

# **Presidential Rhetoric and Supreme Court Decisions**

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## **Abstract**

*Despite the centrality of speeches to the American presidency, no research has specifically investigated the frequency of presidential public commentary about Supreme Court decisions. We do, and examine why presidents discuss Supreme Court cases in their public comments from the Eisenhower to Obama administrations. Our empirical findings support our theoretical expectations in two primary ways. First, presidents speak most frequently after cases have been decided. Second, the monthly volume of presidential remarks on Court cases is shaped to varying degrees by presidents' desires to bolster their reelections, policy goals, and historical legacies. By shedding new light on why presidents comment publicly on Supreme Court cases, this research contributes to our understanding of presidential speechmaking, executive-judicial branch interactions, and how norms and institutions shape the behavior of political actors.*

At a joint press conference in April of 2012, a reporter asked President Barack Obama to speculate on how the Supreme Court might rule concerning the Patient Protection and Affordable Care Act. “Ultimately,” the president said, “I’m confident that the Supreme Court will not take what would be an unprecedented, extraordinary step of overturning a law that was passed by a strong majority of a democratically elected Congress.”<sup>1</sup> Whether or not this statement shaped the Court’s decision to uphold the Act in June, the president’s rhetoric fueled a debate in the popular media about the appropriateness of the president attempting to influence the Court by going public in this manner (e.g., Editorial Board 2012; Hartman 2012). This is so even though the president mentioned *National Federation of Independent Business v. Sebelius* (2012) on only two occasions prior to the Court’s decision. The bulk of the president’s attention to this case occurred after the decision, in dozens of stump speeches delivered during the 2012 presidential election campaign.

These remarks are not the only high-profile instance of presidents targeting Supreme Court cases in their public rhetoric. President Obama famously raised concerns about *Citizens United v. Federal Election Commission* (2010) during his 2010 State of the Union Address and called on Congress to counteract *Shelby County v. Holder* (2013), the Court’s decision to invalidate the preclearance provision of the Voting Rights Act of 1965. George W. Bush publicized his opposition to affirmative action prior to the Court’s decisions in *Gratz v. Bollinger* (2003) and *Grutter v. Bollinger* (2003).<sup>2</sup> Even 50 years ago, President Johnson praised the Court’s decisions in *Brown v. Board of Education* (1954) and *Shelley v. Kraemer* (1948) as he encouraged Congress to pass more expansive civil rights legislation.<sup>3</sup>

Despite these examples of presidential speeches referencing Supreme Court cases, we lack a firm understanding of when, how frequently, and why presidents mention Supreme Court

cases in their public statements. To date, most going public research that examines the interrelationships between the executive and judicial branches of government focuses on judicial nominations, not Supreme Court cases (Cameron and Park 2011; Holmes 2007, 2008; Johnson and Roberts 2004; Krutz, Fleisher, and Bond 1998; Maltese 1995a). In addition, only limited research shows that presidents increase their public attention to policy issues in response to Supreme Court cases on those issues (Flemming, Wood, and Bohte 1999; see Ura 2014). Moreover, despite the firestorm surrounding President Obama's comments delivered before the Court's ruling in the *Sebelius* case, we know next to nothing about how frequently presidents speak on pending decisions or whether they focus their public attention on decided cases.

We remedy this state of affairs by investigating the frequency of both written and spoken comments on historic and recently-decided Supreme Court decisions. To do this, we have cataloged the number of times per month that presidents mention Supreme Court cases in public comments from the Eisenhower to Obama administrations (1953-2012). We use these data to explore two significant topics. First, we analyze the timing of presidential references to Supreme Court cases to determine whether presidents mention cases pending before the Court or discuss cases after they have been decided. Because we find that presidents speak almost exclusively about Supreme Court cases after they have been decided, our primary research question asks: what explains the frequency of the president's monthly public commentary on decided Supreme Court cases? To answer this question, we build upon research that explains the number of presidential speeches over time (Eshbaugh-Soha 2010; Hager and Sullivan 1994; Kernell 1997; Powell 1999; Ragsdale 1984), which concludes, to varying degrees, that presidents speak publicly to bolster their reelection, historical legacies, and policy goals.

This topic is important for many reasons. First, it expands our understanding of the public presidency to include the Supreme Court. Extant research has largely explained going public either as a means to influence the public (Edwards 2003), media (Peake and Eshbaugh-Soha 2008), or Congress (Canes-Wrone 2001), or as a means of responding to the public (Hager and Sullivan 1994) or media (Cohen 2008) environments. Yet, virtually no research explains the frequency of presidential commentary on Supreme Court cases. Thus, this paper adds to the literature by exploring presidents' motivations to reference judicial decisions in their public commentary. Because presidents make spoken and written statements on both historic and recently-decided Supreme Court cases, and may be motivated by different stimuli in doing so, we examine each type of public mention on both types of cases in our analyses.

Second, it sheds light on interbranch interactions between the executive and judiciary. Although studying the relationship between the president and the Court is important simply because the Supreme Court can invalidate any act of the presidency, scholars have traditionally explored these interactions by focusing on presidential nominations (e.g., Maltese 1995a, 1995b; Yalof 1999) and the influence of the Solicitor General on the Court (e.g., Black and Owens 2012; Nicholson and Collins 2008; Pacelle 2003). This research adds to an understudied area of executive-judicial relations, which concerns why and to what extent the president responds to the policy actions of the Supreme Court.

Third, this research is significant because it demonstrates how deference to norms and the availability of formal institutions shape the timing of presidential speeches about Supreme Court cases. We show that, unlike going public to pressure Congress to pass legislation (e.g., Barrett 2004, 2005; Canes-Wrone 2001; Kernell 1997), presidents rarely discuss pending judicial decisions for the purpose of influencing the Court. This suggests that presidents are deferential to

the norm of decisional independence that is so central to an independent judiciary. In addition, the need to go public in this manner is reduced since presidents can communicate their preference to the justices more formally through the Office of Solicitor General. Thus, this research adds further evidence that norms and the existence of formal institutional structures the behavior of political actors (e.g., March and Olson 2004; Peters 2012).

