ASSERTING THE LEGITIMACY OF JUDICIAL POWER IN THE CONSTITUTION OF KENYA: CAN JUDICIAL REVIEW OF NATIONAL SECURITY BE JUSTIFIED?

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ABSTRACT

The currency of executive pleas in cases calling for limitation of rights in matters of national security is often grounded on its functional competence and being elective as opposed to an appointive Judiciary. This concern is not academic as illustrated by the narrative propagated by President Kenyatta on the outcome of the 2017 presidential petition of an unelected minority deciding for the majority.[i] *This paper addresses itself to the question whether judicial review is a legitimate and desirable and effective way to check and balance the exercise of executive power in matters of national security.*

INTRODUCTION

The question of judicial legitimacy vis a vis the executive and legislature forms the core of what American jurists have called the Counter majoritarian difficulty—the ability of unelected judges to thwart majority will in a democracy. In Kenya, for example, the difficulty would manifest in Article 1(2) of the Constitution where "The people may exercise their sovereign power either directly or through their democratically elected representatives" but they have no certainty that their decisions will prevail. If someone who disagrees with the exercise of a legislative or executive authority impacting rights decides to bring the matter before a court under Article 165(3), and the view that finally prevails is that of the judges, the difficulty emerges.

Judicial review of executive conduct in matters of national security necessarily imputes the legitimacy conferred on the executive by democratic or majoritarian attributes and so the first part of this paper [1.1] explores and explains the majoritarian attributes of judicial review. It argues that sometimes the judicial arm freed of sectarian interests that hold back progressive change in the democratic arms and motivated by majoritarian proclivities of its own, is able to reflect the public will more accurately. It may in fact be that what triggers judicial intervention in the first place is because the public will is unable to find expression in the Executive or Legislature. This is merely an aspect of checks and balances. It illustrates that judicial review can, at times, be better at effecting the public will than the elected arms that are, under the Constitution, designed for that very purpose. Ultimately, this reasoning rejects the narrow conception of judicial review as inherently antidemocratic and that it in fact, sometimes, supports democracy by ignoring the majoritarian process but ultimately, and more significantly, producing majoritarian results. This may be anathema for those who care more about process than results, and who view the judiciary as unelected and antidemocratic, and it is of no consequence that it may represent the majority will accurately than the elected arms. This paper delves beyond the fact that the judiciary is unelected and reflects on how much that actually matters if the majority is to be determined. It also analyses the forces that push the democratic arms away from majoritarian outcomes, and the judicial arm the opposite way.

The second part [1.2) also supports desirability of judicial review of executive conduct in national security by considering the effect of the Constitution of Kenya 2010 upon our traditional constitutional order. It clarifies the environment in which both the judiciary and the

elected branches of government are now operating as a result of the new Constitution. It is argued that the Constitution has introduced a new order in which any limitation of constitutional rights must be objectively justifiable. By providing for justifiability, the Constitution is able to provide a general outline on how to measure and control the exercise of executive power in matters of national security. The judiciary has been charged with the responsibility of assessing such justifications. The obvious implication of this responsibility is that it paints a picture of judicial review that is much more complex than the conventional narrative of democratic and non-democratic arms allows.

The third part [1.3] investigates whether judicial deferment to national security is in fact a threat to the new constitutional order. The fourth and final part [1.4] addresses and justifies the effectiveness of judicial review as a way to check and balance the exercise of executive power in matters of national security. The justifications for a vigorous judicial review of executive conduct in national security are enumerated.

MAJORITARIAN ATTRIBUTES OF JUDICIAL REVIEW: WHAT HAPPENS WHEN THE ELECTED BRANCHES ARE 'UNDEMOCRATIC'?

The foremost theoretical justification offered for limitation of rights is that identification of threats to national security is a policy function and that the Executive is functionally better placed to identify and implement matters of policy than the judiciary. This position reflects the supposed counter majoritarian nature of judicial review where a court does not exercise deference to the Executive.[ii] According to Roberts Wray, the primary responsibility for governing the country rests with the Legislature and the Executive, and it is neither the function nor the wish of the judiciary to hinder or interfere more than necessary.[iii]

Beyond the foregoing arguments founded on constitutional theory, a way needs to be found around the counter majoritarian difficulty by projecting on the failings of the democratically elected branches to protect individual rights.[iv] In Kenya, political polarization, ethnicity, monied special interests, voter ignorance and electoral malpractices—are all dynamics that

push democratic decision making away from majoritarian outcomes, just as there are a number of forces that push judicial review the opposite way.

