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Dynamic Environments and Judicial Power

Monica Lineberger

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DYNAMIC ENVIRONMENTS AND JUDICIAL POWER

by

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DEDICATION

To my mother, Linda. All of my accomplishments are a reflection of her dedication to my growth as a person and as a scholar.

ACKNOWLEDGMENTS

I dedicated this book to my mother, but it would not have been possible without the help and guidance from my advisers, family, and friends. I must first thank my adviser, Kirk Randazzo, for quite simply telling it like it is. Kirk has been instrumental in my professional growth, helping me identify weaknesses in my writing, pushing me to think critically on logic, and guiding how I frame my work. I struggled through his classes in graduate school to emerge at the close of the semester a prepared and thoughtful political scientist. But even more than his tenacity for making students cry with difficult assignments, Kirk always knew when moments called for encouragement and support. This guidance has helped me acknowledge my value as a contributor to our discipline, which is worth more than I can repay him.

I owe a tremendous thanks to Lee Walker, my first adviser at the University of South Carolina and the one who instilled in me a passion for judicial politics. Working as a research assistant for Lee in my first semester at graduate school opened my eyes to the exciting sub-field of judicial politics, where I could combine my interests of comparative politics and the rule of law. I am in debt to Lee for his continual support and encouragement.

I would like to thank Susan Miller and Doug Thompson. I never had the privilege to take a class with Susan, but she was always helpful in providing useful tips and suggestions in professionalization workshops. Her door was always open when I needed advice even though I was never her student, and I appreciate that greatly. I did have the pleasure of taking a class with Doug, which continually inspired me to think about judicial politics, constitutions, and the rule of law through different

lenses. I have always appreciated his thoughtful comments that seek to improve my work.

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I am incredibly thankful to my tirelessly supportive family. As I have battled the strange curve balls of life, my mother and father have always been available to provide relief, whether it is in the form of a phone call or a visit. They were my first and are my most dedicated cheerleaders. My sister, Natalie, instilled in me a thirst to strive for more, but also a desire to become a better person. She is truly everything I needed in a sister. My grandparents gave me some of the best advice and support while I was in graduate school. Their wisdom and life experience has helped to guide me through a journey I sometimes did not believe was possible.

ABSTRACT

The study of judicial independence in comparative environments is an increasingly important endeavor for scholars and policy-makers. Scholars seek to understand how an institution without any degree of enforceable power can leverage its position into an influential member of country politics. Policy-makers assume that a high degree of judicial independence correlates with the rule of law, and consequently, a respect for the outcomes from judicial processes. While in recent history the United States Supreme Court has enjoyed a relatively stable degree of judicial autonomy, courts in other countries are plagued by institutional weakness, attacks from other institutions, or corruption from outside forces. As such, scholars frequently attend to the examination of the development of judicial independence. Scholars answer this question through a variety of theoretical frameworks. One theory notes the effect of political competition on the executive, who seeks to insure his or her policy preferences by providing the judiciary with more power. On the opposite end of the spectrum, the executive may seek to further subordinate courts when political competition is high because of political uncertainty surrounding elections. By manipulating the courts as an executive ally, the leader can use the courts to enact policies or even retain power. The final major theory revolving in the literature examines the strategic nature of judges. Judges may wish to defect from the current regime as a signal to the incoming regime to maintain their position on the court. Typically, the literature examined the growth of judicial power through the enactment of constitutional reforms or when judges issue opinions. Despite the depth of work on the development of judicial independence, it is still unclear when and how scholars should observe these phenomena.

When will national actors seek to manipulate judicial power? What are the other manners in which they will attempt to subvert or support the judiciary? The goal of this dissertation is to identify when and how actors manipulate the judiciary to advantage their position or their policies. Thus, the dissertation will answer a series of related questions: when will governmental actors attempt to influence the judiciary? What strategies will each actor use in order to manipulate judicial independence? Finally, do the strategies yield successful results for the institution?

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CHAPTER 1

HOW INSTITUTIONS (BELIEVE THEY) BUILD JUDICIAL POWER

On any given day, searching the term “judicial independence” in the news section of google yields thousands of results that report attacks on, or warnings against the decline of, judicial independence. These concerns for judicial independence arise in unsurprising locations, such as the Philippines, India, and Ecuador. Protesters in Philippines call for judicial independence after the high court voted out Chief Justice Sereno for suggesting the need for human rights in President Duterte’s War on Drugs. Four judges on the Supreme Court of India held a press conference that criticized the process of bench assignment by the Chief Justice, who refuted these allegations. Eventually the Indian parliament submitted a petition seeking the Chief Justice’s impeachment, which the Vice President then rejected because impeachment would have intruded on the independence of the judiciary. Ecuadorean president Moreno recently asserted his commitment that judges should be able to make decisions without pressure, yet simultaneously issued a statement of support for Gustavo Jalkh, the Judiciary Council president, who had a history of vitiating judicial independence while in office. Yet issues with judicial independence should not be contrived as problems foreign to democratic or western governments. The European Union is currently initiating legal action against Poland’s government for concerns that the reforms of the Law and Justice government (PiS) limit judicial independence. Even the U.S. Supreme Court’s newest justice, Neil Gorsuch, recently relayed his fear of

waning judicial independence, resulting from a Supreme Court decision no less. He notes that:

“ceding to the political branches ... in the name of efficient government may seem like an act of judicial restraint, but enforcing Article III isn’t about protecting judicial authority for its own sake. It’s about ensuring the people today and tomorrow enjoy no fewer rights against governmental intrusion than those who came before. And the loss of the right to an independent judge is never a small thing. It’s for that reason Hamilton warned the judiciary to take ‘all possible care...to defend itself against’ intrusions by the other branches.”¹

Justice Gorsuch’s dissent exemplifies the preponderance of judicial independence to judges and demonstrates their concern about how pragmatic decisions can diminish a central tenet of democracy. Judicial independence is clearly a concern for judges, the public, and governments alike, despite whether these actors *fear* declining independence or *propel* it. The interest in judicial independence is ubiquitous; it crosses regions, systems of law, and governmental design. As evidenced by the anecdotes above, the interest in judicial independence leads many governmental actors to try to influence judicial independence in a direction that is useful to that actor.

As a result, scholars seek to understand when executives will subvert or support a judiciary. When an executive faces electoral uncertainty, there is a documented tendency for that executive to shift power to the courts (Ramseyer 1994; Finkel 2005). While the belief that modifying the constitution to empower the judiciary does, in fact, increase the court’s power, recent research shows that it can create judicial instability (Pérez-Liñán and Castagnola 2014). These studies provide a preliminary examination into how judicial power can develop. These studies highlight that shifts

¹ *Oil States Energy Services, LLC v. Greene’s Energy Group, LLC*, 584 US (2018).

in the political environment create opportunities for actors to influence the court. However, scholarship has mainly focused on executive manipulations of the judiciary during periods of electoral uncertainty. This dissertation will provide a more comprehensive picture of which shifts in the political environments create opportunities for national actors. Additionally, it will examine the behavior, both action and rhetoric, of the legislature and judiciary, as well as the executive, in order to better understand how national actors impact judicial power.

Given the quantity and quality of scholarship on the power of the judiciary, scholars devote less attention to the assumptions that form our intuitions about judicial independence. Research recognizes that there are conditions where judges' latitudes extend beyond normal limits to vote against the government's interests (Iaryczower, Spiller, and Tommasi 2002; Helmke 2002, 2005; Helmke and Sanders 2006; Von Doepp 2006; Solomon Jr 2008; Johnson 2015). Research also notes how the actions of executives (and sometimes legislatures) to support judicial power occurs during particular periods, such as exiting office (Ginsburg 2003; Finkel 2004, 2005; Ginsburg and Versteeg 2014; Vanberg 2015). These studies provide important, yet preliminary, steps in understanding the conditional nature upon which judicial power develops. From the prior anecdotes it is possible to see that manipulations of the judiciary do not only occur during elections. Thus this study takes on the task of determining the other conditions under which national actors impose their will upon the judiciary. Numerous questions arise from the unstudied assumptions. First, when will executives attempt to influence judicial authority? Second, under what conditions do legislatures manipulate judicial authority? Third, under what conditions will judges manipulate their own institution? Do certain political environments impact one institution more significantly than others? Finally, to what extent do these environments and behavioral strategies yield preferred outcomes? Answering these questions provides important insight into the interactions between national actors that arise through

formal processes or by an ad hoc manner.

1.1 THE LOGIC OF JUDICIAL MANIPULATION

Within the scholarship exists a simple, yet unstated assumption. Scholars and actors alike believe that actors' behavior, whether action or rhetoric, will subsequently shape the judicial institution. In comparative judicial politics, the most prevalent theory relying on this assumption is political insurance theory. Scholars believe that, fearing a defeat in an upcoming election, an executive will shift power to the judicial institution. By shifting power to the judiciary, executives rationally ensure that the policies enacted under their tenure can remain in place by way of the increase in the strength of the court's newly vested power. The literature generally assumes that this increase in the strength of the court comes from constitutional reforms that provide the judiciary with additional jurisdiction or capabilities. By only examining this singular manner in which the executives manipulate the court, however, limits the extent to which scholarship can understand the development of judicial power. This assumption, and its related implications, is the theoretical starting point of the dissertation.

If national actors believe that their behavior impacts the process of judicial development, then I posit there are more instances in which these actors will attempt to influence judicial power, apart from competitive elections. The prospect of an upcoming election provides an opportunity for national actors to modify their behavior toward the judiciary. In the same vein, there are other environmental shifts that can provide opportunities for national actors to change their behavior. An important characteristic of an environmental shift is that it produces uncertainty within either or both the (1) political environment and (2) the relationships among national actors (i.e. executives, legislatures, and courts). In the dissertation, I seek to explore these environmental shifts in order to gain a more complete picture of how changes within

the broader political context influences actors' behavior toward the judiciary.

One uncommon, but not rare, example of uncertainty within the political environment occurred in Peru in 1997 when the country declared a state of emergency due to "the persistence of acts of violence caused by terrorist groups and drug traffickers, [were] are fomenting a climate of insecurity that threaten[ed] the normal conduct of public and private activities" (Secretary-General 2011). The government, who had begun their own internal War on Terror in 1980, was actively trying to counteract the terrorist activities of El Sendero Luminoso (Shining Path) and the Tupac Amaru Revolutionary Movement (MRTA). The year previous, the MRTA took control of the Japanese embassy where they held hostages for over four months. While the derogation from the Charter of Fundamental Rights and the declaration of the State of Emergency appears justified given the circumstances, these states of emergency tend to also bring about manipulations of judicial power. Riding high from his response to the elimination of the MRTA members involved in the Japanese Embassy hostage crisis in 1996/7, President Fujimori was able to lobby Congress to remove 43% of the Constitutional Court. He targeted members of the court who had ruled against a bid for him to seek an unconstitutional 3rd term.

Within Table 1.1 is a list of theoretically important environmental shifts in the data collected for the dissertation project. For democratic Latin American countries from 1980-2004, the table displays the frequency of whether or not an environmental shift occurred or it provides an indication of whether or not a shift occurred or when a shift occurred one or more times (for non-binary variables). As stated previously, state of emergency is an uncommon environmental factor that modifies decision-making behavior and occurs only 10% of the time under observation for this study. However, it is an environmental shift that can affect democratic countries and will be further discussed in Chapter 3. Therefore its implications are potentially more wide reaching than other environmental factors, like regime change that occurs more frequently, 11%

Table 1.1: Frequency of Shifts

| Category | Density in Dataset |
|---------------------------------------|--------------------|
| Power Reconfiguration | |
| New International Actors | 82% |
| New Domestic Actors: | |
| Legislative | 37% |
| Executive | 48% |
| States of Emergency | 7% |
| *Change in Court Alignment with Exec. | 78% |
| *Change in Court Alignment with Party | 73% |
| Resources | |
| *Positive U.S. Bilateral Aid | 45% |
| *Negative U.S. Bilateral Aid | 39% |
| *Positive Change in Inflation | 52% |
| *Negative Change in Inflation | 48% |
| Electoral Uncertainty | |
| Dissatisfied Electorate: | |
| *Political Expressions | 35% |

of the time within the data, but is not as frequent in the 21st century (at least so far).² Countries agreeing to become members of a new intergovernmental organization and highly competitive legislative and elective elections all occur more than 80% of the time from 1980-2004. While the frequency of new IGO membership may seem surprising at first, given the growth of intergovernmental organizations during the period under observation, it tracks with global rates of increasing membership in international organizations.

When members of other institutions leave, the uncertainty in the *modus operandi* opens up the possibility for other actors to assert their dominance or to change the nature of the decisional process. During these periods, I posit that there should be more behavioral responses toward the judiciary in order to manipulate judicial power to that institution's advantage. Shifts in institutions occur with some regularity,

² Recall that the time period under study includes the 'Lost Decade' in Latin America when many countries transitioned to democracy during this period. While a few backslid into authoritarian regimes, in the period between 2001 and 2004 all countries were considered democracies. The last country to transition back to a democracy was Peru in 2000 with the removal of Fujimori.

the office of the executive holds the most instances of change, with a change in the executive occurring 45.33% of the time (due to elections or not). While change on the court is the least frequent in terms of membership renewal, it is important to note that this does not include when judges were dismissed or removed from office.³

Discussed within the literature is the importance of upcoming elections as an advantageous opportunity for the executive to shift power to the judiciary. Scholarship also notes that there is an associated relationship between the degree of political fragmentation and the independence of the judiciary. The other environmental shifts listed in Table 1.1 are also of theoretical importance to the three national actors under study: the executive, the legislature, and the judiciary. However I argue that some of the changes in the political environment will create disparate responses by the institutions. Broadly, I hypothesize that when shifts occur in the category of ‘power reconfiguration’, the executive will be the institution most likely to change its behavior toward the judiciary. The intuition behind this thought is that as a unitary actor, the executive’s decision making process is most influenced by changes within the balance of power. It is well documented that in Latin America, power is particularly concentrated within the hands of the executive, making this region a beneficial one to study for this hypothesis. On the other hand, I predict that, generally, uncertainty stemming from the electorate is more likely to impact the legislature, as opposed to the executive. The rationale being that the legislature is more attuned to the variability of moods within the electorate, as this institution is typically up for reelection more frequently than the executive institution. I believe that, broadly, the judiciary will be influenced most by the the degree of power entrenchment and the institutional setup of veto players, the logic of which I will discuss in Chapter 2.

³ The reason that I operationalize membership change on the court as when a judge’s term is ending is because the dependent variables may sometimes include dismissal of judges. If I were to include instances of judicial removal, I would be introducing endogeneity into the theoretical and empirical model.

How judicial power develops represents a fundamental debate in the field of judicial politics. Scholars examining determinants of *de jure* independence tend to focus on constitutional reforms as the means to provide judges with the capability to strengthen the judiciary. Although scholars call into question the assumption that constitutional reforms positively impact the judicial institution (Pérez-Liñán and Castagnola 2014). Helmke (2010) provided the first systematic look outside of judicial manipulation via constitutional reforms by examining the reasons for national actor's to attack the membership of their horizontal peers. Scholars have also stepped into examining the activity of judges outside the courtroom and have discovered significant activity in advocacy, demonstrations, boycotts, and legal clubs (de Haan, Silvis, and Thomas 1989; Berkman 2010; Trochev and Ellett 2014; Hilbink 2012; Ghias 2010; Bernard-Maugiron 2008; Lesch 2011). In seeking ways to manipulate judicial power, either supportive or subversive, national actors retain a larger array of behavioral options than traditionally examined. Both executives and legislatures maintain the capability to pursue forms of action, like constitutional reforms, but they also are able to change membership, open investigations, manipulate the budget, takeover buildings, and make provisions for security of the court. These other forms of action can be just as important, if not more so, for the development of judicial power, in any direction. As Pérez-Liñán and Castagnola (2014) note, constitutional reforms can act as detriments to the judiciary by destabilizing the institution with new members. On the other hand, provisions for security, specifically against narcotraffickers can greatly aid the judiciary's ability to rule independently. In the 1990s, countries were riddled with violence from narcotraffickers who specifically targeted judges as a means to threaten others into ruling in favor of the narcotraffickers. As a consequence, many executives resolved to provide increased security so that judges could rule without threat of death.

In addition to the action taken to manipulate judicial power, national actors may

also employ rhetoric as a strategy to achieve a shift in a court's power. Rhetoric is an integral tool of politics within and outside of democracies. Rhetoric can be used as a method of public debate, essentially as a way for leaders to rule via persuasive arguments (Kane and Patapan 2010). Similarly leaders rely on rhetorical strategies to build legitimacy for the regime, drum up support for a movement, or vilify an opposition. Rhetoric permeates the political world, but has been scarcely studied as it relates to judicial power. Staton (2006) and Widner (2001) examined the use of rhetoric by the courts as a way to increase the authority of the court. As a single actor, executives tend to use rhetorical strategies even more frequently than the courts and legislatures, and thus scholars have studied this form of behavior more often. Executives speak about the Court when there are vacancies or in reelection years (Blackstone and Goelzhauser 2013) and when the Supreme Court examines civil right concerns (Flemming, Wood, and Bohte 1999). In the United States, Eshbaugh-Soha and Collins Jr (2015) find that a president is most likely to speak on Supreme Court decisions after they are adjudicated, in order for the decisional process of the justices to remain independent. However much of the work on executive rhetoric and the courts has been focused on the United States, where the findings thereof may not be applicable to areas where judicial power is nascent or nonexistent.

While not as definitive as a behavioral option that involves action, the use of rhetoric by any national actor is powerful, nonetheless, in that it can shape public opinion. Considering that politicians in legislative and executive offices rely on public opinion to retain power, and if we assume that judicial power is also influenced by public opinion, scholarship needs to incorporate both behavioral options into the study of the development of judicial power. Actions, such as removing a justice from the court or modifying the constitution can provide tangible evidence of the capabilities of a court. On the other hand, rhetoric can provide insight into looming conflicts. Moreover, by studying the rhetoric of national actors toward judicial power,

scholars can begin to identify instances where institutions flex power, but later decline to use it. Take the conflict in Nicaragua between President Bolaños, the Sandanista-controlled assembly, and the Supreme Court that occurred in 2004 as an example. After the court convicted a political ally of Bolaños, the president threatened to take action against the judiciary and criticized the institution for its loyalty to parties instead of the law. Only a few days later, Bolaños backed away from the threats on the judiciary by announcing that he will respect the constitution and rule of law despite the provocation by the judiciary. Indeed, institutions where judicial power is in development publicly announce their intentions to not comply with the judicial institution as righteous defiance. Though some executives fold under pressure and eventually comply, the examination of these defiant announcements is a fascinating area in understanding how judicial power develops in practice.

1.2 WHY LATIN AMERICA

Judicial politics in Latin America is one of, if not the, fastest growing area of comparative courts scholarship. Many scholars find countries in Latin America useful to test implications of strategic models. The emphasis on the strategic explanation facilitated the development of new theoretical work outside of U.S. institutions, such as strategic defection (Helmke 2002). It also provides the opportunity to test the strength of other theoretical implications, such as the effect of fragmentation on judicial autonomy (Leiras, Tuñón, and Giraudy 2014). Similar to the U.S. Supreme Court, much of the scholarship in Latin America notes the importance of ideological preferences (Bertomeu, Dalla Pellegrina, and Garoupa 2017; Carroll and Tiede 2012; Tiede 2016; Desposato, Ingram, and Lannes Jr 2014; Oliveira 2008; Basabe-Serrano 2012; Skaar 2013; Hilbink 2007; Sanchez 2011). However, within the judicial literature in Latin America, the main area of inquiry is to examine courts' interactions with other branches of government (Kapiszewski and Taylor 2008). One reason for

this trend is the region-wide experimentation with constitutions that occurred from the 19th century until today. Failures of democratic governments during this time period are numerous. Perhaps this is why scholars argue that at the beginning of the 1990s, constitutions in Latin America included reforms “aimed at curbing the power of presidents, decentralizing power, and empowering courts to virgorously construe constitutions” (Schor 2009, pg. 175). These turnovers provide ample opportunities to test court-executive relations in a variety of regimes, under various constitutional constraints, and with differing degrees of public support.

This rich contextual history is part of the reason why comparative courts scholars adjusted their research to Central and South America. However, single-country studies account for much of the courts literature in Latin America. Much of the work has emphasized countries like Brazil (Taylor 2008; Taylor and Da Ros 2008; Oliveira 2008; Nunes 2010*b*; Brinks 2011; Kapiszewski 2011; Desposato, Ingram, and Lannes Jr 2014), Argentina (Helmke 2002; Iaryczower, Spiller, and Tommasi 2002; Bill Chavez 2004; Finkel 2004; Leiras, Tuñón, and Giraudy 2014; Bertomeu, Dalla Pellegrina, and Garoupa 2017), Colombia (Lamprea 2010; Nunes 2010*a*; Rodriguez-Raga 2011; Espinosa and Landau 2017), Chile (Scribner 2010; Carroll and Tiede 2011; Couso and Hilbink 2011; Carroll and Tiede 2012; Tiede 2016), and Mexico (Eisenstadt 2007; Ríos-Figueroa 2007; Staton 2010; Sánchez, Magaloni, and Magar 2011). Much less frequent is the comparison of Latin America as an entire region, though there are examples of systematic and rigorous work in this area (e.g. Helmke and Rosenbluth 2009; Pérez-Liñán and Castagnola 2014). This dissertation will fit into the latter part of the literature, by systematically examining all countries in Latin America from 1980-2004.⁴ By examining the region as a whole, it helps to provide insights

⁴ I use the term ‘Latin America’ to indicate countries that (1) speak Spanish or Portuguese, (2) were colonized by either Spain or Portugal, and (3) are geographically located in North, Central, or South America. Eighteen countries fit this criteria: Argentina, Bolivia, Brazil, Chile, Colombia, Costa Rica, Dominican Republic, Ecuador, El Salvador, Guatemala, Honduras, Mexico, Nicaragua, Panama, Paraguay, Peru, Uruguay, Venezuela.

into general patterns of behavior where judicial power is in the moment of development to understand what types of environments are inhospitable to that growth or contribute to it.

Using countries within Latin America to test the theoretical expectations of my argument is promising for a variety of reasons. Over the last half-century, many Latin American countries were bogged down by tumultuous movements originating within and outside of their borders. The ‘Lost Decade’ of the 1980s was produced by a systemic debt crisis that filtered throughout the region. While countries transitioned to democracy, others began to backslide into authoritarianism. During this period, the courts were subject to political manipulation by both democratic and military governments (Frühling 1998). By the 1960s and 1970s, the difference between *de jure* law and *de facto* law sparked reforms for legal education. As a result of the Cold War, the United States expanded their influence to the South by creating programs in Latin American countries that were designed to insure an independent and effective judicial system. In the Reagan administration, financial support from the U.S. grew exponentially and did aid in the efficacy of the court’s administration. However, as a judiciary becomes more autonomous, legislatures and executives may look unfavorably at the prospect of losing control over judicial activities. “Thus, building judicial branches that are willing and able to uphold the rule of law requires some fundamental changes in the relationship between the judiciary and the rest of the political system” (Frühling 1998, pg. 249). The tension between the judiciary’s will to be independent and the executive and legislature’s fear of losing a subsidiary is the crux of this dissertation. If the courts only power comes from the persuasion of their writing, why would we observe executives and legislatures to modify their behavior toward the court and support judicial power? Perhaps just as important, is the pen the only weapon of the court to influence its own power? I leverage the diversity of environments in Latin America to answer these questions.

1.3 OVERVIEW OF THE DISSERTATION

Comparative judicial politics scholars have extensively discussed concepts such as judicial independence and ideas on the determinants of judicial behavior. Our understanding of how courts interact with institutions and society is thorough, but not complete. In the following chapters, I present an extended theory of judicial interactions that can contribute to the growth in knowledge on the relationships between courts, the public, institutions, and outcomes. In Chapter 2 of the dissertation, I present the theoretical framework that begins with an examination and discussion of critical, and sometimes unstated, assumptions within comparative judicial literature. Many of the conceptual frameworks used by scholars can be expanded to incorporate shifts in environments that similarly and significantly impact the way in which judicial power develops. I argue that instead of looking to only *de jure* and *de facto* components of judicial power, it is important to examine the environmental shifts that create opportunities for national actors to pursue a goal relative to judicial power. Where scholars have previously focused on the import of constitutional reforms to this process, I extend the conceptualization of behavioral options to include multiple forms of action. In addition, I argue that institutions engage in rhetorical strategies, which can be incredibly useful depending on the climate facing an institution.

Chapter 3 investigates the conditions under which executive and legislative institutions will attempt to subvert or support judicial power. Extending the theoretical framework to these institutions, I argue that certain stimuli affect these institutions disparately. Executive actors will observe reconfigurations in the balance of power between the branches as a particularly salient reason to manipulate judicial power. On the other hand, I hypothesize that legislatures should respond to movements and uncertainty stemming from the electorate, since their position can often be more tenuous than an executive's tenure. Using Bayesian modeling techniques, I find strong support for the theoretical posit that actors find shifts in the political environment

an opportunity to change their behavior toward the judiciary. More importantly, I discover that the legislature frequently engages with the judicial power, even though scholarship has mostly dismissed its importance in this process.

Chapter 4 examines the role of the judicial institution in developing its own institutional power. Many scholars, especially those with ethnocentric biases who transplant American theories into comparative contexts, ignore the capability of judges in comparative environments. If and when the judiciary is discussed, their importance to strengthen judicial power is generally limited to the buildup of legal precedents to accumulate power over time. However, I argue that judges, especially those in comparative environments, use a variety of actions within and outside of the legal realm in order to enhance their institution. Additionally, I hypothesize that stimuli emanating from the electorate and uncertainty in the balance of power should provide the most opportune moment for judges to act. Generally I find support for the theoretical posits that judicial behavior is conditional on the political environment. When the judiciary holds the highest degree of support from the public, judges take advantage of this favorable political climate to increase institutional power. This chapter of the dissertation highlights the necessity of expanding theoretical frameworks built on the observations of United States judges to include the diverse behavioral options available to and used by judiciaries in Central America and the Southern Hemisphere.

Chapter 5 takes a different approach to examining how control over judicial power impacts the relationship between executive, legislative, and judicial institutions. In this chapter, I modify the theoretical framework in order to examine the factors that impact the likelihood of institutions winning interbranch conflicts. Given that the theoretical framework rests on the assumption that national actors initiate conflicts when they believe the manipulation will have the intended effect on judicial power, I examine the nature of those conflicts. I posit that the stimuli leading to changes in behavior will also condition the nature of an interbranch conflict. These hypotheses

center around the importance of environmental uncertainty in increasing the duration of conflicts. In addition, I argue that the types of strategies used by national actors yield various consequences for conflicts, and we should expect to see an initiator engaging in shorter conflict when actors use strategies that signal force and authority, instead of a willingness to compromise. By using event history analysis to uncover what factors determine an initiator successfully concluding a conflict, I find support for the theoretical predictions that the nature of conflicts is highly conditional upon the political environment and the use of specific behaviors by national actors.

CHAPTER 2

STIMULI, RHETORIC, AND ACTION

The term independent court, bandied about much in the current climate, did not always exist as a concept, but was an integral component in many cultures' ability to resolve conflict. The triad of conflict resolution observed being used throughout history is typically organized with an impartial actor who aids in the distribution of justice between two sides (Shapiro 1986). This organizational setup of modern courts has generated a plethora of studies, the most frequent of which center on the decision-making behavior of the judiciary (e.g. Baird 2007; Baum 1997; Caldeira and Wright 1988; Hall 2010; Perry 1991; Pritchett 1948; Schubert 1965, 1974; Segal et al. 2005). Because the traidic nature of judicial decision making requires an impartial judge, scholars analyze judicial outcomes to determine the factors that actually impact a judge's decisional process. Scholars and politicians alike are aware that no actor can truly be impartial. Knowing this, political actors thus intrude upon the powers of the judiciary. Scholarship also followed this line of inquiry to determine when political actors intrude upon the powers of another institution. Fundamentally, these studies examine the distribution of power and how and when it evolves. A common thread of study within the separation of powers literature involves the examination of when and how other instituitons override or reverse high court decisions (Ignagni and Meernik 1994; Spiller and Tiller 1996; Hausegger and Baum 1999; Segal, Westerland, and Lindquist 2011; Carruba, Gabel, and Hankla 2012; Sweet and Brunell 2012). This line of inquiry, which very frequently relies upon rational choice models, determines that the court both avoids and invites reversals under certain conditions. As a conse-

quence, other institutions choose to react to or ignore the court ruling with the result that this game begins anew. Thus separation of powers models also look to examine how constraints stemming from Congressional statutes (Randazzo, Waterman, and Fine 2006; Keck 2007) and institutional organization (Carrubba, Gabel, and Hankla 2008) impact judicial behavior. This area of previous scholarship demonstrates that political actors are rational power-seekers who engage in interbranch conflicts to gain advantage for their office.

The relationship between courts, executives, and legislatures was a ripe area for analysis in Latin America. The intuition put forth first by Murphy (1964) and then by Epstein and Knight (1998) stresses that judges foresee (un)favorable conditions within the political climate relating to the independence of the court. This theoretical posit has frequently been adopted by Latin American scholars in the examination of courts and the rule of law (Kapiszewski and Taylor 2008). Theories based on strategic interactions account for a large percentage of the judicial literature in Latin America. Scholars started to hone in on understanding and predicting the conditions under which judges would behave strategically. When government is marred by high degrees of fragmentation, judges use this opportunity to strike down laws (Iaryczower, Spiller, and Tommasi 2002; Ginsburg 2003; Ríos-Figueroa 2007; Helmke and Ríos-Figueroa 2011; Scribner 2011; Tiede and Ponce 2011, 2014). Uncertainty within the broader political environment manifests itself in a number of ways apart from political fragmentation. Judges see opportunities to exert power as executives exit (Helmke 2002; Iaryczower, Spiller, and Tommasi 2002; Bill Chavez 2004; Scribner 2004; Helmke and Sanders 2006; Rodriguez-Raga 2011).

The climate of political uncertainty also draws interest for scholars to explain executive action towards the courts. Studies show that the effect of the political climate on executive behavior holds even in authoritarian countries where the degree of uncertainty curbs intrusion on the judiciary (Magalhaes 1999; Ginsburg and Versteeg

2013; Moustafa 2007; Basabe-Serrano 2012). However uncertainty can come with a hefty price in certain conditions. Pérez-Liñán and Castagnola (2014) find that during the process of constitutional reforms politicians will push out old judges in order to place ideologically favorable ones on the ‘newly reformed’ court.

The expansive work on comparative court scholarship is impressive, yet still nascent. The tendency of scholarship to adopt theoretical and methodological practices from the U.S. literature is beneficial, in that it helps us understand the limits of our generalizations about courts. However it ignores the fascinating context and institutional structures that the locales outside of the U.S. offer. Most of the work in Latin American courts, for example, looks to understand case outcomes and their determinants. Ideological preferences perform similar roles on top courts in Latin America as they do in the U.S. by impacting the decisional process of judges (Bertomeu, Dalla Pellegrina, and Garoupa 2017; Desposato, Ingram, and Lannes Jr 2014; Oliveira 2008; Basabe-Serrano 2012; Carroll and Tiede 2012; Tiede 2016; Sanchez 2011; Skaar 2013; Hilbink 2007). Similar to the U.S., the way a judge votes also captures comparative court scholars’ attention, whether it is to determine how judges set agendas (Epstein, Knight, and Shvetsova 2001; Arguelhes and Hartmann 2017) or how they favor the incumbent government’s policies (Helmke 2002; Iaryczower, Spiller, and Tommasi 2002; Scribner 2004; Helmke and Sanders 2006; Kapiszewski 2011).

Vanberg (2015) notes that courts are naturally weak and that the judicial institution must rely on the compliance of others to garner strength in a decision. While this is true when considering the structural nature of a court, an emerging literature is moving away from studying courts through the lens of case outcomes and turning toward how judges behave outside the courtroom. Staton (2010) shifts the unit of analysis away from cases to understand extrajudicial activities and notes that these are both strategic and self-empowering. Judges engage in writing editorials (Hilbink 2012), demonstrations (de Haan, Silvis, and Thomas 1989; Berkman 2010; Trochev

and Ellett 2014), and networking (Bakiner 2016) in pursuit of professional goals.

Similarly, literature on the behavior of executives and legislatures as they impact the courts cannot provide a depth of information about the actual behavior of those institutions. A promising line of research focuses on the selection and removal of judges from the court (Helmke 2010; Melton and Ginsburg 2014; Helmke 2017). What is more common, however, is to examine constraints on judges by institutional facets of executives and legislatures, not their actual behavior. For example, political insurance theory measures the degree of political insurance in a few ways. Ginsburg and Versteeg (2014) operationalize political insurance as the difference in the proportion of seats held by the largest party and the second largest party. Another measure of political insurance looks to the importance of elections and operationalizes insurance by the probability of an incumbent government staying in power (Ramseyer 1994; Finkel 2005). Because political insurance posits that politicians shift power to the judiciary via constitutional reforms, when scholars examine executive behavior they analyze the process of negotiating and securing these reforms (Finkel 2008).

Comparative courts scholarship currently emerging is examining the relationship between courts, executives, and legislatures by shifting the focus away from case outcomes and toward other behavior. Such a focus has expanded our knowledge and understanding of how judges perceive the development of their institution given certain climates. In the remaining sections, I outline a theoretical framework that expands our current understanding of how actors in a tripartite system respond to shifts in the political environment to manipulate the judiciary. This framework includes the important work of previous scholars who note the impact of elections, divided governments, and economic conditions. I expand on this work by exploring the impact of the changes within these environments. I argue that when changes within the political environment occurs, political actors (executives, judiciaries, and legislatures) will use this shift to influence judicial power. This chapter discusses what

environments I also propose as important to modifying the interbranch relationship and the behavioral options available to actors when manipulating the judiciary. The logic is predicated upon assumptions embedded within the literature on the nature of the development of judicial power. Thus one of the implications of the results of the dissertation will be to make better judgments about the status of the assumptions we use to analyze judicial power.

2.1 FOUNDATIONS OF THE LOGIC OF JUDICIAL MANIPULATION

The theoretical framework of the dissertation rests on a number of critical assumptions found in the literature on the nature of the development of judicial independence. Scholars build these assumptions into the definitions, conceptualizations, and operationalizations of judicial independence without fully examining the theoretical implications of those posits. The dissertation examines how institutional actors behave toward the judiciary in order to achieve goals, such as policy preferences, policy legitimation, or retention of power. I argue that a series of events determines if and how national actors, (e.g. the legislature, executive, and judiciary), manipulate the power of the judiciary in order to achieve their goals. To begin, I outline a number of assumptions that ground the theoretical framework.

A pervasive and important assumption of judicial decision-making behavior relies on the belief that judges operate in a goal-based framework. Stated differently, scholars assume that judicial behavior is goal-oriented (Baum 1997). The way in which a judge votes on plenary and *certiorari* decisions stems from his or her preferences on the direction that most closely aligns with his or her goals. If a judge is motivated by an ideological goal of a case, attitudinal preferences will influence the decisional process (Segal and Spaeth 1993; Spaeth 1979; Segal and Cover 1989; Spaeth and Segal 1999; Segal and Spaeth 2002). Scholars suggest that legal goals, for instance, precedent, also condition a judge to vote in accordance with those preferences, which

obviously can differ from policy preferences (Shapiro 1965; Knight and Epstein 1996; Brenner and Stier 1996; Hansford and Spriggs 2006; Richards and Kritzer 2002; Clark and Lauderdale 2010; Lax 2011). Thus there is evidence that judges pursue multiple goals in reference to the decision-making process. It is then safe to assume that judges pursuing a number of strategies relative to each goal may occur in any given period of time. Further, it is possible that judicial behavior appears inconsistent with one goal, but in reality is consistent when achieving other goals. For example, judges can vote against their ideological preferences at the stage of granting *certiorari* in order to secure establishing precedent at the plenary stage (Caldeira, Wright, and Zorn 1999). As such, it can be considered rational for actors to pursue multiple goals simultaneously, as evidenced by research that finds behavior consistent with this pattern (Baum 1997). I presume that these assumptions hold for judicial, executive, and legislative actors outside of the United States, since there is no qualifying condition that indicates pursuit of multiple goals occurs only for U.S. actors.

Perhaps the grounding assumption of the framework rests in the rationality of actors. I presume that agents of institutions, (the executive, legislature, and judiciary), hold the capability to understand the future consequences of current moves. That is, actors of national institutions modify their behavior at time t based on their perceptions of what will occur in the future, or $t_t + 1$. Within judicial literature, the assumption that judges behave rationally is commonplace (Rohde 1972; Epstein and Knight 1998). However, when and why justices behave rationally differs during the stages of the decision-making process (Brace and Hall 1990; Perry 1991; Epstein and Knight 1998; Maltzman, Spriggs, and Wahlbeck 2000; Caldeira, Wright, and Zorn 1999). Scholarship also informs research that judges modify their behavior due to influence from the legislature (Segal, Westerland, and Lindquist 2011; Rogers 2001; Chutkow 2008; Keck 2007; Segal 1997; Hausegger and Baum 1999; Spiller and Tiller 1996) and the executive (Carrubba and Zorn 2010; Wohlfarth 2009; Owens 2010;

Bailey 2007; Yates and Whitford 2002). The assumption also works when the relationship reverses: executives and legislatures make rational decisions in regards to their goals relative to the judiciary (Ramseyer and Rasmusen 1997; Ginsburg 2002; Finkel 2008; Popova 2010).

Relatedly, an assumption critical to scholarship on comparative judiciaries, yet one that has largely been unexplored, presumes that not only will actors behave rationally, but also that these actions result in the intended outcome. For example, recent research discovered that executives facing removal from office recognize that an empowered judiciary will uphold the policy preferences once the executive leaves office. Behaving rationally, an executive may then seek to empower the judiciary in order to insure the continuation of his or her policy preferences. One way in which an executive can directly empower the judiciary is via constitutional reforms of the judicial system. As an example, Mexico's 1994 constitutional reforms provided the court with the ability to declare laws unconstitutional contingent upon one-third of the legislature who passed the law asking for this type of judicial ruling (Finkel 2005). Thus both scholars and actors believe that how institutions behave toward the court matter and, more importantly, that these actions produce the desired results of the goals under pursuit.

The assumption that actors believe that their behavior produces the desired outcome is critical to comparative judicial research, specifically scholarship on judicial independence. First, it is one way in which scholars define when a high degree of judicial independence exists: when the judiciary acts with autonomy. That is, scholars build the assumption that there is no external influence on the judicial decision-making process into the definition of judicial independence. As an example, Howard and Carey (2004) define judicial independence as:

“the extent to which a court may adjudicate free from institutional controls, incentives, and impediments imposed or intimidated by force,

money or extralegal, corrupt methods by individuals or institutions outside the judiciary, whether within or outside the government.”

Relatedly, scholars operationalize judicial independence by specifically accounting for external influences in its measurement. Tate and Keith (2007) use the U.S. State Department country reports to construct an ordinal measure of judicial independence rooted in how outside institutions influence (or not) the judiciary. Cingranelli (2008) similarly operationalize judicial independence by examining if and how executives treat judges, such as removing judges from office for political reasons or if there is active governmental interference.¹ Both conceptual beliefs and measurements of judicial independence illuminate an important theoretical implication unexplored within the literature. If both scholars and actors believe national actors can influence judicial independence, then we must also assume that there are a number of instances where actors attempt to manipulate the judiciary beyond what existing theoretical work describes. Current theories describe that executives may shift power to the judiciary when he or she fears removal from office (Ginsburg 2003). As well, comparative judicial scholars note that political competition also conditions executive behavior toward the judicial institution (Bill Chavez 2004; Chavez 2004; Ginsburg 2003; Popova 2010; Ramseyer 1994; Ríos-Figueroa 2006). As such, current theoretical frameworks describe two instances where it is rational for executives to support the independence of the judicial institution: when there is a possibility to be removed from office and when there is a high degree of political competition.

Current literature provides beneficial, preliminary insight into how national institutions interact with one another relative to judicial independence. These instances of influence on the judiciary are both rooted in the executive’s goal to achieve long-

¹ For a comprehensive discussion on the conceptual definitions and measures of judicial independence, see Ríos-Figueroa and Staton (2012).

term insurance for policy preferences.² However, the starting assumptions of this theoretical framework note that actors can (1) hold multiple goals simultaneously and (2) pursue those goals rationally and through various means. When scholars examine only the instances in which the executive manipulates judicial independence for policy preferences, they ignore the other instances where executives may attempt to alter judicial authority. Furthermore, it is not rational to ignore the potential influence of the legislature in regards to manipulating judicial independence. Moreover, scholars tend to ignore the judiciary’s ability to influence the power of their own institution. In fact, research on how judges can shape judicial independence is rooted in the process of development of judicial power that occurred in the United States.³ As a consequence, I develop a theoretical framework that accounts for when all national actors decide to influence the power of the judiciary and what type of events provide opportunities for actors to achieve their goals.

To understand the conditions under which political actors influence judicial power, it is first necessary to determine the goals of the institutions. The goals listed here may not uniformly apply to each country under study here. However, research demonstrates that judges outside of the United States may have different goals than that of the U.S. Supreme Court. For example, Garoupa and Ginsburg (2015) note that judges consider how rulings may affect future job prospects for judges in Latin America, a concern not usually held by United States Supreme Court justices as a consequence of life tenure. On the other hand, judges may hold similar goals across regional environments, such as a concern for other actors’ and the public’s perception of the court’s legitimacy (Helmke and Staton 2011).

I posit that, relative to the judiciary, national institutions pursue other goals apart from insurance of policy preferences. I assume that executives, legislatures, and judi-

² Or security of person.

³ See Carrubba (2009), for example, whose model is a generalized form of the circumstances surrounding the decision in *Marbury v. Madison*.

ciaries are all concerned with policy preferences. This assumption obviously applies to elected officials, like executives and legislatures who are voted into office in order to accomplish the policies of their electoral platform. The assumption that a court also has policy preferences is well established within the judicial scholarship, whether those be ideological preferences or legal.⁴ Depending upon the ideological makeup of the institutions, these policy preferences can conflict, in instances of divided government. Conflicts can also arise because of a change in the ideological makeup of the court and occur when the court becomes unaligned with either the executive or the dominant party within the legislature. I also assume that judges have preferences about the legitimacy of the judicial institution, and will act in order to preserve that legitimacy. A long line of research demonstrates that judges care about the legitimacy of the court, because the continuous loss of support for the court may adversely affect the impact of their rulings (Baum 2006; Carrubba 2009; Rogers 2001; Staton 2006; Hausegger and Baum 1999). Empirical research demonstrates that the importance of the court's legitimacy effectively modifies judicial behavior. Clark (2009) notes that United States Supreme Court justices will modify their behavior in anticipation of a decline in public support from a contentious ruling. However, for those courts who have not yet established a high degree of diffuse public support, judges may see other behavioral options as a viable path to build judicial legitimacy. This is a divergence from the assumptions surrounding the legitimacy literature in the United States. The United States Supreme Court already enjoys a high degree of public support and judicial independence. Justices who would want to improve the perceived legitimacy of the court would likely damage it. These situational circumstances do not hold, however, in countries with lower degrees of public support or judicial power. This opens an opportunity for judges to behave differently.

⁴ See Segal and Spaeth (2002) for an explanation of judicial ideological preferences. For an explanation of the legal preferences of judges, see Masood and Songer (2013).

Lastly, executives and legislatures could be concerned with using the court as a means to secure regime legitimation. Leaders who lack the public support to move forward with their policy preferences may then turn to the court as a method for legitimizing the regime, and as a consequence, the regime's policies. Moustafa (2007) and Landry (2008) note that authoritarian leaders in Egypt and China, respectively, have provided the courts autonomy as a means to build the regime's legitimacy. The decisions by the Supreme Court of Singapore also demonstrate this relationship: though the court maintains power of judicial review, it is scarcely used. Approximately 2% of all decisions from 1965-2012 in Singapore review the use of executive power. However, when the Supreme Court does utilize this tool, it frequently reinforces the legitimacy of the executive to maintain the status quo (Chua and Haynie 2016). Building regime legitimacy through the courts, though, is a precarious game where providing too much autonomy to the courts allows greater pushback against the regime by unfriendly litigants. On the other hand, if the court holds no autonomy, and that status is accurately perceived by the public, the court cannot serve as an effective machine for regime legitimation. In part, this provides insight into why political actors may pursue multiple goals centering on judicial power in any given time frame. Executives or legislative actors may promise judicial reforms one day, and on the next remove many members of the judiciary. In fact, many Latin American executives come into office with the promise of fighting corruption and reforming institutions to provide an effective government. This rhetoric helps to persuade the public of the need for action relative to the judiciary. However, in many instances the rhetoric of promising reforms is followed by some method of undermining the power of the courts.

As previously discussed, I assume that actors can pursue multiple goals simultaneously. Thus in any given time point, executives and legislatures may prioritize two or more of the listed goals and pursue them accordingly. Under this assumption,

the framework also allows the pursuit of goals, relative to judicial independence, that point in opposite directions. Seemingly odd, this can still represent a rational strategy for actors. Supporting judicial independence in one area may satisfy a particular goal, while suppressing the judiciary through other means could also rationally yield an actor's preferences. Circumstances of this nature should be especially common in countries where judicial independence has not yet stabilized. Figure 2.1 graphically demonstrates this relationship for countries in Latin America. The expectation is that when judicial independence is very high or extremely low, national actors do not seek to manipulate judicial power frequently. Typically, high levels of judicial independence occur in strong democracies, where attacks on judicial power could be perceived as unconstitutional. In countries with extremely low levels of judicial independence, the rationale may be either that judges hold the same preferences as the state or that judges simply act as rubber stamps for state policy, despite their own preferences. However for countries where judicial independence falls within a middle range, where independence may be growing or just remaining at the status quo (or even declining), supportive and subversive manipulations of the judicial system should be more frequent. While I do not directly test this larger hypothesis in the dissertation, I do break down some of the components of this broader hypothesis and test them in later chapters.

While not a direct test of the hypothesis above, figure 2.1 generally supports the correlational expectation between judicial independence and manipulations of the judiciary.⁵ Countries with middle-range judicial independence estimates are the ones where actors attempt to manipulate the judicial system both positively and

⁵ The graph depicts the judicial independence measure developed by Linzer and Staton (2015). The count of judicial manipulations comes from original data collected for this dissertation. For illustration, I included countries from all of Latin America (Cuba, Dominican Republic, Mexico, Guatemala, Honduras, El Salvador, Nicaragua, Costa Rica, Panama, Colombia, Venezuela, Ecuador, Peru, Brazil, Bolivia, Paraguay, Chile, Argentina, and Uruguay) and those geographically located in the region (Bahamas, Haiti, Jamaica, Trinidad, Guyana, and Suriname). However, the analysis within the rest of the dissertation only relies on Latin American countries.

