

The Specter of Supreme Court Criticism: Public Opinion and Unilateral Action

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The conventional wisdom suggests that the judicial constraint on presidential unilateralism is weak: judicial challenges are rare and successful ones rarer still. However, we argue that courts have grown increasingly assertive in checking important unilateral policy initiatives in both the foreign and domestic arenas. This judicial reassertion also raises the prospect that courts may exert a more informal constraint on presidential power. Utilizing two experiments embedded on nationally representative surveys, we find evidence that even speculation about a judicial challenge can erode public support for unilateral action. For some issues the effect may be conditional on diffuse support for the Court. Anticipations of these political costs may help explain the relative paucity of major unilateral actions.

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The unilateral politics literature has always acknowledged that presidential unilateral power is only as great as other branches allow it to be. However, the conventional wisdom asserts that the checks placed on the unilateral president are quite weak. Much of the literature has focused on Congress and found it lacking. For example, confronted by President Obama's bold assertions of unilateral authority to shape both domestic and foreign policy, the Republican-controlled Congress reacted predictably. Its members fulminated against the tyranny of "King Obama." Speaker of the House John Boehner accused the president of boasting of his power to "make his own laws" and filed suit charging an abuse of power (French 2014). Yet, when it came to introducing and passing legislation to undo Obama's allegedly illegal acts, Congress was eerily silent.

The reasons for Congress' failure to defend its institutional prerogatives are well known. Collective action dilemmas, supermajoritarian requirements, and a legislative process riddled with transaction costs all but assure that in only the rarest of cases will such efforts succeed (Moe 1998; Brady and Volden 1998; Epstein and O'Halloran 1999). Congress has always faced long odds in marshaling the requisite supermajorities needed to overcome a certain presidential veto and reverse a unilateral directive. These odds are almost insurmountable in the contemporary era of intense partisan polarization in the legislature (McCarty, Poole, and Rosenthal 2006). Summarizing the institutional barriers to effective legislative redress, Moe and Howell (1999, 138) conclude: "The bottom line,

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then, is that the Constitution's incomplete contract sets up a governing structure that virtually invites presidential imperialism."

But what of the courts? Courts have played an important role in both legitimizing and policing the exercise of unilateral power. The judiciary established that unilateral actions, when taken pursuant to proper constitutional or statutory authority, have the full force of law (Howell 2003, 19–21). Moreover, courts retain the capacity to strike down unilateral actions that exceed the president's inherent authority or that are delegated to the administration by statute. When endeavoring to check presidential overreach, courts enjoy some significant advantages. Many of the institutional barriers that cripple congressional attempts to overturn unilateral action are either less significant or irrelevant for the judiciary. For example, only a simple majority is needed to strike down a unilateral action as exceeding delegated or inherent constitutional authority, and collective action dilemmas and transaction costs are also either much lower or largely irrelevant. However, as Alexander Hamilton noted in *Federalist* 78 the courts have no independent means of enforcement. And should the courts strike down a presidential unilateral action, they must rely on the very actor they have just ruled against to implement their ruling.

The most comprehensive empirical assessment of the strength of the judicial check on the unilateral president paints a dour picture. Between 1942 and 1998, presidents issued more than 4,040 executive orders. Of these, only 83 were ever challenged in federal courts. In these cases, presidents emerged victorious more than 80% of the time (Howell 2003, 152–57). These results suggest that the formal legal constraint imposed by the courts on presidential unilateral action is modest at best.

Since 1998, unilateral action has become perhaps even more central to presidential strategy. Echoing James Madison's warning that war is "the true nurse of executive aggrandizement," the terrorist attacks of September 11, 2001 placed increased demands on the White House for quick, decisive action on multiple fronts. More broadly, increasing partisan polarization in Congress has greatly heightened the prospects for legislative gridlock. In divided government, there is little middle ground between the congressional majority and the president. Even in unified government, minority obstruction thwarts most presidential initiatives. Blocked legislatively, presidents face increasing pressures to embrace a range of unilateral instruments to pursue key elements of their policy agendas (e.g., Rottinghaus and Maier 2007; Lowande 2014; Kelley and Marshall 2010).

The basic conclusion of past research is undoubtedly correct: judicial challenges to unilateral action remain relatively rare and successful ones rarer still. However, when we focus on the most important unilateral actions of recent years—after all, the vast majority of executive actions do not merit even a single mention in major media outlets, such as the *New York Times* (Howell 2005; Chiou and Rothenberg 2014)—there is qualitative evidence that federal courts have become increasingly willing to push back against executive action. President Bush famously suffered a string of Supreme Court defeats that struck at key elements of his anti-terror policy, particularly his creation of military tribunals to try suspected terrorists and the administration's policy of holding suspects indefinitely without recourse to the civilian judicial system. President Obama has continued many Bush-era policies in the fight against terrorism, some of which have also attracted

judicial pushback. Perhaps even more importantly, President Obama suffered stinging judicial defeats on many of his most important unilateral domestic policy initiatives, including rulings that threw into legalistic limbo his efforts to shield from deportation millions of undocumented immigrants and to strictly regulate greenhouse gas emissions from power plants.¹

These highly visible and influential judicial rebukes in recent years raise the specter of another judicial-inspired constraint—an informal one driven largely by public opinion. Recently, a nascent literature has begun to take seriously the possibility that public opinion may, under certain conditions, constrain the unilateral president (e.g., Christenson and Kriner 2015; Reeves and Rogowski 2016; Christenson and Kriner 2017a). Moreover, recent research has also explored the capacity of other political actors, most notably members of Congress, to erode public support for presidential unilateralism by challenging executive action on both policy and process grounds (Christenson and Kriner 2017b). However, scholarship in this vein has largely ignored the role of legal challenges and courts in shaping support for the exercise of unilateral power. Outside of issuing rulings, judges rarely inject themselves into the political fray in the hopes of swaying public opinion—Justice Ginsburg’s denunciations of Republican presidential nominee, Donald Trump, notwithstanding. However, political opponents of the president and media elites routinely raise the threat of judicial action to criticize the unilateral executive and foster doubts concerning the constitutionality of executive actions. The resulting injection of legal debates into the public sphere may erode support for unilateral action and raise its political costs. Presidents who anticipate such criticisms and their attendant political costs may amend their behavior and scale back or even forgo unilateral action altogether if they determine that the long-term political costs may exceed the immediate policy benefits.

As a result, we contend that courts may exercise a more powerful check on the unilateral executive than is often presumed. However, much of this check may be exerted informally, through the power of public debates about legal challenges to undermine popular support for the unilateral president.

