Dear CPW-teers,

I hope this letter finds you well. First, I would like to thank you in advance for taking the time to read and comment on my paper. I realize it’s not short, but I hope you found it interesting.

One note about my goals might be helpful. I hope to obtain funding to spend a month or so with the Indonesian Constitutional Court next summer in order to better learn how the justices actually think about cases. This could be important because, as I discuss at the very end, the empirical approach I take originates from the literature on courts in developed legal systems, but I’m not sure how far it extends to new courts in developing democracies. As such, even though I present preliminary empirical results, I am still trying to think through the inputs for my regression model.

Also, I should note that I did not include the mathematical Appendix in this version. It’s long, I haven’t had time to clean it up, and frankly I’d be shocked if anybody actually wanted to read it! Please feel free to e-mail me at dnardi@umich.edu if you’d like to see what I have. (Please also send suggestions regarding tone, style, or typos to that address).

Thank you all again for your help with my paper. I look forward to your comments on Friday November 18, 2011.

Sincerely,

Dominic J. Nardi, Jr.
As Hamilton observed, courts possess neither the power of the purse nor the sword. So why would judges ever risk exercising the power of the pen? Previous scholarship argues that public support for the judiciary effectively compels the government to enforce judicial decisions. According to this literature, courts tend to exercise constitutional review in less complex cases so the public can better monitor government compliance. However, in developing democracies we often see courts adjudicate complex socio-economic rights, even at the risk of government evasion. I argue that in these cases courts are less concerned about whether their decision is enforced and more interested in building public support for the judiciary. Judges believe that by signaling their sympathy to popular causes, they can recruit stakeholders who will defend the court from encroachments on its independence. Moreover, judges personally benefit from the prestige and patronage conferred by NGOs, law schools, and the media. In short, popular support can be an end as well as a means. In this paper, I formalize my theory with a game theoretic model of judicial strategic interactions. Next, I attempt to test the theory with an original dataset of 119 coded cases from Indonesia’s Mahkamah Konstitusi between October 2003 and April 2009.

While scholars of courts in developing democracies have sought to explain why political elites create independent courts with judicial review powers (Ginsburg, 2003; Finkel, 2008), as Horowitz (2006, p. 131) notes, “not even the most careful design of a constitutional court can guarantee that it will become a bulwark of law and guarantor of human rights.” Indeed, as Hamilton (1788) notes, courts possess neither the power of the purse nor the sword. So why would judges ever risk using the power of the pen? The exercise of judicial review

1I would like to (prospectively) thank Lin Lin Aung, Jenna Bednar, Clifford Carrubba, Tom Conway, Diana Greenwald, Brian Min, Nico Ravanilla, Dan Slater, Jeffery Staton, ... and the participants of the Fall 2011 Comparative Politics Workshop and the Center for Southeast Asian Studies Between the Lines Conference ... for their invaluable comments and suggestions.
becomes even more puzzling when courts not only lack “the most careful design” but also face institutional constraints on their autonomy and ability to enforce judgments.

Most strategic models of judicial decision making are based upon executive-judicial relations in Western democracies, arguing that courts are constrained by the government’s ability to impose sanctions on judges or ignore its ruling (Knight and Epstein, 1996). Vanberg (2001) argues that public opinion helps the German Constitutional Court ensure that parliament will comply with its rulings, particularly when the law is not complex. Carrubba and Zorn (2010) extend this model to the U.S. Supreme Court, adjusting for the bicameral nature of Congress by allowing legislative overrides. However, both restrain the role of public opinion to that of an enforcement mechanism supporting the court. Helmke (2004) theory of strategic defection in Argentina does help explain judicial politics in transitioning countries, but only applies to cases in which judges possess minimal independence. Focusing on judicial preferences and political contexts in Malawi and Zambia, VonDoepp (2006) finds that judges are less likely to rule against the government when adjudicating sensitive political disputes.

None of the existing models seems to adequately explain the full spectrum of judicial behavior observed in new democracies. Indeed, Kapiszewski (2011, p. 472) argues that most existing models focus on enforcement of decisions without considering the “range of factors would impinge on judicial decision making in unstable developing democracies.” Why, for example, did the Indonesian Constitutional Court enforce rule that the legislature must allocate 20% of the state budget to education, even though the legislature continually demonstrated its willingness and ability to evade the requirement (13/PUU-VI/2008)? Why did the Philippine Supreme Court continue to take a public role in addressing extrajudicial killings, even when it seemed they would never be solved (Parrero, 2011)? Perhaps most puzzling, why have the supreme courts of India and Pakistan continually issued detailed environmental policy guidelines over the objections of their respective governments (Rosencranz and Nardi, 2011), intervening in exactly the type of complex, unenforceable areas Vanberg (2001) predicted courts would avoid?

I argue that the public influences judicial behavior not just by providing external enforcement, but also as a source of patronage and political support. Judges believe that by signaling their sympathy to popular causes, they can recruit stakeholders who will defend the court from encroachments on its independence (Trochev and Ellet, 2011). Moreover, judges personally benefit from the prestige and patronage conferred by NGOs, law schools, and the media. In short, popular support can be an ends as well as a means. In short, public support can be an ends as well as a means.

Unfortunately, the judicial politics field simply lacks the data to test this theories with a large-N, cross-national sample. Moreover, such a test might cause more problems than it would solve because it would be difficult to account for all relevant features of institutional design and the political context. Rather, I follow Vanberg (2001, 2005), Carrubba and Zorn (2010), and Helmke (2004) in testing this theory with data from a single constitutional court in order to focus on the variables of interest. I use Indonesia’s Mahkamah Konstitusi as a representative example of an “accountable” court in a developing democracy that finds itself extremely susceptible to public pressures. Using data from coded cases, I develop a regression
model that attempts to predict when the court will strike down a law as unconstitutional, taking into account the government’s preferences, the risk of sanctions, and public support.

