2

Going Public on Pending Decisions

On January 15, 2003, President George W. Bush held a press conference on *Gratz* v. *Bollinger* and *Grutter* v. *Bollinger*, the affirmative action cases pending before the Supreme Court.[[1]](#footnote-2) These cases involved challenges to two University of Michigan affirmative action policies on the grounds that they violated the Fourteenth Amendment to the Constitution and the Civil Rights Act of 1964. In his seven-minute speech devoted solely to the cases, the president spoke out in favor of the importance of racial diversity in higher education, but argued that the university’s affirmative action policies were “fundamentally flawed” because they “amount to a quota system that unfairly rewards or penalizes prospective students, based solely on their race” (Goldstein and Milbank [2003](C:\\Users\\Beverly\\AppData\\Local\\Temp\\Temp2_978110849848.zip\\978110849848\\Body\\9781108498487rfa.docx" \l "rfa_186" \o "rfa_186)). Bush further announced that his administration would file an amicus curiae (“friend of the court”) brief arguing that the policies are unconstitutional.

Outside of his conservative base, the president’s speech did not go overwell (Greenhouse [2003](C:\\Users\\Beverly\\AppData\\Local\\Temp\\Temp2_978110849848.zip\\978110849848\\Body\\9781108498487rfa.docx" \l "rfa_192" \o "rfa_192)). Civil rights groups attacked the president for trying to end diversity in our nation’s institutions of higher education (Goldstein and Milbank [2003](C:\\Users\\Beverly\\AppData\\Local\\Temp\\Temp2_978110849848.zip\\978110849848\\Body\\9781108498487rfa.docx" \l "rfa_186" \o "rfa_186)). The president was also criticized for putting the interests of conservative Republicans over those of racial and ethnic minorities, who the party was trying to court (Wilson [2003](C:\\Users\\Beverly\\AppData\\Local\\Temp\\Temp2_978110849848.zip\\978110849848\\Body\\9781108498487rfa.docx" \l "rfa_446" \o "rfa_446)). Senate Minority Leader Tom Daschle (D-SD) questioned the president’s claim that he was committed to diversity, but against programs with track records for increasing diversity (Clymer [2003](C:\\Users\\Beverly\\AppData\\Local\\Temp\\Temp2_978110849848.zip\\978110849848\\Body\\9781108498487rfa.docx" \l "rfa_086" \o "rfa_086)). The *New York Daily News* ([2003](C:\\Users\\Beverly\\AppData\\Local\\Temp\\Temp2_978110849848.zip\\978110849848\\Body\\9781108498487rfa.docx" \l "rfa_321" \o "rfa_321)) went further, arguing that Bush’s rhetoric was “cheap, shallow, disingenuous.”

In addition, the president was condemned for the timing of his speech on two fronts. First, the speech fell on Martin Luther King Jr. Day. This point was not lost on Representative John Lewis (D-GA), a celebrated civil rights activist who was a victim of America’s Bloody Sunday. He penned a scathing editorial condemning the president for seeking racial division in the country and using racial innuendo (J. Lewis [2003](C:\\Users\\Beverly\\AppData\\Local\\Temp\\Temp2_978110849848.zip\\978110849848\\Body\\9781108498487rfa.docx" \l "rfa_266" \o "rfa_266); Moore [2003](C:\\Users\\Beverly\\AppData\\Local\\Temp\\Temp2_978110849848.zip\\978110849848\\Body\\9781108498487rfa.docx" \l "rfa_308" \o "rfa_308)). Second, the speech came only a few weeks after Senator Minority Leader Trent Lott (R-MS) resigned from his leadership position after expressing support for the 1948 racial segregationist presidential bid of Strom Thurmond, further alienating racial minorities in the Republican Party (N. Lewis [2003](C:\\Users\\Beverly\\AppData\\Local\\Temp\\Temp2_978110849848.zip\\978110849848\\Body\\9781108498487rfa.docx" \l "rfa_266" \o "rfa_266)). The *St. Louis Post-Dispatch* ([2003](C:\\Users\\Beverly\\AppData\\Local\\Temp\\Temp2_978110849848.zip\\978110849848\\Body\\9781108498487rfa.docx" \l "rfa_394" \o "rfa_394)) went as far as to write that the president “threw away an opportunity to send the message that the Republican Party is the party of Lincoln, not Lott.”

Even some of his supporters were disappointed or surprised by Bush’s intervention in the cases, particularly as moderate Republican senators had asked the administration not to get involved, fearing electoral backlash from black and Hispanic voters (Wilson [2003](C:\\Users\\Beverly\\AppData\\Local\\Temp\\Temp2_978110849848.zip\\978110849848\\Body\\9781108498487rfa.docx" \l "rfa_446" \o "rfa_446)). Secretary of State Colin Powell voiced his disapproval with the president’s position, arguing that “race should be a factor among many other factors in determining the makeup of a student body of a university” (Loughlin [2003](C:\\Users\\Beverly\\AppData\\Local\\Temp\\Temp2_978110849848.zip\\978110849848\\Body\\9781108498487rfa.docx" \l "rfa_274" \o "rfa_274)). The litigant in one of the cases, Jennifer Gratz, expressed her astonishment that the president weighed in on the cases, particularly as the administration had no obligation to participate in the disputes (Laurence [2003](C:\\Users\\Beverly\\AppData\\Local\\Temp\\Temp2_978110849848.zip\\978110849848\\Body\\9781108498487rfa.docx" \l "rfa_260" \o "rfa_260); Mercer [2003](C:\\Users\\Beverly\\AppData\\Local\\Temp\\Temp2_978110849848.zip\\978110849848\\Body\\9781108498487rfa.docx" \l "rfa_301" \o "rfa_301)).[[2]](#footnote-3)

As this example makes clear, President Bush’s decision to speak on the pending Supreme Court affirmative action cases generated a substantial amount of backlash and surprise from a variety of quarters. Interestingly, however, Bush was not widely criticized for violating the norm of judicial independence. For example, the *New York Times* extensively covered the speech (e.g., Clymer [2003](C:\\Users\\Beverly\\AppData\\Local\\Temp\\Temp2_978110849848.zip\\978110849848\\Body\\9781108498487rfa.docx" \l "rfa_086" \o "rfa_086); Greenhouse [2003](C:\\Users\\Beverly\\AppData\\Local\\Temp\\Temp2_978110849848.zip\\978110849848\\Body\\9781108498487rfa.docx" \l "rfa_192" \o "rfa_192); N. Lewis [2003](C:\\Users\\Beverly\\AppData\\Local\\Temp\\Temp2_978110849848.zip\\978110849848\\Body\\9781108498487rfa.docx" \l "rfa_266" \o "rfa_266); Nagourney [2003](C:\\Users\\Beverly\\AppData\\Local\\Temp\\Temp2_978110849848.zip\\978110849848\\Body\\9781108498487rfa.docx" \l "rfa_314" \o "rfa_314); New York Times [2003](C:\\Users\\Beverly\\AppData\\Local\\Temp\\Temp2_978110849848.zip\\978110849848\\Body\\9781108498487rfa.docx" \l "rfa_323" \o "rfa_323); Stevenson [2003](C:\\Users\\Beverly\\AppData\\Local\\Temp\\Temp2_978110849848.zip\\978110849848\\Body\\9781108498487rfa.docx" \l "rfa_398" \o "rfa_398)), but made no reference to judicial independence at all. To the contrary, the *Times* editorial board referred to Bush’s personal involvement in the cases as “entirely appropriate” (New York Times [2003](C:\\Users\\Beverly\\AppData\\Local\\Temp\\Temp2_978110849848.zip\\978110849848\\Body\\9781108498487rfa.docx" \l "rfa_323" \o "rfa_323)).

This stands in stark contrast to the response President Obama received in reaction to his comments about the Affordable Care Act cases described in the opening of this book (e.g., Bravin [2015](C:\\Users\\Beverly\\AppData\\Local\\Temp\\Temp2_978110849848.zip\\978110849848\\Body\\9781108498487rfa.docx" \l "rfa_049" \o "rfa_049)). Because of his position taking, Obama faced a great deal of public outcry and pushback, particularly involving claims that he violated the norm of judicial independence and engaged in the bullying of Supreme Court justices. Although we speculate that this is yet another example of how the presidency has changed as American politics have become more partisan, it is a notable distinction. Further, it demonstrates that the type of uproar and consternation concerning questions of judicial independence and executive overreach that Obama faced may not be reflective of other presidents.[[3]](#footnote-4) That is, while all presidents face the potential for some sort of backlash for their public remarks on pending Supreme Court decisions, that backlash can vary and it may not outweigh the benefits of this type of position taking.

The purpose of this chapter is to shed light on why presidents discuss pending Supreme Court cases in their public commentary, and what effect, if any, this commentary has on case outcomes. To vet why presidents speak about pending cases, we explore two primary motivations for going public on pending Supreme Court decisions. First, the popular expectation generated from Obama’s remarks prior to the Affordable Care Act cases is that presidents target decisions to influence the outcome of those cases (Rogol, Montgomery, and Kingsland [2018](C:\\Users\\Beverly\\AppData\\Local\\Temp\\Temp2_978110849848.zip\\978110849848\\Body\\9781108498487rfa.docx" \l "rfa_366" \o "rfa_366); Wallsten and Barnes [2012](C:\\Users\\Beverly\\AppData\\Local\\Temp\\Temp2_978110849848.zip\\978110849848\\Body\\9781108498487rfa.docx" \l "rfa_020" \o "rfa_020)). Though this is a common strategy in terms of using presidential speeches to shape the actions of Congress and the bureaucracy (Canes-Wrong [2001](C:\\Users\\Beverly\\AppData\\Local\\Temp\\Temp2_978110849848.zip\\978110849848\\Body\\9781108498487rfa.docx" \l "rfa_065" \o "rfa_065); Edwards and Barrett [2000](C:\\Users\\Beverly\\AppData\\Local\\Temp\\Temp2_978110849848.zip\\978110849848\\Body\\9781108498487rfa.docx" \l "rfa_124" \o "rfa_124); Whitford and Yates [2009](C:\\Users\\Beverly\\AppData\\Local\\Temp\\Temp2_978110849848.zip\\978110849848\\Body\\9781108498487rfa.docx" \l "rfa_439" \o "rfa_439)), this is a risky tactic with regard to the Supreme Court since it makes the president susceptible to attacks for violating the norm of judicial independence, alienating segments of the population, and other criticisms. Moreover, it is not entirely evident why a president would turn to public speeches to influence the justices when the Office of Solicitor General is available to litigate cases or file amicus curiae briefs before the Court on behalf of the administration (Black and Owens [2012](C:\\Users\\Beverly\\AppData\\Local\\Temp\\Temp2_978110849848.zip\\978110849848\\Body\\9781108498487rfa.docx" \l "rfa_035" \o "rfa_035)).

