The Politicized Judiciary: A Threat to Executive Power

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On June 23, 2003 the United States Supreme Court affirmed a decision of the Sixth Circuit Court of Appeals that upheld the Universitry of Michigan law school's affirmative action program *(Barbara Grutter v. Lee Bollinger, et al).* The decision was a stunning defeat for George W. Bush's administration. After debating the legal and political merits of the filing a "friend of the Court" (*amicus curiae)* brief, the Bush administration had taken a clear position against the Michigan programs. Indeed, in a nationally televised press conference, the President himself had described the University's system as "divisive, unfair and impossible to square with the Constitution" (CNN, January 16th, 2004).[1] A year later, the Bush administration's conduct in the war on terrorism was directly challenged by the Court. In an 8-1 decision, the Court declared that citizens detained as "enemy combatants" were entitled to due process and access to an attorney (*Hamdi v. Rumsefeld*). In another 6-3 decision, the Court ruled that foreign "enemy combatants" held at Guantanamo Bay, Cuba should be given access to U.S. Courts *(Rasul et al. v. Bush).*

These three decisions illustrate the challenge presidents face in using the Courts to further their policy and political goals. Indeed, the Court dealt the Bush administration

[1] http://www.cnn.com/2003/ALLPOLITICS/01/15/bush.affirmativeaction/

major setbacks in two of the policy areas (civil rights and the war on terrorism) that were at the top of the President's agenda. The assertiveness of the judicial branch in these three cases is in many respects characteristic of the relationship that currently exists between the Courts and the executive branch.

It is also a characteristic that violates our "textbook" understanding of the relationship between the judicial and executive branches. Scholars typically portray the judiciary as institution that acquiesces to the demands of the executive branch. For example, Edwards and Wayne argue that "most presidents operate under few constraints from the courts" (2003, 400). That portrait of deference is consistent with almost fifty years of scholarly portraits of the relationship between the president the federal courts (see Rossiter 1960, 52).

The textbook portrait of the Court has historically rested on several pillars. First, when the executive branch states a legal position as either a party in a case or by filing an amicus brief, the executive disproportionately wins. For example, Scigiliano discovered that when the United States was a direct party in a case, 64% of the Supreme Court's decisions reflected the position preferred by the executive. Scigliano noted that the executive branch's success ratio was "even better" when it participated as *amicus curiae* (1971, 179). For the period 1952 to 2000, Dean, Ignagni, and Meernik showed that the executive branch prevailed almost 75% of the time when it participated as *amicus curiae* (see also McGuire 1998; Segal and Reedy 1983; Segal 1988; O'Connor 1983).

Second, when the Court is directly asked to decide issues that involve the prerogatives of the executive, the Court has historically ruled in favor of the executive. Between 1792 and 1997, Ragsdale (1998) reports that only 76 decisions of the Supreme

Court directly curtailed executive branch power. The pattern of executive success is even more remarkable if one excludes the 25 instances when the Court ruled against President Nixon. However, even here the Court has recently been willing to rule against the executive. For example, in 1988 the U.S. Supreme Court decided in *Clinton, et al. v. New York City, et al*. that the line item veto (a bill that enabled the president to effectively remove particular line items from appropriation bills) was unconstitutional. The Court's willingness to deny President Clinton the line item veto was not the only threat to executive power experienced by the 42nd President. The Court denied the President's petition to keep Paula Jone's civil suit out of the judicial branch *(Clinton v. Jones)* and executive privilege claims that would have prevented a special prosecutor from being able to compel testimony from Secret Service agents (*Rubin v. United States)*.[2]

The Court's rejection of several pivotal arguments made by Presidents Bush and Clinton suggest that the textbook portrait of executive-judicial branch relations is dated. The judicial branch today is an assertive force in the American political system. Its decisions frequently run counter to the goals and preferences of the executive. Although the "textbook" portrait may have been an accurate description during an earlier period in time, it is not an accurate portrait of the past fifty years. Instead, the court is an independent force that on occasion accommodates the president, but also frequently challenges him. In this chapter, I explore those forces that have reshaped the relationship between the president and the judiciary. I argue that theses forces have undermined the President's ability to use the Courts to pursue his policy and political goals.

[2]The Court also refused to hear cases that would have overturned lower court decisions that denied executive privilege claims that would have prevented the special prosecutor from having access to the notes taken by the White House counsel's office and that would have shielded the working papers of the first lady's health care reform task force.

Executive-Judicial Relations

President Bush's experiences with the Supreme Court reflect an emerging pattern: the Court regularly challenges the decision of the executive branch. This point is illustrated in Figure 1. In this figure, I present the success rate of the executive branch before the Supreme Court in two types of cases. In one set of cases, I report for the period 1954-2000 the success of the federal government before the Supreme Court when the United States is a party in a case. These cases are demarked with a solid line. In the forty-six year period covered, the federal government prevailed when it was a party in 63% of the cases. Although this figure has varied from a high of 83.3% (1983) to a low of 44.1% (1956), the trend is essentially flat.[3] The federal government's record over this period is relatively consistent, prevailing in just under two-thirds the cases in which it participates.

[Figure 1 about here]

The dashed line in Figure 1 explores the success rate of the federal government filed an *amicus curiae* ("friend of the court") brief. Whereas the first series involves cases where the U.S. is a party (e.g. someone commits a federal crime), the second set is cases that do not directly involve the federal government. The briefs in these cases (such as the Michigan affirmative action case discussed earlier) are usually filed at the discretion of the executive branch. As a result, they largely reflect the administration's attempt to use the Court to further the president's agenda (Pacelle 2003; Bailey, Maltzman and Kamoie 2005). A different pattern emerges in these cases. Whereas at

[3]There is no significant change over time in the federal government's success rate when the federal government is a party.

one time the Solicitor General's participation may have been useful for a president seeking to further their policy goals, the Court increasingly rejects the arguments made by the solicitor general on behalf of the president.[4] Whereas the federal government's success rate when the U.S. is a party is essentially stable, its success rate when it participates as an *amicus curiae* has significantly declined over time. Indeed, the fate the Bush administration encountered in *Grutter v. Bollinger* was encountered by the Clinton administration in almost one third of all cases.