Taken together, the theoretical and institutional approaches to rights limitation analysis suggest a possibility where the elected branches are actually the least majoritarian in practice. In this inverted scenario, a judicial ruling may look counter majoritarian only because the base line against which it is judged is the ostensibly democratic nature of the legislative and executive branches,[v] but it turns out to be more popular amongst the electorate.

In a scenario where a judicial decision is more popular than a legislative or executive act, it would overturn the basic premise of the counter majoritarian difficulty on its head, giving rise to a radically different understanding of limitation analysis. Since majoritarianism assumes that the elected branches are democratic institutions and the unelected judiciary is not,[vi] what happens when the opposite is true?

Instead of an undemocratic judiciary checking the democratic branches, we see a democratic judiciary checking the not-so-democratic branches, enforcing Human Rights and the popular will when the elected branches do not. This forms the basis of this paper's conception of the institution of judicial review under the Constitution as distinctly majoritarian.

A number of writers have recognized this phenomenon, noting that judicial rulings are often more majoritarian than the legislative or executive actions they invalidate.[vii] What is, however, unclear is an understanding of the institutional forces that drive this phenomenon. The following part analyses the dynamics behind the phenomenon while exploring the reasons why the executive, though democratic in theory may in practice be most undemocratic in practice.

There are a variety of reasons why a democratically elected executive branch may not reflect majority will. On the one hand, it may be a reflection of structural impediments to majority will and yet on the other hand it may stem from the pull of politics. Standing alone, each of the following reasons would represent a distinct impediment to expression of majority will by the executive while setting the stage for judicial intervention.

STRUCTURAL IMPEDIMENTS TO EXECUTIVE CONDUCT

Although majority rule is considered to be the cornerstone of democratic governance, the Constitution of Kenya 2010 had a different sort of democratic governance in mind. The Constitution has structured our governing institutions to make change difficult, even when backed by majority will. By creating a number of veto points—opportunities to block change—the Constitution forms a democracy that requires the assent of not one, but multiple representative bodies to alter the status quo.

Within this system, the President is one veto point,[viii] Parliament another—and within Parliament, our co-equal, bicameral legislature presents its own structural impediment.[ix] In the Senate, counties with large populations like Nairobi and Kakamega get no more votes than those with small ones like Lamu and Tana River, resulting in disproportionate power for the least populated counties.[x] It is indeed probable that at a time in future the counties having a majority in the Senate will have a minority of the National Assembly. Should this happen, legislation emerging from Senate will have literally nothing to do with majority will.

Other structural impediments to the popular will in this category include the supermajority requirements for overriding the president's veto[xi] and amending the Constitution.[xii] The fundamental point here is that the very structure of our Constitution places significant obstacles in the way of Executive ability to enforce majoritarian preferences. The answer to any lingering doubts why the executive branch does not any better reflect majority will is that the Constitution does not design it that way in the first place.

POLITICAL IMPEDIMENTS TO EXECUTIVE CONDUCT

The second set of impediments to executive conduct are political in nature. Political impediments revolve around the question whether elected executives are agents of the people, duty bound to represent their views—or are they trustees, elected to do what they think is right, regardless of whether it reflects majority? The answer is unclear,[xiii] which allows for substantial discrepancies between the people and their elected representative.

The incumbency re-election rate may be one example.[xiv] Where incumbency advantages are so strong, social scientists are correct in concluding that voters lack meaningful say in who

represents them[xv]—and that, in turn, has antimajoritarian implications of its own. Incentives to respond to the public's wishes are stronger when the public can more easily strip [elected representatives] of their power and today in Kenya that ability is weak.

