Judging Under Political Constraint: The Ecuadorean Case (2008-2015)

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Abstract

Do judges tend to favor the government when ruling politically salient cases? In this paper we present an empirical study on the strategic interplay between the Ecuadorean Constitutional Court (ECC) and the government between 2008 and 2016. On the basis of a quantitative analysis of all 111 abstract constitutional review decisions (*sentencias de acción pública de inconstitucionalidad)* we find that laws are more likely to be struck down by ECC justices when public actors claim unconstitutionality than when non-public parties do. Moreover, variables such as media coverage, type of norm, and time of promulgation of a norm, are also found to be solid predictors of judicial decision-making in constitutional review cases. These findings suggest that Ecuadorean abstract constitutional review can be politically biased, and that constitutional designers may need to consider such a bias when instituting constitutional adjudication proceedings.

Introduction

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This paper is structured as follows: the first section contains a brief overview of some seminal concepts on judicial independence, along with four theoretical models that have guided the existing studies on the field. The main research of judicial politics in Latin America, and specifically in Ecuador, are then presented. The second part

introduces a model of judicial politicization, explaining the causal relationship between the political salience of a case and the strategic nature of voting in constitutional courts. In the third section, hypotheses derived from the model are tested by performing a quantitative analysis of an original dataset that includes all abstract constitutional review decisions solved by the ECC from 2008 to 2015. These findings suggest that Ecuadorean abstract constitutional review can be politically biased, and that constitutional designers may need to consider such a bias when instituting constitutional adjudication proceedings.

Background

Judicial Independence

Two autonomy categories are particularly important to understand judicial independence as the lack of political pressures: *de jure* and *de facto* independence (Feld & Voigt, 2003; Hayo & Voigt, 2007; LaPorta, Lopez-de-Silane, Pop-Eleches, & Shleifer, 2003; Ríos-Figueroa & Staton, 2014). The first category – *de jure* independence – denotes a set of formal institutions that intend to protect judges from political pressures generated inside (endogenous) or outside (exogenous) the judiciary. Usually, features such as time in office, appointment procedures, impeachment, and budgetary autonomy constitute institutional arrangements that are grouped within this category. *De facto* independence, prevents judges' rulings from being influenced by financial and coercive factors.

Despite continuous efforts to conceptualize judicial independence, it remains "an elusive concept" that has legal and political dimensions (Iaryczower, Spiller, & Tommasi, 2002). This concept of judicial independence is broadly defined in the literature as the level of autonomy judges have when deciding cases (Cross, 2003; Kapiszewski & Taylor, 2008; Larkins, 1996; Ríos-Figueroa & Staton, 2014; Russell, 2001). Judicial autonomy thus defined has three related dimensions: 1) autonomy of the judiciary from pressures exerted by other branches of government; 2) impartiality of judges from the parties to a case; and 3) independence of lower judges from higher courts. This paper primarily addresses the first dimension, as we find that ECC justices may be insufficiently independent when ruling politically relevant cases.

With respect to this first dimension, scholars refer to judicial independence as "the extent to which justices can reflect their preferences in their decisions without facing retaliation measures by the Congress or the President" (Iaryczower et al., 2002). This definition implies that the more freedom courts have in deciding cases based on their

ideological or policy preferences, the more independent they are. However, this is not always true because courts might be constrained by the law, and also by such external factors as media coverage, political salience of cases, or judicial precedents.

Along this line, the first dimension of judicial independence is largely related to the judiciary's capacity to check the elected branches. An independent judiciary would therefore be able to take decisions against the government, without facing undesirable payoffs or retaliations (Iaryczower et al., 2002). Nonetheless, interpreting decisions that limit the exercise of legislative and executive prerogatives as evidence of autonomy can be misleading, as even courts that are considered to be independent rule frequently against the government (Kapiszewski & Taylor, 2008).

Theoretical Perspectives of Judicial Behavior

Is the judiciary independent? The answer to this question is undoubtedly linked with judges' behaviors, that is what do judges do and why do they do it? A wide-ranging body of literature has identified various theoretical models of judicial behavior. This section will explore the legal model, the institutional model, the attitudinal model, and the main contributions of these theoretical approaches to the field.

The legal model establishes that justices' preferences are highly influenced by "the facts of the case in light of the plain meaning of statutes and the Constitution" (Segal, 1999). This model is not specifically interested on judges' behavior but in the application of legal norms while arguing decisions. From the legal model perspective, judges' votes differ according to the content of laws (Ackerman, 2000; Cross & Tiller, 1998). The legal model entails two basic premises: legal certainty and endogenous autonomy. Legal certainty, as is widely known, refers to security and stability of law. Endogenous autonomy, by contrast, implies independency within the judicial branch. Briefly, as long as judges are independent, the legal model assumes that legal norms can solve all legal problems.

The institutional model indicates that judges face a set of arrangements – in other words, formal and informal institutions – that in the long term determine their behavior and also motivate them for adopting certain preferences (Epstein & Knight, 2000). Therefore, judges' behavior depends on endogenous and exogenous institutional arrangements. On the one hand, endogenous institutional constraints refer to formal and informal rules that limit judicial performance coming from the judiciary. Lax and

Cameron (2007) refer to judicial agenda setting, administrative punishments and opinion assignment from higher courts, as examples of endogenous constraints. On the other hand, exogenous constraints involve checks coming from either political branches outside the judiciary or private stakeholders. From this perspective, judges will anticipate other actor reactions as they rule their cases.

