

A THEORY OF JUDICIAL DECISIONMAKING ON CASES INVOLVING PRESIDENTIAL POLICYMAKING

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Abstract

Judges render decisions, but alone cannot ensure that their decisions are heeded. For enforcement, judges depend upon the executive branch. Given this institutional arrangement, we should expect judges to set limits on presidential policymaking only when other political actors—Congress, interest groups, or the public—stand to defend the court ruling. To test this supposition, I examined every court case challenging the constitutionality or statutory authority of an executive order issued in the modern era. I find that political opposition against the president consistently and significantly increases the probability that courts (and individual judges) overturn executive orders. Further, the impacts of legal and ideological considerations appear conditional upon the presence of some measure of political opposition against the president.

When the president unilaterally sets public policy, what are the chances that the courts will overturn him? When deciding whether to issue an executive order, executive agreement, proclamation, or memoranda, need the president fear judicial interference? The question goes to the heart of our system of separated powers, for each president's influence over public policy is critically affected by the checks that the judiciary places upon him.

According to most legal scholars, everything rides upon the relevant facts of the case, prior court rulings, and whether Congress or the Constitution delegated the requisite authority for executive action. Should a congressional statute expressly forbid the president's action, or should the action overextend legal authority delegated by Congress, judges faithfully and predictably strike down the president. Judges, by this account, act as impartial referees in a separation of powers game, setting well-defined bounds on executive authority and ensuring that presidents remain within them (Mikva and Lane 1997; Shane and Bruff 1996).

Two literatures within political science, meanwhile, offer a very different view of judicial decisionmaking. Attitudinal and strategic models suggest that judges (and especially Supreme Court Justices) decide cases based upon their own policy preferences.¹ "Courts, in this view, are not importantly different than legislatures and judges are no different than elected politicians" (Ferejohn and Weingast 1992, p. 55). Judges support the president when they approve of his policy choices; and they overturn him when they disapprove. The canons of law (e.g. statutory interpretation, the "plain

¹ The literatures differ only over whether judges' decisions reflect sincere preferences or strategic calculations. For examples of the attitudinal model, see: Cover 1989; Segal and Spaeth 1993; Segal,

meaning” doctrine) are little more than “convenient fiction” to justify the instatement of policy preferences into the law.

Both legal precedent and policy preferences may generally inform judges’ rulings. But to understand how judges confront challenges to presidential policymaking, and the constraints they place on presidential power, we need an institutional theory of executive-judicial relations. The place to begin is by recognizing that the judiciary that can render judgments, but alone cannot implement them. For enforcement, judges look to the executive branch.

In most cases, the fact that judicial power depends upon executive backing is immaterial. Judges can count on the president, and those within his administration, to faithfully execute their decisions. When asked to curb unilateral actions taken by the president, however, judges confront a quandary, for here they face the very individual charged with implementing rulings that they cannot enforce themselves. As Edward Corwin noted more than 40 years ago, “presidential exercises of power will generally have produced some change in the external world beyond ordinary judicial competence to efface” (1957, p. 16). In cases involving presidential policymaking, an appreciation for their institution’s limitations influences judges’ rulings just as much as legal doctrine or policy preferences.

This paper proceeds in four parts. The first examines the institutional foundations of judicial decisionmaking on cases involving presidential policymaking. The second describes the universe of modern federal court cases that challenge the constitutionality or statutory authority of an executive order. The third section examines the political

Epstein, Cameron and Spaeth 1995. For the strategic model, see: Epstein and Knight 1998; Gelly and

conditions under which courts (and judges) overturn the president, and individuals and groups file cases against the president in the first place. The final section concludes.

I. Judicial Constraints on Executive Power

The theoretical argument laid out here can be situated at the intersection of three scholarly literatures: “legal pragmatism” that examines when judges withdraw from conflicts in order to protect the integrity and perceived legitimacy of their institution (Bickel 1962; Scharpf 1966; Strum 1974); the “new institutionalism” that highlights the various institutional constraints (both exogenous and endogenous) that shape judges’ rulings (Clayton and Gillman 1999); and assessments of the institutional capacity of the courts to resolve different kinds of civil and political disputes and act as agents of social change (Cavanaugh and Sarat 1979; Rosenberg 1991).

We begin by noting a peculiar aspect of the design of our system of separated powers. Judges can render decisions, but alone they cannot ensure that their decisions are heeded. As Alexander Hamilton recognized in *Federalist No. 78*, the courts “have neither FORCE nor WILL but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments” (p. 465). In an important sense, for judges to exercise power, they require the president’s cooperation.

The second axiom of this institutional argument concerns the basis of judicial power. Without any formal and independent means of enforcement, the weight of judicial opinion derives from the institution’s public standing. The pomp and circumstance of court proceedings, the formal titles bestowed upon judges, the continual homage paid to canons of law, and the “abiding sense of judicial integrity that comes with

Spiller 1990; Schwartz 1992; Kornhauser 1992.

the robe” all mean to generate the same effect: to reinforce the impression that judges transcend the everyday thicket of politics, that they stand to defend the central principles upon which the Republic was founded, that they remain the most “detached, dispassionate, and trustworthy custodians that our system affords,” and for these reasons alone, their opinions must be heeded (Abraham 1996, p. 82; the latter quote is inscribed on Justice Robert Jackson’s epitaph). It is no accident that judges, more than anyone else in government, fastidiously promote their institution’s public image. They do so because reputation is all they have.

The argument’s third axiom relates the first two: the judiciary’s public image is imperiled when its rulings are ignored. The institution’s reputation and prestige derive from, as much as they contribute to, the willingness of other political actors to heed court rulings.

The Court, of course, has no police officials of its own, and its independence is therefore of a limited kind. This might not be too significant in an individual case, but the Court’s publication of worthless decisions has a cumulative effect. If one decree is ignored the Court loses some of its immense prestige, and each unenforced decision increases the possibility that the next will also go unheeded. Proportionately to the ineffectiveness of its rulings, the operational validity of the Court disappears, and it can eventually cease to exist as a body performing a valuable function (Strum 1974, p. 3-4)

Court rulings retain authority by virtue of their legal enforceability. When enforcement is wanting, however, in a fundamental sense the ruling is compromised. And with the compromise of the ruling comes the compromise of the institution that delivered it.

In most cases, judges can rely upon the backing of the executive branch and render decisions according to legal dicta, their own personal policy preferences, or any other criteria. But in those select cases when executive enforcement is uncertain, judges

may temporarily relinquish their power to rule.² Indeed, “it is an axiom of constitutional justice that any decision which the Court thinks will not be enforced will probably not be made” (Strum 1974, p. 3-4).

Surely, judges rarely admit as much. To the contrary, they insist that “though we may not compel the President to comply, it is not within the contemplation of the law that he would fail to comply.”³ This claim is perfectly understandable. The Court’s mandate is to uphold the Constitution. This mandate, further, is not formally subject to compromise. To openly recognize the issue of enforcement is to “destroy its image as a neutral, objective, eternal body” (Strum 1974, p. 143). Judges dismiss the relevance of politics not because they render decisions in a hermetic environment, but because they have a stake in maintaining their reputation as the sole branch of government that rises above the latest partisan trends. The “cult of the robe” and the perceptions of authority it fosters require that judges insist, against all facts to the contrary, that they remain independent and impartial interpreters of the law (Brigham 1987).

In cases involving presidential policymaking, however, judges have a problem. When the potential source of resistance is the president himself (rather than an interest group, firm, or even some other branch of government) the courts are most vulnerable. For here, the person whose actions are under dispute retains ultimate authority over the enforcement of the court’s ruling.

² For this reason, federal judges expressed deep ambivalence about deciding cases pertaining to slavery and Native American lands in the 19th century, and reapportionment and integration in the 20th (Strum 1974, p. 36-96; Roche 1955; Woolhandler and Collins 1995). On these particular matters, resistance from state governments was probable, and executive backing uncertain. See, for example, *Texas v. White* 7 Wall. 700, 729 (1866); *Mississippi v. Johnson* 4 Wall. 475 (1866); and *Georgia v. Stanton* 6 Wall. 50 (1867).

³ *Virginia Coupon Cases*, 114 U.S. at 288

Certainly, judges need not fear that the president will summarily dismiss every ruling against him. When ignoring the courts is likely to evoke a strong political backlash from Congress, interest groups, or the public, presidents have little choice but to comply. Just as having its decisions go unheeded may damage the judiciary's legitimacy, so too may defying a court ruling exact considerable political costs from the president. When these latter costs rise, executive compliance is likely, and judges can feel free to rule against the president. On the other hand, when the costs of disregarding the courts are low, the issue of enforcement asserts itself most forcefully. Rather than issuing a decision that the president may ignore entirely, or implement only selectively, we can expect judges to uphold the president, even when legal principles and policy preferences demand otherwise.

II. Court Rulings

A small body of empirical work within political science examines the political conditions under which judges overturn the president (Genovese 1980; Ducat and Dudley 1989; Yates and Whitford 1998; King and Meernik 1999). For the most part, these scholars inventory samples of district or Supreme Court cases involving exercises of presidential power. On the whole, they discover that judges are less likely to overturn presidents who appointed them to the bench, presidents who enjoy strong public approval ratings, and policies that involve foreign affairs—all findings that are quite consistent with those reported below.

