COURTS AND POLITICAL PARTIES: THE POLITICS OF CONSTITUTIONAL REVIEW IN ECUADOR

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The central argument of my dissertation is that political parties and timing influence constitutional judges' behavior in highly fragmented party systems under specific institutional conditions such as short terms in office, the threat of impeachment, and the possibility of reappointment. Partisan influence on judges' decisions is selective, and it is dependent on institutional features. The carrots and sticks of appointment, reappointment, and impeachment may be useful tools for legislative coalitions to obtain judges' deferential behavior when the terms of these judges are short and immediate reappointment is possible.

However, politicians do not care about all cases of constitutional adjudication equally. Compared to the total number of constitutional review cases, only few decisions, generally about laws, attract politicians' attention, are reported by the media as national issues, and mobilize pressure groups. In a fragmented party system, partisan influence is difficult to exercise given higher costs for the coalition to monitor and enforce judges' deferential behavior. Hence, a natural division emerges between politically important cases and standard cases without political pressure. Whereas some political variables help explain judicial votes on political cases, they have no influence on standard cases without political relevance. As a consequence, a constitutional judge may behave strategically on political cases and vote sincerely on standard cases.

TABLE OF CONTENTS

LIST OF TABLES

PREFACE

As with any individual endeavor, I could only write this dissertation thanks to the generosity, knowledge, and time of others. My thesis director, Aníbal Pérez-Liñan has taught me more than he can imagine; he has been a demanding director and simultaneously a supportive friend. He made writing the dissertation a rich learning experience which added even more value to my years of study at the University of Pittsburgh. I also have a scholarly debt to Andrés Mejía Acosta at the University of Sussex (England) and Gretchem Helmke at the University of Rochester, who reviewed and discussed the dissertation proposal and provided key ideas for the research design. John Polga-Hecimovich was extremely generous reviewing drafts and providing sharp critique. The committee members provided specific and helpful advice to improve my work.

In Ecuador, several scholars and dear friends, some of them who are currently working in the field of judicial politics in my country were extremely helpful discussing ideas and reviewing drafts, in particular Santiago Basabe, Alex Valle, Luis Avila, Nancy Medina, and Carlos Larrea. It goes without saying that Claudia Narvaez, my wife, was “always there” for me. She and my son David missed time with me to allow me to write the dissertation. At the Universidad Andina in Quito, the Chancellor Enrique Ayala and the Law School Director, José Vicente Troya, were always supportive, helping me to visit Pittsburgh several times after ending my classes to advance the dissertation.

1.1 JUDICIAL POLITICS AND THE SEPARATION-OF-POWERS APPROACH

How does the relationship between political parties and constitutional judges[1] affect judicial independence? The *separation of powers theory* asserts that the ruling party has less influence on judges under *divided government*, that is when the president does not have a majority in congress, and consequently has no impeachment or other court-curbing powers (Chavez 2004, Helmke 2002, 2005, Iaryczower, Spiller and Tommasi 2002, Scribner 2003, Navia and Ríos Figueroa 2005). This dissertation shows that political parties can exert strong leverage on judges, even under *divided government,* if opposition parties can form a legislative coalition to control the reappointment of these judges. I contend that judicial independence is constrained when judges have short terms and are re-appointed by congress, irrespective of whether the government is divided or unified.

Judicial independence is a complex concept including positive and normative dimensions. However, in this dissertation for empirical research purposes, I adopt the working notion developed by Iaryczower, Spiller, and Tommasi (2002) who have defined judicial independence as "the extent to which justices can reflect their preferences in their decisions without facing retaliation measures by congress or the president" (699). These preferences may be related to policy preferences or what a judge thinks is the right interpretation of the law in a specific case. When a constitutional judge cannot state these preferences through his or her vote because political pressures from the president or congress demand a different decision and they can

[1] I define constitutional judges as those with power to take the last decision on constitutional review in a country. These judges are generally justices of the Supreme Court or members of a constitutional court.

exercise harm upon the court or the judge in order to obtain it, the role of that judge as an autonomous political actor and interpreter of the law is clearly questioned. Hence, judicial independence may be seen not as a dichotomy (independence or no independence) but as a variable which can be related to political and institutional conditions, as I explain in the following chapters. I examine how specific institutional features such as terms and reappointments, and retaliation measures such as impeachment, may affect judicial independence.

Terms and reappointment play key roles in the relationships among judges, congress and the executive. Assuming that judges want to retain their office (static ambition), they will show deference to those political actors controlling reappointment. This deference should be observable in judges' rulings on judicial review. If a constitutional judge is deferential to his or her appointing or reappointing party, the judge will strike down as unconstitutional those laws opposed by his or her party and will uphold those laws supported by that party in congress.

My dissertation links the legislative support or opposition of the judge's party to the government, and the judge's vote on the constitutional review of a law during the period 1997-2004. I also examine the impact of judges' time horizons and timing on their voting behavior. In order to investigate these relationships I created a database of constitutional review rulings of the Ecuadorian Constitutional Tribunal (*Tribunal Constitucional* or TC), from 1997 to 2004 (N=2268), including information on the political position of each party in congress during the time that a law was challenged through constitutional review, and votes of each TC judge when deciding on constitutionality of that specific law. For the analysis I will use a soft rational choice approach (Ames 2000), which will be embedded in historical context and triangulated with case studies and qualitative analysis.

Ecuador is a good case in which to study this relationship due to constitutional judges with short terms and the possibility of unlimited reappointment. This reappointment process has historically been controlled by the congress. Unlike in Argentina, Mexico or Chile, where judges have life tenure or long terms without reappointment, constitutional judges in Ecuador had a short term of four years with unlimited reappointment. According to provision 275 of the 1998 Ecuadorian Constitution, the nine TC judges were appointed as follows: Congress directly appointed two TC judges, while the other seven TC judges were appointed by Congress from lists of three candidates sent by several nominating bodies. The president of Ecuador sent Congress two lists of three candidates, from which one nominee from each list was chosen. Likewise, the Supreme Court sent two lists of three candidates to the Congress, which chose one nominee from each. The National Association of Mayors and Provincial Prefects also sent one list of three nominees, from which one nominee was chosen. Similarly, workers' unions and Indian and peasant organizations sent one list of three candidates for congressional selection of one candidate. A last list of three candidates for legislative appointment was sent by business chambers. The most recent Ecuadorian Constitution of 2008 establishes terms of nine years without reappointment, which allow variation within the same case. These institutional features make Ecuador a suitable with which to examine the effect of terms and appointment institutions on judicial decision-making.

According to provision 276 of the 1998 Constitution, the Constitutional Tribunal's jurisdiction in the period of study included several important powers. First, the TC had the power to declare laws or other norms such as decrees, ordinances, resolutions, and government's acts as unconstitutional, which suspended all juridical effects of these norms or acts (provision 276-1 and 2). The TC was also an appellate court of first resort for judges 'decisions denying amparo

petitions, habeas corpus, and other constitutional guarantees protecting rights (provision 276-4). Other TC power refers to final decision-making power in cases where the president vetoed a congressional law proposal because he or she considered it anti-constitutional (provision 276-4). The TC also had the power to examine whether international treaties and international conventions complied with the constitution before these treaties or conventions were known and approved by Congress (provision 276-5). Finally, the TC ruled as a court of last resort for specific jurisdictional conflicts among public institutions. From an administrative point of view, the TC was a public body, independent of the legislature, the executive, and the judiciary, and enjoying its own budget and administration[2].

There are four models in the study of judicial decision making: the legal model, the attitudinal model, historical institutionalism and the rational choice model. *The legal model* is based "in the belief that, in one form or another, the decisions of the Court are substantially influenced by the facts of the case in light of the plain meaning of statutes and the Constitution, the intent of the Framers, and/or precedent" (Segal and Spaeth 2002: 48). *The attitudinal model* posits that the facts of the case are examined by justices based on their own ideological attitudes and values (for instance a conservative or liberal view) (Segal and Spaeth 2002; Segal 1999). *The historical institutionalist model*, asserts that judicial norms and legal traditions are not only constraints but also constitute judicial attitudes and motivations (Clayton and Gillman 1999:4; Hilbink 2007). Finally, *the rational choice model* focuses on *strategic action* or "interdependent behavior with justices' choices shaped, at least in part, by the preferences and likely actions of other relevant actors" (Maltzman, Spriggs and Wahlbeck 1999: 47).

[2] Provision 3 of the Organic Law of Constitutional Control.

The strategic approach is based on the assumption that judges are strategic rational actors. Unlike the legal or attitudinal models sustaining that judges state their most preferred policies or their interpretation of the law in rulings, a strategic approach emphasizes how judges are politically constrained (Baum 1997; Epstein and Knight 1998). However these constraints may be internal or external to the court.

Judges face endogenous and exogenous constraints. *Endogenous constraints* refer to institutions internal to the court which constrain justices' capacity to translate their preferences into legal policy outcomes, such as agenda setting, opinion assignment, and opinion writing (Maltzman, Spriggs and Wahlbeck 1999; 2000; Epstein and Knight 1998). In other words, a justice's behavior is constrained by those of other justices. Consequently, judges need to make strategic choices not only in their final votes but also through a complex multiple-stage process of internal decision-making (Hammond, Bonneau and Sheehan 2006). In the same way, higher courts may restrain or control behavior of lower courts through administrative punishment (e.g impeding judges' promotion and hence rise of their salaries) when lower courts do not follow preferred judicial policies (Hilbink 2007).

Exogenous constraints, in turn, refer to political checks from other branches of government. The separation-of-powers approach examines these external constraints. The core idea of the separation-of-powers approach is that judges are strategic actors whose decisions are constrained by the congress and the president. Rather than deciding cases based on the law or their values, judges systematically take into account the possible reactions of these other institutional actors. Most of the literature on American judicial politics using this approach refers to the Supreme Court's interpretation of statutes (Eskridge 1991, Ferejohn and Weingast 1992a, 1992b; Segal 1997) but some body of research also refers to constitutional issues (Murphy 1962,

Clinton 1994, Knight and Epstein 1996). In both statutory and constitutional cases, judges try to avoid conflicts with the elected branches of government by ruling as close as possible to the preferences of these branches (Baum 1997).

Given the system of life tenure of the US Supreme Court, the American literature, and specifically the separation- of powers research, does not address the role of reappointment on judicial decision-making at the federal level. However, nomination and appointment of justices is acknowledged as an important political phenomenon. In fact, 90 percent of a president's appointments to the US Supreme Court and the federal bench are from the president's party (Peretti, 1999)

At the state courts level, reelection by voters rather than reappointment by high officials is an important subject of research because most judges in the US must face voters to retain their seats (Hall and Bonneau 2006). Interestingly, as Helmke (2005) notes this literature provides a useful "repertoire of ideas" to study high courts in developing countries.

Within this trend, research on Latin American judicial politics has been using the separation-of-powers approach to study court-executive relationships (Chavez 2004, Helmke 2002, 2005 Iaryczower, Spiller and Tommasi 2002). According to these studies, judges are constrained when the president controls a legislative majority (unified government) because he or she can implement court-curbing actions such as impeachment, court-packing, jurisdictional and budgetary restrictions, or the reversal of court's decision through legal or constitutional reforms. Facing these threats, judges will defer to the president's preferences and will tend to decrease the number of rulings reversing presidential rule-making.

In contrast, where divided government prevails there are much better conditions for judicial independence. Power dispersion would water down the aforementioned political

constraints allowing judges to rule based on their own policy preferences or to stick to their preferred interpretation of the law and the constitution.

The theory that unified government tends to preclude judicial independence, and divided government enhances it relies on several assumptions:

1) Judges want to stay in office (static ambitions). Staying in office is necessary even for judges pursuing other goals such as the advancement of policies, personal reputation or institutional legitimacy because all these goals first require them to continuing as judges (Helmke 2005).

2) Judges have life terms[3] or long terms without reappointment. Under these conditions, impeachment is the only formal procedure for removal, which usually requires at least a president with super-majority in congress (unified government), besides other probable constitutional requirements.

3) An opposition congress has no power to pursue impeachment. Only a unified government has the legislative majority to impeach judges whereas divided government implies that opposition does not reach that majority in congress, and consequently judges are secure and independent.

Let's examine each of these assumptions and relationships among them according to the separation-of- powers-theory.

1) Static Ambitions: In principle, this assumption seems quite reasonable considering that constitutional courts are always at the highest level in the judicial hierarchy, constitutional judges earn high salaries by public officials' standards, they enjoy high status and clear political influence, giving them renown even after leaving office, all of which are adequate incentives for

[3] Life terms usually include age limits but these limits by themselves do not make tenure insecure.

lawyers interested in becoming members of the Constitutional Court. In fact, as I will show later for the Ecuadorian case, TC justices often seek and sometimes obtain reappointment under these institutional conditions.

Yet this assumption is not self-evident or unquestionable. It is clearly linked to specific institutional features of the US Supreme Court, such as justices' life tenure, place within the judicial hierarchy, high prestige, and unlikely impeachment.[4] (Baum 1997). In practice, life tenure is just one among many possible types of terms, as I show below in a sample of Latin American countries. Furthermore, in some countries position within the judicial hierarchy is not concentrated in one court but two or more, like in those countries where a constitutional court coexists with a supreme court which also has some constitutional adjudication powers.[5] Levels of justices' prestige and impeachment frequency vary widely across countries. Hence, empirical study of how the assumption of static ambitions holds for cases with different institutional settings, like the one I undertake in my dissertation, is clearly relevant to advance our understanding of justices' goals.

2) Life terms or long terms without reappointment: This assumption is one among diverse institutional alternatives. This is a natural assumption in studies on the US Supreme Court given its system of life tenure. However, among eighteen Latin American countries only the highest courts of Argentina and Brazil have life tenure. Chile had an eight-year term, with immediate reappointment, but a 75 year age limit until the 2005 constitutional reform; currently it has no reappointment. Mexico has a fifteen-year term without reappointment and a 75 year age limit. Nevertheless, among these eighteen countries ten of them have different forms of reappointment.

[4] According to Rohde and Spaeth (1976) and Segal and Spaeth (1993) these justices' lack of electoral accountability and lack of ambition for higher office, in turn, allow them to focus on the content of legal policy.
[5] For instance Chile.

Ecuador[6], Honduras and Guatemala, for instance, have comparatively shorter terms (four, four, and five years, respectively) and immediate reappointment (Navía and Figueroa 2005). Interestingly, the Latin American countries where researchers find that divided government yields judicial independence have life tenure or long terms: Argentina, Mexico, and Chile.

3) An opposition congress which implies divided government has no power to pursue impeachment: According to the separation-of- powers-theory, both the government and the opposition are impeded from reaching the necessary legislative majority to impeach judges. This assumption may be reasonable for bipartisan political systems or party systems organized around two relatively stable and cohesive coalitions, but it is not adequate for countries with highly fragmented party systems where the president's party has only few votes and legislative coalitions are fluid and volatile. In these cases, as I will show here, a president leading a legislative coalition as well as an opposition coalition may control the processes of appointment and reappointment of constitutional judges, exerting influence on judges' behavior. I further analyze this assumption in a specific section about legislative coalitions below.

When terms are short, reappointment unlimited, and the legislature highly fragmented, divided government does not assure judicial independence. In fact, in a divided government in which not all of the assumptions described above are met, congress may have stronger leverage over constitutional judges than the president. This leverage is proportional to congressional control of appointment, re-appointment, and impeachment of judges. The greater the appointment power of congress, the greater the interest of legislators and parties to pursue impeachment if they can replace independent or pro-government judges with judges responsive to congress.

[6] In Ecuador the new constitution enacted in 2008 increased the term to nine years without reappointment.

As a consequence, constitutional judges may be dependent on the president, dependent on the opposition, or independent of both, according to the combination of their terms (life, reappointment or no reappointment), length of term (long or short) and the high or low partisan powers either of the president or congress to impeach these judges.

Judges are independent under divided government when they have life tenure or long terms without reappointment.[7] However, the institution of reappointment makes judges dependent under both unified and divided government. If constitutional judges have static ambitions and can be reappointed, they will respond to those with power in order to gain reappointment. This power may be in the hands of a president with a congressional majority or an *opposition* majority (including a coalition). When there is not a majority to impeach or reappoint the judges, they will be independent.

Initial empirical research on Latin America judicial politics in different countries allows for a general view of terms, partisan powers and independence of constitutional judges. Table 1 below summarizes the expected outcomes holding constant the assumption of static ambitions while relaxing the assumption of a passive congressional opposition, and including term lengths and partisan powers as institutional variables. The column labeled *examples* includes countries or provinces of countries where empirical research was carried out at different years or periods. The column titled *research* indicates the correspondent researchers for each country or region.

Most research on Latin American judicial politics has concentrated on situations summarized in lines one to six: judges with life tenure, which is linked to the president's term and leverage on congress.

[7] Except in situations as those studied by Helmke (2005), where life tenure is still insecure, fostering judges' strategic behavior.

Table 1: Judicial Terms and Judicial Independence in Latin America

	Terms	**Length**	**Partisan**	**Dependent on:**		**Examples**	**Research**
		of Term	**Powers**	**President**	**Opposition**		
1	Life	---	High (Unified)	**Y**	**N**	Argentina (1946-83/ 1989-97), San Luis (1983-2003)	Chávez 2004; Helmke 2005
2	Life	--	Low (Divided)	**N**	**N*** **	Mendoza (1995 -2003) Brazil (1998 -2003)	Chávez 2004; Helmke 2005; Arantes 2005
3	No reappoint-ment	Short****	High (Unified)	**Y**	**N**		
4		Short	Low (Divided)	**N**	**N**		
5	No reappoint-ment	Long	High (Unified)	**Y**	**N**	Mexico (PRI era)**, Venezuela (2004-2007) Ecuador (2007…)	Magaloni and Sanchez 2001; Pérez Perdomo 2005
6	No reappoint-ment	Long	Low (Divided)	**N**	**N**	Chile after 2005	Nogueira 2005
7	Reappoint -ment	Short	High (Unified)	**Y**	**N**	Honduras 2005	Ramos 2005
8	Reappoint -ment	Short	Low (Divided)	**N**	**Y**	Ecuador (1978-2007)	
9	Reappoint -ment	Long****	High (Unified)	**N**	**N**		
10	Reappoint -ment	Long****	Low (Divided)	**N**	**N**	Chile before 2005	Scribner 2004 Hilbink 2007

* The categories for this variable correspond to strong partisan powers (unified government with the capacity to impeach) and strong opposition (with the capacity to impeach). Deadlock (no one can do much) is not included.

** When the current court was appointed in 1995 the PRI still enjoyed supermajoritarian control of the senate and could control the appointment process (Magaloni and Sánchez 2001)

*** Following the literature, I am assuming an opposition without the necessary majority to proceed to impeachment.

**** I assume a short term as five years or less; a long term is five year or more. When a term is long, a judge is independent early in the term. However, assuming static ambitions, he will be dependent late in the term as the time for reappointment approaches.

My dissertation is concerned with conditions described in lines seven to ten, and especially the situation of short terms with reappointment, illustrated by Ecuador in the period 1978-2007. In line five, Ecuador appears as a system without reappointment and long term (nine years); this is due to enactment of the new Ecuadorian Constitution in 2008. I analyze the challenges and projections of this change in the institutional design of the Ecuadorian Constitutional Court in the conclusion.

Notice that table 1 includes only countries with systems of life tenures and appointment, excluding systems where supreme court or constitutional justices are elected by the votes of citizens, such as some American states. In fact, Latin American countries do not include elections among their systems of judicial selection. In these countries judges are always appointed by different political, judicial, or administrative bodies. Consequently, these countries are not comparable to systems that include elections.[8]

1.2 JUDGES AND LEGISLATIVE COALITIONS

The third assumption of the separation of powers theory, the assertion that an opposition congress has no power to pursue impeachment or other effective retaliation affecting judges' behavior, is brought into question by the possible effects of legislative coalitions.

[8] In the US, at the state level, the diversity of systems of judicial selection of Supreme Court justices (partisan and nonpartisan elections, appointment by the legislature or the governor, and merit selection) has yielded some comparative endeavors (Epstein, Knight and Shvetsova 2000). Compared to appointment, partisan elections is a more competitive selection system and produces the highest defeat rates for incumbent judges (Champagne 2003, Hall 2001).

This assumption is based on the idea that in divided government, neither the president nor the opposition has the legislative majority to threaten, punish or appoint judges (Chávez 2004). This situation is especially clear in bipartisan systems, but according to this logic, the greater number of political players in multiparty systems would favor divided government and consequently judicial independence.

However, partisan fragmentation is not static; political parties may form legislative coalitions to support or oppose the government, and these coalitions may reach the majorities and have the interests to threat, impeach, or appoint constitutional judges. In fact, students of Latin American legislative politics have found that minority presidents have been able to assemble government coalitions under presidentialism through distribution of incentives such as cabinets posts (Amorín Neto 2002), political stability beneficial for politicians' futures (Carey and Shugart 1998), selective payoffs or investment (pork) to political parties or individual legislators (Ames 1995, Mainwaring 1999, Mejia Acosta and Polga-Hecimovich 2010).

If the formation, strength, and collapse of legislative coalitions have an effect on the executive's ability to advance its policies and legislation, we should also examine if these coalitions influence the potential veto players of those policies: constitutional judges. Like unified government, legislative coalitions in fragmented systems may provide the required majority for impeachment or appointment of these judges. This power may be enhanced by certain institutional conditions, such as judges' short terms, simple majority for impeachment, or immediate reappointment.

In a fragmented legislature, legislators supporting a minority president will try not only to pass their preferred laws but also to avoid a court's veto on those laws through constitutional review. In order to obtain that safety, the government coalition will appoint or threaten, impeach,

or reappoint constitutional judges to obtain judicial deference to the government's legislation. In the same way, the opposition will also try to form a coalition to veto the president's laws, and will aim to appoint activist constitutional judges.

However, cohesion and length of legislative coalitions may differ widely. If coalitions are cohesive and stable, the situation to some extent may resemble a bipartisan system. If the majority coalition supports the government this may be close to unified government, which would diminish judicial independence; if the opposition coalition controls the majority this may be similar to divided government, which would increase judicial independence.

But if legislative coalitions in a highly fragmented legislature are also short-lived, political instability may also affect constitutional judges. In some presidential systems, when a majority coalition erodes and is displaced by a new coalition, the new majority may exercise its power much in the same way as in a parliamentary system (Mejia Acosta and Polga-Hecimovich 2010). Members of the new coalition may demand cabinet posts, budget allocations and, most importantly for the current analysis, judicial posts. In other words, if fragmentation leads to shifting legislative coalitions, conditions for judicial independence are likely to be adverse.

Additionally, if judges' terms are short, these judges will pay more attention to legislative coalitions and timing within their own terms rather than to presidential terms. As stated in condition 2 above, when the term is long, impeachment is the formal way of removal. However, if the judge's term is short, judges, assuming static ambitions, will have also to create political conditions for reappointment, especially at the end of their own terms.

Political conditions for a judge to obtain reappointment in a highly fragmented party system are, in turn, related to formation, cohesion, and collapse of legislative coalitions with reappointment power at the end of constitutional judges' term. Because the president directly

controls just few votes within congress[9] and the legislative coalitions he forms tends to be unstable due to the high number of political parties, a judge looking for reappointment may find it difficult to stay aligned with the president at the end of his own term. He will have to look for as many legislative votes as possible beyond those of the president and those of his own party, including votes of the opposition. In doing so, at the end of their terms constitutional judges, even those supportive of the government, should rule more frequently against the government.

Most of empirical judicial research in Latin America focuses on countries where terms of constitutional judges are longer than those of the president or legislators, like in Argentina, Mexico, or Chile. Under these institutional conditions, strategic defection or delegation may make much more sense than in countries like Ecuador or Honduras, where terms of judges are short and reappointment is a possibility. In the first case, formally judges have stability in their posts but they need to avoid impeachment from the legislative majority supporting the incoming president. In the second case, when terms are short and there is reappointment, what really matters is timing within judges' own terms, because potential reappointment is marked by the end of their own terms. It is at this time and not at the end of the president's term that legislative coalitions make reappointment decisions whereas probabilities of impeachment are more linked, in a fragmented legislature, to shifting legislative coalitions than to a new presidential term.

[9] Assuming that he controls the votes of his own political party

1.3 CONSTITUTIONAL REVIEW

Constitutional review, the dependent variable of my analysis, is the most politically relevant function of any constitutional court. The power to veto norms enacted or decisions made by the other branches of government necessarily places any constitutional court within the political game. A constitutional court, according to institutional design, can intervene before, during, and after the legislative process (Navia and Rios Figueroa, 2005). In some countries, the court can also veto constitutional reforms and international treaties. Additionally, some constitutional courts decide on the constitutionality of electoral norms, in this way directly reshaping the political map.

Constitutional review is a good indicator of judicial independence. The concept of judicial independence is complex and elusive, since it points out both normative and empirical dimensions (Linares 2003). However, constitutional review may offer partial but important information about independence. For empirical research purposes, Iaryczower, Spiller, and Tommasi (2002) have defined judicial independence as "the extent to which justices can reflect their preferences in their decisions without facing retaliation measures by congress or the president" (699). This is a good working notion of judicial independence because it underlines the concrete power relations making possible a variety of constitutional review rulings. Because these rulings refer directly to actions of the political branches, they provide good information about the levels of judicial independence. Following the standard measurement of judicial review, I will use a dichotomous variable indicating if a law or other juridical rule was upheld or voted unconstitutional. Within this analysis, I will study if constitutional judges behave in the same way when they rule on political cases compared to other cases without political relevance.

Research on judicial politics tends to place judges' voting either as strategic or as sincere behavior. Nevertheless, it is not clear why one behavior has to completely exclude another. Constitutional judges could work, for instance, on a strategic mode during some specific times or when ruling on certain issues of high political relevance whereas the same judges of that court could state their sincere preferences at other times or when voting on cases without political relevance.

In fact, judges working at these two levels or dimensions are probably more representative of the activity of many Latin American constitutional courts. Unlike the US Supreme Court, most of these Latin American courts do not control their dockets, and rule on numerous cases of interests only for the parties involved. The same Latin American courts rule on other cases that implicate key political issues involving actors such as the congress, political parties, the president, and powerful pressure groups. These cases are continuously reported by the press, and they sometimes even elicit reactions of the congress or the president such as threats of impeachment against constitutional judges as well as reactions of other political actors.

This is analogous to the way research in American judicial politics has found that different policy areas have different levels of political salience for judges and other actors involved. For instance, Langer (2002) has found these differences studying rulings across state supreme courts. The scope of conflict (number of actors involved) and the type of conflict (ideological importance) determine political repercussions and importance for political actors.

Chapters three and four of the present work examine constitutional review of laws compared to review of other norms such as decrees or executive rule-making. Because laws are the most general norms after constitutional norms and their enactment procedure is complex, they generally tend to involve more political actors—especially institutional and partisan

actors—than other norms such as decrees, resolutions and others exclusively enacted by the executive. In the same way, many crucial issues within ideologically charged policy areas such as economics, labor, welfare, or elections are also regulated by law. Consequently, when a constitutional court strikes down a law, its political salience tends to be higher than those rulings when the reviewed norm has "lower hierarchy".

Higher legal hierarchy of a law with respect to lower hierarchy of other norms refers not only to formal legal status but involves important political processes. Unlike executive rule-making, enactment of a law necessarily implies interaction of the executive and the legislative. This legislative process is often carefully regulated by constitutions and specific laws; in fact, variations on legislative institutions such as veto power or initiative may deeply change the balance of power between presidents and legislatures.[10] Constitutions often also reserve regulation of certain matters of high political profile such as rights, taxes, budgets or constitutional reforms to the law. Consequently, legislative debate on laws is often accompanied by political participation of political parties, interest groups, elites, and leaders of public opinion. Additionally, laws generally establish the basic framework and procedures formally constraining the executive's rule-making. Because of all these features, news about laws is proportionately more reported by the media than other norms, which reflects and increases public awareness and interest. Of course, this greater political relevance is only proportional; not *all laws* are equally politically important, and *some* executive rule-making may be as politically important as some laws.

[10] In the study of Latin American judicial politics, for instance, research interested in inter-branch relationships has studied legislative powers such as veto, partial veto, and presidential initiative to introduce legislations and presidential decree authority (Shugart and Carey 2003)

In the Ecuadorian case, Basabe Serrano (2008, 2009) has studied constitutional review rulings on economic liberalization and labor deregulation from 1999 to 2007 using the attitudinal model. Basabe places Ecuadorian constitutional judges on an ideological scale ranging from far left to far right, using interviews with lawyers, TC advisors, and politicians. He finds significant statistical relationships between this ideological measurement and TC judges' votes on constitutional review. According to Basabe, these results demonstrate that judges vote sincerely. Although he also finds correspondence between the ideological preference of the nominating parties and each TC judge, legislative fragmentation and participation of numerous organizations and political parties in the appointment process would make TC judges independent from control by any specific political party, according to Basabe.

What Basabe and other researchers using the attitudinal model are capturing is one level or dimension of constitutional courts' operation related to ordinary issues subject to constitutional review. These ordinary issues include thousand of decrees and regulations enacted by the executive and related to standard business of government, such as administrative decisions or operative rules to implement laws. Political parties generally are not interested in content or application of these ordinary decisions, and consequently constitutional judges are free to state their preferences.

In contrast, other issues generally taking the form of laws directly involve the legislative power and political parties. Enactment of laws implies specific parliamentary procedures and direct participation of political parties in the congress. Additionally, some constitutions require that key issues, such as taxes or constitutional rights, be regulated exclusively by laws. In fact, constitutional conflicts about laws tend to have a greater scope than constitutional review of

other norms.[11] Laws generally affect a greater number of people than other norms do, which may have electoral consequences for elected officials. In other words, the scope of conflict or numbers of actors involved in judicial review of laws tends to be higher. This situation, in turn, fosters legislators and the government to pay more attention to the constitutional review of laws than to review of other type of norms. When constitutional judges rule on the constitutionality of laws, it is much more likely that they take a strategic stance since political actors are directly interested in those decisions.

1.4 THE ECUADORIAN CASE

Ecuador provides a good case study on the politics of constitutional review for at least two reasons: 1) the persistence of divided government from the return to democracy in 1979 until 2007 and 2) the institutional features of the Ecuadorian Constitutional Tribunal.

Current studies on judicial politics in Latin America refer to presidents with strong legislative support (Argentina, Mexico) or minority presidents coexisting with relatively stable legislative coalitions and independent judiciaries (Chile). Different levels of legislative fragmentation, however, is a key variable studying relationships between congress and the government, even according to the separation-of-powers-theory which states that the higher the legislative fragmentation, the stronger become judicial independence.

