

## Submission to Report for HRC 56

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Preserving the autonomy of judicial institutions is a pressing challenge for global democracy. We are scholars of judicial politics who study judicial independence. Here, we report on some of our published and ongoing empirical research to contribute to your forthcoming thematic report on safeguarding judicial independence.

This is an important problem. As the left-hand panel of Figure 1 shows, judicial independence (according to the Varieties of Democracy Project) steadily increased over the four decades that spanned the turn to the new millennium (Coppedge et al. 2023). With the global expansion of judicial power came a stark rise in governments’ attacks on the judiciary, evident in the right-hand panel of Figure 1. As courts have been granted (and learned to wield) the authority to hold ambitious governments to account, they have often found themselves squarely in the crosshairs of the institutions whose actions they were charged to constrain.

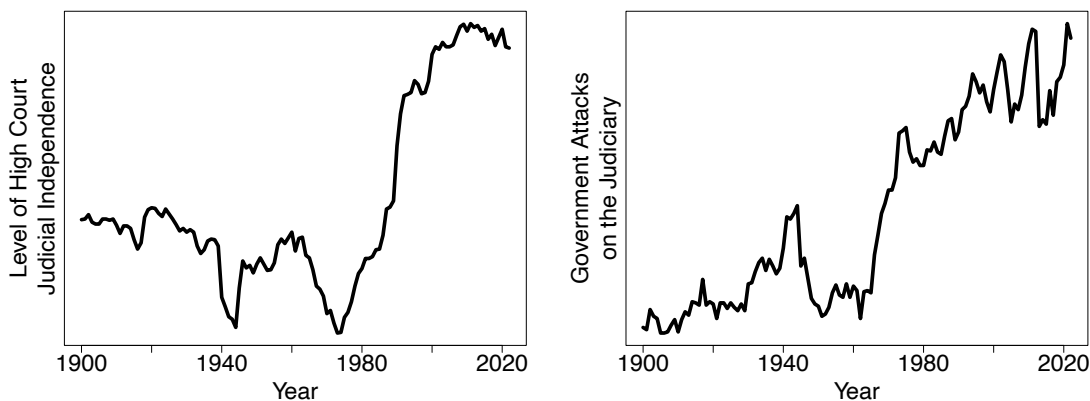


Figure 1: V-Dem data on worldwide levels of high court judicial independence (left-hand panel) and the prevalence of government attacks on the judiciary (right-hand panel) since 1900 (Coppedge et al. 2023). Higher values of the y-axis correspond to more judicial independence (left-hand panel) and more attacks on the judiciary (right-hand panel). The correlation between the two series since 1975 is  $r = 0.79$ .

Many academic theories of judicial independence suggest that the public’s support for courts provides a critical safeguard for judicial independence (e.g., Vanberg 2015). When courts are well-respected by the public, efforts to undermine or politicize them should be met with widespread public hostility and electoral retribution. Our research identifies the individual and institutional conditions under which citizens will defend high courts whose autonomy is threatened by incumbents and examines the costs to incumbents who try to erode judicial independence. Our research is distinguished by its methodological approach and cross-national character: we combine survey experiments fielded in countries throughout North America, South America, and Eastern and Western Europe, observational quantitative analysis, and comparative case study research designs.

We contribute to a nuanced understanding of the challenges facing democratic governance in the contemporary world and the extent to which public knowledge and support for judicial institutions can help to maintain judicial independence or forestall political meddling with the judiciary. Here, we provide three insights of contemporary empirical research

for the forthcoming thematic report and insights geared towards practitioners. The first substantiates an underappreciated way judicial independence is essential to state constraint. The second two underscore how the public’s knowledge and support for judicial institutions can inform and buttress the Special Rapporteur’s effort to bolster judicial independence worldwide.