The ability of the executive branch to count on the Supreme Court to further its policy goals is not unique to the highest court in the land. Federal district and appellate court judges regularly reject claims made by the administration. Although precise data are difficult to come by available evidence suggests that legislation that is designed to overrule a judicial decision frequently stems from a decision that was initially made by either a district or appellate court.[5]

Judicial Decision-Making Criteria

According to the textbook model of judicial-executive relations, federal judges look to the executive branch to provide guidance as to the direction of the law. According to this model, the Court looks to the executive for several reasons. First, the executive provides the Court with information that is necessary to ensure the effective implementation of the law. It is also this argument that has led some to label the

[4]The Office of the Solicitor General (S.G.) is the Justice Department office that has the primary responsibility for representing the administration in all cases that have reached the Supreme Court.

[5] Barnes randomly identified 100 cases that were overridden by Congress and the executive branch. Seventy-three of these overrides were designed to reverse a decision made by a federal district or circuit Court.

executive branch's lawyer before the Supreme Court (the Solicitor General) "the tenth justice" (Caplan 1987; but see McGuire 1998). Second, the Court responds to the executive because of fear that its credibility will be undermined by the executive's refusal to comply or willingness to support a legislative override (Knight and Epstein 1996). As evidence for this view, scholars point to particular instances in time when the Court was reluctant to act in a manner hostile to the preferences of an administration (e.g. Knight and Epstein 1996, Caldeira 1987, Gely and Spiller 1990).

In contrast to these portraits of a constrained and responsive judicial branch, the dominant conclusion one draws from those who study the votes cast by justices is that their actions reflect their policy preferences and the ideological values (Schubert 1965; Segal and Spaeth 2002). In other words, when justices review the positions embraced by the executive branch, they are guided first and foremost by their views of the law and their preferred policy outcomes,

Patterns of Judicial Responsiveness

To determine whether Supreme Court justices are responsive to the wishes of the executive, we can look at the voting behavior of individual justices when the executive participates as an *amici*.[6] If the executive branch serves as a source of legal expertise to the bench or if justices are reluctant to see the executive ignore or overrule the Court, we should expect all justices to support the administration's preferred position. On the other hand, if justices vote in accordance with their policy preferences, we would expect

[6]Bailey, Kamoie and Maltzman (1995) provide such an analysis for all civil liberties/rights cases that arose during the 1953-2002 period. The discussion that follows is based upon this analysis and data.

justice's who are ideological allies of the solicitor general to be more likely to support the position of an ideologically sympathetic administration. In other words, if the S.G.'s participation is viewed by individual justices as a signal regarding an administration's policy preferences, conservative justices (such as Clarence Thomas, Antonin Scalia, and William Rehnquist) should be more responsive to the arguments made by a conservative president's administration (such as George W. Bush or Ronald Reagan) than liberal justices (such as Ruth Bader Ginsburg, Thurgood Marshall, or William Brennan). Likewise, liberal justices should be more responsive to the arguments made by liberal administrations.

Table 1 reports the proportion of the time that each justice voted with the S.G. when he embraced liberal and conservative outcomes and the significance of this difference. The data are based upon all civil liberties and rights cases during the 1953-2002 period.[7] For example, Justice Marshall voted with the S.G. in 16% of the cases when the S.G. embraced a conservative position and 96% of the cases in which he embraced a liberal position. This difference is significant. Indeed, 15 of the 17 justices over this period gave markedly different levels of support to conservative and liberal positions embraced by the solicitor general.

[Table 1 about here]

Although this pattern is highly suggestive that justices do not defer to the executive simply because of their constitutional roles, it is not proof. First, the table does not tell us whether the liberals support a liberal administration because they share the same views or because presidents influence justices' votes. Second, sometimes liberal

[7]For details on how this was calculated, see Bailey, Kamoie, and Maltzman (2005).

administrations embrace conservative positions, and visa versa. In these instances, we would expect a justice who is sympathetic with the predisposition of an administration to be particularly likely to vote contrary to their usual policy positions (see Calvert 1985, 552).[8]

To get a better understanding of the influence administration position taking has on justices' votes, we can examine the conditions under which justices are likely to support the positions of an administration. In table 2, I look at whether a justice supports the position recommended by the solicitor general when the S.G. has filed an *amicus* brief. For explanatory variables, I look at each justice's ideological closeness to the sitting president. And such an examination is presented. In the model, the dependent variable is whether the S.G. took a position that runs contrary to his administration's normal policy views.[9]

[Table 2 about here]

As shown in Table 2, the variable that taps a justice's ideological closeness to the administration (DISTANCE FROM S.G.) is negative and significant. This means that when the S.G. files a brief advocating a conservative position, justices who disagree ideologically with the administration are less likely to vote in the conservative direction. Likewise, when the S.G. advocates a liberal outcome, ideological foes of the president are less likely to embrace the administration's positions. This relationship holds even after controlling for the ideology of the justice (IDEOLOGICAL PROPENSITY), whose coefficient is also statistically significant. The statistically significant OUTLIER variable indicates when the S.G. advocates a position that runs

[8]Such an outcome would be consistent with theoretical work that has explored the dynamics behind "signaling" models.
[9]The precise measurement strategy and a more extensive analysis is detailed in Bailey, Kamoie and Maltzman (2005).

contrary to his usual ideological position, the cue is taken more seriously by justices who typically disagree with him. A justice is more likely to support a conservative S.G. when the S.G. advocates a liberal rather than a conservative outcome.

