Going Public and the Supreme Court

On April 2, 2012, President Obama commented publicly on the pending US Supreme Court decision involving whether the “individual mandate” requirement of the Patient Protection and Affordable Care Act was constitutional. The president remarked that:

Ultimately, I’m confident that the Supreme Court will not take what would be an unprecedented, extraordinary step of overturning a law that was passed by a strong majority of a democratically elected Congress. And I’d just remind conservative commentators that for years what we’ve heard is, the biggest problem on the bench was judicial activism or a lack of judicial restraint, that an unelected group of people would somehow overturn a duly constituted and passed law. Well, this is a good example. And I’m pretty confident that this Court will recognize that and not take that step.¹

The following day, Obama clarified his comments in stating, “the Supreme Court is the final say on our Constitution and our laws, and all of us have to respect it, but it’s precisely because of that extraordinary power that the Court has traditionally exercised significant restraint and deference to our duly elected legislature, our Congress.”² Obama made a similar argument in June of 2015, when he said that it should be an “easy decision” for the Supreme Court to uphold the Affordable Care Act in the face of another statutory challenge.³

These remarks generated much discussion in the news media and political circles about whether it is appropriate for presidents to comment on pending Supreme Court decisions. Critics of the president argued that he was trying to bully the justices (Fabian 2015; Ferris 2015; Wallsten and Barnes 2012). Representative Lamar Smith (R-Texas), Chairman of the House Judiciary Committee, authored an op-ed condemning the president for his “disturbing” comments about the case, which he said revealed “a fundamental lack of...
respect for the judicial branch” (Smith 2012). Senate minority leader Mitch McConnell (R-KY) said the president tried to “intimidate” the Court and “crossed a dangerous line” in his statements, warning the president to “back off” (Associated Press 2012). South Carolina Governor Nikki Haley accused the president of “bullying the Supreme Court” (Swaine 2012), and Senator Chuck Grassley (R-IA) called the president “stupid” for his remarks (Daily Mail Reporter 2012). The Chicago Daily Herald (2012) took the president to task for not respecting the nation’s system of checks and balances, while others referred to the president’s statements as “extraordinary” (Presser 2012), “dangerous” (Agence France Presse 2012), and “virtually unprecedented” (Wolf 2012). Things got so bad for the president that a Fifth Circuit Court of Appeals panel of judges required the Department of Justice to prepare a three-page, single-spaced letter addressing whether the president believes that courts have the power of judicial review (Mears 2012).

Despite the outrage targeted at President Obama, he is far from the only president who has commented on pending Court cases. George H. W. Bush indicated he wanted to see Webster v. Reproductive Health Services (1989) mark the first step toward the end of legal abortion in the United States. Bill Clinton argued in favor of upholding the background checks found in the Brady Handgun Violence Prevention Act at issue in Printz v. United States (1997). George W. Bush took a position against affirmative action in Gratz v. Bollinger (2003) and Grutter v. Bollinger (2003). Indeed, every president since Eisenhower has taken a public position on at least one pending Supreme Court case during their time in office.

Thus, it is evident that modern presidents have targeted the Court’s decisions using their public rhetoric, a strategy known as “going public.” And this makes sense: the Supreme Court is typically viewed as the final arbiter of the Constitution and many presidential policy goals are subject to judicial interpretation, hindering or facilitating presidential success. If presidents can leverage their power to affect the Court’s adjudication of policies that they support or oppose, this would be a significant feature of presidential leadership.

In addition to taking public positions on pending Supreme Court cases, presidents also comment on cases the Court has already decided. In fact, this is the much more common strategy, dating back to President Andrew Jackson. For example, President Ronald Reagan expressed his “profound disappointment” with the Court’s decision in Akron v. Akron Center for Reproductive Health (1983), and called on Congress to “to restore legal protections for the unborn whether by statute or constitutional amendment.” President George W. Bush praised the Court’s opinion in the school choice case of Zelman v. Simmons-Harris (2002), stating that the decision “gave a great victory to
parents and students throughout the Nation” in a manner comparable to *Brown v. Board of Education* (1954). As these examples demonstrate, presidents use their public rhetoric to both criticize and praise the Court’s decisions.