## **Judicial Independence and the Public’s Support for the Rule of Law Helps to Constrain the State**

Independent judiciaries have long been theorized as key enforcers of property rights that contribute to economic development, protagonists of human rights campaigns, and bulwarks of democracy that can steer precarious systems from the precipice of democratic reversal (North and Weingast 1989; Staton, Reenock and Holsinger 2022) Yet the empirical record of court performance on these questions is mixed at best: not all courts protect property rights (Gibson and Nelson 2021), not all jurists champion human rights (Voeten 2008), and judicial institutions are often targeted by would-be autocrats who seek to capture courts and constitutional authorities (Schepple 2018).

In a book project and associated working paper (Driscoll, Krehbiel and Nelson 2024), we identify the conditions under which courts are able to constrain executive overreach. We fielded more than 40,000 interviews in Germany, the United States, Poland, and Hungary in the first two years of the global pandemic. Our surveys contained experiments that presented respondents with hypothetical but true-to-life examples of judicial responses to countries Covid-19 policies. The pandemic provided a unique inferential opportunity for cross-national research: the pandemic presented salient and common threats to the rule of law in every country around the globe.

We demonstrate that, through the use of judicial review, courts signal to citizens that executives have skirted constitutional norms. In response, citizens withdraw support from those executive actions and the executives themselves. Critically, however, the efficacy of courts is limited: only independent courts are able to shape citizens’ attitudes, and courts are most effective when citizens are strongly committed to the rule of law. Thus, our research provides causally-identified empirical evidence that independent judiciaries can help to safeguard democracy and the rule of law.

### *Implications for Practitioners*

Our research highlights a previously underappreciated mechanism whereby independent judiciaries might constrain the state: beyond the formal separation of power or the decisions they render in courtrooms, our research suggests that decisions by independent courts—and not courts that lack independence—can be an important coordinating force for the public to mount opposition to state malfeasance. Our research also underscores that, along with efforts to formally bolster the formal institutional independence of judicial institutions, cultural considerations are consequential as well: judicial efficacy depends on a public committed to the rule of law. Public education programs that foster awareness, knowledge and trust of judicial institutions may be a critical component of rule of law strengthening programs throughout the developing world.

## Public Support for Judicial Institutions is a Feeble Shield

Conventional wisdom has long posited that if courts garner broad public support, incumbents who dare to attack or disregard them will face prompt electoral consequences (Vanberg 2015). The credible threat of electoral retribution effectively transforms the electoral connection into a symbolic “shield,” protecting an otherwise institutionally vulnerable court. This rationale permeates various prominent theories of comparative judicial independence, compliance, and power (e.g., Gibson, Caldeira and Baird 1998; Helmke 2010; Staton 2010; Krehbiel 2016).

Our article, “The Costs of Court Curbing,” puts this logic to the test and offers a fresh perspective on whether stated institutional commitment influences voters’ assessments of incumbents and their inclination to penalize (or potentially reward) incumbents for undermining the institutional integrity of high courts (Driscoll and Nelson 2023*b*). We examine whether politicians face repercussions for attempting to weaken a pinnacle court, using data from two surveys conducted in the United States. We find limited evidence that institutional fealty in the form of public support for the court manifests in an increased willingness to punish incumbents for proposals of court reform.

In related work, we extend this research beyond the United States, examining the responses of citizens in eight Latin American countries (Argentina, Bolivia, Chile, Costa Rica, Guatemala, Panama, Paraguay, and Venezuela) to attempts to pack the judiciary or to strip constitutional courts of their jurisdiction (Driscoll and Nelson 2022). This research provides additional evidence that the public does not generally approve of incumbent efforts at judicial reform, and attempts to erode judicial independence can sometimes undermine the public’s support for incumbents. Importantly, however, only infrequently are attempts to erode judicial independence consequential for voters’ electoral behavior.

