

**RETHINKING JUDICIAL INSTABILITY IN DEVELOPING DEMOCRACIES: A
NATIONAL AND SUBNATIONAL ANALYSIS OF SUPREME COURTS IN
ARGENTINA**

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Submitted to the Graduate Faculty of
Arts and Sciences in partial fulfillment
of the requirements for the degree of
Doctor of Philosophy in Political Science

University of Pittsburgh

2010

UNIVERSITY OF PITTSBURGH

ARTS AND SCIENCES

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María Andrea Castagnola, PhD

University of Pittsburgh, 2010

Why do justices remain in office such a short time despite having life tenure? The objective of this doctoral dissertation is to answer this question by systematically examining which factors influence judges' stability in office at the levels of both the Argentine National Supreme Court of Justice and the Provincial Supreme Courts, from 1983 to 2009. The main argument is that, in developing democracies like Argentina, the larger the ideological distance between the appointing executive and the current executive, the higher the probability that a sitting justice appointed by an executive with different preferences will leave office. With Supreme Court tenure that averages 4.6 years and a recent re-democratization process that started in 1983, Argentina provides a good opportunity to analyze the factors that influence frequent turnover in nascent democratic countries.

The main findings of the research reveal that executives do not trust justices appointed by other executives with different political preferences and in fact there is an overlapping between the electoral executive cycles and judicial turnover. The evidence in the previous chapters have systematically expose that executives (specially at the beginning of their terms) do not buy the strategic behavior model that claims that the justices in the court appointed by executives with other preferences would rule in favor of the incoming executive so as to survive in office. In the end, what this finding reveals is that in general argentine presidents and governors have been

very averse to risky outcomes when it came to the Supreme Courts. Executive had been more conservative, or reluctant to risk, than what the literature had predicted. It is precisely because executives believe in a more attitudinal behavior of the justices that the political proximity between incoming executives and the justice matters to account for judicial stability in the bench. The results in Chapter 5 from the provincial level analysis had disclosed with great detail that loyalty between executives and justices are highly personalized and thus, strongly controlled.

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ACKNOWLEDGMENTS

This dissertation is not the product of a single mind but rather of a collective one. Since the early stages of this project, many people have contributed to this enterprise, especially my professors and classmates from the Political Science Department. I was extremely fortunate to have Chris Bonneau and Aníbal Pérez-Liñán as co-chairs of my dissertation, as well as Dan Brinks and Steve Finkel as the other members of the committee. It was Chris who introduced me to the fascinating world of judicial politics; in addition, over the years he has helped me place my thoughts in perspective with the existing literature. I have also greatly benefited from the unconditional advice and support of Aníbal, as he became the perfect partner with whom to discuss the Argentine and Latin American judiciaries. Dan provided sharp comments that helped me to strengthen my argument, while Steve gave pertinent recommendations regarding the econometric models.

During my field trip in Argentina many people and institutions supported me, including Jacqui Behrend; Leoni Beltran; Marta Catella; Miguel De Luca; Cristina González from JUF EJUS; Álvaro Herrero from Asociación por los Valores Civiles; Horacio Lynch; Juan Pablo Micozzi; María Cristina Mirabella de Sant; Eugenio Nanni; Rolando Nuñez from Centro de Estudios Nelson Mandela; Juan Carlos Rodriguez; Julio Rodriguez; Leonel Rodriguez; Patricio Agustín Rovira from ANDHES; Catalina Smulovitz; and Gabriel Sued from La Nación. Many

people from the provincial judicial branches assisted me in the data-gathering process: María Laura and Nora from the province of Buenos Aires; Edgardo Barrios from Chaco; Verónica Fase and Sergio Pravaz from Chubut; Carolina and Estela from Córdoba; Jorge Picchio from Corrientes; Inés Ghiggi from Entre Ríos; Luis Alberto Ortega from Formosa; Gustavo Arballo from La Pampa; Graciela Díaz Arnaudo from La Rioja; Cecilia from Mendoza; Dr. María Estela Quelas from Misiones; Laura Peláez from Neuquén; Beatriz Drake from Río Negro; Carmen Aranda from Salta; Ada de Echegaray and María Eugenia from San Juan; Dr. Mónica Corvalán from San Luis; and Dr. Félix Zavalía from Tucumán. Field research in Argentina was supported mainly by the pre-doctoral Andrew Mellon Fellowship, along with small grants from the UCIS and CLAS of the University of Pittsburgh. Other people in the US and Mexico also contributed to the project, including, Karina Ansolabehere, Rosemary Coffey, Agustín Grijalva and Julio Ríos Figueroa.

Throughout this project, I have also received a great source of inspiration and support from my family and friends. Those living in Argentina have constantly shared with enthusiasm every news item or scandal related to Supreme Court justices or provincial judiciaries. Special thanks go to my lawyer friends who have patiently introduced me to the most obscure terminology and judicial vocabulary. Most importantly, I would like to thank Enrique, who gave me unconditional support and love all along this enterprise— the essential secret that helped me stay on track.

1.0 INTRODUCTION

During recent years, the front pages of the newspapers have recurrently denounced the lack of independence of the judiciaries by revealing corruption cases as well as political manipulation of the justices. In November 2004, President Lucio Gutierrez from Ecuador with support from the Congress removed 27 justices (out of 31) from the Supreme Court and 7 judges (out of 9) from the Constitutional Tribunal as the result of explicit accusations that the justices and judges were politically loyal to the former president. In April 2005, the judiciary was, once again, the target of political manipulation when Gutierrez purged both the Supreme Court and the Constitutional Tribunal as a way to mitigate the critics and the opposition to his government. The country remained for seven months without a Supreme Court and for 10 months without a Constitutional Tribunal. In July 2007 the Ecuadorian President Rafael Correa carried out a controversial restructure of the judiciary, in which the Supreme Court changed not only its name (to the National Court of Justice) but also the total number of justices (reduced from 31 to 21). That same year, the Constitutional Tribunal was once again purged, in this case as a result of political confrontations with the executive. In Argentina in 1990, President Carlos Menem increased the number of sitting justices of the Supreme Court from 5 to 9 and appointed 6 new justices to the bench, since two of the sitting justices had stepped off because of the excessive political manipulation. In 2003, the Argentine President Néstor Kirchner induced the departure of six

justices: two of them were impeached, and the other four were forced to leave via threats of impeachment and moral coercion. The Latin American courts are not an exception; other judiciaries around the world also suffer political manipulation by the executive. In Pakistan, in 2007, President Pervez Musharraf requested the resignation of Chief Justice Iftikhar Chaudhry due to their political confrontation. The Chief Justice was physically restrained for several hours from leaving the president's office until he presented his resignation. In Zimbabwe, in February 2001, President Robert Mugabe threatened to remove the justices of the Supreme Court by force unless they resigned from the bench or reversed their rulings on recent land cases. A couple of days later, Mugabe forced Chief Justice Anthony Gubbay to resign from the bench, arguing that his government could not guarantee Gubbay's safety if he remained in office. Soon after Gubbay left the office, two other high court justices (Ahmed Ebrahim and Nicholas McNally) were also asked to resign.¹ As a way to ensure that the Supreme Court's decisions would be favorable to Mugabe's regime, in July 2001 the president packed the Court by increasing from five to eight the number of sitting justices. Not surprisingly, the new Court overturned the ruling of the old Court on the land cases, as the government had expected.

Political manipulation of the judiciary is a deep-rooted problem for underdeveloped countries. The increased number of scandals and corruption cases within the judiciary has contributed to a great deterioration in the citizens' confidence in the institution. According to the Latinobarómetro surveys (Corporación Latinobarómetro 2007: 93), from 1996 to 2007, on average, only 30.5% of Latin American citizens had confidence in the judiciary, less than half of the level of confidence that citizens had in the church (72.3%). More surprisingly, because of the

¹ By December 2001, Justice McNally had resigned from the Court due to the executive's excessive abuse of the judiciary, followed by Justice Ebrahim in March 2002.

authoritarian experience in the region, citizens had greater confidence in television (43.3%), the military (40.6%), the president (37.9%) and the police (33.5%) than in the judiciary. Survey data from CIMA Barómetro (CIMA 2000, 2001, 2002, 2003, 2004, 2005, 2006, 2007) also reveals a dramatic situation in the low level of confidence in the institution in individual countries. Since from 2001 to 2008 only 7 countries out of 16 (Brazil, Colombia, Costa Rica, Puerto Rico, Dominican Republic, Uruguay and Venezuela) were above the regional confidence mean (28.9%).² Ecuador (14%), Peru (15%), Paraguay (16%) and Argentina³ (23%) ranked lowest in the confidence scale.

Evidently, the scandals related to the administration of justice and the excessive political manipulation of judges has undermined the citizens' level of confidence. Montesquieu (1752) and Alexander Hamilton (1787-1788) would argue that the numerous attacks on the judiciary happened because the judiciary is the weakest of the three branches of government. Even though in most countries justices are appointed for life (or long-term tenures), the fact that the Congress and the president are often in charge of both the appointing and removal processes makes justices, in underdeveloped countries, often vulnerable to those authorities. Studying the dynamic of vacancy creation in the Supreme Court can reveal valuable information about inter-branch relations, since judicial nominations offer a key political means for executives to enhance their control over the judiciary. Under normal circumstances, vacancies should be isolated events

² Nicaragua, El Salvador and Honduras were excluded from this sample because of the few data points provided by the sample.

³ The confidence level in the judiciary for Argentina ranged from 19% in 2002 to 26% in 2006; likewise, the regional trend, on average, indicated that Argentines had greater confidence in the church (58.5%), the press (46.5%), ONGs (38.6%), the military (35.4%) and the police (26.3%) than in the judiciary (CIMA 2000, 2001, 2002, 2003, 2004, 2005, 2006, 2007).

resulting from retirement, death, or the end of the term (in those cases where justices do not have life tenure); however, if vacancies appear frequently, then this pattern may be indicating that there are other factors affecting the stability of a justice in office. In industrialized democracies like the U.S., vacancies in the Supreme Court are isolated events, since justices serve an average of 12.5 years (Zorn and Van Winkle 2000); in contrast, in underdeveloped countries like Bolivia (with a 10-year tenure), vacancies are much more common, since the average tenure is less than 4 years (Pérez-Liñan and Castagnola 2009). In Argentina, between 1900 and 2009, justices have stayed in office on average less than 7 years; furthermore, every 1.2 years there has been a vacancy on the Court. At the subnational level in Argentina there is also great variation in the stability of the justices: between 1983 and 2009, justices from Corrientes with life-tenure remained in office an average of 2.5 years, while justices from Buenos Aires, also with life-tenure, have served, on average, 8.41 years. These significant variations in the level of judicial turnover reveal that in some cases justices do not voluntarily leave the bench; rather, there must be other factors influencing their departure. Why do justices remain in office for such a short time despite having life-tenure or long-term tenure? What factors account for variations in judicial turnover across cases? The objective of this research is to provide an answer to these questions by systematically examining what factors have influenced justices' stability in office over time on both the Argentine National and the Provincial Supreme Courts. By studying the timing of judicial turnover it is possible to identify whether justices voluntarily step off the bench or leave as the result of political manipulation by the incoming executive. This close examination of the instability of Argentine justices aims to shed light on debates about judicial independence in developing democracies.

More generally, the puzzle of justices' instability in office challenges several assumptions about executive-court relations and judicial behavior. First, the American political literature offers a model of judicial turnover based on the assumption that the justice's own decision to step off the bench is influenced by whether or not the justice shares the same political preferences as the president and the Senate (Hagle 1993; Spriggs and Wahlbeck 1995; Zorn and Van Winkle 2000). The rationale of the strategic retirement strategy is based on the idea that justices are willing to give their seats to another like-minded justice but not to a justice with opposite political preferences. The underlying assumption of this argument is that the longevity of justices in office is mainly determined by the justices' own decision. Even though this assumption holds perfectly for the American case, for underdeveloped countries it is problematic, because there the longevity of justices in office appears to be determined by the executive rather than by the justices themselves. As the earlier examples illustrated, in those countries vacancies in the high court are basically triggered by presidents either inducing the departure of justices through undemocratic decisions, or threatening them with impeachment or moral coercion. Historical data on justices of the U.S. and Argentine Supreme Courts reveals that in Argentina justices have not voluntarily stepped off the bench. Between 1900 and 2007 in the U.S. Supreme Court, 54 justices departed from the bench mainly due to death (46%) and voluntary retirement (44%), while a small number (10%) resigned for other reasons (Ward 2003). In Argentina, in comparison, during that same period 83⁴ justices departed from the bench for these reasons: 37% were removed as a consequence of a change in the political regime from

⁴ The situation is even more problematic when the size of the Supreme Court is considered. Since 1869 the number of U.S. justices was fixed at nine, whereas in Argentina during this period the number of justices has varied between five and nine.

military to democratic or vice versa; 30% resigned from office as a consequence of a change of government within the same political regime; 20% died while in office; 6% were impeached; and the remaining 6% retired voluntarily (Bercholz 2004; Kunz 1989; Pellet Lastra 2001; Tanzi 2005).⁵ Consequently, in Argentina voluntary departure (as the result of natural legal – that is, retirement – and biological – that is, death – conditions) was not the most common explanation for the high judicial turnover.

Second, there has been a large increase in the study of judicial independence in Latin America. Even though Argentina has the most studied Supreme Court in Latin America (Kapiszewski and Taylor 2008), the existing literature does not explicitly address the factors that influence a justice's decision to leave office. Studies to date affirm that life tenure for Argentine justices is not respected, given that the way justices vote (regarding, say, the constitutionality of a proposed law) can account for their instability in office (Helmke 2005; Iaryczower et al. 2002; Scribner 2004). More precisely, these studies focus on how political incentives and the political environment shape the justices' decisions and assume that those decisions ultimately determine the justices' stability in office; however, no systematic research empirically tests this assumption. Thus, if justices can regulate their stability on the bench by whether or not they rule against the ruler, then why don't they simply do that? Why is there, in fact, a high judicial turnover in the country? In other words, the importance of the justices' voting behavior as a mechanism of survival strategy on the bench is called into question.

⁵ In other nascent democracies, like Colombia, there are more serious and severe ways of creating vacancies such as the massive killing of the justices of the Supreme Court that took place in 1985.

The puzzle of justices' instability in office also raises concern about executive-court relations. Along with the previous hypothesis, another relevant untested assumption in the literature is that *only* those presidents with strong political power (i.e., unified governments with supermajorities in the legislature) can craft a supportive court and affect justices' stability in office (Chávez 2004; Iaryczower et al. 2002). This assumption is related to the previous one, since it implies that only those presidents who have the political power to formally remove a justice from office (i.e., by impeachment) will obtain a supportive court. These studies are severely limited because they examine only whether or not the president has the political power to remove a justice from office, but not if it is only those strong presidents who actually do so. Even though this assumption seems convincing, governments rarely have had supermajorities in the legislature sufficient to impeach a justice. If that is the case, how can the high instability of justices be explained? Were those justices removed from office only by those presidents who had the political power formally to do so?

As a way to fill the gap between the American and the Latin American theories, this study begins with the alternative hypothesis that in developing democracies, the greater the political proximity between the ruling executive and the justice, the lower the probability that the justice will leave office. In contrast, in industrialized democracies, judicial turnover is independent of ideological changes in the executive. This is because executives, while in power, want to have a supportive court as a way to maximize their political influence on the decisions of the judiciary. The executive can craft a supportive court not only by appointing friendly justices, as the American literature has long recognized, but more interestingly by influencing when a vacancy will occur either by removing unfriendly justices or by packing the court with loyal justices.

1.1 DESIGN AND METHODOLOGY

Argentina, in terms of both the National Supreme Court and the Provincial Supreme Courts, represents a textbook case for the study of factors affecting the instability of justices in office. Argentina is a federal country with separate judicial entities at the provincial level; moreover, each province is autonomous vis-à-vis the national government in the design of its own institutions, producing a high degree of internal heterogeneity in the constitutional design. Precisely because of the persistent institutional instability, where from 1930 to 1983 democratic and military governments ruled interchangeably followed by a period when the administration changed as the result of party competition, Argentina can be considered a developing democracy. In the early '80s, the country, as well as other countries in the world, entered what is known as *the third wave of democratization* and thus the democratic institutional consolidation process (Huntington 1991).

Previous studies have also shown that Argentina is the theory-generating case for studying executive-court relations in developing democracies. Argentina was used in studies as the classical example of a third wave democracy born with a weak judiciary (Chávez 2004). The constant political manipulation by the executive, and the incapacity of the judiciary to limit attacks on itself, illustrate the difficult situation also present in other developing democracies. Another group of scholars (Helmke 2005; Iaryczower et al. 2002; Scribner 2004) chose Argentina as a case study to demonstrate that, even with the presence of a weak judiciary, Argentine justices have challenged executives by strategically ruling against them; what they

reveal, however, is simply that executives do not have total control over the justices' decisions.⁶ However, these studies have clearly overlooked the high degree of internal heterogeneity in the country, since most of the research was carried out at the national level (i.e., on the National Supreme Court). Even though Chavez (2004) incorporates into her research two Argentine provinces (Mendoza and San Luis), the research illustrates only that there is an internal heterogeneity at the subnational level; it does not examine the causal connections in the other provinces that have undergone other experiences. As a way to overcome this deficit, this research employs the subnational comparative method (including all 23 Provincial Supreme Courts)⁷ to analyze within-country variations (Snyder 2001). It is precisely these variations at the subnational level that would not only shed light on the factors that account for those differences but also would allow development of a mid-range theory about the stability of justices in office that should be applicable to other developing democracies.

More generally, studying the provincial judiciaries in Argentina is of substantive relevance. First, the provincial judiciaries play a central role in local politics, since governors envision this institution as another key political resource to enhance their power. Studying the judiciary over time and across provinces can contribute to understanding how the configuration of local power, as well as diverse institutional design, affects the stability of the justices in office. By doing so, this research redirects attention to the neglected role of the separation of powers at the subnational level, the most overlooked aspect of the literature on federalism (Cameron and

⁶ Moreover, and contrary to theoretical expectations of judicial independence, these studies elucidate that justices who lacked independence, because of the unstable institutional context, were precisely the ones who challenged the executives (Helmke 2005).

⁷ Ciudad Autónoma de Buenos Aires was excluded from the sample, since the Supreme Tribunal started to function only in 1998.

Falleti 2005). Second, studying the provincial judiciaries also provides valuable information about the differences and similarities between the trajectories of the national Supreme Court and the provincial Supreme Courts. The subnational comparative method helps to explain the variations not only across space and time but also across different political regimes (Snyder 2001).

The research proceeds as follows. The next chapter discusses the main contributions and ideas underlying the existing literature. It traces the main theories of judicial turnover both within and outside the American literature, and then develops a theory of vacancy creation that builds on the main contributions of existing research. This theory provides a unified framework for bringing together the preferences and incentives of executives for crafting a supporting court with the different strategies employed by the executives for forcing the retirement of certain justices from the bench. Specifically, the chapter examines how executives can trigger institutional and non-institutional strategies so as to obtain a friendly court.

The third chapter assesses the adequacy of the theory of vacancy creation by an historical examination of executive-court relations in Argentina. Using primary and secondary sources, the chapter traces the different ways in which justices have stepped off the bench from 1916 to 2009. Until the massive impeachment trial of 4 of the 5 members of the Supreme Court in 1946, justices had remained in the bench for long periods, the main reason for their departures being biological (death) and legal (retirements). However, since 1946 justices have been highly unstable on the bench, with the executive in most cases having forced their retirement. Since the 1946 impeachment trial constitutes a critical junction in the history of the executive-court relationship, the chapter shows how the events after the impeachment trial have reinforced

practices undermining the independence of the justices and increasing the cost of changing the direction of events.

Chapter 4 provides a quantitative analysis of the theory of vacancy creation for the Argentine justices of the National Supreme Court between 1916 and 2009. The evidence shows that the preferences and incentives of the executives can affect the stability of the justices on the bench. Specifically, the data reveal that politics matters when accounting for induced retirements from office while non political reasons for non induced retirements. Justices with similar political preferences as the ruling executive are less likely to be forced to step off the bench than are justices with different political preferences. Moreover, political loyalties between justices and executives were proved to be more sophisticated than expected, since what matters is the loyalty of the justices to the *faction* of the political party of the appointing executive rather than to the political party itself. Finally, the data also show that there is a timing effect with regard to involuntary retirements, since justices are more likely to leave the bench at the beginning of a new administration, revealing that executives prefer to craft a supportive court early in their term so as to leverage their political power. Overall, judicial turnover is not a random event but rather the result of the strategic political behavior of the ruling executive.

Chapter 5 uses original data gathered from the provincial Supreme Courts to systematically examine the factors that account for the judicial instability at that level since 1983. Descriptive statistics reveal that provincial justices have been on average more unstable than the justices from the National Supreme Court both before 1983 and afterwards. Governors have recurrently reshuffled their local courts so as to craft a more favorable judiciary, and the qualitative data gathered about the departures of the justices shows that governors have triggered both institutional and non-institutional mechanisms of vacancy creation. Because at the

subnational level there is significant heterogeneity, it was possible to elucidate more clearly how political factors matter under different scenarios. In those provinces with a single-party system (where the same political party has ruled since 1983), governors would not trust justices appointed by a governor from a different political *faction*. Intra-party competition plays a central role in those provinces to account for judicial instability. However, in provinces with a multi-party system, governors do not trust justices appointed by a governor from a different political *party* as well as from a different political faction (as, for example, in Córdoba with Mestre, or in Santiago del Estero with Iturre). Furthermore, the quantitative data reveal that, even though the political proximity between the governors and the justices matters in accounting for the judicial instability, institutional rules may matter as well. Governors have recurrently changed the regulations regarding the number of sitting justices to craft a more favorable court either by enlarging its size (to create new vacancies) or by reducing it (to permit removing unfriendly justices). Institutional rules appear to be a significant factor affecting the stability of the justices.

The findings of the previous chapter laid the groundwork for Chapter 6, which aims to explore to what extent institutional rules can facilitate or constrain judicial turnover. The fact that the Argentine provinces are autonomous and retain all the power that was not specifically entrusted to the national government allows them to dictate their own constitutions. This is precisely the reason for exploring how different institutional rules influence the stability of the justices on the bench. This chapter uses original data collected from the provincial constitutions, as well as other laws and regulations related to the functioning of the local supreme courts since 1983. The analysis of the 54 provincial constitutions suggests that there is great heterogeneity regarding the institutional design in the provincial judiciaries. Chapter 6 presents an econometric model designed to assess the combined effect of institutional rules and political factors (analyzed

in the previous chapters) so as to determine to what extent institutional rules can promote or impede judicial turnover. The findings in this chapter provide evidence to support the theory of vacancy creation. First, the model reveals that political factors, rather than institutional rules, play a central role in accounting for judicial instability. Having life tenure is the only institutional rule that matters in accounting for judicial instability, while rules regarding appointment and removal processes do not. Second, it was demonstrated that changes in the institutional rules, rather than the rules themselves, help account for judicial turnover on the bench; which suggests that governors have triggered both institutional and non-institutional mechanisms of vacancy creation to manipulate the composition of the court.

The last chapter summarizes the main findings of this research and explores the theoretical relevance of the findings for the study of judicial instability in other developing democracies like Peru and Indonesia. The latter become interesting case studies to extend the theory of vacancy creation in which executives manipulate the conformation of the court. However, the experiences of other countries in the region like Ecuador reveal that, in fact, there are different mechanisms of vacancy creation that still need to be addressed by future research. Ecuador illuminates a different way in which judicial turnover is driven— that is, by a coalition of parties in Congress. Ecuador combines features of strong presidentialism with a highly fragmented party system in which the President's party rarely has control over the Congress; thus, it is the Congress rather than the President that manipulates the conformation of the court (Mejía Acosta 2006; Shugart 1995; Shugart and Carey 1992).

2.0 EXPLAINING JUDICIAL TURNOVER: VACANCY CREATION THROUGH INDUCED RETIREMENTS

One of the most fundamental principles of democratic government is to guarantee the independence of the judiciary from the legislative and executive branches. This is necessary because, as signaled by Alexander Hamilton (1787-1788), when the three branches are concentrated in one hand, tyranny is likely to result. The essence of judicial independence is that judges are free from the influence or control of the government when deciding on a case (Fiss 1993). When the judiciary is guaranteed this political insularity, judges can act as a countervailing force within the political system, thus ensuring the necessary checks and balances between the legislature and the executive. But when the judiciary does not have this political insularity, then judges become the target of political manipulation, and the principle of separation of powers vanishes.

In many developing democracies the executive branch often influences the composition of the Supreme Court by forcing the resignation of unfriendly justices or by packing the court with friendly justices. Judiciaries in developing democracies are often dysfunctional with regard to the political system, because the political institutions are still in the process of consolidation and there is a lack of effective horizontal accountability (Diamond 1999). Precisely because of the poor consolidation of the institutions, inter-branch relations in developing democracies have

remained distorted, with the judiciary harmed the most. This political manipulation of the judiciary means that the members of the judicial branch are unable to place real constraints on the executive branch. The high judicial turnover of Supreme Court Justices is one indicator of this problem.

The objective of this chapter is to provide a theoretical framework from which to study judicial turnover in developing countries, both at the national and subnational level. To this end, Section 2.1 assesses the previous theories in the American and Latin American literature that can help explain judicial turnover. Section 2.2, building on the previous theories, presents a theoretical framework for studying vacancy creation, focusing, first, on the preferences and incentives of executives to craft a supporting court and, then, on the different strategies that executives can develop to create vacancies. The final section of the chapter presents a set of testable hypotheses related to which factors account for judicial turnover and when justices are more likely to leave office.

2.1 ASSESSING PREVIOUS THEORIES

2.1.1 The strategic retirement theory

American scholars have long been studying the factors that explain variations in the composition of the U.S. Supreme Court. The existing research is mainly of two types: qualitative and

quantitative.⁸ Qualitative studies, mostly biographic and chronological accounts of the justices who served on the Supreme Court, provide detailed and valuable information about the justices themselves as well as about how the political and social context of the time influenced the Court and its justices (Atkinson 1999; Ward 2003; Schwartz 1993; Rehnquist 2002). On the other hand, quantitative studies have developed a provocative theoretical framework that aims to understand what factors influence the rate of judicial retirement not only at the Supreme Court but also at the lower federal courts. Scholars argue that judicial retirements are not a random event but rather reflect strategic decisions by the justices.⁹ Furthermore, some authors argue that it is politics that motivates justices to strategically retire from the bench (Barrow and Zuk 1990; Hagle 1993; Hall 2001; King 1987; Nixon and Haskin 2000; Spriggs and Wahlbeck 1995; Zorn and Van Winkle 2000; Epstein and Segal 2005), while others insist that personal and economic reasons dominate (Squire 1988; Yoon 2006, 2003).¹⁰

The political retirement rationale is based on the idea that justices are more likely to retire under an administration that shares the same political party as they do. More precisely, the literature suggests that a justice is more likely to retire from office whenever she belongs to the same political party as the President and the majority of the Senate. This is based on the assumption that the justice shares the same political preferences as the executive's appointing

⁸ For earlier works on the topic, please refer to Schmidhauser (1962), Wallis (1936), Callen and Leidecker (1971), Ulmer (1982), and King (1987).

⁹ Some of the few exceptions to this argument can be found in Ulmer (1982) and Wallis (1936).

¹⁰ Even though some of these works account for vacancies in the Supreme Court and others only for those in the lower federal courts, all of them use the same hypotheses to account for judicial retirements. The only exception is the literature on state supreme courts, since in this case scholars pay special attention to the role of judicial elections and institutional variables in understanding the retirements of state supreme court justices (Hall 2001).

political party; in that event, it is more likely that a justice will retire from office because the President will appoint a replacement with the same political preferences as the outgoing justice (Zorn and Van Winkle 2000). Evidently, it is politics that motivates strategic behavior, since justices will be willing to give up their seats only to other like-minded justices and not to justices with different political preferences (Hagle 1993; Spriggs and Wahlbeck 1995; Zorn and Van Winkle 2000). Consequently, if the political party of the President and the Senate is not the same as the political party of the justice, then it is more likely that the justice will “hold off” on retiring until a more favorable political scenario arises. This strategy of “wait-and-see” which political party will be next in office is likely to take place during the last year of the Presidential term but not in the first or second year of the administration, since justices may not or maybe cannot wait that long to step down and also cannot predict in advance who will win the next election (Hagle 1993; Spriggs and Wahlbeck 1995; Zorn and Van Winkle 2000). The opposite is true when executives are reelected, since justices may not be willing to continue holding on to their seats for another four years.

Along with the strategic retirement argument, scholars have included in their statistical analysis non-political variables as a way to control for other factors that may be also affecting judicial turnover. The non-political factors suggest that justices also depart from the bench because of personal and economic reasons. The more common variables associated with this idea are age (used as a proxy for health conditions), salaries, pension benefits, caseload, and job satisfaction. Even though most of the scholars found supporting evidence for some of these explanations along with the political ones, only Squire (1988) and Yoon (2003, 2006) found evidence supporting these non-political factors alone.

In sum, what these empirical studies reveal is that the main underlying assumptions of these models of judicial turnover is that it is the *justice's own* decision what will determine when a vacancy occurs. As Ward argues, "... what is significant about departure [in the U.S. Supreme Court] is the power of the justices themselves to influence who their successor will be by the timing of that departure..." (Ward 2003, 6). In these models of judicial turnover, the justice's own decision to retire from office will still be influenced by whether or not s/he shares the same political preferences as the President and the Senate as well as other personal reasons.

Even though the U.S. literature offers an interesting model of judicial turnover, this hypothesis is based on assumptions that hold perfectly for the American case, and maybe also for other advanced industrial democracies,¹¹ but probably not for developing democracies like Argentina. As previously mentioned, in developing democracies the judiciary and the executive branches often becomes indistinguishable from each other because of the difficulties of the judiciary in placing real constraints on the executive manipulation of the branch. The main problem with using the strategic retirement assumption in developing democracies is that it is the motivation of the *president* rather than of the justice that determines when a vacancy will occur. In other words, in developing democracies the stability of a justice in office is affected by a presidential decision to remove her, whereas in the American literature the stability of the justice in office is solely determined by the justice's own decision. Along these lines, a recent article by Pérez-Liñán and Castagnola (2009) on Latin American Supreme Courts from 1904 to 2006 demonstrated the logic of the above conclusion. More precisely, in Latin American countries, contrary to the American case, presidents, rather than justices, have influenced the timing of

¹¹ Maitra and Smyth (2005) found similar results when studying the determinants of judicial turnover on the Supreme Court of Australia.

judicial retirements and nominations. In sum, even though politics is the main explanation of judicial turnover in both the US and the Argentine cases, politics operates differently in each. Where in the U.S. retirements result from a strategic political calculation by the justices in office, in developing countries retirements come about through a strategic political calculation by the executive in office. As Epstein and Segal point out “... ideology and partisanship have not figured prominently in most judicial *removals* in the United States....” (2005: 32). In developing democracies many of the vacancies in the court are the result of *induced retirements* stimulated by pressures from the executive to craft a supportive court rather than the decision of a loyal justice to retire from office.

2.1.1 Strategic decision making

Legal scholars were the first to conduct research about the judiciaries in developing countries. These works mainly focused on the constitutional and legal aspects of the judiciary; little attention was paid to the political role of the courts.¹² Even though in the early eighties scholars began to focus more on the political aspect of the judiciaries in Latin America,¹³ it was not until the last decade that there has been an increased interest among political scientists in studying judicial politics in developing countries (Russell and O'Brien 2001; Malleson and Russell 2006; Sieder et al. 2005; Ginsburg and Moustafa 2008; Smulovitz 1995; Ginsburg 2003; Schwartz 2000; Gauri and Brinks 2008). Most of the research about Latin American judiciaries is country-

¹² See, for example, Eder (1960), Rosenn (1974) and Biles (1976).

¹³ See, for example, Verner (1984).

specific (Argentina, Brazil, Chile, and Mexico are the most studied judiciaries, with Central American countries the least studied), but during the last years comparative studies have started to appear more frequently (Pérez-Liñán and Castagnola 2009; Scribner 2004; Finkel 2008; Ríos-Figueroa 2006; Staats et al. 2005; Navia and Ríos-Figueroa 2005; Ansolabehere 2007).¹⁴

Since the beginning there has been general consensus that "... Latin American Supreme Courts are politically dependent and dominated by the political environments within which they are embedded..."(Verner 1984: 468). More precisely, the conventional wisdom was that judicial independence was in jeopardy because these countries were embedded in a political environment strongly characterized by executives controlling the judicial branch. Since then, executives have had a crucial role in explaining or defending the independence of the judiciaries. But it was not until the late nineties that a group of scholars returned to this idea and developed a more specific theory about inter-branch relations in developing countries. Based on the principle of separation of powers, these authors theorized about which factors influenced the strategic decision-making of justices from different perspectives. One group concentrated on the conflictive executive-judiciary relationship by paying attention to the voting behavior of the justices (Helmke 2005; Leoni and Ramos 2006; Magaloni and Sanchez 2006; Scribner 2004; Herrero 2007), while the other group focused on how the partisan power of executives can conditioned the decision-making of the justices (Chávez 2004; Domingo 2000; Pérez-Liñán and Castagnola 2009; Ríos-Figueroa 2007). Still others concentrated on both aspects (Iaryczower et al. 2002).¹⁵ These

¹⁴ For an extensive list of works about judicial politics on Argentina or other Latin American countries, please refer to Kapiszewski and Taylor (2008).

¹⁵ There is not much research on Latin American countries about how the Supreme Court and District Courts influence the decision-making of the judges from lower courts, with the exception of Pérez-Liñán

studies reveal that presidents tend not to trust justices and, therefore, are willing to use their political power to craft a supportive court. Even though these studies assume that life tenure for Latin American Supreme Court Justices is not respected (especially for Argentine justices), there is no systematic research that tests this assumption. The only exception to this trend is the recently published article by Pérez-Liñán and Castagnola (2009c), in which they empirically demonstrate that political realignments of the executive can affect the rhythm and flow of judicial turnover in Latin American Supreme Courts. The remainder of this section outlines the main contributions of the existing literature related to the case of Argentina.

Previous studies have examined the relationship between justice preferences and their voting behavior (during the current government and during the last months of the previous government) about the constitutionality of a norm (Helmke 2002, 2005; Iaryczower et al. 2002). Under this line of research, Iaryczower, Spiller and Tommasi (2002) examine how political incentives influence the final decision of justices about the constitutionality of a norm between 1935 and 1998 (Iaryczower et al. 2002). The main findings of the authors are that, first, a justice will support the current government if the government has strong political power to formally remove a justice from office, and, second, a justice will not support the current government if s/he has opposite political tendencies from the president. From a different perspective, Helmke (2002, 2005) studies why under an insecure institutional context, Argentine justices ruled against the government in decisions about the constitutionality of a norm. Contrary to the theoretical expectations of judicial independence, Helmke finds that justices who lack independence are

et al. (2006) piece where the authors empirically examine this relationship in the Bolivian judiciary system.

precisely the ones who rule against the government during the final months of that government.¹⁶ Helmke solves this puzzle by arguing that it is precisely the lack of independence that motivates justices to rule against the current government and in favor of the incoming one, a voting behavior that she calls *strategic defection*, since only when weak governments approach the end of their terms are justices politically motivated to vote against the current government and in favor of the incoming one.¹⁷ The main difference between Helmke and Iaryczower *et al* is that Helmke is assuming that the *previous* voting behavior (i.e., the voting during the previous government in office) rather than the *current* voting behavior of the justices (i.e., the voting during the current government) affects their stability in office.

These lines of research suggest that the longevity of a justice in office is determined by whether or not justices are willing to modify their behavior in order to circumvent reprisals from the executive branch. Like in the American literature, the underlying assumption of these theories is that the stability of the justice in the bench is determined by the justice's own decision, in this case whether or not to rule against the current or previous ruler. Even though these studies suggest that life tenure in Argentina is not respected, they have failed to empirically demonstrate it, since they examine only the relationship between justices' preferences and their voting behavior. They assume, but do not test, the hypothesis that voting behavior has an impact

¹⁶ Theories about judicial independence (and also Iaryczower, Spiller, and Tommasi 2002) argue that justices who lack independence will rule in favor of the government, whereas the opposite is true when justices are independent (Larkins 1996).

¹⁷ Evidently, *strategic defection* behavior is strongly associated with a *surviving strategy*, since those justices who lack independence are precisely the ones who will carry out strategic defection to remain in office when a weak government approaches the end of its term. Therefore, the implicit assumption is that the stability of justices in office can be achieved by defecting from the current government and voting in favor of the incoming one.

on their stability in office. More surprisingly, if Argentine justices have indeed behaved strategically as a survival strategy, then, why justices have been so unstable in the bench?

Another interesting line of research, examine how the partisan power of executives can conditioned the decision-making of the justices (Chávez 2004; Iaryczower et al. 2002). The idea is that, if a president has a supermajority in Congress, then justices will vote as the president would prefer, since the president has the political power to formally remove the justice from office. In order to prevent that from happening, justices will behave as the president would wish, simply as a survival strategy. Conversely, if a president is weak (i.e., his or her party does not have a supermajority in Congress to formally impeach a justice), then justices can vote honestly, challenging the president's preferences because the latter is not able to punish them for voting against the president (Iaryczower et al. 2002: 701). According to these authors, justices will vote honestly or strategically depending on the political power of the current executive. As in the previous case, these studies examine only whether or not the president has the political power to remove a justice from office; they do not test if, in fact, only those strong presidents remove justices (Chávez 2004; Iaryczower et al. 2002). The underlying assumption in the literature is that impeachment (or the fear of impeachment) is the only way to remove justices from office, whereas this research proposes that there are other mechanisms that presidents can use to induce justices to retire. Like in the previous line of research (strategic voting behavior), within this research is also assumed that the longevity of the justice in the bench is determined by the justice decision to whether or not challenge executives with supermajority in the Congress.

To sum up, the existing literature provides an interesting and challenging foundation from which to start studying which factors may account for the short average time that justices stay in office. It also reveals that executives do not trust justices. Building on the contribution of

the literature, the task of the next section is to develop a theoretical framework from which to study judicial turnover by moving from assumptions borrowed from the American literature to assumptions specifically conceived to underdeveloped democracies.

