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INFLUENCING THE COURT: DETERMINANTS OF PRESIDENTIAL ACTION

by

NATALIE ROGOL

Under the Direction of Amy Steigerwalt, PhD

ABSTRACT

This work examines when, and under what conditions, the president seeks to accomplish his policy goals through his interactions with the United States. While there is a wealth of literature that explores how other actors seek to influence the courts, there is little work that systematically explores when and how presidents try to influence the courts. I argue that the president's decision to take action, and the degree of action he takes, is a function of his level of interest or commitment in achieving policy change and the likelihood that policy change would occur without his intervention. This project moves beyond simply assuming presidents want to influence the judiciary to proposing a novel theoretical framework for when they are mostly likely to do so, in what manner, and the potential costs that presidents must weigh in deciding whether to act.

INDEX WORDS: Executive-Judicial Relationship, Presidential Decision Making, Solicitor General, Appeals, Amicus Curiae Briefs.

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NATALIE ROGOL

A Dissertation Submitted in Partial Fulfillment of the Requirements for the Degree of

Doctor of Philosophy

in the College of Arts and Sciences

Georgia State University

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2018

INFLUENCING THE COURT: DETERMINANTS OF PRESIDENTIAL ACTION

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DEDICATION

To Donald Goltz: my first and greatest best friend.

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1 CHAPTER 1: INTRODUCTION

1.1 Introduction

On September 19, 1944, President Truman met with some members of the NAACP. At the meeting, they informed the president about the recent brutal beating of an African American WWII Sergeant, in South Carolina, just hours after he was discharged from the Army.¹ One particularly disturbing fact conveyed to Truman was how the mayor of Batesburg, South Carolina (where the beating occurred) bragged about the incident (Letter, Truman to Clark, 9/20/1944). The next day, Truman relayed the story to his Attorney General (AG), Tom C. Clark (a future Supreme Court Justice), in a letter. In the letter, Truman added, “I have been very much alarmed at the increased racial feelings all over the country” (Letter, Truman to Clark, 9/20/1944). Truman was also tired of waiting to join in or initiate prosecutions after a racially charged beating or lynching took place; he wanted to introduce major policy change to combat racial discrimination (Letter, Truman to Clark, 9/20/1944).

In fact, Truman cared so much about combating discrimination that he asked AG Clark to create a commission charged with investigating potential, broad policy initiatives. On December 5, 1946, Truman signed an executive order that created the President’s Committee on Civil Rights. Shortly thereafter, Truman wrote the Committee:

I have been very much alarmed at certain happenings around the country that go to show there is a latent spirit in some of us that isn't what it ought to be. It has been difficult in some places to enforce even local laws. I want the Attorney General to know just exactly how far he can go legally from the Federal Government's standpoint. I am a believer in the sovereignty of the individual and of the local governments. I don't think the Federal Government ought to be in a position to exercise dictatorial powers locally; but there are certain rights under the Constitution of the United States which I think the Federal

¹ In his letter, Truman did not comment on the name of the victim nor location of the event. But, he is referencing the infamous beating of U.S. Army Sergeant Isaac Woodard Jr. in Batesburg (now Batesburg-Leesville), South Carolina. The attack occurred in February 1946, and Truman met with the NAACP in September. The NAACP fought hard to bring this attack to the public’s attention.

Government has a right to protect. It's big job. Go to it! (Harry S. Truman: "Remarks to the President's Committee on Civil Rights," January 15, 1947).

The Committee would go on to create a list of recommendations and policies, some of which were subsequently implemented by the White House. Truman also spoke to Congress, beseeching it to create its own committee on civil rights in order to enact more legislation to protect minorities (Harry S. Truman: "Special Message to the Congress on Civil Rights," February 2, 1948). Some of the Committee's recommendations for Executive Action included enlarging the staff of the Civil Rights Section of the Department of Justice (DOJ)- which came to fruition- to increase their investigative actions. The Committee also recommended intervention by the DOJ in legal attacks against restrictive covenants (a race-based discriminatory housing practice) which the government would later challenge in the courts (Memo, Recommendations of the President's Committee on Civil Rights, 1947).

Before the Truman presidency, and the expansion of the Civil Rights Section of the DOJ, AG Clark noted that federal investigations into civil rights violations were slow and that the government had not joined as amicus (submitted a friend of the court brief) in civil rights cases in a notable manner (Tom C. Clark Interview, 2/8/1973, 130). Clark went so far as to state, "...why, it's remarkable we got as far as we did. Mr. Roosevelt, it's true, always talked about these things but never did anything about them, except this FEPC [Fair Employment Practice Committee]. But Mr. Truman, he didn't talk about them, he did something about them" (Tom C. Clark Interview, 2/8/1973, 132).

Under the personal leadership of Truman, the administration began to attack civil rights violations through the courts. The DOJ joined as amicus in *Shelley v. Kraemer* (334 U.S. 1), the restrictive covenants case, the *Smith v. Allwright* (321 U.S. 649) case about voting rights in

Texas, and many cases involving desegregation of law and graduate schools. The administration prevailed in *Smith v. Allwright*, *Shelley v. Kraemer* and many of the education cases. In fact, it was Truman's Solicitor General (SG) who, under Truman's encouragement, first got the executive branch involved in the early proceedings of *Brown v. Board I* (347 U.S. 483), the seminal school desegregation case (the Supreme Court would request a brief from Eisenhower's SG after the change in administrations). Talking later about these cases, Clark said, "We won some of our most significant victories in that area, that up to that time was thought to be untouchable" (Tom C. Clark Interview, 2/8/1973,124). Similarly, after his time in office, Drew S. Days III (President Clinton's Solicitor General) wrote about the relationship of the President and SG, saying, "In the Truman Administration, for example, the President was reportedly involved in the groundbreaking decision to authorize the government's amicus brief in *Shelley v. Kraemer* [restrictive covenant case], its first in a civil rights case" (Days III 2001, 509-510).

The above story, and confirmation by former SG Days, highlights Truman's consistent and personal involvement in crafting executive strategy vis-à-vis the judiciary. Obviously, there would be decades and decades more of advancements to be made in civil rights (as there still are). But, Truman took important first steps in engaging with the courts to change policy.

In a system of separated powers, the branches must interact with each other to shape policy. Given the considerable limits to political capital, what inspires the executive branch to take action to influence another? More specifically, when and how does the White House choose to engage with the courts? This dissertation explores these questions by developing and then empirically testing a novel theory for the impetus for executive action within the judicial branch. Rather than primarily focusing on the outcomes of the executive's actions in court, this dissertation explores what prompts the executive to take action in the first place.

The first contribution of this research is to add support to the assumption that the president cares about policy, and furthermore, cares about judicial policy outputs. The understanding of the personal and institutional goals of presidents is well established. Presidents are motivated by policy, reelection, and public image goals. Policy achievements can increase a president's political capital and public standing, allowing him to win future battles (Neustadt 1990). Achieving policy goals also aids in reelection by satisfying public demands for action. Presidents are also concerned about their legacy; reelection, high public standing, and policy achievements can all aid in securing a positive legacy (Curry, Pacelle, and Marshall 2008). Many of a president's policy achievements are realized through their interaction with Congress (Edwards 2003; Kernell 2007), but can also be fulfilled through the court system (Segal, Timpone, and Howard 2000; Pacelle 2003; Curry, Pacelle, and Marshall 2008). This work builds on these studies by observing and assessing what motivates presidential desire to pursue policy through the court system.

The next important contribution of my work is to demonstrate that the executive branch primarily works to promote the president's broad policy goals. This is not an uncontroversial claim in the study of the president and the Department of Justice (DOJ) relationship (see Scigliano 1971; Caplan 1987; Segal 1988; Fisher 1990; Clayton 1992; Salokar 1992; Meinhold and Shull 1998; Graham 2002; Curry, Pacelle, and Marshall 2008; Pacelle 2003; Nicholson and Collins 2008; Black and Owens 2012a). As is covered fully in later chapters, there remains a popular belief that the Solicitor General (SG), America's lawyer, is effectively insulated (Pacelle 2003), or should be insulated (Caplan 1987), from the president. However, my archival analysis demonstrates that there is regular communication between the White House and the Department

of Justice, and that there is real merit in including the president's preferences in theories and models of executive-judicial interactions.

Building off these findings, this work forwards and tests an intuitive, yet original, theory of executive decision-making in choosing to engage with the judicial branch. I contend that presidents care about judicial policy and thereby desire to influence judicial policy. However, as is true of all political actors, there is a limit to the president's political capital. We should see the executive branch take action in the courts according to a strategic and rational decision maker model. I argue the president's decision to take action is a function of his level of interest in seeing a policy change and the likelihood that policy change would occur without his intervention. Executives should therefore act when they care about a policy outcome (they care about the policy enough to spend the capital to enact it) and when that policy outcome is unlikely to occur without their action (they need to spend capital).

Truman's passion for changing civil rights policy poignantly illustrates the basis of this theory. Truman cared about civil rights, and had cared about the issue for a long time (Tom C. Clark Interview, 2/8/1973). As president, Truman was concerned about civil rights violations (Letter, Truman to Clark, 9/20/1944; Harry S. Truman: "Remarks to the President's Committee on Civil Rights," January 15, 1947). When it became apparent policy was not going to change, and in fact the odds seemed stacked against major civil rights progression, Truman decided to take action. He instituted a committee to recommend changes, expanded the civil rights division of the DOJ, and, through his SG, encouraged the Supreme Court to rule for significant change. Truman appears to be the lead in these endeavors, and his DOJ implemented his plan faithfully.

While many scholars focus on how presidents can influence judicial decision making through their appointment powers (Goldman 1997; Moraski and Shipan 1999; Segal, Timpone,

and Howard 2000; Epstein and Segal 2005), I examine instead how, like Truman, presidents may utilize a legal strategy to achieve policy goals. Presidents realize policy change can happen through the courts (Horowitz 1977; Melnick 1994; Hall 2011), and the findings of the judicial decision making field indicate that a president driven by policy would do well to attempt to influence the courts, at least when attempts at influence are politically viable (Whittington 2001; Johnson 2003; Curry, Pacelle, and Marshall 2008). Presidents seek to influence, not just credit claim, because their influence may get them the outcomes they desire. They may obtain these outcomes because the courts actively consider the positions of the other branches. It is important to understand presidential/executive actions, because these actions have very real judicial policy implications. For example, when the government appeals to the Supreme Court, the case is likely to be granted cert. When they government is granted cert, it is more likely than not to win. And, when the Solicitor General submits a friend of the brief, the SG's words are likely to be given significant policy weight by being cited in Supreme Court opinions.

Thus, my final contribution is to provide a more informed understanding of the executive-judicial relationship. The topic of presidential motivation via the judiciary is virtually ignored in the field of executive-judicial politics (but see Eshbaugh-Soha and Collins 2015). In fact, there does not appear to be a general theory that endeavors to predict broad behavior patterns of attempted presidential actions towards the courts. My theory seeks to remedy this oversight. If scholars want to understand the executive-judicial relationship, the field needs to understand the motivations of the relevant actors. While there is a body of literature that speaks to the decision-making motivations of justices, there is little about the motivational structure of executives. We know executives desire policy, but how and when that desire is acted upon in the legal context is understudied. Without understanding why the executive acts, and what explains

variations in when and how he acts, we cannot truly understand why the Court seems to listen. Examining this relationship from the president's perspective not only contributes to our understanding of the executive branch, but also to our understanding of the actions and motivations of the federal judiciary.

Therefore, this study speaks to both public law and presidency scholars. Currently, the bulk of the literature on the executive-judicial relationship is authored by public law scholars. The primary goal of these articles, as discussed above, is to determine what influence the executive can have on the Court- do the Court's ideological outputs reflect the president's preferences? Alternatively, the presidency literature has arguably ignored the executive's interactive relationship with the judicial branch. The work that has examined judicial strategy largely focuses on single case study analyses (Stern 1989; Carson and Kleinerman 2002; Graham 2002; Silverstein 2009), and has not developed a generalizable theory in this area (see Moe 2009). I argue there is more to be understood by offering greater attention to the motivational context of the president. Such a focus illuminates when the president is likely to attempt to influence the Court, where scholars should look for instances of influence, and why the Court may be more or less deferential. Such a focus also reveals the consistent, dynamic relationship between the executive and judicial branch. Scholars interested in understanding executive decision making, and executive influences on policy change, overlook executive-judicial relations at their peril. I therefore seek to identify the broad pathway presidents follow, apply this pathway across multiple administrations, and test it empirically. This dissertation ultimately offers, and provides empirical support for, a novel, generalizable theory as to why and when the president takes action to influence the Supreme Court.

1.2 Overview of Chapters

Chapter 2 explicates my theory of executive strategy vis-à-vis the courts. It begins by utilizing archival evidence to aid in developing an informed theory of executive decision making. This theory buttressing endeavor uses qualitative analysis that relies on the substantial and robust support of presidential and White House documents and discourse. I visited the presidential libraries of Truman, Eisenhower, Carter, and Reagan and conducted broad and extensive searches of documents related to the courts, cases, the Department of Justice, the Solicitor and Attorneys General, and legal matters.

The first part of my archival analysis helps establish the nature of the relationship between the Department of Justice, actors within (Solicitor General and Attorney General), the White House staff, and the president. Based on the archival findings, I argue that the DOJ is responsive to and reflective of the president's policy goals. I do not argue that this representation is perfect, but instead that generally there is faithful representation.

The second part of Chapter 2 uses the archival evidence and past literature to inform my theory of executive decision making to engage with the courts. Using the discourse and findings of the archival searches, I follow the progression of prototypical court cases to observe the decision making behavior of the executive branch. I explore actions the White House may take to influence the courts and observe what White House actors indicate motivated their decisions. The actions I identify in this chapter include initiating a case, appealing a case, the SG requesting a writ, providing amici briefs, establishing a settlement, or the president offering public statements about a case or issue.

Informed by the archival evidence, I offer the following theory: Since the president cannot take action on every case appearing before the court, and because actions have differing

costs, I posit there is a strategic calculation that the president makes in order to determine whether or not he takes action and as well as what types of action he takes. Simply put, the president will only take action when he thinks he has to and only takes action to the extent he believes he has to. The president's decision to take action, and the degree of action he takes, is thus a function of his level of interest in seeing a policy change and the likelihood that policy change would occur without his intervention.

If the president wants to achieve his policy goals through the courts, but thinks the court will rule in favor of his position without intervention, he should not expend extensive effort to attempt to influence the court, since using presidential resources is not necessary in order to realize his policy goals. If he wants a specific policy outcome being debated in the Court, but concludes that his policy position may not win, he will be willing to spend more in terms of effort to see it win. If a policy is very important to the president (if it is a top policy on his agenda), he might pull all the stops, spending as many resources as feasible to achieve the policy.

Chapter 3 quantitatively tests this theory by analyzing the government's decision to appeal a losing federal circuit court case to the Supreme Court. By definition, if the government has the option to appeal a case, it has lost the case. After a loss, the government must decide whether to accept the loss or to challenge this loss by appealing to a higher court. The government cannot appeal every case, however, and so must choose wisely in how to spend its resources; this is particularly true when deciding whether to petition for certiorari to the Supreme Court. The question thus becomes, how does the executive determine which cases are worthy of appeal? In testing the decision to appeal, I observe how the presidential agenda, or desire to win, influences the likelihood of appeal. Thus, this chapter tests the "desire to win" component of my theory. This chapter offers one of the first studies to model presidential preferences in appeal

decisions. Overall, I find if a case topic area is more important to the presidential agenda (as proxied by State of the Union content), the case is more likely to be appealed. Additionally, if the case has received political capital in the past (the case lost at the appeals court and was appealed to the circuit court), the likelihood of appeal again increases. These findings reveal that when a case is more important to the president, executive branch will devote additional capital to attempt a policy win.

Chapter 4 continues the quantitative analysis through an analysis of the government's decision to submit a friend of the court brief to the Supreme Court. When the Court sets its docket, it exerts its agenda setting power; the Court has the authority to choose which cases are granted cert and which are denied. Given the small number of cases decided by the Court each year, these cases hold a lot of potential for policy-making. After the Court establishes its docket, the White House has the option to respond to the Court's agenda by attempting to influence the eventual decision. I argue that executives should seek to influence the outcome when they believe they are least likely to have their policies win on the merits or when they think the Court is most receptive to hearing new arguments. Thus, this chapter tests the executive branch's "likelihood of success" considerations aspect of my theory. I find that if the case outcome is more uncertain (contains more legal uncertainty) then the SG is more likely to submit a brief on the merits. I argue that it is in these cases where the White House believes it can exert more influence. I also find that when the Court is farther from the president ideologically, the SG is more likely to submit a brief on the merits. For courts that are more distant from the president, the executive branch can assume their policy goals will be less likely to be realized.

Chapter 5 offers a review of my findings and a discussion of their broader implications. In particular, I argue there is a need to consider the executive's role in the larger judicial decision

making literature, and that necessitates a consideration of what motivates a president to act. I argue and find that presidents (executives) use the courts strategically to advance their policy goals. Understanding this strategic calculus advances our understanding of the executive-judicial relationship.

2 CHAPTER 2: DEVELOPING A THEORY OF PRESIDENTIAL INTERACTION WITH THE COURTS

2.1 Introduction

In the 1970's, Robert Lipshutz served as President Carter's White House Counsel. Lipshutz notes the Carter administration had agreed that the Department of Justice should maintain independence in criminal prosecutions; the Attorney General should retain power to pursue criminal charges (Robert Lipshutz Interview, 9/29/1979; Miller Center 1988). However, this DOJ independence did not extend to the arena of civil cases. In a 1979 interview, Robert Lipshutz was asked about his relationship with the Department of Justice and Attorney General Griffin Bell. Lipshutz depicts the relationship as responsive to White House input, particularly in cases that were complex or had major policy implications. Lipshutz said:

I insisted, and ultimately the Attorney General agreed, that the White House should play a major role in determining which side of those issues the Justice Department should be on because there were policy judgments in which the law was not black or white--it was law being evolved by those very cases, and the position of the Justice Department should reflect the President's position.

In each case we finally worked it out a little differently as to how to be involved. It was very interesting because in the *Bakke* case the Solicitor's Office, which is under the Attorney General, initially developed a position which would have basically supported *Bakke*, and that's an oversimplification but it would have. We finally--Stu Eizenstat and I particularly--worked closely together against, if you will, this position. And finally when the Justice Department submitted its brief, it really was the other way around--it came out very strongly for affirmative action, which fundamentally is what the Supreme Court ruled. We thought that was a key policy judgment to be made, and we differed with the original position that would have been taken by the Solicitor's Office for the Justice Department and reversed it (Robert Lipshutz Interview, 9/29/1979, 15)

Lipshutz references *Bakke v. University of California Board of Regents* (438 U.S. 265), a famous affirmative action case concerning the consideration of race in college admissions. He argued that the Department of Justice recognized that the president's priorities were to be promoted in civil cases. And, if this promotion was inadequate, the DOJ's outputs would be corrected. In the

Bakke case, the White House mandated that the DOJ reverse its arguments. As an agent of the president, the DOJ complied.

However, while President Carter cared deeply about equality and affirmative action issues, and supported affirmative action based on race, (Memo, Eizenstat and Lipshutz to Carter, 9/6/1977; Memo, Carter to the Heads of Executive Departments and Agencies, 7/20/1978), the White House did not immediately become involved in the *Bakke* case. What was the final impetus for White House involvement? This work seeks to explore why and when executives take action within the legal system.

In this chapter, I first lay out my theory of strategic presidential decision-making towards the judiciary. I then present the evidence uncovered through my archival research, and use this evidence to further build and buttress my theory of presidential strategy vis-à-vis the courts. I examine not only evidence to support the claim that other executive actors will take steps that reflect the president's overall agenda, but also evidence that reveals the specific mechanisms that executive actors pursue in trying to realize the president's goals via the judiciary. This evidence ultimately provides support for a comprehensive theoretical framework for understanding broader executive-judicial interactions. I turn now to an overview of my theory of strategic presidential-judicial interactions.

2.2 A Theory of Strategic Choice of Executive-Court Interactions

I propose a theory of strategic choice to explain executive-judicial interactions. Overall, because a president's primary motivation is to achieve policy goals (Massie, Hansford, and Songer 2004), many of his actions are oriented towards attaining policy ends and implementing policy in a desired way. Previous studies highlight that the president wishes to see the Court rule on cases in ways that are congruent with his ideological preferences (Goldman 1997; Moraski

and Shipan 1999; Segal, Timpone, and Howard 2000; Epstein and Segal 2005). However, what we do not fully understand is how presidents strategically pursue these objectives, and what factors influence the actions ultimately undertaken by administrations in the legal arena. I therefore offer an original theoretical framework for understanding how, why and when administrations take specific actions in order to further the president's policy goals via the judiciary.

Since the president has strong policy goals, and the courts offer an important arena in which to realize these goals, it is natural that the president would try to influence courts when he can. However, he knows that he cannot expend the effort to influence every case, whether it includes the federal government or not. As the founding fathers established, making too many demands of the Court would trigger the Court to protect its institution (*Federalist No. 51*) and push back against the president. Similarly, Wohlfarth (2009) notes that Solicitor Generals who are too polarized may actually hurt their chances of winning in the Court- these SGs demands were too high.

The executive branch further has neither the time nor the resources to get involved in every case. Solicitor General Rex Lee described the decision making calculus of submitting amicus briefs like a poker game. Each SG has a limited amount of chips they can play; therefore, they need play them strategically (Lee, 1985). Even when it chooses to get involved in a case, the executive branch cannot expend unlimited resources. Since there is a limit to the number of times a president can take action on cases, there is an associated opportunity cost; each time the president chooses to act, he reduces his ability to take action on other cases (see Canes-Wrone 2001 for a defense of this logic).

Since the president cannot take action on every case appearing before the court, and because actions have differing costs, I posit there is a strategic calculation that the president makes in order to determine whether or not he takes action and as well as what types of action he takes. Simply put, the president will only take action when he thinks he has to and only takes action to the extent he believes he has to. The president's decision to take action, and the degree of action he takes, is thus a function of his level of interest in seeing a policy change and the likelihood that policy change would occur without his intervention.

If the president wants to achieve his policy goals through the courts, but thinks the court will rule in favor of his position without intervention, he should not expend extensive effort to attempt to influence the court, since using presidential resources is not necessary in order to realize his policy goals. If he wants a specific policy outcome being debated in the Court, but judges that his policy position may not win, he will be willing to spend more in terms of effort to see it win. If a policy is very important to the president (if it is a top policy on his agenda), he might pull all the stops, spending as many resources as feasible to achieve the policy.

There is support for this theory in the literature on the president's decision to go public on policy issues. This literature seeks to understand what motivates a president to offer public statements on a policy issue. Because going public is a costly initiative, presidents engage in the behavior strategically. Holmes (2007) finds that presidents go public on judicial nominees who are likely to face a more controversial confirmation, such as when the president is farther from the Senate filibuster pivot, when there is interest group opposition, and when the president is in his second term; conversely, presidents do not waste unnecessary resources on nominees facing a relatively smooth confirmation process. Likewise, Canes-Wrone argues that presidents should not go public when they think their proposals will be enacted absent their public outreach; to do

so would “squander” resources (2001, 316). Indeed, a president offers public statements about policies where he expects less success without his action (Canes-Wrone 2001). The theoretical basis for conserving capital for when it is necessary in the decision to go public can apply to the decision making to engage with the courts.

There are important differences between the ways the government gets involved in court cases, and these differences influence the cost and benefit calculus of the executive. In some cases, the government is a direct party of the case. When a party, the government may have initiated the suit; at other times, they are sued and are forced to respond. When the government is not a party to the case, they take conscious and costly action when they choose to insert themselves into the conflict through actions like submitting an amicus brief or giving oral arguments in a case. The actions I explore in this work include initiating a case, appealing a case, the SG requesting a writ, providing amici briefs, establishing a settlement, or the president offering public statements about a case or issue.

To further build upon and buttress my theory of strategic executive interactions via the judiciary, I utilize archival research from four presidential libraries. I turn now to a brief overview of how I conducted this research.

2.3 Archival Research

I utilize archival research in order to build upon and further explicate my theory of executive-judicial interactions. Archival research is useful for building a theory of executive decision making because researchers have access to the documents that informed decisions and also the written conversations on the development of policy. At presidential libraries, correspondence between the president and his advisors can be viewed as it occurred.

Viewing this correspondence and record of events offers important and necessary insight into the decision-making process. Rather than proposing a theory and testing it through the operationalization of outputs, I choose to use the archival process to buttress and inform the theory organically. Likewise, initial support of the theory is derived from the statements and actions of the parties directly involved in the executive decision making process.

Because I began this archival project with a partially developed theory, the risk of confirmation bias existed. Cognizant of this fact, I began the research with a willingness to reassess my theory based on new evidence. I explicitly use the archival process to build my theory of presidential engagement with the court system and to provide preliminary evidence that I then quantitatively test in subsequent chapters. Thus, I do not argue that the archival evidence presented herein proves my theory; instead, I use these materials to build a theory of rational actor executive-judicial relationships that subsequent chapters then test empirically.

As I visited the libraries, I deliberately chose to keep the scope of my searches broad; I searched through as many boxes as feasible that related to the president and the judicial branch. I searched any folder I could in the topic areas of judicial-legal matters; the offices of Attorney General, Solicitor General, and White House Counsel, and appropriate secretaries' papers; and other donated papers that may pertain to a case. I also conducted searches based on Supreme Court case names and topic areas. These search categories produced roughly 300 boxes of archival documents, providing a holistic view of the relationship between the president and the executive branch, and the judicial branch. Such an approach allowed the theory to be formed and supported by the evidence presented and allowed for the discovery of actions and ideas I may not have otherwise considered.

2.3.1 Libraries chosen

I visited the Truman, Eisenhower, Carter, and Reagan presidential libraries. I also visited the Library of Congress, where Eisenhower's Solicitor General, Simon Sobeloff, donated his papers. I chose these presidents because they offer distinct advantages to developing my theory. First, the presidencies cover two distinct time periods, post-WWII and more-recent modern. These two eras encapsulate the end of WWII, the start and end of the Cold War, and a change in media technologies. Second, these administrations cover both Republican and Democrat presidents during the two eras. If discernible patterns arise across presidencies, they should be generalizable to other administrations given that these cases capture variations in administrations, parties, and political eras.

Additionally, these libraries have the benefit of having a majority of their papers available for research. While there are more recent libraries than Carter and Reagan's, these more recent libraries often have less than half of their documents processed and available for researchers (see National Archives 2017). Older libraries, such as Truman and Eisenhower's have about 90% of their documents processed. Recent libraries, (Reagan and forward) have less than 50% of their documents processed. These differences may impact which types of materials are available to researchers. Further, different legislation has governed the development and operations of the various libraries. For example, Jimmy Carter signed the Presidential Records Act of 1978, which mandated that (starting with the next president), presidential records would automatically become government property. Still, presidents are able to review their documents and assert claims of executive privilege. Indeed, many of the documents at the Reagan Library are still closed to public viewing for executive privilege reasons.

Presidential libraries often also contain the donated papers of persons working in the administration or those sharing a notable relationship with the president. These actors have wide discretion, however, when deciding when, what, and where to donate their papers. Simon Sobeloff chose to donate his papers to the Library of Congress. Other Solicitor Generals have donated their papers to Universities; Rex E. Lee, Reagan's SG, donated his papers to Brigham Young University.

The following sections report the findings from my archival research in the context of my broader theoretical framework. I turn first to the question of the relationship between the president and the actors who potentially will represent his agenda in dealings with the courts.

2.4 Listening & Responding: The Relationship Between the Department of Justice and the President

It is uncontroversial to note that presidents seek policy goals, and they in turn pursue these goals through the legal system (Goldman 1997; Moraski and Shipan 1999; Segal, Timpone, and Howard 2000; Epstein and Segal 2005; Curry, Pacelle, and Marshall 2008; Nicholson and Collins 2008). To do so, presidents rely on the assistance of a large executive administration to assist in accomplishing of their agenda (Clayton 1992; Yates 2002; Curry, Pacelle, and Marshall 2008; Wohlfarth 2009). Literature covering the presidential principal-agent relationship suggests that agencies and appointees are motivated to follow the general will of the president. Agencies and agents may fear presidential sanctions, such as budget decreases or removal from their position, if they violate the presidential agenda (West and Cooper 1990; Wood and Waterman 1991; Hammond and Knott 1996; Moore, Maclin, and Kershner 2001; Shipan 2004; Waterman 2009). Of the many appointments the president must make, he needs to assign an Attorney General and Solicitor General. Together, these actors establish the means through which the

executive branch will pursue policy through the legal system. Like other presidential nominees, the Solicitor General is aware that her job security relies on accurately representing the president's preferences (Segal 1988; Segal and Reedy 1988; Salokar 1992; Bailey and Chang 2001). Reagan is said to have essentially fired Solicitor General Lee, and Nixon forced out Solicitor General Griswold (see Salokar 1992 and Bailey and Chang 2001).

I posit, and confirm through my archival research, that the president expects his DOJ to implement his policy wishes, which he makes known to his administration. As I show below, after the establishment of a policy course, the AG and SG seek the president's input when they believe it is necessary to ensure they are implementing his wishes.

The relationship between the president and the SG rests on the basis that the president has policy goals that he expects his agents to assist in achieving. And, a large body of work examines SG actions/outputs to observe how accurately she represents the president's policy preferences. Many studies find a responsive principal-agent relationship between the president and DOJ (Salokar 1992; Bailey, Kamoie, and Maltzman 2005; Curry, Pacelle, Marshal 2008). Still, there is a very healthy debate on the extent of the SG's responsiveness. While plenty of scholars argue that the SG accurately represents the president (Segal 1988; Fischer 1990; Clayton 1992; Salokar 1992; Meinhold and Shull 1998; Graham 2002; Curry, Pacelle, and Marshall 2008; Black and Owens 2012), others highlight the independence and autonomy of the SG (Scigliano 1971; Caplan 1987; Pacelle 2003; Nicholson and Collins 2008).