### **Presidential Speeches and the Judiciary**

Presidents have long used public appeals to help achieve their goals. Kernell (1997) first observed that divided government and congressional gridlock encouraged presidents to reach beyond traditional bargaining (Neustadt 1990) to increase their legislative success. Later research shows that although presidential speeches may not move public opinion (Edwards 2003), presidents can speak to increase news coverage of issues (Eshbaugh-Soha and Peake 2011) and, by strategically targeting those issues already supported by the public, increase their legislative success by issuing more public appeals (Canes-Wrone 2001). Others explore whether presidents speak in response to political and congressional variables (Barrett 2005; Eshbaugh-Soha 2010; Hager and Sullivan 1994; Powell 1999). Yet, few studies have explored the relationship between the president's rhetoric and the judiciary. The small body of research that does exist on this topic tends not to address presidential speeches about judicial decisions, but focuses instead on public remarks about judicial nominations.

Maltese (1995a) initiated this line of research, showing that presidents seldom spoke on behalf of Supreme Court nominees prior to Ronald Reagan's first term in office. Although the number of public appeals has increased beginning with Reagan, going public on behalf of Supreme Court nominees is still a rare event. Johnson and Roberts (2004) show that presidents are more likely to go public on nominations when the nominee and president are ideologically

distant from the Senate, and when the nominee is likely to move the median justice on the Court away from the Senate. Holmes (2007, 2008) extended these findings to U.S. court of appeals judges, evincing that the frequency of public utterances is minimal, but has increased over time, and is driven in large part by the vulnerability of the nomination in the Senate. Most recently, Cameron and Park (2011) found that that presidents since 1980 go public more frequently than their predecessors, that a scandalous nomination (e.g. Bork or Thomas) increases public remarks, and the president's job approval has no impact on the president's attention to Supreme Court nominees. On the whole, it appears that presidents go public on nominees when their leadership is most needed, which occurs when their nominees are in danger of failing to be confirmed. Interestingly, research on the impact of these speeches is mixed. Although Krutz, Fleisher, and Bond (1998) and Johnson and Roberts (2004) demonstrate that going public increases the likelihood of confirmation, Holmes (2007) and Cameron and Park (2011) find that going public is negatively related to the success of a nomination.

Moving beyond judicial nominations, others have explored how presidents talk about the Supreme Court more generally. Flemming, Wood, and Bohte (1999) find that presidents increase their attention to policy issues in response to Supreme Court cases that concern civil rights. Although Flemming, Wood, and Bohte (1999) do not find that the Supreme Court responds to presidential attention to issues, Yates, Whitford, and Gillespe (2005) reveal that presidential attention to crime increases the percentage of the Supreme Court's agenda devote to it. In addition, Blackstone and Goelzhauser (2014) discover that presidents speak more about the Court when a vacancy arises and during reelection years, while they devote less attention to the Court during wartime. In addition, presidents who are lawyers speak more often about the Court. Each of these studies provide important evidence that presidents consider Supreme Court

decisions in their public rhetoric. However, unlike the current analysis, this research does not focus on responses to specific Supreme Court cases, which are the primary vehicles by which the Court makes policy, nor does it explore differences between spoken and written comments on historic and recently-decided cases.

### **When do Presidents Speak about Supreme Court Decisions?**

We begin from the well-established perspective that presidents pursue three primary goals while in office—reelection, good public policy, and historical achievement (Canes-Wrone 2001; Light 1999; Moe 1985)—and use their legitimate power and authority to realize them. One of the president’s primary tools to accomplish his goals, of course, is his public speeches. Given the potential relevance of Supreme Court cases to the president’s policy agenda, reelection prospects, and historical significance, presidents have many reasons to speak about them. Presidents know that as the final arbiter of law in the American system of separated powers, the Court has the authority to restrict or expand chances for their goal achievement. The Supreme Court can bolster or counteract presidential policymaking, whether domestic policy initiatives (e.g., *National Federation of Independent Business v. Sebelius*) or unilateral actions undertaken as Commander in Chief (e.g., *Hamdan v. Rumsfeld* 2006). Given this, we posit that presidents will be motivated to address Supreme Court decisions for one of two principle reasons.

First, presidents might use their speeches to influence cases *before* the Court, much as they attempt to influence legislation pending in Congress (Barrett 2004; Canes-Wrone 2001; Kernell 1997). In this mode, presidents seek to push the Court to rule in a manner that reflects their policy preferences and goals. They might highlight public support for their position knowing that justices are receptive to public opinion on pending cases (McGuire and Stimson 2004). In addition, presidents might signal to the Court the extent to which they are willing to



enforce a decision, or remind the justices of their duty to faithfully interpret the Constitution, to help shape the Court's decisions (Epstein and Knight 1998). If seeking to influence the Court's decisions is the primary force driving presidential references to judicial decisions, the vast majority of presidential references to Supreme Court decisions will come *before* the Court renders its opinion in a given case.

Second, presidents might comment on Supreme Court cases *after* they have been handed down in an effort to promote their reelection, policy goals, and historical legacies. Given the excitement that landmark Supreme Court cases, such as *Engel v. Vitale* (1962) and *Roe v. Wade* (1973), can generate in the context of a presidential election campaign, referencing Supreme Court cases may benefit presidents as they pursue reelection. By taking positions on such high-profile cases, the president can communicate to the public his position on the policies underlying those decisions, thereby addressing salient matters of public concern. Presidents might also write about Court decisions as a way to ensure that the executive branch implements the policies underlying those decisions in a manner consistent with his preferences, or address recent cases to influence the Court's decisions in future cases touching on a similar subject matter.

To investigate whether presidential statements about judicial decisions occur primarily before or after the Court hands down its opinions, we searched for "Supreme Court" using the online *Public Papers of the Presidents* database available at the American Presidency Project (2013).<sup>4</sup> Our data span from January of 1953 to August 2012, thus representing the eras of the modern presidency (e.g., Neustadt 1990) and Supreme Court (e.g., Pacelle, Curry, and Marshall 2011). After locating each time the president mentioned the Supreme Court, we determined whether the president referenced a Supreme Court case and, if so, identified the Supreme Court case discussed in each speech. With this information, we coded whether the president's remarks

occurred before or after the Supreme Court’s decision by comparing the date of the speech with the Court’s decision date.

Figure 1 presents the number of Supreme Court cases mentioned by presidents. The black bars are the number of cases referenced before they were decided, while the gray bars indicate the number of cases discussed after the opinions were handed down. Overall, presidents have mentioned 850 Supreme Court cases in their public remarks, comprising 239 unique cases. As Figure 1 illustrates, nearly all of the president’s comments concerning Supreme Court cases occur after the Court has ruled. On only 47 occasions—or 5 percent of the time—has the president mentioned a Supreme Court case prior to a decision. And, although it has become somewhat more common since the Carter Administration for presidents to address cases prior to a ruling, no president has made more than 10 such appeals. Thus, presidents are not speaking about Supreme Court cases in a manner consistent with how scholars envision that presidents go public on legislation before Congress—to put public pressure on legislators to support the president’s position (Kernell 1997). Rather, they tend to speak about cases for reasons other than attempting to influence the Court. As we will argue, presidents speak about decided cases to achieve their electoral and policy goals, in addition to promoting their historical legacies.

