STRATEGIC PRUDENCE IN THE COLOMBIAN CONSTITUTIONAL COURT, 1992-2006

by

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Submitted to the Graduate Faculty of

Political Science in partial fulfillment

of the requirements for the degree of

Doctor of Philosophy

University of Pittsburgh

2011

UNIVERSITY OF PITTSBURGH

DEPARTMENT OF POLITICAL SCIENCE

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July 11, 2011

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Under what conditions are justices able to make decisions that are contrary to the executive's preferences in strong Latin American presidentialisms? To answer this question, I formulate a theory of interbranch relations, particularly of the interplay between courts and justices, on the one hand, and executives and legislatures on the other. The model of strategic prudence involves a game between two players –a court and a government–as well as a stage in which this game takes place, including the institutional design and the political environment. It specifies how players' policy preferences and their assessments of the personal and institutional risks involved in their decision making interact with the institutional setting and the political context. Based on the empirical implications derived from the game, I hypothesize that when courts are institutionally insulated, justices are more likely to decide based on their own preferences, while an institutionally weak court makes them act strategically based on their perception of how the political environment enhances or hinders the government's ability to build a coalition to sanction the court. I test the empirical predictions of the game with the case of the Colombian Constitutional Court (CCC). I combine qualitative evidence, including press coverage and interviews with former justices and law clerks, with a systematic quantitative analysis of an original dataset of abstract review cases decided by the CCC between 1992 and 2006. Given its well-deserved reputation of autonomy and progressive activism, the CCC provides a "crucial case" test of the strategic prudence theory. The analysis of individual judicial decisions provides

strong evidence supporting the hypotheses derived from the game's comparative statics analysis. Justices tend to be prudent when they face a strong administration and when the case under review is salient for the executive. In addition, they are more likely to annul legislation when they have stronger preferences against it and when they anticipate that the incumbent would have to pay a higher cost should it attempt sanctioning the court. This dissertation contributes to the subfield of judicial politics in Latin America and is the first comprehensive study of the Constitutional Court in Colombia.

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ACKNOWLEDGMENTS

Having spent ten years in my Ph.D. program, the last six of which I devoted to complete this dissertation, I owe a debt of gratitude to many people and institutions. First, I want to thank the members of my dissertation committee whose advice and patience made this process such a stimulating endeavor. Barry Ames, my advisor, provided continuous support and feedback during this project. What is more, during the entire program I learned valuable lessons from his insightfulness and intuition for conducting scholarly research. I consider him my mentor and I am grateful for his trust and friendship. Aníbal Pérez-Liñán not only made my first arrival in Pittsburgh more welcoming but also he was always generously open to discuss research ideas, theoretical issues, empirical findings, and personal matters. His sharp comments and criticisms helped me to improve this dissertation. Chris Bonneau's class on judicial politics catalyzed and disciplined my interest in studying courts. Moreover, he was always ready to provide prompt feedback at all stages of my work, reading the first sketches of the theoretical argument, suggesting literature, and helping solving issues on the empirical test of the hypotheses. Having John Ferejohn in my committee was always highly encouraging. His vast knowledge of comparative law and courts helped me to put my project in perspective and I am most grateful for his generous comments and thoughts.

Previous versions of this project benefited from valuable comments at conferences and seminars. I am grateful to Aníbal Pérez-Líñán, Lee Walker, Henrik López, Jodi Finkel, Rachel

Seider, Gretchen Helmke, and Julio Ríos-Figueroa, who discussed parts of this work at LASA, MPSA, ACCPOL, and CIDE. I also want to thank the feedback provided by members of the Comparative Politics Reading Group at the University of Pittsburgh, members of DeJusticia (especially Rodrigo Uprimny and Mauricio García), my colleagues in the Department of Political Science at Universidad de los Andes, and students and colleagues in my judicial politics research group at that same university. Santiago Arteaga, Mireya Camacho, Ana María Montoya, Sebastián Ocampo, and Camila Osorio, bright students at Universidad de los Andes, provided extremely helpful research assistance.

The Political Science Department and the Center for Latin American Studies (CLAS) at the University of Pittsburgh, as well as the Andrew Mellon Predoctoral Dissertation Fellowship provided financial support during my graduate studies and this dissertation's fieldwork. The Faculty of Social Sciences and the Department of Political Science at Universidad de los Andes were also very supportive during the long writing stage of the project and funded my trip back to Pittsburgh to defend this thesis. I thank these institutions as well their staff and faculty. I am particularly grateful to Marsha Tsouris, at the Political Science Department at Pitt for all her help and support.

In Pittsburgh I was fortunate enough to have met people who are now my friends for life. Germán Lodola, Rosario Queirolo, Álvaro Cristiani, Nils Ringe, Sarah Halpern-Meekin, Florencia Tateossian, Grace Jaramillo, Cornelio Delgado, Verónica Lifrieri, Marcelo Auday, Juan Antonio Rodríguez, and, of course, María José Álvarez-Rivadulla, as well as Miguel García, Carolina Maldonado, Laura Wills, and Javier Corredor, who were already my friends from Bogotá, helped making my time in Pittsburgh a really enjoyable experience.

My friends in Colombia were extremely patient during the long time I spent working in this dissertation. Number of times I said no to seeing them and, worse, I was rather cranky when I did see them. In sum, during these years I was not a very good friend and yet there they are.

My father taught me the value of setting high standards for oneself and of making every effort to meet them. His support was crucial when I decided to abandon a career in engineering to pursue an academic path in political science. My late mother, who could not see this project completed, gave me always her unconditional love, the greatest present I could possibly get. I dedicate this dissertation to both of them. My sister María Clara and my brother Santiago, along with their families, complete this inner circle of love and support on which I have always been able to count.

No words could express my gratitude to María José, my love, for being who she is and especially for being so with me. For her tender support and endurance, this degree is almost more hers than mine.

1.0 INTRODUCTION

What determines the level of independence of high courts in presidential democracies? Under what conditions are justices able to make decisions that are contrary to majorities in Congress and, more importantly, that run against executive preferences in strong Latin American presidentialisms? Asking these questions is part of the research agenda of the political science disciplinary subfield of judicial politics, a subfield that views courts as key institutions in the political system and judges as political actors. This dissertation, therefore, shares the view that "explanations of politics are incomplete unless they incorporate courts" (Epstein, Knight, and Shvetsova 2001b: 120).

Judicial independence, understood as "the idea that a judge ought to be free to decide the case before her without fear or anticipation of (illegitimate) punishments or rewards" (Ferejohn 1999: 355), is considered a central factor enhancing the quality of democracy and the rule of law (Epstein, Knight, and Shvetsova 2001b). In fact, the judiciary is "the institution normally charged with the enforcement of the constitution, rights, and other democratic procedures in constitutional democracies" (Larkins 1996: 606). Independence has consequences for various

aspects of democratic performance, including economic growth (Feld and Voigt 2003)[1] and the fight against corruption (Ríos-Figueroa 2006).

The theoretical argument of this dissertation relates to the institutional and political factors impacting constitutional review, defined as "the power of judicial bodies to set aside ordinary legislative or administrative acts if judges conclude that they conflict with the constitution" (Vanberg 2005: 1). It attempts to investigate those factors from a comparative perspective with a special emphasis on Latin America. In doing so, it focuses on the so-called European or Kelsenian model of constitutional review (Ferejohn and Pasquino 2002). In fact, although most comprehensive studies and sophisticated theories of judicial behavior have been conducted with a focus on American courts, particularly the Supreme Court, the American model, despite having been a pioneer of judicial review in the world, has become the exception rather than the norm in the specific ways in which judicial review operates. Unlike in the U.S. where courts at all levels are able to exert review, the European model, which follows the Austrian constitution of 1920, introduces a centralized body outside the judicial hierarchy, a constitutional court, with exclusive jurisdiction to review the compatibility of legislative acts with the constitution. Moreover, these constitutional courts typically study not only concrete controversies involving actual alleged violations of citizens' constitutional rights, as in the U.S., but also abstract challenges to the constitutionality of entire pieces of legislation. Finally, centralized constitutional review is exerted both after the legislative act has been enacted and implemented and before such enactment (Epstein, Knight, and Shvetsova 2001b; Navia and Ríos-Figueroa 2005).

[1] Feld and Voigt (see 2003) parallel the impact of judicial independence on economic performance to that of an independent central bank in mitigating the problem of credibility governments face in the eyes of economic actors.

The Kelsenian model of constitutional review has flourished in the post-World War II era in formerly fascist countries such as Germany and Italy. Constitutional courts were also created in the aftermath of democratic transitions in Spain in Portugal, and even France has adopted this model. After the demise of communist rule, constitutional tribunals were created in the vast majority of new democracies in Eastern Europe (see Sadursky 2002). Although the pace has been different, the centralized model of judicial review has also gained prevalence in Latin America, where constitutional courts separated from the judiciary operate in Bolivia, Brazil, Chile, Colombia, Ecuador, Guatemala, and Peru (Lara Borges, Castagnola, and Pérez-Liñán 2010; Ríos-Figueroa 2011).

The focus of this dissertation is on democracies with strong presidentialisms, where interbranch relationships tend to be more tense and contentious. In fact, one expression of hyper-presidentialism is the concentration of power in the hands of the executive precisely at the expense of the judiciary (Larkins 1998). In this sense, the theory distances itself from accounts of judicial behavior in Parliamentary systems, where the key issue of judicial review is whether or not the legislature complies with court rulings (e.g. Vanberg 2005). It also departs from studies of judicial review exerted by the U.S. Supreme Court, in which the constraints on justices, if any, come from the possibility of Congress passing legislation overturning their decisions (e.g. Spiller and Gely 1992). The focus of this dissertation is rather on contexts in which courts face more serious constraints and are more likely to endure severe sanctions given the power exerted by strong presidents and the related institutional insecurity courts and justices typically have.

In this dissertation I try to answer the question about the institutional and political conditions enabling constitutional courts to check the other branches of government by ruling on the constitutionality of legislation. In doing so, I formulate a theory of interbranch relations,

particularly of the interplay between courts and justices, on the one hand, and executives and legislatures on the other. More concretely, it follows a flourishing body of literature adopting a formal theoretical perspective on the behavior of courts in the U.S. (Epstein and Knight 1998; Epstein, Knight, and Martin 2004; Ferejohn and Weingast 1992), Western and Eastern Europe (Vanberg 2005; Epstein, Knight, and Shvetsova 2001b) and even Latin America (Helmke 2005; Staton 2002), and develops a game-theoretic model of the strategic interplay of courts and justices with the other branches of government in abstract constitutional review cases.

The model of strategic prudence involves a game between two players –a court and a government– as well as a stage in which this game takes place including a given institutional design and a particular political environment. It spells out the way in which the players' policy preferences over the cases under review by the court and their assessment of the personal and institutional risks involved in their decision making interact with the institutional setting and the political context. The analysis of this interaction and of the equilibria of the game derives parsimonious empirical implications regarding the conditions under which it is expected that court justices make decisions contrary to the executive's preferences. Based on these empirical implications this dissertation hypothesizes that when courts are institutionally insulated, justices are more likely to decide based on their own preferences, while an institutionally weak court makes them act strategically based on their assessment of how the political environment enhances or hinders the government's ability to build a coalition aimed at retaliating against the court. The theoretical model is rather simple, and perhaps it could include additional elements to account for details involved in the process of constitutional review. Simplicity, however responds to the fact that the formal theoretical approach is only a means towards the end of conducting an empirical investigation of the implications derived from it.

The theory is intended to be system-free and, therefore, is suitable to travel across countries and across time to include variation in institutional settings and political environments. The empirical predictions of the theoretical model are tested in the case of judicial review by the Colombian Constitutional Court (CCC). In order to do so, this dissertation combines qualitative evidence, obtained through an extensive review of the press as well as interviews with former justices and law clerks, with a systematic quantitative analysis of an original dataset of abstract review cases ruled upon by the CCC between 1992 and 2006.

Colombian courts remain understudied in the growing literature on judicial politics in Latin America. In contrast to the attention paid to courts in Argentina (e.g. Chávez 2004b; Chávez, Ferejohn, and Weingast 2011; Helmke 2005; Iaryczower, Spiller, and Tommasi 2002), Brazil (e.g. Brinks 2011; Kapiszewski 2011; Taylor 2005), Chile (e.g. Couso and Hilbink 2011; Scribner 2003b), and Mexico (e.g. Domingo 2005; Sánchez, Magaloni, and Magar 2011; Staton 2006), very little has been published on the CCC by political scientists (Nunes 2010; Rodríguez-Raga 2011).

To both academics and practitioners who are familiar with the Colombian case, however, the selection of the CCC as a case to test a theory of strategic judicial behavior may seem a bit odd. In fact, in the Latin American context, the Colombian court has a well-deserved reputation of autonomy and activism in the protection of citizen rights and in checking the other branches of government. Moreover, unlike other Latin American countries, including Argentina, Peru, Ecuador, and Venezuela, where judges potentially of actually face more severe sanctions such as impeachment and even physical aggression, a long tradition of judicial review and high levels of legitimacy seem to shield constitutional justices in Colombia. The CCC has become a key player in the Colombian political system, and on many occasions it has exerted its veto power to

prevent the violation of citizens' civil and political rights, to demand active policy-making on the part of the administration to provide goods and services to people whose social and economic rights are threatened, and to aggressively check the power of the legislature and the executive. I argue, however, that even in such a favorable environment there are institutional and political factors compelling justices to engage in strategic behavior. Therefore, the CCC allows the conduction of a "crucial case" test of the strategic prudence theory (Eckstein 1975; Gerring 2007).

The second chapter of this dissertation specifies the game-theoretical model of strategic prudence. Using the language of formal theory, it describes the players, the sequence of moves in the game, the environment in which those players act and the uncertainties they face, and the payoffs each player receives according to the different paths of play. It also includes a section that includes the formal demonstration of the equilibrium analysis, and it concludes with the specification of the comparative statics derived from such analysis and the empirical implications of the game.

Chapter 3 is devoted to presenting the Colombian case, including an account of the history and tradition of judicial review and of the process leading in 1991 to the drafting of a new constitution and the creation of the Constitutional Court. It also describes the organization and structure of the court including its jurisdiction and caseload, the mechanisms to select justices in the CCC and the determination of their tenure, as well as the types of decisions the court makes.

Chapter 4 makes use of qualitative evidence to show that, despite a conspicuous activism of the Colombian Constitutional Court in protecting citizens' rights and checking the other branches of government, a strategic account of judicial behavior is still justified in this case. By means of an extensive press review and the insights obtained from interviews to former justices,

justice assistants and law clerks, the chapter shows instances in which tension between the court and the executive rose, how those episodes were perceived by actors within the court and how the anticipation of the government's reaction helped shaping the court decisions on the cases involved.

Chapter 5 proceeds to a systematic statistical test of the hypotheses derived from the theoretical model. It makes use of an original dataset of abstract review decisions made by the CCC between 1992 and 2006. This dataset, which records individual justice decisions, is supplemented with information regarding the characteristics of justices, the timing of the decision, and the political environment surrounding such decision. Alternative statistical models are specified to operationalize the parameters of the game and to check the robustness of the findings.

Finally, Chapter 6 summarizes the argument and the main findings, spells out the implications of those findings both from a theoretic and a substantive perspectives, and proposes a research agenda on the behavior of courts and judges in presidential democracies.

2.0 A THEORY OF STRATEGIC JUDICIAL PRUDENCE

I present in this chapter a simple but powerful theory of judicial decision making, with special application to Latin American presidential democracies. The theory is simple in that, in a nutshell, it involves the interaction between a justice in a constitutional court and a government operating in a given institutional and political environment, as I show below. It is, however, a powerful theory in the sense that it makes general statements on the interaction between such actors and those institutional and political factors which are in principle testable across countries and institutional settings.

My theoretical model is suitable for presidential democracies in the sense that, unlike theoretical approaches developed for European courts, it does not assume a fusion between the executive and the legislature typical of parliamentary systems (e.g. the study on the German constitutional tribunal by Vanberg 2005). My theory rather states that the executive needs political strength and political support in the legislature to have its initiatives approved and, more concretely, to undertake any action in response to a court decision.

The theory presented here also focuses on political systems with strong presidents typical of Latin America. Unlike studies on the United States where Congress is the central actor interacting with the Supreme Court (e.g. Ferejohn and Weingast 1992), the approach adopted here acknowledges that it is in the presidency where political power, and more specifically the initiative, tend to lie (Morgenstern and Nacif 2002).

In sum, my theoretical model posits that courts and judges operate in different institutional settings which determine the extent to which they are insulated from the pressure and influence of external actors, in particular, the government. The impact of the latter on the court decision making also depends on the former political strength which determines to what extent the executive is able to gather a coalition effective enough to act in response to court rulings. As I show below, the theory does not assume that the executive's strength is necessarily expressed in terms of the seat share its party holds in Congress. The model accounts for political configurations, typical of Latin American countries, whether not only multi-party systems are far from exceptional but also party loyalty is fluid and discipline and cohesion may be rather weak. In this sense, the theory goes beyond explanations of judicial autonomy as a function of whether the government is unified or divided (e.g. Chávez 2004b; Chávez, Ferejohn, and Weingast 2011; Domingo 2000; Scribner 2004). Moreover, although it endorses the view stating that the level of autonomy of a court is inversely proportional to how easy it is for other actors to coordinate against it, the theory presented here adopts a somewhat more dynamic approach relative to accounts of judicial behavior based on the level of fragmentation of political power (Ferejohn, Rosenbluth, and Shipan 2007).

The approach based on positive political theory adopted here favors a transparent statement of the assumptions on which the theoretical argument lies and a clear exposition of the factors and actors involved in it. Using formal theory allows spelling out the relationship between actors' behavior and the constraints they face (Helmke 2005). The formal theoretical model presented in this chapter, however, is but the first step in the investigation I am interested in developing in this dissertation. It is just a means towards the end of deriving the empirical

implications from the analysis of the model's equilibria and putting them to systematic test, an endeavor I pursue in subsequent chapters.

This theory adds up to the relatively short-lived but increasingly productive subfield of judicial politics in Latin America. Accordingly, the argument supports the view that institutions matter and that actors are strategic in the sense that their actions are a function of their anticipation of other actors' behavior. In this view, moreover, judges operate under varying levels of uncertainty and their decision making reflects a trade-off between policy seeking and institutional building and preserving (Helmke and Staton 2011).

Endorsing a strategic account of judicial behavior does not entail making normative assumptions on the very nature of court decision making. I therefore conform to the view that "judges will act sincerely when they can, engaging in strategic behavior only to the extent it is necessary to achieve their desired mix of personal and policy goals" (Brinks 2004: 15). As I show below, moreover, regarding the debate on the suitability of the attitudinal and the strategic models, my theoretical argument acknowledges that this divide is an empirical question largely depending on the institutional framework within which courts and judges operate rather than a matter related to the essence of judicial behavior (Segal and Spaeth 2002: 150). In this sense, my theory endorses he view that "[j]udges' decisions are a function of what they prefer to do, tempered by what they think they ought to do but constrained by what they perceive as feasible to do" (Gibson 1983: 32)

2.1 THEORETICAL PERSPECTIVES ON JUDICIAL BEHAVIOR

Two different broad views have been developed in the literature on courts' behavior vis-à-vis other political actors. A first view conceives of high courts as actors which act unconstrained by external political factors. According to this perspective, justices show a sincere behavior when ruling on a statutory or constitutional matter. This view, in turn, encompasses two different models of courts. On the one hand, a legal model posits that justices base their decisions exclusively on legal criteria.[2] This model views justices as (legally) technical rather than political actors.[3]

On the other hand, some authors state that judicial decisions, rather than being the result of applying legal rules, are indeed a reflection of individual justices' attitudes and political or policy preferences. This attitudinal model sustains that judges act sincerely and that the final decision on a specific case is the result of the interaction of the facts of the case and each justice's attitudes and preferences (Segal and Spaeth 1993, 2002). This is the model most often used to explain U.S. Supreme Court's decisions on the merits (Segal and Spaeth 2002).

In contrast to this approach to courts as unconstrained actors, a second perspective views them as constrained by political factors. This view suggests that judges do not necessarily vote sincerely when addressing an issue but that they rather act strategically, based not only on their individual legal or ideological values but also taking into account institutional and political factors that lead them to consider how their decisions impact the reactions of other political

[2] It may be argued that in this legal model justices are constrained by a (narrow) interpretation of statutes. Still, their behavior under this view is seen as sincere rather than strategic.

[3] In fact, although political scientists rarely embrace this model, justices usually justify their decisions on strictly legal grounds.

actors. The anticipation of such reactions, in turn, influence the decisions they make in the first place.[4]

Although studies of the decision-making process in the U.S. Supreme Court have mostly relied on the attitudinal model, some authors have advanced strategic accounts of justices' behavior in the final stage of judicial review, that is, the final decision on the merits. More concretely, these analyses use a Separation of Powers approach which, in a nutshell, suggests that the court's decision is shaped by its anticipation of the possible reaction Congress might have to such decision. Broadly speaking, the model predicts that a reaction by Congress overturning the court's decision is more likely under unified than under divided government. In anticipation to this reaction, the court will tend to avoid being overruled and therefore will tend to cave to legislative majorities and refrain from making that decision (Epstein and Knight 1998). More specifically, the Separation-of-Powers model of judicial behavior posits that, when making policy through a decision, the court will take into account the location of pivotal actors in order to set policy "as close to its ideal point as possible without getting overturned by Congress" (Segal 2008: 29).

Although strategic models have been developed to approach other stages in the U.S. Supreme Court decision making such as *certiorari* or opinion assignment (e.g. Hammond, Bonneau, and Sheehan 2005; Maltzman, Spriggs II, and Wahlbeck 2000), the empirical record of the Separation of Powers model as an account to explain/predict Supreme Court's final decisions on the merits is not very impressive (see Segal and Spaeth 2002, Chapter 8 for a critical view; Spiller and Gely 2008). The prevalence of the attitudinal theory to model the U.S. Supreme

[4] Overall, the way a game states the sequence of players' moves is implicitly related to whether the court is assumed to be constrained or unconstrained. A game in which the court moves last assumes that the court acts unconstrained, while a game in which there is a further move by another political actor reflects the setting for strategic judicial behavior (Ferejohn and Weingast 1992; Epstein, Knight, and Shvetsova 2001b).

Court, however, rather than reflecting an essential merit of the model itself or an intrinsic flaw in the strategic account, is better explained by the institutional framework in which the Supreme Court operates. As Segal, one of the key authors behind the attitudinal model, admits, Separation of Powers models have not been successful probably because they have been typically tested on "the court that is perhaps most insulated from external influence: the U.S. Supreme Court" (Segal 2008: 30). Institutional features, such as life tenure for justices, shield the court from external influences and, therefore, allow justices to make sincere decisions on the merits, based on a combination of case facts and personal preferences.

The assumption of the court's institutional insulation, which is at the base of the study of the U.S. Supreme Court, becomes a variable in the field of comparative judicial politics. In countries other than the U.S. the level of institutional strength cannot be taken for granted. Analyses of judicial behavior even in countries with long histories of judicial review and regarding courts with high levels of legitimacy, such as Germany,[5] describe judges who are, to varying extents, influenced by other actors in the political context in which they have to decide (e.g. Vanberg 2005).

This view of courts as institutionally weak, or at least weaker than the U.S. Supreme Court, is characteristic of studies of judicial behavior in new democracies in post-communist Eastern European countries (Epstein, Knight, and Shvetsova 2001b) and Asia (e.g. Ginsburg 2003). In most of these studies courts are analyzed as strategic actors, that is, as actors which are constrained by external influences and therefore strategically interact with other political actors and institutions.

[5] Germany, as I describe in Chapter 3, was one of the nations where the second wave of judicial review during the post-World War II era took place.

The study of judicial behavior in Latin America, which can no longer be considered as an incipient field, has also been somewhat dominated by the strategic approach (Chávez 2004b; Chávez, Ferejohn, and Weingast 2011; Helmke 2005; Iaryczower, Spiller, and Tommasi 2002; Ríos-Figueroa 2007; Scribner 2004, 2011). This not only responds to a strategic revolution in the study of courts (Epstein and Knight 2000) but mainly to the fact that Latin American judges often act under high levels of pressure (Helmke and Ríos-Figueroa 2011a). In this region, characterized by strong presidential systems, the external influence on courts does not typically come from legislative majorities, as strategic models of judicial decision making have proposed in the case of the U.S. Supreme Court (e.g. Spiller and Gely 1992) or in the case of Germany (e.g. Vanberg 2005), but from Executives. In fact, high courts have been under sheer attack or continual harassment by Menem in Argentina, Fujimori in Peru, Morales in Bolivia, Gutiérrez and Correa in Ecuador, and Chávez in Venezuela, to mention only the most blatant instances of threats on courts. The theoretical model I develop in this chapter fits into this bourgeoning literature.

The formal model I present below is by no means the first game-theoretical approach to judicial review. In fact, strategic accounts of court decision making are often based on the formalization of preferences, information, and payoffs of players in a game, although many of the studies do not explicitly model such elements. Neither it is the first formal model developed in the subdiscipline of judicial politics focused on Latin America. The strategic revolution in the study of judicial behavior (Epstein and Knight 2000) has led to the publication of some studies of Latin American courts based on formal models (e.g. Helmke 2005; Chávez, Ferejohn, and Weingast 2011).

These models are all based on the insight that courts and judges are more likely to exert an autonomous decision making whenever the institutional setting helps insulating them from external influence and the political context makes it difficult for other players to act against the court or its rulings. My own model shares this basic insight. The extent to which other authors explicitly model these factors and the precise way they do so varies.

Some theories are based on pure spatial models in which the players are located on a one- or two-dimensional policy space based on their preferences and their behavior depends solely on those locations. One example of this approach is the study by Chávez, Ferejohn, and Weingast (2011) comparing the U.S. and the Argentine Supreme Courts. In this model, the court's level of autonomy depends on the extent to which the president's and congress's ideal points are close together (unified government) or apart from each other (divided government). The court's room of maneuver is larger in the latter case than in the former one. This approach assumes that the actors' preferences are common knowledge and that there not additional factors involved in the players' assessments of the other players' options and payoffs.

An extension of the spatial model is used in Epstein, Knight, and Shvetsova (2001b), the application of which is tested on the Russian Constitutional Court. This approach shares the previous assumptions regarding the impact of the players' ideal points in policy space on their behavior, although other considerations and costs are modeled through what the authors call actors' tolerance intervals around those ideal points. The court decision making depends on how wide those intervals are and how they intersect with each other. This model also assumes that players ideal points and tolerance intervals are common knowledge, that is, as in the previous case, it assumes complete information.

Formal models of judicial behavior with incomplete information which go beyond the purely spatial approach have also been developed. An example of this is Helmke's theory of strategic defection (Helmke 2005). In her study of the Argentine Supreme Court she offers a model to explain under what circumstances judges rule against the elected officials who originally appointed the. In this account, judicial behavior is determined by the judges' assessments of the strength of the sitting president and of the preferences of an upcoming administration. Judges will strategically defect from the incumbent when they feel that its strength is declining and when they anticipate the election of a new president with preferences opposed to the current one's. The key insight in this type of models is that judges are not only concerned with the policy outcomes of the case under review but also they have stakes regarding the institutional stability of their posts.

This insight is shared by models which include not only the court and the government and/or the legislature but also the public. An example of this approach is Vanberg's model of judicial review with application to the German Constitutional Tribunal (Vanberg 2005). Although the public is not explicitly a player of his game,[6] it is represented in parameters related to the court's public support and the level of transparency of the environment surrounding the case. The intuition is that a court's decision is more likely to face evasion by the Parliament whenever the court's public support is low or when the matters involved in the case are too complicated for the public to monitor the legislature's compliance with the court ruling (i.e. when the environment is transparent). The players face uncertainty regarding the levels of public support and of transparency, as well as regarding the extent to which the court's preferences are

[6] More recently, Helmke and Staton have developed a model in which the public is explicitly modeled both in the form of litigants' decision to access the court and as the public's reaction itself to the court's ruling (Helmke and Staton 2011).

aligned with the Parliament's. The theory I present here shares some of the features of the theories described above and includes other features which have not been explicitly modeled in previous approaches. First, unlike other models, the game on which this dissertation is based explicitly models the institutional setting in which the court operates, that is, the extent to which this setting insulates the court from the influence of other actors. This element of the formal model is key to determining to what extent justices are free to act sincerely according to their preferences or are constrained and thus are inclined to behave strategically. Second, the theories models the preference alignment between the court and the Executive. Third, as in some of the model types described above, actors are assumed to have both policy preferences and institutional concerns which determine the options and payoffs they have. Fourth, akin to the view that judicial autonomy is a function of the level of fragmentation of the polity (Ferejohn, Rosenbluth, and Shipan 2007), my model posits that the court's room of maneuver depends on the government's strength, that is, on its ability to gather a coalition necessary to react against a court ruling. This parameter of the game expands the unified v. divided government factor included in other models (e.g. Chávez, Ferejohn, and Weingast 2011) and not only it provides a more continuous way to model such fragmentation but also it encompasses more general situations in which parties and party systems are more fluid and less institutionalized, which are not uncommon in Latin America. Moreover, my formal model assumes incomplete information: players are uncertain on how strong the government is and their behavior therefore depends on their subjective beliefs regarding such strength.

In sum, since the aim of this project is to be able to empirically verify the its implications, the model I present below, is rather simple in the sense that it involves a one-shot game between a court and a government. However, it contributes at expanding the corpus of positive political

theories on strategic judicial review with special emphasis on Latin American presidential systems.[7]

2.2 MODELING JUDICIAL REVIEW IN PRESIDENTIAL DEMOCRACIES

Although this dissertation focuses its empirical analysis on constitutional review exerted by Constitutional Court justices in Colombia, the model presented in this chapter is intended to be a general theoretical account of judicial review in presidential democracies (using the case of the Colombian Constitutional Court I probe in Chapter 4, and systematically test in Chapter 5, the empirical implications of this theory). More specifically, it seeks to be applicable to cases of strong presidentialism, that is, to countries where the executive is the strongest political actor.

The theory models the strategic interaction between a justice in a constitutional court (or a high court exerting constitutional review) and the government. The interaction is mediated by the motivations and preferences of the justice, the institutional setting of the court, and the political environment with special emphasis on the political strength of the executive. In a nutshell, the model purports that judicial behavior is determined by the justice's preferences, the level of institutional insulation of the court, and the justice's anticipation of the government's reaction to the court's rulings. Justices' assessment of the likelihood of such reaction depends on their perceptions of the political strength of the government, that is, on how difficult/easy it is for the latter either to gather a legislative coalition (or to act outside the legislature) in order to implement retaliatory action against the justice and/or the court.

[7] Although I do not explicitly model the public as a player of the game, its role is central and it is indirectly included in the players' payoffs through the government's strength parameter and also through the parameter capturing the cost for the government trying to sanction the court.

2.2.1 Specification of the game

The game-theoretic approach I employ in this dissertation presents a constitutional review game in which there are three players: Nature (***N***), a justice in the constitutional court (***J***),[8] and a government (***G***).[9] The sequence of play is as follows: First, Nature makes a first move and selects the type of justice, namely, whether the justice is friendly or hostile. This selection reflects the level of alignment of the justice's preferences with those of the government. Naturally, this is substantively a matter of degree and examining the empirical implications of the model should reflect this continuous measure. However, for simplicity, I present it here as a dichotomous choice.

Then, Nature makes a further move by selecting an institutional design for the court, whether this design helps insulating the court from external factors or it leads to exposing the court to pressures from other political actors. This results in two types of courts, namely, an insulated court and an exposed court. The level of insulation, which is also a matter of degree, depends on various features of the institutional setting of the court. There are in the literature several attempts at developing indices of judicial autonomy (e.g. Feld and Voigt 2003), most of which revolve around institutional factors such as the appointment procedure of justices, their length of tenure, and the procedure needed to remove a justice (Ríos-Figueroa 2011). All those factors determine to what extent courts are insulated from external pressure and, therefore, to

[8] Naturally, justices do not act alone; they play a collegial game (Maltzman, Spriggs II, and Wahlbeck 2000) in which they receive influences from other justices in the court as well as from internal institutional constraints and norms which may shape their strategic behavior. One of these norms may be the search for consensus, as the qualitative evidence presented in Chapter 4 suggests for the case of the Colombian Constitutional Court, which explains in part why, in Chapter 5, I limit the quantitative analysis to justices' votes on non-unanimous decisions. I do not consider in this model these internal influences on each justice's decisions.

[9] This model, including its notation scheme, draws inspiration from Vanberg's models of constitutional review (Vanberg 2001, 2005), though it presents substantial variations.

what extent justices are able to vote sincerely on the merits of a case. Again, for simplicity, the institutional setting of the court is modeled as a dichotomy (insulated/exposed).

Nature makes then its third and final move by choosing the political environment in which the court operates vis-à-vis other political actors, especially the government and its legislative support. This context may be one in which it is hard and costly for the government to build legislative coalitions, that is, when the number of parties is high, the internal cohesion of parties is low (i.e. party discipline is poor), and/or the government lacks a strong support in the legislature (weak president). Or it may be one in which there are few parties and the president enjoys a strong and disciplined legislative contingent (strong president).

This parameter of the game is based on the idea that judicial autonomy is more likely when the political system is fragmented (Ferejohn, Rosenbluth, and Shipan 2007). The rationale behind this approach to the political context lies in the assumption that any rules aimed at promoting judicial independence "are powerful in inverse proportion to the costs involved in coordinating against them" (Ferejohn, Rosenbluth, and Shipan 2007: 278). The particular specification presented here, as a parameter of incomplete information, provides an alternative continuous measure to the commonly used (dichotomous) notion of unified vs. divided government (e.g. Chávez, Ferejohn, and Weingast 2011). Modeling the political context in this manner covers a wider variety of situations including not only two-party systems where it might be easier to identify unified and divided governments but also multi-party systems where this dichotomy is much less clear. Moreover, it also encompasses various electoral rules and their impact on party cohesion and discipline, including party-centered electoral systems and those systems containing incentives to cultivate personal reputations (Carey and Shugart 1995). In addition, it captures the uncertainty faced by governments inherent to those situations in which

legislative support cannot be taken for granted and considerable resources must be allocated to gain that support for each executive-initiated bill.[10] The prior belief, common to all players, that the political environment includes a strong president (i.e. coalition-building is easy or cheap) is captured by the parameter p ($p \in [0,1]$).[11]

Next, the justice makes its move by either upholding a bill as constitutional (c), in which case the game ends, or overturning it ($\bar{c}$).[12] Finally, if the court made a decision to overturn the norm, the government must choose whether to attempt a retaliation (r) either in terms of policy (i.e. by overturning the decision) or by directly impacting the court's or the justice's institutional status, or to comply to the court's ruling ($\bar{r}$).

Justices are assumed to be policy-seekers, that is, their main concern relates to the policy outcome of the case under review. However, they are, to some extent, also concerned with their institutional status. This concern is motivated by how much they value their seats (i.e. the perks of the post, its prestige, the salary, and so on) and/or by how much they value the institutional stability of the court itself. In other words, a justice faces a tradeoff between the policy outcome and the institutional concern. To reflect this assumption, the game prescribes that justices' payoffs depend on two components concerning their preferences. First, justices have preferences over the issue under consideration. They pay a cost A ($A > 0$) when the game results in an outcome that diverges from their preferences regarding the specific bill under review. Friendly justices (F) pay the cost A whenever the court strikes down the norm under review. On the contrary, hostile justices (H) pay such cost whenever the norm is upheld.

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[10] This, for instance, is the nature of the executive-legislative relationships in Brazil (see Ames 2001).

[11] Notice than whenever the political context is that of divided government, p approaches 0. Conversely, as the government is consistently unified, p tends to 1.

[12] This way of modeling the justice's move assumes that the court has no control over its docket, which is the case for most courts exerting abstract review.

Second, justices are also concerned about their institutional status or that of the court, and must pay a cost B ($B > 0$) whenever the government makes an attempt to retaliate in response to a court's decision. This is so because such a move by the government entails a challenge to the court's standing and legitimacy in the political system, or because it entails a direct sanction on the specific justice. This specification is particularly important in Latin America where judges usually face sanctions which tend to be more severe than the simple overriding of their decisions (Helmke and Ríos-Figueroa 2011a).

As for the government, its most preferred outcome is to have its bill implemented as legislation either because the court upholds it or as a result of a successful retaliation. The government's utility function depends on two factors as well. The government pays a policy cost α ($\alpha > 0$) when it complies with an adverse decision by the court (or when it does not succeed in sanctioning the court). In addition, it must pay a cost β ($\beta > 0$) whenever its attempted retaliation to a court's decision fails. Incumbents may suffer a public backlash and an electoral cost if they decide to unsuccessfully oppose the court or attack one or more justices. In fact, to the extent that the court enjoys a fair level of public diffuse support or legitimacy (Caldeira and Gibson 1995; Vanberg 2005), voters in the next election may punish incumbents daring to challenge court rulings. If elected actors attempt to overtly defy court decisions, then they may jeopardize their reelection chances. In this case, the electoral connection arguably acts as a mechanism promoting judicial independence (Vanberg 2001). Notice that an attempted retaliation is assumed to fail if the court is institutionally insulated (I) from external pressures. If the court is exposed (E), that is, if its institutional framework makes it prone to receive such pressures, it is assumed that a government's retaliation will also fail if the political context is such that building legislative coalitions is difficult, when the president is weak (i.e. when p is low). Figure 2.1, which depicts

the game tree, summarizes the sequence of the game and the players' payoffs. As I explain below, friendly justices, that is, those whose preferences are aligned with the government's, will always uphold the legislation under review (i.e. their dominant strategy is *c*). For simplicity, the game tree in Figure 2.1 does not include the first choice made by Nature and, therefore, it omits the branch corresponding to a friendly court.

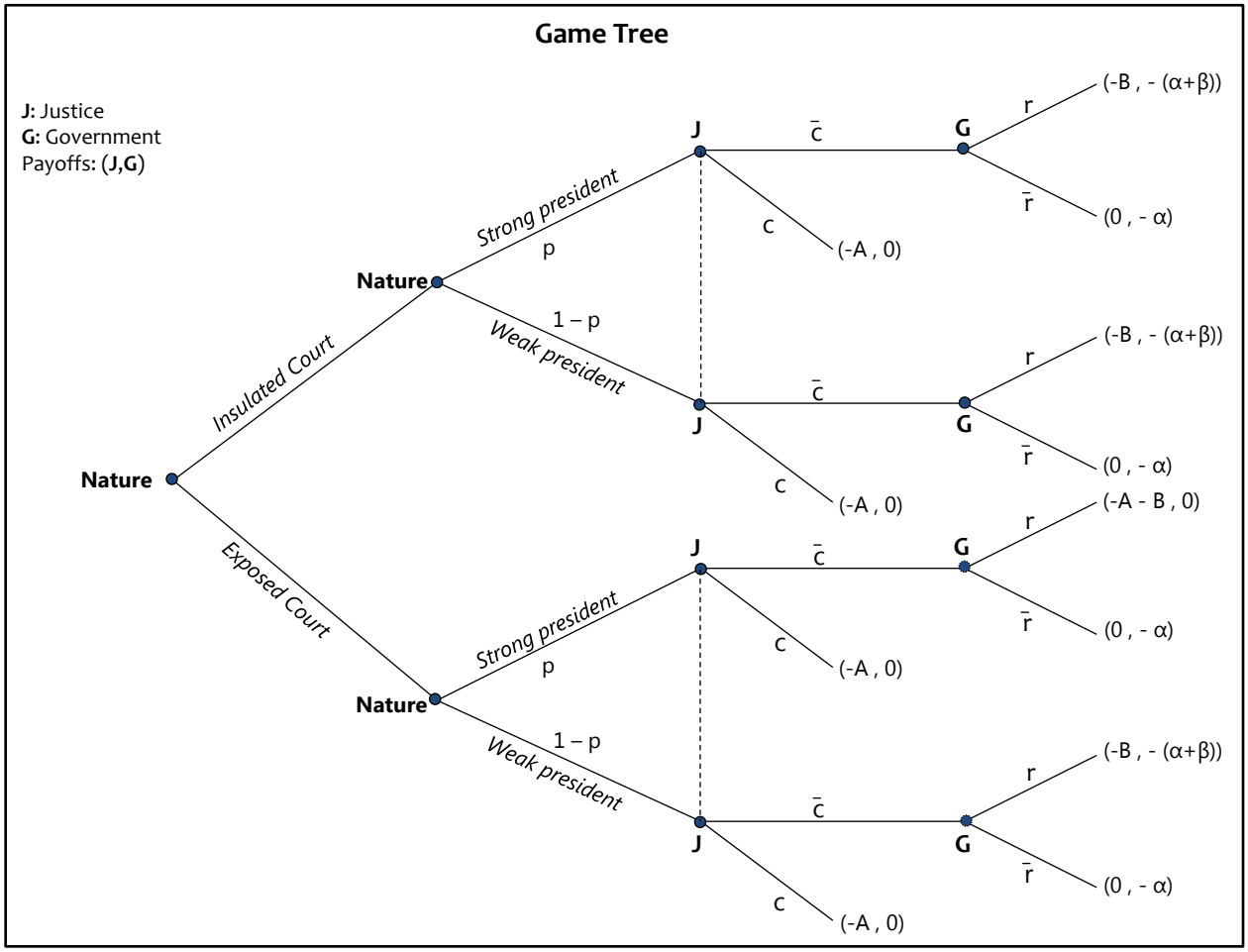

Figure 2.1. Game tree

A strategy for the justice specifies how each type of justice will decide. For example, the strategy $S_J = \{c|FI;\ c|FE;\ \bar{c}|HI;\ c|HE\}$ indicates that a friendly (*F*) justice will uphold the norm,

regardless of whether the court is insulated (*I*) or exposed (*E*); a hostile justice (*H*) in an insulated court will strike down the norm, and a hostile justice in an exposed court will uphold it. As this example implies, a friendly justice will always declare the act constitutional. It also implies that a hostile justice in an insulated court will always strike down the norm, as the game tree suggests (the proof of this result is included in Section 2.3). A strategy for the government specifies whether or not it will react with a sanction on the court or the justice as a result of a court ruling. For example, the strategy $S_G = \{r\}$ means that the government reacts to the court's decision.

2.2.2 Equilibria of the game

The predictions of the game lie on the three factors described above, namely, the type of justice, the level of insulation of the court, and the strength of the government. Two cases are straightforward: First, as specified above, a friendly justice, that is, a justice whose preferences are aligned with those of the government, will always uphold the norm under review. Second, a hostile justice in a court with an institutional setting shielding justices from external pressure will always strike down the norm.

The most interesting, and perhaps the most general, case occurs when a hostile justice operates in an institutionally exposed court. In this case, the behavior of actors depends on the third factor described above, that is, the political strength of the executive which determines to what extent it is easy or difficult for the government to gather the legislative support to impose sanctions on the court should it hand down a decision of unconstitutionality. In other words, the equilibria of the game in this case depend on p.

Definition: Define the "government's threshold" as:

$$p^g \equiv \frac{\beta}{\alpha + \beta}$$

This threshold determines the response of an executive confronted with a judicial decision striking down the norm under review. Whenever the strength of the government p is *above* this threshold p^g, the government chooses to react against an adverse court decision.

The model predicts that, when the government is more concerned by the policy outcome of the case relative to the possible public sanctions resulting from a failed retaliation against the court or one of its members, this threshold will be lower and therefore the government will be more willing to sanction the court or the justice. If, on the contrary, the cost of attempting an unsuccessful attack on the court is higher relative to the policy cost, the government will tend to comply with the judicial decision.

Definition: Define the "justice's threshold" as:

$$p^j \equiv \frac{A - B}{A}$$

This threshold, in turn, determines the action of a hostile justice in an exposed court when reviewing a legislative or executive act. Whenever the strength of the government is *below* this threshold p^j, the justice opts for handing down a decision of unconstitutionality.

The model, then, predicts that when justices are highly concerned with their institutional status relative to the intensity of her preferences over the issue, this threshold is lower and they are more willing to give up policy to preserve the legitimacy of their post or that of the court. If, on the contrary, the intensity of justices' preferences over the issue is high and their institutional concern is comparatively low, the threshold will be higher as well, and justices are willing to jeopardize the institutional stability to achieve their policy goals.

This leads to the identification of three different equilibria or regimes (Figure 2.2):

Judicial Supremacy Equilibrium: In this equilibrium, the hostile justice in an exposed court overturns the norm under review, and the government refrains from sanctioning the court or the justice in anticipation of public backlash given the low level of government's strength. For $p \leq p^g = \beta/(\alpha+\beta)$, the following strategy profile constitutes a Sub-Game Perfect Equilibrium (SGPE):

Justice: $S_J = \{c|FI;\ c|FE;\ \bar{c}|HI;\ \bar{c}|HE\}$

Government: $S_G = \{\bar{r}\}$

Government Supremacy Equilibrium: In this equilibrium the justice will defer to the government in anticipation of its retribution. For $p \geq p^j = (A\text{-}B)/A$, the following strategy profile constitutes a SGPE:

Justice: $S_J = \{c|FI;\ c|FE;\ \bar{c}|HI;\ c|HE\}$

Government: $S_G = \{r\}$

Interbranch Conflict Equilibrium: In this equilibrium, the justice will overturn the bill and the government will react against the justice/court. For $\beta/(\alpha+\beta) = p^g < p < p^j = (A\text{-}B)/A$, the following strategy profile constitutes a SGPE:[13]

Justice: $S_J = \{c|FI;\ c|FE;\ \bar{c}|HI;\ \bar{c}|HE\}$

Government: $S_G = \{r\}$

The three regimes which result from the game's equilibria are described in Figure 2.2.

[13] Notice that to clearly present these results of the model, I assume that $p^g < p^j$. If this is not the case, this regime/equilibrium simply disappears.

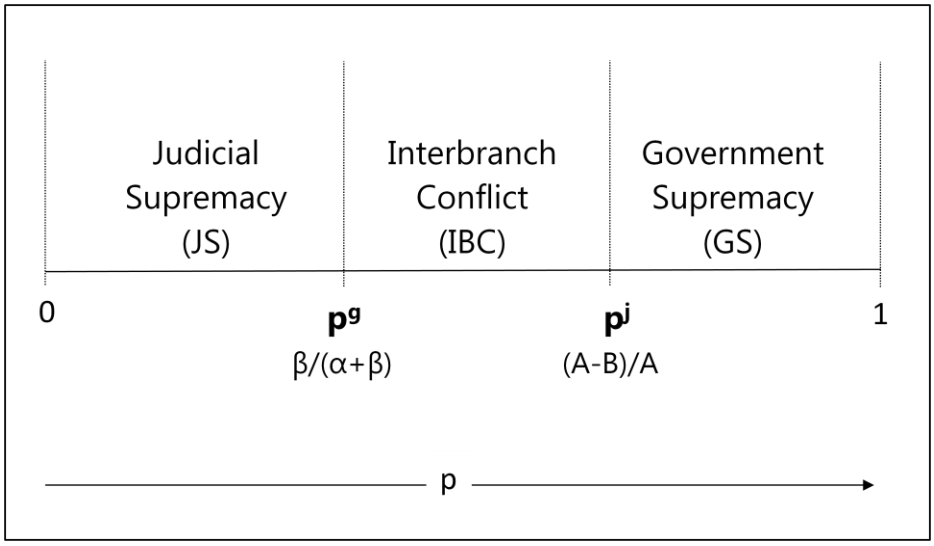

Figure 2.2. Equilibria of the game: Three regimes

The equilibria of the constitutional review game described above can be summarized as follows:

1. Friendly justices will always uphold the bill.
2. If a justice is not aligned with the government over the issue and the court is institutionally insulated from external pressures, then the justice will overturn the bill, and the government will not be able to retaliate $\{\bar{c}, \bar{r}\}$
3. If the justice is not aligned with the government over the issue under review, and the court is not institutionally insulated (i.e. it is exposed), then
   3.1. If $p \leq p^g = \beta/(\alpha + \beta)$, then the justice will overturn the bill and the government will comply with an adverse decision without reacting $\{\bar{c}, \bar{r}\}$, resulting in *Judicial Supremacy* (JS)
   3.2. If $(A - B)/A = p^j \leq p$, then the justice will uphold the bill in anticipation of a likely reaction by the government $\{c, r\}$, resulting in *Government Supremacy* (GS).

3.3. If $\beta/(\alpha+\beta) = p^g < p < p^j = (A-B)/A$, then the justice will overturn the bill and the government will engage in retaliatory behavior against the court or the justice $\{\bar{c}, r\}$, resulting in *Interbranch Conflict* (IBC).

2.3 PROOF OF THE EQUILIBRIA

Tie-Breaking Assumptions

- If indifferent between retaliating and not retaliating, the government chooses to comply.
- If indifferent between upholding and striking down the norm under review, the justice chooses to uphold.

Result 1: In any equilibrium, the friendly justice will always choose to uphold the norm under review, regardless of whether the court is insulated or exposed. The justice's strategy can be stated as:

$$S_J = \{c|FI;\ c|FE; *|HI; *|HE\}$$

I. Consider the hostile justice in an insulated court. The expected utility of the government is given by:

$$EU_G(r) = -(\alpha+\beta)$$

$$EU_G(\bar{r}) = -\alpha$$

The government will always choose to comply with the decision. Therefore, the justice's expected utility is given by:

$$EU_J(c) = -A$$

$$EU_J(\bar{c}) = 0$$

The hostile justice in an insulated court will always choose to strike the norm down.

II. Consider the hostile justice in an exposed court. The government's expected utility is given by:

$$EU_G(r) = (p-1)(\alpha+\beta)$$

$$EU_G(\bar{r}) = -\alpha$$

The government will choose to retaliate iff

$$p > \frac{\beta}{\alpha+\beta} \equiv p^g$$

This is denoted the "government's threshold". If the president's strength meets this condition, then the government chooses to retaliate. Otherwise, it complies.

The expected utility for the justice is determined considering two cases:

A. Consider the case when the government complies with the decision. The justice's expected utility is given by:

$$EU_J(c) = -A$$

$$EU_J(\bar{c}) = 0$$

The justice chooses to strike down the norm.

B. Consider now the case when the government attempts retribution. The justice's expected utility is given by:

$$EU_J(c) = -A$$

$$EU_J(\bar{c}) = -pA - B$$

The justice will choose to strike down iff

$$p < \frac{A-B}{A} \equiv p^j$$

This is denoted the "justice's threshold." If the president's strength meets this condition, the justice chooses to annul the norm. Otherwise, the justice upholds it.

