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The Adjudication Of Presidential Power In The U.S. Supreme Court: a Predictive Model Of Individual Justice Voting

Todd Curry
University of Central Florida
THE ADJUDICATION OF PRESIDENTIAL POWER IN THE U.S. SUPREME COURT:
A PREDICTIVE MODEL OF INDIVIDUAL JUSTICE VOTING

by

TODD CURRY
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ABSTRACT

The interaction between the President and Congress is many times quite public and well documented (Cronin 1980; Covington et al. 1995; Fisher 1994; Schlesinger 2004). Similarly, relations between the Congress and the Supreme Court are well documented; Congress makes law and, if requested, the Court interprets it. The interaction between the president and the Court, however, is not nearly as well defined, and certainly not as public. Supreme Court cases involving the president directly are fairly rare. King and Meernik (1995) identify 347 cases involving the foreign policy powers of the president, decided from 1790 to 1996, which is roughly 1.5 cases per calendar year. This study will examine the influence of attitudinal and extra-attitudinal factors on the individual level decision-making of the U.S. Supreme Court justices in cases involving presidential power. By using both attitudinal and extra-attitudinal factors, such as public opinion and armed conflict, this study will explore the limitations of a simple attitudinal model in complex and highly salient cases such as those that involve presidential power. The cases to be examined will be all presidential power cases decided from 1949 to 2005 ($N = 38$). The unit of analysis will, however, be the justice’s individual-level vote ($N = 337$).
This thesis is dedicated to the memory of my father. I never expected blackjack and craps would get me this far.
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CHAPTER ONE: SEPERATION OF POWERS THEORETICAL GROUNDING

Theoretical Grounding

The relationship between the United States Supreme Court and the presidency is certainly one that has not followed a singular trend. Broad generalizations about interactions between the two institutions are unable to encompass fully the complexities of their inter-branch relationship (King and Meernik 1999). The difficulties of explaining the relationship between these two branches of government stems from their origin. Originating from the Constitution with very little in the way of guidance of enumerated powers unlike their legislative counterparts, both the presidency and the Supreme Court each had to find their own way in regards to gaining power (Hamilton et al. 1788; Pritchett 1949). The powers and duties of the presidency are discussed in Article II of the Constitution, which contains only four sections, in comparison to the ten sections discussing the powers and duties of the Congress. In the four sections dealing with the presidency, Section 1 deals with the president’s selection and Section 4 with the removal of the president, while the other two only enumerate nine distinctive powers. Similarly, Article III, which concerns the federal judiciary, contains three sections, the bulk of which discuss the areas in which the courts will have jurisdiction, but provide no guidance as to the adjudication of actual cases. Therefore, interactions between the two branches are largely informal, except for two distinct venues in which each actor has the power to vastly influence the other.

The president has the constitutional charge to appoint justices to the U.S. Supreme Court, stemming from Article II, Section 2, thus theoretically modifying the ideological composition of the Court (Segal and Spaeth 2002). The other venue in which the branches directly interact is
not specifically enumerated; it has been created directly from the developmental process of the two branches. While the president attempts to extend his institutional power in order to compensate for the minimal powers that the Constitution grants him, the Supreme Court has an obligation that stems from the ruling that the Court articulated in *Marbury v. Madison* (1803), which asserted the Supreme Court as the final interpretative authority regarding the Constitution. When a case involving presidential power comes before the Supreme Court, it is a potential challenge to both institutions’ legitimacy in that the Court, having no executive authority of its own, must rely upon the executive branch, the arm of the president, to enforce a decision that could in effect take power away from that office (Epstein and Knight 1998).\(^1\) Considering how high the stakes are for both institutions, the process of decision-making for the Court should be a complex one. The focus of this thesis will be to examine the factors that affect the individual decisions of each U.S. Supreme Court justice in cases involving the Office of the President.

**Importance of This Research**

The interaction between the President and Congress is many times quite public and well documented (e.g., Cronin 1980; Covington *et al.* 1995; Fisher 1994; Schlesinger 2004). Similarly, relations between the Congress and the Supreme Court are well documented; Congress makes law and, if properly requested, the Court may interpret it. The interaction between the president and the Court, however, is not nearly as well defined, and certainly not as public. Supreme Court cases involving the president directly are relatively rare. King and Meernik (1995) identify 347 cases involving the foreign policy powers of the president, from

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\(^1\) As Alexander Hamilton noted in *Federalist #78*, “The judiciary, on the contrary, has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society; and can take no active resolution whatever. It may truly be said to 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” (Clinton 1961: 78).
1790 to 1996, which is roughly 1.5 cases per calendar year. It is helpful to consider the interactions between the Supreme Court and the president in terms of a separation of powers game, in which each branch of government acts strategically to maximize their goals (Epstein and Knight 1998). Possible interactions in a separation of powers game could include the president’s refusing to enforce the Court’s decisions or the Court’s limiting the legal power of the presidency through case law.

A separation of powers game assumes that each party (the Supreme Court, Congress, and the president) is a rational actor able to rank their alternative goals and actively attempt to reach them when there is a relative lack of formal constraints. Schubert (1959) cites President Franklin Delano Roosevelt’s 1937 Court-packing plan as an example of Supreme Court justices behaving strategically. Before Roosevelt announced his plan to enlarge the size of the Court, the two most moderate justices, Chief Justice Hughes and Justice Roberts, voted more consistently with the conservative members of the Court because they were ideologically economic conservatives (Schubert 1959). Following the announcement, they began voting consistently with the liberal members of the Court, possibly in order to protect the legitimacy of the Court. From this, Schubert argued that the justices, behaving strategically, responded to the external stimulus of the president’s plan and, in turn, made the decision-making of the Court more moderate so as to protect their institutional legitimacy, in that they thereafter ultimately upheld the legality of much of the New Deal legislation (Schubert 1959).

Since the Supreme Court and the president do not want to risk a challenge to their legitimacy (because a reduction in either institution’s legitimacy would make it more difficult for either to act consistently with their policy goals), controversies involving presidential power are seldom heard by the Court. For each institution, legitimacy allows them to carry out their goals
efficiently. There is no appeal once the Court has ruled; for the president, it would clearly be a
defeat. For the Court, deciding against a president could foster public dissent against the Court,
impugning its legitimacy, as it has few formal powers. It seems curious then why either party
would ever allow a case to reach the Court, yet they do. A study of how the individual justices
make their decisions in such cases would be quite telling in that these decisions change the
balance of power within the federal government and, thus, the nation overall.

Segal and Spaeth (2002), proponents of the attitudinal model (which seeks to predict U.S.
Supreme Court justices’ votes in cases by their own individual ideology) – the current
predominant model of judicial decision-making, criticize all rational choice theory. They note
that, “while specific rational choice models can be falsified, as scholars invariably state goals
assumed to motivate their specific models, rational choice theory itself, for the most part, cannot
be” (Segal and Spaeth 2002: 98). They argue this because the predictive power of the theory
rests upon the assumption that individuals behave rationally in order to seek their goals and this
assumption cannot be empirically tested. Rational choice, the foundation of formal separation of
power games, theorizes that individuals act rationally to reach goals and may engage in strategic
behavior, forgoing immediate gratification in order to receive long-term utility. Segal and
Spaeth (2002) argue that because rational choice theory must always operate without having
complete information about the ultimate goal preferences of the actor involved and without
complete information regarding what led the actor to make a certain decision, rational choice
theory cannot be empirically supported. Incomplete information, it would seem, would
ultimately lead to the nonfalsifiability of the theory.

2 An example of a Separation of Power game can be found in Knight and Epstein (1996), which examines the
circumstances surrounding Marbury v. Madison (1803)
One, however, must consider that social science research always works with incomplete information since human decision-making is difficult to quantify precisely (Epstein and Knight 2000). This applies to all areas of quantifiable social science research, not simply rational choice theory. To critique rational choice theory on the grounds of incomplete information, one would also have to call into question even the attitudinal model, since any ideological measure of the justices themselves must be created with incomplete information since researchers must use secondary sources, not the justices themselves, in order to create the measure. The main ideological measure used with the attitudinal model are the Segal/Cover scores (Segal and Cover 1989). These scores measure the ideology of the U.S. Supreme Court justices by completing a content analysis of newspaper editorials from the time the individual was nominated through their conformation. While these measures have been shown to have significant predictive power with regards to individual level vote choice, they certainly are not complete information with regard to the justices’ ideologies. In short, if all social science research, including the attitudinal model, operated with complete information in their analyses there would be no need for error term present in each calculation.

Taking into account all the possibilities of the separation of power game, some of which are quite detrimental to the Court, it would seem quite unlikely that justices would vote their sincere policy preferences without considering some external factors. A Court’s not acting strategically, and its acting solely on the basis of personal policy preferences, would frequently conflict with the other branches of government and the public (Epstein and Knight 1998). If they simply voted their sincere attitudes, there is a possibility they could offend the public or the executive, triggering a separation of powers game, which it would be in their strategic interest to avoid. Stated another way, the Court operates within institutional constraints. This is not to say
the justices will not consider their own ideology in the decision, but it would be atheoretical to assume the justices decide cases in a political vacuum (Epstein and Knight 1998). Other possible factors that may influence their decisions are presidential popularity, whether the president is of the same relative ideology as the justice, whether the president appointed that justice, and if the justice has prior executive experience before joining the Court, among others.

Furthermore, when thinking about case type, all cases may not be viewed similarly. The Constitution gives the executive more power in foreign policy than domestic policy. Pursuant to the president’s Article II powers, the office has nine enumerated powers, of which only the power to grant pardons and reprieves, the power to deliver the state of the union, and the charge to faithfully execute the laws deal with domestic powers. The Supreme Court, following the cue of Article II, Section 2 (which gives the presidential office a wide breadth of foreign policy powers) should be more likely to rule for the president in cases which involve those powers, such as in *U.S. v. Curtiss-Wright* (1936) in which Justice Sutherland stated, “the president alone has the power to speak or listen as a representative of the nation.” Thus, when considering case type, the justices are expected to be more deferential to the president in the realm of foreign policy. Also, if the country is involved in an armed conflict, the Supreme Court may experience a “rally around the flag” effect (a situation in which public opinion and the Congress is temporarily more highly supportive of the president), not unlike the rest of the nation.

Essentially knowing what factors may influence a justice’s vote choice in a case will help

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3 Justice Sutherland also quoted John Marshall who said before the House of Representatives, “the President is the sole organ of the nation in its external relations, and its sole representative with foreign nations. Of consequence, the demand of a foreign nation can only be made on him. He possesses the whole Executive power. He holds and directs the force of the nation. Of consequence, any act to be performed by the force of the nation is to be performed through him.” (1800)
4 See, for example, Mueller (1973) and Lee (1977)
us to better understand not only the behavior of the Supreme Court, but also the behavior of the president when it comes to deciding on what cases he believes are important enough to risk being losing in the nation’s highest court, especially if he is more likely to lose in some cases rather than others (Wildavsky 1966, 1989). It is important to study this relationship between the president and the Court not only because it lacks a more rigorous examination, but also because both branches of the government rely upon each in the system of checks and balances (e.g. the current debate on eavesdropping). The Supreme Court can restrict the relative power of the president or extend it, while the president can choose to enforce the Court’s decisions. This is not only a separation of powers game, but one that could turn the balance of power within the federal government, making it an issue quite important to study.

Literature Review

There is already a substantial canon of literature examining how and why Supreme Court justices behave when it comes to decision-making. Traditionally, dating back to the times of Roman codified law, judges were thought of as impartial arbiters who decided each case based upon the rule of law (Wold 1974). This view of judges was mirrored by one of the nations founders, Alexander Hamilton, in Federalist 78. Hamilton wrote of the Supreme Court justices, “they ought to regulate their decisions by the fundamental laws, rather than by those which are not fundamental” (Clinton 1961: 78). In describing his view of the Court, Hamilton saw a body that would make its decisions on the basis of supremacy of one law to another. This traditional view of decision-making was the predominant model of judicial behavior up until the emergence of the “Legal Realists” in the 1920s, who sought to describe how the Court actually behaved. The Realists envisioned judicial behavior in the terms of how cases were actually decided, not in
the terms of law and precedent. Pritchett (1968, 487) noted, “the [L]egal [R]ealists, influenced by pragmatism, behavioral psychology, psychoanalysis, and statistical sociology, sought reality in human behavior and judicial conduct. They believed that judicial decision-making may be influenced by the ‘hunches’ of judges, and that close cases are commonly decided on the basis of extra-legal factors.” Hence, the legal realists were some of the first researchers to examine the Court not solely on the basis of legal output and content, but in order to determine how the Court reached that legal output using both legal and extra-legal factors.

Emerging from the legal realist movement, C. Herman Pritchett, a political scientist, examined the Court with an eye to the politics of each situation by taking into account the political and partisan climate of the time. This prospective was unique at the time, in that previous analysts had not considered the effect of partisanship or public opinion on the Court’s decision-making. This unique view helped steer the course of scholarly literature toward more modern scientific ways of examining the Court. Pritchett (1949) discussed the behavior of the Court when it, as an institution, interacts with the presidency. He noted that the Vinson Court would be unlikely to, “exercise significant influence on the boundaries of presidential power in the future,” (91) because of the conservative ideology of the Court’s members. Pritchett, identifying the Vinson Court as more reserved concerning executive power rulings than other Courts while also considering the seeming improbability of a future war, reasoned, using extra-legal cues, such as ideology of the Court and the popularity of the president, that the Court would not significantly influence presidential power.

Following the legal realists and Pritchett, came researchers commonly termed as “judicial behavioralists.” Judicial behavioralists, following in the path of the legal realists, sought not only to explain judicial decision-making, but to generate theories that would further the study of
the field. These theories were testable and falsifiable using quantitative techniques and the scientific method (Schubert 1968). This movement was incremental, and much of the early empirical research on the judiciary had a foot in both camps; the Legal Realists and the judicial behavioralists (e.g., Pritchett 1948). The movement from legal realism to judicial behavioralism traces it beginning to the formal articulation of empirically falsifiable theories.

Schubert’s (1965) study is the theoretical bridge between the work of the legal realists and that of the more recent judicial behavioralists in that he was the first researcher in the subfield to build large-scale theories and empirically test them. While simply describing early in his career how the Court operates, Schubert quickly moved forward using quantitative techniques to revolutionize the study of judicial behavior (Maveety 2003). Schubert (1965) argues that Supreme Court justices’ decisions in all cases are a function of their social, economic, and political values. Employing factor analysis, multidimensional scaling and Guttman scaling, Schubert analyzed the selection of cases to determine an “i-point,” or ideological score, for individual justices that represented their most preferred ideology in a two-dimensional space. Schubert finds that the political (conservative to liberal) and economic liberalism (laissez-faire to government controlled) dimensions explain the justices’ votes for the majority of cases heard from the late 1940s through the early 1960s. This work was equally innovative in terms of its theoretical and methodological techniques, and most of the continuing work in the subfield follows in its path.

Continuing on the same theoretical path as Schubert, in that they adhered to the theory that the justice’s personal ideology influenced their decision-making, Rohde and Spaeth (1976)

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5 See Schubert (1950, 1953)
6 Schubert (1974) updated his empirical techniques, yet came to similar results.
argue that justices’ main goal is policy making, and accordingly, they will vote based on their ideological opinions (which Rohde and Spaeth call “attitudes”) when cases arise in which they hold an opinion. Segal and Spaeth (2002) argue that there is only one factor to consider when examining Supreme Court decision-making in all cases: the attitudinal model proscribes that when justices are casting a vote on any case, they simply consider their own ideology or attitude on the particular subject being adjudicated. Segal and Spaeth argue that because members of the U.S. Supreme Court have life tenure and are shielded from other aspects of politics (namely, electoral concerns and public opinion), that they can make decisions based completely on their ideology, discounting even precedent or law as the latter are malleable to essentially any of their goals. 7

While the fact of life tenure is empirically supported, the thought that Supreme Court justices are completely shielded from politics is now being re-examined. 8 Considering that Easton (1953, 1957) defined “politics” as the “authoritative allocation of values,” and the Supreme Court is, thus, seen as a policy-making body, the idea that justices are shielded from political concerns is theoretically inconsistent. Much research has shown that the public is aware of Supreme Court decisions, if only those that are salient. Barnum (1985: 662) concludes that:

The data also suggest that the post-New Deal Supreme Court did not necessarily defy the preferences of the majority when, in order to overturn legislation or protect minorities, it would have been obliged to do so. The Court either refrained from ruling or ruled equivocally on four issues of minority rights—busing, preferential treatment of minorities, legalization of marijuana, and legalization of homosexual activity—on which public opinion was highly negative.

7 Spriggs and Hansford (2001) argue that two legal norms influence the Court’s decision-making as well, but the legal model will be untested in this research.
Thus, the argument that the Court is a counter-majoritarian institution, or an institution that acts against the majority’s will, appears not to be empirically supported (Dahl 1957). If the Court were a counter-majoritarian institution, it would act consistently against the common will of the public, but Barnum falsifies the theory. Indeed, he finds much the opposite in that the Court does not decide against public opinion in general, and in the instances where it does, the trend of public opinion is thus changing. Barnum examined trend rates of public opinion and found a correlation between an increasing trend in public opinion and decision-making.

Acknowledging Barnum (1985), a logical extra-attitudinal factor which justices may take cues from is public opinion. Mishler and Sheehan (1993) show, using multivariate regression, that the U.S. Supreme Court is directly and indirectly affected by public opinion. By “directly,” Mishler and Sheehan are referring to lagged measures of public opinion. They find that when controlling for other traditional predictors of individual level decision-making, a lagged measure of public opinion (typically around five years) produces a statistically significant effect on the Court’s decision-making. Mishler and Sheehan (1993: 96) state that, “although the Court’s decisions are driven substantially by the ideologies of its members, fluctuations in the ideological tenor of public opinion and in the ideological and partisan orientations of the president and Congress are also important.” While “indirectly” refers to the nature of the nomination process, because it is presumable that the nominee will be ideologically similar to the president and the Congress. Mishler and Sheehan (1996: 198) summarize their argument:

public opinion has important direct as well as indirect effects upon the Court. Although this conclusion is inconsistent with a naïve attitudinal model that assumes the impossibility of individual change, it is fully consistent with a more sophisticated model in which attitudes are conceived as one of the important determinants of behavior, and public opinion induced changes in judicial attitudes are one of the important dynamics underlying aggregate changes in Supreme Court decisions.
While the Court will occasionally rule contrary to public opinion, over time according to Barnum (1985) and Mishler and Sheehan (1993; 1996), the Court is cognizant of public opinion and rules consistent with it or at least not inconsistent with it.\(^9\)

In a similar vein, Durr, Martin, and Wolbrecht (2000) find that in the rare circumstances when the Court rules contrary to public sentiment, public support for the Court declines. Taking Barnum (1985) and Durr et al. (2000) in conjunction, it would appear that some individual justices, those closer to ideologically moderate, pay attention to public opinion, and do so because there are consequences to the institutional legitimacy of the Court if they do not, where others who are closer to the ideological extremes are less concerned with public support. As Durr et al. (2000, 775) conclude, “the Supreme Court may be shielded from direct electoral accountability, but our analysis here suggests that the public does punish the Court’s divergence from its preferences, not at the ballot box, but by depleting one of its most valuable resources, the support of the American people.” Hence, there is an indeed a threat to the legitimacy of the Court in the form of public opinion, so one would expect, as Mishler and Sheehan (1993, 1996) found, that members of the Court closer to the ideological center are somewhat responsive to public opinion. Therefore, it is theoretically consistent to propose median justices will be more malleable when it comes to public opinion than those who are more polar in their ideologies.

