

## Judicial Manipulation in Latin America\*

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Judicial manipulation is antithetical to judicial independence, limited government, and the rule of law. It either ensures that the court mirrors the preferences of the incumbent government, or makes it next to impossible for judges who do not to express their sincere views. In such an environment, checks and balances are compromised and horizontal of accountability fails. Such failures, moreover, appear to be self-enforcing. If each new government confronts a court loyal to its predecessors, then they may be much more tempted to remake the court in their own image. As Argentine president Carlos Menem once put it, “why should I be the only president in Argentine history not to have my own court?”

Whereas much attention has been focused on how Latin American judges respond to these sorts of constraints on their independence, far less is understood about the calculus of manipulation itself. From broader statements about the nature of delegative democracy (O’Donnell 1994; Larkins 1998) to standard separation of powers models of court-executive relations (Helmke 2002; 2005; Iaryczower et al. 2002; Magaloni and Sanchez 2006; Rios-Figueroa 2007), most scholars simply take as their starting point the view that judges in the region are subject to manipulation. And, yet, not all leaders in Latin America seek to control the judiciary. Courts have been routinely reshuffled in places like Argentina, Venezuela, Peru and Bolivia, but have been allowed to remain relatively independent in Uruguay, Costa Rica, and Brazil. Such variation demands better description and better explanation.

### Conceptualizing Manipulation

Republican constitutions, such as those in the U.S. and Latin America, are not based on a pure separation of powers, but rather are designed to prevent the concentration and hence abuse of power by a single branch by giving each branch of government a way of exercising influence over the other two (see Manin 1994: 30- 31).<sup>1</sup> Allowing the other branches to select judges who share their views may even help to enhance protections for the judiciary such that politicians do not need or want to violate the independence of individual judges. Along these lines, John Ferejohn (1998) has argued that the structural interdependence among the branches of the U.S. government, which includes the president’s and senate’s ability to select the justices, contributes to the self-enforcing nature of the constitutional protections afforded to U.S. justices.

Starting with Robert Dahl’s seminal critique of the counter-majoritarian thesis (1957), scholars have long recognized the opportunities that the U.S. Constitution—and by extension most Latin American Constitutions –provide for the elected branches of the government to shape the

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<sup>1</sup> This section draws on Helmke (2005).

composition of the Supreme Court. The fact that judges voluntarily step down and that presidents tend to replace them with judges who share their views means that the branches are rarely out of step. The broader implication of Dahl's thesis is that courts ultimately function to legitimate, rather than challenge, the power of the ruling majority.<sup>2</sup>

The difference between the sort of "due influence" described above and the kind of manipulation that is the subject of this chapter lies in whether politicians simply exploit the natural rate of voluntary judicial turnover, or seek to alter the composition above and beyond this rate. Returning to the U.S. example, secure life tenure means that most presidents only get to appoint between two and three justices per term, they do not get to appoint the majority of judges on the bench (Dahl 1957; Pérez-Liñán and Castagnola 2009). But sometimes U.S. presidents get unlucky and fail to have the opportunity to appoint any judges to the bench. Such was the fate that befell Franklin Delano Roosevelt, which led to the infamous clash between the Lochner-era Court and the executive branch over Roosevelt's New Deal policies (*e.g.* see Caldeira 1987).

In response, FDR famously attempted to pack the Court. Although there are no provisions within the U.S. Constitution barring an alteration of the court's size, this was clearly an attempt to alter the composition of the court in a way that not only made it friendly to the incumbent government but that also subverted norm that replacement should occur via the natural rate. Disingenuously citing the courts workload and the justices advanced age, the plan proposed to allow FDR to appoint an additional judge for each federal judge who declined to retire after the age of 70 (Gordon 2009).<sup>3</sup>

Across the political spectrum, the bid was thus roundly criticized as a blatant challenge to judicial independence and was rejected by the Senate Judiciary Committee, who referred to the proposal as:

"a needless, futile and utterly dangerous abandonment of constitutional principle...without precedent or justification. ... it would subjugate the courts to the will of Congress and the President and thereby destroy the independence of the judiciary, the only certain shield of individual rights. ... it stands now before the country, acknowledged by its proponents as a plan to force judicial interpretation of the Constitution, a proposal that violates every sacred tradition of American democracy (Gordon 2009: 342)."

