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Lobbying for Judicial Reform: The Role of the Mexican Supreme Court in Institutional Selection

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ABSTRACT: While the behavior of judges clearly affects the success of judicial reform efforts, it is not clear how judges might influence the selection of judicial institutions aimed at building healthier courts. In this paper, I suggest that judges might play an important role in defining the judicial reform agenda by both directly lobbying important policy makers and by going public. I develop these claims through a discussion of the Mexican Supreme Court’s recent efforts to induce further judicial reform. I consider the Court’s important successes and failures and discuss important constraints on the ability of judges to influence the reform process through lobbying.

Lobbying for Judicial Reform: The Role of the Mexican Supreme Court in Institutional Selection

By Jeffrey K. Staton
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Judicial reform continues to be an important policy issue in Mexico. Both theory and empirical results suggest that a healthy judiciary is vital to a country's prospects for democratic consolidation and economic growth – two issues of continuing relevance in both Mexico and much of Latin America. Scholars suggest that an independent, well functioning judiciary can constrain the state from violating fundamental civil liberties; provide an arena for the peaceful resolution of political conflicts; and, increase investor confidence by stabilizing the norms under which property rights are protected.¹ If a healthy judiciary can accomplish at least one of these normatively appealing goals, attempts to build courts should continue to be worthy of serious scholarship.

In this paper, I ask what role we might expect judges to play in a model of judicial reform. In particular, I ask how the behavior of high court judges might compliment models designed to explain political decisions to build healthy judiciaries. It is obvious that judges intimately affect the success of reform efforts.² After all, reform packages are largely designed to influence judicial performance. It is less clear how judges might influence institutional selection itself. I argue that judges can do so in at least two ways. First, judges can help design the portfolio of measures considered by reformers through consultation and direct lobbying. Although such an influence may not change the general decision to delegate greater authority to the judiciary, it may well affect the substance of the delegation. Second, while judges are unlikely to have a direct influence over the outcomes of legislative bargaining, they may be able to affect public opinion concerning reform, and in that sense, indirectly affect the preferences of reformers. This is to suggest that judges can go public.³

These possibilities of influence raise a number of subsidiary questions about judicial lobbying, both positive and normative. Under what conditions might judges successfully promote their reform proposals? Are there certain kinds of reforms that should be easier to promote than others? Assuming that there are conditions under which judges can successfully promote reform, is this a normatively appealing possibility? Although I do not develop and test a complete model here, I argue that answers to these questions ought to address a set of key political trade-offs. In particular, judges considering a public strategy to influence judicial reform are likely faced with a trade-off between effective public relations and the maintenance of an essentially apolitical image. How judges evaluate this trade-off may explain both the intensity of judicial public relations and the ultimate success of lobbying efforts.

¹ On these issues, see respectively Guillermo O'Donnell, "Horizontal Accountability in New Democracies," in Andreas Schedler, Larry Diamond and Marc F. Plattner, eds., *The Self-Restraining State: Power and Accountability in New Democracies*, (Boulder: Lynne Rienner Publishers, 1999), Alec Stone Sweet, *Governing with Judges: Constitutional Politics in Europe* (Oxford: Oxford University Press, 2000), Douglass North and Robert Paul Thomas, *The Rise of the Western World* (London: Cambridge University Press, 1973).

² See Edgardo Buscaglia and Maria Dakolias, "Judicial Reform in Latin America," (Washington, D.C.: The World Bank, 1996).

³ This concept is famously developed by Samuel Kernell in *Going Public: New Strategies of Presidential Leadership*, 2nd Ed., (Washington D.C.: CQ Press, 1993), 2-6.

Similarly, legislators considering reform proposals likely face policy trade-offs between judicial independence and judicial accountability and between legislative authority and judicial power. Clearly the way legislators evaluate these trade-offs will affect the ability of judges to successfully obtain institutional reform.

I give empirical context to these claims by discussing the role played by the Mexican Supreme Court in the ongoing process of federal judicial reform in Mexico.⁴The ministers of the current Supreme Court, all appointed following a massive change in the structure of the federal judiciary in late 1994, have played an intimate role in the development of the judicial reform agenda.⁵ They have done so largely through direct lobbying efforts aimed at critical national policy makers, an effort aided by a highly aggressive public relations strategy designed in part to create an accurate mechanism through which the Court could speak to the Mexican public. Although the Court has significantly helped frame the reform agenda, its influence over the outcomes of reform debates has been mixed. The Court has successfully advocated policies designed to increase the efficiency of the judicial branch and consolidate the Court's internal control over the administration of the judiciary. On the other hand, the Mexican Congress has declined to implement key proposals aimed at increasing the Court's powers of constitutional interpretation and independence from the elected branches of government.

In what follows, I review two kinds of models designed to explain the decision to delegate political authority to an independent judiciary, and discuss how judicial lobbying compliments both accounts. I then describe the Mexican Supreme Court's efforts to influence its own reform process and highlight the constraints the Court has faced. I conclude by discussing how future theoretical and empirical work might proceed.

Building Healthy Judiciaries

Why might politicians give-up significant authority by delegating power to the judges and subsequently work to make the courts more independent, accessible and efficient?⁶ This is a relevant question in studies of democratizing states, where developing the rule of law is a paramount concern. There are two general approaches to modeling this process. The first, what has come to be called the insurance hypothesis, is an electoral theory.⁷ The notion on this account is that ruling political elites face significant risks in democratizing states that lack healthy courts, especially when such elites perceive a non-trivial probability of losing power. Increasing judicial independence, for example, allows judges to serve as a sort of insurance policy against possible future electoral losses, where the former minority might either attempt to retaliate for previous

⁴ I limit my discussion to the Court's role in developing the federal judiciary. Although the state judiciaries are clearly vital substantive points of interest, an expanded analysis would go quite beyond the scope of this article. For a recent study of the state judiciaries, see Hugo Alejandro Concha Cantú and José Antonio Caballero Juárez, "Diagnóstico sobre la administración de justicia en las entidades federativas. Un estudio institucional sobre la justicia local en México," (México: UNAM, 2001).

⁵ For citations reviewing the 1994 reform, see *infra* note 12.