**[Figure 1 About Here]**

That presidents do not typically comment to pressure the Court is not unexpected for three reasons. First, research indicates that presidents make public appeals to improve their legislative fortunes when the traditional bargaining environment with Congress has broken down (Kernell 1997). Because presidents do not bargain with the Supreme Court regarding its decisions (and are, in fact, forbidden from doing so), the environmental context regarding executive-judicial relations differs from that governing executive-legislative interactions.

Second, although going public to influence the Court’s decisions is perfectly within the bounds of the law, the norm of decisional independence appears to frown on such activity. Indeed, this norm is so strong that Bermant and Wheeler (1995: 836) refer to decisional independence as the “sine qua non of the judicial function.” The strength of this norm no doubt motivated in part the harsh criticism President Obama received from the media regarding the appropriateness of his comments about the pending *Sebelius* case (e.g., Editorial Board 2012; Hartman 2012). Thus, our finding suggests that presidents generally refrain from discussing pending cases in their public rhetoric to avoid violating the norm of decisional independence, lending support for research that shows how norms shape the behavior of political actors (e.g., March and Olson 2004; Peters 2012).

Finally, the president has an institutionalized mechanism that obviates the need to go public to influence the Court: the Office of Solicitor General. As the principal attorney for the executive branch in the Court, the Solicitor General acts in part as an agent of the president, expressing presidential preferences to the Court (e.g., Nicholson and Collins 2008; Pacelle 2003). Thus, rather than going public to influence the Court, the president can simply direct the Solicitor General to appeal or defend cases that further the president’s policy agenda or file amicus curiae (“friend of the court”) briefs in cases in which the federal government is not a party (Collins 2008). This is a particularly effective strategy for influencing the Court’s decision making because of the Court’s deference to the Solicitor General (Black and Owens 2012).

### **Why do Presidents Comment on Decided Cases?**

Because presidents overwhelmingly reference cases after the Court has handed down its decisions, our theory is based on the notion that presidents discuss decided Supreme Court cases to promote their reelection, enhance their historical legacies, and develop good public policy

(Canes-Wrone 2001; Light 1999; Moe 1985). Much as the political environment motivates presidents to speak about domestic policy (Cohen 1997), the economy (Ragsdale 1984), or foreign affairs (Canes-Wrone 2006: Chapter 4), it should also influence the president's public commentary on Court cases. As strategic actors with limited time and resources, presidents will comment on cases when it is most optimal for them to do so.

Although our theory seeks to explain presidential comments generally, we recognize that presidents may have different motivations for speaking publicly or issuing a written statement about a Court case. On the one hand, spoken discussions of Supreme Court cases, such as remarks and question and answer sessions, should be affected by the larger political environment, which tends to influence presidential speeches on any topic (Brace and Hinckley 1993; Hager and Sullivan 1994). On the other hand, written statements are designed to guide the implementation of public policy, furthering the president's primary policy goal in addressing decided cases. Moreover, we suspect that presidents will respond to different stimuli when referencing historic cases or cases decided during the president's tenure in office. We think that presidents are motivated to discuss recently-decided cases to promote their reelection goals and historical legacies, and to guide the direction of public policy. This likely means that presidents will be concerned with contemporary factors when discussing recent cases. Conversely, references to historic cases, such as *Marbury v. Madison* (1803), are unlikely to be affected by variables pertaining to factors like contemporary media coverage of a case or conditions of divided government since these factors are unrelated to the historical significance of a case. With this in mind, there are several variables that should encourage presidents to reference Supreme Court cases in their public commentary.

First, and consistent with the reelection goal, presidents will consider their reelection campaign in their strategic calculus to comment on Supreme Court cases. Supreme Court decisions tend to be an important topic for the president's political base.<sup>5</sup> To mobilize core constituents, the president will likely discuss more Supreme Court cases during reelection years, when voters are most attentive to presidential politics. In speaking about Court decisions, the president attaches himself to specific policies that have been adjudicated by the Court. For those decisions with which the president agrees, he may praise those cases and the principles they stand for, and pledge to carry out the decisions if reelected. For those decisions the president opposes, he can criticize the Court's opinions and make assurances on the campaign trail to redress the damage done by the Court's decisions, perhaps by influencing how the Court might rule in future cases. Either way, reelection years should increase the president's attention to Supreme Court cases, but only for spoken remarks given the president's target audience—the American voter—is only likely to hear the president's spoken words during a reelection campaign. In addition, this finding should pertain primarily to recent cases, which are most likely to stand out in the minds of voters due to their contemporary relevance. Given this, we expect that presidents will speak more about recent Supreme Court cases during reelection years.

A second presidential goal is to promote a historical legacy. Supreme Court decisions tend to be durable, meaning that they are rarely overruled (Spaeth et al. 2013). The president's historical legacy may therefore be tied to the Supreme Court and its decisions about his policy agenda. As Light (1999) notes, presidents tend to be more concerned about their historical legacies during their second term in office. Given this, presidents may be more inclined to tie their legacies to Supreme Court decisions during their second terms. This should be especially true for recent cases in that these are the cases that relate most closely to the president's policy

agenda. Moreover, we expect that presidents will speak, as opposed to write, about more cases since their public speeches provide a powerful forum to shape a favorable image about themselves in the eyes of the public. Thus, we hypothesize that presidents will speak more about recent Supreme Court cases during their second terms in office to influence their historical legacies vis-à-vis the Court.