2.2 A THEORY OF VACANCY CREATION

The starting point of the theoretical framework of this research is that presidents and governors, while in power, want to have a supportive court as a way to maximize their political influence on the decisions of the judiciary. The chief guiding hypothesis is that judicial turnover is mainly the result of changes in the political configuration in the executive. The executive can craft a supportive court not only by appointing friendly justices, as the American literature has long recognized, but more interestingly by influencing when a vacancy will occur either by removing unfriendly justices¹⁸ or by packing the court with loyal justices. The theoretical framework of this research aims to identify *which* factors shape judicial turnover over time, *when* justices are more likely to leave office and *how* executives craft a supportive court. The framework is applicable to analysis at both the national and subnational levels, since executives, both presidents and governors, envision the judiciary as a key political resource to enhance their power in the government. Because the theoretical framework applies to both the national and subnational levels, “executive” refers to either president or governor and “legislature” to either the National Congress or provincial legislatures. The first part of the section examines the

¹⁸ “Unfriendly justices” refers to justices who were appointed by an executive with different political preferences from those of the current executive.

preferences and incentives of executives to craft a supportive court, while the second part of the section introduces the different strategies for vacancy creation.

2.2.1 Preferences and incentives of executives to craft a supportive court

The underlying assumption of this study is that the proportion of justices who depart from the bench in a given year is not a randomly occurring event but rather a function of certain political variables. Politics matters when explaining judicial turnover, since executives want to have a supportive court to maximize their political influence not only on the judiciary but also on policy-making. Also executives prefer to have a supportive court earlier in their term so as to have control over the judiciary during the whole term. A supportive court is one in which the majority of the justices share the same political preferences as the executive (i.e., like-minded justices), and the opposite is true for an unfriendly court. When executives do not have a friendly court, then it is likely that they will try to remove those unfriendly justices because they do not trust them.

Justices are very important players for executives, because they have the capacity to overrule legislation or an executive decision. Even though Tsebelis (2002) argues that justices are not constantly making constitutional interpretations, the fact that they have the capacity to do it makes them influential actors in the political arena. As Chapter 3 shows, the Argentine Supreme Court could have had the capacity to rule in favor of habeas corpus during the military regime and thus put an end to state-sponsored violence and repression; or it could have ruled against the state-owned privatization companies during the Menem administration and prevented the implementation of neoliberal economic policies; or it could have ruled against the

constitutionality of “pesification” during the Kirchner administration and protected the property right of the citizens. The executives’ policy objectives were accomplished in those years because they had crafted a supportive court.

It is precisely because justices have the capacity to frustrate policy-making (and thus affect the stability of the administration) that incoming executives do not trust justices appointed by executives with different political preferences. The desire to have a supportive and dependable court (one that does not constrain the decisions of the ruling executive) is part of the logic that political actors seek to increase their political leverage.¹⁹ Therefore, it is argued that the political proximity between the justice and the executive matters for understanding judicial turnover. Friendly justices are those that are political and ideologically closed to the executive, whereas the opposite is true for unfriendly justices. This is because, in general, a justice who shares the same political preferences as the executive would likely rule in favor of the executive rather than against. Measuring a justice’s political preferences is a difficult task in this case because partial data are available about the vote of the Argentine justices at the National Supreme Court and no data are available about the votes of Argentine justices at the Provincial Supreme Courts. Chapter 4 discusses the measurement issue regarding this variable, but the main idea is that the political preferences of the justices have significant explanatory value for understanding judicial instability in developing democracies. It is argued that the greater the *ideological and political distance* between the sitting justice and the executive, the higher the probability that the justice will leave the bench.

¹⁹ A similar logic applies to the implementation of judicial reforms in Latin America. Jodi Finkel (2008) argues that the implementation of judicial reforms takes place when the ruling party realizes it will not be able to maintain political dominance for another term. Judicial reforms act as an insurance policy for the outgoing ruling party against the incoming party.

Incoming executives confronting an unfriendly court would hardly trust justices not only with a different political ideology but also with a different political background. In developing democracies, Supreme Court Justices do not necessarily come from a judicial career, since it is often the case that former deputies, senators, or ministers are appointed to the bench. For example, in 2002 the Peronist Governor Ángel Maza from La Rioja appointed to the court Agustín Benjamín de la Vega, another Peronist former Governor of the province; similarly, the former Peronist Senator from the province of Tucumán, Ricardo Tomás Maturana, was appointed to the provincial Court in 1990 by the Peronist Governor José Domato; again, in 2002 President Eduardo Duhalde, from the Peronist party, appointed Carlos Maqueda to the Court, who at that time was a Peronist Senator and President of the Senate. Even though the National and Provincial Constitutions in Argentina, and in most developing countries, clearly prohibit justices and judges from participating in politics while in office, constitutions do not necessarily forbid the appointment of justices who had a previous political career. One result of this vagueness in the law is that executives have been choosing candidates with dubious independence from political power. In general, executives often prefer to designate a loyal member of their government rather than a candidate with a judicial background, so that their interests and desires will be carried out in the court. Precisely because of this, it is likely that the incoming executive will initially choose to remove justices with a political background rather than justices with a judicial one, because they represent a clear political threat.

When executives confront an unfriendly court, it is likely that they would manipulate the composition of the court during their first years in government rather than during the last years. This is because having a loyal court at the beginning of the term (rather than at the end) is more likely to guarantee executives the fulfillment of their policy goals. Moreover, at the beginning of

their terms executives have more ability to influence politics (the “honeymoon effect”) than during their last year. For these reasons is that the electoral cycle can set the timing of the judicial turnover. Yet even if the American literature endorses the electoral cycle hypothesis, this hypothesis has a different effect in developing democracies. Under the American model justices retire from the bench when they expect that a like-minded justice will be appointed to succeed them, whereas in the Argentine case the executive seeks to replace justices with others holding different political preferences. For this reason, in the American model, new appointments to the bench are more likely to maintain the ideological balance of the court (Franklin 2002), whereas in the Argentine case it is the opposite that prevails. Electoral cycles turn out to be special moments in which the Court can change its political configuration; indeed, as will be shown in Chapter 3, reshuffles in the Argentine Supreme Court have often occurred after a change in administration. Therefore, in developing democracies it is likely that realignments in the executive power would produce realignments also in the political conformation of the court.

2.2.2 Strategies of vacancy creation: induced retirements

In a recent study, Ríos-Figueroa (2006) demonstrates that between 1950 and 2002 Argentina had at the national level the highest level of *de jure* judicial independence in the Latin American region and also that those levels had been constant throughout those years. If this is the case, then why are Argentine justices so unstable in office? Based on a preliminary analysis of Argentina (Castagnola 2006), it is argued that, as in most developing democracies, presidents have often induced the retirements of unfriendly justices through institutional mechanism but also through non-institutional ones. In the U.S. Supreme Court there are isolated cases of

induced retirements through non-institutional channels,²⁰ but that is not the case in developing democracies like Argentine with unstable judiciaries (Chávez 2007; Verbitsky 1993). Chapter 3 will show that in Argentina since 1946 presidents have systematically used induced retirement strategies, using both institutional and non-institutional mechanisms, to remove troublesome justices from the bench while Chapter 5 the strategies that governors had employed to craft a supportive court since 1983.

This research examines the different mechanisms for induced retirement by which executives, both presidents and governors, may be able to create vacancies without using the full-fledged impeachment process. *Induced retirements*, or involuntary departures, take place when the executive is able to manipulate the resignation of unfriendly justices by triggering institutional and/or non-institutional strategies to force their departure. The recurrent use by politicians of these institutional and non-institutional strategies for inducing the retirement of justices had transformed them into informal rules of action both at the national and subnational levels (Helmke and Levitsky 2006). The existing literature has mostly acknowledged impeachment trials as *the* institutional mechanism for vacancy creation and little attention was given to other institutional rules. This research discloses the importance of studying changes in the institutional arrangements of the judiciary (like tenure system, court-packing, appointment and removal) since they are parts of the “packages” of legal provisions that executives can employ for crafting a supportive court.

²⁰ For example, President Lyndon Johnson on two occasions persuaded justices to retire from office: in 1965 he convinced Justice Arthur J. Goldberg to become the United States ambassador to the United Nations, and in 1967 he indirectly forced the troublesome Justice Tom C. Clark to resign from the bench when he appointed Justice Clark’s son Ramsey to be Attorney General (Hagle 1993). President Richard Nixon in 1969 also forced the resignation of Justice Abe Fortas due to the latter’s fear of impeachment when it was revealed that Fortas had taken money from a charitable foundation.

Even though originally, the Constitution and other legislation have been conceived as structural protections against the potential abuses of power committed by political authorities; executives have often managed to manipulate those rules so as to leverage their political power. As Douglass North (1990) asserts, whenever a politician has the capacity to restructure political institutions, he will do it in such a way that his goals are more likely to be achieved. If that is the case, then studying the evolution of institutional arrangements can provide significant evidence for understanding how executives were able to manipulate the composition of the high Courts. American scholars have also shown that institutional arrangements, especially electoral rules, matter when studying judicial turnover of those elective justices on state supreme courts (Bonneau 2005; Bonneau and Hall 2003; Hall 2001; Hall and Bonneau 2006).

The study of the evolution of institutional arrangements becomes relevant especially for the subnational level analysis due to the internal heterogeneity of the judiciaries. The variations in the constitutions and regulations within the provinces over time, as well as across the provinces, can shed light on how the institutional design affects the stability of the justices as well as the independence of the judiciary from the other branches. It is precisely through changes in the institutional design that governors and presidents can craft a supportive court and enhance their capacity to manipulate the judiciary. It is argued here that constitutional provisions and norms that infringe on the justices' rights and independence will produce an unstable environment for the justices, thus increasing their instability on the bench, while provisions and norms that protect the justices' rights will produce a more secure environment for them, thus reinforcing their stability in office. For example, the tenure system becomes relevant for the analysis when the length of the tenure is shorter than the tenure of the appointing authority, since in those cases there can be a potential for political manipulation (Rios-Figueroa 2009). Even

though most of the Argentine provinces guarantee life tenure to provincial high court justices, there are some that establish fixed terms: Catamarca until 1988, Jujuy until 1986, La Rioja until 1998, Salta and San Juan until 1986, and Tucumán until 1991 (Castagnola 2009). Except in the province of Tucumán, the other five listed above had fixed tenure ranging from one year to six. Bearing in mind that the tenures of governors and legislators range from four to six years, judicial tenure in those provinces should be, at a minimum, longer than six years to prevent abuses.

There is also a difference regarding the court-packing capacity of governors, since nowadays only three provinces (Córdoba, La Rioja, and Neuquén) and the Ciudad de Buenos Aires have clearly established in their Constitutions the total number of justices sitting on the high Courts; while in the rest of the provinces, the number of sitting justices is not clearly determined. Governors and executive can benefit from the vagueness in the rules when confronting an unfriendly court since they can pack the court with friendly justices. Rules regarding retirement age also vary greatly from province to province. Since the '90s, provinces have started to incorporate such a restriction into their constitutions so as to limit the tenure of the justices. All these variations in the institutional designs of the provinces have to be taken into account, because they can have significant effects on the stability of the justices and can provide valuable explanations regarding what is really going on.

However, scholars like Charles Cameron (2002) pose questions about the importance of institutional design for studying the judiciary. Cameron argues that institutional arrangements, though important, cannot account for all the variation among judiciaries, since in some cases, like Argentina, they become only nominal protections, or “parchment barriers,” against abusive executives willing to manipulate the country’s judiciary. In other countries, with no structural

protection for the justices, the judiciary is not threatened by the authorities. According to this view, it is the social environment that produces, or does not produce, a cultural norm in favor of the rule of law; thus structural protections are neither a necessary nor a sufficient condition to guarantee respect for the judiciary. In the American case, John Ferejohn (1999) asserts that constitutional protections for the judiciary have remained stable over the years, because the people have not wanted to alter them. Along this line, Catalina Smulovitz (2003) argues that a decentralized mechanism of control can impose reputational costs on those politicians who use their political resources to transgress the law. In that way, societal accountability strategies became relevant to respecting institutional arrangements and, in this case, the judiciary as well.

Yet the existing research at the subnational level in Argentina reveals that governors have changed institutional arrangements, regardless of the reputational cost, so as to better uphold their interests.²¹ A recent study at the subnational level demonstrates that there is a relationship between changes in the institutional design and protection of the judiciary (Castagnola 2009).²² A historical comparative analysis of all the constitutions and norms for all the provinces between 1983 and 2009 reveals, for example, that those provinces that have had relatively vague rules related to court-packing were the most likely to experience changes in the number of the sitting justices, compared to those that have explicit regulations. The historical analysis also discloses that during this period provinces have changed their constitutions by incorporating rules to fix the retirement age of the justices so as to get rid of troublesome ones. For the above reasons,

²¹ The province of San Luis is the most representative case; for further information, please refer to Castagnola (2009 Chapter 7).

²² A common thread within provincial regulations is ambiguous protection for justices' constitutional rights (like the tenure of the justice on the bench or the salary paid), as well as the publicity accompanying the appointment process.

institutional designs have to be taken into account when studying how executives can craft a supportive court, since changes in the rules regarding the retirement age of the justices, tenure system and the constitutional rights of the justices, among other, can reveal undisclosed strategies of vacancy creation.

Therefore, it is relevant to incorporate in the analysis the institutional design accounting judicial turnover, since executives have often manipulated the legislation so as to craft a supportive court. Common practices of institutional induced retirement have been: offering attractive retirement benefits to the justices (as happened in Tierra del Fuego, Entre Rios, Neuquén, and Misiones), allowing the reappointment of justices to a federal court,²³ removing justices via decree (as the military did in the Supreme Court in 1955, 1966, and 1976), changing the Constitutional rules regarding retirement age (as happened in Chaco in 1994, La Rioja in 1998, and Santiago del Estero in 2005), modifying the number of sitting justices in office (as occurred in La Rioja in 2002), and cutting back the salaries of the justices via a budgetary reduction (as happened in San Luis and Río Negro).²⁴ Interestingly, even though constitutions and the existing literature identify impeachment as *the* institutional mechanism of vacancy creation, all these other (complementary) institutional strategies have the same effect as the impeachment process (i.e., removing a justice from the bench) without the same public visibility and political cost. This is why these other institutional mechanisms of vacancy creation have

²³ The occasion of the reappointment of a justice to a federal court gives the executive, either the president or the governor, an empty seat to which to appoint a loyal justice while relocating the outgoing justice to another court with low political impact.

²⁴ Another institutional mechanism used to get rid of troublesome justices can be to reorganize the courts and not reappoint all the justices, as happened in Australia (Williams 2001).

become used more often in Argentina at both the national and provincial levels since the mid-nineties.

However, executives have also used non-institutional mechanism of vacancy creation. The more common practices are: threatening a justice with possible impeachment due to accusations of corruption or wrongdoing (successfully used in the 23 provinces), discrediting a justice's decision or performance in the media (as happened in San Luis), implicating the justice's family in a scandal so as to harm the reputation of the justice (as occurred in Chaco and Santiago del Estero), and exploiting internal disputes in the Court between the "disloyal" justice and the loyal ones (as in Rio Negro). The fear of impeachment can be an effective mechanism to persuade an unfriendly justice to step down, since it not only harms the reputation of the justice but also imposes economic costs (since in most cases, if the justice is convicted, s/he is automatically prohibited from receiving any type of pension, and the Senate's verdict can inhibit the justice from ever working again in the judicial system).

These informal strategies are powerful, since many justices do not outlast the political persecution, moral attrition, and coercion, and thus ending up resigning from the bench. The importance of these non-institutional induced retirement strategies are that they can have the same effect as a full-fledged impeachment process – that is, the removal of a justice from the bench- but through a less rigorous process. Precisely because these practices are informal, it requires less legal argumentation and evidence to endorse the accusations to the unfriendly justice. These types of unverified denouncements against justices undermine the justices' own credibility within the society. Furthermore, as in the case of institutional mechanisms, these informal practices also have a low public visibility and political cost in comparison to the impeachment process, since the discrediting campaigns and denunciations are not necessarily

undertaken by the executive himself but rather by his collaborators. As the result of the excessive use of these informal practices, Argentine justices – both at the national and subnational levels – have denounced the existence of an “industry of impeachment” based on its improper use for partisan reasons.

Nonetheless, there are two important caveats to consider in terms of the non-institutional practices. First, these practices do not have a guaranteed result. Their success will depend not only on the persistence of the government in using these practices against the unfriendly justice, but also on the capacity of the justice to endure the moral and political persecution. Secondly, these informal practices are more time-consuming than the impeachment process; thus, it may take longer (or maybe never) to see the desired effect. Due to the uncertainty of the results, when triggering informal practices intended to lead to induced retirement, the executive should be aware of the likelihood of having to dedicate more time and resources than might otherwise be anticipated.

Under what circumstances would an executive activate an institutional or non-institutional mechanism for inducing the retirement of an unfriendly justice? Basically, the decision will be determined by the partisan power of the executive in Congress (meaning whether or not the executive has support in the Deputy and Senate Chambers to impeach a justice or to change the relevant legislation). When the executive has a low popularity and his party does not have full control of both houses of the legislature, then non-institutional strategies will likely be followed, given that the executive does not know *a priori* what the verdict of the legislature on an impeachment process will be (i.e., how the other parties will vote in Congress). Even in a context in which the executive has a low amount of congressional power, the non-

institutional strategies of vacancy creation can still be effective. For example, justices may not survive the political persecution when they are constantly accused of wrongdoing in the media.

Even though the main induced strategy for weak executives is the non-institutional one, there are some cases in which the executive can count on the support of other political parties and, thus, make credible their threats against the justices to activate institutional strategies. It is often the case that the target justice does not have a good reputation either because he had a previous political career or he had prior accusations of corruption or wrongdoing. In those cases, even though the ruling party does not have the political power to carry out an impeachment process, the mere accusations or threat of an impeachment become credible since the justice has already a bad reputation within society and the justice knows that sooner or later the impeachment will be carried out. For example, during the Nestor Kirchner administration, it was possible to impeach 6 out of the 9 justices in the bench without the ruling party having the necessary seats in the Congress because those justices had been involved in several corruption scandals and thus their reputation was strongly harmed. Threats of impeachment process can turn into a formal impeachment when the executive can count on the support from other political parties. Therefore, when the troubled justices have an unpopular reputation in society, the non-institutional strategies can turn into institutional strategies because the executive can count on the support from other political parties. It is precisely under these circumstances that threats of impeachment are credible.

On the other hand, when executives have the partisan power in the legislature to either impeach a justice or pass legislation to change the rules of the Court, then executives can activate both institutional and non-institutional strategies. These executives, in sum, have more resources available to craft a supportive court, making it more likely that they would obtain favorable

results in a shorter time than those executives without comparable partisan power in the Congress. Evidently, changing the rules of the Court is not cost-free, but powerful executives can handle the costs associated with it. At the same time, executives have to be extremely careful when selecting incoming justices since it would be very difficult for them to face the political cost associated with the removal of a newly appointed justice. This happened to President Frondizi in 1960 when the newly appointed justices did not support his policies, so he decided to increase the number of justices to 7 to craft a supportive court. President Alfonsín faced the same dilemma when his newly appointed justices started to rule against his will; however, Alfonsín's desire to enlarge the court did not come true due to the lack of congressional support.

It is important to recall that the existing literature on Latin American courts has assumed that, even though executives always want to craft a supportive court, only those presidents or governors with strong support in the Congress will be able to do it (Chávez 2004; Iaryczower et al. 2002). Under this logic, the authors conclude that judicial turnover is reduced when weak presidents or governors are in power, not because they are benevolent toward the existing justices, but rather because they do not have the political capacity to craft a supportive court (Chávez 2004; Iaryczower et al. 2002). However, between 1916 and 2009 in Argentina, governments had a supermajority in the National Congress in only 11 years. Therefore, what can account for the high instability rate of Argentine justices? Were those justices removed from office *only* by those presidents with the political power to formally do so? It may be argued that the non-institutional strategies of induced retirement can also help weak governors and executives to craft a supportive court. The political power of the executive can influence the type of strategy that executives use as well as the timing of the creation of vacancies, since the institutional mechanism of induced retirement may be more expeditious than the non-

institutional ones (due to the uncertainty associated with the result). This does not necessarily guarantee the removal of a justice from the bench. Table 2.1 outlines the main characteristics and differences between the institutional and non-institutional channels of induced retirement.

Table 2.1: Main features of institutional and non-institutional mechanisms of induced retirement at both the national and subnational levels

	<i>Institutional</i>	<i>Non-Institutional</i>
<i>Who?</i>	Strong executives	Strong executives, weak executives
<i>What?</i>	<ul style="list-style-type: none"> • Offer attractive retirement benefits to the justices. • Allow reappointment of the justice to a federal court. • Remove the justice via executive decree (extraordinary mechanism). • Change the Constitutional rules regarding retirement age and the number of sitting justices in office. • Cut back the salaries of the justices via a budgetary reduction. 	<ul style="list-style-type: none"> • Threaten a justice with possible impeachment due to accusations of corruption or wrongdoing. • Discredit the justice’s decision on a case in the media. • Implicate the justice’s family in a scandal. • Foster internal disputes in the Court between the “disloyal” justice and the loyal ones.
<i>Effectiveness?</i>	Yes	Uncertain
<i>Timeframe?</i>	Specified length	Uncertain length

2.3 CONCLUSIONS

Overall, the previous discussion provides the foundations for a new approach for studying executive-court relations in developing democracies. Building off the existing literature, the chapter showed that many of the underlying assumptions are not applicable to the Argentine judiciary and may not be applicable to other developing democracies. Specifically, the chapter reversed the directionality of the relationship between executives and justices by proposing that

executives (either presidents or governors), rather than justices, can determine the stability of justices on the bench. Based on this idea, the chapter then presented a novel framework for the study of judicial instability in office by examining the preferences and incentives of the executive to craft a supportive court. This last section outline the hypotheses to be tested both at the national and subnational level analysis.²⁵ The political proximity of the justice and the ruling executive matter greatly, since executives prefer to have justices on the Court who share their political preferences. This generates the following hypothesis:

Political preference hypothesis: A justice with different political preferences from the ruling executive will be more likely to be removed from office than a justice who shares the same political preferences as the executive.

Due to the importance of justices for policy-making, executives would not trust justices appointed by executives with different political preferences and would seek to manipulate the composition of the court during the first years of the administration so as to maximize their leverage in the court. Stated as a testable hypothesis:

Timing hypothesis: The likelihood that an incoming executive removes a justice from office will be higher during the first year of the government.

The next hypothesis stems from the untested assumption held by a group of scholars (Chávez 2004; Iaryczower et al. 2002) about the partisan power of the executive to craft a supportive court. These authors argue that only those executives who have partisan support in Legislature to formally remove a justice from office (i.e., by impeachment) will obtain a

²⁵ For simplicity issues, “executive” refers to either presidents or governors while “legislature” to either the National Congress or the provincial legislatures.

supportive Court. Even though this study challenges this assumption, it is included in the analysis as a competing hypothesis:

Executive partisan power hypothesis: The likelihood that a justice is removed from office will be higher when the government has a supermajority in Legislature.

Executives who inherit an unfriendly court from previous administrations would hardly trust justices with a different political ideology any more than justices with any political background at all. It is often the case that, during the nomination time, executives prefer to name a loyal member of their government or political party rather than a person with judicial background so as to guarantee that their interests will be accomplished in the court. Consequently, executives who confront an unfriendly court would first prefer to remove those justices with a political background rather than those with a judicial one, since they represent a political threat. Stated as a hypothesis:

Justice's political background hypothesis: A justice with a political career will be more likely to be removed from office compared to a justice with a judicial career.

Along with the previous hypothesis, the chapter also explored the different institutional and non-institutional strategies executives may employ to create vacancies in the court. Besides the increased importance of impeachment trials in the literature as the institutional mechanism for vacancy creation, the chapter uncovered other such mechanisms that, even though they have been used as often as the impeachment trials, have been generally overlooked. The next chapter shifts to the empirical facts by examining executive-court relations in Argentina since 1916, while the following chapter provides empirical evidence to test the theory of vacancy creation in the National Supreme Court and the Provincial Supreme Courts in Chapter five.

3.0 DISCLOSING THE LOGIC OF VACANCY CREATION IN THE ARGENTINE SUPREME COURT, 1916-2009

One of the most striking historical facts about the Argentine Supreme Court is that, regardless of the fact that justices are appointed for life, since 1947 presidents have had a significant power to manipulate the composition of the Supreme Court by inducing, with different strategies, the retirement of the justices from office (Pellet Lastra 2001). Even though the power to craft a supportive court was far more evident during military regimes, democratically elected presidents also have been able to assemble a friendly court. Even more interesting, in 1994 President Carlos Menem, the second democratic executive since the last military regime, increased the number of justices from five to nine. This last enlargement of the Court gave birth to what was later known as the “automatic majority,”²⁶ which reinforced the idea that presidents have an “addiction” to composing their own Supreme Court (Pellet Lastra 2001). This unbalanced relationship between the president and the justices has contributed to the deterioration of public opinion of both

²⁶ The logic behind the idea of “automatic majority” is that the enlargement of the Court to 4 more members ensured that the president, Carlos Menem, would have at least four votes out of nine favorable to his own interests. However, Carlos Menem was able to appoint two more justices to the bench since Justices Adolfo C. Caballero and Jorge A. Bacqué resigned as a consequence of the political manipulation of the Court. In 1990, Menem appointed 6 out of 9 justices in the Court.

branches, but more importantly of the Judiciary.²⁷ A similar story of political manipulation of the courts takes place in the provincial Supreme Courts, since the consecutive changes between military and democratic regimes has also affected the composition of the local courts, in most provinces producing reshuffles.

This chapter applies the notion of positive feedback to illustrate how events in the early stages fed on themselves and reinforced the unbalanced relationship between presidents and justices (Pierson 2004). The 1946 impeachment trial of the Supreme Court justices represents a critical juncture in the history, since it initiated a process of positive feedback whereby the cost of changing the direction of the events was raised significantly. It is precisely the identification of this reinforcing process that can contribute to the understanding of why this unequal executive-court relationship has persisted over time. This chapter employs qualitative data, from primary and secondary sources, to trace the evolution of the inter-branch relationship. Section 3.1 examines the executive-court relationship before 1946, paying special attention to the ways in which vacancies were created. During this first stage, executives had limited incentives to remove justices from the bench, since they shared the ideology of the conservative regime (Pellet Lastra 2001). Consequently, changes in the composition of the Court occurred gradually and as the result of natural causes like death or retirement. Section 3.2 focuses on the second stage of executive-court relations in the country, with the 1946 impeachment trial as the starting point. Contrary to the first part of the history, throughout this period executives had political incentives

²⁷ In 1984 the public opinion surveys of institutional prestige revealed a 57% positive image towards the Judiciary, but as time went by that positive image decreased to 16% in 1991, 11% in 1999, and 8% in 2001 (Poder Judicial de la Nacion Argentina 2004). With the re-democratization process in 1983, political institutions had high levels of prestige within society but as time went by political and economic crisis undermined the reputation of the institutions and increased the social dissatisfaction in the judiciary.

to craft a supportive court since justices had stronger bonds to the appointing executive than to the regime. This particular shift in conceiving the executive-court relationship triggered a self-reinforcing dynamic leading towards a less independent judiciary. The changes in the political regime (from military to civilian and vice versa) were accompanied by purges in the Supreme Court, each one of which amplified the difficulties of reversing the course of the history. During this stage, vacancies in the Supreme Court were mainly induced by the executives. The final section outlines the main changes in the executive-court relationship and lays the ground for the empirical analysis of the vacancy creation framework.

3.1 THE TRADITIONAL WAY OF CREATING VACANCIES: NATURAL CAUSES, 1916-1946

3.1.1 The Radical administrations: 1916-1928

In 1916, the first presidential election conducted under secret and compulsory voting was held in Argentina. Law 8.871, sanctioned in 1912, known as the Sáenz Peña Law, aimed to put an end to electoral fraud in the country, not only by eliminating the open ballot but also by creating a new electoral roll (known as *pardon electoral*). The Ministry of War and the Judiciary, no longer the Executive, were in charge of composing the list of people allowed to vote. Even though suffrage was still restricted to males, this was a very significant step toward eliminating electoral fraud. Therefore, the 1916 presidential election is considered to be the first democratic election in the country. The Unión Cívica Radical (UCR) party ended its electoral abstention and competed for

the presidency. From 1916 until 1930 the UCR governed the country: Presidents Hipólito Yrigoyen from 1916 to 1922, Marcelo T. de Alvear from 1922 to 1928, and Yrigoyen again from 1928 to the military coup in 1930, were all from that party. This was the first time that democratically elected Presidents succeeded each other consecutively without a military interruption; it would be another 59 years before it happened again (Romero 2001).

Yrigoyen was a very charismatic leader, probably the most popular president of the country before Perón (Potash 1982a). When Yrigoyen assumed the presidency in 1916, all the sitting members of the Supreme Court had been appointed by former presidents who were members of the Partido Autonomista Nacional (PAN). There was only one vacancy on the Court, since Justice M.P. Daract died in office on December 25, 1915. It took Yrigoyen three years to fill that vacancy (with Justice Ramón Méndez), partly due to low presidential support in the Senate. In the presidential election of 1922, Yrigoyen supported Marcelo T. de Alvear as the candidate from the UCR party; Alvear assumed the presidency shortly thereafter. As time went by, however, problems arose in the party due to differences in political style between the current and former executives. President Alvear, contrary to his predecessor, decentralized power and did not have strong visibility in the government. As a result of these differences, the UCR divided in two factions: personalist (pro-Yrigoyen) and anti-personalist (pro-Alvear).

The Alvear administration was the first one in the century to have a high judicial turnover in the Supreme Court. Between 1922 and 1928 four justices left the Court (see Table 3.1) due to natural causes (i.e., deaths and retirements). On March 6, 1923, Justice D.E. Palacio died while in office, as did Justice Nicanor Gonzalez del Solar on September 24, 1924. In less than eight months Alvear filled the first vacancy with Justice Roberto Repetto, and in less than three months he appointed Justice Miguel Laurencena to the other open seat. The third vacancy

occurred on June 1, 1927, when Justice Ramón Méndez retired after eight years of service; it took Alvear only one month to appoint Justice Ricardo Guido Lavalle to replace him (Molinelli et al. 1999). The last vacancy came on February 3, 1928, when Justice Laurencena died in office; on September 10 of the same year, Alvear appointed Justice Antonio Sagarna to the Court. It is important to point out that, contrary to what happened during the first Yrigoyen administration, in this case Alvear had full support in the Senate, since more than half of the seats belonged to the president's party (Molinelli et al. 1999). In 1928, despite the divisions in the UCR party, Alvear supported the candidacy of Yrigoyen in the election; at the age of 76 years, he was reelected president.

Table 3.1: Number of justices appointed by executives, 1900-2009

<i>Executive</i>	<i>Party</i>	<i>Number of justices</i>
Julio A. Roca (1898-1904)	PAN	3
Manuel Quintana (1904-1906)	PAN	1
José Figueroa Alcorta (1906-1910)	PAN	2
Roque Sáenz Peña (1910-1914)	PAN	0
Victorino de la Plaza* (1914-1916)	PAN	1
Hipólito Yrigoyen (1916-1922)	UCR	1
Marcelo T. de Alvear (1922-1928)	UCR	4
Hipólito Yrigoyen (1928-1930)	UCR	0
José Felix Uriburu (1930-1932)	Military	1
Agustín P. Justo (1932-1938)	PDN	3
Roberto M. Ortiz (1938-1940)	UCR(A)	1
Ramón Castillo* (1940-1943)	UCR(A)	0
Pedro Ramirez (1943-1944)	Military	0
Julián E. Farrell (1944-1946)	Military	1
Juan D. Perón (1946-1955)	PJ	5
Pedro A. Aramburu (1955-1958)	Military	6
Arturo Frondizi (1958-1962)	UCR(I)	6
José María Guido (1962-1963)	UCR(I)	1
Arturo U. Illia (1963-1966)	UCR(P)	2
Juan C. Onganía (1966-1970)	Military	6
Roberto M. Levingston (1970-1971)	Military	1
Alejandro Lanusse (1971-1973)	Military	0
Juan D. Perón (1973-1974)	PJ	5 ¹
María Estela M. de Perón* (1974-1976)	PJ	2
Jorge R. Videla (1976-1980)	Military	9
Eduardo Viola (1980-1981)	Military	0
Leopoldo Galtieri (1981-1982)	Military	1
Reynaldo Bignone (1982-1983)	Military	2
Raul Alfonsín (1983-1989)	UCR	6
Carlos S. Menem (1989-1999)	PJ	10
Fernando de la Rúa (1999-2001)	Alianza	0
Eduardo Duhalde (2002-2003)	PJ	1
Nestor Kirchner (2003-2007)	PJ	4
Cristina Fernandez de Kirchner (2007-)	PJ	0

Note: *Vice President assumed the Presidency due to the death of the President. PAN: Partido Autonomista Nacional; UCR: Unión Cívica Radical; UCR(I): Unión Cívica Radical Intransigente; UCR(A): Unión Cívica Radical Antipersonalista; UCR(P): Unión Cívica Radical del Pueblo; PJ: Partido Justicialista; PDN: Partido Demócrata Nacional. ¹ Justices appointed under the Cámpora Presidency but informally by Juan Perón.

During the second Yrigoyen administration, the divisions inside the party intensified and corruption scandals increased. By 1930 the antipersonalist faction was strongly against the president's actions. Yrigoyen faced severe criticism also from politicians outside the party, especially when he decided on federal intervention in the province of Entre Rios (Potash 1982a). Although Justice Antonio Bermejo died on October 18, 1929, before the military removed the president from office on September 10, 1930, Yrigoyen had not filled the vacancy on the Court. Therefore, the Supreme Court had at that time only four members: three appointed by Alvear (Justices Antonio Sagarna, Ricardo Guido Lavalle, and Roberto Repetto), and one (Justice José Figueroa Alcorta) appointed by the PAN.

3.1.2 The infamous decade: 1930-1943

On September 10, 1930, José Felix Uriburu became the first de facto president of the country, when Hipólito Yrigoyen was forced out of power and Congress was closed. The military coup in 1930 initiated the *infamous decade*, a period characterized by electoral fraud, political persecution of the members of the UCR (forcing former President Alvear into exile), and an increased in the government corruption. General Uriburu was in office from 1930 until 1932, when General Agustín Justo won the presidential election and remained in power until 1938. Roberto Ortiz won the next election, but a serious health problem made him resign in 1940; his Vice President, Ramón Castillo, assumed the presidency until June 4, 1943, when a second coup removed him from office. As Table 3.1 shows, during this term, General Justo appointed a majority of the justices to the bench.

As soon as Uriburu seized power, Ernesto Padilla (the new Minister of Justice) and Matías Sánchez Sorondo (the new Minister of the Interior) informed the members of the Supreme Court that General Uriburu was now the head of the country. Immediately after receiving the official notice, the justices began to consider whether or not to confirm the coup. Justices Repetto, Sagarna, and Guido Lavalle were inclined to give legitimacy to the military government, whereas Justice Figueroa Alcorta was more concerned about the aims of the military and seemed ready to resign (Pellet Lastra 2001). In the end, the four justices signed the “Acordada” recognizing the new government, but at the same time reaffirmed that the National Constitution guaranteed individual liberties and private property (Articles 14 and 17) (Barrancos y Vedia 2000; Pellet Lastra 2001).²⁸ This controversial pronouncement by the justices of the Supreme Court, that legitimated a military government, would lead to one of several complaints made by the Peronists when they impeached the members of the Court in 1946. One month after the justices’ validation of the Acordada, General Uriburu filled the existing vacancy in the Court with Justice Julián Pera. This was the first time that a military president had appointed a justice to the Supreme Court without the support of the Senate. Another vacancy opened up when, on December 27, 1931, Justice Figueroa Alcorta died in office, but General Uriburu did not have time to fill that seat.

On February 22, 1932, General Agustín Justo, from the Partido Democrático Nacional (PDN), won the election with the support of the military. This first election after the coup was

²⁸ Within the Argentine legal studies there are numerous works that analyze the political consequences of the “Acordada”, some of the defending it while other attacking (Nino 2005; Oteiza 1994; Oyhanarte 1972; Pellet Lastra 2001; Pérez Guilhou 1989).

carried out under suspicion of electoral fraud promoted by the Conservative sectors.²⁹ One of Justo's main challenges was to mitigate the consequences of the Great Depression on the national economy. Under his administration there were a couple of replacements on the Supreme Court. On July 1, 1933, Justo appointed Justice Luis Linares to fill an existing vacancy, but a couple of months later Justice Guido Lavalle died in office. Shortly thereafter, Justo appointed Justice Benito Nazar Anchorena to the second vacancy in the Court. A third vacancy came about on July 26, 1935, when Justice Pera died; to replace him, Justo appointed Justice Juan B. Terán.

In the clearly fraudulent presidential election of 1937(Romero 2001), Roberto Ortiz from the antipersonalist faction of the UCR won with the support of Justo and the Concordancia. One of Ortiz's main goals was to put an end to the manipulation and fraud of the elections, but he was not able to accomplish that task. During his term, there was only one vacancy in the Supreme Court, when the recently appointed Justice Terán died in office on December 8, 1938. Twenty days later Justice Francisco Ramos Mejía was appointed to replace him. Ortiz resigned in mid-1942, due to a serious illness, and his Vice President, Ramón Castillo, assumed the presidency until he was deposed by the military one year later.

3.1.3 Revolution of '43 and the military governments: 1943-1946

Prior to this second coup, there had been other attempts to remove President Castillo from office because of an increasing number of corruption scandals and high social discontent. One day before the coup, Castillo forced Pedro Ramirez, his Minister of War, to resign, since he had met

²⁹ The Conservative sectors would later create the electoral alliance known as "Concordancia" among the PND, the antipersonalist UCR, and the Partido Socialista Independiente.

with the leaders of the UCR to explore the possibility of his becoming that party's presidential candidate in the forthcoming election. As a result of this conflict, Generals Arturo Rawson and Pedro Ramirez planned the removal of Castillo for the next day (Potash 1982a). Contrary to the circumstances of the coup of 1930, in this case the coup was not expected and was not supported by the people. Even though General Rawson was supposed to assume the presidency, he resigned a couple of days later due to disagreements with the rest of the military. Thus, General Pedro Ramirez assumed the presidency on June 7, 1943, with Colonel Juan D. Perón appointed Minister of War.³⁰

As with the military coup in 1930, General Ramirez also closed the Congress and sent an official note to the Supreme Court informing it of the changes in the executive branch. The members of the Supreme Court faced the same dilemma as in 1930: whether or not to legitimize the military coup. Justice Repetto suggested applying the same principles as to the "Acordada" in September 1930, but this time Justices Sagarna and Linares were reluctant to comply, since they did not share the ideology of the military regime (Pellet Lastra 2001). Justice Linares tried to convince his colleagues until the last minute not to sign the new Acordada, since he feared that the military would respect neither the rule of law nor the stability of the justices and judges in office. Linares's arguments, however, did not persuade the rest of the justices; thus they ended up replicating the Acordada of 1930 and giving legitimacy to the military regime. Linares, annoyed with the decision, gradually cut back his attendance on the Court, until he finally resigned from the bench on July 1, 1944 (Pellet Lastra 2001). His departure from the bench is

³⁰ Rawson chose an eclectic group of people for the Cabinet, some of whom had supported the Allies during World War II, while others had supported the Axis powers. His selections were not approved by the rest of the military (Potash 1982a).

considered to be the first time in the twentieth century that a justice voluntarily left office for a reason other than natural causes.

