

HAS TRUMP TRUMPED THE COURTS?

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President Trump’s repeated and unsparing criticisms of the federal judiciary provide an opportunity to examine how public critique of the U.S. Supreme Court affects Americans’ willingness to support the institution. We report the results of an experiment embedded in a nationally-representative survey of Americans that varied in both the source (President Trump or distinguished law professors) and content (legal or political) of the criticism aimed at the Court. Our results—perhaps surprising to many—demonstrate that the greatest decline in support for the Court came among those respondents who learned of criticism by law professors that the Court’s decisions are politicized. The results have important implications for our understanding of the Court’s legitimacy under President Trump.

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INTRODUCTION

Donald Trump is unhappy with the judicial branch of government, and he has felt free to let the American people know. Trump’s list of judicial targets has been lengthy, including United States District Judge Gonzalo P. Curiel (a “hater”¹ and “a very hostile judge”² whose actions are “a total disgrace”³), District Court Judge James Robart (a “so-called judge”⁴ whose “ridiculous”⁵ ruling “put our country in such peril. If something happens

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¹ David Wright, *Trump Again Thunders Against Judiciary*, CNN (Apr. 27, 2017), <http://www.cnn.com/2017/04/26/politics/trump-tweets-ninth-circuit-sanctuary-cities-order/index.html>.

² Jia Tolentino, *Trump and the Truth: “The Mexican” Judge*, NEW YORKER (Sept. 20, 2016), <https://www.newyorker.com/news/news-desk/trump-and-the-truth-the-mexican-judge>.

³ Kristine Phillips, *All the Times Trump Personally Attacked Judges—And Why His Tirades are ‘Worse than Wrong.’* WASH. POST (Apr. 26, 2017), https://www.washingtonpost.com/news/the-fix/wp/2017/04/26/all-the-times-trump-personally-attacked-judges-and-why-his-tirades-are-worse-than-wrong/?utm_term=.b03869cf66ae.

⁴ Donald J. Trump (@realDonaldTrump), TWITTER (Feb. 4, 2017, 5:12 AM), <https://twitter.com/realDonaldTrump/status/827867311054974976>.

⁵ *Id.*

blame him and court system”⁶), the Ninth Circuit (a court that “has a terrible record of being overturned”⁷ and issuing “ridiculous rulings”⁸), Ruth Bader Ginsburg (a “disgrace to the court”⁹), and the judiciary in general (“The courts are making the job very difficult!”¹⁰ because they are “so political,”¹¹ showing “unprecedented judicial overreach”¹² by blocking his immigration policy).

Trump has acknowledged his attacks on the judiciary have been controversial, telling reporters in March 2017, “I have to be nice otherwise I’ll get criticized for—for speaking poorly about our courts.”¹³ His own Supreme Court nominee, Neil Gorsuch, called Trump’s comments about the judiciary “disheartening” and “demoralizing.”¹⁴ Journalists and law professors have expressed concern that such attacks imperil the legitimacy of the judicial branch.¹⁵ In one illustrative exchange, Professor Charles Geyh told the *Washington Post*:

Presidents have disagreed with court rulings all the time. What’s unusual is he’s essentially challenging the legitimacy of the court’s role. And he’s doing that without any reference to applicable law That they are blocking his order is all the evidence he needs that they are exceeding their authority. . . . That’s worse than wrong On some

⁶ Donald J. Trump (@realDonaldTrump), TWITTER (Feb. 5, 2017, 12:39 PM), <https://twitter.com/realdonaldtrump/status/828342202174668800>; see also Eric Bradner & Jeff Zeleny, *Trump: ‘If Something Happens Blame’ the Judge*, CNN (Feb. 5, 2017), <https://www.cnn.com/2017/02/05/politics/trump-twitter-attacks-judge/>.

⁷ Donald J. Trump (@realDonaldTrump), TWITTER (Apr. 26, 2017, 3:38 AM), <https://twitter.com/realdonaldtrump/status/857182179469774848>.

