3-2020

Judicial Credibility

Bert I. Huang

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ABSTRACT

Do people believe a federal court when it rules against the government? And does such judicial credibility depend on the perceived political affiliation of the judge? This study presents a survey experiment addressing these questions, based on a set of recent cases in which both a judge appointed by President George W. Bush and a judge appointed by President Bill Clinton declared the same Trump Administration action to be unlawful. The findings offer evidence that, in a politically salient case, the partisan identification of the judge—here, as a "Bush judge" or "Clinton judge"—can influence the credibility of judicial review in the public mind.

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INTRODUCTION

"We do not have Obama judges or Trump judges, Bush judges or Clinton judges."[1] So says Chief Justice John Roberts. But what do the people think?

This Article uses a survey experiment to see if there may be differences in how much credibility a judicial ruling gets in the public mind, depending on whether the judge is labeled a "Bush judge" or a "Clinton judge." Here is how the experiment works: Among the federal courts recently ruling against the Trump Administration on an issue of national salience, one of the district judges was appointed by President George W. Bush and another was appointed by President Bill Clinton.[2] The issue at hand is the Administration's attempt to cancel the Deferred Action for Childhood Arrivals program, or DACA, which was started by the Obama Administration to provide deportation relief for certain immigrants, often called "Dreamers."[3] This study was conducted before the Supreme Court granted certiorari in these cases.

Each of these two district judges ruled that the Trump Administration's attempted rescission of the DACA program was unlawful.[4] And because they issued opinions that overlap in reasoning and

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1. This quote from Chief Justice Roberts was widely reported as a response to a presidential comment that had criticized a ruling against the Administration as coming from an "Obama judge." *See, e.g.*, Robert Barnes, *Rebuking Trump's Criticism of 'Obama Judge,' Chief Justice Roberts Defends Judiciary as 'Independent*,' WASH. POST (Nov. 21, 2018, 6:21 PM), https://www.washingtonpost.com/politics/rebuking-trumps-criticism-of-obama-judge-chief-justice-roberts-defends-judiciary-as-independent/2018/11/21/6383c7b2-edb7-11e8-96d4-0d23f2 aaad09_story.html [https://perma.cc/9T3E-S2FV]. For the original story, see Mark Sherman, *Roberts, Trump Spar in Extraordinary Scrap over Judges*, ASSOCIATED PRESS (Nov. 21, 2018), https://www.apnews.com/c4b34f9639e141069c08cf1e3deb6b84 [https://perma.cc/F6X5-VPJY]. The quote goes on to say that "[w]hat we have is an extraordinary group of dedicated judges doing their level best to do equal right to those appearing before them." Barnes, *supra*.

2. These cases, and the judges who ruled in them, are detailed below. *See infra* notes 20-25 and accompanying text.

3. For a fuller explanation of the DACA program, see *infra* note 30 and accompanying text.

4. NAACP v. Trump, 298 F. Supp. 3d 209, 215-16 (D.D.C. 2018) (Bates, J.), *cert. before judgment granted*, 139 S. Ct. 2779 (2019); Regents of Univ. of Cal. v. U.S. Dep't of Homeland Sec., 279 F. Supp. 3d 1011, 1018 (N.D. Cal. 2018) (Alsup, J.), *aff'd*, 908 F.3d 476 (9th Cir. 2018), *cert. granted*, 139 S. Ct. 2779 (2019).

result, it becomes possible to conduct an experiment—accurately informing one group of survey subjects that the judge who ruled this way was appointed by President Bush, while telling another group that the judge was appointed by President Clinton. The outcomes of interest are these: What do survey subjects believe about the lawfulness of the Trump Administration's action, after being told about federal court rulings declaring it unlawful? And do subjects' responses differ based on whether the judge is a Bush or Clinton appointee?[5]

The aim here is to observe "judicial credibility" in a straightforward sense—the degree of influence that a court's ruling has on people's beliefs about the very question ruled upon by the court.[6] More specifically, in this case it can be seen as the credibility of judicial review, given that the rulings concern the legality of a

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[5]. At the risk of stating the obvious, this study is *not* about whether Democrat-appointed judges and Republican-appointed judges actually tend to rule differently. That question is the subject of a massive literature; for a thoughtful recent review in this journal by a leader in the field, see Lee Epstein, *Some Thoughts on the Study of Judicial Behavior*, 57 WM. & MARY L. REV. 2017 (2016). For a recent experimental study about the possible role of ideology in legal judgments, involving actual judges, see Dan M. Kahan et al., *"Ideology" or "Situation Sense"? An Experimental Investigation of Motivated Reasoning and Professional Judgment*, 164 U. PA. L. REV. 349 (2016). Whether people perceive federal judges as deciding based on ideology or politics is also well-studied. *See, e.g.*, Max Greenwood, *Majority of Voters Believe Federal Judges Inject Politics into Rulings: Poll*, THE HILL (Dec. 3, 2018, 12:25 PM), https://thehill.com/homenews/campaign/419457-majority-of-voters-believe-federal-judges-inject-politics-into-rulings-poll [https://perma.cc/MW2C-ZPWX] ("Two-thirds of registered voters in the United States believe that federal judges' legal rulings have become increasingly tainted by political bias."). My study goes one step beyond, by investigating one possible implication of such public perceptions of judges—the credibility of their rulings, in the public mind.

[6]. Note that this rather simple definition of judicial credibility is intertwined with a varied set of more complex concepts that the literature has often referred to as the "legitimacy" of a judiciary or a legal system. Professor Fallon's survey offers an insightful taxonomy. RICHARD H. FALLON, JR., LAW AND LEGITIMACY IN THE SUPREME COURT 20-46 (2018) (explaining the categories of sociological, moral, and legal legitimacy); *see also* Tara Leigh Grove, *The Supreme Court's Legitimacy Dilemma*, 132 HARV. L. REV. 2240 (2019) (discussing Professor Fallon's taxonomy and the possible tensions among the categories in practice) (book review). What is measured in this study is also related to (and yet differs from) data about people's degree of diffuse support for the judiciary, sometimes used as a metric for the "institutional legitimacy" of the courts (and usually of the U.S. Supreme Court). For a high-level review of such studies, see Michael J. Nelson & James L. Gibson, *U.S. Supreme Court Legitimacy: Unanswered Questions and an Agenda for Future Research*, in ROUTLEDGE HANDBOOK OF JUDICIAL BEHAVIOR 132, 132-50 (Robert M. Howard & Kirk A. Randazzo eds., 2018). The Conclusion will say more about how the concept of judicial credibility, as defined here, intersects with these various meanings of legitimacy.

government action. How much credibility does a federal court's decision have in influencing people's beliefs about what the government can or cannot lawfully do? And does that credibility depend on the perceived political affiliation of the judge?

Worries about questions such as these are what motivated Chief Justice Roberts, presumably, to fire off such a public retort to a presidential comment criticizing a ruling against the Administration as coming from an "Obama judge."[7] The prospect of eroding respect for at least one federal judge also seems to be what motivated that comment in the first place, as well as a later tweet replying to the Chief Justice.[8] But it is not only the most partisan voices who are labeling federal judges like this: even major news outlets have now made a habit of saying which president appointed a given federal judge, perhaps seeing it as information a reader might wish to know or ought to know.[9] How much has the public internalized these

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7. *See* Barnes, *supra* note 1. Chief Justice Roberts is not the only one concerned about such norms-breaking presidential attacks on the courts or other legal institutions. *See, e.g.*, Tara Leigh Grove, *The Origins (and Fragility) of Judicial Independence*, 71 VAND. L. REV. 465 (2018); Daphna Renan, *Presidential Norms and Article II*, 131 HARV. L. REV. 2187 (2018); Michael D. Shear & Katie Benner, *Trump's War on the Justice System Threatens to Erode Trust in the Law*, N.Y. TIMES (Aug. 25, 2018), https://www.nytimes.com/2018/08/25/us/politics/trump-justice-legal-system.html [https://perma.cc/7TQF-GP6S]; Nina Totenberg, *Trump's Criticism of Judges out of Line with Past Presidents*, NPR (Feb. 11, 2017, 6:19 AM), https://www.npr.org/2017/02/11/514587731/trumps-criticism-of-judges-out-of-line-with-past-presidents [https://perma.cc/T45Q-YHEP].

