INTRODUCTION

On September 11, 1973, General Augusto Pinochet helped to lead the overthrow of one of Latin America's most celebrated democratic regimes. As part of the coup, Chile's military leaders bombed the presidential palace, shut down the Congress, closed or banned political parties, and purged the state bureaucracy. They left the courts, however, completely untouched. In the face of state terror, Chilean human rights defenders thus placed their hopes in the judiciary as the only branch of the democratic state left intact.

To the dismay of justice seekers, Chilean judges cooperated fully with authoritarian regime in the months and years that followed. Not only did the courts grant the military government nearly complete autonomy to pursue its "war" against Marxism, but they also offered repeated legal justification of the regime's expansive police powers. Judges unquestioningly accepted the explanations offered by the government regarding the fate of the disappeared and readily implemented arbitrary decrees, secret laws, and policies that violated the country's legal codes. The Supreme Court, mouthpiece of the judiciary, publicly endorsed General Pinochet's seizure of power and declared that writs of habeas corpus disrupted the Court's ability to deal with the "urgent matters of its jurisdiction." Indeed, of the more than fifty-four hundred habeas corpus petitions filed by human rights lawyers between 1973 and 1983, the courts rejected all but ten (Constable and Valenzuela 1991: 122). Moreover, the Supreme Court unilaterally abdicated both its review power over decisions of military tribunals and its constitutional review

power.[1] Throughout, the justices insisted that the military government was restoring the rule of law, even as the generals made a mockery of the Constitution. Even after civilian rule had been restored, judges continued to endorse the legal edifice constructed by the leaders of the authoritarian regime (including the military's self-amnesty), and left largely unchallenged the principles and values embodied therein.[2]

This performance – which extended from passive capitulation to outright collaboration in authoritarian rule – demands explanation at several levels. To begin, such judicial behavior, in any context, shocks the moral conscience. As with antebellum American judges who applied the Fugitive Slave Laws, German judges who implemented Nazi law, or South African judges who imparted legal legitimacy to apartheid (Cover 1975; Müller 1991; Dyzenhaus 1991; Osiel 1995), one is driven to ask how and why professionals charged with administering justice could turn a blind eye to – or worse, offer justification for – state-sponsored (and often arbitrary) degradation, repression, and brutality. Such behavior is at odds both with (Western) society's moral expectations for professionals, in general, and for judges, in particular. As Paul Camenisch has argued, professionals are "bearers of a public trust, bestowed upon them in the form of a professional degree and title, and endowing them with a monopoly in the provision of a service which is crucial to society." They have "significant power which can be used either for great societal benefit or to considerable societal harm," and thus "they can rightly be accused of failure not only when they use their power, influence and expertise for the wrong purposes, purposes which are positively harmful, but also when they fail to use them for the proper purposes, or even fail to do so with sufficient energy and perseverance" (Camenisch 1983: 15 and 17). Like physicians who provided their professional services to the regime's torturers, then, judges who offered legal endorsement of state-sponsored brutality opened themselves up to ethical critique. But of course *judges* are subject to particular scrutiny because, as professionals, they are trained and take oaths to administer *justice*, or at least to uphold the constitution and the laws, which contain principles

[1] For the official critique of the conduct of the judiciary under the military regime, see Ministerio Secretaría General 1991: Vol. 1, Ch. 4.

[2] This only began to change in the late 1990s, following institutional reform and the detention of General Pinochet in London. The extent and limits of this change will be discussed in Chapter 5.

of justice. The judges in Pinochet's Chile had been trained and appointed under a democratic regime and had taken an oath to uphold the constitution of that regime, which provided a host of liberal and democratic protections. Why was it that they so easily ignored that oath and supported, sometimes passively, other times actively, the illiberal, antidemocratic, and *anti-legal* agenda of the military government?

