therefore generate considerable presidential rhetoric in their own right, are war⁴⁴ and economic downturns.⁴⁵ While focusing on issues such as war and the economy, presidents are likely to have less time to devote to the Supreme Court. Moreover, the public and press are less likely to seek information regarding the Court's actions.

War Hypothesis: Presidents will produce less rhetoric toward the Supreme Court when the United States is at war.

Economy Hypothesis: Presidents will produce less rhetoric toward the Supreme Court during economic downturns.

In addition to features of the polit-

ical environment, the cost of producing rhetoric toward the Supreme Court is likely to vary according to a president's familiarity with the law. It is reasonable to think that, on average, lawyer-presidents are more likely to take an interest in the Supreme Court and to be more comfortable talking about the institution than non-lawyers.⁴⁶ Both Presidents Clinton and Obama repeatedly referenced the fact that they were lawyers and had taught constitutional law as indicators of their interest and credibility in legal affairs.⁴⁷ President George W. Bush, meanwhile, expressed a different sentiment toward legal nuance: "I'm not a lawyer, thankfully. And so I will let my legal experts deal with the ramifications of legal opinions."⁴⁸

Lawyer-President Hypothesis: Presidents who are also attorneys will produce more rhetoric toward the Supreme Court.

Data, Analysis, and Results

Our dependent variable is a yearly count of the number of sentences directed at the Court by presidents from 1929-2011. Because these count data are overdispersed, the variability in the data is larger than expected, we fit models using negative binomial regression, a statistical model for count data that accounts for the overdispersion.⁴⁹

The explanatory variables include: an indicator scored 1 for years with vacancies on the Court; an indicator scored 1 for presidential election years; and an indicator scored 1 for the five lawyer-presidents in our sample (Franklin Roosevelt, Richard Nixon, Gerald Ford, Bill Clinton, and Barack Obama). War is scored 1 if at least six months of a year were spent engaged in one of the following conflicts: World War II, Korea, Vietnam, the Gulf War, Afghanistan, or Iraq.⁵⁰ To capture economic downturns, we include an indicator variable scored 1 if at least six months of a year were spent in recession.⁵¹ We also include three control variables. First, we capture ideological opposition between the president and Supreme Court with a binary variable indicating opposite party control of the Supreme Court and the White House. We capture each president's propensity to go public by scoring the natural log of the number of press conferences held each year.⁵² Last, we also include a time trend to account for an expected increase in going public over time.⁵³

Table 1 presents results from a negative binomial regression explaining the production of presidential rhetoric toward the Supreme Court from 1929-2011. Standard errors are clustered by president. Overall, the results suggest that the aggregate production of presidential rhetoric toward the Supreme Court is a function of the cost of production in relation to a scarce rhetorical agenda. As expected, features of the political environment that impact the cost of producing rhetoric toward the Court are strongly associated with changes in attention to the Court. Setting binary variables at their modes and continuous variables at their means, a Supreme Court vacancy is associated with an increase in the expected number of sentences delivered by presidents in a year from 37 [23, 55] to 50 [32, 74].⁵⁴ Presidential elections are associated with an increase in the expected number of yearly sentences delivered by presidents concerning the Supreme Court from 37 [23, 55] to

43. Data comes from searching the *Public Papers of the Presidents* for the phrase "Supreme Court."

44. See KARLYN KOHRS CAMPBELL & KATHLEEN HALL JAMIESON, *DEEDS DONE IN WORDS: PRESIDENTIAL RHETORIC AND THE GENRES OF GOVERNANCE* (1990).

45. See B. DAN WOOD, *THE POLITICS OF ECONOMIC LEADERSHIP: THE CAUSES AND CONSEQUENCES OF PRESIDENTIAL RHETORIC* (2007).

46. See e.g., HENRY J. ABRAHAM, *JUSTICES, PRESIDENTS, AND SENATORS: A HISTORY OF THE U.S. SUPREME COURT APPOINTMENTS FROM WASHINGTON TO BUSH II* (2008).

47. See e.g., CBS News interview by Dan Rather with President Bill Clinton (March 24, 1993); President Barack Obama, Remarks at a Democratic National Committee Fundraiser in New York City (June 23, 2011).