In fact, the Ecuadorian case challenges the hypothesis that divided government or a highly fragmented legislative system increases the probability of judicial independence. In the

[11] This is a matter of proportion because most (but not all) laws are politically relevant, whereas most (but not all) other norms have low political importance.

period of study, 1997-2004, Ecuador had the most fragmented party system in Latin America after Brazil. On average, the president's party has controlled only 26 percent of legislative seats since 1979 and no president held a congressional majority (Araujo 2004). Most Ecuadorian presidents assembled fragile, short-lived, and content-specific legislative coalitions (Mejía Acosta 2004). Paradoxically, the Ecuadorian president has wide range of powers, such as veto, initiative, and decree powers.

Unlike most of the courts studied in Latin America, whose judges have long terms without reappointment, until 2008, the Ecuadorian Constitutional Tribunal members had terms of four years with unlimited reappointment and no age-limit for retirement. In Ecuador, constitutional judges were appointed and reappointed by the National Congress[12]. Two of them were nominated and appointed directly by the legislature, and the rest were selected from lists sent to Congress by diverse nominating bodies. Congress was required to appoint two judges from the lists sent by the president, two judges from the lists sent by the Supreme Court, one candidate of the list sent by mayors and prefects, one judge from lists sent by unions and organized indigenous groups, and one judge from lists sent by trade organizations and chambers of commerce.[13] However, political parties were the key actors in the appointing process in congress and had strong influence over the nominating institutions such as city councils and workers' unions. In fact, the Ecuadorian press widely reported the appointment of TC judges, their links to political parties, and the coalitional negotiations in congress to appoint, impeach or remove these judges as well as the pressure from parties when the TC ruled on politically key cases.

[12] Table 2-1 in chapter 2 provides an historical summary of TC appointment and composition.
[13] Provision 275 of the 1998 Ecuadorian Constitution

The Constitutional Tribunal had important powers in the 1998 Ecuadorian Constitution. The TC had the power to declare a law or other norms as unconstitutional when that norm was challenged by the president, the National Congress, the Supreme Court, city councils and provincial councils, one thousand citizens or any citizen with the Ombudsman's support. The Tribunal was also the court of last resort to decide on amparo cases, or cases of government's actions violating constitutional rights decided by civil judges acting as judges of first resort, and only later brought before the TC (acting as an appellate court).

Institutional and political practices related to the Ecuadorian TC provide empirical evidence on the role of terms, reappointment, and impeachment. As I explain in the following chapters, the TC has been constantly subject to threats or actual procedures of congressional impeachment from 1997 to 2004. Interestingly, threats and impeachments have occurred at the time of intense political conflict on specific legislation. In spite of high TC judge instability, about 30% of them were reappointed. This situation has been fostered by institutional conditions such as a four-year term without any legal limitations for reappointment. Additionally, as I show in chapter four, most of TC judges have partisan affiliations or close links with specific political parties.

In summary, the Ecuadorian system provides an excellent case study to observe relationships between constitutional judges and political parties. Even the Ecuadorian press and public opinion directly identify constitutional judges by their party tendencies or identities, providing clear information for a direct empirical test about how party preferences affect constitutional review.

1.5 OVERVIEW

The central argument of my dissertation is that political parties and timing influence constitutional judges' behavior in highly fragmented partisan systems under specific institutional conditions such as short terms, impeachment and reappointment.

Partisan influence on judges' votes is dependent on institutional features and selective. Appointment, reappointment and impeachment may be useful tools for legislative coalitions to obtain judges' deferential behavior when terms of these judges are short and immediate reappointment possible. However, politicians do not care equally about all cases of constitutional adjudication. Compared to the total of constitutional review cases, only few, generally about laws, attract the congress' and president's attention, are reported by the media as national issues, and/or mobilize pressure groups. In a fragmented party system, such partisan influence is even more difficult given higher costs for the coalition to monitor and enforce judges' deferential behavior. Hence, a natural division emerges between politically important cases and standard cases without political pressure. Whereas some political variables help explaining votes on political cases, they may have no influence when ruling on standard cases without political relevance. As a consequence, a constitutional judge may behave strategically on political cases and vote sincerely on standard cases.

Partisan influence is also limited by judges' own timing since they need a wider support of legislative votes as reappointment time approaches. In a highly fragmented party system, the number of legislative votes directly controlled by the judge's party may be insufficient for reappointment. Hence, the judge will need to sum votes from the opposition to obtain reappointment. As a consequence, a judge may vote sincerely during most of his or her term on many cases, taking advantage of political fragmentation or lack of political pressure, while

behaving strategically when voting on cases of high political relevance and when time for reappointment approaches.

In the following chapters I combine qualitative and quantitative empirical research on constitutional review rulings of the Ecuadorian Constitutional Tribunal. Chapter two aims to explain the emergence of the Ecuadorian Constitutional Tribunal as a political actor. The chapter presents a historical and political account of constitutional review in Ecuador from its origins in 1945 until the crucial constitutional reforms of 1996 and 1998, and the institutional crisis of 2005. It shows the constant link between legislative coalitions and TC appointments and removals. Chapter three presents statistical analysis of judicial decision-making patterns in the TC from 1997 to 2004. Employing logistic regressions, it shows the empirical links between individual votes of constitutional judges, their political parties' position with respect to the government. The models also include timing in the judge's term as an important predictor of voting as well the role of political plaintiffs, the ombudsman, and case timing. Chapter four examines some key cases of constitutional review in Ecuador from 1997 to 2004. These cases link the dynamics of legislative coalitions, and specifically the position of some legislative political parties, with TC judges' votes on those cases. Chapter five compares the TC institutional model operating until 2007 and the TC model designed in the new Ecuadorian Constitution enacted in 2008; the analysis is instructive because key variables examined in my dissertation, such as terms, impeachment, and reappointment were redesigned in the new constitution, allowing for future comparative study in the area.

2.0 CONSTITUTIONAL REVIEW IN ECUADOR

Ecuador is a good example of how courts and judges have increasingly became key political actors in Latin America. Especially since the 1980s, the Constitutional Tribunal, the Supreme Court, and the Electoral Tribunal had been in the midst of intense conflicts between the executive and the legislature. Since 1997, many former Ecuadorian presidents have faced criminal charges once out of office[14]. The epitome of the politicization of the courts was the 2004 - 2005 crisis when then-President Gutiérrez assembled a pro-government legislative bloc to avoid impeachment. In exchange for their support of the president, the constituent parties required removal of all high court members and allocation of new appointments between the coalition's parties. Paradoxically, this action triggered a national crisis including four months of street protests ending with Gutiérrez's removal from office in April 2005.

The Ecuadorian Constitutional Tribunal (TC) has played an important role in this relationship between the judiciary and politics. Because members of the TC had short terms and were appointed and could be impeached by congress, there is a direct relationship between legislative coalitions and the TC's functioning[15]. From 1997 until 2007, shifting congressional coalitions removed the tribunal six times without following the proper impeachment procedures.

[14] Presidents Abdalá Bucaram (1997-1997), Fabián Alarcón (1997-1998), Jamil Mahuad (1998-200) and Gustavo Noboa (2000-2003) faced criminal prosecution accused of bad use of public funds.
[15] The new 2008 Ecuadorian Constitution changes appointment, terms, and impeachment rules for the Constitutional Tribunal or Court; I address this issue in the conclusions chapter.

After each removal, political parties assembling new congressional majorities allocated the tribunal's seats among the key members of the coalition. In other words, the TC's appointments served as patronage to be distributed among the government's new allies in exchange for congressional support to avoid impeachments, passing legislation or implementing policy. Additionally, the tribunal's constitutional powers themselves were also politically attractive, since hundreds of key pieces of legislation, Executive Decrees, or congressional resolutions were vetoed, modified or legitimized through constitutional adjudication. Even during presidential or congressional crisis, political parties removing public officials had to depend on the tribunal, since many of their actions were challenged as unconstitutional before the TC. In other words, the tribunal was an important source of legitimacy and a key veto player (Araujo 2004).

In this chapter, I review the main historical features of constitutional review in Ecuador. Since my dissertation studies how political parties influence constitutional judges' behavior, I focus specifically on the relationships between the Ecuadorian TC and the congress, where much of partisan politics takes place. Appointment and reappointment, short term lengths, and impeachment rules interacted with informal rules such as appointment of judges linked to wider coalitional negotiations or congressional removal of judges without impeachment procedures, allowing congress to keep tight control over the TC. It was only after the 1996 constitutional reform that the Constitutional Tribunal was given greater leverage through new constitutional powers. Nevertheless this process was broken by the 2005 political crisis.

The chapter also shows that congressional control is related to the idea of *parliamentary sovereignty,* which has been a dominant concept in Ecuadorian constitutionalism. According to this principle, the people are the sovereign, and because congress represents the people it must prevail over the other branches of government. Consequently, congress has had the last word in

constitutional interpretation, including cases where a law was deemed unconstitutional. Constitutional review decisions made by the TC were considered "provisional" because congress had the power to overturn them as the final interpreter of the constitution (Avila 2004, Ordóñez 2006, Salgado 2004, Zavala Egas 1999). In other words, when a law was challenged as unconstitutional, the case could be taken before the TC but the final decision remained in the congress. In fact, especially during its early years, the TC was more of an administrative court that exercised control over the executive than a court to perform constitutional review of legislation enacted by congress.

The history of constitutional review in Ecuador may be laid out in three periods: 1) The historical antecedents (1830 – 1978); 2) The emergence of the tribunal as a political actor (1979-2005); and 3) the TC's crisis. I examine below the main features of each period.

2.1 HISTORICAL BACKGROUND

The Ecuadorian Constitutional Tribunal has its earliest origins in the Tribunal of Constitutional Guarantees (TGC) created by the 1945 Constitution; however, some institutions of formal judicial review existed before this time. Hence, its historical roots can be traced to two periods: before and after creation of the TGC. The first period is named here as parliamentary dominance whereas the second presents the TGC's formation and development.

2.1.1 Parliamentary Dominance

This period extends from Ecuador's foundation as an independent state in 1830 until the establishment of the TGC in 1945. During this time, no specialized constitutional court existed in Ecuador, and the congress itself had the final word on constitutional review. Although Ecuadorian constitutions formally proclaimed the supremacy of the constitution over other laws and norms, no specific legal action or institution existed to allow citizens to claim when a law violated the constitution (Ordoñez 2006).

A landmark case occurred in 1887 which clearly showed how *parliamentary sovereignty* constrained judicial behavior at that time. Federico Irigoyen, an Ecuadorian citizen accused of treason, was condemned to the death penalty by a military court. The court had applied the penalty based on statutory provisions enacted by congress, which reformed the Criminal Code. However, the 1884 Ecuadorian Constitution clearly prohibited the death penalty. When the case reached the Supreme Court, the court stated that even if the law was unconstitutional, she had no power to reform the law or overturn the legislators' will stated in the law, therefore confirming the death penalty. According to the court, congress was the main institutional expression of the people's sovereignty and therefore citizens and authorities should be under its rule (Barragán 2003, Torres 2003).

In the same way, when the Liberal Revolution took place in 1895, the new constitution clearly established that only congress could declare a law or decree as unconstitutional.[16] Although the Supreme Court and the Council of State (*Consejo de Estado*) could *observe* and

[16] Provisions 6 and 7 of the 1906 Ecuadorian Constitution. This was a reiterated provision in Ecuadorian constitutions until the 1992 constitutional reform.

even declare null some norms because they were contrary to the constitution, only congress—as the people's representative—could have the final word about constitutionality of the laws.

Hence, two declarations may be made about this period: first of all, there was a deep contradiction between formally proclaimed constitutional supremacy and parliamentary sovereignty. If the constitution is the highest law it should also constrain legislators, and courts should have the power to declare when laws breach the constitution.[17] Second, there is a paradox when legislatures are formally considered sovereign but in fact they often were tightly controlled by the executive. Hence, the legislative majority was powerful but dependent on the president.

2.1.2 Creation of the Tribunal of Constitutional Guarantees (TGC)

In 1945, a constituent assembly gathered to draft a new constitution. The assembly was under political pressure to bring changes due to a recent and – for Ecuadorian interests - disastrous war against neighboring Peru, outrageous electoral fraud during the last presidential elections, national social turmoil, and state repression[18] (Bossano 1985, Sosa-Buchholz 1990, Vega 1987). Under these circumstances, the assembly established in the new constitution the first constitutional court, called the Tribunal of Constitutional Guarantees (TGC); it also set up an independent electoral court (Grijalva 1998). According to the 1945 Constitution, congress had to

[17] This contradiction places Ecuador and other Latin American countries in a different state from nineteenth-century European countries where constitutions were not formally acknowledged as binding legal rules, but only as political declarations. It is also different of the US case, where the constitution was considered a law from its beginning as an independent state, and the Supreme Court claimed for itself the power to overturn unconstitutional laws.

[18] In Ecuadorian history this period is known as the Glorious Revolution ("Revolución de la Gloriosa") due to national mobilizations after defeat in the war against Peru and removal of then-President Arroyo del Rio who signed the Rio de Janeiro treaty with Peru.

appoint five of nine TGC members,[19] whose terms were two years with unlimited reappointment. The TGC could only suspend application of laws until congress finally decided on the issue.

Table 2-1 below summarizes the historical evolution of main institutional features of the Ecuadorian Constitutional Tribunal[20]. As the table shows, and I explain in detail later, through different constitutions the tribunal has evolved from a predominantly political institution to a court of law. At the beginning, legislators not only appointed TC members but some legislators were members of the tribunal; being a lawyer was not a requirement to be a TC member, and terms were only 2 years long. However, these features changed over time. The 1978 Constitution prohibited legislators from becoming members of the tribunal, while a 1992 constitutional reform required TC members to be lawyers and increased terms to four years. Nevertheless, until the 1998 Constitution, congress was the prime determinant in the appointment of TC members.

[19] Other members were the president of the Supreme Court, a representative of the President of the Republic, the Solicitor General, and one representative of workers' unions.
[20] The name of the Tribunal was Tribunal of Constitutional Guarantees (TGC) until 2006 when the name changed to Constitutional Tribunal (TC).

Table 2-1: The Ecuadorian Constitutional Tribunal, Appointment and Terms

Constitution/ Reform	*Number of members*	*Congressional Appointment* [a]	*Other Appointing Bodies* [b]	*Term*
1945	9	Congress (5) 3 legislators	Supreme Court, President, Solicitor General, Unions	2
1967	10	Congress (6) 3 legislators	Supreme Court, Presidency, Solicitor General, Electoral Tribunal ***Nominating bodies*** [c]	2
1978	11	Congress (11) No legislators	Presidency (2), citizens (2), mayors (1), prefects (1), unions (1), business (1)	2
1992	11	Congress (11) Have to be lawyers	Presidency (2), Judiciary (2), mayors (1), prefects (1), unions (1), business (1)	4
1996	9	Congress (9) Same requisites than Supreme Court Justices	Presidency (2), Supreme Court (2), mayors and prefects (1), unions, peasants and Indians (1), business chambers (1),	4
1998	9	Congress (9)	Same	4

[a] Number in parenthesis indicates number of TC members appointed by Congress with simple majority.
[b] Each institution nominates or appoints one TC member unless other number is indicated in parenthesis.
[c] Number in parenthesis indicates number of TC judges nominated by each institution.

Ecuador was one of the first Latin American countries to adopt a specialized constitutional court. This court was designed under the European influence of Hans Kelsen's model of 'concentrated constitutional control', which implies that final decision-making about constitutional review is made by a specialized court with national jurisdiction. However, under

the ideological influence of the 1930 Spanish Constitution, Ecuador adopted such a court in 1945 (after Cuba was the first in Latin America to do so in 1940), long before the other Latin American countries that eventually adopted this system implemented it. In spite of this early formal adoption, the tribunal did not work well, because in 1946 a coup led by President Velasco Ibarra discarded the 1945 Constitution and fostered enactment of a new constitution which no longer included the TGC.

In 1945, President Velasco Ibarra strongly complained that the TGC's powers placed tremendous restraints on the executive (Sosa-Buchholz 1990, Vega 1987). In truth, the TGC was conceived to replace the old Council of State established in former Ecuadorian constitutions, and therefore it was an administrative body overseeing the executive's decrees and resolutions rather than a court of law to adjudicate on constitutional review of laws (Vera 1948).

However, the 1945 Constitution laid out the basic features of constitutional adjudication in the country until the mid-1990s, including institutional design of the Constitutional Tribunal. Even as late as 1995 the TGC had the power only to 'suspend' application of laws deemed unconstitutional when a judge submitted a constitutional question and until congress finally decided on the issue. When the TGC finally replaced the old Council of State (*Consejo de Estado*), it incorporated the council's corporatist composition which included representatives of worker's unions, business chambers, Indian and peasant organizations, and local governments. These institutions and corporations sent lists of three candidates (*ternas*) to congress from which the TGC members could be chosen and appointed. This mixture of partisan and corporatist arrangement was maintained until the 1998 constitutional reform.

Additionally, the TGC was given other constitutional powers not bestowed to it by former Ecuadorian Constitutions. In 1945, the constitution gave *a priori* review power on law

proposals being discussed in congress to the tribunal instead of the Supreme Court (Salgado 2004: 40). Paradoxically, constitutional adjudication on norms with lower hierarchy than laws was weakened in the 1945 Constitution, since the 1929 Constitution allowed the Council of State to declare null such provisions whereas the 1945 Constitution only gave the TC the power "to make observations" about them.

According to the 1946 Constitution, the Council of State replaced the TGC, and the Supreme Court was again given the power to 'suspend' a law when was passed by congress breaching constitutional procedures. Nevertheless, the final decision was again in hands of congress (López 1999).

The 1967 Constitution reestablished the TGC but also gave the Supreme Court greater power on constitutional review, specifically the power to suspend a law until final congressional decision, whereas the TGC was limited to formulate 'observations' about constitutionality of lower-hierarchy rules such as executive decrees. Congress had the power to appoint six out of ten TGC members, including up to three members of congress. Most TGC members had a two-year term. This constitution clearly reveals the partisan character of TGC appointments as it included provisions dictating that TGC members should represent all political tendencies, including minorities; it also stated that political party leaders and other public officials could attend TGC sessions, having a say in the proceedings but no vote.[21]

[21] Provision 219 of the Ecuadorian Constitution of 1967.

2.1.3 Transition to democracy

Ecuador was ruled by dictatorships from 1970 until 1979, and the transition to democracy in 1979 deeply affected the electoral and party system. In the late seventies, the military government organized two commissions of legal experts to design two different proposals of constitutions and submit them to plebiscite. One commission prepared a proposal based on a reformed version of the 1945 Constitution, whereas another commission proposed a totally new constitution. Citizens selected the former option on a plebiscite held on January 15, 1978.

The 1978 Constitution, along with an Electoral Law and a Law of Political Parties also designed by the correspondent commission, were aimed to modernize Ecuadorian political parties. The explicit goal of this legislation was to replace populism and *caudillo* rule that had dominated politics since the mid-1940s with national political parties organized on the grounds of clear ideologies and policy programs (Pachano 2007). In order to have strong political parties, constitutional and legal provisions established that only parties could nominate candidates for public office and had to reach during elections a minimum mandatory threshold[22] to maintain the party registration, whereas reelection of public officials and political alliances among parties was prohibited[23]. This constitution also adopted a runoff system for presidential elections. Beginning in 1983, constitutional reforms included several changes to this basic model, such as the inclusion of a stronger agenda setting-power for the president (1983), the elimination of the non-reelection rule (1996), and the adoption of midterm legislative elections (1998).

[22] This threshold initially was 0.05 and was applied specially to seats assigned through proportional representation (plurinominal), it was changed several times by diverse legal reforms. This requirement was eliminated in 1985.
[23] This prohibition was eliminated in 1996.

Contrary to the original goal of the legal design, the Ecuadorian party system remained fragmented and volatile until 2007[24] (Conaghan 1995, Mainwaring and Scully 1995, Pachano 2007). Instead of the legally envisioned national organizations, Ecuadorian political parties have been mostly regional electorates and organizations (Freindenberg and Alcántara 2001). In fact, Ecuador continues to have one of the most fragmented party systems in the region (Mainwaring and Scully 1995).

In spite of this fragmentation, four political parties showed greater electoral strength during the period study (Alcántara and Freidenberg 2003, Pachano 2007: 144). The Social Christian Party (PSC) was the most important party for most of these years. As the main right-wing party, the PSC has strong links with the business sector, especially businesses based in the country's largest city of Guayaquil and the coastal region. Under the strong leadership of León Febres Cordero, president from 1984 to 1988, the PSC was a key political actor in the formation of legislative coalitions, in the election and removal of some presidents, as well as in the appointment and dismissal of TC judges, Supreme Court justices, members of the Supreme Electoral Tribunal (TSE),[25] and other high public officials posts. The Democratic Left Party (ID) was another influential force; it belongs to the social-democratic tendency and it is linked to the middle class, industry, and banks (especially from the highlands). The Roldosista Party (PRE) is a populist party founded in 1982 by Abdala Bucaram, a former mayor of Guayaquil and president from 1996 to 1997; its electoral base is on the Coast. Finally, the Christian Democracy party (DP) formed and supported chiefly by middle class intellectuals from the highlands reached the presidency in 1998 with Jamil Mahuad. Other influential parties during this period

[24] In 2007, President's Correa political movement "Alianza País" won 80 out of 130 seats in the last Constituent Assembly, which is unusual in Ecuadorian politics. However it is still unclear if this change mark an structural transformation.

[25] This tribunal was the highest public institution to organize elections and rule on electoral conflicts in the country.

include: Pachakutic (PK), created in 1996 by CONAIE, the main indigenous organization; the Institutionalist Revolutionary Party (PRIAN), founded by Álvaro Noboa, one of the richest businessmen in the country to support his presidential campaigns; and the Democratic Popular Movement (MPD), the legal organization of the Ecuadorian Communist Party; the Patriotic Society Party (PSP) founded by then-colonel and future President Lucio Gutiérrez and a group of middle-rank officials of the military after they led a *coup d'etat* against President Jamil Mahuad; and the Socialist Party (PSE), a small leftist party founded in the 1930s by workers and intellectuals. Nevertheless, none of these parties achieved a congressional majority, and those in the presidency had to resort to crafting coalitions to gain support for the president.

Due to the extreme legislative fragmentation, from 1979 until 2007 no Ecuadorian president had a legislative majority of his own party, and presidents had to assemble short-lived and issue-based coalitions to pass legislation in congress or to implement policies (Mejía Acosta 2004, 2006). Partisan and legislative fragmentation usually has led to intense conflict between the executive and the legislature, generating persistent gridlock. Inter-branch conflict increased after the congressional removal of President Bucaram in 1997. Before that date, presidential successions were held every four years for seventeen years. But in 1997, congress resolved a confrontation with the president by declaring him mentally unfit and thus removing him from office. After Bucaram's ousting, other two presidents, Jamil Mahuad and Lucio Gutiérrez, were also removed in the midst of national turmoil.

Mejía Acosta (2006, 2009) summarizes some interesting information about Ecuadorian presidents and political parties in congress in the table 2.2. It shows that no Ecuadorian president held a majority in congress (counting only on his own party) in the period 1979 – 2005. The table also shows two different periods of presidential stability. The first period (1979–1997) is

characterized by relative presidential stability. Only Jaime Roldós, who died in a plane crash two years into office, was replaced, in that case by then Vice President Oswaldo Hurtado. From 1984 to 1996 all presidents ended their four-year term. In contrast, during the second period, 1996-2005, no president remained a full term, and three presidents, Fabián Alarcón, Gustavo Noboa, and Lucio Gutiérrez had very weak congressional support from their own parties. This fragmentation is also clear from the column including numbers of seats of the largest legislative party. No single party reached a majority on their own; however, the PSC remained the largest legislative bloc from 1990, excluding only the years of Mahuad's government. In fact, the PSC was a key legislative actor and was influential in shaping relationships between congress and the constitutional tribunal during these years.

Table 2-2: Ecuadorian Presidents and Congressional Support (1979-2005)

Years	President	Government Party	Seats in Congress	Largest Party	Seats in Congress
1979-1981	Jaime Roldós	CFP	44.9	CFP	44.9
1981-1984	Osvaldo Hurtado	DP	0	CFP	17.4
1984-1986	León Febres Cordero	PSC	12.7	ID	33.8
1986-1988	León Febres Cordero	PSC	19.7	ID	23.9
1988-1990	Rodrigo Borja	ID	42.3	ID	42.3
1990-1992	Rodrigo Borja	ID	19.4	PSC	22.2
1992-1994	Sixto Durán Ballén	PCE/PUR	15.6	PSC	27.3
1994-1996	Sixto Durán Ballén	PCE/PUR	3.9	PSC	33.8
1996-1997	Abdalá Bucaram	PRE	23.2	PSC	32.9
1997-1998	Fabián Alarcón	FRA	1.2	PSC	31.7
1998-2000	Jamil Mahuad	DP	28.1	DP	28.1
2000-2003	Gustavo Noboa[1]		0	PSC	20.3
2003-2005	Lucio Gutiérrez	PSP	9.0	PSC	25.0
2005-2007	Alfredo Palacio		0	PSC	25.0

Source: Mejía Acosta 2006.

1 This president replaced Jamil Mahuad and did not have an organized political party to support him

After the transition to democracy, in the late 1970s, the TCG begun to slowly increase its powers through constitutional reforms. The 1978 Constitution reestablished the TGC, reproducing most of its features from the 1967 Constitution. Furthermore, in 1983 one of the

reforms transferred the power to suspend laws and other rules deemed unconstitutional until a final decision was made by congress from the Supreme Court to the TGC. The reform also extended the two-year term to all TGC members and required that at least some of them had to be lawyers by profession, which was not a requirement prior to that time. In 1992, a new constitutional reform transferred the power to make final decisions on constitutional review from congress to a new constitutional chamber of the Supreme Court, whereas the TGC remained as a constitutional court of first resort. However, in a contradictory way, the constitution also established that only congress could determine the general and obligatory meaning of unclear constitutional provisions,[26] which is a power that the TC and the Constitutional Chamber of the Supreme Court evidently required to perform constitutional review. Additionally, the reform required two-thirds of congress to appoint TGC members, and extended their terms to four years with unlimited reappointment. Finally, it required that all of TC members had to be lawyers.

The composition of the tribunal experienced some changes from 1978 until 1996. A tendency emerged to strengthen the TC's judicial features and diminish its partisan and corporatist features. For instance, unlike previous constitutions, the 1978 Constitution and its reforms required that those appointed directly by congress must not be legislators. Before 1978, congress not only appointed the majority of TC members but also appointed three legislators among these members. These institutional features plus extremely short terms and unlimited reappointment converted the tribunal into a sort of "extended sub-committee" of congress, an institutionalized expression of parliamentary sovereignty. However, the 1978 Constitution impeded appointment of legislators as tribunal members and required legal training for some TC members; later constitutional reforms raised this standard until requirements matched those of

[26] See provisions 141 and 142 of the 1978 Ecuadorian Constitution, reformed in 1992.

Supreme Court justices. In 1992 terms were doubled from two to four years for all TC members, and the judiciary was given the right to propose two lists of TC nominees to congress.

In spite of these changes, the TC's basic institutional design remained the same until the 1996 constitutional reform: most of the tribunal members were appointed by congress directly or from lists of three candidates sent by the other branches of government, corporations, and social organizations. Nomination of candidates did not diminish or impede partisan politics because political parties managed to influence nominating bodies. For instance, during the 1990s, the PSC had strong influence on business chambers, mayors' organizations, and the Supreme Court. The Socialist Party (PSE), and the Communist Party (MPD) influenced the unions as well as the peasants' and indigenous' organizations. Consequently, the nominating stage of the TC majority was mostly controlled by the appointing political parties. On the other hand, parties in Congress kept control through appointment, short terms, unlimited reappointment, and impeachment powers. In any case, the executive could still appoint at least two TC members through her right to send two *ternas*[27] to congress, which chose one candidate from each *terna*.

To sum up, this period showed that *parliamentary sovereignty* was still the dominant principle, but it also revealed a slow development of jurisdictional powers of the TGC. Congress and political parties kept strong leverage over the TGC, including its institutional design, members' appointment and reappointment, and relative power to overturn the TGC's decisions. Nevertheless, the TGC members' terms were extended to four years, and legal knowledge was required to be appointed. The TC was given greater powers but finally remained under control of the congress. In this way, the majority coalition in congress could use the TC to provide constitutional legitimacy to their decisions and those of the president when challenged; and when

[27] Each terna is a three-candidate list.

the opposition was the majority, it could, through the TC, veto norms and policies decided by the president.

2.2 THE CONSTITUTIONAL TRIBUNAL AS A POLITICAL ACTOR

2.2.1 The Constitutional Reform of 1996

The constitutional reforms of 1996 included the main changes on constitutional adjudication after transition to democracy in 1978 and before enactment of the 2008 Constitution. These reforms also shaped the constitutional reforms of 1998 and influenced activity and composition of the TC for twelve years.

In 1994, President Sixto Durán Ballén held a national plebiscite to reform the constitution. The plebiscite came three months after legislative elections had reduced the government's legislative bloc to just 3.9 % of total of seats. The president, a founder and former member of the Social Christian Party, had gained the 1992 presidential election portraying himself as independent from the influence of political parties, taking advantage of widespread citizen distaste for partisan politics. Once in power, Durán Ballén wanted to push economic and political reforms, but he lacked the necessary congressional support. He tried to implement these changes via a constitutional reform by asking in the plebiscite if the president should or should not send specific constitutional reforms to be discussed in congress. These reforms were mainly aimed to liberalize the economy and labor laws, transform the social security system, and decentralize the government. On August 28, 1994, Durán Ballén obtained approval of his plan

through the plebiscite. The reforms did not only include economic and social issues but also changed some institutional features of constitutional review.

In fact, the main reforms on constitutional review under the 1978 Constitution were made during 1995 and 1996. With this reform the TGC changed its name to "Constitutional Tribunal" (*Tribunal Constitucional*, or TC). The reform made the TC the court of final say for constitutional review but kept the general constitutional provision defining congress as the ultimate interpreter of the constitution. The reform also gave the TC more power to make final decisions on cases involving constitutional rights; it created the writ of *amparo*[28] and the office of the Ombudsman, and strengthened *habeas corpus*, while maintaining TC members' terms at four years, and reducing the number of TC members from eleven to nine. The TC was also given the power of *a priori* constitutional review on international treaties and law proposals. Additionally, all Ecuadorian high Courts were given the power not to apply laws that they deemed unconstitutional, whereas the TC decided finally on the issue.

Why did these reforms strengthening the TC and constitutional adjudication take place during this period? The response points to a *partial delegation of power* from politicians to judges due to specific political pressures at that time. As described, beginning in the early eighties, the crisis of Ecuadorian political parties had grown; no political party had reached the presidency twice since 1979, and conflict between a minority president and legislative opposition had became a constant. Public disapproval toward political parties reached its peak in 1992 when

[28] The amparo is a legal action to immediately suspend authorities' actions when a constitutional right is being violated; the tribunal decision is a judicial ruling and consequently has to be immediately obeyed. Before the 1995–1996 reforms, citizens could bring claims (*quejas*) before the TGC, and the tribunal could "make observations" to the authority violating rights and "require" his removal if the authority failed to accept the TGC decisions. Hence, amparo rulings have a greater coactive weight compared to the former claims systems.