⁶ William C. Prillaman, *The Judiciary and Democratic Decay in Latin America: Declining Confidence in the Rule of Law*, (London: Praeger, 2001), 15-29, identifies accessibility, independence and efficiency as the three critical characteristics of a healthy judiciary.

⁷ For a recent example in the American legal literature see Tom Ginsberg, "Economic Analysis of Constitutional Law: Economic Analysis and the Design of Constitutional Courts," *Theoretical Inquiries in Law*, 3(January, 2002), 49-85. Jodi Finkel, "An Analysis of Mexico's 1994 Judicial Reform," Paper presented at the Latin American Studies Association Conference, Guadalajara, Mexico, April 1997.

violations of civil liberties or radically change the state's legal structure. Independent courts empowered to exercise constitutional review are supposed bulwarks against such possibilities. Finkel offers such an explanation for the 1994 Mexican judicial reform briefly reviewed below.

An alternative model suggests that the state might attempt to build healthy courts in order to resolve a credible commitment problem.⁸ If the state is incapable of committing itself to its own rules, then the expected return to citizen investment in the regime likely will be lowered and so will the incentive to invest.⁹ The state may have greater difficulty generating revenue, inducing compliance with social norms, and perhaps even in reducing competing, revolutionary claims on power. A related story, offered by Schatz, suggests that elites in transitional democracies might delegate authority to courts in order to change perceptions of governmental illegitimacy.¹⁰ On such an account, it might be argued that the 1994 Mexican reform was not a PRI insurance policy against possible future electoral losses. Rather the reform was a means of convincing an increasingly relevant electorate that the government was becoming more willing to respect the rule of law and thus worthy of electoral support. Indeed, Magaloni and Sanchez suggest that the 1994 reform can be understood as such an effort, with the critical caveat that the judiciary was intended to independently exercise its new authority only insofar as it did not challenge the government over important issues of public policy.¹¹

Both of these approaches place some needed theoretical rigor on the analysis of judicial reform, and they clearly generate testable hypotheses about the relationship between legitimacy, electoral uncertainty and the inclination to create healthier judiciaries. Still, neither approach can offer much insight into the substance of judicial reform. It is one thing to suggest that the state ought to be more likely to delegate authority as electoral uncertainty increases; it is quite another to generate predictions about the particular kinds of authority granted. It is here that judges can play an important role by promoting well-defined alternatives for judicial reform. Judges themselves are likely to be more familiar than politicians with plausible institutional solutions to problems of judicial independence, citizen access to the justice system, judicial efficiency, and effective constitutional control. Moreover, as members of the state, judges should be able to gain access to relevant policy makers, a critical condition for effective

⁸ North, Douglass C. and Barry R. Weingast, "Constitutions and Commitment: the Evolution of Institutions Governing Public Choice in Seventeenth-Century England," *The Journal of Economic History*, 49 (December, 1989), 803-832.

⁹ A similar model is famously considered in William M. Landes and Richard A. Posner, "The Independent Judiciary in an Interest-Group Perspective," *Journal of Law and Economics*, 18 (1975), 875-901, where independent courts are considered means for locking in the gains from cooperation in legislative bargains.

¹⁰ Sara Schatz, "A Neo-Weberian Approach to Constitutional Courts in the Transition from Authoritarian Rule: The Mexican Case (1994-1997)," *International Journal of the Sociology of Law*, 26 (1998), 217-244.

¹¹ Beatriz Magaloni and Arianna Sánchez, "Empowering Courts as Constitutional Veto Players: Presidential Delegation and the New Mexican Supreme Court," Paper presented at the 2001 Annual Meeting of the American Political Science Association. San Francisco. August 30- September 2, 2001.

lobbying.¹² Given these advantages, it should come as no surprise that judges in many countries have attempted to influence public policy over the state of the judiciary.¹³

Clearly, this kind of influence over the reform project is important but limited. While access to political leaders is likely necessary in order to help frame the agenda, it is unlikely that access alone will be sufficient. Just like any lobbying group, judges require political leverage in order to be effective, and absent a natural constituency such leverage may be hard to come by. Of course, like politicians and interest groups, judges can turn to the media in order to generate public support. They can do so by giving speeches, granting interviews, writing editorials, and publishing books on important subjects of judicial reform.¹⁴ Still, appealing to the public presents judges with an important trade-off. One of the serious problems courts face in transitional democracies is a lingering sense that the judiciary is overly politicized.¹⁵ Direct appeals to the public over issues such as the appropriate distribution of government expenditures is a political enterprise. Such appeals may risk a concurrent judicial attempt to appear detached from politics. If judges care about developing an apolitical image, they may face a trade-off between the possible gains to be captured through effective public appeals and the costs of appearing politicized. Accordingly, the degree to which judges engage in public strategies to affect reform and their ultimate success should be a function of the way they evaluate this trade-off.

Even if judges are able to frame the legislative agenda over judicial reform, policy success is not guaranteed. And perhaps this is a good thing. There is no assurance that judge-led reform proposals will be in the general public interest. Instead, such proposals ought to reflect the preferences of the judiciary itself and those preferences may or may not be in accord with some ideal separation of powers. In a strictly positive sense, proposals to increase both judicial independence from the elected branches and expand judicial powers of constitutional review also present legislators with difficult choices, especially if they value judicial accountability and their own prerogative over public policy. Granting judges greater independence weakly decreases the ability of elected officials to hold judges accountable for their behavior.¹⁶ Also, granting greater constitutional review authority to courts weakly decreases legislative control over public policy. In short, legislators, and implicitly the people they represent, face trade-offs between judicial independence and accountability and between legislative control over public policy and judicial power. The success of judicial attempts to influence reform, as well as a normative evaluation of the appeal of judicial lobbying, will surely be a function of how legislators and their constituents evaluate these trade-offs.

Of course, there are classes of reform proposals, like judicial efficiency, that are less likely to present legislators with the difficult policy choices induced by proposals to

¹² On the importance of access in lobbying, see John M. Hansen, *Gaining Access: Congress and the Farm Lobby, 1919-1981*, (Chicago: University of Chicago Press, 1991).

