The Value of Vagueness: A Positive Theory of Judicial Opinions

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Abstract

Despite the general preference for clarity in the law, judicial opinions frequently produce unclear standards. While vagueness may result from the natural imprecision of language, we contend that *political considerations* are at the heart of judicial decisions to issue ambiguous or precise decisions. In particular, ambiguity presents judges with the ability to resolve two political problems associated with judicial review: fundamental uncertainty over the implications of their policy choices and public displays of judicial weakness resulting from non-compliance. Yet, the very ambiguity that can hide non-compliance also removes a central source of pressure to comply that judges can place on policymakers that may disagree with a judicial decision but cannot afford the political backlash of publicly ignoring an unambiguous order. In other words, ambiguity presents judges with a trade-off. We present a model of judicial opinions that suggests how courts evaluate this trade-off. A central conclusion is that vagueness is not clearly associated with a particular political environment. Courts in strong political positions may issue vague decisions to increase their influence over policy, while courts in weak positions may use vagueness to hide their lack of influence.

Introduction

The law does not celebrate vagueness. This is unsurprising given that we use law to define appropriate social conduct, to coordinate beliefs over what kinds of conduct to expect from others, and to specify the procedures the state must follow in order to address violations of social norms (Austin 1920; McAdams 2000), all of which are more difficult to accomplish without specificity. American jurisprudence reflects the general distaste for vagueness in both criminal and civil law. Indeed, criminal statutes may be voided because they fail to adequately communicate the boundaries between legal and illegal behavior and because they encourage discriminatory implementation.[1] Similarly, contracts may be deemed unenforceable on vagueness grounds, because they do not establish clear expectations for the parties.[2]

The concern over vagueness is not limited to statutes or contracts; it reaches jurisprudence itself. Constitutional law is full of judicial debate over what constitutes clear standards of review, which are almost universally preferred to unclear standards (but see Culver 2004 and Endicott 2000). In commerce clause jurisprudence, moves away from evaluating what activities have "direct" or "indirect" effects on interstate commerce or identifying what constitutes a "traditional governmental function" are justified by the inability of an intelligent person to accurately draw the appropriate distinctions or to identify the correct functions.[3] The same general point holds for the Court's search and seizure cases, in particular those concerning

[1] See, e.g., *Grayned v. City of Rockford*, 408 U.S. 104 (1972); Connally v. General Construction Co.,269 U.S. 385 (1926); Lanzetta v. New Jersey, 306 U.S. 451 (1939); Colautti v. Franklin, 439 U.S. 379 (1979); Village of Hoffman Estates v. Flipside, 455 U.S. 489 (1982).

[2] See *Martin Delicatessen v Schumacher*, 52 NY2d 105, 109 and the Restatement [Second] of Contracts §33 (1981).

[3] *U.S. v. E.C. Knight Co*., 156 U.S. 1 (1895); *NLRB v. Jones & Lauglin Steel Corporation*, 301 U.S. 1 (1937); *National League of Cities v. Usery,* 426 U.S. 833 (1976); *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985).

car searches or even the Court's abortion cases, where we famously learn that "liberty finds no refuge in a jurisprudence of doubt".[4]

There are good reasons to be concerned about vague appellate court opinions. They communicate unclear standards to lower court judges, and as such they decrease the probability that conflicts will not be resolved similarly in different jurisdictions. As a consequence, vague opinions render law less predictable, and predictability may be the most important feature of a well functioning legal regime. It is also possible that vague opinions are more likely to be manipulated by judges themselves. Indeed this is Justice Scalia's primary objection to the Supreme Court's modern confrontation clause jurisprudence, which allows for the admission of hearsay evidence so long as the statement under consideration exhibits sufficient "indicia of reliability".[5] To meet this standard, judges must ask whether the statement either falls within an accepted hearsay exception or bears "significant guarantees of trustworthiness". Of course, it is not at all clear whether "a significant guarantee of trustworthiness" does much to clarify what is meant by "indicia of reliability". In so far as this is true, much is left to the discretion of individual judges, and in such cases the opportunities for non-legal influences on decision making likely increase.

In addition to the legal implications of vagueness, there are real political consequences to establishing unclear standards. Scholars have long argued that ambiguous standards render executive branch implementation difficult (Baum 1976; Johnson 1979; Wasby 1970). When rules are not clearly expressed, policy implementers are forced to expend resources divining the court's intended meaning. Moreover, if implementation is carried out at the local level (e.g., school prayer standards), vagueness likely increases the variance in implementation across jurisdictions,

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[4] *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833 (1992). Regarding the Court's car search cases, see *Carroll* v. *United States*, 267 U.S. 132 (1925), *United States* v. *Ross*, 456 U.S. 798 (1982), *Pennsylvania* v. *Labron*, 518 U.S. 938 (1996), *New York v. Belton*, 453 U.S. 454 (1981), *Thornton v. United States* (2004).

[5] *Crawford v. Washington* (2004). See *Ohio* v. *Roberts,* 448 U.S. 56 (1980) for the Court's authoritative statement of the hearsay standard.

again undermining equal protection. Most important, unclear standards breed non-compliance. When it is difficult to say what constitutes faithful implementation, executive officers are granted a significant degree of freedom to comply with judicial decisions as they see fit. Empirically, we know that federal agency compliance with Supreme Court decisions decreases in the vagueness of the opinion (Spriggs 1996, 1997). At the local level, there is perhaps no greater example of the relationship between opinion vagueness and non-compliance in constitutional law than the second Brown decision, which was implemented in a shocking variety of ways across and within the states, often in rather obvious non-compliance with what we might think of as the spirit of Brown II (Rosenberg 1991).

In short, the case for vagueness does not look good. Yet, we continue to observe unclear judicial standards. This is puzzling. While it is possible that judicial vagueness merely reflects intrinsic imprecision in written language, in this paper we suggest that vagueness might serve important political purposes. We advance this argument from the perspective of separation of powers theory, and ask whether there is something about vagueness that might solve problems associated with judicial policy making in the context of inter-branch politics. In particular, we consider two general kinds of problems. First, although we may model judicial decision making as a process under which judges are perfectly informed about the consequences of their choices, this is highly unlikely. It is far more likely that judges are at least minimally uncertain about whether their rules will, say, merely induce proper respect for the rights of the criminally accused or unduly burden law enforcement to the detriment of public safety. In such a context, perfect opinion clarity, especially in constitutional law where the political branches may find it difficult to fix inappropriate judicial rules, may lock-in undesirable policy outcomes from the court's perspective. Vagueness may allow judges to void unacceptable policies while relying on the expertise of legislatures and executives in order to weed out alternative, judge-made policies that

turn out to be inappropriate.[6] Second, there are some issues over which courts are likely to anticipate non-compliance, no matter how clear they may be. The desegregation issue is a classic example. When courts confront policies that they sincerely dislike, yet they expect non-compliance with decisions voiding such policies, they are faced with a difficult choice. Either strategically defer to political pressures or sincerely void the policy and likely be publicly defied. We suggest that vagueness may allow courts to "hide" non-compliance. If public defiance constitutes a genuine loss of institutional prestige (Choper 1980), vagueness may allow courts to avoid a potential blow to the institution. If no one can say for sure what a court has ordered, it is not possible to claim that the court has been defied.

On this account, vagueness seems an attractive means of addressing the problems of policy uncertainty and public defiance. That said, vagueness should not be unambiguously preferred to clarity, even if we assume away a multitude of genuine legal incentives for transparency. Since it is more difficult to defy a clear judicial order than a vague one, being vague removes an important source of pressure judges can place on potentially recalcitrant politicians. Accordingly, we believe the ability to be vague presents judges with a compelling trade-off: vague standards may resolve problems of policy uncertainty and public defiance, but they may also invite non-compliance from politicians disinclined to implement unfavorable orders. In the remainder of this paper we develop a game theory model of judicial opinions that characterizes this trade-off and suggests implications for how courts might resolve it in particular cases.

We divide the remainder of this paper into three sections. In the following section, we introduce a model of judicial-executive relations in which we develop our argument and propose a set of empirical implications for judicial opinion clarity. We then discuss two well known U.S. Supreme Court cases, United States v. Nixon, 483 U.S. 683 (1974) and Hamdi v. Rumsfeld, 542

[6] In a sense, the model we develop flips Roger's (2001) analysis on its head. That is, Rogers considers how legislatures might use judicial review to dispose of inappropriate legislation, while we consider the reverse – courts may use legislatures and executives to dispose of inappropriate judicial rules.