When looking at amicus brief submission behavior, Meinhold and Shull (1998) analyze the public papers of the presidents (all presidential addresses) to explore the connection between presidential agendas and brief submissions. They find that the Solicitor General is sensitive to the policy and ideological preferences of their presidents. Salokar (1992) similarly argues that

Solicitor General brief activity is both sensitive to and reflective of the president's agenda, and does not find support for the depiction of strict independence from the White House (173- 174). Likewise, others argue that the Solicitor General reflects the president's ideological preferences (Segal 1988; Fischer 1990; Salokar 1992; Meinhold and Shull 1998).

On the other side of the debate, some authors discuss the SG's unique relationship with the Court and emphasize the benefit of independence (Scigliano 1971; Caplan 1987; Pacelle 2003). If the SG appears to be immune from a partisan agenda, the Court may consider her information to be more reliable. Pacelle acknowledges that SGs need to pursue the president's agenda to some degree, but also need to maintain and "own" independence in order to avoid alienating the Court (2003, 30); it is this independence that aids in the Solicitor's success in the Court (Scigliano 1971). In fact, Pacelle goes so far as to argue that the Office of the Solicitor General's "symbiotic" relationship with the Court "impairs" the ability of the president to influence the Solicitor General (Pacelle 2003, 43).

To test the SG's responsiveness to the president, Nicholson and Collins (2008) conduct a content analysis of State of the Union addresses and find the SG's decision to submit a brief in a particular issue area is not predicted by the rate at which the president talks about that issue area. They, therefore, conclude that the SG is not driven by the agenda items of the president, and is likely cognizant that too many partisan briefs may lead the Court to view the SG as a partisan pawn rather than a neutral source of information (Nicholson and Collins 2008). Specifically, a SG who appears too politicized, or too adamantly advocates the president's position, while also being more extreme than others offering briefs, becomes less successful in having the Court adopt her position (Wohlfarth 2009).

Because of the potential benefits of independence, and because of findings from Pacelle (2003) and Nicholson and Collins (2008), some scholars question the validity of modeling presidential preferences in an executive-judicial model or developing theories that rest on the SG promoting a presidential agenda. However, I examine the president-SG relationship from a different vantage point. Most of these scholars ask how effectively the president is represented by the SG and expect a one-to-one match between preference and action. But, in order to most successfully promote the president's agenda, we should not always see a one-to-one match. Blindly pursuing the president's policy goals, if this blind pursuit becomes detrimental to the administration's overall success rate, is not aiding the president. Thus, blind pursuit of policy goals can lead to an irrational and worthless use of political capital. I argue instead that strategic political actors recognize this need to behave strategically. Therefore, I contend that the SG seeks to faithfully represent the president's agenda to the degree that she can given the temporal political context. The question thus becomes, when is it most logical for the SG to pursue the president's goals and what extent of action is necessary? In other words, once the president establishes a political agenda, how does the SG act on it?

I further argue that considering the Court's preferences does not necessitate that one forgoes the president's. Even Pacelle notes, "Most solicitors general believe it is proper to contribute to the administration's agenda..." (2003, 31). Indeed, in order to most effectively advocate for the president, one must be acutely aware of where the Court resides. This chapter steps into the healthy debate about the SG-president-Court relationship to demonstrate that the SG can effectively consider the Court's likely decision (with regard to legal certainty), the president's desires compared to the Court, and strategically work within the context of both.

Therefore, in line with the works by Meinhold and Shull, Salokar, and others I argue that the SG is indeed an effective representative of the president.

My assessment of the archival records thus investigated the degree to which coordination arose between the president and these two actors and their offices as well as whether evidence suggests that they follow priorities set by the president. Overall, as I explicate in detail below, I find strong evidence across the four presidencies covered that there is a high level of coordination between presidents and their AGs and SGs, and that AGs and SGs primarily reflect the president's priorities as they approach dealings with the judiciary. What does differ is the specifics in how presidents interact with these important actors. These actors personally assert they are concerned with the president's interests, and more importantly, their actions further support this assertion. They may not follow the president's preferences on every case, but the primary and evident trend is to follow them. Additionally, archival records suggest the president is unequivocally interested in the affairs of the DOJ and many of the cases that make their way through the court system. The president does not need to be personally involved nor interested in every case funneling through the courts. The president will become engaged in the decision making on a case when that case triggers his interest, i.e., when he desires to affect policy through winning in the Court. It is on these cases where he acts to ensure compliance. Otherwise, he establishes a policy program which the DOJ largely fulfills. And, if compliance fails, the president is inevitably made aware and can take corrective action.

The following section discusses the relationship between the White House and the Department of Justice based on the evidence obtained through the archival process. The collected memos, letters, releases, and interviews suggest that presidential appointees are aware of the president's policy preferences and choose to follow the "spirit" of these policies. The

section further explores how presidents provide instruction to their DOJ appointees. Often this instruction comes directly from the president, other times, the president's counsel handles directive communication between the White House and Department of Justice. Finally, some instances arose where the president directed the DOJ to change course- that is he did not just preemptively set policy, but corrected actions when he believed they ran counter to his ends. The section also provides evidence that the DOJ not only hears or receives directions, but chooses to comply with the president's prerogatives. The discussion is organized chronologically according to president.

2.4.1 Coordination between the White House and the DOJ

Two of Truman's DOJ appointees, J. Howard McGrath (SG and AG) and Philip Perlman (SG), indicated that Truman did not give much direction on the day to day proceedings of the DOJ. Despite this, they were abundantly clear as to his policy preferences. Philip Perlman, in a discussion of the administration's civil rights policy, said that the SG's office was aware of the president's positions, and did not need to confer with the president on the entering of new cases because they were already in tune with his preferences (Philip Perlman Interview). However, on certain cases, in person meetings occurred; Perlman said he met with Truman to discuss university integration cases (Philip Perlman Interview). Likewise, Tom Clark (while still in the DOJ) met with Truman to establish the government's position and action on the race-based covenants case, among others. Clark, in an interview, said Truman, "was anxious to wipe out such discriminations; that's why we pushed prosecutions in the labor and voting area" (Tom C. Clark Interview, 2/8/1973, 128), indicating Truman made known a desire and they worked to achieve it.

McGrath (who served as both AG and SG) was more forward about the close relationship between President Truman and the DOJ. He said that in addition to cabinet meetings, he met with Truman alone about once or twice a week. He also said the department took action in line with what they thought Truman wanted, and always filled the president in on case actions. When cases were of an unusual or controversial nature, Truman would offer his preferences on actions to take. McGrath said the DOJ operated under the president's "attitude of holding us to the responsibility of doing what was supposed to be done" (J. Howard McGrath Interview, 5). McGrath implied that they knew they were to follow the president's preferences, sought the president's preferences, and ensured that regular communication was maintained. The memos in the archives reinforce this sentiment. For example, in the *Roanoke Rapids* case, Truman thanked McGrath for his update on the case, and reminded him that he is very interested in the case's outcome due to its implications for public power (Letter, Truman to McGrath, 12/1/1951).

The archival documents also suggest President Truman took the initiative in legal coordination by explicitly directing his DOJ on how to act in specific cases. After reading DOJ memos, Truman would offer a prescription for action. For example, in 1947, Truman received a brief about a Missouri doctor's tax evasion case. Some DOJ attorneys were debating whether or not the government should continue pursuing the case (Memo, Key to Clark, 1/23/1947), and Truman wrote Clark that the doctor needed to be prosecuted (Letter, Truman to Tom C. Clark, 1/31/1947). In a similar example, Truman wrote AG McGrath that he wanted the DOJ to investigate leaked information on atomic secrets and then further demanded an update when the investigation was complete (Letter, Truman to McGrath, 1/4/1951).

In response to a 1948 labor dispute that led to a strike between coal operators and the International Union, United Mine Workers of America, Truman wrote Clark, "I therefore direct

you... to petition in the name of the United States any district court of the United States having jurisdiction of the parties to enjoin the continuance of such strike, and for such other relief as may be in your judgment be necessary or appropriate” (Letter, Truman to Tom C. Clark, 4/3/1948). Clark pursued the issue in the courts (Truman, Harry S.: "Special Message to the Congress Reporting the Settlement of the Bituminous Coal Labor Dispute.," August 5, 1948). Similarly, Truman wrote the AG, in 1952, to petition the district courts about the labor conflict between the American Locomotive Company and members of the United Steel Workers of America, CIO (Letter, Truman to McGranery, 12/1/1952). McGranery complied (*United States v. American Locomotive Co.*, 109 F. Supp. 78 (W.D.N.Y. 1952)). In another case, Attorney General James P. McGranery wrote Truman that he was preparing a case against the “international oil cartel” as Truman directed (Letter, James P. McGranery to President Truman, 7/16/1952).

Truman was also personally involved in directing actions in the case against the Dollar Lines (later, American President Lines), a ship transportation company. In one letter to Attorney General McGrath, Truman thanked the AG for pursuing the case in D.C. as he directed, and then told him to open up a suit in the court of the Northern District of California. In another case against a shipping company, Truman ordered his Attorney General to pursue legal action against the U.S. Lines Company concerning the sale of a ship (Press Release, McGranery, 12/11/1952).

In an interview, Secretary of Commerce Charles Sawyer offered a striking example of Truman intervening with respect to his Solicitor General’s actions. After the government’s loss in the lower courts, Sawyer convinced Truman to settle in the *Dollar Lines* case. However, SG Perlman was unwilling to forward Sawyer’s position. Sawyer recounted reporting Perlman’s efforts to Truman, and how Truman promised to tell Perlman to “stay out of it” (Charles W.

Sawyer Interview, 31). Sawyer indicated Truman followed through on his word and asked Perlman to back down (Charles W. Sawyer Interview). Perlman complied, despite his own initial preferences, and the case was settled. All told, these examples highlight how Truman personally advocated for cases. While the DOJ could be expected to act in accordance with the president's broad policies, the executive also offered individual and personalized direction.

This relationship is evident across the other presidencies examined. Luckily for researchers, President Eisenhower's secretary, Ann Whitman, kept a log of his telephone calls, often with a brief account of the conversation. There are many descriptions of calls between Eisenhower and his Attorneys General where they discussed cases and the actions to take. For example, they talked about segregation and discrimination cases (Telephone call, Brownell to Eisenhower, 5/31/1955; Telephone call, Eisenhower to Brownell, 9/4/1958). In a September 4, 1958, call to the AG, Eisenhower and the AG discussed filing a discrimination case in Dawson, GA and the deadlines for doing so (Telephone call, Eisenhower to Brownell, 9/4/1958). During the "Little Rock" events, Eisenhower was in frequent contact with Attorney General Brownell. Also, his AG appears to be one of the first Eisenhower told about his final decision to send troops to Little Rock (Telephone call, Eisenhower to Brownell, 9/25/1957). Status updates about the environment in Little Rock would continue a year later (Telephone call, Eisenhower to Brownell, 9/4/1958).

Eisenhower would also seek explanations of DOJ behavior. At the end of the Truman administration, the government brought a case (which the Eisenhower DOJ continued) against the *Kansas City Star* newspaper and sought divestiture. At a Gridiron Club dinner, Roy Roberts, the editor and president of the *Kansas City Star*, approached Eisenhower and said he was "treated rather shamefully and harsh" by the government (Telephone call, Eisenhower to Brownell,

5/9/1955). After this conversation, Eisenhower called Attorney General Brownell because he wanted to know “what procedures Brownell’s people followed in cases of this sort” (Telephone call, Eisenhower to Brownell, 5/9/1955). Essentially, the president was asking the AG to defend his actions. Brownell explained the DOJ’s actions, how they even looked into Roberts’ claims, and that it was found that the newspaper used illegal practices on their advertisers. Then, Eisenhower stated he “of course wants them [DOJ] to do their duty,” but do so with the intent to protect the rights of private citizens (Telephone call, Eisenhower to Brownell, 5/9/1955). At another point, Eisenhower was troubled by an article in in the *Herald Tribune* which accused the Republican-controlled DOJ of harming businesses and forcing consent decrees that went beyond the requirements of the law. He forwarded the article to Brownell and requested an account the DOJ’s efforts in anti-trust cases (Letter, Eisenhower to Brownell, 6/12/1957). Brownell outlined for Eisenhower the Department’s position and practices, and descriptive statistics on suits and outcomes (Letter, Brownell to Eisenhower, 6/25/1957).

At times, the president would also offer clear orders for his DOJ. For example, in a telephone conversation about the Vineot criminal case, Eisenhower thought the AG should offer a reply to some public protests (Telephone call, Eisenhower to Brownell, 2/22/1955). In another instance, in response to a memo forwarded to Eisenhower about the case against the Aluminum Company of America (Alcoa) Eisenhower wrote, “While I do not know the status of your case against Alcoa, I think you should make no more moves until you get a message either from Mr. Cutler or from me” (Letter, Eisenhower to Brownell, 10/26/1953). Eisenhower wanted his AG to hold off on further action until he considered the topic further.

In a particularly striking example of direction giving, Ann Whitman records Eisenhower’s comments to AG Brownell:

Called the Attorney General

About a suit recently called to his attention, involving a \$750 million pipeline. Understands it is going to Supreme Court. If it isn't received there, the case is settled. It is a thing that would be very good for all of us, for our economy - - would mean more work next year for a lot of people. President thinks it should be done before end of Session. Asked Brownell if he could ask "the Chief" to take a look at it & hurry it up. Brownell will do (Telephone call, Eisenhower to Brownell, 5/12/1955).

Not only did Eisenhower deliberately indicate his preference on the case, he also instructed Attorney General Brownell to take pains to speed the Court's efforts to make a decision about accepting the case (which the AG indicated he would do).

Along with meetings and telephone calls, Eisenhower practiced frequent written communication with his Attorneys General. Eisenhower requested reports of cases, like *US v. Eastman Kodak Company* (CCH TRADE REG. REP. (1954 Trade Cas)) (see Letter, Brownell to Eisenhower 1/25/1955), *Pennsylvania v. Nelson* (350 U.S. 497), and *Mallory v. US* (354 U.S. 449) (Letter, Eisenhower to Rogers, 5/12/1958; Letter, Rogers to Eisenhower, 5/27/1958), and the Salk Vaccine (the polio vaccine) anti-trust cases (Letter, Eisenhower to Rogers, 5/20/1958). He sent his AG writings on policy areas to consider, such as labor and anti-trust issues (Letter, Eisenhower to Brownell 12/19/1953; Letter, Eisenhower to Brownell, 5/20/1957 b). After William P. Rogers became Eisenhower's new Attorney General, the president indicated that he wished for him to send reports of "actions in which you know I have a special interest" (Letter, Eisenhower to Rogers, 6/8/1958). The AG would send Eisenhower opinions and summaries from court decisions, even when the government was not a party (Letter, Rogers to Eisenhower, 9/29/1958; Letter, Brownell to Eisenhower 7/1/1957; Letter, Rogers to Eisenhower, 6/4/1958), so that Eisenhower could keep abreast of developments. Eisenhower also took the opportunity to direct and review press releases from the DOJ (e.g., Letter, Brownell to Eisenhower, 11/10/1954).

As explained above, Eisenhower would also ask for a clarification of DOJ actions in a variety of policy areas, including anti-trust and industry laws and rulings (Letter, Eisenhower to Brownell, 4/28/1954; Letter, Eisenhower to Brownell 1/25/1955; Letter, Eisenhower to Brownell 4/25/1956; Letter, Eisenhower to Brownell, 5/20/1957a; Letter, Eisenhower to Brownell, 6/12/1957; Letter, Eisenhower to Rogers, 11/14/1957; Letter, Brownell to Eisenhower 7/1/1957; Letter, Eisenhower to Rogers, 6/8/1958). The archives suggest Eisenhower's AGs complied with these requests; there is evidence of direct responses to the points of concern in Eisenhower's letters, and Eisenhower would thank his AGs for the updates (see Letter, Eisenhower to Brownell, 4/28/1954 handwritten comment; Letter, Brownell to Eisenhower 1/25/1955; Letter, Eisenhower to Rogers, 5/28/1958). For example, Eisenhower wrote AG William Rogers to inquire about companies producing the Salk vaccine (the polio vaccine) who had been cited under anti-trust laws. Charlie Halleck, a Republican House leader, had asked Eisenhower why the government seemed to urge companies to produce the vaccine quickly, and then transitioned to citing them in court. Eisenhower wanted a memorandum on this policy before he met again with congressional leaders (Letter, Eisenhower to Rogers, 5/20/1958). Rogers replied with a memo detailing the history of the vaccine and the government's role in encouraging its development. He also noted that the five companies indicted were charged with conspiring to submit uniform price quotes (Letter, Rogers to Eisenhower, 5/26/1958). Additionally, Rogers relayed this information to Halleck (Letter, Rogers to Eisenhower, 5/26/1958). Collectively, these letters indicate to the DOJ that they should seek to engage with the White House and shed further light on what policy areas and positions were important to Eisenhower and highlight his preferences on cases. The discourse further indicates that the AGs listened to Eisenhower's requests for information and responded appropriately.

While Eisenhower would make many requests for information from the DOJ, the DOJ would also actively work to keep Eisenhower informed through their own initiative. That is, the DOJ did not wait for Eisenhower to ask questions, but actively consulted him in cases where they anticipated he would like to be involved. The DOJ, particularly on important or unique issues, would consult with Eisenhower to ensure they were reflecting his policy preferences. When Rogers forwarded the president a brief for a case under review at the Federal Communications Commission, he stated, “It is, as you will notice, a short brief; but I think it accurately sets forth your views” (Letter, Rogers to Eisenhower, 5/7/1959). This letter, and others like it, served to keep Eisenhower abreast of developments while also allowing him to offer commentary or direction if desired. More preemptively, Attorney General Rogers wrote to Eisenhower about a discrimination case the department wanted to pursue in the Middle District of Georgia and noted, “If this meets with your approval, we plan to file this suit on Wednesday” (Letter, Rogers to Eisenhower, 9/1/1958).

Likewise, during the *Brown* school segregation cases, Attorney General Brownell wrote Solicitor General Sobeloff, “Before any definitive acceptance of the Court’s invitation to participate in these cases you and I are to have a conference with the President, at which time we will present to him the arguments pro and con as to the filing of a brief and participation in the oral argument” (Letter, Brownell to Sobeloff, 6/25/1954; sentiment repeated in Letter, Brownell to Sobelof 7/15/1945). They were to let Eisenhower make the decision on how to act in these cases. These examples illustrate that Eisenhower’s DOJ appointees worked to ensure compliance with his policy goals, and explicitly included him in the decision making process when determining which cases to pursue.

Throughout the exchanges of information, Eisenhower would review and correct (or make in agreement with his preference) DOJ output. Eisenhower had a direct hand in editing the briefs on the *Brown II* case (Herbert Brownell Interview, 5/5/1967). As further evidence of the president's effort in *Brown*, on May 31, 1955, Brownell called Eisenhower to say the Supreme Court followed the President's formula almost exactly (Telephone call, Brownell to Eisenhower, 5/31/1955). This message from Brownell indicates he accepted Eisenhower's edits and the Supreme Court was likewise influenced. This reviewing practice would occur in various cases (see Letter, Rankin to Kendall, 11/16/1960; Letter, Rogers to Eisenhower, 5/7/1959).

Beyond editing briefs, Eisenhower would even edit his appointees' public speeches. Eisenhower ordered changes be made to a speech AG Rogers was preparing for an American Bar Association meeting about federal policy on school integration (Memorandum for Record, telephone Call, 8/22/1958). Eisenhower did not want the AG to "give the impression that the Federal government is looking for opportunities to intervene on its own initiative" and that "there should be some intimation that a satisfactory integration plan did not necessarily, in my view, contemplate complete success in a matter of five or ten years" (Memorandum for Record, telephone Call, 8/22/1958). This example demonstrates Eisenhower's expectation that his appointees largely follow his policy dictates in both formal court filings as well as more policy-oriented public appearances.

Still, Eisenhower could not be involved in the decision making on every case. Brownell, in an oral history, indicated that Eisenhower generally had to rely on his assistants, particularly in the drafting of briefs; he had to trust that that briefs accomplished his purposes (Herbert Brownell Interview, 5/5/1967). However, he also said:

On the school segregation case, the *Brown Case*, there was discussion with him; a series of conferences with him over a period of two years dealt basically with the question of

the extent of our participation in the case, what was our responsibility to the court.... There were some unexplored areas there, in which he had to establish policy. Then we reviewed, by oral conference, all of our briefs in the Brown Case with him. One case, I remember he actually wrote in his own handwriting some suggested language for one of the briefs. I merely mention that to show his participation (Herbert Brownell Interview, 5/5/1967, 162).

Overall, Eisenhower appeared confident that the DOJ would honestly reflect his wishes, particularly in the cases in which he became more involved. That is why he could write Dillon Anderson (National Security Advisor) about the Tidelands case, "I do know the Attorney General has not yet filed his brief and his brief is going to recite in detail the statement I made just above" and that, "the only thing I can do is to make certain that he does not misinterpret my views, but on the contrary, states them exactly as I have repeated them time and time again" (Letter, Eisenhower to Anderson 11/23/1957).

Like Truman and Eisenhower before him, Carter directed the efforts of his DOJ appointees to ensure his policy goals were being implemented. Griffin Bell, President Carter's first Attorney General, explained in an oral history interview how he understood his role, "The President is really the Attorney General under the Constitution. There is no Attorney General in the Constitution. He has the duty to faithfully execute the law, so I just assumed he would tell me what to do" (Miller Center 1988). Bell, described his working relationship with the White House, "We just had sort of a loose arrangement. Looking back on it, I wouldn't want to change any part of it, because I think I was doing what he wanted to do. I kept him advised. He was very proud of a lot of the things we were doing" (Miller Center 1988). Bell indicated that he worked to keep Carter informed, and that Carter was generally pleased with his team's efforts. Again, this provides evidence for the broader point that the White House and DOJ maintained a close relationship. It should be noted, however, that this coordination referred to civil, as opposed to

criminal matters; Bell maintained that he enjoyed independence from the White House on criminal matters, and Robert Lipshutz, White House Counsel, agreed (Robert Lipshutz Interview, 9/29/1979; Miller Center 1988).

Lipshutz indicated that the White House was highly involved in the DOJ's civil affairs efforts. President Carter's Counsels Office maintained a strong relationship with the DOJ, often serving as a conduit between the president and DOJ members. The DOJ would work with the counsels and the president in order to establish executive policy. Early in the administration, the White House deliberately got involved in the Bakke, Tellico Dam, Phoebe, and veteran's preference cases, among others (Robert Lipshutz Interview, 9/29/1979).

In addition to Bell and Lipshutz's comments, many of Carter's White House documents, and the donated papers of his White House aides, indicate that the White House staff helped to monitor the DOJ's efforts. For example, a memo to Stu Eizenstat, the White House Domestic Affairs Advisor, reviewed Justice's brief in the *Consumer's Union* case and indicated the White House should get involved if they determine the brief is counter to their interests (Memo, Malson and Roos to Eizenstat, 4/17/1979). Here, the White House observed the DOJ to make sure they complied with administration preferences.

Carter's White House also directed the crafting of amicus curiae briefs. After receiving the DOJ brief for the *Bakke v. University of California Board of Regents* affirmative action case, Eizenstat, Chief Domestic Policy Advisor, and Robert Lipshutz, White House Counsel, told Carter that they believed the brief needs substantial edits and even want to add the suggestion that the Supreme Court remand the decision. In a handwritten response to the memo, Carter said that he wants the brief to include a strong affirmative action endorsement, but to clarify that they do not support rigid quotas, and that remanding may be ill advised. He then tells Eizenstat to

“jump into the drafting process” (Memo, Eizenstat and Lipshutz to Carter, 9/6/1977). In his 1979 interview, Lipshutz summarized the *Bakke* proceedings:

Finally, when the Justice Department submitted its brief, it really was the other way around--it came out very strongly for affirmative action, which fundamentally is what the Supreme Court ruled. We thought that was a key policy judgment to be made, and we differed with the original position that would have been taken by the Solicitor's Office for the Justice Department and reversed it (Robert Lipshutz Interview, 9/29/1979, 15).

After the Carter White House directed the DOJ to edit their *Bakke* brief, Robert Lipshutz (White House Counsel) and Eizenstat wrote Carter, “The Solicitor General and the Assistant Attorney General for Civil Rights and their staffs have obviously worked very hard on the brief and have produced a fine product. It is a substantial improvement over previous drafts and takes the generally positive thrust toward affirmative action that the Administration should take” (Memo, Lipshutz and Eizenstat to Carter, 9/16/1977). Altogether, these statements and correspondence suggest that the DOJ heard and responded accordingly to the White House’s directives.

Likewise, the White House observed the DOJ’s efforts in a brief in the the *United Steelworkers of America, AFL-CIO-CLC v. Weber* (443 U.S. 193). case (Memo, Vice President et al., 1/13/1979, 4). The *Weber* case was another affirmative action case that challenged the right of a company to collectively bargain an affirmative action program. A memo to Carter from a group of advisors explained, “From a policy/political view we likewise support the thrust of the draft brief since it is consistent with the position taken in the Bakke case and with the Administration’s support for affirmative action” (Memo, Vice President et al. to Carter, 1/13/1979, 4). But, these advisors indicated that they believed the DOJ should “tone down” their rhetoric and remove “favorable references to ‘quotas’” (Memo, Vice President et al. to Carter, 1/13/1979, 4).

The Bradley Case, which addressed the mandatory retirement age in the Foreign Service, offers an example of how the DOJ would seek, and the White House would provide, policy input. *Holbrook Bradley et. al.* challenged the mandatory retirement age. Morton Hollander (a long-serving DOJ attorney) asked counsel's opinion on whether or not the government should appeal after the government lost in the the U.S. District Court for the District of Columbia; they wanted approval to proceed. Lipshutz, Counsel to the President, wrote:

In view of both the district court's decision and the general Administration position on mandatory retirement [that the mandatory retirement age for Civil Service should be removed, but exceptions should be made for specialized personnel], we believe that Justice must determine whether it can responsibly argue that Foreign Service personnel constitute a specialized category of Federal employees to whom mandatory retirement policies can apply. Only if such an argument can be made should an appeal be taken (Letter, Lipshutz to Hollander, 8/3/1977).

This response, while leaving discretion to the DOJ, informs the DOJ of the administrative position, and indicates under what conditions an appeal should be taken (Letter, Lipshutz to Hollander, 8/3/1977). The DOJ ultimately decided to appeal to the Supreme Court and won in an 8-1 decision (*Vance v. Bradley*, 440 U.S. 93 (1979)).

And, when the Carter White House believed they did not have the opportunity to exert enough input, they took action to promote their voice in the DOJ. Partway through Carter's term, Stewart Eizenstat, Carter's Chief Domestic Policy Advisor, wrote Lipshutz that he wanted the White House to have earlier notice of the Solicitor General's agenda. Bell had indicated he would share the office's briefs, but Eizenstat wanted the White House to be able to offer earlier input, when appropriate, and before feelings were hardened (Memo, Eizenstat to Lipshutz, 12/23/1978). In an interview, Lipshutz said, "I insisted, and ultimately the Attorney General agreed, that the White House should play a major role in determining which side of those issues the Justice Department should be on because there were policy judgments in which the law was

not black or white--it was law being evolved by those very cases, and the position of the Justice Department should reflect the President's position" (Robert Lipshutz Interview, 9/29/1979).

Similarly, as the result *Ray v. Arco* (435 U.S. 151), where two agencies had opposing views on the case, Carter's counsel wrote Carter that they believed they should determine how to assert administration policy choices when there are significant cases between two agencies. He should, therefore, request that the AG recommend guidelines for dealing with these matters so they would not have to be considered on an ad hoc basis (Memo, Lipshutz, Eizenstat, and Watson to Carter, July 18, 1977).

When the Supreme Court was nearing a decision on the *Bakke v. University of California Board of Regents* affirmative action case, President Carter sent the Attorney General a memo that offered a prescription for general behavior beyond simply arguing the case:

In view of the importance of the Bakke decision, I would like to be sure that our response is carefully coordinated. I would prefer that we not make any public statements which go beyond the position already articulated in our brief or direct any specific agency action until you and I have had a chance to carefully review and discuss the implications of the Court's decision (Memo, Carter to Bell, 6/27/1978).

Bell even received instructions on what he should and should not say on a visit he took to Mexico (Memo, Eizenstat and Gutierrez to Mondale, 1/31/1978). Therefore, it seems Carter expected the DOJ to represent his interests even beyond the scope of case briefs, appeals, and actions strictly limited to interacting with the Court.

Carter went so far as to offer stinging critiques to his appointees when they stepped out of line. Once angered by Bell's decision not to prosecute "somebody", Carter threatened to fire him, and wrote that Bell "brought disgrace on the Carter administration" (Miller Center 1988). Though Carter never fired Bell, and they otherwise seemed to have a good relationship, Bell was cognizant of this criticism and would recount it years later.

Finally, the Reagan administration, like the other administrations maintained a strong relationship with its DOJ. As with the Truman, Eisenhower, and Carter administration, the Reagan White House did not stay up to date on every DOJ proceeding. However, memos from John Roberts, then aide to White House Counsel Fielding, indicate that the DOJ regularly informed the White House and the Counsel's office when cases were of special interest or importance and that this information was relayed to Reagan. On these cases, the Counsel's office would prepare memos for Reagan and his advisors. Michael Baroody, the Deputy Assistant to the President, often received reports of DOJ court proceedings.

As a typical example Roberts would write, "Pursuant to our usual procedure..., I have prepared a memorandum for Baroody, alerting him of this newsworthy development from Justice" and then follow with the news (Memo, Roberts to Fielding, 10/5/1984). Likewise, in a memo about the *Secretary, United States Department of Education v. Betty-Louise Felton* (787 F. 2d 35), a case involving, Title I, the establishment clause, and public funds providing for remedial education in parochial schools, Roberts wrote, "Consistent with our usual practice in such cases, I have prepared a memorandum for Baroody, copy to Speakes, advising them of the filing" (Memo, Roberts to Fielding, 8/10/1984). Later, Roger Clegg, Associate Deputy Attorney General, sent Roberts a memo stating: "The attached materials deal with a railroad right-of-way case that has engendered a fair amount of congressional interest... so you may want to apprise Messrs. Fielding and Hauser about what is going on, in case they get calls" (Fielding and Hauser were in the Counsels office) (Memo, Clegg to Roberts, 11/30/1984). These are just three representations of the many memos regularly sent.

