How Many Justices Does It Take to Control the Court? A New Argument for Understanding Judicial Independence

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Abstract

The literature on judicial politics has usually suggested that presidents could guarantee their influence over Supreme Courts' decisions provided that presidents nominate at least half of the bench. I argue, however, that this is not always the case, as in some courts, individual justices have primacy over the collective body. I develop a model that states that the control of the agenda power by individual justices is a determinant factor for understanding judicial independence. The Brazilian Supreme Court serves as a good case, as there are several institutional rules that allow each justice to pause or change the result of a judgment, without consulting his or her peers. My research design focuses on three cases studies of the court and 3,043 decisions, which I analyze using matching. Results show that, when the government has a strong interest in a particular lawsuit, the probability of this lawsuit being halted by a Supreme Court justice is higher. The fact that presidents can influence individual justices, and in turn these justices can affect the course of a lawsuit, sheds new light on the role that judicial independence has when considering presidents' influence over Supreme Court decisions.

KEYWORDS: Judicial Politics, Brazilian Supreme Court, Judicial Independence

1 Introduction

Many studies in judicial politics have tried to understand what judicial independence means and to what extent courts are affected by other political actors. These have been the central themes of various analyses in the literature, such as Ferejohn (1998); Ginsburg and Melton (2014); Hanssen (2004); Helmke and McLean (2014); Helmke and Rosenbluth (2009), among other articles. Those studies usually consider that the goal of actors who intend to influence courts is to control the majority of justices. For this intent, they utilize strategies such as packing the court or impeaching justices.

In this paper, I argue that traditional theories employed in political science to understand judicial behavior are not sufficiently general to capture the particularities of some courts abroad. Too much power granted to justices can force a court to become dependent on other branches, groups or individuals. I argue that, because of the agenda-setting rules of some courts, justices can prevent a case from being judged or, if they are chosen to be the rapporteur, can individually make a decision in favor of influencers. I demonstrate that it suffices for an influencer to influence one or two justices to rule favorably in the influencer's case. For the same reason, the executive branch does not have to count on nominating at least half of the court, as having only one or two justices who support the executive agenda will ensure that cases against the executive branch will be struck down. Finally, I highlight the implications of this theory for judicial independence discussions in the literature, since we cannot evaluate how judges are de facto independent without considering this aspect.

The Brazilian Supreme Court offers a good example, as the independent nature of Brazilian justices does not comply with the expected outcomes identified in established judicial literature (Rios-Figueroa & Taylor, 2006; M. Taylor, 2008). Scholars have long debated whether the main hypothesis from the attitudinal model can be replicated in the Brazilian Supreme Court, seeking to answer whether Brazilian justices' decisions are based on common patterns that make them associated with a party or group. Prado and Turner (2009) indicate that the president might nominate younger justices in order to perpetuate his or her influence on the court. Arguelhes

and Ribeiro (2010), on the other hand, state that the president, by appointing authorities, might have other goals than to influence behavior, such as bargaining with the legislature and making public policy. Oliveira (2012a) finds groups of justices with similar voting behavior, although they sometimes diverge from the president who appointed them. Ribeiro and Arguelhes (2013) state that it might be naïve to test attitudinal model implications in the Brazilian Supreme Court because it is too different from its counterpart in the US. Ferreira and Mueller (2014) maintain that there is an important but overlooked dimension that can explain 95 percent of the decisions in the court; the economic interest of the government. Desposato, Ingram, and Lannes Jr (2014) find a political split in the court that appeared only after the Judicial Reform in 2005.

As a result of these varied and conflicting findings, scholars disagree regarding the relationship between the executive branch and the Supreme Court. In recent years, however, a new form of reasoning regarding Brazilian Supreme Court behavior has emerged. This body of work highlights strategic behaviors of the justices, such as the ability to prevent a case from being judged, or independently changing the results of a ruling without consulting other members of the court. Common strategies used by justices, among others, are: a) the employment of an institutional mechanism called "pedido de vista," which allows any justice to delay a judgment in order to give the case greater deliberation; (Arguelhes & Hartmann, 2017; Arguelhes & Ribeiro, 2016); b) the role of the rapporteur to stop a case or make decisions by him/herself without consulting other justices, (Arguelhes & Ribeiro, 2016, 2018a, 2018b; Hartmann & da Silva Ferreira, 2016) and; c) the role of the head of the Supreme Court to determine which lawsuits will be judged. I argue that the institutions emphasized in this new literature might have implications on traditional phenomena studied in judicial politics, such as judicial independence.