8. The reply tweet stated: "Sorry Chief Justice John Roberts, but you do indeed have 'Obama judges,' and they have a much different point of view than the people who are charged with the safety of our country. It would be great if the 9th Circuit was indeed an 'independent judiciary.'" Donald J. Trump (@realDonaldTrump), TWITTER (Nov. 21, 2018, 12:51 PM), https://twitter.com/realdonaldtrump/status/1065346909362143232 [https://perma.cc/4BCL-443V]. For a recent study of how comments on social media might affect not only public perceptions of the federal judiciary, but also participants in the system, see Jeffrey L. Fisher & Allison Orr Larsen, *Virtual Briefing at the Supreme Court*, 105 CORNELL L. REV. 85 (2019).

9. *See* Josh Gerstein, *Third Judge Rules Against Trump Move to End DACA*, POLITICO (Apr. 24, 2018, 8:09 PM), https://www.politico.com/story/2018/04/24/third-judge-rules-against-trump-daca-550092 [https://perma.cc/2PRL-U2SP] ("Bates, who was appointed by President George W. Bush, is the first Republican appointee to rule against President Donald Trump's move to wind down DACA. Two district court judges appointed by President Bill Clinton ... previously came to similar conclusions."); Tom Hals, *U.S. Appeals Court Rules Against Trump on DACA Immigration Program*, REUTERS (Nov. 8, 2018, 1:09 PM), https://www.reuters.com/article/us-usa-immigration-daca/u-s-appeals-court-rules-against-trump-on-daca-immigration-program-idUSKCN1ND2QN [https://perma.cc/R37Y-S62C] ("Wardlaw was appointed by Democratic former President Bill Clinton. The other two judges, John Owens and Jacqueline Nguyen, were appointed by Obama, a Democrat."); Ann E. Marimow & Robert Barnes,

pervasive signals about the relevance of the appointing president for assessing a judge's rulings? Could such signals be eroding public respect for the federal judiciary?[10] Could the political labeling of judges even affect whether people believe the rulings of our federal courts?

This study takes an empirical step toward answering such questions. To venture some hypotheses, it is easy to imagine various psychological factors that may be at work.[11] First, some people may give more credibility to a judge perceived to share their own political leaning.[12] Second, some may give more credibility to a ruling against the Administration if it comes from a judge perceived to be more sympathetic toward the Administration—as when a child asks her more lenient parent for a chocolate, but is still told "no."[13] These two

Appeals Court Finds Trump Administration's Move to End DACA 'Arbitrary and Capricious,' Wash. Post (May 17, 2019, 3:20 PM), https://www.washingtonpost.com/local/legal-issues/ appeals-court-finds-trump-administrations-move-to-end-daca-arbitrary-and-capricious/2019/ 05/17/580d2c04-5ba1-11e9-842d-7d3ed7eb3957_story.html [https://perma.cc/D958-6ZK2] (noting that Judge Richardson, who dissented, was "named to the court by President Trump," and that of the two judges in the majority, "Diaz was nominated by President Barack Obama, and King by President Bill Clinton").

10. *See, e.g.*, Shear & Benner, *supra* note 7. For a recent survey-experiment study of the impact of the President's rhetoric on diffuse-support measures of institutional legitimacy for the U.S. Supreme Court, see Michael J. Nelson & James L. Gibson, *Has Trump Trumped the Courts?*, 93 N.Y.U. L. Rev. Online 32, 39 (2018) ("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.").

11. Potential interactions among these (and other) factors are also imaginable, and a range of factors might be at work within the mind of any given individual.

12. For example, some might assign more credibility to a judge seen as coming from one's own in-group—here, based on political affiliation—perhaps due to an expectation of sharing a legal philosophy or ideology, or due to a greater trust in a fellow group member's judgment. Or there may be an adverse reaction to the ruling of a judge perceived to be an outsider, or in an opposed group. It should go without saying, though, that some survey subjects might not see themselves as belonging to the same in-group as a Bush-appointed judge (or Trump Administration officials, for that matter); and some might not consider a Clinton-appointed judge to be an outsider or in an opposed group.

13. Consider how news reports sometimes carry a note of surprise on occasions when a Trump-appointed judge has ruled against the Administration. *See, e.g.*, Christal Hayes, *It's Not Just 'Obama Judges. Here Are Republican Appointees Who Have Ruled Against Trump*, USA Today (Nov. 24, 2018, 3:08 PM), https://www.usatoday.com/story/news/politics/2018/11/ 24/five-times-republican-appointed-judges-ruled-against-president-trump/2083399002/ [https://perma.cc/UV5C-5PSF]. Relatedly, one might speculate that the perception of favoritism may be a source of concern for the judges themselves. *See* Naomi Jagoda & Jacqueline Thomsen, *Trump Judges Face Scrutiny over President's Cases*, The Hill (Aug. 4,

factors may widen the gap in influence between a Bush-appointed judge and a Clinton-appointed judge.[14] Third, because the DACA rescission issue is a fairly technical legal question, one might expect the general public to find court rulings especially informative. And yet, fourth, given the political salience of the DACA program, some people may want to believe that its rescission is lawful or unlawful, and they may hold on to such a motivated belief despite contrary information.[15] These latter two factors may work against each other in affecting the impact of a court ruling on people's beliefs.

Two notes about the survey subjects are in order before previewing the findings. First, because in these DACA cases the federal courts have ruled against a Republican administration, this study focuses only on the reactions of self-identified Republicans.[16] A similar configuration of cases in a Democratic administration would

2019, 8:30 AM), https://thehill.com/regulation/court-battles/456013-trump-judges-face-scruti ny-over-presidents-cases [https://perma.cc/D8EJ-RU3S] ("Federal judges nominated by President Trump are facing a major public test as they handle cases that involve Trump personally or some of his most controversial policies," and in particular, that "three recently appointed district judges in D.C.—Trevor McFadden, Timothy Kelly and Carl Nichols—have found themselves and their rulings under a magnifying glass as they deal with cases involving Trump.").

14. That is, both should increase credibility for the Bush-appointed judge, relative to the Clinton-appointed judge (for the Republican survey subjects in this study). This relative characterization is not meant to overlook the possibility that some people might perceive a Bush-appointed judge to be not quite as sympathetic to the Trump Administration as, say, a Trump-appointed judge. *See* Barnes, *supra* note 1. To date, however, no Trump-appointed judge has authored a ruling in the DACA cases; nor has any Obama-appointed judge. That is why this study focuses on a comparison of a Bush-appointed judge with a Clinton-appointed judge.

15. These factors are stated broadly and might easily be subdivided or more specifically named. For example, one might take this fourth factor and say that part of it is "confirmation bias," and another part "motivated cognition," and another part "cognitive dissonance." Such variations might be interesting to investigate in future work, but this study only measures overall net effects, and is not designed to tease apart these possibilities.

16. In assessing the credibility of judicial review, it seems most useful to observe whether people's beliefs change in response to court rulings against an administration of their own party. This is not to suggest that all survey subjects support every action that the Trump Administration takes. Although the data cannot distinguish subjects who generally support the Trump Administration from those who do not, the study design does expressly distinguish those who oppose DACA as a policy matter from those who do not (and each group is analyzed separately). It also presents data both from the full sample of subjects who had self-identified as Republican to the survey firm before taking this survey, as well as from a subsample of subjects who continued to self-identify as Republican when asked during this survey (more than two years into the Trump Administration). *See infra* Tables 1 & 2.

be needed for a parallel study of how Democrats respond to an unfavorable ruling. Second, these findings are not based on a nationally representative sample; due to the recruitment method, there is an overrepresentation of older subjects.[17]

The findings, in brief: Judicial credibility can vary based on the political labeling of the judge. Telling these survey subjects that a Bush-appointed judge ruled against the Trump Administration exerted more influence on their beliefs than telling them that a Clinton-appointed judge did so. The degree of influence seems limited in either case, however. Many subjects appeared to stick to their prior beliefs about the legality of the Administration's action despite being told about rulings to the contrary by either judge. Moreover, these prior beliefs correlate with subjects' views on DACA as a policy matter. Subjects who said that DACA is generally a bad policy were less likely (than other subjects) to say that the rescission was probably unlawful and much more likely to say that it was probably lawful.

Part I will detail the survey design and present the data, and Part II will discuss what these findings might teach us (or not) about the political labeling of federal judges and about the credibility of judicial review. The Conclusion will relate judicial credibility to concerns of judicial legitimacy, situating these findings in a political moment when numerous government actions are being blocked by the lower federal courts—a time when their credibility is repeatedly put to the test.