The existing literature addresses two important issues. It tests aspects of discretionary and rule-making models of judicial decisionmaking, and their relations to

well-known theories of presidential power (see, especially, Ducat and Dudley 1989); and it examines whether judges appear more deferential to the president in some policy arenas than others. Scholars, however, have paid considerably less attention to how the institutional design of our system of separated powers defines the relationship between judges and presidents. And no one has systematically examined whether concerns about enforcement inform judges' rulings on cases involving presidential policymaking.

To do so, I identified every challenge to an executive order heard at every level of the federal judiciary between 1942 and 1996.⁴ Challenges that were dismissed on the grounds of ripeness, mootness, justiciability, or the political question doctrine, all of which constituted de facto rulings in favor of the president, do not enter the database. By restricting the analysis to only those cases that actually go to trial, observed findings represent conservative estimates of judges' willingness to support the president. To the extent that any selection bias is introduced, it leads to an underestimation of presidential success in the judiciary.

The appendix lists all 82 cases that challenged executive orders in the modern era. Some of the cases are well known, such as *Korematsu v. U.S.*, which affirmed President Roosevelt's decision to intern American citizens of Japanese descent during World War II; or *Youngstown v. Sawyer*, which overturned Truman's seizure of the steel mills during

⁴ To constitute a challenge, a case must raise questions about either the constitutionality or the statutory authority of an executive order. The following kinds of cases, therefore, are excluded from the database: cases in which an individual or firm are brought to court for violating an executive order, and the only issue in dispute concerns the facts of the matter (see, for example, *Sierra Club v. Hodel* (544 F.2d 1036, 1976) or *Fagundez v. Oakland Raiders Professional Football Club* (498 F.2d 1394, 1974)); cases in which an individual or firm sued a government agency for not complying with an executive order (see *Itek Corporation v. First National Bank of Boston* (704 F.2d 1, 1983) or *EDF, Inc. v. Andrus* (619 F.2d 1368, 1980)); and cases in which a private party or federal agency claimed exemption from a particular executive order (see *Chan v. Reno* (113 F.3d 1068, 1997) or *Blanchette v. United States Environmental Protection Agency* (551 F.2d 906 1977)).

the Korean War. Other cases, meanwhile, are relatively obscure. *DeRieux v. The Five Smiths*, *US v. Pro Football Inc.* and *Oakland Raiders v. Office of Emergency Preparedness*, for example, all concerned Nixon orders that temporarily fixed wages and prices; *Unidyne Corp. v. Iran*, *Security Pacific National Bank v. Government of Iran*, *Chase T. Main International v. Khuzestan Water*, and *Power and American International Group v. Iran* centered on the constitutionality of Carter and Reagan orders that froze Iranian accounts in American banks.

These 82 cases challenged all sorts of executive orders, equally distributed between foreign and domestic policy.⁵ Foreign orders primarily concerned immigration issues, the appropriation of foreign accounts in domestic banks, loyalty review guidelines established for federal employees, and the classification of national security information. Domestic orders concerned the appropriation of private lands for national parks, patent infringements, the desegregation of public schools, and affirmative action guidelines. Figure 1 summarizes the kinds of executive orders disputed in the various court cases.

District courts disposed of nineteen of the cases (or 23 percent) in the database, appellate courts fifty (61 percent),⁶ and the Supreme Court thirteen (16 percent).⁷ These data contrast markedly from the universe of cases brought before the federal courts,

⁵ Given that presidents issue, on average, twice as many significant domestic executive orders as foreign orders, foreign orders actually have a higher probability of being challenged in the courts (see Author's Citation 2000).

⁶ While the DC circuit heard the most cases in the database, all eleven circuits (plus the federal circuit) heard at least one. The president's chances of winning a case, however, did not depend upon the circuit in which it was heard.

⁷ The breakdown of votes at the appellate and Supreme Court levels were roughly comparable when ruling in favor of the president or when overturning him. Appellate level decisions were almost always unanimous. Six or seven of the nine Justices typically signed majority opinions at the Supreme Court level.

where approximately 75 percent of cases are resolved at the district level, 25 percent at the appellate level, and just one tenth of one percent by the Supreme Court.⁸

While 82 separate court cases are included in this database, only 44 separate executive orders (or sets of orders on the same subject) were actually challenged.⁹ As Figure 2 shows, 29 executive orders were challenged just once, seven orders were challenged in two separate court cases, four were challenged three times, two four times, and three orders five or more times. As one might anticipate, Johnson's affirmative action order received the greatest amount of attention in the federal courts, the subject of fully eight separate federal court challenges between 1971 and 1984.

In these cases, individuals, interest groups, corporations, and political parties all challenged executive orders. In 15 percent of the cases, challenges constituted aspects of a defense against prosecution by a federal agency charged with enforcing an executive order. In *U.S. v. Redskins Professional Football Club*, for example, the federal government alleged that the Redskins professional football team violated executive order 11723 (which established a 90-day freeze on rents, wages and salaries) by increasing the prices of their tickets. The Redskins did not dispute the facts of the case, but instead argued that the executive order represented an "unconstitutional taking without just compensation."

In the remaining 85 percent of cases, members within the executive branch represented the defendants. In 77 percent of such cases (or 65 percent of cases overall),

⁸ These data come from the Administrative Office of the United States for the 1997 calendar year. While the figures vary somewhat from year to year, and depending upon whether one considers criminal as well as civil cases, the vast majority, however defined, never make it to the Supreme Court.

⁹ This represents roughly nine percent of all "significant" executive orders issued between 1942 and 1996 (Author's Citation 2000).

presidents defended an executive order that they themselves issued. Occasionally, however, presidents defended an executive order issued by a prior administration. In *Sale v. Haitian Centers Council*, for example, the Haitian Centers Council challenged a Bush order that allowed the coast guard to return emigrants rescued at sea immediately to their native country. During the 1992 presidential election, candidate Bill Clinton announced his opposition to the Bush administration's policy. Concurrently, the Second Circuit Court of Appeals ruled that Bush's order violated the 1980 Refugee Act, but allowed the order to stand while the president's administration filed an appeal with the Supreme Court. As it worked out, a month after assuming office Clinton reversed his earlier stance and informed the Supreme Court that he supported Bush's order. The Supreme Court promptly reversed the appellate decision and upheld the order.

Overall, in these cases presidents fared quite well. Fully 83 percent of the time, the courts affirmed the president's executive order. Broken out by final level of disposition, presidents won 69 percent of the cases at the Supreme Court, 86 percent in appellate courts, and 84 percent in district courts. Overall, the president lost only 14 of 82 court challenges.¹⁰ By way of comparison, federal administrative agencies historically have won 73 percent of cases brought before the Supreme Court, and 58 percent before appellate courts (Humphries and Songer 1999; Sheehan 1990).

The remarkable win-record presidents have secured is not due to a handful of especially propitious years. As Figure 3 shows, modern presidents have fought and won

¹⁰ Ducat and Dudley (1989) find that presidents win 61 percent of federal district court cases involving presidential power (many of which did not involve executive orders). Ducat and Dudley do not provide data on how these cases were ultimately resolved at the appellate or Supreme Court level. Yates and Whitford (1989) find that Supreme Court justices vote for the president 55 percent of the time. They do not

challenges at about the same rate throughout the post-War period.¹¹ Only two presidents obtained a perfect win record – Roosevelt and Johnson. For most presidents, win rates fluctuated between 60 and 90 percent. The courts, it seems, have sided with the president during most of the modern era.

Explaining Variance

Given the courts' dependence on executive enforcement, we should expect judges generally to support the president. The data confirm as much. Ultimately, though, we need a theory that explains variance, predicting when judges will rule in favor of the president and when they will overturn him. Because judges always rely upon the executive branch for enforcement, it remains unclear when they might find against the president.

The variable costs to the president of ignoring a court ruling animate an otherwise static theory of judicial deference. When presidents refuse to enforce a court order, they risk condemnation from Congress, interest groups, and the public. Each can hurt the president in different ways: killing aspects of his legislative agenda; manipulating media attention; or tossing him out of office at the next election.

When Congress, interest groups, or the public are mobilized against the president, the expected costs to the president of refusing to enforce a court order escalate. Judges, therefore, can proceed with relative confidence that other political actors will induce executive compliance. But when Congress and the president tend to agree with one

report, however, the percentage of cases the president actually wins; further, their dataset consists of only 32 cases between 1949 and 1993.

¹¹ Between 1789 and 1956, state and federal courts overturned a grand total of 16 executive orders (Schubert 1973, 361-365).

another, when interest groups are not particularly concerned about the outcome of a case, or when the public holds the president in high regard, the political costs to the president of ignoring a court ruling (or simply overlooking its more objectionable aspects) decline. Judges, in these instances, will almost always uphold the president.

To test this claim, I constructed three variables, each of which identifies a different source of political opposition to the president: divided government, whether or not interest groups filed amici curiae encouraging the court to overturn an executive order,¹² and the president's job approval rating the week before a court case is decided.¹³ The greater the amount of opposition from either Congress, interest groups, or the public at the time the court considers a case, the more likely that judges should rule against the president.

The argument here is not that Congress, interest groups, or the public inform the content of court rulings. Rather, their mobilized opposition is a precondition for judges to rule against the president. During periods of divided government, or high interest group opposition, or low approval ratings, judges may well find in favor of the president. But when the reverse conditions hold, judges should almost always uphold the president. Congressional, interest group, and public opposition to the president frees up judges to rule on cases as they see fit—which may very well involve assessments of the case's legal merits or judges' own policy preferences.

