# The Puzzle of Purges:

## Presidential Instability and Judicial Manipulation in Latin America[*]

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Abstract

This paper develops a new strategic theory of judicial manipulation. In contrast to standard insulation accounts, I argue that uncertainty about remaining in power leads politicians to violate judicial independence, not shore it up. Following this survivalist logic, the paper proposes and tests three hypotheses using a novel dataset on judicial crises across eighteen Latin American countries between 1985 and 2008. I show that variation in judicial crises is systematically related to the president's risk of instability as captured by presidential powers, timing within the presidential term, and the history of past presidential instability. The conclusion explores the broader implications of my argument for institutional instability and democratic backsliding.

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> *With his poll numbers plummeting, many Venezuelans are wondering whether Maduro will keep his job and what tricks he'll need to pull to do so. One thing is clear: Whatever he does, the country's Supreme Court will be there to rubber-stamp it.*[1]

Imagine a leader who wants to mitigate the risks of losing power. Under standard theories of democracy, such leaders should work hard to please their citizens by delivering on their campaign promises, encouraging economic prosperity, providing basic security, and the like. And, to the extent that citizens value democratic institutions and the rule of law, a leader who wishes to remain in power should respect the limits that institutions, such as independent courts, place on their power. This is one version of how liberal democracies become self-enforcing (Weingast 1997).

Yet, we can also imagine a leader who wants to remain in office, but chooses a very different path. This leader may also be fairly elected, but then clings to power by undermining other liberal democratic institutions (Levitsky and Ziblatt 2018). When it comes to the courts, this leader appreciates the value of friendly judges willing to rubberstamp policies that violate the constitution. But, more importantly, she also comes to rely on the court both to exercise forbearance for transgressions committed by the president's supporters, while also deploying the full extent of the law's power to harass the president's opponents (Corrales 2015). The larger the threat of losing office looms, and the more a leader believes the court can help ameliorate that risk, the more attractive capturing and weaponizing the court becomes. Under this scenario, it is the fear of political instability that fundamentally drives judicial instability.

The idea that strongmen (or would-be strongmen) beget weak courts is well-known. Writing about Latin America, Guillermo O'Donnell coined the term "delegative democracy" to characterize popularly-elected presidents who refuse to countenance checks on their power. Yet although O'Donnell certainly

[1] Vox. "How Venezuela's supreme court triggered one of the biggest political crises in the country's history." May 1, 2017.

notes the quixotic nature of presidential power, he does not tie the visissitudes of power to the president's desire to control the courts. Nor does the more general insulation theory of judicial independence recognize this sort of dynamic. Indeed, according to this familiar logic, it is precisely when presidents are losing power that they should be most inclined to imbue courts with independence (Ramseyer and Rosenbluth 1993; Ramseyer 1994; Ramseyer and Rasmusen 1997; Ginsburg 2002; Finkel 2008).

Turning the insulation logic on its head, this paper explores how politicians' uncertainty about their future is precisely what motivates judicial manipulation. The key idea hinges on the recognition that in contemporary democracies politicians' fate is partly endogenous to who controls the courts. Thus, if capturing the court can help to extend the incumbent's political lifespan, then the calculus shifts from one in which an insecure incumbent promotes judicial independence as a means of limiting the next government, to one in which the incumbent instead subjugates the current court in order shore up her own government.

Consider some of the most egregious examples from contemporary Latin America. In 1991, Peruvian President Alberto Fujimori staved off a looming corruption inquiry into the first lady's inner circle and neutralized threats by the legislative opposition to remove him under the "moral incapacity" clause of the constitution by carrying out an autogolpe that closed both the legislature and the Supreme Court. Six year later, judges who dared to rule against Fujimori's third re-election bid were duly impeached and the Constitutional Tribunal was rendered inquorate.

Now, more than twenty-five years later, Venezuela's embattled president, Nicolás Maduro, is carrying out a slightly different version from the same playbook. Shortly before the new opposition legislature was seated last year, Maduro packed an already loyal court with 13 new members. After striking down multiple pieces of opposition legislation, the Court then launched its own coup by dissolving the opposition-led National Assembly and temporarily seizing the legislature's powers. In the midst of

mass protests and international outcry, Maduro forced the Court to recant; subsequently, the Court has banned the opposition from the upcoming presidential elections and continued to jail political opponents and business executives in oil and banking.[2]

Elsewhere, and often under the double-speak of "protecting" human rights, loyal judges in countries such as Nicaragua, Honduras and Bolivia have shredded constitutional terms limits enabling incumbent presidents to remain in power, while also green-lighting investigations of the political opposition. Meanwhile, in Ecuador, judges have been repeatedly drawn into executive-legislative battles over the president's fate. Under President Guitierrez, for instance, the president blatantly used the Supreme Court as a bargaining chip to cling to power. Facing a series of mounting criminal charges in 2004, Guitierrez replaced all 31 judges on the Supreme Court as part of a quid pro quo deal whereby the new court would drop existing charges against the PRE's leader, former President Abdala Bucaram, in exchange for the PRE blocking attempts to impeach Guitierrez. In this case, however, the plan backfired spectacularly and Guitierrez was swiftly removed from power. The remainder of this paper lays out this "kill or be killed" logic of judicial manipulation and offers original systematic evidence consistent with this novel approach.

**Manipulating to Survive: A New Theoretical Framework of Judicial Purges**

Latin American politicians are among the most insecure in the world. During the second half of the 20th century, the region experienced more regime changes than any other, with Argentina holding the record at fully eight regime transitions between 1950 and 1990. Since the third wave of democracy swept the region, the pattern of political instability has persisted – albeit in different form. Since the mid-1980s, more than twenty elected Latin American leaders have been forced out of office early. The list ranges from Bolivia's Hernán Siles Zuazo and Argentina's Raúl Alfonsín, who found their mandates cut short in the midst of major economic crises during the 1980s, to the seemingly textbook impeachments

[2] Reuters. "Venezuela Says Taking Over Banesco for 90 Days, Arrests 11 Top Bank Executives." May 3, 2018.

carried out against Presidents Fernando Collor de Melo in Brazil and Carlos Andrés Pérez in Venezuela during the 1990s, to the more recent and controversial ousters of other democratically-elected leaders such as Gonzalo Sánchez de Lozada in Bolivia in 2003, Lucio Gutiérrez in Ecuador in 2005, Manuel Zelaya in Honduras in 2009, Fernando Lugo in Paraguay in 2012, Dilma Rousseff in Brazil in 2016, and Pedro Pablo Kuczynski in Peru in 2018. As we shall see in the following section, scores of other contemporary Latin American presidents have also been threatened with early removal, yet have narrowly clung to power.