¹³ For examples in the United States see, Winkle, John W., III, "Judges Before Congress: Reform Politics and Individual Freedom." *Polity*, 22 (1990), 443-460; in Russia, see Peter H. Solomon, Jr, "Putin's Judicial Reform: Making Judges Accountable as well as Independent, *East European Constitutional Review* 11 (2002), 117-124; in Zimbabwe and Tanzania see Jennifer A. Widner, *Building the Rule of Law*, (New York: W.W. Norton & Company, 2001).

¹⁴ Widner, 36.

¹⁵ Prillaman, 19-21.

¹⁶ By "weakly decrease" I mean that greater independence will either produce no change in judicial accountability or it will reduce it.

increase judicial independence or constitutional review. For example, typical solutions to judicial inefficiency include designing better legal education and judicial training, updating antiquated mechanisms for communication within the judicial hierarchy, and eliminating overly restrictive procedural rules.¹⁷ There may not be consensus over particular approaches to reducing inefficiency, however, it is unlikely that efficiency proposals will either undercut legislative policy authority or the ability to hold judges accountable. Accordingly, in the absence of a significant legislative trade-off, we might suspect that judges will be more successfully promote reforms designed to combat inefficiency than reforms over independence or judicial power.

Mexican Supreme Court Ministers and Judicial Reform

In this section I discuss how the ministers of the Mexican Supreme Court have generally set about advancing their interests in reform through direct lobbying and public relations. I then review specific efforts the Court has made to advance reform in the elected branches of government. In short, the current Supreme Court has enjoyed a reasonable degree of success in shaping the reform agenda, and some of the Court's proposals have resulted in significant institutional change. On the other hand, other proposals have been disregarded, especially those that would have significantly reduced the legislature's control over the judiciary.

Beginnings: On December 31, 1994 newly elected president Ernesto Zedillo published a series of recently adopted constitutional amendments altering the structure of the Mexican federal judiciary. The change created an entirely new Supreme Court and started the ministers down a road of real political relevance.¹⁸ The 1994 reform has been thoroughly analyzed by a number of distinguished scholars, and accordingly, I only note its key elements here.¹⁹

The Zedillo amendments reduced the size of the Supreme Court from 26 to 11 ministers, and reduced the number of benches from four to two.²⁰ Moreover, as part of its transitory provisions, all members of Supreme Court were forced to resign. While the Senate previously voted to approve or reject a single nominee offered by the president per open seat, under the new appointment procedure the Senate selects each

¹⁷ Prillaman, 17-18.

¹⁸ In the Senatorial debate on the reform, members of both the PRI and the PAN spoke vehemently in favor of the proposal. A few *perredistas*, however, stood against the reform arguing that it did not adequately address the widespread problem of corruption and provided inadequate mechanisms for access to justice. In the end, however, 108 Senators out of 112 present voted to pass the reform, *en lo general* and *en lo particular* as amended. For a fine review of the parties' arguments see Carranco Zúñiga, 109-117.

¹⁹ For analyses in Spanish see, Héctor Fix Zamudio and José Ramon Cossío Díaz, *El Poder Judicial en el Ordenamiento Mexicano*, (México: Fondo de Cultura Económica, 1995) and Joel Carranco Zúñiga, *Poder Judicial*. (México: Editorial Porrúa, 2000). For English-language reviews, see Héctor Fix Fierro, "Judicial Reform in Mexico: What Next?," Paper presented at the Rule of Law Workshop: Legal and Judicial Reform in Developing Countries, Stanford Law School, February 26, 2001 and Pilar Domingo, "Judicial Independence: The Politics of the Supreme Court of Mexico," *Journal of Latin America Studies*, 32 (2000), 705-735.

²⁰ The benches previous to the reform separately specialized in civil, penal, administrative and labor matters. Under the new configuration, the first bench hears penal and civil cases, while the second bench hears labor and administrative cases. For a criticism of this organizational structure see Burgoa (1995, *find citation...not it references*) who argues that civil and penal law require familiarity with fundamentally different legal concepts and jurisprudence and thus the new structure cannot provide the efficiency gains from specialization found in the previous structure.

minister from a list of three nominees.²¹ Once appointed, the ministers select a president from among their own number, who serves a four-year term. The Court's president leads the seven-member Federal Council of the Judiciary (Consejo de la Judicatura Federal or Counsel) also created in 1994 to be the judiciary's chief administrative body.²²

Concerning the Supreme Court's ability to control constitutional meaning, the reform created a new institution of abstract constitutional review, the *action of unconstitutionality*. This action complements Mexico's traditional means of constitutional review, the amparo suit, which was designed in the 19th Century as a means for rectifying state violations of individual rights. Legal effects in amparo are limited to the parties immediately involved in the case, and thus amparo limits the degree to which Mexican courts can significantly affect public policy.²³ In contrast, the action of unconstitutionality grants the Supreme Court the power to set general effects in a certain class of cases, as long as 8 of 11 ministers adopt the majority proposal. The reform also enhanced the Court's power in *constitutional controversies*, an action under which the Supreme Court rules on conflicts arising between two branches of the same level of government and disputes between governments of distinct levels in Mexico's federal system. Finally, in creating the action of unconstitutionality, reformers implemented a forgiving standing requirement that grants the power to challenge the constitutionality of laws to minorities of the state legislatures, minorities of either house of the national congress, and federally registered political parties, among other agents of the state.²⁴ In short, the Zedillo reform drastically changed the institutional structure of the federal judiciary. Perhaps most important, by requiring the resignation of all then current members, the reform paved the way for a new set of judges to revitalize the third branch of government.

A New Supreme Court: The eleven ministers who took the bench in early 1995 hoped to develop a trusted federal judiciary and turn the Court itself into an effective constitutional tribunal, one capable of systematically controlling constitutional meaning and ultimately creating conditions under which the rule of law might be fully realized.²⁵

²¹ After the President submits the list or *terna*, the Senate has thirty days to make an appointment, which it does via a 2/3 super-majority voting rule. In the event that the Senate fails to choose a minister within thirty days, the minister designated by the President is appointed; however, if the Senate rejects the entire list, the President must submit another. If the Senate rejects the second list, the President's designee is appointed, Constitución Política de los Estados Unidos Mexicanos (CPM), Artículo 96.

²² CPM, Artículo 100. For a review of judicial counsels in Latin America see Héctor Fix Zamudio and Héctor Fix Fierro, *El Consejo de la Judicatura* (México: Instituto de Investigaciones Jurídicas, UNAM, 1996).

