PART I

JUDICIAL COMMUNICATION AND JUDICIAL POWER

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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 Crespin 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 though 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.

JUDICIAL POWER

What does it mean to call a court powerful? A common conceptualization of judicial power centers on the rules that shape a court's jurisdiction, rules that are defined explicitly by constitutions and statutes or developed by judges themselves in their jurisprudence. (Baker 1971; Barber 1993; Beard 1962; Billikopf 1973; Boudin 1962; Burgoa 1984, 1998; Fix-Zamudio 1987; González Casanova 1967; González Cosío 1985; Gunther 1991; Johnson 1996; Lasser 1988; Rabasa 1982; Tena Ramírez 1957). The power of a court, its *de jure* power, is a legal description of what a court may do, what kind of conflicts it may resolve, and what remedies it may propose. Courts exercise power when they have jurisdiction. Billikopf (1973, 205) delivers a representative statement on the traditional legal notion of judicial power as jurisdiction. He writes:

> No clear line can be drawn between the terms judicial power and jurisdiction. . . . The word power is generally used in reference to the means employed in carrying jurisdiction into execution; the term jurisdiction refers to the capacity of the court to exercise its powers.

This conceptualization is not limited to the formal institutional scholarship often found in comparative legal analysis. Indeed, Tate and Vallinder's (1995) foundational volume drew attention to the increasing degree to which courts were entering political debates in the 1990s, debates traditionally thought to be outside of their jurisdiction (also see Baird 2004; Stone 1992; Stone Sweet 2000). Judiciaries were becoming politicized precisely because the jurisdictions of the world's courts were being expanded, either by politicians or by courts themselves, in part with the aid of a network of rights activists who wanted more politically relevant courts (Epp 1998). Nearly a decade after the Tate and Vallinder project began, Ginsburg (2003, 7–8) provided systematic evidence for the general expansion of formal judicial power, demonstrating that just about every third-wave democracy established a kind of constitutional review.

The *de jure* concept is useful in arguments about institutional design, especially where subsequent compliance is assumed. A court with highly limited jurisdiction clearly is unlikely to affect the majority of a state's policy debates. Although the *de jure* power concept works nicely within a discussion of the rules that should regulate constitutional review, it does not offer a satisfactory conceptual structure for addressing public policy outcomes. Under the *de jure* definition, we can call a court powerful if its

formal rules grant it significant authority, whether or not that authority is exercised in practice. This risks overlooking weakness in two kinds of courts: those that are openly defied and those that shy away from conflict in order to avoid open defiance. And as summarized above, we observe outcomes of this sort commonly enough. For this reason, because compliance cannot be assumed, I adopt a *de facto* concept of judicial power. By *power*, I mean that an actor can cause by its actions the outcome that it prefers.[6]

This definition is identical to Cameron's (2002) judicial independence concept (also see Larkins 1996, 611), although I will generally use the term *power*. Because there are moments when it will be convenient to use *independence*, it is worth distinguishing the power concept from a common alternative. Judicial independence is also conceptualized as a state of the world in which judges are able to make decisions that are free from external influence, whether that influence comes from coordinate branches of government, the private sector, or even from within the judiciary.[7] As Kornhauser (2002) suggests, independent judges in this second sense are the "authors of their own decisions." Critically, however, a powerful court under the Cameron concept must be autonomous under the Kornhauser concept. If it were not, then it would be impossible for the court to cause by its actions *the outcome it prefers*. The difference between the concepts, at least insofar as I wish to use them, is that an autonomous court might lack power, because it is unable to induce compliance generally, whereas a powerful court is autonomous and it is obeyed.

A FUNDAMENTAL PROBLEM OF JUDICIAL POLICYMAKING

The problem on which I will focus follows immediately from Publius's contention in the *78th Federalist* that courts are inherently weak political institutions. Lacking physically or financially coercive means of enforcement, judicial power ultimately turns on the choices of elected officials to respect the authority of courts. On many accounts, the problem undermines judicial power through either overt noncompliance or judicial prudence. It is understood that constitutional courts are defied on

[6] Also see Dahl (1963) or Nagel (1975).