An Increasingly Assertive Judiciary

For most of American history, the courts rationally shied away from direct confrontations with the executive branch (Fisher 2005). Even some of the rare presidential defeats, such as the landmark ruling in *Youngstown Sheet & Tube Co. v. Sawyer* (1952), may have paradoxically bolstered presidential power in the long term (Silverstein 1997; Bellia 2002). Capturing the feeble nature of the judicial constraint, Posner and Vermeule

1. In *United States v. Texas*, the Supreme Court upheld a lower-court injunction blocking implementation of the Deferred Action for Parents of Americans and Lawful Permanent Residents program, issued by Obama in November 2014. Similarly, on February 9, 2016, the Supreme Court issued a stay, temporarily blocking implementation of the Clean Power Plan pending action on plaintiffs’ petition for review in the D.C. Circuit Court. https://www.supremecourt.gov/orders/courtorders/020916zr3_hf5m.pdf. In *Michigan v. EPA*, the Supreme Court also struck down an EPA rule, strongly backed by the Obama administration, regulating mercury emissions from power plants under the Clean Air Act.

(2011, 4) provocatively argue that “we live in a regime of executive-centered government, in an age after the separation of powers, and the legally constrained executive is now a historical curiosity.”²

However, in recent years there is considerable evidence that the courts have grown increasingly assertive in checking the unilateral president, in both the foreign and domestic spheres. While the Supreme Court refrained from confronting broad assertions of unilateral presidential power in the immediate aftermath of 9/11, beginning with *Hamdi v. Rumsfeld* (2004) and Justice O’Connor’s declaration that a state of war “is not a blank check for the President when it comes to the rights of the nation’s citizens,” the Court issued a string of rulings striking down key elements of the Bush administration’s conduct of the war on terror. The Court in *Hamdi* ruled that the administration could not hold American citizens as enemy combatants and deny them due process and habeas corpus rights. In *Hamdan v. Rumsfeld* (2006), the Court struck down the military tribunals unilaterally created by the president to try terror suspects as in violation of both the Uniform Code of Military Justice and the Geneva Conventions. And in *Boumediene v. Bush* (2008), the Court ruled that all detainees at Guantanamo, regardless of their nationality, were guaranteed habeas corpus rights.

Under President Obama, courts have been perhaps even more aggressive in thwarting major unilateral initiatives. In the national security realm, several court rulings struck blows against the Obama administration’s continuation and expansion of Bush-era electronic surveillance plans. In *Klayman v. Obama* (2013), federal district court judge Richard Leon labeled the National Security Agency’s (NSA) metadata collection program “almost Orwellian” and ruled that it constituted a violation of the Fourth Amendment. In 2015, the Second Circuit Court of Appeals ruled in *ACLU v. Clapper* (2013) that the implementation of the program exceeded the authority authorized by Congress under the Patriot Act.

Perhaps even more importantly, court rulings have temporarily blocked and deeply imperiled several of President Obama’s most consequential unilateral initiatives in domestic policy. In 2007, the Supreme Court ruled in *Massachusetts v. Environmental Protection Agency* (EPA) that greenhouse gasses, including carbon dioxide, are pollutants subject to regulation under the Clean Air Act. This gave the EPA the authority and, in the assessment of many, the obligation to regulate carbon dioxide emissions. Under President Bush, the EPA dragged its feet in implementing the ruling. However, shortly after taking office, President Obama directed the EPA to begin tightening regulations on greenhouse gas emissions. This process culminated in the president’s August 3, 2015 announcement of the Clean Power Plan, a bold set of new regulations that aimed to reduce carbon dioxide emissions from power plants 32% below 2005 levels by 2030 (Adler 2016). The administration anticipated legal challenges and in crafting the regulations went to considerable lengths to insulate the plan from critics (Freeman 2015). Despite these efforts, 27 states filed suit in federal court to block the plan from going into effect. In February 2016, the Supreme Court in a 5–4 decision ordered a temporary stay

2. For a contrasting view that sees more evidence of continued legal constraint through practice-based law, see Bradley and Morrison (2013).

on the plan's implementation until the legal challenges have been resolved. The judicial delay effectively killed the Clean Power Plan. On March 28, 2017 President Trump signed an executive order directing the EPA to review the Clean Power Plan with an eye toward dismantling it before it ever takes effect.

The courts have also struck a devastating blow to President Obama's efforts to unilaterally shield millions of undocumented immigrants from deportation. In 2012, after repeated failures to enact the Development, Relief, and Education for Alien Minors (DREAM) Act, President Obama announced the Deferred Action for Childhood Arrivals (DACA) program, which unilaterally shielded 1.7 million undocumented immigrants who entered the United States as children via a two-year reprieve from deportation. Two years later, Obama acted again to shield an additional 4.9 million undocumented immigrants from deportation through a new initiative, Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA). Opponents of the immigration action filed suit in federal court to block the plan's implementation. A federal district court judge issued a preliminary injunction, and the Fifth Circuit rejected the Obama administration's request for a stay in March 2015. In November 2015 the circuit court affirmed the injunction and ordered that the case go to trial. The Obama administration then appealed to the Supreme Court, which in a 4–4 decision in *United States v. Texas* (2016) affirmed the lower court's ruling, leaving the injunction in place through the end of Obama's presidency.

While the Affordable Care Act (ACA) has largely survived several legal challenges to its constitutionality, President Obama's unilateral adjustments to its implementation also attracted judicial pushback. The ACA provided for cost-sharing reduction subsidies that would allow insurers to reduce out-of-pocket costs for low-income Americans by recouping many of the costs in the form of a rebate from the federal government. However, the statute required that the funds for this rebate be appropriated by Congress. In 2014 President Obama requested \$4 billion to cover these subsidies, and Congress refused to appropriate the funds. Nevertheless, to fund the rebates the Obama administration took the requisite money from the larger pool that supports premium subsidies (Haberhorn 2016). Speaker Boehner filed suit in federal court alleging that the president's maneuver was unconstitutional. In May 2016 federal district court judge Rosemary Collyer agreed. In *United States House of Representatives v. Burwell* (2016), Collyer ruled that the Obama administration overstepped its authority in paying the reimbursement without a congressional appropriation. The Republican sweep of the 2016 elections, coupled with their pledge to repeal the ACA in its entirety, has largely rendered the ultimate fate of the legal challenge to Obama's action moot. Still, this litigation is yet another example of the increased willingness of the federal courts to push back against the most significant unilateral initiatives in recent years.³

Finally, despite the Republican triumph in the 2016 elections, President Obama stood to enjoy one final policy victory in the waning days of his administration through a

3. As an even further example of court activism, in *NLRB v. Canning* the Supreme Court struck down President Obama's aggressive use of recess appointments as unconstitutional. This decision has had major implications for the Obama administration's efforts to shape policy implementation (see Ostrander 2015).