Struck by this new combination of governmental instability and regime stability, a growing number of scholars have sought to explain the onset of presidential crises in the absence of traditional military coups (e.g. Valenzuela 2004; Hochstetler 2006; Pérez-Liñán 2007). Building on this literature, Helmke (2017) adapts a series of bargaining models due to Powell (1999) that show theoretically and empirically that the risk of presidential instability is heightened whenever a president's formal constitutional powers outstrip her partisan powers. In contexts where the gap between these two types of powers is wide, this work concludes that it is more likely that the legislative opposition will become dissatisfied and that executive-legislative bargaining will break down. The task of this paper is to begin to draw out the implications of this new theory of presidential instability for understanding judicial instability.

Here, I begin with the basic observation that in separation-of-powers systems the judiciary matters because of its capacity to influence the nature of executive-legislative bargaining around presidential removal. Of course, in any concrete situation, the court's role will be bounded. Depending on its jurisdiction, courts can only hear certain types of cases. Overturning precedent is certainly possible, but may be costly. Legislatures can always pass new laws that get around judicial decisions. That said, as long as courts have the capacity to marginally shift the relevant parameters within the executive-

legislative bargaining framework, then the president potentially faces incentives to control it.

First, and perhaps most obviously, courts can help shift the formal distribution of policy-making power between the executive and legislative branches. Examples abound of courts that are friendly to the president issuing decisions expanding presidential power, as well as courts that are loyal to the opposition contracting it. For instance, in Argentina during the 1990s the recently stacked judiciary allowed the executive to issue bonds to stem the financial crisis, thus expanding Carlos Menem's decree power. A decade later, with the previous administration's court still largely intact, the judges essentially reversed themselves in *Smith*, when they struck down President Duhalde's bid to freeze savings accounts during the 2001 economic meltdown (Helmke 2005: 147-148). Likewise, in Peru prior to the autogolpe, the opposition-dominated judiciary repeatedly struck down Fujimori's economic and security policies (Kenny 2004). By contrast, following the self-coup, few of Fujimori's newly appointed judges dared to challenge the government's expansive use of presidential powers, and those that did were swiftly punished.[3]

Observing that presidents value judges who expand their policy-making power also lies at the core of the familiar delegative democracy arguments. Yet, notice that if the main implication of the foregoing executive-legislative bargaining model is correct, then expanding the president's policy-making power also simultaneously increases the risk to that president; judicial manipulation in order to expand the president's constitutional powers becomes a double-edged sword. Thus, from the standpoint of the president seeking to cling to office, controlling the courts must also revolve around affecting the probability of the opposition's success in ousting the president.

[3] Most notably, in 1997 the Constitutional Tribunal refused to allow Fujimori to run for a third term and three of the judges were subsequently impeached. With a fourth judge resigning in protest, the court was left inquorate, and Fujimori ran and won.

The extent to which courts perform (or fail to perform) this basic shield and dagger role comes across in numerous ways throughout contemporary Latin American history. For instance, in countries with single chamber legislatures where high courts are called upon to serve as the second chamber in any formal impeachment process, the court directly affects whether presidents are ultimately removed from office. In Venezuela, the Supreme Court was instrumental during the impeachment process that removed Carlos Andres Pérez from office in 1992. In Brazil, the Court served the same function in Collor de Mello's impeachment. Most recently, the Guatemalan Supreme Court sanctioned the process for removing Otto Pérez Molina's immunity to stand trial on corruption charges, which ultimately led to the resignation of the president.[4]

Beyond its role as a prosecutorial body, the judiciary can also affect the legislature's probability of successfully removing the executive in more subtle ways. Consider Evo Morales' judicial strategy in Bolivia. Following one of the most surprising presidential elections in Bolivian history, the former cocalero leader swept to power in December 2005, winning the first round with 53.7% of the vote and claiming the majority of seats in Congress. Although Morales went on to garner the largest vote share in recent Bolivian history, in the next few years Morales would go on to face numerous referenda challenging his hold over breakaway regions, as well as his hold on the presidency itself.[5] Midway through his first year in power, the Defense Minister threatened protesters in the antigovernment regions with court action for engaging in "secessionist discourse."[6] After that, courts were asked to adjudicate everything from monetary claims stemming from government's decision to nationalize the gas and oil industry, to corruption charges against

[4] *The Guardian* 9/1/2015
[5] To give just one example in September 2007, the governor of Cochabamba, Manfredo Reyes Villa called for Morales to resign for his incompetence and for leading the country to the brink of civil war. See *Latin American Weekly Reports* 9/6/2007.
[6] *LAWR* 9/12/2006

opposition politicians, including the former president (Carey 2009), to the legality of Morales' recall referendum.

Not surprisingly, Morales quickly realized that he needed to take control over the courts to help thwart challenges both to his policies and to his grip on office. As Castagnola and Peréz-Liñán (2011) describe, almost immediately after Morales took office, justices on both the Supreme Court and the Constitutional Tribunal were pressured to tender their resignations.[7] Criticizing the court's former composition as "tantamount to an a priori sentence against indigenous people,"[8] Morales unilaterally used his decree powers to fill the new vacancies on the bench rather than employ the standard method of selection (via a joint session of both houses of congress). By March 2008, there was only a single judge, Silvia Salame Farjat, left on the tribunal.[9] Meanwhile, the government also initiated several impeachment proceedings against remaining Supreme Court members for allegedly protecting opposition. By purging the opposition's judiciary, Morales ultimately succeeded in foreclosing one of the opposition's most important tools for challenging his efforts to control the Constituent Assembly. As Lehoucq (2008) notes, the constitutional

[7] Part of this early wave of resignations arose, no doubt, from the skirmishes between the executive and the judiciary over the latter's alleged failure to punish corruption associated with past administrations (*LAWR* 4/25/2006). Most notably, Morales lambasted the Supreme Court for failing to process cases dealing with the previous interim administration's controversial decision to hand over surface-to-air missiles (SAMs) to the United States for destruction. According to one report, Morales explicitly threatened the judiciary stating that, "If the judges did not prove to the people that they were devoted to doing 'justice and not simply trying to protect the corrupt' then by the time the constituent assembly is called, they may find themselves out of jobs" (*LAWR* 4/25/2006). In Bolivia the Constitutional Tribunal was undone, in part, by its opposition to Morales' decision to appoint new Supreme Court justices by decree. One month after the TC's rather bold decision curtailing the president's decree, the government brought charges against four of the five justices for perverting the course of justice." (*LAWR* 5/24/2007)

[8] *LAWR* 5/24/2007.