48. President George Bush, The President's News Conference With Prime Minister Anders Fogh Rasmussen of Denmark in Kongens Lyngby, Denmark (July 6, 2005).

49. We checked for autocorrelation by calculating the Portmanteau (Q) statistic. The results suggest that these data are not serially correlated.

50. We followed Lee Epstein, Daniel E. Ho, Gary King & Jeffrey A. Segal, *The Supreme Court During Crisis: How War Affects Only Non-War Cases*, 80 NYU L. REV. 1 (2005) in selecting conflicts denoted as wars, given that the United States has not officially declared war since World War II. Dates were obtained from the International Crisis Behavior Project.

51. Dates were compiled based on information provided by the National Bureau of Economic Research on U.S. business cycle expansions and contractions.

52. Our results with respect to our five key hypotheses are robust to an alternative specification where we measure presidents' propensities to go public by including the average number of words in each president's State of the Union addresses.

53. See Kernell, *supra* note 10. We include this measure in addition to the press conferences variable because Kernell's research suggests that there has been a linear trend in opportunities to go public that is conceptually distinct from a president's propensity to go public. The two measures are actually slightly negatively correlated, suggesting that they are capturing different dimensions to going public.

54. 95% confidence intervals are in brackets.

59 [38, 86].⁵⁵ Periods of war, however, are associated with a decrease in the expected production of presidential rhetoric toward the Court from 37 [23, 55] to 19 [12, 30] sentences per year. Economic downturns are not associated with changes in the production of presidential rhetoric toward the Court.⁵⁶

Presidential familiarity with the law is associated with an increased production of rhetoric concerning the Supreme Court as expected. Substantively, having a lawyer-president increases the expected number of yearly sentences delivered concerning the Court from 37 [23, 55] to 84 [37, 165]. Thus, of the explanatory variables considered here, having a president who is also an attorney is associated with the largest increase in the overall production of rhetoric concerning the Court. With respect to the control variables, ideological opposition between the Court and White House, presidential inclination to go public, and time are not associated with changes in the aggregate production of presidential rhetoric toward the Supreme Court.

Explaining Rhetorical Sentiment

In this section, we offer a brief extension of our analysis to consider the determinants of rhetorical sentiment toward the Supreme Court. Although our theoretical perspective emphasizes aggregate rhetorical production, it is instructive to see how features of the political environment and presidential familiarity with the law are related to the production of positive, negative, and neutral rhetoric separately. To this end, Table 2 displays results from a series of negative binomial regressions explaining rhetorical sentiment using the same explanatory variables from our discussion of aggregate rhetoric.

The results presented in Table 2 suggest that the determinants of rhetorical sentiment differ across categories. As an initial matter, Supreme Court vacancies are primarily associated with an increase in neutral rhetoric. Elections are associated with increases in both negative

	B (SE)	Expected Count [95% CI]
Vacancy	0.32** (0.15)	50 [32, 74]
Presidential Election	0.47* (0.28)	59 [38, 86]
War	-0.65** (0.31)	19 [12, 30]
Recession	0.17 (0.26)	
Lawyer	0.78** (0.31)	84 [37, 165]
Ideological Opposition	0.24 (0.42)	
Natural Log Press Conferences	-0.30 (0.25)	
Counter	0.01 (0.01)	
Intercept	4.10** (0.79)	

N=83 *p<0.10 **p<0.05 (two-tailed)
The Expected Count column gives the simulated expected number of sentences delivered by presidents when the specified condition is present, setting binary variables at their modes and continuous variables at their means. Brackets report the associated 95% confidence intervals.

and neutral rhetoric. The occurrence of war and having lawyer-presidents are associated with the production of negative rhetoric: As expected, war is associated with decreased negative rhetoric while having a lawyer in the White House is associated with increased negative rhetoric. Overall, the production of positive rhetoric appears to be noisier than the production of negative rhetoric. Interestingly, divided control of the branches is associated with increased positive rhetoric. This seemingly counterintuitive result may be due to the fact that presidents who disagree with Supreme Court opinions nonetheless make remarks expressing respect for the Supreme Court as an institution and willingness to follow its precedents, as demonstrated by President Eisenhower's response to the Court's decision in *Brown*. These pre-

liminary findings should help inform the development of more nuanced theoretical perspectives explaining the differential positive and negative rhetorical treatment of the Court by presidents.