It did not take long for Linares's fears to be realized. As soon as Ramirez had seized power, he removed several judges from the federal courts without an impeachment trial. By the time Linares stepped off the bench, General Julián Farrell was the military President of the country, following General Ramirez's resignation due to internal conflicts in the military.³¹ General Farrell appointed Justice Tomás D. Casares to the Court on September 27, 1944. When Farrell assumed the Presidency, Juan D. Perón became Vice President, while the Secretary of War remained as head of the Department of Labor. By that time, Perón was increasing his popularity and gaining support from the people, especially the working class.

In the provinces, the incoming military governors, appointed by the military regime, also set in motion a plan to attack the local judiciaries, especially the Supreme Courts. The partial data available for some provinces during those years reveal that in the Provinces of Buenos Aires, Mendoza and Tucumán the military governors were able to reshuffle the composition of the courts. In contrast, in the case of Córdoba, the military governor removed only one justice from the bench but ended up appointing two new justices out of five due to a vacancy on the court. These clear attacks on the Provincial Supreme Courts, not clearly present in regard to the National Supreme Court, would become recurrent at the national level during subsequent years.

During the military regime, the National Supreme Court made some decisions that aimed to limit the *de facto* government. For example, in 1945 the Court annulled the decision of the

³¹ Ramirez wanted to break relations with the Axis and gradually incorporate civilians into his government, but another faction of the military (Grupo de Oficiales Unidos – GOU) wished to continue the military revolution and remain neutral in World War II (Potash 1982a).

executive to create federal tribunals in Chaco; also that year, the Court invalidated the executive's decision to relocate the federal judge Salvador Dana Montañño from the city of Santa Fe to San Rafael, and reversed the executive's decision to remove Judge Barraco Mármol from the Federal Court in Córdoba (Carrio 1996). Furthermore, the Court did not allow the appointments of the members of the Labor Appeal Court in the bench. One of the most important decisions of the Supreme Court against the military government and, especially, in favor of Perón's labor initiatives, was the "Dock Sud Buenos Aires" case, in which the Court declared unconstitutional an executive decree that aimed to allow the Department of Labor to impose monetary penalties on the regional secretaries (Carrio 1996). Perón and his allies interpreted all these decisions as a way to undermine the executive's power and bolster his opponents before the presidential election for the democratic transition.

When World War II ended, popular demonstrations erupted against Argentina's regime. By October Perón's popularity reached its maximum when he was forced to resign and was arrested in Martín Garcia Island. Eva Duarte, her partner, and the General Confederation of Labor (CGT) organized mass demonstrations supporting Perón and when Perón was released free elections were promised. On the day of the presidential election, Colonel Perón won the presidency. His party obtained more than 2/3 of the seats in the Chamber of Deputies and all but two seats in the Senate (Molinelli 1999).

3.2 A NEW WAY OF CREATING VACANCIES: INDUCED RETIREMENTS, 1947-2009

3.2.1 The Peronist governments: 1946-1955

Juan Perón assumed the presidency on June 4, 1946, at which time he was also promoted from Colonel to General within the military, revealing that his candidacy was supported by both military and civilians (especially the working class) (Potash 1982b). Four days after the investiture ceremony, Deputy Rodolfo A. Decker from Perón's party requested the impeachment of Justices Repetto, Sagarna, Nazar Anchorena, and Ramos Mejías, as well as the Solicitor General Juan Alvarez. Most of the accusations against the justices were related to decisions, previously mentioned, that aimed to control the *de facto* government. Justices Repetto and Sangarna, were held responsible also for the "Acordadas" of 1930 and 1943 by which they had legitimized the military governments. Justice Casares, a representative of the Catholic church, was excluded from the impeachment action, despite having made the same decisions as the other justices in the controversial cases, because Perón preferred to avoid creating problems with that sector of society (Pellet Lastra 2001). Historians agree on the unfair accusation of the justices and the violation of due process,³² understanding that the impeachments were motivated by political reasons (Pellet Lastra 2001; Oyhanarte 1972; Carrio 1996). The absurd accusation of Justice Repetto exemplifies the suspicious trials carried out in the Senate. When Repetto was

³² A couple of weeks prior to the trial in the Senate, the rules regarding the trial procedure were changed: first, the defendant lawyers were not longer able to present their defendant statement since the president of the Senate would be in charge of reading it out loud, and, second, the defendant lawyers were not able to sit next to the accused but rather in common areas.

formally accused on July 8, he was at that time no longer even a member of the Supreme Court. Having foreseen Perón's intention to manipulate and control the Supreme Court, Repetto had deliberately resigned before that could happen. The executive had, indeed, accepted his resignation on May 22, but he was, nevertheless, formally accused in the Senate. Since there were Perón majorities in both chambers, the impeachment process developed as expected. Nine months later, on April 30, 1947, Justices Sagarna, Nazar Anchorena and Ramos Mejías were found guilty and removed from the bench. Regarding Justice Repetto, the Congress admitted that, by the time of the accusation, he was no longer part of the Court; thus the case against him was dismissed.

The impeachment trial of the justices of the Supreme Court and the subsequent appointment of friendly justices to the Court represent a critical juncture in the evolution of the executive-court relationship, because they established a different logic of interactions that in the following years would become difficult to reverse. The tough confrontation between the Supreme Court and the executive during the previous military regime proved, first, the key role played by the judiciary in policy-making and, second, the lack of tolerance of executives of justices ruling against their will. Moreover, the reshuffle of the court demonstrated that executives do not necessarily have to deal with an unfriendly court. In the end, what made this event "critical" is that it triggered a process of positive feedback that would reinforce a less independent pattern of relations.

On August 1, 1947, Perón appointed Justices Felipe S. Pérez, Justo L. Alvarez Rodriguez, Luis R. Longhi, and Rodolfo Valenzuela to the Supreme Court, the first voluntary reshuffle in the Court (see Table 3.1). These four justices shared in common not only their loyalty to Perón but also their prior political association with the PJ (Pellet Lastra 2001). Two

years later, Justice Alvarez Rodriguez died in office; Perón appointed Justice Atilio Pessagno, also one of his political allies, to replace him. In addition to these justices having had clear political associations with Perón and his party before their appointment to the bench, they continued to be publicly connected with the ruling party during their time in office. A clear example is their participation during the Constitutional Reform of 1949 as representatives of Perón's party, despite criticism from the opposition. The constitutional reform introduced two important changes in the functioning of the judiciary, as well as several other workers' rights and the possibility of presidential reelection. From 1949 on, the justices of the Supreme Court would no longer be removed from office by the impeachment process but rather by a jury conformed by judges (Article 91); secondly, the judges from the federal courts would lose their tenure on the bench and have to be reappointed to office (Transitory Article 4). Like the impeachment process for members of the Supreme Court, these changes in the Constitution aimed at the same result: removing from office those judges who were deemed unfriendly to Perón. In the end, 74 judges from the lower courts were not reappointed, and others were forced to retire (Pellet Lastra 2001). In order to avoid future problems with members of the Judiciary, one of the requirements for future justices was to be affiliated with the Partido Justicialista (Pellet Lastra 2001). In 1951 Perón was reelected president and remained in office until September 1955, when a military coup overthrew him. Problems with the economy, the church, and society, due to political persecution of the opposition, encouraged military dissidents to remove Perón from office.

At the provincial level, the partial data available reveal that the Supreme Courts of Buenos Aires, Córdoba and Mendoza were also reshuffled when Perón assumed the presidency. The positive feedback provided by the replication at the subnational level of the political

manipulations of the Supreme Courts definitely complemented the process of creating a less independent pattern of relations between the executive and the judiciary.

3.2.2 The Liberating Revolution and the military governments: 1955-1958

General Eduardo Lonardi assumed the *de facto* presidency on September 23, 1955, thus initiating the Liberating Revolution that was to end as soon as the country was “reorganized.” However, two months later, an internal mutiny within the military, originated by the hardliners, deposed General Lonardi and placed General Pedro Aramburu in the presidency. The military issued a decree that removed all the members of the Supreme Court, and appointed all new justices as part of their plan for reorganizing the country. The second purge of the Supreme Court reinforced Perón’s initiative in how to deal with unfriendly justices and, thus, reaffirmed the political process of political manipulation of the judiciary. Keeping the Peronist justices on the bench, which was not an option for the military, could have stopped the emergence of an unequal interaction between the executive and the judiciary. However, the purge of the Court reinforced the political process of manipulation launched by Perón.

The Peronist party (PJ) suffered proscription, and all public reference to the leader or to the party was forbidden (Decree-Law 4161 of 1956). If Perón wanted to “Peronize” the country, the military wanted to reverse that action. Thus the main task of the revolution was to “de-Peronize” the country and its institutions both at the national and subnational level. One of the main targets of the military was the judicial branch; indeed, their first symbolic action was to officially restore the reputation of the justices who had been impeached in 1947. The military removed the members of the Supreme Court and 70% of the lower court judges were “puestos en

comisión” (suspended) (Pellet Lastra 2001). Aramburu appointed to the Supreme Court five anti-Peronist justices with strong judicial experience as well as a firm commitment to the Liberating Revolution (Justices Alfredo Orgaz, Manuel Argañarás, Enrique V. Galli, Carlos Herrera, and Jorge Vera Vallejos). Along these lines, in April 1956, the *de facto* government knocked down the last foundation of the Peronist administration: the 1949 National Constitution. Aramburu, via a decree-law, abolished the Peronist Constitution and restored the Constitution of 1853. Justice Vera Vallejo interpreted this action as a clear abuse of the power of the military government and resigned from the bench (Pellet Lastra 2001). Four months later, Aramburu appointed Benjamín Villegas Basavilbaso to fill the vacancy.

The “de-Peronization” plan affected also the judiciaries in the provinces. In 1955, the Supreme Courts of Buenos Aires, Chaco, Córdoba, Entre Ríos, Jujuy, La Pampa, Mendoza, Santa Fe and Tucumán were also reshuffled as soon as the military government seized power. The provinces of Chaco, Entre Ríos and La Pampa experienced their first purge since their Supreme Courts were created in 1953, 1950 and 1954, respectively. Even in the case of La Pampa, the local military governor not only removed from the bench all 5 justices appointed a couple of months earlier but also reduced the number of sitting justices to three. Evidently, the provincial Supreme Courts were following the same pattern of reshuffles as the National Supreme Court and thus reinforcing this process of positive feedback.

In February of 1958 Aramburu called for presidential elections, but the PJ was still proscribed. The UCR presented two candidates: Ricardo Balbín (endorsed by General Aramburu) from the Popular faction, and Arturo Frondizi from the Intransigent faction. Four days before the election, Frondizi and Perón (from his exile) made a secret pact in which the Peronists would support Frondizi’s candidacy in return for his promise of giving them a voice in

the government and remove all the Supreme Court Justices (Potash 1982b). The Peronist votes became Frondizi's votes allowing him to win the election. This was the first time in forty years that a presidential candidate not supported by the outgoing administration won an election.

3.2.3 The radical governments: 1958-1966

Frondizi assumed the presidency on May 1, 1958. His most important tasks were to reconcile the Peronists and the anti-Peronists, solve the economic crisis, and avoid undue military pressure. One of his main priorities was to reorganize the National Supreme Court, since all of its members had been appointed during the military regime. Contrary to the strategy followed by Perón, Frondizi took a different tack. He was not able to remove all of the justices at once, because that would have annoyed the military, so he decided to confirm two of the existing justices and then submitted a bill to Congress to enlarge the Court. Evidently, Frondizi violated the secret pact with Perón. Justices Villegas Basavilbaso and Orgaz remained on the bench as a symbol of tolerance of the previous administration,³³ and Frondizi decided to buy off the other three justices if they quietly left the bench. Justice Herrera was offered the post of Argentine ambassador in Switzerland; Justice Argañaraz (by that time 70 years old) was forced to retire; and Justice Galli was offered a place on the National Commission in charge of reforming the Civil Code. He refused it, however, without compromising the incoming government (Pellet Lastra 2001). On May 12, 1958, Frondizi appointed justices Luis M. Boffi Boggero, Julio C. Oyhanarte, and Aristóbulo D. Aráoz de Lamadrid to fill the three vacancies and thus produce the

³³ Justice Orgaz remained in office as a symbol of juridical continuity and Justice Villegas Basavilbaso as a special request from the Navy (Pellet Lastra 2001).

third reshuffle in the court. All three incoming justices had clear bonds with the president and his party (Pellet Lastra 2001).

At the subnational level, the Supreme Courts of Buenos Aires, Chaco, Córdoba, Jujuy, La Pampa, Mendoza and Tucumán were also reshuffled. The Supreme Courts of Chubut, Formosa and Santa Cruz started to function in 1958, so in those provinces the incoming governors appointed new justices to the Courts, thus crafting a supportive body. In the case of the Supreme Court of Entre Rios, by the end of 1957 four justices had resigned from the bench; thus the incoming governor in 1958 appointed 5 out of the 9 justices, since there was one vacancy on the Court. The similarities in political manipulation between the National and Provincial Supreme Courts would become stronger in the coming years.

Once the National Supreme Court was “reorganized,” Frondizi, like the previous administrations, moved on to the judges in the lower courts. Based on the fact that the current judges had been appointed by the military and thus without Congressional support, Frondizi decreed that all judges needed to have Senate support. Evidently, this strategy was aimed to remove unfriendly judges from office, as Perón and the military had done before. The judges who had not been confirmed by the Senate or agreed to retire presented writs of amparo arguing that the government had violated their right of life tenure. The Supreme Court denied the writs of the judges, which ended up intensifying their discontent. Meanwhile, Chief Justice Orgaz was the person responsible for leading the swearing-in ceremonies of the incoming judges. A couple of weeks later, all the judges of the National Criminal Appeals Court resigned in solidarity with the recently displaced Judge Sagasta (from the same court), and the conflict between the executive and the judges increased dramatically. A couple of days later, the Chief Justice resigned from the bench due to popular discontent with the political manipulation of the federal

judiciary. Frondizi decided to mitigate the judicial crisis by meeting with members of the Bar Association in order to take into account their opinions on how to proceed. As a result of the meeting, Frondizi was advised to reappoint the displaced judges who were members of such critical courts as the Criminal and Federal. Thus the judges from the Federal Court, as well as the recently resigned Chief Justice Orgaz, decided to return to the bench; the judges of the Penal Court, however, did not do so, being offended by the president's manipulation of the judiciary.

On February 3, 1960, the Senate approved enlarging the Supreme Court from five to seven members (Law 15.271). Chief Justice Orgaz, who strongly criticized the enlargement of the Court, took a twenty-day leave from the bench. In the meantime, Frondizi appointed Justices Ricardo Colombres and Pedro Aberastury to fill the two new vacancies, both of them with close connections to Frondizi and to Quijano (the Assistant Secretary of Justice) (Pellet Lastra 2001). Shortly after Orgaz returned to the bench, he resigned, due to his discontent with the political manipulation of the Supreme Court. Six months later, Frondizi appointed Justice Esteban Imaz to replace him. Unlike the previous appointees, Justice Imaz had no political or ideological bond to either Frondizi or his political party; rather, he was considered a candidate who had had a purely judicial career. Historians argue that, by the time Orgaz resigned from the bench, Frondizi already had a majority (five out of the seven justices), which explains both the delay in the President's appointment of Imaz to the bench and his lack of a political connection to the ruling party (Pellet Lastra 2001). By September 12, Justice Oyhanarte resigned, and Justice José F. Bidau was appointed to replace him. In total, Frondizi appointed 6 out of the 7 justices in the Court (see Table 3.1).

In the gubernatorial election of 1962, Frondizi allowed the Peronist candidates to run for election under a neo-Peronist party label since the PJ was still banned. The Peronist candidates

won most of the governorships, generating nervousness among the military, who were not willing to allow the reappearance of the Peronists in the political arena. As a result, Frondizi carried out massive federal interventions to prevent the elected Peronist governors from assuming power. These interventions were, however, not enough for the military, so on March 29, 1962, Frondizi was overthrown. Unlike the previous coups, the military decided to carry out a democratic transition and allowed a civilian to take power. José María Guido, president of the Senate, was the next person in the line of succession, since the Vice President had already resigned.

The main task for the interim president was to schedule immediate presidential elections, so as to secure a democratic transition. The Peronista party was again banned from participating. On July 7, 1963, presidential elections were held. Arturo Illia, from the people's faction of the UCR, won with only 25% of the vote, giving him a low level of legitimacy. By the time Illia assumed the presidency, the majority of the justices had been appointed by Frondizi, so he sent a bill to Congress to enlarge the number of sitting justices from 7 to 10 (Oteiza 1994). As a way to increase his legitimacy, Illia offered one of the vacancies to Carlos Fayt, at that time the President of the Bar Association, but only if he supported the enlargement of the Court. Carlos Fayt rejected the proposition and publicly condemned the president's proposal (La Nación 23/02/2008). The enlargement bill was approved in the Senate but not in the Chamber of Deputies; thus Illia's intent to craft a supporting court vanished. However, during his short administration two justices stepped off the bench: Justice Villegas Basavilbaso retired on September 22, 1964, and Justice Bidau resigned the following month. Justice Carlos Juan Zavala, who shared a political sympathy with the UCR, was appointed on November 26, and Justice Almirar Mercader, a candidate with a strong connection to the party, was appointed on

February 3, 1965. Besides the enlargement proposal, there are not many records on secondary and primary sources about the executive-court relations during Illia's administration. However, one of Illia's decisions was to abolish all restrictions on the PJ, which caused anger and surprise among the military. Two years later, in the legislative elections of 1965, the Peronists obtained 55% of the vote; this triumph stimulated a fear among the military of a possible return to power of the PJ. Thus on June 28, 1966, Illia was removed from office by a military junta.

3.2.4 Argentine Revolution and the military governments: 1966-1973

On that date, the military, therefore, seized power for the fourth time. General Juan Carlos Onganía became president. During this period, Onganía announced new repressive legislation to strengthen anti-communism and reduce the power of the trade unions. The first decisions of the junta were to remove the constitutionally elected president and vice-president from office, close the Congress and provincial legislatures, and remove from office all the members of the National and Provincial Supreme Court along with the Solicitor General (Decree 3 and Revolutionary Statute art. 9, 1966). Onganía's decision reinforced the previous strategies of dealing with unfriendly justices. General Onganía decided to reduce the number of justices to five (Decree-Law 16.895 of July 5, 1966) as a way to reestablish the previous order. Onganía appointed Justices Eduardo A. Ortiz, Roberto E. Chute, Marco Aurelio Risolía, Guillermo A. Borda and Luis C. Cabral to the Supreme Court. The purge of the Court corroborated the logic of political manipulation of the judiciary as well as increasing the cost of switching to a different alternative. The removal of the Supreme Court justices exhibited a process of positive feedback and contributed to consolidate this even pattern of executive-court relations.

The manipulation of the judiciary was also carried out at the subnational level, which ended up reinforcing the positive feedback. Onganía allowed the military governors (“interventores”), if necessary, to remove the justices from the local Supreme Courts; in fact, the governors had 30 days to send the composition of the court to Onganía for formal ratification. The military governors of the provinces of Buenos Aires, Chaco, Chubut, Córdoba, Entre Ríos, Formosa, Jujuy, La Pampa, Mendoza, Neuquén, Rio Negro, Santa Cruz and Tucumán decided to reshuffle their local Courts. In the case of Buenos Aires, 4 justices departed from the bench, allowing the military governor to appoint 5 justices out of 9 since there was a vacancy on the Court. In the case of Santa Fe, there was not a complete reshuffle of the Court; however, the military governor appointed 2 out of 5 justices. Evidently, many of the military governors took advantage of the opportunity that General Onganía gave them to craft a supportive court.

Contrary to the previous military coups, the federal judges were not removed from office. At the beginning of 1967, Onganía offered the Ministry of the Interior to his loyal friend Justice Borda, which prompted Borda to resign from the Court. In his place, Justice José F. Bidau was reappointed to the bench. During this period, the Supreme Court confirmed the military power in several cases like “Molina Ricardo”, “Ricardo Sofía” and “Pucci”, however, there were also some exception like the “Azul y Blanco” case in which the members of the Supreme Court protected the freedom of the press by annulling the shutting down of the magazine (Carrio 1996; Oteiza 1994).

During this period, the repressive actions of the military government generated violence in political life. May 1969 was marked by the “Cordobazo,” a series of violent confrontations between the military and society (mainly students and workers). By this time, Montoneros, a military organization from the PJ, and the Popular Revolutionary Army (ERP), a military

organization from the Revolutionary Labor Party, emerged as a counter force to the military government, using guerilla warfare tactics. By June 1969, the government declared a state of siege (Decree-Law 18.262), and Onganía explicitly ordered the shutting down of the newspapers “Primera Plana” (Decree 4.179) and “Ojo” (Carrio 1996; Oteiza 1994). The Supreme Court supported those restrictions on the freedom of the press.

By 1970, and as a result of an internal revolt within the military, General Levingston became president of the country. As in 1930, this time the Supreme Court also recognized Levingston as the new executive of the country. In July 1970 Justice Bidau died while in office and Levingston appointed Margarita Argúas to the Court, resulting in the first time that a woman was a Supreme Court justice in the country. In 1971, as a result of another military revolt, General Agustín Lanusse became military president of the country with the consent of the Supreme Court. Since Lanusse faced strong protests, the government employed violent tactics to silence the dissenters. However, by 1973 the escalating unrest had pushed the military government to schedule a presidential election to achieve stability.

3.2.5 The return of the Peronist government: 1973-1976

This time, the PJ was allowed to run for elections, but not Juan Perón himself. Héctor Campora, Perón’s personal delegate, ran for the presidency as a way to circumvent the veto on Perón. The slogan for the election was “Campora to the government and Perón to power.” Campora obtained 49% of the votes; Ricardo Balbín, from the UCR, 25%. The second-round election between the two candidates was suspended, because Balbín resigned his rights and recognized his defeat. After Campora assumed the presidency on May 25, 1973, his first executive order (Amnesty

Law 20.508) was to grant amnesty to almost 400 political prisoners who had been jailed during the Argentine Revolution.

As soon as the military stepped down, all the members of the Supreme Court resigned. Based on the previous experience with the Peronists government, along with rumors of possible impeachment, they were less than confident about their future on the Court. The retirement Law 19.939 facilitated the departure of the justices since the law established that: first, the justices would be able to retire from the bench without any restriction regarding of number of years in service, and, second, that the retirement pension would be equal to the current salary of the justices. As expected, on June 8 the Supreme Court was purged again and 5 new justices were appointed (Justices Justices Miguel A. Bercaitz, Agustín Díaz Bialet, Manuel Guillermo L. Aráuz Castex, Ernesto Corvalán Nanclares, and Héctor Masnatta). Evidently, the cost of switching to some other alternative of how to deal with an unfriendly court raised as time went by.

As in 1947, all the incoming justices had in common a strong loyalty to Perón (Pellet Lastra 2001). The swearing-in ceremony of the justices was held as a Peronist victory, and the hall was crowded with loyal people from the party singing Peronist songs. On June 20 Perón returned to the country, and the different factions of the PJ ended up in a bloody confrontation near the airport, forcing President Campora and his Vice President to resign. Raúl Lastiri, the next in the line of succession, assumed the presidency and scheduled another election for September. Juan Perón won that election with 62% of the votes, and his wife, María Estela Martínez de Perón, became the first woman Vice President of the country.

At the subnational level the local Courts also experienced changes. The Courts of Buenos Aires, Chaco, Chubut, Córdoba, Entre Ríos, Jujuy, Mendoza, Rio Negro, Santa Cruz, Santa Fe

and Tucumán were reshuffled, while on the Court of Neuquén only two justices out of 5 were replaced, as was 1 justice out of 3 in San Juan. Based on the partial data available for the provinces, the province of Formosa was the only one that did not remove any of the justices appointed during the military regime, since Governor Antenor Argentino Gauna sent the same list of justices for congressional approval. The local legislature confirmed the justices on the bench.

As in the previous Peronist government, the lower courts of the judiciary became also the target of attacks. Before the democratic transition took place, Lanusse issued the Decree 4.502, which declared that the judges appointed during the military government had received the support from the Senate since during those years the Argentine Revolution had self-imposed those attributions. Evidently, the objective of the decree was to prevent that the next incoming executive would remove the judges appointed by the military government arguing that those appointments did not have the Senate's support. As expected, the president submitted to the Senate for consideration the list of judges whose appointment took place during the military government. As a way to solve out this conflict, and secure a number of seats for friendly and reliable judges, in November 1973, Perón passed a transitory law (Law 20.550) allowing sitting judges, prosecuting attorneys, secretaries, and defense attorneys to retire in advance from the bench with exceptional benefits in comparison to the ordinary retirement law. About 35% of the members of the judiciary did retire in advance, allowing the government to fill those vacancies with its supporters (Pellet Lastra 2001).

Less than a year after Perón assumed the presidency, he died in office (July 1st, 1974) and his wife became president. The Court changed its conformation, however, during the presidency of Perón's wife, María Estela Martínez de Perón. During that short period, Justices Aráuz Castex

and Corvalán Nanclares resigned in response to a presidential request (Pellet Lastra 2001). Martinez de Perón, who then appointed Justice Corvalán Nanclares as her loyal Minister of Justice and Justice Aráuz Castex as her faithful Minister of Foreign Affairs, named Justices Ricardo Levene and Pablo A. Ramella to fill the two new vacancies.

But the days of the government of Martinez de Perón were numbered. Her downfall was a severe economic crisis, including hyperinflation, along with major political confrontations in society, as bloody terrorist attacks ended again with a military coup. On March 24, 1976, a military junta formed by General Jorge Videla (representing the Army), Admiral Emilio Massera (representing the Navy), and Brigadier Ramón Agosti (representing the Air Force) removed Martinez de Perón from power. Two days later General Videla seized the presidency of the country. Martinez de Perón remained under house arrest for five years and then was sent into exile in Spain.

3.2.6 National Reorganization Process: 1976-1983

The aim of the military coup was to carry out a National Reorganization Process. The justices of the Supreme Court were automatically removed from the bench as well as the justices from the Provincial Supreme Courts. Moreover, Law 21.258 suspended (“declarar en comisión”) all the members of the judiciary including the provincial ones. Once more, the incoming executive reinforced the practices carried out by the previous presidents, and the judiciary was reshuffled one more time. The permanent purge of the Court after a change in government reaffirmed the positive feedback process. On April 2, 1976, General Videla appointed Justices Carlos Heredia, Adolfo Gabrielli, Alejandro R. Caride, Abelardo F. Rossi, and Federico Videla Escalada to the

bench. These justices had had judicial careers, and some of them had connections with the military, but none of them had been involved in politics (Pellet Lastra 2001). The newly Supreme Court was subservient to the interest of the executive, and the first proof was the rejection of the amparo writ presented by Enrique V. Rocca against his illegal removal from the Electoral Court. Justices Videla Escalada and Caride were the first to resign from the bench for personal reasons, whereupon Justices Pedro J. Frias and Emilio M. Daireaux were appointed to replace them. In 1978 and 1980 Justices Heredia and Daireaux died while in office, and Videla appointed Justices Elías Gustavino and César Black in their stead.

At the subnational level the local Supreme Court witnessed one more time the political manipulation by the executives. The Courts of Buenos Aires, Chaco, Chubut, Córdoba, Entre Rios, Jujuy, La Pampa, Mendoza, Neuquén, Río Negro, Santa Cruz, Santa Fe, San Juan and Tucumán were reshuffled, while in the Court of Formosa 2 out of 5 justices departed from the bench. The military governors reproduced the purge of the National Court at the subnational level, reinforcing one more time the positive feedback and lack of judicial independence.

In 1981 an internal confrontation within the military produced the resignation of General Videla and a short presidency of General Viola until General Leopoldo F. Galtieri assumed the presidency. During his administration Justice Frías resigned, to be followed by Galtieri's appointment of Justice Carlos A. Renom in February 1982. The following year, Galtieri ordered the invasion of the British Falkland Islands, but two months later the British regained control and Galtieri was removed from power. General Reynaldo B. Bignone seized the presidency on July 1, 1982, and was charged with reestablishing democracy in the country. In the beginning of October 1983, foreseeing the return of democracy and difficulties in their confirmation by the Senate, Justices Black and Renom resigned and were replaced by Justices Julio J. Martínez Vivot

and Emilio P. Gnecco. Bignone, however, conditioned the return to democracy by imposing limits to any future investigation of human rights violations; moreover, he decreed an amnesty for military personnel involved in human rights abuses (Law 22.924), even though both these decisions were strongly criticized by society. Elections were scheduled for October 30, and it was clear that the military regime would end. Raúl Alfonsín, a centrist from the UCR's progressive wing, won the election. Thus democracy was reestablished in the country after a long period of dictatorship.

The period of this last military government is known as the Dirty War, since these years were characterized by state-sponsored violence and repression against suspected terrorist and political opponents of the regime. Violation of human rights became commonplace, since in the vast majority of cases the judiciary did not protect those rights. Relatives of political prisoners started to submit writs of habeas corpus to federal courts, but in only a few cases did those writs reach the Supreme Court (Helmke 2005). The illegal detention of Jacobo Timerman, a director of the newspaper "La Opinión," was one of the most important cases that did reach that court. It received a lot of international attention, and the international community advocated for the release of Mr. Timerman. This was the first and only time when the Supreme Court granted a petition in favor of a plaintiff; otherwise, the Court would have simply denied jurisdiction to hear the case (as happened, for example, in the "Pérez de Smith, Ana María y otros" case) (Carrio 1996; Oteiza 1994).

3.2.7 The return of democracy: Alfonsín 1983-1989

Alfonsín assumed the Presidency on December 10, 1983. Since Alfonsín was not willing to keep in office the justices appointed by the junta, he had already considered different possible strategies in case those justices remained on the bench. Even though justices are appointed for life, it was often the case that those justices appointed during the military regime without congressional approval were often subject to congressional reappointment during democratic transitions so as to legitimize their seats. In this case, the justices appointed during the military regime voluntarily left the court due to the uncertainty of their reappointment by Congress, thus reshuffling the court one more time. The same thing occurred at the subnational level with all the provinces except for San Juan, since the previous military governor and the incoming democratic governor belonged to the same family; thus, it was not necessary to change the composition of the Court. The incoming governors of all the other provinces were able to appoint new justices to the bench with the approval of the legislature.

At the national level, Alfonsín appointed to the bench Justices Genaro R. Carrió, José S. Caballero, Augusto C. Belluscio, Carlos S. Fayt and Enrique Petracchi, what produced, once again, a reshuffle in the Court. The logic behind the appointments of the justices was different from the one adopted by the Peronist governments. In this case, Alfonsín appointed three justices with a clear bond to the UCR party (Carrió, Caballero, and Belluscio) and two justices lacking a UCR connection but with a socialist (Justice Fayt) or a Peronist (Justice Petracchi) bond. In this case, and contrary to the previous reshuffles in the Court, the court was not packed with all friendly justices. Nevertheless, the distribution adopted aimed to secure the president the majority of the votes. In 1985, Justice Carrió resigned from office for health reasons (Pellet

Lastra 2001; Verbitsky 1993), the last departure from the bench that was not induced by the executive. In his place Justice Jorge A. Bacqué was appointed; he was a person with no political connections to the UCR party but with an ideology similar to that of the outgoing justice (Verbitsky 1993).

Even though Alfonsín was able to craft a supportive court, the problem of what to do with the judges from the lower court who had served during the military regime remained. After a failed attempt, during the first months, to pass a law similar to the one sanctioned during the third Peronist administration (Law 20.550), Alfonsín proposed a more flexible law affecting only to those members of the judiciary who had not been confirmed by the Senate. The judges would have the opportunity to present their retirement papers in advance if they had worked at least 25 years (including 15 years as a justice, with 8 years of those on their current bench). Unsurprisingly, the law had the expected result: in a couple of months, 500 judges retired from the bench (Pellet Lastra 2001).

During the first years of the Alfonsín administration, criminal trials in civilian courts of the officers implicated in killings during the military period were carried out;³⁴ obviously, these trials met with disapproval from the military. By the end of 1986, Alfonsín was encouraged to pass a Full Stop Law (Ley de Punto Final 23.492) that aimed to end the investigation and prosecution of the officers implicated in crimes against humanity by giving prosecutors no more than a 60-day period to file criminal charges. Although the law was clearly intended to minimize the anger of the military, during the Easter weekend in 1987, a military cadre staged a mutiny in a training camp. The rebels were objecting to the ongoing civil trials against the military, so the

³⁴ The Congress via law 23.040 declared unconstitutional the military law (Law 22.924) that prevented the prosecution of human right abuses during the military government.

president negotiated more concessions with them. The only way out of this situation for Alfonsín was for the lawsuits to end up in the Supreme Court, where the justices would rule according to Alfonsín's will. This meant exempting officers from prosecution based on the idea that they were merely obeying orders (Verbitsky 1993). In this way, the president could satisfy requests from both his constituencies: the civilian insistence on taking officers to trial, and the military demand to stop the trials. But the justices of the Supreme Court were not willing to do what Alfonsín wanted. So to resolve the situation, the president issued a bill the Law of Due Obedience (Law 23.521), in June 1987, to exempt subordinates from prosecution.³⁵ By that time, it was clear that Alfonsín did not have a friendly and loyal Supreme Court, after all; thus, in November 1987 he presented a bill to enlarge the court from five to seven justices. The Radicals did not obtain support from the Peronists to approve the law, but the latter made a counteroffer to increase the number of justices from five to nine; that way, the Radicals and the Peronists would each appoint two additional justices (Verbitsky 1993). In the meantime, there was no other alternative for Alfonsín but to keep the peace with the justices, since removing one of the unfriendly justices whom he had appointed would exact a high political cost (even more difficult after the return of democracy). The justices of the Supreme Court strongly opposed the enlargement, and Justice Belluscio even threatened to resign if the Court was enlarged (La Nación 6/1/1988). As expected, as soon as the presidential campaign started, the enlargement project was dropped (Verbitsky 1993).

In 1989 presidential elections took place during a serious economic crisis and an always-increasing hyperinflation and Carlos Menem, from the PJ, won the election. By the end of May,

³⁵ The National Congress repealed the Full Stop and the Due Obedience laws in 2003 and in 2005 the Supreme Court declared those laws unconstitutional.

riots and looting broke out in a number of cities, while the proportion of people in poverty reached 47%. These events led Alfonsín to transfer power to Carlos Menem in July rather than in December.

3.2.8 The Menemist governments: 1989-1999

Even though Menem was from the PJ, his economic and social policies were very different from those Perón had supported during his administrations (Sidicaro 2002). In a couple of months, President Menem sent to Congress bills that aimed to privatize state-owned industries and cut government spending, clearly the opposite of Perón's policies. During his first months in office, Menem reactivated the project of increasing the number of justices on the Supreme Court to nine so as to craft a supportive court. Now the Radicals, in the opposition, were against the project and thus blocked the bill in the Congress. In the meantime (as a backup alternative), Menem and his collaborators launched a plan to induce the retirement of Justices Fayt and Caballero. Menem offered Justice Fayt the Argentine ambassadorship to Colombia, but he rejected it by sending him as a present a copy of his book titled "Law and Ethics." (Verbitsky 1993) Justice Caballero was offered the opportunity to become the Argentine representative at the international organizations headquartered in Geneva (La Nación 3/8/1989), but following the request of his colleagues at the court he refused (Verbitsky 1993). However, a couple of month later, he resigned from the bench.

During that time, Justice Belluscio's partner apparently committed suicide in Paris. Menem's allies saw this as a perfect situation for impeaching the justice (one of Alfonsín's ally) and obtaining another vacancy as a result. Senator Alicia Saadi from the PJ requested that the

justice be impeached. The Chamber of Deputies approved the request, but it was later rejected in the Senate. In April 1990, however, the enlargement bill was passed (Law 23.744), creating a total of five new vacancies (four from the enlargement bill and one from the resignation of Justice Caballero). The opposition publicly denounced the government for using irregular procedures to approve the law, since not only was the necessary quorum not present in the Chamber of Deputies at the time of the voting, but also the law was voted as a whole rather than article-by-article (Verbitsky 1993). During that controversial session, the opposition asked Alberto Pierri, the President of the Chamber, to call for another ballot, but the proponents of the law were already celebrating their victory (Verbitsky 1993).

In sum, the Peronist court-packing plan worked perfectly, not only because the bill was approved, but also because it induced Justice Bacqué to resign from the bench as a protest against the political manipulation of the Court (La Nación 11/05/1990). Consequently, there were six empty seats out of nine to be filled (four from the enlargement law, one from Caballero's resignation and the other one from Bacqué's departure), just what the government needed to craft a supportive court. The following day, the government sent up a list of candidates for the Court, which gained support from the Senate in 24 hours. Justices Julio Oyhanarte (for the second time), Julio Nazareno, Rodolfo Barra, Mariano Cavagna Martinez, Ricardo Levene (for the second time), and Eduardo Moliné O'Connor were the new members, all of them with clear connections either to Menem himself or to the PJ (Verbitsky 1993; Chávez 2007; Helmke 2005). One year after the appointment of these justices, Julio Oyhanarte resigned from the bench. The official explanation was that he wanted to resume working in the private sector; however, unofficial sources revealed that the justice was strongly disappointed because he had not been appointed Chief Justice (La Nación 23/11/1990) (Verbitsky 1993).

But the political manipulation of the justices was not restricted to the Supreme Court; it also applied to other critical courts at lower levels. In addition to enlarging the number of sitting judges in the federal courts from six to twelve, Menem was able to induce the retirement of five of those judges,³⁶ which resulted in his gaining complete control of those courts by way of appointing eleven of the judges (Verbitsky 2007). Furthermore, in 1992 Menem created a new Appellate Criminal Court (Cámara Nacional de Casación Penal) to which he was able to appoint nine out of ten judges (Verbitsky 1993, 2007). This court is the second most important body in the judiciary (after the Supreme Court), since it is in charge of establishing all the jurisprudence regarding penal law, and its decisions as a collegiate body are binding on all the judges. The court has jurisdiction over all the lawsuits to which a member of the Executive Power is a party, evidently a very sensitive area for the government that was to be handed over to friendly judges. The selection of the candidates for the court created a scandal, since one of Menem's protégées, Ana María Capolupo, admitted publicly that she did not know penal law but would learn it (Verbitsky 1993). An investigation carried out by the newspaper *Página/12* revealed that Ana María Capolupo's announcement was indeed truthful, since at the university she had twice failed her final exams in Penal Law I and once in Penal Law II (Verbitsky 1993). The Minister of Justice, León Arslanian, subsequently resigned due to the excessive manipulation of the justices.