The Reagan White House Counsel would also work to guarantee compliance in general DOJ practices. In an oral history, White House Counsel A. B. Culvahouse highlighted an

instance in which the Counsel took an active role in DOJ affairs. In the interview, Culvahouse began to describe a “labor case” (but does not specify which labor case), where at the behest of Reagan, Culvahouse requested SG Charles Fried come to his office to explain the DOJ’s position. Culvahouse “couldn’t figure out why what would seem to be the President’s position was not the position of the Solicitor General in Court” (Miller Center 2004). In another case, the National Security Archives filed a Freedom of Information Act request for White House documents. After Culvahouse claimed administrative executive privilege, the National Security Archives sued the Administration. Unhappy with the DOJ’s handling of the case, and deciding the administration really needed to win, Culvahouse said he, “did get the Justice Department’s attention on doing a better job litigating that case, for lots of different reasons” (Miller Center 2004). In these two instances, Culvahouse indicates he took an active role in directing and attaining compliance from the DOJ.

Peter Wallison, also White House Counsel, discussed his substantial rewrites to Attorney General recommendations for presidential signature (particularly legislation recommendations), which indicates the White House’s general involvement in correcting, or editing, DOJ materials (Miller Center 2003). Wallison stated, in relation to DOJ materials, “... we’d get the thing over and we’d either throw it out or we’d re-write it so it sounded like something we thought Reagan should sign” (Miller Center 2003). Wallison’s insight, in conjunction with the the edits of legal documents, and the direction from Culvahouse, implies that compliance was a goal that permeated the various avenues of the White House and DOJ’s interactions.

Additionally, the paper trail suggests that Reagan’s White House staff carefully watched the DOJ’s efforts, working to keep Reagan informed on the development of policy and cases. Importantly, there is evidence that the DOJ and Counsel’s actions were reported to, and

discussed with, the president. Many memos were sent to the president or his direct aides from various staff reporting on the dealings of cases (for example: Conference Report, Reagan, et al., 8/11/1981; Memo, Baxter to Fuller, 8/5/1981; Memo, Cabinet Administration Staffing Memorandum, 8/6/1981; Memo, Hauser to Harper, 7/11/1983; Memo, McFarlane to Reagan, 11/14/1983; Letter, Fielding to Baroody, 7/31/1984; Memo, Fielding to Baroody, 8/10/1984; Memo, Roberts to Fielding, 10/5/1984; Memo, Fielding to Baroody, 10/24/1984; Memo, Clegg to Roberts, 11/30/1984; Memo, Clegg to Hauser, 1/17/1985). As a specific example, in AT&T anti-trust litigation, Baldrige informed Reagan about the DOJ 's decision to drop their case against AT&T if the president approved of the administrative amendment to legislation that would achieve the same substance as they hoped in the case. Baldrige suggested Reagan should support the administrative amendment and asked for a decision either way (Memo, Baldrige to Reagan, 7/21/1981). The Administration supported the bill (which passed in the Senate). Eventually, the Justice Department and AT&T would settle the case (Memo, Baldrige to Members, Cabinet Council on Commerce and Trade, n.d.).

President Reagan wanted policy to reflect his values and interests and sought to ensure the DOJ acted in kind. In a letter to Fielding about the *New Jersey v. T.L.O.* (469 U.S. 325) case about the right of a principal to search a student's bag, Roberts writes, "As you know, the President has on several occasions announced that he has directed the Department of Justice to file amicus curiae briefs in support of the rights of school officials and teachers to enforce discipline in the schools" (Letter, Roberts to Fielding, 7/31/1984). In the *New Jersey v. T.L.O.* case, the government would ultimately file an amicus brief in favor of the school.

Reagan's pocket veto case particularly highlights the White House's involvement with the DOJ. Reagan pocket vetoed a bill between congressional sessions in November 1983. Some

members of Congress sued and claimed the bill had become law because Reagan's actions did not actually result in a pocket veto. The District of Court of the District of Columbia sided in favor of Reagan. But, the administration eventually lost in the appeal (Memo, Rusthoven to Fielding, 9/18/1984; Memo, Willard to Lee, 11/2/1984), and decided to appeal to the Supreme Court. Because this suit was a direct challenge to the president's order, and therefore presidential power, it is naturally expected that the White House would want to be intimately involved in the proceedings of the case. John Roberts, aide to White House Counsel Fred Fielding, offered his view of the White House's role during the *Barnes v. Kline* (759 F. 2d 21) pocket veto case. Roberts wrote, "I do not, however, like being in the position of giving a 'recommendation' to the Civil Division. If we give anything it should be an order, based on their advice" (Letter, Roberts to Fielding, 8/23/1985).

The DOJ, understanding the importance of the case to the President, also requested the input of the administration. Fred Fielding, White House Counsel, wrote Sherrie Cooksey, his colleague, "The Justice Department has requested our views by Monday, June 10 on any points we would want raised in the Government's supplemental brief on the court's questions" (Letter, Cooksey to Fielding, 6/6/1985). The Department of Justice sent the petition for a hearing en banc, and Sherrie Cooksey, Associate Counsel to the President, suggested some edits and clarifications (Letter, Cooksey to Fielding, 5/10/1985). These edits are significant because they demonstrate the White House had an active interest in ensuring that their policy preferences were protected in documents reaching the courts.

John Roberts, then an aide to White House Counsel Fielding, informed Fielding that the Acting Assistant Attorney General had asked for the White House Counsel's views on seeking certiorari (Letter, Roberts to Fielding, 8/23/1985). The Counsels office later informed the DOJ

that they wanted the SG to seek cert in the case. After acknowledging counsel's advice, the Acting Assistant Attorney also recommends cert to the SG (Memo, Willard to Solicitor General, n.d.). Accordingly, the case was appealed. Throughout the development of the *Barnes v. Kline* pocket veto case, the White House Counsel and DOJ would meet, and exchange many letters and memos; the president's counsel was helping the DOJ forge a path forward (see Letter, Willard to Cooksey, 5/9/1985; and Letter, Roberts to Fielding, 8/23/1985).

Just as in other administrations, Reagan's DOJ would ask for White House comments on draft briefs and activities (Letter, Martin to Fielding, 2/9/1981; Letter, Martin to Fielding, 2/9/1981; Memo, White to DeMuth et al., 10/2/1981; Memo, Strauss to Hauser, 11/9/1982; Memo, Lilly to Cribb, Horowitz, and Roberts, 7/25/1984; Letter, Cooksey to Fielding, 5/10/1985; Letter, Ludwiszewski to Keisler, 3/16/1987). Additionally, Deputy Attorney General Roger Clegg regularly sent briefings on cases to Reagan's Deputy Counsel Hauser (Memo, Clegg to Hauser, 8/17/1984a; Memo, Clegg to Hauser, 8/17/1984b; Memo, Clegg to Roberts, 8/27/1984; Memo, Clegg to Roberts, 9/13/1984). The White House would, in turn, offer edits (Memo, Rusthoven to Hauser, 11/10/1982; Letter, Cooksey to Fielding, 5/10/1985). The Counsel's office examined the brief for cert *Richard Nixon v. Gerald P. Carmen, Administrator of General Services, et al.*, the case about Nixon's access to his tapes and offered many handwritten edits (Memo, Rusthoven to Hauser, 11/10/1982; Memo, Strauss to Hauser, 11/9/1982) (the case was denied).

While preparing for the *Beck v. Communication Workers* (487 U.S. 735) case (a case about what fees unions can collect), the Solicitor General sent the White House a draft amicus curiae brief. (Interestingly, in this case, the administration would decide to support the union.) The Supreme Court had issued a Call for the Views of the Solicitor General, or an invited brief.

Arthur B. Culvahouse, Jr., Counsel to the President, wrote the Deputy Attorney General to explain that the case was important to the administration and they were glad for the opportunity to give the administration's position through commentary on the draft brief. Culvahouse ended his assessment of the brief by writing, "In order to succinctly set out our reading of the law on this issue, and to assist you in your own consideration of whether the Administration can effectively argue in behalf of the result in *Beck* as amicus curiae, we have provided our analysis in outline form below" (Letter, Culvahouse to Burns, 4/30/1987).

2.4.2 Summary

Overall, a thorough examination of the correspondence, briefs, and memos from the four presidential libraries evidences that the president and his White House are intimately involved in the proceedings of the DOJ. While many scholars assume that the DOJ, particularly the SG, are inclined to follow the directives of the president (Clayton 1992; Graham 2002; Black and Owens 2012), there remains much more to be understood about the relationship between the president and DOJ. This research fills a gap in the literature by examining the broader relationship between the DOJ and the president, particularly in civil cases. Beyond showing that Justice is responsive to the president, this research revealed how the relationship is maintained and how it operates. The archives show that the president successfully sets policy preferences that the Department of Justice then seeks to honor. Further, presidents commonly provide instruction to their DOJ appointees. These actions move beyond a general establishment of policy preferences to a specific prescription of actions to take to achieve these preferences. Some directives come from the president himself, while in other cases we witness the importance and the role of the White House Counsel. The collected data highlights that all four White Houses actively inserted themselves in DOJ decision-making as part of their efforts to ensure the DOJ accurately reflected

executive preferences both in legal filings as well as public appearances by DOJ officials. These corrective efforts could be as innocuous as edits to amicus briefs or the commands could take the form of harsh reproaches or entire changes of administration positions.

Finally, appointees are aware of presidential policies, and when there is a question of preference, or an issue of certain interest, the DOJ, as a matter of routine, seeks White House input on the topic. The archival evidence similarly suggests that presidents desire routine notification of DOJ actions, and, importantly, the DOJ works to inform the White House of its activities. The weekly meetings between Truman and McGrath (J. Howard McGrath Interview, 5) were thus not extraordinary meetings but rather a reflection of the normal relationship between presidents and their DOJ's. This practice allows the White House to keep abreast of developments and suggest changes of course when necessary. Therefore, while presidents cannot personally oversee every action the DOJ takes, they do direct efforts in cases that are of particular importance.

Collectively, the archival evidence demonstrates that the White House is unambiguously concerned with the proceedings of the DOJ, particularly the Attorney General and the Solicitor General. And, these actors listen and respond to the president's concerns and preferences. Across all four presidential administrations, there is a strong and consistent relationship between the White House and the Department of Justice. Given the variations in the administrations assessed, from eras to party to presidential personality these findings are likely generalizable across administrations. The level of presidential interest and direct personal oversight may vary across administrations, but the evidence suggests a clear pattern of interest and even personal, presidential oversight. Likewise, the DOJ may not always fully represent the president's interest in every activity in every administration, but the DOJ will never completely fail to promote the

president's agenda. Therefore, I propose scholars of the executive-judicial relationship can and should investigate executive strategy, actions, and preferences by observing the Attorney General, Solicitor General, and other actors within the DOJ. These actors' calculations and decisions reflect both indirect and direct presidential influences. Presidents indirectly influence their DOJ's by laying out policy priorities and engaging in passive forms of oversight. Presidents also more directly – and personally – influence them.

2.5 Cases and their Strategic Decisions

The rest of this chapter presents archival evidence of how these administration actors strategically engage with the judicial branch to further the president's policy goals. I theorize that executive actions via the judiciary are a function of the president's policy preferences as well as the likelihood that the president's goals will be realized absent intervention. I discuss various cases for each president that highlight the rational actor calculus in use. I organize the discussion by the strategic tools the archives revealed presidents routinely utilize in interacting with the courts: initiating cases, appealing cases, submitting a brief, asking the Court to speed up on an issue, agreeing on a settlement, and issuing public statements.²

As explained previously, at the libraries, my search was broad, aiming to capture the true nature of executive correspondence on such issues as the legal system, court cases, and the Department of Justice. I collected documents related to these topics, and then organized them by topic (such as relationship with the DOJ) or case. Some cases received attention to the level that a narrative of the White House involvement was clearly evident. These are the cases that I chose to highlight in this study. Thus, the selection of the cases for this chapter was organic and

² There may be other potential actions the executive can take. However, I am focusing on those that were consistently utilized across administrations examined.

influenced only by what was found at the presidential libraries. Therefore, these cases may not be representative of *all* cases. However, the cases highlighted in this chapter are representative of those that attract presidents' attention and direction. As my theory concerns what invokes executive action on cases, I observe what these cases have in common to deduce what motivates the extent of action.

After examining the history and narrative of the case, a pattern of actions taken on cases emerged. The actions I highlight are ones that show up repeatedly in the case narratives. Throughout the following section, cases are organized by what action they best highlight: initiating cases, appealing cases, submitting a brief, asking the Court to speed up on an issue, agreeing on a settlement, and issuing public statements. Of course, every case will necessarily use multiple strategic tools, but generally, one stands out as most prominent. For example, I use Truman and Eisenhower's U.S. Lines Case (against the United States Lines Company) to demonstrate a decision to invite a suit and initiate a new counter-suit. However, this case also includes the tactic of settlement. I choose this approach for the sake of clarity and comprehension; it is best to describe each case holistically.

Each discussion of a case explores what factors motivated the executive's decision making. I note the president's stated policy preferences, strength of preference, the White House's discussion of case favorability (were the odds in their favor), and direct suggestions by the President or White House. These discussions highlight my theory of the president's decision to interact and the extent of interaction with the judicial branch. As desire for a policy increases, and the odds of prevailing in the related case decreases, the archival evidence reveals that the government takes more action to win.

2.5.1 *Initiating Cases*

Sometimes the government decides the best course of action to influence a particular policy is to utilize the legal arena. The government can therefore initiate a legal proceeding. When the government works to create a case, they are deciding that it is worth bearing whatever legal and political costs they are about to incur. However, simply because the government initiates a case does not mean they will pour unlimited resources into it. For example, even if they expend significant resources on a case, the president may never decide to speak publicly on the case, even if he is actively involved behind the scenes.

President Truman demonstrated multiple instances of directing his Department of Justice to initiate cases in the court system. For example, in 1951, Truman wrote the AG to petition the district courts about the labor conflict between the American Locomotive Company and members of the United Steel Workers of America, CIO (Letter, Truman to McGranery, 12/1/1952). Truman would become involved in number of labor disputes, the Steel Seizure being most infamous. In the case of the American Locomotive conflict, Truman wrote, “In my opinion this unresolved labor dispute has resulted in a strike affecting the entire industry or a substantial part thereof engaged in trade and commerce among the several States and with foreign nations and in the production of good for commerce, which strike, if permitted to continue, will imperil the national safety [sic]” (Letter, Truman to McGranery, 12/1/1952). Therefore, Truman viewed this case as important and wanted the Government to initiate a case to see its resolution. Attorney General McGranery complied (*United States v. American Locomotive Co.*, 109 F. Supp. 78 (W.D.N.Y. 1952)).

Earlier, in 1948, Truman wrote Tom Clark, his AG at the time, to petition in court any related party to end a coal strike (Letter, Truman to Clark, 4/3/1948). The president believe this

strike also threatened the nation's economy and stability (Letter, Truman to Clark, 4/3/1948). Clark achieved an injunction in the D.C. District Court to order the miners back to work (the workers complied after future court rulings held them in contempt of court) (Truman, Harry S.: "Special Message to the Congress Reporting the Settlement of the Bituminous Coal Labor Dispute.," August 5, 1948).

Eisenhower's DOJ also initiated a civil rights case in Georgia. The DOJ claimed the city of Dawson, GA was systematically discriminating against the voting rights of African Americans. The Civil Rights Act of 1957 allowed the Federal Government to bring suit against those preventing qualified individuals the right to vote based on skin color. AG Rogers wrote Eisenhower, "We have had many complaints since the passage of the Act, but this is the first time we have felt that the evidence was strong enough to proceed in court" (Letter, Rogers to Eisenhower, 9/1/1958). Incidentally, the Government would follow this case to the Supreme Court (on direct appeal after the District Court in Georgia found the Government did not have a right to bring the case) (*United States v. Raines*, 362 U.S. 17 (1960)). The SC reversed the District Court's decision, so the government maintained its right to institute cases. This decision was an important win for Eisenhower's policy goals of protecting civil rights and maintaining executive power (these policy preferences will be explored more fully in following sections).

The following pages will highlight in more detail two cases where the government decided to initiate legal battles. These cases include the U.S. Lines Case and the Tidelands case. The U.S. Lines case involved the Truman Administration inviting legal action and the Eisenhower Administration initiating a counter-suit when it took over the case. In the Tidelands case, the Government directly sued Louisiana, thereby creating a new judicial controversy on the

subject. However, due to the tempered and conflicting interest Eisenhower had in the case, the Administration hesitated to take even stronger action to win the case.

These two cases demonstrate specific points of the theory of executive engagement with the courts. First, Truman and Eisenhower had clear policy goals in both of these cases, and engaged with the court system when a court case would provide the most rational way to protect their interests. Second, the administrations displayed strategic decision making when deciding how to pursue the cases. The Eisenhower Administration agreed to a settlement in the *U.S. Lines* case because they believed that offered the best chance to realize part of their goals. In the *Tidelands* case, due to the lukewarm preferences of Eisenhower on the policy, we see restrained efforts by the administration.

U.S. Lines Case

The United States Lines Company, a shipping company, was to purchase the superliner, SS United States, from the federal government. Under the original contract, the company would purchase the ship for \$26 million, while the government would use construction subsidies and defense allowances to pay the remaining cost of about \$70 million. However, in 1949, the Comptroller General issued a special report to Congress that criticized this sale and said the construction subsidies were excessive (Press Release, McGranery, 12/11/1952). President Truman's Attorney General McGranery reviewed the contract and "applicable law," and decided that the government could void the contract at its discretion (Press Release, McGranery, 12/11/1952, 11). In this case study, Truman directs action that would inevitably bring about litigation; while the administration did not file suit, they invited it. When the case transitioned to the Eisenhower Administration after he took office, the Government initiated its own counter-suit, thereby increasing the costs they would have to pay in order to win.

In terms of presidential interest, Truman indicated that his administration had always had an interest in maritime affairs, and that “the construction of the SS UNITED STATES has been followed with especial [sic] attention by me since the time in 49 when the subsidy and national defense allowances... were called into serious question by the Comptroller General...” (Letter, Truman to Sawyer, 6/13/1952). At various points, Truman indicated that he believed the government had means to hold U.S. Lines accountable (Letter, Truman to McGranery, 6/20/1952; Memo, Dennison to Truman, 5/5/1955).

Even before there was an official case, there was internal debate as to the likelihood of government success. McGranery initially indicated, at least publicly, that he believed that the government would likely win a large amount of this money if a case ever went to court (Press Release, McGranery, 12/11/1952). However, Truman’s Secretary of Commerce Sawyer, also the Secretary of Commerce during the Steel Seizure case, seemed less confident about their choice of action against U.S. Lines. Sawyer told Truman that if the Company refused to renegotiate, there was no legal course open except to go through with the sale, but that the government could bring a suit later (Letter, Sawyer to Truman, 6/7/1952; Memo, Dennison to Truman, 12/10/1952). Sawyer wanted to prevent the invitation of a suit, and said that if the government wanted to later, they could direct their own suit.

After receiving the input of his AG and Secretary of Commerce, Truman the ship’s delivery, honoring the government’s contract (appeasing Sawyer and the U.S. Lines, at least temporarily). However, Truman also withheld \$10 million out of the operating subsidies due to the company (Letter, McGranery to Truman, 6/27/1952; Press Release, McGranery, 12/11/1952). The government knew this action would likely invite a suit (see Letter, Sawyer to Truman,

6/7/1952). In January 1953, U.S. Lines Company filed suit in a court of claims to obtain the withheld operating subsidy (Memo, Dennison to Truman, 5/5/1955).

Leading up to Truman's withholding of the U.S. Lines' operating subsidies, the Truman Administration released public comments about the case. In a press release, McGranery announced that the government wanted to avoid lengthy litigation and enact a settlement on a reasonable basis, but that the U.S. Lines Company did not reciprocate the government's "generous spirit" (Press Release, McGranery, 12/11/1952, 1). The press release also included a letter from Truman where he stated he invited the company to discuss the contract with him, but they refused on multiple occasions (Press Release, McGranery, 12/11/1952). Here, we see the government taking preemptive steps to defend themselves publicly.

At the end of January, President Eisenhower took office. Eisenhower's Attorney General Brownell and Assistant Attorney General Burger agreed that the government had a case and a legitimate interest, and that the conflict should be settled out of court. Still, the Justice Department, under Eisenhower's administration, prepared a countersuit. The Court of Claims extended the deadline for the counter-claim to facilitate negotiations for a settlement (Memo, Dennison to Truman, 5/5/1955). Unsuccessful in settling, on March 25, 1954, the government filed its counter-suit. In Robert Dennison's (Naval Aide and friend to Truman) account of the affairs he wrote, "the company was reminded that a long court fight would probably be involved, and that the Government stood a chance of winning, if not in the court, at least in terms of public opinion" (Memo, Dennison to Truman, 5/5/1955, 5). The Eisenhower administration, however, appeared to recognize the odds of winning were low, and after many rounds of negotiation, the Government and U.S. Lines settled for \$4 million. Dennison wrote Truman:

It undoubtedly is much lower than the amount actually due the Government on a strict application of law. However, the Government's willingness to settle on a figure of this

magnitude was based largely on the realization that, no matter how strong the case, it would have difficulty winning in the Court of Claims. Also, it was believed that the \$4 million was sizable enough to satisfy the principles underlying the Government's case (Memo, Dennison to Truman, 5/5/1955, 6).

My theory predicts that presidents should take greater legal action when they have a high desire to see a positive outcome of some policy or in some policy area, but view the likelihood of winning as low. Truman had expressed interest in maritime activities, and then expressed an obvious interest in the affairs around the U.S. Lines. He believed that the company had taken advantage of the Government, and he was determined to rectify the situation. Due to this interest and the drive to succeed in this policy area, the Truman administration instigated the case; they took action that they knew would invite a suit. The Administration could have conceded the issue by delivering the ship, while complaining privately or even publicly. However, they withheld the \$10 million in order to force legal recourse. Eisenhower's Administration, agreeing with Truman's position and case, pursued the case through the spring of 1954. The Eisenhower Administration first attempted a settlement, but then determined to countersue the U.S. Lines Company. Even though they initiated a counter-suit, the DOJ was most concerned with settling, because they viewed it as the best means to win their case; they could recoup enough to satisfy the principal underlying the case, while perhaps avoiding total defeat in the Court of Claims. That is, they could pay less costs in order to still win. However, they viewed the counter-suit as a viable tool to bring about a win.

Tidelands

The Tidelands case concerned coastal states' rights to lands off the coast. Ownership of the tidelands, either by the states or the federal government was not firmly established, nor of much importance, until the advancement of drilling technology made the lands much more valuable. For the territories that then became states, such as California, Texas, and Louisiana,

their relationship to the tidelands after joining the union remained untested in the courts. In 1947, in *U.S. v. California*, 322 U.S. 19, the Supreme Court ruled that California did not own the three-mile area along its coast, but rather the Federal Government had paramount rights over the belt, and the minerals therein. When Eisenhower ran in 1952, part of his platform promised to introduce legislation that would return the tidelands to the states.

Eisenhower initially believed that states should have the rights to the tidelands up to three leagues from their coast (later the government would argue for three miles). However, when Congress passed the Submerged Lands Act, it recognized state rights to land in their boundaries at the time the states entered the union. In 1955, the government entered a case against Louisiana to determine its right to lands (Louisiana had been issuing leases to drill for oil beyond a three-mile boundary, and beyond what the government recognized belonged to the state) (Press Release, Department of Justice, 11/7/1957). By 1957, the case came before the Supreme Court.

While the case was at the Supreme Court, Texas submitted a friend of the Court brief arguing that the Court should not decide in a way that would prejudice Texas' claim to territory up to nine miles from the coast (Press Release, Department of Justice, 11/7/1957). The Supreme Court ordered that it was necessary to review the rights of all the Gulf States before issuing a decision. The AG apparently believed Texas made an unwise decision when entering its brief (and from Texas's standpoint, the AG was likely right). When only Alabama voluntarily entered the case, the United States brought in the remaining states (as the Court requested) (Press Release, Department of Justice, 11/7/1957). The government continued to argue that the Gulf States only had rights to the three-mile mark.

Internal documents show that the Administration believed they should offer the Court an argument most favorable to the federal government while executing the law the Executive

branch was charged with by Congress (the Submerged Lands Act) (Letter, Brownell to Eisenhower, 11/10/1954; Memo, Rogers, 12/4/1957). Demonstrating Administrative cooperation on the arguments, Eisenhower wrote, “The Attorney General and I agreed that the statements that he and I had both made publicly regarding the rights of Texas would not only be repeated in a press release, but would be categorically stated before the Court” (Letter, Eisenhower to Anderson 11/23/1957).

Despite their involvement in the case, the government remained restrained in the actions it took. The government had brought the remaining coastal states into the case, but it only did so at the behest of the Court. While there were Administrative public comments on the case (Press Release, Department of Justice, 11/7/1957), Eisenhower did not appear to spend much of his public efforts discussing the case (see Public Papers of the President, *The American Presidency Project*). Further, when the Administration spoke of the case, it sought to shift responsibility to the Court; according to the Administration, it was the Court that needed to interpret the meaning of the Submerged Lands Act (Letter, Brownell to Eisenhower, 11/10/1954; Memo, Rogers, 12/4/1957). Finally, in his letter to Dillon Anderson, Eisenhower emphasized the blame for the expansion of the conflict was on Texas (Letter, Eisenhower to Anderson 11/23/1957; see also Press Release, Department of Justice, 11/7/1957).

Demonstrative of my theory, the Tidelands case represents an area where Eisenhower had a clear interest in the policy. He campaigned to give states their rightful territory and he advocated that Congress approve a bill that would clearly define the boundaries (Eisenhower, Letter to Senator Anderson, 4/24/1953).³ While the Administration got involved in a legal

³ During the litigation, the Administration still wanted to balance the state’s rights with national interests. In terms of international relations, the U.S. claimed three-miles outside its boundaries, as did most countries (Letter, Brownell to Eisenhower, 11/10/1954; Press Release, Department of Justice, 11/7/1957; Memo, Rogers, 12/4/1957; Herbert Brownell Interview, 5/5/1967).

dispute on the issue that would essentially limit states' rights, they only took litigious action when Louisiana started to approve leases outside its border. The Administration did not seek to broaden the case beyond Louisiana, and only did so after the Court demanded the addition of the remaining Gulf Coast states. In 1960, the Supreme Court decided that Louisiana, Mississippi, and Alabama were not entitled to lands beyond the three-mile mark, while Florida and Texas were entitled to three leagues (about ten miles) (*United States v. Louisiana*, 363 U.S. 1 (1960)). Because this case was in an area in which the president cared and campaigned about, the administration was willing to expend the effort to initiate a case. But, the degree of action they took was moderated by the lowered desire to control the eventual outcome (they were seeking to push responsibility to the Court).

2.5.2 *Appealing Cases*

When the federal government is a party to the case and experiences a loss, it must decide whether to accept the loss or to appeal the case. Appealing a case is not a costless activity; indeed, it requires considerable effort to decide to appeal a case, prepare the necessary documents and to prepare for the next round of arguments. However, appealing is an entirely routine and expected legal action. Therefore, I identify appealing cases as one of the lower-cost actions the government can take to pursue its ends. Still, the government does not appeal every case they lose, indicative of the costs accrued while appealing. Therefore, executive actors balance the executive branch's policy goals with the costs necessary to achieve them.

For example, in a case against Kearney & Trecker Corporation, Sobeloff denied appeal because he did not believe the result of the decision would have a serious impact on future cases the government would be involved in (the facts of this particular case were too unique) (Letter, Sobeloff to Brownell, 7/11/1954). Therefore, the policy gains did not justify the costs, and the

Administration abandoned the case. However, in *U.S. v. City of Wendell, Idaho* (237 F.2d 51), Sobeloff approved appealing the case because he agreed with the Housing and Home Finance Agency's assessment that the loss would put federal policy in danger and contribute to financial losses for the Government (Note, Sobeloff, 4/21/1955).

This section presents multiple case studies of instances when the executive branch decided to appeal a case: Truman's Roanoke Rapids and Dollar Lines case, Carter's North Dakota Injunction case, and Reagan's Pocket Veto case. In Truman's Dollar Lines case, the government appealed multiple times; incidentally they also initiated another suit against the Dollar Line Company so that they had multiple cases proceeding through the courts. In the Roanoke Rapids case, Truman indicated he wanted the case appealed to the Supreme Court, but after that, the Administration balked from allotting more resources to the case. In the North Dakota Injunction case, the government was so unhappy with the decision that they not only appealed, but also sought an expedited appeal. The North Dakota Injunction case also reveals a fascinating incident where Carter seriously contemplated ignoring the lower court's order. Finally, in Reagan's pocket veto case we see the government continue to appeal up to the Supreme Court, but concede for a ruling of mootness when they realize the odds are so highly stacked against them.

Roanoke Rapids Case

The Roanoke Rapids case pitted two agencies, the Federal Power Commission and the Secretary of the Interior, against each other. The Secretary of the Interior, whose position President Truman supported, argued that Congress had reserved the Roanoke Rapids site for public development, and that this placed the site beyond the licensing power of the Federal Power Commission (*United States ex rel. Chapman, Secretary of the Interior, v. Federal Power*

Commission et al. Virginia REA ASS'N et al. v. Federal Power Commission et al., 345 U.S. 153 (73 S.Ct. 609, 97 L.Ed. 918)). The Commission granted licenses to private power companies to develop the Roanoke River basin, while the Department of the Interior believed the federal government should develop the area.