The attitudinal model explains that justices are biased by their personal ideologies while deciding cases. As Dyevre (2010) explains, "the central proposition of the attitudinal model is that judges decide cases in light of their brute policy preferences." In other words, personal attitudes concerning values and ideological preferences will define either if a judicial decision is sincere – also called conviction decision – or strategic, meaning that it has been influenced by external ideological orientations (Segal & Spaeth, 2002).

Combining these theoretical models, scholars frequently analyze courts' behavior and judicial review as the result of strategic interactions between the executive, the legislature and the judiciary, within the separation of powers approach (Kaufman, 1980; Segal, 1997). Specifically, the separation of powers theory asserts that unified governments tend to undermine judicial independence, whereas intense political competition favors conviction voting (Landes & Posner, 1975; Ramseyer, 1994). Judicial independence, in this regard, is conceived as the capacity of courts to effectively act as veto players and overturn legislation emanated from the legislative and the executive. Consequently, it is worth noting that judicial decisions are also highly dependent on justices' anticipation of political rewards or retaliations coming from other political branches.

Moreover, the separation of powers theory relies on two assumptions directly related to judges' job stability. On the one hand, it is assumed that judges have static ambitions, which basically means that they want to stay in office in order to pursue either institutional legitimacy or personal reputation (Helmke 2005). On the other hand, under a unified government political actors may easily appoint aligned judges and impeach non-compliant ones, causing job instability and political dependency (Chávez 2004).

In reality, judges' ambitions and behavior are not static. They depend on the legal and political system as well as on the legal and political salience of the case. The political salience effect has been traditionally eluded by the literature as only recently Epstein and Posner (2015) have shown that US justices are more likely to vote for their appointing

president, when cases are reported in newspapers. Consequently, judicial behavior and judicial independence in general can best be understood in the context of a specific legal and political system.

Separation of Powers in Latin America

This study examines separation of powers in an Ecuadorean context. Considering that Ecuador is part of Latin America and that Latin American countries somewhat faced similar challenges and difficulties regarding the separation of powers, it is important to understand the interaction between courts and political actors in Latin America.

Existing studies in Latin America have depicted vast empirical evidence about strategic interactions between courts and other political actors (Kapiszewski & Taylor, 2008). Particularly, political competition, judicial stability and appointment procedures have a large impact on judicial independence. Nevertheless, the political salience and of the case submitted to the Court has not been deeply addressed.

Regarding political competition, most of scholars agree on the fact that unified governments tend to preclude judicial independence (Beer 2006; Brinks 2005; Chávez 2004; Finkel 2004; Ginsburg 2003; Ríos-Figueroa 2007), whereas political competition increases the probabilities of attaining judicial independence (Dargent 2009; Finkel 2004; Ginsburg 2003; Magaloni 2003). Still, fragmented governments may be able to control the judiciary, depending on certain institutional layouts. For instance, Grijalva (2010) evidenced that weak legislative coalitions are able to influence judges under specific institutional conditions, such as "short terms in office, the threat of impeachment, and the possibility of reappointment." Research has also shown that judicial stability favors conviction voting, whereas instability encourages strategic voting (Iaryczower, Spiller and Tommasi 2002). Nevertheless, extreme instability has also caused sincere judicial behavior (Basabe-Serrano 2012). In addition, scholars concede that as the number of political actors involved in justices' appointment procedures increases, the more likely it is that judges will tend to be independent (Helmke 2005; Magaloni Sánchez 2001; Pérez-Liñán and Castagnola 2009).

Finally, it has been suggested that political actors do not care equally about all constitutional review cases (Grijalva 2010). In this regard, ECC's justices might vote selectively depending on the type of case and political salience of those issues presented before them (Taylor 2008; Brace and Hall 1995, 1993). In addition, media coverage may also affect court's strategic behaviors (Grijalva 2010). Despite the relevance of these assumptions, they have not been empirically tested.

The Case of Ecuador

Constitutional Adjudication in Ecuador

Constitutional adjudication is generally characterized as the combination of three main variables, type of adjudication (concrete or abstract), timing of the adjudication (*a priori* or *a posteriori)* and whether it can be exercised by all the judiciary or just by a special body (centralized or decentralized) (Ginsburg & Versteeg, 2014). Since 2008, Ecuador embraced an eclectic model of constitutional adjudication, in which only ECC's justices have the authority to declare the unconstitutionality of those norms emanated from other political branches (centralized review). Within this institutional framework, the ECC widely controls for concrete, abstract, a priori and a posteriori constitutional review, depending on the type of petition submitted before the Court[1]. Additionally, constitutional justices may issue binding jurisprudence and, as stated by the Ecuadorean Constitution (2008), the ECC's interpretation cannot be overruled by the legislature[2].