In the remainder of the paper, I discuss the theoretical literature on judicial behavior, especially as applied to developing democracies. In order to motivate the rest of the paper, I then provide a brief background on Indonesia’s Constitutional Court, the Mahkamah Konstitusi. Next, I present my model and highlight differences between it and previous scholarship. In the fourth section, I solve the equilibria of the game and interpret the results. In the fifth section, I present my hypotheses and data. Finally, I present and interpret my results.

1 Theoretical Background

1.1 Separation of Powers

Western legal education tends to focus on what judges say in their opinions and less on how judges actually behave (Friedman, 2005). The Attitudinalist school of U.S. judicial behavior assumes judges rule simply based on their policy preferences and that their votes reflect their preferences (Segal and Cover, 1989). However, Strategic Institutionalists point out that courts typically lack the means to independently enforce its decisions (aside from possibly a marshall service to seize assets). This “implementation gap” becomes particularly problematic when enforcing judgments requires active cooperation from one or both of the other branches of government (Maltzman et al., 1999).

If it disagrees with the court’s decision, the executive branch has several options to undermine implementation. First, the executive can simply ignore it and weather the political consequences. For example, Rosenberg (1991) shows that state governors successfully resisted Brown v. Board until the intervention of the federal National Guard. Alternatively, the executive can acknowledge the decision but delay implementation indefinitely or comply only in part. Because courts rely upon litigants to bring them new information about administrative compliance, if the executive makes noncompliance more difficult to detect then it might escape the notice of both the courts and the public.

For its part, the legislature can attempt to override any adverse decision. For questions of statutory interpretation, the legislature can simply pass a new law clarifying its preferred policy outcomes. Constitutional cases are more difficult to override because legislators typically face greater procedural hurdles in passing constitutional amendments. Hettinger and Zorn (2005) object to this portrayal of legislative overrides because in practice legislators ignore many if not most opinions. However, Meernik and Ignagni (1997) find that the U.S. Congress attempted to reverse 22% of Supreme Court judgments and succeeded in doing so in 33% of cases.

The literature is divided on the role of separation of judgments on judicial decisions. Santoni and Zucchini (2004) find that an increase in the number and distance of veto players leads to an increase in Italian Constitutional Court findings of unconstitutionality. Likewise, Cooter and Ginsburg (1996) find that judicial daring rises as the number of vetoes on new legislation increases, suggesting that judges intentionally exploit the opportunity. By con-
Contrast, Carrubba and Zorn (2010) argue that the president’s veto effectively means that his preferences determine the final policy outcome. Meanwhile, Tsebelis (2002) argues that in most cases because judges are appointed by the branches their preferences are absorbed and fall within the win set of the other veto players. It does seem however that dividing appointment authority between the other branches of government insulates judges by allowing them to switch patrons (Guarnieri, 2003; Ferejohn and Weingast, 1992; Bill-Chavez, 2003).

1.2 Public Support

One solution to the enforcement problem is public support for the court. Carrubba (2009) argues that citizens support the judiciary less out of concern for abstract notions such as the “rule of law” and more because they find it in their interests to do so. When governments rely upon or seek public support, refusing to comply with judicial rulings might spark a negative backlash. Vanberg (2001) identifies two conditions in order for popular pressure to effectively check noncompliance. First, the court must enjoy sufficient public support in order to make an attempt at noncompliance unattractive. Second, voters must be able to monitor government responses to judicial rulings effectively and reliably (Vanberg, 2001, p. 347). While public support for courts is generally high (Gibson et al., 1998), Vanberg argues that latter condition can be difficult to achieve if the government does not openly challenge the court but rather implicitly subverts its ruling. Moreover, judicial opinions often contain technical and abstract language, compounding compliance assessment. Finally, the public’s response will depend upon awareness of the case and its complexity (Vanberg, 2001, p. 348).

However, this assumption does not necessarily hold in new democracies. First, as the Gibson et al. (1998) survey suggests, there is a link between older courts and stronger diffuse public support. By contrast, most courts in developing democracies do not possess a reservoir of historical goodwill. If judges are perceived as close to an unpopular regime or corrupt, the judiciary’s reputation can suffer considerable Helmke (2004, p. 1). Shapiro (2008, p. 334-35) points out that judges under authoritarian regimes face a difficult task in maintaining public credibility and avoiding the appearance of subservience whilst not provoking the regime. Even in developed democracies, the public sometimes attacks courts for unpopular rulings. In the U.S., Brown v. Board and Roe v. Wade led to popular criticism of the court and widespread calls for the impeachment of certain justices (Rosenberg, 1991; Friedman, 2009). Stephenson (2004) shows that in these circumstances courts might end up “rubber-stamping” government policies (Carrubba, 2009). In addition, Epp (1998, p. 22) argues that, in addition to broader public support, courts also need highly organized public interest litigation groups as partners who can continually monitor and challenge government attempts at evasion.