The presidency, however, is held accountable in two ways: at the ballot box and by the American people. Presidential power has been, and will continue to be, a perennial topic in political science (e.g., Lee 1977; Meernik 1995; Mueller 1973; Partell 1997; Peterson 1994; Wildavsky 1966). Every president seeks to bring his/her philosophy on governing to shape

\(^9\) See also Mishler and Sheehan (1993, 1996) and Link (1995)
policy however; each president is limited in what he can do to extend his power during his time period. Taking into account how supportive the Congress is of the president, there is a large degree of variance in the power and influence each president could wield legally on both domestic and international situations (Nelson 2003). Therefore, it has been difficult for scholars to develop a unified theory that systematically measures presidential power. Neustadt (1990) argues that the most successful presidents in the post-WWII era are those who do not rely solely on their legal powers of the office, but those who use their substantial powers to persuade. This power to persuade is not limited to the public, but it can be used to influence those members of Congress and also justices of the Court (Kernell 1997). His ability to persuade those around him (Congress, his advisors, foreign nations, and the press) is tantamount to his being able to command. A president with far-ranging persuasive powers is able to convince persons that his interest is theirs as well. For Neustadt (1990, 40), "the essence of a President's persuasive task, with congressmen and everybody else, is to induce them to believe that what he wants of them is what their own appraisal of their own responsibilities requires them to do in their own interest, not his." Hence, with regards to the United States Supreme Court, the president can work as a thought leader for the nation, convincing the public, and, in turn, the Court that his interest is also their own.

Neustadt also argues that to a lesser degree, presidents must also make use of their power to command. A president’s power to command stems from those acts that the executive has been granted legal authority to carry out either from the Constitution, an act of Congress, or the implied consent of Congress or the States. As Justice Jackson noted in his concurring opinion in *Youngstown Sheet and Tube Co. v. Sawyer* (1952), “when the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all
that he possesses in his own right plus all that Congress can delegate. In these circumstances, and only in these, may he be said (for what it may be worth) to personify federal sovereignty.”

Hence, the president’s power to command is dependent upon the implicit or implied delegation of Congress if it does not stem directly from the U.S. Constitution.

King and Meernik (1999) address the president’s power to command in an examination of Supreme Court cases involving the president’s foreign policy powers. They investigate two hypotheses that the Supreme Court does not issue decisions in many cases that involve the foreign policy powers of the president because the Constitution of the United States gives the president more power in foreign policy powers than domestic and that, when the Court does issue a decision, it is more often than not in favor of the president. In testing to the first hypothesis, King and Meernik, using stringent coding rules, create a database of all cases involving the president’s foreign policy powers.\(^{10}\) They review 347 cases decided from 1790 to 1996. While not a large number when considering the total number of cases that the Court has decided, it certainly is a large enough number to rebut the assumption that the foreign policy powers of the president are adjudicated rarely. Testing the second hypothesis, King and Meernik argue that there are types of cases in the realm of foreign power that the president is more likely to lose than others because they arise from situations in which the presidents’ power is questionable in regards to the law. Creating dummy variables for each type of case they identify, they assess that in the cases that are decided on the basis of civil liberties, or cases on which the Constitution or relevant statutes are silent concerning the issue at hand, the president is indeed

\(^{10}\) They searched the WESTLAW database for all cases decided from 1790 to 1996 and initially found around 750 cases. After reading the majority opinions and rejected those cases which only tangentially referenced foreign policy, the researchers only kept the cases if an executive official argued the case in front of the Court or if they submitted an amicus brief on behalf of the president.
more likely to lose than cases decided base on specifically delegated powers of the president, such as his war powers or his treaty powers. King and Meernik, however, do not consider other factors as possible explanatory options, such as whether the country was engaged in an armed conflict or if a justice’s ideology coincided with presidential ideology. Ultimately, King and Meernik show how the Court has ruled, but not why it did so.

Traditionally, those analysts investigating a link between presidential influence and the Supreme Court considered the appointment process as the only means by which a president had any hope of influencing the decisions of the Supreme Court because, once on the Court, individual justices are shielded from political and electoral concerns as discussed earlier. This theory has been termed “judicial replacement” and asserts that the president can positively affect the Court’s decision-making outcomes, but only indirectly through the role of appointments (Norpoth and Segal 1994). Through appointments, the president can influence the ideology of the Court and, in turn, the way that the justices vote in cases. Those who tout the theory of “judicial replacement” claim that the only linkage between the Court’s opinions and the public’s preferences lie within confirmation process, to which the justices are subjected (Dahl 1957). It is argued that the Senators and elected office-holders, are representative of the public’s opinions and, therefore, those judges who complete the nominating process may share similar opinions to the public (Norpoth and Segal 1994). The theory of judicial replacement is closely tied to the attitudinal model as both argue that once on the Court, justices consider no external factors, only their individual ideologies, because they are shielded from political concerns since their office is life-tenured and their decisions are unable to be easily nullified. Therefore, according to proponents of the judicial replacement theory, the president only has an indirect effect on the outcome of the Court in any case (Dahl 1957; Funston 1975; Norpoth and Segal 1994).
However, Hurwitz and Stefko (2004) determine that “newcomer justices,” those recently confirmed to the Court, are more likely to follow legal precedent than their more senior colleagues. This means that the indirect influence of the president, which Norpoth and Segal (1994) find, may not be instantaneous, or uniform in nature among all justices, and only appears following an acclimation period of some indeterminate length (Hagle 1993; Wood et al. 1998).

Ducat and Dudley (1989) examine presidential success rates in the Federal District courts. Their dataset was constructed by searching WESTLAW for the terms “executive” or “president” in the headnotes or as a topic. Cases were then examined individually to assess content and retained only if the president or executive power was specifically discussed in the opinion of the Court. This process yielded 198 cases decided from 1949 to 1984. The researchers then had to decide if the cases involved the president’s foreign or domestic power, and if the cases were decided for or against the president. Ducat and Dudley included a variable which averaged the president’s approval rating, as measured by Gallup, for the three-month period prior to the decision being issued. Ducat and Dudley also included variables for the party of the president, whether the justice deciding the case was appointed by the president in the case involved, and whether the justice had previous executive experience at the state or federal level. The results found that only the foreign/domestic variable, presidential approval, and judicial loyalty to their appointing president variables were statistically significant. While these results are not directly applicable to president/Supreme Court relations because Federal Court judges may have further career aspirations (which depend upon presidential nomination), the Ducat and Dudley model will be used in this research with some modifications that will be discussed later.

This research will largely be an extension of the previous research of Yates and Whitford (1998) and Yates (2002). Yates and Whitford (1998) examined whether numerous external
factors hold sway on the Court when it considers cases of presidential power. By following similar data-gathering techniques as Ducat and Dudley, they collect 32 Supreme Court cases decided from 1949 to 1993, yielding 280 individual justice votes to analyze. Yates and Whitford examined numerous hypotheses to test the effect of different external factors on the decision-making process of individual justices.

Yates and Whitford’s (1998) first hypothesis is essentially the “two presidencies” thesis, first articulated by Wildavsky (1966). Wildavsky argued that the president has two distinct spheres of power when dealing with Congress. The president was theoretically expected to have much more influence over the Congress when discussing foreign policy issues because of the president’s enumerated powers in the Constitution and because of U.S. Supreme Court’s historical deference to the president in cases involving the foreign policy power. The president was expected to have comparably less success in cases involving domestic policy. While Wildavsky examined the executive’s relative success rates in Congress, Yates and Whitford hypothesize that a justice will be more likely to vote in favor of the president if the case deals with foreign or military powers because the Constitution in Article II, Section 2 and federal statutes (such as the ones adjudicated in U.S. v. Curtiss-Wright (1936) and Youngstown Sheet & Tube Co. v. Sawyer (1952)) in which the president is given considerable more power in the realm of foreign and military powers.

Yates and Whitford (1998) next propose the presidential approval hypothesis. It states that the president’s approval rating should be positively related to a justice’s vote in his favor. They hypothesize this because if justices are responding to external cues, such as public opinion

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11 For example, Korematsu v. U.S. (1944), Lichter v. U.S. (1948), and Youngstown Sheet & Tube Co. v. Sawyer (1952)
(Mishler and Sheehan 1993, 1996), in a case involving the president, it would be theoretically consistent to assume some justices would review the president’s approval rating for a cue as to how to vote in the case. If some justices consider public opinion and are unlikely to buck prevailing public sentiment, it would be likely to conclude that in cases involving the president, they would also consider his popularity as a cue to determine how to decide in a given case.

Yates and Whitford’s third hypothesis asserts that on the basis of partisan identification, a justice will be more likely to rule for or against the president. Depending on the operationalization of the variable, Yates and Whitford test two different versions of the justice party affiliation hypothesis, in order to retain continuity with previous research and to attempt to show the short-comings of previous operationalizations. The first version tested in Ducat and Dudley (1989) stated that Democratic Supreme Court Justices would be more likely to support extensions of presidential power than Republican justices. Ducat and Dudley tested the hypothesis in this manner because they agreed with the “savior” model of the presidency. The “savior” model of the presidency is associated with Franklin Delano Roosevelt and, as Nelson (2003, 3) described, “the model’s underlying rationale is the president is the chief guardian of the national interest, not only in foreign policy but also in domestic affairs…”. This rationale ultimately was time-bound as the political parties’ policy preferences have changed over time. Since Democrats were associated with Roosevelt and the “savior” model of the presidency, Ducat and Dudley hypothesize that Democrat justices will be more likely to rule for the president. The second version of this hypothesis, the one tested in Yates and Whitford (1998), states that a justice’s affiliation with the Democratic party should be negatively related with the likelihood that a justice will vote in favor of presidential power because Democrats have become
more recently suspicious of presidential extensions of power. Yates and Whitford test the hypothesis in this way because they believe in the post-WWII era, Democrats became wary of the vast powers of the president after the conflict in Vietnam and the abuses of Watergate (Thomas and Pika 1996) and, therefore, expected Democrat justices would be more likely to vote against the president in cases of presidential power.

Yates and Whitford’s fourth hypothesis is termed the “judicial appointment” hypothesis and proposes that if a justice has been appointed by the current president, that justice will be more likely to vote in favor of presidential power in deference to the president who appointed him/her. In addition to the simple assertion that a justice will be preferential to the president who nominated them out of patronage, Tate (1981) and Tate and Handberg (1991) offer an additional theory: they argue that presidents, who have definite policy goals, will nominate justices who have similar goals, or at the least similar ideologies. Therefore, not simply out of patronage will a justice decide for their nominating president, but also because the president and the justice should share similar ideologies and policy goals that may influence the justice’s decision-making.

The fifth hypothesis identified is the “same party” hypothesis and proposes that if the justice is of the same party as the president, that justice is more likely to vote in favor of presidential power as a factor of partisan unity. The fifth hypothesis is tested in an extended model which uses the Segal-Cover (1989) ideology scores. These scores, created for each individual justice since Earl Warren, place each justice on an ideological continuum ranging from -1 (most conservative) to +1 (most liberal). The Segal-Cover scores were developed by

12 There is a possibility for multicollinearity between hypotheses four and five. However, the hypotheses measure distinctly different theories and if multicollinearity exists between the variables, it is not expected to affect the model. This will be examined in my own analysis.
completing a textual analysis of newspaper editorials from the time a justice was nominated through the Senate’s conformation. These values were originally developed for use with civil rights cases, but other researchers have used them with limited success in different types of cases (Arrington and Brenner 2004; Segal \textit{et al.} 1995; Yates and Whitford 1998; Yates 2002; \textit{but see} Epstein and Mershon 1996).\footnote{Epstein and Mershon (1996) caution against using the Segal-Cover scores for other types of cases than they were developed however. Since this research will be an extension of Yates and Whitford (1998) who successfully employed the measures, this problem is unforeseen.}

The final hypothesis, called the “executive experience” hypothesis, states that if a justice has had prior executive experience in a post at the state or federal level (\textit{e.g.}, Attorney General’s office, state governor, etc.), he/she will be more likely to support presidential power because the justice will be familiar with the challenges of an executive office, and thus, may be more willing to extend the president power. Tate (1981) and Tate and Handberg (1991) each articulate similar theories regarding executive experience.

In the first model tested, what Yates and Whitford (1998) term the “Supreme Court Model” (543) (which is the same as Ducat and Dudley’s (1989) model), only two variables coefficient estimates were statistically significant and, thus, lend support to the hypotheses that they tested. The foreign/military coefficient, which measures case type, is positively signed and statistically significant, lending support to the “two presidencies” hypothesis, thus showing that justices are more likely to rule for the president in cases that involve his foreign policy powers. The justices’ party affiliation variable is negative correlated and also statistically significant, which lends support to Yates and Whitford’s hypothesis that a justice’s identification with the Democratic party would be negatively correlated with a vote in favor of presidential power at in least in more contemporary times.
In the second model tested, the Extended Model (545), the same hypotheses were tested, but the way in which two of them are specified had been modified. The justice’s party variable has been replaced by a justice ideology variable, and measured along the Segal-Cover ideology scale, which is a more precise measure than a simple, dichotomous party identification. The second variable replaced is the presidential approval variable. It was originally measured by averaging all Gallop polls concerning presidential approval for three months before the decision. This is the manner in which Ducat and Dudley measured presidential approval. Yates and Whitford (1998) operationalize their measure in a different way. They use the same three month period, but take the difference of the first and last Gallop poll, instead of a three month average. Yates and Whitford argue that measuring presidential approval in this way captures the trend of presidential opinion at the time of the decision rather than averaging out the period, which smoothes out any fluctuations. This Extended Model finds three variables coefficient estimates that reach statistical significance. Again, the foreign/military variable is positive and statistically significant. The justice ideology variable is negative (as was the justice’s party variable in the original model) and statistically significant. The approval trend variable is positive and statistically significant. This extended model improves upon the original model’s percent reduction of error (PRE). The original model’s PRE was 11.1, while the Extended Model has a PRE of 13.5. Therefore, while the variables in the Extended Model measure the same concepts as in the original model, they are measured in a more precise way by using continuous measures (Segal-Cover scores) and a better operationalization of public opinion trend, which increases their predictive value.

14 The PRE measure tells a reader that by knowing the values of all the independent variables, we can better predict our dependent variable by that percent of.
Yates and Whitford argue that the PRE measures did not perform as well as expected because of the inclusion of both domestic and foreign/military cases together within the same model. Therefore, they estimate the Extended Model again, separating domestic cases and foreign policy cases. While the two variables that were significant in the Extended Model originally remain significant and in their hypothesized directions, the PRE in the domestic model jumps to 25.3, while the foreign model declines to 11.6. These results suggest that the external factors have more of an influence in cases involving domestic powers than foreign policy power cases.

Yates (2002) modifies his model by the inclusion of a new variable that increases the predictive power of his model. Yates hypothesizes that if the president or his officers are the petitioner before the Court, the justices will be more likely to vote against the president. Yates (2002) argues that in most cases, the Court has extensive discretion when deciding what cases it will hear. When justices consider what cases to grant certiorari, they will most likely choose cases where the Court will overturn the lower court decision, thus on average ruling for the petitioner. However, in high profile cases such as those involving the Office of the President, the Court does not have as much discretion because there is external pressure on the institution to resolve the controversy. Hence, in cases involving the president, the preferred decision of the Court will be when the president is a respondent because in this context, the Court can vote simultaneously to uphold presidential power and the decision of the lower court thus influencing
the ruling. This variable was found to have extensive predictive power and substantially increases the model’s PRE to 49 percent.\textsuperscript{15}

Yates, however, missed one aspect that perennially affects decision-making at all levels of government: when the United States is involved in an armed conflict, a “rally around the flag” effect takes place. A “rally around the flag” effect occurs when armed conflict involving the United States causes public opinion of the president to rise significantly, and, thus, his success rates in Congress also increase (Baker and Oneal 2001; Lee 1977; Mueller 1973). Meernik (1995) argues that while armed conflict does not give the president a blank check on which to write his policy initiatives, it does have a calculable affect on public opinion. Since Congress is a representative institution, and, therefore, theoretically responsive to public opinion, Congress may show more deference to the president in times of armed conflict. Little research has examined the effect that an armed conflict may have on decision making of Supreme Court justices.\textsuperscript{16} The presence of an armed conflict creates a situation in which a surplus of power is transferred to the president and, thus, decision making of the Court may recognize this. Previous courts have articulated similar doctrines in \textit{Korematsu v. U.S.} (1944) and \textit{Lichter v. U.S.} (1948).

Epstein, Ho, King, and Segal (2005), however, disagree with this theoretical assertion. They find, using nonparametric matching, that during wartime, cases that are not directly related to the war will be decided in a more conservative manner than cases decided when no war is present. However, contrary to most scholarly discourse on the subject, they conclude that the presence of war does not have a noticeable statistical effect on Supreme Court decision making.

\textsuperscript{15} Besides the inclusion of a new variable into the model, Yates (2002) employed a logistic regression where Yates and Whitford (1998) uses a probit regression. Yates (2002) also included dichotomous variables for each presidential administration in to control for interadministration deviations, “that may occur due to characteristics and phenomena attributable to specific presidents.”

\textsuperscript{16} For example of such research see Lanier (2003), Chapter 6
in cases directly related to the war. Epstein et al. (2005, 109) summarize: “we show that war causes the Court to decide cases unrelated to the war in a markedly more conservative direction than they otherwise would. However, war appears to have no effect on the conservatism of the Court’s decisions in cases closely related to an ongoing military conflict.”

