

Judicial Power and Strategic Communication in Mexico

JEFFREY K. STATON
Emory University

 **CAMBRIDGE**
UNIVERSITY PRESS

Introduction

On August 24, 2000, the Mexican Supreme Court resolved a constitutional conflict between opposition members of the lower chamber of Congress and President Ernesto Zedillo.¹ The sentence granted a congressional committee access to a trust account previously housed in a failed bank, which the federal government had taken control of in the weeks preceding the 1994 peso crisis. The committee sought access to the trust's records, because it believed that the records might reveal a scheme to fund Zedillo's presidential campaign illegally. This was the first time in modern Mexican history that the Supreme Court challenged the power of the presidency in a case of such magnitude, and the court was quick to highlight it. Its ministers gave press conferences and interviews with various media outlets in which they detailed what the decision required of Zedillo and described their jurisprudential rationale. Although the court's primary public face was its president, Genaro Góngora Pimentel, the effort was collective. Practically every minister played a role. The court's public communication campaign was coordinated and aggressive.

The Supreme Court's reaction is not uniquely Mexican. Constitutional judges around the world engage the public through the media.² Nearly every high court maintains a Web site where it houses information on pending and completed cases, descriptions of its jurisdiction, and

¹ Controversia Constitucional 26/99, *Semanario Judicial de la Federación y su Gaceta*, Novena Época, Tomo XII, Agosto de 2000, pp. 575, 962–963, 966–967, y 980.

² I will refer to judges who sit on high courts with constitutional jurisdiction (e.g., U.S. Supreme Court) and European-style constitutional courts (e.g., Austrian Constitutional Court) as “constitutional judges.”

biographical summaries of its membership. Of course, this is fairly passive communication. Like the members of the Mexican Supreme Court, constitutional judges are commonly more direct. Often they use the media to underline key jurisprudential points. For example, Colombia Constitutional Court President Jaime Córdova Triviño gave a series of interviews in May 2006 clarifying a decision striking down a law that had granted partial amnesty to paramilitary group leaders.³ Canadian Supreme Court Justice Ian Binnie presented a lecture in February 2004 in which he discussed whether the court had usurped legislative authority with its interpretation of the Canadian Charter of Rights. Judges also defend publicly the concept of the rule of law in the context of particular cases (Kommers 1997). Even more commonly, judges use public forums simply to request better coverage. Australia High Court Justice Michael Kirby has suggested that the failure of the Australian media to construct a High Court beat makes it difficult to communicate its decisions properly (also see Badinter and Breyer 2004, 265–266). In order to help organize their public activities, constitutional courts often house public relations offices. Christian Neuwirth, press officer for the Austrian Constitutional Court, provides a representative statement on its varied work.

But let me express that the written press information is not a big part in my usual work. If there are cases to be decided, I try to prepare journalists [for] what they can expect. [I]f the decision is made, I try to explain what the case is about. This is a permanent dialogue – far more than a written press statement.⁴

Table 1.1 underscores the breadth of the phenomenon in Latin America, where courts have developed particularly aggressive public relations strategies. As the table suggests, all but one constitutional court or Supreme Court with constitutional jurisdiction in the region makes final sentences directly available to the media via their Web sites, and 72 percent of these courts alert the media to their resolutions through press releases. Of the courts that issue press releases, 92 percent of them do so selectively. That is, they promote some but not all of their decisions. Because press releases are a simple and common form of political communication, these data are merely suggestive of the multiple ways by which courts communicate with the public. Still, they reflect a systematic effort

³ See Clara Isabel Vélez Rincón, “Ley 975: quedó la forma pero cambió el fondo,” *El Colombiano*, May 20, 2006.

⁴ Personal communication with author, July 24, 2006.

TABLE 1.1. *Public Relations Summary for Constitutional Courts or High Courts with Constitutional Jurisdiction in Latin America*

	Make Decisions Available on Publicly Accessible Web Site	Announce Decision through Press Release	
		Selective Promotion	Universal Promotion
Argentina	✓	✓	
Bolivia	✓	✓	
Brazil	✓	✓	
Chile	✓		
Colombia	✓	✓	
Costa Rica	✓	✓	
Dominican Republic	✓	✓	
Ecuador	✓	✓	
El Salvador	✓	✓	
Guatemala	✓		
Honduras	✓		✓
Mexico	✓	✓	
Nicaragua	✓		
Panama		✓	
Paraguay	✓	✓	
Peru	✓	✓	
Uruguay	✓		
Venezuela	✓	✓	

Note: Summarizes public relations activities of constitutional courts or high courts with constitutional jurisdiction in Latin America. The selective and universal promotion columns indicate whether the court announces some or all decisions by issuing press release.

to influence the quality and quantity of information about constitutional tribunals. There can be no doubt that high court judges are trying to get their public relations right.

THE PUZZLE

For sure, good public relations are essential in politics. Articulating a policy agenda, defending a controversial policy failure, managing a campaign message, and, perhaps most importantly, explaining a personal indiscretion, all require effective strategies of public communication (Flowers, Haynes, and Crespín 2003; Hillygus and Jackman 2003; Kernell 1993; McGraw 1991). It is difficult to think of a scenario in which political actors do not have an incentive to get their public relations

right. The natural explanation, however, is that, in one way or another, the ballot box constitutes the primary incentive for democratic political action (e.g., Downs 1957; Mayhew 1974; Powell 2000). For this reason, the desire to communicate with the public is theoretically intuitive and normatively appealing. But high court judges do not depend directly on votes.

Perhaps of greater concern, judicial legitimacy is thought to derive from a healthy separation of judges from the public, a separation that allows judicial deliberation to be perceived as principled, neutral, and guided by procedure (Gibson, Caldeira, and Baird 1998; Hibbing and Theiss-Morse 1995; Scheb and Lyons 2000). This concern has not been lost on the judiciary. Consider U.S. Supreme Court Chief Justice Harlan Stone's rationale for declining Senator Styles Bridges' invitation to a testimonial dinner:

The Court, as you know, has of late suffered from overmuch publicity. After all, its only claim to public confidence is the thoroughness and fidelity with which it does its daily task, which is exacting enough to demand the undivided attention of all its members. The majority are new in their positions and not too familiar with the traditions of the Court which have stood it in such good stead during the 150 years of its history. The upshot of all this is that I am anxious to see the Court removed more from the public eye except on decision day, as soon as possible – to imbue its members by example and by precept with the idea that the big job placed on us by the Constitution is our single intent in life and that, for the present, public appearances and addresses by the judges and the attendant publicity ought to be avoided. (as quoted in Mason 1953)

Likewise, in 1948, Felix Frankfurter famously suggested that he suffered from “judicial lockjaw,” a condition of self-censorship in which judges refrain from extrajudicial conduct (Dubek 2007). And, there is at least anecdotal evidence that judges invite trouble through public engagement. In states as different as Russia and Germany, high court judges have been criticized for publicly arguing for compliance in the context of significant resistance to their decisions (Hausmaninger 1995; Jackson and Tushnet 2006, 740).

In many familiar ways, the judiciary differs from the elected branches of government, and for that reason, public, nonadjudicatory communication has been regarded skeptically. Nevertheless, high court judges communicate with the public directly and quite outside the structure of written legal opinions. The central puzzle of this book concerns why they would do so. Why do judges go public?

In the broadest sense, I wish to suggest that, to understand why judges go public, we must first turn our attention to the politics of constitutional review. We must consider a fundamental problem of judicial policymaking, one that undermines judicial independence and threatens constitutionalism. Once we develop a sense of the conditions under which this problem can be solved, an explanation of judicial public relations emerges: *judges go public to construct conditions favorable to the exercise of independent judicial power.*⁵ To foreshadow, communication strategies are designed to advance the transparency of the conflicts constitutional courts resolve and to promote a deep societal belief in judicial legitimacy, conditions that promote judicial power. I will demonstrate that public relations offers material, if ultimately limited, control over transparency and, by so doing, expands the boundaries of judicial power. I will also claim that although it is possible to advance judicial legitimacy merely through public relations, judicial behavior itself, and not just what courts communicate about it, affects legitimacy. A key implication of this argument is that there can be a tension between the goals of constructing transparency and legitimacy. Judges might like to maximize the public's information about their work under some conditions, but might prefer public ignorance under others. Where courts are free to resolve conflicts sincerely, without concern for external political interference, complete transparency is highly useful. However, where courts have incentives to engage in prudent decision making, complete transparency can be problematic, because it can highlight the lack of impartiality necessary to negotiate difficult political controversies and, by doing so, undermine legitimacy. Strategic public relations can address this problem; however, because the media is not an arm of the judiciary, courts cannot fully control what is reported about them. For that reason, the tension is not easily resolved, and courts under serious political constraints may confront a power trap: promote transparency and risk undermining legitimacy or do not promote transparency and risk political irrelevance. In the remainder of this chapter, I will define judicial power and state the problem of judicial policymaking around which the argument revolves. I discuss theoretical solutions to this problem, and in that context, I summarize the argument, introduce the research design, and describe the chapters that follow.

⁵ Baum (2006) presents an excellent analysis of the multiple audiences judges target. The goal of this book is not to catalog these various audiences in an international context, but rather to place the phenomenon of nonadjudicatory judicial speech within a unified model of judicial power.

A Model of Constitutional Review and Case Promotion

Why do constitutional courts promote their decisions in the media? In this chapter, I describe how courts might construct their power by influencing information within a public enforcement model of constitutional review. This requires thinking about how case promotion affects the logic of existing models of constitutional review in which information is exogenously determined. The chapter is divided into three sections. I begin by describing the underlying public enforcement mechanism as it has emerged in the theoretical literature. I will identify problems that derive from such a mechanism and ask how judicial public relations might address them. In the second section, I develop two straightforward game theory models of judicial-government interaction, one of which allows the court to influence information while the other does not. I discuss the intuition behind the central results and identify observable implications, which I will test in subsequent chapters. In the final section, I return to the political challenges judges face within a public enforcement mechanism when they lack control over information and consider the extent to which public relations can solve these problems.

A PUBLIC ENFORCEMENT MECHANISM

Given the judiciary's lack of enforcement powers, it seems clear enough that we should not treat judicial decisions as unconditionally binding, at least on coordinate branches of government. Still, it would strain empiricism beyond recognition to imagine that courts never control the outcomes to sensitive policy conflicts – that authorities can disregard their legal obligations always or even more often than not. Thus, it seems likely

that we can identify conditions under which judicial decisions can be treated as if they were binding. Let us begin by supposing that the public serves as an indirect enforcement mechanism for judicial decisions, pressuring representatives for compliance. That the public would play such a role is consistent with standard assumptions about the behavior of elected officials, that is, that they respond in some way to constituent desires. However, if we make this assumption, we necessarily ask whether the public ever responds to perceived threats to the rule of law. In a sense, we would not expect to observe many negative public reactions if politicians are generally forward looking and sensitive to constituent interests. Yet, whether because of myopia or uncertainty, there are examples. The experience of the U.S. Supreme Court during Roosevelt's court-packing plan represents the most familiar example of a significant, negative public response to a policy seemingly aimed at manipulating constitutional interpretation (Caldeira 1986). The Pakistani lawyers' movement, which led a massive resistance against President Pervez Musharraf's repeated assaults on the Supreme Court in 2007 and 2008, constitutes a recent and salient example of the potential negative consequences of attacking a court.

If it is plausible to assume that, under some conditions, there are costs to attacking the authority of a court, whether through direct noncompliance or institutional manipulation, then we confront a second question. Why would the public defend unelected judges against the choices of its own representatives? Stephenson (2004) suggests that the public promotes compliance with judicial decisions when it believes that the judiciary is more likely to represent its interests than its elected representatives. In political systems in which politicians commonly engage in rent-seeking activities, it is certainly reasonable that voters will believe that politicians will pursue policies inconsistent with constituent interests. This is a special concern in policy areas where voters face informational challenges relative to their representatives, who may use their private information to pursue personal wealth or their own, independent ideological proclivities (Stokes 2001).

Although plausible, this argument does not sit easily with the observation that publics do, at least on occasion, support courts in political conflicts where elected officials seem to be representing community values accurately. As we know from the court-packing episode in the United States, Roosevelt's efforts to shape the size of the Supreme Court in order to induce a constitutional jurisprudence more in line with dominant national interests were met with serious resistance from the public (Friedman 2000, 1037–1046). It is not only unclear how the

Stephenson model would explain this outcome, but the behavior in question also raises a difficult question in its own right. Why might people support a court against a president when the president is accurately reflecting their interests? In other words, why might people promote the rule of law universally?

On Weingast's (1997) familiar account, individuals promote the universal application of the rule of law in order to prevent the occasional state exploitation of their own rights. It is better to live in a world in which everyone's rights are protected than in a world in which I sometimes benefit from the exploitation of another group, and I sometimes have my own rights violated. The crucial point here is that the sovereign believes that individuals in society will successfully coordinate in response to state actions that violate rights. Weingast identifies the coordination problem that must be resolved under any sort of public enforcement story; however, it is not clear how groups identify rights violations in the first place. In the Weingast model, the problem is not whether individuals can observe the state violating limits on its authority. This is observed perfectly. The problem involves what to do once the state trespasses on rights. But interpreting a state action as outside the bounds of constitutional limits necessarily precedes the coordination dilemma over how to respond to a state that has surpassed its limits.

Judicial legitimacy theorists do not address the coordination dilemma Weingast identifies, but they do suggest how individuals identify violations in the first place. The idea is not so much that people agree about whether policies cross the formal boundaries of state authority, but rather that people are willing to defend a court that says that they boundaries have been violated. Judicial legitimacy theorists suggest that individuals support courts even when it is personally costly to do so, but only when they endow them with legitimacy. Legitimacy is conceptualized as *diffuse public support* or a deep commitment to the institutional integrity of the judiciary (Caldeira and Gibson 1992, 638). The concept requires a commitment to defending the institutional structure and authority of the judiciary, even if particular decisions run against personal interests. Under this view, people support courts when they believe that doing so is the "right thing to do." The empirical evidence presented in Gibson, Caldeira, and Baird's study suggests that these beliefs likely are generated over a long period of time. Building on these insights, Carrubba (2009) suggests that, by carefully managing compliance through strategic constitutional review, courts can induce publics to believe that it would be in their interest to support the judiciary generally, even if this means

punishing an elected official for noncompliance when the public gains from it, in the short run at least. Once individuals in society share this belief, judicial decisions can be treated as if they were fully binding on governments. I will return to the Carrubba point in Chapter 6. For now, it is sufficient to note that these arguments suggest ways of understanding why individuals might support courts against elected governments, and by implication, why judicial orders might be treated as if they were binding when courts enjoy sufficient public support.

Still, although a supportive public that is able to coordinate on a response to state violations of the rule of law may be necessary for the exercise of judicial power, the public enforcement account also involves a monitoring problem (Vanberg 2005). In particular, people must be sufficiently informed about the cases that courts resolve in order to identify and deter potential noncompliance. It only makes sense to invoke the public as an enforcement mechanism for judicial decisions, indirectly or directly, if people are aware of what they are enforcing. Stated differently, the political incentives for noncompliance are strongest when it is unlikely that constituents will learn about it. Consequently, when the public is unlikely to be informed about the particulars of the conflicts courts are called upon to resolve, judicial decisions will not be binding, and the incentive for strategic deference returns.