Public support can also go beyond an enforcement mechanism to provide judges with direct benefits. After their judicial career, judges with public support can often look to

\[2\] Although Staton (2006) finds that courts sometimes attempt to overcome these problems by issuing press releases.
careers in private practice and law schools as opposed to being dependent upon political elites for their retirement. Trochev and Ellet (2011) document that Uganda judges who actively networked with the lawyers’ association and media received more support against attempts to interfere with judicial independence than their Ukrainian counterparts. While Egypt established judicial review in order to attract foreign investment, Moustafa (2007) finds that judicial support networks allowed the Supreme Constitutional Court to expand its jurisdiction into political questions. Elite legal institutions might also confer awards and recognition upon judges. Indeed, intellectually minded judges such as U.S. Supreme Court Justice Antonin Scalia likely derive as much personal utility from having advanced the theory of originalism in legal academia as from any substantive policy outcome he voted on. Popular chief justices might even find themselves courted to run for president.3

1.3 Removing Independence

Scholars have not yet produced a precise and universally accepted definition of formal judicial independence, but most would agree that it comprises a set of structural arrangements that minimize judges’ dependence on other branches of government and increases the likelihood that they will decide cases impartially (Russell, 2001). However, limits on judicial independence are the norm, not the exception. Political elites also possess a variety of informal means to interfere with judicial independence, including: 1) generalized institutional assaults; 2) personnel manipulation; 3) remuneration manipulation; 4) personal attacks; 5) patronage; and 6) personal communications (VonDoepp and Ellet, 2011, p. 152-153). Not all limits on judicial independence are illiberal or illegal. Many countries have adopted formal measures, such as impeachment, to hold judges accountable for ethics violations. Most judges in Europe serve for limited term, often with the possibility of reappointment (Brown and Wise, 2004, p. 152). Amongst new democracies, the modal term for justices is just nine years, with life tenure a distinct minority (Ginsburg, 2003, p. 50-53). More broadly, civil law countries tend to afford the other branches a larger role in managing court personnel and budgets (Helmke and Rosenbluth, 2009).

Conventional wisdom suggests that without complete independence judges will act like bureaucratic agents.4 However, even under such constraints, we do observe many instances of “judicial activism.” Carrubba et al. (2008, p. 442) note that while a majority of member states could resist European Court of Justice judgments, the ECJ nonetheless rules against member states in around 50% of cases.5

3As did former Chief Justice Reynato Puno of the Philippine Supreme Court, Chief Justice Mohammad Mahfud, MD, of the Indonesian Constitutional Court, and various judges after Mubarak’s ouster in Egypt.

4While informative, the bureaucracy literature does not fully translate into the judicial politics field because courts do not have a single, dominant principal such as a minister. Moreover, judges are not limited to “shirking” or “sabotage” (Strom, 2000, p. 270) but can also veto their “principals.” While Helmke’s strategic defection is similar to Huber and Lupia (2001), there is little parallel in the bureaucratic politics literature to judicial activism even under secure governments. The judicial-relations game might better be described as an interaction between accountability and separation of powers (Fearon, 1999).

5In China, where the 1982 Constitution explicitly gives local people’s congresses the authority to rate and remove judges, plaintiffs have a significantly higher rate of victory in administrative lawsuit than counterparts.
The comparative courts literature has focused on this puzzle from the elites’ perspective. Toharia (1975) and del Carmen (1974) argue that authoritarian regimes allow courts some independence in order to legitimate their. Graber (1993) and Whittington (2009) argue that legislators defer to courts when judicial opinions provide political cover for controversial policy decisions. Verner (1984, p. 486) finds that non-independent courts can be useful as a means of monitoring and disciplining bureaucratic agents. According to Barros (2002, p. 82), even courts that lack independence can mediate intra-elite disputes. Moreover, courts perform other key functions minimally related to judicial independence, such as providing expert interpretations of the law (Legomsky, 1990), managing non-political criminal prosecutions (Solomon, 1996), and maintaining social control (Tate and Haynie, 1993).

None of these theories provides a sufficient explanation as to when judges themselves decide to exercise judicial review. The judicial behavior literature also does not provide a complete answer. Helmke (2002, 2004) finds that Argentine judges are more likely to “strategically defect” and rule against the government when the president appears likely to lose upcoming elections. However, while this might explain judicial behavior during transitions, it does not explain judicial activism throughout the rest of the political cycle. VonDoepp (2006) finds that judges do act strategically in that they do not rule against key elite interests. However, this does not explain judicial behavior in cases that are not explicitly political.

2 Indonesia’s Mahkamah Konstitusi

Indonesia’s 1945 Constitution initially did not grant judges any constitutional review powers and there was no precedent for a constitutional court. At the dawn of General Suharto’s New Order regime in 1966, the Indonesian Judges’ Association (IKAHI) lobbied the Ministry of Justice for constitutional review powers (Pompe, 2005). Instead, the parliament confirmed the ministry’s control over judicial budgets, appointments to the lower courts (Law14/1970). The regime coopted judicial institutions by appointing retired military officers to leadership positions in the Supreme Court. In particular sensitive cases, New Order elites issued vague warnings to judges advising them to be “cautious” (Bedner, 2001, p. 229). When one chamber of the Supreme Court dared to award villagers compensation for damages caused by the Kedung Ombo dam in Central Java, Suharto “suggested” that Chief Justice Purwoto should overturn the decision (Pompe, 2005, p. 152). Incidentally, judicial independence suffered during Indonesia’s “democratic” years as well. The country’s first president, Sukarno, even passed a law allowing the government to interfere in the administration of justice in order to protect “revolutionary interests, the state or national honor, or pressing public interest” (Law19/1964).