Durán Ballén, a former PSC leader, abandoned his party few months before election, presented himself as an independent candidate[29] and was elected president.

Durán Ballén's government was composed of right-wing professionals, entrepreneurs, and intellectuals interested in economic liberalization. The government's modernization plan included privatization, deregulation, and greater productivity, especially of state power, the hydrocarbon industry, and telecommunications companies. In a clandestine agreement, during the first two years of the administration, the president's former party, the PSC, provided legislative support for the government in exchange of budgetary allocations for local governments held by PSC politicians and direct cash transfers to PSC legislators. This political agreement also included nomination of Supreme Court justices and members of the Electoral Tribunal (Mejía Acosta 2006, 2009).

However, the government-PSC coalition abruptly dissolved when Vice President Alberto Dahik publicly denounced the PSC after the party increased demands for government resources. In response, the PSC and other political parties begun to block government policies in congress through veto of legislation, and later, an impeachment process against the vice president[30]. Furthermore, the government believed that the constitution itself posed structural constraints to the plans of economic liberalization (Echeverria 2006). Hence, the government aimed for a constitutional reform limiting budgetary resources to congress. Mejía Acosta (2009) states that these reforms adopted through referenda in 1995 were oriented to eliminate legislators' ability to demand and channel budgetary allocations for their provinces, and reduce presidential use of

[29] Sixto Durán Ballen organized, however, a short lived electoral machine, the Republican Union (*Partido Unión Republicano*- PUR), to support his presidential campaign.

[30] The PSC also fostered criminal prosecution of Vice President Dahik accusing him of corruption in use of public funds. Although impeachment was not successful, Dahik had to resign and leave the country then the Supreme Court ordered his imprisonment.

discretionary off budget spending accounts. The central aim of the reform was to reduce availability and discretion of coalition incentives in order to overcome legislators' actions to block legislation and policies. However, as Mejía Acosta and Polga-Hecimovich (2010) point out, this reduction only made even more unstable legislative coalition compared to this process before 1996.[31]

The reduction of available budgetary resources for legislative coalition formation had a direct impact on the TC during the following years. Contrary to expectations, the 1996 constitutional reform made legislative coalitions shorter and weaker (Mejía Acosta and Polga-Hecimovich 2010), and the TC remained dependent on these legislative coalitions for judicial appointment, reappointment, and impeachment. Consequently, as I later show, greater instability of legislative coalitions after 1996 also made the TC much more vulnerable and unstable.

The scope of the 1996 reform was not limited to budgetary matters, but also included reforms to the justice system. Judicial reform was necessary to modernize these institutions according to the requirements of the market-oriented reforms sought by the government. In 1994, President Durán Ballén had organized a special commission of jurists to prepare a proposal for constitutional reform. These commissioners devised the institutional design strengthening the TC and protection of constitutional rights[32] (Salgado 2004). Many of the reforms to the TC and protection of constitutional rights proposed by this commission were later approved by congress.

To sum up, the 1995–1996 reforms on constitutional adjudication were designed outside political parties, by legal scholars and politically supported by a president who separated himself from political parties and used plebiscites to advance his program in a moment when parties

[31] According to Mejía Acosta and Polga-Hecimovich (2010) the average coalition duration in the period 1979-1995 was 12 months while this average was 3.32 months during the period 1996-2006.
[32] Personal interview with Julio Echeverria, political scientist whose research covers the Durán Ballén government, Quito, August 12, 2009.

generated legislative deadlock that blocked the government's modernization plans. Under these circumstances, political parties accepted a partial delegation of power to the TC. Delegation was partial because the tribunal was given greater powers but congress still maintained important instruments of control over the tribunal, such as appointment, reappointment, and impeachment. However, because legislative coalitions became much more volatile after 1996 due to reduction of incentives such as budgetary allocations, the TC was affected and TC judges were removed and appointed more frequently by these shifting legislative coalitions.

Table 2-3 below shows the expansion of TC powers in 1996 and summarizes the different legal actions at disposal of the TC in different periods. *A priori* adjudication refers to constitutional adjudication before formal enactment of a law or other norm. *A posteriori* adjudication occurs after the law or norm is formally enacted and can be concrete or abstract. Concrete adjudication implies that the law has been applied to a specific case, whereas abstract adjudication does not include any specific application to any case; the TC only examines an abstract contradiction between the law or other norm and the constitution. (Navia and Rios-Figueroa 2005). Table 2-3 shows that TC powers increased after 1996; unlike prior years, these powers included *a priori* as well as *a posteriori* adjudication, they also combined concrete and abstract adjudication while making the TC the final decision-maker in matters of constitutional review.

Table 2-3: The TC and Types of Constitutional Adjudication

Constitution / Reform	*A priori Adjudication*	*A posteriori Adjudication*	*Final Decision A posteriori adj.*
1945	Yes	Concrete	Congress
1967	No[a]	None[c]	Congress
1978	No[b]	None[c]	Congress
1983	No	Abstract	Constitutional chamber CSJ
1992	No	Abstract	TC[d]
1996	Yes	Abstract and Concrete	TC[d]
1998	Yes	Abstract and Concrete	TC[d]
2008	Yes	Abstract and Concrete	Constitutional Court

[a] Supreme Court (CSJ) exercises *a priori* adjudication
[b] Elimination of *a priori* adjudication
[c] Supreme Court exercised abstract and concrete adjudication
[d] Congress still had the power to establish a final and general interpretation of the constitution

The 1996 constitutional reform revealed the tension between change and status quo. On one hand, the reform was designed and supported by a government without any significant parliamentary support, a government holding a view supposedly independent of political parties. These conditions helped to foster change. On the other hand, political parties in congress had the last word on the issue, when they discussed and approved the reform. As a result, the TC obtained greater power, but legislative appointment, short terms, and impeachment rules made the TC still dependent on the legislature.

Rules for appointment of the Supreme Court (CSJ) also changed after a 1997 plebiscite on judicial independence and new provisions in the 1998 constitutional reform. Before this date,

the CSJ justices—like the Constitutional Tribunal members—were subject to appointment and impeachment by congress, but their terms were six years with unlimited reappointment. Under these conditions, the CSJ was also continuously and deeply affected by political conflicts between the president and congress.[33] Many of these conflicts ended up in impeachment of justices, and new appointments of close allies. The plebiscite asked Ecuadorian citizens if they approved of a new system of judicial selection by the same justices (cooptation) and life tenure.[34] Once this reform was approved in the plebiscite, it was included in the 1998 constitutional reform which established life terms for the CSJ justices, a system of cooptation for new appointments, and suppressed congressional impeachment. Consequently, at least at the institutional level, constitutional changes in the Supreme Court were deeper than for the TC. Nevertheless, in practice congress added a transitory provision to the 1998 constitutional reform and appointed CSJ justices "for the last time". These justices remained in office until 2005 when, in spite of the slew of reforms, a new political crisis rooted in the unconstitutional removal of all tribunals emerged.

2.2.2 The 1998 Constitution, the TC and legislative coalitions

The 1996 and 1998 constitutional reforms gave the TC a wider set of tools of constitutional control compared to former years. The TC finally displaced the Supreme Court in

[33] The largest conflict occurred in 1988 when then President Febres Cordero disagreed with constitutional reforms and legislative procedures leading to appointment of a new Supreme Court; the president ordered the military to impede the new justices appointed by congress from entering the Supreme Court Palace. As a strong symbol, the palace was surrounded by military tanks.

[34] The plebiscite also included a question about appointment of the Supreme Electoral Tribunal, the highest electoral court in Ecuador, it proposed a change from a system where congress appointed the tribunal members from lists sent by the president, the Supreme Courts and citizen's colleges, to a system where these lists were sent by the seven political parties obtaining the greatest number of votes at the end of general last elections, whereas congress kept the power to appoint the tribunal members from these lists. As this reform was also approved, it was later included in the 1998 constitutional reform.

matters of constitutional adjudication, whereas the jurisdictional dimension of the TC was formally strengthened through requirements of legal training for all members. By the 1990s , the TC was given power to control constitutionality of law proposals (a priori adjudication), and it could strike down any challenged law after its enactment by congress due to substantive or procedural constitutional violations, it could also invalidate norms and acts enacted by the president or his ministries (a posteriori adjudication). TC decisions were final and could not be revised by congress.

The constitutional reforms of 1996 and 1998 significantly decreased the number and type of political incentives available for presidents in order to forge legislative coalitions supporting their governments. As a consequence, these coalitions became weaker and shorter, which had a direct impact on the TC, as I show below. Nevertheless, TC members' appointment and impeachment remained under congressional control. Aware of the TC's growing powers, political parties managed to place close supporters as TC members to influence key political rulings. For the same reason, the TC was constantly affected by legislative politics. The composition of the TC reflected the interests and views of legislative majorities, whereas subsequent changes in those majorities frequently translated into removal of TC members. Although the 1998 Ecuadorian Constitution established an impeachment procedure, legislative majorities constantly evaded these rules in order to remove TC members and gain control of the tribunal through new appointments as I will explain.

As I will show in chapter three and below, these greater powers placed the TC in a paradoxical situation: on one hand, when ruling on cases without political pressure, the tribunal worked as a relatively independent court of law before which ordinary citizens brought their claims against violations of the constitution. On the other hand, when ruling on politically

important cases, the TC became a sort of additional legislative arena, an institution deciding thorough constitutional review on issues of great importance for the economy, the electoral system, or social rights; as a consequence, political parties permanently looked for influence or control over TC judges.

On July 7, 1996, after the constitutional reforms of 1996, Abdalá Bucaram of the Roldosista Party (PRE) was elected president. He assumed office on August 10, 1996. Students of contemporary Ecuadorian politics agree that Bucaram's presidential election marked the beginning of a new political period in Ecuador (Pachano 1997, Echeverria 2006) characterized by almost continuous presidential crisis until the election of current President Rafael Correa on January 15, 2007. In fact, Bucaram was the first of three elected presidents unconstitutionally removed from office by congress from 1997 to 2005. This period contrasts with the constitutional succession of Ecuadorian presidents from 1978 until 1997.

Although ostensibly a left-of-center populist, Bucaram and his government tried to continue the modernization, structural adjustment, and neoliberal policies implemented by Durán Ballén. His main economic goal was to apply a plan of monetary convertibility in order to detain escalating inflation (Acosta 1997). However, the social costs of such policies added to the public perception of his government's corruption, authoritarian style, and partisan manipulation of public institutions, triggered intense social and political conflict (Pachano 1997). Initially, Bucaram assembled a clandestine legislative coalition with the PSC obtaining its support for approval of the Electric Sector Regime Law and election of new Supreme Court justices. However, the coalition fell apart on November 1996 when the PSC rejected the government's proposal of raising taxes. The 1996 reforms played a role because they made it more difficult for

Bucaram to distribute budgetary concessions to keep the coalition together (Mejía Acosta and Polga-Hecimovich 2010).

Without enough support in parliament and pressed by increasing popular discontent, on February 1997 an opposition legislative coalition led by the ex-government partner PSC removed Bucaram, adducing mental incapacity and in the mid of a national strike. This legislative coalition also removed and replaced the Attorney General, the Solicitor General, the Ombudsman, other supervisory public institutions and also all TC members. The TC in particular was a threat to congress since it could declare congressional removal of Bucaram as unconstitutional.[35] The PSC managed to place three out of nine new TC members, including control of the TC presidency, while Pachakutic (PK), the party of Indian organizations which had been instrumental in massive street protests against Bucaram, placed two TC judges. The other coalition members, the Democratic Left (ID), the Liberal Party (PL), the Popular Democratic Party (MPD) and Popular Democracy (DP) each placed one judge. In this way, the greater difficulties in maintaining stable legislative coalitions created by the 1996 reform, along with the other economic and political conditions mentioned above resulted in the congressionally-led removal of almost all key high public officials, including the president and TC judges. This would be just the beginning, as during the next years from 1997 to 2005, shifting legislative coalitions described in table 2-4 would result in the removal of two more presidents and four constitutional tribunals.

[35] In fact, according to Ernesto López, then president of the TGC, the tribunal declared the removal of Bucaram as unconstitutional. However, in the midst of political turmoil and street protest, the tribunal decision did not have any political impact and remained relatively unknown; Quito, personal interview, January 27, 2006.

Table 2-4: Legislative coalitions and the Ecuadorian Constitutional Tribunal 1997 – 2007

President	*Legislative Coalition*	*Constitutional Tribunal**
Alarcón	1997. February 6. Congressional majority removes President Bucaram from office, after massive street protest.	Feb 6. Congress removes TC along with other top public officials. May 13. New TC appointment: PSC (3), PK (2), ID (1), PL (1), MPD (1), DP (1)
Mahuad	1999. March 30. DP (government) / PSC coalition breaks.	April 30. TC removal May 5. New appointment of six TC members: DP (3), ID (1), PSC (1), PRE (1) June 17. Appointment of other three TC members: PSE (1), PSC (2)
Gutiérrez	2003. February. Opposition coalition: PSC / ID, and other smaller parties: DP, PRIAN, PSE March. New government coalition: PSP / PSC and other smaller parties: PK, PRIAN, DP 2004. November. Government (PSP) / PSC coalition breaks and impeachment proceedings against President Gutiérrez begin. 2004. Nov 24. Government forms a new legislative coalition to avoid impeachment: Major parties: PRE, PRIAN, PSP 2005. January – April. National protests against congressional removal of courts. On April 20, congress removes President Gutiérrez from office.	2003. Appointment of two TC judges: PSC (1), ID (1) March 24. New TC appointments: PSP (2), DP (1), PSC (3), PK (1). 2004. Nov 25. TC removal. New appointment: PRIAN (2), PSP (2), PSC (1), MPD (1), PSE (1), PRE (1), DP (1). 2005. TC removal. Congress does not appoint new members for 11 months.
Palacios	2006. February 22. PSC / ID coalition breaks PSC leads new legislative coalition (PRIAN, PRE, PSP)	TC removal New TC appointments: PSC (4), EXECUTIVE (2), PRE (1), PRIAN (1), PSP (1).
Correa	2007. March 7. Electoral Court removes 57 opposition legislators. Government assembles new majority. April 23. TC declares legislators' removal unconstitutional.	April 24. TC removal June 1. New TC appointments: PAIS (2), MPD (3), PRE (1), PK (1), PSC (1)

*Party ID or closeness of TC members is widely reported in Ecuadorian Press. Each TC member has an alternate (*suplente*) who is not included here.

Once Bucaram was removed from office, congress appointed the President of the Legislature, Fabian Alarcón, as interim president. Alarcón called a national plebiscite for April 1997 in order to elect a Constituent Assembly aimed to reform the Constitution of 1978. The new Constitution[36] was enacted on June five of 1998 and basically followed the model of constitutional adjudication of 1978 but including the constitutional reforms of 1996. Terms, appointment, and impeachment of TC judges remained untouched. Political parties in the assembly preferred to maintain the same system in order to avoid conflicts on power distribution and advance other constitutional reforms.[37]

The Constitutional Assembly designing these new reforms was also dominated by traditional political parties; hence they basically maintained the status quo with regard to the TC composition. The TC members had still a short term for constitutional court standards, they had to be appointed by congress, and could have unlimited reappointment. Unlike Supreme Court justices, TC members could be subject to impeachment by congress.

Under the new constitution, a new elected president, Jamil Mahuad, was inaugurated on August 10, 1998. Mahuad's party, the Christian Democratic Party (DP) won 35 of 123 congressional seats, and like former Presidents Durán Ballén and Bucaram, Mahuad sought the legislative support of the PSC to assemble his governing coalition (Mejía Acosta and Polga-Hecimovich 2010). Based on this coalition, the president could pursue and pass key economic legislation to advance market-oriented reforms, and appointed the Attorney General, the

[36] From a legal and formal view, the Constitution of 1998 was only a constitutional reform of the Constitution of 1978. However, the importance of these reforms lets us speak of this as a new constitution.

[37] According to some members of the 1998 Constituent Assembly, if they had tried to change the TC appointment system a conflict among parties had would arise making it difficult to reach other partisan agreements; interview with Julio César Trujillo, a former TGC president and member of the Constituent Assembly, Quito, January 4 of 2006.

Ombudsman, the Banking Superintendent and the Electoral Tribunal. However, when the government declared a banking holiday and froze bank accounts in March 1999, Mahuad unpopularity rose dramatically, social protest escalated, and the DP-PSC coalition collapsed, on March 30 of 1999.

President Mahuad tried to form a new coalition with political parties on the left, especially PK and ID, and tried also to advance banking and public finance legislation. However, this was a difficult task because, as Mejía Acosta and Polga-Hecimovich (2010) observe, Mahuad "had already allocated strategic posts to the PSC (Judicial Courts, Electoral Tribunal)." Additionally, the Constitutional Tribunal, under PSC influence, declared unconstitutional some constitutional provisions which gave congress the legal power to impeach officials placed on these strategic posts.[38] Furthermore, the PSC announced a constitutional challenge before the TC against government's tax legal reforms, especially against the Law for Reforms of Public Finance. Facing these challenges and threats from the TC, in April 1999 the new legislative majority declared that TC judges were appointed not for a full term but just to complete the term of TC members removed in 1997. The legislature's argument that the TC judges were only completing a prior full term, plus public knowledge of their probable removal several months before the new congressional appointments and political weakness of the president all had an effect on judges' behavior, as I show in chapter three. Specifically, TC judges became "activists" against the government.

On April 30, 1999, the new legislative majority removed all TC members and appointed new ones allocating some posts among the coalition parties. President Mahuad could increase the

[38] *Diario Hoy* Newspaper, "El Tribunal Constitucional", Quito, 29 April 1999.

number of TC judges aligned with his political party[39], DP, from one to three. At that time the TC had ruled on or had pending other rulings on crucial economic issues such as constitutionality of a gas price increase, and the bank freeze ordered by President Mahuad in the midst of the above-mentioned financial crisis and economic depression. Consequently, the executive had immediate and specific interests in TC composition. The PSC used its influence on nomination by the business chambers and local government organizations and kept three TC members. The new government's coalition partners, the ID, PRE and PSE obtained one TC post each.

The new government's coalition was short-lived and Mahuad needed to forge an agreement with Bucaram's PRE to approve the 2000 budget. By January 2000 the political and economic situation was critical. The government decided to eliminate the national currency, the *sucre*, and replace it with the U.S. dollar in order to avoid hyperinflation. On January 21, young military officers supported by indigenous groups perpetrated a *coup d'etat* against Mahuad. Although Mahuad never resigned, congress formally accepted a "resignation" from him and after intense negotiation, appointed Vice President Gustavo Noboa as the new president.

The TC members appointed in 1999 were not hit by the presidential crisis this time; they completed their full terms and stayed in office until March 2003 when congress appointed the new judges. During his government Noboa was also forced to assemble different legislative coalitions in order to pass legislation and advance his policies. I show in case studies in chapter four how legislative coalitions built by President Noboa like opposition legislative coalitions influenced TC judges' behavior, especially when ruling on key economic and political cases.

[39] According to the constitution the president could nominate candidates within two lists of candidates. Hence congress had to elect two of the candidates of those nominated by Mahuad. The government also managed to influence nomination of the candidate of the Supreme Court.

These cases included a legal reform increasing the value added tax which was crucial for government's budget, some legal provisions allowing privatization of power companies, key legal reforms of the social security system, and the constitutional procedure in the election of president of Congress in 2000. The strong barrier that the TC rulings posed for some of President Noboa's main economic policies pushed him to publicly propose replacing the TC by a chamber of the Supreme Court in charge of constitutional adjudication.

On January 15, 2003, Noboa ended his term and Lucio Gutiérrez (PSP), an ex-coronel and co-conspirator of the 2000 coup, took office.[40] Gutiérrez won the presidential election based on a political alliance with the Left (PK and MPD). However, once in power he shifted toward the political Right while advancing market-oriented reforms. During seven months, Gutiérrez faced constant conflict with his leftist allies (PK, MPD) who began to vote against the government's proposals in congress. Finally, in October 2003 the president broke the alliance and publicly formed a new legislative coalition with the Social Christian Party (PSC) in order to advance privatization of public petroleum, electricity, and telecommunications companies. An examination of changes in legislative coalitions during this period shows how appointment of TC judges was directly affected.

At the beginning of Gutiérrez's government, the opposition led by the PSC formed a very short-lived coalition with the Social Democrat ID, and other smaller parties like the DP and PSE. These parties controlled the Presidency of Congress and most of legislative committees. This coalition also appointed two of the nine TC judges,[41] one linked to the PSC and another to the ID.

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[40] Gutiérrez had led the military-indigenous insurrection against President Mahuad on 21 of January of 2001.
[41] This legislative majority appointed the two judges, whose nomination—according to the constitution—also had to be made by congress.

However, about one month later, on March 24, the PSC dismissed the alliance with the ID and reached an agreement with the government's PSP and smaller parties PRIAN, DP and PK to appoint the other seven TC judges and the telecommunications, banks and business superintendents. The coalition composition was reflected in TC appointments. The PSC appointed other additional three TC judges obtaining in this way four of nine judges[42]. The government (PSP) placed two judges while the PSC's former ally, the ID, was excluded. In this way, the government coalition guaranteed five out of the nine TC votes; this majority was important to avoid any veto against the government's economic legislation.

The PSP-PSC coalition revealed its first fissures on April 2004 when Gutiérrez's cousin and one of PSP leaders, René Borbua publically denounced that PSC leaders for obtaining illegal benefits of public contracts. PSC leader León Febres Cordero responded by accusing Borbua of "trafficking in influences" against the Constitutional Tribunal (Mejía Acosta and Polga-Hecimovich 2010). After this conflict, erosion of the coalition continued during local government elections in October. The PSP and the PSC supported different electoral formulas for local elections in a case (the D'Hondt case) brought before the TC (which I analyze in detail in chapter four). Additionally, the president openly used public funds to finance his party's campaign, which elicited strong resistance from the other political parties. However, Gutiérrez's party, the PSP, suffered a wide defeat on this election, while the PSC and ID obtained excellent electoral results. One day after the election, the PSC and ID supported by other parties publicly stated their willingness to initiate impeachment proceedings against Gutiérrez (Montúfar 2008).

[42] According to the Constitution, the Supreme Court, local government organizations and business chambers nominated the candidates, but the PSC had strong influence on all these organizations, and controlled the votes in Congress to negotiate appointment.

Collapse of the government coalition had a direct impact on the TC. In order to avoid impeachment, Gutiérrez formed a new legislative coalition, this time with the PRIAN, PRE, MPD, and PSE in November 2004. The new agreement was based on the unconstitutional removal and open distribution of Supreme Court, Electoral Tribunal, and Constitutional Tribunal posts among coalition partners. However, this time this allocation triggered a serious political crisis ending in Gutiérrez's congressional removal from office. Analysis of this crisis is important because it had important consequences for the TC, including its deactivation during almost one year due to the lack of appointment of new judges as well as a complete institutional redesign included in the new 2008 Constitution.

2.3 THE TC AND THE POLITICAL CRISIS OF 2005

During the last months of 2004 Ecuador began to face broad and intensive political turmoil. Opposition parties forcefully tried to gather the congressional votes required to impeach then-President Lucio Gutiérrez under charges of illegal use of public funds during local elections. The PSC, the party with the largest legislative bloc, had broken its alliance with the government and was willing to join the opposition to initiate impeachment proceedings. In order to survive, the Gutiérrez government assembled a new legislative coalition including the PRE and the PRIAN, as well as five opposition legislators who shifted their position in exchange for government favors.

The new government's allies had conditioned legislative support on distribution of key public offices, including posts at the Constitutional Tribunal, the Supreme Court, and the

Electoral Tribunal. Four parties[43] in the new government coalition had been looking to impeach TC members since April of that year when the tribunal declared the D'Hondt electoral method unconstitutional, a ruling that had been harmful for those parties during local elections.[44] The PRE was especially interested in having a strong influence on the Supreme Court, where criminal charges had been brought against its leader, former President Abdalá Bucaram, who had been in a self-imposed exile in Panama since 1997.

On November 25, 2004, the new pro-government majority in the Ecuadorian Congress asserting that a political reform was urgent to free the courts of PSC's control, removed all members of the TC without following impeachment procedures and appointed new ones based on a legislative resolution. This was just a first step in a long and complex political crisis which included the legislative dismissal of Supreme Court life-tenure justices and the appointment of a new pro-government Supreme Court, as well as dismissal of the Electoral Court and the appointment of a new one. The legislature followed neither the constitution nor the statutes, actions that were harshly criticized by opposition parties, the media, the Catholic Church, business chambers, local governments, civil society organizations, and even international organizations.

In spite of this reaction, on March 31, 2005, the president of the newly appointed Supreme Court ruled dropping criminal charges against former President Abdalá Bucaram. A few days later, Bucaram and other prosecuted politicians returned from exile to Ecuador, which triggered a deep political conflict. Massive, continuous street protests took place in the country;

[43] The MPD, PRE, DP, and PRIAN

[44] As stated above, Ecuador held local government elections in October 2004. However, the TC had declared the D'hondt formula contrary to the proportional representation principle included in the Ecuadorian Constitution. Political parties were bitterly divided about the applicable formula. While the D'hondt formula helped to gain seats to small parties, bigger parties (specially the PSC) supported the adoption of other electoral formulas more beneficial for the majorities. I examine this case in chapter four.

harsh criticism from the media and even civil disobedience openly challenged President Gutiérrez's legitimacy after these actions, demanding his immediate resignation. Gutiérrez replied that congress, not he, had made these decisions; he also argued that the new courts were provisional and he would call a plebiscite to reform the constitution in order to improve judicial independence. Nevertheless, political violence and official repression escalated; Gutiérrez decreed a state of emergency on April 15, suspending some constitutional rights and, in a desperate move, dismissing the recently appointed government's allies, the Supreme Court. He argued that congress had acted against citizen's will and ignored the government's proposals to create a new procedure to appoint a new Supreme Court. On April 20, in the midst of national protests, a new legislative majority dismissed President Gutiérrez, declaring that he had "abandoned the presidency", thereby breaching the constitution. The same majority dismissed the recently appointed TC on April 26.

Why the TC was the first political target in this story? Gutiérrez's legislative coalition first dismissed the TC because it could act as a veto player of the new congressional majority. This majority aimed for the removal of the whole Supreme Court and the appointment of new justices, allocating posts among the new coalition parties, but such a decision was plainly unconstitutional since the Supreme Court justices had life tenure and were not subject to any kind of impeachment according to the constitution. If this decision was challenged as unconstitutional before the TC, the tribunal could declare it unconstitutional. The likelihood of that happening was increased by the fact that the TC members had been appointed by the political parties being displaced by the new legislative coalition. On the other hand, if the president's coalition firmly controlled the TC, the tribunal could endorse what the new

legislative majority was going to do. Furthermore, the TC was the court of last resort to decide *amparo* cases which could also challenge Gutiérrez's government actions.

Indeed, several challenges to the constitutionality of the above-mentioned congressional resolutions were brought before the TC, even by Gutiérrez's supporters. However, the government had already assured itself a majority in the tribunal. The TC's rulings were in fact crucial, to legitimize the recently appointed Supreme Court and congress' irregular proceedings.

As planned, the pro-government TC endorsed Gutiérrez and his allies by omission since they did not rule about dismissal of the Supreme Court for four months. Nevertheless, when the TC was ready to provide explicit support to the president,[45] the crisis exploded through popular mobilization, and a new majority in congress was formed. Hence, on April 20, Gutiérrez and his potential TC supporters were removed from office.

During the following eleven months, congress did not appoint new TC members. Because the Supreme Court (CSJ) was also removed by congress, it was not possible to choose TC members from the three-candidate lists to be sent to Congress by the CSJ. Additionally, because the attacks on judicial independence were an important source of the crisis, an immediate new partisan allocation of judicial posts could have triggered further protests and public opinion rejection. In fact, a merit-based process to appoint new CSJ justices took place under the auspices of the United Nations during the following months. The new CSJ was finally appointed on November 30, 2005. By contrast, TC appointments were carried out almost three months later, but under exactly the same rules of former appointments.

Why did political parties use such different strategies to resolve the CSJ and TC crises? Although the CSJ may be crucial when ruling on criminal charges against political leaders and

[45] Ecuador Inmediato, April 18, 2005

top public officials, most of the CSJ cases affect only private interests and parties. By contrast, the TC has to constantly decide on major political conflicts related to politics and the economy. For instance, by late June 2006 several constitutional review cases were pending for the TC, including those related to election of the new Supreme Court, political rights of former President Gutiérrez to once again run as a presidential candidate, and reforms to the Hydrocarbons Law, which allocates revenues of oil exports among the Ecuadorian state and private companies. The TC had also to decide about a national restructuring of the judiciary which had begun months earlier.[46] In the final chapter, I examine the appointment of a new TC on February 22, 2006, and its participation in the convening of the 2008 Constituent Assembly.

The clear linkage between legislative coalitions and TC appointments and removals contributes to the argument of high dependence of TC members from congress under certain formal and informal institutions.

2.4 CONCLUSIONS

The institutional features of TC member's appointment, reappointment, and impeachment interacted with informal rules of legislative coalitions. The historical account reveals that short terms, unlimited reappointment, and constitutional provisions of impeachment were instrumental to legislative coalitions in the sense that facilitated uncertainty and threats through intentional ambiguity. In fact, from 1997 to 2005, legislative coalitions appointed TC members three times (1997, 1999 and 2004), interpreting ambiguous constitutional provisions and without clarifying

[46] El Comercio newspaper, June 25 2005, page 3.

if the new TC members were appointed for a full term (four years) or partial term (the time to complete terms of former TC members). In this way, ambiguous and informal rules increased TC dependency created by formal rules establishing short terms.

These relationships between formal and informal rules conform to empirical research and theoretical reasoning on institutions in Latin America (Helmke and Levitsky 2006). Students of the region have found that formal institutions, like appointment, terms, and impeachment, are sometimes complemented or substituted by informal rules, like the coalitional bargaining on TC appointments and the removal of members based on simple majority studied here.

In spite of constant removal, one out of three TC members were reappointed during the period of study (1997-2004); other TC members moved to different public offices or courts. For instance, Guillermo Castro, who was placed as TC member in 1999 by the PRE, was appointed as President of the Supreme Court in 2005 by the Gutiérrez's legislative coalition where the PRE was a crucial component, as stated above. He ruled dropping criminal charges against Bucaram, which triggered the 2005 political crisis. Hernán Rivadeneira, a re-appointed TC member (1999 and 2004) placed by the Socialist Party (PSE), was later appointed to the Supreme Electoral Tribunal.

