

Modern Judicial Confirmation Hearings and Institutional Support for the Supreme Court.

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Introduction

In one sense, this article is a response to Carrington and French (2021). More broadly, however, we speak to the debate regarding the value of modern Senate confirmation hearings of US Supreme Court nominees. On one side of this debate are those who find little value in the hearings and the potential for great harm to the Supreme Court's essential store of legitimacy (Kagan 1995; Zilis and Blandau 2021).¹ On the other side are those who see the hearings as providing important public goods: during hearings senators represent constituent interests (Schoenherr, Lane, and Armaly 2020) and participants "engage in a debate about the meaning of the Constitution" (Collins and Ringhand 2013, 1). Carrington and French enter the discussion in a unique way, by arguing that the behavior of a nominee (rather than the partisan and political nature of a modern judicial confirmation hearing) harmed the Supreme Court's legitimacy.

We begin this article by describing modern judicial confirmation hearings and why we think they (and not necessarily the individual behavior of a nominee) present a potent threat to Supreme Court legitimacy. We then turn more directly to Carrington and French. Relying primarily on the association between (1) personal affect towards Supreme Court nominee Brett Kavanaugh and (2) support for concrete institutional reform, Carrington and French argue that Brett Kavanaugh's behavior during his confirmation hearings harmed the Court's legitimacy. While we also found an association between affect and institutional support in our earlier work

¹ Scholars often refer to legitimacy as "diffuse support," institutional loyalty," "a reservoir of goodwill," or as simply "support" for the Court. We use the various terms throughout this article when referring to legitimacy.

(Krewson and Schroedel 2020), we are skeptical that one can infer from this relationship that Brett Kavanaugh's overtly political behavior caused a decrease in Court legitimacy. For reasons we outline below, Carrington and French's supplemental experiment does not convince us otherwise.

Still, we find much in common between our study and Carrington and French's study. Most importantly, both studies reveal the Court's legitimacy to be weak in the aftermath of the Kavanaugh confirmation. A low reservoir of goodwill is a serious threat because of the Court's reliance on others to implement decisions "voluntarily out of obligation rather than out of fear of punishment or anticipation of reward" (Tyler 2006, 375).

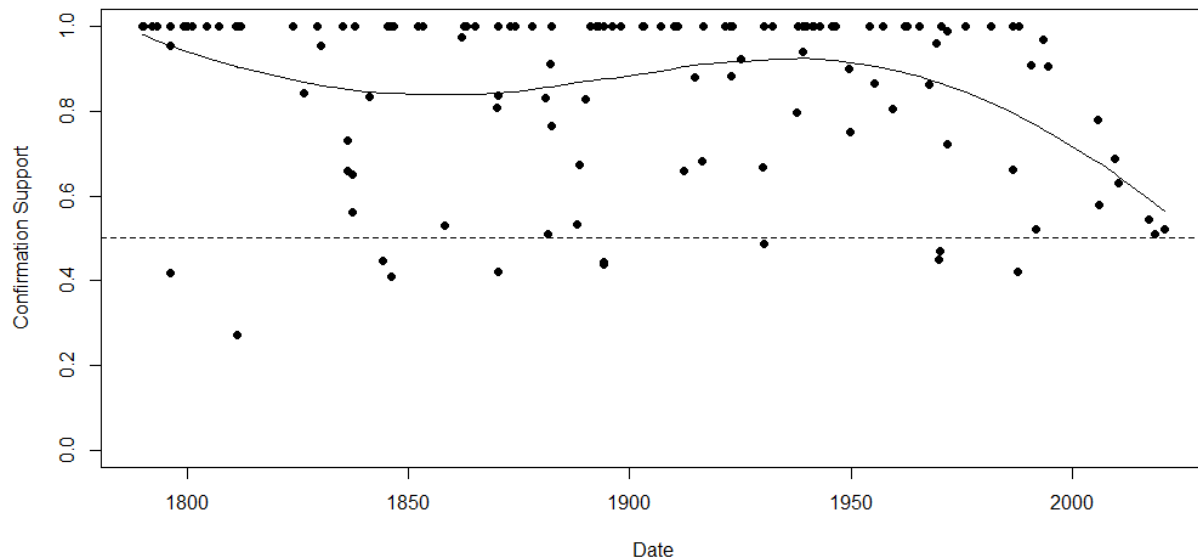
With a low level of institutional support for the Court, some may despair about the future of the judiciary. We think there is reason to be hopeful. Based on a follow-up survey which we did not report in our initial study, we show that partisan differences in perceptions of legitimacy reduced over the ten weeks following the Kavanaugh confirmation. Furthermore, the public remained consistent in its desire to evaluate nominees based on their legal characteristics and background more so than their political attributes.