¹² In two of these cases, members of Congress, rather than interest groups, actually filed the briefs. When parties on both sides of the issue filed briefs, this variable was coded zero. The variable was coded one only when all amicus briefs opposed the president's order, which occurred 12 percent of the time.

¹³ This variable catalogs the last Gallup poll that included a question about the public's approval of the president's performance before a court ruling was released. In most instances, this occurred about one week beforehand.

The data support this conjecture. Table 1 shows the percentage of cases that presidents lose given different levels of political opposition. Absent any political opposition—i.e. during periods of unified government, when no amicus briefs were filed against the president, and the president’s approval ratings were above the lowest decile in the sample distribution—presidents enjoyed a perfect win rate. When one source of opposition applied, presidents lost 20 percent of the cases. When two applied, presidents lost fully 31 percent of the cases. (To none of the 82 cases did all three conditions apply.)

Table 3 examines the direct impact of each source of political opposition on the likelihood that presidents win court challenges. Simple logit models were calculated with robust standard errors to correct for heteroskedasticity.¹⁴ The dependent variable is coded 1 if the president won the case and zero otherwise. Table 2 provides descriptive statistics for all variables included in the analyses.

The overall fit of the model is quite good. We can reject a constant-only model at $p=.01$. Furthermore, all three political opposition variables have the expected sign and are statistically significant. Holding all other covariates at their means, during periods of divided government presidents are 19 percent less likely to win a court challenge; when interest groups have mobilized against the president on a particular issue, the president is

At the Supreme Court level, justices often decide cases long before actually publishing their opinions. As a robustness check, I collected public support data after the first day that arguments were held on these cases. The impacts recovered from this measure virtually replicate those reported below.

¹⁴ As Figure 2 reports, some of these cases involve challenges to the same executive order. Virtually all court cases that involved the same executive order, however, were adjudicated in different circuits. Decisions rendered in one case, therefore, did not bind judges deciding other cases. Nonetheless, models that adjust for clustering on the order challenged generate virtually identical results as those presented below.

Generalized estimating equations (or marginal models) provide another route by which to correct for correlated data. These models are typically used to compare differences between groups of subjects. In this paper, we are primarily interested in the effect of a host of political variables on the probability that a court will overturn a given executive order. As such, cluster-specific (or conditional) models are more appropriate for dealing with these correlated data (Zorn 2001).

22 percent less likely to withstand a court challenge; and a shift from one standard deviation below the mean of public approval ratings to one standard deviation above translates into a 13 percent increase in the probability that the president wins his case. A Wald test rejects the null hypothesis that $B_1 = B_2 = B_3 = 0$ at $p=.02$.¹⁵

When controlling for the final level of disposition at which a case is decided, the magnitude and significance of all three measures of political opposition increase. Meanwhile, presidents are significantly less likely to win cases decided by the Supreme Court. Our theory lends one explanation why. Because of these cases' high visibility, presidents have a much more difficult time escaping the scrutiny of politicians, interest groups, and the public at large. The costs of refusing to enforce a Supreme Court ruling exceed those of cases decided by appellate or district courts. Consequently, the issue of enforcement is less acute, and Justices can feel free to overturn the president.

Issue saliency, though, may have little to do with the Supreme Court's proclivity for overturning the president—instead, the Court simply may have access to greater resources to combat the president. To generate a more direct measure of issue saliency, therefore, I identified whether the *New York Times* covered each court case prior to the final decision being rendered. Model three contains the relevant indicator variable.¹⁶ Because media coverage obviously increases the higher a case proceeds in the judiciary, this model omits the appellate and Supreme Court indicators.

¹⁵ Supreme Court Justices may monitor the larger political environment, while appellate and district judges focus on issues of fact and legal precedent. After dropping from the analysis the 13 cases resolved at the Supreme Court, however, it turns out that during periods of unified government, presidents won every single case resolved at the district and appellate levels. The estimated impacts of presidential approval ratings and interest group opposition, meanwhile, retain their signs and significance.

¹⁶ Substituting a variable that counts the actual number of articles on each court case generates virtually identical point estimates. Among the 21 cases that are mentioned at least once in the *Times*, the mean

When the *Times* writes at least one article on a court case prior to the announcement of its final ruling, the chances that the president wins drop from 85 to 61 percent. Heightened public awareness of federal court cases involving challenges to executive orders rarely benefits the president. Presidents cannot easily ignore rulings that attract widespread public scrutiny. Knowing this beforehand, it appears that judges are more willing to overturn them.

The last two models in table 3 control for whether the challenged executive order involved foreign policy matters and whether the case was decided when the country was at war.¹⁷ In addition, these models also control for whether the court decided a case during the last year of a presidential term.

Little changes: the estimated impacts of the political opposition and saliency variables remain significant. Interestingly, though, judges are much more likely to rule against a president who defends an order during the last year of his term. The reason may trace back once again to the issue of enforcement. Given some positive probability that a new president from a different party will enforce the court's ruling, judges may feel emboldened to rule against the current president during the waning days of his administration. Indicator variables for war and foreign policy, meanwhile, have negligible impacts on outcomes.

number of mentions is 4.6 with a standard deviation of 5.0. As one might expect, the most frequently mentioned case in the database is *Youngstown v. Sawyer*, about which 23 stories were written.

¹⁷ Ducat and Dudley find that presidential approval ratings affect the courts' willingness to overturn the president in domestic affairs, but not foreign affairs (1989). When running separate models for cases involving foreign and domestic executive orders, virtually identical point estimates for the three political opposition variables are observed. The constant, however, is smaller in the second model, suggesting that judges are less likely to uphold the president when he issues a domestic policy order. These models, therefore, control for the policy content of the executive order under dispute. Given the relatively small number of observations and the high base win rate for presidents, in these initial models it is not feasible to include additional indicator variables for different kinds of domestic and foreign policy orders.

There are a variety of competing explanations of judicial behavior. According to the attitudinal model, for instance, judges should only support presidents with similar policy preferences. The models in table 4, therefore, include controls for the partisan alignment of the court deciding the case and the president defending the executive order.¹⁸

According to legal models of judicial decisionmaking, judges rule according to the dictates of law and the relevant facts at hand. Unfortunately, it is generally impossible to identify a clear, exogenous measure of such legal considerations. One source, however, is promising. When issuing executive orders, presidents routinely cite a formal basis of legal authority—usually some mix of laws and/or enumerated powers. While the choice is endogenous, all presidents obviously want to proceed on the firmest ground possible. To the extent that there is sufficient variance in the sources of authority that presidents cite, and that judges pay attention to as much, we may have some grounds for evaluating the merits of the legal model.

When they can reliably identify delegated powers in a contemporary statute, presidents have strong legal grounding upon which to issue an executive order. When mining antiquated legislation for discretionary authority, or waving their hands about broader constitutional powers, the legal basis for an executive order is probably more suspect. The models in table 4, therefore, include an indicator variable that is coded one

¹⁸ This is simply an indicator variable that is coded one if the president defending the executive order is from the same party as the district court judge (or majority of judges at the appellate and Supreme Court levels) deciding the case.

when the presidents defends an executive order that cites legislation that was enacted while he was in office, and zero otherwise.¹⁹

Divided government, interest group opposition, and public approval ratings continue to have statistically significant impacts on the probability that the president wins the court case. Wald tests consistently reject the null hypothesis that the political opposition variables are jointly indistinguishable from zero. And as before, presidents are less likely to win court cases that attract considerable public attention.

The findings also support the attitudinal and legal models. When the president defending an executive order comes from the same political party as a majority of the judges deciding the case, his chances of winning improve substantially. Similarly, presidents are significantly more likely to win court cases challenging executive orders that cite as legal authority recently enacted statutes. The impacts are consistently significant regardless of which measure of saliency we use and whether or not additional controls are introduced.²⁰

The models in tables 3 and 4 predict case outcomes, not the rulings of individual judges. At the district level, the two are synonymous. At the appellate and Supreme Court levels, however, presidents (and those acting on their behalf) typically stand before three and nine judges respectively.²¹ The previous models, therefore, may disregard considerable variation in judges' voting behaviors. In table 5, therefore, the unit of

¹⁹ Seventeen percent of the time presidents defended an executive order that cited as its basis for legal authority a legislative enactment that they themselves signed; 47 percent of the cases involved an executive order that cited a statute that was enacted prior to the defending president's administration; in 26 percent of the cases, the president defended an order that cited only broad constitutional powers.

²⁰ Models that omit variables for political opposition and the level of final disposition do not generate statistically significant impacts for the alignment of court-president policy preferences or the contemporary citation of authority to act.

²¹ A panel of nine judges ruled on one appellate case in the database.

analysis changes from 82 court rulings to 276 votes.²² Standard errors have been adjusted to correct for clustering on each court case. Once again, table 2 provides relevant summary statistics.

As before, political opposition and case saliency consistently impact the likelihood that judges will rule against the president. The greater the amount of political opposition to the president, and the higher profile the case, the more likely that judges vote against the challenged executive order.²³

The effects of some of the other variables, however, shift slightly. Judges now appear more willing to support the president when the executive order concerns foreign policy.²⁴ Further, the partisan alignment of the president and judge no longer increases the probability that a judge will rule in favor of the president; nor does the citation of statutory authority.