Regardless of whether presidents should or should not target Supreme Court cases in their public remarks, we know relatively little about when and why presidents make public statements about pending or decided Supreme Court cases. Thus, we lack answers to pressing questions involving this rhetorical strategy: Do presidents speak about pending Court cases to influence Supreme Court justices, as Representative Smith’s comments suggest? What are the presidents’ motivations for commenting on cases after they have been handed down? How often do presidents comment on cases and how do these statements affect Congress, the news media, and the public? What are the consequences of these types of comments for our understanding of American democracy and judicial independence?

The purpose of this book is to thoroughly investigate why presidents talk about Supreme Court decisions in their public rhetoric. To this end, we address when presidents speak about cases, the tone they take when they speak, and the impact presidential rhetoric has on the Court’s decisions, Congress, the news media, and the public. We examine spoken and written remarks by presidents, and explore the extent to which presidents discuss both contemporary and historical cases. In commenting on Supreme Court cases, we show that presidents are primarily motivated to demonstrate democratic responsiveness by talking about issues that are important to the American public (Dahl 1957). This is evinced by the preponderance of case mentions that occur after the Court has issued a ruling, and by our revelation that even when presidents comment on pending cases, they are not generally trying to affect case outcomes. Moreover, we show that, when presidents discuss recently decided cases, they often do so to shape the implementation of Court decisions by the bureaucracy and Congress. In doing this, we argue, presidents are exercising their legitimate constitutional function to “take Care that the Laws be faithfully executed” (U.S. Constitution, Article II, Section 3). Thus, far from being bullies, when presidents speak about Supreme Court decisions, they are performing a perfectly acceptable role in American democracy.

In the next section, we explain our motivation for writing this book, focusing on why we believe it is significant to understand presidential rhetoric regarding Supreme Court cases. Next, we discuss why presidents make public appeals generally and who they target in those appeals. We then present a sketch of our theoretical framework for understanding why presidents discuss Supreme Court decisions in their public rhetoric, including a treatment of the...
norm of judicial independence. This is followed by an introduction to the data used throughout this book and a brief analysis of the frequency with which presidents discuss pending and decided cases. We close with an overview of the chapters that follow.

THE IMPORTANCE OF UNDERSTANDING GOING PUBLIC ON SUPREME COURT DECISIONS

We are motivated to write this book for a number of reasons. First, exploring presidential rhetoric concerning Supreme Court cases helps us to illustrate a significant, but previously understudied aspect of the interrelationship between the executive and judiciary. Public remarks made on Supreme Court cases are important to the president’s governing strategy vis-à-vis the Court, particularly because the Court can strike down executive and legislative policies supported by the president. Because of this fact, presidents are not, and need not be, neutral in relation to cases pending before the Court, even in the face of allegations of violating the norm of judicial independence. By examining presidential rhetoric on cases, this study moves beyond previous examinations of presidential-Court interrelations that focus primarily on the Office of Solicitor General (Black and Owens 2012; Nicholson and Collins 2008; Pacelle 2003) or presidential nominations to the federal courts (Cameron and Park 2011; Holmes 2007, 2008; Johnson and Roberts 2004; Maltese 1995a; Yalof 1999). Although this prior research offers much insight into executive-judicial relations, our understanding of this relationship will be enriched by exploring presidential position taking on Court decisions via a president’s spoken and written remarks. This allows us to link one of the president’s primary governing strategies – going public – to the Court’s primary means of policy making – the decisions it renders.

This book also speaks to the larger issue of how presidents view the norm of judicial independence and their role in the coordinate construction of the Constitution. On the one hand, when presidents take a position on pending judicial decisions, they are susceptible to charges of violating the norm of judicial independence, which concerns the capability of judges to issue rulings free from interference by either Congress or the presidency (Reddish 1995, 699). On the other hand, the coordinate construction view holds that when presidents discuss Supreme Court decisions, they are not violating the norm of judicial independence. Instead, they are engaging in their own, perfectly appropriate, efforts to reach a common understanding of what the Constitution stands for at a given moment in time (Meese 1987; Paulsen 1994; Whittington 2001). By investigating a yet unexamined aspect of the
relationship between the president and the Court – going public on Supreme Court decisions – we introduce new evidence to the debate between these opposing viewpoints.