The Big(ger) Picture

Disentangling the effects of the overt political behavior of a Supreme Court nominee from the effects of the partisan and political nature of modern judicial confirmation hearings is a challenging task. Since 2005, the political nature of judicial confirmation hearings has grown in intensity and regularity. A few figures make this point obvious. Figure 1, below, plots the percentage of senators supporting a nominee for each Supreme Court nomination considered by the full Senate. We also include a non-linear regression (loess) line to demonstrate trends in Senate support over time.

Clearly, unanimous support for nominees is a relic of the past; the data make clear that the Senate is increasingly hostile towards Supreme Court nominees.

Figure 1: Filled circles represent the percentage of United States senators supporting each Supreme Court nominee which received treatment from the full Senate. Voice votes are coded as 100 percent support. The line represents trends in voting over time using a non-linear regression method (loess).

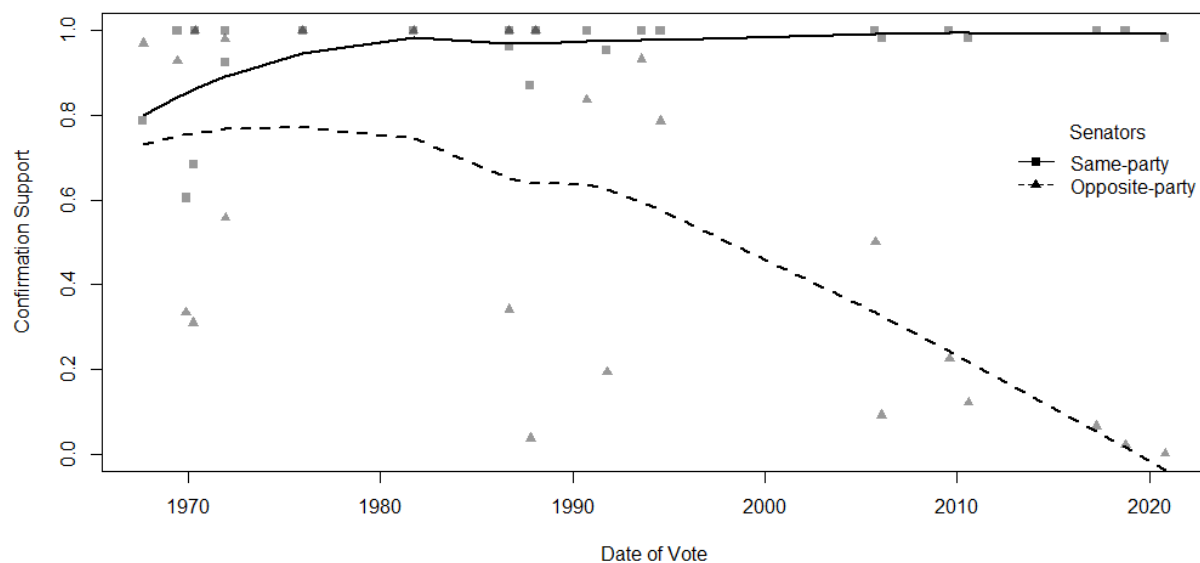


Perhaps of more importance than overall voting percentages is that Senate support for Supreme Court nominees is now extraordinarily partisan. Figure 2, below, plots the proportion of senators supporting nominees in all final roll call votes since 1967, broken down by whether the senators were of the same- (squares) or opposite-party (triangles) of the nominating president.² We also plot non-linear trends over time for both same- (solid) and opposite-party (dashed) senators. From 1967 to 1994, ninety-three percent of senators from the president's party supported the nominee, and seventy-two percent of senators from the opposite party did so. Since 2005, same-party support has become nearly complete (ninety-nine percent) while opposite-party

² Before 1967, the Senate frequently provided consent for nominees through "voice votes," in which votes were not formally recorded. We ignore votes of senators who are not from one of the main two parties in Figure 2.

support has disappeared (fifteen percent). If we ignore the confirmation vote for Chief Justice Roberts, opposite-party support has reduced to a mere nine percent since 2005.