I. COMPARING JUDICIAL CREDIBILITY

The configuration of the DACA-rescission cases created an opportunity to compare the influence of telling people that a ruling against the government had been made by a judge appointed by President George W. Bush,[18] with that of telling people the same

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17. The participants were recruited by the survey firm SurveyMonkey; the extent of overrepresentation of older subjects is detailed below. *See infra* Part I.B.

18. Judge John Bates was appointed by President George W. Bush. *Bates, John D.*, FED. JUD. CTR., https://www.fjc.gov/history/judges/bates-john-d [https://perma.cc/M756-QNWF].

ruling had been made by a judge appointed by President Bill Clinton.[19]

At the time these surveys were conducted (June 2019), four federal district courts had ruled on the lawfulness of how the Trump Administration tried to cancel the DACA program.[20] In essence, three of the district courts had ruled against this Administration, issuing preliminary injunctions or partial relief in a way that put the DACA program in a holding pattern.[21] Among the appeals from these rulings, the U.S. Court of Appeals for the Ninth Circuit had reached a decision largely affirming the court below and upholding

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19. Judge William Alsup and Judge Nicholas Garaufis were both appointed by President Bill Clinton. *Alsup, William Haskel*, FED. JUD. CTR., https://www.fjc.gov/history/judges/alsup-william-haskell [https://perma.cc/7KCS-GMLJ]; *Garaufis, Nicholas*, FED. JUD. CTR., https://www.fjc.gov/history/judges/garaufis-nicholas [https://perma.cc/3HJH-U75R]. Judge Alsup's decision more closely matches that of Judge Bates, in relevant aspects, and so for present purposes all mentions of the "Clinton-appointed judge" in this Article can be taken to refer to Judge Alsup.

20. *See* NAACP v. Trump, 298 F. Supp. 3d 209, 249 (D.D.C. 2018) (Bates, J.), *cert. before judgment granted*, 139 S. Ct. 2779 (2019); Casa De Maryland v. U.S. Dep't of Homeland Sec., 284 F. Supp. 3d 758, 772, 779 (D. Md. 2018) (Titus, J.), *aff'd in part, vacated in part, rev'd in part*, 924 F.3d 684 (4th Cir. 2019); Batalla Vidal v. Nielsen, 279 F. Supp. 3d 401, 437-38 (E.D.N.Y. 2018) (Garaufis, J.), *cert. before judgment granted*, 139 S. Ct. 2773 (2019); Regents of Univ. of Cal. v. U.S. Dep't of Homeland Sec., 279 F. Supp. 3d 1011, 1048-50 (N.D. Cal. 2018) (Alsup, J.), *aff'd*, 908 F.3d 476 (9th Cir. 2018), *cert. granted*, 139 S. Ct. 2779 (2019). In the District of Columbia case, Judge John Bates issued a further opinion after allowing the government ninety days to remedy the defects in the rescission decision. NAACP v. Trump, 315 F. Supp. 3d 457, 473 (D.D.C. 2018), *cert. before judgment granted*, 139 S. Ct. 2779 (2019).

21. Taken together, these courts' orders required the government to continue processing DACA renewals (with the proviso that renewal requests may be decided in an individualized way), but did not require accepting new applications or granting advance parole. *See* NAACP v. Trump, 321 F. Supp. 3d 143, 150 (D.D.C. 2018); *Batalla Vidal*, 279 F. Supp. 3d at 437; *Regents of Univ. of Cal.*, 279 F. Supp. 3d at 1048. On January 9, 2018, Judge Alsup granted a preliminary injunction to this effect. *Regents of Univ. of Cal.*, 279 F. Supp. 3d at 1048-49. Judge Garaufis did likewise, on February 13, 2018. *Batalla Vidal*, 279 F. Supp. 3d at 437. On August 17, 2018, Judge Bates partially stayed his order vacating the rescission, in a way that matched the two preliminary injunctions. *NAACP*, 321 F. Supp. 3d at 146, 150 ("The Court will stay its order as to new DACA applications and applications for advance parole, but not as to renewal applications."). It must be noted that another federal district court decided a different DACA case in the reverse posture, with challengers attacking the lawfulness of the program itself (rather than the rescission); although this judge signaled that he would find DACA to be unlawful under the Administrative Procedures Act, he also declined to issue a preliminary injunction against continuing the program. Texas v. United States, 328 F. Supp. 3d 662, 742-43 (S.D. Tex. 2018) (Hanen, J.); *see also* Michael D. Shear, *Federal Judge in Texas Delivers Unexpected Victory for DACA Program*, N.Y. TIMES (Aug. 31, 2018), https://www.nytimes.com/2018/08/31/us/politics/texas-judge-daca.html [https://perma.cc/KE5D-NQPD].

its remedy.[22] One other federal district court had ruled in favor of this Administration,[23] but the U.S. Court of Appeals for the Fourth Circuit had reversed.[24] Notably, when this survey was conducted, the Supreme Court had not yet granted certiorari in these cases (much less heard oral arguments or reached a decision).[25]

A. Survey Design

The surveys conveyed simplified information about the state of these federal court rulings.[26] One Bush-appointed judge and one Clinton-appointed judge issued district court opinions that overlapped enough to be summarized in an identical way;[27] in either case, the judge could be fairly characterized in the survey text as ruling "that the government had failed to show that the DACA program is unlawful"; that "the government had failed to properly explain its decision, as federal law requires"; and that therefore, "the way the government tried to cancel the program was unlawful."[28] Other aspects of their rulings did not align, but this characterization captures their shared bottom line, for purposes of this study.[29]

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22. Regents of Univ. of Cal. v. U.S. Dep't of Homeland Sec., 908 F.3d 476, 520 (9th Cir. 2018). At the time of this survey, the District of Columbia (*NAACP v. Trump*) and New York (*Batalla Vidal v. Nielson*) cases had not yet been decided on appeal.

23. *Casa De Maryland*, 284 F. Supp. 3d at 772.

24. Casa De Maryland v. U.S. Dep't of Homeland Sec., 924 F.3d 684, 690-91 (4th Cir. 2019).

25. The Supreme Court granted certiorari in three of the cases on June 28, 2018, after this survey had been completed earlier in the month. *See, e.g.*, NAACP v. Trump, 298 F. Supp. 3d 209 (D.D.C. 2018), *cert. before judgment granted*, 2019 WL 2649836 (June 28, 2019) (No. 18-588).

26. For this survey it was advantageous to convey true information rather than to invent fictional accounts, given that these cases had a fairly high profile at the time. Thus, I chose not to include scenarios in which an Obama-appointed or a Trump-appointed judge had authored a ruling in these cases (as neither would have been true).

27. Again, the Bush-appointed judge was Judge John Bates in the District of Columbia case (*NAACP v. Trump*), and the Clinton-appointed judge was Judge William Alsup in the California case (*Regents of Univ. of Cal. v. U.S. Dep't of Homeland Sec.*). *See supra* notes 18-19.

28. *See* NAACP v. Trump, 315 F. Supp. 3d 457, 460-61 (D.D.C. 2018), *cert. before judgment granted*, 139 S. Ct. 2779 (2019); Regents of Univ. of Cal. v. U.S. Dep't of Homeland Sec., 279 F. Supp. 3d 1011, 1037-46 (N.D. Cal. 2018), *aff'd*, 908 F.3d 476 (9th Cir. 2018), *cert. granted*, 139 S. Ct. 2779 (2019).

29. For example, because Judge Bates had given the government a chance to revise its

Two experimental conditions could thus be created, with identical information except for which president appointed the judge making the ruling. I will refer to these as the {Bush judge} and {Clinton judge} conditions. For the {No ruling} condition, in which no information is revealed about any courts' rulings, the legal conclusions noted above are instead attributed to the challengers in the lawsuits, as arguments they raised. Each survey subject sees only one of the three conditions in this study's between-subject design.

Here is what the subjects experience as they take the survey. They first encounter a very brief explanation of the DACA program. The same phrasing is used for all survey subjects:

> *In 2012, during the Obama Administration, the federal government started a program for undocumented immigrants who arrived in the United States as a child, before the age of 16.*
>
> *The program is called Deferred Action for Childhood Arrivals, or DACA, and its participants are sometimes called "Dreamers." The program offers work permits and protection from deportation, for renewable two-year periods.*
>
> *In 2017, during the Trump Administration, the federal government announced that it would cancel the DACA program.*

As with other information given in the survey, this description of DACA eligibility is simplified; listing all the other eligibility criteria would have required a long block of text that risked losing the attention of the survey subjects.[30] The DACA program has been heavily covered in the media, and this brief description is aimed at reminding subjects of its general contours.