It is possible that the attitudinal and legal variables are simply too crude to detect effects. When substituting for the partisan alignment of judge and president an indicator variable for whether the deciding judge was appointed by the president defending the executive order—suggesting a tighter fit between the political preferences of the two

²² *Bailey v. Richardson*, 341 U.S. 918, was decided per curiam, affirming the appellate court decision by an equally divided Court; Justice Clark withdrew from the decision. The Supreme Court, however, did not release information on how the remaining eight justices voted. For this analysis, therefore, I used the three appellate-level votes that were published on this case. Also, in four cases in this database, one judge abstained; and in one Supreme Court case, two judges abstained. These five observations have been dropped from the analysis.

²³ When isolating votes in the Supreme Court from votes in appellate and district courts, the coefficients on the political opposition variables hold fast. Wald tests of the joint significance of divided government, interest group opposition, and public approval ratings consistently reject the null.

²⁴ Given the higher number of observations, and the added variance they yield, it is now possible to distinguish different types of foreign and domestic policies. When doing so, however, little analytic traction is gained. Presidents are more likely to win cases involving both foreign trade and defense policy matters. And while judges appear slightly more willing to overturn executive orders involving civil service matters than other kinds of domestic policies (social welfare, regulation of the economy, energy, agriculture), the differences in impacts are not statistically significant.

individuals, while possibly capturing some measure of deference on the part of the judge to the president who appointed her—the recovered point estimates become positive and highly significant. Finer measures of legal considerations may also generate significant effects.

Recall, though, our original argument. When political opposition is mobilized against the president, and the issue of enforcement is essentially moot, judges may consider the statutory authority of the president’s actions and their own political ideologies. But when Congress, interest groups, and the public at large generally support the president, legal and attitudinal considerations should have negligible effects on court rulings. While the main effects of attitudinal and legal variables are not significant, interaction terms should be.

Table 6 reports the effect of partisan alignment and the statutory basis for an executive order separately, depending upon the presence of political opposition against the president (as defined in table 1).²⁵ The results confirm our theory. Given some opposition to the president, both variables have positive and statistically significant impacts on the likelihood that judges will uphold the president’s actions. Absent political opposition, however, neither affects the chances that judges will vote in favor of the president. When Congress, interest groups, and the public support the president, judges do not appear to consult their partisanship or the statutory or constitutional authority upon which presidents base their actions. Within the domain of federal court cases involving

²⁵ Because presidents never lost a case during periods of unified government, when interest groups did not file amicus briefs against him, and his public approval ratings were above the lowest tenth percentile, we cannot calculate interactive effects when the dependent variable involves court rulings rather than the decisions of individual judges.

presidential policymaking, the effects of attitudinal and legal considerations appear conditional upon the presence of some opposition against the president.

When Court Challenges Are Waged

This theory has implications not only for how judges rule on cases involving presidential policymaking, but also when parties bring suit against the president. Presumably, individuals, corporations, and interest groups will go after the president when they stand the greatest chance of winning. And if politics define the president's odds in the judiciary, we should witness more challenges to executive orders when the president faces substantial opposition, and fewer when he enjoys widespread support.

Table 7 examines the impact of divided government and the president's public approval ratings on the number of cases challenging executive orders that are decided each year between 1942 and 1996.²⁶ Because we are working with event count data, I estimate Poisson models with robust standard errors. Table 2 presents the relevant descriptive statistics.

As the regression results clearly indicate, parties challenge executive orders less frequently during periods of unified government and when the president's approval ratings are relatively high. The effects, both individually and jointly, are highly statistically significant. During periods of divided government, the president faces slightly less than one fewer court challenge each year. A shift from one standard

²⁶ We also might count the number of cases that are decided each year at the lowest court of disposition. While this measure does not account for the willingness of an individual or corporation to appeal an unfavorable lower court decision, it arguably does a better job of identifying the precise moment when a party decides to bring suit against the president. Fortunately, the results do not hinge upon any particular decision-rule. When estimating models that use as the dependent variable the number of cases decided at the lowest court of disposition, virtually identical results as those presented in table 7 are observed. The

deviation below the mean of public approval ratings to one standard deviation above correlates with roughly one fewer court challenge waged against the president.

When control variables are introduced for the partisan alignment of the Supreme Court and the president, periods of war, and the last year of the president's term, the impacts of the political opposition variables remain firm (see column 2). Nor does anything change when adding a trend term—meant to capture the rising litigiousness of the post-War era—and controlling for the number of executive orders issued during the previous year (see column 3). Just as judges look to sources of political opposition when deciding cases involving presidential policymaking, so too do individuals and groups when deciding whether to challenge the president in the first place.

III. Conclusion

In most cases, the fact that judges lack an independent means of enforcement is immaterial. Judges usually can count on the executive branch to enforce rulings against private parties, federal agencies, and state governments. A dilemma arises, however, when judges consider cases involving presidential power, for here they must pass judgment on the very individual charged with implementing their rulings. Should the president decide to ignore a court order entirely, or enforce it only selectively, then the integrity of the courts suffers, and with it the weight of judicial opinion.

Lacking a window into their internal thought processes, we cannot know for sure whether judges seriously consider that possibility that presidents will ignore rulings

only substantive difference is that the impact for the number of executive orders issued the previous year becomes positive and highly statistically significant.

against them, and the impact this may have on the judiciary's reputation. All we observe are judges' decisions; we can only infer the basis on which they are made.

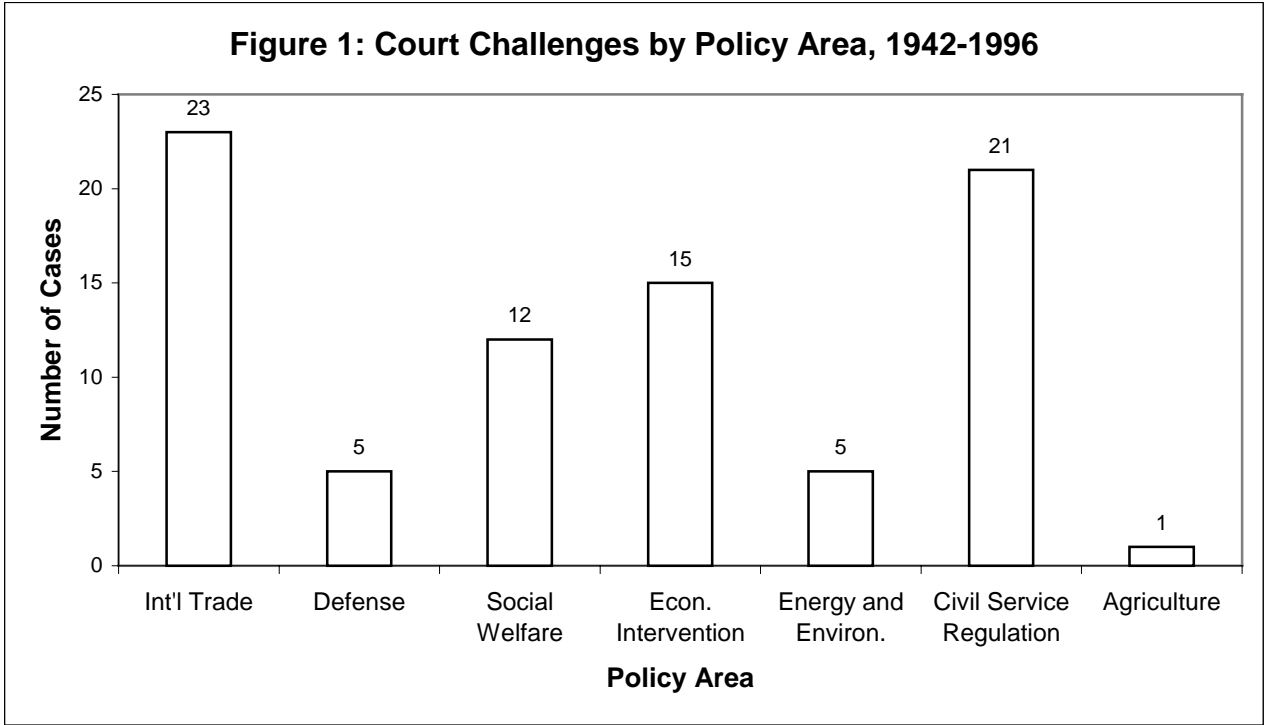
The legal record is remarkably consistent with an institutional explanation of judicial decisionmaking based upon executive enforcement. Despite the fact that the Constitution says nothing about the president's power to issue executive orders, modern courts uphold the president over eighty percent of the time. Judges overturn the president only when Congress, interest groups, or the public opposes him, or when a case is particularly salient. Mobilized political opposition and heightened public scrutiny have the same effect: they increase the costs of defying a court order, and thereby increase the likelihood of executive compliance.

The data presented here also support the notion that policy preferences and legal considerations influence judicial decisionmaking. Judges appointed by Republican presidents generally support executive orders defended by Republican presidents; and likewise for Democrats. In addition, the source of authority that presidents cite when issuing an executive order appears to have some bearing on the rulings that judges deliver.