Using 3,043 lawsuits from 1998 to 2015, I show that, when government interest in a case is high, the probability of the lawsuit being halted is higher. This result is robust, even when I increase the size of the treatment group to include cases where federal branches have interest in general. Finally, in case studies, I demonstrate how this influence for pausing lawsuits works in practice.

In the sections that follow, I begin by exploring when the executive power chooses to influence behavior in courts. I develop a theory of costs of influencing justices, given their agenda power, in opposition to traditional models, which emphasize the control of the majority. I also prove that costs, when considering the agenda power, are lower. Then, in [section 3](#), I offer a brief description of the Brazilian Supreme Court functions. I show that the Brazilian president can exert power over the Supreme Court by nominating one or two justices who are sympathetic to the president's interests. In [section 4](#) and [section 5](#), I describe the data utilized and I devise a matching method for capturing the causal effect of the interest of the government on *pedidos de vista*. Finally, I describe three case studies that show the particularities of *pedidos de vista*.

2 Theory

One of the most-important aspects of judicial independence is the relationship between the government and the judiciary branch, as one of the most laudable objectives of constitutional theory has been to insulate justices from possible influences from other powers. Among scholars of American politics, it is widely accepted that justices usually decide according to the preferences of the party of the government who had appointed them. For example, [Posner \(2010, p. 20-22\)](#) shows evidence that the decision of justices are actually influenced by the ideology of the president who nominated them. [Segal and Spaeth \(2002\)](#) also tested the implications of their attitudinal model, a theory that emphasizes judges' attitudes as an important explanation of their behavior, by employing the party of the president as a proxy for justice preferences.

Although this relationship has not been extensively explored in the Latin America case, there are some works that have shed light on how the executive and legislative branches influence the behavior of justices of some Latin American high courts. [Helmke \(2002\)](#) found that the Argentine Supreme Court decisions in support of government positively correlate with the president's popularity. [M. M. Taylor \(2014\)](#) also reveals other informal strategies used to influence Venezuelan Courts under Hugo Chavez.

Traditional theories consider several strategies utilized by the president so as to control courts, including packing the court and removing justices who are opposed to the president's ideas. These strategies are employed for the purpose of controlling the majority of the court. If a government or other political branches are capable of influencing the majority of a bench, they are also able to obtain favorable decisions. Because of the clear advantage that controlling the majority of a bench can afford the president's party, scientists and legal scholars often study members in the median justice position (Bonneau, Hammond, Maltzman, & Wahlbeck, 2007; Grofman & Brazill, 2002; Martin, Quinn, & Epstein, 2004). The median voter theorem is the common formal theory employed in the literature to analyze courts' decision-making processes. This theorem states that majoritarian decisions are determined when a common order of preferences is assumed by the median voter of the group (Black, 1948). The role of the median justice is frequently analyzed in the literature, as his ideological position can predict the decision on a certain case. In this context, the concept of judicial independence is related, and can be defined as the cost of influencing the median justice.

The median voter theorem is also a simplified description of the decision-making process. In certain contexts, however, agenda-setting powers can predict decision or results with a higher rate of accuracy. If this statement is true about courts, researchers should have to redefine judicial independence to account for those differences. I argue that agenda power has an important effect on the costs influencers might face to influence courts. In this section, I elaborate on this difference. First, I describe the particularities and costs brought by assuming the median voter theory in a court context. Second, I describe an alternative model, considering agenda-setting aspects, which could help researchers understand why courts where individual justices control the agenda, as in Brazil, are less independent. Finally, I derive implications and hypothesis from this new model.

2.1 The majority rule and the median voter theorem

Literature in political science has emphasized a common theory, called the median voter theorem, to explain group choices that are subjected to the majority rule (Black, 1948)¹. This theory takes for granted, among other things, two important assumptions: 1) Preferences of actors should follow a common order of preference, and; 2) Preferences of political actors are single-peaked; that is, there is a point that represents the maximum of their preference. Black (1948) thus, that a majority rule following these assumptions will be the one represented by the median voter. In other words, among the actors, when a majority rule is assumed, the one whose preference is the median among all the individual preferences will indicate the preference of the group.