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rationales for the rescission, his (later) opinion took those revisions into account. *See supra* note 20. And, as noted above, Judge Alsup ordered a preliminary injunction, whereas Judge Bates ordered vacatur of the rescission decision, subject to a partial stay. *See supra* notes 20-21.

30. It is possible that some of the omitted details (such as needing to be under age 31 on June 15, 2012, or the criminal-record requirements) might have affected how some subjects would answer the policy-preference question. But their answers to that question are not an outcome of interest in this study; they are, instead, used for categorizing the subjects into subsamples.

The subjects are then asked to answer a question about their policy preference—whether they think the DACA program is "generally a good [or bad] policy."[31] Notably, at this point, the survey has not mentioned the court cases; nor is there any sign yet that the survey will ask about the lawfulness of the canceling of the program.[32] Only after the subjects have registered their policy preferences can they proceed to the next page, which begins to present information about the cases.[33]

At this point, the three sets of subjects receive different information about the cases.[34] Those subjects randomized into either the {Bush judge} or {Clinton judge} conditions are told that the judge ruled against the government, as shown below.[35] These two conditions have identical wording, aside from the words "George W. Bush" and "Bill Clinton."

> {Bush judge} or {Clinton judge}
>
> *Several lawsuits are now challenging the government's decision to cancel the DACA program. In these cases, the government has argued that the program is unlawful. But the government has been losing these cases.*

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31. They could choose among the options "I think the DACA program is generally a good policy," "I think the DACA program is generally a bad policy," and "I have not formed a view on this."

32. It is possible that for some subjects, their policy preference will be affected by their beliefs about the legality of DACA itself (as informed by sources outside the survey). But to be clear, it is not this study's purpose to test such a possibility (say, by measuring whether a favorable court ruling influences people's support for a given substantive policy), sometimes called an "endorsement" effect, in the literature. *See, e.g.*, Katerina Linos & Kimberly Twist, *The Supreme Court, the Media, and Public Opinion: Comparing Experimental and Observational Methods*, 45 J. LEGAL STUD. 223, 223-27 (2016) (measuring the "endorsement" effects of major U.S. Supreme Court rulings; that is, whether rulings upholding the legality of certain laws or government actions embodying certain policies can "increase (or decrease) overall support for these policies" in public opinion).

33. Subjects are required to answer every question, and they cannot return to a prior page to change their answers.

34. In each of the three conditions, after reading their respective versions of the description the subjects are asked a comprehension question; as noted below, those who fail this check are excluded from the sample.

35. The labels in curly brackets here are only for expositional purposes; they do not appear on the survey.

> *For example, a federal judge appointed by President George W. Bush [or Bill Clinton] ruled that the government had failed to show that the DACA program is unlawful. He also ruled that the government had failed to properly explain its decision, as federal law requires.*
>
> *The judge concluded, therefore, that the way the government tried to cancel the program was unlawful.*
>
> *So far, the appeals courts have affirmed rulings like these. The Supreme Court has not yet heard the issue.*

Note that the description mentions the Bush-appointed or Clinton-appointed judge only as one example of a federal court ruling against this Administration.[36] This phrasing may tend to impress more firmly upon readers that the Trump Administration's attempt to cancel DACA has been deemed unlawful by multiple federal courts.[37] Yet note that the description may also create some room for subjects to hold the contrary view, by mentioning that the Supreme Court has not yet had the final word.[38]

Meanwhile, those subjects in the {No ruling} condition, which does not mention any courts' rulings at all, are instead told that the challengers have presented certain reasons for ruling against the Administration—reasons that mirror the description of the court ruling in the {Bush judge} and {Clinton judge} conditions. This design allows a comparison between the two conditions that

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36. Note also that no political-affiliation information is given about any other courts mentioned. This phrasing thus avoids distracting from the political labeling of the mentioned district judge; but, the tradeoff is that subjects are left to imagine what they will about the makeup of those other courts. To speculate, it is possible that the mention of a Bush-appointed district judge might conjure up a different mental impression of the other courts ruling the same way, than the mention of a Clinton-appointed district judge.

37. This impression is also reinforced by what the phrasing does not mention: the one district court initially ruling the other way (before being reversed on appeal) on the lawfulness of the canceling of DACA; and, as noted above, the Texas case, which is in the reverse posture of challenging the lawfulness of the DACA program in the first place (though that legal question is also relevant to the other cases). *See* Shear, *supra* note 21; *supra* notes 20-21 and accompanying text.

38. It is possible to imagine a description that omitted this fact, but then many subjects would likely be left wondering, "So what did the Supreme Court say?" Recall that at the time of the survey, the Supreme Court had not yet granted certiorari in these cases.

describe the court rulings with one that does not, while holding roughly constant the presence of the legal arguments on both sides.

{No ruling}

Several lawsuits are now challenging the government's decision to cancel the DACA program. In these cases, the government has argued that the program is unlawful.

The challengers argue that the government has failed to show that the DACA program is unlawful. They also argue that the government has failed to properly explain its decision, as federal law requires.

They argue, therefore, that the way the government tried to cancel the program was unlawful.

The survey then asked the subjects the principal question of interest: whether they think that the Administration's attempt to rescind DACA is lawful or unlawful. Their three choices are: "I think that the way the government tried to cancel the program was probably unlawful," "I think that the way the government tried to cancel the program was probably lawful," and "I have not formed a view on this."[39] The question and the three options are identical in the {Bush judge}, {Clinton judge}, and {No ruling} conditions.[40] Recall that by the time the subjects reach this principal question, they have already answered a separate question about their policy preferences; this sequencing helps make clear that the new question (about the lawfulness of the way the government tried to cancel the

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39. In the analysis to follow, these answers will occasionally be referred in shorthand as the "unlawful," "lawful," or "no view" positions. But it is useful to remember that the actual phrasing of the answer options is "probably unlawful" or "probably lawful." This phrasing was chosen to be more user-friendly for the survey subjects, drawing on colloquial usage (for example, "I think that's probably true") and also allowing some leeway by not requiring certainty. This seemed useful given the somewhat technical nature of the issue (the lawfulness of the attempted canceling of DACA), and the lack of other facts or argumentation given. The phrasing of "I have not formed a view on this" was also meant to be more user-friendly than "I do not know."

40. Note that the question does not mention the courts; the subjects in the {No ruling} condition have not yet read anything about the court rulings at this point.

DACA program) is distinct from the prior question (about whether the program is a good or bad policy).[41]

B. Survey Population

The survey subjects are adults from across the United States who have self-identified as Republicans. All are volunteers recruited by the survey firm SurveyMonkey, which distributed the surveys online.[42] The sample is screened to exclude any subjects who have attended law school, who have recently answered another survey about DACA, who fail the comprehension check, who say they did not take the survey seriously, or who do not answer all the questions on the survey.[43] In total, 1259 subjects are included, of whom 50 percent are female.[44] It should be emphasized that this is not a nationally representative sample. Most notably, due to the way SurveyMonkey recruits subjects and also due to this study's focus on self-identified Republicans, older subjects are overrepresented.[45] In this study, 62 percent of the subjects are over sixty years old. For comparison, 57 percent of the likely voter pool among Republicans is aged fifty or older.[46]

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41. *See supra* notes 31-32 and accompanying text.

42. They are volunteers in the sense that they do not receive a time-based wage, nor monetary pay for each survey. Rather, they receive compensation in the form of either donations to a charity, entry in a sweepstakes contest, or reward points that can be redeemed for goods. *See Rewards*, SURVEYMONKEY, https://www.surveymonkey.com/rewards [https://perma.cc/6XXA-6EYY]. This recruitment method raises the possibility that these subjects are more charitably minded (or more interested in the sweepstakes or rewards prizes on offer) than the broader population.

43. Aside from the comprehension check, these are posed as questions on the final follow-up page, after the subjects have answered the substantive questions. There is also a standard consent page at the start of the survey, where subjects have to click "Agree" in order to proceed.

44. Of the 1259 total subjects, 625 are female.

45. SurveyMonkey is generally able to ensure an age distribution that roughly tracks the census, but this was not an option for a sample as large as in this study, given that the population was already limited to self-identified Republicans. Gender balancing was available, however, and was applied.