Given this, we explore a secondary reason to explain why presidents go public on pending Supreme Court decisions: to demonstrate their commitment to issues important to the American people. By discussing pending cases in their public remarks, presidents are able to show the citizenry their commitments to important issues and demonstrate they are willing to defend those positions in the face of legal challenges. This might be a particularly useful strategy for motivating public support for presidential priorities or to inspire partisan enthusiasm for the president. At the least, by commenting on important cases, presidents demonstrate that they are committed to the democratic norms of responding to issues of public concern and acting as the leaders of their political parties.

To evaluate these motivations, we have cataloged the number of times presidents discuss undecided Supreme Court cases during the Eisenhower to Obama administrations (1953–2017). Because presidents rarely go public on pending cases, inferential statistical models are inappropriate for our analysis. Accordingly, we present descriptive data that provide leverage over why presidents discuss pending cases. Our data allow us to examine the timing of statements, the types of speeches in which presidents mention cases, whether presidents take strong positions on case outcomes, the length of statements on pending decisions, and the outcome of the cases presidents discuss in their public commentary. Based on these analyses, we conclude that presidents’ primary motivation to speak about pending cases is not to influence their outcomes, but rather to take public positions that demonstrate their commitment to the policies implicated in the litigation.

Presidents Motivations to Target Court Decisions

Presidents are purposive actors who have significant time and resource constraints. Thus, any action by the president should be geared to achieve some end, as part of a larger strategy, and with the intent of minimizing costs. As with all other aspects of presidential leadership, therefore, we think that presidents are motivated to target pending Supreme Court decisions in their public remarks so long as doing so helps the president to obtain good policy, reelection, and/or historical achievement (e.g., Moe [1985](C:\\Users\\Beverly\\AppData\\Local\\Temp\\Temp2_978110849848.zip\\978110849848\\Body\\9781108498487rfa.docx" \l "rfa_304" \o "rfa_304)). Furthermore, presidents are only likely to engage in a discretionary activity, such as speaking publicly about a Supreme Court case, when they perceive some benefit to these efforts, and that this benefit outweighs the potential costs. As it relates to discussing pending cases, the primary costs are the time and energy spent preparing and delivering remarks about the cases, the negative impression that may come from violating the norm of judicial independence, and any loss in public support for the positions they take. The potential benefits to the president include influencing the outcome of the case and thereby influencing policy, building electoral support, and achieving some historical benefit, such as being associated with the establishment of a landmark Supreme Court decision.

The Costs of Going Public

While the burden of researching cases largely falls on White House staff, and is thus a minimal cost to the president individually, if presidents are viewed in a negative light for discussing pending cases, this might affect their public support and historical legacy. In particular, the norm of judicial independence coupled with the constitutional separation of powers insinuates that presidents should not actively lobby the Court via public appeals (Reddish [1995](C:\\Users\\Beverly\\AppData\\Local\\Temp\\Temp2_978110849848.zip\\978110849848\\Body\\9781108498487rfa.docx" \l "rfa_358" \o "rfa_358)). Indeed, President Obama’s remarks on the *Sebelius* case were seen by critics as “unprecedented” and in violation of the norm of decisional independence (Wallsten and Barnes [2012](C:\\Users\\Beverly\\AppData\\Local\\Temp\\Temp2_978110849848.zip\\978110849848\\Body\\9781108498487rfa.docx" \l "rfa_020" \o "rfa_020)). For example, Laurence Tribe suggested that “Even if such comments won’t affect the justices a bit, they can contribute to an atmosphere of public cynicism that I know this president laments” (Wallsten and Barnes [2012](C:\\Users\\Beverly\\AppData\\Local\\Temp\\Temp2_978110849848.zip\\978110849848\\Body\\9781108498487rfa.docx" \l "rfa_020" \o "rfa_020)). Consequently, there is a risk to presidents’ reputations as guardians of democratic and constitutional norms when they speak about cases pending before the Court.

Similarly, presidents might be criticized for the positions they take on pending cases in their public speeches. As noted on p. 000, Bush faced a host of criticism for his strong public position on the University of Michigan affirmative action cases, including claims that his position was disingenuous, abandoned racial minorities, and turned off political moderates. Further, Democrats were particularly vocal in their opposition to Bush, illustrating how members of the opposite party of the president can seize on such speeches in an effort to hurt the president in the eyes of the public.

The Role of the Office of Solicitor General

In addition to these costs associated with taking public positions on pending cases, the Office of Solicitor General (OSG) provides another reason why presidents may only sparingly use this rhetorical tactic. As the principal attorney for the executive branch in the Supreme Court, the OSG limits the need to make public appeals since it litigates cases on behalf of the president (Nicholson and Collins [2008](C:\\Users\\Beverly\\AppData\\Local\\Temp\\Temp2_978110849848.zip\\978110849848\\Body\\9781108498487rfa.docx" \l "rfa_324" \o "rfa_324); Pacelle [2003](C:\\Users\\Beverly\\AppData\\Local\\Temp\\Temp2_978110849848.zip\\978110849848\\Body\\9781108498487rfa.docx" \l "rfa_332" \o "rfa_332)). Further, because the Solicitor General serves at the pleasure of the president, the president can communicate directly with the OSG to ensure the office takes positions in important cases consistent with the president’s policy preferences (Caplan [1987](C:\\Users\\Beverly\\AppData\\Local\\Temp\\Temp2_978110849848.zip\\978110849848\\Body\\9781108498487rfa.docx" \l "rfa_069" \o "rfa_069); Days [2001](C:\\Users\\Beverly\\AppData\\Local\\Temp\\Temp2_978110849848.zip\\978110849848\\Body\\9781108498487rfa.docx" \l "rfa_107" \o "rfa_107); Salokar [1992](C:\\Users\\Beverly\\AppData\\Local\\Temp\\Temp2_978110849848.zip\\978110849848\\Body\\9781108498487rfa.docx" \l "rfa_374" \o "rfa_374)). If the federal government is a direct party to the case, the OSG represents the interest of the president as a litigant; if the federal government is not a direct party, the OSG can file amicus curiae briefs to make the justices aware of the president’s position in the case (Collins [2008a](C:\\Users\\Beverly\\AppData\\Local\\Temp\\Temp2_978110849848.zip\\978110849848\\Body\\9781108498487rfa.docx" \l "rfa_093" \o "rfa_093)). Thus, the OSG provides a direct and formal mechanism by which presidents can make their positions known to the justices.

Importantly, there is evidence that the justices grant the OSG a substantial amount of deference, ruling in favor of the positions advocated by the OSG in approximately 70 percent of cases (Black and Owens [2012](C:\\Users\\Beverly\\AppData\\Local\\Temp\\Temp2_978110849848.zip\\978110849848\\Body\\9781108498487rfa.docx" \l "rfa_035" \o "rfa_035)). Further, because the OSG is institutionalized, presidents face little risk of being accused of violating the norm of judicial independence by relying on the OSG to communicate their preferences to the justices. Thus, the OSG provides presidents with a formal mechanism to have their preferences translated to the Court in a manner that is both familiar to the justices and avoids the potential for criticism for violating the norm of judicial independence. Accordingly, this office may obviate the need for presidents to take public positions on pending cases, or at least minimize the frequency with which they do so.

The Benefits of Going Public

Just as there are costs to going public, and a clear institutional reason – the Office of Solicitor General – why presidents have little need to speak about pending cases, there are several reasons why presidents may be motivated to discuss pending cases. In determining whether to take public positions on pending cases, we posit that presidents will be motivated by two primary factors. First, presidents may take positions on pending cases in their public remarks to influence the outcome of cases through public leadership. This is consistent with the classic going public strategy (Kernell [1997](C:\\Users\\Beverly\\AppData\\Local\\Temp\\Temp2_978110849848.zip\\978110849848\\Body\\9781108498487rfa.docx" \l "rfa_245" \o "rfa_245)), in which presidents use public pressure to influence the Court to support the president’s position, much as they do with respect to influencing legislative outcomes. It is also in line with the popular view that presidents who speak about pending cases are trying to pressure the Court to adopt the president’s position. And there is some evidence that presidential power does extend to influence over judicial decisions. Yates and Whitford ([1998](C:\\Users\\Beverly\\AppData\\Local\\Temp\\Temp2_978110849848.zip\\978110849848\\Body\\9781108498487rfa.docx" \l "rfa_456" \o "rfa_456)) and Yates ([2002](C:\\Users\\Beverly\\AppData\\Local\\Temp\\Temp2_978110849848.zip\\978110849848\\Body\\9781108498487rfa.docx" \l "rfa_455" \o "rfa_455)) show, for example, that more popular presidents are more likely to see their preferences adopted by the Court (see also Ducat and Dudley [1989](C:\\Users\\Beverly\\AppData\\Local\\Temp\\Temp2_978110849848.zip\\978110849848\\Body\\9781108498487rfa.docx" \l "rfa_117" \o "rfa_117) with respect to federal district courts; but see Nicholson and Collins [2008](C:\\Users\\Beverly\\AppData\\Local\\Temp\\Temp2_978110849848.zip\\978110849848\\Body\\9781108498487rfa.docx" \l "rfa_324" \o "rfa_324) on Supreme Court amicus briefs). In addition, Rogol, Montgomery, and Kingsland ([2018](C:\\Users\\Beverly\\AppData\\Local\\Temp\\Temp2_978110849848.zip\\978110849848\\Body\\9781108498487rfa.docx" \l "rfa_366" \o "rfa_366)) demonstrate that, when the Court is ideologically unaligned with the president, the justices are more likely to rule in favor of the president’s policy preferences in civil rights and liberties cases when the president devotes a relatively large amount of attention to those issue areas in his State of the Union address.