These patterns clearly demonstrate that different justices treat the information from the administration in a selective manner. Rather than merely deferring to the executive or viewing the executive as a valuable source of unbiased information about the law and the direction it should develop, justices view information from the administration as a signal about the policy implications of particular decisions. Thus, liberal justices value information from liberal administrations, and conservative justices prefer the positions of conservative administrations. This pattern is consistent with arguments that justices' decisions reflect their policy views.

This pattern also highlights one of the reasons why the executive branch has a hard time controlling the judiciary. Justices do not unquestionably defer to the executive when they hold different views about policy. Although this analysis is limited to the relationship between Supreme Court justices and the executive branch, there is little reason to suspect that lower court justices are particularly prone to defer to the executive branch. Instead, the actions of lower court judges appear to reflect the combination of three factors: the judge's ideology, the legal facts of the case, and the goal of avoiding reversal by acting in compliance with the decisions of the Supreme Court (Songer, Segal, and Cameron 1994; but see Klein 2002, Cross 2004). Indeed, scholars have found that federal district and appellate court judges appointed by Presidents Lyndon Johnson, Ronald Reagan and George W. Bush quite often supported outcomes contrary to the

views one would expect from the administration that appointed them.[10] Even though these three presidents actively sought to appoint judges who shared their ideological views, presidents were essentially powerless to control them once they were confirmed onto the federal bench.

Appointing Federal Judges

The fact that judges and justices frequently vote in a manner inconsistent with the preferences of the executive who appointed them stems in part from how judges make decisions once they are on the bench. However, judicial independence also grows from the politics of the appointment process. Although the president has the constitutional responsibility to nominate federal judges, the capacity of any single president to alter the nature of the judiciary is limited in several ways.[11] First, the opportunities for a single president to shape the judiciary are limited. On the federal trial and appellate benches, the turnover rate is approximately 4% each year (Carp, Mannning and Stidham 2004). On the Supreme Court, the turnover rate throughout our nation's history has been approximately one justice every two year period.

Second, the vast majority of the vacancies presidents can fill have a small impact on the bench's ideological composition. Because judges' have lifetime appointments, the ability of a president to change a bench's ideological tenor depends on both who retires and the ideological bent of that court. If the bench is overwhelming dominated by either

[10]Carp, Manning and Stidham (2004) report that 36.1% of the votes cast by G.W. Bush's appointees and 35.8% of the votes cast by Reagan judges were in support of liberal outcomes. Likewise, 48.1% of Johnson appointee votes were in support of conservative outcomes.

[11]For a comprehensive overview of the nomination and confirmation process, see Goldman (1997).

liberal or conservative judges, no single appointment is likely to make a big difference in the partisan or ideological balance of the bench.[12] Likewise, if a judge or justice retires who holds views sympathetic to those of the president, the president will be unable to use the appointment to alter the composition of the court. For example, if a conservative Supreme Court Justice (such as Antonin Scalia) retires, a conservative president can appoint another conservative, but that doesn't remove any liberals from the Court or change the status quo.

Third, the appointment power is a limited one, because predicting future judicial behavior is complicated. Once confirmed, a judge has his or her position for life. They therefore have virtually no incentive to defer to the views of the president by complying with his policy positions and legal arguments. Even if the administration uses a litmus test or screening process to identify judges who would be most likely to be "true" believers in an administration's positions, the administration is likely to encounter what economists often term an "adverse selection problem." That is, a president lacks the capacity to fully understand a nominees policy preferences and such nominees have an incentive to present themselves in a manner that is favorable to the president's positions.

Fourth, the Senate can be a powerful constraint on president's use of the appointment power as a tool for crafting the bench. Article 2, Section 2, of the Constitution stipulates that presidential appointments must be made with the "Advise and Consent" of the Senate. As a result, the president and the Senate share the appointment

[12]One of the reasons Sandra Day O'Connor's retirement from the bench was so important was because the natural court she was retiring from was divided between conservatives and liberals and she was a swing voter. William Kristol, the editor of the conservative *Weekly Standard*explained, "The Court is the pivot point on social policy, and O'Connor's seat is the pivot point on the Court" (Balz 2005). For a discussion about the importance of pivotal seats, see Moraksi and Shipan (1999).

power. The constitutionally–prescribed role of the Senate provides senators with the opportunity to influence the fate of presidential appointees and thus the chance to shape the makeup of the federal bench.

When it comes to district and circuit appointments, individual senators often have the incentive and power to restrict the president's choices. Senators' influence arises from several corners. First, the geographic design of the federal courts strongly shapes the nature of Senate involvement in selecting federal judges. Because federal trial and appellate level courts are territorially defined, each federal judgeship is associated with a home state, and new judges are typically drawn from that state. As a result, senators attempt to influence the president's choice of appointees to federal courts in their states.