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The New Order’s collapse in 1998 initiated a wave of reforms (known as the Reformasi period). The parliament (Majelis Permusyawaratan Rakyat or MPR) adopted four amendment packages that essentially rewrote the 1945 Constitution, particularly expanding its protections for human rights and decentralizing administrative power to the provinces. However, these reforms also fragmented the political elite and increased political uncertainty. After the 1999 elections, no party held a majority of seats in the MPR, while Suharto’s party and its main opponent - GOLKAR and PDI-P - were tied at 26% each. Most dramatically, the MPR impeached the first post-New Order president, Abdurrahman Wahid. In the midst of this chaos, the elite saw the need for a mechanism to enforce the new constitutional rules (Mietzner, 2010, p. 400). The MPR refused to give the Supreme Court constitutional review because of concerns that it had become too corrupted under the New Order (Lindsey, 2002, p. 261). As such, the MPR established a new Constitutional Court (Mahkamah Konstitusi) in the third constitutional amendment package.

Originally, the amendments granted the Mahkamah Konstitusi jurisdiction over: 1) the constitutionality of national statutes (PUU); 2) disputes between state institutions (SKLN); 3) election disputes (PHPU); 4) impeachment proceedings against the president or vice-president; and 5) the dissolution of political parties (Constitution, 1945, art. 24C(1)).

Elections disputes constitute the vast bulk of the Court’s docket, particularly during the 2004 and 2009 elections (Fenwick, 2008). Petitions for constitutional review of laws comprise the second largest item on the docket, consisting of 337 cases. However, the Court only has review jurisdiction over national statutes; challenges to administrative regulations or sub-national laws must be brought in the Supreme Court or Administrative Courts (Constitution, 1945, art. 24A(1)).

Some scholars believe the government has taken advantage of this gap and begun to promulgate constitutionally questionable programs through regulation rather than statute (Butt and Lindsey, 2008), reemphasizing the need for the Court to take government preferences into account.

The Constitutional Court is formally independent and yet is subject to accountability mechanisms. The president, first house of the legislature (Dewan Perwakilan Rakyat or DPR), and Supreme Court each appoint three members to the Court (Constitution, 1945, art. 24C(2)). The Court has nominal budgetary autonomy and can offer justices relatively high salaries (Mietzner, 2010, p. 414). However, these justices are only appointed for five years and can be reappointed for another term (Law24/2003, art. 22). Even amongst constitutional courts in new democracies, five years is extremely short. In theory, divided appointment authority could provide justices with with an alternative means of reappointment if they

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8Thus far, the Court has not heard any impeachment or party-dissolution cases.
9The Court received 657 national election cases in 2009 alone.
10Although the Supreme Court has thus far not exercised its judicial review powers.
11The modal term length for courts established between 1986-2002 is nine years, while none are lower than five years (Ginsburg, 2003, 51-56). The possibility of reelection is not even permitted in most countries, with the exception of Hungary and a few international tribunals (Vanberg, 2005, p. 85).
rule against their original patrons. Indeed, from 2004-2009 the president’s party – the Democrat Party – won a mere 7.5% and was a junior partner in the governing coalition (Sukma, 2010, 67-69). However, in practice this has placed justices in the awkward position of having to campaign for their jobs, such as when Justice Harjono actively lobbied the DPR to appoint him when President Yudhoyono refused to do so (Mietzner, 2010, 415). Moreover, the president can dismiss justices for ethics violations upon the recommendation of the Honorary Council of the Constitutional Court (Law24/2003, art. 23(c)).

The legacy of the New Order also casts its shadow, with political elites occasionally making threats against the justices. Sometimes this comes in subtle forms, such as when President Yudhoyono asked Justice Mukthie Fadjar during his interview to “coordinate” with the cabinet before promulgating decisions (the candidate rebuked the president, but was appointed anyways) (Mietzner, 2010, 416). Former Vice President Jusuf Kalla frequently called justices and vented his anger over their decisions. Even Harjono has complained that “the challenges of this Court initially come from members of parliament who are unhappy [that its decisions have] curtailed Parliament authority to make a law [sic]” (Harjono, 2007). Other threats have been more ominous. After the 2004 election, former Chief Justice Jimly Asshididdique claims that thugs affiliated with former general and failed presidential candidate Wiranto demanded that he be allowed to compete in the runoff election (Mietzner, 2010, 407). After the Court legalized the Indonesian Communist Party, senior military commanders called the justices bemoaning that they had not “coordinated” with the armed forces (Mietzner, 2010, 413). Despite these subtle – and not-so-subtle – pressures, thus far no government or institution has ever crossed the threshold of outright belligerency towards the justices.

Despite these constraints, the Constitutional Court has exercised its powers vigorously, even when compared to more formally independent and prominent courts, such as India and South Africa’s – much less America’s (Venning, 2008). In one of its first decisions, the Court struck down a major reform of the electricity sector (001-021-022/PUU-I/2003; Butt and Lindsey, 2008). It has also legalized the Indonesian Communist Party (011-017/PUU-I/2003); freed a terror suspect after the 2002 Bali bombings (013/PUU-I/2003); stripped the Judicial Commission of its enforcement powers (005/PUU-IV/2006); mandated an open party-list system for the 2009 elections (22-24/PUU-VI/2008); and even required the DPR to allocate 20% of the budget to education (13/PUU-VI/2008). From 2003-2008, the Court revised 74 laws, annulled four completely, and nullified portions of another 23 (Mahfud, 2009). Former DPR member Alvine Lie claims that the DPR is “frightened of the CC” and now DPR committees produce verbatim transcripts in order to preemptively defend laws against challenge (Sherlock, 2010, 172). In short, the Constitutional Court’s strength and actions are not what one would have predicted simply by considering its formal institutional design.