QED

2.4 COMPARATIVE STATICS AND EMPIRICAL IMPLICATIONS

In order to derive empirical implications from the equilibria of the game, it is necessary to undertake comparative statics analyses. One way to do this is by specifying whether there should be shifts between the different regimes, and in which direction, as a result of varying one parameter of the game at a time (while leaving the other parameters unchanged). This comparative statics analysis is summarized in Table 2.1. Although I retake in detail the results of this analysis in Chapter 5, where I spell out the hypotheses that could be derived from the game and empirically test them, it is worth reviewing in this short section the observable implications stem from the game's equilibria and its comparative statics.

Table 2.1. Comparative statics of the strategic prudence game

Equilibrium	Increase in A	Increase in B	Increase in α	Increase in β	Increase in p
JS	No change	GS	IBC, GS	No change	IBC, GS
IBC	No change	GS	No change	JS	GS
GS	IBC, JS	No change	No change	JS	No change

First, it is clear that, as the government grows stronger, the ability of the court and its justices to rule against it is constrained and the likely outcome is government supremacy (GS). This result is rather intuitive. Less so is the prediction that increases in the executive's strength may also lead to clashes with the court. Given the uncertainty regarding the actual strength of the

government, justices who have been able to autonomously behave may end up miscalculating such strength and being punished because of a daring ruling. This feature nicely illustrates how introducing uncertainty is central to predicting actual conflict which otherwise would be successfully avoided by rational actors anticipating their counterparts' responses.

Second, as justices have more stakes or have stronger preferences regarding the case under review, they will be more willing to make a decision which may lead to conflict with the executive. Depending on the political strength of the latter, it may also lead to a situation in which the court prevails and the government decides not to retaliate. Conversely, as justices are more concerned with the institutional survival of the court and with their stability in office, they will tend to be more deferent, leading to government supremacy.

Finally, as cases grow more salient for the incumbent administration the likelihood of confrontation with the court increases. Eventually, this situation may result in justices being deferent to avoid such confrontation. Likewise, an increasing perceived cost to the government resulting from the public backlash which may occur because of a failed retaliation against the court may lead to its refraining from undertaking such retribution, which in turn leads to the justices' preferences prevailing.

This analysis leads to the formulation of hypotheses on the conditions under which justices will make decisions against the executive's preferences. These hypotheses are qualitatively explored in Chapter 4 and systematically tested in Chapter 5 of this dissertation. Moreover, as I will develop further in Chapter 5, the comparative statics analysis presented below may lead to consider hypotheses regarding how parameters A, B, α, and β may have an impact on shifting from one equilibrium to another (and ultimately on the likelihood of a judge striking down the norm under review) which is *conditioned* by the president's strength p.

Consider for instance the parameter related to the cost paid by justices if they uphold a norm they dislike (parameter A). A straightforward interpretation of the comparative statics suggests that when this cost is higher a justice will be more likely to strike down the norm. An interactive interpretation of the comparative statics, however, would lead to state that the effect of this cost on the probability that the justice will strike down the norm is higher when the president is stronger. This seemingly counterintuitive hypothesis derives from the fact that when the president is weaker, justices will tend to defy him more often regardless of how salient the case is for them. In other words, when the executive's strength is small it would be more difficult to detect the effect of parameter A on the justice's decision. In fact, according to this interpretation, only when the executive is stronger (and therefore a decision striking down the norm is less likely) a higher cost paid by justices for upholding the norm would have a visible (positive) effect on their likelihood of striking down the norm. In other words, only when p is large the Government Supremacy equilibrium might shift into the Interbranch Conflict equilibrium (or even a Justice Supremacy equilibrium) as a result of an increase in A.

The same logic applies to the remaining parameters of the game. The effect of the cost paid by justices when the government attempts a retaliation on their likelihood of annulling the norm is hypothesized to be higher when the president is weaker. The same is expected regarding the effect of the cost paid by the government for complying with an adverse decision in court. Finally, the cost paid by the government for a failed retribution should have a stronger effect on the likelihood of a decision striking down the norm when the president is stronger.

3.0 CONSTITUTIONAL REVIEW IN COLOMBIA AND THE CONSTITUTIONAL COURT

After presenting the nuts and bolts of the theoretical argument in the previous chapter, I turn here to the case on which the empirical implications of this theory are to be tested. Although I provide a complete justification of the use of the Colombian Constitutional Court (CCC) for such test in the next chapter, let me emphasize here, first, that Colombian courts have been rather neglected and remain highly understudied in the flourishing literature on judicial politics in Latin America. A recent literature review on the subject (Kapiszewski and Taylor 2008) makes references to just a few works on Colombia, particularly on the CCC and its role in the protection of citizen rights. Moreover, all these papers and book chapters were authored by jurists from a legal-sociological perspective (Cepeda 2005; Rodríguez, Uprimny, and García-Villegas 2003; Uprimny 2003a, 2006), not by political scientists. This contrasts with the attention paid by the subfield to courts in Argentina (Brinks 2004, 2005; Chávez 2003, 2004b, 2004a; Chávez, Ferejohn, and Weingast 2011; Helmke 2002, 2003, 2005; Iaryczower, Spiller, and Tommasi 2002; Kapiszewski 2007; Scribner 2003a, 2004, 2011), Brazil (Brinks 2004, 2005, 2011; Kapiszewski 2007, 2011; Taylor 2004, 2005, 2006, 2008), Chile (Couso 2002, 2004, 2005; Couso and Hilbink 2011; Hilbink 2003, 2007, 1999; Scribner 2003b, 2003a, 2004, 2001, 2011), Mexico (Domingo 2000, 2005; Magaloni 2003; Sánchez, Magaloni, and Magar 2011; Staton 2004, 2003, 2006, 2002), and even Costa Rica (Wilson 2005; Wilson and Rodríguez Cordero 2006), Ecuador (Basabe 2008;

Grijalva 2010), and Peru (Dargent 2009). Only recently a few works on the CCC from a judicial politics perspective have been published (Nunes 2010; Rodríguez-Raga 2011).

This seemingly lack of academic interest in Colombian courts may be the result of the international reputation of the CCC as an independent, activist court (Helmke and Ríos-Figueroa 2011a; Kapiszewski and Taylor 2008), which may have make it look like a weak case to test the strategic accounts of judicial behavior prevailing in the region. However, as I show in detail in the following chapter, despite this well-founded reputation of autonomy, the CCC face strong constraints and its justices must often deal with the predicament of compromising policy outcomes related to specific cases in order to preserve the institutional stability of the court. In consequence, the CCC becomes a 'crucial case' (Eckstein 1975) in which to test the strategic prudence theory presented in Chapter 2 in the sense that its seemingly independence makes it less likely to find empirical evidence of strategic behavior by court justices.

The chapter proceeds as follows. The first section includes an account of the origins and evolution of constitutional review in Colombia since the early 20th century until the introduction of the new Constitution in 1991. The second section describes the circumstances under which this constitution came to be drafted by a constituent assembly and the debates leading to the creation of the Constitutional Court. The third section contains a detailed description of the organization and structure of the court, including the specification of its jurisdiction and data on its caseload, the provisions ruling the selection and retention of justices, and the description of the court's decision-making procedure and of the type of decisions it hands down. All these institutional features are presented in comparative perspective. The final section concludes.

3.1 A LONG TRADITION OF CONSTITUTIONAL REVIEW IN COLOMBIA

Although rarely recognized in the comparative literature, constitutional review, that is, "the power of courts to strike down incompatible legislation" (Ginsburg 2008: 81), has a rather long tradition in Colombia.[14] The conventional wisdom states that constitutional review, originated in the United States, was rare before World War II outside Anglo-American federal polities ruled by common law. This same view locates a second wave of provisions for constitutional review in post-fascist West European countries like Austria, Germany, Italy, Portugal, and Spain (Ginsburg 2008; Ferejohn, Rosenbluth, and Shipan 2007).

In Colombia, however, constitutional review dates back at least to 1910 when a constitutional amendment introduced a mechanism named Public Action of Unconstitutionality (PAU) through which any citizen could challenge a piece of legislation already in place, and the Supreme Court was bound to make an abstract, a posteriori review decision with effects for everybody (i.e. *erga omnes*). The 1886 conservative constitution in Colombia contained provisions for constitutional review by a judicial body, the Supreme Court, but its role was more that of an arbiter between the Executive and the legislature when the former vetoed a bill on grounds of unconstitutionality and the latter insisted in approving such bill. According to (Cepeda 2007: 18), the citizen-initiated procedure for constitutional review introduced in 1910 was the first of its kind set in place in the world.[15] The wide accessibility of this mechanism for

[14] As Cepeda (2007: 3) points out, one of the stereotypes about Colombia depicts it as a "legalist" country, the other major stereotype being that a of a violent one.

[15] In 1904, a statute was adopted creating PAUs only for executive emergency decrees. This was extended to other forms of legislation in the amendment approved in 1910. Also this year it was created what was known as the "exception of unconstitutionality" by means of which any judge can refuse in a concrete situation to apply a law that he or she deems unconstitutional. This form of constitutional review has only *inter partes* effects, that is, applies to the specific case under review and does not eliminate the piece of legislation from the legal framework of the country.

constitutional review can be explained in part as a means of offering guarantees to the opposition party within the peace agreements between the traditional Liberal and Conservative political parties that put an end to the civil war known as the War of Thousand Days.[16]

In 1936, the Liberal López Pumarejo administration introduced major constitutional changes aimed, among other purposes, at expanding individual and collective rights after more than three decades of conservative rule. Although these amendments left unchanged the norms of constitutional adjudication, by expanding civil liberties such as religious freedom, the right to strike for workers, freedom of association, and so on, the 1936 amendment gave justices and the Supreme Court more room of maneuver to interpret the constitution in order to enforce the protection of rights (Cepeda 2007: 20-21).

In 1958, the National Front, yet another pact set in place between liberals and conservatives to mitigate the violent conflict between the two parties (the period known as *La Violencia*) and to put an end to a short period of military rule (1953-1957),[17] introduced two new mechanisms aimed at insulating the Supreme Court from conflicts between the two political parties and from shifts in public opinion and electoral results. On the one hand, as was decided for all elected officials and the main government agencies, the Supreme Court had to include as many justices from the Liberal party as there were from the Conservative one. This parity was one of the key features of the National Front (1958-1974). On the other hand, new justices in the Supreme Court were to be selected by sitting justices without any involvement of the government or the legislature (Cepeda 2007: 23).

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[16] This logic of extending guarantees to the opposition parties by expanding constitutional review, which has been documented by Ginsburg (2003) for Asian new democracies, is at the origin of the constitution introduced in 1991 and the creation of a constitutional court, as I show below.

[17] Unlike other Latin American countries, this was a rather short and "soft" dictatorship during which the Supreme Court and constitutional review were not suspended.

Furthermore, in 1960 an amendment was approved to give Congress the ability to challenge the constitutionality of emergency decrees. Given that the legislature rarely used this prerogative, the Supreme Court was given in 1968 the power to review *ex officio* the compatibility of emergency decrees vis-à-vis the Constitution. The 1968 amendment also specified how long should take the Supreme Court to exert review on constitutionality cases, as a response to the view that the court tended to delay decisions on controversial topics, sometimes up to over ten years (Cepeda 2007: 26). The amendment also gave the Supreme Court the power to hear cases in which the challenge was based on possible flaws in the legislative procedure followed to approve legislation (Cepeda 2007: 27). Incidentally, the reform included a proposal to create a Constitutional Court; this proposal was defeated.

By 1990, the Supreme Court's attributions regarding constitutional review included: (1) reviewing bills that were vetoed by the president on unconstitutionality grounds and insisted by Congress; (2) automatically reviewing emergency decrees; (3) deciding on Public Actions of Unconstitutionality (PAUs) filed by citizens against ordinary legislation and executive decrees (i.e. those issued by the Executive under special powers delegated by Congress); (4) deciding on PAUs filed by citizens against constitutional amendments approved by Congress, though only for procedural flaws; and (5) reviewing bills approving international treaties.

Despite the long history of constitutional review described above, at the end of the 1980s the Supreme Court was perceived as deferent to the Executive, especially regarding the review of emergency decrees. For various reasons including, but not limited to, the difficulty in approving legislation in Congress during the National Front, the *exceptional* state of siege had become the *normal* state of affairs and most legislation was passed by means of emergency decrees. Colombia was under state of siege during around 30 years between 1949 and 1991 (Uprimny

2003a: 51), with increasingly problematic effects on civil liberties and political rights. During this period, the Supreme Court in many cases acted merely as a rubber stamp legitimizing those decrees. This was one of the reasons why, as I will show below, the Supreme Court was largely perceived as an ineffective institution in protecting individual rights, which eventually lead to the creation of the Constitutional Court (Cepeda 2007: 25). In the next section I will describe the process by which a constituent assembly was convened and a new constitution was drafted in 1991 creating in Colombia a specialized tribunal in charge exclusively of constitutional review: the Constitutional Court.

3.2 THE NATIONAL CONSTITUENT ASSEMBLY AND THE CREATION OF THE CONSTITUTIONAL COURT

The 1980s were perceived in Colombia as a decade of acute political crisis. This crisis is often characterized by two main features, both of which led to the election of convention in charge of drafting a new constitution for the country.

One the one hand, the political regime was increasingly losing its legitimacy. The origin of this process is commonly placed in the bipartisan agreement called the National Front. This was a sort of consociational arrangement (see Lijphart 1969; Dávila Ladrón de Guevara 2002) between the traditional Liberal and Conservative parties agreed upon to put an end both to the outbreak of violence between these parties in the late 1940s and early 1950s, the period known as *La Violencia*, and to the subsequent short lapse of military rule (1953-1957). Among the clauses of the National Front arrangement was an even distribution between the two parties of all elected posts, most government positions and the composition of the Supreme Court. The

Executive was to be alternated between the two parties (e.g. in 1958 only liberal candidates could run for office, in 1962 only candidates from the Conservative party could do so, and so on until the election held in 1970). Although the pact succeeded in defusing bipartisan conflict, it closed the entry to the political arena for political movements other than the traditional parties. Also, given that the agreement adopted rules requiring super-majorities for the passage of most legislation (Archer 1990; Archer and Shugart 1997), the period was characterized by legislative gridlock which made the use of a state of emergency, the state of siege, by the Executive the rule rather than the exception. Although the application of most of the National Front's clauses reached an end in the mid 1970s, its logic of exclusion and deadlock survived until the late 1980s.

On the other hand, the period was marked by a growing violence with many faces (Dugas 1997) including, though not limited to, the violence associated to the leftist guerrilla groups emerged in the 1960s, the right-wing paramilitary groups, and the drug cartels. The 1980s witnessed the assassination of tens of policemen, journalists, members of the judiciary, and salient political figures, as well as several terrorist attacks with a significant toll of civilian casualties perpetrated mostly by the Medellín cartel headed by Pablo Escobar. It was a time of growth for the rebel groups, especially the FARC and the ELN, and of the killing by paramilitary squads of hundreds of members of the UP, a political party created as a result of an attempted peace treaty with the FARC which eventually failed. On August 18, 1989, Luis Carlos Galán, a promising, charismatic figure in the Liberal party who was running for president in the 1990 elections, was murdered during a campaign rally near Bogotá. Galan's program included a position of zero-tolerance with the drug gangs and was perceived, especially by the Medellín cartel as a credible threat for this millionaire illegal business. Pablo Escobar was the mastermind

behind this assassination which was the most open and defiant move ever made by the organized crime against the establishment. This event was followed by the murder of presidential candidates Bernardo Jaramillo from the UP (March, 1990), and Carlos Pizarro from AD-M19, a party created as a result of the successful demobilization of the M-19 guerrilla group (April, 1990).

These two factors, the regime's loss of legitimacy and the increasing levels of violence, reinforced each other (Dugas 1997) and created the perception that a major changes in the rules of the game was urgently needed. Attempts to amend the constitution were made since the 1970s. The López administration (1974-1978) promoted the creation of a constituent assembly while the Turbay administration (1978-1982) tried to pass a major amendment through Congress, both attempts aimed, among other issues, at introducing reforms in the judiciary and the constitutional jurisdiction. Although in both cases the incumbent's majorities in the legislature approved their proposals, the Supreme Court struck down the amendments procedures (Dávila Ladrón de Guevara 2002). In fact, the proposal to convene an assembly to amend the constitution was in the agenda during the entire decade of 1980, but the truth of the matter was that the constitution valid at the time expressively forbade any amendment made outside the legislature. In 1988, the Barco administration (1986-1990), in conjunction with the leaders of the traditional parties, promoted yet another proposal to create a constituent convention emerged from Congress to undertake an amendment which would take into account proposals made by citizens and groups in society (Dávila Ladrón de Guevara 2002: 111). This time the Council of State, the judicial organ in charge of reviewing administrative acts, found the agreement between the administration and the political parties unconstitutional. As a way off the impasse, the

government resorted to Congress where, after a long debate, the proposal was defeated in December, 1989.

The situation was therefore one of an Executive eager to make reforms, a legislature unable or unwilling to approve them, and a judiciary striking down any amendment proposal circumventing Congress (Ruiz and Dugas 1991; Archer and Shugart 1997). After this new failed attempt, and with increasing levels of violence including several car bombs in public places (at that time the media and political actors coined the term "narcoterrorism"), a movement of university students managed to introduce a special, informal ballot in the local and legislative elections held in March 11, 1990. The so-called "seventh" ballot[18] asked voters whether or not they would support electing a constituent convention. The proposal, although with no legal force, was supported by more than two million voters. Taking advantage of the political impact of these results, Barco issued an emergency decree introducing a now official ballot in the upcoming presidential election to be held in May. Unlike previous occasions and perhaps as a result of the public pressure, the Supreme Court made an issue upholding the decree. This decision was handed down just three days before the election date!

On May 27, then, the presidential election and the plebiscite took place. The proposal to convene a National Constituent Assembly (NCA) was supported by 89 percent of the votes, although turnout was particularly low; in fact, the May election had 1.5 million less voters than the March election (Dávila Ladrón de Guevara 2002).[19] Elections to select the 70 members of the NCA, in turn, were held on December 9, 1990, four months into the Gaviria administration. The

[18] The movement was called the initiative for the *séptima papeleta* or seventh ballot because it was to be held simultaneously with the election of city councilors and mayors, department deputies, senators, representatives, as well as the Liberal party primary election.

[19] This low turnout has been explained by the fact that César Gaviria, the heir of assassinated Galán as a Liberal party candidate, was thought to have a landslide victory, which in fact he had. In any case, critics of the 1991 constitution have always questioned the legitimacy of the NCA because these high levels of abstention (Dávila 2002: 113-115).

results of this election showed a surprising distribution of the assembly's seats between the Liberal party (36 percent), AD-M19, the party created as a result of the peace agreement between the M-19 rebels and the Barco administration (27 percent), the MSN, a new party created and headed by Álvaro Gómez Hurtado, a historical figure in the Conservative party (16 percent), and the official Conservative party (7 percent). For the first time in recent Colombian history, the two traditional parties were not able to secure a majority of seats and had to compromise other political forces. This distribution of seats explains in part the outcome of the assembly which was convened between February 5 and July 4, 1991. Not only there was a significant participation of center-left deputies from AD-M19 but also the almost three-fold share of seats between this party, the Liberals, and the Conservatives introduced significant uncertainty to future elections regarding which faction would held power at the end of the Gaviria administration. This uncertainty was reflected in the provisions in the new constitution including a comprehensive bill of rights and more limits on executive power, especially regarding the use (and abuse) of states of emergency. The expansion of judicial review and the creation of a new constitutional court in charge of protecting the constitution are also partially explained by this uncertainty (Ferejohn, Rosenbluth, and Shipan 2007; Ginsburg 2003).

The idea of taking constitutional review out of a panel within the Supreme Court also in charge of other jurisdictions (e.g. criminal, civil, labor) and into a specialized constitutional court was hardly new in Colombia. A failed reform in 1979 included this provision. Another attempt in the same direction was made in Congress in 1984 but received strong public criticism in the

media, especially from members of the judiciary and Supreme Court justices,[20] and was eventually defeated.

The Gaviria administration reintroduced in the National Constituent Assembly the proposal to create constitutional court. The proposal initially received moderate support by the assembly members and originated significant controversy between those who praised the job done by the Supreme Court and preferred keeping the task of constitutional adjudication in its hands, and those who favored the creation of a new, specialized tribunal (NCA 1991a, 1991b).[21] The latter was the position of president Gaviria and his government. Gaviria's second address to the assembly was devoted, among other issues, to defend the creation of a new constitutional court (Cepeda 1993a: 104 fn 1). In that address, he asked "Which institution will have the mission to prevent that a powerful authority through laws, decrees, acts, orders, or any administrative action stops the great transformation your are promoting?" (speech of April 17, 1991, quoted in Cepeda 1993a: 338). The government's endorsement was crucial to the final decision.[22] The proposal was ultimately approved by the vote of 44 out of the 70 members of the assembly (Cepeda 2007: 37; NCA 1991c).[23]

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[20] See op-ed article "¿Corte Suprema o Corte Constitucional?" by the then Supreme Court justice Manuel Gaona Cruz (*El Tiempo*, 9/4/1984, p. 5A-8B).

[21] See "A debate, Corte Constitucional" (*El Tiempo Online Archive* 6/5/1991: http://www.eltiempo.com/archivo/documento/MAM-95316) and "Corte Constitucional divide a Constituyente", by Édgar Torres (*El Tiempo Online Archive* 6/5/1991: http://www.eltiempo.com/archivo/documento/MAM-96486).

[22] Later on, Gaviria sustained that his administration was the only actor originally in favor of creating a Constitutional Court (Gaviria in De la Calle 2004: 48).

[23] In fact, the Constitutional Court was the only new institution approved in the NCA by a secret vote (Cepeda 1993b: xi) which makes it impossible to keep track of who or which parties were in favor or against its creation.

3.3 ORGANIZATION AND STRUCTURE OF THE CONSTITUTIONAL COURT

3.3.1 Jurisdiction and caseload

As I show in the previous section, the discussion within the constituent assembly regarding constitutional review centered on a choice between two main options. On the one hand, some important sectors in the convention favored the status quo, namely, having a special panel with the existing Supreme Court adjudicating constitutional issues.[24] On the other hand, another faction within the assembly, as well as the government, thought that the new constitution, including an expanded bill of rights, new mechanisms for the protection of those rights, and further limits on executive and legislative powers, required a separate, specialized legal body outside the hierarchy of ordinary courts to secure the enforcement of these provisions.

This discussion did not take place in a theoretical void. It reflected the usual classification of constitutional adjudication into two ideal-typical models (Vanberg 2005; Epstein, Knight, and Shvetsova 2001b). On the one hand, in the American (or Anglo-American, see Ginsburg 2008) model, based on common law, any court within the judiciary is entitled to declare the unconstitutionality of a legislative or administrative act. At the top of the judicial hierarchy lies a supreme court operating as an organ of last resort of constitutional adjudication. Moreover, in this model review is typically activated as a result of a concrete controversy. The most representative instance of this model is obviously the United States Supreme Court (Vanberg 2005). On the other hand, the European model based on civil law typically provides for a separate tribunal outside the judiciary with exclusive jurisdiction over constitutional

[24] This panel, the *Sala Constitucional*, was in fact created in 1968 as a response to the perceived need to have some level of specialization in public law within the Court.

adjudication. These constitutional courts, the origin of which is usually placed in Kelsen's draft of the 1920 Austrian constitution, exert abstract review, that is, they do not require an actual case to act. The German Bundesverfassungsgericht is perhaps the most prototypical example of this model (Vanberg 2005; Ginsburg 2008).

The choice made by the constituent assembly in Colombia follows a worldwide trend, especially in new or less consolidated democracies, both to expand constitutional review and to create constitutional courts (Ferreres Comella 2004a; Ginsburg 2003; Horowitz 2006; Ferejohn and Pasquino 2004). In fact, the introduction of a constitutional court outside the judiciary has been argued to be a central factor in the expansion of constitutional review and, in particular, in the protection of individual and collective rights, for several reasons. Some authors sustain that having the court separate from the judicial hierarchy allows for the selection as judges of lawyers who are not embedded in the judicial career, or even professionals outside the legal practice, who might have a more proactive view of the constitutional defense of rights. According to this view, career judges tend to respond to an incentive structure and a legal culture that make them adopt a more traditional and formal approach to the role of courts (Couso and Hilbink 2011; Ríos-Figueroa 2011; Guarnieri and Pederzoli 2002). Moreover, in countries experiencing transitions to democracy, the judicial hierarchy is likely to have been associated to the former authoritarian regime which would make transition framers reluctant to involve those career judges in the new model of constitutional adjudication (Horowitz 2006).

Some others emphasize the political character of constitutional review and therefore point out to the fact that having judges of a constitutional court selected by political actors (the executive, the legislature) is more compatible with this character than choosing them from the traditional judicial hierarchy (Ferejohn and Pasquino 2003). On a different vein, it has been

argued that having a centralized court not only allows for the necessary specialization in public law matters but also enhances the creation of a clearer and more consistent jurisprudence (cf. Ferreres Comella 2004a, 2004b).

This trend to have a tribunal centralizing constitutional adjudication has prevailed in post-World War II Western Europe as well as in post-Communist Eastern Europe (Ginsburg 2008; Horowitz 2006). In Latin America, however, the most common model is that of a Supreme Court at the head of the judiciary exerting constitutional review (Horowitz 2006; Navia and Ríos-Figueroa 2005). By mid-2010, only seven Latin American countries have created separate constitutional courts: Bolivia, Brazil, Chile, Colombia, Ecuador, Guatemala, and Peru (Lara Borges, Castagnola, and Pérez-Liñán 2010; Ríos-Figueroa 2011).[25]

3.3.1.1 Jurisdiction

The two ideal types of judicial review described above are insufficient to encompass the diversity in constitutional adjudication around the world. Particularly in Latin America there exists an intricate "mosaic" of instruments and institutions in charge of checking the constitutionality of acts issued by the different branches and levels of government (Navia and Ríos-Figueroa 2005). A related yet more fruitful approach is to distinguish three main factors that characterize the way in which constitutional review is exerted (Navia and Ríos-Figueroa 2005; Ríos-Figueroa 2011). First, the *type* of adjudication refers to whether it is concrete, that is, when review can only take place as a result of a specific controversy, or abstract, in which adjudication occurs without an actual case. Second, the *timing* of review distinguishes *a priori* review (before the piece of legislation has been enacted) from *a posteriori* review (after the act

[25] The Dominican Republic has just adopted a new constitution which introduces a constitutional tribunal. At the moment this is written, however, this tribunal has not started its operation yet.

has been adopted). Finally, the *jurisdiction* refers to whether constitutional review is centralized, when it is concentrated in a single judicial organ, or decentralized, when adjudication is exerted along a hierarchy of judges, tribunals, and courts (Ríos-Figueroa 2011; Epstein, Knight, and Shvetsova 2001b).

In principle, eight combinations of these three characteristics result, although only four of them are logically possible or empirically observed. These legal instruments for constitutional adjudication are (1) concrete, centralized, a posteriori; (2) concrete, decentralized, a posteriori, (3) abstract, centralized, a posteriori; and (4) abstract, centralized, a priori.[26] Moreover, Ríos-Figueroa (2011) considers two additional factors which are crucial to better assess the actual effectiveness of these legal instruments for constitutional review. First, it is important to consider the scope of a decision which may have, on the one hand, effects only applicable to the parties involved in the constitutional controversy (*inter partes*) or, on the other hand, effects for all members of the polity (*erga omnes*), in which case the act held unconstitutional is excluded from the legal framework of the country. A second factor involves the level of access to the legal instrument. Who can file a constitutional suit activating such instrument has an impact on how effective the role of constitutional adjudication is in checking the power of other political actors, in arbitrating conflict between branches and levels of government, and in enforcing the protection of citizens' rights. This access can be more or less open depending on whether any citizen can challenge the constitutionality of an act or whether this ability is restricted to certain actors in the political system and/or in society.

[26] For logical reasons, concrete review, whether centralized or decentralized, can only occur a posteriori. Similarly, given its character of constitutional consultation before the enactment of legislation, a priori review can only be centralized. Finally, although logically possible, abstract decentralized review may result in a chaotic state of legal uncertainty in which any judge could exclude an entire piece of legislation from the legal framework, and therefore it is not observed, at least in Latin America (Ríos-Figueroa 2011).

The theoretical framework described in the previous paragraphs sheds light on the legal instruments available to the Colombian Constitutional Court (CCC). Article 241 of the constitution approved in 1991 provides, first, that the court must exert abstract, centralized, a priori (*ex officio*) review (instrument #4) of the following acts:

- Emergency decrees issued by the Executive: The new constitution replaced the infamous state of siege existing in the previous chart by three specific states of emergency:[27] (a) state of external war, for international armed conflicts; (b) state of internal commotion, for sudden and severe perturbations of the internal order; and (c) state of social and economic emergency, for serious economic crises or natural disasters. By declaring any of these states of ermegency, the Executive can issue emergency decrees in order to address the situation. The CCC must automatically review the constitutionality of these decrees. Moreover, although not specified in the Constitution, the CCC in one of its first decisions (Decision C-004/1992)[28] affirmed the competence of automatically reviewing the very presidential act declaring the state of exception not only for procedural or formal issues but also in its substance. The doctrine set by the court in that decision thus allows it to verify whether there were sufficiently strong reasons, supported in evidence, to declare the state of emergency in the first place (Uprimny 2003a: 55). The control of states of exception

[27] The Constitution also specifies time limits for these states of emergency, as well as some limits on the exercise of executive power during these situations. For a complete discussion on emergency powers and their review by the CCC, see (Uprimny 2003a).

[28] For decisions issued by the CCC I use the official nomenclature used by the court itself. This nomenclature starts with a letter to distinguish abstract review decisions (marked with a 'C') from concrete review decisions (marked with a 'T', for *tutela* which is the name given to concrete constitutionality cases). This letter is followed by the number of the decision in chronological order within a year. Finally, the nomenclature ends with the year of the decision. In a few cases, the number is followed by a letter (e.g. Decision C-089A/1994).

and of legislation adopted during those states is clearly one of the major changes introduced by the constituent assembly to limit presidential power.

- Statutory acts: These are special bills approved by Congress aimed at regulating citizen rights and the mechanisms for their protection, the administration of justice, the organization and functioning of political parties and elections, the exercise of popular participation (e.g. referenda, plebiscites, etc.), and states of exception. The CCC must automatically review the constitutionality of these acts for both procedural and substantive issues.
- Legislative acts either calling for a referendum (on both legislative bills and constitutional amendments), a plebiscite, or a local or regional popular consultation, or convening a constituent assembly: The CCC can only review constitutionality of the procedure by which these acts were approved.
- Legislative bills vetoed by the executive on grounds of unconstitutionality. If the president argues that a bill approved by Congress is unconstitutional, he can veto it and return it to the legislature for its amendment. If Congress insists on approving the bill, the CCC must automatically review it for both procedural and substantive issues.
- International treaties and legislative acts approving them: The Executive must submit the approving act to the CCC within six days of its enactment, and the court must review both the procedure and the contents of the treaty and the act. Should the treaty be found unconstitutional by the court, it could not be ratified.

All cases under this instrument have *erga omnes* effects. Moreover, access to this instrument is considered to be restricted since these cases are only generated by executive or legislative acts.

Article 241 of the constitution also determines that the CCC exerts abstract, centralized, a posteriori review (instrument #3) on the following acts:

- Ordinary acts approved by Congress: The court must make a decision on the constitutionality of a legislative act as a result of a Public Action of Unconstitutionality (PAU) filed by any citizen.
- Executive decrees: In some circumstances, Congress can delegate legislative powers to the executive which, under these powers, can issue decrees with legal effects on a variety of matters. Any citizen can file a PAU challenging the constitutionality of an executive decree and, provided that the suit is properly filed, the court must make a abstract review decision on the case.
- Legislative acts aimed at amending the Constitution: Here again, any citizen can file a PAU challenging the constitutionality of the amending act. In this case, however, the Court must exert review only regarding procedural flaws in the approval of the amendment in Congress.

Public Actions of Unconstitutionality (PAUs) as a mechanism for constitutional challenge of legislative acts exist in Colombia since 1910, as explained in a previous section of this chapter.[29] This mechanism, unique in Latin America, makes abstract constitutional review exceptionally accessible.[30] Because of these institutional features, Colombia "has, perhaps, the most open system of judicial review" (Cepeda 2005: 74).

In contrast with the U.S. Supreme Court, moreover, the CCC has no control over its docket for abstract review cases. Not only the court has to address *ex-officio* those cases subject

[29] These actions are also referred to in the legal milieu as *Actio Popularis*.

[30] As a matter of fact, Decision C-003/1993 specified that PAUs can only be filed by individual citizens (or groups of citizens), but not by legal entities such as corporations.

to automatic review (mentioned above) but also it has to study and make decisions, with *erga omnes* effects, on the constitutionality of those legislative acts challenged by any citizen in a PAU, which is in fact a rather simple action filed in written and specifying only the challenged norm(s), the constitutional provisions which are allegedly violated by these norms, the reasons for those violations, and the reasons why the challenger thinks the court is competent to hear the case. This lack of agenda control not only makes the CCC's caseload extremely large, as I will discuss in more detail in a following section, but also prevents any strategic behavior by the court in the agenda-setting process, unlike what has been studied in the case of the U.S. Supreme Court (see Hammond, Bonneau, and Sheehan 2005).

Finally, the CCC exerts concrete, decentralized, a posteriori review when it acts as a court of last resort in *tutela* actions. These actions can be filed, with little formal requirements, by citizens in search of protection of their rights when they feel that these rights are being violated or threatened by the action (or omission) of a public authority or even a private entity. This *tutela* writ is typically filed before any ordinary judge, and it eventually reaches the CCC. The court receives all concrete cases and selects only a few (around 2 percent) for its review and final decision which may uphold or reverse the decision made by a lower court or judge. In these cases, therefore, the CCC has some discretion in setting its own agenda.

The vast majority of decisions in these cases have effects only for the parties involved in the controversy. However, there have been a few instances in which several *tutela* actions are filed regarding the same specific issue and the CCC has then decided to declare the existence of an "unconstitutional state of affairs".[31] An example of this occurred in 1998 when several jail inmates filed *tutela* cases looking for protection of their basic rights given the extremely

[31] Since its creation, the CCC has declared the unconstitutional state of affairs nine times. The first time was in 1997 and the last in 2004 (Rodríguez Garavito 2010: 441-442).

unhealthy conditions of Colombian prisons. The court considered that this situation deserved more than decisions made on a per-case basis and issued the general "unconstitutional state of affairs" decision ordering the government to put an end to this situation.[32] The court made a similar decision in 2004 after many people who had been forced to leave their homes because of the internal conflict have filed *tutela* actions seeking the protection of their basic rights, mainly the rights to human dignity and housing (Uprimny 2006).[33] In these instances, the court has made decisions with effects for everybody (i.e. *erga omnes*).

Based on Ríos-Figueroa (Ríos-Figueroa 2011: 49), Table 3.1, below, shows the use of the four instruments described above by Latin American constitutional courts. While abstract review decisions have always *erga omnes* effects, in the case of concrete review instruments the table shows whether the decisions have *inter partes* or *erga omnes* effects.

Table 3.1. Legal instruments in Latin American constitutional courts

Country	**Instrument 1** Concrete Centralized A posteriori	**Instrument 2** Concrete Decentralized A posteriori	**Instrument 3** Abstract Centralized A priori	**Instrument 4** Abstract Centralized A posteriori
Bolivia *Tribunal Constitucional Plurinacional*	*Erga omnes*	*Inter partes*	Yes	Yes
Brazil *Supremo Tribunal Federal*	*Inter partes*	*Inter partes*	No	Yes
Chile *Tribunal Constitucional*	*Inter partes*	No	Yes	Yes
Colombia *Corte Constitucional*	No	*Inter partes, erga omnes*[34]	Yes	Yes
Ecuador *Corte Constitucional*	No	*Inter partes*	Yes	Yes
Guatemala *Corte de Constitucionalidad*	*Inter partes*	*Inter partes*	No	Yes

[32] Decision T-153/1998.

[33] Decision T-025/2004.

[34] Though the vast majority of concrete, decentralized, a posteriori cases in Colombia (i.e. *tutela* actions) have *inter partes* effects, in a few instances these cases, once they have reached the CCC, have resulted in the court declaring the existence of an "unconstitutional state of affairs" under which its decisions have *erga omnes* effects.

Peru *Tribunal Constitucional*	*Inter partes*	*Inter partes*	No	Yes

The table shows that, unlike the American Supreme Court, all Latin American constitutional tribunals have the power of abstract review of actions of unconstitutionality filed by some actor against legislation already in place. In this sense, they can all be considered "Kelsenian" courts falling into the European model described above. The comparative view, however, shows that all countries have more than this instrument for constitutional review. More specifically, all these courts have some sort of concrete review, whether centralized, as in Bolivia, Brazil, Chile, Guatemala, and Peru, or as an organ of last resort, as in all countries except Chile. Moreover, in countries such as Bolivia and (in the very special cases described above) Colombia, concrete review decisions may have effects beyond the specific parties involved in the case. The diversity of this mosaic of constitutional review (Navia and Ríos-Figueroa 2005) makes it clear how difficult it is to classify a particular country in one specific mode, since in each country various instruments operate simultaneously.

Table 3.2, in turn, specifies for all countries with constitutional courts which actors are entitled to file challenges against the constitutionality of an act which may result in an abstract review by these courts. The information for this table was obtained from each country's current constitution.

As shown in the table, access is most open in Colombia and Ecuador, where any citizen can file actions for abstract review of legislation.[35] This contrasts with the cases of Bolivia and Chile where only elected officials have the prerogative to challenge legislation before the court.

[35] The previous Ecuadoran constitution of 1998 stated that abstract review was accessible only for the President, a simple majority of Congress, the Supreme Court, provincial and local councils (for administrative acts only), and groups of 1,000 citizens, or an individual with the approval of the Ombdusman. See Ecuador, Constitution (1998): http://www.acnur.org/biblioteca/pdf/0061.pdf.

Close to these cases with a rather restricted access, Brazil and Peru have provisions by which both elected officials and organizations in society can gain access to abstract constitutional review.[36]

Table 3.2. Access to abstract review in Latin American constitutional courts

Country	Who can gain access?
Bolivia[37]	President, Congress, regional legislators and executives.
Brazil[38]	President, Congress, state legislatures, state Governors, Attorney-General, bar association, political parties, confederation of labor unions, national professional associations.
Chile[39]	25% of Congress.
Colombia[40]	Any citizen (no legal entities).
Ecuador[41]	Any citizen (individually or collectively).
Guatemala[42]	?
Peru[43]	President, Attorney-General, Ombudsman, 25% of Congress, 5000 citizens, regional authorities, professional councils.

3.3.1.2 Caseload

The Colombian Constitutional Court has played an active role in the political system. Between its first case in 1992 and the end of the first Uribe administration in August 2006, the CCC issued 4,058 decisions on abstract constitutional review, roughly over 270 decisions per year (see Table 3.3, below). Moreover, Manuel José Cepeda Espinosa, one of president Gaviria's advisors during the debates at the 1991 constitutional convention where he actively promoted the creation of the Constitutional Court, and himself a court justice between 2001 and 2009, estimates that abstract review decisions represent just one third of the CCC's caseload, the other

[36] The Guatemalan constitution does not specify who can challenge the constitutionality of general norms.
[37] Bolivia, Constitution (2009): http://bit.ly/f7hfD3, and Act 027/2010: http://bit.ly/h07ExY.
[38] Brazil, Constitution (1988): http://bit.ly/flCely.
[39] Chile, Constitution (1980, updated 2009): http://bit.ly/cXTTb9.
[40] Art. 242 of the Constitution.
[41] Ecuador, Constitution (2008): http://bit.ly/a2QD6U.
[42] Guatemala, Constitution (1985, with reforms in 1993): http://bit.ly/f9zOLd.
[43] Peru, Constitution (1993, with reforms until 2005): http://bit.ly/dKCNi3.

two thirds being concrete review cases, i.e. *tutela* decisions (Cepeda 2007: 58).[44] This amounts to over 800 decisions handed down by the court every year since its creation, around eight times the yearly average delivered by the U.S. Supreme Court (Epstein, Segal, and Spaeth forthcoming), and also over eight times the average number of constitutional review decisions typically issued every year by the Colombian Supreme Court before the creation of the CCC in 1991 (Cepeda 2007: 59).

Table 3.3 shows the number of abstract review cases decided by the court between 1992 and August 2006, at the end of the first Uribe's term (the time period covered by this dissertation). The data are disaggregated by case type grouped in the two abstract review instruments described above, that is, *a posteriori* cases triggered by Public Actions of Unconstitutionality (PAUs) filed by citizens (instrument #3), and *a priori* cases (instrument #4).

Table 3.3. Colombian Constitutional Court: Abstract review caseload (1992-2006)

Year	A posteriori (Instrument #4)			A priori, *ex officio* (Instrument #3)					Total
	Ordinary Act	Executive Decree	Constit. Amend.	Emergency Decree	Interntl. Treaty	Statutory Act	President Veto	Referend. /Plebiscite	
1992	13	23	1	7	7	-	-	-	51
1993	68	72	-	47	15	-	2	-	204
1994	126	65	-	11	12	6	2	-	222
1995	116	79	-	9	17	1	5	-	227
1996	190	107	-	13	31	1	5	-	347
1997	154	96	2	16	26	-	10	-	304
1998	151	65	1	-	16	-	6	-	239
1999	148	94	-	13	29	-	4	-	288
2000	219	129	-	-	35	3	10	-	396
2001	239	79	-	-	22	1	27	-	368
2002	210	84	3	9	18	3	11	-	338
2003	232	69	3	7	15	1	10	1	338
2004	206	63	20	-	26	3	10	-	328

[44] The court only has a discretionary docket in concrete cases; it selects for review a mere 2% of the total *tutela* cases filed nationwide (Cepeda 2007: 107).

Year	A posteriori (Instrument #4)			A priori, *ex officio* (Instrument #3)					Total
	Ordinary Act	Executive Decree	Constit. Amend.	Emergency Decree	Interntl. Treaty	Statutory Act	President Veto	Referend. /Plebiscite	
2005	168	49	23	-	9	5	6	-	260
2006	103	24	6	-	8	2	4	1	148
Total	2,343	1,098	59	132	286	26	112	2	4,058
%	57.7%	27.1%	1.5%	3.3%	7.0%	0.6%	2.8%	0.0%	

As I explained above, the court does not have discretionary docket over abstract review cases. Not only it studies *ex officio* emergency decrees, legislative acts international treaties, statutory acts, presidential vetoes, and calls for referenda, plebiscites, and constituent assemblies, but also it has to review challenges filed by citizens against already enacted legislation. Public Actions of Unconstitutionality can be filed by any citizen and must meet but a few formal requirements, including being filed in writing, specifying the norms that are challenged, the constitutional provisions that are allegedly violated by these norms, and the reasons argued for these alleged violations. This openness of access partly accounts for the comparatively large caseload of the court. The increasing number of cases shown in Table 3.3, above, especially between 1992 and 2000, also shows that it likely that the court's active behavior in safeguarding the constitution and especially protecting citizens' rights has created on plaintiffs incentives to increasingly resort to the court.

As Table 3.3 reveals, over 85% of the court's caseload in abstract review results from citizen action, especially from PAUs against ordinary legislation (58%) and executive decrees (27%). At least in principle, these are the cases in which the preferences of the Executive and/or its legislative coalition are more clearly in favor of a court decision upholding the norm, and therefore make up the sample of cases on which the following empirical chapters will focus.

3.3.2 Selection and retention of justices

Judicial independence is considered to be a necessary condition for an effective constitutional adjudication (Ríos-Figueroa 2011; Ríos-Figueroa and Staton 2009). Protecting citizens' rights and especially checking other branches of government require that constitutional judges enjoy a minimum level of insulation from internal and external political pressure so that they are "able to act sincerely — that is, to act on the basis of their own, sincerely-held preferences (whatever those preferences may be and regardless of the preferences of other relevant political actors) — without fear of facing reprisals from the public or the political regime" (Epstein, Knight, and Shvetsova 2001a: 29).[45] Institutions related to the appointment and retention of court members are central in providing such insulation (Feld and Voigt 2003; Ríos-Figueroa 2011; Ríos-Figueroa and Staton 2009; Epstein, Knight, and Shvetsova 2001a; Horowitz 2006). This section briefly discusses the theoretical implications of these institutions for the level of independence of courts, and describes them, in comparative perspective, for the case of the Colombian Constitutional Court.

3.3.2.1 Court size

A first institutional feature, rarely considered in the literature, concerns whether the size of the court is determined in the constitution or has been specified in ordinary legislation (Ríos-Figueroa 2011; Lara Borges, Castagnola, and Pérez-Liñán 2010). To the extent that rules governing the level of insulation of the court are "powerful in inverse proportion to the costs involved in coordinating against them" (Ferejohn, Rosenbluth, and Shipan 2007: 728), this

[45] Some authors refer to this level of insulation as judicial *autonomy* (Ríos-Figueroa and Staton 2009).

distinction is important given that it determines how difficult it is for external political actors, typically the executive and the legislature, to modify the size and composition of the court. Since constitutional amendments often require qualified majorities or more complex approval procedures than ordinary legislation, courts tend to be more insulated from external pressure when the number of its justices is established in the constitution (Ríos-Figueroa 2011; Lara Borges, Castagnola, and Pérez-Liñán 2010).

The Colombian Constitution approved in 1991 does not specify the number of justices that should seat in the CCC; it merely states that the court should have an odd number of justices.[46] Moreover, a transitory article in the Constitution provided that a provisional court of seven should operate during a year awaiting legislative action by Congress to specify the definite court size. It was only in mid-1992 that the legislature, within the bill establishing the rules of operation of the Senate and the House, included a clause setting the number of CCC justices at nine.[47] In 1996, a statutory act regulating the administration of justice confirmed this provision.[48] This institutional feature, also present in the Bolivian *Tribunal Constitucional Plurinacional*, might expose the CCC to pressures from the other branches of government which, at least in principle, could (make credible threats to) increase or decrease the court size (court-packing) without special majorities or intricate approval procedures. This weakness notwithstanding, no serious proposal to change the number of the CCC's justices has been introduced since its

[46] Colombian Constitution, Art. 239.
[47] Act 5, 1992.
[48] Act 270, 1996, of "Administration of Justice". A statutory act is a special piece of legislation approved by Congress to regulate very specific matters including citizens' rights and their protection, the administration of justice, and the organization of political parties and elections, among others. The requirements for its enactment are more demanding than those for ordinary legislation since it must be approved by an absolute majority of Congress members in each chamber (not only by those attending at the moment of approval) and must be reviewed *ex-officio* by the Constitutional Court (Colombian Constitution Arts. 152 and 153).

creation in 1991. The second column in Table 3.4 shows the number of justices for all Latin American constitutional courts.

3.3.2.2 Appointment

According to some authors who have developed indices to measure *de jure* judicial independence, courts are more autonomous when its members are selected either by the judiciary itself or by at least two different actors in the political system or in civil society. In the latter case, the more actors are involved in the selection process, the more independent the court. In contrast, courts are less insulated from external pressure when justices are appointed by a single political actor outside the judiciary (Lara Borges, Castagnola, and Pérez-Liñán 2010; Feld and Voigt 2003; Ríos-Figueroa 2011).

When more than one actor or organ are in charge of appointing judges in a court, the procedure may be by *parity*, when each of these actors appoints part of the seats, or by *coordination*, when there must be some sort of agreement among the organs involved in the selection process. In the first case, the pool of candidates to the bench widens and it is likely that the court ends up having justices of different types and with different perspectives beyond traditional judges who have pursued a career in the judiciary, a feature that, as I described above, has been considered important for constitutional review (Ríos-Figueroa 2011; Ferejohn and Pasquino 2004; Guarnieri and Pederzoli 2002). When appointing actors must coordinate to select judges, in contrast, the pool of candidates tend to shrink (Ríos-Figueroa 2011).

In general, the wide variety of procedures to select judges for high courts around the world involve variations around one of the following methods: (a) appointment by *parity* among a set of actors (e.g. executive, legislature, judiciary, civil society organizations); (b) appointment by *coordination* among a set of actors; (b) nomination by (parity or coordination of) a set of

actors and confirmation by another actor (typically the legislature); (c) appointment by the judiciary itself; (d) popular election (Ríos-Figueroa 2011; Epstein, Knight, and Shvetsova 2002). The third column in Table 3.4 shows that Latin American constitutional courts use combinations of these basic procedures to select their members.

Table 3.4. Selection and retention of justices in Latin American constitutional courts

Country	Number of justices	Appointment	Length of tenure & Re-election
Bolivia	7 (of which 2 must be indigenous)[49]	Popular vote out of candidates selected by Congress	6 years, no immediate re-election
Brazil	11	The president nominates, the Senate confirms (absolute majority)	Life tenure
Chile	10	Parity: president (3), 2/3 of Congress (4), Supreme Court (3)	9 years (partially renewed every 3 years), no re-election
Colombia	9[50]	Parity + confirmation: Senate selects from three-candidate lists nominated by President (3), Supreme Court (3), Council of State (3)	8 years, no re-election
Ecuador	9	Coordination: selection by a board with six designees by the president (2), Congress (2), Transparency and the Social Control branch (2)	9 years (partially renewed every 3 years), no immediate re-election
Guatemala	5	Parity: Supreme Court (1), Congress (1), President (1), University council (1), Bar association (1)	5 years (no explicit prohibition of re-election)
Peru	7	Coordination: 2/3 of Congress	5 years, no immediate re-election

Prior to the 1991 Colombian constitution, new justices for the Supreme Court were selected by sitting members of the same court, a procedure called co-optation.[51] The constitutional convention, consistent with the decision of creating a constitutional court outside the judiciary, made a shift in the selection process and sought to provide a more political origin for its justices.[52] Article 239 of the Constitution provides that the CCC justices are nominated by

[49] The number is not specified in the Constitution but in Act 027, 2010 "of the Plurinational Constitutional Tribunal".

[50] The Constitution requires an odd number of justices and provides for a provisional seven-member court. Act 5, 1992 and Statutory Act 270, 1996 set the number of justices at nine.

[51] The Colombian Supreme Court still uses co-optation to select its members.

[52] In fact, one of the criticisms made to the appointment process approved for the Constitutional Court was that it would politicize the exercise of constitutional adjudication (Cepeda 1993a).

parity between the president, the Supreme Court, and the Council of State (nominating three justices each), and confirmed by the Senate. More specifically, for each of the court seats, the president, the Supreme Court, or the Council of State submit a three-candidate list from which the Senate makes the selection. The institution which has originally nominated a retiring justice or a justice who has finished the term in court is in charge of submitting to the Senate a new three-candidate list from which the latter must select the replacement. This procedure guarantees that at each time the court is "balanced", that is, it has three justices appointed by the president, three by the Supreme Court and three by the Council of State.