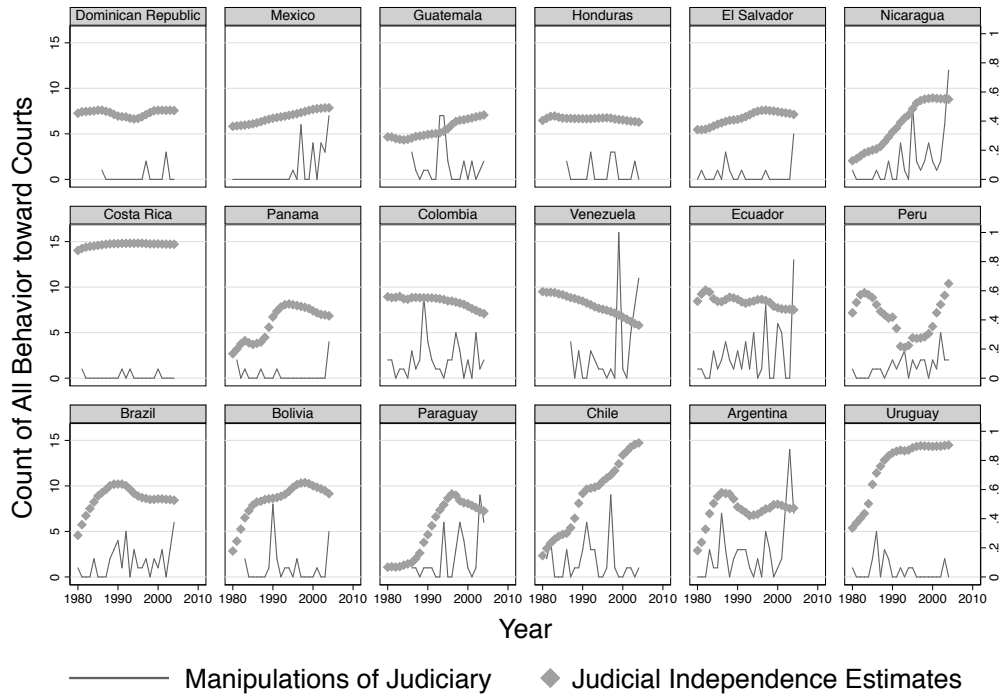


Figure 2.1: Relationship of Judicial Independence and Institutional Behaviors

negatively. Singapore is an additional illustrative case of these dueling directionalities. State interest in economic growth prompted executives to relax restrictions of judicial review in areas of economic issues, to which courts responded by deciding against the state within this area, especially when the political consequences are low (Chua and Haynie 2016). However, executives continue to restrict other aspects of judicial power in Singapore, as it suits the state’s policy interests. Therefore, executives and legislatures can rationally pursue multiple goals simultaneously with respect to judicial power.

2.2 OPPORTUNITIES IN ENVIRONMENTAL SHIFTS

Thus far, the theory has been rooted in a number of simplifying assumptions extant in the literature. National actors, executives, legislatures, and judges, seek to manipulate judicial independence when pursuing certain goals. Actors rationally pursue

multiple goals simultaneously.⁶ Finally, all actors believe that certain actions taken in pursuit of goals relative to judicial independence will, in fact, impact judicial independence in the desired direction. If the legislature proposes to provide the judiciary with the power of judicial review, the legislature takes this action with the assumption judicial review bolsters judicial independence. From these grounding assumptions stem numerous questions: Under which conditions will actors pursue these goals? How will actors pursue the goals? What changes in environments present opportunities for actors to pursue one goal over another? Which strategies yield long-term success in achieving goals relative to judicial independence? These are the questions that I take up in this dissertation and for which I develop a conceptual framework below.

I argue that when actors pursue goals relative to judicial independence, shifts in the environment can provide opportunities to which actors can choose to respond and take advantage. Actors respond to these changes as a means to achieve a goal relative to the judiciary. For the purpose of this dissertation, I use a similar definition of political environment as Kuklinski et al. (2001) that is also influenced by (Dahl 1972). A political environment represents the politically relevant interactions between actors and audiences available to the public that involves power or authority. This definition encompasses what occurs within national institutions and outside of national institutions that audiences can observe. Thus the definition of a political environment is limited to occurrences in the public sphere. While private information likely impacts the behavior of decision makers, there are theoretical and methodological reasons for its absence. Theoretically, the framework rests on a series of interconnected events. That is, a shift occurs in the environment, an actor chooses to respond, that actor decides what type of response will be best suited in achieving an actor's given goal. An important facet of responses by actors is that they occur within the public

⁶ By simultaneously I mean over a period of time that could be measured in different units: either months or years.

sphere. Actors that respond with public communication make that decision with the intention of transmitting it to an audience. Similarly, responses that include types of action must either be (1) justified to constituents or (2) occur in the public eye. The methodological issue against private information is simple in that these types of political interactions are simply unobservable and cannot be captured by traditional methods of research. Since the theoretical argument presumes public information, the methodological issue is not concerning to the design of the study. As such, the definition does not include private deals to which the public is not privy.

Using a broader definition of a political environment that encompasses more than simply the political system provides flexibility in what constitutes a shift in the environment. Changes in an environment should then relate back to the operations therein. Thus, a shift must be observable by audiences or occur in a public sphere. In addition, the shift to the political environment must change the process or the nature of interaction between actors, specifically between the legislature, judicial, and executive institutions.

When, and what type of, shifts impact the interactions between these institutions? While any actor within one of these institutions may have policy preferences toward judicial power, actors can only devote attention to a small proportion of issues at any given point in time. If we assume that actors can only pay attention to a few issues in any given time period, we would expect that, on average, policies toward judicial power would not dominate the major policies institutions put forth. As a consequence, generally policy, in terms of both behavior and rhetoric, should remain relatively stable. However, executive, legislative, and judicial behavior may suddenly change due to a shift that punctuates the stability of policy toward judicial power (True, Jones, and Baumgartner 1999). I posit that there are two categories of events that will create a shift in which executives, legislatures, and judiciaries can then divert policy attention toward judicial power. One type of shift occurs when the status quo

of the distribution of power is threatened or upset. Another category of shift occurs when outside actors exert pressure on national institutions to conform to democratic norms.

Upsets in the balance of power can be particularly impactful shifts. It is common for political actors to perceive their interaction with the coordinate branches of government as a zero-sum game, where the losses and wins by actors balance to zero. Of course, politics is never a one-off; actors play the game repeatedly for an undertermined period of time. However when a shift occurs that rearranges the resources that actors hold, or perhaps the actor itself, the way in which all players engage in the game, i.e. politics, changes. Therefore, instances of power redistribution punctuate the normal proceedings and act as an opportunity for an actor to modify its behavior.

Balance of Power Hypothesis: When power is reconfigured between the national institutions, we should observe a corresponding change in behavior toward judicial power.

I expect that upsets to the balance of power will act as an opportunity for actors to modify their behavior. However, power can be reconfigured between institutions in a number of ways that will create divergent effects on *how* an institution changes their behavior. I theorize that there are two theoretically important ways in which power is redistributed between national actors. One way occurs when the redistribution of power follows an expected procedure or expected path. That is, the outcome of how power will be redistributed is known. While every possible permutation of the redistribution of power is not known, the general certainty of its outcome provides players with additional levels of information. When national actors have (relatively) complete information, the full decision-making process is known. Consequently actors engage in games differently when it is clear the way in which other actors will behave. I expect that redistributions of power will resemble this process, where the general certainty in where power is concentrated or moved provides complete information to

a national actor.

Certainty Redistribution Hypothesis: When the outcome of a redistribution of power is certain, there should be a corresponding increase in critical and supportive behavior.

Shifts that upset the status quo of power distribution can also occur when it is uncertain how the power will be redistributed. If actors are uncertain as to the outcome of the reconfiguration of power, then their behavior should mimic a player with incomplete information. In essence, actors know the general possibilities of what could become of a redistribution of power, but due to incomplete information, it is unclear which path will yield the greatest utility. Therefore, uncertainty within politics changes the way in which actors interact with one another. Actors respond to this uncertainty by reevaluating the interaction between their institution and the two other national institutions. I posit that shifts with such a lack of clarity should act as moments where we observe institutions behaving cautiously because it is uncertain how the other institution will engage in politicking. Thus, we should observe fewer instances of both critical and supportive rhetoric.

Uncertainty Redistribution Hypothesis: When the outcome of a redistribution of power is uncertain, there should be a corresponding decrease in critical and supportive behavior.

The second type of shift that impacts behavior occurs when the costs of not conforming to democratic norms becomes high. Stated differently, this shift occurs when the benefit of constraining behavior to democratic norms either (1) increases or (2) is less costly than the utility received from operating outside of democratic norms. This type of shift focuses on pressures originating outside of the setup of the government via the Constitution and the membership of national institutions. Instead, it focuses on those forces exogenous to the legislature, executive, and the judiciary. These types of shifts stem from organizations or constituents that adeptly

pressure national institutions to modify their behavior.

Actors capable of this type of pressure will be international actors with close relationships or the societal actors to which the government is politically accountable.

Democratic Norms Hypothesis: When entities outside of the government exert pressure on a government to conform to democratic norms, then there should be a corresponding increase in supportive behavior and a corresponding decrease in critical behavior.

The theory states that shocks to an environment change the nature of interactions that must be observed by the public. There are a number of conditions that must be met in order for an event to be considered a type of “shift” to the system. I previously outlined that the shift must be observable to the public. The shift must also act as a threat to the distribution of power or pressure national institutions to conform to democratic norms. These events motivate national actors to take advantage of an opportunity to change their policy toward judicial power. Such shifts provide the ability for actors to pay attention to judicial power as an instance of a punctuated equilibrium. This assumption is already built into the literature, though it is unstated and unexplored. Scholarship on political insurance theory notes that executives shift power to the judiciary in order to insure the survival of policy preferences after the leader leaves office. In this case, the election would be considered a “shift” to the environment since it is (1) publicly observable and (2) acts as a threat to the future distribution of power between government entities. Because the leader observes the possibility of removal from office, he or she will modify behavior relative to judicial independence in order to secure policy preferences.

Though I theorize shifts within the political environment as important to understanding the conditions under which political actors will influence judicial power, these shocks are neither necessary nor sufficient for an institution to change its behavior. shifts to the political environment provide an opportunity for political actors.

Ultimately political actors choose whether or not to take advantage of the opportunity presented by the shift. Political actors must weigh the transaction costs of pursuing a manipulation of judicial power against the expected benefits that this manipulation will bring. If the expected benefit is less than the transaction costs associated with the manipulation, the political actor should rationally choose to do nothing and preserve the status quo. Thus a shift is sometimes sufficient, but not always sufficient, to observing a manipulation of judicial power. As well, a shift in the political environment is not necessary for judicial manipulation to occur. Hypothetically, if an executive or legislature wished to disband the judiciary entirely by seizing the institution, without any rationale, it could do so. The judiciary controls no power of enforcement and thus capturing a building would be technically feasible. While this is hypothetically possible, it is not very likely. If the executive, for instance, uses its unilateral powers over the military to seize an institution, it faces backlash from the public and from other political actors. shifts, then, are not strictly necessary nor sufficient to guaranteeing behavioral responses by institutional actors. On the other hand, political actors with policy and legitimacy goals relative to the judiciary could use the shift in the political environment as a justification for modifying their behavior. A shift then may be considered a loosely necessary condition for observing a political actor to modify its behavior.

If shifts are neither strictly necessary nor sufficient to observing actors modify their behavior toward the judiciary, then when will shifts in the political environment correspond with changes in behavior? In the dissertation, I examine instances of actors engaging in critical behavior toward the judiciary and instances of supportive behavior. When a shift occurs in the political environment, it will lead to political actors behaving critically toward the judiciary under a few conditions. In order for a shift to change behavior, the actor must have a goal that it wishes to pursue toward judicial power. If shifts occur and the actor holds no goal, then there the actor will

not perceive the shift as an opportunity of which to take advantage. On the other hand, when the actor has policy goals relative to judicial power, a shift can present an advantageous opportunity to pursue them. In addition, a shift will lead to an increase in critical behavior toward the judiciary when the actor could not otherwise pursue their policy goals without retribution from their audiences, such as the larger public or other institutions.

Critical Behavior Hypothesis: shifts to the political environment will correspond with an increase in critical behavior when a political actor already holds a policy goal relative to judicial power *and* the actor could not otherwise pursue their goal without retribution from their political audiences

Generally, I posit that the executive will be most impacted by changes within the configuration of power. If executives perceive the distribution of power as a zero-sum game and prefer to either maintain or attain power, then its reconfiguration should be a highly motivating factor to modify behavior. This theoretical posit works for systems where power has typically been concentrated within the executive institution. Additionally, the movements and possible actions of executives in separation of powers systems are more flexible than their parliamentary counterparts. Presidential executives are capable of using unilateral powers, without consultation of party or the assembly, to pursue their preferred goals. As such, behaviors associated with a shift in power reconfiguration can occur swiftly.

Executive Power Distribution Hypothesis: Executives within presidential systems should respond to shifts within power reconfigurations more often than their executives within parliamentary systems. Executives in presidential systems should also be the most impacted by environmental shifts of power redistribution, over other types of environmental shifts.

The length of time that veto players remain in office should condition the interactions between the branches, specifically how the judiciary behaves. Given that judges typically come to the court via at least the executive branch, and wish to create reversal-proof opinions, the greater the degree that power becomes concentrated in one institution, the more it should change judicial behavior. As the degree of power becomes increasingly concentrated within one party or one institution, we should observe the judiciary behaving less supportive toward its own judicial power. The rationale behind this thought is that the strength of the veto player prevents courts from pursuing goals that would empower the judiciary, since they could be overridden by the dominant party or institution. However, when power is dispersed relatively equally amongst dominant parties, we should see a corresponding increase in judicial empowerment. When power is distributed more equally between political actors, judges find this opportunity as advantageous to pursue goals relative to their own institution. Lack of a unified opposition, in an executive or legislature, would result in a lower probability of retribution or override.

Judicial Hypothesis: The degree of power entrenchment, or its varied dispersion, should be the most impactful modifier of judicial behavior. When power is concentrated within one institution or one party, we should observe a corresponding decrease in a court’s supportive behavior. As power is distributed more equally between parties or institutions, we should observe a corresponding increase in a court’s supportive behavior.

The different categories of shifts to political environments can be found in Table 2.1. The table lists the ways in which I operationalize the how countries can experience threats to the balance of power or how actors outside of the national government exerts pressure on democratic norms. The table captures, over all of the countries within the dataset, how many times one such shift was present from the years 1980-2004. Generally, the most frequent disturbance to the political environment stems

Table 2.1: Shifts Relevant to Judicial Power

| Category | Density in Dataset |
|---------------------------------------|--------------------|
| Power Reconfiguration | |
| New International Actors | 82% |
| New Domestic Actors: | |
| Legislative | 37% |
| Executive | 48% |
| States of Emergency | 7% |
| *Change in Court Alignment with Exec. | 78% |
| *Change in Court Alignment with Party | 73% |
| Resources | |
| *Positive U.S. Bilateral Aid | 45% |
| *Negative U.S. Bilateral Aid | 39% |
| *Positive Change in Inflation | 52% |
| *Negative Change in Inflation | 48% |
| Electoral Uncertainty | |
| Dissatisfied Electorate: | |
| *Political Expressions | 35% |

from the broad category of power reconfiguration. For example, the change in the ideological alignment between the court and the president is non-zero 78% of the time within the entire dataset from 1980-2004. This means that from 1980-2004, Latin American countries experienced no change in the alignment of the court and the president only 22% of the time.⁷

2.3 RHETORIC AND DIRECT ACTION

I posit that the series of events that motivates manipulations of judicial independence occur in roughly two stages. First, a shift to the environment occurs. Second, national actors must decide the process of responding to the event. Executives, legislatures, and judiciaries will first decide whether or not the shift necessitates action. Then the actor decides the form in which the response takes. The process of response represents

⁷ This method of interpretation should be used for all measures denoted with a '*'. These measures represent the delta between the current year and the previous year of the concept captured by the measure.

an important aspect of how actors satisfy their goals relative to judicial independence. Table 2.2 summarizes the use of rhetoric or action that each national institution uses in order to subvert or support the judiciary. While some of the responses indicate the direction of the behavior, rhetorical attacks on the judiciary are decidedly negative, other categories of responses are ambivalent to the direction of the behavior. For example, the category of ‘budget’ within the form of action can be either positive, where the legislature approves a budget increase for the judiciary, or negative, when an institution freezes the budget of the judicial institution.

During the decisional process of responding to an environmental stimuli, actors consider two aspects of the response: the form and the direction. I define the form of a response to represent the behavioral options available for actors that would aid in manipulating judicial power. For executive and legislative actors, the form of response can take on rhetoric or action. Narratives that institutions build and construct around courts can result in powerful statements of support or damning evidence of ineffectiveness. Whether or not the rhetoric used captures the performance of the judicial institution or not, shaping perceptions of the judicial institution can be an important and effective tool in order to achieve goals. I posit that rhetorical strategy can be a useful tool by the legislature, executive, and judiciary. It is relatively well established that presidents effectively use communication with the public in order to promote issues or achieve preferences (Kernell 2006). Similarly, legislatures with aware constituents or electorally competitive seats may find the use of rhetoric helpful Cook (1996). Given the nature of this study, it is rational to assume that both the executive and the legislature would also employ narratives as a means to influence the judicial institution. Narratives can dilute diffuse support of the court, diminish constituent’s accessing the court, or promote its efficacy and efficiency. Moreover, rhetoric can transform into a strategy in order to shift blame when a controversial shift occurs within the system, even if this perception does not correspond with facts.

Table 2.2: Responses of National Actors

| Type of Response | Judiciary | Executive | Legislature |
|-----------------------------------|-----------|-----------|-------------|
| Use of Rhetoric | | | |
| Attacks | 29 | 33 | 10 |
| Mobilization | 2 | 9 | 5 |
| Threats | 3 | 9 | 4 |
| Statements of Noncompliance | 0 | 4 | 1 |
| Support | 3 | 7 | 6 |
| Promise of Constitutional Reforms | 0 | 6 | 2 |
| Statements of Compliance | 0 | 2 | 0 |
| Form of Action | | | |
| Rulings | 66 | 0 | 0 |
| Ruling Constitutional | 5 | 0 | 0 |
| Ruling Unconstitutional | 27 | 0 | 0 |
| Dismiss Case | 4 | 0 | 0 |
| Direct Order | 26 | 0 | 0 |
| Membership on Court | 9 | 24 | 42 |
| Constitutional Reforms | 2 | 13 | 17 |
| Non-Compliance | 13 | 21 | 16 |
| Budget | 5 | 7 | 6 |
| Protests | 8 | 1 | 0 |
| Investigation | 6 | 4 | 10 |
| Expanding Power | 2 | 4 | 6 |
| Decreasing Power | 1 | 1 | 1 |
| Requests for Action | 3 | 25 | 12 |
| Other | 6 | 22 | 14 |

Note: While it may appear odd that there is one instance of the judiciary decreasing its own power, it is not inconsistent with the behavior of judges in areas where judicial independence is low and the fear of retaliation, usually by the executive, is high.

Therefore rhetoric may be strategic or sincere. However the intention behind its use is immaterial to this framework since the research in this dissertation specifically focuses on how stimuli may induce rhetoric, instead of examining whether the rhetoric produces the intended effect on judicial independence.

Legislatures and executives may then frame narratives about the judicial institution in order to satisfy audiences or drive certain agendas. I expect for rhetorical

strategy to be a viable option to satisfy an audience when the cost of responding is high in combination with a high cost of taking action. Rhetoric can also become useful when the consequences of its use are low. Stated differently, for an inattentive public or an noncompetitive electorate, creating narratives about the judiciary can be useful (especially when it is used to shift blame) when retribution for those actions is not likely.

Typically viewed as the subdued actor, judges and courts recently moved into the foray of media relations or direct communication with the public. Traditional thought may have conceptualized rhetoric by judges in terms of opinions, this is no longer the case and may lead to new interactions between courts and their audiences. In Mexico, Staton (2006) uncovered that judges perform an active role in shaping the narrative surrounding the outcomes on select decisions from the Court. That is, in creating newsworthy stories about important decisions, it is possible that judges can increase their authority (Widner 2001). Though Staton (2006) does note that this result is attenuated if the case was likely to garner media attention without judicial promotion, which is usually the case. However, in the new age of media where informers can connect directly with consumers, judicial rhetoric may advance beyond public relations concerning case results. Judicial institutions may find facebook, twitter, and other platforms useful to promote a narrative of transparency, institutional stability, or even demonstrate independence in itself. As an example, when the Supreme Court of the United Kingdom became its own institution, separate from the House of Lords in 2009, a major concern for the institution was to appear as a separate and independent body. As it was previously housed in the United Kingdom's parliament, the U.K. judiciary pursued a number of paths to build institutional legitimacy and appear independent. In 2011 the institution created a twitter account where they publicized important case outcomes, public interactions of the judges, and promoted public accessibility to the Court. It is important to repeat that whether or not the

specific actions of public outreach supported judicial independence is not germane to this specific study. What is telling, is that judicial institutions are increasingly becoming actively involved in shaping their own authority and shaping narratives about the judiciary is assumed to be an effective strategy to achieve their goals.

Another behavioral option of responding to shifting environments takes the form of action toward the judiciary by any of the three major national actors. Traditional lines of thought on how judicial independence develops or is threatened stems from the actions of external actors. Scholars developing conceptual frameworks of judicial independence note the connection between *de jure* and *de facto* components. Responsive actions could contain either, however one frequently studied area relates to constitutional reforms. Specifically, scholars believe that actors provide powers of judicial review within constitutional reforms in order to bolster judicial independence (Domingo 2000; Finkel 2004, 2008; Bowen 2013). However, constitutional reforms intended to provide a higher degree of independence do not always yield the desired result and can have opposite effects (Couso 2003; Chua and Haynie 2016). Apart from constitutional reforms, actors manipulate judicial independence by specifically ignoring or not complying with judicial rulings, preempting action by the court, or requesting injunctions and arrests that align with the actors' goals. What is clear from this line of literature is the import of executive and legislative actions toward the judiciary.

From this line of reasoning, it is rational to extrapolate that executives and legislatures use other types of actions in order to influence the judiciary. Previous literature discussed the importance of executives and legislatures manipulating power. However they can also act to change the courts in regard to membership, security, and institutional stability. Executives and legislatures can manipulate the membership of courts by bolstering or diminishing judicial independence. In order to insure policy preferences or policy legitimation by the judicial system, actors might pack the

courts, remove judges from office, or use unconstitutional methods of appointment, as Bill Chavez (2004) notes occurs in Argentina. Actors can also bolster the judiciary by making non-controversial appointments in the sense that executives and legislatures abide by the constitutional process, which can similarly lead to insurance of policy preferences after actors leave office. The security of both courts and personnel functions similarly. Executives and legislatures can undermine security, by seizing the building, or bolster judicial power by increasing security and instituting protocols to insure the safety of judges. Finally, influencing the stability of the institution through changes in budgets or salaries, making inquiries or investigations, or suspending the judiciary in its entirety.

Figures 2.2, 2.3, and 2.4 depict the behavior of executives, legislatures, and judiciaries in Latin America from 1980-2004. Behavior critical of the judiciary, meaning behavior specifically intended to subvert the institution, is the most common direction of both form and action for these institutions. One interesting trend seen over time is that both forms of behavior, rhetoric and action, appear to be increasing. Recall the intuition that there is a correlation between judicial independence (the measure) and judicial manipulations from earlier in the chapter. This general trend explains the increase of both critical and supportive behavior of the judicial institution toward the later years in the dataset because there was a general increase in independence in Latin America at this time.⁸

⁸ Refer back to Figure 2.1 to see countries' individual movements within judicial independence.

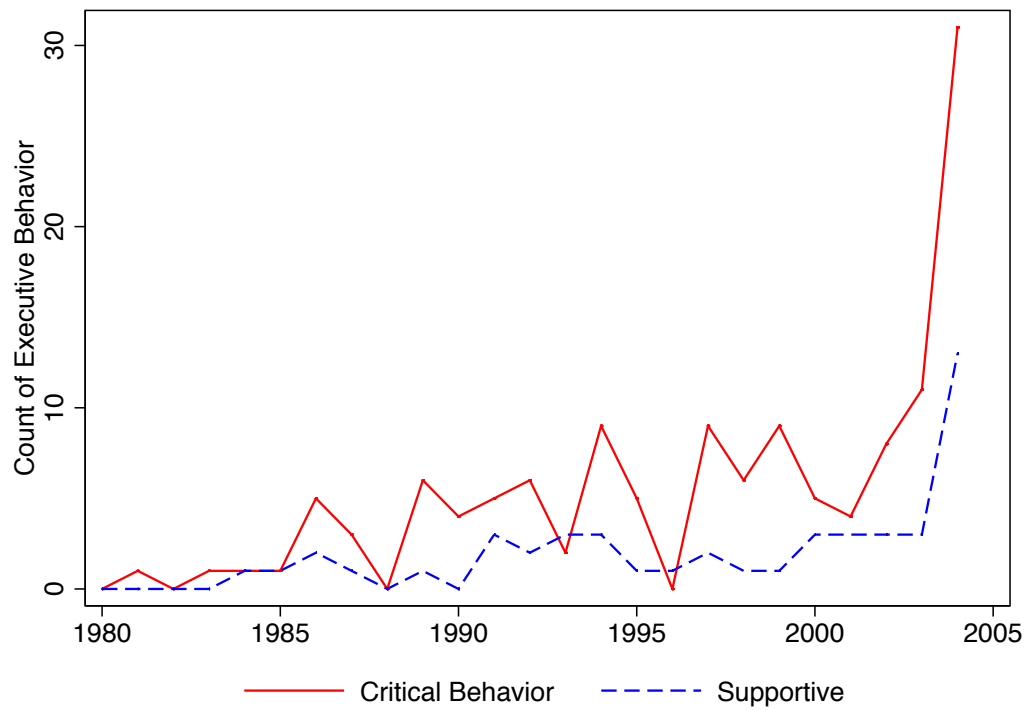


Figure 2.2: Count of All Executive Actions by Direction

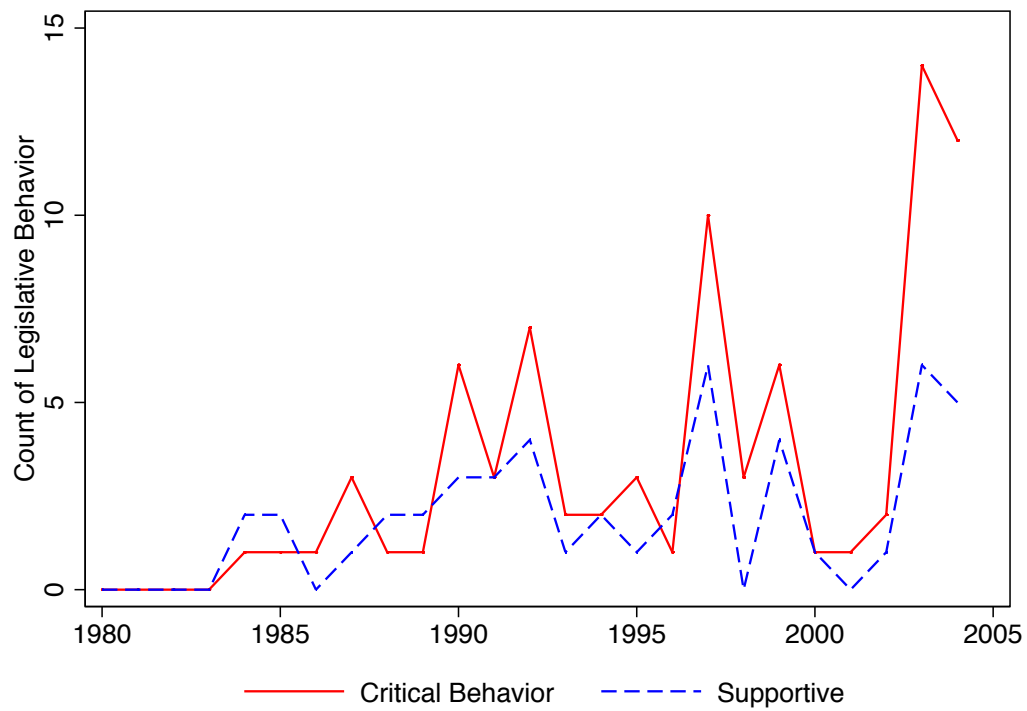


Figure 2.3: Count of All Legislative Actions by Direction

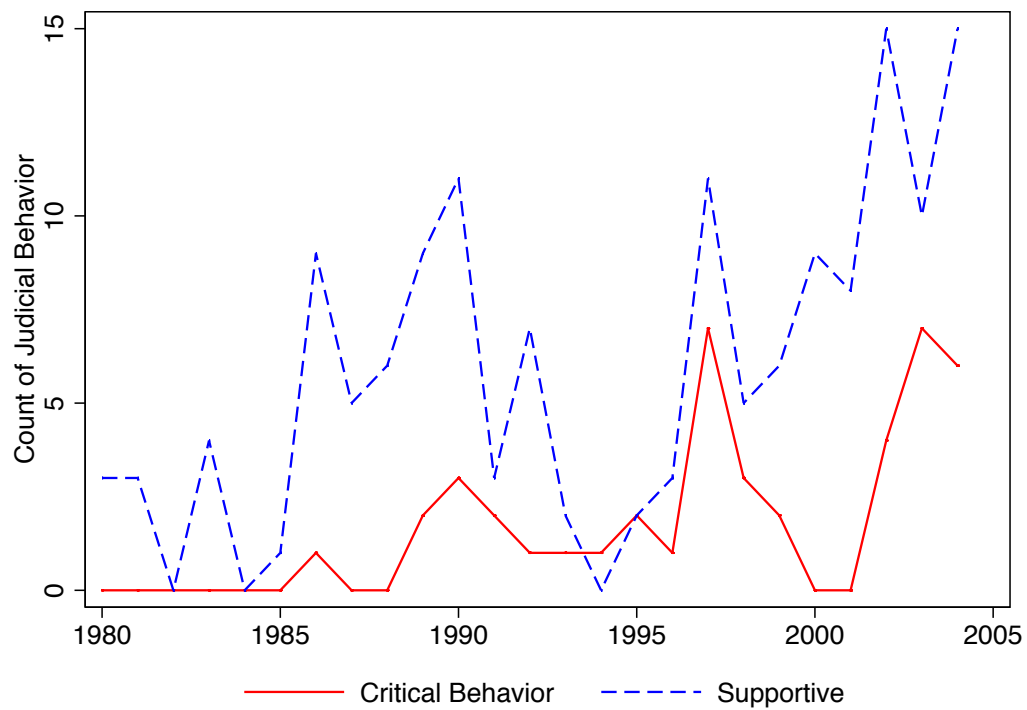


Figure 2.4: Count of All Judicial Actions by Direction

CHAPTER 3

ACTIVE LEGISLATURES AND RESPONSIVE EXECUTIVES

After the Nicaraguan Revolution in 1979 toppled the Somoza regime, the Sandinista National Liberation Front (FSLN) seized political power by marching into Managua and pledging to fulfill the promises of their democratic socialist platform. For two years the Sandanistas worked with centrist political parties in an effort to rebuild what war had destroyed. However, a series of resignations by the centrist members left the Sandanistas in exclusive control of the government where the party promoted education and health initiatives. Yet international bodies levied criticism at the government for its profuse human rights abuses. As a result of the government's socialist policies and civil rights abuses, right-wing rebel groups, known as the Contras, led a systematic resistance against the government and its social reforms for decades.

The Esquipulas Peace Agreement of 1987 created the process for democratization, national reconciliation, and an end to the conflict between the government and the Contras. In a surprising upset, an anti-Sandinista coalition candidate, Violeta Chamorro, won the presidency. After a decade of hostilities, 50,000 dead, and billions of dollars in damages to the country, the people believed that only a new regime would usher in peace to the ongoing conflict. The Sandinistas left power peacefully, but used their position in the assembly to secure their policy preferences. In a strategic move, the Sandinistas appointed two new members of a government commission when most of the members supporting the president were not present at the assembly. The assembly's opposition, friendly to the executive, petitioned the Nicaraguan Supreme Court for an injunction against a vote to install the newly appointed secretaries in

the commission. President Chamorro, instead of taking action directly, proclaimed that she would wait for the Supreme Court to rule on the case. The Supreme Court accepted the injunction, declared the legislative activities occurring since the installment of the Commissioners as null and void, and backed the executive. Under cover of the judicial ruling, the executive disbanded the Governing Board, seized the Congressional Assembly, and placed it under military guard until a new Governing Board was elected.

The example in Nicaragua is illustrative of how political actors perceive the judiciary as a useful tool for legitimizing policy. Though seizure of facilities may be a rare instance of political strategy, other manipulations by politicians to the judiciary are not, and can lead to important consequences for national policy and the rule of law. This chapter explores the conditions under which political actors seek to influence the judiciary and what type of strategic behavior the actors will pursue.

I specifically examine power imbalances by focusing on the behaviors of the executive and legislature toward the judiciary. The motivating question is: when and why will actors attempt to influence or manipulate judicial authority? Contemporary scholarship indicates that uncertainty surrounding whether an executive will keep power induces the leader to behave strategically toward the judicial institution. However theoretical work lacks focus on other motivations for executives (or legislatures) to use this strategic path. The goal of this chapter is to identify the various impetuses that provide actors the opportunity to influence judicial authority and determine the degree to which these events impact legislative and executive behavior.

Research typically identifies political uncertainty from elections as the motivation for strategic behavior toward the judiciary. The rationale behind this belief centers on actors in elected branches, such as the executive and the legislature. It is assumed that players in these institutions preserve their retention of power by using the judiciary strategically. Theoretical work notes that extrajudicial actors expand powers for the

judiciary as a concession to a hostile or divided polity in order to keep power or to insure the survival of their policies. Scholarship also uncovers executives forcing alliances with courts by undermining judicial authority to maintain power (Popova 2010). As such, uncertainty in electoral politics performs an important function for understanding the specific conditions for why actors manipulate the judiciary.

Less certain is the extent to which other events impact actors' attempts to subordinate or empower the judicial institution. Scholarship discusses the importance of economic investments, but work has shown that it can produce both positive and null responses by governmental actors. Comparative scholars in Latin America identify patterns of executives forced out of office due to pressure from the public via protests, but its indirect impact on the judiciary has not been studied. Certainly other events, like those mentioned, trigger uncertainty in the political environment. The ambiguity surrounding these events should generate a corresponding response by executive and/or legislative actors. However, these situations remain unstudied and unexplored by comparative or judicial scholars. I develop a new theoretical framework and methodological test to remedy this void by answering a number of key questions: What other events motivate extrajudicial institutions into influencing judicial autonomy? Do certain factors impact one institution more significantly than another? Under what conditions will governmental actors be motivated to manipulate judicial independence?

3.1 PREVIOUS EXAMINATIONS OF JUDICIAL POWER

How does judicial independence develop outside of the United States? This fundamental question to scholars of comparative courts motivates research to explore the underpinnings of judicial authority.

The bulk of scholarship examining the power dynamics of the judiciary focuses on why executives choose to shift power to the judicial institution. Ramseyer (1994) was

the first to posit that judicial independence depended more on the degree of electoral competition than the substance of constitutional texts. Magalhaes (1999) built off the concept of political uncertainty and noted the positive relationship between electoral uncertainty and executive's treatment, or rather lack of mistreatment, of the judiciary. Since then, scholarship has tested this political insurance theory in a number of environments. For example, Ginsburg and Versteeg (2014) noted that political insurance functions in both democratic and authoritarian countries. Moustafa (2007) further confirms that authoritarian states can have powerful judiciaries because those respective leaders perceive the benefits of courts as a mechanism for regime legitimation. However, when executives empower courts in order to achieve regime legitimacy, courts do not always use this empowerment to protect human rights or the rule of law. Using evidence from Turkey, Shambayati and Kirdis (2009) demonstrate that judicial empowerment can facilitate the state's control of society. Similarly, a state can use the courts to produce legitimacy in regards to economic policy and simultaneously curtail civil liberties (Moustafa 2007; Chua and Haynie 2016). Thus, executives in democratic and authoritarian environments can use the judiciary to execute a variety of goals that can result in a commitment to human rights or regime legitimation.

The theory of political insurance depends upon the degree of political uncertainty and, for the most part, scholars have conceptualized political uncertainty by the competitiveness of elections. One way to determine the competitiveness of an election is to examine the degree of power fragmentation within parties. If one party holds the majority of power, for example Mexico's Institutional Revolutionary Party (PRI) that was in power from 1929-2000, then judicial authority will decrease since a one-party system obviates the need for future insurance (Chavez 2004). On the other hand, when power is fragmented, the judiciary can not only expand its power, but also effectively enter into the foray of policymaking (Ginsburg 2003; Ríos-Figueroa 2007). However there is some debate as to whether political competition will *always*

augment judicial authority. Randazzo, Gibler, and Reid (2016) point to the conditional effects of the political landscape, regime type, and ethnic fractionalization on the development of judicial power. Popova (2010) finds an association between high political competition and a reduction in an independent judiciary, since incumbents can benefit from subservient courts in elections. Despite this conflict, the conclusion from the literature is clear: the broader political environment shapes the behavior of, and treatment toward, the judicial institution.

The research examining how judicial authority develops globally has discovered important associations between executives and judicial power and posited a robust theory that translates across regime types. However, there are a number of unanswered questions within the current literature that, if studied, could provide a comprehensive picture of power dynamics between branches. First, scholarship has focused exclusively on when, why, and how executives manipulate judicial power and ignored the potential influence of legislatures. Given that reforms, budgets, and even appointments proceed through the legislative body, the importance of this institution in shifting judicial power should not be ignored. Second, while scholars generally recognize the importance of the larger political conditions in which institutions operate, the main focus of the literature centers on political fragmentation and, consequently, electoral uncertainty. Other variations within the political environment likely influence judicial authority, yet remain unexplored. Finally, in order to test the political insurance theory, many scholars look for associations between elections and an aggregate score that captures judicial independence. This approach is, and has been, quite useful, however it fails to capture other relevant associations between political conditions and subsequent executive and legislative behavior toward the judiciary.

This chapter similarly centers around the development of judicial authority, however it seeks to examine the topic by taking into account the aforementioned underexplored areas. It is a departure from previous literature since it explores alternative

stimuli that motivate actors to manipulate judicial authority. I argue that there are additional conditions in the environment, apart from political fragmentation, that present opportunities for legislatures and executives. In the next section I outline how this discussion is critical to understanding how judicial power develops over time and in different environments.

3.2 STIMULUS AND RESPONSE

The premise of my argument centers on the unanswered questions stemming from the literature. The focus on how executive and legislative institutions respond to shifts in the environment will provide a fuller understanding of how these actors can alter judicial authority. I argue that to understand the variations in judicial power, scholars should look at a series of interconnected events that will create opportunities for actors to pursue their goals toward the court. First, a shift in the political environment occurs that provides an opportunity for either the legislature or executive to act. If the institution decides to take advantage of that opportunity, the actor will choose to either take direct action or use rhetoric in order to alter judicial authority. A number of assumptions underlie this series of events, which I detail below.

3.2.1 ASSUMPTIONS

The main assumption of this chapter affirms that persons in the executive and legislative offices are rational actors. That is, actors of these institutions can recognize the future consequences of their actions and modify their current behavior in order to seek the best possible outcome. Applying the rational actor assumption to this theoretical framework, if institutional actors are rational, I assume that these actors can recognize shifts in the political environment as opportunities to pursue their goals relative to judicial power. After this recognition, actors can choose between two paths of how to alter judicial power: a supporting position or a critical position. Each of

these paths can take the form of either direct action or the use of rhetoric.

A form of action can be a useful strategy for actors given the distribution of power between branches of government. When actors use forms of direct action, such as removing judges from the court, increasing the security of their offices, or even using the military to take over their office buildings, transaction costs are significantly higher than the use of rhetoric. Thus there are certain conditions under which actors may see this behavior as useful to achieve their goals vis-a-vis judicial power. First, actors must be capable of spending political capital, essentially paying for the transaction costs, to manipulate judicial power. When power is concentrated within one institution or one party, the ability to use political capital for this end is at its zenith, and thus the most likely condition we would observe instances of manipulating the judiciary via direct action. When power is highly concentrated in such a manner, fear of retaliation from other institutions is low, and thus does not play an important part of the decision-making calculus.

If action is a viable strategy when power is highly concentrated, rhetoric should be the more rational option for when the distribution of power between branches is dispersed evenly. Institutional arrangements faithful to the separation of powers doctrine reinforces static or incremental changes in policy (True, Jones, and Baumgartner 1999). The same logic can apply to institutional policies toward judicial power. Gridlock, in terms of effective checks and balances on extraconstitutional behavior, would then leave open actors to pursue rhetoric to support their goals toward judicial power. In addition to power fragmentation, rhetoric can be a useful strategy as a method to shirk blame in periods of public disapproval. In the same vein, uses of rhetoric should increase during elections as a tool of the political campaign.

Another critical assumption to this theoretical framework lies in the beliefs of the actions of the executive and legislature. I assume that both actors believe that their attempts to influence the judiciary will yield the desired result upon the judiciary.

As an example, if the legislature votes to strip the budget for the next judicial year in order to block the top court from voting on a controversial case, the consequence of this action will be that the court is blocked from issuing a decision, in effect decreasing the court's power. In this instance, the legislature took action with the intention of removing judicial authority and resulted in the desired outcome. However, it is not necessary that the desired outcome occurs for either the executive or legislature to hold the belief that their strategic manipulations of the judiciary will occur. As an example, the Election of 1800 in the United States resulted in the rise to power of the Democratic-Republicans, who suspended the Supreme Court for a year due to a controversial case on the docket. The return of the Supreme Court and the decision of the case, while still favoring the Democratic-Republicans, then resulted in an increase in judicial authority by way of the introduction of judicial review for the United States courts. Thus despite whether or not the action of the executive or legislature alters judicial independence in the desired way, the actors' belief that it will is rational.

This assumption is also common, though unstated, in judicial literature. When devising different measurements of judicial independence, scholars frequently incorporate the executive's and legislature's power to influence the judiciary within their measures. Therefore measures of judicial independence either conceptualize or operationalize the term by noting that extrajudicial institutions impact the development of judicial authority. Glaeser et al. (2004); Linzer and Staton (2015); Feld and Voigt (2003) discuss the importance of this underlying component of judicial independence, but do not directly use executive or legislative actions to measure it. Cingranelli (2008); Keith, Tate, and Poe (2009); Howard and Carey (2004) specifically measure a judiciary's freedom from control of other institutions and actors to build a measure of judicial independence. At the core of scholars' correlation between judicial independence and influences by executive and/or legislative branches is the assumption that these actors attempt to, or do, manipulate the judiciary in order to impact judicial

independence in a certain direction. This assumption is important for this theoretical argument because it connects specific actions of executives and legislatures to the goal of affecting judicial independence.

Relatedly, I hold two assumptions pertaining to the goals of executive and legislative institutions. First, their goals vis-à-vis judicial power do not have to be related to the subject of the stimulus. I do not assume or even expect for the content or reason of the stimulus to be related to executive or legislative action. For example, since the attacks in Paris in November of 2015, the French administration has put the country in a declared state of emergency that suspends the rule of law and grants the government the power to impose curfews, disperse demonstrations, and perform administrative searches without due process of law. One could observe the logical ties between these powers and national security. However, the administration has used the suspension of these rights to quash protests related to economic issues, such as a worker's rights protest scheduled for June 2016. As such, it is not necessary for the subject of the stimulus to be related to how or why an executive or legislature alters judicial power. I conceptualize these stimuli simply as the creation of the ability or opportunity for an executive or legislature to modify their behavior toward the judiciary. That said, it is also possible within this theoretical framework for a stimulus to be correlated with the response from national institutions.

Second, institutions are capable of pursuing multiple goals simultaneously, even ones that may appear to shift judicial authority in opposing directions. Most research on judicial independence notes that political competition is a key factor in motivating action by another institution (Bill Chavez 2004; Chavez 2004; Ginsburg 2003; Popova 2010; Ramseyer 1994; Ríos-Figueroa 2006). However political competition is not the sole reason actors undertake these political strategies. Furthermore, the literature assumes singular goals over time. In other words, if a study investigates executive actions toward judicial independence in Spain over a twenty-year period, the research

assumes the motivation of the executive stems from political insurance (or strategic pressure, etc). This assumption limits the ability to understand what types of events motivate actors to pursue which strategies at certain moments in time. Perhaps the executive in Spain is concerned with political insurance near re-election time, but is it reasonable to automatically assume that this concern is stagnant across his or her tenure? Assuming the singularity of goals by an actor limits theoretical development of comparative courts. The theoretical framework of this chapter is grounded in the assumption that actors will hold different goals depending upon the nature of the political environment and changes therein.

3.2.2 STIMULI

The theory assumes that executives and legislatures choose to alter judicial authority after a shift in the political environment, or what I also refer to as a stimulus. The succeeding question is then, what constitutes a shift to the political environment? I use a similar definition of political environment as Kuklinski et al. (2001), but one that is also influenced by (Dahl 1972). A political environment represents the politically relevant interactions between actors and audiences, available to the public, that involves power or authority. This definition can encompass what occurs both within national institutions and outside of national institutions that audiences can observe. In other words, a shift can occur within an institution when there is a turnover in membership. A shift may also occur outside of an institution, at the societal or international level, that will impact an actor's decision-making process in a similar way. However, the definition of a political environment is limited to occurrences only in the public sphere. Private information is not considered to be a stimulus in this framework. I limit the definition in this manner due to the previously stated assumptions of the framework. Because I am only interested in alterations to judicial authority that are publicly identifiable and justified by the opportunity

created by the stimuli, I must only focus on stimuli available to the public.