Both of these motivations to speak about Supreme Court cases should be enhanced by a case's salience. As strategic actors, presidents speak publicly when they think it will benefit them and seek to maximize their public exposure when they issue public statements. Presidents will therefore want to comment on Supreme Court cases when the media—and therefore, the public—already have their attention turned to the Supreme Court. Because presidents are often responsive to media attention on a number of foreign and domestic policy issues (Edwards and Wood 1999; Eshbaugh-Soha and Peake 2005), and because Supreme Court decisions influence news coverage (Flemming, Bohte, and Wood 1997), it follows that presidents will more frequently address Supreme Court decisions, and especially recent decisions, when they are covered in the news. In so doing, presidents are enabled to share their opinions on the most pressing of the Court's decisions, potentially using those decisions to promote their electoral goals and historical legacies. Speaking out on high profile cases allows presidents to augment or diminish public acceptance of the decision, which might be particularly useful for enhancing their reelection prospects or affecting the implementation of those decisions. In addition, attaching themselves to the Court's most salient decisions can promote their historical legacies by highlighting their positions on the most important of the Court's cases. Because we believe that presidential attention to such salience cases will be shaped by contemporaneous media

coverage of the cases, we expect that presidents will make more references to recently-decided Supreme Court cases when media coverage of those cases is high.<sup>6</sup>

Our final hypothesis is based on presidents' desire for good public policy. As we have demonstrated, presidents do not typically comment on pending decisions of the Court to influence Court decisions. Instead, presidents comment on decided cases. One way to achieve good policy when commenting on decided Supreme Court cases is by referencing them with the implementation or legitimization of their policy goals in mind. Although presidents can speak to affect the implementation of decisions by calling on Congress or the bureaucracy to take action on Supreme Court decisions, or to shape future Court decisions, a more direct power that the president has to affect the implementation of Court cases is through written statements. Written statements that invoke Supreme Court cases, such as signing statements and messages to Congress, are more likely than spoken comments to address legal interpretations of bills the president has signed, and are thus most likely considered to be "constitutional" statements that are not intended to generate a public response (Kelley and Marshall 2010). Instead, there are largely done for the purpose of directing the implementation of the decision by the bureaucracy or to motivate Congress to act on the decision.

Of course, the president is not the only branch of government that can influence the implementation of policy. As co-principal of the federal bureaucracy, Congress may also affect the implementation of a Supreme Court decision, whether by holding oversight hearings or writing more detailed legislation. Congress is more likely to wish to direct the implementation of policy differently than the president when the majority party in Congress differs from the president's party affiliation (Ringquist, Worsham, and Eisner 2003). Therefore, presidents may be more compelled to issue written statements to guide the implementation of policy goals that

relate to Supreme Court cases under divided government. By doing so, presidents can direct the bureaucracy in the face of a hostile Congress on significant matters of public policy that have been adjudicated by the Supreme Court. Because this concerns the president's relationship with the sitting Congress, we believe concerns about divided government will primarily influence presidential directives relating to recent cases. Accordingly, we expect that presidents will write more about recently-decided Supreme Court cases during divided government to promote their policy goals.

### **Data**

To test our hypotheses, we utilize the data on presidential mentions of Supreme Court decisions discussed above. Again, we searched for "Supreme Court" using the online version of the *Public Papers of the Presidents*. After locating each time the president mentioned the Supreme Court, we determined whether the president referenced a Supreme Court case and identified the Supreme Court case discussed. Because presidents overwhelmingly comment on Supreme Court decisions after they are handed down, our dependent variable in the foregoing analysis is the number of decided cases the president mentioned in a month between January 1953 and August 2012. The unit of analysis is the month.<sup>7</sup> We counted the number of mentions per month according to the number of speeches or statements in which the president references Supreme Court decisions. Cases are counted only once per speech. That is, if the president mentioned the same case multiple times in a single speech or statement, that mention is counted once in terms of the dependent variable. However, if the president mentioned the same case in multiple speeches or statements in a month, that case is counted multiple times in that month.<sup>8</sup> For example, in September 1957, President Eisenhower mentioned *Brown v. Board of Education*



in four separate speeches. Because Eisenhower did not mention any other case that month, the monthly count for September 1957 is four.

Our count measure averages 1.1 cases per month, and ranges from 0 (which is the modal category) to a high of 19 cases mentioned by Bill Clinton in November of 2000 (these cases were discussed in interviews and targeted campaign events for the Democratic Party's presidential nominee, Al Gore). In addition to using the number of cases mentioned per month as our dependent variable, we also separately analyze spoken and written references to Supreme Court cases since written comments may be responsive to different political stimuli (e.g., Kelley and Marshall 2010) and should be driven primarily by the president's desire to affect policy implementation. Presidents have spoken more than they have written about Court decisions. In our data, 63 percent of public comments (504 statements) on decided Supreme Court decisions came in the form of spoken remarks, while the remaining 37 percent were written (299 statements). Spoken and written remarks average 0.7 and 0.4 cases per month, respectively.

As noted above, we divide these cases further into recently-decided and historic cases. Recently-decided cases are defined as those cases handed down during the incumbent president's tenure in office. Historic cases are those that were decided before the president entered office. Figure 2 summarizes total mentions of historical and recent decisions by president and according to whether these comments were written or spoken. Overall, presidents spoke more about historic (429 mentions) than recently-decided (374) cases and mention historic and recent cases, on average, 0.6 and 0.52 times per month, respectively. Historical references are driven by a handful of cases: *Brown v. Board of Education* (71 mentions), *Roe v. Wade* (67 mentions), *Engel v. Vitale* (31 mentions), and *INS v. Chadha* (1983) (62 mentions, all written). Although incumbent Eisenhower mentioned *Brown* 27 times during his term in office, incumbent Kennedy

mention *Engel* only once and incumbent Nixon ignored *Roe* in his public commentary. Among rhetoric about historic cases, 239 are spoken and 190 are written. Recently-decided cases are also more heavily weighted toward spoken remarks (265) than written statements (109).

**[Figure 2 About Here]**

To test our hypotheses, we have operationalized our key independent variables as follows. *Reelection Year* is coded 1 for the months of January through October during the president's reelection campaign, and 0 otherwise. *Second Term* is scored 1 for each month during the president's second term in office, and 0 during a president's first term. *SC Media Coverage* is the percentage of Supreme Court decisions handed down each month that appeared as the lead case in a story on the front page of the *New York Times* on the day after the decision was rendered (Epstein and Segal 2000). *Divided Government* is coded 1 when at least one chamber of Congress is not controlled by the president's party, and 0 otherwise.