To summarize, scholars identify two conditions under which we can invoke the public as an indirect enforcement mechanism for judicial decisions: (1) courts must enjoy sufficient legitimacy to make political defiance unattractive, and (2) people must be sufficiently informed about their activities in order to monitor potential noncompliance. The legitimacy condition sets a conceptual lower bound on the court's support. The claim is not that only the most supported courts will exercise influence over policy outcomes, but that some level of support is necessary. Without any public support, elected officials will anticipate no cost for defying judicial decisions, and the judicial incentive to resolve cases prudentially is strongest. The transparency condition suggests that publics must be informed about the results they are allegedly enforcing. If they are not, then noncompliance will go undetected. If noncompliance will go undetected, then the incentive to comply is considerably reduced, and the incentive to resolve cases on prudential grounds returns yet again.

Three implications of these conditions bear directly on judicial public relations. If the argument is correct, then we ought to expect constitutional courts to be more likely to exercise their power when they expect the public to learn about and understand their decisions. Following immediately

from this point, media inattention to constitutional decisions presents a serious problem for constitutional courts. Insofar as the media is the primary means by which individuals learn about political events (e.g., Graber 2005), media attention is crucial to the enforcement mechanism. If the media ignores judicial outputs, it is unclear how people will learn about the decisions they are supposed to enforce. Further, judges have an interest in developing and maintaining their legitimacy. Legitimacy is a precious resource. Without it, judicial power is highly dependent on institutional arrangements that constrain the elected branches of government (Andrews and Montinola 2004; Tsebelis 2002) or upon the choices of politicians to constrain themselves (Ginsburg 2003; Landes and Posner 1975).

So far, media attention seems to be a solution to the transparency problem. But media attention presents a distinct problem of its own. Although the press frequently communicates judgments accurately (i.e., who wins and loses a case), reporters often misinterpret jurisprudential rationales, an outcome that judges themselves cite as frustrating (Davis 1994, 31). From a purely professional perspective, this is a problem. No judge can possibly enjoy reading an incorrect description of her reasoning. But perhaps there is a larger problem. An established literature in judicial politics suggests that judicial opinions themselves are a key element of the myth of judicial impartiality. Opinions support the idea that judicial deliberation is purely technical and impartial. If judges use opinions, in part, to help mold that image, and the media incorrectly summarizes their rationales, then it is immediately obvious that judges should take an interest in ensuring that their reasoning is properly communicated to the public through the press. Thus, the failure to control information presents both a transparency and a legitimacy problem for courts. Importantly, and in contrast to the transparency problem, the legitimacy problem is paramount when the media is *expected to cover a case*. In this way, it is possible that both media inattention and media attention are problematic for courts, albeit for different reasons. In the subsequent section, I seek to answer whether courts can solve the problems of media attention and inattention by promoting their cases. I ask whether the utility of case promotion is limited, and if so, what are the conditions that limit judicial influence?

MODELS OF CONSTITUTIONAL REVIEW

In this section, I develop two models of judicial–government interaction that explore the concerns I have just raised. The analytical approach involves comparing the results of two straightforward game theory

models. A baseline model is designed to capture the key dynamics of the Vanberg story. It describes a public enforcement mechanism for judicial opinions in which transparency is exogenously determined. In the second model, I allow the court to influence transparency. I will compare the results of these two models and, by so doing, derive hypotheses concerning judicial public relations and judicial decision making that are consistent with an exogenous or endogenous treatment of case transparency.¹ This exercise not only clarifies how judicial public relations might advance judicial power, it also suggests a way of distinguishing models that treat information as at least partially under the control of the judiciary from models that treat information as fully exogenous.

BASELINE MODEL

Figure 2.1 depicts an extensive form game of incomplete information played between a constitutional court and a national executive, although

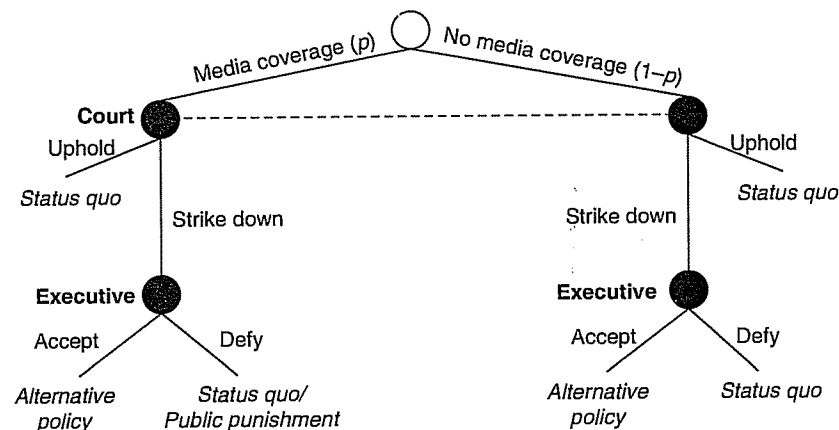


FIGURE 2.1. Baseline Model

¹ It is worth stressing that this theoretical exercise naturally extends the Vanberg argument. In the original setup, transparency is treated as an exogenous variable, although Vanberg never makes a principled argument about why we should treat transparency in that way. The theoretical analysis here considers what we should expect to observe if we imagine that transparency is endogenous to judicial behavior. A further approach might imagine what happens if we allow the players to compete over how they are covered.

the second player may be conceptualized as any government official. The game begins after the court has been asked to review the constitutionality of an action taken by the president. This approach to modeling judicial decision making suggests that judges essentially partition policies (sets of case facts, if you like) into bins that indicate acceptable and unacceptable choices rather than establish points on a line (as in Lax 2007). For the sake of argument, let us assume that some individual in society, affected by the president's action, has standing to bring a constitutional action against the president. The court may uphold the *status quo* policy (i.e., the president's action), or it may strike it down and substitute an alternative policy in its place. If we imagine that the *status quo* policy is something like detaining a citizen in a military prison, then the alternative policy might be conceptualized as setting the citizen free. The constitutional action, then, is best thought of as some sort of individual constitutional complaint (e.g., *habeas corpus* or *amparo*), although this limitation is not required. If the court strikes down the *status quo* policy, the executive chooses whether to accept the alternative. I conceptualize noncompliance broadly. Although noncompliance always involves the continued implementation of the *status quo*, noncompliance may also involve taking retributive actions against the court, the severity of which I parameterize in the court's payoff function. For each terminal history of the game, Figure 2.1 includes a brief description of what policy obtains and whether the executive is punished for defiance.

I model the transparency of the case with a simple device that incorporates the media. Prior to either player taking an action, there is a random draw from a set that determines the level of media attention and, by implication, public awareness of the case. Either the media will cover the resolution and accurately communicate the court's judgment, or the media will ignore the decision and the public will go uninformed about the interaction. Denote the probability that the media covers the resolution p . The court does not observe the outcome of the draw, but it knows the distribution from which it is drawn (i.e., the court knows p).²

² The court moves before it sees whether there is coverage of the decision. This seems natural insofar as, strictly speaking, there cannot be coverage of a decision that has not been released. Yet, reporters often obtain information about case outcomes prior to a formal release date, and their editors sometimes run stories in advance. In such a case, the court would be making a decision under complete certainty. Although the model does not capture this scenario perfectly, it does allow for scenarios that are functionally equivalent. What is required is an evaluation of the model in which we set p arbitrarily close to one. The results that follow consider equilibria under all values of p , so that the

Because the executive moves after the resolution, she observes whether the media covers the case. As a result, the executive is perfectly informed about the history of the game. Thus, a strategy for the court is a function $s_c: I_c \rightarrow A_c$, that assigns an action from $A_c = \{Uphold, Strike\ Down\}$ to the court's single information set I_c . A strategy for the executive is a function $s_e: I_e \rightarrow A_e$ that assigns an action from $A_e = \{Accept, Defy\}$ to each of her two singleton information sets.

In keeping with common assumptions in judicial politics, I assume that judicial choice is primarily a function of policy preferences. The value of the *status quo* policy is fixed at 0 for both players. If the executive faithfully implements an alternative, the court receives $a_c \in \mathbb{R}_+$.³ The court pays a cost $c > 0$ if the executive fails to comply. Although I assume that the media accurately covers the judgment, consistent with the judicial belief that reporters often mischaracterize jurisprudential details, I assume that the court pays a cost $e \in (0, a_c)$, which reflects the primacy of policy preferences. This cost represents the value the court places on reporters accurately communicating their decisional rationale. Note that the court only pays this cost if the media covers the resolution.

The executive is assumed to prefer the *status quo* to any alternative and will pay a cost $a_e > 0$ if she complies with an unfavorable decision. If the executive fails to comply and the media is covering the case, she pays a cost among her constituents for defying the court, $b > 0$. One natural interpretation of these parameters incorporates the concepts of specific public support (the public's issue-related preferences) and diffuse public support. If we assume that the executive is generally responsive to public preferences, then a_e may represent specific public support for the *status quo* and b may represent diffuse public support for the court. Interpreted in this way, the model allows executives to defy highly legitimate courts over valuable policies, but it also allows executives to implement decisions that are unpopular among their constituents, as long as diffuse public support is sufficiently large. This is a sensible result to allow for because the heart of the diffuse public support concept is that people are willing to accept unpopular decisions as long as the decisional source is legitimate.

For any given values of the parameters, there is a unique pure strategy subgame perfect equilibrium. There are three cases in the baseline model.

model essentially captures a situation in which judges know for certain that a case will be covered.

³ The key results of the model are not affected by allowing $a_c < 0$. The implications of this assumption are discussed in Staton (2006).

- Case 1: Informational Deference (For $a_e \leq b$ & $p < \frac{c}{c+a_c}$)
 - $s_c = Uphold$ the *status quo*.
 - $s_e = Defy$ if the media fails to cover the decision and *Accept* otherwise.
- Case 2: Judicial Power (For $a_e \leq b$ & $p \geq \frac{c}{c+a_c}$)
 - $s_c = Strike down$ the *status quo*.
 - $s_e = Defy$ if the media fails to cover the decision and *Accept* otherwise.
- Case 3: Judicial Deference (For $a_e > b$ & $\forall p$)
 - $s_c = Uphold$ the *status quo*.
 - $s_e = Defy$ all unfavorable verdicts.

Figure 2.2 depicts the equilibria for varying judicial beliefs over *ex post* media coverage and for varying degrees of importance to which the executive assigns the *status quo*. The *Informational Deference* and *Judicial Power* equilibria reflect the core dynamics in the Vanberg argument. When it is unlikely that the media will cover the resolution (i.e., for $p < \frac{c}{c+a_c}$), the court strategically avoids conflict with the executive. Because the executive will defy the decision if the media ignores it, the court upholds the *status quo* in the *Informational Deference* equilibrium because it cannot depend on the public to serve as its enforcement mechanism. Importantly,

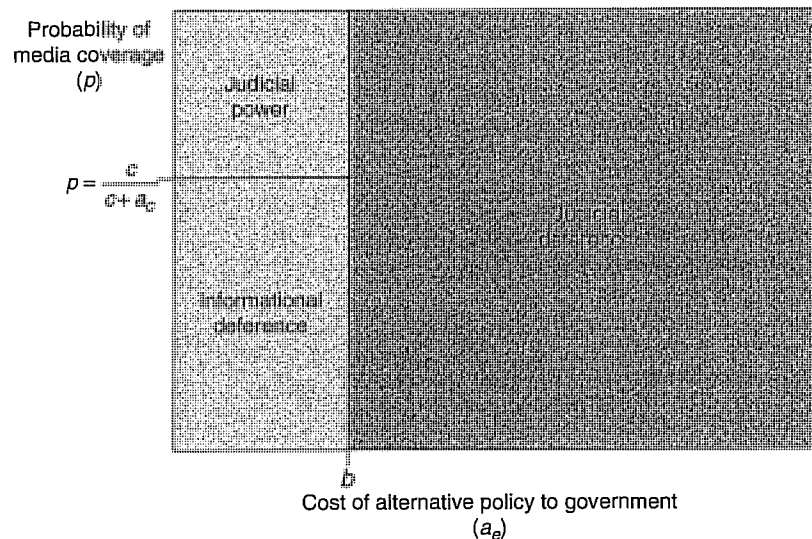


FIGURE 2.2. Equilibria (Baseline Model)

the information environment in this case induces the court's deference. Indeed, a court that is greatly supported may find itself in this kind of equilibrium whenever the cases it resolves are difficult to communicate to the public. For this reason, Vanberg (2005) finds that the German Federal Constitutional Court behaves strategically despite its overwhelming public support. Regardless of a court's legitimacy, prudential decision making results from insufficient information.

In the *Judicial Power* equilibrium, the court challenges the executive's policy, expecting the media to provide transparency through its coverage of the resolution. As is clear from the expression, the critical value of p , above which the court will strike down the *status quo*, increases in the cost of noncompliance (c) and decreases in the value the court assigns to the alternative policy (a_c).⁴ In other words, the more costly the noncompliance (or the less valuable the alternative), the more certain the court will need to be in the media's *ex post* coverage before it strikes down the *status quo*.

This much summarizes Vanberg's transparency argument; however, there is a critical difference between the empirical prediction Vanberg suggests and what this model implies. Note that the dynamics I have just described completely disappear when the *status quo* is sufficiently important to the executive. In the *Judicial Deference* equilibrium, the government does not condition its response to the court on whether the media covers the resolution. Indeed, the government will defy an unfavorable resolution even if the public will become perfectly informed about the defiance. In such a case, transparency does not afford the court the necessary leverage to confront the government. Consequently, the court's decisions are not a function of its beliefs about the likely transparency of the case. It simply defers to the executive's authority.

The baseline model suggests empirical implications concerning the choices of constitutional courts to strike down public policies and the choices of public officials to respect those decisions.

Baseline Implication 1: When courts do not influence the transparency of the cases they resolve, they should be less likely to strike down public policies as the importance of the policy to the government increases.

Baseline Implication 2: When courts do not influence the transparency of the cases they resolve, the relationship between judicial beliefs

⁴ $\frac{\partial p}{\partial c} > 0$ and $\frac{\partial p}{\partial a_c} < 0$.

about transparency and the choice to strike down a public policy is conditioned by the importance of the *status quo* to the government. When policy importance is relatively small, courts should be more likely to strike policies down as transparency increases; however, when importance is relatively large, there should be no relationship between transparency and the court's decision.

These results reflect the common perception that strategic judicial behavior is increasingly likely as the importance of public policies to relevant political actors increases (e.g., Helmke 2002; Iaryczower, Spiller, and Tommasi 2002); however, it is important to stress two qualifications. First, the claim that judicial power decreases in policy salience must be conditioned by a *ceteris paribus* condition. Importantly, for sufficiently large public backlash costs, the power of a court may cover extremely salient policies. Second, the model also suggests that strategic behavior is observable in less salient conflicts, especially when the media is unlikely to cover a resolution. Most importantly, it suggests that the influence of transparency on judicial power is conditional – it depends on the importance of the underlying policy issue to the government being challenged. For many public policies, transparency will matter a great deal; however, for sufficiently important policies, transparency is irrelevant to the choice to strike down a public policy. If this implication is correct, then estimates of the effect of transparency on judicial decision making may be both overstated and understated if analysts do not allow this effect to be conditioned by policy importance. For highly important policies, unconditional estimates of transparency are likely larger than they should be; however, for less important policies, unconditional estimates are likely smaller than they should be. Finally, if we continue to assume that a_e reflects the public's specific support for the policy under review and that b reflects something like the public's diffuse support for the court, then the result also places a reasonable upper bound on the role of judicial legitimacy in interbranch relations. There are likely some public policies that are important enough that publics will not support even the most legitimate courts in battles with their representatives.

The baseline model also implies a hypothesis concerning compliance with unfavorable constitutional decisions, one that underscores the importance of considering the strategic environment in which constitutional courts operate.

Baseline Implication 3: When courts cannot influence the transparency of the cases they resolve, officials should be more likely to defy constitutional court decisions over relatively unimportant policies that go uncovered by the media.

