

Strategic Deference in the Colombian Constitutional Court, 1992 - 2006*

Juan Carlos Rodríguez-Raga
Assistant Professor
Department of Political Science
Universidad de los Andes (Bogotá)
(juanrodr@uniandes.edu.co)

Prepared for presentation at the conference Judicial Politics in Latin America
CIDE (Mexico)
Mexico, D.F., March 4-8, 2009.

* I had very fruitful discussions with Sebastián Ocampo and Mireya Camacho on the ways of coding certain items of the Court's decisions. María José Alzate, María Alejandra Baquero, Paula Betancourt, Nicolás Castillo, Marta Castro, Natalia Cortina, Pablo Devis, Alejandra Fernández, Natalia García, Natalia Guerrero, and Emmanuel Vargas provided valuable research assistance in the construction of the dataset.

What determines the level of independence of high courts in presidential democracies? Under what conditions are justices able to make decisions which run against executive's preferences in strong Latin American presidentialisms?

This paper discusses the strategic interplay of high courts with the other branches of government in abstract constitutional review cases. Based on the empirical implications derived from a formal theoretical model I develop elsewhere (Rodríguez-Raga 2008), I test the conditions under which the Colombian Constitutional Court defers to the Executive in cases related to ordinary legislation or executive decrees. The analysis provides empirical evidence supporting a strategic account of the Court's behavior. More concretely, the paper shows that, based on its assessment of the political context in which it makes a decision and of signals sent by the Executive regarding the relevance of the issue, the Court tends to strategically defer to the government when reviewing cases that are salient for a politically strong administration.

The paper is divided into five sections. First, I briefly review the types of constitutional adjudication in Latin America and locate the Colombian case within this assortment of models, based on whether judicial review is concrete or abstract, whether adjudication is made before or after a piece of legislation is implemented, and whether it takes place in a central court or along the entire judicial hierarchy of a nation.

Second, I summarize the theoretical perspectives advanced in the political science literature on judicial behavior, emphasizing the legal, attitudinal, and strategic models explaining high courts'

decisions. I also make a case for the use of formal, strategic theories of judicial behavior to analyze the Colombian Constitutional Court.

The third section describes the original dataset of all abstract constitutional review cases studied and decided upon by the Colombian Constitutional Court between 1992 and 2006, and makes use of the empirical implications of a game-theoretic model of constitutional adjudication I develop elsewhere (Rodríguez-Raga 2008) to derive testable hypotheses regarding the determinants of court's decisions striking down legislation and the strategic interaction between the Colombian Constitutional Court and the Executive.

In the fourth section, I operationalize the hypotheses for those cases in which a citizen, through a public action of unconstitutionality (*Acción Pública de Inconstitucionalidad* – API), challenges an ordinary bill or an executive decree. The section and the paper end with a discussion of the evidence derived from the statistical analysis suggesting that the Colombian Constitutional court strategically defers to the Executive when there are indications that the latter may adversely react to a decision that checks the government power. The final section concludes

Constitutional Adjudication in Latin America

Three main variables may describe the model of constitutional adjudication carried out in a specific country (Navia and Ríos-Figueroa 2005). First, the type of adjudication, that is, whether it is concrete or abstract. Concrete review is that in which a judicial body must decide on the merits of constitutionality of a specific case. The final decision, in principle, has effects *inter partes*, that is, only on the parties actually involved in the specific case. In contrast, abstract adjudication takes place

when review is done in the absence of an actual controversy. Judicial decisions in these cases have a much broader impact (*erga omnes*), since they affect the entire system either by confirming a norm or by suppressing it from the legal framework.

A second characteristic is the timing of adjudication. Constitutional review is made *a priori* when it takes place before a bill is formally enacted and applied; control in this case is automatic. In contrast, *a posteriori* review occurs adjudication when a law can be reviewed after its enactment and implementation, typically as a result of a challenge made by some actor in society.

Finally, constitutional adjudication can be centralized or diffused. In the former, only one judicial body, typically a high court is in charge of reviewing the constitutionality of legislation. The latter occurs if more than one court (or the whole hierarchy of judges and courts) is entitled to declare a law unconstitutional.

Eight possible combinations of these three variables arise, but only four models of constitutional adjudication are logically possible:¹ (1) Concrete centralized a posteriori; (2) Concrete diffused a posteriori; (3) Abstract centralized a priori; and (4) Abstract centralized a posteriori.

While constitutional review in the United States conforms to Model (2), Latin American countries have developed a wide “mosaic” of constitutional adjudication models, and in some of these countries mixed systems operate (Navia and Ríos-Figueroa 2005). Colombia is not an exception.

On the one hand, concrete diffused a posteriori review occurs when an individual files a petition (*recurso de amparo* or *acción de tutela*) at a lower level of the judicial hierarchy if he or she feels that a

¹ Obviously, concrete adjudication cannot be done a priori, since it requires an actual case to be analyzed. A concrete controversy is also needed for diffused adjudication, hence it cannot be of the abstract type (Navia and Ríos-Figueroa 2005: 199).

law, any ordinance, or even the behavior of a private party have actually resulted in a violation of his or her constitutional rights. The Constitutional Court may choose to review any lower court decision on a petition, having therefore the ability to discretionally grant certiorari to a case and setting its own agenda.

On the other hand the Colombian Constitutional Court exerts abstract centralized adjudication on the constitutionality of legislation. Such a review can be *a priori* and is automatically (*ex-officio*) addressed by the Court for international treaties, executive emergency decrees, and statutory acts. It can also be *a posteriori* when challenges (APIS)² are filed on ordinary bills, executive ordinary (delegated) decrees, and constitutional amendments.

Concrete review of *tutelas* has become a major instrument for protecting citizen constitutional rights. However, given the broader repercussions of abstract review on the policy-making process, my study focuses on this type of constitutional adjudication since this mode is a better illustration of the Court's behavior as a political actor and of its strategic interaction with other branches of government in a separation of powers approach.

Theoretical perspectives on judicial behavior

Two different and opposite views have been developed in the literature on courts' behavior vis-à-vis other political actors. A first view conceives of high courts as actors which act unconstrained by

² API stands for *Acción Pública de Inconstitucionalidad*, Spanish for 'public action of unconstitutionality.' Any citizen, with very few formalities, can file an API. In fact, Colombia is considered to have "the most open and accessible constitutional review system in the Western world" (Cepeda 2004: 170). This broad citizen initiative was already in place before the constitution of 1991. Moreover, cases must be filed by individual citizens and cannot be filed by anyone representing an institutional or economic actor

external political factors. According to this perspective, justices show a sincere behavior when ruling on a statutory or constitutional matter.

This view encompasses two different models of courts. On the one hand, a legal model posits that justices base their decisions exclusively on legal criteria.³ This model views justices as (legally) technical rather than political actors.⁴

On the other hand, some authors state that judicial decisions, rather than being the result of applying legal rules, are indeed a reflection of individual justices' attitudes and political or policy preferences. This attitudinal model sustains that, when the institutional setting is suitable (i.e. when it insulates justices from external influences), justices act sincerely based on their own ideological stances. This is the model most often used to explain U.S. Supreme Court's decisions of statutory review (Rhode and Spaeth 1976; Segal and Spaeth 2002).

In contrast to this approach to courts as unconstrained actors, a second perspective views them as constrained by political factors. Two types of influences may impact justices' decisions according to this view. On the one hand, given their non-elected nature, justices must care about the court's legitimacy vis-à-vis elected officials representing public views, that is, executives and legislatures. On the other hand, justices face more direct constraints exerted by other political actors empowered to implement court-curbing practices. These practices include restricting court jurisdictions, altering the composition of the court (either by reducing the number of its members, by impeaching individual

³ It may be argued that in this legal model justices are constrained by a (narrow) interpretation of statutes. Still, their behavior under this view is seen as sincere rather than strategic.