⁸ Donald J. Trump (@realDonaldTrump), TWITTER (Apr. 26, 2017, 3:20 AM), <https://twitter.com/realdonaldtrump/status/857177434210304001>.

⁹ Michael D. Shear & Maggie Haberman, *Donald Trump Calls Ruth Bader Ginsburg’s Remarks a ‘Disgrace to the Court,’* N.Y. TIMES (July 12, 2016), <https://nyti.ms/2GEy6qA>.

¹⁰ Donald J. Trump (@realDonaldTrump), TWITTER (Feb. 5, 2017, 12:42 PM), <https://twitter.com/realdonaldtrump/status/828343072840900610>.

¹¹ Rachael Revesz, *Donald Trump Says Federal Judges Ruling Against His ‘Muslim Ban’ Are ‘Political,’* INDEPENDENT (Feb. 8, 2017), <http://www.independent.co.uk/news/world/americas/donald-trump-muslim-ban-federal-judges-political-ruling-immigration-travel-restrictions-a7569341.html>.

¹² Jeremy Diamond, *Trump Rails Against Court Ruling Blocking Travel Ban*, CNN (Mar. 15, 2017), <http://www.cnn.com/2017/03/15/politics/donald-trump-travel-ban-judge-ruling/>.

¹³ *Id.*

¹⁴ Abby Phillip, Robert Barnes & Ed O’Keefe, *Supreme Court Nominee Gorsuch Says Trump’s Attacks on Judiciary Are ‘Demoralizing,’* WASH. POST (Feb. 9, 2017), https://www.washingtonpost.com/politics/supreme-court-nominee-gorsuch-says-trumps-attacks-on-judiciary-are-demoralizing/2017/02/08/64e03fe2-ee3f-11e6-9662-6eedf1627882_story.html?utm_term=.2ea1727fb051.

¹⁵ See, e.g., Interview by Judy Woodruff with Paul Cassell and Rebecca Kourlis, *Do Trump’s Attacks on Judicial Legitimacy Go Too Far?*, PBS (Feb. 9, 2017, 8:58 PM), <http://www.pbs.org/newshour/bb/trumps-attacks-judicial-legitimacy-go-far/> (interviewing two former judges about Trump’s attacks on judicial legitimacy).

level, that's dangerous.¹⁶

In short, it is widely believed that President Trump's criticism of the judiciary poses real and immediate threats to the public esteem courts need in order to be effective.

Luckily, academic political scientists and psychologists have devoted a great deal of effort to understanding the determinants and dynamics of public support for courts.¹⁷ Perhaps surprisingly, the bulk of this research suggests that the U.S. Supreme Court's legitimacy is high, stable, and relatively unencumbered by the incredible partisanship that grips American politics today.¹⁸ Indeed, because the public holds courts in such high esteem, research shows, even mere exposure to symbols of judicial authority can mitigate disappointment with institutional performance.¹⁹ While some scholars argue that disagreement with a court's decision affects judgments of its legitimacy,²⁰ the most recent evidence suggests that ideological disagreement with a court's rulings plays only a minor role in one's support for a court and affects evaluations of institutional performance only among a minority of Americans.²¹ Moreover, repeated

¹⁶ Phillips, *supra* note 3.

¹⁷ See Tom R. Tyler, *Psychological Perspectives on Legitimacy and Legitimation*, 57 ANN. REV. PSYCHOL. 375, 379 (2006) (“[R]esearch on people’s personal interactions with . . . judges indicates that people who view those authorities as legitimate are more likely to accept their decisions, an effect that is distinct from the general finding that people are more likely to accept decisions that are more favorable and/or fairer.”). Other reviews of the academic literature on legitimacy abound. See James L. Gibson & Michael J. Nelson, *The Legitimacy of the US Supreme Court: Conventional Wisdoms and Recent Challenges Thereto*, 10 ANN. REV. L. & SOC. SCI. 201 (2014) (reviewing research on the legitimacy of the Supreme Court and concluding the Court’s legitimacy is reasonably secure); see also Christian S. Crandall & Ryan K. Beasley, *A Perceptual Theory of Legitimacy: Politics, Prejudice, Social Institutions, and Moral Value*, in THE PSYCHOLOGY OF LEGITIMACY: EMERGING PERSPECTIVES ON IDEOLOGY, JUSTICE, AND INTERGROUP RELATIONS 77, 87–90 (John T. Jost & Brenda Major eds., 2001) (describing the importance of legitimacy for judicial institutions).