Obviously, this potential for influence proceeds differently from what Kernell ([1997](C:\\Users\\Beverly\\AppData\\Local\\Temp\\Temp2_978110849848.zip\\978110849848\\Body\\9781108498487rfa.docx" \l "rfa_245" \o "rfa_245)) suggested would motivate a legislative response to presidential remarks. Recall that Kernell expected presidential speeches to create a groundswell of public support on behalf of the president’s position. In turn, the public would contact their legislators or otherwise put pressure on them to support the president or face electoral retaliation. This, for Kernell, is the mechanism that allows for going public to be successful in the legislative arena.

For the Court, presidential influence over public opinion would work in a different way. We would not expect the public to respond to presidential speeches by contacting the justices. But, there is fairly compelling evidence that the Court is receptive to public attitudes and tends to follow general trends in public opinion (e.g., Epstein and Martin [2010](C:\\Users\\Beverly\\AppData\\Local\\Temp\\Temp2_978110849848.zip\\978110849848\\Body\\9781108498487rfa.docx" \l "rfa_133" \o "rfa_133); Friedman [2009](C:\\Users\\Beverly\\AppData\\Local\\Temp\\Temp2_978110849848.zip\\978110849848\\Body\\9781108498487rfa.docx" \l "rfa_165" \o "rfa_165); Giles, Blackstone, and Vining Jr. [2008](C:\\Users\\Beverly\\AppData\\Local\\Temp\\Temp2_978110849848.zip\\978110849848\\Body\\9781108498487rfa.docx" \l "rfa_181" \o "rfa_181); McGuire and Stimson [2004](C:\\Users\\Beverly\\AppData\\Local\\Temp\\Temp2_978110849848.zip\\978110849848\\Body\\9781108498487rfa.docx" \l "rfa_296" \o "rfa_296)). Building off these literatures, we believe that presidential speeches about pending decisions may increase the salience of those issues to the public and motivate them to support the president’s position, while further encouraging the justices to consider public opinion as they deliberate over those issues. This approach to going public is more akin to Canes-Wrone’s ([2001](C:\\Users\\Beverly\\AppData\\Local\\Temp\\Temp2_978110849848.zip\\978110849848\\Body\\9781108498487rfa.docx" \l "rfa_065" \o "rfa_065)) model of influence through speeches, which also hinges on issue salience. Presidents, undoubtedly, are going to raise this when they use scarce resources to highlight a pending Court decision and so this approach would be plausible in theory, and consistent with previous research on presidential leadership through speechmaking. Under this theory of going public, of course, the ultimate target of the president’s speeches is the justices and the potential benefit is a favorable decision.

The second reason why presidents may speak about pending cases is to demonstrate their commitment to issues important to the American people and the democratic process. The public expects presidents to address issues of top concern to the nation (Waterman, Silva, and Jenkins-Smith [2014](C:\\Users\\Beverly\\AppData\\Local\\Temp\\Temp2_978110849848.zip\\978110849848\\Body\\9781108498487rfa.docx" \l "rfa_433" \o "rfa_433)). As a result, presidents may feel compelled to talk about cases prior to a decision. Such speeches might include explaining to the public the position taken in a legal brief filed on behalf of the federal government, or educating the public as to why the executive branch believes a case should be decided in a particular way. Doing so is consistent with the foundations of the permanent campaign (Doherty [2012](C:\\Users\\Beverly\\AppData\\Local\\Temp\\Temp2_978110849848.zip\\978110849848\\Body\\9781108498487rfa.docx" \l "rfa_113" \o "rfa_113)), a president’s relentless pursuit of public support through travel and public speechmaking.

Both of these reasons for presidential action are consistent with the coordinate construction, or departmentalism, view of constitutional interpretation. Unlike the judicial supremacy perspective, which posits that the judicial branch is the primary arbiter of constitutional meaning, this view holds that all three branches play a role in constitutional interpretation (e.g., Scigliano [1971](C:\\Users\\Beverly\\AppData\\Local\\Temp\\Temp2_978110849848.zip\\978110849848\\Body\\9781108498487rfa.docx" \l "rfa_378" \o "rfa_378); Whittington [2007](C:\\Users\\Beverly\\AppData\\Local\\Temp\\Temp2_978110849848.zip\\978110849848\\Body\\9781108498487rfa.docx" \l "rfa_444" \o "rfa_444)). Thus, when the president takes a public position on a pending Supreme Court case, he is not violating the norm of judicial independence. Instead, he is fulfilling his duty as a legitimate interpreter of the Constitution who is engaging in an open dialogue with the judicial branch regarding how best to apply the Constitution to a given dispute. Further, when the president takes a public position on a pending case, the president can address issues of significance to the public. Because the president, unlike the justices, is elected, this can potentially provide the opportunity for democratic input into constitutional interpretation (e.g., Kramer [2004](C:\\Users\\Beverly\\AppData\\Local\\Temp\\Temp2_978110849848.zip\\978110849848\\Body\\9781108498487rfa.docx" \l "rfa_251" \o "rfa_251); Steilen [2013](C:\\Users\\Beverly\\AppData\\Local\\Temp\\Temp2_978110849848.zip\\978110849848\\Body\\9781108498487rfa.docx" \l "rfa_396" \o "rfa_396)). Though presidents vary with respect to whether they follow departmentalism or judicial supremacy views of constitutional interpretation (Whittington [2001](C:\\Users\\Beverly\\AppData\\Local\\Temp\\Temp2_978110849848.zip\\978110849848\\Body\\9781108498487rfa.docx" \l "rfa_441" \o "rfa_441)), it is evident that all presidents can claim at least some authority over constitutional interpretation if they see fit. One way that they can do this, largely absent from scholarship on the coordinate construction of the Constitution, is by going public on pending decisions.

In addition, presidents might discuss pending cases to appeal to their partisan bases and motivate these voters. After all, presidents are most likely to represent partisan preferences in their public rhetoric (Wood [2009](C:\\Users\\Beverly\\AppData\\Local\\Temp\\Temp2_978110849848.zip\\978110849848\\Body\\9781108498487rfa.docx" \l "rfa_450" \o "rfa_450)), something that should be reflected in their position taking on pending cases. Thus, presidents can show their partisan supporters that they are aware of the issues important to them and are willing to take public stances on those issues, which may increase or maintain their co-partisans’ support for the president. Under this theory, the ultimate target of these speeches is the public, not the justices, and the potential benefit is mobilizing public support behind the president’s positions for reasons other than to influence case outcomes. Indeed, many of the newspaper articles involving President Bush’s position on the University of Michigan affirmative action cases made this very point – that presidents can take clear ideological positions that appeal to their bases in a manner that is likely to generate media coverage (e.g., N. Lewis [2003](C:\\Users\\Beverly\\AppData\\Local\\Temp\\Temp2_978110849848.zip\\978110849848\\Body\\9781108498487rfa.docx" \l "rfa_266" \o "rfa_266); Stevenson [2003](C:\\Users\\Beverly\\AppData\\Local\\Temp\\Temp2_978110849848.zip\\978110849848\\Body\\9781108498487rfa.docx" \l "rfa_398" \o "rfa_398); Wilson [2003](C:\\Users\\Beverly\\AppData\\Local\\Temp\\Temp2_978110849848.zip\\978110849848\\Body\\9781108498487rfa.docx" \l "rfa_446" \o "rfa_446)).

Discussing pending cases is not a cost-free activity, of course, and thus requires presidents to understand the costs and benefits of doing so. Further, the ability of the OSG to represent presidents’ interests limits the need to turn to public appeals on pending decisions, which supports the empirical data revealed in [Chapter 1](C:\\Users\\Beverly\\AppData\\Local\\Temp\\Temp2_978110849848.zip\\978110849848\\Body\\9781108498487c01.docx" \l "c001" \o "c001) that going public on pending cases is quite rare. Moreover, there is always the potential criticism that a president may be opportunistic and look to pander to the public by taking positions on high profile issues. This criticism may be unfounded, however, given that presidents are unlikely to speak about an issue simply to pander to public opinion (Canes-Wrone [2006](C:\\Users\\Beverly\\AppData\\Local\\Temp\\Temp2_978110849848.zip\\978110849848\\Body\\9781108498487rfa.docx" \l "rfa_066" \o "rfa_066); Jacobs and Shapiro [2000](C:\\Users\\Beverly\\AppData\\Local\\Temp\\Temp2_978110849848.zip\\978110849848\\Body\\9781108498487rfa.docx" \l "rfa_228" \o "rfa_228)). Therefore, although we think that the decision to speak about cases is strategic – in that presidents will consider the potential costs and benefits of doing so – we also believe that presidential statements on pending Court cases reflect presidents’ sincere preferences (Peterson [1990](C:\\Users\\Beverly\\AppData\\Local\\Temp\\Temp2_978110849848.zip\\978110849848\\Body\\9781108498487rfa.docx" \l "rfa_342" \o "rfa_342)).