²³ The authoritative work on amparo is Iganacio Burgoa O., *El Juicio de Amparo*, 24^a Ed. (México: Editorial Porrúa, 1998). In English, a terrific if somewhat dated work is, Richard D. Baker, *Judicial Review in Mexico. A Study of the Amparo Suit* (Austin: University of Texas Press, 1971).

²⁴ CPM, Artículo 105 (II)A-F.

²⁵ In his first annual report on the state of the federal judiciary, President Aguinaco Alemán speaks to the goal of developing public trust in his first annual report of the state of the federal judiciary. See, José Vicente Aguinaco Alemán, *El Nuevo Poder Judicial de la Federació* (México: Suprema Corte de la Nación, 1998), 22-23. Further, many of the Court's administrative accords on the judiciary's internal design are justified as means of perfecting the Court's role as a constitutional court. See, for example, Acuerdo 6/1999, Considerando 4 whose exposition of motives states, "It is essential to permit the Supreme Court, as happens in other nations, to concentrate all of its efforts on the recognition and resolution of new issues or on those issues of such high importance that their resolution will influence the interpretation and application of the national judicial order." Also see Acuerdos 6/2000 Considerando 1, 9/1999 Considerando 7, all of which advocate the Supreme Court's position as a constitutional court.

Unfortunately, both systematic and anecdotal evidence suggested that even after the 1994 reform, the Mexican public continued to consider the federal judiciary largely inaccessible to most people, unworthy of public trust, and subservient to the executive branch.²⁶ As might be expected, all of this was more or less apparent to the ministers, who publicly admitted the existence of these perceptions.²⁷ In order to help change the judiciary's public profile, the ministers began to develop further institutional reforms. Among a long list of interests, the Supreme Court desired changes in rules concerning the Federal Council of the Judiciary, the judicial budget, the nature of the *amparo suit*, the power to initiate laws in Congress, and the ability to directly regulate the distribution of cases between the Court's benches and the collegial circuit courts of appeals.

Some elements of the Court's reform package could be carried out independently, but others required action from the elected branches of government. This situation presented two problems. Although the ministers could directly contact party leaders, cabinet officials and President Zedillo (now Fox) himself, as un-elected judges they lacked a natural constituency or group of interests that they might leverage in conversations with public officials. More seriously, they had no effective way of explaining their proposals to the Mexican public, and as a result, no clear way of influencing legislative or executive policy interests through their own supporters. The reason? Neither print nor television media, which had historically ignored the Supreme Court, appeared prepared to accurately cover the judiciary. Jesús Aranda, one of the first reporters to provide daily coverage of the Court, described the situation as follows.

Before [the reform] the Court was very closed-off. There was a public relations office that would suddenly issue a press release but reporters did not go the Court. In the end nothing was known or understood about the Court. This reflected the judiciary's situation in the country. Why? Because one always spoke of an executive or a legislature – the judiciary was always seen as an appendage of the executive. The judiciary did whatever the president wanted.²⁸

The result of this negative image and general lack of interest was that reporters were unfamiliar with the judiciary and thus unprepared to provide the kind of coverage that might allow the ministers to develop a consistent message.

In order to change this situation the Supreme Court pursued a multi-dimensional media-relations strategy, led by its activist president Genaro Góngora Pimentel, who served from January 1999 through December 2002. This work was originally organized by its own Office of Public Relations (DCS), which was subsumed under the control of the Counsel's press office in January of 2001.²⁹ The DCS took out advertisements

²⁶ Domingo 1999, 171-174. In particular, she reports the results from a 1996 *Voz y Voto* poll which suggest that nearly 50% of Mexico City residents who had no experience with the legal system believed the Supreme Court ministers themselves to be dishonest or very dishonest.

²⁷ See interviews with Ministers Palacios, Aguirre Anguiano, and Ortiz Mayagotia in Óscar Camacho Guzmán, "El presidente de México no tiene privilegios en la Suprema Corte," 11 October 1999, *Milenio Diario*, 39.

²⁸ Jesús Aranda. Personal communication. June 6, 2001. Mexico City, Mexico.

²⁹ I discuss the Court's public relations work in Jeffrey K. Staton, *Judicial Activism and Public Authority Compliance: The Role of Public Support in the Mexican Separation of Powers System* (Washington University, Unpublished Doctoral Dissertation, 2002), 152-189.

announcing the Court's autonomy. It published books, pamphlets, comics and videos summarizing the Court's most salient decisions, describing its internal structure, and highlighting its new role in Mexican politics. The ministers themselves granted interviews with the media on a wide variety of topics.³⁰ Further, an important goal of the DCS, whose members admitted to being in a "daily battle for the new image of the Court," was to develop accurate media coverage.³¹ The judicial writing style is not reader friendly, and as a result, resolutions are unusually difficult to interpret without a reasonable familiarity with the law. To address this issue, the Supreme Court offered legal seminars for reporters so that they might better cover the intricacies of judicial resolutions.

Substantively, the DCS attempted to craft an image of an independent, apolitical Supreme Court, one responsible for an increasingly accessible and efficient judiciary. In order to help promote a consistent message, the DCS issued press releases announcing information on pending and resolved cases and on critical administrative decisions taken by the Supreme Court and the Counsel.

(Figure 1)

Figure 1 shows the number of press releases announcing case results and administrative decisions issued each quarter from January 1997 through June 2003.³² With the exception of the first quarter of 1997, the Court consistently issued more press releases announcing administrative decisions than the results of cases; however, while the number of releases on cases remained relatively stable until 2003, the number of administrative press releases skyrocketed beginning 2001.³³ In fact, in the fourth quarter of 2002 the overwhelming majority of press releases (97%) announced administrative decisions or proposals – many of which directly concerned issues of judicial reform. For example, between 2001 and 2003, 14% of the Court's administrative press releases announced the opening of a new federal district court or circuit tribunal, an important element of its reform package to enhance judicial efficiency and increase access.³⁴ Moreover, these administrative announcements frequently contained reviews of substantive messages the Court wished to promote. Indeed, 23% of the Court's press releases announcing the opening of a new court between 2001 and 2003 quoted a speech by a member of the Supreme Court or Counsel making an appeal for a constitutional reform of the judiciary's budgetary authority. Sixty-three percent (63%) of those same press releases contained a message reaffirming the Court's interest in promoting justice for all Mexicans.