This book also expands on our knowledge of the president’s role in implementing Supreme Court decisions. Because it lacks the power to execute its rulings, the Court must rely on other actors, including the executive and legislative branches, to enforce its opinions. Presidents can assist the Court in obtaining public support for its decisions by speaking favorably about them. Presidents can also use public statements to lead the implementation of policy and the enforcement of the Court’s decisions by the executive branch (e.g., Bullock and Lamb 1984). Conversely, presidents seeking to hinder the implementation of judicial decisions can criticize the Court’s opinions to encourage public resistance or congressional efforts to limit or overrule those decisions (Canon and Johnson 1999; Epstein and Knight 1998). Thus, by investigating this topic, we bring new evidence to bear on the president’s role in the implementation of judicial decisions. This speaks directly to the ability of the president to engage in constitutional construction by attempting to shape the way the public, media, bureaucracy, and Congress understand the Constitution, as well as set the agendas of those institutions (Cohen 1995; Edwards and Wood 1999; Edwards and Barrett 2000; Whitford and Yates 2009). Indeed, although presidents are often seen as the primary movers of the national policy debate (Baumgartner and Jones 1993; Kingdon 1995), it remains to be seen how presidential remarks on Supreme Court cases shape the national conversation on the issues considered in those cases or whether these remarks are effective tools for presidential agenda-setting.

This book also contributes to our understanding of the effects of presidential speeches on the media. Although there has been a great deal of research on presidents’ ability to lead the media (e.g., Cohen 2008), this is the first book to examine the ability of presidents to shape newspaper coverage of speeches involving Supreme Court decisions. Thus, it sheds new light on the effectiveness of presidential strategies for influencing media coverage. That is significant because the news media represents one of the primary intermediaries by which presidents’ messages are filtered to the public (e.g., Eshbaugh-Soha and Peake 2011), a particularly important role given the limited attention the public pays to the Supreme Court (Dost 2015; Hoekstra 2003).

This work also clarifies whether presidents can shape public attitudes on the Court’s decisions, and whether they lead or follow public opinion on the Court’s cases. To do this, we present a first-of-its-kind survey experiment that investigates whether presidential position taking on the Court’s cases shapes the way the public views those decisions, and the Court itself (e.g., Armaly 2018;
Clark and Kastellec (2015). We pair our experimental survey with observational data on whether presidents try to lead or follow public opinion in their public remarks on the Court’s cases, thus providing a rich look into the relationship between the president and the public as it involves public rhetoric on the Court’s decisions.

Finally, this book expands our knowledge of the public presidency to include the Supreme Court. Going public is the foundation of presidential leadership, and public speeches are the primary means by which presidents attempt to influence public opinion (Edwards 2003), news coverage (Eshbaugh-Soha and Peake 2011), and their success in Congress (Canes-Wrone 2001; Kernell 1997). Despite the large literature devoted to this topic, we do not yet know how often presidents speak about Supreme Court cases, why they do so, or whether these comments have any substantive impact on judicial decisions, the media, Congress, or the public. Thus, this book adds to the larger going public literature by extending our understanding of the president’s public commentary to an investigation of Supreme Court cases.

**PRESIDENTIAL PUBLIC APPEALS**

One of the president’s most commonly employed strategies of leadership is “going public.” It is by going public that presidents take advantage of their central role in American democracy. Presidents go public in an effort to further their policy goals, reelection prospects, and historical relevance. Since 1953, presidents have spoken nearly 310 times per year, peaking at 449 speeches per year during the Clinton Administration (Ragsdale 2014). Below, we detail some of the reasons that presidents go public in general. Because this book is the first to focus specifically on why presidents go public on the Court’s decisions, we flesh out our detailed theoretical explanations for this type of going public in the chapters that follow.

**Why Do Presidents Go Public?**

Presidents have numerous motivations for public speaking, and the primary incentives for doing so arose relatively recently in the long history of the American republic. Since Nixon’s creation of the Office of Communications, which helped to facilitate public relations – and certainly since Ronald Reagan stressed public outreach to achieve his goals – presidents have emphasized public relations to generate support, meet public expectations, and otherwise campaign continuously to promote their presidencies, policies, and reelection campaigns outside Washington, DC. As much
research has illustrated (Hager and Sullivan 1994; Powell 1999), the increase in presidential speeches over time marks a central characteristic behind the leadership strategies of modern presidents.

