

Executive Power and the Law

Tiberiu Dragu ¹

Stanford University

Email: tdragu@stanford.edu

October 4, 2008

¹I thank Oliver Board, Josh Cohen, Xiaochen Fan, Jim Fearon, John Ferejohn, Tim Johnson, Karen Jusko, Ruth Kricheli, Terry Moe, and Andy Skrzypacz for helpful comments and suggestions. All errors are mine.

Abstract

A key constitutional mechanism to enforce the rule of law is the judicial power to review the legality of executive actions. In this paper I analyze the effect of judicial uncertainty on the president's incentives to expand his powers. I study a formal model in which the president takes an action without knowing with certainty whether a court will or will not uphold the legality of his action. I show that more judicial uncertainty induces the president to take more aggressive action, regardless of the president's attitude toward risk. I also analyze the effect of communication on the president's and the court's welfare and show that both parties benefit if the court announces the range of legal actions before the president acts. The findings provide novel policy recommendations regarding the effects of legal doctrines regulating presidential powers, as well as the optimal design of judicial review of executive actions. The key policy implications are: i) narrow, case-by-case court rulings on presidential powers reinforce legal uncertainty and embolden presidents to act aggressively and ii) courts should exercise abstract review in addition to ex-post review of executive actions.

In the aftermath of September 11, 2001 terrorist attack, President George W. Bush ordered the detention of individuals suspected of terrorism without giving them the right to challenge the validity of their detention in a full-fledged federal court proceeding. President Bush argued that his actions were legal given his implied constitutional authority as commander in chief. However, in *Rasul v. Bush*, *Hamdi v. Rumsfeld*, *Hamdan v. Rumsfeld*, and *Boumediene v. Bush*, the Supreme Court has invalidated the administration's legal interpretation of executive power.¹

President Bush is not the first president with an aggressive view of his legal authority to act. Although the president's power to act must stem from the Constitution or an act of Congress, the scope and boundaries of the presidential powers are not fixed but open to different legal interpretations. The Constitution is vague and indeterminate when it comes to presidential powers (Corwin 1984). The key provisions of Article II are written in indeterminate terms such as "executive power" or the "duty to take care that the laws are faithfully executed". In addition, case law on presidential powers is underdeveloped: few Supreme Court cases analyze presidential constitutional powers (Marshall 2008). Moreover, even the most precise statutes prove ambiguous in practice; most likely, a presidential action involves multiple statutes, which "may point in different directions" (Kinkopf 2006).

When law is incomplete the president has leeway in interpreting constitutional or statutory provisions that bear on the legality of his actions. However, the essence of the rule of law is that executive authority is subject to, and constrained by, law. A key constitutional mechanism to enforce the rule of law is the judicial power to review the legality of executive actions. The courts have the final authority to say "what the law is", as Chief Justice John Marshall wrote in *Marbury v. Madison*, the landmark case that established the principle that the courts get the final word on the meaning of the Constitution.²

The court's power to strike down presidential actions as illegal provides a strong incentive

¹*Rasul v. Bush*, 159 U.S. 548 (2004), *Hamdi v. Rumsfeld*, 159 U.S. 578 (2004), *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006), *Boumediene v. Bush*, 553 U.S. (2008).

²*Marbury v. Madison*, 5 U.S. 137 (1803).

for the president to consider the possibility of a judicial reaction before acting. Nonetheless, the president does not know in advance the court's legal interpretation. The uncertainty is structural: the president cannot ask the courts for advice regarding the legality of his actions. Since Chief Justice Jay refused President Washington's request for legal advice in 1793, the Supreme Court has frequently reiterated the view that providing advisory opinions is not a part of the judicial powers of the federal courts (Field 1949). Even informal communication is unlikely: The Code of Conduct for United States Judges prohibits judges from making public statements on legal issues that ultimately might be settled by the courts, "A judge should avoid public comment on the merits of a pending or impending action."³

In this paper I study the effect of judicial uncertainty on the president's incentives to expand his powers. I analyze a game-theoretic model in which the president chooses an action that departs from an existing status-quo. When the president acts he is uncertain about a future judicial ruling and thus he has to assess intelligently whether the court will or will not uphold the legality of his action. After the president chooses an action, the court reviews the action and decides whether or not to uphold it. If the court overturns the president's action, the initial status-quo prevails and the president pays a cost. I show that more judicial uncertainty induces the president to take more aggressive action, regardless of the president's attitude toward risk.

This result is relevant for understanding the effects of legal doctrines regulating presidential powers. Courts have generally avoided to define the scope and limits of presidential powers; courts have followed this decision-making style even when they have overturned a specific presidential action (Sunstein 1999). Along these lines, Cass Sunstein has developed an influential theory, positing that judges should produce narrow, case-by-case rulings and leave things undecided (Sunstein 1999). However, the existing literature does not consider how narrow rulings impact the president's incentives to act. In doing so, the literature overlooks the possibility that if courts avoid defining the scope and limits of presidential powers,

³Canon 3A(6), Code of Conduct for United States Judges.

such rulings reinforce legal uncertainty and embolden presidents to act aggressively.

I also analyze and compare the president's and the court's welfare under three institutions. The first institution is "no communication" (hence the baseline model), in which the president cannot communicate with the court before acting (institutional setting that represents the interaction between the president and the judiciary in the United States). The second institution is "cheap talk communication," in which the court sends a costless message before the president chooses an action. The third institution is "communication and commitment," in which the president commits to a decision rule (as a function of the message the court sends). The comparative institutional analysis shows that the "communication and commitment" institution strictly Pareto dominates the other two institutions. The "communication and commitment" institution looks as an abstract judicial review: the court announces the range of legal actions and then the president chooses its most preferred action from this range.

This result is relevant for understanding the optimal design of judicial review of executive actions. A key question in the constitutional design literature is whether constitutional courts should also exercise abstract or concrete review (Ferejohn and Pasquino 2002). The existing literature has examined this important question of constitutional design in the context of judicial review of legislation (Vanberg 1998; Stone Sweet 2000; Jackson and Tushnet 2006). However, the optimal constitutional design of judicial review of executive actions has not been theoretically analyzed yet. This analysis is important given the commitment of liberal democracies to hold the executive legally accountable in order to preserve the "rule of law."

In the United States, federal courts can only exercise concrete review of executive actions. Since Chief Justice Jay refused President Washington's request for legal advice in 1793, the legal norm has been that federal courts interpret the law only in the context of a real case or controversy. However, our comparative institutional analysis suggests that such "case and controversy" review produces inefficiencies; both the president and the court are better off if courts can exercise abstract review in addition to "case and controversy" review of executive

actions.

While the motivating example is the United State, the analysis has general relevance. The lack of formal, constitutional definition of executive power is a stylized fact. The definition gaps of the United States constitution are found in other countries such as Australia, Canada, New Zealand, and Germany (Craig and Tomkins 2007). In addition, legal control through judicial review is a method of checking the executive power in all these countries. Generally, influenced by the American constitutional theory, many democracies have lodged the final authority to protect the rule of law in a constitutional court that has the power to strike down executive actions (Akerman 1997; Ferejohn and Pasquino 2003).

In addition to the literature on legal accountability of executive actions, the paper contributes to several other strands of literature. The paper contributes to the literature on presidential unilateral politics. Political scientists have become increasingly interested in studying the president's unilateral actions and the general conclusion is that the president has ample room for maneuver (Moe and Howell 1999; Mayer 1999; Cooper 2001; Howell 2003). However, existing theories of presidential unilateralism focus mainly on the interaction between the president and Congress or they assume that the president has complete knowledge about the courts. The effect of judicial uncertainty on presidential actions has not been analyzed yet. This analysis is important given that the president must legally justify his actions. I show that analyzing the strategic interaction between the president and the courts in the presence of judicial uncertainty adds considerably to what we know about presidential unilateral politics.

The paper also contributes to the veto bargaining literature (Cameron and McCarty 2004). In a seminal paper, Romer and Rosenthal (1978) analyze the complete information version of the veto bargaining game. Matthews (1989) develops an influential model of veto threats in which a vetoer might use a costless signal to reveal information about his preferences. McCarty (1997) analyzes how reputational incentives alter the veto bargaining over multiple issues. Cameron (2000) analyzes a sequential veto bargaining with incomplete

information in which the proposer can make multiple offers and might learn about the vetoer's preference. My contributions to the veto bargaining literature are: i) the comparative statics on the agenda setter's uncertainty about the vetoer's preference; ii) the analysis of the veto bargaining game in which the agenda setter commits to a decision rule as a function of the vetoer's message; and iii) the welfare comparison of three institutions: "no communication veto bargaining," "cheap talk veto bargaining," and "communication with commitment veto bargaining".

The paper is also related to the crisis bargaining analysis in international politics. In a mechanism design approach, Banks (1990) analyzes a two-player bargaining game in the shadow of the war in which one party has private information about its expected benefit from war. Banks shows that in any Bayesian equilibrium the probability of war cannot decrease as the informed party's expected utility of war increases. Fearon (1995) analyzes a bargaining game in which an uninformed party makes a take-it-or-leave-it offer to an informed party and shows that communication does not influence the bargaining or the probability of war. The model in this paper differs from the crisis bargaining models in that I analyze a take-it-or-leave-it bargaining situation that has a common-interest component and I shall show that allowing communication can be welfare-improving.

The rest of the paper is organized as follows. In section 1, I formulate the baseline model and derive the equilibrium and comparative statics results. In section 2, I analyze the impact of communication on the president's and the court's welfare. In section 3, I discuss the policy and observable implications of the results. In section 5, I conclude. All proofs are in the Appendix.

1 The Model

The players are the president P and a court C . An exogenous status-quo q is in place. The player's preferences are over the one-dimensional action space, $X = R$.