¹⁸ See James L. Gibson, *The Legitimacy of the U.S. Supreme Court in a Polarized Polity*, 4 J. EMPIRICAL LEGAL STUD. 507, 517–26 (2007) (finding that Americans are reasonably united in their commitment to the Supreme Court); see also James L. Gibson, *Performance Evaluations Are Not Legitimacy Judgments: A Caution About Interpreting Public Opinions Toward the United States Supreme Court*, 54 WASH. U. J.L. & POL’Y 71, 85 (2017) (“Supreme Court legitimacy is not polarized by the partisanship of its constituents.”).

¹⁹ See James L. Gibson, Milton Lodge & Benjamin Woodson, *Losing, but Accepting: Legitimacy, Positivity Theory, and the Symbols of Judicial Authority*, 48 LAW & SOC’Y REV. 837, 857–58 (2014); James L. Gibson & Michael J. Nelson, *Change in Institutional Support for the US Supreme Court: Is the Court’s Legitimacy Imperiled by the Decisions It Makes?*, 80 PUB. OPINION Q. 622, 634–36 (2016).

²⁰ See, e.g., Brandon L. Bartels & Christopher D. Johnston, *On the Ideological Foundations of Supreme Court Legitimacy in the American Public*, 57 AM. J. POL. SCI. 184, 187–97 (2013); Dino P. Christenson & David M. Glick, *Chief Justice Roberts’s Health Care Decision Disrobed: The Microfoundations of the Supreme Court’s Legitimacy*, 59 AM. J. POL. SCI. 403, 404–05, 415–16 (2015).

²¹ James L. Gibson & Michael J. Nelson, *Is the U.S. Supreme Court’s Legitimacy Grounded in Performance Satisfaction and Ideology?*, 59 AM. J. POL. SCI. 162, 168–70 (2015).

interviews with the same random sample of Americans over the second half of the Obama administration revealed no meaningful aggregate-level or individual-level change in support for the U.S. Supreme Court.²²

However, the Court's support is not unflappable. Rather, a growing body of research suggests that perceptions that the Court's decisions are politicized—that is, that the Justices are no more than politicians in robes—are associated with sharply lower levels of support for courts.²³ Citizens do not penalize courts for making ideological decisions; they understand that judges, like most people, have principled stands on most important issues of the day.²⁴ But, when citizens believe that judicial behavior crosses the line from principled to politicized,²⁵ they no longer extend high levels of support to courts.²⁶ This growing body of research suggests that comments—like Trump's suggestion that judges are “so political”—may do real and lasting damage to public support for America's courts.

I

RESEARCH DESIGN & DATA

With this in mind, we conducted an experiment seeking the views of a random sample of Americans who were chosen to become members of

²² See Michael J. Nelson & Patrick Tucker, *The Stability of the U.S. Supreme Court's Legitimacy* 5 (June 5, 2017) (unpublished manuscript) (on file with author) (“Our analysis reveals a remarkable stability in public support for the Court.”).