⁴ In fact, although political scientists rarely embrace this model, justices usually justify their decisions on strictly legal grounds.

justices, and/or by packing the court with more friendly justices), passing laws or amendments aimed at reversing court decisions, or simply by failing to implement court rulings. Overall, this view of courts as constrained actors suggests that justices do not necessarily vote sincerely when addressing an issue but that they rather act strategically, based not only on their individual legal or ideological values but also taking into account institutional and political factors that lead them to consider how their decisions may trigger a retaliatory response from the other institutional actors which may undermine the court's legitimacy.⁵

Based on a separation-of-powers approach, the latter perspective views judicial review as the result of the interaction of the three branches of government. More specifically, separation of powers models of courts state that justices take into account the elected coalition's reactions to their rulings when making decisions on the constitutionality of legislation. Judicial independence, exerted in this case as the decision of justices to overturn legislation passed by Congress and signed by the president, depends on justices' anticipation of executive and legislative responses. This anticipation, in turn, depends on both institutional and political factors.

Studies of the political role of courts in Latin America have been rare until recently. If legislative institutions had only recently gained their place in the scholarly work on the region, the same could not be said about judicial institutions. Courts were largely perceived as irrelevant actors among students of Latin American politics. In the past decade, several scholars developed a promising research agenda on judicial politics in Latin America. Some of these works have embraced the view

⁵ Overall, a view of courts as unconstrained actors can be described by a game in which the court moves last, while the strategic account can be thought of as a game in which there is a further move by the government after the court's decision (Ferejohn and Weingast 1992).

of Latin American courts which are constrained by institutional and political factors, acting strategically to pursue their policy goals. This is the approach that has characterized the study of courts in Argentina (Helmke 2002, 2005; Iaryczower, Spiller, and Tommasi 2002; Chávez 2004; Chávez, Ferejohn, and Weingast 2003), Chile (Scribner 2003), and Mexico (Ríos-Figueroa 2003). Many of these studies emphasize the institutional weakness of Latin American high courts, especially relative to strong executives that characterize democracies in the region.

Works on courts in Colombia have been much rarer. A recent review of the literature of judicial politics in Latin America (Kapiszewski and Taylor 2008) shows that studies in Colombia have been developed by lawyers from a legal sociological perspective (Uprimny 2004; Rodríguez, Uprimny, and García-Villegas 2003). No work by political scientists on judicial behavior in Colombia is reported.

A case for formal theoretical analyses on the Colombian Constitutional Court

Studying judicial behavior from a strategic perspective entails several problems. One of the main challenges to this approach lies in the difficulty of empirically observing actual supporting evidence. Theoretically, this kind of analysis sustains that judicial behavior results from strategic calculations by judges and courts based on their anticipation of how other political actors will react to their decisions. Depending on the institutional solidity of the court, judges may expect retaliatory actions by strong executives characteristic of Latin America if the court makes a decision aimed at checking the power of incumbent administration. As a result, under certain conditions, courts act strategically by deferring to a strong president with the power to undertake actions which may jeopardize the institutional status of the court and/or the professional careers of individual justices.

This theoretical account of judicial behavior faces two empirical difficulties. On the one hand, if one does not observe actual occurrences of interbranch conflict or real attacks to the Court, then a theory explaining judicial behavior as a function of the anticipation of such conflict or retaliation may seem implausible. Even if such a ‘peaceful’ situation may be predicted by the equilibria derived from a game-theoretic model, researchers should provide evidence that the assumptions of the game, in this case the risk of conflict I actually there (Vanberg 2001).

On the other hand, it may seem hard to conclude that justices act strategically when frequent attacks on them are actually observed. If their behavior is indeed the result of their anticipating reprisals, they would avoid clashes and no conflict should be observable (Helmke and Staton 2009). Formal models deal with this issue by introducing varying degrees of uncertainty in the players’ calculations. Again, however, establishing the connection between these theoretical devices and the empirical world is a major task for the researcher.

Despite these difficulties, studying the strategic interaction between courts and other political actors, concretely the Executive, seems specially promising in Colombia. The Constitutional Court has enjoyed remarkable levels of autonomy and has been able to make highly controversial decisions that check executive power and run against its preferences. Decisions limiting the conditions under which presidents can declare emergency states, reforming the entire housing credit system, and striking down norms that made abortion illegal in all cases and norms that penalized the possession of personal doses of narcotic drugs, all opposed by the incumbent administration at the time, are just a few instances that have earned the Court a reputation for its independence. Nonetheless, there

have been several public threats of retaliation issued by government officials and the president himself since 1992 when the Court began its operation.

Cepeda (2007) reports that every administration since 1991 has announced a constitutional amendment as a response to a Court's ruling. These include specific reforms on the issue decided upon by the Court (e.g. budget, military tribunals), which were ultimately approved by Congress. Moreover, several attempts of amendment to the very functions and jurisdiction of the Court were made or at least announced by the different administrations during the past fifteen years (220-223).

In 1995, for instance, some members of Congress made statements purporting the suppression of the Court itself as a response to a decision that established stricter conditions under which members of the armed forces involved in illegal acts or crimes would be able to enjoy their privilege to be tried in military courts (El Tiempo Online Archive, 04/16/95). In 1997, the Samper administration announced an amendment to eliminate constitutional review of decrees aimed at declaring the state of economic or national security emergency (El Tiempo Online Archive, 03/16/97). In February, 1999, Chief Justice Vladimiro Naranjo publicly stated that the Court would not allowed to be intimidated by pressures exerted by the Pastrana administration regarding the review of executive emergency decrees (El Tiempo Online Archive, 02/26/99).

In July, 2002, immediately upon taking office, the Uribe administration, through the appointed Minister of the Interior Fernando Londoño, uttered strong statements against the Constitution and especially the Court (El Tiempo Online Archive, 07/09/02). In fact, a few months later, Mr. Londoño announced an amendment aimed at restricting some of the Court's functions, including

the suppression of conditional decisions⁶ and the requirement of super-majorities to strike down legislation (El Tiempo Online Archive, 07/30/03). More recently, Fabio Valencia, Minister of the Interior and of Justice of the second Uribe administration, announced still another reform of the judicial system and of the operation of high courts.

All this rather anecdotal evidence shows how the incumbent may react to Court decisions checking his power. The fact that none of the major amendment proposals was actually approved in Congress (most of them were not even introduced or were withdrawn by the government) or by referendum shows that the level of legitimacy of the Court has been sufficiently high so far to prevent major attacks against its jurisdiction. It also shows, however, that actual threats have been made, which suggests in turn that the Court is aware of the consequences of its decisions and can anticipate potential retaliatory actions by other actors, particularly the government.

Theory, data, and hypotheses

Based on the discussion above, I developed elsewhere (Rodríguez-Raga 2008) a formal theoretical model of the interaction of the Court and the Executive. The general game specifies costs and utility functions for both players based on the Court's institutional setting (which determines to what extent it is insulated from political pressures), justices' preferences over the issue under review, the salience of the case for the government, and the political strength of the latter. The equilibria of the game describe the conditions under which the Court would make a decision of striking down

⁶ Conditional decisions are those in which the Court includes in its opinion specific ways of understanding and applying legal norms.

legislation, depending on its anticipation of the Executive's reaction (retaliatory or not) to such a ruling.