More generally, we can infer that politicians' decision to engage in judicial manipulation only becomes salient when the natural rate of selection fails to allow presidents to achieve a friendly majority. If this is correct, then it implies something of a paradox. That is, manipulation should be less attractive if judicial tenure is fixed and relatively short. Elsewhere, however, Helmke and Staton (2011) have warned that formal tenure protections may not automatically map on to judicial manipulation. This is because, at least from the judge's perspective, life tenure can produce countervailing effects. On the one hand, to the extent that longer tenure increases the judge's stake in the court's legitimacy, judges may be more tempted to stand up to the government to attract both legitimacy and litigants. On the other hand, because longer tenure also increases the value of a seat

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<sup>2</sup> Of course, even when presidents manage to appoint judges they want, principle-agent problems may still arise. Presidents may find judges who share their views on some, but not all issues. Judges may turn out to behave very differently than the nominating president anticipates. Or, over the passage of time, justices might alter their views. For any combination of these reasons, scholars have concluded that even judges appointed for their ideological congruence with one party are unlikely to support the policies of that party all of the time (Segal and Spaeth 2002).

<sup>3</sup> With respect to the Supreme Court it would have permitted Roosevelt name up to six additional justices.

for the judge (i.e., by increasing the salary stream associated with the position), it increases the incentives for the judge to appease the new government. If the latter motivation swamps the former, then strategic decision-making means that manipulation instead remains strictly off the equilibrium path.

### **Measuring Manipulation**

To study judicial manipulation systematically, we need clear rules for identifying it empirically. A new dataset, *Inter-branch Crises in Latin America* (ICLA), constructed by Helmke (2017) records instances of judicial manipulation across 18 Latin American countries between 1985 and 2009. The following three criteria are used to discern what counts as judicial manipulation and what does not: 1) political actors and peak courts, 2) composition at stake, and 3) threats, not outcomes.

In terms of the first criterion, the focus is explicitly on capturing instances of political manipulation or the threat of manipulation of peak court justices (Supreme Court and/or Constitutional Court) by either the president and/or the legislature. Certainly, any number of actors outside of the judiciary might also seek to influence the judiciary through bribes, violence, or other means, but this is not political manipulation *per se*.

The second criterion acknowledges that while judicial manipulation can practically take many forms—such as jurisdiction stripping or salary reduction—for the sake of tractability the focus is exclusively on threats or actions that aim to change the composition of the judiciary. The menu of manipulation thus includes everything from impeachment to forced resignation to court-packing to dismantling the court entirely. As Castagnola and Pérez-Liñán (2011) point out, in Bolivia the independence of the judiciary has been repeatedly crushed through a combination of these methods. Peru offers another familiar case in point. Five years after the complete overhaul of the judiciary in 1992, Fujimori’s cronies in Congress impeached several justices on the Constitutional Tribunal for daring to rule against the president’s bid for a third term in office. Rendered inoperative, the high court simply ceased to function.

The third criterion recognizes that the attempt at judicial manipulation may succeed in altering the composition of the high court, but need not. Identifying both successful and unsuccessful attempts to manipulate provides important insight into both the degree of manipulation as well as the motives that underlie it. And to the extent that judges behave strategically, it is an open question whether merely attempting manipulation may be sufficient to bring the court in line. Based on these criteria, ICLA ultimately identifies 36 separate instances (26 presidential-led attacks on the courts and 10 legislature-led attacks on the courts) of judicial manipulation within Latin America between 1985 and 2009.

<b>Country</b>	<b>Administration</b>	<b>Year*</b>
Argentina	Alfonsín	1987
	Duhalde	2002
	Menem	<b>1989</b>
	N Kirchner	<b>2003</b>
Bolivia	Paz Zamora	1990
	Morales	<b>2006;2007;2008</b>
	Sánchez de Lozada	<b>1993</b>
Chile	Aylwin	1991
	Frei	<b>1997</b>
Ecuador	Bucaram	<b>1996</b>
	Cordero	<b>1985</b>
	Durán-Ballen	1994
	Gutiérrez	<b>2004;2005</b>
	Correa	<b>2007</b>
Guatemala	Serrano	<b>1993</b>
Nicaragua	Bolaños	2004
Paraguay	Duarte	<b>2003</b>
	Wasmosy	<b>1993</b>
Peru	Fujimori	<b>1991</b>
	Fujimori	<b>1997</b>
Venezuela	Pérez	<b>1992</b>
	Chávez	<b>1999</b>
	Chávez	2002; <b>2003</b>