46. PEW RESEARCH CTR., WIDE GENDER GAP, GROWING EDUCATIONAL DIVIDE IN VOTERS' PARTY IDENTIFICATION 25 (2018), https://www.people-press.org/2018/03/20/wide-gender-gap-growing-educational-divide-in-voters-party-identification/[https://perma.cc/ZJG9-BGAJ] ("Nearly six-in-ten Republican and Republican-leaning voters (57%) are ages 50 and older, compared with 42% who are under 50.").

All of these subjects self-identified as Republicans at the time of their original recruitment for SurveyMonkey's proprietary panel. The advantage of relying on this classifier is that there is no way for it to be affected by the contents of this survey. And yet, because it also seems useful to recognize that some subjects may have revised their affiliation, a follow-up question in the survey asks anew whether they identify as Republican, Democrat, Independent, or Other.[47] More than four out of five answered that they (still) identify as Republican.[48] When the sample is limited to only these subjects, the overall results remain essentially the same, as seen in Table 2, with one exception noted below. I have chosen to focus on presenting results based on the original classifier, as seen in Table 1, because it is sure to be unaffected by what this survey says about DACA and the courts.[49]

Recall that the reason for focusing on Republican survey subjects in this study is that, in these particular cases, the federal courts are ruling against a Republican administration's action.[50] A parallel study focusing on Democrats might be possible someday, if multiple judges appointed by differing-party presidents were to rule the same way against a Democratic administration, on an issue of similar political salience.[51]

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47. There is also an open-ended text box for elaboration; typical entries include mentions of being libertarian or conservative (despite no longer identifying as Republican).

48. Nearly all of the rest answered Independent or Other. Fewer than 1 percent identified as Democrat. The sample size of subjects who no longer identify as Republican is unfortunately too small for any useful statistical analysis. Also, information about when the subjects originally identified themselves to SurveyMonkey as Republican is not available; this is one disadvantage of analyzing the full sample, relative to analyzing the subsample of those who still identify as Republican when asked in the survey itself. This also suggests that the study is likely missing people who now identify as Republican but did not at the time they were originally asked by SurveyMonkey.

49. It would have been possible to avoid such endogeneity by asking about political affiliation before presenting the information about DACA, but such an ordering would also risk priming the subjects in a partisan way from the get-go. As the survey is designed, the subjects do not know that they have been chosen for the sample because they previously self-identified as Republicans. *Cf.* Nsikan Akpan, *How Seeing a Political Logo Can Impair Your Understanding of Facts*, PBS: NEWSHOUR (Sept. 3, 2018, 4:08 PM), https://www.pbs.org/news hour/science/how-seeing-a-political-logo-can-impair-your-understanding-of-facts [https:// perma.cc/U3FT-8W7G] (explaining the results of a recent study that showed "[w]hen reminded of our partisan identity, we promote ideas that our [sic] consistent with our attitudes and social beliefs," even in spite of legitimate facts contrary to those ideas).

50. *See supra* notes 12-16 and accompanying text.

51. The closest recent analogue would seem to be the DAPA (Deferred Action for Parents

Table 1. Subjects Originally Identifying as Republican

A. DACA Opponents

| | Views of DACA Rescission | | | |
	Probably unlawful	*Probably lawful*	*No view*	*N*
Bush judge	8.7 %	61.3 %	30.0 %	287
Clinton judge	6.6 %	70.9 %	22.5 %	244
No ruling	3.1 %	77.3 %	19.6 %	286

B. Everyone Else

| | Views of DACA Rescission | | | |
	Probably unlawful	*Probably lawful*	*No view*	*N*
Bush judge	46.3 %	13.1 %	40.6 %	160
Clinton judge	29.0 %	29.0 %	41.9 %	155
No ruling	28.3 %	29.1 %	42.5 %	127

of Americans and Lawful Permanent Residents) case brought against the Obama Administration, but in that instance all the judges who ruled or voted against the Administration (that is, the district judge and the two judges in the majority on the Fifth Circuit panel) were appointed by Republican presidents; thus, no comparison is possible between judges ruling the same way but appointed by differing-party presidents. Judge Andrew Hanen, a Bush nominee, wrote the district court opinion. Texas v. United States, 86 F. Supp. 3d 591, 604 (S.D. Tex. 2015); *Hanen, Andrew S.*, FED. JUD. CTR., https://www.fjc.gov/ history/judges/hanen-andrew-s [https://perma.cc/G9T6-BRBH]. Judge Jerry Smith, a Bush nominee, wrote the Fifth Circuit opinion; Judge Jennifer Elrod, a Reagan nominee, joined the majority. Texas v. United States, 809 F.3d 134, 146 (5th Cir. 2015); *Elrod, Jennifer Walker*, FED. JUD. CTR., https://www.fjc.gov/history/judges/elrod-jennifer-walker [https://perma.cc/RK59-UZMU]; *Smith, Jerry Edwin*, FED. JUD. CTR., https://www.fjc.gov/history/judges/smith-jerry-edwin [https://perma.cc/N4BE-CKLL]. The Supreme Court affirmed, by an equally divided court, and thus the votes are unknown (though one might speculate). United States v. Texas, 136 S. Ct. 2271 (2016) (mem.) (per curiam).

Table 2. Subjects Still Identifying as Republican

A. DACA Opponents

| | Views of DACA Rescission | | | |
	Probably unlawful	*Probably lawful*	*No view*	*N*
Bush judge	9.5 %	59.8 %	30.7 %	241
Clinton judge	6.9 %	70.3 %	22.8 %	202
No ruling	2.2 %	77.9 %	19.9 %	226

B. Everyone Else

| | Views of DACA Rescission | | | |
	Probably unlawful	*Probably lawful*	*No view*	*N*
Bush judge	46.8 %	14.4 %	38.8 %	139
Clinton judge	28.2 %	29.0 %	42.7 %	131
No ruling	28.3 %	29.3 %	42.4 %	99

C. Findings

How much does informing people about these court rulings affect whether they think the government action is lawful or unlawful? Does the degree of influence vary, depending on whether the judge making the specified ruling is labeled a "Bush judge" or a "Clinton judge"? And does this all depend on what someone thinks of DACA as a policy matter in the first place?

These questions can be answered by comparing across the three conditions—{Bush judge}, {Clinton judge}, and {No ruling}—while also distinguishing those who oppose DACA from those who do not. Given that more than half (65 percent) of the sample answered "I think DACA is generally a bad policy," the closest to an equal division is between those subjects (call them "DACA Opponents") and the rest, who answered either "I think DACA is generally a good policy" or "I have not formed a view on this" (call them "Everyone

Else").[52] For reasons of sample size, I am presenting the analysis with these two latter groups combined into one. Thus, the main comparisons of interest will be across the three conditions for the DACA Opponents and, separately, across the three conditions for Everyone Else.

The findings can be seen in Tables 1 and 2. The following discussion will analyze the responses of the survey subjects as broken down into the two groups just described, DACA Opponents and Everyone Else. The responses of DACA Opponents are shown in panel A, and the responses of Everyone Else are shown in panel B, of each Table. As noted, the exposition here will focus on the full sample in Table 1 (of subjects who originally self-identified to SurveyMonkey as being Republican), rather than the subsample in Table 2 (of subjects who continued to identify as Republican when asked during this survey); aside from one exception addressed below, the results are essentially the same.

The simplest way to address the question of whether it matters how a judge is labeled is to directly compare the {Bush judge} and {Clinton judge} conditions.[53] Among the DACA Opponents, a large majority of subjects answered that the Trump Administration's rescission of DACA was probably lawful—but fewer were willing to say so when they were told that a Bush-appointed judge had ruled

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52. Note again that the DACA policy preference question is asked (on a prior survey page) before the lawfulness question; moreover, in the {No ruling} condition, the court rulings information is only presented after the lawfulness question (on a separate page). *See supra* notes 36-38 and accompanying text. It remains possible that for some subjects, one's policy view might be influenced by one's (externally informed) views about the lawfulness of the DACA program itself. For example, the DACA Opponents group may include some subjects who think that the program is bad policy in part because they already think it is unlawful to begin with; one might imagine such subjects being either less responsive to the court rulings (because their prior beliefs about the legality of DACA or of its rescission are more firmly established), or more responsive (because the informational impact of the contrary court rulings is greater), relative to other subjects who consider DACA to be a bad policy solely for other reasons, or who do not hold prior beliefs about legality. This study has not asked subjects to explain why they think DACA is generally a good or bad policy, and thus does not distinguish among possible motivations within the DACA Opponents group.