Particularly, abstract constitutional review proceeds in absence of a concrete judicial case. Unlike judicial review in the United States, which generally entails the violation of somebody's constitutional rights, abstract constitutional review does not include a concrete legal case where specific rights are being infringed (Ginsburg, 2008). Instead, the ECC evaluates the conformity of a norm with the constitution, in abstract. To this effect, the ECC does not resolve a dispute between two parties when deciding public claims of unconstitutionality. In this regard, any litigant can claim the unconstitutionality of a norm and the Court will decide whether to declare it as constitutional or not. Consequently, abstract constitutional review always entails *erga omnes* effects.

Because of its configuration, abstract constitutional review directly influences public policies. In addition of being an important instrument for checks and balances in democratic states and a useful instrument to correct law, constitutional review can also reshape the political and legal conditions of a country (LaPorta 2002). Particularly, in this study we examine abstract constitutional review because it might show that even under strong *de iure* judicial independence features, such as longer terms in office, and no ECC

[1] Provisions 428, 436, 438, 439, and 443 of the Ecuadorean Constitution (2008).
[2] Provision 436 (6) of the Ecuadorean Constitution (2008).

judges' impeachment by the legislature, *de facto* judicial independence may be compromised depending on the political salience of a case. Furthermore, due to its institutional variability, the Ecuadorean case allows us to examine if political actors may influence Constitutional Court judges' decisions. This is the context in which the empirical study is conducted.

Political Stability and Judicial Independence in Ecuador

It will be tested within the context of improved stability whether the presence of political litigants and the political salience of a case is associated with the outcome of ECC decisions. There are two main reasons why Ecuador is a good case study for testing this relationship. First, since 2008 major constitutional reforms with regard to the selection mechanisms for ECC justices, the size of the court, the elimination of legislative impeachment and the attributions of the Court have taken place. Second, political competition was debilitated as the country experience the consolidation of a unified government. This section will further discuss the Executive's political strength and the ECC's institutional features in order to specify empirical implications of the presented hypotheses.

Even if constitutional guarantees institute a functional separation of powers, Latin American countries traditionally concentrate political power in the Executive (Helmke 2002; O'Donnell 1994). As depicted in Table 1, Ecuador has experienced an unexpected period of political stability with the consolidation of a unified government, as Rafael Correa – the current President of Ecuador – managed to hold the majority of seats at the National Assembly since 2008 (Polga-Hecimovich 2013).

Table 1
Presidents and Legislative Support (1979-2015)

Years	President	Presidential Party	Seats in Congress (%)	Largest Party in Congress	Seats in Congress (%)
1979-1981	Jaime Roldós	Concentración de Fuerzas Populares	44.9	Concentración de Fuerzas Populares	44.9
1981-1984	Osvaldo Hurtado	Democracia Popular	0	Concentración de Fuerzas Populares	17.4

1984-1986	León Febres-Cordero	Partido Social Cristiano	12.7	Izquierda Democrática	33.8
1988-1990	Rodrigo Borja	Izquierda Democrática	42.3	Izquierda Democrática	42.3
1990-1992	Rodrigo Borja	Izquierda Democrática	19.4	Partido Social Cristiano	22.2
1992-1994	Sixto Durán Ballén	Partido Unidad Republicana	15.6	Partido Social Cristiano	27.3
1994-1996	Sixto Durán Ballén	Partido Unidad Republicana	3.9	Partido Social Cristiano	33.8
1996-1997	Abdalá Bucaram	Partido Roldosista Ecuatoriano	23.2	Partido Social Cristiano	32.9
1997-1998	Fabián Alarcón	Partido Roldosista Ecuatoriano	23.2	Partido Social Cristiano	32.9
1998-2000	Jamil Mahuad	Democracia Popular	28.1	Democracia Popular	28.1
2000-2003	Gustavo Noboa	Without party	0	Partido Social Cristiano	20.3
2003-2005	Lucio Gutiérrez	Partido Sociedad Patriótica	9.0	Partido Social Cristiano	25.0
2005-2007	Alfredo Palacio	Without party	0	Partido Social Cristiano	25.0
2008-2009	Rafael Correa	Alianza País	60.5	Alianza País	60.5
2009-2013	Rafael Correa	Alianza País	47.5	Alianza País	47.5
2013-2017	Rafael Correa	Alianza País	72.9	Alianza País	72.9

Source: adapted from Mejía Acosta, 2006.

In contrast, highly fragmented presidential regimes struggled to promote and execute stable policies from 1978 to 2006. In addition, the ECC – formerly known as Constitutional Tribunal (CT) – was extremely susceptible to constant executive-legislative impasses as shown in Table 2, which eventually triggered several judicial turnovers (Basabe-Serrano and Polga-Hecimovich, 2013). In this regard, political instability produced the dismissal of numerous CT's justices and the removal of two democratically elected presidents from 1997 to 2005.