These results are questionable, however, because of the way in which “crisis” is defined. In operationalizing the term “crisis,” Epstein et al. formulate a three-part definition: the first two parts of the definition tap the traditional definition of crisis which are periods of actual war and events which “specialists have labeled as ‘major.’”17 Their third measure is, “the presence or absence of a ‘rally effect’ in the form of a ten-point (or greater) surge in presidential popularity caused by an international event” (46). Only one part of this three-pronged definition needs to be present for it to be labeled as a time of “crisis.” These international events may, or may not, even be related to an actual interstate conflict. Through the use of this three-part definition, their results may be inaccurate. By including questionable operationalizations of “times of crisis,” they artificially inflate the number of cases that occurred during these time periods. For my analysis, I employ a standardized definition of “armed conflict,” which arises from the Uppsala Conflict Data Program (UCDP).18 These data from the UCDP has been used in scholarly research since 1988, most recently by Harbom and Wallensteen (2005), and is updated annually. These data have also been backdated to 1946 (Gledistich et al. 2002). This database has been tested numerous times for validity and reliability while the three-pronged definition of conflict used by Epstein et al. is being utilized essentially for the first time.

17 They include World War II, Korean, Vietnam, and Gulf Wars, and the war in Afghanistan. They also include the Berlin Blockade, the Cuban Missile and Iran-Hostage crises, and September 11.
18 “An ‘armed conflict’ is a contested incompatibility which concerns government and/or territory where the use of armed force between two parties, of which at least one is the government of a state, results in at least 25 battle-related deaths” Wallensteen and Sollenberg (1995).
Summary

Interactions between the Supreme Court and the president are a complex, and under examined, occurrence. Outside of the research of King and Meernik (1999), Yates and Whitford (1998) and Yates (2002) there has been little empirical work done examining the decision making process of the individual justices of the Supreme Court in cases involving presidential power. While the attitudinal model (Segal and Spaeth 2002) continues to be the dominant paradigm in the field of judicial behavior, other researchers (e.g., Barnum 1985; Durr et al. 2000; Mishler and Sheehan 1993, 1996) have successfully predicted decision-making of the Supreme Court using more sophisticated models which include extra-attitudinal and extra-legal factors.

Thus, to successfully examine the individual level decision-making of the Supreme Court in cases involving presidential power a naïve attitudinal model (Mishler and Sheehan 1996) will not suffice. As such, the next chapter will build the theoretical backing to help move beyond a simple attitudinal model, to a more robust and sophisticated model using numerous extra-attitudinal and extra-legal factors which seek to more accurately describe the complex relationship between individual level justice voting in cases of presidential power.
CHAPTER TWO: ATTITUDINAL AND EXTRA-ATTITUDINAL FACTORS EFFECTING DECISION-MAKING

This thesis is not developed in isolation from other theory; its development is in response to the current dominant paradigm in judicial decision-making literature, the attitudinal model, as Segal and Spaeth (1993, 2002) developed. The attitudinal model asserts that in all cases which appear before the Court, the individual justices need only to reference their personal ideologies (attitudes) relative to the issue stimulus of the case. If their ideology is consistent with tenets of the case, the attitudinal model predicts that the justices will rule affirmatively in it. If the justice’s ideology is not consistent with the facts of the case, that justice will vote against the case. This model has its merits when it comes to its predictive capabilities of most cases. Furthermore, using ideology to predict vote choice is consistent with the bulk of literature of the field (e.g., Schubert 1965; 1974; Tate 1981; Tate and Handberg 1991). However, this model does not include any variable other than the ideology of the justice, what Mishler and Sheehan (1996: 198) term the “naïve attitudinal model.”

While political scientists strive for parsimony when developing models of personal behavior, the attitudinal model may be faulted for its simplicity (Mishler and Sheehan 1996). The attitudinal model is in essence a one variable model, using ideology to predict a justice’s vote choice. This one variable model does not take into account any extra-attitudinal factors. Segal and Spaeth (2002) argue that justices of the Supreme Court are isolated from external factors that would otherwise affect decision-making. Segal and Spaeth note that Supreme Court
justices typically have no goals to seek further office\textsuperscript{19}; appointment to the Court is the culmination of their employment and life goals. Furthermore, since the Supreme Court is not subject to being over-ruled by other courts, the justices should be free to implement their policy goals through their office displaying their private notions on public issues (Schubert 1965). Also, Segal and Spaeth note that justices are nearly immune from political accountability, noting that only one justice in the history of the Court was impeached and that vote failed (Steamer 1971). Additionally they lack electoral accountability since they are nominated to their office, and have job security, because their positions are life-tenured. To further show that justices are able to act solely on their policy goals, Segal and Spaeth note that the Supreme Court controls its own docket to a large extent. They state that while this fact alone does not means justices are acting on their policy goals, it is a prerequisite to their doing so (Segal and Spaeth 2002).

While some of Segal and Spaeth’s assumptions about the Court are empirically supported; they fail to acknowledge the interconnection of the branches of the federal government. Segal and Spaeth (2002) correctly assert that the decisions of the Court are not reversible by any other court; however, they simply attempt to explain away the check and balances that help to control the Courts decisions (Segal and Spaeth 2002). The Congress can override the Court’s decision-making through statute as it did following \textit{Mansell v. Mansell} (1989). Since Congress controls the language of the law, it is certainly free to modify (Hausegger and Baum 1999). Also, and of more impact to this study, the president also plays a role when it comes to judicial decision-making for it is his charge to enforce the decisions of the Supreme Court. While it is rare, the president has refused to enforce the Court’s decision before

\textsuperscript{19} According to Epstein \textit{et al.} (2002), only two justices (David Davis in 1877 and Charles E. Hughes in 1916) retired to seek elective office.
(e.g., *Worcester v. Georgia* 1831). While this occurrence is certainly a rarity, the threat of its potentiality looms large. A president’s refusing to enact a Court decision is tantamount to an executive fiat, and furthermore, it serves as an amazing rebuke to the institutional legitimacy of the Court.

Segal and Spaeth also correctly state that members of the Court are rarely impeached, but this fact alone does not mean that the justices or the Court are immune from political accountability (Mondak 1994). Political accountability does not come in the form that justices are susceptible to being impeached, but rather from challenges to the Court’s institutional legitimacy. Institutional legitimacy, in the form of public support, is necessary for justices to act on their policy goals. As Justice Felix Frankfurter stated in *Baker v. Carr* (1962, 267), “the Court’s authority—possessed neither of the purse nor the sword—ultimately rests on sustained public confidence in its moral sanction.” If the Court acts in a manner that draws negative attention upon the Court, it is more likely its decisional outputs will be questioned by other branches of the federal government, if not the public at large. Such was the case during the Roosevelt Court-packing plan. During the 1930s, much of President Franklin Roosevelt’s New Deal legislation was being overturned by the conservative Hughes Court. These rulings were unpopular with both the presidential administration and the populace as a whole. President Roosevelt, responding to the lack of institutional legitimacy, proposed a plan which would increase the size of the Supreme Court from nine members to fifteen (Pritchett 1958). While this proposal served to be unpopular as well, two justices, Charles E. Hughes and Owen J. Roberts, began voting with the liberal bloc of the Court and made the issue moot (Pritchett 1958). Therefore, while political accountability may not come in the form of direct challenges to
individuals of the Court, it can come from broader, substantive challenge to the legitimacy of the Court.

In certain types of cases, mostly those of low saliency, the set of specifications which Segal and Spaeth set out may affect the Court in the way it describes. Thus, in certain types of cases, the attitudinal model may be more valid. Justices in lower saliency cases may act on the basis of their ideology alone. However, in this subset of cases that deal with presidential power the attitudinal model is too simplistic to account for individual level decision-making because of the high saliency of these cases and the separation of power conflicts that are inherent in such cases. Therefore I disagree with Segal and Spaeth (2002, 111) when they state, “justices need not respond to public opinion, Congress, or the President; and because the Supreme Court is the court of last resort the justices, unlike their lower court colleagues, may freely implement their personal policy preferences as the attitudinal model specifies.” Cases which involve the president are highly salient encounters with extremely unique separation of powers conflicts. Despite the justices’ perceived “shielding” from outside influences, such cases as this study examines, which have the ability to call into question the institutional legitimacy of the Court, should be approached in a different manner than the naïve attitudinal model suggests.

This subset of cases references specific instances when the two branches of government come into direct contact and possible conflict with each other. These cases are not typical; across the 56 years that the study examines, only 38 cases were found. The rarity of these types of cases should serve as a signal to researchers that the Supreme Court is typically wary of hearing these cases. Therefore, when these cases appear on its docket, one which they largely control, the Court may handle them with special care because these are fairly rare, extremely public, and nationally sensitive cases.
If the predominant theory of Supreme Court decision-making, the attitudinal model, were applied to this subset of cases, despite the uniqueness of the political ramifications (which amount to direct judicial interaction with the executive branch), the balance of power issues that arise, and the distinct constitutional questions, it may be expected that justices would still simply vote their policy preferences because the attitudinal model assumes that all individual level decision-making by the Supreme Court justices is a function of ideology. This theory is too simplistic to account for the complexities that arise in separation of power cases, in particular in cases that involve presidential power. Therefore, while acknowledging the importance of a justice’s attitude in decision-making, this study postulates that there are multiple attitudinal and extra-attitudinal factors that may influence a justice’s individual level decision-making.

Following the research of Yates (2002) and others, this study theorizes that, Supreme Court cases in which the president or presidential power is being adjudicated, the attitudinal model of judicial decision-making may not completely account for the justices’ individual decision-making process because in these highly salient cases, the presence of external and political cues may influence the justices because highly salient cases such as these may call into question the very legitimacy of the Court. Since there are numerous political and external factors that can affect the justices’ decision-making process in cases involving presidential power, there will be numerous hypotheses in order to test this theory.

Acknowledging that the Court’s decision-making in salient cases are directly affected by public opinion (Mishler and Sheehan 1993, 1996), and further realizing that if the Court rules contrary to public opinion, the diffuse public support of the institution may erode (Durr et al. 2000), it is theoretically consistent that in cases involving the president, the justices of the Court may look to the president’s approval rating as a possible cue as to how to rule in a certain case.
Considering the myriad of topics on which the Court issues decisions, it would be nearly impossible to judge the publics’ opinion in all of them. Furthermore, the public’s opinion is certainly not fixed on some abstract issues. With regard to the president, however, public opinion is well formed and readily available for the justices to reference. Ruling against a popular president may well create questions about the Court’s institutional legitimacy. Thus, it would be more likely for a Court to be willing to rule against an unpopular president. An unpopular president cannot effectively call upon public dissent of the Court’s decision because of the associated low political capital. In essence, public approval of the president will serve to cue in part the justices as how they should vote. Therefore,

\[ H_1. \text{The president’s approval rating will be directly related to the likelihood that a justice will cast a vote supporting or extending presidential power.} \]

While King and Meernik (1999) find that the president is not universally successful in cases that concern his foreign policy powers, it is a well-established finding that the president can act more authoritatively in foreign policy because of the greater power given to him pursuant to Article 2, Section 2 (Wildavsky 1966, 1989). Wildavsky argued that the Constitution invested the president with a unique repository of power in the realm of foreign affairs. From the president’s position as the head of state, he receives foreign diplomats, makes treaties, and represents the nation on an international scale. Furthermore, as the commander-in-chief, the president is constitutionally the wager of war. Wildavsky hypothesized that because of these specific constitutional dictates, a president could expect higher success rates in Congress with regard to foreign policy concerns. While Wildavsky discussed presidential power via the Congress, the president may also enjoy increased deference before the Court. Indeed, previous
research has found that the solicitor general (the lawyer for the Office of the President) experiences higher success rates before the Court than other litigators (McGuire 1998; Salokar 1992). The Court should recognize the constitutional advantages that the president enjoys when acting in accordance with his substantial foreign policy powers. Furthermore, in numerous decisions handed down by the Court (such as *U.S. v. Curtiss-Wright Export Corp.* (1936) and *Youngstown Sheet & Tube Co. v. Sawyer* (1952)), justices have consistently articulated that the president can act more decisively in the realm of foreign policy than within the domestic arena. Therefore, I expect that:

\[ H_2. \textit{A justice will be more likely to vote to support the president’s position if the case involves foreign or military powers than a domestic power issue.} \]

In the post-WWII era, Democrats began to question the extensive powers of the president. The occurrences of the Vietnam War and Watergate only served to solidify their opinions (Thomas and Pika 1996). The Democratic Party began to realize that with broad extensions of presidential power came the possibility of the abuses of that power. Democrats in Congress sought to curtail the broad powers of the president. As Fisher (1994, 741) stated, “the scope of presidential war powers climbed to such heights that the [Democratic] Congress felt compelled to pass the War Powers Resolution in 1973.” The War Powers Resolution sought to limit the power of the president to wage armed conflict without a Congressional declaration of formal war. Similarly, it would be theoretically consistent to expect that Democrats on the Court would behave similarly in voting to restrict the powers of the presidency. Therefore, consistent with the results of Yates and Whitford (1998),
H₃. A justice who is affiliated with the Democratic Party will be more likely to decide against the president in cases of presidential power.

Adherents of the theory of judicial replacement argue that the only time that a president can influence the decision making of the Court is through the nomination process (e.g., Dahl 1957; Funston 1975; Norpoth and Segal 1994). Tate (1981) and Tate and Handberg (1991) theorize another reason, besides patronage, that justices may be more deferential to their nominating president. They assert that a president will nominate someone who shares similar goals and ideologies because they wish the legality of their policies to upheld in the Court. Therefore, despite whichever motivation is exerting its force,

H₄. A justice is more likely to rule for the president if that president nominated them to the bench.

Ducat and Dudley (1989) and Yates and Whitford (1998) argue that a justice who has previously served in an executive position may sympathize with the president, who occupies an office not so dissimilar from his/her previous employment. They so theorize because there are certain restraints that come with the executive office and the uniform similarities of these restraints on executive offices may affect the justices’ votes. Previous judicial experience has been found to serve as a strong predictive variable on individual level decision-making (Tate 1981; Tate and Handberg 1991), and previous executive experience is hypothesized to have similar effects. Therefore,

H₅. If a justice has had prior executive experience, then he or she will be more likely to decide in favor of the president.

Yates (2002) suggests that when a president appears before the Court, his status as a
litigant (petitioner or respondent) may influence how individual justices will vote in the case, citrus paribus. Under most circumstances, the Court has discretion in deciding what cases to hear (e.g., Perry 1991) but in cases that are highly salient, such as those that involve presidential power, or that involve external pressures, such as concentrated public opinion and media coverage, make it more likely that the Court will grant certiorari. In these situations, Yates hypothesizes that the Court will prefer situations in which it can rule simultaneously consistent with the ruling of the lower court and for the president. Thus,

\[ H_6. \text{A justice will be more likely to support presidential power if the president appears in front of the Court as a respondent.} \]

The president traditionally experiences a “rally effect” when the United States is involved in an armed conflict (Baker and Oneal 2001; Lee 1997; Mueller 1973). A “rally effect” is characterized by higher degrees of support for the president by the public and the Congress than otherwise observed. During times of conflict, the president has more authority to act in both domestic and foreign powers (Baker and Oneal 2001). The Court, therefore, may be influenced by a similar rally effect. Some Supreme Court cases, such as Korematsu v. U.S. (1944), spell out specifically that during times of war, the president has a heightened degree of power. Therefore,

\[ H_7. \text{If the United States is involved in an armed conflict at the time of the Court’s decision, a justice will be more likely to rule in favor of the president.} \]

**Uniqueness of The Analysis**

This study’s contribution to this area of research is two-fold: first, the most recent research on the issue was concluded in 2002; that analysis covers the period from 1949 to 1993 (Yates 2002). Using nearly the same model as Yates and Whitford (1998), I will update the
analysis through the 2005 calendar year. This will help analysts understand how the Court behaves when adjudicating cases involving presidential power, and how that behavior may have been modified since the issue was last examined.

Second, by inclusion of the armed conflict hypothesis ($H_7$), I introduce a new concept to the study of president/Supreme Court relations. If the presence of an armed conflict does influence how the Court decides, besides further showing the contextual limitations of the attitudinal model to accurately predict Supreme Court decision-making in cases involving the president, it will also provide further insight into interaction between these two branches of government since this is one of the two formal avenues in which these branches directly interact. Furthermore, it will extend the “rally effect” literature into an area in which it has rarely been used, the study of the U.S. Supreme Court.

**Data Considerations**

The data for this research will be drawn from numerous published sources. To locate the Supreme Court cases that involve presidential power, I followed the same basic case collection procedures of Yates and Whitford (1998). First, I obtained a list of all cases that involve Article I, Section 7, Article II, or Amendments XII, XX, XXII or XXV of the United States Constitution as listed in the *United States Supreme Court Judicial Database* (Spaeth 2002). To include those cases that this process may have missed, I then searched the *United States Supreme Court Digest-Lawyers’ Edition* for the general topics of United States, War, and Constitutional law for cases which mentioned the president or the executive branch. Cases were then screened by determining if presidential power was listed as the key point of law or discussed in the text of the case. Each case was then read and retained only if substantial discussion (defined as a paragraph
or more) was given to presidential power in the decision. This selection of cases was then “shepardized” using Shepard’s Citations to determine if the progeny of the original cases dealt with presidential power as well. This process yielded 38 cases.

The unit of analysis, however, will not be the case itself as this will result in too few cases. The dependent variable \(N=337\) is the individual votes of the justices in cases from 1949 to 2005 where presidential power is being adjudicated, where 1 is coded as being a vote for presidential power and 0 is coded as a vote against presidential power. I operationalize my dependent variable in this way in order to capture more variation, to increase my sample size, and to further provide a more micro-level, individual view of the decision-making process consistent with Mishler and Sheehan (1993, 1996), as they find that when using attributes and public opinion data to explain decision-making, median justices will be more affected by public opinion than others.

The first independent variable is presidential popularity. The conceptual definition of presidential popularity will be the extent to which the American public approves of the job the president is doing. This variable will be operationally defined as the change \(t_2 - t_1\) in Gallup Public Opinion Polls over a three-month period preceding the decision of the U.S. Supreme Court in a given case. Yates and Whitford (1998) test presidential prestige in two ways: a simple average of all polls done in three month period and the change over time in those ratings. They take the difference of the two polls as the measurement of presidential popularity. Measured in this way, the variable should tap intra-administrational changes in popularity and produce a more representative picture of popularity trends than an average measure of popularity over three

\[20\] Yates and Whitford found 32 cases decided from 1949 to 1993.

\[21\] The question that will be utilized from the Gallup Poll asks, “Do you approve or disapprove of the way [name of the president] is handling his job as president?”.
months however, the less precise measure of popularity will be used in a separate model. Measured as the change over a three month period, these data hypothetically could range from –100 to 100. In actuality, the parameters of this variable range from –12 (which occurred in three cases) to 25 (which occurred only in one case).

