

# The End of Supreme Court Deference to the President?

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## Summary

1. To assess presidential performance in the U.S. Supreme Court, we created a dataset of cases of concern to the President. The dataset covers Presidents Franklin D. Roosevelt through Barack Obama (1932-2015 terms), which amounts to 84 Court terms and 13 Presidents.
2. Three findings emerge from the raw data.
  - a. Presidents prevailed in nearly two-thirds of their cases; and captured over 60% of all votes cast.
  - b. Obama's win rate of just 50.5% is significantly lower than the average win rate and, in fact, the lowest in our dataset.
  - c. A few commentators have noticed Obama's problems in the Court, attributing them to Obama himself.<sup>1</sup> But because our data show a downward secular trend in presidential success ever since the Reagan years, it may be that the Obama administration is just the latest victim of a Court that has gradually been losing confidence in the executive branch.

## The Dataset

To create the dataset, we began with the U.S. Supreme Court Database.<sup>2</sup> We included all orally argued cases decided between the 1932 and 2015 terms that resulted in a signed majority opinion or a judgment. Using the *petitioner* and *respondent* variables in the Database, we identified cases of concern to the President: those in which the United States, an executive actor (*e.g.*, the Attorney General or the President himself), or a federal agency was a party.<sup>3</sup> In total, the dataset houses 3,778 cases (32,444 votes)—or about 40% of all orally argued cases during the 1932-2015 terms. (For more details, see the Appendix.)

## Win Rates

With some exceptions (again, see the Appendix), we determined whether the executive branch won or lost the case by the *partyWinning* variable in the U.S. Supreme Court Database. Figure 1 summarizes the raw data: the fraction of decisions in favor of the President, by each President.<sup>4</sup>

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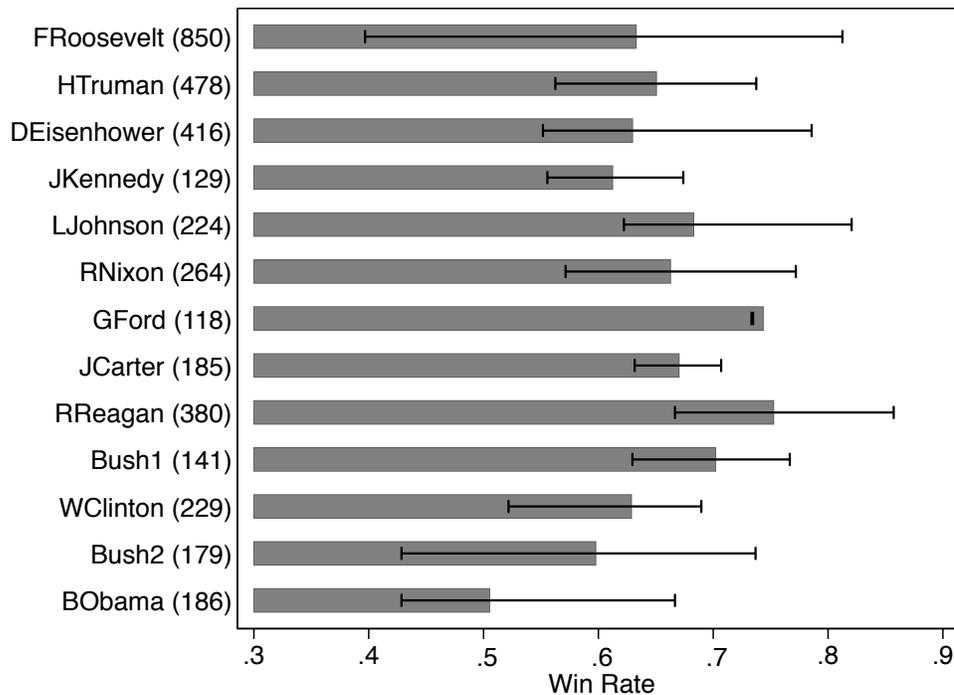
<sup>1</sup> *E.g.*, Ilya Shapiro, "Obama has Lost in the Supreme Court More than Any Modern President," July 16, 2016, The Federalist, at <http://thefederalist.com/2016/07/06/obama-has-lost-in-the-supreme-court-more-than-any-modern-president/>; Oliver Roeder, "Despite this Week's Victories, Obama Has Struggled at the Supreme Court," June 28, 2015, FiveThirtyEight, at <http://fivethirtyeight.com/datalab/despite-this-weeks-victories-obama-has-struggled-at-the-supreme-court/>.