U.S. ___ (2004), which we use to underscore the causal mechanism we propose. We leave a final section for a few concluding remarks.

Modeling Judicial Vagueness

Our aim is to highlight a fundamental tension that courts must confront when considering how specific an opinion to craft. This tension emerges out of competing considerations that may impact judicial decisions, including the limited ability of courts to design policies that achieve a given goal in an effective manner, the desire to avoid public disobedience, and the pressure for compliance that courts can place on other policymakers by increasing the specificity of their rulings. The first two considerations may lead judges to desire some vagueness in their rulings, first, to take advantage of the policy expertise available to executives and legislatures that are willing to work towards the realization of a court's policy goals and, second, to provide "cover" against public disobedience by other branches that are determined not to see a court's decision realized. Generating pressure for compliance, on the other hand, provides reason for increasing the specificity of rulings in order to reduce the opportunities for recalcitrant legislators and executive officials to stymie the court's agenda.

To consider how – and under what circumstances – these considerations affect the interactions between courts and legislatures, we focus on two versions of a simple model. In the first version (the baseline model), the court is restricted to issuing highly specific decisions: If it strikes down a policy, it must propose an alternative policy that should replace the status quo. In the second version, the court is able to strike down policies while leaving the precise remedy (or alternative policy) vague. Comparing across the two versions of the model allows us to isolate the circumstances under which judges will choose to issue highly specific rulings and when they will choose to be vague. It is important to note that we do not view the baseline model as an accurate representation of judicial decision-making; judges are typically not forced to provide a highly specific remedy when they choose to annul a statute. Instead, the baseline model serves as a

device that will allow us to delineate more clearly *why* judges may choose to be vague when we consider the full model.

A Baseline Model

Consider the following baseline model. There are two strategic actors in the game: A court and an executive.[7] The sequence of moves is as follows:

1. The court moves first. It reviews the status quo policy SQ. The court may either uphold or strike down the policy. If it annuls the status quo, the court orders the executive to implement one of two alternative policies (x or y). If the court upholds the status quo, the game ends.
2. If the court strikes down the status quo, the executive must respond to the court's ruling. It can implement the policy ordered by the court. Alternatively, it can choose to ignore the court and to implement any of three alternatives (x , y , or SQ).

The key to modeling the trade-offs confronting the court lies in specifying judicial preferences. We assume that the court dislikes the status quo and would prefer to see an alternative policy outcome. The difficulty for the court is that it lacks the policy expertise to know with certainty which alternative policy, x or y , is going to produce the policy outcome the court prefers. In one "state of the world," policy *x* produces the desired result, but in another "state of the world" policy *y* is appropriate. Let the probability that policy *x* is appropriate be given by $\Pr(x \text{ appropriate}) = q \in (0,1)$. Thus, *y* is appropriate with probability 1-*q*.[8] We use the phrase "judicial policy uncertainty" as a shorthand for the uncertainty the court faces regarding which of the two policies is appropriate. Thus, as *q* approaches $\frac{1}{2}$, judicial uncertainty increases. As *q*

[7] Alternatively, one could think of the other player as a legislature. The only important substantive point is that we simplify by assuming that the policymaker that reacts to a judicial decision can be modeled as a unitary actor.

[8] Thus, the court confronts a problem that is analogous to the problem faced by the floor in Gilligan and Krehbiel's (1996) model of the relationship between Congressional committees and the floor.

approaches 1, the court is increasingly certain that policy *x* is appropriate; as *q* approaches 0, the court is increasingly certain that *y* is appropriate.

Importantly, we assume that for any "state of the world," the court prefers the status quo to implementation of the *wrong* policy. That is, implementation of *y* when *x* is the appropriate choice results in an outcome that is *worse* from the court's perspective than not having acted at all. As a concrete example, consider the US Supreme Court confronting an executive policy in which enemy combatants are detained without the ability to challenge the factual basis of their detention. A majority of justices may prefer a policy outcome that provides detainees with some ability to challenge their detentions. The difficulty is that they may be uncertain about *which exact manner* of challenging their detention will provide due process without undermining legitimate national security interests. More importantly, they may prefer the status quo to the creation of some procedure that will, in fact, endanger national security. In short, the difficulty confronting the justices in deciding whether to strike down the status quo and place it with *x* or *y* is that they are uncertain about which of these policies is going to result in an outcome they actually prefer.

To model these preferences, we normalize the utility of the status quo policy to 0 and the payoff of implementing the appropriate alternative policy to 1 (i.e., the court receives a payoff of 1 if *x* (*y*) is implemented and *x* (*y*) is, in fact, the appropriate policy). On the other hand, if an *inappropriate* policy is implemented, the court pays a cost of $M > 0$ (i.e., the court receives a payoff of -*M* if *x* (*y*) is implemented but *y* (*x*) is, in fact, the appropriate policy) We also assume that the court has institutional concerns in addition to these policy preferences. Specifically, defiance of the court by the executive is costly since such defiance highlights the relative weakness of the judiciary. Thus, we assume that the court pays a cost of $c > 0$ if the executive chooses to ignore a specific judicial order.

A crucial consideration for the court in approaching a case concerns the likely reaction by other policymakers to the court's decision. Will the executive be willing to implement the court's

ruling, or will it attempt to resist it? We incorporate this consideration by assuming that the court cannot be certain about executive preferences. Specifically, we assume that there are two types of executives. A "friendly" executive shares the court's policy preferences: It would like to see the status quo replaced by an appropriate alternative policy. Thus, a friendly executive receives a payoff of 0 for continued implementation of the status quo. It receives a payoff of 1 if the appropriate alternative policy is implemented (i.e., the friendly executive receives a payoff of 1 if x (y) is implemented and x (y) is, in fact, the appropriate policy). Like the court, the friendly executive prefers the status quo to an inappropriate policy and derives a payoff of -1 if the inappropriate policy is implemented.[9] The other type of executive is "hostile." A hostile executive prefers the status quo policy to the alternative outcome favored by the court. Thus, the hostile executive derives a payoff of 1 from continued implementation of the status quo. It receives a payoff of 0 for implementation of the appropriate alternative policy and a payoff of -1 from implementation of the inappropriate alternative policy.[10] We assume that the probability that the executive is friendly is given by $\Pr(\text{Friendly}) = p$. As p approaches 1, the court is increasingly confident that it is confronting a friendly executive.

As in the case of the court, we also assume that executives are motivated by institutional concerns in addition to policy concerns. Specifically, we assume that ignoring a judicial decision is costly to the executive – most obviously, we might imagine that citizens may believe such an

[9] At this point, a question may arise: If the friendly executive prefers another policy, why does the court have to act at all, i.e., why would the executive not simply implement the appropriate policy? One answer is that policymakers are confronted by severe resource constraints, most importantly time: Any government cannot act on all policy proposals that it would like to see implemented. Instead it must prioritize those proposals that it will pursue. We can thus think of the policy in question as a policy on which the executive's preferences may coincide with the court's, but the priority of the policy is not high enough for the executive to have acted on the policy without prompting from the court.

[10] Thus, these preferences assume that given the choice between two policies that aim at an outcome the hostile executive does not favor, the worst outcome from the executive's point of view is an inappropriate policy that has additional, negative consequences. To go back to the substantive example given above, the executive might believe that detainees should not be able to challenge their detentions; however, given that they will be able to do so, it would prefer a policy a procedure that ensures national security to one that endangers national security.

action to be illegitimate, and decrease their support for the executive. Thus, we assume that if the executive chooses to ignore a judicial decision, it must pay a cost of $B > 0$.

Equilibria in the Baseline Model

We can usefully separate the equilibria in the baseline model into three different cases: i) Those in which the cost of evading the court is so high that all executives are willing to obey any order issued by the court, ii) those in which the cost of evasion is so low that the hostile executive ignores all orders and the friendly executive ignores any orders that turn out to be inappropriate, iii) and those in which the cost of evading the court is in an intermediate range in which the two types of executives are willing to obey appropriate orders but will ignore inappropriate ones.

Case 1: The cost of evasion is high ($B \geq 2$)

> **Equilibrium A:** For $B \geq 2$**,** the following strategy profile constitutes a subgame perfect equilibrium:
>
> **Friendly Executive:** Obey all judicial rulings.
> **Hostile Executive:** Obey all judicial rulings.
> **Court:** If $q < \min[\frac{1}{2}, \frac{1}{1+M}]$, strike down SQ and order *y*.
> If $q > \max[\frac{1}{2}, \frac{M}{1+M}]$, strike down SQ and order *x*.
> If $q \in [\frac{1}{1+M}, \frac{M}{1+M}]$, uphold SQ.

