

Courts and the Making of Public Policy

Opposition or Coalition: Courts and the Political Process in Times of Crisis

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Executive Summary

- The question of how courts respond to national emergencies or crises is of profound importance in a democratic society. In the United States, the federal courts exercise the power of judicial review, giving them the authority to invalidate acts of legislatures or executives as unconstitutional. Given this, those groups who wish to ensure that government does not infringe on valued liberties during times of crisis often look to the federal courts to serve as a limitation on legislative and executive overreach.
- Whether the courts can effectively serve this function, however, has preoccupied legal scholars and social scientists for several decades. The normative debates revolve around whether and under what circumstances an unelected body should overturn acts of democratically elected legislatures. Empirical assessments have tried to ascertain the extent to which courts are institutionally situated to serve as a meaningful limit on the branches of government that have the power of the purse and the power of enforcement.
- This policy brief suggests that framing the question as an oppositional one; that is, as a question of the courts in opposition to other branches of government, misrepresents fundamental and distinctive aspects of the US federal courts. Rather, the judiciary operates in conjunction with other branches of government, often by invitation or by default when governing majorities either cannot or will not resolve disputes that divide them. In this sense, the impact of court decisions is measured less by direct social policy outcomes or compliance by other actors, than by the ways in which they contribute to or challenge dominant governing coalitions.

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Introduction

In 2006, during the Senate confirmation hearings for now Supreme Court Justice Samuel Alito, Senator Edward Kennedy (Democratic from Massachusetts) told reporters that Alito had ‘supported a level of overreaching presidential power that, frankly, most Americans find disturbing and even frightening’ (Nagourney 2006). The implication of Senator Kennedy’s remarks were that, should Alito be elevated to the nation’s top court, he would be likely to support the actions of the Bush administration as they pertained to constitutional arguments about the power of the executive, and the detention and treatment of suspected terrorists.

This scenario is a familiar one in US politics. Supreme Court nominees face an array of well-informed senators keen to question them about their views on the major political controversies of the day, including the limits of government power, the place of religion in public life, and the rights of women and racial minorities, among others. The Supreme Court’s role in American politics, its exercise of judicial power to strike down acts of legislatures and executives, and its claim to judicial supremacy have inspired volumes of normative and empirical analyses on the role of courts in American politics, the extent to which courts engage in policymaking, and the proper role of the judiciary in a democracy.

The underlying assumption is that the court plays a central role in supporting or limiting government power and that the ‘wrong’ configuration of Justices will make decisions that either violate individual liberties or extend those liberties too far. Advocates and opponents of judicial review often both see a political process in which the Supreme Court stands in opposition to majoritarian decision making and has the potential to produce clear winners and losers. Such questions become particularly salient and

fiercely contested when government power is at its peak, during war or other forms of military conflict, when executives tend to demand and receive greater authority to regulate individual conduct than during times of peace and security. If the legislature and executive are awash with war powers, many see the federal courts as a crucial bulwark against the abuse of individual liberty.

The question of whether we can trust the courts in times of crisis, presupposes this conflictual and oppositional relationship between courts, legislatures, and executives. Will courts stand in the way of the government’s oft-observed desire to expand its power into new and far-reaching domains when the nation is threatened by external or internal forces? The question implies that *some* political institution needs to hold government in check during times of national emergencies and that the courts might well serve such a function.

I would like to suggest that this approach obscures the political dynamics and institutional limitations on the judiciary as it is situated in a larger political process, as well as the interactive relationship between courts and the other branches of government. In fact, scholars of the Supreme Court and constitutionalism in the United States recognize that courts are more dynamic, interactive, and dependent on other branches of government than the question of trust of the courts suggests. Even the language used to describe court actions falls prey to the perception of ‘winners and losers’ by referring to the court ‘clamping down’ on civil liberties, as though the court itself initiates such legislation (Epstein et al. 2005). But the ability of the courts to exercise judicial supremacy in ways that limits governmental power during times of crisis is deeply dependent on its relationship to other political actors, particularly presidents and members of Congress. Sometimes,

those actors may try to leverage the court for their own ends, while at others a majority of Justices will simply sustain the constitutional preferences of those who appointed them (Dahl 1957). Other political actors, state lawmakers or party elites for example, may also try to push decision making into the courts for strategic purposes. In order to understand the impact of the courts in times of crisis, we need to reflect on the specific interrelationships between the judiciary and other political actors and institutions in the United States.