As I explained above, the constitution included transitory provisions for the selection of a seven-member provisional court awaiting legislative regulation on the ultimate number of justices. Of the seven justices of this provisional court, which operated between February 1992 and January 1993, two were directly appointed by the president, one by the Supreme Court, one by the Council of State, and one by the Inspector General. These five justices, once they took their seats on the bench, selected the remaining two members of the court from two lists of three candidates submitted by the president. Table 3.5 lists all the justices appointed to the CCC between 1992 and 2006, along with information on which actors nominated them and the time periods they served in the court.

Table 3.5. Justices of the Colombian Constitutional Court: Nominations and tenure (1992-2006)

Justice	Nomination[53]	Began	Ended
Ciro Angarita B.[54]		1992	1993

[53] Since the nomination procedure for the provisional court operating between 1992 and 1993 was atypical and was made according to transitory provisions in the Constitution, I do not include in this column nomination information for justices appointed to this provisional court.

[54] Justice Ciro Angarita Barón was nominated by the president and selected as a member of the provisional court by the five directly appointed justices. In 1993 he was included of one of the lists nominated by president Gaviria, but he was defeated in the Senate by another member of that list, Hernando Herrera Vergara.

Justice	Nomination[53]	Began	Ended
Simón Rodríguez R.[55]		1992	1993
Jaime Sanín G.[56]		1992	1993
Eduardo Cifuentes M.[57]	President	1992	2000
Alejandro Martínez C.[58]	President	1992	2001
José G. Hernández[59]	Supreme Court	1992	2001
Fabio Morón D.[60]	Supreme Court	1992	2001
Jorge Arango M.	Supreme Court	1993	1998
Hernando Herrera V.	President	1993	1999
Vladimiro Naranjo	Council of State	1993	2000
Antonio Barrera C.	Council of State	1993	2001
Carlos Gaviria D.	Council of State	1993	2001
Alfredo Beltrán S.	Supreme Court	1998	2006
Álvaro Tafur G.	President	1999	
Rodrigo Escobar G.	Council of State	2000	
Eduardo Montealegre	Council of State	2001	2004
Jaime Araújo R.	Council of State	2001	
Manuel J. Cepeda	President	2001	
Marco G. Monroy	President	2001	
Jaime Córdoba T.	Supreme Court	2001	
Clara Inés Vargas	Supreme Court	2001	
Humberto Sierra P.	Council of State	2004	
Nilson Pinilla P.	Supreme Court	2006	

[55] Justice Simón Rodríguez Rodríguez was appointed by the Council of State as a member of the provisional court. He was later a member of one of the lists nominated by president Gaviria in 1993, but he was defeated in the Senate by another member of that list, Alejandro Martínez Caballero.

[56] Justice Jaime Sanín Greiffenstein was one of the two members of the CCC directly appointed by president Gaviria to the provisional court.

[57] Justice Eduardo Cifuentes Muñoz was directly appointed by Inspector General Arrieta to the provisional court. One year after, he was included in one of the lists nominated by president Gaviria in 1993 and selected by the Senate as a member of the first court.

[58] Justice Alejandro Martínez Caballero was directly appointed by president Gaviria to the provisional court. One year later he was included in one of the president's lists and selected by the Senate as a member of the first court.

[59] Justice José Gregorio Hernández was nominated by the president and selected as a member of the provisional court by the five directly appointed justices. In 1993 he was included of one of the lists nominated by the Supreme Court, and he was selected by the Senate as a member of the first court.

[60] Justice Fabio Morón Díaz was directly appointed by president Gaviria to the provisional court. One year later he was included in one of the lists nominated by the Supreme Court, and selected by the Senate as a member of the first court.

3.3.2.3 Length of tenure and re-election

Courts independence is not determined by the appointment procedure alone but by its combination with judges' length of tenure (Ríos-Figueroa and Staton 2009).[61] In fact, as the length of tenure increases, courts obtain more autonomy (Horowitz 2006) and the appointment procedure becomes irrelevant. Ríos-Figueroa (2011) sustains that, in general, judges are more independent when their length of tenure is longer than that of their appointers.

Life-tenured justices, as those in the U.S. Supreme Court, given that they are not involved in ordinary politics and have no progressive ambition, are considered to be more autonomous (Segal and Spaeth 2002; Epstein, Knight, and Shvetsova 2002).[62] However, in the context of the recent trend of constitutional review, especially in those cases in which it is exerted by separate, specialized bodies, granting judges life tenure is rather the exception than the norm; most constitutional courts around the world have justices appointed for fixed terms (Epstein, Knight, and Shvetsova 2002; Ferejohn and Pasquino 2004). In fact, of the seven constitutional courts in Latin America, only the Brazilian *Supremo Tribunal Federal* has justices appointed for life (until their mandatory retirement age), as shown in the fourth column of Table 3.4, above.

Judicial autonomy also depends on whether justices can be re-elected —either immediately or after a term— or not. Renewable terms create re-election incentives in judges which may induce them to act strategically. These incentives may we somewhat weaker if justices can be re-elected only after a term has elapsed, Fixed, non-renewable terms may provide more independence, although the incentive to pursue a public career after leaving the bench may

[61] Some indices of *de jure* judicial independence include whether the constitution guarantees the length of tenure of judges (see Keith 2002).

[62] Epstein, Knight, and Shvetsova (2001a) have argued, however, that life-tenured justices who originally may have shared the views of the regime under which they were appointed, can eventually fall out of line of subsequent regimes' preferences. In this case, they might see their decisions overturned and therefore may be induced to act strategically.

also induce justices to act strategically, especially when tenures are shorter (Epstein, Knight, and Shvetsova 2001a) or when justices reach the court at a short age.

Justices are appointed to the Colombian Constitutional Court for eight-year, non-renewable terms, a tenure which is longer than that of courts in Bolivia, Guatemala, and Peru, but shorter than in the cases of Chile, Ecuador, and of course Brazil.[63] Given that the president and Congress in Colombia have four-year terms, this institutional setting provides in principle a significant level of autonomy for justices, according to the criteria suggested by Ríos-Figueroa (2011).

Nevertheless, a constitutional amendment promoted by the executive and approved by Congress in 2004 lifted the ban that the 1991 constitution had placed on presidential re-election. This change, which allowed president Uribe to be re-elected, has altered the system of checks and balances and may have weakened judicial independence and constitutional review since it opened the possibility for the same executive-legislative coalition to influence the selection of a greater proportion of court justices. Even though the president still can appoint only one third of the court members, given that he may stay longer in office he can exert, through his legislative coalition, a stronger and wider influence on the Senate's selection of candidates nominated by the Supreme Court and the Council of State. In fact, had Uribe not been re-elected in 2006, he would have not been able to nominate a single CCC justice and only two of them would have been appointed during his first administration, between 2002 and 2006 (see Table 3.5, above). In contrast, by the end of Uribe's second term in 2010 all justices had been selected under his rule (Rubiano 2009). Moreover, the president's coalition in Congress approved in 2009 a bill calling for a referendum aiming at allowing a second presidential re-election. The Constitutional Court

[63] Prior to the 1991 constitution, justices of the Colombian Supreme Court were appointed for life. The new constitution stated an eight-year non-renewable term.

had to review this bill *ex officio* and found a series of flaws in its legislative approval procedure. The CCC also argued that a third presidential term would create a further unbalance in the political system and would concentrate excessive power in the hands of the executive. The referendum was struck down in February 2010 by a 7-2 court decision, and Uribe could not run for office again.[64]

3.3.3 Decision making and decisions

Procedures for decision making in the Colombian Constitutional Court differ depending on whether the controversy to be decided is a *tutela* (concrete review) or a case for abstract adjudication. These procedures are regulated by Executive Decrees 2067 and 2591, 1991 and by the internal regulations adopted by the court itself.[65]

3.3.3.1 Concrete review: the *tutela* action

One of the major innovations introduced by the constituent assembly in 1991 was the creation of the *tutela* action. Under the new constitution, citizens who feel that their rights are being threatened or violated can file one of such actions asking a judge to review their cases. The judge must then issue a decision within ten days, which makes the *tutela* action an extremely powerful tool for the protection of individual rights. These cases are eventually forwarded to the Constitutional Court by lower level judges and tribunals around the country.

Between 1992 and 2010, the number of such cases received by the court every year has been estimated between 70,000 and 400,000 (Jaramillo and Barreto 2010) out of which the court

[64] See "La Corte constitucional le dijo 'no' al referendo reeleccionista: Era Uribe terminará el 7 de agosto" (*El Tiempo Online Archive* 2/26/2010: http://www.eltiempo.com/archivo/documento/CMS-7304227)

[65] Internal regulations are adopted through Court Agreements.

has the discretion to select those that will be reviewed. A two-justice panel (called a "selection chamber"), appointed by the CCC plenum every month,[66] makes this initial decision, for which it has a 30-day term from the moment the case has been reported as officially received by the court. Although the CCC selects for review just around 2 percent of the total amount of *tutela* cases, they represent two-thirds of the court's caseload (Cepeda 2007: 107).[67] Those selected cases are reviewed by three-justice panels (called a "review chambers"), appointed by the plenum. Each court justice acts as the president of one of those chambers which also includes the two following justices in alphabetical order. In total there are nine selection chambers (each one ruled by each court justice) which make a final decision by a two-third majority. The court can decide for or against the plaintiff, and can uphold or reverse the ruling made by a lower level judge.[68] In a few instances, when the case leads to a decision aimed at changing or unifying the court precedent, such decision is made by a majority of the entire court.

As I mentioned above, the introduction of this mechanism has proven to be a powerful instrument for the protection of individual rights and has been widely used by ordinary citizens who have found, perhaps for the first time in Colombian history, that the constitution can help them solve their everyday problems. Moreover, in times of economic recession, *tutela* actions have been resorted to by citizens in order to preserve their social rights, including healthcare, pension funds, and salaries (Cepeda 2007; Uprimny 2006). The court has made highly salient concrete review decisions, including, among many others, the protection of unionized workers

[66] Initially, every month two justices were appointed to the selection chamber in alphabetical order, but since 2007 the selection is made by drawing lots (Court Agreement 1, 2007).

[67] There are few analyses of the court's agenda-setting process on concrete review (see Jaramillo and Barreto 2010). Moreover, the systematic study of the factors influencing the court's decision to select certain *tutela* cases over others is still a pending task for national and international scholars.

[68] The court rules in favor of the plaintiff in around 60% of the cases (Cepeda 2007: 59).

against discriminatory practices by their employers,[69] the requirement to public and private healthcare institutions to provide patients with treatments that may have not been included in their healthcare plans if those treatments are deemed to be crucial to preserve their fundamental rights (including but not limited to HIV patients),[70] and the order to the national government to address the well-being of people displaced by the armed conflict.[71] Some of these decisions have had effects beyond the parties involved in the specific controversy. These salient cases notwithstanding, most concrete review decisions do not entail a clear political confrontation with other branches of government. In general, the more politically charged cases occur in abstract review, which partly explains why I focus the empirical analysis of this dissertation on the latter.

3.3.3.2 Abstract review of legislation

As I mentioned before, the court does not have a discretionary docket regarding abstract review cases. This is obvious for those cases which require *a priori*, *ex officio* review by the court, namely emergency decrees, bills approving international treaties, statutory acts, bills calling referenda, plebiscites, and constituent assemblies, and presidential vetoes on grounds of unconstitutionality (see Table 3.3, above). On the other hand, public actions of unconstitutionality filed by citizens against ordinary legislation, executive decrees, and constitutional amendments (abstract *a posteriori* cases), as long as they meet some basic formal requirements, must also be addressed by the court.

[69] Decision SU-342/1995.
[70] Decisions T-534/1992 and SU-480/1997.
[71] Decisions SU-1150/2000 and T-025/2004.

Once they arrive to the court, the Chief Justice distributes the cases among justices in alphabetical order, aiming at keeping the workload balanced based on the number of legislative acts being challenged, their complexity, the requirements of evidence, and so on. The justice assigned to a case, called rapporteur (*sustanciador*), or opinion writer has ten days to decide on whether the case meets the filing requirements and can be admitted for review. If the case is admitted, the rapporteur can request the collection of pieces of evidence relevant to the case (e.g. the transcripts and proceedings of the bill approval process in Congress).

Once the case is admitted, it is forwarded to the Inspector General (IG) who has 30 days to submit his suggestion on how the court should rule.[72] All abstract review cases require the Inspector General to suggest a ruling to the court. This suggestion becomes an important piece of information regarding the constitutional merits of the case. The IG can also play a more political role in signaling the court whether the latter can count on the IG as a strategic ally for the final decision. In any case, between 1992 and 2006 the CCC reached a decision which was consistent with the IG's suggestion in around 70 percent of the cases. Chapter 5 includes the empirical analysis of the impact of the IG on the court decision making.

The opinion writer can request the Executive and Congress to submit in writing their arguments supporting the constitutionality of the challenged norm. A majority of the court, on demand by any justice, may also call a public hearing in which the Executive and Congress can orally present these arguments. In addition, the rapporteur can ask public agencies, private

[72] The *Procuraduría General de la Nación* (Office of the Inspector General) is an independent, administrative institution overseeing the behavior of public officials and the proper operation of government institutions and agencies. It is also charged with the safeguarding of people's constitutional rights, guaranteeing Human Rights protection, and intervening in the name of the people in the defense of the public interest. It is not to be confused with the *Fiscalía General de la Nación* (Attorney General or Prosecutor General) which in other countries such as Mexico is also named *Procuraduría*.

organizations, and/or experts to submit *amici curiae* briefs regarding the matters of the case. *Amici* can also be summoned by a majority of the court to expose their views in public hearing.[73]

Following the advisory opinion rendered by the IG, the rapporteur has another 30 days to draft an opinion which is then submitted to the court to be discussed in secret conference, and eventually to be voted. If the original opinion draft does not reach at least five votes, the president of the court can request a justice among those who voted against it to draft a new opinion to reflect the new majority decision. Unlike most European constitutional courts (see Vanberg 2005), it is possible to keep record of individual votes in CCC decisions. Those justices who agree with the final decision but do not fully agree with the majority opinion can write an individual or collective concurring opinion. Likewise, those who disagree with the majority decision write individual or collective dissenting opinions.

Court decisions may vary according to the extent to which they uphold or strike down the challenged statute or specific provisions within it. First, the court may make a decision of *inhibition*, that is, a decision not to decide on the constitutional merits of the case. This may happen when a majority of the court finds that, despite its initial admission by the rapporteur, a citizen Public Action of Unconstitutionality was not properly submitted (e.g. when the constitutional charges are not well argued). In some salient cases, a decision of this type can be (and has been) interpreted as a signal that the case is not closed and as an invitation for litigants to file a new controversy. This was clearly the case in 2005 when the court made no decision (a decision of inhibition) in a challenge filed against the norm that criminalizes abortion. The suit argued that women choosing to have an abortion should not be prosecuted in three specific cases:

[73] For an analysis of the impact of *amici curiae* briefs on the CCC decisions, see Arteaga-Iriarte and Rodríguez-Raga (2010).

when pregnancy was a result of rape, non-consensual sex, or unauthorized artificial insemination, when there was evidence of fetus malformation, and when pregnancy entailed serious threats for the woman's health.[74] The press release issued by the court announcing this (no) decision described the alleged flaws in the suit and even instructed litigants on how to file a new, improved one.[75] A new PAU was indeed presented in 2006 and the challenged norm was found *conditionally constitutional* by the court, that is, criminalization of abortion was considered constitutional *except* in the three cases mentioned above.[76]

Second, the court may find that the controversy has already been settled in a previous decision, and may therefore make a decision of *stare decisis*. In these cases, the CCC confirms its own precedent and includes in the final decision the reference to those previous decisions on which the review of the case should be based. This generally occurs when multiple suits are filed against a particular statute after the court has already ruled on the same particular constitutional charges against such norm. In most cases of *stare decisis*, the precedent had been recently set by the court, typically within the previous year.

Besides these two types of decisions in which the merits of the case are not explicitly addressed or in which the case is referred to a previous decision, the court may find the statute *constitutional* in its entirety. The court can also rule that the norm is *partially constitutional*, that is it may find that some of the challenged articles or sections of a statute are constitutional whereas some others are incompatible with the constitution and must be therefore excluded. The

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[74] Decisions C-1299/2005 and C-1300/2005.

[75] The Court usually announces its decisions in salient cases through press releases before the official, written decision is handed down. For this case, see the court's press release of 12/07/2005: "Comunicado de prensa sobre las sentencias relativas al aborto" (http://www.elabedul.net/Documentos/Temas/Aborto/Comunicado.pdf, last checked 11/13/2010). See also Jaramillo and Alfonso (2008: 61)

[76] Decision C-355/2006.

court may also modulate its decision by specifying that a norm can only be considered constitutional if it is interpreted in a particular way, that is, the court may rule that the norm is *conditionally constitutional*. This was the case in the 2006 decision on abortion in which the court upheld the norm that criminalizes abortion as long as exceptions were made in the three cases mentioned above. Finally, the court may struck down the entire statute as *unconstitutional*, in which case such statute is considered void and excluded from the nation's legal framework.

Table 3.6 shows that in half of the cases reviewed between its origin in 1992 and the end of the first Uribe administration (August 2006) the court upheld the challenged norms, and only in 12 percent of the cases it struck down the norms entirely. In almost two of every ten cases the court found unconstitutional some of the challenged sections of the statute or conditioned their constitutionality to a specific interpretation.

Table 3.6. Colombian Constitutional Court - Abstract review by decision type (1992-2006)

Year	Inhibition	Stare decisis	Constitutional	Partially/ Conditionally constitutional	Unconstitu-tional	Total
1992	2	-	32	10	8	52
1993	6	13	119	38	28	204
1994	8	28	114	46	26	222
1995	9	16	128	36	38	227
1996	10	32	200	63	42	347
1997	12	39	158	44	51	304
1998	13	18	132	56	21	240
1999	24	40	135	42	47	288
2000	25	55	195	77	42	394
2001	30	45	186	76	31	368
2002	27	37	166	82	27	339
2003	23	42	148	99	26	338
2004	31	47	145	53	50	326
2005	40	33	109	41	38	261
2006	26	16	73	20	13	148

Year	Inhibition	Stare decisis	Constitutional	Partially/ Conditionally constitutional	Unconstitu-tional	Total
Total	286	461	2,040	783	488	4,058
%	7.0%	11.4%	50.3%	19.3%	12.0%	

3.4 CONCLUSION

This chapter presents a brief account of the history of constitutional review in Colombia and of the political circumstances under which the Constitutional Court was established in 1991. It also describes the institutional structure of the court in a comparative perspective and provides descriptive data regarding the court's composition, its caseload, and the decisions it has handed down between 1992 and 2006, the time period on which this dissertation is focused.

Following the trend of expansion of constitutional adjudication in the world and, more specifically, in Latin America, the CCC was created as a specialized body outside the traditional judiciary. As such, it has managed to emerge as a key institution in the protection individual and collective rights and in the task of checking the other branches of government. As president Gaviria, its first and most enthusiastic sponsor, intended, the court has become the "soul of the constitution"[77] and one of the most powerful yet understudied courts in Latin America (Helmke and Ríos-Figueroa 2011b: 22).

The normative importance of the court's duty as the guardian of the constitutional supremacy does not make of the court an institution acting above the political fray. On the

[77] Those were the words used by Gaviria in his speech addressed during the ceremony in which the first CCC justices took oath on November 29, 1991 (cited in Cepeda 1993a: 377-379).

contrary, as I will show in the following chapter, the court has been at the very center of several political controversies from the moment it started exerting concrete and abstract constitutional review. The court's activism has not been exempt from harsh criticisms made by political observers and scholars in the fields of law, politics, and economics. Moreover, it has received direct, public attacks by government officials, members of the legislature, and even judges from other high courts in response to its rulings. This contentious interaction with other players in the political scene is precisely what motivates the theory presented in Chapter 2. The court does not act in a vacuum and its decisions are conditioned by the political environment in which they are made. This chapter thus provides the institutional context for the empirical assessment of such theory included in subsequent chapters of this dissertation.

4.0 MAKING THE CASE FOR THE APPLICATION OF THE STRATEGIC PRUDENCE THEORY IN THE COLOMBIAN CASE

After having set the theoretical model (Chapter 2) and having described the origin and institutional characteristics of the Colombian Constitutional Court – CCC (Chapter 3), this chapter answers the following questions: Is it worth using the CCC to test the theory of judicial strategic prudence? What kind of test would that be?

In other words, the goal of this chapter is to assess to what extent the CCC fits the strategic account of judicial behavior sketched above and whether or not a systematic test of that theory is justified in the Colombian case. The answers to these questions are not obvious. It could be argued that, in many respects, the CCC does not fit the stereotypical model of weak Latin American courts. In fact, the court has a well-deserved reputation for its activism, its progressive and liberal positions, and its independence. Many examples regarding the CCC's active protection of civil liberties and of economic and social rights support that view.

Moreover, the court has successfully checked the power of the Executive and the legislature on several occasions. On February 26, 2010, for instance, the court struck down a bill calling a referendum which would have asked Colombian citizens whether or not then president Uribe could run for a third term. Despite the enormous approval rates enjoyed by Uribe at the time, the CCC, in a 7-2 decision, not only found several procedural flaws in the approval of the bill in Congress but also claimed that the approval of a second presidential re-election would

entail a substitution of the constitution, something that, according to the court's interpretation and precedent, could only be achieved through a constituent convention.[78] In contrast to what happened in the case of the Peruvian Constitutional Tribunal's decision against Fujimori's bid for a third term in 2000, president Uribe complied with the court's decision and on May, 2010, a presidential election was held under normal conditions.

Is this court, despite its ostensible independence, willing or compelled to engage in strategic behavior? If so, does justices' behavior follow the rationale outlined in Chapter 2? This chapter addresses this question. After a short methodological note on the evidence used in the chapter, the second section illustrates the activist and autonomous record of the CCC by describing several instances in which the court made bold decisions protecting civil liberties and economic and social rights, with profound policy implications, as well as instances in which the court checked the powers of the legislature and especially of the president in strongly controversial cases. The third section shows that, although many of the constraints imposed on other Latin American courts, such as threats or actual instances of shutting down or packing the court, or of impeaching and dismissing individual justices, are not present and are not even conceivable in Colombia, there are factors in the political environment which might influence justices' behavior and make them weight their policy preferences against the political costs of making decisions against the Executive. In the conclusion I argue that, although the test I propose in the next chapter is based on a quantitative analysis of all individual justices' decisions made in the CCC between 1992 and 2006, and in this sense it is not a case study analysis,

[78] Court Decision C-141/2010. For a video clip showing Chief Justice Mauricio González (who was in the minority) announcing the decision to the media and the public, see http://www.wradio.com.co/nota.aspx?id=959651; http://www.caracol.com.co/nota.aspx?id=959651.

assessing the theory of strategic prudence in Colombia fits the logic of the crucial case method proposed by Eckstein (Eckstein 1975; see also Gerring 2007).

4.1 METHODOLOGICAL NOTE ON THE EVIDENCE USED IN THIS CHAPTER

In this chapter, especially in section 4.3, I make use of qualitative evidence from two different sources. On the one hand, a review of the press coverage on the court and on its relationship with its political context from 1992 to 2006 highlights the most prominent cases put under the court review and their repercussions with regards to the relationship of the court with its political environment. On the other hand, I use information from semi-structured interviews with former court justices, assistant justices and law clerks which uncovers the views held from inside the court on its interaction with the other branches of government. This evidence is not a systematic empirical test of the theory, among other things because both the press reports and the former court members' recollections are likely to be biased towards the most critical moments of the court's operation and to refer to a sample which is hardly representative of the court's caseload. It is my contention, however, that the implications of the information obtained from these sources deserves further investigation and makes it worthwhile to undertake a quantitative empirical analysis of the conditions under which justices are more likely to strike down legislative acts and executive decrees, that is, to perform a systematic empirical test of the formal theoretic model developed in Chapter 2.

In order to gather the press coverage on the court, I checked the online archive of *El Tiempo*, the main national newspaper,[79] and, to a lesser extent, of *Semana*, the main weekly magazine focusing on current events, political news, and so on.[80] Figure 4.1, which shows the number of annual matches to the keywords "*Corte Constitucional*" in the *El Tiempo* online archive between 1990 and 2008, illustrates the somewhat increasing relevance of the Constitutional Court in the nation's political arena.[81]

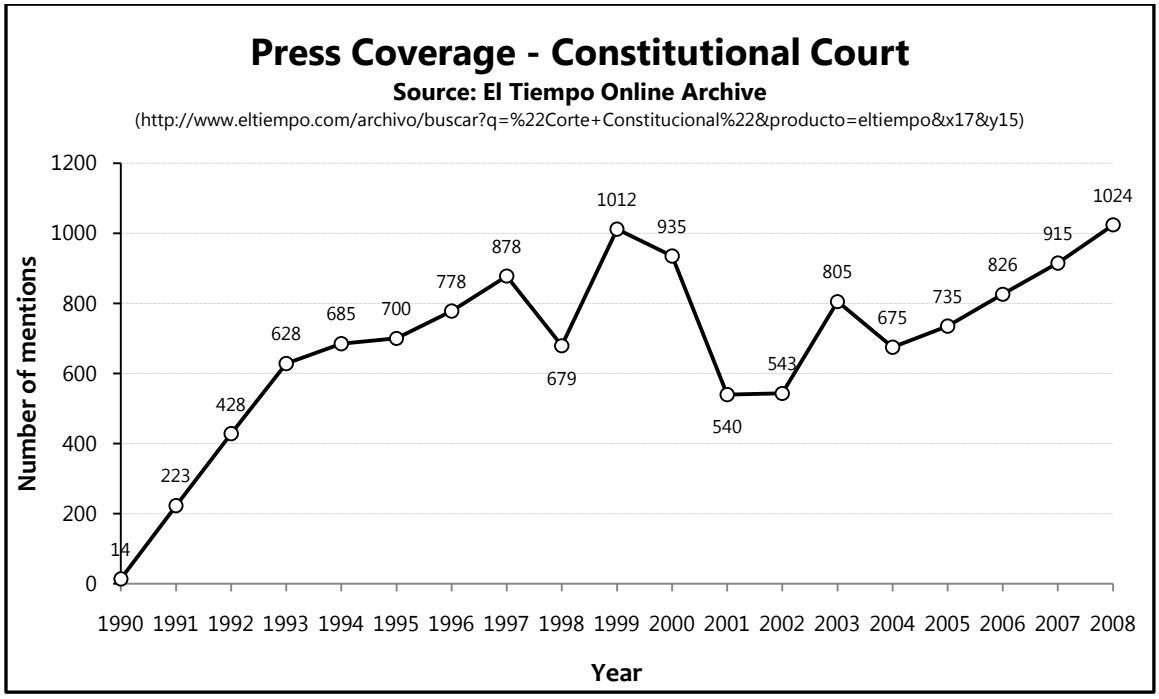

Figure 4.1. Press coverage on the Constitutional Court (1990-2008)

The most fruitful searches, however, were obtained when keywords related to legislation aimed at amending the court's competences ("*reforma judicial*"), to clashes with the Executive

[79] The *El Tiempo Online Archive*'s web page is http://www.eltiempo.com/seccion_archivo/index.php.

[80] *Semana* is perhaps the Colombian equivalent of the American *Time* or *Newsweek* magazines. Its website is http://www.semana.com/Home.aspx.

[81] The trend shows a decrease in coverage in electoral years 1998 and 2002.

("*choque de poderes*" or "*choque de trenes*"), or to specific topics such as abortion ("*aborto*"), housing (e.g. "*UPAC*"), or states of emergency ("*conmoción interior*" or "*emergencia económica*") were added to the keywords mentioned above.[82] The review of the press articles obtained through those searches was used to illustrate the events described in this chapter and to draft some of the questions of the questionnaire used in the interviews.

During the first quarter of 2011, I conducted interviews with seven former justices and five former assistant justices and law clerks who served in the court in different moments between 1992 and 2006.[83] The general purpose of the interviews was to obtain the views, perceptions, and interpretations of the actors involved in the CCC during the period covered by my study.

In order to be able to obtain the respondents' candid recollections of their experiences and perceptions while they worked at the court, I let them know that the interviews were confidential and that I would include no information allowing the identification of the authors of the quotations and paraphrases included here. After each quotation I employ a conventional notation including letters and numbers, as follows: Justices are assigned ids J1 through J7, and assistant justices and law clerks are assigned the ids LC1 through LC5. This notation will allow the reader to follow respondents' answers related to different issues. Given that 'male' is the modal gender of my interviewees, I use the male pronouns regardless of respondents' actual gender (see Vanberg 2005). Assigning a letter and a number to each respondent would not be

[82] Ana María Montoya and Camila Osorio were extremely helpful in conducting this review of the press coverage.

[83] Of the former justices interviewed, three belonged to the 'first' court (roughly between 1993 and 2001), and four belonged to the 'second' court (roughly between 2001 and 2009). Assistant justices and law clerks typically served during both terms, working for more than one justice.

enough protection for such confidentiality if I included a list with their names in an appendix. I therefore omit such list.

Although some authors advice not to tape elite interviews, I preferred using a tape recorder to be able to achieve a better rapport with each interviewee; taking notes during the interview would have made it difficult for me to keep eye contact with the respondent and to pay full attention to his answers. Also, I did not trust my memory enough to wait for the interview to end to make notes; I would risk missing important points and verbatim expressions which I wanted to capture. All respondents found no problem in using a tape recorder and, although a few of them were initially too aware of being recorded, as the interview went on they felt more at ease and ended up providing several candid remarks which, regardless of the presence of the tape recorder, were possible because of the confidentiality guaranteed at the beginning of each interview (Zuckerman 1972).

I include in Appendix A the English translation of the questionnaire based on which the interviews were conducted. The questionnaire contains thirty-three questions dealing mainly with (a) respondents' general descriptions of the relationship between the court and the Executive; (b) respondents' recollections, perceptions, and interpretation of specific events of tension and confrontation between the court and the executive that I had previously identified from the press review; (c) respondents' interpretations of the findings I obtained from the quantitative analysis of abstract review decisions.I did not ask all questions to all respondents because in some cases the conversation on some issues took longer than expected and the interviewee ran out of time. In other cases, answers to some questions would have made asking others redundant. Moreover, since some questions referred to specific events, they were only

asked to those respondents who were in the court at the time those events occurred.[84] Also, not all interviews were conducted in the same order specified in the base questionnaire; the course of the interview determined whether or not I jumped to some issues which were supposed to be asked later on. In those cases, I usually was able to go back to the skipped questions.

Overall, despite the fact that these were elite interviews and that, in general, these were rather busy persons, obtaining the appointments for interviews was relatively easy (usually less than a week elapsed between the moment I asked for an interview and the moment I got the appointment). Also, respondents were rather generous with their time.[85]

4.2 A WELL DESERVED REPUTATION OF ACTIVISM AND INDEPENDENCE

Colombia has been considered one of the success stories of judicial activism and autonomy in Latin America. Some analysts include it among those countries "in which, to different degrees, constitutional judges have been willing and able both to enforce rights and to arbitrate interbranch relations" (Helmke and Ríos-Figueroa 2011b: 23). In a continent where strong presidents have been able to sanction judges and courts as a result of judicial decisions that they have disliked, and where those sanctions have been "far more daunting than simply having their decisions overturned" (Helmke and Ríos-Figueroa 2011b: 18), the CCC has been able not only to protect the so-called negative liberties by limiting state action against individual civil and political rights, but also to enforce positive rights which require state provision of services for their protection. Moreover, it has been able to vigorously check the other branches of

[84] The questionnaire in Appendix A indicates which questions were to be asked to whom.
[85] Interviews lasted between 38 and 98 minutes, with an average of over an hour (63 minutes).

government, not only by reviewing Congress legislation and even constitutional amendments but also Executive use of emergency powers.

4.2.1 An active court protecting citizen rights

The writ of *tutela*, introduced in the constitution in 1991 (and described in Chapter 3), played a key role in the protection of citizen rights. Not only it was created as a mechanism by which the judicial system must act promptly in concrete cases of alleged violations of those rights (the judge or court to which the action is filed must make a decision within ten days), which in itself is a significant improvement in the provision of justice given that regular cases in Colombia can take months and often years to be decided, but the *tutela* has also meant a major step in opening access to the system of justice given that very little formalities are required from citizens who see their rights at risk to file such a writ (Gargarella, Domingo, and Roux 2006). This mechanism of concrete review have been accompanied by the exercise of abstract review which, as described in Chapter 3, has a long tradition in Colombia.

These legal instruments act upon an extensive bill of rights entrenched in the 1991 constitution, which was "deliberately intended to transform Colombian society" (Uprimny 2006: 128). Furthermore, international treaties signed by the Colombian state regarding the protection of rights are incorporated into what is called the "block of constitutionality", that is, they have constitutional rank and therefore are legally binding (Uprimny 2006).

The availability of these legal instruments, however, is a necessary yet not sufficient condition for judicial activism. In Colombia, the court has been able and willing to use them thoroughly for the protection of individual and collective rights; in fact, it "has been both

creative and forceful in advancing pro-poor court action" (Domingo 2006: 5), which has entailed a true rights revolution in Colombia (Wilson 2009; Ansolabehere 2010: 80; Epp 1998).

Regarding the protection of negative liberties, the court has dealt with somewhat classical issues such as the protection of worker rights. In several concrete review decisions, the CCC has protected the right of workers to join labor unions by ruling against employers that favored non-unionized employees (T-230/1994) or by ordering them to re-hire workers who had been laid-off allegedly because of their union affiliation (T-436/2000) or in violation of International Labor Organization's (ILO) principles (T-568/1999).[86]

The court has also adopted views which could be considered more libertarian in the protection of civil liberties. In a very controversial abstract review decision of 1994, the CCC declared unconstitutional portions of the National Narcotics Act that criminalized the possession and consumption of minimum dosages of narcotic drugs (C-221/1994). According to the court, individuals are constitutionally entitled to freely develop their own personality and therefore the criminalization of such behavior violated that right (Pahl 1995).[87] In a 1997 abstract review decision, the court also decriminalized euthanasia when terminally ill patients had freely given their consent (C-239/1997). In fact, "Colombia is the only country in which active euthanasia was, to some extent, decriminalized by a Constitutional Court decision, based on human rights arguments" (Michlowski 2009: 183).[88] Moreover, in 2006 the court updated a fairly conservative legislation by decriminalizing abortion in three specific circumstances: when the pregnancy is the result of rape, non-consensual sex of non-consensual artificial insemination, when there is

[86] See Uprimny (2006).

[87] See more on this case and its repercussions below.

[88] The original challenge filed against Article 329 of the Criminal Code asked the court to protect the rights of terminally ill patients by declaring unconstitutional the attenuating circumstances and the reduced jail time previewed for the offense of mercy killing. The court not only found those arguments unwarranted but it went further to state that physicians committing mercy killing with the free consent of the patient should not be criminally prosecuted (see Michlowski 2009).

certified evidence of severe fetal malformation, and when there is certified evidence that the woman's life or health are at risk (Jaramillo and Alfonso 2008; Ordolis 2008). In the latter two cases mentioned above, the decisions made by the court met harsh criticism from conservative sectors in society and, especially, from the rather influential Catholic Church.

The court progressive activism has not been limited to the protection of civil and political liberties. Quite the contrary; according to one former justice, in Colombia, as in Latin America, rather than issues related to civil rights, which are more common in the U.S., the relevant issues for the people are those problems of proper nutrition, decent housing, education, health, etc. (Cifuentes 1995).Although the constitution states that *tutela* actions only apply to fundamental rights, the court has developed and affirmed the so called 'connection' doctrine by which economic, social, and cultural rights are judicially enforceable when not doing so risks violating fundamental rights which are connected to them.

The protection of those positive rights does not (only) limit the action of the state but, on the contrary, typically entails the active involvement of the government in the provision of services to those citizens for whom the court enforces those rights. Court decisions in this regard have meant large public expenditures in the provision of those services.

For instance, as a result of a concrete review case of 1998 regarding the extremely bad conditions in which prison inmates were kept, the court declared an "unconstitutional state of affairs" (explained in Chapter 3), and ordered the government to invest in improving those conditions (T-153/1998). In the same vein, the court found in 2004 that there was also an unconstitutional state of affairs regarding the living conditions of thousands of internally displaced people, that is, people who had been forced to flee their homes by the pressure of the internal conflict and of illegal armed groups. The CCC ordered the government to design and

implement comprehensive policies for the protection of these refugees and the improvement of their living conditions (T-025/2004). Uprimny estimates that these two cases may have involved public expenditures of around $240 million and $425 million, respectively (Uprimny 2006: 149, fn. 27 ; Rodríguez and Rodríguez 2010); see also (Rodríguez and Rodríguez 2010; Cepeda 2007).

In reviewing hundreds of cases related to health issues, the court not only has protected the rights of patients to receive proper medication and treatment for several conditions within their healthcare plans, but it has also restructured the entire health system in the nation (Cepeda 2007; Yamin and Parra-Vera 2009, 2010; Nunes 2010; Uprimny 2006). Also, a comprehensive restructuring of the housing credit and mortgage system was the result of several abstract review decisions aimed at alleviating the critical situation of mostly middle-class mortgage debtors in 1999 (Uprimny 2006; Cepeda 2007).[89]

Court decisions on economic issues such as those described here have met strong reactions not only from the incumbent administrations, a subject I deal with in the following sections, but also from representatives of trade unions and business groups, as well as from scholars mainly in the area of economics (e.g. Clavijo 2001; Kalmanovitz 2000). Some of these critics argue that the court has acted in a populist way, that these decisions have had serious fiscal consequences, and that the court has overstepped with these decisions the role of the legislature.[90] In any case, because of these decisions, the court has been considered "one of the most progressive judicial bodies in the [Latin American] region in defending, advancing, and protecting economic and social rights" (Kaufman 2009: 654). Not only its jurisprudence has

[89] This case is described in further detail below.
[90] For a summary of the criticisms made at these court decisions, see (Uprimny 2006).

served as precedent for other high courts in the region (Rodríguez and Rodríguez 2010: 14) but it has also been capitalized by the court to build its legitimacy (Uprimny 2006, 2003b).

4.2.2 An autonomous court checking the other branches of government

In addition to actively protecting citizen rights on many occasions, the court has also a significant record in checking the other branches of government. Besides its power, included in the constitution, to exert abstract review on legislation of different sorts, as I explained in Chapter 3, which in itself gives the court a role as a veto player regarding policymaking by the legislature and the Executive, the court has increasingly become an active check on the other branches particularly in three different areas: first, it controls that decisions made by the other high courts do not violate individuals' fundamental rights; second, it limits Congress' power to amend the constitution; and third, it checks the Executive's use of states of emergency.

The first of these checks on other branches has put the CCC in strong disagreement with the other high courts. Given some ambiguities in the constitution which states that the Supreme Court (SC) and the Council of State (CoS) are organs of last resort in the ordinary and administrative jurisdictions, respectively, while at the same time it states that the *tutela* writ can be filed to seek immediate protection citizen rights against the action or omission of any public authority, since 1992, when the CCC started to operate, it has had to deal with *tutela* actions filed against judicial decisions. Despite some initial hesitations,[91] the CCC has increasingly developed

[91] Decision C-543/1992 seemed to state that *tutela* actions did not apply to judicial decisions, although it also specified some exceptions when the judicial decision was considered a *de facto* action outside the legal framework (Botero and Jaramillo 2006).

constitutional precedent regarding the applicability of *tutela* writs against judicial decisions and regarding the competences the CCC has to review those cases.

This has resulted in sustained and on occasions hard clashes between the CCC, on the one hand, and the other high courts, namely the SC and the CoS, on the other. In terms of their functions, the conflict has been apparent when the SC and the CoS have stated that *tutela* actions do not apply to judicial decisions, when specific panels within the SC have refused to review *tutela* writs filed against decisions made by other panels within the same court, and when the SC and the CoS have been reluctant to make a new decision once the CCC has annulled their original one, in which case the CCC has issued the final decision itself (Botero and Jaramillo 2006). These incidents have resulted in public confrontation in the media between representatives of the different courts,[92] in proposals of constitutional amendment to suppress *tutela* actions against judicial decisions (see below), and even in some unresolved cases being filed at, and admitted by, the Inter-American human rights system (Botero and Jaramillo 2006). However, the CCC has been able on several occasions to successfully check decisions made by the other high courts.

The second major check on other branches relates to the power Congress has to amend the constitution. The 1991 constitution states that *Actos Legislativos* (i.e. constitutional amendments going through the legislature) are not automatically reviewed by the court. When some citizen files a constitutional challenge against one of these acts, the constitution states that the CCC must limit its review to procedural issues in the passage of the amendment.[93] In recent years, however, the court has started to develop a doctrine according to which the power of

[92] See, for instance, "Pugna entre cortes por reforma a la tutela" (*El Tiempo Online Archive* 8/21/1997: http://www.eltiempo.com/archivo/documento/MAM-634477).

[93] See below for an explanation of the procedure required to approve these amendments in Congress.

amending the constitution through Congress is not absolute.[94] The doctrine introduces a distinction between the reform of the constitution and the substitution of the constitution. While the former can be undertaken through the legislature, the latter can only be achieved by the 'primary constituent', i.e. the people, through a constituent assembly.

This doctrine was a rather quiet response to what, in the early 2000s, was perceived by the court as a massive attack by the Uribe administration against the constitution itself. According to one of my interviewees, "[in 2003] eight out of nine justices were really afraid of what the *Uribismo* was doing […] Given that amendments are so easy here, they needed to close [the amendment power] down […] through the doctrine of substitution" (LC4). In consequence, since 2003 the CCC has steadily affirmed the power to review constitutional amendments not only regarding procedural flaws but also regarding what has been called 'competence flaws.' In this sense, the CCC claims the ability to review whether the amendment affects the central values of the constitution (i.e. whether or not it entails a substitution of the constitution) in which case, according to this doctrine, the legislature lacks the competence to approve it.

The first full development of the 'substitution' doctrine was stated in the decision regarding the constitutionality of the amendment allowing the (first) reelection of president Uribe (C-1040/2005). Although the court upheld the amendment (and Uribe ran for office and was reelected in 2006), the decision affirmed the court's competence to go beyond the procedural review of amendments in the terms described here. In fact, a few years later, on top of pointing out at serious flaws in the legislative procedure to approve an act calling for a referendum to allow Uribe's running for a third term in 2010, the court also referred to the first reelection precedent of 2005 to strike such act down (C-141/2010).

[94] In this respect, the Colombian Constitutional Court joins high courts in Germany, India, and Peru which have also developed doctrines of implicit limits to constitutional reform (Colón-Ríos 2010).

A third check on other branches which illustrates the level of autonomy acquired by the court relates to the control of the Executive's use of emergency powers. As I described in Chapter 3, prior to the 1991 Constitution, the Supreme Court, in charge of reviewing decrees declaring a state of emergency did so only by checking whether or not a rather simple procedure, including the signature of all ministers, had been met to issue the decree. As a result, the exception had become the norm and the nation lived over eighty percent of the time in a state of emergency between 1970 and 1991 (García-Villegas and Uprimny 2005).

In order to fix this situation, from the very first time that the Gaviria administration issued a decree of this kind in 1992, the CCC has increasingly claimed and affirmed the competence to review not only the procedural aspects of those decrees declaring states of emergency (internal commotion and economic/social emergency), but also the substantive motivations included in such decrees, even though the Constitution does not explicitly provide for this level of review (Uprimny 2003a). This doctrine orders that, in the decree declaring the state of emergency, the incumbent must make a convincing case arguing that the events requiring exceptional measures are in fact new and cannot be handled by ordinary means. As I show below, Executives have been highly reluctant to accept judicial review of what they consider should be their prerogative. However, in 20 years of constitutional review by the CCC, the Executive has issued 25 decrees declaring a state of emergency (including five extensions), and the court annulled these decrees in seven occasions (Uprimny 2011, 2004). Moreover, unlike the protection of economic and social rights and the issue on *tutela* actions against judicial decisions, according to one former assistant justice (LC4), the question of whether or not the court has the competence to substantively review decrees declaring states of emergency, though still controversial, seems to have been increasingly settled in favor of the court.

4.2.3 Accounts of the activism and autonomy of the Colombian Constitutional Court

The institutional settings of the court and of the judiciary seem to be at best a partial explanation of the level of autonomy of the Colombian Constitutional Court. Empirically measuring judicial independence from an institutional standpoint has been an elusive task in comparative politics. Feld and Voigt (2003), for instance, develop an index of de jure judicial independence in which, based on an expert survey, they code several institutional factors including the constitutional status of the highest court; the procedures to amend the constitution; the features related to appointment, tenure, retirement, removal, reelection, and salaries of judges; and features related to access, jurisdiction, and transparency of the court. In their sample of 71 countries over which the average is .654 in a 0-to-1 scale, Colombia occupies the top rank with .939 (Feld and Voigt 2003). The validity of this indicator, however, may be somewhat questionable if we consider, for instance, that the U.S. ranks #30 (.685), and Ecuador ranks #9 (.835).[95]

Some authors claim that indices such as this tend to blend together two different concepts, namely, judicial autonomy and judicial power (Ríos-Figueroa and Staton 2009). More recently, focusing specifically on constitutional review in Latin America, Ríos-Figueroa (2011) proposes a separate index of *de jure* judicial independence based on the appointment procedure for justices, the length of their tenure, justices' removal procedure, and whether or not the number of justices in the high court is stated in the constitution. According to this index, which

[95] Feld and Voigt also developed an index of *de facto* independence based on the actual operation of the provisions included in the constitution. According to this index, in a sample of 62 countries, the average is .591 and Colombia ranks #32 with .571 (Feld and Voigt 2003).

goes from 0 to 6, the CCC scores 4, behind Guatemala, which receives 6 points, and Argentina, Brazil, and Mexico, all with 5 points (Ríos-Figueroa 2011).[96]

In sum, the relationship between the institutional status of the court and its level of autonomy and activism is far from clear. Other explanations, mainly developed by local authors and voiced in my interviews, are worth briefly reporting.

On the one hand, there are long-term, cultural accounts which purport, first, that the CCC capitalized on a long tradition of constitutional review in Colombia. As I explained in Chapter 3, constitutional review of legislation dates from at least 1910 when a constitutional amendment introduced Public Actions of Unconstitutionality (PAUs) through which any citizen could challenge a piece of legislation and the Supreme Court had to made a decision on the constitutionality of such piece (Uprimny 2006; Cepeda 2007). This tradition is clearly illustrated in the words of one of my respondents:

> In my classes I like to discuss the counter-majoritarian dilemma [involved in the legal instrument of constitutional review], but my students just don't get it. I use to spend half of the class session trying to convince them that there is indeed a problem; they can't imagine that a court could not review the constitutionality of legislative acts. That is an element of tradition and legal culture. (LC4)

In addition to this, second, there is also a long tradition of judicial independence. Some authors locate its origin in the transition to democracy after the short period of military rule in the 1950s. In order to avoid being prosecuted, the outgoing military government was able to include in the constitutional plebiscite of 1957 a clause ordering that high court justices should be selected by themselves, a mechanism known as co-optation, and that the military were to

[96] The average over a sample of 18 Latin American courts is 3.78 (Ríos-Figueroa 2011).

select the first court. Up to that point, Supreme Court justices used to have strong links with political parties and with the Executive. Co-optation helped breaking that link (Uprimny, Rodríguez, and García-Villegas nd). As a result, there is now a widely accepted view that law is separated from politics. In the words of one former justice, "We do not accept that a justice has a personal relationship with someone from the executive. Scalia can go playing golf with the U.S. vice-president, and there may be some people complaining, but in general they don't care. That is unthinkable in Colombia" (J1). One former assistant justice describes it like this:

> It is a court which emerges in a country with a tradition of judicial independence: court decisions are honored, a president never says publicly 'I won't comply,' while in other Latin American countries they do. That tradition says that judges are respected. (LC4)

Into this long-term, path-dependence approach, an account involving the critical-juncture of 1991 fits rather well (Collier and Collier 1991; Mahoney 2000). Many observers point to the first temporary court in order to explain the level of activism of the CCC. Capitalizing on the traditions of judicial review and independence described above, justices in the first court did not have to spend the time and resources that new courts in other countries typically need to build their legitimacy (Ginsburg 2003; Epstein, Knight, and Shvetsova 2001b). The first court, then, could start developing the new chart of rights and the new legal instruments, especially the *tutela* action, included in the 1991 constitution.

Moreover, despite some confrontations, the CCC did not have to face a hostile executive during the first few years of its existence. As one former assistant justice put it, "The fact that the Court started its operation under president Gaviria, who was a key promoter of the new constitution and of the very creation of the Constitutional Court, was crucial for the Court to start gaining prestige without having to engage in harsh disputes with the Executive" (LC2). Also,

those liberal justices in the first court played a central role in advancing the values and principles of the new progressive constitution. The temporary provisions for that court, including a one-year term (see Chapter 3), had important effects on the character adopted by the CCC, according to one former justice:

> I think that [the first] court was somewhat suicidal in the sense that, given that it was a one-year court, then the odds to have this court's justices reelected were slim and remote, and that possibility was not a dominant argument among justices. We, for instance, understood that we had only one year and that what we would not say in one year we would not be able to say it ever. So the court was more daring. (J6)

Recalling those first steps, a former assistant justice even goes to say that "Those were fascinating years, the first two. And there was an impression in the court of being sort of a universal legislator; a high court leading the nation, which, of course, was overreaching" (LC3).

Since those first years, then, the distinctive trait of CCC justices was that of having sort of a mission, the mission to develop and protect the values embedded in the constitution (Nunes 2010). And with that sense of having a mission came the prestige of being a member of the court. Those traits were transmitted to subsequent courts, as one former assistant justice sustains:

> The prestige of the Constitutional Court is a result of the quality of those justices and of those assistant justices who were in the first court, during just one year. One year was enough. The new ones discovered the prestige entailed […] in a progressive defense of the constitution. And […] they have preserved their legal teams, which know the way the court reasons, regardless of how good they are. They have built it. There are still today people [working at the court] who were there from the beginning; they work with one or another justice. Those first justices brought a character to the court which represented political payoffs and social recognition […]. This inertia is still there. The precedent prevails. The

> advisors have still a great influence. I'd think that half of the current court staff comes from the previous one. (LC5)

In sum, the critical juncture in the early 1990s gave place to a new path of judicial activism in Colombia which, although with variations, still prevails. Two contextual factors seem to have played a role as well. On the one hand, according to some authors, the active role played by the court was also stimulated by the weakness of political parties and of social movements. This weakness left a vacuum in the representation of vulnerable sectors in the population, a vacuum that was filled by the CCC (Uprimny 2006). Moreover, another account points to the violent context in Colombia and to how respecting the judiciary and honoring its decisions have been mechanisms to alleviate the uncertainties created by this violent context (Cepeda 2004).