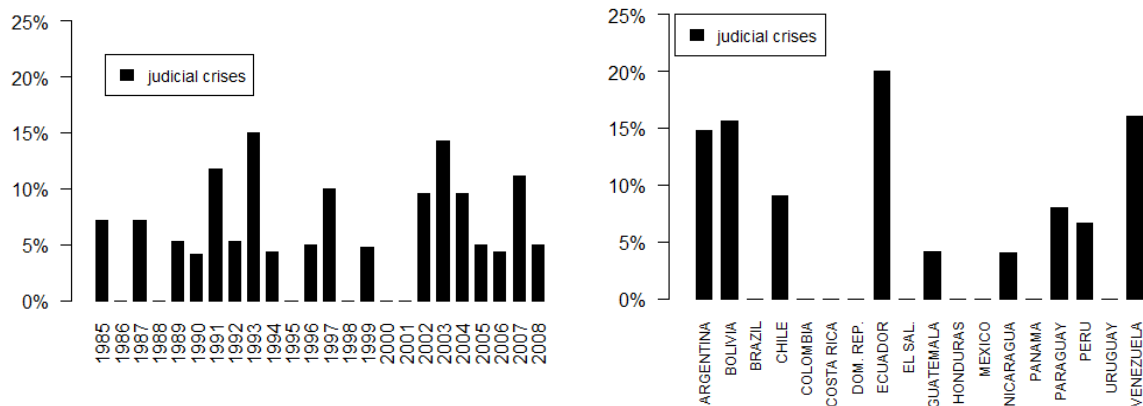
\* Bold indicates that attack succeeded.

**Table 1. Presidential Attacks on the Courts in Latin America, 1985-2008**

An alternative empirical approach is developed by Pérez-Liñán and Castagnola (2009), who have gathered data on the number of Supreme Court justices entering the Supreme Court each year for eleven Latin American countries between 1904 and 2006. Note that whether such turnover constitutes manipulation is not baked into their measure, rather it comes out of their analysis of key correlates such as a new government or a new constitution.

While both approaches have their strength and weaknesses, both return similar information about recent patterns of manipulation in Latin America. First, both studies support O'Donnell's skepticism that Latin American democracies would automatically consolidate the rule of law over time (1999:175-194). Rather, the figures below (based on Helmke 2017) show that the incidence of judicial crises has not markedly declined over the last two and half decades. Although the rate has varied year to year, there is no evidence that judicial manipulation is steadily diminishing over time.

Likewise, in their longer time-series analysis Pérez-Liñán and Castagnola (2009) find that judicial turnover is actually more sensitive to political factors among third wave democracies compared to earlier periods in Latin American history, thus leading them to agree with Tsebelis (2002, Chapter 10) that “the advent of democracy may have accelerated the race to control courts, rather than reducing it (Pérez-Liñán and Castagnola 2009: 106).” More specifically, in their discussion of the expected proportion of incoming justices per year, there are only three countries (Argentina, Colombia, and El Salvador) that have lower rates post 1978 compared to the post World War II. The rest of the countries in their sample have rates that are relatively stable, or slightly higher between these two periods (Pérez-Liñán and Castagnola 2009: 96).



**Figures 1 and 2. Percentages of Judicial Crises in Latin America, 1985-2008**

The second pattern that stands out is the striking degree of cross-sectional variation. Remarkably, as Figure 2 shows there is an almost bimodal distribution whereby countries either entirely escape judicial manipulation or experience repeated bouts of it. Ecuador stands out as a kind of regional basket case with judicial crises occurring more than 20% of the time (6 judicial crises out of 30 administration-years respectively). Venezuela, Bolivia, and Argentina are not far behind. By contrast, the data confirm that almost half of the region (Brazil, Colombia, Costa Rica, Dominican Republic, El Salvador, Honduras, Mexico, Panama, and Uruguay) is relatively free from the plague of judicial crises, at least following the third wave of democratization.

The third empirical pattern is that most instances of judicial manipulation occur relatively early in a new government’s term. Analyzing data from the 1980s onward, both Helmke (2017) and Pérez-Liñán and Castagnola (2009) independently find that the first two years of a new administration are significantly associated with judicial turnover on the high court. Specifically, the latter show that “between 1978 and 2006, new administrations increased the number of appointments by 34 percent (Pérez-Liñán and Castagnola 2009: 106).” The substantive effect identified by Helmke is somewhat smaller—the probability of a judicial crisis ranges roughly from 10 percent from the first year and declines to less than one percent in the final year of the president’s term—but the trajectory is the same. What explains these patterns?