In explaining the volume of presidential comments about Supreme Court decisions, we also account for two variables that have been instrumental in explaining other presidential public activities: the president's approval ratings and timing. First, lower approval ratings encourage presidents to speak more frequently with the intent of improving their political situation (Eshbaugh-Soha 2010). When approval ratings are low, presidents may wish to speak about the decisions of a federal institution that is typically more well-regarded than either the presidency or Congress (Kelleher and Wolak 2007),<sup>9</sup> much as members of Congress may wish to campaign with presidents who are more popular than they are in their legislative districts (Cohen, Krassa, and Hamman 1991; Eshbaugh-Soha and Nicholson-Crotty 2009; Keele, Fogarty, and Stimson 2004). *Job Approval*<sub>*t-1*</sub> comprises the monthly average Gallup job approval rating of the president, lagged one month (Gallup 2013b). We expect this variable will be negatively signed.<sup>10</sup>

Second, presidential speechmaking has increased significantly since the Reagan Administration (Eshbaugh-Soha 2010; Hager and Sullivan 1994). Reagan was the first president who went public to bolster his legislative success (Kernell 1997) and subsequent presidents have built upon Reagan's strategy to speak frequently to achieve their policy goals, especially as part of the "permanent campaign" to win reelection (Doherty 2012). Thus, it is likely that the president will reference more Supreme Court cases since January of 1981 than before. *Post-Carter Presidencies* is coded 1 from January of 1981 through August 2012 (the end of our time series), and 0 before these dates. We expect this variable will be positively signed. Our expectations for these variables pertain to the models that include only spoken remarks as job approval and timing pertain to presidential strategies for improving their image in the eyes of the public, and thus relate to speechmaking. Because presidents can reference both recent and historic cases in such speeches in their efforts to improve their public standing, we believe that these variables will be influential in both the recently-decided and historic case models.

We also include variables that capture aspects of the Supreme Court and individual presidents. Since the Court tends to fall out of the spotlight when it recesses for the summer, presidents may discuss more judicial decisions during the Supreme Court's traditional session. *Court in Session* is coded 1 for the months of October through June, and 0 otherwise.<sup>11</sup> We expect this variable will be positively signed. In addition, monthly attention to cases may be driven by the number of cases the Court decides in a given month. In months where the Court releases a large number of opinions, there are more cases on which the president may comment, compared to months in which the Court hands down a smaller volume of opinions. *Court Decisions* represents the number of Supreme Court decisions rendered each month, based on information in the *Supreme Court Database* (Spaeth et al. 2013). We expect this variable will be

positively signed. Presidents who were attorneys prior to assuming the presidency may be more interested in the Court than non-lawyer presidents since they have chosen a career path in the law (Blackstone and Goelzhauser 2014). *Lawyer* is coded 1 for the Nixon, Ford, Clinton, and Obama administrations, and 0 for other administrations.<sup>12</sup> We expect this variable will be positively signed. Finally, we include a one month lag of our dependent variables, *Cases Mentioned<sub>t-1</sub>*, to account for the possibility of autocorrelation.<sup>13</sup>

## Findings

We present our findings in Table 1. The first column contains all presidential commentary on Supreme Court decisions; the second and third columns focus on spoken and written treatments of recently-decided cases (those decided during the president's tenure in office); and the fourth and fifth columns pertain to spoken and written comments on historic cases.<sup>14</sup> Since our dependent variables are count measures—and there is evidence of over dispersion in our data—we use negative binomial regression models to estimate the number of decided Court cases mentioned by presidents per month.<sup>15</sup> Table 1 supports for our theoretical expectations, and also shows that the president's strategic calculus varies by his choice of communication and the recentness of the Court's decisions.

First, consistent with our primary hypothesis, presidents mention more recently-decided Supreme Court decisions in their public speeches during reelection years. The results of the spoken model of recently-decided cases in Table 1 indicate that during the months of a presidential reelection campaign, presidential speeches about cases increase by about 102 percent compared to other months. Interestingly, the spoken model of historic cases also indicates that presidents focus more attention on Supreme Court decisions during reelection years, although the size of this effect—an increase of 59 percent during reelection years—is not as strong as for

recently-decided cases. This indicates that presidents discuss both recent (e.g., *National Federation of Independent Business v. Sebelius*) and historically-significant cases (e.g., *Roe v. Wade*) to excite their political bases. Also as expected, these findings do not carry over to written comments, given that voters are less likely to know about the president's written statements. Thus, the reelection year variable denotes that presidents speak about Supreme Court decisions to bolster their reelection prospects.

**[Table 1 About Here]**

Second, Table 1 reveals that presidents devote about 44 percent more speeches to recently-decided cases during their second terms in office. This indicates that presidents appear to consider recent cases most relevant to their historical legacies and focus attention on them during their final terms in office, likely in an effort to build positive historical legacies. In addition, presidents both speak and write about Supreme Court decisions that are featured in the media. For spoken remarks, a one standard deviation increase in the percentage of the Court's docket featured in the media leads to a 26.2 percent increase in the number of speeches concerning recent Court decisions; for written remarks, a one standard deviation increase corresponds to a 42 percent increase.<sup>16</sup> According to these findings, therefore, presidents can strategically promote their reelection and historical legacy goals through their public comments on high profile, recently-decided Supreme Court cases.

Third, we find evidence that presidents write about more recently-decided Supreme Court cases during periods of divided government as a way to counter congressional influence over the implementation of public policy. During periods of divided government, presidential written statements regarding cases increase by about 115 percent, as compared to periods of unified government. This finding is consistent with our expectation that presidents want to direct the

implementation of Court cases, primarily when Congress—the president’s co-principal in the implementation of policy—is controlled by the other party.<sup>17</sup> Although presidents are also less likely to speak about historic cases during divided government, it is unclear how any mention of historic cases might relate to the president’s goal of affecting policy implementation.

Several controls variables also perform as expected. First, consistent with our idea that presidents want to associate themselves with a more popular branch of government when they are not so popular, presidents speak about more historic Supreme Court cases when their job approval ratings fall. Specifically, a one-standard deviation decline in presidential approval ratings increases presidential speeches concerning historic cases by about 19 percent. Second, since and including Reagan, presidents mention significantly more Court cases every month than their predecessors, at a 50 percent increase in the number of speeches that mention recent Supreme Court cases for these more recent presidencies; a 46 percent increase in speeches that mention historic cases; and a 104 percent increase in written mentions of cases. Third, although presidents comment on recent cases more frequently the more cases the Court decides, they are only more likely to speak about historic cases when the Court is in session. Inexplicably, presidents discuss recent cases less when the Court is in session.<sup>18</sup> Fourth, presidents who were trained as lawyers speak (but do not write) more frequently about historic Supreme Court cases than non-lawyers. More precisely, lawyers mention historic cases in about 69 percent more speeches than their non-lawyer counterparts. This suggests that presidents who were lawyers may be more comfortable than non-lawyers in speaking extemporaneously about Supreme Court decisions. Presumably, this is because their background training makes them more familiar than non-lawyers with the substance of the Court’s historic decisions and therefore more willing to discuss those decisions in public.