Removal of TC members were not only limited but also aided by formal rules. Because congress claimed that TC members had been appointed to complete previous terms and therefore had ended their terms, legislators did not even follow impeachment procedures. However, congressional impeachment powers included in the constitution were still underlying or justifying the power to remove TC members. In contrast, removal of life-tenured Supreme Court justices in 2005 was much more difficult and had higher political costs since formal rules were clear in establishing unlimited terms and denying congress impeachment powers.

TC posts had both instrumental and direct political value. On one hand, political parties sought influence on TC rulings because the tribunal had the constitutional powers to decide key cases related to elections, politics, and the economy. In several cases the decisions could directly affect political parties, and especially the executive. On the other hand, TC posts had their own political value as the object of political bargaining and were part of the patronage being allocated to parties entering new coalitional arrangements. Mejía Acosta (2004, 2006) has empirically demonstrated for the 1979-1998 period that posts in the judiciary as well as in the Electoral and Constitutional tribunals had been discretionary coalition payoffs available to Ecuadorian Presidents.

3.0 POLITICAL PARTIES AND THE CONSTITUTIONAL TRIBUNAL IN ECUADOR

In this chapter I present quantitative evidence in support of the theory developed in chapter one about importance of judicial term length as well as unlimited reappointment to explain judges' behavior. Using logistic regression, the chapter shows that judges may vote in different ways depending on at what moment of their own terms they vote; the analysis also reveals partisan influences in the individual votes of TC judges on constitutional review from 1997 to 2004. Finally, the statistical models account for a different hierarchy of norms under constitutional review such as laws, decrees, and other government regulations.

The results show that constitutional judges may be dependent on political parties even under divided government. Variables such as temporal proximity to the end of the judge's term, the intervention of a political plaintiff in the case, or the type of norm in question also influence judges' behavior. TC judges tend to strike down more norms during the last six months of their terms. When the challenged norm is a law and the judge is tied to a political party that makes up part of the government opposition, the judge is more likely to declare a law unconstitutional.

The dependent variable, *constitutional review*, measures whether judges declare different types of norms enacted by the executive and its legislative coalition unconstitutional. These norms include not only laws passed by congress and signed by the president but also presidential decrees and resolutions of state secretaries or other public institutions. I have considered these

norms as enacted by the government, namely the executive with explicit or implicit support of its legislative coalition. In contrast, political parties in the opposition will also tend to oppose many of these norms. In this chapter I explore how partisan positions influence TC judges' behavior when ruling on cases of abstract constitutional adjudication.

I focus my research on *abstract review*, a specific type of constitutional adjudication concentrating on the abstract compatibility of a law or other type of norm with the constitution. Unlike American judicial review, which is always concrete (linked to violations of somebody's constitutional rights) and decentralized (any judge or court has the power to declare a law unconstitutional), *abstract review* does not necessarily include a concrete case where citizens' specific rights are being violated. Furthermore, unlike amparo suits, only the highest constitutional court can declare the law as unconstitutional. In other words, the plaintiff can challenge any law as unconstitutional, even if that law has not been yet applied in any particular case, and solicit the Constitutional Tribunal to declare that law unconstitutional. Although Ecuador and other Latin American countries have also developed procedures of concrete and decentralized review (e.g amparo cases), abstract review facilitates empirical research on separation of powers because often implies interaction of executive and congress and often includes politically relevant cases and conflicts related to public policy, which in turn improves availability of information. Hence there are not only conceptual but also methodological reasons to restrain my research to abstract review, as I make clear below in the data base description.

In the Ecuadorian case, the TC rulings on constitutional review cases require at least five of nine tribunal members' votes to declare a norm unconstitutional.[47] Unlike procedures of

[47] Provision 11 of regulations to apply the Ecuadorian Organic Law of Constitutional Control

concrete review such as amparo cases, which can be decided within the TC's three judges' commissions[48] (*salas*), abstract review rulings must always be voted on in the full court.

In the models presented in this chapter, I account for different situations; first, I include a model only of laws. Second, I include a model of norms different of laws, which mainly account for decrees and regulations. Finally, I include a third model that combines all types of norms.

The variables in the models are designed to explain TC judges' behavior when they rule on political cases, and most of variables included in these models are statistically significant. However, as all constitutional review cases are included and most of these cases do not have a high political importance, this is reflected in the goodness of fit of the models. Like chapter 2 and 4 show, even constitutional review of laws elicit political attention basically in key cases where congress, the president, interest groups, social movements, and public opinion are involved. In this way, the TC is an important political actor not because most of its rulings are on political cases but because among its many rulings there is a small subset of key cases of high political importance explained by the variables in the model.

According to the 1998 Ecuadorian Constitution, cases of constitutional review could be brought before the TC by the president, the congress, the Supreme Court, local governments, and any one thousand citizens. Any individual citizen could also challenge a law as unconstitutional before the tribunal, but this first required a positive opinion declaration from the Ombudsman.[49] This opinion was mainly constrained to verification of formal aspects such as indication of the challenged norm, information about the plaintiff, etc., but without it an individual citizen could not take his case before the TC.

[48] However, if one of the three judges disagrees, the case could be appealed before the court in full.
[49] Provision 277 of the 1998 Constitution

3.1 INDEPENDENT VARIABLES

Research on constitutional review in Latin America has found that judicial decision-making is affected by variables such as timing of the rulings, unified or divided government, ideology, political salience of a case, and the type of issue decided by a ruling as I explained in chapter one. I will use some of these variables as alternative explanations of the impact of partisan preferences and career incentives on constitutional review.

The timing of judges' decisions and presidential control over congress are currently the main variables to explain what makes constitutional judges uphold or strike down norms supported by the ruling party in Latin America (Chavez, 2004, Helmke 2002 and 2005, Iaryczower, Spiller and Tommasi 2002, Magaloni and Sánchez 2001). Although the variables are distinct, they are conceptually linked in the sense that governments change over time from unified to divided and vice versa. In other words, these changes are defined within a temporal frame and generally marked either by a change of regime or by presidential or legislative elections.

3.1.1 Timing

Helmke's (2002, 2005) theory and research on strategic defection of judges in unstable institutional environments focuses on timing and political changes. Using dummy variables, she generates a series of transition or change variables before crucial events such as the end of dictatorship and the beginning of democracy, or the proximity of congressional and presidential elections. Her analyses of Argentine Supreme Court decisions from 1976 to 1995 demonstrates

that judges strategically defect against the president once his or her government begins to lose power at the end of the term.

Iaryczower, Spiller and Tommasi (2002) also use timing indicators to reflect the president's political control over congress in their study on the constitutionality of national norms decided by the Argentinean Supreme Court from 1935 to 1997. They measure the expected time remaining for a president to be replaced by a president from an opposing political tendency, and they find that the longer the horizon, the higher the probability of a pro-constitutionality decision.

Other scholars (Finkel 2007; Gingsburg 2003; Magaloni and Sánchez 2001; Ramseyer 1994, 1997) find that ending periods of a regime may elicit a process of *delegation* of actual power from politicians to courts (insurance theory). When a political party in power expects to lose it during a transition and to become an opposition party, it may appoint constitutional judges to control the incoming president or the new political majority in congress.[50] For instance, in Mexico the hegemonic party, the PRI, lost its supermajority in the lower chamber for first time in 1988. This was just the beginning of a weakening process during the next years. In 1994 the PRI fostered constitutional reforms to empower the Supreme Court, and the next year appointed a new Supreme Court whose ruling tended to favor PRI interests[51] (Magaloni and Sánchez 2001). A sort of insurance strategy pursued by the opposition took place in Argentina and Peru during the 1990s when judicial reform began as constitutional reform but was only transferred into law and policies when Menem's and Fujimori's governments required legislative support to implement constitutional changes allowing presidential reelection. In these cases, the ruling

[50] The underlying assumption is that the new government will respect judicial independence.
[51] To the extent that the new judges remain loyal to the outgoing power, this theory contradicts that of strategic defection.

parties delegated power to the judiciary in exchange of support of the opposition for constitutional reform (Finkel 2007).

I argue that in addition to the president's end of term, the justices' timing may influence judicial behavior. As I made clear in chapter one, timing directly related to the length of the terms (and reappointment rules) may also have an impact since justices who want to keep their posts may change their behavior as they approach the end of their terms in order to obtain support from principals controlling reappointment. In fact, in countries like Ecuador, where some presidents have been ousted from power in the midst of political turmoil (see chapter two), the time left until the justices' end of the term may be comparatively more certain than the time left until the presidents' exit. Consequently, as I explain below, I include both the president's and the justices' timing in the empirical models for the Ecuadorian case.

3.1.2 Legislative majorities and coalitions

The separation-of-powers approach often assumes a clear-cut division of government and opposition which at some point provides judges with enough information to strategically decide if they are better off by staying loyal or opposing a government (Chavez 2004a, 2004b; Epstein, Shvetsova and Knight 2002; Eskridge 1991; Ferejohn and Weingast 1992a, 1992b; Helmke 2002, 2005; Iaryczower, Spiller and Tommasi 2002; Scribner 2004; Segal 1997). Iaryczower, Spiller and Tommasi (2002), for instance, find that "the president having a sufficient majority to change court size produces a 13 percent increase in the probability of a favorable outcome; having a majority sufficient to impeach justices produces a 23 percent increase in the probability of a favorable outcome" (709).

However, there are different levels of presidential or legislative leverage on judges, depending on the level of fragmentation of the party system. For instance, Argentine politics during the period studied by Helmke (2002, 2005) was dominated by two parties, the Radical Party (UCR) and the Justicialist Party (also known as the Peronist Party, or PJ), while the military was a crucial third actor during the country's transition to democracy in the 1980s. In spite of some divisions within these parties and within the military, the number of partisan actors was smaller than in other more fragmented Latin American systems, like the Ecuadorian one. This fragmentation, in turn, affects the formation of legislative coalitions and the presidential ability to appoint and remove constitutional judges.

According to Chávez (2004) a fragmented or divided government assures judicial independence because a president lacking a legislative majority faces political competition and cannot impeach or punish judges. However, the question is: what happens when legislative majorities are consistently in the opposition? What happens if these majorities composition constantly shifts? Additionally, as a result of fragmentation or competition, government and opposition coalitions are formed; and these coalitions may become a credible threat to judges and constitutional courts.

3.1.3 Political salience

Political salience is another important independent variable in the study of judicial politics (Epstein and Segal 2000). Even among constitutional issues, not all have the same political weight; many involve only individual interests of specific citizens or small groups. At the other extreme, there are national issues about which powerful political or economic forces have strong interests (Taylor-Robinson and Diaz 1999; Vanberg 2005). Consequently, one can expect more

strategic behavior when judges rule about politically salient cases. I understand *salience,* for operative purposes, as the political importance or relevance attributed by the government and public opinion to a case (Helmke 2002: 295).

Empirical research on constitutional review often identifies the political salience of norms by the fact that the enacting government was either contemporary or prior to the time of the ruling, and also by the formal hierarchy of the norm challenged (Epstein, Shvetsova, Knight 2001; Scribner 2003, 2004). Helmke (2002, 2005) measures the importance of each ruling by means of diverse dummy variables related to the timing and political importance or salience of decrees, appeals and overturning of judicial decisions. She distinguishes, for instance, between decrees passed by the sitting government and those passed by past governments. She also distinguishes between decree and salient decree, and she finds that Argentine justices are more likely to defect from the incumbent government in the most important cases.

In the same way, Iaryczower et al (2002) differentiate among federal laws and decrees or resolutions; their research shows that the probability of the court upholding a norm is higher when the challenged norm is a law, than when it is a decree or a resolution. This probability is also higher for federal norms compared to local norms.

Both Helmke (2002 and 2005) and Iaryczower, et al (2002). include variables measuring if a law was enacted by the sitting government or a former government and find that it is more likely that judges uphold those norms enacted during the current administration than norms of former governments. Similar variables are used by Scribner (2004) for the Chilean and Argentinean cases. Beyond Latin America, Epstein, Shvetsova and Knight (2001), in a study based on qualitative information of the Russian Constitutional Court between the years 1992-

1993 and 1995-1996, find that “the less salient the case, the more authoritative past decisions of the Constitutional Court within the general issue area” (130).

Many of these features are related to the legal features of a case since they refer to the formal legal hierarchy of a law, and its time of enactment. Consequently, through this variable and the Ombudsman variable, I also account for legal characteristics of each case.

To sum up, three different concepts are useful to measure political salience: timing of norms, political importance of a case for involved actors, and hierarchy of norms.

3.1.4 Ombudsman:

Like the US case where the opinions of the Solicitor General significantly influence Supreme Court decisions, there are other constitutional systems where the opinion of a high official, as required by law, may influence the direction of court outcomes. In the Argentine case, Iaryczower et al (2002) found that the opinion of the Solicitor General (*Procurador General de la Nación*) increases the probability that the court will uphold the constitutionality of a norm. Interestingly, by studying the impact on individual decisions their research shows that the Solicitor General opinion does not have a significant impact on the direction of the rulings when he shares the same opinion of the president in a unified government.

The Ombudsman specifically is an independent party who declares a legal technical opinion on a case. In many Latin American countries, like in Ecuador, the Ombudsman not only has a political and moral power to denounce human rights violations but he or she can also initiate some legal actions (habeas corpus and amparo) before the Supreme Court or the Constitutional Tribunal. Unlike the American Solicitor General, the Ombudsman in Latin American countries is independent from the government, whose interests are represented by the

office of the Attorney General. To some extent the opinion of a high official such as the Ombudsman may function as a proxy for the role of law as an intervening variable in judicial decision making. I include this variable to capture the role of legal factors in judges' decisions.

Theory and models on judicial behavior tend to focus on politically sensitive or salient cases, but most cases decided by constitutional judges and courts are cases without political importance, cases that matter mainly to the parties directly involved. Whereas politically salient cases are usually decided under political pressure, the rest of the cases are decided taking the law or policy preferences as the crucial criterion. Hence, the same court may function at different levels, *a political one* in which the court is responsive to political factors and *a legal level* in which the same court frames its rulings according to the judges' values as depicted by the attitudinal model or legal parameters, as asserted by the legal model. Inclusion of the Ombudsman's opinion may function as a proxy for the law as a variable.

In the Ecuadorian case, the Ombudsman is one of the high officials who can support a process of constitutional review. According to the 1998 Constitution, any citizen could challenge a norm as unconstitutional before the TC if the Ombudsman found that the challenge was formally adequate.[52] The Ombudsman was obligated to examine some legal requisites of the challenge and, if those requisites were met, he would dictate a positive opinion supporting the challenge. Consequently, some of those challenging a norm before the court sought the Ombudsman's support. In other cases, the Ombudsman by himself took the challenge before the TC.

[52] An alternative was to collect one thousand signatures of citizens supporting the challenge. Besides these legal actions only the president, congress, the Supreme Court, and local government could challenge laws as unconstitutional before the TC. See provision 277 of the 1998 Constitution.

3.1.5 Case Facts

Empirical research has demonstrated that case facts matter; in other words, conditions such as specific features of a legal conflict or the legal type of a case influence judicial behavior. This research refers mainly to the US Supreme Court and other American Courts (Brace and Hall 1997, Hall and Brace 1996, Ignani 1994, Hagle 1991, McGuirre 1990, Segal 1984). These facts may interact with judge's attitudes, legal variables, and political context.

Research beyond American judicial politics has also found that case facts affect judicial decision-making. On the study of Latin American courts, both Helmke (2002, 2005) and Iaryczower (2002) included issue or subject variables in their research. For the Ecuadorian case, Basabe (2008, 2009) focuses his analysis on cases of state economic intervention or privatization and cases related to labor deregulation.

Research on Eastern Europe has also included case facts. Epstein, Shvetsova and Knight (2001) classify cases into three groups: separation of powers, federalism, and human rights, and find different court tendencies for each group. Studying post-communist courts, Herron and Randazzo (2003) find that judges are more inclined to invalidate legislation concerning private rights or governmental operations but less likely to overturn tax statutes.

Since my research focuses on abstract constitutional review, it is important to clarify that I use the term "facts of the case" in a methodological sense applied exclusively to empirical research in judicial politics. This clarification is in place because, from a technical-legal point of view, "abstract review" does not involve facts to the extent that is limited to determine if a law or other norm is conceptually and formally compatible with the constitution. However, for

methodological purposes, concrete features of cases such as the type of subject matter of subsets of cases are considered facts of a case.

Because I am mainly concerned with separation of powers and timing, I include case facts as a control variable. I classify the constitutional review rulings included in the database in three groups according to the type of issue or main subject matter: 1) cases related to economic matters 2) civil and political rights and 3) social rights.

3.1.6 Ideology

As stated in chapter one, the attitudinal model asserts that facts of the case are examined by justices of the US Supreme Court based on their own sincere ideological attitudes and values[53], for instance a conservative or liberal view (Segal and Spaeth 2002; Segal 1999). In Segal's and Spaeth's words "[former Supreme Court Chief Justice] Rehnquist votes the way he does because he is extremely conservative; Marshall voted the way he did because he was extremely liberal" (Segal and Spaeth 2002: 86). Although justices may behave strategically at other stages of decision, they will state sincerely their policy preferences in final votes of the outcome of cases because these votes no longer have any strategic value (Baum 1997).

The main argument - or assumption - of attitudinalists to assert justices' sincere behavior on final votes is the unconstrained institutional condition of the US Supreme Court. According to this model, special features such as life tenure, fixed justices' salaries, and difficulties of

[53] Empirical studies on other topics related to the US Supreme Court also often include *ideology* as a variable. For instance, in research on the court's legitimacy this variable has ranged from "unfocused ideological and party identifications," such as liberal or conservative, democrat or republican, to "more specific policy views" (Calderia and Gibson 1992; Gibson and Caldeira 1992; Segal 1999; Durr, Martin and Wolbrecht 2000; Gibson, Caldeira and Spence 2003).

congressional reversal or lack of a higher court when deciding a case, allow justices to state their sincere policy preferences.

The attitudinal model has fostered numerous theoretical doubts from different fronts such as historical, sociological, and rational choice institutionalisms (e.g. Clayton 1999; Gillman and Clayton 1999; Hammond, Bonneau and Sheehan 2005: 41-51), however ideology is an important explanatory variable used in several empirical studies on the US Supreme Court decision-making at the individual justice and court aggregate levels (Rohde and Spaeth 1976; Segal and Cover 1989: Segal and Spaeth 1993; Segal, Epstein, Cameron and Spaeth 1995, Spaeth 1979).

Beyond the US, most empirical research has not included ideology as an independent variable. The early stage of this research outside the US, in addition to methodological difficulties created by multiparty systems and complex methods of appointment make ideological identification of judges more difficult than in the US. Just a few studies have included ideological orientation of justices in relation to ideology of the president (Iaryczower, Spiller and Tomassi 2001; Scribner 2004).

I include ideology basically as an important control variable. Consequently I am not primarily interested in the impact of specific ideological orientations on judicial decision-making but to the extent that this control variable completes the model explaining the impact of political parties on the dependent variable.

For the Ecuadorian case, Basabe (2008, 2009) has developed an ideological index of constitutional judges, which I use to include TC judges' ideology in the model. Basabe's index contains information from 1999 to 2007, excluding two years (1997 and 1998) included in my database; consequently, Basabe's N is smaller than mine. In order to keep a larger N, I run first several models without the ideology variable. Then, I present identical models including this

time Basabe's measurement of ideology for each judge. This data is not available for any other Latin American country as Basabe (2009) notes in his dissertation.

3.2 DATA BASE AND INFORMATION SOURCES

I collected an original database of constitutional review rulings[54] from 1997 to 2004.[55] The unit of analysis is the vote of each TC judge for each case (N = 2268).[56] Unlike Helmke (2002, 2005), I did not include *amparo* cases (a constitutional action to protect rights*)* because in Ecuador amparo is applied only to individual decisions by public officials. In fact, the 1998 Constitution, the Ecuadorian laws and jurisprudence explicitly prohibited use of amparo against laws and other general rules. Additionally, amparo cases involve a legal procedure completely different of abstract review; they could be brought only for victims of constitutional rights violations before civil law judges as judges of first resort; a chamber of the Constitutional Tribunal compounded of three judges could review these rulings as a court of last resort. Finally, inclusion of amparo cases would have meant complex problems of sampling and stratification since thousands of these cases are decided by Ecuadorian judges all over the country, and only

[54] The subject of these rulings is fundamentally general norms (organic and ordinary laws, decrees, regulations, etc).
[55] I limit my statistical research to this time period because it was only with the 1996 constitutional reform that the TC became the last-ditch veto player in matters of constitutional review (Salgado 2004, Araujo 2004) as I explained in chapter two. Before this period, the TC's rulings could be reversed by a specialized chamber of the Supreme Court or by congress. Additionally, the jurisdictional powers, number of judges, terms and appointment process of the TC judges were quite different before and after 1997. Consequently, the current Ecuadorian system of constitutional review and the TC as the highest constitutional court could be traced only from 1997 for purpose of database building and statistical analysis.
[56] I included observations on votes of substitute TC judges in order to obtain more complete information on influence of political parties on TC judges because appointment of these judges is also influenced by parties; these substitutes judges vote only when the main judge is absent but their inclusion in the database increased the N.

some of them are brought before the TC as appellate court. Unlike rulings of abstract review, which are decided by the full Constitutional Tribunal, amparo cases may be decided by only one of the chambers (*salas*) of the Constitutional Tribunal.

For each case of constitutional review, I collected information on the timing of the tribunal's decision, the timing of the TC judges' appointment, and the expected date for the end of their terms, as well as the type of rule being challenged, and its political salience. For each judge, I identified the judge's party identification.[57] In the Ecuadorian case, this information is available through press reports since many journalists identified party alignments when new TC judges were appointed or reappointed.

The database also includes information on political parties' legislative coalitions; this information registers legislative parties' relation with the incumbent government. It indicates if the justice's party was part of a government coalition or an opposition coalition when the TC judges voted on each challenged law or norm. In this way, the data base allows testing hypotheses linking political parties' positions in congress and TC judges' votes regarding each law or norm. If TC judges have static ambitions and can be re-nominated for a new term by their political parties, I expect that these judges will vote in agreement with their appointing parties' preferences.

The data set is based on different sources. Most TC rulings from 1997 to 2004, including individual votes, are available in digital format. Most rulings were published by the TC in CD –ROM format (*Resoluciones del Tribunal Constitucional*) from 1997 to 2004. Research

[57] By party ID, I refer to a clear and public closeness or professional link between a TC judge and a political party. For instance, some TC judges were lawyers of unions close to specific parties supporting their appointment at the TC, other judges worked as legal advisors during the government of other parties. These types of links were widely reported in the Ecuadorian Press. Basabe (2008, 2009) has also confirmed these relationships for the Ecuadorian case.

on legal databases (SILEC and FIEL), the general official bulletin where TC rulings are published (*Registro Oficial*), the TC bulletin including its rulings (*Gaceta Constitucional*), and the Constitutional Tribunal archive completed this information. Information on the alignment of judges with political parties is publicly available through press sources (*Explored* and *El Comercio/Terra* databases). The variable ideology was included based on the ideological index developed by Basabe (2008, 2009) as explained in detail below.

The dependent variable, CONSTITUTIONAL REVIEW, is measured through a dichotomous variable coded as 0 if the challenged law was upheld and 1 if it was voted unconstitutional. I coded this decision at the individual level, so the database includes each vote of each judge in each case.[58]

Following the previous work on this subject (Helmke 2002, 2005; Scribner 2003, Iaryczower et al 2002), I employ logistic regressions to empirically test the influence of diverse independent variables on the probability of constitutional review rulings against the government.

3.3 HYPOTHESES AND MEASUREMENT

3.3.1 Timing

I measure the effects of timing in three ways: 1) a dichotomous variable for the last six months of the judge in the tribunal captures incentives related to reappointment (JUDGE'S END OF TERM). 2) a continuous variable reflecting the number of months the judge has been on the

[58] I also coded cases where a judge was absent and the substitute judge voted. Some cases were "accumulated", which means they were decided in a single ruling by the TC. However, because judges' TC votes may be independent for each individual case, I coded each case as an individual case.

tribunal captures the professional socialization and the process of legal learning on the bench (TIME IN OFFICE), and 3) a dichotomous variable for the last six months of the president in office measures incentives for strategic defection (PRESIDENT'S END OF TERM).

I measure JUDGE'S END OF TERM using dummy variables for the last six months of each judge's term. I assume that six months before ending a judge's term is a reasonable period for the judge to consider conditions for his or her reappointment, taking into account the dynamics of legislative parties and shifting congressional coalitions in the Ecuadorian case, which were explained in chapter 2. Because congressional appointments of TC judges in 1997 were unclear with respect to length (congress did not state exactly when judges would finish their terms, which gave legislators power to remove them after one and a half years[59]). This variable also includes the last six months of TC judges in 2004; at that period Ecuador faced a strong political crisis and removal of TC judges was a clear expectation.[60]

Most of research on Latin American judicial politics assumes that constitutional judges have long terms and consequently that these judges will (or should) remain in office after presidents or legislators end their terms. Hence, judges defect in favor of the incoming president (Helmke 2002, 2005) or respond to an outgoing party displaced by the rising opposition (Magaloni and Sanchez 2001). In Argentina, for instance, Helmke (2002, 2005) finds that judges used the terms of presidents and midterm legislative elections as parameter to evaluate their own stability as constitutional judges even having life tenure. However, when presidential and congressional terms are in practice highly uncertain, as in Ecuador during 1997-2005,

[59] At that time a transitory constitutional provision established that TC judges would remain in office until the end of the interim president's term, August 10, 1998. After this date, congress had the power to remove them at any time. A similar situation took place in the 2006 appointment of TC judges. They were removed by Congress in 2007 claiming that they had been appointed only to complete a former term instead of a full term.
[60] See chapter one.

constitutional judges may prefer to use their own terms, which are comparatively more certain, as a framework to set their position respect to the government and its coalition.

Appointment as a constitutional court judge is just the beginning of a process by which the new member of that court learns from his or her institutional environment, brings his or her own view of the law and its relationships with politics, and maintains or reshapes that view in the interaction with other judges and personnel within the court, and with other high public officials outside the court. This interactive process has two features: 1) it takes place along time, and specifically along the judge's term and 2) it may affect the judge's behavior. Consequently, I add to presidential and legislative terms, normally included in separation-of-powers research, this variable accounting for timing within terms of judges themselves. In this way, it is possible to capture changes or differences in behavioral patterns through a judge's term.

I would expect that judges at the beginning of their terms tend to be more activists than later in their terms due to a learning process of legal and jurisprudential restraints formerly developed by the court.[61] In fact, as it will be clear in chapter four, many TC judges have partisan backgrounds, but they do not necessarily have specialized knowledge in constitutional law; very few legal scholars have been appointed as TC judges whereas prominent lawyers specialized in constitutional law have rarely been appointed to the tribunal. Additionally, a minority president does not represent a credible threat for TC judges and consequently they are more prone to strike down his laws. Only when the president can form a majoritarian legislative coalition does his influence on TC judges' behavior increase. Latin American constitutions, including the Ecuadorian constitution, establish many rights, including economic, social, cultural, and collective rights; these constitutions also contain detailed procedures to enact or

[61] Personal Interview, Victor Hugo López (former TC Chief legal advisor 2006 - 2008, TC General Secretary 2001 – 2005), Quito, 29 July, 2009.

veto legislation. Given this ample normative framework, constitutional judges prima facie have many interpretative options at their disposal to declare a law as unconstitutional. However, as they learn from experiences previously accumulated in the court and become acquainted with jurisprudential precedence, they become more specific in their legal reasoning and tend to restrict their criteria and policies of constitutional review. Hence, they become less activists as they advance in their terms.

A minority president usually cannot assure a new nomination and appointment to TC judges because he or she alone does not control a sufficient and stable number of legislative votes. Conversely, a judge interested in reappointment may look, during the end of his term[62], for supportive votes of opposition parties given in exchange of that judge's votes within the TC to strike down certain norms or laws[63]. Hence, I measure this dynamic through the variable TIME IN OFFICE. I measure time through the whole term of each judge counting the numbers of days from the beginning of a judge's term until the day when he cast his vote for a specific case. This variable allows me to capture the effect of time during a judge's term, controlling independently this time effect during the last six months of each term through the variable JUDGE'S END OF TERM, since I expect changes in behavior as the time for potential reappointment approach. More specifically, for the variable JUDGE'S END OF TERM, I code 1 to identify the last six months before the end of a full term of four years, or the last six months before the day when congress removed the judges, and I use 0 if the ruling was decided at any other point in time. I will test the following hypotheses:

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[62] In spite of congressional removal of TC judges without impeachment procedures, formal terms had importance since congress dismissed TC judges and appointed new ones arguing that judges had ending or completed these formal terms, as I explained in chapter two.

[63] The existence of logrolling among judges within the Constitutional Tribunal was confirmed by former TC advisors and officials. Personal Interview, Victor Hugo López (former TC Chief legal advisor 2006 - 2008, TC General Secretary 2001 – 2005), Quito, 29 July, 2009.

H1) during the last six months in office of the judge, it is more likely that he or she will vote against a norm enacted by the government.

PRESIDENT'S END OF TERM may affect a judge's votes at least in two ways: 1) when the vote in a case is cast close to the end of a presidential term, the judges' behavior may be influenced if political bargaining to appoint new judges begins (Helmke 2005, 2002, Rios Figueroa 2005, Gingsburg 2003, Magaloni and Sanchez 2001) and 2) when the president faces a serious political crisis, a judge's deference level to the president may be altered by congressional threat of impeachment or public mobilization against the president. The corresponding hypothesis is:

H2) during the last six months in office of the president, it is more likely that a justice will vote against a norm enacted by the government.

Even if the justice and the president belong to the same party, a minority president, as I stated above, cannot assure reappointment and the judge will require wider legislative support and consequently will approach to some extent opposition's preferences. Furthermore, in a highly fragmented party system, like the Ecuadorian one, it is unlikely that the same political party continue in office, which diminishes a judge's incentives to maintain alignment with the government.

PRESIDENT'S END OF TERM is measured by dummy variables to identify if the TC decision was made before or during the last six months of the correspondent presidential term or

in the six months of turmoil preceding the removal of the president. During the period of study, two presidents were removed from office by congress after growing political crisis and street protests. Consequently I also use dummy variables to identify the six months previous to their removal, when these presidential crises were predictable. I use 1 when the TC decision was made during these last six months and 0 otherwise.

3.3.2 Legislative majorities and coalitions

In Ecuador the press widely reports the links between appointing political parties and each TC judge. Each time that new TC judges were appointed, impeached or removed the Ecuadorian press reported the coalitional negotiations in Congress, including the position of each party respect to the President. Consequently, I included in the database the political party identification of each TC judge, and each party's position respect to the President at the time of each TC ruling. In this way, I could directly link the TC judge's decision in each case and his or her party's position respect to the President. Empirical account of this link helped to assess the role of reappointment.