Two conditions must be met in order for a stimulus to be considered a shift the political environment in this framework. The stimulus must (1) be publicly observable and (2) impact the decision-making behavior of institutions relative to the judiciary. Thus, I am only concerned with stimuli to which the public have the ability to recognize and that deal with how institutions treat the judiciary. By deduction, I ignore events that are observable by the public, but have no impact on the decision-making behavior of national institutions. For example, situations involving natural disasters that do not incur states of emergency would certainly be observed and experienced by the public, but I have no expectation that such an event would change the decision making behavior of actors toward the judicial institution. Since the second condition could be conceptualized quite broadly, I note two categories that are of theoretical importance to how actors may treat the judiciary. Shifts that center around power reconfiguration and electoral uncertainty should all impact the way in which executives and legislatures alter the judicial institution.

Recall from the previous chapter that details the the logic of the theory that there are two broad categories of what constitutes a shift important to understanding the development of judicial power. The first shift examines movements within the balance of power between national institutions. The second category of a shift examines external pressures that raise the costs of not conforming to democratic norms. These two categories represent the boundaries for what I consider to be relevant changes within the environment in order to understand the development of judicial power. I explore further how these broad categories can be further conceptualized and measured.

Chapter 2 put forth the expectation that when an interbranch balance of power is upset, then we should observe a corresponding change in behavior toward judicial power. This shift focuses on the relationship between institutions and specifically examines how changes within the power relationship affects behavior. The relation-

ship between branches can either be disturbed with (1) certainty with respect to the outcome or (2) uncertainty.

SHIFTS FROM REDISTRIBUTION OF POWER

How can a shift occur that provides certainty with respect to the outcome? I argue that there are three ways in which outcomes of power redistribution provide clear information on the characteristics of the players. One shift results from a suspension in constitutional procedure, where reconfiguration results in power becoming concentrated within the executive. Movements toward extreme ideological positions in opposing institutions can also provide illuminating information on how interbranch conflict could play out. When the alignment of an institution moves to either of the extremes, where the institution experiencing membership change becomes fully aligned or fully non-aligned with either the executive or the legislature, it can be more transparent about how such institutions will engage in politicking rather than small movements within institutions. Finally, the clearest shift occurs when an actor experiences a membership change within its own institution. If an actor is being voted out of office, nothing can be plainer than the prospect of not being able to play the game in the future. The possibility for repeating the game ends, and as a consequence, institutions modify their behavior. Thus, I posit that shifts that help provide complete information as to the nature of the redistribution of power will lead to a corresponding increase in critical and supportive behavior.

One type of power reconfiguration occurs when a country declares a state of emergency. By definition, states of emergency suspend the typical operating procedures and lift certain controls or limits on the type of actions that a national government can take. The central purpose of a state of emergency is for the government to regain control of its country in order to resume normal operations. Thus by definition, a state of emergency is a type of ‘power reconfiguration’ that can result in a huge

impact upon the interactions between national institutions. As an example, Pakistan's former President Musharraf had a tumultuous relationship with the judiciary, specifically Chief Justice Chaudry. In 2007, Musharraf suspended the Chief Justice of the Supreme Court. Subsequent protests lead to deaths and an investigation by the Supreme Court, who makes an historic decision to reinstate Chaudry, a decision with which Musharraf complies. Later that year, Pakistan re-elects Musharraf by a majority of the vote. However the Supreme Court announces the winner cannot be determined without completing a review of whether Musharraf legitimately stood for re-election as General. Following the elections and the announcement of the Supreme Court, a suicide bomb targeted at previously exiled Prime Minister Benazir Bhutto occurs at her homecoming parade, which sparks Musharraf to declare a state of emergency. In the wake of this incident and the state of emergency, Musharraf not only dismisses Chaudry again, but uses the state of emergency to force the resignation of 37 judges who refused to take oaths of loyalty, dismisses other judges resisting Musharraf's rule, and places 10 Supreme Court judges under house arrest. Later that month, he uses the state of emergency and suspension of the Constitution (and essentially the suspension of the Supreme Court) to accede to the Presidency.

Executive use of declaring countries in states of emergency is fairly common after crisis incidents. A state of emergency allows the executive to act quickly and decisively in order to remedy an issue or in order to insure public safety. However, the potential for strategic maneuvering abounds due to the relatively wide discretion executives hold in declaring what an emergency is and when the country is in one. Similarly, it is not unheard of, even in developed nations, for an executive to reach beyond the subject of the state of emergency to pursue additional goals.¹ Therefore I posit that the state of emergency stimulus will impact the decision-making process of the executive, and not the legislature, in how it treats the judiciary. I expect to see

¹ See the example of the French government discussed earlier in this chapter.

an increase of critical behavior, both in rhetoric and action, toward the judiciary after a country declares a state of emergency. I expect this result for two reasons. Embodying a tougher stance on ‘justice’ and ‘judicial authority’ during times of crisis could be easily couched in the narrative of regaining control. Therefore the executive could find it feasible to sway public opinion in favor of his or her actions in the context of the national crisis. If the executive does not observe this path as plausible, it is also possible that the executive could pursue his or her goal despite using the emergency narrative. If normal constitutional procedures are suspended, then the typical recourse for an attack on judicial authority may also be suspended. Thus, if the executive observes the consequences as insignificant, the actor may forsake an emergency narrative and seek to depress judicial authority in any case.

There is certainty in the redistribution of power when it is clear the how the power will be redistributed upon ideological lines. According to the balance of power hypothesis mentioned in Chapter 2, shifts in power reconfiguration should prompt a corresponding modification in behavior. However, actors may also respond to the direction and magnitude of that realignment. As institutions become nonaligned or more greatly aligned with any given actor, that actor should be more likely to increase its critical behavior of judicial power. If the court was entirely ideologically proximate to the executive, if the court then became completely unaligned with the executive should have a greater impact on executive behavior than a small shift in ideological composition of the judges. Changes in membership or ideological composition of institutions create uncertainty between national actors. Different compositions require institutions to reevaluate current relationships and modify those relationships when necessary. The greater the degree of uncertainty, the higher its potential to impact interbranch relationships. Higher degrees of uncertainty arise when the magnitude of the shift in the institution’s composition is at its extremes. For example, when the change in the composition of the court switches by one member, uncertainty about in-

terbranch relationships should be relatively low. A small fraction of the court shifted. However when the membership of the court changes by 75%, the uncertainty relating to the interbranch relationship is much higher.

Composition Shift Hypothesis: Changes within the composition of other institutions should modify executive, legislative, and judicial behavior. When the magnitude of the shift is at its greatest, there should be a corresponding increase in behavioral responses by each institution. As an opposing institution becomes further unaligned with a political actor, we should see critical behavior toward the judiciary increase and supportive behavior toward the judiciary decrease. As well, when an opposing institution becomes more aligned with a political actor, critical behavior should decrease and supportive behavior should increase.

Stimuli resulting from electoral uncertainty have been the most tested hypotheses relating to the manipulations of judicial authority. In studying when and how extrajudicial institutions, specifically executives, subvert the judiciary, many comparative court scholars focus on political fragmentation within a society. Research demonstrates that the judicial institution typically flourishes when executives face a society with a high degree of political fragmentation (Ramseyer 1994; Bill Chavez 2004; Ginsburg 2003; Chavez 2004; Ríos-Figueroa 2007). Ramseyer (1994) points to the credible expectations about political turnover via the election cycle. Politicians strive to enact their policy preferences. The extent to which politicians can successfully implement their goals depends upon the strength of their majority. When political preferences at the societal level are fragmented, groups are able to amass less votes. The amount of votes collected by legislatures or executives impacts the judiciary by signaling to judges the credibility of override or retribution for outcomes of their decisions, especially political ones. As such, this line of thinking typically leads scholars to determine that higher degrees of political fragmentation lead to a

correspondingly higher degree of judicial independence.

The problem with current scholarship lies in both conceptualization and operationalization of how political fragmentation impacts judicial independence via the responses of the executive or legislature. Conceptually, if increases in political fragmentation motivate politicians to manipulate the judiciary, when political fragmentation is high these actors should be constantly influencing the judicial institution. However this is not an accurate observation nor a rational line of thought. First, and what much of the literature assumes, is that a high degree of political fragmentation should primarily motivate actors to influence the judiciary when an election cycle is imminent in which a politician or party may lose.² Therefore this effect may become dynamic only near election cycles. Consequently it should also be at its lowest effect immediately after an election when coalitions, majorities, or public opinion is at the apex of cohesion.

Political insurance is one instance of how the stimulus-response framework applies in cases of electoral uncertainty. Other indicators of electoral uncertainty can arise out of a dissatisfied electorate, where members of society engage in political activism to protest or change the policies of current leadership. Events occurring at a societal level, such as protests, riots, or attacks, perform an important function of indicating citizen dissatisfaction to the current government. Executives frequently respond to these events in order to appease their constituents and maintain stability. Executives, especially in Latin America, perceive such events as a credible threat to their rule since a number of leaders in Latin America have been ousted as a direct result of extreme dissatisfaction from constituents (Hochstetler 2006). Executives are thus concerned with tenure of their rule and may use the judiciary strategically to insure the maintenance of power. Executives may manipulate judicial power to either legitimize policy preferences and control discontent populations (Shambayati and Kirdis

² This is stated and modeled explicitly by Ramseyer (1994)

2009; Woods and Hilbink 2009) or to appease constituents by assenting to reforms.

Just as certainty and information in the relationship between branches can modify behavior, uncertainty as to the outcome of power being redistributed between national actors can affect behavior. Uncertainty within redistribution of power occurs when (1) some instance of membership in a coordinate institution changes and (2) when it is unknown how the coordinate branch will engage in the game of politics. Given the imperfect information available to actors, we should observe actors adopting more cautious strategies to avoid losing a politically important ally in the future. As such, when a shift redistributes power in a way where the outcome is unknown, there should be a corresponding decrease in both critical and supportive behavior of judicial power.

SHIFTS FROM PRESSURES ON NORMS

The second broad category of a shift occurs when actors exogenous to the national institutions exert pressure on the government to conform to democratic norms. Events that create this type of shift rearrange the cost-benefit analysis that institutions calculate when deciding how to engage with judicial power. While institutions may wish to subvert or support the judiciary, ultimately, in democracies, an actor's behavior is accountable to its audience outside of the government. Pressures stem from both the societal and international level. When pressures arise from these external actors, the costs of not conforming to the norms of democracy rise in such a way where it is more beneficial to respect norms of democracy rather than to fulfill one's own policy preference. Governments can conform to the norms of democracy, in this case, by respecting and upholding the rule of law. Thus, on average, when shifts from external actors pressure governments on judicial power, we should see a corresponding increase in supportive behavior and decrease in critical behavior.

International and societal actors can effectively pressure the government to conform to the norms of democracy. International actors can exert pressure on a country's

government by threatening to withdraw aid. Economic factors incentivize politicians to influence the judiciary. From the literature, it is already known that there is a connection between economic factors and judicial independence. Herron and Randazzo (2003) note that lower levels of economic growth correlate with a higher probability that a post-communist court will use judicial review against a legislature. In Argentina and Brazil, economic conditions represent external constraints to judicial decision-making (Kapiszewski 2013). From research by Moustafa (2007), we also know that courts in authoritarian regimes assist in the progress of economic growth. Chavez (2004) specifically identifies the import of economic growth by arguing it enhances competition and catalyzes political fragmentation.

Perhaps the most influential international donor during the time period under study is the United States. Until 1989, the United States, in the midst of the Cold War, engaged in proxy warfare with the U.S.S.R. around the globe. Latin America, as a geographically proximate neighbor to the U.S., was a prime target for the United States to exert its influence in the ideological battle against communism. To do this, the U.S. provided a vast amount of aid to Latin American countries committed to democratic norms, or perhaps committed to stamping out communism. In the 1980s, then-President Ronald Reagan began a program designed to promote the administration of justice by providing avenues for legal training and administrative management of the courts. Thus the United States attempted to battle the growth of leftist movements within Latin America by expanding the rule of law and access to the courts. If courts are better equipped to efficiently manage caseloads and the application of the law remains stable, then supposedly this efficiency would translate to increased outcomes for laypeople interacting with the legal system.³ Part of the ability for

³ Of course the primary benefit for the United States may have been that consistency in the rule of law builds confidence for private investors to funnel money into the region. This motivation for providing financial support to Latin America squares with U.S. foreign policy. In addition, it would make sense given that the economic situation in the 1980s for Latin America was troublesome for many countries. The sharp increase in oil prices of the 70s funneled investments into Latin

courts to develop the rule of law is for other institutions to respect the nature of an impartial court. In effect, this should mean that institutions do not subvert judicial power. Thus we should expect to see that as the change in the amount of bilateral aid from the United States increases, legislatures and executives should decrease critical behavior of judicial power and increase supportive behavior of judicial authority. If this relationship is true, then we should also observe a symmetrical and opposite relationship. As the change in the amount of aid from the United States decreases, we should observe executives and legislatures engaging in more critical behavior and less supportive behavior.

International organizations may also induce governments to conform to democratic norms. International institutions can act as a legitimizing tool for a country. This process can be especially important for countries in the process of democratic consolidation. One way in which this legitimizing function occurs is by joining an international organization. Requirements and standards regulating which countries accede to an organization impact the behavior of national politicians in obvious ways. As an illustration, to enter Mercosur (Southern Common Market in Latin America) countries must demonstrate commitment to key objectives such as: signing free trade agreements, free circulation of individuals between member states, and common dispute resolution mechanisms. Similarly, behavior within a country that diverges from these fundamental objectives or protocols results in consequences at the international level. In June 2012, Paraguay was suspended from Mercosur due to what other members argued was a breach of the constitution by ousting President Lugo through a hurried impeachment.⁴ The relationship between national politics and international

American countries. When oil prices plummeted, Latin American countries found themselves in a dire position - they were unable to repay the rising cost of their debts. The U.S. eventually created Brady Bonds to help debt-ridden countries, partially because of the U.S.'s reliance upon primary resources from Latin America. For either motivation, the correlational arrow points in the same direction. That the U.S. was interested in the promotion of the rule of law in Latin America and provided aid to secure its development.

⁴ Some argue the impeachment was previously orchestrated. Lugo claims the impeachment was

and regional organizations is important in how the latter shapes activities in the former. I argue that seeking membership in one or more of these organizations represents a shift that motivates actors to influence the judiciary. I assume that membership in an international organization should impact the executive institution (in a presidential system) more than the legislature, as the executive acts as head of state and is the primary point of contact. Therefore when a country seeks membership in an international organization, executives should be more likely to positively influence judicial power and decrease their critical behavior toward the judiciary over their legislative counterparts.

The last type of shift that induces governments to support judicial power occurs when citizens engage in political expression. Citizens in democratic countries are able to engage in politics through conventional means, like voting, and unconventional methods, like protests. Conventional methods of political engagement, while impactful, only occur in pre-determined periods. By examining only instances of voting as a way to engage with the elected institutions, it limits the potential impact of people to hold their governments accountable. Because citizens are able to engage in unconventional methods at any given point in time, elected institutions receive cues about the preferences of their constituents in real time. Political expressions, such as protests, can thus act as a check on both the executive and the judiciary as a means to insure that agents stay faithful to the will of their principals. Similar to the degree of change in bilateral aid, I do not believe that simply one instance of a political expression will constrain institutions. In order for executive and legislatures to leave their policy stasis with respect to the judiciary, a significant event must take place that necessitates their attention. As theorized in Chapter 2, policymakers simply cannot devote unlimited time and attention to all relevant policies, rather they disproportionately examine certain policy issues in a given time point. Thus, we should only

actually a form of a coup since he was only given two hours to prepare a defense.

observe executives and legislatures modify their behavior when the count of political expressions increases. I posit, then, that as the number of protests increases, there should be a corresponding increase in supportive behavior and decrease in critical behavior.

C

3.2.3 RESPONSES

During the decisional process of responding to an environmental stimuli, actors consider two aspects of the response: the form and the direction. I define the form of a response to represent the behavioral options available for actors that would aid in manipulating judicial power. For executive and legislative actors, the form of response can take on rhetoric or action. The direction of the response relates to the intentions of the responding institution and can be either be supportive of judicial power or detrimental to it. For example, in 1993 when the United States government pressured the Costa Rican president to overturn an unfavorable Supreme Court decision (unfavorable to the United States), President Fournier publicly responded by praising the independence of the judiciary and communicated to the United States that the government does not interfere with judicial decisions. This would be an example of a rhetorical strategy that is supportive of judicial power in the dataset.

Narratives that institutions build and construct around courts can result in powerful statements of support or damning evidence of ineffectiveness. Whether or not the rhetoric used captures the performance of the judicial institution or not, shaping perceptions of the judicial institution can be an important and effective tool in order to achieve goals. It is relatively well established that presidents effectively use communication with the public in order to promote issues or achieve preferences (Kernell 2006). Similarly, legislatures with attentive constituents or electorally competitive seats may find the use of rhetoric helpful (Cook 1996). Given the nature of this

study, it is rational to assume that both the executive and the legislature would also employ narratives as a means to influence the judicial institution. Narratives can dilute diffuse support of the court, diminish constituent's accessing the court, or promote its efficacy and efficiency. President Fujimori of Peru in 1990 degraded the court by calling the judiciary "a bunch of jackals" and naming the court as a "palace of injustice." Only one month later did he then initiate corruption charges against approximately 700 members of the judicial system, where his previous statements laid the groundwork for the justification of his actions. Moreover, rhetoric can transform into a strategy in order to shift blame when a controversial shift, or stimulus, occurs within the system, even if this perception does not correspond with facts. Therefore rhetoric may be strategic or sincere. However the intention behind its use is immaterial to this framework since the research in this dissertation specifically focuses on how stimuli may induce rhetoric, instead of examining whether the rhetoric produces the intended effect on judicial independence.

Legislatures and executives may then frame narratives about the judicial institution in order to satisfy audiences or drive certain agendas. I expect for rhetorical strategy to be a viable option to satisfy an audience when the cost of responding is high in combination with a high cost of taking action. Rhetoric can also become useful when the consequences of its use are low. Stated differently, for an inattentive public or an noncompetitive electorate, creating narratives about the judiciary can be useful (especially when it is used to shift blame) when retribution for those actions is not likely.

Another behavioral option of responding to shifting environments takes the form of action toward the judiciary by any of the three major national actors. Traditional lines of thought on how judicial independence develops, or is threatened, stems from the actions of external actors. Scholars developing conceptual frameworks of judicial independence note the connection between *de jure* and *de facto* components. Re-

sponsive actions could contain either, however one frequently studied area relates to constitutional reforms. Specifically, scholars believe that actors provide powers of judicial review within constitutional reforms in order to bolster judicial independence (Domingo 2000; Finkel 2004, 2008; Bowen 2013). However, constitutional reforms intended to provide a higher degree of independence do not always yield the desired result and can have opposite effects (Couso 2003; Chua and Haynie 2016). Apart from constitutional reforms, actors manipulate judicial independence by specifically ignoring or not complying with judicial rulings, preempting action by the court, or requesting injunctions and arrests that align with the actors' goals. What is clear from this line of literature is the import of executive and legislative actions toward the judiciary.

From this line of reasoning, it is rational to extrapolate that executives and legislatures use other types of actions in order to influence the judiciary. Previous literature discussed the importance of executives and legislatures manipulating power. However they can also act to change the courts in regard to membership, security, and institutional stability. Executives and legislatures can manipulate the membership of courts by bolstering or diminishing judicial independence. In order to insure policy preferences or policy legitimation by the judicial system, actors might pack the courts, remove judges from office, or use unconstitutional methods of appointment, as Bill Chavez (2004) notes occurs in Argentina. Actors can also bolster the judiciary by making non-controversial appointments in the sense that executives and legislatures abide by the constitutional process, which can similarly lead to insurance of policy preferences after actors leave office. The security of both courts and personnel functions similarly. Executives and legislatures can undermine security, by seizing the building, or bolster judicial power by increasing security and instituting protocols to insure the safety of judges. Finally, influencing the stability of the institution through changes in budgets or salaries, making inquiries or investigations, or suspending the

judiciary in its entirety.

3.3 TESTING EXECUTIVE AND LEGISLATIVE MANIPULATIONS

In order to test the implications of my theoretical framework, I collected data on all interactions between the executive and the judiciary, and the legislature and the judiciary between 1980-2004 for all democratic Latin American countries.⁵ The unit of analysis is the country-year. Ideally, the dataset would contain 25 years of information for each of the 18 countries in the study, which would provide a total of 450 observations. However, within the time frame, a number of countries were controlled by authoritarian regimes.⁶ Therefore, the total number of observations for the time period is 341. The information on the behaviors of the executive and legislature toward the judiciary come from Latin News, a reliable source of information for political behavior in Latin America (Helmke 2010). From this source, I coded information on the initiator of the manipulation, the target, the method of manipulation, and the intended direction of influence upon judicial power. The method of manipulation can take one of six forms: (0) if the initiator attacks with words, (1) if the initiator calls to mobilize actors, such as protests, (2) if the initiator directly threatens the judiciary, (3) if the initiator takes direct action, (4) if the initiator promises a type of action relative to the judiciary, (5) if it is a court ruling, and (6) if the initiator demonstrates support for the judiciary. For the outcome variable, I combined these methods into two forms: critical responses and supportive responses. Moreover, to understand the differences in legislative and executive behavior, I subset the data

⁵ Latin America is defined as the geographic region south of the U.S. border that was colonized by Spain or Portugal. The following countries are represented in the dataset: Argentina, Bolivia, Brazil, Chile, Colombia, Costa Rica, the Dominican Republic, Ecuador, El Salvador, Guatemala, Honduras, Mexico, Nicaragua, Panama, Paraguay, Peru, Uruguay, Venezuela.

⁶ Mexico 1980-1996, Guatemala 1980-1995, Honduras 1980-1981, El Salvador 1980-1983, Nicaragua 1980-1989, Panama 1980-1988, Brazil 1980-1984, Bolivia 1980-1981, Paraguay 1980-1991, Chile 1980-1988, Argentina 1980-1982, Uruguay 1980-1984, Peru 1992-1999.

into two models: one for legislative behavior and the other for executive. Therefore I have four outcome variables to test the implications of my theoretical posits: executive critical behavior, executive supportive behavior, legislative critical behavior, and legislative supportive behavior.

The intended direction of manipulation takes on two values: (-1) if the initiator sought to diminish judicial power and (1) if the action or rhetoric supported judicial power. As an example, in June of 1991 the Bolivian Congress voted to allow eight members of the Supreme Court to return to their posts after the U.S. ambassador suggested impeaching them would look bad for investments. In this observation, Congress would be the initiator, the Supreme Court is the target, the method of action would be coded as (3), a type of direct action, and the direction of the behavior would be intended as a positive influence on judicial independence, a (1). I use this coding schema for all executive and legislative behavior toward the judiciary over the period of 1980 - 2004. As such, it is possible to contain multiple observations in any given year, or month. To account for multiple observations, I calculated the count of critical and supportive behavior for each institution for each country-year in the dataset.

For the explanatory variables, the data originate from a variety of sources. I extracted information on protests and attacks from the Social, Political, and Economic Event Database (SPEED). From SPEED I calculated the frequency of attacks, events of political expression, for each country year in the dataset. By reorganizing this data I include variables for the count of political expression events and politically motivated attacks. Events are considered political expressions if they are initiated by a non-governmental entity, public, threatening, and contain a political message. Examples of these events would be speeches, signs, mass demonstrations, strikes, and protests. Politically motivated attacks are those events that cause harm for political reasons. Examples of politically motivated attacks include riots, assassinations, kid-

nappings, and border incidents (Hayes and Nardulli 2011). Both of these variables were standardized.⁷ To calculate the number of new inter-governmental organizations a country joined each year I used the Correlates of War II International Governmental Organizations Dataset. I transformed this data to conform with my dataset and generated a new variable, which is a dichotomous indicator of whether or not a country joined a new international organization. To account for political system information, I collected data from the Dataset of Political Institutions. From this data, I calculated a number of variables central to my theoretical framework. To account for my theoretical posit that shifts within institutions impact behavior, I coded whether or not there was a change in the executive or legislature's major party. For example, if Mexico's Institutional Revolutionary Party (PRI) party lost control of the legislature to the National Action Party (PAN), that year would be coded as (1) and (0) otherwise. I use the State of Emergency Mapping Database to account for when a country's normal rule of law is suspended. This variable takes on a value of (1) if the country was under a state of emergency at the time and (0) otherwise. The descriptive statistics of these variables can be found in Table 3.1. Finally, I include data that captures ideological alignment of the court, as well as a variable that measures the number of judges whose term is ending in a given year. I transformed variables from Pérez-Liñán and Castagnola (2014) into two measures: (1) The change in the percentage of judges aligned with the president, (2) the change in the percentage of judges aligned with the party in power. I also include a variable that captures the age of the Constitution as a way to control for the establishment of democratic norms.

Yearly economic data for each country comes from the World Bank. For data on the change in national economic indicators, I use the change in percentage of

⁷ When standardizing a variable, a researcher subtracts the mean from the original value. That score is then divided by the standard deviation. Thus the variable is centered around 0, the mean. A value of -.5 represents a half standard deviation below the mean, while a value of 2 indicates two standard deviations above the mean.

inflation for all years in the study. I partitioned this variable into two series of data: one that captures a positive change in the percent of inflation and another that captures the negative percentage change in inflation. From the World Bank, I also collected information on the amount that of financial support that the United States provides bilaterally. As well, I separated this variable into two series: one that captures a positive change in the amount of bilateral aid, and one that captures a negative change in the amount of bilateral aid. To avoid issues of simultaneity, I lagged all of these variables by one year. I also standardized all of these variables due to efficiency concerns within the Bayesian model.

Table 3.1: Descriptive Statistics: Explanatory and Outcome Variables

| Variable | Observations | Mean | SD | Min | Max |
|---------------------------------------|--------------|------------|-----------|-----------|-----------|
| Explanatory Variables | | | | | |
| New IGO Membership | 341 | .823 | .37 | 0 | 1 |
| Legislative Turnover | 341 | .378 | .485 | 0 | 1 |
| Executive Turnover | 341 | .481 | .500 | 0 | 1 |
| State of Emergency | 341 | .07 | .265 | 0 | 1 |
| * Δ in Judges Aligned w/ Pres. | 341 | -.001 | .301 | -1 | .677 |
| * Δ in Judges Aligned w/ Party | 341 | -.005 | .297 | -1 | .666 |
| *Political Expressions | 341 | 1.11 | 2.5 | 0 | 25 |
| Age of Constitution | 341 | 24.9 | 29.9 | 0 | 140 |
| *Pos. Δ in Inflation | 341 | 9,237 | 15,395 | 0 | 67,012 |
| *Neg. Δ in Inflation | 341 | -8,832 | 16,368 | -69,362 | 0 |
| *Pos. Δ in U.S. Aid | 341 | 741936 | 6,681,690 | 0 | 9,000,000 |
| *Neg. Δ in U.S. Aid | 341 | -9,000,000 | -659,825 | 8,003,407 | 0 |
| Outcome Variables | | | | | |
| Executive Critical Behavior | 341 | .387 | .989 | 0 | 8 |
| Executive Supportive Behavior | 341 | .140 | .451 | 0 | 4 |
| Legislative Critical Behavior | 341 | .237 | .641 | 0 | 4 |
| Legislative Supportive Behavior | 341 | .140 | .288 | 0 | 3 |

*Indicates a variable that is standardized within the model. Dispersion of the un-standardized measure is represented here. I standardized the variables due to model inefficiency. Standardization of variables generally quickens the time it takes for a model to converge.

To test the implications of my theoretical framework I apply Markov Chain Monte Carlo techniques to a Bayesian poisson regression. I use this specific method for a number of reasons. Bayesian analysis proves to be powerful for data with unique

Data-generating processes (Wakefield 2013). Second, I prefer Bayesian modeling as it can not only handle small sample sizes, but the theory behind the model reflects the reality of the data-generating process: that data are observed and can be updated with new information. Conversely, frequentist models assume data are fixed, with parameters remaining constant over repeated random sampling. For this type of data, those frequentist assumptions are simply untrue. Therefore I use a Bayesian poisson regression for theoretical and practical reasons.⁸

One primary issue with making inferences from the output of Bayesian modeling techniques is the question of whether the model converged in the posterior distribution. In fact, inference is only valid when the model has converged and the results come from the actual posterior distribution. To insure convergence, I used a burn-in period of 1 million and an MCMC sample size of 100,000. I ran multiple diagnostic tests to determine whether the model converged, since there is no single definitive evaluation of convergence. I used trace plots to check for well-mixed models, autocorrelation plots to insure the influence of time is negligible, and tested for effective sample sizes. Graphical summaries of these convergence diagnostics for each parameter in the model are reported in the Appendix. Effective sample sizes provide information on the amount of observations that were drawn independently in the MCMC chain. Models with high ESS (effective sample sizes) are efficient. The average efficiency for the Executive behavior models was approximately 9% and was 10% for the legislative behavior models. For Bayesian models using Metropolis-Hastings algorithms, efficiencies at or above 10% are considered good and below 1% should generate a cause for concern (StataCorp 2017). All these indicators provided supportive information that the models had converged. Additionally, the acceptance rate for the Metropolis-

⁸ In addition to the model I report here, I ran a number of zero-inflated negative binomial models. In the inflation equation, I accounted for judicial independence and the squared value of judicial independence, however the results remained essentially the same, neither judicial independence nor its squared value predicted the count of zeros, and the model was less efficient. Therefore I report the simpler model here.

Hastings algorithm varied between 20% and 30% for all models, which is close to the optimal rate of 23% (Gelman et al. 1995).

A central concern with Bayesian modeling revolves around the use of prior distributions, where the prior represents the belief about modeled quantities before empirical evidence is examined. For the following analyses, I use a low-information prior of a normal distribution with wide variance that models the uncertainty surrounding the quantities of interest. A weakly-informed prior is an appropriate strategy for a number of reasons. First, there are a relatively small number of observations in the dataset. With a strongly-informed prior, the prior distribution may overwhelm the data and result in Type I or Type II errors. Therefore I explicitly model the uncertainty surrounding the quantities of interest to let the data ‘speak for themselves.’ Second, the theoretical framework examines and expands on the assumptions of previous literature, therefore there is no a priori reason to have strong theoretical certainties about each quantity of interest. As such, using a weakly-informed prior assumes the principle of indifference and assigns equal weight to all possible probabilities. Though there are different perspectives on the use of non-informative and informative priors, Gelman et al. (2008), among others, notes that weakly-informative priors can be appropriate and should be used by researchers when those circumstances arise.

3.4 ANALYZING MANIPULATIONS IN POWER

Table 3.2: Legislative and Executive Influences on Judicial Power

| Critical Methods | | | Supportive Methods | | |
|------------------|-----------|-------------|------------------------|-----------|-------------|
| | Executive | Legislature | | Executive | Legislature |
| Attacks | 34 | 10 | Promise of Action | 10 | 5 |
| Mobilization | 21 | 11 | Public Show of Support | 12 | 9 |
| Threats | 25 | 8 | Direct Action | 29 | 31 |
| Direct Action | 65 | 65 | | | |
| Totals | 145 | 94 | Totals | 51 | 45 |

I premise my theory on the belief that certain stimuli from power redistribution and electoral uncertainty influence how executives and legislatures behave in regards to judicial power. The theoretical framework notes that executives and legislatures will influence judicial power as a means to achieve their policy preferences. I argue that these interactions are responses to changes in the political environment. In the rest of the section, I first discuss descriptive statistics and then conclude with a discussion of the results of the Bayesian model.⁹

It should come as no surprise that executives in presidential systems are the most frequent manipulators of judicial authority. Table 3.2 shows that executives critically influence the judiciary approximately 1.3 times more than their legislative counterparts. Though both will use forms of direct action at the same rate, executives are much more likely to use critical rhetoric in order to manipulate the judiciary. On the other hand, both legislatures and executives offer support, whether through rhetoric or some form of action, at nearly the same rates. In the data, the bulk of manipulations on the judiciary stem from presidential systems, rather than assembly-elected or parliamentary setups. Due to decentralization of power, the power balance between major national institutions can shift easily (perhaps resulting from willing actors seeking to gain more power). In addition, there are simply more countries operating under presidential systems than parliamentary or assembly-elected ones. Nonetheless, most manipulations on the judiciary occur in presidential systems (95%), while assembly-elected systems and parliamentary systems represent 4% and 1%, respectively.¹⁰

⁹ After the results of the Bayesian poisson regression, I performed two interval tests to procure the probability of each explanatory variable's effect on executive and legislative treatments of judicial power. The first determined the probability that the variable's posterior mean was above or below 0, depending on the theoretical posit. The second was an interval test that examined the probability that the variable's posterior mean lie in between -.1 and .1.

¹⁰ Brazil, Guatemala, and Honduras each used the assembly-elected system for various and short periods of time: Guatemala from 1994-1995, Honduras from 1982-1989, and Brazil from 1980-1985. From 1980-1984, Panama employed a parliamentary system

3.4.1 INFLUENCES ON EXECUTIVE BEHAVIOR ON JUDICIAL POWER

Table 3.3: Influences on Executive Behavior toward Judicial Power

| Explanatory Variable | Critical Behavior | Supportive Behavior |
|--|-------------------------|-------------------------|
| Redistribution of Power | | |
| State of Emergency | .579 (.076, 1.04) | .516 (-.341, 1.28) |
| Change in Govt's Vote Share | -.227 (-.434, -.023) | .141 (-.208, .482) |
| Executive Turnover | .809 (.318, 1.28) | 1.39 (.722, 2.05) |
| Change of Court Alignment | .824 (.278, 1.40) | .532 (-.278, 1.38) |
| Legislative Turnover | -.569 (-1.06, -.05) | -1.03 (-1.73, -.349) |
| Pressures on Norms | | |
| New IGO Membership | -.415 (-.817, -.006) | -.044 (-.693, .663) |
| *Positive Change in U.S. Bilateral Aid | -.971 (-1.57, -.212) | -.743 (-1.47, -.005) |
| *Negative Change in U.S. Bilateral Aid | .004 (-.129, .213) | .613 (-.018, 1.17) |
| *Political Expressions | .232 (.061, .378) | -.204 (-.727, .213) |
| Age of Constitution | -.001 (-.008, .004) | .001 (-.008, .010) |
| Constant | -1.04 (-1.48, -.599) | -2.57 (-3.37, -1.85) |
| Observations | 341 | 341 |
| Acceptance Rate | .25 | .22 |

*Denotes a standardized variable.

Table 3.3 presents the results from the Bayesian poisson regression over two outcome variables of executive behavior: critical responses (toward judicial power) and supportive responses. I find support for my theoretical posits that shifts in the political environment that predict how shifts within the distribution of power in a country acts as an opportunity for the executive to modify its behavior toward judicial power. The results of the Critical Behavior Model are more robust in that a greater number

of environmental shifts alter executive behavior. In Figure 3.1, I have plotted the predicted effect on executive behavior for both the critical and supportive models. The figure provides results for two tests of the posits surrounding how executives behave during periods of power reconfiguration. I posited that, if political insurance theory accurately describes executive behavior, we should observe an increase in supportive action and rhetoric when an executive may leave office. In the graph at the bottom of 3.1, there is a strong association between executive turnover and observed supportive behavior by the executive. In fact, 99% of the time when there is turnover in this institution, there is an associated increase in supportive behavior. This provides additional support for the political insurance hypothesis. As well, it confirms the theoretical posit within the dissertation that other types of executive behavior are theoretically relevant to understanding the growth of judicial power. Although the results do indicate support for political insurance theory, this effect may be attenuated by the results from the Critical Behavior Model. Turnover in the executive institution is also associated with a large increase in the amount of critical behavior toward the judiciary. This finding corroborates the results of Pérez-Liñán and Castagnola (2014) who discover that constitutional reforms increase the instability of the court. Executives may make promises to reform the constitution and increase judicial power, but that action may come with additional strings attached that concomitantly undermine the judiciary. Another explanation could be that executives engage in critical behavior during periods of turnover as a last-ditch effort to maintain power within the executive institution. Either way, this finding calls into question the extent to which executives solely support judicial power when leaving office.

When normal constitutional procedures are suspended via national emergencies or crises, power is typically concentrated within the executive. Thus, this shift within the balance of power should have an effect on executive behavior. As hypothesized,



Figure 3.1: Predicted Effects on Executive Behavior

This graph contains the effects for all dichotomous variables in the supportive and critical executive behavior models. I calculated the effect by subtracting the predicted value at when the variable takes on a 1 minus when the variable takes on a value of 0.

when a country declares a state of emergency, the executive increases its subversion and support of the judiciary. Executives choose critical responses in 98% of the cases when there is a declaration of a state of emergency and will bolster the judiciary 89% of the time. When a country declares a state of emergency, it is the case that almost every time, we should observe an increase in critical behavior, but only about three-quarters of the time will the executive also support judicial power. This dual strategy is not surprising. Executives can use the drastic change in the suspension of the regular institutional order to achieve the policy goals most attractive at the time. Since I assume that executives can pursue multiple goals in reference to judicial power, it is rational that this actor would use the occasion to take either strategic path. In both instances, it provides additional support that executive behavior is highly impacted by instances of upsets in the balance of power.

The alignment of the legislature strongly conditions how executives use rhetoric or action when attempting to manipulate the court. The plot in Figure 3.4 demonstrates that the change in the governments vote share decreases the amount of critical behavior. When the government is faced by a large opposition there is a corresponding increase of critical response by approximately .65. As the alignment of the legislature shifts toward the ideological preferences of the executive, the effect reduces substantially, and eventually leads to a decrease in critical behavior at its maximum value. This result, in tandem with the results on the alignment of the court and the degree of electoral competition, demonstrates the importance of the degree of a shift in the political environment. While previous work has accurately predicted the importance of elections or a fragmented government, the results from the critical behavior model demonstrate that what may modify executive behavior the most is when the stimulus that changes the political environment moves more than average.

Shifts within the constitutional order and executive and legislative institutions strongly impact how the executive behaves toward judicial power. Along the same

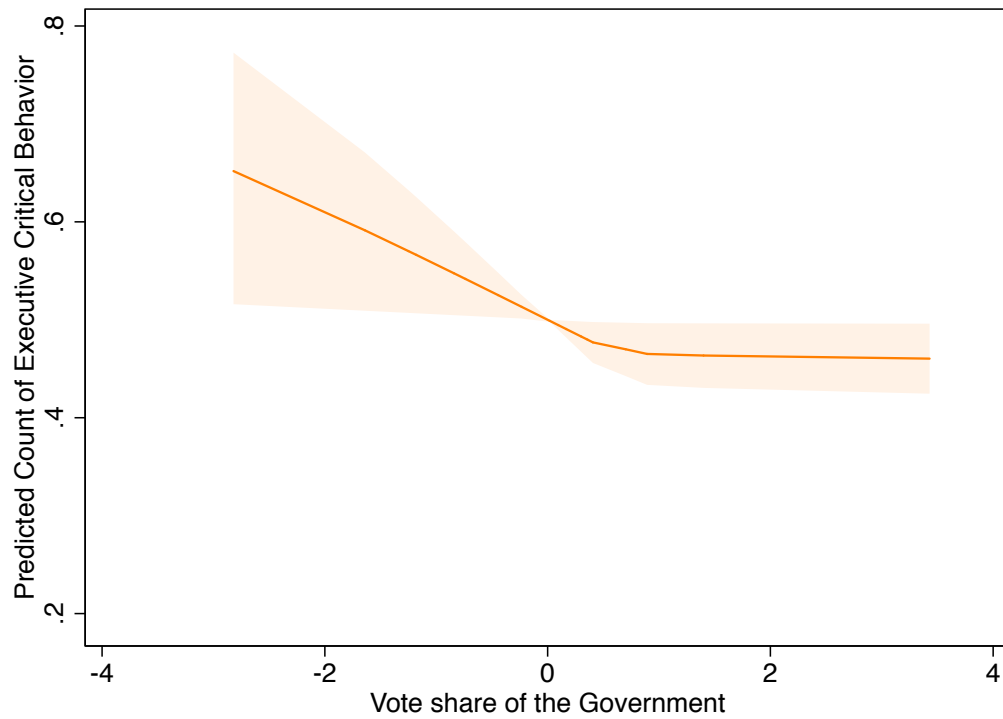


Figure 3.2: Predicted Count of Executive Critical Behavior over Government's Share of Votes in Legislature

This graph displays the standardized values of the government's vote share in the legislature. A value of 0 represents the mean. A value of 1, for instance, represents one standard deviation above the mean. In this case, it represents the government holding a larger vote share in the legislature than average.

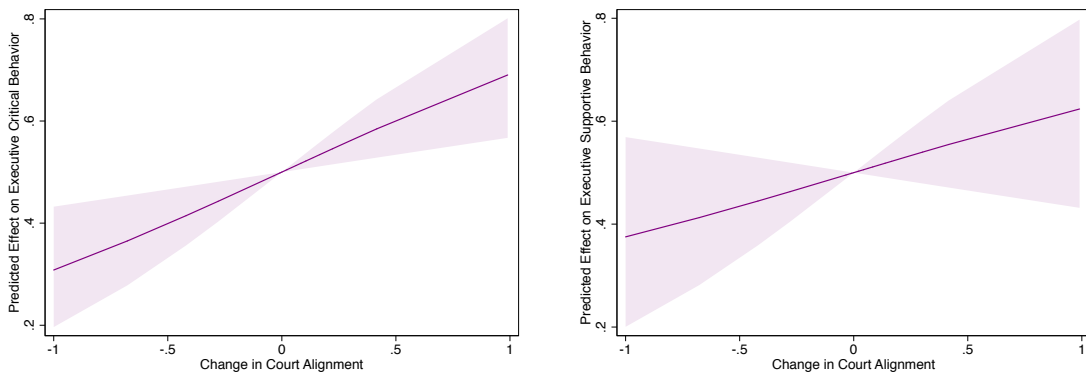


Figure 3.3: Predicted Count of Executive Behavior for Shifts in the Alignment of the Judiciary

vein, the degree of change within the alignment of the court is strongly associated with the executive modifying its critical behavior toward the judiciary, but not its supportive behavior. As the court moves away from complete alignment with the executive (denoted by -1 in Figure 3.5), the executive increasingly engages in critical behavior toward the judiciary. When the court is fully aligned with the legislature, critical behavior increases by .7, on average. This finding demonstrates that executives are particularly responsive to the degree of change within the court, not simply that the court has undergone some type of turnover within its membership. However this result is not born out in the Supportive Behavior Model. While the effect of moving away from alignment with the president is positive, the credible intervals surrounding the effect are wide, which indicates that there is not a theoretically meaningful difference between when the court is fully aligned with the executive or fully aligned with the legislature when examining supportive behavior of the executive. Perhaps in democratic countries, this result is intuitive. When a court is aligned with the executive in a democracy, supposedly the court carries some degree of legitimacy already. Therefore there would be no need to increase supportive behavior toward the court, as the executive does not need to engage in legitimizing the regime.

The following results from the Critical Behavior and Supportive Behavior models of the executive provide initial support on the balance of power and certainty hypotheses. When power is redistributed within or among national institutions, executives become incredibly motivated to alter how they behave toward judicial power. Mostly, this behavior comes in the form of critical action or rhetoric. While some variables positively impact the amount that an executive engages in supportive behavior, only when the executive leaves his or her institution do we then observe an effect that is positive in 99% of the cases. However, reconfigurations of power that result in uncertainty in interbranch relationships has the predicted effect for both critical and supportive behavior models. Recall that without complete information,

executives should not want to engage in either critical or supportive behavior toward the judiciary, because it is uncertain how the new institutions will engage in politicking with one another. Legislative turnover corresponds with a decrease in supportive behavior 99% of the time and a decrease in critical behavior 98% of the time.

I find support for my theoretical posit about the relevance of new actors in the political environment. In years when a country plans to accede to a new international organization, the executive is 98% less likely to behave detrimentally to the judicial institution. In other words, on some level international organizations are ‘effective’ modifiers of behavior by serving as a watchdog on how executives treat the judiciary. Notably, however, membership in a new international organization does not *increase* executive behavior that augments judicial power. I find strong backing for the additional expectation that new actors should lead to a decrease in critical and supportive behavior due to the uncertainty surrounding how power would be redistributed.

3.4.2 INFLUENCES OF LEGISLATIVE BEHAVIOR ON JUDICIAL POWER

Do environmental stimuli impact how legislatures influence judicial power? Literature has typically only examined the interactions between executives and judiciaries. I posit that (1) the legislatures seek to manipulate the judicial institution and (2) that certain stimuli will also condition the various actions taken by the legislature. Table 3.4 presents the results of the legislative models that examine which stimuli impact its behavior. In my theoretical framework I posited that shifts that exert pressure on the government’s support of norms and the nature of rebalancing power are important to understanding why an actor modifies its behavior. However, the legislature should also use the opportunity of new actors in national institutions to modify their behavior toward the courts. I find some support that shifts in the redistribution of power and pressures on democratic norms act as opportunities of which legislatures take advantage. I plotted the effects from the dichotomous variables on

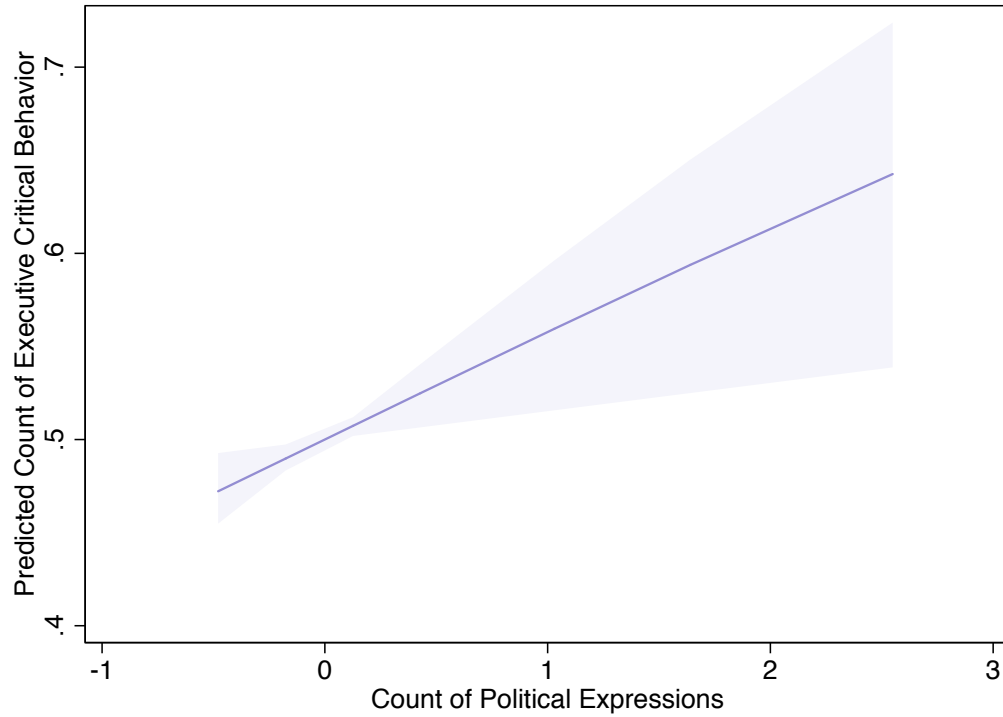


Figure 3.4: Predicted Count of Executive Critical Behavior over Count of Protests

This graph displays the standardized values of the government's vote share in the legislature. A value of 0 represents the mean. A value of 1, for instance, represents one standard deviation above the mean. In this case, it represents the government holding a larger vote share in the legislature than average.