Table 2
Constitutional Tribunal Turnovers

Year	Executive	Legislative coalition	Constitutional Tribunal (CT) Turnovers
1997	Fabián Alarcón (interim president)	Partido Social Cristiano, Pachakutic, Izquierda Democrática, Movimiento Popular Democrático, Democracia Popular	Congress removes all TC judges (February 6) and appoints new ones (May 13)
1999	Jamil Mahuad (removed in 2000)	Democracia Popular, Izquierda Democrática, Partido Roldosista Ecuatoriano	Congress removes all TC judges and appoints new ones (May 5 - June 17)
2003-2005	Lucio Gutiérrez (removed in 2005)	Partido Roldosista Ecuatoriano, Partido Renovador Institucional Acción Nacional, Partido Sociedad Patriótica	Congress removes all TC judges and appoints new ones (November 25)
2006	Alfredo Palacios (interim president)	Partido Social Cristiano, Partido Roldosista Ecuatoriano y Partido Sociedad Patriótica	Congress removes all TC judges and appoints new ones (February 22)

Source: Adapted from Grijalva, 2010.

Likewise, between 1996 and 2006, partisan interests largely influenced Constitutional Court justices' decisions. Political influence on justices was dependent on institutional features such as short terms in office, the threat of legislative impeachment, and the possibility of reappointment (Grijalva, 2010). Indeed, between 1997 and 2009, none of the CT's justices finished the term for which they were elected.

Acknowledging previous institutional flaws that threatened judicial independence, the 2008's Ecuadorean Constitution eliminated immediate reappointment and impeachment of ECC justices, and implemented a nine-year term in office, and a merit-based appointment procedure in order to enhance *de jure* judicial independence.

Table 3
ECC' institutional layout

Period	Term in office[3]	Type of Government[4]	Capacity to Impeach justices	*De Iure* Judicial Independence[5]	Reappointment	Research
2008-2015	Long term	Unified	No	High	No	-
1996-2007	Short term	Divided	Yes	Low	Yes	Grijalva (2010); Basabe-Serrano (2012)

Since 2008, the beginning and ending of justices' terms in office are not simultaneous. Instead, a third of the ECC (three judges) has to be replaced every three years. Ideally, a staggered renewal of justices may pose several difficulties for politicians to control justice' appointments.

Concerning the appointment procedure, Grijalva (2010) explains:

> The Constitutional Court justices are appointed as follows: The President, the National Assembly, and the Council of Citizen Participation and Social Control (also known as Transparency and Social Control Branch[6]) – which is a new branch of the government created by the 2008, integrated by representatives of civil society organizations, and also has constitutional powers to appoint other high public officials – must 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

[3] We considered three types of tenures. First a life tenure, second, a long tenure (more than five years) and, finally a short tenure (five years or less).
[4] When the president controls a legislative majority the government is unified, but if the president does not control a legislative majority then government is qualified as divided.
[5] Following Ríos Figueroa (2010), countries that scored more than three points in the Index of *de iure* judicial independence were classified as countries with a high level of *de iure* judicial independence. Conversely, if a country achieved three points or less, we consider it as a country with a low level of *de iure* judicial independence. Ríos-Figueroa structures the index based on, "(1) whether the appointment is made by judges themselves or by at least two different organs of government, (2) whether the length of tenure is longer than the appointer's tenure, (3) the relationship between appointment procedure and length of tenure, (4) whether the process to remove judges involves at least two-thirds of the legislature, and finally, (5) whether the number of constitutional judges is specified in the constitution." The index scores from 0 – representing a low degree of *de iure* judicial independence – to 6 – representing that *de iure* judicial independence is ensured.
[6] According to provision 204 of the Ecuadorean Constitution (2008), "the Transparency and Social Control Branch of Government shall promote and foster monitoring of public entities and bodies and of natural persons or legal entities of the private sector who provide services or carry out activities for the general welfare, so they shall conduct them with responsibility, transparency and equity; it shall foster and encourage public participation; it shall protect the exercise and fulfillment of rights; and it shall prevent and combat corruption".

the three new justices of the Constitutional Court.

Major criticism has been addressed to the fact that the Executive may easily appoint the new ECC's majority because Rafael Correa – the current President of Ecuador – has a majoritarian legislative coalition supporting his government, which will also influence the Transparency and Social Control Branch (Basabe-Serrano 2009). Despite this criticism, justices now enjoy greater insulation – at least formally – from political pressures than before 2008, as shown in Table 4.

Table 4
De Iure Judicial Independence Features (Constitution 1998 v. Constitution 2008)

Constitution	1998	2008
Number of Judges	9	9
Term in Office	4 years	9 years, two thirds of them shall be renewed every three years.
Reelection	Yes	No
Dismissal	Impeachment decided by the Congress (simple majority)	The dismissal of a judge shall be decided upon by two thirds of the members of the Constitutional Court
Nominating bodies	Presidency (2 candidates), Supreme Court (2 candidates), mayors and prefects (1 candidate), unions, peasants and Indians (1 candidate), business chambers (1 candidate)	Executive Branch (9 candidates), Legislative Branch (9 candidates) and Transparency and Social Control Branch (9 candidates)
Appointing bodies	Congress	Rating Committee, conformed by: a) 2 members nominated by Executive, b) 2 members nominated by the Congress and c) 2 members nominated by the Transparency and Social Control Branch
***De Iure* Judicial Independence Score**[7]	**3 points**	**5 points**

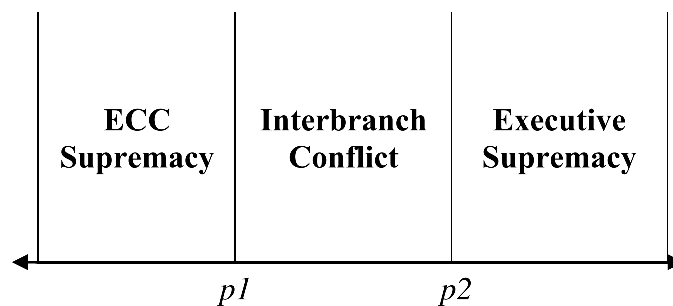
[7] We used Ríos-Figueroa (2010) index of *De Jure* Judicial Independence, to calculate the scores.