Assuming that constitutional judges have static ambitions, if political parties have reappointing power, constitutional judges will tend to behave more like legislators under party discipline. The position of a political party with respect to the president (PARTY'S OPPOSITION) is measured using a dichotomous variable registering if the party was part of a pro-government legislative coalition (=0) or an opposition legislative coalition (= 1) when the

TC ruled on a challenged norm.[64] In order to identify the parties' positions, I reviewed press news reporting on coalitional politics in the Ecuadorian Congress during the period of study. As I stated before, in the Ecuadorian case legislative coalitions are content-specific and short-lived. Consequently, I revised coalition formation and changes from the beginning of each presidential term and for each month of each year. Most of my data included in the model was confirmed by specific research on Ecuadorian legislative coalitions carried on by Mejia-Acosta (2004, 2006) and by Mejía-Acosta and Polga-Hecimovich (2010).

To sum up, legislative opposition to the government by the judge's party[65] may influence judicial behavior. I examine the effect of this variable on judges' votes through the following hypothesis:

H3) The greater the opposition of the judge's party to the president, the more likely is that a justice will strike down a norm enacted by the government.

In a highly fragmented legislature marked by shifting short-lived coalitions, a TC judge looking for re-nomination and re-appointment at the end of his term will need not only legislative votes from his own party but also support of those institutions controlling nomination, and as much votes as possible of legislators of other parties intervening in appointment, including opposition parties. In contrast, a minority president controlling a few legislative votes cannot assure this support. Hence, even TC judges aligned with the government will try at this critical period to get closer to the opposition in order to obtain their votes. This closeness may be

[64] I assumed that political parties in the president's legislative coalition also supported the enactment of other norms, different of laws, by the president and his government, whereas opposition parties opposed these norms.
[65] As I explained in chapters 1 and 2, in Ecuador the press widely reports partisan identity of judges once they are nominated and appointed by congress.

obtained through logrolling within the tribunal. In other words, a TC judge may vote to strike down norms challenged by opposition parties or nominating organizations in exchange of support for his re-nomination and votes for his reappointment in congress. I will test the following hypothesis:

H4) All judges, either aligned with opposition parties or government coalition parties, will be more likely to strike down norms, at the end of their terms.

3.3.3 Salience

As it was stated above, not all the constitutional issues have the same political weight; many involve only few persons or small groups. At the other extreme, there are national issues about which powerful political or economic forces have strong interests, including the president and main political parties. I will measure the effect of salience on judges' votes based on CASE TIMING that is if the norm was brought before the TC during the current government or a former government. Generally, laws and other norms enacted by the current government have greater political importance because the president will care less about rules prior to his government. CASE TIMING is measured by a dummy indicating if the constitutional challenge against the norm was brought before the court during the current presidential term (=1) or during a previous presidential term (=0). The corresponding hypothesis is:

H5) if the challenge to a norm was brought before the TC in the current presidential term, it is more likely that the justice will uphold the law.

I also measure salience with a dummy variable indicating 1 if the leader of a political party or other political leader intervenes in the case as a plaintiff challenging a law or other rule and 0 if he or she does not. This information is available in the analyzed documents for each case. Direct intervention as plaintiff of one or more party leaders sends a strong signal of partisan interest in a case, which may affect judicial behavior considering that legislative parties had power for reappointment or impeachment of these judges. I expect the following relationship:

H6) when a political leader is the plaintiff in a case, it is more likely that the judge will vote to strike down the norm.

I also account for formal hierarchy of the challenged rule (Helmke 2005, 2002, Iaryczower, Spiller, and Tommasi 2002) running a specific model only for laws. This allows me to compare predictors for the model for laws, predictors of a model for norms (different from laws), and a third model including all type of rules.

To some extent, laws are different from other types of norms; passing laws necessarily implies interaction of the executive and legislative powers, there are constitutional procedures for their enactment, and some constitutions provide regulation of certain subjects, such as budgets, taxes or fundamental rights, exclusively by law. In fact, important institutions such as initiative for legislation and veto powers are directly related to the formal hierarchy and political relevance of laws. Because of these political and formal features, partisan influences may be much greater when a judge review a law compared to other norms. Consequently, I will test the following hypothesis:

H7) when a judge reviews a law and his party is in the opposition coalition it is more likely that the judge will vote to strike down that law.

3.3.4 Ombudsman

In Latin America the Ombudsman is generally appointed by congress to research and check standards of human rights protection; he also can intervene in cases of abstract constitutional review. Unlike the American Solicitor General, the Ombudsman does not represent government interests but citizen rights. As explained at the beginning of this chapter, according to the 1998 Ecuadorian Constitution, individual citizens require the Ombudsman's support to challenge a norm before the TC.[66] A positive opinion means that the constitutional challenge against a law, decree, resolution or other norm has at least the legally established formal requirements[67] to be brought before the TC by an individual citizen. The corresponding hypothesis is:

H8) Justices are more likely to strike down a norm when the Ombudsman intervenes in a case.

3.3.5 Case Facts

As I explained above, I account for case facts through three dummy variables indicating if a case is related to economic matters, civil rights, or social rights. I include these variables mainly as

[66] The Ombudsman may also adopt a more active role in a case by becoming a party and defending a specific position in that case.
[67] Some of these requirements are related to the type of norm that can be challenged, the type of authority or public institution enacting the norm, etc.

control variables since factual features of a constitutional case may also influence the direction of judges' decision-making.

3.3.6 Ideology

In Latin America, including Ecuador, political actors have been usually placed in a scale going from the political left to the political right, considering as moderates those placed at the political center. I will use this scale to classify TC judges, using for each judge a range from -1 for extreme right to 1 for extreme left. For this measurement, I will use data from available empirical research on TC judges, specifically I will use data built by Basabe (2008, 2009), a lawyer and PH. D in political science who has developed it from survey research applied to specialized Ecuadorian lawyers, TC advisors, scholars, and journalists in four Ecuadorian cities: Quito, Guayaquil, Cuenca, and Loja. The survey included questions on the economy and labor, which in Ecuador are issues marking ideological differences among political left and right. As I stated above, I use this variable only as a control variable. The following table presents a summary of all these variables.

Table 3-1: Variable Description for a Model of Constitutional Review

Variable	*Variable Description*
Judge's end of term	= 1 if justice voted during last six months of his term 0 if justice voted before last six months of his term
Party's opposition	= 1 if justice's party opposes the president 0 if justice's party supports the president
Time in office	= Days from the beginning of the judges' term until day of vote
President's end of term	= 1 if TC ruling was decided during last six months 0 if the ruling was decided before last six months
Political Plaintiff	= 1 if a political leader intervened as plaintiff in the case 0 otherwise
Ombudsman	= 1 if the Ombudsman intervenes in the case 0 otherwise
Case timing	= 1 if the law was challenged during the current presidential term = 0 if it was challenged before the current presidential term
Economic matters	= 1 if the challenged law is related to economic matters 0 otherwise
Civil rights	= 1 if the challenged law is related to civil rights 0 otherwise
Social rights	= 1 if the challenged law is related to social rights 0 otherwise
Ideology	= scale ranging from -1 for extreme right to 1 to extreme left

3.4 INSTITUTIONAL CONDITIONS OF CONSTITUTIONAL REVIEW

Table 3.2 below includes three models of constitutional review based on the variables described above. These models are logistic regressions obtained using Stata 8.1. Model 1 includes only cases of constitutional review of laws, either organic laws or ordinary laws[68]. In the Ecuadorian system laws proposals have to be approved by both, Congress and the President. Model 2 includes norms different of laws: presidential decrees, administrative decisions, president's regulations of laws (reglamentos), and decisions or regulation of state secretaries and other public institutions, and model 3 includes cases where all type of norms (laws, decrees, regulations, etc.) were subject to review.

3.4.1 Timing and reappointment

As stated above, most of research on judicial politics in Latin America has focused on presidents' timing. The basic idea is that once the president loses power, constitutional judges are more likely to strike down the laws he or she enacts. However, the three models in table 3.2 show TC judges' greater proclivity to strike down a law or other norms *during the last six months of their own terms as judges*, confirming hypothesis 1.

[68] In Ecuador , organic laws regulate specific matters and according to provisions 142 and 143 of the 1998 Constitution had be approved by the majority of Congress, whereas ordinary laws could be approved just for the majority of legislators attending an specific congressional session.

Table 3-2: TC Judges' Votes and Institutional Conditions

Variable	*Model 1*	*Model 2*	*Model 3*
Judge's end of term	1.236*****	. 8025**	.5868*
	(.5335)	(.2633)	(.2491)
Party's opposition	.4308*	-.0647	.0219
	(.1934)	(.1020)	(.0864)
End of Term x Opposition		-.1273	-.0099
		(.3131)	(.2916)
Time in office	-.0009**	-.0006**	-.0006**
	(.0003)	(.0002)	(.0001)
President's end of term	-.6986*	.0650	-.0213
	(.2833)	(.1122)	(.0660)
Political plaintiff	.3701	.2856*	.3426**
	(.2835)	(.1260)	(.1183)
Ombudsman	-.5609**	-.2305*	-.3393**
	(.1893)	(.1255)	(.1024)
Case timing	.1236	.2962**	.2196**
	(.1523)	(.0851)	(.0834)
Economic matters	-.6246	-.5994**	-.4719**
	(.5564)	(.1706)	(.1792)
Civil rights	-.1877	-.6362**	-.5167**
	(.4839)	(.1937)	(.1602)
Social rights	-.4662	-.4005*	-.2184
	(.5147)	(.1707)	.1624
Constant	.9275*	-.0792	.0544
	(.4278)	(.1439)	(.1272)
N	419	1849	2268
Log likelihood	-281.7809	-1107.696	-1416.7737

NOTE: Dependent Variable = probability that a judge of the Constitutional Tribunal vote to strike down a norm, coded 1=unconstitutional and 0=constitutional. Robust standard errors in parentheses are adjusted for clustering on each judge. Model 1 does not include the interaction due to collinearity. Results are consistent when running either relogit regression or logit with fixed effects by justice. All p values are one-tailed tests of significance.
* $p \leq .05$. ** $p \leq .01$.

This is a reversal of the tendency revealed by the variable *Time in Office*, which shows that TC judges tend to uphold norms as their number of days in office increases. At the beginning of their terms, according to TC advisors[69], many new judges tend to base its first rulings on private or administrative law[70] rather than Constitutional Law.[71] As a consequence, they use a too wide criteria based on legality to judge when a norm is unconstitutional; as time passes, TC judges learn of the TC's institutional culture, and these judges progressively restrain their judgments to constitutional terms. This explains why at the beginning of their terms TC judges are more activists and they become later more self-restrained. Hence, this variable controls for influence of legal ideology in the model.

However, at the end of their terms judges have less time left in office but they want to be reappointed and consequently have to be deferent to legislative political parties controlling this process. Hence, they can trade activist votes on judicial review for partisan support for re-nomination and re-appointment. According to some former TC officials, at the end of TC judges' terms nominating organizations such as unions, peasants and Indian organizations, commerce chambers, and local government organizations exercised pressure even through street demonstrations to obtain TC favorable rulings.[72] Consequently, TC judges looking for re-nomination will also be sensitive to these requirements. Additionally, TC judges may also vote

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[69] Personal Interviews: Berenice Polit (TC advisor), Quito, 24 June, 2009; Victor Hugo López (former TC Chief legal advisor 2006 - 2008, TC General Secretary 2001 – 2005), Quito, 29 July, 2009

[70] Most of the time of TC judges is devoted to "amparo cases" against violations of rights of members of the public service. In a research I did for the Ecuadorian Justice Department, 36.26 % of amparos in the period 1997-2004 were about public servants rights, but very often it was not clear if the problem was only legal or a constitutional violation actually occurred (Grijalva 2008).

[71] In Ecuador, constitutional law is underdeveloped as a professional area; hence most of TC judges are lawyers with experience in administrative, labor, and private law.

[72] Personal Interviews: Berenice Polit (TC advisor), Quito, 24 June, 2009; Victor Hugo López (former TC Chief legal advisor 2006 - 2008, TC General Secretary 2001 – 2005), Quito, 29 July, 2009; Ramiro Rivadeneira (former TC advisor 2001 – 2008), Quito, 11 August, 2009.

during this period against the government in judicial review cases in exchange of votes of opposition parties for reappointment.

In contrast, president's end of term is significant only in the case of constitutional review of laws (model 1), but the negative coefficient shows a different relationship than that found by other researchers. If the challenge to the law occurs during the last six months of the president's term, it will be less likely that a judge will strike down the norm, as the negative coefficient of president's end of term shows. Consequently, hypothesis 2 can be rejected. If TC judges do not perceive that a change of president immediately affects their stability or reappointment, and the policy orientation of the incoming president[73] is similar to that of the outgoing president, they really do not have reasons to become activist judges. This behavior may be also due to lack of information in the midst of conditions of high political instability, such as the frequent presidential crisis that plague Ecuadorian politics. Since the political future during this time of change is uncertain, TC judges strategically prefer to wait to obtain a more clear view of power balance and orientation once the crisis is resolved and the new president assumes office, and consequently are reluctant to strike down laws and other norms. In fact, an activist stance in the midst of political turmoil may trigger political attacks against the tribunal.

In the Ecuadorian case, presidential terms have been more uncertain than TC judges' terms. Hence, the level of uncertainty is comparatively lower with regards to judges' own terms when compared to presidential terms, and it is reasonable that TC judges use their own terms as a reference for judicial decision-making.

At the end of their terms, TC judges looking for reelection have to be more deferential to those with the power to reappoint them. All models clearly show that relationship; TC judges,

[73] In the period of study two presidents, Mahuad and Gutiérrez, were removed from office by congress and replaced by their vice presidents who basically followed similar policies.

either linked to the opposition or government coalition become more "activist" at the end of their own terms. They are more likely to strike down laws and other type of norms, of which most of them are enacted by the executive. In the case of TC judges linked to the government coalition such defection is linked to the president's political situation and the need of a broad support of opposition legislative votes and nominating institutions to obtain reappointment. In fact, chapter two showed that TC appointments were made during times of legislative coalition breaks and coalition formation. During that periods minority presidents were particularly vulnerable and could not assure TC judges' reappointment. In contrast, the opposition frequently led by the Social Christian Party (PSC) provided better political opportunities to obtain or at least to complete the required votes for reappointment.

Case timing is significant for models 2 and 3, which means that norms challenged before the TC in the current presidential term are more likely to be stricken down than those norms challenged before the current presidential term, which rejects hypothesis 5. Normally, we should expect that older norms can be challenged and stricken down more than current norms because the former norms tend to be less salient at least for the incumbent government and consequently the TC would have more leverage to strike down that norm. However, if legislative majorities shift continuously, legislative minorities have to make an active use of constitutional review of current norms as means of potential veto.

Finally, case facts, which are included basically as control variables, are not significant when ruling on constitutionality of laws. However, when constitutional review refers to norms different of laws, case facts are significant, excluding only social rights in model 3. When rulings refer to economic matters, civil rights, and social rights there is less propensity to declare those norms as unconstitutional.

3.4.2 Constitutional review of laws

If the challenged norm is a law, the coefficient of *party's opposition* in model 1 shows that these judges follow preferences of their political parties. In other words, if his party is in the opposition coalition, it is more likely that a TC judge will strike down the challenged law as stated in hypothesis 7. Interestingly, the party's position is significant but only for the review of laws, not for norms different of laws, and all type of norms, as estimated in models 2 and 3. In this way hypothesis 3 is confirmed for the constitutional review of laws. How do we explain this difference between review of laws and other norms?

Constitutional review of laws directly involves relationships between the executive and the legislature. Unlike decrees or other regulations enacted by the president, his secretaries or public agencies, the enactment of laws requires a constitutional procedure where both the president and congress are necessarily related and exercise initiative and veto powers. Additionally, some constitutions, like the Ecuadorian one, require a law to regulate specific matters,[74] such as the annual fiscal budget, taxes or regulations of constitutional rights. Consequently, unlike other norms, generation of the law implies preferences and actions of political parties in congress. This feature explains why party's position is significant in model 1, including only laws, while is not significant in model 2, which excludes laws and model 3, which include all type of norms.

In model 1, party's position provides judges direct information about their parties' political preferences, and consequently, unlike models 2 and 3, the presence of a political

[74] Ecuadorian constitutional law names this requirement as legal reserve (*reserva legal*), which implies that this matters cannot be regulated by other types of norms different of laws such as decrees, executive orders, or other norms. For instance provision 141 of the 1998 Ecuadorian Constitution determined some of the matter subject to legal reserve.

plaintiff becomes irrelevant[75]. Because his party takes a stance in congress to support or oppose the current government, a TC judge knows the party's preferences on politically important issues regulated by the challenged law. This level of information is not usually reached when the judge votes on constitutional revision of other type of norms, many of them without major political relevance, and consequently only the direct participation of political plaintiffs provides information on political preferences. This variable becomes significant in models 2 and 3. Consequently, hypothesis 6 is rejected for the sub-set of laws (in model 1) and confirmed for norms different of laws (model 2), and the overall sample of norms (model 3).

3.4.3 Interaction of judge's term and party

Models 2 and 3 include interactions effects between the end of the judge's term and his party's position in congress vis-a-vis the government. I include these interactions in order to test hypothesis 4. The coefficient "judge's end of term" reveals that at the end of their terms judges whose parties are aligned with the government become more activist. The interaction coefficients in both models are not significant, which shows that during these last six months, TC judges whose parties oppose the government basically have the same behavior than judges whose parties support the government. The sum between judge's end of term and the interaction is significant in both models, which confirm that opposition judges have the same behavior than government judges during their last six months in office.

Interestingly, unlike results in model 1, the coefficients for "party's opposition" in models 2 and 3 are not significant, which confirms that timing rather than political party is

[75] However, this result change when one control by ideology as I show below.

crucial in constitutional review of norms different of laws. In other words, the fact of voting in the last six months of their term has the same effect on judges whose parties support the government and judges whose parties oppose the government: they adopt an activist behavior.

Similar behavior of government and opposition judges is explained by strategic needs. At the end or their periods all judges need a wide support of votes in the congress to be reappointed. Consequently, judges who supported the government are more likely to rule against the government when they are in their final six months in order to obtain support for reappointment from the legislative opposition.

Hence, we can observe two different kind of behavior of TC judges. At one level or dimension, as models 2 and 3 show, when TC judges rule on most cases which lack political relevance, partisan influences on judge's votes are not significant,[76] but ending their terms affect behavior of all judges. In contrast, as model 1 shows, partisan position with respect to the government influences judge's decisions when the judges votes on constitutional review of a law, and many of cases where a challenged law is politically important.

This difference between review of laws and review of other type of norms is an important finding because it reveals that the same judge within a constitutional court can behave in a very different way according to the type of challenged norm. On one hand, they can follow their values, policy preferences, or the law when ruling on standard cases without political pressure. However, at the end of their terms, TC judges either aligned with the government or the opposition become more activists due to strategic reasons related to their reappointment. On the other hand, constitutional judges can behave strategically and be directly responsive to political

[76] The exception to this situation is given by those cases when a political party directly states its interest in becoming a plaintiff, as models 2 and 3 show. However, considering this participation these cases may be considered as politically relevant.

parties when ruling on politically relevant cases decided through review of laws. Hence, judge's timing and political salience of a case are crucial variables explaining judicial behavior.

3.4.4 Role of the Ombudsman

The three models in table 3.2 indicate that the Ombudsman's intervention in a case diminishes the likelihood of striking down a norm. Supportive specialized opinion of a high official such as the Solicitor General or the Ombudsman increases the likelihood of reaching a favorable outcome. In the Ombudsman´s case his opinion has even been used as a proxy to account for the role of the law in judicial decision-making. However, in the Ecuadorian case, the Ombudsman unfortunately does not enjoy great public confidence; the Office of the Ombudsman has been seen as object of patronage and even corruption. Additionally, this result may be linked to the political dimension of constitutional review. Whereas, other cases are brought before the TC by political plaintiffs such as the president, congress, the Supreme Court or political leaders with thousands of citizens' signatures supporting that legal action, most of cases supported by the Ombudsman do not have political relevance. Hence, the cases where citizens are plaintiffs lower probabilities of obtaining a judges' vote to strike down a norm, enabling us to reject hypothesis 8.

The predicted probabilities of model 1 appear in table 3.3. Situation number 5 reveals a very high probability (88%) of striking down a norm when the ruling takes place during the last six months of a TC judge's term, the justice's party opposes the president and there is a political plaintiff. These percentages decreases 16% when the ruling is about economic matters, whereas is higher if it is related to civil or social rights.

Table 3-3: Predicted Probabilities of a Vote to Strike Down a Law

Situation	Last 6 Months	Opposition Party	Political Plaintiff	Economic Matters	Civil Rights	Social Rights	*Probability* [1]
1	No	No	No	No	No	No	.51 (.3061-.7077)
2	No	Yes	No	No	No	No	.61 (.3777-.8084)
3	Yes	No	No	No	No	No	.77 (.5791-.9026)
4	Yes	Yes	No	No	No	No	.84 (.6928-.9289)
5	Yes	Yes	Yes	No	No	No	.88 (.7260-.9545)
6	Yes	Yes	Yes	Yes	No	No	.72 (.4971-.8782)
7	Yes	Yes	Yes	No	Yes	No	.85 (.6604-.9535)
8	Yes	Yes	Yes	No	No	Yes	.82 (.6468-.9289)

1 Number in parenthesis is the 95% confidence interval for the median estimate in Bayesian simulation, based on the parameters from model 1 in table 3.2
NOTE: *Judge's time in office* held at 365 days and *presidential timing* at last six months of presidential term; *Ombudsman* held at no participation. Case timing held at *law challenged during current presidential term.*

These results confirm the contention that constitutional adjudication of laws is strongly influenced by both judge's end of term and party's opposition. Table 3.3 shows that both variables increase probabilities to strike down a norm to 84%. As table 3.4 below shows, these

probabilities are lower when we analyze constitutional adjudication on norms different from laws. For instance, for this type of norm, situation five shows a lower probability than laws; there is a 72% probability of striking down a norm, which means a 16% less probability than striking down laws. If we observe these probabilities comparing table 3.3 and table 3.4, partisan influences on constitutional review of norms different from laws are much weaker than those influences on review of law. For instance, situation 2 in table 3.4 shows that alignment of a TC judge with an opposition party implies 49% of probabilities to strike down a norm whereas this figure reaches 61% when that norm is a law. In the same way, ruling during the last six months means a 70% probability of striking down a norm but this percentage is higher (77%) in the case of laws.

Table 3-4: Predicted Probabilities of a Vote to Strike Down Norms Different from Laws

Situation	Last 6 Months	Opposition Party	Political Plaintiff	Economic Matters	Civil Rights	Social Rights	*Probability* [1]
1	No	No	No	No	No	No	.51 (.4172-.6007)
2	No	Yes	No	No	No	No	.49 (.4045-.5868)
3	Yes	No	No	No	No	No	.70 (.6019-.7769)
4	Yes	Yes	No	No	No	No	.66 (.5788-.7367)
5	Yes	Yes	Yes	No	No	No	.72 (.6316-.7955)
6	Yes	Yes	Yes	Yes	No	No	.63 (.5151-.7317)
7	Yes	Yes	Yes	No	Yes	No	.58 (.4415-.7069)
8	Yes	Yes	Yes	No	No	Yes	.63 (.5249-.7330)

1 Number in parenthesis is confidence interval for the median estimate in Bayesian simulation, based on the parameters from model 2 in table 3.2

NOTE: Judge's time in office held at 365 days and presidential timing at last six months of presidential term; Ombudsman held at no participation. Case timing held at *law challenged during current presidential term*. Values of the interaction term in the simulation are set in accordance with the dummies for *opposition* and *last six months in office*.

Findings of model 3 are illustrated by the predicted probabilities of voting against a norm presented in table 3.5. This table shows that alignment with an opposition party does not make almost any difference in the probability to vote to strike down a norm when we take all norms besides laws into consideration. However, ruling during last six months of the judge's term raises the probability from about 50% to 65%. A political plaintiff such as a party leader increases this probability to 72%. Nevertheless, this percentage decreases to about 62% when rulings refer to economic matters or civil rights, and it increases to 68% when the ruling refers to social rights. The results show that partisan influences and timing are more important for probabilities to strike down a law (88% in table 3.3) than all type of norms (72% in table 3.5).

Table 3-5: Predicted Probabilities of a Vote to Strike Down All Norms

Situation	Last 6 Months	Opposition Party	Political Plaintiff	Economic Matters	Civil Rights	Social Rights	*Probability* [1]
1	No	No	No	No	No	No	.50 (.4397-5687)
2	No	Yes	No	No	No	No	.51 (.4444-.5716)
3	Yes	No	No	No	No	No	.65 (.5452-.7298)
4	Yes	Yes	No	No	No	No	.65 (.5806-.7218)
5	Yes	Yes	Yes	No	No	No	.72 (.6485-.7924)
6	Yes	Yes	Yes	Yes	No	No	.62 (.4993-.7151)
7	Yes	Yes	Yes	No	Yes	No	.61 (.4892-.7203)
8	Yes	Yes	Yes	No	No	Yes	.68 (.5751-.7665)

1 Number in parenthesis is confidence interval for the median estimate in Bayesian simulation, based on the parameters from model 3 in table 3.2

NOTE: *Judge's time in office* held at 365 days and *presidential timing* at last six months of presidential term; Ombudsman held at no participation. *Case timing* held at *law challenged during current presidential term*. Values of the interaction term in the simulation are set in accordance to the dummies for opposition and last six months in office.

3.4.5 Ideology

As I explained above, I run separate models without including the ideology variable in order to increase the N. In the following models I include this variable using Basabe's ideological index for Ecuadorian constitutional judges from 1999 to 2007. Table 3.6 below shows the basic significant relationships remain similar. Judges' timing is still significant in the three models, whereas party's opposition is significant only in the model of laws.

Table 3-6 TC Judges' Votes and Institutional Conditions Including Ideology

Variable	*Model 1*	*Model 2*	*Model 3*
Judge's end of term	1.700****	1.069*	.8201*
	(.4937)	(.4484)	(.4336)
Party's opposition	.4213*	.0104	.0923
	(.2153)	(.1112)	(.0833)
End of Term x Opposition		-.3696	-.0847
		(.5595)	(.5222)
Time in office	-.0011**	-.0008**	-.0008**
	(.0003)	(.0003)	(.0002)
President's end of term	-.6242*	-.0598	-.1114
	(.3021)	(.1809)	(.1128)
Political plaintiff	.6540*	.3198*	.4223**
	(.3428)	(.1357)	(.1479)
Ombudsman	-.6246**	-.4067*	-.5521**
	(.2331)	(.1754)	(.1375)
Case timing	.2044	.3923**	.3290**
	(.1321)	(.1099)	(.1004)
Economic matters	-.5140	-.5461*	-.4579*
	(.6468)	(.2136)	(.2308)
Civil rights	.2431	-.4606*	-.2990
	(.4186)	(.2348)	(.1778)
Social rights	-.1488	-.2878	-.1163
	(.5569)	(.1996)	(.1997)
Ideology	.1155	.2488*	.2358*
	(.2665)	(.1081)	(.1205)
Constant	.6090	-.0359	.1221
	(.4385)	(.1862)	(.1739)
N	332	1383	1715
Log likelihood	-221.18087	-810.46985	-1050.2712

NOTE: Dependent Variable = probability that a judge of the Constitutional Tribunal vote to strike down a norm, coded 1=unconstitutional and 0=constitutional.
Robust standard errors in parentheses are adjusted for clustering on each judge. Model 1 does not include interactions due to collinearity. Results are consistent when running either relogit regression or logit with fixed effects by justice. All p values are one-tailed tests of significance.
* $p \leq .05$. ** $p \leq .01$.

Interestingly, when controlling by ideology, political plaintiff in model 1 becomes significant. If a political leader fills out a constitutional challenge against a law, it is more likely that it will be declared unconstitutional. This variable was not significant when model 1 did not include ideology. However, ideology itself is not significant in this model, and it is marginally significant in the other two models.[77]

The predicted probabilities of model 1 including ideology appear in table 3.7 below. Controlling for ideology increases the probability of striking down a law in most of the situations. For instance, in situation five, controlling for ideology increases probabilities from 88% (table 3.3) to 92%. Hence, these results reveal that political variables and timing are determinant on the direction of TC rulings on politically relevant laws, even if ideology is included as control variable.

[77] Additionally, when controlling by ideology, civil rights is no longer significant in model 3, and social rights is not significant in model 2. I include these variables in the models as control variables.

Table 3-7: Predicted Probabilities of a Vote to strike down a Law, Including Ideology

Situation	Last 6 Months	Opposition Party	Political Plaintiff	Economic Matters	Civil Rights	Social Rights	*Probability*
1	No	No	No	No	No	No	.45 (.2659-6536)
2	No	Yes	No	No	No	No	.55 (.3154-.7603)
3	Yes	No	No	No	No	No	.81 (.6086-.9305)
4	Yes	Yes	No	No	No	No	.86 (.6999-9527)
5	Yes	Yes	Yes	No	No	No	.92 (.7760-.9794)
6	Yes	Yes	Yes	Yes	No	No	.82 (.6587-.9244)
7	Yes	Yes	Yes	No	Yes	No	.94 (.8607-.9765)
8	Yes	Yes	Yes	No	No	Yes	.91 (.7853-.9699)

Number in parenthesis is confidence interval for the median estimate in Bayesian simulation, based on the parameters from model 1 in table 3.6

NOTE: Judge's time in office held at 365 days and presidential timing at last six months of presidential term; Ombudsman held at no participation. Ideology held at 0 in order to represent a moderate judge. Values of the interaction term in the simulation are set in accordance to the dummies for opposition and last six months in office.

Table 3.8 below shows that these predicted probabilities decrease from 92% (for laws) to 73% when they refer to norms different of laws and ideology is included in the model. Interestingly, the inclusion of ideology in table 3.8 does not have a strong impact (72% in table 3.4 and 73% in table 3.8) increasing probabilities of striking down a norm as we found in the case of laws.

Table 3-8: Predicted Probabilities of a Vote to strike down norms different of laws, Including Ideology

Situation	Last 6 Months	Opposition Party	Political Plaintiff	Economic Matters	Civil Rights	Social Rights	*Probability*
1	No	No	No	No	No	No	.50 (.3668-6375)
2	No	Yes	No	No	No	No	.50 (.3800-.6248)
3	Yes	No	No	No	No	No	.74 (.5908-.8475)
4	Yes	Yes	No	No	No	No	.67 (.5290-7962)
5	Yes	Yes	Yes	No	No	No	.73 (.6024-.8523)
6	Yes	Yes	Yes	Yes	No	No	.70 (.4674-.8458)
7	Yes	Yes	Yes	No	Yes	No	.64 (.4316-.8106)
8	Yes	Yes	Yes	No	No	Yes	.68 (.5210-.8143)

Number in parenthesis is confidence interval for the median estimate in Bayesian simulation, based on the parameters from model 2 in table 3.6

NOTE: Judge's time in office held at 365 days and presidential timing at last six months of presidential term; Ombudsman held at no participation. Ideology held at 0 in order to represent a moderate judge. Values of the interaction term in the simulation are set in accordance to the dummies for opposition and last six months in office.

