

Armed Conflict, Presidential Power, and the Supreme Court: The Mitigating and
Magnifying Effect of Public Opinion

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ABSTRACT

The interaction between the president and Congress is at many times quite public and well documented. Similarly, relations between the Congress and the Supreme Court are well documented; Congress makes law and, if requested, the Court interprets it. The interaction between the president and the Court, however, is not nearly as well defined, and certainly not as public. As such, this study examines individual justice decision making in cases involving presidential power. We hypothesize that the effect of public opinion is not uniform, but instead, depending on the presence of U.S. troops in armed conflict, serves to either magnify or mitigate the president's likelihood of success. To this end, this papers addresses significant shortcomings in previous work that address Supreme Court decision making during these important cases.

On June 28, 2004, the United States Supreme Court handed down two decisions that dealt the foreign policy powers of the president. This occurrence by itself is not particularly noteworthy. The Court historically decides around 1.5 cases dealing with the foreign policy power of the president per term (King and Meernik 1995). However, both of the two cases decided on June 28, 2004, *Rasul v. Bush* and *Hamdi v. Rumsfeld*, dealt significant blows to presidential power. While previous studies have not found that the president is universally successful in cases concerning foreign policy, general findings demonstrate that presidents can expect much greater success in foreign policy before the Court than in domestic policy (Epstein, Ho, King, Segal 2005, King and Meernik 1995, Wildavsky 1966, 1989). Why then were both of these cases distinct outliers from the dominant theory? I hypothesize that two factors work in tandem to create an environment that can mitigate Wildavsky's two presidencies thesis: armed conflict, and declining public opinion of the president.

Wildavsky argued that the US Constitution invests within the president a unique repository of power in the realm of foreign affairs. The presidential powers listed in Article II of the Constitution make it clear that the president enjoys considerable powers in the foreign policy area, including the near unilateral power that stems from being Commander-in-Chief. Wildavsky's theory as applied to the Court can best be understood by Justice Sutherland's opinion in *U.S. v. Curtiss-Wright*. Sutherland argued that the president had a plenary and exclusive power, "as the sole organ of the federal government in the field of international relations (1936, 299)."

Nevertheless, research based upon these theories often fails to take into account the circumstances surrounding a president's attempt to use their power in both foreign

and domestic policy areas. Exogenous occurrences, either in the form of low public opinion of the president or the United States' involvement in armed conflict, may mitigate or even magnify the president's power, especially in cases before the Supreme Court. This article examines this dependent relationship in detail.

Separation of Powers

US Supreme Court decision making in cases of president power occurs in an environment where the institutions of government are forced to interact. At the least, the executive branch and the judicial branch will interact. However, most gains in presidential power come from either Congress' positive action, of congress or its acquiescence.¹ Thus, decisions made by the Supreme Court involving presidential power could declare sections of congressional law unconstitutional while simultaneously limiting the power of the president. This precisely happened in *Boumediene v. Bush* (2008), when the Court found that portions of the Detainee Treatment Act of 2005 did not provide an adequate replacement for habeas corpus.

While the review of congressional laws is relatively common, Supreme Court cases involving the president are rare. It is helpful to consider the interactions between the Supreme Court and the president in terms of a separation of powers game, in which each branch of government acts strategically to maximize their goals (Epstein and Knight 1998). Possible interactions in a separation of powers game could include the president's refusing to enforce the Court's decisions or the Court's limiting the legal power of the presidency through case law.

¹ Members of congress, especially during times of war, modify their voting behavior to serve the wants of the president (Howell and Rogowski 2013).

A separation of powers game assumes that each party (the Supreme Court, Congress, and the president) is a rational actor able to rank their alternative goals and actively attempt to reach them when there is a relative lack of formal constraints. Considering all the possibilities of the separation of power game, some of which are quite detrimental to the Court, it would seem quite unlikely that justices would vote their sincere policy preferences without considering some external factors. The Court's actions based solely on personal policy references, rather than acting strategically, would frequently conflict with the other branches of government and the public (Epstein and Knight 1998). If the justices simply voted their sincere attitudes, there is a possibility they could offend the public or the executive, triggering a separation of powers conflict. Such a conflict would be counter to their best interests, and should be strategically avoided.