## Political Uncertainty and Judicial Manipulation

Starting with Ramseyer's (1994) classic depiction of judicial independence as a repeated prisoner's dilemma, the comparative judicial politics literature has largely viewed political uncertainty, which is the very foundation of democracy, in wholly favorable terms (Ramseyer and Rosenbluth 1993; Ramseyer 1994; Ramseyer and Rasmusen 1997; Ginsburg 2002; Finkel 2008). According to the standard insulation account, politicians opt for judicial independence as a key mechanism for restraining their political opponents. More specifically, this cooperative equilibrium obtains whenever parties expect to alternate indefinitely in office with one another, and wish to limit the extent of policy changes the incumbent government can implement.

But there are at least three reasons why politician's uncertainty about their future need not breed judicial independence. First, and most obviously, we know that theoretically any equilibrium can be sustained in the repeated prisoner's dilemma framework. As Ramseyer himself acknowledges, even if politicians expect to alternate in power indefinitely, they may still choose to keep courts dependent (Ramseyer 1994: 742).

Second, in contemporary Latin America, as in other parts of the developing world, political uncertainty often goes far beyond elections. Struck by the frequency of presidential crises that result in executives being prematurely ousted from power a growing number of Latin American experts have sought to explain this new form of institutional instability (e.g. Valenzuela 2004; Hochstetler 2006; Pérez-Liñán 2007; Helmke 2010; 2017). With respect to courts, such instability means that presidents spend their time in office trying to survive, not on limiting their successors' policy options through institutional design.

Third, and relatedly, whereas existing insulation accounts treat political uncertainty as a purely exogenous parameter, it is important to recognize that uncertainty is also partly endogenous to who controls the courts (Helmke 2017). Because courts can potentially tilt the playing field in any number of ways—prosecuting political opponents, weighing in on the reach of presidential prerogative, determining the number of presidential terms, and even deciding on whether to impeach the president and/or remove her from office—control over the court is imperative whenever the president believes he or she is imperiled.

Consider the following examples from Bolivia and Ecuador. Notwithstanding his surprisingly decisive victory in 2005, Evo Morales's presidency has been deeply polarizing, particularly along geographic lines. From his decision to nationalize Bolivia's gas reserves to his convocation of a constituent assembly, his first year in office only further exacerbated deep-seated regional tensions and led to increasing demands for autonomy by the richer "Media Luna" region (Lehoucq, 2008). 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.<sup>4</sup> Midway through his first year in power, the Defense Minister threatened pro testers in the antigovernment regions with court action for engaging in "secessionist discourse."<sup>5</sup> After that, courts were asked to adjudicate everything

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<sup>4</sup> 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 *LAWR*, September 6, 2007.

<sup>5</sup> *Latin American Weekly Report (LAWR)*, September 12, 2006.

from monetary claims stemming from the government's decision to nationalize the gas and oil industry to corruption charges against opposition politicians, including the former president (Carey 2009), to the legality of Morales' recall referendum.

In this context of growing insecurity, 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 Pérez-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.<sup>6</sup> Criticizing the court's former composition as "tantamount to an a priori sentence against indigenous people,"<sup>7</sup> 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, only a single judge, Silvia Salame Farjat, was left on the tribunal.<sup>8</sup> Meanwhile, the government also initiated several impeachment proceedings against remaining Supreme Court members for allegedly protecting the 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 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 vis-à-vis the Ecuadorian courts employed during Lucio Gutiérrez's short-lived administration (2003–2005). With Gutiérrez's own Patriotic Society Party holding just six of the 100 congressional seats, the president blatantly used the judiciary as a bargaining chip with its allies (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.<sup>9</sup> 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 Partido Roldosista Ecuatoriano (PRE) and the Partido Renovador Institucional Acción Nacional (PRIAN) to fundamentally restructure the nation's high courts.

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<sup>6</sup> 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*, April 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 to the United States for destruction. According to one report, Morales explicitly threatened the judiciary, stating, "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*, April 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 Constitutional Tribunal'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*, May 24, 2007).