President Truman personally cared about this issue. He even wrote his Attorney General, “I am very much interested in this case as it gets at the very fundamentals of public power” (Letter, Truman to McGrath, 12/1/1951). Therefore, when the Department of the Interior lost their case in the circuit court, Truman expressed his strong desire to have the case appealed to the Supreme Court. He wrote, “I would very much like to have this case appealed to the Supreme Court. I hope you will cooperate with the Secretary of the Interior in getting this done. The fundamental basis of our whole policy is at stake in this case, and it should be passed on by the high court” (Letter, Truman to McGrath, 11/22/1951.).

The Attorney General assured Truman that the case would be appealed, but indicated that he was not decided if the DOJ should get involved in the case or rather let the two agencies pursue the case in front of the Supreme Court on their own. Indeed, the Department of Justice would later decide to remain “neutral” in the case. Admittedly, I can only speculate why the DOJ may have preferred remaining neutral in the case, even though Truman wanted it appealed. Very likely, simply appealing the case to be heard by the Supreme Court appeased Truman. Additionally, the Secretary of the Interior may have had some misgivings about appealing without the DOJ getting involved (Letter, McGrath to Truman, 12/7/1951). This perhaps indicates that his willingness to pursue the case on his own initiative waned. Truman possibly recognized that his compatriots’ preferences did not match his own, and he was satisfied the case was appealed with or without DOJ involvement. Indeed, Interior apparently had a weak case

because it lost in the Supreme Court in a 6-9 decision. Truman's desire to pursue the case ended with appeal, and he did not feel a need to devote more resources to the case.

In sum, Truman expressed interest in having the Roanoke Rapids case appealed to the Supreme Court and the odds of his preferences prevailing in court were questionable, so he got personally involved. The DOJ apparently thought this was a worthwhile enough endeavor and ensured that the case would be appealed, even if they hoped to remain officially neutral. Therefore, the desire to appeal was strong enough, even if the desire to take further actions to help ensure a win was not.

Dollar Lines Case

The Dollar Shipping Company, owned by the Dollar family, was involved in a long dispute with the United States government. In 1938, the Dollar Shipping Company faced financial troubles, was deemed unsound, and the United States Maritime Commission took control of the company (the common stock holders transferred their stock to the Commission in exchange for being released from their obligations). The Commission transferred leadership and renamed the company, American President Lines (which is still in operation today) (Memo, Morison to Perlman, 8/11/1950). In 1945, Stanley Dollar sued to have the company returned to his family, saying the company had only pledged its stock, and had not transferred it (Memo, Morison to Perlman, 8/11/1950).

In *Dollar v. Land* (184 F. 2d 245) (Admiral Emory S. Land was the then-Chairman of the Maritime Commission), the District of Columbia Circuit ruled that Dollar Lines intended only to pledge its stock rather than transfer it to the Maritime Commission. Therefore, the court ruled that the government should return the stock. Naturally, the Administration disagreed with the ruling. In a memo to the SG, an Assistant AG wrote, "The contrary conclusion of the Court of

Appeals is based on an erroneous application of legal principles and results in a gross miscarriage of justice. The plaintiffs have received the full benefit of their bargain, but by this decision the Government is deprived of its benefits, which are now worth several million dollars” (Memo, Morison to Perlman, 8/11/1950, 4). He went on to say that the Court of Appeals misconstrued rules and was not warranted in ignoring the findings of the trial court (Memo, Morison to Perlman, 8/11/1950). In addition, Assistant AG Morison believed that the decision weakened the precedent from *Larson v. Domestic and Foreign Commerce Corp*, which in part held that parties could not sue government officials when they were really attempting to sue the federal government (Memo, Morison to Perlman, 8/11/1950). Therefore, Morison and others recommended that the government appeal the decision.

The Supreme Court declined to review the D.C. Circuit’s decision; the Supreme Court expressed no opinions on the merits, *but* said that the judgment of case was not binding on the United States. Therefore, President Truman wrote Secretary of Commerce Sawyer, “you are directed to continue to hold this stock on behalf of the United States” (Letter, Truman to Sawyer, 11/30/1950).

In the spring of, 1951, Truman also directed the Attorney General to start litigation in the Northern District of California:

It is my wish that you continue to prosecute this suit, on behalf of the United States, so that the rights of the United States, which have not been adjudicated in the previous litigation, may be fully protected, and that you take all appropriate steps in the California suit to vindicate and assert all rights of the United States (Letter, Truman to McGrath, 4/6/1951).

Following directions, Secretary of Commerce Sawyer, delivered the certificate of stock but did not endorse them. Likewise, in the Northern District of California, the Administration requested and received an injunction to prevent the Dollars from asserting rights of ownership of

the stock (see *Sawyer v. Dollar*, 190 F. 2d 623 (D.D.C. 1951)). However, on May 18, 1951, the D.C. Circuit Court again ruled that Sawyer should turn over the stock. A long saga, these cases would progress through a series of courts, stays, and injunctions. By 1952, cases were still processing through the Circuit Courts, were to be heard again by the Supreme Court, and, by then, the government was hoping to settle. Sawyer wrote the president, “we are still faced with years of litigation of this matter, which as I understood your wishes, is the thing we want to end by the settlement” (Letter, Sawyer to Truman, 5/15/1952).

Charles Sawyer, at times a reluctant participant Truman’s important cases (such as the Steel Seizure case), explained in an interview that he believed the Dollars were entirely wrong in their actions and their intentions, but that it was time for the United States to reach a settlement. Sawyer explained, “I said to the President that the time had come to settle this litigation. We had lost the case in four different courts, and although I was convinced we were right, I thought it should be disposed of. I told him so. He said, ‘All right. You go ahead and settle it’” (Charles W. Sawyer Interview, 31). Sawyer and Dollar agreed to public auction of the stock where the government and Dollar would split the profit (Dollar was also allowed to bid on the stock, but he did not win) (Charles W. Sawyer Interview).

The proceedings of this case highlight the various components of the executive strategic calculation. Truman was motivated to protect the government’s interests in this case, particularly the monetary interests; he believed the United States needed to be “vindicated” (Letter, Truman to McGrath, 4/6/1951). After facing unfavorable rulings in the D.C. Circuit Court, and a denial of cert from the Supreme Court, Truman had Sawyer turn over the stock but refuse to sign it. This was not an insignificant action; Truman was displaying the government’s disagreement with the ruling, and seeking to prevent its enforcement. The D.C. Circuit viewed

the failure to turn over the stock as contempt (and presumably a challenge to their legitimacy) (see *Sawyer v. Dollar*, 190 F. 2d 633 (D.D.C. 1951)). To further protect the United States, Truman ordered his DOJ to begin litigation in California to prevent Dollar from asserting ownership of the stock. Therefore, the Administration took significant steps in order to protect their interests. They were motivated to win, but were unsure of their likelihood, so they went as far as to open new cases in a different district, follow it through in the Ninth Circuit, and even risk contempt of court. However, as time passed, and the benefits of protracted litigation decreased, the desire to pour more resources into the case waned. By 1952, after a series of loses, the administration was ready to settle.

North Dakota Injunction Lawsuit

In May of 1977, Carter asked his Secretary of the Interior, Chairman of the Council on Environmental Quality, and the Director of the Office of Management and Budget to prepare a water resources policy study. After this directive, and when the study was nearly complete, North Dakota sued to prevent the study from being delivered to the president. The state argued that the policy study was a major federal endeavor that could affect the quality of the environment and should not be delivered until an environmental impact statement was prepared (Memo, Bell to Carter, 3/15/1978).

In March, 1978, a North Dakota judge enjoined the three Carter advisors, Secretary Andrus, Jim McIntyre, and Charles Warren from sending the water policy recommendations, without first preparing an environmental impact statement (Memo, Eizenstat and Fletcher to Carter, 3/14/1978). The Administration found the order “ridiculous,” and expected that, if pursued, the order would be overturned (Memo, Eizenstat and Fletcher to Carter, 3/14/1978).

Justice sought an expedited appeal, but anticipated the appeal to take a couple of weeks (Memo, Eizenstat and Fletcher to Carter, 3/14/1978).

On the memo briefing him on the injunction, Carter handwrote and forwarded to his White House Counsel: “Bob Lipshutz- I prefer to ignore him. Consequences?” (Memo, Eizenstat and Fletcher to Carter, 3/14/1978). This handwritten note is particularly compelling. This court decision challenged Carter’s right to advice from his staff, thereby his executive power, and he was predictably unhappy with the judge’s action. His policy preferences were so strong, in fact, that he was ready to ignore the lower court’s order which would be a highly public and combative action.

Lipshutz responded to Carter and highlighted the consequences if they ignored the North Dakota Judge’s order. If the defendants forwarded their recommendations, they would be in contempt of court and subject to fines or even imprisonment (Memo, Lipshutz and McKenna to Carter, 3/15/1978). Lipshutz went on to write that appeal briefs have already been submitted, that they anticipate an early hearing, and that they “fully expect a favorable decision”. Lipshutz also thought that this case could set in precedent the president’s absolute right to receive advice from advisors. Attorney General Bell also sent Carter a memo that reminded him the way to test an injunction was not through its violation, but through an appeal (Memo, Bell to Carter, 3/15/1978). Therefore, and regardless of the appeal outcome, White House Counsel and the Attorney General did not recommend that Carter defy the jurisdiction of the court (Memo, Lipshutz and McKenna to Carter, 3/15/1978). Carter indicated that he approved of their decision to comply with the court order, but added a handwritten note: “Very reluctantly. This is obviously judicial stupidity & I hate to honor it - & I won’t much longer – J.” (Memo, Lipshutz and McKenna to Carter, 3/15/1978).

The Eighth Circuit Court of Appeals ruled in favor of the government, but stayed its order for two days to allow for an appeal. The Supreme Court refused to extend the stay. After this decision, Carter's advisors were permitted to forward their water policy recommendations (Memo, Lipshutz and McKenna to Carter, 3/15/1978).

Carter cared deeply about the outcome of this case. He personally initiated the water policy study, a North Dakota district court challenged movement on the policy study, but also challenged his right to advice. Therefore, the case had implications for his policy preferences. The DOJ found the order, by their own terms, "ridiculous" (Memo, Eizenstat and Fletcher to Carter, 3/14/1978), and expected a fairly easy win after an appeal. Still, they cared enough about the policy implications to expedite the case after an initial loss. As my theory predicts, the administration should not take more action than necessary to achieve their preferences. Carter could have ignored the court and received his advice before the appeal was heard, and by doing so he would send a strong message to the courts about his preferences on his right to advice. However, this action would have used a high amount of political capital, especially since it would have challenged the jurisdiction and legitimacy of the judicial branch, and potentially lead to a charge contempt of court. Taking more action, beyond the appeal, was deemed unnecessary to eventually (within a couple of weeks) achieve the Administration's policy goals.

Pocket Veto Case

In November 1983, in between congressional sessions, President Reagan attempted to pocket veto a congressional bill sent for his signature. Some members of Congress sued, claiming Reagan's actions did not result in a pocket veto, and that the bill had become law. The District Court decided in favor of Reagan, but an appeal resulted in an unfavorable ruling for the administration (Memo, Rusthoven to Fielding, 9/18/1984; Memo, Willard to Lee, 11/2/1984).

This pocket veto case, *Barnes v. Kline*, was important to the Reagan administration for a number of reasons. First, the administration wanted to prevent this bill from becoming law; hence the veto in the first place. More obviously, this case introduced a question of presidential powers- does the president have the authority to pocket veto in such a manner. Finally, by asking if “courts do have jurisdiction to mediate irreconcilable (sic) disputes on purely governmental powers between the political branches,” this case had implications for the judicial branch’s relationship with the others (Memo, Cooksey to Fielding, 5/10/1985). Highlighting the importance of the case, Theodore Olsen wrote that if the government could get the Supreme Court to adopt the government’s position in its opinion, it would put them “in a better, if not conclusive, position to advise the President regarding the scope of his power under the Pocket Veto Clause during intrasession adjournments as well” (Memo, Olson to Lee, 10/31/1984). He added, “As you know, the law of the District of Columbia Circuit is currently against us on this issue” (Memo, Olson to Lee, 10/31/1984).

Some of these considerations became less important to the administration. After losing in the Circuit Court, Fielding sent a memo to other Reagan appointees that indicated the practical significance of the loss was small; the funds in the vetoed bill had already been spent and if the bill was to become law, it would expire by its own terms shortly thereafter. But, the significance for presidential powers remained, and Justice was going to decide if and how to appeal the decision.

The institutional importance of the case triggered the Counsels office to work closely with the DOJ to coordinate efforts on the case. This was the case, after all, in which Roberts wrote that he wanted to provide the DOJ with an order based on their advice (Letter, Roberts to Fielding, 8/23/1985). In a memo to Fielding about the DOJ’s petition to have the Circuit Court

hear the case en banc, Cooksey wrote, “As a final point, if this petition is granted, I believe we should work closely with Justice on the development of their position on congressional standing” (Memo, Cooksey to Fielding, 5/10/1985).

Because the case was important to the administration, they took particular efforts to ensure they received a favorable outcome. The administration planned to publicly defend their actions and position. Fielding ended his August, 1984 memo by guiding how the advisors should respond to press inquiries. He directed the administrators to say, “We disagree with the Court of Appeals’ ruling, which reversed a District Court decision upholding the President’s action” (Memo, Fielding to Meese et al., 8/30/1984). This statement would show public administrative disagreement, and therefore criticism, of the judicial branch. The statement would also signal presidential preferences to a wide audience. A public response of this kind would use some political capital and bring attention to the divergence between the branches.

After close coordination among the administration was established, a September, 1985 memo from John Roberts to Fielding illuminates the administration’s broader discussion of strategy. After explaining that en banc was sought and denied, Roberts writes:

Since the decision is as binding on us as a Supreme Court decision, and since we lost everything below, we obviously want the Supreme Court to review the pocket veto issue on the merits... unless we obtain Supreme Court review on the pocket veto issue on the merits this time, we will have to concede the issue in the future” (Memo, Roberts to Fielding, 9/24/1985).

After the Administration experienced the defeat in appealing en banc, they decided to appeal to the Supreme Court. However, after much debate, they also decided to argue that the case was moot. Richard Willard, an Acting Assistant Attorney General wrote:

Obviously, a ruling that this case is moot will not be anywhere near as valuable as a ruling that congressional plaintiffs have no standing or, alternatively, that the Pocket Veto Clause is applicable. If we do not adhere to the argument that the case is moot, however, it will appear we are asking the Supreme Court to be less scrupulous in applying case-or-

controversy requirements than we asked the court of appeals to be. That seems to us tactically imprudent, and likely to adversely affect our standing argument because of the overlap in issues (Memorandum, Willard to Solicitor General).

While the practical significance of *Barnes v. Kline* was reduced by time and budget circumstances, there was a clear and heavy impact on presidential powers and the executive relationship with Congress. In order to have precedent leaning towards presidential power, the motivation to win was strong. The proceedings of the case demonstrate the rational calculation involved in interacting with the Court. The Olsen and Roberts statements also encapsulate my theory of executive strategy; the administration had strong desire to win in this policy area, but had already experienced losses in the case. Therefore, they needed to take decisive action in an attempt to gain a favorable outcome. Because the executive lost, but wanted to win, there was a strong desire to seek cert on the merits in front of the Supreme Court. Next, by letting the judicial branch know it was displeased, the development of critical statements to provide to the press is indicative of presidential efforts to win in a future case. The administration could have refrained from offering an opinion on the outcome, but instead they chose to offer a negative one.

In *Barnes v. Kline*, we see that the executive branch desired a specific outcome, that the odds were not entirely in their favor, but they spent considerable efforts to attempt to secure a win. They were also explicitly tactical in the decision to appeal and argue for mootness. Arguing for mootness, even if it would not get the administration a complete win, would prevent total loss. Therefore, the administration took only the necessary action to achieve the best, yet realistic, outcome they could. Eventually, the Supreme Court agreed with the plaintiffs and decided the case was moot, remanding the case to the Circuit Court to remand to the District Court to dismiss the complaint (*Burke v. Barnes*, 479 U.S. 361 (1987)).

2.5.3 *Expediting Cases*

The executive branch can also ask courts to grant an expedited appeal or simply ask the Court to address a case more quickly than they otherwise would. Because this action represents the executive branch suggesting how the Court handles its docket, it requires a certain amount of political capital. When he makes this suggestion, the president is using his sway to influence the Court; too much of this would insult the Court's autonomy, resulting in backlash. The following pages present two cases in which the Eisenhower Administration asked the Court to speed its action on a case of interest. In the D.C. Desegregation case, the Administration wanted the civil rights issue quickly resolved, as they thought it would impact future policy. In the Pipeline case, Eisenhower was concerned about the economic impact of delay and told his DOJ to ask the Court to hurry up.

Desegregation in D.C. Case (Thompson Case)

When the District of Columbia enjoyed a four-year period of territorial government and a popularly elected local legislature, it passed two laws, in 1872 and 1873, that prohibited discrimination in restaurants and certain places of public accommodation. Sobeloff wrote that when Eisenhower entered the presidency, he identified the ceasing of segregation in D.C. as an administrative goal (Notes, Sobeloff, n.d.). After Eisenhower took the presidency and wanted the laws of 1872 and 1873 re-enforced, others challenged these laws in the federal courts. The Court of Appeals ruled that the laws were invalid. Sobeloff identified this Circuit Court decision as a "crushing blow" to the administration (Notes, Sobeloff, n.d., 2). Because the area was important to the administration, and because they saw the case lose at the circuit level, the DOJ immediately decided to get involved as *amicus curiae* (they were not a party to the case).

After submitting the brief on February 20, 1953, the Attorney General also asked the Court to expedite consideration of the case, wanting arguments to be heard immediately (Notes, Sobeloff, n.d.). The Supreme Court reacted favorably to this request, hearing arguments on April 6, 1953 (earlier than expected without the request). Because this was an important issue area to the Administration, the AG requested to participate in oral arguments, which was also granted by the Court. The Supreme Court eventually reversed the lower court's decision, ending segregation in public places in D.C. (Notes, Sobeloff, n.d.).

Pipeline Case

In the mid-1950s, a series of court cases involving gas pipelines were going through the federal courts (see U.S. Court of Appeals for the District of Columbia Circuit - 243 F.2d 628 (D.C. Cir. 1957) for a listing). The Panhandle pipeline case (see *Panhandle Eastern Pipe Line Company v. Federal Power Commission* 219 F.2d 729) was percolating through the court system when it came to President Eisenhower's attention. The case was important to Eisenhower because of the great sum of money it involved and the potential for employment opportunities. Eisenhower wanted a quick resolution to the case that would allow construction and progress to resume. (Construction was stalled until the Court made a decision on whether or not it would hear the case.) Eisenhower apparently believed that his Administration could simply ask "the Chief" to take a look at it & hurry it up" (Telephone call, Eisenhower to Brownell, 5/12/1955). After Eisenhower requested Brownell ask the Court to hurry up, Brownell said he "will do" (Telephone call, Eisenhower to Brownell, 5/12/1955). At the end of May 1955, Brownell called Eisenhower to inform him that they could go ahead with the Panhandle Pipeline construction;

Ann Whitman recorded that the President was very happy about this (Telephone call, Brownell to Eisenhower, 5/31/1955)⁴.

2.5.4 *Settling Cases*

Sometimes, it is not prudent for the government to litigate cases to the absolute end; the government may be better served by reaching a settlement with the other party. A settlement represents a compromise, where hopefully both parties believe they can share in the win. Typically, a settlement will happen when the government (or both parties) has a degree of uncertainty about the outcome. In an interview, Truman's Attorney General, McGrath, explained their view of a settlement in an anti-trust case against the Atlantic Purchasing Company: "The case was finally won by the government. I say it was won by the government – it was settled by consent decree after we got out, but the government got substantially what it wanted... . Even though we got a lot of abuse from it, the fact remains it was justified, and we won it" (J. Howard McGrath Interview, 2/24/1955, 3).

A settlement is still a costly activity. In order to be a strong contender in a settlement (in order to get what you want) you need to act as if you believe hold the stronger position and are entirely willing to pursue the case if the other party does not want to meet on agreeable terms. To finally achieve a settlement, the government may need to continue investing resources into the case. Recall Truman's U.S. Lines case: in this case, the government poured significant resources, from appealing, opening new suits, and coordinating multiple Secretaries, until the parties eventually achieved a settlement.

⁴I do not know that Eisenhower's statement actually caused the Court to hurry. However, the action is indicative of strategy making. "Panhandle sought review in Panhandle Eastern Pipe Line Co. v. Federal Power Comm., 3 Cir., 1955, 219 F.2d 729, certiorari denied" (see U.S. Court of Appeals for the District of Columbia Circuit - 243 F.2d 628 (D.C. Cir. 1957)).

The AT&T anti-trust case, during the Reagan Administration, illuminates how the executive might emphasize negotiating a settlement. The Government was entirely open to settlement, but AT&T remained confident in their ability to win a court case. To bolster its position, the Executive pursued the company through the courts and also supported legislation that would put restrictions on AT&T.

AT&T Case

The case of *U.S. v. AT&T* (552 F. Supp. 131) is an example where the government pursued litigation until a settlement could be reached; the settlement became preferable to protracted litigation. Reagan inherited the *U.S. v. AT&T* anti-trust case, which began in 1974. AT&T was suspected of acting as a monopoly, counter to U.S. law, to subsidize the cost of its networks. Eventually, the case was settled by a consent decree which required divestiture (*United States V. American Tel. and Tel. Co.*, 552 F. Supp. 131 (D.D.C. 1983)). While the case was active, the Reagan Administration spent considerable energy on planning its proceedings.

Michael Uhlmann, Special Assistant to the President, wrote Meese, Counselor to the President, that the administration needed to decide between legislation and litigation while planning to successfully accomplish the administration's policy ends of divestiture and new regulation. Uhlmann also mentioned his concern about whether the litigation would be perceived as accomplishing these ends (Memo, Uhlmann to Meese, 7/25/1981). Recognizing the limits of political capital, he also noted that litigation was time consuming. In fact, the Government estimated it would take 55 weeks to present its case, and then the case would involve 119 weeks of trial (to end in May of 1983) (Memorandum, Meese, 1/21/1981). The government understood that the case against AT&T would be costly in terms of management,

time, and resources, so that it “require[d] the consideration of a settlement” (Memorandum, Meese, 1/21/1981).

A memorandum in Meese’s files also showed that the government knew, and noted, that AT&T believed it would not be found guilty, and that the dramatic divestiture sought by the Antitrust Division of the DOJ would not be ordered. Noting AT&T’s confidence implies that the government was aware of their own uncertainty in achieving a complete win- the memo even stated, “And, there is the cloud of uncertainty inherent in any litigation” (Memorandum, Meese, 1/21/1981, 9).

Another consideration for the administration was that the *U.S. v. AT&T* case was salient to many actors. Uhlmann expected the case to be covered thoroughly in the press (Memo, Uhlmann to Meese, 7/25/1981). Ronald Frankum (an associate of Meese) wrote, “It should be borne in mind that if the case is dismissed prematurely, both the House and Senate Judiciary Committees will almost certainly conduct investigations on the decision-making process which led to dismissal” (Memo, Frankum to Meese, 6/30/1981, 2). The executive knew that the legislative branch was observing its efforts, and that it would judge its strategic calculations.

Thinking in terms of capital, Frankum wrote to Meese, “To have the President order the dismissal of the case at this time seems [an] unwarranted use of political capital” (Memo, Frankum to Meese, 6/30/1981, 2). Therefore, since the government wanted the case resolved, with the monopoly divested, and because the case was in the public and political spotlight, the Administration decided to urge and support amendments to a current bill in the Senate (S. 898), while also continuing the case and seeking a consent decree. The administration wanted the consent decree to follow as close as possible S. 898 and the proposed administrative amendments (Memo, Cabinet Administration Staffing Memorandum, 8/6/1981).

The proceedings in the AT&T case offer support for a theory of strategic decision making. First, Frankum's memo highlights that political capital was important to the administration and decisions needed to be made to preserve this capital. He also considered that other actors expected responsible decision making from the president. The administration clearly had certain policy goals they wanted to achieve in terms of telecommunication regulation. Indeed, this area was so important to the Administration, they decided to create a taskforce that would report to the President (Memo, Meese to Baldrige, 5/28/1981). The executive branch did not view litigation as the only way to achieve their ends, but instead thought legislation to create statutory regulation policies was a viable, and perhaps more time-conscious alternative. However, the administration maintained the case as a safety against legislative failure. They also sought to settle the case as a way to achieve the goals of divestiture. Eventually, a settlement with AT&T was reached.

2.5.5 Submitting as Amicus Curiae

When the executive is not a party to a case, one way in which they can get involved is through submitting an amicus curiae brief to advocate for a position on the merits. Writing a brief requires hours of work, research, and resources. Submitting a brief also introduces the costs of entering a new political argument. This action is inherently costly, and any decision to submit must recognize that in its calculus. The Executive branch will offer a brief when they care enough about the case to see their position win and they think that the addition of their voice to the argument will help secure a win. As Tom Clark said about his time as President Truman's AG, "when the Government joined in the cases it gave the case emphasis necessary for an expedited decision" (Tom C. Clark Interview, 2/8/1973, 128).

This section will explore some cases where the Government eventually submitted amicus briefs; the decision to submit a brief, however, was not always a forgone conclusion. The *Brown v. Board* cases (and related cases) reveal a fascinating interaction between the Court and the Executive. Eisenhower expressed reluctance to intervene in this area, primarily to not lose votes in the South, and that made him more hesitant to offer briefs or take action beyond offering briefs. Carter's *Bakke* and *Weber* cases also demonstrate the decision to offer briefs. The *Bakke* case highlights how the government did not offer a brief until it became more insecure about the likelihood of the case being decided in a favorable direction. Finally, the Reagan Administration chose to offer a brief in *New Jersey v. T.L.O.*, because it was an issue area that the president demonstrated he cared greatly about and the odds of his position prevailing had decreased.

Brown v. Board of Education

Brown v. Board I (347 U.S. 483) reached the Supreme Court while Truman was still president. Civil rights was an immensely important issue area to Truman (Tom C. Clark Interview, 2/8/1973), and his DOJ submitted an amicus brief for the case detailing how segregation hurt America's reputation abroad (among other points). Truman's Attorney General, McGranery had even requested to give oral arguments in the case, though that request was denied by the Court (Notes, Sobeloff, n.d.). However, the Court was unable to reach a decision and decided to rehear the case in the fall of 1953. The Court asked the Eisenhower Administration to join the oral argument and to submit a brief discussing the intent of the Fourteenth Amendment (Memo for Record, Eisenhower, 8/19/1953).

Civil Rights was an issue clearly important to Eisenhower. Brownell explained that Eisenhower cared about civil rights and made it a policy area of interest for the Administration. (Herbert Brownell Interview, 5/5/1967). However, Eisenhower's standing on civil rights was not

always as obvious and blatant as Truman's. Eisenhower did care about civil rights (he did, after all, pursue desegregation in D.C. public facilities; appoint Warren, who had previously supported integration, as Chief Justice; desegregate D.C. schools immediately after the *Brown* ruling; and use troops to integrate Little Rock High School), but he cared about his southern vote and thought a slow progression of integration was appropriate in the South (Smith 2012, see pages 708-712). And while he would take drastic action to support the Supreme Court after it was challenged in Arkansas, Eisenhower seemed to be privately hesitant to laud their decision. For example, after *Brown v. Board II* (349 U.S. 294) was decided, Ann Whitman records in her diary:

At 2:38 he came back... Later said that the troubles brought about by the Supreme Court decision were the most important problem facing the government, domestically, today. I asked the President what alternative course the Supreme Court could have adopted. He thought that perhaps they could have demanded that segregation be eliminated in graduate schools, later in colleges, later in high schools, as a means of overcoming the passionate and inbred attitudes that they [the South] developed over generations (Diary Entry, Ann Whitman, 8/14/1956).

Likewise, Eisenhower wrote his childhood friend, Swede (Edward E. Hazlett), that the impact of the Supreme Court's decision created the greatest disturbance in domestic politics. He explained his position in civil rights to Swede which called for gradual change due to the longstanding, and until 1954, Constitutionally endorsed segregation practices (Letter, Eisenhower to Swede, 7/22/1957).

Because integration functioned as a more complicated concern for Eisenhower, I believe he was less inclined to get involved in the *Brown v. Board I* (347 U.S. 483) case- his DOJ did not submit a brief until it was asked to. Even as they were planning to submit a brief, Eisenhower seemed less than thrilled about the need to do so; he wrote for his personal record that such an

“opinion” from the AG constituted an invasion of the duties and responsibilities of the Supreme Court (Memo for Record, Eisenhower, 8/19/1953, 1).

Even after defending segregation and the Court in Little Rock, Eisenhower remained publicly moderate on integration issues. In the summer of 1958, Rogers sent Eisenhower a speech he planned to give to the American Bar Association. After reading the speech, Eisenhower called Rogers with some commanding recommendations. Perhaps most striking, Eisenhower stated, “I recommended to Rogers that he avoid predictions that the law (integration) will necessarily be permanent” (Memorandum for Record, telephone Call, 8/22/1958). He also did not want Rogers to give the impression that the Federal government was looking for opportunities to intervene in integration cases. Finally, he said that successful integration did not mean integration in five to ten years, but in some cases it might take 30 to 40 years to reach the ideal (Memorandum for Record, telephone Call, 8/22/1958).

Despite his temperate approach to civil rights, we know it was still a concern for him; he did want civil rights progression. However, the Administration knew that the issue of civil rights was an area of “bitter partisan and sectional controversy” (Herbert Brownell Interview, 5/5/1967, 207). And, as indicated by the Court’s inability to make a decision in the first arguments of the Brown case, the policy outcome of the court was uncertain. Therefore, cases in this issue area required a great deal of personal attention (Herbert Brownell Interview, 5/5/1967, 207), or calculated discretion. Of course, an invitation from the Court is hard to turn down, and the Administration offered their brief. Despite the *Brown v. Board* decision, conflict remained. Even after the case was decided, there was another year of arguments concerning implementation processes. While Eisenhower was privately cool on the issue of *Brown I*, the executive branch still preferred integration over segregation. Therefore, Administrative action in the *Brown II*

case was deemed necessary to achieve their policy goals. Again, the Court invited the government to participate which generally limits of the executive's choice to get involved; but, the case is still interesting because there was apparently serious consideration of refraining from offering a brief on the case (Letter, Sobeloff to Brownell, 7/7/1954).