³⁰ Staton, 152-153.

³¹ In particular, the DCS was required to help better inform the Mexican public about the actual structure and role of the federal courts through the media. The DCS was also asked to publicly yet professionally defend the judiciary's independence. The Court's public relations policy is published in *Compromiso, órgano informativo del Poder Judicial de la Federación*, número 1, (julio-agosto, 1999), 21-22. Vizcaino Zamora, Arturo. Personal Communication. June 10, 2000. Mexico City: Supreme Court of Justice of the Nation.

³² The codebook for these data is available upon request from the author. For the purposes of this table, the coding is rather straightforward.

³³ The likely explanation for this pattern is that in 2001, the press offices of the Supreme Court and the Federal Judicial Counsel were consolidated. Insofar as the Counsel doesn't resolve legal cases, the increase in total press releases resulting from combining the two press offices had to affect the number of administrative announcements only. On the reason for this consolidation, see Staton 2002, 183-186.

³⁴ Data and codebook available upon request.

Perhaps of greater interest, the number of press releases issued by the Supreme Court has absolutely plummeted in 2003. While the Court averaged 24 releases per quarter between 1997 and 2002, it has only issued 5 during the first two quarters of 2003! This reduced activity corresponds with the election of the Court's new president Minister Mariano Azuela, and suggests that the ministers may have begun to seriously consider the risks of cultivating such a high public profile. I return to this issue below.

Although coverage of the Supreme Court has certainly grown since 1995, we should be careful about drawing causal inferences about the Court's effect on its own coverage.³⁵ Given the Court's new powers of constitutional review, it has increasingly resolved politically relevant cases, and those cases generate considerable interest in the press, independent of the Court's activities. Furthermore, it is unclear whether or not the Court effectively crafted a new image or substantially increased public support for particular reform proposals.³⁶ Still, it is clear that by the end of 2002 the DCS and an increasingly cognoscente press corps offered the Court an effective mechanism for communicating its reform interests to the public. I now discuss examples of the Court's attempts to influence judicial reform.

Judicial Independence: Unsurprisingly, the Supreme Court has promoted institutional changes designed to increase the independence of the federal judiciary. The key proposal has been a constitutional amendment guaranteeing the judiciary a fixed yearly percentage of the federal budget. Constitutionally, the Supreme Court is empowered to submit a budget directly to Congress for its consideration, while the Counsel submits a budget for the remainder of the judiciary. In practice, this requirement has meant that the Court negotiates directly with the President of the Republic.³⁷ The concern among the ministers is that the budgetary structure grants the legislature an unnecessary degree of control over the judiciary's activities.³⁸ Despite the lack of a fixed budgetary provision, the judiciary's budget has grown tremendously over the past six years. Fix Fierro suggests that the current allocation is over four times as great as it was in 1997.³⁹ For the ministers, the issue is not so much how much the Court's budget has grown, but rather whether or not the Court has to consistently seek legislative approval for increases.

The Court has promoted its budgetary reform initiative via direct lobbying and through more subtle forms of public relations. For example, on August 17, 2000, roughly six

³⁵ A search at the newspaper *La Jornada's* website for articles on the Supreme Court reveals the significant change in coverage. For example, a search under "Suprema Corte" in 1996 generates 460 hits. In contrast, an identical search in 2001 and 2002 generates 1,312 and 1,964 respectively.

³⁶ Data obtained by the newspaper *Reforma* on the Supreme Court's national approval suggest that in the days immediately following the Fox transition, 50% of Mexicans surveyed held a favorable opinion of the Court. Only 7% expressed a negative opinion. See, Jeffrey Staton, "Public Support and Spin: Judicial Policy Implementation in Mexico City and Mérida," *Comparative Politics* (forthcoming, 2003). This result suggests a different understanding of the Court's image than that contained in Domingo, *supra* note 29. By February 2002 however, only 39% of respondents issued a favorable opinion while the percentage of respondents issuing a negative opinion had risen to 17%. Moreover, these latter results are confirmed by Fix Fierro 2000, 39, who discusses a poll contained in *Este País* wherein only 36% of respondents suggested that they had some to much confidence in the Supreme Court.

³⁷ Fix Fierro, 33.

³⁸ See November 28, 2001 comments by Minister Aguirre Anguiano at the 7th Iberoamerican Summit of Supreme Tribunals and Courts. These are summarized in Comunicado 581, Dirección General de Comunicación Social, SCJN.

³⁹ Fix Fierro, 33.

weeks after Vicente Fox won the Mexican presidency, his transition team on justice and public security matters took part in a breakfast meeting with the eleven ministers. The subject of the meeting, which was highly covered by the national media, concerned a number of the president-elect's reform proposals for the justice system, none of which addressed the Court's budget reform.⁴⁰ Although the ministers were able to press their interests directly to the transition team, there was no assurance that the conversation would receive general media coverage and thus more effectively compete for a position on the Fox agenda.

President Góngora took advantage of this well-publicized opportunity, holding a press conference after the meeting. He announced that he had presented the transition team with a thirteen-page comparative analysis of budgetary rules concerning Latin American judiciaries.⁴¹ In it, Góngora vigorously argued for the proposed change. Important for the coverage the Court would receive on the following day, the DCS had previously prepped beat reporters covering the meeting on the interests of the Court, paving the way for a coverage that focused not just on what Fox cared to promote, but on the Ministers' interests as well. In somewhat of a public relations coup for the Court, the following day's newspaper coverage of the event highlighted the Court's budgetary proposal along side Fox's justice system reform.⁴²

The budget continued to be a hot reform issue for the Court over the next two years. President Góngora has pushed this issue as a region-wide concern for judicial independence, promoting the reform at both national judicial conferences and a series of international meetings of high court judges.⁴³ In August of 2002, the Congress formally began to consider the proposal; however, the initiative seems to have died during the winter of 2003. The result of the Court's efforts on the budgetary reform suggest that the ministers were successful in generating media coverage and eventually inducing Congress to formally consider the measure, but they have been incapable of generating institutional change.