Understanding Presidents’ Motivations for Going Public

We have already established in [Chapter 1](C:\\Users\\Beverly\\AppData\\Local\\Temp\\Temp2_978110849848.zip\\978110849848\\Body\\9781108498487c01.docx" \l "c001" \o "c001) that presidents rarely go public on pending Supreme Court decisions. They do so, nevertheless, and there are two competing views that appear to best summarize presidents’ likely motivations. First, presidents may go public in an effort to influence case outcomes. Second, presidents may go public in an effort to demonstrate that they are responsive to issues that are important to the American public. We explore how we might parse these two motivations. Note that we do not contend these motivations are always mutually exclusive. Rather, we believe that we can paint a picture of overall presidential behavior based on a variety of factors that are more likely to correspond to one approach or the other. With this information in hand, we believe we can then provide some generalizable insights about presidential motivations for position taking on pending Supreme Court decisions.

Timing of Remarks

If presidents’ primary motivation for discussing pending cases in their public speeches is to influence the justices’ decisions, their speeches should share several common characteristics. First, the timing of speeches on pending decisions may signal the president’s intent in speaking about them. If presidents are primarily motivated to influence case outcomes with their speeches, those speeches should cluster within days of the date of oral argument. Such is the case because the justices meet in conference later in the week following oral argument to cast their initial votes and begin the opinion writing process (Baum [2013](C:\\Users\\Beverly\\AppData\\Local\\Temp\\Temp2_978110849848.zip\\978110849848\\Body\\9781108498487rfa.docx" \l "rfa_027" \o "rfa_027), 109). Further, the justices begin forming their opinions about the outcome of cases in the weeks prior to oral argument based on the legal briefs, lower court opinions, and bench memoranda that accompany the case (Corley, Collins, and Calvin [2011](C:\\Users\\Beverly\\AppData\\Local\\Temp\\Temp2_978110849848.zip\\978110849848\\Body\\9781108498487rfa.docx" \l "rfa_102" \o "rfa_102); Ward and Weiden [2006](C:\\Users\\Beverly\\AppData\\Local\\Temp\\Temp2_978110849848.zip\\978110849848\\Body\\9781108498487rfa.docx" \l "rfa_431" \o "rfa_431)). Thus, the date of oral argument represents one of the last opportunities to shape the justices’ decisions before they begin casting votes and writing opinions. Further, it is perhaps the point in which the justices’ attention is most focused on a given case. Moreover, the media devote substantial attention to covering oral arguments (Clark, Lax, and Rice [2015](C:\\Users\\Beverly\\AppData\\Local\\Temp\\Temp2_978110849848.zip\\978110849848\\Body\\9781108498487rfa.docx" \l "rfa_082" \o "rfa_082)). By taking positions on cases around the date of oral arguments, presidents are provided with the opportunity to shape the nature of that coverage, potentially putting their positions on the justices’ radar. Conversely, speeches made months prior to oral argument might not permeate the justices’ psyches since they are unlikely to have given the case close scrutiny at such an early date. Similarly, speeches made months after oral argument are probably not an effective means of influencing the justices since they would be inclined to have already joined drafts of the opinions by then. Thus, while such early or late speeches may prove useful for presidents seeking to demonstrate their commitment to matters of public concern, they are not likely to be effective as a means of influencing the Court. Accordingly, if presidents discuss pending cases in an effort to influence the justices, we expect that their speeches will cluster within days of the date of oral argument.

Types of Remarks

Second, we expect presidents to comment on cases in prepared remarks if they are attempting to influence case outcomes. There are three main means by which presidents can communicate: in spoken, prepared remarks, such as formal addresses; in written, prepared remarks, such as in memoranda or statements; and in unprepared, spoken responses, such as question and answer sessions with reporters. If presidents are trying to influence the justices, we expect them to develop this strategy, including their approach and choices of words, internally, and to communicate their position publicly in prepared remarks. Such is the case because prepared remarks may be more likely to set the media’s agenda, therefore raising the salience of the case (Bradshaw, Coe, and Neumann [2014](C:\\Users\\Beverly\\AppData\\Local\\Temp\\Temp2_978110849848.zip\\978110849848\\Body\\9781108498487rfa.docx" \l "rfa_048" \o "rfa_048)).[[4]](#footnote-5) And since the media often drives the public’s agenda (Iyengar and Kinder [1987](C:\\Users\\Beverly\\AppData\\Local\\Temp\\Temp2_978110849848.zip\\978110849848\\Body\\9781108498487rfa.docx" \l "rfa_227" \o "rfa_227)), setting the media’s agenda may motivate public interest in the case, which could affect the justices’ decisions (McGuire and Stimson [2004](C:\\Users\\Beverly\\AppData\\Local\\Temp\\Temp2_978110849848.zip\\978110849848\\Body\\9781108498487rfa.docx" \l "rfa_296" \o "rfa_296)).

Conversely, presidents are more likely comment on cases in response to reporters’ questions when they are not trying to influence the outcome of cases. Although presidents often anticipate the topics reporters are likely to ask about (Eshbaugh-Soha [2013](C:\\Users\\Beverly\\AppData\\Local\\Temp\\Temp2_978110849848.zip\\978110849848\\Body\\9781108498487rfa.docx" \l "rfa_142" \o "rfa_142); Kumar [2007](C:\\Users\\Beverly\\AppData\\Local\\Temp\\Temp2_978110849848.zip\\978110849848\\Body\\9781108498487rfa.docx" \l "rfa_255" \o "rfa_255)), a question-and-answer format allows the media to dictate the topic of discussion and guide the president’s comments through their questions. Presidents may be compelled to answer reporters’ questions about Court cases – even when they have no intent to affect the Court’s decision – so as to demonstrate a democratic commitment to newsworthy issues that are also important to the public, with the added benefit, we think, of building public or partisan support for their position.

In addition, responses offer presidents less control over the exact language used in their comments than prepared remarks, which also suggests a weaker form of commitment to the positions taken on the cases. For example, President Obama misspoke when he described the administration’s position in *United States* v. *Windsor* ([2013](C:\\Users\\Beverly\\AppData\\Local\\Temp\\Temp2_978110849848.zip\\978110849848\\Body\\9781108498487rfa.docx" \l "rfa_424" \o "rfa_424)) as follows: “In the meantime, we filed briefs before the Supreme Court that say we think that any discrimination against gays, lesbians, transgenders is subject to heightened scrutiny, and we don’t think that DOMA is unconstitutional.”[[5]](#footnote-6) Though the White House subsequently corrected this error regarding the constitutionality of the Defense of Marriage Act, it is unlikely that the president would have stumbled in this manner in a prepared remark. Accordingly, if presidents discuss pending cases for the purpose of influencing the justices, we expect to observe most comments come in the form of written or spoken prepared remarks.

Position Strength

Third, if presidents are primarily interested in influencing case outcomes, we expect that they will take strong positions on the outcomes in their public speeches. By taking unequivocal positions, in which there is no ambiguity as to the president’s preferred outcome for the case, presidents send the public and the justices a clear signal that they have a strong preference over how the case should be decided. Further, the media may be more attracted to covering such speeches since they represent instances in which presidents take an unwavering public position on a case. This media coverage might increase the justices’ awareness of the president’s position. And, because the president plays a role in the implementation of the Court’s decisions (Epstein and Knight [1998](C:\\Users\\Beverly\\AppData\\Local\\Temp\\Temp2_978110849848.zip\\978110849848\\Body\\9781108498487rfa.docx" \l "rfa_130" \o "rfa_130); Hall [2014](C:\\Users\\Beverly\\AppData\\Local\\Temp\\Temp2_978110849848.zip\\978110849848\\Body\\9781108498487rfa.docx" \l "rfa_204" \o "rfa_204)), a strong public remark about a case may signal to the justices that the president will faithfully oversee the implementation of the Court’s decision if the justices rule in favor of the president’s view. On the contrary, if presidents are primarily concerned with addressing issues of public concern, they may avoid taking strong positions on cases for fear that doing so may offend some members of the public. Given this, if presidents discuss pending cases for the purpose of influencing the justices, we expect presidents will take strong positions on the outcome of cases.

Presidential Priorities

Fourth, if presidents chiefly use their speeches to influence the justices, we believe they will focus on cases involving presidential policy priorities. Presidents are most likely to go public on their top policy priorities because a defeat on these issues could damage their reputations and undermine their claims for historical relevance (Neustadt [1990](C:\\Users\\Beverly\\AppData\\Local\\Temp\\Temp2_978110849848.zip\\978110849848\\Body\\9781108498487rfa.docx" \l "rfa_320" \o "rfa_320)). For example, should the Court strike down a president’s signature policy achievement, not only is there an immediate loss in terms of eliminating the policy, but there is also the potential for historical damage in the sense that the president might be viewed as being ineffective (Light [1999](C:\\Users\\Beverly\\AppData\\Local\\Temp\\Temp2_978110849848.zip\\978110849848\\Body\\9781108498487rfa.docx" \l "rfa_267" \o "rfa_267)). To counter such criticism, presidents may attempt to pressure justices to support presidential preferences on cases involving their top policy priorities. Conversely, if presidents are motivated to discuss cases primarily as a way of taking positions on matters of public concern, they will not limit their remarks to cases involving policy priorities. Instead, they can comment on a wider array of cases, many of which may be salient to the public and media, but that are not top presidential priorities. Accordingly, if presidents are primarily motivated to influence the justices, we believe they will tend to comment on cases involving presidential policy priorities.

