



POPULAR JUSTICE

Presidential Prestige and
Executive Success in the Supreme Court

JEFF YATES

Popular Justice

SUNY series on the Presidency: Contemporary Issues

John Kenneth White, editor

Popular Justice

*Presidential Prestige and Executive Success
in the Supreme Court*

Jeff Yates

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*To my family, who has encouraged me
in every venture that I have endeavored, and
to my wife Rebecca, who provides continuing inspiration
in all that I do*

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Chapter One

Introduction

The relationship between the president and the United States Supreme Court is indeed an enigmatic one. Perhaps this is attributable to a lack of consensus over the appropriate parameters of power between these two branches of government. President (and later Supreme Court Chief Justice) William Howard Taft embraced a limited presidential power, stating “the president can exercise no power which cannot be fairly and reasonably traced to some specific grant of power or justly implied and included within such grant as proper and necessary” (Biskupic and Witt 1997, 169). In contrast, President Theodore Roosevelt’s “stewardship” theory of presidential leadership envisioned an expansive power in which the president should act on the public’s behalf, in Roosevelt’s words, “whenever and in whatever manner [is] necessary, unless prevented by direct constitutional or legislative provision” (170). Hence, while Taft envisions a model of presidential action constrained by rules and subject to exacting judicial review, Roosevelt’s model of the presidency is one of ample executive discretion and deference from other political actors.

The effective bounds of the Supreme Court’s powers are similarly indeterminate. While Chief Justice John Marshall successfully positioned the Supreme Court as the final authority on the Constitution in *Marbury v. Madison*, the practical ability of the Court to function as an effective political force is perhaps open to question. Under the Constitution, the Court has little in the way of direct implementation power and is essentially dependent upon its institutional legitimacy for compliance with its commands. An example of the Court’s enforcement quandary and its inherent reliance upon public confidence for its tacit authority is illustrated

by Justice Lewis Powell's retrospective comments (in 1988) concerning the Court's order that President Richard Nixon turn over damaging tapes in *United States v. Nixon*. Powell confided that, "one has to wonder what would have happened if Nixon had said what President Jackson said on one occasion, 'You have your decree, now enforce it.' Of course, there was no way we could have enforced it. We had 50 'police' officers, but Nixon had the First Infantry Division" (Powell 1995, 173). In the end the unpopular and beleaguered executive complied and the Court managed to avoid a potentially serious threat to its institutional authority.

Interaction between the president and the Court does not always involve the president as a direct party before the Court as in *United States v. Nixon*. The president and the Court also interface informally in their confrontations over the direction of American legal policy. Certainly presidents hold convictions on many of the policy areas that the Court rules on. While presidents cannot force justices to vote their way, there are informal means by which they can cast their influence on Supreme Court policy-making. Similarly, Supreme Court justices hold their own ideas about the direction of the policies implemented by the executive's bureaucratic agencies, and they review them on a regular basis in Supreme Court litigation.

In this book I examine the interaction in the modern era between these two primary political institutions, the presidency and the United States Supreme Court. I assay the fortunes of presidents before the United States Supreme Court and provide insights as to what factors may influence presidential success in Supreme Court litigation. Of particular interest is the question of whether presidents' fortunes before the Court are affected by the level of prestige (public approval) that they experience while in office.

Several important political considerations are addressed. Fundamentally, if we assume that presidents wish to effectively assert their influence, then it is important to discern whether, and under what conditions, presidential power can be successfully exercised and afforded deference by other political actors (i.e., the Supreme Court justices). Further, judicial scholars assert that judicial decision making can be explained largely by attitudinal, external, and political determinants. Under the constitutional separation of powers framework, the justices of the