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Abstract

Chief Justice John Roberts rightly — albeit in an uncharacteristically direct manner — defended the integrity of the federal judiciary and its members from a direct affront from the president of the United States. Roberts’s defense sent President Donald Trump atwitter in a series of messages that doubled down on his previous ridicule of an “Obama Judge” from the “total disaster” Ninth Circuit Court of Appeals. [*except*]

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OPINION

How to turn down political heat on Supreme Court and federal judges: Stop signing opinions

Scott S. Boddery , Opinion contributor Published 5:00 a.m. ET Dec. 7, 2018 | Updated 9:02 a.m. ET Dec. 7, 2018

Opinions are routinely issued 'by the court' instead of a specific author. More of this would reduce political noise, encourage analysis on the merits.

Chief Justice John Roberts rightly — albeit in an uncharacteristically direct manner — [defended](#) the integrity of the federal judiciary and its members from a direct affront from the president of the United States. Roberts's defense sent President Donald Trump atwitter in a series of messages that doubled down on his previous ridicule of an "[Obama Judge](#)" from the "[total disaster](#)" Ninth Circuit Court of Appeals.

Trump's attack was just the latest from political actors who pass judgment on a legal opinion based on the identity of the authoring jurist's nominating president. Democratic Sen. Sheldon Whitehouse publicly decried "[the Roberts five](#)" during Brett Kavanaugh's initial round of confirmation hearings. These political attacks have a common refrain that accuses a given judge of being an "activist" because he or she authored a decision with which the politician disagrees.

Framing the federal judiciary as a polarized, political battleground has become a rallying cry for politicians looking to garner support from their base voters. But a cursory look at the federal judiciary's undertakings, particularly those of the Supreme Court, reveals a reality that's quite different from the typical narrative that surrounds the court.

A way to protect the court from partisanship

In any given term, a [plurality](#) of cases decided by the high court are done so unanimously, without a single dissenting vote. Over the past decade, less than 20 percent of cases decided each court term follow the infamous 5-4 voting bloc. Justices who are seemingly polar opposite from one another on the ideological spectrum — say, Ruth Bader Ginsburg and Clarence Thomas — [vote together](#) more often than not.

Taken together, these facts in conjunction with the partisan rhetoric being directed toward the court suggest a judiciary that's politicized by outside actors rather than an internally polarized court.

If Roberts is sincere about shielding the federal judiciary from politicization, he should consider a straightforward change to the way the lower courts and the Supreme Court conduct their business: guard the identity of opinion authors from the public.

This tactic isn't as radical as it might seem: The Supreme Court routinely issues opinions "by the court," rather than from an identified opinion writer. These legal decisions are known as [per curiam](#) opinions. This strategy is far from novel: [Germany's Federal Constitutional Court](#) and the [European Court of Justice](#) abide by a norm of releasing unsigned opinions to the public.

Court observers have long understood that a given legal opinion is not the sole prerogative of its author but rather represents a collective bargain among the court members in the majority bloc. To laud or ridicule a legal opinion based on which justice authored the opinion overlooks important dynamics attendant to the court's functioning, as well as the reality that atypical voting blocs abound during every court term.

Indeed, social science research supports the notion that individuals [augment their agreement](#) with a court opinion based on the identity of the opinion author rather than the opinion's content itself, and a forthcoming study goes one step further to show that per curiam opinions garner [more agreement](#) than opinions attributed to individual justices.

Unsigned opinions garner more agreement

Beyond increasing agreement with a given decision, per curiam opinions have the crucial benefit of removing the political signals that accompany an authoring justice's name. Outside observers would have no way of knowing whether an "Obama Judge" or a "Bush Judge" or a "Trump Judge" wrote a given per curiam opinion. Removing the identity of the majority, concurring and dissenting opinions reduces the opinions to the strength of their legal reasoning and avoids running the risk of having an opinion's content overshadowed by the author's identity.

Issuing per curiam majority opinions and unsigned dissents can pay dividends toward protecting the judiciary from the hyper-partisan rhetoric that has become part and parcel in present day discussions of the Supreme Court and lower courts. Of course, this custom wouldn't stop intimate court observers from debating the likely identity of an opinion's author, but it would remove the readily available political fodder media outlets currently use when they announce court decisions to the public.

As the weakest branch of the U.S. government, the judiciary has relied on public support to survive since its founding, and it may be necessary for it to be proactive to endure beyond these polarized times.

[Scott S. Boddery](#) is an assistant professor of political science and public law at Gettysburg College and an expert in judicial behavior, legal decision making, and court legitimacy.

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