²³ See James L. Gibson & Michael J. Nelson, *Reconsidering Positivity Theory: What Roles Do Politicization, Ideological Disagreement, and Legal Realism Play in Shaping U.S. Supreme Court Legitimacy?*, 14 J. EMPIRICAL LEGAL STUD. 592, 604–05 (2017). This phrase—“politicians in robes”—has been widely used in popular discourse, with Neil Gorsuch telling the Senate Judiciary Committee during his Supreme Court confirmation hearing that “these days we sometimes hear judges cynically described as politicians in robes. Seeking to enforce their own politics rather than striving to apply the law impartially. But I just don't think that's what a life in the law is about.” *Full Text of Supreme Court Nominee Gorsuch's Remarks to Senate Panel*, BLOOMBERG (Mar. 20, 2017), <https://www.bloomberg.com/news/articles/2017-03-20/supreme-court-nominee-gorsuch-s-remarks-to-senate-panel-text>.

²⁴ See James L. Gibson & Gregory A. Caldeira, *Has Legal Realism Damaged the Legitimacy of the U.S. Supreme Court?*, 45 LAW & SOC'Y REV. 195, 207 (2011) (finding that belief in mechanical jurisprudence is not a necessary condition for Americans to believe that the U.S. Supreme Court is legitimate).

²⁵ By “politicized” we, like Gibson and Nelson, *supra* note 23, at 594 n.6, mean “that ordinary political processes common to the other branches of government also pertain to the U.S. Supreme Court.” In this sense, “politicized” behavior refers to “insincerity and strategic behavior, in self-interested behavior, in involvement with partisan politics, and perhaps even in disdain for the preferences of the institution's constituents.” *Id.* This differs from “principled” behavior in which judges make decisions based on their own beliefs, even if those principled beliefs are ideological in nature. In short, principled behavior is sincere behavior while much politicized behavior is strategic in nature.

²⁶ *Id.* at 609–12 (finding the Court's perceived politicization affects the legitimacy judgments of the U.S. population).

Washington University's The American Panel Survey (TAPS).²⁷ An experimental approach is particularly useful for research questions like these, in which some might worry that, because many people hold the Court in such high esteem, they devalue criticism of the Court. The use of an experiment that randomly assigns individuals to treatments has the virtue of mitigating these concerns and enabling us to make clear conclusions about the causal determinants of support for courts.

The experiment, which we fielded in August 2017, randomly divided the respondents into four groups. First, half of the respondents read a short vignette about criticism of the Supreme Court made by "a bipartisan group of distinguished law professors"²⁸ while the other half read about criticism of the Court leveled by President Trump. Our intention was that the criticism made by law professors would provide a baseline against which criticism by President Trump could be compared.²⁹

Also, recall that recent research suggests that criticism on politicized grounds has been found to be especially harmful to courts' public support. With this in mind, half of the subjects read that the Court was criticized on legal grounds ("the Supreme Court justices too often do not follow what the Constitution says"³⁰) and half read that the Court was criticized on politicized grounds ("the Supreme Court justices are really nothing more than politicians in robes"³¹). An example of a full vignette is as follows:

In a recent speech, President Trump discussed the role of the U.S. Supreme Court. President Trump was quite critical of the Supreme Court, saying that the Supreme Court justices are really nothing more than politicians in robes.³²

This experimental design allowed us to compare the effects of both the speaker and the content of the speech on support for the Supreme Court. Following recent research, we expected that criticism made by President Trump on politicized grounds (the full vignette just provided) would generate the lowest level of Supreme Court legitimacy.

But what, exactly, is legitimacy, and how can we measure it? Social scientists broadly agree on the outlines of legitimacy theory, which has its basis in the work of David Easton.³³ Briefly, legitimacy (also called

²⁷ More information on TAPS, including technical information about subject recruitment, is available in WASH. U. ST. LOUIS, THE AMERICAN PANEL SURVEY STUDY DESCRIPTION AND TECHNICAL REPORT (2013), http://taps.wustl.edu/files/taps/imce/technical_report-2013-2.pdf.

²⁸ The American Panel Survey Instrument (Aug. 17, 2017) [hereinafter TAPS Instrument] (on file with authors).

²⁹ Because our treatments were randomly assigned and we examine change in diffuse support over time, we need not worry about global temporal trends that affect all respondents equally.

³⁰ TAPS Instrument, *supra* note 28.