I test here some of the empirical implications of the theoretical model. To do so, I make use of an original dataset of all decisions made by the Colombian Constitutional Court in abstract constitutional review, between 1992 and 2006. I coded a comprehensive set of variables for each case based on the textual opinion produced by the Court itself, as well as from other sources necessary to complete the data requirements.⁷ Those variables can be grouped in nine categories:⁸

1. Variables identifying the case according to the identification system used by the Court.
2. Information on how the case was originated, whether it is a case for automatic review by the Court or it comes from a citizen's challenge, in which case the name(s) of the challenger(s) is (are) recorded.
3. Case types allowing the identification of what kind of legislation is being under review (e.g. ordinary or statutory bills, executive decrees, constitutional amendments, bills calling a referendum or plebiscite, and laws approving an international treaty).
4. A series of dates including the date in which the piece of legislation was originally created, the date when it was challenged, as well as the admission and decision dates.

⁷ I had very fruitful discussions with Sebastián Ocampo and Mireya Camacho on the ways of coding certain items of the Court's decisions. María José Alzate, María Alejandra Baquero, Paula Betancourt, Nicolás Castillo, Marta Castro, Natalia Cortina, Pablo Devis, Alejandra Fernández, Natalia García, Natalia Guerrero, and Emmanuel Vargas provided valuable research assistance in the construction of the dataset.

⁸ The codebook is available upon request.

5. The subject to which the case is related (e.g. economic issues, electoral/party issues, separation of powers, civil or political rights, social or economic rights, environmental or collective rights, and national security issues).
6. Interventions by the Executive and each of its ministries.
7. The view of the Inspector General – IG (whose opinion is required for each case under review) regarding the issue.
8. Whether *amici* of the Court, including other agencies, other judicial or legislative bodies, the police and the armed forces, or civil society organizations participated in the case and what their opinion was.
9. Finally, information on the identities of the Chief Justice acting in each case and the justice to which the opinion-writing was assigned, as well as the decision made by each individual justice and the Court's majority.

Of 4,117 cases included in the dataset, I employ here those cases in which ordinary bills approved by Congress and executive decrees were studied by the Court between 1992 when the Court started to operate, and August 2006 when the first Uribe administration came to an end. This sample amounts to 3,329 cases, that is, 81% of the Court's caseload. All these cases reached the Court as a result of public actions of unconstitutionality (APIs) filed by citizens, and represent those cases in which the preferences of the Executive and/or its legislative coalition are clearly in favor of a

decision upholding the challenged norm. Figure 1 shows the number of ordinary bills and executive decrees challenged by APIs, and therefore reviewed by the Court, between 1992 and 2006.⁹

[Figure 1 about here]

Under the theoretical framework of the Court's strategic anticipation of Executive's reaction to its decisions, my first hypothesis deals with the role of the Inspector General (IG). According to the Colombian constitution, every case under (abstract) review by the Court must be studied by the IG, an official in charge of protecting citizen rights and of supervising the behavior of public officials.¹⁰ The IG must write an opinion on the merits of the case stating whether he or she considers that the piece of legislation should be upheld or struck down. Although this opinion is not mandatory for the Court, it acts both as a legal guideline on the merits of the case and also as a signal of the level of support the Court may have should it decide to oppose the Executive. I sustain that the Court will tend to make a decision striking down legislation more often when such a decision is supported by the IG's advisory opinion. In fact, the Court agrees with the IG's opinion 72% of the time. Figure 2 shows this level of agreement for both ordinary legislation and executive decrees between 1992 and 2006.

[Figure 2 about here]

⁹ The Court has no agenda-setting power in abstract review. If a challenged against legislation is properly filed through an API, the Court must address it and issue an opinion on the merits of the case.

¹⁰ The IG is elected in the same manner as Court's justices (i.e. confirmed by the Senate out of a triplet appointed by the President, the State Council, and the Supreme Court).

The first hypothesis is then:

H₁: The Court is more likely to strike down a piece of legislation if the Inspector General (IG) advises to do so.

One of the major predictions of the game-theoretic model is that the Executive will be more likely to attempt retaliatory action in cases which are more important for the administration. A first, raw, indication of this depends on the type of the case under review. Although the Executive tends to push in favor of the challenged norm regardless of its type, executive decrees are pieces of legislation especially designed by the incumbent under delegated powers. It is expectable therefore that the government derives more utility from executive decrees being upheld by the Court than from ordinary legislation.

The Court is aware that decrees are especially cherished by the government and, therefore, it anticipates a stronger reaction than in the case of ordinary legislation should the decision be to pronounce the norm unconstitutional. In consequence, I hypothesize the following:

H₂: The Court is less likely to strike down executive decrees than ordinary bills.

The model predicts that when a particular case under review is salient for the government, it will push harder in favor of a decision upholding the norm. Moreover, the likelihood of retaliatory action if that is not the case increases as the political strength of the administration is larger. The rationale behind this expectation lies in the fact that, in case of an adverse decision, the Executive would need legislative support if it wanted to pass amendments to the constitution in order either to address the particular issue overturned by the Court or, even more so, to introduce constitutional norms aimed

at curbing the Court jurisdiction. Given the Court's legitimacy, legislators know that attacking it entails electoral costs that may endanger their reelection. The Executive, then, needs to have enough political strength to build a legislative coalition to achieve such retaliatory measures. The following prediction derives from this discussion:

H3: In cases that are salient for the Executive, the larger its legislative support, the less likely it will be that the Court will strike down the norm under review.

Data and empirical model

As I mentioned above, I make use of an original dataset of Court decisions reviewing ordinary legislation and executive decrees. The dependent variable in this study is a dummy coded 1 if the Court does not uphold entirely the piece of legislation, that is, if the Court makes a decision considering the norm totally or partially unconstitutional, or if the decision conditions its constitutionality. The variable is coded 0 only if the Court finds the norm constitutional in its entirety and with no conditions. Figure 3 shows the proportion of ordinary bills and executive decrees struck down by the Court between 1992 and 2006.

[Figure 3 about here]

To operationalize H_1 , I include a dummy indicting whether the IG's opinion states that the norm is entirely constitutional (0) or it advises to partially or totally overturn the norm. I expect this variable to have a positive impact on the likelihood of a Court decision striking down the piece of legislation.

In order to test H_2 , I use a dummy variable indicating the type of case under review. The variable is coded 0 when the Court reviews an ordinary bill, and 1 when the norm is an executive decree. I expect that the Court will be less likely to strike down the norm in the latter case.

Testing H_3 requires both a measure of case salience for the government and of its political strength. I operationalize salience by means of a dummy coded 1 when at least one minister or someone on her behalf intervenes in the case either during a Court hearing or by sending a memo with the government position.¹¹ Salience is coded 0 if there is no government intervention in the case. Figure 4 shows the proportion of cases in which the governments sent at least a ministry to push in favor of either ordinary bills and executive decrees.

[Figure 4 about here]

Operationalizing legislative support for the government is a bit more problematic. Since roll call votes are extremely rare in the Colombian legislature, it is not possible to determine how many members of Congress actually support Executive-sponsored bills. The use of Executive success in Congress (i.e. the rate of bills sponsored by the government that are actually approved) is also problematic since this measure may be biased by the strategic behavior of a weak executive who may only sponsor those bills for which legislative success is reasonably expectable, avoiding the political costs of rejection in Congress (Pachón 2006; Cárdenas, Junguito, and Pachón 2004).