De iure judicial independence may be considered insufficient under unified governments, powerful presidential regimes and unconsolidated democracies, such as the Ecuadorean case. Under unconsolidated democracies, informal institutions, relatively unfettered executive powers and weak enforcement of the rule of law might drastically reduce the costs and increase the benefits of pressuring the ECC for incumbents to get a favorable ruling.

Modeling ECC-Executive Relations

Based on Rodríguez-Fraga (2008) two player zero-sum game and the separation of powers theory, in this section we model the strategic interactions between the ECC and the Executive power. This model specifies each player's preferences, but most importantly, it evidences under which conditions the ECC will tend to act tactically by deferring to a strong President.

Figure 1
Strategic Defection Game



Source: Adapted from Rodríguez-Fraga, 2011.

Figure 1 depicts a three-stage game in which parameter *p* describes the Executive's political strength and weakness to retaliate against the ECC. This continuum parameter identifies two thresholds. The first threshold is given by *p1*, in which the Executive will decide to retaliate against ECC's adverse decisions, but it will also face undesired costs if this retaliation fails. For instance, former Ecuadorean President Lucio Gutiérrez was removed from office on April 2005, after he promoted the removal of all the justices of the ECC (formerly known as the Constitutional Tribunal) and the appointment of new subservient justices. In addition, evidence has shown that when

Executive's economic policies are not succeeding and start to loose support from the legislature and public opinion, judges tend to issue more decisions against the government (Helmke 2002). This phenomenon has been named as the logic of strategic defection.

The second threshold is given by *p2*, in which the government is strong enough to retaliate against adverse decisions issued by the ECC without affronting any costs. To this effect, official authorities might tend to maximize the costs and benefits of pressuring the ECC. Under presidential regimes, presidential power is largely dependent on formal prerogatives (Shugart & Carey, 1992), support in congress (Cox & Morgenstern, 2001), and its capacity to track and influence public opinion (Hager & Sullivan, 1994). When strong enough, Executive's retaliations may indeed operate through formal or informal measures – *i.e.*, budget cuts, harassment through tax authorities, suppression of benefits that judges are entitled to by law, or simply non-compliance (Solomon & Foglesong, 2000). Below *p1* the ECC can strike down and uphold norms without facing any retaliation from the Executive.

Complementing this three-stage model, we predict that ECC's justices may vote strategically depending on the political salience of cases. Following Helmke (2002), we understand political salience as a matter of importance attributed to a case by the government and the public opinion. Indeed, we assume that those cases reported by the newspapers, in which public plaintiffs claim the unconstitutionality of a norm, may entail larger political salience than other cases. Of course, political salience encompasses further considerations. For the sake of simplicity and operative purposes, we also undertake four additional legal considerations. First, general regulation, whether organic or ordinary laws issued by the National Assembly, might be more politically salient than local norms. Second, norms enacted while the current government is in office may entail higher salience than other kind of regulation. Third, the content of a norm, whether it addresses fundamental rights or economic or taxation issues, can also determine the salience of a case. Finally, we assume that executive decrees might involve higher political stakes than other norms.

Hypotheses

Based on theoretical insights on judicial independence and the ECC's strategic defection, we formulate the following hypotheses:

H1: The presence of public actors as plaintiffs in constitutional review proceedings increases the probability of the norm being declared unconstitutional than with non-public plaintiffs.

Depending on the Executive's political strength and the salience of the case, claims of unconstitutionality proposed by pro-government public authorities, especially those serving in the Executive and Legislative, will tend be more successful than with a non-public plaintiff. Success is defined here as the number of claims presented by either public or non-public plaintiffs in which the ECC declares the unconstitutionality of a norm. Following this line of thought, if a case arises that is of high value to the government, and costs of pressuring the court are low, we expect to see a strategic defection of the ECC towards presidential interests. Under this context public plaintiffs will be more successful than non-public ones.

Of course, not all cases entail the same political burden, nor do they raise the same level of political attention. In fact, many cases solved by the ECC affect only particular or private interests. Instead, cases reported by the newspapers are more likely to involve national issues, which are attractive for the public opinion and may involve higher benefits for the government.

H2: Media exposure to a case will increase the probability of a norm being declared unconstitutional.