³¹ *Id.*

³² *Id.*

³³ See generally DAVID EASTON, A SYSTEMS ANALYSIS OF POLITICAL LIFE 267–310

“diffuse support”) is “a reservoir of favorable attitudes or good will that helps members to accept or tolerate outputs to which they are opposed or the effect of which they see as damaging to their wants.”³⁴ It differs from “specific support,” which is satisfaction with particular actions by an institution.³⁵ Legitimacy and specific support tend to be positively correlated, but not overwhelmingly so.³⁶

We followed the conventional approach to measuring diffuse support, which consists of a battery of questions that asks respondents about their willingness to consider fundamental changes to the institutional structure of the Supreme Court.³⁷ After they had read the vignette, we asked respondents to indicate their level of agreement with the following statements on a five-point scale:

If the Supreme Court started making a lot of decisions that most disagree with, it might be better to do away with the Court altogether (57.0% supportive of the Court; 13.3% not supportive of the Court).³⁸

The Court ought to be made less independent so that it listens a lot more to what the people want (46.7% supportive of the Court; 26.1% not supportive of the Court).

It is inevitable that the Court gets mixed up in politics; we ought to have stronger means of controlling the Court (37.5% supportive of the Court; 28.2% not supportive of the Court).³⁹

We then combined the three items into a single index. The items were quite reliable, with a Cronbach’s alpha of 0.95. Factor analysis revealed a unidimensional solution, with all three items loading onto a single factor, with all loadings above 0.79.

We are particularly interested in the effect of the vignette on change in individual-level support for the Court. Luckily, TAPS asked these same three questions in the June 2017 wave of its survey. To calculate our dependent variable, change in legitimacy, we took the average responses to the three questions and subtracted them ($t_2 - t_1$), so that positive values

(1965); David Easton, *A Re-assessment of the Concept of Political Support*, 5 BRIT. J. POL. SCI. 435 (1975).

³⁴ EASTON, *supra* note 33, at 273.

³⁵ Gregory A. Caldeira & James L. Gibson, *The Etiology of Public Support for the Supreme Court*, 36 AM. J. POL. SCI. 635, 637 (1992) (“‘Specific support’ consists of a set of attitudes toward an institution based upon the fulfillment of demands for particular policies or actions.”).

³⁶ See Gibson & Nelson, *supra* note 21, at 164–73 (finding that the Court’s legitimacy is not highly dependent upon the Court making decisions that please the American people).

³⁷ See James L. Gibson, Gregory A. Caldeira & Lester Kenyatta Spence, *Measuring Attitudes Toward the United States Supreme Court*, 47 AM. J. POL. SCI. 354, 358 (2003) (adopting a conception of loyalty as opposition to making fundamental structural and functional changes to the courts).

³⁸ The percentages are calculated on the basis of collapsing the five-point Likert response set (e.g., “disagree strongly” and “disagree” responses are combined).

³⁹ TAPS Instrument, *supra* note 28.

indicate an increase in legitimacy between the two months and negative values indicate a decrease in legitimacy between the two surveys.

II

RESULTS

Armed with our four experimental treatments and a reliable and valid dependent variable, we then considered the effects that the identity of the speaker and the content of the criticism had on respondents' support for the U.S. Supreme Court. Because respondents were randomly assigned into one of the four conditions, a simple comparison of the average level of legitimacy change among the respondents in each condition served as an appropriate test for differences across the conditions.

We begin by examining the effect of the content of the criticism on support for the Supreme Court. Here, the most important conclusion we find is a statistically significant difference in legitimacy change between those individuals who were exposed to criticism of the Court on political grounds and those who were exposed to criticism of the Court on legal grounds ($p=0.04$, $N=2111$, one-tailed test). Respondents who were exposed to criticism on political grounds, on average, reported a -0.19 change in legitimacy between the two surveys while those exposed to criticism on legal grounds lowered their support for the Court by only -0.08 . In other words, both types of criticism resulted in lower average support for the Supreme Court, but the amount of change was greater among those who heard a criticism of the Court on politicized grounds. This finding is in line with previous research revealing that individuals' perceptions of politicized courts are associated with a decrease in public support for courts. Yet this finding is particularly important inasmuch as it represents the first time that scholars have been able to test the effects of politicization on change in support for the Supreme Court using a nationally representative survey.