Stated another way, the Court operates within institutional constraints. However, the institutions surrounding the Court also provide institutional incentives. With life tenure and unreducible salaries, the Court is relatively insulated from direct retribution from either Congress or the president. Without an electoral connection, the justices of the Court should be, under certain circumstances, the only institution of government that is able to check presidential power. This is not to say the justices will not consider their own ideology in a decision, but it would be atheoretical to assume the justices decide cases in a political vacuum (Maltzman, Spriggs, Wahlbeck 2000, Bailey and Maltzman 2011).

The US Supreme Court may not be populated by individuals who believe themselves to be politicians, but many circumstances push them to the forefront of politics. When justices of the Supreme Court are called on to decide whether a piece of

legislation drafted by Congress exceeded the Article II powers of the presidency, they are, by definition, making a political decision. These decisions are salient, high profile, and under the scrutiny of two co-equal branches of government, and perhaps even the public. The Court may very well behave atypically in these unique circumstances. The political context could also be a salient factor that influences justices' decision making. A president's approval rating could influence an ideological opponent to support expanding presidential power (Yates 2002). Furthermore, if the United States is at war, the Court could perceive the president or its place in the separation of powers differently.

Supreme Court Decision Making While at War

War may indeed change everything, but in terms of how Supreme Court justices decide cases during wartime, it is not clear what "everything" entails. There are certain, well-wrought findings that should inform us. Foremost, when the United States is engaged in armed conflict, a "rally around the flag" effect often occurs (Lee 1977). Indeed, during wartime the president has historically gained a wellspring of support from the public, and, usually, Congress. Evidence tends to demonstrate that justices are more likely to decide in favor of the president when the president's public opinion rating is trending upward, as is often the case during a wartime "rally moment" (Yates 2002). Furthermore, there is literature that demonstrates that armed conflict does have an effect on Supreme Court decision, but only on cases that are unrelated to foreign policy (Epstein *et al.* 2005). I argue that these findings, while they appear to be incongruent, are actually complementary, in large part because each study failed to model both concepts adequately (or at all).

Yates missed one aspect that should affect decision making in each institution of the federal government; that is, whether the United States is involved in an armed conflict. While armed conflict in the short run can lead to an increase in public opinion of the president, as conflict drags on, public opinion is more malleable. Meernik (1995) argues that while armed conflict does not give the president a blank check on which to write his policy initiatives, it does have a calculable effect on public opinion. Since Congress is a representative institution, and, therefore, theoretically responsive to public opinion, Congress may show more deference to the president in times of armed conflict.

Simultaneously, the presence of an armed conflict creates a situation in which a surplus of power is transferred to the president, and thus, the Court's decision making should recognize this. Previous courts have articulated similar doctrines in *Korematsu v. U.S.* (1944) and *Lichter v. U.S.* (1948). However, Epstein *et al.* (2005) find in their examination of decision making during times of conflict that cases unrelated to the conflict are more likely to be decided in a conservative fashion, while there was no similar effect in cases related to the conflict. While this research tells us that cases unrelated to armed conflict are affected by armed conflict, it is important to note that most of the cases did not involve presidential power. Because of the nature of the study, the cases not related to conflict were civil rights and liberties cases. However, cases related to conflict likely do involve some level of presidential power and yet, they do not detect an effect.

This study looks solely at presidential power cases before the Supreme Court. We seek to provide a more nuanced picture of individual justice voting in cases involving presidential power. We recognize that generally, Wildavsky's two presidencies thesis

should hold true before the Court, meaning that presidents should be more successful in foreign policy cases as opposed to domestic issues. This however, is only a starting point.

When examining decisions on the merits by the Supreme Court, the ideology of the justices almost certainly plays an important role (Segal and Spaeth 1992, 2002). There is no theoretical reason to assume even in this specialized area of Supreme Court jurisprudence that ideology should behave differently. Indeed, in cases involving questions of presidential power, justices may behave more ideologically, as they have an easy ideological reference point: that of the incumbent president. Justices should be more likely to decide against the president as their ideologies diverge.