Political opponents, journalists, members of civil society, and the bar association condemned many of the decisions of the manipulated lower courts as well as the Supreme Court and suspicions of the "automatic majority" in the Court increased as time went by. For example, between 1990 and 1997 there were 170 requests for judicial impeachment (Poder Ciudadano

³⁶ Menem promoted all the judges except Judge María Servini de Cubria, because at that time she was working on the Yomagate (Jacquelin 1998).

1997), but the majority of the Peronists in the Congress, especially in the Impeachment Committee, blocked the investigation and processing of those requests. One of the first most controversial cases that reached the Supreme Court was that of “Aerolineas Argentinas.” In 1990, after the enlargement of the Court, the government planned the privatization of the national airline (Aerolineas Argentinas) via Decree 1.024. The opposition presented a writ of amparo against the sale of the shares of the company because of the fraudulent process underway. In order to prevent the case from reaching a tribunal with unfriendly judges, the court adopted, for the first time, the *per saltum* doctrine, whereby the case would go directly to the friendly Supreme Court, which was expected to comply with the president’s interests. Unsurprisingly, the Supreme Court rejected the writ of amparo and the privatization was accomplished.

Meanwhile, President Menem started to explore the possibility of remaining in office for a second term, despite the fact that the ruling constitution did not allow for reelection. In order to change the Constitution, Menem needed the support of the Radicals to obtain 2/3 of the votes of both houses of Congress; thus he arranged a private meeting with former President Alfonsín (known as the Olivos Pact). The result of the meeting, which was hosted in the presidential residence in Olivos, was that the Radicals agreed to support the incorporation of reelection of the president in exchange for including stronger checks on the executive power plus the resignation of three justices of the Supreme Court (*Página/12* 1/12/1993). Menem started to work immediately on the requests. The first candidates whom Menem considered were: Justice

Boggiano, due to the recent scandal on the disappearing of a ruling of the Court,³⁷ Justices Nazareno and either Moliné O'Connor or Barra, because of their unconditional loyalty (*Página/12* 1/12/1993). Boggiano refused to leave the bench. President Menem, as a means to encourage the justices to voluntarily depart from the bench, claimed that resigning was a "patriotic act." In December 1993, Justices Barra and Cavagna complied with Menem's desires; as a reward for their loyalty, Barra was appointed Minister of Justice and Cavagna was offered the Argentine ambassadorship to Italy (*Diario de la República* 2/12/1993). The third vacancy would come from Justice Levene, since he had publicly announced that he would retire in February 1994 if all the impeachment demands against him were dismissed (Jacquelin 1998). As it turned out, Levene did not retire from the bench until two years later than had been agreed.

President Menem and Alfonsín agreed to appoint Gustavo Bossert and Guillermo Lopez to the seats left by Barra and Cavagna, while Héctor Masnatta was to replace Levene. Guillermo Lopez was Menem's candidate, Héctor Masnatta was Alfonsín's, and Bossert was considered to be a neutral or independent candidate (*Página/12* 11/12/1993). However, his systematic participation in Menem's "automatic majority" would reveal that he was not really a neutral

³⁷ One of the most important incidents inside the Supreme Court during this period was the scandal inspired by the disappearance of a ruling of the Court against the Central Bank. The Court was deciding whether or not Ricardo Montesori, a lawyer who was involved with the bankruptcy of the Patagonia Bank, could also receive fees from the Central Bank for carrying out that transaction (Verbitsky 1993). On February 16, 1993, Justices Boggiano, Barra, Petracchi, Belluscio, and Moliné O'Connor signed a ruling in favor of the attorney, but the Central Bank responded by presenting a writ to reconsider the decision. On June 8, Justices Barra, Levene, Fayt, Belluscio, Petracchi, and Nazareno rejected the writ and reiterated their previous decision. However, that ruling somehow disappeared from Court records, and a new ruling favoring the Central Bank was handed down by Justices Boggiano, Barra, Moliné O'Connor, and Nazareno. After Justice Belluscio realized that the original ruling was missing from the file, he found out that it had been removed by the secretary of Chief Justice Boggiano. It did not take long for the denunciation of their four colleagues by Justices Petracchi and Belluscio to become a national scandal. The political opposition, bar associations, and several NGOs called for the impeachment of the four justices involved, while at the same time the Minister of the Economy, Domingo Cavallo, publicly accused Justices Petracchi and Belluscio of lying (*El Tribuno* 2/10/1993).

justice. In actuality, Masnatta was never appointed to the third vacancy, since Menem decided to appoint his close friend Adolfo Vazquez, a change of mind that caused anger and frustration among the Radicals because of the violation of the pact (Clarín 8/12/1995). The appointment process of these justices was highly criticized due to the increased number of irregularities (Verbitsky 1993). Perón and Menem have been the two presidents, both from the PJ, to appoint the largest number of justices to the bench (ten justices each), even more than General Videla, who appointed nine justices during the military regime (see Table 3.1).

3.2.9 The short stay of the radicals in the government and the convoluted succession:

1999-2001

By the end of the second term of the Menem administration, social and economic problems had undermined support for the government and the party, which affected the results of the presidential election of 1999. The two most popular candidates were Fernando de la Rúa, from the newly created Alianza (an alliance between the Radicals and FREPASO), and Eduardo Duhalde, from the PJ. Fernando de la Rúa won with 48% of the votes. The investiture ceremony was a historic occasion; not only was it the first time that a Peronist handed over the government to a Radical, but it was the longest period of uninterrupted democracy in the twentieth century.

During the presidential campaign, the members of the Alianza outlined several strategies of how to resolve the difficulties of dealing with an unfriendly court, in case they should win the elections. Deputy Melchor Cruchaga advocated reducing the number of sitting justices to five, while Deputy Rodolfo Terragno campaigned for the creation of a Constitutional Tribunal so that the Supreme Court would not be responsible for ruling on cases related to the constitutionality of

a norm (La Nación 31/05/1999). At the same time, Carlos Alvarez, the vice presidential candidate of the Alianza, suggested that they were, in fact, expecting that the justices from the “automatic majority” would voluntarily resign from the bench, since they were not willing to contribute to the instability of the judiciary that had started in 1947 (La Nación 1/06/1999). The members of the PJ, obviously, criticized all those ideas.

As soon as De la Rúa assumed the presidency, his advisors started to explore the possibility of creating a couple of vacancies in the court. Justice Fayt appeared as the perfect candidate, because he had at that time reached the age retirement limit. The constitutional reform in 1994 modified the life tenure system for the justices. Article 99, subsection 4, included the restriction that “... once they [the justices] have reached the age of seventy-five years, a new appointment, with the same consent, shall be necessary if they are to continue in office....” Reappointments after five years could be repeated indefinitely. The expiration of the judicial appointment previously established became effective five years after the enactment of the constitutional reform (Temporary Provision No. 11). By 1994, Justice Fayt was 75 years old, so this was the first sign that in those years Menem wanted his seat (*Página/12* 1/12/1993). In 1999, when the restriction became effective, Justice Fayt presented a declarative action to the judiciary in an attempt to void the reappointment provision. According to Fayt, the constitutional reform law (“núcleo básico de coincidencias”) did not include the requisite modification to Article 99, subsection 4; therefore, the modification should be discarded. After a long judicial process, the case reached the Supreme Court, where the justices annulled Article 99, subsection 4 (Hernández 2001). The Alianza lost the perfect candidate for the potential vacancy in the court.

De la Rúa’s administration was characterized by an ongoing economic crisis and continuous fights between the coalition members. The dissension ended up with the resignation

of the vice president in 2000 (after 10 months of government) as the result of a bribery scandal in the Senate. Moreover, the Supreme Court was showing a slow and sporadic support for the government, as evidenced by its ratification of the Decree 433 of salary reduction for state-workers. Popular support decreased rapidly, due to the sense of an inactive administration that had failed to tackle corruption (like the fruitless imprisonment for a government corruption scandal of ex-President Menem, who was released after six months). The economy of the country was in almost complete stagnation after three years of recession, while the convertibility law (that fixed the peso to the US dollar) made exports uncompetitive, which worsened the situation. Argentine individuals and businesses feared a complete crash of the economy as well as a devaluation of the currency, motivating them to exchange pesos for dollars and withdraw large amounts of money from the banks, thereby putting the banking system of the country in risk due to the diminishing US dollar reserves in the Central Bank.

On December 1, 2001, the Minister of the Economy, Domingo Cavallo, announced a restriction³⁸ on cash withdrawals from bank accounts for a 90-day period (Decree 1570/01). In fact, bank accounts were virtually frozen, causing discontent and fear among the people. The PJ announced that the decision was unconstitutional; to counteract it, they would present a writ of amparo against it. One week after the decree was promulgated, there were 200 writs of amparo claiming its unconstitutionality (Smulovitz 2005). By mid-December of 2001, the financial crisis and the growing popular unrest had led to riots and looting in several cities, which motivated the president to declare a state of siege and forced the resignation of Cavallo. Argentines held responsible for the economic crisis the Supreme Court Justices and protesters daily gathered

³⁸ Initially, account holders were allowed to withdraw US\$250 on a weekly basis, and then US\$300, from accounts denominated in pesos.

outside the court and the justice's houses to demand their resignations. On December 21, de la Rúa resigned from office as a result of violent riots and strong popular pot-banging demonstrations ("cacerolazos") all over the country.

Determining the succession of the presidency, however, was not an easy task, not only because the vice president had also resigned, but because the social and economic chaos of the country was discouraging potential candidates from assuming the position. The next in line of succession was Ramón Puerta, the President of the Senate from the PJ; he took office temporarily on December 21. Two days later, the PJ appointed Adolfo Rodríguez Saá as the interim president of the country, but on December 30 he resigned due to lack of support from his party. Ramón Puerta again assumed the presidency (since he was first in line), but resigned the following day, at which point Eduardo Caamaño, the Peronist President of the House of Deputies and next in line, became president. That same day Caamaño called for an extraordinary session of Congress to choose an interim president. On January 1, 2002, the Congress chose Eduardo Duhalde, the Peronist candidate who had been defeated in the 1999 presidential election, as interim president.

3.2.10 The Peronists again in government: Duhalde and the Kirchner couple

During the first months of 2002, Duhalde ended the ten years of US Dollar-peso parity (Law 25.561 – the Emergency Law); combined with the restrictions on withdrawing money from the banks, that produced an avalanche of lawsuits against the government. The judiciary rapidly became the epicenter of the conflict and a key player in the policy-making. The first case to

reach the Supreme Court was the “Smith case.”³⁹ The president Duhalde tried to convince the justices to declare unfounded the accusation of unconstitutionality, because, according to the government, pesification was the only way out of the financial crisis (La Nación 13/02/2002). Members of the executive specifically let Justice Petracchi know that, if he ruled in favor of the unconstitutionality of the decree, they would provide evidence about the bribes he had received during the Menem administration (Abiad and Thieberger 2005). In February 2002, six out of the nine justices decided that the restrictions imposed by Decree 1.570 were, in fact, unconstitutional; Justices Petracchi, Belluscio, and Bossert abstained from voting. As a consequence of that decision, the president issued Decree 214, which forced the pesification of all obligations then in foreign currency.⁴⁰ Likewise, on March 5, considering a lawsuit brought by the province of San Luis against Banco de la Nación (a bank owned by the Argentine government), the Supreme Court declared again the unconstitutionality of the pesification of bank deposits and ordered the bank to return the money to the province. Even then, however, the scope of the decision was limited to the case under analysis, because of the diffuse Argentine constitutional review system.⁴¹ At the same time, it showed that the Court was not willing to conform automatically to the executive’s interests.

In February 2002, the opposition requested the impeachment of all the members of the Supreme Court due to misconduct and possible crimes committed during the Menem

³⁹ Carlos Antonio Smith, from the province of Corrientes, presented a lawsuit requesting to withdraw more than US \$200,000 from his bank account.

⁴⁰ The “pesification” of the economy not only affected bank deposits, since dollar deposits were forced into pesification at the rate of 1.4 pesos per US dollar, but also triggered inflation, since the exchange rate plummeted to 3.37 pesos to the dollar in June 2002 and recovered only to 2.98 pesos to the dollar.

⁴¹ Because of the lack of a binding precedent, the decision of the case affects only the parties involved.

administration. Impeaching all the justices at the same time was not the best strategy since it produced a great delay and errors in the process, undermining the support from the elites in the impeachment trial (Helmke 2005). After nine months of investigation and debates, the impeachment process was dismissed. Ten days later, Justice Bossert, the justice who had received the least number of votes for impeachment,⁴² resigned from the bench because of political persecution. In his resignation letter he confessed that "... I have had enough of the unfair damages I suffered, the unmerited charges presented against myself ..." on top of "... the disappointment I suffered [which has] contributed to my spiritual satiation..." (Periodismo 2002). The point of interest here is that the Bossert's resignation revealed the existence of a mutual extortion between the justices and the president, since the justices were able to undermine the stability of the administration by ruling against the pesification and, at the same time, the executive was forcing a reverse in the ruling by threatening the justices with an impeachment trial. The resignation of Bossert from the bench allowed Duhalde to appoint a very loyal candidate to the Court, the Peronist President of the Senate at that time, Juan Carlos Maqueda. The opposition and the Bar Association fruitlessly and publicly criticized the nomination due to the candidate's strong political connections to the PJ (Diario C 27/12/2002).

In April 2003, Néstor Kirchner, from the PJ, won the presidential elections and assumed office on May 25. Kirchner assumed the presidency with only 22% of the votes, since former president Menem decided not to run for the ballotage. Therefore, one of his most important goals during his term was to obtain legitimacy and popular support. Kirchner's first target was to clean

⁴² Justice Vazquez received 140 votes in favor of impeachment, Justice Moliné O'Connor 139, Justice Lopez 132, Justice Boggiano 131, Justice Belluscio 122, Justice Fayt 85, Justice Petracchi 72, and Justice Bossert 63 (Clarín 11/10/2002).

the Supreme Court, as the society was requesting, so he impeached all the justices who belonged to Menem's automatic majority in order to gain the confidence and support of the people. Kirchner had been governor of the province of Santa Cruz, where he was considered a local *caudillo*, since 1991 (Gatti 2004). He was Duhalde's candidate, against former President Menem. Duhalde's support for Kirchner was interpreted by political analysts as his attempt to continue ruling "behind the throne"; however, as soon as Kirchner became president, he distanced himself from Duhalde by appointing him the Argentine representative of Mercosur in Uruguay. In the legislative elections of 2005, their wives actually competed for a seat in the Senate.

Immediately thereafter, he started to explore how to overcome the difficulties with the members of the Supreme Court, since they appeared determined to continue ruling in favor of the unconstitutionality of the pesification, i.e., against government interests. He decided to change the strategy of attack: rather than impeaching all the justices at the same time, he did it one by one. Undoubtedly, the fact that Nestor Kirchner's wife, Cristina Fernández de Kirchner, had a seat in the Senate and on the Impeachment Trial Commission; assured that the president's wishes would be heard in the sessions.

His first attack was on Justice Fayt (one of the non-Peronist justices). His party started to prepare a request for impeachment, but members of the opposition were not willing to support it; instead, they chose to encourage the impeachment of Justice Nazareno, because he was one of the most controversial members of the "automatic majority" during the Menem administration (Abiad and Thieberger 2005) (BBC 05/06/2003). On June 2, 2003, Justice Nazareno publicly condemned the desire of the government to remove the current justices in order to craft a supportive court. According to Nazareno, "If they change this court now, do you think that they [the government] will put their enemies [on the bench]? If they are telling me that I was devoted

to Menem, with that same logic I should say not to take out this Court because Menem is no longer in power....” (Abiad and Thieberger 2005: 49). This was the perfect excuse for the government to start working on Nazareno’s resignation rather than Fayt’s. Kirchner responded to Nazareno’s comment via a nationwide broadcast, and the very next day the government was composing its request for the impeachment of Nazareno. In the meantime, the government was threatening the rest of the justices by saying that many of them shared in common crimes rather than a true vocation for justice; evidently, this declaration annoyed all the members of the Court (Abiad and Thieberger 2005). As a way to differentiate himself from previous presidents, especially Menem, on June 16 Kirchner issued Decree 222, by which he automatically imposed limitations on the appointment process, thereby showing society that he was not intending to manipulate future nominations to the Supreme Court. That same day the Peronist congressmen presented the impeachment request for Nazareno, and a public hearing was scheduled one week later. On June 27 Nazareno resigned from the bench due to the political pressure and the high possibility of being impeached (Clarín 27/06/2003). This was Kirchner’s first victory over the Court. He then chose Eugenio Zaffaroni, a very prestigious and well-known lawyer with a judicial career in the federal judiciary as well as a short political one.⁴³ The nomination was welcomed in academia because of Zaffaroni’s faultless background, though some sectors from the church tried to impugn the candidate because of his views about the rights of gays and lesbians. Zaffaroni’s swearing-in ceremony was in mid October 2003.

⁴³ In 1994 he was a representative of the Frente Grande party for the reform of the National Constitution and in 1998 he was a legislator from Ciudad de Buenos Aires from that party (Abiad and Thieberger 2005).

On August 13, 2003, two-thirds of the members of the Chamber of Deputies approved the impeachment request for Justice Moliné O'Connor. During the whole process, Moliné O'Connor was constantly advised to resign from the bench before the Senate made the final decision, but he was not willing to do so (Abiad and Thieberger 2005). Meanwhile, the government started to work on Justice López's departure. Miguel Ángel Pichetto, a PJ senator, arranged a private meeting with López to discuss his retirement from the bench (Abiad and Thieberger 2005). The government was planning to use the same strategy as before – that is, impeachment, if López was not willing to cooperate. Apparently, López agreed to resign from the bench, but not immediately. Just in case López changed his mind or took more time than the government was willing to wait (as occurred with Justice Levene that resigned two years later), an impeachment request was forwarded to the Congress (BBC 23/10/2003). On October 23, 2003, when the Chamber of Deputies was about to begin the impeachment process, López resigned. A couple of months later, on December 2, the Senate was in the last stage of the impeachment trial of Justice Moliné O'Connor; with 45 votes out of 64, the Senate impeached him, thus producing the third vacancy on the Court for the Kirchner administration. Kirchner appointed Carmen María Argibay and Elena Highton de Nolasco to fill the vacancies, two well-known and respected lawyers inside and outside the country, making them the first women appointed to the Court by a democratically elected regime. Highton de Nolasco's swearing-in ceremony was on June 9, 2004; Arbogay's was on February 3, 2005.⁴⁴

⁴⁴ Carmen Argobay's swearing-in ceremony took place more than one year after her nomination, because at that time she was working on the International Criminal Court on crimes against humanity in the former Yugoslavia.

By July 2004, Kirchner's attack and "rearrangement" of the Court started to have positive results. Even though the justices appointed by Kirchner did not have a clear political connection to the PJ party or the president (as previously happened), they shared a similar ideology on relevant topics such as the pesification and human rights. On the "Cabrera" pesification case, the Court decided that those who had withdrawn their money from the bank in pesos had done so voluntarily, thus consenting to the pesification; therefore, they could not claim damages (La Nación 14/07/2004). This decision not only invalidated thousands of claims against the government, but also stopped the massive withdrawal of cash from bank deposits. Despite this positive sign, the government continued with the reorganization of the Supreme Court. The next in line was Justice Vazquez, the last member of the "automatic majority." The government had already prepared a request for the impeachment of Vazquez for wrongdoing such as forcing judge Alicia Iermini to obtain evidence on a case (Abiad and Thieberger 2005). In August 2004, during the public hearing, Vazquez publicly condemned his impeachment on the ground that it was happening only because he was part of Menem's group and not Kirchner's. This declaration revealed that Kirchner's motivation for the entire impeachment process was an ideological one, but it also confirmed that Vazquez had always been part of Menem's political alliance (La Gaceta 13/08/2004).⁴⁵ On August 25, the justice reported that his car had been shot at three times, although luckily none of the bullets hit him (Clarín 26/08/2004). He travelled to Uruguay to request political asylum, but Jorge Battle, the president of that country, denied it (La Nación 26/08/2004). The judge who was in charge of the case never corroborated the story of an attack

⁴⁵ During the public hearings for the nomination, Vazquez confessed that he was a friend of Menem (Clarín 7/12/1995). Weeks later a private letter to President Menem in which Vazquez promised that his decisions in the Court would not let him down was disclosed.

on the justice. Vazquez tried to resist the political pressure during the trial as much as he could, but in the end he resigned on September 1; the fear of having his impeachment confirmed, as in the case of Moliné O'Connor, was too strong (La Nación 1/09/2004). With this departure, Kirchner had induced four resignations from the bench, but there were still a couple of unfriendly justices in the bench to be removed.

On October 26, the Supreme Court put an end to the uncertainty over the constitutionality of pesification. In the "Bustos" case, the Court deemed the pesification constitutional, affirming that the 2001 Decree and Emergency Law issued during the crisis were acceptable. The decision was strongly criticized, because it seemed that an economic rationale – stabilizing the bank system – had prevailed over a judicial rationale – defending property rights (La Nación 27/10/2004). It was apparent that the decision aimed to put an end to the controversy over the constitutionality of the pesification rather than defend the rights of the citizens. The Court decision was endorsed by Justices Boggiano, Belluscio, Maqueda, Highton de Nolasco, and Zaffaroni, while Justice Fayt voted against it and Justice Petracchi excused himself from voting. Once again, the decisions of the rearranged Supreme Court were starting to show congruence with government interests.

The next target was Justice Antonio Boggiano, the last ultra-Menemist member of the Court (Página/12 22/11/2004).⁴⁶ On December 16 the Chamber of Deputies approved by more than 2/3 of the votes (159 affirmative votes out of 170) the impeachment of Justice Boggiano due to wrongdoing (Abiad and Thieberger 2005). That same day the Congress approved by a 2/3 vote

⁴⁶ Even though at the beginning Kirchner decided not to impeach Justice Boggiano due to his strong connections to the church (La Nación 12/10/2004), the majority of the Peronist party and the opposition supported his impeachment (Página/12 22/11/2004).

the nomination of Ricardo Lorenzetti to the bench, another well known and respected lawyer. During 2005 the Impeachment Commission worked hard on the Boggiano case; by June the senators had decided to suspend the justice from the bench (Clarín 23/06/2005). As in previous cases, Boggiano was constantly advised to resign and not continue with the trial (Abiad and Thieberger 2005). At the same time, Justice Belluscio decided to resign, on the ground that he had already turned 75 years old (it will be recalled that the Constitution of 1994 (Article 99) had established that, when a justice reached that age and was willing to continue serving, he had to be reconfirmed by the Senate) (Clarín 08/06/2005). Even though, in the case of Justice Fayt in 1999, Justice Belluscio had endorsed Fayt's claim to remain on the bench, in his own case the justice considered it unethical to take advantage of his earlier decision. However, unofficial sources revealed that the government was indeed working on Belluscio's impeachment (Wainfeld and Ginzberg 2005). Boggiano, who was in the last stages of his trial, was still resisting the pressure to resign (Abiad and Thieberger 2005). By the end of September, the Senate had approved the impeachment and Boggiano was removed from the bench, producing a sixth vacancy. Kirchner, in sum, during his first two years in office, induced the departure of six out of nine justices and was able to appoint four justices (see Table 3.1).

Even though Kirchner appointed to the bench four justices with no clear tie to either the PJ or himself, they all belonged to a similar political ideology and shared the same interest on certain topics like human rights and civil liberties. The rulings of the Supreme Court regarding the pesification case and the human rights abuses during the military regime endorsed the president's will, but the lack of a political connection with the president generated certain verbal confrontations between the justices and the executive (La Nación 05/09/2006). Even though at the beginning of Kirchner's mandate the Supreme Court ruled in favor of the president's

interests, as time went by the confrontations between the executive and the court came to light, revealing that Kirchner had not packed the court with friends as previous executives had done (Perfil 31/12/2009).

In the beginning of 2006, Kirchner sent a law to the Congress to reform the Council of Judicature which aimed to retain the veto power on the appointment and impeachment process of the judges. The opposition strongly criticized the reform, as they were already denouncing the lack of an independent judiciary (La Nación 07/11/2006). By November 2006, there were still two Court vacancies to fill and the opposition was condemning the existence of a new “automatic majority” in the court. In this context, Senator Cristina Kirchner submitted a bill proposing to reduce the number of sitting justices from nine to five so as to reduce the disapproval of the opposition and the society. However, the law also reduced the required majority for voting, from 5 to 4 votes, and thus potentially helped to resolve the deadlocks in the pesification cases (La Nación 29/11/2006). The bill was approved (Law 26.186), but the Court remained as it was with seven justices, four of them appointed by Kirchner. In October 2007, Cristina Fernandez de Kirchner was elected president of the country. This was the second time a wife succeeded her husband in the presidency.⁴⁷ Political analysts referred to her administration as the second term of Néstor Kirchner, not only because of the strong continuity in policy but also because of the strong denunciation of political manipulation by her husband (Revista Noticias 1/11/2007).

⁴⁷ The first time occurred when Isabel Martinez de Perón succeeded Juan Perón after his death.

3.3 CONCLUSION

This chapter has used secondary and primary data to describe the executive-court relationship in the country. Until 1946, justices in the National Supreme Court had remained on the bench for longer periods than afterwards, and departures had resulted mainly from natural causes, like retirement and death. The massive impeachment trial and reshuffle in Supreme Court, as well as the purges in the lower courts and provincial Supreme Courts during the first years of the Perón administration, constituted a critical juncture in the evolution of the executive-court relationship. What makes this situation critical is that it has triggered a different type of relationship between the branches of government that has generated some positive feedback (Pierson 2004). The subsequent changes in administration have imitated Perón's blow to the Court and thus reinforced the lack of tolerance of executives for an unfriendly court. For that reason, after 1946 executives have in most cases induced the retirement of unfriendly justices so as to craft a supportive court. It was precisely this constant reshuffle in court personnel that made it more difficult to reverse in the following years the course of action towards a more independent judiciary. Even though during some specific administrations, like those of Illia and De la Rúa, there were no reshuffles in the Court, the several attempts to force the resignation of a justice or enlarge the number of sitting justices reinforced the inertia supporting a subservient judiciary.

Even if after the first Peronist administration the Supreme Court became a clear target of attack, since executives envisioned the justices as key players in their revolutionary political project, before 1946 the court was also a relevant actor for carrying out revolutions. The Acordada of 1930 clearly exemplifies this aspect since the military junta required judicial legitimacy for their government. Therefore, it is not that the positive feedback was generated as a

result of Peronist and anti-Peronist governments but rather after a change in the conception of the executives about the role of the judiciary. This change in their conception was reinforced by the successive purges in the Court that gave way to a positive feedback effect.

While the political manipulation of the Supreme Court justices captured most of the attention, this chapter has also illustrated that executives have expanded their control over the lower courts as well. Moreover, this chapter has also pointed up that justices in the Provincial Supreme Courts have been constantly removed from the bench as the result of changes in the political regimes (from democratic to military regimes and vice versa). Chapter 5 will specifically deal with the Provincial Supreme Courts by analyzing the historical evolution of the executive-court relationship in the provinces as well as by evaluating the political determinants of the stability of justices on the bench. The political heterogeneity at the subnational level creates different patterns of judicial stability and thus of political manipulation.

The historical evolution of the executive-court relationship provides significant evidence to support the hypotheses developed in Chapter 2. Firstly, the constant reshuffles in the Supreme Court that happened as the result of changes in the political realignment indicate that justices with different political preferences from the ruling executive are more likely to depart from the bench than justices with similar political preferences. More precisely, justices appointed during democratic periods (and vice versa) were not likely to remain on the bench when the military sized power, since they were often perceived as justices with different political preferences and thus not acceptable to the regime. Secondly, the continuous reshuffles in the Supreme Court happened most of the time during the first years of the incoming executive, thus suggesting that executives preferred to craft a supportive court early in their government so as to leverage their political power as soon as possible.

The preceding chapter also demonstrated that executives, when facing an unfriendly court, have often induced the retirement of the justices so as to alter the ideological balance of the court. Even though in most cases executives have replaced unfriendly justices with loyal ones, as in the cases of the Peronist and the military governments there were a couple of times in which executives did not pack the court with friends. For example, Néstor Kirchner appointed only one justice, Carlos Maqueda, with a clear political background, while other justices with a similar ideology had no clear political tie to either the Peronist party or Perón's faction (Frente para la Victoria). Even though in some cases the court ruled in favor of Kirchner's interests, as in the case of human rights violations⁴⁸ and the pesification of the economy, there were other cases in which the court ruled against the interests of the government, as in the union labor case.

Section 3.2 showed that Argentine executives have used different strategies to craft a supportive court. Although the military, when seizing the presidency via decree, have systematically removed justices from the bench both at the National and Provincial Courts (Aramburu, Onganía and Videla), civilian executives have tried different ways to induce retirement and craft a supportive court. The most common ones were: enlargement of the court (during the Frondizi, Illia, Alfonsín, and Menem administrations), impeachment and threat of impeachment (during the Perón, Duhalde and Kirchner administrations), age retirement (Menem, De la Rúa), and discrediting the justices' performance in the media (Kirchner). Along with these strategies, there were five special cases in which executives have used more benevolent forms of non-institutional induced retirements to create a vacancy in the court. The logic of these

⁴⁸ In 2003 the Supreme Court upheld the decision of the Congress that the amnesty law protecting military personnel from prosecution was unconstitutional. This historic decision paved the way for prosecutions in the country, and hundreds of cases were reopened.

resignations is different from the others, since friendly justices stepped off the bench, rather than unfriendly ones, either to be appointed to more important jobs (that required more loyalty) or to help the executive in policy making. Nevertheless, what drove the resignations of these justices was the executive's motivation rather than their own. During the Onganía and Martínez de Perón administrations, three of their most loyal justices were appointed to more important jobs: Justice Borda to be Onganía's Minister of Interior, Justice Aráuz Castex to be Martínez de Perón's Minister of Foreign Affairs, and Justice Corvalán Nanclares to be Martínez de Perón's Minister of Justice. During the Menem administration, two justices also stepped down in response to a special request from the president. Menem needed vacancies on the Court to obtain support from the Radical party for the constitutional reform that would allow him reelection. Menem offered those justices more prestigious jobs in exchange for their loyalty and support: Justice Barra was promoted to be Minister of Justice, and Justice Cavagna Martínez was made the Argentine ambassador to Italy. These five special cases of "benevolent" induced retirements took place when the executive had an ideological closeness with the justices, in contrast to the "malevolent" induced retirements when it did not. The next chapter evaluates the theory of vacancy creation in the National Supreme Court while the following one on the Provincial Supreme Courts.

4.0 UNVEILING JUDICIAL TURNOVER IN THE NATIONAL SUPREME COURT

The preceding overview of Argentine history revealed that judicial turnover has not been consistent over the years. The average tenure of a Supreme Court justice from 1900 to 2009 was 6.7 years. However, 1946 must be considered a critical juncture in the evolution of executive-court relations, as before that year justices remained in office for 10.6 years on average, while afterwards the average tenure was 5.7 years. The previous chapter also illustrated that the arrival of Perón to the presidency in 1947 and the consecutive purges in the court by military and civilian administrations reinforced the pattern of instability of the justices in office. Moreover, if one concentrates only on the last democratic period (1983-2009), the average tenure for a justice has been 6.5 years, not that different from the average for the entire period 1947-2009. This high rate of instability of justices, even after the return of democracy, indicates that both civilian and military executives have manipulated the Court. Still, the question remains: why do Argentine justices remain such a short time in office despite having life tenure? What factors can account for the high judicial turnover?

The objective of this chapter is to empirically assess the theory of vacancy creation presented in Chapter 2, using data on the Argentine justices of the National Supreme Court. Specifically, this chapter uses quantitative data to systematically analyze the 83 departures of the Supreme Court justices from the bench from 1916 to 2009 so as to determine how the incentives

and preferences of the executives have influenced those retirements. Section 4.1 discusses the data and methodology for testing the alternative explanations for vacancy creation. The following section presents the results of the survival and competing risk models, and the last section outlines the main conclusion.

4.1 DATA AND METHODOLOGY

The dataset contains information about Argentine Supreme Court justices from 1916 to 2009. The dependent variable is the year in which a justice departs from the bench, indicating with a 1 the year the justice exits and a 0 otherwise. Judicial vacancies have been not a rare event but a rather familiar one, since they have occurred on average every 1.2 years. The units of analysis are justice-years.

Preliminary descriptive analysis of judicial turnover in the country reveals that on several occasions more than half of the sitting justices have simultaneously departed from the bench in a given year, mainly as a result of changes in the type of regime (from democracy to military and vice versa). Figure 4.1 shows that the Court has been abruptly reshuffled⁴⁹ on 7 different occasions, starting in 1947 with Perón and ending in 1983 with the return of democracy. Three of those reshuffles happened as the result of a military coup (1955, 1966, and 1976), while the other four occurred as the result of the return of democracy to the country (1947 and 1973 under the Perón administration, 1958 under Frondizi, and 1983 under Alfonsín).

⁴⁹ This is when more than half of the sitting justices depart from the bench in a given year.

Evidently, the ultimate goal of these abrupt reshuffles has been to pack the court with loyal justices. Even though these “packings” of the Supreme Court were the consequence of sudden purges in the court, there are other alternatives for crafting a supportive court. One is the gradual replacement of unfriendly justices over a period of several years. President Néstor Kirchner pursued this strategy over three years, by the end of which he was able to appointing 4 of the 7 justices. Another means of packing the court with friends is to expand the size of the court. Presidents Frondizi and Menem successfully packed the court by increasing the number of sitting justices contrary to the experience of Presidents Illia and Alfonsín, who did not obtain the necessary support in Congress.⁵⁰ The key issue here is that even though Figure 4.1 shows that the court has been abruptly reshuffled 7 times, in fact the court has been packed on 9 occasions due to gradual replacements and enlargements. Therefore, reshuffles are an exclusive function of removals both abrupt and gradual, while packing is a function also of expanding the number of justices.

⁵⁰ By the time Frondizi expanded the number of sitting justices on the court he had already appointed to the bench 3 out of 5 justices; after the expansion he had 5 out of 7, making a larger loyal coalition to secure his goals, a double packing of friendly justices. Menem was in a different situation, since by the time he increased the number of justices he had inherited a court with justices appointed by Alfonsín. The 1990 enlargement law allowed Menem to pack the court with loyal justices without reshuffling the composition, since he appointed 6 out of the 9 justices. Four of the vacancies were the result of the enlargement of the court, and the other two were the result of induced retirements of justices.

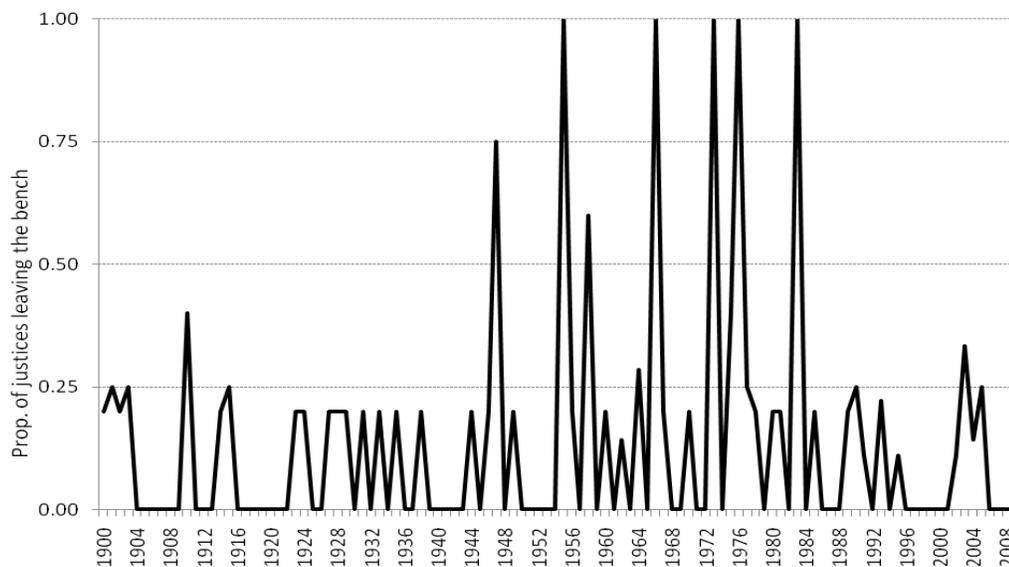


Figure 4.1 Reshuffles in the Supreme Court 1900-2009

The starting point of this research is the assumption that executives, while in power, want to have a supportive court as a way to maximize their political influence on the decisions of the judiciary. According to the theory of vacancy creation, executives can craft a supportive court not only by appointing friendly justices, as the American literature has long recognized, but more interestingly by influencing when a vacancy will occur either by removing unfriendly justices or by packing the court with loyal justices. The main hypothesis relates to the political proximity between the incoming executive and the sitting justices. It is argued that the justices who share the same political preferences as the ruling executives – that is, friendly justices – are likely to rule in favor of the executive, whereas the opposite is true for justices who do not share the same political preferences as the ruling executive.

Measuring a justice’s political preferences is a difficult task, because only partial data are available about how justices vote on the National Supreme Court and no data are available at the Provincial Supreme Court. The only systematized data reveal the way justices vote regarding the

constitutionality of a norm; this is not enough information to create an index reflecting an overall evaluation of the justice's preferences over time. As a way to overcome this difficulty, this study proposes two types of proxy variables to measure the political proximity of justices and executives. The first measure captures the political alignment of the justice to the executive by paying attention to the political ID of the appointing executive (both the political party and the political faction of the party); the second one mediates the alignment of the justice (both the political party and the political faction) by the level of congressional support enjoyed by the executive party at the time when the appointment is made. Consequently, the first measure stresses the importance of the political alignment of the appointing executive, while the second one improves the measure by emphasizing the importance of the partisan power of the political parties during the appointment process.