Another example is the influence of special-interest groups such as the Kenya Bankers Association and the Tobacco Lobby. As public-choice theory has long recognized, a small but intensely interested minority can exert more influence than a large but diffusely interested majority.[xvi]

Yet another antimajoritarian force is the increasingly polarized nature of Kenyan political parties, attributed in large part to ethnicity and the exceedingly high percentage of safe seats where certain parties are dominant.[xvii] The dynamics of ethnic parties create "safe seat" constituencies where a nomination is as good as a win. This phenomenon eliminates competitive elections as a mechanism by which representatives are held accountable to mainstream public opinion. The executive is then often a result of a coalition of ethnic communities' politicians who pander to the narrow ethnic base, not the median voter, resulting in what political scientists Jacob Hacker and Paul Pierson describe as "policymaking that starkly and repeatedly departs from the centre of public opinion."[xviii]

The Kenyan public's input into the political process is also an important source of democratic dysfunction as well. The average Kenyan voter is "rationally ignorant", rarely appreciates the benefits of a well-informed vote and prefers party and ethnic as opposed to policy preferences.[xix] It is reasonable therefore to assume that executive conduct cannot be considered as a product majority will in any meaningful sense.

The above listed political dynamics work to prevent the executive and legislative branches from being truly representative of the majority will.

TOPIC-SPECIFIC IMPEDIMENTS TO EXECUTIVE CONDUCT

The nature of the issue under consideration can, and often does, create impediments to majoritarian change of its own. One way this can happen is if support for a policy is correlated with a particular demographic constituency, but which is underrepresented in the executive which can safely ignore the issue.

The other possibility in this category is issues that are too hot, or cold, for the executive to handle. An issue can be too hot—too polarizing—to trigger a response from the executive branch for a number of reasons. Sometimes the executive finds it too costly to take a stand on an issue. Unwilling or unable to decide the issue itself, the executive will facilitate, invite, solicit, and even plead for judicial involvement.[xx]

An issue also may be too cold—too low priority—to trigger a response from the executive branch. Such issues are rarely, if ever, executed because they are out of step with prevailing social imperatives, but the very fact that they are rarely, if ever, enforced is what keeps them low priority.[xxi] Low political prioritisation explains why the executive may be ill-suited to remedy the problem.[xxii] Cold issues such as these lack democratic legitimacy, so judicially invalidating them is not radically inconsistent with democratic ideals.

In concluding this section, reasons have emerged which show why although democratically elected, the executive may not accurately represent majoritarian views. The next question then becomes how judicial decision-making compares and how it may in fact be a more accurate representation of majority views.

WHY THE JUDICIARY MAY BE MOST REPRESENTATIVE IN PRACTICE

Judicial decision making differs from executive decision making in at least two respects. First, in the Supreme Court, for example, a majority of four carries the day and since it is the apex court, it can set new precedent by changing its own decisions. Second, judicial decision making is free of electoral pressures which define executive decision making.[xxiii] Judicial independence is enhanced since the justices are appointed and enjoy security of tenure until the age of seventy years. The fact of the court not being the subject of an electoral process would suggest that it is less majoritarian than the executive. But as seen above, electoral pressures are themselves cause of why the executive is often times less majoritarian and the Judiciary, being free of the same pressures more majoritarian. In the absence of the pull exerted by partisan elections, the Judiciary is freed of the majoritarian impediment to decision making…the democratic process itself.

The fact that the judiciary, although a non-majoritarian institution, could reflect the majoritarian will begs the question *why?* An understanding of the mechanisms by which majoritarian influences infiltrate and legitimise judicial law making are not well understood. If understood, such would fortify the democratic legitimacy of judicial review and lessen objections to judicial review of executive conduct in matters of national security. The following sections, however, make an attempt at classifying and clarifying those mechanisms.

JUDICIAL APPOINTMENTS PROCESS

The judicial-appointments process under Article 161 is the primary explanation for the judiciary's majoritarian proclivities.[xxiv] Judges are recommended by the Judicial Service Commission, appointed by the President and in the case of the Chief Justice and the Deputy Chief Justice subject to the approval of the National Assembly.[xxv]

The composition of the Judicial Service Commission aside, the President who appoints judges and the legislators who confirm them are presumably political actors who favour the appointment of judges with political and ideological leanings similar to their own and the constituents who elected them.[xxvi]Implicit in this theory is the assumption that elected officials have majoritarian policy preferences by virtue of their election, so judges appointed in their likeness will have majoritarian policy preferences too.