Second, Senate procedures that empower individual senators curtail a president's power. Although the Constitution prescribes Senate "advice" as well as "consent," nothing in the Constitution requires the president to respect the views of interested senators from the state. In practice, however, judicial nominees must pass muster with the entire chamber. Senate procedures that enable a minority of Senators to block a nominee with a filibuster make Senate leaders reluctant to consider nominees who do not have broad support.[13]

[13]Senate Majority Leader, Bill Frist (R-Tennessee) attempted in 2005 to eliminate filibusters of judicial nominees through a more radical approach that became known as the "the nuclear option." Under this approach, a simple majority of the Senate would seek through parliamentary appeals to establish the precedent that filibusters against nominations were unconstitutional. The approach was dubbed the nuclear option because of the anticipated consequences if the attempt were to succeed: Democrats would exploit their remaining procedural advantages and shut down most Senate business. Frist was forced to abandon adoption of this tactic when a bipartisan coalition refused to support such a procedure. Because the existence of the filibuster empowers every member individually, filibuster reform efforts usually fail (Binder and Smith 1997). Frist's 2005

Therefore, presidents have an incentive to anticipate objections from home state and other pivotal senators in making appointments. In the past, federal judgeships rarely elicited the interest of senators outside the nominee's home state, so the views of the home state senators from the president's party were typically sufficient to determine whether or not nominees would be confirmed. Other senators would typically defer to the views of the home state senator from the president's party, thus establishing the norm of *senatorial courtesy*. Moreover, the Senate Judiciary Committee in the early 20th century established the "blue slip," a process in which the views of home state senators—regardless of whether they hailed from the president's party—were solicited before the committee passed judgment on the nominees (Binder 2004). By granting home state senators a role in the confirmation process, individual senators could threaten to block a nominee during confirmation and thus encourage the president to consider senators' views before making appointments. In other words, the blue slip and *senatorial courtesy* provided individual senators with some leverage over the president.

Third, the Senate rarely considers nominations that lack the support of the Senate Judiciary Committee. For example, Orrin Hatch (R-UT) used his leverage as chair of the Judiciary panel to force President Bill Clinton to nominate Hatch's friend Ted Stewart to a Utah district court seat. Although Clinton was reluctant to nominate Stewart because of his perceived as his anti-environmental record as the head of Utah's Department of Natural Resources during the 1980s, Hatch held as hostage 42 other judicial nominations until Clinton made the nomination (Ring 2004).

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failure will inevitably force Bush to take into account the views of a wider spectrum of senators prior to making a judicial nomination.

Fourth, divided party control of the Senate and White House also limits the president's ability to stack the courts as he sees fit. In such periods, the opposition party controlling the Senate is unwilling to give the president much leeway to reshape the federal bench. Instead, the opposition will allow homestate senators and the judiciary committee chair to block nominees they oppose (Binder and Maltzman 2002; 2004).

Likewise, the fact that the Senate calendar is determined by the majority empowers the opposing president during periods of divided government (Binder and Maltzman 2002; 2004). During periods when the Senate is controlled by the president's party, the Senate is more likely to ignore the will of homestate Senators and judiciary committee chairs are more likely to envision their role as one of shepherding through presidential nominations.

Because judicial selection has rarely in the past elicited national attention and because Senate nominations have only occasionally triggered open conflict, conventional wisdom emphasizes the tranquil relationship between presidents and senators in shaping the federal bench. Senate observers have portrayed the president as deferring to the views of the home state senators from his party when selecting judges for the nation's district courts. Presidents are said to be less likely to defer to senators over the selection of appellate judges for the Circuit Courts of Appeal. Nevertheless, even here the process is usually portrayed as reflecting cooperation between home state senators and the White House.

Patterns of Confirmation Politics

Despite the conventional wisdom, trends in the nomination and confirmation process suggest otherwise. Figure 2 shows the increasing length of the confirmation process over the last half of the twentieth century, a measure that likely reflects the level of disagreement over nominees in that Congress. The data include all nominees for the Federal District and Circuit Courts of Appeal eventually confirmed by the Senate. If the amount of time it takes to move an appointee from nomination to confirmation reflects the level of disagreement over the nominee, charges that the confirmation process is newly politicized certainly hold some weight. The Senate took on average just one month to confirm the average judicial nominee during President Ronald Reagan's first term. By the end of President Bill Clinton's second term, the wait had increased on average five-fold for district court nominees and seven-fold for appellate court nominees. At least a fourth of Clinton's judicial nominees in the 106th Congress (1999-2000) waited more than six months to be confirmed, including U.S. District Court Judge Richard Paez who had waited nearly four years to be confirmed to the Ninth Circuit Court of Appeals. Confirmation delay continued to increase under President George W. Bush, reaching a record for appellate court nominees in the 107th Congress (2001-2002).

[Figure 2 about here.]

Still, delays weathered by recent presidents in securing confirmation of their nominees reflect more than Clinton's polarized relations with a Republican Senate or Bush's polarized relations with a Democratic Senate. Delays in the confirmation process were considerable in the mid-1980s, when Reagan saw Democratic Senates take on average nearly four months to confirm his judicial nominees. Even during a rare episode

of unified Democratic control during 1993 and 1994, the Senate took on average three months to confirm the majority party's nominees.

The roots of today's impasse over federal judges are also visible in confirmation rates for judicial nominees. In Figure 3, a sharp decline in the rate of confirmation for district and appellate court appointees is quite striking. Whereas 100% of Circuit Court nominees were confirmed in the 1950s, less than forty percent were confirmed in the 107th Congress (2001-2). Overall, the data support the notion that the Senate confirmation process has markedly changed over the past ten years, and suggest that presidents have an increasingly hard time stacking the bench to their advantage.