It is crucial to stress that noncompliance should be decreasingly likely as policy importance increases. Although it is true that the incentive to defy a decision increases as salience increases, salient policies are precisely the policies over which the court defers to the executive.

Finally, the baseline model highlights the two informational problems judges may be able to resolve through public relations. The first concerns transparency – the problem identified by the Vanberg model. It is uncertainty surrounding the public's ability to monitor the interaction that produces strategic judicial behavior under the *Informational Deference* equilibrium. If the court were sure that the media would cover the resolution, it would have no incentive to uphold the *status quo*, precisely because these are decisions that the government would respect given sufficient public information. Thus, if judges are able to induce media attention for their resolutions, they may be able to eliminate the necessity to defer strategically in situations characterized by the *Informational Deference* equilibrium. The second problem concerns the legitimacy condition. In all cases, the court expects to lose the cost of misinformation, discounted by the probability of media coverage (i.e., $p * e$ in equilibrium). This problem may be resolvable via public relations as well. Case promotion can give judges the ability to clarify their resolutions, improving on the reporters' descriptions of the case. I now turn to a version of the model in which the court is able to produce accurate media coverage through case promotion.

PROMOTION MODEL

The promotion model, depicted in Figure 2.3, is identical to the baseline in all ways but one. I allow the court to promote a resolution among the national media at a cost $k > 0$. This cost may be interpreted in one of two ways. We might imagine that it measures the administrative costs associated with promoting a case, in the sense that it is at least minimally costly to translate dense legal text into language that is appropriate for public consumption, and it may be personally or institutionally costly to contact editorial staffs or beat reporters with the purpose of lobbying for a particular kind of coverage. Alternatively, we can conceptualize k as the opportunity cost of promoting one decision, knowing that not all

decisions can be successfully promoted. The logic here is that the promotion of all cases largely renders it impossible for the media to recognize clearly why one case is more worthy of coverage than another. The key point is that promoting a case is costly in the model, although this cost may be arbitrarily small. Maintaining the assumption that constitutional politics is ultimately about policy, I assume $a_c > k$.⁵ I further assume that, if the court promotes the resolution, the media accurately translates information about the case to the public. Clearly, this is a strong assumption, but it reduces the set of parameters, and relaxing it does not materially affect the implications of the model. What matters is that case promotion at least increases the chances of quality media coverage.⁶ I return to this issue after describing the results. The remaining structure of the model is identical to the baseline. A strategy for the court continues to assign a single action to its single information set; however, its action set now takes the following form:

$A_c = \{Uphold; Uphold and Promote; Strike Down; and Strike Down and Promote\}$. An executive strategy assigns an action, *Comply* or *Defy*, to each of its four singleton information sets.

Like the baseline model, there is a unique subgame perfect equilibrium for any given values of the parameters. There are four cases to consider.

Case 1: Judicial Deference (For $a_e > b$ & $p \leq \frac{k}{e}$)

$s_c = Uphold$ the status quo.

$s_e = Defy$ all unfavorable verdicts.

Case 2: Public Judicial Deference (For $a_e > b$ & $p > \frac{k}{e}$)

$s_c = Uphold$ the status quo and *Promote* the decision.

$s_e = Defy$ all unfavorable verdicts.

Case 3: Public Judicial Power (For $a_e \leq b$ & $p \leq \frac{c + a_c - k}{c + a_c - e}$)

$s_c = Strike down$ the status quo and *Promote* the decision.

⁵ This assumption reduces the number of cases I consider. Allowing $k > a_c$ does not affect the incentives to promote decisions when courts either uphold or strike down; however, it would allow for some equilibria in which courts strategically uphold the *status quo* in order to avoid having to pay the cost of promotion, a result that only obtains for small a_c . Because policy is generally perceived to be paramount, the model assumes away this possibility.

⁶ Davis (1994) provides empirical support for this claim in the United States, and my own investigation of the Mexican data, which I briefly discuss below, supports it as well.

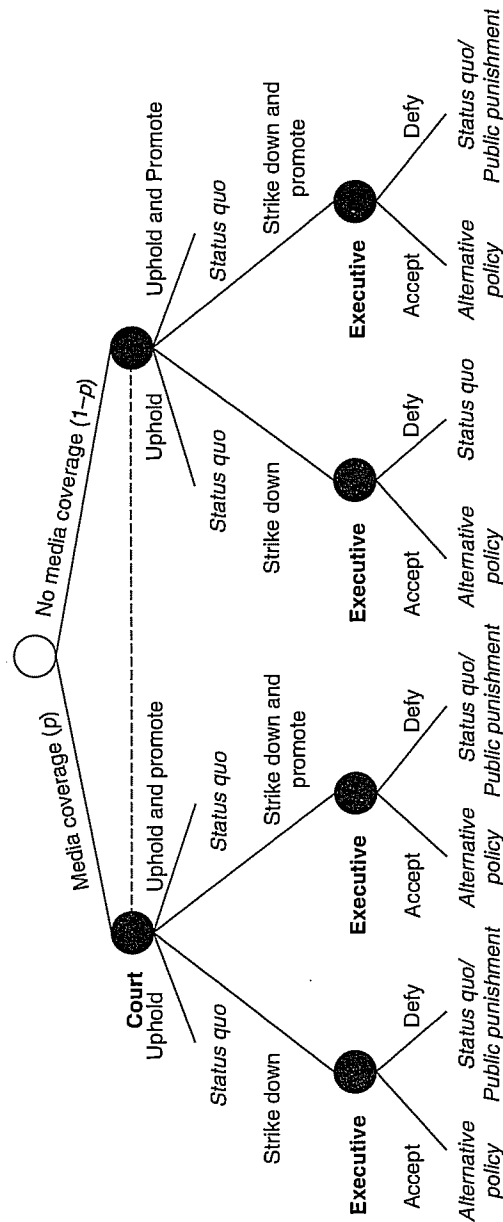


FIGURE 2.3. Promotion Model

$s_e = Defy$ if the media fails to cover the decision and *Accept* otherwise.

Case 4: Judicial Power (For $a_e \leq b$ & $p > \frac{c + a_c - k}{c + a_c - e}$)

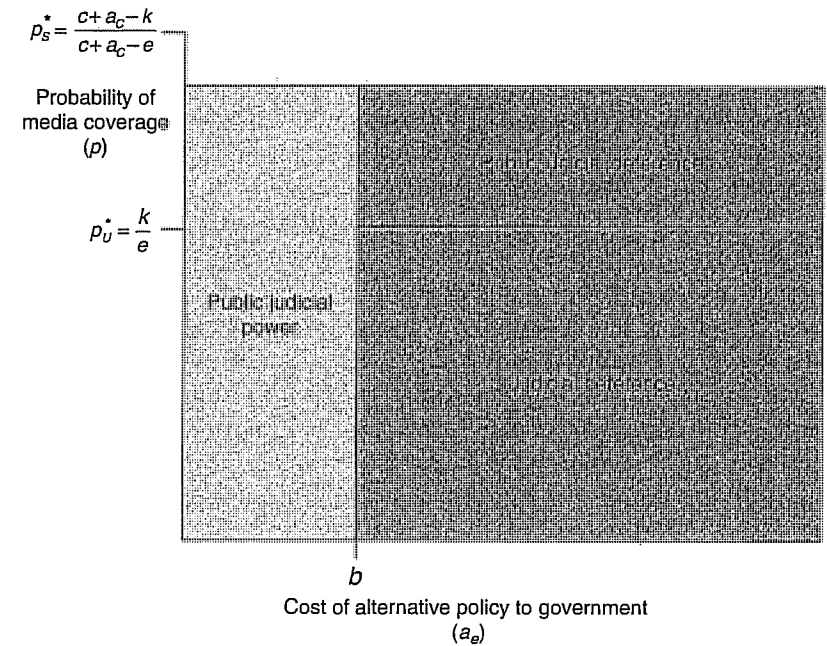
$s_c = Strike\ down\ the\ status\ quo.$

$s_e = Defy$ if the media fails to cover the decision and *Accept* otherwise.

Figure 2.4 depicts the promotion model equilibria. The top panel (Figure 2.4a) shows the results when the cost of promoting a case is low relative to the cost of poor reporting, while the bottom panel (Figure 2.4b) shows the results under the opposite assumption. First, note that for sufficiently important policies ($a_e > b$), judicial decision making looks nearly identical to the baseline model. In both the *Judicial Deference* and *Public Judicial Deference* cases (shaded dark in the figure), the executive will defy all unfavorable decisions, whether or not the public is informed about the defiance. Under such scenarios, the court defers to the government's authority, recognizing that public support is insufficient to induce compliance. This is true no matter how likely the court is to believe that the media will cover the decision. Still, the court's beliefs about *ex post* media coverage distinguish between the two judicial weakness equilibria. As long as the cost of case promotion is sufficiently low, as it is on the top, the court only promotes its decision when the media is likely to cover the case (i.e., when $p > \frac{k}{e}$). It does so in order to resolve the problem associated with poor reporting of the decision's rationale. Once it becomes sufficiently unlikely that the media will report on the case, the court simply upholds the *status quo* and avoids the cost of promotion. When the cost of case promotion is large relative to the errors the court anticipates in the media, as is true in the bottom panel, if the court upholds the *status quo*, it will never promote the case. This suggests that even when case promotion cannot solve the transparency problem, courts may use case promotion to advance legitimacy, but only if the administrative costs of doing so are not prohibitive.

A key difference between the promotion and baseline models concerns the effect of transparency on decision making. In the promotion model, although it is still the case that the court will uphold policies that are highly important to the executive, it is no longer the case that it will strategically defer to the government when the probability of *ex post* media coverage is too low. Instead, when $p \leq \frac{c + a_c - k}{c + a_c - e}$, the court will strike down the *status quo* and create its own media coverage via case

(a) Equilibria with low promotion costs ($k < e$)



(b) Equilibria with high promotion costs ($k \geq e$)

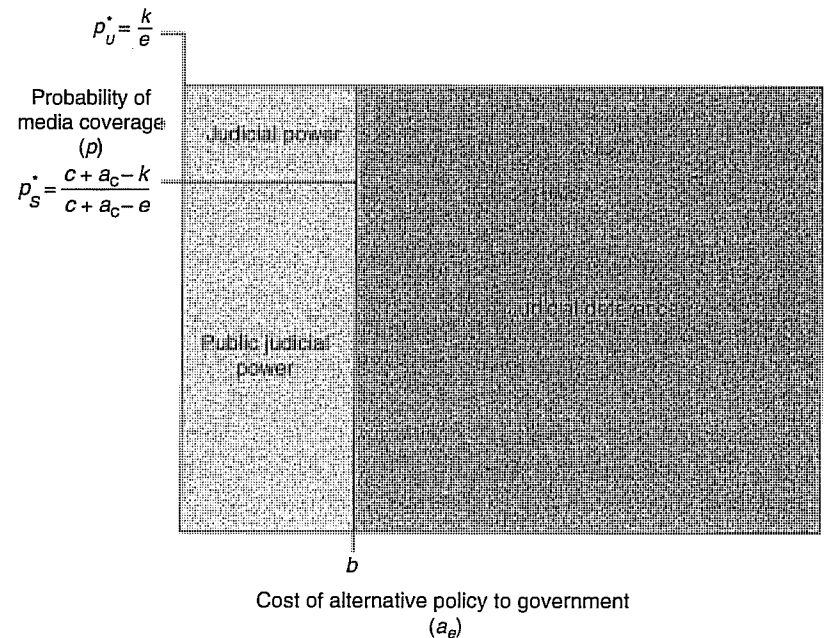


FIGURE 2.4. Equilibria (Promotion Model)

promotion. This *Public Judicial Power* case is depicted in left side of the left panel. Alternatively, if $p > \frac{c+a_c-k}{c+a_c-e}$, the court strikes down the policy yet saves the cost of case promotion, relying on the media to provide the public with the information necessary to induce compliance.

It is useful to note that when the court intends to strike down the *status quo* and the cost of case promotion is low (the left panel), the condition on the court's beliefs about media coverage is met for all values of the parameters; however, when the cost of case promotion is relatively high, this condition is only met for sufficiently low probabilities of *ex post* media coverage. Substantively, when case promotion is relatively costless, the court promotes all decisions striking down the *status quo*; however, when case promotion is relatively costly, the court promotes decisions striking down the *status quo* only if the media is sufficiently unlikely to cover the resolution. I will return to this issue below. In summary, the key point is this: if the transparency of the cases the courts resolve is endogenous to judicial-government interaction, then judges have a limited degree of control over their own power.

I am now in position to consider the empirical implications of the promotion model.

Promotion Implication 1: When courts can influence the transparency of the cases they resolve, they should be less likely to strike down policies as the importance the government assigns to the policy increases.

Promotion Implication 2: When courts can influence the transparency of the cases they resolve, there should be no relationship between beliefs about transparency and decision making.

The first implication is perfectly consistent with the baseline model. Whether or not judges can influence the transparency of their cases, judicial decision making is affected by the importance of the policy to the government. The second implication is distinct. When courts have control over transparency, there should be no relationship between beliefs in transparency as provided by the media and decision making. When policies are sufficiently important, these beliefs are irrelevant because transparency does not offer courts sufficient leverage to exercise their authority. On the other hand, for less important policies, courts can create transparency when they need it. Consequently, their beliefs over whether the media will cover their resolutions should not be related to their decision-making process.

When courts can influence the transparency of the cases they resolve, noncompliance depends on the cost of case promotion.

Promotion Implication 3: If the cost of case promotion is trivial, officials should never be observed in defiance of constitutional courts. If the cost of case promotion is more than trivial, officials should be more likely to defy constitutional court decisions over relatively unimportant policies that are not covered.

This implication has two parts. The first concerns what we should observe if promoting a case is effectively costless. The second concerns what we should observe if case promotion is relatively costly. The logic is as follows. If the cost of case promotion is small relative to the errors judges perceive in media coverage, then the model suggests that the court will publicize all cases striking down the *status quo*. Of course, it is still the case that the court only strikes down policies that are insufficiently important, so that if the public is informed, the government will comply. Because the court provides transparency for its decisions when transparency is required, there should be no instances in which the government will defy the court in equilibrium. In contrast, if case promotion is relatively costly, then the promotion model suggests the same implication as the baseline model.

So far I have considered the implications of the baseline and promotion models for constitutional decision making and compliance. Yet the core reason for constructing a model of case promotion is to explain promotion itself. This is something that existing theoretical models of constitutional review cannot do, because they do not consider the possibility.

Promotion Implication 4: Constitutional courts should be more likely to promote decisions that strike down the *status quo* than those that uphold it. This relationship should be especially strong when the court believes that the case is unlikely to be transparent.

The intuition behind this result is as follows. Using the results described under the equilibrium summary above for the promotion model, let $p^U = \frac{k}{e}$ and $p^S = \frac{c+a_c-k}{c+a_c-e}$. The court will promote a resolution upholding the *status quo* if and only if $p \geq p^U$; it will promote a resolution striking down the *status quo* if and only if $p < p^S$. Whether the court upholds the *status quo* or strikes it down, it faces the costs imposed by imprecise media coverage (e); however, when the court strikes down a policy, it

confronts the additional political problem of noncompliance. If the cost of promotion is sufficiently small, there will be cases in which the court promotes decisions upholding the *status quo*, but every time it is optimal to promote a decision upholding the *status quo*, it is optimal to promote a decision striking it down. If we continue to assume that k is small enough so that p^U can be satisfied, at high values of p , the court will promote all kinds of decisions, resolving reporter inaccuracy; but at low values of p , the incentive to promote in order to address inaccuracy disappears because it is unlikely that there will be any inaccuracy to correct. At such values of p , only decisions striking down the *status quo* will be promoted in order to deal with potential noncompliance. Thus, constitutional courts should be more likely to promote cases striking down the *status quo* than those upholding the *status quo*, yet this relationship should be especially strong when the court is unlikely to believe that the media will cover the resolution.