The foregoing notwithstanding, the judicial-appointments process is not a complete explanation for judicial tendencies to make majoritarian decisions. Judges have a judicial life expectancy much longer than those who put them on the Bench, so their views could easily differ from the prevailing ideology of any given moment.[xxvii]

MAJORITARIAN CONSTRAINTS ON JUDICIAL DECISION MAKING

A second explanation for judicial majoritarian proclivities is that the force of majority will imposes constraints on the Judges' ability to deviate significantly, and for long from the majority views. A judiciary with non-majoritarian views will not always be able to pursue those views because ultimately the execution of its decisions will fall on the executive rendering it

not so independent after all. Because it lacks the power of enforcement, the Judiciary has three compelling reasons why it should never digress from majoritarian preferences even where it could. These are to ensure that its rulings are enforced, to protect itself from retaliatory legislative measures, and to preserve its institutional legitimacy. These reasons are each discussed in turn.

The judiciary needs the support of the executive branch to make its rulings matter by ensuring obedience and yet the Executive may choose to undermine or simply ignore the ruling instead. In recognition of this impediment, judges act strategically as a result, anticipating the reaction of the executive branch and adjusting their decisions accordingly.[xxviii] Although majoritarian rulings do not guarantee that the executive branch will enforce them, the public's anticipated reaction does play an integral part in the mix. The more popular the ruling, the riskier it will be for the Executive to oppose or subvert it; conversely, the more unpopular the ruling, the more difficult it will be for executive officials will commit to enforcement. In sum, one reason for the Judiciary to be concerned to issue majoritarian rulings is the worry over its execution by the executive.

The other reason the Judiciary will look out to issue majoritarian rulings is the possibility of the Executive implementing measures to compel it to toe the line. The Executive can push through Parliament measures to curtail its budget, pack its JSC membership, strip its jurisdiction or even propose constitutional amendments to reverse its rulings.[xxix]

Here again, majority will play a part in the mix. The more unpopular the court's decision, the more likely that the executive branch will not execute it, and the converse is true as well; the Executive will retaliate against the Judiciary only when doing so does not militate against the public will. Ultimately the judiciary is safest going with the majority will.

The last majoritarian constraint is the Judiciary's need to preserve its institutional legitimacy. When judicial rulings go unenforced, or the Judiciary itself is attacked, judges lose some modicum of political power, which, over time, can render the judiciary vulnerable to further disregard and attacks by the democratic branches.[xxx]

In conclusion, the main reason the judiciary is majoritarian is that it often has little choice. Majority will impose significant constraints on the Judiciary's ability to deviate from majority preferences. The next question then becomes how much such constraint matters.

MAJORITARIAN INFLUENCES ON JUDICIAL DECISION MAKING

In the same manner as majority will constrains the Judges decisions, it also influences the decisions they ultimately make. This is largely attributable to the larger cultural backdrop against which cases are decided. Because the Constitution is largely a declaration of principles as opposed to a strict set of rules it is inherently indeterminate and therefore subject to interpretation. This makes it unavoidable that its interpretation will be reflection of attitudes, assumptions—even prejudices—that define a given place and time.[xxxi] Steven Winter makes the same point when he says,

"[J]udges cannot even think without implicating the dominant normative assumptions that shape their society," resulting in "unarticulated normative assumptions that shape and produce legal outcomes with distinctly majoritarian overtones."[xxxii]

Just like everybody else, judges are also a product of a particular time and space that defines their existence.

The pull of dominant public opinion is another majoritarian force which influences the decision making of judges. Empirical studies have proved that dominant public opinion is a statistically significant and powerful influence on the Judges.[xxxiii] On the impact of public opinion on judicial decision making, Chief Justice Rehnquist wrote over twenty years ago, "Judges, so long as they are relatively normal human beings, can no more escape being influenced by public opinion in the long run than can people working at other jobs."[xxxiv] Whether judges decisions are influenced by social opinions or factors that that shape social opinions, the ultimate result is that whatever the outcomes of their decisions, such decisions will tend to reflect majority opinions.

In conclusion, there are numerous factors that would account for judicial decisions leaning towards majoritarianism. This is not to suggest that courts always make majoritarian decisions but rather, it explains why the judiciary in many respects reinforces majoritarian views so that the institution that is not thought of as majoritarian often is and those that are majoritarian sometimes are not.

CONCLUSION

The main contribution of this article is its argument that the judiciary, although unelected and supposedly having less democratic credentials than the executive and legislature, is as democratic in its functions and outcomes, at times more than the two.