Length of Remarks

Finally, if presidents’ intent is to influence case outcomes, we posit that their remarks on pending cases will be relatively long. Presidents who devote comparatively extensive remarks to pending cases illustrate that they have thought in depth about the case and understand its implications. As it is, lengthier speeches provide presidents with the opportunity to explain why their preferred position has merit and is a better option for the justices than their opponent’s position. Since Supreme Court justices are used to writing lengthy opinions (Black and Spriggs [2008](C:\\Users\\Beverly\\AppData\\Local\\Temp\\Temp2_978110849848.zip\\978110849848\\Body\\9781108498487rfa.docx" \l "rfa_037" \o "rfa_037)), they may better appreciate the time and energy that go into lengthy remarks on pending cases more so than brief comments with little legal depth. Further, presidential influence through speeches centers on the attention presidents devote to an issue, such that presidents are more likely to increase their legislative success by going public more frequently (Barrett [2004](C:\\Users\\Beverly\\AppData\\Local\\Temp\\Temp2_978110849848.zip\\978110849848\\Body\\9781108498487rfa.docx" \l "rfa_021" \o "rfa_021)) and increase public concern by devoting more sentences to a policy (Cohen [1997](C:\\Users\\Beverly\\AppData\\Local\\Temp\\Temp2_978110849848.zip\\978110849848\\Body\\9781108498487rfa.docx" \l "rfa_088" \o "rfa_088)). Given this, presidents are likely to be familiar with the benefits of giving certain issues a great deal of attention and pursue this strategy in their efforts to influence the Court. Conversely, if presidents are primarily interested in addressing matters of public concern, the length of their comments is not as relevant as having taken a position, particularly given the media’s tendency to cover soundbites, not lengthy explanations. Thus, if presidents discuss pending cases for the purpose of influencing the justices, we expect such speeches to be relatively long.

Investigating Presidential Discussions of Pending Cases

To examine presidential motivations for going public on the Court’s pending cases, we use the data described in [Chapter 1](C:\\Users\\Beverly\\AppData\\Local\\Temp\\Temp2_978110849848.zip\\978110849848\\Body\\9781108498487c01.docx" \l "c001" \o "c001). [Figure 2.1](#c002_fig1) presents the number of presidential comments on pending Supreme Court cases. The black portion of the bars indicates the number of speeches in which presidents mention pending cases and take a position on those cases. The white portion of the bars indicates those speeches in which presidents mention pending cases, but do not take a position on the cases. For example, in response to a reporter’s question about *Webster* v. *Reproductive Health Services* ([1989](C:\\Users\\Beverly\\AppData\\Local\\Temp\\Temp2_978110849848.zip\\978110849848\\Body\\9781108498487rfa.docx" \l "rfa_434" \o "rfa_434)), President George H. W. Bush made his position on the case evident:

It is an emotional issue, and I am firmly positioned in favor of overturn of *Roe* v. *Wade*. And that’s my position, and I’m not going to change that position. But I don’t want to see the divisiveness that that whole issue causes split this country. And yet the decision is going to be – I don’t know what they’re going to decide, but my position on it is very clear.[[6]](#footnote-7)

Conversely, President Obama discussed *United States* v. *Texas* ([2016](C:\\Users\\Beverly\\AppData\\Local\\Temp\\Temp2_978110849848.zip\\978110849848\\Body\\9781108498487rfa.docx" \l "rfa_421" \o "rfa_421)) in response to a reporter’s questions about the case, but did not take a position on the case’s outcome:

So we put forward a plan. Part of it we were able to implement: the DREAM Act kids who we were able to make sure were treated like the young Americans that they are. We then had an additional program through administrative action that the Supreme Court put a stay on – or the lower courts put a stay on, and is about to go to the Supreme Court. In part, the process takes a long time generally. With the Supreme Court one Justice short, it will be interesting to see whether or not they can come to a ruling or whether they’re – they arrive at a tie, a 4–4 tie. We don’t know yet. That’s pending.

In the meantime, we’re still implementing a number of reforms and changes to make the system – the legal immigration system smoother, not as expensive, fairer to people, to treat families with more respect. We have changed our priorities in terms of enforcement so that we’re not deporting and separating families as much and more focused on going after criminals and people who pose a security threat to the community. But our hands are a little bit tied on some of the bigger things until the Supreme Court rules.[[7]](#footnote-8)

[Figure 2.1](#c002_fig1) reveals several important findings. First, presidential discussions of pending cases are rare. From 1953 to 2017, presidents discussed 36 unique pending cases in 54 speeches. (Appendix Table 2.1 provides a list of these cases.) Moreover, when they discuss cases, they do not always take positions on those cases. Of the 54 speeches that mention a pending case, presidents took a position on the case mentioned in 40 speeches (74.1 percent). Second, presidential discussions of pending cases have increased over time. Although each president in our sample commented on at least one pending Supreme Court case, recent presidents have commented on more pending cases in comparison with presidents who served before Carter. Prior to Carter, presidents from Eisenhower to Ford commented on cases in a single speech each, with the exception of Eisenhower and Nixon, who addressed two and three cases, respectively. Since the Carter administration, presidents have discussed cases in an average of approximately eight speeches per president, with Clinton and Obama mentioning cases in 11 and 13 speeches each. This finding also holds for position taking on pending cases. Presidents Kennedy, Johnson, Nixon, and Ford took a position on a single case each. Since Carter, presidents have taken positions on pending cases in an average of six speeches per president. Further, presidents have become increasingly accustomed to addressing the same case in multiple speeches. For example, President George W. Bush discussed *Hamdan* v. *Rumsfeld* in four speeches, and President Obama addressed *King* v. *Burwell* (2015) in three speeches and *National Federation of Independent Business* v. *Sebelius* in four speeches. This overall increase in going public with respect to the Court’s pending decisions is consistent with the tendency of more recent presidents to speak about judicial nominations (Cameron and Park [2011](C:\\Users\\Beverly\\AppData\\Local\\Temp\\Temp2_978110849848.zip\\978110849848\\Body\\9781108498487rfa.docx" \l "rfa_064" \o "rfa_064)) and the Supreme Court in general terms (Blackstone and Goelzhauser [2014](C:\\Users\\Beverly\\AppData\\Local\\Temp\\Temp2_978110849848.zip\\978110849848\\Body\\9781108498487rfa.docx" \l "rfa_040" \o "rfa_040)). Moreover, this figure should put to rest the claim that President Obama’s position taking regarding the Affordable Care Act cases was unprecedented.