Department of Labor rule that would extend overtime pay to more than four million salaried employees. However, on November 21, just nine days before the rule went into effect, U.S. District Court Judge Amos Mazzant, an Obama appointee, struck down the rule as executive overreach and issued a nationwide injunction on its implementation. With the incoming Trump administration all but certain to drop the appeal, the district court ruling doomed President Obama's boldest action to boost wages. Of course, even with the district court ruling, President Trump could have endeavored to roll back the regulation after he took office. However, the judicial defeat for Obama spared the Trump administration from having to embark on a lengthy process to undo an existing regulation.⁴

The transition of presidential power from one party to the next usually produces a flurry of unilateral action, and the fledgling Trump administration is no exception. However, what is unique is that it took fewer than 10 days for President Trump to suffer his first defeat in the federal courts. One week after his inauguration, Donald Trump signed an executive order temporarily banning all noncitizens from seven Islamic countries from entering the United States. The backlash was immediate as media outlets around the world carried stories of families separated at airports and even of Iraqis who had worked with the U.S. Army being denied entry to the country. The American Civil Liberties Union immediately filed suit in federal court seeking a stay of the president's order. Only two days after Trump signed the order, a federal district court judge issued an emergency stay, blocking efforts to deport such individuals pending final adjudication. On February 9 the Ninth Circuit Court of Appeals rejected the administration's appeal. Rather than appealing the Ninth Circuit's ruling, the Trump administration crafted a new, more narrowly tailored travel ban in the hopes that it would pass constitutional muster. However, this revised order, too, has suffered a series of defeats in federal courts and whether it will ever go into effect remains uncertain.

While this legal battle is far from over, it is a harbinger of future legal challenges to Trump's unilateral agenda. "I hope Trump enjoys losing," said ACLU national director Faiz Shakir. Misappropriating the rallying cry of candidate Trump, Shakir taunted, "He's going to lose so much we're going to get sick and tired of his losing" (Calfas 2017). Shakir's prognostication was undoubtedly hyperbolic. However, it reflects the growing prominence of legal challenges to unilateral action and speculation about them in the media and in the public sphere.

An Informal Judicial Constraint

This heightened court activity suggests another, more informal constraint on presidential unilateralism: public speculation about judicial challenges and the constitutionality of presidential actions may significantly erode public support for a unilateral initiative. Previous scholarship has argued that courts respond to public opinion when

4. Strikingly, none of these cases involved judicial rulings striking down executive orders. As a result, simply extending prior analyses of judicial responses to executive orders would miss the important defeats suffered by both Presidents Obama and Bush.

ruling on the legality of unilateral action; courts are significantly more likely to rule against an unpopular president than one who enjoys a strong reservoir of popular support (Howell 2003, 160–64). However, the relationship between judicial action and public opinion may be more complicated than previously supposed. Even the specter of judicial action may lower support for the president and unilateral policy initiatives; such an erosion of public support, in turn, could set the stage for future judicial activism.

A nascent body of scholarship has examined public opinion as an indirect but potentially significant constraint on presidential unilateralism (Posner and Vermeule 2011; Christenson and Kriner 2015; Reeves and Rogowski 2015; 2016; Christenson and Kriner 2017a). However, public assessments of unilateral action are not formed in a vacuum. Rather, it is informed by the reactions of other political elites. For example, congressional opponents of unilateral action routinely challenge the unilateral president in the public sphere (Mayhew 2000). And these congressional challenges significantly erode support for presidential unilateralism. As a result, members of Congress can raise the political costs of unilateral action for the president—even when they cannot formally block it—by mobilizing public opinion against executive action (Christenson and Kriner 2017b).

Previous research, however, has paid scant attention to whether judicial action—or even the mere threat of it—can also influence popular assessments of the unilateral president. In stark contrast to members of Congress, sitting judges almost never offer public opinions about the constitutionality of executive actions except when deciding a case pending before them. Nevertheless, other political and media actors routinely speculate that the courts will strike down a unilateral initiative as unconstitutional. For example, in urging the nation’s governors to refuse to submit state-level plans on how they would comply with the Clean Power Plan, Senate Majority Leader Mitch McConnell (2015b) invoked Harvard law professor Laurence Tribe, noting that the liberal legal scholar judged the plan “constitutionally reckless.” McConnell argued that if governors carefully examined the plan in detail, they would agree with him that “the EPA’s proposal goes far beyond its legal authority and that the courts are likely to strike it down.”

Media norms place a premium on official conflict in Washington (Cappella and Jamieson 1997; Patterson 1996; Groeling 2010). As a result, it is unsurprising that many media pundits love to speculate about whether courts will hear challenges to the constitutionality of high-profile unilateral actions and, if they do, how the courts will rule. When the federal courts at any level take up a case concerning the constitutionality of an executive action, prognosticating journalists are eager to divine the outcome for the public. For example, when the Second Circuit Court of Appeals held oral arguments on a legal challenge to the NSA’s metadata collection program, *Politico* (Gerstein 2014) ran with the headline: “Appeals Court Chilly to Feds’ Argument for NSA Surveillance Program.” Even just the announcement that the courts will consider a challenge to a presidential order can trigger an avalanche of news coverage and speculation concerning the order’s constitutionality. Following the declaration that the Supreme Court would hear a challenge to the constitutionality of President Obama’s immigration actions, George Will (2016) penned an op-ed in the *Washington Post* where he openly pined: “Will the Supreme Court Strike Back at Obama’s Overreach?” (see also Savage 2016).

On still other occasions the courts need not even hear a case to spark media speculation that the judiciary will ultimately strike down a unilateral initiative as unconstitutional (e.g., Rivkin and Foley 2014; Adler 2015). For example, before the ink had dried on President Obama's modest executive actions to tighten the enforcement of federal gun laws, Fox News ran articles by in-house legal analyst and former New Jersey superior court judge, Andrew Napolitano (2016), arguing why Obama's actions failed to pass constitutional muster and why the Supreme Court would be likely to strike them down based on precedent.

When the media and other political actors raise the possibility that the courts will strike down unilateral action as unconstitutional, does the specter of judicial intervention have any influence on public opinion? An emerging literature exploring the microfoundations of public support for unilateral action offers several reasons to expect that efforts to sow doubt about an executive action by raising the prospect of a judicial reversal will bear fruit. Some scholarship finds evidence of considerable innate public skepticism toward unilateral power. In a pair of studies, Reeves and Rogowski (2015; 2016) explore support for "the office of the presidency and not any particular president" (2016, 140). In this context, they find that supermajorities of Americans oppose presidents acting unilaterally to enact policy change without going to Congress for its approval. This opposition is particularly strong among subjects most committed to ideals of the rule of law. Elite cues warning that the courts may strike down a unilateral action as unconstitutional may resonate with many Americans' underlying qualms about unilateral action.

By contrast, in an assessment of public support for a range of unilateral initiatives undertaken by Presidents Bush and Obama, Christenson and Kriner (2017a) found that partisan and policy incentives routinely trumped constitutional mores in shaping assessments of unilateralism. However, constitutional concerns can still influence attitudes toward unilateral action—provided that these concerns are raised and activated by other political actors. In subsequent research, Christenson and Kriner (2017b) found that other actors—most importantly members of Congress—can erode support for unilateral actions by explicitly arguing that presidents are transgressing constitutional limits on their authority and treading on congressional prerogatives. Moreover, constitutional challenges levied by members of Congress appear more effective than those attributed to other actors. Despite Congress' low approval rating, when a constitutional challenge to presidential unilateralism is made by members of Congress, it seems to imbue the challenge with institutional legitimacy (Kriner and Schickler 2014; 2016). This makes the challenge more influential with the public than when the same argument is attributed to a nongovernmental actor.