To illustrate this point, let us assume that five legislators have to decide on a common subject, such as a carbon tax legislation. We assume that they can have three alternatives or points of preferences: a_1) a high tax rate, a_2) a low tax rate, a_3) no tax. The first assumption imposes an order of preference. For example, $a_1 < a_2 < a_3$. In this case, if a_1 is the most preferred option for an actor i , the assumption implies that he prefers a_2 to a_3 , as well. The second assumption only states that the actor will always have a set of alternatives that he/she would consider the most preferable of all. The median voter theorem will consider that, for a set of several actors, given a order of preference of alternatives, the actor in the middle will always represent the choice of the majority.

This example is common in the literature. Assume that preferences might be pinpointed in a Euclidean unidimensional space and five actors have single-peaked and symmetric utility functions, as shown in subsection 2.1. Clearly, in this case, a_3 is the median voter.

As a formalization of the majority rule, this theorem has been very influential in political science and economics.

Concerning the judiciary, the median voter theorem has been employed to understand how agents can influence a court's behavior (Martin et al., 2004). If a president intends to influence

¹See Shepsle (2010) for a didactic explanation

Figure 1: Distribution of single-peaked utility functions across an ideological dimension

the court, she will probably consider how to nominate its median justice, or how to change the median justice, in order to obtain favorable decisions. That is why common strategies typically concern how to secure a majority in a court, for example, by packing the court or removing justices. It is easy to analyze both situations. Imagine there is a Supreme Court with five justices, and one of them is aligned with the preferences of the government. If the government creates four more seats on the bench, packing the court, the president can make the initial justice the new median voter. The same logic applies to situations in which justices are impeached. If there are nine justices and the government influences only four of them, by impeaching one of the other five, the government can nominate one more and, hence, it can control the court.

This framework helps us understand better what is at stake in terms of judicial independence. Suppose there is an influencer, called i , that represents any actor who would try to influence a result in a court. We also assume n justices, represented by $1, 2, \dots, j, \dots, n$. This justice might take a decision. Each of these players have a utility function with a single peak in a Euclidean space. Finally, we consider a specific lawsuit, called i . Each justice has an ideological preference,

represented by z_j , and is available to change their position according to a price p_j . His/her decision is given by: $U(z_j, p_j) = |z_j - p_j|$. If $U(z_j, p_j) > 0$ and if the price is paid, he/she will take a decision accordingly.

Assume the influencer has a preference situated at u_i in the ideological scale and he or she wants a decision in a lawsuit that is the closest possible to his or her preference. In this model, we make the constraint that lawsuits can have only two outcomes: yea (y) or nay (n), to keep the *status quo*. Without the loss of generality, the preferable outcome for the influencer here will be given by y . If y is closer to u_i , he or she will try to influence the court to make this decision. Now we have three possible situations regarding the cost c paid by an influencer:

1. A minimum threat situation, because if every justice or at least more than half of the bench is close to y , the influencer does not have to pay any price and will not try to influence the court;
2. On the other hand, if every justice is close to n , the influencer will have to pay the price of half of the justices plus the median voter;
3. Finally, if m justices, such that $m \leq n/2$ are closer to y , the influencer will have to pay the price of $n/2 + m$ justices, including the median justice. For the purposes of this paper, we will be considering the case that the influencer will only have to pay the price of the median justice.

Therefore, an influencer will have to pay the price, at least, of the median justice, and, at most, this quantity summed to equal to the prices of the integer part of $n/2$ justices. Calling this price c_m :

$$p_m \leq c_m \leq \sum_{j=1}^{\frac{n}{2}} p_j + p_m \quad (1)$$

A possible interaction with other influencers is not being considered in this model. Strategies taken by actors in order to reduce the cost are also not being assumed. In other words, if the

government wants to pack the Court or impeach justices, those actions do not matter to the argument here presented.

Finally, it is important to define costs mean in this model. Here costs are considered any benefit a possible influencer can give to a justice, for example bribes, perquisites, rights, and budget. It is also comprehended the benefit of being nominated to the Court. If an influencer can grant a larger part of the budget to the Supreme Court or high salaries, these are costs to influence justices.

2.2 A new model

The framework of judicial independence which focuses upon median justices is not suited to explain the decision-making process in courts where individual behavior is emphasized. In certain courts, lawsuits can be delayed by justices individually. In addition to this, justices might also change the status quo by making individual decisions. How would an influencer behave in this case? With what strategy would he or she attempt to influence the court? For this situation, a new model is necessary.