Figure 1 illustrates this equilibrium graphically. In this case, the cost of defying the court is so considerable, that both types of executives will obey any judicial ruling. As a result, the likelihood that the executive is friendly (*p*) has no impact on the court's strategy. Instead, the court only worries about the degree of judicial policy uncertainty and the costs associated with implementation of the wrong policy. When the court is sufficiently uncertain about which policy is appropriate (in the range $[\frac{1}{1+M}, \frac{M}{1+M}]$), it upholds the status quo. It strikes down the status quo and orders implementation of *x* or *y* only when it is fairly certain which policy is appropriate. As the cost of implementing the wrong policy (*M*) increases, the court becomes more restrained

and upholds the status quo in a larger set of circumstances (the range $[\frac{1}{1+M}, \frac{M}{1+M}]$ expands).

In other words, in this case, "judicial restraint" (in the sense of upholding the status quo) is a product of the limited capacity of the judges as policymakers: Judges restrain themselves because they want to avoid implementation of inappropriate policies.

Case 2: The cost of evasion is intermediate ($B \in [1,2)$)

> **Equilibrium B:** For $B \in [1,2)$, the following strategy profile constitutes a subgame perfect equilibrium:
>
> > **Friendly Executive:** Obey any judicial order that is appropriate. Ignore an order that is inappropriate and implement the appropriate alternative policy.
> > **Hostile Executive:** Obey any judicial order that is appropriate. Ignore an order that is inappropriate and implement the status quo.
> >
> > **Court:** If $q < \min[\frac{1}{2}, \frac{1}{1-p+c}]$ strike down SQ and order *y*.
> >
> > If $q > \max[\frac{1}{2}, \frac{c-p}{1-p+c}]$ strike down SQ and order *x*.
> >
> > If $q \in [\frac{c-p}{1-p+c}, \frac{1}{1-p+c}]$, uphold SQ.

Figure 2 illustrates this equilibrium.[11] Recall that in case 1, the cost of defiance is high enough to induce all types of executive to comply with any judicial order. In the current case, the cost of defiance is still sufficiently high to induce compliance with appropriate orders. But it no longer outweighs the cost of implementing a policy that will not achieve the court's intended policy outcome. As a result, both types of executive will ignore an inappropriate judicial order. In this new environment, the calculations confronting the court change in a significant way. In case 1, the court must confront the limitation of its own policy expertise: Because it knows that even inappropriate orders will be implemented, the court becomes less willing to strike down

[11] The figure is drawn for $c \in (1,2)$. As c goes below 1, only the upper half of the figure is relevant: The cost of being defied is so low that the court does not worry about noncompliance and simply orders what it believes to be the right policy. As c goes above 2 (noncompliance becomes very costly for the court), only the lower part of the figure is relevant. The court becomes more and more willing to uphold the SQ to avoid noncompliance as the executive is more likely to be hostile.

legislation as judicial policy uncertainty grows. In the current case, the court no longer has to confront this difficulty. Both types of executives will not implement an inappropriate judicial order.

Instead, another concern now becomes relevant: If the court strikes down the status quo but its order turns out to be inappropriate, it will be defied by both types of executive. The friendly executive will defy the court and instead implement the appropriate policy to achieve the policy outcome favored by the court. The hostile executive will defy the court and continue to implement the status quo. While defiance is costly in both cases (c), it is particularly costly for the court to confront a hostile executive who not only defies the court but implements a policy that the court does not favor. Not surprisingly, the court's strategy therefore depends on *both* the probability that the executive is hostile and judicial policy uncertainty. As judicial policy uncertainty increases, a "mistake" is more likely, which will lead to defiance. And as the executive is more likely to be hostile, the costs of such a mistake increase. As a result, the court is more likely to uphold the status quo as it is more likely to face a hostile executive and as its uncertainty over appropriate policy increases.

Note an important distinction between judicial restraint in the two cases we have considered so far. In case 1, the court upheld the status quo in order to avoid implementation of an inappropriate policy. Restraint was a response to the limits of the policymaking abilities of judges. In the current case, there is no such concern: An inappropriate policy will never be implemented. Instead, restraint is a response to the potential for defiance. Under certain circumstances, the costs of defiance are sufficiently high to lead the court to uphold the SQ in order to avoid a confrontation.

Case 3: The cost of evasion is low ($B < 1$)

In this case, the following strategy profile constitutes a subgame perfect equilibrium:

> **Equilibrium C:** For $B < 1$ **,** the following strategy profile constitutes a subgame perfect equilibrium:
>
> > **Friendly Executive:** Obey any judicial order that is appropriate. Ignore an order that is inappropriate and implement the appropriate alternative policy.
> > **Hostile Executive:** Ignore all judicial orders and implement the status quo.
> > **Court:** If $q < \min[\frac{1}{2}, \frac{p - c(1-p)}{pc}]$ strike down SQ and order *y*.
> >
> > If $q > \max[\frac{1}{2}, \frac{c-p}{pc}]$ strike down SQ and order *x*.
> >
> > If $q \in [\frac{p - c(1-p)}{pc}, \frac{c-p}{pc}]$, uphold SQ.

Figure 3 illustrates this equilibrium. In this final case, the costs of defying the court are so low that only a friendly executive will obey an appropriate judicial order. In all other circumstances, judicial decisions will be ignored. Once again, the considerations for the court shift. From the court's perspective, there is no purpose in striking down the status quo if the court is relatively certain that the executive is hostile. Doing so will only incur the costs of defiance. Hence, the court upholds the status quo in the lower part of the figure. If, however, the court is sufficiently certain that the executive is friendly to its purposes, it is willing to strike down the status quo in order to give the friendly executive an opportunity to implement the appropriate policy. The court becomes more likely to do so as judicial policy uncertainty declines because it is less likely to incur the costs of defiance in providing the executive with an opportunity to replace the status quo. Once again, as in case 2, judicial restraint (upholding the status quo) is therefore a response to the potential for defiance and not a response to fear of implementation of an inappropriate policy.

Equilibria in the Full Model

We are now in a position to consider the full model. How will judicial behavior change when judges are not limited to substituting a specific policy when striking down a statute but can instead be vague about what they expect the executive to do in response to a judicial decision? If an order is vague, it is not clear what "compliance" with the decision requires and therefore, executives are free to respond as they wish without incurring the costs of defiance. As a result, in response to a vague order, both types of executive will implement their most preferred policies. Thus, being vague offers several advantages: If the executive is friendly, vagueness results in the implementation of the appropriate policy from the court's point of view. If the executive is hostile and determined to ignore the court, vagueness will serve to "hide" evasion. But of course vagueness also has a drawback. If the executive is hostile but, given the costs of defiance, would be willing to implement an appropriate order by the court, being vague rather than specific reduces pressure on the executive and results in the continuation of the status quo rather than the policy outcome favored by the court. How will this trade-off play out? Once again, we can consider the three cases outlined above.

Case 1: The cost of evasion is high ($B \geq 2$)

> **Equilibrium $\hat{\mathbf{A}}$:** For $B \geq 2$, the following strategy profile constitutes a subgame perfect equilibrium:
>
> > **Friendly Executive:** Obey all specific judicial rulings. Implement the appropriate policy in response to a vague order.
> > **Hostile Executive:** Obey all specific judicial rulings. Implement the status quo in response to a vague order.
> >
> > **Court:** If $q < \min[\frac{1}{2}, \frac{1-p}{1+M}]$, strike down SQ and order *y*.
> >
> > If $q > \max[\frac{1}{2}, \frac{M+p}{1+M}]$, strike down SQ and order *x*.
> >
> > If $q \in [\frac{1-p}{1+M}, \frac{M+p}{1+M}]$, strike down SQ and issue a vague ruling.