Formally, recognize that if there is a p that satisfies the p^U condition (and the court promotes a decision upholding the *status quo*), then the same p satisfies the p^S condition (and the court promotes a decision striking it down); however, the converse is not true. There are two possibilities. Either the cost of promotion is less than the cost of media inaccuracy, or it is not (i.e., $k < e$ or $k \geq e$). If $k < e$, then $p^U \in (0,1)$ and will be satisfied for sufficiently high p . If $k < e$, however, p^S is satisfied for *all* parameter values, because $\frac{c+a_e-k}{c+a_e-e} > 1$. Alternatively, if $k \geq e$, the court will never promote a decision upholding the *status quo*, because $p^U \geq 1$, and no p is this large; however, $k \geq e$, $p^S \in (0,1)$, and it will be satisfied for sufficiently low p .

Summary of models and their implications

Although the preceding arguments are simple, they suggest a number of observable implications across a range of substantive topics. The central difference between the two models concerns the degree to which judges can influence their media coverage. In the baseline model, media coverage is exogenous; in the promotion model, it is endogenous to the interaction. In some cases, these different approaches produce exactly the same observable implications; however, in other cases, they suggest hypotheses that are distinct. Table 2.1 summarizes the key hypotheses that I will examine in the second part of this book. Check marks are placed in the final two columns in order to indicate the modeling approach that generates the hypotheses to the left.

TABLE 2.1. Observable Implications by Model Type

Subject	Hypothesis	Baseline Model	Promotion Model
Case Promotion	A constitutional court is more likely to promote a decision striking down the <i>status quo</i> than a decision upholding the <i>status quo</i>		✓
Constitutional Decision Making	A constitutional court is less likely to strike down a public policy as the importance of the policy to the government increases	✓	✓
Constitutional Decision Making	A constitutional court is more likely to strike down a public policy as likelihood of <i>ex post</i> media coverage increases, but only for insufficiently important policies	✓	
Constitutional Decision Making	The likelihood of <i>ex post</i> media coverage is unrelated to a constitutional court's decisions to strike down public policies		✓
Compliance	Governmental noncompliance should not be observed		✓*
Compliance	Governmental noncompliance should be more likely in relatively unimportant cases that are not covered by the media	✓	✓**

Note: Summarizes the observable implications of the baseline and promotion models. Checks (✓) indicate the model that produces the hypothesis listed to the left.

*If case promotion is costless.

**If case promotion is costly.

Having reviewed the key empirical implications of the model, it is important to return to the assumption about the court's control over transparency if it chooses to promote a case. A natural alternative modeling approach might allow the court to successfully promote its cases probabilistically. What are the consequences of such an assumption for the key results? For a sufficiently low probability of case promotion, the model collapses into the baseline and all of the predictions in that model apply. Above this threshold, the alternative collapses into the promotion model, and all of its predictions apply. Importantly, no matter how

likely it is that a court can influence its coverage, there is no material effect on the relationship between case salience and the incentive to defer strategically. Similarly, a court is always more likely to promote a decision striking down a policy than upholding a policy, especially when the media is unlikely to cover the resolution.⁷ The essential consequence of relaxing the assumption of perfect promotion at a cost is that the promotion model would retain some features of the baseline model. The bottom line is that it might be more difficult to find support for the case promotion hypothesis if courts believe they can only partially control their coverage.

IMPLICATIONS

At the beginning of this chapter, I suggested that both media inattention and media attention might produce distinct problems for constitutional judges. The problem of media inattention is directly implied by existing theoretical models of judicial power in which the public is an enforcement mechanism for judicial resolutions. If individuals derive information about national politics from the media, and the media ignores the constitutional court, then monitoring will be impossible and the enforcement mechanism will fall apart no matter how beloved the court. Insofar as that is true, media inattention undermines the use of judicial power.

The transparency problem

Can judges solve this problem through public relations? If they can, then this suggests that judges can be active participants in the construction of their own power. Judges, on this account, do not merely respond to existing conditions, rather they attempt to influence those conditions whenever

⁷ There is one case, which only exists in a model in which promotion is probabilistically successful. When the value of the policy to the government is insufficiently high, when the costs of promotion are sufficiently low, when the costs of noncompliance are sufficiently high, when the value of the policy is sufficiently low for the court, and when both the probability of *ex post* coverage and the probability of successfully promoting a case are neither too large nor too small, there can exist an equilibrium in which the court will strategically uphold a policy and promote its decision. The logic is that if the probability of successful promotion is too low and *ex post* media coverage is too unlikely, then it is likely that an effort to strike and promote will fail. The court wishes to avoid this. However, because the probability of *ex post* coverage is sufficiently high, the court wishes to avoid poor reporting of its rationale. Finally, because the probability of success is not too small, it is worth making the effort to try to influence its coverage, but again, only for decisions strategically upholding the *status quo*.

possible. If the models I have just developed are correct, then the answer is that public relations can influence judicial power, but not under all conditions. In particular, the degree to which judicial public relations can increase judicial power depends on the importance of the *status quo* policy to the government relative to the cost the government must pay for defiance. When policy importance is low relative to the cost of defiance, the court has a great deal of leverage over the government, and it can use public relations to ensure its power. However, when the policy's importance is high relative to the cost of defiance, the court will have far less leverage, and public relations as a tool of judicial power will be of less use. In other words, judicial public relations does not expand the boundaries of judicial power outward arbitrarily – its effect is limited. From the perspective of research design, this limitation reminds us that tests of the model should be conducted at the level of the constitutional conflict. Although there is absolutely nothing wrong with a research design that includes multiple countries, the interesting variance will be at the level of the conflict, not say at the country or even country-year level. In summary, judges can play an active role in constructing the conditions for judicial power, yet that role is limited by the value of the *status quo*.

The legitimacy problem

The second problem I identified above concerns the problem induced by media attention. The idea was that the press frequently misinterprets jurisprudential rationales, which is both professionally unappealing and may even undermine judicial power. If written opinions are a primary means by which judges communicate impartiality, and if impartiality is a core element of judicial legitimacy, then it is immediately obvious that judges should take an interest in ensuring that their reasoning is properly communicated to the public through the press. In contrast to the transparency problem induced by media inattention, this problem is paramount when the media is expected to cover a case. Can public relations solve this problem as well? As before, the answer is a qualified yes; however, the limit to public relations' success in solving this problem is uniquely related to the costs of case promotion. As long as the cost of promoting a case is sufficiently low, then courts can always resolve this problem via promotion.

In general, this idea suggests that courts have an interest in lowering the costs of case promotion. One way courts might tackle this problem is

by attempting to construct their own media coverage. As I discuss in subsequent chapters, the Mexican Supreme Court took an extremely active role in attempting to train its beat reporters to provide better coverage. In terms of the theoretical argument, this practice might appear useful inasmuch as it can lower the costs of case promotion. Indeed, it ought to be easier to communicate with a reporting corps as their level of familiarity with the law increases. This seems to have been Justice Kirby's rationale for seeking a change in the way the national media covered the Australian High Court. Although this logic seems plausible, it is certainly possible that constructing a beat may increase these costs. Although a better-informed media is more likely to be able to understand a judge's jurisprudential rationale, it is also possible that this better-informed media would be less willing to simply report a court's description of its decisions and instead rely on its own interpretation. If this is true, then constructing a beat may have no influence on the net costs of case promotion. Although greater information may lower those costs by making any particular message from the bench easier to communicate, greater professionalization may decrease the probability that the media is willing to listen to a judge's appeals.

To summarize, the theoretical argument suggests that judicial public relations offers a solution to both the transparency and legitimacy problems, and as a result, judges have control over their own power, even if this control is bounded. In the subsequent chapters, I test a number of the implications that have emerged from the argument. Much of the empirical work takes place in Mexico, and it is to that setting that I now turn.

APPENDIX 2

Baseline model

The solution concept is subgame perfect equilibrium. If indifferent, I assume that the court upholds the policy and the executive accepts. Consider the executive's choice in the baseline model first. If $a_e > b$, then the executive always defies the court. If $a_e < b$, then the executive complies if the media has not covered the case and defies if the media has covered the case. Consider that the expected utility for the court of upholding the policy is $-pe$ whatever the executive does. If the executive defies decisions only if the media does not cover the case, then the court's expected utility of striking down is $p(c + a_c - e) - c$; however, if the

executive defies all decisions, then the court's expected utility of striking down is $-pe - c$. Clearly, if $a_e > b$ and the executive defies always, the court must uphold the policy. To do otherwise only adds an additional cost. This establishes *Judicial Deference* case. Now, if $a_e < b$, then the court's choice depends on whether $p(c + a_c - e) - c < -pe$, which it is if $p < \frac{c}{c+a_c}$. In the event that this condition holds, then the court upholds; however, if it does not, the court strikes down. This simple condition on p establishes the *Informational Deference* and *Judicial Power* cases.

Promotion model

The executive's equilibrium choices are identical to those in the baseline: defy all verdicts if $a_e > b$; however, if $a_e < b$, accept verdicts when the media covers the case and defy otherwise. If the court does not promote the decision, its expected utilities are identical to those in the baseline model. If the court upholds the *status quo* and promotes, it earns $-k$, the cost of promotion. If $a_e < b$ and the court strikes down the *status quo* and promotes it receives $a_c - k$; however, if $a_e > b$ and the court promotes a decision striking down the *status quo*, it expects $-c - k$.

Clearly, if $a_e > b$, striking down is never better than upholding for the reason given in the baseline model. Similarly, if $a_e > b$, then striking down and promoting, which yields $-k - c$, is never better than upholding and promoting, which yields $-k$. Thus, the only question is whether the court will promote a decision upholding the *status quo* or not. This it will do if and only if $p > \frac{k}{e}$. If this condition does not hold, the court simply upholds the policy. These results establish the *Judicial Deference* and *Public Judicial Deference* cases. Finally, consider what happens if $a_e < b$ and the executive will comply if the media covers the case. Upholding and promoting can never be optimal, because it would yield only $-k$ and the court could obtain $a_c - k$ by striking down and promoting, which is larger by the restriction on a_c . Further, simply upholding is also never optimal because $a_c - k$ is clearly larger than $-pe$. Thus, the only question is whether the court will promote a decision striking down the *status quo*. This involves asking when $a_c - k < p(c + a_c - e) - c$, which it is if and only if $p > \frac{c+a_c-k}{c+a_c-e}$. If this condition holds, then the court will strike down the *status quo* but fail to promote, relying on exogenously determined media coverage. If the condition fails, the court strikes down the *status quo* and creates its own coverage. This establishes *Public Judicial Power* and *Judicial Power* cases.

PART II

THE POLITICS OF CONSTITUTIONAL REVIEW IN MEXICO

In many respects, July 2, 2000, the day on which Vicente Fox's presidential campaign ended seventy-one years of Partido Revolucionario Institucional (PRI) rule, marks a watershed in Mexican political history. After July 2, it was impossible to claim that no meaningful opportunity existed for national representation outside the broad yet ultimately exclusive structure of the PRI. The election suggested that power could be transferred peacefully between parties via fair democratic procedures. Patterns of political participation also changed in 2000. Historically, the educated and politically aware participated at levels far below what standard turnout models predict. The PRI strategy of mobilizing poor and rural voters through clientelistic networks and corporatist state structures induced a participatory pattern reflective of broad cynicism in the electorate. In 2000, however, participation patterns reflected those of advanced democracies, indicating that Mexicans came to believe *en masse* that their votes would count (Klesner and Lawson 2001).

Certainly, July 2 was a big day. Yet, although the Fox victory serves as a useful symbol of the transition, treating the date as a true critical juncture misses two important elements of the democratization process. Most scholars of Mexico perceive the transition to have been protracted, playing out in a variety of ways (e.g., development of significant opposition parties, increased political competition at the state level, PRI congressional losses in 1997, and so on) roughly during the fifteen years preceding the Fox election (Cornelius, Gentleman, and Smith 1989; Shirk 2005; Wuhs 2008). July 2 is probably best thought of as wholly consistent with a general process of democratization rather than the date on which Mexico became a democracy. But beyond the distinction between a gradual

and a punctuated change, the second element of the story that is blurred by focusing on the Fox election is a legal one. In the sense that democracy can be as much about broad adherence to the rule of law (e.g., Linz and Stepan 1996, 10) as it is about inclusive and competitive elections (e.g., Dahl 1972), the story of the Mexican transition should not be restricted to tales of increasing electoral competition. Rather it should also consider the sustained process of judicial reform aimed at constructing a more effective counterbalance to presidential or even legislative power. And that process began in earnest long before the 2000 federal elections.

Responding to a growing public concern over injustice, insecurity, and judicial corruption, and in the wake of a series of political assassinations, Ernesto Zedillo, the PRI's candidate for the presidency in 1994, developed a bold plan for the reformation of the Mexican justice system (González Oropeza 1995). And reforming the judiciary was Zedillo's first order of business after taking office. The Zedillo reform reduced the size of the Supreme Court from twenty-six to eleven ministers (justices) and reduced the number of benches from four to two.¹ As part of its transitory provisions, all current members of the Supreme Court were forced to resign, paving the way for the appointment of an entirely new court, which was to be staffed by judges more committed to the judicial career (Staton 2007). Zedillo also created the seven-member Federal Council of the Judiciary (Consejo de la Judicatura Federal [CJF]) to relieve the Supreme Court of much of its administrative responsibilities.² Critically, the reform altered the Supreme Court's constitutional jurisdiction. It created a new institution of abstract constitutional review, the *action of unconstitutionality*, and expanded the court's authority under the *constitutional controversy*, a constitutional action largely designed to resolve federalism and separation of powers questions. Two years later, the Supreme Court was granted jurisdiction over cases challenging the constitutionality of electoral laws.

Scholars have interpreted these reforms through the lens of two related, willful delegation models of judicial power. Finkel (2008) views the Zedillo reform as a form of political insurance, a delegation of presidential authority to hedge against possible losses of power in the ongoing process of democratization. The Supreme Court was granted new powers

¹ The benches previous to the reform separately specialized in civil, penal, administrative, and labor matters. Under the new configuration, the first bench hears penal and civil cases, while the second bench hears labor and administrative cases.

² CPM, Artículo 100. For a review of judicial councils in Latin America see Héctor Fix Zamudio and Héctor Fix Fierro, *El Consejo de la Judicatura* (México: Instituto de Investigaciones Jurídicas, UNAM, 1996).

of judicial review to ensure that core party interests would not be undermined in the event that the PRI lost a major election in the near future. Magaloni (2003) instead argues that the reform reflected an effort to manage political conflicts in a context of increasing heterogeneity of representation at the state level. Where once the president could resolve disputes within or across state boundaries, or between states and the republic, through his control over the national party (and by implication his control over local parties), as opposition parties came to win elections across the republic, this mechanism broke down. According to Magaloni, Zedillo empowered the Supreme Court to avoid constant political crises. Whatever the rationale for the reform, it is important to note that both arguments rest on an assumption around which this book revolves: the Mexican Supreme Court would exercise meaningful control over the conflicts it would be called upon to resolve. Absent *de facto* power, it is not clear how the court could have been conceptualized as "insurance" against electoral misfortunes or as a successful arbiter of future political conflicts.

