

Jeffrey A. Segal, Richard I. Timpono, and Robert M. Howard. 2000.
“Buyer Beware? Presidential Influence through Supreme Court Appointments.”
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Excerpts:

Presidents clearly attempt to mold politics through the use of their formal and informal powers. While presidents engage in numerous explicit battles with other branches of government over the direction of policy, as well as the extent of executive power itself, less direct approaches can often have a dramatic effect. The appointment power allows presidents the opportunity to extend their agenda into a variety of areas that they could not control on their own. While such influence is usually limited to the sitting president’s term of office, judicial appointments can provide policy-minded presidents with an enduring legacy long after their terms are through. This is clearly the reason that Supreme Court nominations have become major partisan and ideological battles.

Whether or not presidents can extend their policy goals through appointments to the Supreme Court has normative implications for the nature of American institutions as well as practical ones for presidential influence. One area of debate over the Supreme Court is its undemocratic and potentially counter-majoritarian nature. Dahl (1957) has argued that the appointment process is an important constraint on counter-majoritarian impulses of the Court. Thus, appointing presidents and Senates attempting to exert a policy influence in this manner may be considered a beneficial democratic constraint on the Supreme Court.

Given the normative and practical issues involved, we examine the question of just how successful presidents have been in using Supreme Court appointments to extend their policy goals. This requires appointees to follow the path supported by the president. Thus, the critical first question to ask is whether or not their appointees share their views. Concordance, the relative agreement between judicial behavior and presidential policy preferences in this case, is critical for understanding presidential success.

We explicitly choose “concordance” over the more commonplace “responsiveness.” Responsiveness suggests that presidential preferences directly influence justices’ decisions. Concordance requires only that the justices act in agreement with the presidential preferences. This could be due to direct influence on the justices’ decision-making, but it could also be due to an indirect influence through the appointment of justices with shared values. Given the institutional structure and independence of the Court the latter approach of choosing like-minded justices is key to any endurance of a president’s policy influence in this domain.

Measuring concordance between justices and presidents requires a measure of presidential preferences. In order to create such a measure, we conducted a random mail survey in the Spring of 1995 of political scientists listed in the American Political Science Association Directory of Membership (1994) as belonging to the presidency section. We asked respondents to reply to the following statement: “Using whatever criteria you believe appropriate, please evaluate the following presidents on their liberalism in economic policy and social policy (0 = conservative; 100 = extremely liberal).” Sixty-one of the 100 scholars replied, yielding between 57 and 59 sets

of usable responses.

Results

We present the results for both economic and social liberalism in Table 1. [EXCLUDED] The table shows a clear split between Democrats and Republicans, with Democratic presidents ranking more liberal on both social and economic scales than their Republican counterparts. Nevertheless, presidents within each party vary considerably. Of the presidents under consideration, Lyndon Johnson ranks the most socially liberal, followed by Truman, then Bill Clinton and Franklin Roosevelt. John F. Kennedy ranks the most conservative of the group, with a score just below that of Carter.

The Republican judged the most liberal on social policy in the group is Richard Nixon, although still far below the score of the most conservative ranked Democrat, John Kennedy. Despite his well-known opposition to civil rights and civil liberties, Nixon expanded entitlement programs, established wage and price controls, created the EPA, and proposed major reforms of the welfare system. Five and one-half points below Nixon is Ford, and two and one-half points below Ford is Eisenhower. Not surprising is Reagan's placement, by far, as the most conservative of any American President since the Great Depression.

On the scale of economic liberalism, the Democrats again all rank higher than the Republican presidents. Unlike his placement on social liberalism, Roosevelt scores the highest on economic liberalism, outranking even Johnson. Truman again ranks right below these two, followed by Kennedy, scoring comparatively higher for economic liberalism than for social liberalism. Clinton and Carter round out the Democratic presidents' rankings.

General Concordance

We assess presidential policy success in Supreme Court appointments with the justices' voting in both civil liberties cases and economic cases. We derive both from Harold Spaeth's US. Supreme Court Database, which we merged with data from the 1937 through 1945 terms.

Civil liberties data include questions of First Amendment rights, criminal procedure, equal protection, due process, privacy, and attorneys. In all cases except those dealing with the Fifth Amendment's takings clause, a liberal vote upholds individual rights against governmental intrusion. Economics data include all economics and union cases. Liberal votes support governmental regulations in the regular economics cases and unions in the union cases.

We ran a regression analysis to determine how well the voting behavior of Supreme Court nominees could be predicted from the ideology of their appointing president. The analysis (not shown) demonstrates that for each ten points more liberal the presidential scholars rated a president in the domain, an appointed justice is predicted to vote liberally in 4.22 percent more civil liberties cases and 3.41 percent more economics cases. On an aggregate level, we can see that presidents do reasonably well in appointing justices who follow their policy preferences.

Further analyses (not shown) demonstrate that the substantive relationship between presidential

policy preferences and justice behavior declines over time. In both domains, the early terms of the justices' careers drive concordance, with the substantive impact of presidential ideology declining the longer justices sit on the bench. In the domain of economic policy, justices' votes cannot be statistically distinguished from being unrelated to their appointing presidents' positions after ten terms on the bench. In the less salient domain of civil liberties, presidents fare even worse, with the relationship being statistically insignificant after merely four terms on the bench. Thus, while presidents have been reasonably successful in their Supreme Court appointments, this influence is not as enduring as the aggregate results imply.

Discussion

We conclude, based on the data presented, that presidents since Franklin Roosevelt have been fairly successful from a policy standpoint in their Supreme Court appointments. However, the finer examination shows that this success is somewhat fleeting and that change in judicial behavior diminishes the long-run impact of presidential appointments. This has implications for both normative and practical politics.

Supreme Court justices vote relatively concordantly with their appointing president in the early years of their appointment to the bench. However, this relationship declines over time. If justices shift their views with the rest of society over time, then moving away from appointing presidents may be considered desirable from a democratic theory perspective. However, many studies in this area thus far have not found a clear link between justices' attitude change and shifts in public opinion. Thus, life tenure on the Court may be considered a problem from a counter-majoritarian perspective if the constraining influence of the appointment process is only short-lived.