In addition to the dynamic nature of the Supreme Court, which complicates the straightforward court intervention thesis, the federal courts, as Alexander Hamilton noted, have little capacity to enforce their decisions directly. While the persuasive power of legal reasoning can make their opinions more or less likely to be accepted, the relational nature of court authority becomes even clearer in this context. When courts make unpopular decisions, they often do so knowing that some portion of the governing party, or vocal opponents of the majority coalition, share their constitutional logic (Graber 1993). Thus, the first point here, that courts operate as part of a governing structure, is an important precursor for understanding the second: that the courts lack basic enforcement power. The courts are largely dependent on other political actors, not only to carry out their decisions, but also because it is often those actors who engage the Supreme Court for its opinion in the first place.

Courts as agents of change

Many analyses of the role of courts in the political process assess whether and to what extent courts *should* exercise judicial review in a democratic system. Should the federal judiciary – unelected, appointed for life and, therefore, largely unaccountable to the majority – invalidate acts of Congress or the executive, the branches that clearly represent the interests of the majority of citizens? This question, originally referred to as ‘the countermajoritarian difficulty’ by legal scholar Alexander Bickel, has generated volumes of commentary (Bickel 1962).

Resting on the foundation of limited government and articulated clearly in the Federalist papers, the notion of a judiciary that has supreme say over the meaning of the Constitution is rooted in the idea that the institution of the judiciary could remain above the public fracas that often characterizes crises of governance (Kent 1826). According to this perspective, courts provide a legitimate venue for challenging government restrictions on individual liberty and a potential source of the vindication of those liberties. Some Justices have also suggested that courts can and should serve as a limitation on other branches of government. Justice Abe Fortas, for example, argued that the judiciary is uniquely situated to block efforts to undermine fundamental constitutional rights (Fortas 1968). The Supreme Court itself has articulated this role for itself in numerous cases.¹

Empirical analyses of Supreme Court decisions have also frequently focused on the role of the judiciary as a counterpoint to other branches, and whether its decisions effectively limit governmental power. While there are some notable examples of courts standing in the way of governmental restrictions on liberty, conventional wisdom has typically been that court decision making more often sustains the social policies enacted by majorities than challenges them (Graber 1993). Courts will infrequently stand alone in opposition to the other branches of government, in part because they are institutionally and ideologically linked to them. Supreme Court Justices are, after all, appointed by presidents and approved by Senates, with whom they are likely to share similar pedigree and educational backgrounds, and are unlikely to have philosophical perspectives on the Constitution that routinely put them at odds with the democratically elected branches of government.

In *The Hollow Hope*, Gerald Rosenberg (1991) argued that even when courts do run counter to

1. See *United States v. United States District Court* 407 U.S. 297 (1972); *City of Boerne v. Flores* 521 U.S. 507 (1997); *Cooper v. Aaron* 358 U.S. 1 (1958).

lawmaking majorities, they are constrained in their ability to affect political outcomes. Constraints fall into three broad categories:

- 1) the limited set of rights established in the Constitution;
- 2) the ideological linkage between Justices and the presidents who appoint them; and
- 3) the lack of enforcement power.

According to Rosenberg, these limitations pose formidable obstacles to the court's ability to alter the direction of social policy that is promoted by majority coalitions. Noting these constraints, Rosenberg suggests that courts will serve a significant policymaking role only when several other conditions are present, such as support for change from some members of Congress, the executive, or significant portions of the public, or when there are political incentives for compliance.

While others have made compelling arguments that Rosenberg fails to take account of the more nuanced and subtle ways the court may influence policy, his primary analysis – that the Supreme Court is highly constrained in its ability to substantially oppose the majoritarian institutions – is largely consistent with a wide range of socio-legal research and analysis. Indeed, the constraints that Rosenberg observes are particularly acute when the court faces highly complicated issues and institutions, or conflicts in which the national government has a significant stake (McCloskey 1960).