Consider the case that the influencer has a lawsuit against him/herself. In this situation, he/she would want to pause it for indeterminate time in order to secure his/her outcome of preference. He/she can, thus, count on the ability of one justice to manipulate the agenda-setting mechanisms. In other words, he/she must pay the price of only one justice, the cheaper one. The cost is determined by:

$$c_1 = \min(p_1, p_2, \dots, p_n) \quad (2)$$

Now consider the opposite situation: the influencer files a lawsuit and aims for a certain outcome. This lawsuit is randomly distributed to a justice whose price is p_j . The influencer, then, has two options: 1) pay the individual price p_j , or; 2) pay the collective price described by the

median justice model. Of those two choices, she will pick the cheapest. Thus,

$$c_2 = \min(p_j, c_m) \tag{3}$$

Taking those costs for granted, We conclude that courts with any of those two characteristics will tend to be more dependent than courts where collective decisions prevail. In order to do that, we must prove that any of those costs c_1 and c_2 will always be less or equal than c_m , the cost for collective courts.

Proposition 1. c_1 and c_2 are always less or equal than c_m

Proof. First, we must prove that c_2 is less or equal than c_m . As c_2 is the minimum of c_m or p_j by definition, this is sufficient to prove.

Second, we must prove that c_1 is less or equal than c_m . The definition of c_m indicates that the minimum possible value of c_m will be p_m . With the definition of c_1 , we have $\min(p_1, p_2, \dots, p_n) \leq p_m$. Thus, this part is also proved.

□

This theorem shows, therefore, that courts where too many powers are granted to justices, including the power to pause lawsuits and make individual decisions, are more suited to judicial dependence than courts where group decisions are always necessary.

If we assume this new model is a realistic representation of most courts, judicial politics' main conclusions must be explored in a new light. For example, rules regarding agenda-setting can immensely impact the extent of judicial independence. In this argument, powers granted to individual justices can make them more powerful and also create new opportunities where they can be influenced.

Researchers, however, tend to overemphasize aspects of the relationship between the judiciary and other powers, obscuring our understanding of judicial independence. For example, they tend to look to aspects such as the strategies of packing the court, nominating judges, and non-compliance of decisions. The problem with this viewpoint is it fails to understand possible

variables inside the evidence. If a court does not historically have justices being impeached, this might suggest that it is more deferential to other powers.

3 How the Brazilian Supreme Court works and agenda-setting

3.1 The court and the nomination Process

The Brazilian Supreme Court has its origins in 1891, yet its current form is derived from the Constitution of 1988. Currently, it is constituted by 11 justices who are appointed by the President of the Republic and confirmed by the Brazilian Federal Senate. They have no fixed terms, but they are obliged to retire when they turn 75 years old. They must meet the following criteria to be nominated: they must be at least 35 years old, possess extensive knowledge of the country's laws, and have a good reputation. Regarding the internal structure of the court, the head is chosen among the court's eldest members to serve for a two-year term.

Cases reach the tribunal via at least three processes. The first refers to those cases which are directly judged by the court, such as criminal prosecution against high-ranking authorities, namely the President of Republic, senators, and representatives. The second concerns actions regarding abstract judicial review, i.e. when a plaintiff tries to strike down a law or normative acts without relying on previous disputes. Finally, the greatest number of cases are related to those deriving from appeals and reviews.

As previously mentioned, the Brazilian Supreme Court can be reached through many types of processes. This is likely the cause for the dramatic caseload increase of the court after the Constitution of 1988, in addition to the greater breadth of constitutional rights, the standing rules, and the lack of a formal docket control (Rios-Figueroa & Taylor, 2006; Verissimo, 2008). According to the Brazilian Supreme Court website², the court accepted roughly 1,700 lawsuits in 1990, compared to the 90,000 lawsuits it accepted in 2016.

Needless to say, a court with only 11 justices cannot handle this tremendous caseload without

²<http://www.stf.jus.br>

additional institutional solutions. The decision-making process in the court must be of three types, according to judicial rules. The first type, decisions made by the full court, constitute the smallest part of the whole caseload. The second type consists of justices joining together in two groups of five, excluding the head. Finally, the greatest number of the decisions are taken by singular justices, as indicated in [Table 1](#).