In the same way, the predicted probabilities based on the model 3 confirm these hypotheses. Most of predicted probabilities based on model 3, including ideology, increase or remain relatively similar. The biggest increase occurs in situation eight, which is the most political situation: the judge is ruling during his last sixth months in office, he is aligned with an opposition party, there is a political plaintiff, and the case involves civil rights. In this case, the inclusion of ideology increases the predicted probability of striking down a norm from .61 to .72. In the case of social rights, this probability increases from .68 to .76.

Table 3-9 Predicted Probabilities to Strike Down all Norms, Including Ideology

Situation	Last 6 Months	Opposition Party	Political Plaintiff	Economic Matters	Civil Rights	Social Rights	*Probability*
1	No	No	No	No	No	No	.51 (.4141-5950)
2	No	Yes	No	No	No	No	.53 (.0446-.6151)
3	Yes	No	No	No	No	No	.70 (.5320-.8215)
4	Yes	Yes	No	No	No	No	.70 (.5888-7995)
5	Yes	Yes	Yes	No	No	No	.78 (.6758-.8679)
6	Yes	Yes	Yes	Yes	No	No	.69 (.4865-.8433)
7	Yes	Yes	Yes	No	Yes	No	.72 (.5754-.8500)
8	Yes	Yes	Yes	No	No	Yes	.76 (.6273-.8670)

Number in parenthesis is confidence interval for the median estimate in Bayesian simulation, based on the parameters from model 3 in table 3.6

NOTE: Judge's time in office held at 365 days and presidential timing at last six months of presidential term; Ombudsman held at no participation. Ideology held at 0 in order to represent a moderate judge. Values of the interaction term in the simulation are set in accordance to the dummies for opposition and last six months in office.

All these results confirm that judges' timing and partisan influences continue influencing constitutional review of laws when controlling by ideology; this control even makes the influence of partisan plaintiffs clear.

Thus, these results confirm the idea that a Constitutional Court can operate at different levels. A political level where partisan positions influence judges' decisions and a legal level where judges' values and attitudes influence their decisions when political parties do not care about these cases and consequently do not exert important influence on those rulings. In other words, judges may vote strategically or sincerely depending on the timing of their terms and concrete features of a case.

3.4.6 Conclusions

In summary, the findings in this chapter support the theory that timing, represented by judges' terms, influence judicial decision-making. When these decisions are about the constitutionality of a law, the party's position in congress with respect to the president also influences a judge's votes. Party's position influences a judge's votes on most political cases represented by review of laws, and it is not statistically significant in review of other norms.

However, intervention of a political plaintiff in a case, challenging either a law or other kind of norm (presidential decree, a state secretary's resolution, etc.) is a signal of the political importance of that case and this fact incline the judge to strike down a norm.

These results show a TC working at two levels or dimensions. At one level, consisting of cases without political significance, judges pay attention to their own time horizons and partisan influences do not affect judicial decision-making. At a second level, consisting of political cases

linked to law review or intervention of political plaintiffs, position of political parties influences TC judges' votes.

Although all Ecuadorian presidents during this period were minority presidents, judges in the Constitutional Tribunal were not highly independent; they were dependent on political parties and Congress. Hence, divided government did not assure judicial independence, and political parties in congress managed to exert control over the judges they appointed, taking advantage of the endings of judges' short terms and expectations of reappointment.

4.0 CONSTITUTIONAL REVIEW RULINGS

Chapter 3 showed that partisan alignments are irrelevant for most constitutional decisions, but they become influential when the Constitutional Tribunal specifically considers laws. How important is partisanship for the formation of laws in Ecuador? In this chapter I study some critical cases in order to address this question

The study of specific cases of constitutional review provides a concrete view of partisan actors shaping legal decisions. Constitutional rulings of high political profile are taken in the context of active legislative and partisan politics, public opinion pressure, and social group interests. Consequently, they are reported by the press and clearly recalled by key actors. In this chapter, I examine three TC rulings which show the power relationships between the TC, congress and the president. Specifically, the cases show how the position and cohesion of political parties in congress influences the decision-making process of TC judges when ruling on cases of high political profile. As I explain in previous chapters, most TC rulings are standard cases without high political importance but this does not mean that the TC is free from political pressures when deciding on some key cases.

The selected cases have high political importance. They involved political parties, the president, and social movements and were widely reported in Ecuadorian press. The cases also elicited congressional threats of impeachment against TC judges. In this way, I focus on the type of cases where political variables play a crucial role. However, the cases also pose legal puzzles

requiring interpretation of the constitution and statutes, which allow me to evaluate the consistency of legal arguments as a way to assess the influence of the law as an independent variable in contrast to political variables.

In some of the cases there are evident violations of the constitution by provisions of a specific law, but a majority of TC judges still voted against the unconstitutionality of the norm. Frequently, constitutional norms and legal norms allow a *margin of interpretation*, which provides the interpreters two or more answers to the same legal problem. However, in other situations this margin is reduced because the much greater weight and consistence of legal arguments in favor of one interpretation. If we find, like in the firm detention case that I examine below, that constitutional judges develop weak legal arguments to maintain norms that are clearly unconstitutional, this situation may also be indirect evidence of the role of other variables different from the law--such as political variables--influencing judges' behavior.

The cases were also selected trying to include diversity in the matters involved. The Value Added Tax Case (VAT) is related to economic policy in the context of structural adjustment programming, whereas the D'hondt case refers to electoral issues directly touching partisan interests. Finally, the firm detention case addresses issues of criminal procedure and human rights. In this way, I can study the role of the relationships between judges and parties in very diverse rulings.

The time of the rulings correspond to different presidential, legislative, and judicial terms. I include variance in the timing of decisions in order to observe judicial behavior of different cohorts of TC judges during the time of different legislative coalitions and presidents. Two cases, the D'hondt case and the Firm Detention case, were decided under the same

presidential term, but the Firm Detention case had a second ruling in the term of a different president.

To sum up, case study allows examining the ideological and legal complexities around specific cases, and the concrete partisan influences playing in each ruling. In all cases I start with the background of each ruling, and explain the legal puzzle to be solved by the Tribunal, including the main legal arguments; I identify the political actors involved, especially the relevant political parties, social movements, or interests groups. The analysis shows the professional and ideological links between parties and judges, and the parallelisms between political parties' positions and judges' votes in the corresponding ruling.

4.1 THE VALUE ADDED TAX CASE

4.1.1 General background

Market-oriented governments of Presidents Durán Ballén (1992-1996), Alarcón (1997-1998), and Mahuad (1998-2000) aimed to advance privatization and deregulation processes, especially in economic activities formerly reserved to state ownership such as oil, electricity, and telecommunications. This process of economic liberalization was also supported thorough international loans from financial institutions such as the World Bank and the International Monetary Fund. However, this support was also conditioned on specific measures of economic policy by the recipient country, as in the value added tax case.

In 2000 the Ecuadorian economy was adjusting to consequences of the previous year's severe banking crisis and subsequent dollarization reform, which had ended in political crisis and

the ousting of President Mahuad in January of that year. Vice President Gustavo Noboa, who assumed office after Mahuad, quickly managed to obtain congressional support to pass the Monetary Stability and Economic Recovery Laws (popularly called *Trole* 1 and 2), as well as the Fiscal Budget Law in November. After these economic adjustment policies the International Monetary Fund (IMF) authorized fresh loans for Ecuador (Mejía Acosta 2004, Pachano 2007). In May 2001, President Noboa also tried to pass a tax reform concerning among other changes, legal reforms to a public oil stabilization fund, an income tax increase, and institutional reforms to the Ecuadorian Internal Revenue Service and Custom Service. In addition, the legal reform also increased the value added tax (VAT) from 12 % to 15 %, which elicited strong political opposition. According to the president, the VAT increase was needed to balance the budget, pay international debts, and obtain new loans. However, main legislative parties both on the right (PSC) and the left (ID, PK, MPD) strongly opposed the government's goal, which was manifested in a six-month conflict between congress and the president, including crucial TC involvement.

President Noboa had sent the proposal to congress as an *emergency law*, which was provided for under the Ecuadorian Constitution for laws on economic matters requiring fast congressional approval[78]. On March 29, 86 of 123 legislators approved most of these legal tax reforms but overturned the VAT increase from 12% to 15%. When President Noboa received the revised proposal from congress he vetoed the 12% VAT provision and sent the proposal back to congress this time including an alternative VAT increase to 14% instead of 15%. On May 8, the congress voted on this alternative presidential proposal; in this occasion, however, the initial 86 votes against the VAT increase were reduced to only 72 because the government managed to

[78] Similar to fast track in the American legislative system.

reach a clandestine political agreement with the PRE. However, according to the Ecuadorian Constitution at least a 2/3 majority of congress, that is 82 votes, was necessary to override the veto,[79] whereas if congress failed to decide within 30 days about the issue, the president could put the proposal into effect in the form of a presidential decree[80].

A political and constitutional conflict emerged as a consequence of the shift in legislative voting on the VAT. As the congress not could reach the required 2/3 majority to confirm its initial proposal, the government held that after 30 days the proposal had to become law, according to the constitution.[81] Consequently on May 14, the President's proposal including the VAT increase of 14% was published in the official bulletin and put into effect. The opposition reacted aggressively: some social movements threatened protests whereas all opposition parties argued that Noboa could not veto an inexistent congressional proposal since congress had only maintained the original 12% VAT, and the president did not have constitutional powers to send congress the alternative VAT increase to 14%. Finally, some opposition parties and social movements[82] challenged the constitutionality of the VAT increase before the Constitutional Tribunal[83].

[79] Provision 153 b) of the 1998 Ecuadorian Constitution.
[80] Provision 155 and 155 of the 1998 Ecuadorian Constitution.
[81] Provisions 155 and 156 of the 1998 Ecuadorian Constitution ordered that law proposals about economic matters sent by the president as urgent proposals should be voted by congress within 30 days. The proposal became law if congress did not reach a decision within this time.
[82] PK, MPD as well as diverse national grass-roots organizations challenged before the TC the presidential decree. Four different legal actions were brought before the TC against the reform, but the TC accumulated them in a single case. PK, MPD as well as diverse national grass-roots organizations challenged before the TC the presidential decree.
[83] TC ruling 126-2001-TP.

4.1.2 The ruling

On August 7, the TC ruled that the VAT increase was unconstitutional. The ruling was voted under strong public opinion pressure. The issue was present in main news headlines during several weeks, and public discussions developed around the economic consequences of the VAT increase and the constitutional problems of its approval. President Noboa himself attended a hearing before the TC and presented legal arguments and warnings of strong negative economic and social consequences if the VAT increase was overruled by the TC.

Beyond the constitutional arguments of those TC members favoring and opposing the VAT increase, they clearly reflected policy preferences of their political parties in congress. TC members René de la Torre, Hernán Salgado, and Carlos Helou who were publicly linked to the DP – the pro-government party- voted to support the VAT increase. Guillermo Castro Dager (PRE) also voted to support the government's position. Those TC members publicly linked to opposition parties, Oswaldo Cevallos, Luis Chacón, Guillermo Durán (all related to the PSC), Marco Morales (ID), and Hernán Rivadeneira (PSE) voted to strike down the VAT increase decree.

We can notice that the TC majority and minority is not divided along ideological lines because the PSC is placed on the right of the Ecuadorian ideological spectrum and tends to reject taxes increments while the ID and PSE can be placed on the center left and left, which tends to favor taxes increments for social redistributive purposes. If TC judges responded to ideological preferences, the TC judges close to ID and PSE should have supported the government's reform. However, in the VAT case both parties due to their opposition to Noboa's government at that time rejected the legal reform, and TC judges close to these parties adopted identical position. In

contrast, the DP and judges close to this party supported the government's position. The vote of Guillermo Castro (PRE) is specially revealing of this partisan alignment, as I explain below.

All these judges had some links with appointing political parties. René de la Torre, appointed with support of the DP, was one of the party's founders and had been elected as legislator representing the DP three times. Hernán Salgado, a university professor and legal scholar was probably the TC judge with the most independent profile; he worked in INEDES, an NGO close to the DP party. Carlos Helou was also member of the DP party and advisor of the Comptroller General during Mahuad's government (DP), and had been an advisor to DP legislators. Guillermo Castro, affiliated to the PRE party, had been Attorney General during Abdala Bucaram's Government, PRE alternate legislator and candidate, and legal advisor of PRE high officials. On the opposition side, Oswaldo Cevallos, a PSC member was nominated to the TC by the Supreme Court based on the PSC party's support. Luis Chacón, other PSC member, was nominated by the Guayaquil's Chamber of Commerce, but also appointed in congress with PSC support. Marco Morales, affiliated with the ID, had been Vice Minister of Social Welfare and Director of the Ecuadorian Social Security Institute (IESS) during President Borja's government (ID). Hernán Rivadeneira, an active member of the Socialist Party (PSE), had been lawyer of unions linked to this party.

The vote of other TC member supporting the executive, Guillermo Castro Dager,[84] a PRE party member, was especially revealing. His party, the PRE, along with some party-switchers, had shifted its position in congress on May 8. At the beginning, the PRE opposed the VAT increase and PRE legislators voted accordingly, but on May 8, PRE legislators did not attend the second legislative session (to reject the VAT increase to 14%), placing congress in the difficult

[84] Four years later, in January 2005, Castro Dager was appointed to the Supreme Court through a PRE agreement with then President Lucio Gutierrez .

situation described above. Months later, it became known that the Noboa's government had reached an agreement with the PRE party to obtain congressional support for the VAT increase in exchange for key public offices and legal reforms.[85] The political negotiation included appointment of a new Finance Minister close to the PRE, a presidential decree authorizing imprisonment of prosecuted former presidents at their houses instead of a regular jail, which benefited the PRE's leader, Abdalá Bucaram, who was being prosecuted and in self-exile in Panama. Under these circumstances, it was not surprising that Castro Dager, a TC member linked to the PRE, voted to support the VAT increase.

Since the legislative majority supported the TC's ruling on the VAT increase, the tribunal was not threatened with impeachment by the legislators. However, President Noboa bitterly denounced partisan politics within the TC. According to the president, the TC had become the main tool of the opposition.[86] Noboa declared that a constitutional reform was necessary to replace the TC by a constitutional chamber within the Supreme Court. Clearly, this was Noboa's threat to the TC since he lacked the congressional majority to advance formal impeachment.

The VAT case clearly shows how partisan alignments and legislative coalitions influenced judicial behavior. Positions of legislative parties were replicated by those TC judges linked to each one of these parties. Even coalitional dynamics such as the negotiation of the PRE party with Noboa's government influenced judicial decision-making through the vote of the TC

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[85] Few weeks before ending his term President Noboa declared that his biggest mistake in office was to make a secret political agreement with the PRE to appoint Carlos Julio Emanuel as new Finance Secretary in exchange of legislative support for the VAT increase. "Low Grades" in *Diario Hoy*, Quito, December 23, 2002.

[86] Another TC decision strongly affecting Noboa's government was an appellate writ against Ricardo Noboa, brother of President Noboa, who was then head of the Planning State Council (CONAM). Plaintiffs claim that his appointment was nepotism and violated the Ecuadorian Constitutions and specific legal provisions. Ricardo Noboa finally had to resign. Because all the TC rulings on these key cases were against government, Noboa asserted that the tribunal had became the main tool of the opposition, according to him the tribunal was completely biased due to political parties' influence.

judge linked to the PRE party; all these facts were widely reported by the Ecuadorian press. In other words, TC judges were unable to develop autonomous positions respect to the VAT, based on their own legal interpretations or values. President Noboa could not assemble a stable legislative coalition to threaten the TC with impeachment in case of ruling against the VAT. Instead, he publicly declared that the TC should be replaced by a constitutional chamber within the Supreme Court. However, this threat was not credible, at least at that moment, because of the lack of legislative support to advance a constitutional reform in that direction.

The VAT case also shows that a divided government and a minority president do not necessarily lead to judicial independence, as I asserted in Chapter One. In spite of a highly fragmented legislature, political parties managed to organize an opposition legislative coalition to oppose the VAT which, in turn, had direct influence on the TC majority. However, timing in this case did not have any direct effect on judicial decision-making since TC judges had been only one year and three months in office and their terms finished on 2003.

4.1.3 Legal arguments

The VAT case refers to constitutional review of legislative procedures. Unlike the D'hondt case and the Firm Detention case whose legal debates between TC judges had a substantive character, the VAT case formally focuses on a procedural problem. Of course, the TC ruling had important economic and political consequences, but from a constitutional point of view it was possible to frame it as a formal problem. This procedural character is interesting for purposes of hypothesis testing because procedures may be seen as relatively more objective than substantive issues. Hence, judges' values and attitudes may play a lesser role when voting on procedural issues.

This situation allows discarding or at least limiting the alternative attitudinalist explanation pointing to values and attitudes as explanations of judicial behavior.

The 1998 Ecuadorian Constitution partially regulated the procedural problem discussed in the VAT case. According to provision 153 of the constitution, when the president partially vetoes a law proposal, he can submit an alternative proposal and congress has three options: 1) it can agree to the presidential veto and reform accordingly the original proposal; 2) it can override the veto with a 2/3 congressional majority; 3) it can fail to *consider the law proposal* for a period of thirty days—counting from the day received upon which the president must order publication of his proposal in the form of a decree.

In the VAT case a constitutional conflict emerged because congress did not reach the required 2/3 majority to override the veto (keeping a VAT of 12%). Nor did congress agree with the president's proposal including an increase to a 14% VAT. Instead, congress voted on the president's alternative proposal (14% VAT) and explicitly rejected the VAT increase with 76 votes—that is less than the 2/3 (82 votes) required majority. According to article 156 of the 1998 Constitution, if Congress did not approve, modified or veto the president's proposal within 30 days, the president could put it into effect using the legal form of a decree.

As congress' action was not clearly regulated in the constitution, many questions emerged: Was the 14% VAT president's alternative a veto or a new law proposal? What was the legal effect of congress' decision? Was the president's law proposal lawfully rejected by congress? Or was that congressional override constitutionally inexistent due to lack of votes? In this last case, after 30 days should the law proposal go into effect in the form of a decree as the constitution established when congress did not undertake any decision?

The plaintiffs argued that congress had *considered* and rejected the proposal and consequently the president would violate the constitution by enacting it in the form of a decree.[87] They asserted that more of 82 legislators voted and consequently they *considered* the proposal although only 76 voted against the VAT increase to 14%. In any case, this simple majority was constitutionally valid and enough to reject the proposal.

President Noboa argued that a 2/3 legislative majority (82 votes) was necessary to override his veto, and only 76 legislators voted. Consequently, congress had not *considered* the proposal in the term of 30 days established by the Constitution and he could put it into effect as a decree according to provision 156 of the Constitution.

TC judges basically adopted the plaintiffs' or defendants' arguments. The TC majority argued that the presidential decree increasing the VAT was unconstitutional because the president could only veto the law proposal approved by congress, he could not change this proposal to include the VAT increase to 14%. Additionally, the TC majority asserted that congress *had considered* the law proposal; legislators had voted to choose among two options: to accept the president's proposal or to override his veto. Consequently, constitutional article 153 establishing that a law proposal could be put into effect if congress did not consider the proposal within 30 days was not applicable.

The dissenting votes held that a 2/3 legislative majority was constitutionally required to override the president's veto, and congress had not reached that majority. According to Article 153 of the Constitution the president could submit an alternative proposal in the case of partial veto. Furthermore, the minority asserted that *considering* a law proposal does not mean merely holding a legislative debate but voting on the law proposal and adopting a decision based on the

[87] TC Ruling 126-2001-TP

required number of votes. However, congress neither reached the 2/3 majority to override the veto nor accepted the veto. Consequently, according to Article 153, congress failed to adopt a decision and the decree could be put into effect by the president.

From a constitutional point of view, the minority's position was stronger than the majority's. It is clear that congress did not reach the 2/3 majority to override the presidential veto. The president could also submit an alternative proposal to congress with his veto because Article 153-5 explicitly gave him that power. The majority's interpretation of what c*onsidering* means is striking. It is a to-the-letter interpretation of the constitution leading to nonsense, since "considering" a law proposal in the legislative procedure logically implies voting. Hence, this majority's interpretation reveals notable argumentative weakness.

Nevertheless the stronger TC majority's position was created by political conditions. It was just President Noboa's political move dismantling the opposition majority which impeded congress from reaching the required 2/3. However, as the opposition held control of the TC, his decree was overruled and constitutional rules dismissed by the TC majority.

4.2 THE D'HONDT CASE

4.2.1 General background

This case shows the link between legislative political parties and TC judges with respect to the constitutional review of electoral legislation. It reveals a parallelism between the position of judges' political parties in congress and judges' votes in the TC.

Electoral law matters are sensitive issues for political parties. Rules of the electoral game may affect candidates' chances to run and be elected, and this legislation also has influence on the party system structure itself. In the Ecuadorian system, governments have constantly fostered electoral reforms to improve their number of representatives in congress and avoid legislative deadlocks (Pachano 2007), whereas political parties have struggled to impose electoral systems for their benefit (Trujillo 2006) and appointed close friends as judges of the Electoral Supreme Tribunal (TSE).

As with the Constitutional Tribunal (TC), the TSE was frequently subject to partisan influence. In fact, the TSE and the TC shared a relatively similar institutional design; the TSE judges also had a four-year term and could be reappointed without limitations and removed through impeachment by congress. Unlike the TC, congress appointed TSE members from lists of candidates nominated by the political parties obtaining the highest number of votes during last multiple-seat elections. TSE members were also continuously removed and appointed by congress some times without following impeachment procedures. However, TSE decisions and electoral legislation were also subject to constitutional review by the Constitutional Tribunal, and consequently importance of the TC as a political arena was also due to its institutional condition of court of last resort on certain electoral conflicts.

On May 25, 1997, Ecuadorian citizens voted in a plebiscite to confirm the congressional appointment of Fabian Alarcón as the interim president after Congress had removed President Abdalá Bucaram. However, the plebiscite also included other questions. One of these pertained to the Ecuadorian electoral system, and asked citizens if they would prefer to replace closed and blocked lists to elect legislators, city council members, and other collective political bodies by a system of open lists (panachage) to allow the free selection of candidates within a list or among

different lists but ensuring minorities' representation. Fifty-two percent of Ecuadorians supported this electoral reform (Rivera 2006, Flores 2004). In the new system, each citizen can vote for as many candidates as public officials have to be elected (Pachano 2007). In 1997, a reform to the electoral law established that posts should be assigned by plurality rule, or according to the number of votes garnered by each candidate. However, this was virtually a majority system; a new regulation of the Supreme Electoral Tribunal and a legal reform supported by Congress in 2000 tried to make open lists and the representation of minorities compatible through application of the D'Hondt electoral formula (Pachano 2007). In the new system each party pooled votes obtained by individual candidates and the total sum of votes obtained were used to allocate seats based on the D'Hondt formula. Electoral law distributes seats to the most voted candidates within each party. The D'Hondt formula allocates seats one by one based on a highest average method. The D'Hondt formula in the Ecuadorian case was adopted as follows: first, all the votes cast for all candidates of the same list were summed, and the result was divided in ascending and continuous order by 1, by 2, etc, until it reached the last number of seats to be allocated. Each list was allocated the corresponding number of seats in descending order until all the seats in the corresponding electoral district were allocated. Finally, the candidates with the highest number of votes from each list were elected.

Once legally approved, the D'Hondt formula triggered a national political debate about its convenience for democratic representation and its compatibility with the Ecuadorian Constitution. On one hand, defenders of the D'Hondt method argued that it ensured the representation of minorities. This camp was integrated particularly by small political parties which would be able to gain some public office thanks to this electoral formula. On the other hand, the big political parties, and specially the PSC asserted that the D'Hondt formula was

unconstitutional because it violated the voter's constitutional right to freely choose individual candidates given that it assigns posts computing votes of lists and not votes of each candidate.

The PSC's assertion that the D'Hondt formula was incompatible with the right to choose candidates and specifically with open list elections is clearly questionable. It has no grounds in electoral law nor in the theory of electoral systems. I analyze this problem below. At this point, it is important to notice the weakness of the plaintiffs' constitutional arguments and the judicial' majority in the TC. Again, like in the VAT case, this is a clear signal of an underlying partisan dynamic where legal discourse functions only as a dubious rationalization of political decisions. In fact, it is in PSC's electoral interests, rather than in legal reasons, where we can find a better explanation of TC ruling on the D'Hondt formula.

The PSC's partisan structure was characterized by strong national and local leaders whose political power was located specially in the Ecuadorian coast, and specifically in province of Guayas, the most populated Ecuadorian province (electing 18 congressmen), where the PSC was clearly dominant. Consequently, PSC's votes were highly personalized and a majoritarian system instead of a proportional representation system was very beneficial for PSC' electoral interests. In contrast, D'Hondt allowed representation of parties rather than individual candidates, and smaller political parties could obtain some posts based on their votes for whole lists.

The PSC's claim took legal form in 2004 when then party vice president Xavier Neira[88] filled out a constitutional challenge before the TC against the legal reform establishing the

[88] Xavier Neira, a congressman and former PSC presidential candidate, was publicly known for his political influence on many key judicial decisions. Neira was the right-hand man of León Febres Cordero, a former president and the main PSC leader. Although he is an economist, Neira was partner of a law firm, Neira and Associates, which handled important lawsuits in Ecuadorian courts, including criminal cases against his political enemies. In 2009, Neira prosecuted a journalist, accusing him of influencing and corrupting the judicial system; during the

D'Hondt formula[89]. The reasons for this legal action were practical: elections of city council members and other public officials of local governments were programmed for October of that year. For the PSC these elections were especially important in PSC's stronghold, the province of Guayas and Guayaquil city, where the party controlled local governments (provincial prefect and Guayaquil's mayor) and it was clearly dominant. Hence, the PSC had direct and immediate interest in declaration of the D'Hondt formula as unconstitutional. For instance, according to Xavier Neira, during the 2000 legislative elections in the province of Guayas the PSP candidate Renán Borbua obtained 64.442 whereas the PSC candidate Ottón Ordoñez obtained 366.836. However, application of the D'Hondt formula meant that Borbúa displaced Ordoñez, and was elected as congressman for Guayas.

4.2.2 The ruling

On February 17, 2004, the TC declared the D'Hondt electoral method unconstitutional. TC judges Miguel Camba, Luis Rojas, Manuel Jaramillo, and Jaime Nogales—all judges close to the PSC—voted to strike down D'Hondt. A fifth vote to complete the majority came from Simón Zavala, a judge close to the PSP, the government party. The dissent TC minority was formed by René de la Torre (DP), Enrique Herreria (ID), Milton Burbano (PSP) and Mauro Terán (PK).

Miguel Camba, close to the PSC, had been appointed to the TC from a list of candidates nominated by the Supreme Court, where the PSC had strong influence. In the same way, Luis Rojas, also aligned with the PSC had been in 1994 member of the Guayaquil City Council

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lawsuit, it was revealed that Neira had made 411 phone calls to different judges in just five months. That year, the US Embassy canceled Neira's US visa, accusing him of corruption: this erupted into a public scandal. After this, political rivals within the PSC finally managed to oust Neira from the party.

[89] TC case number 025-2003-TC

representing the PSC, and was nominated to the TC by the business chambers, an institution under PSC influence. Years later, in a criminal lawsuit, it was demonstrated that Rojas received dozens of cell phone calls from Xavier Neira when he was judge in Guayaquil city.[90]

Simon Zavala's vote itself was marked by some ambiguity because he did not sign the majority opinion, but wrote a concurring opinion striking down the D'Hondt formula reasoning differently than the majority. The TC judges on the minority noticed this situation and stated that Zavala's vote, according to TC internal rules, was not clearly on the majority. The other TC judge close to the PSP, Milton Burbano, voted against the declaration of unconstitutionality. How do we explain this ambiguity and contradiction of votes among TC judges close to the PSP? Although the electoral benefit of this ruling for the PSP was dubious, at that moment the PSC was still the government's main ally in congress, as I explained it in Chapter Two. However, the legislative alliance was facing a strong crisis; some PSP leaders were strongly attacking and being attacked by the PSC, whereas other PSP members favored a continuation of the alliance. Under these circumstances, the ambiguity and division of PSP judges reflected the unstable coalition of the PSC and the government, and the PSC skillfully took advantage of this situation, taking into account that they needed only one vote to obtain the required five-judge majority.

Nevertheless, there was clear alignment of judicial and party partisan positions with regards to the D'Hondt formula when the TC made its decision. Judge René de la Torre, who had a clear link to the Popular Democracy Party (DP) as I explained in the study of the Added Value Tax Case, voted against ruling out D'Hondt, which was consistent with the DP party line. The other two TC judges, Enrique Herrería (close to the Democratic Left Party (ID)) and Mauro

[90] Journalist Xavier Castro published these accusations in the Ecuadorian Journal Vistazo Nro 944 in 2006. In April 30 of 2009 the same journal in its issue Nr 1001 reported that Castro had won the criminal suit against Neira based on hundred of Neira´s cell phone calls to different judges. For a summary see Xavier Flores Aguirre, Juicio Silencio y Sospechas, Quito, El Telegrafo Newspaper, May 17 of 2009.

Terán (close to Pachakutic (PK)) also voted against striking down D'Hondt following publicly known partisan preferences. Again, the links between TC judges and political parties had direct antecedents. Enrique Herrería had been Chief of the Police (*Intendente General*) in the province of Guayas during the government of President Rodrigo Borja (ID) from 1988 until 1992. Mauro Terán, a former judge of the Police Court and the Superior Court, had important links with the Social Security Ecuadorian Institute (IESS); he was nominated by the workers' unions and appointed by congress with support of Pachakutik.

The TC ruling created a "legal vacuum" because there was no electoral formula to allocate posts during that year's local elections. Major parties, such as the PSC and ID, blocked the enactment of new electoral legislation creating a new electoral formula. Instead, these major political parties supported a Supreme Electoral Tribunal resolution to replace the D'Hondt formula by the Imperiali formula, which was more beneficial to their lists and candidates.

4.2.3 Legal arguments

The 1998 Ecuadorian Constitution established that citizens could choose their preferred candidates from a list or between lists in multi-member elections. The law should make this principle compatible with the proportional representation of minorities. The plaintiffs, specially represented by PSC leader Xavier Neira of the PSC, argued that the D'Hondt method included in the Ecuadorian Electoral Law was unconstitutional because this method was not technically adequate for open list elections. Responding to this constitutional challenge, those political parties defending the D'Hondt method asserted that this formula allowed adequate representation of minorities; they presented electoral data before the TC to illustrate their arguments.