53. The exposition here will speak of comparing the perceived credibility of the Bush-appointed judge with that of the Clinton-appointed judge; but as explained below, given the text of the survey it would be more precise (though more tedious) to speak of the perceived credibility of the whole group of federal courts mentioned (including the Bush-appointed or Clinton-appointed judge) *relative* to the credibility of the Trump Administration as the losing litigant. *See infra* Part II.A.

to the contrary, declaring the rescission unlawful, than when told
that a Clinton-appointed judge had done so. As panel A in Table 1
reports, 61 percent of these subjects said that the rescission was
probably lawful in the {Bush judge} condition as compared to 71
percent in the {Clinton judge} condition.[54] It thus appears that some
subjects who would have said that the rescission was probably
lawful, despite hearing that a Clinton-appointed judge had ruled to
the contrary, were nonetheless influenced enough by a Bush-
appointed judge's identical ruling to shift away from that belief.[55] It
is not apparent, however, that the Bush-appointed judge was much
more influential than the Clinton-appointed judge in easing this
group's reluctance to say that the DACA rescission was probably
unlawful; similarly small shares said so, 9 percent and 7 percent in
the {Bush judge} and {Clinton judge} conditions, respectively.[56]

   For Everyone Else, views of legality also varied depending on how
the judge was politically identified: Fewer said that the rescission
was probably lawful, *and* more said it was probably unlawful, when
they were told that a Bush-appointed judge had declared it unlawful
than when told that a Clinton-appointed judge had done so. As
panel B in Table 1 reports, 46 percent said that the rescission was
probably unlawful in the {Bush judge} condition as compared to 29
percent in the {Clinton judge} condition;[57] and 13 percent said it was
probably lawful in the {Bush judge} condition, as compared to 29
percent in the {Clinton judge} condition.[58] It thus appears that some
subjects who would have said that the rescission was probably
lawful, despite a Clinton-appointed judge's contrary ruling, were
nonetheless influenced enough by a Bush-appointed judge's ruling
to shift away from that position. And it also appears that some
subjects who would have credited a Bush-appointed judge's ruling,
enough to say that they believed that the rescission was probably
unlawful, did not find the same credibility in an identical ruling by
a Clinton-appointed judge.

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   54. $\chi^2(1, N = 531) = 5.370$, p = 0.020.
   55. Throughout, I refer to differences across conditions casually using terms such as
"shift," "rise," or "fall"; but to be clear, this study uses a between-subject and not a within-
subject design, and each subject only sees one condition.
   56. $\chi^2(1, N = 531) = 0.858$, p = 0.354.
   57. $\chi^2(1, N = 315) = 9.929$, p = 0.002.
   58. $\chi^2(1, N = 315) = 12.028$, p < 0.001.

Taken together, these contrasts between the {Bush judge} and {Clinton judge} conditions offer the most straightforward evidence that, for this study's population of self-identified Republicans, beliefs about the legality of the Trump Administration's actions can differ depending on whether a court ruling is said to come from a "Bush judge" or a "Clinton judge." It may also be notable that in only one of these subsamples—the Everyone Else group in the {Bush judge} condition—did more subjects say that the rescission was probably unlawful (46 percent) than say that it was probably lawful (13 percent), after hearing that a federal judge had ruled it to be unlawful.

Each of these two conditions can also be compared with the {No ruling} condition. This is the condition that presents subjects with background information about the lawsuits but does not say how the courts have ruled (though it is possible that some subjects may have heard about the rulings from sources external to the survey). Comparisons between this condition and the two judge-specific conditions can be interpreted as the impact of expressly giving information about how the courts have ruled, relative to only describing the lawsuit and the parties' litigating positions.

In the {No ruling} condition, the DACA Opponents and Everyone Else groups reported strikingly different beliefs about the lawfulness of the government action. As seen in panel A in Table 1, 77 percent of those opposing DACA responded that the Trump Administration's rescission is probably lawful, and only 3 percent responded that it is probably unlawful, when told only about the existence of the lawsuits but not about how the courts have ruled. By contrast, roughly equal shares among Everyone Else responded that rescinding DACA is probably lawful or probably unlawful—29 percent and 28 percent, respectively, as seen in panel B in Table 1.

When told about the Bush-appointed judge's ruling, somewhat fewer of the DACA Opponents remained willing to maintain that the government action is probably lawful, falling from 77 percent in the {No ruling} condition to 61 percent in the {Bush judge} condition, as seen in panel A in Table 1.[59] There is also a shift toward responding that it is probably unlawful, rising from 3 percent to 9 percent,

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59. $\chi^2(1, N = 573) = 17.122$, $p < 0.001$.

respectively.[60] Meanwhile, among Everyone Else, the 29 percent in the {No ruling} condition who answered that it is probably lawful falls to 13 percent in the {Bush judge} condition,[61] and the 28 percent answering that the government action is probably unlawful rises to 46 percent, as seen in panel B in Table 1.[62] These shifts provide evidence of the informational impact of learning about the court rulings when a Bush-appointed judge is specified, relative to hearing only about the parties' litigating positions.

There is less evidence, however, of the influence of telling subjects about the court rulings when a Clinton-appointed judge is specified. For the DACA Opponents, the {Clinton judge} condition seems to show little change from the {No ruling} condition. As seen in panel A in Table 1, the share responding that the government action is probably unlawful seems to rise somewhat from 3 percent to 7 percent,[63] and the share responding that it is probably lawful seems to fall somewhat from 77 percent to 71 percent[64]—but one cannot say either with much confidence, as these differences are not statistically significant at the conventional level.[65] It should be noted that here one result differs if the sample is limited to only those subjects who continued to self-identify as Republican.[66] Among them, as seen in panel A in Table 2, the share saying the rescission is probably unlawful rises instead from 2 percent to 7 percent, a difference that *is* statistically significant at the conventional level;[67]

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60. $\chi^2(1, N = 573) = 7.945$, $p = 0.005$.

61. $\chi^2(1, N = 287) = 11.253$, $p < 0.001$.

62. $\chi^2(1, N = 287) = 9.601$, $p = 0.002$.

63. $\chi^2(1, N = 530) = 3.408$, $p = 0.065$.

64. $\chi^2(1, N = 530) = 2.802$, $p = 0.094$.

65. By conventional level, I mean the $p = 0.05$ cutoff. The reader is also welcome to bypass this convention and assess statistical confidence directly from the p-values reported in these notes. A familiar reminder is also in order, that the lack of a statistically significant effect represents a lack of evidence—and is not itself evidence of no effect.

66. For a discussion about how many survey subjects who self-identified as Republicans at the original time of their recruitment by SurveyMonkey continue to identify as such at the time of this survey, and about why this exposition focuses on the original classification, see *supra* notes 53-55 and accompanying text.

67. $\chi^2(1, N = 428) = 5.598$, $p = 0.018$. That the gap between 2 percent and 7 percent in the subsample of subjects who still identify as Republican is statistically significant, and yet the gap between 3 percent and 7 percent in the full sample is not statistically significant, should *not* be interpreted as evidence of a substantive difference between the subsample and the full sample; needless to say, this study does not have the statistical power to distinguish between 2 percent and 3 percent.

this suggests that subjects in the subsample assigned less credibility to the plaintiffs than to the Clinton-appointed judge. Meanwhile, among Everyone Else, the share answering that the rescission is probably unlawful does not appear to change, from 28 percent in the {No ruling} condition to 29 percent in the {Clinton judge} condition, as seen in panel B in Table 1.[68] The share saying that it is probably lawful also seems unchanged, from 29 percent in the {No ruling} condition to 29 percent in the {Clinton judge} condition.[69]

What might account for the differences observed between the {Bush judge} and {Clinton judge} conditions—when the only thing that varies between the two scenarios are the words "George W. Bush" and "Bill Clinton" in describing the appointment of the district judge? Recall the mechanisms suggested in the Introduction: Some subjects may be assigning more weight to the judge ruling against an administration of the same perceived party. Or, some subjects may be assigning more influential weight to the ruling of a Bush-appointed judge because he is perceived to be a Republican—and thus a member of a trusted in-group, perhaps likely to share one's own legal philosophy or ideology. A related possibility is that, for some subjects, the mention of the Clinton appointment primes a more partisan reaction, perhaps causing them to adhere more closely to their original motivated beliefs.