The justices themselves credit public pressure as the key to their success. Justice Muru-

\[12\] Surprisingly, Indonesia’s Mahkamah Konstitusi does not appear in Jackson and Tushnet (2006), the main legal textbook on constitutional law.

\[13\] Even thought commentators at the time of drafting thought this particular provision was meant to be symbolic (Ellis, 2002, 146).
Siaahan called public opinion “absolutely vital” in preserving the Court’s independence (Mietzner, 2010, p. 414). While most Indonesians do not follow the Court closely, in 2005 of those who have at least heard of it more than two-thirds (68%) were satisfied with its performance (IFES, 2005). Asshiddique claims that civil society and NGO support were far stronger than any government or military pressure against the justices. In fact, he even worries that “some judges want to be popular” (Mietzner, 2010, p. 414). In addition to providing diffuse support for judicial independence, civil society has directly rewarded justices for popular decisions. After a high-profile corruption case in 2009, several NGOs and universities presented Chief Justice Mohammad Mahfud prestigious bravery awards (Mietzner, 2010, p. 416). Meanwhile, most of the retired justices have gone on to careers in academia or the non-profit sector. A recent editorial describes Mahfud as “one of the most popular figures in the country” (Pos, 2011) and he is occasionally touted as a candidate for the 2014 presidential elections.

3 Game Theoretic Model

The primary focus of this game is modeling the interaction between judicial review, government evasion, and public support. The game has three actors, each with its own ideal point: the judiciary \((x_J)\), the legislature \((x_L)\), and the executive \((x_E)\) (the public also has an ideal point, \(x_E\), but it does not make any strategic moves). I start the game by allowing Nature to set policy at some status quo point \(x_{SQ}\). The status quo could represent a newly enacted law or a law inherited from a previous government. I make no assumptions about the status quo except that all parties know its location and have a complete set of preferences relative to it. Each actor maximizes ideological utility \(I_i\), with \(i \in \{J, L, E\}\), when the final policy outcome is equal to its ideal point \(\max\{I_i\text{ when }|x_i - x| = 0\}\). Importantly, I assume that before the game begins the executive and legislature had attempted to shift the status quo as close to their ideal points as possible. However, because they face institutional and/or resource constraints, they cannot – or will not – shift the status quo any closer than \(x_{SQ}\).

This departure from past models better reflects the policy environment courts face. In established democracies, courts tend to strike down laws within a few years after their enactment, if at all (Hettinger and Zorn, 2005, p. 17). However, there are reasons why a court might strike down older laws, particularly in developing democracies. First, a revolution or transition could shift the regime’s ideological radically, meaning that current preferences no longer match existing law. Second, the court’s median voter might change after the appointment of a new judge, leaving the judges inclined to revisit past disputes. Finally, the court itself or its constitutional review powers might be relatively new and as such its first chance to review legislation comes only years after passage. Moreover, as shown in the next section, incorporating this parameter reveals equilibria not readily apparent in a tabula rasa.

Following Vanberg (2001, 2005) and Carrubba and Zorn (2010), public support can influence the payoffs to each player. Nature sets the political environment as one in which popular mobilization is either costless or costly, with prior probabilities of \(p\) and \(1 - p\), respectively. In a “costless” environment \((\tau)\), transparency is high, the public can readily evaluate court
rulings and detect evasions, and barriers collective action are low. By contrast, in a “costly”
environment (−τ), either citizens are not able to mobilize or they do not detect the impact
of government evasion. None of the actors know with certainty ex ante whether any particular
evasion attempt will succeed. The beliefs at at each information node are captured by the
parameter qi ∈ (0, 1), with i ∈ [J, L, E].

I account for the direction of public support by making it a function of whether whether
the court’s ruling moved policy closer to the public’s ideal. If the court shifts policy towards
the public’s ideal point (|x_E − x_J| < |x_E − x_SQ|), then the public response will support the
judiciary and oppose any government evasion (β_J > 0, β_L, β_E < 0). On the other hand, if
the public had preferred the status quo (|x_E − x_J| > |x_E − x_SQ|), then it will oppose the court
and support government evasion (β_J < 0, β_L, β_E > 0). If the public is indifferent between
the status quo and the court’s ideal point (|x_E − x_J| = |x_E − x_SQ|), then there is no public
reaction and the game is the same as in a “costly” environment (−τ). Here I assume that
all players know the direction of the public’s ideal point, if not its exact location, because
the public provides information about itself through polls, elections, and amicus briefs to
the court.14

The court’s overall utility consists of four variables: ideological preferences, institutional
integrity, patronage concerns, and popularity. The court’s ideological preferences are
represented by I_J, the distance between the court’s ideal point and the final policy outcome.
When the final outcome is the status quo, I_J = −|x_J − x_SQ|. By contrast, when the court
succeeds in exercising review, its utility becomes I_J = −|x_J − x_J| = 0. The court’s institu-
tional concerns are represented by a payoff C > 0, which represents the reputational cost of
being unable to prevent the government from reverting policy back to the status quo. As
discussed above, the public response to the court (β_J) can either be positive or negative. If
the government disagrees with the court’s decision, it can attempt to impose sanctions (S)
on the judges. Because I am primarily interested in moderately independent or “account-
able” courts, I assume the government can only impose sanctions if both branches agree to
do so.15

For both the executive and legislature, ideological utility is conditioned upon the distance
between the final policy outcome and their ideal point.16 If the court succeeds in its exercise
of constitutional review, the utilities for the legislature and executive are I_L = −|x_L − x_J|
and I_E = −|x_E − x_J|, respectively. By contrast, if either branch succeeds in reversing
the court’s decision, policy reverts back to the status quo the utilities are calculated with

14Note that in the game tree in Figure 1 I portray β_J as positive and β_L and β_E as negative. I do
this simply to emphasize that these variables go in opposite directions. If there is negative public reaction
to the court’s decision, the public response is calculated using −(β_J), −(−β_L), and −(−β_E), respectively.
Moreover, because of the nature of the threshold equations below, β ̸= 0 in this model.