All these explanations of the Constitutional Court character and behavior in Colombia suggest interesting hypotheses that deserve a more detailed, comparative examination than what this dissertation can offer. In any case, it seems to be a fact that the CCC stands out for its autonomy and progressive activism in the region. Not only the literature mentioned attests to that but also the perceptions of the actors involved in the short history of the court echo that view, which could be summarized as follows:

> The Colombian Constitutional Court is a model for all other courts in Latin America and the Caribbean. They look at the court's precedent as a guide for their decisions on specific topics. And not only in Latin America; nowadays, also in Spain they are looking at the court for guidance. The Inter American Human Rights Court is always mentioning the court. Its international legitimacy makes it unique. It has a lot of prestige. (J2)

4.3 CONSTRAINTS IMPOSED UPON THE COURT

Does the picture drawn in the previous section mean that justices in the Colombian Constitutional Court act unconstrained by other political actors and by the environment in which they make decisions? The answer is no. Despite the activism and autonomy described above, or perhaps because of them, several court decisions have met strong resistance particularly from the Executive, which has reacted in different ways to many of those decisions. Precisely the existence of court decisions which are adverse to the Executive, the occurrence of potential or actual reactions by the Executive to those decisions, and the perceptions and anticipation of those reactions by court justices underline the constraints imposed upon the court and are central to the theory of strategic prudence introduced in Chapter 2.

Some authors emphasize the fact that rational choice explanations of individual or collective actors' behavior are based on the subjective perceptions of these actors; in this sense, actors' anticipatory reactions are central to these explanations (Vanberg 2005). Players' perceptions and anticipatory reactions may be related to actual instances of other actors' actions or to unrealized counterfactuals on these actions located in the players' minds. In this sense, they technically belong to the off-equilibrium path behavior which is "significant to sustaining equilibrium path actions" (Vanberg 2005: 117). In consequence, this section provides qualitative evidence of salient events in which tensions and even clashes occurred between the court and the incumbent administration, and of justices' thoughts, perceptions, and responses related these events. As specified in the first section of this chapter, the evidence comes from a comprehensive press review and especially from semi-structured interviews with former justices and former assistant justices and law clerks in the court.

From this section we may infer, first, that justices in the CCC are policy-seekers, that is, they are mainly concerned with the outcomes of the specific case under review. Second, this section shows that court decisions which are contrary to the preferences of the Executive entail a cost for the latter which in some cases trigger government reactions against the specific decision and/or against the court. Third, it makes clear that those reactions are costly for the court; justices resent them and, in some occasions, anticipating these reactions, justices weight the policy implications of a particular case against the potential damage those reactions might have on the medium-to-long term institutional status of the court. As a whole, this qualitative evidence provides insights on the constraints imposed upon the court and on the subjective perceptions actors have of these constraints. Together, constraints and perceptions on those constraints refer to the parameters of the game-theoretic model introduced in Chapter 2. The next chapter systematically addresses these insights and presents a quantitative test of the empirical implications of such model.

4.3.1 Episodes of tension between the Court and the Executive

Since the CCC was created in 1991 and started operating in 1992, there have been moments of great tension with the Executive. In fact, during all administrations between 1992 and 2006 the court made decisions which triggered public responses and reactions by the government. As one former justice put it:

> I could say that tensions emerge from the fact that presidents do not like to be controlled. And when the court has responsibly exerted control it is almost inevitable that those hostile relationships emerge. (J5)

Even though president Gaviria (1990-1994) was the central promoter of the new constitution and of the creation of the Constitutional Court (see Chapter 3), his administration was not exempt from confrontations with it. In May, 1994, the CCC declared unconstitutional two articles of the National Narcotics Act that criminalized the possession and consumption of minimal quantities of narcotic drugs. The court, in a 5-4 decision (C-221/1994), defended liberal values of self-determination and considered that such articles violated citizens' right to develop their own personality.[97]

This decision was criticized not only by the government but also by several interest groups, political actors, and members of civil society, including trade unions, the Catholic Church, presidential candidates running for the 1994 election, and even the U.S. State Department.[98] However, as I show below, the reaction of the Gaviria administration was particularly strong, to the point of initiating a constitutional amendment aimed at overturning the court decision.

One former assistant justice recalled that event. When he started working in the court, "there was almost an immediate tension regarding the decision on the personal consumption of drugs. That was a decision to which the administration had a strong reaction. And there was at the moment a time of strong confrontation. Although that was almost at the end of the Gaviria administration, those were very tense weeks." (LC4). Moreover, one of the former justices I interviewed remembered that event in these terms:

> [A moment of great tension was] during the Gaviria administration, when the court made the decision in 1994 by which the criminalization of the personal consumption of drugs was

[97] See "Despenalizan uso de drogas" (*El Tiempo Online Archive* 5/6/1994: http://www.eltiempo.com/archivo/documento/MAM-121481).

[98] See "Rechazo general a la despenalización" (*El Tiempo Online Archive* 5/7/1994: http://www.eltiempo.com/archivo/documento/MAM-121560).

> struck down. At the moment, president Gaviria (who has now changed his mind and, along with other former Latin American presidents, is proposing the legalization of drugs) said that the decision created chaos. I wrote a dissent, but I have to acknowledge that the president's attack on the court was unfair. The result was that even those of us who were in the minority supported the court against the government's attack which was hard and furious. It was a serious confrontation between president Gaviria and his Minister of Interior (Villegas), on the one hand, and the then Chief Justice Arango […] We had to support the court even though some of us disagreed with the decision. That was a hard moment. (J3)

More acute confrontations between the Executive and the court emerged during the Samper administration (1994-1998). First and foremost, there was a period in 1995 when the tension escalated and harsh public statements from both sides were reported in the press. In August, the government issued a decree declaring the state of internal commotion with the alleged purpose of getting adequate instruments to deal with security and public order problems which, in the Executive's view, were the result of upcoming, unforeseen events and therefore required exceptional tools. In October, 1995, the court struck down that decree in a 7-2 decision (C-466/1995) on the grounds that there were no sufficient reasons for a state of emergency and that the security situation could and should be handled with ordinary legislative mechanisms.

In fact, when the Samper's decree was struck down in October, 1995, the administration's reaction was extremely hard:

> The world fell upon the court. The government was the first to state that the court did not allow it to rule, that the court was obstructing the task of preserving public order. President Samper went public on TV to say that the court was making an illegitimate decision because in his opinion the decree declaring the emergency was not to be reviewed […] So that led to a hard confrontation with the government. [At that moment] I received [anonymous] death threats. (J3)

The Chief Justice at the time, José Gregorio Hernández, accused the government of creating an atmosphere of fear and panic resulting from public statements made by its officials[99] and refused to attend a summons from Congress to explain the court's decision.[100]

In November, 1995, however, Álvaro Gómez Hurtado, a former presidential candidate, co-chair of the National Constituent Assembly, and son of one of the most prominent and controversial conservative presidents in Colombian history, was assassinated in Bogotá. "Mr. Samper went publicly on TV to regret Gómez's murder, [and] he referred to the court in an inappropriate way uttering that he would call again for a state of emergency, almost defying the court, almost to see whether the court was capable of strike it down again. That was in my opinion an inappropriate move." (J5). Moreover, "many political leaders publicly stated that the court was to blame for the murder. That the court had tied the government's hands preventing it to handle the internal security situation and that that was the reason why Gómez had been murdered." (J3).

Under this level of pressure, in a situation in which there was "an atmosphere making it very difficult for the court to analyze the case in an independent way" (J5), the court eventually upheld that second decree in a 6-3 decision (C-027/1996). A former assistant justice even remembers that "some discussions took place in the court's halls regarding how difficult it would [have been] for the court to say no again." (LC5).

Later, in January, 1997, the Samper administration issued a new decree, this time to declare the state of economic emergency to deal with an extreme budget deficit and with a

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[99] See "Acusan al gobierno de provocar pánico" (*El Tiempo Online Archive* 10/21/1995: http://www.eltiempo.com/archivo/documento/MAM-430974).

[100] See "No iremos al Congreso a hablar sobre conmoción" (*El Tiempo Online Archive* 10/26/1995: http://www.eltiempo.com/archivo/documento/MAM-436240).

massive in-flow of foreign currency.[101] In a 6-3 decision (C-122/1997), the court overturned this decree arguing, again, that the facts on which the emergency was called were neither new nor unforeseeable.[102] As a result, the government announced a constitutional amendment aimed at limiting the court's competence to review decrees declaring states of emergency.[103] Chief Justice Hernández responded by accusing Samper of being a dictator and made explicit references to retaliations by the Executive which, in the court's view, were unacceptable.[104]

Although most justices I interviewed agree that president Pastrana's (1998-2002) relationship with the court was somewhat more civil, there were some significant cases reviewed by the CCC which created a high level of tension with the government. Early in 1999, the court had to review a decree issued by the administration declaring the economic emergency to deal with a crisis of the financial system. During these months, there were rumors that there were seven votes in the court against the decree,[105] and these speculations, apparently resulting from leaks to the press, created an atmosphere of distress in which there were public statements by the minister of Economy and by private corporations implying that such a decision would create chaos in the financial markets and accusing court justices of those leaks, accusations which were strongly rejected by the court.[106] Eventually, the rumors were proved wrong and the court upheld the decree in a 7-2 decision (C-122/1999).

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[101] See "Decretan Emergencia Económica y Social" (*El Tiempo Online Archive* 1/14/1997: http://www.eltiempo.com/archivo/documento/MAM-517892)

[102] See "Cayó la Emergencia Económica" (*El Tiempo Online Archive* 3/13/1997: http://www.eltiempo.com/archivo/documento/MAM-548323).

[103] I discuss those attempts at introducing court-curbing measures, as well as their consequences, below.

[104] See "Samper-Corte: pulso ante la opinión" (*El Tiempo Online Archive* 3/16/1997: http://www.eltiempo.com/archivo/documento/MAM-590475).

[105] See "Emergencia, con siete votos en contra" (*El Tiempo Online Archive* 2/25/1999: http://www.eltiempo.com/archivo/documento/MAM-873257).

[106] See "Corte y Minhacienda chocan por la Emergencia" (*El Tiempo Online Archive* 2/26/1999: http://www.eltiempo.com/archivo/documento/MAM-869870), and "'No nos dejamos intimidar': Corte" (*El Tiempo Online Archive* 2/26/1999: http://www.eltiempo.com/archivo/documento/MAM-871794).

The late-nineties was a time in which many mortgage debtors were in a very difficult situation because of the regime ruling interest rates according to the so called UPAC system, which regulated housing loans and mortgages. In fact, there were estimates that up to 200,000 families were on the verge of losing their homes (Uprimny 2006). In the middle of the crisis, some norms related to the UPAC system were challenged and the court had to review them. The months during which the court studied the case were really stressful. One former justice recalled that "*El Tiempo* published a front page headline saying 'The fate of the nation depends on the court's decision.' That was almost a threat." (J5). That perception might be particularly relevant considering that:

> Governments are often able to 'use' most media. You can [see] how the Executive expresses itself not only directly but also through the media which are controlled by it. That creates an atmosphere of opinion which has an effect on the court and creates tensions within the court. (J6)

In a 6-3 decision (C-700/1999) the court overturned those norms and ordered the Executive to formulate a new system linking interest rates to inflation and to recalculate mortgages to alleviate debtors' burdens. It allowed, however, a seven-month period for the government to introduce new legislation to regulate the housing market.

The first term of president Uribe (2002-2006) was also characterized by episodes which entailed severe tension between the government and the court. Less than a week after Uribe's inauguration, as a result of a terrorist attack perpetrated by the FARC guerrilla group in Bogotá, the government issued a decree declaring the state of internal commotion. However, Minister of

Interior, Fernando Londoño, initially refused to send the decree to the CCC for its review.[107] One former justice recalls the event in these terms:

> One [moment] that I remember of tension and differences between the government and the court was when, after Uribe's inauguration, his first act was to declare the state of emergency because the disturbances in the internal security. At that moment, the decree declaring the emergency had to be reviewed by the court. However, the then minister thought that that decree should not be reviewed […] So there was a great deal of tension since the court thought its competences were jeopardized. From that time comes [Minister of Interior] Londoño's infamous statement that he [eventually] sent the decree to the court only as a mere courtesy. That was a difficult moment. (J4)[108]

The decree was eventually upheld by the court in an 8-1 decision (C-802/2002).

In 2004, the administration introduced a constitutional amendment, the Anti-Terrorism Act, which allowed the military to conduct arrests, home searches, and wiretaps without a warrant issued by a judge or a prosecutor. This was a very controversial issue, with problematic implications for civil liberties protected by the constitution and by international law, although the high popularity enjoyed by president Uribe was precisely based on his hard-line agenda against guerrilla movements and terror. The case created a lot of pressure on the court during its analysis. At the end, the court struck down the amendment because, in the view of the 5-4 majority, its approval in Congress had had procedural flaws (Decision C-816/2004).[109]

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[107] See "Polémica por cortesía" (*El Tiempo Online Archive* 7/14/2002: http://www.eltiempo.com/archivo/documento/MAM-1328624).

[108] Minister Londoño was publicly known by his opposition to the 1991 Constitution and to the Constitutional Court. As an assistant justice put it: "Fernando Londoño was kind of a nut case […] who, since the constitution was adopted, in his classes at the Javeriana, used to throw the constitution on the floor and to complain about it." (LC1)

[109] According to one of the former justices I interviewed (J7), this case raised the question of whether the doctrine purporting that Congress lacks the competence to substitute the constitution (explained in a previous section of this chapter) was applicable. Given that the doctrine was not fully developed at that time and that the majority

> In the decision of the Anti-Terrorism Act we expected a strong reaction from the Uribe administration, but there was no such a strong response, which was somewhat surprising. […] There was strong pressure in the media. There were a lot of leaks, really annoying. The other justices said that that was the most stressful case there have been up to that point in the court […] So the following days we expected a strong reaction, and it didn't happen. (J7)

The reaction did come a few months later when the Uribe administration announced a constitutional amendment which included provisions to limit the court power to review constitutional amendments.[110]

One final, paradigmatic, episode of tension between the court and the executive occurred when the court had to review the amendment approved in Congress to suppress from the constitution the prohibition of presidential reelection. The amendment, approved by the government's strong coalition in the legislature, aimed at allowing president Uribe to run for office in the 2006 election. For a long time, the nation anxiously awaited the court decision. And justices within the court felt the pressure:

> The moment of greatest tension during my tenure was the first reelection. It was so tense that for more than one and a half months I could not go out of my house because people approached me and put pressure on me. Friends, acquaintances, and people I didn't know and that I ran into when I was having a cup of coffee at *Juan Valdez*, everybody tended to approach me to tell me to vote in one way or another. And the entire nation, the media, were asking for a quick decision. That was the moment of greatest tension, I think, within the court. (J4)

Asked about those moments, another former justice said:

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could not agree on how to apply it to the case, they opted to limit the decision's arguments to the procedural flaws in the legislative passage of the Anti-Terrorism Act.

[110] I discuss this amendment later in this chapter.

> [During the discussion of the first reelection the pressure] was inescapable no matter where you were. So what I did was not going out where I could be exposed to that kind of remarks. Those were critical moments, no doubt about that, which were public. And the most critical moment was when we made the decision disavowing Minister Sabas Pretelt as a valid interlocutor.[111] We made public a letter as a result of an interview he gave. The letter resulted in a communication from the president. And that was a difficult moment; it had never occurred before. (J1)

In sum, all administrations have had clashes with the CCC which have resulted in public statements and mutual accusations. What this rather anecdotal evidence suggests is, first, that court decisions are relevant for executives; although they use to comply with, or at least tend not to openly defy these decisions even when they are adverse to their preferences, they do react by using the mass media to complain about what they consider are court moves overstepping its competences. These episodes also show, second, that these public reactions by the Executive entail costs to the court which has often felt compelled to use the same channels to issue public statements aimed at controlling the damage Executive reactions might have produced on the court's image and legitimacy. Even though these instances of posturing are not innocuous, they are probably not enough justification for a theory of judicial strategic behavior. The following two sub-sections show that Executive reactions have not been limited to public statements in the media. They have also included instances in which the Executive promoted constitutional amendments aimed at overturning court decisions (sub-section 4.3.2) and constitutional amendments and legislation intended to limit the court's competences and to curtail its power (sub-section 4.3.3). Naturally, to be effective constraints on the court, these responses do not need to be successful; they simply need to be perceived as credible threats by justices in the

[111] At that time, Sabas Pretelt had already replaced Londoño as Minister of Interior.

court. In consequence, the following sub-sections also provide evidence of how those moves by the Executive were perceived from inside the court.

4.3.2 Overturning court decisions

According to Ginsburg (2003), constraints on courts emerge as a function of the responses of strong actors in the political system to court decisions. Those responses include what Ginsburg calls "formally constitutional challenges", that is, attempts to overrule the court through normal, constitutional channels (Ginsburg 2003: 77-81). Regarding constitutional review, the most typical response in this category is the announcement, promotion, and/or achievement of an amendment aimed at changing the constitution in the specific policy area addressed by the court decision, overturning it.

Although more difficult than in the case of ordinary legislation, constitutional amendments in Colombia are comparatively easy to achieve in Congress. Unlike other countries where supermajorities in one or two chambers are required to pass such amendments, the 1991 Constitution made constitutional reforms more difficult only by delaying their approval, not by establishing a more demanding proportion of legislative seats behind the proposal. In fact, in order to be approved, in Colombia amendments must undergo eight debates and votes (i.e. votes in committee and in the floor, both in the Upper and the Lower houses, in two consecutive legislative years). In the first "round", the proposal must be approved by a simple majority of those legislators in attendance to the specific chamber committee or floor session (provided, naturally, that a minimum quorum is reached). In the second round, the proposal must pass the four votes by the simple majority of all members of the specific committee or chamber.

The rationale behind this amending procedure is to protect the constitution by delaying those decisions so that they are not made precipitously, in principle allowing different views to be heard and have the chance to make their cases in Congress, and letting the specific circumstances that had originally triggered the proposal to cool off. Given that the presidential and congressional terms are four years long, there are costs in engaging in a two-year process of amending the constitution.

Other procedures to introduce changes to the constitution include a referendum which can be initiated by the Executive, by a group of at least thirty percent of the nation's municipal councilors or departmental deputies, or by the signatures of at least five percent of the population included in the electoral census. Once initiated, a simple majority of members Congress must approve the legislative act calling the referendum. Amendments can also be accomplished by a Constituent Assembly. Congress must approve a legislative act to call citizens to decide whether or not they want a constituent assembly to convene. In such case, members of the assembly must be popularly elected.

All in all, although having an amendment approved in Colombia is not an easy task (many amendment proposals introduced in Congress reach the sixth or seventh debates before they get "killed"), this mechanism is not as stringent as those existing in countries where supermajorities (typically two-thirds) are required to pass constitutional changes. In consequence, the possibility of an Executive response to a court decision in the form of a constitutional amendment is real. Moreover, there have been some examples in which proposals of constitutional amendments to override court decisions were actually made.

The first instance occurred in 1994, as a result of the decision to de-criminalize the personal consumption of drugs described above. Despite having actively promoted the creation

of the CCC three years earlier, the Gaviria administration strongly disagreed with the court on this issue and announced a popular referendum to amend the constitution in order to explicitly state that the possession and consumption of drugs, even in minimal doses, should be considered a crime. The two top candidates running for the presidential office that year publicly stated their support for the initiative.[112]

President Gaviria later argued that the administration did not mean to circumvent the court's decision and that resorting to a referendum should not be interpreted as a threat to judicial independence.[113] The announcement, however, was received by the court as a subterfuge to override the court. Chief Justice Jorge Arango Mejía recalled the importance of the principle of checks and balances and stated that government officials questioning court decisions created an interference with that principle.[114]

Those were the last weeks of the Gaviria administration, though. Incoming president Samper, inaugurated on August 7, 1994, changed his mind on the referendum and announced instead a constitutional amendment in Congress.[115] Although the amendment was discussed and approved in the first rounds in the legislature,[116] it eventually died. The issue was rather forgotten for many years until, after several attempts, president Uribe was successful in having the amendment approved in Congress in December, 2009.[117]

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[112] See "Consulta popular para penalizar consumo de droga" (*El Tiempo Online Archive* 5/8/1994: http://www.eltiempo.com/archivo/documento/MAM-122402).

[113] See "Abonado terreno para referendo" (*El Tiempo Online Archive* 6/1/1994: http://www.eltiempo.com/archivo/documento/MAM-141152).

[114] See "Los fallos no se pueden discutir" (*El Tiempo Online Archive* 5/20/1994: http://www.eltiempo.com/archivo/documento/MAM-131777).

[115] Resorting to Congress instead of promoting a referendum was, according to government officials, a more democratic option and a way to prevent a clash with the Constitutional Court. See "Con ley atajarán dosis personal (*El Tiempo Online Archive* 11/2/1994: http://www.eltiempo.com/archivo/documento/MAM-245967).

[116] See "Aprobada reforma para penalizar dosis mínima" (*El Tiempo Online Archive* 12/8/1994: http://www.eltiempo.com/archivo/documento/MAM-261346).

[117] See "Mininterior: 'No vamos a ir tras el adicto, sino tras el jíbaro'" (*El Tiempo Online Archive* 12/13/2009: http://www.eltiempo.com/archivo/documento/MAM-3759197).

One former assistant justice, regarding the proposal made by the Gaviria administration in 1994, argues that such a proposal was "not seen as an attempt to circumvent the decision, but as a legitimate step in the system of checks and balances" (LC2). One of the justices involved in the case was even clearer on that:

> I cannot tell about other justices' views because those were things that were not formally discussed. In general, I can tell that many justices looked at that as something rather normal. We thought that precisely, given that the role of a court is a countermajoritarian one, that is, to slow down a bit the democratic principle, the only way for the democratic principle to express itself is through a constitutional amendment. (J6)

However, that feeling was not unanimous. Even though the proposal eventually failed in Congress, one justice considers that it was indeed a way of evading the court decision: "Those are reactions against the court's jurisdiction and aim at blocking its decisions" (J3). Moreover, another justice described the issue as one of the moments of greatest tension with the Executive: "That was something unheard of, never before a president had done that" (J5). An assistant justice recalled that president Gaviria's proposal was thought of as an attempt to mock the court: "The progressive wing in the court did see in that decision a liberal accomplishment and the government's reaction was seen as an attempt to sabotage the court" (LC3).

During the Samper administration a somewhat harsher episode occurred. The court had to review norms regulating the operation of the military justice, in particular its jurisdiction and the composition of the military tribunals. Those have been traditionally sensitive issues in Colombia characterized by a confrontation between a view committed to the defense of human rights and concerned by the impunity that might result from members of the armed forces accused of human rights violations being judged within the military jurisdiction, on the one hand, and the

position in defense of the military autonomy in the prosecution and trial of their own members, on the other.

In March, 1995, the court made a 5-4 decision (C-141/1995) ordering that only retired members of the armed forces could be part of military tribunals. The rationale behind this decision was to enhance military justice's impartiality by preventing that indicted officers could be prosecuted and tried by lower-rank officers who would formally be their subordinates.[118] The decision met strong resistance from the government and public statements were exchanged between the Minister of Defense, Fernando Botero, asking the court to reconsider its decision,[119] and Chief Justice José Gregorio Hernández affirming the court's autonomy and rejecting external interferences.[120]

The decision received even stronger criticism from members of the military who felt it as a way to undermine their special jurisdiction.[121] The association of retired officers even issued a statement announcing that they refused to be part of military tribunals, in a clear attempt to challenge the court.[122]

A few weeks later a constitutional amendment was introduced in Congress to revert the court decision. The proposal received strong support from legislators and was promoted by then Senator Germán Vargas Lleras and by the Samper administration.[123] The debates on the

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[118] See "Golpe constitucional a fuero militar" (*El Tiempo Online Archive* 3/31/1995: http://www.eltiempo.com/archivo/documento/MAM-284801).

[119] See "Es un duro golpe a la moral de las FF.AA." (*El Tiempo Online Archive* 4/4/1995: http://www.eltiempo.com/archivo/documento/MAM-309815).

[120] See "Corte pide respeto a su independencia" (*El Tiempo Online Archive* 4/5/1995: http://www.eltiempo.com/archivo/documento/MAM-309500).

[121] What is called, in Spanish, the *fuero militar*.

[122] See "Oficiales (R) se abstienen de integrar consejos de guerra" (*El Tiempo Online Archive* 4/4/1995: http://www.eltiempo.com/archivo/documento/MAM-309178).

[123] See "Bloque de apoyo a fuero militar" (*El Tiempo Online Archive* 5/4/1995: http://www.eltiempo.com/archivo/documento/MAM-321836) and "Militares activos sí serán jueces" (*El Tiempo Online Archive* 5/18/1995: http://www.eltiempo.com/archivo/documento/MAM-328531).

amendment in Congress were attended by ministers of Defense and Justice and by high-rank officers of the Army,[124] and its approval was rather expeditious.[125]

Regarding this case, a former justice described the amendment as "an instauration of a political view which was very different from the one decided by the court. And therefore, those moves implied a criticism to the court. And [we could say that] Congress had a more rightist position while the court was more leftist. And Congress supported a view which traditionally prevailed in Colombia which was that of including active officers in military tribunals" (J5). In comparison to the debate on the personal consumption of drugs, a former assistant justice said that the case of the military tribunals "was a more sensitive issue in the Court. Most justices were aligned to international law and saw with the upmost suspicion any move in this sense. In fact, there was a clear intention among several justices to stop any attempt to go backwards regarding military justice" (LC2).

In sum, the qualitative evidence presented here shows that having a constitutional amendment aimed at overturning a court's decision is not only a credible possibility but also one that actually occurred. On the other hand, regarding whether these proposed or actual amendments were perceived as attempts to evade or mock the court, that is to say, as moves which were costly for the court, the evidence is mixed, although there are indications that those costs were perceived at least by some of the justices. In fact, while "some justices did have [that] feeling, [I think] that is part of the institutional architecture in Colombia. Why in Colombia the court has the power it has? Because, unlike in the U.S., the CCC does not have the last word. The

[124] See "Restablecido el pleno fuero military" (*El Tiempo Online Archive* 11/30/1995: http://www.eltiempo.com/archivo/documento/MAM-469590).

[125] See "Por decreto, nuevas normas" (*El Tiempo Online Archive* 12/16/1995: http://www.eltiempo.com/archivo/documento/MAM-485421).

political process can *overrule the court*,[126] as Americans say, but they must do so through constitutional amendments" (J1). Another witness of the time put it this way.

> Some [justices] did say 'this is a mockery because, given that here amending the constitution is so easy, then our decisions are being reverted through amendments.' Others felt: 'Well, that's the game, we can strike down and they have the power to amend.' So there were both. [These moves] were not appreciated, but some of them were received as part of the game, in a cool way. And there were issues on which justices almost wanted an amendment, [as if they thought] 'if you want that, you need to amend.' I think the more confrontational ones were the threat regarding the personal consumption of drugs, which really pissed those in the majority off, and the one on military criminal justice. But others were seen as part of the game. (LC4)

4.3.3 Threatening the institutional status of the court

The previous sub-section dealt with confrontations between the Executive and the court revolving mainly around policy outcomes. However, there are also what Ginsburg calls 'unconstitutional challenges' on the court which often entail attacks on its very institutional status (Ginsburg 2003: 77-81). These attacks, at least in the Colombian case, are not technically unconstitutional, though. They take typically the form of constitutional amendments aimed at limiting the court's competences or jurisdiction.

In fact, unlike other countries in Latin America, sanctions to the Constitutional Court and its justices in Colombia do not no include shutting down the court, as in Peru, Ecuador, Bolivia, and Venezuela, packing the court with cronies, as Menem did in Argentina, or impeaching

[126] Originally in English.

individual justices, as in Ecuador under Gutiérrez. Reactions of this kind simply seem unthinkable in Colombia. Moreover, no court-curbing proposal of amendment has succeeded in Colombia since the CCC was created in 1991. This does not mean, however, that these amendments have not been announced in the media and, in some cases, introduced in Congress. The most notorious instances have occurred as a result of court decisions annulling a decree of declaration of a state of emergency. As I mentioned above, the substantive review of those decrees has been one of the most controversial competences affirmed by the court. In fact, although the constitution does not include an explicit provision for it, the court has been able to seize the competence and has actively exerted it on several occasions.

One of these occasions came when president Samper issued his first decree declaring the internal commotion in 1995. The court struck down such decree triggering an immediate reaction by the incumbent, which I describe above.[127] Moreover, there were not only public statements from both sides, but also the administration announced an amendment aimed at restricting the court review of decrees declaring the state of emergency to a check of the procedural aspects of the decree emission.[128] The proposal was discussed in both chambers during the second half of 1996 but it ultimately did not have enough support in the legislature and was rejected.

A couple of years later, in 1997, after the court struck down a new decree, this time declaring the state of economic emergency (see above), another proposal was introduced in Congress by the then Minister of Interior, Horacio Serpa, who, ironically, was one of the three chairmen of the National Constituent Assembly which created the CCC in 1991. One more time the proposed amendment addressed the prohibition of substantively reviewing decrees declaring

[127] See "Evaluación del orden público le corresponde al gobierno" (*El Tiempo Online Archive* 10/21/1995: http://www.eltiempo.com/archivo/documento/MAM-431136).

[128] See "Reducirían control de la Corte" (*El Tiempo Online Archive* 7/10/1996: http://www.eltiempo.com/archivo/documento/MAM-439949).

states of emergency.[129] Once again, in the middle of corruption scandals related to the links between the drug cartels and the electoral campaign of Samper, the proposal did not carry enough support in Congress and was dropped.

Besides these two proposals initiated by the Samper administration, during this term there were others including provisions which were more severe attacks against the court. One of them sought to eliminate the court itself. Another one was a court-packing amendment proposing to increase the number of CCC justices from nine to fifteen.

Were these proposed amendments taken seriously by the court? Were they credible threats against the institutional status of the court? One of the justices at the time recalls these proposals as follows:

> When Horacio Serpa was Minister of Interior, they proposed limiting the court's competences. We did not accept them. That was an important debate […] After that, in Congress, there were also confrontations. […] I had to [publicly] face a proposal made by Senators Roberto Gerlein and Luis Guillermo Giraldo, who initially proposed to shut down the court. We defused that. After that, they presented a proposal stating that the CCC should have 15 justices.[130] That was in 1995. On top of that, [the proposal stated that] decisions should be made by super majorities, something like two thirds, I don't remember well. We did not accept that either […] In sum, those attacks occurred several times. [However] at those moments the Court received a strong support from the people, from the nation, from the *pueblo* […] In my time (I don't know what current justices think), in my time I was not concerned at all [by these proposals], because we said 'if they suppress the court, so be it,

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[129] See "Ofensiva legislativa contra la Corte" *El Tiempo Online Archive* 3/19/1997: http://www.eltiempo.com/archivo/documento/MAM-561006).

[130] See "15 magistrados tendrá Corte Constitucional" (*El Tiempo Online Archive* 2/6/1995: http://www.eltiempo.com/archivo/documento/MAM-337302) and "Propuesta para acabar con la Corte Constitucional" by John Gutiérrez (*El Tiempo Online Archive* 4/5/1995: http://www.eltiempo.com/archivo/documento/MAM-309208)

> but we will defend the court's independence until the last minute. And we were united, even those who had dissenting opinions. (J3)

This feeling of being shielded by the people's support is also present in another statement made by one of the former justices I interviewed:

> [These proposals] created no concern at all […] Justices thought of themselves to be the guardians of the new constitution. At the same time they perceived a growing popular support for their decisions […] Justices became also to a certain extent […] very close to the needs of vulnerable individuals, of marginalized populations, which are not necessarily properly represented in the political circuit or the demands of whom are not properly addressed. […] We knew that that meant support for the court. As a consequence, [these threats] were laughable. (J6)

Assistant justices and law clerks tended to have a slightly more moderate view. One of them stated that, despite the fact that "the court started to receive support from people who spoke publicly," the government's reactions and the proposals to curb the court's competences on these issues "were perceived as credible threats and generated concern; some more so than others, but always as credible threats" (LC4). Moreover, the situation was better described by another law clerk at the time: "[A proposal to curb the court's competences] was disturbing. It was not disturbing when presidents had low approval rates; it was clear that the court defended itself, and that, from the beginning, people identified the court with the *tutela*. When presidents had high approval rates, the concern was greater" (LC5). The Samper administration and his legislative coalition were not terribly strong in this respect. In fact, during the discussion of the last amendment proposed by Samper to limit the court's competences, members of congress at that

time publicly admitted that they were doubtful about legislators daring to go against a popular court when elections were approaching.[131]

That was not the case during the Uribe administration. Permanently above 70 points of approval, Uribe enjoyed both popular and legislative support. That posed a considerable threat. In fact, the government proposed several amendments regarding the competences of the CCC during the first Uribe administration (2002-2006). These amendments addressed several aspects of the court's power which, as I described in a previous section of this chapter, had been controversial since its creation in 1991.[132]

First, the court has always claimed the competence to review *tutela* writs against judicial decisions when these decisions may have violated individuals' fundamental rights. This competence has created for years considerable tensions between the CCC and the other high courts, i.e. the Supreme Court and the Council of State (Botero and Jaramillo 2006). The Uribe administration initially sided with the Supreme Court and announced limits to this competence in its proposed amendments.[133]

Second, as a result of some salient CCC decisions protecting economic, social, and cultural rights, including those related to the health system and the attention to forcibly displaced people, the proposal included provisions to forbid judicial decisions involving expenditures not previously included and approved in budget plans. In fact, the court has been often criticized for not taking into account the financial and economic consequences of its decisions and for overstepping the legislative function of allocating public funds (Uprimny 2006).

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[131] See "Reservas sobre poda en poderes de la Corte" (*El Tiempo Online Archive* 3/27/1997: http://www.eltiempo.com/archivo/documento/MAM-552560).

[132] See "La Corte se extralimitó" (*El Tiempo Online Archive* 9/5/2004: http://www.eltiempo.com/archivo/documento/MAM-1538059).

[133] The 'alliance' of the government with the Supreme Court did not last long and was ostensibly broken after the latter started the prosecution of several politicians close to the Uribe administration accused of having conducted electoral campaigns in association with illegal paramilitary groups.

Third, in the same vein of previous attempts of reform (described above), the amendments included restrictions to the constitutional review of decrees declaring states of emergency, limiting such review to procedural matters exclusively. This provision echoed a permanent complaint of executives arguing that such decrees were the epitome of a political act and that only the government should have the ability of assessing the situation and of determining the conditions of exception in that particular situation.

Fourth, the proposed amendment restricted the court review of constitutional amendments to strictly procedural matters. In fact, as I explained above, the court had made the first steps to develop a doctrine by which Congress was entitled to change the constitution but not to substitute it. Although at that time the doctrine had neither been fully developed nor effectively used by the court, the government was reacting to the first decisions increasingly affirming that competence.

Finally, the various amendments included restrictions to the overturning of legislation in the court. Particularly, it stated that decisions of unconstitutionality needed to be reached by a two-thirds supermajority. This provision naturally would have made it harder for the court to strike down legislative and executive acts and would allow a minority in the court to block decisions against the administration.

Asked about how these amendments were taken in the court, one former justice referred to the proposal imposing supermajorities to strike down legislation in court:

> That was the first constitutional amendment [of that administration], the hardest amendment there have been against the court. [These amendment proposals] were very badly taken […] and that was really a difficult moment, a moment of great tension […] What actually happened was that members of Congress and party leaders supported the Court. They did not support the amendment, which ultimately was not even introduced in Congress. (J1)

Another justice expressed his concern not only for the court's institutional status but also for the protection of the constitution:

> Those attempts to limit the competences of the court were badly taken because those were attempts to limit the CCC. And to limit the CCC is to limit constitutional review, and that is not something that goes against the court but against citizen rights. [With those amendments] the supremacy of the constitution gets weaker, too. So that proposal, which was made by Minister Londoño […] also included a prohibition to make dissents public. That shows that they wanted to limit the court and to restrict its competences, which undermines the protection of rights. (J2)

Were these threats credible? There is variation in the perception of those amendment proposals. One justice, for instance, said that "In principle, that amendment could have been approved since the president was so popular and had a strong coalition in Congress" (J2). In contrast, another, although he acknowledges that "justices did not like those proposals", the benefit of hindsight allows him to state that those proposals "did not lead to a strong confrontation, among other things because nothing went beyond proposals, they were never successful. They did not even become bills. The Court was rather unconcerned because of its great popular support. In all cases of court curbing proposals, society's support has been strong. That helped surrounding the court with a quiet atmosphere" (J4).

In fact, surprisingly enough, despite Uribe's strong support, these amendments were not successful and some of them did not even reach the legislature. Does this mean that the potential for reaction by the different administrations does not amount to effective constraints on the court? The following testimonials show that, in controversial cases, justices weighted the specifics related to policy outcomes of the case against considerations on the institutional status of the court.

One of my respondents (J5) reports that a justice told him once that, while he thought that the decision on the decriminalization of the personal consumption of drugs was excellent from a legal point of view, he was certain that it was an opinion he himself would have never written because, in his view, the first duty of a constitutional court was to survive.

One assistant justice, commenting on the different views within the first court, referred to specific justices as follows:

> The difference between Cifuentes and Angarita was that the latter did not care, he fought no matter what. He was sort of a representative of the ethics of conviction. In contrast, Cifuentes was more akin to an ethics of responsibility and weighted how far the court could go. If a fight was too costly, he didn't engage in it. So that was a consideration. [However] the relationship between them was very good. There were allies in trying to defeat the old guard coming from the Supreme Court. (LC3)

In the same vein, one former justice sustained that "a very important factor is the justice's view on the sustainability of the active defense of a progressive constitution. [There are justices who] sometimes make decisions which, in my opinion, are too extreme and which jeopardize the sustainability of a process of active defense of a progressive constitution" (J1).

How were those considerations materialized in the court? One former justice makes a really rich explanation:

> [The anticipation of strong executive reaction] did emerge in the [discussion of the] Anti-Terrorism Act. Not in a very explicit way because that is not something that a justice would not state upfront in a debate of which there are public proceedings, but it did emerge with an argument based on the importance of building a sustainable doctrine […] So the argument was 'either we handle this right or the court gets too vulnerable in legal and political terms.' But when the idea is made explicit, then the politically correct discourse is to say 'we don't

> care.' So that type of considerations are more often made in the chambers, in private discussions, than in public debates because at the moment someone brings it up, the answer of another one would be to say 'we must decide based on the legal facts, we should not be considering the consequences, etc.' But that obviously played a role. (J7)

Perhaps the most paradigmatic case of a threat which was never realized but which had an unequivocal impact on justices' behavior was the discussion of the first reelection of president Uribe. As I explained above, the government's majorities in Congress approved a constitutional amendment eliminating the prohibition of presidential reelection. The aim of the amendment was clearly to favor Uribe's will to run for office again in 2006. Justices breathed a really stressful atmosphere while they studied the case, as I document above. In fact, although one of those justices thinks that, should the court had struck down the amendment, "president Uribe would have also complied with the decision, accepted it," he acknowledges that it was likely that, given the high level of approval enjoyed by Uribe, "it may have triggered a movement looking for a referendum or a constituent assembly, though […] In that perspective, it would have been too risky" (J1).

One assistant justice working at the court at the time confirms this view: "[In the reelection case] there was a well-founded fear that, given the high presidential approval, should the Court strike down such reelection, it was very likely that, first thing next morning, the president would call for a referendum or a constituent assembly. That was a real fear, at least in the mind of some Justices" (LC2). Another assistant justice does not hesitate in sustaining that the decision on the first reelection "was definitely strategic; there were justices who knew it was unconstitutional but thought that the court would be shut down so they voted for, not against it" (LC5).

These examples illustrate that the anticipation of the executive's reaction to a court decision does play a role in shaping the way justices make decisions. This happens at least in some cases and for some justices. One former assistant justice nicely argues that there are in fact different considerations justices make when making a decision:

> One was the legal-political view of the justice on a particular case; the other was the thought 'Will this decision be accepted?' or 'What would be the impact? Will the court suffer?' Some justices were really sensitive to this. [The justices I served with] had a sense of protecting the court; the one who had this clearest and who played that role the most, among those I knew, was Cepeda. [For some justices] the idea of protecting the institutional status of the court was strongly related to looking for consensus. [There were others] who looked for decisions to advance a constitutional agenda for the court which sometimes put the court at the edge, but taking into account the reaction, assessing whether such a decision would be well digested […] And there were some ones who didn't care that much […] So yes, the balance was not easy […] I don't think there was a unique style. (LC4)

4.4 CONCLUSION

This chapter shows that the CCC has been exceptionally autonomous, activist and progressive in protecting citizens' rights and in checking the other branches of government. Although a detailed discussion regarding the factors explaining such autonomy and activism lies beyond the scope of this dissertation, I summarized some of the accounts that have been advanced regarding the exceptionality of the CCC.

This chapter also provides, however, some evidence, albeit impressionistic, of the impact of the political environment on justices' behavior. This evidence suggests that there are indeed

constraints imposed upon the court. Moreover, it suggests that justices not only are aware of such constraints but also they take them into account when making a decision, especially in controversial cases. In other words, external factors surrounding the justices' endeavor are included their utility functions. Despite the fact that Colombia is one of the success stories of judicial activism and autonomy in Latin America, the qualitative evidence presented here suggests that it is worth undertaking a systematic test of the empirical implications of the theory of strategic prudence on the CCC. In this sense, the CCC can be considered a crucial-case test for the theory (Gerring 2007; Eckstein 1975; Ragin 1992)

5.0 TESTING THE THEORY OF STRATEGIC PRUDENCE

I sketched in Chapter 2 a game theoretical model to specify the strategic interaction between a High Court and its justices, on the one hand, and the Executive and its legislative coalition, on the other. The model emphasizes the importance of the political environment surrounding the court on judicial decision making. More specifically, the theory states that judicial behavior is a function of the court members' anticipation of the government's reaction to a decision regarding the constitutionality of a statute.

Chapter 3 includes an account of the process by which a Constitutional Court was created in Colombia in 1991, and described, in comparative perspective, the institutional setting in which that court operates, including its jurisdiction and caseload, the procedure to select its members, and the decision making process within the court. Chapter 4, in turn, provided qualitative evidence of the several instances in which the Colombian government reacted against Court's decisions. Such reactions included not only strong statements against the court and its justices made by members of the executive or the government's legislative coalition but also public announcements of bills aimed at overturning court decisions that the government strongly disliked or constitutional amendments to curb the court's jurisdiction.

The aim of this chapter, then, is to systematically test the empirical implications derived from the game theoretic model of strategic prudence on the Colombian Constitutional Court. It makes use of an original dataset of individual justices' decisions on the merits for cases of

abstract review of legislation between 1992 and 2006. The chapter proceeds as follows. The first section shows a general description of the dataset of court decisions which is, to my knowledge, the first attempt at systematically recording the Colombian Constitutional Court's caseload and decision making. The second section proposes a first approach to the hypotheses derived from the theoretical model's comparative statics analysis, operationalizes these hypotheses and shows the results of the multivariate statistical analysis conducted to test them. The third section presents a more complex and comprehensive set of statistical model specifications directly derived from a more specific understanding of the theory's predictions. The fourth section discusses the findings related to the impact of ideological locations of justices. The final section concludes.

5.1 THE ORIGINAL DATASET OF THE COLOMBIAN CONSTITUTIONAL COURT DECISIONS

During the first half of 2007, with the assistance of eleven undergraduate students of Political Science and Law, I gathered an original dataset containing all decisions made by the Colombian Constitutional Court in abstract constitutional review between 1992 and 2006. The information was extracted and coded from the text of the decision issued by the Court in each case, which includes the facts of the case, the court composition at the time of the decision, as well as the majority opinion, the concurring and dissenting opinions, whenever there were such opinions.[134]

[134] I had very fruitful discussions with Sebastián Ocampo, Mireya Camacho, and Santiago Arteaga on the best ways of coding certain items of the Court's decisions. Along with María José Alzate, María Alejandra Baquero, Paula Betancourt, Nicolás Castillo, Marta Castro, Natalia Cortina, Pablo Devis, Alejandra Fernández, Natalia

A comprehensive set of variables were coded for each case under review by the Court. Those variables can be grouped in ten broad categories:

1. Variables identifying the case according to the nomenclature system used by the Court. This nomenclature starts with a letter 'C' which indicates abstract review decisions (as opposed to concrete review decisions marked with a 'T', which are not included in this dataset). This letter is followed by the number of the decision in chronological order within a year. Finally, the nomenclature ends with the year of the decision. In a few cases, the number is followed by a letter (e.g. Decision C-089A/1994).
2. Information on how the case was originated, whether it is a case for automatic review by the Court or resulting from a citizen's challenge (Public Action of Unconstitutionality, or PAU), in which case the name(s) of the challenger(s) is (are) recorded.
3. Case types allowing the identification of what kind of legislation is being reviewed by the court (e.g. ordinary legislation, executive decrees, constitutional amendments, emergency decrees, bills approving international treaties, statutory acts, bills calling referenda, plebiscites, and constituent assemblies, or presidential vetoes on grounds of unconstitutionality).
4. A series of dates including the date in which the challenged act was originally created, the date when it was challenged, as well as the admission and decision dates.
5. The policy area to which the case is related.
6. Interventions by the Executive and each of its ministries.
7. The opinion of the Inspector General – IG (whose opinion is required for each case under review) regarding the issue.
8. Whether *amici* of the Court —including other government agencies, judicial or legislative bodies, the police and the armed forces, or civil society organizations— participated in the case and what their opinion was.
9. Information on the identities of the Chief Justice acting in each case, of the justice to whom the opinion-writing was originally assigned, and of the justice who wrote the final opinion.

García, Natalia Guerrero, and Emmanuel Vargas, they provided valuable research assistance in the construction of the dataset. I include the Spanish version of codebook for this dataset in Appendix B.

10. The decision made by each individual justice and the Court's majority.

Of 4,169 cases included in the dataset, for the empirical analysis I employ those cases in which either ordinary bills approved by Congress or executive decrees were studied by the court between March, 1993 —when the provisional court ended its term and the first Court appointed following the standard procedure (described in Chapter 3) started to operate— and August 2006, when the first Uribe administration came to an end.[135] As I explained in Chapter 3, these types of cases reach the Court as a result of Public Actions of Unconstitutionality (PAUs) filed by citizens. Moreover, ordinary legislation and executive decrees represent those cases in which the preferences of the Executive and/or its legislative coalition are more clearly in favor of a decision upholding the challenged act. Therefore, this set of cases suits well an empirical test of the strategic prudence theory sketched above.

Such a theory proposes an explanation of judicial decision making based on the interplay of factors related to the case under review, individual justices' characteristics, and the political circumstances under which the case is reviewed by the justices. In other words, the theory models individuals acting in the face of specific cases in a given political context. Therefore, the court's case dataset described above must be further expanded in two ways. First, I transformed it into a dataset in which the individual justice is the unit of analysis.[136] In addition to including all the case information described above, I added data related to the justices' appointment — including whether they were appointed by the president, the Supreme Court or the Council of

[135] The timeframe covers the portion of the Gaviria administration after the end of the provisional court's term (1993-94), as well as the Samper (1994-98), Pastrana (1998-2002), and first Uribe (2002-06) administrations.

[136] In Rodríguez-Raga (2011) I developed a test of the theory presented in this dissertation using overall court decisions as the unit of analysis. That test empirically supports the game-theoretic model's predictions.

State—, their date of selection and of retirement, as well as their ideological position.[137] Second, I added information related to the political environment, concretely regarding the political strength of the government, at the time the decision was handed down by the court.[138]

Most studies of individual justice behavior focus on non unanimous decisions. This is particularly true for models testing the attitudinal model, that is, models explaining judicial decision making on individual justices' attitudes and preferences (Segal and Spaeth 2002, 1993; Songer and Johnson 2007; Bonneau and Rice 2009). Although some authors point out that even unanimous cases may reveal the ideological make up of the court (Baum 1997; Segal and Spaeth 1989), I conduct the analysis on those cases on which non unanimous decisions were handed down by the court, not only because these cases better reflect the impact of individual level factors on justices' decisions but also because non unanimous decisions are likely to be made on the most controversial cases, leaving out trivial matters on which no strategic behavior is expected.[139] The resulting sample includes 561 cases, of which 407 (73%) are ordinary acts and 154 (27%) are executive decrees, which amount to 4,573 individual justice decisions.[140]

[137] Later in this chapter I describe the procedure I followed to code each justice's ideological position.

[138] I discuss different measures of the political strength of the government in the following section.

[139] I report in Appendix D the results of the analysis when all decisions (unanimous and non unanimous) are included in the models. These results are substantively identical to the ones shown in this chapter for most independent variables.

[140] The legal matters involved in a case under review may have an impact on the justices themselves (e.g. when an act regulating the salaries of the judiciary has been challenged). In these instances, the sitting justices abstain from studying the case, which is taken by an ad-hoc court of *conjueces* (i.e. special judges who are not permanently employed by the court but who have been previously selected to step in when necessary). I exclude these cases of the sample. I also exclude individual decisions made by substitute justices, that is, those who temporarily replace justices who are ill or absent for any other reason (these substitutes typically work as high level legal clerks for the absent justices). Finally, I also exclude those observations in which a Justice's opinion suggests that the Court should either inhibit itself or abstain to make a decision on the merits by referring to a previous decision (*stare decisis*); see Chapter 3 for a description of all the possible abstract review decisions in the Colombian Court.

5.2 A SIMPLE, STRAIGHTFORWARD EMPIRICAL TEST

5.2.1 Hypotheses

The analysis of comparative statics derived from the game theoretical model described in Chapter 2 is summarized in Table 2.1, which I reproduce here as Table 5.1.

Table 5.1. Comparative statics of the game

Equilibrium	Increase in A	Increase in B	Increase in α	Increase in β	Increase in p
JS	No change	GS	IBC, GS	No change	IBC, GS
IBC	No change	GS	No change	JS	GS
GS	IBC, JS	No change	No change	JS	No change

The table shows how the game equilibria might change as a result of an increase in each of its parameters, ceteris paribus. This analysis leads to the following empirically testable hypotheses:

H_1: The *more* justices dislike a norm under review (*A*), the *more* likely it is that they will vote to strike such a norm down.