Figure 2: Filled squares represent the percentage of United States senators supporting each Supreme Court nominee appointed by a president from the same party since 1967. The solid line represents the trend in voting over time for these same senators. The filled triangles and dashed trend line represent similar estimates for senators from the opposite party of the nominating president. Before 1967, the Senate frequently provided consent to a nominee through a “voice vote,” in which the senators’ votes were not formally recorded.



The partisanship and politics *surrounding* the confirmation process have increased in intensity and regularity. Liberal and conservative groups spent a combined 2.3 million for and against the nomination of Samuel Alito in 2005 (Gibson and Caldeira 2009). This number pales in comparison to recent levels of outside spending, even when considering individual groups alone. In 2020, Demand Justice spent approximately 10 million against the confirmation of Amy Coney Barrett. The Judicial Crisis Network spent approximately 10 million fighting for her support.³

Why might the political and partisan nature of modern judicial confirmation hearings harm the legitimacy of the Supreme Court? Senators and other elites do not shy away from criticizing

³ <https://www.opensecrets.org/news/2020/10/supreme-court-vacancy-acb/>

Supreme Court decisions during confirmation hearings. Because the attacks are partisan, they likely have a partisan effect. For example, Democrats attacked the Court during Brett Kavanaugh's confirmation hearing and Republicans tended to defend the Court as currently constituted. Citizens who identified as Democrat were more likely to be influenced by the attacks of co-partisan elites and those who identified as Republican were more likely to follow the lead of their co-partisan elites in supporting the Court. We think our argument is consistent with research regarding the influence of elite rhetoric and partisan cues on support for the Court (*see* Nicholson and Hansford 2014; Nelson and Gibson 2019; Rogowski and Stone 2019).

Did One Bad Apple Spoil the Bunch?

Carrington and French (2021) focus on the individual behavior of nominees rather than on the political and partisan nature of modern judicial confirmation hearings. More specifically, they claim that Brett Kavanaugh's "overtly political" behavior "significantly and meaningfully affect[ed] institutional support" for the Supreme Court. But the Kavanaugh confirmation hearings demonstrate the difficulty of isolating the effects of the politics surrounding modern judicial confirmation hearings from the effects of the nominee him- or her-self.

It is unquestionable that Brett Kavanaugh behaved in an overtly political and partisan manner on September 27, 2018, when responding publicly to allegations of sexual misconduct made by Christine Blasey Ford. Yet, according to data analyzed by Janie Velencia and Dhrumil Mehta of FiveThirtyEight, "in the seven days before and after [that] hearing, . . . net support for Kavanaugh's nomination declined by an average of 1 point." In contrast, "most of the deterioration in the public's support for the Kavanaugh nomination happened *after* Ford's name became public

. . . but *before* the [September 27th] hearing” (emphasis added).⁴ In other words, it appears that the political context of the hearing—rather than any overt political behavior during the hearing itself—led to substantial changes in views towards Brett Kavanaugh.

The empirical foundation for Carrington and French’s argument that Kavanaugh’s *behavior* harmed the Court’s legitimacy is the positive association between measures of affect towards Kavanaugh and of institutional support for the Supreme Court. In our article, we too found a statistically significant (though weak) correlation between favorability towards Kavanaugh and institutional loyalty, though we used a different measurement approach to legitimacy.

What should we make of the correlation between affect towards Kavanaugh and support for the Court? Does it reflect a causal effect of the nominee’s behavior on Court legitimacy? As Carrington and French acknowledge, support for Brett Kavanaugh may be endogenous to one’s loyalty to the Court. That is, those who desire to change the Supreme Court institutionally may be motivated to feel less support for Kavanaugh than those who support the Court as currently structured. Even putting concerns regarding endogeneity aside, it is not clear to us that favorability towards Kavanaugh was a function of his behavior during the hearings.