Second, we examine whether the effect of the type of criticism varied based on the source of the criticism. These results are shown in Figure 1. Among respondents who were exposed to criticism by law professors, the content of the criticism had an effect ($p<0.001$, one-tailed test); those who were exposed to a politicized treatment had a larger negative change in support for the Court (-0.32) than those who were exposed to legal criticism (-0.03). On the other hand, there was no statistically significant difference in the amount of change experienced by respondents who heard politicized (mean change: -0.07) or legal (mean change: -0.11) criticism from President Trump ($p=0.31$, one-tailed test). More broadly, respondents who learned that the Court had been criticized by President Trump have similar levels of legitimacy change compared to those who had learned the Court had been criticized by the law professors across both types of

criticism ($p < 0.11$, $N = 2111$, one-tailed test). And these conclusions hold when Republican and Democratic respondents are examined separately.

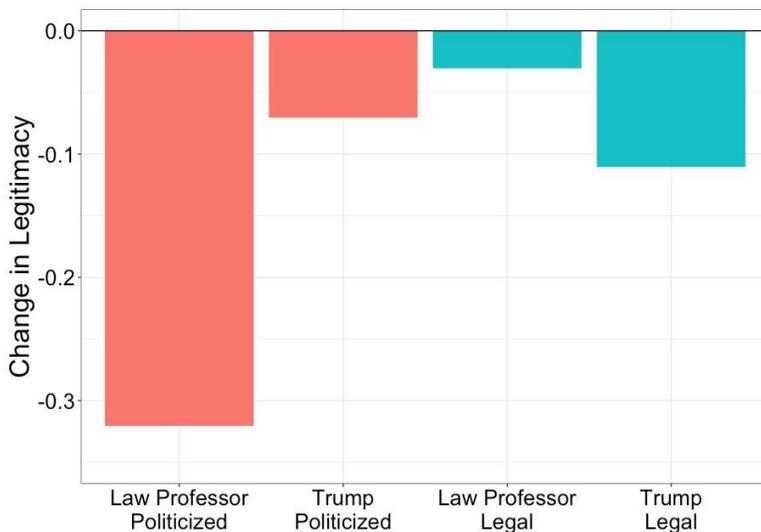


FIGURE 1: CHANGE IN U.S. SUPREME COURT’S LEGITIMACY IN RESPONSE TO EXPERIMENTAL TREATMENTS

The length of the bar corresponds to the average change in legitimacy among respondents who were randomly assigned to that treatment. That the “Law Professor Politicized” bar is the longest demonstrates that those respondents who read that law professors criticized the Court as too politicized were most negatively affected by the experimental treatment.

In short, our results suggest that criticisms of the Court made by President Trump are not associated with change in support for the Court regardless of the content of the criticism the President makes. On the other hand, criticisms by law professors that the Court has become politicized are potent. We think the most likely interpretation of these results is that President Trump’s criticisms have become so ubiquitous in everyday life in America as to be rendered “cheap talk” by the American people. On the other hand, the views of law professors—whose views ordinary Americans may not hear about every day—represent professionals making judgments in their area of expertise, and so they seem to be afforded more weight by the American people.

Taken together, our results provide some practical implications for protecting the judiciary in the modern era. The U.S. public holds the Supreme Court in high esteem and has been relatively unbothered by

President Trump's intermittent attacks on the U.S. judicial system. However, this does not mean that the U.S. judiciary is invincible. The fact that politicized criticism by legal elites is associated with lower levels of support suggests that criticisms from these sources bear substantial weight among the American people, and legal elites should therefore pick their battles—and their words—with care lest they harm the very institutions they are trying to protect.