The TC majority basically followed plaintiff's argument. These judges asserted that the D'Hondt formula was not compatible with open lists; it did not allow voters to freely choose candidates from a list or between lists because the voter had to vote for the whole list to increase probabilities of election of his preferred candidate. According to them, D'Hondt was useful for a proportional representation system.

The main argument of the minority TC judges opposed to striking down the D'Hondt formula was that the Ecuadorian Constitution clearly established a proportional representation system, not a plurality system. The D'Hondt formula, according to them, was constitutional because on one hand it allows proportional representation, and on the other hand is compatible with open lists elections. In any case, the TC minority stated, even any eventual technical inconvenience of D'Hondt for open lists elections did not automatically make it unconstitutional.

Given other conditions of the Ecuadorian electoral system some constitutional analysts agreed in some *technical inconvenience* of D'Hondt as a mean to select individual candidates (Flores 2004, Moreno 2004, Rivadeneira 2004, Trujillo 2006). However, as Rivadeneira (2004) notices, that *technical inconvenience* could not made the D'Hondt method unconstitutional because this was just a matter requiring a legal reform by the Ecuadorian Congress.

There is a clear parallelism between political parties' positions and votes of TC judges identified with these parties. TC judges close to the PSC showed the most clear partisan alignment, whereas judges close to the government party showed ambiguity and even division between Simón Zavala and Miltón Burbano, both of whom identified with the PSP. Although then President Gutiérrez formally opposed striking down the D'Hondt formula, the PSC managed to obtain Zavala's support—whose vote was the only one necessary to reach the majority required within the TC.

On April 2004, 31 legislators belonging to those political parties (PSE, PRE, CFP, DP, PRIAN, PK) supporting the D'Hondt formula began impeachment procedures against the five TC judges who voted to declare this electoral formula unconstitutional. These legislators asserted that the TC ruling violated the constitutional right of political minorities to obtain representation. Interestingly, the PSP (government party) was not among the parties beginning impeachment, which confirms the former assertion that PSP held an ambiguous position with respect to the application of D'Hondt while it remained a PSC ally, leading to the integration of the five-judge majority that was able to strike it down. The impeachment did not take place due to lack of legislative votes.

The assertion that the D'Hondt formula is not compatible with open list elections is technically and legally wrong. The D'Hondt allocation procedure is operative either for closed lists or open lists. For instance, the Swiss electoral system combines both proportional representation and open lists. In fact, open list election allows voters to influence seats allocation results by creating conditions to elect the most voted candidate within each party's list. Article 99 of the Ecuadorian Constitution created a system just in that sense, allowing Ecuadorians to choose candidates from one list or among different list. However, this constitutional provision could not be interpreted in the sense of implementation of a plurality system because the same article ordered the creation of a system of proportional representation in order to assure political minorities' rights. It is known that the D'Hondt formula yields relatively good proportional representation effects, especially compared to other electoral formulas. As in the other cases studied here, the weakness of TC rulings reveals how partisan interests were the main variable explaining TC judge's behavior. In fact, the ruling was simply instrumental to the

reestablishment of the majority system applied before the 1998 Constitution. In 2006, the congress reformed electoral law, returning to the D'Hondt formula under specific adjustments.

4.3 THE FIRM DETENTION CASE

4.3.1 General background

This case is related to constitutional adjudication on rules of Ecuadorian criminal procedure. It shows how TC judges of the same ideological orientation, values, and attitude may change their decisions when the political environment changes, specifically in regards to the cohesion of legislative coalitions. More specifically, in this case a group of TC judges close to the PSC reflected the party's position when this political organization was united and strong in congress, leading a legislative coalition and representing a credible threat of judicial impeachment or support for reappointment. However, three years later the PSC became a weaker and divided legislative party; this time a different group of TC judges close to the PSC did not follow their party's position even under threat of impeachment when the same legal provisions were again challenged before the TC.

Ecuador, like other Latin American countries, faced a growing number of people under arrest without sentence in the 1990s. This situation became not only a judicial problem, but also a social and political problem because the criminal system collapsed under the pressure of overcrowded jails and unmanageable numbers of trials. The Ecuadorian state was even condemned by the Inter-American Court of Human Rights in several cases where arrests

exceeded all reasonable time.[91] As a response, the 1998 constitutional reform included deadlines of six months and one year, according to the type of crime, to maintain someone under arrest without sentence. After that time, the judge's order of imprisonment was automatically revoked. This constitutional provision, however, did not accelerate trials and many detainees had to be freed to meet the constitutional standard. Consequently, public opinion perceived the constitutional reform as one of the sources of the growth of crime.

In 2002, under growing crime rates, a legislator and party leader from the PSC, Cynthia Viteri, proposed a legal reform to the Ecuadorian criminal code to create the figure of *firm detention* (*detención en firme*), a legal institution obligating criminal judges to order prolonged detention beyond constitutional deadlines to assure attendance of the prosecuted person to trial. The PSC traditionally supports harsh punishments in criminal legislation as a deterrent of crime, and firm detention was one of the most important legal reforms fostered by the PSC to fight crime. Since the highest crime rates in the country are found in Guayaquil, the PSC's electoral stronghold, the PSC's policy about crime has been seen by other political parties, especially on the Left, as a PSC strategy to obtain public opinion support and sometimes electoral benefits. On January 13, 2003, the Ecuadorian Congress passed a legal reform to the criminal procedure code establishing the *firm detention*.

4.3.2 The ruling

On June 2003, Carlos Poveda, a criminal judge from Latacunga, a small city south of Quito, declared that legal provisions of the criminal code establishing and regulating firm detention

[91] The main trials where the Ecuadorian government was condemned by the Inter American Court of Human Rights were the cases of Tibi, Suárez Rosero, and Acosta.

were contrary to the constitution and rejected its application in a specific criminal case that he was judging. According to provision 274 of the Ecuadorian Constitution, any Ecuadorian judge could declare that a provision of a law being applied to a specific case that he is judging was unconstitutional. Consequently, Poveda did not apply the legal provision in the specific case and had to consult the Constitutional Tribunal, since only the TC had the power to declare that that legal provision was unconstitutional for all future cases. In other words, only the TC had the power to declare the legal provision unconstitutional with general legal effects (*erga omnes*)[92].

Judge Poveda's decision obtained national attention when PSC legislator Cynthia Viteri publicly denounced that he was illegally freeing criminals and creating a dangerous precedent. Judge Poveda was the object of pressure and threat of judges of the Superior Court of his jurisdiction, and from the National Judicial Council. According to Poveda there were clear links between these pressures and the PSC because high authorities in the council were close to the PSC.[93] For instance, Olmedo Castro, then the Executive Director of the National Judicial Council, had been an advisor of President Febres Cordero, the PSC's leader; Olmedo Castro was also prosecretary of the National Congress under PSC auspices in 1998. Hence, it was clear that the PSC tried to stop consultation of this issue before the TC.

Poveda's decision finally reached the Constitutional Tribunal. On December 11, 2003, the TC ruled that firm detention was constitutional. At that time, the PSC had four out of nine TC judges (Oswaldo Cevallos, Miguel Camba, Jaime Nogales, and Luis Rojas), and the party had became a key coalition partner for Gutiérrez's government after the collapse of its electoral coalition with leftist parties (PK and the MPD). The vote of Judge René de la Torre (DP) was

[92] However, even if the TC does not declare unconstitutional the law, the judge´s initial rulings does not change, according to provisión 274 of the 1998 Constitution
[93] Personal interview. Judge Carlos Poveda, Quito, October 12, 2009.

enough to complete the required majority to uphold the legal reform supported by the PSC in congress. In the minority, the TC judges voting to strike down the reform were Milton Burbano (PSP), Enrique Herrería (ID), Mauro Terán (PK), and Simón Zavala (PSP).

There were also clear links between most of TC judges voting to support the PSC-promoted firm detention and the PSC. Oswaldo Cevallos, a business lawyer, had been reappointed on March 2003 as TC judge. In both appointments, 1999 and 2003, he counted on the legislative support of the PSC. Similarly, Miguel Camba, another business lawyer, had been also appointed TC judge with the support of the PSC in 1997, and reappointed in 2003 with the legislative sponsorship of the same party. Jaime Nogales Izurieta also sponsored by the PSC had been judge of the Guayas Superior Court (a provincial court) before his appointment as TC judge. His son, Jaime Nogales, and active PSC member and leader, was elected province council member by the PSC from 1996 to 2000, and 2000 to 2004, and was also Prefect of Guayas in 2009, the PSC stronghold. Luis Rojas was elected member of the Guayaquil City Council in 1994; his name appeared in 2009 in a list of criminal judges receiving hundreds of cell phone calls during five months from Xavier Neira, a national PSC leader, in a criminal lawsuit brought by him against journalist Xavier Castro who publicly denounced Neira's influence in the judicial system. Rojas also had his private lawyer's office next to Neira's in a Guayaquil building for several years. Rojas and Nogales were also members of the board of directors of the Guayaquil's soccer team Barcelona, traditionally controlled by PSC national leaders.

4.3.3 Legal arguments

In Criminal Ecuadorian law there are some provisional judicial orders called precautionary measures to prevent the escape of those accused of a crime. There are three different type of

precautionary measures: 1) Detention due to flagrant offense, where the constitution gives the criminal judge a deadline of twenty-four hours to examine evidence and decide whether to prosecute the accused person or order his or her release; 2) Provisional detention, where a criminal judge may order the provisional detention of a suspect during the twenty four hours after the crime when there is evidence of criminal responsibility; and 3) Preventive imprisonment, where a criminal judge can order imprisonment of someone detained during a flagrant offense, someone provisionally detained, or someone whose criminal responsibility is revealed during a trial. The aim of preventive imprisonment is not to punish the offender but to ensure that the accused attends the trial and avoids impunity if he or she is found guilty. The 1998 Ecuadorian Constitution established a six month and one year deadline for preventive imprisonment according to the type of crime.[94]

Firm detention was a new precautionary measurement that judges had to order to replace preventive imprisonment when they found enough evidence of criminal responsibility. However, unlike preventive imprisonment, firm detention was not restrained by any of the mentioned constitutional time limits. However, the difference was nominal; in practice firm detention had the same effects of preventive imprisonment. Consequently, once firm detention was ordered, any prosecuted person could stay imprisoned until the judge's final ruling.

An examination of legal arguments in the firm detention case confirms that political factors, and especially PSC political pressure, prevailed over legal analysis. From a legal point of view it was pretty clear that firm detention violated the constitution. The majority's arguments in

[94] Article 24-8 of the 1998 Ecuadorian Constitution established that "Preventive imprisonment cannot exceed six months in cases involving offenses punishable by imprisonment, or one year, for crimes punishable by reclusion. If it exceeds those limits, the detention order shall be void, under the responsibility of the judge trying the case".

the ruling were extremely weak and contradictory.[95] The basic argument was that firm detention was constitutional because it was created by a formally valid law giving criminal judges that power and establishing specific deadlines and procedures. The TC majority asserted that firm detention was an effective measure to assure attendance of the detainee at trial and avoid impunity. It also asserted that firm detention was not a precautionary measure like detention due to flagrant offense, provisional detention, or preventive imprisonment. The 1998 Constitution did not mention firm detention when establishing deadlines and consequently, these constitutional deadlines were not applicable to firm detention.

All of these are contemptible arguments from a legal-technical perspective. First, formal validity, which is an adequate legislative procedure, is not sufficient condition for a law to be constitutional. If content of the law violates constitutional rights, the law may be formally valid but it is unconstitutional from a material point of view. Of course, the TC must preserve both formal and material constitutionality of the law. Second, the fact that the constitution did not mention or did not literally forbid firm detention does not imply that it is not contrary to the constitution. The tribunal could not reduce the analysis to the letter of the constitution but it should examine if firm detention was in fact a new precautionary measure and if its concrete effects and consequences violated constitutional deadlines and rights, specifically the right to due process.

In spite of all these flaws in the majority's argumentation, constitutional analysis of TC dissenting judges was also weak, which also shows the irrelevance of legal debate in the case. The minority judges basically repeated and supported Judge Poveda's arguments. A lack of arguments from this minority makes some sense if the TC decision was as highly politicized as it

[95] TC ruling 002-2003-DI, November 18, 2003.

was; within this perspective, any legal argument developed by the minority was inconsequential. Of course, this strategy is not acceptable from a normative point of view, since constitutional judges must always sustain their rulings.

Most Ecuadorian legal scholars considered firm detention to be unconstitutional and contrary to international human rights treaties ratified by Ecuador. According to Ecuadorian constitutional and criminal law experts, firm detention violated the constitutional deadline of detention, the right to be considered innocent until criminal responsibility is proven, the standard of a reasonable term to be prosecuted and other principles of due process; additionally, it violated similar principles of due process of law established in international human rights treaties ratified by the Ecuadorian state (Pajares 2005, Arias 2006, Zavala 2006, Granda 2007).

To sum up, given that firm detention clearly violated the Constitution, and the corresponding weakness of legal arguments of the PSC judges in the ruling, it is clear that judges aligned with the PSC could not have voted against firm detention without facing retaliation when this party was united and strong, and with enough capacity to initiate impeachment procedures against them in congress.

In 2005, prisoner's organizations again challenged firm detention through a formally different constitutional procedure from that used in 2003.[96] On September 26, 2006, the TC majority, including TC judges close to the PSC, ruled that firm detention was unconstitutional.[97] They ruled in that direction in spite of the fact that Cynthia Viteri and the PSC legislative bloc publicly threatened judges ruling out firm detention with impeachment. Four TC judges close to

[96] As I explain above, in 2003 the constitutional challenge followed the procedure of inapplicability, which means that a judge does not apply a law in a trial because he thinks is unconstitutional. However, he must submit the issue to the TC, which can decide about the provisions with general effects. In 2005 the constitutional challenge followed a different procedure called lawsuit of unconstitutionality. Under this procedure any person with the support of the ombudsman or 1,000 citizens could challenge the law as unconstitutional without need of a specific trial where that law is being applied.

[97] TC ruling N. 0002-05-TC

the PSC, Enrique Tamariz, Jacinto Loaiza, Santiago Velasquez, and Jorge Alvear voted to strike down firm detention. Tarquino Orellana (who also had links with the PSC) completed the five-vote majority, while Juan Montalvo (PSP) and Carlos Soria (PRIAN) voted against the majority decision. Manuel Viteri (PRE) did not attend the tribunal session.

Like the judges voting in 2003, these judges also had important links to the PSC. Enrique Tamariz was elected alternate member of the National Judicial Council with PSC support. The PSC also supported election of Jacinto Loaiza as member of a legislative commission of codification in National Congress. Santiago Velásquez, a banker's lawyer, was advisor of the PSC legislative bloc in 1992 and 1993. Jorge Alvear, linked to the Chamber of Commerce of Guayaquil, was a civil judge and later a criminal judge sponsored by the PSC to be appointed as TC judge. Consequently, the ideological profile of the PSC judges was similar to those PSC judges ruling on the same matter in 2003. In fact, Basabe's ideological index places both groups of judges between .44 and .64. However, the votes of PSC judges in 2006 on firm detention took a different direction.

This time the majority's ruling had an adequate argumentative development. The ruling examined the compatibility of firm detention with constitutional deadlines for provisional imprisonment, its precautionary character and its relationships with norms of international human rights treaties ratified by Ecuador. In contrast to the first ruling, legal experts supported the arguments and direction of the ruling due to the same legal arguments stated by the TC majority.

Why did this group of PSC judges rule differently in 2006 than judges with similar ideological profiles and links in 2003? The response cannot be a probable difference in the level of legal education and technical expertise of the first and the second group of TC judges because

unconstitutionality of firm detention was evident. The answer lies more in the PSC's strength than in legal or professional reasons. In the 2006 legislative elections the PSC experienced a deep crisis; the party's leadership was divided between former President León Febres Cordero and the mayor of Guayaquil, Jaime Nebot. The division implied even separated electoral campaigns; Febres Cordero organized his own campaign for legislators while Nebot ran for reelection as mayor of Guayaquil and organized a separate campaign of city councils members. In the parliamentary elections, the PSC lost its status as largest legislative party and obtained third place with only 13 legislators (out of 100); it was the beginning of the end of the PSC as the main congressional force. The PSC was also weakened by accusations of corruption again important leaders like Xavier Neira,[98] Xavier Cazar, and others. Cynthia Viteri, the PSC presidential candidate, obtained only fifth place in that year's presidential elections.[99]

This case shows that TC judges were influenced by the PSC only when this party had a pivotal role for reappointmentment or impeachment. However, when the party was divided and weak in congress, these constraints also were weak or null, and TC judges could decide based on their own preferences. In both years, 2003 and 2006, Ecuador had a divided government, but the main difference between these years was the levels of cohesion and strength of the PSC, high in 2003 and low in 2006. Consequently, in 2003 the PSC could lead a parliamentary coalition to impeach those TC judges striking down the law of firm detention. This situation changed in 2006 when the PSC was divided and had less power to form such legislative coalition. In fact, according to some TC advisors, TC judges began to assert the need and importance for judicial independence in 2006.[100]

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[98] Neira, the party leader closest to former President Febres Cordero, was excluded from the PSC in that year.
[99] *El Hoy* Newspaper, "Social Christian Party in its worst hours", Quito, November 12, 2006.
[100] Interview with Ramiro Rivadeneira, TC advisor, Quito 11 of August, 2009.

4.4 CONCLUSIONS

In chapter three, I used empirical models to show that political parties influenced TC rulings in cases of constitutional review of laws. Likewise, in this chapter, I confirmed this hypothesis through case studies. This chapter showed a clear and permanent alignment of TC judges to the preferences of their corresponding political parties in important national cases related to tax, criminal, and electoral legislation. These partisan pressures are also revealed when judges voted against political actors' preferences because they were publicly threatened with impeachment in some of these cases.

In contrast to the view of these judges as basically independent lawyers looking for greater professional status through temporal TC appointment (Basabe 2008, 2009), the chapter traced strong and recurrent professional, political, and social links between most of the judges involved in the cases and specific political parties, before and after their appointment as TC judges. However, the cases studied in this chapter are all politically relevant. As chapter three demonstrated, there are many constitutional review cases which do not elicit political parties' attention allowing TC judges to state more freely their preferences. Hence, this combination of sincere voting and strategic voting depicts a complex dynamic of constitutional courts.

From a normative perspective, a Constitutional Court or Tribunal should not be reduced to a sort of additional legislative chamber when ruling on key political cases. Of course, constitutional review of politically crucial legislation always reflects pressure from the congress, the president, political parties, civil society organizations, and public opinion. However, this pressure must not translate to direct orders, threats, and impeachments. If judges and courts have to be arbiters to solve institutional conflicts and protect constitutional rights, they need to rule

according to their professional interpretation of the law or their own strategic considerations without suffering political actors' systematic retaliation.

5.0 CONCLUSION: THE FUTURE OF CONSTITUTIONAL REVIEW

A great deal of valuable research on judicial politics seems to rest on dichotomous assumptions. Governments are either unified or divided and this political condition makes judges and courts in each case either dependent or independent. Judicial behavior, in turn, states sincere preferences or strategic calculations. However, do these dichotomous assumptions account for the complexity of judicial politics? Are there dependent judges under divided government? Can judges and courts be dependent when ruling on a type of cases and independent when ruling on others? Can judges vote sincerely under some political and institutional conditions and strategically under different conditions?

Chapter one set the theoretical basis of the dissertation questioning these dichotomous assumptions. The main idea was that political parties and the timing not only of the president but also of the judge and the case influence constitutional judges' behavior in highly fragmented partisan systems under specific institutional conditions such as short terms, feasible conditions for impeachment, and the possibility of reappointment to the bench. This chapter also developed the theory that constitutional courts work at two levels: a political level where partisan influences and strategic calculations take place, and a legal level, where judges are free to vote sincerely, according to their preferences or interpretation of the law.

Chapter two offered a historical account of the Ecuadorian Constitutional Tribunal (TC) from 1945 to 2005. Although the focus of the dissertation is in the 1997-2004 period, the chapter

provided background and context by presenting detailed historical description of institutional and political relationships between the Constitutional Tribunal, the president, and congress. This description led to the analytical conclusion that legislative coalitions have constantly determined appointment, reappointment, and removal of TC judges, which in turn influences judicial decisions on key political cases.

Chapter three developed six models of constitutional review, which included timing, ideology, and legal and facts case variables. The statistical results supported the hypothesis that partisan positions with respect to the government influenced TC judges' decisions when ruling on the constitutionality of laws. These results also supported the theory of a court working at two levels because there was no statistical evidence of direct partisan influences on rulings without political importance.

Chapter four examined carefully three highly relevant political cases of constitutional review. The analysis showed that legal aspects were only one of many diverse variables influencing decision-making. TC judges basically followed partisan preferences when they voted in these cases.

To sum up, the Ecuadorian case shows that divided government does not necessarily assure judicial independence. Institutional features such as appointment, reappointment, terms, and impeachment can also restrain or enhance independence. These institutions link constitutional courts with the legislature and the executive. In most countries the president and parliament intervene in the appointment and impeachment of justices of the constitutional court or constitutional tribunal. Consequently, the legislators' and presidents' terms and coalitions are also relevant for justices. Additionally, justices' own terms may influence their decisions, especially when terms are short and reappointment is possible.

In any case, the judicial independence/dependence dichotomy is relative in the sense that no political actors have the interest and resources to monitor absolutely all judges' rulings. Most of the thousand of rulings decided by a constitutional tribunal do not have an important national political dimension, and consequently the president and congress need to focus on those rulings strongly affecting public policies, electoral interest, and opinion public judgments.

The Ecuadorian case shows that persistent divided government may be a necessary but not sufficient condition for judicial independence. As one of the most politically fragmented polities in Latin America before 2007, Ecuador should have a very independent judiciary. However, partisan and legislative fragmentation has yielded a coalitional dynamic in congress, which in turn has used reappointments and impeachments as political goods to be allocated among coalition members and means of partisan influence over the Constitutional Tribunal. Short terms have been instrumental for this purpose.

However, partisan influence over the Constitutional Tribunal has not meant absolute control. A completely subservient tribunal was neither possible nor necessary. It was not possible because legislative coalitions and political parties' cohesion were not static and their dynamics changed constantly the political context of judicial decision-making. It was not necessary because most of TC's rulings were not politically important for the president and legislators. Only when key legislation was at stake did political parties send clear signals to justices indicating their preferences, in order for TC judges to follow these preferences.

The TC's institutional design based on short terms, unlimited reappointment, and impeachment reached its limits in 2008 when Ecuador enacted a new constitution extending justices' terms to nine years without reappointment and eliminating congressional impeachment. Before this constitutional change, new TC judges were once again appointed on February 22,

2006, and removed on April 24, 2007 following the same patterns of coalitional allocation described in chapter two. In this final chapter, I analyze this TC crisis as an immediate and direct background of the mentioned institutional innovation. Because the constitutional change is directly linked to the institutions studied in this dissertation, I bring together some findings of former chapters in order to develop a final analysis about judicial independence under divided government.

5.1 THE DEMISE OF THE TC, 2005-2008

This section describes the political pressures the TC had to face after the 2005 political crisis, as an immediate background of constitutional change about judges‘ terms, reappointment, and impeachment. It shows how appointment of new TC judges responded to coalitional arrangements negotiated in congress, and how then this new tribunal was involved in intense political conflict between congress, the president and the Supreme Electoral Tribunal. It demonstrates how contemporary Ecuadorian politics, and specifically congressional appointments and removals of TC judges can be directly linked to partisan influences and judicial decision-making directions.

As I explain at the end of chapter 2, Ecuador experienced a severe political crisis during the last months of 2004 and first months of 2005, which resulted in the congressional removal of then-President Lucio Gutiérrez on April 20, 2005. The crisis had been triggered by removal of all justices from the highest Ecuadorian Courts (Supreme Court, Supreme Electoral Tribunal, and Constitutional Tribunal), as described in chapter 2. In this section, I describe the situation of the Constitutional Tribunal after that period. The political effects on the TC were paradoxical. On

one hand, the tribunal was deactivated during eleven months because congress did not appoint any new TC judges. However, after those eleven months, political parties appointed new TC judges following the same pattern of coalitional allocation historically applied in former appointments by congress. On the other hand, the TC appointment system reached this time a limit and the political forces fostering a constituent assembly begun to push for constitutional redesign.

This story begins with the congressional appointment of new TC judges by political parties allocating these posts as political resources. However, the new TC faced a crisis after election of Rafael Correa as new president. Correa convoked a Constituent Assembly to draft a new constitution, fulfilling one of his main campaign promises. The president's convocation of the assembly triggered an intense conflict with congress, which opposed the initiative. Deadlock ended with the removal of 57 legislators by the highest Electoral Court which argued that electoral law authorized removal of public officials blocking elections. The removed legislators challenged the constitutionality of the Electoral Court decision before the TC, while the government assumed a new legislative majority. The Constitutional Tribunal finally declared that legislators' removal was unconstitutional. The next day, all TC judges were removed and new pro-government TC judges were appointed by Congress.

On February 22, 2006, after eleven months without a court, a new legislative coalition appointed a new Constitutional Tribunal. During this year, after the ousting of President Gutiérrez, the PSC had maintained an implicit legislative alliance with the Democratic Left[101] (*Izquierda Democrática* or ID). Both the PSC and the ID had been crucial in the dismissal of Gutiérrez (PSP), and both parties opposed the PRE (former President Abdalá Bucaram's party).

[101] The Ecuadorian Social Democrat Party

However, once there were conditions to appoint a new TC, the two parties had serious differences about how many TC members each party should place at the tribunal as they negotiated an agreement; additionally, both parties wanted control of the TC presidency. Surprisingly, on February 2006, the PSC shifted its position, broke its implicit alliance with the ID and reached an agreement with its former political foes, the PSP and the PRE, to appoint a new Constitutional Tribunal. The alliance also included the PRIAN and independent legislators close to the PSC. The ID and other center-left parties were excluded from TC appointments. The PSC managed to place four of nine TC members; the PRE, the PRIAN, and the PSP placed one each, and President Alfredo Palacios placed two.

Nevertheless, the terms of newly appointed TC members were again unclear. Whereas the opposition parties asserted that the new judges could stay in office only to complete the four-year term of the prior dismissed court, the new majority parties asserted that they should stay a whole term of four years. This ambiguity, as explained in chapter 2, had been a recurrent strategy of political parties when appointing TC members. By increasing uncertainty about TC terms, political parties could threaten TC judges more easily with removal, without following impeachment procedures, strengthening their control over TC members.

On January 15, 2007, a new elected president, Rafael Correa, took office. The main promise during Correa's presidential campaign had been to call a Constituent Assembly to draft a new constitution. Correa had developed his presidential campaign as a harsh critique against the status quo supported by traditional political parties and economic groups. Among his proposals, Correa offered to build new institutions where courts and judges were free of partisan control; once he became president, his political movement, *Alianza Pais* (Country Alliance, or AP) did not have a single legislator in congress because it did not participate on purpose in

legislative elections as a symbol of rejection of partisan politics. Hence, the Constituent Assembly was not only an option but an urgent necessity for the Correa's government. In fact, one of his first decrees was calling a plebiscite on March 15 to determine if citizens wanted to elect a Constituent Assembly to draft a new constitution which, in turn, would be approved by referendum. The presidential decree ordered the Supreme Electoral Tribunal (TSE) to organize the plebiscite, but the tribunal instead sent the decree to the National Congress asking if they should proceed to convoke the plebiscite.

Congressional opposition to Correa's government asserted that the president had no constitutional powers to call the assembly. The legislative majority rejected Correa's decree as unconstitutional; according to them, the 1998 constitution did not include the institution of a Constituent Assembly and required congressional approval before the president could call a plebiscite to *reform the constitution.* Consequently, the plebiscite was not constitutionally possible and instead this majority proposed that congress should reform the constitution. Correa's government replied that *a new constitution was not a constitutional reform, but an important national issue* on which the president had constitutional powers to ask the people. Anyway, President Correa insisted seeking congressional approval for the plebiscite but then faced congressional deadlock. At the end of January, strong popular demonstrations and even violence took place in front of the congress building demanding opposition legislators to give way to the plebiscite. In February 13, a majority of 54 legislators approved the call for a plebiscite, and the Supreme Electoral Tribunal officially convoked it on March 1 under the conditions wanted by the president, which included dissolution of the National Congress once the Constituent Assembly was elected and gathered.

The congressional opposition reacted by challenging the TSE resolution convoking the plebiscite as unconstitutional before the TC. The opposition asserted that the president had manipulated the terms and conditions to convoke the plebiscite including in the correspondent resolution the dissolution of congress, which was unconstitutional. Additionally, on March 6, the legislative opposition managed to obtain a majority to remove the president of the TSE, Jorge Acosta, who had been a key actor in convoking the plebiscite. On March 7 the Supreme Electoral Tribunal (TSE) dismissed 57 legislators of the National Congress. The government and political parties supporting the plebiscite had managed to control the TSE; this new majority within the TSE dismissed the 57 opposition legislators under a legal provision stating that the TSE could remove public officials illegally blocking elections. Additional legal actions challenging the constitutionality of the TSE decision were then brought before the TC.

At the beginning, the TC members, most of who had been appointed by opposition parties but were also under threat of removal by the TSE and congress dismissed these actions on formal legal grounds. However, after several weeks, they finally shifted their position. On April 23, the TC majority ruled that the removal of 49 of the 57 opposition legislators was unconstitutional. Neither congress nor the Correa's government accepted the TC ruling. The next day the new pro-government legislative majority was formed with alternate legislators after the removal of opposition legislators, declared that TC judges had completed their terms, removed them, and appointed new TC judges. Although the government did not have its own legislators, it had managed to form a new legislative majority formed of pro-government parties, five PSC dissident deputies, and 21 alternate deputies of the dismissed opposition legislators[102]. Removal of most of opposition representatives had clearly changed the legislative balance of power. The

[102] The Correa administration directly supported incorporation of alternate deputies to congress through the police and military forces.

21 substitute deputies also belonged to opposition parties but they wanted to assume office as principal legislators, and the government provided conditions to achieve this goal in exchange for political support. Consequently, this new legislative majority, as a reaction to the TC ruling ordering reincorporation of the dismissed legislators, removed all TC members on April 24, arguing that they already had been ended their constitutional terms. In other words, this majority took also advantage of unclear term lengths.

On June 1, the appointment of new TC members served to consolidate the new pro-government coalition. Impeachment procedures against Finance Minister, Ricardo Patiño[103], had been pending since March 1. Once most of the opposition majority was dismantled, the government offered TC posts to the other political parties in exchange for abandoning the impeachment proceedings against Patiño. The offer was especially aimed at the ID that was actively supporting Patiño's impeachment. The ID did not accept the offer[104] but the rest of pro-government parties, former alternate legislators and PSC dissidents did, so the new TC clearly reflected the new balance of power in congress. The Popular Democratic Party (MPD), a close ally of the Correa government, placed three out of nine TC members, the government placed two, and the PRE placed three, assuring a TC pro-government majority. Even the PSC dissidents allocated one of the TC members, while the ID was excluded.