H_2: The *higher* the cost paid by justices as a result of government retribution (*B*), the *less* likely it is that they will vote to strike the norm down.

H_3: The *higher* the cost paid by the government if the Court strikes down legislation it favors (α), the *less* likely it is that justices will vote to strike the norm down.

H_4: The *higher* the cost paid by the government for a failed retaliation against the Court or a specific justice (β), the *more* likely it is that justices will vote to strike down the norm under review.

H_5: The *stronger* the government (*p*), the *less* likely it is that justices will vote to strike the norm down.

5.2.2 Operationalization and estimation

The dependent variable in this analysis is a dummy, UNCONSTITUTIONALITY, coded 1 if the Justice does not uphold entirely the piece of legislation, that is, if such Justice makes a decision considering the act totally or partially unconstitutional, or if the decision conditions its implementation or its enforcement. The variable is coded 0 only if the Justice finds the norm constitutional in its entirety and with no conditions. In other words, I model here the probability that a Justice decides against the legal norm, and therefore against the Executive, even by merely considering small portions of the norm unconstitutional or conditionally constitutional. This means that, under this coding scheme, deference only occurs when the Justice votes for leaving the norm untouched,[141] which happens in 35 percent of the observations.

I operationalize *A*, the cost for justices if they upholds legislation (H_1), by means of a variable (DIVERGENCE) coded 1 when the Justice was appointed during an administration prior to the incumbent at the moment of the Court's decision, and 0 when the Justice was appointed during the incumbent administration.[142] DIVERGENCE measures whether or not the Justice is aligned with the currently ruling coalition, including the president. A value of zero for this variable indicates a

[141] Using an alternative coding of 1 when the Justice votes for striking the norm down in its entirety, and 0 otherwise, does not yield substantively different results, though it would show deference more often.

[142] An alternative way to measure *divergence* would be to include a dummy variable coded 1 for Justices nominated by the president, and 0 for Justices nominated by the Supreme Court or the Council of State (see the description of the appointing procedure in Chapter 3). However, since regardless of the nominating actor all appointments are ultimately made by the Senate, the influence of the ruling coalition is arguably strong no matter the origin of the three-candidate list. Moreover, Rubiano (2009) has provided qualitative evidence to make the case that a politically strong president is often able to impose on the Senate his preferred candidate from each of those three-candidate lists.

lower cost (*A*) for the Justice to uphold legislation favored by the Executive. In the sample analyzed here, 1,120 individual votes were made by justices appointed during the incumbent administration (24 percent), while 3,453 votes (76 percent) were handed down by justices appointed during a previous administration.

In order to test H_2, it is worth noting that justices are assumed to be both policy-seekers and institution-builders and preserving. In other words, justices are not only concerned with the outcome of the case under review but also they tend to have in mind the survival and legitimacy of the institutional status of the court and/or their own individual professional prestige. These motivations conform to Helmke's classification of judges into three ideal-typical categories: policy-seekers, careerists and professionals (Helmke 2005: 30-34). These distinctions notwithstanding, as this author acknowledges, justices pay significant costs whenever they face sanctions by the government and their permanence in the court is jeopardized. These costs, however, vary according to the discount rates justices hold on their future which, in turn, depend on their time horizon, *ceteris paribus*. I therefore operationalize *B* by means of a variable, JUDICIAL CYCLE, which measures the number of months left before the term of the Justice at the time of the decision. This indicator ranges from 0 to 96, with a mean of 55.[143] Newly appointed justices are likely to have a higher concern for the institutional status of the Court than justices who are about to step down. Therefore, the former would have to pay a higher cost should the

[143] I always count the number of months left before a Justice's legal term ends, even if such Justice actually ended up leaving the bench earlier; even if that was the case, it would be impossible to estimate the exact moment when she made the decision of stepping down. In a few cases, this measure may therefore overestimate the Justice's subjective time horizon on which the rationale of this hypothesis is based.

Executive attempt retribution as a result of a Court's decision. As this variable decreases (i.e. when the time left before the end of the Justice's term is shorter), so does this cost (B).[144]

To test H_3, we may think of the policy cost paid by the incumbent administration α as a parameter indicating the salience of the case for the government. In general, the government's stakes are higher when an executive decree is being reviewed by the Court than in the case of ordinary legislation. Therefore, I operationalize this game parameter by means of a dummy variable coded 1 when the act under review is an EXECUTIVE DECREE, and 0 otherwise.

I test H_4 by operationalizing β through the opinion written by the Inspector General (IG) regarding the case under review. As I explained in a previous chapter, the Colombian constitution orders that every case under abstract review by the Court must be previously studied by the IG, an official in charge of protecting citizen rights and of supervising the behavior of public officials.[145] The IG must write an opinion on the merits of the case stating whether he considers that the piece of legislation should be upheld or struck down. Although this opinion is not mandatory for the Court, it may act as a signal of the level of support the Court has should it decide to oppose the Executive. Variable IG STRIKES DOWN is coded 1 if this opinion suggests that the Court should (totally or partially) strike down legislation, and 0 otherwise.[146]

Finally, in order to test H_5 I need an indicator of the Executive's political strength (p), that is, the ability of the government to gather a coalition to adopt court-curbing measures. Naturally, to build such a coalition the president needs enough support in Congress. Measuring legislative

[144] It is worth reminding here the view of one the CCC former justices interviewed (discussed in Chapter 4) who explained the boldness of justices in the temporary court of 1992 by the fact that they had been appointed for just one year.

[145] The IG is appointed in a similar way as Court's justices (i.e. selected by the Senate out of a list of three candidates nominated by the President, the Council of State, and the Supreme Court).

[146] An alternative specification could have the IG's opinion as an indicator of the legal merits of a case, and include opinions made by civil society organizations, as *amici curiae* briefs, favoring the unconstitutionality of the act under review as an indicator of parameter β. This alternative specification yields substantively similar results, as shown in Appendix D.

support in Colombia, however, is quite problematic. Since roll call votes are extremely rare in the Colombian legislature,[147] it is not possible to determine how many members of Congress actually support Executive-sponsored bills. The use of Executive success in Congress (i.e. the rate of bills sponsored by the government that are actually approved) is also problematic since this measure may be biased by the strategic behavior of a weak executive who may publicly sponsor only those bills for which legislative success is reasonably expectable, avoiding the political costs of rejection in Congress (Cárdenas, Junguito, and Pachón 2006; Pachón 2006).

Using simply the raw size of the government's coalition measured as the proportion of congressional seats held by members of parties who supported the electoral campaign of the president leaves us with an indicator with little variation in time (in fact, it would remain constant for the entire presidential term) and, thus, with little empirical usefulness to test my hypotheses.

An alternative measure of the level of legislative support enjoyed by the president can be estimated by looking at the behavior of members of Congress at the initial session of each legislative year. During this session, held on July 20th of each year, votes are taken to select chairs of each committee and presidents of both the Upper and Lower Houses. A proxy of the Executive's legislative support could be the percentage of lawmakers supporting the candidates for these positions who are also supported by the administration. This measure, however, presents at least two potential problems. On the one hand, although it varies more than indicators based on electoral data, it remains constant for each year; for the timeframe analyzed here, this variable would be measured only fourteen times. On the other hand, these figures may reflect specific agreements among parties to select the holders of these congressional posts, where

[147] Recent reforms to the way Congress operates have made roll-call votes a much more frequent practice in Colombia.

logrolling is a common practice, and may not be reliable measure of the actual level of legislative support that the Executive will enjoy during a particular legislative year.

An alternative operational strategy is the use of presidential public approval rates as a proxy for the political strength of the government. Given the typically dominant position of executives in Latin America, popular presidents tend also to have strong legislative support. This is both because voting preferences are likely reflected in electoral results in both presidential and legislative elections and, more importantly, because, especially in countries where party discipline is poor and party boundaries are fluid, legislative behavior may be strongly influenced by the incentive to support a popular administration. In other words, legislators know that opposing a president with high levels of public approval may be electorally costly.[148] Such a president, therefore, is in a strong position to get his initiatives passed in Congress, particularly those aimed at curbing the Court.

In the empirical analysis included below, I specify alternate models using both presidential approval rates and the executive's legislative support as proxies of the government's strength. To measure presidential approval, on the one hand, I use Gallup polls conducted periodically from 1992 to 2006 (Gallup 2009). For each individual Justice decision, I record the level of PRESIDENTIAL APPROVAL at the time that decision was made. This variable ranges from 17 to 78, with a mean of 46.3. To measure legislative support, on the other hand, I use the proportion of members of the Lower House who supported candidates for the legislature's chairpersonships who were favored by the president (obtained from Saavedra 2006). This variable ranges from 0.31 to 0.97, with a mean of 0.62.

[148] The high levels of approval enjoyed by president Uribe explain at least in part the collapse of the Liberal party, once the most powerful one in Colombia. In fact, when liberal leaders stated the party's official opposition to the administration, many of its legislators defected and created or joined new political movements that supported Uribe in Congress.

Given the operationalization of the parameters, the hypotheses above can be reformulated as follows:

H_1: A Justice who was appointed during an administration prior to the incumbent (DIVERGENCE=1) is *more* likely to vote for the unconstitutionality of the challenged statute than a Justice appointed by the current ruling coalition.

H_2: The *longer* the time left before the end of the justice' term (the *larger* JUDICIAL CYCLE), the *less* likely it is that the Justice will vote to strike the statute down.

H_3: It is *less* likely that a Justice votes to overturn the statute when the case is more salient for the government (EXECUTIVE DECREE=1) than when it is less salient (EXECUTIVE DECREE=0).

H_4: It is *more* likely that a Justice votes to strike down the statute when the Inspector General recommends so (IG STRIKES DOWN=1) than when he does not (IG STRIKES DOWN=0).

H_5: The *higher* the level of government's strength (eiher PRESIDENTIAL APPROVAL or SUPPORT IN THE LOWER HOUSE) the *less* likely it is that a Justice will vote to overturn the statute.

In addition to modeling the empirical implications of the game, I also include variables to test two alternative hypotheses. First, perhaps the most successful account of judicial decision making, especially in the case of the United States Supreme Court, is the so called attitudinal model (Segal and Spaeth 2002, 1993). This model sustains that judges decide based on their personal attitudes and policy preferences. In order to test this hypothesis, I use Justices' scores

on a left-right ideology scale, according to an expert survey I conducted between April and July, 2009. I assume that presidents are usually to the right of the Court (García-Villegas 2009). Therefore, I expect this variable to negatively impact the likelihood of a decision striking down legislation. In other words, a more rightist Justice should be more deferent to the government than a left-leaning one. In a later section of this chapter, I will discuss in more detail the method I used to measure ideology for Justices in the Colombian Constitutional Court, the findings regarding the impact of ideology on judicial behavior, and the implications of those findings.

Second, Helmke (2005) has proposed a theory of *strategic defection* which she has tested on the Argentine Supreme Court. In broad terms, this theory posits that justices who usually defer to the government may start to strike down legislation at the end of a presidential term when they perceive that the outgoing administration is losing popular support. In order to empirically address this hypothesis here, I include a variable, ELECTORAL CYCLE, measured as the number of months left before the end of the presidential term. In general, this variable ranges from 0 to 47. However, in October, 2005, the Court upheld a constitutional amendment, promoted by the Uribe administration, allowing the incumbent to run for reelection.[149] Therefore, I added 48 more months to this indicator for decisions made after that moment to reflect the updated temporal horizon faced by justices. In other words, once the reelection amendment was approved and found constitutional by the Court, justices knew that they would have to coexist with president Uribe for four additional years and therefore they had to update their expectations.[150]

I include in the model two control dummy variables to indicate whether the justice was nominated by the SUPREME COURT or by the COUNCIL OF STATE (coded 1 in either case). A value

[149] The 1991 Constitution had explicitly forbidden presidential reelection.

[150] The president's approval rate at the time made it clear to everyone that, once approved and upheld by the Court, the amendment would mean an electoral victory and a second term for Uribe.

of 0 for both dummies means that the justice was nominated by the president (either during the incumbent or a previous administration).

Finally, in order to control for unobserved, idiosyncratic features of each of the four administrations covered by the analysis, other than their level of strength (public approval or legislative support), I include alternate models with dummies for each administration (GAVIRIA, SAMPER, and PASTRANA, leaving the first URIBE administration as the base category). This specification helps improving my ability to reach general findings despite the fact that there are few presidential terms.

Table 5.2 shows the results of logistic models on justices' decisions to overturn legislation. Given that the dataset contains multiple decisions made by 20 justices on a set of cases, observations are not independent from each other. If the estimation does not take this data structure into account, it is possible to obtain downwardly biased standard errors and, therefore inflated statistical significance (Zorn 2006). Therefore, I cluster observations on justice to estimate robust standard errors.

Table 5.2. Determinants of a Justice's decision of unconstitutionality

Dependent variable: Justice decision of UNCONSTITUTIONALITY	Strength as PRESIDENTIAL APPROVAL		Strength as SUPPORT IN THE LOWER HOUSE	
	Coefficient (Robust std. err)		**Coefficient (Robust std. err)**	
PRESIDENTIAL STRENGTH	-0.010	**	-0.018	***	-1.112	***	-1.674	***
	(0.003)		(0.005)		(0.286)		(0.344)	
DIVERGENCE	0.579	***	0.519	‡	0.592	***	0.362	**
	(0.174)		(0.305)		(0.156)		(0.174)	
JUDICIAL CYCLE	0.004		0.004		0.000		-0.002	
	(0.004)		(0.004)		(0.003)		(0.003)	
EXECUTIVE DECREE	-0.213	***	-0.201	***	-0.150	***	-0.120	**
	(0.039)		(0.040)		(0.045)		(0.046)	
IG STRIKES DOWN	0.380	***	0.381	***	0.358	***	0.377	***
	(0.068)		(0.069)		(0.070)		(0.069)	
IDEOLOGY	-0.128	***	-0.132	***	-0.125	***	-0.133	***
	(0.031)		(0.030)		(0.033)		(0.030)	
ELECTORAL CYCLE	-0.009	***	-0.007	**	-0.010	***	-0.011	***
	(0.003)		(0.002)		(0.003)		(0.003)	
NOM. BY SUPREME COURT	-0.024		-0.019		-0.037		-0.019	
	(0.105)		(0.111)		(0.102)		(0.111)	
NOM. BY COUNCIL OF STATE	0.182	‡	0.183	‡	0.176		0.178	‡
	(0.109)		(0.104)		(0.116)		(0.102)	
GAVIRIA			-0.260				-0.590	**
			(0.257)				(0.181)	
SAMPER			-0.305	‡			-0.242	‡
			(0.184)				(0.139)	
PASTRANA			-0.484	*			-0.403	**
			(0.219)				(0.145)	
Constant	1.279	***	1.955	***	1.699	***	2.618	***
	(0.290)		(0.533)		(0.279)		(0.400)	
Observations	4,397		4,397		4,573		4,573	
Percent correct	65.89%		65.66%		65.71%		65.80%	
Wald Chi-2	536.98	***	736.57	***	308.90	***	648.01	***

Observations clustered on Justice

Robust standard errors in parentheses

*** p<0.001, ** p<0.01, * p<0.05, ‡ p<0.1

5.2.3 Discussion

Before engaging in the discussion of the findings related to each hypothesis, it is worth noting that these findings are robust to different model specifications. On the one hand, the use of alternative measures of presidential strength, namely, presidential approval rates and government's legislative support in the Lower House, yields practically identical results. Moreover, on the other hand, the inclusion of dummies for each administration leaves virtually unchanged the significance of the estimates. In other words, although the empirical analysis conducted here covers only four administrations and therefore the generality of the conclusions derived from it must be asserted with caution, the substantive findings related to each hypothesis do not seem to be the result of the particular presidents analyzed here.

Regarding hypothesis H_1, the models show a significant impact of the timing of justices' appointments on their decision making. Justices appointed during a previous presidential term are more likely to strike down a statute than justices who were sworn in during the incumbent administration. The substantive meanings of coefficients in a logistic regression model are better understood by means of graphical representations.[151] Figure 5.1 shows the predicted probabilities of unconstitutionality, along with their 95% confidence intervals,[152] for the cases when the Justice was appointed either by the incumbent administration or by a previous one.[153]

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[151] Unless noted otherwise, the substantive and graphical analyses that follow correspond to the model specification with presidential approval as the measure of government's strength, without dummies for individual administrations.

[152] The dark grey area represents the 95% confidence interval around the point estimate.

[153] In all post-estimation analyses presented in this chapter I coded in Stata 11 the computation of predicted probabilities using the `predictnl` command for the expression of the logistic function:

$$P(y=1) = p = \Lambda(XB) = \frac{1}{1+e^{-XB}}$$

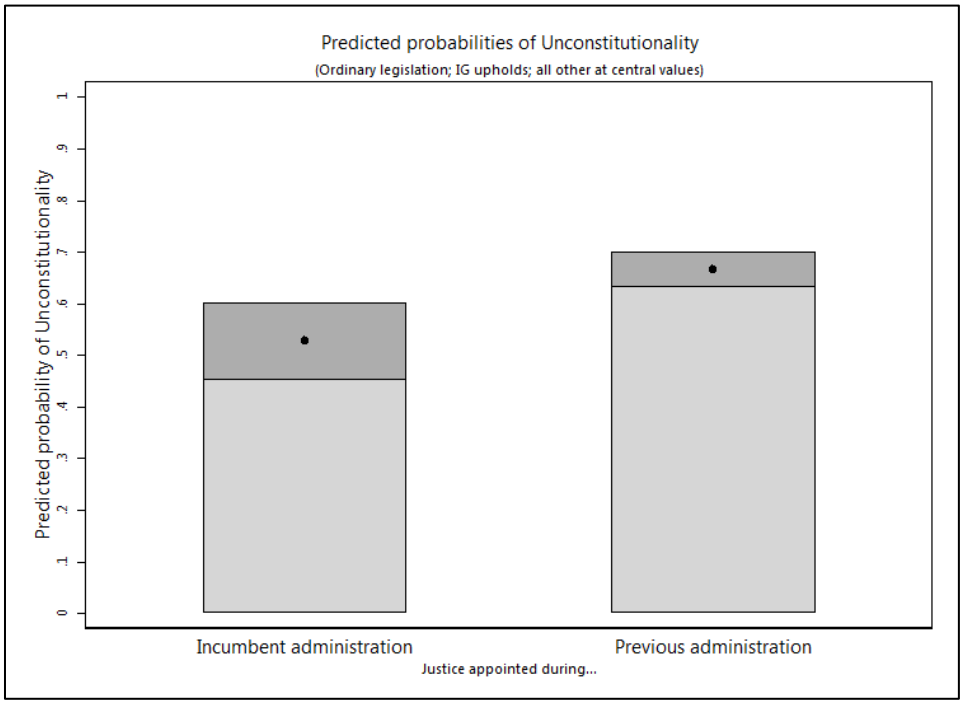

Figure 5.1. Predicted probability of *unconstitutionality* for Justices appointed during either the incumbent or a previous administration

While the estimated probability of a decision supporting the unconstitutionality of the norm is .53 when the Justice was appointed during the current administration, this probability rises to .67 when the Justice nomination was made during a previous presidential term. It is apparent from the models' results that the level of alignment between the ruling coalition and a Justice has a significant impact on the decision regarding the constitutionality of a statute that has been challenged in Court.

The analysis does not provide empirical support for H_2. Not only the sign of the coefficient is the opposite to what the theory predicts but also the ratio of the coefficient to its

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`predictnl` also computes standard errors of the estimates along with 95% confidence intervals' lower and upper boundaries. In all cases, the predictions are made for different values of the variable being discussed, with the remaining variables fixed at their modal/central values, as indicated in the graphs' legends.

standard error is not large enough to allow us to conclude that the effect of the time left before a Justice's term ends on the probability of a decision for the unconstitutionality of the statute is significantly different from zero.

In contrast, the statistical models provide empirical evidence to support H_3. As Figure 5.2 shows, the predicted probability that a Justice makes a decision for the unconstitutionality is lower when the reviewed statute is an executive decree (.62) than in the case of ordinary legislation (.67). This difference is small but statistically significant. *Ceteris paribus*, a Justice tends to be more deferent regarding pieces of legislation that are more salient for the Executive than when the norm under review is an ordinary act approved by Congress.

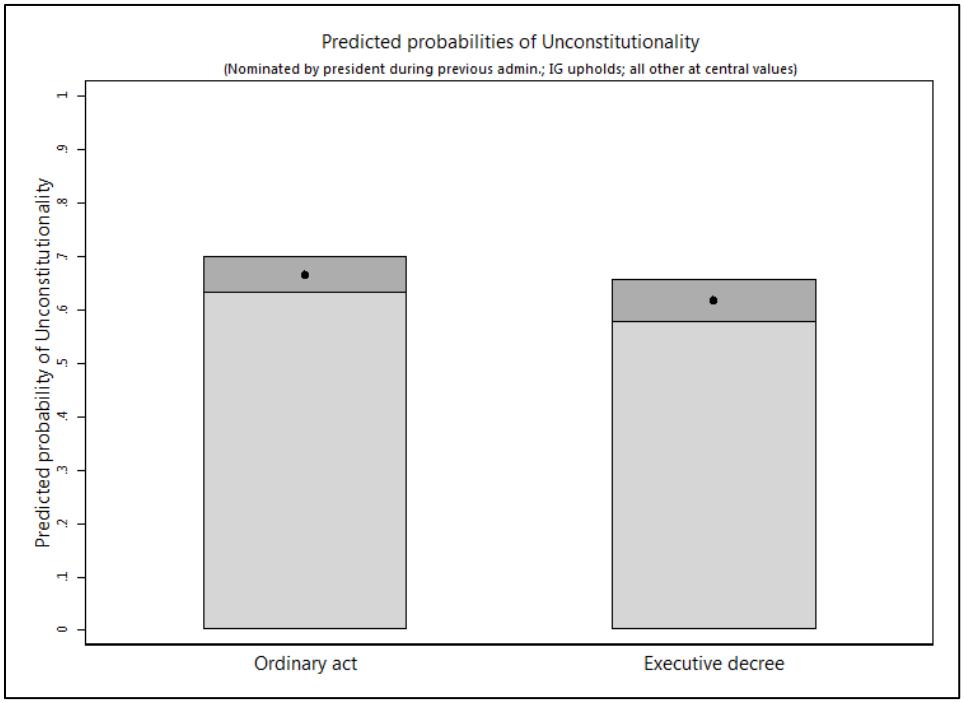

Figure 5.2. Predicted probabilities of *unconstitutionality* for ordinary legislation and executive decrees

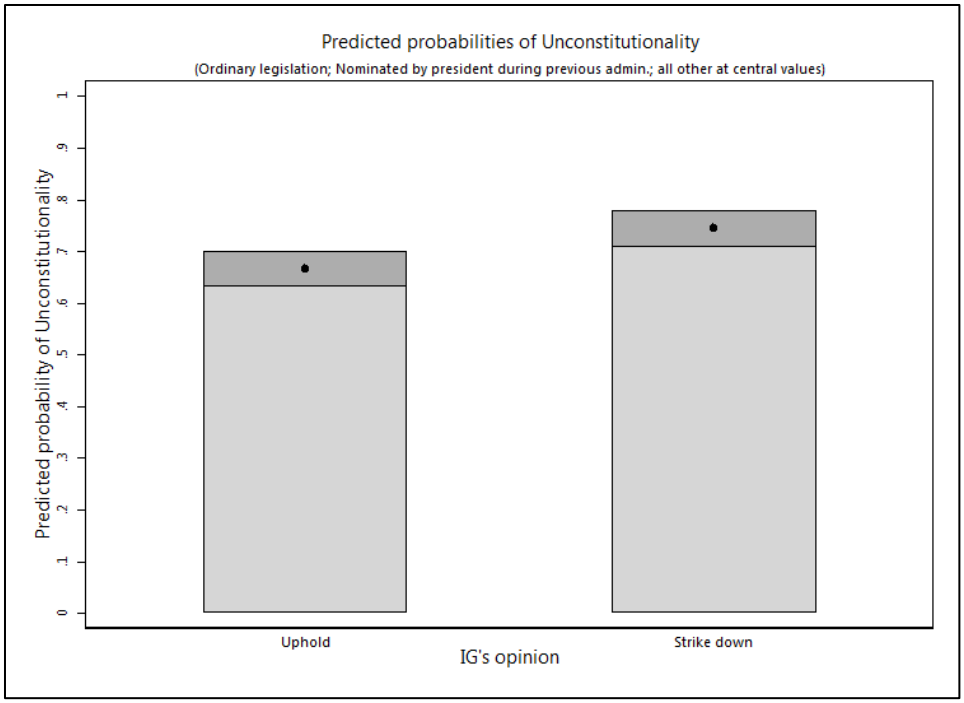

Figure 5.3. Predicted probabilities of *unconstitutionality* when the IG suggests either to uphold or strike down the statute

H_4 also receives strong support from the statistical models estimated above. Justices are significantly more likely to decide for the unconstitutionality of the reviewed statute when the Inspector General (IG) suggests doing so (.74) than when the IG's opinion purports that the statute should be upheld (.67), as shown in Figure 5.3. The IG's opinion seems to be a strong signal for justices regarding the support that the latter would enjoy should they opt for striking down the statute.

The statistical models provide even further evidence supporting the strategic account of judicial behavior in Colombia. All other things being equal, Justices tend to be more deferent towards stronger presidents. In fact, justices are more likely to strike down legislation when the president enjoys lower levels of approval than when they face a popular administration, as shown in Figure 5.4.

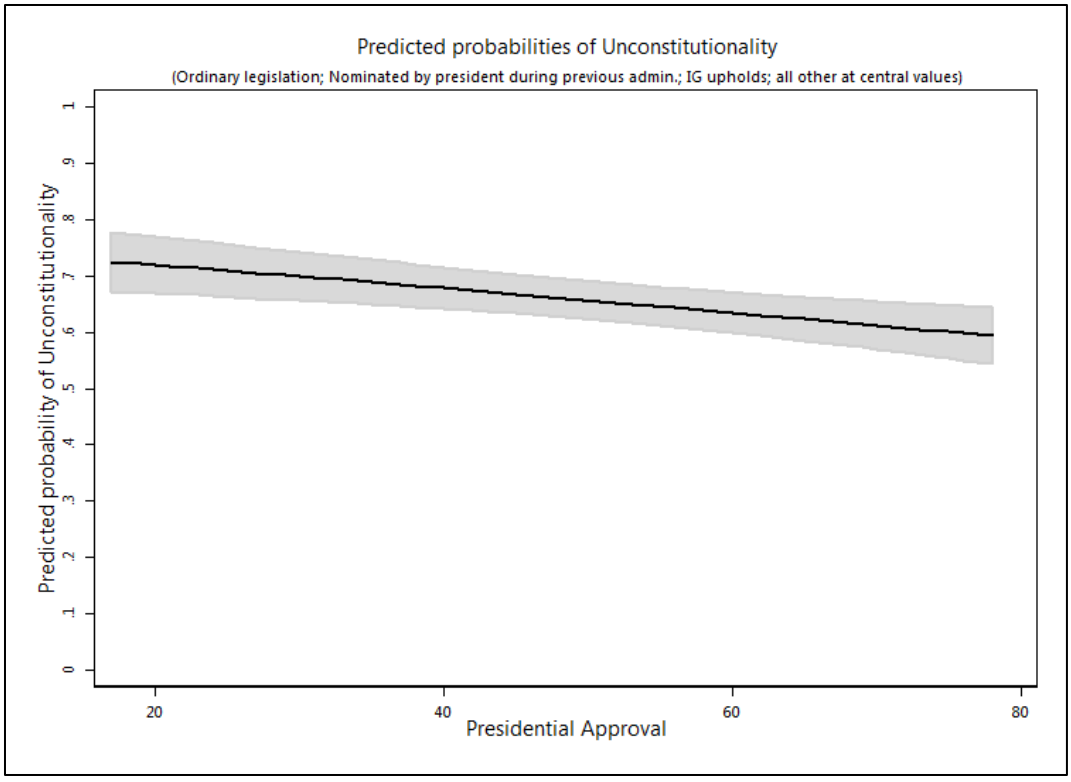

Figure 5.4. Predicted probability of *unconstitutionality* for different values of presidential approval

For a president with 20 points of approval, for instance, the estimated probability of unconstitutionality is .72. This probability drops to .60 for a popular president with 75 points of approval. Around the mean approval, the probability of unconstitutionality is .67. In sum, stronger presidents face significantly more deferent justices.

Using the alternate measure of government's strength, that is, its share of legislative support in the Lower House, shows the same pattern, as shown in Figure 5.5. For instance, the probability of a decision of unconstitutionality when the Lower House seat share is 40% is predicted to be .72, while when the government's legislative support reaches 80% this probability drops to .62.

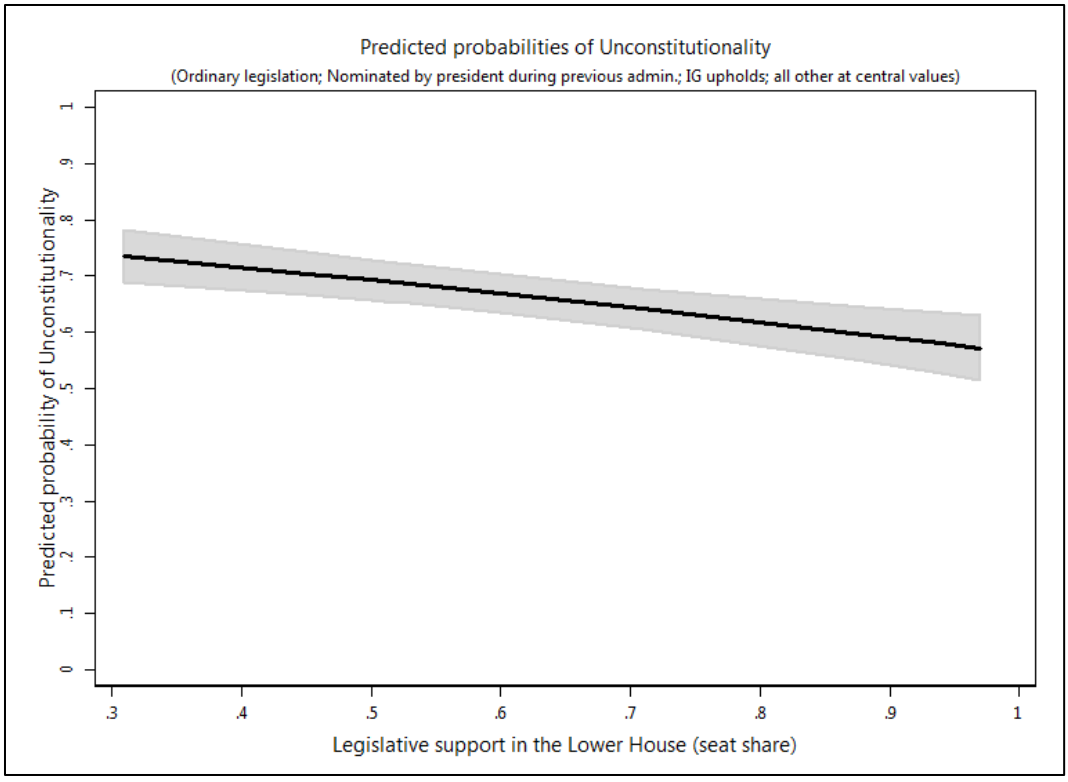

Figure 5.5. Predicted probability of *unconstitutionality*
for different values of the Executive's legislative support in the Lower House

In sum, the empirical evidence presented here, which refers to abstract review cases, shows a Court that strategically defers to the Executive depending on the costs for the players associated with both giving up policy and clashing with each other. The discussion on strategic prudence and the findings presented here may run counter the view, common in the literature, of the Colombian Constitutional Court as a highly independent tribunal. This popular view, however, results from the study of specific highly salient cases in which the Court made decisions enforcing citizen rights, not from a systematic analysis of all cases reviewed by the Court. Moreover, these instances are typically concrete review cases (*tutelas*). Overall, from a comparative perspective the Colombian Constitutional Court has earned a well-deserved reputation for its autonomy. In fact, unlike other countries where the puzzle lies in why a weak

court chooses to act independently (e.g. the Argentine Supreme Court; see Helmke 2005), in Colombia the Court is expected to exhibit an autonomous behavior. A closer look, however, also shows that this autonomy is somehow constrained by political factors of which justices seem well aware.

The empirical models specified and tested here assess a first glance at the empirical implications of the game-theoretical model regarding the strategic nature of the interaction of the Court with the Executive in the Colombian case. Their findings provide partial support to a Separation-of-Powers account of the Court's anticipation of other political actors' reactions to its decisions –particularly by the Executive branch– and its resulting strategic behavior. In the following section I will show how the comparative statics analysis emanated from the theoretical model can derive more nuanced hypotheses regarding the interplay of the different parameters of the game. A final section in this chapter will discuss the impact of justices' personal preferences on their voting behavior in abstract review cases in order to assess the empirical performance of the attitudinal model (Segal and Spaeth 2002, 1993).

5.3 A MORE COMPREHENSIVE EMPIRICAL TEST

5.3.1 A new, slightly different set of hypotheses

The previous section provided a first test of the strategic prudence theory based on a "simple" derivation of hypotheses from the comparative statics analysis summarized in Table 5.1. However, a closer look at the expected changes in the equilibrium regimes resulting from

changes in the parameters of the game may lead to more nuanced and comprehensive hypotheses to be empirically tested.

This insight results from a closer look at the comparative statics of the game, shown in Table 5.1. In fact, the impact of increases in the four game parameters related to costs for the players, namely, *A*, *B*, α, and β, on the likelihood of the game switching from one regime to the next seemingly depend on which regime the game is in the first place, which in turn depends on the level of presidential strength (i.e. parameter *p*), as depicted in Figure 2.2. In other words, there might be the case that the strength of the president is a factor conditioning the way the players' behavior is influenced by the costs associated with their giving up policy and clashing with each other. This more nuanced analysis leads to the following hypotheses, which are a reformulation of the first four hypotheses stated in the previous section:

H_1: The *more* a Justice dislikes a norm under review (*A*), the *more* likely it is that such Justice will vote to strike such a norm down. This effect should be larger for *higher* levels presidential political strength (*p*).

H_2: The *higher* the cost paid by a Justice for government retribution (*B*), the *less* likely it is that such Justice will vote to strike the norm down. This effect should be larger for *lower* levels of presidential political strength (*p*).

H_3: The *higher* the cost paid by the government if the Court strikes down legislation it favors (α), the *less* likely it is that a Justice will vote to strike the norm down. This effect should be larger for *lower* levels of presidential political strength (*p*).

H_4: The *higher* the cost paid by the government for a failed retaliation against the Court (β), the *more* likely it is that a Justice will vote to strike down the norm

under review. This effect should be larger for *higher* levels of presidential political strength (*p*).

Following the same operationalization strategy described in the previous section, these hypotheses lead to the following operational hypotheses:

H_1: A Justice who was appointed during an administration prior to the incumbent (DIVERGENCE=1) is *more* likely to vote for the unconstitutionality of the challenged statute than a Justice appointed by the current ruling coalition, especially when the government's strength (PRESIDENTIAL APPROVAL or SUPPORT IN THE LOWER HOUSE) is *higher*.

H_2: The *longer* the time left before the end of the justice' term (the *larger* JUDICIAL CYCLE), the *less* likely it is that the Justice will vote to strike the statute down, especially when the government is weaker (i.e. when PRESIDENTIAL APPROVAL or SUPPORT IN THE LOWER HOUSE are *lower*).

H_3: It is *less* likely that a Justice votes to overturn the statute when the case is more salient for the government (EXECUTIVE DECREE=1) than when it is less salient (EXECUTIVE DECREE=0), especially when PRESIDENTIAL APPROVAL or SUPPORT IN THE LOWER HOUSE are *lower*.

H_4: It is *more* likely that a Justice votes to strike down the statute when the Inspector General recommends so (IG STRIKES DOWN=1) than when he does not (IG STRIKES DOWN=0), especially when the government is stronger (i.e. when PRESIDENTIAL APPROVAL or SUPPORT IN THE LOWER HOUSE are *higher*).

5.3.2 Estimation and discussion

These hypotheses call for model specifications which include interactive terms in order to account for the conditional effects described above. The results of these models are shown in Table 5.3. A first glance at the coefficients and their signs suggests that most hypotheses in their interactive form seem to receive strong empirical support. Not only there is evidence of strategic behavior by the CCC justices but also the impact of the four parameters of the game *A*, *B*, α, and β, seems to be conditional to the executive's strength (*p*). These findings are rather robust to the different specifications incorporated in the analysis, including both measures of presidential strength (presidential approval and seat chare in the Lower House). Again, the strategic judicial behavior and the interactive pattern unveiled in the analysis do not seem to be the result of particular features of the presidential terms included in the analysis, as shown in the models including dummies for each administration.

Table 5.3. Determinants of a Justice's decision of unconstitutionality (interactive models)

Dependent variable: Justice decision of UNCONSTITUTIONALITY	Strength as PRESIDENTIAL APPROVAL				Strength as SUPPORT IN THE LOWER HOUSE			
	Coefficient (Robust std. err)		**Coefficient (Robust std. err)**		**Coefficient (Robust std. err)**		**Coefficient (Robust std. err)**	
PRESIDENTIAL STRENGTH	-0.065	***	-0.095	***	-5.248	***	-6.798	***
	(0.011)		(0.018)		(1.024)		(1.331)	
DIVERGENCE	-0.719	**	-1.374	***	-0.500		-1.032	*
	(0.228)		(0.308)		(0.425)		(0.507)	
DIVERGENCE X PRES. STRENGTH	0.028	***	0.039	***	1.693	**	1.943	*
	(0.004)		(0.006)		(0.611)		(0.803)	
JUDICIAL CYCLE	-0.021	***	-0.028	**	-0.025	**	-0.036	***
	(0.006)		(0.008)		(0.009)		(0.010)	
JUDICIAL CYCLE X PRES. STRENGTH	0.001	***	0.001	***	0.042	***	0.053	***
	(0.000)		(0.000)		(0.012)		(0.013)	
EXECUTIVE DECREE	-0.338	***	-0.322	**	-0.532	***	-0.504	***
	(0.101)		(0.104)		(0.138)		(0.134)	
EXECUTIVE DECREE X PRES. STRENGTH	0.003	‡	0.003	‡	0.617	**	0.614	***
	(0.002)		(0.002)		(0.193)		(0.186)	
IG STRIKES DOWN	-0.408	***	-0.383	***	-0.651	***	-0.606	***
	(0.106)		(0.104)		(0.114)		(0.115)	
IG STRIKES DOWN X PRES. STRENGTH	0.016	***	0.016	***	1.579	***	1.533	***
	(0.002)		(0.002)		(0.184)		(0.187)	
IDEOLOGY	-0.148	***	-0.161	***	-0.136	***	-0.148	***
	(0.026)		(0.025)		(0.031)		(0.027)	
ELECTORAL CYCLE	-0.010	**	-0.005	*	-0.009	*	-0.008	*
	(0.003)		(0.002)		(0.003)		(0.003)	
NOM. BY SUPREME COURT	0.032		0.068		-0.006		0.027	
	(0.109)		(0.124)		(0.097)		(0.107)	
NOM. BY COUNCIL OF STATE	0.157		0.163	‡	0.151		0.142	
	(0.102)		(0.098)		(0.114)		(0.100)	
GAVIRIA			-0.212				-0.688	***
			(0.224)				(0.192)	
SAMPER			-0.411	*			-0.282	‡
			(0.185)				(0.149)	
PASTRANA			-0.891	***			-0.596	***
			(0.232)				(0.165)	
Constant	3.874	***	5.784	***	4.288	***	6.094	***
	(0.522)		(0.911)		(0.721)		(0.953)	
Observations	4,397		4,397		4,573		4,573	
Percent correct	66.25%		66.70%		66.21%		65.78%	
Wald Chi-2	458.30	***	1716.90	***	280.25	***	506.77	***

Observations clustered on Justice;

Robust standard errors in parentheses

*** p<0.001, ** p<0.01, * p<0.05, ‡ p<0.1

Examining only the coefficients in models with interactive terms, however, can hardly suffice to assess the effects of the different factors, especially on a binary dependent variable. In other words, it is not accurate to reach valid conclusions based solely on the magnitudes and significances of the individual coefficients and of the multiplicative terms. It is necessary to conduct a more careful analysis of the marginal effects on the dependent variable of the factors of interest depending on the values of the conditioning variable (Ai and Norton 2003; Berry and Rubin 2007; Brambor, Clark, and Golder 2006; Kam and Franzese 2007; Mitchell and Chen 2005; Norton, Wang, and Ai 2004). The discussion that follows takes into account this detailed analytical strategy to assess the hypotheses' empirical support.[154]

The interactive nature of H_1 in its new formulation is apparent in Figure 5.6, which shows the marginal effect (and its 95% confidence interval) of DIVERGENCE on the dependent variable for different values of presidential approval. As shown in Figure 5.7, the probability of unconstitutionality is lower for a Justice appointed during the incumbent administration than for one appointed during a previous term, but only at sufficiently high levels of presidential

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[154] Technically, if in the logistic model with an interaction we have that

$$P(y=1) = p = \Lambda(XB) = \frac{1}{1+e^{-XB}} = \frac{e^{XB}}{1+e^{XB}}$$

where

$$XB = \beta_0 + \beta_1 x_1 + ... + \beta_i x_i + ... + \beta_j x_j + ... + \beta_{ij} x_i x_j + ... + \beta_m x_m$$

then, the marginal effect of, say, x_i, on the probability p is modulated by x_j according to the following expression:

$$\frac{\delta p}{\delta x_i} = \frac{e^{XB}}{(1+e^{XB})^2}(\beta_i + \beta_{ij} x_j)$$

I coded the syntax to compute this expression and the predicted probabilities for the various interactions in the model and then graphed their shape in Stata 11 to present my results here. (The Stata code is available upon request.) These graphs correspond to the models using presidential approval as the measure of government's strength without administration dummies.

approval. The alignment of a Justice with the ruling coalition only makes a difference on judicial behavior when a strong administration leads such a coalition.

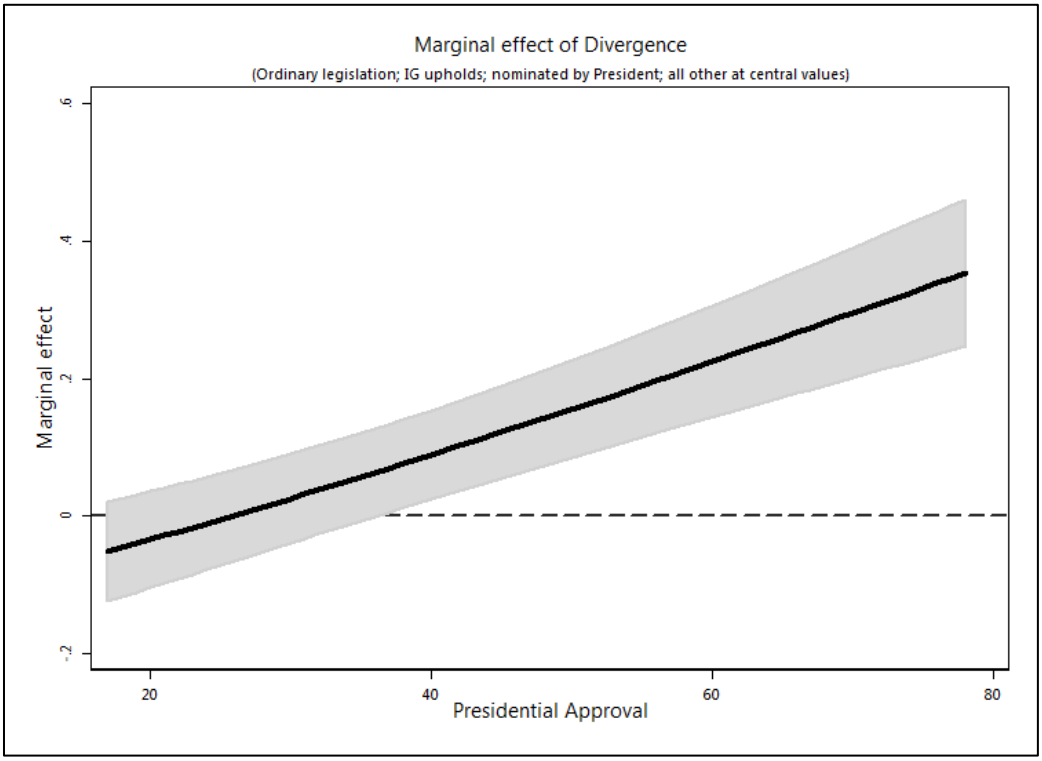

Figure 5.6. Marginal effect of *divergence* on the probability of *unconstitutionality*, for various levels of presidential approval

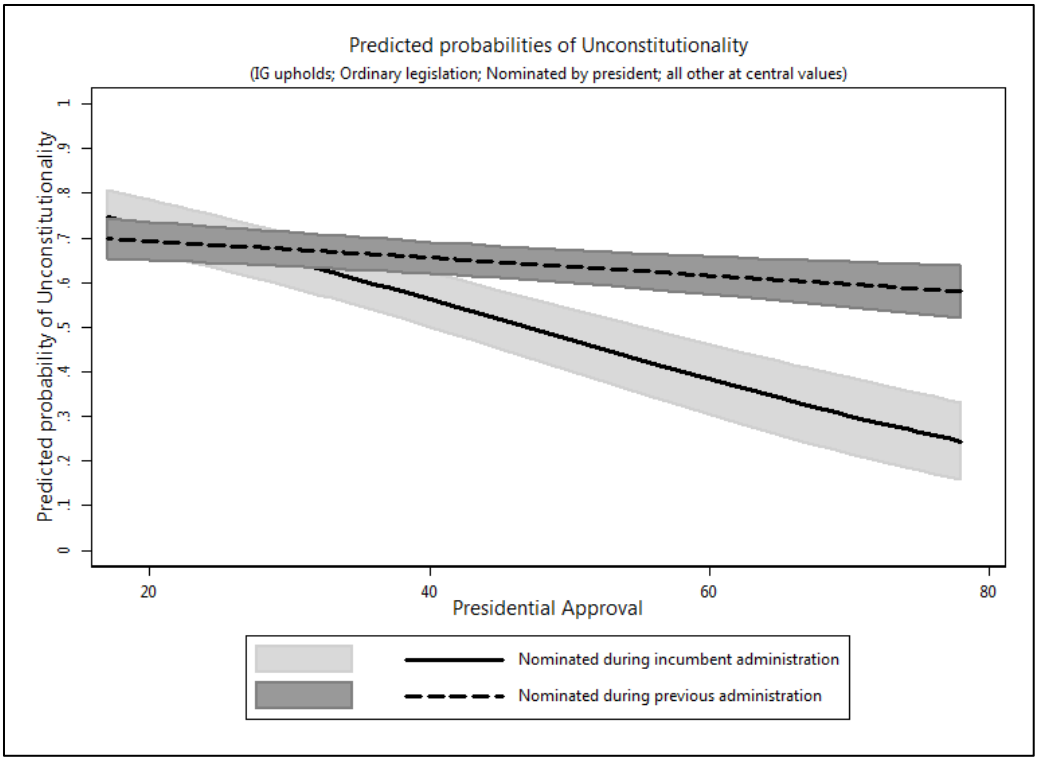

Figure 5.7. Predicted probabilities of *unconstitutionality* for Justices appointed during either the incumbent or a previous administration, at different levels of presidential approval

The analysis in the previous section found no empirical support for H_2. Its new formulation, including an interaction between judicial cycle and presidential approval, shows a different, richer picture. The hypothesis predicts that, *ceteris paribus*, justices at the beginning of their tenure should be less likely to decide for the unconstitutionality than justices about to finish their terms, but only for administrations enjoying lower levels of strength.

Figure 5.8 shows that this expectation is partially warranted. It also shows, however, that justices with a long time left before the end of their tenure is significantly less deferent to popular administrations. The statistical models, in fact, estimate that the likelihood that justices finishing their time in office make a decision of unconstitutionality sharply declines with the Executive's approval, while such a probability remains stable in the case of justices starting their

tenures, as shown in Figure 5.9 (what seems a slight increase is not significant for the range of approval).