[Figure 3 about here]

Of course, presidents also have a difficult time cherry picking the Supreme Court. Indeed, because of the visibility and importance of these positions, we would expect even more legislative review and resistance. Over the past 40 years, only 75% of presidential nominations to the Supreme Court have been confirmed.[14]

Although these figures and facts are indicative of the changing shape and tone of the nominating process, even these may exaggerate the president's influence on the bench. Strategic presidents frequently attempt to avoid protracted nomination battles by taking into account the preferences of the Senate. This dynamic was suggested by a Ninth Circuit judge, Stephen Reinhardt: "Clinton was not willing to have any fights over

[14]Between 1965 and 2005, the justices Abe Fortas, Thurgood Marshall, Warren Burger, Harry Blackmun, Lewis Powell, William Rehnquist, John Paul Stevens, Sandra Day O'Connor, Anttonin Scalia, Anthony Kennedy, David Souter, Clarence Thomas, Ruth Bader Ginsburg, Stephen Breyer and John Roberts were confirmed. Nominations for Homer Thornberry, Clement Haynsworth, Harrold Carswell, Robert Bork and Daniel Ginsburg were not confirmed. Although President Reagan announced Ginsburg's nomination, it was never formally submitted to the Senate for consideration.

(the courts)," Reinhardt once observed, "so he just bowed to the Republicans, and he was careful not to nominate anyone who might be considered liberal" (cited in Ring 2004). Likewise, some prominent conservative commentators (such as Ann Coulter) felt that George W. Bush's choice of John Roberts was too big of a concession to the moderate wing of the Republican party.[15]

To more systematically explore the difficulty presidents face in shaping the bench, in Table 3 I model the probability that the Senate will act, during the 1947-1998 period, on a given appellate court nominee at a particular time.[16] Technically, the coefficients help us to understand whether a particular independent variable increases or decreases what is known as the "hazard" or "risk" of Senate action. The hazard of Senate action is thus roughly the probability of swift Senate action by the Senate to confirm a president's nominee.

The estimates generated by the analysis essentially indicate whether each independent variable increases or decreases how long it takes for the Senate to act. An independent variable whose coefficient has a positive sign means that increases in the value of the variable will speed up the probability of Senate action; negatively-signed coefficients show that as the value of the

[15]http://www.townhall.com/columnists/anncoulter/ac20050721.shtml

[16] In particular, Table 1 shows the results for a duration model. Because duration models include information about when a nominee is confirmed and whether the observation is censored (never confirmed), the model simultaneously helps one understand both whether, when, and how the Senate acts on any given nominee. Details on measurement of the independent variables, the construction of the dependent variable, and the estimation strategy appear in Binder and Maltzman (2002; 2005). The model reported here differs slightly from Binder and Maltzman (2002; 2005). Whereas Binder and Maltzman (2002) used fixed effects to capture the impact of specific presidents on judicial selection, this model includes a time counter ("Congress") that allows one to gauge whether the process of advice and consent has changed significantly over time. To simplify presentation, the model presented here is more abbreviated than those that appear in Binder and Maltzman (2002; 2005).

independent variable increases, the likelihood of swift Senate confirmation goes down. As independent variables, I use variables to tap the ideological distance between the median Senator and the president and between that Senator and the nominee. To determine whether the Senate is more reluctant to confirm a nominee when the vacancy is on a bench where the partisan balance of the sitting judges is evenly divided, we include a dummy variable to demark these "critical" nominations. To assess the impact of the Judiciary chair and homestate senator, I include variables to tap the ideological distance between the president and the furthest homestate senator and the chair of the Judiciary committee. To assess whether partisan forces shape the confirmation process, I include variables to denote whether the Senate is controlled by the president's party; the ideological distance between the president and the opposing party's median, and whether a critical seat is being filled during a period of divided government. To determine whether the effect of the "institutional forces" variables are exaggerated during periods of divided government, these variables are interacted with a measure demarking the presence of divided government. Finally, I include variables to tap the quality of the president's nominees (as judged by the American Bar Association), the number of nominations pending, the time left in the session and a counter variable to control for the trend seen in figures 2 and 3.[17]

[Table 3 about here.]

The results in Table 3 strongly suggest the Senate's institutional features and the rise of partisanship in recent years severely limits the president in shaping the bench. For example, when judgeships open up on closely divided benches during divided government, senators drag their heels and radically slow down the confirmation process. When home state senators and the

[17]The specific measures used and a more extensive theoretical justification for these variables is contained in Binder and Maltzman (2002).

Judiciary Committee chair ideologically disagree strongly with the president, they exploit the Senate rules and practices to drag out the confirmation process.

These findings help explain why presidents often find themselves unable to fill vacancies on some federal appellate circuits. Take for example the Sixth Circuit Court of Appeals. In 1997 and 1998, the circuit was nearly evenly balanced between Democrats and Republicans, as Democrats made up roughly 45% of the bench. That tight ideological balance led the parties to stalemate over additional appointments to that bench, despite the fact that nearly a quarter of the bench was vacant. Michigan's lone Republican senator blocked the president's nominees by exploiting the blue slip in the late 1990s, and the Republican chair of the Judiciary panel recognized his objections. Michigan's two Democratic senators after the 2000 elections then objected to President Bush's appointments to the circuit. General disagreement over the policy views of the nominees certainly fueled these senators, but their opposition was particularly intense given the stakes of filling the judgeships for the ideological balance of the regional bench.

Most importantly, neither president was able to ensure confirmation for his preferred nominees for the federal bench. Hamstrung by opposition party control of the Senate and the Judiciary Committee and buffeted Senate rules and practices that enhance senators' ability to block confirmation, neither Bush nor Clinton could persuade the Senate to confirm their nominees to this closely balanced Court. The Senate, in short, can place a severe constrain on presidents seeking to mold a federal bench that strongly supports his policy agenda.

Judicial Politicization

The contentiousness of the confirmation process and the reluctance of judges to indiscrimately defer to the administration's legal opinions grows in large part from the politicization of the law (Kagan 2001; Lovell 2003; Burke 2004; Barnes 2004). The growth in litigation is apparent in a number of different ways. For example, in 1961 approximately 13,500 statutory claims were filed in Federal District Courts. In 1970, close to 40,000 staturtory claims were filed; in 1980 more than 75,000 claims; in 1990 over 125,000 and by 1998 close to 160,000 claims (Barnes 2004; United States 2000). The pattern is obvious. The courts are increasing being used to resolve questions that arise from the political arena.