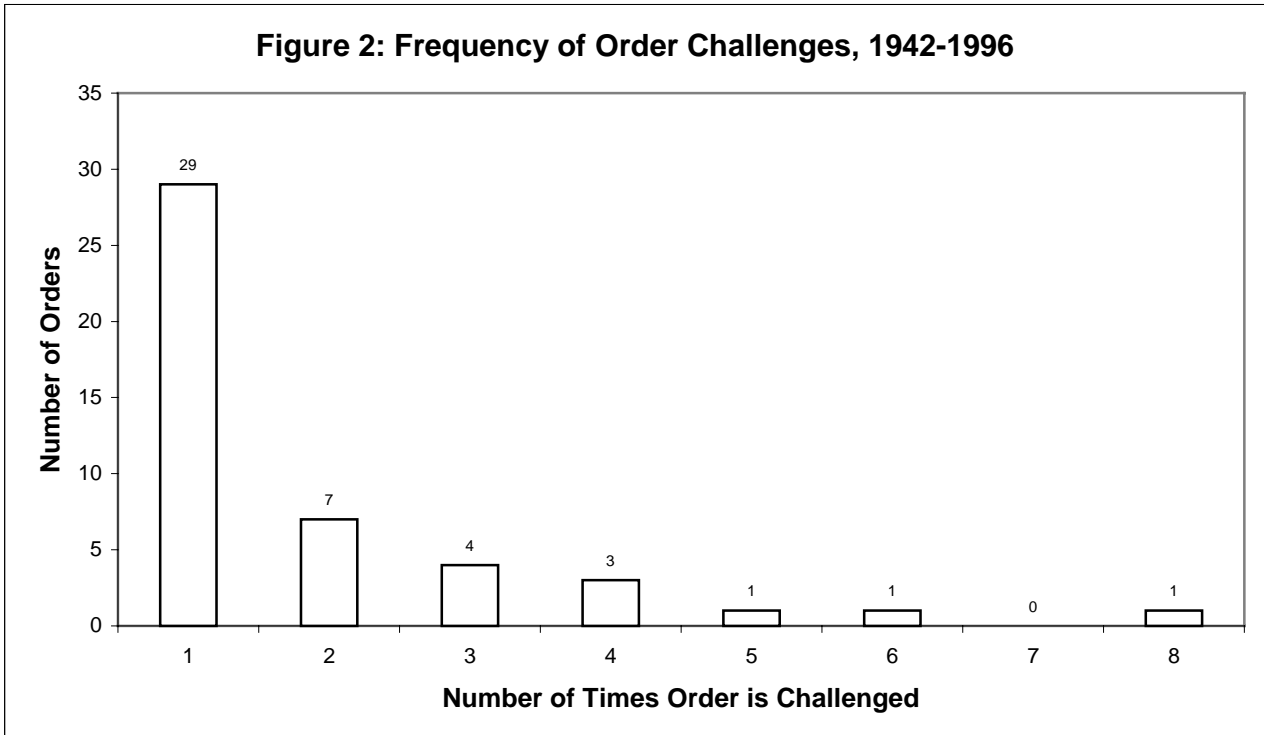
Judicial decisionmaking on cases involving presidential power, however, is not just a mix of legal, attitudinal, and institutional considerations. Policy preferences and legal doctrine come into play when the possibility of executive defiance is low. Not once in the modern era have the courts overturned an executive order when the president enjoys broad based support from Congress, interest groups, and the public. Surely, though, there have been occasions when judges, owing to the ideological pre-commitments or legal philosophies, would have liked to.

Two directions for future research present themselves. First, scholars much pay greater attention to the sources of judicial integrity. The possibility that the executive will ignore court rulings does not represent the only threat to the judiciary's reputation—should judges always find in favor of the president, their image as an impartial and independent arbiter of justice may also suffer. Second, scholars should extend the empirical tests presented here to other types of presidential directives, such as executive orders, impoundments of budgetary allotments, proclamations, and executive agreements.

Still, this paper takes us a long way towards a richer understanding of the institutional components of judicial decisionmaking in cases involving presidential policymaking. For reasons built into the design of a system of separated powers, judges almost always favor the president. When they do not, usually it is because other political actors oppose the president and stand to defend a court order against him.

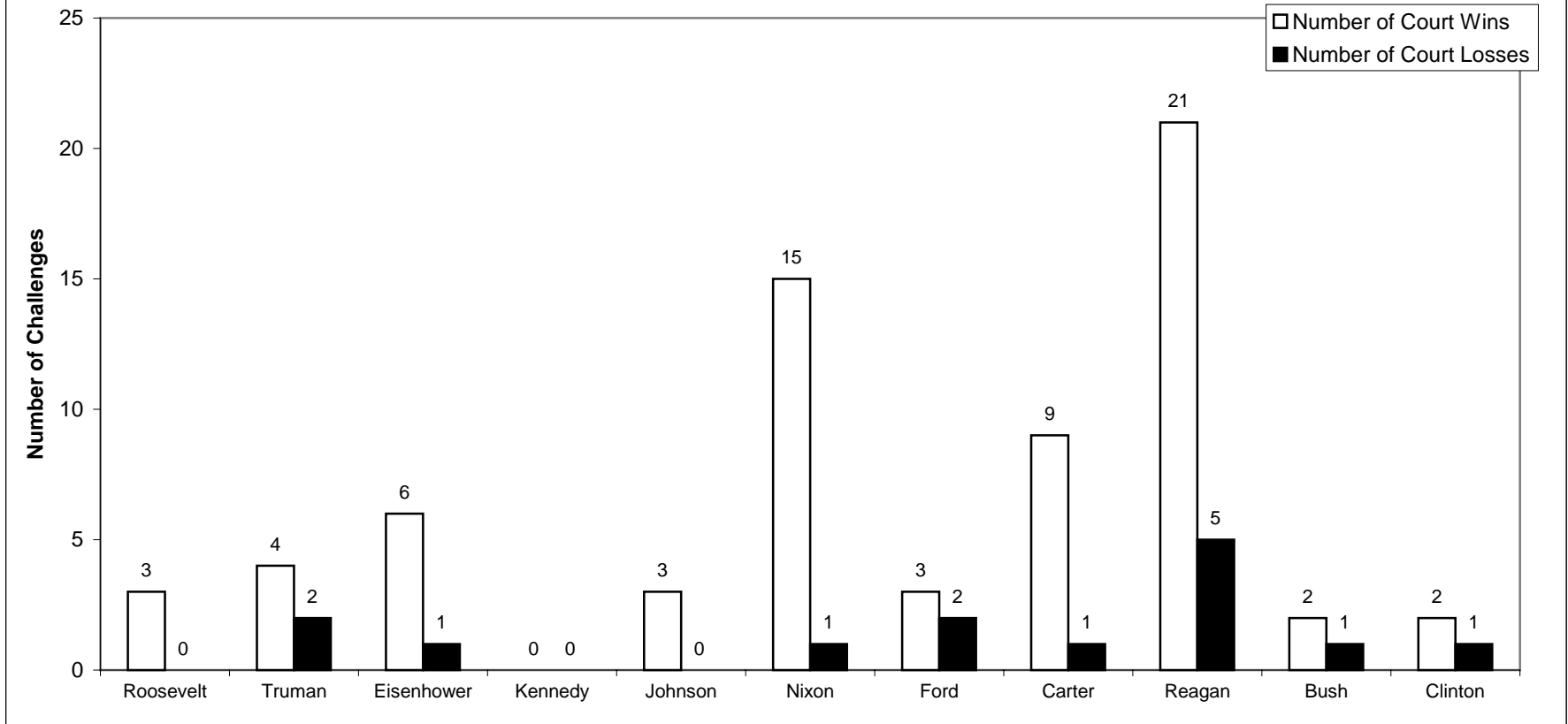


82 total federal court cases challenging executive orders.



44 separate orders (or sets of orders on the same subject) challenged. Judges never ruled on the constitutional or statutory authority of 4,041 executive orders issued between 1942 and 1996.

Figure 3: Challenge Outcomes by Administration Defending Order



The 82 challenges are represented here by the administration that participated in oral arguments before the court of final disposition.

Table 1: President Win-Rates by Level of Political Opposition

	LEVEL OF POLITICAL OPPOSITION		
	Low	Medium	High
President Loses Case	0.0%	19.6%	30.8%
President Wins Case	100.0	80.4	61.2
Total	100.0%	100.0%	100.0%
(N)	18	51	13

Level of opposition is coded low during periods of unified government, when no opposing briefs are filed on a case, and the president's approval rating is above the lowest tenth percentile; medium when one of the previous conditions held; high sources when two held. In the 82 cases surveyed, there were no instances when all three conditions held. Pearson chi square(2)=5.66, p=.06.