A cursory look at the institutional history of the Mexican federal judiciary suggests that the Zedillo appointees themselves would have been justified to question their authority. Generally speaking, major institutions governing the Supreme Court's tenure and jurisdiction have been malleable. The size of the Mexican Supreme Court was changed five times between 1917 and 1994, and the ministers' tenure changed seven times between independence and the Zedillo reforms. More broadly, the primary constitutional provisions concerning the federal judiciary were amended sixty-nine times during the twentieth century (Carranco Zúñiga 2000, 97). Scholars have suggested that judicial reforms in 1928 and in 1934 should be understood as political responses to undesirable judicial qualities. The 1928 reform increased the size of the Supreme Court from eleven to sixteen and altered the appointment process. Domingo writes:

The 1928 reform was welcomed by the more progressive elements of the Revolution as a way of controlling what at the time was seen as a reactionary judiciary, that served the interests of the regional caudillos and landlords, to the detriment of the revolutionary reforms. (Domingo 2000, 713)

The 1934 reform, which eliminated life tenure, also appears to have been designed to control a judiciary out of step with the political philosophy of the day. On President Lázaro Cárdenas's understanding of life tenure for judges, Baker writes:

Such a concept of judicial tenure . . . was inconsistent with the revolutionary principle of limited terms without re-election and derogated from the sovereignty that

properly resided in the people. The practice of the courts and their legal views, their exaggerated reverence for tradition and established precedent, was only too well known, whereas the administration of justice in the new Mexico properly necessitated the flexible, expedient, spontaneous approach of the Revolution. (Baker 1971, 57)

The 1958 reform to the Supreme Court's internal structure was explicitly designed to control an overly active court. The reform amended Article 11 of the *Organic Law of the Judicial Branch* and required the Supreme Court to sit *en banc* in review of decisions questioning the constitutionality of a state or federal law. Previously, the court had been empowered to hear such claims in benches. The motivation of the reform appears to have been the Supreme Court's administrative bench, which was striking down federal laws in *amparo* suits with too high a frequency (Baker 1971, 73). The reform seems to have had an effect, as Schwarz claims:

The reluctance [of the Court] to void governmental enactments on constitutional grounds [during the 1970s] is primarily the result of an unfavorable congressional response in 1958 to this style of judicial activism: by granting monopoly power to the Plenary Court over all "constitutionality *amparos*," the Congress ensured that it would be an awkward and rarely successful remedy. (Schwarz 1973, 313)

Events following the Zedillo reform suggest the reasonableness of assuming that the new members of the Mexican Supreme Court would have perceived a potential for political attacks on the judiciary designed to undermine its authority. Indeed, as recently as December 2004, members of the PRI called for the impeachment of two Supreme Court ministers for having accepted for review a constitutional action in which President Vicente Fox challenged the constitutionality of a congressional override of the federal budget.³

In light of its institutional history, it would not have been surprising if the Zedillo appointees wondered about the limits of their power in early 1995. It is for this reason that Mexico, during the period of democratization, offers an excellent opportunity to evaluate the predictions of the model developed in Chapter 2. Before subjecting explicit empirical predictions to empirical analysis with data on Mexican Supreme Court decision making, it is worth asking what the men and women charged with the task of providing political insurance or managing party disputes

³ It is interesting to note that Alberto Núñez Esteva of the Mexican Federation of Employers publicly came out in opposition to impeachment, defending the institutional integrity of the federal judiciary. See "Lamentan empresarios ataques a Corte" [Businessmen Regret Attacks on the Court], *El Universal*, January 18, 2005.

set about doing in the early days of their tenure. What might we expect from a court with new powers of constitutional review in a context of a democratic transition and following a history of relative judicial subjugation? As it turns out, one activity involved the development of a coherent public relations strategy.

This part of the book probes the empirical implications of the argument developed in Chapter 2 through an analysis of the Mexican Supreme Court at the turn of the twenty-first century. Chapter 3 details the Supreme Court's public relations work during the period of Mexico's transition. Chapter 4 then provides an analysis of constitutional review, case promotion, and compliance on the Mexican Supreme Court. The primary implication of this research is that, although the democratization process opens opportunities for the creation of a powerful court, judicial power is not legislated. Courts are not powerful because politicians endow them with formal powers of constitutional review. Instead, judicial power emerges out of strategic interactions between courts and political officials within the context of the normal politics of political representation. Public support for courts and the pressure constituents can place on their representatives for failing to respect the rule of law is essential to judicial power. For this reason, judges have strong incentives to get the public relations right.

These observations speak not just to theories of judicial power, but also to theories of democratic transition and judicial reform. Periods of democratization represent opportunities for courts to develop their authority by engaging the public; however, public engagement will not turn weak courts into strong courts overnight. Judges in democratizing states still confront significant political obstacles. Recognizing that judges can construct judicial power, but that power is sensitive to external political conditions, suggests that new willful delegation models of judicial reform, perhaps building on the accounts given by Finkel or Magaloni, might benefit from rolling expectations about the future politics of constitutional review into the calculus of institutional design.

This logic suggests that the goals of transparency and legitimacy may reinforce each other, but it is important to consider carefully Silva Meza's point about demonstration. The court argues publicly that it is impartial and that its decisions are unaffected by politics. The problem is that although the court can easily publicize the technical aspects of judicial decision-making, it is more difficult to demonstrate impartiality simply by saying so. This is especially difficult if the Mexican Supreme Court is constrained in some ways by real political interests, especially if those constraints induce strategic decision-making, at least on occasion. We might wonder about the consequences of those constraints for a nonstrategic public relations strategy aimed at maximizing public awareness by making the Supreme Court's work as transparent as possible. Before we can answer these questions, however, it is useful to know whether there is evidence of political influences on Supreme Court decision-making.

4

Decisions, Case Promotion, and Compliance

The conflict between Ernesto Zedillo and the Chamber of Deputies, which the Supreme Court resolved and publicly promoted in the summer of 2000, concerned one of the most politically controversial policies of the time. To save a collapsing financial sector during the 1994 peso crisis, the federal government had assumed the debts of several failing banks under the Banking Fund for Savings Protection (FOBAPROA), a program originally designed to ensure depositor assets. By 1998, it had become clear that many of these obligations were unrecoverable, and Zedillo proposed transferring them to the general public account, this time to ensure the solvency of FOBAPROA itself. Opposition parties in the Chamber of Deputies viewed the proposal skeptically, largely because a number of the loans in question were granted under lax risk management standards and, in some cases, were simply illegal, made by bank managers to family members, friends, and in some cases, to themselves.¹ In addition, the president of the bankrupt Banco Unión, Carlos Cabal Peniche, announced in a *Miami Herald* interview that he illegally channeled U.S. \$25 million to 1994 PRI electoral campaigns via a trust account that was assumed by FOBAPROA. The trust had been established by Fernando Ortiz Arana y Carlos Enrique Sales Gutiérrez, then the president and finance secretary of the PRI; and, it had been funded by loans from Banco Unión to companies associated with Cabal Peniche himself.² In support of his statement, Cabal Peniche produced what he claimed were copies of cancelled checks

¹ See Mackey (1998), Section 7 on reportable transactions.

² Andres Oppenheimer, "Banker tells of huge PRI donations: Fugitive says \$25 million campaign gift 'normal' in Mexico," *Miami Herald*, May 29, 1999.

from the PRI in the amount of U.S. \$4 million.³ Although Zedillo denied knowledge of these transactions, Cabal Peniche claimed that the president had participated directly in the scheme.

Whether or not Cabal Peniche was lying, as alleged by the president, his allegations gave a degree of credibility to the growing congressional skepticism over FOBAPROA. The Chamber of Deputies requested detailed information on the trust in question, including the names of the officials who carried out each transaction and notes on the decision-making process by which bank interventions were carried out.⁴ Zedillo denied all of these requests, which led the chamber to initiate a controversy in the Supreme Court demanding that the information be released.

The court's unanimous decision did just that. The opinion noted that Constitutional Articles 73 and 74 granted Congress the responsibility of approving the federal budget and overseeing actions taken by the president that affect the public debt. The court held that, although these powers do not ordinarily permit the legislature to access information on private trust accounts, "It must be concluded that the interest safeguarded by the concept of fiduciary secrecy must not obstruct the Congress's faculties when private debt is converted into public debt." When private debt is made public, the Congress, acting in the interests of all Mexican citizens, must be given access to information relevant to its responsibilities concerning public accounts. As we know from Chapter 1, the court aggressively promoted the outcome of this case, granting interviews with any media source interested in a statement. Although President Zedillo was in Central America at the time of the announcement, his response was immediate. Within hours of the announcement the president directed his Secretary of Finance to release the information.

Coming less than two months after Fox's victory, the case received a great deal of attention and was widely regarded in the popular press as a fundamental statement on the changing nature of the Mexican separation of powers system.⁵ On that account, the reforms of the mid-1990s had

³ Sam Dillon, "Donor Implicates Mexican Party in Scandal," *New York Times*, June 7, 1999.

⁴ Mireya Cuéllar *et al.* "Documentación detallada sobre el Fobaproa, pide la oposición a la SG," *La Jornada*, July 22, 1998, <http://www.jornada.unam.mx>.

⁵ See, Agustín Ambríz, "Cómo Aplastó la Corte a la Presidencia," *Revista Proceso* (Agosto 29, 2000): 16–20; Alberto Aziz Nassif, "Fin de sexenio, fin de régimen," *La Jornada*, Agosto 29, 2000; Federecio Reyes-Heroles, "Cría ultras y . . .," *Reforma*, Agosto 29, 2000; Carlos Sodi Serret, "Suprema Corte: El Poder Silencioso," *Excélsior*, Agosto 30,

created a powerful new force in Mexican politics, as Finkel's insurance account would suggest. The Zedillo decision simply confirmed the court's expanded authority. Despite this attractive rule-of-law narrative, it is not clearly the correct lesson to take away from the resolution. Instead, the Zedillo decision might simply reflect the Supreme Court's effort to exercise its authority as effectively as possible in an uncertain political environment.

In this regard, it is important to note that the resolution, authored by Minister Olga Sanchez, was finished nearly two months prior to its announcement, placing the original resolution date roughly one month prior to the presidential contest. Local media coverage reported an internal battle at the court over whether to announce the decision before the election,⁶ and the court itself issued a press release claiming that it would not be rushed, for to do so would "call its role as final arbiter into question."⁷ According to reporter Norma Jiménez, the motive for delaying the release was to avoid being perceived as supporting one political party over another. The majority of the ministers opted to delay the announcement in order to maintain the image of the federal judiciary as fundamentally impartial. Of course, waiting until after the election also permitted the Supreme Court to evaluate President Zedillo's postelectoral political position. Would it be an Ernesto Zedillo whose preferred candidate had just won the presidential election, or would it be Ernesto Zedillo, the lame duck? Rather than demonstrate the court's unconditioned power, it is possible that the decision provides a lens through which we can view the conditions under which that power is used, conditions that the court could have been influencing with its aggressive approach to public relations. This chapter provides an empirical basis to answer questions about the role of the Mexican Supreme Court in Mexican politics during the transitional period. It also suggests answers to more general questions about judicial public relations and power.

2000; Jesús Vergara Aceves, "Resolución clave de la Suprema Corte," *El Universal*, Agosto 29, 2000; "Fallo positivo y trascendente," *El Universal*, Agosto 26, 2000; "El fallo histórico equilibra poderes," *Revista Impacto*, Agosto 27, 2000.

⁶ Norma Jiménez, "Zedillo, obligado a entregar información del Fobaproa," *Milenio Diario*, August 24, 2000, .

⁷ Comunicado de Prensa Número 278, "Si la Suprema Corte de Justicia Se Sometiera a Tiempos Electorales, Pedería su Credibilidad Como Árbitro: Ministro Góngora Pimentel," Suprema Corte de Justicia de la Nación, Junio 26, 2000.

DECISION AND CASE PROMOTION DATA

The first section of this chapter tests decision making and case promotion hypotheses. I present tests that distinguish between a public support model in which the transparency of constitutional conflicts is exogenously determined and a model in which judges themselves have control over transparency. With these goals in mind, I attempt to explain the Mexican Supreme Court's choices to strike down public policies under its constitutional review authority and its choices to promote these decisions before the national media, behaviors that I have argued are linked theoretically. In addition, I present information on Supreme Court efforts to seek compliance with orders of the lower federal judiciary.

I use an original data set on all constitutional decisions in review of state or federal laws or reviewable executive actions (e.g., decrees) resolved by the Supreme Court in plenary session between January 1, 1997 and December 31, 2002. The data set includes three kinds of constitutional actions: *amparo* appeals, constitutional controversies, and actions of unconstitutionality. *Amparo* is Mexico's traditional constitutional action, developed in the nineteenth century. It is an individual constitutional complaint in which persons, organizations, and corporations may challenge governmental violations of individual rights in federal court. In constitutional controversies, the court resolves conflicts between levels of government (e.g., municipalities and states or states and the republic) and across powers of government (e.g., state legislature and governor). Constitutional questions in these cases deal with issues of federalism and the separation of powers. Finally, under actions of unconstitutionality, the court exercises abstract review over the constitutionality of state laws, federal laws, and international treaties.⁸ Appendix 4A describes the current structure of the Mexican judiciary, provides some technical information on these constitutional actions, and summarizes the process by which constitutional cases come to be resolved by the Supreme Court.⁹

As Table 4.1 indicates, there were 1,006 analytically distinct constitutional cases during this period.¹⁰ With one exception, the Supreme

⁸ On the differences between these actions, see Carranco Zúñiga (2000) or Cossío (2002).

⁹ The unit of analysis is thus the constitutional case. All replication material is available upon request. Summaries of the Supreme Court opinions that are included in the sample are available at www.scjn.gob.mx.

¹⁰ Between 1995 and 2002, the Supreme Court decided 3,084 cases, or better put, it resolved 3,084 distinct case files. The data set restricts the number of analyzable cases

TABLE 4.1. Summary of Supreme Court Constitutional Docket, 1997–2002

	N	%
Indirect Amparo Appeal	658	65.4
Direct Amparo Appeal	161	16.0
Constitutional Controversy	100	9.9
Action of Unconstitutionality	87	8.7
TOTAL	1,006	100

Source: Supreme Court of the Nation (<http://scjn.gob.mx>).

Note: As described in the text, the table reflects the number of analytically distinct cases resolved by the Supreme Court under its three core institutions of constitutional review. Appendix 4B describes case selection criteria.

Court's jurisdiction in all three cases is mandatory.¹¹ Thus, the data set includes all constitutional claims that met the court's statutorily defined jurisdiction.

Restricting the analysis to the six-year period from the beginning of 1997 to the end of 2002 is done, in part, on pragmatic grounds. The only systematic, valid indicator of the Supreme Court's case promotion choices, measured at the level of the constitutional case (described later) is easily coded, but only available beginning in January 1997. This explains the start date. And, the full court ceased hearing *amparo* appeals

to 1,536 over this period, 1,006 of which were resolved between January 1997 and December 2002. The rationale behind the reduction is as follows. Many cases with distinct case file numbers address identical legal issues, and result in identical resolutions resolved by an identical vote on the same day. For example, a major constitutional reform on indigenous rights reform that passed in the summer of 2001 generated 292 distinct constitutional controversies filed by municipalities from across the country. Each of the 292 cases challenged the procedures Congress used to adopt the amendment. These cases make up nearly 10 percent of the court's total constitutional caseload, yet they were all formally resolved on September 6, 2002, by the same vote and for the same reason. These cases are clearly not independent of each other. Moreover, because the theoretical model is concerned with constitutional court reactions to public policies, and each of these similar cases deals with the same policy, we do not want to treat them as separate observations. Appendix B describes the rules for case selection.