Undoubtedly, public discussions on politically salient cases are generally reported by mass media, as it represents one of the most relevant political arenas, in which societal issues are debated (Bennett et al. 2004; Ferree et al. 2002; Helbling and Tresch 2011). Wherefore, if a case is reported by newspapers, it might involve higher political repercussions. As shown by Langer (2002) a case might produce higher or lower repercussions depending on its scope and the type of conflict it addresses. Cases involving a large numbers of actors and ideological matters will tend to be more relevant for both media and politicians. Accordingly, as public awareness increases, a case might entail larger costs or benefits for incumbents (Wartjen 2012). Along this line, we expect that public actors may maximize their choices by claiming the unconstitutionality of those norms that attract media coverage, which will be measured by means of whether the challenged norm was reported by the newspapers or not. Therefore, depending on the media's attention of a case, we expect to see subservient or defiant behaviors of the ECC towards the Executive.

Methods

To answer the question of whether the ECC tends to favor the government when ruling politically salient cases or not, we gathered a data set that contained information on all public claims of unconstitutionality decisions (N=109) – *sentencias de acción pública de inconstitucionalidad* – issued by the ECC between 2008 and 2015. This original database included a comprehensive set of variables concerning each decision.

The result of the decision served as the dependent variable. It was dichotomously coded 1 if the Court upheld the constitutionality of the norm, and 0 if the norm was declared as unconstitutional.

We also created a series of dichotomous variables to capture the type of plaintiff. We coded 1 when the plaintiff was a public official and 0 otherwise. We included an additional variable to differentiate executive actors. This variable was coded 1, if the public official was a member of the executive branch and 0 otherwise. As previously explained, we expect that the Court would tend to strike down legislation when public officials claim unconstitutionality.

Furthermore, media exposure was measured by means of a binary variable (1 when the case was reported in a newspaper and 0 otherwise).[8] To ensure the adequate temporal order of the exposure of a case and the ECC decision, we only coded reported cases that were on the newspapers prior to when the actual decision was adopted by the Court.

Several other binary variables were used as control variables. Among the most important: *Type of Norm* (whether the challenged norm was a national law or not), *Norm Promulgation* (law enacted during Correa's presidential term or not), and three variables that reflect the applicable area of the law, that is, civil and political rights (whether the case addressed civil and political rights or not), economic social and cultural Rights (whether the case addressed economic, social, and cultural rights or not), collective rights (whether the case addressed collective rights or not), and taxation (whether the case involved any taxation issue or not) were measured and controlled for. We also controlled for whether cases were sponsored by private legal bureaus, NGOs and legal aid centers.

[8] Influential newspapers such as *El Comercio, El Hoy, La Hora, El Telégrafo, El Universo, Ecuador Inmediato, Los Andes* were used to extract relevant information on judicial cases. All the newspapers have online databases available. Name of plaintiff, challenged law and case facts were used as key words for each case.

Three variables (dummy) were used to the asses the quality of the lawsuit presented by private plaintiffs, namely, *Private Legal Sponsorship* (whether the claim was legally sponsored by a private bureau or not), *Community Legal Aid* (whether the claim was sponsored by a pro bono legal aid center), and also *NGOs* (whether the claim was sponsored by a NGO or nor). Furthermore, we included a continuous variable to capture individual dissenting votes per case. This variable was constructed by dividing the number of dissenting votes by the number of votes of the majority. The year when the decision was issued was also measured. Moreover, we added a *Dissenting Rate* variable to assess the complexity of each case. The underlying argument of this logic was that in the more complex cases justices will tend to issue more dissenting votes than in other type of cases.

Due to the dichotomous nature of the variables under consideration, logistic regression analysis was used to appraise the effect of the predictors on the dependent variable. We report the logit coefficients, standard errors, and significance levels for each of the variable included in the analysis.

Results

As depicted in Table 5, the ECC upheld the challenged norm in most cases (70.3% or 78 out of 111), meaning that the majority of public claims of constitutionality were rejected by the Court. The results also show that public plaintiffs filed less public claims of constitutionality than did non-public plaintiffs (mostly citizens and private legal persons). Accordingly, executive actors intervened as plaintiffs only in 13.5% of the observed cases. Concerning media coverage, 32.7% of the cases were reported by the newspapers. It is worth noting that in all the cases in which executive actors acted as plaintiffs and were reported by the newspapers, the norm was declared as unconstitutional by the ECC.

Table 5

Descriptive Results

Variable	**Breakdown**	**Percentage**
Decision	Unconstitutionality	29.7
	Constitutionality	70.3
Plaintiff	Public Plaintiff	21.6
	Non Public Plaintiff	78.4
	Executive Plaintiff	13.5

Executive Plaintiff	Non Executive Plaintiff	86.5
Media Coverage	Reported by Newspapers	32.7
	Not reported	67.3

Although executive actors filed much less public claims of constitutionality than non-public actors, they were far more successful. To evaluate the success of public plaintiffs, executive plaintiffs, and non-public plaintiffs, we implemented a specific coefficient. We use Yule's Q coefficient to compare differences in success between the three actors. Success is defined here as the number of claims presented by either public or private plaintiffs in which the ECC declares the unconstitutionality of a norm. Coefficient Q ranges from $-1 \leq Q \leq +1$[9]. A value of Q close to 1 represents an absolute success of both Public and Executive plaintiffs. Conversely, negative values approaching –1 suggests citizens' success. Values approaching zero imply a balance between citizens and public actors' successes before the Court. Table 6 measures the effect of public plaintiffs and citizens' successes, whereas Table 7 provides the effect of executive plaintiffs (exclusively) and citizens' successes.

