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PRESSURE OF THE POPULAR: PRESIDENTIAL PRESTIGE AND THE HIGH COURT

Timothy W. Clark[†]

Popular Justice: Presidential Prestige and Executive Success in the Supreme Court. By Jeff Yates. State University of New York Press, 2002. 131 pages. \$17.95.

Some argue the 2000 presidential election was decided by the judiciary branch (both the U.S. Supreme Court¹ and Florida Supreme Court²), not the voters. While the 2000 election reminded us of the complex interaction that occurs among the judiciary, the presidency, and the public, there is limited scholarship on this relationship. Despite being written before the 2000 election (but regrettably not published until 2002), *Popular Justice: Presidential Prestige and Executive Success in the Supreme Court*³ is one work that begins to systematically analyze this interaction.

This relatively concise and intriguing book explores the interaction between the United States Supreme Court and the presidency in the modern era. *Popular Justice* takes up the current and longstanding discussion where “judicial scholars assert that judicial decision making can be explained largely by attitudinal, external, and political determinants.”⁴ Specifically, this book speaks to the current debate within the judicial politics literature on whether the Supreme Court is a

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1. See *Bush v. Palm Beach County Canvassing Bd.*, 531 U.S. 70, 78 (2000). See also *Bush v. Gore*, 531 U.S. 98, 111 (2000).

2. See, e.g., *Gore v. Harris*, 773 So. 2d 524, 526 (Fla. 2000).

3. JEFF YATES, *POPULAR JUSTICE: PRESIDENTIAL PRESTIGE AND EXECUTIVE SUCCESS IN THE SUPREME COURT* (2002) [hereinafter *POPULAR JUSTICE*].

4. *Id.* at 2.

majoritarian institution (subject to public opinion held by the majority or the elites) or a counter-majoritarian institution (operating outside the influence of the majority opinion of the public or elites). In the second chapter, Yates succinctly reviews the status of theory and research on the connections between the presidency and the U.S. Supreme Court. In this debate where the non-majoritarian theories have long been a staple of high school civics classes, and oft-cited by the founding fathers of the United States,⁵ judicial observers have noted that in reality the court is less than free from outside influences. For example, Justice Felix Frankfurter noted that the court was constrained by the lack of ability to enforce its decisions and its reliance on Congress for annual funding.⁶ Additionally, other judicial scholars suggest “[j]ustices are no less susceptible than other individuals in society to influence by evolving societal norms and values.”⁷

Readers should be cautioned that the core of this short book (chapters 3-5) is laden with discussion of statistical analyses instead of the typical descriptive qualitative evaluations usually found in assessments of the relationship between presidential power and the Supreme Court.⁸ Yates’ methodological focus, while often providing very dry reading, is absolutely necessary. Yates begins to fill the void in the research literature where there has been a “relative lack of systematic quantitative analysis concerning how the Supreme Court has decided on presidential power.”⁹

As a social scientist trained in quantitative methodology, I find that *Popular Justice* is an admirable, state-of-the-art analysis using sound statistical techniques that effectively tease out factors affecting Supreme Court decisions. Moreover, the book is an exemplary work using the scientific social science method to investigate an important social and

5. THE FEDERALIST No. 78 (Alexander Hamilton).

6. *Baker v. Carr*, 369 U.S. 186, 267 (1962) (Frankfurter, J., dissenting).

7. See William Mishler & Reginald S. Sheehan, *The Supreme Court as a Counter-majoritarian Institution? Impact of Public Opinion on Supreme Court Decisions*, 87 AM. POL. SCI. REV. 87, 89 (1993). See also WILLIAM H. REHNQUIST, *THE SUPREME COURT*, 98 (Alfred A. Knopf 2001) (1987).

8. See, e.g., HENRY J. ABRAHAM, *JUSTICES AND PRESIDENTS: A POLITICAL HISTORY OF APPOINTMENTS TO THE SUPREME COURT* (Oxford University Press 1992); JOAN BISKUPIC & ELDER WITT, *CONGRESSIONAL QUARTERLY’S GUIDE TO THE U.S. SUPREME COURT* (Congressional Quarterly 1997); SHELDON GOLDMAN, *JUDICIAL APPOINTMENTS AND THE PRESIDENTIAL AGENDA IN THE PRESIDENCY IN AMERICAN POLITICS* (Paul Brace et al. eds. 1989); NORMAN C. THOMAS & JOSEPH A. PIKA, *THE POLITICS OF THE PRESIDENCY* (CQ Press 1996); LAURENCE H. TRIBE, *GOD SAVE THIS HONORABLE COURT* (Random House 1985).