55. We also fit a model including a variable capturing "Court-centered elections" as coded by Stephenson (*see supra* note 41, at 26) in his seminal work on the Supreme Court and presidential elections, which we updated by examining major party platforms from recent presidential elections. The results were similar and the overall production of rhetoric did not change during Court-centered elections.

56. To check the robustness of our findings with respect to economic conditions, we employed two alternative measures of macroeconomic performance: (1) the yearly percentage change in gross domestic product [1931-2011] and (2) the absolute value of the yearly change in the consumer price index based on a 1982 base = 100 [1929-2011]. The results suggested that increases in GDP were associated with increased rhetoric as expected. However, changes in CPI were not associated with the production of rhetoric toward the Supreme Court.

TABLE 2. The Determinants of Rhetorical Sentiment Toward the Supreme Court, 1929-2011

	Positive	Negative	Neutral
Vacancy	0.03 (0.18)	-0.22 (0.54)	1.14 (0.32)
Presidential Election	0.60 (0.40)	0.57* (0.32)	0.90** (0.24)
War	-0.13 (0.28)	-1.84** (0.74)	0.23 (0.33)
Recession	0.12 (0.30)	0.57 (0.65)	0.09 (0.34)
Lawyer	-0.09 (0.31)	1.80** (0.66)	0.47 (0.30)
Ideological Opposition	0.60** (0.20)	-0.08 (1.09)	-0.10 (0.23)
Natural Log Press Conferences	0.03 (0.03)	-0.26 (0.48)	0.03 (0.23)
Counter	0.02** (0.01)	0.01 (0.02)	0.03** (0.01)
Intercept	1.50 (1.16)	3.10* (1.62)	0.11 (1.05)

N=83 in each model *p<0.10 **p<0.05 (two-tailed)

Conclusion

Scholars, journalists, and politicians routinely comment on the president's use of rhetoric toward the Supreme Court. By counting and content-analyzing every sentence spoken or written by presidents directed toward the Supreme Court as an institution, we capture both the intensity and tone of presidential rhetoric concerning the Court from 1929-2011. This approach substantially broadens previous studies of presidential rhetoric and the Supreme Court, which have focused either exclusively on going public in support of particular nominees or on policy rather than Court-specific rhetoric. We find presidential rhetoric toward the Supreme Court varies substantially across presidents. However, this variation is a predict-

able function of the costs of production as reflected by features of the political environment and presidential familiarity with the law. Events such as elections, war, and vacancies change the cost of devoting scarce agenda space to the Supreme Court; moreover, lawyer-presidents seem to have the ability and inclination to refer to the Court more regularly.

Examining presidential rhetoric toward the Supreme Court is a fruitful area for further research. The existing literature on separation of powers emphasizes appointments and enforcement as the mechanisms by which presidents control or attempt to exert influence over the Supreme Court. However, rhetoric may be another effective tool. Negative rhetoric, for instance, may signal a willingness to refuse

enforcement or otherwise cut away at the Court's diffuse support or store of institutional legitimacy. Positive rhetoric, meanwhile, can be a way to add to the Court's legitimacy. In addition to further exploring the determinants of presidential rhetoric toward the Supreme Court, the literature on executive-judicial relations would benefit from examining the consequences of this rhetoric in areas such as agenda setting, decision making on the merits, and public support.

Our data collection strategy can also be extended to the study of other inter-institutional relationships. Notwithstanding the growing literature considering presidential rhetoric from a quantitative perspective, most analyses focus either on a small number of presidential statements (e.g., State of the Union addresses) or a narrow band of comments (e.g., those involving nominations). Our approach of content-analyzing every public reference to the Supreme Court as an institution can be expanded to examine presidential statements concerning Congress, the bureaucracy, or even the presidency itself. We hope scholars will make use of the data presented here to extend our understanding of executive-judicial relations while employing similar approaches to advance our understanding of other institutional relationships. ★

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