Table 6

Public plaintiffs v non-public plaintiffs

Plaintiff origin	**Wining complaints**	**Failing complaints**	**Success rate**
Public	15 (A)	9 (B)	1.66 (A/B)
Non public	18 (C)	69 (D)	0.26 (C/D)

Table 7

Executive Plaintiff v non-public plaintiffs

Plaintiff origin	**Wining complaints**	**Failing complaints**	**Success rate**
Executive	13 (A)	2 (B)	6.5 (A/B)
Non public	18 (C)	69 (D)	0.26 (C/D)

If we use Yule's Q to compare the success of plaintiffs, we find that the average coefficient for public actors is 0.72, while the average coefficient for executive actors (exclusively) is 0.92. Consequently, these results illustrate that when executive plaintiffs

[9] The Yule's Q coefficient is given by the ratio of (AD - CB)/(AD + CB). See table 1 and table 2.

challenge a norm, it is more likely that the ECC will strike down legislation. It is also worth mentioning that executive actors were mostly interested in challenging general norms, as 73% of the laws challenged by executive actors were either organic or ordinary laws.

Logistic regression analysis was also used to predict the ECC decision. We run three logistic regression models to test the hypothesis and asses the relative impact of the predictors on the decision issued by the ECC. Model 1 tests *Executive Plaintiff* (whether an official authority working for the Executive branch acted as a plaintiff or not) and *Media Coverage* (whether the case was reported by the newspaper or not) as separate variables, the decision (whether the court declares a norm as constitutional or unconstitutional) being the outcome variable. In model 2 we tested an interaction of *Executive Plaintiff* and *Media Coverage* on the decision. In model 3, we dropped variable *Executive Plaintiff*, but included *Public Plaintiff* (whether an official authority acted as the plaintiff or not) and *Media Coverage* separately. Table 8 presents the results of the logistic regression analysis for the three models.

Table 8

Constitutional Review Decisions

Variable	**Model 1**	**Model 2**	**Model 3**
*Executive Plaintiff * Media Coverage*		-3.054**	
		(1.383)	
Executive Plaintiff	-2.57*		
	(1.249)		
Public Plaintiff			-1.307
			(1.023)
Media Exposure		-1.93*	-1.864*
	(0.773)		(0.756)
Type of Norm	0.554	-0.174	0.34
	(0.997)	(0.798)	(0.879)
Executive Decree	1.564	0.674	1.584
	(1.48)	(1.251)	(1.477)
Norm Promulgation	-0.573	-0.544	-0.396
	(1.608)	(1.001)	(1.402)
Civil and Political Rights	-0.555	0.282	-0.103
	(1.042)	(1.01)	(1.017)

Economic and Social Rights	-0.027	0.232	0.057
	(0.859)	(0.835)	(0.857)
Collective Rights	2.81***	4.154***	3.716***
	(1.31)	(1.502)	(1.308)
Economic and Taxation issues	1.721	2.226**	1.788
	(0.969)	(0.884)	(0.985)
Year 2009	-2.136	-1.82	-2.09
	(1.5)	(1.36)	(1.44)
Year 2010	-1.209	-1.725	-1.236
	(1.221)	(1.164)	(1.223)
Year 2011	-0.427	-1.725	-0.414
	(1.558)	(1.575)	(1.562)
Year 2012	0.855	0.925	0.666
	(1.061)	(1.032)	(1.054)
Year 2013	0.939	0.52	0.586
	(1.343)	(1.238)	(1.287)
Year 2014	-0.601	-0.638	-0.731
	(1.199)	(1.201)	(1.228)
Private Legal Sponsorship	0.653	1.149	1.1014
	(1.089)	(0.907)	(1.18)
Dissenting rate	-0.648	-1.747	-1.678
	(4.657)	(4.774)	(4.865)
Constant	0.759	-0.467	0.278*
	(1.517)	(1.249)	(1.532)
N	111	111	111
Chi-Sq.	62.414	56.056	58.955
Log-pseudo likelihood	69.059	76.159	72.517

$* = p < .05$; $** = p < .01$; $*** = p < .001$

In these logistic models, a positive coefficient for any of the explanatory variables increases the probability of a ruling declaring the constitutionality of the norm. Conversely, negative coefficients indicate that explanatory variables decrease the probabilities of the norm being declared as constitutional. In alternative terms, negative coefficients would increase the probabilities of a norm being declared as unconstitutional by the ECC.

Because coefficients are not always intuitive for the reader, the probability of a law being declared unconstitutional was calculated on the basis of each model's coefficients[10].

Table 9

Predicted Probabilities

	Plaintiff	**Media Coverage**	**Probability of the law being declared unconstitutional**
Model 1	Executive Plaintiff	Unreported	0.78
Model 2	Executive Plaintiff	Reported	0.92
Model 3	Public Plaintiff	Reported	0.66
	Public Plaintiff	Unreported	0.53
	Non-Public Plaintiff	Reported	0.34
	Non-Public Plaintiff	Unreported	0.27

These probabilities support the proposition that when executive plaintiffs intervene in politically salient constitutional review proceedings, which have been reported by the newspaper, ECC justices tend to declare the norm as unconstitutional.