The president's preference is represented by a twice continuously differentiable, single-peaked (about an ideal position p) and (weakly) concave utility function $U_P(\cdot)$. The court's preference is represented by a single-peaked and symmetric (about an ideal position c) utility function $U_C(\cdot)$.⁴ The ideal position of the court can be thought of as the most preferred position of the median justice. I fix the president's ideal position at $p = 0$ and the status-quo at $q > 0$. The difference $|q - p| = q$ can be interpreted as the conflict between the existing status-quo and the president's ideal position.

The president is uncertain about the court's most preferred position; the president only knows that the court's ideal position is uniformly distributed on the interval $[c_l, c_h]$. I assume that the lower bound c_l is such that $c_l < q$ and the upper bound is such that $c_h > q$. The assumption allows for the possibility that the court might accept some changes from the status-quo ($c_l < q$) as well as the possibility that the court might reject some changes from the status-quo ($c_h > q$).⁵

The game proceeds as follows: Nature chooses the court's position, $c \in [c_l, c_h]$. The president moves next by taking an action $x \in R$. After the president takes an action x , the court either accepts or vetoes the president's action. If the court vetoes the action x , the initial status-quo q prevails and the president pays a cost $r \geq 0$. The parameter r is a direct cost that the president pays if the court rejects his action (also the president pays an indirect cost if the court rejects his action since the status-quo prevails). In this setup, the president cares about his legacy, that is the president wants his actions to be upheld by the court.

The direct cost r is a political cost since the president is not legally liable if the court rejects the president's legal interpretations. If the judiciary deems his actions illegal, the president might suffer a loss of political prestige in the Washington political community or in the public standing. Also, the president's policy legacy might suffer. Moreover, the cost r can also be interpreted as a policy opportunity loss. The president has limited time and

⁴This implies that $\forall x, y \in R$ such that $|x - c| = |y - c|$ then $U_C(x) = U_C(y)$.

⁵If $c_l > q$, the court will always reject any position that the president prefers to the status-quo. Also, if $c_h < q$, the court will always accept some changes that the president prefers over the status-quo.

resources to develop his policy program. If the president's actions are overturned in courts, time and resources that could have been allocated on other issues has been used on a policy that the judiciary ultimately rejects.

The model is consistent with different micro-foundations of judicial behavior. The model is consistent with legalism, a theory that depicts judicial decisions to be determined by preexisting legal doctrines and judicial precedents (Schauer 1988). In this framework, the court's ideal position could be interpreted as the court's most preferred reading of existing legal materials; the president is uncertain about the range of legal positions that could be inferred from preexisting legal sources. The model is also consistent with theories that depict judges as seekers of legal policy (Epstein and Knight 1998; Segal and Spaeth 2002). In this framework, the court's ideal position could be interpreted as the the most preferred policy of the median justice in an unidimensional ideological space; the president is uncertain about the median justice's ideal policy. Moreover, the model is consistent with pragmatism, a theory that depicts judicial decisions to be determined by their practical consequences (Posner 2008). In this framework, the court's position could be interpreted as the point that balances the anticipated consequences of accepting and rejecting a presidential action; the president is uncertain about the balancing point's location.

1.1 Equilibrium

A strategy for the president is a choice $x \in R$. A strategy for the court is a mapping from R to the set $\{veto, not\ veto\}$, specifying whether to veto x or not for each president's choice x .

In the last stage, for any president's choice $x \in R$, the court will not veto the president's choice if $U_C(x) \geq U_C(q)$, and the court will veto the president's action if $U_C(x) < U_C(q)$. Given the symmetry of utility function $U_C(\cdot)$ about the ideal point, the court's strategy is the following: 1) if $c \leq q$, the court accepts x if $x \geq 2c - q$ and rejects x if $x < 2c - q$, and 2) if $c \geq q$, the court accepts x if $x \leq 2c - q$ and rejects x if $x > 2c - q$. I establish the

following lemma:

Lemma 1. *Given the court's equilibrium strategy, all actions x such that $x < \max\{0, 2c_l - q\}$ and $x > q$ are not optimal for the president.*

The president maximizes his expected utility:

$$EU_P(x) = \Pr(c \leq \frac{x+q}{2}) \cdot U_P(x) + \Pr(c > \frac{x+q}{2}) \cdot (U_P(q) - r), \quad (1)$$

in which the probabilities of acceptance and rejection are: $\Pr(\text{Court Accepts } x) = \Pr(c \leq \frac{x+q}{2})$ and $\Pr(\text{Court Rejects } x) = \Pr(c > \frac{x+q}{2})$. The president's optimal choice is the solution to the following maximization problem:

$$\operatorname{argmax}_{x \in [\max\{0, 2c_l - q\}, q]} \left\{ \Pr(c \leq \frac{x+q}{2}) \cdot U_P(x) + \Pr(c > \frac{x+q}{2}) \cdot (U_P(q) - r) \right\} \quad (2)$$

The trade-off the president faces is the following: If he chooses an action further from the existing status-quo (and closer to his most preferred position), his payoff is bigger if the court upholds it. However, his choice also affects the probability that the court upholds his action. An action further from the existing status-quo increases the probability that the court rejects the president's action, meaning that such a choice could result in a lower payoff for the president. We have the following result:

Lemma 2. *The president's optimal choice x^* exists and is unique. If $r \geq \bar{r}$, the optimal choice $x^* = q$, the president does not change the status-quo. If $r < \bar{r}$, the optimal choice $x^* < q$, the president chooses an action different than the status-quo.*

The threshold value \bar{r} for which the president chooses an action different than the status-quo is $\bar{r} = -2 \cdot \frac{\partial U_P(x)}{\partial x} \Big|_q \cdot (q - c_l)$. Given the court's equilibrium strategy and the president's optimal action we have the following:

Proposition 1. *The game has a unique perfect Bayesian equilibrium.*

In the next sections I do comparative statics on how changes in the exogenous parameters impact the president's optimal action x^* .

1.2 Comparative Statics

1.2.1 A More Uncertain Judicial Environment

To do comparative statics on the president's uncertainty about the court's position, I reparametrize the uniform distribution by its mean and variance; thus the court's ideal position is uniformly distributed on the interval $[-\theta + c_m, \theta + c_m]$. Given this specification, the president's expected position of the court is $E[c] = c_m$, and $\theta > 0$ parametrizes the variance of the distribution.

The specification allows us to do the following comparative statics exercise: keep the mean constant and change the variance of the distribution. If we have two distributions $F(c) \sim U[-\theta_1 + c_m, \theta_1 + c_m]$ and $G(c) \sim U[-\theta_2 + c_m, \theta_2 + c_m]$ in which $\theta_1 < \theta_2$, then the distribution $G(c)$ is a mean preserving spread of the distribution $F(c)$ (Rothschild and Stiglitz 1970). This implies that the president faces a more uncertain judicial environment if the distribution of the court's ideal point is $G(c)$ and thus the comparative statics exercise shows how an increase in judicial uncertainty impacts the president's optimal action x^* . We have the following:

Proposition 2. *i) If the president faces a more uncertain judicial environment, the president takes more aggressive action. ii) If the president faces a more uncertain judicial environment, the set of direct costs for which the president chooses an action different than the status-quo enlarges.*

Proposition 2, part i) says that if $G(c)$ is a mean-preserving spread of $F(c)$, the president's optimal action is closer to the president's ideal point when the distribution of the court's ideal point is $G(c)$ than when the distribution is $F(c)$.

Although one would expect that a riskier judicial environment coupled with a risk averse

president would make the president less aggressive, our result indicates the opposite. The intuition for this result is the following. When the president is more uncertain about the court, there exists more heterogeneity in the court's likelihood to oppose or approve a change from the status-quo. On the one hand, the court's position might be further on the president's side of the status-quo and thus the court would support more aggressive actions. On the other hand, the court's position might be further on the opposite side of the status-quo and thus the court would veto any change from the status-quo in the direction of the president's ideal point. But any action greater than the status quo is weakly dominated (by the status quo) for the president. The fact that there are more types further on the opposite side of the status-quo does not affect the president's calculus.⁶

1.2.2 Other results

I also provide comparative statics results for how an increase in policy conflict and the direct cost impact the president's incentives to act. The results are the following:

Proposition 3. *The president takes less aggressive action if the policy conflict increases or if the direct cost of rejection increases.*

Thus an increase in the policy conflict (between the status-quo and the president's ideal point) induces the president to take more cautious action. Note that in the complete information case, if the status-quo increases, the president would choose an action closer to the president's ideal point, and thus would take more aggressive action (Romer and Rosenthal 1978). In the incomplete information case, this result does not hold. If the status-quo increases, keeping fixed the president's uncertainty about the court's ideal point, the probability that the court rejects the president's choice increases and thus the president has an incentive to take more cautious action in order to decrease the probability of a court rejection.

⁶Also, in Appendix 2, I investigate the conditions under which this result holds under a more general specification of the president's uncertainty about the court.

The intuition for how an increase in the direct cost r impacts on the president’s optimal action x^* is simple. If the cost increases, the payoff for the president when the court rejects his action decreases. As a result, the president has an incentive to take more cautious action in order to decrease the probability of a court rejection.

2 The Effect of Communication

In the previous section, the president and the court cannot communicate before the president acts, the institutional setting that represents the interaction between the president and the judiciary in the United States. In this section, I investigate other institutional arrangements that might improve the president’s and the court’s welfare. Specifically, I analyze and compare the president’s and the court’s welfare under three institutions. The first institution is “no communication,” which is the baseline model analyzed in the previous section. The second institution is “cheap talk communication,” in which the court sends a costless message before the president chooses an action. The third institution is “communication and commitment,” in which the president commits to a decision rule (as a function of the message the court sends). This comparative institutional analysis has relevance for understanding key questions regarding the design of judicial review. I will discuss its policy implications in section 3.

To provide the comparative institutional analysis, I work with quadratic loss functions for the president’s and the court’s utility respectively. The president and the court’s preferences are given by the following functions:

$$U_P = -(0 - x)^2 \text{ and } U_C = -(c - x)^2, \quad (3)$$

and the president knows that the court’s ideal outcome is uniformly distributed on the interval $[c_l, c_h]$; all other parameters are as in the baseline model.