[7] Kapiszewski and Taylor (2008) provide an excellent conceptual discussion of concepts of judicial independence and power. On independence as autonomy (in a variety of ways), see Couso (2004), Brinks (2005), and Ríos-Figueroa (2006).

occasion (Canon and Johnson 1999; Johnson 1967; Rosenberg 1991; Spriggs 1996; Staton 2004; Trochev 2002; Vanberg 2005; Volcansek 2000) and that they sometimes strategically avoid conflict (Clinton 1994; Epstein and Knight 1996; Fix-Fierro 1998b; Lasser 1988; Murphy 1964; Schwarz 1973; Volcansek 1991).[8] The entire Pakistani Supreme Court was dismissed and jailed in 2007 by President Pervez Musharraf when it was suspected that it would nullify his election to a third term. To avoid such outcomes, we commonly observe prudential decision making. The president of the Venezuelan Supreme Court, Cecilia Sosa Gomez, resigned her post in 1999 over her court's approval of a highly suspect judicial reform enacted by allies of Hugo Chavez. Sosa suggested that the court had "committed suicide to avoid being assassinated. But the result is the same. It is dead."[9] Helmke (2005) even suggests that instances in which judges seem to challenge powerful and potentially dangerous political officials are designed to avoid being purged from the bench following a regime or government transition. Importantly, examples of this sort can be found even in states where we anticipate widespread adherence to the rule of law. Local governments in the United States and Germany have simply refused to implement critical constitutional decisions over equal protection and religious establishment (Rosenberg 1991; Vanberg 2005).

In much democratic theory, the stakes of solving this problem are high. Powerful judiciaries are, in part, solutions to a core democratic dilemma: how can government be sufficiently energized to induce social cooperation yet sufficiently restrained from violating individual rights (e.g., Madison 1787)? The response to this problem in classic and modern political theory involves dividing sovereignty (e.g., Falaschetti and Miller 2000; Locke 1698; Montesquieu 1962, 152), and the judiciary is a crucial component of this division (North 1990; North and Weingast 1989). But the institutional hedge provided by the judiciary only works if judges are willing and able to constrain government choices. If they cannot, then the judiciary provides no solution. Indeed, on some accounts, a state only can be considered democratic if it contains a judiciary that

[8] It is important to note that the Argentine judges in Helmke's study are strategically inviting conflict, rather than avoiding it. Nevertheless, in an important sense, this is only a matter of labeling. What is going on here is that judges are inviting conflict with a current government to avoid conflict with a future one. Although the temporal dynamic is illuminating, the behavior is still consistent with the general incentive to decide prudentially on occasion.

[9] "Top Venezuelan judge resigns," BBC News, online, http://news.bbc.co.uk, August 25, 1999.

enforces the rule of law (Linz and Stepan 1996; O'Donnell 1999). In this sense, democracy depends on solving the fundamental problem of judicial policymaking.

THEORETICAL SOLUTIONS

Under what conditions do courts successfully exercise their power? One simple, yet elegant answer is that courts exercise power when governments want them to. Governments willfully delegate power to courts to solve a variety of political dilemmas. There are at least four variants of this line of argument. The first suggests that ruling political coalitions empower judiciaries in contexts of increasing political competition. Judicial review serves as a form of insurance against potential violations of the current majority's interests or over changes to fundamental policy regimes in the event that it loses control over the state (Finkel 2008; Ginsburg 2003; Hirshl 2001). A second type of willful delegation argument suggests that powerful courts provide informational advantages to political majorities, weeding out policies adopted under uncertainty that turn out to be ill-designed or simply ineffectual, but that governments cannot unravel through the legislative process (Rogers 2001). Whittington (2007) develops a related argument in which governments use powerful courts to dismantle the policies adopted by past majorities, but that would be difficult or impossible to reform through law or rule making. A fourth willful delegation model suggests that courts gain power when governments recognize that an unconstrained state renders sovereign promises to respect property rights meaningless. These "noncredible" commitments erode the incentives for economic growth and threaten state solvency (Barro 1997; North and Weingast 1989). Courts are given power to render promises to protect property rights credible (Moustafa 2007).

Although there is a great deal to admire in each of these arguments, they either deal with the choice to empower courts formally rather than with the implementation problem, or they have trouble explaining why we do not see powerful courts in nearly all corners of the world. The information and credible commitment stories provide compelling rationales for creating formally strong courts, but they struggle to explain international variance in judicial power. Few states can thrive without investment, and consequently, nearly all states confront the time-inconsistency problem that drives the credible commitment argument. Likewise, it would seem that uncertainty affects policymaking in every state around the world, a problem that could be aided by *ex post* judicial review, as Rogers suggests.