4.1.1 Alignment to the political party and the faction

The proximity of the justice to the executive can be determined by the political party of the appointing executive, since the idea is that the justice reflects the political preferences of the party of that executive (Hagle 1993; Spriggs and Wahlbeck 1995; Zorn and Van Winkle 2000).⁵¹ So, for example, justices appointed by the president from Party A will likely share the same political preferences as Party A. However, in countries with high party factionalism, like Argentina especially at the subnational level, it is also important to consider the political

⁵¹ Even though some recent studies in the American literature have challenged the assumption that justices reflect the political preferences of the appointing executive, this type of analysis is hard to carry out in Argentina due to data constraints (Szmer and Songer 2005).

factions⁵² within the political parties of the appointing executive. It may be the case that in countries with party factionalism the proximity of the justice to the executive may not necessarily be determined by the political party itself but rather by the political faction of the appointing executive. So, for example, at the national level, Presidents Kirchner and Menem both belonged to the Peronist party; however, President Kirchner's political faction successfully impeached two justices appointed by former President Menem's faction (Justices Moline O'Connor and Boggiano) and forced four more (Justices Nazareno, Lopez, Vazquez, and Belluscio) to retire. Evidently, Presidents Kirchner and Menem belonged to different factions of the PJ and this was one of the reasons why Kirchner forced the removal of what he considered unfriendly justices. At the provincial level, ideological distance is also important, since during the last twenty-five years many of the Argentine provinces have been governed by the same political party. In the province of Neuquén, for example, the Movimiento Popular Neuquino has ruled from 1983 until the present; however, different political factions of that party have governed during those years: those loyal to Felipe Sapag or to Elias Sapag. The political preferences of each faction clearly differentiate them from the other faction, a distinction reflected in the political proximity of the justices appointed by each of the factions.

Therefore, while American scholars consider political proximity only when the justice shares the same political preferences of the political party of the appointing executive, in this case it is also important to consider the political faction of the appointing executive. In countries with intra-party fragmentation it is more likely that executives will be considered friends when they and the justice in question belong to the same political faction of their party. Consequently,

⁵² "Political faction" accounts for ideological differences within the same political party.

two measures of political proximity are employed: one using the political *party* of the appointing executive, and the other using the political *faction* of the appointing executive. The dummy variable for political party alignment captures whether or not the justice was appointed to office by a president of the same political party as the current ruling executive, while the dummy variable for faction alignment captures whether or not the justice was appointed to office by a president of the same political faction as the current ruling executive. So, for example, in 1991 President Menem from the PJ appointed Justice Boggiano to the court; during the years that the PJ was the ruling party, the dummy variable for party alignment was coded 1 and 0 for the other years (when the Alianza was the ruling party). Regarding the dummy variable for faction alignment, since Justice Boggiano was appointed by Menem, and the other PJ presidents who followed him (Presidents Duhalde, Néstor Kirchner and Cristina Fernandez) were from a different faction of the PJ,⁵³ faction alignment for Boggiano is coded 1 only during the years of the Menem administration and 0 otherwise.

The alignment variables lead to the following hypothesis: first, a justice who belongs to the same political faction as the ruling executive is less likely to be removed from the bench; and second, a justice who belongs to the same political party as the ruling executive is less likely to

⁵³ Chapter 5 discusses in greater detail the coding rules for this variable, but the main idea is that, if the outgoing executive supported the incoming executive during the candidate nomination or the primaries, it is argued that they belong to the same faction; whereas, if the outgoing executive supported another candidate during the nomination and primaries or even competed himself, then it is argued that they do not belong to the same faction. It is also considered whether the incoming executive who has been supported by the outgoing executive remains loyal to the faction during his administration. So, for example, in the case of Néstor Kirchner from the PJ, former President Duhalde also from the PJ supported Kirchner's nomination but as soon as Kirchner assumed the presidency he clearly betrayed and separated from Duhalde's faction, creating a new faction inside the PJ (called Frente para la Victoria).

be removed from the bench. Due to party factionalism, one may expect to find significant results on the variable using political faction as a measure of political alignment.

4.1.2 Ideological distance: alignments to the executive mediated by the partisan power in Congress

Even though the previous variables can capture political proximity between justices and executive even in the context of intra-party fragmentation, those variables do not take into consideration the role and partisan power of the political parties during the appointment process. If the ruling party does not have full control of the Congress to appoint a justice with close political preferences, then the justice appointed to the Court would hardly be fully aligned with the appointing executive. In the previous measures it was assumed that the executive in office had full control over the appointment process, while in this case that assumption is relaxed. In this case it is considered the partisan power of the political parties in the process in conjunction with the political party and faction alignment. Like in the previous case there are two measures of ideological distance: one is identifying the political faction of the ruling executive while the second one is using the political party. Therefore, the ideological distance scales are defined as a function of the political alignment between the sitting justice and the executive (either the political faction or the political party) mediated by the political support for political parties in the Congress during the appointing period. In this case, the appointing process is conceived as political negotiation among the parties in Congress.

Congressional support is relevant because the greater the partisan support of the executive during the appointing time, the more likely it is that the appointing executive will

select a candidate with similar political preferences (Iaryczower et al. 2002).⁵⁴ If the executive had full support (in terms of whatever type of congressional majority the executive needed to approve a nomination, either 2/3 or a simple majority), then the justice would have the same political preferences (i.e., be a *pure clone*) as those of the nominating president; otherwise, the justice would be a *mixed clone* of the executive and the legislature, since the ruling party would have to negotiate with the other parties to obtain support. This corresponds with what the American literature refers to as the strategic behavior of executives during the nominating process (Moraski and Shipan 1999; Hammond et al. 2005). The idea is that, based on the political distribution of the seats in the Senate, presidents use their power of nomination strategically in order to bring the Court in line with their policy preferences. Based on the political support that the president enjoys in the Senate, justices can be conceived as pure or mixed patronage appointments.

Thus, the ideological distance variables capture the political proximity of the justices to the executives by paying attention to the partisan power of the executive in Congress. Due to lack of information, in these measures it is only employ congressional support for the political party of the executive and not congressional the support for the faction of the executive. Even though within Congress there is also some degree of factionalism (known as “bloques”), it is hard to obtain that information during the long period of analysis in the National Congress or in the Provincial Legislatures. Nevertheless, according to Argentine experts on provincial legislatures (Miguel De Luca and Andrés Malamud), the voting behavior at the provincial level

⁵⁴ Within legislatures, there is also some degree of factionalism (known as “bloques”); however, no data are available about it at the provincial level between 1983 and 2008. Nonetheless, experts on provincial legislatures suggest that voting behavior at the provincial level is homogeneous within the political party.

is prone to be homogenous within the political parties; therefore, it is assumed that parties vote cohesively during the appointing process.

The ideological distance variable is a scale that ranges from 0 to 1. Justices who have the same political preferences as the executive or no ideological distance (i.e., a value of 0) are those justices who have been appointed by an executive with full control of the Senate during the appointing process or by a friendly past executive with control of the Senate.⁵⁵ So, for example, in 1990 President Menem had full control of the Senate; therefore, the justices he appointed in that year were very close to his political preferences (i.e., full clone justices), since he did not need to negotiate with other parties to appoint them. For the subsequent PJ administrations those justices would be also considered politically close to the ruling executive, in the case of the ideological distance variable that is based on the political *party* of the executives, but not for the ideological distance variable that is based on the political *faction* of the executives. In the case of the justices who were appointed during the military regime, those justices would be completely aligned with the military executives since the Generals had no Congressional restriction on the appointment process.

On the other hand, justices who do not share the same political preferences or have a full ideological distance from the executive (i.e., a value of 1) are those who have been appointed by unfriendly executives (either because the executive belong to a different political party or political faction) who had full control of the Senate. Following the Menem example, above, during the Alianza administration that came after the Menem government, the justices appointed in 1990 received the highest score in the measure of ideological distance from President De la

⁵⁵ Until 1994 the Senate confirmed candidates by a simple majority of the seats, while after the Constitutional Reform it took 2/3 of the seats.

Rua, since the Alianza government (either the UCR or the FREPASO) did not negotiate with the PJ the appointment of those justices at the appointing time. Another example is the justices who were appointed during the military government who served also during the democratic period (and vice versa), since in those cases the military had no restrictions from the Congress on appointing the justices.

However, as previously mentioned, not all executives had full control of the Senate during the appointment process to enable them to select a justice with identical political preferences. In those cases, the ideological distance of the justice from the executive is mediated by the partisan power of the ruling party. For example, let us imagine that the president from Party A (in t_0) controls only 40% of the seats of the Senate (Party B controls 35% and Party C, 25%) and needs a simple majority (51%) to appoint a justice. In this situation, Party A would have to negotiate with other parties so as to obtain the necessary votes. Therefore, Party A will not be able to select a clone justice (i.e., a justice with identical political preferences), but rather a justice with some ideological distance due to the bargaining process with the other parties. Taking into account the political advantage of the executive during the appointing process, it is likely that the executive would still have a preferential place in the bargaining process.⁵⁶ So, in this case, if Party A had 40% of the votes out of 51% (i.e., the executive controlled 78% of the total votes necessary for the appointment), the index of ideological distance would be 0.22 points (i.e., $1-0.78$) indicating that the president had to make limited concessions to the pivotal senator outside of his or her party. A 0.22 points in the ideological distance scale reflects that the justice does not have the same political preference as the executive, since that would be a value of 0, but

⁵⁶ The president is the one who nominates a justice to the bench and, thus, the first political actor in the appointing sequence.

rather that the justice has quite similar preferences to those of the executive. Now, let us imagine that in the next presidential elections (t_{+1}) Party B wins; then the ideological distance of a justice appointed in the previous administration (t_0) would be determined by the partisan and bargaining power of Party B in the Senate at the appointing time. Since Party A had 40% of the seats out of the 51%, then Party A could have sealed an agreement for the appointment with either Party B or Party C. Given that both of the parties could have supported Party A in the appointment process (since Party A needed only 11% of the seats in the Senate) and there is no way to obtain information about the bargaining process for such a long timeframe, in those cases it would be computed as if the justice were fully distant from the executive. This is, if Party B or C wins the next presidential election, then a justice appointed during the administration of Party A has a full ideological distance from the current executive. It is for this reason that this can be conceived as an improved variable of the alignment variables since it takes into account the partisan power of the political parties during the appointment process.

4.1.3 Timing of the departure

The argument is that executives want a supportive court during the first two years of their administration⁵⁷, because they want to use their political leverage on the judiciary to carry out their policies. Three different measures are used to assess this effect: a change in the administration, a change in the ruling party, and the establishment of military governments.

⁵⁷ The first two years of the administration were coded, because changes in the administration often come at the end of the calendar year, when the Judiciary is closed; thus the resignation of the justice happens during the following year.

These dummy variables aim to account for leadership, party, and regime effects. Significant results are expected when there are changes in the ruling party, since in most cases incoming executives inherit a court with justices appointed by executives from a different party.⁵⁸ The military government variable measures not only the establishment of a military government but also those cases in which there were changes within the ruling military elite. As shown above, military governments also experienced changes within the ruling elite, so this variable also captures when new military executives takes office within the same military regime.⁵⁹ One may expect to find significant results whenever military governments seized power, since they can use their unbounded power not only to close the Congress and overthrow the president but also to craft a supportive court. However, as the chapter 3 illustrated, there will probably not be significant differences between military and democratic regimes, since both types of regime have been able to craft a supportive court.

4.1.4 Political background of the justices

Also included is a dummy variable that specifies the justices' political background, being 1 when the justice had a political background and 0 a judicial one. There were some cases in which justices had both a political and a judicial career; in those cases the justices were coded as 1 (i.e., having a political background), since what matters most is a prior political connection.

⁵⁸ One exception to this assumption is the change in the ruling party in 2002 when President Duhalde from the PJ inherited a Court with a majority of Peronist justices, despite a change in ruling party because the Alianza government (UCR and FREPASO) did not appoint new members in the court.

⁵⁹ This variable can also be interpreted as regime type, since it is correlated with the presence of military rulers in the government.

Secondary sources and newspapers⁶⁰ were used to code whether or not the appointed justice had a political or a judicial background, with special attention paid to the justice's previous job and political relations. Justices with a political background are those that either previously held a political position such as congressmen, minister, political advisers or that have a personal relationship with the president or his political team. During the military regimes, when political parties were proscribed, it was important to code whether or not the justice had a special bond to the military. It was predicted that those justices with political (or military) backgrounds would be more likely to leave office than those with judicial backgrounds, because incoming authorities would likely first remove those justices who represented a political threat.

4.1.5 Executive partisan power

The model also includes the executive partisan power hypothesis that stems from a group of scholars (Chávez 2004; Iaryczower et al. 2002) who claim that only those executives that have the partisan power in Congress to formally remove a justice from office (i.e., impeach) will obtain a supportive Court. Even though this study challenges this assumption I include this in the analysis as a competing hypothesis. A dummy variable was included to measure strong, unified governments (i.e., those where the executive had 2/3 or more of the seats in both chambers) coded as 1 and 0 otherwise.

⁶⁰ The data was gathered from the following list of books, journal articles and working papers (Helmke 2005; Abiad and Thieberger 2005; Pellet Lastra 2001; Verbitsky 1993; Tanzi 2005; Chávez 2007, 2004; Kunz 1989). Data from La Nación, Clarín and Página 12 newspapers were used to complement and corroborate the information from the secondary sources.

4.1.6 Justice's age and size of the court

Along with the previous hypotheses, additional explanations are proposed in relation to the preferences and personal characteristics of the justices that recur in the literature. These variables aim to evaluate how the personal characteristics of justices influence their stability in office. One variable captures the effect of the justice's age on the probability of departing from office. This variable can also be interpreted as a proxy for the health of the justice, since older justices are more likely to experience health problems and eventually die in office or retire of their own accord. It may, therefore, be predicted that older justices are more likely to step off the bench than younger justices. Another variable in the model indicates the size of the Court as a way to control for reductions in the number of sitting justices. The expectation is that smaller court increases the probability of any justice of leaving office. Table 4.1 presents a summary of the variables and their measurement.

Table 4.1: Sample information and variable definition

Variable name	Definition	Mean	Std Dev.	Min	Max
Justice's departure from the bench	1 if the justice departs from the bench, 0 otherwise	0.120	0.325	0	1
Alignment with the political faction	1 if justice and ruling executive belong to the same political faction, 0 otherwise	0.574	0.495	0	1
Alignment with the political party	1 if justice and ruling executive belong to the same political party, 0 otherwise	0.640	0.480	0	1
Ideological distance with the political faction	a 0-1 scale that captures the ideological distance of the justice from the ruling executive based on the political faction ID of the executive, 0 having no ideological distance (clone justice) and 1 the highest ideological distance	0.462	0.473	0	1
Ideological distance with the political party	a 0-1 scale that captures the ideological distance of the justice from the ruling executive based on the political party ID of the executive, 0 having no ideological distance (clone justice) and 1 the highest ideological distance	0.390	0.457	0	1
New administration	1 if there is a change in the administration, 0 otherwise	0.478	0.500	0	1
New ruling party	1 if there is a change in the ruling party, 0 otherwise	0.304	0.461	0	1
New military administration	1 if there is a change in the military administration, 0 otherwise	0.111	0.314	0	1
Background of the justice	1 if the justice has a political background, 0 a judicial one	0.685	0.465	0	1
Executive partisan power	1 if the executive controls 2/3 of both chambers in Congress, 0 otherwise	0.89	0.285	0	1
Justice's age	The age of the justice	60.854	9.104	37	91
Size of the court	Number of sitting justices in the court	5.990	1.6504 2	5	9

4.2 UNDERSTANDING JUDICIAL INSTABILITY IN THE NATIONAL SUPREME COURT, 1916-2009

In order to test the previous hypotheses and following the literature, a survival model for discrete data was used (Box-Steffensmeier and Jones 2004; Nixon and Haskin 2000; Squire 1988; Zorn and Van Winkle 2000).⁶¹ Because justices depart from the bench during the judicial calendar year, the underlying process is assumed to be discrete; thus the intervals for the duration are measured in terms of years. I include a temporal dependence variable, not only because each individual case has multiple data points and thus can exhibit temporal dependence, but also for the purpose of examining whether or not the stability of a justice in office changes over time. The Carter and Signorino (2007) time polynomial method (t , t^2 , and t^3) was used to model temporal dependence, since these authors provide evidence that the use of time dummies suffers from issues of inefficiency. The dataset contains information about the Argentine justices appointed to the Supreme Court from 1916 to 2009. The dependent variable is a dummy that indicates with a 1 the year the justice exits office (the event) and a 0 otherwise. The units of analysis are justice-years. Table 4.2 presents the results of the survival discrete-model using a logit estimator with robust standard errors. Because the alignment variables and the ideological

⁶¹ Because the dependent variable is dichotomous with only 12% of the cases being 1's, rare events logit model is appropriate (King and Zeng 2001). I estimated both rare events logit and logit models with Huber/White/Sandwich robust variance estimator to adjust for within-group (justice) correlation (Wooldridge 2002), and I obtained similar results. Due to the similarity of results between those two models, I present the results for the logit model with Huber/White/Sandwich robust variance estimator.

distance indicators are highly correlated, Model 4.1 presents the results using the alignment variables while Model 4.2 using the ideological distance variables.⁶²

⁶² Even though the alignments variables are also highly correlated (0.84), the results still hold when the model is run using each of the alignment variables separately. Model 4.2 contains a smaller number of observations than Model 4.1 since there are no data available before 1916 regarding the conformation of the National Congress. Therefore, the justices appointed before that year who were still serving on the court are not included in the sample size.

Table 4.2: Survival model of judicial turnover for the Supreme Court, 1916-2009 (all retirements)

	Model 4.1	Model 4.2
Alignment with the political faction	-1.380** (0.599)	-
Alignment with the political party	0.735 (0.501)	-
Ideological distance with the political faction	-	1.613** (0.791)
Ideological distance with the political party	-	-0.706 (0.595)
New administration	0.408 (0.449)	0.312 (0.570)
New ruling party	1.124** (0.497)	1.140** (0.562)
New military administration	1.198** (0.399)	1.119** (0.402)
Background of the justice	0.082 (0.282)	0.286 (0.330)
Executive partisan power	0.411 (0.553)	0.318 (0.608)
Justice's age	0.043** (0.020)	0.042** (0.199)
Size of the court	-0.111 (0.115)	-0.144 (0.129)
t	0.613*** (0.175)	0.534** (0.185)
t ₂	-0.061*** (0.017)	-0.052** (0.018)
t ₃	0.002*** (0.000)	0.001** (0.000)
Intercept	-6.201*** (1.583)	-6.510*** (1.483)
N	666	565
Wald X ² (df)	63.33(12)	55.45(12)
Prob.> X ²	0.000	0.000
Pseudo R ²	0.185	0.194

Log-Likelihood -194.363 -173.681

Note: *Significant at $p < .10$; ** at $p < .05$; *** at $p < .001$. Robust standard errors in parentheses.

The results from Model 4.1 indicate that being aligned with the faction of the president reduces the probability of a justice of leaving the bench in a given year. The fact that the coefficient for party alignment is not statistically significant reveals that the proximity of the justice with the faction of the president is more important for accounting judicial turnover than with the political party. That is, friendly justices are not necessarily the ones that have been appointed by executives from the same political party but rather from the same political faction of the party.

The dummy variables for changes in the ruling party and for changes in the military administration are positive and statistically significant. This suggests that during the first two years when a new party comes to power, justices are more likely to depart from the bench. The coefficient for change in the administration is not statistically significant, which implies that the probability of a justice departing from the bench increases not necessary when there is a change in the administration but rather when there is a new ruling party in power. The establishment of military administrations also increases the likelihood of a justice departing from the bench, revealing that justices are unstable under both democratic and military regimes.

The variable of the justice's age is also significant; it reveals, as expected, that the older the justice is, the more likely he or she will leave the bench. The variable for the executive partisan power in Congress is not statistically significant. This indicates that, in fact, there is no relationship between the partisan power of the executive and the probability that a justice will depart from the bench. This may be because presidents had (at least) 2/3 of the seats in both chambers in only 11 years between 1916 and 2009. The temporal duration terms are significant,

revealing the existence of a temporal dependence on justices' tenure or a non-linear evolution over time. Figure 4.1 (based on Model 4.1) plots the log-odds of judicial departures over time. The risk for departing from the bench increases around year seven but the hazard rate expands significantly after the second decade in office, what may suggests the effect of the justice's age for retirement.

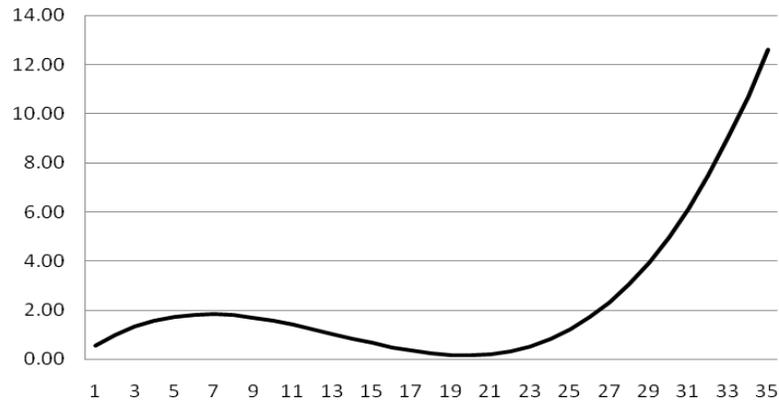


Figure 4.2: Hazard function from Model 3.1

Model 4.2 from Table 4.1 presents the results of the survival discrete-model using a logit estimator with robust standard errors for the ideological distance variables, one based on the political *party* ID of the executives and the other on their political *faction*. The results indicate, once again, that the greater the ideological distance a justice is from the political *faction* of the current executive, rather than from the political *party* of the executive, the more likely it is that he or she will leave the bench. As in Model 4.1, in this case the political proximity of the justice to the political faction of the ruling executive also affects the stability of the justice in office. The fact that what matters is the alignment to the political *faction*, rather than the political *party*, reveals that loyalties are more precise and more closely linked to the preference of the ruling executive than what the American literature suggests. In the end, executives do not trust justices

with different political preferences since those justices will not protect the executives' interest in the Court. The dummy variable for military changes in administration is statistically significant, suggesting that during the first two years of a new military administration justices are more likely to depart from the bench. The dummy variable for change in the ruling party also resulted statistically significant and in the expected direction, suggesting that justices are more likely to depart from the bench during the first two years of a new ruling party in office. The justice's age and the temporal variables are also statistically significant and in the expected direction.⁶³

Because Models 4.1 and 4.2 are non-linear predicted probabilities were computed for the justices under different circumstances. Table 4.3 plots the predicted probabilities for Model 4.1 in various political contexts. On average (i.e. holding all the variables at their mean) a justice has 0.07 probability of departing from the bench but that probability increases under different political context. Let's consider that there is a change in the civilian administration and the justice is aligned with the political faction of the incoming president, then the probability of that justice leaving office in a given year increases 11%, while if the justice is not aligned with the faction of the current executive the probability increases to 32%. Changes in military administration also increase the probability of a justice departing from the bench. If there is a change in a military administration and the justice is aligned with the military, the probability of the justice leaving office in a given year increases 17%, while if the justice is not aligned with the military the probability increases to 28%. Therefore, those justices aligned with a different political faction from that of the ruling executives have a greater probability of leaving office

⁶³ As in Model 4.1, the temporal duration terms indicates the non-linear evolution of the justice's hazard rate over time and the effect is very similar. The log-odds of judicial departures reveals that justices are more likely to leave after 7 years in office and again the hazard rate increases significantly after the second decade of the justice in office.

during the first years of the administration than those justices aligned with the faction of the ruling executive. These results expose not only that incoming executives prefer to craft a supportive court during the first years of their government so as to increase their political leverage but also that justices are unstable under both civilian and military administrations. Democracies have not produced so far a more stable and independent judiciary than military governments.

Table 4.3: Predicted probabilities for Model 4.1

		Aligned with the faction of the president	Not aligned with the faction of the president
Civil	Change in administration	0.105 (0.019, 0.192)	0.319 (0.193, 0.444)
	No change in administration	0.024 (0.003, 0.047)	0.092 (0.021, 0.163)
Military	Change in administration	0.167 (0.022)	0.276 (0.066)
	No change in administration	0.039 (0.013, 0.064)	0.071 (0.015, 0.127)

Note: 95% confidence interval in parenthesis.

The predicted probabilities for Model 4.2, plotted in Table 4.4, also support the importance of politics in explaining judicial stability on the bench. On average (i.e. holding all the variables at their mean) a justice has 0.08 probability of departing from the bench. Let's consider that there is a change in the civilian administration and the justice is ideologically distant from the ruling president, the probability of the justice leaving office in a given year increases 34%, while if the justice is not ideologically distant from the president the probability of leaving office reduces to 9%. Similar results are found when there are changes in a military administration. If there is a change in a military administration and the justice is ideologically distant from the military, the probability of the justice leaving office in a given year increases

40%, while if the justice is not ideologically distant from the military the probability reduces 12%. The political proximity of the justice to the ruling party can affect the stability of the justice on the bench, since those justices ideologically distant are more likely to depart from the bench at the beginning of a new administration. As in the previous model, justices are unstable under both military and democratic administrations.

Table 4.4: Predicted probabilities for Model 4.2

		Minimum ideological distance	Maximum ideological distance
Civil	Change in administration	0.094 (-0.004, 0.191)	0.341 (0.198, 0.485)
	No change in administration	0.024 (-0.001, 0.049)	0.108 (0.016, 0.200)
Military	Change in administration	0.115 (-0.050, 0.280)	0.396 (0.170, 0.622)
	No change in administration	0.030 (0.001, 0.059)	0.135 (0.009, 0.261)

Note: 95% confidence interval in parenthesis.

It should be noted that the results of Models 4.1 and 4.2 assume that the justice is at risk of experiencing only a single event – departing from the bench – and not of different kinds of events (Box-Steffensmeier and Jones 2004). Based on the theoretical model developed in Chapter 2, this is not a reasonable assumption since justices can leave the bench due to different reasons. More precisely, as Chapter 3 disclosed, justices have been in many times induced to depart from the bench either because of political persecution through threats of impeachment process or because of political pressures from the executive; while on other occasions the departures of the justices from the bench have not been forced. This suggests that there is a competing process, in which a justice is at risk of experiencing one of two different kinds of events: an induced retirement or a non induced retirement. On the other hand, induced

retirement, or involuntary departure, captures those departures in which executives had forced the retirement of the justice from office, such as the removal of justices via executive decree as occurred at the beginning of the military regimes, impeachments, threats of impeachment, changes in the Constitution so as to reduce the number of justices or impose restriction in the retirement age, and offer other attractive positions. On the one hand, the non induced departure, accounts for those justices who leave the bench because of natural causes, either the justice died while in office or the justice retired from the bench.⁶⁴ Between 1916 and 2009 a total of 83 justices stepped off the bench. Figure 4.2 shows that 54 justices (65%) have been induced to retire from the bench, while the other 29 justices (35%) appear to have stepped off the bench for natural causes. Furthermore, most of the natural departures took place during the first half of the century, whereas the opposite is true for induced retirements. This suggests not only that most of the justices have been forced to step off the bench, but also that this kind of departure has become more common since 1947. Therefore, a model was constructed for the different ways in which vacancies can occur as a way to obtain a more complete explanation. It is expected that the political variables, like the alignment of the justices, the change of administration, and the political background among others, would matter to account for those justices that were forced to retire from the bench while biological reason, like the age of the justice, would account for those justices that voluntarily departed from the bench.

⁶⁴ Also included in this category are six cases where it was not completely clear whether or not the justice was forced to step off the bench. They were included on this category since it is the default event.

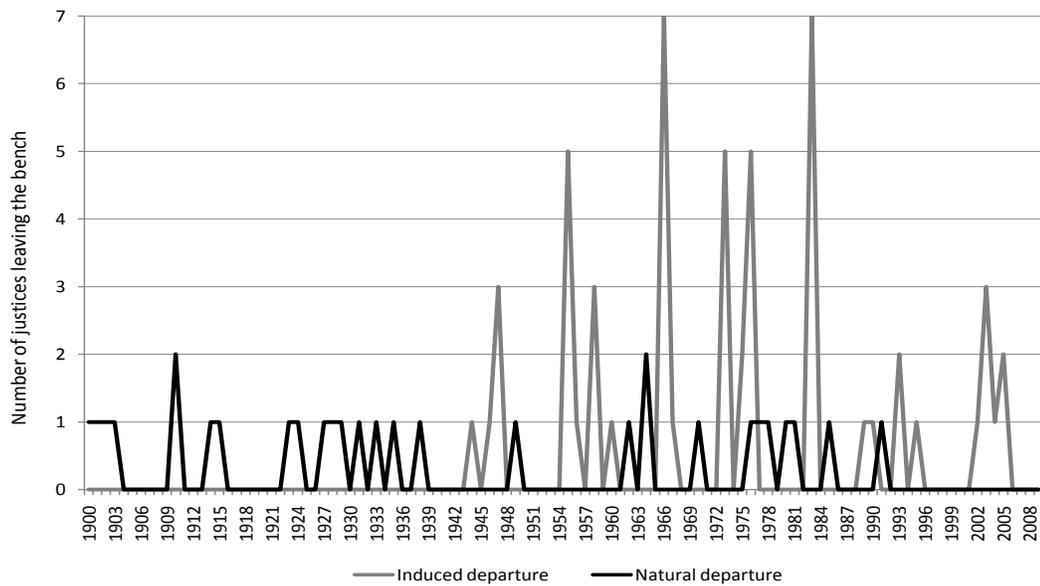


Figure 4.3: Different kinds of departures of justices from the bench

Models 4.3 and 4.4 from Table 4.5 show the discrete-time competing risk model, using multinomial logit⁶⁵ with robust standard errors. The first columns account for the induced retirement vacancies, while the second columns cover the vacancies that occurred as the result of non induced causes (Box-Steffensmeier and Jones 2004 Chapter 10). Model 4.3 incorporates the alignment variables, while Model 4.4 covers the ideological distance ones. Let us consider first the explanations for the induced retirements for both models (the first columns of Models 4.3 and 4.4), and then the non- induced retirements. Being aligned with the *faction* of the ruling president reduces the probability of being forced to leave the bench, while being aligned with the political *party* of the executive does not necessarily affect the stability of the justice on the bench. Regarding the effect of ideological distance variables, as in model 4.2, the greater the ideological distance from the executive in relation to the political faction the more likely that the justice will

⁶⁵ It is worth pointing out that in this case the reference category, the “0”, represents the non-event.

be forced to depart, while the variable for ideological distance with the political party is not statistically significant. This suggests that executives are more likely to induce the retirement of unfriendly justices rather than of friendly ones, but more precisely of those justices that do not have a close ideological connection. The fact that loyalties are identify with the faction within the political party and not with the political party per se, exposes that the loyalty between executives and justices are highly personalized that thus, strongly controlled.

The dummy variables for changes in ruling party and military administration indicate that during the first two years when a new party comes to power or a new military executive seizes office justices are more likely to be forced to retire from the bench. These results hold true in Models 4.3 and 4.4. The time duration variables are also statistically significant in both models; this suggests that there is a non-linear evolution of the justices' hazard rate over time.⁶⁶ The main difference with the survival models in Table 4.2 is that, when distinguishing between the types of retirements, the justice's age variable is not statistically significant, suggesting that the age of the justices has no impact on the probability of being forced to step down.

⁶⁶ A plot of the log-odds of the judicial exit over time reveals that in both models the risk of leaving office increases around year seven and after the second decade in office the hazard rate considerably expands.

Table 4.5: Competing risk model of judicial turnover for the Supreme Court, 1916-2009

	Model 4.3		Model 4.4	
	Induced	Non induced	Induced	Non induced
Alignment faction	-1.771** (0.868)	-0.950 (0.812)	-	-
Alignment political party	0.776 (0.571)	0.853 (0.871)	-	-
Ideological distance with the faction	-	-	1.808* (0.985)	1.237 (1.291)
Ideological distance with the political party	-	-	-0.739 (0.638)	-0.471 (1.003)
New administration	0.234 (0.886)	0.422 (0.505)	0.364 (0.958)	0.292 (0.706)
New ruling party	2.100** (0.834)	-0.616 (0.828)	1.891** (0.850)	-0.717 (0.919)
New military administration	1.610** (0.516)	0.627 (0.730)	1.450** (0.499)	0.659 (0.787)
Background of the justice	-0.212 (0.376)	0.674 (0.563)	-0.141 (0.385)	0.851 (0.642)
Executive partisan power	0.819 (0.659)	-0.688 (1.109)	0.653 (0.676)	-0.731 (1.129)
Justice's age	0.29 (0.023)	0.065** (0.028)	0.029 (0.023)	0.068** (0.028)
Size of the court	0.014 (0.138)	-0.343 (0.240)	-0.044 (0.145)	-0.333 (0.269)
t	0.742** (0.280)	0.252 (0.247)	0.702** (0.269)	0.168 (0.392)
t ₂	-0.073** (0.024)	-0.030 (0.029)	-0.067** (0.024)	-0.026 (0.049)
t ₃	0.002** (0.001)	0.001 (0.001)	0.002** (0.001)	0.001 (0.001)
Intercept	- 7.261*** (2.113)	-6.291** (2.247)	-7.765*** (1.909)	-6.525** (2.081)
N	666		565	
Wald X ² (df)	109.64(24)		96.81(24)	
Prob.> X ²	0.000		0.000	

Pseudo R ²	0.222	0.223
Log-Likelihood	-221.985	-198.991

Note: *Significant at p<.10; ** at p<.05; *** at p<.001. Robust standard errors in parentheses.

Now, let us consider the explanations for the natural departures (the second columns of Models 4.3 and 4.4). The variable for the justice’s age in both Models 4.3 and 4.4 is statistically significant, revealing that older justices have a greater probability of voluntarily leaving the court. This finding denotes the effect of the justice’s age on retirement. Consider the hypothetical case of a justice after five years in office with the other variables at their mean: for every standard deviation increase in age (i.e., every 9 years in office), the probability of a justice voluntarily leaving the bench increases by 2%,⁶⁷ a weak effect.

The competing risk models revealed that there is, in fact, a competing process going on between those induced departures and non-induced ones. Justices have been forced to retire from office basically for political and ideological reasons. Incoming executives prefer to have loyal justices on the bench appointed by their same political faction; they also prefer to craft that supportive court at the beginning of their term. Since the Supreme Court is a relevant political actor that can control the other branches of government, specially the executive one, executives have exclusively relied only on those justices who were appointed by their same political faction rather than by the same political party. This holds true in both democratic and non-democratic periods. On the other hand, the competing risk models demonstrated that the departures of those justices who were not forced to leave the bench were in fact the result of a biological and natural process, since what mattered most was the age of the justice.

⁶⁷ The predicted probability was calculated for Model 4.3, but the same results were obtained for Model 4.4.

4.3 CONCLUSIONS

Taken together, the results corroborate the hypotheses of the theory of vacancy creation. Specifically, the data suggest that there is a different dynamic going on when accounting for judicial turnover in the country. On the one hand, the non-induced or voluntary departures result basically from biological causes, since the older the justice the more likely it is that he or she will voluntarily step down. This suggests that politics do not influence this type of departure; in fact, it is precisely the justice's own decision and not the executive's to depart from the bench.

On the other hand, the evidence revealed that politics does matter when accounting for induced retirements from the bench. Executives do not trust unfriendly justices, as suggested by the fact that justices with political preferences different from the ruling executives are more likely to depart from the bench than those with similar preferences. More precisely, in the context of intra-party fragmentation, executives are less likely to force the retirement of justices appointed by previous executives from the same *faction* as opposed to those from the same political *party*. This situation reveals that the political loyalties of justices and executives turn out to be more sophisticated and personal than had been expected. This chapter also proved that there is a non-linear effect of time for those induced retirements, since this type of departure is more likely to take place not only at the beginning of a new administration, but also under an administration with a new ruling party, suggesting the political advantages for executives of having a supportive court during their term in office.

Finally, the evidence indicates that democracy has not so far produced more stable and independent judiciaries in Argentina. In other words, there is no strong evidence that justices under military regimes have an increased likelihood of being removed from office, nor that

justices are significantly more stable under democratic regimes. The fact that justices are highly unstable under both democratic and military regimes suggests that the democratization process has not resulted in a consolidation of the judicial institutions. Chapter 3 can help explain this counterintuitive result for the Argentine case. The massive impeachment trial in 1947 originated a process of positive feedback in which the cost of changing the direction of events rose significantly. Both democratic and military regimes followed the same pattern of executive-court relations in which the stability of the justices depended on the stability of the political elites in power. This strong legacy of relationships, or path dependency, not only continued through time, regardless of the regime type, but was also reinforced along the years. This durable executive-court relationship explains why democratic governments have not produced so far a more stable judiciary than military ones.

5.0 INSTABILITY AT THE SUBNATIONAL LEVEL: THE PERSISTENT POLITICAL MANIPULATION OF THE SUPREME COURTS

The previous chapter has empirically corroborated that several of the core hypotheses of vacancy creation can account for the high judicial turnover characteristic of the National Supreme Court. The objective of this chapter is to extend the analysis of the vacancy creation to the provincial Supreme Courts. Have provincial justices, like national justices, also been vulnerable to the political manipulation of the executive? Which provinces have a more stable judiciary and what factors can account for any differences? Shedding light on the causes of the within-country differences would allow formulating a mid-range theory about the stability of justices in office that should be applicable to other developing democracies.

This chapter, which contains original quantitative data collected in the provincial Supreme Courts about the justices who were in office between 1983 and 2009, systematically analyzes the departures of 525 justices from the 23 provincial Supreme Courts so as to determine how the incentives and preferences of the executives have influenced these departures. The first section of the chapter contains a brief overview of the main features of the Argentine provinces, while the second section presents a descriptive analysis of the different formal and informal mechanisms of induced retirement that governors have triggered since 1983. As in the National Supreme Court, in the provincial Supreme Courts the vast majority of the justices have been

induced to depart from the bench before the end of their terms. The third section uses descriptive data to evaluate the differences in the judicial turnover among the provinces. It is mainly here that the number of times that Supreme Courts were reshuffled and the average number of years that justices served on the courts before 1983 and afterwards are examined. It turns out that, over all, provincial justices have been even more unstable than the justices of the National Supreme Court. The fourth section uses quantitative data to empirically assess the theory of vacancy creation at the subnational level. The main findings corroborate those of Chapter 4, as governors' incentives and preferences can be said to account for the high judicial turnover in the provinces. Furthermore, as Chapter 4 illustrated, political loyalties in the context of intra-party fragmentation have turned out to be more sophisticated depending whether or no there is party competition within the province. In single party provinces justices appointed by previous governors from the same political faction are less likely to retire from the bench than those coming from different political factions. The last section of the chapter outlines the main conclusions.

5.1 A BRIEF OUTLINE OF THE SUBNATIONAL DIFFERENCES

Argentina is currently subdivided into 23 provinces and one autonomous district (Ciudad Autónoma de Buenos Aires). However, in 1990 there were just 22 provinces plus the capital city of Buenos Aires, as it was only in that year that the provincialization law No. 23. 775 declared Tierra del Fuego the 23rd province of the country; two years later its first governor was elected, while in 1993 its High Tribunal of Justices was conformed. The city of Buenos Aires became an

autonomous district after the National Constitutional reform of 1994, in which it was granted the capacity to have its own constitution and political system. The first governor of Buenos Aires was democratically elected in 1996, and the High Tribunal began work in 1998. Thus, due to its recent creation, the Autonomous City of Buenos Aires is not included in this sample of counties.