[9] Although Justice Farjat could only issue non-binding decrees, over the next two years she used her post to challenge the government, ruling, for instance, in July 2008 that the recall referendum against Morales and the opposition governors was illegal (Castagnola and Pérez-Liñán, 2011: 30). A little less than a year later, she finally stepped down.

reform process triggered enormous opposition and surely would have prompted litigation by the opposition had the Constitutional Tribunal still been operative.

Or, consider the tactics employed during Lucio Gutiérrez's short-lived administration in Ecuador (2003-5). With Gutiérrez's own Patriotic Society Party (PSP) party holding just six of the one hundred congressional seats, the president blatantly used the judiciary as a bargaining chip with its allies (Mejía Acosta and Polga-Hecimovich, 2010). By early 2004, Gutiérrez faced a mounting series of criminal charges ranging from covering up corruption within the administration to accepting campaign contributions for his party from drug traffickers and foreign parties.[10] As demands for the president's impeachment grew and his relationship with his then-current coalition partner, the Social Christian Party (PSC), became increasingly strained, Gutiérrez began a series of negotiations with the PRE and the PRIAN to fundamentally restructure the nation's high courts.

Starting with a new round of appointments at the Constitutional Tribunal and the Supreme Electoral Tribunal in November 2004, which clearly targeted PSC judges, Gutiérrez promised that the newly designated judges were only temporary replacements until a referendum to fully "depoliticize" the judiciary could be held.[11] A little less than a month later, however, the administration again went after the Supreme Court, replacing all 31 justices in one fell swoop. Despite the government's claim that the tenure of the Supreme Court justices had simply run out at the end of January 2003, news leaked that the government had cut a quid pro quo deal with the PRE in which the new court would drop charges pending against exiled president Bucaram in exchange for the PRE's efforts to block impeachment charges against Gutiérrez.[12] The new so-called "Pinchi Corte," which was named after the nickname of one of Bucaram's closest childhood

[10] *LAWR* 4/20/2004
[11] *LAWR* 11/30/2004
[12] *LAWR* 12/14/2004

friends, the new Chief Justice Guillermo Castro, quickly seemed to validate critics' concerns: the Court's very first decision was to withdraw the arrest warrants against Bucaram and allow his return to Ecuador, thereby salvaging—albeit temporarily—Gutiérrez's bid to retain power.

Stepping back from these examples, here I propose three testable hypotheses that begin to connect systematically the threat of presidential instability and the desire to mitigate it with judicial instability. Starting with the formal institutional context, the first extension of the executive-legislative bargaining theory is also the most counter-intuitive. That is, if the most constitutionally powerful presidents are also the most at risk (per Helmke 2017; 2018), then they should also be the most prone to launch offensive attacks against the judiciary. Conversely, if the risk of removal plays no role in the president's motivation and she is instead manipulating the courts solely in order to expand her policy-making powers, as proponents of delegative democracy would have it, then we should see just the opposite prediction: To the extent that constitutionally weaker presidents would benefit marginally more from friendly courts than constitutionally stronger presidents, then we should see presidential attacks on the judiciary decreasing in formal presidential powers.

Extrapolating from Helmke's executive-legislative model about the effects of the partisan composition of the legislature for the likelihood of judicial manipulation is less straightforward. On the one hand, if minority presidents are more likely than majority presidents to face a threat of removal, they should have the greatest incentive to also target the courts. On the other hand, given that minority presidents will tend to have a much tougher time succeeding in remaking the courts, it may be that there are two countervailing effects of the president's partisan status. That is, if incentives and ability essentially cancel each other out with respect to the executive's ability to target the courts, then we would not necessarily expect an interaction between the president's partisan status and the scope of her constitutional powers.

Rather, the likelihood of a judicial manipulation should increase as the president's constitutional powers grow, regardless of whether the president is in the minority.

Beyond exploring how the core institutional parameters of the executive-legislative model affect judicial instability, we can posit two addition hypotheses that are consistent with the overarching logic of manipulation as a survival strategy, but inconsistent with the insulation logic. First, although we can never get inside a politicians' head, numerous anecdotal examples suggest that a president's perception of risk is heavily influenced by their predecessors' fates (Helmke 2017). If this is correct and presidents can partly draw inferences about their security from previous administrations, then we should see a positive association between presidential instability at time *T* and judicial instability at time *T+1*. Conversly, if politicians instead seek to mitigate their uncertainty by respecting judicial independence, then there should either be no relationship between manipulation and past removal or the relationship should be negative. Finally, and in a similar vein, the survivalist logic suggests that these sorts of judicial "reforms" should take place early in a president's term, as opposed to at the end of the term. To the extent that presidents are trying proactively deter bids to oust them from power and maximize the stream of benefits that loyal courts provide, the likelihood of judicial manipulation thus decreases with the amount of time the administration has been in power.

**Patterns of Institutional Instability**

Before turning to examine these hypotheses, let me start with some basic patterns gleaned from the *Inter-Branch Crisis in Latin American Dataset.* The dataset spans 18 Latin American countries (Argentina, Bolivia, Brazil, Chile, Colombia, Costa Rica, Dominican Republic, Ecuador, El Salvador, Guatemala, Honduras, Mexico, Nicaragua, Panama, Paraguay, Peru, Uruguay, Venezuela) over a period of 24 years (1985- 2008), and includes information about institutional crises across all three main branches of the government. To capture these sorts of high stakes events systematically, I employ the following selection

rules:

- Conflicts must involve at least two of the three main branches of the government (executive, legislative, high courts).
- The survival or majority composition of the targeted branch must be at stake.
- Crises can include both successful and unsuccessful attacks/threats that meet the above criteria.
- Sustained attempts to remove multiple members of the targeted branch are coded as a single crisis.
- Attempts to alter the composition of a multi-member branch must affect multiple members.
- Countries enter the dataset when they become democracies.