Reframing the debate

Both the normative and empirical analyses provide ample grounds for concern over the question of what courts may do in times of crisis, although in so doing, these approaches continue to treat the Supreme Court as either an ally or an opponent of the other branches of government. Recent work, however, suggests that this way of thinking about the relationship between courts, legislatures, and executives is limited because it fails to take account of the ways in which courts function as part of a dynamic political process. This is true both in terms

of the tendency for judges to be drawn from the same elite quarters as lawmakers, and also because of the ways in which other political actors use the court to achieve certain policy goals.

Mark Graber argues that legislatures often invite courts to be part of the political process when they wish to avoid responsibility for making choices among competing policy goals, and also when they hope for a particular political outcome that they do not think they can publicly support. In the years leading up to the civil war, for example, members of Congress and leaders of the major political parties willingly invited the Supreme Court into conflicts over the rights of slave-owners in new territories. The Kansas-Nebraska Act of 1854 provided for all cases involving title to slaves to be appealed to and decided by the Supreme Court, in part because of the legislative stalemates in which the major political parties found themselves on the issue (Grabner 1993: 41). Such a move had strategic political value as it helped both political parties avoid the most contentious issue of the day – slavery in the territories – which cross-cut traditional party divisions. The enforcement of subsequent decisions, then, was less problematic than it would have been had the courts stepped into a conflict in which they were clearly running counter to the primary powerful governing coalition.

Keith Whittington has also provided detailed evidence that political elites and elected officials, specifically presidents, frequently have reasons to bolster the supremacy of the Supreme Court in national decision making. As Whittington notes, 'the [Supreme] Court must compete with other political actors for the authority to define the terms of the Constitution. For the Court to compete successfully, other political actors must have reasons for allowing the Court to "win"' (Whittington 2007: 26).

Jonathon Casper (1976) noted that Supreme Court decisions need to be examined beyond this 'winners and losers' framework, and to be understood in terms of the recurring activity and interactive political branches that characterize American politics. In other

words, decision making in the Supreme Court takes place in the context of Justices who have been appointed by governing coalitions and lawmakers who may wish to break stalemates by encouraging judicial review.

From this perspective, the court acts not so much to limit the excesses of other branches of government, but as a part of a larger governing coalition in which members of the elected branches draw on court decisions for political support. A compelling example of this is provided by the role that the federal courts played in prison reform in the United States.

Federal courts were crucial in the remoulding of state prisons in the United States. Overcrowding, corporal punishment, limited or no health care, and squalid living quarters were common prison conditions in many states, particularly the poorer, southern states. Beginning in the late 1960s and early 1970s, and for several decades subsequent, federal courts embarked on a concerted effort to demand that state governments ensure the health and safety of their prisoners. However, federal courts could hardly have had an impact if all state officials had been unrelenting in their recalcitrance or if open hostility towards federal court orders had characterized all relations with state actors.

As Malcolm Feeley and Edwin Rubin (2000) illustrate in their detailed analysis of prison reform, however, federal courts were most successful when they were aided by sympathetic prison administrators or allies in state government. Some states may well have tacitly encouraged federal court intervention in order to provide a kind of political cover for their interest in improving prison conditions – a position that was unlikely to be electorally popular.

Judicial authority in times of crisis

Where does this leave the court in terms of emergencies and crises today? Given the limitations on the courts, can they offer meaningful, that is, enforceable, limitations on other branches of government? Such questions belie straightforward answers precisely because legal outcomes are so

dependent on the political coalitions, governing majorities, and institutional configurations of the time. It is possible that certain types of emergencies actually furnish courts with opportunities to enhance rights and liberties, as World War II did when opponents of the flag salute challenged its requirement in public schools.² Most analyses, however, suggest that the Supreme Court is unlikely to challenge the social policies of dominant majority coalitions in times of war or other major crises. Much, however, appears to depend on the view of political leaders towards specific rights and liberties prior to the crisis.