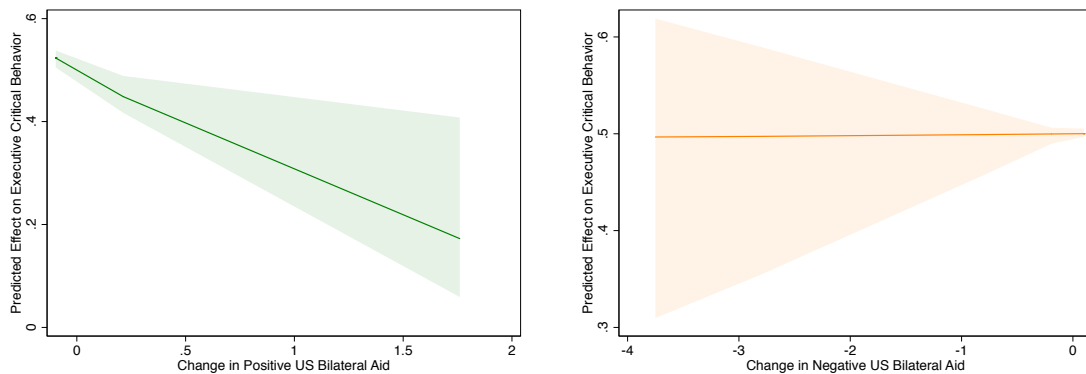


Figure 3.5: Predicted Count of Executive Behavior for Shifts in the Alignment of the Judiciary

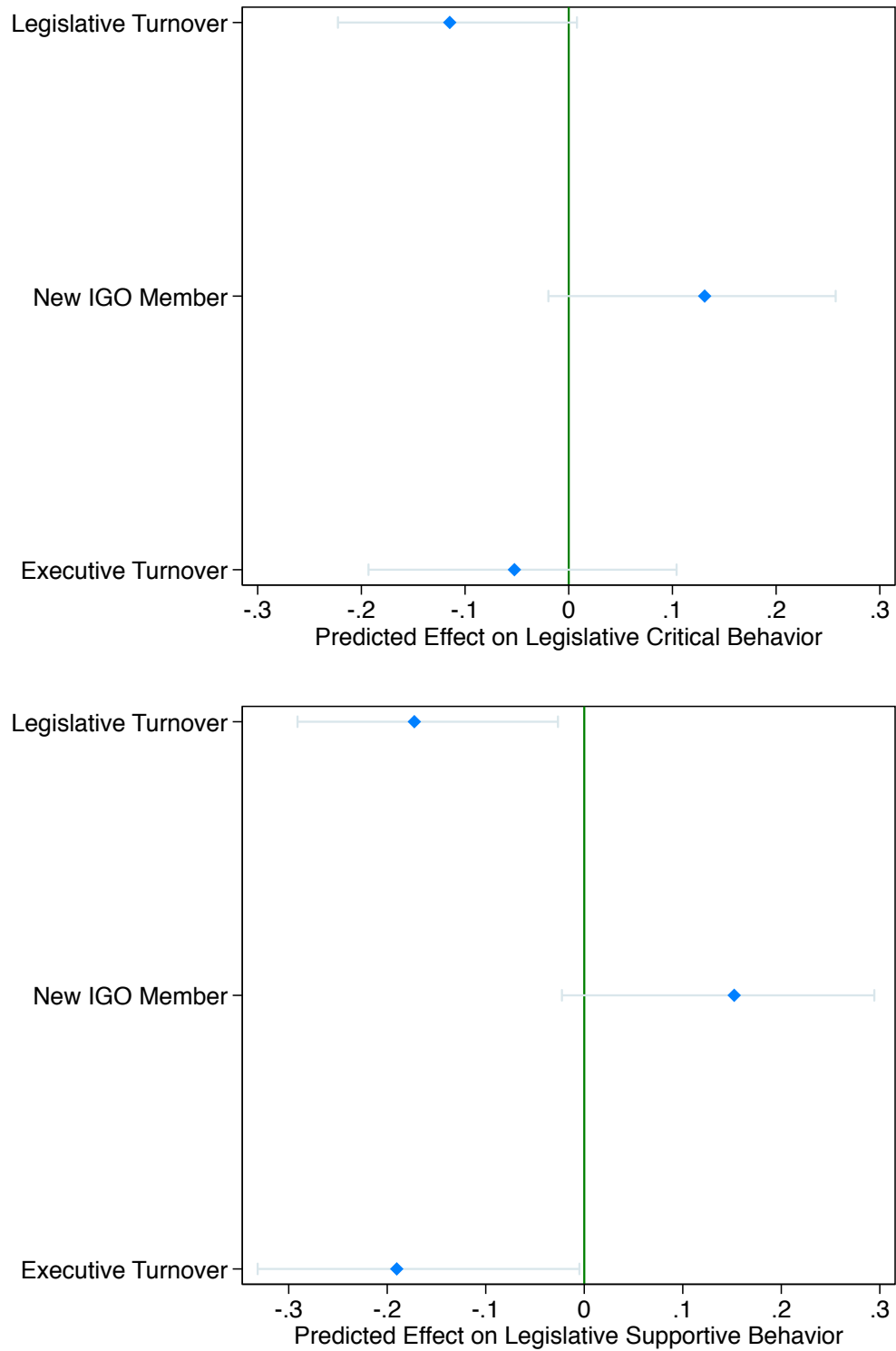


Figure 3.6: Predicted Effects on Legislative Behavior

This graph contains the effects for all dichotomous variables in the supportive and critical executive behavior models. I calculated the effect by subtracting the predicted value at when the variable takes on a 1 minus when the variable takes on a value of 0.

Table 3.4: Influences on Legislative Behavior toward Judicial Power

| Explanatory Variable | Critical Behavior | Supportive Behavior |
|--|-------------------------|-------------------------|
| Power Reconfiguration | | |
| Executive Turnover | .549 (-.079, 1.13) | .787 (.088, 1.44) |
| *Change of Judges Aligned w/ Party | .782 (.046, 1.53) | .138 (-.798, 1.10) |
| Legislative Turnover | -.215 (-.815, .422) | -.973 (-1.72, -.214) |
| *Change in Vote Share of Government | .078 (-.178, .336) | () |
| Democratic Norms | | |
| *Count of Political Expressions | -.273 (-.737, .100) | .151 (-.203, .442) |
| New IGO Member | -.474 (-.957, .032) | () |
| *Positive Change in U.S. Bilateral Aid | -.836 (-1.52, -.089) | -.716 (-1.45, .013) |
| *Negative Change in U.S. Bilateral Aid | .684 (.040, 1.22) | .741 (-.023, 1.49) |
| Control Age of Constitution | -.009 (-.020, .001) | -.015 (-.031, -.002) |
| Constant | -1.29 (-1.86, -.752) | -1.89 (-2.40, -1.42) |
| Observations | 341 | 341 |
| Acceptance Rate | .22 | .21 |

legislative critical and supportive behavior in Figure 3.6. The executive behavior models demonstrated that executives conditioned their behavior on when shifts occur in the judiciary. The results from the legislative model are not as optimistic with respect to the redistribution in the balance of power. I did find a similar result for the legislative behavior models that when power reconfiguration occurs in the executive branch, the legislative branch is less likely to behave in a supportive manner. However the effect is essentially null examining the relationship between the uncertainty generated by turnover in the executive and the decrease in critical behavior. The effect is modest - hardly better than flipping a coin.

Similar to the executive models, the legislature also modifies its behavior when

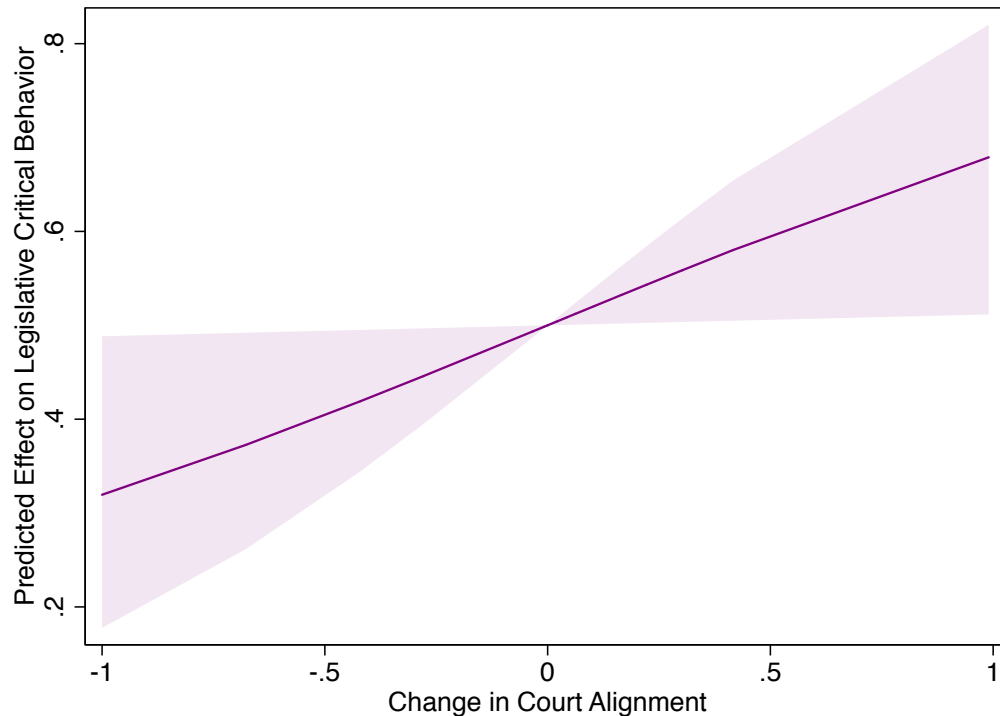


Figure 3.7: Predicted Count of Critical Legislative Behavior over Change of Court Alignment

there are changes to the court's ideological alignment, as seen in Figure 3.7. When the court is completely aligned with the ruling party, critical legislative responses decrease by approximately .6, on average. As the court moves further away from an alignment with the ruling party, there is an associated increase in critical legislative behavior. Just as within the findings in the executive model, changes in the ideological membership of the court greatly impact how legislatures behave with respect to critical behavior, but not supportive behavior.

One way to determine how uncertainty impacts legislative behavior is to examine how the institution modifies its behavior during elections. If political insurance theory applies to the legislative branch, then we would expect to see an increase in supportive behavior when the chance of the ruling party leaving office is greater. However, the results of the supportive behavior model in Figure 3.6 point to a different story. When the ruling party is removed from power, (i.e. when there is turnover), the

shift decreases legislative supportive behavior by nearly 1 response. One explanation for this result is that ruling parties in legislatures cannot accurately predict when they will keep or lose power and subsequently decrease their behavior toward judicial power. An alternative explanation lies in using the judiciary as an electoral strategy. If we believe that ruling parties in legislatures can accurately predict when they will lose power, then it is possible that they choose not to support judicial power as a way to diminish its importance in a campaign. However when the party believes it will maintain power, it uses the promise of judicial reform as a party platform for reelection, despite whether or not they intend to follow through. If the second narrative captures legislative behavior, then it provides an interesting insight into how the legislature and executive use judicial power during instances of electoral uncertainty.

Finally, in Figure 3.6, I observe mixed support for my expectation that acceding to new international organizations should increase supportive behavior and decrease critical behavior. I find that when a country accedes to a new IGO, legislative behavior increases in both critical and supportive methods. Perhaps the dual strategy of the legislature stems from the multiple and potentially varied preferences within that institution. The dual strategy observed in the relationship between legislative behavior and membership in new international organizations, as well as the relationship between declaring a state of emergency and executive behavior warrants further review. One behavior may be centered on rhetoric and the other on forms of action. Due to data limitations, it is impossible to test within the current dataset.

In my theoretical framework, I also posit society can act as a catalyst for the legislature to support judicial power. Dissatisfied electorates can act as powerful persuasive forces by using the tools of political expression available. Unfortunately passionately discontented groups may also use violent tactics to secure their preferred policy change. The theory states that the more political expressions that occur (non-

violent) should positively impact the legislature supporting the judiciary. This is because people not involved with political expression events may be more sympathetic if the citizens present their voices in an acceptable manner, instead of a violent one. And as the amount of expression events grows, it may indicate larger support within society for the cause. On the other hand, as the number of violent events grows, the legislature should be less supportive, and increasingly critical, of the court. The results in Table 3.4 provide some support for the theoretical posit that the greater the amount of protests, the larger the effect would be on legislative behavior. When protests occur, legislative behavior does alter in the predicted directions. 91% of the time, the presence of protests will lead to a decrease in critical behavior, while in 83% of cases it will exert a positive effect on supportive behavior. However, the intuition that the effect on legislative behavior will grow over the number of political expressions does not hold. In effect, no matter the number of political expressions, critical behavior decreases and supportive behavior increases. What makes this result doubly interesting is that as the count of protests grew, critical behavior by the executive toward the judiciary also increased.

3.5 CONCLUSION

The relationship between judicial independence, democratic rule, and the stability of the rule of law is unquestioned by scholars. Judiciaries with high levels of independence typically occur in democratic countries who value the maintenance of the rule of law. However judicial independence, which I conceptualize as the power of the judiciary, is a nebulous concept that is both hard to define and measure. Central to most studies on judicial independence is the assumption that executives can manipulate the amount of power and autonomy a judiciary contains. This foundational assumption within the literature has not been theoretically explored or empirically tested. As such, the primary goal of the dissertation is to provide insight on the

relationship between extrajudicial institutions and the autonomy of the judiciary. The motivating question of this chapter is: when and why will actors attempt to influence judicial authority? The simple answer is that executives and legislatures manipulate judicial power when changes in political environments occur. These shifts send important signals to the executive or legislature on how the actor should treat judicial power: critically or affirmatively. I find support for traditional hypotheses on the development of judicial power, as well as some novel and exciting results that support my theoretical posits.

Previous literature indicates that executives behave in one of two ways to influence judicial power. One theory notes that executives cede power to the judiciary when the leader perceives a potential loss of power. If the executive is aware that he or she will lose in an upcoming election, the leader will shift power to the judiciary to strengthen the institution with the goal that when the leader exits, his or her policy preferences will survive (Ginsburg 2003; Ginsburg and Versteeg 2014; Finkel 2008). A second situation occurs when national parties are weak and political competition is high, incumbents find deferential courts as stronger allies than independent ones (Popova 2010). However, if executives and legislatures only influence the judiciary when political fragmentation is high or when those actors are on the cusp of leaving office, then all the activity of those actors should be clustered around those crucial times. My theoretical framework tells a different story. I theorize that shifts to environments represent stimuli to which actors can respond. Certain stimuli will provoke responses from the executive and legislature to influence judicial authority positively or negatively in order to achieve some policy preference. These stimuli stem from international, national, and sub-national levels and function as signals to executive and legislative actors that strategic behavior in manipulating the judiciary is a rational path forward.

Using Markov Chain Monte Carlo techniques applied to Bayesian regression, the

results demonstrate that executives and legislatures do respond to dynamic environments, especially when the status quo of power could be affected by an environmental shift. I find support for my central posits that power redistribution and electoral uncertainty act as important stimuli that induces the legislature and executive to modify their behavior. I find additional support, but interesting qualifications, for previous theoretical posits like political insurance theory. This theory expects executives to increase supportive behavior toward the judiciary when there is a reasonable expectation that he or she will leave office. The results provide strong evidence that this is the case. Executives can accurately detect when their fate in office is coming to an end versus when they will win an election. They increase supportive behavior when they lose, but not when there simply are elections. However, there is also an uptick in critical behavior by the executive, which illuminates that executives may empower the judiciary to seek policy insurance, but undermine it simultaneously. One might rationally expect that political insurance also explains the actions of the legislative institution when facing elections. However, I find that legislatures decrease their supportive behavior when they lose elections and increase it when they do not. This could be an indication of a political insurance by avoidance. If ruling parties do not include judicial reform as part of their platform when they likely face defeat, it is possible the issue would not become a major part of other parties' platforms. In a way, it insures the status quo of the interbranch relationship by avoiding the issue.

Power redistribution has a potent impact on legislative and executive behavior, though its effects manifests themselves differently for each institution. Executive critical behavior is highly determinant upon changes within coordinate institutions. Executives seek to undermine judicial power when the judiciary moves farther away from the executive ideologically. Change in membership on the court similarly impacts the way in which executives treat courts. This result supports the theoretical intuition that power redistribution greatly impacts the executive. This makes sense

especially for Latin American countries where power has typically been concentrated in the executive since gaining independence from Spain in the 19th century. Even though it regards the treatment of the judiciary, legislatures are less impacted by changes in the judiciary than changes within the executive. Given the degree of power concentration within the executive, it seems reasonable that legislatures are galvanized by executive turnover, not cautioned by it.

Another key finding from the results shows the importance of international organizations to the stability of judicial power. When countries become members of new international organizations, executives are much less likely to negatively manipulate judicial authority. Executives concerned with membership being denied or approved recognize the inherent value of an independent judiciary to most international organizations. As such through the process of membership, these organizations serve as watchdogs on executive behavior, where executives believe the best strategic option is to conform to international norms on not undermining judicial authority. Another way to interpret this result is that international organizations affect policy change, or at least temporary behavioral change. For policy makers or international groups concerned with human rights, this should be an encouraging result since judiciaries with higher degrees of independence respect the rule of law.

The central purpose of this chapter is to examine the mechanics occurring underneath judicial independence: how it develops and who is involved in its development. I find support for my theoretical framework with originally collected data in Latin America from 1980-2004. The key finding from the results is that judicial power can be subverted or bolstered by both executive and legislative institutions for a variety of factors. Executives are particularly motivated by changes in the environment that shift the status quo of power, while legislatures are motivated by electoral uncertainty.

CHAPTER 4

THE POWER OF THE PEN

“It proves incontestably, that the judiciary is beyond comparison the weakest of the three departments of power, that it can never attack with success either of the other two; and that all possible care is requisite to enable it to defend itself against their attacks” - Federalist No. 78

Scholarship typically perceives the judiciary as a weak institution that relies on enforcement or compliance by other actors for judicial decisions to be carried out. As a result, judicial power, and the development thereof, is contingent upon the support from institutions, actors, and environments external to the judiciary. However, this argument rests upon the assumption that the judiciary can only increase power by way of ruling against the government incrementally to build support via the rule of law. While the power of the American judiciary seems to have developed along this path, judges outside of the United States may use different strategic paths to expand judicial power.

Opposite to the mysterious beings behind the velvet curtain in the American Supreme Court, Latin American judges can and do take public stances or protest against the treatment of the judiciary. The 1985 Constitution in Guatemala established an independent judiciary that created a robust legal system. Later modifications came in 1994 with a new criminal code that strengthened the due process system. Strains on the court resources became burdensome and the Court petitioned the Guatemalan legislature for an increase in the judiciary’s budget. The legislature responded to this open request by doubling the budget of the Guatemalan legislature.

Not all cases of judicial self-empowerment result in such positive outcomes. Judges use protests as signals for other institutions or the public to their policy and legal preferences, though with varying success.

Hugo Chavez's 1998 electoral platform centered on reforming the Constitution and strengthening the economic conditions of the country and its poorest people. After historically low voter turnout, Chavez took the office of the executive in February 1999. While economic conditions worsened, Chavez sought to fulfill his campaign goal of reforming the Constitution by calling upon the people to vote for in a Constitutional Assembly to create a new Constitution. Over 70% of voters agree with this course of action and the assembly is elected with the power to disassemble both the standing Supreme Court and legislature. In the meantime, the Court takes and rules on a case and issues an opinion that does not allow for the executive, Chavez, to campaign in local elections. Chavez takes the opportunity to appeal to the public with targeted attacks on the integrity of the judiciary. In addition, in a speech to the branches of government, Chavez discusses his plans to defy the court's ruling. As a form of protest, the justices walk out during his speech. However, these protests and rulings could not halt the progress of the Constitutional assembly. Eventually the court deferred to the authority of the Constitutional assembly, however the Chief Justice resigned in protest.

The quote from Federalist No. 78 at the beginning of the chapter presents a partial picture of judicial behavior in Latin America. The truth in the difficulty of the judiciary to defend itself against attacks from other institutions is apparent from the political maneuverings of Chavez's early days in the presidency. Despite rulings, protests, and resignations, the judiciary was still subject to the manipulations of other institutions. However, Latin American judges' concern with the legacy and functioning of the judiciary does lead them to employ other strategies at self-empowerment. The focus of this chapter examines the various strategies judges use

and the environmental conditions under which judges manipulate judicial power.

What conditions facilitate strategic behavior by judges? Under what conditions will judges use different strategic options over others? To answer these questions, I develop a theoretical framework that posits certain political environments should condition strategic judicial behavior. Given that the courts under study in this dissertation are not elected, I posit that judges behavior will be contingent on the redistribution of power and the degree of power concentration within the executive and legislative institutions. To test the implications of my theoretical framework, I collect original data on the interactions between two dyads: the executive-judiciary relationship and the legislative-judiciary relationship. I test my theoretical posits in the region of Latin America from 1980-2004 using a Bayesian poisson model.

The results indicate that courts do not condition their behavior on the outcome of elections, rather that the ideological makeup of other institutions and the tenure of veto players is what impacts judicial behavior. Furthermore, while judges do frequently manipulate their institutions power through rulings, they use a range of other behaviors to pursue their goals relative to judicial power. Judges in Latin America play an active role in participating in the development of the power of their institution. Figure 2.4 demonstrated that this type of judicial activism was generally on the rise. Given that many courts now use technological advances to improve communication with their audiences, it is fair to assume that judges will not passively let others manipulate judicial power.

4.1 PREVIOUS EXPLANATIONS OF COMPARATIVE JUDICIAL BEHAVIOR

As noted by Epperly and Lineberger (2017), the theoretical frameworks used to analyze judicial behavior in the comparative context typically begins by transplanting theories designed for the American judicial system into comparative environments. Even assumptions underlying the American-designed theories can go unchallenged

when applied to a comparative context. As the quote at the start of this chapter demonstrates, Alexander Hamilton and scholars today still conceive of the judiciary as the weakest branch. While comparative courts scholars have ventured outside the repository of theoretical work in American courts, this assumption still persists within much of the discipline's work on comparative courts.

In considering rational judicial behavior, scholars naturally default to the most commonly studied and theorized perspective of examining how judges decide when faced with constraints from external actors. The basis of such studies adopt the basic assumption from Gely and Spiller (1990) and Eskridge and Ferejohn (1992) that judges are sophisticated thinkers who recognize that, in equilibrium, the best option is constructing reversal-proof opinions. Carrubba (2005) formally demonstrates this equilibrium as it applies to international courts. While they can facilitate compliance with an agreement, international courts cannot deepen cooperation when constrained by the preferences of governments. Similarly, the implication from this model catalyzed research examining how judicial power develops outside consolidated democracies. Ríos-Figueroa (2007) echoes the importance of this implication in a study of Mexico where he finds a correlation between a high degree of fragmentation and judicialized policymaking. Ginsburg (2003) similarly theorizes the rational behavior of courts is to develop the institution's political authority incrementally, though his argument departs from tradition as he argues judges make these strategic choices without considering their appointers' political views.

Generally the focus of comparative court studies centers around the conditions under which judges make strategic choices, related to a wide array of outcomes. It seems logical to first examine the extent to which judges behave strategically when deciding the outcomes of a case. When deciding whether or not to grant leave to appeal, Epstein, Knight, and Shvetsova (2001) note that judges do behave strategically and that behavior is predicated on the interaction between the judiciary and other

institutions. Herron and Randazzo (2003) find additional support that the power of the executive directly influences judicial behavior, specifically when judges nullify laws. In a similar vein, Iaryczower, Spiller, and Tommasi (2002) note the strategic importance of the pivotal judge when the strength of the executive is high. Helmke (2002, 2005) demonstrates that during institutional uncertainty, judges strategically defect in their decisions to signal not the current executive, but the incoming government of future loyalty. Certain conditions may also induce judges into the strategic choice of judicial restraint. Judges may find it more advantageous to not take action, rather than engaging in politically controversial questions that threaten their institutional power (Moustafa 2003; Ginsburg and Moustafa 2008; Couso 2003; Woods and Hilbink 2009).

However, of greater interest both theoretically and normatively, is the relationship between judicial behavior and judicial independence. Its normative importance stems from the strong relationship between a high degree of judicial independence and commitment to the rule of law. And it is of theoretical import to scholars who understand the normative consequences but have so far failed to pin down exactly how and when judicial independence develops. To what extent can judges on top courts or judges in international settings actively and directly shape the power of their own institution? Once perceived as passive players in a system, scholars now question how and when judges utilize their leverage to achieve their personal and policy goals, with such goals ranging from defecting against the executive during times of regime crisis (Helmke 2002, 2005) to supporting questionable regime decisions so as not to threaten career advancement (Ramseyer 1994; VonDoepp 2005).

Limited avenues exist for judges to directly engage with the growth of judicial independence; After all, a judge has an obligation to decide on cases in her docket. Yet judges, as rational thinkers, can simultaneously explore long-term strategies with legal and policy consequences of import while fulfilling their duty on the court. After

observing the growth of power that national, regional, and international courts assumed, questions arose on the process with which judges could build such authority. Specifically these questions first appeared in observing the increasing effectiveness of the European Court of Justice (ECJ), as the court is said to have been the primary promoter of further EU integration. Alter (1998) revitalizes the theoretical perspective that judges accomplish their legal and policy goals by introducing principles in precedent and incrementally applying those principles in later cases. Scholars later inferred that judges not only use legal reasoning as a strategic means to establish preferred policy, but it also serves to protect institutional legitimacy (Weiler 1991; Burley and Mattli 1993; Sweet 2000). Drawing upon this literature Ginsburg (2003) and Carrubba (2009) demonstrate the importance of legal strategy for emerging courts to significantly expand power in the long term without notice or concerns from other political powers in the present.

Courts concerned with developing or maintaining judicial independence can usually be assumed to also consider perceptions of legitimacy as critical for achieving judicial authority. Scholarship notes the relationship can be mutually beneficial, where legitimacy aids in courts using their authority (Staton 2010), which produces a recursive effect thereby enhancing perceived legitimacy of the institution. As rational actors, judges are aware they can take actions to both empower their institution and restrain their decisions for self-preservation. Widner (2001) and Staton (2006, 2010) examine the first approach where judges develop strategies to assert power and enhance legitimacy. Staton (2006) examines this process by examining when the Mexican court promotes case results, finding they do so strategically to influence perceptions of the court.¹ Staton (2010) also examines Mexico's public relations campaign, noting its intended effect of increasing transparency and legitimacy. Widner

¹ The United Kingdom is currently using this approach with the creation of the Supreme Court in 2009 by actively disassociating the court's previous ties with the House of Lords to appear more independent and transparent.

(2001) similarly believes judges in developing countries are active in shaping power, but first must build their own constituency to achieve any of their goals. In fact, she argues, it is the belief in the power of their public audience that led judges in Africa to choose such a path. Nevertheless, attempting to assert or enhance power may not always be the rational choice. Rasmusen (1994) discusses how it is similarly useful for judges to restrain themselves in certain conditions to avoid losing legitimacy in the short-run and preserve its durability in the long-term.

4.2 THEORETICAL FRAMEWORK

4.2.1 ASSUMPTIONS

The theoretical framework for the dissertation rests in a number of critical assumptions within the literature on the nature of the development of judicial independence. Scholars build these assumptions into the definition, conceptualizations, and operationalizations of judicial independence without fully examining the theoretical implications of those posits. The dissertation examines how institutional actors behave toward the judiciary in order to achieve goals, such as policy preferences, policy legitimization, or retention of power. I argue that a series of events determines if and how the judiciary manipulates the power of the judicial institution in order to achieve their goals. To begin, I outline a number of assumptions that ground the theoretical framework.

A pervasive and important assumption of judicial decision-making behavior relies on the belief that judges operate in a goal-based framework. Stated differently, scholars assume that judicial behavior is goal-oriented (Baum 1997). The way in which a judge votes on plenary and *certiorari* decisions stems from his or her preferences on the direction that most closely aligns with his or her goals. If a judge is motivated by an ideological goal of a case, attitudinal preferences will influence the decisional process (Segal and Spaeth 1993; Spaeth 1979; Segal and Cover 1989; Spaeth and

Segal 1999; Segal and Spaeth 2002). Scholars suggest that legal goals, for instance, precedent, also condition a judge to vote in accordance with those preferences, which obviously can differ from policy preferences (Shapiro 1965; Knight and Epstein 1996; Brenner and Stier 1996; Hansford and Spriggs 2006; Richards and Kritzer 2002; Clark and Lauderdale 2010; Lax 2011). Thus there is evidence that judges pursue multiple goals in reference to the decision-making process. It is then safe to assume that judges pursuing a number of strategies relative to each goal may occur in any given period of time. Further, it is possible that judicial behavior that appears inconsistent with one goal, but in reality is consistent when achieving other goals. For example, judges can vote against their ideological preferences at the stage of granting *certiorari* in order to secure establishing precedent at the plenary stage (Caldeira, Wright, and Zorn 1999). As such, it can be considered rational for actors to pursue multiple goals simultaneously, as evidenced by research that finds behavior consistent with this pattern (Baum 1997).

Perhaps the grounding assumption of the framework rests in the rationality of actors. I presume that agents of institutions hold the capability to understand the future consequences of current moves. That is, actors of national institutions modify their behavior at time t based on their perceptions of what will occur in the future, or t_{t+1} . Within judicial literature, the assumption that judges behave rationally is commonplace (Rohde 1972; Epstein and Knight 1998). However, when and why justices behave rationally differs during the stages of the decision-making process (Brace and Hall 1990; Perry 1991; Epstein and Knight 1998; Maltzman, Spriggs, and Wahlbeck 2000; Caldeira, Wright, and Zorn 1999). Scholarship also informs research that judges modify their behavior due to influence from the legislature (Segal, Westerland, and Lindquist 2011; Rogers 2001; Chutkow 2008; Keck 2007; Segal 1997; Hausegger and Baum 1999; Spiller and Tiller 1996) and the executive (Carrubba and Zorn 2010; Wohlfarth 2009; Owens 2010; Bailey 2007; Yates and Whitford 2002).

Related, an assumption critical to scholarship on comparative judiciaries, yet one that has largely been unexplored, presumes that not only will actors behave rationally, but also that these actions result in the intended outcome. For example, recent research discovered that executives facing removal from office recognize that an empowered judiciary will uphold the policy preferences once the executive leaves office. Behaving rationally, an executive may then seek to empower the judiciary in order to insure the continuation of his or her policy preferences. One way in which an executive can directly empower the judiciary is via constitutional reforms of the judicial system. As an example, Mexico's 1994 constitutional reforms provided the court with the ability to declare laws unconstitutional contingent upon one-third of the legislature who passed the law requesting this type of judicial ruling (Finkel 2005). Thus both scholars and actors believe that how institutions behave toward the court matter and, more importantly, that these actions produce the desired results of the goals under pursuit.

The assumption that actors believe that their behavior produces the desired outcome is critical to comparative judicial research, specifically for scholarship on judicial independence. First, it is one way in which scholars define when a high degree of judicial independence exists: when the judiciary acts with autonomy. That is, scholars build the assumption that there is no external influence on the judicial decision-making process into the definition of judicial independence. As an example, Howard and Carey (2004) define judicial independence as

“the extent to which a court may adjudicate free from institutional controls, incentives, and impediments imposed or intimidated by force, money or extralegal, corrupt methods by individuals or institutions outside the judiciary, whether within or outside the government.”

Relatedly, scholars operationalize judicial independence by specifically accounting

for external influences in its measurement. Tate and Keith (2007) use the U.S. State Department country reports to construct an ordinal measure of judicial independence rooted in how outside institutions influence (or not) the judiciary. Cingranelli (2008) similarly operationalizes judicial independence by examining if and how executives treat judges, such as removing judges from office for political reasons or if there is active governmental interference.² Both conceptual beliefs and measurements of judicial independence illuminate an important theoretical implication unexplored within the literature. If both scholars and actors believe national actors can influence judicial independence, then we must also assume that there are a number of instances where actors attempt to manipulate the judiciary beyond what existing theoretical work describes. Carrubba (2009) posits that the key to developing a high degree of judicial independence occurs when justices on top courts incrementally use their rulings to increase the power and legitimacy of the court. The assumption behind that framework is that these rulings cumulatively augment judicial independence.

Due to the nature of the judiciary within different types of systems, the goals of judges can differ widely. In developed democracies, judges examine decisions through the lens of legal or policy preferences. On the other hand in developing nations, judges may be concerned with more basic goals, like the security of their person, rather than institutional stability. When judges are aligned with other national institutions, they can share similar goals to the executive and/or legislature and aid in achieving desired outcomes, such as facilitating economic growth and supporting the legitimacy of the regime (Moustafa 2007). In fact, the Supreme Court of Singapore demonstrates the effects of such an alignment: though the court maintains power of judicial review, it is scarcely used. Approximately 2% of all decisions from 1965-2012 in Singapore review the use of executive power. However, when the Supreme Court does utilize this tool,

² For a comprehensive discussion on the conceptual definitions and measures of judicial independence, see Rios Figueroa and Staton (2012).

it frequently reinforces the legitimacy of the executive to maintain the status quo (Chua and Haynie 2016). In addition, judges can pursue their own goals, given that judges are willing to take advantage of opportunities. Those goals can relate to legal policy, the judicial institution, and a judge's personal and professional life.³

4.2.2 STIMULUS AND RESPONSE

4.2.3 STIMULI: INSTITUTIONAL SHIFTS AND INSTITUTIONAL ENTRENCHMENT

Understanding how institutions induce and constrain judicial preferences is critical in the study of how judges operate. In the United States, where institutional structures at the federal level are largely static, theorizing and testing how institutional variation affects judges is rarely possible. Analysts of comparative judicial politics, on the other hand, are faced with an overwhelming degree of diversity in institutional and political constraints that should affect judicial behavior, especially strategic judicial behavior. When scholars discuss strategic judicial behavior in terms of institutional constraints in comparative contexts, the type of constraints can refer to formal constraints on the judiciary, formal constraints stemming from other political actors, and informal constraints arising out of the distribution of power. I posit that shifts in informal constraints rooted in power distribution will be most pertinent to predicting how judges will respond in an effort to bolster its own institution.

Characteristics of governmental systems, such as power distribution within an institutional structure, coalition formation and dissolution, the number of parties in a legislature, all have potential consequences on the decision-making process of judges. These indirect influences affect both the (strategic) options available to judges, as well as the difference in values those options hold. If scholars start with the basic assumption that the goal of any decision is to make a 'reversal-proof opinion', the variations in systems of institutional setup will matter in how judges come to make

³ For a thorough discussion of judge's goals, see Baum (1997).

that decision. If a top court faces a unitary government there is only one veto player to satisfy within the legal opinion. However the simple presence of more than one veto player, as in a divided government or systems with bicameral legislatures, will increase the number of actors a court should satisfy if it does not want its decision overturned. Similarly, systems that induce coalition formation and dissolution or devolution increase the uncertainty surrounding the preferences of the government. In a weak coalition, judges could attempt to satisfy all parties or could act strategically in reference to their own preferences if they hold a credible belief the coalition would dissolve. On the other side, strong coalitions, perhaps with only a few like-minded parties, increase the certainty of government stability and decrease the flexibility for strategic judicial action. Whether these effects exist and to what extent they exert a significant effect on judicial behavior is unknown because comparative scholarship has yet to study these variations from a global perspective.⁴

I posit that the most important characteristic for the purpose of this study will be to examine how the strength of veto players affects judiciaries' willingness to use supportive and critical behavior in order to influence judicial power. The nature of the veto player should have a conditioning effect on whether or not, and the degree to which, judges participate in manipulation of judicial power. When a veto player is strong and could likely block any action from the judiciary, then we should observe a corresponding decrease in the judiciary to undermine or enhance judicial power. However when facing a weaker veto player, we should see judiciaries increasingly use rhetorical strategies or direct action to reconfigure power in their favor. I operationalize the strength of the veto player in a few different ways: the length of its tenure, the vote share in the legislature, number of parties in the legislature, and the restraints

⁴ Unfortunately I cannot directly test any arguments relating to coalition formation and dissolution or on the differences between parliamentary and presidential systems. Out of 450 observations, only 5 observations are ones where the country uses a parliamentary system. Thus this is a potential area for future research to further this argument.

imposed on the executive.⁵

The distribution of power between and among institutions creates an opportunity for judges to behave strategically. The framework of political insurance theories easily fall under consequences toward judicial power because of reconfiguration. Political insurance theory posits that executives, in the face of losing an election, will shift power to the judicial institution as a form of insurance for his or her policy preferences (Ginsburg 2003). By empowering the judiciary, a leader can exit office with assurances (1) that preferred policies remain after the leader leaves and (2) of the leader's personal security. This theoretical framework is premised on the assumption that during times of political uncertainty, specifically around elections, executives will attempt to positively support judicial autonomy whereby the leader can maintain his or her policy preferences after their removal. If the uncertainty of elections provokes an outgoing leader to bolster judicial power, then it may be reasonable to assume that judges also recognize this strategic action by the executive and legislature. If that is the case, then we should observe judiciaries increasing supportive action and rhetoric during years when there are elections in the executive and/or legislature. The rationale being that, anticipating a reconfiguration in power between institutions, the judiciary takes advantage of the opportunity of the transition to bolster its own institution.

4.2.4 BEHAVIORAL OPTIONS: RHETORIC AND ACTION

I posit that the series of events that motivates manipulations of judicial independence occur in roughly two stages. First, a shift to the environment occurs. Second, the judiciary must decide the process of responding to the event. Judiciaries will first decide whether or not the shift necessitates action. Then the actor decides the form

⁵ These operationalizations of the strength of national veto players will be discussed more fully within the research design.

in which the response takes. The process of response represents an important aspect of how actors satisfy their goals relative to judicial power.

During the decisional process of responding to an environmental stimuli, actors consider two aspects of the response: the form and the direction. I define the form of a response to represent the behavioral options available for actors that would aid in manipulating judicial power. I posit that the use of rhetorical strategy can be a useful tool by the judiciary. Narratives can dilute diffuse support of the court, diminish their constituents' ability to access the court, or promote its efficacy and efficiency. Moreover, rhetoric can transform into a strategy in order to shift blame when a controversial shift occurs within the system, even if this perception does not correspond with facts. Therefore rhetoric may be strategic or sincere. However the intention behind its use is immaterial to this framework since the research in this dissertation specifically focuses on how stimuli may induce rhetoric, instead of examining whether the rhetoric produces the intended effect on judicial independence.

Typically viewed as the subdued actor, judges and courts recently moved into the foray of media relations or direct communication with the public. Traditional thought may have conceptualized rhetoric by judges in terms of opinions, however this is no longer the case and may lead to new interactions between courts and their audiences. In Mexico, Staton (2006) uncovered that judges perform an active role in shaping the narrative surrounding the outcomes on select decisions from the Court. That is, in creating newsworthy stories about important decisions, it is possible that judges can increase their authority (Widner 2001). Though Staton (2006) does note that this result is attenuated if the case was likely to garner media attention without judicial promotion, which is usually the case. However, in the new age of media where informers can connect directly with consumers, judicial rhetoric may advance beyond public relations concerning case results. Judicial institutions may find facebook, twitter, and other platforms useful to promote a narrative of transparency, institutional stability,

or even demonstrate independence in itself. As an example, when the Supreme Court of the United Kingdom became its own institution, separate from the House of Lords in 2009, a major concern for the institution was the necessity to appear as a separate and independent body. As it was previously housed in the United Kingdom's Parliament, the U.K. judiciary pursued a number of paths to build institutional legitimacy and appear independent. In 2011 the institution created a twitter account where they publicized important case outcomes, public interactions of the judges, and promoted public accessibility to the Court. It is important to repeat that whether or not the specific actions of public outreach supported judicial independence is not germane to this specific study. What is telling, is that judicial institutions are increasingly becoming actively involved in shaping their own authority and shaping narratives about the judiciary is assumed to be an effective strategy to achieve their goals.

Another behavioral option of responding to shifting environments takes the form of judicial action. Traditionally, scholars believed that judicial power was solely dependent on the actions of actors external the judiciary (i.e. the executive or legislature). However, a new line of research focuses on the extralegal activities of judges and finds that, contrary to previous thought, judges do engage in the development of the judicial system. Judicial actors manipulate judicial independence by specifically ignoring or not complying with other institutions, preempting others' action, or requesting injunctions and arrests that align with the judges' goals. Judges have also migrated to using actions outside of the courtroom. Judges engage in writing editorials (Hilbink 2012), demonstrations (de Haan, Silvis, and Thomas 1989; Berkman 2010; Trochev and Ellett 2014), and networking (Bakiner 2016) in pursuit of institutional goals.

4.3 RESEARCH DESIGN

In order to test the implications of my theoretical framework, I collected data on when the judiciary attempted to empower itself or undermine its power between 1980-2004

for all democratic Latin American countries.⁶ The unit of analysis is the country-year. Ideally, the dataset would contain 25 years of information for each of the 18 countries in the study, which would provide a total of 450 observations. However, within the time frame, a number of countries were controlled by authoritarian regimes.⁷ The total number of observations is 341. The information on the behaviors of the judiciary toward the judiciary come from Latin News, a reliable source of information for political behavior in Latin America (Helmke 2010). From this source, I coded information on the initiator of the manipulation, the target, the method of manipulation, and the intended direction of influence upon judicial power. The method of manipulation can take one of six forms: (0) if the initiator attacks with words, (1) if the initiator calls to mobilize actors, such as protests, (2) if the initiator directly threatens the judiciary, (3) if the initiator takes direct action, (4) if the initiator promises a type of action relative to the judiciary, (5) if it is a court ruling, and (6) if the initiator demonstrates support for the judiciary.

For the outcome variable, I combined these methods into two forms: critical responses and supportive responses. I calculated the frequency of critical and supportive responses to create two outcome variables: the Count of Judicial Critical Behavior and the Count of Judicial Supportive Behavior per year for each country. Thus there is one observation per country-year, where explanatory variables can be: binary (*Executive Turnover*, *Legislative Turnover*, *Fragmentation*), a count (*Executive Years in Office*, *Ruling Party in Power*, *Tenure of Longest Veto Player*) or a percentage (*Vote Share of Government*, *Vote Share of Opposition*, *Vote Share of Opposition Squared*). Descriptive statistics on the outcome and explanatory variables are listed in 4.1.

⁶ Latin America is defined as the geographic region south of the U.S. border that was colonized by Spain or Portugal. The following countries are represented in the dataset: Argentina, Bolivia, Brazil, Chile, Colombia, Costa Rica, the Dominican Republic, Ecuador, El Salvador, Guatemala, Honduras, Mexico, Nicaragua, Panama, Paraguay, Peru, Uruguay, Venezuela.

⁷ Mexico 1980-1996, Guatemala 1980-1995, Honduras 1980-1981, El Salvador 1980-1983, Nicaragua 1980-1989, Panama 1980-1988, Brazil 1980-1984, Bolivia 1980-1981, Paraguay 1980-1991, Chile 1980-1988, Argentina 1980-1982, Uruguay 1980-1984, Peru 1992-1999.

Table 4.1: The Process of Judicial Independence: Motivations and Outcomes

| Variable | Obs. | Mean | SD | Min | Max |
|--|------|------|------|-------|------|
| Explanatory Variables | | | | | |
| Executive Years in Office | 341 | 3.81 | 4.65 | 1 | 35 |
| *Vote Share of Government | 341 | 0 | 1 | -2.82 | 3.42 |
| Fragmentation | 341 | .551 | .498 | 0 | 1 |
| *Ruling Party in Power | 341 | 0 | 1 | -.557 | 4.31 |
| *Vote Share of Opposition | 341 | 0 | 1 | -1.09 | 1.83 |
| *Vote Share of Opposition ² | 341 | 0 | 1 | -.936 | 2.72 |
| Tenure of Longest Veto Player | 341 | 6.03 | 6.39 | 1 | 35 |
| Executive Turnover | 341 | .453 | .498 | 0 | 1 |
| Legislature Turnover | 341 | .34 | .474 | 0 | 1 |
| Outcome Variables | | | | | |
| Count of Judicial Critical Behavior | 341 | .109 | .394 | 0 | 3 |
| Count of Judicial Supportive Behavior | 341 | .37 | .768 | 0 | 4 |

For the explanatory variables, the data originate from a variety of sources. The two outcome variables come from originally collected data for this dissertation. To account for political system information, I collected data from the Dataset of Political Institutions (Cruz, Keefer, and Scartascini 2016). From this data, I calculated a number of variables central to my theoretical framework. To account for my theoretical posit that shifts within institutions impact behavior, I coded whether or not there was a change in the executive or legislature's major party. For example, if Mexico's Institutional Revolutionary Party (PRI) party lost control of the legislature to the National Action Party (PAN), that year would be coded as (1) and (0) otherwise. My theoretical framework centers around the idea that political fragmentation is a key component to understanding institutional behavior toward judicial autonomy and to test for political fragmentation, I use an indicator variable for when the system has a divided government. I also used the Database for Political Institutions to test measures that capture the power structure between the branches. *Executive Years in Office* measures the length of time an executive has held office. *Vote Share of the*

Government captures how large of a majority the government has in the legislature by measuring the amount of seats held divided by the total number of seats.⁸ To capture the power entrenchment from the legislature, I use the variable *Ruling Party in Power* which measures the number of years that the party of the chief executive has held power.⁹ *Vote Share of Opposition* and its squared term capture the total number of votes that all opposition parties have and its squared value, respectively.¹⁰ Finally, *Tenure of Longest Veto Player* measures the number of years the veto player with the longest tenure has been in power.¹¹

To test the implications of my theoretical framework I apply Markov Chain Monte Carlo techniques to a Bayesian poisson regression. I use this specific method for a number of reasons. Bayesian analysis proves to be powerful for data with unique Data-generating processes (Wakefield 2013). Using a Bayesian modeling strategy for this type of issue avoids the underlying theory of frequentist models relying upon long term and large N averages that do not apply in this instance. Second, I prefer bayesian modeling as it can not only handle small sample sizes, but the theory behind the model reflects the reality of the data-generating process: that data are observed and can be updated with new information. Conversely, frequentist models assume data is fixed, with parameters remaining constant over repeated random sampling.