Argentina is the 8th largest country in the world, and the second largest (after Brazil) among the Latin American countries; however, due to weather conditions, a large part of the territory is poorly inhabited (United Nations 2007). Because provinces vary not only in terms of land area and population but also the level of economic development, Table 5.1 presents 4 relevant socio-economic indicators that account for these differences. The largest provinces of the country are: Buenos Aires, Santa Cruz, Chubut, Río Negro, and Córdoba; all together they represent more than 40% of the total surface of the country. However, 68% of the population of the country is mainly concentrated in the provinces of: Buenos Aires, Córdoba, Santa Fe, Ciudad de Buenos Aires and Mendoza. Even though Santa Cruz, Chubut and Río Negro are among the largest provinces, they belong to the Patagonia region; together with Tierra del Fuego they are among the provinces with smaller population density because of the harsh weather condition. Therefore, except from Buenos Aires, the other three largest provinces of the country are not among the most populated ones. It is precisely because of this reason that most political party' campaigns for presidential elections focus on Buenos Aires, Córdoba, Santa Fe, Ciudad de Buenos Aires and Mendoza; the most populated provinces of the country. On the other hand, the provinces of Tierra del Fuego, Tucumán, Misiones, Jujuy, and Formosa are among the smallest provinces in the country and by far below the average population, except from Tucumán that is the 6th most populated province and thus, relevant for national politics.

Table 5.1: Socio-economic indicators at the subnational level

Provinces	Population (2001)	Surface (Km ²)	Poverty ** (%households)	GDP*** (% of the National GDP)
Buenos Aires	13,827,203	307,571	15.9	42.47
Catamarca	334,568	102,602	26.9	0.47
Cdad. de Bs As	2,776,138	203	7.2	16.37
Chaco	984,446	99,633	35.2	2.09
Chubut	413,237	224,686	20.9	0.99
Córdoba	3,066,801	165,321	14.4	6.67
Corrientes	930,991	88,199	30.5	1.73
Entre Ríos	1,158,147	78,781	19.9	2.65
Formosa	486,559	72,066	36.4	0.73
Jujuy	611,888	53,219	34.9	0.81
La Pampa	299,294	143,440	13.3	0.82
La Rioja	289,983	89,680	24.2	0.70
Mendoza	1,579,651	148,827	16.3	3.49
Misiones	965,522	29,801	30.9	1.70
Neuquén	474,155	94,078	22.8	1.15
Río Negro	552,822	203,013	23.2	1.27
Salta	1,079,051	155,488	34.6	1.63
San Juan	620,023	89,651	19.2	1.50
San Luis	367,933	76,748	19.8	0.79
Santa Cruz	196,958	243,943	16.0	0.48
Santa Fe	3,000,701	133,007	15.3	7.43
Sgo. del Estero	804,457	136,351	35.2	1.20
Tierra del Fuego	101,079*	21,571	22.2	0.31
Tucumán	1,338,523	22,524	27.2	2.55
Total Country	36,260,130	2,780,403	17.7	100

Note: * Neither the Argentine territory in the Antarctic nor the Falkland Islands (980.874 Km²) are included in this table. ** Percentage of households with unsatisfied basic needs (NBI). The value represents the average poverty for the province in 1980, 1991, and 2001. *** GDP as a percentage of the national GDP based on the level of household electricity consumption (Mirabella de Sant and Nanni 2004). The value represents the average GDP of the province in 1990, 2000 and 2009. Sources: Mirabella de Sant and Nanni (2004) and INDEC (2001b, 2001a, 1991, 1980).

The third indicator of Table 5.1, often considered as a proxy for poverty, captures the percentage of households in the province with unsatisfied basic needs.⁶⁸ As happens in many developing democracies, poverty varies greatly within the country, especially between the capital city and the provinces. Formosa, Santiago del Estero, Chaco, Jujuy and Salta have more than 1/3 of their households living below the poverty line, while Ciudad de Buenos Aires has less than 8% of its households with unsatisfied basic needs. The poverty indicator is correlated with the Gross Domestic Product (GDP) of the provinces, since the provinces with the highest GDP⁶⁹ are the ones with the lowest percentage of their households living below the poverty line. The GDP of Buenos Aires, Ciudad de Buenos Aires, Santa Fe, Córdoba and Mendoza combined represents 76.4% of the national GDP, with Buenos Aires and Ciudad de Buenos Aires being the wealthiest economies in the country. The GDP of the other 20 provinces represents the remaining 23.6% of the national GDP (each province having, on average, 1.2% of the national GDP). Therefore, the wealthiest provinces in Argentina, which are also the ones with the greatest number of

⁶⁸ The NBI index uses a group of variables to identify poor areas in the country. A person is considered to be poor if he lives in a household with: (1) more than 3 persons per room; (2) a non-conventional house, like a mud hut or rented quarters; (3) a house with no indoor flush toilet; (4) a child between 6 and 12 years old who is not attending a school; and (5) household head who is poorly educated and economically responsible for four or more persons. For further information, please refer to INDEC (2001a, 1991, 1980). The value represents the average percentage of households with unsatisfied needs in the last three national censuses: 1980, 1991 and 2001 (Instituto Nacional de Estadística y Censo de la República Argentina 1980, 1991, 2001a).

⁶⁹ Due to the lack of historical data at the subnational level regarding GDP, this analysis follows de Sant and Nanni's (2004) procedure for computing the provincial GDP, which is estimated as a percentage of the national GDP based on the level of household electricity consumption in each province. The value represents the average GDP of the provinces in 1990, 2000 and 2009. The author is deeply indebted to the generosity of Maria Cristina Mirabella de Sant and Eugenio Nanni for sharing their dataset and assisting in updating the variables to 2009. Since 2007 the INDEC, the Argentine Census Bureau in charge of producing the national and provincial statistics, has been strongly denounced for manipulating the economic indicators of the country — especially the inflation rate and GDP (*La Nación* 3/02/2007); thus the values of the provincial GDP of the provinces for 2008 and 2009 were computed according to their performance in previous years.

inhabitants, become relevant actors in national politics because of the large size of their constituencies for presidential elections and also because of their fiscal contribution to the federal tax-sharing agreement.

Finally, it is important to point out that the provinces with a smaller GDP are also the ones that have had a single-party system since 1983. Formosa, Jujuy, La Pampa, La Rioja, Neuquén, Río Negro San Luis and Santa Cruz share in common not only their small share of their GDP compared to the national GDP but also the fact that the same party has been ruling these provinces from 1983 to the present (the UCR in Río Negro, the Movimiento Popular Neuquino in Neuquén and the PJ in the other 6 provinces). The province of San Luis represents an extreme case of a dominant single party because, unlike the other provinces, in which there is some political competition among the internal factions of the dominant party, the Rodríguez Súa family has been governing the province over the last 27 years. Catamarca and Santiago del Estero used to be like San Luis, but the federal intervention in Catamarca in 1991 put an end to the Saadis' reign, while in Santiago del Estero the second federal intervention in 2004 dismantled the Juárez' supremacy. Nevertheless, both provinces still rank low in their GDP and have high percentages of their households living below the poverty line.

5.2 THE LOGIC OF VACANCY CREATION IN THE PROVINCIAL SUPREME COURTS, 1983-2009

Chapter 3 briefly showed that, since 1916, the provincial Supreme Courts have indeed been politically manipulated by their governors. Before 1983 high courts were reshuffled more than

once, not only after regime changes but also as the result of changes in the governor. The partial data available for some provinces before 1983 indicate that most of the vacancies were induced by the incoming governors either via a decree, as happened during military regimes, or via non-institutional mechanisms like discrediting the justices, as happened especially during the transitions from military to civilian administrations (Córdova 1994; Montilla Zavalía 2007).

Because there are no studies available indicating the reasons why provincial justices have departed from the bench, a qualitative research project was carried out to fill that gap. Original data regarding the departures of the provincial justices between 1983 and 2009 were collected from over 27 provincial and national newspapers preserved in the newspaper archive at the Argentine Library of Congress.⁷⁰ More than 700 newspaper articles were examined in the course of a five-months-long data-gathering process. The collection of data was complemented and corroborated with interviews and books, since the quality of provincial journalism and freedom of the press varied greatly from province to province. Moreover, it was not until the 1990s that judicial news was reported on a daily basis; before that time, the judiciary was often absent from newspaper coverage. The triangulation of data allowed the author not only to enhance the accuracy of the data but also to fill in the gaps during those times of absence of data in the local newspapers. The diversity of the data-gathering strategy, in fact, permitted identification of the reasons why justices departed from the bench in 33% of the cases of provincial justices who were in office between 1983 and 2009. The majority of the unidentified cases belong to the justices who departed before the 1990s.

⁷⁰ The author is deeply indebted to Diego Castelfranco, Luis Cecchi and Ignacio Puente for their invaluable research assistance in collecting the data for the provinces of Buenos Aires, Córdoba, Jujuy, La Rioja, San Juan and Santa Fe.

Since the return of democracy in 1983 and 2009, a total of 525 justices left the bench in all the Argentine provinces. For 180 of them it was possible to determine their reason for leaving. Graph 4.1, which is the result of the effort to systematize the qualitative data gathered, classifies the justices according to their reasons for departing from the bench. As in the National Supreme Court, the majority of the provincial justices were forced to retire from the bench, while only 4% of them died⁷¹ while in office. Graph 4.1 summarizes both the institutional and non-institutional mechanisms of vacancy creation used by governors over the years.

⁷¹ In Catamarca, Justice Oscar Guillermo Diaz died on December 7, 2000 (*La Unión* 8/12/2000), and Justice César Ernesto Oviedo on April 2, 2008 (*La Unión* 3/4/2008). In Chaco, Justice Aquiles Hernan Sotelo died on November 21, 1997 (*Norte*, 22/11/1997). In Córdoba, Justice Berta Kaller Orchansky died on December 11, 2003 (*La Voz del Interior* 11/12/2003). In Corrientes, Justice Carlos Contreras Gomez died on April 17^h, 1996 (*El Litoral* 18/4/1996), and Justice Marcos Derqui on September 9, 1999 (*El Litoral* 10/9/1999). In Jujuy, Justice Amado Roberto Cura died on January 16, 1994 (*El Tribuno* 17/1/1994) and Justice Raúl Octavio Nocetti died on June 1, 2004 (*El Tribuno* 2/6/2004). In Misiones, Justice Primo A. Bertolini died on October 6, 2006 (*El Territorio* 7/10/2006), and Justice Ismael Carlos Acosta on September 22, 1996 (*El Territorio* 22/11/1996). In Tierra del Fuego, Justice José Salomón died on September 3, 2002 (Ramonet 2007). In Tucumán, Justice Arturo Domingo Ponsati died on April 9, 1998 (*La Gaceta* 10/4/1998).

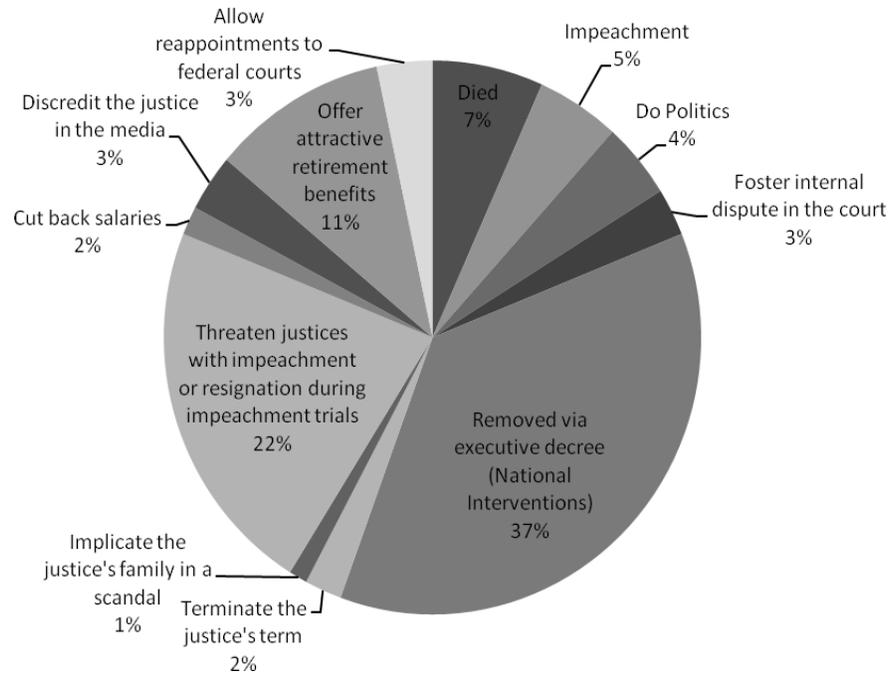


Figure 5.1: Reasons for leaving the provincial Supreme Courts, 1983-2009

Among the institutional mechanisms of vacancy creation, the most popular one was the use of executive decrees during federal interventions to remove the justices from the bench. Since 1983 to 2009 the national government intervened in 4 provinces because of extreme cases of government corruption and wrongdoing: Corrientes in 1992 and 1999, Catamarca in 1991, Santiago del Estero in 1993 and 2004 and Tucumán in 1991. In those cases the president of the country, with the assent of the Congress, took control of the province and removed the local authorities, including the justices of the courts. A total of 66 justices (37%) were removed as a consequence of national interventions in those four provinces, some of them at the beginning of the intervention (32 justices), others at the end when the situation was normalized (25 justices); still others were removed during the intervention as a result of a change in the ruling authority (6

justices), and the remaining (3 justices) were removed because of disagreements with the intervener.⁷²

Another institutional mechanism of vacancy creation used by governors in 18 cases was to offer attractive retirement benefits to the sitting justices so as to induce their retirement.⁷³ The incoming Peronist governor in Tierra del Fuego in 1999, Carlos Manfredotti, issued Law No. 460, which established the compulsory retirement of the justices and judges in the provinces who were at least 50 years old and had 5 years of benefit contributions (Ramonet 2007). As a result of this permissive law, 3 out of the 5 sitting justices in the Court retired from the bench (Justices Felix González Godoy, Omar Alberto Carranza and Tomas Hutchinson) as well as 83% of the federal judges (Página 12 3/10/2007) from their courts. A similar situation took place in Río Negro, when in 1994⁷⁴ the governor Horacio Massaccesi modified the retirement law so as to create 3 vacancies out of the 5 seats in the court (Justices Edgar Nelson Echarren, Jorge Luis Garcia Osella and Nely Azucena Flores retired from the bench) (Río Negro 14/05/1994). The

⁷² During the first intervention in Corrientes, when Claudia Bello left the province and Ideler Tornelli was appointed as provincial authority, all the justices appointed by Bello were removed from the bench, so that Tornelli could appoint new ones. A similar situation came about when Pedro Benjamín Aquino left the province and Luis Prol became the new authority; that is, all the justices were removed from the bench.

⁷³ In September 2008, President Cristina Fernandez de Kirchner issued a decree (Decree 1401/2008) that was to allow many justices in Mendoza to formally retire from the bench. The current governor of the province is Celso Jaque, from the PJ, while the previous two administrations were from the UCR party. The decree would help to reshuffle the court, since 5 out of the 7 justices (Herman Salvini, Fernando Romano, Pedro Llorente, Aída Kemelmajer and Carlos Bhöm) are eligible to retire from the bench (Mendoza online 25/11/2008).

⁷⁴ In 1992 the governor tried to issue a bill calling for compulsory retirement; it would have produced a reshuffle in the judiciary, but the opposition did not support it (Río Negro 20/08/1992).

governor of Neuquén in 2001, Jorge Sobich,⁷⁵ also issued a bill (Law No. 2.378) with flexible requirements for retirement, in this case inducing the retirement of 3 out of the 5 justices (Justices Fernando Regino Macome, Luis Armando Vidal and Rodolfo Gabriel Medrano). In Entre Ríos, Governor Sergio Montiel in 2000 issued a life annuity law (“renta vitalicia” – Law No. 9.241) for those justices who retired from the bench; the bill was approved in the legislature because the ruling party had majorities in both chambers (El Día 20/05/2000). Three out of nine justices (Justices Carlos Nesa, Julio Herrera and Jesús Solari) retired. In Misiones, Governor Carlos Rovira issued a bill to induce the retirement of Justices Luis Absi, Julio Eugenio Dionisi and Marta A. Poggiese de Oudin.⁷⁶ The retirement of these three justices plus the death of Justice Primo Bertolini in October and the impeachment of Justice Marta Catella in February 2006 produced 5 vacancies on the court. Therefore, Governor Rovira was thus able to appoint 5 out of the 9 justices in Misiones. The governor of Tucumán, Jose Domato, also issued a bill offering attractive retirement benefits in 1989 so as to create vacancies on the Court. However, in this case, and contrary to the other examples, Justice René Mario Goane resigned before the law was passed because of the excessive political manipulation of the justices; he believed it was not acceptable to take advantage of the extra benefits (La Gaceta 2/11/1992). Finally, in 1988, Justices Eduardo Martinez Echenique and Alberto Serra from the province of Córdoba also retired from the bench, but in this case they were forced to do so because they had reached the official retirement age (La Voz del Interior 12/02/1988). A similar situation happened in La

⁷⁵ In 1995 Jorge Sobich tried to modify the retirement law so as to craft a more favorable court, but he did not have support in the congress (Río Negro 29/12/2009).

⁷⁶ In this case the law established that those who retired would have a pension of 85% of their salary rather than 82%, which is what was established by most provinces (Misiones online 10/05/2006).

Rioja with Justice Agustín Benjamín de la Vega, when he was not reappointed once he reached retirement age.⁷⁷

The impeachment trial was also used as an institutional mechanism to induce the retirement of provincial justices, but, as in the National Supreme Court, only a small number of justices were actually removed by this procedure. Since 1983 a total of 9 justices were impeached, and 40 were threatened with an impeachment trial (see Graph 4.1). The first such trial was carried out in San Juan in 1986, when Justices Carlos Graffigna Latino and Eduardo Aguiar Aranciva decided to accept the writ of amparo presented by two legislators opposed to their dismissal from the chamber (Diario de Cuyo 6/3/1986). The decision of the court was strongly criticized by the government, which then pressured the justices to dismiss the amparo with an impeachment. The trial took place, and the justices were removed in June 1986 (Diario de Cuyo 18/06/1986). The second impeachment trial occurred in 1985 in Santiago del Estero against Justice Remigio Carol. Even though the justice was formally accused of wrongdoing in the “Santa Ana Case” in 1984, at a time when he was a federal justice (El Liberal 4/3/1985), the interpretation of the trial suggested that it was actually a reprisal from the government against the justice’s illegal practices.⁷⁸ The next impeachment trial also took place in Santiago del Estero, when in 1991 Justices David Oscar Beltran and Santiago Grand were found guilty of corruption in the “Sleibe case” (El Liberal 4/06/1991). The trial occurred during debates about increasing the number of sitting justices on the court, a circumstance that allowed the Peronist governor,

⁷⁷ Governor Carlos Reutemann from Santa Fe tried to force the retirement of Justice Casiano Iribarne in 1995 when the justice reached retirement age. In this case, the justice presented a writ of amparo to the Supreme Court and remained on the bench (Página 12 Rosario 1/09/1999).

⁷⁸ Interview with Dr. David Oscar Beltran, October 30, 2008, Hotel Gran Coventry, Santiago del Estero.

César Iturre, to craft a more favorable court, because all the justices had been appointed by Carlos Juarez, also a Peronist but from a different faction from Iturre. In the end, the court was enlarged from 7 to 9 justices; Governor Iturre was able to appoint 5 out of the 9, because Justice Baudillo Sayago, who had also been threatened with impeachment, resigned. In 1993 Justice Carlos Nellar was impeached from the Supreme Court of San Luis because of wrongdoing; he was the only justice who faced trial, because the rest of the justices resigned before a trial could be scheduled. In 2004 Justice Leoni Beltran from Santiago del Estero was also impeached, in this case because of wrongdoing and ignorance of the law. His impeachment trial was part of the “court cleaning” process carried out by the governor so as to prevent a federal intervention in the province (El Liberal 8/8/2003). All the justices on the court (Ernesto Kozameth, Clara Herrera de Celiz, Jose Azar and Myriam Argibay de Bilik) were accused, but they decided to retire rather than go to trial. As it happened, the “cleaning” did not prevent federal intervention but rather accelerated it. The province of Misiones also carried out an impeachment trial, in this case against Justice Marta Catella; the accusations mainly focused on the justice’s decisions against government interests on electoral issues (Centro de Estudios Sociales y Legales 2007). The justice was found guilty and removed from the bench in 2006. A couple of months later the Attorney General, Lloyd Jorge Wickström, was also removed via an impeachment trial. Both trials were strongly criticized by the local Bar Association and by NGOS because of their violation of due process (Centro de Estudios Sociales y Legales 2007; Wickström 2008). The final impeachment trial took place in Neuquén in 2008, when Justice Eduardo José Badano was

accused of a lack of independence during the impeachment trial of Attorney General Ricardo Mendaña (Diario Judicial 11/8/2008).⁷⁹

Governors have also triggered other institutional mechanisms of vacancy creation such as allowing the reappointment of justices to the federal court, terminating the terms of the justices and cutting back their salaries. These strategies, however, have been less widely used than the others. Regarding the first strategy, in 6 cases governors have allowed the reappointment of justices to other courts [Justices Jesús Daniel Los Arcos Vidarrueta from La Pampa (La Arena 29/1/1994), Nerio Roberto Bonifati from Neuquén (Río Negro 10/11/1990), Ernesto Iglesias Hunt from Río Negro (Río Negro 13/5/1993), Oscar Eduardo Gatica from San Luis (Diario República 21/5/1997), Juan Pedro Cortelezzi from Tierra del Fuego (Ramonet 2007) and Emilio Juan Sarulle from Tucumán (La Gaceta 28/3/1995)]. La Rioja is the only province that decided to abruptly end the term of the justices due to a reduction in the number of sitting justices; this took place in 2002 after Constitutional reform was approved.⁸⁰ As a result of the constitutional reform, Governor Ángel Maza chose Justices Domingo Tulián, Mario Gerardo Guzmán Soria,

⁷⁹ Justices Roberto Fernandez and Oscar Sommariva were also accused, but they resigned before their trials (Río Negro 18/4/2008).

⁸⁰ A reduction in the number of sitting justices has also been implemented in other provinces. In Buenos Aires Law No. 13.662/07 reduced from 9 to 7 the sitting justices, but the vacancies were to occur when the justices voluntarily departed from the bench (as with Law No. 26.183/06 relating to the National Supreme Court). In 1995 Río Negro also reduced the number of justices (Law No. 2.910/95) from 5 to 3, whereupon two justices (Jorge Luis Garcia Osella and Nely Azucena Flores) retired from the bench due to implementation of an attractive retirement benefit law. In 1993, when San Luis reduced the number of justices to 5 (Law No. 4.212/93), vacancies resulted from the induced retirement of the sitting justices due to threats of impeachment. In Formosa in 1995 the court reduced the number of justices from 5 to 3 (Law No. 1.169/95), and the attractive retirement benefit facilitated the retirement of two justices. Justices Roberto Fernandez and Oscar Sommariva were also accused, but they resigned before trial (Río Negro 18/4/2008). In Santiago del Estero the federal intervention of 1994 reduced the court from 9 to 5 justices, and finally in Misiones in 2003 the governor also decided to reduce the number of justices from 9 to 5 (Law No. 3.964/03) by encouraging gradual departures; however, in 2005 another law reversed that decision (Law No. 4.245/05). For further details please refer to Castagnola (2009, Chapter 1).

Daniel César Herrera, and Tomás José Yoma to force their departure (Diario Judicial 25/8/2003).⁸¹ Finally, on three occasions justices departed from the bench due to cutbacks in salaries: in 1993 Justice Oscar Agustín del Valle Galindez from Jujuy (Pregón 30/12/1993), in 1995 Justice Eduardo Horacio Podestá de Oro from San Juan (El Cuyo 26/12/1995), and in 2002 Justice Carlos Andino from Tierra del Fuego (Ramonet 2007).

Governors have also triggered non-institutional mechanisms of vacancy creation. One of the most popular informal mechanisms of vacancy creation was the threat of removal via impeachment. Since 1983 a total of 40 justices from 12 provinces departed from the bench, with San Luis being the most successful, having produced 8 vacancies in all, Neuquén was the second most successful with 6 vacancies, followed by Santiago del Estero, Córdoba and Salta in third place with 5 vacancies each. In San Luis in 1993, 6 of the justices of the Supreme Court faced accusations leading to impeachment due to inappropriate behavior (El Diario de la República 24/7/1993); 5 of them⁸² resigned before the trial was carried out (El Diario de la República 15/07/1993), while the justice who faced an impeachment trial, Carlos Nellar, was found guilty and removed from the bench (El Diario de la República 7/10/1993). The second massive departure due to threats of impeachment took place in 2005, when the national government was deciding whether or not to intervene in the province due to the excessive denunciations of corruption in the local government (Página 12 5/4/2004). Local authorities encouraged the impeachment of the Supreme Court justices with the ultimate goal of “reorganizing the

⁸¹ Those justices were precisely the ones who had opposed reform due to violations of constitutional procedure while the reform was being enacted.

⁸² Justices César Carmen Zucco, Carlos Aguilermo Maqueda, Luis Escudero Gauna, Cruz Ortiz and Luis Antonio Amitrano.

judiciary” and thus preventing the intervention. Chief Justice Guillermo Catalfamo and Justices Elvira del Carmen Gatica and Aníbal Asturdillo left the bench, and Attorney General Julio César Agúndez (La Nación 11/3/2005) also quit, which ended up dissuading the proposed intervention. A similar situation occurred in Santiago del Estero in 2003, when the national government was also considering federal intervention. In that case, the possibility of an impeachment trial resulted in the departure of 4 out of the 5 justices (Chief Justice Ernesto Kozameth and Justices Clara Herrera de Celiz, José Azar and Myriam Argibay de Bilik), while the remaining justice, Leoni Beltran, was formally removed through an impeachment conviction (La Nación 17/11/2003). However, despite the massive departures of justices, in this case the federal intervention was carried out. Departures due to threats of impeachment also took place in Neuquén. In 1985 Chief Justice Helvecio Martín Barba was threatened with impeachment due to his unfavorable ruling on a case, and the other 4 justices of the court tendered their resignations in solidarity with him (Río Negro 5/11/1985). In the end, Chief Justice Barba and three other justices⁸³ retired due to the political threat of impeachment. In 2008 Justices Jorge Oscar Sommariva and Roberto Omar Fernández also departed from the bench as the result of numerous threats of impeachment, with the death of the teacher Fuentealba being one of those warnings (CTA Neuquén 2008).⁸⁴ In 1995 in Córdoba 5⁸⁵ out of the 7 justices also departed from the bench as a way to avoid an impeachment trial. Again, the accusations against the justices because of wrongdoing (Crónica 20/11/1995) took place when there was a change in the ruling

⁸³ Justices Arturo Ernesto González Taboada, Luis Emilio Silva Zambrano and Héctor Eduardo Olcese.

⁸⁴ Justice Eduardo José Badano, contrary to the other justices, decided to face the impeachment trial; the jury found him guilty.

⁸⁵ Justices Venancio Petitto, Manuel Ayán, Rogelio Berardo, Roberto Loustau Bidau and Daniel Carreras.

political faction (La Voz del Interior 21/11/1995). In 1990 Justice Baudillo Sayago from Santiago del Estero left the bench when accusations of corruption reached the legislature (El Liberal 20/12/1990). Governors in Salta also triggered this informal mechanism of vacancy creation: thus, in 1988 Justice Abraham Reston and Chief Justice Luis Adolfo Saravia departed due to an impeachment trial focusing on the “Saltagate,”⁸⁶ and in 1990 Justices Milton Morey, Manuel Pecci and Marcelo Sergio O’Connor left the bench as the result of threats of impeachment because of their decision to declare unconstitutional the impeachment of Vice-Governor Pedro Máximo de los Rios. In La Rioja three justices departed from the bench because of threats of impeachment: Justices Ramón Ruarte and Alberto Luis Baigorri in 2004 as the result of Governor Ángel Maza’s desire to reshuffle the court; and Justice Francisco Ricardo Martínez after accusations of impeachment because of wrongdoing. However, Justice Martínez announced that Vice-Governor Herrera and Chief Justice Ávial had pressured him to set aside a sensible decision in a case of interest to them. In Tucumán in 1988 all the justices tendered their resignations to Governor José Donato because of strong accusations of wrongdoing and the possibility of impeachment, but the governor rejected them (La Gaceta 28/6/1988). Nonetheless, Justices Carlos Malfussi and José Ricardo Falú resigned (La Gaceta 1/7/1988). In Tierra del Fuego two justices resigned as the result of threats of impeachment: in 2002, Justice Ricardo Klass and in 2008, Justice Mario Robbio (Ramonet 2007). In Santa Fe, when Governor Carlos Reutemann assumed office, as a way to craft a more favorable court he started to pressure some justices to depart. Justices Casiano Iribarne and Decio Ulloa resigned in 2000, when they were accused of wrongdoing (Página 12 Rosario 2/2/2002, Página 12 Rosario 23/3/2002). Justice

⁸⁶ In the political “Saltagate” scandal, the Chief Justice of the Court and Emilio Cantarero, a government legislator, were tape-recorded discussing the sentences of the court.

Sergio Eduardo Valdecantos from Jujuy was accused in 2004 of receiving a pension simultaneously with his salary (known as “the fake pension case”) and decided to retire from the bench before his impeachment trial began (Pregón 6/8/2004). In La Pampa in 2001 Justice Alberto Iglesias was about to face an impeachment trial because he was accused of bugging the other justices’ offices; however, he departed from the bench during the process (La Arena 24/02/2001).

Another informal mechanism of vacancy creation has been to foster internal disputes in the court, such as confrontations between those justices who are close to the ruling executive and those who are not. A total of 5 justices from the provinces of Neuquén, Catamarca and Córdoba departed for this reason. In Neuquén Justice Martín Pío Elustondo left the bench in 1986 due to internal disagreements with Justice Bonifati (Río Negro 1/10/1986). In 1989 Chief Justice Héctor Pedro Iribarne from Neuquén retired from the bench when other justices requested that he be given a psychiatric exam (Río Negro 18/8/1989). In 1992 Justice Federico Alberto Rua from Neuquén departed due to moral disagreements with incoming Justice Marcelo Juan Otharán (Río Negro 28/4/1992). In 2004 Justices Otharán and Ernesto González Taboada retired due to internal disagreements with justices appointed by Governor Jorge Sobich (Centro de Estudios Sociales y Legales 2005). In Córdoba in 2001 Justice Adan Luis Ferrer also left the bench as the result of internal disagreements with other justices of the court (La Voz del Interior 19/9/2001).

An additional informal strategy of vacancy creation is the discrediting of the justices in the media. The provinces of Catamarca, Chubut and San Luis used this strategy to create a total of 6 vacancies. In San Luis, Justices Oscar Alberto Bianchi, Elias Taurant and Alberto Estrada Dubor resigned in 1996 as the result of an insulting newspaper campaign aimed at reshuffling the court. The local newspaper, owned by the governor’s family, published a photomontage of the

faces of the justices superimposed on the bodies of strippers, thereby leading to the departure of the justices (El Diario de la República 26/11/1996). In Catamarca, Chief Justices José María Sarreabayrouse Varangot and Antonio Miguel Lupiañez left the bench when Attorney General Moreno strongly criticized the justices' behavior and rulings (La Unión 25/11/1984, La Unión 31/10/1984). Finally, Chief Justice Raúl Martín from Chubut departed from the bench in 1990 due to demeaning media coverage related to the impeachment trial against him (El Chubut 1/4/1990).

Only on two occasions have justices departed from the bench because members of their families were allegedly involved in a scandal. In the case of Justice Eduardo Molina from Chaco, the government implicated his son in a corruption scandal presumably because the justice had refused to halt investigation of killings in Puerto Videla attributed to the government (Diario del Norte 23/12/2006). In Santiago del Estero Justice Mariano Utrera was forced to resign from the bench when a local newspaper disclosed that her daughter, who was working in the judiciary, had falsified her legal diploma (El Liberal 11/6/1996).

Finally, a total of 8 justices left the bench to become involved in politics. These departures represented a reward for the justices, since, contrary to the other cases, in these situations they were being promoted because of their strong loyalty to the governor. In the National Supreme Court there are also a couple of cases similar to these, as Chapter 3 described. In Córdoba, Justice Roberto Loustau Bidaut resigned from the bench in 1986 because he was offered the job of presiding over the constitutional reform assembly of 1987 (La Voz del Interior 23/7/95); in 1990 he was reappointed to the provincial Supreme Court. Justice Octavio Cortes Olmedo, also from Córdoba, resigned from the bench in 1991 to become the Governor's Minister in the province (La Voz del Interior 18/12/91), and Chief Justice Luis García Castrillón from San

Juan left to enroll in the Bolquismo Party (Diario de Cuyo 21/11/1993). In Neuquén Justice Aydeé Vazquez de Arguello resigned in 1993 to run as a candidate for vice-governor in the executive elections. Justice Vázquez was a friend of Felipe Sapag, and it is believed that her nomination was designed to take away votes for the candidacy of Jorge Sobich, the main rival of Felipe Sapag in their political faction of the MPN Party (Río Negro 7/2/1993). Justice Oscar Massei from Neuquén and Chief Justice Alfredo Carlos Dato from Tucumán departed from the bench because they were offered seats as National Deputies (Río Negro 12/5/1995, El Siglo 16/8/2007), while Justice Carlos José Antonio Sergnese from San Luis was offered a seat in the National Senate (La Nación 9/4/1999). Justice Carlos Alberto Zannini resigned from the Court in Santa Cruz when Kirchner left the province to assume the presidency of the country; President Kirchner then appointed Zannini as his Legal and Technical Secretary (Abiad and Thieberger 2005).

Overall, the previous description reveals that governors have triggered a wide variety of formal and informal mechanisms of vacancy creation in the past 27 years. Moreover, the data suggest that governors have been inclined to activate both institutional and non-institutional mechanisms to induce the retirement of the justices, with the threat of impeachment being the most successful one among the non-institutional ones. As at the national level, more justices have departed from the bench because of threats of impeachment (or during the impeachment trial itself) than because they were actually convicted, and only a small number of justices died while serving on the court.

5.3 EXPLORING VARIATIONS IN THE PROVINCIAL JUDICIAL TURNOVER

One indicator of the instability of justices in office is the number of times that the high courts were reshuffled. From the beginning of the twentieth century until 1983, the Supreme Court of Córdoba was reshuffled 12 times,⁸⁷ and the court of Buenos Aires 8 times.⁸⁸ Many provincial Supreme Courts were created during the 1950s and early 1960s as a result of the national provincialization laws. The Supreme Court of Entre Ríos was created in 1950 (before was the Superior Tribunal) and was reshuffled 4 times until 1983; the Supreme Court of Chaco was reshuffled 6 times between 1954 and 1983; and the court of La Pampa was reorganized 5 times between 1955 and 1983 (Ghiggi 2007; Poder Judicial de la Provincia de La Pampa 2007; Poder Judicial de la Provincia del Chaco 2009). The high courts of Chubut, Formosa, and Santa Cruz were created in 1959; they were reshuffled 3 times in Chubut and Formosa and 5 times in Santa Cruz (Poder Judicial de la Provincia del Chubut 2007; Córdoba 1994; Lamote 2007). The high court of Río Negro began to function in 1960, and the court of Neuquén in 1961; until 1983 these courts were reshuffled 5 and 4 times, respectively (Pelaez 2007; Poder Judicial de la Provincia de Río Negro 2009). Evidently, provincial high courts during this period were more vulnerable than the National Supreme Court itself, since during those years the national court experienced a total of 6 reshuffles (in 1947, 1955, 1958, 1966, 1973 and 1976). These preliminary data indicate that,

⁸⁷ Since 1900 the court of Córdoba was reshuffled in 1914, 1925, 1947, 1949, 1955, 1958, 1960, 1963, 1966, 1972, 1973 and 1976 (Biblioteca Tribunal Superior de Justicia de Córdoba 2007).

⁸⁸ Since 1905 the court of Buenos Aires was reshuffled in 1905, 1943, 1946, 1952, 1955, 1958, 1973 and 1976 (Departamento Histórico-Judicial 2006).

prior to the democratization process in 1983, there was a legacy of reshuffling the provincial high courts, with many of them proving even more unstable than the national one.⁸⁹

However, the legacy of reshuffling the provincial high courts did not end when democracy was reestablished in 1983, as happened with the national court (which was then reshuffled for the last time). Graph 4.2 displays the number of times that provincial high courts were reshuffled after the return of democracy in 1983 and 2009.⁹⁰ The Supreme Courts of Santiago del Estero, Corrientes and Neuquén were reshuffled in the last 27 years between 5 and 6 times each, which amounts to one reshuffle every 5 years and a half. It is important to point out that Santiago del Estero and Corrientes have twice experienced interventions by the national government: Corrientes in 1992 and 1999, and Santiago del Estero in 1993 and 2004. With this information in mind, one can see that Neuquén is the province with the greatest number of reshuffles without federal intervention. The province of La Rioja ranks next after Neuquén, with 4 reshuffles. These two provinces share in common not only the high number of times that their courts have been reshuffled during democracy without federal intervention, but also that they have been ruled by the same political party since 1983 (the Movimiento Popular Neuquino in Neuquén and the Peronist Party in La Rioja). This evidence demonstrates that reshuffles are not necessarily the byproduct of changes in the regime or in the ruling party. The intra-party

⁸⁹ Preliminary data from Mendoza reveal that, between 1941 and 1983, the high court was reshuffled 7 times (Poder Judicial de la Provincia de Mendoza 2009). In Tucumán and Jujuy the courts were reshuffled 6 and 5 times, respectively, between 1950 and 1983 (Montilla Zavalía 2007; Caballero 2007).

⁹⁰ Reshuffles when the military regime ended in 1983 were not computed in the graph. As previously mentioned, all the provinces except in the case of San Juan had reshuffled their courts when democracy was reestablished in the country.

fragmentation in Neuquén and La Rioja offers a strong explanation for the instability of their judiciaries.