What, then, of the courts? There are strong reasons to believe that invoking the courts and the possibility of a judicial reversal should also instill arguments about the shaky legal foundation of executive actions with institutional gravitas. The judiciary enjoys widespread popular legitimacy and engenders a consistently high level of diffuse support unequaled by the other branches of government (e.g., Caldeira and Gibson 1992; Gibson 2007; Gibson, Caldeira, and Baird 1998; Associated Press–NORC Center for Public Affairs Research 2014) that may make it a particularly valuable cue to the public.

The Supreme Court is held in such high esteem in part because it is seen as above the political fray; the Court reinforces this perception with various symbols (e.g., judicial robes) of its differences from the other branches (Gibson, Caldeira, and Spence 2003). Its unique position was evident when the editorial boards of the *New York Times* and *Washington Post* took umbrage with Justice Ruth Bader Ginsburg's public criticism of the presumptive Republican presidential nominee, Donald Trump. Although there is no legal ethics code that prevents Supreme Court justices from speaking about candidates or elections, legal ethics experts and related media coverage pushed Ginsburg to express regret for publicly expressing her political opinion: "Judges should avoid commenting on a candidate for public office. In the future I will be more circumspect" (Barnes 2016). Because the judiciary remains the most trusted and respected branch of government, we hypothesize:

H1. Receiving information that the courts might strike down a unilateral action will reduce support for the action.

While trust in the Court remains comparatively high, there is considerable variation in the Court's perceived legitimacy across Americans (Bartels and Johnston 2013; Christenson and Glick 2015). Scholars have long shown that cues from trusted sources are more influential than identical cues from a source with which the receiver does not share preferences or attachments (Crawford and Sobel 1982; Lupia and McCubbins 1994; Druckman 2001). Cues from trusted sources are likely to be incorporated into the opinion formation process, while cues from untrusted sources are more likely to be resisted (Zaller 1992). As a result, while we expect cues that raise the prospects of a judicial reversal to erode support for unilateral action in the aggregate, we also expect that such cues will be more influential with some Americans than with others. This yields our second hypothesis:

H2. Cues speculating that the courts are likely to rule a unilateral action unconstitutional will be most influential on the opinions of those who perceive the Supreme Court to be a legitimate institution.

Experimental Design

In what follows, we discuss our results from two experiments embedded on nationally representative surveys. The purpose is to examine the capacity of cues raising the specter of a judicial reversal to erode public support for two of the most important unilateral actions of the Obama presidency: the Clean Power Plan and immigration reform.⁵

5. Both the Clean Power Plan and the immigration action are among the most important exercises of unilateral authority in the Obama administration. As a result, our experiments are unable to offer direct insight into whether discussion of judicial challenges can undermine public support for the president on less salient policy areas. However, we argue that demonstrating the power of the court to influence public opinion in such prominent cases is critically important to determining its potential to exercise a serious constraint on the unilateral president through informal means.

The experimental approach provides causal leverage on the effects of potential institutional objections to executive action on public opinion, thereby maximizing internal validity. In observational studies it can be unclear whether public opinion on policy issues moves in response to elite cues or in reaction to them, or as a result of other simultaneously occurring exogenous events. Moreover, changes in public support may create the environment for media, representatives, or even justices to speak out, reversing the causal arrow. For example, Howell (2003) finds that courts are much more likely to rule against unpopular presidents in cases involving unilateral action than they are when the president enjoys strong public support. To ensure a test of the posited direction, we rely on randomized treatment assignment.

Each experiment examines the dynamics of popular support for an actual executive action taken by the sitting president. This approach necessarily limits our ability to generalize to other presidents. However, by focusing on a range of current policy issues and by using treatments that employ language similar to that used by real political actors to express and defend their positions, we also seek to minimize concerns about external validity. The first experiment tests our first hypothesis (H1) that information warning of a likely judicial challenge will reduce support for a unilateral action. The second experiment was embedded on a longer survey that included a battery of questions to measure perceptions of judicial legitimacy, which allows us to test our second hypothesis (H2) that such information will be more influential with those who believe the court is legitimate than with those who doubt it.

The Clean Power Plan Experiment

We begin by testing H1 in the context of perhaps President Obama's most important executive initiative in the domestic sphere: the Clean Power Plan, which directs the EPA to regulate carbon dioxide emissions as a greenhouse gas. We chose the Clean Power Plan for two reasons. First, it affords a critical test of our argument, because it allows us to examine whether Congress can erode public support for one of the most highly salient, consequential, and polarizing of President Obama's unilateral initiatives. The high salience and intense partisan polarization of public attitudes toward climate change policy in general (Dunlap and McCright 2008) and toward the Clean Power Plan in particular stack the deck against finding treatment effects.⁶ Many Americans already know where they stand on whether or not the government should more aggressively regulate emissions to combat global climate change. Cues anticipating judicial action should be more influential on issues where fewer Americans possess strong priors

6. A June 2012 poll mentioning Obama's EPA plan found a majority of Republicans supported Congress taking action to stop the EPA from regulating greenhouse gas emissions, 52% to 39%. By contrast, Democrats opposed legislative efforts to block the plan by more than two to one, 28% to 65%. Survey by United Technologies, National Journal. Methodology: Conducted by Princeton Survey Research Associates International, June 14–June 17, 2012 and based on 1,002 telephone interviews. Sample: National adult. 601 respondents were interviewed on a landline telephone, and 401 were interviewed on a cell phone, including 187 who had no landline telephone.

and public opinion is less calcified. Second, in this context our treatment was highly externally valid as the month before our experiment went into the field a range of actors, including Harvard Law Professor Laurence Tribe and Senate Majority Leader Mitch McConnell, had publicly argued that the courts were likely to strike down the Clean Power Plan as unconstitutional.⁷

To test our hypothesis, we embedded a survey experiment on a nationally representative YouGov/Polimetrix survey conducted from April 24 to 28, 2015. All subjects received the following prompt, which was based on actual media coverage of the issue: “President Obama has directed the EPA to begin regulating carbon dioxide from coal power plants to reduce greenhouse gas emissions, combat climate change, and improve public health.” Our experiment privileges the president’s position by introducing his action and justification first. This reflects the actual advantage of the White House in setting the agenda and generating media coverage (Entman 2004).

After learning of the president’s position, respondents randomly assigned into the treatment group were provided a strong cue that the Court may oppose such an action: “Many legal experts warn that such an action could be struck down as unconstitutional by the Supreme Court as an overextension of presidential power. Regardless of the merits of the policy, the Supreme Court is likely to rule that such an action violates our constitutional system of checks and balances.”⁸ Notably, the Court’s objection is made purely on the grounds of constitutionality. While members of Congress, media pundits, and observers might also criticize the action on policy grounds, the expressed duty of the Court is to rule solely on constitutionality. Indeed, as we alluded to above with the Ginsburg criticism of Trump, the Court is largely considered to act and comment strictly on the rule of law as opposed to ideology or politics.