¹¹ Pursuant to a 1988 constitutional amendment, the Supreme Court enjoys a limited power of discretionary review through what is called *atracción* (Mexican Constitution, Article 107, Section 8). If the court deems an issue raised in an appeal outside of its appellate jurisdiction fundamentally important to the law, it may exercise *atracción*. In addition, the federal attorney general may request that the court take up a case of national interest, and circuit courts may certify appeals for Supreme Court review.

under normal circumstances in 2003, which makes comparison across the traditional constitutional review actions impossible after December 2002.¹²

Importantly, there is nothing in the theoretical argument that demands a long time series even if it were possible to construct one, and the date restrictions have some useful analytical properties. The Supreme Court's membership did not change between February 1995 and December 2003, when two of the original eleven ministers were replaced. This absolute stability in membership allows me to control for aggregate judicial ideology. Unless preferences are rapidly changing over the course of the period studied, the aggregate ideology of the court, whatever that may be, is controlled by design. Second, the court did not hear many constitutional controversies or actions of unconstitutionality prior to 1997, so the start date eliminates very little information. Third, the time period captures three distinct institutional settings from the perspective of a fragmented government theory of power. There is a period of fully unified national government under a PRI president, a period of divided government under a PRI president, and the beginning of the Fox administration, a period of truly divided national government. Fourth, as I demonstrated in the previous chapter, there is evidence suggesting that the Supreme Court's media coverage was almost entirely neutral during the period around the Fox election, an implicit assumption in the theoretical model.¹³

The final advantage of the Mexican case concerns judicial legitimacy. Diffuse support is controlled by design, unless it is rapidly changing over the short time period of the study. This result is highly unlikely given the slow way diffuse support has been shown to develop (Gibson, Caldeira, and Baird 1998, 353). The study does require that diffuse support be greater than zero. Unfortunately, there is no precise measure of diffuse public support for the Mexican Supreme Court during the period studied here.¹⁴ Still, available public opinion data suggests that diffuse

¹² On April 16, 2002, the Supreme Court elected to remit all revision appeals in *amparo* to the benches, save those dealing with governmental corruption. See Supreme Court Acuedo 4/2002.

¹³ Although there is no clear reason to suspect that the court's coverage changed dramatically in the subsequent years, I cannot test this possibility.

¹⁴ Unfortunately, neither the World Values Survey nor the Latinobarómetro include items appropriate for measuring Supreme Court support. The World Values Survey asks about public trust in the "legal system" (Question V137, 1995 Wave, www.worldvaluessurvey.org) while the Latinobarómetro asks about trust in the "judiciary"

support may not have been completely absent. In a series of national opinion surveys conducted by the newspaper *Reforma* between December 2000 and March 2002, respondents were asked to evaluate the job of the Supreme Court. During this period, the percentage of respondents expressing favorable opinions varied between 40 percent and 50 percent, statistics that climb as high as 87 percent when excluding nonresponses and neutral ratings.¹⁵

Hypothesis Review

The theoretical analysis suggests a number of hypotheses concerning a constitutional court's likelihood of striking down public policies. The key is to identify implications that distinguish between the baseline model, in which the transparency of the case is exogenously given, and the promotion model, in which courts can control transparency. Both models propose that courts should be decreasingly likely to strike down public policies as the importance of the policy to government officials with control over the institutions of the federal judiciary increases; however, the models differ over the effects of judicial beliefs over transparency. If the baseline model is correct, courts should be more likely to strike down public policies when they believe that their decisions will be observed and understood by the public; however, this effect should be strongest for the least important policies. As policy importance increases, there should be a point at which beliefs in transparency have no effect on the likelihood of striking down a public policy, precisely because the policy is important enough that diffuse public support is an insufficient

(Question V.2.32, <http://www.latinobarometro.org>). Given the high levels of public confusion in Mexico about what institutions in particular fall within the judiciary or the legal system, these are highly imprecise measures of institutional commitment to the Supreme Court itself. The Latinobarómetro provides some reason to perceive a moderate degree of support for the court, even under the broad measure that it uses. In 1995, only 24 percent of respondents expressed no trust at all in the judiciary. This percentage climbed as high as 44 percent in 1996 and 55 percent in 2003, but the simple average between 1995 and 2004 was only 34 percent. Clearly, when one-third of the country expresses no trust at all in the judiciary, there is a problem. That said, a sizable proportion of Mexico seems to have trusted the judiciary at least a little. And again, there is a difference between the judiciary in general and the Supreme Court.

¹⁵ During this period, the director of public opinion for *Reforma* was political scientist Alejandro Moreno, the country investigator for the 2000 wave of the World Values Survey. Information on the *Reforma* sampling design can be obtained at www.reforma.com/encuestas or by contacting the author. I have been unable to locate national public opinion results for the period between 1997 and 2000.

constraint on state action. In contrast, if the promotion model is correct, there should be no observable effect of beliefs on transparency, because either the policy is too important for public support to matter or because public support should matter, but courts can create their own transparency.

As discussed in Chapter 2, because transparency is exogenous, the baseline model provides no prediction about when constitutional courts will promote their decisions. The promotion model provides a simple prediction. Courts should be more likely to promote decisions striking down public policies, but especially so when judges believe that their decisions are unlikely to be observed and understood by the public if they do nothing. In other words, when courts do not expect the media to cover a resolution, their choices to promote cases should be highly sensitive to the decision outcome. This is because the risk of the media improperly reporting the decision rationale (which exists however the court treats the *status quo* policy) is extremely small, yet the incentive to promote as a means of ensuring that the public may monitor compliance remains strong. Because the judicial interest in public monitoring only kicks in when the *status quo* has been disturbed, courts should condition their promotion choices on whether they strike down the policy under review. On the other hand, when courts expect *ex post* media coverage, the concern over ensuring public monitoring becomes less important and promotion concentrates on ensuring proper coverage of the decision rationale, which exists independently of whether the court strikes down the policy under review. This is not to say that the incentive to promote in order to ensure the capacity of the public to monitor disappears; however, given the expectation of *ex post* media coverage and the corresponding possibility of reporting errors, the effect of striking down the policy under review should attenuate, or at least not increase.

Measurement and Estimation

Two measures are required to test these expectations: an indicator of whether the Supreme Court strikes down the policy under review and an indicator of the court's decision to promote the resolution. A measure of the former concept is easily obtained. The variable *Strike* indicates whether the Supreme Court invalidated a policy challenged through one of the three constitutional actions. *Strike* is coded 1 if the court supported at least one argument against the constitutionality of the policy and 0 otherwise.

A systematic, case-by-case measure of promotion is less obvious, because the court's case promotion behavior takes a variety of forms. Ministers give press conferences and offer interviews with the mass media. They publish full-length manuscripts on constitutional doctrine, and they sponsor and participate in academic conferences. More informally, the ministers hold conversations in the halls of the Supreme Court building and in their offices with key members of the press. And, of course, the Supreme Court has its own public relations office, which is responsible for its overall media strategy. Unfortunately, it is impossible to obtain observable, reliable, case-by-case indicators of the vast majority of public relations efforts carried out by the court. Yet, one readily available indicator provides a reasonable summary of the court's case-specific promotion strategy. The second dependent variable, *Press*, is coded 1 if the Supreme Court issued a press release announcing the result and 0 otherwise. Press releases on case outcomes typically summarize the major components of the resolution, including the parties to the case, the constitutional question, and a brief statement of the rationale. Ministers and members of the press office are frequently happy to fill in over the phone or e-mail details not covered by the press releases. In this sense, it is better to think of the variable *Press* as a general indicator of the court's promotion strategy rather than the only means by which the court communicates with the public.¹⁶

If the promotion model is correct, then *Strike* and *Press* are jointly determined. We can estimate their joint distribution and test the hypotheses specified above by the following recursive simultaneous equations model.

$$\begin{aligned} \text{Strike} &= \Phi[\beta_1(\text{Importance}) + \beta_2(\text{Coverage}) \\ &\quad + \beta_3(\text{Importance} * \text{Coverage}) + \alpha_1 X_1] \\ \text{Press} &= \Phi[\beta_4(\text{Strike}) + \beta_5(\text{Coverage}) \\ &\quad + \beta_6(\text{Strike} * \text{Coverage}) + \alpha_2 X_2], \end{aligned}$$

where *Importance* is a measure of political importance assigned to the challenged policy by Mexican federal officials (the officials with control over the Supreme Court's institutional structure); *Coverage* measures the court's expectations about subsequent media coverage in the event that

¹⁶ Although many press releases are drafted by DCS staff, the language is approved by individual ministers, the DCS director, or his immediate assistant.

the case is not promoted; and the X_i are vectors of control variables for each equation. As recommended by Greene (1998), this model can be estimated via bivariate probit.

Policy importance

I measure federal policy importance by appealing to the kind of constitutional claim under review and the level of the public official against whom the claim was raised. Two assumptions underlie the measure. Federal officials care more about federal policies than state policies, and they care more about the policies challenged through constitutional controversies and actions of unconstitutionality than they do about those challenged through *amparo*. Given these assumptions, I generate a scale of increasing federal importance, coded from 0 to 3, ranging from a state law challenged via an *amparo* suit to a federal law challenged under the action of unconstitutionality or constitutional controversy.¹⁷ The first assumption would appear relatively uncontroversial. On average, the Federal Congress likely cares more about the federal penal code than it does about the penal code of Nuevo León. The second assumption deserves further justification. Why would federal officials care more about policies challenged under the constitutional controversy or action of unconstitutionality than policies challenged under *amparo*? Whereas resolutions to *amparo* suits settle only the immediate controversy being adjudicated,¹⁸ decisions in both constitutional controversies and actions of unconstitutionality have the potential of setting general effects. With respect to the measure, I argue that federal officials ought to care more about resolutions that have the potential of setting precedent than about those that do not.¹⁹

¹⁷ The results are robust to an alternative coding scheme in which I combine the state policies into one category and where I use a dummy variable distinguishing between state and federal policies.

¹⁸ The court may establish formal jurisprudential theses in *amparo*. A jurisprudential thesis is binding on all lower federal court judges; however, it is not clear that theses significantly affect bureaucratic decisions to enforce laws. Legal principles may become part of the jurisprudence when the court establishes that it has invoked a similar principle in five consecutive cases (Ley de Amparo, Article 192). These theses may be abrogated by a coalition of eight ministers voting contrary to provision under analysis (Article 194).

¹⁹ Another element of salience that this coding procedure picks up is the average age of the statute under attack. Although the data source makes it impossible to know exactly how old the particular section being challenged was in the *amparo* cases, there is good reason to believe that these provisions were older, on average. In the first place, actions of unconstitutionality must be moved within thirty days of final passage and common constitutional controversies involve live political conflicts. None of this is necessarily true of the *amparo* cases.

Constitutional controversies and actions of unconstitutionality also deal with what we might understand as more significant political issues. Typical constitutional controversies involve state-municipal conflicts over the autonomy of local governments, state-state boundary disputes, and federal interbranch conflicts over competing claims on power (Fix-Fierro 1998a, 1998b). Actions of unconstitutionality frequently involve political party challenges to the constitutionality of electoral laws, rules quite essential to political interests. These are cases that affect large numbers of people and large sums of money. In contrast, state entities have extremely limited standing in *amparo*, and political parties have none. Also, individuals are prohibited from challenging electoral codes through *amparo*. Finally, the court itself has argued that *amparo* suits are generically less important than constitutional controversies and actions of unconstitutionality.²⁰ A more complete analysis of measurement validity is detailed in Appendix 4B.²¹

Beliefs in transparency

A perfect measure of Supreme Court beliefs in the likelihood of *ex post* media coverage would get inside the heads of the ministers at the time of the decision. The case files do not include plausible measures of these beliefs. For example, I was unable to locate intracourt memos that discuss how the ministers understood media attention. It is also unclear how one would construct a case-by-case indicator over a six-year period simply by asking the ministers to recall what they were thinking for each of more than a thousand decisions rendered in the past. To obtain a measure of beliefs, I code prior national print media coverage of the case or the conflict that generated the Supreme Court's resolution. I assume that the court estimates a higher probability of *ex post* coverage when the print media has already covered the case. As discussed in Chapter 3, each member of the Supreme Court receives a daily news briefing with photocopied articles of every print story that even tangentially relates to the federal judiciary. Consequently, print coverage is a natural way for

²⁰ See *supra* note 8.

²¹ Of course, some *amparo* cases are likely to be salient, perhaps more so than some constitutional controversies. Although the appendix provides a number of robustness checks, it is not possible to remove all error from this indicator. Without a clear argument for what exactly makes a particular class of *amparo* appeals more or less salient (beyond the level of government), it is likely that the error is random. If this is the case, the consequence is that causal effects will be biased toward zero, making it more difficult to uncover a significant causal effect of importance.

the ministers to generate beliefs about the probability that the press will cover its resolutions.

Specifically, I use the newspaper *La Jornada*, one of the major national papers with a dedicated and respected beat reporter, as a proxy for general media attention. Coverage is coded 1 if *La Jornada* ran an article on the controversy prior to the decision and 0 otherwise. Appendix 4B to this chapter describes how articles describing coverage of the Supreme Court cases were selected. Preliminary analysis within Mexico at research university libraries offered little confidence in the reliability of electronic searches for articles concerning the Mexican judiciary.²² The best strategy appeared to be a daily, full text search. *La Jornada* maintains a publicly accessible Web site that contains past issues dating from March 29, 1996 to the present. In addition, *La Jornada* is one of a small number of widely circulated newspapers known for its independence (Lawson 2002, 69).

Unsurprisingly, only 3 percent of the court's docket during the period studied received prior coverage by *La Jornada*. On the other hand, prior coverage is an excellent predictor of whether the resolution will receive subsequent media attention. Consider Table 4.2. Although *La Jornada* covered only 3 percent of the final resolutions to conflicts it had not been

TABLE 4.2. *Print Media Coverage of Supreme Court Constitutional Decisions (by prior coverage)*

<i>La Jornada</i> Coverage Prior to the Decision?	<i>La Jornada</i> Coverage After the Decision?		Total
	No	Yes	
No	949	28	977
(%)	(97.1)	(2.9)	(100)
Yes	8	21	29
(%)	(27.6)	(72.4)	(100)

Sources: *La Jornada* (<http://www.jornada.unam.mx>); Supreme Court of the Nation (<http://scjn.gob.mx>).

Note: Shows coverage of Supreme Court constitutional decisions following the decision in *La Jornada* based on whether *La Jornada* covered the case or policy conflict that led to the case prior to the decision. Row percentages are in parentheses. Note that although *La Jornada* only covered 3 percent of the decisions it had not covered prior to the resolution date, it covered more than 72 percent of the decisions it had already been covering.

²² *InfoLatina*, Lexis-Nexis's Spanish search engine and all utilities maintained by the main national newspapers produced highly erratic results, especially for the mid- to late 1990s.

covering, it covered more than 72 percent of resolutions to cases it was already covering. In other words, *La Jornada* was about 2,400 percent more likely to cover a case outcome if it was already following the conflict than if it was not.

Controls

In the *Strike* equation, I control for three potential influences on judicial decision making. Following the basic insight of veto player theory (Tsebelis 2002), Iaryczower, Spiller, and Tommasi (2002) suggest that courts should be more deferential under unified government, because it is easier for presidents and legislators to coordinate a response to the judiciary's activism. Ríos-Figueroa (2006) finds evidence of this veto player effect in an analysis of Mexican Supreme Court decision making in constitutional controversies and actions of unconstitutionality. To capture the three phases of unified-divided government in Mexico between 1997 and 2002, I include dummy variables for the period of truly divided national government under Vicente Fox (*Divided*), when the National Action Party (PAN) controlled the presidency but did not control a majority in the Chamber of Deputies. I include another dummy variable for the period of PRI government under Ernesto Zedillo, when the PRI controlled the presidency but enjoyed only plurality support in the legislature (*Unified-Pl*). Thus, the period of unified government under Zedillo, in which the PRI still maintained majority control over the Congress, is the base category.²³ In order to address the possibility that Supreme Court decisions were affected by partisan factors (Magaloni and Sánchez 2001), I also include a dummy variable, *PRI*, coded 1 if authority responsible for the challenged policy is either a *príista* executive or a majority *príista* legislature and 0 otherwise.²⁴

I also control for the identity of the plaintiff moving the constitutional action, capturing the notion that the quality of legal representation should vary according to plaintiff type, and using the assumption that political

²³ The first period ended on September 1, 1997, and the second on December 1, 2000. Given this setup it is not possible also to control for regime type. On many accounts, Mexico was a democracy during this entire period. This seems to be the consensus among country experts, as reviewed at the beginning of chapter 3. Mexico scored above 6 on the Polity IV measure during the entire period. It was coded as an autocracy by the ACLP measure until 2000. Either regime type is controlled during the entire period or it is perfectly collinear with the dummy variable that picks up the Fox administration.