Table 1: Amount of decisions by year and type

Year	Plenary	Groups	Individual Justices
2010	2552 (2.33%)	8789 (8.01%)	98354 (89.66%)
2011	2013 (1.97%)	11084 (10.82%)	89313 (87.21%)
2012	1242 (1.38%)	10848 (12.07%)	77770 (86.55%)
2013	2445 (2.71%)	11657 (12.92%)	76146 (84.37%)
2014	2709 (2.37%)	14364 (12.55%)	97366 (85.08%)
2015	2820 (2.42%)	14896 (12.77%)	98933 (84.81%)
2016	3431 (2.93%)	11100 (9.48%)	102564 (87.59%)

3.2 Agenda-setting in the court

In recent years, the agenda powers of the Brazilian Supreme Court justices have been emphasized by political scientists. ([Arguelhes & Hartmann, 2017](#); [Arguelhes & Ribeiro, 2016](#); [Hartmann & da Silva Ferreira, 2016](#)). This has been a departure from the subjects that used to dominate judicial politics studies, e.g. the ways of reaching the court, the types of plaintiff and defendants, and the results of justices' decisions. ([Arantes, 1997](#); [Oliveira, 2012a](#); [M. Taylor, 2008](#), for instance). Increasingly, researchers are discovering that agenda-setting rules have strong implications for how courts actually work.

In the Brazilian Supreme Court, agenda setting can be classified according to the player:

1. *The agenda powers of the Supreme Court head.*

The agenda-setting capacity of the Brazilian Supreme Court head corresponds with the powers of assigning cases that either will or will not be discussed by the plenary. When the rapporteur ends his or her rapport on lawsuits, he or she submits it to the secretary

with a message of “Ready to be included in the agenda.” From there, the Supreme Court head decides whether or when that case will be discussed. There are no clear criteria which determine his or her decision. Although several systems have been implemented in the past ³, it is widely recognized that the head sets the agenda arbitrarily. For example, newspapers reported that the Supreme Court head in 2018, Carmén Lúcia, was pressured to include a lawsuit regarding the potential imprisonment of former Brazilian president, Lula da Silva, in the agenda. (Casado & Turollo Jr., 2018).

2. *The agenda powers of the rapporteur.*

Similar to the Supreme Court head, the rapporteur has the power to closely analyze any lawsuit and present a report to the rest of the court regarding the particularities of the case. Therefore, he or she is the first to vote in group decisions. Cases in general are randomly distributed to rapporteurs by an algorithm. Rapporteurs have an important role in judgments in the court, but the extent of his or her influence on verdicts is debatable. (da Silva, 2016; dos Santos Almeida & Bogossian, 2016; Oliveira, 2012b; Silva, 2015).

The rapporteur also has the power to withhold a case to be decided by his or her peers. Hence, in this case, he or she can stop a judgment if she decides that the case is not ready. This is not an uncommon occurrence. Half of the cases that constitute the whole docket of the court are currently held by the rapporteur. Of a total of 40,000 current cases, around 20,000 are in this category. Some cases have been stacked for more than five, 10 or 15 years, as shown in *item 2*.

Moreover, unlike other players, the rapporteur has the power to change the status quo situation for an action. An important fact about the power of interrupting judgments is that players can only guarantee the status quo outcome. The rapporteur, on the contrary, can change this outcome, by making an individual decision by him/herself. This happens because in some types of lawsuits, including Abstract Judicial Review Controls, justices

³Falcão and Oliveira (2013) tell us of the system of “Pauta Temática”, implemented in 2004 by the head Nelson Jobim, which aimed to prioritize high-profile cases in the court’s agenda

Figure 2: Time in which cases are delayed by the rapporteur (08-29-2017)

may make an independent decision when a case is urgent. For example, in 2014, Justice Luiz Fux made two decisions on a case regarding annual allowances to Brazilian judges. This decision reportedly had a \$393 million dollar impact on the federal budget between the years of 2010 to 2014 (Shalders, 2018). Since his decision, Fux has not submitted the case to be judged by his peers.

3. *The agenda powers of every justice.*

Every justice has the power to delay judgments. The institutional mechanism which guarantees this right is called “pedido de vista.” When a justice employs this rule, he or she is

given time to further consider a case before giving her decision. This right is often justified by the immense caseload burdening the court. However, there is no rule that obliges this justice to withdraw the lawsuit, so he or she can keep it stopped as long as he or she wishes. Arguelhes and Hartmann (2017) showed that this rule works as an extra-official docket control mechanism. According to the authors, justices will also employ pedidos de vista to prevent cases from being judged.

Those institutional attributes have not received much attention from the literature until recently. Brazilian newspapers typically assume that pedido de vista is employed by justices strategically when justices do not want a lawsuit to be heard. For example, a controversial case about the end of private financing of electoral campaigns was stopped by Justice Gilmar Mendes. Articles in the media suggested that he withheld the case because he did not agree with the potential result, since the majority opinion had already been formed (“Pedido de vista no STF se torna ‘pedido a perder de vista’”, 2015).