In all, we find support for our key hypotheses. Presidents speak more frequently about recently-decided cases during reelection years to generate support for their reelection. They also speak about more recent decisions during their second terms in office in an effort to build a favorable historical legacy. Presidents discuss more cases in their spoken rhetoric when recent Supreme Court cases are in the media spotlight, which allows presidents to leverage public attention to those cases in pursuit of their electoral goals, primarily. That presidents write about more recently-decided cases during divided government lends support to our argument that presidents consider the implementation of judicial decisions in their public commentary on Supreme Court cases. Thus, and taken as a whole, these results indicate that the monthly volume of presidential remarks on Court cases is shaped to varying degrees by presidents' desires to bolster their reelections, policy goals, and historical legacies.

## **Conclusions**

By shedding new light on an overlooked aspect of the public presidency, these findings evince several important revelations concerning presidential statements about Supreme Court cases. First, presidents seldom discuss pending Supreme Court cases, choosing instead to speak about cases after they have been adjudicated. This finding is important because it reveals that presidents do not actively seek to influence judicial decision making through their public commentary. As we argue, this is likely a partial function of presidential deference to the norm of decisional independence, coupled with the ability of the Solicitor General to provide the Court with information regarding the president's preferred policies in legal briefs and during oral arguments. Consequently, instead of trying to influence the outcome of pending decisions, presidents speak most frequently about recently-decided cases during reelection years to help achieve their electoral goals. Presidents also prefer to comment on recent cases when they are

salient to the media and the American people, perhaps to maximize their public exposure—and address issues of obvious public concern—when they discuss Supreme Court cases.

Beyond these findings, the paper presents varied influences on monthly presidential attention to Supreme Court cases. We find evidence that presidents speak more about Court cases in their second terms to further their historical legacy and that they write more often about recent Supreme Court cases to guide the implementation of those decisions under periods of divided government. Coupling the latter finding with the predominance of presidential comments on Supreme Court cases after they have been decided provides support for the president's goal of policy implementation in evoking recent court cases if good policy is a goal of presidents when they reference Court cases, as we believe it is. In addition, the larger political context affects the president's mentions of judicial decisions. Just as lower job approval ratings encourage more public speeches on historic cases, presidents after Carter speak and write about more cases. Both findings are consistent with research that explains other presidential activities. We also find some evidence of individual-level variation, as lawyers discuss more historic Supreme Court cases, no doubt in part due to their training and interest in the law.

In addition to providing important insight into presidential statements regarding Supreme Court decisions, our analysis points to profitable directions for future research. First, although our data illustrate that presidents seldom discuss cases pending before the Court, this is nonetheless an intriguing strategy, particularly as it appears to violate the norm of decisional independence. Investigating why presidents choose to discuss cases publicly before they are decided and what impact these comments have on Supreme Court decisions will surely contribute to our knowledge of the interactions between the executive and judicial branches. Second, given our focus on monthly presidential attention to Supreme Court cases, we have not



examined the tone of the president's remarks in this paper, but recognize the importance of this topic.<sup>19</sup> Thus, future research could help to explain why and under what conditions presidents choose to praise or criticize the Supreme Court. In addition, research may explore why presidents discuss particular Supreme Court decisions in their public statements. This will shed light on the corpus of cases that presidents deem significant enough to discuss, while also providing insight into motivations that cannot be captured in a monthly analysis, such as the historical significance of a case. To be sure, investigating presidential statements on Supreme Court decisions contributes to our understanding of a variety of salient topics to political scientists and increased attention to these, and other, research questions has the potential to improve our appreciation of the relationship between the executive and the courts.