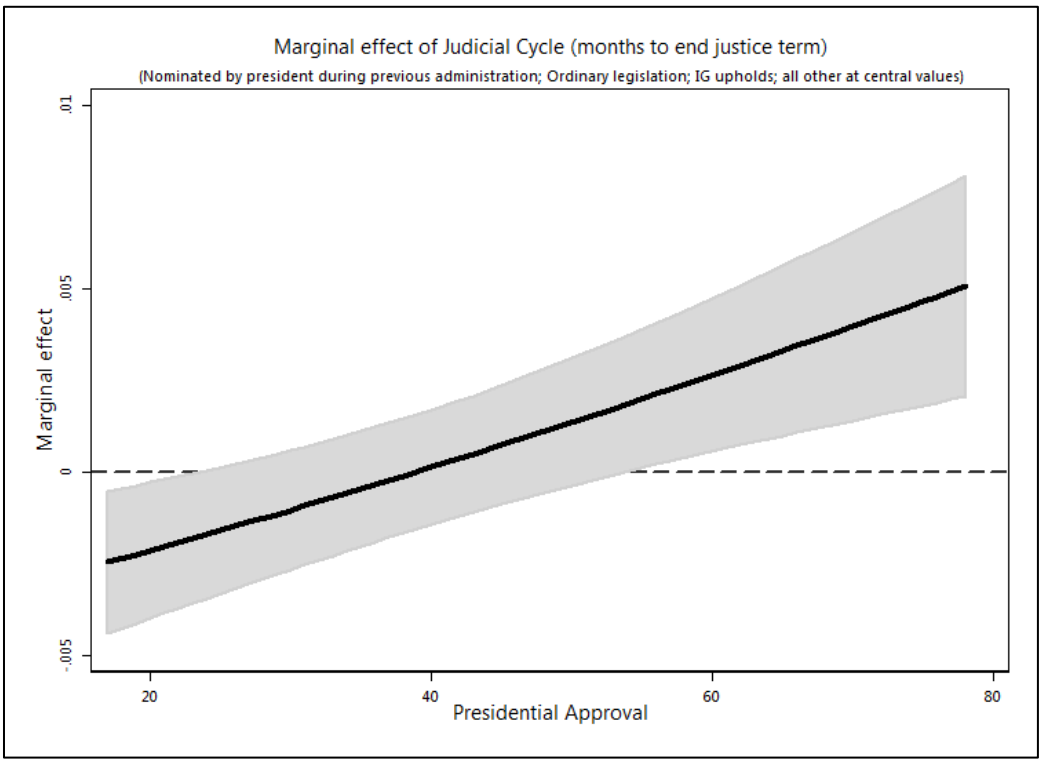

Figure 5.8. Marginal effect of the *judicial cycle* on the probability of *unconstitutionality* for different values of presidential approval

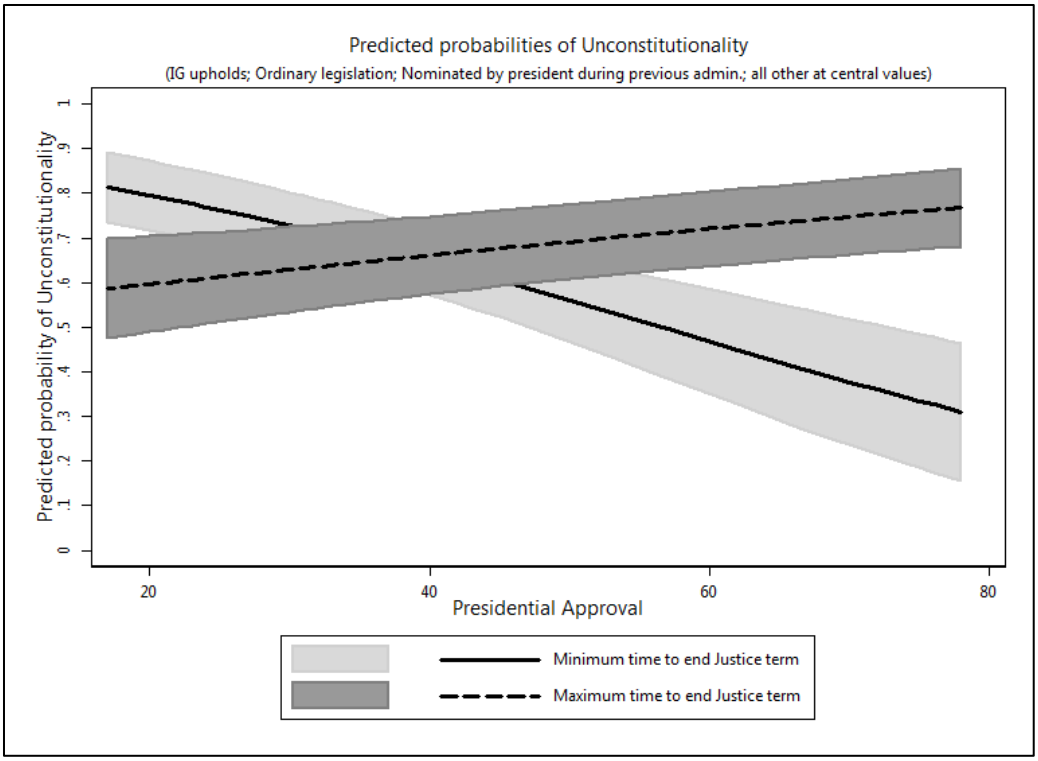

Figure 5.9. Predicted probabilities of *unconstitutionality* for justices starting and ending their tenures, at different values of presidential approval

As for H_3, the analysis of the interactive effect shows that the fact that the norm under review is an executive decree, as a signal of the level of salience of the case for the administration, is an effective deterrent for court justices, though this effect declines as the government get stronger, as shown in Figure 5.10. Moreover, the effect of the type of legislation is small in magnitude, as is apparent in Figure 5.11. Perhaps using a finer measure of case salience, such as an analysis of the briefs filed by government officials and agencies for each case, could provide stronger support for H_3. This analysis, however, goes beyond the scope of this dissertation.

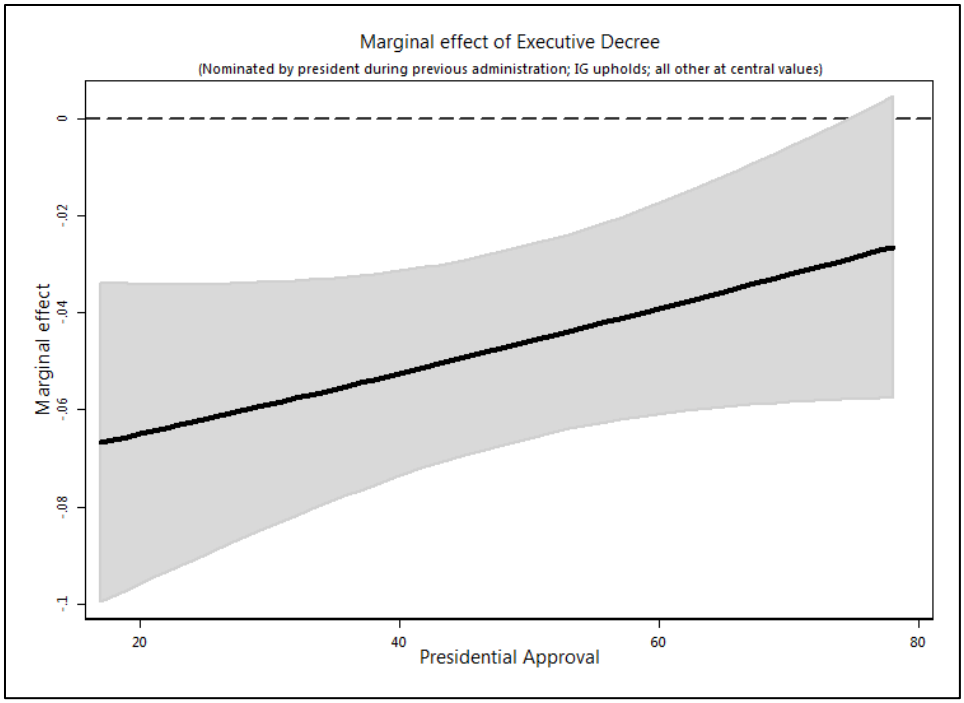

Figure 5.10. Marginal effect of *executive decree* on the probability of *unconstitutionality* for different values of presidential approval

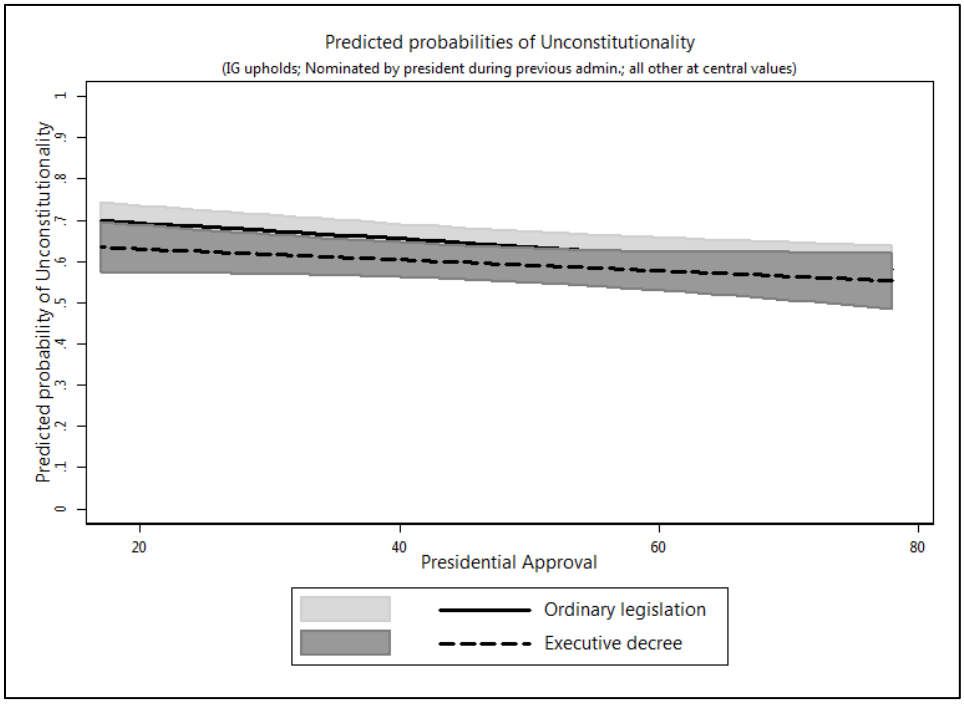

Figure 5.11. Predicted probabilities of *unconstitutionality* for ordinary legislation and executive decrees at different values of presidential approval

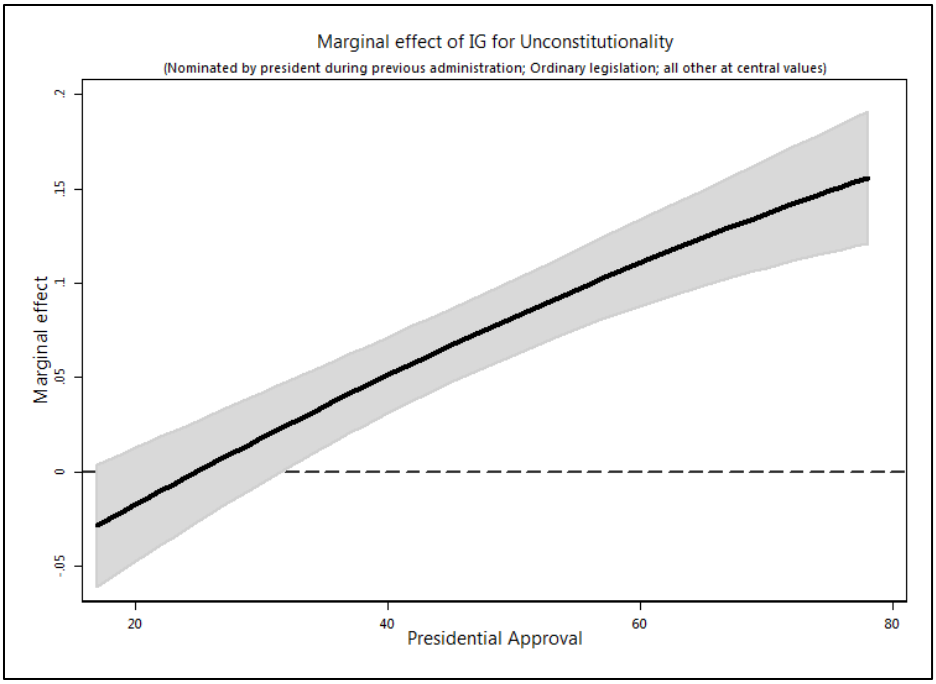

Figure 5.12. Marginal effect of a *strike down* opinion by the IG on the probability of *unconstitutionality*, for different values of presidential approval

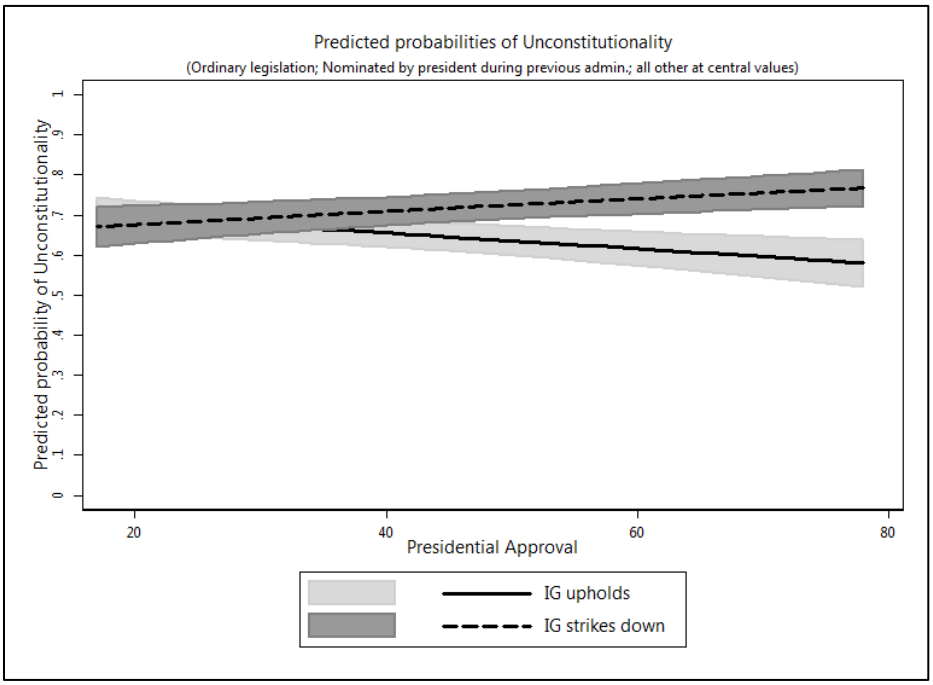

Figure 5.13. Predicted probabilities of *unconstitutionality* for an IG opinion of either *uphold* or *strike down* the statute, at different values of presidential approval

Finally, the effect of the IG's support for a decision of unconstitutionality is also mediated by the government's strength, as stated in the interactive formulation of H_4. Figure 5.12 shows that this effect is only significant, and positive, beyond a certain level of presidential approval, as purported by the hypothesis. For weak administrations, the likelihood of a decision of unconstitutionality is high, regardless of the IG's opinion. This probability declines when a Justice faces a popular president and the IG suggests upholding the statute under review (see **Error! Reference source not found.**). An IG's opinion that favors striking down the statute counteracts the effect of the Executive's strength on the probability of a Justice making a decision of unconstitutionality.

The analysis developed in this section highlights the importance of conducting a careful derivation of hypotheses from the theoretical model's analysis of comparative statics (Carrubba, Yuen, and Zorn 2007). In this case, such an analysis uncovers the interactive nature of the impact of the game's parameter on the phenomenon under study. This leads to stating multiplicative terms to be included in the estimation of a statistical model which provides a more accurate test of the theoretical model presented in Chapter 2.[155]

In any case, whether or not the specification contains interactions, the data on individual justices' decisions provide strong empirical support for the theory of strategic prudence in the case of the Colombian Constitutional Court. These findings suggest that, when facing a decision on abstract review of legislation, justices take into account the political context in which they must make such decisions and their personal situations within that context.

Before turning to the next section in which I assess the findings regarding the attitudinal model (Segal and Spaeth 2002, 1993), it is worth mentioning that the president's electoral cycle

[155] In general, the comparative statics analyses derived from game-theoretical models of this type (e.g. Vanberg 2005) should be empirically tested using interactive specifications such as the one presented in this section.

also plays a role in explaining justices' behavior. As shown in Table 5.3, the coefficient for the time left before the end of the incumbent's term is significant.[156] Table 5.4, in turn, shows the predicted probabilities that a justice will decide against the statute for different values of the president's time left in office (when all other variables are at their modal values). Although this is a rough test of the strategic defection theory advanced by Helmke (2002, 2005), these results show that, *ceteris paribus*, justices tend to defer more often to Executives who have a long time ahead than to presidents reaching the end of their tenures.

Table 5.4. Predicted probabilities of unconstitutionality
for different values of the time left before the president's term ends

Months to end president's term	Predicted probability of *unconstitutionality*	95% confidence interval	
54	.573	[.512	.635]
48	.588	[. 534	.641]
42	.602	[.555	.648]
36	.619	[.575	.657]
30	.630	[.592	.667]
24	.643	[.607	.679]
18	.657	[.620	.693]
12	.670	[.630	.709]
6	.683	[.639	.726]
0	.695	[.647	.744]

[156] This finding is robust to different model specifications, as shown in Appendix D.

5.4 TESTING THE ATTITUDINAL MODEL IN THE COLOMBIAN CONSTITUTIONAL COURT

The attitudinal model has been advanced by scholars studying mainly the United States Supreme Court (Segal and Spaeth 2002, 1993).[157] This model purports that Justices make their decisions based on their own attitudes and preferences. More specifically, these attitudes interact with the facts of a case to produce a decision on the merits. Although some scholars have suggested a strategic account of US Supreme Court justices' decision making, the attitudinal model is perhaps the most successful explanatory approach to the US Supreme Court case.

As the model's promoters acknowledge, this approach does not necessarily travel well to other cases, either to lower levels courts in the United States or to high courts in other countries (Segal and Spaeth 2002). The reason lies in the variation in the institutional setting within those cases. US Supreme Court justices are able to make decisions based mainly on their own preferences (i.e. they are able to act sincerely) because of the insulation provided by institutional features such as life tenure. In contexts in which justices are more institutionally exposed to external pressures, it is expectable to observe strategic behavior.

Of course, this does not mean that in cases where courts lack the institutional insulation enjoyed by the US Supreme Court individual preferences are irrelevant. As one former justice I interviewed put it, "it cannot be denied that the philosophical positions and political conceptions of judges impact their decisions." (J4). Moreover, as I showed in the empirical models of behavior of justices in the Colombian Constitutional Court, summarized in Table 5.2 and Table

[157] Some tests of the attitudinal model in countries other than the U.S. include Songer and Johnson (2007) for Canada, and Basabe (2008) for Ecuador.

5.3, and will discussed further in this section, justices' ideological positions have a robust impact on their decisions regarding cases of abstract constitutional review.

Coming up with an independent measure of political attitudes for justices is not an easy task. As has been pointed out, using justices' votes to estimate their preferences would lead to circularity in the determination of causes and effects since one would be predicting judicial behavior by means of attitudes inferred by the very same judicial behavior. Using *past* votes to derive preferences used in turn to predict *future* votes would only assess judicial consistency, not the impact of judicial attitudes on judicial behavior; to the extent that past votes may be in part determined by strategic behavior, it is impossible to discern the effect of preferences on votes (Segal and Spaeth 2002).

This task is harder in the case of the Colombian Constitutional Court. Replicating the measurement strategy used in the case of US Supreme Court justices (Segal and Cover 1989) is unfeasible since there is no systematic record of journalistic reviews for candidates to the bench. An attempt to derive justices' ideologies from the preferences of their nominators (the president, the Supreme Court, and the Council of State) or their appointers (the Senate) only begs the question of trying to estimate these actors' preferences in the first place.

Given this difficulties, and following the idea developed in Basabe (2008), I decided to survey experts on the court. More concretely, I devised a sample of public law professors at universities around the country, as well as former and current court clerks, and conducted an e-mail survey on this sample. Although justices' political preferences have probably more than one dimension, as was pointed out by more than one of the respondents, for the sake of simplicity the questionnaire contained a single question for each justice. I simply asked respondents to provide

an ideological score (on a left-right 1-to-10 scale) for each of the justices that have been sworn in from 1992 to 2006.

Two caveats should be made regarding this measure of ideology. First, constraining judicial ideology to a one-dimensional scale certainly obscures richer descriptions of justices' preferences which may vary along two or more dimensions. For instance, a justice such as José G. Hernández (1993-2001) was said to lean to the left in socioeconomic matters, thus supporting an active role of the state in the economy and favoring court decisions aimed at protecting social and economic rights, but he was more conservative regarding "moral" issues related to civil liberties such as abortion and euthanasia. The survey could have addressed more than one attitude dimension, but I decided to keep it simple in order to increase the response rate. Second, it is possible that survey respondents may not provide a measure of justices' ideological position that is entirely independent from the justices' behavior. In other words, respondents' perceptions of justices' attitudes and preferences may result from their knowledge of them prior to their appointments, in combination with their assessments of their behavior in court. Unfortunately, as was previously discussed, there is no other reliable source for Colombian Constitutional Court justices' ideological position such as the analysis of newspapers editorials used for the U.S. Supreme Court (Segal and Cover 1989). In fact, mine is, to my knowledge, the first attempt at systematically recording Constitutional Court attitudes.

The online survey obtained responses from 43 experts. For each justice's IDEOLOGY I recorded the mean response in the survey.[158] Figure 5.14 shows the ideological scores for all twenty justices included in the sample, along with 95% confidence intervals..

[158] I include the survey questionnaire in Appendix C.

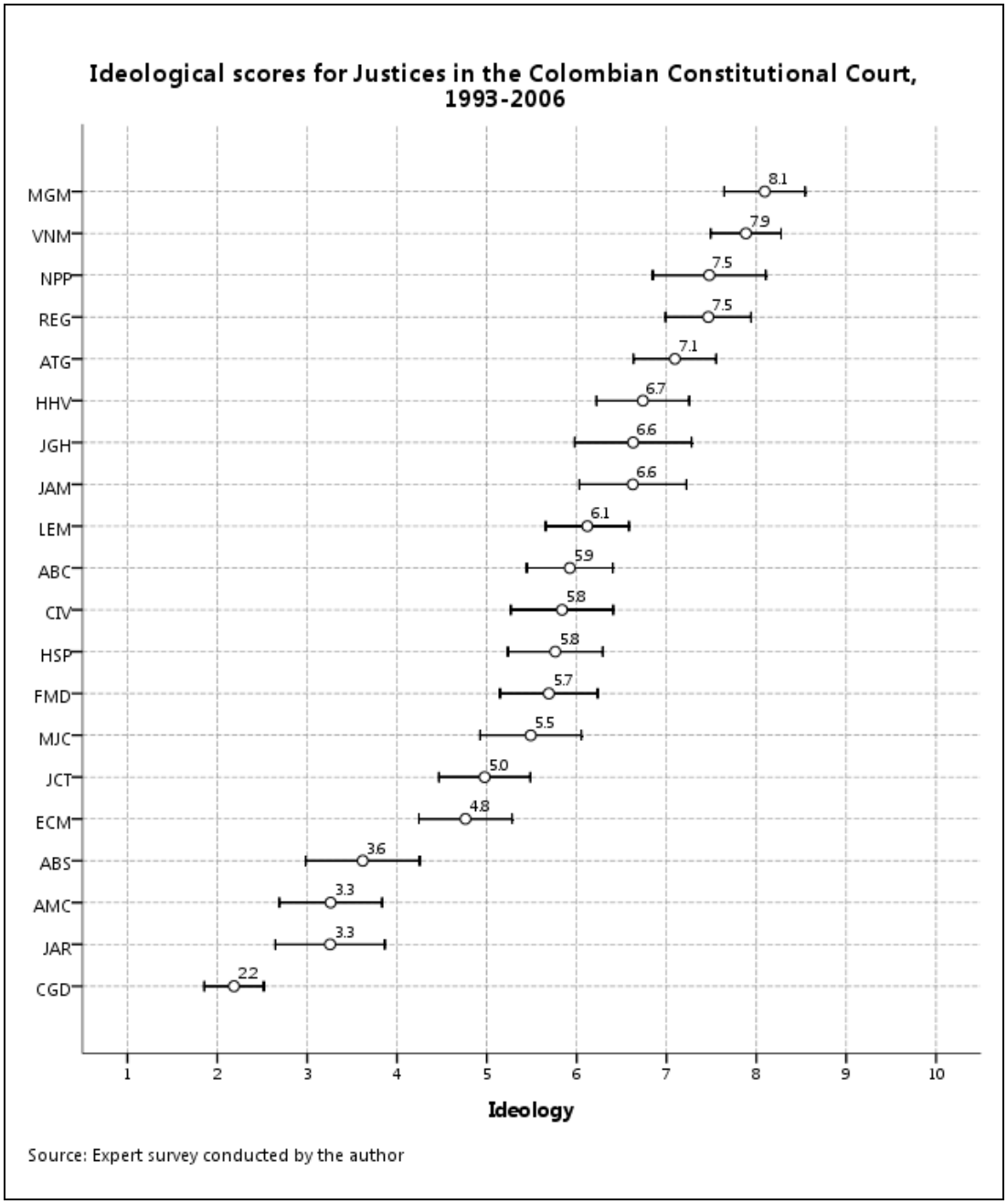

Figure 5.14. Ideological scores for Justices in the Colombian Constitutional Court, 1993-2006[159]

[159] The Justices' initials have, from left to right, the following meanings: CGD: Carlos Gaviria Díaz; JAR: Jaime Araújo Rentería; AMC: Alejandro Martínez Caballero; ABS: Alfredo Beltrán Sierra; ECM: Eduardo Cifuentes Muñoz; JCT: Jaime Córdoba Triviño; MJC: Manuel José Cepeda; FMD: Fabio Morón Díaz; HSP: Humberto Sierra Porto; CIV: Clara Inés Vargas; ABC: Antonio Barrera Carbonell; LEM: Luis Eduardo Montealegre Lynett; JAM: Jorge Arango Mejía; JGH: José Gregorio Hernández; HHV: Hernando Herrera Vergara; ATG: Álvaro Tafur Galvis; REG: Rodrigo Escobar Gil; NPP: Nilson Pinilla Pinilla; VNM: Vladimiro Naranjo Mejía; MGM: Marco Gerardo Monroy Cabra.

Justices' ideology turned out to be a robust predictor of their behavior, not only in the models shown in previous sections of this chapter but also in other alternative specifications (shown in Appendix D). Based on the model discussed in the previous section (i.e. the model including multiplicative terms), Figure 5.15 shows the predicted probabilities of a decision for the unconstitutionality of the statute for the range of justices' ideological positions. The shape of the graph clearly suggests that justices on the right are more likely to uphold legislation than left-leaning justices.

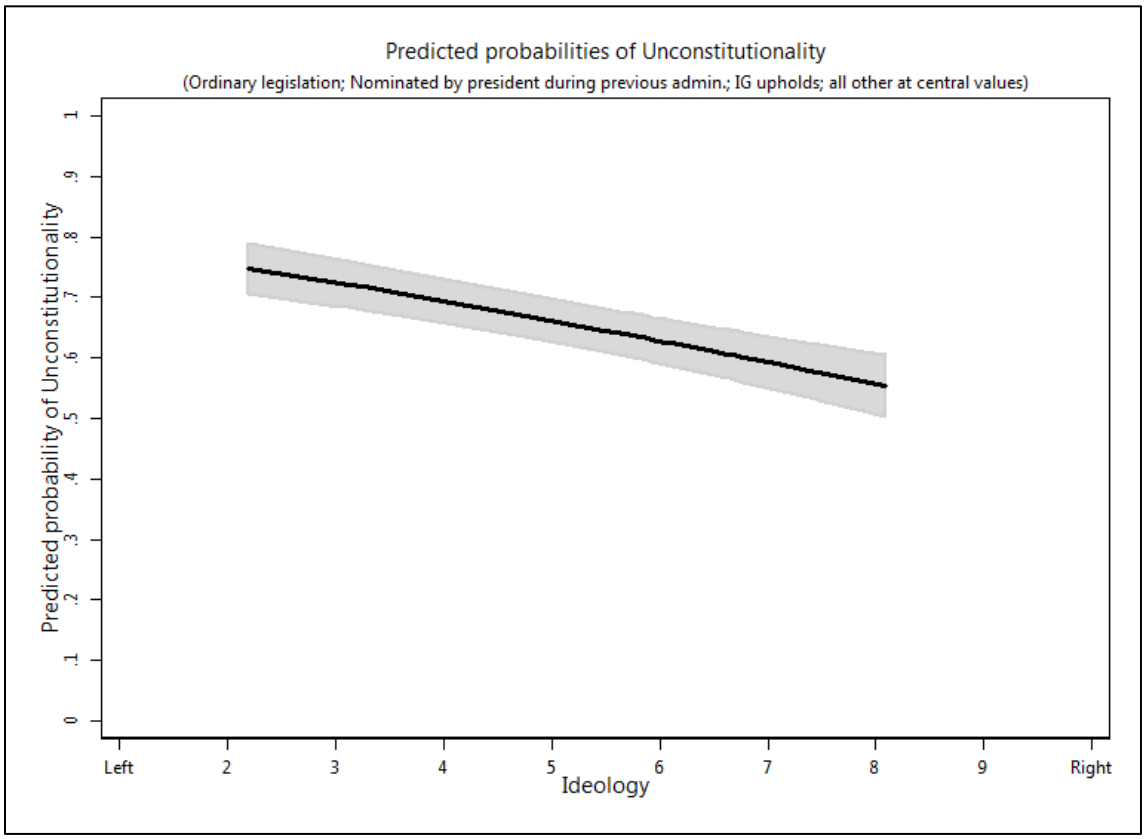

Figure 5.15. Predicted probabilities of *unconstitutionality* for different values of justices' ideology

Moreover, **Error! Reference source not found.** shows the ideological score, the predicted probability of unconstitutionality, and the actual rate of decisions striking down the statute under review, for each justice in the sample. Although in a few cases the model's predictions deviates somewhat from the actual behavior (especially in the case of Justice J. G. Hernández, for whom the deference rate is overestimated in the statistical model, and in the case of Justice H. Sierra Porto, for whom the opposite occurs), justices ideological positions, as perceived by experts on the Court, tend to predict well their decisions on abstract review cases.[160]

Table 5.5. Predicted probabilities and actual rates of unconstitutionality decisions according to justices' ideological scores

Initials	Name	Ideology	Predicted	Actual
CGD	Carlos Gaviria Díaz	2.186	.75	.78
JAR	Jaime Araújo Rentería	3.256	.72	.78
AMC	Alejandro Martínez Caballero	3.262	.72	.76
ABS	Alfredo Beltrán Sierra	3.619	.71	.67
ECM	Eduardo Cifuentes Muñoz	4.762	.67	.69
JCT	Jaime Córboba Triviño	4.976	.66	.64
MJC	Manuel José Cepeda	5.488	.65	.58
FMD	Fabio Morón Díaz	5.691	.64	.67
HSP	Humberto Sierra Porto	5.762	.64	.51
CIV	Clara Inés Vargas	5.837	.63	.63
ABC	Antonio Barrera Carbonell	5.923	.63	.72
LEM	Luis Eduardo Montealegre Lynett	6.119	.62	.65
JAM	Jorge Arango Mejía	6.625	.61	.59
JGH	José Gregorio Hernández	6.628	.61	.72
HHV	Hernando Herrera Vergara	6.737	.60	.57
ATG	Álvaro Tafur Galvis	7.093	.59	.59
REG	Rodrigo Escobar Gil	7.465	.58	.64
NPP	Nilson Pinilla Pinilla	7.476	.58	N/A
VNM	Vladimiro Naranjo Mejía	7.884	.56	.57
MGM	Marco Gerardo Monroy Cabra	8.093	.55	.59

[160] It is worth reminding that the analysis discussed here includes only non-unanimous decisions, that is, decisions on the most contentious cases and where the effect of individual justices traits are more likely to play a role in explaining their behavior. When the entire universe of cases is included in the model, the effect of justices' ideological positions on their decisions is smaller, although still statistically significant, as shown in Appendix D.

One of the former law clerks in the court I interviewed interprets this finding in Colombia by stating that it reflects the tension between a constitution which is progressive in terms of social rights and liberal in terms of civil liberties, and governments which tend to be more conservative. According to this view, the relationship found between the justices ideological positions and their decisions "makes sense in the Colombian case because there has not been a left leaning administration and therefore the function of leftist justices is more to strike down than to uphold [legislation]" (LC4). Although there is no systematic measure of the ideological position of the different administrations, especially relative to the court justices', putting this impressionistic interpretation in spatial terms would mean that ruling coalitions are located to the right in the ideological spectrum. In consequence, conservative justices tend to be aligned more often with such coalitions and therefore are more likely to uphold legislation issued by them. That is what the statistical models analyzed above seemingly show. This finding, therefore, reflects the effect of the ideological *distance* between a justice and the administration rather than some essential behavior on the part of left-leaning justices, although this would require further investigation in contexts where there is more variation in the ideological configuration of the polity.

These findings notwithstanding, however, the empirical models discussed in the previous sections clearly illustrate that the justices' attitudes are insufficient to fully explain judicial behavior in the Colombian Constitutional Court. The multivariate analysis shows that, controlling for their preferences, justices' decisions reflect their assessment of the political context in which the Court operates and, more concretely, conform to the theory of strategic prudence introduced in this dissertation.

5.5 CONCLUSION

The previous sections of this chapter provide a fairly convincing test of the empirical implications of the theory introduced in Chapter 2. The comparative statics analysis of the formal model allowed me to state a series of testable hypotheses which I then operationalized using the information included in the original dataset of abstract review decisions made by the Colombian Constitutional Court between 1992 and 2006. The statistical models I specified based on those hypotheses and some alternative hypotheses and control variables confirm my theoretical expectations. Alternative model specifications shown in Appendix D suggest that the findings are robust.

As I showed above, the CCC is reputed for its autonomy and its progressive protection of individual and collective rights. Given this reputation, one would expect to find justices behaving sincerely when making decisions on abstract review of legislation based mainly on their own attitudes. In fact, the empirical tests show that justices' ideological preferences play a consistent role in shaping their decision making. Paraphrasing Gibson (1983: 32), justices in the CCC indeed tend to do what they prefer to do. Their behavior, however, is tempered by the constraints imposed upon them by the political environment in which they operate. More concretely, justices in the CCC face a tradeoff between their preferences over policy involved in each case and their concern for their institutional stability and that of the court. The evaluation of this tradeoff in each case is a function of the justices' assessment of the strength of the government they face and of its ability to react to their decisions. In sum, in order to preserve their status and to be able to advance their own agenda regarding the protection of constitutional rights, justices seem to be strategically prudent.

6.0 CONCLUSION

This dissertation has introduced a theory of interbranch relations within the separation-of-powers view of judicial behavior. The theory is simple: justices have policy preferences over issues under their review, but they also care for their own stability and that of the court as an institution. The formalization of this intuition leads to a derivation of equilibria of the strategic prudence game and to an analysis of the comparative statics resulting from such equilibria, that is, the expectations of going from one equilibrium to the next as a consequence of increases in each of the game parameters.

The theory is indeed simple, but it is also powerful in the sense that it provides clear-cut expectations regarding judicial behavior that can be tested in a wide range of institutional and political environments in which constitutional review takes place. In this sense, the formal model is but a first step, a means towards the goal of empirically investigating the conditions under which courts are able to make decisions contrary to the executive's preferences in strong presidential systems such as those in Latin America.

I test the theory in the case of the Colombian Constitutional Court, created in the constitution of 1991. For this I make use of an original dataset of all individual justice decisions made on abstract review between 1992 and 2006. A simple test provides strong evidence supporting the hypotheses derived from the comparative statics analysis. Justices tend to be prudent when they face a strong administration and when the case under review is particularly

salient for the executive. Also they are more likely to annul legislation when they have stronger preferences against it and when they anticipate that the incumbent would have to pay a higher cost should it attempt sanctioning the court.

A more sophisticated test takes into account the interactive nature of the strategic interbranch relation. It captures, for instance, the intuition that the freedom having been appointed during a previous administration creates on justices only expresses itself when the incumbent is strong. Justices will tend to oppose weaker presidents regardless of the timing of their appointments. Also, the salience of a case for the executive is a clearer deterrent on justices when the president is weak. This effect disappears when the administration gets stronger.

The case of Colombia is particularly demanding as a test of the strategic prudence theory. Impressionistic evidence suggests that the Colombian Constitutional Court (CCC) is one of the most autonomous judicial bodies in Latin America. Its rulings protecting citizen rights and checking the power of presidents have created for the court a reputation of progressive activism that would make strategic behavior unlikely. The evidence presented here, both qualitative and quantitative, however, suggests that despite this reputation there are indeed elements of strategic prudence in the justices behavior. As in other courts around the world, justices in the CCC do not only have policy preferences but also have institutional concerns that make them include in their decisions considerations of the political climate in which they make decisions. Moreover, the reputation of the Colombian court might be the result of having been strategically prudent in order not only to advance a constitutional right protection agenda but also to preserve the stability of a new institution. This last conjecture, however, demands further investigation.

What are the implications of the findings presented in this dissertation for understanding Colombian politics? The Constitutional Court is perceived as a major player in the political

system. Individual and collective actors in Colombia now acknowledge that they need to take into account the view of the court in the policy-making process (Cárdenas, Junguito, and Pachón 2006). As we have seen, some think that the court is taking this central role too far and is substituting its preferences for those of representatives elected by the people. This criticism has mainly arisen in decisions imposing upon the government public expenditures in the provision of services. The fact, however, is that some of the court's most salient rulings have dealt with issues that have remained mostly unaddressed by the legislature and the government, such as the promotion of rights of vulnerable populations and minorities and the protection of civil liberties, such as in the case of euthanasia and abortion. Moreover, as the drafters of the constitution expected, the CCC has become a major check on the power of the other branches of government.

Despite these criticisms, the court is largely perceived as a legitimate body. Public opinion data, such as the Americas Barometer, show that it has consistently enjoyed higher levels of citizen trust than other institutions including Congress (Rodríguez-Raga and Seligson 2010). Do the findings presented in this dissertation undermine the court's legitimacy? As in most countries, the sanctity of justice and of high courts lies precisely on being perceived as non-political institutions, as players above politics. That is true regarding party politics in the Colombian case. There is no evidence suggesting that the CCC has a partisan agenda. Although some media still refer to justices as belonging to the liberal or the conservative parties, a legacy of the parity imposed by the National Front on the Supreme Court in the second half of the 20th century, these labels are increasingly meaningless and are now rarely used. As the findings presented here suggest, on the other hand, the attitudes of justices matter for their decision making. This fact has been increasingly acknowledged by observers of the court and political actors, although until now there had been just anecdotal evidence. Despite the fact that the

measure of ideology employed here is far from perfect, it seems clear that justices located on the left of the ideological spectrum tend to annul legislative acts more often than those on the right.

One way of interpretation of this finding is by realizing that all presidents in this period can be located right of the center of the scale. If this is true, the effect of justices' ideology on their likelihood of striking down a norm can be interpreted in a spatial manner, that is, justices closer to the administration in terms of ideology tend to uphold its acts more often than justices who are more distant, on the left. A slightly more qualified interpretation may emerge from the way the constitution was drafted in the first place. As I described in Chapter 3, the constitutional convention elected in 1990 had a rather atypical partisan distribution, with the left-wing AD-M19 holding almost a third of the seats in the convention. This unprecedented representation of the left led to a constitution that shifted to the liberal/progressive end of the spectrum. Subsequent elections, however, proved that the success of leftist parties was ephemeral, and center-to-right parties have dominated the electoral arena since. In this sense, the constitution was out of phase vis-à-vis the political system. The policy agenda of left-leaning justices in the Constitutional Court, therefore, consisted in safeguarding a liberal constitution from conservative attacks. That is why they appear annulling legislation more often.

There seems to be an increasing awareness of the relevance of justices' attitudes on constitutional adjudication. Nominators, especially executives, have realized this already, and there seems to be a slight shift to the right in the ideological score of the median justice. Moreover, society in general seems to be more willing to acknowledge the political nature of the court and of its role in policy-making in Colombia, although this deserves further investigation.

Moving beyond the findings related to the attitudes of court justices, the evidence of strategic behavior may also be potentially damaging for the court's legitimacy. In an anecdotal

note, my students seem shocked when they first hear that the court is "strategic." The lay meaning attributed to the term tends to carry dark shades of illegitimate behavior, which would place justices at the same level of politicians. It is clear, though, that throughout this dissertation strategic behavior simple means taking into account what other political players may or may not do in response. It is rather obvious that the court, being a political institution, does not operate in a vacuum and that, in addition to analyzing the merits of each constitutional controversy, it must consider the political consequences of its ruling. The evidence presented here makes this fact clear.

One of the central findings is that the strength of the court varies in inverse proportion to the strength of the president. Justices tend to cave more often to the executive when the latter enjoys stronger support either in the form of a larger coalition in the legislature or as high approval rates. Also, it is important to note other findings related to the impact of justices' nominations. There seems to be no effect of the identity of the nominator (the president, the Supreme Court, or the Council of State). What matters is the timing of the nomination. Justices tend to be more prudent when they face the administration during which they were appointed, even controlling for the time they have spent on the bench. This is another manifestation of the centrality of the executive in Latin American presidential regimes. Finally, it is worth noting the robust effect of the opinion cast by the Inspector General, which may be interpreted as a signal both of the merits of the case and of the support the court could obtain with a particular decision. These interpretations, however, should receive further research. The general pattern found in the Colombian Constitutional Court, and the specific factors involved in its decision making, had not been studied in a systematic way before. In a sense, then, this dissertation and the court's decision dataset supply a first stone upon which further research can be built.

6.1 RESEARCH AGENDA

As I mentioned above, this dissertation is the first thorough analysis of judicial decision making in Colombia.[161] It is therefore a mere initial step in a promising research path on the politics of constitutional review in Colombia. This project belongs to the literature on judicial politics in Latin America and its theoretical argument has the potential of illuminating such literature.

A first, direct extension for the theoretical model introduced here should be to provide a broader test of its implications. This could be done by incorporating in such a test other countries and other points in time. This would allow variation in the institutional setting the impact of which is a central prediction of the model. Courts in other countries enjoy different levels of institutional insulation which in turn should shape the extent to which justices are compelled to engage in strategic behavior. Even in the Colombian context, combining the data used here with dataset of decisions on constitutional review made by the Supreme Court before 1991 would also provide such institutional variation.

In the same vein, adding more "systems" would allow for variation in the political context, particularly regarding the ideological configuration of the polity. In Colombia most administrations are located on the center-right of the spectrum, but in other countries this may vary. A comparative analysis would provide more conclusive evidence regarding the impact of justices' attitudes. Are left-leaning justices aligned with leftist governments? This question could be answered with this new research design.

The model itself can be extended in several ways to incorporate the impact of other factors. Of particular interest is the inclusion of the public as a player. Although the public

[161] But see Nunes (2010).

reaction to the behavior of justices and executives is tacitly included in the costs these players have when they engage in interbranch conflict, explicitly modeling this factor in the game could lead to interesting predictions beyond those already introduced here (see Vanberg 2005). Another way to include the "public" could be by modeling litigants into the game. As Helmke and Staton (2011) pointed out, courts typically do not have the initiative and therefore must rely on litigants to bring cases in. Including them, as these authors do, and testing the implications of the incentives involved in such interaction would lead to a better understanding of judicial behavior. Yet another alternative is to model and test the impact of *amici curiae* (see Arteaga-Iriarte and Rodríguez-Raga 2010). In fact, modeling the interventions by groups in society who are either invited by the court or ask to be heard by it in public hearings regarding a particular case may also produce interesting insights regarding the strategic use made by the court of *amici curiae* briefs.

On a slightly different note, models of judicial behavior could go beyond one-shot games. It is intuitive to think of court decision making as a process in which all matters are not dealt in a per case basis. In other words, cases may not be entirely independent from each other. As some of the interviews I conducted suggest, courts gain power and legitimacy in a cumulative way over a range of cases. As in Marbury v. Madison for the U.S. Supreme Court, other courts may also affirm or expand their competences one step at a time, by being prudent in salient, risky cases and being bolder in cases which are seemingly less relevant. This may have been the case of the CCC when, in reviewing the first declaration of state of exception by president Gaviria in 1992, it caved to the president's preferences while at the same time it affirmed its competence to review not only the procedural aspects of such declaration but also its substantive motivations. The CCC slowly created a precedent on which it could lean when it decided to openly defy a

president trying to make use of exceptional powers. One-shot games are not able to capture this dynamic process that calls for other theoretical and empirical modeling techniques.

The analysis presented here could also be extended by including jurisdictions in which courts have more control over their dockets. As in the case of concrete review of *tutela* writs by the Colombian Constitutional Court, this tribunal only reviews a tiny proportion of controversies, as in the case of the U.S. Supreme Court. The analysis of the criteria used by the court to strategically grant *certiorari* has not been done for Latin American courts and seems a promising way to go.

Many other aspects of judicial behavior, which have received considerable attention from scholars studying U.S. courts, still need investigation in other countries, particularly in Latin America. These include not only the process of case selection by the court I already mentioned but also issues related to the selection of justices and the creation of precedent. However, one particular aspect of interbranch relations deserves special attention: the impact of courts on legislatures and executives. Just as justices are constrained by their anticipation of the reactions by strong administrations, it may well be the case that legislators and governments anticipate the court's review decisions on legislation. There is at least anecdotal evidence in Colombia that congress members are increasingly aware of the role of the CCC and have this role in mind when they approve legislative acts. Some even argue that legislators who oppose a particular norm but do not have enough seats to prevent its approval would intentionally try to create procedural flaws in its passage in Congress to provide grounds for the court to annul it. This may not be only the case of Colombia. Other countries with abstract constitutional review could also witness this pattern of behavior. There is, to my knowledge, no systematic study of the impact of courts on legislatures in Latin America.

APPENDIX A

QUESTIONNAIRE FOR INTERVIEWS WITH FORMER JUSTICES, ASSISTANT JUSTICES, AND LAW CLERKS

The following is my translation from Spanish of the questionnaire I drafted and used in my interviews to former justices, assistant justices, and law clerks. Since some issues in the questionnaire refer to specific cases, the first column includes an indication on who is supposed to be asked each question.

Table A.1. Questionnaire for interviews

		GENERAL
ALL	**1.**	How would you describe in general the relationship of the court with the Executive and with Congress?
ALL	**2.**	Since the beginning of the court in 1992, have there been changes in the relationship between the court and the president? Why?
ALL	**3.**	During your time in the court, which was the moment of greatest tension with the government? Why?
ALL	**4.**	Did you ever felt pressure, direct or indirect, to vote in one sense or another? **[EXPLORE WHAT KIND OF PRESSURE, FROM WHOM, IN WHAT CIRCUMSTANCES, ETC.]**

ALL	**5.**	Do you think that another justice was put under pressure at some point? **[EXPLORE WHAT KIND OF PRESSURE, FROM WHOM, IN WHAT CIRCUMSTANCES, ETC.]**
		INTERPRETATION OF FINDINGS
ALL	**6.**	As part of my dissertation, I built a dataset with all abstract review decisions made between 1992 and 2006. As a result of the analysis of these data I found that there is a great deal of agreement between the opinion submitted by the Inspector General (IG) and the final decision made by the court. However, there are also several cases in which they disagree. What is the role played by the IG's opinion when a justice must make a decision regarding the constitutionality of a norm? Why does this role vary from case to case? Why do you think there are differences among justices regarding whether or not the IG's opinion is taken into account?
	7.	Is it possible that, in controversial or hard cases, the IG's opinion is used as a strategic support, as an ally with whom the burden of a controversial decision could be shared?
ALL	**8.**	In my analysis I also found that it is more frequent that a justice decides that a norm is unconstitutional towards the end of a president's term than at the beginning of it. Why do you think this is the case?
ALL	**9.**	I also found that justices tend to uphold norms more often during the presidential term in which they were nominated than during the following administrations (and this is regardless of who nominated them –the Supreme Court, Council of State or the President). Why do you think this happens?
ALL	**10.**	As part of my research I have also conducted a survey of "experts" on the Court including academics, former assistant justices, law clerks, etc. In that survey I asked my respondents to classify all justices, from 1992 until 2006, in an ideological scale from left to right. Looking at these data together with the decisions' data I found that justices that are more on the right tend to uphold norms more often than those more on the left. What's your opinion on this finding?
ALL	**11.**	Another one of my findings was that there seems to be a relationship between justices' behavior and the approval of the incumbent president. When a president is popular (according to Gallup's quarterly opinion polls) it is more likely that a justice makes more decisions upholding the norm under review. Yet, when the president's approval lowers, the likelihood of unconstitutionality decisions increases. How do you interpret this result?

		CONSTITUTIONAL AMENDMENTS: LIMITATION OF COMPETENCES
ALL	**12.**	Scholars who have studied the Court and its role in the control of declarations of states of emergency argue that during the Court's first years there was a paradoxical situation in which the Court, while upholding the first declarations of internal commotion (by pres. Gaviria), in those same decisions it affirmed its competence to review those declarations substantively and not only in terms of their procedural aspects. This could have made it possible for the Court to have more legitimacy and support in subsequent decisions to strike other declarations of internal commotion, like the one by Samper in 1995. This perspective compares this move with that of the American Supreme Court in *Marbury v. Madison*. What do you think about this interpretation?
[SAMPER 1995] **JAM** **HHV** **ECM** **VNM** **ABC** **FMD** **JGH** **CGD**	**13.**	Cepeda, in his book *Polémicas Constitucionales*, says that since the Court was created each administration has announced constitutional reforms in response to its decisions. In fact, on many occasions after (and even before) a decision strikes down, say, a declaration of internal commotion or economic emergency, the government, angry at the Court's decision, announced constitutional reforms to limit the Court's competences to review those decisions substantively. As an example, this happened during the Samper administration after the Court stroke down a declaration of internal commotion in 1995. How were these threats of constitutional amendment felt inside the Court? Where they credible?
[URIBE] **LEM** **ABS** **ATG** **REG** **MJC** **JCT** **CIV** **JAR** **MGM**	**14.**	Cepeda, in his book, *Polémicas Constitucionales*, says that since the Court was created each administration has announced constitutional reforms in response to Court's decisions. On some occasions, the government announced a constitutional reform to modify the Court's competences or its form of operation trying to limit its capacity to control executive or Congress acts. This happened during the Uribe government when the executive announced a reform requiring that the Court could only strike down laws or decrees with a qualified majority. On some occasions there was also talk of reforms trying to eliminate the Court. How were these threats of constitutional amendment felt inside the Court? Where they credible?

[URIBE 2004] **ABS** **ATG** **REG** **MJC** **JCT** **CIV** **JAR** **MGM**	**15.**	Looking at the history of the Court I found that on one occasion, when it declared unconstitutional for procedural flaws the Anti Terrorism Act of the Uribe's administration, former president Gaviria warned that if the Court kept opposing constitutional reforms, there would be a situation like the one in the seventies and eighties when the Supreme Court blocked all the reforms proposed by the governments of López Michelsen, Turbay, Betancur, and Barco. The risk, according to Gaviria, was that the whole 1991 Constitution would fall dawn. Coming from a former president that had promoted the 1991 Constitution and the creation of the Constitutional Court, this warning did not seem innocuous. Was it? Do you remember how this warning was received by the Court?
[GAVIRIA & SAMPER] **JAM** **HHV** **ECM** **VNM** **ABC** **AMC** **FMD** **JGH** **CGD**	**16.**	On other occasions what happened was that in response to a Court's decision, the government and Congress introduced constitutional reforms to overturn that decision. That happened, for example, during the Gaviria and Samper administrations with the decriminalization of the personal use of drugs. Gaviria announced a referendum with signatures to include the prohibition of carrying drugs in the Constitution. Samper abandoned the idea of a referendum but tried to introduce a constitutional amendment with the same goal. I understand this reform was almost approved in Congress. How did the Court perceive these measures? Were they perceived as measures trying to bypass Court's decisions? Were they forms to undermine the prestige or the legitimacy of the Court?
[SAMPER 1995] **JAM** **HHV** **ECM** **VNM** **ABC** **AMC** **FMD** **JGH** **CGD**	**17.**	A similar situation happened with the decision about the military jurisdiction during the Samper administration. A Court's divided decision (5-4) established in 1995 that military tribunals could only be constituted by retired officials to avoid the possibility of judges having less power than those being prosecuted. The Samper administration and members of his coalition in Congress, clearly influenced by the military elite, managed to approve in 1996 a constitutional reform that re-established martial courts with active members of the military (although it specified that military jurisdiction only operated to crimes related to service acts). Were these reforms perceived as mocking or overlooking the Court's jurisprudence?