These factors help illustrate the extent of agenda-setting powers in the Brazilian Supreme Court. Individual Brazilian justices have more power in comparison to other courts abroad. They can prevent actions from being judged and, when acting as rapporteurs, make decisions without consulting their peers. In the next section, we formalize how an influencer can use these features to reach favorable decisions.

3.3 Judicial independence of the Brazilian Supreme Court

Literature has traditionally viewed Brazil as a country with high rates of independence. (Rios-Figueroa & Taylor, 2006; M. Taylor, 2008). As M. Taylor (2008, p. 44) expressively points out:

(...) Brazil’s federal courts are strongly independent of the elected branches. Judicial decisions are made without undue concern for the executive or legislative branches’ reaction; compliance with court decisions by public bureaucracies is largely expected;

and recent history suggests that no retaliation is to be expected in terms of court budgets or administrative freedom.

This is in contrast with other courts in South America. For instance, the Argentine Supreme Court has a history of court-packing and impeaching justices. From this perspective, the Brazilian Supreme Court seems independent in comparison. However, this view does not include subtle aspects that have great importance. For example, it does not fit cases where the government pressured justices to exercise *pedido de vista* to pause a lawsuit. Those characteristics can help explain why in Brazil we have not seen strategies of controlling the court by the government, since mechanisms of individual power for justices make it inherently easy for governments to influence the court. Therefore, by considering the costs generated by the institutional rules in my model, I can provide a greater understanding of judicial independence in high courts.

According to the model, influencers will try to make justices use specific strategies to control the agenda power. One strong influencer in judicial politics studies is the government itself. I will test if the government tries to employ judicial mechanisms to control the court. The justification for using the government in this model is due to the concentration of power in the hands of the executive. They have the final word in budget discussions, and the right to nominate new justices and to pressure the coalition to grant benefits, among other powers. It is reasonable to consider the government as having a strong influence over the Supreme Court, and that it will use strategies to control it.

Furthermore, the government is expected to pressure justices to use *pedidos de vista* more often to pause lawsuits than to rely on the decisions by individual justices, because the government rarely serves as the plaintiff in legal actions in the Supreme Court. Thus, only the hypothesis that *pedidos de vista* is utilized will be tested here. The hypothesis is defined as follows:

H1. *Lawsuits in which the government has a strong interest against them will be more likely to be paused by pedidos de vista.*

4 Data

In order to test the hypothesis, I employ a dataset of 3,043 lawsuits from 1988 to 2015 regarding concentrated judicial review in the Brazilian Supreme Court provided by [Fonseca and Moreira \(2018\)](#). In Brazil, this system allows any actor listed in the constitution, such as the federal prosecutor, the senate, the chamber of deputies, the governor, or even national trade unions, to initiate a legal action against some law or normative act they consider unconstitutional. It is also possible that the president of the republic might call on the Supreme Court to declare a law constitutional in order to prevent lower judges from declaring it unconstitutional. Those lawsuits were removed, as I investigate only those actions where the plaintiff is not the president.

The investigated outcome variable is if *pedidos de vista* is used in a certain lawsuit. If so, I code this variable as 1, and 0 otherwise. The independent variable is the individual or entity who was petitioned in the lawsuit. If the lawsuit was against the president, we code 1, and 0 otherwise.

The dataset also includes dummy variables for the subject of each lawsuit. Those variables are: a) administration of justice; b) public administration; c) party and political disputes; d) tax and economic discussions; e) civil society problems, and; f) justices. For example, if Justice Marco Aurelio voted on a case, a variable representing him will receive a value of 1. The dataset also includes the year that the case was filed in the court.

5 Method and Results

The causal relationship tested here is between the interest of the government in a case and the probability of *pedido de vista* being utilized by a justice.

Table 2 shows the mean values and standard errors according to the independent variable. Considering only this relationship inside the non-matched data, there is a positive effect for being in favor the president. A Welch two sample t-test for the difference between the means has a p-value of 0.000577.

Possible confounding factors should be considered in terms of what could be influencing a

Table 2: *Pedidos de vista* in relation to the interest of the president

president_interest	n	Vista_Mean	Vista_Sd_Error
0	2304	0.09	0.006
1	739	0.14	0.013

pedido de vista. As mentioned in Section 2, the institutional reason for a justice employing *pedidos de vista* is to allow more time for a justice to study the case and reach a better ruling. An assumption that the subject of a lawsuit has an effect on the complexity of a case, as well as on the interest of the government, creates the opportunity of an identification strategy for controlling this variable.