The second independent variable is case type. Case type is conceptualized as whether the case being examined concerns the foreign policy powers of the president or domestic policy powers of the president. This variable is operationalized by including cases that concern the military powers of the president with those that concern the foreign policy powers into one case type. The reasoning underlying this variable’s operationalization is that the Constitution provides the president with specific enumerated powers in both the realms of foreign policy and military action, pursuant to Article II, Section 2. Moreover, military action usually involves another state, which further taps a president’s foreign policy powers, so inclusion of the president’s military power with the foreign policy power is consistent theoretically. This variable as measured contains two values; coded 0 if the case involves foreign policy issues and coded 1 if the case deals with domestic policy concerns.

The third independent variable is justice ideology. Justice ideology is conceptualized as the relative political liberalism of each member of the Court using the contemporary understanding of that term. The operational definition will be the placement of the justice on the Segal-Cover (1989) continuum. The scores were developed as a result of completing a content analysis of newspaper editorials from the time that the president nominated the justice

22 Other researchers use a similar classification: Ducat and Dudley (1989), King and Meernik (1999), Peterson (1994), and Wildavsky (1966).
23 This data will be drawn from *The Supreme Court Compendium* (Epstein et al. 2003).
until their conformation. The scores range from 1, being associated with the most liberal, to 0, being the most conservative. These ideology scores provide direction (they range from 0 to 1, are not constrained as either 0 or 1) and an interval level of measurement. Tate (1981) demonstrates that personal attribute models, including party identification measures, have significant predictive powers when analyzing individual justice votes in economic and civil liberties/rights cases. Tate and Handberg (1991) further show that personal attribute models, including party identification measures, have predictive success over substantial time periods (1916 – 1988). Ducat and Dudley used the less precise measure of simple party identification, but their results were less impressive than those of Yates and Whitford, who employed the more precise measurement. This study will also include measures of personal attributes such as party identification and rural/urban origins, following Tate (1981) and Tate and Handberg (1991). An alternative model will be estimated without the Segal-Cover scores, but including party identification and rural/urban origins. Party identifications will be coded so that 0 is Republican, 1 is Independent (Frankfurter for this analysis), and 2 is Democrat. The rural or urban origins variable will be coded 0 if the justice is from rural origins, and 1 if the justice was raised in an urban environment. These less precise measures of personal attributes are expected to have a similar effect on the model as do the Segal-Cover scores, but to a lesser extent because of their lack of specificity.

The fourth independent variable included in the present analysis is the nominating president. This variable is conceptualized and operationalized as the president who nominated each justice. Some cases arise that concern a president who has already left office. These cases

24 Furthermore not all justices are easily assigned to political parties (namely, Frankfurter and Brandeis) so the use of the Segal-Cover scores should more accurately predict their behavior
will be assigned to the president who the case involves, not the incumbent. Previous researchers
have hypothesized that if a justice is nominated by the president, who is party to the case being
adjudicated, then the justice will be more likely to vote for the president. Ducat and Dudley
(1989) find this coefficient estimate to produce a statistically significant effect on their model,
is because Ducat and Dudley were researching Federal Court judges, who, while they have life
tenure, still are dependent upon the president for a possible promotion to the Supreme Court or
other position. Yates recognizes that the Supreme Court justices lack this influence by the
nominating president. The variable will be included in the model to retain comparability with
the previous research and to test if the relationship has gained in statistical significance since
previous research was conducted. It will be coded as a dummy variable for which 0 is a justice
not nominated by the president involved with the case, and 1 is a just who was nominated by the
president which the case involves.

The fifth independent variable is executive experience. This variable is conceptualized
and operationalized by the presence of any form of governmental executive experience in the
justice’s historical career at the state or federal level. It is hypothesized that justices with prior
executive experience will be more deferential to the president because the justices may
sympathize with the limitations of an executive office (Tate 1981; Tate and Handberg 1991).
Both Ducat and Dudley (1989) and Yates and Whitford (1998) find that prior executive
experience has no statistically significant associated with on the dependent variable; however, it
will be retained to further continuity of this research with the existing literature. This variable
will also be coded as a dummy variable such that a justice coded 0 had no prior executive
experience and a justice coded 1 had prior executive experience at the federal or state level.
The sixth independent variable is petitioner status. This variable is conceptualized and operationalized as the litigant status which the president appears before the Court, whether it is as petitioner or respondent. Yates (2002) hypothesized that if the president appears in front of the Court as respondent, the justices will be more likely to rule in favor of the president because the president has already won in a lower court. Typically, the Court possesses a good deal of discretion when granting certiorari and chooses cases which it is likely to reverse (Provine 1980; Perry 1991). For example, according to Epstein et al. (2003), in 2001, 9,195 cases were petitioned the Court for review, however, only 88 of those cases were granted certiorari. However, in high profile cases such as those which involve presidential power, the Court does not possess the same amount of discretion because these are abnormally public controversies in which the Court could lose some legitimacy if it denied certiorari. Cases involving the president fall into this category. As Yates (2002, 34) notes, “when the president appears as a respondent, he has, in effect, been hauled before the Supreme Court by a litigant that the federal court chose not to support. Here, the Court can both support the president and decide consistently with the lower federal court.” This variable will be coded as 0 if the president is appearing before the court as a petitioner and 1 if the president appears as the respondent.

The seventh independent variable is the presence of an armed conflict. This variable is conceptualized as the presence of an armed conflict in which the United States is involved in on the date on which the Supreme Court announces its decision in the case being analyzed. This research will use the definition of armed conflict as identified in Wallensteen and Sollenberg (1995, 345): armed conflict is, “a contested incompatibility which concerns government and/or territory where the use of armed force between two parties, of which at least one is the government of a state, results in at least 25 battle-related deaths.” The presence of armed
conflict will be operationalized as armed conflicts involving the United States and another political actor. This data will come from the Uppsala Conflict Data Program. I will alternatively, in a separate model, specify armed conflict by the Correlates of War (COW) definition to determine if magnitude of the event, in the form of body count, has a noticeable effect upon the decision-making of the Court. The COW database classifies armed conflict in a similar way as the UCDP, but only includes an event in the database if it has had at least 1000 battle-related deaths in a year. The COW data has been used substantially since Singer and Small (1972) and is the dominant dataset in the study of international conflict. Measures for both armed conflict variables will be coded as dummies, with 0 being the absence of armed conflict and 1 being the presence of it.

To analyze this data, I will employ a logistic regression because my dependent variable is dichotomous. The equation for the logistic regression is

\[ y = \frac{e^{(\alpha + \beta_1 x_1 + \beta_2 x_2 + \ldots + \beta_n x_n)}}{1 + e^{(\alpha + \beta_1 x_1 + \beta_2 x_2 + \ldots + \beta_n x_n)}} \]

Where:

- \( b_1 = \) presidential approval rating
- \( b_2 = \) case type
- \( b_3 = \) justice party affiliation
- \( b_4 = \) nominating president

For examples of other research using the UCDP see Gleditsch et al. (2002) and Wallensteen and Sollenberg (1995).
Since my dependent variable is dichotomous (a vote either for or against the president), using OLS regression would violate one of the assumptions of linear regression, that being the linearity of the dependent variable (Cleary and Angel 1984; Lottes et al. 1996; Walsh 1987). Since the dependent variable can only obtain two values, a logistic regression accounts for this, by assuming an s-curve instead of a linear form. Yates and Whitford (1998) initially used probit analysis following the research of Ducat and Dudley (1989); however, when Yates (2002) modified the model, he employed logistic regression which provided a better fit for the dependent variable. Since this study will be extending that research of Yates, it will use the same methodology in order to maintain continuity and comparability to that study.

**Summary**

Thus, this study will examine the effect of attitudinal and extra-attitudinal factors on the individual level decision-making of the justices of the U.S. Supreme Court in cases involving presidential power. By using both attitudinal and extra-attitudinal factors, this study will attempt to show the limitations of a simple attitudinal model in complex and highly salient cases such as those which involve presidential power.

Before examining the formal model’s performance the data needs to be formally examined to describe the data and to detect for any possible statistical errors. In order to do this descriptive statistics and bivariate correlations will be used. These methods of analysis will

\[ \beta_5 = \text{prior executive experience} \]

\[ \beta_6 = \text{litigant status of the president} \]

\[ \beta_7 = \text{presence of armed conflict} \]
provide a better understanding of these data being used and allow the researcher to detect if there are any abnormalities associated with the data collection process.
CHAPTER THREE: EXPLORATORY ANALYSES OF THE DATASET

The time period to be analyzed in this study spans 56 calendar years, from the beginning of the Vinson Court (1949) to the end of the Rehnquist Court (2005). During this period, 30 different Supreme Court Justices served; the first, Hugo Black, was sworn in on August 19, 1937: the last, Stephen Breyer, on August 3, 1994. Across this period, four different chief justices served: Frederick Moore Vinson (1946–1953), Earl Warren (1953–1974), Warren Earl Burger (1969–1995), and William Hubbs Rehnquist (1986–2005). During this time, eleven presidents also served, beginning with Harry S Truman and continuing through George W. Bush. This period of analysis begins shortly after the end of World War II, including the Korean War, the Vietnam War, Operation Desert Storm, the War in Iraq, and the entire Cold War. It also includes minor skirmishes that the United States was involved in, including the Taiwan Strait Crisis in 1954 and 1958, the nationalist uprising in Puerto Rico in 1950, the Bay of Pigs invasion in 1961, numerous conflicts in Southeast Asia during the 1960s, the American Invasion of Grenada in 1983, the U.S. invasion of Panama in 1989, and the assault on Afghanistan and Iraq beginning in 2001.

In short, the time period being examined is complex historically and politically. In the 56 years that this study covers, numerous events have occurred that could serve to influence decision-making of the Court. If external factors may influence how the members on the Court behave, it is important to include them in any analysis of decision-making but especially in cases that involve presidential power. Decisions in many Supreme Court cases have little impact outside of the issue area that the particular case involves. That is to say, the precedent of most cases, while law and binding upon the nation, has limited influence outside of the topical area of
the case. Rulings in tax law affect only tax law while, rulings in civil procedure affect only civil procedure. This is certainly not the case with presidential power. A ruling for or against the president can have “fallout” effects for other institutions and branches of government. For example, in *INS v. Chadha* (1983), the Court held that a legislative veto was unconstitutional. A legislative veto refers to the congressional negation of federal agency or presidential actions. While the direct ruling in the case meant that the House of Representatives was not allowed to overrule Immigration and Naturalization Services and deport Chadha, the fallout of the decision was much broader. Following this decision, executive agencies were free from Congressional oversight in the form of a legislative veto. Considering executive agencies range from the Federal Communications Committee, which regulates the broadcast airwaves, to the Bureau of Alcohol, Tobacco, and Firearms, which is a law enforcement agency, the fallout effect was widespread. Thus, it would seem anti-theoretical that the esteemed members of the highest Court would approach a tax law cases with the same decision-making strategy as a case involving presidential power. Therefore, external factors should be considered in order to develop the most theoretically developed and predictive model of the justices’ behavior in this subset of cases.

**Descriptive Statistics**

As stated previously, there are 337 individual votes to be analyzed this analyses dataset. On the whole, 201 votes were cast in favor of presidential power, representing 59.6 percent of the sample. Presidents have fai red well before the Court throughout time, with the notable exceptions of President Nixon and President Ford. President Nixon won only 10 votes out of the
Justice Votes In Cases of Presidential Power

Figure 1 Individual Justice Votes Over Time
52 the total votes cast involving his administration, while President Ford won only seven votes out of 17 total. President George W. Bush has, through 2005, won a little less than half has well, but with more years remaining in his presidency, this is a trend that could be merely temporary.

Table 1 shows the proportion of pro-presidential power votes by total votes. There is a significant discrepancy between the cases reported by Yates and Whitford (1998) and myself. For some presidents, I found more cases than they did; for others, I found fewer. Since similar coding rules were used, this result seems curious. While Yates and Whitford do not report their case list, mine are included in the appendix for replicability and review by future researchers.

Table 1 Presidential Success Before the Supreme Court: Truman through George W. Bush

<table>
<thead>
<tr>
<th>President</th>
<th>% Votes of Total Votes</th>
<th>President</th>
<th>% Votes of Total Votes</th>
</tr>
</thead>
<tbody>
<tr>
<td>Truman (1949 – 53)</td>
<td>50% for 18 Votes [60 % for 25 Votes]</td>
<td>Carter (1977 – 81)</td>
<td>88.8% for 9 Votes [38.9% for 18 Votes]</td>
</tr>
<tr>
<td>Eisenhower (1953 – 61)</td>
<td>50% for 18 Votes [16.7% for 8 Votes]</td>
<td>Reagan (1981 – 89)</td>
<td>70.9% for 62 Votes [61.4% for 70 Votes]</td>
</tr>
<tr>
<td>Johnson (1963 – 69)</td>
<td>76.4% for 17 Votes [66.7% for 9 Votes]</td>
<td>Bush Sr. (1989 – 93)</td>
<td>91.6% for 36 Votes [64.2% for 53 Votes]</td>
</tr>
<tr>
<td>Nixon (1969 – 74)</td>
<td>21.1% for 52 Votes [32.6% for 43 Votes]</td>
<td>Clinton (1993 – 01)</td>
<td>69.1 for 81 Votes [100% for 9 Votes]*</td>
</tr>
<tr>
<td>Ford (1974 – 77)</td>
<td>41.1% for 17 Votes [65.7 for 35 Votes]</td>
<td>Bush (2001 – 05)</td>
<td>40.7% for 27 Votes</td>
</tr>
</tbody>
</table>

Percents in brackets are those that Yates and Whitford results for each corresponding president. *Yates and Whitford’s analysis ends in 1993

The case type variable (whether the case is foreign/domestic), is relatively evenly distributed throughout the sample as well. Throughout the time period of the sample, the Court heard 16 cases dealing with foreign policy concerns of the president and 22 cases dealing with domestic policy. This yields 144 foreign policy votes and 198 domestic policy votes. This finding is consistent with one of King and Meernik (1999), who find that the Court consistently
Figure 2 Presidential Nominees Over Time In Presidential Power Cases
hears cases each year dealing with foreign policy. This finding counters the conclusion in Henkin (1996, 148), who states, “the Supreme Court in particular intervenes only infrequently and its foreign affairs cases are few and haphazard.”

Other variables, however, are not as evenly distributed throughout the sample, nor were they expected to be. Examining the simple frequency of the nominating president variable, it shows that around 20 percent of the votes cast were by a justice who was nominated by the president who was involved in the case. While this number is not large (N=69), it is large enough for our sample to produce valid effects. The prior executive experience variable is of nearly the same size (N=66) and is large enough to affect the sample potentially.

Turning to the personal attribute variables, the distribution is fairly uniform, although it shifts over time. In the beginning of the time period, there was a more uniform distribution between justices who had rural and urban origins; however, following Justice Goldberg’s nomination in 1962 by President Kennedy, nearly all justices were uniformly drawn from urban backgrounds.

Looking at the distribution of party identification among the justices, the sample contains 15 Democrats, 1 Independent (Frankfurter, who is nominally considered a Democrat), and 14 Republicans. The distribution, however, is not consistent throughout time, with there being more Democrats in the earlier segment of the sample (1949–1976), with more Republicans in the latter years. This is theoretically consistent with the number of Justices nominated by Republican presidents in later half of the sample. The Segal-Cover scores range from as low as a total conservative score of 0 (Justice Scalia) to a total liberal score of 1 (Justices Jackson, Brennan, Fortas, and Thurgood Marshall).
Table 2 Personal Attributes of the Supreme Court Justices

<table>
<thead>
<tr>
<th>Justice</th>
<th>Party ID</th>
<th>Rural/Urban</th>
<th>Segal/Cover</th>
<th>Justice</th>
<th>Party ID</th>
<th>Rural/Urban</th>
<th>Segal/Cover</th>
</tr>
</thead>
<tbody>
<tr>
<td>Vinson</td>
<td>Dem</td>
<td>Rural</td>
<td>0.75</td>
<td>Goldberg</td>
<td>Dem</td>
<td>Urban</td>
<td>0.75</td>
</tr>
<tr>
<td>Black</td>
<td>Dem</td>
<td>Rural</td>
<td>0.875</td>
<td>Fortas</td>
<td>Dem</td>
<td>Urban</td>
<td>1</td>
</tr>
<tr>
<td>Reed</td>
<td>Dem</td>
<td>Rural</td>
<td>0.725</td>
<td>Marshall</td>
<td>Dem</td>
<td>Urban</td>
<td>1</td>
</tr>
<tr>
<td>Frankfurter</td>
<td>Ind</td>
<td>Urban</td>
<td>0.665</td>
<td>Burger</td>
<td>Rep</td>
<td>Urban</td>
<td>0.115</td>
</tr>
<tr>
<td>Douglas</td>
<td>Dem</td>
<td>Rural</td>
<td>0.73</td>
<td>Blackmun</td>
<td>Rep</td>
<td>Urban</td>
<td>0.115</td>
</tr>
<tr>
<td>Jackson</td>
<td>Dem</td>
<td>Rural</td>
<td>1</td>
<td>Powell</td>
<td>Dem</td>
<td>Urban</td>
<td>0.165</td>
</tr>
<tr>
<td>Burton</td>
<td>Rep</td>
<td>Urban</td>
<td>0.28</td>
<td>Rehnquist</td>
<td>Rep</td>
<td>Urban</td>
<td>0.045</td>
</tr>
<tr>
<td>Clark</td>
<td>Dem</td>
<td>Urban</td>
<td>0.5</td>
<td>Stevens</td>
<td>Rep</td>
<td>Urban</td>
<td>0.25</td>
</tr>
<tr>
<td>Minton</td>
<td>Dem</td>
<td>Rural</td>
<td>0.72</td>
<td>O’Connor</td>
<td>Rep</td>
<td>Urban</td>
<td>0.415</td>
</tr>
<tr>
<td>Warren</td>
<td>Rep</td>
<td>Rural</td>
<td>0.75</td>
<td>Scalia</td>
<td>Rep</td>
<td>Urban</td>
<td>0</td>
</tr>
<tr>
<td>Harlan</td>
<td>Rep</td>
<td>Urban</td>
<td>0.875</td>
<td>Kennedy</td>
<td>Rep</td>
<td>Urban</td>
<td>0.365</td>
</tr>
<tr>
<td>Brennan</td>
<td>Dem</td>
<td>Urban</td>
<td>1</td>
<td>Souter</td>
<td>Rep</td>
<td>Rural</td>
<td>0.325</td>
</tr>
<tr>
<td>Whittaker</td>
<td>Rep</td>
<td>Rural</td>
<td>0.5</td>
<td>Thomas</td>
<td>Rep</td>
<td>Rural</td>
<td>0.25</td>
</tr>
<tr>
<td>Stewart</td>
<td>Rep</td>
<td>Urban</td>
<td>0.75</td>
<td>Ginsburg</td>
<td>Dem</td>
<td>Urban</td>
<td>0.68</td>
</tr>
<tr>
<td>White</td>
<td>Dem</td>
<td>Rural</td>
<td>0.5</td>
<td>Breyer</td>
<td>Dem</td>
<td>Urban</td>
<td>0.475</td>
</tr>
</tbody>
</table>

The variables that measure attributes of the president are litigant status and the president’s approval. The litigant status variable is distributed evenly throughout the sample. It mirrors the distribution of case type more closely than any other, with 144 votes occurring during cases where the president was petitioner and 198 votes occurring when the president was respondent. Public opinion, however, is not as evenly distributed. The public approval variable measures the change in approval ratings of the president for a three-month period preceding the decision in the case. Therefore, hypothetically, this measure can range anywhere from -100 to 100. For the 38 cases of the sample, opinion change ranged from -12 to 25. Instead of the
hypothetical range of 200 points, the data’s range is much smaller, consisting of only 37 absolute points. While the mean of the data is -1.39, the mode is 1 occurring for 5 cases (13.2% of the sample), with -1 being the next frequently occurring score in 4 cases (10.5% of the sample).