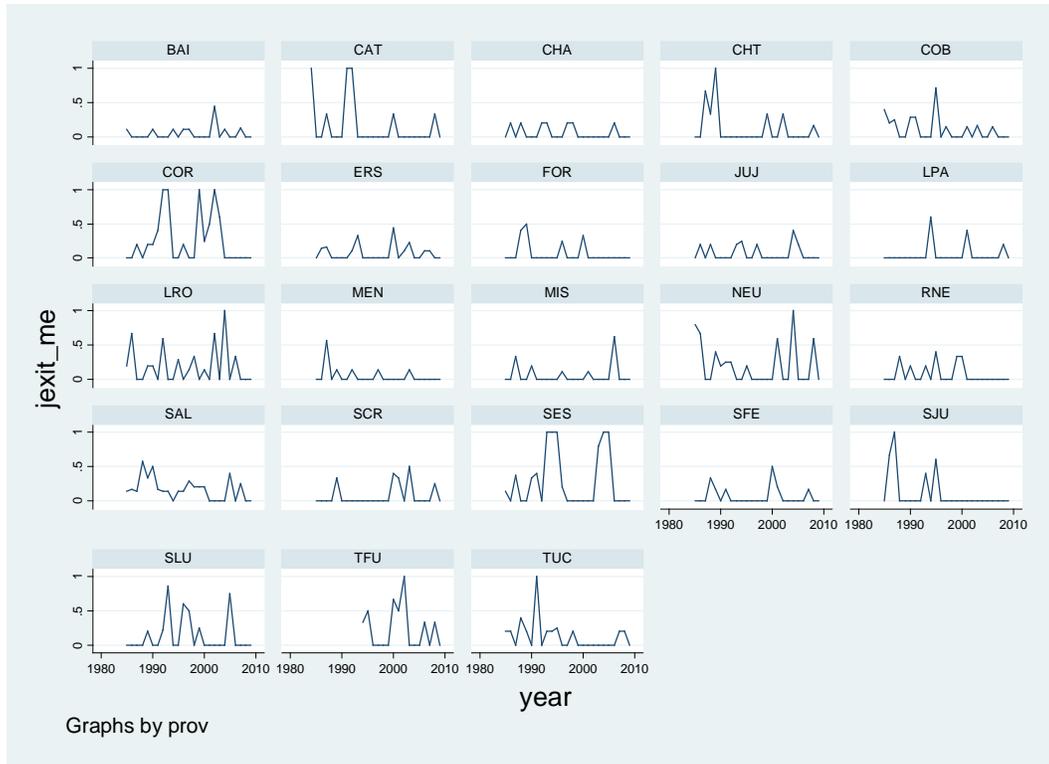


Figure 5.2: Reshuffles in the provincial Supreme Courts, 1983-2009

Note: Total number of reshuffles on the Provincial Supreme Courts: Santiago del Estero 6; Corrientes and Neuquén 5 times; La Rioja 4; Catamarca, San Juan, and San Luis 3 times; Chubut and Tierra del Fuego 2 times; Córdoba, La Pampa, Mendoza, Misiones, Salta, and Tucumán 1 time; and Buenos Aires, Chaco, Entre Ríos, Formosa, Jujuy, Río Negro, Santa Cruz, and Santa Fe did not have a reshuffle during this period.

Judicial turnover is another good indicator to consider when examining the instability of the justices in office. Table 5.2 presents the average tenure of the provincial justices prior to and after 1983. For seven provinces⁹¹ this study provides no data about the tenure of their justices prior to 1983 because of the difficulties in gathering such data. Prior to 1983, in six provinces (Formosa, La Pampa, Neuquén, Río Negro, Santa Cruz and Santa Fe), justices remained on the bench on average for less than 3 years, while in only three provinces (Buenos Aires, Mendoza

⁹¹ Catamarca, Corrientes, La Rioja, Misiones, Salta, Santiago del Estero and San Luis.

and San Juan) did justices serve on the bench on average for as long as 5 years. The average tenure for that period for the National Supreme Court justices was 6.8 years, while the average tenure of the provincial justices was 3.8 years. These data reveal that the instability of the justices at the provincial level was far more crucial than at the national level, since in some provinces deputies or senators served more years in office than their Supreme Court justices.

Table 5.2: Average tenure of Provincial Supreme Courts justices

	Average tenure before 1983	Average tenure 1983-2009	Average improved
Buenos Aires	5.11 ¹	8.41	9.38
Catamarca	-	2.94	3.8
Chaco	3.3 ²	6.25	8.47
Chubut	4.9 ³	6.55	6.76
Córdoba	4.58 ⁴	4.58	5.65
Corrientes	-	2.49	2.98
Entre Ríos	4.76 ⁵	7.95	8.62
Formosa	2.62 ⁶	7.27	9.19
Jujuy	3.74 ⁷	8.38	8.11
La Pampa	2.84 ⁸	9.33	9.29
La Rioja	-	4.54	4.58
Mendoza	5.17 ⁹	3.5	7.24
Misiones	-	10.4	9.74
Neuquén	2.31 ¹⁰	5.84	5.27
Río Negro	2.81 ¹¹	7.20	8.23
Salta	-	4.68	4.72
Santa Cruz	2.8 ¹²	6.75	7.44
Sgo. Del Estero	-	3.17	3.26
Santa Fe	2.93 ¹³	9.38	9.26
San Juan	5.6 ¹⁴	6	9.15
San Luis	-	4.67	4.95
Tierra del Fuego	N.A.*	3.78	3.81
Tucumán	4.13 ¹⁵	3.37	4.31
Prov. Average	3.84	5.35	6.23
National Average	6.85	6.50	

Note: ¹Since 1905; ²since 1954; ³since 1959; ⁴since 1900; ⁵since 1951; ⁶since 1959; ⁷since 1950; ⁸since 1955, ⁹since 1941, ¹⁰since 1961, ¹¹since 1960, ¹²since 1959, ¹³since 1962, ¹⁴since 1962 and ¹⁵since 1950. *The Supreme Tribunal of Tierra del Fuego was created in 1993.

Since 1983 the average tenure of the provincial justices increased in most cases, except in Córdoba, which remained the same, and in the provinces of Mendoza and Tucumán, in which the average tenure was reduced. In Mendoza, the average tenure of the justices prior to 1983 was 5.17 years, while since 1983 it has been 3.5 years. In Tucumán, justices remained in the bench an average of 4.13 years before 1983 and afterwards for only 3.37 years. These data are quite revealing, since many well-known Argentine NGOs like CELS, ADC and Poder Ciudadano, as well as a study published by Bill Chavez (2004), place Mendoza at the top of their rankings. One possible explanation for this is that 5 out of the 7 current justices on the Supreme Court of Mendoza have been on the bench for over 20 years⁹²; thus the average tenure on this court does not reflected the prior experience of the sitting justices. If their total tenure of is taken into account, then the average in Mendoza increases to 7.24 years. As a result of this analysis, comparable measures of the average tenure in the rest of the provinces were computed, but there were no significant changes except for Chaco and Formosa, where the average tenure increased by 2 years (in Chaco, to 8.47 years, and in Formosa, to 9.19 years), and for San Juan, where that figure increased by 3 years (to an average tenure of 9.15 years). Only in Buenos Aires, Jujuy, La Pampa, Misiones and Santa Fe did their justices served on average more than 8 years on the bench, while in Catamarca, Corrientes, Santiago del Estero, Tierra del Fuego and Tucumán their justices served for less than 4 years. Evidently, there is great variation in the average tenure of justices in the provinces, a situation that reflects the heterogeneity of cases at the subnational level. Even though some provinces have a longer average tenure than the justices from the

⁹² Justices Aida Kemelmajer Carlucci and Hernán Amilton Salvini were appointed to the bench in 1984, Justices Fernando Romano, Pedro Jorge Llorente and Jorge Horacio Nanclares in 1987, Justice Carlos Böhm in 1997 and Justice Alejandro Pérez Hualde in 2004 (Poder Judicial de la Provincia de Mendoza 2009).

National Supreme Court, still the average tenure for all the provinces after 1983 is 5.35 years, lower than the national average tenure of 6.50 years.

5.4 UNDERSTANDING JUDICIAL TURNOVER IN THE PROVINCIAL SUPREME COURTS, 1983-2009

The objective of this section is to empirically test the theory of vacancy creation at the subnational level. This section uses quantitative data to systematically assess the 525 departures of justices from the 23 Argentine provinces since the return of democracy in 1983 so as to determine how the incentives and preferences of the governor have influenced those retirements.

The dataset contains original data on the provincial justices who served on the bench in the Argentine provinces since 1983. The empirical part of this chapter resembles the comparable section of Chapter 4, since it uses similar econometric models and the same main independent variables. The dependent variable in this case is the year in which a justice departs from the bench; a 1 indicates the year the justice exits, while a 0 is used otherwise.

The main assumption is that the governors, once in office, want to have a supportive court so as to maximize their political power. The main hypothesis relates to the political proximity between the incoming governor and the sitting justices. It is argued that justices who share the same political preferences as the ruling governor — that is, friendly justices — are likely to rule in favor of the governor, whereas the opposite is true for justices who do not share the same political preferences as the ruling governor. As in Chapter 4, two measures of political proximity are used: the justice's alignment with the governor's political party or political

faction, and the ideological distance variable (alignment with the governor — political party or political faction — mediated by the partisan power in Congress). Briefly, the first measure contains two dummy variables that capture whether or not the sitting justice was appointed by the same political party as the current governor (first dummy variable) or the same political faction (second dummy variable).⁹³ The second measure is an improved version of the alignment variables, since it takes into consideration the role and the partisan power of the political parties during the appointment process.⁹⁴ This second measure also contains two variables that range from 0 to 1, with 0 referring to those justices who do *not* indicate an ideological distance from the governor's political party (one variable) or political faction (second variable), and 1 the opposite.

Different sources of information were used for measuring political factions at the subnational level. Governors were considered to be from the same political faction when the outgoing governor or the *interna* faction of the governor supported the candidacy of the incoming governor. This information was collected from different sources depending on the electoral laws of the provinces. In some cases the information was taken from the primary elections within the parties or the *sublemas* in the elections (double simultaneous voting), and in other cases from reading the local newspapers during the electoral campaigns; subsequently, interviews with local experts were carried out to corroborate the information gleaned from the newspapers. Those cases in which incoming governors betrayed the political faction that had

⁹³ For further details of the measurement issues of these variables please refer to Chapter 4, Section 4.1.1.

⁹⁴ For further details of the measurement issues of these variables, please refer to Chapter 4, Section 4.1.2. Original data were collected at the subnational level regarding the composition of the legislature to create the improved ideological variable for the 23 provinces since 1983 (Vuletin and Castagnola 2009).

supported them during the elections were also taken into account, as happened, for example, in Santiago del Estero with Governor Iturre. In those instances, even though the incoming governor was from the same *interna* as the outgoing one, it was coded as a different *interna* since once in office the incoming governor no longer belonged to the same faction as the outgoing one.

Because at the subnational level many provinces have a single-party system, it is expected that the political faction variables (in terms of both alignment itself and alignment mediated by partisan power) matter greatly in those provinces. In order to test this hypothesis, the model incorporates a dummy variable that indicates with 1 the provinces in which a single party has been ruling the province since 1983 and 0 otherwise. The provinces with a single-party system are: Formosa, Jujuy, La Pampa, La Rioja, Neuquén, Río Negro, San Luis and Santa Cruz. The interaction between the single-party variable and the political faction variable should allow us to explore whether or not intra-party competition in those provinces can account for the stability of justices on the bench. The American literature claims that the political proximity of the justice to the executive can be determined by the political party of the appointing executive; however, this study challenges that hypothesis by claiming that the political proximity can more realistically be determined by the political *faction* of the appointing executive.

Along with the ideological variables, the model also includes the timing hypotheses. The main argument is that governors want a supportive court during the first years of their administration, since they want to use their political leverage on the judiciary to carry out their policies right from the start. Two different variables are used to measure this effect: a change in the administration and a change in the ruling party. These dummy variables aim to account for the leadership and party effect; that is, significant results are expected when there is a change in

the ruling administration, since in most cases incoming executives inherit a court with justices appointed by executives from a different party.

The model also includes the executive partisan power hypothesis in order to examine whether or not justices are more vulnerable to governors who are backed by strong partisan power in Congress. Two control variables are proposed. The first variable aims to capture the size of the court as a way to control for reductions in the number of sitting justices. The expectation is that reducing the number of sitting justices increases the probability of any single justice leaving office. The second variable controls for the years in which the provinces experienced a federal intervention; in other words, it is expected that during such intervention justices are more likely to depart from the bench.

In order to test the previous hypotheses along the lines found in the literature, a survival model for discrete data was used (Box-Steffensmeier and Jones 2004; Nixon and Haskin 2000; Squire 1988; Zorn and Van Winkle 2000). As in Chapter 4, included are the Carter and Signorino (2007) time polynomial methods to model temporal dependence, not only because each individual case has multiple data points and thus can exhibit temporal dependence, but also for the purpose of examining whether or not the stability of a justice in office changes over time. The units of analysis are justice-years. Table 5.3 presents the results of the survival discrete-model using a logit estimator with fixed effects (using country dummy variables) with robust standard errors for both models. Because the alignment variables and the ideological distance are highly correlated, Model 5.1 presents the results using the alignment variables, with Model 5.2 using the ideological distance variables.

Table 5.3: Survival model of judicial turnover for the Provincial Supreme Court, 1983-2009

	Model 5.1	Model 5.2
Alignment with the political faction	-0.264 (0.283)	-
Alignment with the political party	-1.547*** (0.238)	-
Alignment with the political faction in a single-party province	-0.692** (0.244)	-
Ideological distance from the political faction	-	0.287 (0.316)
Ideological distance from the political party	-	1.434*** (0.270)
Ideological distance from the political faction in a single-party province	-	0.545** (0.250)
Single-party province	1.628*** (0.470)	0.151 (0.573)
New administration	0.209 (0.155)	0.171 (0.153)
New ruling party	0.353** (0.174)	0.554** (0.178)
Executive partisan power	0.140 (0.222)	0.239 (0.224)
National Intervention	1.957*** (0.331)	2.133*** (0.325)
Size of the court	-0.186** (0.067)	-0.188** (0.067)
t	0.304*** (0.094)	0.406*** (0.094)
t ₂	-0.027** (0.008)	-0.035*** (0.000)
t ₃	0.000** (0.000)	0.001*** (0.000)
Intercept	-1.187 (0.750)	-3.310*** (0.707)
N	3489	3478
Wald X ² (df)	399.17(33)	367.30(33)
Prob.> X ²	0.000	0.000
Pseudo R ²	0.151	0.141
Log-Likelihood	-1094.085	-1101.160

Note: *Significant at p<.10; **at p<.05; ***at p<.001. Robust standard errors are in parentheses. Country dummy variables are not reported due to space limitations.

The results from Model 5.1 indicate an interesting pattern of loyalty relations between justices and governors. The interpretation of the coefficients deserves special attention because of the interaction coefficient between alignment with a political faction and a single-party province. The fact that the coefficient for alignment with the political faction is not statistically significant suggests that there is no meaningful relationship between those justices who are aligned with the governor in provinces without a single-party system and their leaving the bench. In other words, in provinces with a multiparty-system, the stability of the justices is not necessarily related to the appointing political faction of the governor.⁹⁵ The coefficient for the interaction variable did prove statistically significant and in the expected direction, meaning that in provinces with a single-party system being aligned with the political faction of the governor reduces the probability of the justice departing from the bench.⁹⁶ This suggests that, when there is no change in the ruling party, justices are not necessarily stable on the bench since in those situations the stability of the justices is more closely related to the political *faction* of the appointing authority. Finally, the variable for alignment with a political party also proved statistically significant and in the expected direction, which reveals that a justice being aligned with the political party of the governor can indeed reduce the probability of his or her leaving the bench.

The dummy variables for changes in the ruling party and single-party system produced statistically significant results. This suggests that, during the first two years after a new party comes to power, justices are more likely to depart from the bench. The coefficient for change in

⁹⁵ When testing for the double effect of being in the same faction and party of the president the probability of a justice departing from the bench reduced (it was used Lincom command in STATA).

⁹⁶ The Lincom command in STATA was used to test for the interaction effect of the variables.

the administration is not statistically significant, which implies that the probability of a justice departing from the bench increases does not necessarily when there is a change in the administration, but rather when a new ruling party comes into power. It is important to point out that the effect of single party province is greater than expected justices are more likely to depart from the bench in those provinces regardless of the political proximity with the ruling governor. These results are consistent with those from Chapter 4. Secondly, being a justice in a province with a single-party system who is not aligned with the political faction of the governor also increases the probability of that justice departing from the bench.

The variable for the executive partisan party is not statistically significant, suggesting that the more political competition a province has, the less likely it is that a justice will depart from the bench. This results corroborates those of Chapter 4 since in fact, there is no relationship between the partisan power of the executive and the probability that a justice will depart from the bench. Moreover, this lack of finding is consistent with a recent study about provincial courts in Argentina that shows that political competition does not protect judicial stability either (Leiras et al. 2009). The dummy variable for intervention also showed significant results in the expected direction, suggesting that, during a federal intervention, justices are more likely to depart from the bench. The variable for the size of the court also corroborates the findings in Chapter 4, since it reveals that changes in the number of sitting justices can also affect the stability of the justices, as enlarging the number reduces the probability of a given justice to depart from the bench, while the opposite is true when governors decide to reduce the number of justices. Finally, the temporal duration terms are significant, revealing the existence of a temporal dependence on justices' tenure or a non-linear evolution over time. The log-odds of judicial departures over time reveals that the risk for departing from the bench increases around year seven but the hazard rate

expands significantly after the second decade in office, what may suggest the effect of the justice's age for retirement.

Model 5.2 from Table 5.3 presents the results of the survival discrete-model using a logit estimator with fixed effects and robust standard errors for the ideological distance variables. The results corroborate those of Model 5.1 except in the case of the single-party province.⁹⁷ Because Models 5.1 and 5.2 are non-linear, for a substantive interpretation predicted probabilities were computed for the justices under different circumstances using the results from Model 5.1. On average (i.e., holding all the variables at their mean), a justice has 0.08 probability of departing from the bench, but that probability increases in different political contexts. First consideration will be given below to the scenario for a justice serving on a court in a province with a single-party system, and then to one for a justice serving in a province with a multi or two-party system.

In a single-party province, when there is a change in the ruling administration and the justice is from the same political faction as the incoming governor, the probability of the justice departing from the bench in a given year is 15%, while if the justice is not aligned with the political faction of the incoming governor the probability increases to 27%, almost the double. When there is no change in the ruling administration and the justice is aligned with the political faction of the governor, then the probability of the justice departing from the bench is 9%, while if the justice is not aligned with the governor the probability increases to 17%. Consideration of the scenario for those provinces with a multi or two-party system yields the following: when there is a change in the ruling party and the justice is from a different party, the probability of

⁹⁷ Model 5.2 has less number of observations because Justice Raúl Eduardo Arangure from Entre Ríos is excluded from the model since he entered the Court in 1976 and there is no data available about the executive partisan power at that time.

departing from the bench in a given year is 25%. However if the sitting justice had survived a changed in the ruling party (i.e. the justice was not aligned with the previous governor) and now the justice is aligned with the same political faction as the incoming governor, the probability of the justice leaving the bench is 5% (less than the average probability) while if the justice is from a different faction of the same party the probability increases slightly to 7%. In provinces with political competition governors prefers to deal with justices nominated by them rather than by justices nominated by the opposition.

Evidently, the pattern of political loyalties between the justices and the provincial governor varies according to the type of party system. Being aligned with the political faction of the governor matters more in those provinces in which a single party has been ruling, while alignment with the political party itself matters more in those provinces in which there is political competition. What this finding reveals is that intra-party competition in provinces with a single-party system plays a central role in accounting for judicial turnover, since it can have the same effect as inter-party competition in provinces with multi-or two party systems. The literature about provincial parties in Argentina have recognized that in subnational politics it is often a small group of leaders or a single person (in those extreme single party cases like the province of San Luis) who generally dominates the political parties (De Luca et al. 2002; Jones 2002) but there is no systematic analysis of how these leaders compete for power; nor the logic of intra-party competition. Even though intra-party competition at the provincial level has not

been extensively studied,⁹⁸ the existing research suggests that the political competition within the province will depend basically upon patronage, pork barrel politics and clientelism.

So far it has been demonstrated that provincial justices both in single-party and in multiple-party provinces have high probabilities of departing from the bench when a new administration takes office. But are incoming governors more likely to craft a supportive court in some provinces than in others? Table 5.4 displays the predicted probabilities of the provincial justices' leaving the Supreme Court, in order to explore in which provinces governors are more likely to craft a supportive court. Corrientes, Santiago del Estero, Catamarca, Tucumán, Neuquén and Tierra del Fuego rank the highest in the table. It is important to recall that federal interventions were carried out in Corrientes, Santiago del Estero and Catamarca, perhaps explaining their high position in the rank order. Neuquén is a province with a single-party system while Tucumán and Tierra del Fuego have a multi-party system. This finding corroborates that both intra-party and inter-party competition matters greatly, not only for judicial turnover but also for local politics. Even though Mendoza is traditionally considered by scholars and NGOs as the most independent and stable judiciary in the country, Table 5.4 reveals that, in fact, other provinces rank higher.

⁹⁸ Steven Levitsky (2003, 2001a, 2001b) has extensively analyzed intra-party competition in the Peronist Party organization, however, mainly at the national level.

Table 5.4: Probability of a justice leaving the Supreme Court, by province

	Pr. of a justice leaving the court
Buenos Aires	0.09
Catamarca	0.18
Chaco	0.08
Chubut	0.11
Córdoba	0.13
Corrientes	0.22
Entre Ríos	0.09
Formosa	0.09
Jujuy	0.09
La Pampa	0.07
La Rioja	0.16
Mendoza	0.11
Misiones	0.07
Neuquén	0.17
Río Negro	0.10
Salta	0.14
Santa Cruz	0.11
Sgo. del Estero	0.21
Santa Fe	0.08
San Juan	0.07
San Luis	0.14
Tierra del Fuego	0.17
Tucumán	0.18

Among the provinces that rank lowest in the table are La Pampa, Misiones and San Juan. It is important to recall that on these provinces the same faction or a couple of factions have been ruling the province most of the time and also in the case of La Pampa and San Juan governors have been able to craft a supportive court by enlarging the number of sitting justices.

5.5 CONCLUSION

The present chapter uses original data to examine the judicial turnover at the subnational level by paying special attention to the way governors have traditionally induced the departure of justices as well as the reasons that motivated those retirements. The preliminary data collected for provincial justices who served on the bench before 1983 revealed that governors have recurrently manipulated the conformation of the courts by reshuffling the justices. Before 1983, the average judicial turnover in the provinces was lower than the average turnover at the National Supreme Court, suggesting that the political manipulation of justices was more dramatic at the subnational level. After 1983, when democracy was reestablished in the country, governors kept reshuffling the courts and provincial justices continued being highly unstable on the bench. However, even though the average tenure of the justices improved upon the restoration of democracy, progress was not as significant as might have been expected. As Chapter 4 disclosed, democracy has not necessarily produced more stable judiciaries in Argentina.

The systematization of the qualitative data gathered from primary and secondary sources about the different strategies used by governors to induce the departure of justices from the bench shows that governors created vacancies on the Court by other means besides the impeachment trials highlighted in the literature. In fact, the impeachment trial was only one strategy of vacancy creation among others, as it turns out that only 3% of departures resulted from an impeachment trial. Because impeachment removals had been systematically reported by

the local newspapers,⁹⁹ that 9% could be even lower, if one takes into account the fact that data were found regarding only 33% of the departures. Graph 4.1 illustrates that governors triggered widely diverse strategies of formal and informal mechanisms of vacancy creation, one of the most successful being the offer of attractive retirement benefits. It is precisely by examining those strategies that it is possible to shed light on the way governors were able to craft supportive courts.

Finally, the survival models reveal that the incentives and preferences of the governors account for the degree of judicial stability in office. As Chapter 4 demonstrated, governors do not trust justices appointed by other governors, especially if they belong to another political faction. Because at the provincial level there is a great heterogeneity of cases, it was possible to elucidate how political loyalties work more specifically under different scenarios. On the one hand, in provinces with a single-party system, the instability of the justices can be explained because of intra-party competition, since in those cases governors would not trust justices appointed by a different political faction. This suggests that intra-party competition can have the same effect as inter-party competition in a province featuring a multi-party system. On the other hand, in provinces that do have a multi-party system (or, at least, a two-party system), judicial turnover results from the competition between the parties and in some provinces also within the factions (as in the cases of Córdoba, where the change of administration from Eduardo Angeloz to Ramón Mestre, both from the UCR, produced a reshuffling in the court, or Santiago del

⁹⁹ Because in many cases provincial impeachment trials appeared in provincial jurisprudence, local jurisprudence was also consulted to ensure that no impeachment trial was missing. Abeledo Perrot (Lexis Nexis) and Sistema Argentino de Informática Jurídica (SAIJ) databases were carefully checked.

Estero, where the confrontation between Governors Iturre and Juarez, both from the PJ, resulted in the enlargement of the court and the removal of 3 justices).

Even though the political proximity between the governor and the sitting justices can account for the stability of the justices on the bench, the models proved, in addition, that the governor's court-packing capacity can also account for this phenomenon. The enlargement or reduction in the number of sitting justices results in a significant factor for understanding the variations in judicial stability. Governors have frequently used formal mechanisms of vacancy creation not only to induce departures but also in some cases to create new seats on the court. The qualitative data revealed that governors had systematically used institutional mechanisms to craft a supportive court, a strategy that often involved changes in the provincial constitutions or in the law. The objective of the next chapter is precisely to examine whether or not these changes in the institutional rules can affect the stability of the justices on the bench.

6.0 THE INSTITUTIONAL DETERMINANTS OF JUDICIAL TURNOVER AT THE SUBNATIONAL LEVEL

The previous chapters examined whether or not politics affects judicial turnover at the levels of both the National and Provincial Supreme Courts in Argentina. Overall, the evidence revealed that politics does contribute to explaining the instability of the justices on the bench. However, the evidence from the previous chapters also indicates that institutional rules appear to be a significant factor affecting the instability of the justices, because governors have recurrently changed the regulations regarding the number of sitting justices. Not yet examined is the extent to which institutional rules themselves might promote or impede judicial turnover.

Argentina is a federal country divided into 23 provinces and the autonomous city of Buenos Aires. The provinces are also autonomous, retaining all the powers not specifically entrusted to the national government; this allows them to dictate their own constitutions, respecting always the principles established in the National Constitution (Bielsa and Graña 1999). It is precisely this feature that has produced a high degree of internal heterogeneity in constitutional design and led to different patterns of judicial organization as well. This chapter, based on the variations in institutional organization both across provinces and within each

province, explores how different institutional rules influence the stability of justices on the bench.

Below are analyses of original data gathered from 54 provincial constitutions and laws from 1983 to 2009 related to the functioning of the local supreme courts.¹⁰⁰ The analysis of the legal norms and constitutions focuses on the type of tenure system, procedures for appointment and removal, the court-packing capacity of executives, and the responsibilities of the courts, among others. The next section provides descriptive information for examining the institutional evolution of the provincial courts in terms of the function of the supreme courts, while the following section presents the results of a negative binomial model used to test the institutional determinants of judicial turnover at the subnational level in the last 27 years.

6.1 EVOLUTION OF THE INSTITUTIONAL RULES OF THE SUPREME COURTS FROM 1983 TO 2009

6.1.1 The capacity of executives to pack the court

The original text of the National Constitution of 1853 (Article 91) established a fixed number of nine sitting justices for the National Supreme Court. With the constitutional reform of 1860, however, that part of the article was eliminated, and there has been no subsequent specific regulation on that topic. In developing democracies, the vagueness regarding this feature is

¹⁰⁰ The author is indebted to Juan Manuel Benvenuto, Maximiliano Cerra, Gabriela Rendon, and Jacqueline Goldszer for their research assistance in gathering the data. For a more comprehensive analysis of the provincial normative, please refer to Castagnola (2009).

generally associated with institutional rules highly vulnerable to political manipulation, since the total number of sitting justices can be modified by law. The provinces of Buenos Aires, Corrientes, Salta (since 1986), Misiones, and Tucumán have followed the same institutional design as the national government (see Table 6.1, column 1), while the rest of the provinces have implemented variations on that rule. Table 6.1 displays the different institutional rules adopted by the provinces between 1983 and 2009 regarding the court-packing capacity of the executive.

Table 6.1: Institutional evolution regarding the court-packing capacity of executives, 1983-2009

	<i>No specification</i>	<i>Fixed number of sitting justices</i>	<i>Minimum number of sitting justices</i>	<i>Range in number of sitting justices</i>
Buenos Aires	C1934, C1994			
Catamarca			C1966, C1988	
Chaco			C1957, C1994	
Chubut				C1957, C1994
Córdoba		C1923, C1987, C2001		
Corrientes	C1960, C1993			
Entre Ríos			C1933	
Formosa			C1957, C1991, C2003	
Jujuy			C1986	C1935
La Pampa			C1960, C1994	
La Rioja		C2008		C1933, C1986, C1998, C2002
Mendoza			C1965, C1997	
Misiones	C1958			
Neuquén		C2006	C1957, C1993	
Río Negro			C1957	C1988
Salta	C1986, C1998	C1929		
San Juan		C1927	C1986	
San Luis				C1962, C1987
Santa Cruz			C1957, C1994, C1998	
Santa Fe			C1962	
Sgo. del Estero		C1960	C1986, C2002, C2005	
Tierra del Fuego			C1991	
Tucumán	C1907, C1990, C2006			
Nation	C1853, 1994			

Note: The years when the constitutions were adopted appear in the columns.

One institutional variation of the rule clearly specifies the total number of sitting justices (Table 6.1, column 2). This rule can have a more favorable effect on developing democracies, since the clarity of the norm could prevent the political manipulation of the courts; that is, only through constitutional reform would it be possible to change the total number of sitting justices. Constitutional reforms are more difficult to carry out than changes in the law, since they require more political negotiation and more time. As Table 6.1 shows, with the return of the democracy to the country in 1983, the provinces of Córdoba, Salta, San Juan, and Santiago del Estero restricted the court-packing capacity of the executive; however, as time went by, only the province of Córdoba maintained that rule, while the other three provinces adopted more imprecise regulations, empowering the executive and the legislature to manipulate the composition of the court. As a matter of fact, shortly after the changes in the constitutional rules, these provinces did increase the number of sitting justices on their courts. Nevertheless, La Rioja (since 2008) and Neuquén (since 2006) moved in the opposite direction from Salta, San Juan, and Santiago del Estero. In the last round of constitutional reform, these two provinces decided to restrict the court-packing capacity of the executive by clearly establishing in their constitutions the total number of sitting justices. Through all these shifts in the constitutional rules, only the province of Córdoba was consistently able to limit executive power, while the other provinces followed that pattern only sporadically.

The second variation in the national government rule, and the most popular, established a minimum number of sitting justices on the court (Table 6.1, column 3). This rule, like that adopted by the national government, is also vulnerable to political manipulation due to the lack of specificity of the maximum number of justices. Currently, 57% of the provinces have adopted the maximum or minimum rule, and 22% the no-specification rule, revealing that politicians

have preferred a certain ambiguity in institutional design in 79% of the provinces. Finally, the third variation established a minimum and maximum number of justices on the court (Table 6.1, column 4). In this case, executives have a restricted capacity to pack the court, since there is a maximum number of sitting justices established in the constitution. Currently, four provinces have adopted this rule.

Even though most of the provinces have adopted imprecise institutional rules (i.e., they have not restricted the executive's court-packing and unpacking capacity), one may still ask how many provinces have indeed changed the total number of sitting justices. Table 6.2 shows how many times the provinces have either increased or decreased the number. Since 1983 fourteen provinces have changed the total number of sitting justices in their courts: seven of them (Buenos Aires, Chubut, Córdoba, Entre Ríos, La Pampa, San Juan and Santa Cruz) did it once; four (Río Negro, Salta, San Luis, and Santiago del Estero) and the national government did it twice; two (Formosa and La Rioja) did it three times; and the province of Misiones changed the total number of justices four times.¹⁰¹ It is important to mention that, out of the nine provinces (Catamarca, Chaco, Corrientes, Jujuy, Mendoza, Neuquén, Santa Fe, Tierra del Fuego and Tucumán) that did not change the number of justices, the province of Tierra del Fuego came into the sample only in 1992, after its incorporation as an autonomous province. Overall, more than half of the provinces (61%) changed the total number of sitting justices at least once, which suggests that executives have indeed manipulated the composition of the courts.

¹⁰¹ For further details about the reasons why the provinces modified their total number of justices, please refer to Castagnola (2009).

Table 6.2: Number of times the provinces changed the total number of sitting justices on their Supreme Courts between 1983 and 2008

<i>No change</i>	<i>One change</i>	<i>Two changes</i>	<i>Three or more changes</i>
1. Catamarca	1. Buenos Aires	1. Nation	1. Formosa (L712/87,
2. Chaco	(L13662/07)	(L23774/90,	L1169/95, L1354/00)
3. Corrientes	2. Chubut (L5475/06)	L26183/06)	2. La Rioja
4. Jujuy	3. Córdoba (C1987)	2. Río Negro	(L5635/91, L7249/02,
5. Mendoza	4. Entre Ríos	(L2245/88,	C2008)
6. Neuquén	(L8065/88)	L2910/95)	3. Misiones
7. Santa Fe	5. La Pampa	3. Salta (L6985/98,	(L2441/87, L2819/90,
8. Tierra del Fuego	(L1407/92)	D3367/07,	L3964/03, L4245/05)
9. Tucumán	6. San Juan (C1986)	L7515/08)	
	7. Santa Cruz	4. San Luis	
	(L2404/95)	(L4929/91,	
		L4212/93)	
		5. Santiago del	
		Estero (L5861/91,	
		L6011/94)	

Note: “L” corresponds to the number of the law, followed by the year of its going into effect; “C” corresponds to the year of the provincial constitution; and “D” corresponds to the number of the decree, followed by the year of its going into effect.

Moreover, Table 6.2 reveals that, during the last 27 years, there were 27 changes in the total number of sitting justices both at the national and subnational levels, suggesting an average of at least one enlargement or reduction per year. Have these changes become more frequent since the enlargement of the National Supreme Court in 1990? Before 1990 there were six changes in the total number of justices, while during the nineties there were ten changes, and from 2000 to 2009 there were eleven changes. This suggests that changing the number of justices serving the courts was a steady characteristic of the Argentine judiciaries rather than something that resulted after the change in the National Supreme Court in 1990. In conclusion, since the return of democracy, most of the provinces (87%) have adopted institutional rules that do not clearly establish the total number of sitting justices; moreover, more than half of the provinces (61%) changed that number at least once.

6.1.2 Tenure system for the justices

Both the national and provincial constitutions establish that justices shall hold office during good behavior, as a way to guarantee the independence of the justices from political interference. However, not all of the provinces have guaranteed life tenure to their justices; rather, many of them have adopted fixed-term tenure. Lifetime appointments produce job security and help ensure the court's independence from the President and Congress. Even though life tenure is generally associated with having justices independent of the political hierarchy, fixed tenures can also have the same effect, if the length of the tenure does not coincide exactly with the tenure of the appointing authorities. When the tenure of the justice does coincide with that of the appointing authorities, then there is potential for abuse (Madison et al. 1787-1788). Table 6.3 displays the different tenure systems adopted by the Argentine provinces since 1983. Although Salta is the only province that still has fixed-term tenure for its justices, in 1983 there were five other provinces that also had fixed terms: Catamarca until 1988, Jujuy and San Juan until 1986, La Rioja until 1998, and Tucumán until 1991. Except for La Rioja, the other four provinces modified the tenure system in their first constitutional reform, while La Rioja did so in its second reform.

Table 6.3: Institutional evolution regarding the tenure systems in the provinces, 1983-2009

<i>Life tenure</i>	<i>Fixed tenure</i>
Nation (C1853, 1994)	
Buenos Aires (C1934, 1994)	
Catamarca (C1988) ←	Catamarca (C1966): 4 years on probation
Chaco (C1957, C1994)	
Chubut (C1957, C1994)	
Córdoba (C1923, C1987, C2001)	
Corrientes (C1960, C1993, C2007)	
Entre Ríos (C1933)	
Formosa (C1957, C1991, C2003)	
Jujuy (C1986) ←	Jujuy (C1935): 6 years with reelection
La Pampa (C1960, C1994)	
La Rioja (C1998, C2002, C2008) ←	La Rioja (C1933): 1 year on probation La Rioja (C1986): 6 years with reelection
Mendoza (C1965, C1997)	
Misiones (C1958)	
Neuquén (C1957, C1993, C2006)	
Río Negro (C1957, 1988)	
San Juan (C1986) ←	San Juan (C1927): 3 years on probation Salta (C1929, C1986, C1998): 6 years with reelection
-	
San Luis (C1962, C1987)	
Santa Cruz (C1957, C1994, C1998)	
Santa Fe (C1962)	
Sgo. Del Estero (C1960, C1986, C2002, C2005)	
Tierra del Fuego (C1991)	
Tucumán (C1991, C2006) ←	Tucumán (C1907): 10 years

Note: The years of adoption of the constitutions appear in parentheses.

In Catamarca, until the constitutional reform of 1988, the justices were appointed for a 4-year term trial period; once those justices had completed the trial period, in the absence of any disciplinary action they automatically obtained life tenure (Article 195, Constitution 1988). Between 1983 and 1988 only Justice Mario Alejandro Guzmán completed the four-year trial

period, since the other justices resigned earlier due to political pressure. It is important to mention that the term of the governor and legislatures in Catamarca coincides exactly with the length of tenure of the justices, producing an obvious potential for abuse.

La Rioja, until the constitutional reform of 1998, had a fixed-term tenure system, but that was changed as time went by. In 1983 the justices were appointed for a one-year trial period; if they survived that period, they automatically obtained life tenure (Article 98, Constitutional Province 1933). Evidently, the trial period system can undermine the independence of the justices, since their confirmation to the bench will depend completely upon their prior performance. The trial period system can be conceived of as a safety net mechanism for the appointing authorities, because they have the capacity to remove disloyal justices from the bench without a complicated institutional process. According to the data from the Supreme Court of La Rioja, all the justices appointed under that rule passed the one-year trial period; however, four out of the five justices tendered their resignations during the constitutional reform in 1986 when the tenure system changed. The reform of 1986 represented a significant change in the independence of the provincial justices, since the province adopted a system of six years of tenure with the possibility of reelection. Between 1986 and 1998 11 justices were appointed to the Court; five of them completed their terms, and two of these (Justices Domingo Tulian and Vicente Miguel Delonardi) were reelected to the bench. Less than half of the justices were able to complete their terms (the average tenure of a justice for that period being 3.7 years), and the reelection option was not frequently used. Even though in 1998 La Rioja adopted a life tenure system, the average length of tenure for the justices was not affected, since on average justices remained in office for no more than 5.8 years.