This question becomes even weightier when considered in light of Chile's political culture and history. In a continent plagued by political violence and instability, pre-Pinochet Chile had often been touted as "exceptional" (Valenzuela 1989: 160 and 172).[3] Whereas the political histories of other countries in the region often featured "brutal, distorted, manipulated, political institutions and pseudo-liberal democratic regimes" (Diamond and Linz 1989: 20) and "[an absence of] traditions of participation, contestation, and toleration of dissent" (Waisman 1989: 63), Chile stood out for its "high level of party competition and popular participation, open and fair elections, and strong respect for democratic freedoms" (Valenzuela 1989: 160; see also Valenzuela and Valenzuela 1983). In fact, a 1965 index that ranked countries in terms of democratic performance placed Chile in the top 15 percent, above the United States, France, Italy, and West Germany (Bollen 1980).[4] Chile also boasted a "strong historical tradition of respect for the rule of law and a constitutional framework of presidential government" (Valenzuela 1995: 31). In contrast to Brazil or Mexico, where the law is very unevenly applied across the territory, or to Argentina, which is notorious for its systemic corruption, Chile has long distinguished itself by its rule-bound and orderly society. As one prominent Chilean social scientist argued in 1974: "One of the most characteristic political realities of Chile is the importance of legality as a superior standard [*instancia*] to which all behaviors and the resolution of conflicts between people and institutions are referred. . . . Legality is the foundation of the government's legitimacy" (Arriagada 1974: 122).[5] Why

[3] See also Blakemore (1993), who notes that, in the nineteenth century, Chile was considered "the England of Latin America"; and Dahl (1971), in which Chile figures as a prominent case of successful democratic development.

[4] For a more critical perspective on Chile's "democratic exceptionalism," see Loveman and Lira (2002).

[5] Similarly, Chilean constitutional lawyer José Luis Cea (1978: 6) notes that at the conclusion of the 1960s, "the Chilean population, by and large, had been educated in respect for the principle of legality, which it had internalized as its own. In accordance

was it that Chilean judges so easily abandoned these alleged national traditions?

The behavior of Chilean judges is particularly remarkable when contrasted to that displayed by judges in countries with ostensibly far less democratic and legalistic traditions, such as Brazil and Argentina.[6] After the 1964 coup in Brazil, the Supreme Court, left intact by the junta, repeatedly called the generals on their affront to the historic Brazilian constitution, *even after* the military attempted to stack it with more sympathetic judges (Karst and Rosenn 1975; Feinrider 1981; Nadorff 1982; Osiel 1995).[7] Lower courts and even military courts also sought to limit what the military government could do in the name of national security, although the former were quickly deprived of their independence (Ballard 1999: 241; Pereira 2005: 77). In Argentina, a thoroughly purged judiciary first capitulated almost completely to the ruling junta, but, toward the end of the regime, began issuing general rulings limiting the military's power (Helmke 2002).

The central question that this book seeks to answer is thus: Why did Chilean judges who had been trained under and appointed by democratic governments facilitate and condone authoritarian policies? Put differently, why in a country with such a long history of democratic practice and respect for legality, a country whose human rights movement was one of the strongest on the continent, did judges make no public and concerted effort to defend liberal democratic principles and practices, not only under Pinochet but well into the 1990s? In answering this question, the book speaks to debates in public law and comparative politics regarding the roots of judicial behavior, the definition and limits of judicial independence, and the way the judicial role should be conceived and constructed to promote the rule of law and rights protection.

with said principle, the rulers as well as the ruled could act only to the extent that an explicit legal precept, technically generated, had previously ordered, permitted, or prohibited that action."

[6] It is also surprising given that Chile's judiciary was commonly thought to be *much* more independent than its Argentine counterpart (Verner 1984).

[7] In October 1965, the Brazilian junta passed Institutional Act No. 2, which expanded the Supreme Court from eleven to sixteen members and gave exclusive judicial appointment power to the executive. This did not achieve the desired level of compliance from the high court, however, so in late 1968 and early 1969, through Institutional Acts 5 and 6, the junta reduced membership on the court back down to eleven and forced three of the acting justices into early retirement, which led the Supreme Court president to resign in protest (see Ballard 1999: 241).