Table 2: Summary Statistics

	Mean	Standard Deviation	Min	Max	N
Analysis of Case Outcomes					
President Wins Case	0.83	0.38	0	1	82
Divided Government	0.71	0.46	0	1	82
Interest Groups Oppose	0.12	0.33	0	1	82
President's Approval Ratings	0.50	0.13	0.25	0.74	82
Supreme Court	0.16	0.37	0	1	82
Appellate Court	0.61	0.49	0	1	82
District Court	0.23	0.42	0	1	82
<i>New York Times</i> Coverage	0.26	0.44	0	1	82
Last Year of President's Term	0.23	0.42	0	1	82
Foreign	0.28	0.45	0	1	82
War	0.34	0.48	0	1	82
Ideological Alignment of					
Deciding Court and President	0.49	0.50	0	1	82
Contemporary Citation of Auth.	0.17	0.38	0	1	82
Analysis of Rulings Made by Individual Judges					
Judge Rules in Favor of Pres.	0.75	0.43	0	1	276
Divided Government	0.60	0.49	0	1	276
Interest Groups Oppose	0.13	0.34	0	1	276
President's Approval Ratings	0.50	0.14	0.25	0.74	276
Supreme Court	0.38	0.49	0	1	276
Appellate Court	0.55	0.50	0	1	276
District Court	0.07	0.25	0	1	276
<i>New York Times</i> Coverage	0.44	0.50	0	1	276
Last Year of President's Term	0.23	0.42	0	1	276
Foreign	0.30	0.46	0	1	276
War	0.37	0.48	0	1	276
Ideological Alignment of					
Deciding Judge and President	0.54	0.50	0	1	276
Contemporary Citation of Auth.	0.15	0.36	0	1	276
Annual Counts of Court Challenges, 1942-1996					
Number of Cases	1.49	1.94	0	12	55
Divided Government	0.58	0.50	0	1	55
President's Approval Ratings	0.55	0.13	0.26	0.78	55
Ideological Alignment of					
Supreme Court and President	0.65	0.48	0	1	55
Last Year of President's Term	0.25	0.44	0	1	55
War	0.35	0.48	0	1	55
Total EOs Issued Prev. Year	79.65	57.83	36	382	55

Table 3: When Presidents Win Court Challenges

	PRESIDENTIAL SUCCESS IN COURTS				
	1	2A	2B	3A	3B
Political Opposition					
Divided Gov't	-1.40** (0.74)	-2.53*** (0.82)	-2.07*** (0.40)	-2.54*** (0.99)	-2.24*** (0.95)
Int. Groups Oppose	-1.24** (0.73)	-1.48** (0.74)	-1.40** (0.45)	-1.31* (0.82)	-1.23* (0.82)
Public Approval	4.05* (2.59)	5.02** (2.47)	4.21** (2.43)	5.69** (3.25)	4.62* (2.86)
Saliency of Case					
Supreme Court	--	-1.96** (1.03)	--	-2.49* (1.52)	--
Appellate Court	--	0.26 (0.83)	--	-0.12 (1.26)	--
<i>NY Times</i> Coverage	--	--	-1.30** (0.40)	--	-1.35** (0.71)
Controls					
Last Yr of Pres Term	--	--	--	-2.42*** (0.89)	-2.31*** (0.73)
War	--	--	--	0.23 (0.95)	0.06 (0.91)
Foreign Policy	--	--	--	0.84 (1.05)	0.84 (0.88)
Constant	0.93 (1.37)	1.69 (1.41)	1.80 (1.33)	2.29* (1.65)	2.39** (1.42)
(N)	82 decisions	82 decisions	82 decisions	82 decisions	82 decisions
Pseudo-R ²	.10	.18	.14	.34	.30
Log Likelihood	-33.71	-30.88	-32.25	-24.90	-26.21
Wald Test	.02	.00	.01	.04	.07

Logit models estimated. The dependent variable is scored 1 if the president wins the challenge and zero otherwise. Robust standard errors reported in parentheses. * significant at .10 level, one-tailed tests conducted; ** significant at .05 level; *** significant at .01 level. The Wald Test reports the joint significance of the three political opposition variables on a two-tailed test.

Table 4: Introducing Aspects of the Attitudinal and Legal Models

	PRESIDENTIAL SUCCESS IN COURTS			
	1A	1B	2A	2B
Political Opposition				
Divided Government	-3.24*** (1.17)	-3.35*** (1.19)	-3.59*** (1.42)	-3.51*** (1.28)
Interest Groups Oppose	-1.68** (0.83)	-1.73** (0.92)	-1.39** (0.78)	-1.56** (0.87)
Public Approval	7.48** (3.52)	7.21** (3.13)	8.53** (3.94)	7.44*** (3.18)
Saliency of Case				
Supreme Court	-2.40*** (1.03)	--	-3.64* (2.24)	--
Appellate Court	0.54 (0.88)	--	-0.32 (1.73)	--
<i>NY Times</i> Coverage	--	-3.15*** (0.83)	--	-2.94*** (0.40)
Attitudinal Model				
Partisan Alignment of President and Court	1.68** (0.72)	2.59*** (0.80)	1.98*** (0.84)	2.24*** (0.88)
“Legal” Model				
Contemporary Citation of Authority to Act	1.92* (1.22)	1.85* (1.22)	1.24 (1.17)	1.73** (0.94)
Controls				
Last Yr of Pres Term	--	--	-2.51** (1.10)	-2.07*** (0.79)
War	--	--	-0.14 (1.17)	-0.20 (1.04)
Foreign Policy	--	--	0.31 (0.99)	0.43 (0.87)
Constant	0.19 (1.66)	0.83 (1.66)	1.60 (2.29)	1.63 (1.78)
(N)	82 decisions	82 decisions	82 decisions	82 decisions
Pseudo-R ²	.28	.29	.41	.40
Log Likelihood	-26.99	-26.67	-21.95	-22.54
Wald Test	.00	.00	.01	.01

Logit models estimated. The dependent variable is scored 1 if the president wins the challenge and zero otherwise. Robust standard errors reported in parentheses. * significant at .10 level, one-tailed tests conducted; ** significant at .05 level; *** significant at .01 level. The Wald Test reports the joint significance of the three political opposition variables on a two-tailed test.

Table 5: How Individual Judges Vote on Challenges to Presidential Actions

	PRESIDENTIAL SUCCESS WITH JUDGES					
	1A	1B	2A	2B	3A	3B
Political Opposition						
Divided Government	-0.94*** (0.40)	-0.79** (0.39)	-0.90** (0.42)	-0.82** (0.44)	-0.78** (0.45)	-0.72* (0.50)
Interest Groups Oppose	-1.13*** (0.46)	-0.89* (0.50)	-1.12*** (0.48)	-0.87** (0.51)	-0.91** (0.54)	-0.66* (0.49)
Public Approval	2.85** (1.38)	2.09* (1.45)	2.82** (1.49)	2.29* (1.64)	2.01* (1.43)	1.63 (1.56)
Saliency of Case						
Supreme Court	-1.54** (0.71)	--	-1.48** (0.71)	--	-1.73** (0.78)	--
Appellate Court	-0.13 (0.72)	--	-0.03 (0.71)	--	-0.41 (0.78)	--
<i>NY Times</i> Coverage	--	-1.10*** (0.40)	--	-1.14*** (0.39)	--	-1.00*** (0.36)
Attitudinal Model						
Partisan Alignment of President and Judge	--	--	0.38 (0.34)	0.36 (0.33)	0.30 (0.33)	0.26 (0.34)
“Legal” Model						
Contemporary Citation of Authority to Act	--	--	0.65 (0.65)	0.66 (0.74)	0.45 (0.70)	0.52 (0.80)
Controls						
Last Yr of Pres Term	--	--	--	--	-0.90** (0.47)	-0.96** (0.43)
War	--	--	--	--	-0.20 (0.42)	-0.24 (0.42)
Foreign Policy	--	--	--	--	0.86** (0.45)	0.75** (0.45)
Constant	1.21* (0.93)	1.28* (0.82)	0.84 (0.99)	0.96 (0.88)	1.52* (0.99)	1.28* (0.86)
(N)	276 votes	276 votes	276 votes	276 votes	276 votes	276 votes
Pseudo-R ²	.10	.08	.11	.09	.16	.13
Log Likelihood	-139.11	-142.42	-137.36	-140.76	-129.97	-133.43
Wald Test	.00	.03	.01	.05	.13	.26

Logit models estimated. The dependent variable is scored 1 if the judge supports the president and zero otherwise. Robust standard errors adjusted for clustering on the court case are reported in parentheses. * significant at .10 level, one-tailed tests conducted; ** significant at .05 level; *** significant at .01 level. The Wald Test reports the joint significance of the three political opposition variables on a two-tailed test.

Table 6: The Conditional Effects of Attitudinal and Legal Considerations

	PRESIDENTIAL SUCCESS WITH JUDGES			
	1A	1B	2A	2B
Attitudinal Model				
Partisan Alignment (given political opposition)	0.74** (0.36)	0.68** (0.36)	0.66** (0.36)	0.57* (0.38)
Partisan Alignment (given no political opposition)	-0.98 (0.79)	-0.53 (0.76)	-1.00* (0.78)	-0.60 (0.80)
“Legal” Model				
Contemporary Citation (given political opposition)	1.60** (0.87)	1.82** (0.95)	1.64** (0.87)	1.89** (0.93)
Contemporary Citation (given no political opposition)	0.23 (1.13)	-0.62 (0.88)	-0.70 (1.13)	-1.51* (0.98)
Political Opposition				
Divided Government	-1.81*** (0.51)	-1.69*** (0.50)	-1.76*** (0.62)	-1.67*** (0.60)
Interest Groups Oppose	-1.30*** (0.53)	-0.97** (0.54)	-1.08** (0.58)	-0.77* (0.53)
Public Approval	5.30*** (1.96)	4.64*** (1.92)	4.71*** (1.87)	4.10*** (1.76)
Saliency of Case				
Supreme Court	-1.56** (0.70)	--	-1.08** (0.58)	--
Appellate Court	0.14 (0.72)	--	-1.74** (0.79)	--
<i>NY Times</i> Coverage	--	-1.35*** (0.39)	--	-1.20*** (0.38)
Controls				
Last Year of President’s Term	--	--	-0.84** (0.50)	-0.87** (0.47)
War	--	--	-0.01 (0.46)	-0.08 (0.47)
Foreign Policy	--	--	1.12** (0.50)	1.10** (0.48)
Constant	0.16 (1.05)	0.44 (1.02)	0.58 (1.03)	0.61 (0.94)
(N)	276 votes	276 votes	276 votes	276 votes
Pseudo-R ²	.13	.11	.19	.17
Log Likelihood	-133.70	-136.75	-125.42	-128.18
Wald Test	.00	.00	.01	.01

Logit models estimated. The dependent variable is scored 1 if the judge supports the president and zero otherwise. Robust standard errors adjusted for clustering on the court case are reported in parentheses. * significant at .10 level, one-tailed tests conducted; ** significant at .05 level; *** significant at .01 level. The Wald Test reports the joint significance of the three political opposition variables on a two-tailed test.