Respondents in the control group were not given any information about the Court’s likely ruling. All subjects were asked to indicate their support for “President Obama taking unilateral action to reduce carbon dioxide emissions.” In the experiment, support for the president’s action was measured on a 4-point Likert scale. To guard against satisficing, we omitted a neutral midpoint category (e.g., Krosnick 1991; 1999). In the analyses, we collapse the strongly support and support categories to create a dummy variable of general support for the unilateral action.

To assess the effect of the Court treatment on support for executive action to regulate carbon dioxide emissions, we estimate logit models and present the results

7. Finally, these and related comments questioning the constitutionality of the Clean Power Plan may have already lowered support for the executive action, thus further stacking the deck against finding evidence of treatment effects.

8. The first sentence raises the specter that the Supreme Court “could be struck down as unconstitutional by the Supreme Court.” The second sentence uses stronger language and states that the Court “is likely to rule” the action unconstitutional. This stronger phrasing reflects the usage and claims of those who seek to raise the prospects of judicial action in the public consciousness. For example, in trying to rally opposition to the Clean Power Plan, Mitch McConnell (2015b) wrote that “the courts are likely to strike it down.” Similarly, in his *Wall Street Journal* op ed, Harvard Law Professor Laurence Tribe (2014) made repeated references to recent precedent to bolster his argument that the Clean Power Plan is unconstitutional, and that the courts are likely to rule it so. Future research should investigate whether changes in language, such as cues arguing only that a judicial overrule is possible, mitigate the influence of the treatment.

TABLE 1
Logit Models of Support for the Carbon Dioxide (CO₂) Executive Order

	(1)	(2)
Treatment	-0.416** (0.186)	-0.749*** (0.236)
Republican		-1.134*** (0.273)
Democrat		2.070*** (0.324)
Male		-0.070 (0.230)
Education		0.043 (0.080)
Age		-0.020*** (0.007)
White		-0.587** (0.281)
Constant	0.828*** (0.132)	2.056*** (0.490)
Observations	514	514
Log Likelihood	-329.720	-233.710
Akaike Inf. Crit.	663.439	483.420

Notes: * $p < .10$; ** $p < .05$; *** $p < .01$.

in Table 1. The independent variable of interest is a dummy variable identifying assignment to the treatment. Model 1 is a simple bivariate logit with the treatment variable. Model 2 adds controls for a number of factors that might affect support for unilateral action on this issue. Although subjects were randomly assigned to the two experimental groups, randomization can still result in imperfect balance across likely confounders. To that end a multivariate logit model allows us to account for any remaining imbalances and improve the precision of our estimates. Most importantly, the model controls for subjects' partisan affiliation, as well as gender, educational attainment, age, and race.

The treatment effect, both in the bivariate and multivariate models, is highly significant and in the direction expected by H1. Figure 1 provides an illustration of the treatment effect size by calculating the predicted probabilities of support for unilateral action for the median independent in both the control and treatment groups. These effect size estimates are based on the results in Model 2 of Table 1. The Court treatment changes the probability of support from about .65 to .46. That is, those exposed to speculation that the Court might rule a unilateral action unconstitutional are less supportive of it by just under 20 points on average. This large drop in support is strong evidence against the null hypothesis that information about institutional opposition to unilateral action does not affect public support for the action. Even in modern politics, where elites and the public are highly polarized, and even on a highly politicized issue, like regulating carbon dioxide emissions, the public responds to cues speculating that the Court will object to the constitutionality of the president's policy-making process. It is important to

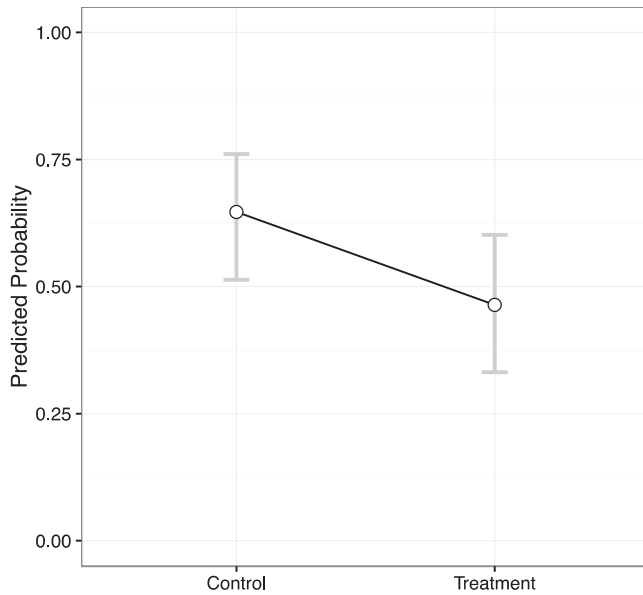


FIGURE 1. Change in predicted probabilities of support for the carbon dioxide (CO₂) executive order by treatment condition.

Notes: Point estimates with all other variables held constant at their medians; i bars present 95% confidence intervals.

remember that this is the effect of a single, relatively modest cue concerning the likely objection of the Court to the president's action.⁹

We also note that a number of the control variables predict support for Obama's unilateral actions on environmental protection. Figure 2 graphs the changes in predicted probabilities for the median respondent in the treatment condition across the values of each variable. We can see that both an increase in age and being white lead to lower support for the action. More importantly, we find strong partisan effects. Relative to the independent baseline, the median Republican's predicted probability of supporting executive action is 24 percentage points lower (.46 vs. .22), while the predicted probability of support for the median Democrat is 41 points higher (.46 vs. .87). One cannot escape the power of partisanship in shaping public support for policy action, even when the constitutionality of the process is suspect (Christenson and Kriner 2017a).

9. A common critique of experimental research is that the observed treatment effects may overstate what would be observed in the real world. Experiments expose all of the subjects in the treatment group to the treatment; in more realistic settings, many low-information Americans may not receive such elite cues. To examine whether our results are driven exclusively by low-information, we use education as a proxy for political sophistication. We then reestimated the logit model from Table 1 with the interaction of the SCOTUS treatment and education. The resulting coefficient was actually negative, and not statistically significant. As a result, there is no evidence that our treatment effect was concentrated solely among less politically sophisticated subjects.