<sup>7</sup> *LAWR*, January, 2007.

<sup>8</sup> Although Justice Farjat could issue only nonbinding 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.

<sup>9</sup> *LAWR*, April 20, 2004.

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.<sup>10</sup> A little less than a month later, however, the administration again went after the Supreme Court, replacing all thirty-one 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.<sup>11</sup> The new so-called Pinchi Corte, which was named after the nickname of one of Bucaram’s closest childhood 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.

More generally, the view that political uncertainty spurs rather than thwarts manipulation follows a logic similar to that of offensive strikes in wars (Helmke 2010; 2017). Whether the threat is imminent or more distal, in environments where politicians are frequently at risk of being removed from office through electoral means or otherwise, and courts, in part, shape these prospects, the likelihood that the cooperative equilibrium leading to judicial independence obtains is substantially reduced. Rather, rapid irregular alternations of power force politicians to adopt a warlike mentality. Instead of creating independent institutions, they attack them.

This alternative approach linking political instability to judicial instability suggests a number of testable implications. Here, I discuss just two. The first, and perhaps most obvious, highlights the presidents’ beliefs about her own prospects for staying in office. Although beliefs are notoriously hard to capture, intuitively, we might imagine that the vulnerability of previous presidents influences leaders’ assessments about the probability that they will be successfully ousted. If this is right, we should not only see a strong link between current threats of presidential instability and judicial manipulation—as in the Morales and Gutierrez examples—but also a correlation between past instances of political instability and judicial manipulation.

In accordance with this expectation, Helmke (2017) finds that a country with no previous history of presidential ousters has less than one percent of chance of engaging in manipulation whereas a country with multiple recent incidents of presidential instability has about a 30 percent chance of engaging in manipulation. Indeed, once we control for presidential instability the effects of previous judicial instability on current judicial instability, whereby each leader simply follows the kind of tit for tat norm invoked by Menem and seeks to remake their predecessors’ courts, essentially disappears.

Second, the core conditions that trigger presidential instability should also help to account for judicial instability. Elsewhere, I have shown that presidential instability is triggered by the concentration of formal legislative powers in the presidency (Helmke 2017). The basic idea is that imbuing the president with extensive policy-making powers raises the stakes to the opposition for

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<sup>10</sup> LAWR, November 30, 2004.

<sup>11</sup> LAWR, December 14, 2004.



being out of power and thus increases their incentives to coordinate to remove the president. With respect to the judiciary, the testable implication is that strong presidential powers should also spillover on to the judiciary. This is precisely what we see in Latin America where 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. Notice that this finding stands in stark contrast both to standard separation of powers accounts, which highlight the threat posed by unified government, as well as the implicit view that presidents pack courts merely in order to expand their own policy-making powers. Were either true, we would expect judicial crises to instead increase in unified government and to decrease in presidential powers. Instead, we find just the opposite.

## **Public Support**

According to the judicial politics literature (Caldeira 1986; Gibson, Caldeira, and Baird 1998; Vanberg 2001; 2005), public support for the judiciary is one of the primary deterrents to violations of judicial independence and authority by politicians. The rationale by which public trust in courts insulate them from political retribution is nicely expressed by Georg Vanberg, who writes:

“If citizens value judicial independence and regard respect for judicial rulings as important, a decision by elected officials to resist a judicial ruling may result in a loss of public support (i.e., citizens may withdraw their support at the voting booth, in an opinion poll, etc.). The fear of such a public backlash can be a forceful inducement to implement judicial decisions faithfully (Vanberg 2005: 20).”

Consistent with the calculus of manipulation contained in the previous section, we can think of public support as a kind of cost that politicians bear for attacking courts. Thus, insofar as we have argued that judicial control can endogenously extend a politician’s term, we can also imagine that attempting to seize control over a popular court might instead foreshorten it.