15The expected value of S can either be interpreted as the probability of the judge receiving a sanction of
size S or as the amount of sanctions to be imposed out of a total of S. They are mathematically equivalent,
but it is not clear whether one pathway is more prevalent than the other.

16I implicitly assume that both the executive and legislature know the court’s type. First, governments
can learn much about judges during the appointment and confirmation process. Second, governments have
cadres of lawyers scouring judicial opinions in order to learn the court’s preferences on certain issues. Finally,
in this model the legislature and executive only move after the court.
respect $x_{SQ}$ ($I_L = -|x_L - x_{SQ}|$, $I_E = -|x_E - x_{SQ}|$). If, however, there is public response, then the legislature suffers $\beta_L$ while the executive suffers $\beta_E$. I assume the court has complete information about the government’s preferences from its briefs or other sources of information (Helmke, 2004, p. 35).

In the game, the court moves first and can either exercise review and strike the law down (review) or refrain from exercising review ($\neg$review). In the latter case, the game simply ends as each player receives the same utility it would have under the status quo. Next, the legislature can either accept the decision ($\neg$override) or attempt to override it with new legislation (override) and reinstate the status quo. Overriding the decision entails some cost $\alpha$ ($\alpha > 0$) that reflects the legislature’s internal coordination problem and opportunity costs. In either case, the executive moves. If the legislature overrode the court’s decision, the executive can either join the legislature ($\neg$support) or refuse to implement the legislature’s new law (support). On the other hand, if the legislature did not override the court’s decision, the executive can decide to evade it ($\neg$support) or accept it (support).

When the legislature and executive disagree, I follow Carrubba and Zorn (2010) in finding that the executive has an effective veto over legislative action, but for different reasons. While relatively few countries grant their executives formal veto power (Watson, 1988), Tsebelis and Aleman (2005) show that presidents can significantly influence the policy agenda even when they can only remit comments back to the legislature. Second, executive evasion is harder to detect and punish. Moreover, in practice presidents possess resources, such as control over patronage, that enable them to manipulate legislators (Helmke, 2004, p. 28). As such, when the executive supports the court’s decision, the final policy will reflect the court’s ideal point, whereas executive evasion reverts policy back to the status quo. However, after any evasion attempt, the court still suffers the institutional cost $C$, even when its policy is ultimately implemented.

As single round of the game is reproduced in Figure 1.

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17 I allow the legislature to move first for several reasons. First, legislative override will likely occur soon after the court issues the decision. Such attempts are relatively easy to detect. By contrast, the executive can openly promise to adhere to the court’s decision but delay or obfuscate implementation, making detection of noncompliance much more difficult. Moreover, executive noncompliance can occur over an indefinite timeline, whereas a legislative override is a discrete event.

18 In other words, $\neg$support implies that the executive maneuvers against the judicial decision, while support implies support for it.

19 This assumption is debatable as a final victory for the court might enhance its reputation. However, I count any evasion attempt as imposing a cost because it exposes the court’s relative impotence. Further research should be done to determine exactly when courts suffer institutional damage due to evasion attempts.
Figure 1: Game Theoretic Model
4 Results & Interpretation

I solve this game for eight unique political environments, varying the direction of the court’s decision and the direction of public support (see the Appendix for proofs). Without a loss of generality, I specify that the court can move in four directions. A court sympathetic to the legislature moves policy towards the legislature’s ideal point and away from the executive’s decision ($|x_L - x_J| > |x_L - x_{SQ}| \cap |x_E - x_J| < |x_E - x_{SQ}|$). Second, a court sympathetic to the executive shifts policy towards the executive’s ideal point and away from the legislature’s ($|x_E - x_J| < |x_E - x_{SQ}| \cap |x_L - x_J| > |x_L - x_{SQ}|$). In a one-dimensional policy space, these scenarios only occur when the status quo is located between the other two branches.

Third, a court sympathetic to both branches moves policy closer to both the legislature and executive’s ideal points ($|x_L - x_J| < |x_L - x_{SQ}| \cap |x_E - x_J| < |x_E - x_{SQ}|$). Finally, a court sympathetic to neither branch can move policy away from both the legislature and executive’s ideal points ($|x_L - x_J| > |x_L - x_{SQ}| \cap |x_E - x_J| > |x_E - x_{SQ}|$). These last two occur when the status quo is to either the left or right of both branches. For each of the scenarios, the public can either support the court ($\beta_L \geq 0 \cap -\beta_E < 0$) or oppose it ($\beta_L < 0 \cap -\beta_E \geq 0$).