### *Implications for Practitioners*

This finding underscores how the electoral connection alone is a weak mechanism to safeguard judicial independence, even under favorable circumstances: the U.S. Supreme Court, compared to many constitutional courts worldwide, has historically enjoyed widespread public support (Gibson, Caldeira and Baird 1998; Gibson 2007). That domestic electoral consequences of court reform proposals are so small in this environment—a best case scenario for observing these effects—highlights the importance of nonelectoral consequences, including sanctions from international organizations and civil society, for elites who try to weaken judicial independence. Moreover, one should not merely assume that because citizens tend to look fondly upon courts that they will stand up to incumbents who try to weaken judicial power and authority.

## Public Attitudes Toward Judicial Reforms are Sensitive to Framing and Partisan Cues

Elites worldwide propose reforms to courts that have consequences for judicial independence. Our research suggests that the public’s response to these proposals is highly sensitive to the framing elites provide as justifications for these proposals and citizens’ shared partisan ties to the incumbents who propose these reforms (see also Clark and Kastellec 2015; Bartels

and Johnston 2020; Driscoll and Nelson 2023a).

Our article, “Accountability for Court Packing,” examines the public’s evaluation of one type of court reform: court packing (Nelson and Driscoll 2023). In three separate surveys, we conducted experiments that varied the partisanship of the incumbent who sought to pack the courts and the rationale he provided for the proposal, either for benign bureaucratic ends or to change the ideological composition of the courts, inspired by the types of justifications often provided by reform advocates for these changes. We find that the public is more receptive to changes described in neutral, bureaucratic terms, as opposed to those construed as a political ploy to stack the judiciary with like-minded jurists. Yet they are also more supportive of reform efforts advanced by copartisans, independent of the motivation cited for said reform. Moreover, respondents’ preexisting support for the judiciary has only a limited protective effect the face of copartisan efforts to reform the judiciary.

This analysis expands our understanding of court reform processes by elucidating how politicians’ justifications for court reforms influences public reactions to these proposals, and by implication, shape public support for the courts themselves. Reform advocates can mitigate public opposition or garner support by presenting judicial reform proposals as benign and non-political; Indeed, many attempts to undermine democracy and the separation of powers are framed by reformers as efforts to enhance democratic processes and improve efficiency (Levitsky and Ziblatt 2018). Our findings align with recent studies indicating that shared partisanship challenges defending democratic institutions, particularly in highly polarized political environments (Graham and Svobik 2020; Svobik 2020).

### *Implications for Practitioners*

Messaging matters when it comes to the public’s response to attacks on judicial independence. So too does the identity of the messenger—and history and practice—affect how the public receives these proposals. Academics have long suggested that, so long as the public is sufficiently supportive of courts, any attack on judicial independence will result in electoral retribution. Although citizens might initially oppose a court packing proposal and penalize an incumbent for suggesting it, justifications offered by proponents could render citizens unable to identify such proposals and consequently fail to hold incumbents accountable for attempting to erode judicial independence. Because these proposals are often highly technical in nature and may be difficult for many citizens to understand, our research suggests that international organizations and civil society organizations have an important role to play in identifying and publicizing attempts to erode judicial independence, and to explain to citizens in plain terms the consequences of judicial reforms for the integrity of the judiciary and the rule of law.

## **Conclusions**

It is imperative to address contemporary challenges to democracy by safeguarding the autonomy of judicial systems and ensuring their independence from political influence. Our research highlights the importance of judicial independence for promoting and protecting the rule of law. And, against contemporary challenges to judicial independence, our research suggests that the public may—left to its own devices—provide insufficient consequences for

incumbents who seek to bend the judiciary to their will. For these reasons, international organizations, institutions responsible for public education, independent media organizations, and other parts of civil society have an important role to play in sounding the alarm when judicial independence is threatened and helping to ensure there are credible consequences for those who try to erode judicial authority.

### **Authors' Statement on Reproduction of Materials**

We have included as addendum two of the unpublished pieces of research we cite. Because these are still working papers, we ask that they not be made public on the Special Rapporteur's website. You would be welcome to post our report and we would be happy to provide DOI of all publications when they have cleared the peer-review process.

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