As presidential power cases provide the Court with an easy reference in terms of ideology, it also provides an easier reference point for estimating the opinion of the public. While it is not clear that the Court regularly responds to public opinion (but see Mishler and Sheehan 1993, 1996), research has shown that if the Court rules contrary to public opinion, the diffuse public support of the institution may erode (Durr *et al.* 2000). Considering the myriad of topics on which the Court issues decisions, it would be nearly impossible to judge the public's opinion in all of them. However, with reference to the president, public opinion is well formed and readily available for the justices to reference. Ruling against a popular president may well create questions about the Court's institutional legitimacy. Thus, it would be more likely for a Court to be willing to rule against an unpopular president. An unpopular president cannot effectively call upon public dissent of the Court's decision because of the associated low political capital.

However, armed conflict and public opinion should not be considered in isolation. Clearly, in the context of the United States, armed conflict and presidential approval are

linked (Baker and Oneal 2001). More broadly, however, we should incorporate the institutional arrangement of our government and the primacy of law into our theories. There is no question that the presidency is the strongest in the area of foreign powers. Furthermore, during a rally around the flag event (when the United States is involved in armed conflict and presidential approval is high), the justices should be more likely to support extensions of presidential power in the area of foreign policy. In this sense, opinion should act as a magnifier of the law, further increasing the justices' likelihood to support presidential power.

In the domestic arena, the president has less formal power. When the United States is not involved in armed conflict, public opinion should behave as originally hypothesized. When public opinion is high, the president more likely to win. We anticipate however, that this relationship will be reversed when the Supreme Court is deciding domestic policy cases during armed conflict. When presidential approval ratings are high during times of armed conflict, Congress may be more willing to advance the president's domestic power, even beyond recognized constitutional limitations, because of the rally effect that takes place. Members of Congress, unwilling to act against the public's support of the president and risk their own electoral fortunes, will be inclined to allow domestic power gains by the president. In these situations, the Court becomes the only institution able to check the president adequately. The justices, understanding the president may use the rally effect to gain power in an area where they are institutionally weak, will be more likely to decide against the president. In these circumstances, the president's own popularity will mitigate likelihood for presidential success before the Court.

Data and Methods

The data for this research will be drawn from numerous published sources. To locate the Supreme Court cases that involve presidential power, we followed the same basic case collection procedures of Yates and Whitford (1998), with one significant alteration through the inclusion of *Shepard's Citations*. First, we obtained a list of all cases that involve Article I, Section 7, Article II, or Amendments XII, XX, XXII, or XXV of the US Constitution as listed in the *United States Supreme Court Judicial Database*. To include any cases that this process may have missed, we then searched the *United States Supreme Court Digest—Lawyers' Edition* in the general topics of the United States, war, and constitutional law for cases that mentioned the president or the executive branch. Cases were then screened by determining whether presidential power was listed as the key point of law or discussed in the text of the case. Each case was then read and retained only if substantial discussion (defined as one paragraph or more) was given to presidential power in the opinion. This selection of cases was then “shepardized” using *Shepard's Citations* to determine if the progeny of the original cases dealt with presidential power as well. This process yielded 45 cases.

The dependent variable ($N=399$) is the individual votes of the justices in cases from 1949 to 2007 where presidential power is being adjudicated, where 1 is coded as being a vote for presidential power and 0 is coded as a vote against presidential power. I operationalize my dependent variable in this way in order to capture more variation, to increase my sample size, and to further provide a more micro-level, individual view of the decision-making process.

Presidential popularity is a central independent variables in this research. This variable will be operationally defined as the change ($t_2 - t_1$) in Gallup Public Opinion Polls of presidential confidence over a three-month period preceding the decision of the US Supreme Court in a given case. This specific question has only modified its wording slightly since 1949, and in such a way as not to skew the concept being measured.²

The second primary variable of interest is a measure of armed conflict. This variable is conceptualized as the presence of an armed conflict in which the United States is involved on the date on which the Supreme Court announces its decision in the case being analyzed. This research will use the definition of armed conflict as identified in Wallensteen and Sollenberg (1995, 345), where armed conflict is “a contested incompatibility which concerns government and/or territory where the use of armed force between two parties, of which at least one is the government of a state, results in at least 25 battle-related deaths.” This data will come from the Uppsala Conflict Data Program.³ This variable will be coded as a dummy variable, with 1 being the presence of armed conflict.