Table 7: Predicting the Annual Number of Court Challenges to Executive Orders, 1942-1996

	ANNUAL NUMBER OF COURT CHALLENGES		
	1A	1B	1C
Political Opposition			
Divided Government	0.67*** (0.28)	0.67*** (0.28)	0.61** (0.29)
Public Approval	-2.68*** (0.80)	-2.70*** (0.99)	-2.65*** (0.96)
Controls			
Support for President in SC	--	0.03 (0.39)	0.01 (0.36)
War	--	-0.01 (0.33)	0.12 (0.34)
Last Year of President's Term	--	-0.18 (0.32)	-0.16 (0.30)
Trend	--	--	0.02** (0.01)
Total EOs Issued Prev. Year	--	--	0.003 (0.003)
Constant	1.39*** (0.41)	1.42** (0.65)	0.57 (0.84)
(N)	55 years	55 years	55 years
Pseudo-R ²	.08	.08	.10
Log Likelihood	-92.55	-92.30	-90.31
Wald Test	.00	.00	.00

Poisson models estimated. The dependent variable consists of the annual number of court challenges to executive orders decided at the final court of disposition. Robust standard errors are reported in parentheses. * significant at .10 level, one-tailed tests conducted; ** significant at .05 level; *** significant at .01 level. The Wald Test reports the joint significance of the two political opposition variables on a two-tailed test.

Bibliography

- Abraham, Henry. 1996. The Judiciary: The Supreme Court in the Governmental Process. New York, NY: New York University Press.
- Aloe, Paul H.. 1982. "Justiciability and the Limits of Presidential Foreign Policy Power." *Hofstra Law Review*. Fall: 517-556.
- Burgess, Christine. 1994. "When May a President Refuse to Enforce the Law?" *Texas Law Review*. February: 631-667.
- Bickel, Alexander. 1962. The Least Dangerous Branch: The Supreme Court and the Bar of Politics. Indianapolis, IN: Bobbs-Merrill.
- Brigham, John. 1987. The Cult of the Court. Philadelphia: Temple University Press.
- Bruff, Harold. 1982. "Judicial Review and the President's Statutory Powers." *Virginia Law Review*. 68(1): 1-61.
- Cavanagh, Ralph and Austin Sarat. 1979. "Thinking about Courts: Toward and Beyond a Jurisprudence of Judicial Competence." *Law and Society Review*. 14: 371-419.
- Corwin, Edward. 1957. The President, Office and Powers, 1787-1948: History and Analysis of Practice and Opinion. New York: New York University Press.
- Ducat, Craig and Robert Dudley. 1989. "Federal District Judges and presidential Power During the Postwar Era." *Journal of Politics*. 51: 98-118.
- Epstein, Lee and Jack Knight. 1998. The Choices Justices Make. Washington, D.C.: Congressional Quarterly Press.
- Ferejohn, John and Barry Weingast. 1992. "Limitation of Statutes: Strategic Statutory Interpretation." *Georgetown Law Journal*. 80(3): 565-582.
- Fleishman, Joel and Arthur Aufses. 1976. "Law and Orders: The Problem of Presidential Legislation." *Law and Contemporary Problems*. 40(3): 1-46.
- Gelly, R., and P. Spiller. 1992. "A Rational Choice Theory of Supreme Court Statutory Decisions with Applications to the State Farm and Grove City Cases." *Journal of Law, Economics, and Organizations*. 6: 263-300.
- Genovese, Michael. 1980. The Supreme Court, The Constitution, and Presidential Power. Lanham, MD: University Press of America.

- Humphries, Martha Anne, and Donald R. Songer. 1999. "Law and Politics in Judicial Oversight of Federal Administrative Agencies." *Journal of Politics* 6:207-220.
- King, Kimi Lynn and James Meernik. 1999. "The Supreme Court and the Powers of the Executive: The Adjudication of Foreign Policy." *Political Research Quarterly*. 52: 801-824.
- Kornhauser, L.A.. 1992. "Modeling Collegial Courts II: Legal Doctrine." *Journal of Law Economics, and Organizations*. 8: 441-470.
- Melnick, Shep. 1993. "Between the Lines: Interpreting Welfare Rights." Washington, D.C.: Brookings Institution Press.
- Mikva, Abner and Eric Lane. 1997. An Introduction to Statutory Interpretation and the Legislative Process. New York: Aspen Law and Business.
- Nagel, Robert F.. 1989. "Political Law, Legalistic Politics: A Recent History of the Political Question Doctrine." *University of Chicago Law Review*. 56: 643-669.
- Perry, H.W. 1994. Deciding to Decide: Agenda Setting in the United States Supreme Court. Cambridge, MA: Harvard University Press.
- Roche, John. 1955. "Judicial Self-Restraint." *The American Political Science Review*. September, 49(3): 762-772.
- Rosenberg, Gerald. 1994. The Hollow Hope: Can the Courts Bring About Social Change? Chicago, Ill: University of Chicago Press.
- Scharpf, Fritz. 1966. "Judicial Review and the Political Question: A Functional Analysis." *Yale Law Journal*. 75: 517-538.
- Schubert, Glendon. 1973. The Presidency in the Courts. New York: Da Capo Press.
- Schwartz, E.P.. 1992. "Policy, Precedent, and Power: A Positive Theory of Supreme Court Decisionmaking." *Journal of Law, Economics, and Organizations*. 8: 219-252.
- Segal, Jeffrey and Albert Cover. 1989. "Ideological Values and the Votes of U.S. Supreme Court Justices." *American Political Science Review*. 83: 557-565.
- Segal, Jeffrey and Harold Spaeth. 1993. The Supreme Court and the Attitudinal Model. New York, NY: Cambridge University Press.
- Segal, Jeffrey, Lee Epstein, Charles Cameron, and Harold Spaeth. "Ideological Values and the Votes of U.S. Supreme Court Justices Revisited." *Journal of Politics*. 57: 812-822.

- Shane, Peter and Harold Bruff. 1988. The Law of Presidential Power. Durham, N.C.: Carolina Academic Press.
- Sheehan, Reginald S. 1990. "Administrative Agencies and the Court: A Reexamination of the Impact of Agency Type on Decisional Outcomes." *Western Political Quarterly*. 43:875-885.
- Silverstein, Gordon. 1992. "Judicial Enhancement of Executive Power." In The President, The Congress and the Making of Foreign Policy, ed. Paul E. Peterson. Norman: University of Oklahoma Press.
- _____. 1997. Imbalance of Powers: Constitutional Interpretation and the Making of American Foreign Policy. New York: Oxford University Press.
- Songer, Donald. 1982. "Consensual and Nonconsensual Decisions in Unanimous Opinions of the United States Courts of Appeals." *American Journal of Political Science*. 26: 225-39.
- Songer, Donald and Susan Haire. 1992. "Who Wins on Appeal? Upperdogs and Underdogs in the United States Courts of Appeals." *American Journal of Political Science*. 36: 235-58.
- Songer, Donald, Jeffrey Segal, and Charles Cameron. 1994. "The Hierarchy of Justice: Testing a Principal-Agent Model of Supreme Court-Circuit Court Interaction." *American Journal of Political Science*. 38: 235-58.
- Strum, Phillipa. 1974. The Supreme Court and "Political Questions": A Study in Judicial Evasion. Alabama: University of Alabama Press.
- Wechsler, Herbert. 1961. Toward Neutral Principles of Constitutional Law. Principles, Politics and Fundamental Law. Cambridge: Harvard University Press.
- Weinberg, Louise. 1994. "Political Questions and the Guarantee Clause." *University of Colorado Law Review*, 65: 887-946.
- Woolhandler, Ann and Michael Collins. 1995. "State Standing." *Virginia Law Review*. 81: p. 387-520.
- Yates, Jeff and Andrew Whitford. 1998. "Presidential Power and the United States Supreme Court." *Political Research Quarterly*. 51: 539-50.
- Author's Cite:
- (2000). "Presidential Power and the Politics of Unilateral Action." Doctoral Dissertation. Stanford University.