The article argues that under the Constitution, any law or exercise of executive power that limits rights must be justified and the judiciary has the responsibility of assessing such justification. In the process it may emerge that legislative or executive output is countermanded which raises the question of the legitimacy of such judicial output viewed against the democratic character of the legislature and executive.

Using a plea of national security as justification for limitation of rights by the executive where it argues for judicial deference to executive, the article illustrates instances when the executive may actually be undemocratic through structural, political and topic specific impediments.

The article also advances arguments which exhibit the democratic credentials of the judiciary such as the appointments process, majoritarian constraints and influences on judicial decision making which lend democratic legitimacy to judicial output. In view of the above, the democratic credentials of the judiciary and its justification to review matters of national security are justified.

REFERENCES

[i] East African Standard 2nd September 2017 … "I respect the Supreme Court's decision but I don't agree with it... Millions of Kenyans queued and voted, but six people have decided that they will go against the will of Kenyans…"

[ii] See Mark A Graber: " Foreword: From the Countermajoritarian Difficulty to Juristocracy and the Political Construction of Judicial Power" (2006) 65 Md L Rev l; Barry Friedman, "The History of the Countermajoritarian Difficulty, Part One: The Road to Judicial Supremacy" (1998) 73 NYU L Rev 333 at 335; Samuel Issacharoff, "Constitutionalizing Democracy in Fractured Societies" (2004) 82 Tex L Rev 1861 (equating judicial review with constitutionalism which "exists in inherent tension with the democratic commitment to majoritarian rule. At some level, any conception of democracy invariably encompasses a commitment to rule by majoritarian preferences, whether expressed directly or through representative bodies. At the same time, any conception of constitutionalism must accept pre-existing restraints on the range of choices available to governing majorities").

[iii] Kenneth Roberts-Wray: "Human Rights in the Commonwealth" (1968) 17 Int'l & Comp LQ 908 at 924.
[iv] See Mark A. Graber, The Countermajoritarian Difficulty: From Courts to Congress to Constitutional Order, 4 ANN. REV. L. & SOC. SCI. 361, 362 (2008) (presenting literature review of how "scholarly concern with democratic deficits in American constitutionalism has shifted from the courts to electoral institutions," and noting that within the social sciences, "[t]he countermajoritarian difficulty is emigrating from the judiciary to the elected branches of government")
[v] See George I. Lovell, Legislative Deferrals: Statutory Ambiguity, Judicial Power, and American Democracy, at xv (2003) ("The basic idea of th[e] conventional framework is that outcomes created by elected legislators form a democratic baseline against which to evaluate outcomes produced by other branches . . . ."); Thomas R. Marshall, Public Opinion and the Supreme Court 5 (1989) (lamenting the "ipso facto assumption that the policies of the popularly elected branches necessarily represent a nationwide public opinion majority.").
[vi] See Barry Friedman, Dialogue and Judicial Review, 91 MICH. L. REV. 577, 630 (1993) ("The countermajoritarian difficulty posits that the 'political' branches are 'legitimate' because they further majority will, while courts are illegitimate because they impede it. . . . [C]ountermajoritarian theory rests explicitly on the notion that the other branches of government 'represent' majority will in a way the judiciary does not . . . .").