This study is not designed to distinguish among these possibilities or to sort out their interactions, but it seems sensible to speculate that they might coexist within a given sample or even within the same individual subject. Note that this study measures only aggregate differences among groups of subjects; it does not observe how any individual subject's views respond to differing information (as each subject only sees one condition). Although such group differences are revealing, they may also mask heterogeneity within each group. For example, although it may be tempting to infer that a Clinton-appointed judge has faint credibility with these survey subjects, it is also possible that the elusiveness of an aggregate effect is due to the offsetting of a positive influence for some subjects by an oppositional reaction (a sort of negative credibility) among others.

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68. $\chi^2(1, N = 282) = 0.016$, p = 0.899.
69. $\chi^2(1, N = 282) = 0.000$, p = 0.985.

II. BUSH JUDGES, CLINTON JUDGES?

These findings offer evidence that beliefs about the legality of a government action can be differently influenced by hearing that a Bush-appointed judge, as opposed to a Clinton-appointed judge, has ruled against the government. To better understand what we can learn (or not) from these findings, it may be useful to begin by articulating more precisely just whose credibility is being observed here. The discussion will then turn to important limitations of this study, including features that might not generalize to alternative study designs or to new contexts.

A. Whose Credibility?

In this study, judicial credibility is a relative measure. Given the nature of these DACA cases, each survey subject is implicitly weighing the perceived credibility of the Bush-appointed judge, of the Clinton-appointed judge, or of the challengers *against* the perceived credibility of the Trump Administration. It may thus be more precise to say that what we are observing here is the credibility of judicial review.[70]

In addition, recall that several courts are mentioned in each of the judicial scenarios. The judge who is identified as Bush-appointed or Clinton-appointed (who made the individual ruling described in detail) has the spotlight, but the appeals courts (who agree) and the

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70. One upshot is that this complicates how we should interpret any comparisons *between* the two groups of subjects, the DACA Opponents (those who said that DACA is generally bad as a policy matter) and Everyone Else (those who said that DACA is generally a good policy, or who expressed no view). Comparing across the randomized conditions *within* each group is fairly straightforward. Although the survey subjects no doubt assign varying amounts of credibility to the Administration, we can expect the averages to be similar across conditions. Thus, any differences across conditions can be seen as differences in the average credibility assigned to the Bush-appointed judge, to the Clinton-appointed judge, or to the challengers. When comparing *between* the two groups, however, we must fall back on the relative concept. The reason is that the DACA Opponents might assign, on average, a different amount of credibility to this Administration than does Everyone Else. Unless we assume away such a possibility, the most we can learn is how the credibility of judicial review (that is, the courts' credibility relative to the Administration's) varies between the groups. That is, we cannot say that the numbers show how the average credibility of the Bush-appointed judge or the Clinton-appointed judge (or of the challengers) differs between the two groups.

Supreme Court (which has not yet taken up the issue) are also mentioned.[71] Thus, the observations may be understood as relating to the credibility of this bundle of courts and the status of their decisions collectively.[72] To be clear, however, the only thing that varies between the {Bush judge} and {Clinton judge} conditions is the name of the appointing president of that one district judge.

B. Other Contexts?

As with any such study, the effects measured here are specific to the sampled population, to the social and political climate of the time, and to the details of the survey design. For these familiar reasons, external validity and generalizability are always open to question; in that spirit, and to help situate this study's findings, it may be useful to highlight some features specific to this study's context and design that may be likely to differ in other settings or in other studies.

First, the central comparison here is between a Bush-appointed judge and a Clinton-appointed judge. One might readily imagine a more pronounced contrast in another study, should real events make possible a similar comparison between an Obama-appointed judge and a Trump-appointed judge. For example, for some subjects, hearing that a Trump-appointed judge has ruled against the Trump Administration may be more telling than hearing that a Bush-appointed judge has done so.[73] Or some may simply tend to believe

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71. Except in the {No ruling} condition, which does not mention any courts' rulings. *See supra* Part I.A. In theory, there is also the possible complication that the DACA Opponents and Everyone Else groups are assigning, on average, different amounts of credibility to the challengers in the {No ruling} condition. If so, the cautionary note about comparing across groups applies here too. But this would not be much of a worry if one doubted that many subjects would have any reason to give the challengers much credibility; the challengers (states, nonprofits, and universities) are not identified in the survey scenario, and their argument is only described in a minimal way.

72. One might easily imagine that there is heterogeneity in how the survey subjects consider this bundle of courts: some may be focusing on the individual judge, some on the appeals courts, and some on the lack of any final word from the Supreme Court. I chose to mention all of these courts because it would seem natural for subjects to wonder, upon hearing only about one district judge's ruling, what happened in other cases, or on appeal.

73. *See, e.g.*, Jagoda & Thomsen, *supra* note 13 (describing special attention paid to Trump-appointed judges in cases against the administration); Carrie Johnson, *Trump's Impact on Federal Courts: Judicial Nominees by the Numbers*, NPR (Aug. 5, 2019, 5:01 AM),

a Trump-appointed judge more than a Bush-appointed judge (or a Clinton-appointed judge more than an Obama-appointed judge).[74] Moreover, it is worth a reminder that in this study design judicial credibility is assessed relative to the perceived credibility of the government, which may also vary across time.

Second, the rescission of DACA is a salient and politicized issue in the minds of many people. For issues that are more obscure or less political, one might speculate that the public's beliefs about the lawfulness of government action might be more malleable and thus more open to influence by a judicial ruling (imagine a study about a ruling that a highway transportation regulation was rescinded without proper explanation).[75] The politicized nature of the current DACA discourse may also tend to widen the gap in perceived credibility between the two judges, because it may seem less informative when a Clinton-appointed judge rules against the Administration and more telling when a Bush-appointed judge rules that way (relative to rulings on a less politicized issue).

Third, there is the nature of the legal judgment at hand: One might expect nonlawyers to have weaker prior beliefs about a more technical legal question, such as the procedural propriety of the DACA rescission at issue here. Asking them instead to assess a question of fact based on some evidence presented, or a normative question (should DACA be illegal?), or even a positive legal question

https://www.npr.org/2019/08/05/747013608/trumps-impact-on-federal-courts-judicial-nominees-by-the-numbers [https://perma.cc/5QR7-25W3] (quoting Russell Wheeler of the Brookings Institution as saying, about Trump-appointed judges, that "[w]hen you replace a 70-year-old George W. Bush appointee who is slightly to the right of center with a 45-year-old movement conservative, obviously you're not trading apples for apples").

74. As noted, these differential assignments of credibility may have various psychological origins, such as an expectation of sharing a legal philosophy or ideology. *Cf.* Will Baude & Ryan D. Doerfler, *Arguing with Friends*, 117 MICH. L. REV. 319 (2018) (arguing that judges should find more informative the views of those with similar methodological or ideological approaches). The imagined differences could also go the other way, of course; one might imagine *narrower* gaps between the hypothetical {Obama judge} and {Trump judge} conditions than between the {Clinton judge} and {Bush judge} conditions, if subjects tended to give less credibility to a Trump-appointed judge than to a Bush-appointed judge, or more credibility to an Obama-appointed judge than to a Clinton-appointed judge.

75. *Cf.* David Fontana & Donald Braman, *Judicial Backlash or Just Backlash? Evidence from a National Experiment*, 112 COLUM. L. REV. 731, 771-75 (2012) (exploring the contrast between low-salience and high-salience cases in how the public might psychologically respond to being told about a Supreme Court ruling); *id.* at 782 ("[I]n high-salience cases there is little chance the [Supreme] Court can convince opponents.").

on which people might have stronger prior beliefs (is there a constitutional right to an abortion?), might well result in less responsiveness to a court ruling.[76] Moreover, the scenario in this study says little about how to assess the lawfulness of the government's action, and it seems possible that a different design offering more guidance might prompt more subjects to depart from their prior beliefs; yet, more guidance might also diminish a tendency to defer to the courts. And the fact that this survey presents both sides' arguments,[77] if only in a cursory way, might also create more room to align with whichever side the subject might otherwise favor.[78]

Finally, there are devils in the details of the posture of the DACA cases at the time of this study: the Supreme Court had not yet granted certiorari in these cases; and thus, the scenario says that the Court has "not yet heard the issue"—which to some subjects may have signaled that the lower courts' rulings are not authoritative or that the legal issue remains very much an open question. Furthermore, the scenarios here do not explain the consequences of the courts' rulings, in part because the preliminary injunctions are somewhat complicated in these DACA cases. It seems possible that in another context, clearly identifying the stakes of judicial review might more strongly motivate beliefs about legality that align with the consequences that subjects prefer.[79]

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76. And it seems plausible that strongly motivated beliefs might attach to issues at the intersection of law and fact—say, questions of fact with implications for the law. Professor Larsen offers notable illustrations. Allison Orr Larsen, *Constitutional Law in an Age of Alternative Facts*, 93 N.Y.U. L. Rev. 175, 202-18 (2018). Furthermore, there is the possibility that an issue's complexity may affect someone's willingness to grant credibility to a judicial ruling. *Cf.* Erin F. Delaney, *Analyzing Avoidance: Judicial Strategy in Comparative Perspective*, 66 Duke L.J. 1, 22 n.101 (2016) ("If complexity may serve to enhance legitimacy, there is nevertheless bound to be a point when complexity begins to undermine legitimacy.").