Appendix: Court Challenges to Executive Orders

	Date	Case Name	EO Challenged	Case Number	Decision
1	43/06/21	<i>Hirabayashi v. US</i>	9066	320 U.S. 81	For President
2	43/07/14	<i>US v. Von Clemm</i>	8405	136 F. 2d 968	For President
3	44/12/18	<i>Korematsu v. US</i>	9066	323 U.S. 214	For President
4	46/07/29	<i>Wilcox v. Emmons</i>	9066	67 F. Supp. 339	For President
5	50/03/22	<i>International Workers Order v. McGrath</i>	9835	182 F. 2d 368	For President
6	50/04/17	<i>Washington v. McGrath</i>	9835	182 F. 2d 375	For President
7	51/04/30	<i>Bailey v. Richardson</i>	9835	341 U.S. 918	For President
8	51/04/30	<i>Joint Anti-Fascist Refugee Committee v. McGrath</i>	9835	341 U.S. 123	Against
9	52/06/02	<i>Youngstown Sheet & Tube Co. v. Sawyer</i>	10340	343 U.S. 579	Against
10	53/05/25	<i>Perko et. al. v. United States</i>	10092	204 F. 2d 446	For President
11	55/07/14	<i>National Lawyers Guild v. Brownwell</i>	9835, 10450	225 F. 2d 552	For President
12	56/06/11	<i>Cole v. Young</i>	10450	351 U.S. 536	Against
13	57/05/09	<i>Lithuanian Workers v. Brownwell</i>	9835, 10450	247 F. 2d 64 ⁽¹⁾	For President
14	58/04/28	<i>Jackson v. Kuhn</i>	10730	254 F. 2d 555	For President
15	58/05/19	<i>Moreno Rios v. US</i>	10653	256 F. 2d 68	For President
16	58/08/15	<i>Eastern States Petroleum v. Seaton</i>	10761	165 F. Supp. 363	For President
17	65/05/03	<i>Zemel v. Rusk</i>	11037	381 U.S. 1	For President
18	66/11/23	<i>McBride v. Roland</i>	10173	369 F. 2d 65	For President
19	67/03/23	<i>Rose v. McNamara</i>	10713	375 F. 2d 924	For President
20	69/07/25	<i>Kahn v. Secretary of HEW</i>	10450	302 F. Supp. 178	For President
21	70/12/21	<i>Williamson v. Aldridge</i>	10713	320 F. Supp. 840	For President
22	71/03/31	<i>United Federation of Postal Clerks v. Blount</i>	11491	325 F. Supp. 879	For President
23	71/04/22	<i>Contractors Assoc. of E. Penn. v. Shultz</i>	11246	442 F. 2d 159	For President
24	71/09/23	<i>Ogletree v. McNamara</i>	11246	449 F. 2d 93	For President
25	71/10/07	<i>Calif. Teachers Assoc. v. Newport Mesa USD</i>	11615	333 F. Supp. 436	For President
26	71/11/03	<i>Gordon v. Blount</i>	10450	336 F. Supp. 1271	For President
27	71/11/30	<i>US v. Intone Corporation</i>	11615	334 F. Supp. 905	For President
28	72/07/14	<i>Jennings v. Connally</i>	11627	347 F. Supp. 409	Against
29	72/11/24	<i>United Black Fund v. Hampton</i>	10927	352 F. Supp. 898	For President
30	73/04/18	<i>Ray Baille Trash Hauling v. Kleppe (SBA)</i>	11625	477 F. 2d 696	For President
31	73/09/01	<i>Western States Meat Packers Assoc. v. Dunlop</i>	11723	482 F. 2d 1401	For President
32	73/12/20	<i>League of Voluntary Hospitals v. Local 1199</i>	11695	490 F. 2d 1398	For President
33	74/01/02	<i>Oakland Raiders v. Office of Emergency Preparedness</i>	11615	380 F. Supp. 187	For President
34	74/01/11	<i>Jolly v. US</i>	11491	488 F. 2d 35	For President
35	74/06/20	<i>DeRieux v. The Five Smiths (Atlanta Falcons)</i>	11615	499 F. 2d 1321	For President
36	75/04/15	<i>US v. Pro Football Inc.</i>	11723	514 F. 2d 1396	For President
37	76/06/01	<i>Hampton v. Mow Sun Wong</i>	10577	426 U.S. 88	Against
38	76/08/19	<i>Aviation Consumer Action Project v. CAB</i>	11920	418 F. Supp. 634	For President
39	76/09/22	<i>National Treasury Employees Union v. Fasser</i>	11491	428 F. Supp. 295	Against
40	76/11/24	<i>Kaplan v. Corcoran</i>	10096	545 F. 2d 1073	For President
41	77/02/16	<i>Ramos v. US Civil Service Commission</i>	11935	430 F. Supp. 422	For President
42	78/07/25	<i>Daughtrey v. Carter</i>	11967	584 F. 2d 1050	For President
43	78/08/24	<i>Vergara v. Hampton</i>	11935	581 F. 2d 1281	For President
44	78/10/05	<i>Jalil v. Campbell</i>	11935	590 F. 2d 1120	For President

Appendix Continued

	Date	Case Name	EO Challenged	Case Number	Decision
45	79/06/22	<i>AFL-CIO v. Kahn</i>	12092	618 F. 2d 784	For President
46	79/06/27	<i>United Steal Workers v. Weber</i>	11246	443 U.S. 193	For President
47	79/07/20	<i>Uniroyal v. Marshall</i>	11246	482 F. Supp. 364	For President
48	80/09/02	<i>Mow Sun Wong v. Campbell</i>	11935	626 F. 2d 739	For President
49	80/10/22	<i>Nat'l Bank of Commerce of San Antonio v. Marshall</i>	11246, 11375	628 F.2d 474	For President
50	81/01/09	<i>Liberty Mutual Insurance Co. v. Friedman</i>	11246	639 F. 2d 164	Against
51	81/02/02	<i>Levy v. Urbach</i>	11157	651 F. 2d 1278	Against
52	81/03/06	<i>US v. Mississippi Power and Light Co.</i>	11246	638 F. 2d 899	For President
53	81/03/30	<i>Unidyne Corp. v. Iran</i>	12294	512 F. Supp. 705	For President
54	81/04/30	<i>Security Pacific National Bank v. Gov't of Iran</i>	12294, 12285	513 F. Supp. 864	For President
55	81/05/22	<i>Chase T. Main Int'l v. Khuzestan Water and Power</i>	12276-12285	651 F. 2d 800	For President
56	81/06/05	<i>American International Group v. Iran</i>	12294	657 F. 2d 430	For President
57	81/06/29	<i>Haig v. Agee</i>	11295	453 U.S. 280	For President
58	81/07/02	<i>Dames & Moore v. Regan</i>	12170	453 U.S. 654	For President
59	81/07/10	<i>Marschalk v. Iran National Airlines</i>	12276-12285	657 F. 2d 3	For President
60	81/07/15	<i>Electronic Data Systems v. Social Security Org. of Iran</i>	12294	651 F. 2d 1007	For President
61	81/09/03	<i>National Treasury Employees Union v. Regan</i>	12171	108 L.R.R.M. 2948	For President
62	83/02/09	<i>Behring International v. Imperial Iranian Air</i>	12294	699 F. 2d 657	For President
63	83/07/15	<i>NAACP v. Devine</i>	12404	727 F. 2d 1247 ⁽²⁾	Against
64	84/01/23	<i>New Orleans Public Service v. US</i>	11246	723 F. 2d 422	Against
65	84/07/12	<i>Florsheim Shoe Co. v. US</i>	12204	744 F. 2d 787	For President
66	84/07/17	<i>United Presbyterian Church v. Reagan</i>	12333	738 F. 2d 1375	For President
67	84/09/21	<i>Ozonoff v. Berzak</i>	10422	744 F. 2d 224	Against
68	85/07/02	<i>Cornelius v. NAACP</i>	12404, 12353	473 U.S. 788	For President
69	86/04/08	<i>Hinton v. Devine</i>	10422	633 F. Supp. 1023	Against
70	86/07/17	<i>Heinemann v. US</i>	10096	796 F. 2d 451	For President
71	86/09/11	<i>US v. Hescorp Heavy Equip. Sales Corp.</i>	12205, 12211	801 F. 2d 70	For President
72	87/01/09	<i>Haitian Refugee Center v. Gracey</i>	12324	809 F. 2d 794	For President
73	87/03/27	<i>National Assoc. of Air Traffic Specialists v. Dole</i>	12564	1987 WL 348512	For President
74	88/09/22	<i>Belk v. U.S.</i>	12276-12285	858 F. 2d 706	For President
75	88/10/13	<i>Chang v. US</i>	12543, 12544	859 F. 2d 893	For President
76	89/01/05	<i>Conservation Law Foundation v. Clark</i>	11644	864 F. 2d 954	For President
77	89/03/24	<i>American Federation of Gov. Employees v. Reagan</i>	12559	870 F. 2d 723	For President
78	92/02/04	<i>Haitian Refugee Center v. Baker</i>	12324	953 F. 2nd 1498	For President
79	92/07/29	<i>Haitian Centers Council v. McNary</i>	12807	969 F. 2d 1350 ⁽³⁾	Against
80	93/02/26	<i>US v. Arch Trading Co.</i>	12722, 12724	987 F. 2d 1087	For President
81	93/06/21	<i>Sale v. Haitian Centers Council</i>	12807	509 U.S. 155	For President
82	96/02/02	<i>Chamber of Commerce v. Reich</i>	12954	74 F. 3d 1322	Against

⁽¹⁾ Judgment subsequently vacated, 355 U.S. 23 (1957)

⁽²⁾ Judgment subsequently reversed, 473 U.S. 788 (1985)

⁽³⁾ Judgment subsequently reversed, 509 U.S. 155 (1993)