These two variables may exhibit multicollinearity. The correlation between public opinion and armed conflict is Cramer’s $v = 0.739$. Theoretically, these two variables should move together. The “rally around the flag” literature describes just this relationship (Baker and O’Neal 2001; Lee 1977; Meernik 1995; Mueller 1973; Partell 1997). When the United States is involved in armed conflict, the popularity of the president usually increases. However, public opinion and armed conflict, while

² The question that will be utilized from the Gallup Poll asks, “Do you approve or disapprove of the way [name of the president] is handling his job as president?”

³ For examples of other research using the UCDP, see Gleditsch *et al.* (2002), and Wallensteen and Sollenberg (1995).

interrelated, should have their own independent effects upon individual level decision making as well. This possible correlation is not problematic for this study however, as an interaction between these two variables is necessary to answer the research question.

This new interaction between armed conflict and public opinion will accomplish multiple tasks. By using the interaction in the model, it will control for the co-variation between armed conflict and public opinion. Indeed, while some authors have argued the use of interactions with their level variables in models are a possible cause for multicollinearity, Brambor *et al.* (2006) challenge this assumption by showing that including both the interaction and the level variables in the same model can *control* for multicollinearity of the level variables while also assessing the impact of their covariance upon the dependent variable. Friedrich (1982) notes a similar finding. As such, the inclusion of the interaction between public opinion and armed conflict will be used not only to control for the possible multicollinearity between the two variables, thus allowing for a more accurate assessment of their effects upon the model, the interaction will also allow an examination of the effect of the two variables together, considering that much literature has noted that public opinion moves in sync with armed conflict.

This study includes numerous control variables that may affect how individual justices reach decisions in cases of presidential power beyond our primary variables of interest. The first of these measures the constitutional powers of the president. Case type recognizes that the president is at the pinnacle of his constitutional power in the area of military affairs and foreign policy. This variable as measured contains two values; coded 0 if the case involves foreign policy issues and coded 1 if the case deals with domestic policy concerns.

Any study in judicial decision making needs to control for the ideological predisposition of the judge (Segal and Spaeth 2002). In this project, it makes sense not to solely measure the ideology of the justice, but to juxtapose it with the ideology of the president. Theoretically, the individual justice will be more likely to decide in favor for the president when they are closer in ideology. To facilitate this measure, we employ the Judicial Common Space scores (2007). These scores measure Supreme Court justices in the same ideological spaces as members of Congress and the presidents. Using these measures, we calculate the absolute value of the difference between the justice and the president to measure ideological proximity.

Presidents nominate Supreme Court justices. If the case in question surrounds the powers of the president by whom a specific justice was nominated, than that justice could be more likely to decide in their nominating president's favor. Some cases arise that concern a president who has already left office. These cases will be assigned to the president who the case involves, not the incumbent. Previous researchers have hypothesized that if a justice is nominated by the president, who is party to the case being adjudicated, then the justice will be more likely to vote for the president. It will be coded as a dummy variable for which 0 is a justice not nominated by the president involved with the case, and 1 is a justice who was nominated by the president which the case involves.

It is hypothesized that justices with prior executive experience will be more deferential to the president because the justices may sympathize with the limitations of an executive office (Tate 1981; Tate and Handberg 1991). This includes individuals who have worked in the executive branch of federal or state governments. This variable will

also be coded as a dummy variable such that a justice coded 0 had no prior executive experience and a justice coded 1 had prior executive experience at the federal or state level.

Lastly, this study will control for petitioner status. Yates (2002) hypothesized that if the president appears in front of the Court as respondent, the justices will be more likely to rule in favor of the president because the president has already won in a lower court. Other research demonstrates that the petitioner is favored, as the Supreme Court is less likely to take a case to simply affirm the lower court's opinion (Caldeira and Wright 1988). Regardless, this variable will be coded as 0 if the president is appearing before the court as a petitioner and 1 if the president appears as the respondent.

Results

The findings of each of the three models can be found in Table 1. The full model provides evidence that some of our assumptions concerning presidential power before the Supreme Court is correct. As the two presidencies thesis contends, justices are more likely to vote to support presidential power in cases involving foreign policy as opposed to domestic policy. Furthermore, as each justice becomes more ideologically distant from the president, they are less likely to vote to support extensions of presidential power.