77. For a recent discussion of one-sided vs. two-sided framing, see Linos & Twist, *supra* note 32, at 225-32.

78. *See id.* at 230 ("[I]ndividuals who receive two-sided, competing frames are more likely to retain their original views."). And, as already noted, the cases (and hence the survey) pit the government's credibility against that of the courts. *See supra* Part I. One might expect to find much more apparent influence in a study about a court ruling in, say, a private lawsuit.

79. But it is not obvious whether explaining the actual half-measure remedy in this case would have done so (recall that two resulting preliminary injunctions and a partial stay of vacatur in effect put DACA in a holding pattern, in which the government was accepting renewals but not new applications), given that an uninformed subject might have imagined a more extreme consequence of ruling that rescission is unlawful (namely, DACA being allowed to operate at full force). For a fuller description of the dynamics by which the district

C. Further Limitations

Two further limitations are worth emphasizing for good measure. First, a survey-based study like this is inherently artificial in ways that limit external validity. For one thing, it must deliver the relevant information directly. Thus, even if this survey's wording approximates what one might read on a basic newswire, it is still quite unlike the usual ways people might otherwise have learned of these cases. It is not obvious whether one should expect less or more influence when such information appears in a natural nonsurvey setting. The typical worry is that surveys relatively overstate such effects because in real life people do not always hear or internalize the news.[80] And yet, the impact of information might be dampened in a survey due to the subjects' doubts about its trustworthiness, coming from an anonymous online survey interface.

Second, this study is a single snapshot; it is not a time-lapse movie. Based on these data there is no telling whether the degree of influence of hearing that a certain federal judge has ruled a certain way would have been higher, lower, or about the same, at any other point in time. Even if it seems intuitive that the harsh criticisms of the courts in today's political rhetoric—and especially the high-profile denunciations of "Obama judges"[81]—may be making a difference, this study simply does not measure changes over time.

CONCLUSION: CREDIBILITY AND LEGITIMACY

It may emphatically be the province of the courts to say what the law is,[82] but does the public believe them when they do? A cynic might be surprised to see that telling these survey subjects about the court rulings had any influence at all, in light of polling data showing that two-thirds of American voters think federal judges

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courts converged on this particular holding pattern, see Bert I. Huang, *Coordinating Injunctions*, 98 TEX. L. REV. (forthcoming 2020).

80. For a state-of-the-art analysis of how real-world news and survey-experiment news may differ in informational impact, see Linos & Twist, *supra* note 32.

81. *See* Trump, *supra* note 8.

82. *Cf.* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is.").

today are ruling more and more based on their political views.[83] Such a cynic might also have assumed that survey subjects would mostly stick to their motivated beliefs on such a politically salient issue.[84]

But an idealist who expected that most people would defer to the rulings of the federal courts, especially in reviewing the legality of a government action, might be a bit troubled by these findings. Even recognizing that government officers regularly acquiesce to rulings that they (or the public) believe the courts got wrong, this idealist might see judicial credibility in individual cases as one source of the "sociological legitimacy" of the federal courts in the first place:[85] a court's ability to influence people's beliefs may promote the actual acceptance of its rulings (rather than mere acquiescence, a softer foundation for compliance), and rulings that seem correct to people may bolster public support for the courts over time.[86] The idealist may imagine that both effects, of inducing acceptance of specific rulings and of building a reservoir of general respect, would be especially valuable for those times when the courts must play a countermajoritarian role.

Probably neither the idealist nor the cynic would be shocked to see that partisan labeling matters for a judge's perceived credibility in ruling on a politically controversial issue. And yet the idealist might worry that judges thought to be of the same party as a current administration would have to carry more of the burden of

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83. Greenwood, *supra* note 5.

84. This cynic might well point to the large gap in beliefs between those who oppose DACA and those who do not (even within a sample of only Republicans) in the {No ruling} condition, and remark that whatever influence the courts might have apparently does little to close that gap. *See supra* notes 53-54 and accompanying text; *supra* Tables 1 & 2.

85. *See* FALLON, *supra* note 6. And as Professor Grove has reminded us, acquiescence is hardly a given in historical perspective, even for rulings of the Supreme Court. *See* Grove, *supra* note 7.

86. Such dynamics of "specific support" and "diffuse support," respectively, tend to be discussed in relation to the sociological legitimacy of the Supreme Court. *See generally* Nelson & Gibson, *supra* note 6. Yet they may also be applicable to the lower federal courts, especially as these courts are increasingly pushed into the spotlight. In addition, there is the possibility that trends in lower-court rulings can be used by the Supreme Court to boost the acceptability of its own rulings. *See* Neil S. Siegel, *Reciprocal Legitimation in the Federal Courts System*, 70 VAND. L. REV. 1183 (2017).

credibility, in the public eye, in ruling against the government in such high-profile cases. Or is that a ray of hope?[87]

The idealist, being an optimist, might also point out that the subjects in this study were expressly told that the Supreme Court had not yet taken up the issue. Could it be that some subjects therefore inferred that the legal question remained unsettled? Fair enough—and yet, this may be cold comfort in our particular political moment. Among the dozens of legal challenges to the Trump Administration's actions, only a handful will make it to the Supreme Court. It seems likely that the posture of the DACA cases at the time of this survey will also be the enduring posture in case after case, with the lower federal courts blocking a government action.[88] If so, it will be their judicial credibility that matters.

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87. There have been other such rulings of late. Judge Dana M. Sabraw, a George W. Bush appointee, ruled that a plaintiff challenging the Administration's practice of separating families at the southern border was likely to succeed on the merits. *See* Ms. L. v. U.S. Immigration & Customs Enf't (ICE), 310 F. Supp. 3d 1133, 1142-46 (S.D. Cal. 2018). Trump-appointed judges have also ruled against the Administration. Judge Timothy J. Kelly ruled that the White House violated due process when it revoked CNN reporter Jim Acosta's press pass. *See* Transcript of Motion Hearing at 14-15, Cable News Network, Inc. v. Trump, No. 1:18-cv-02610-TJK (D.D.C. Nov. 16, 2018), ECF No. 22. Judge Dabney L. Friedrich ruled that the appointment of Special Counsel Robert Mueller satisfied the requirements of the Constitution's Appointments Clause and did not violate core separation of powers principles. *See* United States v. Concord Mgmt. & Consulting LLC, 317 F. Supp. 3d 598, 602, 623-24 (D.D.C. 2018).

88. *See* Fred Barbash & Deanna Paul, *The Real Reason the Trump Administration Is Constantly Losing in Court*, WASH. POST (Mar. 19, 2019, 12:05 PM), https://beta.washington post.com/world/national-security/the-real-reason-president-trump-is-constantly-losing-in-court/2019/03/19/f5ffb056-33a8-11e9-af5b-b51b7ff322e9_story.html [https://perma.cc/59WS-6X3Q]; INST. FOR POLICY INTEGRITY, *Roundup: Trump-Era Agency Policy in the Courts*, https://policyintegrity.org/deregulation-roundup [https://perma.cc/R7BT-BLLD]. This is not to overlook the possibility of inferences being drawn (by some among the public) from denials of certiorari by the Supreme Court that the Court agrees with the lower courts' rulings. In the DACA cases, the Court did grant certiorari—but at the time of these surveys, it had not yet done so. And as this Article goes to press, the Court has yet to rule on the merits.