OVERVIEW OF THE ARGUMENT

The main argument put forth in this book is that the behavior of Chilean judges under Pinochet is attributable largely to institutional factors. Although I also highlight the importance of the personal political views of some judges, particularly on the powerful Supreme Court, that factor alone is not sufficient to explain the courts' paltry defense of liberal democratic principles not just during, but also before and after, the authoritarian interlude. To account fully for the weak response of the judiciary to violations of constitutionalist principles (i.e., liberal and democratic rights and limited power), it is necessary to understand how the institutional setting fostered and amplified illiberal and even antidemocratic attitudes, but constrained the development and expression of liberal democratic perspectives.[8] The institutional structure and institutional ideology of the Chilean judiciary, historically constructed around the concept of apoliticism, provided professional understandings and incentives that rendered even democratic-minded judges unequipped and disinclined to take stands in defense of liberal democratic principles.

Some definitions and clarifications are necessary to make sense of this claim. To begin, by "institutional structure" I mean the organizational rules governing the powers and duties of different offices within the institution, including their relationship to each other and to other government offices. By "institutional ideology" I mean the discrete and relatively coherent set of ideas shared by members of the institution regarding the institution's social function or role, that is, the professional norms that guide behavior within the institution (Smith 1988). These norms were both embodied in and reproduced by the institutional structure. In saying that these institutional features were historically constructed around the concept of "apoliticism," I mean that they were developed in the nineteenth and early twentieth centuries with the goal of keeping judges insulated from and out of the debates and affairs of the elected branches. Beyond simply securing judicial independence from partisan manipulation – a worthy ideal – the judicial structure and ideology in Chile built a high conceptual wall between "law" and "politics." However, far from rendering the judiciary politically neutral, these institutional features worked to foster and enhance a strongly

[8] On how institutions "refract and constrain" outcomes, see Thelen and Steinmo (1992: 3).

conservative and generally anticonstitutionalist orientation among judges. Rather than invoke the rights guarantees or liberal-democratic structure of the national constitution to limit abuses of public power and promote equality before the law, then, Chilean judges, some actively but most passively, rendered decisions that bolstered the power of state officials and reinforced the traditional social hierarchy, long before and well beyond the seventeen-year dictatorship.

As I will explain in Chapter 2, the judiciary's institutional ideology has its roots in nineteenth-century legal positivism, which consigned judges to be "slaves of the law" (Jaksic 1997: 266). This view developed into what I identified in my research as a legal essentialist or "antipolitics" conception of the judicial role among judges. Judges understood "law" and "politics" as two entirely distinct and unrelated pursuits, and considered the goals of judges and legislators to be completely separate and divergent. In this fetishized view of the law,[9] the less "political" judges were, the more "legal" they would be.

Such an understanding, I argue, was strengthened and reproduced by the institutional structure that was established in the 1920s, when reformers sought to end executive manipulation of the courts and professionalize the judicial career.[10] It was at this time that the formal judicial hierarchy was established and the Supreme Court was given control over discipline and promotion within the career, even controlling nominations to its own ranks. Although this structure successfully increased judicial independence from executive control, it henceforth provided incentives for judges to look primarily to their superiors – rather than to any other audience or reference group – for cues on how to decide cases. Judges thus learned that to succeed professionally, the best strategy was to eschew independent or innovative interpretation in favor of conservative rulings that would please the high-court justices. In this way, conservatism and conformity were continually reproduced within the inward-looking judicial ranks.

It was for these reasons that after the 1973 military coup even judges personally at odds with the laws and practices of the military regime were professionally unwilling or unable to defend liberal democratic

[9] I thank Carol Greenhouse for this phrasing.

[10] By professionalization, I mean a process by which an institution is transformed such that the criteria for selection and promotion within it are made on the basis of specialized knowledge and demonstrated skill or merit, rather than primarily through personal or partisan favors.

principles and practices. Publicly challenging the validity of the regime's laws and policies in the name of liberal-democratic values and principles was viewed as unprofessional "political" behavior, which threatened the integrity of the judiciary and the rule of law. Under the watchful eye of the Supreme Court, any judge who aspired to rise in the ranks of the judiciary learned not to take such stands. Instead, judges conformed to the conservative line set and policed by the Supreme Court.