There are several reasons why presidents have increased their speechmaking since the early 1970s. Kernell (1997) initially observed an institutional change in Congress that precipitated a shift in the president’s target audience, from members of Congress to the American people. Simply, as Congress decentralized into myriad points of access and divided government became more common, bargaining with a few party leaders and committee chairs proved to be insufficient for presidents to achieve their legislative policy goals. Thus, we observe a shift from what Kernell calls institutionalized pluralism to individualized pluralism. Coupling this to changes in the party nomination process, which encourages outsider presidential candidates who need support from the party rank and file, not party leadership, is a decentralized Congress that encourages presidents to go public to build the public support necessary to break legislative gridlock. Moreover, the creation and evolution of the Office of Communications, which correlates with the rise in public speeches (Eshbaugh-Soha 2011), provided more recent presidents with the institutional tools and resources necessary to continue to deliver more speeches than their predecessors.

Other changes external to the institutions of Washington, DC, further facilitated the rise of the public presidency. Improved communications technology made it more feasible for presidents to reach large, national audiences. Reagan, in particular, took advantage of national addresses to pressure Congress in a prototypical going public strategy: to motivate the public to demand that their legislative representatives support the president. Although the effectiveness of public outreach is limited (Edwards 2003), technological advances that eased public access to television significantly increased the number of presidential speeches over time (Hager and Sullivan 1994).

Who Do Presidents Target with Speeches?

With more speeches have come more opportunities for presidents to reach a variety of target audiences. One of the president’s primary targets, of course, is the American public. Presidents target the public in their speeches in an effort to raise the salience of issues (Canes-Wrong 2001), build support for their policy agendas (Rottinghaus 2010), and increase their approval ratings (Cohen and Powell 2005). In so doing, presidents can promote their reelections, enhance their ability to make public policy, and advance their presidencies in the eyes of history (Light 1999; Moe 1985).
Presidents also use speeches to influence the media, and they do so in a variety of ways. Typically, presidential speeches designed to increase the amount of news coverage of the president are successful (Cohen 2010), whether by setting the media’s agenda on domestic policy issues (Edwards and Wood 1999), or by generating more local news coverage in a strategy some call “going local” (Eshbaugh-Soha and Peake 2006). Further, added media coverage can benefit presidents as it often enhances the salience of policies to the public, making presidential priorities public priorities (Cohen 1997). The evidence of presidential leadership of the news media therefore points to speeches as an essential source of power for presidents that allows them to generate public interest in a policy, which in turn may give presidents the weight of democratic legitimacy in pursuit of their policy goals (Eshbaugh-Soha and Peake 2011).

Presidents additionally use speeches to influence the legislative process (Kernell 1997). In an effort to pressure Congress to support their policy priorities, presidents target bills before Congress with their public rhetoric, which increases their legislative success rate (Barrett 2004). Given the role of public opinion in the going public strategy, presidents are most likely to go public – and be most successful influencing Congress – on policies that already enjoy popular support (Canes-Wrone 2001). In other words, presidential speeches do not necessarily change legislative preferences. Rather, speaking frequently about an issue increases the salience of that policy to the public. If the public already supports the president’s position, the decision for a legislator to support that position is an obvious one. Relatedly, public appeals can affect the legislative agenda (Edwards and Barrett 2000), a precursor to enhanced legislative success. Although increasing partisanship may actually encourage presidents to revisit traditional bargaining strategies in pursuit of legislation under unified government (McGauvan and Eshbaugh-Soha 2017), presidents have continued to speak frequently for a variety of other reasons that we have listed.

Speeches can influence the bureaucracy, too. By affecting an agency’s policy priorities, speeches increase the consistency between bureaucratic policy decisions and the president’s policy preferences (Whitford and Yates 2009). That is, the more the president prioritizes an issue on his policy agenda, the more likely relevant bureaucratic agencies will follow the president’s leadership on that issue. Presidents may also affect the implementation of public policy more directly. For example, among policies that are salient and relatively uncomplicated to bureaucrats and the American public, the president’s positive rhetoric enhances bureaucratic activity (Eshbaugh-Soha 2006).
Presidential Speeches Involving the Judiciary