Using simply the raw size of the government's coalition measured as the proportion of congressional seats held by members of parties who supported the electoral campaign of the then-

¹¹ When the government intervenes in cases of abstract review, it does so in favor of the piece of legislation under review (Cepeda 2007: 225).

candidate incumbent leaves us with an indicator with little variation in time (in fact, it would remain constant for the entire presidential term) and, thus, not very empirically useful to test my hypotheses.

In consequence, I use presidential approval by the public as a proxy for the political strength of the government. Given the typically dominant position of executives in Latin America, popular presidents tend also to have strong legislative support. In other words, legislators know that opposing a popular administration is electorally costly.¹²

To measure presidential approval I use Gallup polls conducted periodically from 1992 to 2006 (Gallup 2006). For each case under review, I record the level of presidential approval at the time the Court decision was made. Figure 5 shows these scores for the analyzed period.

[Figure 5 about here]

H₃, however, predicts that the negative impact of case salience on the likelihood of a Court decision striking down the norm is magnified by the level of presidential approval. To test this conditioning effect I include in the model a multiplicative term reflecting the interaction between these two variables (i.e. SALIENCE x PRESIDENTIAL APPROVAL).

The results of the logistic model testing all three hypotheses are shown in Table 1. The model supports H₁. The IG's opinion significantly guides the Court's behavior. As I mentioned above, this finding can be interpreted as the existing agreement on the constitutional arguments supporting or

¹² The high levels of approval enjoyed by president Uribe explain at least in part the collapse of the Liberal party, once the most powerful in Colombia. In fact, when liberal leaders stated the party's official opposition to the administration, many of its legislators defected and created or joined new political movements that support Uribe in Congress.

rejecting the norm under review. Alternatively, this can also provide evidence of how the Court feels more comfortable confronting the president's preferences when another political actor such as the IG is by its side.

[Table 1 about here]

The empirical analysis also suggests that the Court defers more often to the president when reviewing legislation directly enacted by the Executive than in the case of ordinary legislation (H_2), as shown by the significance of the coefficient for the EXECUTIVE DECREE dummy.

It is not accurate to reach plausible conclusions on H_3 based solely on the magnitude and significance of the individual coefficients for SALIENCE and PRESIDENTIAL APPROVAL, and of the interaction term. This is more so when the analysis is done on a binary dependent variable. In this case, at most, we can conclude from the table that case salience has no significant effect on the Court's decision *when* presidential approval is zero (a finding which, by the way, is consistent with the expected behavior conveyed by my hypothesis).¹³ It is necessary to conduct a more careful analysis of the marginal effect on the dependent variable of the variable of interest—in this case SALIENCE—and of its changes depending on the values of the conditioning variable—PRESIDENTIAL APPROVAL (see Ai and Norton 2003; Berry and Rubin 2007; Kam and Franzese 2007; Mitchell and Chen 2005; Norton, Wang, and Ai 2004).

Figure 6 graphs the marginal effect of case salience on the probability of having a Court decision striking down legislation, along a range of levels of presidential approval, for ordinary bills in which

¹³ Conversely, we can also conclude that presidential approval has no significant effect when the issue is not important for the administration.

the Inspector General advises to uphold the norm. The graph shows that unpopular presidents are not able to impact the Court's behavior by showing signals that the case under review is salient for the administration. Beyond a certain level of approval, however, this signal has clear effects on the Court which increasingly tends to defer to popular presidents in salient cases.

[Figure 6 about here]

This effect is also apparent when analyzing the probability of having a decision striking down legislation predicted by the statistical model when the case is both salient and not salient, at varying degrees of presidential political strength. Figure 7 shows how the deterrent effect of governmental signaling of its stakes in the case increases with its political strength, and provides empirical evidence to the strategic deference theoretical argument presented here.

[Figure 7 about here]

Conclusion

The empirical model described and tested in the last part of this paper is just a partial effort to assess the empirical implications of broader theoretical framework. It relates to a single institutional setting: The Colombian Constitutional Court between 1992 and 2006. This means that none of the institutional arguments embedded in the game-theoretic model has been tested. Nevertheless, it is a promising first step towards a more complex, comparative empirical work. A step that supports the general argument which sustains that Courts act strategically, anticipating other political actors' reactions.

On the one hand, the dataset described above allows undertaking more complex analyses on the Colombian Constitutional Court, including exploring variations across areas and topics involved in the constitutional review cases, analyzing individual justices' voting behavior on the merits, and the impact of *amici* on Court's decisions. The theoretical model lends itself to empirical analyzes including institutional variation, either by comparing Colombia with other countries or by comparing constitutional review before and after the Constitution was enacted in 1991. In fact, constitutional review has a long tradition in Colombia, way before 1991. The institutional features surrounding it did considerably change at that time, though. This would allow empirically examining the conditions under which strategic deference occurs in a quasi-experimental setting. In sum, this is just the beginning of a long, exciting journey to both the theoretical foundations of judicial behavior in Latin America and the puzzling lessons that can be drawn from the Colombian case.

References

- Ai, Chunrong and Edward C. Norton. 2003. "Interaction Terms in Logit and Probit Models." *Economic Letters* 80: 123-129.
- Berry, William D. and Jacqueline H. Rubin. "How to Test for Interaction in Models with Binary Dependent Variables." Unpublished manuscript.
- Caldeira, Gregory A. 1986. "Neither the Purse Nor the Sword: Dynamics of Public Confidence in the Supreme Court." *American Political Science Review* 80(4): 1209-1226.
- Caldeira, Gregory A. and James L. Gibson. 1992. "The Etiology of Public Support for the Supreme Court." *American Journal of Political Science* 36(3): 635-691.
- Cárdenas, Mauricio, Roberto Junguito, and Mónica Pachón. 2004. "Political Institutions, Policy Making Processes and Policy Outcomes: The Case of Colombia." Available at <http://www.fedesarrollo.org/contenido/articulo.asp?chapter=90&article=373>.
- Cepeda, Manuel José. 2004. "La defensa judicial de la constitución." In Cepeda, Fernando, ed. *Fortalezas de Colombia*. Bogotá: Planeta: 145-211.
- Cepeda, Manuel José. 2007. *Polémicas constitucionales*. Bogotá: Legis.
- Chávez, Rebecca B. 2004. *Rule of Law in Nascent Democracies: Judicial Politics in Argentina*. Stanford: Stanford University Press.

Chávez, Rebecca B., John A. Ferejohn, and Barry R. Weingast. 2003. "A Theory of the Politically Independent Judiciary." Paper delivered at the 2003 Annual Meeting of the American Political Science Association. Philadelphia (PA), August 27-31.

Crisp, Brian F. and Scott Deposato. 2004. "Constituency Building in Multimember Districts." *The Journal of Politics* 66(1): 136-156.

Domingo, Pilar. 2000. "Judicial Independence: The Politics of Supreme Court in Mexico." *Journal of Latin American Studies* 32: 705-735.

Ferejohn, John A. and Barry R. Weingast. 1992. "A Positive Theory of Statutory Interpretation." *International Review of Law and Economics* 12 (June): 263-279.

Ferejohn, John, Frances Rosenbluth, and Charles Shipan. 2004. "Comparative Judicial Politics." (<http://www.uiowa.edu/~c030310/FRS%20Oxford.pdf>).

Gallup. 2006.

(<http://www.elcolombiano.com/debuenaFuente/Encuestas\%202006/favorabilidadmayo2006.ppt>).

(checked 02/10/09)

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

Helmke, Gretchen. 2005. *Courts under Constraints: Judges, Generals, and Presidents in Argentina*. Cambridge: Cambridge University Press.