Until 1986 San Juan also had a fixed-term system, in this case a three-year trial period with the possibility of obtaining life tenure afterwards. This province was the only one that did not remove any justices upon the return of democracy in 1983, because the governor during the last military regime happened to belong to the same family as the newly elected governor. That is why the three justices obtained life tenure, one of them (Justice Eduardo Aguiar Aranciva) in 1984 and the other two (Justices Carlos Graffigna Latino and José Héctor Baistrocchi) in 1985.

Jujuy, Salta and Tucumán are the provinces with the longest fixed tenure as well as those that did not implement a trial period system. In the case of Jujuy, until 1986 justices were appointed for a fixed term of six years with the possibility of reelection, while in the case of Tucumán, until 1991 justices were appointed for a ten-year term. In both provinces the terms of the justices did not coincide with those of the appointing authorities; moreover, in contrast to the other provinces that also had fixed-term tenure, justices were not appointed for a trial period. The justices appointed in Jujuy remained on the bench during the constitutional reform of 1986 and continued serving for additional years, some of them having been reelected. In Tucumán none of the justices appointed between 1983 and 1990 were able to complete their terms; in fact, justices remained on the bench on average for less than three years, serving less time than a legislator or a governor.

Salta is the only province that still has a fixed term for justices, in this case a six-year term with the possibility of reelection; until 1998 those justices who were reelected automatically obtained life tenure. Between 1983 and 2009, 32 justices were appointed to the Supreme Court of Salta, but only 12 of them (37.5%) completed their terms. As in the case of La Rioja, the reelection rate was also low, since only four justices were reelected, three of them (Justices Rodolfo Urtubey, Guillermo Posadas, and María Cristina Garros Martínez) once, and the other

one (Justice Edgardo Vicente) twice. Only Justice Urtubey obtained life tenure, since the other reelections took place after the constitutional reform of 1998, at which time the provision for life tenure was eliminated. Since 1983 justices in La Rioja have remained on the bench for an average of 4.8 years. It would seem that the length of tenure did not have a clear influence on the stability of the justices.

Overall, most of the Argentine provinces adopted the life tenure system, as those that started with a fixed term gradually changed to the life one. The evidence reveals that, in those provinces that had fixed terms, the justices almost never finished their mandates, with average tenure ranging between 3 to 5 years regardless of the length of the terms.

6.1.3 The appointing process

In Argentina, both the national and subnational Supreme Court justices are appointed indirectly. The judiciary is the only branch of government in which its members are not democratically elected by the people but rather are selected by the other branches. It is precisely this characteristic that may engender doubts regarding the legitimacy of the justices' decisions (Gargarella 1997). Most of the provinces have adopted the congressional model of judicial appointment in which the executive nominates the candidate and the Senate confirms the nomination.¹⁰² The only exceptions to this mechanism are the provinces of Chaco, Río Negro (since 1988), San Juan (since 1986) and Tierra del Fuego, in which either the executive or the legislature is absent from the process.

¹⁰² In unicameral provinces, it is the entire legislature that approves the candidate.

In Chaco and Tierra del Fuego, the Council of Magistrates presents a short list of candidates, and the executive is in charge of appointing one of them. Even though in this process the legislature is not explicitly present, some of the members of the council are legislators. The council of Chaco has a total of seven members: two justices from the local Supreme Court, two legislators, two lawyers from the local Bar Association, and the Attorney General. In the case of Tierra del Fuego, the council also has a total of seven members: one justice from the local Supreme Court, two lawyers from the local Bar Association, the Attorney General, two legislators, and one representative from the executive branch.

In Río Negro, justices are appointed by a council specially created for that task. It is composed of the governor, three lawyers from the local Bar Association, and three legislators. In the case of a tie, the vote of the governor counts double (Article 204, Constitution 1988). Finally, San Juan adopted in 1986 a special mechanism of appointment in which the governor is not part of the process. In this province the Council of Magistrates is in charge of presenting a short list of candidates, while the local legislature appoints one of them. The council has a total of five members: two lawyers from the local Bar Association, one legislator, one justice from the local Supreme Court, and one representative from the executive branch.

Even though some researchers affirm that, when the judiciary is involved in the appointment procedure, there is little space for politicians to manipulate the appointment (Ríos-Figueroa 2006), in the previously mentioned four provinces participation of the judiciary has not necessary prevented manipulation. In Río Negro and Tierra del Fuego, four out of the seven members of their councils (57%) are politicians, while in Chaco three out of seven (43%) and in San Juan two out of five (40%) are likewise. In the first two provinces it is difficult to suppose that politicians would not manipulate the appointment process, since they represent more than

half of the total members and, consequently, of the votes. In the case of Chaco, it is important to recall that, even though this province was the first one to introduce the council into the appointment process, it was not until 1994 that the council in fact started to participate therein. Before that year, justices were appointed according to the congressional model, due to lack of establishment of the council (Article 164 from the 1957 Constitution and Article 158 from the 1994 Constitution). Nevertheless, the three appointments that took place in Chaco after 1994¹⁰³ have been strongly criticized by the press and civil society. Local NGOs have denounced the violation of the process in the selection of the candidates, presenting claims against the constitutionality of the process and requesting removal of the justices (Centro de Estudios Nelson Mandela 2008). As of the end of 2009, those claims were still unresolved. Overall, variations in institutional design have not necessarily produced appointments independent of the political power structure.

Another important aspect of the appointment process, along with the authorities' involvement, is the voting procedure either to select the candidate (in those provinces with a short list) or to confirm the nomination (in those cases with a congressional model). At the national government level, from 1983 until the present time, the required majority for confirming candidates has undergone one change. Before the constitutional reform of 1994, a candidate was approved by a simple majority of the votes of the Senators present, while after the reform the candidate required 2/3 of the votes of the members present. The ultimate goal of the reform was to increase the consensus in the appointment process, thereby enhancing the legitimacy of the

¹⁰³ Justice Rubén Avalos was appointed in 1997, Justice Ricardo Franco in 1998, and Justice Rolando Toledo in 2000.

justices. Table 6.4 displays the institutional evolution at the subnational and national levels regarding the majority required in the appointing process.

Table 6.4: Institutional evolution regarding the required majority for appointing justices to the Court, 1983-

2009

	<i>Simple majority of members present</i>	<i>Simple majority of total members</i>	<i>2/3 majority of members present</i>	<i>2/3 majority of total members</i>
Buenos Aires	C1934 (S)	C1994 (S)		
Catamarca	C1966 (S), C1988 (S)			
Chaco				C1957 (JC), C1994 (JC)
Chubut	C1957 (L)			C1994 (L)
Córdoba	C1923 (S), C1987 (S), C2001 (L)			
Corrientes	C1960 (S), C1993 (S)			
Entre Ríos	C1933 (S)			
Formosa	C1957 (L), C1991 (L), C2003 (L)			
Jujuy	C1935 (L), C1986 (L)			
La Pampa	C1960 (L), C1994 (L)			
La Rioja	C1933 (L), C1986 (L), C1998 (L), C2002 (L), C2008 (L)			
Mendoza	C1965 (S), C1997 (S)			
Misiones				C1958 (L)
Neuquén	C1957 (L), C1993 (L)		C2006 (L)	
Río Negro	C1957, (L) C1988 (JC)			
Salta	C1929 (S), C1986 (S), C1998 (S)			
San Juan	C1927 (JC), C1986 (JC)			
San Luis	C1962 (L), C1987 (S)			
Santa Cruz	C1957 (L), C1994 (L), C1998 (L)			
Santa Fe	C1962 (JS)			
Sgo. del Estero	C1960 (L), C1986 (L), C2002 (L), C2005 (L)			
Tierra del Fuego	C1991 (JC)			
Tucumán	C1990 (L), C2006 (L)		C1907 (S)	
Nation	C1853 (S)		C1994 (S)	

Note: The years of adoption of the constitutions appear in the columns. S = Senate, L = Unicameral Legislature, JS = Joint session of both chambers of Congress, and JC = Judicial Council.

The provinces adopted four different types of majorities: a simple majority of members present, a simple majority of total members, a 2/3 majority of members present, and a 2/3 majority of total members. Evidently, the greater the number of votes required, the more difficult it is to reach consensus, but the greater the legitimacy of the justice appointed. If consensus was hard to obtain, then political parties would have to negotiate with other parties and thus moderate their preferences for specific candidates. As Table 6.4 shows, by 1983 most of the provinces had adopted a rule calling for confirmation by a simple majority of members present; the exceptions were Tucumán, requiring a 2/3 majority of members present, and Chaco and Misiones, specifying a 2/3 majority of total members. In 1990 Tucumán decided to require confirmation by only a simple majority of members present, thus adopting the same procedure as the national government. However, since 1994 some provinces have decided to follow the same constitutional reform as the national government, thereby increasing the level of consensus needed for the appointment. Buenos Aires in 1994 slightly increased the majority required by specifying a simple majority of total members rather than of members present; Neuquén in 2006 enlarged the majority to 2/3 of members present; and Chubut in 1994 called for confirmation by 2/3 of total members. Overall, most of the provinces have decided to take greater control over the appointment process by requiring only a narrow majority, while only six provinces have chosen to widen the consensus needed. Political parties in general are not willing to moderate their political and ideological preferences in connection with the appointment process.

6.1.4 The removal process: impeachment

The National Constitution adopted the congressional model of impeachment, similar to that used in the United States but with minor modifications (Sabsay 2004). Even though most of the Argentine provinces followed that model also, some provinces implemented a hybrid model known as the “impeachment jury.” The main difference between the two systems is the type of actors involved in the process: in the congressional model the legislative branch is the main actor, while in the other models other actors participate as well. In the congressional model of impeachment, the lower chamber is charged with making the accusation against the justice, while the upper chamber operates as the jury, deciding whether or not to convict the justice.¹⁰⁴ On the other hand, while “impeachment juries” are generally made up of a diverse group of people coming from all three branches of government, the nature of the process is the same (Camps 2000).

Nowadays all the provinces have adopted the same removal process as the national government except for San Luis and Tierra del Fuego, both of which have impeachment juries. In 1983, however, La Rioja, San Juan, and Santiago del Estero still had juries. La Rioja and San Juan changed to the congressional model in 1986 in their first constitutional reform, while Santiago del Estero changed in 2002 during its third reform. The impeachment jury used in La Rioja since 1933 included aspects of the congressional model, since the legislature was in charge

¹⁰⁴ The unicameral provinces have implemented variations on this model. For example, in Chubut, Córdoba, Río Negro, and La Rioja, the legislature is divided in half, with one half in charge of the accusation and the other of the trial. In La Pampa and Tucumán, the legislature creates two commissions, with legislators assigned to one of them, while in Formosa the legislature creates only the commission for the accusation, the rest of the legislature being in charge of the trial. It is important to point out that these commissions always reflect the same proportion of political parties as in the legislatures themselves.

of the accusation against the justice, while a special commission acted as the jury. This jury was composed of the president of the local Supreme Court, the president of the Educational Council, the mayor of La Rioja, the Attorney General, four lawyers from the local Bar Association, and four citizens (Article 117, Constitution 1933). In San Juan the jury provided for in the 1927 Constitution had five members: three legislators and two justices from the local Supreme Court, while in Santiago del Estero the jury had a total of nine members: one justice from the local Supreme Court, three legislators, three lawyers from the local Bar Association, and two judges. The jury from San Juan had a strong political presence, since three out of the five members came from politics. In Tierra del Fuego the Council of Magistrates is in charge of impeaching the justices; thus, the political component is also strongly present.

San Luis represents an interesting case since, even though the province has always had an impeachment jury, the composition of the jury changed with the reforms in the Constitution. At the beginning (since 1962), the jury was composed of twelve members, all of them from the legislature, while in the 1987 constitutional reform the jury structure was changed. Since that time the jury has had a total of nine members: the president of the local Supreme Court, three legislators, two lawyers, and three judges. The political influence on the structure of the jury changed from 100% as of 1927 to 33% since that time, revealing at first sight a significant curtailment of political influence on the process. However, local NGOs have revealed that the process is still highly politicized, because it is often the case that the judges and lawyers on the jury are friends or supporters of the local government.

To sum up, most of the provinces have followed the same congressional model of impeachment as in the national government, handing over to the local legislature the responsibility of trying and punishing justices accused of wrongdoing. Even though some

provinces adopted impeachment juries composed of a diverse group of people, most of them were still highly monopolized by politicians. Politicians have not so far decided to depoliticize the impeachment process.

As in the appointment process, the other relevant aspect is the majority required for convicting the defendant. The national constitution dictates that justices may be formally removed from the bench by a 2/3 majority of senators present, forcing the latter to reach a greater consensus than when appointing justices to the bench. Indeed, most of the provinces also have called for a simple majority of senators present to appoint justices, but a majority of 2/3 of members present for impeachment. Table 6.5 shows the institutional evolution of the provinces regarding the majority required for convicting a justice of the court.

Table 6.5: Institutional evolution regarding the required majority for removing justices from the court, 1983-2009

	<i>Majority of members present</i>	<i>Majority of total members</i>	<i>2/3 of members present</i>	<i>2/3 of total members</i>
Buenos Aires	C1934 (C), C1994 (C)			
Catamarca			C1966 (C), C1988 (C)	
Chaco			C1957(C), C1994(C)	
Chubut	C1957 (C)			C1994 (C)
Córdoba	C1923 (C)		C1987 (C)	C2001 (C)
Corrientes				C1960 (C), C1993 (C)
Entre Ríos	C1933 (C)			
Formosa				C1957 (C), C1991 (C), C2003 (C)
Jujuy				C1935 (C), C1986 (C)
La Pampa			C1960 (C), C1994 (C)	
La Rioja				C1933 (J), C1986 (C), C1998 (C), C2002 (C), C2008(C)
Mendoza			C1965 (C), C1997 (C)	
Misiones				C1958 (C)
Neuquén				C1957 (C), C1993 (C), 2006 (C)
Río Negro				C1957 (C), C1988 (C)
Salta			C1929 (C), C1986 (C), C1998 (C)	
San Juan		C1927 (J)		C1986 (C)
San Luis	C1987 (J)		C1962 (J)	
Santa Cruz			C1957 (C), C1994 (C), C1998 (C)	
Santa Fe			C1962 (C)	
Sgo. del Estero	C1960 (J), C1986 (J)		C2002 (C), C2005 (C)	
Tierra del Fuego		C1991 (J)		
Tucumán			C1907 (C), C1990 (C), C2006 (C)	
Nation			C1853 (C), C1994 (C)	

Note: The years of adoption of the constitutions appear in the columns. C = Congressional Model, and J = Impeachment Jury

In 1983 six provinces (Buenos Aires, Entre Ríos, Chubut, Córdoba, Santiago del Estero and San Luis) called for a majority of the members present to vote for removal of justices from the bench; one province (San Juan) required a majority of the total members; 8 provinces (Catamarca, Chaco, La Pampa, Mendoza, Salta, Santa Cruz, Santa Fe and Tucumán) called for 2/3 of the members present; and the other 7 provinces (Corrientes, Formosa, Jujuy, La Rioja, Misiones, Neuquén and Río Negro) required 2/3 of the total members. As can be seen, at the beginning of this period a greater number of provinces required a higher degree of consensus for removing a justice from the bench in comparison to that for appointing a justice. However, as time went by, many provinces increased the required majority for convicting a justice. Chubut in 1994 passed from the lowest level of difficulty for convicting a justice (majority of the members present) to the highest level of difficulty (2/3 of the total members). San Juan followed the same pattern by moving in 1986 from requiring a majority of the total members to 2/3 of the total members. Córdoba followed a two-step process in enlarging the consensus: in 1987 it increased its requirement to 2/3 of the members present, and in 2001 to 2/3 of the total members. Santiago del Estero in 2002 also raised the bar for consensus from a majority of the members present to 2/3 of the members present. Even though there was a clear trend among the provinces toward increasing the level of difficulty for convicting a justice, San Luis followed a different pattern. In 1987 the province reduced the required majority from 2/3 of the members present to the majority of the members present. By the end of 2009, 20 provinces out of 23 required a 2/3 majority of the votes, half of them from the members present and the other half from the total members.

In conclusion, the provinces have generally moved toward a more rigorous system for removing a justice from the bench as compared to appointing one. This implies that a higher degree of consensus is required to remove a justice than to confirm him or her on the court. It is

still not clear why that is so, since getting onto the court should be as difficult as getting off; however, it may be that politicians are more interested in facilitating the entrance of the justices as opposed to their exit. As the previous chapters have shown, executives have often relied on informal mechanisms for inducing the retirement of justices rather than the impeachment process itself. If this is the case, then politicians would tend to be less concerned about the majority required for removing a justice than for appointing one. That is to say, politicians are strongly motivated not to make appointing a justice more difficult; otherwise, removing a justice from the court would not be that beneficial, since executives would not be confident about who will serve next on the court.

6.2 THE INSTITUTIONAL DETERMINANTS OF JUDICIAL TURNOVER IN THE PROVINCES

The previous section illustrated how the evolution of institutional rules influenced the frequency of turnover of justices. These rules, and their variations, reveal the incentives of politicians and especially of governors over time. What is not yet clear is whether institutional rules are important to understanding variations in the stability of justices on the bench. Can institutional rules really influence judicial turnover? This section uses a Negative Binomial estimator (NB)¹⁰⁵

¹⁰⁵ Because the dependent variable has an abnormal distribution (most of the observations are concentrated between 0 and 1 departure) it is not appropriate to run an OLS regression. It would violate several of the assumptions resulting in biased coefficients (DeMaris 2004; Kennedy 2003). In cases like this one, it would be more appropriate to perform either a Poisson or a Negative Binomial regression or a Continuous Parameter Binomial since these procedures are suitable for count responses with an abnormal distribution (DeMaris 2004; Long 1997). However, a Poisson regression cannot be performed in this case

with fixed effects to determine the importance of institutional rules in studying the factors that affect judicial turnover at subnational levels (Long and Freese 2006; Long 1997). The advantages of performing a NB regression are not only that it assumes the existence of an overdispersed distribution but also that it relaxes the assumptions that the probability of an event occurring at one time is constant and independent of all previous events (King 1998). Substantially, this means that the rate of a justice leaving the bench is not constant across provinces, and that the number of departures in a year is related to the number of departures in the previous year. The dependent variable is the number of justices departing from the bench in a given year, and the unit of analysis is province-year. The dataset contains a total of 611 observations and original data from the 54 provincial constitutions from 1983 until the present time.

Table 6.6 displays the statistical model of judicial turnover for the 23 provinces since the return of democracy in 1983 and 2009. The predictors seek to capture the institutional conditions and the political factors that may explain the frequency of judicial turnover in the different jurisdictions. The first variable captures the capacity of executives to modify the total number of justices on the bench, indicating with a 1 if the constitution establishes a fixed number of justices and 0 otherwise. The hypothesis suggests that having a fixed number of justices would increase the number of justices departing from the bench because, if a governor cannot increase the number of sitting justices, then it is expected that the governor would remove some of them to

because the mean of the dependent variable is not do they equal to its variance, and the events accumulating over a period are neither independent nor have a constant rate of occurrence (King 1998). Performing a Continuous Parameter Binomial would also be inappropriate since it has an overdispersed distribution density (the variance exceeds the mean) rather than an underdispersed one. Therefore, based on the specificities of the distribution of the dependent variable, the coefficients are estimated here with a Negative Binomial Regression (NB) (Long 1997).

craft a supportive court. The second dichotomous predictor measures whether or not the provinces have established life tenure for the justices. The expectation is that adopting a life tenure system will reduce overall judicial turnover.

There are two variables representing the level of difficulty for the required majority in the appointing and removal processes, namely, two scale variables ranging from 1 to 4, 1 being the lowest level of difficulty and 4 the highest. The different levels of difficulty correspond to those examined in Tables 6.4 and 6.5.¹⁰⁶ The level of difficulty for appointing or removing a justice is negatively correlated with the number of justices departing from the bench: the higher the level of difficulty, the less likely that justices will leave the bench.

¹⁰⁶ Level 1 = majority of members present, Level 2 = majority of total members, Level 3 = 2/3 of members present, and Level 4 = 2/3 of total members.

Table 6.6: Institutional determinants of judicial turnover at the subnational levels, 1983-2009

	Model with fixed effects
Fixed number of justices	-0.449 (0.352)
Life tenure	-0.769** (0.279)
Difficulties in appointing	-0.001 (0.126)
Difficulties in removing	-0.046 (0.118)
Jurisdiction over administrative cases	0.047 (0.228)
Tenure restrictions	-0.125 (0.369)
New administration	0.180 (0.176)
New ruling party	0.664*** (0.204)
Partisan power of the governor	-0.003 (0.217)
Intervention	1.566*** (0.370)
Size of the court	-0.035 (0.064)
Constitutional reform	0.758** (0.258)
Constant	-0.041 (0.706)
Wald X2 (df)	81.53(12)***
N	611

Note: *Significant at p<.10; ** at p<.05; *** at p<.001.

The following variable captures whether or not Supreme Court justices are allowed to hear contentious administrative cases. Justices are not responsible for these cases when the province has a provincial court (Contentious and Administrative Court of Appeals) with special jurisdiction over this type of case. Contentious administrative cases refer to complaints arising from citizens or companies against the government, which means that one of the parties in the trial is the local administration. It is for this reason that contentious administrative cases are

extremely sensitive for the government, which would have a special interest in resolving such disputes. When the local Supreme Court justices are responsible for hearing this type of case, then their sphere of decision-making increases along with the potential impact they can have on politics. If this happens, politicians also have a potential interest in manipulating the composition of the justices because of the increasing impact they can have on politics. The expectation is that, when justices are responsible for hearing contentious administrative actions, then their turnover may be higher, while the opposite is true when Supreme Court justices are not responsible for deciding these sensitive cases. The other dichotomous predictor measures whether or not local constitutions impose age restrictions on the justices. It is expected that, when there is a restriction of this kind, justices will be more unstable in the bench.

Table 6.6 includes three variables related to the political factors that may also be accounting for judicial turnover. As in models from Chapters 4 and 5, in this case also are included the timing hypotheses and the partisan power of the executive. The main argument is that governors want a supportive court during the first years of their administration, since they want to use their political leverage on the judiciary to carry out their policies right from the start. Two different variables are used to measure this effect: a change in the administration and a change in the ruling party. The other political variable captures the partisan power of the executive. According to the hypothesis of Chavez (2003) and Iaryczower et al. (2002), it is expected that, when the executive controls both chambers in Congress with $2/3$ of majority, justices will be more unstable on the bench.

Finally, Table 6.6 also includes three control variables. The first variable aims to control for federal intervention in the provinces, since during an intervention justices are more likely to depart from the bench than at other times. The second variable is a dummy variable that indicates

whether in that year the province experienced constitutional reform, since changes to the constitution often have an impact on the stability of the justices. The other variable measures the size of the court as a way to control for reductions in the number of sitting justices. The expectation is that reducing the number of sitting justices increases the probability of any single justice leaving office.

The results of Table 6.6 indicate that political factors matter more than institutional rules in accounting for provincial judicial turnover. The variable for life tenure is the only institutional variable that had statistically significant result and in the expected direction. Adopting a *life* tenure system reduces the number of justices departing from the bench compared to having a *fixed* tenure system. The fact that the variables for the appointing and removal processes do not lead to statistically significant results may be because it is problematic to assume that the ordinal scale is an interval scale. As a way to solve for this problem each variable was recorded into two dummy variables so as to evaluate if the effect is given by the proportion of the majority required, either a simple or a 2/3 majority, by whether the majority is based from the members present or the total members. The results of that model are consistent with the one in Table 6.6 showing that there is no relationship between the required majority for appointing and removing justices and the stability of the justices on the bench.

Regarding the political variables, the results are consistent with those of Chapter 5: changes in the ruling party increase the number of justices departing from the bench. This suggests that there is an overlapping of changes in the ruling administration and in the court more precisely, whenever there is a change in the ruling party it is expected that there will be changes in the conformation of the Supreme Court. Also, Table 6.6 shows the null finding of the executive partisan power hypothesis, revealing that there is no relationship between the partisan

power of the governor and the frequency of the justices leaving the bench.¹⁰⁷ This result is consistent with those of Chapters 4 and 5 and with those of Leiras et al. (2009). The control variables for provincial intervention and constitutional reform also had statistically significant results. Having a federal intervention increases the number of justices departing from the bench, as does provincial constitutional reform.

Because count models are non-linear, the substantive interpretation of the coefficient is not straightforward. The factor change as a percentage was computed using the formula $(\exp(\beta) - 1 * 100)$ (Long and Freese 2006: 360). According to the model, having life tenure reduces the frequency of judicial turnover by 54%. In other words, if the expected number of justices departing in a given year were 10, then the expected number of justices having life tenure who left the bench would be reduced to 5. Following changes in the ruling party judicial turnover increases by 95%, suggesting that during those years the frequency of departures is likely to almost double. A similar result is found for those years in which constitutional reforms were carried out, since turnover increases 113%. Finally, during federal interventions it is very unlikely that justices will remain on the bench, since at those times judicial turnover increases by 379%, suggesting that during those years the frequency of departures almost quadruples.

¹⁰⁷ Because in many provinces legislators can impeach a justice with a simple majority, the model run here relaxes the assumption for the partisan power hypothesis by using a simple majority in both chambers rather than 2/3 of the seats. Nevertheless, the results are still consistent with those of Table 6.6.

6.3 CONCLUSION

Institutional rules do not play a central role in explaining judicial turnover in the provinces: it is politics that matters most. The data presented in this chapter have revealed, on the one hand, a great level of heterogeneity in the institutional design of the provincial judiciaries and, on the other, that none of these variations can account for the instability of the justices on the bench. In other words, it is the governors' incentives and preferences that account for the judicial turnover rather than the institutional rules regarding the functioning of the court. The only rule that turns out to be significant is having a life tenure system, which suggests that the tenure system itself is relevant to keeping justices on the bench. The models in this chapter have also shown that neither the appointing nor removal processes matter to the stability of the judiciary, contrary to what the literature suggests about the importance of impeachment trials (Chávez 2004; Iaryczower et al. 2002). However, it has been demonstrated that, during years of constitutional reforms, justices are more unstable on the bench. If instability increases during those years, even though the institutional rules are not necessarily relevant to explaining that instability, then what this situation maybe elucidating is that it is the changes in the rules, not the rules *per se*, that account for the instability of the justices. This situation exposes once more the importance of the incentives and preferences of politicians in shaping the stability of the justices. Finally, the findings in this chapter also corroborate the results of the previous chapter: that there is an overlap between changes in the executive office and changes in the conformation of the court; with the incoming governor evidently leading the judicial system changes.

Overall, the results of this chapter provide evidence to confirm the theory of vacancy creation. First, it was demonstrated that politics plays a central role in accounting for judicial

instability rather than the institutional rules regulating the judiciaries. Second, it was shown that the changes in the institutional rules, and not the rules themselves, have also proved to be relevant, which suggests that executives have triggered both institutional and non-institutional strategies for inducing judicial retirements. Third, the null finding between the partisan power of the executive and the stability of the justices on the bench revealed that justices are not necessarily more vulnerable under powerful executives than under weak ones. It is not the partisan power of the executive that determines the frequency of judicial turnover, but rather the political incentives and ideology of the sitting justices themselves.

7.0 CONCLUSION

Courts are powerful actors in politics. However, until the recent decade, scholars in the region have often neglected their importance for the understanding of politics. Justices have the capacity to control the President and the Congress; while at the same time influence the policy-making process (Baum 1998). It is not news that in developing democracies politicians have often tried to control the decisions of the courts by manipulating their conformation. However, until now no research had explicitly addressed which factors affect judicial turnover or how executives have been able to manipulate the conformation of the courts. This research aims to fill that gap in the literature and contribute to the understanding of executive-court relations in developing democracies. The following section discusses the main findings of this research in light of the debates in the existing literature, while the final section explores the theoretical relevance of the findings for the study of judicial instability in other developing democracies.

7.1 RETHINKING JUDICIAL INSTABILITY IN DEVELOPING DEMOCRACIES

The strategic or the attitudinal model of judicial behavior?

The existing research affirms that life tenure for Argentine justices is not respected, given that the way justices vote (regarding, say, the constitutionality of a law) can account for their

instability in office (Helmke 2005; Iaryczower et al. 2002; Scribner 2004; Helmke 2002). However, these studies have not tested the assumption that the way justices vote can, in fact, account for their instability. What is even more puzzling is that the high judicial turnover of Argentine justices provides contradictory evidence. If justices can, in theory, regulate their stability on the bench by ruling for or against the ruler, then why have Argentine justices not simply done that? In other words, this study has called into question the argument that in Argentina executives act according to the strategic behavior model rather than the attitudinal one (Segal and Spaeth 2002).

One of the main findings of Chapters 4, 5 and 6 is that executives do not trust justices appointed by other executives with different political preferences; in fact, there is an overlap between the electoral executive cycles and judicial turnover. The evidence in the previous chapters has systematically revealed that executives (especially at the beginning of their terms) do not buy into the strategic behavior model that claims that justices appointed by executives with different political preferences would nonetheless rule in favor of the incoming executive in order to survive in office. In the end, what these findings reveal is that, in general, Argentine presidents and governors have been very averse to risking unfavorable outcomes when it comes to the Supreme Courts. Executives have been more conservative, or reluctant to risk, than the literature predicted.

It is precisely because executives believe in a more attitudinal behavior model relating to the justices that the political proximity between incoming executives and the justices is important in accounting for judicial stability on the bench. The results in Chapter 5 from the provincial level analysis disclosed with great detail that the loyalty between executives and justices is highly personalized and, thus, strongly controlled. On the one hand, in provinces with a single-

party system, justices appointed by an executive from a different political faction from the incoming executive are more likely to depart from the bench than those who have been appointed by executives from the same faction. On the other hand, in provinces with a multi- or two-party system, what matters more is the political party of the appointing executive rather than the faction.

Is it only executives with strong partisan power in Congress who can manipulate the conformation of the Court?

The studies carried out on the Supreme Court in Argentina have systematically claimed that there is a relationship between the partisan power of the executive and the capacity of the executive to manipulate the composition of the court. More precisely, these studies affirm that *only* those presidents with strong political power (i.e., unified governments with supermajorities in the legislature) can craft a supportive court and affect justices' stability in office (Chávez 2004; Iaryczower et al. 2002). This is because only those presidents who have the political power to formally remove a justice from office (i.e., by impeachment) can guarantee themselves a supportive court. Even though this assumption seems convincing, the evidence from the National and Provincial Supreme Courts does not corroborate this belief. The empirical results from Chapters 4, 5 and 6 suggest that, in fact, there is no relationship between the partisan power of the executive and judicial turnover — that is, that justices are not necessarily more unstable when executives have the power to formally remove them from the bench. The qualitative research in Chapters 3 and 5 sheds light on this finding by illustrating how executives without significant partisan power in Congress were, nonetheless, able to induce the retirement of justices from the bench and craft a supportive court.

The systematic null finding about the partisan power of the executive brings up the unsolved puzzle of how political competition and party fragmentation shape judicial independence. So far, the literature argues that party competition is the key mechanism for the fragmentation of political power, which in the end would produce a more independent judiciary because power was not concentrated in one branch of government (Chávez 2004). Or, in other words, when executives do not have the partisan power in Congress to control the stability of the justices on the court (i.e., the power to impeach the justices), then they are more likely to vote sincerely on the cases that come before them, because presidents cannot arbitrarily remove them (Iaryczower et al. 2002). But the evidence in the Argentine case, both at the national and provincial levels, indicates that neither party hegemony nor party competition has necessarily produced a more stable judiciary. Executives irrespective of their partisan power in Congress have been able to manipulate the composition of the courts by triggering both formal and informal mechanisms of vacancy creation. In fact, a broader analysis of other Latin American cases also challenges this assumption. Bolivia, Brazil and Ecuador are often characterized as countries with a fragmented party system, but this fragmentation has not necessarily produced stable and independent judiciaries. Between 1900 and 2009 Supreme Court justices in Bolivia have remained in office an average of 3.6 years, in Brazil for 10.7 years and in Ecuador for 4.2 years (Pérez Liñán and Castagnola 2009b, 2009a). Future research on intra-branch relations and judicial independence should carefully address this unsolved puzzle.

Tracing the strategies for inducing the retirement of justices from the bench

Chapters 3 and 5 have exposed the different institutional and non-institutional mechanisms aimed at inducing retirements that executives have used to manipulate the conformation of the

courts. One of the most revealing findings is that impeachment has not been the most popular method for crafting a supportive court. The literature has strongly acknowledged the impeachment trials as *the* most popular strategy for executives to create vacancies on the court. However, the systematic analysis of the departure of justices from the national Supreme Court from 1916 to 2009 and the provincial courts since 1983 suggests that, in fact, executives have developed more ingenious tactics for inducing the retirement of justices. The threat of an impeachment trial, for example, or the offer of attractive retirement benefits and possible reappointment were the two most successful strategies among the institutional and non-institutional mechanisms of vacancy creation. In the end, executives have developed the ability to multiply and diversify strategies for inducing retirement, and many of those new ploys are being reproduced in other provinces, as, for example, Law 460 of Tierra del Fuego that established compulsory retirement of justices.

Along these lines, the results of Chapter 6 revealed an interesting finding, namely, that the institutional rules regarding the functioning of the provincial courts do not play a central role in accounting for judicial turnover— that is, the rules have neither impeded nor promoted the departure of the justices. Indeed, what the evidence exposed is that what matters in accounting for judicial instability is the *changes* in constitutional rules rather than the rules *per se*. In the end, it is the instability of the institutional rules that affects the stability of the justices on the bench. The changes in the rules are, in fact, reflecting the changes in the preferences and incentives of the governors who are faced with an unfriendly court.

7.2 JUDICIAL INSTABILITY BEYOND ARGENTINA

The previous chapters have provided considerable evidence for a theory of vacancy creation related to the justices of the Argentine national and provincial supreme courts. But the argument applies more generally to any situation in which executives manipulate the conformation of the high courts. In fact, this theory of vacancy creation appears consistent with the experiences of several supreme courts in Latin America as in Peru and Paraguay, and in other developing democracies such as Indonesia, Russia and Ukraine (Pompe 2005; Trochev 2008).

Presidents in Peru have often manipulated the conformation of the Supreme Court and the Constitutional Tribunal, with Alberto Fujimori being the most representative case. In 1990 Fujimori assumed the presidency; shortly thereafter he launched neoliberal economic reforms that produced a rapid decrease in public support (Stokes 2001). The opposition, which was in control of both chambers of Congress, was able to obstruct the government's ability to enact those economic reforms. By 1992 Fujimori, with the support of the military, carried out a presidential coup (often called an "auto-coup") to put an end to the political deadlock. The Congress and the Constitutional Tribunal were closed down. In June 1996 the Constitutional Tribunal was reopened and new members were appointed. Soon after that Fujimori started to campaign for re-election (i.e., a third term in office) based on the recently enacted Law No. 26.657 that allowed him to run for a third consecutive term. The Bar Association of Lima asserted that the law was unconstitutional. On November 20, 1996, five out of the seven members of the Constitutional Tribunal ruled against the re-election, and soon those justices began to suffer political pressures and moral coercion. On January 2, 1997, Justices Ricardo Nugent López Cháves and Luis Díaz Valverde requested a new vote on the issue. At that time,

four justices refrained from casting a vote, while Justices Manuel Aguirre Roca, Delia Revoredo Marsano and Guillermo Rey Terry again ruled against the applicability of Law 26.657. The degree of political pressure against the justices of the Constitutional Tribunal to reverse the decision was far from evident, so the National Congress, on February 28, 1997, created a special commission to investigate possible abuses. Shortly after that initiative, the government's party requested the impeachment of those three justices because of wrongdoing. In May 28, 1997, the three justices were found guilty and removed from the bench. Fujimori was re-elected, but social protest and the exposé of the Montesinos bribery scandal that led to the defection of opposition leader Alberto Kuri accelerated Fujimori's fall.

Even though in many developing democracies executives have often manipulated the conformation of the courts, there are some countries where this theory does not apply. The identification of these cases does not undermine the strength of this research but rather bolsters it. When middle range theory is being developed, it is important to identify not only where the theory can be applied but also where it cannot, since it is precisely by this process that a better understanding of the topic can be achieved. The experience of the Supreme Court and Constitutional Tribunal in Ecuador reveals that, in fact, there is another form of political manipulation that is not necessarily carried out by the executive, but rather by the political coalitions in Congress. One of the most striking features about the instability of the Supreme Court justices in Ecuador is that it was the Congress, rather than the executive, that set the pace for judicial departures. The purges of the Supreme Court in 1985, 1997 and 2004 resulted from resolutions of the National Congress, where legislators simply declared the termination of judicial tenure (Albuja Martínez 2008). These legislative resolutions were the direct result of changes in the political coalitions in Congress and, thus, the rearrangement of the ideological

positions of the parties that were then replicated on the court. In this case, it is precisely the high fragmentation of the political parties in Congress (and the constant reconfiguration of the coalitions) that has produced the high judicial instability in the bench. Evidently, the political competition inside Congress has not generated, so far, positive results in the judiciary, as scholars had predicted. A similar situation applies to the Constitutional Tribunal, where from 1997 to 2007 the reconfiguration of Congressional coalitions resulted in the tribunal's reshuffling on six occasions (Grijalva 2010).

Another interesting feature about the Ecuadorian case that exposes the importance of Congress is the role of the Constitutional Tribunal regarding its capacity of constitutional review. In Ecuador the judicial review was, for the most part, delegated to Congress. The Tribunal of Constitutional Guarantees (TCG) was finally incorporated in the Constitutional reform of 1967,¹⁰⁸ but this tribunal had a limited capacity of judicial review that became even more diminished as time went by (Ávila 2004). In the Constitutional reform of 1978, it was established that it was not the TCG but rather Congress that had the capacity to suspend a law (Ordóñez Espinosa 2000). It was not until the Constitutional reform of 1996 that judicial review became an exclusive feature of the judiciary branch. Overall, Ecuador represents an interesting case to explore, since it combines features of strong presidentialism with a highly fragmented party system in which the President's party rarely has control over Congress; thus, it is Congress rather than the President who manipulates the conformation of the court (Mejía Acosta 2006; Shugart 1995; Shugart and Carey 1992). Future studies should address this issue.

¹⁰⁸ The TCG was incorporated in the Constitutional reform of 1945, but eliminated in the reform of 1946 (Ávila 2004).

To conclude, studying the factors that account for judicial instability in office becomes relevant for the understanding of politics and intra-branch relations, since the judiciary has often been neglected. Therefore, the incorporation of the judiciary into studies about politics produces significant improvement in the theory building of the discipline. Given the high incidence of judicial instability in developing countries, and the fundamental importance of courts to the democratization process, there is a need for further study on the topic. This research has proposed possible lines of investigation that would contribute to the discipline's understanding of the role of the courts in democratization and the conditions under which courts can become more or less useful in the consolidation of democratic governance.

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