Begin Table.1

**Appendix Table.2.1**

Pending Supreme Court cases discussed by presidents, 1953–2017

| Case (Year) | President | Speeches | Position |
| --- | --- | --- | --- |
| *Cooper* v. *Aaron* ([1958](C:\\Users\\Beverly\\AppData\\Local\\Temp\\Temp2_978110849848.zip\\978110849848\\Body\\9781108498487rfa.docx" \l "rfa_101" \o "rfa_101)) | Eisenhower | 1 | 0 |
| *US* v. *Cannelton Sewer Pipe Co.* (1960) | Eisenhower | 1 | 0 |
| *Peterson* v. *City of Greenville* (1963) | Kennedy | 1 | 100 |
| *Heart of Atlanta Motel* v. *US* (1964) | Johnson | 1 | 100 |
| *US* v. *Nevada* (1973) | Nixon | 1 | 100 |
| *US* v. *Nixon* ([1974](C:\\Users\\Beverly\\AppData\\Local\\Temp\\Temp2_978110849848.zip\\978110849848\\Body\\9781108498487rfa.docx" \l "rfa_420" \o "rfa_420)) | ,Nixon | 2 | 0 |
| *Runyon* v. *McCrary* ((1976) | Ford | 1 | 100 |
| *Regents of California* v. *Bakke* ([1978](C:\\Users\\Beverly\\AppData\\Local\\Temp\\Temp2_978110849848.zip\\978110849848\\Body\\9781108498487rfa.docx" \l "rfa_359" \o "rfa_359)) | Carter | 2 | 50 |
| *New York Times* v. *Jascalevich* (1978) | Carter | 1 | 0 |
| *INS* v. *Chadha* ([1983](C:\\Users\\Beverly\\AppData\\Local\\Temp\\Temp2_978110849848.zip\\978110849848\\Body\\9781108498487rfa.docx" \l "rfa_226" \o "rfa_226)) | Carter | 2 | 100 |
| *Boston Firefighters* v. *NAACP* (1983) | Reagan | 1 | 100 |
| *Estate of Thornton* v. *Caldor* (1985) | Reagan | 1 | 100 |
| *Bowsher* v. *Synar* ([1986](C:\\Users\\Beverly\\AppData\\Local\\Temp\\Temp2_978110849848.zip\\978110849848\\Body\\9781108498487rfa.docx" \l "rfa_045" \o "rfa_045)) | Reagan | 3 | 0 |
| *Webster* v. *Reproductive Health Services* ([1989](C:\\Users\\Beverly\\AppData\\Local\\Temp\\Temp2_978110849848.zip\\978110849848\\Body\\9781108498487rfa.docx" \l "rfa_434" \o "rfa_434)) | H. W. Bush | 3 | 66.7 |
| *Michigan Dept. of State Police* v. *Sitz* (1990) | H. W. Bush | 1 | 100 |
| *Planned Parenthood* v. *Casey* (1992) | H. W. Bush | 2 | 100 |
| *Miller* v. *Johnson* (1995) | Clinton | 1 | 100 |
| *US* v. *Lopez* (1995) | Clinton | 1 | 100 |
| *Printz* v. *US* ([1997](C:\\Users\\Beverly\\AppData\\Local\\Temp\\Temp2_978110849848.zip\\978110849848\\Body\\9781108498487rfa.docx" \l "rfa_350" \o "rfa_350)) | Clinton | 2 | 100 |
| *Clinton* v. *Jones* (1997) | Clinton | 1 | 0 |
| *Raines* v. *Byrd* (1997) | Clinton | 2 | 50 |
| *Clinton* v. *New York* ([1998](C:\\Users\\Beverly\\AppData\\Local\\Temp\\Temp2_978110849848.zip\\978110849848\\Body\\9781108498487rfa.docx" \l "rfa_085" \o "rfa_085)) | Clinton | 1 | 100 |
| *Department of Commerce* v. *US House* (1999) | Clinton | 1 | 100 |
| *FDA* v. *Brown & Williamson Tobacco* (2000) | Clinton | 1 | 100 |
| *Bush* v. *Gore* (2000) | Clinton | 1 | 0 |
| *Gratz* v. *Bollinger* ([2003](C:\\Users\\Beverly\\AppData\\Local\\Temp\\Temp2_978110849848.zip\\978110849848\\Body\\9781108498487rfa.docx" \l "rfa_191" \o "rfa_191)) | W. Bush | 1 | 100 |
| *Grutter* v. *Bollinger* ([2003](C:\\Users\\Beverly\\AppData\\Local\\Temp\\Temp2_978110849848.zip\\978110849848\\Body\\9781108498487rfa.docx" \l "rfa_201" \o "rfa_201)) | W. Bush | 1 | 100 |
| *Hamdan* v. *Rumsfeld* ([2006](C:\\Users\\Beverly\\AppData\\Local\\Temp\\Temp2_978110849848.zip\\978110849848\\Body\\9781108498487rfa.docx" \l "rfa_207" \o "rfa_207)) | W. Bush | 4 | 50 |
| *al-Marr*i v. *Spagone* ([2009](C:\\Users\\Beverly\\AppData\\Local\\Temp\\Temp2_978110849848.zip\\978110849848\\Body\\9781108498487rfa.docx" \l "rfa_006" \o "rfa_006)) | Obama | 1 | 100 |
| *NFIB* v. *Sebelius* ([2012](C:\\Users\\Beverly\\AppData\\Local\\Temp\\Temp2_978110849848.zip\\978110849848\\Body\\9781108498487rfa.docx" \l "rfa_316" \o "rfa_316)) | Obama | 4 | 100 |
| *US* v. *Windsor* ([2013](C:\\Users\\Beverly\\AppData\\Local\\Temp\\Temp2_978110849848.zip\\978110849848\\Body\\9781108498487rfa.docx" \l "rfa_424" \o "rfa_424)) | Obama | 1 | 100 |
| *Hollingsworth* v. *Perry* ([2013](C:\\Users\\Beverly\\AppData\\Local\\Temp\\Temp2_978110849848.zip\\978110849848\\Body\\9781108498487rfa.docx" \l "rfa_220" \o "rfa_220)) | Obama | 1 | 100 |
| *McCutcheon* v. *FEC* ([2014](C:\\Users\\Beverly\\AppData\\Local\\Temp\\Temp2_978110849848.zip\\978110849848\\Body\\9781108498487rfa.docx" \l "rfa_294" \o "rfa_294)) | Obama | 1 | 100 |
| *King* v. *Burwell* (2015) | Obama | 3 | 100 |
| *Obergefell* v. *Hodges* ([2015](C:\\Users\\Beverly\\AppData\\Local\\Temp\\Temp2_978110849848.zip\\978110849848\\Body\\9781108498487rfa.docx" \l "rfa_328" \o "rfa_328)) | Obama | 1 | 100 |
| *US* v. *Texas* (2016) | Obama | 1 | 100 |
| Overall |  | 54 | 74.1 |

**Speeches** represents the number of speeches in which presidents discussed each case. **Position** indicates the percentage of speeches in which presidents took a position on the case.

End Table.1

XX INSERT Figure 2.1. The number of presidential speeches on pending cases, 1953–2017 NEAR HERE XX

We continue our investigation by examining the characteristics of the speeches under analysis. Because we are most interested in those speeches in which presidents engaged in position taking on cases, we limit our remaining analyses to those instances in which presidents took a position on a pending case. As noted above, since presidents comment on pending cases very rarely, this small sample size necessarily limits the extent of our analysis. Therefore, the remainder of our discussion is also descriptive in nature.

We begin by examining the timing of presidential speeches on pending cases. To calculate this information, we compared the date of the speech to the oral argument date, as indicated in Spaeth et al. ([2018](C:\\Users\\Beverly\\AppData\\Local\\Temp\\Temp2_978110849848.zip\\978110849848\\Body\\9781108498487rfa.docx" \l "rfa_391" \o "rfa_391)). [Figure 2.2](#c002_fig2) reports the number of days from the date of oral argument that the speech was given. Negative values indicate the number of days *before* oral argument that the speech was given, and positive values indicate the number of days *after* oral argument that the speech was given. The solid line indicates the scaled normal density curve.

Begin Figure 2.2

Figure 2.2. The timing of presidential speeches on pending Supreme Court decisions relative to the date of oral argument, 1953–2017

*Note*: Negative values indicate the number of days before oral argument that the speech was given, and positive values indicate the number of days after oral argument that the speech was given. The solid line indicates the scaled normal density curve.

End Figure 2.2

On average, presidents take positions on cases 89 days before oral argument (standard deviation = 219), although there is some evidence that speeches cluster around oral argument.[[8]](#footnote-9) For example, 11 of the 39[[9]](#footnote-10) speeches (28.2 percent) were given within a month before or after oral argument. However, if presidents’ motivation for discussing pending cases was to influence the justices, we would expect a much higher percentage of speeches to cluster around the date of oral arguments since that date marks the period in which the justices’ attention is most focused on the cases. Indeed, even a generous calculation of ± one month around oral arguments indicates that only about one in four speeches coincide with this time period. This provides perhaps the most compelling evidence that presidents’ primary motivation for position taking on pending cases is not to influence the justices, but rather to address matters of public concern and appeal to their political bases, as it indicates that presidential speeches are rarely timed to coincide with the period of time in which the justices are most engaged with their cases.

[Figure 2.3](#c002_fig3) presents the types of remarks in which presidents discussed Supreme Court cases. Written, prepared remarks include messages to Congress, signing remarks, and, most commonly, policy statements. Spoken, prepared remarks consist of statements made during speeches, such as those with religious leaders and interest groups. Responses include unprepared oral remarks, such as those made during news conferences, interviews with reporters, and during question-and-answer sessions. Overall, presidents have taken a position on pending cases in 10 written, prepared remarks; 11 spoken, prepared remarks; and 19 spoken, unprepared responses. Thus, presidents discuss pending cases in prepared and unprepared remarks with roughly equal frequency. Indeed, 19 of the presidents’ 40 (47.5 percent) mentions of pending Supreme Court cases were made in some form of question-and-answer session.[[10]](#footnote-11) Among these, nine were responses to questions in more structured press conferences. Although presidents have some control over the subject of questions asked (Eshbaugh-Soha [2013](C:\\Users\\Beverly\\AppData\\Local\\Temp\\Temp2_978110849848.zip\\978110849848\\Body\\9781108498487rfa.docx" \l "rfa_142" \o "rfa_142); Kumar [2007](C:\\Users\\Beverly\\AppData\\Local\\Temp\\Temp2_978110849848.zip\\978110849848\\Body\\9781108498487rfa.docx" \l "rfa_255" \o "rfa_255)) and are likely to be aware that a reporter will ask about a high-profile Supreme Court case, the president’s decision to comment on pending cases in response to reporters’ questions suggests that presidents often go public on Supreme Court cases to demonstrate a democratic commitment to address issues of public concern, not to purposively influence the Court’s decision. If that was the case, we would expect to see substantially more discussions of pending cases in prepared remarks, as compared with11 unprepared remarks. Instead, presidents address pending cases in almost an equal amount of prepared and unprepared remarks.

XX INSERT Figure 2.3. The number of presidential speeches by type of remark, 1953–2017 NEAR HERE XX

[Figure 2.4](#c002_fig4) illustrates the frequency with which presidents take strong positions on pending decisions. Strong positions are coded as those in which presidents expressed an unequivocal and clear position as to their preferred outcome of the case. Strong positions often involve presidents detailing their stance on a piece of legislation being reviewed or specifically noting that the Court should rule in a particular way. Those positions not coded as strong include instances in which presidents suggest a law is constitutional, restate the position taken by the Solicitor General in a case without advocating for it, or make a statement from which the president’s position can be inferred. For example, President Clinton’s position on *Printz* v. *United States* ([1997](C:\\Users\\Beverly\\AppData\\Local\\Temp\\Temp2_978110849848.zip\\978110849848\\Body\\9781108498487rfa.docx" \l "rfa_350" \o "rfa_350)) is coded as strong:

Now the Supreme Court has agreed to review a case over the constitutionality of requiring local law enforcement officials to help make sure that a person buying a handgun is legally entitled to do so. Well, I just want to make clear I am going to do everything in my power to keep the Brady Bill the law of the land. It’s keeping people alive. It’s a good thing. Convicted felons and fugitives and people who are a threat to the community or to their own spouses and children should not be out there, if we can keep them legally from having the handguns by a simple waiting period so that we can check whether they should have it or not. Every law enforcement organization in this country has endorsed the Brady Bill. And we dare not walk away from it. It is keeping people alive.[[11]](#footnote-12)

Conversely, President Carter’s position in *Regents of the University of California* v. *Bakke* ([1978](C:\\Users\\Beverly\\AppData\\Local\\Temp\\Temp2_978110849848.zip\\978110849848\\Body\\9781108498487rfa.docx" \l "rfa_359" \o "rfa_359)) is not coded as a strong position, as revealed in this portion of his response to a reporter’s question:

Well, as you know, we filed a brief that was prepared by the Solicitor General, Mr. McCree, which I think is compatible with what you would have wanted. This is the White House position, because I personally approved the brief. I am not a lawyer. And the Attorney General filed it on behalf of me and the entire administration.[[12]](#footnote-13)

Overall, presidents took strong positions on pending cases in 19 of the 40 speeches in which they took a position on a case (47.5 percent). Interestingly, no president took a strong position until George H. W. Bush in 1989. Since that date, presidents took strong positions in 63 percent of speeches, with Presidents Clinton and Obama most frequently taking strong positions in 67 percent of their respective speeches. Considered as a whole, [Figure 2.4](#c002_fig4) reveals that, though strong position taking has increased over time, this is not the dominant strategy for presidents when they take positions on pending cases. Instead, presidents more frequently take weaker positions on cases, a strategy that is consistent with addressing issues of public concern to demonstrate that they are in touch with issues important to the American people and appealing to their political bases, rather than attempting to influence the outcome of the Court’s decisions.