Within Latin America, of course, one of the most widely touted facts about the rule of law in the region is how poorly the public regards the judiciary. *Latinobarómetro* surveys provide us with an overview of the evolution of public opinion about the judiciary over the last decade and across countries. On average, the percentage of Latin American citizens reporting that they had “a lot” or “some” confidence in the judiciary has varied between a high of just 38% to a low of 20%, with average levels of confidence tending to decline over the decade. During the late 1990s around 62% of those surveyed had “little” or “no” confidence in the judiciary, but in the new millennium that percentage has risen to around 70%.<sup>12</sup>

And, for the most part, Latin American presidents who have targeted the judiciary have seemed to have skillfully played on the public’s dissatisfaction with elite institutions. Prior to Chávez’s election, for instance, the Venezuelan judiciary was widely considered one of the country’s most

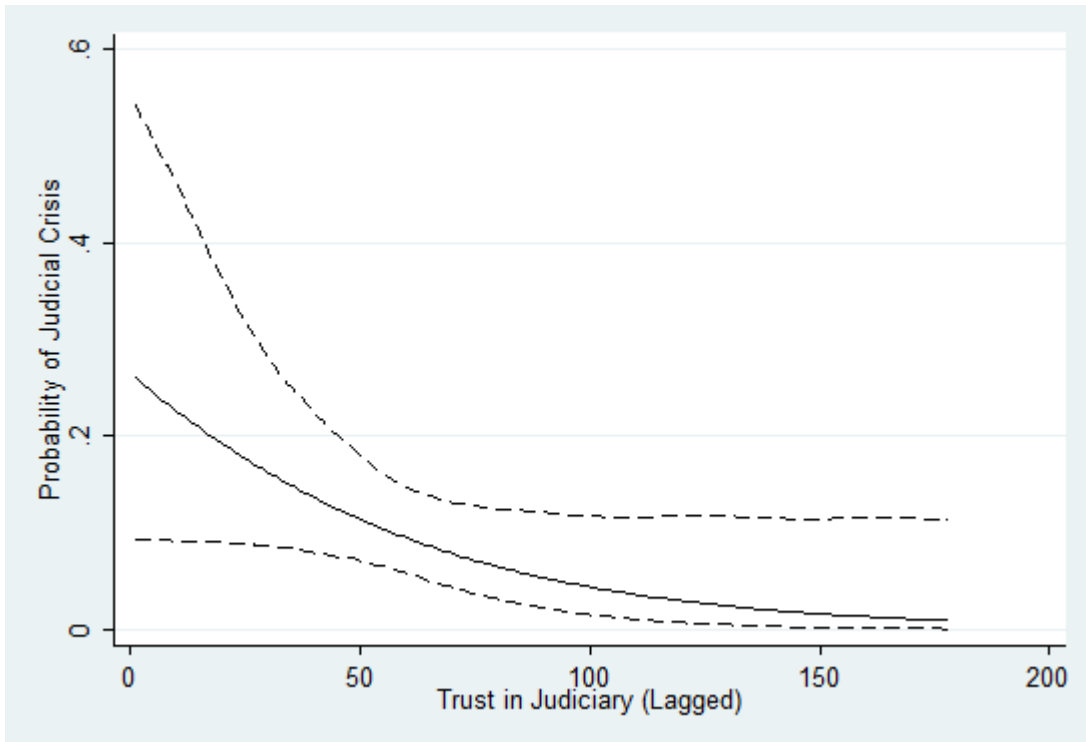
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<sup>12</sup> Behind the regional averages, however, there is a great deal of cross-national variation. For example, in Ecuador and Peru, only one in five citizens surveyed has any confidence in the judiciary. Argentines, Bolivians, Paraguayans, Guatemalans, Nicaraguans, and Mexicans have scarcely better impressions of their courts. But in Brazil, Costa Rica, Dominican Republic, and Uruguay, where between 40% and 50% of people on average have a positive view of the judiciary, the court appear to be on much more solid ground with the public.

corrupt and inefficient institutions. During the 1990s, a best-selling book entitled *How Much to Buy a Judge?* described major law firms participating in informal networks that enabled their clients to purchase favorable rulings. Meanwhile, enormous case backlogs meant that claims made by ordinary citizens tended to languish in the court system for years, if not decades (Hammergren 2007). Summarizing these problems, a 1996 study by the Lawyers Committee for Human Rights concluded that the country's judiciary symbolized all that had gone wrong with Venezuela's political system. The roots of the crisis in the judiciary intertwine several areas: political interference, corruption, institutional neglect, and the failure to provide access to justice for the vast part of the Venezuelan population. Building on this discontent, Chávez successfully pitched his attack on the Venezuelan judiciary as part and parcel of a broader plan to eliminate the last vestiges of the traditional Punto Fijo system and the massive corruption associated with it.