[insert Table 1]

Interestingly, in the presence of numerous controls, the United States' involvement in armed conflict decreases the likelihood of justices voting consistently with presidential power. This relationship however, may be augmented by the marginal effect of the interaction. Figure 1 shows the marginal effect of the public opinion condition by armed conflict. When the United States is involved in armed conflict, the

effect of public opinion is positive. As the president becomes more popular, the justices are more likely to decide for an extension of presidential power. When the United States is involved in an armed conflict however, and the president's popularity increases, the justices are less likely to vote in the president's favor. This interactive relationship applies to all cases, but indeed may be different when looking specifically at either foreign or domestic cases.

[insert Figure 1]

Turning to the model examining presidential success in domestic policy cases, the ideological difference variable behaves as hypothesized: as the ideological distance between the president and the justice increases, the justice is less likely to vote for increasing presidential power. While controlling for other factors, the United States' involvement in armed conflict motivates justices to agree with the president's position. Also, justices are more likely to support presidents when the president's popularity is rising, confirming in part Yates and Whitford (1998).

[insert Figure 2]

When examining the hypothesized relationship of the interaction, it appears as though the hypothesized conditional effect of public opinion dependent upon armed conflict holds true. When the United States is not involved in an armed conflict, presidential popularity behaves as expected, with justices more likely to support the president when presidential popularity is trending upward. However, during armed conflict the justices behave in the opposite fashion. The justices modify their general trend of presidential support during high popularity periods, and become *less* likely to support the president in the domestic policy area during armed conflict.

In the area of foreign policy, ideological distance from the president still plays a significant role in justices' decision making. It is the one consistent variable across all three models, adding credence to the importance of ideology in judicial decision making. In contrast with the finding regarding domestic cases, the presence of US troops in arenas of conflict decreases the likelihood of votes to support presidential power. While armed conflict increases the president's chance for success before the Court in the arena of domestic policy, it decreases their possibly of success in foreign policy. Presidential popularity does not reach statistical significance, demonstrating the nuances that differentiate justice voting in domestic as opposed to foreign policy cases. Examining Figure 3, it is clear that justices are not influenced by public opinion in foreign policy cases in the absence of armed conflict. However, during armed conflict, justices appear to take the popularity trend of the president into account, being less likely to favor him when he is decreasing in popularity and supporting him more when he is increasing in popularity.

[Insert Figure 3]

Discussion

Justices of the US Supreme Court are individuals operating within a larger institutional environment. They are members of just one of the three federal policy-making branches, but their unique position in the system offers them the ability to make determinations over the constitutionality of the other two branches' actions when requested. This study examined presidential success before the Supreme Court under a variety of controls in order to offer a more precise view of the relationship between the interaction of the Court and the president.

To this end, we have discovered that public opinion and armed conflict play a much more nuanced role in justice voting than two previous studies found (Yates and Whitford 1998, Epstein *et al.* 2005). When looking at all cases involving presidential power, armed conflict actually reduces the likelihood of presidential success before the Court. However, when the conditional effect of armed conflict and presidential popularity is examined, it becomes clear that justices are less likely to support the president's position when presidential popularity is increasing and the United States is involved in an armed conflict.

This interesting conditional effect is further examined by selecting cases dependent upon whether the cases examined issues surrounding foreign or domestic powers of the president. In the domestic policy arena the same trend appears: namely, during armed conflict the president is more likely to lose before the Court as presidential popularity increases. In this area, public opinion mitigates the presidents' success. When there is no armed conflict however, it magnifies their likelihood of winning. This, however does not hold in the foreign policy area. In the absence of armed conflict, the likelihood of a justice's vote for the president is invariant to the president's popularity. While the justices are less likely to rule in favor of the president when the United States is involved in armed conflict, the president is more likely to win as presidential popularity increases, magnifying the "rally around the flag" effect.