9. *POPULAR JUSTICE*, *supra* note 3, at 5.

political issue. Yates uses the latest and most appropriate statistical techniques to test a set of clearly defined hypotheses. In reviewing the methodology, I had no argument with any of his findings and was very impressed by his rigor and analysis.

In this book, Yates quantitatively examines three discrete types of cases before the Supreme Court. Each analysis scrutinizes a different type of case before the Court. The first analysis focuses on cases dealing with the president's formal statutory and constitutional powers. The second analysis examines cases dealing with federal administrative agencies, while the third analyzes cases deciding substantive policy issues.

Yates' analysis of cases involving the president's formal statutory and constitutional powers was inspired by Ducat and Dudley's earlier work on federal district courts.¹⁰ These researchers found presidential approval ratings and judicial loyalty to the appointing president affected presidential outcomes in the federal district courts. Yates essentially duplicates Ducat and Dudley's analysis but focuses on the president's public approval rating in Supreme Court decisions. Ultimately, Yates' analysis reveals "interactions between the Court and the president concerning the president's formal powers are influenced by a variety of factors, including presidential prestige and the justices' ideological inclinations."¹¹

In chapter four, Yates shifts his analysis to cases involving federal administrative agencies. Yates believes the courts serve as a place where "[p]olitical consternation over partisan-based policy changes in the federal agencies are often resolved"¹² Likewise, presidential scholars have noted that the federal bureaucracy has become one of the president's most-valuable tools for implementing policy preferences.¹³ Thus, the federal agency has become an extension of presidential power. Consequently this chapter's analysis investigates "the deference paid to president's administrative agencies by the Supreme Court justices by assessing the influence of attitudinal, political, and external factors

10. Craig R. Ducat & Robert L. Dudley, *Federal District Judges and Presidential Power during the Postwar Era*, 51 J. POLS. 98, 98-118 (1989).

11. POPULAR JUSTICE, *supra* note 3, at 46.

12. MARTIN SHAPIRO, *THE SUPREME COURT AND ADMINISTRATIVE AGENCIES* (1968).

13. TERRY M. MOE, *The Politicized Presidency*, in *THE MANAGERIAL PRESIDENCY*, 135, 135 (James P. Pfiffner ed. 1991); TERRY M. MOE, *The Presidency and the Bureaucracy: The Presidential Advantage*, in *THE PRESIDENCY AND THE POLITICAL SYSTEM*, 437 (Michael Nelson ed. 5th ed. 1998).

including the impact of presidential prestige.”¹⁴ Yates found “presidential prestige affects justice decision making when the president’s cabinet agencies come before the Court.”¹⁵

Lastly, in chapter five, Yates completes his analysis by looking at the effect of presidential prestige (and other attitudinal and political factors) for cases before the Supreme Court that decide substantive policy issues that the president actively supports. Yates’ analysis shows presidential prestige had different effects depending on the issue.¹⁶ Presidential prestige had little or no effect on issues of civil rights, labor rights, diplomacy, or defense policy before the Court. However, presidential prestige did have a significant effect on issues dealing with law and order.

Chapter six details Yates’ conclusions based on the sum of the findings of his three analyses. Yates concludes presidential power before the court does depend on the president’s current popularity among the population. Yates provides accurate and meaningful evidence that most scholars, if confronted with this same evidence, would have to conclude that presidential prestige, in most cases, had an effect on Supreme Court decisions.

Reflecting on Yates’ findings leaves one with an uneasy feeling. As a typical American, I have been taught the cardinal truth that Supreme Court justices are insulated from external influences by nature of life tenure and by appointment.¹⁷ The thought that these life-tenured rational justices serving in the highest court of our land are swayed by popular opinion and the latest opinion polls may leave me (and I assume other typical Americans) a little unnerved. Thus, the evidence in *Popular Justice* leaves the reader with the feeling that all is not as it seems, and what we have been taught about the American “separation of powers” may not hold true. It makes one wonder about veracity of the other “truths” of the American political process that we have collectively learned.

14. POPULAR JUSTICE, *supra* note 3, at 4.

15. *Id.* at 70.

16. *Id.* at 102.

17. U.S. CONST. art. III, § 1.