⁸ This variable is standardized. Due to model inefficiency in an initial iteration, I standardized some variables that were contributing to non-convergence. In this instance, negative values indicate a smaller percentage of vote share and positive values indicate a larger percentage of vote share, compared to the average. In the data, the average percentage of government votes in the legislature is 45%.

⁹ This variable is also standardized for model efficiency concerns. The mean of the original variable is 8.2, which means that the average number of years the party of the executive was in power was for 8.2 years. The standard deviation is 14.5 years.

¹⁰ Both of these variables are standardized. Vote Share of Opposition's original mean was 25 with a standard deviation of 23. Vote Share of Opposition Squared's original mean was 1189 with a standard deviation of 1271.

¹¹ In presidential systems, veto players are defined as the president and the largest party in the legislature. IN parliamentary systems, the veto players are defined as the Prime Minister and the three largest government parties.(Cruz, Keefer, and Scartascini 2016)

For this type of data, those frequentist assumptions are simply untrue. Therefore I use a Bayesian regression for theoretical and practical reasons.¹²

One primary issue with making inferences from the output of bayesian modeling techniques is the question of whether the model converged in the posterior distribution. In fact, inference is only valid when the model has converged and the results come from the actual posterior distribution. To insure convergence, I used a burn-in period of 1 million iterations and an MCMC sample size of 100,000. I ran multiple diagnostic tests to determine whether the model converged, since there is no single definitive evaluation of convergence. I used trace plots to check for well-mixed models, autocorrelation plots to insure the influence of time is negligible, and tested for effective sample sizes. The efficiencies of both models centered around 9%. All of these indicators provided supportive information that the models had converged. Moreover, the acceptance rate for the Metropolis-Hastings algorithm varied was .31 for the critical behavior model and .26 for the supportive behavior model, both good indicators of an efficient sampler.

A central concern with Bayesian modeling revolves around the use of prior distributions, where the prior represents the belief about modeled quantities before empirical evidence is examined. For the following analyses, I use a low-information prior of a normal distribution with wide variance that models the uncertainty surrounding the quantities of interest. A weakly-informed prior is an appropriate strategy for a number of reasons. First, there are a relatively small number of observations in the dataset. With a strongly-informed prior, the prior distribution may overwhelm the data and result in Type I or Type II errors. Therefore I explicitly model the uncertainty surrounding the quantities of interest to let the data ‘speak for them-

¹² In addition to the model I report here, I ran a number of zero-inflated negative binomial models. In the inflation equation, I accounted for judicial independence and the squared value of judicial independence, however the results remained essentially the same, neither judicial independence nor its squared value predicted the count of zeros, and the model was less efficient. Therefore I report the simpler model here.

selves.’ Second, the theoretical framework examines and expands on the assumptions of previous literature, therefore there is no a priori reason to have strong theoretical certainties about each quantity of interest. As such, using a weakly-informed prior assumes the principle of indifference and assigns equal weight to all possible probabilities. Though there are different perspectives on the use of non-informative and informative priors, Gelman et al. (2008), among others, notes that weakly-informative priors can be appropriate and should be used by researchers when those circumstances arise.

4.4 ANALYSIS

Table 4.2: Judicial Movements on Judicial Power

| Negative Methods | | | Positive Methods | | |
|------------------|-----------|------------|------------------------|-----------|------------|
| | Frequency | Percentage | | Frequency | Percentage |
| Attacks | 27 | 41.5% | Public Show of Support | 6 | 4% |
| Mobilization | 6 | 9% | Direct Action | 22 | 14.5% |
| Threats | 5 | 7.5% | Rulings | 123 | 81.5% |
| Direct Action | 11 | 17% | | | |
| Rulings | 16 | 25% | | | |
| Totals | 65 | 100% | Totals | 151 | 100% |

*Note: I also coded for instances where the judiciary responded or acted in a way to maintain the “status quo”. In the data there are 8 neutral direct actions, 1 instance of a call for mobilization, and 8 neutral rulings.

Judges in Latin America behave much differently from the mysterious entities behind the curtain in the United States. Not only do judges use traditional legal methods when attempting to expand or alter judicial power, they may simultaneously use threats, protests, or publicly ignore other institutions. In Table 4.2 I list the frequency with which judges use each of these methods in regards to altering judicial power where I have divided the categories by critical and supportive methods of responses. In total, judges typically used supportive responses toward other institutions in order to bolster their own power; 70% of the responses in the dataset

are supportive, while only 30% are critical. Unsurprisingly in terms of how this institution responds, judges mostly behave like judges. Out of the 216 instances of judicial responses, 139 of them came in the form of a ruling. However, judges also frequently used rhetorical attacks on their own institution. Typically these rhetorical attacks come from retiring judges who are dissatisfied with the judicial institution. A retiring Mexican judge noted that there is corruption in 99% of the judiciary. Judges are not as hesitant to take up direct action against the legislature or executive as well. In Nicaragua in 1999, the judges boycotted Congressional proceedings as a way to protest Congressional actions against the Sandinistas in the courts. These examples illustrate the diverse methods of response that judiciaries use in order to alter their own institution's power. Although judicial activity is a rare occurrence in the dataset from 1980-2004, there is an upward trend of activity for judges (and executives and legislatures) after the turn of the century.

Table 4.3: Specific Judicial Actions

| Type of Action | Frequency | Percentage |
|------------------------|-----------|------------|
| Rule Unconstitutional | 28 | 24% |
| Direct Order | 26 | 22% |
| Ignore or Not Comply | 11 | 9% |
| Remove from Office | 9 | 7% |
| Protest | 8 | 6% |
| Open Investigation | 6 | 5% |
| Funding Concerns | 5 | 4% |
| Rule Constitutional | 5 | 5% |
| Dismiss Case | 4 | 3% |
| Injunction | 3 | 2.5% |
| Expand Powers | 2 | 2% |
| Constitutional Reforms | 2 | 2% |

Some categories only occurred once within the dataset: Suspension, Decrease in powers, Holding a plebiscite, Preemption, and Requesting an opinion. A majority of actions were coded into specific categories of responses, but not all of them. I only include instances where I sub-classified these cases.

Table 4.3 lists specific types of judicial behavior that occur in the dataset. From

this information, it is possible to get a more complete picture of how judges in Latin America take advantage of the legal process or other forms of public action in order to achieve their own goals relative to the judiciary. Once again, it is not surprising to observe that judges most frequently behave as judges and rule against the constitutionality of policies or practices. However, they also frequently issue direct orders to other institutions, publicly disregard orders or requests from executives and legislatures, and protest to voice their opinion. Where judges have typically been seen as members of a weaker institution who frequently fall into line with government preferences, these descriptive statistics tell a different story. One observation stemming from these tables is that judges are proactive in diverse fashions in order to alter judicial power. Using an array of methods, judges actively and publicly engage with the executive and legislature for institution building. Another trend is the increasing amount of activity for many countries around the 2000s. It would be reasonable to predict that this trend continues after 2004 and, most likely, continues to increase as countries engage in the process of democratic consolidation. This demonstrates that (1) judges perceive their methods of action and rhetoric as effective strategies and that (2) as countries move into the phase of developing democracies, the battle for power is continually contested.

To test the hypotheses of my theoretical framework, I run two models that capture the different ways that judges modify behavior to shift their own institution's power. The theoretical framework posits that courts should respond to the power structures, and shifts therein, of the political environment. These theoretical intuitions provide strong explanations for when judges seek to bolster the judiciary. Judges take advantage of opportunities when the relationship between the branches is unaligned. Unlike the executive and legislature, turnover in both executive and legislative institutions does not modify judicial behavior. While this is not a direct test of the theory of strategic defection, it does provide additional context to that theory. If judges do see

Table 4.4: Influences of Judicial Behavior

| Variable | Critical Behavior Model | Supportive Behavior Model |
|---------------------------------------|-----------------------------|---------------------------|
| | Mean (Credible Interval) | Mean (C.I.) |
| Years Executive in Office | -.102 (-.261, .024) | -.051 (-.105, -.000) |
| Vote Share of Gov't | -.424 (-.762, -.077) | .201 (-.397, -.000) |
| Divded Gov't | .113 (-.545, .794) | -.257 (-.629, .111) |
| Ruling Party in Power | -.152 (-.686, .318) | -.606 (-.937, -.301) |
| Vote Share of Opposition | .119 (.322, 2.07) | .118 (.644, 1.747) |
| Vote Share of Opposition ² | -.968 (-1.82, -.131) | -.842 (-1.38, -.322) |
| Tenure of Longest Veto Player | .047 (-.033, .124) | .092 (.047, .134) |
| Executive Turnover | .253 (-.571, 1.05) | -.166 (-.689, .335) |
| Legislative Turnover | .144 (-.652, .991) | .198 (-.332, .747) |
| Constant | -2.67 (-3.45, -1.91) | -1.358 (-3.45, -1.91) |
| Observations | 450 | 450 |
| MH Acceptance Rate | .31 | .26 |
| Sample Size | 100,000 | 100,000 |

advantage in strategic defection, they will only pursue this tool within their rulings against the incumbent government, not within the broader behavioral options available to them. Those judiciaries pursuing strategic defection, then, are taking a risk that incoming governments are attuned to the content of decisions issued by the court and disinterested in other judicial behavior. An additional null finding that provides insight into the motivations of judicial behavior is that political fragmentation, in the form of whether or not the government is divided, has no impact on either critical or supportive behavior. Although judicial independence flourishes during periods of political fragmentation, it essentially has a null effect on the propensity of judicial supportive behavior.

Though the judiciary does not modify its behavior when it faces uncertainty from new actors in its peer institutions, veto players, and the degree of power entrenchment of those veto players, does condition the behavior of judges. Similar to the

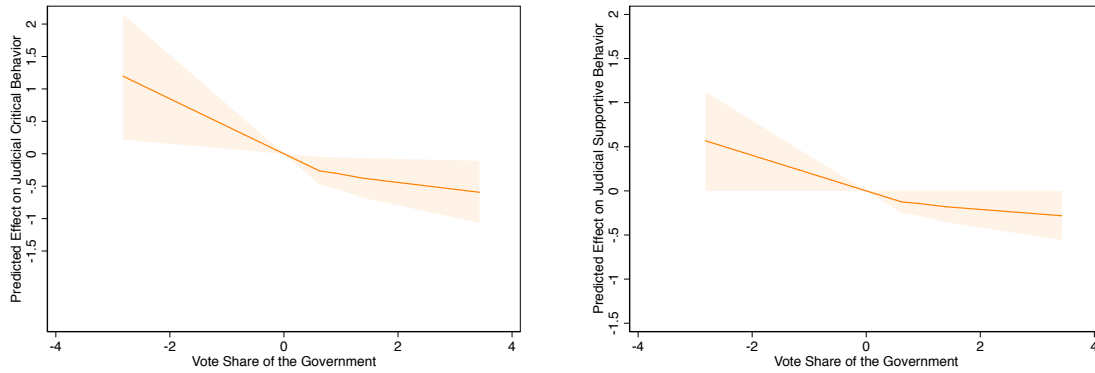


Figure 4.1: Effect of Vote Share of Government on Critical and Supportive Judicial Behavior

This graph displays the standardized values of the government’s vote share in the legislature. A value of 0 represents the mean. A value of 1, for instance, represents one standard deviation above the mean. In this case, it represents the government holding a larger vote share in the legislature than average.

executive, the ideological makeup of the legislature impacts both critical and supportive behavior of the judiciary. Figure 4.1 displays both of these effects. When the government’s share of votes in the legislature is low, critical responses by the judiciary increase by over 1 and supportive responses increase by approximately .5. Though the direction of the effect is similar for critical and supportive behavior, the vote share of the government impacts critical judicial behavior to a larger degree, by increasing critical responses more at its lows and creating a larger propensity to not undermine the judiciary when the legislature and government are aligned. What matters for judicial behavior, then, is not shifts in single institutions, but the relationship between institutions. This seems reasonable given that justices seek to make reversal-proof opinions. Thus the degree to which their opinions may be counteracted is an important environmental condition to consider when pursuing their goals.

In the same vein, the amount of votes held by all opposition parties similarly modifies the actions and rhetoric of judges. Figure 4.2 depicts the impact of the government’s vote share and its quadratic effect on critical and supportive behavior. The direction and magnitude of both variables exhibits a similar effect on judicial

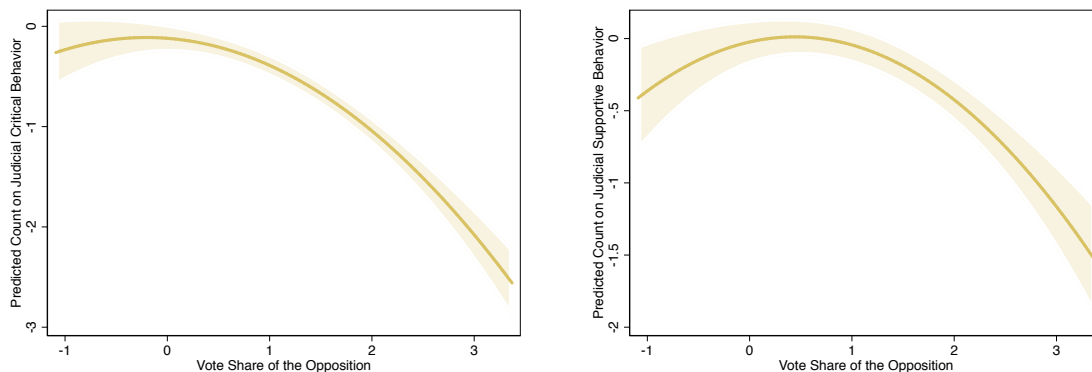


Figure 4.2: Effect of Vote Share of Opposition on Critical and Supportive Judicial Behavior

This graph displays the standardized values of the government's vote share in the legislature. A value of 0 represents the mean. A value of 1, for instance, represents one standard deviation above the mean. In this case, it represents the opposition holding more votes in the legislature than average.

behavior. In the critical behavior graph on the left, as the vote share of the opposition increases, the effect upon judicial critical behavior decreases. At two standard deviations above the mean, there is a predicted decrease of critical judicial behavior of one. A similar effect occurs for supportive judicial behavior, though the effect is not as large as in the critical model. As the vote share of the opposition parties increases to two standard deviations above the mean, there is a predicted decrease of .5 instances of supportive behavior by the judiciary. The results indicate that when the distribution of power lies at extreme, judges are much less likely to pursue goals relative to their own institution. However, during institutional setups where the vote share of the opposition is moderately large, the judiciary uses the favorable political environment to their advantage. These findings reaffirm the intuitions and assumptions of previous scholars who posit that judges are rational policymakers.

From these results it is clear that the distribution of power between the branches is a significant environment for judges when considering whether or not to manipulate its own authority. Another way to conceptualize the distribution of power is to examine how it impacts judicial behavior when it is concentrated in certain insti-

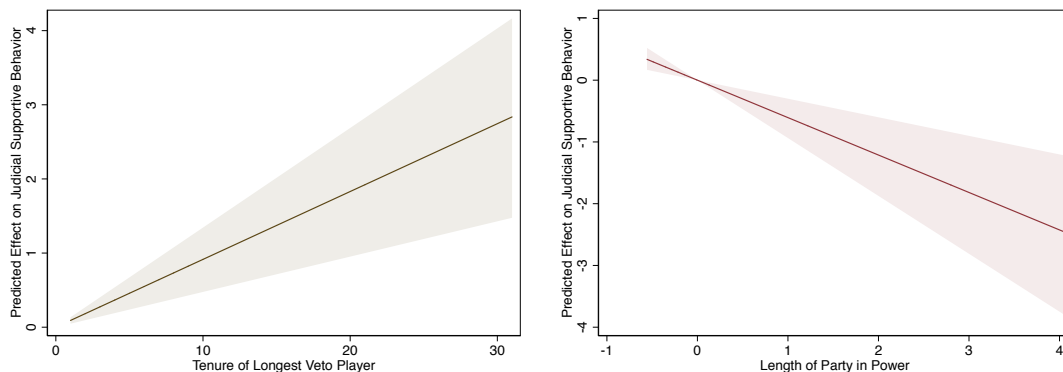


Figure 4.3: Effect Plot of Tenure of Veto Player and Length of Ruling Party in Power

The graph displaying the effect of Length of Party in Power uses standardized values of the years in power. A value of 0 represents the mean. A value of 1 represents one standard deviation above the mean. In this case it represents the ruling party has been in power for a longer time than average.

tutions or veto players. Figure 4.3 displays the effects of the tenure of the longest veto player and the years the ruling party has held on to power for only supportive judicial behavior.¹³ As the years in power of the veto player with the longest tenure increases, there is a subsequent increase in the amount of supportive behavior by the judiciary. This is an interesting finding, considering that the previous results indicate judges carefully consider the distribution of power before pursuing either critical or supportive behavior. However, the effect of tenure truly takes hold when the veto player is in power for at least 10 years, where it produces an increase in of 1 supportive response toward judicial power. This result is especially intriguing given that when the party of the chief executive stays in power for increasingly longer periods of time, the effect on supportive behavior is substantially less likely.

¹³ Neither of these variables impacted judges to modify critical behavior. There was a 90% probability that the effect of the longest tenured veto player would be between -.1 and .1. More than a quarter of the time the effect of the ruling party in power would be between -.1 and .1. Essentially two null effects on judicial critical behavior.

4.5 CONCLUSION

The purpose of this chapter is to examine which environmental opportunities courts will take advantage of in order to alter judicial power. Much of the narrative in current scholarship focuses on how other institutions, mainly executives, take certain actions to cede power to the judiciary. The reason behind this focus is that the judiciary is a weaker institution, one that is dependent upon other institutions, agencies, corporations, and people to comply with its rulings. The motivating question of this chapter is: when and why will judges attempt to manipulate judicial power? Judges are rational actors who recognize the dependent nature of their institution. Thus judges are attuned to interbranch relationships and the power structures therein. I posit that because judges operate in such a dynamic environment, then the propensity to alter judicial power will be impacted by changes within those power structures. I find support for my theoretical posit that power redistribution and concentration greatly affect the modification of judicial behavior. On the other hand, power redistribution in the form of new actors does not effect judicial motivations. Thus judges are no more or less likely to preempt or respond to the executive or legislative institution when facing reelection.

Using Markov Chain Monte Carlo techniques applied to Bayesian poisson regression, the results demonstrate that judges may not be as weak or deferential as perceived. Using original data, as well as comparative datasets, in Latin America from 1980-2004, I discover that judges are both proactive and reactive to the stimuli in the political environment. A leading predictor in how judges modify their own power comes from the power relationship between the executive and legislative branches. At its extremes, when power is highly concentrated within the executive or within the legislature, the probability that judges will either undermine or support their own institution is low. In fact in some cases it exhibits a negative effect on the outcome variable. However when the power distribution between the executive and legislature

moves towards the middle, the judiciary is much more likely to both subvert and support judicial power. Given the nature of the judiciary in a system using separation of powers, this makes sense. When power is divided between other institutions, the likelihood of either institution retaliating against the judiciary is lower. The capability for the institutions to seek retribution is not as certain when power is concentrated. This provides initial support for a widely-used theoretical assumption that judges are rational actors.

CHAPTER 5

RESOLVING INTERBRANCH CONFLICTS

The analyses within the previous chapters of the dissertation reveal that institutions modify their behavior toward judicial power surrounding shifts in the political environment. Initial chapters of the dissertation examined how shifts in the environment were related to either critical or supportive behavior by each institution. However, behavior can also be divided by its substance, not only its direction. When studying comparative judicial politics, an overwhelming amount of scholars have examined how executives treat judicial power by looking at instances of direct interference, such as removing a justice from the court or implementing constitutional reforms. Yet to understand the nature and duration of interbranch conflicts, it is beneficial to examine how rhetoric can additionally influence this process.

After years of rampant corruption, reforms to Ecuador's Constitution in 1997 facilitated the judiciary's move from a politically-appointed body to an independent one. Additional empowerment came in the form of changes to the criminal justice procedure codes in 2001. In 2003, presidential candidate Gutierrez campaigned on a promise to combat corruption and poverty, won the election for executive office. In 2004, President Gutierrez then began to threaten the judiciary by saying he will get his supporters to "rise up and burn the courts" due to its politicization. He even dismisses impeachment charges against himself as the result of this politicized Supreme Court. After those impeachment charges ultimately failed, he used his power through the legislature to remove 27 of the 31 justices on the Supreme Court. Simultaneously he pushed judges sympathetic to his ideology through the legislature

into positions on the top court. Though this move eventually cost him his presidency and his ability to remain in Ecuador, its occurrence was facilitated by his initial rhetoric and stated goals of fighting against corruption and for social justice.

Action is not required for a conflict to exist between branches. In fact, this example highlights an instance where rhetoric can be just as useful as direct action when branches pursue manipulations against one another. Nonetheless, scholars typically focus the study of executive-judicial relations on instances of direct action between those two branches, despite assumptions in our theories that indicate rhetoric could be a significant factor in judicial power. This chapter analyzes the determinants of terminating and winning these interbranch conflicts that arise from both action and rhetoric.

By exploring the efforts of the executive, legislature and the judiciary, the chapters presented a comprehensive picture on how perceptions of change and change itself can alter the motivations to undertake certain types of behaviors. For example, if executives shift power to the judiciary when the risk of being removed from office is high, it is reasonable to assume that the executive (and the legislature) will also shift or encroach upon judicial power in other advantageous conditions as well. Executives respond to events wherein power was reconfigured among national institutions, while legislatures were prone to changing their behavior toward the judiciary when tensions within the electorate run high. In previous work, I note that recognizing their own perilous position within national politics, judges empower the judiciary when the chances for a successful outcome are highest: when (1) the public places more support in the judiciary than in the executive and/or legislature and (2) when institutional uncertainty exists between executives, legislatures, and judiciaries. While informative, these chapters raise additional questions. To what extent are the rhetorical and behavioral strategies efficacious for each institution? Which types of strategies are more likely to yield preferred outcomes? Do actors engage in these conflicts rationally?

5.1 LITERATURE REVIEW

Prior theoretical explanations of how institutions treat the judiciary focus mainly on the behavioral options presented to executives. Generally, scholarship focuses on the various incentives executives face when there is a reasonable expectation of electoral uncertainty. The basic argument is that the higher the probability of overturning political power to opposing parties, the more likely that executives shift power to the judiciary. An independent judiciary is a more beneficial ally in the long-run to uphold policy preferences than the loss of executive power at the current time (Hirschl 2004; Bill Chavez, Ferejohn, and Weingast 2011; Ríos-Figueroa 2007; Von Doepp 2006; Domingo 2000). Notably, this literature has placed emphasis on the importance of executive actions toward the judicial institution, while ignoring how legislatures may also choose to subvert or support the courts. Helmke (2010) takes on this gap within the literature by examining interbranch crises in Latin America, and developing a theory that accounts for manipulations to the personnel of other branches by all three institutions. This work provides an important first step in uncovering the conditions under which institutions seek to undermine one another. While the scope of Helmke's (2010) project focuses on interbranch conflicts with regards to personnel, the focus of this chapter centers on how interbranch conflicts affect judicial power. Moreover, this paper is concerned with the use of both direct action and rhetoric in these conflicts.

Judicial power, or judicial independence, has been the subject of study for many scholars in an attempt to measure economic development or the rule of law and for scholars concerned with its conceptualization and measurement. Scholarship on the determinants of judicial independence are often categorized as either *de jure* (Rosenberg 2008) or *de facto* (Kornhauser 2002; Becker 1970; Cameron 2002), but when looking at judicial independence as the concept to explain, scholars typically define it by its *de facto* determinants (Feld and Voigt 2003; Linzer and Staton 2015). In order to measure the concept of judicial independence, scholars have designed

measures to capture expert opinions (Feld and Voigt 2003), constitutions (Keith 2002; Glaeser et al. 2004), economic data (Clague et al. 1999), and constraints on the executive (Henisz 2000) to capture judicial independence. For the purpose of this paper, the specific definition or measure of judicial independence is not relevant to the study of interbranch conflicts because a common assumption underlies both the theoretical developments of judicial independence and the perceptions of judicial power by state actors. Both scholars and governmental elites assume that when the executive provides or takes away power from the judiciary, that those actions result in real changes to the level of power the judiciary holds. This assumption is important for this paper because we can assume, then, that when institutions use rhetoric or direct action relative to judicial power, it will result in a change therein.

Comparative judicial politics is an increasingly important field in both the judicial and comparative scholars. The status of both of these literatures demonstrate both the substantial work and theories offered by scholars and the plethora of questions arising from these theoretical foundations. This manuscript takes on a number of assumptions underlying much of the literature as well as broadening the scope of how scholars examine the development of judicial power. I argue that it is imperative for scholars to look at the actions and goals of both the legislature and the judiciary, not just the executive, as well as the various behavioral options each institution can incorporate, namely rhetoric, in the study of judicial power.

5.2 THEORETICAL FRAMEWORK

Once an interbranch conflict begins, how long will it endure? Moreover, under what conditions will the interbranch conflict end? In this section I will discuss a number of assumptions central to my theoretical framework on the duration and termination of conflicts. The theory purports that entrenchment of power and electoral uncertainty are environmental conditions that will raise the costs of entering into a conflict with

other national branches and, in turn, prolong the duration of the disputes. On the other hand, the direction and type of behaviors produced by the institutions will determine whether a conflict terminates or not.

The grounding assumption of the theoretical framework rests in the rationality of actors. I presume that agents of institutions, e.g. the executive, legislature, and judiciary, hold the capability to understand the future consequences of current moves. That is, actors of national institutions modify their behavior at time t based on their perceptions of what will occur in the future, or t_{t+1} . The prevailing assumption within the judicial literature is that judges behave rationally (Rohde 1972; Epstein and Knight 1998). However, when and why justices behave rationally differs during the stages of the decision-making process (Brace and Hall 1990; Perry 1991; Epstein and Knight 1998; Maltzman, Spriggs, and Wahlbeck 2000; Caldeira, Wright, and Zorn 1999). Scholarship also informs research that judges modify their behavior due to influence from the legislature (Segal, Westerland, and Lindquist 2011; Rogers 2001; Chutkow 2008; Keck 2007; Segal 1997; Hausegger and Baum 1999; Spiller and Tiller 1996) and the executive (Carrubba and Zorn 2010; Wohlfarth 2009; Owens 2010; Bailey 2007; Yates and Whitford 2002). The assumption also works when the relationship reverses: executives and legislatures make rational decisions in regard to their goals relative to the judiciary (Ramseyer and Rasmusen 1997; Ginsburg 2002; Finkel 2008; Popova 2010). Thus empirical evidence supporting the assumption that institutions behave rationally holds in a variety of contexts.

Relatedly, an assumption critical to scholarship on comparative judiciaries, yet one that has largely been unexplored, presumes that not only will actors behave rationally, but also that these actions result in the intended outcome. For example, recent research discovered that executives facing removal from office recognize that an empowered judiciary will uphold the policy preferences once the executive leaves office. Behaving rationally, an executive may then seek to empower the judiciary in

order to insure the continuation of his or her policy preferences (Ginsburg and Versteeg 2014; Woods and Hilbink 2009; Moustafa 2007). Epperly (2013) demonstrates that, at least in regard to the fate of ousted leaders, the assumed relationship between an empowered judiciary and the preferences of former executives holds merit. One way in which an executive can directly empower the judiciary is via constitutional reforms of the judicial system. As an example, Mexico's 1994 constitutional reforms provided the court with the ability to declare laws unconstitutional, though this ability is contingent upon one-third of the legislature who passed the law asking for this type of judicial ruling (Finkel 2005). Thus both scholars and actors believe that how institutions behave toward the court matter and, more importantly, that these actions produce the desired results of the goals under pursuit.

If scholars believe in both the rational behavior and goal-oriented posits, then we can use those assumptions in tandem. This means that when actors pursue their goals relative to judicial power, the actions or rhetoric used to achieve those goals is done rationally. For this theoretical argument, I conceptualize the rational pursuit of goals as: actors using rhetorical or behavioral strategies in order to successfully conclude an interbranch conflict concerned with judicial power. For the purpose of this study, I am specifically interested in when interbranch conflicts are centered on manipulating judicial power, by way of support or subversion. As an example, the tenure of President Cordero in the 1980s that was marred by clashes between the executive and the legislature, where, at one point, the legislature retaliated by impeaching some members of the President's cabinet, would not be considered an interbranch conflict in this dataset. Ultimately the previous conflict involves the degree of power that the legislature can exercise over the executive and does not directly concern judicial power. However, when President Cordero called in tanks to block the legislated appointed Supreme Court from sitting would be an example of an interbranch crisis dealing with the subversion of judicial power.

After an initial attempt on alteration of judicial power, the other institutions can then decide to respond to the intrusion on the judiciary. Respondent institutions have the same behavioral options available as instigators. They can either use rhetoric or to employ a form of direct action. I theorize that there are two motivations that induce a respondent to counter the alteration of judicial power. Institutions will respond when (1) there is a credible belief that the responding institution could win the conflict and/or (2) when the cost in responding is sufficiently low. Note that the two motivations are not mutually exclusive, however I address each separately.

The first motivation for response centers on the likelihood that the respondent would gain its preferred outcome at the conclusion of the conflict. That is, actors enter into conflicts when there is a reasonable expectation of winning the conflict at its conclusion. Given the assumption of rationality by most of the judicial literature, this should be a non-controversial assumption. Based on the assumption that actors are rational, an institution should enter into conflicts when the costs of entrance are low.¹

In the following section, I outline the conditions that will decrease the costs associated with continuation of a conflict, and how these conditions result in the duration of interbranch conflicts. I then discuss the theoretical reasons for the determinants of terminating a conflict.

5.2.1 ON TERMINATING CONFLICTS

What are the conditions under which an interbranch conflict will conclude? What factors lead to the rapid conclusion of conflicts or to their endurance? I address these questions by developing a theoretical argument that stems from the premise that actors are rational and will engage in conflicts after considering the costs and benefits

¹ Contingent upon that institution's belief that winning the conflict is not possible, this is the other reason for why an actor may enter into the conflict.

of responding to the instigating institution. As well, I assume that institutions seek to resolve conflicts rather than prolong them. The reason behind this assumption relates to the costs associated with prolonging a conflict; the longer a conflict endures, the more resources an institution must invest into prolonging the conflict. These consumed resources can be literal or figurative. In other words, the cost of prolonging a conflict can be monetary means or political capital. Given these costs, I assume that actors only prolong interbranch conflicts when either the benefits outweigh the (high) costs, or when the costs of prolonging the conflict are very low. I argue that the degree of power entrenchment and electoral uncertainty are the two primary environmental conditions that will impact the duration of the conflict. In addition, I argue that certain behavioral strategies by the three major institutions will shorten or lengthen the conflict.

The balance of power between institutions is an important factor in how conflicts between branches resolve, especially considering that the judiciary cannot enforce its decisions nor fund them. An imbalance in the distribution of power will likely lead to more frequent interbranch crises (Helmke 2010).² It is reasonable to assume that power imbalances will also impact the decisional process of resolving those conflicts. Scholarship already notes that courts are more likely to uphold executive actions when the threat of retaliation is high (Johnson 2015; Helmke and Ríos-Figueroa 2011; Herron and Randazzo 2003; Von Doepp 2006). Moreover, when countries achieve a relatively equal dispersion of power between branches, the independence of the judiciary can flourish (Bill Chavez 2004; Finkel 2004; Ginsburg 2003; Vanberg 2015).

The degree to which power is concentrated in one body or distributed between multiple institutions provides important signals to actors engaged in interbranch conflicts. Specifically, the extent of power concentration indicates the potential costs

² It is important to note that Helmke (2010) defines a crisis in terms of attacks on personnel of other institutions, however the logic behind this result could extend to other areas of crisis not explicitly accounted for in her study.

associated with prolonging an interbranch conflict. As power becomes entrenched, that is concentrated, within one institution or one party, the costs increase. There are two reasons why power concentration can lead to a higher cost of prolonging conflict. One is that when a single institution controls a majority of resources, then by default, other institutions have less resources to use in order to win a conflict.³ Thus if a weaker institution finds itself in such a situation, it may be willing to engage in an interbranch conflict, but lacks the capability to do so. As a result of the inability to use resources to engage in the interbranch conflict, the weaker institution ceases to pursue and subsequently ends the conflict.

The second and more pervasive reason why concentration of power favors stronger institutions in conflicts relates to the larger degree of political influence that the powerful institution holds. When an opponent holds a high degree of political capital relative to one's own institution, it becomes necessary to calculate the potential repercussions from the opposing institution. This argument is based on the premise that when power is concentrated within one institution, that power translates into the ability to influence or control other institutions. Higher degrees of power entrenchment send signals to opposing institutions about the increasing costs associated with continuing a conflict. I theorize that the relative power between branches and the degree of public support can either enhance or diminish the effectiveness of rhetorical and behavioral strategies.

The environment can also shape national branch behavior toward the judiciary when institutions face electoral uncertainty. It is a commonly accepted assumption that those with power wish to keep it; a premise that is especially true for actors that have attained political power (De Mesquita 2005). However, an election casts doubt on the probability of a politician continuing his or her term in office. Despite the mag-

³ This premise relies on the assumption that resources are finite. This is a reasonable assumption, especially if you consider resources to be defined in terms of money or budgets.

nitude of the probability of remaining in office, politicians recognize the importance of satisfying constituent desires during this period of uncertainty. Moreover, constituent's political awareness generally spikes during election times when they must decide whether to vote the incumbent out of office or not. As a result, the period of electoral uncertainty for a politician can become an advantageous method to speak directly to constituents by engaging in interbranch dialogue or dispute. Politicians may observe electoral uncertainty as an opportunity to initiate a new interbranch conflict, conclude a previous one, or to take on a stronger stance in a current dispute. Of course, all of the action or rhetoric pursued at this time is in order to satisfy constituent desires as a means to secure electoral certainty. As a consequence, periods of electoral uncertainty should increase the duration of conflicts, as forward-looking politicians seek to shore up voter support.

In addition to the importance of environmental factors in the process of interbranch conflict resolution, I also emphasize that the behavioral options used by actors determines the length of a conflict. After choosing to respond to a conflict, an actor must then determine the direction (positive or negative) and the type (action or rhetoric) of behavior that satisfies the pursuits of the actor within the conflict.

Recall that the theoretical argument assumes that one reason institutions choose to prolong conflicts occurs when the associated costs of a behavioral strategy are significantly low. When national actors choose to pursue a strategy of rhetoric, minimal, if any, resources are required in order for the rhetoric used to reach its political targets (both the institutions and the user's constituents). The only potential cost for pursuing the rhetorical strategy is one of reputation, where it could be augmented or damaged. And while the probability of a rhetorical attack successfully ending a conflict in the institution's favor are low, it may be the only method available to weaker institutions. Thus, I argue that these types of rhetorical attacks will only serve to increase the duration of conflicts, because each institution can use this strategy as a

method of response without wasting valued resources.

The second reason institutions choose to prolong conflicts between branches is when investing resources into a conflict will yield the institution's desired outcome, despite what the cost of that investment will be. Interbranch conflicts may range from trivial to highly salient. Strategies using minimal resources may signal to other institutions that either (1) the instigator does not highly value the outcome of the conflict or (2) that the instigator is merely testing these options before proceeding to use costly rhetoric or action. Such strategies may then result in targeted institutions responding with their own low-cost behavior, thereby extending the duration of the conflict. If this is the case, it would be reasonable to expect that when institutions use costly behavioral strategies, their chances of a successful outcome improve. This is because costly strategies signal to other players that the instigating institution is seriously concerned with the outcome of the conflict and is willing to spend more resources in securing a favorable outcome. Thus opposing institutions may then spend resources into prolonging the conflict in order to secure a conciliation or compromise from the institution that initially took direct action.

DURATION AND OUTCOMES OF INTERBRANCH CONFLICTS

My theory generates a number of testable propositions. First, that when countries experience high degrees of power entrenchment, the costs of prolonging conflicts increases. As a result, interbranch conflicts should end quicker when power has been entrenched for longer periods of time. I operationalize power entrenchment in two ways. One way to observe whether power is solidified within a country, is to examine the number of years actors have held tenure in an institution. In order to specifically examine the concept of power entrenchment, I use the actor who has held the longest tenure relative to all of the institutions. The second way to measure the degree to which power is concentrated, is to note whether or not a single party controls both

the executive and legislative branches. This is significant because it can be assumed that the party would present a unified platform on the party's policy toward judicial power. As such, it represents a decent measure of the extent to which power is concentrated within a country.

Additionally, the theory also notes the importance of how the strength of political capital between institutions will shape the costs associated with actors entering into and prolonging interbranch conflicts. One way to determine the degree of power imbalance between institutions is to use public support as a proxy. When public support for an institution is higher than its national counterparts, the legitimacy received from this degree of public support may dissuade other institutions from responding. The rationale behind this thought is that a responding institution anticipates a potential backlash from the public if it were to counter the institution with the highest degree of support, therefore it avoids the conflict. The validity of this proxy also rests on the assumption that institutions can accurately interpret which branch has the highest degree of public support. However, if this assumption is correct, we should expect to observe that institutions with large degrees of public support relative to other branches have shorter conflicts than those with relatively less confidence. Institutions also take into consideration the relative costs of responding when deciding whether to continue an interbranch conflict.

I also argue that when institutions face electoral uncertainty, this environmental condition will shape an actor's behavior toward the judiciary. During periods when an executive faces an election or when a legislature faces an election, we should see a corresponding increase in both the endurance of conflicts and the length of time it takes before an instigator of a conflict achieves a successful outcome. Finally, I note that the behavioral options available to institutions shape the duration and outcomes of conflicts. Negative rhetorical strategies are more likely to produce longer conflicts, however they do not guarantee a quicker and favorable resolution to a conflict. On

the other hand, conflicts that contain positive net responses during an interbranch conflict should end quicker than conflicts containing net negative responses.

5.3 RESEARCH METHODS/DESIGN

5.3.1 IDENTIFYING SUCCESSFUL OUTCOMES

Recall that my theoretical argument rests upon institutions and the public perceiving a power conflict between the executive and the judiciary, and the legislature and the judiciary. Given this assumption in my argument, I define the end of the conflict in two ways: (1) when the conflict is ended in terms of policy and (2) when the instigator of the conflict achieves a successful outcome. For the first outcome variable, I identify the end of the policy conflict by the last instance of a rhetorical or behavioral action that modifies policy. While the last instance of rhetoric and action usually corresponds with the termination of the conflict, this is not always the case. At times, institutional actors respond to the ‘policy’ end of the conflict in order to publicly disagree with the outcome. Out of the 80 conflicts identified in the dataset, 16 of those contain a rebuttal by a dissatisfied actor. The judiciary and executive used this tactic seven times each, while the legislature only did so twice. There does not appear to be an obvious trend of certain countries using these tactics over others. Various actors in Brazil, Chile, Colombia, Ecuador, Guatemala, Mexico, Nicaragua, Paraguay, Peru, and Venezuela all used this method of response. Moreover, there does not seem to be a pattern within how actors respond. Actors most frequently use rhetorical strategies in their retorts, but will also take some type of action in 30% of the cases. For example, during a speech by Hugo Chavez in 1999, the President of the Supreme Court walked out in protest due to an ongoing conflict between the court and the executive’s involvement with campaigning. While this action may represent the end of a certain conflict, it does not represent the end of the conflict in terms of policy. Given that this chapter explores the conditions under which we see successful

outcomes, I believe it is appropriate to use the last move relative to policy to denote the end of the conflict, rather than the last public gesture.

In order to test the theoretical propositions that deal with rationality, I also create an outcome variable that identifies when the instigator of a conflict achieves the desired result at its termination. I consider a conflict to end in a successful outcome if the instigator achieves its preferred policy. For example, the Guatemalan judiciary in 1994 requested additional resources for their budget, to which Congress obliged and doubled their budget for 1994. Since the judiciary received additional resources, this would be considered a successful outcome in the dataset. A failed outcome in this coding scheme would be a failure to achieve the preferred outcome of the instigator or when the instigator accepts a different policy position than initially preferred or indicated.

Table 5.1: Duration of Conflict by Conflict Instigator

| Days of Conflict | Total Conflicts | Conflict Instigated By: | | |
|------------------|-----------------|-------------------------|-----------|-------------|
| | | Judiciary | Executive | Legislature |
| 1 | 18 | 7 | 8 | 3 |
| 2-10 | 14 | 9 | 3 | 2 |
| 11-20 | 9 | 1 | 6 | 2 |
| 21-30 | 5 | 2 | 1 | 2 |
| 31-40 | 2 | 1 | 0 | 1 |
| 41-60 | 5 | 2 | 1 | 2 |
| 61-80 | 8 | 2 | 3 | 3 |
| 81-100 | 4 | 1 | 3 | 0 |
| 101-150 | 2 | 1 | 1 | 0 |
| 151-200 | 3 | 0 | 1 | 2 |
| 200-250 | 1 | 0 | 1 | 0 |
| 251-300 | 2 | 0 | 1 | 1 |
| 300-400 | 3 | 3 | 0 | 0 |
| 401-500 | 1 | 0 | 1 | 0 |
| 501-1000 | 1 | 0 | 1 | 0 |
| 1001+ | 1 | 0 | 1 | 0 |
| Mean Exit Time: | 61.5 | 44.8 | 108.4 | 60.3 |
| Observations: | 81 | 29 | 33 | 18 |

Original data collected on Latin American countries from 1980-2003

Due to the nature of the coding institutional behaviors from newspaper reports, it is impossible to accurately identify the exact date on which a given action or use of rhetoric took place. The sources in Latin News that I used are pulled from daily, weekly, bi-weekly, and monthly sources. One consequence of this method of data collection is that there are a few conflicts in the dataset that begin and end on the same day. I created a new time variable that treats time in each conflict systematically and equally. I counted the number of days from the beginning of the conflict until the end of the conflict. I took this number and divided it by the total number of behaviors that occurred within the interbranch conflict. I used this number to create an equally dispersed measure of time that is relative to each conflict. Therefore, if a conflict occurred over a 15-day period and I recorded three instances of responses in that time period, there would be seven days in between the first and second instances of behavior and an additional seven days between the second and third instances of behavior. For conflicts that begin and end on the same day, I coded each response as occurring on its own, separate day. For instance, if a conflict has three instances of recorded behavior on the same day, the exit time for this conflict would occur on day three. Table 5.1 provides descriptive temporal statistics about the outcome variable. I also tabulate this information by the initiator of the conflict. Conflicts started by executives and legislatures both endure for longer time periods than those begun by judiciaries. However, conflicts initiated by executives endure for more than twice as long as judiciaries and 1.8 times as long as ones initiated by the legislature. Executives and judiciaries initiate conflicts at nearly the same rate with 33 and 29 instigations, respectively. On the surface, this discovery makes sense for the political context of Latin America. Judges are fundamentally concerned with their own institutional power and will actively seek to develop it, as discussed in Chapter 4. Strong executives that overreach into other institutions' authority has been the norm, and not the exception, in Latin America, which provides context to why this

institution seeks out the most conflicts of the three branches.

5.3.2 EXPLANATORY VARIABLES

Tables 5.2 and 5.3 provide descriptive statistics on the types of rhetorical strategies and behaviors that actors use. Table 5.2 demonstrates the different strategies used to end the policy conflict and Table 5.3 specifically examines the strategies used by the last player where the instigator of the conflict achieves a favorable outcome. Unsurprisingly, the most common option to both end and ‘win’ a conflict lies in direct action by the legislature and executive, or a court ruling by the judiciary. Examining the frequency of the instigator winning in table 5.3, it is notable that all three institutions win conflicts at relatively similar rates: 18 favorable outcomes for the judiciary, 21 for the executive, and 19 for the legislature. However, the rate at which the institution wins a conflict it initiated varies. Judiciaries successfully terminated 7 out of the 18 conflicts for a rate of 38%. On the other hand, executives and legislatures win at a rate of approximately 52% for each institution.⁴

To test the implications of my argument, I obtained some explanatory variables from external data and created the remainder of the variables from the original data I collected. I collected this data by coding every instance of interbranch crisis concerning the judiciary in all Latin American countries from 1980-2004. I used Latin Daily News to obtain the information on conflicts between these branches and coded the method of response (rhetoric or action) and the direction of the response (subversive or supportive to judicial power). Explanatory variables from my original data are: *Rhetoric* and *Action Vitality*. *Rhetoric* is an indicator variable that informs whether an actor used specifically rhetoric within an interbranch conflict. *Action Vitality* represents the amount of negative direct action subtracted from positive direct action

⁴ The executive won 11 out of 21 conflicts and the legislature won 10 out of the 19 conflicts it instigated.

Table 5.2: Type of Rhetoric/Action used by that ends the conflict of policy

| | Judiciary | Executive | Legislature |
|------------------------|---------------------------|---------------------------|---------------------------|
| | Frequency (Percentage) | Frequency (Percentage) | Frequency (Percentage) |
| Rhetorical Attacks | 3 (12%) | | |
| Mobilization | | 2 (7.41%) | 1 (4.17%) |
| Threats | | 1 (3.7%) | |
| Direct Action | 3 (12%) | 20 (74%) | 19 (79%) |
| Rulings | 16 (64%) | | |
| Promise of Support | | 1 (3.7%) | |
| Public Show of Support | 2 (8%) | 3 (11%) | 4 (16%) |
| Totals | 25 | 27 | 24 |

*Note: Original data collected on Latin American countries from 1980-2003

used by all institutions in a given conflict. Therefore if the judiciary acted negatively 3 times and the executive acted positively once, this variable would have a score of -2 at the end of the conflict.