We claim that justices are highly cognizant of their institutional and political environments. During times of armed conflict, when the president's popularity is high, Congress is less likely to serve as a check on executive power. Members of Congress themselves may not be immune from the rally effect, but it is more likely that challenging

a powerful, popular president does not seem rational for an individual interested in reelection (Mayhew 1974). As such, this makes the Supreme Court the only institution with the constitutional power, and the institutional insulation (in terms of life-tenure), to check the president. Indeed, of all the conditional relationships examined in this paper regarding armed conflict and presidential popularity, only once is that relationship significant and negative. Only in the area of domestic policy, an area where the president has the least constitutional power, do the justices actively check the power of a popular president.

Conclusion

The research on the effect of public opinion on the decision making of Supreme Court justices has a history of inconsistent findings, ranging from the direct effects discovered by Mishler and Sheehan (1993, 1996) to the significant effects discovered primarily in nonsalient cases (Casillas, Enns and Wohlfarth 2011). While most agree that public opinion influences the justices, the method and size of that effect are still open for debate. While this study does not answer the question of how public opinion affects justices in all cases, it does demonstrate that the effect of public opinion on justices is more nuanced than previously thought, especially in the salient area of presidential power cases.

The differential effect of public opinion dependent on the presence of US troops in an arena of armed conflict is a recognition by the justices of their unique position in our separation of powers and within the legal context of the US Constitution. The president, while not exactly the sole organ, does have more power in the foreign policy arena. Though the president is generally weaker in domestic policy, this situation can be

mitigated even further through the exogenous circumstances of a “rally around the flag” effect. The justices, in their recognition that Congress may be unwilling to counter a popular president, demonstrate an impressive externalization of their position. Despite appearances otherwise, the justices are not monks cloistered in a monastery, but remain cognizant of armed conflict, their position within our federal system, and the US Constitution.

CASE LIST

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Table 1. Logistic Regression of Justice Votes in Presidential Power Cases

	Full Model		Domestic Policy Cases		Foreign Policy Cases	
	Coef.	(SE)	Coef.	(SE)	Coef.	(SE)
Case Type	-.705***	(.219)	---	---	---	---
Petitioner Status	-.453	(.253)	-.597	(.369)	-.002	(.461)
Executive Experience	-.039	(.272)	-.281	(.393)	-.397	(.488)
Nominating President	-.025	(.288)	.270	(.398)	.724	(.605)
Ideological Difference	-1.01***	(.267)	-.848*	(.391)	-1.38***	(.467)
Armed Conflict	-.619***	(.226)	.616*	(.314)	-2.66***	(.479)
Presidential Popularity	.033	(.025)	.212***	(.069)	-.016	(.036)
Conflict*Popularity	-.102**	(.042)	-.351***	(.088)	.069	(.070)
Constant	1.87***		.348*		3.23***	
<i>N</i>	398		212		186	
<i>Pseudo R</i> ²	.070		.127		.264	

Figure 1.