Three cases occurred under conditions of a 12-point drop in the approval rating of the president: *Airports Auth. v. Citizens for Noise Abatement* (1991) under Bush Sr., *Freytag v. Commissioner* (1991) also under Bush Sr., and *Sale v. Haitian Ctrs. Council* (1993) under Clinton. Both 1991 cases were handed down on the same day, explaining why they share the same score. Only one case occurred following a 25-point increase: *Goldwater v. Carter* (1979). However, there may be other factors influencing this precipitous decrease in presidential approval level.

Armed conflict was measured in two ways in order to test whether magnitude of the armed conflict in terms of body count has a discernable effect on individual-level voting. Using the more inclusive measure of armed conflict in terms of body count (the one developed by the Uppsala Conflict Data Program), 18 cases in the sample occurred during times of armed conflict. The armed conflicts included in this measure are the Korean War (1948-1950), the Taiwan Strait Conflicts (1954, 1958), the Puerto Rican Nationalist Uprising (1950), the Bay of Pigs Invasion
Figure 3 Partisan Identification Over Time
Figure 4 Litigant Status of the President Over Time
Figure 5 Public Opinion Change Over Time

Armed conflict measured in the more restrictive manner in terms of body count (following the Correlates of War definition), occurred in 12 of 38 cases. This measure did not include the Taiwan Strait Conflicts, the Vietnam War (1974, 1975), or the U.S. involvement in Grenada and Panama.

**Bivariate Analyses**

Before discussing the more statistically complex logistic regression, these data will be explained through simple bivariate analyses to determine the actual direction and strength of the relationships. In this section, crosstabulations will be estimated with and without controls for case type to determine if case type may influence the direction or magnitude of the relationships between the independent variables and the dependent variable.

The first bivariate analysis is the sort of individual level votes by case type. It has been argued by numerous authors (e.g., Wildavsky 1966, 1969; King and Meernik 1999; Yates and Whitford 1998; Yates 2002) that the president will achieve more success when acting under foreign policy powers than domestic powers. Therefore, in the crosstabulation, it is expected to find a significant relationship between case type and individual level votes, and that a vote which occurs in a foreign policy case will be more likely to be correlated with extending presidential power.
Table 3 shows that case type clearly is correlated with individual justice voting. This table shows that in cases dealing with the foreign policy powers of the president, a justice is more likely to cast a vote in favor of presidential power, while in domestic cases the opposite holds true. The Cramer’s V test statistic of .241 shows this is a moderately strong relationship. Cramer’s V, the proper measure of association between two nominal variables, is measured on a metric from 0 (no relationship) to 1 (a perfect relationship) (Kennedy 2003). The Chi-Square measure examines the distribution of the variables against the null hypothesis that assumes an equal distribution. The critical value for this table is .4772, so the Chi-Square measure of 19.604 substantially crosses the critical value, meaning that the null hypothesis can be rejected.

Yates (2002) argues that litigant status of the president is directly associated with how a justice will vote in the case. Yates hypothesizes, as do I, that if the president appears before the Court as a respondent, individual justices will be more likely to vote in his favor because they can vote to simultaneously to uphold the lower court and to support the president.

<table>
<thead>
<tr>
<th>Case Type</th>
<th>Foreign</th>
<th>Domestic</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>Votes</td>
<td>38</td>
<td>98</td>
<td>136</td>
</tr>
<tr>
<td></td>
<td>(26.6%)</td>
<td>(50.5%)</td>
<td>(40.4%)</td>
</tr>
<tr>
<td>Positive Power</td>
<td>105</td>
<td>96</td>
<td>201</td>
</tr>
<tr>
<td></td>
<td>(73.4%)</td>
<td>(49.5%)</td>
<td>(59.6%)</td>
</tr>
<tr>
<td>Total</td>
<td>143</td>
<td>194</td>
<td>337</td>
</tr>
</tbody>
</table>

Chi-Square = 19.604, \( p < 0.01 \)
Cramer’s V = .241
Percents are column based
Table 4 Crosstabulation of Votes by Litigant Status of the President

<table>
<thead>
<tr>
<th>Litigant Status</th>
<th>Petitioner</th>
<th>Respondent</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>Votes</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Negative Power</td>
<td>55 (38.7%)</td>
<td>81 (41.5%)</td>
<td>136 (40.4%)</td>
</tr>
<tr>
<td>Positive Power</td>
<td>87 (61.3%)</td>
<td>114 (58.5%)</td>
<td>201 (59.6%)</td>
</tr>
<tr>
<td>Total</td>
<td>142</td>
<td>195</td>
<td>337</td>
</tr>
</tbody>
</table>

Chi-Square = .269, p=.604
Cramer’s V = .028

The findings of this crosstabulation fails to reject the null hypothesis (which states there is no relationship between litigant status and the way a justice votes). This crosstabulation was also estimated while controlling for case type, but the results did not reach conventional levels of statistical significance. Indeed, it appears that as the petitioner, the president will experience similar levels of success as when he is a respondent. This association may still reach statistical significance when controlling for other factors, which will be done in formal regression model. This crosstabulation, however, does not lend support to the litigant status hypothesis.

Yates and Whitford (1998) also hypothesize that if the president has nominated a justice who is ruling on a case concerning him, that justice will be more likely to rule in his favor. Ducat and Dudley (1989) find this to be a statistical significant explanatory variable, when explaining decision-making of the Courts of Appeal, however Yates and Whitford (1998) and Yates (2002) do not find this variable to be a statistically significant predictor of individual level vote choice.
As expected, there is no relationship when between the presidential nominee variable and the individual justice’s votes. There was also no relationship demonstrated between the variables when controlling for case type. Ducat and Dudley find this association to be a statistically significant predictor of vote choice for Courts of Appeals judges. However, the Courts of Appeals are dissimilar from the Supreme Court in that they are not courts of last resort. The judges on the Courts of Appeals are dependent on the president for possible promotion to the Supreme Court or an executive position within his cabinet. Furthermore, members of the Courts of Appeals could have electoral motivations as well. These motivations are not present for justices of the Supreme Court; hence it is theoretically consistent that the nominating president association would not reach statistical significance.

Tate and Handberg (1991) argue that personal attribute models have significant predictive power when it comes to individual level decision-making models of the Court because personal attributes serve as proxy measures for individual ideological attitudes. Similarly, it should hold true that personal attributes may have a significant affect on decision-making in cases of presidential powers like Tate (1981) and Tate and Handberg (1991). One personal attribute included in the current model being examined is rural/urban origins. I hypothesize that

### Table 5 Crosstabulation of Votes by Presidential Nominee

<table>
<thead>
<tr>
<th></th>
<th>Presidential Nominee</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>No</td>
<td>Yes</td>
</tr>
<tr>
<td>Votes</td>
<td>109 (39.9%)</td>
<td>27 (42.2%)</td>
</tr>
<tr>
<td>Negative Power</td>
<td>164 (60.1%)</td>
<td>37 (57.8%)</td>
</tr>
<tr>
<td>Positive Power</td>
<td>273</td>
<td>64</td>
</tr>
</tbody>
</table>

Chi-Square = .110, \( p = .740 \)
Cramer’s V = .018
a justice’s urban background will be directly related to a vote for presidential power. When this analysis is estimated without controlling for case type, there is no relationship demonstrated; however, when controlling for case type, the crosstabulation for domestic cases approaches significance at the $p<.100$ level. When controlling for other factors, this variable may exert a statistically significant affect on the model.

Table 6 Crosstabulation of Votes by Rural/Urban Origin Controlled for Foreign Cases

<table>
<thead>
<tr>
<th>Origin</th>
<th>Rural</th>
<th>Urban</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>Votes</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Negative Power</td>
<td>11 (27.5%)</td>
<td>27 (26.2%)</td>
<td>38 (26.6%)</td>
</tr>
<tr>
<td>Positive Power</td>
<td>29 (72.5%)</td>
<td>76 (73.8%)</td>
<td>105 (73.4%)</td>
</tr>
<tr>
<td>Total</td>
<td>40</td>
<td>103</td>
<td>143</td>
</tr>
</tbody>
</table>

Chi-Square = .024, $p=.876$
Cramer’s V = .013

When selecting only foreign policy cases, rural/urban origins is not a significant predictor of individual level votes. A possible explanation for this finding is that case type may dominate the relationship. Thus, when a justice is casting a vote in foreign policy cases, the justice considers case type more heavily than their personal attributes, as measured by rural/urban origins. However, in the aggregate, justices who were socialized in rural areas appear to support the president at a higher rate in foreign policy cases than did such justices in domestic cases. Thus, these results imply that case type may be associated with the individual-level voting of the justices.
Table 7 Crosstabulation of Votes by Rural/Urban Origin Controlled for Domestic Cases

<table>
<thead>
<tr>
<th></th>
<th>Origin</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Rural</td>
<td>Urban</td>
</tr>
<tr>
<td>Votes Negative Power</td>
<td>26</td>
<td>72</td>
</tr>
<tr>
<td></td>
<td>(60.5%)</td>
<td>(47.7%)</td>
</tr>
<tr>
<td>Votes Positive Power</td>
<td>17</td>
<td>79</td>
</tr>
<tr>
<td></td>
<td>(39.5%)</td>
<td>(52.3%)</td>
</tr>
<tr>
<td>Total</td>
<td>43</td>
<td>151</td>
</tr>
</tbody>
</table>

Chi-Square = 2.188, p = .139
Cramer's V = .106

This crosstabulation as well does not reach conventional levels of statistical significance and, thus, fails to reject the null hypothesis. However, the relationship may be demonstrated when controlling for other variables in the formal model.

The relationship for party identification is ultimately a much better predictor of decision making in this sub-set of Supreme Court cases than is rural/urban origins. This is not surprising when considering that while rural/urban origins may affect the justice’s view point, party identification amounts to a self-assignment of themselves into a group that represents their attitudes. A justice’s origin is something they are assigned based on where they grow up, a factor ultimately out of their control. While it can be argued that party identification is out of their control as well, that it in fact is generated as part of a nurturing process of childhood (Sears and Funk 1999) ultimately however, party identification is a self-chosen assignment. Since the justices choose to identify themselves as Republican, independent, or Democrat, this label may be an excellent predictor of individual level decision-making. Indeed, prior research (Segal and Spaeth 1993, 2002; Tate 1981; Tate and Handberg 1991), has shown that party identification accurately predicts individual-level voting on the Court.
Yates and Whitford (1998) hypothesize, as I do, that a justice’s affiliation with the Republican Party will be positively correlated with a vote in favor of presidential power. This is because following World War II, Democrats began to fear the extensive powers of the executive, and these fears were only magnified with the occurrence of the Vietnam War and Watergate (Thomas and Pika 1996). In the wake of Vietnam and Watergate, the Congress passed many statutes designed to curb what they believed to be overreaching by the president. Termed the “Imperial Presidency,” the president has been viewed as growing overly powerful in the last 30 years (Schlesinger 2004). These concerns have grown even louder with the current Bush administration’s War on Terrorism.

Table 8 Crosstabulation of Votes by Partisan Identification

<table>
<thead>
<tr>
<th>Party Identification</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>Votes</td>
<td></td>
</tr>
<tr>
<td>Negative Power</td>
<td>63</td>
</tr>
<tr>
<td></td>
<td>(31.3%)</td>
</tr>
<tr>
<td>Positive Power</td>
<td>138</td>
</tr>
<tr>
<td></td>
<td>(68.7%)</td>
</tr>
<tr>
<td>Total</td>
<td>201</td>
</tr>
</tbody>
</table>

Chi-Square = 16.832, p < .001
Cramer’s V = .223

Table 8 shows that the hypothesized relationship between party identification and a justice’s votes may be empirically supported. This relationship is nearly as strong as that between case type and vote choice in that they both have similar magnitudes of Cramer’s V measures with equivalent levels of statistical significance. Republican justices appear to be more likely to vote for extensions of presidential power than do Democratic justices. The relationship was estimated controlling for case type and a similar relationship was found, implying that case
type does not intervene upon partisan identification in individual-level vote choice. This finding is important because it shows that case type and partisan identification are independent of each other and do not covariate. Both partisan identification and case type could have statistically significant effects upon individual level decision-making when controlling for the other because the two variables measure distinctly different occurrences which are not theoretically linked.

Table 9 Crosstabulation of Votes by Partisan Identification controlling for Domestic Cases

<table>
<thead>
<tr>
<th>Party Identification</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>Votes</td>
<td></td>
</tr>
<tr>
<td>Negative Power</td>
<td>48</td>
</tr>
<tr>
<td>(41.0%)</td>
<td>(50.0%)</td>
</tr>
<tr>
<td>Positive Power</td>
<td>69</td>
</tr>
<tr>
<td>(59.0%)</td>
<td>(50.0%)</td>
</tr>
<tr>
<td>Total</td>
<td>117</td>
</tr>
</tbody>
</table>

Chi-Square = 10.803, \( p < .005 \)
Cramer’s V = .236

The Cramer’s V measurement in Table 9 and Table 10 are nearly identical, which implies that the relationship between partisan identification and the justices’ votes retain the same relative strength even when controlling for case type. The justice’s partisan identification has the same affect in domestic cases as foreign.

When comparing the distribution between the two crosstabulations, it is important to note that Republican justices show an increased likelihood to support the president in foreign policy cases (59 percent to 82.1 percent). Also, Democratic justices experience a similar change; supporting the president 34.7 percent of the time in domestic cases to 61.4 percent in foreign cases.
The last remaining personal attribute to be examined is the Segal-Cover scores, which measures ideology of the justices, a metric created from a textual analysis of newspaper editorials written about the individual justices from the time they were nominated until their confirmation. This measure was developed to be used to examine the effect of personal attributes on civil rights and liberties cases, but other researchers have found it to have predictive possibilities in other sub-sets of Supreme Court cases (Arrington and Brenner 2004; Segal et al. 1995; Yates and Whitford 1998; Yates 2002, but see Epstein and Mershon 1996). Segal-Cover scores range from 0 (being the most conservative) to 1 (being the most liberal). Yates and Whitford (1998) hypothesize that a justice with a lower Segal-Cover score will be more likely to vote in favor of presidential power than a justice with a higher score. The crosstabulation of votes by Segal-Cover scores is not practical to display because the empirical scores are an interval level variable containing too many values to be easily fitted on the printed page. However, the relationship is significant at the $p<.019$ level. The Chi-Square value is 36.529, which is quite large, especially when considering the critical value for this relationship is .4772. The $\eta$ (designed to measure nominal by interval level relationships) is .320 (on a 0 to 1 metric),
implying there is a strong relationship between these two variables. In the regression analysis, models will be estimated twice: once using party identification and rural/urban origins as the measures of personal attributes; the other using the Segal-Cover scores. The reason for completing two separate models is because there is a high degree of multicollinearity between party identification and the Segal-Cover scores ($\eta = .962$).

Yates and Whitford (1998) and Yates (2002) find public approval of the president at the time a decision is handed down to be a statistically significant predictor of how an individual justice will vote in a case involving presidential power. Public approval was measured by Yates and Whitford (1998) and in this study as the change in the public approval rating of the president over a three-month period preceding the decision of the case. The crosstabulation of votes by approval rating generates a significant relationship at the $p<.001$ level. The Chi-Square measure of $89.168$ shows a substantial relationship ($\ell = .000$). The $\eta$ measurement shows a strong relationship at $0.514$. However, when controlling for case type, the relationship between public opinion and vote choice becomes muted in foreign policy cases. Comparing the Chi-Square statistics, the relationship between votes and opinion in only domestic cases is more than double that of the same relationship in only foreign cases ($79.369$ for domestic and $37.628$ for foreign). Both relationships, however, retain their statistical significance where $\ell = .000$ (domestic) and $\ell = .000$ (foreign). Thus, while public opinion has a statistically significant affect concerning both types of cases (foreign and domestic), the relationship appears to be substantially strong in the domestic cohort.

There, however, appears to be an occurrence of multicollinearity between the public opinion variable and the armed conflict variable. Multicollinearity occurs when two independent variables are correlated with each other to a large degree (Gujarati 2002). This is a statistical
problem because one of the assumptions in a regression equation is that effects of the exploratory variables are independent of each other. The multicollinearity experienced between armed conflict and public opinion would be consistent with the “rally” literature, which argues that armed conflict leads to an increase in public opinion for the president (Baker and Oneal 2001; Lee 1977; Mueller 1973). Similarly, when estimating a crosstabulation between these two variables, there is a statistically significant relationship ($\ell = .000$). The Chi-Square for this relationship is substantial at 186.770. Furthermore, the $\eta$ for the relationship was .739, showing a substantially strong relationship. This $\eta$ measure shows a strong possibility of multicollinearity between public opinion and armed conflict. It is possible that the inclusion of the armed conflict variable in the regression may mute the influence of public opinion on the dependent variable.

The relationship between armed conflict and individual-level voting in cases of presidential power has not been explored in the previous literature. The hypothesis of this paper asserts that there will be a direct relationship between the presence of armed conflict and the likelihood of a justice supporting presidential power.