Perhaps even more telling are changes in who uses the federal courts. Between 1958-1961, an average of 4.75 *amicus* briefs were filed each year by public interest groups or law firms. Between 1978 and 1981, interests groups filed an average of 45.5 briefs each term. Between 1986 and 1990, an average of 103 briefs were filed each year (Epstein, Segal, Spaeth, and Walker 2003, 689). Once again, the pattern is clear. Organized interests are increasingly using the courts as a vehicle for pursuing and protecting their policy agendas.

It is not surprising that gun control groups, property right groups, anti-smoking groups, pro-choice groups, organized labor and environmentalists utilize the legal process to pursue agendas that might not be implemented by elected officials. When legislators seem unable and unwilling to definitively resolve controversial policy questions, adversaries not surprisingly turn to the courts to pursue their agenda (Lovell 2003). It is this phenomenon that recently led Justice Antonin Scalia to question "the propriety,

indeed the sanity, of having value-laden decisions such as these [capital punishment, abortion, and physician-assisted suicide] made for the entire society... by judges" (Belkin 2004). As the courts have become increasingly controversial and accessible policy makers, rather than merely interpreters of legal facts and cases, the president's influence over the judiciary has been challenged. Given the stakes of Court decisions, few are willing to allow the president unfettered influence over the judiciary and its pivotal legal choices.

Likewise, the inability of Presidents to control the judiciary is increasingly a threat to executive branch control of policy outcomes. With the Courts having been transformed into a viable outlet for routinely determining important policy questions, the lack of presidential control has become an important threat to executive power and influence. The growth in policy by litigation has encouraged members of Congress and interest groups to challenge presidential influence over judicial nominations and executive branch success. Even without these challenges, the constantly growing and changing docket would make it virtually impossible for a President to use nominations to shape future outcomes. As Justice Sandra Day O'Connor recently explained:

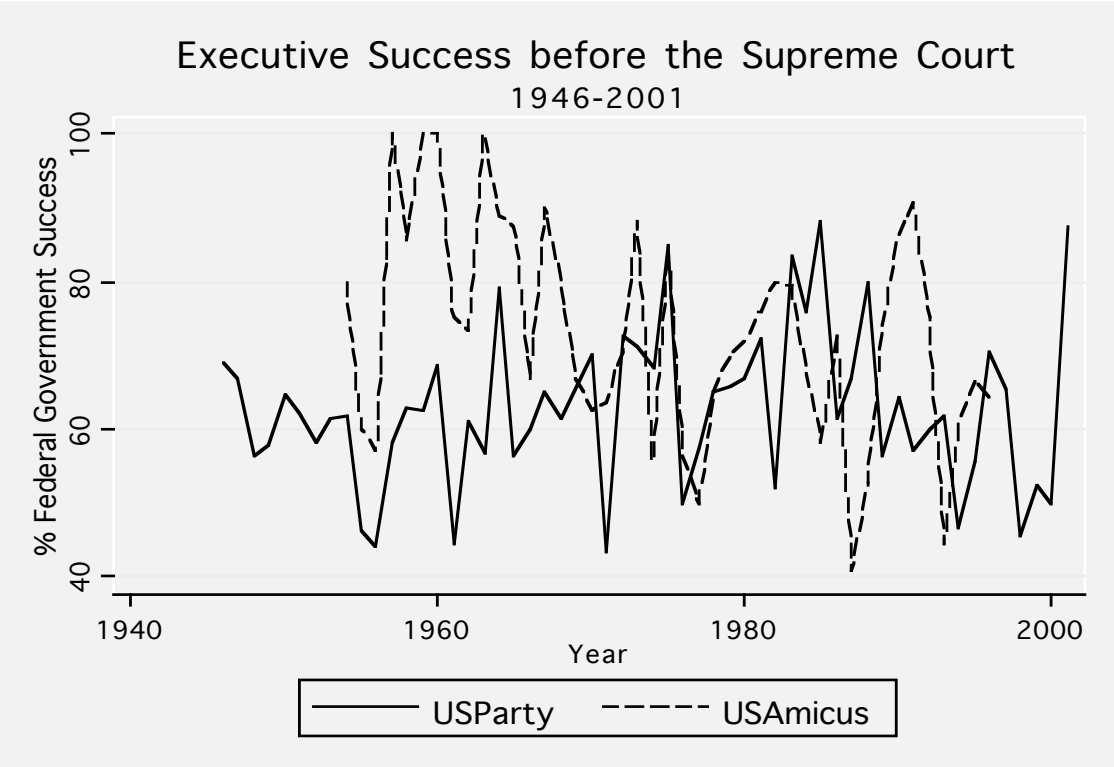
> I frankly do not know how anyone going on the court would be able to predict the thousands of issues that come before the Court. I myself couldn't have told President Reagan what I would do on all these issues, because I hadn't faced them (Gibson 2005).

Conclusion

In *Federalist #78*, Alexander Hamilton argued "that the judiciary is beyond comparison the weakest of the three departments of power; that it can never attack with success either of the other two." Hamilton's view is consistent with the textbook understanding of judicial-executive relations. This understanding suggests that the judiciary is neither threat nor hinderance to executive power.