XX INSERT Figure 2.4. The number of strong positions taken on Supreme Court cases by presidents, 1953–2017 NEAR HERE XX

[Figure 2.5](#c002_fig5) illuminates how often presidents discuss pending cases that align with their policy priorities. To determine whether a case addresses one of the president’s top legislative priorities, we matched our cases with Eshbaugh-Soha’s ([2005](C:\\Users\\Beverly\\AppData\\Local\\Temp\\Temp2_978110849848.zip\\978110849848\\Body\\9781108498487rfa.docx" \l "rfa_138" \o "rfa_138)) and Eshbaugh-Soha and Miles’s (2008–2009) lists of domestic presidential priorities, and added the Affordable Care Act for the Obama administration. We also matched one foreign policy priority not on these lists of domestic proposals – the War in Iraq – with one Supreme Court case during the George W. Bush administration – *Hamdan* v. *Rumsfeld* ([2006](C:\\Users\\Beverly\\AppData\\Local\\Temp\\Temp2_978110849848.zip\\978110849848\\Body\\9781108498487rfa.docx" \l "rfa_207" \o "rfa_207)) – to create a final list of cases that involved presidential priorities.

Figure 2.5. The number of speeches on Supreme Court cases involving presidential policy priorities by presidents, 1953–2017

[Figure 2.5](#c002_fig5) indicates that presidents addressed cases that aligned with their policy priorities in 17 of 40 speeches in which they took a position on a pending case (42.5 percent). Notably, only 5 of the 11 presidents in our sample discussed any cases involving their policy priorities. Of those that did, Presidents Clinton and Obama discussed the most priority-related cases, in 66.7 percent and 58.3 percent of their respective speeches. Overall, these results support the view that presidents do not discuss cases to influence the Court. If this were the president’s primary strategy, we would expect to see far more attention devoted to cases that implicate their policy priorities. Instead, we find further evidence that presidents discuss pending cases to show the citizenry that they are responsive to matters of public concern, including those not involving policy priorities.

XX INSERT Figure 2.6. The average number of words in presidential speeches involving pending Supreme Court decisions, 1953–2017 NEAR HERE XX

[Figure 2.6](#c002_fig6) provides information regarding the length of presidential comments on pending decisions. The black portion of the bars indicates the average number of words in each remark that involved the discussion of the pending case, and the white portion of the bars indicates the average number of words in the entire remark.[[13]](#footnote-14) The number of words devoted to the Court’s decisions ranges from a low of a single word to a high of 712 words. On the low end, President George H. W. Bush took a position on *Webster* when he responded “Yes” to a reporter’s question that asked whether he would like to see the case “be the first step in a move to ban abortion in this country?”[[14]](#footnote-15) On the high end, President George W. Bush outlined his position on the University of Michigan affirmative action cases in 11 paragraphs, constituting more than 700 words.[[15]](#footnote-16) The mean number of words devoted to pending decisions is 188 (standard deviation = 173). To put this in perspective, the average number of words in the whole of the remarks under analysis that mention cases is 3,225 (standard deviation = 2,793). This means that less than 6 percent of presidential remarks that involve position taking on pending cases are actually devoted to the case itself. If presidents’ primary motivation for discussing cases was to influence the decisions of the Court, we would expect this percentage to be substantially higher, indicating that they devote much of their remarks to the cases themselves. Instead, we find less than 1 in 15 words touch on cases, which is more consistent with demonstrating their commitment to issues that are important to the American people and appealing to their political bases than trying to influence the justices.

The Impact of Presidential Discussions of Pending Cases

Although we are chiefly interested in understanding why presidents discuss pending cases in their public rhetoric, we are also able to provide some evidence with respect to the impact of these speeches on case outcomes in [Figure 2.7](#c002_fig7).[[16]](#footnote-17) The white bars indicate the success rate of the Solicitor General in cases in which presidents took a public position, and the black bars indicate the Solicitor General’s overall success rate, as reported in Black and Owens ([2012](C:\\Users\\Beverly\\AppData\\Local\\Temp\\Temp2_978110849848.zip\\978110849848\\Body\\9781108498487rfa.docx" \l "rfa_035" \o "rfa_035), 26). Note that the Solicitor General either filed an amicus curiae brief or represented the government as a litigant in all of the cases in which presidents took a public position. In the cases in which the US filed an amicus curiae brief, the president’s position emerged victorious in 71 percent of cases, compared with 75 percent of cases overall. In those cases in which the US was a litigant, the president’s position was endorsed by the Court in 56 percent of cases, compared with 65 percent of cases overall. Thus, there is no evidence of a positive effect of presidential rhetoric on the justices.[[17]](#footnote-18)

XX INSERT Figure 2.7. Solicitor General success in the Supreme Court, 1953–2017 NEAR HERE XX

In fact, one might interpret these figures to imply that presidents take positions on cases they perceive as being at risk of losing. One way to look into this further is to examine instances in which presidents took positions in cases after the Solicitor General participated in oral arguments. Research demonstrates that case outcomes can be partially predicted by the number of questions asked at oral arguments, with the party receiving the highest volume of questioning more likely to lose (e.g., Epstein, Landes, and Posner [2010](C:\\Users\\Beverly\\AppData\\Local\\Temp\\Temp2_978110849848.zip\\978110849848\\Body\\9781108498487rfa.docx" \l "rfa_131" \o "rfa_131); Greenhouse [2004](C:\\Users\\Beverly\\AppData\\Local\\Temp\\Temp2_978110849848.zip\\978110849848\\Body\\9781108498487rfa.docx" \l "rfa_193" \o "rfa_193); Johnson et al. [2009](C:\\Users\\Beverly\\AppData\\Local\\Temp\\Temp2_978110849848.zip\\978110849848\\Body\\9781108498487rfa.docx" \l "rfa_234" \o "rfa_234); Roberts [2005](C:\\Users\\Beverly\\AppData\\Local\\Temp\\Temp2_978110849848.zip\\978110849848\\Body\\9781108498487rfa.docx" \l "rfa_364" \o "rfa_364)). The logic is that, when the justices ask a particularly high volume of questions of an attorney, this signals their doubt as to the validity of that attorney’s position. Conversely, when the justices ask few questions of an attorney, this is suggestive of agreement with that attorney’s position. Applying these findings to the focus of this chapter, if presidents take positions on cases they believe they are likely to lose after oral arguments, we would expect the attorneys in the Solicitor General’s office to be asked a higher volume of questions than their opponents at oral arguments in such cases.

From the president’s perspective, taking a public position on cases they are likely to lose may be a strategic effort to relay to the justices that they have a strong opinion on the case and are willing to use the bully pulpit to communicate that position. Since it is so rare for presidents to take positions on pending decisions, the justices might view this as a credible signal that the president cares a great deal about the outcome of the case and may give the president’s position additional consideration. Further, such a strategy by presidents is consistent with the manner in which they go public on judicial nominations. Research indicates that presidents tend to make public speeches in support of their judicial nominees when they are likely to fail, not when they are likely to be confirmed (Cameron and Park [2011](C:\\Users\\Beverly\\AppData\\Local\\Temp\\Temp2_978110849848.zip\\978110849848\\Body\\9781108498487rfa.docx" \l "rfa_064" \o "rfa_064); Holmes [2007](C:\\Users\\Beverly\\AppData\\Local\\Temp\\Temp2_978110849848.zip\\978110849848\\Body\\9781108498487rfa.docx" \l "rfa_221" \o "rfa_221), [2008](C:\\Users\\Beverly\\AppData\\Local\\Temp\\Temp2_978110849848.zip\\978110849848\\Body\\9781108498487rfa.docx" \l "rfa_222" \o "rfa_222); Johnson and Roberts [2004](C:\\Users\\Beverly\\AppData\\Local\\Temp\\Temp2_978110849848.zip\\978110849848\\Body\\9781108498487rfa.docx" \l "rfa_236" \o "rfa_236)). Moreover, presidents might take public positions on cases they are likely to lose to build partisan support for their positions in an effort to encourage legislative or executive actions to reverse or alter the decisions. Thus, presidents might be expected to go public on cases they are danger of losing.

To evaluate this possibility, we examine the number of questions asked at oral arguments for those instances in which presidents took a position, after oral arguments, on a pending case in which the Solicitor General participated in oral arguments. We include cases in which attorneys from the Office of Solicitor General represented the United States as a party and as an amicus curiae at oral arguments. There is a total of only nine cases that fit our criteria, so we recognize that we have a very small sample size, which limits our ability to draw firm conclusions.