I also obtained explanatory variables from different data sources in order to test certain implications from my argument. From the Latin Barometer, I obtained data on the level of public confidence in the executive, legislature, and judiciary. I applied the average level of confidence for each institution, for each year, to each country represented in the Latin Barometer dataset (Latinobarómetro 2015). Unfortunately I do not have information of public support for these institutions for all of the observations in my dataset.⁵ For this reason, I run two models for the outcome variable

⁵ Confidence in institutions data is missing for the Dominican Republic, Trinidad and Tobago, Guatemala (for years below 2000), Honduras (for years below 1998), Nicaragua (for years below 1999), Colombia (for years below 1998), Venezuela (for years below 1999), Ecuador (for years below 1996), Peru (for years below 1996), Brazil (for years below 2000), Bolivia (for years below 2000),

Table 5.3: When Instigator ends Conflict and Wins Conflict

| | Judiciary | Executive | Legislature |
|------------------------|---------------------------|---------------------------|---------------------------|
| | Frequency (Percentage) | Frequency (Percentage) | Frequency (Percentage) |
| Rhetorical Attacks | 5 (27%) | | |
| Mobilization | | 2 (9%) | 1 (5%) |
| Threats | | 2 (9%) | 1 (5%) |
| Direct Action | 3 (16%) | 13 (62%) | 14 (74%) |
| Rulings | 10 (55%) | | |
| Promise of Action | | 1 (4%) | |
| Public Show of Support | | 3 (14%) | 3 (15%) |
| Totals | 18 | 21 | 19 |

*Note: Original data collected on Latin American countries from 1980-2003

that examines how interbranch conflicts are won, the Public Support Model and the Minimal Model.

From the Dataset of Political Institutions, I retrieve information to construct variables on the *Executive Years in Office*, *One Party Control*, *Executive Election*, and *Legislative Election* (Cruz, Keefer, and Scartascini 2016). *Executive Years in Office* is the count of years that an executive or legislature has held office. *One Party Control* takes on a value of 1 if the executive has an absolute majority in the legislative body, and 0 otherwise. Finally, *Executive Election* and *Legislative Election* denote when an institution has an election during the year of the observation (1), and takes on a value of 0 when no election is being held in the respective institution.

Paraguay (for years below 1999), Chile (for years below 1996), Argentina (for years below 2000), and Uruguay (for years below 2002).

5.3.3 MODEL

I test the first theoretical proposition via the use of an event history model, where the duration of the conflict is measured as the number of days in which the conflict endured. This model will be particularly useful in order to better understand what conditions increase the likelihood that a conflict will terminate and what conditions lead to successful outcomes of those conflicts. I chose a duration model as it allows researchers to investigate the probability of the occurrence of an event over a given time interval, in this case, over a conflict. Duration analysis focuses on the occurrence of a single, rather than a repeated, number of events. Survival analysis has been used to great effect in the judicial literature, despite its relatively infrequent occurrence (Benesh and Reddick 2002; Spriggs and Hansford 2001).

While Box-Steffensmeier and Jones (2004) notes a variety of potential duration models for these types of analyses, I employ a parametric duration model using a Weibull distribution as it best captures the time-dependent nature of the data. The Weibull model assumes that the hazard rate either changes by either increasing or decreasing over time. Given that I am measure the time until the end of a conflict, it is clear that the hazard rate should decrease over time. The Kaplan-Meier graphs confirmed this intuition, therefore I proceed with a Weibull Regression model.

Duration models estimate the probability and duration to when an event occurs. Therefore, one aspect of duration models is a dichotomous estimation of the probability that an event of interest will be observed. The survivor function estimates the probability that the duration has survived beyond a given period of time and can be mathematically notated as:

$$S(t) = Pr(T \leq t) \tag{5.1}$$

With the survivor or duration function, the dependent variable is the amount of time that has passed before an event is experienced, provided that the event being predicted has not already occurred, such as time to death or conflict. The estimated

hazard rates indicate the increased or decreased likelihood of experiencing the event. For the survival function, a negative hazard rate increases the survival rate while a positive hazard rate decreases the survival rate. I provide hazard rates for the results in tables, while I plot the survivor function in the graphs.

5.4 RESULTS

I report four models that test the various implications of my theoretical argument. The first set of models examine what factors impact the duration of conflicts between the national branches. The next two models display the results on the factors that determine the time it takes until an instigator of interbranch conflict achieves a favorable outcome. For both outcome variables, I report two models, a minimal model and a public support model. I separate the models due to the large decrease in the number of observations in the Public Support model. This is a consequence of the lack of data on public confidence in national institutions for a number of years or certain countries.⁶ However in both outcome variables, the minimal model and public support models demonstrate similar relationships between explanatory and outcome variables. The results and graphs will be interpreted from the more theoretically proximate ‘Public Support Model’.

In Table 5.4, I report results on the first outcome variable, duration of interbranch conflict. Although hazard ratios are not directly interpretable, it is possible to tell the direction and significance of the explanatory variables for each of the models. In terms of the set of predictions surrounding the power entrenchment hypotheses, I find mixed support. Certainly the degree of power entrenchment within the executive over time provides a major impact on the degree of conflict endurance; the longer an executive is in power, the more likely he or she will be able to end interbranch conflicts at a faster rate than his or her first year in office. Figure 5.1 demonstrates

⁶ See the information above for when and where the LatinBarometer Surveys collected data.

the relationship between duration of a conflict and the amount of years an executive is in office. Executives that have held office for only one year engage in interbranch conflicts that survive for much longer than those executives in office for a longer period of time. Additionally, the more public trust in an executive institution, the higher the ability of the executive to end interbranch conflicts quickly. Notably, when one party controls both the executive and legislature, there is not significant difference on the length of interbranch conflicts than when one party does not control both of these institutions. In part, this may be due to the historical degree of power concentration within the executive branch in Latin America. In looking at the lack of result in party control and the high degree of influence confidence in the executive holds over conflicts, this result does not appear counterintuitive. However it does present a number of questions for further testing, especially in regards to regional context. Will this result hold true in regions where power dispersion is shared more equitably between the legislature and executive? And as Latin American democracies move away from consecutive elections of executives, will this relationship diminish?

Electoral uncertainty is theoretically a particularly influential factor on the duration of interbranch conflicts. Previous literature predicts that electoral uncertainty can also impact the way in which executives behave toward judicial power. I also assume that the logic that applies to the behavior of the executive institution when facing electoral uncertainty would similarly apply to the legislature. In testing the literature's previous hypothesis and my own additional one, I find a curious conclusion. Neither executive nor legislative elections impacts the duration of interbranch conflicts. Previous chapters of the dissertation revealed that uncertainty surrounding elections can be an advantageous time to manipulate judicial power. And even though the model demonstrates that conflicts during executive elections end quicker than periods where there is no executive election, the result does not significantly influence the outcome. A similar result is true for conflicts occurring during legisla-

tive elections, though conflicts around this time last longer than when there is no legislative election.

Table 5.4: Influences on the Time until a Conflict Ends

| Explanatory Variable | Minimal Model | Public Support Model |
|-------------------------------|-----------------|----------------------|
| Power Entrenchment | | |
| Exec. Years in Office | 1.16 (.095) | 1.27 (.170) |
| One party controls Exec & Leg | .903 (.234) | .383 (.173) |
| Avg. Confidence Executive | - | 3.66 (2.76) |
| Avg. Confidence Legislature | - | .194 (.275) |
| Avg. Confidence Judiciary | - | .472 (.605) |
| Electoral Uncertainty | | |
| Legislative Election | 1.41 (.464) | .546 (.413) |
| Executive Election | .507 (.207) | 1.314 (1.01) |
| Behavioral Options | | |
| Use of Rhetoric | .259 (.105) | .244 (.141) |
| Action Vitality | 1.088 (.076) | 1.108 (.127) |
| Control | | |
| GDP Per Capita | .999 (.000) | 1.00 (.001) |
| Constant | .109 (.042) | 2.879 (4.94) |
| Number of Observations | 254 | 132 |
| χ^2 | 38.84* | 42.53* |
| Number of Subjects | 80 | 38 |

The last set of predictions that impact the duration of interbranch conflicts relate to the cost of behavioral options available to actors. I assume that low-cost options, such as the use of rhetoric, will be attractive to institutions wishing to prolong conflicts, but who either do not have the capability or desire to invest a large number of

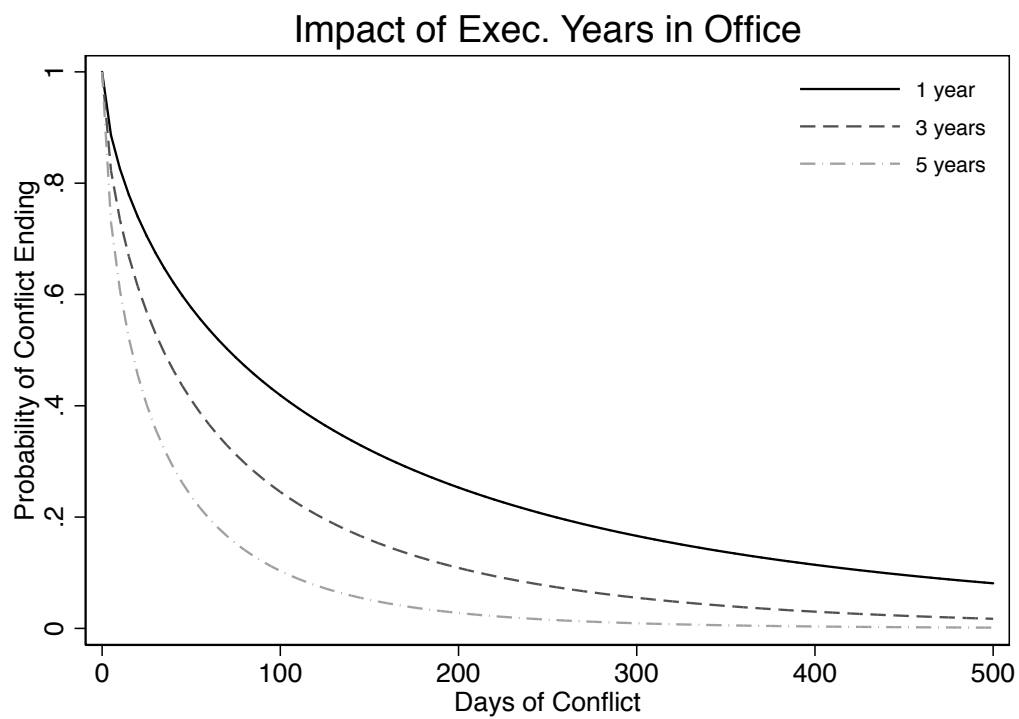


Figure 5.1: Impact of Executive Years in Office

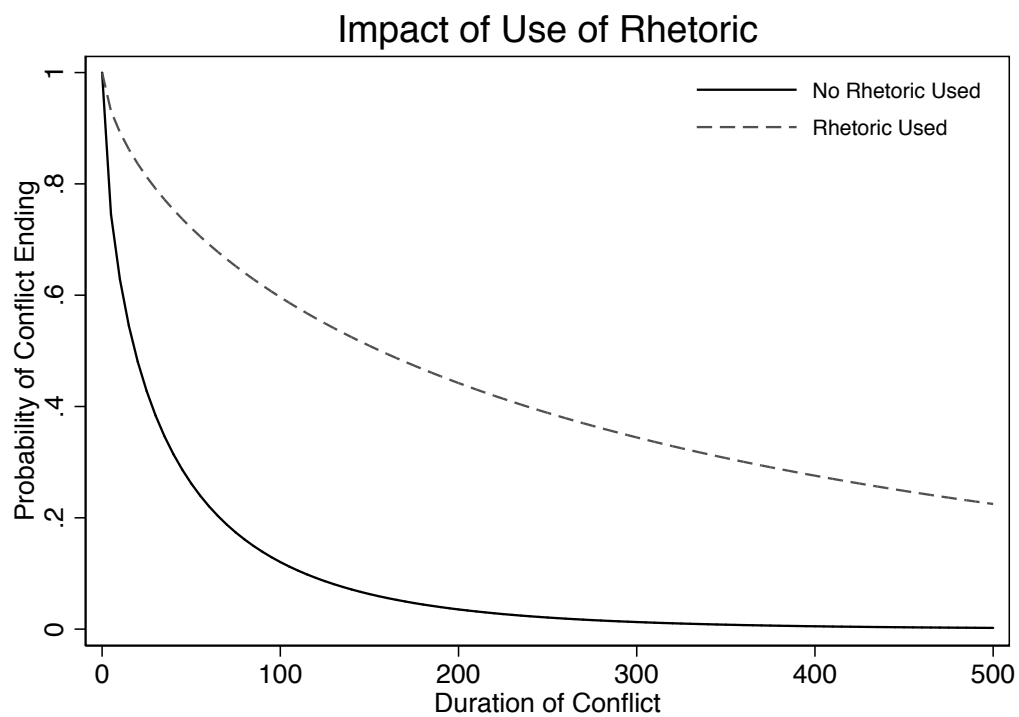


Figure 5.2: Impact of Negative Rhetoric

resources in the conflict. As such, when rhetorical attacks are used in interbranch conflicts, we should observe those conflicts to last for a longer degree of time than when that strategy is not used. Figure 5.2 demonstrates that when rhetoric is used on the 50th day of a conflict, there is approximately an 80% chance of the conflict enduring, while only a 30% chance otherwise. This result provides support for the theoretical intuition that institutions do not only engage in interbranch conflict with direct action when attempting to manipulate judicial power. It indicates that rhetoric, specifically rhetorical attacks against the judicial institution, are a quite common tactic used by institutions. In a broader sense, this result illustrates the importance of rhetoric as a rational and useful strategy for institutions seeking to shift judicial power.

The next two models that I report test the hypotheses of the impacts on how institutions win interbranch conflicts. I argue that power entrenchment, high-cost behaviors, and public support should be the most significant driver of how long a conflict endures before the instigator achieves a successful resolution of the conflict.

The relationship between the explanatory variables and the time it takes for an instigator to win a conflict is quite similar to what influences the termination of a conflict (the previous set of models). One way to interpret the similarity in relationships is that if instigators enter into interbranch conflicts with the intention of achieving a favorable outcome, and the time in which it takes to secure the desired result matches the general pattern of simply terminating conflicts, that instigators enter into interbranch conflicts rationally. In other words, instigators will engage in conflicts with certainty of a favorable result. If this interpretation is correct, then it may be an additional finding that supports the assumption that actors are rational, specifically with their behavior toward the judicial institution.

The results from the Public Support Model support the hypotheses surrounding the impact of costly behavior on the successful termination of a conflict. My first posit noted that when an actor responds with actual change in behavior, instead

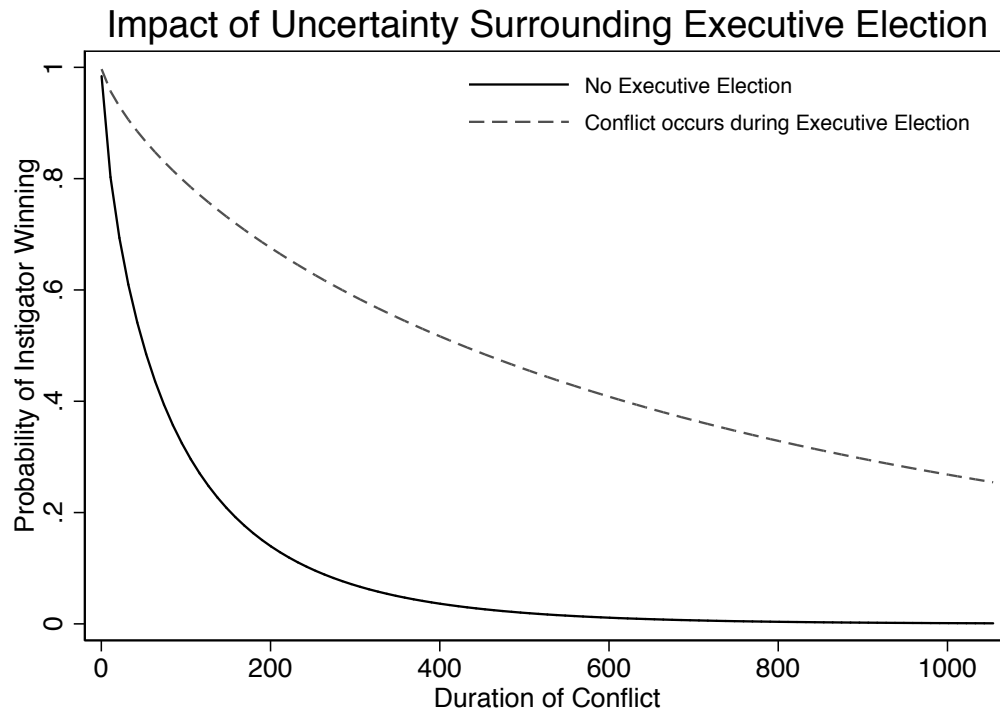


Figure 5.3: Impact of Executive Election

of a threat, the likelihood of winning a conflict increases. The results indicate that this hypothesis is supported. When using a log-rank test for the equality of survivor functions, there were approximately 60 events expected when rhetoric was not used, and approximately 20 when rhetoric was used.⁷ To provide a concrete example, when an actor uses costly behavior and the duration of the event has already lasted 90 days, the probability of successful termination is at 56%. However when using rhetorical strategies, the probability of the event enduring (under the same conditions) is at approximately 75%. I also theorized that the frequency of using direct behavior would impact the termination of successful conflicts. The results of this model, while not directly supporting my theoretical posits, do provide interesting insight into the use of these two strategies.

While electoral uncertainty of either executive or legislative elections had no sta-

⁷ This test had a χ^2 value of 14.57 and was significant at the .0001 level.

tistically significant effect on the duration of conflicts, executive elections do play a factor in the time elapsed before an instigator achieves his or her preferred policy. Figure 5.3 demonstrates the dramatic difference between the duration of conflicts that occur during election years, as opposed to conflicts that occur when there is no executive election. During years in which executive elections occur, interbranch conflicts tend to survive for a significantly longer period of time than years where there is no election. For instance, conflicts that have lasted for 100 days and when there is no executive election have a 30% probability of enduring. When an executive election is taking place, however, there is an 80% chance that the interbranch conflict will survive. This result, in combination with the lack of significance of executive elections for the regular model provides additional insight into executive behavior. Perhaps this is an indication that when executives engage in interbranch conflicts during election years, it is for one of two reasons. The first is that the executive may be particularly motivated to obtain a successful outcome to insure their electoral chances. The second possibility is that executives rationally enter into interbranch conflicts when they perceive that there is a high likelihood to achieve their preferred policy toward judicial power.

Finally, the theoretical posits relating to the degree of public support in each institution provides invaluable insight into both the judicial and institutions literatures. The effects of public confidence in the executive and confidence in the judiciary hold opposite effects on the duration of interbranch conflicts, but both matter quite significantly. Public confidence in the legislature, however, is not an important factor for the time of a conflict until an instigator yields a successful outcome. Perhaps this result occurred because legislatures pursue less interbranch conflicts in regard to judicial power. Or perhaps I find this result because legislatures are multi-bodied institutions with varied preferences that make it difficult to achieve a common goal relative to another institution.

Table 5.5: Influences on the Time until an Instigator Wins the Conflict

| Explanatory Variable | Main Model | Public Support Model |
|---------------------------------|-----------------|----------------------|
| Power Entrenchment | | |
| Executive Years in Office | 1.13 (.112) | 1.31 (.191) |
| One party controls Exec. & Leg. | 1.03 (.325) | .714 (.411) |
| Average Confidence in Exec | - | 4.387 (4.50) |
| Average Confidence in Legisl. | - | .659 (1.19) |
| Average Confidence in Judiciary | - | .090 (.183) |
| Electoral Uncertainty | | |
| Executive Election | .214 (.112) | .199 (.227) |
| Legislature Election | 2.085 (.744) | .1.82 (.1.75) |
| Behavioral Options | | |
| Rhetoric Used | .231 (.122) | .172 (.134) |
| Action Vitality | 1.05 (.088) | 1.06 (.140) |
| Controls | | |
| GDP Per Capita | .999 (.000) | 1.000 (.001) |
| Number of Observations | 268 | 138 |
| χ^2 | 32.96* | 41.70* |
| Number of Subjects | 80 | 38 |

I also discover an interactive relationship between public confidence in the executive and public confidence in the judiciary on how conflicts are successfully resolved. Figure 5.4 depicts six graphs of survival functions. On the left, graphs depict the impact of the executive on the duration of a successful conflict over degree of support for the judiciary.⁸ On the right, the graphs depict the impact of public support for

⁸ From top to bottom: impact of public confidence in executive over (1) average confidence in judiciary, (2) low confidence in judiciary, and (3) high confidence in judiciary.

the legislature over degree of support for the executive.⁹ The light-dashed line indicates high levels of public support for an institution (in all sets of graphs). Together, these figures demonstrate the conditional nature in which conflicts are successfully resolved. The left graphs show the impact of confidence in the executive. For all three graphs, when confidence in the executive is high, conflicts conclude in favor of the initiator much more quickly than when confidence in the executive is low. The speed of that resolution, however, depends upon the relative degree of confidence within the judiciary. When the public has low levels of confidence in the judiciary, successful resolution of conflicts occur extremely quickly, even when there are low levels of confidence in the executive. When confidence in the judiciary increases to its highest point, interbranch conflicts endure for much longer periods. In attempting to understand interbranch conflicts in Latin America, these results strongly point to the importance of power entrenchment within the executive. That the authority of the executive permeates political affairs such that the actor can wield such influence over an interbranch conflict even when there is little public support cannot be questioned. While the conditional results do show that this effect can be tempered, the question remains as to whether or not this temperance behooves judicial power.

On the right side, the impact of public confidence in the judiciary demonstrates the opposite effect. The lower confidence in the judiciary is associated with a swifter outcome for the instigator of the interbranch conflict. One interpretation of the inverse effects between the executive and the judiciary can be attributed to the lack of enforcement power of the judicial institution. Scholars typically believe that legitimacy is the bite behind the power of the pen. If that assumption holds true for Latin American courts, it could be a plausible interpretation for why conflicts end so dramatically at low levels of confidence in the judiciary. Once again though, the

⁹ From top to bottom: impact of public confidence in judiciary over (1) average confidence in executive, (2) low confidence in executive, and (3) high confidence in executive.

impact of confidence of the judiciary on conflicts must take into account the degree of support for the executive. When the executive holds low levels of support, interbranch conflicts endure at much higher rates than at other levels of confidence in the executive, provided that there is medium or high support for the judiciary as well. The results from the public confidence model, while informative, point to yet another crucial question. If public confidence in institutions highly influences when instigators achieve their preferred policies toward the judiciary, under what conditions will those policies lead to actual augmentation of judicial power, the rule of law, and ultimately, judicial independence?

CONCLUSION AND IMPLICATIONS

What are the effective strategies executives, legislatures, and judiciaries use in order to end an interbranch conflict dealing with judicial power? What methods do they employ to win a conflict the institution initiated? This study examines what factors impact the likelihood of institutions winning interbranch conflicts that center on manipulating judicial power, with the intention of either supporting or subverting judicial independence. Moreover, the study discusses why scholars should be more attentive to the seemingly minute conflicts occurring between branches at the national level. Given that much of all the political science literature is grounded in the assumption that actors are rational, the study illuminates (at a preliminary level) the extent to which we should believe this assumption is credible or whether it should be called into question under certain conditions.

Executives and legislatures may seek to manipulate judicial power for a variety of reasons. Supporting the powers of the judiciary in the short-term may lead to the stability or continuation of long-term policy preferences.¹⁰ Supporting the independence of the judiciary in economic suits may signal to foreign investors that the

¹⁰ See Carrubba's (2009) discussion on building a successful, independent judiciary.

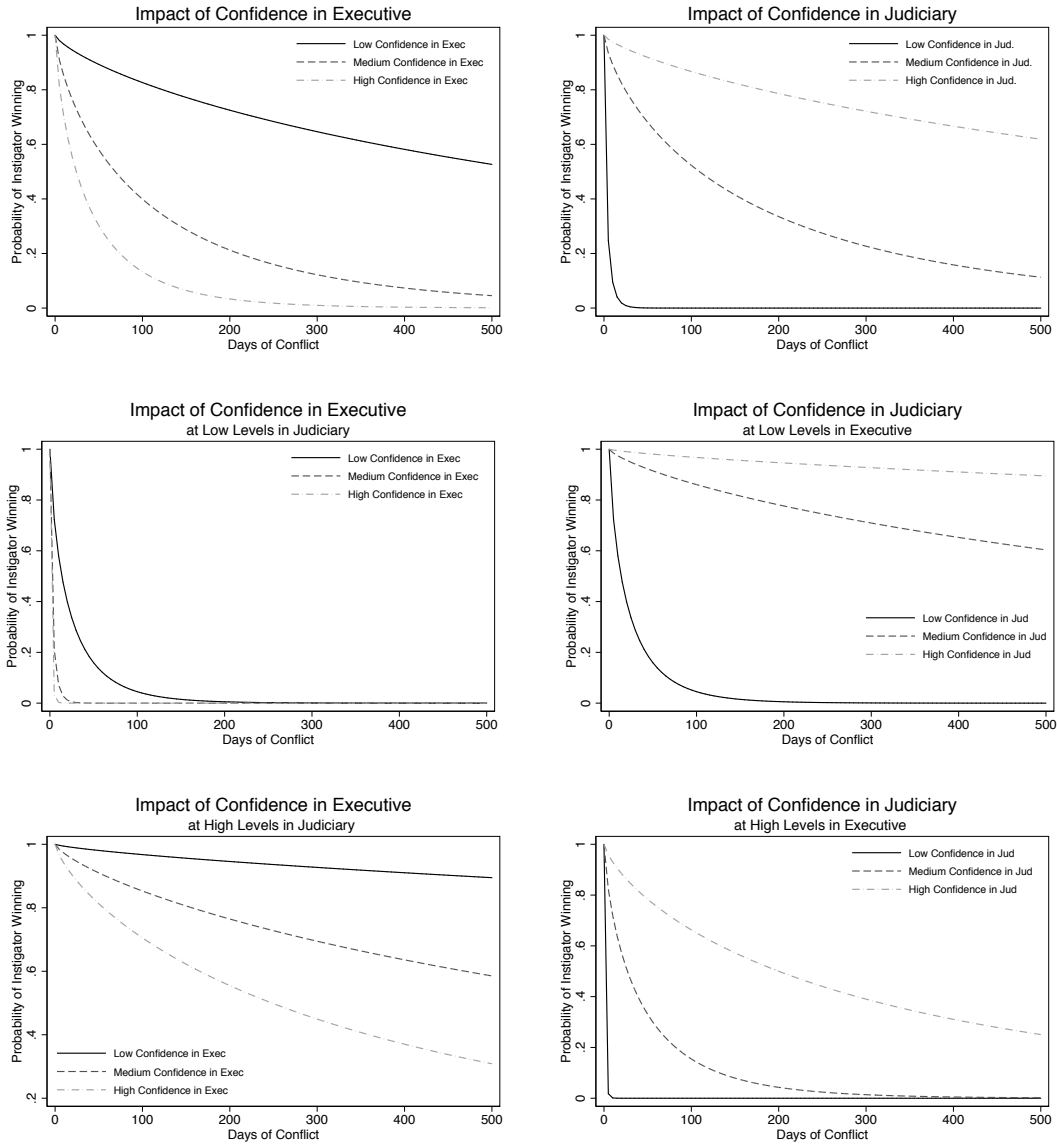


Figure 5.4: Impact of Confidence on the Duration to Winning a Conflict

Graphs on the left represent the impact of confidence in the executive at (1) average levels of confidence in legislature, at (2) low levels of confidence in Legislature and (3) high levels of confidence in the legislature. On the right represents the impact of confidence in the legislature at (1) an average level of confidence in executive (2) at low levels of confidence in executive, and (3) high levels of confidence in the executive

country's judicial system will treat business fairly and impartially.¹¹ On the other hand, subverting judicial power, by removing unfriendly judges and replacing them with regime loyalists, may provide the government with the ability to halt legislation being struck down in the courts.¹² Or the newly elected President may call the legitimacy of the courts into question by noting the unprofessionalism of justices speaking in opposition to a potential candidate.¹³ The common theme behind these actions is that the initiator of the conflict believes the action or rhetorical strategy used to manipulate judicial power will have the intended effect upon judicial power. Beginning with this assumption, I test how effective the strategies employed by the legislative, executive, and judicial institutions are in achieving the preferred outcome relative to judicial power. To do this, I create a theoretical framework that centers on how changes in the political environment impact the efficacy of conflict resolution. I posit that power imbalances, political uncertainty, and public support can provide important signals to institutional actors on the most advantageous time to initiate a conflict that will resolve in the institution's favor.

To test the implications of my argument, I rely on event history analysis that examines (1) what factors impact the termination of a conflict and (2) what factors determine when a conflict will end successfully for the initiator of that conflict. I test my theoretical arguments with original and pre-existing data for over 80 conflicts in Latin America from 1980-2004. The results of the models indicate that institutions respond to signals or changes in the environment when engaging in interbranch conflicts. Public confidence in the executive and legislature, the modes of institutional behavior, and the degree of power entrenchment all influence the termination and the successful termination of interbranch conflicts. Notably, public support for the

¹¹ For example, judicial independence in Singapore is high for economic cases, but low otherwise.

¹² The most recent example of this situation being the coup in Turkey in the summer of 2016.

¹³ For example, the conflict between President Trump and Supreme Court Justice Ruth Bader Ginsburg that occurred in the summer of 2016.

executive and the judiciary conditions the likelihood of a conflict enduring to a significant extent. This result indicates that the assumption for rationality may be credible for the executive, under certain conditions. It also indicates that while executives with their unequal share of distributed power can decisively influence the evolution of a conflict, that power does not always proceed unchecked. Lastly, the impact of rhetoric, direct action, and cumulative actions by the institutions are mixed. An instigator of a conflict is more likely to achieve its preferred outcome when it uses a form of direct action to end the conflict. However the frequent use of direct actions in a conflict can actually prolong its duration, as opposed to only using rhetorical strategies. This degree of variation suggests that further investigation into the specific categories of actions, are the consequential effects on conflicts, is warranted.

CHAPTER 6

CLOSING THOUGHTS

Independent courts are essential components of many varieties of governments, but especially for democracies. The ability to issue a decision free from external influence and additionally for that opinion to be followed is critical for the rule of law. Yet how do independent courts come about? In answer to this question, many scholars have put forth explanations that describe the process of accumulating judicial power. Carubba (2009) places importance on creating strategic opinions that seek to establish judicial power by slowly building it up via legal rulings. Ramseyer (1994) points to the necessity of competitive elections. When a country continually holds free and fair elections, political actors support the independence of a court because of the belief that the political actor could come to power again via an election. Despite these theoretical frameworks, courts with moderate and low levels of judicial independence still exist. By looking at the news it is possible to observe that national actors manipulate those courts. As such, the goal of this dissertation is to discover when and how will national actors seek to alter the power of the judiciary?

I develop a theoretical framework that rests on a major, though untested, assumption within comparative courts literature. When actors do attempt to manipulate judicial power, the actor believes that this manipulation yields the intended outcome. For example, when the legislature agrees to double the budget of the judiciary, the belief is that the legislature is supporting judicial power. Generally, scholars employ this assumption when examining the relationship between executive elections and constitutional reforms. The intuition is that when an executive has a credible belief

that she will be ousted from office, the executive reforms the constitution to provide additional power to the judiciary. The executive assumes that the provision of extra strength to the judicial institution diffuses into the decision making process of judges, where the judges will then uphold the policies enacted by the executive when she was in office. If this is true, then a number of concerns arise. (1) Executives are not the only actors who retain goals relative to the judiciary. Both legislatures and judges have preferences on the alteration of judicial power. (2) Elections represent only one of many environments that create uncertainty for national actors. If executives seek to manipulate judicial power during one of these uncertain environments, then it is likely that these actors are motivated by shifts in other political environments to pursue their judicial goals. (3) There are other means to manipulate judicial power apart from constitutional reforms. Additionally, actors may see advantage in using rhetoric to achieve their judicial goals, instead of methods of action.

The purpose of the dissertation is to provide a comprehensive picture of how national actors believe they influence judicial power by addressing the three concerns above. I extend my analysis outside of the executive institution. I assume that both the legislature and the judiciary play an integral role in the development of judicial power. I develop a theoretical framework that examines three types of shifts in a political environment that may impact behavior, apart from elections. Institutions facing reconfiguration of power, power concentration, and electoral uncertainty, can take advantage of the shift by pursuing to alter judicial authority. I posit that these three shifts change the nature of the relationship between the three branches. When this occurs, executives, legislatures, and judiciaries modify their behavior, though the shifts impact the institutions disparately. Judiciaries who face no electoral uncertainties, will modify their behavior when changes within the power status-quo occur. Executives are similarly impacted by power reconfiguration. Given that previous scholarship notes that electoral uncertainty modifies executive behavior, I also test

this implication. Finally, legislatures should also be impacted by electoral uncertainty and the shifting tides of power redistribution.

Constitutional reforms and alterations of judicial membership have been the two largest areas for scholars to examine the development of judicial power. However I discuss the importance of broadening the set of behavioral options available to institutions. Behavior can take on two forms: action or rhetoric. Within each of these options, multiple types and formats exist. Certainly actors will remove or add justices to the bench when possible, as well as amending the constitution. However actors can also manipulate the judicial budget, modify security protocols, initiate investigations, protest, and not comply with judicial rulings. Though ignored by scholarship for some time, these forms of action are just as important to understanding judicial power as traditionally-studied methods. In fact, in my data, executives request judicial action more than they manipulate membership on the court or secure constitutional reforms. Moreover, the most common form of behavior by the executive is actually a rhetorical attack on the judiciary that is intended to undermine its authority. The use of rhetoric in relation to judicial power can be incredibly important. This rings especially true as technology advances and the ability for actors to communicate directly with each other or the public progresses swiftly.

Even more importantly, studying rhetoric and its uses in interbranch conflict can be useful to understanding how reforms or later manipulations of the judiciary are perceived by the public. Even in the United States where judicial independence is at its maximum there are instances of branches seeking to influence at least the perception of the judicial system. During the summer of 2017, fifty-eight Republican Congressmen called on Justice Ruth Bader Ginsburg to recuse herself from the upcoming case *International Refugee Assistance Project v. Trump* to be heard during the 2017 October term. Legislators supporting President Trump inserted themselves into this conflict between the judiciary and the executive branch after Justice Gins-

burg’s public comments on a Trump presidency nearly a year ago. On July 8th, 2016 in an interview to the *New York Times*, Justice Ginsburg stated that she “couldn’t imagine what this place would be - I can’t imagine what this country would be - with Donald Trump as our President.” Days later she called the president “a faker” during a CNN interview that questioned her earlier comments from the *New York Times* article.¹ Even though she later apologized for her statements, the controversy continues to follow her throughout his presidency. In their letter to Justice Ginsburg, the lawmakers note that the Justice’s lack of impartiality “would violate the law and undermine the credibility of the Supreme Court of the United States.”² While it does not appear likely that Justice Ginsburg will recuse herself, the use of rhetoric in this interbranch conflict has initiated greater discussion about the recusal process for justices of the Supreme Court. There is now an opportunity for lawmakers to question the legitimacy of Supreme Court rulings where Justice Ginsburg hears a case that involves the Trump administration. And while this could simply boil down to a moment of posturing for the Congressmen, this type of rhetoric may impact diffuse public support for the Supreme Court in the long run.

To test the implications of my theoretical framework, I use two methodological techniques. In Chapters 3 and 4, I employ a Bayesian poisson regression to determine what impacts the propensity of executive, judicial, and legislative alterations of judicial authority. Bayesian analysis is a powerful tool for data with few observations, which applies to a number of my models. In Chapter 5, I use an event history model to capture what impacts the duration of interbranch conflict.

The results from the dissertation provide general support for existing theoretical posits, with some additional conditions. As well, I find support for my intuitions that dynamic environments play an important role in modifying when national ac-

¹ Interview available at: <http://www.cnn.com/2016/07/12/politics/justice-ruth-bader-ginsburg-donald-trump-faker/>

² DeSantis et al., pg 2

tors subvert or support judicial power. The results from chapter 3 show that power redistribution has a potent impact on legislative and executive behavior, though its effects manifest themselves differently for each institution. Executive critical behavior is highly determinant upon changes within the judicial institution. Executives seek to undermine judicial power when the judiciary moves farther away from the executive ideologically. Change in membership on the court similarly impacts the way in which executives treat courts. This result supports the theoretical intuition that power redistribution greatly impacts the executive. This makes sense especially for Latin American countries where power has typically been concentrated in the executive since gaining independence from Spain in the 19th century. Even though it regards the treatment of the judiciary, legislatures are less impacted by changes in the judiciary than changes within the executive. Given the degree of power concentration within the executive, it seems reasonable that legislatures are galvanized by executive turnover, not cautioned by it.

Another key finding from the results shows the importance of international organizations to the stability of judicial power. When countries become members of new international organizations, executives are much less likely to negatively manipulate judicial independence. Executives concerned with membership being denied or approved recognize the inherent value of an independent judiciary to most international organizations. As such through the process of membership, these organizations serve as watchdogs on executive behavior, where executives believe the best strategic option is to conform to international norms on not undermining judicial authority. Another way to interpret this result is that international organizations affect policy change, or at least temporary behavioral change. For policy makers or international groups concerned with human rights, this should be an encouraging result since judiciaries with higher degrees of independence respect the rule of law.

In Chapter 4, I discover that judges are both proactive and reactive to the stim-

uli in the political environment. A leading predictor in how judges modify their own power comes from the power relationship between the executive and legislative branches. At its extremes, when power is highly concentrated within the executive or within the legislature, the probability that judges will either undermine or support their own institution is low. In fact in some cases it exhibits a negative effect on the outcome variable. However when the power distribution between the executive and legislature moves towards the middle, the judiciary is much more likely to both subvert and support judicial power. Given the nature of the judiciary in a system using separation of powers, this makes sense. When power is divided between other institutions, the likelihood of either institution retaliating against the judiciary is lower. The capability for the institutions to seek retribution is not as certain when power is concentrated. This provides initial support for a widely-used theoretical assumption that judges are rational actors.

In Chapter 5, the results of the models indicate that institutions respond to signals or changes in the environment when engaging in interbranch conflicts. Public confidence in the executive and legislature, the modes of institutional behavior, and the degree of power entrenchment all influence the termination and the successful termination of interbranch conflicts. Notably, public support for the executive conditions the likelihood of a conflict enduring to a significant extent. In addition, how public support impacts the duration of conflicts is conditional on the levels of public support retained by the executive and the judiciary. This result indicates that the assumption for rationality may be credible for the executive, under certain conditions. Lastly, the impact of rhetoric, direct action, and cumulative actions by the institutions are mixed. An instigator of a conflict is more likely to achieve its preferred outcome when it uses a form of direct action to end the conflict. However the frequent use of direct actions in a conflict can actually prolong its duration, as opposed to only using rhetorical strategies. This degree of variation suggests that further investiga-

tion into the specific categories of actions, are the consequential effects on conflicts, is warranted.

The results from this dissertation highlight the central role that legislatures play in the development of the judiciary. Though this institution may not engage in the manipulation of power as frequently as the executive, the legislature does have judicial preferences and does use environmental stimuli to achieve those preferences. Along the same line of thought, is the (not so) astonishing conclusion that judges manipulate their own institution. Moreover, judges in Latin America are not imprisoned within the realm of legal rulings, they are active in the broader environment while they pursue their goals. Despite being somewhat ignored by comparative courts scholars, these results demonstrate the need for additional thought and investigation on interbranch relationships.

The goal of the dissertation was to illuminate additional environments that impact the formation of judicial power. However a number of additional lines of inquiry arise out of the theoretical intuitions and results. Other actors may also seek to alter judicial power. One such national actor that comes to mind is the military. In Latin America, executives and militaries were, at times, indistinguishable, yet even when they are separate from the executive, the military may play an important part in the role of the courts. Additional actors of interest to the development of judicial power could be interest groups, especially ones that hold the capability to organize voters or lobby politicians.

Though I tested my theoretical posits about the importance of shifts within political environments in Latin America, I believe the general theoretical framework can be transplanted across regions or systems of law. Obvious areas in which the theoretical framework fits naturally are other countries struggling with democratic consolidation or democratic backsliding. The state of emergency implemented as a consequence of the attempted coup in Turkey is an illustrative example. The strug-

gle for power between the Turkish government and its judicial branch has been the status quo between these two institutions for some time. In the summer of 2016, the struggle was brought to the forefront when President Erdogan, assisted by the Turkish Parliament, passed legislation that drastically modified the judiciary by removing the positions of over 1,900 judges and absolving them of their duties. The opposing party, the Republican People's Party (CHP), filed a law suit directly to the Constitutional Court on July 1, 2016, a day after the bill's passage. In an eerily prophetic interview, former president of the Court Sami Selçuk criticized the bill saying that "[S]uch changes could be found only in times of military coup. In a normal legal order, no one can even dare to think of [such changes]." Only days later, on July 15, such circumstances arose after a failed military coup prompted President Erdogan to purge the judicial institution, among others, of 2,745 judges and submit orders for their detentions. The purges affected the judiciary at all levels; over 500 judges from courts of first instance and over 2,200 from courts of original jurisdiction were dismissed.³

There are other aspects of political systems that I did not have the opportunity or capability to test within this research project. The difference between parliamentary and presidential systems may provide another layer of context to judicial power. In the same vein, I have only tested my theoretical framework in separation of powers systems. When judges are appointed via independent bodies, like a judicial commission, this should affect the behavioral options available to executives and legislatures. Simply, it represents one less option with which to influence the judiciary.⁴ It is possible that such an institutional setup may also modify the way in which judges act toward their own institution. Finally, I was able to present evidence on a cor-

³ While President Erdogan did not directly dismiss the judges, as that power lies with the Supreme Board of Judges and Prosecutors, it was performed under his direction.

⁴ That is if the selection and appointment process is truly independent and separate from political maneuverings.

relational relationship of my theoretical intuitions, but it is an area of research that would be exciting to test in a global perspective. This is the relationship between low, middle, and high levels of judicial independence and the relative frequency with which executives, legislatures, and judiciaries alter judges' power. The intuition is that at low and high levels of judicial independence, there is either no willingness or no capability to manipulate judicial power. However, when a country is in the thick of democratic consolidation, and judicial power is seen as fluid, institutions should be much more likely to use both critical and supportive behavior to achieve their goals relative to judicial power.

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APPENDIX A

DIAGNOSTICS OF CHAPTER 1 MODELS

For each of the four models in Chapter 1, I include diagnostic graphs of the model to demonstrate that the Bayesian poisson model converged. In Bayesian analysis, it is impossible to prove that the model used is the converged model that accurately describes the relationship between explanatory and outcome variables. In frequentist analysis, statisticians developed hypothesis testing as a way to determine whether one can reject the null hypothesis that the model accurately captures the relationship between variables. However because Bayesian analysis is based on simulation, there are different techniques used to determine the “fit” of the model. These diagnostics provide information to determine if the model shows signs of convergence. I included four types of plots for every model parameter for each of the models run. Graphical summaries to determine convergence include trace plots, autocorrelation plots, and two distributional plots (histograms and densities). If a model has converged, the autocorrelation plot, in the upper left-hand corner, should center on a similar mean, upper, and lower limit. In effect, convergence in this plot looks like a fuzzy caterpillar. Autocorrelation plots, in the bottom lower-hand corner, provide information on the degree of autocorrelation between simulated models. Using a Metropolis-Hasting algorithm in Bayesian analysis naturally leads to some autocorrelation between models because it uses the previous model information to determine the subsequent model. However, autocorrelation should become negligible (reach 0) after a short amount of time. In the Autocorrelation plots in the lower left-hand corner, the bars should be steadily decrease toward 0. The histogram on the top right and the density plot on

the bottom right corners help users identify how the posterior distribution behaves given the specified priors. Because I used a normal prior for the models, these plots should show parameters conforming to the normal distribution.