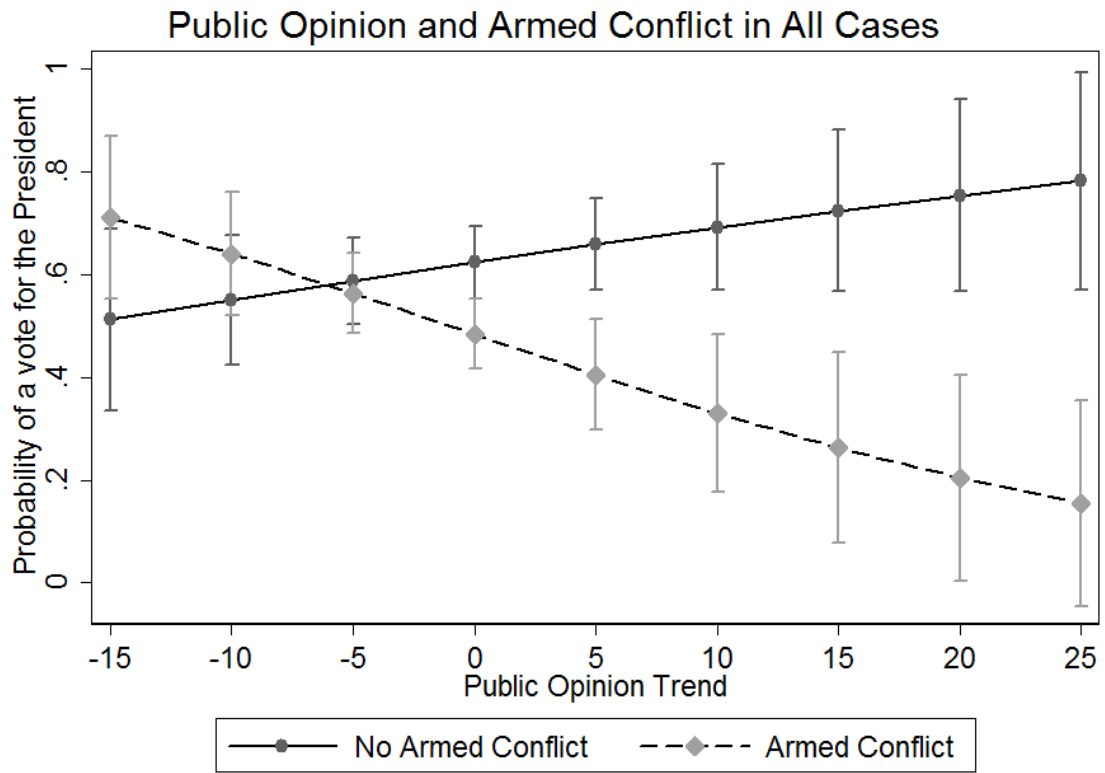


Figure 2.

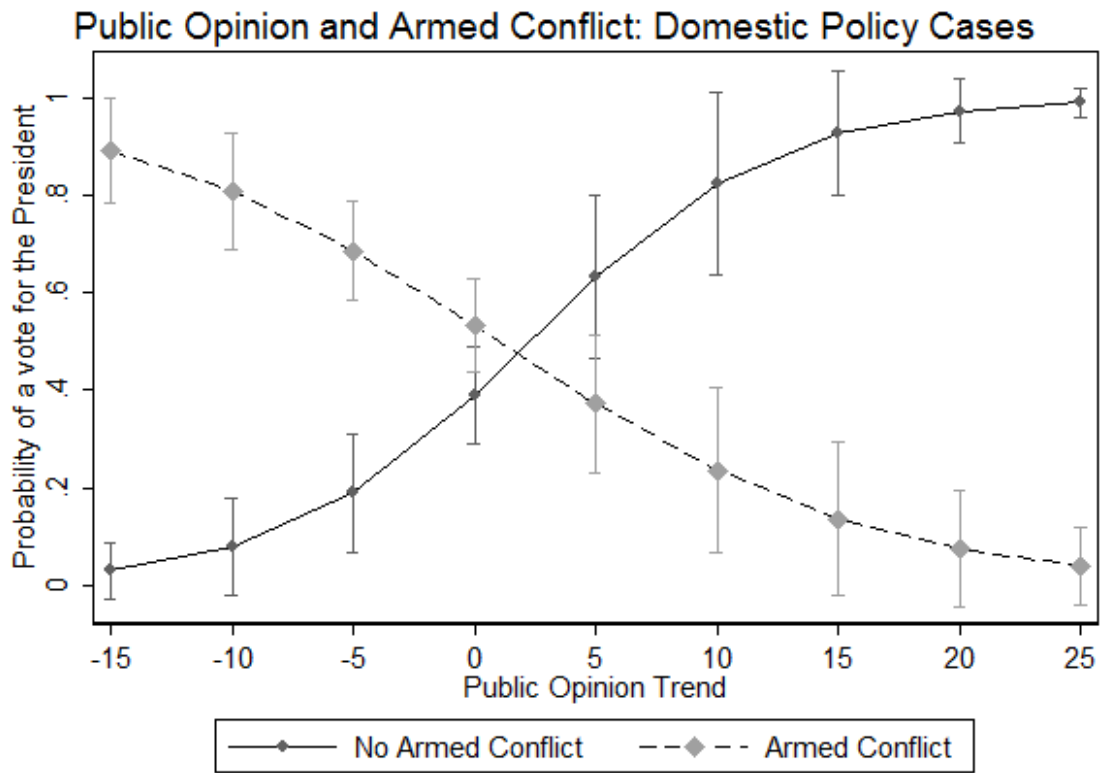


Figure 3.