Table 11 Crosstabulation of Votes by Armed Conflict in all Cases

<table>
<thead>
<tr>
<th></th>
<th>Armed conflict</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Absence</td>
<td>Presence</td>
</tr>
<tr>
<td>Votes</td>
<td>68</td>
<td>68</td>
</tr>
<tr>
<td></td>
<td>(38.2%)</td>
<td>(42.8%)</td>
</tr>
<tr>
<td>Negative Power</td>
<td>110</td>
<td>91</td>
</tr>
<tr>
<td></td>
<td>(61.8%)</td>
<td>(57.2%)</td>
</tr>
<tr>
<td>Positive Power</td>
<td>178</td>
<td>159</td>
</tr>
<tr>
<td>Total</td>
<td>178</td>
<td>159</td>
</tr>
</tbody>
</table>

Chi-Square = .727, $p = .394$
Cramer’s V = .046
There appears to be no relationship between armed conflicts (as measured by the Uppsala Conflict Data Program) without controlling for case type. If there is a relationship between individual voting and armed conflict in only one of the case types, it would mean that armed conflict only effects decision-making in that case type; however, if it has a significant effect on both case types it would mean that the relationship has different directional effects depending upon case type.

Table 12 Crosstabulation of Votes by Armed Conflict in only Domestic Cases

<table>
<thead>
<tr>
<th>Armed conflict</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
</tr>
<tr>
<td>Absence</td>
<td>Presence</td>
</tr>
<tr>
<td>Votes Negative Power</td>
<td>59 (60.8%)</td>
</tr>
<tr>
<td>Positive Power</td>
<td>38 (39.2%)</td>
</tr>
<tr>
<td>Total</td>
<td>97</td>
</tr>
</tbody>
</table>

Chi-Square = 8.248, $p<.004$
Cramer’s V = .206

Table 13 Crosstabulation of Votes by Armed Conflict in only Foreign Cases

<table>
<thead>
<tr>
<th>Armed conflict</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
</tr>
<tr>
<td>Absence</td>
<td>Presence</td>
</tr>
<tr>
<td>Votes Neg Power</td>
<td>9 (11.1%)</td>
</tr>
<tr>
<td>Pro Power</td>
<td>72 (88.9%)</td>
</tr>
<tr>
<td>Total</td>
<td>81</td>
</tr>
</tbody>
</table>

Chi-Square = 22.892, $p<.000$
Cramer’s V = .400

The results shown in Table 12 and Table 13 imply that armed conflict has different directional effects on individual level voting when controlling for case type. Furthermore, the
relationship appears significantly stronger for foreign cases than those that are domestic. There are two implications of this finding. First, armed conflict does exhibit a statistically significant effect on individual level decision-making of U.S Supreme Court justices. Second, the effect of armed conflict is directional meaning that, during armed conflict, a president is more likely to win if the case involves his domestic powers, and more likely to lose if the case involves his foreign policy powers. This finding is consistent with those of Epstein et al. (2005).

Summary

While descriptive statistics and bivariate analyses partially describe the relationships between the variables, it is impossible to fully explain the complexities of individual-level justice voting in cases of presidential power without using a more rigorous form of analysis. In order to analyze the effect of these numerous variables on individual-level voting, in the next chapter I will use logistic regression in order to examine the influence of the variables while holding the values of the other explanatory variables constant. Then, one can more clearly understand the association of various influences on the decision-making of individual justices in cases involving the president.

In chapter three steps have been taken to provide a better understanding of the dataset being used in the present analysis. Trends were described not only over time, but with relation to each other. Case type appears to be the strongest predictor of individual-level justice voting. Case type also appears to modify the relationship between the other explanatory variables and justice voting. This may mean that the model which this study proposes could contain different effects depending on cases type. In order to access the possibility of this occurrence, the next chapter will examine the model not only in the aggregate (including both cases types), but also
by estimating separate models for each case type. It is hypothesized that explanatory variables within the domestic case model will exhibit a stronger effect upon individual level voting, partially because of the statistical dominance of foreign policy cases in individual level decision-making.
CHAPTER FOUR: FINDINGS OF THE FORMAL, INDIVIDUAL-LEVEL DECISION-MAKING MODEL

While the previous chapter examined the dataset in detail, simple descriptive statistics and bivariate analysis cannot accurately test the formal model correctly. While these basic analyses can serve to describe these data and display some methodologically basic correlations between variables, they do not have the statistical rigor needed to assess the effects of multiple independent variables on a dependent variable. Traditionally, in order to determine the effect of numerous independent variables on a dependent variable, an ordinary least squares regression is used (Stimson 1985). However, one of the assumptions of OLS regressions is that the dependent variable is continuous and linear. The dependent variable for this analysis (the vote of the individual justice in each case) is dichotomous. Dichotomous variables do not tend to follow a linear trend; instead, the trend of dichotomous variables tends to follow an s-shaped curve.

Thus, for dichotomous variables, a logistic regression is traditionally employed because, by utilizing the log values of the independent variables, the regression can determine the coefficients effect on the curvilinear dependent variable (Cleary and Angel 1984; Lottes et al. 1996; Walsh 1987).

However, before calculating the logistic regression, certain tests need to be completed in order to check for problems within the dataset. The problems this data set was tested for were multicollinearity and autocorrelation. If the presence of either of issues is found, the findings could be misleading, muted, or simply incorrect (Gujarati 2002). Once these issues are tested for, and, if found corrected, then it is appropriate to test the formal individual level decision-making model through a logistic regression.
**Autocorrelation**

All regression equations are predicated on the statistical assumption that the disturbance term from one observation is not correlated with the disturbance term of the previous observation. When working with time-series data, such as the type collected for this analysis, these disturbance terms may be correlated. This is called autocorrelation or serial correlation. The presence of autocorrelation in a regression can cause an error in the coefficients estimates of statistical significance, thus it is an important issue to test for and correct if present.

Often times, controlling for time period effects will eliminate the possible presence of autocorrelation within a dataset. Therefore, before formally testing for autocorrelation, presidential dummy variables were created in order to control for period effects (Stimson 1985). When creating time period dummy variables, not all time periods can be modeled because the matrix algebra will become singular. Therefore, presidential dummy variables were created for all presidents except the one with the largest number of cases during his administration, which in this dataset was President Clinton ($N = 8$) (Gujarati 2002). Doing so creates a baseline influence. This should control for period effects and also any effect that individual presidents had upon the dependent variable itself. Controlling for period effects, however, does not always aptly correct autocorrelation. Therefore, it is proper to test for autocorrelation formally.

Traditionally, to test for autocorrelation, the Durbin-Watson $d$ test is employed. The Durbin-Watson $d$ statistic is calculated by use of the equation:

$$d = \sum_{t=2}^{N} (\hat{e}_t - \hat{e}_{t-1})^2 / \sum_{t=1}^{N} \hat{e}_t^2$$

where $e_t$ are the residuals (or disturbance terms) from the regression. Generally, the closer that $d$ approaches 2, the less evidence of autocorrelation. For every regression, there is $d_L$ and a $d_U$, which represent the lower and upper boundary of the Durbin-Watson critical values, which are
based upon the number of independent variables \((k = 18)\) and the number of observations \((N = 337)\). If the measure of Durbin-Watson \(d\) falls below the lower boundary, there is evidence of positive autocorrelation, if the \(d\) falls within the lower and upper boundary (called the zone of indecision), the test is inconclusive and further examination of These data is warranted, and if the \(d\) is above the upper boundary that the data does not experience positive, first order autocorrelation. However, These data may be correlated in other ways.

The \(d_L\) for this dataset is 1.575 and the \(d_U\) is 1.967. Thus, in order to determine if the dataset being used for this analysis contains no autocorrelation, its Durbin-Watson \(d\) must be greater than 1.967. The actual Durbin-Watson \(d\) measure for this non-transformed dataset is 1.522. This shows a presence of positive autocorrelation since it falls below the \(d_L\) value for this dataset.

In attempting to correct for positive autocorrelation, a lagged endogenous variable (that is \(t-1\) of the dependent variable) was be added to the model. Adding such a variable may control for the dependent variable’s inertia, which may be causing the autocorrelation (Lanier and Wood 2001). However, by including a lagged endogenous variable, the Durbin-Watson \(d\) test statistic can no longer be used to test for autocorrelation as one of the equations assumptions is that no lagged variables are present in the analysis. Therefore, to examine if autocorrelation is still present in the model after the inclusion of the lagged endogenous variable, the Durbin-Watson \(h\) test was completed. The equation for Durbin-Watson \(h\) is:

\[
h = r \frac{n}{\sqrt{1 - n(S_e^2)}}
\]

where \(h\) is the Durbin-Watson \(h\), \(n\) is the number of cases, \(r\) is the correlation coefficient for the first order lag, and \(S_e^2\) is the squared standard error of the regression coefficient. The \(h\) measure
is distributed like the $t$ test of significance, so results falling within one standard deviation ($t=1.96$) do not show the presence of autocorrelation. The Durbin-Watson $h$ measure for this data including a lagged endogenous variable is 1.91. Therefore, with the inclusion of a lagged endogenous variable, this dataset likely contains no significant autocorrelation.

**Multicollinearity**

Multicollinearity occurs when two variables in the same model have a direct correlation or linear relationship between them with a measure of Pearson’s $r$ or a Cramer’s $v$ of greater than 0.80. When variables exhibit multicollinearity, their independent effects on the model may be biased downward in magnitude and the variances of the coefficient estimates may be inflated (Kennedy 2003). Thus, it is important to identify variables that could possibly exhibit multicollinearity and attempt to correct for this statistical problem.

None of the variables that will be used simultaneously within the present model exhibit a relationship greater than 0.80. The party identification variable correlates strongly with the Segal-Cover scores (Cramer’s $v = 0.981$); however, these variables will be used in separate models. There are variables, however, that do exhibit a relationship of greater than 0.70 as measured by Cramer’s $v$. While this is below the traditional standard for multicollinearity, these pairs of variables should theoretically covariate. Thus, it is theoretically consistent to attempt to solve this presence of possible multicollinearity.

The two variables that exhibit the possibility for multicollinearity are public opinion and armed conflict. The correlation between public opinion and armed conflict (as measured by UCDP) is Cramer’s $v = 0.739$. The correlation between public opinion and armed conflict (as
measure by COW) is Cramer’s $\nu = 0.645$. Theoretically, these two variables should move together. The “rally around the flag” literature describes just this relationship (Baker and O’Neal 2001; Lee 1977; Meernik 1995; Mueller 1973; Partell 1997). When the United States is involved in armed conflict, the popularity of the president usually increases. However, public opinion and armed conflict, while interrelated, may possibly have their own independent affects upon individual level decision-making as well. For this reason, and also to control for the possibility of multicollinearity between the two variables, an interaction between public opinion of the president and armed conflict will be included in each model estimation.

An interaction of two variables is accomplished by multiplying their values together to form a new variable. This new interaction between armed conflict and public opinion will accomplish multiple tasks. By using the interaction in the model, it will control for the co-variation between armed conflict and public opinion. Indeed, while some authors have challenged the use of interactions with their level variables in models as a possible cause for multicollinearity, Brambor et al. (2006) challenge this assumption by showing that including both the interaction and the level variables in the same model can control for multicollinearity of the level variables while also assessing the impact of their co-variance upon the dependent variable. Friedrich (1982) notes a similar finding. As such, the inclusion of the interaction between public opinion and armed conflict will be used not only to control for the possible multicollinearity between the two variables, thus allowing for a more accurate assessment of their effects upon the model, the interaction will also allow an examination of the effect of the two variables together considering much literature has noted that public opinion moves in sync with armed conflict. This may provide greater confidence in the findings and more generalizability of the findings.
Formal Model Testing

Now that the model has been examined and corrected for both the presence of autocorrelation and multicollinearity, it is now proper to formally test the model of individual-level vote choice of U.S. Supreme Court justices in cases of presidential power. A logistic regression will be utilized as the dependent variable is dichotomous. The equation being used to calculate the regression is:

\[ Y = \frac{e^{(\alpha + \beta_1 x_1 + \beta_2 x_2 + \ldots + \beta_n x_n)}}{1 + e^{(\alpha + \beta_1 x_1 + \beta_2 x_2 + \ldots + \beta_n x_n)}} \]

Where:

- \( b_1 \) = presidential approval rating
- \( b_2 \) = case type
- \( b_3 \) = justice party affiliation
- \( b_4 \) = nominating president
- \( b_5 \) = prior executive experience
- \( b_6 \) = litigant status of the president
- \( b_7 \) = presence of armed conflict
- \( b_8 \) = interaction of armed conflict and public opinion

The model will include nine independent variables which may to predict individual-level justice voting in cases of presidential power. They are: the presence of armed conflict; the change in the public opinion of the president over a three-month time preceding the formal decision in the case; the interaction of armed conflict and public opinion; whether the case involves foreign or domestic issues, if the justice involved has had prior executive experience; whether the justice was nominated by the president involved in the case; the justice’s party
identification (or Segal-Cover score); the justice’s rural or urban origin; and, lastly, the
president’s litigant status in the case being adjudicated. Furthermore, there are nine presidential
dummy variables that seek to control for period effects that may have occurred during each
president’s administration. Finally, a lagged endogenous variable will be included to control for
autocorrelation within the model, as discussed.

The first two models estimated will have two alternative measures of the justice’s
personal attributes. Table 14 displays with party identification and rural or urban origins to
measure personal attributes, while Table 15 displays the findings when the Segal-Cover scores
are employed instead. All other variables in Table 14 and 15 are the same. Table 14 and 15
examine individual level decision-making in presidential power cases overall. That is to say
cases are not sorted by case type. This methodology is done to provide a clearer picture of the
trend of decision-making in these cases overall.

Only three non-control variables (armed conflict, case type, and party identification)
reach conventional levels of statistic significance ($p<0.05$). Three other non-control variables
(public opinion, public opinion and armed conflict, and nominated justice) approach statistical
significance at the 0.1 level.

In terms of coefficient strength, both armed conflict and case type are larger in marginal
effect that the other non-control variables substantially. All estimators are signed in their
hypothesized direction, except the interaction of armed conflict and public opinion. A possible
cause for this differently signed coefficient estimate is perhaps because while public opinion
tends to increase shortly following the start of armed conflict yet over a longer period of time
public opinion may fall as opposition to the armed conflict increases. Explaining the marginal
effect (which is the percent likelihood that a one point increase in the independent variable will cause a one point increase in the dependent variable) (Gujarati 2002), the most substantial effects are again armed conflict and case type.\textsuperscript{26}

Table 14 Logistic Regression of All Cases

<table>
<thead>
<tr>
<th></th>
<th>Marginal Effect</th>
<th>beta</th>
<th>S.E.</th>
<th>(p)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Armed Conflict</td>
<td>46.9</td>
<td>2.210</td>
<td>.779</td>
<td>.005</td>
</tr>
<tr>
<td>Public Opinion</td>
<td>1.7</td>
<td>.068</td>
<td>.038</td>
<td>.074</td>
</tr>
<tr>
<td>Armed*Opinion</td>
<td>-3.2</td>
<td>-.129</td>
<td>.076</td>
<td>.089</td>
</tr>
<tr>
<td>Case Type</td>
<td>-51.0</td>
<td>-2.538</td>
<td>.499</td>
<td>.000</td>
</tr>
<tr>
<td>Executive</td>
<td>-0.4</td>
<td>-.160</td>
<td>.441</td>
<td>.971</td>
</tr>
<tr>
<td>Nominated</td>
<td>15.8</td>
<td>.731</td>
<td>.418</td>
<td>.080</td>
</tr>
<tr>
<td>PartyID</td>
<td>-13.7</td>
<td>-.552</td>
<td>.177</td>
<td>.002</td>
</tr>
<tr>
<td>Rural/Urban</td>
<td>-1.7</td>
<td>-.073</td>
<td>.373</td>
<td>.845</td>
</tr>
<tr>
<td>Respondent</td>
<td>-1.4</td>
<td>-.063</td>
<td>.349</td>
<td>.856</td>
</tr>
<tr>
<td>Truman</td>
<td>-64.7</td>
<td>-4.144</td>
<td>1.165</td>
<td>.000</td>
</tr>
<tr>
<td>Eisenhower</td>
<td>-43.6</td>
<td>-1.914</td>
<td>.982</td>
<td>.051</td>
</tr>
<tr>
<td>Johnson</td>
<td>-56.2</td>
<td>-2.848</td>
<td>1.176</td>
<td>.015</td>
</tr>
<tr>
<td>Nixon</td>
<td>-65.6</td>
<td>-3.894</td>
<td>1.143</td>
<td>.020</td>
</tr>
<tr>
<td>Ford</td>
<td>-37.6</td>
<td>-1.594</td>
<td>.949</td>
<td>.093</td>
</tr>
<tr>
<td>Carter</td>
<td>-33.6</td>
<td>-1.399</td>
<td>1.050</td>
<td>.183</td>
</tr>
<tr>
<td>Reagan</td>
<td>-9.4</td>
<td>-.393</td>
<td>.447</td>
<td>.379</td>
</tr>
<tr>
<td>Bush</td>
<td>-6.6</td>
<td>-.278</td>
<td>1.078</td>
<td>.796</td>
</tr>
<tr>
<td>GWBush</td>
<td>-71.2</td>
<td>-5.317</td>
<td>1.186</td>
<td>.000</td>
</tr>
<tr>
<td>Lagged DV</td>
<td>29.8</td>
<td>1.282</td>
<td>.306</td>
<td>.000</td>
</tr>
<tr>
<td>Constant</td>
<td>2.012</td>
<td>2.660</td>
<td>.002</td>
<td>21.2%</td>
</tr>
</tbody>
</table>

\(N = 337\) Mean of the DV=.60 Std. Deviation of the DV=.491 Nagelkerke \(r^2 = .497\)
-2 Log Likelihood = 295.436 Percent Correctly Predicted = 80.4
PRE = 21.2\%

\textsuperscript{26}Marginal effect was calculated using the XPost excel sheet developed by Cheng and Long (2000), which follow procedures discussed in Long (1997).
Comparing the finding reported in Tables 14 and 15, all coefficient estimates have remained signed in the same direction and retain a similar magnitude. Examining specifically the comparison between the personal attribute measures, the Segal-Cover scores have a larger marginal effect upon than the dependent variable than does the combination of party identification and rural or urban origins, the traditional personal attribute model employed by Tate (1981) and Tate and Handberg (1991). This finding was expected as the Segal-Cover scores are continuous measures ranging from zero to one, while party identification and rural or urban origins are simply ordinal variables. Thus, because the Segal-Cover scores capture more
variance, it is theoretically consistent that they will have a larger marginal effect upon the dependent variable. Therefore, for all further regressions the Segal-Cover scores will be used as the measure of personal attributes and ideology within the model.