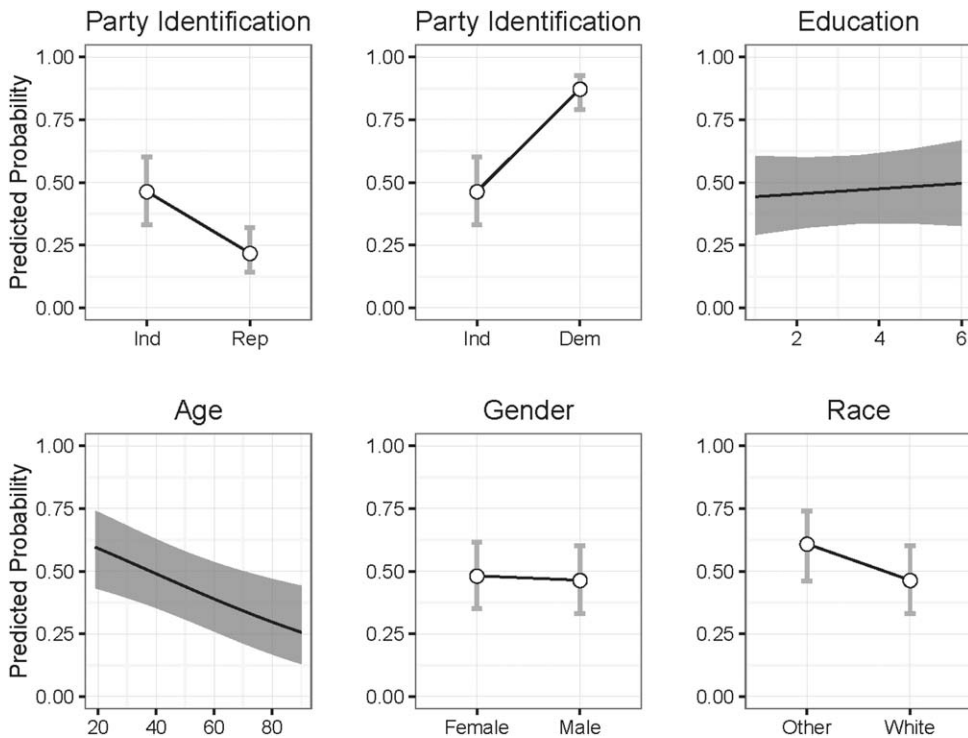


FIGURE 2. Change in predicted probabilities of support for the carbon dioxide (CO₂) executive order.

Note: Estimates with all other variables held constant at their medians. For dichotomous variables, circles indicate point estimates and i bars present 95% confidence intervals. For continuous variables, solid line indicates estimated values and shading indicates 95% confidence intervals.

Immigration Experiment

To test H2, we embedded an original experiment on the 2014 Cooperative Congressional Election Study conducted by YouGov/Polimetrix.¹⁰ Throughout the summer of 2014 Washington was abuzz with anticipation for a new round of executive actions to liberalize immigration enforcement and shield more illegal aliens from deportation. President Obama ultimately decided to postpone taking the controversial step until after the midterm elections. Against this backdrop, we constructed an experiment to examine whether informing subjects about speculation that the Court could overturn Obama’s long-anticipated action would reduce public support for a unilateral course.

In important respects, the immigration issue represents an even more unlikely policy area in which to find evidence of treatment effects. Immigration is one of the most

10. The CCES is a national stratified sample conducted twice during election years with both pre- and postelection waves (see <http://projects.iq.harvard.edu/cces/home>). Sample demographics are presented in Table 1.

polarizing issues in the contemporary political arena (Jones 2016). As a result, partisan cues may simply overwhelm any new information about the likely reaction of other elites, including the Supreme Court. Few Americans lack predispositions on which to base their assessments of immigration-related action. As a result, the prospects for elite opinion leadership should be smaller here than on another policy issue about which the public has less prior information.

The experiment began by informing all subjects of the basic facts concerning President Obama's anticipated executive action on immigration, which the administration had deferred until after the 2014 midterm elections. All subjects read the following prompt: "Efforts at enacting comprehensive immigration reform have failed in Congress. As a result, President Obama is considering new executive action to give legal status to many undocumented immigrants, and to provide a pathway to citizenship for those who meet certain criteria."

Subjects were then randomly assigned to one of two experimental groups. Those assigned to the control group received no additional information. Those assigned to the treatment group received speculation by legal experts that the Court might strike down the anticipated action as unconstitutional. These subjects were told: "Many legal experts warn that such an action could be struck down as unconstitutional by the Supreme Court as an overextension of presidential power. Regardless of the merits of the policy, the Supreme Court is likely to rule that such an action violates our constitutional system of checks and balances." All subjects were then asked the same question: "Would you support or oppose President Obama acting unilaterally to change the nation's immigration laws?" As in the previous experiment, support for the president's action was measured on a 4-point Likert scale and collapsed to calculate the percentage supporting the president's action.

We also included a series of questions to gauge the public's perception of the Court's legitimacy, which we expect to moderate the treatment effect. The legitimacy score is based on several questions of diffuse support for the Supreme Court (see, e.g., Gibson, Caldeira, and Spence 2003; Bartels and Johnston 2013; Gibson and Nelson 2015; Christenson and Glick 2015). We use the respondents' levels of agreement with six related statements: disagreeing with a lot of Court rulings means "it might be better to do away with the Supreme Court altogether"; judges "who consistently make decisions at odds with what a majority of the people want should be removed from their position as judge"; the Court "ought to be made less independent so that it listens a lot more to what the people want"; the Court "favors some groups"; and the Court "can usually be trusted to make decisions that are right for the country" and in "the best interests of the American people." Each of these is measured on a 6-point scale on which respondents indicate their agreement with the statements. The six responses are summed, resulting in values that can range from six (minimum agreement or lowest legitimacy) to 36 (greatest agreement or highest legitimacy). To test our hypothesis that those who believe the court is legitimate will be more responsive to the judicial check cue than those who do not believe the court is legitimate, we dichotomized our measure. Subjects who scored 18 or lower on our scale gave answers that, on average, were inconsistent with court legitimacy. These subjects, 30% of our sample, were

TABLE 2
Logit Models of Support for the Immigration Executive Order

	(1)	(2)	(3)	(4)
Treatment	-0.116 (0.136)	-0.243 (0.169)	-0.146 (0.173)	0.465 (0.323)
Legitimacy			0.165 (0.191)	0.594** (0.271)
Republican		-1.590*** (0.270)	-1.612*** (0.279)	-1.624*** (0.280)
Democrat		1.589*** (0.200)	1.648*** (0.204)	1.670*** (0.206)
Male		-0.174 (0.174)	-0.152 (0.178)	-0.159 (0.179)
Education		0.182*** (0.060)	0.175*** (0.062)	0.175*** (0.062)
Age		-0.009 (0.006)	-0.010* (0.006)	-0.010* (0.006)
White		-0.468** (0.195)	-0.418** (0.199)	-0.418** (0.201)
Treatment * Legitimacy				-0.861** (0.384)
Constant	-0.178* (0.096)	-0.311 (0.385)	-0.486 (0.410)	-0.796* (0.435)
Observations	884	884	859	859
Log Likelihood	-606.243	-433.235	-415.342	-412.805
Akaike Inf. Crit.	1,216.487	882.470	848.684	845.611

Notes: * $p < .10$; ** $p < .05$; *** $p < .01$.

coded 0 on our legitimacy indicator variable. The remaining 70%, who gave the court higher legitimacy ratings, were coded 1.

To assess the effects of the Supreme Court treatment on support for Obama's immigration action, we estimate a series of logit models and provide the results in Table 2. In all cases the independent variable of interest is a dummy variable indicating assignment to the Supreme Court treatment, which we first introduce alone in Model 1. In Model 2 we add controls for a number of other demographic characteristics that might also influence support for the immigration action. Most importantly, the model includes two dummy variables indicating whether or not subjects identified with the Democratic or Republican party (including leaners). The model also controls for subjects' educational attainment, race, gender, and age. Finally, as called for in H2, we consider the role of legitimacy as both a direct effect (Model 3) and as a moderator of the treatment effect (Model 4).