The welfare comparison of the three institutions is from an ex-ante perspective. Also,

I compare the outcomes in the most informative equilibrium of the each institution, if the equilibrium is not unique.

2.1 Cheap Talk Communication

First, I analyze the institution in which the court can send a costless message before the president chooses an action (the court has the option to refuse to communicate with the president). The timing of the game is as follows. First, Nature chooses the court's ideal position, $c \in [c_l, c_h]$. Second, the court sends a message $m \in M$ and we assume that the set M contains more than one message.⁷ Third, the president observes the court's message and chooses an action $x(m) \in R$. Fourth, the court observes the president's choice and decides whether to veto or not veto the action $x(m)$.

The game has multiple equilibria. Since this is a cheap talk interaction, a babbling equilibrium always exists. Regarding the most informative equilibrium, Matthews (1989) has analyzed the effect of cheap talk in this type of bargaining game and shown that only two kinds of equilibria exists. In one equilibrium, the president does not learn anything beyond his prior information and chooses the same action as in the game without communication. In the second equilibrium (an informative equilibrium), the court tells the president which of two sets contains his type. In this equilibrium, depending on the message the president receives, the optimal action is either the president's ideal point $x = 0$ or an action such that $0 < x^* \leq q$.

The existence of an informative equilibrium depends on the initial conditions. In particular it must be the case that the court type c_l prefers the president's ideal position $x = 0$ to the action the president would choose if c_l keeps silent. In this environment, the type that is indifferent between getting $x = 0$ and not communicating with the president is $\min\{\hat{c}, \frac{1}{2}\}$, in which $\hat{c} = \frac{1}{2}(-q + \sqrt{2q^2 + r})$. We have the following result:

Proposition 4. *If $c_l > \min\{\hat{c}, \frac{q}{2}\}$ the only equilibrium is the babbling equilibrium. If*

⁷As mentioned, the court can refuse to communicate with the president, so silence is a message as well.

$c_l \leq \min\{\widehat{c}, \frac{q}{2}\}$, there also exists an informative equilibrium: for some $m^* \in M$, types $c \in [c_l, \min\{\widehat{c}, \frac{q}{2}\}]$ sends the message $m=m^*$ and types $c \notin [c_l, \min\{\widehat{c}, \frac{q}{2}\}]$ sends the message $m \neq m^*$; the president chooses $x(m) = 0$ if $m = m^*$ and $x(m) = \min\{2\widehat{c}, q\}$ if $m \neq m^*$.

In the informative equilibrium, the message m^* could be “choose your ideal point” and types who do not benefit from sending this message could choose not to communicate with the president (or any $m \neq m^*$). Also, for any value of the initial parameters, we have the following welfare result:

Proposition 5. *The president is (weakly) better off in the cheap talk communication as compared to no communication institution. The effect of cheap talk communication on the court’s welfare is ambiguous.*

Corollary 1. *If $r = 0$ or $r \geq \bar{r}$, cheap talk communication (weakly) Pareto dominates no communication.*

Proposition 6 says that the president is better off in the cheap talk communication and corollary 2 suggests sufficient conditions such that both the president and the court are better off in the cheap talk communication. Next, I analyze the institution in which the president commits to a decision rule before the court sends a message.

2.2 Communication and Commitment

To model communication with commitment, I employ a mechanism design approach. From the Revelation Principle, there is no loss of generality in restricting the president to offer a direct revelation mechanism $\{x(\tilde{c})_{\tilde{c} \in [c_l, c_h]}\}$ (Myerson 1982).

The timing of the game is as follows. First, Nature chooses the court’s ideal position and the court observes its preference. Second, the president offers a mechanism $\{x(\tilde{c})_{\tilde{c} \in [c_l, c_h]}\}$. Third, the court sends a message to the president. Fourth, the president chooses the corresponding action according to the rule to which the president has committed. Fifth, the court decides to veto or not the president’s action.

I solve for the optimal continuous commitment rule for the president. We have the following proposition:

Proposition 6. *If $c_l \geq 0$, the optimal (continuous) commitment rule is: $x(c) = c$ if $c \in [c_l, q)$ and $x(c) = q$ if $c \geq q$. If $c_l < 0$, the optimal (continuous) commitment rule is: $x(c) = c$ if $c \in (0, q)$; $x(c) = 0$ if $c \leq 0$; and $x(c) = q$ if $c \geq q$.*

Given this commitment rule, in the unique equilibrium of this game, the court reports truthfully its ideal position; also, the court does not veto the action chosen. The unique equilibrium *looks as* an abstract judicial review: the court announces the range of legal actions and then the president chooses his most preferred action from this range. For instance, if $c \leq 0$, the range of legal actions the court announces is $[c, q]$ and the president chooses $x^* = 0 \in [c, q]$; if $c > 0$, the range of legal actions the court announces is $[c, q]$ and the president chooses $x^* = c \in [c, q]$; and if $c \geq q$, the range of legal actions the court announces is $[q, c]$ and the president chooses $x^* = q \in [q, c]$.

It is worth comparing the equilibrium of this commitment game with the equilibrium of the game in which the president has complete information about the court's preferences. In the complete information case, if $c < 0$, the president chooses $x^* = 0$ since the court prefers the president's ideal point to the status-quo; if $c > q$, the president chooses $x^* = q$ since the court prefers the status-quo to any outcome the president prefers to the status-quo; and if $0 \leq c \leq q$, president chooses $x^* = 0$ if $0 \leq c \leq \frac{q}{2}$ and $x^* = 2q - c$ if $\frac{q}{2} < c \leq q$. In this later case, both the court and the president prefer a change from the status-quo but the president wants more aggressive change. If the president has complete information about the court, he can exercise his first mover advantage and extract the entire surplus by offering the action that makes the court indifferent between accepting and rejecting it (or by offering his ideal action if $0 \leq c \leq \frac{q}{2}$).

In the "communication with commitment" institution, the president's choice is the same as in the complete information case if $c < 0$ or $c > q$. In these cases, the president does not benefit from knowing for sure the court's ideal position since all types less than 0 accept

the policy $x = 0$ and all types greater than q oppose any policy less than $x = q$. However, if $0 \leq c \leq q$ the outcome is $x^* = c$ since the president prefers to commit to implement the court's ideal position. In this case, the president benefits from knowing the court's ideal position since for any action x he chooses, the final outcome can be either x (in the instances in which the court accepts it) or q (in the instances in which the court rejects it). In this case, the optimal commitment rule is as if the president gives his (complete information) first-mover advantage to the court.

I compare the president's and the court's welfare in this institution with their welfare in the "no communication" and "cheap talk communication" institutions. First, and not too surprisingly, the court is strictly better off in the "communication and commitment" institution as compared to the other two institutions. Somewhat counterintuitively, the president is also strictly better off in the "communication and commitment" institution as compared to the other two institutions (for any value of r). We have the following results:

Proposition 7. *Communication and commitment strictly Pareto dominates no communication.*

Proposition 8. *Communication and commitment strictly Pareto dominates cheap talk communication.*

Next, I discuss some additional results of the comparative institutional analysis.

2.3 Comparative Institutional Analysis

Propositions 7 and 8 suggest that both the president and the court are better off in the "communication and commitment" institution. I will discuss the policy significance of this result in the next section. Also, we can also compare the equilibrium probability that the court rejects the president's action in the three institutional arrangements. We have the following result:

Corollary 2. $\Pr^{Commitment}(Court\ Rejects\ x^*) < \Pr^{CheapTalk}(Court\ Rejects\ x^*) \leq$

$\text{Pr}^{\text{NoCommunication}}(\text{Court Rejects } x^*)$.

Next, I discuss the policy and observable implications of the analysis.

3 Discussion

3.1 The Effect of Legal Doctrines

As mentioned, the model is consistent with different micro-foundations of judicial behavior. The model is consistent with legalism and, given this interpretation, the result that more judicial uncertainty emboldens the president to choose a more aggressive action has policy implications for understanding how legal uncertainty impacts the president's incentives to expand his powers. The Supreme Court has generally avoided to regulate the scope and limits of presidential war powers, even when it has ruled against the president. In his famous opinion in *Youngstown Sheet & Tube Co. v. Sawyer*, Justice Robert Jackson wrote that "court decisions [about the scope of presidential power] are indecisive because of the judicial practice of dealing with the largest questions in the most narrow way" (Jackson 1952).

The Supreme Court's practice of avoiding to define the scope and limits of presidential war powers can be seen in two famous rulings regarding the legality of military commission. In *Ex Parte Quirin*, the court stated that "it is unnecessary for present purposes to determine to what extent the President as Commander in Chief has constitutional power to create military commissions without the support of Congressional legislation."⁸ In *Hamadan v. Rumsfeld*, the court stated that "whether...the President may constitutionally convene military commissions without the sanction of Congress... is a question this Court has not answered definitively, and need not answer today."⁹

On the other hand, the Supreme Court has regulated more clearly the president's administrative powers. Article II, section I, of the Constitution opens with these words: "the

⁸Ex-Parte Quirin, 317 U.S 1 (1942).

⁹Hamadan v. Rumsfeld, 548 U.S. 557 (2006).

executive power shall be vested in the president of the United States of America.” The scope of the executive authority and its limits were not clearly spelled out in the Constitution. However, the Supreme Court has ruled that the president has full control over executive branch agencies but independent agencies own their allegiance to Congress and thus they are outside of the president’s control.

In *Myers v. United States*, the Supreme Court asserted that the president’s broad power of removal over any executive officer, except federal judges, were based upon Article II in the Constitution.¹⁰ However, in *Humphrey’s Executor v. United State*, the Supreme Court restricted the president’s control over independent agencies. The court ruled that Congress could establish agencies, functioning quasi-legislatively or quasi-judicially, which would be independent of the President (if Congress would like them to be).¹¹

Proposition 2, part i) suggests narrow court rulings on presidential powers reinforce legal uncertainty and embolden presidents to act aggressively. Also, the result suggests that presidents more likely take aggressive actions in areas in which the Supreme Court has left the limits of presidential authority undefined as compared to areas in which the Supreme Court has defined more clearly the limits of presidential authority.