The findings from Tables 14 and 15 tell us numerous things. First, the presence of armed conflict does have a statistically significant effect on individual-level decision-making in cases of presidential power. The presence of armed conflict alone increases the likelihood that an individual justice will vote for the president by 47% in both Table 14 and 15. This means that the justices of the Supreme Court are strongly influenced by the presence of the United States being involved in armed conflict when deciding a case involving presidential power. Also, as previous research has noted (e.g., King and Meernik 1999; Yates and Whitford 1998; Yates 2002), justices are more likely to vote for the president in cases involving the president’s military or foreign power. It appears thus, that consistently with the delegation of powers in the Constitution of the United States, the U.S. Supreme Court recognizes that the president has more power in foreign policy than in domestic policy. The estimates for public opinion do not reach conventional levels of statistical significance in either model and the marginal effect appears to be only a modest one. The finding that public opinion does not have a statistically significant effect on individual-level justice voting in cases of presidential power is a departure from Yates and Whitford (1998) and Yates (2002). In both studies, the researchers find public opinion to be statistically significant and to have a large effect on the dependent variable. One possible explanation for the finding in this paper is the inclusion of armed conflict as a variable. As indicated previously, the presence of armed conflict is typically followed by an increase in the president’s public opinion, therefore by including armed conflict as a variable it is theoretically consistent that public opinion would have a decreased effect upon individual justice voting.
Yates (2002) also finds litigant status to have a statistically significant association with individual justice decision making in cases of presidential power however, this study does not come to the same conclusion. Whether the president appears before the Court as petitioner or respondent appears to have no statistically significant association with the justices’ votes.

Before considering the impacts of this model separately in domestic and foreign policy cases, it is important to determine if the magnitude of the armed conflict is associated with the decision making of the justices. In order to do this, the model will be re-estimated with the inclusion of the armed conflict variable as measured Correlates of War database, instead of the Uppsala Conflict Data Program. The inclusion criteria for both data sets are similar except for their measure of body count. The UCDP includes an occurrence of armed conflict if there have been more than 25 battle deaths in a single year. The COW database, however, includes an occurrence of armed conflict if there have been more than 1000 battle deaths in a single year. Thus, within the dataset the occurrence of armed conflict is more prevalent when using the UCDP. Specifically, armed conflict occurs in 18 of 38 cases when using the UCDP measure and in only 12 of 38 cases when using the COW measure. Because of the way these data are collected by the UCDP and the COW database, all occurrences of armed conflict included in the COW measure are included in the UCDP.

The armed conflict measure in Tables 14 and 15 uses the UCDP, the more liberal measure of armed conflict. Table 16 is identical to Table 15, except for the measure of armed conflict will now be calculated by the COW database. This should make it possible to determine whether magnitude of the armed conflict effects justice decision making. While body count may not be the most accurate way to determine the magnitude of an armed conflict, body count has traditionally been used in international conflict literature (Wallensteen and Sollenberg 1993;
Singer and Small 1972). The interaction of armed conflict with public opinion should theoretically tap approval of the war and measure magnitude in that way as well.

Table 16 Logistic Regression of All Cases with Armed Conflict as Measured by CoW

<table>
<thead>
<tr>
<th></th>
<th>Marginal Effect</th>
<th>beta</th>
<th>S.E.</th>
<th>p</th>
</tr>
</thead>
<tbody>
<tr>
<td>Armed Conflict</td>
<td>5.0</td>
<td>.221</td>
<td>1.407</td>
<td>.875</td>
</tr>
<tr>
<td>Public Opinion</td>
<td>0.7</td>
<td>.032</td>
<td>.030</td>
<td>.292</td>
</tr>
<tr>
<td>Armed*Opinion</td>
<td>0.9</td>
<td>.036</td>
<td>.115</td>
<td>.752</td>
</tr>
<tr>
<td>Case Type</td>
<td>-44.3</td>
<td>-2.143</td>
<td>.460</td>
<td>.000</td>
</tr>
<tr>
<td>Executive</td>
<td>-2.0</td>
<td>-0.87</td>
<td>.406</td>
<td>.830</td>
</tr>
<tr>
<td>Nominated</td>
<td>8.6</td>
<td>.385</td>
<td>.390</td>
<td>.323</td>
</tr>
<tr>
<td>Segal-Cover</td>
<td>-33.8</td>
<td>-1.480</td>
<td>.524</td>
<td>.005</td>
</tr>
<tr>
<td>Respondent</td>
<td>0.2</td>
<td>.011</td>
<td>.348</td>
<td>.976</td>
</tr>
<tr>
<td>Truman</td>
<td>-46.2</td>
<td>-2.063</td>
<td>1.688</td>
<td>.222</td>
</tr>
<tr>
<td>Eisenhower</td>
<td>11.6</td>
<td>.544</td>
<td>.634</td>
<td>.390</td>
</tr>
<tr>
<td>Johnson</td>
<td>-20.2</td>
<td>-0.826</td>
<td>1.773</td>
<td>.641</td>
</tr>
<tr>
<td>Nixon</td>
<td>-42.5</td>
<td>-1.834</td>
<td>1.422</td>
<td>.197</td>
</tr>
<tr>
<td>Ford</td>
<td>-1.2</td>
<td>-.050</td>
<td>.673</td>
<td>.940</td>
</tr>
<tr>
<td>Carter</td>
<td>-23.6</td>
<td>-.968</td>
<td>.826</td>
<td>.241</td>
</tr>
<tr>
<td>Reagan</td>
<td>-4.6</td>
<td>-.197</td>
<td>.423</td>
<td>.641</td>
</tr>
<tr>
<td>Bush</td>
<td>37.3</td>
<td>2.507</td>
<td>1.428</td>
<td>.079</td>
</tr>
<tr>
<td>GWBush</td>
<td>-47.6</td>
<td>-2.127</td>
<td>1.473</td>
<td>.149</td>
</tr>
<tr>
<td>Lagged DV</td>
<td>32.2</td>
<td>1.392</td>
<td>.295</td>
<td>.000</td>
</tr>
<tr>
<td>Constant</td>
<td>1.803</td>
<td>.579</td>
<td>.002</td>
<td></td>
</tr>
</tbody>
</table>

\( N = 337 \) Mean of the DV=.60  Std. Deviation of the DV=.491
Nagelkerke \( r^2 = .462 \)
-2 Log Likelihood = 308.914
Percent Correctly Predicted = 79.2
PRE = 20.0%

When comparing Tables 15 and 16 armed conflict loses statistical significance, when its measured by the COW database.  Furthermore, its marginal effect its decreases to 5.0% (when measured by COW) from 47.0% (when measured by UCDP).  Armed conflict as measured by the UCDP, which reaches statistical significance, includes some incidents that would not be considered publicly salient such as the Taiwan Strait Crisis in 1954 and 1958 and the nationalist uprising in Puerto Rico in 1950, among others.  It is important to note, however, that Supreme Court justices are political elites, and as such, may be more aware of political happenings.
throughout the world than non-elites. It would appear as though individual justices are affected by armed conflict however, the magnitude of the armed conflict does not statistically influence their decision-making. The COW measure of armed conflict does not affect the other variables in the model that greatly, the sizes of the coefficients only change moderately. Thus, for the purpose of this study, armed conflict as measured by the UCDP will be used for the remainder of the study as its coefficient estimate is statistically significant.

One important factor remains the same in all the regressions estimated to this point: case type has the largest effect on individual level justice decision-making. This result means that when justices approach a presidential power case, the largest factor that weighs how they will decide is whether the case references the president’s domestic power or the president’s foreign and military power. This result could also mean that justices approach the decision making process of domestic case differently that foreign. Since the Constitution of the United States grants the president his greatest nexus of power in foreign and military affairs, perhaps there is little else for justices to consider in these cases. In domestic cases, however, the president’s powers would be more malleable and less concrete. Therefore, when justices consider domestic cases, it would seem likely that other extra-legal and extra-attitudinal factors may have an effect upon their decision making.

In order to make this examine this possibility, two separate models were estimated: one for domestic cases and one for foreign/military. The domestic model includes 198 votes to analyze; the foreign model 144. The model for each contains the same variables as previous models except case type, which is the selection variable for each model. Also, in each model, certain presidential dummy variables were excluded from the analysis because they were constant within the model, thus providing no variance to test.
Table 17 Logistic Regression of Only Domestic Cases

<table>
<thead>
<tr>
<th></th>
<th>Marginal Effect</th>
<th>beta</th>
<th>S.E.</th>
<th>p.</th>
</tr>
</thead>
<tbody>
<tr>
<td>Armed Conflict</td>
<td>52.7</td>
<td>2.347</td>
<td>.898</td>
<td>.009</td>
</tr>
<tr>
<td>opinion</td>
<td>6.2</td>
<td>.262</td>
<td>.132</td>
<td>.047</td>
</tr>
<tr>
<td>Armed*Opinion</td>
<td>-7.6</td>
<td>-.351</td>
<td>.166</td>
<td>.034</td>
</tr>
<tr>
<td>Executive</td>
<td>-19.3</td>
<td>-.805</td>
<td>.659</td>
<td>.222</td>
</tr>
<tr>
<td>Nominated</td>
<td>15.4</td>
<td>.623</td>
<td>.533</td>
<td>.242</td>
</tr>
<tr>
<td>SegalCover</td>
<td>-25.3</td>
<td>-1.043</td>
<td>.726</td>
<td>.150</td>
</tr>
<tr>
<td>Respondent</td>
<td>-7.1</td>
<td>-.284</td>
<td>.519</td>
<td>.584</td>
</tr>
<tr>
<td>Eisenhower</td>
<td>-33.2</td>
<td>-1.565</td>
<td>1.162</td>
<td>.178</td>
</tr>
<tr>
<td>Nixon</td>
<td>-56.0</td>
<td>-3.571</td>
<td>1.295</td>
<td>.006</td>
</tr>
<tr>
<td>Ford</td>
<td>-36.1</td>
<td>-1.761</td>
<td>1.050</td>
<td>.093</td>
</tr>
<tr>
<td>Carter</td>
<td>32.9</td>
<td>1.474</td>
<td>1.865</td>
<td>.429</td>
</tr>
<tr>
<td>Reagan</td>
<td>0.4</td>
<td>.013</td>
<td>.600</td>
<td>.983</td>
</tr>
<tr>
<td>Bush</td>
<td>-6.2</td>
<td>-.253</td>
<td>1.224</td>
<td>.836</td>
</tr>
<tr>
<td>Lagged DV</td>
<td>51.2</td>
<td>2.270</td>
<td>.443</td>
<td>.000</td>
</tr>
<tr>
<td>Constant</td>
<td>-1.126</td>
<td>.600</td>
<td>.061</td>
<td></td>
</tr>
</tbody>
</table>

\( N = 194 \) Mean of the DV = .49 Std. Deviation of the DV = .501
Nagelkerke \( r^2 = .614 \)
-2 Log Likelihood = 145.292
Percent Correctly Predicted = 86.2
PRE = 34.8%

This model in Table 17 provides the first statistically significant coefficients for public opinion of the president and the interaction of that opinion with armed conflict within this study. This finding means that in domestic cases, public opinion trend of the president has a statistically significant effect on individual-level justice decision making. This supports the findings of Yates and Whitford (1998) and Yates (2002). The interaction of armed conflict and public opinion has a negative effect on the model, possibly because as armed conflict continues through time, it has a possible negative effect upon public opinion, as seen during the Vietnam War. It is also important to note that the coefficient for the Segal-Cover scores do not reach statistical significance, as shown in Table 17.
Table 18 Logistic Regression for Only Foreign/Military Cases

<table>
<thead>
<tr>
<th></th>
<th>Marginal Effect</th>
<th>beta</th>
<th>S.E.</th>
<th>p.</th>
</tr>
</thead>
<tbody>
<tr>
<td>Armed Conflict</td>
<td>-65.6</td>
<td>-4.149</td>
<td>1.637</td>
<td>.011</td>
</tr>
<tr>
<td>Opinion</td>
<td>-0.8</td>
<td>-.051</td>
<td>.097</td>
<td>.600</td>
</tr>
<tr>
<td>Armed*Opinion</td>
<td>-0.1</td>
<td>.003</td>
<td>.180</td>
<td>.987</td>
</tr>
<tr>
<td>Executive</td>
<td>-0.6</td>
<td>-.045</td>
<td>.609</td>
<td>.942</td>
</tr>
<tr>
<td>nominated</td>
<td>9.8</td>
<td>.823</td>
<td>.901</td>
<td>.361</td>
</tr>
<tr>
<td>SegalCover</td>
<td>-23.9</td>
<td>-1.531</td>
<td>.874</td>
<td>.080</td>
</tr>
<tr>
<td>respondent</td>
<td>-5.9</td>
<td>-.406</td>
<td>.609</td>
<td>.505</td>
</tr>
<tr>
<td>Truman</td>
<td>9.9</td>
<td>.827</td>
<td>1.684</td>
<td>.623</td>
</tr>
<tr>
<td>Johnson</td>
<td>22.0</td>
<td>2.806</td>
<td>1.933</td>
<td>.147</td>
</tr>
<tr>
<td>Carter</td>
<td>6.4</td>
<td>.508</td>
<td>3.119</td>
<td>.871</td>
</tr>
<tr>
<td>Reagan</td>
<td>-38.6</td>
<td>-2.044</td>
<td>1.199</td>
<td>.088</td>
</tr>
<tr>
<td>Lagged DV</td>
<td>-7.8</td>
<td>-.572</td>
<td>.540</td>
<td>.290</td>
</tr>
<tr>
<td>Constant</td>
<td>4.528</td>
<td>1.251</td>
<td>.000</td>
<td></td>
</tr>
</tbody>
</table>

N = 143 Mean of the DV = .73 Std. Deviation of the DV = .443
Nagelkerke $r^2 = .375$
-2 Log Likelihood = 122.690
Percent Correctly Predicted = 80.3
PRE = 7.1%

Only one variable in the foreign model reaches statistical significance: armed conflict. However, its coefficient is signed in the opposite direction as hypothesized. This means that during foreign/military cases, the presence of the U.S.’s being involved in armed conflict actually increases the likelihood individual justices will vote against the president. Only the Segal-Cover scores approach conventional levels of statistical significance, as shown in Table 18. In foreign/military cases, the most important factor explaining the dependent variable is the presence of armed conflict.

When comparing the models estimated separately for domestic and foreign/military cases, some distinctly interesting occurrences emerge. Among domestic cases, the public opinion trend of the president, and the interaction of armed conflict and public opinion become statistically significant. This means that when the justices consider domestic power cases
involving the president, they are more attuned to extra-attitudinal and extra-legal factors. These variables do not reach conventional levels of statistical significance for foreign/military cases. In foreign/military cases, only one variable reaches statistical significance, which may possibly mean that justices consider very few factors when considering foreign cases because of the considerable constitutional power given to the president in foreign and military issues. Most importantly, when separating the model by case type, the presence of armed conflict has dramatically different effects upon the model. Within domestic cases, it has a statistically significant, positive effect. This means that when the justices are considering a domestic power case, the presence of armed conflict increases the likelihood that will decide in favor of the president which supports the findings of Epstein et al. (2005). However, a similar association is not present among foreign/military cases. In fact, the opposite result emerges. Among foreign/military cases, the presence of armed conflict increases the likelihood the justices will decide against the president. This relationship was not hypothesized, and contradicts much of the rally around the flag literature.

The model predicts individual level votes quite well. The model contained in Table 15, which analyzes individual voting without separating the model by case type, accurately predicts 79.8 percent of the justices’ voting. This is an improvement of 20.6 percent over the 59.2 percent baseline. Table 17, which only contained domestic cases, accurately predicted 86.2 percent of the votes, which is a 34.8 percent increase over the 51.3 percent baseline. Table 18, which was estimated for only foreign and military cases, accurately predicted 80.3 percent of the individual votes, which is a 7.1 percent increase over the 73.2 percent baseline. This only moderate increase in the predictive accuracy may be because of the larger likelihood that the president will win cases involving foreign and military powers.
When examining the Nagelkerke $R^2$ measures a similar trend emerges as with the percent correctly predicted. Nagelkerke $R^2$ was used to evaluate model performance, and while calculated differently, it should be interpreted like an $R^2$ measure in an OLS regression in terms of strength (Gujarati 2002). Nagelkerke $R^2$ ranges from 0 to 1 but, unlike the $R^2$ statistic used in OLS regression, the Nagelkerke $R^2$ is not a percent reduction of error measure and should not be interpreted as one. In Table 15, the Nagelkerke $R^2$ is .492 meaning that the variables have a moderate to strong effect upon the model. In Table 17, the Nagelkerke $R^2$ is .614, which means that for domestic cases the model performs quite well. In Table 18, however, the Nagelkerke $R^2$ is only .375 which shows a weak to moderate model. Again, this can possibly be explained by the consideration that justices give foreign/military cases when deciding in favor of the president.

Summary

The analyses completed in this Chapter have shown that justices consider extra-attitudinal and extra-legal factors when making decisions involving cases of presidential power. Furthermore, it has shown that the presence of armed conflict has a statistically significant effect upon individual-level justice decision making. In the aggregate model, all coefficients were in their hypothesized directions. Furthermore, the only two variables that reached statistical significance consistently were armed conflict and personal attribute variables (either party identification or the Segal-Cover scores). The results of this examination led support to $H_3$ and $H_7$ in the aggregate. In domestic cases, $H_1$ and $H_7$ cannot be rejected. In foreign cases, however, while the estimate of armed conflict is statistically significant, it is not in its hypothesized direction. Thus, the effect of armed conflict upon the individual level decision-making of the justices is dependant upon what type of case the Court is hearing. In domestic cases, the
presence of armed conflict is associated with the increased likelihood that a justice will cast a vote in favor of the president, while in foreign and military cases, the presence of armed conflict is associated with the likelihood that a justice with vote against the president. This finding contradicts previous research which argues that the presence of armed conflict increases support for the president. The next Chapter will develop theoretical reason why the presence of armed conflict is associated with the increased likelihood that justices will vote against the president in foreign and military cases.
CHAPTER FIVE: CONCLUSION

The relationship between the presidency and Congress has been an area of frequent research (e.g., Bond and Fleisher 1980; Covington et. al 1995; Cronin 1980; Fisher 1994; Meernik 1995; Rivers and Rose 1985; Schlesinger 2004; Wildavsky 1966, 1989), as has the relationship between the U.S. Supreme Court and Congress (e.g., Clark and McGuire 1996; Handberg and Hill 1980; Hausegger and Baum 1999; Ignagni and Meernik 1994; Marshall 1989; Meernik and Ignagni 1995); however, the relationship between the Supreme Court and the presidency is an area which has only recently (with the emergence of the separation of powers model) begun to be examined with sophisticated quantitative analyses (King and Meernik 1999; Yates and Whitford 1998; Yates 2002). The U.S. Supreme Court and the presidency both have extremely limited powers constitutionally, unlike their congressional colleagues which receive the wealth of the power from the Constitution. Therefore, an examination of how they interact directly with their policy-making roles may be quite elaborative.

