

# Chapter One

## Introduction

The relationship between the president and the United States Supreme Court is indeed an enigmatic one. Perhaps this is attributable to a lack of consensus over the appropriate parameters of power between these two branches of government. President (and later Supreme Court Chief Justice) William Howard Taft embraced a limited presidential power, stating “the president can exercise no power which cannot be fairly and reasonably traced to some specific grant of power or justly implied and included within such grant as proper and necessary” (Biskupic and Witt 1997, 169). In contrast, President Theodore Roosevelt’s “stewardship” theory of presidential leadership envisioned an expansive power in which the president should act on the public’s behalf, in Roosevelt’s words, “whenever and in whatever manner [is] necessary, unless prevented by direct constitutional or legislative provision” (170). Hence, while Taft envisions a model of presidential action constrained by rules and subject to exacting judicial review, Roosevelt’s model of the presidency is one of ample executive discretion and deference from other political actors.

The effective bounds of the Supreme Court’s powers are similarly indeterminate. While Chief Justice John Marshall successfully positioned the Supreme Court as the final authority on the Constitution in *Marbury v. Madison*, the practical ability of the Court to function as an effective political force is perhaps open to question. Under the Constitution, the Court has little in the way of direct implementation power and is essentially dependent upon its institutional legitimacy for compliance with its commands. An example of the Court’s enforcement quandary and its inherent reliance upon public confidence for its tacit authority is illustrated

by Justice Lewis Powell's retrospective comments (in 1988) concerning the Court's order that President Richard Nixon turn over damaging tapes in *United States v. Nixon*. Powell confided that, "one has to wonder what would have happened if Nixon had said what President Jackson said on one occasion, 'You have your decree, now enforce it.' Of course, there was no way we could have enforced it. We had 50 'police' officers, but Nixon had the First Infantry Division" (Powell 1995, 173). In the end the unpopular and beleaguered executive complied and the Court managed to avoid a potentially serious threat to its institutional authority.

Interaction between the president and the Court does not always involve the president as a direct party before the Court as in *United States v. Nixon*. The president and the Court also interface informally in their confrontations over the direction of American legal policy. Certainly presidents hold convictions on many of the policy areas that the Court rules on. While presidents cannot force justices to vote their way, there are informal means by which they can cast their influence on Supreme Court policy-making. Similarly, Supreme Court justices hold their own ideas about the direction of the policies implemented by the executive's bureaucratic agencies, and they review them on a regular basis in Supreme Court litigation.

In this book I examine the interaction in the modern era between these two primary political institutions, the presidency and the United States Supreme Court. I assay the fortunes of presidents before the United States Supreme Court and provide insights as to what factors may influence presidential success in Supreme Court litigation. Of particular interest is the question of whether presidents' fortunes before the Court are affected by the level of prestige (public approval) that they experience while in office.

Several important political considerations are addressed. Fundamentally, if we assume that presidents wish to effectively assert their influence, then it is important to discern whether, and under what conditions, presidential power can be successfully exercised and afforded deference by other political actors (i.e., the Supreme Court justices). Further, judicial scholars assert that judicial decision making can be explained largely by attitudinal, external, and political determinants. Under the constitutional separation of powers framework, the justices of the

Supreme Court may act as either facilitators or inhibitors of presidential power. Thus, it is interesting to evaluate what factors help to explain judicial decision making (for or against the president) in cases concerning presidential power in one form or another. Lastly, a prominent debate within the judicial politics literature concerns whether the Supreme Court acts as a majoritarian or counter-majoritarian institution. Here (chapter 2), I assess whether majoritarian opinion (in this instance, public support for the president) influences Supreme Court justice decision making.

I address the considerations outlined above by testing established theories of presidential political power and judicial decision making from the relevant presidency and judicial politics literature, *vis-à-vis* political interactions between the president and the Supreme Court. I use these primary theories to help explain presidential fortunes in the Supreme Court in three discrete situations in which the president and Court interact. By examining such theories on president-Court relations across several different contexts, I am able to provide a more generalizable account of presidential power before the Court.

First, I address presidential success with the Court in cases involving the formal constitutional and statutory powers of the president. This section (chapter 3) is inspired by the thoughtful work of Ducat and Dudley (1989a, b), who examined presidential fortunes before the federal district courts in cases concerning the formal constitutional and statutory powers of the executive office. They found that judicial loyalty to the appointing president, case type (foreign vs. domestic), and presidential approval ratings affected presidential outcomes in the federal district courts. I build upon this basic framework to assess the votes of the Supreme Court justices in such “presidential power” cases coming before the Court. In this chapter I assess the impact of presidential prestige (public approval), on justices’ support for the president, by considering the president’s public approval rating at the time of the relevant event (i.e., when the case comes before the Court). Furthermore, considering the fluctuations in approval that ordinarily occur during presidential administrations, I estimate additionally the effects of intra-administration changes (trends) in presidential approval that occur before the case is decided.

Second, I examine presidential power in the Supreme Court via the federal administrative agencies (chapter 4). Presidential scholars, such as Terry Moe (1991, 1998) and others, have advanced the notion that the federal bureaucracy has become increasingly politicized and has become one of the executive's most valuable tools for implementing his policy preferences. However, as Shapiro (1968) notes, such discourse on the politicization of the federal bureaucracy must take into account the fact that political consternation over partisan-based policy changes in the federal agencies are often resolved in court. While the fortunes of the federal agencies in the Supreme Court have long been a topic of interest for judicial scholars (e.g., Pritchett 1948, Tanenhaus 1960, Canon and Giles 1972, Handberg 1979), few have linked their success levels to presidential politics and none have considered the influence of presidential approval on agency success with the Court. I examine the deference paid to presidents' administrative agencies by Supreme Court justices by assessing the influence of attitudinal, political, and external factors including the impact of presidential prestige.

Third, I look at the ability of presidents to get their substantive policy preferences supported by the Supreme Court justices (chapter 5). By "substantive policy preferences," I mean those substantive policies (e.g., law and order, civil rights, etc.) that the Court's decisions affect, and on which presidents have expressed, in one form or another, opinions or predilections as to preferred case outcomes and judicial policy direction. In order to ascertain whether such expressed preferences are heeded by the justices, it is necessary to develop a method of measuring at least some of the legal policy preferences that presidents seek to effectuate through the Supreme Court. While judicial scholars have traditionally discerned presidential legal policy preferences through anecdotal evidence and party presidential election platforms (see Stidham and Carp 1987), I use an alternative method—presidential policy signaling—to ascertain presidential policy inclinations and priorities. In this chapter I argue that attitudinal, political, and external factors, including presidential public standing, can affect the likelihood that the Supreme Court justices will afford deference to presidents' policy preferences.

There have been numerous assessments of presidential power with regard to the Supreme Court (e.g., Pritchett 1948, Rossiter

1951, Schubert 1957, Scigliano 1971, Corwin 1984, Abraham 1992, Biskupic and Witt 1997). However, with rare exception (Yates 1999, Yates and Whitford 1998, Genovese 1980), such studies have provided essentially qualitative evaluations of executive interactions with the Supreme Court and the individual justices or analysis of specific Court holdings concerning presidential assertions of power. Thus, there is a relative lack of systematic quantitative analysis concerning how the Supreme Court has decided on presidential power. I endeavor to assess presidential power with the Supreme Court by empirically testing hypotheses regarding interactions between the presidency and the Supreme Court justices. Furthermore, my examination of the impact of presidential approval on Supreme Court justice decision making undertakes to provide some insight into the enduring debate on the influence of public opinion on Supreme Court decision making.