Figure 4 illustrates this equilibrium. The relevant comparison for this case is equilibrium A in the baseline model, illustrated in Figure 1. Recall that the cost of defiance is so high that all

executives will obey any judicial order. In equilibrium A, the court would strike down the status quo only if it was sufficiently certain about the appropriate replacement policy. In the current scenario, the court has the additional option of being vague. As a consequence, the court's behavior changes markedly. Most importantly, the court no longer upholds the status quo. Instead, it begins to issue vague rulings. Specifically, if the court is fairly certain that the executive is friendly, it issues a vague ruling for all degrees of judicial uncertainty (the top part of the figure). Doing so allows the court to take advantage of a friendly executive's policy expertise. As the executive is more likely to be hostile, the court begins to issue specific orders for x or y for a larger and larger degree of judicial policy uncertainty. The intuition behind this behavior is immediate: The court knows that a hostile executive will obey a specific order but continue to implement the status quo in response to a vague order. When the executive is hostile, a specific order, should it turn out to be appropriate, would therefore lead to an outcome the court favors. The risk in issuing such an order is that it turns out to be inappropriate and will be implemented anyway. Hence, the court must trade-off the pressure it can exert to get compliance by being specific against the risk that the order is inappropriate. As the court is more confident that it is confronting a hostile court, it is more eager to generate this pressure for compliance even as judicial policy uncertainty is higher. Thus, we observe a similar dynamic as in case A: "Judicial restraint" no longer exhibits itself in upholding the status quo; instead the court now strikes down the status quo but is vague about the consequences that should flow from the court's decision. But once again, "restraint" is a response to the limited ability of judges to make policy: The desire to avoid implementation of inappropriate policies leads judges to be vague.

Case 2: The cost of evasion is intermediate ($B \in [1,2)$)

> **Equilibrium $\hat{\mathbf{B}}$:** For $B \in [1,2)$ **,** the following strategy profile constitutes a subgame perfect equilibrium:
>
> > **Friendly Executive:** Obey any judicial order that is appropriate. Ignore an order that is inappropriate and implement the appropriate alternative policy.

Hostile Executive: Obey any judicial order that is appropriate. Ignore an order that is inappropriate and implement the status quo.

Court: If $q < \min[\frac{1}{2}, \frac{1-p}{1-p+c}]$ strike down SQ and order *y*.

If $q > \max[\frac{1}{2}, \frac{c}{1-p+c}]$ strike down SQ and order *x*.

If $q \in [\frac{1-p}{1-p+c}, \frac{c}{1-p+c}]$, uphold SQ.

Figure 5 illustrates this equilibrium. The relevant comparison from the baseline model is Figure 2. Once again, the possibility of issuing a vague ruling has an important impact on the behavior of the court. In particular, when the court is sufficiently confident that the executive is friendly, it strikes down the status quo and issues a vague ruling. Doing so allows the court to annul the status quo and to take advantage of the policy expertise of the executive in order to achieve its preferred policy outcome. In this region (the top region of Figure 5), "restraint" is thus a response to the limits of judicial policymaking. In the lower part of Figure 5, on the other hand, the court's concerns are different. When it is fairly confident that the executive is hostile, a specific order will result in the court's most preferred outcome if the order turns out to be appropriate. If, on the other hand, the order turns out to be inappropriate, the court will incur the cost of defiance. It can "hide" such defiance by being vague. The court thus confronts the following trade-off: A specific ruling is a gamble: If appropriate, it results in the court's preferred policy outcome; if inappropriate, it results in public defiance. A vague order, on the other hand, avoids defiance but maintains the status quo. If judicial policy uncertainty is sufficiently high the gamble becomes less attractive and the court is more likely to issue a vague ruling. In this scenario, vagueness thus serves two purposes simultaneously: The court can use vagueness to hide noncompliance when it is sufficiently uncertain about the appropriate policy and the executive is likely to be hostile and it allows the court to take advantage of the executive's expertise when it is friendly.

Case 3: The cost of evasion is low ($B < 1$)

In this case, the following strategy profile constitutes a subgame perfect equilibrium:

Equilibrium $\hat{C}$: For $B < 1$, the following strategy profile constitutes a subgame perfect equilibrium:

> **Friendly Executive:** Obey any judicial order that is appropriate. Ignore an order that is inappropriate and implement the appropriate alternative policy.
> **Hostile Executive:** Ignore all judicial orders and implement the status quo.
> **Court:** Always strike down the status quo and issue a vague ruling.

This final case is analogous to equilibrium C above, displayed in figure 3. The cost of defying the court is so small for the executive that it chooses to ignore any judicial order. In equilibrium C, the court therefore only strikes down the status quo if it is highly certain that the executive is friendly in order to provide the executive with an opportunity to implement the appropriate policy. In most cases, however, the court simply chooses to uphold the status quo to avoid noncompliance. Once the court can choose to be vague, its behavior changes: It now issues a vague ruling in all circumstances. The logic of doing so is immediate: By being vague, the court can take advantage of the policy making expertise of a friendly executive: If the executive is friendly, the court will obtain its most preferred outcome. At the same time, given the low degree of public support enjoyed by the court, vagueness insulates the court against the costs of public defiance of the court. Once again, vagueness thus serves two purposes: It allows the court to strike down the status quo while taking advantage of the policy expertise of the executive to generate the appropriate alternative policy. And it also allows the court to hide non-compliance with its decisions without having to uphold the status quo outright (as it had to do in Equilibrium C).

Discussion

This simple model highlights a number of important dimensions in understanding the conditions under which judges will be tempted to issue "vague" opinions and when they will be lead to issue highly specific decisions. The most important insight is that vague opinions can serve two separate purposes:

1) Vagueness in an opinion allows judges to deal with their limited ability to make appropriate public policy and to take advantage of the policy expertise of other branches.

Naturally, using vagueness to take advantage of the policymaking abilities of other branches is contingent on the expectation that these other branches will, in fact, make an effort to implement the policy goals of the court. Thus, as judges are more confident that other policymakers share their policy preferences, we would expect to see an increase in the use of vague rulings as opposed to highly specific judicial orders. Figures 4-6 reflect this expectation. On the other hand, if a court enjoys sufficient public support to generate compliance even by executives that do not share the court's policy preferences, we would expect the opposite relationship as the court is more likely to confront a hostile executive. In this case, vagueness provides the executive with discretion that will not be used as envisioned by the court. As a result, the court is more eager to issue a specific ruling to increase pressure for compliance. The only consideration that tempers this behavior is the fact that the court wants to avoid implementation of inappropriate policies. Therefore the court may be vague if judicial policy uncertainty is sufficiently high.

2) Vagueness in an opinion allows judges to hide expected noncompliance by recalcitrant policymakers in the other branches.

Taking advantage of the policy expertise of other policymakers is one reason for vagueness. A second reason is less sanguine. When the court is in a weak position because it does not have sufficient public backing to induce compliance with its decisions (most notably when $B < 1$), judges may also make use of vague opinions in order to be able to strike down the status quo without having to risk public defiance. By being sufficiently unclear or ambiguous about what is required in response to a judicial decision, they are able to mask or hide noncompliance by other policymakers.

The central implication of this argument is therefore that the decision by judges to issue either highly specific or ambiguous, vague opinions is influenced by a number of different considerations and factors, and that vagueness may serve different purposes in different

circumstances. Sometimes – if the court enjoys high public support, and defiance imposes significant costs on other policymakers – vagueness is a response to the limited ability of judges to make appropriate public policy. Ambiguity allows a court to strike down a statute while giving free reign to other (friendly) policymakers to respond to the court's decision in the appropriate way. Moreover, when the court is particularly uncertain about the consequences of particular alternative policies, vagueness helps guard against the negative consequences of inappropriate policies. At other times – when the court enjoys little public support and defiance of the court is not costly for other policymakers – vagueness may primarily serve the purpose of hiding defiance of the court while preserving the possibility that a friendly executive may, after all, implement the court's agenda. This argument leads to a number of testable empirical implications – we state two here. The first implication applies to courts that enjoy at least the minimum degree of public support to make defiance of the court politically unattractive for executives under most circumstances:[12]

1) The likelihood that a court will issue a vague decision increases in policy uncertainty, however, this relationship is conditioned by the beliefs the court has about the policy maker. When the court believes that the policy maker shares its preferences, it is willing to be vague for relatively low levels of uncertainty; however, when the court believes that the policy maker does not share its preferences, the court is willing to be vague only for relatively high levels of uncertainty.

This proposition is clearly illustrated by the equilibria in Figures 4 and 5. Vagueness allows courts to take advantage of the executive policy expertise. When courts can trust executives to implement appropriate alternative policies, they will be willing to be vague even when they are fairly certain about the possible effects of their polices. But, when executives cannot be trusted, the incentive to be clear increases, and courts will be vague for only relatively high degrees of uncertainty.

[12] That is, cases 1 and 2 in the formal analysis.

The second implication applies to circumstances in which a court enjoys little public support and the costs of defying the court are negligible for other policymakers:

2) A court that enjoys little or no public support will never issue highly specific rulings.