[URIBE 2004] **ABS** **ATG** **REG** **MJC** **JCT** **CIV** **JAR** **MGM**	**18.**	During the discussion about the Anti Terrorism Act of president Uribe, the Court had initially (August 2004) declared that constitutional reforms not only should leave intact the main foundations of the 1991 Constitution but also that they could not violate fundamental rights. Yet in October 2004 the Court changed its jurisprudence and decided that the government could introduce constitutional amendments including restrictions to fundamental rights in the future and that those would not be reviewed by the Court as long as they did not affect the constitutional foundations. What were the reasons behind this change in jurisprudcence [Only to RUY, Do you think this happened because you were not in the Court anymore and you were replaced by HSP? Or was it for something else?]
		STATES OF EMERGENCY: INTERNAL COMMOTION
[SAMPER 1995] **JAM** **HHV** **ECM** **VNM** **ABC** **AMC** **FMD** **JGH** **CGD**	**19.**	The Samper administration declared its first internal commotion in August 1995. On October that year the Court struck down that commotion. After the angry response from the government and from some political sectors that even called the Court "fascist and dictatorial", some justices denounced having received even death threats. [To JGH: You were the Court's Chief Justice at the time and spoke in defense of the Court's autonomy.] What do you remember from that time? How was this moment lived inside the Court?
[SAMPER 1995] **JAM** **HHV** **ECM** **VNM** **ABC** **AMC** **FMD** **JGH** **CGD**	**20.**	Then, in November of that year (1995), 'Alvaro Gómez Hurtado was murdered. And the Samper administration immediately declared an internal commotion state. This time the Court did support the declaration. Was this only because of the unfortunate events of the murder of Mr. Gómez Hurtado? Was there any connection between the strong reactions that the first adverse decision of the Court provoked in Samper and some political sectors and this new decision to support a state of internal commotion declared by the president?

[SAMPER Y PASTRANA] **HHV** **ECM** **VNM** **ABC** **AMC** **FMD** **JGH** **CGD**	**21.**	A revision of the press of that time left me the impression that the relation between the Court and the Pastrana administration was kinder than the one it had had with the Samper administration. Do you agree with this impression? If so, what are the reasons behind this differential relation?
[URIBE 2002] **LEM** **ABS** **ATG** **REG** **MJC** **JCT** **CIV** **JAR** **MGM**	**22.**	A few days after taking office, president Uribe declared a state of internal commotion. The goal was to face problems in public security that, according to the government, had been deepened by terrorists acts in urban areas. In fact, the day of his inauguration there was an attack to the Presidential palace. In that occasion, the Interior Minister Fernando Londoño Hoyos stated that this decree was not to be reviewed by the Court. How did you receive the minister's declaration inside the Court?
[URIBE 2002] **LEM** **ABS** **ATG** **REG** **MJC** **JCT** **CIV** **JAR** **MGM**	**23.**	In fact, the government sent the decrees issued during the internal commotion for the Court to revise, but it didn't send the decree that declared that commotion. According to the press, that produced a reaction by the Court voiced by its then Chief Justice, Mr. Monroy Cabra, reaffirming the Court's competence to review the decree that declared the commotion. How do you remember this episode?
		STATES OF EMERGENCY: ECONOMIC EMERGENCY

[PASTRANA 1998] **ECM** **VNM** **ABC** **AMC** **FMD** **JGH** **CGD** **ABS** **ATG**	**24.**	During the discussion of the Pastrana Economic Emergency (declared on November 1998), everybody expected it to be declared unconstitutional. There were only some press reports (e.g. *El Tiempo*) saying there was a majority of 7 to 2 for the unconstitutionality. The press also reported government pressures by the Economics Minister, Juan Camilo Restrepo and by some trade unions who said that a declaration of unconstitutionality would lead to complete economic crisis. There was also talk that the financial markets were relatively stagnant waiting for the Court to decide. Yet, eventually, the Court's decision of declaring the emergency (conditionally) constitutional (7-2) (C-122/1999) surprised everybody. Do you remember what happened with this decision? Why did the press got it wrong? Were all the rumors that there was a majority against the unconstitutionality completely flawed? Did the scenario of economic disaster that the government and some unions were threatening with exercise any pressure on the Court?
[PASTRANA 1998] **ECM** **VNM** **ABC** **AMC** **FMD** **JGH** **CGD** **ABS** **ATG**	**25.**	Justice Fabio Morón was in charge of drafting the opinion about the declaration of the state of emergency (and JGH was in charge of the opinión about the 2*1000 tax, right)? The press announced a negative opinion. Was there a change in the opinion? Why?
[SAMPER 1997] **JAM** **HHV** **ECM** **VNM** **ABC** **AMC** **FMD** **JGH** **CGD**	**26.**	In 1997 the Court had declared the Economic Emergency of Samper unconstitutional. That decision had generated strong reactions from the government questioning the legitimacy of the Court and announcing measures to limit its competence. On that occasion, some justices publicly expressed their concern for the threats that the Court was receiving, including reducing its competences and even its elimination. What do you remember about this situation?

[PASTRANA 1998-99] **ECM** **VNM** **ABC** **AMC** **FMD** **JGH** **CGD** **ABS** **ATG**	**27.**	In the Court's discussions about the Pastrana Emergency, do you remember any reference to the economic emergency of Samper, to that 1997 decision or to its consequences/reactions? Was there a relationship between these two decisions? What were the differences in both emergency declarations, one found unconstitutional (during Samper) and the other one declared constitutional (Pastrana)?
ALL	**28.**	Someone told me that in cases involving economic topics, the government used to send ministers to try to lecture some justices on economic matters and hoping to get their favorable votes. Did you ever see this happening while you were in the Court?
ALL	**29.**	Do you remember any other episode of conflict between the Court and the government during the time you were in the Court?
ALL	**30.**	In general, are justices aware of the cases that will generate more controversy?
ALL	**31.**	And do justices know or foresee which will be the government's reaction?
ALL	**32.**	Di you ever feel that if you made a decision to either side you could put the institutional continuity of the Court at risk?
ALL	**33.**	How do you compare the Court's performance and its relation to the executive in regarding other courts in Latin America?

APPENDIX B

CONSTITUTIONAL COURT ABSTRACT REVIEW DECISION DATASET:

CODEBOOK IN SPANISH

Libro de códigos v16 – 043010

Table B.1. Abstract review decision dataset codebook

AÑO	Año (AAAA): 1982 – 2006
SENTENCIA	Número de la sentencia (Cxxx); se puede incluir al final una letra (ej. CxxxA) en caso de que sea necesario
EXPED1	Número del primer expediente (Dxxxx)
EXPED2	Número del segundo expediente o 9999 si no existe
EXPED3	Número del tercer expediente o 9999 si no existe
EXPED4	Número del cuarto expediente o 9999 si no existe
APELDEM1	Apellidos del primer demandante o 9999 si de oficio
NOMBDEM1	Nombres del primer demandante o 9999 si de oficio
APELDEM2	Apellidos del segundo demandante o 9999 si no existe
NOMBDEM2	Nombres del segundo demandante o 9999 si no existe
APELDEM3	Apellidos del tercer demandante o 9999 si no existe

NOMBDEM3	Nombres del tercer demandante o 9999 si no existe
APELDEM4	Apellidos del cuarto demandante o 9999 si no existe
NOMBDEM4	Nombres del cuarto demandante o 9999 si no existe
APELDEM5	Apellidos del quinto demandante o 9999 si no existe
NOMBDEM5	Nombres del quinto demandante o 9999 si no existe
ADMISION	Decisión de admisión [1] Admitida [2] Inadmitida parcialmente [3] Inadmitida totalmente [4] Rechazada [5] De oficio [9] No hay información/No aplica
MOTINAD	Motivo de la inadmisión o rechazo [1] Problemas formales en la formulación de la demanda [2] Cosa juzgada constitucional Otro _____ [9] No hay información/No aplica

TIPOCASO	Tipo de caso en discusión [01] Ley Estatutaria [02] Acto Legislativo [03] Decretos de Estados de Excepción [04] Decretos con Fuerza de Ley [05] Ley Ordinaria [06] Tratado Internacional [07] Convocatoria de Referendo [08] Plebiscito [09] Consulta Popular [10] Convocatoria a Asamblea Constituyente [11] Objeción del Ejecutivo [12] Ley orgánica
IDNORMA	Número de identificación de la norma demandada
TITNORMA	Título de la norma demandada
MASNORM	¿Hay otras normas demandadas? [0] No [1] Sí
OTRASNOR	Incluir como texto cuáles son las normas demandadas adicionales, separadas por punto y coma (ej. 'Ley xxx de 1993; Ley www de 1987'); 9999 si no hay otras normas (si MASNORM=0).
IDSENADO	Número de identificación de la norma en su debate en el Senado (para proyectos de ley y leyes estatutarias); 9999 si no aplica.
IDCAMARA	Número de identificación de la norma en su debate en la Cámara de Representantes (para proyectos de ley y leyes estatutarias); 9999 si no aplica.

TIPODEM	Tipo de demanda [1] Procedimental [2] Sustantiva [3] Ambas [9] No aplica
OFICIO	Indica si la revisión de la Corte es de oficio [0] Acción Pública de Inconstitucionalidad [1] Revisión de oficio
ARTCP01	Primer artículo de la Constitución Política mencionado como objeto de violación por la norma demandada, o Si se refiere a un decreto emitido con base en facultades extraordinarias que han sido declaradas inexequibles, anotar **150**, o Si es de oficio, anotar 8888.
ARTCP02	Segundo artículo de la Constitución Política mencionado como objeto de violación por la norma demandada, o 9999 si no aplica.
ARTCP03	Tercer artículo de la Constitución Política mencionado como objeto de violación por la norma demandada, o 9999 si no aplica.
ARTCP04	Cuarto artículo de la Constitución Política mencionado como objeto de violación por la norma demandada, o 9999 si no aplica.
ARTCP05	Quinto artículo de la Constitución Política mencionado como objeto de violación por la norma demandada, o 9999 si no aplica.
ARTCP06	Sexto artículo de la Constitución Política mencionado como objeto de violación por la norma demandada, o 9999 si no aplica.
ARTCP07	Séptimo artículo de la Constitución Política mencionado como objeto de violación por la norma demandada, o 9999 si no aplica.
ARTCP08	Octavo artículo de la Constitución Política mencionado como objeto de violación por la norma demandada, o 9999 si no aplica.

ARTCP09	Noveno artículo de la Constitución Política mencionado como objeto de violación por la norma demandada, o 9999 si no aplica.
ARTCP10	Décimo artículo de la Constitución Política mencionado como objeto de violación por la norma demandada, o 9999 si no aplica.
AÑONORMA	Año (AAAA) de expedición de la norma demandada
MESNORMA	Mes (MM) de expedición de la norma demandada
DIANORMA	Día (DD) de expedición de la norma demandada
AÑODEM	Año (AAAA) de la demanda
MESDEM	Mes (MM) de la demanda
DIADEM	Día (DD) de la demanda
AÑOADM	Año (AAAA) de admisión/rechazo de la demanda por parte de la Corte (auto admisorio) – Si de oficio, año de reparto.
MESADM	Mes (MM) de admisión/rechazo de la demanda por parte de la Corte (auto admisorio) – Si de oficio, mes de reparto.
DIAADM	Día (DD) de admisión/rechazo de la demanda por parte de la Corte (auto admisorio) – Si de oficio, día de reparto.
AÑOSENT	Año (AAAA) de la sentencia de la Corte, o 9999 si no aplica
MESSENT	Mes (MM) de la sentencia de la Corte, o 99 si no aplica
DIASENT	Día (DD) de la sentencia de la Corte, o 99 si no aplica

TEMANOR1	<u>Primer tema o materia de la norma demandada</u> [01] Económico [02] Electoral / Partidos políticos [03] Separación de poderes [04] Derechos civiles y/o políticos [05] Derechos sociales y/o económicos [06] Conflicto armado, orden público [07] Derechos ambientales y colectivos Otro tema _____ [09] No aplica
TEMANOR2	<u>Segundo tema o materia de la norma demandada</u> [01] Económico [02] Electoral / Partidos políticos [03] Separación de poderes [04] Derechos civiles y/o políticos [05] Derechos sociales y/o económicos [06] Conflicto armado, orden público [07] Derechos ambientales y colectivos Otro tema _____ [09] No aplica

TEMANOR3	Tercer tema o materia de la norma demandada [01] Económico [02] Electoral / Partidos políticos [03] Separación de poderes [04] Derechos civiles y/o políticos [05] Derechos sociales y/o económicos [06] Conflicto armado, orden público [07] Derechos ambientales y colectivos Otro tema _____ [09] No aplica

TIPONORM	Tipo de norma demandada [01] Acuerdo/Canje de notas/Convención internacional/Convenio/etc. [02] Código Civil [03] Código Contencioso Administrativo [04] Código de Comercio [05] Código Penal [06] Código de Procedimiento Civil [07] Código de Procedimiento Penal [08] Código Sustantivo del Trabajo [09] Ley 100 de 1993 [10] Ley 80 de 1993 [11] Decreto [12] Ley[162] [13] Acto Legislativo [14] Código Procesal Laboral [15] Código Disciplinario Único [16] Estatuto Tributario [17] Código Penal Militar Otro _____ [99] No aplica
APELPROC	Apellidos del Procurador General de la Nación o de quien actúe en su nombre
NOMBPROC	Nombres del Procurador General de la Nación o de quien actúe en su nombre

[162] No incluye decretos-ley, que deben tener el valor 11.

CONCPROC	<u>Concepto del Procurador General de la Nación</u> [01] Sentencia inhibitoria[163] [02] Cosa juzgada constitucional[164] [03] Cosa juzgada constitucional desde el punto de vista formal[165] [04] Exequible [05] Exequible (únicamente) por los cargos formulados [06] Condicionalmente exequible [07] Parcialmente inexequible[166] [08] Parcial y condicionalmente inexequible [09] Inexequible [99] No aplica[167]
MININT	<u>Participación del Ministerio del Interior</u> [0] No participó [1] Participó
MINJUS	<u>Participación del Ministerio de Justicia y del Derecho</u> [0] No participó [1] Participó [9] Si el caso fue después de la fusión con el Ministerio del Interior
MINHAC	<u>Participación del Ministerio de Hacienda y Crédito Público</u> [0] No participó [1] Participó

[163] En el caso de una sentencia inhibitoria parcial, se codificará la otra decisión.
[164] Si se combina con otra sentencia parcial o condicionalmente exequible o inexequible, se codificará esta última.
[165] Si se combina con otra sentencia parcial o condicionalmente exequible o inexequible, se codificará esta última.
[166] También se usa este código en el caso de una sentencia parcialmente exequible.
[167] El Procurador no emitió un concepto.

MINDEF	Participación del Ministerio de Defensa Nacional [0] No participó [1] Participó
MINREL	Participación del Ministerio de Relaciones Exteriores [0] No participó [1] Participó
MINAGR	Participación del Ministerio de Agricultura [0] No participó [1] Participó
MINTRA	Participación del Ministerio del trabajo y Seguridad Social [0] No participó [1] Participó
MINSAL	Participación del Ministerio de Salud [0] No participó [1] Participó [9] Si el caso fue después de la fusión con el Ministerio de Trabajo en el Ministerio de Protección Social
MINMIN	Participación del Ministerio de Minas y Energía [0] No participó [1] Participó
MINCEX	Participación del Ministerio de Comercio Exterior [0] No participó [1] Participó

MINDES	Participación del Ministerio de Desarrollo Económico [0] No participó [1] Participó [9] Si el caso fue después de la fusión con el Ministerio de Comercio Exterior en el Ministerio de Comercio, Industria y Turismo (o con el Ministerio del Medio Ambiente)
MINEDU	Participación del Ministerio de Educación [0] No participó [1] Participó
MINAMB	Participación del Ministerio del Medio Ambiente [0] No participó [1] Participó
MINTRN	Participación del Ministerio de Transporte [0] No participó [1] Participó
MINCUL	Participación del Ministerio de Cultura [0] No participó [1] Participó
MINCOM	Participación del Ministerio de Comunicaciones [0] No participó [1] Participó
INTCSJ	Intervención de la Corte Suprema de Justicia [01] Interviniente invitado [02] Interviniente sin ser invitado [99] No participó

CONCCSJ	Concepto de la Corte Suprema de Justicia [01] Sentencia inhibitoria[168] [02] Cosa juzgada constitucional[169] [03] Cosa juzgada constitucional desde el punto de vista formal[170] [04] Exequible [05] Exequible (únicamente) por los cargos formulados [06] Condicionalmente exequible [07] Parcialmente inexequible[171] [08] Parcial y condicionalmente inexequible [09] Inexequible [98] Participó pero no emitió concepto [99] No participó
INTCE	Intervención del Consejo de Estado [01] Interviniente invitado [02] Interviniente sin ser invitado [99] No participó

[168] En el caso de una sentencia inhibitoria parcial, se codificará la otra decisión.
[169] Si se combina con otra sentencia parcial o condicionalmente exequible o inexequible, se codificará esta última.
[170] Si se combina con otra sentencia parcial o condicionalmente exequible o inexequible, se codificará esta última.
[171] También se usa este código en el caso de una sentencia parcialmente exequible.

CONCCE	<u>Concepto del Consejo de Estado</u> [01] Sentencia inhibitoria[172] [02] Cosa juzgada constitucional[173] [03] Cosa juzgada constitucional desde el punto de vista formal[174] [04] Exequible [05] Exequible (únicamente) por los cargos formulados [06] Condicionalmente exequible [07] Parcialmente inexequible[175] [08] Parcial y condicionalmente inexequible [09] Inexequible [98] Participó pero no emitió concepto [99] No participó
INTCJUD	<u>Intervención del Consejo Superior de la Judicatura</u> [01] Interviniente invitado [02] Interviniente sin ser invitado [99] No participó

[172] En el caso de una sentencia inhibitoria parcial, se codificará la otra decisión.
[173] Si se combina con otra sentencia parcial o condicionalmente exequible o inexequible, se codificará esta última.
[174] Si se combina con otra sentencia parcial o condicionalmente exequible o inexequible, se codificará esta última.
[175] También se usa este código en el caso de una sentencia parcialmente exequible.

CONCJUD	Concepto del Consejo Superior de la Judicatura [01] Sentencia inhibitoria[176] [02] Cosa juzgada constitucional[177] [03] Cosa juzgada constitucional desde el punto de vista formal[178] [04] Exequible [05] Exequible (únicamente) por los cargos formulados [06] Condicionalmente exequible [07] Parcialmente inexequible[179] [08] Parcial y condicionalmente inexequible [09] Inexequible [98] Participó pero no emitió concepto [99] No participó
INTCNE	Intervención de Consejo Nacional Electoral [01] Interviniente invitado [02] Interviniente sin ser invitado [99] No participó

[176] En el caso de una sentencia inhibitoria parcial, se codificará la otra decisión.
[177] Si se combina con otra sentencia parcial o condicionalmente exequible o inexequible, se codificará esta última.
[178] Si se combina con otra sentencia parcial o condicionalmente exequible o inexequible, se codificará esta última.
[179] También se usa este código en el caso de una sentencia parcialmente exequible.

CONCCNE	Concepto del Consejo Nacional Electoral [01] Sentencia inhibitoria[180] [02] Cosa juzgada constitucional[181] [03] Cosa juzgada constitucional desde el punto de vista formal[182] [04] Exequible [05] Exequible (únicamente) por los cargos formulados [06] Condicionalmente exequible [07] Parcialmente inexequible[183] [08] Parcial y condicionalmente inexequible [09] Inexequible [98] Participó pero no emitió concepto [99] No participó
INTRNEC	Intervención de la Registraduría Nacional del Estado Civil [01] Interviniente invitado [02] Interviniente sin ser invitado [99] No participó

[180] En el caso de una sentencia inhibitoria parcial, se codificará la otra decisión.
[181] Si se combina con otra sentencia parcial o condicionalmente exequible o inexequible, se codificará esta última.
[182] Si se combina con otra sentencia parcial o condicionalmente exequible o inexequible, se codificará esta última.
[183] También se usa este código en el caso de una sentencia parcialmente exequible.

CONCRNEC	Concepto de la Registraduría Nacional del Estado Civil [01] Sentencia inhibitoria[184] [02] Cosa juzgada constitucional[185] [03] Cosa juzgada constitucional desde el punto de vista formal[186] [04] Exequible [05] Exequible (únicamente) por los cargos formulados [06] Condicionalmente exequible [07] Parcialmente inexequible[187] [08] Parcial y condicionalmente inexequible [09] Inexequible [98] Participó pero no emitió concepto [99] No participó
INTFIS	Intervención de la Fiscalía General de la Nación [01] Interviniente invitado [02] Interviniente sin ser invitado [99] No participó

[184] En el caso de una sentencia inhibitoria parcial, se codificará la otra decisión.
[185] Si se combina con otra sentencia parcial o condicionalmente exequible o inexequible, se codificará esta última.
[186] Si se combina con otra sentencia parcial o condicionalmente exequible o inexequible, se codificará esta última.
[187] También se usa este código en el caso de una sentencia parcialmente exequible.

CONCFIS	Concepto de la Fiscalía General de la Nación [01] Sentencia inhibitoria[188] [02] Cosa juzgada constitucional[189] [03] Cosa juzgada constitucional desde el punto de vista formal[190] [04] Exequible [05] Exequible (únicamente) por los cargos formulados [06] Condicionalmente exequible [07] Parcialmente inexequible[191] [08] Parcial y condicionalmente inexequible [09] Inexequible [98] Participó pero no emitió concepto [99] No participó
INTCGR	Intervención de la Contraloría General de la República [01] Interviniente invitado [02] Interviniente sin ser invitado [99] No participó

[188] En el caso de una sentencia inhibitoria parcial, se codificará la otra decisión.

[189] Si se combina con otra sentencia parcial o condicionalmente exequible o inexequible, se codificará esta última.

[190] Si se combina con otra sentencia parcial o condicionalmente exequible o inexequible, se codificará esta última.

[191] También se usa este código en el caso de una sentencia parcialmente exequible.

CONCCGR	<u>Concepto de la Contraloría General de la República</u> [01] Sentencia inhibitoria[192] [02] Cosa juzgada constitucional[193] [03] Cosa juzgada constitucional desde el punto de vista formal[194] [04] Exequible [05] Exequible (únicamente) por los cargos formulados [06] Condicionalmente exequible [07] Parcialmente inexequible[195] [08] Parcial y condicionalmente inexequible [09] Inexequible [98] Participó pero no emitió concepto [99] No participó
INTSEN	<u>Intervención del Senado</u> [01] Interviniente invitado [02] Interviniente sin ser invitado [99] No participó

[192] En el caso de una sentencia inhibitoria parcial, se codificará la otra decisión.
[193] Si se combina con otra sentencia parcial o condicionalmente exequible o inexequible, se codificará esta última.
[194] Si se combina con otra sentencia parcial o condicionalmente exequible o inexequible, se codificará esta última.
[195] También se usa este código en el caso de una sentencia parcialmente exequible.

CONCSEN	Concepto del Senado [01] Sentencia inhibitoria[196] [02] Cosa juzgada constitucional[197] [03] Cosa juzgada constitucional desde el punto de vista formal[198] [04] Exequible [05] Exequible (únicamente) por los cargos formulados [06] Condicionalmente exequible [07] Parcialmente inexequible[199] [08] Parcial y condicionalmente inexequible [09] Inexequible [98] Participó pero no emitió concepto [99] No participó
INTCAM	Intervención de la Cámara de Representantes [01] Interviniente invitado [02] Interviniente sin ser invitado [99] No participó

[196] En el caso de una sentencia inhibitoria parcial, se codificará la otra decisión.
[197] Si se combina con otra sentencia parcial o condicionalmente exequible o inexequible, se codificará esta última.
[198] Si se combina con otra sentencia parcial o condicionalmente exequible o inexequible, se codificará esta última.
[199] También se usa este código en el caso de una sentencia parcialmente exequible.

CONCCAM	<u>Concepto de la Cámara de Representantes</u> [01] Sentencia inhibitoria[200] [02] Cosa juzgada constitucional[201] [03] Cosa juzgada constitucional desde el punto de vista formal[202] [04] Exequible [05] Exequible (únicamente) por los cargos formulados [06] Condicionalmente exequible [07] Parcialmente inexequible[203] [08] Parcial y condicionalmente inexequible [09] Inexequible [98] Participó pero no emitió concepto [99] No participó
INTVP	<u>Intervención de la Vicepresidencia de la República</u> [01] Interviniente invitado [02] Interviniente sin ser invitado [99] No participó

[200] En el caso de una sentencia inhibitoria parcial, se codificará la otra decisión.
[201] Si se combina con otra sentencia parcial o condicionalmente exequible o inexequible, se codificará esta última.
[202] Si se combina con otra sentencia parcial o condicionalmente exequible o inexequible, se codificará esta última.
[203] También se usa este código en el caso de una sentencia parcialmente exequible.

CONCVP	<u>Concepto de la Vicepresidencia de la República</u> [01] Sentencia inhibitoria[204] [02] Cosa juzgada constitucional[205] [03] Cosa juzgada constitucional desde el punto de vista formal[206] [04] Exequible [05] Exequible (únicamente) por los cargos formulados [06] Condicionalmente exequible [07] Parcialmente inexequible[207] [08] Parcial y condicionalmente inexequible [09] Inexequible [98] Participó pero no emitió concepto [99] No participó
INTDNP	<u>Intervención del Departamento Nacional de Planeación</u> [01] Interviniente invitado [02] Interviniente sin ser invitado [99] No participó

[204] En el caso de una sentencia inhibitoria parcial, se codificará la otra decisión.
[205] Si se combina con otra sentencia parcial o condicionalmente exequible o inexequible, se codificará esta última.
[206] Si se combina con otra sentencia parcial o condicionalmente exequible o inexequible, se codificará esta última.
[207] También se usa este código en el caso de una sentencia parcialmente exequible.

CONCDNP	Concepto del Departamento Nacional de Planeación [01] Sentencia inhibitoria[208] [02] Cosa juzgada constitucional[209] [03] Cosa juzgada constitucional desde el punto de vista formal[210] [04] Exequible [05] Exequible (únicamente) por los cargos formulados [06] Condicionalmente exequible [07] Parcialmente inexequible[211] [08] Parcial y condicionalmente inexequible [09] Inexequible [98] Participó pero no emitió concepto [99] No participó
INTBR	Intervención del Banco de la República [01] Interviniente invitado [02] Interviniente sin ser invitado [99] No participó

[208] En el caso de una sentencia inhibitoria parcial, se codificará la otra decisión.
[209] Si se combina con otra sentencia parcial o condicionalmente exequible o inexequible, se codificará esta última.
[210] Si se combina con otra sentencia parcial o condicionalmente exequible o inexequible, se codificará esta última.
[211] También se usa este código en el caso de una sentencia parcialmente exequible.

CONCBR	Concepto del Banco de la República [01] Sentencia inhibitoria[212] [02] Cosa juzgada constitucional[213] [03] Cosa juzgada constitucional desde el punto de vista formal[214] [04] Exequible [05] Exequible (únicamente) por los cargos formulados [06] Condicionalmente exequible [07] Parcialmente inexequible[215] [08] Parcial y condicionalmente inexequible [09] Inexequible [98] Participó pero no emitió concepto [99] No participó
INTPOL	Intervención de la Policía Nacional [01] Interviniente invitado [02] Interviniente sin ser invitado [99] No participó

[212] En el caso de una sentencia inhibitoria parcial, se codificará la otra decisión.
[213] Si se combina con otra sentencia parcial o condicionalmente exequible o inexequible, se codificará esta última.
[214] Si se combina con otra sentencia parcial o condicionalmente exequible o inexequible, se codificará esta última.
[215] También se usa este código en el caso de una sentencia parcialmente exequible.

CONCPOL	<u>Concepto de la Policía Nacional</u> [01] Sentencia inhibitoria[216] [02] Cosa juzgada constitucional[217] [03] Cosa juzgada constitucional desde el punto de vista formal[218] [04] Exequible [05] Exequible (únicamente) por los cargos formulados [06] Condicionalmente exequible [07] Parcialmente inexequible[219] [08] Parcial y condicionalmente inexequible [09] Inexequible [98] Participó pero no emitió concepto [99] No participó
INTFFMM	<u>Intervención de las Fuerzas Militares</u> [01] Interviniente invitado [02] Interviniente sin ser invitado [99] No participó

[216] En el caso de una sentencia inhibitoria parcial, se codificará la otra decisión.
[217] Si se combina con otra sentencia parcial o condicionalmente exequible o inexequible, se codificará esta última.
[218] Si se combina con otra sentencia parcial o condicionalmente exequible o inexequible, se codificará esta última.
[219] También se usa este código en el caso de una sentencia parcialmente exequible.

CONCFFMM	<u>Concepto de las Fuerzas Militares</u> [01] Sentencia inhibitoria[220] [02] Cosa juzgada constitucional[221] [03] Cosa juzgada constitucional desde el punto de vista formal[222] [04] Exequible [05] Exequible (únicamente) por los cargos formulados [06] Condicionalmente exequible [07] Parcialmente inexequible[223] [08] Parcial y condicionalmente inexequible [09] Inexequible [98] Participó pero no emitió concepto [99] No participó
INTDP	<u>Intervención de la Defensoría del Pueblo</u> [01] Interviniente invitado [02] Interviniente sin ser invitado [99] No participó

[220] En el caso de una sentencia inhibitoria parcial, se codificará la otra decisión.

[221] Si se combina con otra sentencia parcial o condicionalmente exequible o inexequible, se codificará esta última.

[222] Si se combina con otra sentencia parcial o condicionalmente exequible o inexequible, se codificará esta última.

[223] También se usa este código en el caso de una sentencia parcialmente exequible.

CONCDP	Concepto de la Defensoría del Pueblo [01] Sentencia inhibitoria[224] [02] Cosa juzgada constitucional[225] [03] Cosa juzgada constitucional desde el punto de vista formal[226] [04] Exequible [05] Exequible (únicamente) por los cargos formulados [06] Condicionalmente exequible [07] Parcialmente inexequible[227] [08] Parcial y condicionalmente inexequible [09] Inexequible [98] Participó pero no emitió concepto [99] No participó
INTSIND	Intervención de central sindical [01] Interviniente invitado [02] Interviniente sin ser invitado [99] No participó

[224] En el caso de una sentencia inhibitoria parcial, se codificará la otra decisión.
[225] Si se combina con otra sentencia parcial o condicionalmente exequible o inexequible, se codificará esta última.
[226] Si se combina con otra sentencia parcial o condicionalmente exequible o inexequible, se codificará esta última.
[227] También se usa este código en el caso de una sentencia parcialmente exequible.

CONCSIND	Concepto de centrales sindicales [01] Sentencia inhibitoria[228] [02] Cosa juzgada constitucional[229] [03] Cosa juzgada constitucional desde el punto de vista formal[230] [04] Exequible [05] Exequible (únicamente) por los cargos formulados [06] Condicionalmente exequible [07] Parcialmente inexequible[231] [08] Parcial y condicionalmente inexequible [09] Inexequible [98] Participó pero no emitió concepto [99] No participó
INTGREM	Intervención de gremio de la producción [01] Interviniente invitado [02] Interviniente sin ser invitado [99] No participó

[228] En el caso de una sentencia inhibitoria parcial, se codificará la otra decisión.
[229] Si se combina con otra sentencia parcial o condicionalmente exequible o inexequible, se codificará esta última.
[230] Si se combina con otra sentencia parcial o condicionalmente exequible o inexequible, se codificará esta última.
[231] También se usa este código en el caso de una sentencia parcialmente exequible.

CONCGREM	<u>Concepto de gremio de la producción</u> [01] Sentencia inhibitoria[232] [02] Cosa juzgada constitucional[233] [03] Cosa juzgada constitucional desde el punto de vista formal[234] [04] Exequible [05] Exequible (únicamente) por los cargos formulados [06] Condicionalmente exequible [07] Parcialmente inexequible[235] [08] Parcial y condicionalmente inexequible [09] Inexequible [98] Participó pero no emitió concepto [99] No participó
INTUNIV	<u>Intervención de universidad</u> [01] Interviniente invitado [02] Interviniente sin ser invitado [99] No participó

[232] En el caso de una sentencia inhibitoria parcial, se codificará la otra decisión.

[233] Si se combina con otra sentencia parcial o condicionalmente exequible o inexequible, se codificará esta última.

[234] Si se combina con otra sentencia parcial o condicionalmente exequible o inexequible, se codificará esta última.

[235] También se usa este código en el caso de una sentencia parcialmente exequible.

CONCUNIV	Concepto de universidad [01] Sentencia inhibitoria[236] [02] Cosa juzgada constitucional[237] [03] Cosa juzgada constitucional desde el punto de vista formal[238] [04] Exequible [05] Exequible (únicamente) por los cargos formulados [06] Condicionalmente exequible [07] Parcialmente inexequible[239] [08] Parcial y condicionalmente inexequible [09] Inexequible [98] Participó pero no emitió concepto [99] No participó
INTACAD	Intervención de academia o centro de pensamiento [01] Interviniente invitado [02] Interviniente sin ser invitado [99] No participó

[236] En el caso de una sentencia inhibitoria parcial, se codificará la otra decisión.
[237] Si se combina con otra sentencia parcial o condicionalmente exequible o inexequible, se codificará esta última.
[238] Si se combina con otra sentencia parcial o condicionalmente exequible o inexequible, se codificará esta última.
[239] También se usa este código en el caso de una sentencia parcialmente exequible.

CONCACAD	<u>Concepto de academia o centro de pensamiento</u> [01] Sentencia inhibitoria[240] [02] Cosa juzgada constitucional[241] [03] Cosa juzgada constitucional desde el punto de vista formal[242] [04] Exequible [05] Exequible (únicamente) por los cargos formulados [06] Condicionalmente exequible [07] Parcialmente inexequible[243] [08] Parcial y condicionalmente inexequible [09] Inexequible [98] Participó pero no emitió concepto [99] No participó
INTONG	<u>Intervención de ONG</u> [01] Interviniente invitado [02] Interviniente sin ser invitado [99] No participó

[240] En el caso de una sentencia inhibitoria parcial, se codificará la otra decisión.

[241] Si se combina con otra sentencia parcial o condicionalmente exequible o inexequible, se codificará esta última.

[242] Si se combina con otra sentencia parcial o condicionalmente exequible o inexequible, se codificará esta última.

[243] También se usa este código en el caso de una sentencia parcialmente exequible.

CONCONG	<u>Concepto de ONG</u> [01] Sentencia inhibitoria[244] [02] Cosa juzgada constitucional[245] [03] Cosa juzgada constitucional desde el punto de vista formal[246] [04] Exequible [05] Exequible (únicamente) por los cargos formulados [06] Condicionalmente exequible [07] Parcialmente inexequible[247] [08] Parcial y condicionalmente inexequible [09] Inexequible [98] Participó pero no emitió concepto [99] No participó

[244] En el caso de una sentencia inhibitoria parcial, se codificará la otra decisión.
[245] Si se combina con otra sentencia parcial o condicionalmente exequible o inexequible, se codificará esta última.
[246] Si se combina con otra sentencia parcial o condicionalmente exequible o inexequible, se codificará esta última.
[247] También se usa este código en el caso de una sentencia parcialmente exequible.

PRESID	Presidente de la Corte Constitucional [001] Jaime Sanín Greiffenstein [002] Simón Rodríguez Rodríguez [003] Ciro Angarita Barón [004] Jorge Arango Mejía [005] Hernando Herrera Vergara [006] Eduardo Cifuentes [007] Vladimiro Naranjo Mesa [008] Antonio Barrera Carbonell [009] Alejandro Martínez Caballero [010] Fabio Morón Díaz [011] José Gregorio Hernández Galindo [012] Carlos Gaviria Díaz [013] Luis Eduardo Montealegre Lynett [014] Alfredo Beltrán Sierra [015] Álvaro Tafur Galvis [016] Rodrigo Escobar Gil [017] Manuel José Cepeda Espinosa [018] Jaime Córdoba Triviño [019] Clara Inés Vargas Hernández [020] Jaime Araújo Rentería [021] Marco Gerardo Monroy Cabra [022] Humberto Sierra Porto [023] Nilson Pinilla Pinilla [024] Rodrigo Uprimny Yépez [025] Martha Victoria Sáchica de Moncaleano [026] Carmenza Isaza de Gómez [027] Julio César Ortiz Gutiérrez [028] Cristina Pardo Schlessinger [029] Jairo Charry Rivas. [030] Maria Teresa Garcés Lloreda

MAGPONOR	Magistrado Ponente original [001] Jaime Sanín Greiffenstein [002] Simón Rodríguez Rodríguez [003] Ciro Angarita Barón [004] Jorge Arango Mejía [005] Hernando Herrera Vergara [006] Eduardo Cifuentes [007] Vladimiro Naranjo Mesa [008] Antonio Barrera Carbonell [009] Alejandro Martínez Caballero [010] Fabio Morón Díaz [011] José Gregorio Hernández Galindo [012] Carlos Gaviria Díaz [013] Luis Eduardo Montealegre Lynett [014] Alfredo Beltrán Sierra [015] Álvaro Tafur Galvis [016] Rodrigo Escobar Gil [017] Manuel José Cepeda Espinosa [018] Jaime Córdoba Triviño [019] Clara Inés Vargas Hernández [020] Jaime Araújo Rentería [021] Marco Gerardo Monroy Cabra [022] Humberto Sierra Porto [023] Nilson Pinilla Pinilla [024] Rodrigo Uprimny Yépez [025] Martha Victoria Sáchica de Moncaleano [026] Carmenza Isaza de Gómez [027] Julio César Ortiz Gutiérrez [028] Cristina Pardo Schlessinger [029] Jairo Charry Rivas. [030] Maria Teresa Garcés Lloreda [555] Ponencia múltiple

MAGPONDE1	<u>Primer Magistrado Ponente definitivo</u> [001] Jaime Sanín Greiffenstein [002] Simón Rodríguez Rodríguez [003] Ciro Angarita Barón [004] Jorge Arango Mejía [005] Hernando Herrera Vergara [006] Eduardo Cifuentes [007] Vladimiro Naranjo Mesa [008] Antonio Barrera Carbonell [009] Alejandro Martínez Caballero [010] Fabio Morón Díaz [011] José Gregorio Hernández Galindo [012] Carlos Gaviria Díaz [013] Luis Eduardo Montealegre Lynett [014] Alfredo Beltrán Sierra [015] Álvaro Tafur Galvis [016] Rodrigo Escobar Gil [017] Manuel José Cepeda Espinosa [018] Jaime Córdoba Triviño [019] Clara Inés Vargas Hernández [020] Jaime Araújo Rentería [021] Marco Gerardo Monroy Cabra [022] Humberto Sierra Porto [023] Nilson Pinilla Pinilla [024] Rodrigo Uprimny Yépez [025] Martha Victoria Sáchica de Moncaleano [026] Carmenza Isaza de Gómez [027] Julio César Ortiz Gutiérrez [028] Cristina Pardo Schlessinger [029] Jairo Charry Rivas. [030] Maria Teresa Garcés Lloreda

MAGPONDE2	Segundo Magistrado Ponente definitivo [001] Jaime Sanín Greiffenstein [002] Simón Rodríguez Rodríguez [003] Ciro Angarita Barón [004] Jorge Arango Mejía [005] Hernando Herrera Vergara [006] Eduardo Cifuentes [007] Vladimiro Naranjo Mesa [008] Antonio Barrera Carbonell [009] Alejandro Martínez Caballero [010] Fabio Morón Díaz [011] José Gregorio Hernández Galindo [012] Carlos Gaviria Díaz [013] Luis Eduardo Montealegre Lynett [014] Alfredo Beltrán Sierra [015] Álvaro Tafur Galvis [016] Rodrigo Escobar Gil [017] Manuel José Cepeda Espinosa [018] Jaime Córdoba Triviño [019] Clara Inés Vargas Hernández [020] Jaime Araújo Rentería [021] Marco Gerardo Monroy Cabra [022] Humberto Sierra Porto [023] Nilson Pinilla Pinilla [024] Rodrigo Uprimny Yépez [025] Martha Victoria Sáchica de Moncaleano [026] Carmenza Isaza de Gómez [027] Julio César Ortiz Gutiérrez [028] Cristina Pardo Schlessinger [029] Jairo Charry Rivas. [030] Maria Teresa Garcés Lloreda [999] No aplica

MAGPONDE3	Tercer Magistrado Ponente definitivo [001] Jaime Sanín Greiffenstein [002] Simón Rodríguez Rodríguez [003] Ciro Angarita Barón [004] Jorge Arango Mejía [005] Hernando Herrera Vergara [006] Eduardo Cifuentes [007] Vladimiro Naranjo Mesa [008] Antonio Barrera Carbonell [009] Alejandro Martínez Caballero [010] Fabio Morón Díaz [011] José Gregorio Hernández Galindo [012] Carlos Gaviria Díaz [013] Luis Eduardo Montealegre Lynett [014] Alfredo Beltrán Sierra [015] Álvaro Tafur Galvis [016] Rodrigo Escobar Gil [017] Manuel José Cepeda Espinosa [018] Jaime Córdoba Triviño [019] Clara Inés Vargas Hernández [020] Jaime Araújo Rentería [021] Marco Gerardo Monroy Cabra [022] Humberto Sierra Porto [023] Nilson Pinilla Pinilla [024] Rodrigo Uprimny Yépez [025] Martha Victoria Sáchica de Moncaleano [026] Carmenza Isaza de Gómez [027] Julio César Ortiz Gutiérrez [028] Cristina Pardo Schlessinger [029] Jairo Charry Rivas. [030] Maria Teresa Garcés Lloreda [999] No aplica

DECISIÓN	<u>Decisión de la mayoría en la Corte</u> [01] Sentencia inhibitoria[248] [02] Cosa juzgada constitucional[249] [03] Cosa juzgada constitucional desde el punto de vista formal[250] [04] Exequible [05] Exequible (únicamente) por los cargos formulados [06] Condicionalmente exequible [07] Parcialmente inexequible[251] [08] Parcial y condicionalmente inexequible [09] Inexequible [8888] Sentencia anulada [9999] Sentencia de Tutela
DECCOJU	<u>Cosa juzgada, decisión previa a la que se remite</u> [99] No hay cosa juzgada. [01] Sentencia inhibitoria[252] [04] Exequible [05] Exequible (únicamente) por los cargos formulados [06] Condicionalmente exequible [07] Parcialmente inexequible[253] [08] Parcial y condicionalmente inexequible [09] Inexequible
SENTP1	Número de la primera sentencia previa citada en caso de Cosa Juzgada Constitucional (Cxxxx o CSJxxxx), o 9999 si no aplica

[248] En el caso de una sentencia inhibitoria parcial, se codificará la otra decisión.
[249] Si se combina con otra sentencia parcial o condicionalmente exequible o inexequible, se codificará esta última.
[250] Si se combina con otra sentencia parcial o condicionalmente exequible o inexequible, se codificará esta última.
[251] También se usa este código en el caso de una sentencia parcialmente exequible.
[252] En el caso de una sentencia inhibitoria parcial, se codificará la otra decisión.
[253] También se usa este código en el caso de una sentencia parcialmente exequible.

AÑOP1	Año (AAAA) de la primera sentencia previa citada en caso de Cosa Juzgada Constitucional, o 9999 si no aplica
SENTP2	Número de la segunda sentencia previa citada en caso de Cosa Juzgada Constitucional (Cxxxx o CSJxxxx), o 9999 si no aplica
AÑOP2	Año (AAAA) de la segunda sentencia previa citada en caso de Cosa Juzgada Constitucional, o 9999 si no aplica
SENTP3	Número de la tercera sentencia previa citada en caso de Cosa Juzgada Constitucional (Cxxxx o CSJxxxx), o 9999 si no aplica
AÑOP3	Año (AAAA) de la tercera sentencia previa citada en caso de Cosa Juzgada Constitucional, o 9999 si no aplica

JSG	<u>Votación del Magistrado Jaime Sanín Greiffenstein</u> [11] Sustituido por magistrado encargado [66] Votó con la mayoría [77] Aclaró el voto [88] Ausente [99] No aplica (no era magistrado en el momento de la sentencia <u>Salvamento de voto</u> [01] Sentencia inhibitoria[254] [02] Cosa juzgada constitucional[255] [03] Cosa juzgada constitucional desde el punto de vista formal[256] [04] Exequible [05] Exequible (únicamente) por los cargos formulados [06] Condicionalmente exequible [06,5] Más o menos condicionalmente exequible [07] Parcialmente inexequible[257] [07,5] Más o menos parcialmente exequible [08] Parcial y condicionalmente inexequible [08,5] Más o menos parcial y condicionalmente inexequible [09] Inexequible [09,5] Más inexequible (Más normas o temporalmente) [10] No inhibirse / No declarar cosa juzgada

[254] En el caso de una sentencia inhibitoria parcial, se codificará la otra decisión.
[255] Si se combina con otra sentencia parcial o condicionalmente exequible o inexequible, se codificará esta última.
[256] Si se combina con otra sentencia parcial o condicionalmente exequible o inexequible, se codificará esta última.
[257] También se usa este código en el caso de una sentencia parcialmente exequible.

SRR	<u>Votación del Magistrado Simón Rodríguez Rodríguez</u> [11] Sustituido por magistrado encargado [66] Votó con la mayoría [77] Aclaró el voto [88] Ausente [99] No aplica (no era magistrado en el momento de la sentencia <u>Salvamento de voto</u> [01] Sentencia inhibitoria[258] [02] Cosa juzgada constitucional[259] [03] Cosa juzgada constitucional desde el punto de vista formal[260] [04] Exequible [05] Exequible (únicamente) por los cargos formulados [06] Condicionalmente exequible [06,5] Más o menos condicionalmente exequible [07] Parcialmente inexequible[261] [07,5] Más o menos parcialmente exequible [08] Parcial y condicionalmente inexequible [08,5] Más o menos parcial y condicionalmente inexequible [09] Inexequible [09,5] Más inexequible (Más normas o temporalmente) [10] No inhibirse / No declarar cosa juzgada

[258] En el caso de una sentencia inhibitoria parcial, se codificará la otra decisión.
[259] Si se combina con otra sentencia parcial o condicionalmente exequible o inexequible, se codificará esta última.
[260] Si se combina con otra sentencia parcial o condicionalmente exequible o inexequible, se codificará esta última.
[261] También se usa este código en el caso de una sentencia parcialmente exequible.

CAB	Votación del Magistrado Ciro Angarita Barón [11] Sustituido por magistrado encargado [66] Votó con la mayoría [77] Aclaró el voto [88] Ausente [99] No aplica (no era magistrado en el momento de la sentencia Salvamento de voto [01] Sentencia inhibitoria[262] [02] Cosa juzgada constitucional[263] [03] Cosa juzgada constitucional desde el punto de vista formal[264] [04] Exequible [05] Exequible (únicamente) por los cargos formulados [06] Condicionalmente exequible [06,5] Más o menos condicionalmente exequible [07] Parcialmente inexequible[265] [07,5] Más o menos parcialmente exequible [08] Parcial y condicionalmente inexequible [08,5] Más o menos parcial y condicionalmente inexequible [09] Inexequible [09,5] Más inexequible (Más normas o temporalmente) [10] No inhibirse / No declarar cosa juzgada

[262] En el caso de una sentencia inhibitoria parcial, se codificará la otra decisión.
[263] Si se combina con otra sentencia parcial o condicionalmente exequible o inexequible, se codificará esta última.
[264] Si se combina con otra sentencia parcial o condicionalmente exequible o inexequible, se codificará esta última.
[265] También se usa este código en el caso de una sentencia parcialmente exequible.

JAM	<u>Votación del Magistrado Jorge Arango Mejía</u> [11] Sustituido por magistrado encargado [66] Votó con la mayoría [77] Aclaró el voto [88] Ausente [99] No aplica (no era magistrado en el momento de la sentencia <u>Salvamento de voto</u> [01] Sentencia inhibitoria[266] [02] Cosa juzgada constitucional[267] [03] Cosa juzgada constitucional desde el punto de vista formal[268] [04] Exequible [05] Exequible (únicamente) por los cargos formulados [06] Condicionalmente exequible [06,5] Más o menos condicionalmente exequible [07] Parcialmente inexequible[269] [07,5] Más o menos parcialmente exequible [08] Parcial y condicionalmente inexequible [08,5] Más o menos parcial y condicionalmente inexequible [09] Inexequible [09,5] Más inexequible (Más normas o temporalmente) [10] No inhibirse / No declarar cosa juzgada

[266] En el caso de una sentencia inhibitoria parcial, se codificará la otra decisión.
[267] Si se combina con otra sentencia parcial o condicionalmente exequible o inexequible, se codificará esta última.
[268] Si se combina con otra sentencia parcial o condicionalmente exequible o inexequible, se codificará esta última.
[269] También se usa este código en el caso de una sentencia parcialmente exequible.

HHV	<u>Votación del Magistrado Hernando Herrera Vergara</u> [11] Sustituido por magistrado encargado [66] Votó con la mayoría [77] Aclaró el voto [88] Ausente [99] No aplica (no era magistrado en el momento de la sentencia <u>Salvamento de voto</u> [01] Sentencia inhibitoria[270] [02] Cosa juzgada constitucional[271] [03] Cosa juzgada constitucional desde el punto de vista formal[272] [04] Exequible [05] Exequible (únicamente) por los cargos formulados [06] Condicionalmente exequible [06,5] Más o menos condicionalmente exequible [07] Parcialmente inexequible[273] [07,5] Más o menos parcialmente exequible [08] Parcial y condicionalmente inexequible [08,5] Más o menos parcial y condicionalmente inexequible [09] Inexequible [09,5] Más inexequible (Más normas o temporalmente) [10] No inhibirse / No declarar cosa juzgada

[270] En el caso de una sentencia inhibitoria parcial, se codificará la otra decisión.
[271] Si se combina con otra sentencia parcial o condicionalmente exequible o inexequible, se codificará esta última.
[272] Si se combina con otra sentencia parcial o condicionalmente exequible o inexequible, se codificará esta última.
[273] También se usa este código en el caso de una sentencia parcialmente exequible.