The detainee cases at Guantanamo Bay illustrate many of these points. While, on the one hand, *Hamdi v. Rumsfeld*, *Rasul v. Bush*, and *Hamdan v. Rumsfeld* can be seen as the Court standing in opposition to executive overreach, a careful reading of these cases reveals the Court's deep reliance on congressional intention and purpose.³ Unwilling to forge its own path entirely, the Court repeatedly resisted the articulation of clear, first-order constitutional principles (Epstein et al. 2005).

It is worth considering these cases in light of Graber's analysis of institutional stalemates, in which the dominant governing coalition prefers the Court to resolve difficult constitutional questions because lawmakers are on uncertain terrain with respect to their constituents and/or because they face internal party divisions that they are unwilling to exacerbate. Clearly some portion of Democrats and even some Republicans have been uncomfortable with the assertions of executive power proffered by the Bush administration. The Republican party has had its share of detractors from President Bush's policies on detainees, most notably Senator John McCain, who openly opposed any treatment of detainees that could be considered torture. Few, however, wish to

2. *West Virginia v. Barnette* 319 U.S. 624 (1943). See also Graber (1993).

3. *Hamdi v. Rumsfeld* 542 U.S. 507 (2004); *Rasul v. Bush* 542 U.S. 466 (2004); *Hamdan v. Rumsfeld* 548 U.S. 557 (2006).

be seen voting against the president at a time of crisis, even members of the opposing party who openly oppose his policies.

Knowledge that cases will reach the highest court provide an opportunity for lawmakers to take positions which they think citizens will view favourably, while expressing certainty that the administration will exercise its discretion judiciously. If it does not, the majority in Congress can rest assured that the Supreme Court would reflect on its floor debates and legislative intent as it considers whether the executive's actions were consistent with constitutional principle.

Conclusions

All of this suggests that, if all of the politically elected branches of government and a strong majority of the public are intent on suspending liberties during a national crisis, the judiciary is unlikely to be willing or able to stop them. More importantly, if lawmakers are uninterested in the Court's intervention and are equally unwilling to enforce restraints that it may impose on the other branches, then the Court is unlikely to have opportunity or inclination to intervene anyway. This is particularly true when court opinions rely on execution by other branches of the federal government, though such instances of lock-step agreement among the elected branches are not all that common.

Typically, majority coalitions eventually fracture on key policy responses to emergencies, particularly as time passes and the country moves farther from the initial crisis. Sometimes this means that they will direct conflict to the courts in hopes that they can win support for their particular policy priorities. Also, minority parties often find opportunities to drive a wedge into majority coalitions in ways that provide opportunities for federal courts to reinforce their challenges to the status quo.

The federal courts, then, are and will continue to be a legitimate site for carrying out debates about executive power, liberty, and civil rights, but perhaps not in the way we traditionally think. As legal scholars have noted, the Supreme Court is most effective at drawing boundaries around legislative and executive power when at least some portion of the governing elites have a stake in the courts doing so. And this may be more common than we believe. Put succinctly, 'Realistic theories of judicial function, thus, must examine the extent to which particular instances of judicial review actually promote or retard deliberate policymaking, majoritarianism and political accountability' (Graber 1993: 72).

A key lesson is that, while senators are right to pay attention to the views of Supreme Court nominees, we should not be surprised that such nominees often reflect the social policy preferences of presiding presidents. Nor should we be surprised that presidents whose parties also control the Senate will have greater opportunity for successfully nominating judges whose ideological positions are closer to their own, or that Justices will often support the policy priorities of the presidents who appoint them.

In fact, such realities need not even alarm us once we recognize that the Supreme Court operates as part of a political process and is utilized by a wide range of political actors, including those who wish to limit the extent of government power. What we should bear in mind when scrutinizing judicial intervention, however, are the constitutional views of dominant governing coalitions and, more importantly, of those who stand for elected office. It is, after all, their views that are most likely to work their way into Supreme Court decisions and, more importantly, their views that shape legislative and executive responses to crises in the first place.

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