<sup>2</sup> Available at: <http://supremecourtdatabase.org/>.

<sup>3</sup> We also checked the *issue* value 130015 (executive authority vis-à-vis Congress or the states) and *lawSupp* values involving provisions of Article II.

<sup>4</sup> We show the fraction of decisions. The correlation between decisions for the President and votes for the President is 0.93.

**Figure 1.** Fraction of Decisions in Favor of the President, From F. Roosevelt to B. Obama, 1932-2015 Terms



*Notes:*

1. The N (in parentheses) is the total number of cases in our dataset that the Court decided when the President was in office and for which the Supreme Court Database codes the winner.<sup>5</sup>
2. The bars show the (weighted) mean win rate for each President. The capped lines show the minimum and maximum fractions for each term that the President was in office. Minimums and maximums exclude terms in which the sitting President participated in fewer than 10 cases. For this reason, Ford's maximum is less than his average success because he won 7 of 8 cases in the 1976 term (87.5%). For purposes of calculating minimum and maximum fractions, the number of Supreme Court terms included is 13 for Roosevelt; 9 for Eisenhower; 8 for Truman, Reagan, Clinton, Bush2, and Obama; 6 for Nixon; 5 for Johnson; 4 for Carter and Bush1; 3 for Kennedy; and 2 for Ford.

On the one hand, the data seem to confirm a story that scholars have long told: When the President goes to Court, he wins.<sup>6</sup> Over the course of the 84 terms and 13 Presidents in our dataset, Presidents prevailed in nearly two-thirds of their cases<sup>7</sup> (and captured 60% of all votes). By comparison, the states won significantly fewer of their cases during the same period (53%<sup>8</sup>).

On the other hand, Figure 1 suggests problems with the standard story—notably, the declining win rate since the Reagan administration. Before Reagan, the President prevailed in 65% of his cases and captured 61% of all votes; during the Reagan years, those percentages increased significantly to 75% and 68%. Thereafter they dropped to 60% (decisions) and 58% (votes)—statistically significant declines from the pre-Reagan win rate and, of course, from Reagan's rate. Obama's performance was especially poor. He prevailed in just 50.5% of his cases—a percentage slightly *lower* than the states' win rate while Obama was in office

<sup>5</sup> The Database codes the winner as “unclear” in 16 cases in our dataset.

<sup>6</sup> *E.g.*, Robert Scigliano, *The Supreme Court and the Presidency* (1971); Rebecca Mae Sakolar, *The Solicitor General: The Politics of Law* (1992); Ryan C. Black & Ryan J. Owens, *The Solicitor General and the United States Supreme Court: Executive Branch Influence and Judicial Decisions* (2012).

<sup>7</sup> 65.1% of 3,778 cases; 61.3% of the 32,444 votes.

<sup>8</sup> 53.3% of 2,102 cases.

(55.4%). This is the worst record of any President in our dataset; and it may be the worst since the Zachary Taylor administration.<sup>9</sup>

Based on these data, we understand why some commentators blame Obama himself for his administration's poor showing; they say the Court merely pushed back on aggressive executive policy making.<sup>10</sup> But Figure 1 suggests another possibility: Obama was just the latest victim of a Court growing less and less deferential to the executive branch. In fact—and low as it may be—Obama's win rate is *not* significantly lower than Bush 2's at the conventional level of  $p \leq .05$ .

Figure 2, which plots the data by term, seems to confirm the secular (downward) trend;<sup>11</sup> and pre- and post-term regressions may help us pinpoint its start.<sup>12</sup> From the regressions we learn that the trend is relatively flat until the 1981 term—coinciding with Reagan's second year in office—when it begins to creep up significantly. Increases in the President's win rate continue through the 1986 term, Reagan's penultimate,<sup>13</sup> with the downward trend starting around the 1990 term (Bush 1's third Supreme Court term) and in full swing by 2000 (Bush 2's first term). Put somewhat differently, the predicted probability of a President winning in a 1980 term case is over 0.77;<sup>14</sup> by 1990, it drops to 0.70,<sup>15</sup> though remains above the mean predicted value of 0.66.<sup>16</sup> But in 2000, the predicted fraction falls to 0.61;<sup>17</sup> and in 2010, Obama's third Supreme Court term, the President's projected probability of victory is barely 0.50.<sup>18</sup>

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<sup>9</sup> We base this statement on a preliminary dataset of all cases of concern to the President, from George Washington forward.

<sup>10</sup> See note 1.