Because the legislature’s decision to override a court’s decision is not determinative and is subject to executive “veto”, I condense these eight political environments into four scenarios. The Perfect Bayesian Equilibria solutions to the game are provided below, where I compare the beliefs at each information set ($q_i$) with the common prior ($p$):

### 4.1 Silence of the Judges

In this scenario, the court moves policy away from the executive’s ideal point ($|x_E - x_J| > |x_E - x_{SQ}|$), while its effect on the legislature is irrelevant. Public opinion does not support the court ($\beta_L < 0 \cap -\beta_E \leq 0$). The following represent PBE strategies for each player:

**Legislature:** $S_L = [(\text{override}; p \geq \frac{\alpha}{\beta_L}); (\neg \text{override}; p < \frac{\alpha}{\beta_L})]

**Executive:** $S_E = [(\neg \text{support}; p \geq \frac{|x_E - x_{SQ} - |x_E - x_J||}{x_E - x_{SQ}})]

**Judiciary:** $S_J = [(\neg \text{review}; p \geq \max\{-\frac{C_{\beta_J}}{\beta_J}, -\frac{C_{\beta_J}}{\beta_J}\})]

The court is at its weakest when confronted with both a hostile executive and public. Despite the legislature’s ideological preferences, because the legislature almost always attempts to override the court judges faces a serious risk of sanctions in addition to any institutional cost ($p > -\frac{C_{\beta_J}}{\beta_J}$). Even if the legislature does not override the court, the executive will reverse the court’s policy decision. As such, judges believe that judicial review would always be detrimental to their interests ($p > -\frac{C_{\beta_J}}{\beta_J}$) and never exercise review. In dismissing such cases, judges will often cite public opinion or the executive’s interests in protecting its citizens. In fact, judges will sometimes develop a political questions doctrine in order to discourage plaintiffs from even bringing such cases to the courts.

It is difficult to provide concrete examples of this scenario precisely because no player
actually moves at the PBE. We might expect this equilibrium when judges as a cohort have policy preferences outside of the country’s mainstream, such as national security and civil rights during wartime. Both the government and voters often voice support for more draconian measures in response to the needs of war. According to Justice Douglas’ memoirs, the U.S. Supreme Court did not rule the prosecution of a German-American in a military tribunal unconstitutional in *Ex parte Quirin* in part because the Attorney General told the justice that “the Army is going to go ahead and execute the [saboteurs] whatever the Court did” (Douglas, 1980, p. 138-39). Likewise, during the War on Terror U.S. federal courts have consistently rejected reparations claims by foreign nationals who claim to have been victims of extraordinary rendition (e.g., *Arar v. Ashcroft*).

### 4.2 The Blame Game

In this scenario, the court moves policy towards the executive’s ideal point ($|x_E - x_J| < |x_E - x_{SQ}|$), while its effect on the legislature is irrelevant. In theory, the court’s opinion could benefit both branches. However, public opinion does not support the court ($\beta_I < 0 \cap -\beta_L, -\beta_E \geq 0$). The following represent PBE strategies for each player:

**Legislature:** $S_L = [(\text{override}; p \geq \frac{\alpha}{\beta_L}); (\neg \text{override}; p < \frac{\alpha}{\beta_L})]$  

**Executive:** $S_E = [(\neg \text{support}; p \geq \frac{|x_E - x_{SQ}| - |x_E - x_J|}{\beta_E}); (\text{support}; p < \frac{|x_E - x_{SQ}| - |x_E - x_J|}{\beta_E})]$  

**Judiciary:** $S_J = [(\text{review}; p \leq \frac{|x_J - x_{SQ}|}{\beta_J} \text{ and } p \leq \min\{\frac{\alpha}{\beta_L}, \frac{|x_E - x_{SQ}| - |x_E - x_J|}{\beta_E}\}); (\text{mix review, } \neg \text{review}; \frac{|x_J - x_{SQ}| - C}{\beta_J} < p < \frac{|x_J - x_{SQ}|}{\beta_J} \text{ and } \frac{\alpha}{\beta_L} < p < \frac{|x_E - x_{SQ}| - |x_E - x_J|}{\beta_E})]; (\neg \text{review}; p > \frac{|x_J - x_{SQ}| - C}{\beta_J} \text{ and } p > \frac{|x_E - x_{SQ}| - |x_E - x_J|}{\beta_E})]$  

Despite the fact that the decision might benefit the legislature, the legislature attempts to override the decision in order to pander to the public as long as the cost of legislating is small. Likewise, if the public backlash against the court is large relative to the decision’s policy benefits, the executive might feel compelled to evade the court’s opinion. The court will feel less constrained when it believes it is in the low transparency environment ($p$ is low). Its response depends primarily upon the extent to which it believes the executive will attempt to evade its decision ($p < \frac{|x_E - x_{SQ}| - |x_E - x_J|}{\beta_E}$). When this condition is not satisfied, the court will never exercise review. Next, the court must balance the policy gains from judicial review with the threat of public backlash and institutional damage ($p < \frac{|x_J - x_{SQ}| - C}{\beta_J}$). If the court believes that neither branch will evade the decision and it is faced only with public backlash, it will mix between review and not review. While these requirements push the probability of judicial review down, judicial review is still possible if the court is willing to suffer the backlash and institutional costs.

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20It’s perhaps not coincidental that the Supreme Court’s earlier decisions regarding the Guantanamo Bay were relatively deferential and that it only definitively extended *habeas corpus* to detainees in *Boumediene v. Bush* when the public mood had soured on the war and the Democrats appeared poised to win the 2008 elections.
This equilibrium allows political elites to blame courts for unpopular or anti-majoritarian policies. Because the government selects judges, it can screen for candidates who share its preferences (Salzberger, 1993, p. 361-64). In Western democracies, this equilibrium has proven especially useful in resolving controversial issues, such as abortion, flag burning, hate speech, and minority rights (Whittington, 2009). In former socialist countries, neoliberal elites have encouraged judges to dismantle popular social welfare polices (Moustafa, 2007; Hirschl, 2004). As shown in the model, judges reap all of the political backlash for the policy decision while the other branches of government can gain public support by posturing against the court. For its part, when the executive decides to support an unpopular court decision, it often does so by emphasizing its lack of discretion and duty to “uphold the law of the land.”