In making this institutionalist argument, I do not mean to imply that the judiciary functioned in a social and cultural vacuum. Indeed, I make clear that the institutional structure and ideology of the Chilean judiciary embodied and reproduced the interests and ideas of its nineteenth- and early twentieth-century designers. My explanation is, therefore, historically bounded. Yet this study offers more than a particularistic interpretation of judicial performance in Chile. It uses the Chilean case both to test and to generate hypotheses regarding the sources of judicial behavior under both democratic and authoritarian regimes.[11] The hypotheses I explore in this study include explanations of judicial behavior based in personal policy preferences, legal philosophy, class-based interests, and regime-related variables such as fear and manipulation by the executive. My analysis of the Chilean case demonstrates the limits of each of these explanations on its own, and offers instead a more complete institutional argument, whose general elements can in turn be tested in future comparative research.

The main theoretical contribution of this longitudinal case study, then, is its identification of the sources of a clear pattern of judicial behavior that persisted across regimes in Chile. The sources of this behavior are not, however, unique to Chile. In the final chapter of the book, I present evidence from secondary sources on a variety of other cases that suggest broad applicability of my argument, and with these additional cases in mind, I proffer several lessons for scholars and policy makers. The first is that formal judicial independence, even when achieved and respected, is not sufficient to produce a judicial defense of rights and the rule of law. Indeed, institutional variables appear to impact significantly whether or not judges will be willing and able to assert themselves in defense of rights and the rule of law. Second, judicial behavior scholars need to pay more attention not only to the way

[11] For discussions of the value of case study to theory-building in political science, see Lijphart 1971; Eckstein 1992; King, Keohane and Verba 1994; Rueschemeyer 2003; Gerring 2004.

institutions constrain the expression of judges' preexisting attitudes but also to how they constitute judges' professional identities and goals. Judicial role conceptions matter, and we need to understand better how they are formed, maintained, or altered. Finally, apoliticism appears to be the wrong ideal around which to construct a judiciary in service of liberal democracy. Although judicial independence and professionalism are legitimate *desiderata* for any polity committed to the rule of law, it is neither possible nor desirable to construct a judiciary beyond politics. For when judges are prohibited by institutional structure and/or ideology from engaging with the wider polity, they are unlikely to cultivate the professional attributes necessary for them to defend and promote liberal-democratic constitutionalism. An "apolitical" judiciary is thus far better suited to authoritarianism than to democracy.

METHODOLOGY AND DATA REPORTING

This book offers a longitudinal analysis of judicial performance in Chile from 1964 to 2000. It is based primarily on archival research and interviews conducted in Chile during a one-year period in 1996, as well as two shorter visits in 2001. I chose 1964, the beginning of the presidency of Eduardo Frei Montalva, as the start date for my analysis of primary data because it was precisely at this time that Chile was deemed most democratic. Examining judicial behavior (both decisions and other public declarations and acts) during this period, as well as during and after the dictatorship, allowed me to determine if and how behavior changed with regime change. The main sources of this data were judicial decisions in civil and political rights cases, published in the three main jurisprudential journals: *Revista de Derecho y Jurisprudencia*, *Gaceta Jurídica*, and *Fallos del Mes*. To locate these cases, I used the indices of each volume, searching for references to civil and political rights as well as to other terms that signaled government involvement, such as the Law of Internal Security. I then read them all and analyzed them for their legal reasoning and their political content. I also recorded which judges participated in or dissented from each decision, searching for patterns at the individual level. For the authoritarian period, I supplemented the data from the jurisprudential journals with information in the monthly and annual reports of the *Vicaría de la Solidaridad* and the archives of the *Comisión Chilena de Derechos Humanos*, which were the two main institutions from which the struggle for human rights was conducted. Although I discuss some of these latter cases in the text, the quantitative

analysis, summarized in the tables in each chapter, is based solely on the published cases.