In a second analysis, Carrington and French find differences in support for the Court between a treatment group told that “Senator Ted Cruz . . . will be nominated to fill the next Court vacancy whenever that should occur” and a control group receiving no such information. In measuring Court support, they used the traditional measure of legitimacy (Gibson, Caldeira, and Spence 2003). They concluded that, although there is a “significant decrease in institutional support between the treatment and control groups, the effect size is small when compared to” the

⁴ <https://fivethirtyeight.com/features/a-final-look-at-where-voters-stand-on-kavanaugh-before-the-senate-votes/>

effect size of favorability towards Kavanaugh on Court support from their first study, which measured Court support using more “concrete efforts at reform of the Court.”

Carrington and French claim that the findings from their two studies “lend support to the idea that the [traditional] institutional support battery underestimates the extent to which the public is willing to support efforts to curb the Court.” We do not disagree that differences in measurement of the dependent variable *could* explain the different results across their two studies. But there are plenty of other plausible explanations, including the use of different *independent* variables in their two studies, as well as differences in the survey samples, survey designs, and survey instruments.

Carrington and French use their second experimental study to “confirm the direction of [the] relationship” between the negative feelings generated towards Kavanaugh by his behavior and reduced support for the Court. We do not think the supplemental experiment clinches their argument because the treatment employed does not reflect any (1) overt political behavior (2) by a nominee (3) during a confirmation hearing. Still, we find it interesting that simply mentioning the possibility of a Ted Cruz nomination appears to reduce diffuse support for the Supreme Court.

Finally, we worry that Carrington and French take our findings out of context. While we wrote one paragraph on the relationship between favorability and diffuse support, we tried to avoid making causal claims in that regard. Rather, our purpose was to analyze public views of the Court in the *aftermath* of (rather than *because* of) the Kavanaugh confirmation. We did find low legitimacy after the Kavanaugh confirmation hearings, but we also found some positive results related to the judiciary. For example, despite the politicized nature of the confirmation hearing, “legal qualities and moral character were more important to the public than a nominee's political attributes” in its immediate aftermath.

Public Views in the Aftermath of the Aftermath: Results from a Second Survey Wave

Our initial article analyzed data from a survey administered in the immediate aftermath of the Kavanaugh confirmation. Approximately 10 weeks after that initial survey, we resurveyed participants and re-measured their institutional loyalty to the Court and their views on various characteristics of nominees. While we did not discuss this second wave of data in our original article, we think it may be of use here. In particular, the data shed light on the longer-term effects of confirmation hearings. Four-hundred participants completed both of waves of our survey. We do not claim that this two-wave panel is representative of the American population, but we do think that their views (and change in views) is informative.

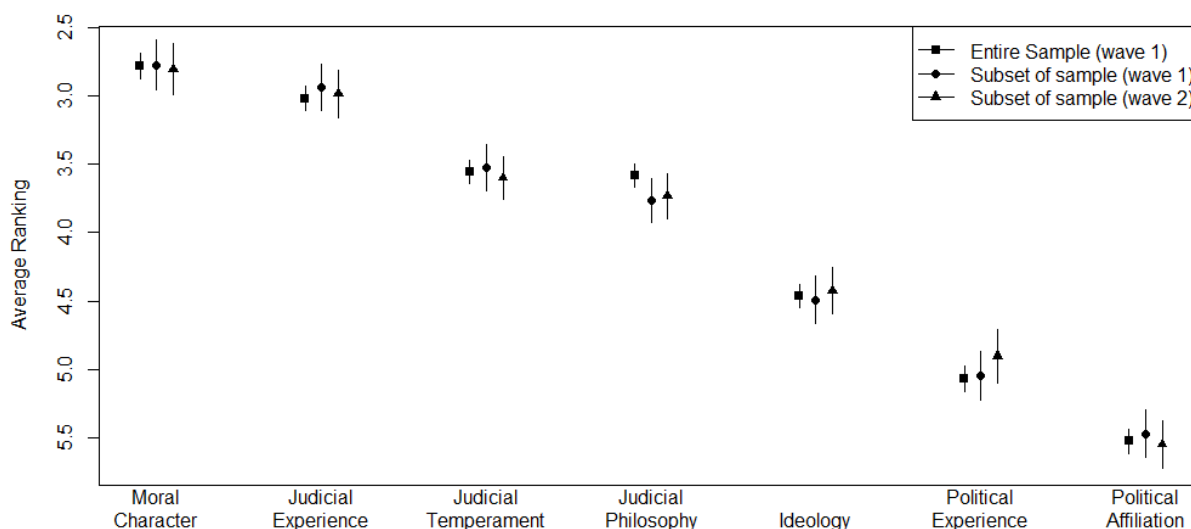
Immediately after the hearing, these four hundred participants demonstrated a statistically significant correlation in their favorability towards Kavanaugh and their institutional support of the Court. The correlation for this smaller sample was 0.29. (It was 0.23 for the entire wave 1 sample.) Ten weeks later, however, the correlation between views towards Kavanaugh and institutional support for the Court dropped to a mere 0.08. This second-wave correlation is not statistically significant. To the extent which views towards Kavanaugh predicted institutional loyalty to the Court, that relationship dissipated quite rapidly.