A.0.1 EXECUTIVE CRITICAL BEHAVIOR MODEL

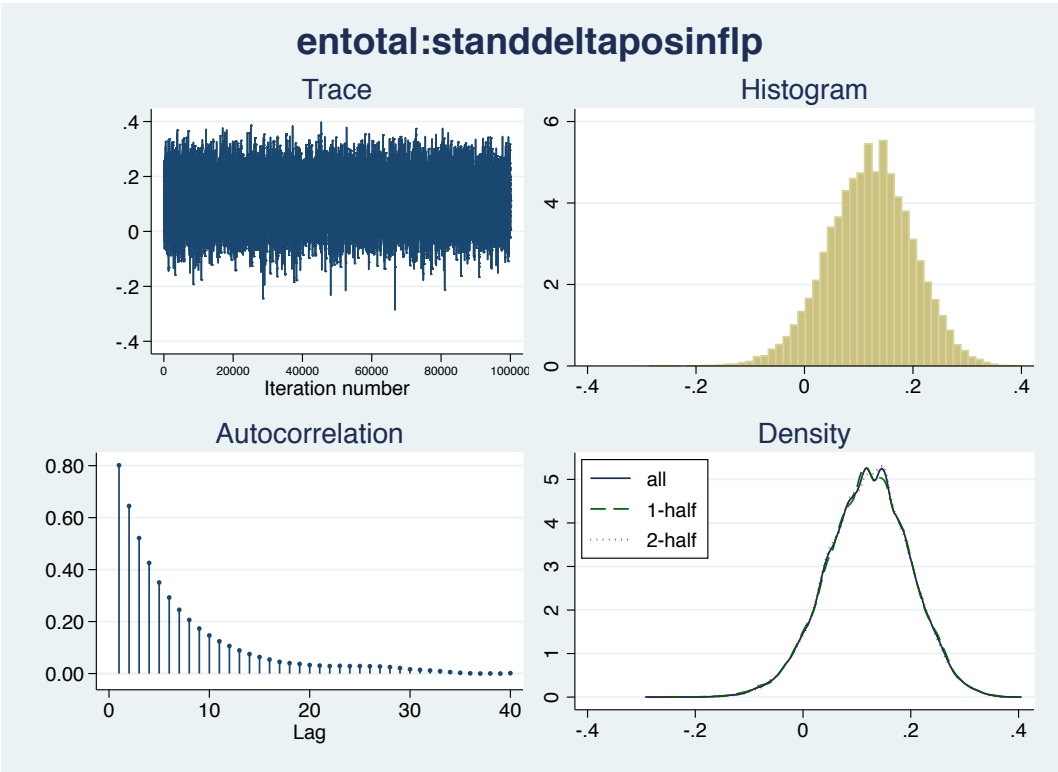


Figure A.1: Diagnostics of Executive Critical Behavior Model: Positive Changes in Inflation

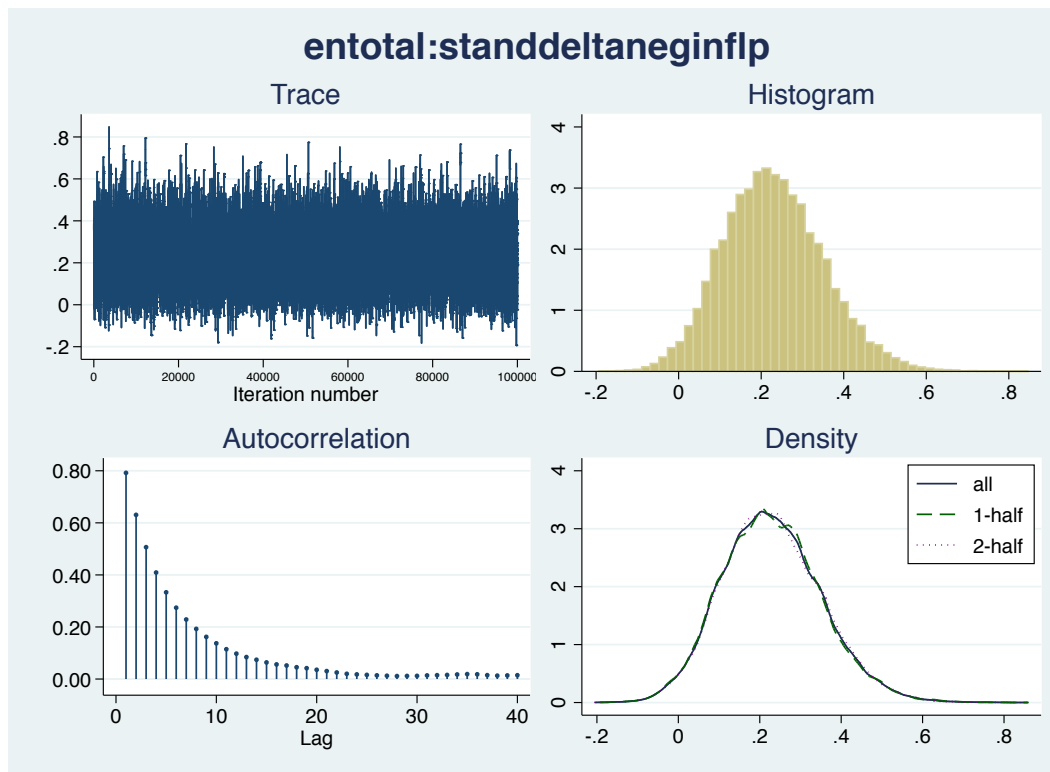


Figure A.2: Diagnostics of Executive Critical Behavior Model: Negative Changes in Inflation

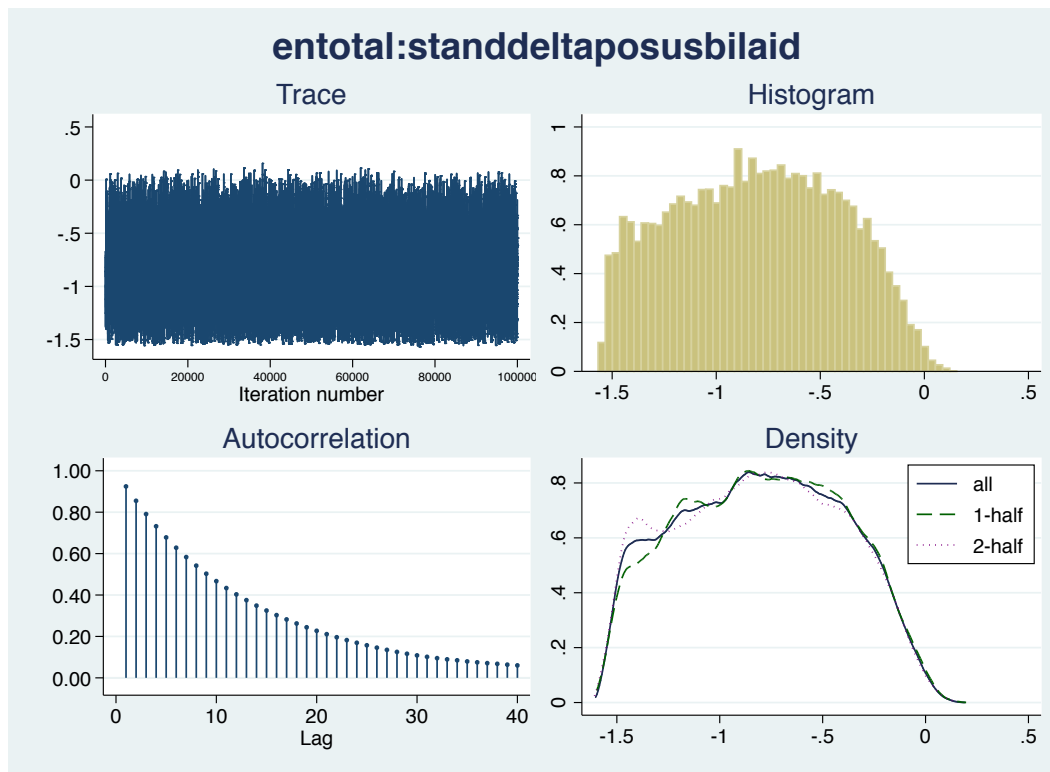


Figure A.3: Diagnostics of Executive Critical Behavior Model: Positive Changes in U.S. Bilateral Aid

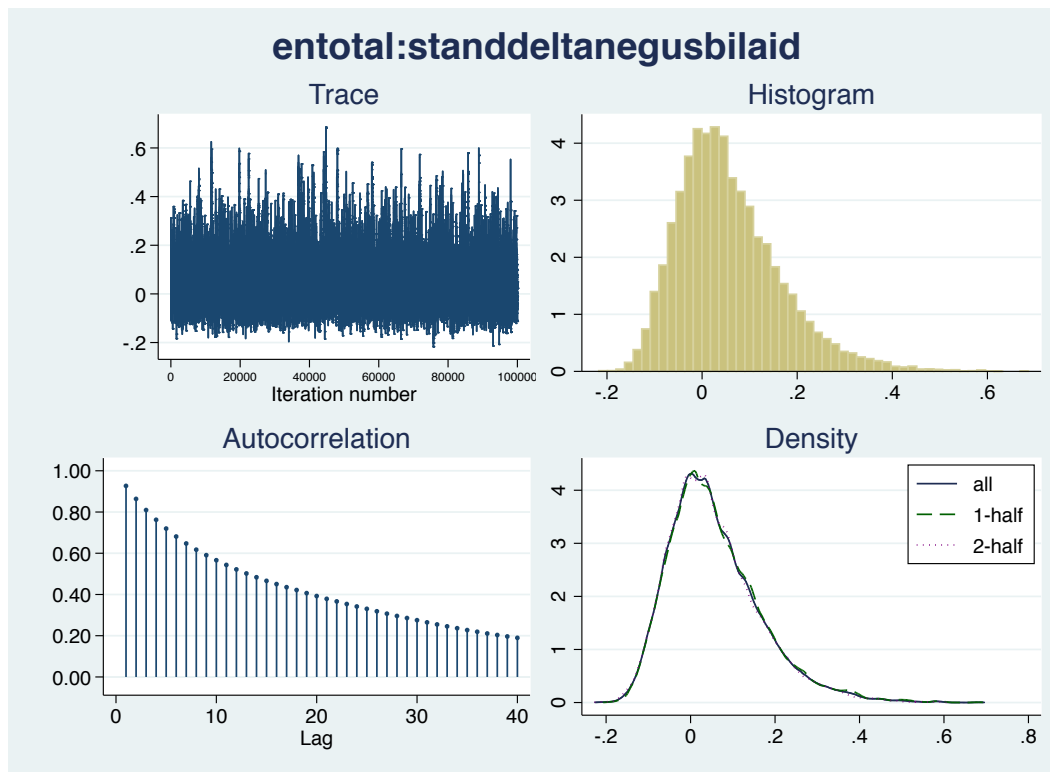


Figure A.4: Diagnostics of Executive Critical Behavior Model: Negative Changes in U.S. Bilateral Aid

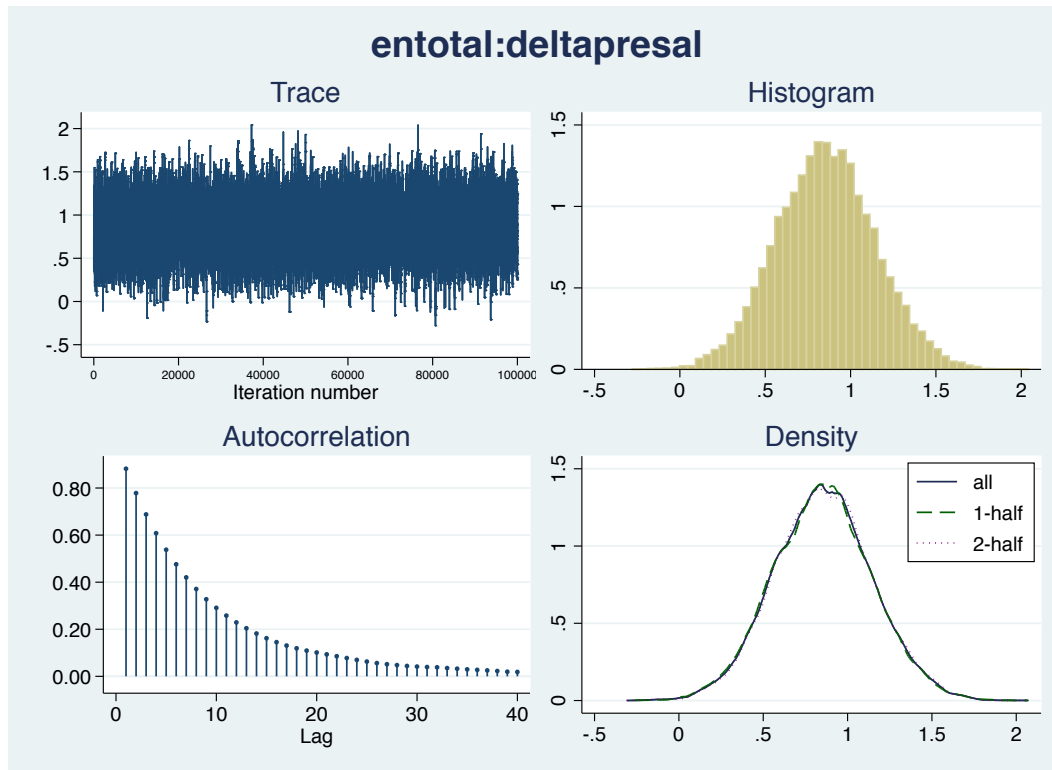


Figure A.5: Diagnostics of Executive Critical Behavior Model: Change in Court Alignment with President

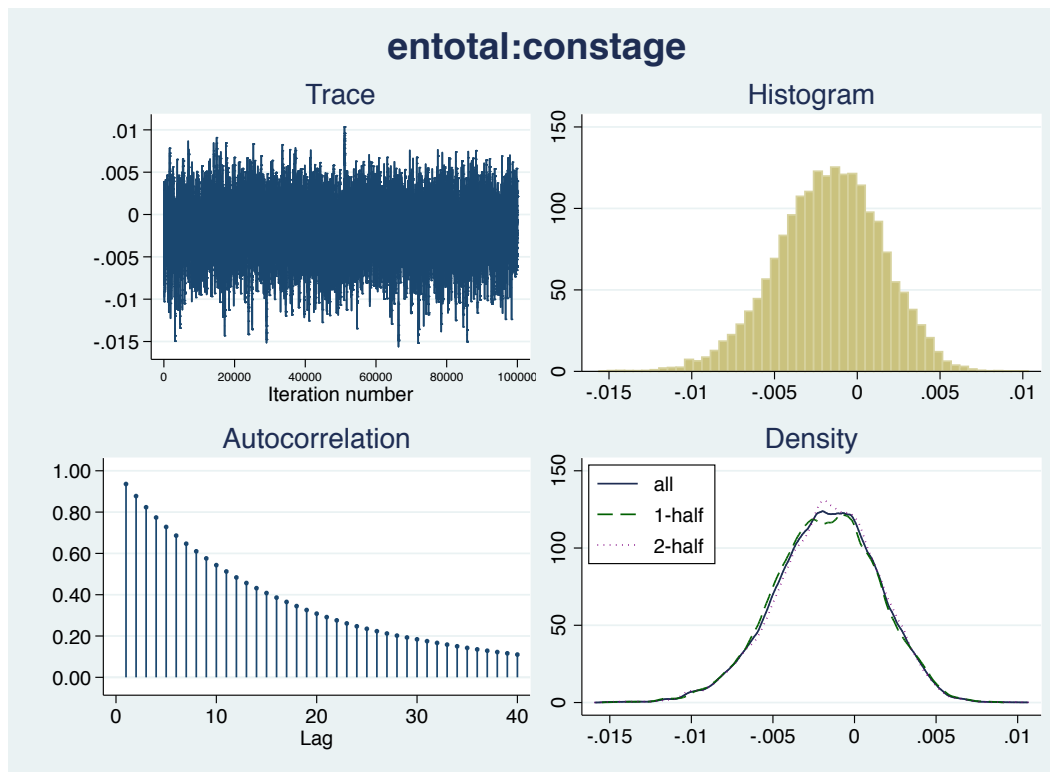


Figure A.6: Diagnostics of Executive Critical Behavior Model: Age of Constitution

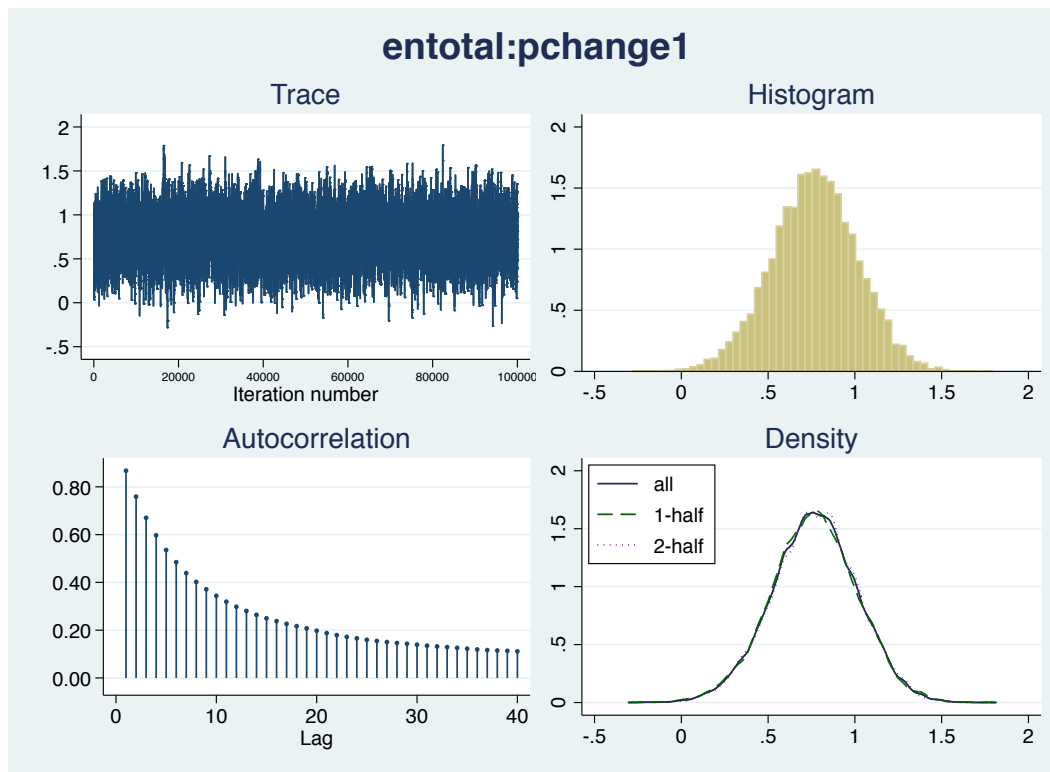


Figure A.7: Diagnostics of Executive Critical Behavior Model: Turnover in Executive Branch

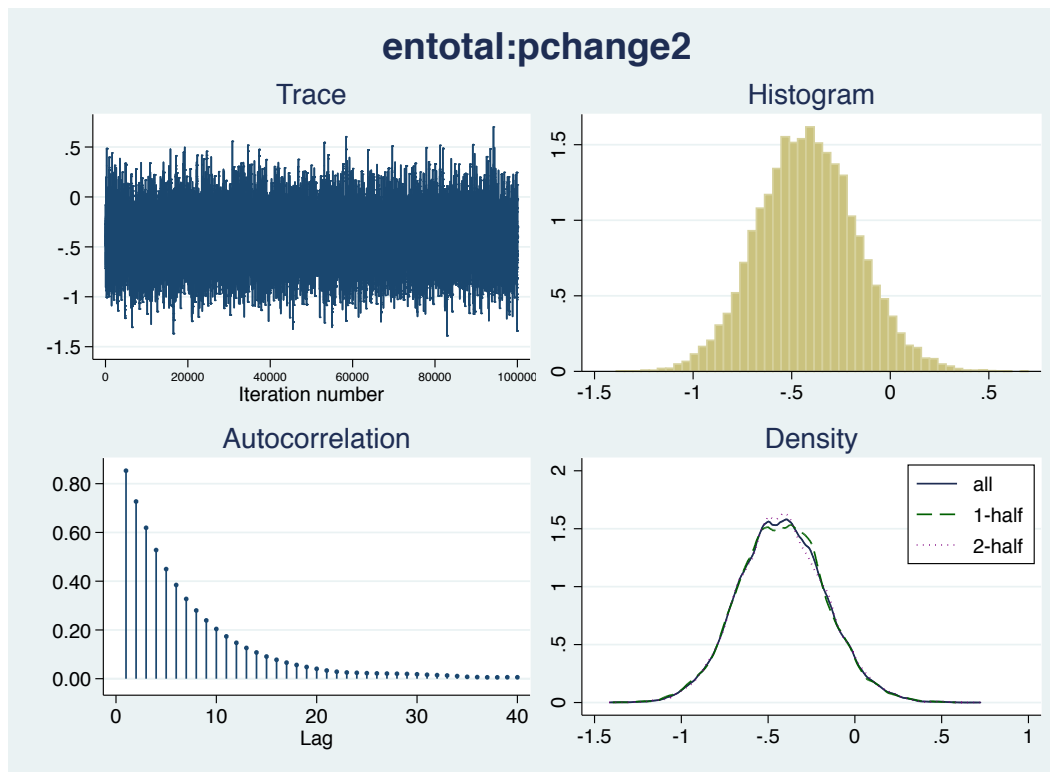


Figure A.8: Diagnostics of Executive Critical Behavior Model: Turnover in Legislative Branch

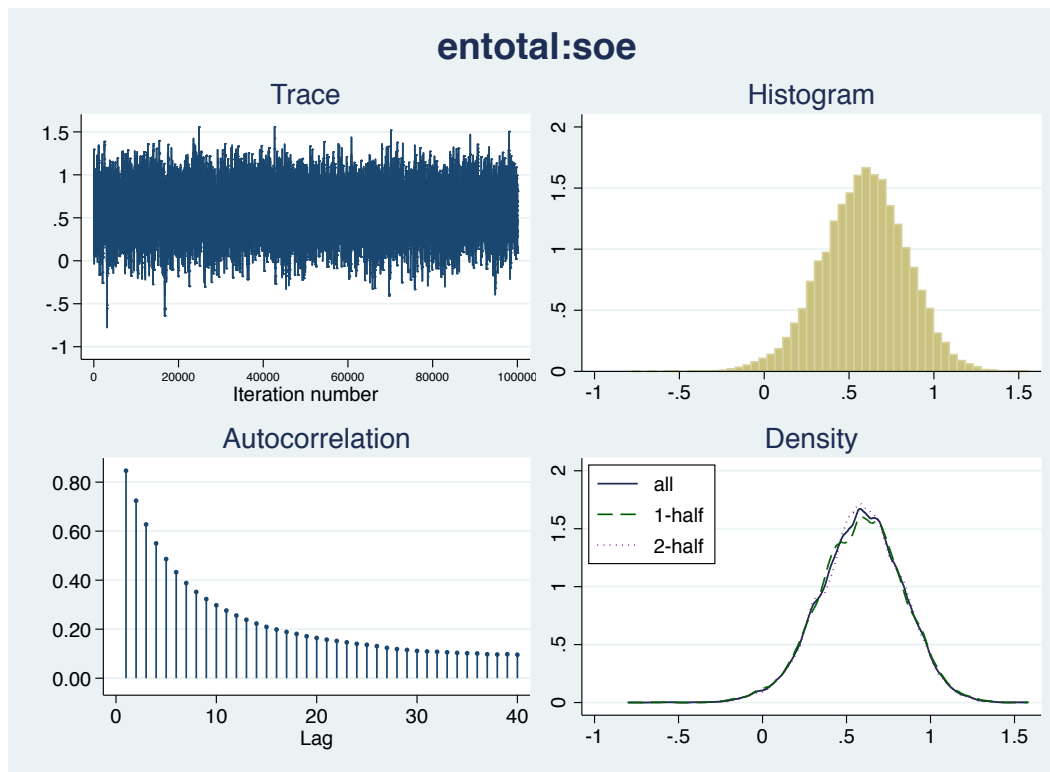


Figure A.9: Diagnostics of Executive Critical Behavior Model: State of Emergency Declared

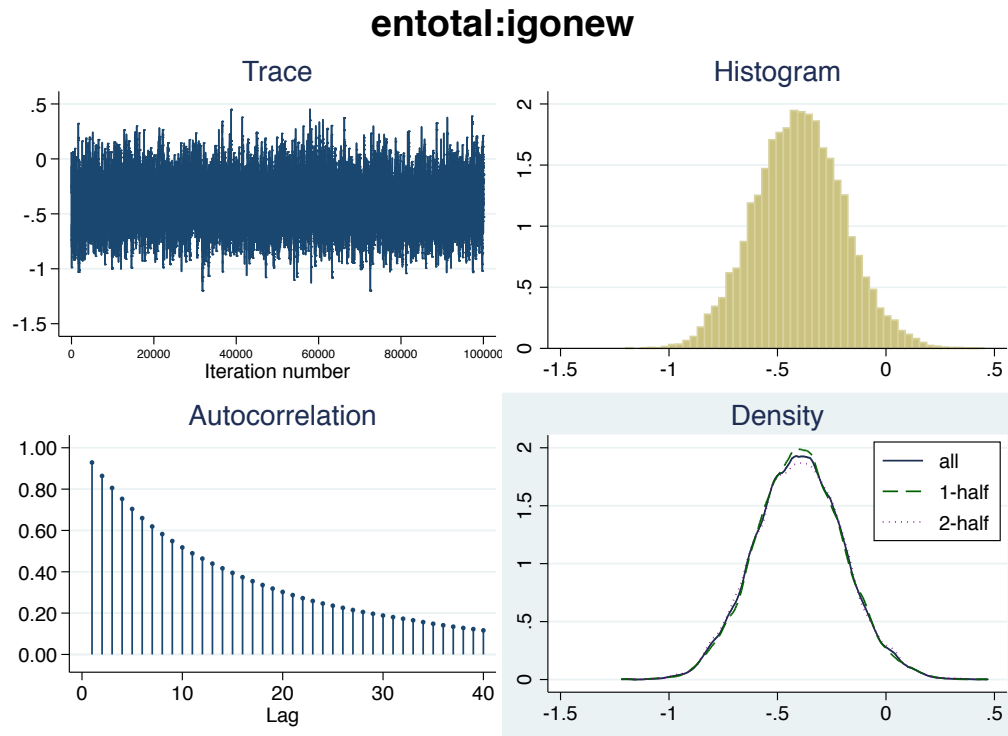


Figure A.10: Diagnostics of Executive Critical Behavior Model: New Member in an IGO

A.0.2 EXECUTIVE SUPPORTIVE BEHAVIOR MODEL

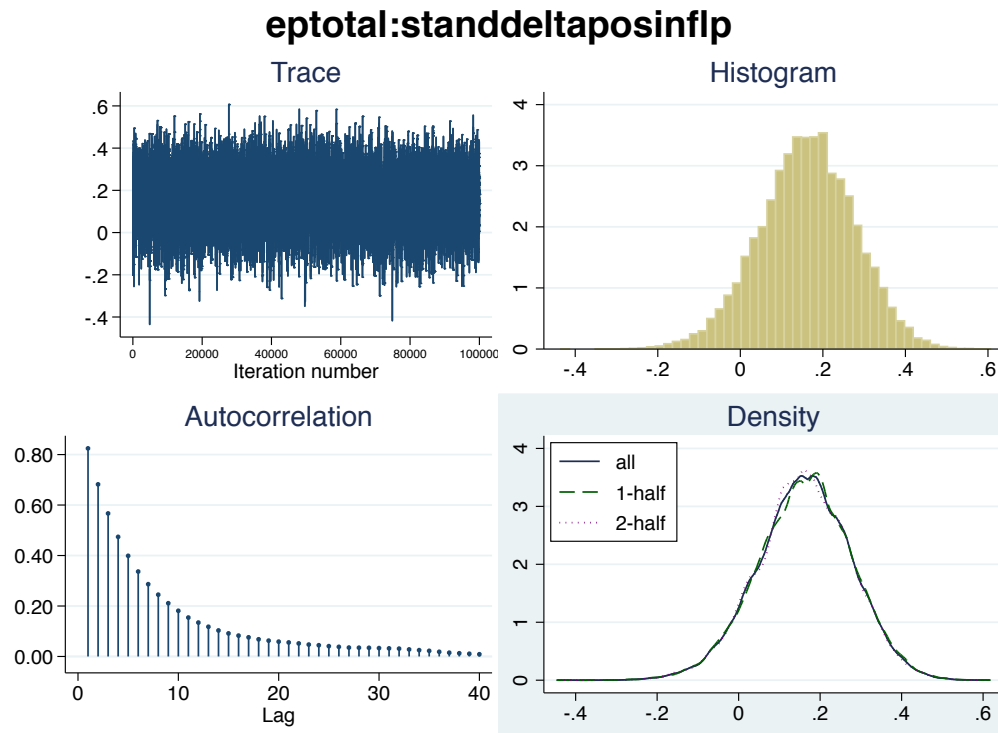


Figure A.11: Diagnostics of Supportive Critical Behavior Model: Positive Changes in Inflation

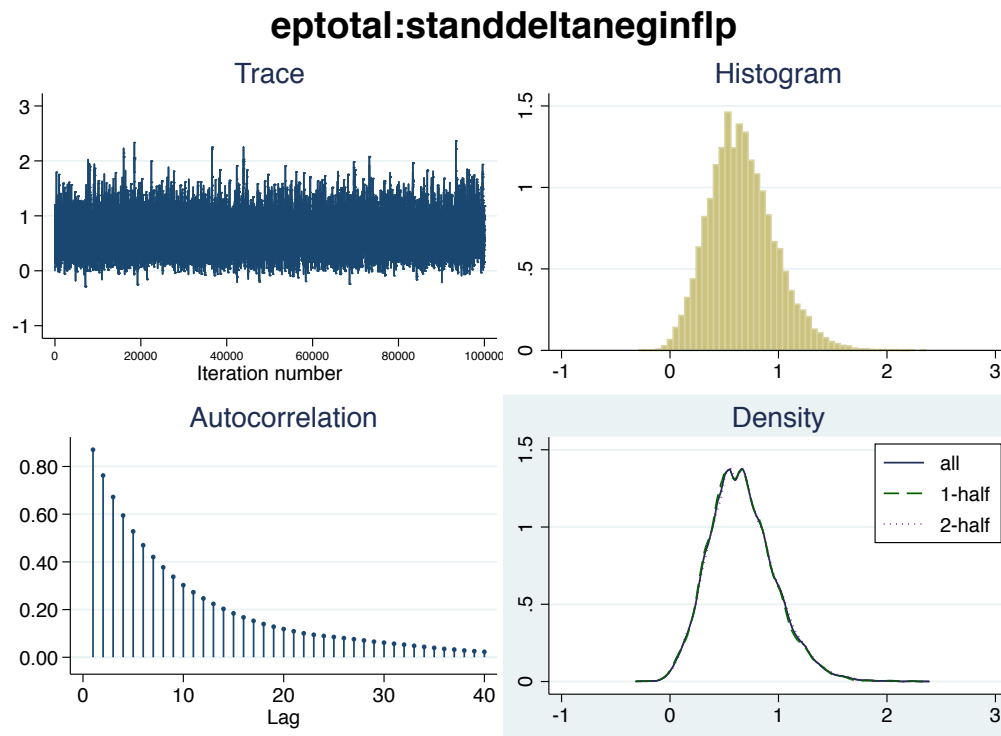


Figure A.12: Diagnostics of Executive Supportive Behavior Model: Negative Changes in Inflation

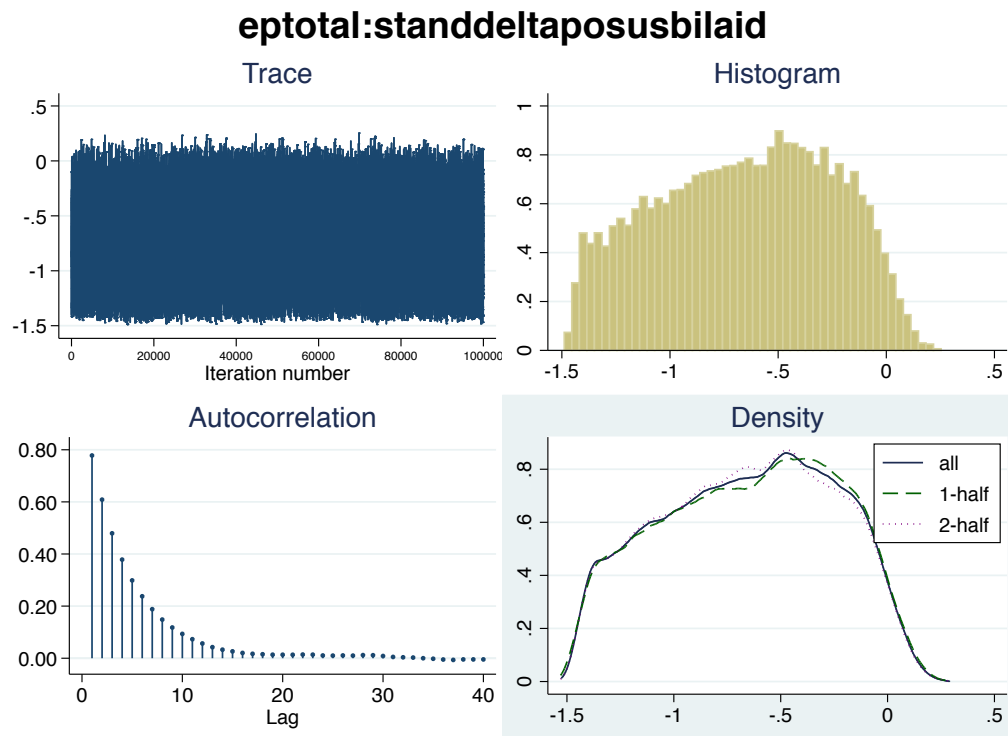


Figure A.13: Diagnostics of Executive Supportive Behavior Model: Positive Changes in U.S. Bilateral Aid

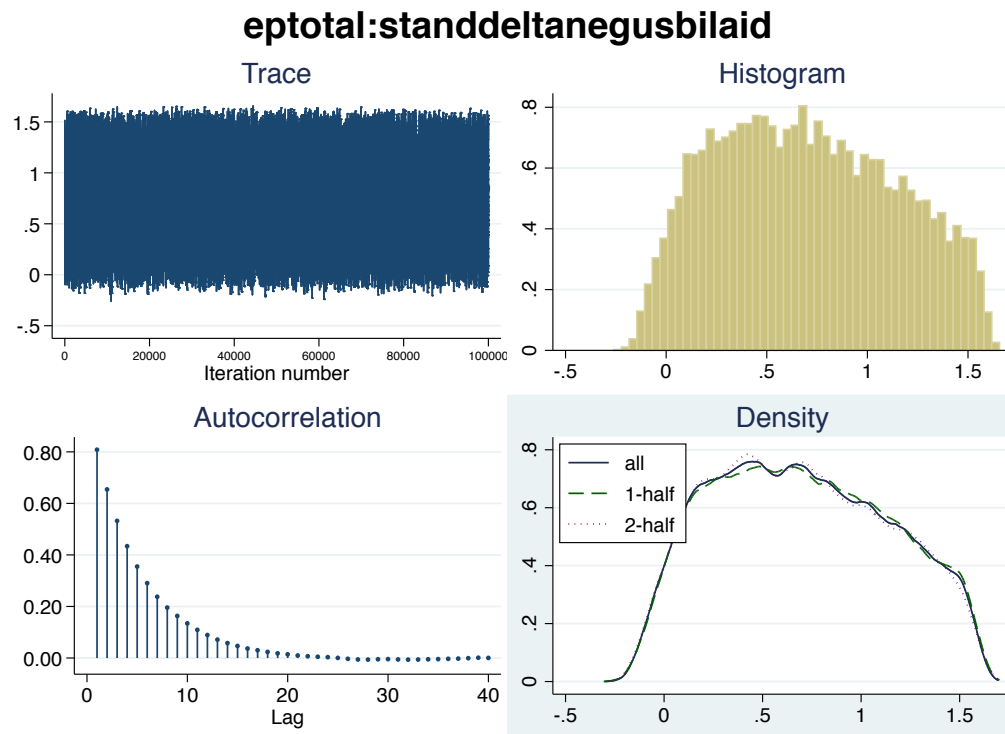


Figure A.14: Diagnostics of Executive Supportive Behavior Model: Negative Changes in U.S. Bilateral Aid

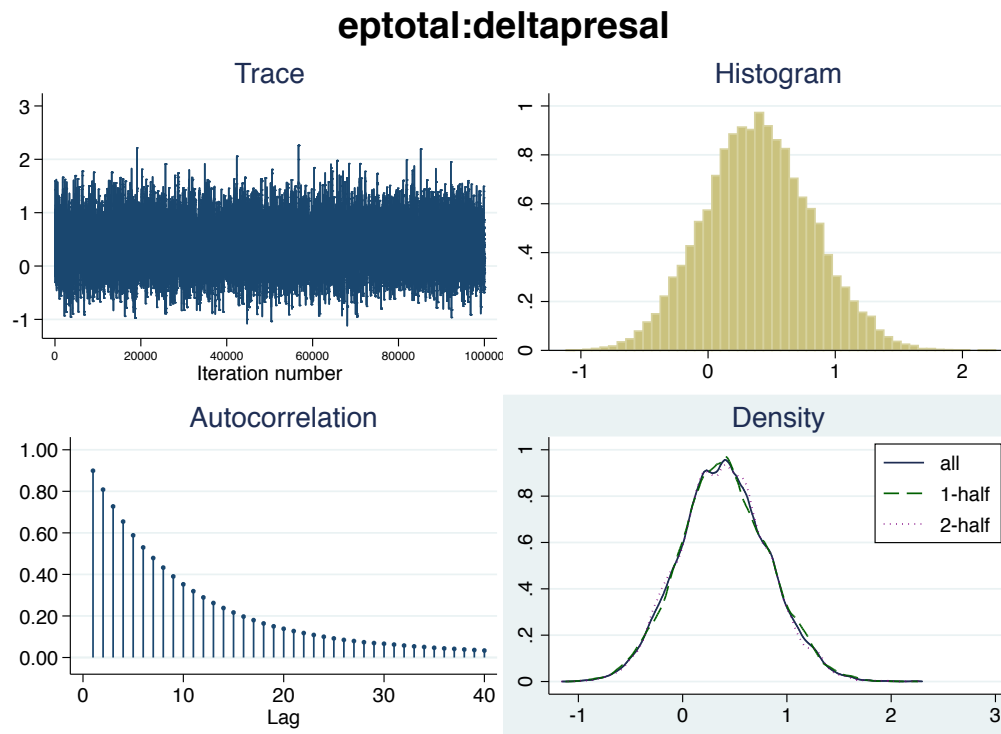


Figure A.15: Diagnostics of Executive Supportive Behavior Model: Change in Court Alignment with President

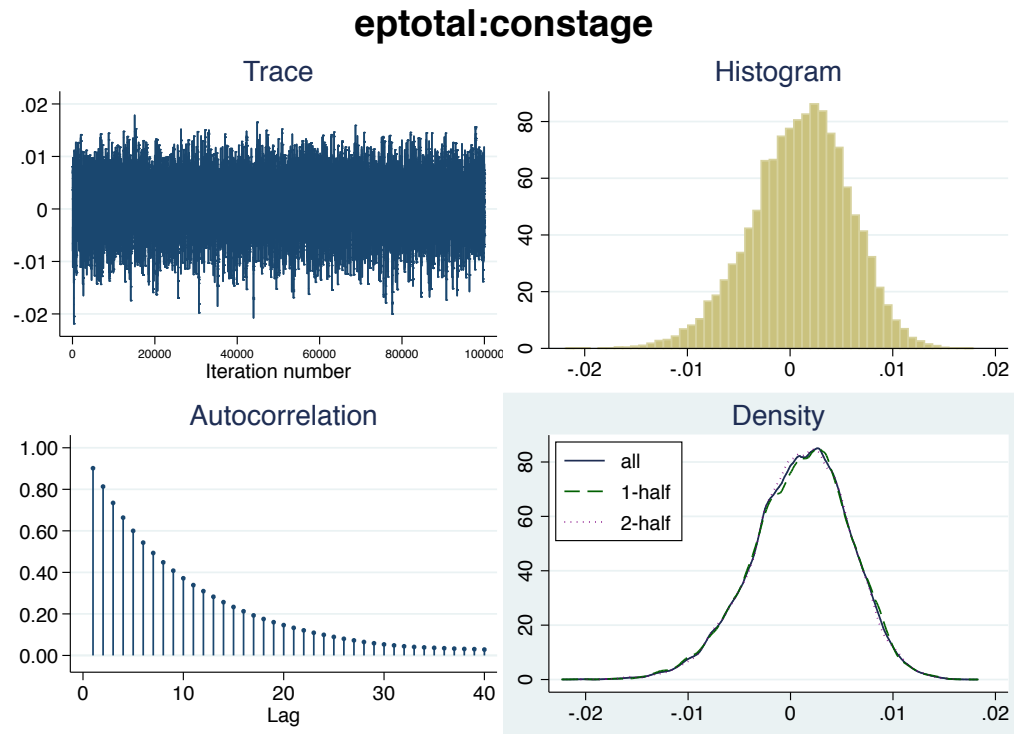


Figure A.16: Diagnostics of Executive Supportive Behavior Model: Age of Constitu-
tion

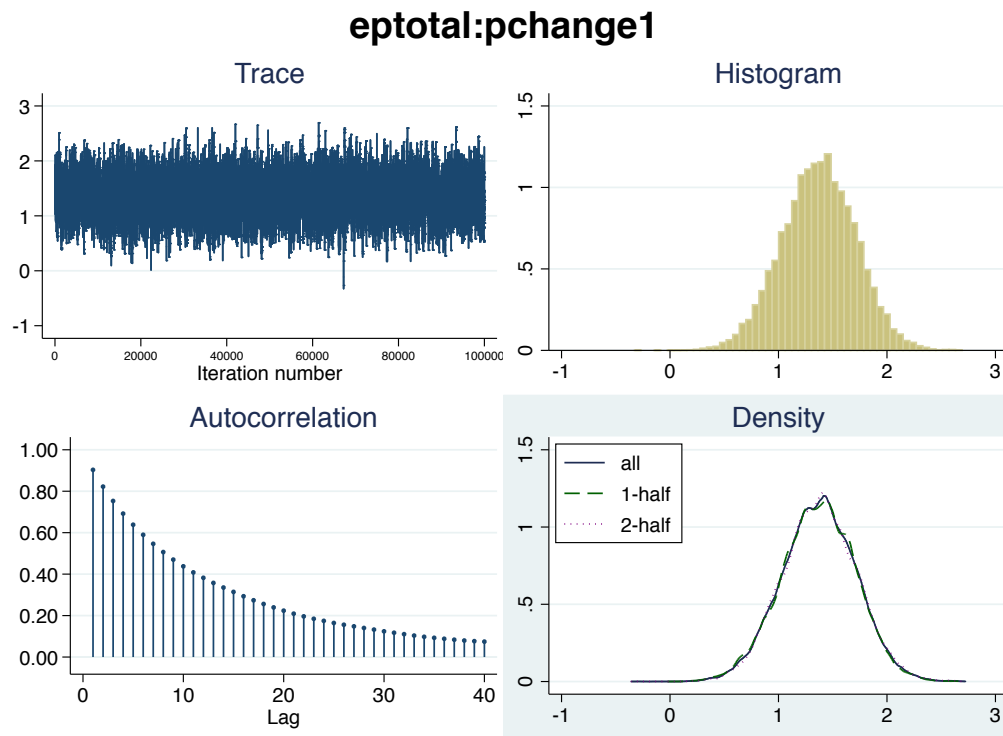


Figure A.17: Diagnostics of Executive Supportive Behavior Model: Turnover in Executive Branch

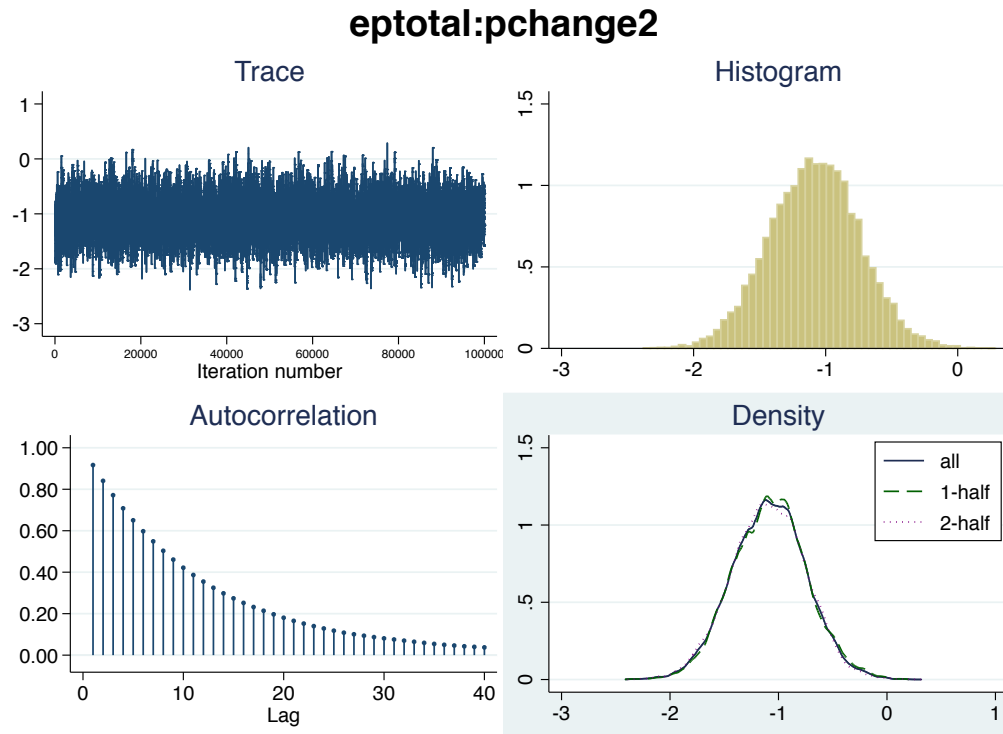


Figure A.18: Diagnostics of Executive Supportive Behavior Model: Turnover in Legislative Branch

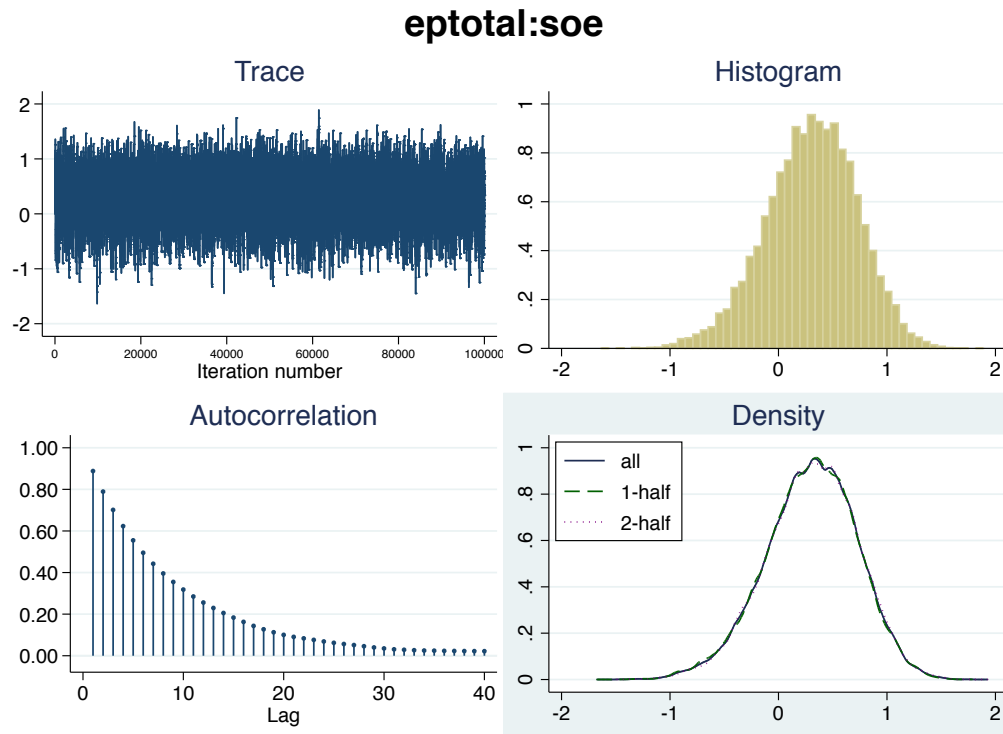


Figure A.19: Diagnostics of Executive Supportive Behavior Model: State of Emergency Declared