The first two rules specify which actors and actions matter. Because I am ultimately interested in explaining the emergence of inter-branch crises, not their particular resolution, the third rule clarifies that inter-branch crises are determined by institutional actors' threats and actions, not by any particular outcome. Thus, I include all attempts by one branch to remove another that fail as well as those that succeed. The fourth, fifth, and sixth rules clarify how individual crises are counted and when administrations enter the dataset. Although certainly other selection rules could reasonably be developed, here my goal is to devise and implement consistently a protocol that transforms what are often highly complex episodes into discrete observations.

To construct the *ICLA* dataset, I began by drawing on the *Latin American Weekly Reports* (multiple years), a news publication that offers weekly coverage of political events across the region. Using the selection rules described above, a team of research assistants from the University of Rochester and I read through each and every Latin American Weekly Report published between 1985 and 2008 to identify all presidential, legislative, and judicial crises. To transform these qualitative accounts into quantitative data, I then grouped all articles related to each crisis and created individual case histories containing a variety of information, such as which administration was in power, the start date of the crisis, which branch initiated the conflict and which branch was targeted, the specific type of threat involved, and the outcome of the

crisis. My coding for each crisis was then checked using a variety of other primary country- specific sources, including Spanish language national newspapers, interviews with political actors and country experts, as well as numerous relevant secondary sources.

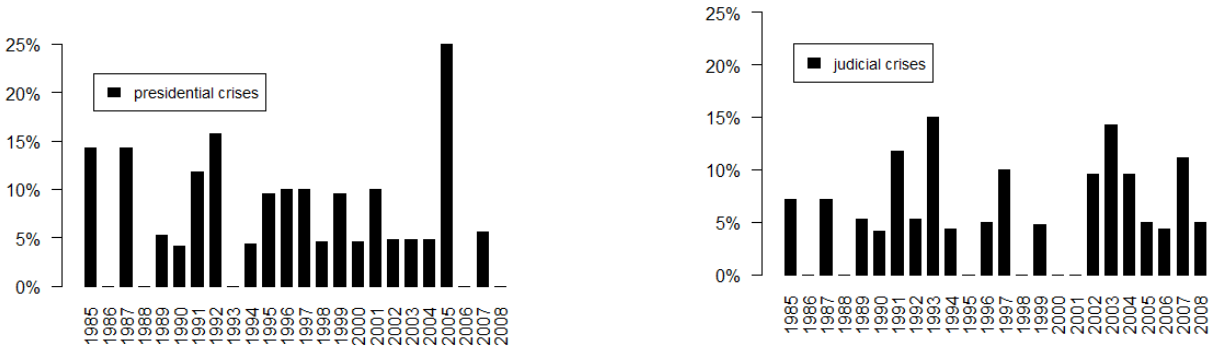
The total number of observations in the dataset is 1,888. The unit of analysis is the ordered inter-branch dyad for each administration-year. Because my aim is to explain why judicial crises emerge or not, the dataset also contains all "non-cases" for each unit of analysis in which an inter-branch crisis did not occur. Between 1985 and 2008, there were a total of 34 presidential crises and 27 judicial crises for 472 administration-years.[13]

In keeping with scholars' skepticism that Latin America's democracies have consolidated over time, we see that the incidence of institutional instability has not markedly declined over the last two and half decades. Consider presidential crises. Notwithstanding the spike in 2005, the five-year average rate has been relatively steady over the last twenty five years, ranging from about 7% in the late 1980s and early 1990s, up to approximately 9% during the late 1990s, down to 6% in the first five years of the new millennium, and around 8% in the period between 2005-2008 (See Figure 1(a)).[14] There has been somewhat more temporal variation among judicial crises, but, again no evidence of consolidation. Presidential attacks on courts have varied between 4% in the late 1980s, jumping to 8% in the early 1990s, returning to 4% in the late 1990s, and rising to 6% after 2000. (See Figure 1(b)).[15]

[13] For presidential crises, this includes the fifteen episodes from 1985 to 2008 in which presidents were successfully removed from office early, as well as nineteen instances in which presidents faced a threat of removal, but managed to remain in office. Among judicial crises, twenty attacks were successful and seven were not.

[14] There were 5 attacks out of 79 administration-years between 1985 and 1989, 7 attacks out of 103 administration-years between 1990 and 1994, 9 attacks out of 104 administration-years between 1995 and 1999, 6 attacks out of 105 administration-years between 2000 and 2004, and 6 attacks out 81 administration-years between 2005 and 2008.

[15] There were 3 attacks out of 79 administration-years between 1985 and 1989, 8 attacks out of 103 administration-years between 1990 and 1994, 4 attacks out of 104 administration-years between 1995 and 1999, and 12 attacks out of 186 administration-years between 2000 and 2008.