As hypothesized, the coefficients of variables *Public Plaintiff, Executive Plaintiff,* as well as *Media Coverage* are negative in the regression model. These negative coefficients related to the aforementioned variables confirm the hypothesis that the presence of public actors, and especially of actors those coming from the Executive branch, increases the probability of the law being declared unconstitutional when the case was reported by the newspapers. This tendency persist in all three models. Only in model

[10] As show in Annex 1, the following formulas were used: a) Exp (β0 + β1 (*Plaintiff*) + β2 (*Media Exposure*))/(1 + Exp (β0 + β1 (*Plaintiff*) + β2 (*Media Exposure*)), b) Exp (β0 + β1 (*Plaintiff*) + β2 (*Media Exposure*))/(1 + Exp (β0 + β1 (*Plaintiff*) + β2 (*Media Exposure*) + β3 (*Type of Law*) + β4 (*Promulgation of Law*)) and c) Exp (β0 + β1 (*Executive Plaintiff*) + β2 (*Media Exposure*) + β3 (*Type of Law*) + β4 (*Promulgation of Law*) + β5 (*Promulgation of Law*))/ 1 + Exp (β0 + β1 (*Executive Plaintiff*) + β2 (*Media Exposure*) + β3 (*Type of Law*) + β4 (*Promulgation of Law*).

3, which includes variables *Public Plaintiff* and *Media Coverage* as separate variables, the *Public Plaintiff* variable loses statistical significance ($p < .05$).

Furthermore, when controlling for variables such as *Type of Law* (whether the challenged norm was an organic or ordinary law or not), *Law Promulgation* (whether the challenged norm was enacted during Correa's presidential term or not), *Executive Decree* (whether the challenged norm was an Executive decree or nor), or the type of rights addressed by the challenged norm, the impact of executive actors as plaintiffs and *Media Coverage* over the final decision persisted. In addition, the coefficient of the control variables confirm that political influence is selective depending on the type of case and political salience of those issues presented before the ECC. Plaintiff and Media Exposure are the variables that best explain the voting decisions made by the ECC, in accordance to what was argued in this paper.

Discussion

The results above explained are strongly consistent with our original hypotheses. Is this evidence strong enough to assert that the ECC has felt short when checking the Executive? In the first place, it should be remarked that ECC's reactions evidence strategic behaviors when Executive's interests are at stake. For instance, the ECC is largely supportive of the Executive's prerogatives and rejects all the claims that were proposed by other public officials or citizens, by declaring the constitutionality of executive decrees and the unconstitutionality of those norms challenged by executive actors. In addition, we also observe that those claims presented by citizens and private legal persons hardly ever succeed in the ECC. It seems unlikely that this consistent failure is determined by a reiterative misunderstanding of the law.

Under consolidated democracies, we may assume that the Executive often acts constitutionally. This would partially explain why public officials have such a striking success when claiming unconstitutionality before the ECC and citizens do not. However, under unconsolidated Latin American democracies, this assumption seems farfetched. In such political environments public officials have deep-rooted mistrust on democratic institutions. Within this context, the high level of uncertainty might tend to maximize the benefits of pressuring courts, specially, when the Executive is strong enough to retaliate against adverse decisions issued by the ECC without affronting any costs.

In such environments politicians might also seek to increase the benefits of pressuring the Courts by intervening in those cases that are politically salient. We

logically assume that those cases reported by the newspapers, in which public plaintiffs claim the unconstitutionality of a norm, may entail larger political salience than other cases. This assumption explains the fact that variables *Type of Plaintiff* and *Media Coverage* are the most powerful predictors of constitutional annulment cases.

Conclusion

Judicial independence still remains a much debated concept that encompasses fundamental operationalization challenges for its measurement and analysis. Particularly, we have analyzed the political dimension of judicial independence, understanding it as the extent to which judges are able to take autonomous decisions free of political pressures or retaliations. What does this dimension of judicial independence entails in practice? We maintain that judicial autonomy from the elected branches is highly dependent on the legal and political system as well as on the legal and political salience of the case. Consequently, judicial behavior and judicial independence in general can best be understood in the context of a specific legal system and political environment.

Factors such as political environment and *de jure* institutional arrangements have been used to explain strategic judicial behavior. Extending traditional theoretical approaches, this paper has shown that, even under strong de jure judicial independence features, such as long terms in office, a large number of political actors involved in justices' appointment procedures, and the elimination of impeachment by the legislature, *de facto* independence may be compromised depending on the political salience of a case. In this line of thought, we find that laws are more likely to be struck down by ECC justices when a public actor (mainly those supporting Executive's policies) claims unconstitutionality. This tendency persists while controlling for media coverage, filtering out possible confounding relationships between a case being reported by newspapers and the type of plaintiff. Contrariwise, unconstitutionality claims hardly ever succeed when a citizen calls upon the unconstitutionality of a norm. The plaintiff effect found in this study could be confounded by political actors bringing strong cases to court, and citizens primarily weak cases, for example because citizens systematically misinterpret of misunderstand the constitution, and political actors do not. However we have included several variables to control such effects which have not produced significant effects on the outcome of the decision.

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