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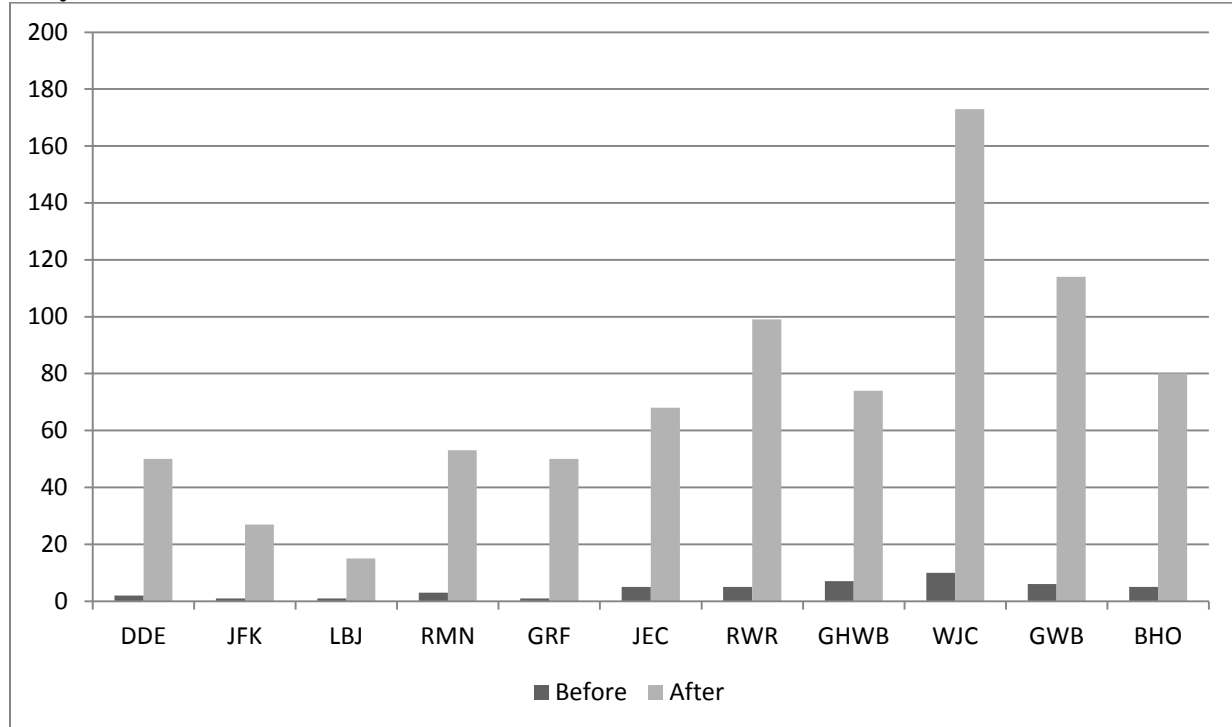
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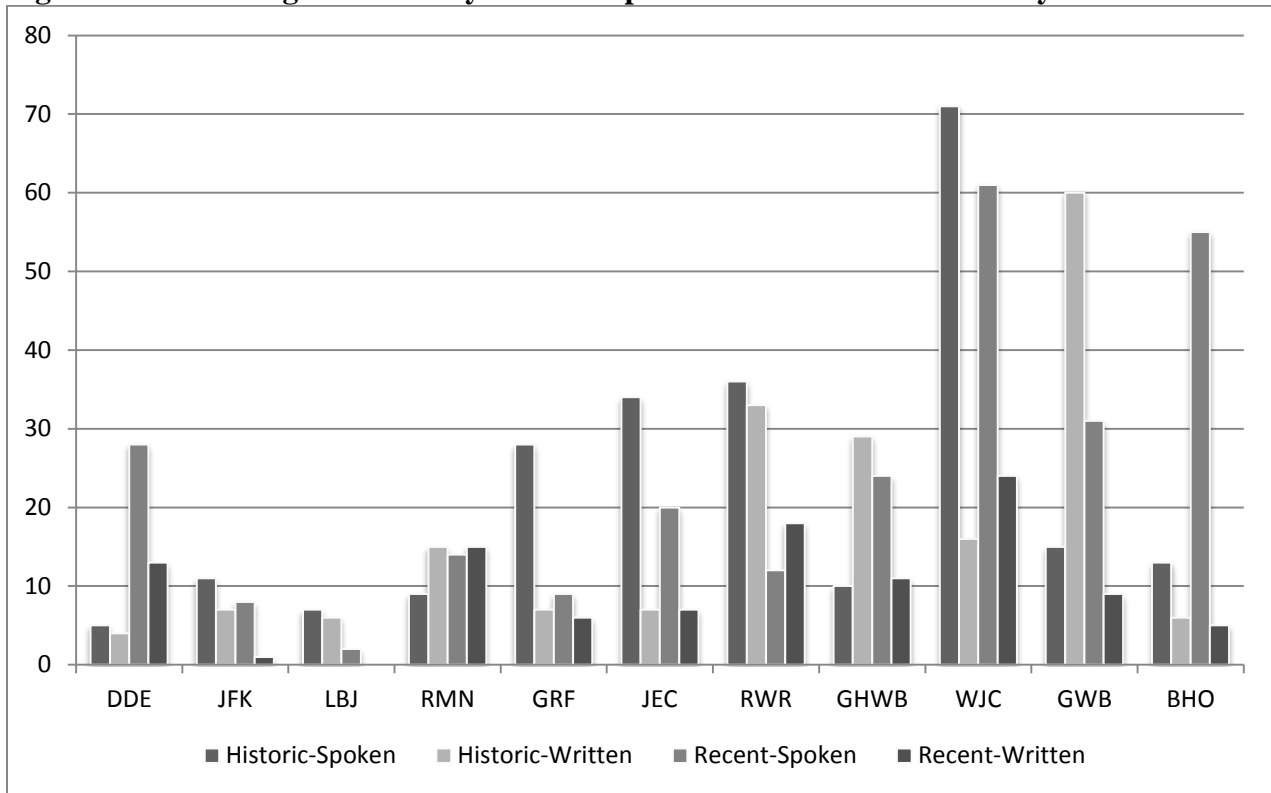
**Figure 1. Number of U.S. Supreme Court Cases Mentioned by Presidents, Before and After They Were Decided**



*Note:* Coded through August 29, 2012.

*Source:* Data collected by the authors using the *Public Papers of the Presidents*.

**Figure 2. The Timing and Delivery of U.S. Supreme Court Case Mentions by President**



*Note:* Coded through August 29, 2012.

*Source:* Data collected by the authors using the *Public Papers of the Presidents*.

**Table 1. Determinants of Monthly Mentions of U.S. Supreme Court Cases, 1953-2012**

	All	Recent		Historic	
	Commentary	Spoken	Written	Spoken	Written
Reelection Year	0.45* (0.16) [+57.5]	0.70* (0.29) [+102.2]	0.41 (0.32)	0.46* (0.25) [+59.0]	0.31 (0.26)
Second Term	0.04 (0.14)	0.58* (0.26) [+43.7]	0.39 (0.27)	-0.11 (0.24)	-0.30 (0.24)
SC Media Coverage	0.01* (0.005) [+15.7]	0.02* (0.01) [+26.2]	0.03* (0.01) [+41.7]	0.01 (0.01)	-0.002 (0.01)
Divided Government	-0.09 (0.14)	-0.10 (0.25)	0.77* (0.32) [+115.4]	-0.42* (0.21) [-34.4]	-0.02 (0.22)
Job Approval <sub>t-1</sub>	-0.01 (0.004)	-0.003 (0.01)	-0.01 (0.01)	-0.02* (0.01) [-19.1]	-0.0004 (0.01)
Post-Carter Presidencies	0.58* (0.12) [+78.9]	0.40* (0.22) [+49.6]	0.32 (0.24)	0.38* (0.20) [+45.7]	0.928* (0.22) [+150.1]
Court in Session	-0.17 (0.15)	-1.08* (0.27) [-66.1]	-0.73* (0.30) [-51.9]	0.48* (0.25) [+60.9]	0.33 (0.25)
Court Decisions	0.01 (0.01)	0.04* (0.01) [+55.0]	0.02* (0.01) [+28.2]	-0.02 (0.01)	-0.00 (0.01)
Lawyer	0.19 (0.12)	0.36 (0.23)	0.29 (0.24)	0.52* (0.20) [+68.8]	-0.37 (0.22)
Cases Mentioned <sub>t-1</sub>	0.17* (0.03) [+37.2]	0.47* (0.09) [+71.7]	0.37* (0.20) [+44.9]	0.35* (0.10) [+42.3]	0.34* (0.12) [+40.1]
Constant	-0.33 (0.31)	-1.16* (0.55)	-2.39* (0.65)	-1.03* (0.52)	-2.44* (0.53)
Likelihood Ratio $\chi^2$	103.66*	92.66*	50.31*	54.29*	45.95*
Likelihood Ratio of $\alpha$	287.13*	217.20*	18.78*	98.94*	54.03*
Vuong Test	-0.00	-0.00	-0.01	0.47	-0.00
N	715	715	715	715	715

*Note:* Entries are negative binomial regression coefficients. The dependent variable is the number of Supreme Court cases presidents mentioned in a month. The N represents the number of months over our time series, which is the unit of analysis. Standard errors are reported in parentheses. Percent change in the dependent variable for statistically significant coefficients are reported in brackets. Percent change is calculated as a 0 to 1 increase for dichotomous variables

and a one standard deviation increase for continuous variables, holding all other variables at their modal or mean values. \*  $p < .05$  (one-tailed tests).