XX INSERT Figure 2.8. The average number of questions at oral argument supporting and opposing the president’s position, 1953–2017 NEAR HERE XX

To examine how the president’s position faired at oral arguments, we coded the number of questions asked, per minute, by the justices of the attorneys arguing in support of the president’s position and the number of questions asked, per minute, by the justices of the attorneys arguing in opposition to the president’s position. We use the per minute average to account for the fact that there are variations in the length of time granted to each litigant when the Solicitor General participates in oral arguments as an amicus. When the Solicitor General participates in oral arguments as an amicus, we also include the number of questions asked of the counsel supported by the Solicitor General, since the number of questions that lawyer receives is also reflective of the justice’s likely positions on the case.[[18]](#footnote-19) We obtained the oral argument transcripts from Oyez ([2018](C:\\Users\\Beverly\\AppData\\Local\\Temp\\Temp2_978110849848.zip\\978110849848\\Body\\9781108498487rfa.docx" \l "rfa_330" \o "rfa_330)).

[Figure 2.8](#c002_fig8) reports the number of questions asked by the justices of the attorneys advocating for the president’s position and those asked of the attorneys advocating for the opposing position. In the nine cases under analysis, the justices asked the attorneys supporting the president’s position an average of 1.9 questions per minute, compared with an average of 1.7 questions per minute for the opposing attorneys. A difference-of-means test reveals this distinction is not statistically significant. Moreover, looking at the individual oral arguments reveals that the attorneys representing the president’s position were asked more questions than their opposition in only 4 out of 9 cases. Thus, there does not appear to be systematic evidence that presidents are more likely to take public positions on pending cases if the justices appear to oppose the presidents’ positions at oral arguments. We believe this provides additional evidence that presidential remarks on pending cases are not primarily intended to influence the justices.

Conclusions

Speaking publicly is central to the president’s governing strategy. Although we know that presidents speak to influence legislation, news coverage, and public opinion, the extent of our understanding of whether presidents speak to influence the Supreme Court has heretofore been limited. Having catalogued and analyzed the universe of cases in which presidents have spoken about pending Supreme Court decisions, we offer two primary conclusions concerning presidential efforts to target cases through public appeals.

First, such appeals are very rare. From 1953 to 2017, presidents discussed Supreme Court cases in only 54 speeches and took a position on the cases in only 40 speeches covering 28 cases. Thus, though presidents are occasionally willing to take public positions on pending cases, this is not a common rhetorical strategy. That discussions of pending cases are infrequent should not be surprising. As we have argued, taking a position on pending cases involves costs. For instance, presidents may be subject to attacks for bullying the justices and for violating the norm of judicial independence, as was the case with President Obama’s discussions of challenges to the Affordable Care Act. In addition, when presidents take positions on pending cases, they run the risk of losing the support of those members of the public who disagree with the presidents’ positions. Perhaps most importantly, presidents have a formal mechanism to relay their preferences to the justices that limits the need to make public appeals: the Office of Solicitor General. Significantly, because the OSG is institutionalized, there are few (if any) negative consequences of communicating the presidents’ positions to the Court via the Solicitor General.

Second, our analyses of the characteristics of presidential speeches indicate that presidents do not primarily take positions on pending cases to influence the justices. Instead, they seem to be motivated by the desire to demonstrate their responsiveness to issues important to the American people and to build political and electoral support. To be clear, we are not concluding that presidents *never* take positions on pending cases in the hope that they will influence the Court’s decision. For instance, George W. Bush’s speech on the University of Michigan affirmative action cases has many of the hallmarks of trying to the influence the justices: it was a prepared remark; it was lengthy, and the president took a strong position on outcome of the cases. Rather, on balance, our evidence reveals this is not the dominant strategy for discussing pending cases. For example, presidents take positions on cases with roughly equal frequency in prepared and unprepared remarks and do not overwhelmingly take strong positions on cases or primarily address cases touching on their policy priorities. Further, when they take positions on a pending cases, presidents do not devote especially lengthy portions of their public remarks to the cases. Perhaps most tellingly, the timing of presidential positions on pending cases is not consistent with a dominant strategy of influencing the justices as only about one in four speeches fall within one month of oral argument. Thus, the weight of our evidence suggests that presidents do not go public on pending cases primarily to influence their outcomes. This suggests that presidents may view their role in the coordinate construction of the Constitution not as primarily involving efforts to shape the Court’s pending decisions, but rather as efforts to influence the interpretation of already decided cases, as we demonstrate in the chapters that follow.

All of this makes sense and plays into a balanced approach to presidential relations with the Court. On the one hand, presidents run the risk of being criticized for violating the norm of judicial independence if they attempt to pressure the Court by taking public positions on pending cases. This is one reason why the president is not likely to attempt this strategy. But the president may still affect Court decisions through the Office of the Solicitor General, which provides the opportunity to engage in the coordinate construction of the Constitution in a different manner. Further, presidents are fortunate that they do not have to speak about Court cases, as they might have to speak about pending legislation to influence its outcome. Thus, presidents are in an enviable position that enables them to protect the norm of judicial independence while still influencing the outcome of Supreme Court cases through the Office of Solicitor General. If this mechanism was not available to presidents, then they might have to reconsider using their public rhetoric to affect Court decisions. Of course, there is no reason to think that the Office of Solicitor General is likely to go away any time soon, so the patterns demonstrated in this chapter are likely to hold for future presidents.

1. “Remarks on the Michigan Affirmative Action Case,” January 15, 2003. [↑](#footnote-ref-2)
2. Although media coverage of Bush’s speech was overwhelmingly negative, not all reactions to President Bush’s speech were critical. For example, Bush was praised for his stance by African Americans affiliated with Project 21, a conservative leadership network (US Newswire [2003](C:\\Users\\Beverly\\AppData\\Local\\Temp\\Temp2_978110849848.zip\\978110849848\\Body\\9781108498487rfa.docx" \l "rfa_426" \o "rfa_426)). [↑](#footnote-ref-3)
3. For example, Clinton’s remarks on *Printz* v. *United States* ([1997](C:\\Users\\Beverly\\AppData\\Local\\Temp\\Temp2_978110849848.zip\\978110849848\\Body\\9781108498487rfa.docx" \l "rfa_350" \o "rfa_350)), which involved the implementation of background checks for potential handgun purchases found in the Brady Bill, were delivered during the midst of his reelection campaign, but generated virtually no newspaper coverage at all. See e.g., “Remarks at the Women’s Legal Defense Fund Luncheon,” June 20, 1996. [↑](#footnote-ref-4)
4. This appears to be the case, at least for the State of the Union Address (Bradshaw, Coe, and Neumann [2014](C:\\Users\\Beverly\\AppData\\Local\\Temp\\Temp2_978110849848.zip\\978110849848\\Body\\9781108498487rfa.docx" \l "rfa_048" \o "rfa_048)), although no study of which we are aware compares the impact of prepared versus responsive remarks on presidential leadership of the news agenda. Even so, this reasoning is consistent with studies that restrict analysis of going public to influence Congress to prepared remarks (Barrett [2004](C:\\Users\\Beverly\\AppData\\Local\\Temp\\Temp2_978110849848.zip\\978110849848\\Body\\9781108498487rfa.docx" \l "rfa_021" \o "rfa_021)). [↑](#footnote-ref-5)
5. “The President’s News Conference,” June 29, 2011. [↑](#footnote-ref-6)
6. “The President’s News Conference,” June 27, 1989. [↑](#footnote-ref-7)
7. “Remarks to College Reporters and a Question-and-Answer Session,” April 28, 2016. [↑](#footnote-ref-8)
8. Measuring timing relative to the date the first US government brief was filed reveals a nearly identical distribution of comments. This measure is correlated with the measure reported in [Figure 2.2](#c002_fig2) at r = 0.98. [↑](#footnote-ref-9)
9. There are only 39 speeches in the data in [Figure 2.2](#c002_fig2), as President Obama took a position on *al-Marri* v. *Spagone* (2009), which was not orally argued as it was dismissed as moot. [↑](#footnote-ref-10)
10. All but one of these responses was to a reporter’s question. President Obama responded to an audience member’s question about *National Federation of Independent Business* v. *Sebelius* in August 2011. [↑](#footnote-ref-11)
11. “Remarks at the Women’s Legal Defense Fund Luncheon,” June 20, 1996. [↑](#footnote-ref-12)
12. “Interview with the President Remarks and a Question-and-Answer Session with Representatives of Black Media Associations,” February 16, 1978. [↑](#footnote-ref-13)
13. To calculate this for question-and-answer sessions, we ignored reporters’ questions and only included the president’s remarks. [↑](#footnote-ref-14)
14. “Question-and-Answer Session with Reporters Following a Meeting with Former President Reagan in Los Angeles, California,” April 26, 1989. [↑](#footnote-ref-15)
15. “Remarks on the Michigan Affirmative Action Case,” January 15, 2003. [↑](#footnote-ref-16)
16. On very rare occasions, presidents make public statements discussing the appeal of lower court decisions to the Supreme Court. For example, President Carter addressed the appeal of *INS* v. *Chadha* (1983) from the Ninth Circuit in a relatively lengthy statement (“*Chadha* v*. Immigration and Naturalization Service* Statement on the Ninth Circuit Court of Appeals Decision,” December 24, 1980). Though such remarks are interesting, they are so infrequent that it would be difficult to draw any conclusions as to their influence on the Court’s agenda-setting process. [↑](#footnote-ref-17)
17. This finding suggests that presidential position taking on the Court’s cases may damage the Solicitor General’s credibility in the eyes of the justices (e.g., Wohlfarth [2009](C:\\Users\\Beverly\\AppData\\Local\\Temp\\Temp2_978110849848.zip\\978110849848\\Body\\9781108498487rfa.docx" \l "rfa_447" \o "rfa_447)). However, we are hesitant to draw this conclusion given the small number of cases in which presidents take positions on the Court’s pending cases. [↑](#footnote-ref-18)
18. When we exclude the number of questions asked of the attorney supported by the Solicitor General as an amicus, we obtain substantively similar results. The correlation between the two measures is 0.98. [↑](#footnote-ref-19)