<sup>11</sup> Again, we show the fraction of decisions. The correlation between decisions and votes is 0.90.

<sup>12</sup> We estimated regressions of the President's win rate (or whether the President won or not) on term (since 1950), each term moving forward. We adapted this strategy from Lee Epstein, Rene Lindstadt, Jeffrey A. Segal, & Chad Westerland, "The Changing Dynamics of Senate Voting on Supreme Court Nominees." 68 *Journal of Politics* 296 (2006).

<sup>13</sup> In the 1988 term, Reagan was a party in only 4 of 34 "president" cases. The remaining 30 were under Bush 1.

<sup>14</sup> The 95% confidence interval is [0.73, 0.81]. This and the predictions that follow are from a logistic regression of whether the President won on term, clustered on term, from the 1980 term forward.

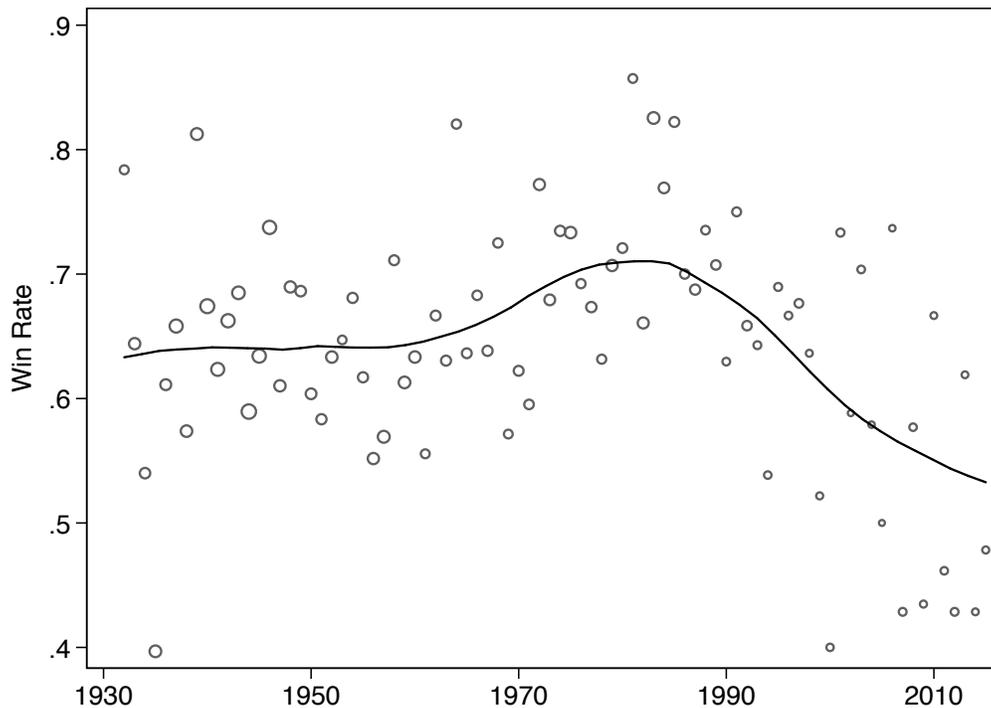
<sup>15</sup> The 95% confidence interval is [0.67, 0.73].

<sup>16</sup> The 95% confidence interval is [0.63, 0.69].

<sup>17</sup> The 95% confidence interval is [0.58, 0.64].

<sup>18</sup> 0.52 [0.46, 0.57].

**Figure 2.** Fraction of Decisions in Favor of the President, by Term, 1932-2015



Notes:

1. The hollow circles are the win rates for each term weighted by the number of cases in which the President was a party: the smaller the circle the fewer the total cases.
2. The black line is a loess smoothing line for the fraction of decisions in favor of the President.

### Discussion

On January 18, 2017, the Obama administration argued its last two cases in the Supreme Court.<sup>19</sup> If it were typical of most administrations that preceded it, we'd give Obama better than 3:2 odds of victory. But now his chances are around 50-50—because, we suspect, the President is no longer as dominant in the Supreme Court as he was three decades ago.

Why? Several possibilities occur to us.

First, in recent years we have witnessed the emergence of a specialized Supreme Court bar of equal or even higher quality than the President's lawyers.<sup>20</sup> The President's win rate has declined as the quality of this group has increased. But what explains the emergence of the modern Supreme Court bar?

Second, some commentators believe that recent Presidents, starting with Reagan, have aggressively asserted executive power based on strained interpretations of the Constitution and of statutes. It is possible that the Court has responded by ruling against Presidents with more frequency, though not all commentators agree that recent Presidents have been more aggressive than past Presidents.