[vii] See, e.g., Barry Friedman, The Will of The People: How Public Opinion has influenced the Supreme Court and shaped the meaning of the Constitution 368 (2009) ("It frequently is the case that when judges rely on the Constitution to invalidate the actions of the other branches of government, they are enforcing the will of the American people."); Jeffrey Rosen, The Most Democratic Branch: How The Courts Serve America 4 (2006) ("How did we get to this odd moment in American history where unelected Supreme Court justices sometimes express the views of popular majorities more faithfully than the people's elected representatives?"); Michael J. Klarman, Constitutional Fact/Constitutional Fiction: A Critique of Bruce Ackerman's Theory of Constitutional Moments, 44 STAN. L. REV. 759, 795 (1992) (reviewing Bruce Ackerman, We The People: Foundations (1991)) ("Where legislative self-interest is that intense, judicial review is likely to be more majoritarian than legislative decision making.").
[viii] Article 115. (1) Within fourteen days after receipt of a Bill, the President shall—
(a) assent to the Bill; or
(b) refer the Bill back to Parliament for reconsideration by Parliament, noting any reservations that the President has concerning the Bill.
[ix] (4) Parliament, after considering the President's reservations, may pass the Bill a second time, without amendment, or with amendments that do not fully accommodate the President's reservations, by a vote supported—
(a) by two-thirds of members of the National Assembly; and
(b) two-thirds of the delegations in the Senate, if it is a Bill that requires the approval of the Senate.
(5) If Parliament has passed a Bill under clause (4)—
(a) the appropriate Speaker shall within seven days re-submit it to the President; and
(b) the President shall within seven days assent to the Bill.
[x] Article 98. (1) The Senate consists of—
(a) forty-seven members each elected by the registered voters of the counties, each county constituting a single member constituency;
[xi] Supra note 12 Article 115 (4)
[xii] Article 256(1) A Bill to amend this Constitution— (d) shall have been passed by Parliament when each House of Parliament has passed the Bill, in readings, by not less than two-thirds of all the members of that House.
[xiii] For an attempt to empirically answer this question, see Justin Fox & Kenneth W. Shotts, Delegates or Trustees? A Theory of Political Accountability, 71 J. POL. 1225 (2009).
[xiv] No incumbent President has lost an election in independent Kenya.
[xv] Patrick Basham & Dennis Polhill, Uncompetitive Elections and the American Political System, POL'Y ANALYSIS, June 2005, at 1, 2–3; see also id. at 1–2 (reporting that 99.3% of "unindicted congressional and state legislative incumbents" won reelection in the 1980s and recommending that elected officials be disconnected from campaign and election rule making and regulation);see also Michael J. Klarman, Majoritarian Judicial Review: The Entrenchment Problem, 85 GEO. L.J. at 498, 509–28 (discussing various entrenchment measures adopted by policymakers and concluding, "In [none of these entrenchment contexts] is legislative decision making likely to be majoritarian; judicial review quite plausibly would be more so".
[xvi] See generally James M. Buchanan, Politics Without Romance: A Sketch of Positive Public Choice Theory and Its Normative Implications, in The Theory Of Public Choice—II, at 11 (James M. Buchanan & Robert D. Tollison eds., 1984) (providing a summary of "the emergence and the content of the 'theory of public choice'");
[xvii] 2013 National Elections TNA-Kikuyu, ODM Luo/Luhya, URP-Kalenjin, Wiper-Kamba etc.