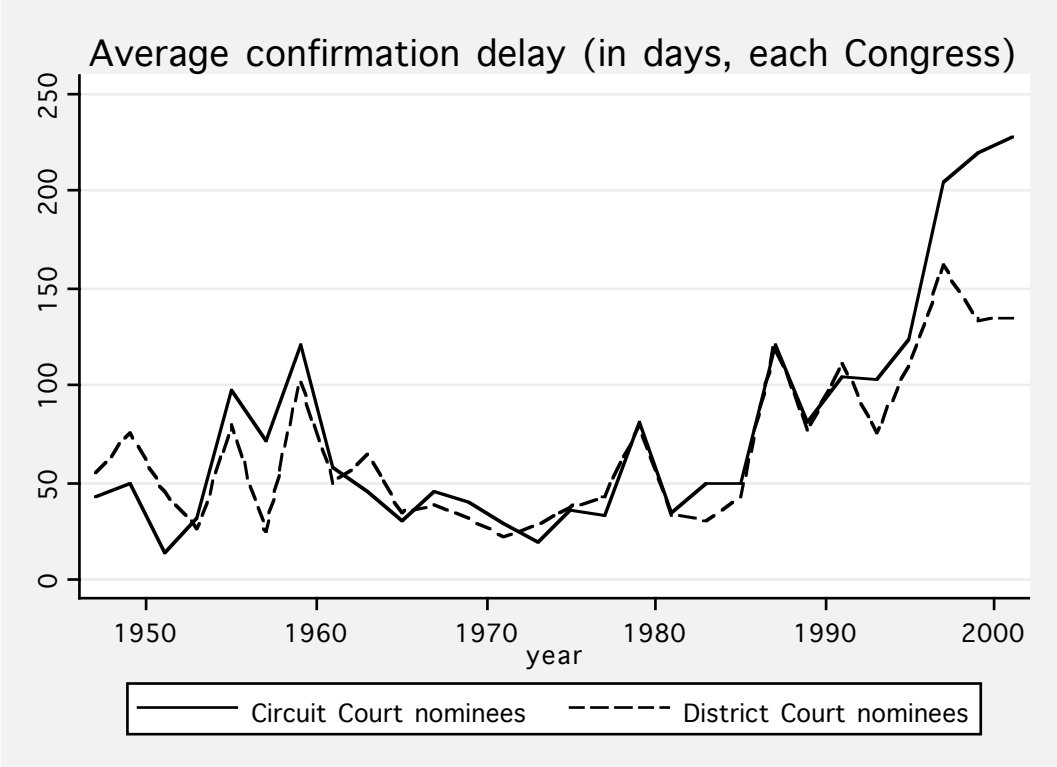
The two pillars of the conventional wisdom —— the president's appointment power and his superior legal guidance have begun to crumble. No longer can we view judges and justices as simple followers of the executive's positions and opinions. As the judicial branch has been called on to resolve contentious policy political issues, executive influence has waned —— challenged both by senators seeking influence the makeup of the bench, by other litigants, and and by the justices themselves as critical issues and issues addressed by the Courts. It is time to abandon the conventional wisdom.

Figure 1



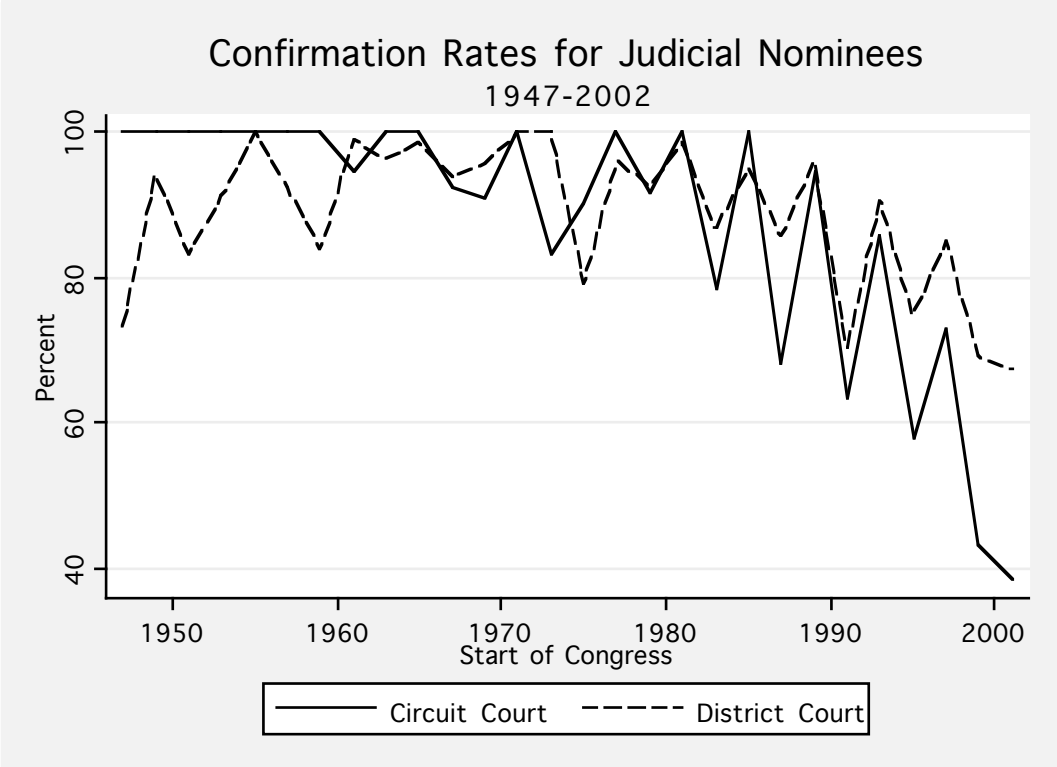
Source: Data compiled from Epstein, Segal, Spaeth, and Walker (2003), tables 7-12 and 7-15.

Figure 2



Source: Data compiled from *Final Legislative and Executive Calendars*, Senate Judiciary Committee, 80th-105th Congresses.