The logic of this implication is immediate: A court with little public support can exert little pressure for compliance on other policymakers. If the judges wish to avoid clear public demonstrations of their impotence, they will therefore seek to avoid clear confrontations with other policymakers by issuing vague or ambiguous rulings that these policymakers can effectively ignore without openly defying a judicial decision. Vagueness serves as a shield for judges to mask their lack of authority.

So what follows from all of this? Is vagueness in judicial decisions a sign of weakness? Is vagueness a judicial virtue or a judicial vice? Our analysis provides no clear, black and white answer. Vagueness serves different purposes in different circumstances. Sometimes, vague decisions are a symptom of a weak judiciary that recognizes its inability to force compliance by recalcitrant policymakers in other branches and seeks to hide its impotence behind ambiguous opinions that will have little or no effect on public policy. At other times, vagueness is the expression of a strong judiciary that uses ambiguity to pursue its own agenda more effectively by making use of the policy expertise of other policymakers.

Watergate and the War on Terror

We believe that the central tension the model highlights is evident in a number of United States Supreme Court cases, especially those in which the Court is called upon to characterize the boundary between Article II and Article III powers. We discuss two cases here that exemplify the behavior predicted by the first implication above: United States v. Nixon and Hamdi v. Rumsfeld. In our opinion, these cases share a great deal in common, from the level of presidential commitment to the policies under review to the central argument advanced in defense of those policies. On the other hand, the Nixon decision is relatively transparent whereas the Hamdi decision is decidedly vague, and we believe our model can shed light on this variance. Given the

executives' commitment to the status quo, the Supreme Court likely had good reason to be as clear as possible in both cases in order to place pressure on the president to comply its alternative policies; however, uncertainty over the consequences of its policy choices could have given reason to be less clear in order to avoid locking-in an inappropriate alternative. There is a reasonable case to be made for believing that policy uncertainty was higher in Hamdi than in Nixon, and thus, the vagueness in the Hamdi decision could have been a response to that concern. In what follows, we briefly review the facts, key constitutional issues and decisions in both cases. We then discuss the similarities between the two cases across the relevant dimensions identified by the model. We conclude by addressing policy uncertainty.

U.S. v. Nixon

The facts of the Watergate tapes case are well known, but we briefly review them here in order to structure our comparison (O'Brien 2005; Schwartz 1990). In June 1972, five individuals associated with Richard Nixon's Committee for the Re-election of the President were caught breaking into the headquarters of the national Democratic Party at the Watergate hotel complex. The purpose of the break-in appears to have been to bug the office so that the Nixon's campaign might snoop on opposition strategy. In the 1973 congressional hearings regarding the matter, Alexander Butterfield, a former aide to the president, disclosed that Nixon taped his Oval Office conversations, which raised the possibility of recorded evidence linking the president to the Watergate scandal. The special prosecutor investigating the case, Archibald Cox, eventually subpoenaed sixty-four tapes which he believed were relevant. When Nixon refused to turn over the information to Cox, Judge John Sirica issued a subpoena *duces tecem* requiring the president to release the tapes. Nixon refused. After losing on appeal, Nixon released a limited set of recordings, which turned out to exclude long periods of conversation. He also fired Cox.[13] Unfortunately for the president, Cox's replacement Leon Jaworski, was similarly committed to

[13] Actually, Attorneys General resigned before Robert Bork, the former solicitor general did Nixon's dirty work (O'Brien 2005, 235)

obtaining the tapes. Following the federal indictment of several top Nixon aides, Jaworski obtained a court order requiring the president to deliver the tapes, and when Nixon refused again, Jaworski sought expedited review before the Supreme Court.

The central issue in the case concerned Nixon's claim that the president enjoys an absolute privilege to keep conversations between he and his advisors private, even if this information eventually might be deemed material to a criminal investigation. Jaworski countered by claiming that while the executive might enjoy some degree of privilege, it was certainly not absolute. On the absolute executive privilege issue, the Supreme Court could not have been more clear.

> [N]either the doctrine of separation of powers, nor the need for confidentiality of high-level communications, without more, can sustain an absolute, unqualified Presidential privilege of immunity from judicial process under all circumstances. The President's need for complete candor and objectivity from advisers calls for great deference from the courts. However, when the privilege depends solely on the broad, undifferentiated claim of public interest in the confidentiality of such conversations, a confrontation with other values arises. Absent a claim of need to protect military, diplomatic, or sensitive national security secrets, we find it difficult to accept the argument that even the very important interest in confidentiality of Presidential communications is significantly diminished by production of such material for in camera inspection with all the protection that a district court will be obliged to provide (418 U.S. 683, 707).

The consequence of this opinion was similarly clear. Nixon was required to release the tapes in their entirety (O'Brien 2005, 239).

Hamdi v. Rumsfeld

Yasser Esam Hamdi was captured by members the Afghani Northern Alliance some time in 2001 during the United States campaign to subdue al Qaeda and the Taliban regime. [14] Hamdi, an American citizen, was eventually turned over to the United States military. He was subsequently declared an "enemy combatant" and transferred to the U.S. navy for detention. In

[14] Following the September 11 attacks, the Congress passed the Authorization for the Use of Military Force (AUMF), which empowered the President to subdue any organizations, states or individuals responsible for the attack or any such entity that might be harboring those responsible. Whether the AUMF granted Bush the authority to detain Hamdi became the key threshold issue in the case.

June 2002, Hamdi's father petitioned for a writ of habeas corpus on behalf of his son. The petition requested that Hamdi be afforded a lawyer, that the military cease interrogating him and that he be given an evidentiary hearing to contest any facts used by the United States to justify the detention (542 U.S. ___, 3). During the course of the proceedings, the government presented the federal district court with a declaration from one Michael Mobbs, a "special advisor" to the Secretary of Defense, in which Mobbs gives a general justification for Hamdi's detention. Although the district court considered the Mobbs Declaration insufficient grounds to sustain Hamdi's detention, the Fourth Circuit reversed this decision and Hamdi appealed to the Supreme Court.

Assuming that the Congress had authorized the military to detain American citizens who were declared enemy combatants, the Supreme Court was presented with a relatively straightforward question. Does holding an American citizen in military custody without the opportunity to challenge the factual basis of the detention violate the citizen's constitutional right to due process? On this issue, and in contrast to the approach in Nixon, the Court could not have been more vague. Writing for a four-member plurality, Justice O'Connor states:

> We hold that although Congress authorized the detention of combatants in the narrow circumstances alleged here, due process demands that a citizen held in the United States as an enemy combatant be given a *meaningful opportunity to contest the factual basis for that detention before a neutral decisionmaker* (1) [emphasis is ours].

The consequence of this decision is that American citizen detainees get hearings before "neutral decisionmakers". But what does it mean to afford someone access to a "neutral decisionmaker"? For us, this decision is precisely what we mean by vague. By offering citizen (or non-citizen) detainees extremely deferential, administrative review it clearly would be possible to nominally comply with the "neutral decisionmaker" standard yet maintain the status quo ante. That is, afford no review at all. The Hamdi decision is all the more vague in light of the opinions of Justices Scalia and Souter, who both provided

clear alternative means of resolving the conflict.[15] In Hamdi's case, the United States government eventually negotiated a deal under which Hamdi would return to Saudi Arabia. For the remainder of the non-citizen Guantanamo detainees, the government opted to design special administrative hearings. Underscoring the vagueness of this opinion, there is already conflict between district court judges over whether such hearings constitute due process.[16]

Analysis

Despite the obvious variance in the clarity of these opinions, the Nixon and Hamdi cases share a great deal in common. In the first place, majorities of both Courts disapproved of the status quo policy. In the Nixon case, opposition to the president's claim was unanimous. In Hamdi, all but Justice Thomas opposed the practice of indefinite, unreviewable detentions. Second, these were policies to which the Bush and Nixon administrations were strongly attached. For Bush, military detentions were a central piece of his war on terror. For Nixon, absolute executive privilege served an obvious purpose – it hid evidence linking the president to the Watergate controversy. Third, the arguments the executives made in support of their policies were similar in an important way. Both presidents seem to be advancing a theory of constitutional law under which the executive becomes the ultimate arbiter of the constitution in limited cases. If Nixon is correct, only the president may determine when executive privilege may be violated. If Bush is correct, then it is the president that determines whether military detentions violate due process. Finally, the Supreme Court enjoyed significant diffuse public support in both cases, at least relative to many constitutional courts around the world (Caldeira 1987; Gibson, Caldeira and Baird 1998). Although it is likely that specific public support was higher for Hamdi-like detentions than for Nixon's executive privilege claim, the key issue is that it is probable that

[15] Justice Souter's position was that the government was not lawfully authorized to detain Hamdi as it was doing (542 U.S. ___, 15). Justice Scalia maintained that the government needed to try Hamdi for treason, suspend the writ of habeas corpus, or show a federal judge why a habeas writ should not be issued (542 U.S. ___, X.