To begin, we note that the direct effect of the treatment is negative. As shown in Figure 3 (from Model 2), the Court treatment drops the predicted probability of support for the unilateral action for the median independent by .05. While the treatment effect is in the expected direction, this small change is not statistically significant. We find

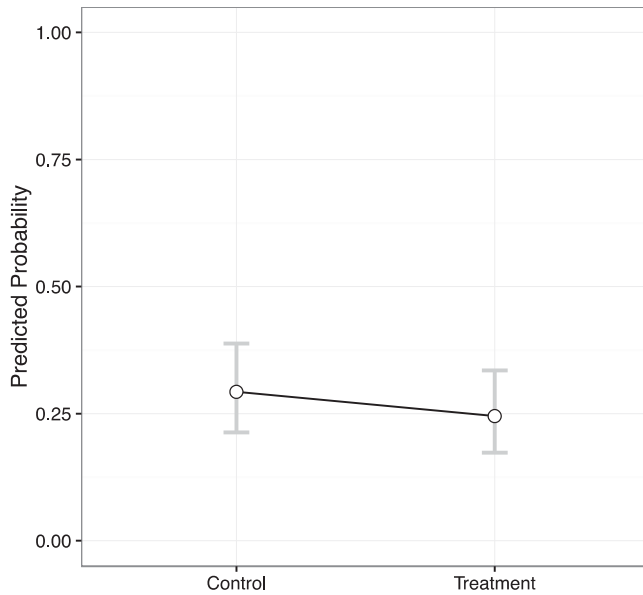


FIGURE 3. Change in predicted probabilities of support for the immigration executive order by treatment condition (Table 2, Model 2).

Note: Point estimates with all other variables held constant at their medians; i bars present 95% confidence intervals.

limited evidence of the Court's power to erode support for unilateral action on immigration among the general public.¹¹

We note that a number of the control variables, however, affect support for the action. Whites are less likely to support the Obama's immigration action than other races, while an increase in education leads to a greater probability of support for it. As expected, Democrats and Republicans, regardless of the treatment condition, are more likely to support and oppose the action, respectively. The first two graphs of Figure 5 (from Model 4) plot the change in predicted probabilities of moving from the baseline party identification of independent to each of the two major parties. Even controlling for the treatment effect, at .62 Democrats have a predicted probability of support almost 40 percentage points greater than independents. Republicans are 18 percentage points lower in support of the action than are independents. In sum, the lack of statistical significance for the treatment coupled with the large effects from the party identification dummies

11. As in the Clean Power Plan Experiment, we also looked for evidence that the effect varied by level of political sophistication. In the Immigration Experiment, we used six factual political knowledge questions on the Common Content of the CCES to construct a 7-point scale. We then re-estimated the model in column 2 of Table 2 with two additional variables: this index of political knowledge and its interaction with the SCOTUS treatment. The coefficient on the interaction is positive, consistent with the hypothesis that the treatment effect is smaller for more politically sophisticated subjects. However, there is considerable uncertainty about this estimate, and the standard error is larger than the coefficient estimate itself. As a result, we again find little evidence that our effect is concentrated solely among low-information subjects who might not receive such cues in the real world.

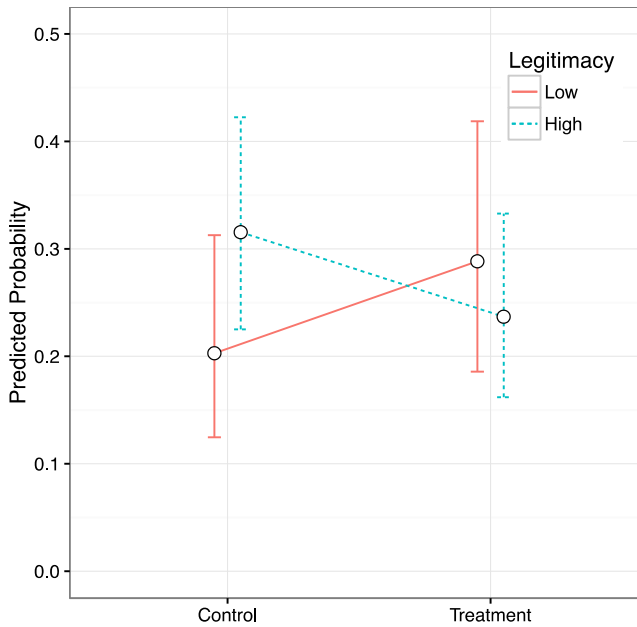


FIGURE 4. Change in predicted probabilities of support for the immigration executive order by treatment-legitimacy Interaction (Table 2, Model 4).

Note: Point estimates with all other variables held constant at their medians; i bars present 95% confidence intervals.

provides evidence for a partisan cues explanation. On the highly polarized issue of immigration Democrats and Republicans appear so sorted on the issue as to be virtually unaffected by additional signals from the Court.¹²

Finally, we move to the test of H2. Model 3 includes the indicator variable identifying subjects who viewed the court as legitimate. Somewhat surprisingly, the resulting coefficient is positive, suggesting that those who perceive the Court as a highly legitimate institution are marginally more likely to support the unilateral action. However, the standard error is relatively large and thus the direct effect of legitimacy is insignificant. Our primary expectations, however, pertained to the conditioning role of legitimacy, not its direct effects. That is, we posited that the effect of a cue raising the specter of a Court challenge to unilateral action should be especially useful to those who perceive the Court as a legitimate institution. Even on an issue with a clear partisan divide (as discussed above), the power of the treatment may depend on the value of the cue giver.

12. Indeed, the base level of support for Obama's anticipated immigration action among Republicans is so low (i.e., the median Republican had less than a .10 probability of backing them) that it was virtually impossible for the Court treatment to lower support among this sizeable block of the sample. Accordingly, we re-estimated our model in column two with the interaction of the treatment and the Republican dummy variable. Doing so shows that the Court treatment did have a negative and significant ($p < .10$, two-tailed test) effect on support for the immigration actions among Democrats and independents. Among Republicans, by contrast, the treatment had no effect.