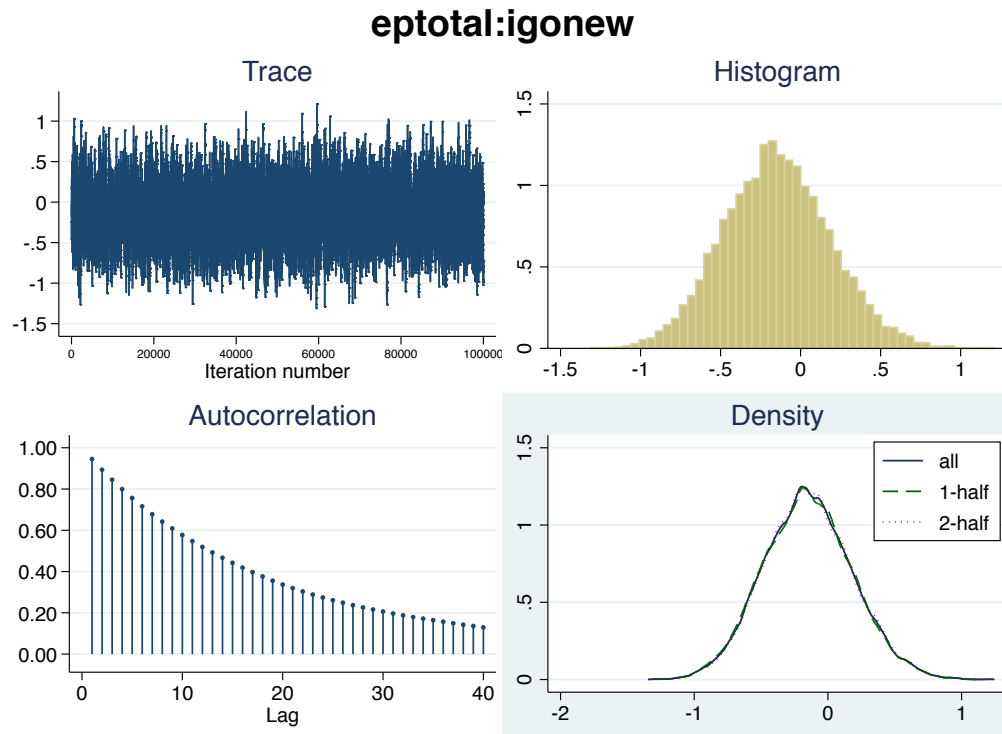


Figure A.20: Diagnostics of Executive Supportive Behavior Model: New Member in an IGO

A.0.3 LEGISLATIVE CRITICAL BEHAVIOR MODEL

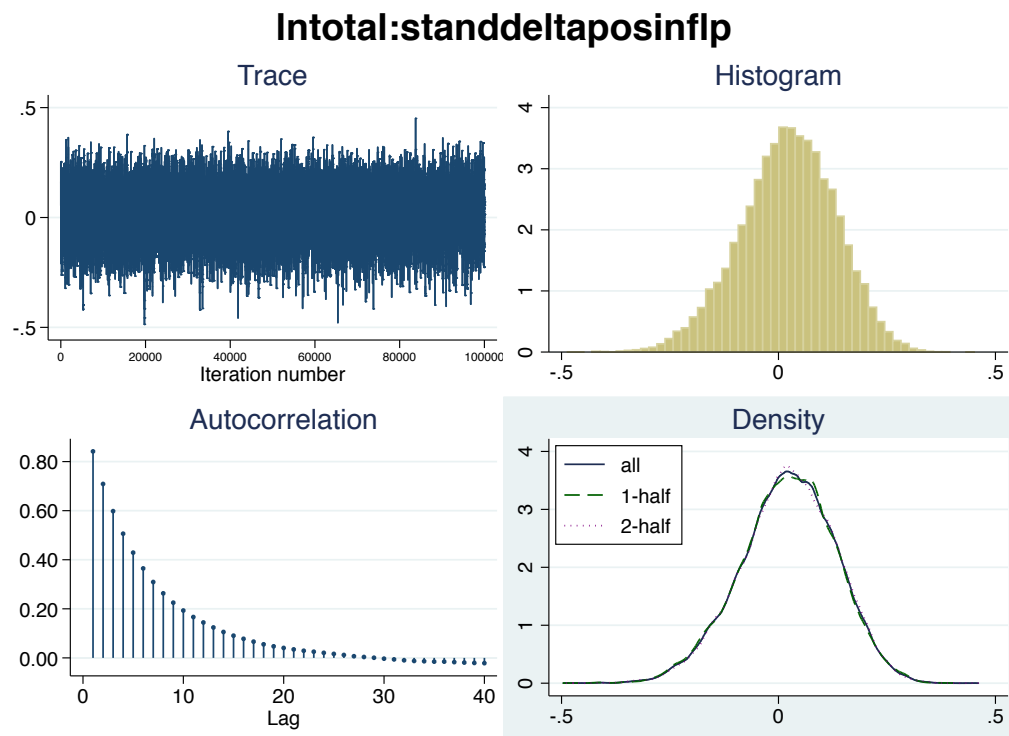


Figure A.21: Diagnostics of Legislative Critical Behavior Model: Positive Changes in Inflation

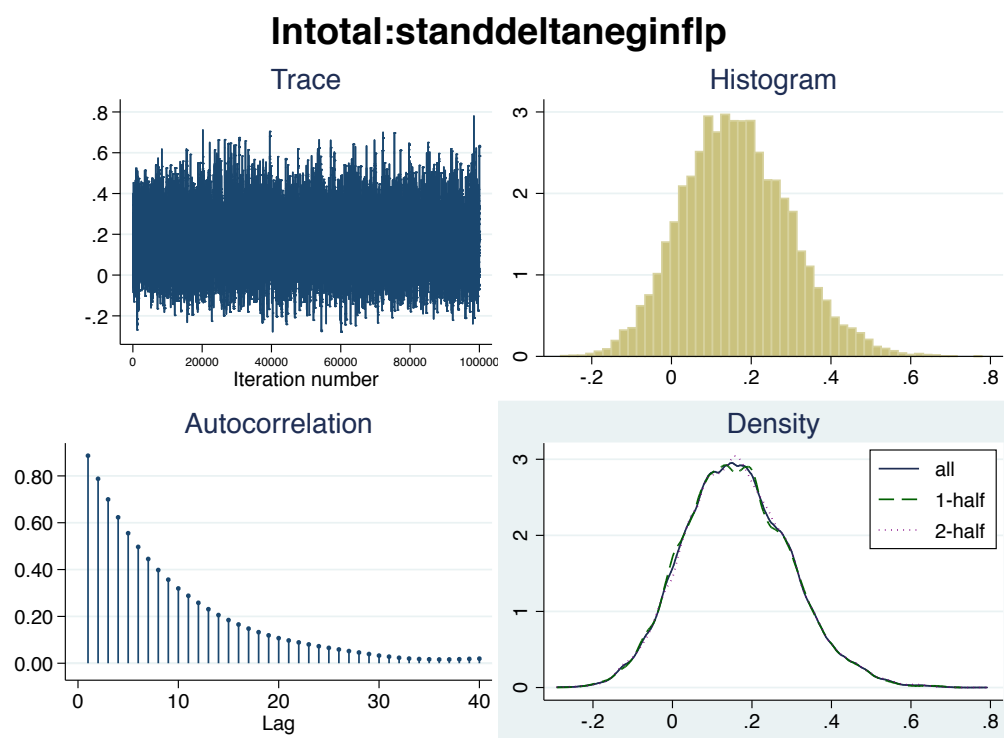


Figure A.22: Diagnostics of Legislative Critical Behavior Model: Negative Changes in Inflation

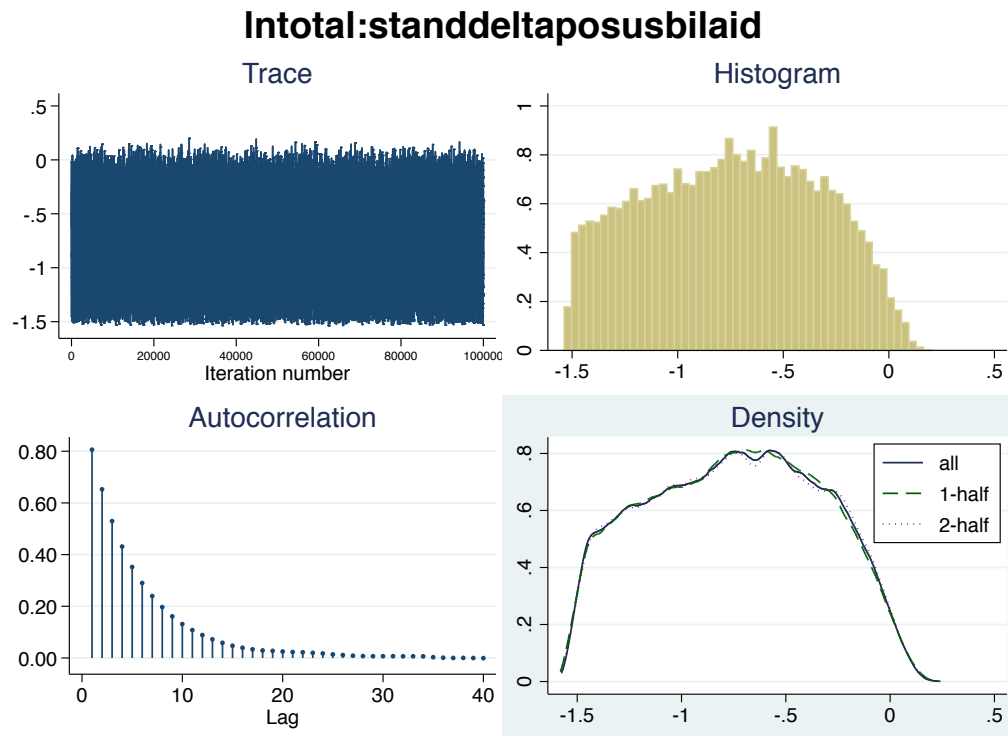


Figure A.23: Diagnostics of Legislative Critical Behavior Model: Positive Changes in U.S. Bilateral Aid

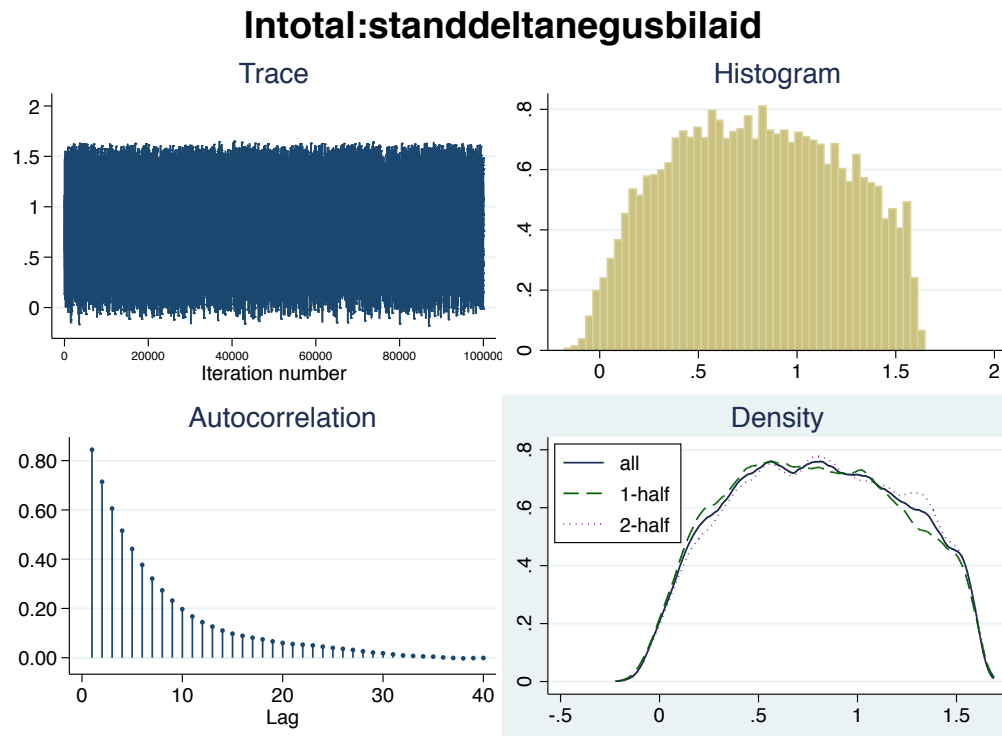


Figure A.24: Diagnostics of Legislative Critical Behavior Model: Negative Changes in U.S. Bilateral Aid

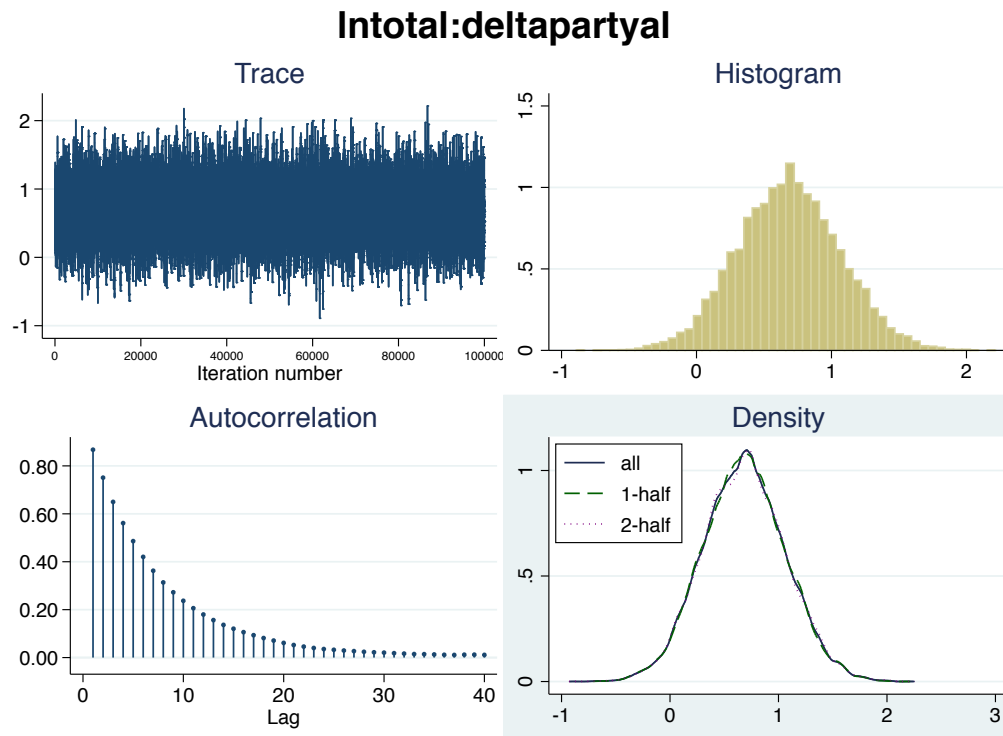


Figure A.25: Diagnostics of Legislative Critical Behavior Model: Change in Court Alignment with the Party

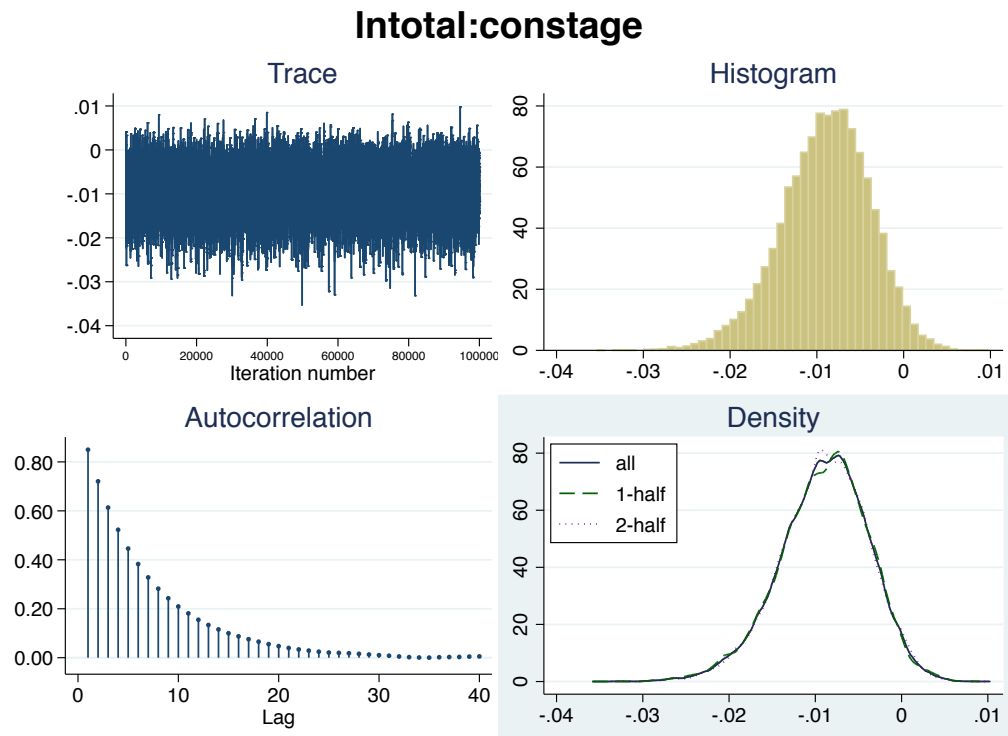


Figure A.26: Diagnostics of Legislative Critical Behavior Model: Age of Constitution

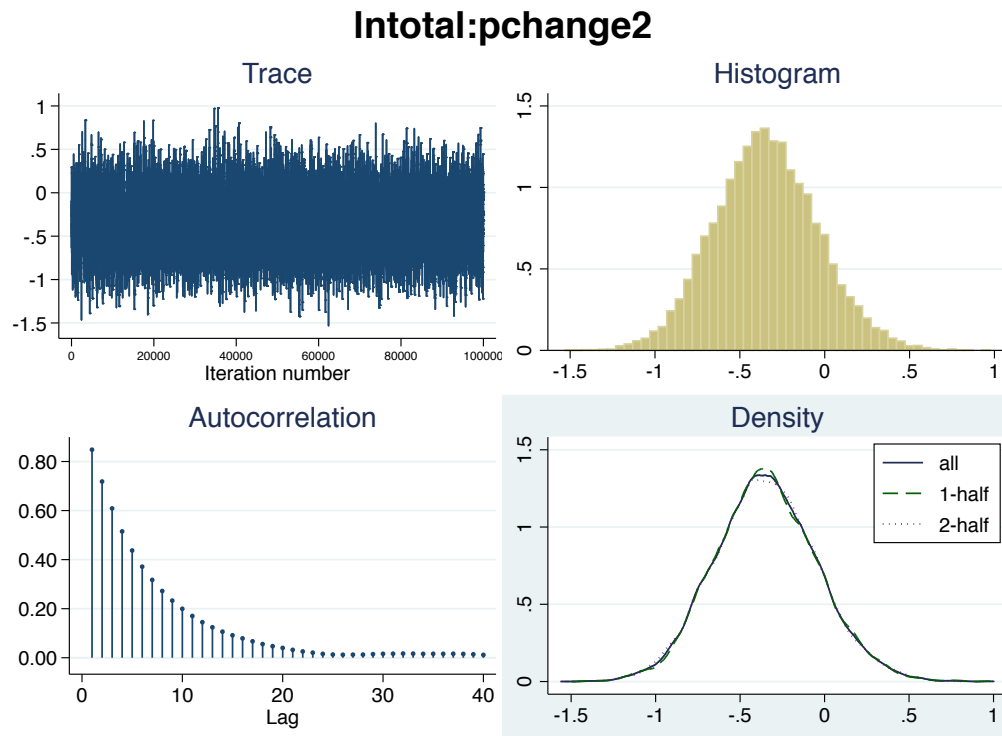


Figure A.27: Diagnostics of Legislative Critical Behavior Model: Turnover in Executive Branch

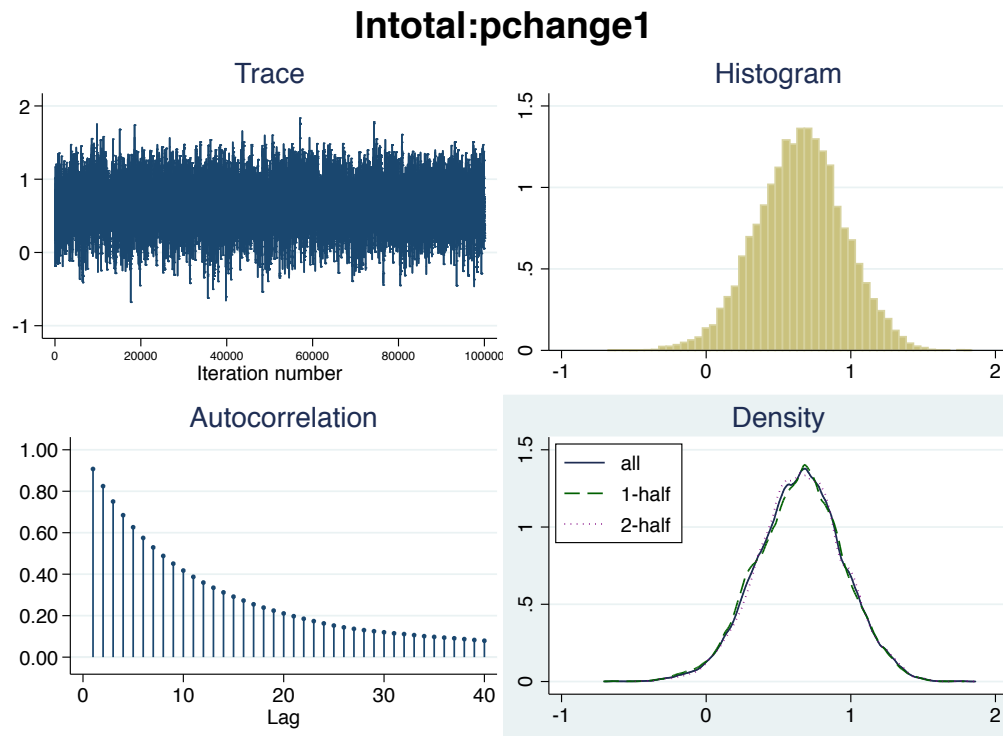


Figure A.28: Diagnostics of Legislative Critical Behavior Model: Turnover in Legislative Branch

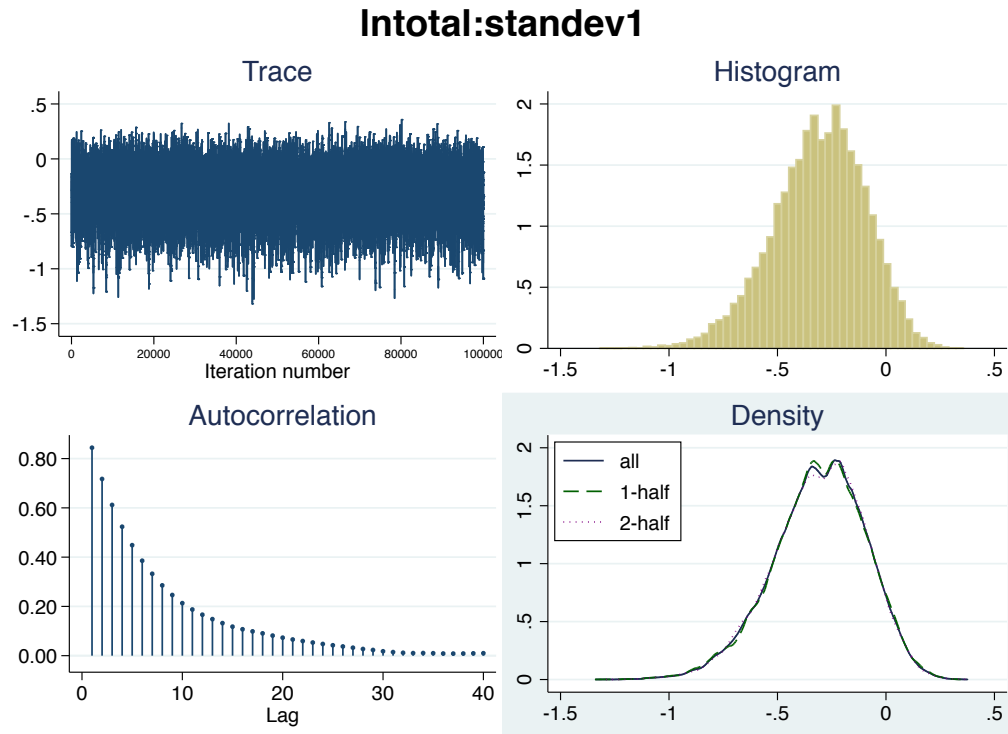


Figure A.29: Diagnostics of Legislative Critical Behavior Model: Count of Protests

Count of Protests is a standardized variable and, therefore, contains negative values.

A.0.4 LEGISLATIVE SUPPORTIVE BEHAVIOR MODEL

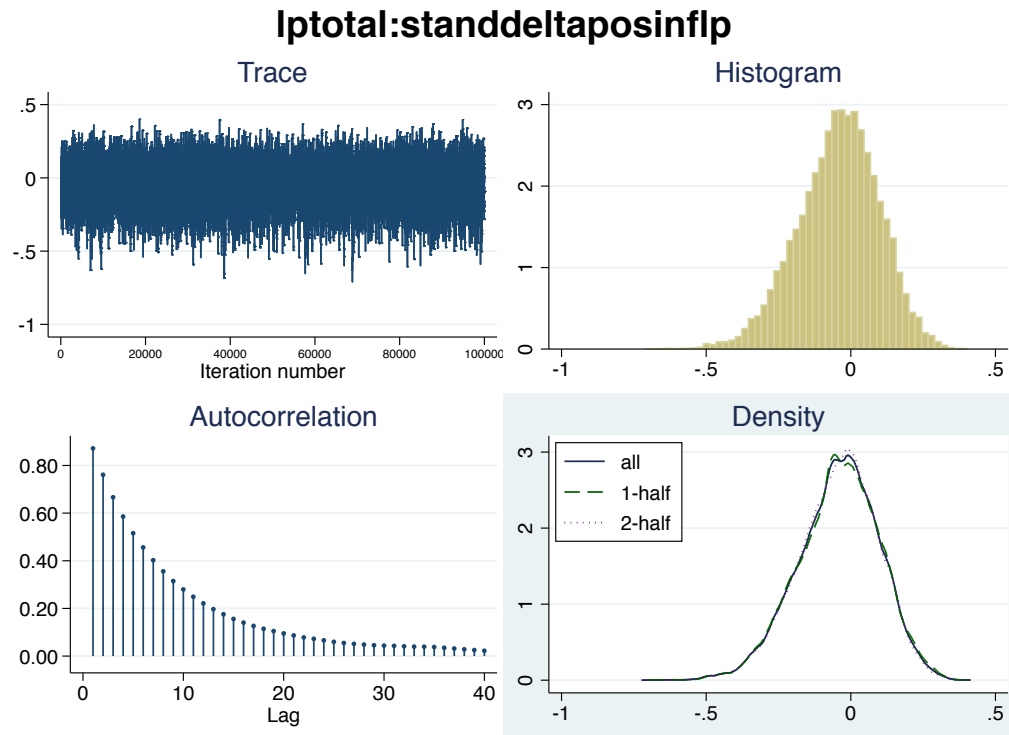


Figure A.30: Diagnostics of Legislative Supportive Behavior Model: Positive Changes in Inflation

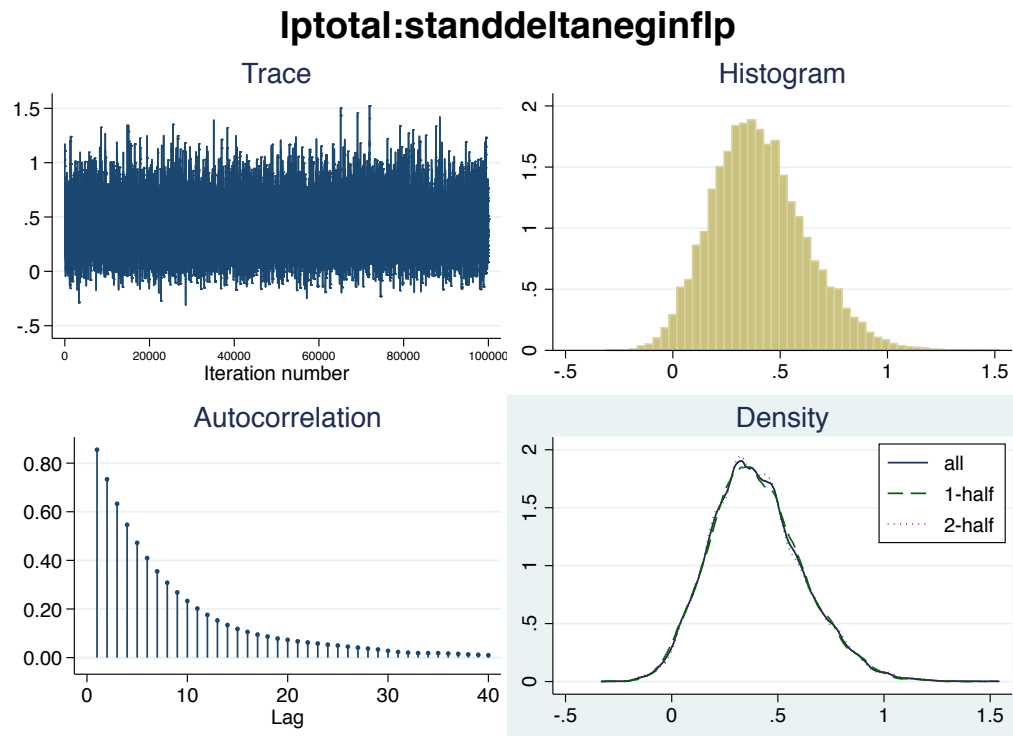


Figure A.31: Diagnostics of Legislative Supportive Behavior Model: Negative Changes in Inflation

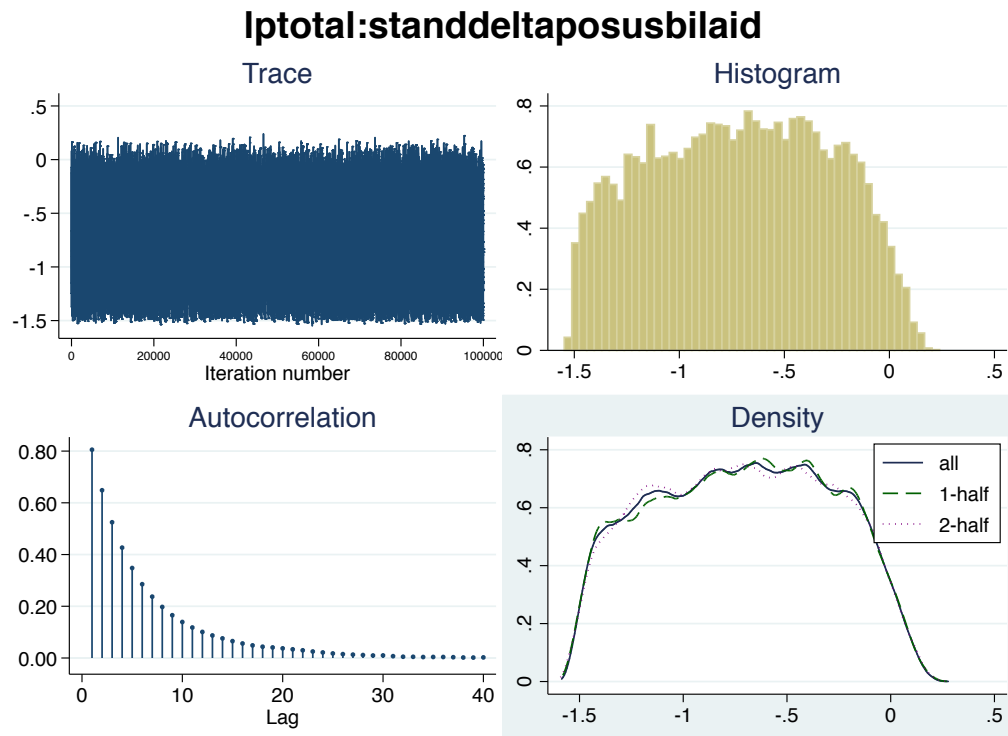


Figure A.32: Diagnostics of Legislative Supportive Behavior Model: Positive Changes in U.S. Bilateral Aid

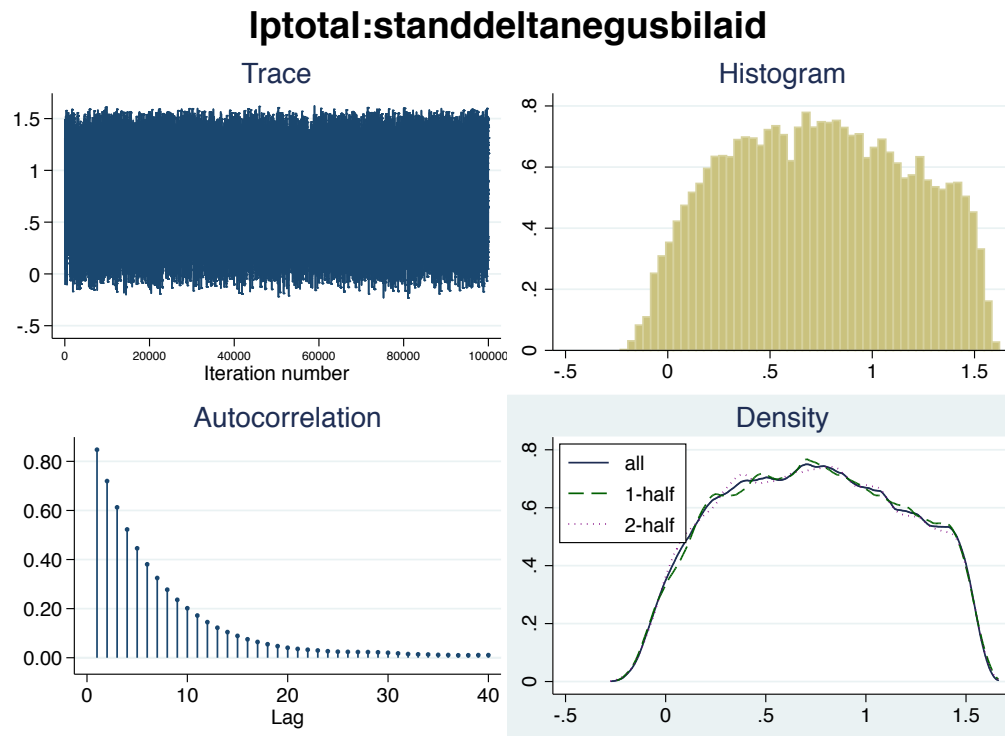


Figure A.33: Diagnostics of Legislative Supportive Behavior Model: Negative Changes in U.S. Bilateral Aid

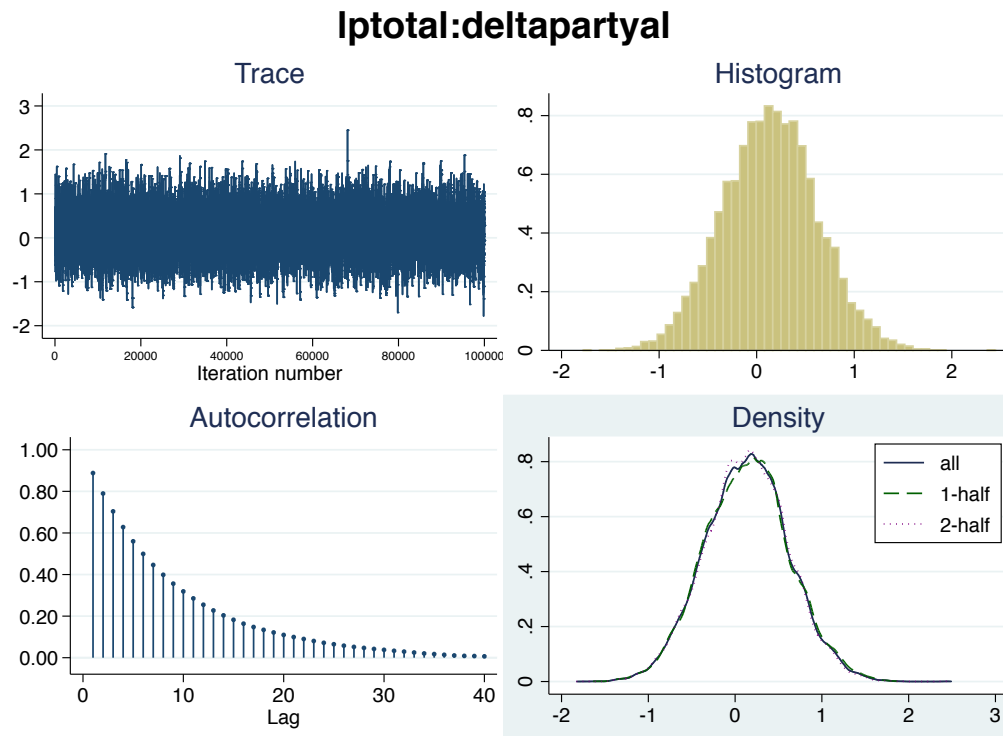


Figure A.34: Diagnostics of Legislative Supportive Behavior Model: Change in Court Alignment with the Party

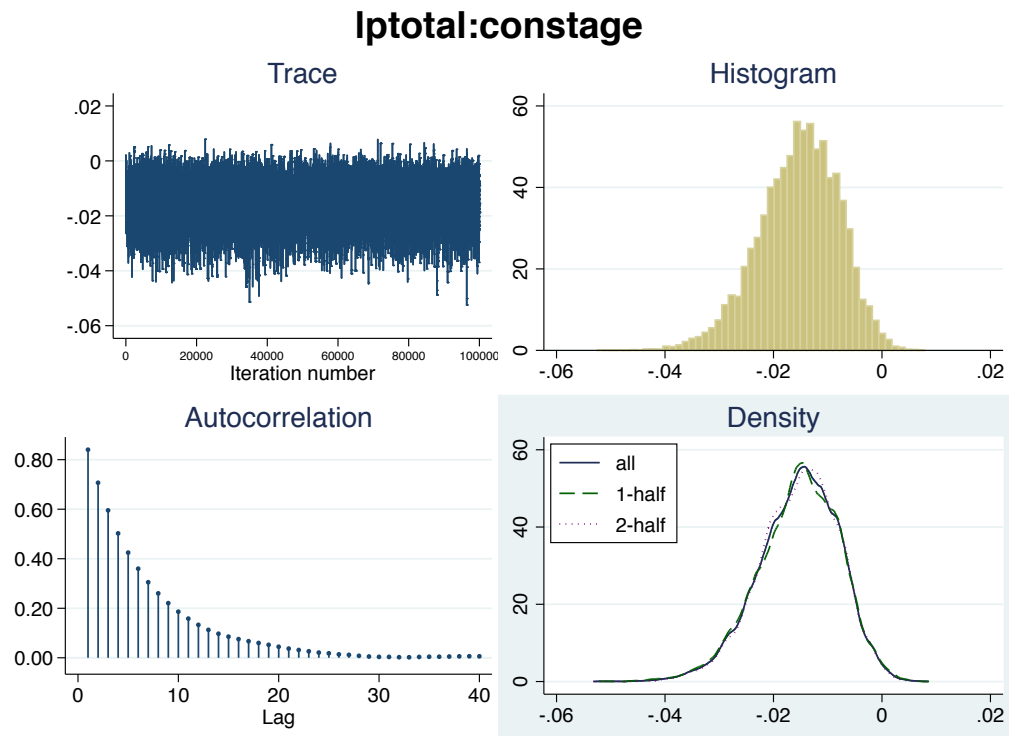


Figure A.35: Diagnostics of Legislative Supportive Behavior Model: Age of Constitution

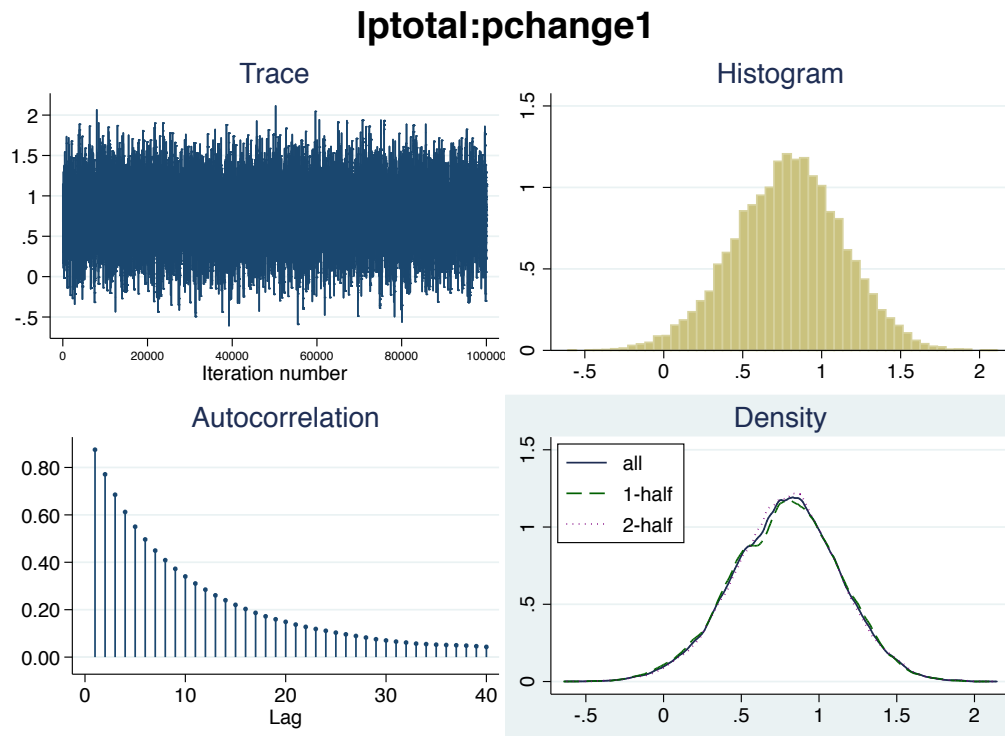


Figure A.36: Diagnostics of Legislative Supportive Behavior Model: Turnover in Executive Branch

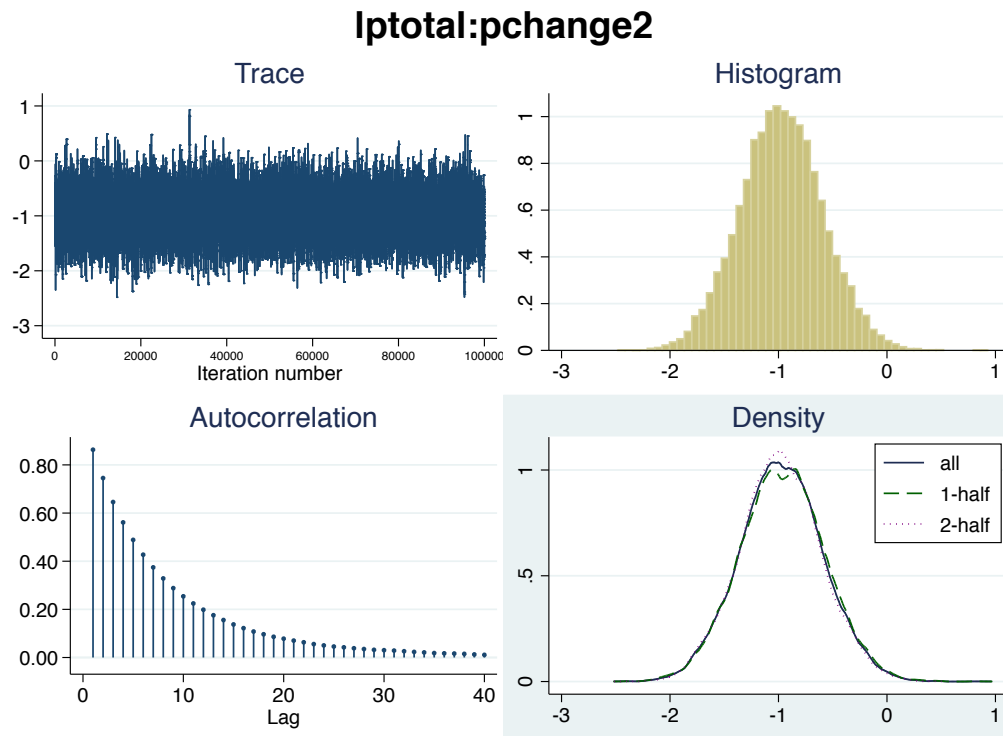


Figure A.37: Diagnostics of Legislative Supportive Behavior Model: Turnover in Legislative Branch

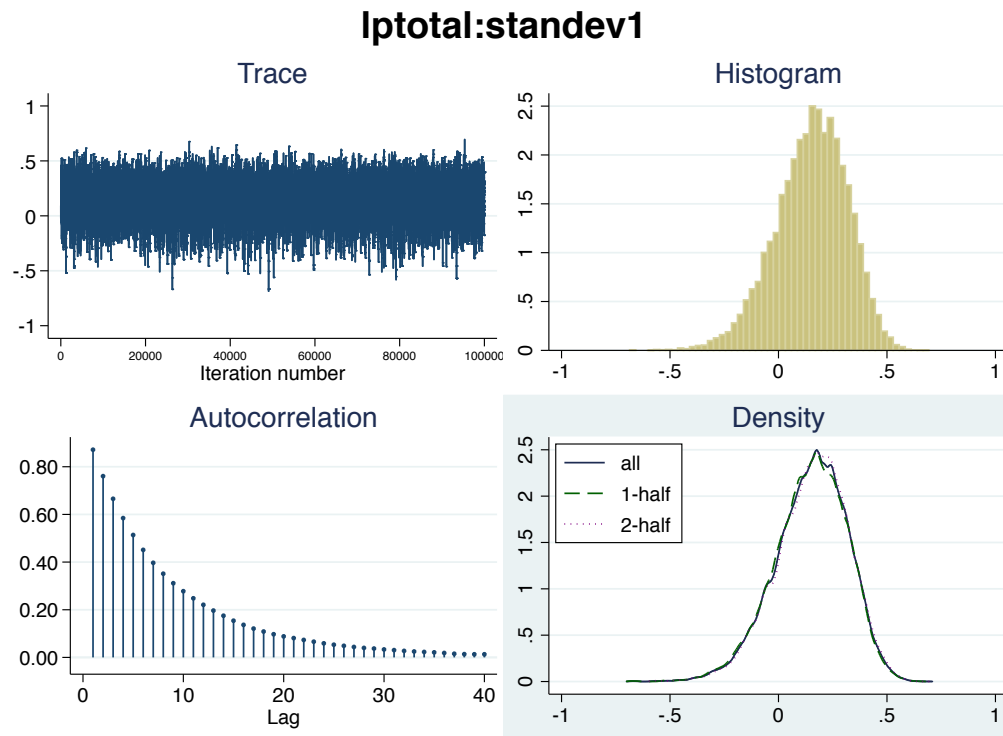


Figure A.38: Diagnostics of Legislative Supportive Behavior Model: Count of Protests

Count of Protests is a standardized variable and, therefore, contains negative values.