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Presidential Name-Dropping at the Supreme Court

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Schoolhouse Rock, and the Constitution, teach that a bill becomes a law when the president signs it. Often the Supreme Court will explain that a given bill was signed by "the president." But on rare occasions, the justices will refer to the president by name. Does this SCOTUS name-dropping matter? If the Court merely notes which president was in office when Congress passed a specific bill, there is no problem. That fact, in the legal lingo, is merely *descriptive*. However, if the Court identifies the president to make a broader point—for example, that the bill was passed by a liberal or a conservative—there may indeed be a problem. The Court should resist the urge to wade, or even dip a toe, into partisan squabbles by naming the politicians responsible for legislation, unless, of course, those facts are necessary to resolve a given a case.

Recently the Court's newest member named two presidents in two very different contexts. In *Rimini Street v. Oracle*, a fairly routine case about court fees, Justice Brett Kavanaugh wrote the majority opinion for a unanimous court. He observed that in 1853, "President Fillmore signed a comprehensive federal statute establishing a federal schedule for the award of costs in federal court." This reference to Fillmore was fine, providing a brief history lesson for anyone not too sure who was president back then. On the court of appeals, then-Judge Kavanaugh would routinely name the president who signed a bill into law.

In a second, high-profile case, Kavanaugh's presidential name-dropping took a turn. *Nielsen v. Preap* considered several provisions of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), which imposed tighter restrictions on immigration. The Court held that IIRIRA did not require that certain aliens held in federal custody should be entitled to a bond hearing. Justice Samuel Alito wrote the majority opinion, which was joined by Chief Justice John Roberts and Justices Clarence Thomas, Neil Gorsuch, and Kavanaugh.

The newest member of the Court wrote a brief concurrence. He offered several reasons the majority opinion was "narrow." In the penultimate paragraph of his opinion, Kavanaugh wrote, "The issue before us is entirely statutory and requires our interpretation of the strict 1996 illegal-immigration law [IIRIRA] passed by Congress and signed by President Clinton." President Bill Clinton signed the Republican-sponsored bill into law on September 30, 1996—shortly before he stood for reelection—as part of his first-term pivot to the center.

I have no doubt that Kavanaugh's intent here was as innocuous as in *Rimini*. But the implication was very different: The Court was not being "strict" toward immigrants; a bipartisan Congress and Clinton were being "strict" toward immigrants. In other words, don't blame us for interpreting the law in a tough fashion—even a Democrat was fine with it.

Clinton signed another contentious bill nine days earlier. On September 21, 1996, he approved the Defense of Marriage Act (DOMA), which limited the federal definition of marriage to one

man and one woman. Nearly two decades later, the Supreme Court declared DOMA unconstitutional in *United States v. Windsor*. Justice Anthony Kennedy's majority opinion found that the "principal purpose" behind those who had approved the law was "a bare desire to harm" gays and lesbians.

Roberts dissented in *Windsor*. He contended that there was "hardly enough" evidence to show that the "342 Representatives and 85 Senators who voted for it, and the President who signed it" were motivated by bigotry. Of course, Roberts's specificity made it easy to figure out that Democrats *and* Republicans had overwhelmingly favored DOMA, and that a popular Democratic president had signed it into law.

But Roberts was right to omit the president's name. (In 2013, Clinton claimed that he had signed DOMA only to prevent a constitutional amendment banning same-sex marriage, though there is no evidence to support that revisionism.) And Roberts's silence seems to be the majority rule. In more than 300 decisions in which the Supreme Court referred to the president who had signed a bill into law, about a dozen named him.

Recently there was a significant case in which it was essential to name the president: *Trump v. Hawaii*. The travel-ban litigation turned almost entirely on the words and deeds of one person. Accordingly, Roberts's majority opinion mentioned the president by name once, and only once: "Shortly after taking office, President Trump signed Executive Order No. 13769, Protecting the Nation From Foreign Terrorist Entry Into the United States." The remainder of the majority opinion only referred to "the President." Once again, Roberts struck the right tone. "[W]e must consider not only the statements of a particular President," he wrote, "but also the authority of the Presidency itself." The case wasn't personalized to Trump, even though the case was all about Trump.

Justice Sonia Sotomayor's dissent struck a different tone. In her written opinion she repeatedly referred to "President Trump" and the "Trump administration." During her oral announcement, she even used the president's given name to criticize the third iteration of the travel ban: "But this repackaging is window dressing and it does nothing to cleanse the presidential proclamation of the discriminatory animus that President Donald Trump repeatedly conveyed as a candidate, as President-elect, and as President." Seated in the gallery, I was shocked that she added "Donald." Indeed, every time she uttered the word "Trump," her voice was filled with disdain.

The justices should be careful about naming politicians, especially when they name in order to make a point about the political process. Citing legislative history from members of Congress who supported or opposed a bill is completely justifiable; those statements were designed to inform the law's meaning. But it is generally a mistake to focus on the identity of the person whose only contribution was to sign the bill into law. Although this error does not violate any ethics rule, it's worth avoiding for the sake of keeping the Court as far away from politics as possible. Kavanaugh's reference to Clinton was right on the border-line; Sotomayor's reference to Donald Trump crossed it.

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