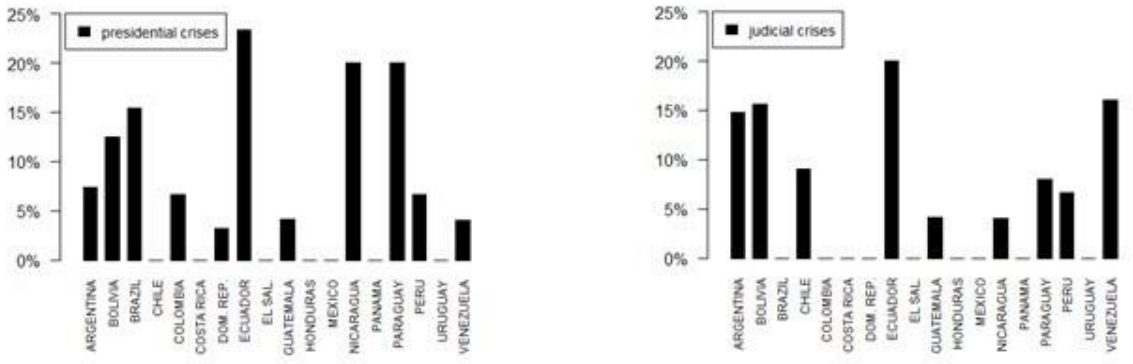

**Figures 1a and 1b: Presidential and Judicial Crises by Year**

If institutional crises have been spread out relatively evenly over the last three decades, cross-sectional comparisons reveal far more systematic variation. Although few countries in the region have entirely escaped institutional instability, Figures 2(a) and 2(b) demonstrate that the distribution of inter-branch crises across the region has been quite uneven. Using the administration-year ordered dyad as the baseline, Ecuador stands out as a kind of regional basket case with presidential and judicial crises occurring more than 20% of the time (7 presidential crises and 6 judicial crises out of 30 administration-years respectively). Presidential crises have occurred over 10% of the time in Bolivia, Brazil, Nicaragua, and Paraguay, less than 10% of the time in Argentina, Colombia, Dominican Republic, Guatemala, Peru, and Venezuela; whereas Chile, Costa Rica, El Salvador, Honduras, Mexico and Uruguay have had none at all.[16]

Meanwhile, Argentina, Bolivia and Venezuela have suffered the most judicial crises (more than

[16] Although a handful of the more troubled Central American democracies (e.g. Honduras, El Salvador, and Guatemala) are not among the high scorers, the overall picture of inter-branch strife thus generally mirrors the scholarly consensus about variation in the quality of democracy across the region. Of course, given that the more egregious instances of institutional instability are often factored in to such rankings, it would only be surprising if quality was not at least loosely associated with crises.

10% of the time). Crises have occurred more than 5% of the time in Chile, Paraguay and Peru, and only slight less frequently in Guatemala and Nicaragua.




**Figures 2a and 2b: Presidential and Judicial Crises by Country**

Figures 2(a) and 2(b) further suggest that presidential crises and judicial crises tend to go hand in hand. This is certainly the case in countries that have suffered multiple crises, such as Argentina, Bolivia, Ecuador, Guatemala, Nicaragua, Paraguay, Peru, and Venezuela. Figure 3, which plots the total number of judicial crises instigated by presidents on the total number of presidential crises, likewise shows a clear positive relationship. Moving from the country-level to the administration-level, basic bivariate statistical analysis reveals that the odds of a president who does not suffer a crisis attacking the judiciary are around 12%, while the odds that a president who does suffer a crisis will target their court rises to 39%

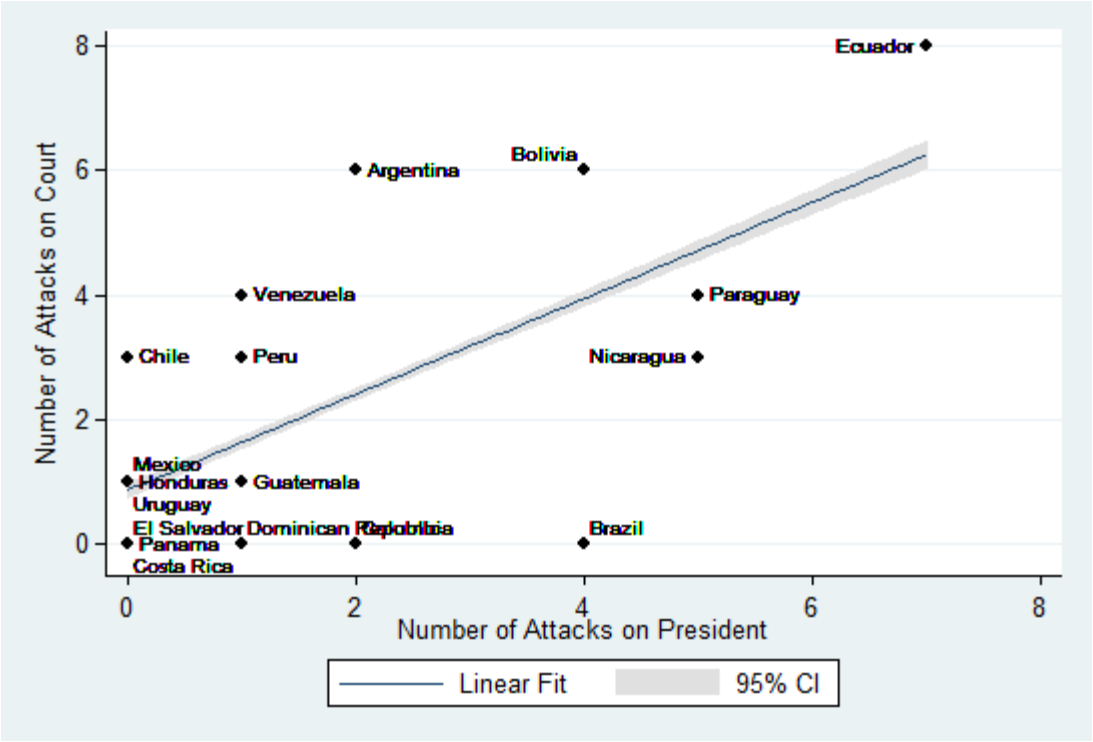



**Figure 3: Bivariate Relationship between Presidential and Judicial Crises**

Yet, there are several reasons not to make too much of the correlation between the number of presidential crises and judicial crises. As Figure 3 and Table 1 (see below) show, there are still plenty of cases in which one type of attack occurs without the other.