The analysis also has relevance for the law and economics debate regarding the optimal specificity of legal norms regulating presidential powers, the rules versus standards debate. On the one hand, rules establish legal boundaries on the presence or absence of certain triggering facts; thus under a rule it is possible to know ex-ante the legal status of an action with reasonable certainty. On the other hand, standards require judges to incorporate into legal decisions a range of facts that are too broad to be specified ex-ante in a rule; thus under a standard it is not possible to know ex-ante with certainty the legality of an action (Ehrlich and Posner 1974; Kaplow 1992). Our analysis suggests that if the courts regulate presidential powers by standards rather than rules, standards more likely induce presidential

¹⁰Myers v. United States, 272 U.S. 52 (1926).

¹¹Humphrey’s Executor v. U.S., 295 U.S. 602 (1935).

rashness.

Also, it is worth noting that our analysis suggests a different effect of legal uncertainty on public official actions as compared to the effect of legal uncertainty on individual actions suggested in the previous literature. Legal scholarship has long argued that legal uncertainty produces a “chilling effect”: if a law is vague, an individual refrains from taking an action that might be deemed illegal in order to avoid legal punishment (Ehrlich and Posner 1974). Along the same lines, John Rawls argued that “if the percept of no crime without a law is violated, say by statutes, being vague and imprecise, what we are at liberty to do is likewise vague and imprecise. The boundaries of our liberties are uncertain. And to the extent that this is so, liberty is restricted by a reasonable fear of its exercise” (Rawls 1971).

Proposition 2, part ii), suggests that, in our setting, the effect of legal uncertainty on presidential actions is in the opposite direction that the one suggested in the “chilling effect” literature. A key difference between judicial review of presidential actions and judicial review of individual actions is that the president is not legally liable for actions taken while exercising his powers, if the court finds a presidential action illegal. On the other hand, if a citizen’s action is deemed illegal, the citizen is legally liable and might pay a fine or even go to prison.

3.2 The Effect of Ideological Uncertainty

The model is also consistent with theories that depict judges as seekers of legal policy. Given this interpretation, our result that more judicial uncertainty induces the president to take a more aggressive action has implication for Cass Sunstein’s influential theory of judicial minimalism. Judicial minimalism refers to a situation in which courts prefer case-by-case judgments and rule narrowly rather than broadly. In contrast, judicial maximalism refers to a situation in which courts prefer judgments that might give guidance for the future cases and rule broadly rather than narrowly (Sunstein 1999). The Sunstein analysis makes Justice Sandra Day O’Connor, the median justice of the Rehnquist court, the very model of judicial minimalism. Justice O’Connor limited her rulings to the facts of the case at hand

and pursued case-by-case judgments rather than broad judicial decisions.¹²

Sunstein's minimalism-maximalism dimension differs from the liberal-conservative dimension familiar to students of judicial politics. In Sunstein's theory a judge could be liberal and minimalist, or conservative and minimalist (or any other combination) (Sunstein 1999). The minimalism-maximalism dimension represents a judge's decision-making style (irrespective of her policy preferences).¹³ However, if the median justice follows a minimalist decision-making style, such a case-by-case approach creates uncertainty about her policy preference since one is less likely to infer her policy preference from past rulings. As a result, the analysis suggests that presidents are more likely to take aggressive actions if the median justice is minimalist.

3.3 The Design of Judicial Review of Executive Actions

The comparative institutional analysis has important normative policy implications. Under the current legal norm the president cannot formally communicate with the Supreme Court to ask for advice regarding the legality of his actions. No legal doctrine is more entrenched and revered than the ban on federal courts providing advisory opinions. In 1793 the Supreme Court refused the request of President Washington to interpret the treaties pertaining to questions of international law arising out of the French Revolution wars. And since then the Supreme Court has frequently reiterated the initial position that the rendition of advisory opinions is not part of the judicial powers of the federal courts (Field 1949).

However, some state Supreme Courts give advisory opinions to other branches of government. State constitutions in Colorado, Florida, Maine, Massachusetts, Michigan, New Hampshire, Rhode Island and South Dakota authorize the judiciary to give advice when the legislature or the governor requests it. For instance, the Florida Constitution allows for a

¹²Also, Sunstein argues that Justice Kennedy, who now sits in the ideological center of the Roberts courts, followed in his decisions the principal of judicial minimalism.

¹³Anderson (2008) has developed an empirical measure in which judges are ordered on a minimalism-maximalism dimension.

limited form of advisory opinions: it specifies that the Governor could request an advisory opinion only as to the interpretation of the constitution upon any question affecting executive powers and duties. More generally, national courts in other countries can provide advisory opinions as well.¹⁴

Influential constitutional scholars have argued against providing advisory opinions. For example, Alex Bickel cautioned that “courts may make no pronouncements in the large and in the abstract . . . [and] may give no opinions, even in a concrete case, which are advisory because they are not finally decisive ”(Bickel 1962). James B. Thayer explained more generally that “the giving of advisory opinions ... is not the exercise of the judicial function at all, and the opinions thus given have not the quality of judicial authority ”(Thayer 1893).

A stronger criticism against advisory opinions is that although they should not be legally binding, citizens “regularly fail to distinguish between advisory opinions and real cases” (Farina 1992). Along the same lines, Justice Frankfurter cautioned that: “It must remember that advisory opinions are not merely advisory ” (Frankfurter 1924). That is, the advisory opinions are treated as legal pronouncements and are *de facto* legally binding.¹⁵

For one, our analysis shows that allowing communication might be beneficial. Non-binding advisory opinions could provide a channel for the president and the court to communicate and to reduce the president’s uncertainty about the court’s position. In the “cheap talk communication” institution, the president learns whether the court supports or not his most preferred action and then chooses his action accordingly; also, both the president and the court might be better off.

More importantly, the comparative institutional analysis suggests that the *de facto* legally binding aspect of advisory opinions might not be problematic. In fact, it could be an informal mechanism to enforce the equilibrium of the “communication and commitment” institution.

¹⁴For example, in Canada and Germany.

¹⁵In particular, in countries that respect the rule of law, the public would regard a court’s advisory opinion as *de facto* legally binding and the executive might be compelled to treat it as legally binding, as well.

Moreover, our welfare analysis shows that both the president and the judiciary are strictly better off in the “communication and commitment” institution as compared to the other two institutions. Thus the legally binding effect of advisory opinion might be beneficial after all, an implication that the existing literature overlooks.

More generally, the comparative institutional analysis has relevance for understanding the optimal design of judicial review of executive actions. The institution of judicial review is entrenched in most advanced democracies and has recently spread in developing democracies as well. The main rationale is to provide checks on the elected branches of government and to uphold the rule of law. As mentioned, a key question in the constitutional design literature is whether constitutional courts should exercise abstract or to concrete judicial review (Ferejohn and Pasquino 2002) but this question has been analyzed in the context of judicial review of legislation only.¹⁶

The “communication and commitment” institution can be regarded as a form of abstract review of executive actions. In equilibrium, the court announces the range of legal actions and then the executive chooses his most preferred action from this range. This equilibrium can be achieved through a constitutional provision that allows for abstract review of executive actions, a review that is legally binding on the executive. That is, before the executive acts, the court announces the range of legal actions and the executive cannot choose an action outside this range. Such an institutional arrangement gives an incentive to the court to truthfully announce its most preferred reading of the preexisting legal rules and also brings legal certainty into the system since the president knows what actions are deemed legal. Moreover, such an institutional arrangement saves resources that would be wasted if the court finds an executive act illegal in a “case and controversy” review.

Moreover, the comparative institutional analysis produces an interesting observable implication. Corollary 2 suggests that the equilibrium probability of a judicial rejection of

¹⁶Germany, Italy, and Spain allow for abstract review while the legality of an action can also be challenged ex-post, after it is implemented.

executive actions is smaller in countries that allow for some form of ex-ante communication (either formal or informal) between the executive and the judiciary.

As a final note, I want to emphasize that the analysis does not apply to judicial review of legislation. A key difference between judicial review of legislation and judicial review of executive action is that the president is not a lawmaker; when the president acts, the legality of his actions has to be justified by a preexisting statute or by a provision in the Constitution. As Jeremy Waldron argues, “it is almost universally accepted that the executives elective credentials are subject to the principle of the rule of law, and, as a result, that officials may properly be required by courts to act in accordance with legal authorization” (Waldron 2006). Abstract judicial review of legislation or allowing advisory opinions in the legislative process presents different trade-offs (see Rogers and Vanberg (2002) for a formal model and a thorough discussion of the trade-offs of allowing advisory opinions in the legislation process).

4 Conclusion

In this paper, I have analyzed the effect of judicial uncertainty on the president’s incentives to act, as well as the effect of communication on the president’s and the court’s welfare. I have found that more judicial uncertainty induces the president to act more aggressively, regardless of the president’s attitude toward risk. The result suggests that narrow, case-by-case court rulings on presidential powers reinforce legal uncertainty and embolden presidents to act aggressively. Also, I have shown that the institution in which the court announces the range of legal actions before the president acts and then the president chooses an action from this range is Pareto superior. This result suggests that courts should also exercise abstract review in addition to ex-post review of executive actions.

In this paper, I have analyzed the trade-offs and the optimal mechanism of judicial review of executive actions. Election is another mechanism to hold the executive accountable. An

important future research is to study both political and legal mechanisms of holding the executive accountable. A current argument in the political and legal theory literature is that electoral accountability provides a sufficient check on executive power and as such legal accountability through judicial review is an undemocratic institution, which is unnecessary for preserving the rule of law (for an excellent review of this literature and an argument against judicial review see Bellamy (2007)). However, arguments about the superiority of political accountability of executive actions have not been thoroughly investigated. An important future study is whether election is a better mechanism to hold the executive accountable, and whether a (non-elected) judiciary having the power to strike down executive actions improves the rule of law.