Figure 3



Source: Data compiled from *Final Legislative and Executive Calendars*, Senate Judiciary Committee, 80th-105th Congresses. Data for 106th and 107th Congresses compiled from United States Senate Committee on the Judiciary website, http://judiciary.senate.gov.

Table 1
Support for the Solicitor General *Amicus* Positions
(1953-2002 Terms)

Justice	Percent Support for S.G				Number of S.G. *Amicus* Briefs Filed	
	Overall	S.G. Liberal	S.G. Conservative	Chi-Sq*	S.G. Conservative	S.G. Liberal
Black	0.74	0.78	0.43	-	7	54
Reed	1.00	1.00	1.00	-	1	2
Frankfurter	0.73	0.80	0.00	-	1	10
Douglas	0.8	0.97	0.13	51.31*	15	59
Jackson	1.00	1.00	-	-		2
Burton	1.00	1.00	1.00	-	1	4
Clark	0.79	0.82	0.50	-	4	44
Minton	1.00	1.00	1.00	-	1	2
Warren	0.92	0.96	0.50	-	6	53
Harlan	0.47	0.49	0.25	-	4	51
Brennan	0.55	0.95	0.25	128.71*	157	115
Whittaker	0.75	0.75	-	-		8
Stewart	0.67	0.65	0.71	0.29	34	84
BWhite	0.79	0.74	0.82	2.78	192	117
Goldberg	1.00	1.00	-	-		25
Fortas	0.73	0.82	0.40	-	5	17
Marshall	0.42	0.96	0.16	138.23*	163	77
Burger	0.79	0.59	0.92	23.99*	96	58
Blackmun	0.61	0.85	0.51	28.94*	192	85
Powell	0.73	0.58	0.82	11.82*	107	59
Rehnquist	0.77	0.42	0.95	136.22*	246	130
Stevens	0.48	0.76	0.34	58.54*	236	123
OConnor	0.77	0.65	0.82	9.80*	217	95
Scalia	0.71	0.35	0.88	67.21*	151	72
AKennedy	0.73	0.48	0.86	32.01*	127	67
Souter	0.69	0.82	0.60	8.40*	92	65
Thomas	0.64	0.28	0.90	56.30*	80	60
Ginsburg	0.66	0.8	0.52	10.55*	60	56
Breyer	0.75	0.87	0.65	6.21*	54	45

*Significance of difference between support for S.G. when he urges a liberal and a conservative outcome. Critical value for $\alpha<0.05$ is 3.84. If a justice participated in fewer than 10 cases where the S.G. participated as a liberal *amici* and 10 cases where the S.G. participated as a conservative *amici,* χ^2 is not calculated. A version of this table originally appeared in Bailey, Kamoie, and Maltzman (1995).

Table 2:
Probability of a Justice Voting in a Manner Consistent with S.G. Amicus Brief

Variable (expected sign)		
Signaling Variables		
Distance from S.G. (-)	-0.26***	-0.23***
	(5.82)	(5.49)
Outlier signal (+)	0.20***	0.15**
	(3.52)	(2.67)
Justice Specific Controls		
Ideological propensity (+)	0.68***	0.71***
	(10.78)	(11.05)
Freshman (+)	-	0.14*
	-	(1.39)
Case Specific Controls		
Legal salience (-)	-	-0.30***
	-	(3.96)
Political salience (-)	-	-0.31***
	-	(4.98)
Invitation (+)	-	-0.13
	-	(1.08)
Complexity (+)	-	-0.08
	-	(1.22)
Constant	0.55	0.63
	(9.31)	(3.66)
-2 Log Likelihood	-1915.3	-1852.9
Pseudo R^2	0.23	0.24
Correctly predicted %	77.21%	77.23%
Reduction in error %	30.1%	30.1%
Number of Observations	3888	3888

Note: Entries are unstandardized coefficients from probit estimation (t-statistics are in parentheses and based on robust standard errors). Fixed effects for each S.G. are included in the model, but not reported. A version of this table originally appeared in Bailey, Kamoie, and Maltzman (1995).
*p < 0.10; **p<0.01; ***p<0.001 (one-tailed)

Table 3:
Cox Regression of the Timing of Senate Confirmation Decisions, 1947-1998
(Nominations to U.S. Circuit Courts of Appeal)

Variable (expected direction)	Coefficient (robust s.e.)
Ideological forces	
Ideological distance between Senate and president (-)	1.00 (.79)
Ideological distance between Senate and nominee (-)	.16 (.40)
Nomination to a closely balanced court (-)	.36 (.15)
Senate Institutional forces	
Ideological distance between Judiciary chair and president (-)	.16 (.36)
Home state senator is ideologically distant from president (-)	.49 (.19)
Partisan forces	
Divided government (-)	-.10 (.30)
Ideological distance between president and opposing party (-)	-3.14 (1.06) **
Nomination to a closely balanced court during divided govt. (-)	-.82 (.25) ***
Senate institutional forces during divided government	
Ideological distance between Judiciary chair and president (-) During divided government	-1.05 (.61)*
Home state senator is ideologically distant from president (-) during divided government	-2.32 (1.20) *
Presidential forces	
Well-qualified nominee (+)	.01 (.13)
Qualified nominee (+)	.49 (.65)
Temporal forces	
Number of nominations pending (-)	-.02 (.00) ***
Time left in session (+)	-.00 (.00)
Congress counter (-)	-.04 (.02) **
Log Likelihood	-1814.13
Chi2	304.76***
N	413

Notes: The table reports results of a Cox regression model, based on Stata 8.0 *stcox* routine. Significance of coefficients is indicated as follows: * $p < .05$, ** $p < .01$, *** $p < .001$ (all one-tailed t-tests).

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