ECM	<u>Votación del Magistrado Eduardo Cifuentes Muñoz</u> [11] Sustituido por magistrado encargado [66] Votó con la mayoría [77] Aclaró el voto [88] Ausente [99] No aplica (no era magistrado en el momento de la sentencia <u>Salvamento de voto</u> [01] Sentencia inhibitoria[274] [02] Cosa juzgada constitucional[275] [03] Cosa juzgada constitucional desde el punto de vista formal[276] [04] Exequible [05] Exequible (únicamente) por los cargos formulados [06] Condicionalmente exequible [06,5] Más o menos condicionalmente exequible [07] Parcialmente inexequible[277] [07,5] Más o menos parcialmente exequible [08] Parcial y condicionalmente inexequible [08,5] Más o menos parcial y condicionalmente inexequible [09] Inexequible [09,5] Más inexequible (Más normas o temporalmente) [10] No inhibirse / No declarar cosa juzgada

[274] En el caso de una sentencia inhibitoria parcial, se codificará la otra decisión.
[275] Si se combina con otra sentencia parcial o condicionalmente exequible o inexequible, se codificará esta última.
[276] Si se combina con otra sentencia parcial o condicionalmente exequible o inexequible, se codificará esta última.
[277] También se usa este código en el caso de una sentencia parcialmente exequible.

VNM	<u>Votación del Magistrado Vladimiro Naranjo Mesa</u> [11] Sustituido por magistrado encargado [66] Votó con la mayoría [77] Aclaró el voto [88] Ausente [99] No aplica (no era magistrado en el momento de la sentencia <u>Salvamento de voto</u> [01] Sentencia inhibitoria[278] [02] Cosa juzgada constitucional[279] [03] Cosa juzgada constitucional desde el punto de vista formal[280] [04] Exequible [05] Exequible (únicamente) por los cargos formulados [06] Condicionalmente exequible [06,5] Más o menos condicionalmente exequible [07] Parcialmente inexequible[281] [07,5] Más o menos parcialmente exequible [08] Parcial y condicionalmente inexequible [08,5] Más o menos parcial y condicionalmente inexequible [09] Inexequible [09,5] Más inexequible (Más normas o temporalmente) [10] No inhibirse / No declarar cosa juzgada

[278] En el caso de una sentencia inhibitoria parcial, se codificará la otra decisión.
[279] Si se combina con otra sentencia parcial o condicionalmente exequible o inexequible, se codificará esta última.
[280] Si se combina con otra sentencia parcial o condicionalmente exequible o inexequible, se codificará esta última.
[281] También se usa este código en el caso de una sentencia parcialmente exequible.

ABC	<u>Votación del Magistrado Antonio Barrera Carbonell</u> [11] Sustituido por magistrado encargado [66] Votó con la mayoría [77] Aclaró el voto [88] Ausente [99] No aplica (no era magistrado en el momento de la sentencia <u>Salvamento de voto</u> [01] Sentencia inhibitoria[282] [02] Cosa juzgada constitucional[283] [03] Cosa juzgada constitucional desde el punto de vista formal[284] [04] Exequible [05] Exequible (únicamente) por los cargos formulados [06] Condicionalmente exequible [06,5] Más o menos condicionalmente exequible [07] Parcialmente inexequible[285] [07,5] Más o menos parcialmente exequible [08] Parcial y condicionalmente inexequible [08,5] Más o menos parcial y condicionalmente inexequible [09] Inexequible [09,5] Más inexequible (Más normas o temporalmente) [10] No inhibirse / No declarar cosa juzgada

[282] En el caso de una sentencia inhibitoria parcial, se codificará la otra decisión.

[283] Si se combina con otra sentencia parcial o condicionalmente exequible o inexequible, se codificará esta última.

[284] Si se combina con otra sentencia parcial o condicionalmente exequible o inexequible, se codificará esta última.

[285] También se usa este código en el caso de una sentencia parcialmente exequible.

AMC	<u>Votación del Magistrado Alejandro Martínez Caballero</u> [11] Sustituido por magistrado encargado [66] Votó con la mayoría [77] Aclaró el voto [88] Ausente [99] No aplica (no era magistrado en el momento de la sentencia <u>Salvamento de voto</u> [01] Sentencia inhibitoria[286] [02] Cosa juzgada constitucional[287] [03] Cosa juzgada constitucional desde el punto de vista formal[288] [04] Exequible [05] Exequible (únicamente) por los cargos formulados [06] Condicionalmente exequible [06,5] Más o menos condicionalmente exequible [07] Parcialmente inexequible[289] [07,5] Más o menos parcialmente exequible [08] Parcial y condicionalmente inexequible [08,5] Más o menos parcial y condicionalmente inexequible [09] Inexequible [09,5] Más inexequible (Más normas o temporalmente) [10] No inhibirse / No declarar cosa juzgada

[286] En el caso de una sentencia inhibitoria parcial, se codificará la otra decisión.
[287] Si se combina con otra sentencia parcial o condicionalmente exequible o inexequible, se codificará esta última.
[288] Si se combina con otra sentencia parcial o condicionalmente exequible o inexequible, se codificará esta última.
[289] También se usa este código en el caso de una sentencia parcialmente exequible.

FMD	<u>Votación del Magistrado Fabio Morón Díaz</u> [11] Sustituido por magistrado encargado [66] Votó con la mayoría [77] Aclaró el voto [88] Ausente [99] No aplica (no era magistrado en el momento de la sentencia <u>Salvamento de voto</u> [01] Sentencia inhibitoria[290] [02] Cosa juzgada constitucional[291] [03] Cosa juzgada constitucional desde el punto de vista formal[292] [04] Exequible [05] Exequible (únicamente) por los cargos formulados [06] Condicionalmente exequible [06,5] Más o menos condicionalmente exequible [07] Parcialmente inexequible[293] [07,5] Más o menos parcialmente exequible [08] Parcial y condicionalmente inexequible [08,5] Más o menos parcial y condicionalmente inexequible [09] Inexequible [09,5] Más inexequible (Más normas o temporalmente) [10] No inhibirse / No declarar cosa juzgada

[290] En el caso de una sentencia inhibitoria parcial, se codificará la otra decisión.
[291] Si se combina con otra sentencia parcial o condicionalmente exequible o inexequible, se codificará esta última.
[292] Si se combina con otra sentencia parcial o condicionalmente exequible o inexequible, se codificará esta última.
[293] También se usa este código en el caso de una sentencia parcialmente exequible.

JGH	<u>Votación del Magistrado José Gregorio Hernández</u> [11] Sustituido por magistrado encargado [66] Votó con la mayoría [77] Aclaró el voto [88] Ausente [99] No aplica (no era magistrado en el momento de la sentencia <u>Salvamento de voto</u> [01] Sentencia inhibitoria[294] [02] Cosa juzgada constitucional[295] [03] Cosa juzgada constitucional desde el punto de vista formal[296] [04] Exequible [05] Exequible (únicamente) por los cargos formulados [06] Condicionalmente exequible [06,5] Más o menos condicionalmente exequible [07] Parcialmente inexequible[297] [07,5] Más o menos parcialmente exequible [08] Parcial y condicionalmente inexequible [08,5] Más o menos parcial y condicionalmente inexequible [09] Inexequible [09,5] Más inexequible (Más normas o temporalmente) [10] No inhibirse / No declarar cosa juzgada

[294] En el caso de una sentencia inhibitoria parcial, se codificará la otra decisión.
[295] Si se combina con otra sentencia parcial o condicionalmente exequible o inexequible, se codificará esta última.
[296] Si se combina con otra sentencia parcial o condicionalmente exequible o inexequible, se codificará esta última.
[297] También se usa este código en el caso de una sentencia parcialmente exequible.

CGD	<u>Votación del Magistrado Carlos Gaviria Díaz</u> [11] Sustituido por magistrado encargado [66] Votó con la mayoría [77] Aclaró el voto [88] Ausente [99] No aplica (no era magistrado en el momento de la sentencia <u>Salvamento de voto</u> [01] Sentencia inhibitoria[298] [02] Cosa juzgada constitucional[299] [03] Cosa juzgada constitucional desde el punto de vista formal[300] [04] Exequible [05] Exequible (únicamente) por los cargos formulados [06] Condicionalmente exequible [06,5] Más o menos condicionalmente exequible [07] Parcialmente inexequible[301] [07,5] Más o menos parcialmente exequible [08] Parcial y condicionalmente inexequible [08,5] Más o menos parcial y condicionalmente inexequible [09] Inexequible [09,5] Más inexequible (Más normas o temporalmente) [10] No inhibirse / No declarar cosa juzgada

[298] En el caso de una sentencia inhibitoria parcial, se codificará la otra decisión.
[299] Si se combina con otra sentencia parcial o condicionalmente exequible o inexequible, se codificará esta última.
[300] Si se combina con otra sentencia parcial o condicionalmente exequible o inexequible, se codificará esta última.
[301] También se usa este código en el caso de una sentencia parcialmente exequible.

LEM	<u>Votación del Magistrado Luis Eduardo Montealegre Lynett</u> [11] Sustituido por magistrado encargado [66] Votó con la mayoría [77] Aclaró el voto [88] Ausente [99] No aplica (no era magistrado en el momento de la sentencia <u>Salvamento de voto</u> [01] Sentencia inhibitoria[302] [02] Cosa juzgada constitucional[303] [03] Cosa juzgada constitucional desde el punto de vista formal[304] [04] Exequible [05] Exequible (únicamente) por los cargos formulados [06] Condicionalmente exequible [06,5] Más o menos condicionalmente exequible [07] Parcialmente inexequible[305] [07,5] Más o menos parcialmente exequible [08] Parcial y condicionalmente inexequible [08,5] Más o menos parcial y condicionalmente inexequible [09] Inexequible [09,5] Más inexequible (Más normas o temporalmente) [10] No inhibirse / No declarar cosa juzgada

[302] En el caso de una sentencia inhibitoria parcial, se codificará la otra decisión.
[303] Si se combina con otra sentencia parcial o condicionalmente exequible o inexequible, se codificará esta última.
[304] Si se combina con otra sentencia parcial o condicionalmente exequible o inexequible, se codificará esta última.
[305] También se usa este código en el caso de una sentencia parcialmente exequible.

ABS	<u>Votación del Magistrado Alfredo Beltrán Sierra</u> [11] Sustituido por magistrado encargado [66] Votó con la mayoría [77] Aclaró el voto [88] Ausente [99] No aplica (no era magistrado en el momento de la sentencia <u>Salvamento de voto</u> [01] Sentencia inhibitoria[306] [02] Cosa juzgada constitucional[307] [03] Cosa juzgada constitucional desde el punto de vista formal[308] [04] Exequible [05] Exequible (únicamente) por los cargos formulados [06] Condicionalmente exequible [06,5] Más o menos condicionalmente exequible [07] Parcialmente inexequible[309] [07,5] Más o menos parcialmente exequible [08] Parcial y condicionalmente inexequible [08,5] Más o menos parcial y condicionalmente inexequible [09] Inexequible [09,5] Más inexequible (Más normas o temporalmente) [10] No inhibirse / No declarar cosa juzgada

[306] En el caso de una sentencia inhibitoria parcial, se codificará la otra decisión.
[307] Si se combina con otra sentencia parcial o condicionalmente exequible o inexequible, se codificará esta última.
[308] Si se combina con otra sentencia parcial o condicionalmente exequible o inexequible, se codificará esta última.
[309] También se usa este código en el caso de una sentencia parcialmente exequible.

ATG	<u>Votación del Magistrado Álvaro Tafur Galvis</u> [11] Sustituido por magistrado encargado [66] Votó con la mayoría [77] Aclaró el voto [88] Ausente [99] No aplica (no era magistrado en el momento de la sentencia <u>Salvamento de voto</u> [01] Sentencia inhibitoria[310] [02] Cosa juzgada constitucional[311] [03] Cosa juzgada constitucional desde el punto de vista formal[312] [04] Exequible [05] Exequible (únicamente) por los cargos formulados [06] Condicionalmente exequible [06,5] Más o menos condicionalmente exequible [07] Parcialmente inexequible[313] [07,5] Más o menos parcialmente exequible [08] Parcial y condicionalmente inexequible [08,5] Más o menos parcial y condicionalmente inexequible [09] Inexequible [09,5] Más inexequible (Más normas o temporalmente) [10] No inhibirse / No declarar cosa juzgada

[310] En el caso de una sentencia inhibitoria parcial, se codificará la otra decisión.
[311] Si se combina con otra sentencia parcial o condicionalmente exequible o inexequible, se codificará esta última.
[312] Si se combina con otra sentencia parcial o condicionalmente exequible o inexequible, se codificará esta última.
[313] También se usa este código en el caso de una sentencia parcialmente exequible.

REG	<u>Votación del Magistrado Rodrigo Escobar Gil</u> [11] Sustituido por magistrado encargado [66] Votó con la mayoría [77] Aclaró el voto [88] Ausente [99] No aplica (no era magistrado en el momento de la sentencia <u>Salvamento de voto</u> [01] Sentencia inhibitoria[314] [02] Cosa juzgada constitucional[315] [03] Cosa juzgada constitucional desde el punto de vista formal[316] [04] Exequible [05] Exequible (únicamente) por los cargos formulados [06] Condicionalmente exequible [06,5] Más o menos condicionalmente exequible [07] Parcialmente inexequible[317] [07,5] Más o menos parcialmente exequible [08] Parcial y condicionalmente inexequible [08,5] Más o menos parcial y condicionalmente inexequible [09] Inexequible [09,5] Más inexequible (Más normas o temporalmente) [10] No inhibirse / No declarar cosa juzgada

[314] En el caso de una sentencia inhibitoria parcial, se codificará la otra decisión.
[315] Si se combina con otra sentencia parcial o condicionalmente exequible o inexequible, se codificará esta última.
[316] Si se combina con otra sentencia parcial o condicionalmente exequible o inexequible, se codificará esta última.
[317] También se usa este código en el caso de una sentencia parcialmente exequible.

MJC	Votación del Magistrado Manuel José Cepeda Espinosa [11] Sustituido por magistrado encargado [66] Votó con la mayoría [77] Aclaró el voto [88] Ausente [99] No aplica (no era magistrado en el momento de la sentencia Salvamento de voto [01] Sentencia inhibitoria[318] [02] Cosa juzgada constitucional[319] [03] Cosa juzgada constitucional desde el punto de vista formal[320] [04] Exequible [05] Exequible (únicamente) por los cargos formulados [06] Condicionalmente exequible [06,5] Más o menos condicionalmente exequible [07] Parcialmente inexequible[321] [07,5] Más o menos parcialmente exequible [08] Parcial y condicionalmente inexequible [08,5] Más o menos parcial y condicionalmente inexequible [09] Inexequible [09,5] Más inexequible (Más normas o temporalmente) [10] No inhibirse / No declarar cosa juzgada

[318] En el caso de una sentencia inhibitoria parcial, se codificará la otra decisión.
[319] Si se combina con otra sentencia parcial o condicionalmente exequible o inexequible, se codificará esta última.
[320] Si se combina con otra sentencia parcial o condicionalmente exequible o inexequible, se codificará esta última.
[321] También se usa este código en el caso de una sentencia parcialmente exequible.

JCT	<u>Votación del Magistrado Jaime Córdoba Triviño</u> [11] Sustituido por magistrado encargado [66] Votó con la mayoría [77] Aclaró el voto [88] Ausente [99] No aplica (no era magistrado en el momento de la sentencia <u>Salvamento de voto</u> [01] Sentencia inhibitoria[322] [02] Cosa juzgada constitucional[323] [03] Cosa juzgada constitucional desde el punto de vista formal[324] [04] Exequible [05] Exequible (únicamente) por los cargos formulados [06] Condicionalmente exequible [06,5] Más o menos condicionalmente exequible [07] Parcialmente inexequible[325] [07,5] Más o menos parcialmente exequible [08] Parcial y condicionalmente inexequible [08,5] Más o menos parcial y condicionalmente inexequible [09] Inexequible [09,5] Más inexequible (Más normas o temporalmente) [10] No inhibirse / No declarar cosa juzgada

[322] En el caso de una sentencia inhibitoria parcial, se codificará la otra decisión.
[323] Si se combina con otra sentencia parcial o condicionalmente exequible o inexequible, se codificará esta última.
[324] Si se combina con otra sentencia parcial o condicionalmente exequible o inexequible, se codificará esta última.
[325] También se usa este código en el caso de una sentencia parcialmente exequible.

CIV	<u>Votación de la Magistrada Clara Inés Vargas Hernández</u> [11] Sustituido por magistrado encargado [66] Votó con la mayoría [77] Aclaró el voto [88] Ausente [99] No aplica (no era magistrado en el momento de la sentencia <u>Salvamento de voto</u> [01] Sentencia inhibitoria[326] [02] Cosa juzgada constitucional[327] [03] Cosa juzgada constitucional desde el punto de vista formal[328] [04] Exequible [05] Exequible (únicamente) por los cargos formulados [06] Condicionalmente exequible [06,5] Más o menos condicionalmente exequible [07] Parcialmente inexequible[329] [07,5] Más o menos parcialmente exequible [08] Parcial y condicionalmente inexequible [08,5] Más o menos parcial y condicionalmente inexequible [09] Inexequible [09,5] Más inexequible (Más normas o temporalmente) [10] No inhibirse / No declarar cosa juzgada

[326] En el caso de una sentencia inhibitoria parcial, se codificará la otra decisión.
[327] Si se combina con otra sentencia parcial o condicionalmente exequible o inexequible, se codificará esta última.
[328] Si se combina con otra sentencia parcial o condicionalmente exequible o inexequible, se codificará esta última.
[329] También se usa este código en el caso de una sentencia parcialmente exequible.

JAR	<u>Votación del Magistrado Jaime Araújo Rentería</u> [11] Sustituido por magistrado encargado [66] Votó con la mayoría [77] Aclaró el voto [88] Ausente [99] No aplica (no era magistrado en el momento de la sentencia <u>Salvamento de voto</u> [01] Sentencia inhibitoria[330] [02] Cosa juzgada constitucional[331] [03] Cosa juzgada constitucional desde el punto de vista formal[332] [04] Exequible [05] Exequible (únicamente) por los cargos formulados [06] Condicionalmente exequible [06,5] Más o menos condicionalmente exequible [07] Parcialmente inexequible[333] [07,5] Más o menos parcialmente exequible [08] Parcial y condicionalmente inexequible [08,5] Más o menos parcial y condicionalmente inexequible [09] Inexequible [09,5] Más inexequible (Más normas o temporalmente) [10] No inhibirse / No declarar cosa juzgada

[330] En el caso de una sentencia inhibitoria parcial, se codificará la otra decisión.
[331] Si se combina con otra sentencia parcial o condicionalmente exequible o inexequible, se codificará esta última.
[332] Si se combina con otra sentencia parcial o condicionalmente exequible o inexequible, se codificará esta última.
[333] También se usa este código en el caso de una sentencia parcialmente exequible.

MGM	<u>Votación del Magistrado Marco Gerardo Monroy Cabra</u> [11] Sustituido por magistrado encargado [66] Votó con la mayoría [77] Aclaró el voto [88] Ausente [99] No aplica (no era magistrado en el momento de la sentencia <u>Salvamento de voto</u> [01] Sentencia inhibitoria[334] [02] Cosa juzgada constitucional[335] [03] Cosa juzgada constitucional desde el punto de vista formal[336] [04] Exequible [05] Exequible (únicamente) por los cargos formulados [06] Condicionalmente exequible [06,5] Más o menos condicionalmente exequible [07] Parcialmente inexequible[337] [07,5] Más o menos parcialmente exequible [08] Parcial y condicionalmente inexequible [08,5] Más o menos parcial y condicionalmente inexequible [09] Inexequible [09,5] Más inexequible (Más normas o temporalmente) [10] No inhibirse / No declarar cosa juzgada

[334] En el caso de una sentencia inhibitoria parcial, se codificará la otra decisión.
[335] Si se combina con otra sentencia parcial o condicionalmente exequible o inexequible, se codificará esta última.
[336] Si se combina con otra sentencia parcial o condicionalmente exequible o inexequible, se codificará esta última.
[337] También se usa este código en el caso de una sentencia parcialmente exequible.

HSP	<u>Votación del Magistrado Humberto Sierra Porto</u> [11] Sustituido por magistrado encargado [66] Votó con la mayoría [77] Aclaró el voto [88] Ausente [99] No aplica (no era magistrado en el momento de la sentencia <u>Salvamento de voto</u> [01] Sentencia inhibitoria[338] [02] Cosa juzgada constitucional[339] [03] Cosa juzgada constitucional desde el punto de vista formal[340] [04] Exequible [05] Exequible (únicamente) por los cargos formulados [06] Condicionalmente exequible [06,5] Más o menos condicionalmente exequible [07] Parcialmente inexequible[341] [07,5] Más o menos parcialmente exequible [08] Parcial y condicionalmente inexequible [08,5] Más o menos parcial y condicionalmente inexequible [09] Inexequible [09,5] Más inexequible (Más normas o temporalmente) [10] No inhibirse / No declarar cosa juzgada

[338] En el caso de una sentencia inhibitoria parcial, se codificará la otra decisión.
[339] Si se combina con otra sentencia parcial o condicionalmente exequible o inexequible, se codificará esta última.
[340] Si se combina con otra sentencia parcial o condicionalmente exequible o inexequible, se codificará esta última.
[341] También se usa este código en el caso de una sentencia parcialmente exequible.

NPP	<u>Votación del Magistrado Nilson Pinilla Pinilla</u> [11] Sustituido por magistrado encargado [66] Votó con la mayoría [77] Aclaró el voto [88] Ausente [99] No aplica (no era magistrado en el momento de la sentencia <u>Salvamento de voto</u> [01] Sentencia inhibitoria[342] [02] Cosa juzgada constitucional[343] [03] Cosa juzgada constitucional desde el punto de vista formal[344] [04] Exequible [05] Exequible (únicamente) por los cargos formulados [06] Condicionalmente exequible [06,5] Más o menos condicionalmente exequible [07] Parcialmente inexequible[345] [07,5] Más o menos parcialmente exequible [08] Parcial y condicionalmente inexequible [08,5] Más o menos parcial y condicionalmente inexequible [09] Inexequible [09,5] Más inexequible (Más normas o temporalmente) [10] No inhibirse / No declarar cosa juzgada

[342] En el caso de una sentencia inhibitoria parcial, se codificará la otra decisión.
[343] Si se combina con otra sentencia parcial o condicionalmente exequible o inexequible, se codificará esta última.
[344] Si se combina con otra sentencia parcial o condicionalmente exequible o inexequible, se codificará esta última.
[345] También se usa este código en el caso de una sentencia parcialmente exequible.

RUY	<u>Votación del Magistrado Rodrigo Uprimny Yépez</u> [66] Votó con la mayoría [77] Aclaró el voto [88] Ausente [99] No aplica (no era magistrado en el momento de la sentencia <u>Salvamento de voto</u> [01] Sentencia inhibitoria[346] [02] Cosa juzgada constitucional[347] [03] Cosa juzgada constitucional desde el punto de vista formal[348] [04] Exequible [05] Exequible (únicamente) por los cargos formulados [06] Condicionalmente exequible [06,5] Más o menos condicionalmente exequible [07] Parcialmente inexequible[349] [07,5] Más o menos parcialmente exequible [08] Parcial y condicionalmente inexequible [08,5] Más o menos parcial y condicionalmente inexequible [09] Inexequible [09,5] Más inexequible (Más normas o temporalmente) [10] No inhibirse / No declarar cosa juzgada

[346] En el caso de una sentencia inhibitoria parcial, se codificará la otra decisión.
[347] Si se combina con otra sentencia parcial o condicionalmente exequible o inexequible, se codificará esta última.
[348] Si se combina con otra sentencia parcial o condicionalmente exequible o inexequible, se codificará esta última.
[349] También se usa este código en el caso de una sentencia parcialmente exequible.

MVS	<u>Votación de la Magistrada Martha Victoria Sáchica</u> [66] Votó con la mayoría [77] Aclaró el voto [88] Ausente [99] No aplica (no era magistrado en el momento de la sentencia <u>Salvamento de voto</u> [01] Sentencia inhibitoria[350] [02] Cosa juzgada constitucional[351] [03] Cosa juzgada constitucional desde el punto de vista formal[352] [04] Exequible [05] Exequible (únicamente) por los cargos formulados [06] Condicionalmente exequible [06,5] Más o menos condicionalmente exequible [07] Parcialmente inexequible[353] [07,5] Más o menos parcialmente exequible [08] Parcial y condicionalmente inexequible [08,5] Más o menos parcial y condicionalmente inexequible [09] Inexequible [09,5] Más inexequible (Más normas o temporalmente) [10] No inhibirse / No declarar cosa juzgada

[350] En el caso de una sentencia inhibitoria parcial, se codificará la otra decisión.
[351] Si se combina con otra sentencia parcial o condicionalmente exequible o inexequible, se codificará esta última.
[352] Si se combina con otra sentencia parcial o condicionalmente exequible o inexequible, se codificará esta última.
[353] También se usa este código en el caso de una sentencia parcialmente exequible.

CIG	<u>Votación de la Magistrada Carmenza Isaza de Gómez</u> [66] Votó con la mayoría [77] Aclaró el voto [88] Ausente [99] No aplica (no era magistrado en el momento de la sentencia <u>Salvamento de voto</u> [01] Sentencia inhibitoria[354] [02] Cosa juzgada constitucional[355] [03] Cosa juzgada constitucional desde el punto de vista formal[356] [04] Exequible [05] Exequible (únicamente) por los cargos formulados [06] Condicionalmente exequible [06,5] Más o menos condicionalmente exequible [07] Parcialmente inexequible[357] [07,5] Más o menos parcialmente exequible [08] Parcial y condicionalmente inexequible [08,5] Más o menos parcial y condicionalmente inexequible [09] Inexequible [09,5] Más inexequible (Más normas o temporalmente) [10] No inhibirse / No declarar cosa juzgada

[354] En el caso de una sentencia inhibitoria parcial, se codificará la otra decisión.
[355] Si se combina con otra sentencia parcial o condicionalmente exequible o inexequible, se codificará esta última.
[356] Si se combina con otra sentencia parcial o condicionalmente exequible o inexequible, se codificará esta última.
[357] También se usa este código en el caso de una sentencia parcialmente exequible.

JCO	<u>Votación del Magistrado Julio César Ortiz Gutiérrez</u> [66] Votó con la mayoría [77] Aclaró el voto [88] Ausente [99] No aplica (no era magistrado en el momento de la sentencia <u>Salvamento de voto</u> [01] Sentencia inhibitoria[358] [02] Cosa juzgada constitucional[359] [03] Cosa juzgada constitucional desde el punto de vista formal[360] [04] Exequible [05] Exequible (únicamente) por los cargos formulados [06] Condicionalmente exequible [06,5] Más o menos condicionalmente exequible [07] Parcialmente inexequible[361] [07,5] Más o menos parcialmente exequible [08] Parcial y condicionalmente inexequible [08,5] Más o menos parcial y condicionalmente inexequible [09] Inexequible [09,5] Más inexequible (Más normas o temporalmente) [10] No inhibirse / No declarar cosa juzgada

[358] En el caso de una sentencia inhibitoria parcial, se codificará la otra decisión.
[359] Si se combina con otra sentencia parcial o condicionalmente exequible o inexequible, se codificará esta última.
[360] Si se combina con otra sentencia parcial o condicionalmente exequible o inexequible, se codificará esta última.
[361] También se usa este código en el caso de una sentencia parcialmente exequible.

CPS	<u>Votación de la Magistrada Cristina Pardo Schlessinger</u> [66] Votó con la mayoría [77] Aclaró el voto [88] Ausente [99] No aplica (no era magistrado en el momento de la sentencia <u>Salvamento de voto</u> [01] Sentencia inhibitoria[362] [02] Cosa juzgada constitucional[363] [03] Cosa juzgada constitucional desde el punto de vista formal[364] [04] Exequible [05] Exequible (únicamente) por los cargos formulados [06] Condicionalmente exequible [06,5] Más o menos condicionalmente exequible [07] Parcialmente inexequible[365] [07,5] Más o menos parcialmente exequible [08] Parcial y condicionalmente inexequible [08,5] Más o menos parcial y condicionalmente inexequible [09] Inexequible [09,5] Más inexequible (Más normas o temporalmente) [10] No inhibirse / No declarar cosa juzgada

[362] En el caso de una sentencia inhibitoria parcial, se codificará la otra decisión.
[363] Si se combina con otra sentencia parcial o condicionalmente exequible o inexequible, se codificará esta última.
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[365] También se usa este código en el caso de una sentencia parcialmente exequible.

JCR	<u>Votación del Magistrado Jairo Charry Rivas</u> [66] Votó con la mayoría [77] Aclaró el voto [88] Ausente [99] No aplica (no era magistrado en el momento de la sentencia <u>Salvamento de voto</u> [01] Sentencia inhibitoria[366] [02] Cosa juzgada constitucional[367] [03] Cosa juzgada constitucional desde el punto de vista formal[368] [04] Exequible [05] Exequible (únicamente) por los cargos formulados [06] Condicionalmente exequible [06,5] Más o menos condicionalmente exequible [07] Parcialmente inexequible[369] [07,5] Más o menos parcialmente exequible [08] Parcial y condicionalmente inexequible [08,5] Más o menos parcial y condicionalmente inexequible [09] Inexequible [09,5] Más inexequible (Más normas o temporalmente) [10] No inhibirse / No declarar cosa juzgada

[366] En el caso de una sentencia inhibitoria parcial, se codificará la otra decisión.
[367] Si se combina con otra sentencia parcial o condicionalmente exequible o inexequible, se codificará esta última.
[368] Si se combina con otra sentencia parcial o condicionalmente exequible o inexequible, se codificará esta última.
[369] También se usa este código en el caso de una sentencia parcialmente exequible.

MTG	<u>Votación de la Magistrada Maria Teresa Garces Lloreda</u> [66] Votó con la mayoría [77] Aclaró el voto [88] Ausente [99] No aplica (no era magistrado en el momento de la sentencia <u>Salvamento de voto</u> [01] Sentencia inhibitoria[370] [02] Cosa juzgada constitucional[371] [03] Cosa juzgada constitucional desde el punto de vista formal[372] [04] Exequible [05] Exequible (únicamente) por los cargos formulados [06] Condicionalmente exequible [06,5] Más o menos condicionalmente exequible [07] Parcialmente inexequible[373] [07,5] Más o menos parcialmente exequible [08] Parcial y condicionalmente inexequible [08,5] Más o menos parcial y condicionalmente inexequible [09] Inexequible [09,5] Más inexequible (Más normas o temporalmente) [10] No inhibirse / No declarar cosa juzgada
RELATOR	Texto completo de la descripción del tema hecha por la Relatoría de la Corte.

[370] En el caso de una sentencia inhibitoria parcial, se codificará la otra decisión.
[371] Si se combina con otra sentencia parcial o condicionalmente exequible o inexequible, se codificará esta última.
[372] Si se combina con otra sentencia parcial o condicionalmente exequible o inexequible, se codificará esta última.
[373] También se usa este código en el caso de una sentencia parcialmente exequible.

SENTCONJ	Participación de conjuez en la sentencia [01] En la decisión participó sentencia por lo menos un conjuez [99] No participó ningún conjuez
REL_EXP	Número del expediente tomado directamente de la página de la Corte.
REL_DEM	Nombre del demandante tomado directamente de la página de la Corte.
REL_AVSV	Aclaraciones y salvamentos tomado directamente de la página de la Corte (sólo para sentencias a partir de 2001).
REL_REL	Texto de la relatoría tomado directamente de la página de la Corte.

REL_PONENTE	Magistrado ponente tomado directamente de la página de la Corte [001] Jaime Sanín Greiffenstein [002] Simón Rodríguez Rodríguez [003] Ciro Angarita Barón [004] Jorge Arango Mejía [005] Hernando Herrera Vergara [006] Eduardo Cifuentes [007] Vladimiro Naranjo Mesa [008] Antonio Barrera Carbonell [009] Alejandro Martínez Caballero [010] Fabio Morón Díaz [011] José Gregorio Hernández Galindo [012] Carlos Gaviria Díaz [013] Luis Eduardo Montealegre Lynett [014] Alfredo Beltrán Sierra [015] Álvaro Tafur Galvis [016] Rodrigo Escobar Gil [017] Manuel José Cepeda Espinosa [018] Jaime Córdoba Triviño [019] Clara Inés Vargas Hernández [020] Jaime Araújo Rentería [021] Marco Gerardo Monroy Cabra [022] Humberto Sierra Porto [023] Nilson Pinilla Pinilla [024] Rodrigo Uprimny Yépez [025] Martha Victoria Sáchica de Moncaleano [026] Carmenza Isaza de Gómez [027] Julio César Ortiz Gutiérrez [028] Cristina Pardo Schlessinger [029] Jairo Charry Rivas. [030] Maria Teresa Garcés Lloreda

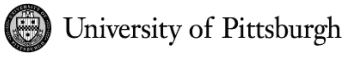
SALVCOJU	<u>Sentido de la cosa juzgada en el salvamento de voto</u> [01] Sentencia inhibitoria[374] [04] Exequible [05] Exequible (únicamente) por los cargos formulados [06] Condicionalmente exequible [07] Parcialmente inexequible[375] [08] Parcial y condicionalmente inexequible [09] Inexequible

[374] En el caso de una sentencia inhibitoria parcial, se codificará la otra decisión.
[375] También se usa este código en el caso de una sentencia parcialmente exequible.

APPENDIX C

QUESTIONNAIRE FOR EXPERT SURVEY ON JUSTICES' IDEOLOGICAL LOCATIONS

The following is my translation of the cover letter for the e-mail survey expert on justices' ideological locations:



Bogotá, April 28, 2009

<Name>

<Title>

Dear <Mr/Ms> <Name>,

My name is Juan Carlos Rodríguez-Raga, a Ph.D. student in Political Science at University of Pittsburgh and professor of the Political Science Department at Universidad de los Andes.

My Ph.D. dissertation analyzes the behavior of the Constitutional Court since its creation until now. For this reason, I would like to resort to your knowledge on this court. Concretely, I would like to ask your qualified opinion regarding the ideological locations of the Court's justices.

You will find attached a form with a list of **all** justices appointed to the court from the moment it started its operation in 1992, including those who in some circumstances have taken the bench temporarily.

In order to fill this form, which will take around ten minutes, I ask you to please mark the box which, in your opinion, best represents each justice's ideological location in a 1-to-10 scale where 1 means ***"Left"*** and 10 means ***"Right"***.

Once you have completed the form, you have several options:

- If you have a local e-mail system (such as Outlook, Outlook Express, or Eudora, for example), you can click the button labeled **E-mail** to send the form automatically to my electronic address.
- If you use a web-base e-mail system (Yahoo, Gmail, Hotmail, etc.), you can click on the button labeled **Save**, save the form in some folder, and then append it to an e-mail message addressed to juanrodr@uniandes.edu.co.
- Or, if you prefer, you can print the form (using the button labeled **Print**) and send it by fax to the number 3394949 Ext. 3202, addressed to me.
- If you have any questions or any technical inconvenience, please do not hesitate in calling me to this number: 317-517-4931.

This form has been sent to more than 300 experts in Public Law all around the nation. Naturally, your responses will be kept in absolute confidentiality, and the resulting data set will not include any personal identification, according to the academic norms of confidentiality ruling research at University of Pittsburgh.

I really appreciate your help in this project.

Best regards,

Juan Carlos Rodríguez Raga
ABD – Political Science - University of Pittsburgh
Assistant Professor– Political Science – Universidad de los Andes
juanrodr@uniandes.edu.co
jcr753@pitt.edu
Cell: +57-317-5174931

The following is the image of the interactive PDF form:

E-mail Grabar... Imprimir... Limpiar formulario

Jaime Sanín Greiffenstein

Izquierda									Derecha
1	2	3	4	5	6	7	8	9	10
○	○	○	○	○	○	○	○	○	○

Simón Rodríguez Rodríguez

Izquierda									Derecha
1	2	3	4	5	6	7	8	9	10
○	○	○	○	○	○	○	○	○	○

Ciro Angarita Barón

Izquierda									Derecha
1	2	3	4	5	6	7	8	9	10
○	○	○	○	○	○	○	○	○	○

Jorge Arango Mejía

Izquierda									Derecha
1	2	3	4	5	6	7	8	9	10
○	○	○	○	○	○	○	○	○	○

Hernando Herrera Vergara

Izquierda									Derecha
1	2	3	4	5	6	7	8	9	10
○	○	○	○	○	○	○	○	○	○

Eduardo Cifuentes Muñoz

Izquierda									Derecha
1	2	3	4	5	6	7	8	9	10
○	○	○	○	○	○	○	○	○	○

Vladimiro Naranjo Mesa

Izquierda									Derecha
1	2	3	4	5	6	7	8	9	10
○	○	○	○	○	○	○	○	○	○

Antonio Barrera Carbonell

Izquierda									Derecha
1	2	3	4	5	6	7	8	9	10
○	○	○	○	○	○	○	○	○	○

Alejandro Martínez Caballero

Izquierda									Derecha
1	2	3	4	5	6	7	8	9	10
○	○	○	○	○	○	○	○	○	○

Fabio Morón Díaz

Izquierda									Derecha
1	2	3	4	5	6	7	8	9	10
○	○	○	○	○	○	○	○	○	○

José Gregorio Hernández

Izquierda									Derecha
1	2	3	4	5	6	7	8	9	10
○	○	○	○	○	○	○	○	○	○

Carlos Gaviria Díaz

Izquierda									Derecha
1	2	3	4	5	6	7	8	9	10
○	○	○	○	○	○	○	○	○	○

Luis Eduardo Montealegre Lynett

Izquierda									Derecha
1	2	3	4	5	6	7	8	9	10
○	○	○	○	○	○	○	○	○	○

Alfredo Beltrán Sierra

Izquierda									Derecha
1	2	3	4	5	6	7	8	9	10
○	○	○	○	○	○	○	○	○	○

Álvaro Tafur Galvis

Izquierda									Derecha
1	2	3	4	5	6	7	8	9	10
○	○	○	○	○	○	○	○	○	○

Rodrigo Escobar Gil

Izquierda									Derecha
1	2	3	4	5	6	7	8	9	10
○	○	○	○	○	○	○	○	○	○

Manuel José Cepeda Espinosa

Izquierda									Derecha
1	2	3	4	5	6	7	8	9	10
○	○	○	○	○	○	○	○	○	○

Jaime Córdoba Triviño

Izquierda									Derecha
1	2	3	4	5	6	7	8	9	10
○	○	○	○	○	○	○	○	○	○

Clara Inés Vargas Hernández

Izquierda									Derecha
1	2	3	4	5	6	7	8	9	10
○	○	○	○	○	○	○	○	○	○

Jaime Araújo Rentería

Izquierda									Derecha
1	2	3	4	5	6	7	8	9	10
○	○	○	○	○	○	○	○	○	○

Marco Gerardo Monroy Cabra

Izquierda									Derecha
1	2	3	4	5	6	7	8	9	10
○	○	○	○	○	○	○	○	○	○

Humberto Sierra Porto

Izquierda									Derecha
1	2	3	4	5	6	7	8	9	10
○	○	○	○	○	○	○	○	○	○

Nilson Pinilla Pinilla

Izquierda									Derecha
1	2	3	4	5	6	7	8	9	10
○	○	○	○	○	○	○	○	○	○

Mauricio González Cuervo

Izquierda									Derecha
1	2	3	4	5	6	7	8	9	10
○	○	○	○	○	○	○	○	○	○

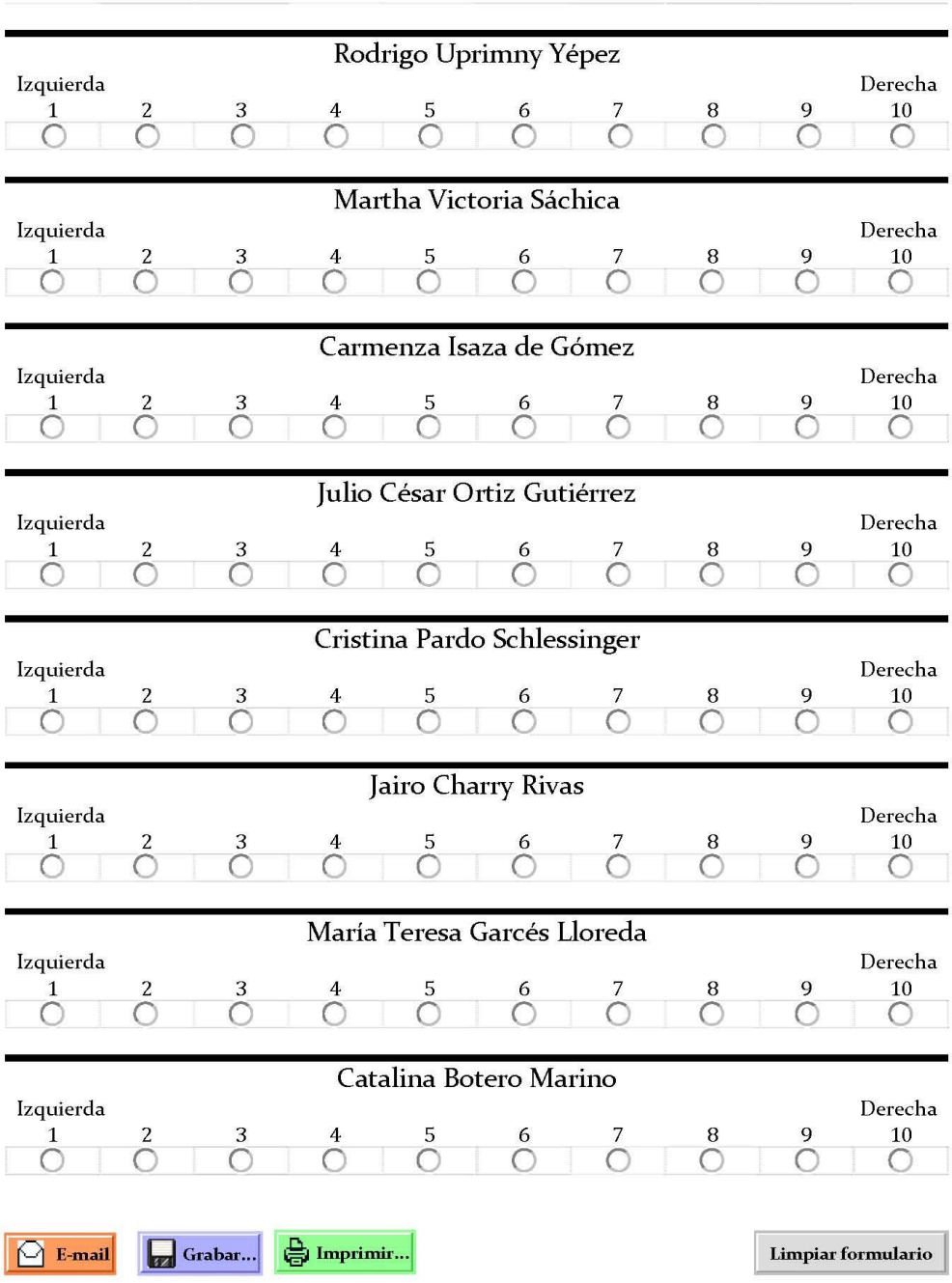


Figure C.1. Ideology scoring questionnaire

APPENDIX D

ALTERNATIVE MODEL SPECIFICATIONS

The following table shows several alternative specifications of the statistical models presented in Chapter 5. The description of the each model is the following:

- Model 1 is the baseline model presented in Section 5.2, that is, the model without interactions. This model uses the sample of cases with non-unanimous decisions.
- Model 2 is the model presented in Section 5.3, that is, the model with interactions between the parameters of the game and presidential approval. This model uses the sample of cases with non-unanimous decisions.
- Model 3 takes the specification in Model 1 and substitutes the level of the president's support in the Lower House for the indicator of presidential approval as a measure of the government's strength.
- Model 4 is the same Model 3 including interactions of the parameters of the game this time with the level of the president's legislative support in the Lower House.
- Model 5 takes the specification in Model 1 and substitutes an indicator of *amici curiae* interventions in the case for the opinion of the Inspector General.
- Model 6 is the same Model 5, with interactions.

- Model 7 uses the same specification as in Model 1 but includes in the sample all cases, both unanimous and non-unanimous.
- Model 8 is the same Model 7, with interactions.

Table D.1. Alternative model specifications: results

	Model 1	Model 2	Model 3	Model 4	Model 5	Model 6	Model 7	Model 8
VARIABLES	**Coefficient (Robust std. err)**	**Coefficient (Robust std. err)**	**Coefficient (Robust std. err)**	**Coefficient (Robust std. err)**	**Coefficient (Robust std. err)**	**Coefficient (Robust std. err)**	**Coefficient (Robust std. err)**	**Coefficient (Robust std. err)**
IDEOLOGY	-0.128***	-0.148***	-0.125***	-0.136***	-0.129***	-0.146***	-0.026*	-0.032**
	(0.031)	(0.026)	(0.033)	(0.031)	(0.031)	(0.025)	(0.013)	(0.011)
ELECTORAL CYCLE	-0.009***	-0.010**	-0.010***	-0.009*	-0.009**	-0.10**	-0.004**	-0.005***
	(0.003)	(0.003)	(0.003)	(0.003)	(0.003)	(0.003)	(0.002)	(0.001)
NOM. SUPREME COURT	-0.024	0.032	-0.037	-0.006	-0.024	0.028	0.004	0.025
	(0.105)	(0.109)	(0.102)	(0.097)	(0.106)	(0.108)	(0.040)	(0.032)
NOM. COUNCIL STATE	0.182‡	0.157	0.176	0.151	0.182‡	0.159	0.043	0.054‡
	(0.109)	(0.102)	(0.116)	(0.114)	(0.108)	(0.101)	(0.046)	(0.032)
PRES. APPROVAL	-0.010**	-0.065***			-0.010**	-0.058**	0.002*	-0.013***
	(0.003)	(0.011)			(0.003)	(0.010)	(0.001)	(0.004)
DIVERGENCE	0.579***	-0.719**	0.592***	-0.500	0.589***	-0.658**	0.041	-0.462***
	(0.174)	(0.228)	(0.156)	(0.425)	(0.175)	(0.223)	(0.057)	(0.109)
DIVERGENCE X		0.028***				0.027***		0.013***
PRES. APPROVAL		(0.004)				(0.004)		(0.003)
JUDICIAL CYCLE	0.004	-0.021***	0.000	-0.025**	0.004	-0.019**	0.000	-0.004*
	(0.004)	(0.006)	(0.003)	(0.009)	(0.004)	(0.006)	(0.001)	(0.002)
JUDICIAL CYCLE X		0.001***				0.001***		0.000*
PRES. APPROVAL		(0.000)				(0.000)		(0.000)
DECREE	-0.213***	-0.338***	-0.150***	-0.532***	-0.210***	-0.309**	-0.273***	-0.326***
	(0.039)	(0.101)	(0.045)	(0.138)	(0.039)	(0.109)	(0.012)	(0.052)
DECREE X		0.003‡						0.001
PRES. APPROVAL		(0.002)						(0.001)
IG STRIKES DOWN	0.380***	-0.408***	0.358***	-0.651***	0.379***	0.380***	1.498***	1.682***
	(0.068)	(0.106)	(0.070)	(0.114)	(0.068)	(0.071)	(0.041)	(0.036)
IG STRIKES DOWN X		0.016***						-0.004***
PRES. APPROVAL		(0.002)						(0.001)
SUPP. LOWER HOUSE			-1.112***	-5.248***				
			(0.286)	(1.024)				
DIVERGENCE X				1.693**				
SUPP. LOWER HOUSE				(0.611)				
JUDICIAL CYCLE X				0.042***				
SUPP. LOWER HOUSE				(0.012)				
DECREE X				0.617**				
SUPP. LOWER HOUSE				(0.193)				
IG STRIKES DOWN X				1.579***				
SUPP. LOWER HOUSE				(0.184)				

	Model 1	Model 2	Model 3	Model 4	Model 5	Model 6	Model 7	Model 8
VARIABLES	**Coefficient (Robust std. err)**	**Coefficient (Robust std. err)**	**Coefficient (Robust std. err)**	**Coefficient (Robust std. err)**	**Coefficient (Robust std. err)**	**Coefficient (Robust std. err)**	**Coefficient (Robust std. err)**	**Coefficient (Robust std. err)**
CIVIL SOCIETY					0.150‡	-0.203		
					(0.079)	(0.206)		
CIVIL SOCIETY X						0.006*		
PRES. APPROVAL						(0.003)		
CONSTANT	1.279***	3.874***	1.699***	4.288***	1.269***	3.546***	-0.645***	-0.032
	(0.290)	(0.522)	(0.279)	(0.721)	(0.285)	(0.473)	(0.091)	(0.166)
OBSERVATIONS	4,397	4,397	4,573	4,573	4,397	4,397	21,359	21,359
PERCENT CORRECT	65.89%	66.25%	65.71%	66.21%	65.68%	66.20%	68.81%	68.81%
WALD CHI-2	536.98	458.30	308.90	280.25	525.57	387.21	7,843.20	12,743.40

Observations clustered on Justice: Robust standard errors in parentheses

*** p<0.001, ** p<0.01, * p<0.05, ‡ p<0.1

Model 1: Baseline – Non unanimous, $\boldsymbol{p}$ ≅ PRESIDENTIAL APPROVAL, $\boldsymbol{\beta}$ ≅ IG STRIKES DOWN, No interactions

Model 2: Non unanimous, $\boldsymbol{p}$ ≅ PRESIDENTIAL APPROVAL, $\boldsymbol{\beta}$ ≅ IG STRIKES DOWN, Interactions

Model 3: Non unanimous, $\boldsymbol{p}$ ≅ SUPPORT IN LOWER HOUSE, $\boldsymbol{\beta}$ ≅ IG STRIKES DOWN, No interactions

Model 4: Non unanimous, $\boldsymbol{p}$ ≅ SUPPORT IN LOWER HOUSE, $\boldsymbol{\beta}$ ≅ IG STRIKES DOWN, Interactions

Model 5: Non unanimous, $\boldsymbol{p}$ ≅ PRESIDENTIAL APPROVAL, $\boldsymbol{\beta}$ ≅ CIVIL SOCIETY STRIKES DOWN, No interactions

Model 6: Non unanimous, $\boldsymbol{p}$ ≅ PRESIDENTIAL APPROVAL, $\boldsymbol{\beta}$ ≅ CIVIL SOCIETY STRIKES DOWN, Interactions

Model 7: Both unanimous & non unanimous, $\boldsymbol{p}$ ≅ PRESIDENTIAL APPROVAL, $\boldsymbol{\beta}$ ≅ IG STRIKES DOWN, No interactions

Model 8: Both unanimous & non unanimous, $\boldsymbol{p}$ ≅ PRESIDENTIAL APPROVAL, $\boldsymbol{\beta}$ ≅ IG STRIKES DOWN, Interactions

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