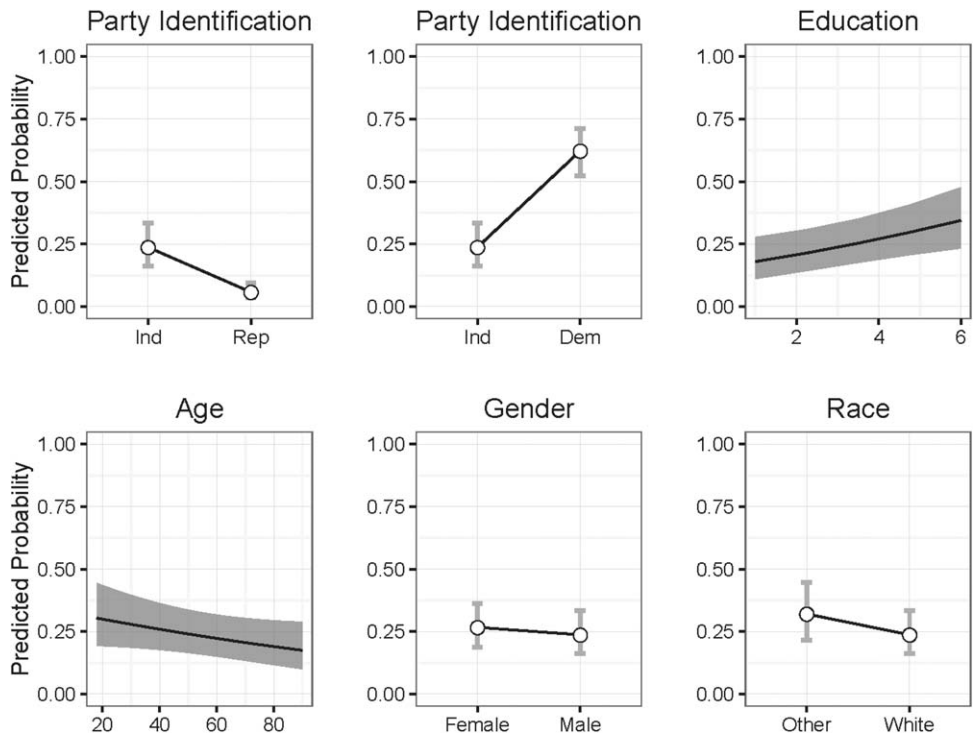


FIGURE 5. Change in predicted probabilities of support for the immigration executive order (Table 2, Model 4).

Note: Estimates with all other variables held constant at their medians. For dichotomous variables, circles indicate point estimates and i bars present 95% confidence intervals. For continuous variables, solid line indicates estimated values and shading indicates 95% confidence intervals.

In Model 4 we add an interaction term that comprises the legitimacy indicator and treatment variable to a fully specified logit model of support for unilateral action. Here we find strong evidence in support of H2 that legitimacy moderates the treatment effect. The interaction is significant and in the expected direction. Figure 4 illustrates the effects of the interaction for the median independent. The different slopes in lines connecting the treatment effects for those with high and low legitimacy highlight the significant moderating role of legitimacy. Most notably, for the almost 70% of subjects in our sample who believed the Court to be legitimate, the Court treatment significantly decreased support for unilateral action. That is, the treatment works in the expected direction for those with high regard for the Court, dropping their predicted probability of backing Obama’s actions by about eight points, from .32 to .24.

We anticipated that the Court treatment may not decrease support for unilateral action among the minority of subjects who gave the Court low legitimacy scores. However, Figure 4 shows that among these subjects there was a clear backlash effect. For those with low regard for the Court, priming them with information about the potential for the Court to strike down the president’s unilateral action leads them to support the action

more so than if they had received no information about the Court's constitutional opposition. Subjects who questioned the Court's legitimacy reacted to information about its likely response to a unilateral action by updating their own opinions in the opposite direction and becoming more supportive of the president's immigration initiative. Here the change in predicted probability is nearly nine percentage points.

While we did not anticipate such a strong backlash effect, the result is consistent with literatures in cognitive psychology on motivated reasoning and cognitive dissonance (e.g., Kunda 1990; Taber and Lodge 2006). It also complements research showing significant backlashes in other contexts, for example, in response to dissonant information concerning the absence of weapons of mass destruction in Iraq (Nyhan and Reifler 2010) or the health impacts of climate change (Hart and Nisbet 2012), as well as in response to wartime policy cues from opposition party elites (Kriner and Howell 2013). In sum, we find that the institutional critique treatment works with approximately equal effect, but in opposite directions depending on the regard in which the public holds the institution.

Discussion

Presidential unilateral power is conditional on the capacity of Congress and the courts to check unilateral actions. In practice, however, the institutional hurdles and reluctance of both the legislature and judiciary to overturn presidential unilateral initiatives mean presidents can act virtually unhindered. Christenson and Kriner (2015) note that this conflict brought about by the separation of powers poses an interesting question about the use of unilateral action: even though there has been an increase in the use of unilateral actions over time, should we not expect even more? If the formal constraints on unilateral action are minimal to nonexistent, and overcoming legislative gridlock is unlikely, what keeps presidents from achieving even more of their policy goals through unilateral action? One possible answer to this question is that presidents, in choosing the process for pushing their policy agenda, concern themselves not just with the formal constraints on their power, but also with the informal constraints on it, most specifically, public opinion. If this is true, then knowing who can affect public opinion on unilateral action is of paramount importance.

In this article we explored the capacity of one possible actor to affect public opinion on support for unilateral action: the Supreme Court. Specifically, we found that open speculation that the Court might strike down a unilateral action as unconstitutional can significantly erode support for that action among at least a large segment of the public. Criticism of President Obama's unilateral action on environmental protection, for example, was remarkably powerful. However, the specter of a judicial rebuke was less influential in shaping attitudes toward President Obama's executive actions on immigration. This suggests that attitudes toward immigration may be more calcified than those toward the Clean Power Plan (but see Cohen 2015). Moreover, the Immigration Experiment also showed that the effect of a cue challenging unilateral action can be conditional, at least for a highly polarized issue. Those who believed the Court to be legitimate became less likely to support Obama's immigration actions when warned of a likely judicial

challenge. However, those who did not judge the Court legitimate responded in the opposite manner to the same cue. This suggests that the reputation of the institution associated with a constitutional challenge is a key consideration for some issues.

A number of important questions remain. For example, while our experiments focused on two high-profile domestic policy initiatives, the courts have also been increasingly active in checking executive initiative in the foreign policy realm. Future research might explore whether the specter of judicial action is equally effective in foreign affairs when presidents are acting pursuant to their authority as commander in chief. Similarly, in our experiments “many legal experts” were the cue givers touting the prospects for judicial action. However, a wide range of actors from opposition politicians to law professors to media pundits routinely speculate publicly that the courts will strike down executive action in the hopes of mobilizing popular sentiment against the president. Future research might also explore how the source of the elite actor warning of judicial action shapes the influence of such concerns on public opinion. Finally, future research should probe in more detail whether, and if so in what conditions, the courts are particularly well positioned to affect public support for unilateral action.

While our experimental analyses cannot answer definitively whether and when public opinion truly constrains presidential action, we can say with some confidence that, if it does, the separation of powers system may be more influential than previously thought. Courts may be influential even when they do not strike down executive action. Rather, even the threat of judicial reversals and public speculation about the Court’s response can have serious consequences for presidents. Our results have exposed a mechanism by which a branch of government might overcome its expressed and limited powers to constrain the president by moving public opinion against the president’s action. Anticipating other actors’ capacity to raise the political costs of unilateral action, even when they cannot overturn or block it, may encourage presidents to forgo unilateral initiatives to avoid incurring significant political costs.

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