5 Appendix 1

Lemma 1. *Given the court's equilibrium strategy, all actions x such that $x < \max\{0, 2c_l - q\}$ and $x > q$ are not optimal for the president.*

Proof. For any $x > q$, the president prefers the status-quo since his utility is single peaked about 0 and $U_P(x) < U_P(q)$ if $x > q$. If the initial conditions are such that $2c_l - q < 0$ with positive probability the court accepts $x = 0$. The president is better off by choosing $x = 0$ rather than any $x < 0$ since the president's ideal point is 0 and the probability that the court accepts $x = 0$ is greater than the probability that the court accepts any $x < 0$. If the initial conditions are such that $2c_l - q \geq 0$ there is zero probability that the court accepts any $x < 2c_l - q$. Then the president is always better off by choosing $q - \varepsilon$ for example rather than any $x < 2c_l - q$ since the court accepts this action with positive probability and the president prefers $x = q - \varepsilon$ to the status-quo. Thus all actions $x < \max\{0, 2c_l - q\}$ are not optimal for the president given the court's equilibrium strategy. ■

Lemma 2. *The president's optimal choice x^* exists and is unique. If $r \geq \bar{r}$, the optimal choice $x^* = q$, the president does not change the status-quo. If $r < \bar{r}$, the optimal choice*

$x^* < q$, the president chooses an action different than the status-quo.

Proof. First, since we maximize a continuous function on a compact interval, existence is guaranteed. Second, I show uniqueness: For any policy $x \in [\max\{0, 2c_l - q\}, q]$ the court accepts x if $c \leq \frac{x+q}{2}$ and thus the probability that the court accepts x is $F(\frac{x+q}{2}) = \frac{x+q-2c_l}{2(c_h-c_l)}$. The president's maximization problem is:

$$\operatorname{argmax}_{x \in [\max\{0, 2c_l - q\}, q]} \left\{ \frac{x+q-2c_l}{2(c_h-c_l)} \cdot U_P(x) + \left(1 - \frac{x+q-2c_l}{2(c_h-c_l)}\right) \cdot (U_P(q) - r) \right\} \quad (4)$$

The president's optimal action is the solution to the first order condition:

$$\frac{1}{2(c_h-c_l)} \cdot U_P(x) + \frac{x+q-2c_l}{2(c_h-c_l)} \cdot \frac{\partial U_P(x)}{\partial x} - \frac{1}{2(c_h-c_l)} \cdot (U_P(q) - r) = 0 \quad (5)$$

The second order condition is:

$$\frac{1}{(c_h-c_l)} \cdot \frac{\partial U_P(x)}{\partial x} + \frac{x+q-2c_l}{2(c_h-c_l)} \cdot \frac{\partial^2 U_P(x)}{\partial x \partial x} < 0 \quad (6)$$

for all $x \in (\max\{0, 2c_l - q\}, q]$ since:

1. $\frac{\partial^2 U_P(x)}{\partial x \partial x} \leq 0$ by the (weak) concavity of the utility function $U_P(\cdot)$;
2. $\frac{\partial U_P(x)}{\partial x} < 0$ for all $x \in (\max\{0, 2c_l - q\}, q]$.

Thus the president's maximization problem has a unique solution. Note also that the first order condition reduces to:

$$-\frac{\frac{\partial U_P(x)}{\partial x}}{U_P(x) - U_P(q) + r} = \frac{1}{x+q-2c_l} \quad (7)$$

The LHS expression is strictly increasing in x since

$$\frac{\partial}{\partial x} \left[\frac{\frac{\partial U_P(x)}{\partial x}}{U_P(x) - U_P(q) + r} \right] = \frac{-\frac{\partial^2 U_P(x)}{\partial x \partial x} (U_P(x) - U_P(q) + r) + \left(\frac{\partial U_P(x)}{\partial x}\right)^2}{(U_P(x) - U_P(q) + r)^2}. \text{ And } \frac{-\frac{\partial^2 U_P(x)}{\partial x \partial x} (U_P(x) - U_P(q) + r) + \left(\frac{\partial U_P(x)}{\partial x}\right)^2}{(U_P(x) - U_P(q) + r)^2} > 0$$

for all $x \in R$ since:

1. $-\frac{\partial^2 U_P(x)}{\partial x \partial x} \geq 0$ by the (weak) concavity of the utility function $U_P(\cdot)$;
2. $(U_P(x) - U_P(q) + r) \geq 0$ since $x \in [\max\{0, 2c_l - q\}, q]$, $U_P(x) - U_P(q) \geq 0$ by the single peakness of the utility function $U_P(\cdot)$ and $r \geq 0$ by assumption.
3. $(\frac{\partial U_P(x)}{\partial x})^2 > 0$ for all $x \in (\max\{0, 2c_l - q\}, q]$.

Denote the solution to the equation by $x^{solution}$. We can see that the LHS expression is decreasing in r and thus for high values of r the president has to choose a higher value of x (since the RHS expression is strictly decreasing in x). But the president does not choose any $x > q$ and thus if $\frac{\frac{\partial U_P(x)}{\partial x}|_q}{U_P(q) - U_P(q) + r} \geq \frac{1}{q + q - 2c_l}$, the president's optimal choice is $x^{solution} = q$. Thus if the direct cost $r \geq \frac{\partial U_P(x)}{\partial x}|_q \cdot (2q - 2c_l)$, the president does not change the status-quo and if $r < \frac{\partial U_P(x)}{\partial x}|_q \cdot (2q - 2c_l)$, the optimal action $x^{solution} < q$. ■

Proposition 1. *The perfect Bayesian equilibrium of the game is unique.*

Proof. Now, putting together the above lemma with the court's decision we prove proposition 1. ■

Proposition 2. *i) If the president faces a more uncertain judicial environment, the president take more aggressive action. ii) If the president faces a more uncertain judicial environment, the set of direct costs for which the president chooses an action different than the status-quo enlarges.*

Proof. If we re-parametrize the uniform distribution by the mean and variance we have $c_l = -\theta + c_m$ and $c_h = \theta + c_m$. Proposition 2 reduces to show that if θ increases, the optimal x^* decreases. If we rewrite the first order condition we get:

$$-\frac{\frac{\partial U_P(x)}{\partial x}}{U_P(x) - U_P(q) + r} = \frac{1}{x + q - 2c_m + 2\theta} \quad (8)$$

i) Since the president's optimal action is the solution to this equation, we can see that the RHS expression strictly decreases in θ . To balance the decrease in the RHS expression,

the president chooses a more aggressive action (lower value of x), so that the LHS expression decreases and the RHS expression increases. Also, note that the president's optimal action is increasing in c_l since $c_l = -\theta + c_m$.

ii) Also, the threshold value of the direct cost for which the president chooses an action less than the status-quo increases with an increase in θ . We can rewrite the previous bound as $\bar{r} = \frac{\partial U_P(x)}{\partial x} \Big|_q \cdot (2q - 2c_m + 2\theta)$. Thus if θ increases the set of direct costs $r < \bar{r}$ for which the president finds beneficial to change the status-quo increases as well. ■

Proposition 3. *The president takes less aggressive action if the policy conflict increases or if the direct cost of rejection increases.*

Proof. The optimal x^* is the solution to the first order condition:

$$\frac{1}{2(c_h - c_l)} \cdot U_P(x) + \frac{x + q - 2c_l}{2(c_h - c_l)} \cdot \frac{\partial U_P(x)}{\partial x} - \frac{1}{2(c_h - c_l)} \cdot (U_P(q) - r) = 0 \quad (9)$$

Since the second order condition is negative for all $x \in (\max\{0, 2c_l - q\}, q]$, by using the implicit function theorem the sign of derivative $\frac{\partial}{\partial q}[x^*(q)]$ is the same as the sign of the following derivative: $\frac{\partial}{\partial q}[(U_P(x) + (x + q + 2\theta - 2c_m) \cdot \frac{\partial U_P(x)}{\partial x} - U_P(q) + r)] = \frac{1}{2(c_h - c_l)} \cdot (\frac{\partial U_P(x)}{\partial x} - \frac{\partial U_P(q)}{\partial q})$ if the optimal solution is different than q .

By the (weak) concavity of the utility function $U_P(\cdot)$, $\frac{\partial U_P(x)}{\partial x} - \frac{\partial U_P(q)}{\partial q} \geq 0$ for any $x \in [\max\{0, 2c_l - q\}, q]$. Thus $\frac{\partial x^*(q)}{\partial q} \geq 0$. And if the optimal solution is a boundary solution, $x^* = q$, the optimal solution is (weakly) increasing in q .

Similarly, using the implicit function theorem, the sign of $\frac{\partial}{\partial r}[x^*(r)]$ is the same as the sign of $\frac{\partial}{\partial r}(U_P(x) + (x + q + 2\theta - 2 \cdot c_m) \cdot \frac{\partial U_P(x)}{\partial x} - U_P(q) + r) = \frac{1}{2(c_h - c_l)}$ if the optimal solution is different than q . Since $\frac{1}{2(c_h - c_l)} > 0$, then $\frac{\partial x^*(r)}{\partial r} > 0$. And if the optimal solution is a boundary solution, $x^* = q$, the optimal solution is (weakly) increasing in r ■

Proposition 4. *If $c_l > \min\{\hat{c}, \frac{q}{2}\}$ the only equilibrium is the babbling equilibrium. If $c_l \leq \min\{\hat{c}, \frac{q}{2}\}$, there also exists an informative equilibrium: for some $m^* \in M$, types $c \in$*

$[c_l, \min\{\widehat{c}, \frac{q}{2}\}]$ sends the message $m=m^*$ and types $c \notin [c_l, \min\{\widehat{c}, \frac{q}{2}\}]$ sends the message $m \neq m^*$; the president chooses $x(m) = 0$ if $m = m^*$ and $x(m) = \min\{2\widehat{c}, q\}$ if $m \neq m^*$.