[16] See "Judge Grants Captives Access to U.S. Court," Los Angeles Times, February 1, 2005.

defying a clear order from the United States Supreme Court would have been at least difficult for both presidents.

Given the likely judicial distaste for the status quo policies, the likely hostility of the executives to any change in those policies and the general public support for the Supreme Court, it is probable that the Nixon and Hamdi Courts each confronted a situation like that depicted by the lower part of Figure 4.[17] In such a case, the incentive to be clear is obvious – it places pressure on the president to comply. This incentive was well understood by the Nixon Court. In fact, Nixon's spokesman had publicly stated that the president would comply with a "definitive decision", which raised the question of whether Nixon might defy some order that was less than definitive (Woodward and Armstrong 1979, 287). At oral arguments, Justice Stewart was particularly interested in getting James St. Clair, the president's attorney, to admit that the president would not disobey the Court. Most important, though scholars usually emphasize the Nixon Court's search for coalitional unanimity on the merits vote, there was considerable effort to ensure a coherent, clear rationale (Woodward and Armstrong 1979, 295), one that could not be easily skirted. Although we lack the historical information to make similar claims about the Hamdi Court, it seems reasonable to believe that the Justices must have contemplated the potential reactions of the Bush administration a vague opinion. It surely must have crossed their minds that it would be possible to grant some form of review to Hamdi without materially affecting the president's detention policy. The point is not that Bush would have defied a clear order, but that it would be possible to issue an opinion that was vague enough to allow Bush to nominally change the process by which detainees could challenge their enemy combatant status without changing the policy in fact. In this sense, and like the Watergate case, there should have been pressure in Hamdi to be clear.

[17] It is plausible to envision the Hamdi case as a situation in which $B \in [1,2)$ while the Nixon case is one in which $B \geq 2$. Still, the claims we make continue to hold as long as $B \geq 1$.

So what accounts for the clarity of the Nixon opinion relative to Hamdi? In our view, a persuasive explanation lies in the degree of policy uncertainty that likely surrounded the cases. Both policies were justified, in part, as necessary for maintaining control over national security issues. In Hamdi, the government's argument against a full trial-like procedure was that such a process would unnecessarily "intrude on secrets of national defense" by pulling military officers out of the battlefield and requiring them to give testimony in a court (542 U.S. ___, 25). In Nixon, absolute privilege assured that presidents received uncensored advice, potentially relevant for critical issues of national security (418 U.S. 683, 709). Despite the similarities of these arguments, it would appear reasonable that the Hamdi Court might have been at least marginally more uncertain about the implications of giving detainees access to the federal courts than the Nixon Court might have been about the implications of requiring Nixon to turn-over the tapes. In particular, there was only one Watergate controversy pending at the time of the Nixon decision while the Hamdi Court faced hundreds of federal detainees. Had the Court granted Hamdi a habeas hearing, it would have had to grant one to Jose Padilla and any other American citizen detainee. Moreover, it is short logical step to granting habeas to non-citizens as well. This would have resulted in hundreds of judicial hearings on the factual bases of the detentions of the full set of federal detainees. As we see it, it was more likely that national security interests would be undermined by innumerable hearings on federal detentions than by a single *in camera* review of the Nixon evidence. Graphically speaking, the Hamdi Court likely faced a situation in the bottom, center of Figure 4, while the Nixon Court faced a situation in either of the bottom corners of the figure. As we note above, a definitive test of the model will require many more observations, but these cases nicely illustrate the mechanism.

Conclusion

Despite the general preference for clarity in the law, U.S. Supreme Court opinions are often vague: Two reasonably intelligent people could often reasonably disagree about what a vague standard expressed in a decision requires. While vagueness may, to some extent, result

from the natural imprecision of language, we contend that *political considerations* are at the heart of judicial decisions to issue ambiguous or precise decisions. In particular, judicial ambiguity presents judges with several advantages. It can allow courts to take advantage of the policy expertise of sympathetic policymakers in other branches. Where other policymakers are not friendly, and determined to evade negative judicial decisions, ambiguity can serve to hide non-compliance and thus avoid public displays of judicial impotence. At the same time, the very ambiguity that can hide non-compliance also removes a central source of pressure to comply that judges can place on policymakers that may disagree with a judicial decision but cannot afford the political backlash of publicly ignoring an unambiguous judicial ruling. In other words, ambiguity presents judges with a trade-off. The model we present demonstrates how judges evaluate this trade-off, depending on uncertainty judges face over the implications of particular policies, uncertainty about the preferences of other policymakers, and the costs and benefits of both non-compliance and locking-in an inappropriate constitutional rule. A central conclusion is that vagueness is not clearly associated with a particular environment: Courts in a strong position may issue vague decisions to increase their influence over policy, while courts in a weak position may use it to hide their lack of influence. We cannot reason directly from the precision of a decision to the political influences on the court's decision.

APPENDIX

The Baseline Model:

1. The Presidential Response Stage

1) SUPPOSE THE PRESIDENT IS FRIENDLY:

Case a) The court has ordered X:

If X is appropriate, the president will obviously implement. If X is inappropriate, the expected utilities are given by:

$$EU(x) = -1$$
$$EU(y) = 1 - B$$
$$EU(SQ) = -B$$

Thus, the friendly president will obey and implement x iff $B \geq 2$.

The situation is symmetric for an order of y.

Thus, the friendly president will always obey an appropriate order and obey an inappropriate order if $B \geq 2$.

2) SUPPOSE THE PRESIDENT IS HOSTILE:

Suppose the court has ordered $z \in \{x, y\}$.

Case 1: z is appropriate. Then the expected utilities are given by:

$$EU(z) = 0$$
$$EU(SQ) = 1 - B$$

Thus, the hostile president will obey an appropriate order if $B \geq 1$.

Case 2: z is inappropriate. Then the expected utilities are given by:

$$EU(z) = -1$$
$$EU(SQ) = 1 - B$$

Thus, the hostile president will obey an inappropriate order if $B \geq 2$.

Thus, the hostile president will obey an appropriate order if $B \geq 1$ and obey an inappropriate order if $B \geq 2$.

2. The Court Stage

1) SUPPOSE $B \geq 2$. ALL PRESIDENTS OBEY ALL ORDERS.

The expected utilities of the possible rulings are given by:

$EU(x) = q - M(1-q)$
$EU(y) = 1 - q - qM$
$EU(SQ) = 0$

The Court will uphold the SQ iff:

1) SQ beats x:

$$q - M(1-q) \leq 0$$
$$\Leftrightarrow$$
$$q \leq \frac{M}{1+M}$$

2) SQ beats y:

$$1 - q - qM \leq 0$$
$$\Leftrightarrow$$
$$q \geq \frac{1}{1+M}$$

The Court will order x iff:

1) x beats SQ:

$$q > \frac{M}{1+M}$$

2) x beats y:

$$q - M(1-q) \geq 1 - q - qM$$
$$\Leftrightarrow$$
$$q \geq \frac{1}{2}$$

The Court will order y iff:

3) y beats SQ:

$$q < \frac{1}{1+M}$$

4) y beats x:

$$q < \frac{1}{2}$$

2) SUPPOSE $B \in [1,2)$. ALL PRESIDENTS OBEY AN APPROPRIATE ORDER AND ALL PRESIDENTS OBEY AN INAPPROPRIATE ORDER.

The expected utilities of the possible rulings are given by:

$$EU(x) = q + (1-q)(p-c)$$
$$EU(y) = 1 - q + q(p-c)$$
$$EU(SQ) = 0$$

The Court will uphold the SQ iff:

3) SQ beats x:

$$q + (1-q)(p-c) \leq 0$$
$$\Leftrightarrow$$
$$q \leq \frac{c-p}{(1-p)+c}$$

4) SQ beats y:

$$1 - q + q(p-c) \leq 0$$
$$\Leftrightarrow$$
$$q \geq \frac{1}{1-p+c}$$

The Court will order x iff:

5) x beats SQ:

$$q > \frac{c-p}{1-p+c}$$

6) x beats y:

$$q + (1-q)(p-c) \geq 1 - q + q(p-c)$$
$$\Leftrightarrow$$
$$q \geq \frac{1}{2}$$

The Court will order y iff:

7) y beats SQ:

$$q < \frac{1}{1-p+c}$$

8) y beats x:

$$q < \frac{1}{2}$$

3) SUPPOSE $B < 1$. THE FRIENDLY PRESIDENT OBEYS AN APPROPRIATE ORDER. ALL OTHER ORDERS ARE IGNORED.