The TC's role during the debates surrounding the call of a Constituent Assembly confirms the findings documented for the period up to 2005. First, the tribunal was clearly facing the challenge of ruling on a *political case,* a case whose features were evidently different of what

[103] Patiño is a strong man in the Correa government, and even a close friend to the president. He had been accused of illegal procedures when secretly meeting financial investors in a hotel in Quito; the meeting was recorded without his knowledge and nationally broadcasted on television.
[104] ID party chief publicly denounced government's offer and stated that they do not bargain due to ideological and ethical reasons. *El Comercio* Newspaper, June 4, 2007.

I have called *legal cases* or standard cases without political pressures. Secondly, political pressure on the TC was strong and public; in fact this pressure led the TC to some initial ducking. Third, the TC majority identified with the opposition parties finally followed partisan preferences and legal criteria. In fact, from a constitutional point of view, removal of 57 legislators by the TSE based on a generic legal provisional was unacceptable. Fourth, the TC was again part of the political patronage distributed to negotiate and form legislative coalitions. Fifth, the appointment of new TC judges showed that the new pro-government coalition required maintaining control over political cases in order to sustain legislation, public policies, and political aims.

5.2 THE 2008 CONSTITUTION AND THE CONSTITUTIONAL COURT

In spite of all the pressures of real politics, Correa's call to elect a constituent assembly to draft a new constitution responded to Ecuadorian citizens' perception that political parties had taken over many state institutions as mere patronage and completely distorted their normal functioning within the law. The cases of the Supreme Court, the Supreme Electoral Tribunal, and the Constitutional Tribunal during the 2005 crisis are especially illustrative. In fact, as I explained in chapters one and two, the 2005 crisis was linked to this crisis of all the highest courts. Consequently, the new constitution should include a response to partisan manipulation of the judicial system. Here, I briefly describe the main changes established by the new Ecuadorian

Constitution of 2008 regarding the appointment, reappointment, impeachment, and term length of Constitutional Court[105] justices.

On April 15, 2007, 81.7 % of Ecuadorian citizens approved the plebiscite to call a Constituent Assembly to draft a new constitution. In the elections of representatives to the assembly, the president's political movement *Alianza País* (AP) obtained 69.5 % of total of votes and placed 80 out of 130 representatives. On July 24, 2008 the Constituent Assembly approved the proposal of the new constitution which was approved by a national referendum on September 28 of that year.

This constitution changed the institutional design of the TC. The current constitution creates the Constitutional Court[106] (CC), which has most of TC powers established in the 1998 Constitution. However, the CC justices have a nine-year term. The beginning and ending of the justice's terms are not concurrent because a third of the court has to be renewed each three years.[107] The theory is that it is difficult for a president or a legislative majority to maintain control for the court under staggered renewal of judges. For the same purpose, immediate reappointment and congressional impeachment of TC judges was eliminated by the new constitution.

The main critique against this institutional design has been directed against the new, complex appointment system. According to the constitution[108] and the new Law of

[105] The new Constitution changed the name of the institution from Constitutional Tribunal to Constitutional Court
[106]. The Constitutional Court is mainly regulated by provisions 429 to 440 of the 2008 Constitution
[107] To renovate the court in this way, the constitution provides that three of the first nine judges of the court will leave the court by lot after three years, in order to appoint three judges for a full nine-year term. After six years other group of three years will also leave the court, to appoint the second third of the court. Provision 432 of the 2008 Constitution
[108] Provision 434 of the 2008 Constitution

Constitutional Guarantees[109], the Constitutional Court justices are appointed as follows: The president, the National Assembly, and the Council of Transparency and Social Control[110] must each send a list of nine candidates to a special commission previously appointed by the same nominating authorities. The special commission must organize a public and merit-based selection process to appoint the three new justices of the Constitutional Court. Critics of this system have noticed that the current government easily can manage to appoint the new CC majority because President Correa has a majority coalition supporting his government in the National Assembly, which will determine also the majority of members of the Council of Transparency and Social Control.

Currently, the Constitutional Tribunal has assumed the functions of the Constitutional Court, and only when the new nominating institutions are created, the new Constitutional Court will be appointed. The study of decision patterns of the new Constitutional Court will offer interesting empirical evidence to test the interaction between this new set of institutional conditions (longer terms, no reappointment, no impeachment) and a new political context characterized by a majoritarian government like that of the Correa administration.

Additionally, the powers of the Constitutional Court have been changed and to some extent strengthened compared to those of the Constitutional Tribunal in the 1998 Constitution. The constitution is now completely clear in the sense that the Constitutional Court is the only final legal interpreter of the constitution, and this interpretation cannot be overruled by the legislature; it gives the court, among other powers, the power to dictate binding jurisprudence for

[109] The new appointment process is carefully regulated from provision 177 to provision 183 of the Organic Law of Jurisdictional Guarantees and Constitutional Control

[110] This is a new political branch of government created by the 2008 Constitution and integrated by representatives of civil society organizations. The council has constitutional powers to appoint other high public officials and contribute to fight public corruption

all the judicial system, including some elements of the common law system[111]. The constitution also extends constitutional control over rulings of all courts and judges, which was excluded in the 1998 Constitution.

According to the separation-of-powers theory, we should now see in Ecuador a constitutional court dependent on the president, given the existence of unified government, long judicial terms, and no reappointment. However, other institutional features supporting judicial independence such as renewal of one third of the court each three years, elimination of parliamentary impeachment, and implementation of merit-based appointment criteria elicit empirical questions. Consequently, Ecuador will continue providing an interesting case study for comparative purposes, including comparative work within the same country because these institutional changes may modify time and strategic horizons of constitutional judges as I have argued in my dissertation.

5.3 TIME AND STRATEGY

For the Ecuadorian case, Santiago Basabe (2008, 2009) has found empirical evidence of TC judges voting according to their ideological orientations; consequently, according to Basabe, TC judges always voted sincerely. Through my dissertation I have argued that the TC worked at two levels or dimensions, a legal one where judges voted sincerely and a political one where strategic behavior takes place. Consequently, Basabe's view may be right but incomplete in the sense that existence of sincere voting does not necessarily precludes strategic behavior as the

[111] Provision 436-6 of the 2008 Constitution

historical, statistical, and case study evidence presented in former chapters show. The attitudinal and the legal models do not consider time as a variable affecting judicial decision-making. Values, attitudes and legal ideology are relatively stable , and consequently they should lead to constitutional judges to state continuous and consistent rulings on similar cases over time. In other words, if a constitutional judge holds values and attitudes on the left, we should see consistent decisions against privatization, deregulation of labor, or other forms of economic liberalization. If a judge's values are on the right he will favor privatization, flexible labor legislation, and economic liberalization (Basabe 2008, 2009).

An exception to this exclusion of time is given by the inclusion in attitudinal research of the agenda-setting process. Some attitudinalists have accepted that judges may behave strategically within the court, in the relationships with their colleagues, and in order to advance their sincerely preferred policies. However, these strategic endeavors do not affect the direction of final rulings according to this approach.

In contrast, a strategic approach takes into account the role of time. If judicial decision-making is influenced by actions of the other branches of government, time is an important variable. For instance, presidential and legislative terms may have an impact on judicial decision-making because judges could include this information when voting on a case. My dissertation has demonstrated that terms of judges themselves may influence their rulings due to strategic considerations, as they seek reappointment.

In fact, if TC judges always voted sincerely we should not see changes in their individual positions over time. Yet, why would a judge voting sincerely become more activist at the end of his or her term, as the empirical evidence of chapter three shows? Time variables should be irrelevant because voting patterns should be stable. Furthermore, if judges voted always

sincerely, presence or absence of political actors as plaintiffs should not affect judges' decisions. However, empirical evidence in the Ecuadorian case shows that this influence exists and increases judges' propensity to rule out a norm as unconstitutional. Additionally, conditions for only voting sincerely should imply isolation of judicial decision-making from legislative politics. However, chapter two, three and four revealed in the Ecuadorian case direct links between direction of rulings and coalitional politics in congress.

However, when the TC ruled on cases without political pressures there was no statistical evidence of partisan influence, which is consistent with Basabe's claims that judges decided based on their preferences. Nevertheless, for this type of case strategic behavior may take place within the court among justices in order to reach the majority to support a ruling. In any case, in this situation, a judge would act strategically only to obtain a majority ruling as close as possible to his or her ideal points.

In contrast, the literature on Latin America judicial politics using a strategic approach (Chavez 2004, Helmke 2002, 2005, Iaryczower, Spiller and Tommasi 2002, Scribner 2003) includes time in the analysis, especially through presidential and legislative terms. My analysis followed this path including as variables case timing and judges' terms. However, the strategic approach tends to overlook the specific features and dynamic of rulings on standard legal cases without great interest for the president or congress, which may allow judges to vote sincerely. This research also tends to aggregate laws and other norms as decrees and administrative decisions. It is assumed that all cases are politically relevant and technical differences between types of norms are not relevant. However, my dissertation shows that constitutional rulings of laws are influenced by variables which are not significant constitutional review of other norms. Finally, this literature concentrates on countries with two or relatively few political parties, and

judges with life tenure or long terms without reappointment. Empirical research for those countries finds that divided government enhances judicial independence. In this dissertation I have included a different type of country, with a highly fragmented partisan system, short judicial terms with reappointment, and minority presidents. Under these different institutional features divided government does not generates judicial independence, especially in rulings over politically relevant cases.

Study of institutional variability may increase our knowledge of judicial behavior. Comparative research on constitutional courts, including different appointment, terms and impeachment systems along different countries or within one country can offer new insights about how institutions matter in judicial politics.

Latin American countries represent a set of countries providing enough variance to carry out this research. As I showed in chapter one, the region encompasses diverse institutional arrangements for their highest courts and their relationships with legislatures and executives. At the same time, these countries share common historical backgrounds and the same civil law system. Consequently, in spite of their differences, many legal institutions like constitutional review procedures or amparo cases may be comparable, and they may be the object of interesting comparative work.

Within the same country, comparative work can be carried out comparing different courts or even the same court or institution over time. In the case of federal systems, this work can develop comparison through different states. Additionally, comparing different type of cases may provide a better understanding of courts' complexity. The theory that a constitutional court can function simultaneously at a political and at a legal level should be empirically tested in

other countries and constitutional courts and it could provide new ideas in the debate between attitudinal, legal, and strategic accounts of judicial behavior.

In any case, comparative work in Latin American judicial politics must enhance concepts and methods based on empirical research through diverse countries. Assumptions of specific national courts such as the US Supreme Court or the Argentine Supreme Court as models or ideal types for research may be misleading. As in the US where American judicial scholars have expanded research from the Supreme Court to other courts, comparative judicial politics also needs variance.

BIBLIOGRAPHY

Acosta, Alberto. 2007. “El Bucaramismo en el Poder” in Baez, René and other authors, ¿Y ahora que?, Quito: Eskeletra Editorial.

Alcantara, Manuel, and Flavia Freidenberg. 2003. Partidos Políticos de América Latina – Países Andinos. México: Fondo de Cultura Económica.

Ames, Barry. 1995. “Electoral Strategy Under Open-List Proportional Representation.” American Journal of Political Science 39: 406-33.

Ames, Barry. 2000. *The Deadlock of Democracy in Brazil*. Ann Arbor: University of Michigan Press.

Amorin Neto. 2002. “Presidential Cabinets and Legislative Cohesion in Brazil” in *Legislative Politics in Latin America* edited by Scott Morgenstern and Benito Nacif. Cambridge: Cambridge University Press.

Arantes, Rogerio. 2005. “Constitutionalism, the Expansion of Justice and the Judicialization of Politics in Brazil” in *The Judicialization of Politics in Latin America* edited by Rachel Sieder, Line Schjolden and Alan Angell. New York: Palgrave.

Araujo, M. C., A Mejia, S Pachano, A Pérez Liñan, S Saiegh 2004. “Political Institutions, Policymaking Processes, and Policy Outcomes in Ecuador”. L. A. R. Network, Interamerican Development Bank: 49.

Arias, Miguel. 2006. *La Detención en Firme: Análisis de una medida cautelar inconstitucional*. Cuenca: Bgoffset.

Avila, Luis. 2004. Efectos de la Declaratoria de Inconstitucionalidad en el Ecuador. Quito: Corporación de Estudios y Publicaciones.

Barragan Romero, Gil. “El Control de Constitucionalidad” In Temas de Derecho Constitutional edited by Fabian Corral, Quito: Ediciones Legales.

Basabe, Santiago. 2008. “Las Preferencias Ideológicas y Políticas Judiciales: Un Modelo Actitudinal sobre el Voto en el Tribunal Constitucional del Ecuador.” *América Latina Hoy* 49: 157-177.

Basabe, Santiago. 2009. “Jueces Sin Toga: Políticas Judiciales, Preferencias Ideológicas y Proceso de Toma de Decisiones en el Tribunal Constitucional del Ecuador (1999 – 2007).” PH.D Dissertation, Universidad Nacional de San Martin.

Baum, Lawrence. 1997. *The Puzzle of Judicial Behavior*. Ann Harbor, Michigan: The University of Michigan Press.

Bossano, Guillermo. 1985. *Evolución del Derecho Constitucional Ecuatoriano.* Quito: Editorial Universitaria.

Brace, Paul and Melinda Hall. (1997) “The Interplay of Preferences, Case Facts, Context, and Rules in the Politics of Judicial Choice,” 59 (4) J. of Politics. 1206.

Brinks, Daniel. 2002. “Informal Institutions and the Rule of Law: The Judicial Response to State Killing in Buenos Aires and Sao Paulo in the 1990s”. Paper presented at the Conference on Informal Institutions and Politics in the Developing World, Harvard University, April 5 - 6, 2002.

Caldeira, Gregory A. and James L. Gibson. 1992. “The Etiology of Public Support for the Supreme Court.” *American Journal of Political Science* 36 (August): 635-691.

Carey, John and M. S Shugar. 1998. *Executive Decree Authority*. New York: Cambridge University Press.

Champagne, A. 2003 "The Politics of Judicial Selection." *The Policy Studies Journal* 31(3).

Chavez, Rebecca Bill. 2004a. *The rule of law in nascent democracies: judicial politics in Argentina*. Stanford: Stanford University Press.

Chavez, Rebecca Bill 2004b. “The Evolution of Judicial Autonomy in Argentina.” *Journal of Politics*, August 2004 v36 i3 p. 451(28)

Clayton, Cornell. 1999. “The Supreme Court and Political Jurisprudence: New and Old Institutionalisms” In *Supreme Court Decision-Making: New Institutionalist Appraoches*, edited by Cornell Clayton and Howard Gillman. Chicago: University of Chicago Press.

Conaghan, Catherine. 1995. “Politicians against Parties: Discord and Disconnection in Ecuador’s Party System” In Building Democratic Institutions: Party Systems in Latin America, edited by Scott Mainwaring and Timothy Scully. Stanford: Stanford University Press.

Durr, Robert H., Andrew D. Martin, and Christina Wolbrecht. 2000. “Ideological Divergence and Public Support for the Supreme Court.” *American Journal of Political Science* 44 (October): 768-776.

Echeverria, Julio. 2006. *El Desafío Constitucional*. Quito: Abya Yala.

Epstein, L. K., Jack and Shvetsova, Olga. 2000. Selecting Selection Systems. Annual Conference on the Scientific Study of Judicial Politics, Columbus, OH.

Epstein, Lee, Olga Shvetsova and Jack Knight. 2001. "The Role of Constitutional Courts in the Establishment and Maintenance of Democratic Systems of Government." *Law & Society Review* 35(117).

Epstein, Lee and Jack Knight.1998. *The Choices Justices Make*. Washington, D.C: CQ Press.

Epstein, Lee and Jeffrey A. Segal. 2000. "Measuring Issue Salience." *American Journal of Political Science* 44 (January): 66-83.

Eskridge, William N., Jr. 1991 "Overriding Supreme Court Statutory Interpretation Decisions." *Yale Law Journal* 101:331- 455.

Ferejohn John, A and Barry R. Weingast. 1992a. "Positive Political Theory and Public Law." *Georgetown Law Journal 565: 565-579*

Ferejohn John.1992b. "A Positive Theory of Statutory Interpretation." *International Review of Law and Economics* (12): 263-79.

Finkel, Jodi S. 2008. *Judicial Reform as Political Insurance: Argentina, Peru and Mexico in the 1990s*. Notre Dame: University of Notre Dame Press.

Flores. Fernando. 2004. "Los Partidos Políticos en Ecuador." In La Participación Política en Ecuador, coordinated by Fernando Flores, Quito: Corporación Editora Nacional.

Freidenberg, Flavia and Manuel Alcántara. 2001. "Cuestión Regional y Política en Ecuador: Partidos de Vocación Nacional y Apoyo Regional." *América Latina Hoy* 27: 123-152.

Gibson, James L. and Gregory A. Caldeira. 1992. "Blacks and the United States Supreme Court: Models of Diffuse Support." *Journal of Politics* 54 (November): 1120-1148.

Gibson, J. L., G. A. Caldeira, and L. K. Spence. 2003. "The Supreme Court and the US presidential election of 2000: Wounds, self-inflicted or otherwise?" *British Journal of Political Science* 33:535-556.

Gillman Howard and Cornell W. Clayton. 1999. "Beyond Judicial Attitudes: Institutional Approaches to Supreme Court Decision-Making" In *Supreme Court Decision-Making: New Institutionalist Approaches*, edited by Cornell Clayton and Howard Gillman. Chicago: University of Chicago Press.

Ginsburg, T. 2003. *Constitutional review in new democracies: constitutional courts in Asian cases*. New York: Cambridge University Press.

Graber, M., A. 2005. "Constructing Judicial Review" *Annual Review Political Science* (8): 425-51.

Granda, Iván. 2007. "Análisis de la Resolución de Inconstitucionalidad de la Detención en Firme por parte del Tribunal Constitucional" in *Revista de Derecho Foro* Nro 8 (2).

Grijalva, Agustin. 1998. *Elecciones y Representación Política.* Quito: Corporación Editora Nacional.

Grijalva, Agustin. 2008. Diagnóstico sobre la Ley Orgánica de Control Constitucional del Ecuador. Quito: unpublished report for the Ecuadorian Justice Department.

Hagle, Timothy M. (1991) "But Do They Have to See It to Know It: The Supreme Court's Obscenity and Pornography Decisions," 44(4) Western Political Q. 1039.

Hall, M. Gall and C. W. Bonneau. 2006. "Does Quality Matter? Challengers in State Supreme Court Elections" *American Journal of Political Science* 50(1): 20-33.

Hall, Melinda and Paul Brace. (1996) "Justice´s Responses to Case Facts: An Interactive Model", 24 (2) American Politics Q. 237.

Hammond, T. H., Chris W. Bonneau, and Reginald S. Sheehan (2005). *Strategic Behavior and Policy Choice on the U.S. Supreme Court*. Stanford: Stanford University Press.

Helmke, Gretchen. 2005. *Courts under constraints: judges, generals, and presidents in Argentina.* Cambridge; New York: Cambridge University Press.

Helmke, G. and S. Levitsky (ed). 2003. "Informal Institutions and Comparative Politics: a research agenda". Notre Dame, Ind., Helen Kellogg Institute for International Studies.

Helmke, Gretchen. 2002. "The Logic of Strategic Defection: Court-Executive Relations in Argentina under Dictatorship and Democracy." *American Political Science Review* 96(2): 291-303.

Helmke, G. and S. Levitsky. 2006. Informal Institutions and Democracy: lessons from Latin America. Baltimore; The John Hopkins University Press.

Herron, E. S., and Kirk Randazzo. 2003. "The Relationship Between Independence and Judicial Review in Post-Communist Courts." *The Journal of Politics* 65(2): 422-438.

Hilbink, L.2007. *Judges beyond Politics in Democracy and Dictatorship*, New York: Cambridge University Press.

Hilbink, L. 2003. "An Exception to Chilean Exceptionalism ?" in *What Justice ? Whose Justice ?* edited by Wickham-Crowley. Berkeley: University of California Press.

Hirschl, Ran. 2004. *Towards Juristocracy*. Cambridge: Harvard University Press.

Iaryczower, Matias, Pablo T. Spiller, and Mariano Tommasi. 2002. "Judicial Independence in Unstable Environments, Argentina 1935-1998." *American Journal of Political Science* 46(4): 699-716.

Ignagni, Joseph A. (1994) "Explaining and Predicting Supreme Court Decision Making: The Burger Court's Establishment Clause Decisions," 36(2) J. of Church & State 301.

King, G., Robert O.Keohane, and Sidney Verba. 1994. *Designing Social Inquiry: Scientific Inference in Qualitative Research*. Princeton: Princeton University Press.

Knight, J., and Lee Epstein.1996. "On the Struggle for Judicial Supremacy." *Law and Society Review* (30): 87-120.

Koopmans, T. 2003. *Courts and Political Institutions*. Cambridge: Cambridge University Press.

Langer, L. 2002. *Judicial Review in State Supreme Courts*. New York: State University of New York.

Levitsky, H. G. 2006. Informal Institutions and Democracy: Lessons from Latin America, The John Hopkins University Press.

Lijphart, Arend. 1999. *Patterns of Democracy: Government Forms and Performance in Thirty-Six Countries*. New Haven: Yale University Press.

Linares, Sebastián. 2003. "La Independencia Judicial: Conceptualización y Medición" in Independencia Judicial en América Latina ¿de quién? ¿para qué? ¿cómo?, edited by Germán Burgos. Bogotá: ILSA.

Lopez, Ernesto. 1999. "Evolución del Control Constitucional en Ecuador. In Derecho Constitucional para Fortalecer la Democracia, Quito: Fundacion Konrad Adenauer.

McGuire, Kevin T. (1990) "Obscenity, Libertarian Values, and Decision Making in the Supreme Court," 18(1) American Politics Q. 47.

Magaloni, Beatriz and Arianna Sanchez. 2001. "Empowering Courts as Constitutional Veto Players: Presidential Delegation and the New Mexican Supreme Court." Paper presented at the Annual Meeting of the American Political Science Association, September 2001.

Mainwaring, Scott. 1993. *Rethinking Party Systems in the Third Wave of Democratization: The Case of Brazil*. Stanford: Stanford University Press.

Mainwaring, Scott and Timothy Scully (Ed). 1995. Building Democratic Institutions. *Party Systems in Latin America.* Standord: Standford University Press.

Maltzman, Forrest, James F. Spriggs, II, and Paul J. Wahlbeck. 1999. "Strategy and Judicial Choice: New Institutionalist Approaches to Supreme Court Decision-Making." In *Supreme Court Decision-Making: New Institutionalist Approaches*, edited by Cornell Clayton and Howard Gillman. Chicago: University of Chicago Press.

Maltzman, Forrest, James F. Spriggs, and Paul J. Wahlbeck. 2000. *Crafting Law on the Supreme Court: The Collegial Game*. New York: Cambridge University Press.

Mejia Acosta, J. A. 2004. "Ghost Coalitions: Economic Reforms, Fragmented Legislatures and Informal Institutions in Ecuador." PH.D Dissertation, University of Notre Dame.

Mejia Acosta, Andrés, M. C Araujo, A. Perez-Liñan. S Saiegh. 2006. Veto Players, Fickle Institutions and Low Quality Policies (1997-2005). Interamerican Development Bank: working paper R-523.

Mejia Acosta, J. A. 2006. "Crafting Legislative Ghost Coalitions in Ecuador". In Informal Institutions and Democracy: lessons from Latin America, edited by Gretchen Helmke and Steven Levitsky. Baltimore: The John Hopkins University Press.

Mejia Acosta, J. A, and John Polga-Hecimovich. 2010. "Parliamentary Solutions to Presidential Crises in Ecuador" Eds. Mariana Llanos and Leiv Marsteintredet, New York, NY: Palgrave Macmillan.

Montufar, César. "El Populismo Intermitente de Lucio Gutiérrez" 2008 in Eds Carlos de la Torre and Enrique Peruzzotti. Quito: FLACSO-Ecuador.

Moreno, Jorge. "La Participación Política en el Ecuador" in La Participación Política en el Ecuador edited by Fernando Flores. Quito, Corporación Editora.

Murphy, Walter F. *Congress and the Court*. Chicago: University of Chicago Press.

Navia, Patricio, and Julio Ríos-Figueroa. 2005. "The Constitutional Adjudication Mosaic of Latin America." *Comparative Political Studies* 38(2): 189-217.

Nogueira, Humberto. 2005. "La Integración y el Estatuto Jurídico del Tribunal Constitucional después de la Reforma Constitucional del 2005" in Foro Constitucional Latinoamericano Nro 11.

Ordoñez, Hugo. 2006. *El Tribunal Constitucional Ecuatoriano*. Quito: Pudeleco, 2006.

Pachano, Simón. 1997. "Bucaram, ¡Fuera! Bucaram, ¿Fuera?" in Baez, René and other authors, ¿Y ahora que?, Quito: Eskeletra Editorial.

Pachano, Simón. 2007. *La Trama de Penélope: Procesos Políticos e Instituciones en el Ecuador*. Quito: FLACSO.

Pajares, Emilio. 2005. “Las Garantías Constitucionales de la Libertad Personal” in Derechos y Libertades edited by Luz Entrena Vásquez. Quito: Corporación Editora.

Peretti, T. 2003. “Una evaluación normativa del conocimiento científico social sobre la independencia judicial” in *Independencia Judicial en América Latina*. G. Burgos Silva. Bogotá: ILSA

Pérez Perdomo, Rogelio. “Judicialization and Regime Transformation: the Venezuelan Supreme Court” in *The Judicialization of Politics in Latin America* edited by Rachel Sieder, Line Schjolden and Alan Angell. New York, Palgrave.

Ramos Rollón, Marisa. 2005. Sistemas Judiciales y Democracia en Centroamérica, Barcelona: CIDOB.

Ramseyer, J. Mark. 1994. “The Puzzling (In) Dependence of Courts: A Comparative Approach.” *Journal of Legal Studies* 23: 721.

Ramseyer, J. Mark, and Eric B. Rasmusen. (1997) “Judicial Independence in a Civil Law Regime: The Evidence from Japan.” *Journal of Law, Economics and Organizations* 13, nro2: 259-86.

Rios-Figueroa, J. 2006. Institutional Models of Judicial Independence in Latin America. 2006 Meeting Latin American Studies Association. San Juan (Puerto Rico).

Rivadeneira Ramiro. “Inconstitucionalidad del Método D´Hondt” in La Participación Política en el Ecuador edited by Fernando Flores. Quito, Corporación Editora.

Rivera, Ramiro. 2006. *Reforma Política*. Quito: Fundación Konrad Adenauer. 2006.

Rohde, David W., and Harold J. Spaeth. 1976. *Supreme Court decision making*. San Francisco: W. H. Freeman.

Salgado, Hernán. 2004. *Manual De Justicia Constitucional Ecuatoriana*. Quito: Corporación Editora Nacional.

Scribner, Druscila. 2003. Sincere and Strategic Judicial Behavior on the Chilean Supreme Court. Paper presented at the 61TH Annual Conference of the Midwest Political Science Association, Palmer House Hilton, Chicago, April 3-5 2003.

Scribner, Druscila. 2004, “Limiting Presidential Power: Supreme Court –Executive Relationship in Argentina and Chile.” Ph. D Dissertation in Political Science, University of California – San Diego.

Segal, Jeffrey A. (1984) “Predicting Supreme Court Cases Probabilistically: The Search and Seizure Cases, 1962–1981,” 78(4) American Political Science Rev. 891.

Segal, Jeffrey A. 1997. "Separation-of-Powers Games in the Positive Theory of Congress and Courts." *American Political Science Review* 91 (March): 28-44.

Segal, Jeffrey A. 1999. "Supreme Court Deference to Congress: An examination of the Marksist Model". In *Supreme Court Decision-Making: New Institutionalist Approaches*, edited by Cornell Clayton and Howard Gillman. Chicago: University of Chicago Press.

Segal, Jennifer A. 1999. "Diffuse Support for the U.S. Supreme Court: Reliable Reservoir or Fickle Foundation?" *The American Review of Politics* 20 (Spring): 1-24.

Segal, Jeffrey A., and Albert Cover. 1989. "Ideological Values and the Votes of Supreme Court Justices." *American Political Science Review* 83: 557-65.

Segal. J., A and Harold Spaeth. 1993. *The Supreme Court and the Attitudinal Model*. New York: Cambridge University Press.

Segal, J., A, and Harold Spaeth. 2002. *The Supreme Court and the Attitudinal Model Revisited*. Cambridge: Cambridge University Press.

Segal, Jeffrey A., Lee Epstein, Charles M. Cameron, and Harold J. Spaeth. 1995. "Ideological Values and the Votes of Supreme Court Justices Revisited." *Journal of Politics* 57:812-23.

Shugart, Matthew and John M. Carey. 1992. *Presidents and Assemblies: Constitutional Design and Electoral Dynamics*. New York: Cambridge University Press.

Sosa-Buchholz, Ximena. 1990. "Velasquismo: The Most Significant Movement in Modern Ecuadorian History." M.A Dissertation, University of New Mexico.

Spaeth, Harold J. 1979. *Supreme Court policy making*. San Francisco: W.H. Freeman.

Tarrow, S. 2004. Bridging the Quantitative-Qualitative Divide, in *Rethinking Social Inquiry*. Edited by Henry Brady and David. Collier. Lanham: Rowman and Littlefield.

Taylor-Robinson Michelle. 1999. "Who Gets Legislation Passed in a Marginal Legislature and is the Label Marginal Legislature Still Appropriate? A Study of the Honduran Congress." *Comparative Political Studies* 32(5): 589-625.

Torres, Luis Fernando. 2003. *Legitimidad de la Justicia Constitucional*. Quito: Libreria Juridica Cevallos.

Trujillo, Julio César. 2006. *Teoría del Estado en el Ecuador*. Quito: Corporación Editora Nacional.

Tsebelis, George. 2002. *Veto Players. How Political Institutions Work*. New York: Princeton University Press.

Vanberg, G. 2005. *The Politics of Constitutional Review in Germany*. New York: Cambridge University Press.

Vega, Silvia. *La Gloriosa*. Quito: Editorial El Conejo.

Vera, Alfredo. *Anhelo y Pasión de la Democracia Ecuatoriana*. Quito: Editorial Casa de la Cultura.

Wilson, B. M. 2005. "Changing Dynamics:The Political Impact of Costa Rica´s Constitutional Court". *The Judicialization of Politics in Latin America*. edited by Rachel Sieder, Line Schjolden and Alan Angell. New York: Palgrave.

Zavala Egas, Jorge. 1999. *Derecho Constitucional*. Guayaquil: Edino.

Zavala Egas, Jorge. 2006. "Declaratoria de Inconstitucionalidad de la Detención en Firme." *Temas Constitucionales* 9(4): 7-13.