| | **Judicial Crisis** | **No Judicial Crisis** |
|---|---|---|
| **Presidential Crisis** | **Alfonsín** 1987/**1989**[a]<br>Bolaños 2004/2004;2005<br>**Bucaram 1996**/**1997**<br>**Cordero 1985**/1987<br>**Duarte 2003**/2005<br>Durán-Ballén 1994/1995<br>**Fujimori 1991**/1991<br>**Gutiérrez 2004;2005**/**2005**<br>Paz Zamora 1990/1991<br>**Pérez 1992**/**1992**<br>**Serrano 1993**/**1993**<br>**Wasmosy 1993**/1996 | Alemán 1997<br>**Balaguer 1994**<br>Betancur 1985<br>Borja 1990;1992<br>Cardoso 1999<br>Chamorro 1995<br>**Collor 1992**<br>**Cubas 1998**<br>**de la Rúa 2001**<br>**Fujimori 2000**<br>González 2001;2002<br>Lula 2005<br>**Mahuad 1999**<br>**Mesa 2005**<br>Ortega 2007<br>Samper 1996<br>**Sánchez de Lozada 2003**<br>**Sarney 1987**<br>**Siles 1985** |
| **No Presidential Crisis** | Aylwin 1991<br>**Chávez 1999**<br>**Chávez** 2002; **2003**<br>**Correa 2007**<br>Duhalde 2002<br>**Frei 1997**<br>**Fujimori 1997**<br>**Menem 1989**<br>**Morales 2006;2007;2008**<br>**N Kirchner 2003**<br>**Sánchez de Lozada 1993** | |

**Table 1: Presidential Crises and Judicial Crises**

In the upper-right hand corner, there are fully 21 cases in which a president suffered a crisis, but did not go after his court. Here, it could well be that the courts were largely already under the president's control—in the Dominican Republic president Balaguer had been in power for twelve years prior to his fall, and remaking the court would have done nothing to save him. A similar explanation likely applies to Fujimori in 2000. Or, it could be that the president did clash with the court, but lacked either the time or capacity to launch a full scale attack—Raúl Cubas's row with the Paraguayan Supreme Court over its decision to block Oviedo's release from prison comes to mind. Conversely, in the lower-left hand corner, there are 10 cases in which presidents attacked their courts, but were not themselves attacked. Such cases, of course, may turn out to be entirely consistent with the survivalist logic outlined above, as these judicial attacks may have helped to avert a presidential crisis.

**Estimating the Effects of Presidential Risk on Judicial Crises**

Like most concepts in social science, risk is not directly observable. Here, drawing on Helmke (2017), I operationalize the presidential threat environment using multiple proxy measures. To capture presidential power, I draw on Aleman and Tsebelis's measures (2005), which update Shugart and Carey (1992), and yield some of the most comprehensive available cross-national measures of the president's formal constitution powers. The variable ranges from a low score of 18 for Mexico, a country widely considered to have one of the weakest constitutional presidencies (cf. Weldon 1997), to a high score of 33 for Ecuador, a country commonly viewed as having one of the strongest constitutional presidencies in Latin America (cf. Mainwaring and Shugart 1997). Here, I employ a dummy variable, *Minority President*, which indicates whether or not the president's party lacks the majority of seats in the lower

chamber of Congress.[17] In fully 61% of all observations, presidents were in the minority (See Table 2 for the means and ranges for all variables). The interaction term, *Minority* × *Power*, takes on the value of the president's formal constitutional powers for minority presidents and zero otherwise.

The third independent variable seeks to capture the president's beliefs about the probability of a presidential crisis. *Past Removals* thus builds on the supposition that individuals may not simply form assessments based on objective laws of probability. Rather, following behavioral economics, individuals are often subject to severe biases (Rabin 1998). Kahneman, Slovic and Tversky (1982) posit a "law of small numbers," such that individuals tend to over-infer probabilities from short sequences of events (cited in Rabin 1998). If this is true, then past attacks against previous leaders in a given country should influence a current leader's assessment of being attacked. Here, *Past Removals* is a basic count variable that records the number of times that previous presidents in a given country have been threatened with removal, or removed early from office for each administration. The variable ranges from 0 to 7, with a mean of 0.99. Finally, to capture the effect of timing on the likelihood of a judicial crisis, I construct the variable *Term*. This variable is calculated using the current year for each

[17] Using a dichotomous variable allows me to capture the fact that the threat to the president is largely discontinuous. In other words, under most institutional rules, the difference between a president who has 49% of the seats and one that has 51% is far greater than the difference between a president who controls 20% versus 25% of the seats. To calculate the president's minority status in the lower house, I gathered electoral data for each administration country year from the following sources: The 2006 Database of Political Institutions World Bank dataset, Georgetown University's Center for Latin American Studies' Political Database of the Americas (PDBA), Binghamton University's Center on Democratic Performance's Election Results Archive (ERA), Psephos Election Archive, and various Wikipedia country-election pages. Data from McDonald and Ruhl (1989) were used to fill in missing information for the following administrations: Ortega (Nicaragua, first administration); Sanguinetti (Uruguay); Cordova (Honduras); and Siles Zuazo (Bolivia).

observation minus the year that the administration started. I then add a 1 to all observations so that the first year of an administration equals one. This variable ranges between 1 and 7 with a mean of 3.05.

| Variable | # of Observations | Mean | Range |
|---|---|---|---|
| *Judicial Crisis* | 472 | 0.06 | 0 - 1 |
| *Minority President* | 472 | 0.61 | 0 - 1 |
| *Power* | 472 | 24.9 | 18 - 33 |
| *Term* | 472 | 3.05 | 1 - 7 |
| *Past Removals* | 472 | 0.99 | 0 - 7 |

**Table 2: Descriptive Statistics**

To begin to examine the multiple testable implications that come from extending the bargaining framework to courts, the remainder of this section presents the results from a series of rare events logit models. Here, the dependent variable, *Judicial Crises*, takes on a value of "1" for all observations in which the executive threatens to alter or alters the composition of the high court(s) either through impeachment, forced resignation, dissolution, or court packing, and "0" otherwise.

I start with the baseline interactive model used to predict the likelihood of a legislative attack on the president, which includes measures for the president's constitutional powers, partisan powers, their interaction (Helmke 2017). To capture the idea that protests also increase the likelihood of presidential instability (Hochstetler 2006; Kim and Bahry 2008; Álvarez and

Marsteintredet 2010), I also include the variable *Protest*.[18] Following the logic elaborated in the previous section, here I expect that increasing the president's *de jure* powers should also increase the likelihood of a judicial crisis, but that the president's *de facto* powers should have no independent or conditional effect. This reasoning stems from the observation that in the case of judicial purges, the president's incentives to target the courts and her ability to do so cut in opposite directions with respect to minority status. Notice how this prediction also departs from the conventional wisdom associated with the delegative democracy account in which presidents pack courts merely in order to expand their own policy-making powers; were this the case, we would expect judicial crises to decrease in presidential powers.