Likewise, Fujimori's decision to purge the Peruvian judiciary also proved to be hugely popular. By the time of the coup, fully 89 percent of Peruvians approved of Fujimori's decision to intervene in the judiciary (Kenney, 2004: 228). And during the Morales administration's assault on the judiciary, the government released a fifty-page document, entitled "Towards a New Justice System in Bolivia," which labeled the judiciary as the country's "most corrupt" institution. Polls taken by Transparency International that same year indicate that more than 80 percent of Bolivian respondents shared the government's view.

Although most scholars have focused on how public support affects judicial decision-making and government compliance with such decisions, a similar mechanism can easily be extended to calculus of judicial manipulation. Specifically, we should expect that the higher public support is for courts *ex ante*, the less attractive manipulation will be. In line with this expectation, Figure 3 reveals a steady decline in the likelihood of a judicial crisis as confidence in the courts increases. What is more, although systematic analysis on the connection between manipulation and public opinion in Latin America is quite provisional, simple bivariate logistic regressions suggest that in most cases the president actually seems to "benefit" from judicial manipulation. On average presidents who attack their courts enjoy a 24 point jump in popularity (Helmke 2017).



**Figure 3: The effect of trust in the judiciary on judicial crises**

### Discussion

The problem of judicial manipulation is widely known among Latin American experts. Yet, systematic analyses of when, why, and how politicians violate judicial independence are only beginning to emerge. This short chapter has sought to push the literature on judicial manipulation forward conceptually, empirically, and theoretically. Thus, I began by distinguishing judicial manipulation from the more routine sort of political influence that emerges when politicians re-select judges following voluntary turnover on the bench. Following this more abstract discussion, I then proposed three criteria for identifying judicial manipulation empirically, which involved politicians altering the composition of peak courts. Drawing on my own original data, as well as a new dataset constructed by Pérez-Liñán and Castagnola (2009), I identified three major patterns. First, consistent with the critics of democratic consolidation, judicial manipulation is no less frequent now than it was at the beginning of the third wave of democratization. Second, there is substantial cross-national variation in terms of which countries engage in manipulation, and which do not. Third, courts are most vulnerable under new governments, and especially within the first two years of the new administration's term.

To begin to account for these patterns, I proposed an alternative approach to judicial manipulation that links political instability to judicial instability. In contrast to standard insulation, separation of powers, and delegative democracy arguments, I argued that the risk of judicial manipulation is heightened whenever presidents are themselves at risk of removal. Precisely because courts can tilt the playing field against incumbents or the opposition, the basic logic is that politicians seize control over courts as quickly as they can as part of their drive to survive. This alternative logic helps make sense of the enormous cross-national variation in the region, by showing how both past incidents of

presidential instability, and the underlying institutional conditions that trigger them, correlate with judicial manipulation. Last but not least, the chapter also explored how judicial manipulation both affects and is affected by public trust in institutions. Although much work remains to be done, preliminary analyses confirm the view that public support shields courts and that the presidents who target them are not adversely affected by manipulating unpopular courts.

More generally, this paper suggests two broader implications. The first is that instability cascades across institutions and over time.<sup>13</sup> As one of Ecuadorian Supreme Court justices put it,

“It’s not [judicial] instability, its instability of the country; we are a part of the country, that’s it.”<sup>14</sup>

Specifically, if the prospect of a presidential crisis serves as a kind of tripwire that provokes presidents at risk to target their opponents in other institutions, then this 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. At the same time, arguing that institutional crises are inter-connected implicitly cuts against the current tendency to assume that this new form of presidential instability represents a largely positive turn whereby presidentialism is simply being parliamentarized (cf. Pérez-Liñán 2005; Marsteintredet and Berntzen 2008).

The second broader point hints at a novel, if disturbing, connection between the so-called “judicialization of politics” and the politicization of the judiciary. Flipping 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 in Bolivia or Ortega in Nicaragua, who have unabashedly used the courts to prosecute their political enemies, but it also rings true for leaders like Correa in Ecuador, who feared that their opponents would do the same. This implies that the best shield for the judiciary lies in cultivating political stability more generally, not necessarily in creating standard formal protections or expanding the court’s jurisdiction.

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<sup>13</sup> In Helmke (2017) I extend this analysis to legislatures, and specifically show how presidential crises are linked to autogolpes and constituent assemblies.

<sup>14</sup> Author interview with José Vicente Troya in Quito, Ecuador, July 2008.

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