²⁴ Partisanship data for the state legislatures and governors may be found at the Web site for the Mexican Senate (www.senado.gob.mx).

status is a reasonable proxy for litigant resources (McGuire 1995; Sheehan, Mishler, and Songer 1992). The issue of legal representation is especially relevant in Mexico where access to good counsel is limited and the disparities between the legal representation of various parties is often great (Rubio, Magaloni, and Jaime 1994, 119–134). Controlling for plaintiff identity involves estimating a series of dummy variables that account for a large number of plaintiff categories.²⁵ The base category is the modal plaintiff, a private individual.²⁶

In the *Press* equation, I control for a policy importance and an idiosyncratic, personality-based theory of case promotion. As we know, the DCS was charged with publicizing the results of cases that resolve intrinsically “important” issues in Mexican law.²⁷ Unfortunately, the court did not define what it meant by an intrinsically important issue, and therefore, it does not appear to be a ready-made measure of this concept. Still, it would appear that *Importance*, as defined above, might capture generally what makes a particular constitutional question more intrinsically important than another. The questions the court addresses ought to matter more

²⁵ These categories include individual or private business, municipality, union, civil, or religious association, small political party, corporation, large political party (PRI, PAN, PRD), university, state legislature, state executive, federal commission, federal congress, state judiciary, federal judiciary, and federal executive. The results are robust to an ordinal measure of complainant political status.

²⁶ Once we include *amparos*, constitutional controversies, and actions of unconstitutionality in the same model, it is not possible to control for issue area without double-counting the concept. This is because the issues that arise under these actions are different. For example, you cannot challenge an electoral law under *amparo*. Of course, although this is disadvantageous in one sense, it provides a significant advantage in another. In particular, this distinction is one of the motivations for treating policies challenged under actions of unconstitutionality and constitutional controversies as generically *more important* than those challenged under *amparo*.

²⁷ It is possible that case promotion has nothing to do with the public support mechanism. Indeed, we might imagine that there is no underlying noncompliance problem. In such a world, the court nonetheless might be particularly likely to promote cases striking down public policies in the sense that they reflect potential changes in the law worth announcing. This assumption makes the case outcome results (which are themselves consistent with a model in which there is an underlying noncompliance problem) described below difficult to interpret, but it is worth considering the argument setting those results aside for argument’s sake. It is not clear that the direction of the decision necessarily reflects an inherently more important legal outcome. Important legal principles are carried in cases that uphold the constitutionality of particular policies. For example, in 2008, the Supreme Court upheld a federal district law that legalized abortion during the first twelve weeks of pregnancy. The court refused to define a fetus as a person in the first trimester (*Acción de inconstitucionalidad 146/2007*). This was, quite frankly, a massive constitutional decision, and it came in the form of a decision upholding the constitutionality of a law.

as the level of government challenged and precedent-setting value of the decision increase. They are intrinsically important questions for exactly the same reason that federal political officials ought to care more about the outcomes of these cases. Accordingly, we ought to expect the Supreme Court to be more likely to publicize its decisions as the federal importance of the policy increases.

Finally, I control for the Genaro Góngora Pimentel regime. The Supreme Court selects its own president from among all current members. Each president serves a four-year, nonrenewable term. The court elected Góngora in 1999, and it is popularly assumed that the court’s public relations activities became increasingly aggressive and strategic following his election. In order to address this possibility, I include a dummy variable *Góngora*, which is coded 1 for all cases resolved during President Góngora’s tenure and 0 otherwise.

A FINAL NOTE ON RESEARCH DESIGN

Whittington (2005) suggests that governments may, at times, wish a court to invalidate policies that they find politically difficult to change through typical democratic processes. This raises the possibility that a variable that indicates whether the government won a particular case might not provide a valid measure of judicial power. The Whittington argument is persuasive. There are likely occasions when governments wish to lose cases. A measure of governmental success is not necessarily a good measure of judicial independence. Although valid, the critique does not undermine the current design. The dependent variable does not indicate whether the national government was successful. Instead, it indicates whether the Supreme Court invalidated whatever public policy was before it. Some of the challenged policies, after all, are state laws. Moreover, the research design does not propose that “striking public policies” is a valid measure of judicial power. Rather, the logic behind the design is that if the theory of judicial power is correct, then the court’s choices to strike down policies should vary with theoretically relevant concepts (e.g., federal policy importance and transparency).

Analysis

Table 4.3 displays results from two bivariate probit estimations. Model 1 excludes those observations in which the Supreme Court failed to reach the substantive question underlying the case, and instead dismissed the

TABLE 4.3. Determinants of Supreme Court Decisions to Strike Policy and Promote Cases

	Excludes Procedural Dismissals Model 1			All Decisions Model 2		
	β		RSE	β		RSE
<i>Strike Equation</i>						
<i>Coverage</i>	1.56	***	0.34	1.12		0.81
<i>Importance</i>	-0.120	***	0.02	-0.131	***	0.02
<i>Coverage*Importance</i>	-0.603	***	0.04	-0.367		0.27
<i>Importance</i>						
<i>Unified-Pl</i>	0.264	*	0.13	0.213	*	0.11
<i>Divided</i>	0.351		0.22	0.342		0.22
<i>Party</i>	0.078		0.08	0.082		0.09
<i>Complainant Types</i>						
<i>Corporation</i>	0.251	***	0.07	0.292	***	0.292
<i>Large Political Party (PRI, PAN, PRD)</i>	0.904	***	0.13	0.741	***	0.741
<i>State Legislature</i>	0.624	***	0.17	0.494		0.17
<i>Federal Executive</i>	6.10	***	0.31	7.06	***	0.58
<i>Constant</i>	-0.864	***	0.06	-0.910	***	0.04
<i>Press Equation</i>						
<i>Strike</i>	2.13	***	0.29	1.88	***	0.33
<i>Coverage</i>	1.80	***	0.29	2.01	***	0.21
<i>Strike*Coverage</i>	-1.02	***	0.17	-0.956	**	0.37
<i>Importance</i>	0.325		0.05	0.282	***	0.07
<i>Góngora</i>	-0.106	***	0.11	-0.121		0.15
<i>Constant</i>	-2.25		0.27	-2.14	***	0.34
	N = 852			N = 1,005		
	$\rho = -0.723$			$\rho = -0.558$		
	$\chi^2 = 45.68$			$\chi^2 = 6.35$		
	$p < 0.001$			$p < 0.011$		

Source: Supreme Court of the Nation (<http://scjn.gob.mx>).

Note: Results of bivariate probit model with robust standard errors correcting for clustering within constitutional action type. *** $p < 0.001$, ** $p < 0.01$, * $p < 0.05$.

claim on procedural grounds. Model 2 includes all observations, including those in which the court dismissed the claim for procedural default. There is a fair reason to treat procedural dismissals as equivalent to denials on the merits, which is what Model 2 does. Mexican federal judges have

a great deal of freedom to find procedural default in their cases, and scholars have argued that they manipulate these rules in order to reduce the judicial caseload (Rubio, Magaloni, and Jaime 1994). It is certainly possible that they do so to avoid political conflict or to benefit political allies (Magaloni and Sanchez 2001). On the other hand, some dismissals would appear to be clearly required by law, suggesting that these cases are fundamentally different from those in which the court resolved the underlying constitutional issue.²⁸ Consequently, I report models run on both sets of data.

Decisions to invalidate public policies

Table 4.3 provides support for the baseline and promotion models. Consider the *Strike* equation. The *Importance* coefficients are negative and strongly significant in both models. As summarized above, both theoretical models anticipate this effect. More importantly, note that the *Coverage* coefficient is positive in both models and that the interaction term (*Coverage*Importance*) is negative. As the baseline model suggests, it appears that the Supreme Court was more likely to strike down public policies in cases that were likely to be covered by the press than cases that were not; however, that effect would appear to attenuate as the importance of the policy under review to federal officials increases. On the other hand, although the coefficients are similarly signed in both models, they are smaller and lose statistical significance in Model 2. It is important to note that Model 2 is estimated on more than 150 more observations than Model 1; so if anything, the Model 2 estimates should be more precise. Critically, it is impossible to evaluate the statistical significance of the *Coverage* effect simply from reviewing the coefficients and their standard errors in Table 4.3 (Brambor, Clark, and Golder 2006). The hypothesis tests summarized in Table 4.3 for the *Coverage* effect are useful in only one regard. We can discern from Model 1 that the effect of *Coverage* is positive and statistically significant when *Importance* is equal to 0. Model 2, in contrast, suggests that the *Coverage* effect is statistically indistinguishable from zero at the identical value of *Importance*. In order to evaluate better the statistical and substantive effects of *Coverage*, we require additional analysis.

²⁸ For example, in 2001, the Supreme Court dismissed a municipal challenge to President Fox's decision to expropriate a plot of communal land for the construction of a new airport after Fox reversed his decision and the cause of action ceased to exist.

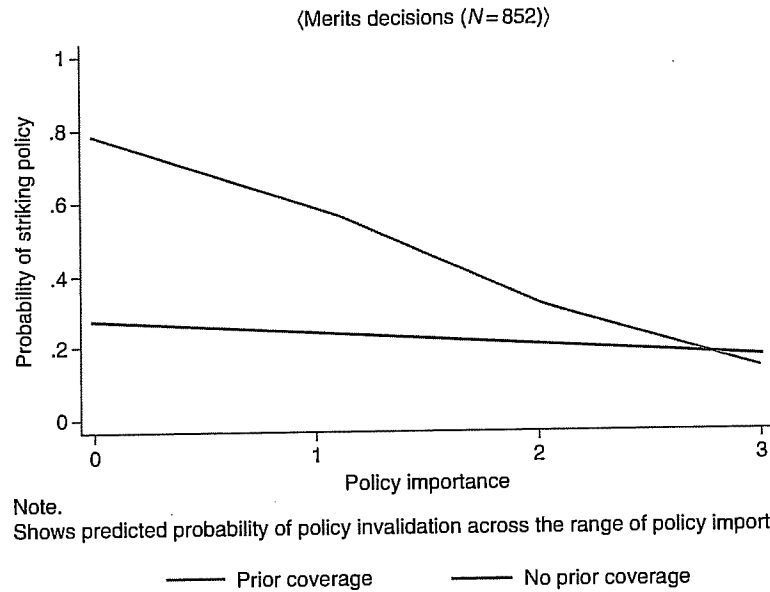


FIGURE 4.1. Predicted Probability of Policy Invalidation by Federal Policy Importance and Prior *La Jornada* Coverage

Figure 4.1 shows the predicted probability of the Supreme Court invalidating a public policy on constitutional grounds across the range of *Importance*. All other variables in the model are set to their mean levels. Estimates for cases that received prior coverage by *La Jornada* are in red; those that did not receive prior coverage are in black. Note that both lines slope downward, which reflects the negative effect of federal policy importance. For cases that received prior coverage, the predicted probability of a policy invalidation drops from a high of approximately 0.78 to a low of 0.14 across the range of *Importance*. For cases that did not receive prior coverage, the predicted probability of an invalidation drops from a high of 0.28 to 0.17. These estimates are consistent with both theoretical models. Of course, the empirical results that can distinguish between the exogenous and endogenous models of transparency concern the differences between the black and red lines in Figure 4.1. The distance between the black line and the red line is precisely the effect the *Coverage* on *Strike*, conditional on a value of *Importance*. Although Figure 4.1 suggests support for the exogenous model, once again we do not know whether the differences are statistically distinguishable from zero.

Figure 4.2, which reports the effect of *Coverage* on *Strike* for the Model 1 estimation, provides exactly the information we require. The dark gray

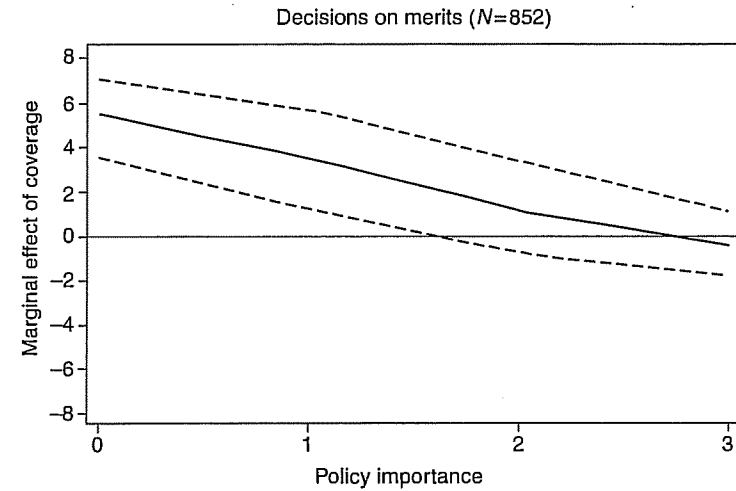
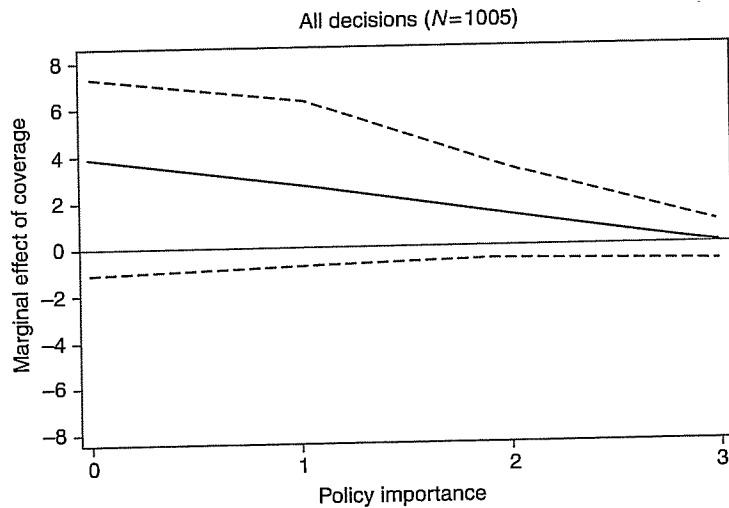


FIGURE 4.2. Marginal Effect of Coverage as Importance Varies (Merits Decisions)

line in the figure represents the change in the predicted probability of a policy invalidation associated with flipping the *Coverage* variable from zero to one. The dashed lines surrounding the solid gray line indicate the 95 percent confidence interval around that change. Figure 4.2 indicates strong support for the baseline model. Indeed, the effect of *Coverage* is positive and significant for relatively low levels of policy importance, but it becomes statistically insignificant as *Importance* increases. Interestingly, and consistent with the impression given by Table 4.3, Figure 4.3 offers no support for the baseline model. Although the estimated *Coverage* effects look similar to those in Figure 4.2, the 95 percent confidence interval straddles the zero line across the entire range of *Importance*. Thus, Figure 4.3 is consistent with the promotion model, which anticipated that prior media coverage would be unrelated to the court's constitutional decisions.