In order to condition on the subject of each case, we utilized a classification obtained on the Supreme Court website. I then applied a matching strategy with the nearest neighbors, employing *MatchIt* package in R (Ho, Imai, King, Stuart, et al., 2011). The procedure reduced the sample to 1,457 data points. Figure 5 shows the average standardized differences for each variable before and after matching. This measure is calculated through the formula $sdm_x = \frac{X_{treatment} - X_{control}}{\sqrt{sd_{treatment}^2 + sd_{control}^2}}$. The balance seems guaranteed after the procedure.

A linear probability model can be computed using *president_interest* as an independent variable and *vista* as a dependent. Fixed effects for years were also included. The formula is:

$$vista_i = a_i + president_interest_i$$

I also tested a second version, using *federal_interest* instead of *president* as a robustness measure. In this version, we used every case where federal administration, the congress, or the judiciary were defendants.

Estimates indicate that the difference between the probability of a *pedido de vista* happen given the interest of the president is positive and equal to 0.06 and 0.066, if we used fixed effects. If we use the interest of federal branches, the estimate does not change much.

5 shows these results.

Figure 3: Standardized differences in balance before and after matching.

Thus, the results indicate that if the president or the government has an interest in a lawsuit, the probability of having this lawsuit paused by a justice is very high. This result has several implications for the manner in which researchers understand judicial independence. Case studies can show how these interferences occur.

Table 3: Regression estimates for president_interest and federal_interest over *pedido de vista*

	<i>Dependent variable:</i>			
	vista			
	(1)	(2)	(3)	(4)
president_interest	0.066*** (0.017)	0.060*** (0.016)		
federal_interest			0.061*** (0.016)	0.057*** (0.015)
Constant	0.161 (0.141)	0.084*** (0.012)	0.251** (0.103)	0.091*** (0.011)
Fixed Effects	Yes	No	Yes	No
Observations	1,478	1,478	1,778	1,778
R ²	0.036	0.009	0.029	0.008
Adjusted R ²	0.018	0.008	0.013	0.007
Residual Std. Error	0.315 (df = 1449)	0.316 (df = 1476)	0.323 (df = 1749)	0.324 (df = 1776)
F Statistic	1.951*** (df = 28; 1449)	13.099*** (df = 1; 1476)	1.859*** (df = 28; 1749)	13.967*** (df = 1; 1776)

Note:

*p<0.05; **p<0.01; ***p<0.001

6 Case studies

In the following case studies, we show how the procedure of capturing the court occurs by using one or a few justices.

6.1 Justice Nelson Jobim

Nelson Jobim was a justice nominated by president Fernando Henrique Cardoso in 1997. Before serving on the Supreme Court, he had served as a legislator from 1987 to 1995, and then as a Minister of Justice from 1995 and 1997. He was the leader of PMDB, one of the most-powerful parties in Brazilian politics.

Because of his previous role as a Minister of Justice, Jobim was called the advocate of the government inside the Supreme Court ⁴. by a major Brazilian newspaper. His government sympathies were evident after the economic crisis at the end of the 1980s and the beginning of the 1990s, when Brazil started a new economic plan to demolish inflation and establish a fiscal re-

⁴"Nomeado por FHC, Nelson Jobim assume defesa do governo no STF". Folha de S Paulo. May 10th 1997. <https://www1.folha.uol.com.br/fsp/1997/5/10/brasil/12.html>

form. As part of the plan, several state companies were privatized. In addition to the discussion of those privatizations inside congress, parties proposed a series of actions in the Brazilian Supreme Court, challenging the decisions to privatize state businesses (Kapiszewski, 2011). Justices would have to discuss the reforms in light of the constitution and the laws.

The discussion of those plans would be deleterious to the purposes of the government, so to guarantee that the government's interests would be represented in court, Cardoso made his first nomination to the Supreme Court bench, Nelson Jobim. Jobim paused dozens of lawsuits that were against the interests of the government, using *pedidos de vista*. Examples include ⁵:

1. *Constitutionality Direct Action n. 1491*, which questioned a law regulating broadcast services received a *pedido de vista* by Jobim in July 1998.
2. *Constitutionality Direct Action n. 2591*, which questioned the application of Consumer Code regulation to banks in Brazil.
3. *Constitutionality Direct Action n. 1923*, which questioned a law regulating *Social Organizations*, a type of partnership between the public administration and private entities.
4. *Constitutionality Direct Action n. 2135*, which discussed the application of some labour regimes to public officers.