<sup>19</sup> *Lee v. Tam*, 15-1293; *Ashcroft v. Abbasi*, 15-1359.

<sup>20</sup> See, e.g., Richard J. Lazarus, "Advocacy Matters Before and Within the Supreme Court: Transforming the Court by Transforming the Bar," 96 *Georgetown Law Journal* 1487 (2008); Joan Biskupic, Janet Roberts, & John Shiffman, "The Echo Chamber," December 8, 2014, Reuters, at: <http://www.reuters.com/investigates/special-report/scotus/>

Third, greater ideological distances between the Court's center and recent Presidents is a natural explanation for the declining win rate. But the ideological distance today is hardly unprecedented. Many other (successful) Presidents—including Carter and Reagan—were equally if not more distant from the pivotal Justice.

## Appendix. The Dataset

To address questions about the President's performance in the Supreme Court, we created a dataset covering cases of concern to each of the modern-day Presidents (from Franklin D. Roosevelt forward).<sup>21</sup> The U.S. Supreme Court Database served as our foundation.<sup>22</sup> This version covers all orally argued cases (including per curiams) decided between the 1946 and 2015 terms. To include the FDR administration, we appended cases from 1932-1945 terms of the legacy Supreme Court Database.<sup>23</sup> For all terms, we exclude per curiam decisions.<sup>24</sup>

To define a case of concern to the President, we used the *petitioner* and *respondent* variables in the Database. These allowed us to identify cases in which the United States, an executive actor (*e.g.*, the Attorney General or the President himself), or a federal agency was a party.<sup>25</sup>

This procedure, though systematic and reliable, has its limits. Because the Database identifies only the lead parties, cases in which the United States or an executive actor was a party but not the lead party were improperly excluded.<sup>26</sup> Moreover, in some cases one government agency was pitted against another, making it difficult to classify the President as the winner or loser. To address these problems, we took the additional step of determining whether the Office of the Solicitor General (SG) or the Office of the Attorney General (AG) represented the petitioner or the respondent. We hand-collected the data for the 1932-1945 and 2002-2015 terms;<sup>27</sup> we used Collins's data for 1946-2001 terms.<sup>28</sup>

This step allowed us to identify cases in which the United States or executive actors/agencies were not the lead parties. We were also able to deal with cases in which the federal government was on both sides. If the AG or the SG represented the United States, a federal agency, or various executive actors, our rule was to code based on the AG's or SG's position (to reverse or affirm). If the AG/SG did not represent the agency (for example, the Interstate Commerce Commission in the 1940s) or the President (in say, *Clinton v. Jones*<sup>29</sup>), or the United States or the AG/SG did not enter the case as an amicus curiae, then we coded the President's position as the same as the executive actor. If the AG/SG filed an amicus brief opposed to the agency's position, we coded the President's position based on the AG's/SG's recommendation, not the agency's. In other words, the AG/SG was our tiebreaker.

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<sup>21</sup> See also Lee Epstein & Eric Posner, "[Supreme Court Justices' Loyalty to the President.](#)" 45 *Journal of Legal Studies* 401 (2016).

<sup>22</sup> Available at: <http://supremecourtdatabase.org>.

<sup>23</sup> Of the 83 president cases decided during the 1932 term, Hoover was in office for 46 (55.4%) and FDR, for 37 (44.6%). We include only FDR's 37 cases.

<sup>24</sup> That is, we include decisionType= 1 (signed majority opinion) or 7 (judgment of the Court).

<sup>25</sup> We also checked the *issue* value 130015 (executive authority vis-a-vis congress or the states) and *lawSupp* values involving provisions of Article II.

<sup>26</sup> We should note that the current version of the legacy Database covers only the first docket in decisions in which the Court consolidated petitions under one *U.S. Reports* citation. When we searched to determine whether the government was an additional party, we followed the Database—including only those cases in which the government was a party in the first docket.

<sup>27</sup> We conducted Lexis searches on "attorney general" or "solicitor general." We went through each case because the searches turned up many false positives.

<sup>28</sup> Available at: <http://blogs.umass.edu/pmcollins/data/>.

<sup>29</sup> 520 U.S. 681 (1997).

Following these rules, we created variables indicating whether the “President” (a combination of US/agency/executive actor) was the petitioner or respondent. We refer to these cases as “president cases.” We identified the specific President in office based on the date of the Court’s decision.