Proof. Matthews (1989) has proved that only two types of equilibria exists in a more general setup. In one equilibrium, the president does not learn anything beyond his prior information and chooses the same action as in the game without communication. In the second equilibrium (an informative equilibrium), the court tells the president which of two sets contains his type. The reader is referred to Matthews's paper for a thorough characterization of this cheap talk game. In here, I will do the proof for our environment.

In order for information to be transmitted in equilibrium, a necessary and sufficient condition is that the lowest court type c_l prefers the policy $x = 0$ to the policy \widehat{x} that the president chooses if no information is transmitted. Thus it must be the case that $2c_l \leq \widehat{x} \Rightarrow 2c_l \leq \frac{1}{3} \cdot (2c_l - q + \sqrt{4 \cdot c_l^2 - 4qc_l + 4q^2 + 3r}) \Rightarrow c_l \leq \frac{1}{2}(-q + \sqrt{2q^2 + r})$ in which $\widehat{x} = \frac{1}{3} \cdot (2c_l - q + \sqrt{4 \cdot c_l^2 - 4qc_l + 4q^2 + 3r})$ is the policy the president chooses absent any communication. Denote the boundary type $\widehat{c} = \frac{1}{2}(-q + \sqrt{2q^2 + r})$. Also since no type $c > \frac{q}{2}$ prefers $x = 0$ to the status-quo, then it also must be the case that $c_l \leq \frac{q}{2}$ for some information to be transmitted. Thus for information to be transmitted in equilibrium we need that $c_l \leq \min\{\widehat{c}, \frac{q}{2}\}$. Otherwise, if $c_l > \min\{\widehat{c}, \frac{q}{2}\}$, the only equilibrium is the babbling equilibrium.

Now let consider the case in which $c_l \leq \min\{\widehat{c}, \frac{q}{2}\}$ so information is credibly transmitted in equilibrium. First, consider the situation in which $\min\{\widehat{c}, \frac{q}{2}\} = \widehat{c}$. If this is the case, we also must have $\min\{2\widehat{c}, q\} = 2\widehat{c}$. Now, if $c_l < \widehat{c}$ an informative equilibrium in which types $c \in [c_l, \widehat{c}]$ sends the message $m = m^*$ exists. We can check that no type has a profitable deviation. Suppose that a type $c' \in [c_l, \widehat{c}]$ deviates and send $m \neq m^*$ and all other types follow the previous strategy. Then the president would choose $x = 2\widehat{c}$. But $c' < \widehat{c}$ and type c' prefers $x = 0$ to $x = 2\widehat{c}$. So no type $c' \in [c_l, \widehat{c}]$ has a profitable deviation. Now if a type $c' \in [\widehat{c}, c_h]$ deviates and sends any other message in M that is different than m^* , the president still chooses $x = 2\widehat{c}$. If the type c' sends the message m^* the president chooses $x = 0$ but the

type c' prefers $x = 2\widehat{c}$ to $x = 0$. Thus no type $c' \in [\widehat{c}, c_h]$ has a profitable deviation.

Second, consider the situation in which $\min\{\widehat{c}, \frac{q}{2}\} = \frac{q}{2}$. If this is the case, we also must have $\min\{2\widehat{c}, q\} = q$. Now, if $c_l < \frac{q}{2}$ an informative equilibrium in which types $c \in [c_l, \frac{q}{2}]$ sends the message $m = m^*$ exists. Suppose that a type $c' \in [c_l, \frac{q}{2}]$ deviates and send $m \neq m^*$ and all other types follow the previous strategy. Then, the president chooses $x = q$. But $c' \leq \frac{q}{2}$ and type c' prefers $x = 0$ to $x = q$. So no type $c' \in [c_l, \widehat{c}]$ has a profitable deviation. Now if a type $c' \in [\frac{q}{2}, c_h]$ deviates and sends any other message in M that is different than m^* , the president still chooses $x = q$. If the type c' sends the message m^* the president chooses $x = 0$ but the type c' prefers $x = q$ to $x = 0$. Thus no type $c' \in [\frac{q}{2}, c_h]$ has a profitable deviation. ■

Proposition 5. *The president is (weakly) better off in the cheap talk communication as compared to the no communication institution. The effect of cheap talk communication on the court's welfare is ambiguous.*

Proof. The president can ignore any message sent by the court and thus he cannot be worse off than in the no communication game. To show that he is weakly better off, we only need to find an example in which the president's expected utility is greater in the cheap talk communication than in the no communication game. Let $q = 1$, $r = 0$, and $c \sim [0, \frac{4}{3}]$. In the no communication case, the president's expected utility is $EU_p = -\frac{5}{9}$. In the cheap talk case, the president's expected utility is $EU_p = -\frac{1}{2}$.

To prove that the effect of communication on the court's welfare is ambiguous, I will show two examples, one in which the court is better off and one in which the court is worse off in the cheap talk communication than in the no communication game. Let $q = 1$, $c_l = \frac{101}{512}$, $c_h = \frac{4}{3}$, and $r = \frac{9}{4}$. Then the court's expected utility in the no communication game is $EU_c = -0.0958$ and the court's expected utility in the cheap talk game is $EU_c = -0.0963$. Also, let $q = 1$, $c_l = \frac{3}{32}$, $c_h = \frac{4}{3}$, and $r = 1$. Then the court's expected utility in the no communication game is $EU_c = -0.0473$ and the court's expected utility in the cheap talk

game is $EU_c = -0.0374$. ■

Corollary 1. *If $r = 0$ or $r \geq \bar{r}$, cheap talk communication (weakly) Pareto dominates no communication.*

Proof. For the president, proposition 5 shows that he is always (weakly) better off in the cheap talk game.

If $r = 0$, the court's expected utility is:

$$EU_C^{Cheap\ Talk} = \frac{1}{12(c_h - c_l)} \cdot (-4c_h^3 + 4c_l^3 + 12c_h \cdot q^2 - 12c_h^2 \cdot q + 9(-1 + \sqrt{2})^3).$$

And the court's expected utility in the game without communication is:

$$EU_C^{No\ Communication} = -\frac{1}{27(c_h - c_l)} \cdot (9c_h^3 - 7c_l^3 + 27c_h^2 - 27c_h^2 \cdot q - 4q^2 \cdot (q + \sqrt{c_l^2 - c_l \cdot q + q^2}) + 5c_l(-3q + 2\sqrt{c_l^2 - c_l \cdot q + q^2}) + c_l^2(9q + 2\sqrt{c_l^2 - c_l \cdot q + q^2})).$$

$$\text{Now, the difference } EU_C^{Cheap\ Talk} - EU_C^{No\ Communication} = \frac{1}{108(c_h - c_l)} \cdot (8c_l^3 + q^3 \cdot ((-97 + 81\sqrt{2}) - 16\sqrt{c_l^2 - c_l \cdot q + q^2}) + 20c_l(-3q + 2\sqrt{c_l^2 - c_l \cdot q + q^2}) + 4c_l^2(9q + 2\sqrt{c_l^2 - c_l \cdot q + q^2})).$$

I have checked the inequality with Mathematica and for any $c_l \leq \min\{\hat{c}, \frac{q}{2}\}$ and $q > 0$ the expression $EU_C^{Cheap\ Talk} - EU_C^{No\ Communication} > 0$. Thus, the court is better off in the game with cheap talk communication.

Now, if $r \geq \bar{r}$, the president does not change the status-quo, $x^* = q$. If the initial conditions are such that $c_l > \frac{q}{2}$, the court's payoff is the same in both games since an informative equilibrium does not exist. And if the initial conditions are such that $c_l \leq \frac{q}{2}$, types $c \in [c_l, \frac{q}{2}]$ gain from information transmission and the court is (ex-ante) better off in the cheap talk than in the no communication game. ■

Proposition 6. *If $c_l \geq 0$, the optimal (continuous) commitment rule is: $x(c) = c$ if $c \in [c_l, q)$ and $x(c) = q$ if $c \geq q$. If $c_l < 0$, the optimal (continuous) commitment rule is: $x(c) = c$ if $c \in (0, q)$; $x(c) = 0$ if $c \leq 0$; and $x(c) = q$ if $c \geq q$.*

Proof. As mentioned, I solve for the optimal continuous commitment rule. I prove the result in two steps. First I find the optimal continuous commitment rule from the set of rules such that the court will not veto the policy implemented as a result of the message sent. Second,

I show that the optimal continuous commitment rule in the class of mechanisms in which the court does not veto the action chosen dominates any other continuous commitment rule in which the court vetoes.

1) I restrict the analysis to the mechanisms $M(x(c))$ such that $x(c)$ is not vetoed by the court. Invoking the revelation principle we can, without loss of generality, represent the optimization problem as:

$$\max_{x(c)} - \int_{c_l}^q (x(c))^2 f(c) dc; \quad (10)$$

subject to the incentive compatibility constraint:

$$-(x(c) - c)^2 \geq -(x(\tilde{c}) - c)^2, \forall c, \tilde{c} \quad (11)$$

From the incentive compatibility, for any $c > \tilde{c}$ we have:

$$-(x(c) - c)^2 \geq -(x(\tilde{c}) - c)^2 \text{ and } -(x(\tilde{c}) - \tilde{c})^2 \geq -(x(c) - \tilde{c})^2. \quad (12)$$

Summing the two constraints we get:

$$(c - \tilde{c}) \cdot (x(c) - x(\tilde{c})) \geq 0 \quad (13)$$

Therefore, $x(\cdot)$ is weakly increasing. The incentive compatibility constraint is satisfied (and only satisfied) by two classes of mechanisms: the pooling one in which $x(c) = a$ for all $c \in [c_l, c_h]$, and the fully separating one corresponding to the court's ideal point, $x(c) = c$ for all $c \in [c_l, q]$.