- Helmke, Gretchen, and Jeffrey Staton. 2009. "Courting Conflict: The Logic of Risky Judicial Decisions in Latin America." Presented at the Conference *Judicial Politics in Latin America*. Mexico, D.F. March 4-8.
- Iaryczower, Matias, Pablo T. Spiller, and Mariano Tommasi. 2002. "Judicial Independence in Unstable Environments, Argentina 1935-1998." *American Journal of Political Science* 46(4): 699-716.
- Kam, Cindy D. and Robert J. Franzese. 2007. *Modeling and Interpreting Interactive Hypotheses in Regression Analysis*. Ann Arbor: The University of Michigan Press.
- Kapiszewski, Diana and Matthew M. Taylor. 2008. "Doing Courts Justice? Studying Judicial Politics in Latin America." *Perspectives on Politics* 6(4): 741-767.
- Mitchell, Michael and Xiao Chen. 2005. "Visualizing Main Effects and Interactions for Binary Logit Models." *The Stata Journal* 5(1): 64-82.
- Navia, Patricio and Julio Ríos-Figueroa. 2005. "The Constitutional Adjudication Mosaic of Latin America." *Comparative Political Studies* 38(2): 189-217.
- Norton, Edward C., Hua Wang, and Chunrong Ai. 2004. "Computing Interaction Effects and Standard Errors in Logit and Probit Models." *The Stata Journal* 4(2): 154-167.
- Pachón, Mónica. 2006. "Congress and Political Parties." In Cepeda, Fernando, ed. *Strengths of Colombia*. Bogotá: Planeta.
- Ríos-Figueroa, Julio. 2003. "A Minimum Condition for the Judiciary to Become an Effective Power. The Mexican Supreme Court, 1994-2002." Paper delivered at the 2003 Meeting of the Latin American Studies Association. Dallas (TX), March 27-29.

- Rodríguez, César, Rodrigo Uprimny, and Mauricio García-Villegas. 2003. "Justice and Society in Colombia: A Sociological Analysis of Colombian Courts." In Friedman, Lawrence and Rogelio Pérez Perdomo, eds. *Legal Culture in the Age of Globalization: Latin America and Latin Europe*. Stanford: Stanford University Press.
- Rodríguez-Raga, Juan Carlos. 2003. "The Regional Diversity of Electoral Competition in Colombia." Paper delivered at the 2003 Meeting of the Latin American Studies Association. Dallas (TX), March 27-29.
- Rodríguez-Raga, Juan Carlos. 2008. "Strategic Constitutional Review in Latin America: The Case of Colombia, 1992-2006. Paper delivered at the 2008 Conference of the Midwest Political Science Association. Chicago (IL), April 3-6.
- Rohde, David W. and Harold J. Spaeth. 1976. *Supreme Court Decision Making*. San Francisco: W. H. Freeman.
- Scribner, Druscilla. 2003. "Sincere and Strategic Judicial Behavior on the Chilean Supreme Court." Paper delivered at the 61th Annual Conference of the Midwest Political Science Association. Chicago (IL), April 3-5.
- Segal, Jeffrey A. and Harold J. Spaeth. 2002. *The Supreme Court and the Attitudinal Model Revisited*. New York: Cambridge University Press.
- Smithey, Shannon Ishiyima and John Ishiyima. 2000. "Judicious Choices: Designing Courts in Post-Communist Politics." *Communist and Post-Communist Studies* 33: 163-182.

- Tate, C. Neal. 1995. "Why the Expansion of Judicial Power?" In Tate, C. Neal and Torbjörn Vallinder, eds. *The Global Expansion of Judicial Power*. New York: New York University Press: 27-37.
- Uprimny, Rodrigo. 2004. "The Constitutional Court and Control of Presidential Extraordinary Powers in Colombia." In Gloppen, Siri, Roberto Gargarella, and Elin Skaar, eds. *The Accountability Functions of Courts in New Democracies*. London: Frank Cass Publishers.
- Vanberg, Georg. 2001. "Legislative-Judicial Relations: A Game-Theoretic Approach to Constitutional Review." *American Journal of Political Science* 45(2): 346-361.

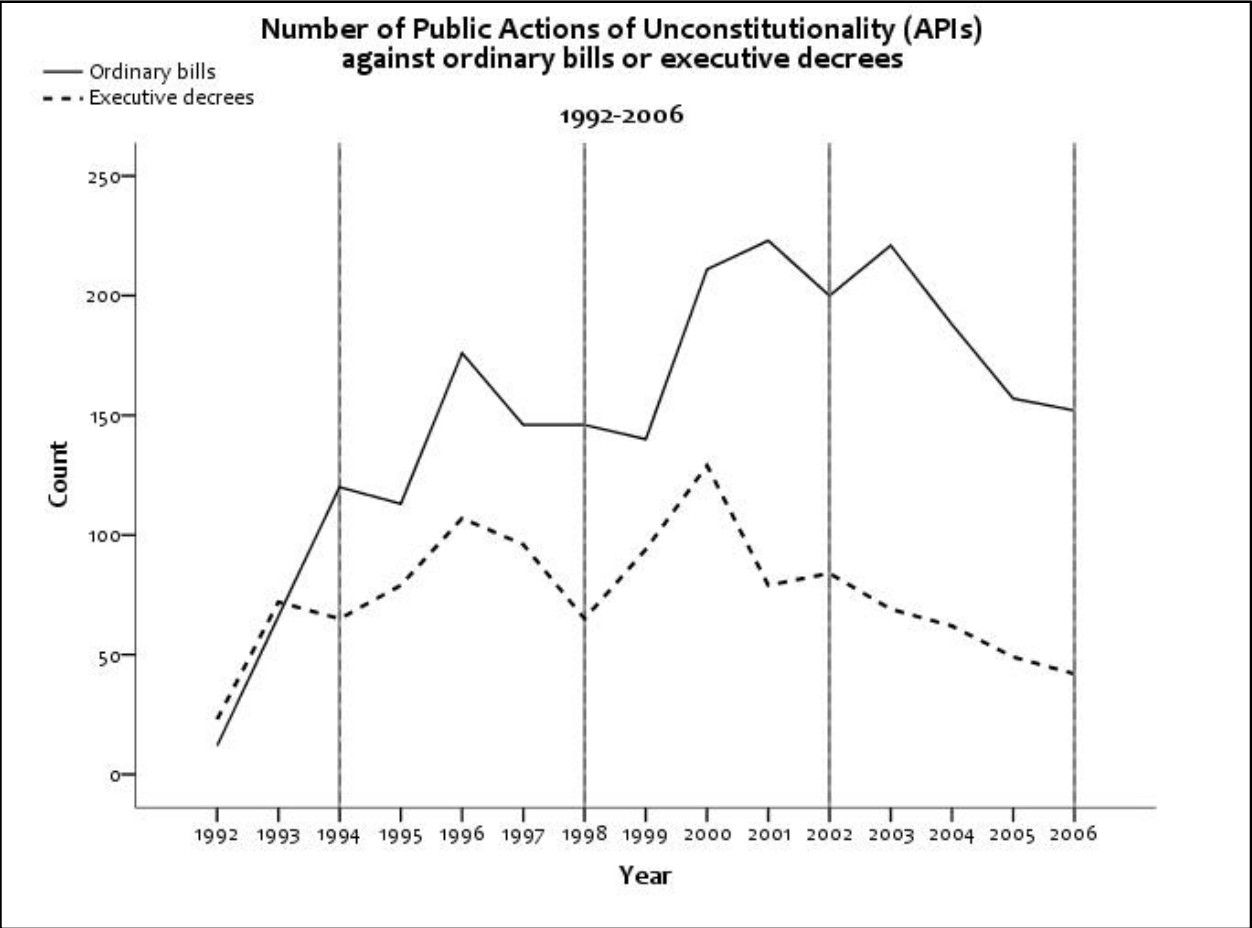


Figure 1. Number of Public Actions of Unconstitutionality (APIs) against ordinary bills and executive decrees, 1992-2002