Judicial Authority: The Supreme Court has promoted three significant reform initiatives since 1994 concerning its jurisdiction, constitutional review powers and administrative authority. Its most successful proposal involved a plan to redefine the nature of the Federal Judicial Counsel. The initiative arose out of a conflict between the Counsel and the Court over whether or not the Counsel's administrative decisions were re-viewable through amparo.⁴⁴ The fundamental political issue involved whether or not the Supreme Court sat at the top of the judicial hierarchy.

⁴⁰ In particular, Fox proposed to move the federal agrarian, labor and administrative courts from the executive to the judicial branch. He also proposed to transform the Republic's Attorney General's office (PGR) into something like the United States' Justice Department and to create a new cabinet position on security and justice services. Daniel Lizárraga, "Negocian hoy reformas Ministros y foxistas," 17 August 2000, *Reforma*, 2.

⁴¹ The title of this brief study is entitled *Debilidad constitucional en el Presupuesto de Egresos del Poder Judicial de la Federación*. It may be obtained from the Judiciary's Office of Social Communication upon request (Comunicación Social, www.cjf.gob.mx/comsocial/default.asp).

⁴² For example, see Mario Torres, "Demanda SCJN 6% del presupuesto federal," 18 August 2000, *El Universal*, 7A.

⁴³ See the findings from the 7th Cumbre Iberoamericana de Cortes y Tribunales Supremos de Justicia, downloadable at www.cjf.gob.mx.

⁴⁴ Jesús Aranda, "Resurge la pugna entre la Corte y el Consejo de la Judicatura." 24 August 1998, *La Jornada*.

In January of 1999, the Court sent a formal proposal to President Zedillo hoping to clarify its position. Zedillo submitted the proposal to the Congress with limited modifications. The changes adopted by the Congress reduced the tenure of counselors from six to three years and required that the current members of the Counsel resign. More important, the reform changed the selection procedures for Counsel members. Originally, the Court selected three of the seven counselors randomly from a list of possible candidates. The reform granted the Court the power to select members of its choosing, giving it direct control over a majority of the Counsel's membership. The Counsel reform, which was driven largely by the Court's direct lobbying efforts, undoubtedly increased its administrative authority, allowing the ministers to create a fully coherent strategy for developing the federal judiciary.

The Court has also promoted a constitutional amendment granting it the power to initiate bills on subjects concerning the judiciary. The reform would have allowed the Court to initiate laws both related to federal jurisdiction and, predictably, the judicial budget. For two years beginning in 2000, President Góngora directly requested that President Fox and the Congress proceed with this change. On June 26, 2001 Góngora testified before the House of Deputies' Special Committee on State Reform. He argued that because the Supreme Court best understands which of its institutions require reform, it ought to be granted the power to initiate its own laws. This would not interfere with the authority of the other two branches of government, because the Congress could always reject its proposals and the president could always veto them. Such a power, on Góngora's account, would simply allow the Court to ensure the consolidation of democracy.⁴⁵ To date, Congress has taken no definitive action on this proposal.

Clearly, the most well-developed reform measure on the Court's authority involves a drastic change in the Amparo Law. On November 17, 1999 President Góngora formally installed a seven-member commission charged with investigating how best to reform the current Amparo Law, appointing Minister Román Palacios chairman.⁴⁶ The commission sought proposals from members of the legal community and the general public. The elaborate process of submission and review generated 1,430 distinct reform recommendations. Of the 247 articles in the Amparo Law, only 18 did not receive any attention by those making proposals. With the written proposals and the commission's own summaries in hand, the commission hosted eleven public conferences in cities around the country between March 3 and April 7, 2000 on the subject of the reform.⁴⁷ These meetings were attended by 955 lawyers and included 89 presentations on the

⁴⁵ See Comunicado 421, Dirección General de Comunicación Social, Suprema Corte de Justicia de la Nación.

⁴⁶ The commission, designed to be as inclusive as possible, included judges, legal scholars and attorneys. The other members of the commission included Minister Silva Meza, José Ramón Cossío Díaz, César Esquinca Muñoz, Héctor Fix Zamudio, Javier Auijano Baz, Manuel Ernesto Saloma Vera and Artunro Zaldívar Lelo de Larrea. At the time of their appointments Cossío Díaz was chair of the Department of Law at the Instituto Tecnológico Autónomo de México, Esquinca Muñoz was the General Director of the Instituto Federal de la Defensoría Pública, Fix Zamudio was Emitus Researcher at the Universidad Nacional Autónoma de México's Instituto de Investigaciones Jurídicas, Saloma Vera was a professor at the Instituto de la Judicatura Federal, and Zaldívar Lelo and Saloma Vera were in successful private practices. See review in Suprema Corte de Justicia de la Nación, *Proyecto de la Ley de Amparo Reglamentaria de los Artículos 103 y 107 de la Constitución Política de los Estados Unidos Mexicanos* (México: Suprema Corte de Justicia de la Nación, 2001).

⁴⁷ Conferences were held in Baja California, Guanajuato, Tlaxcala, Querétaro, Durango, Oaxaca, Chiapas, San Luis Potosí, Cuernavaca, Zacatecas and Cd. Victoria.

Amparo Law. By making this process so public, the Court attempted to build wide support for the initiative it would send the Congress.

On August 29 the commission submitted its formal reform to the ministers. In light of the monumental number of individual recommendations that the commission deemed reasonable, its members opted to draft an entirely new law. This draft was accepted by a majority of the Court and was subsequently sent to the President of the Republic and both houses of the national Congress for their consideration.⁴⁸ The proposal's most controversial article involves a reconsideration of the famous *Otero Formula*, which limits the effects in amparo to the parties immediately involved in the suit. Although the proposal allows the Court to continue making decisions that establish only specific effects, it also provides a mechanism wherein the ministers may speak generally on the constitutionality of laws.⁴⁹ If the Supreme Court establishes a formal jurisprudential thesis on the unconstitutionality of a law or regulation, within thirty days, it may set general effects by declaring this law or regulation unconstitutional, thereby abrogating the norm.

This reform, if adopted, would clearly change the Court's ability to control constitutional meaning. Of course, it would also fundamentally alter the original formulation of amparo, rendering it much more similar the individual constitutional complaint evident in many European systems of constitutional review.⁵⁰ Despite some important criticisms from traditional Mexican legal scholars, the Court has been resolute in its search for this new power.⁵¹ That said, Congress has never formally undertaken consideration of the Court's proposal, even after the grand effort to mobilize public support.