[xviii] See Jacob S. Hacker & Paul Pierson, Off Center: The Republican Revolution and The Erosion of American Democracy 9, at 16, 19 (2005).
[xix] Ilya Somin, Political Ignorance and the Countermajoritarian Difficulty: A New Perspective on the Central Obsession of Constitutional Theory, 89 IOWA L. REV. 1287, 1290, 1370 (2004) at 1324–29 (supporting "rational ignorance" theory of low voter knowledge with empirical evidence). Interestingly, politicians tend to be "rationally ignorant" themselves. Given the volume and technical detail of proposed legislation, legislators rarely have the time to ponder the bills they are voting on, turning instead to party leadership or political allies to tell them how to vote. See Jason T. Burnette, Note, Eyes on Their Own Paper: Practical Construction in Constitutional Interpretation, 39 GA. L. REV. 1065, 1093 (2005).
[xx] Thomas M. Keck, Party Politics or Judicial Independence? The Regime Politics Literature Hits the Law Schools, 32 LAW & SOC. INQUIRY 511, 516 (2007) (book review).
[xxi] Cass R. Sunstein, What Did Lawrence Hold? Of Autonomy, Desuetude, Sexuality, and Marriage, 2003 SUP. CT. REV. 27, 50–58 (analyzing same-sex-sodomy statutes as an example of this phenomenon).
[xxii] George I. Lovell & Scott E. Lemieux, Assessing Juristocracy: Are Judges Rulers or Agents? 65 MD. L. REV. 100, 107 (2006) ("[R]epeal campaigns never develop much momentum because lack of enforcement makes the campaign seem mostly symbolic and thus less important than fights over more consequential laws.").
[xxiii] See Article 160. (1) In the exercise of judicial authority, the Judiciary, as constituted by Article 161, shall be subject only to this Constitution and the law and shall not be subject to the control or direction of any person or authority.
[xxiv] See William Mishler & Reginald S. Sheehan, Public Opinion, the Attitudinal Model, and Supreme Court Decision Making: A Micro-Analytic Perspective, 58 J. POL. 169, 171 (1996) (recognizing judicial-appointments process as the "conventional explanation of the relationship between public opinion and Supreme Court decisions"); see also Terri Peretti, An Empirical Analysis of Alexander Bickel's The Least Dangerous Branch, in The Judiciary And American Democracy: Alexander Bickel, The Countermajoritarian Difficulty, And Contemporary Constitutional Theory 123 at 132 (Kenneth D. Ward & Cecilia R. Castillo eds., 2005) [hereinafter The Judiciary And American Democracy] ("[T]he countermajoritarian features of American democracy . . . were deliberately adopted by the Framers precisely because of their antimajoritarian effects. Federalist 10 clearly expresses the Framers' strong fears of majority tyranny.")., at 132 (noting that "[m]ost scholars agree that the appointment process is the dominant path through which public opinion influences Supreme Court decisions");
[xxv] 166. (1) The President shall appoint—
(a) the Chief Justice and the Deputy Chief Justice, in accordance with the recommendation of the Judicial Service Commission, and subject to the approval of the National Assembly; and
(b) all other judges, in accordance with the recommendation of the Judicial Service Commission.
[xxvi] See Lee Epstein et al., The Supreme Court as a Strategic National Policymaker, 50 Emory L.J.583, 586 (2001)
[xxvii] See Article 167. (1) A judge shall retire from office on attaining the age of seventy years, but may elect to retire at any time after attaining the age of sixty-five years.
See also Steven G. Calabresi & James Lindgren, Term Limits for the Supreme Court: Life Tenure Reconsidered, 29 HARV. J.L. & PUB. POL'Y 769 (2006) (documenting the average tenure of retiring Justices from 1971 to 2000 at just over twenty-six years).
[xxviii] See Lee Epstein et al., The Supreme Court as a Strategic National Policymaker, 50 EMORY L.J. at 610 (2001); ("Tests at both the individual and the aggregate levels support the proposition that the Justices adjust their decisions in anticipation of the potential responses of the other branches of government.");
[xxix] See Jesse H. Choper, Judicial Review and The National Political Process 10 (1980) at 47–55 (discussing variety of court-curbing measures); Neal Devins & Louis Fisher, The Democratic Constitution 22–28 (2004)
[xxx] See, e.g., Lawrence Baum & Neal Devins, Why the Supreme Court Cares about Elites, Not the American People, 98 GEO. L.J. at 1530
[xxxi] As Oliver Wendell Holmes explained, "The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed." Oliver Wendell Holmes, The Common Law 1 (Harvard Univ. Press 1963) (1881); see also Michael J. Klarman, From Jim Crow to Civil Rights: The Supreme Court and the Struggle for Racial Equality 294 (2004) at 5–6 ("[B]ecause constitutional law is generally quite indeterminate, constitutional interpretation almost inevitably reflects the broader social and political context of the times."); see also Larry Kramer, Generating Constitutional Meaning, 94 CALIF. L. REV. 1439, 1441 (2006); at 1440 (noting "the inevitable ways in which the views of courts and judges are shaped by the evolving understandings of the societies in which the judges also live").

[xxxii] Steven L. Winter, An Upside/Down View of the Countermajoritarian Difficulty, 69 TEX. L. REV. 1881, 1925, 1927 (1991); see also Lawrence M. Friedman, Coming of Age: Law and Society Enters an Exclusive Club, 1 ANN. REV. L. & SOC. SCI. 1, 10 (2005) ("In some ways, people are like animals born and raised in zoos; they are not aware that their world of cages and enclosures is highly artificial, that their range of behavior is limited by conditions they did not create for themselves. . . . This is true for legal behavior as much as for any other form of behavior.").

[xxxiii] Kevin T. McGuire & James A. Stimson, The Least Dangerous Branch Revisited: New Evidence on Supreme Court Responsiveness to Public Preferences, 66 J. POL. 1018, 1033 (2004) ("We set out trying to determine whether the Supreme Court responds directly to movements in public opinion and whether the data used in prior analyses undercut accurate estimation of this relationship. We have unusually clear answers to both. . . . [W]e has found that the Court's policy outcomes are indeed affected by public opinion, but to a degree far greater than previously documented.")

[xxxiv] William H. Rehnquist, Constitutional Law and Public Opinion, 20 SUFFOLK U. L. REV. 751, 768 (1986).