I should note that Chile's jurisprudential journals do not provide exhaustive records of all decisions rendered by the courts, but are, rather, collections of cases selected by the editors for their juridical or social interest or importance. There simply is no accessible "raw" source of judicial decision data for the period I covered in Chile. The advantage of this is that the number of decisions I worked with was manageable enough that I could read them all and analyze them in detail. The disadvantage is that I cannot say that the decisions I analyzed are an unquestionably representative sample of all the decisions rendered. However, given that the editors of the different sources were of very different political persuasions, and given that I interviewed legal scholars from across the political spectrum for this study, always asking them for further case references, I am confident in the general representativeness of the sample.

Interviews were a second major source for my analysis. On three different research trips (one in 1996 and two in 2001), I conducted a total of 115 interviews with legal scholars and practitioners, former ministers of justice, and, most importantly, judges. In 1996, I interviewed thirty-six acting high-court (AHC) judges (fifteen of seventeen Supreme Court members and twenty-one members of the appellate courts of Santiago and San Miguel)[12] plus ten lower-court and/or former judges. In 2001,

[12] The thirty-six represented two-thirds of the total (fifty-four) of acting high court (AHC) judges in the Metropolitan Region (greater Santiago). I selected high court judges because it is they who have jurisdiction in areas of constitutional justice (writs protecting constitutional rights and writs of inapplicability due to unconstitutionality), as well as in cases involving violations of the Law of Internal State Security. (As Chilean human rights lawyer Roberto Garretón notes, first instance judges "had little to do with problems of constitutional justice under the military regime" In addition, all high court judges also have worked in first instance courts earlier in their careers, many under the military regime, and thus could speak to that experience as well. I felt justified limiting the study to Santiago for three interrelated reasons: First, most judges work outside of Santiago early in their careers, so interviewees in Santiago bring perspectives from the provinces; second, the Santiago Appeals Court is often a springboard into the Supreme Court, and thus its members are more likely to be future Supreme Court justices than those from the regions (Navarro Beltrán [1988] calculates that 45 percent of all Santiago Appeals Court judges go on to become Supreme Court justices); and third, the judiciary, like the country, is highly centralized and the views and decisions of the Supreme Court and the Santiago Appeals Court draw the most public attention and define the judiciary in the public mind.

I interviewed fifteen judges, ten of whom I had interviewed in 1996. All interviews were semistructured and lasted anywhere from forty-five minutes to four hours. Through the interviews, I probed the judges' role conception, their political leanings, and their understandings of the institutional and/or political constraints that they were subjected to under different regimes and administrations. I sought to ask questions in the most open-ended way possible, so as not to lead the subjects or to put them on the defensive. Because interview responses cannot necessarily be taken at face value, I sought to triangulate and contextualize the responses through interviews with a variety of actors, and, where possible, through archival material.

Because interviewees were promised anonymity, their names appear only in Appendix B, where they are listed alphabetically, and are not tied personally to their statements cited in the text. Instead, throughout the text I use a coding system that identifies subjects only by category and assigns them each a number that corresponds to the year and the (random) order in which I interviewed them. For example, the appellate court judge that I interviewed first in 2001 is identified as "ACJ01–1;" the seventh Supreme Court justice interviewed in 1996 as "SCJ96–7," and so on. The key to the categories is as follows:

SCJ	Supreme Court Justice
ACJ	Appellate Court Judge
LCJ	Lower Court Judge
FJ	Former Judge
AI	Abogado Integrante
HRL	Human Rights Lawyer
OL	Other Lawyer and/or Law Professor (includes Ministers of Justice)

A third major source of information for the analysis was records of the plenary sessions of the Supreme Court, including the annual evaluations. Through these materials, I was able to see when and how the Supreme Court exercised its disciplinary and promotion power over the judicial hierarchy, and if there was any evidence of their changing or retracting decisions in the face of disagreement from the executive.

Finally, I drew on numerous secondary sources, such as major newspapers and magazines, biographical encyclopedias, law school theses, judicial memoirs, and scholarly journal articles and books. These were particularly useful in providing historical background to the study's focus