Efficiency: Many of the Court's reform measures affecting judicial efficiency have not required the assistance of the elected branches of government. Efforts such as creating an internal network for employees of the federal judiciary, creating a school for the continuing education of members of the judicial career and automating the storage of jurisprudential theses were all carried out within the judiciary itself. Other reform measures have required the participation of the elected branches.

In 1999, the ministers proposed a constitutional amendment to grant the Supreme Court direct power to distribute cases among its own benches and the collegial circuit courts. The problem, as the Court saw it, was that it was being weighed down by amparo appeals upon which it had already defined jurisprudential theses. Without the authority to decide for itself on the kinds of appeals it could remit to the circuits, the Court would have had to appeal directly to the Congress each time it believed there could be gains

⁴⁸ Minister Juventino V. Castro y Castro, himself a former public prosecutor filed an important dissent on the proposal concerning the removal of the Ministerio Público. The Court has published this dissent in a book entitled *Réquiem para el Ministerio Público en el Amparo*.

⁴⁹ Proyecto, Artículos 232-235.

⁵⁰ Ferrer Mac-Gregor *cite on amparo in Spain – Stone Sweet on the individual constitutional complaint*.

⁵¹ In particular, Doctor Ignacio Burgoa, author of the definitive work on amparo, and law professor to many of the Ministers, filed a well-developed opinion with the Supreme Court in November of 1999 in disagreement with many of the important reforms eventually adopted by the Court. In response, Góngora made a point of publicly thanking Burgoa and welcoming further criticism. See, Comunicado 303, Dirección General de Comunicación Social, SCJN.

from a more efficient distribution of jurisdiction. The Court's efforts in this regard were successful.⁵²

The Court and Counsel's effort to create a greater number of judgeships and courts has necessitated a significant increase in the judicial budget. Such increases required congressional acquiescence, and accordingly some reasonable justification from the judiciary. The number of federal courts has absolutely skyrocketed since the 1994 reform. Fix Fierro reports that the federal judiciary added 76 district courts between 1995 and 2001; it added 83 collegial circuit courts over the same period. Unfortunately for the Court's interests, the number of cases per judge has increased with the increase in the number of courts, and accordingly, there has not been an appreciable decrease in the average workload of federal judges.⁵³ That said, data compiled by the World Bank actually suggest that Mexican federal courts, at least in civil amparo cases, have been more or less effectively dealing with the problem of backlog. In fact, among the 16 countries for which it collected sufficient data in 2000, Mexico ranked highest on its clearance measure, the ratio of cases disposed to cases filed in a particular year.⁵⁴ The sample included regional neighbors Costa Rica, Nicaragua, Ecuador, Peru, Argentina, and Colombia.

Summary: Since 1994 the Mexican state has been building a healthier judiciary, and the ministers of the Supreme Court have played an important role in molding the substance of the process. Still, the ministers have had to address a number of obstacles that limit their ability to promote reform. First, they could not implement many changes without the support of the elected branches of government. Second, as judges, they lacked a natural constituency from which they might have leveraged support for their proposals. Third, they lacked a mechanism through which they might directly communicate their proposals to the Mexican public.

Above, I have suggested that the Court attempted to address these problems by directly lobbying members of the executive and legislative branches. They implemented a coordinated public relations effort designed to create accurate media coverage and promote reform messages to the public. Substantively, the Court has been relatively successful in its attempts to frame the reform debate. In some cases the ministers have been successful. However, two of their most important reform proposals, the amparo law reform and the budgetary reform, have not been enacted. Moreover, since the beginning of 2003, the Court has greatly reduced its public relations work. These patterns suggest a number of limitations on the ability of judges to affect the policy choices of elected officials on judicial institutions. I end with a discussion of these limitations.

Conclusions

The notion that judges might be able to shape the legislative or executive reform agenda adds a degree of substance to the theoretical literature analyzing why politicians might choose to build healthy judiciaries. The models I review above suggest two ways of understanding the incentive to reform. Still, they do not offer much more than general predictions about delegation. That is, it is not clear what either the insurance or

⁵² See Ley Organica de la Federaci3n, Articulo 11, V.

⁵³ Fix Fierro, 41.

⁵⁴ The data is stored at <http://www4.worldbank.org/legal/database/>. I can produce a table for July if requested.

credible commitment accounts have to say about the particular institutional choices elected officials make. For many political scientists, perhaps this is not important. To understand the plausible incentive structures that induce delegation might be enough. Still, if we want to either accurately describe the world or understand how actual judicial institutions are created, we might do well to consider the role of judges in helping to shape the reform agenda. Of course, there are important limitations on the effects we might suspect judges to have.

Going Public: Clearly, part of the Supreme Court's program to influence judicial reform has involved an effort to explain its positions to the Mexican public. This part of the Court's public relations strategy is critical insofar as the ministers do not represent a relevant set of constituents outside the members of the judiciary itself. If the Court wants leverage, it has to create it through developing wide public support for its interests. Yet, this effort to generate support for particular reform measures may be limited by the Court's concomitant desire to present itself as fundamentally apolitical.⁵⁵ Making sales pitches directly to voters risks developing a politicized image, precisely what most judges, and certainly the ministers of the Mexican Supreme Court, would like to avoid. Moreover, strong appeals for coverage may invite negative as well as positive analysis. In fact, recent articles on the Mexican judiciary in the newspaper *Reforma* have focused on the rise of already high judicial salaries and questions regarding the judiciary's decisions to increase the number of judges and courts.⁵⁶

Appeals to the public for support concerning judicial reform thus present judges with a compelling trade-off. Remaining inactive and largely detached from the political arena limits the ability of judges to create support for their reform efforts. However, running an aggressive public relations campaign risks developing an image of a politicized judiciary. The clearly noticeable reduction in the Supreme Court's public communication with the press since January of 2003 suggests that the ministers may now perceive that the marginal benefits obtained by continuing its previously aggressive public relations work may now be outpaced by the marginal costs of appearing to be just another political branch of government.