The results contained in model 1 and graphed in Figure 4 tend to support the first hypothesis.[19] Although the fact that only the constituent coefficient for *Power* is significant suggests that the effect is limited to majority governments, the graph shows that substantively, the probability of judicial crises increases from less than 1% among the weakest presidents to roughly 20% among the strongest, regardless of whether the president is in the minority or majority.[20]

[18] Protest documents the number of anti-governmental demonstrations for each country per year (Banks 2005)

[19] This relationship holds across multiple measures of both formal presidential powers and minority government (see Helmke, 2017).

[20] The graph is generated without including Protest in this statistical model. Note that the results do not change in any meaningful way if we include the variable.

| | *Model 1* | *Model 2* | *Model 3* |
|---|---|---|---|
| *Minority President* | 0.55<br>(1.13) | | |
| *Presidential Power* | 0.22**<br>(0.09) | | |
| *Minority* Power* | -0.05<br>(0.10) | | |
| *Protest* | 0.22***<br>(0.07) | | |
| *Past Removals* | | 0.33***<br>(0.06) | |
| *Term Year* | | | -0.42***<br>(0.14) |
| *Constant* | -4.90***<br>(1.08) | -3.22***<br>(0.34) | -1.66***<br>(0.48) |
| *No. of Observations* | 454 | 474 | 474 |

**Table 3: Judicial Crises and Risk of Presidential Removal**

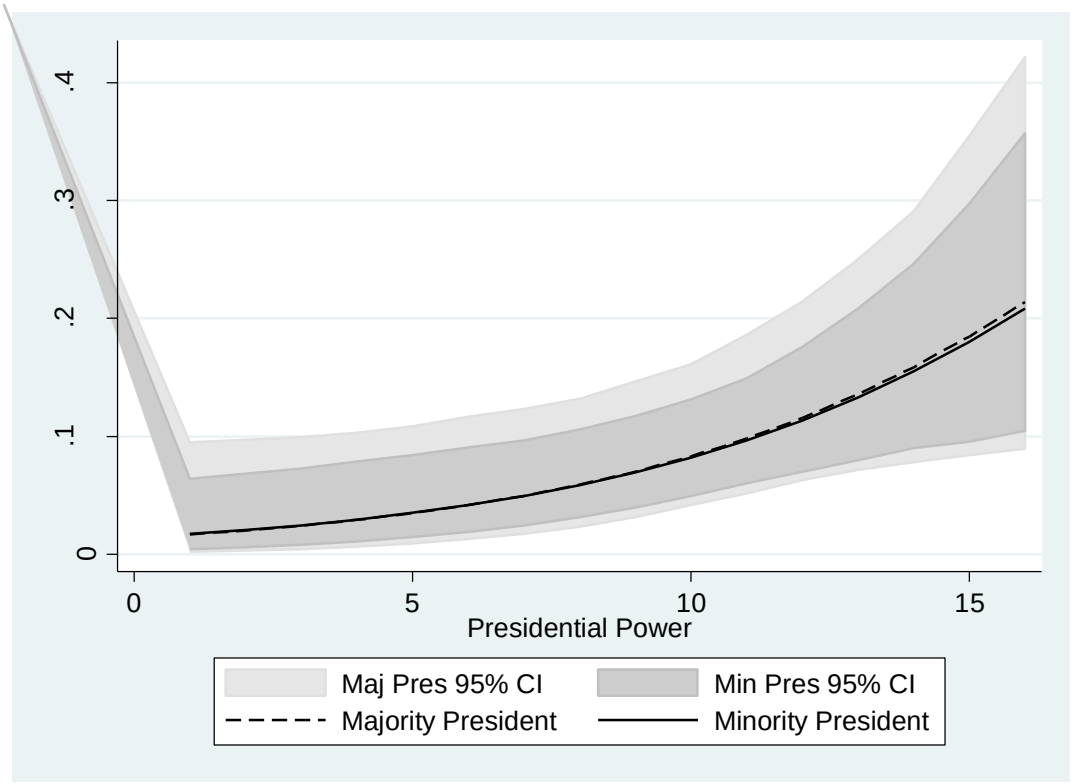



**Figure 4: Predicted Probability of Judicial Crises by Presidential Power Among Minority and Majority Presidents**

These results are robust to estimating the model on the subset of isolated judicial crises, thereby dropping the five cases in which presidents simultaneously attacked both the courts and the legislature (Fujimori 1991, Serrano 1993, De León 1993, Chávez 1999, Correa 2007), and to dropping Ecuador, which has the largest single number of judicial crises (1985, 1994, 1996, 1997, 2003, 2004, 2005, 2007).

Turning to the president's expectations about threats to her survival, I employ *Past Removals* to explore their effects on the probability that the president will launch a judicial crisis.

Recall that the former count variable measures the number of previous leaders in a given country that have been removed or subjected to threats of removal by congress for each administration.