It is evident that presidents have multiple motivations and audiences for going public. Though we have a fairly comprehensive understanding of why presidents go public to influence the public, media, Congress, and the bureaucracy, we have very limited knowledge of why presidents target the Supreme Court in their public appeals. One body of work on this topic focuses on presidents going public in support of their judicial nominees. Maltese (1995b) initiated this line of research by showing that Ronald Reagan was the first president to go public to influence Supreme Court confirmation votes, a strategy that later presidents followed. Specifically, he studied how Ronald Reagan issued a number of public appeals in response to the contentious judiciary committee hearings that eventually brought down Judge Robert Bork’s nomination to the Supreme Court. Reagan spoke about the Bork nomination in 34 public remarks, which included mentions in several radio addresses and was the sole subject of a national address on October 14, 1987.

The Bork case helps to illustrate later work on the effectiveness of going public on Supreme Court nominations more generally. Johnson and Roberts (2004) demonstrate that presidents more often go public on their Supreme Court nominees when those nominees are less likely to be confirmed by the Senate. Holmes (2007, 2008) extended this line of inquiry to US court of appeals judges and found that, although the frequency of public utterances is minimal for these nominees, it has increased over time, and is driven in large part by the nomination’s vulnerability in the Senate. Finally, Cameron and Park (2011) found that going public on behalf of Supreme Court nominees occurs most frequently when the nominee’s confirmation is in danger, such as during contentious confirmation hearings (e.g., the nominations of Robert Bork and Clarence Thomas).

The question of whether presidential speeches increase the likelihood that the Senate will approve a judicial nomination is also important. On the one hand, Krutz, Fleisher, and Bond (1998) show that the length of the president’s announcement of a nominee is correlated with a higher likelihood of that nominee’s success in the Senate. Johnson and Roberts (2004) refine this approach by analyzing all remarks prior to a nominee’s Senate vote. They demonstrate that more presidential remarks on a nominee leads the Senate to cast fewer no votes than would be expected without going public. On the other hand, both Holmes (2007) and Cameron and Park (2011) find that going public is negatively related to the success of judicial nominations. This follows from their expectations concerning why presidents go public on judicial nominees.
Although presidents hope to influence Senate confirmation votes with their speeches, presidents have spoken most often about judicial nominees when such speeches are deemed necessary to deflect criticism away from a vulnerable nominee with the goal of ensuring confirmation.

There is little research that examines the tendency for presidents to target the Court more generally and outside of the nomination process through their rhetoric. Among this small body of literature, Blackstone and Goelzhauser (2014) find that presidents deliver more negative sentences about the Court in the year after the Court makes decisions that are contrary to the president’s own policy preferences. They discover that presidents speak more about the Supreme Court when a vacancy arises and during reelection years, but devote less attention to it during wartime. Presidents who are lawyers also speak more often about the Court than other presidents. Blackstone and Goelzhauser (2014) look more broadly at mentions of the Supreme Court, which include comments about Supreme Court nominations or, in the case of Franklin D. Roosevelt, several mentions of his plan to increase the number of justices on the high bench (i.e., his “Court-packing plan”). They do not focus specifically on presidential mentions of Supreme Court cases that are the primary vehicles by which the Court makes policy. Nevertheless, their attention to tone is important and helps extend our understanding of presidential rhetoric generally and as it relates to the judiciary more specifically.

In addition, two studies explore whether presidential attention to certain issue areas in public speeches influences decision-making in the Supreme Court. First, Wahlbeck (1997) shows that presidential discussions of crime fighting in State of the Union Address is correlated with the evolution of search and seizure law in the Court. Second, Rogol, Montgomery, and Kingsland (2018) illustrate that the volume of attention presidents devote to civil rights and liberties in their State of the Union addresses influences the ideological direction of the Court’s decisions in those policy areas. Although neither of these studies deals directly with presidential statements on the Court’s decisions, they nonetheless provide evidence that presidents target the issues areas handled by the Court in their public speeches and that the justices may be responsive to presidential rhetoric.

WHY PRESIDENTS SPEAK ABOUT SUPREME COURT CASES

Our theoretical framework to answer how often and when presidents speak about Supreme Court cases is built upon several key assumptions of presidential behavior. At base, we contend that presidents are strategic actors who have limited time and resources. They will therefore act purposively to achieve