Involvement in the case required administrative coordination, and correspondence between staff members highlighted pertinent strategic considerations. When deciding whether or not to offer a brief in *Brown v. Board II* Brownell wrote SG Sobeloff:

Before any definite acceptance of the Court's invitation to participate in these cases you and I are to have a conference with the President, at which time we will present to him the arguments pro and con as to the filing of the brief and participation in the oral argument. Obviously, this conference should not take place until we have preliminarily reviewed the problems involved, especially from the standpoint of the problems which the President will face in connection with the enforcement decrees (Letter, Brownell to Sobeloff, 6/25/1954).

Brownell also suggested they form a working group to discuss the policy aspects of the case (Letter, Brownell to Sobeloff, 6/25/1954). This indicates that the Administration actively and deliberately considered the policy implications of the case, how to achieve the policy they preferred, and if submitting a brief or oral argument would help them achieve their ends.

The White House decided to offer a brief. Sobeloff noted that an invitation to join should not be lightly declined. Also, since the government had participated previously, it would make it more difficult to explain to the public why they were not participating now. A lack of participation would lead to a misunderstanding about the president's policy standing, since he had previously commented publicly on integration (Letter, Sobeloff to Brownell, 7/7/1954). Furthermore, Sobeloff explained that many of the briefs currently addressing the decrees about integration represented what he termed "extreme positions," boycotting integration or asking for immediate and total integration. He said the Administration could advocate for the middle

ground: “If a middle ground is possible, it will undoubtedly have to be advanced by the United States, and any proposal by the Attorney General carrying with it the implicit sanction of the President will unquestionably have considerable weight with the Court” (Letter, Sobeloff to Brownell, 7/7/1954, 1). Therefore, the Administration also believed they could influence the Court, shape the policy outcome, and that their voice was necessary to do so.

Civil rights disputes continued well after the Brown cases, and the Administration continued to insert themselves into the conversation in order to influence policy. In 1958, the Governor of Arkansas was investigating leasing Little Rock High School to a private company in order to turn it into a private high school (a means by which to reintroduce segregation). In this case, the DOJ submitted a brief to the Circuit Court that argued states cannot use private corporations to a way to conduct public business to avoid Court orders (Letter, Rogers to Eisenhower, 9/25/1958). The DOJ also announced this action through a press release (Press Release, Department of Justice, 9/29/1958). However, the Administration was not in a rush to pursue the case in Arkansas. After the 8th Circuit Court of Appeals issued a stay, AG Rogers called Eisenhower and stated he believed they should “act slowly as possible” (Telephone Call, Rogers to Eisenhower, 8/21/1958). Instead they should have a similar case proceeding in Arlington, where pro-integration sentiment was higher, serve as the test case (Telephone Call, Rogers to Eisenhower, 8/21/1958). The easiest way to increase their odds of winning was to devote efforts to a more promising case, thereby setting precedent for others.

Overall, the Eisenhower took action to ensure a successful outcome in the Brown cases. However, the procession of action was restrained, due to Eisenhower’s complication relationship with civil rights. Still, as a theory of strategic executive action predicts, when the odds of

success were low, or when there were strong challenges to their positions, the President and his DOJ took the action necessary to win.

Regents of the University of California v. Bakke

The *Bakke* case is a landmark educational affirmative action case decided during Carter's presidency. The case had important affirmative action policy implications for Carter, and he wanted to see his preference for affirmative action protected. The *Bakke* case concerned claims of reverse discrimination. Bakke, a white male, applied to medical school, was rejected, and filed suit claiming less qualified minority students were granted admission instead. Meanwhile, it had been the Carter Administration's policy to "vigorously support affirmative action" (Memo, Eizenstat and Lipshutz to Carter, 9/6/1977). Carter would later write in a memorandum for the heads of executive departments and agencies, "Since my administration began, I have been strongly committed to a policy of affirmative action. It is through such programs that we can expect to remove the efforts of discrimination and ensure equal opportunities for all Americans" (Memo, Carter to the Heads of Executive Departments and Agencies, 7/20/1978). Initially, the administration stayed out of the *Bakke* case. But, and in support of my theory, when the outcome uncertainty increased, the government took action to improve their chances of winning.

Once *Bakke* arrived at the Supreme Court, Margaret McKenna (Deputy White House Counsel) indicated the need for the Executive to get involved in the case. By June 1977, the Justice Department had not yet filed a brief in the case. Because the case had gained national attention, and had important policy implications, McKenna wrote, "this is really a serious and volatile policy decision which I think that we, and even the President, should be involved in. What we do not want is the time to elapse and the decision to be made for us because it is too late to file" (Memo, McKenna to Lipshutz, 6/16/1977, 2). Because the case was volatile, the

administration could not be entirely sure that their position would win. Indeed, until the opinion was released, the White House was decidedly unsure about what the final outcome would be (Memo, Eizenstat and Lipshutz to Carter, 6/26/1978).

A paper prepared for, and read by, the President indicated that the executive branch believed their efforts to submit a brief could hold influence with the Supreme Court. The paper stated, “Because the Bakke case is not controlled by any Supreme Court precedent the views expressed by the Government may have great weight with the Supreme Court” (Memo, forwarded from Hutcheson to Eizenstat and Lipshutz, 9/7/1977, 4). Noting the importance of the case, and the potential for influence, the administration acted as McKenna suggested, and the Counsels office and Carter got involved in DOJ efforts in *Bakke*. After the DOJ formed their brief, Eizenstat and Lipshutz offered comments about the brief to Carter. Then, Carter directed that the brief should strongly endorse affirmative action and differentiate affirmative action from quotas (handwritten directions on Memo, Eizenstat and Lipshutz to Carter, 9/6/1977).

After oral arguments, the Supreme Court requested supplemental briefs discussing the effects of Title VI (of the Civil Rights Act of 1964) on the case. The DOJ considered whether they should also enter a supplemental brief. Eizenstat and Lipshutz wrote Carter that they did not think Title VI prohibited flexible affirmative action, but they acknowledged the Court could rule against that- they were not certain the Court would rule in their favor on this point. If the Court ruled against their position, Carter’s advisors believed it would negatively impact executive policy (Memo, Eizenstat and Lipshutz to Carter, 10/28/1977). Again, there was a desire for a policy outcome but uncertainty, or a lower perception of likely achievement. Accordingly, the government submitted a supplemental brief (see *Regents of Univ. of California v. Bakke* 438 U.S. 265 (1978)).

Eventually, the case was decided largely as the Executive branch hoped, and the Carter Administration reacted positively to the Court's decision. AG Bell told the press, "We think that the opinion... confirm[s] what we thought the law was and it confirms our position and what we have been doing about affirmative action programs" (Press Briefing, Bell, 6/28/1978). Further showing his support for the policy outcome Carter sent a memorandum to his agencies after the case was decided:

I want to make certain that, in the aftermath of Bakke, you continue to develop, implement and enforce vigorously affirmative action programs. I also want to make certain that the Administration's strong commitment to equal opportunity and affirmative action is recognized and understood by all Americans" (Memo, Carter to the Heads of Executive Departments and Agencies, 7/20/1978).

My theory holds that when the president's desire for policy is high, but the outcome of judicial success in that policy area is lower, he should be more likely to take action to influence a case's outcome. The proceedings of the *Bakke* case illuminate how this calculation plays out in practice. The policy area of affirmative action was clearly important to the administration and the Carter Administration was observing the *Bakke* case. The Counsels Office recognized the case was volatile, and the executive had much to lose with an unfavorable decision. There was also stated uncertainty about the case's outcome. As the outcome became more uncertain, the Administration, and Carter personally, got involved in the case, coordinating DOJ efforts. Eizenstat and Lipshutz (and even Carter) edited the DOJ's brief on the merits until it was sure the brief would reflect executive preferences. The administration believed its efforts were worthwhile, and a productive use of capital, because it believed its brief could hold great weight with the Supreme Court. When the Court requested supplemental briefs from the parties of the case, the Administration again wanted to make its views known to the justices. The

Administration took these efforts because it desired to protect its policies, and because it believed they could successfully act to protect their policies.

United Steelworkers of America, AFL-CIO-CLC v. Weber

After *Bakke* was decided, the Carter Administration had the opportunity to get involved in another affirmative action case. The *Weber* case involved the question of whether a private employer and a union could voluntarily agree, through collective bargaining, to an affirmative action program that reserved 50% of openings in a new training program for African American applicants. The District Court ruled against Kaiser and the Steelworkers, and the U.S. intervened when the case got to the Court of Appeals; the Court of Appeals ruled against Kaiser and the Union in a 2 to 1 decision. Kaiser and the Union, joined by the U.S., asked the Supreme Court to hear the case and reverse the lower courts (Memo, Vice President et al., 1/13/1979).

After the request for writ, Carter asked to be briefed on what the government would do on the merits. The Attorney General forwarded a draft brief, and Carter's advisors indicated they agreed with the position of the brief (which reflected the positions the government had taken before). The advisors' memo to the president about this draft brief described the strengths and weaknesses of continuing with this policy in an amicus brief. If the administration submitted the brief, they feared losing support from some conservative groups and "blue collar workers" for appearing to support a quota system (Memo, Vice President et al., 1/13/1979, 4-5). If they did not restate their support for Kaiser's plan, the Administration believed they would receive negative reactions from civil rights groups, that affirmative action progress would be chilled in other companies, and that the Government would appear highly inconsistent by not continuing on such a course (Memo, Vice President et al., 1/13/1979). Deciding the pros far outweighed the

cons of submitting, the U.S. submitted its brief, and eventually, the Supreme Court, in a 5-2 majority, upheld the affirmative action program.

Like the Bakke case, the Weber case was in a policy area of high importance to President Carter. Carter made clear he supported strong affirmative action programs. The Administration viewed the Kaiser plan as an important way to increase equal access in the workplace. Furthermore, the White House believed a negative decision would reduce affirmative action in workplaces generally (Memo, Vice President et al., 1/13/1979). The government witnessed their policy preference lose in the district and circuit court. Because the case was in an important policy area to the president, because the government had experienced losses, and because total loss could be damaging to the policy area in general, the administration chose to get involved in this case by offering multiple briefs.

New Jersey v. T.L.O

New Jersey v. T.L.O involved a high school assistant vice principal who searched a student's bag for cigarettes. The student had been caught smoking, but denied it. Still, the student handed over her bag when the assistant vice principal asked to see it. In the purse, the assistant vice principal found rolling paper, marijuana, and a record of sales of marijuana to other students. The student was removed from school and eventually ruled a delinquent. This case, concerning the rights of school administrators, was in an issue area of expressed importance to President Reagan. Roberts wrote that the President announced many times that he directed his DOJ to file briefs in support of the rights of school officials to enforce discipline (Letter, Roberts to Fielding, 7/31/1984).

The New Jersey Supreme Court decided that the assistant vice principal lacked reasonable grounds to search the student's purse (Letter, Roberts to Fielding, 7/31/1984), and the

case eventually made its way to the Supreme Court. The Supreme Court heard the case, but failed to reach a decision by adjournment. The Court decided to have a reargument in the next session. Before the reargument, the federal government (Reagan Administration) decided to get involved in the case by filing an amicus curiae brief. The Solicitor General, arguing for reversal, filed a brief in favor of the principal.

In this case, we see that the issue area was important to the executive; indeed, it was a publicly expressed area of importance. Still, when the case made it to the Supreme Court, the administration did not get involved. However, when the Supreme Court failed to make a decision and ordered a reargument, the executive branch was then cognizant that the odds were not entirely in favor of their policy preference. So, the administration decided to get involved in the case by sending the Court an amicus curiae brief. Again, my theory predicts that when the president is less likely to observe his desired policy outcome, he will be more likely to take action to increase the odds of his success. Accordingly, my theory predicts that once the administration knew that it may lose in the *New Jersey v. T.L.O* case, they should be more likely to get involved in the case. The administration did so through an amicus brief.

2.5.6 Going Public

Finally, the president, or the executive branch, can offer public statements on cases pending in the court system. I argue that offering public comments about a court decision is one of the costliest activities a president can take on *pending* cases. Public statements, in general, are a costly activity. Usually, public statements are carefully crafted in order to avoid public gaffes and ensure the executive's position is accurately communicated. In the case of speeches on a subject, such as a national address on the steel seizure incident, multiple people will exert effort to draft and re-draft the statement.

Contributing to the cost of pending case commentary, presidents do not want to be viewed as inappropriately influencing the Court. Speaking about a case, before its decision, is a blatant and visible attempt at influence. This concern colors presidential decision making. Take, for example, Truman: in the midst of a campaign for public opinion during the Steel Seizure developments, Truman did not attend James McGranery's ceremony to become Attorney General because Justices would be present. Truman wrote McGranery: "I was as sorry as I could be that I couldn't get to your Ceremony yesterday but you understand perfectly the reason why I didn't come. I want no implication that I have in any way lobbied with the High Court in the Steel Case" (Letter, Truman to McGranery, 5/28/1952). Indeed, because of the costs involved, commenting on a case before its decision is a rare occurrence (Eshbaugh-Soha and Collins 2015).

Despite these high costs, Truman and his officials spoke multiple times about the Steel Seizure issue, and even the Court and its role in the case. This case also exhibits the use of multiple strategic tools: the Administration prepared for possible litigation even before the mills were seized, it sought a stay, and appealed immediately and directly to the Supreme Court. The following pages explore Truman's Steel Seizure case.

Steel Seizure Case

The Steel Seizure Case, *Youngstown Sheet & Tube Co. v. Sawyer* (343 U.S. 579), is perhaps the most ubiquitous case to arise from Truman's presidency. After labor negotiations stalled, members of the Steelworkers Union were threatening to strike against their steel companies. At the time of the Steel Seizure, when talks between the Steelworkers Union and the Steel Companies broke down, the United States was involved in the Korean War. Truman believed that a stoppage in steel production would be dangerous for the nation's war efforts

(Letter, Truman to Feinsinger, 12/22/1951). Truman's primary goal in the events of the steel strike was to protect the production of steel because he thought it was vital to the safety of the country. Well before talks broke down and striking commenced, Truman engaged in efforts, such as sending the parties to the Wage Stabilization Board, in an attempt to ensure the continuation of steel production (Letter, Truman to Feinsinger, 12/22/1951). After the Government seized the mills, the mills sued the government for taking unconstitutional action. This case challenged presidential powers to seize private property during wartime or a state of national emergency (a tactic used by presidents before).

Before the seizure, when it was clear that the situation between the union and companies was more than tenuous, the White House began preparing for possible action to ensure the continued production of steel. White House Aides prepared memos on the possibility of using the Taft-Hartley Act (legislation that provides certain avenues for the president to get involved in strikes), Section 18 seizure, seizure under inherent powers of the President, and sending a seizure bill to Congress (Memo, Enarson to Steelman, 4/3/1952). Eventually, they settled on seizing the mills by the inherent powers of the president (which was not an unprecedented action) (Letter, Truman to Murphy, 5/29/1952).

If they seized the mills, the Administration knew the companies would take immediate counter-action through the courts, but that at least the government could maintain steel production in the interim. Even when making its action plan, the government was clearly unsure about the likelihood of winning a legal contest over seizing the mills through inherent power (Memo, Kayle to Stone, 4/1/1952). Enarson wrote, seizure under inherent powers "raises a serious constitutional issue which we are not likely to win in the courts" (Memo, Enarson to Steelman, 4/3/1952, 2). The White House believed it would need to immediately defend the

action through public statements and legal briefs from the DOJ (Memo, Enarson to Steelman, 4/3/1952).

Even after the Supreme Court took the case and was deliberating, there was evidence that the White House remained uncertain about their ability to prevail in the case. Secretary of Commerce Sawyer sent Truman a memo with a list of possible actions in response to the Court's decision. The memo contained outlines for a decision that would uphold the seizure, void the seizure but indicate Taft-Hartley should be used, void but with no line of action indicated, and no decision (or a remand) (Memo, Sawyer to Truman, 5/21/1952). Additionally, the White House preemptively prepared a draft speech for Truman if the Court ruled that he did not have the authority to seize the mills (Memo, Bell to Murphy, 5/21/1952).

The White House took many steps to defend and strengthen its position, because there was so much uncertainty about the outcome of the case, and because Truman so strongly cared about ensuring steel production. President Truman repeatedly addressed the nation about taking over the steel industry. In a radio and television address, after explaining why the nation was in a state of emergency, Truman said:

Therefore, I am taking two actions tonight. First, I am directing the Secretary of Commerce to take possession of the steel mills, and to keep them operating. Second, I am directing the Acting Director of Defense Mobilization to get the representatives of the steel companies and the steelworkers down here to Washington at the earliest possible date in a renewed effort to get them to settle their dispute. I am taking these measures because it is the only way to prevent a shutdown and to keep steel production rolling. It is also my hope that they will help bring about a quick settlement of the dispute. I want you to understand clearly why these measures are necessary, and how this situation in the steel industry came about (Harry S. Truman: "Radio and Television Address to the American People on the Need for Government Operation of the Steel Mills.," April 8, 1952).

Even while the case was pending in the court system, Truman continued to speak publicly about the issue. At a news conference, Truman stated:

As I told you last week, the President of the United States has very great inherent powers to meet great national emergencies. Now, I want to talk to you a little bit about steel. I told my advisory committee the other day that the reason for the steel seizure was the fact that we are in one of the greatest emergencies the country has ever been in... (Harry S. Truman: "The President's News Conference," April 24, 1952).

And, in the famous letter to C.S. Jones (a constituent who sent a letter to the president), that was published nationally, Truman wrote:

I realized that the action I was taking in this case was very drastic, and I did it only as a matter of necessity to meet an extreme emergency. In so doing, I believe that I was acting within the powers of the President under the Constitution--and indeed, that it was the duty of the President under the Constitution to act to preserve the safety of the Nation. The powers of the President are derived from the Constitution, and they are limited, of course, by the provisions of the Constitution, particularly those that protect the rights of individuals. The legal problems that arise from these facts are now being examined in the courts, as is proper, but I feel sure that the Constitution does not require me to endanger our national safety by letting all the steel mills shut down in this critical time (Harry S. Truman: "Letter to C. S. Jones in Response to Questions on the Steel Situation.," April 27, 1952).

This last statement is of particular interest. Truman did not directly address any court in this statement. However, he did indicate that the courts were hearing his case, and reminded the public his position was defensible under the Constitution (he means, one can assume, within in any court). All told, between seizing the mills and the Supreme Court's decision, Truman spoke about seven times explicitly defending his actions.⁵

⁵ Harry S. Truman: "Special Message to the Congress Reporting on the Situation in the Steel Industry.," April 9, 1952. Online by Gerhard Peters and John T. Woolley, *The American Presidency Project*. <http://www.presidency.ucsb.edu/ws/?pid=14455>.; Harry S. Truman: "Letter to the President of the Senate Concerning Government Operation of the Nation's Steel Mills.," April 21, 1952. Online by Gerhard Peters and John T. Woolley, *The American Presidency Project*. <http://www.presidency.ucsb.edu/ws/?pid=14088>.; Harry S. Truman: "The President's News Conference," April 24, 1952. Online by Gerhard Peters and John T. Woolley, *The American Presidency Project*. <http://www.presidency.ucsb.edu/ws/?pid=14092>.; Harry S. Truman: "Letter to C. S. Jones in Response to Questions on the Steel Situation.," April 27, 1952. Online by Gerhard Peters and John T. Woolley, *The American Presidency Project*. <http://www.presidency.ucsb.edu/ws/?pid=14096>.; Harry S. Truman: "Telegrams to Industry Leaders and to the Union President Calling a Meeting on the Steel Strike.," May 2, 1952. Online by Gerhard Peters and John T. Woolley, *The American Presidency Project*. <http://www.presidency.ucsb.edu/ws/?pid=14102>.; Harry S. Truman: "Remarks at a Meeting With Steel industry and Labor Leaders.," May 3, 1952. Online by Gerhard Peters and John T. Woolley, *The American Presidency Project*. <http://www.presidency.ucsb.edu/ws/?pid=14104>.; Harry S. Truman: "The President's News Conference," May 22,

After the companies sued, District Court Judge Pine ruled that Truman did not have the constitutional authority to seize the steel. Naturally, the White House was not pleased with the decision, particularly its ruling on presidential power. Enarson, Special Assistant in the White House wrote that, “The Justice Department felt that his very hurried opinion was weak in several respects” and that “there was the strong conviction of the Justice Department that it could not give up its position now since to do so would be interpreted as yielding on the position it had taken” (Memo for Files, Enarson, 4/30/1952, 2).

After the loss in the district court, there was no message formally giving the companies back their ownership power, instead there was an immediate move for the White House to maintain control of the mills. Directly after Judge Pine’s decision, the White House appealed for a stay on his decision. The stay was granted and the government remained in control of the steel mills. In addition to requesting a stay, Secretary of Commerce Sawyer said in a public statement after Judge Pine’s decision:

Judge Pine has held that the President’s act is unconstitutional. Temporarily, the injunction which he issued has been stayed by a five-to-four decision of the Court of Appeals. The matter will unquestionably be presented to the Supreme Court, where it may finally be decided. Meanwhile, however, the uncertainty which hangs over the situation makes it difficult for the Executive Branch of the Government and for the parties themselves to know what is their proper course of action (Statement of the Honorable Charles Sawyer, Secretary of Commerce, 5/1/1952).

This statement reminds the public that the lower court judge’s decision has been halted by the Court of Appeals and will likely be reviewed by the Supreme Court; therefore, that judge offered a questionable ruling. Sawyer also implied that until the courts act, there will be certainty surrounding the issue. Still, Sawyer did not indicate which way the Supreme Court would rule. Even Truman was careful in talking about the case when it was before the Court,

because he did not want to be seen as trying to influence the Court (Harry S. Truman: "The President's News Conference," May 22, 1952). However, Truman was attempting to defend his actions to the public, who would surely also be observing the Court's decision.

Despite the stating that they did not wish to influence the Court, and containing now obvious directions to the Court, the White House's behavior clearly had that aim. At a news conference where Truman said he could not talk about the steel case until the Supreme Court made their decision, Joseph Short, Secretary to the President gave an addendum to the news conference. In it he said:

Neither the Congress nor the courts could deny the inherent powers of the Presidency without tearing up the Constitution. The President said that the Supreme Court, in the pending steel case, might properly decide that the conditions existing did not justify the use by the President of his inherent powers, but that such a decision would not deny the existence of the inherent powers. I would like to make it clear that the President would not have seized the steel mills had he not believed that he was taking a legal step. At the time of this press conference he did not anticipate that the Court would decide otherwise than that he had acted properly (Harry S. Truman: "The President's News Conference," May 22, 1952).

Here, Truman's position, and that the White House views their actions as constitutional, is again presented to the public. The statement also includes the idea that he did not believe the Court would decide he acted improperly.

Despite all of the public statements and legal actions, when the Supreme Court finally ruled against the president, saying he did not have the authority to seize the steel mills, Truman immediately (on the same day) ordered Sawyer to relinquish control of the mills (Letter, Truman to Sawyer, 6/2/1952). President Truman did as he said he would (Harry S. Truman: "The President's News Conference," May 22, 1952), and fully complied with the Supreme Court's ruling. Truman remained interested in the Court's decision and received, and saved, an analysis on the justices' opinions (Analysis of Opinions., n.d.; Comments on the Majority Opinions in the

Surprise Court Decision in the Steel Case, n.d.). I can imagine, at least from the comments on the case that Truman saved, he was unhappy with the Court's decision. However, perhaps the loss was not so bad that he felt the need to speak publicly about it; it was a 6 to 3 decision with seven opinions (majority, five concurring, and one dissenting). Though he did not criticize the Court after its decision, Truman appealed to Congress to pass seizure legislation (Harry S. Truman: "Special Message to the Congress on the Steel Strike.," June 10, 1952).

The steel seizure case fits the pattern of my theory. First, Truman repeatedly expressed his desire to keep the steel mills in production. Second, the case also concerned presidential power, of which he felt the prerogative to protect. Seizing the mills was not his first option, nor his preferred, but when talks broke down he believed he had no choice but to do something, and the best option was to seize the mills through the inherent powers of the president. Once the Administration chose that path, they knew there would be public controversy and a necessary legal defense. They also knew that there was a strong likelihood they would lose at the Supreme Court. Accordingly, the White House took action to strengthen its position and attempt to increase the odds of winning. After their first loss in the courts, the administration sought and received an immediate stay, and then appealed their case to the Supreme Court. The president and his staff provided multiple public comments on the issue even when it was before the courts, and prepared for immediate responses to the various decisions the Court could make. In all, the White House had a clearly preferred policy outcome on the case, followed the development of the case, calculated their odds of winning, and took action to increase those odds.

2.6 Conclusion

Scholars, pundits, and the public recognize that presidents want to influence judicial decisions (Goldman 1997; Moraski and Shipan 1999; Segal, Timpone, and Howard 2000; Epstein and Segal 2005; Curry, Pacelle, and Marshall 2008; Nicholson and Collins 2008). However, the scholarly literature lacks a comprehensive framework for explaining when presidents are most likely to try to influence policy-making through the courts, outside of the president's power of selecting judges for the federal bench. This chapter assesses archival evidence to develop a framework for explaining when and how the president will take action to try and influence court decisions. Ultimately, based on this archival evidence, I offer a theory of presidential behavior vis-à-vis the courts that reflects the rational and strategic policy-oriented behavior of presidents when approaching the courts. To buttress and support my theory of presidential engagement with the federal court system, I present archival evidence gleaned from four presidencies: Truman, Eisenhower, Carter and Reagan.

Evidence gathered at these libraries demonstrates presidents make strategic decisions about cases. First, presidents become more involved in cases that are salient to their agenda or political preferences and pursue (and push their agents to pursue) these cases more deliberately. Second, executive involvement in the case increases as the likelihood of winning decreases. That is, when the president faces significant challenges in a case that he has a high desire to win, he is more willing to expend political capital.

However, much of the executive interaction with the courts occurs at with actors below the president. The president is the principal with multiple agents who act to enact his preferences and strategy. Therefore, studying executive interaction with the courts is not simply about examining the president, but necessitates studying his agents. I show that presidents not

only care about legal policy making, but that they also successfully establish policy for their Department of Justice to pursue in the legal system. Evidence demonstrates that the Attorney Generals and Solicitor Generals have a responsive relationship with the leader of the executive branch. My archival research shows that, at times, the president directly and decisively communicates with his DOJ appointees to coordinate executive policy. Additionally, the president relies on his Counsel's Office to monitor DOJ actions and serve as a conduit between the president and the AG and SG. These findings demonstrate that the DOJ is highly reflective of the president's policy preferences, and that such a reflection is orchestrated and deliberate.

These findings expand our knowledge about the executive's role in shaping policy through the legal system. Specifically, this work highlights the collaborative relationship between presidents, Attorney Generals and Solicitor Generals, as well as the overarching responsiveness of the DOJ. The work also supports a decision making model of when to take action in the court system that is based on strategy and cost and benefit analysis. This project therefore moves beyond simply assuming presidents want to influence the judiciary to proposing a framework for when they are mostly likely to do so, in what manner, and the potential costs that presidents must weigh in deciding whether to act. The remaining chapters empirically test this theory of executive decision making. Chapter 3 now turns to an assessment of the decision of the government to appeal cases to the US Supreme Court.

3 CHAPTER 3: THE GOVERNMENT'S STRATEGIC DECISION TO APPEAL

3.1 Introduction

In 1948, the United States government was operating a potato price support program. Meanwhile, the price of potatoes was lower in Canada, which would have allowed speculators to make a large profit by buying Canadian potatoes to sell in America. The Agricultural Adjustment Act of 1948 allowed the president, after hearings by the Tariff Commission, to set import quotas or duties on products in the price support program. The Act still recognized (at least in the view of the executive branch- see Memo, Rankin to Sobeloff, October 1954) the right of the president to operate through treaties or international agreements. In 1948, Canada agreed to put an embargo on its export of potatoes, unless the potatoes were for seed purposes. In exchange, the US would not impose import quotas or duties.

After this agreement, the American firm, Capps, purchased Canadian seed potatoes. However, some of their potatoes were sold at a profit for food purposes. The United States government estimated that Capps's actions cost the government nearly \$150,000 in support payments and then sued to recover the expenditures. The United States lost at the district court on the grounds that there was not sufficient evidence for breach of contract and damage to the US. The government then chose to appeal to the 4th Circuit Court. Early in Eisenhower's first term, the circuit court affirmed the district court, again ruling against the United States (Memo, Rankin to Sobeloff, October 1954). The administration had now lost in both the district court and the circuit court. The question facing the Eisenhower administration was a simple, yet striking one: should it appeal the circuit court judgment to the US Supreme Court?

Whenever the federal government loses a case in a lower federal court, it possesses the right to appeal to a higher court. Appeals to the circuit courts must be adjudicated, and so are

generally a matter of routine. Appeals to the US Supreme Court, however, differ widely. The Supreme Court sets its own agenda, and chooses which cases it will hear; each year, the Court receives approximately 8,000 petitions, and selects fewer than 150. As a result, the US government, via the Solicitor General's office, must make important choices about which cases to appeal. The vast majority of cases the government loses at the circuit courts will not be taken further.