In our initial article, we found a statistically significant difference in Court support between Democrats (3.90) and Republicans (4.63). For only those participants who participated in both waves, Democrats (3.78) were also less supportive than Republicans (4.51) at wave 1. Interestingly, after ten weeks the differences in institutional support between Democrats (3.99) and Republicans (4.33) reduced. While overall legitimacy did not change significantly over ten weeks, Democrats as a group exhibited a statistically significant increase in institutional loyalty towards the Court (0.21) and Republicans exhibited a statistically significant decrease in support

(-0.18). It appears that whatever polarizing impact the hearings may have had on institutional support initially, partisan differences diminished within a few months after the hearings.

We also observed little variation in how people ranked various nominee attributes over the period of the 10 weeks between our two survey waves. Figure 3, below, plots the average rankings for each of seven nominee attributes. We did this for the entire sample immediately after the Kavanaugh hearings (filled squares), the sample of four hundred participants completing both surveys at wave 1 (filled circles), and the sample of four hundred participants completing both surveys at wave 2 (filled triangles). Vertical lines represent 95 percent confidence intervals. Regardless of the sample or wave, the public consistently preferred legal characteristics over political ones. Interestingly, moral character continued to be the most important characteristic throughout the study.

Figure 3: The average rankings of 7 nominee characteristics. The entire sample (see filled squares and overlapping vertical lines) replicates the results in Figure 3 of our initial article. The filled circles and overlapping lines reflect the average rankings for participants at wave 1 who completed both waves of the survey. The filled triangles and overlapping lines indicate the average rankings for participants at wave 2 who completed both waves of the survey.



Conclusion

Do modern judicial confirmation hearings influence public views of the Court and how the public evaluates nominees? If so, how does the behavior of the nominee during confirmation hearings come into play? Carrington and French provide important insights into these questions, and we find much in common between their article and ours. Both demonstrate that views towards nominees relate to views towards the Supreme Court. We question whether this relationship is causal or merely predictive, and we debate over the substantive magnitude of the relationship, but the relationship remains regardless. We agree that research on the connection between views of individual nominees and views towards the Supreme Court is an “important area of scholarship.”

Both articles also agree that legitimacy was especially low in the aftermath of the Kavanaugh confirmation. Relying on data from a second survey-wave, we show that the low level of legitimacy hardly changed ten weeks after the Senate confirmation vote. The gap between Republicans and Democrats did reduce, however, with Republicans coming down from higher levels of support and Democrats coming up from lower levels of support.

Low levels of legitimacy are concerning; yet they may not present an existential threat to the judiciary. Based on data from our two-wave survey, the public remains persistent in wanting to evaluate nominees based on moral character and legal background rather than political attributes. To the extent that the public supports institutional change, it seems to be because they view the Court as falling short of some legal standard rather than because they want the Court to abandon its judicial role. Future research should consider this more nuanced understanding whenever analyzing changes in support for the Court.

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