Also, continuous mechanisms will have at most one strictly increasing part on which $x(c) = c$ (otherwise the continuity will be violated). Thus the optimal continuous mechanism is either flat or $x(c) = c$. Denote by c_1 and c_2 the boundary of the segment where $x(c) = c$, then a optimal continuous mechanism is the solution to the following maximization problem:

$$\max_{c_1, c_2} \left\{ - \int_{\max\{c_l, 0\}}^{c_1} c_1^2 \cdot \frac{1}{c_h - c_l} dc - \int_{c_1}^{c_2} c_2^2 \cdot \frac{1}{c_h - c_l} dc - \int_{c_2}^q c_2^2 \cdot \frac{1}{c_h - c_l} dc \right\} \quad (14)$$

Denote the expression to be maximized by $R(c_1, c_2)$. If $c_l > 0$, $R(c_1, c_2) = \frac{1}{3(c_h - c_l)} \cdot (-2c_1^3 + 2c_2^3 + 3c_1^2 \cdot c_l - 3c_2^2 \cdot q)$.

$\frac{\partial R(c_1, c_2)}{\partial c_1} = -2c_1 \cdot (c_1 - c_l)$ and the optimal c_1 is the solution to the equation: $-2c_1 \cdot (c_1 - c_l) = 0$. Thus, $c_1^* = c_l$ since $c_l > 0$.

$\frac{\partial R(c_1, c_2)}{\partial c_2} = c_2 - q$ and the optimal c_2 is the solution to the equation $c_2 - q = 0$. Thus, $c_2^* = q$.

And if $c_l \leq 0$, $R(c_1, c_2) = \frac{1}{3(c_h - c_l)} \cdot (-2c_1^3 + 2c_2^3 - 3c_2^2 \cdot q)$. Then $\frac{\partial R(c_1, c_2)}{\partial c_1} = -2c_1^2$ and thus $c_1^* = 0$.

Moreover, $\frac{\partial R(c_1, c_2)}{\partial c_2} = 2c_2 \cdot (c_2 - q)$ and thus $c_2^* = q$ since $c_2 > c_1$.

Next, I show that we did not lose anything by restricting the space of mechanisms to those that are not vetoed by the court. Note that the president's optimal commitment rule does not depend on any information the court has if $c \leq 0$ or if $c \geq q$. In these situations, the optimal rule is $x(c) = 0$ if $c \leq 0$ and $x(c) = q$ if $c \geq q$. I only need to show that when $c \in (0, q)$ the president cannot do better than $x(c) = c$ if the court vetoes the mechanism. I prove the following lemma:

Smoothing Lemma. i) Let $c \sim U[a, b]$ in which $0 < a < b$ and the president's utility is $U_P = -x^2$. Ex-ante, the institution in which the policy implemented is $x = c$ dominates the institution in which the policy implemented is $x = a$ if $c \in [a, \frac{a+b}{2}]$ and $x = b$ if $[\frac{a+b}{2}, b]$.
ii) Let $c \sim U[t, b]$ in which $0 < t < \frac{b}{2}$ and the president's utility is $U_P = -x^2$. Ex-ante, the institution in which the policy implemented is $x = c$ dominates the institution in which the policy implemented is $x = 0$ if $c \in [t, \frac{b}{2}]$ and $x = b$ if $[\frac{b}{2}, b]$.

Proof. i) The president's expected utility in the first institution is $EU_P^1 = -\frac{1}{2}(a^2 + b^2)$. The president's expected utility in the second institution is $EU_P^2 = -\frac{1}{3}(a^2 + b^2 + ab)$. The difference in utility $EU_P^2 - EU_P^1 = \frac{1}{6}(a - b)^2 > 0$ for any a and b .

ii) The president's expected utility in the first institution is $EU_P^1 = -\frac{b^3}{2(b-t)}$. And the president utility in the second institution is $EU_P^2 = -\frac{1}{3}(b^2 + bt + t^2)$. The difference in utility is $EU_P^2 - EU_P^1 = \frac{b^3 + 2t^3}{6(b-t)} > 0$ for any t and b . ■

I use this lemma to show that we did not lose anything by restricting our search for the optimal continuous commitment rule from the class of rules that are not vetoed by the court. Now, suppose that instead of offering $x(c) = c$ the president chooses $x(c) = c$ if $c \in (0, a)$ and $x(c) = a$ if $c \in [a, q]$. Then a simple application of lemma 4, part i) shows that the president is better off by also choosing $x(c) = c$ on the interval $[a, q]$. Thus we do not lose anything by only considering the veto free mechanisms. The president's optimal continuous commitment rule is the one given in proposition 6. ■

Proposition 7. *Communication and commitment strictly Pareto dominates no communication.*

Proof. If $c \leq 0$, the court is better off in the commitment case since the equilibrium outcome is $x^* = 0$ in the commitment case and $x^* > 0$ in the no communication case. If $c \in (0, q)$ the court is better off in the commitment case since, in equilibrium, the court gets exactly its ideal point. And if $c \geq q$ the court's payoff is the same in the two institutions. Since with positive probability $c < q$, then, ex-ante the court is strictly better off in the commitment case.

For the president, if $c \leq \hat{x}$ (in which \hat{x} is the equilibrium action in the no communication game), the president is better off in the commitment case since the equilibrium outcome is $x^* = c$ in the commitment case and $x^* = \hat{x}$ in the no communication case; if $c \in [\hat{x}, \frac{q+\hat{x}}{2}]$ the president is better off in the no communication case since the equilibrium outcome is $x^* = \hat{x}$ in the no communication case and $x^* = c$ in the commitment case; if $c \in [\frac{q+\hat{x}}{2}, q]$ the president is better off in the commitment case since the equilibrium outcome is $x^* = c$ in the commitment case and $x^* = q$ in the no communication case; and if $c \in [q, c_h]$ the president's payoff is the same in the two institutions. But from smoothing lemma, part i) we know that

if $c \in [\widehat{x}, q]$ the president is strictly better off in the commitment case. Since in the other cases, the president is better off in the commitment case or indifferent and since with positive probability $c < q$, then, ex-ante, the president is strictly better off in the commitment case.

■

Proposition 8. *Communication and commitment strictly Pareto dominates cheap talk communication.*

Proof. For the court, if $c \leq 0$, the court is indifferent between the two institutions; if $c \in (0, q)$ the court is strictly better off in the commitment case since the court gets its ideal point; and if $c \geq q$ the court is indifferent between the two institutions. And since with positive probability $c < q$, ex-ante, the court is strictly better off in the commitment case.

To show that the president is better off in the commitment case we only need to show that he is better off in the unique equilibrium of the communication and commitment game than in the informative equilibrium of the cheap talk game. Consider first the case in which $c_l \leq 0$. Then if $c \in [c_l, 0]$ the president is indifferent between the two institutions; if $c \in [0, \widehat{c}]$, the president is better off in the cheap talk game since the equilibrium outcome is $x^* = 0$ in the cheap talk case and $x^* = c$ in the commitment case; if $c \in [\widehat{c}, 2\widehat{c}]$, the president is better off in the commitment game since the equilibrium outcome is $x^* = 2\widehat{c}$ in the cheap talk case and $x^* = c$ in the commitment case; if $c \in [2\widehat{c}, \frac{q+2\widehat{c}}{2}]$, the president is better off in the cheap talk game since the equilibrium outcome is $x^* = 2\widehat{c}$ in the cheap talk case and $x^* = c$ in the commitment case; if $c \in [\frac{q+2\widehat{c}}{2}, q]$, the president is better off in the commitment game since the equilibrium outcome is $x^* = q$ in the cheap talk case and $x^* = c$ in the commitment case; and if $c \in [q, c_h]$, the president is indifferent between the two institutions. But an application of the smoothing lemma, part i) if $c \in [0, 2\widehat{c}]$ and $c \in [2\widehat{c}, q]$ shows that the president is strictly better off in the commitment game.

Next, consider the case in which $c_l > 0$. If $c \in [c_l, \widehat{c}]$, the president is better off in the cheap talk game since the equilibrium outcome is $x^* = 0$ in the cheap talk case and $x^* = c$ in the commitment case; if $c \in [\widehat{c}, 2\widehat{c}]$, the president is better off in the commitment game since

the equilibrium outcome is $x^* = 2\hat{c}$ in the cheap talk case and $x^* = c$ in the commitment case; if $c \in [2\hat{c}, \frac{q+2\hat{c}}{2}]$, the president is better off in the cheap talk game since the equilibrium outcome is $x^* = 2\hat{c}$ in the cheap talk case and $x^* = c$ in the commitment case; if $c \in [\frac{q+2\hat{c}}{2}, q]$, the president is better off in the commitment game since the equilibrium outcome is $x^* = q$ in the cheap talk case and $x^* = c$ in the commitment case; and if $c \in [q, c_h]$, the president is indifferent between the two institutions. If $c \in [2\hat{c}, q]$ by smoothing lemma, part i), the president is strictly better off in the commitment case. We only need to show that the president is also strictly better off in the commitment case if $c \in [c_l, 2\hat{c}]$. But this is just an application on smoothing lemma, part ii). ■

Corollary 2. $\Pr^{Commitment}(Court\ Rejects\ x^*) < \Pr^{CheapTalk}(Court\ Rejects\ x^*) \leq \Pr^{NoCommunication}(Court\ Rejects\ x^*)$.