In the Capps case, the 4th Circuit Court, led by Judge Parker, came to the conclusion that Congress, not the president, had the constitutional authority to regulate foreign commerce (*United States v. Guy W. Capps, Inc*, 204 F.2d 655 (4th Cir. 1953)). Therefore, when the president made an executive agreement with Canada about potato embargos, he encroached on Congress's authority. The Capps decision thus limited the extent to which presidents could reach agreements with foreign governments on matters addressing foreign commerce. This basis for the ruling made the Capps case much more important to the new administration than it might have been otherwise. Solicitor General Sobeloff noted the many disagreements the administration had with the circuit court's decision, and later noted his fear that this precedent could adversely impact presidential power in foreign affairs (Memo, Rankin to Sobeloff, October 1954). Therefore, even though the government had already lost twice, the Attorney General decided to apply for cert at the Supreme Court. As it turned out, the government would also lose at the Supreme Court. The Supreme Court agreed there was a lack of evidence to prove breach of contract, but did not "reach or pass upon the other grounds discussed by the Court of Appeals" (*United States v. Guy W. Capps., Inc.*, 348 U.S. 296 (1955)).

Why would the administration choose to appeal a case it had already lost twice? As explicated in Chapter 2, I postulate that presidents and their administrations are most likely to act

vis-à-vis the judiciary when they care deeply about an issue, and when they predict that they will not win absent intervention. Part and parcel of any administrative judicial strategy is the decision of when to appeal a case that the government has lost in the Circuit Courts to the US Supreme Court for review. I argue that the decision of whether to file for certiorari in the US Supreme Court provides a particularly good test of the degree to which presidential agenda influences administration actions towards the courts. In all of the cases examined in this chapter, the president lost in the lower courts; absent appeal, the president's favored position has lost as well. But, the government does not appeal every case it loses in the lower federal courts – in fact, it more often than not declines to petition for certiorari. Thus, what drives administrations to appeal cases to the US Supreme Court?

In this chapter, I explore the extent to which presidential priorities inform the pool of cases selected to be appealed to the Supreme Court. I first review archival evidence that suggests the executive branch considers and pursues presidential interests through the appeals process. My theory, explicated in detail in the previous chapter, suggests administrations should act when they have a higher desire for a policy outcome, but are unlikely to realize that policy absent their intervention. This chapter tests this theory through a quantitative analysis of the decision to appeal cases from the circuit courts to the Supreme Court. Providing support for my theory, I find that administrations are more likely to appeal cases that show evidence of importance to the executive.

3.2 Strategic Appeals Decisions: Evidence from the Archives

I posit that a primary motivation for appealing a case is the importance of the case to the president. As shown in Chapter 2, archival evidence demonstrates that administrations may choose to appeal cases because the topic of the case is important to them or their agenda; the

Capps case was important for its potential impact on presidential powers. Similarly, as detailed more explicitly in the prior chapter, the *Roanoke Rapids* case was appealed, in part because it was important to Truman that it be appealed. In fact, we know the *Roanoke Rapids* Case was important to President Truman because he wrote, “I would very much like to have this case appealed to the Supreme Court. I hope you will cooperate with the Secretary of the Interior in getting this done. The fundamental basis of our whole policy is at stake in this case, and it should be passed on by the high court” (Letter, Truman to McGrath, 11/22/1951).

Even without the direct written commands of a president, the archival evidence discussed in the previous chapter and related below reveal that SGs feel they should forward the president’s goals in appeals decisions. In the case, *City of Detroit, Country of Wayne, Michigan v. Federal Power Commission, Panhandle Eastern Pipe Line Company* (230 F.2d 810), Eisenhower’s Solicitor General Sobeloff had to decide whether or not to appeal the case. He listed a few reasons to support his decision not to appeal. The final reason was that he did not want, due to the nature of the case, to forward a policy that contradicted Eisenhower’s agenda. Sobeloff stated, in unambiguous terms, “it is not believed that the Department of Justice, a part of the Executive Branch, should take a position inconsistent with that of the President by attacking as improper a decision which seeks to assure such consumer safeguards” (Memo, Sobeloff, 5/20/1954, 3). In making a decision to not appeal, Sobeloff was aware of and acted on the president’s agenda.

After the 1984, *United States v. Chicago Board of Education* (744 F.2d 1300) Northern Illinois District Court case (one in a series of related cases that spanned over a decade), the DOJ decided to appeal the decision to the 7th Circuit Court and request a stay. Background material

prepared for Richard Hauser (Counsel to President Reagan) by Roger Clegg, Associate Deputy Attorney General, discussed how the case related to the administration:

Relationship to Administration Philosophy: The Administration has consistently stressed that courts should not engage in "judicial activism" that impermissibly interferes with the legislative and executive functions of Government. Our opposition to the district court's attempt to restrain the President from exercising his most basic and exclusive constitutional duties is consistent with this policy (Memo, Clegg to Roberts, 8/17/1984b).

These excerpts lend support to the idea that the DOJ works to forward the administration's goals through the courts. Cases may be viewed as important because they address an important presidential power. The *Capps* case was important in part because the circuit court challenged the president's authority in executive agreements. Likewise, President Carter's *North Dakota Injunction Case*, discussed in Chapter 2, challenged his presidential right to advice from his appointees. In the *Steel Seizure Case*, the Truman administration believed the president's power to seize private property during wartime or a national emergency was threatened. Alternatively, a case may be important to the executive because it is part of the president's agenda. The president's agenda includes the issue areas they wish to pursue throughout their years and terms. A major impetus for the Eisenhower administration to become involved in the *Tidelands Case* was his having campaigned on the issue

Of course, when deciding to appeal a case, there are other case-specific factors to consider. The DOJ also needs to assess if the case is a good tool to forward the government's agenda. In the case against Kearney & Trecker Corporation (mentioned in the previous chapter), Sobeloff declined to appeal because he did not believe the result of the decision would have a serious impact on future cases the government would be involved in (Letter, Sobeloff to Brownell, 7/11/1954). In another instance, a tax evasion case *Costello v. United States* (see 221 F.2d 668), Sobeloff writes "questions presented did not appear to have general importance

warranting Supreme Court review, it was concluded that the Government should properly oppose certiorari” (Note, *Costello vs. United States*, Sobeloff, 6/14/1955).

Sometimes, the DOJ will authorize an appeal to the Supreme Court because it believes the Court is the proper branch to address the issue or answer provide clarified interpretation of the law. When competing district courts were siding with opposite parties in the dispute between the Union Pacific Railroad and Denver and Rio Grande Western Railroad (the United States was listed as a party), Sobeloff wrote that the conflict could only be answered by the Supreme Court (Note, *Union Pacific Railroad Co. vs. U.S. & I.C.C.*, Sobeloff, 4/21/1955).

Similarly, the Court was used to clarify law in *United States v. Tieger* (234 F. 2d 589), a case about a land developer who allowed his clients to improperly use FHA loans to build new properties. The government sued him for violating the False Claims statute. The district court ruled against the government, but did not clarify the rule. Therefore, Sobeloff authorize an appeal “to get clarity into the law”- however, it is interesting to note he authorized appeal even though “it is likely to be clarified against the government” (Note, *United States v. Tieger*, Sobeloff, 4/21/1955). Similarly, when 20th Century Fox said that because its film scouting flights took off and landed from the same location it did not count as taxable transportation spending, Sobeloff authorized an appeal to have the courts settle the question (Note, *20th Century Fox Film Corp vs. United States*, Sobeloff, 6/10/1955).

Collectively, the archival evidence demonstrates that the executive branch considers the interest and role of the Court to interpret and clarify the law. However, the archival evidence also shows that cases that are important to the president and administration are pursued through the legal system. Again, my archival findings, more fully covered in the previous chapter, build support for my theory that presidents are more likely to take action to realize political goals the

more they want those goals realized and the more they are unlikely to realize them without executive action. This chapter extends the study with quantitative analysis of the decision to appeal cases from the circuit courts to the Supreme Court.

After the government loses a case at the circuit court, they can either accept the decision as a loss or appeal it in an attempt for a more favorable outcome; cases will remain defeated policies unless the government chooses to appeal. Since all of the cases from which the executive can appeal contain policies that have been decided against the government (executive branch), this chapter will focus on the question of importance to the presidential agenda. Executives wish to be successful in the courts, but the DOJ will not be able to appeal every losing decision. Strategically, I suggest that executives are mostly likely to act, that is appeal, in the cases that are most important to the administration; they (rationally) pursue their interests. Put another way, they have already lost, but they can take a gamble to find better odds in a higher court. They should be motivated to take this gamble on their more important cases. This chapter finds that Solicitors General are more likely to appeal cases that have been previously appealed (indicating some previous interest), and finds mixed support that SGs are more likely to appeal those cases that better represent the president's agenda. Overall, I argue the executive branch behaves strategically when deciding to appeal cases.

The extant literature exploring the decision to appeal, while limited, supports the idea that litigants behave strategically in deciding to appeal to the Supreme Court. Songer, Cameron, and Segal (1995) find that litigants (they observe criminals in search and seizure cases) behave rationally by weighing the costs and benefits when choosing to appeal their losing cases to the Supreme Court. They argue that litigants calculate their likelihood of success, their resources,

and the likelihood the Court would grant cert before they appeal; they appeal when the potential benefits outweigh costs.

Zorn's (2002) study is one of the few that quantitatively analyzes the Department of Justice's and Solicitor General's decision to appeal to the Supreme Court. Zorn examines decisions to appeal during 1993 and 1994 to observe the impact of various factors of cost, reviewability, and likelihood of victory. Zorn argues that SGs consider the Court's interests when deciding to appeal; SGs use similar criteria to that of the Court when deciding to grant cert. The SG will appeal cases that invalidate laws, that contain amicus briefs, and that introduce intercircuit conflict or a lower court reversal (Zorn 2002).

Zorn (2002) establishes a baseline understanding of the SG's decision to appeal, and offers support for the idea that the SG considers what the Court considers important when deciding to appeal. However, Zorn does not fully explore how the executive branch may be strategically pursuing an administrative agenda, even while strategically considering the Court and its priorities. I argue that considering the president's and the Court's desire need not be a mutually exclusive activity for the Department of Justice. Indeed, a good SG (one who is more likely to be successful and keep her job) will regard both. While controlling for variables that literature suggests are important to the Court when granting cert, the analysis in this chapter will expand our understanding of appeals decisions by testing a broad theory of strategic executive behavior.

3.3 Testing a Model of Strategic Appeals

The data for this analysis is gathered from The Original U.S. Appeals Court Database 1925-1996 (Songer 2008) and the Shepardizing the Courts of Appeals Database (Solberg 2010).⁶ These datasets provide information on a random sampling of federal appellate court cases. I use all “first hearing” cases⁷ (in the random sample) from 1946 to 1996 in which the federal government lost in the Courts of Appeals; if the government won, the Solicitor General would have no reason to appeal the case.⁸

To model executive strategy in appeals decisions, I utilize two proxies to indicate importance to the executive. First, I use the State of the Union (SOTU) to measure the president’s broad political agenda. The State of the Union, the president’s annual address to Congress and the nation, is one of the ways modern presidents can reach a large audience to identify policy priorities (Light 1999; Tedin, Rottinghaus, and Rodgers 2011). The State of the Union has been used to measure presidential agenda and is useful for capturing relative changes in agenda *within* presidencies. Presidents are, to an extent, limited in how much time they can spend speaking during the State of the Union. Thus, time spent on any one issue area can potentially take away from time spent on another issue area. Because of this, the SOTU can help capture the comparative importance of issues for a given year.

⁶ Songer, Donald R. 2008. Original U.S. Appeals Court Database 1925-1996.; Solberg, Rorie. 2010. Shepardizing the Court of Appeals Database.

⁷ In this particular analysis, I choose first hearing cases in order to make the process tracing direct; the Circuit Court hears the case and then the government chooses to appeal to the Supreme Court. Including cases that are not a first hearing case does not substantially change the results. However, the one-tailed p-value of the State of the Union variable increases from .06 to .08. Future analysis can more clearly examine the decision to request additional rehearings and rehearings en banc before pursuing a writ of cert.

⁸ All cases that did not involve the federal government as an appellant or respondent were dropped from the data set. All cases where members of the federal government were coded as both respondents and appellants were dropped (for example, see *James L. BUCKLEY et al., Plaintiffs, v. Hon. Francis R. VALEO et al., Defendants*). All cases where the federal government won at the Appellant Court were dropped.

I therefore created a variable capturing the proportion at which a topic was discussed during the state of the union. Baumgartner and Jones' *Comparative Agendas Project* State of Union Address Dataset codes statements made during the State of the Union according to policy area.⁹ Baumgartner and Jones identify 20 major policy areas, including macroeconomics; civil rights, minority issues, and civil liberties (one category); defense; and social welfare.¹⁰ Using the issue area codes from the Appeals Court database, I collapsed the topic codes from the Baumgartner and Jones dataset to match the Appellant datasets. After collapsing the groups into broad categories¹¹, I am left with four main topic areas: Criminal, Civil Rights and Liberties, Labor Relations, and Economics. Cases without a clear topic area (as coded by the Appeals database) are coded as miscellaneous and are not used in the analysis.

To create the Proportion of the SOTU independent variable, I count the number of statements per topic area per a SOTU and divide by the total number of statements during the SOTU.¹² Therefore, every topic area for every year has a score that indicates the proportion of the SOTU devoted to it.

Second, I use a post hoc measure of importance by including a dummy variable for cases where the government has lost twice below. Every case in the dataset used in this study is one in which the government lost at the circuit court. If they were the petitioner in the case, they

⁹ Each quasi-statement is coded per policy topic. A quasi-statement is the segment between punctuations; for example, semi-colons, and periods.

¹⁰ The major topic codes are: macroeconomics; civil rights, minority issues, and civil liberties; health; agriculture; labor and employment; education; environment; energy; immigration; transportation; law, crime, and family issues; social welfare; community development and housing issues; banking, finance, and domestic commerce; defense; space, science, technology, and communication; foreign trade; international affairs; government operations; public lands and water management.

¹¹ In order to match the Baumgartner and Jones dataset, the Appeals Court Databases categories of "Civil Rights", "First Amendment", "Due Process", and "Privacy" were collapsed into one group, Civil Rights and Liberties.

¹² Because The State of Union Addresses Dataset codes each quasi-statement, some quasi-statements do not convey a complete "policy-thought" related to an issue area. However, these are quasi-statements that are encompassed in a particular area of discussion and coded as being under that topic area. Since non-policy quasi-statements are scattered throughout the entirety of speeches, I continue to use in the proportions calculations.

necessarily lost below; even after a district court loss, the government decided the case was important enough to appeal.¹³ If they are a “loser” at the circuit court, the judicial branch has decided against them twice already. Thus, one can assume the odds are not in favor of them finding future judicial success. Additionally, since the lower courts were united in their decision, there is less motivation for the Supreme Court to accept to hear the case on the merits (the Court wants to resolve conflict). However, the choice to appeal a double-loss case, as opposed to appealing one where the government has a lower court ruling in its favor, provides some indication that the administration cares about the legal issue or policy question raised. Therefore, these cases should actually have a higher likelihood of being appealed to the Supreme Court.

The second independent variable of interest is thus appellant status at the Circuit Court level. When the government was the appellant in the circuit court case, it indicates that the government lost in the trial court and chose to appeal that losing outcome. A decision to petition for certiorari, and thus a decision to appeal a case twice, signals the administration is particularly interested in the case outcome. Appellant is coded as 1 (respondent as 0). Zorn also codes for respondent/appellant status, and notes that appealing a losing district case is indicative of some sort of “appealability” (2002, 155). However, Zorn hypothesized that respondent status (or a lower court reversal) would increase the odds of appealing to the Supreme Court. He offers no explanation for why he finds otherwise. My theory, however, provides an explanation for this phenomenon.

¹³ For clarity in the data, I drop cases with cross-appeals. However, including cross-appeals does not significantly change the results.

3.3.1 *Dependent Variable*

The dependent variable in this analysis is whether the federal government appeals a Circuit Court case to the Supreme Court. The dependent variable is coded dichotomously, with 1 reflecting the case was appealed by the federal government to the US Supreme Court, and 0 otherwise. Because the dependent variable is dichotomous, I use logit to estimate the models. I use robust standard errors to account for the possibility of heteroskedasticity, but make no assumptions about its structure. Because of the directional hypotheses, one-tailed testing is used.

3.3.2 *Additional Independent Variables*

Past literature suggests that litigants, including the federal government, consider what is important to the Court itself when deciding to petition for cert. Therefore, this study controls for a number of these other variables. Amicus briefs, or friend of the court briefs, are indicative of outside interest in a case (Caldeira and Wright 1990; Salokar 1992; Collins 2007). These briefs provide new information to courts and identify the position of interested parties not included in the case (Salokar 1992; Collins 2007). Beyond influencing case outcomes and opinions, amicus briefs have been shown to influence the likelihood the Supreme Court grants cert (Caldeira and Wright 1988; Caldeira and Wright 1990). Zorn (2002) suggests that the presence of lower court amicus briefs indicates a case has higher political importance, a component the Supreme Court considers when granting cert. Therefore, cases with amicus briefs are more likely to be reviewed by the Court; knowing this, a litigant may be more inclined to appeal such a case. Thus, I include a dichotomous variable, Amicus Brief, coded 1 if the case has at least one friend of the Court brief.

I choose to include a variable that indicates whether there was a split decision between the judges on the on the Circuit Court panel. A split vote indicates that not all judges were

opposed to the arguments of the government. Therefore, there may be merit to the government's position (Zorn 2002). A split decision should tell the government that they might find favor with another Court if they appeal the decision.

I also control for whether the case ruled a law or administrative action unconstitutional. Traditionally, SGs appeal whenever a government action has been ruled unconstitutional (Lochner 1993; Zorn 2002) Chamberlain, writing about an interview with SG Griswold, stated, "the only time the solicitor general is obligated to seek certiorari is when a court holds 'an act of Congress is unconstitutional'" (1987, 393). Unconstitutional is an indicator variable coded 1 when a lower court ruled a law or administrative action unconstitutional, and 0 otherwise.

Finally, I control for presidential approval. If a president is more popular, the administration may assume other political actors will be more likely to concede to his preferences. If he is popular, and his cases get to the Supreme Court, the president could find leverage if the public approves of him and/or his policy position (Ducat and Dudley 1989; Carruba and Zorn 2010). A high approval rating demonstrates broad approval for the president's agenda. The Court may therefore be wary of handing down a decision that is opposite the president's position when the president's approval ratings are higher; this is particularly true if the Court is worried about claims that it is acting in a countermajoritarian manner. I use the American Presidency Project's president's average approval rating for a given year.

3.4 Findings

The primary question of this chapter is when and why the government chooses to appeal a case to the Supreme Court. Whenever the government loses, it (via the SG's office) has the option of appealing the case to the US Supreme Court. As discussed above, the administration strategically decides which cases to appeal. Given the vast number of cases decided by the

Circuit Courts in each year, I use the Appeals Database, which includes a random sample of cases from the various circuit courts. I examine 1,675 cases decided between 1946 and 1996 where the government was a loser (where there were no cross-appeals and the case was a first hearing).

Figure 3.1 displays a plot of the percentage of cases appealed for each year of the data. Recall, the Appeals Database is a random sample of circuit court cases; therefore, this data represents trends in the population of cases. As Figure 3.1 demonstrates, few of the government's losing cases are appealed each year. Of the cases included in my analysis, the government chose to appeal just 11.94%. The government chooses not to appeal nearly nine out of ten of their losing cases. Therefore, appealing cases is an uncommon, but important, activity. Because of the paucity of appeals, this is likely a behavior-area that requires strategic decision making. The rest of the analysis explores this strategy.

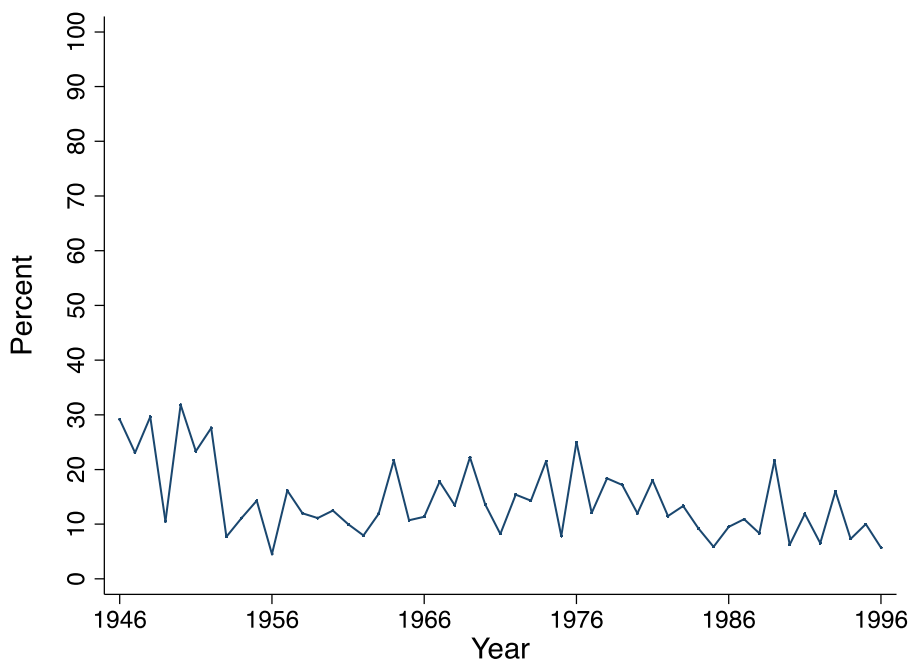


Figure 3.1 Percent of Losing Cases Appealed (in dataset)

As Chapter 2 lays out more fully, I argue the administration is more likely to take action when the president's interest in a policy is high, and when the likelihood of winning without intervention is low. The decision to appeal captures a set of cases where the possibility of winning is literally zero without further action by the executive: in these cases, the executive has lost on their policy in the lower courts and will continue to experience a loss unless they successfully appeal. In this chapter, I therefore focus on the question of executive interest in achieving a policy goal.

Table 3.1 displays summary statistics for the Proportion of the State of the Union variable. Economics is the most discussed topic area, with an average 30% coverage in the State of the Union. Economics coverage ranges from 6% coverage (President Truman in 1951) to 58% of the speech (President Ford in 1975). The remaining three topic areas all have a minimum of 0, meaning they were not discussed in a particular State of the Union. Civil Rights and Liberties was kept from the SOTU in 1958 and 1959 (President Eisenhower), 1973 (President Nixon), 1979 and 1980 (President Carter), and 1984 (President Reagan). LBJ spent 11.4% of his outgoing address to Congress on Civil Rights and Liberties. The remaining statistics are displayed below. Overall, the Proportion of the State of the Union variable displays important variation in the data.

Table 3.1 Summary Statistics for Proportion of State of the Union

Topic Area	Min	Max	Mean	Std. Dev.
Criminal	0	0.226	0.035	0.045
Civil Rights and Liberties	0	0.115	0.041	0.035
Labor Relations	0	0.241	0.033	0.025
Economics	0.057	0.582	0.295	0.110
Overall	0	0.582	0.145	0.150

In the data used in the analysis, the government was the appellant only 26.19% of the time. In most of the cases at the circuit level, the government is there because a losing party at the district level appealed the case. Again, once at the Circuit Court, the government appeals about 11.94% of their losing cases. Overall, the government appeals very few of their cases. If there are so many to choose from, but so few are appealed, it is very likely that there is a filtering system in place. Indeed, Rex Lee wrote:

The judgment whether to file will not be made in your department or your agency, even though the issue is crucial to your program. The judgment will be made by someone in the Justice Department. And what makes it even worse, the person tells you no, (as he will five times out of six) not because he disagrees with your position, but solely because he perceives that filing that case might affect his relationship with the Court.... Any given administration ought to be in a better position than the Court to make a judgment as to the comparative importance to its total program of a petition from one department or another (1985, 598-599).

Descriptively, there is indication that the presidential agenda has some impact on increasing the likelihood of appeal. Figure 3.2 displays the appeals rates for below average, above average, and the top quartile of topic coverage during the State of the Union. The appeal rate for cases in issue areas with below average topic coverage during the State of the Union is 11.12%. When cases are in an issue area that constitutes an above average SOTU content, the appeal rate is 13.0%. For issue areas in the top 25% of coverage, the appeal rate is 14.73%. This initial evidence thus suggests that administrations may view cases within the issue area of relative focus for a president as more important ones to pursue.

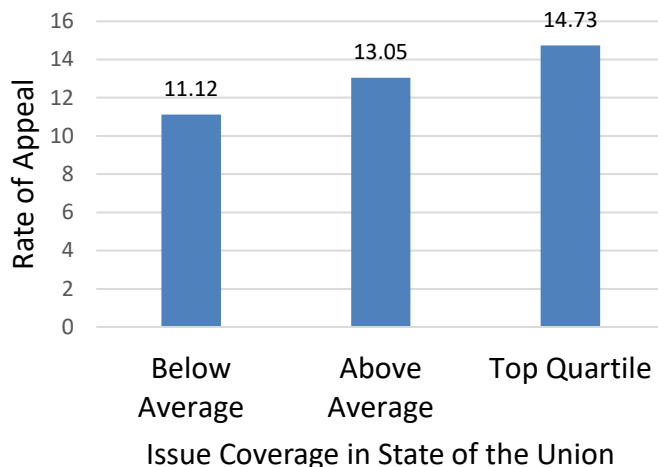


Figure 3.2: Appeal Rate by Coverage Ratio in SOTU

I also posit that cases that have demonstrated importance to the administration are also more likely to be directly appealed to the Supreme Court. Figure 3.3 plots the appeal rate for cases where the government was a lost at the district court level and when the government won at the district court. When the government was the won at the district court, therefore another party brought the case to the circuit court, 10.67% of cases were appealed to the Supreme Court. However, this rate increases for cases in which the government was the losing party at the district court. If the government lost at the district court, appealed to the circuit court, and lost again, then the appeal rate is 15.49%.

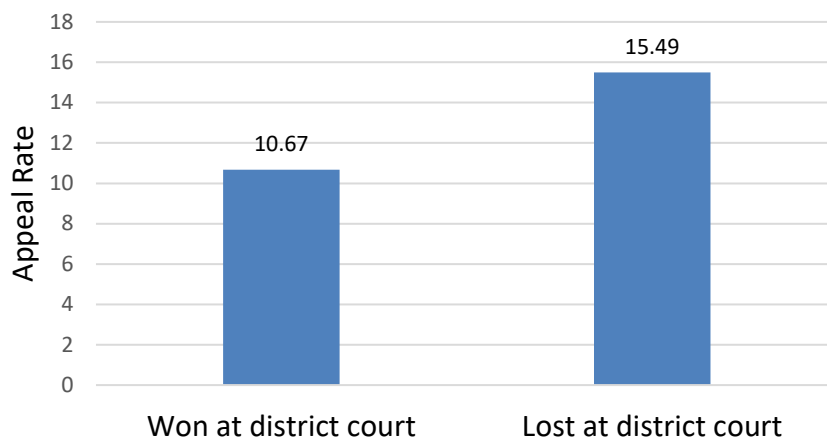


Figure 3.3: Rate of Appeal by Outcome Status at District Court

Together, these descriptive results are indicative of decision making based on importance to the administration. However, to more fully explore this relationship and to test for alternative explanations, I estimate a logit model on the decision to appeal. Table 3.2 displays the results of the logit model. Overall, as shown in Table 3.2, the results indicate support for my theory that appeals decisions are in part a function of the administration's interest in the issue.

The first independent variable of interest, the Proportion of the SOTU variable is positively signed and is significant at the 0.1 threshold ($p\text{-value}=0.063$). Therefore, a higher rate of discussion a topic area receives during the SOTU, the more likely the government is to appeal a case in that issue area. Appellant, the second independent variable of interest, is also significant ($p\text{-value}=0.004$) and positively signed. When the government loses in the district and circuit courts, they are more likely to appeal a losing case to the Supreme Court. Because these cases were important, the executive branch was more willing to expend capital to try the cases in a higher court.

Table 3.2: Likelihood of Appealing Losing Cases to the Supreme Court

VARIABLES	Appeal to Supreme Court
Proportion of SOTU	0.753* (0.492)
Appellant	0.437*** (0.163)
Unconstitutional	1.321*** (0.588)
Amicus Briefs	0.788** (0.337)
Split Decision	0.530*** (0.202)
Presidential Approval	-0.0168*** (0.00624)
Constant	-1.502*** (0.340)
Observations	1,676

One tailed test. Robust standard errors in parentheses

*** p<0.01, ** p<0.05, * p<0.1

Many of the controls also perform as expected. If a circuit court ruled some action of the government unconstitutional, the SG is more likely to approve an appeal to the Supreme Court. This finding comports with Griswold's statement that the SG feels obligated to appeal these cases. When the case received amicus briefs, the SG was more likely to appeal the case. These briefs indicate greater public interest, and may increase the odds the Supreme Court accepts the case. If the judges on the circuit court are split in their decision, then the SG is more likely to appeal. Such cases may indicate a stronger position of the federal government were they to appeal. Finally, presidential approval is negatively signed and significant at the .01 level. Thus, even as the president's popularity increases, the likelihood they appeal a case decreases.¹⁴

¹⁴ Perhaps the presidential approval results further get at the not-going-to-win-otherwise idea. If the president has low approval, then he is less likely to see his policies enacted in Congress. So, perhaps the administration believes the Court is a more useful tool.

To examine the impact of the variables of interest, I calculate adjusted predictions. Adjusted predictions specify values for each of the independent variables and compute the probability of the event occurring for those instances. Therefore, I calculate the probability of appeal at various levels of Proportion of the SOTU and Appellant. All other variables were held at their means or modes, as appropriate. Because the other variables that indicate a case is more likely to be appealed, such as Unconstitutional, Amicus Briefs, and Split Decision are all held at their modes, they are all held at zero. Thus, the adjusted predictions for Proportion of SOTU (with Appellant held at 0) show the impact of the president's agenda when little else is recommending the case for cert. Likewise, the adjusted prediction for Appellant (Proportion of SOTU held at its mean) demonstrates the impact of previous case importance to the administration when little else about the case can recommend the case for appeal.