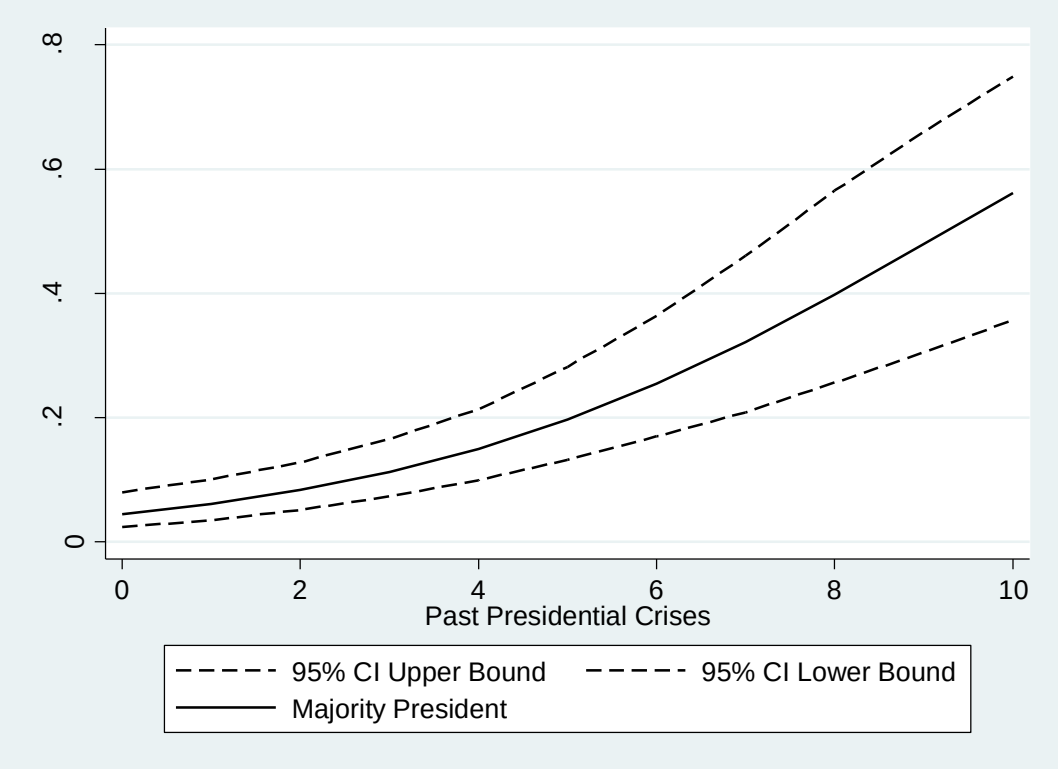



**Figure 5: Predicted Probability of Judicial Crises by Past Presidential Crises**

Model 2 and Figure 5 shows that history of presidential crises does indeed have a strong positive effect on the likelihood of a judicial crisis. Here, the probability of a judicial crisis starts at less than 5% with no previous experiences of presidential instability and jumps to over 50% for environments, which have experienced the highest number of previous presidential crises.[21]

[21] These results continue to hold when we expand the number of judicial crises to include all 33 cases and are just shy of significance if we recode the independent variable as a dummy variable

Finally, I also explore whether timing within the administration can help us to predict the onset of judicial crises. I expect that presidents will try to purge and pack their courts as quickly as possible and this is exactly what we see: the coefficient in model 3 is negative and significant. Substantively, the probability of judicial crises ranges from roughly 10% in the first year of an administration and declines to less than 1% in the seventh year.

**Discussion**

Most judicial politics theories have been built around explaining the puzzle of judicial independence. This paper instead theorizes explicitly about the conditions under which politicians are prone to manipulate their courts. By arguing that courts can partly endogenously shape politicians' fate at the hands of legislative opponents, I argue that greater political insecurity leads presidents to gut judicial independence, not shore it up. This also suggests a new twist to the familiar portrait of delegative democracies: Latin American presidents violate checks and balances not merely to prove their omnipotence, but rather precisely because they fear becoming impotent down the road. Using an original dataset on inter-branch crises in contemporary Latin America, the empirical evidence is generally consistent with this new approach. That said, both the theory and the empirical results could and should be pushed further. On the theoretical side, the obvious next step is to explicitly model the politicians' decision to manipulate (not simply extrapolate the president's incentives from the executive-legislative bargaining game). On the empirical side, confidence in the results may be increased with additional robustness checks (alternative measures, additional control variables, at the like), but the real challenge is whether we can identify the causal effect through a stronger research design.

representing whether the previous administration experienced a presidential crisis or not. The results, however, are not robust to dropping Ecuador.

More generally, this paper suggests three sets of broader implications. Recognizing that institutional crises are inter-connected cuts against the older tendency in the literature to treat these phenomenon along parallel tracks; with one literature on presidential crises and another on judicial politics. Rather, constitutional hardball in all of its manifestations should be studied under a unified theoretical framework (Helmke 2017; Ginsburg and Huq 2018; Levitsky and Ziblatt 2018).

In this spirit, this paper shows one way in which political instability (or its anticipation) cascades across institutions and over time. The overarching lesson is that Latin America's new form of institutional instability (Pérez-Liñán 2007) not only leaves presidents vulnerable, but also threatens the very institutions that safeguard basic individual and human rights. As such, the idea that this new type of instability is not about regime change is not quite right: coups may be a thing of the past, but the piecemeal process of democratic erosion is certainly at work. When courts are captured, political enemies are jailed, protesters are killed, and the press is stripped of its ability to hold governments accountable. Recent events in Venezuela and Nicaragua make this lesson all too clear.

The second broader point hints at a novel, if disturbing, connection between the so-called "judicialization of politics" and the politicization of the judiciary. Extending Toharia's finding (1974) that sometimes courts are independent precisely because they have no power, here the implication is that as courts gain the ability to exercise more influence and political actors become more likely to litigate their conflicts, the stakes of politicians controlling the court rise accordingly. This has clearly been the case for leaders like Morales and Ortega, who have unabashedly used the courts to prosecute their political enemies, but it also rings true for leaders like Correa and Chávez, who feared that their opponents would do the same. Contra Hamilton (1961[1787]), this implies that expanding a court's jurisdiction and/or increasing judicial tenure

may actually yield more political attacks against the judiciary, not fewer, particularly if leaders are themselves at risk. Helmke and Staton (2010) make a similar argument about the countervailing effects of tenure and jurisdiction on the likelihood of inter-branch crises, but they highlight the conflicting imperatives that such institutional protections pose for judges, rather than for politicians.

Finally, the theoretical story developed here also potentially dovetails with the literature on strategic judicial decision-making. Elsewhere, for example, I have argued that institutional instability prompts judges to strategically defect from weak governments in order to curry favor with incoming governments (Helmke 2002; 2005). If this is right, it makes all the more sense for vulnerable governments to try to manipulate courts when and where they can. This is so for at least two reasons. In the short term, seizing control over the court may help tilt the playing field in favor of the incumbent, thus endogenously lowering the chances that she will be weakened. And, the more judges are viewed as pure cronies, the less plausible strategic defection becomes (Helmke 2005: 54-56). In other words, under some conditions, it may be that governments actually benefit from having judges who are unable to signal their independence. To explore fully the implications of this logic for judicial behavior, however, we need to develop a new game theoretic model that formally endogenizes the government's fate with respect to the choices judges make. This remains a task for future research

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