## Notes

<sup>1</sup> “The President’s News Conference with President Felipe de Jesus Calderon Hinojosa of Mexico and Prime Minister Stephen Harper of Canada,” April 2, 2012.

<sup>2</sup> “Remarks on the Michigan Affirmative Action Case,” January 15, 2003.

<sup>3</sup> “Special Message to Congress Proposing Further Legislation to Strengthen Civil Rights,” April 28, 1966.

<sup>4</sup> Save for a handful of off-the-record speeches at fundraisers (see Doherty 2012), which are not published, the *Public Papers of the Presidents* contain all public presidential remarks, spoken and written. We also debated searching for the name of each case decided by the Court, but choose not to pursue this strategy since presidents frequently discuss Supreme Court decisions without specifically mentioning the name of the case, as exemplified in President Obama’s discussion of *National Federation of Independent Business v. Sebelius* in the opening paragraph. For example, searching for “*Texas v. Johnson*” returns a single hit (which was accompanied by the term “Supreme Court”), while our search strategies returns an additional 10 hits, for a total of 11 speeches.

<sup>5</sup> This is the conventional wisdom, although the 2012 presidential election did not follow this tendency, as neither Obama nor Romney made much issue of the Supreme Court, whether cases or potential nominees (Barnes 2012).

<sup>6</sup> We recognize that presidents occasionally discuss salient cases when they are asked by reporters about those cases. Although such activities are driven primarily by the media, they nonetheless provide an opportunity for presidents to take positions on the Court’s most significant cases, which can further their reelection goals and promote their historical legacies.

<sup>7</sup> The month is one of several possible units of analysis to explain presidential attention to cases with one potential alternative being the case-level. Our approach in this paper is to explain the frequency of public commentary, much like previous research that has attempted to explain the frequency of all speeches (Eshbaugh-Soha 2010; Hager and Sullivan 1994; Powell 1999; Ragsdale 1994). Accordingly, we believe our research design builds upon this literature and makes a significant contribution to the study of presidential speeches that reference the judiciary.

<sup>8</sup> It does not matter whether we analyze the number of unique cases or all cases mentioned in a month as these counts are correlated at 0.98 (Spearman's rank coefficient).

<sup>9</sup> Although the Supreme Court has had a job approval rating of less than 50 percent since late 2011, its average approval rating since 2001 is 54 percent (Gallup 2013a). From 1985-2013, Supreme Court favorability ranges from 51 to 77 percent very/mostly favorable (Pew Research Center 2013). Including the Court's approval in our model is not feasible given how infrequently polling organizations ask this question.

<sup>10</sup> Although the state of the economy could also affect presidential attention to Supreme Court cases, including both the misery index (Bureau of Labor Statistics 2013) and job approval affects the significance of both variables due to multicollinearity ( $r = -0.46$ ). We model approval ratings since they are more directly tied to the president's public activities than the state of the economy.

<sup>11</sup> Although October through June is the Court's traditional session, the Court hands down decisions during other months, most notably in July. When we include July in the operationalization of this variable, the results do not differ. We also considered including a variable capturing the month of June since the Court tends to hand down its most salient cases at the end of its term. We ultimately excluded that variable from the model because it is correlated with *Court Decisions* at the 0.71 level.

<sup>12</sup> We ran an alternative model specification that included fixed effects for presidents. Including these dummy variables adds to the explanatory power of the model, but force-drops the *Lawyer* and *Post-Carter Presidencies* variables due to multicollinearity. Since we cannot model both sets of variables, and find the *Lawyer* and *Post-Carter Presidencies* variables substantively more interesting than fixed effects, we chose to exclude presidential dummies from our presentation. Fortunately, the results of the models that include presidential dummies tend to mirror the variation in Court mentions presented in Figure 2. Except for the *Lawyer*, *Post-Carter Presidencies* (which we cannot include), and *Divided Government* variables (see footnote 17), the results in Table 1 remain substantively unaltered if we include presidential fixed effects.

<sup>13</sup> Although correlograms are suggestive of first-order autocorrelation for each of our dependent variables in the absence of a lagged dependent variable, modeling a lagged dependent variable is probably overly cautious, since excluding one has no significant impact on the results. There is no risk of cointegration because neither the dependent nor independent variables are integrated. In addition, there is minimal evidence of multicollinearity as none of the variables are correlated higher than 0.49 and the variance inflation factor does not exceed 1.48 for any variables in the model. Moreover, the results are not overly sensitive to the inclusion or exclusion of particular variables. We also considered including a variable capturing the ideological distance between the president and the Court, but opted not to because we have no theoretical expectation for its direction given our dependent variables, which include negative, neutral, and positive remarks about decisions.

<sup>14</sup> In the interest of conserving space, we do not present models for all recent and all historic commentary. The results of these models closely follow the results of both spoken models.

<sup>15</sup> Another modeling strategy is to normalize the monthly counts to mean daily averages to account for different lengths of months, which we do not report because the results are substantively similar to those presented in Table 1.

<sup>16</sup> Although there may be some concern that the president's remarks drive media coverage of Supreme Court cases, regressing our measure of salience on presidential speeches (lagged one month) reveals a statistically insignificant impact of speeches on salience.

<sup>17</sup> We maintain that this result is suggestive because the inclusion of presidential fixed effects renders the *Divided Government* variable statistically insignificant.

<sup>18</sup> This finding is quite robust, and remains significant in a variety of specifications.

<sup>19</sup> Based on our reading of the presidential statements under analysis, it appears that the tone of presidential remarks about judicial decisions is driven primarily by case-specific factors that cannot be captured using the month as the unit of analysis. For example, Barack Obama offered roughly equal negative and positive commentary on the *Citizen's United* and *Sebelius* cases, respectively. These were responses to the cases themselves, not to monthly variation in the political environment. Indeed, when we run a model separating our dependent variable into positive and negative monthly comments, the president's ideological proximity to the Court fails to achieve statistical significance.