A future model of this process might more systematically evaluate the conditions under which judges will be more likely risk developing an overly politicized image. At first blush, one might hypothesize that such a choice will be non-linear in the degree of public trust enjoyed by the judiciary. That is, we might expect judges who enjoy little trust and judges that are greatly trusted to engage in fairly aggressive public relations, while judges that fall somewhere in the middle might be expected to be more careful. The idea here, though underdeveloped, is that while judges that enjoy little trust likely will have less impact on public opinion, they will also have little to lose by generating a negative image. Judges that enjoy much trust might expect their appeals to be particularly persuasive. In contrast, judges that are neither significantly trusted nor distrusted might not expect to greatly affect public opinion and perceive the costs of appearing politicized to be significant. Clearly, both theoretical and empirical work on this issue is in order.

⁵⁵ For a statement on this concern, see Juan Silva Meza, "La Corte y la Defensa de la Constitución," In Alberto Aragón Bolado, Ed., *Once Voces* (México: Suprema Corte de Justicia de la Nación, 2000).

⁵⁶ See Víctor Fuentes, "Disfruta élite judicial de privilegios," *Reforma*, 26 February 2003, Víctor Fuentes, "Duplican salaries al Poder Judicial," *Reforma*, 25 February 2003, and Víctor Fuentes and Benito Jiménez, "Cuestionan crecimiento de Poder Judicial," *Reforma*, 12 December 2002.

Political Responses: Successfully convincing executives or congressional delegates to consider reform proposals does not mean that those proposals will be enacted. Given their role as high-ranking officials of the state, we might expect high court judges to obtain relatively easy access to policy makers. Indeed, the Mexican Supreme Court seems to have been quite capable of directly lobbying the most important elected officials of the state. That said, the Court has failed to successfully promote both its amparo and budget reforms, issues on which it has expended considerable resources. In the end, it would appear that the ministers have been largely successful in obtaining desired results in areas that did not directly affect significant sources of legislative or executive power, especially power over the judiciary itself. The conflict with the Counsel was largely an intra-judicial battle, not one whose result would affect important legislative interests. The same can be said for the reform to the Court's power to remit certain cases to the circuits.

In contrast, the Court has been fairly unsuccessful in its attempts to gain budgetary independence and expanded powers of constitutional review in amparo. Although reformers might expect gains from judicial independence on both the insurance and commitment accounts, they must trade independence off against judicial accountability.⁵⁷ Similarly, reformers must trade legislative authority off against judicial power. Granting the judiciary further budgetary independence would have surely created a more independent set of courts; however, it would have rendered those courts less accountable, as well. Budgetary authority is an important check on the power of the judiciary, and one that might be carefully guarded by institutional equals. Also, the Supreme Court has been increasingly willing to challenge the authority of both the Congress and the President, especially since the 2000 transition.⁵⁸ Enhancing

⁵⁷ On this issue, see Stephen B. Burbank and Barry Friedman, "Reconsidering Judicial Independence," in Stephen B. Burbank and Barry Friedman, Eds., *Judicial Independence at the Crossroads: An Interdisciplinary Approach* (Thousand Oaks: Sage Publications, 2001), 14-17.

⁵⁸ Jodi Finkel, "Supreme Court Decisions on Electoral Rules After Mexico's 1994 Judicial Reform: An Empowered Court," *Journal of Latin American Studies*, (forthcoming, 2003)

the Court's powers in amparo might allow the Court to more efficiently control constitutionality; however, it would also mean that the Court could better control public policy. Without a pressing legislative reason for change, it is not surprising that the amparo reform has stalled.

For future research, the point here is a simple one. All things equal, we might expect judges to be at least as successful as other powerful interest groups in shaping reform debates. However, we should expect judges to have less success influencing the outcomes of debates in both areas that directly enhance their powers over public policy and the ability of the elected branches to hold judges accountable for their actions than in areas that do not.

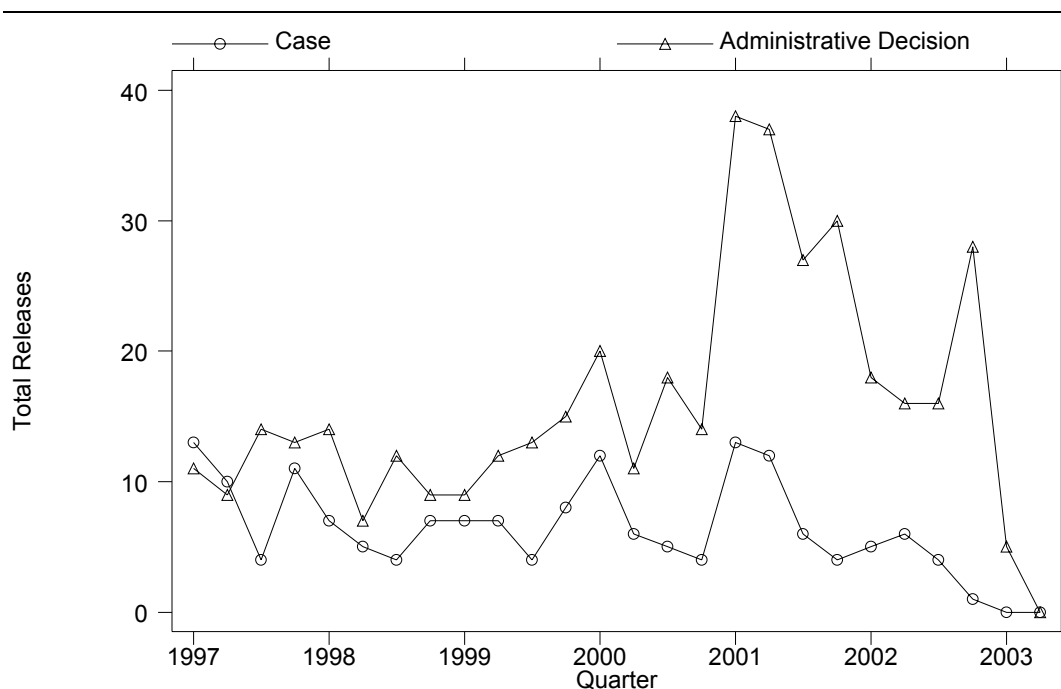


Figure 1: Supreme Court Press Releases by Quarter (1997-2003)