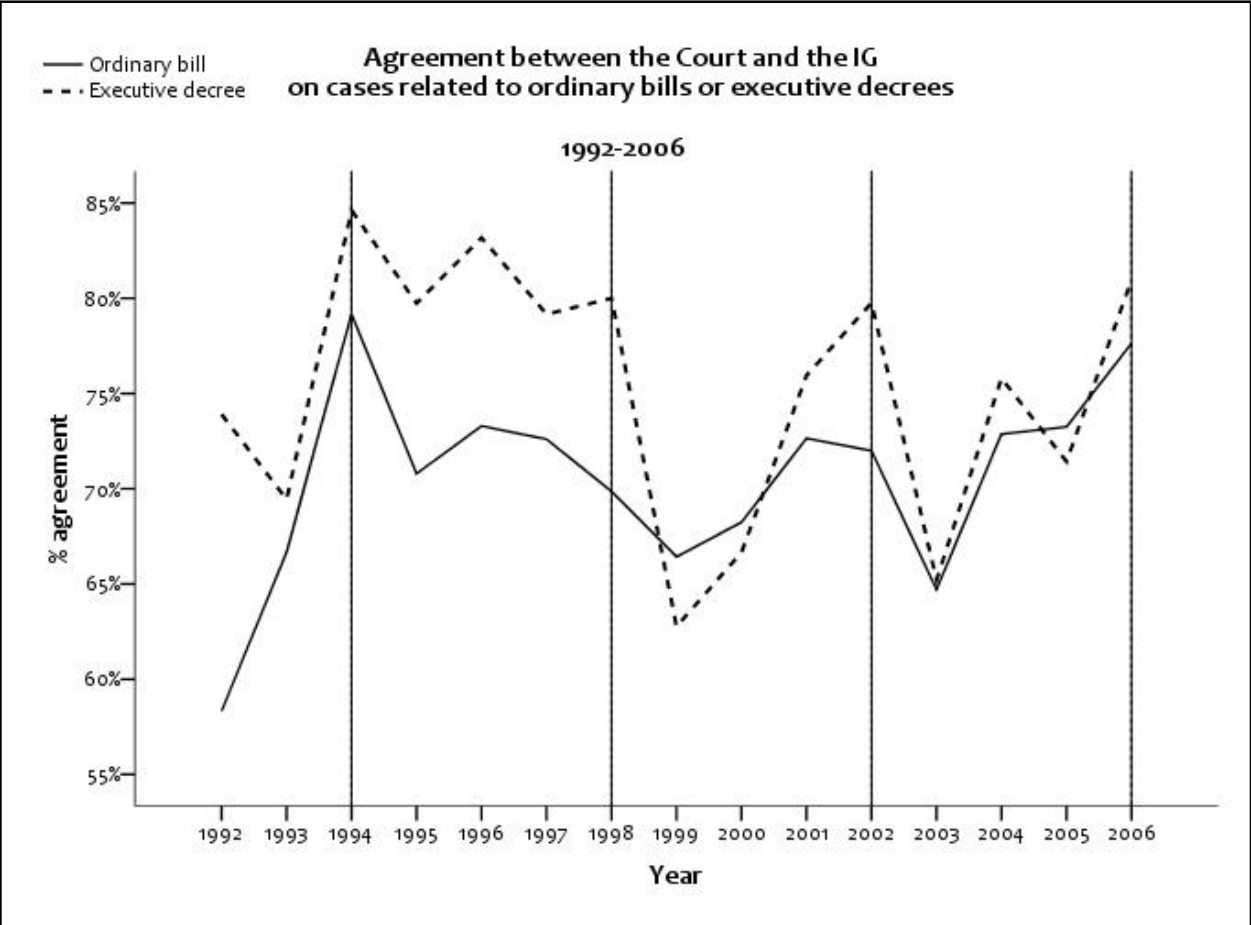


Figure 2. Agreement between the Court and the IG, 1992-2006

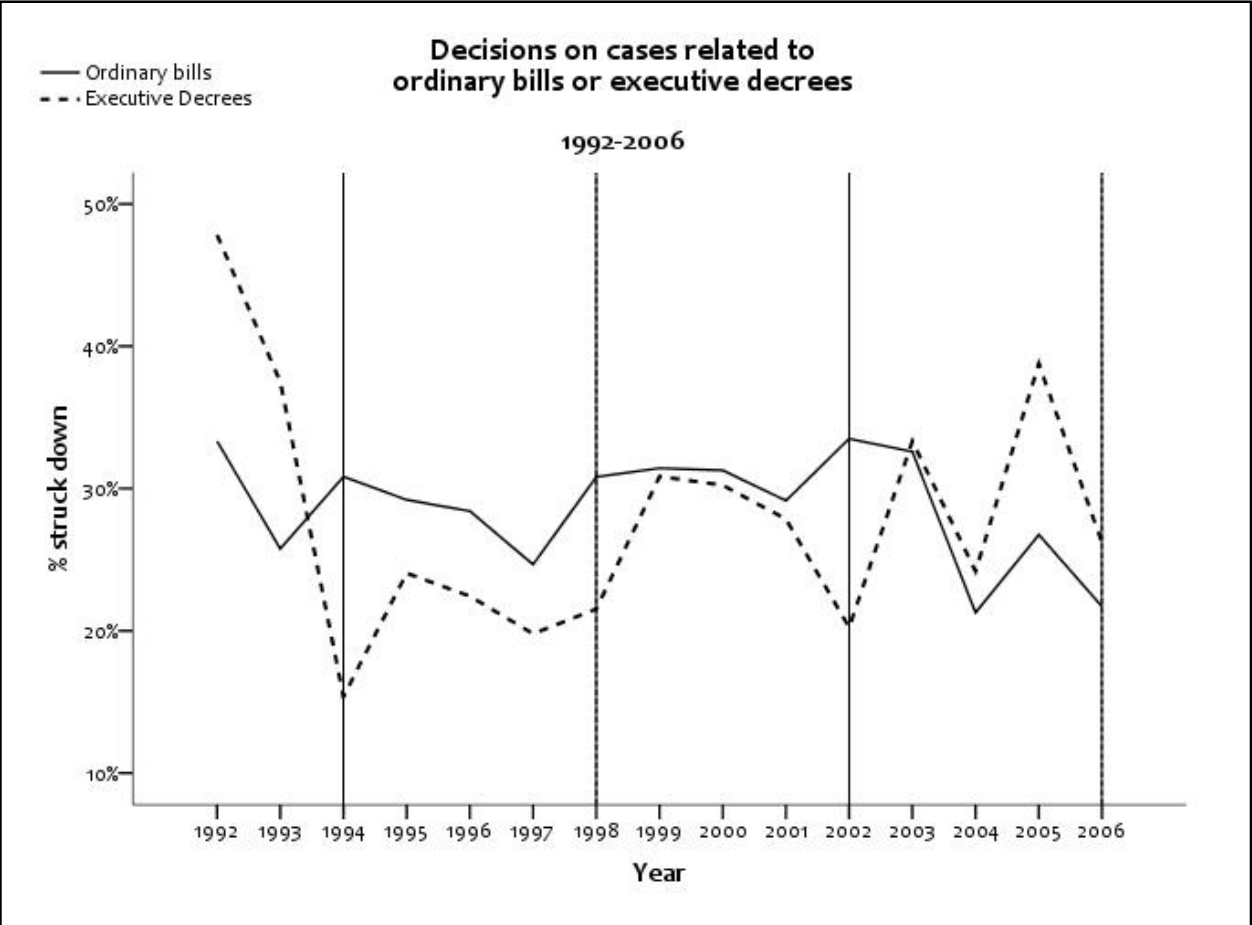


Figure 3. Distribution of decisions on ordinary bills and executive decrees, 1992 - 2006