Proof. First, in the equilibrium of the communication and commitment game the court does not veto the action implemented, thus the equilibrium probability of a court rejection is zero. Second, in the cheap talk game and the no communication game, in equilibrium, the court rejects the president's action with positive probability. If the initial conditions are such that an informative equilibrium does not exist, the equilibrium probability of a court rejection is the same in the cheap talk and in the no communication game. On the other hand, if the initial conditions are such that an informative equilibrium exists, the president chooses either $x = 0$ (which the court does not veto) or $0 < x^{CheapTalk} \leq q$ (which the court might veto) in the cheap talk game. But the president's optimal action $x^{NoCommunication} < x^{CheapTalk}$ and thus, in equilibrium, the probability of a court rejection is higher in the no communication game. ■

6 Appendix 2

In this appendix, I provide conditions under which the comparative static result in proposition 2, part i) holds in a more general setting. Let the president's uncertainty about the

court's ideal action be represented by a cumulative distribution function $F(c)$ with continuous density function $f(c)$ everywhere positive on $[c_l, c_h]$. The next lemma establishes a sufficient condition for the president's maximization problem to have a unique solution:

Uniqueness Lemma. *The president's optimal choice x^* is unique if the reversed hazard rate $\frac{f(c)}{F(c)}$ is decreasing.*

The requirement that the reversed hazard rate is decreasing is satisfied by any log-concave distribution, for example. If the lemma holds, the perfect Bayesian equilibrium is unique.

Now, suppose we compare two distributions $F(c)$ and $G(c)$ with $G(c)$ being a mean preserving spread of $F(c)$. A sufficient condition for the previous comparative statics result to hold is the following: the reversed hazard rate of the distribution $G(c)$ is less than the reversed hazard rate of the distribution $F(c)$ on $[\max\{\frac{q}{2}, \frac{c_l+q}{2}\}, q]$. We have the following result.

Proposition 9. *For any two distributions $F(c)$ and $G(c)$ with $G(c)$ being a mean preserving spread of $F(c)$, and $\frac{g(c)}{G(c)} < \frac{f(c)}{F(c)}$ everywhere on $[\max\{\frac{q}{2}, \frac{c_l+q}{2}\}, q]$, the president chooses a more aggressive action when $G(c)$ than when $F(c)$.*

In words, the president is more aggressive when he is more uncertain about the court's ideal position. Substantively, proposition 9 says that a substantive increase in uncertainty (in order for the condition $\frac{g(c)}{G(c)} < \frac{f(c)}{F(c)}$ everywhere on $[\max\{\frac{q}{2}, \frac{c_l+q}{2}\}, q]$ to hold) induces the president to choose a more aggressive action.

Proof. The equilibrium conditions for the two distributions are:

$$-\frac{\frac{\partial U_P(x)}{\partial x}}{U_P(x) - U_P(q) + r} = \frac{f(\frac{x+q}{2})}{F(\frac{x+q}{2})} \text{ and } -\frac{\frac{\partial U_P(x)}{\partial x}}{U_P(x) - U_P(q) + r} = \frac{g(\frac{x+q}{2})}{G(\frac{x+q}{2})}. \quad (15)$$

In lemma 2 we show that the expression $-\frac{\frac{\partial U_P(x)}{\partial x}}{U_P(x) - U_P(q) + r}$ is strictly increasing in x . Thus if the reversed hazard rate is strictly decreasing, since we maximize a continuous function on a compact interval, the optimal action is unique.

If the distribution is $F(x)$, the optimal solution is $x \in [\max\{0, 2c_l - q\}, q]$. Since both reversed hazard rates are strictly decreasing, if $\frac{g(c)}{G(c)} < \frac{f(c)}{F(c)}$ on $[\max\{\frac{q}{2}, \frac{c_l+q}{2}\}, q]$, then $\frac{g(\frac{x+q}{2})}{G(\frac{x+q}{2})} < \frac{f(\frac{x+q}{2})}{F(\frac{x+q}{2})}$ if $x \in [\max\{0, 2c_l - q\}, q]$. Thus the optimal solution $x_{F(c)}^* \geq x_{G(c)}^*$. The equality obtains if the initial conditions are as such that in both cases the president does not change the status-quo, that is $x_{F(c)}^* = x_{G(c)}^* = q$ ■

References

- [1] Ackerman, Bruce. 1997. "The Rise of World Constitutionalism," *Virginia Law Review* 83(4): 771-797.
- [2] Anderson, Robert. 2008. "Measuring Meta-Doctrine: An Empirical Assessment of Judicial Minimalism in the Supreme Court." Pepperdine University Legal Studies Research Paper.
- [3] Banks, Jeffrey S. 1990. "Equilibrium Behavior in Bargaining Games." *American Journal of Political Science* 34(3):599-614.
- [4] Bellamy, Richard. 2007. "Political Constitutionalism: A Republican Defence of the Constitutionality of Democracy." Cambridge: Cambridge University Press.
- [5] Bickel, Alexander. 1962. "The Least Dangerous Branch: The Supreme Court at the Bar of Politics." Indianapolis, IN:Boobs-Merill
- [6] Cameron, Charles. 2000. "Veto Bargaining: Presidents and the Politics of Negative Power." Cambridge: Cambridge University Press.
- [7] Cameron, Charles and Nolan McCarty. 2005. "Models of Vetoes and Veto Bargaining." *Annual Review of Political Science* 7: 409-435.
- [8] Corwin, Edward. 1984. "The President: Office and Powers, 1787-1984: History and Analysis of Practice and Opinion." New York: New York University Press.

- [9] Cooper, Phillip. 2002. "By Order of the President: The Use and Abuse of Executive Direct Action." University Press of Kansas.
- [10] Craig, Paul and Adam Tomkins. 2007. "The Executive and the Public Law: Power and Accountability in Comparative Perspective." Oxford: Oxford University Press.
- [11] Ehrlich, Isaac and Richard Posner. 1974. "An Economic Analysis of Legal Rulemaking." *The Journal of Legal Studies* 3(1): 257-286.
- [12] Epstein, Lee and Jack Knight. 1998. "The Choices Justice Make." Washington, D.C.: CQ Press
- [13] Farina, Cyntia. 1992. "Supreme Judicial Court Advisory Opinions: Two Centuries of Interbranch Dialog." in the History of Law in Massachusetts: The Supreme Judicial Court. edited by Russell K. Osgood. Boston: Supreme Judicial Court Historical Society.
- [14] Fearon, James. 1995. "Rationalist Explanations for War." *International Organization* 49(3): 379-414.
- [15] Ferejohn, John and Pasquale Pasquino. 2002. "Constitutional Courts as Deliberative Institutions." in Constitutional Justice, East and West, W. Sadurski ed., Kluwer Law International: The Hague.
- [16] Ferejohn, John and Pasquale Pasquino. 2003. "Rule of Democracy and Rule of Law." in Maravall and Przeworski, eds., Democracy and the Rule of Law. New York: Cambridge University Press
- [17] Field, Oliver P. 1949. "The Advisory Opinion – An Analysis." *Indiana Law Journal* 24 (2): 203
- [18] Frankfurter, Felix. 1924. "A Note on Advisory Opinions" *Harvard Law Review* 37: 1002
- [19] Howell, William. 2003. "Power Without Persuasion." Princeton: Princeton University Press.

- [20] Jackson, Robert. 1952. concurring opinion. *Youngstown Co. v. Sawyer* 343 U.S. 579.
- [21] Jackson Vicki, and Mark Tushnet. 2006. "Comparative Constitutional Law." New York: Foundation Press.
- [22] Kaplow, Louis. 1992. "Rules versus Standards, An Economic Analysis." *Duke Law Journal* 42: 557
- [23] Kinkopf, Neil. 2006. "The Statutory Commander in Chief." *Indiana Law Journal* 81: 1169.
- [24] Marshall, William. "Eleven Reasons Why Presidential Power Inevitably Expands and Why It Matters." *Boston Law Review* 88: 505.
- [25] Matthews, Steven. 1989. "Veto Threats: Rhetoric in a Bargaining Game." *Quarterly Journal of Economics* 104 (1): 347-69
- [26] Myerson, R. 1982. "Optimal Coordination Mechanisms in Generalized Principal-Agent Problems." *Journal of Mathematical Economics* 10: 6781.
- [27] McCarty, Nolan. 1997. "Presidential Reputation and the Veto." *Economics and Politics* 9: 1-27.
- [28] Moe, Terry. 1985. "The Politicized Presidency." in *New Directions in American politics*, edited by John Chubb and Paul Peterson. Washington, DC: Brookings.
- [29] Moe, Terry and William G. Howell. 1999. "The Presidential Power of Unilateral Action." *Journal of Law, Economics and Organization* 15(1): 132-179.
- [30] Mayer, Kenneth. 2001. "With a Stroke of the Pen: Executive Orders and Presidential Power." Princeton: Princeton University Press.
- [31] Posner, Richard. 2008. "How Judges Think." Cambridge,MA: Harvard University Press

- [32] Rawls, John. 1971. "A Theory of Justice." Cambridge: The Belknap Press of Harvard University Press.
- [33] Rogers, James and George Vanberg. 2002. "Judicial Advisory Opinions and Legislative Outcomes in Comparative Perspective." *American Journal of Political Science* 46(2): 379-397
- [34] Romer, Thomas and Howard Rosenthal. 1978. Resource Allocation, Controlled Agendas, and the Status Quo." *Public Choice* 33: 27-44.
- [35] Rothschild, Michael and Joseph E. Stiglitz. 1970. "Increasing Risk I, A Definition." *Journal of Economic Theory* 2(3): 225-243.
- [36] Segal, Jeffrey A. and Harold J. Spaeth. 2002. "The Supreme Court and the Attitudinal Model Revisited." Cambridge: Cambridge University Press.
- [37] Schauer, Frederick. 1988. "Formalism." *Yale Law Journal* 97: 509.
- [38] Stone Sweet, Alec. 2000. "Governing with Judges: Constitutional Politics in Europe." Oxford: Oxford University Press.
- [39] Sunstein, Cass R. 1999. "One Case at a Time: Judicial Minimalism on the Supreme Court." Cambridge, MA: Harvard University Press.
- [40] Thayer, James. 1893. "The Origin and Scope of the American Doctrine of Constitutional Law." *Harvard Law Review* 7: 129.
- [41] Vanberg, Georg. 1998. "Abstract Judicial Review, Legislative Bargaining, and Policy-Compromise." *Journal of Theoretical Politics* 10: 299-326.
- [42] Waldron, Jeremy. 2006. "The Core of the Case Against Judicial Review." *The Yale Law Journal* 115: 1346.