The expected utilities of the possible rulings are given by:

$$EU(x) = qpc + p - c$$
$$EU(y) = p - c + pc - qpc$$
$$EU(SQ) = 0$$

The Court will uphold the SQ iff:

5) SQ beats x:

$$qpc + p - c \leq 0$$
$$\Leftrightarrow$$
$$q \leq \frac{c - p}{pc}$$

6) SQ beats y:

$$p - c + pc - qpc \leq 0$$
$$\Leftrightarrow$$
$$q \geq \frac{p - c(1 - p)}{pc}$$

The Court will order x iff:

9) x beats SQ:

$$q > \frac{c - p}{pc}$$

10) x beats y:

$$q + (1 - q)(p - c) \geq 1 - q + q(p - c)$$
$$\Leftrightarrow$$
$$q \geq \frac{1}{2}$$

The Court will order y iff:

11) y beats SQ:

$$q < \frac{p - c(1 - p)}{pc}$$

12) y beats x:

$$q < \frac{1}{2}$$

The Full Model: Adding Vagueness

Now suppose the court has the additional option of vetoing the SQ, but being vague about the remedy so that the president can implement either x, y, or even SQ in response without being perceived to be defying the court. This adds a new option to the strategy set for the court. Since both types of president will implement their preferred policies in response to a vague order, the expected utility for the court of being vague is given by:

$$EU(vague) = p$$

1) SUPPOSE $B \geq 2$. ALL PRESIDENTS OBEY ALL ORDERS.

The expected utilities of the possible rulings are given by:

$$EU(x) = q - M(1-q)$$
$$EU(y) = 1 - q - qM$$
$$EU(SQ) = 0$$
$$EU(vague) = p$$

The Court will never uphold the SQ since it is dominated by being vague.

The Court will order x iff:

1) x beats vague:
$$q > \frac{p+M}{1+M}$$
2) x beats y:
$$q \geq \frac{1}{2}$$

The Court will order y iff:

1) y beats x:
$$q < \frac{1}{2}$$
2) y beats vague:
$$q < \frac{1-p}{1+M}$$

The Court will be vague iff:

1) vague beats x:
$$q \leq \frac{p+M}{1+M}$$
2) vague beats y:
$$q \geq \frac{1-p}{1+M}$$

2) SUPPOSE $B \in [1,2)$. ALL PRESIDENTS OBEY AN APPROPRIATE ORDER AND ALL PRESIDENTS OBEY AN INAPPROPRIATE ORDER.

The expected utilities of the possible rulings are given by:

$$EU(x) = q + (1-q)(p-c)$$
$$EU(y) = 1 - q + q(p-c)$$
$$EU(SQ) = 0$$
$$EU(vague) = p$$

The Court will never uphold the SQ
The Court will order x iff:

1) x beats vague:

$$q > \frac{c}{1-p+c}$$

2) x beats y:

$$q \geq \frac{1}{2}$$

The Court will order y iff:

1) y beats x:

$$q < \frac{1}{2}$$

2) y beats vague:

$$q < \frac{1-p}{1-p+c}$$

The Court will be vague iff:

1) vague beats x:

$$q \leq \frac{c}{1-p+c}$$

2) vague beats y:

$$q \geq \frac{1-p}{1-p+c}$$

3) SUPPOSE $B < 1$. FRIENDLY PRESIDENT OBEYS AN APPROPRIATE ORDER AND ALL OTHER ORDERS ARE IGNORED.

The expected utilities of the possible rulings are given by:

$$EU(x) = qpc + p - c$$
$$EU(y) = p - c + PC - QPC$$
$$EU(SQ) = 0$$
$$EU(vague) = p$$

A little algebra shows that vagueness dominates all other options: The court will always be vague.

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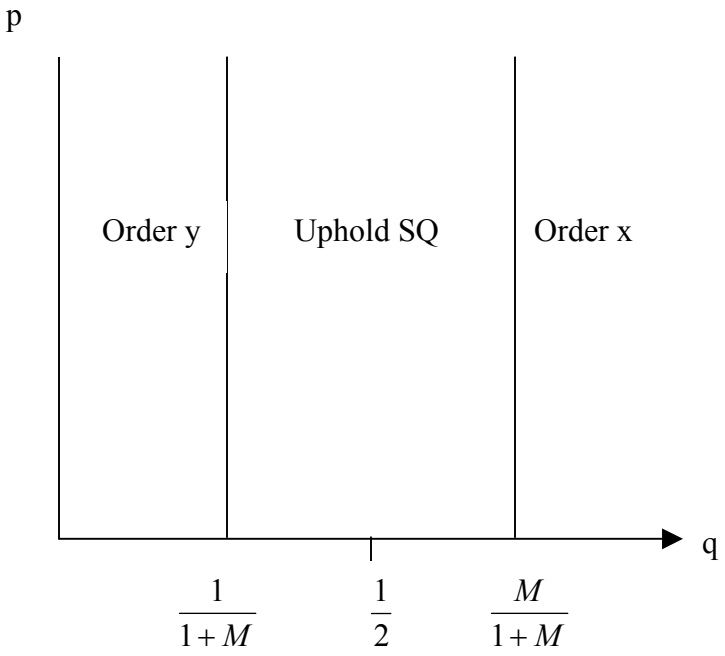
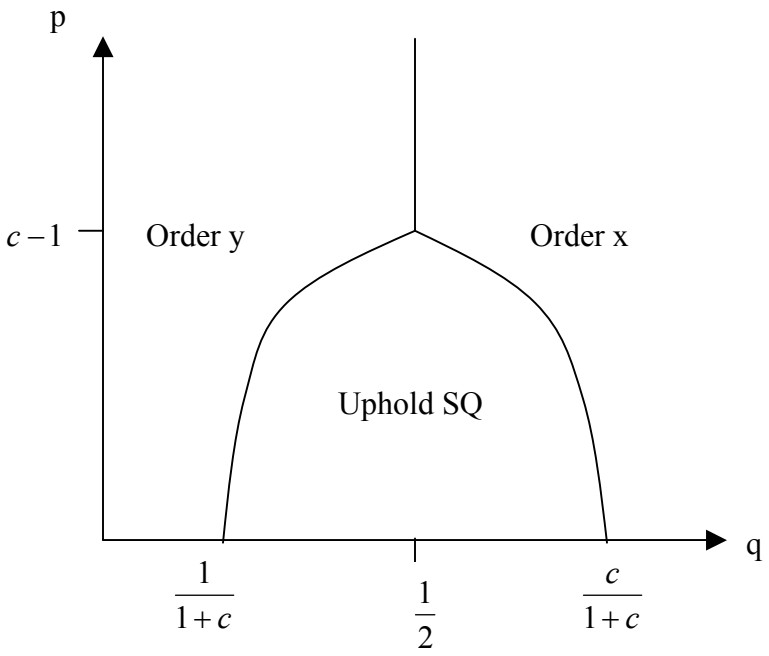
Figure 1: Equilibrium when $B \geq 2$



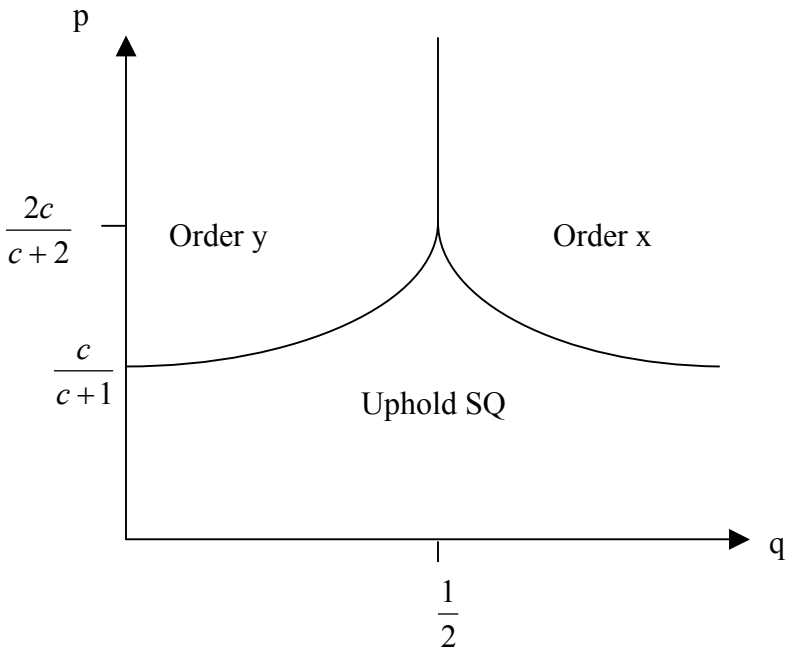
As M goes to 1, the two lines converge to q=1/2, and the court simply orders the policy that it believes to be more likely to be right.