This study departs from the current dominant paradigm within the field of judicial politics, the attitudinal model (Segal and Spaeth 1993, 2002). As previous researchers have argued, the attitudinal model, which seeks to predict individual level justice voting solely on the basis of individual ideology, is too simplistic to fully account for the decision-making process of each justice (Mishler and Sheehan 1993, 1996; Yates and Whitford 1998; Yates 2002). The attitudinal model, however, does have strong predictive powers, and, as such, cannot be fully discarded. What Mishler and Sheehan (1996:198) describe as the “naïve attitudinal model” is a starting point for more thorough examinations of individual-level decision making of the U.S. Supreme Court.
This analysis, beginning with the attitudinal model as a theoretic starting point, hypothesized that because of the highly salient nature of the type of cases being examined, a more interactive model of decision making needed to be employed. The “separation of power” literature is instructive concerning how to model decision-making in cases in which another branch of government is involved (Epstein and Knight 1998). Operating from a very basic game theoretical approach, this work makes the assumption was made that some individual justices may take into consideration other non-attitudinal factors, directly and indirectly, that were related to the case they were deciding. Therefore, while beginning with the attitudinal model, it was expected that other extra-attitudinal and extra-legal factors may affect the individual justice’s decision making.

The research done herein completed was part replication, part refinement. This study was modeled after the previous research of Yates and Whitford (1998) and Yates (2002). Yates and Whitford (1998) examined the individual-level decision making of U.S. Supreme Court justices in cases of presidential power from 1949 to 1993 ($N=32$). While this research tried to exactly replicate the cases used in their research by following the same coding rules, there were substantial differences partially because Yates and Whitford did not supply a case list.\footnote{The appendix contains a list of cases, the votes of which are examined herein.} As such, this research is more readily verifiable than that of Yates and Whitford. Besides extending the time line of analysis through 2005, another explanatory variable was included in the analysis: the presence of armed conflict.

Mishler and Sheehan (1993, 1996) argued that in salient cases, individual justices may consider public opinion when making their decisions. Yates and Whitford (1998) and Yates
(2002), building upon previous work, hypothesized that in Supreme Court cases which involved the president justices would be more likely to examine the public support of the president than the public support of the issue being adjudicated. Since this study in large part replicated the work of Yates (2002), it included a similar measure of public opinion of the president that sought to predict decision making of the individual justices.

Wildavsky (1966, 1989) was the first researcher to articulate the “two presidencies” thesis, which argued than the president could expect to be more successful with Congress in foreign policy because a considerably larger amount of power was constitutionally delegated to the president in this field as compared to domestic policy. Building upon this theory, King and Meernik (1999) examined the number of cases that dealt with foreign policy powers, and the president’s success rate in those cases. They found that throughout the history of the Court, the president won his cases the majority of the time; however, in cases that dealt with foreign policy issues, he was substantially more successful. Yates (2002) hypothesized that when individual justices heard cases involving the foreign policy powers of the president, they would be more likely to rule in his favor. This analysis made a similar assumption.

Researchers have long hypothesized that because of patronage, justices will vote in accordance with their nominating president’s principles and, as such, if when the president appears before the Court, he should reasonably expect his nominees to support his (Dahl 1957; Funston 1975; Norpoth and Segal 1994). Tate (1981) and Tate and Handberg (1991) hypothesize that besides patronage, justices may vote consistently with their nominating president’s ideologies because it is likely that the president nominated an ideological match to himself. Therefore, this analysis included a dichotomous variable to assess the extent to which a justice ruled in favor of his nominated president.
Ducat and Dudley (1989) and Yates and Whitford (1998) argued that a justice having previous executive experience at the state or federal level would perhaps cause them to be more likely to rule in favor of presidential power. Tate (1981) and Tate and Handberg (1991) found that previous judicial experience and previous prosecutorial experience could affect decision making as well. Therefore, in this research a dichotomous variable was included to test whether previous executive experience has an affect on individual-level decision making.

Yates (2002) hypothesized that whether the president appeared before the Court as petitioner or respondent may have affect a justice’s decision making. He argued that normally the Court has discretion when deciding what cases to grant certiorari. However, in highly salient cases, the decision to hear a case is not completely up to the Court as external pressures may dictate action. Presidential power is one instance of these highly salient cases. In cases that involve presidential power, Yates (2002) argues that the Court prefers a situation where the Court can rule simultaneously with the decision of the lower court and for the president. As such, in this analysis it was expected that the president would be more likely to win if he appeared before the Court as respondent.

Researchers in the congressional politics field have often used the “rally around the flag” theory to explain interaction between the Congress and the president during times of armed conflict (Baker and Oneal 2001; Lee 1977; Mueller 1973); however, little research has been conducted on the effect armed conflict may have on U.S. Supreme Court decision-making. Borrowing from the “rally around the flag” literature, this research hypothesized that the presence of armed conflict at the time of a Supreme Court decision would increase the likelihood that the justices would decide in favor of the president. Epstein et. al (2005) argue that armed conflict is directly related to decision making in cases which are not related to the war (domestic
cases), but does not have a statistically significant effect for cases that are related to the war (foreign cases). Epstein et al. (2005) examined all cases from 1941 to 2002, while this study only analyzed cases which involved presidential power from 1949 to 2005.

Therefore, starting from the “naïve attitudinal model,” this study built a more theoretically complete model to predict individual level decision-making of the U.S. Supreme Court justices in cases of presidential power. By assessing the effect of not only ideology, but also presidential approval rating, case type, presidential nomination, prior executive experience of the justice, litigant status of the president, and the presence of armed conflict, it was hoped that cleared picture of how justices behaved in cases of presidential power would be achieved.

Findings and Theoretical Explanations

The overall results confirmed most of the findings of the literature, but contradicted some of them as well. Contradicting the work of Yates and Whitford (1998) and Yates (2002), in this analysis public opinion of the president only reached statistical significance once, in the subset of domestic cases. Yates and Whitford (1998) found public opinion of the president (measured in the same way as the current analysis) to be the third largest predictor of individual-level votes behind only case type and ideology. Public opinion of the president consistently reached statistical significance in each of their analyses, while in the current examination it reached statistical significance in only one of the subsets of cases (domestic). Furthermore, in the current analysis public opinion, when statistically significant, was not a substantial predictor of individual-level justice voting. A one point increase in public opinion only increased the likelihood a justice would vote for the president in domestic cases by 6.2 percent. When compared with other variables that attained statistical significance in the model, this performance
is not impressive. When considering the presence of armed conflict increases the likelihood a justice will vote for the president by 52.7 percent, a 6.2 percent increase (the smallest statistically significant increase in the model) is not as substantial as one would expected from Yates and Whitford’s research.

There are numerous possible explanations for the small impact of public opinion within this analysis. As mentioned before, the current analysis, while modeled after the research of Yates and Whitford (1998) and Yates (2002), was unable to completely replicate the work because of the lack of a case listing provided in either work. As such, the two studies case selection may differ drastically. A more theoretical reason for the lack of performance by public opinion in this model could be the inclusion of an armed conflict variable in the present analysis. Armed conflict and public opinion of the president are known to covary, as explained by the “rally around the flag” literature (Baker and Oneal 2001; Lee 1977; Mueller 1973). Furthermore, in this analysis, the two variables were tested for multicollinearity, and while they did not reach the critical value \((0.80 \eta)\), it was rather high \((0.739 \eta)\). Despite the presence of a control variable (in the form of an interaction between public opinion and the presence of armed conflict), armed conflict could serve to ultimately mute the effect of public opinion on individual level decision-making. Also conflicting with the findings of Yates (2002) is the failure of the litigant status of the president to ever reach statistical significance. There is no theoretic reason why these results should differ from the results of Yates (2002); therefore, this discrepancy may arise because of differing case selection.

Another variable that failed to reach statistical significance herein is the presence of a justice nominated by the president who is party to the case being considered. Ducat and Dudley (1989) found this variable to reach statistical significance in their analysis of Federal Appeal’s
Court justices. Yates and Whitford (1998), replicating the work of Ducat and Dudley on the Supreme Court level, however did not find the justice’s nominating president to be a statistically significant predictor of individual level voting. Tate (1981) and Tate and Handberg (1991) note that while there is a possibility of patronage between a justice and his nominating president, another possible explanation for a justice ruling consistently with the policy initiatives of a president (or in this case for the president) is because a president will traditionally nominate a justice who has a similar ideology to him, thus assuring that the justice will vote consistently with the ideology of the president. In this analysis, this could mean that the variation expected from the nominating president variable has been absorbed by the inclusion of a variable measuring the ideology of the individual justice.

The presence of previous executive experience variable also did not reach conventional levels of statistical significance within this model. Ducat and Dudley (1989) in their analysis of Federal Appeal’s court justices and Yates and Whitford (1998) in their analysis of Supreme Court justices did not find this variable to be a statistically significant predictor of individual level justice voting in cases of presidential power either. While Tate and Handberg (1991) find previous judicial experience to be a significant predictor of individual justice voting, it appears that previous executive experience does not have a similar effect.

Three variables did consistently reach conventional levels of statistical significance: justice ideology, case type, and the presence of armed conflict. Justice ideology has traditionally been seen as the cornerstone of predicting justice voting since the emergence of the judicial behavioralists (Schubert 1965, 1974). While it is not the only factor to consider when considering the policy outputs of judges (Mishler and Sheehan 1993, 1996; but see Segal and Spaeth 1992, 2002), it is the point from which most analyses of individual level justice voting
begin. The finding that ideology is a strong predictor of individual level justice decision-making in cases of presidential power is therefore terribly surprising. More liberal justices are strongly associated with voting against presidential power. This is theoretically explained by the coalescing of elites within the Democratic Party (at least during this period of analysis) an aversion to broad extensions of power of the president. Democrats began to see the power of the president as something that needed to be checked in the wake of the Vietnam War and Watergate (Schlesinger 2004; Thomas and Pike 1996). Thus, in the Supreme Court, it is theoretically consistent to find the more liberal judges (those traditionally associated with the Democratic Party) to be more likely to vote against the president in these cases.

The theoretical reasoning behind the statistical significance of case type when analyzing individual-level justice voting dates to the inception of the United States constitutional democracy. The United States constitution specifically sets forth that the president has more substantial powers in the realm of foreign policy than in that of domestic. It would be theoretically consistent that the Supreme Court’s members would recognize and act in accordance with this distinction. Therefore, the finding that a justice is more likely to vote for the president if the case references his foreign policy powers is to be expected and confirms the findings of King and Meernik (1999), Yates and Whitford (1998), and Yates (2002). When case type was included in the model and not used as a selection variable, its marginal effect consistently outperformed all other variables contained within the model. In the aggregate, if the case being considered involved presidential foreign policy powers, a justice was approximately 50 percent more likely to rule in favor of the president. This finding has two important implications. First, the attitudinal model, as Segal and Spaeth (1992, 2002) describe it, does not completely account for the variation in individual level justice voting in cases of presidential
power. Case type, an extra-attitudinal factor, is a statistically significant predictor of individual level voting as well as the presence of armed conflict. If the “naïve attitudinal model” were correct, variables that did not measure ideology would not have reached statistical significance. Second, ideology does not even have the largest marginal effect upon the model. Case type outperforms ideology in terms of predictive capability. Therefore, while ideology is an important consideration for any analysis of Supreme Court decision-making, it is a starting point, but not the only point.

The presence of armed conflict variable, while outperforming the expectations of this researcher, still presents quite a puzzle to be explained. In the aggregate, the results were as hypothesized: the presence of armed conflict increases the likelihood a justice will vote in favor of the president. In terms of marginal effect, the presence of armed conflict increases the likelihood a justice would vote for the president by 47 percent, which is only outperformed in Table 15 by case type, and then only marginally. This finding in the aggregate lends support to the argument that the “rally around the flag” literature can be translated seamlessly to the judicial politics field. When sorting by case type, however, the effect of the presence of armed conflict is modified.

In domestic cases, the presence of armed conflict performed as was hypothesized: the presence of armed conflict means that individual justices are more 52.7 percent more likely to rule in favor of the president. However, the same trend is not present among the foreign/military cases. In those cases, the presence of armed conflict means that individual justices were 65.6 percent less likely to vote for the president. These findings are comparable to those of Epstein et. al (2005), with one important difference. While Epstein et. al conclude that the presence of armed conflict was strongly associated with increased conservatism among cases not related to
the war, they found no significant effect between armed conflict and those cases related to the war. In the present analysis, not only was there a significant effect between armed conflict and justice decision-making in foreign/military cases, but it was a negative effect, meaning that in foreign/military cases that were ruled upon during times of armed conflict individual justices were more likely to rule against the president.

Theoretically, this presents a conundrum. The “rally around the flag” literature describes a situation in which the president experiences an increase in his political capital as a result of the United States, being involved in an armed conflict. This means that in both the domestic and foreign policy cases, the president should experience a situation where he is freer to implement his policy initiatives. Therefore, especially in the realm of foreign/military powers, one would expect the presence of armed conflict to increase the likelihood of the president’s winning individual level votes before the Supreme Court. Noting the work of Schlesinger (2004) and Thomas and Pika (1996), elite Democrats have become wary of the president’s war-making power. Fisher (2004) acknowledges that while Democrats within Congress have been wary of the relatively unchecked power of the president, they have been unwilling to take action against the office excluding the War Powers Resolution, which while instituted to provide a check upon the military powers of the president, has been seldom used to do so. Following this reasoning, it is theoretically possible that the Supreme Court is attempting to play a role in checking the actions of the president. Fisher identifies that one of the reasons why members of Congress may refuse to check the presidency is that often their electoral success is closely tied to the president. Taking action against the president, especially during times of armed conflict where traditionally the public mood is supportive of the president, may have electoral consequences. Justices on the Supreme Court, however, lack a similar electoral motivation. Because of their life-tenure, the
justices are in a “safer” position from which to check presidential military power. Furthermore, because of their position, political retribution from the executive is unlikely. As such, it is theoretically possible that justices of the Supreme Court, because of their life tenure and lack of electoral accountability, are more structurally able to take actions to check the military powers of the president than their congressional brethren. If this is the case, the continued expansion of the military powers under President George W. Bush may, if decided by the Court, may eventually lead to conflict between these two branches of government.

Further Research

While this work introduced a new variable (the presence of armed conflict) into the study of the interaction between the Supreme Court and the presidency, there are additional strategies researchers could take to provide an even more theoretically satisfying understanding of their interaction. While the magnitude of the armed conflict was examined as a possible effect that may influence individual level justice decision-making within this analysis, it was done by using body count as a proxy for magnitude of the armed conflict. This process, while theoretically consistent with the international conflict literature, may not be the best way to examine magnitude with respect to the United States. While body count certainly plays role in “magnitude,” it does not address public saliency or concern in the armed conflict. While Vietnam had both public saliency and a large body count, it was largely seen in a negative light. However, World War II, which was also publicly salient and had a large body count, was seen in a positive way by the public. Therefore, a measure of magnitude of armed conflict that rests upon body count as its sole proxy does not completely explain the complexities. Therefore, a more robust measure of the magnitude of armed conflict may be developed that takes into
consideration not only body count, but also public saliency and public mood. Furthermore, public mood during an armed conflict may not be a constant and should be accounted for within the measure.

The results of this study may be time bound. As Schlesinger (2004) and Thomas and Pika (1996) acknowledge, following World War II, the Democratic Party became wary of the unchecked power of the presidency. However, as Nelson (2003) points out, the Democrats under Franklin Delano Roosevelt celebrated a strong presidency. While it could be true that attitudinal factors may still play a role in the time before this current analysis (pre-1949), the relative impact of the ideological make up may be less, or the direction of that impact may be reversed. Also, the powers of the judiciary and the presidency have developed by an incremental process and, therefore, the interaction between these two branches may well be different in eras during which the relative power of both institutions is substantially different. In fact, prior to the Judge’s Bill of 1925, the discretionary power of the Supreme Court was highly limited and as such the Court had a much different agenda than it does currently (Lanier 2003). Before the Judge’s Bill, presidential power may have not been an issue that consistently reached the Court. In addition, Lanier (2003) illustrates a decline in unanimity on the Court in the 1940s. Previously, dissenting votes were a rare occurrence. As such, it would be theoretically consistent to assert that those cases that involved presidential power that reached the Court were typically not decided down ideological lines. This would have substantial implications for the empirical study of the interaction between the Supreme Court and the presidency. Therefore, further researchers should strive to extend this research by including other time periods in order to develop a clearer picture of the relationship between the Supreme Court and the president. Furthermore, through the use of time series analysis, the theories generated in the study could be examined to see if
they are truly time bound. King and Meernik (1999) examine the foreign policy cases of the president before the Supreme Court, but that analysis focuses on how the Court has ruled, but not why it has ruled that way.

While this analysis focuses on the direct interaction of the Supreme Court and the presidency through an analysis of those cases that appeared before the Court that involved presidential power, this is not the only venue in which these two institutions interact. Yates (2002) also examines presidential success in two alternate venues before the Supreme Court: the executive bureaucracy and the president’s policy initiatives. Alternately, Salokar (1992) examines the success of the Solicitor General, the president’s lawyer, before the Court. To fully address the separation of power issues that arise when these two branches of government interact, a more thorough analysis of these addition cases needs to be undertaken. Also, the work of Yates and Whitford (1998), which this work attempts to replicate, is a response to the work of Ducat and Dudley (1989), who examine the success of the president before the U.S. Courts of Appeal. This area of examination is in due for a revisiting, and with the emergence of a readily available U.S. Court of Appeals database (Songer 1990), which includes cases decided from 1925 to 1988, and has been recently updated; this research should be relatively straightforward to complete.

Conclusion

This study set out to examine the interaction between the U.S. Supreme Court and the presidency. Beginning from the assumption that the “naïve attitudinal model” was too simplistic to fully account for the variation in individual level justice decision-making, a more robust model was constructed using attitudinal, extra-attitudinal, and extra-legal factors to predict
individual justice behavior. Operating from the theoretical construct of a “separation of powers”
game, it was believed that in these highly salient cases while attitudinal factors would be
important, other factors would also account for variation. As expected, ideology and case type
were statistically significant predictors of individual level justice voting. The effect of armed
conflict however was more substantial, and more puzzling, than expected. It would appear as in
the modern era Cicero’s maxim “inter arma silent leges” (during war, the law is silent) must be
reconsidered. In the post-World War II era, it appears that during war, the Constitution speaks
with a distinctly louder voice.
Johnson v. Eisentrager, 339 U.S. 763 (1950)
Youngstown Sheet and Tube Co. v. Sawyer, 343 U.S. 579 (1952)
Zemel v. Rusk, 381 U.S. 1 (1965)
Zschernig v. Miller, 389 U.S. 429 (1968)
U.S. v. United States District Court, 407 U.S. 297 (1972)


The above cases are those contained within the analysis.
LIST OF REFERENCES


*Marbury v. Madison.* 1803. 1 Cr. 137.