Figure 3.4 displays the adjusted predictions for Proportion of the State of the Union. The adjusted predictions for Proportion of the State of the Union, or the probability of appealing, is .084 if the president does not cover the topic area of the case during the SOTU. If the president spends over half the speech on a topic area (58%), the likelihood of appealing increases to .124. When the topic area of a case appeared to be not at all important to the president, at least in terms of State of the Union coverage, the case has less than the overall average (11.94% was the average rate of appeal) chance of appeal. However, when the case receives max coverage, there is a greater than average likelihood of appeal. Since the likelihood of appealing, on average, is very small, the adjusted predictions of .084 and .124 may seem like small shifts. However, this is a 47.6% increase in the probability of appeal, a substantively significant shift.

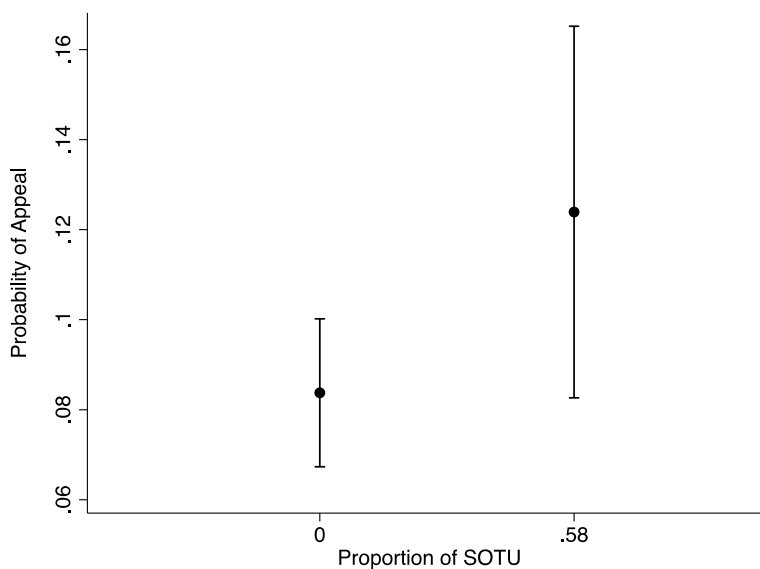


Figure 3.4: Adjusted Predictions for Proportion of SOTU
90% confidence interval

Figure 3.5 displays the adjusted predictions of the impact of Appellant status. When the government is the respondent (or won below), the probability of appeal is .093. When the government is the appellant (now a double-loser), the likelihood of appeal increases to .136 (the confidence intervals do not overlap). When the government is the respondent in the case, all else held equal, the appeal rate is below the overall average of 11.94%. Again, when the government is the appellant, the appeal rate increases 13.6%. This is a 46.2% increase in the probability of appeal. Again, this is a substantively significant increase. Thus, if the White House demonstrated a willingness to spend political capital to appeal a losing case from the district, they are more likely to spend capital to request cert.

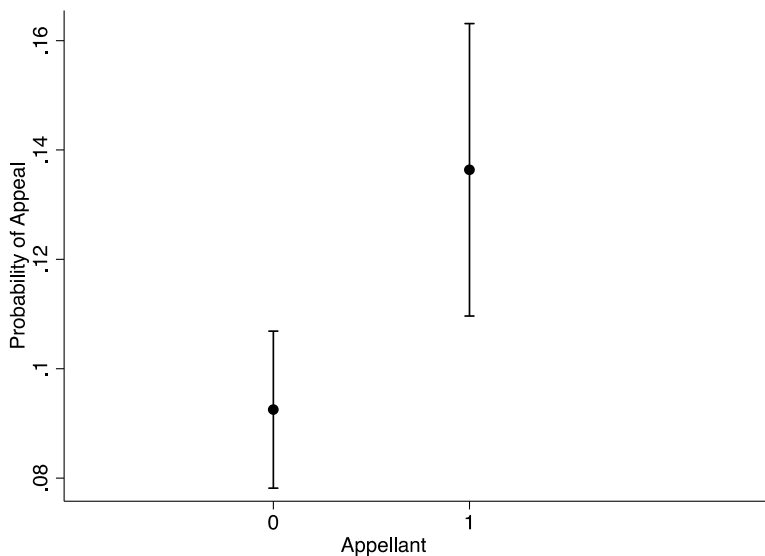


Figure 3.5: Adjusted Predictions For Appellant Status
90% confidence interval

3.5 Conclusion

When the North Dakota District Court ruled against President Carter in the *North Dakota Injunction Case*, the White House had an important decision to make. If you recall from Chapter 2, Carter was nearly ready to ignore the court order and receive the water resource policy study report from his appointees. Following the wise advice of his staff, Carter decided to comply with the court order. Because Carter was so passionate about the case, and also because the case had very important executive power implications, the government decided to request an expedited appeal. This case shows that the decision to appeal is one of the strategic tools of the executive branch. *North Dakota*, and the other cases presented at the start of this chapter, highlights the underlying foundations of the strategic calculation: executives take action on cases that they desire to win but are unlikely to win absent intervention. In other words, presidential agenda is an important factor in the strategic calculation to appeal.

The quantitative analysis demonstrated that presidential agenda, as measured by topic content ratios in the State of the Union, is positively associated with the likelihood of appeal. Likewise, previous appeals, as an indication of prior executive devotion of capital to a case, increases the odds that a case is appealed to the Supreme Court. Thus, this chapter models and shows a meaningful impact of executive agenda in the decision to appeal.

There are two important implications of these findings in terms of modeling the government appeals process. First, considering Court interests and pursuing a presidential agenda are not mutually exclusive. The Solicitor General can both consider and account for the Supreme Court's preferences while pursuing the president's agenda. The question becomes, given the president's interests, and my understanding of the Court's needs, how can I best achieve the administration's goals. Therefore, we should model the executive agenda in studies of appeal behavior.

Second, executive decisions to appeal may not be solely about the likelihood of winning once at the Supreme Court, but rather about the desire to at least attempt to reverse a stinging loss. In instances of losses at both the district and circuit courts, it is not necessarily the strongest cases that are appealed (ones where at least one lower court has sided with the government). It is the cases that appear important, despite losses, that are appealed. This provides additional evidence for my theory that the government considers their policy interests in and likelihood of winning absent intervention in legal decisions.

The next chapter continues the quantitative analysis and turns to an investigation of the executive branch's decision to submit a friend of the court brief on the merits in Supreme Court cases.

4 CHAPTER 4: AMICUS BRIEFS: REPRESENTING THE PRESIDENT'S INTERESTS

IN COURT

Each year there are about ninety to 100 Supreme Court merits cases in which the government is not a party. By definition these are important cases. Almost every one of them involves questions in which I either have an interest or could easily develop one. And I will tell you that in every single case the Court would be better off if it had the benefit of my views. That is true today, and it was also true when I was Solicitor General. But I started from the premise that if I filed in every single case, the Court would not have taken me as seriously. It is almost as though I had a certain number of chips that I could play. Where was the best place to play them? If you assume that you are going to file as amicus in about twenty-five or thirty cases (and that is probably about right), how do you select those twenty-five or thirty?

- Rex Lee, Solicitor General, Reagan Administration, 1985.¹⁵

4.1 Introduction

In July 1979, in the 5 to 4 decision for *Gannett Company, Inc. v. DePasquale* (443 U.S. 368), the Supreme Court held that the public and the press had no constitutional right to attend criminal trials. Two suspects charged with murder asked the trial court to bar the public from a pre-trial hearing arguing that publicity about the case was preventing them from receiving a fair trial. The judge granted the request, and also included the press in the denial of access. The Gannett Company (a media conglomerate) challenged the decision, and after losing in the state of New York, the United States Supreme Court granted their petition for cert (*Gannett Co., Inc. v. DePasquale*, 443 U.S. 368 (1979)).

The Carter administration was unhappy with the *Gannet* decision and its subsequent limitations on civil liberties, and considered various political responses. The Attorney General even prepared a speech recommending that Federal prosecutors and the states keep trials open

¹⁵ Lee, Rex E. 1985. "Lawyering for the Government: Politics, Polemics, and Principle." *Ohio State Law Journal* 47(3):595-601., page 599.

(Memo, Nuestadt to Eizenstat, 9/18/1979). Rick Neustadt, associate director of the White House domestic policy staff (and son of presidential advisor and political scientist, Richard Neustadt), wrote to Stu Eizenstat (Chief Domestic Policy Advisor) that more cases involving “the open trial issue were on their way to the Supreme Court” (Memo, Nuestadt to Eizenstat, 9/18/1979). Nuestadt, noting he already spoke with the Department of Justice, suggested that the Solicitor General select the best case and file a friend of the Court brief outlining the administration’s positions (Memo, Nuestadt to Eizenstat, 9/18/1979).

One such case winding through the lower courts, the *Richmond Newspapers* case, concerned the issue of barring the press from criminal trials. In a Virginia murder trial, after a reversal of conviction and then two mistrials, the judge agreed to the defense’s request that the trial be closed to the public. Two reporters from Richmond Newspapers Inc. challenged the judge’s decision and eventually appealed to the Supreme Court (*Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980)).

In November, the *Richmond Newspapers* case was granted cert by the Supreme Court, and Nuestadt urged Eizenstat to convince the SG to submit an amicus curiae brief in the case. Nuestadt argued that offering the Court a brief on the merits would be the best way for the Administration to effectively demonstrate their support of the press and civil liberties (Memo, Nuestadt to Eizenstat, 11/14/1979). However, Neustadt noted that Justice was hesitant to submit a brief. As it turns out, the United States never submitted a brief on the merits in the *Richmond* case.

Two years earlier, in the affirmative action case *Regents of the University of California v. Bakke* affirmative action case, Carter’s Justice Department also debated submitting a brief. As more fully detailed in Chapter 2, while the White House and DOJ were closely observing the

proceedings of the case, they stayed uninvolved until after the Supreme Court had granted cert. Even then, the DOJ did not immediately decide to get involved in the case. It was only after the urging of White House Counsel that the DOJ agreed to act and submitted an amicus brief on the merits (Memo, McKenna to Lipshutz, 6/16/1977).

Both the *Richmond Newspapers* and *Bakke* cases involved an important civil liberties/rights issue that the Carter White House cared about. Indeed, the Carter administration was concerned enough about the *Richmond Newspapers* case that the Attorney General planned to offer a speech on the matter. Similarly, in regards to the *Bakke* case, Carter regularly communicated his concern and support for affirmative action programs (Memo, Eizenstat and Lipshutz to Carter, 9/6/1977). Thus, why, in the words of Rex Lee, did the administration decide to “play its chips” in one case but hold on to them in the other? And, what factors influenced these decisions?

As explicated more fully in Chapter 2, I argue that presidents and the members of their administrations strategically engage with the judiciary. Presidents desire to see their policy preferences enacted into law, and just as they strategically seek to influence Congressional decision making, they similarly want to influence the decisions of the third branch. I posit that presidents and the members of the administration will take affirmative actions to influence judicial outcomes when the president’s interest in an issue is high and when the likelihood of a decision in the president’s favor is low absent presidential intervention. The ultimate decision-making process utilized in the *Richmond Newspapers* and *Bakke* cases highlights this strategic calculation: In the *Bakke* case, the White House was uncertain as to the likely outcome (Memo, Eizenstat and Lipshutz to Carter, 6/26/1978; Memo, Eizenstat and Lipshutz to Carter, 10/28/1977). Because of the volatile nature and importance of the case (Memo, McKenna to

Lipshutz, 6/16/1977), and because of the inherent uncertainty, they decided to let the Court know of their views through a friend of the Court brief.

While the *Richmond Newspapers* case was also important and garnered significant public attention, the DOJ decided not to get involved. Unlike the *Bakke* case, the DOJ was fairly confident that their views would prevail at the Supreme Court in the *Richmond Newspapers* case decision. Nuestadt initially told Eizenstat that the DOJ thought “the Court will act soon to cut back the Gannett decision” (Memo, Nuestadt to Eizenstat, 9/18/1979) and later that the Supreme Court “generally expected to use [*Richmond Newspapers*] to narrow the Gannett holding” (Memo, Nuestadt to Eizenstat, 11/14/1979). A narrower ruling is what the Administration preferred. In its 7-1 decision, the Court “concluded that the right of the public and press to attend criminal trials is guaranteed under the First and Fourteenth Amendments” (*Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980)). Ultimately, and without having to expend any political capital, the executive branch achieved its policy desires.

I argue that these two case studies illuminate that the impetus for administrations taking action relied not just on the desire to win, for the White House had strong and specific desires in both of these policy areas, but also on the necessity for action. In one case, the executive branch ultimately decided that lobbying the Court was unnecessary due to the high likelihood that their position would prevail. In the other case, the DOJ and White House remained genuinely uncertain about the decision outcome and thought their opinions could influence the Court.

If all cases the Supreme Court hears are considered important (Lee, 1985) then it is important to investigate when and why a case receives additional executive attention. This chapter further explores the executive-judicial decision making calculus through an analysis of amici filings by the SG to test my theory of when the executive chooses to get involved with the

Court. The following pages more fully present my theory for when the executive is most likely to choose to offer an amicus curiae brief, and then tests this theory by analyzing submission behavior over from 1956 to 2005. The results suggest that the executive branch behaves strategically in deciding to offer a brief on the merits, paying particular attention to its assessment of whether the administration is likely to win absent any intervention.

4.2 Amicus Curiae Briefs

The amicus curiae brief, or friend of the Court brief, serves to provide the Court legal and political information that may not have been present in litigant briefs and to highlight potential policy consequences of decisions (Salokar 1992; Collins 2007). Briefs may be submitted at the petition stage or on the merits. In the modern era, the amicus curiae brief, with an intent to influence broad policy outputs, increasingly promotes the political goals of the submitters (Caldiera and Wright 1990; Salokar 1992; Collins 2007). Accordingly, many scholars have noted the increasing frequency of amicus submissions since the 1950s (Segal 1988; Salokar 1992; Collins 2007). To demonstrate the rising popularity of using the amicus brief, Figure 4.1 plots the rate of cases receiving any amicus brief (from the government or other interested parties) from 1956 to 2005.¹⁶ The graph demonstrates a significant increase from the 1950s, with a particularly steep jump in submission rates in the early 1970s. Nearly 83% of cases from 1985 to 2005 have received briefs from an interested party.

¹⁶ Data from Solowiej and Collins (2009) and Corely, Steigerwalt, and Ward (2013).

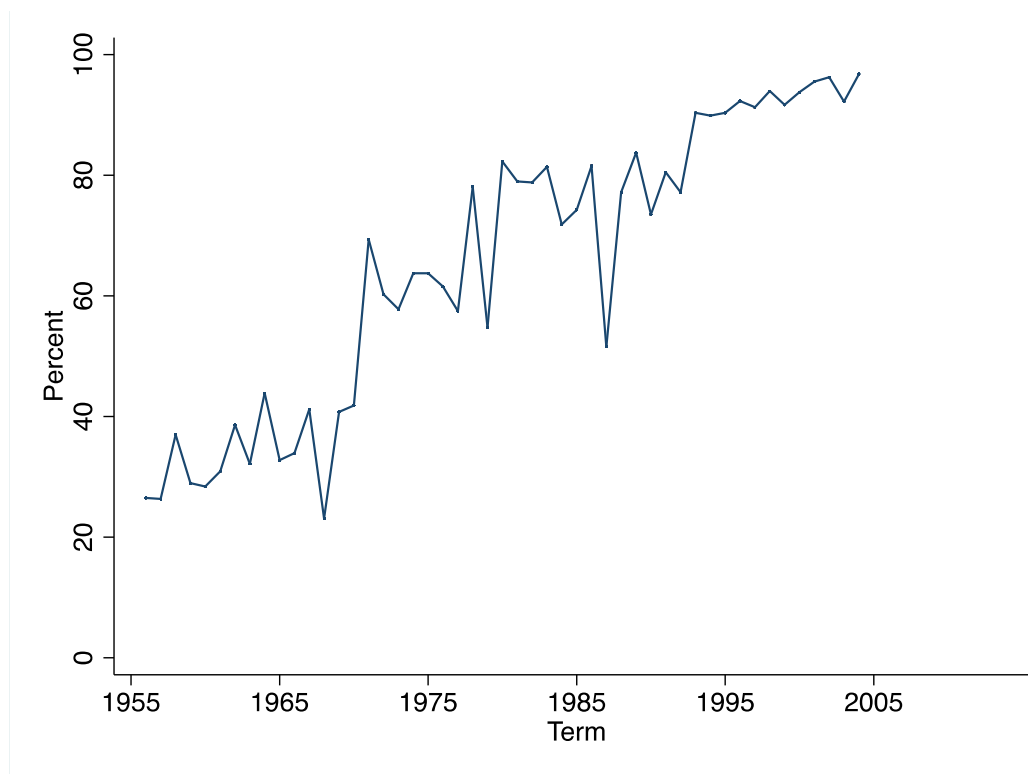


Figure 4.1: Percent of Cases Receiving an Amicus Brief on the Merits

Many times, the Court will request briefs from the executive branch, indicating that the Court views the amicus brief as a potentially useful source of information. These “calls for the views of the Solicitor General” or CVSGs offer the Court perspectives on executive perceptions of policy and legal impact and provide an indicator of potential executive support (Johnson 2003; Pacelle 2003; Black and Owens 2012a). Further illustrating their importance, the Court at times adopts verbatim the legal arguments found in SG briefs in its final opinions (Pacelle 2003; Corley 2008).

The SG does not need to wait for an invitation to submit, however; during a term, the SG provides many uninvited briefs. Unlike all other entities, the Solicitor General does not need Court permission, nor the permission of the litigants to offer briefs (Salokar 1992; Johnson 2003; Nicholson and Collins 2008). Because of this discretion, the SG has wide latitude in deciding when to become involved in the Court’s proceedings. Thus, the decision to submit an amicus

brief serves as an important indicator of executive preferences and a key tool in forwarding policy goals. Figure 4.2 plots the the percent of cases without a CVSG (and where the government was not a party) that the Solicitor General submitted a brief on the merits from the 1956 to 2015 terms.¹⁷ As Figure 4.2 demonstrates, the rate of using briefs on the merits has increased since the 1950's. In the first three decades of this data (1956 to 1984), the average submission rate was about 16%. In the later three decades of the data (1985 to 2015), the average submission rate rose to 34%.

These submission trends indicate that the amicus brief is a well-used, but not overly-common tactic. Submission is not so common that it is routine, but it is common enough that it suggests filing an amicus brief serves as an important tool for the executive. The submission trends shown in Figure 4.2 also suggests administrations engage in strategic calculation about when and on what cases to submit a brief, and thus formally engage with the judicial branch. The decision of whether to submit an amicus brief thus provides a worthwhile place to explore executive-judicial strategy.

¹⁷ Data from Solowiej and Collins (2009), updated by Corley, Steigerwalt, and Ward (2013) through 2005, and updated using Office of the Solicitor General's list of briefs found at <https://www.justice.gov/osg/supreme-court-briefs> through 2015.

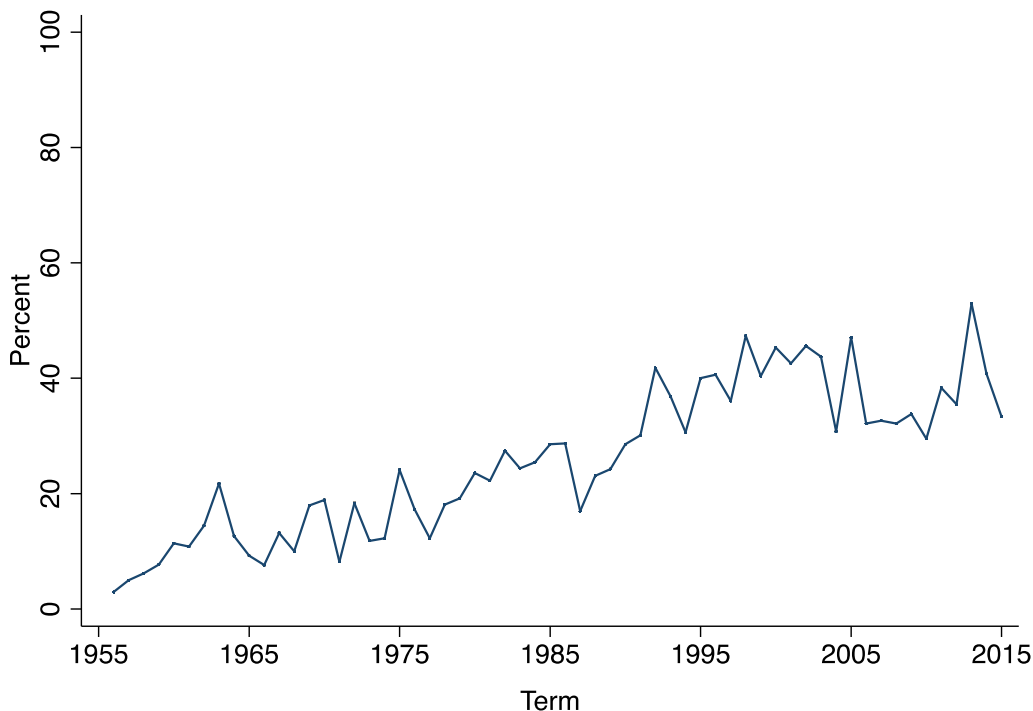


Figure 4.2: Percent of Cases Where Solicitor General Gives a Brief

*The plot is for percent of cases receiving a SG amicus brief when the government is not a party and was not invited by the Supreme Court to give a brief. (Cases that originated in a state court are removed from the empirical analysis).

The friend of the Court brief is an important tool for the executive branch. When the executive branch offers a brief for cert or on the merits, it is more likely to win (Segal 1988; Caldiera and Wright 1990; Salokar 1992; McGuire 1995; Deen, Ignani, and Meernick 2003; Pacelle 2003; Bailey, Kamoie, and Maltzman 2005). This success is likely due to the SG's repeat player status (Galanter 1974), its unique understanding of the informational needs of the Court (Segal 1988; Pacelle 2003), and the OSG's professionalism (Black and Owens 2012b).

4.3 A Theory of Executive Strategy: Deciding to Provide a Brief on the Merits

In addition to studying the effectiveness and influence of SG amicus briefs, scholars have attempted to identify what motivates a SG to submit a brief. Scholars agree that the SG promotes policy when providing briefs (Salokar 1992; Pacelle 2003). Further, studies show that

the SG does not simply pick cases on which she believes the U.S. will prevail (Salokar 1992; Nicholson and Collins 2008; Black and Owens 2012b). Salokar (1992) argues that SGs do not only submit briefs with policy arguments that are sure to win in Court. She cites Solicitor General Fried who said, “Sometimes, even though you didn’t think you were going to win, nevertheless, you did want to have a particular position put before the Court” (Salokar 1992, 137). Therefore, calculations other than winability can motivate the SG. Most important, SGs use amicus briefs to pursue policy goals. However, the real debate in the literature concerns whose policy the SG is promoting to the Court.

Chapter 2 detailed the debate over the responsiveness to and independence from the president by the Solicitor General. As an appointee of the president, the SG is beholden to the executive’s preferences; however, some scholars highlight the need for a degree of SG independence (Scigliano 1971; Caplan 1987; Pacelle 2003).

In the context of amicus submissions, Nicholson and Collins (2008) content analyze State of the Union addresses and find the SG’s decision to submit a brief in a particular issue area is not predicted by the rate at which the president talks about that issue area. SGs who appear too politicized are also less successful in having the Court adopt their positions (Wohlfarth 2009). However, Meinhold and Shull (1998) analyze the public papers of the presidents (encompassing all presidential addresses and not simply the SOTU) to explore the connection between presidential agendas and amici submissions and find that the SG represents the president’s interests. Salokar similarly argues that Solicitor General brief activity is both sensitive to and reflective of the president’s agenda, and down plays a strict independence from the White House (1992, 173- 174). In this chapter, I examine how the SG can represent the president’s will through amicus brief submissions *given* the political context.

As detailed in Chapter 2, archival data demonstrates the robust and responsive relationship between the DOJ and the president. In particular, I discover clear evidence that the SG is an effective representative of the president's interest and that the briefs submitted are indicative of strategic behavior to pursue policy goals related to these interests. Recall the Carter administration's decision to submit a brief in the *Bakke* case was cemented after the administration feared the case could likely be decided against their wishes. After the DOJ drafted a brief, the White House demanded significant edits so the legal arguments would more accurately reflect Carter's position on affirmative action. Likewise, for *New Jersey v. T.L.O.*, the motivation to get involved in the case by submitting a brief grew once the Reagan administration believed their odds of prevailing had diminished. Because one of the, if not *the*, main presidential goals is policy, I argue that SGs promote the political goals of the president through amicus submissions.

Still, the SG cannot act on every case with an important or interesting policy component. No doubt, the executive branch needs to be strategic in their deployment of amicus briefs. Salokar writes that SG Lee's concern was that the government not overextend its hand by spending too much capital on too many briefs (1992, 141). SGs also need to consider the credibility of the office and the benefits of submitting an additional brief (Salokar 1992). Nicholson and Collins (2008) offer an impressive examination of what motivates a Solicitor General to provide a brief. They find that the SG's decision-making process reflects what is important to the Court. For example, the SG is more likely to offer a brief on a case with lower court conflict. Likewise, the SG appears to get involved in cases with a greater legal impact (cases appealed from federal rather than state courts) and when the government seeks clarification on the interpretation of administrative rules (Nicholson and Collins 2008, 402).

I build on this prior work by taking in to account how the SG's decision-making also reflects the interests of the president. My overarching theory rests on multiple assumptions. The crux of the theory suggests that the president should take action in the Supreme Court when he is unlikely to win and when the issue is more important to him. Second, I assume the executive believes that its actions can be effective and should be used in a manner to achieve policy goals. Finally, actions require capital; therefore, there is a limit to the number of actions that can be taken.

Building on these assumptions, throughout this dissertation I theorize that an important component of executive strategy vis-à-vis the judiciary is the combination of the president's preference for a policy outcome as well as the likelihood of achieving that outcome in the absence of executive action. Since all cases granted certiorari by the US Supreme Court are inherently important, in this chapter, I focus on the question of the need for executive action. In short, I propose that executives wish to influence Court decisions, but also that they recognize they will not be able to do so in all instances. Strategically, I suggest that presidents are most likely to act – here by submitting an amicus brief – in those cases where the outcome is not preordained, or, put another way, in those cases where executive action may be necessary to help tilt the scales.

The chapter tests the proposition that strategic presidents should choose to get involved in Supreme Court cases where they believe they can be most effective or where they are most needed. As such, we should see the SG offering briefs on cases where they believe they can exert influence or where they believe they will lose absent intervention. Such opportunities occur when the case has a higher degree of legal uncertainty or when the Court is ideologically distant from the president. Thus, I hypothesize that when a case is being decided by an

ideologically distant court, or when the case has a higher degree of legal uncertainty, the administration will be more likely to offer a brief.

Diverging from previous research (see e.g., Nicholson and Collins 2008), I assume that all cases to be heard on the merits by the Supreme Court are politically important.¹⁸ As Rex Lee emphasized, “Each year there are about ninety to 100 Supreme Court merits cases in which the government is not a party. By definition these are important cases. Almost every one of them involves questions in which I [as Solicitor General] either have an interest or could easily develop one” (1985, 599). The outcomes of Supreme Court cases have the potential to shape precedent and make policy (Horowitz 1977; Melnick 1994; Hall 2011).

Further, unlike the decision of whether to appeal a Circuit Court decision (examined in depth in Chapter 3), at the merits stage, the Court has already set its policy agenda, but the president is also given the opportunity to respond. A president will not ignore important and emerging issues considered by the Court simply because he did not cover it in his State of Union. Likewise, the SG will not fail to attempt to influence important court cases because the topic was not addressed in the SOTU. Thus, if a president wishes to see the Supreme Court’s ultimate policy outcomes reflect his preferences, he needs to consider the entirety of the Court’s docket. More broadly, broadening how scholars measure executive preferences beyond the president’s publicly stated political agenda can introduce us to new and nuanced ways the executive might be pursuing political goals. I turn now to a discussion of how specifically I investigate the potential link between presidential preferences, amicus filings, and presidential desires to influence judicial outcomes.

¹⁸ I further assume that political importance is a different concept than public salience.

4.4 Data and Methods

I argue throughout this dissertation that the president seeks to influence the development of policy made via the judiciary. As described above, one important, potential mechanism of influence is the submission of amicus briefs via the Solicitor General on cases the US Supreme Court has accepted for certiorari. Using the Spaeth Supreme Court Database, I examine orally argued Supreme Court cases of federal court origin decided during the 1956 to 2004 terms. Cases where the United States was a direct litigant or where the Solicitor General was invited to submit a brief were removed from the data. CVSGs are viewed as nearly mandatory; therefore, the executive has little choice but to submit the brief (Johnson 2003).¹⁹ Alternatively, in cases granted cert where there is not a direct invitation, the executive can make an independent, strategic decision to get involved.

The dependent variable is a dichotomous measure of whether or not the SG submitted a brief on the merits. This data was gathered by Collins (2008) and updated by Corley, Steigerwalt, and Ward (2013). The variable is coded as 1 if the Solicitor General gave a brief on the merits and a 0 otherwise. Because the dependent variable is dichotomous, I use logit to estimate the model. I use robust standard errors to account for the possibility of heteroskedasticity, but make no assumptions about its structure. Because of the directional hypothesis, one-tailed testing is used.

4.4.1 *Independent Variables*

To measure presidential strategy, rather than indicate presidential issue preferences by examining the State of the Union, I assume that all cases accepted for certiorari are inherently

¹⁹ Data on whether or not there was a CVSG was gathered from Solowiej and Collins (2009) and updated by Corley, Steigerwalt, and Ward (2013) through 2005.

important to the president as the head of the US government. The question instead is whether the administration perceives that the president's preferences will not be enshrined in law absent intervention. My primary independent variables of interest are thus two measures designed to capture this uncertainty that may influence the SG's calculation of whether the submission of an amicus brief is necessary: the degree of legal uncertainty as to the case outcome and the ideological distance between the president and the Court.