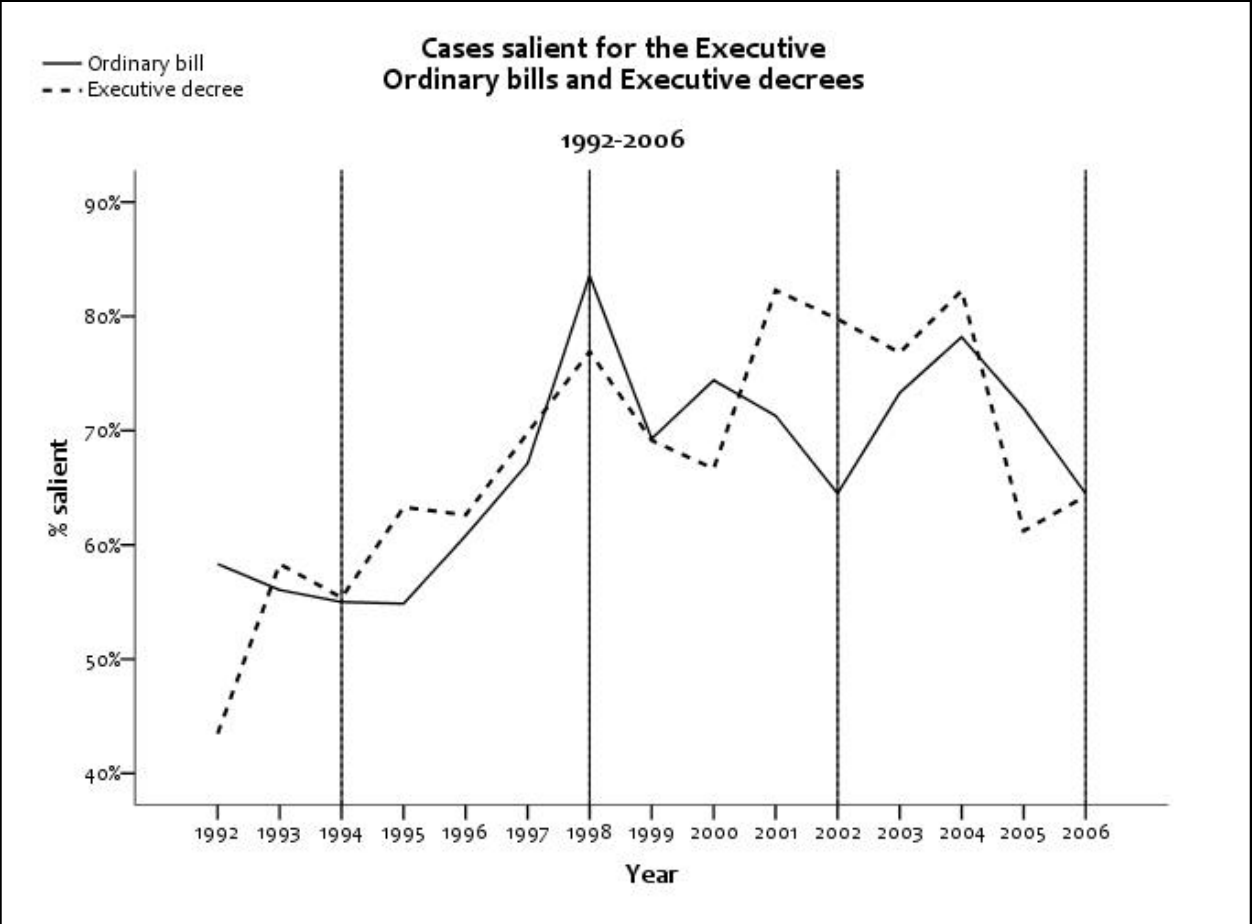


Figure 4. Salience of cases related to ordinary bills and executive decrees, 1992-2006

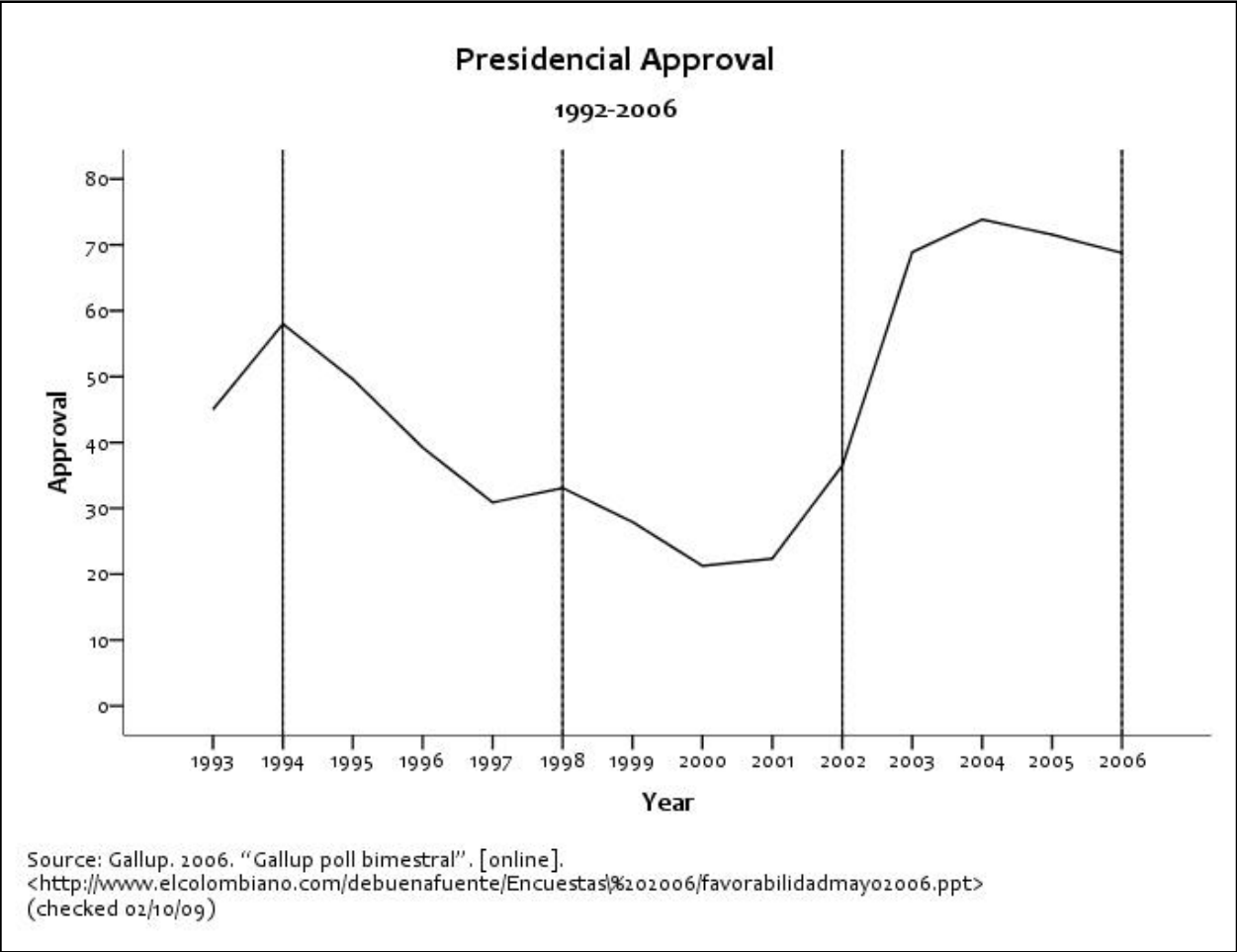


Figure 5. Presidential approval, 1992-2006

Table 1. Determinants of the likelihood of a Court decision striking down legislation