A 2003 article ⁶ counted 77 lawsuits paused by Jobim. All of them had strong implications for the government, especially regarding public budget. The case of Justice Jobim is a clear example of the theory. Government interference in the judgement of the lawsuits against its interests through *pedidos de vista* is most commonly requested by justices who are aligned with the president's interests. This is a low-cost guarantee that the government's interests will be represented, without having to appeal to rules for packing the court or impeaching justices.

⁵See "Gaveta do Supremo: Presidente do STF demora até oito anos para analisar ações". Consultor Jurídico. March 3rd 2006. https://www.conjur.com.br/2006-mar-03/nelson_jobim_demora_oito_anos_devolver_acoes

⁶ "STF regulamenta prazo para pedidos de vista de ministros". December 15th 2003. <http://www.oabms.org.br/noticias.php?id=1680>

6.2 Campaign financing case

In 2014, a lawsuit challenged the system of campaign financing in Brazil. Since 1994, companies could donate large sums of money to candidates and parties in Brazilian elections, provided that their intentions to support the candidate(s) had been declared to the electoral court. In 2014, an action was filed in the Supreme Court, challenging this rule. Plaintiffs argued that the Brazilian constitution should forbid financing by companies and firms. After six justices voted, a majority had ruled in favor of the prohibition. Realizing that the result was inevitable, one of the justices, Gilmar Mendes, decided to stop the lawsuit, using a *pedido de vista*.

Gilmar Mendes is widely known as a justice who maintains close relationships to politicians in Brazil. Before his nomination to the court, he was the General Public Attorney, and started several legal challenges in defense of the government. His nomination to the Supreme Court was controversial. He faced a harsh campaign against a member of the Worker's Party (PT), and at his confirmation, Eduardo Suplicy, a famous PT senator, called Mendes the "Brazilian Dr. No," a reference to the archvillain in a James Bond movie.

Campaign financing by big companies has played a key role in Brazilian politics since 1994. In 2014 alone, \$4.9 billion reais (almost \$2 billion dollars) were spent on campaigns for the president, the governor, senators, and representatives (Carazza, 2018). The Carwash Operation, which began in 2014, put politicians and owners of big construction companies in prison, in part due to donating and receiving funds that had not been declared to the electoral court. Thus, politicians had clear incentives to ensure that any lawsuit that would hinder campaign financing from companies would not be judged.

This case is particularly interesting because the decision was already known. As six justices had decided against private financing, the majority had been reached. Apart from Justice Gilmar Mendes exercising his agenda power, the government would have been unable to halt the court's decision.

6.3 Allowances for judges in Brazil

Pedidos de vista is not the only factor that can impact judicial independence. Individual decisions made by justices can have strong effects as well. An illustrative case is the lawsuit regarding allowances for justices and prosecutors.

Salaries for legal public careers are not clearly established in the constitution. Although salaries are defined by law, there are other types of allowances set aside to pay public workers' living expenses; for example, allowances related to food and other benefits. In 2014, the allowance that was set aside to pay rent for judges' homes was questioned in the Supreme Court. The lawsuit was given to Luiz Fux to be the rapporteur.

Justice Luiz Fux was a judge of a lower court before joining the Supreme Court. In addition, he has a close relationship with several judge associations, so it was expected that he would act according to the preferences of those associations. He made an individual decision to maintain the allowances, and did not take the lawsuit back to be judged by the rest of the court. Economists estimate that this decision cost the public budget 3 billions reais.

It is not easy to identify any potential interference from the lower court judges in this case, but we can reasonably conclude that the associations of judges would be able to ensure a favorable decision by influencing only one justice.

7 Conclusion

Courts where individual justices have strong agenda powers are subject to more interference from external agents. The argument for this is straightforward: as the costs of influencing one or two justices is lower than obtaining the majority, those courts are cheaper to be bought by influencers.

This point is clearly illustrated in the Brazilian Supreme Court. Cases where the president, the government, politicians or associations try to obtain a favorable decision by pressuring one justice to utilize their agenda-setting powers are common. Furthermore, a quantitative causal

analysis of pedidos de vista shows that cases in which the government or other federal branches have strong interests are paused more frequently.

The results suggest that part of judicial independence studies should focus on agenda mechanisms. In Brazil, for example, although there are no recent cases of court-packing or impeachment of justices, the government was able to guarantee favorable decisions inside the Supreme Court. This also challenges the traditional thinking among political scientists that the Brazilian Supreme Court has high rates of judicial independence.

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