Figure 2: Equilibrium when $B \in [1,2)$



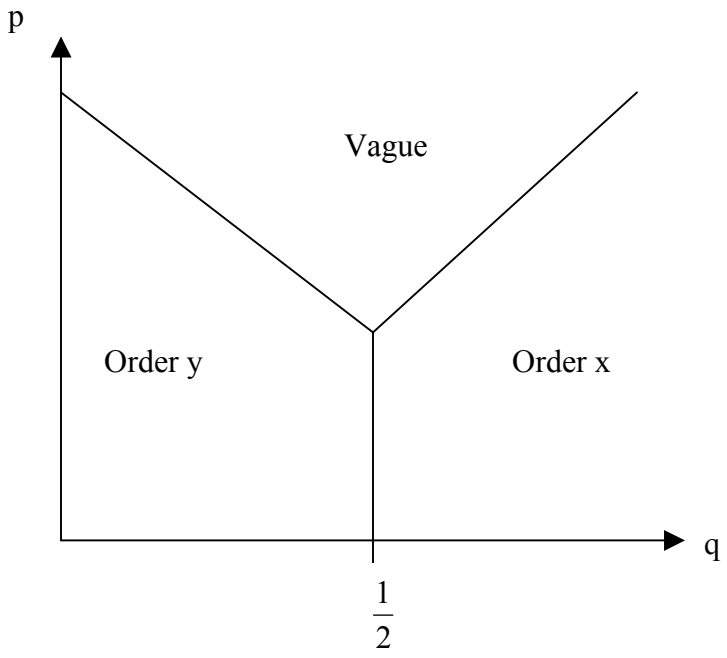
For $c \leq 1$, only the upper half of the figure is relevant: The cost of being defied is so low that the court does not worry about noncompliance and simply orders what it believes to be the right policy. For $c > 1$, only the lower part of the figure is relevant. The court becomes more and more willing to uphold the SQ to avoid noncompliance as it is more confident that the executive is hostile.

Figure 3: Equilibrium when $B < 1$



Because only a friendly executive will obey an appropriate order, the court only vetoes when it is sufficiently certain that the executive is friendly. As c increases, the court has to be more and more sure that the executive is friendly (c/(c+1) slides up). As the court is more uncertain (q around ½), it is more likely to uphold to avoid the defiance cost c.

Figure 4: Equilibrium when $B \geq 2$
Graphically (drawn for M<1):



For M>1:

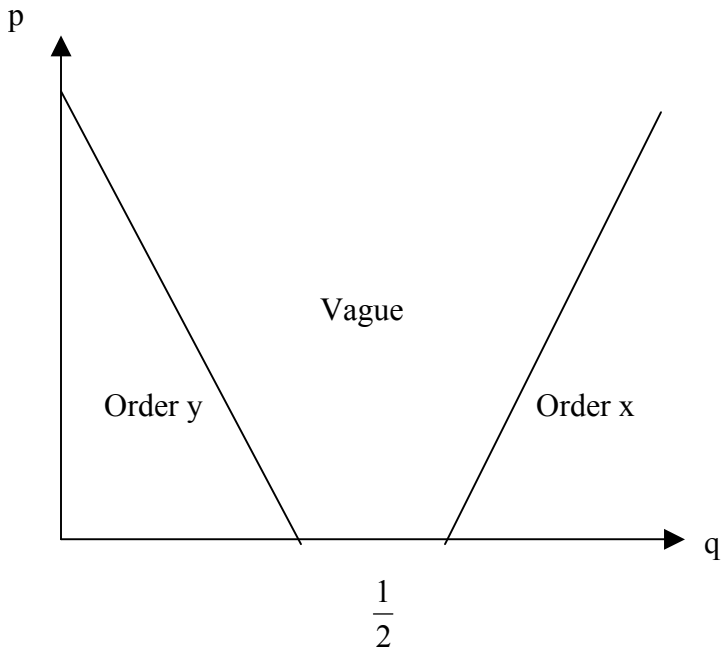
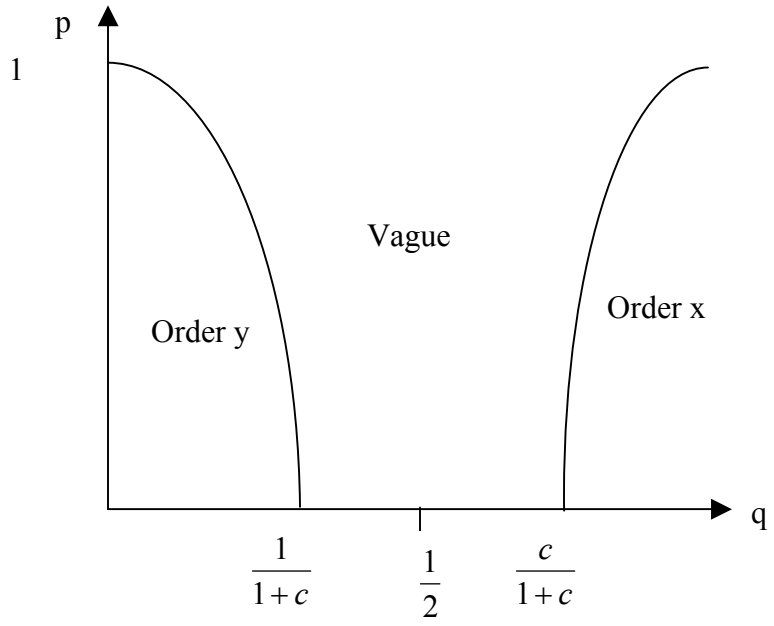
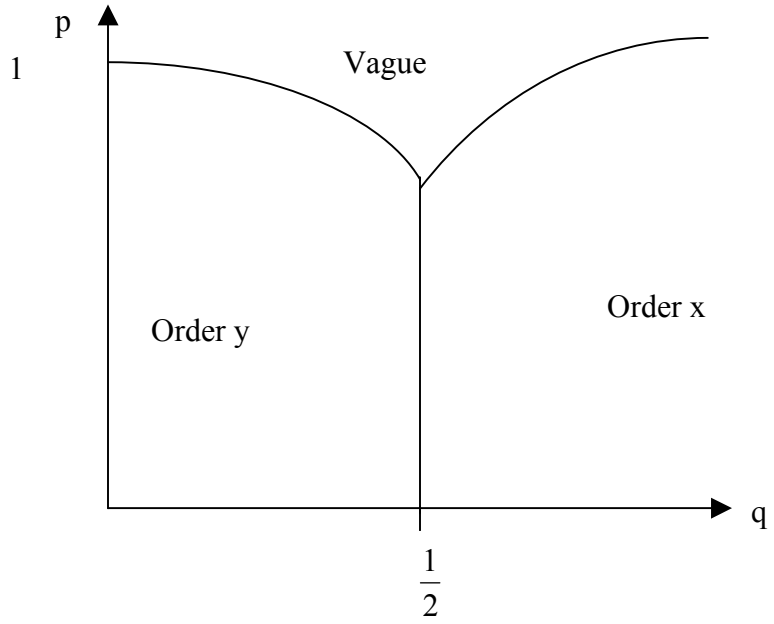


Figure 5: Equilibrium when $B \in [1,2)$
Graphically ($c \geq 1$**):**



Graphically ($c < 1$**):**



As the executive is likely to be friendly, the court is vague to take advantage of the executive's expertise. As defiance gets costlier, the court also becomes vague to hide noncompliance by a hostile executive. Thus, vagueness serves two purposes simultaneously: it hides noncompliance and it allows the court to take advantage of the executive's expertise when it is friendly.

Figure 6: Equilibrium when $B < 1$