Dependent variable: STRIKEDOWN (0/1)	Coefficient (Std. error)	P> z
IG	1.391 (.089)	.000 ***
EXECUTIVE DECREE	-.183 (.091)	.044 *
SALIENCE	-.080 (.210)	.703
PRES. APPROVAL	-.000 (.004)	.895
SALIENCE X PRES. APPROVAL	-.003 (.004)	.465
CONSTANT	-1.130 (.183)	
N	3,167	
Pseudo R ²	.069	

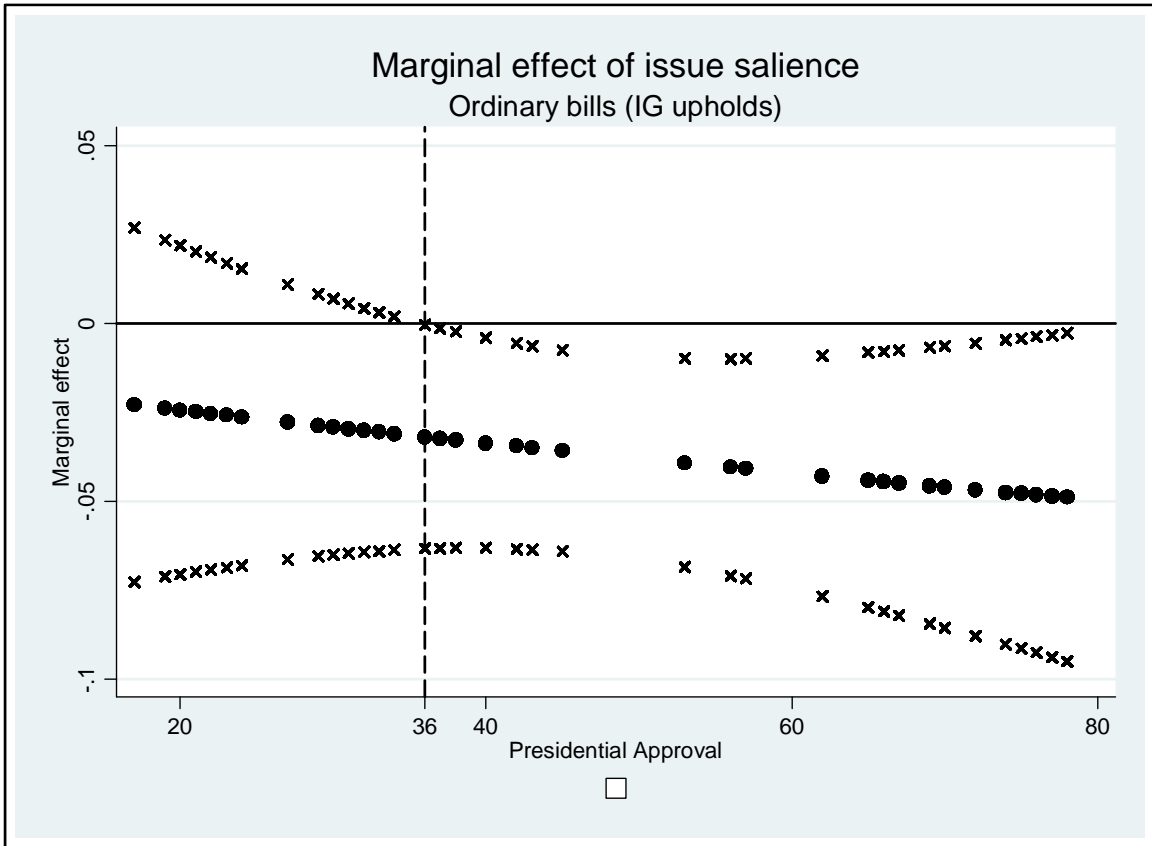


Figure 6. Marginal effect of case salience conditioned by presidential approval

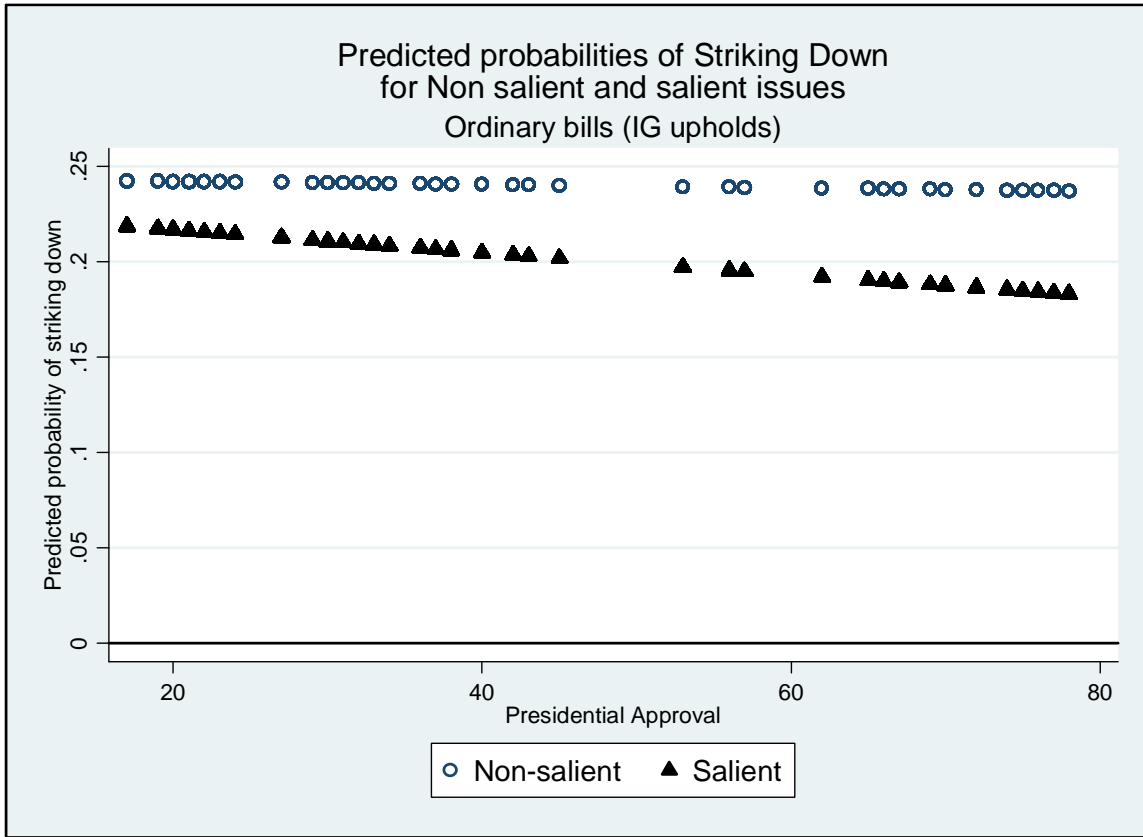


Figure 7. Predicted probabilities of a decision striking down ordinary bills for salient and not salient cases at varying levels of presidential approval