Having summarized Figures 4.2 and 4.3, we find ourselves with mixed empirical results, which offer support for both models. Both models predicted the negative effect of *Importance* on *Strike*, but while Model 1 provides empirical support for the baseline model's predictions concerning the effects of *Coverage*, Model 2 is consistent with the promotion model. How we evaluate the evidence, then, depends in part on whether we conceptualize procedural dismissals as a form of denial, as Magaloni



Note. Displays changes in the predicted probability of a decision to strike a public policy when the media covers a case prior to the decision, for all values of the policy importance measure. Cases that were dismissed on procedural grounds are included. Dashed lines reflect the 95% confidence interval around the predicted change.

FIGURE 4.3. Marginal Effect of Coverage as Importance Varies (All Decisions)

and Sanchez (2001) and Rubio, Magaloni, and Jaime (1994) appear to do, or whether we conceptualize procedural dismissals as exogenously determined by objective criteria over which Supreme Court ministers have little control. If we adopt the former conceptualization, then the results support the promotion model. If we take the latter, then the results are consistent with the baseline model.

There is an additional possibility. Recall that the promotion model assumes that a court has complete control over the transparency of its conflicts. As the court's control weakens, the promotion model increasingly looks like the baseline model. In fact, in the limit, when the court has no control over subsequent media attention, the promotion model completely collapses into the baseline model. What if courts cannot render some cases fully transparent? This could happen in one of two ways.

It is possible that the remedies for some constitutional violations lack transparency inherently. For example, a 2006 decision of the Israeli Supreme Court held that the targeted killings of Palestinian militants do not necessarily violate international law; however, the court established a set of clear guidelines that the Israeli Defense Forces (IDF) must follow in order to ensure the procedure's legality. Two years later, the *Haaretz*

newspaper reported that the IDF had largely ignored the guidelines.²⁹ One of the alleged violations was that the IDF ordered a killing in a situation in which innocent bystanders were likely to be killed. No matter how clear the court was in its initial decision, it is probably impossible to articulate perfectly what probability of collateral damage is sufficient to restrict an assassination order. Insofar as this is true, noncompliance is not necessarily observable. In this sense, we might suspect that some decisions can never be rendered fully transparent. Critically, however, this cannot explain the result in Figure 4.2. If the lack of transparency is being driven by an inherent murkiness in some remedies, then we should not find that prior media coverage matters. This is because the media will suffer from the court's inability to clarify as well. So, if the inability to control transparency perfectly explains what we are observing, it must derive from some other feature of the process. The second possibility, which can be investigated in these data, is that courts cannot control perfectly the coverage they receive. If control is incomplete, then prior media coverage might continue to influence decision making.

Supreme Court effects on media coverage

The media's desire for access should provide leverage to the court over its coverage (Cook 1996), but it is reasonable to believe that newsworthiness is in some ways independent of judicial appeals. This is increasingly true in Mexico where press independence has grown substantially over the past two decades (Díaz Barriga and Kleiber 1996; Lawson 2002). Whereas government agencies once routinely paid newspapers to publish government-produced stories (*gacetillas*), the modern-day Mexican press largely runs newsworthy articles as determined by professional journalistic norms (Lawson 2002, 84–88).

To examine the court's influence over subsequent media coverage, I estimate the effect of a press release on the probability that *La Jornada* will cover the case after it has been resolved. The dependent variable, *Coverage After*, is coded 1 if *La Jornada* ran a story on the case following the resolution and 0 otherwise. Because *La Jornada's* beat reporter was particularly independent, the test is biased against finding a relationship. Jesus Aranda was far more likely than the average reporter to be familiar with cases worth covering, independent of the court's prodding (Aranda 2001). The key causal variable is *Press*, again coded 1 if the court issued a

²⁹ See URL: <http://www.haaretz.com/hasen/spages/1041160.html>.

TABLE 4.4. Predicted Probability of *La Jornada* Coverage

	Press Release Issued (95% C.I.)	No Press Release Issued (95% C.I.)	Difference (95% C.I.)
Predicted probability	0.16 (0.12, 0.20)	0.02 (0.01, 0.03)	0.14* (0.11, 0.17)

Source: Supreme Court of the Nation (<http://scjn.gob.mx>).

Note: Table 4.4 displays predicted probabilities of *La Jornada* coverage of a Supreme Court constitutional decision by whether the Supreme Court issued a press release, holding *Coverage* at its mean value. The result is nearly identical when holding *Coverage* at its median value.

press release announcing the case and 0 otherwise. The most straightforward indicator of newsworthiness derives from the media's own coverage of the conflict being adjudicated. In other words, the press itself should have the best sense of what kinds of cases are worthy of coverage. Thus, I control for whether *La Jornada* had covered the case prior to the Supreme Court resolution. As described in Chapter 4, *Coverage* takes a value of 1 if there was coverage and 0 otherwise.

Table 4.4 displays predicted probabilities of *La Jornada* coverage by whether the Supreme Court issued a press release. It also contains 95 percent confidence intervals around the predictions. The court appears to have a significant, although ultimately limited influence over its coverage. Without a press release, Supreme Court decisions are extremely unlikely to be covered by the press. The predicted probability is 0.02. Indeed, the lower bound on the 95 percent confidence interval for this estimate is effectively zero. By sending a press release, the court increases the probability of coverage by 700 percent. Still, it is clear that the court does not simply induce coverage with a press release. The results suggest that, although it is fair to treat transparency as endogenous to judicial behavior, it is unrealistic to believe that transparency is fully endogenous. There are limits to the court's ability to influence its coverage. In this sense, the mixed results summarized above are probably best explained by the court's imperfect control over its coverage. For this reason, beliefs about *ex post* coverage are more likely to influence decision making than they would if control were complete.

Decisions to promote

The results of the bivariate probit model are encouraging, but we have yet to consider the second equation. Why does the Supreme Court promote

TABLE 4.5. Predicted Probability of Press Release by Case Outcome and Prior Media Coverage

	Merits Decisions (N = 852)		All Decisions (N = 1,005)	
	No Prior Coverage	Prior Coverage	No Prior Coverage	Prior Coverage
Policy Struck Down (95% Confidence Interval)	0.50 (0.28, 0.72)	0.77 (0.52, 0.93)	0.43 (0.09, 0.89)	0.78 (0.52, 0.94)
Policy Upheld (95% Confidence Interval)	0.02 (0.005, 0.04)	0.38 (0.11, 0.71)	0.02 (0.007, 0.04)	0.47 (0.14, 0.82)
Difference (95% Confidence Interval)	0.48* (0.26, 0.69)	0.39* (0.04, 0.69)	0.41* (0.08, 0.80)	0.31 (-0.12, 0.71)

Source: Supreme Court of the Nation (<http://scjn.gob.mx>).

Note: Shows predicted probability of Supreme Court issuing a press release announcing its decision by whether it struck down the public policy challenged in the case and the prior media coverage. * $p < 0.05$.

some cases and not others? The baseline model offers no prediction, whereas the promotion model suggests that the court does so to address poor reporting of decision rationales and to ensure the public that the public may monitor the interaction if noncompliance is a potential problem that can be solved in part through transparency. Empirically, if the promotion model is correct, we should estimate a positive relationship between *Strike* and *Press*, especially so for resolutions unlikely to be covered by *La Jornada*. Table 4.3 provides preliminary support for this hypothesis across Models 1 and 2. The *Strike* coefficient is large and strongly significant in both models, and the interaction term (*Strike***Coverage*) is negative and significant in both models as well.

Table 4.5 shows the predicted probability of the court issuing a press release announcing its decision by whether it struck down the policy under review and whether the case had received prior media coverage. All other variables in the model are set to their mean levels. To evaluate the case promotion hypothesis, we must consider the difference between the predicted probability of a press release when the court upholds and strikes down the policy under review. The first column indicates a massive effect of the court's merits decision on the choice to promote. When *La Jornada* has not covered the case prior to the decision, the probability that

the court issues a press release announcing the case result is only 0.02. This probability increases to 0.50 simply by the court striking down the policy. As the last row of the table demonstrates, this difference, 0.48, is statistically significant. When *La Jornada* has already provided coverage, the court is more likely to issue a press release, but the effect of the decision outcome is smaller – 0.39. Turning to the estimates from Model 2, we observe roughly the same relationship; however, the results are even more strongly consistent with the promotion model. In Model 2, the effect of *Strike* on *Press* is positive and significant (0.41) when *La Jornada* has provided no coverage. But not only does the effect attenuate for cases in which *La Jornada* has provided coverage (0.31), it is statistically indistinguishable from zero. In other words, Model 2 suggests that when coverage is expected, there is no relationship between the merits decision and the probability of promoting, a result absolutely consistent with the argument that the court has two incentives to engage the media, one of which has to do with ensuring coverage at all and the other with ensuring that the coverage is accurate.

In summary, exactly when public monitoring is needed and least likely to be available for lack of media coverage, the court promotes its cases. There is always an incentive to publicize in order to ensure accurate coverage when the media is likely to cover the resolution. However, when the media is not likely to cover the result, the case outcome is a powerful predictor of whether the court publicizes its decisions, precisely because these are the decisions for which public support is most helpful.

Controls

The empirical results provide support for some of the control variables suggested by the literature. In the first equation, the identity of the complainant (plaintiff) clearly appears to influence decision making. Corporations, large political parties, state legislatures, and the federal executive were all more successful than individuals. These results provide support for the legal capacity argument (McGuire 1995; Rubio, Magaloni, and Jaime 1994; Sheehan, Mishler, and Songer 1992). Mexican organizations with greater resources are more successful before the Supreme Court. In addition, the measures of unified- divided government are both positive, though only *Unified-Pl* reaches statistical significance.³⁰

³⁰ It should be noted *Divided* very nearly reaches conventional levels of statistical significance in the two-tailed test ($p < 0.12$).

This result provides support for the Iaryczower, Spiller, and Tommasi (2002) account and is consistent with results in Ríos-Figueroa (2006). The Supreme Court was less aggressive during the period of unified PRI government than it was after the PRI lost control of the Congress. Interestingly, *Party* is not significant in either model, undermining the notion that the court was in some way especially attached to the PRI (Magaloni and Sanchez 2001).³¹ It is, of course, possible that the relationship between many of these variables and *Strike* is highly interactive, though not obviously implied by the particular theoretical argument I have advanced. For example, it is certainly possible that the Supreme Court was most sensitive to federal policy importance during periods of unified PRI governance.

Turning to the second equation, the probability of a press release being issued increased based on the federal importance of the policy. This result is consistent with the court's own account of its press releases. The Supreme Court is more likely to publicize cases as the importance of the case increases. Finally, it does not appear that Genaro Góngora was more likely than his predecessor to push the DCS to issue a press release.

Judicial Public Relations and Judicial Power

The empirical tests summarized in this chapter are largely consistent with the promotion model of constitutional review, where the transparency of constitutional conflicts is endogenous to the conflicts themselves. There is evidence that the Supreme Court's constitutional decisions are influenced by the federal importance of the policies it reviews. On the other hand, the results concerning the effects of beliefs in *ex post* media coverage are mixed. When estimated on all observations, the evidence suggests that the court's choices to strike down public policies are not related to its beliefs about whether the media will cover its decisions. This much is consistent with the endogenous view of transparency. Yet, when estimated on only

³¹ Although the PRI result is tangential to the core argument in this chapter, it is interesting to note the difference between the estimate here and in Magaloni and Sanchez. That said, I have no particular reason to doubt the partisan effects in Magaloni and Sanchez because there are a number of explanations. First and foremost, Magaloni and Sanchez do not include *amparo* suits in their analysis. More importantly, it is not clear how the authors have dealt with the issue of multiple case files, which I address in Appendix B. As a consequence of these different case selection rules, the results are not directly comparable. Of course, it is comforting to note that the unified government results are roughly identical in my results and those of Magaloni and Sanchez and Ríos-Figueroa.

those cases in which the court reached the underlying constitutional question, the evidence suggests that the court is more likely to strike a policy when the media is paying attention, but only for insufficiently important policies, a result consistent with the exogenous account of transparency. Less ambiguous are the results on case promotion itself. I find consistent evidence for the promotion model in the analysis of the court's choices to issue press releases announcing case results. The court is more likely to do so when it strikes down public policies, especially if the case is unlikely to be covered if it does nothing. These results are robust to case selection.

In summary, although the results are broadly consistent with the promotion model of constitutional review, there are pieces of evidence suggesting that the baseline approach, in which transparency is exogenous to judicial efforts, is the appropriate theoretical model. A theoretical middle ground is plausible. In it, constitutional judges are imperfectly capable of influencing the transparency of their conflicts. As a consequence, they must be sensitive to the media, because it cannot be controlled completely.

PUBLIC AUTHORITY COMPLIANCE

So far, the empirical analysis has centered on constitutional adjudication and the choices to promote resolutions. Yet the theoretical models make predictions about compliance behavior. As summarized in Table 2.1, if case promotion is relatively costless, then the promotion model suggests that we should not observe noncompliance; however, if case promotion is relatively costly, then both the baseline and case promotion models make the same prediction. Noncompliance is especially likely in relatively unimportant cases that go unreported by the media. The logic of this argument is straightforward. Courts should be extremely careful with salient cases, recognizing that government officials might be willing to defy orders publicly when the policies matter enough. In this way, strategic deference reduces the opportunities for noncompliance in salient cases. As case salience declines, courts should be less deferential, and thus, the opportunity for noncompliance arises. Importantly, it is in these cases, when the media fails to cover the decision, that officials are best able to ignore judicial decisions without cost. Now, if case promotion is costless for courts, they will always solve this transparency problem, and transparency will ensure compliance in the relatively low salience cases, just as strategic deference eliminates the possibility for noncompliance in high salience cases. For this reason, if promotion is costless, we should not

observe noncompliance. However, if promotion is relatively costly, then there will be sufficient opportunities for noncompliance when courts elect not to signal to the media that a case is newsworthy.

The central challenge in evaluating compliance with the data set I have used in this chapter concerns how to measure compliance with more than 1,000 Supreme Court decisions. The case files did not contain this information, and I could identify no individual at the Supreme Court who could tell me precisely what happened to each case after the decision was released.³² To evaluate the compliance hypotheses, then, I turn to another data set. I will evaluate public authority responses to the Supreme Court and its noncompliance incidents (*incidente de inejecución*), cases in which the court investigates claims that public officials have defied a federal judicial order in an *amparo* case. The advantage of this strategy is that the Supreme Court archives each incident, and the record carefully details the history of the defiant behavior under investigation. Although every case in the sample ultimately ends in compliance, there is massive variance in the time it takes to induce a public authority to comply. In many cases, the issue is not resolved until the responsible authority is replaced; in some cases, multiple replacements are necessary. Indeed, if we take the date on which *amparo* relief was first granted by a federal district court as the starting point for the period of defiance, the longest period in the data set spans nineteen years! Thus, although decisions are eventually implemented, the court is defied considerably in many cases. For this reason, I will conceptualize noncompliance temporally and code the time it takes between the date on which the Supreme Court formally admits an incident of noncompliance until the action that was required of the public official in the original decision is carried out.

Noncompliance incidents

The noncompliance incident gives force to Constitutional Articles 105 (III) and 107 (XVI), which grant the Supreme Court the power to remove a public official from office for failing to implement a decision of a federal judge in a constitutional case. Noncompliance incidents may follow from actions of unconstitutionality, constitutional controversies, and *amparo*

³² Creyke and McMillan (2004), in their compelling analysis of administrative responses to decisions of the Federal Court of Australia, obtained compliance measures by contacting the attorneys of record in each conflict. This proved impossible in Mexico because I was unable to gain permission at the Supreme Court to generate a contact list from the case files.