My theory of executive decision making rests on the premise that the White House is aware of the relative odds of success before it decides to take action to influence the Court; the executive branch can analyze the political scene and the likelihood of case outcomes before choosing to act. Importantly, information is available to the relevant political actors (i.e. the president and the Justices) at the time when certiorari decisions and amici filings decisions are being made (Corley, Steigerwalt, and Ward 2013). The president and SG are able to assess these factors- such as whether there is ideologically-based dissent in the lower courts or a higher degree of legal complexity- and so I argue that a strategic executive branch will be aware of when a case outcome is less-than-certain. Because of their awareness of the a priori factors of uncertainty, the executive branch is therefore aware of when Justices will be most inclined to vote on other considerations, including political attitudes. It is in these cases, where a legal outcome is not "pre-determined," that the president should seek to influence the outcome.

To measure Uncertainty, I rely on Corley, Steigerwalt, and Ward's Legal Certainty Index. Corley, Steigerwalt, and Ward (2013) developed a measure of legal certainty in order to test the constraining power of law on judicial decision making. When a case is more legally certain, factors in the case indicate a single, "correct" legal answer is more likely to exist. Corley, Steigerwalt, and Ward (2013) argue that the "legal certainty" of a case acts as a vice on Justices'

attitudes, thereby inducing them to vote on considerations other than policy preferences. Therefore, when case outcomes are more certain, there is a higher likelihood of unanimous and highly consensual decisions (Corley, Steigerwalt, and Ward 2013). To measure legal certainty, Corley, Steigerwalt, and Ward (2013) develop an index that consists of five factors: whether the case addresses a question of statutory interpretation, whether there is a high level of amicus participation, whether there is non-ideological dissent in the last lower court to hear the case, whether the case is legally complex, and whether there is conflict between lower courts over the legal question.²⁰ To indicate increasing uncertainty, and thereby the increased opportunity for ideological and strategic decision making, I reverse the code of this variable. This study's variable of Uncertainty ranges from 0 (lowest level of uncertainty) to 5 (highest level of uncertainty).

Additionally, the administration is aware of the policy positions of the Court itself, and will respond strategically. When the White House is cognizant of the fact that a divergent Court is likely to act on its preferences, the executive should attempt to mitigate policy losses by publicly announcing its preferences via an amicus brief. To capture Supreme Court-President Ideological Distance, I use Common Space Scores to place the Court and the President on one ideological scale. I use the absolute value of distance between the president and the median justice on the Court (raw data available from Epstein et al. 2007 and Lewis et al. 2017). A

²⁰ The first factor of the scale was a measure of legally non-complex cases. Using the Spaeth dataset, they coded cases addressing two or fewer legal issues and laws as 1, and cases with more than two as 0. Second, amicus participation was coded as 1 for one or no amicus briefs filed and 0 if more than one amicus brief was filed. Third, they code for lack of legal conflict. If the lower courts disagree on the case decision, and if the case raises a salient issue, it is more likely to activate ideological preferences. Using the cert variable in the Spaeth dataset, they code all cases that lack a conflict or involve an important conflict 1, and 0 if the case involves a conflict in the lower court over a relatively unimportant question. Fourth, lower court cases in which there was neither a dissent nor a concurrence were coded 1 and for ideological incongruence in dissents and concurrences. Fifth, the index includes a measure of statutory versus a constitutional issue and is coded 1 if the case decided a statutory issue and 0 otherwise

higher value indicates a greater distance between the president and the median Court justice, and I predict an increased likelihood of amicus filings in such cases.

I control for whether there is divided government. When Congress and the President are of opposite parties, the president may be more inclined to rely on the Court for policy wins, and thus should be more likely to submit an amicus brief. Divided party control of legislative and executive branches is coded as 1, and unified control is coded as 0. Like Nicholson and Collins (2008), I also control for whether the SG is more likely to file when a case challenges the action of a federal administrative agency. When the case involves an action of a federal administrative agency, Federal Administrative Action is coded as 1 (0 otherwise). The executive branch should feel inclined to protect its actions and so the likelihood of submitting a brief should increase when the case involves administrative action.

If a case is politically salient to the public, the Executive branch may want to get involved by submitting a brief on the merits. This would allow the president to shape publicly visible policy, and perhaps, if successful, credit-claim. Epstein and Segal's (2000) measure of case salience captures whether the case was discussed in a front page article in the *New York Times* the day after the decision was handed down. Cases covered in a front-page story in the *NYT* are coded 1, and all others 0. Finally, I control for the Court's docket size. This control highlights the need for discretionary behavior on the part of the SG. As docket size increases, there are more cases from the OSG to choose from, more cases where the US is a party, and thus, less resources to devote to any one case.

4.5 The Decision to Submit an Amicus Brief

I examined a total of 2,531 US Supreme Court cases between 1956 to 2005 that originated in federal courts where the government was not involved as a party in the suit and was

not invited by the Court to give a brief. The primary question in this exploration is when and why the government decides to submit an amicus brief in such cases. Overall, the government submitted a brief 23.31% of the time. Thus, submitting a brief is not an uncommon activity. However, it is also not an action taken by default. Therefore, there is important variation in the data that suggests the potential for strategic decision making on behalf of the executive branch.

Since all cases granted certiorari by the US Supreme Court are inherently important, in this chapter, I focus on the question of the need for executive action. I propose that executives wish to influence Court decisions, but also that they recognize they will not be able to do so in all instances. Strategically, I suggest that administrations are most likely to submit an amicus brief in those cases where the outcome is not preordained, or in those cases where executive action may be necessary to help tilt the scales.

I first examine whether evidence exists that presidents are more likely to order their SGs to submit briefs in cases where the legal outcome is more uncertain. Table 4.1 displays the cross-tabulation of the Uncertainty variable and the dichotomous dependent variable, Offering an Amicus Brief. Overall, as Uncertainty increases, the percentage of cases where the government chooses to submit an amicus brief increases. This initial evidence thus suggests that presidents may view legally uncertain cases as those where their chance of influencing the Court's ultimate decision is highest.

Table 4.1: Crosstab of Uncertainty and Giving an Amicus Brief

	Uncertainty						
Amicus	0	1	2	3	4	5	Total
NO							
<i>Frequency</i>	315	718	629	242	37	1	1,941
<i>Percentage</i>	80.56%	78.56%	75.06%	72.37%	69.81%	50.00%	76.69%
YES							
<i>Frequency</i>	76	196	209	92	16	1	590
<i>Percentage</i>	19.44%	21.44%	29.94%	27.63	30.19%	50.00%	23.31%
Total	391	914	838	333	53	2	2,531

Similarly, I posit presidents are more likely to act when the Court is ideologically distant and thus less likely, all else being equal, to rule in the direction the president wishes simply based on ideological alignment between the two branches. Turning to the data itself, the values for Ideological Distance range from a minimum of .012 to a maximum of 1.008. The mean value of Ideological Distance is .542. The mean amicus submission rate for below average Ideological Distances is 14.49%. When Ideological Distance is greater than the mean of .542, the mean Amicus Brief submission rate jumps to 29.7%. Figure 4.3 displays the data. This finding again suggests that presidents strategically submit amicus briefs, doing so when the Court is predisposed to rule against their preferences. This evidence also suggests presidents strategically take action when they believe executive intervention may be most influential, and, oppositely, are more inclined to sit out in cases where the Court is ideologically close and likely to rule in favor of their ideological goals.

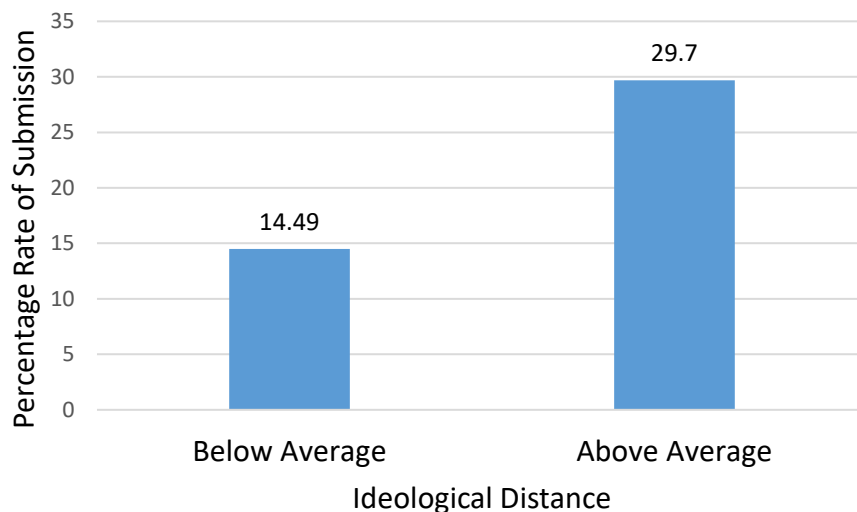


Figure 4.3: Percent of Cases Receiving Amicus Brief by Ideological Distance

These results, while indicative of strategic presidential decision making based on the likelihood of winning, are not determinative. To analyze the relationship between signals of where strategic executive action may be most warranted and submission, I estimate a logit model. Table 4.2 displays the results. Overall, the results reveal administrations engaging in strategic decision making when determining whether to submit an amicus brief.

In the model, as the uncertainty within a case increases, so does the likelihood of submitting a brief (significant at $p < 0.1$ level). Likewise, as the ideological distance (significant at the $p < 0.01$ level) between the president and the median Justice increases, so too does the likelihood of entering a brief. Both of these results suggest the administration strategically assesses the need for executive intervention, and is more likely to submit an amicus brief when the position favored by the administration is less likely.

The controls, with the exception of Federal Administrative Action, perform as expected. When the president faces a divided government, he is more likely to attempt to influence politics through the Supreme Court by submitting amicus briefs. A case that was politically salient (as in

it appeared on the front page of the NYT the day after its decision) was more likely to receive a brief from the Solicitor General. As the docket size increases, the likelihood of a case having a SG brief decreases. The unexpected finding was for the Federal Administrative Action variable. The variable is significant and negatively signed; a case that addresses an administrative action is less likely to receive an amicus brief from the SG.

Table 4.2: Likelihood of Submitting an Amicus Brief on the Merits

<u>VARIABLES</u>	
Uncertainty	0.0716* (0.0514)
Ideological Distance	1.803*** (0.240)
Divided	0.400*** (0.119)
Federal Administrative Action	-1.498*** (0.137)
Salient	0.770*** (0.137)
Docket Size	-0.00706*** (0.00198)
Constant	-1.534*** (0.311)
<u>Observations</u>	<u>2,531</u>

Robust standard errors in parentheses. One-tailed test.
*** p<0.01, ** p<0.05, * p<0.1

To analyze the impact of Uncertainty and Ideological Distance, I generate adjusted predictions of the component terms. Adjusted predictions specify values for each of the independent variables and compute the probability of the event occurring for those instances. Therefore, I calculate the probability of the Solicitor General submitting a brief at various values of the independent variables. To observe the impact of Uncertainty, I calculate adjusted predictions with Uncertainty at its values 0 through 5. All other variables were held at their means or modes, as appropriate. Figure 4.4 displays the results. The x-axis displays the various

levels of Uncertainty; 0 indicates the least amount of case outcome uncertainty, and 5 the greatest. The y-axis displays the predicted probabilities of submitting an amicus brief on the merits.

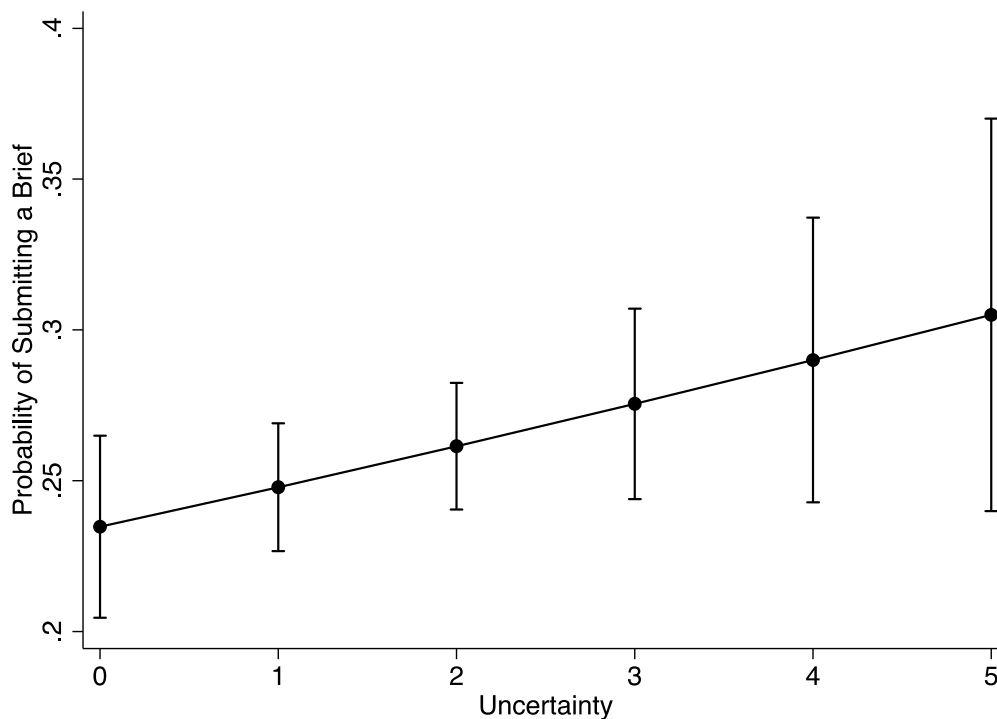


Figure 4.4: Adjusted Predictions for Uncertainty

90% two-tailed confidence intervals for the adjusted prediction is reported in brackets.

When Uncertainty is at its lowest, and the Court is an average distance from the president, there is a 0.23 probability of submitting an amicus brief. However, when Uncertainty increases, so does like likelihood of submission. With an Uncertainty level of 4, the adjusted prediction for submitting a brief is 0.29, or a 26% increase in the likelihood of submission, a substantively significant impact.

Next, I observe the impact of Ideological Distance. I plot the adjusted predictions for Ideological Distance at its minimum, mean, and maximum levels. I hold Uncertainty at its modal level, 1. All other variables were held at their means or modes. Figure 4.5 displays the

results. As ideological distance between the president and the median Justice increases, so does the predicted probability that the Solicitor General submits a brief of the merits. At Ideological Distance's minimum value, or where the president and the Court are ideologically proximate, the predicted probability for submitting a brief is 0.11. However, when the Court is farther away, at a mean distance from the president, the likelihood that the SG submits a brief increases to 0.24. For a most distant Court, the likelihood further increases to 0.43. Moving from Ideological Distance's minimum to maximum distance leads to a 291% increase in the predicted probability of submitting a brief. This is a substantively significant increase.

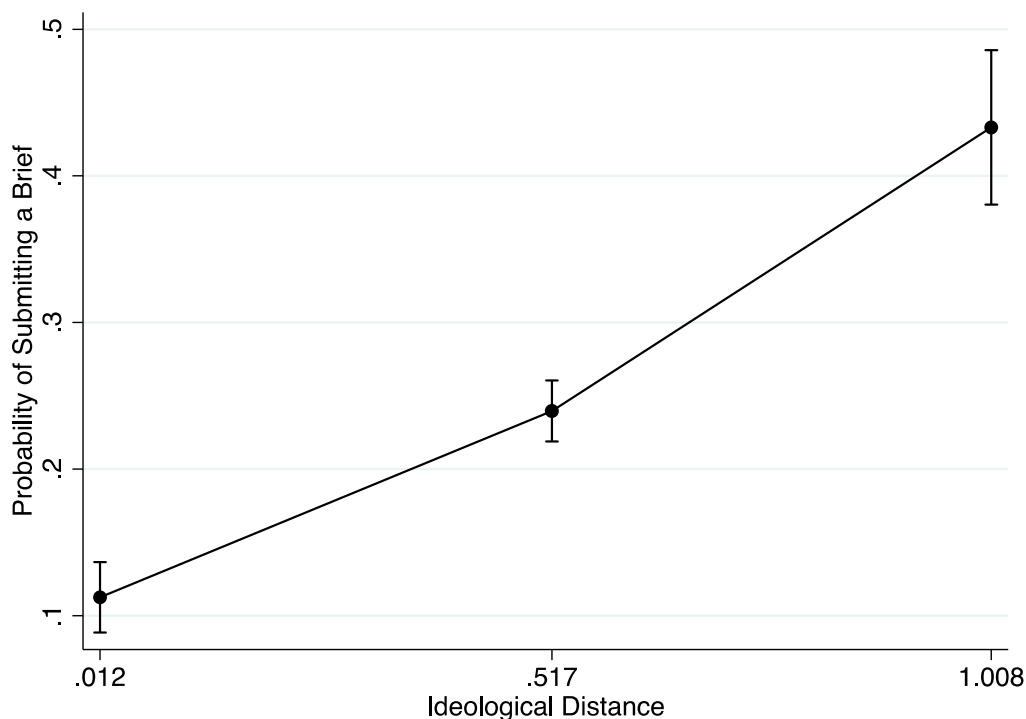


Figure 4.5: Adjusted Predictions for Ideological Distance
90% two-tailed confidence intervals for the adjusted prediction is reported in brackets.

Overall, these results illuminate the strategic calculations administrations make before exerting effort and using political capital when pursuing policy goals through the courts. I find convincing evidence that administrations rely on two proxies to assess whether to submit amicus

briefs. First, administrations note whether the Court's ideological leanings reflects its policy preferences. I find the likelihood of amicus brief submission increases when the president and Court are more distant, suggesting that the White House believes it is unlikely to win without intervention and should attempt to persuade Courts that are naturally more opposed to their position. Second, when the Court's outcomes are more legally uncertain, the president can find greater leverage to exert his policy preferences. Because of this, the probability of submitting a brief increases as uncertainty increases. Overall, amicus submission patterns reflect a strategic calculation by presidents and their administrations and represent an efficient use of capital.

4.6 Conclusion

This chapter continued the exploration of executive decision making towards the Supreme Court. My overarching theory is that presidents believe that one fruitful way to ensure their policy preferences become enshrined in law is to strategically seek to influence the development of policy in the courts. Amici briefs provide a successful way for the administration to attempt to demonstrate its preferences to the Supreme Court. However, prior studies suggest SG amicus briefs do not necessarily reflect presidential preferences. These analyses presumed that we should see a correlation between issues the president cares about (as shown through SOTU speeches) and the cases for which briefs are submitted (see e.g., Nicholson and Collins 2008). Alternatively, as highlighted by former Solicitor General Rex Lee, I theorize that all cases granted certiorari by the Supreme Court reflect important policy and legal issues presidents must pay attention to. However, administrations also recognize that their potential power to influence the Court is one that must be utilized selectively. The question is therefore not whether the SG faithfully reflects the president's specific issue preferences, but rather whether the SG intervenes when the president's preferred position is unlikely to prevail without further action. I argue

specifically that presidents, through their administrations, will take action to influence the judiciary when they have a high desire for their policy preferences to be realized, but when their desires are unlikely to be met without affirmative intervention.

By adopting Corley, Steigerwalt, and Ward's (2013) legal certainty measure, this study identifies which cases have greater legal uncertainty, and therefore, when the case outcome is not predetermined by precedent or other factors. When the case outcome is not predetermined, there is a higher perception of the administration's ability to influence the outcome. Thus, when a case has a high degree of legal uncertainty, the president can assume executive efforts to influence the outcome may be better received. Similarly, when the Court is farther ideologically from the president, the administration can assume they are more likely to lose cases. Thus, there may be additional motivation to take action in such cases. If you only have a few "chips" to play, the best place to submit is in cases where you are likely to lose (because the Court naturally opposes you) or where you may be able to influence the outcome (because the case outcome is uncertain).

All told, the findings in this chapter add support to the theory that there is executive strategy in the decision to interact with the court system. When the executive branch chooses to engage with the Court they must weigh the costs and potential benefits of doing so to most effectively allocate their resources. Furthermore, this strategy does reflect presidential preferences and considers when the administration is least likely to achieve them. In these scenarios, the administration may assess that it is worth the effort to attempt to alter the likely outcome. The next chapter discusses the implications of my findings for the study of presidents, courts, and the executive-judicial relationship.

5 CHAPTER 5: CONCLUSION

In a system of separated powers, the branches must interact with each other to shape policy. All three branches work to protect their institution just as Madison, in *Federalist 51*, predicted. The president, and the entirety of the executive branch, pursues his unique policy goals. Likewise, judges vote using their attitudes. No actor, however, can pursue his or her policy goals without considering the other branches. And, in reality, each branch may rely on the others to achieve policy goals. Thus, at times, the president may choose, or be forced, to engage with the courts in order to realize policy achievements. President Truman realized this truth when the courts stopped his take-over of the steel mills. President Carter witnessed the power of the courts when his water policy report was prevented from delivery by a district court. Carter also realized the potential for policy gains when he petitioned the Supreme Court in favor of affirmative action in *Regents of the University of California v. Bakke*, and ultimately saw his preferences prevail.

In this study, I propose a novel theory to explain when, why, and how executives take action to pursue policy goals through the legal system. As previous literature suggests, presidents care about judicial policy and care to influence judicial policy. However, as is true of all political actors, there is a limit to the president's political capital. Because of these limitations, I suggest that we should see the executive branch take action in the courts according to a strategic and rational decision maker model. The president's decision to take action is thus a function of his level of interest in seeing a policy change and the likelihood that policy change would occur without his intervention. Therefore, executives should take action when they care about a policy outcome (they care about policy enough to spend the capital to enact it) and when that policy outcome is unlikely to occur without their action (they need to spend capital).

To further inform my theory, I visited four presidential libraries to collect substantial and extensive documentation on the executive-judicial relationship. This set of administration materials covers both Republican and Democratic administrations, as well as a span of 28 term years (over 44 years; 1945-1988), providing a suitable groundwork for developing a generalizable theory of presidential strategy vis-à-vis the courts. The archival evidence presented in Chapter 2 expands and demonstrates my theory of executive decision making. I observe commentary on administrative assessments of likelihood of winning and expressions of relative importance of cases. Overall, the archival evidence suggests that the executive branch weighs the likelihood of winning against the desire to win to decide if action is warranted. In cases where the executive desires a win, but the odds are unfavorable, the executive should be more likely to take action. The archival evidence also revealed a core set of actions administrations utilize to influence legal policy: initiating a case, appealing a case or requesting a writ of certiorari, providing amicus briefs, establishing a settlement, and the president offering public statements about a case or issue. The major contribution of this endeavor was to buttress my theory with evidence from actual White House and executive branch correspondence. Thus, I not only build a theory and test it with expected outputs in a quantitative model, but I build this theory organically from what the records of past presidencies show us.

While the president establishes policy goals, he must rely on his agents to implement his plans and represent his interests. The work carried through the judicial branch is handled by the Department of Justice. The president's goals in the legal area can only be met if the DOJ works to forward his preferences. The archival evidence presented herein reveals that presidents enjoy a responsive relationship with their appointed officials in the Department of Justice. In particular, the Solicitor General works to advance the political agenda of the president.

Coordination is fostered through regular meetings and correspondence with the White House and additional observation through the White House Counsel's office.

These findings are a major contribution of my work: I enter into the debate of the role of the SG and demonstrate that she effectively models the president's preferences. The rest of my dissertation demonstrates how the SG works to represent the president while considering the political environment and needs and interests of the courts. Thus, my work provides a more nuanced understanding of SG representation that captures the variety ways of the SG works to advance the president's interests even when the actions taken may not specifically reflect issue priorities proposed by the president (as in the case of amicus submissions). A more nuanced understanding of the SG's responsive relationship to the president is important to expand our understanding of the executive-judicial relationship. Ignoring important questions of presidential interests in the courts due to the over-simplified claim that the SG has total independence does not serve our field well. Therefore, future research could expand more effort to understand the SG's relationship with the president and its implications for judicial proceedings.

I turn in Chapters 3 and 4 to an empirical test of my theory of strategic executive action via the courts. Chapter 3 models my theory in the context of the government's decision to appeal a losing circuit court case to the Supreme Court. By necessity, if the government has the option to appeal a case, they have lost the case. In other words, after a loss, the government must decide whether to accept a loss or to challenge this loss by appealing to a higher court. In testing the decision to appeal, I investigate how the presidential agenda, or desire to win, influences the likelihood of appeal. The analysis demonstrates that if a case topic area is more important to the presidential agenda (as proxied by State of the Union content), the government is more likely to appeal the case to the Supreme Court. Additionally, if the case has been allotted political capital

in the past (the case lost at the appeals court and was appealed to the circuit court), there is again an increased likelihood of appeal- the case was important to the president, therefore the White House devoted additional capital to attempt a policy win. This chapter is one of the first studies to model presidential preferences in appeal decisions and reveals that the SG not only strategically appeals cases most appealing to the Court, but also strategically pursues those cases most reflective of the president's agenda. Because the executive branch follows the presidential policy agenda in the legal system, studies on government appeal behavior would do well to model the executive agenda.

Chapter 4 continues the quantitative analysis through an exploration of the government's decision to submit a friend of the court brief to the Supreme Court. When the Court sets its docket, it has exerted its agenda setting power; the Court has the authority to choose which cases are granted cert and which are denied. By definition, these cases hold great potential for policy-making. After the Court establishes its docket, the White House has the option to respond to the Court's agenda by attempting to influence the eventual decision. I argue that executives should seek to influence the outcome when they believe they are least likely to have their policies win on the merits or when they think the Court is most receptive to hearing new arguments. Thus, this chapter tests the executive branch's "likelihood of success" considerations component of my theory. I find that if the case outcome is more uncertain (contains more legal uncertainty) then the SG is more likely to submit a brief on the merits. I argue that it is in these cases where the White House believes it can exert more influence. I also find that when the Court is farther from the president ideologically, the SG is more likely to submit a brief on the merits. For courts that are more distant from the president, the executive branch can assume their policy goals will be less likely to be realized.

The findings presented in Chapter 4 also expand our understanding of SG representation of the president in the amicus process. Prior studies presume representing the president means reflecting a one-to-one correlation with his issue positions. I argue instead, that all cases granted certiorari by the Supreme Court reflect important legal and policy questions. In these cases, the agenda is set by the Court itself and so the president (and his administration) can only respond; we should thus not necessarily expect to see, for example, SG amicus briefs reflecting preferences laid out in the State of the Union. What we should expect to see is the SG strategically offering briefs when the administration's preferred position is less likely to win absent intervention. The findings presented in Chapter 4 illuminate that the SG engages in these strategic calculations and thus is responsive to the president's ideological position.

Overall, this dissertation offers an important contribution to our understanding of action-taking in the executive branch. The findings demonstrate that the executive pursues actions for the sake of achieving policy. And, the executive branch uses the judicial branch in an attempt to achieve its political goals. There are a variety of ways through which the executive can engage the court. These costly and premeditated actions are not undertaken simply for the sake of credit claiming or grandstanding, but for the real pursuit of policy. Throughout the dissertation, I observe that executives are more likely to take action as the odds against them increase. Thus, we see that executives take action when they are unlikely to win absent intervention. The SG is willing to appeal cases from the circuit to the Supreme Court that have lost at the district. This suggests that they are not simply appealing cases that are most likely to win. The SG is also more likely to submit a brief when the Court is more ideologically distant, and therefore, less likely to rule in the administration's favor.

Overall, my analysis serves to provide a more comprehensive and nuanced understanding of the executive-judicial relationship. The topic of presidential motivation for engaging with the courts on specific cases is virtually ignored (but see Eshbaugh-Soha and Collins 2015). We know that presidents pursue policy ends, but until this study, there was no overarching explanation for when and how this desire is acted upon in the legal process. This work develops a broad theory that can be used to explain an array of executive actions used to influence the court. The evidence demonstrates that administrations strategically engage the courts and further informs our understanding of presidential motivation. Administrations are aware of and care about influencing judicial policy. Action taking is not random nor for the sole purposes of credit-claiming. Thus, when we consider the interaction between the executive and judicial branches, it is worth considering why such action should even occur.

Because the president and the courts are interdependent, as branches with separated powers and checks and balances, we cannot truly understand the Court's relationship or (sometimes) apparent responsiveness to the executive without also understanding the president's motivation. Therefore, this work speaks to audiences in the presidency and public law fields.

If public law scholars care to understand how judges may be influenced by the executive branch, they should first more clearly understand why and when the executive seeks influence. Such an understanding changes how we might model appealing decisions or change how we understand amicus behavior at the Supreme Court. Also, there is leverage to be gained by assuming the Solicitor General is representing presidential preferences (we can use the ideal point of the president when accounting for presidential preferences in models).

Presidency scholars ignored for too long the modeling of executive-judicial exchanges. The judicial branch represents an important policy making vehicle that presidents regularly engage and utilize. If we argue that presidents care about and pursue policy, then we should fully consider the different avenues of pursuit and their implications.

Offering more attention to the president's policy pursuit through the courts offers a new way to view the role of the branches in a democratic society. Court cases affect society and the strategic actions by presidents can be a useful bridge between democracy and law. If the field does not account for how a democratically elected official can influence the court, we ignore an important mode of public influence. Thus, these findings can also inform discussions of how public sentiments makes its way to the Court.

This dissertation quantitatively analyzed two important actions, appealing cases and submitting amicus briefs. However, my archival research demonstrated that there are more tools presidents use to engage with the courts. Future research should expand our understanding of these actions. For example, why and when does the government settle cases and what is the extent of its settlement behavior? (Galanter 1974 touches on the role of settlements, but there is more to be known.) Eshbaugh-Soha and Collins (2015) examine the use of the going public on court cases, but the majority of their focus is on why the presidents speak after a case is decided. They, and this dissertation, provide a start to understanding why a president would go public before a case is decided that future research should expand upon. Collectively, this and future research can have implications for our understanding of the judicial branch's institutional independence.

Offering greater attention to the motivational context of the president necessarily expands our understanding of the executive-judicial relationship. My theory predicts when a president is

likely to attempt to influence the Court, where scholars should look for instances of influence, and why the Court may be more or less deferential. I identify a broad pathway presidents follow, apply this pathway across multiple administrations, and test it empirically. I believe this dissertation is an important step in creating a generalizable theory as to why and when the president takes action to influence the courts.

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