4.3 Judge of the People

In this scenario, the court moves policy away from the executive’s ideal point ($|x_E - x_J| > |x_E - x_{SQ}|$), while its effect on the legislature is irrelevant. However, public opinion does support the court ($\beta_J > 0 \cap -\beta_L, -\beta_E \leq 0$). The following represent PBE strategies for each player:

**Legislature:** $S_L = [(\neg \text{override}; p \geq -\frac{\alpha}{\beta_L})]$

**Executive:** $S_E = [(\neg \text{support}; p < \frac{|x_E - x_J| - |x_E - x_{SQ}|}{\beta_E}); (\text{support}; p > \frac{|x_E - x_J| - |x_E - x_{SQ}|}{\beta_E})]$

**Judiciary:** $S_J = [(\text{review}; p > \min\{\frac{C}{\beta_J}; \frac{|x_E - x_J| - |x_E - x_{SQ}|}{\beta_E}\}); (\neg \text{review}; p < \min\{\frac{C}{\beta_J}; \frac{|x_E - x_J| - |x_E - x_{SQ}|}{\beta_E}\})]$

Even though the executive dislikes the court’s opinion, public support affords the court far greater discretion. In line with Stephenson (2004) predictions, the public supports the court when its ideal point is closer to the court’s than to that of the elected government. The legislature always panders to public opinion and never attempts to override the decision, thus removing the threat of sanctions against the justices. The executive will again base its decision on the gap between the court’s decision and the status quo, but must also consider the cost of public backlash for evading the court. Under these circumstances, the court can exercise review in either of two circumstances. First, if it believes that the executive will not evade its decisions ($p > \frac{|x_E - x_J| - |x_E - x_{SQ}|}{\beta_E}$), it will always exercise review. Second, if the court believes that the institutional costs due to executive evasion will be low and public support sufficiently high ($p < \frac{C}{\beta_J}$), then the court will exercise review. In the latter case, it is important to emphasize that the ideological benefit the court receives does not factor into its decision.

In moving policy far from the executive’s ideal point, the court must realize that there is a strong chance the decision will never be implemented. Its strategy in orienting its decision

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21U.S. President Eisenhower’s speech in the wake of the 1957 Little Rock crisis provides an excellent example, where he described his duty to enforce *Brown v. Board* as “inescapable,” even though historians believe he secretly supported civil rights (Nichols, 2008).
towards the public seems to be that specific support in the short-term it will eventually translate into diffuse support. This bargain can be especially appealing to courts that possess little preexisting goodwill or courts that have just emerged from under authoritarian rule. The court can signal its sympathy with and value to the public by issuing bold decisions early on that match the interests of key support groups. Indeed, Dahl (1957) expects most new courts in democracies to issue their boldest decision within a few years of their establishment. For example, the Supreme Courts of India and the Philippines both issued several remarkable decisions supporting environmentalism, women’s rights, and other progressive causes soon after their respective experiences under martial law (Gatmaytan, 2003; Rosencranz and Nardi, 2011). The new Constitutional Courts of South Africa and Indonesia have both enforced socioeconomic rights in their constitutions, which many observers had thought were merely hortatory (Sunstein, 2001; Butt and Lindsey, 2008). These decisions often have significant financial and distributive impacts (Brinks and Gauri, 2011). It is questionable whether any these decisions were ever fully enforced – or whether complete compliance was even possible – but they certainly did bolster the court’s image both domestically and abroad.

4.4 All the President’s Judges

In this scenario, the court moves policy towards the executive’s ideal point (\(|x_E - x_J| < |x_E - x_{SQ}|\)), while its effect on the legislature is irrelevant. Moreover, public opinion does support the court (\(\beta_J > 0 \cap -\beta_L, -\beta_E \leq 0\)). The following represent PBE strategies for each player:

**Legislature:** \(S_L = [(\neg \text{override}; p \geq -\frac{a}{\beta_L})]\)

**Executive:** \(S_E = [(\text{support}; p > \frac{|x_E - x_J| - |x_E - x_{SQ}|}{\beta_E})]\)

**Judiciary:** \(S_J = [(\text{review}; p > -\frac{|x_J - x_{SQ}|}{\beta_J})]\)

With the executive and public on its side, the court is in one sense at its strongest. As expected, the legislature will never contradict the popular will by attempting an override. More importantly, the executive will never evade the court’s decision because in doing so it gains both the policy benefit and avoids public backlash. Not only can the court exercise review under these circumstances, but it will always exercise review (\(p > -\frac{|x_J - x_{SQ}|}{\beta_J}\)). There is no risk of either sanctions or institutional costs because neither branch will evade the decision. The only question is how much added benefit public support will provide the court.

This equilibrium describes the basis underlying several popular rationales for judicial review, particularly when governments cannot achieve their policy objectives without judicial review. For example, when governments want to stimulate economic growth, they often create courts in order to provide investors with a credible commitment (Smith and Farralles, 2010). Likewise, political elites utilize courts in order to monitor and discipline bureaucratic agents (Shapiro, 1986; Staton, 2010). All of these outcomes also tend to be popular amongst both citizens. In fact, there is a copious literature finding a relationship between independent
courts and FDI (Porta, 2004; Feld and Voigt, 2003). The results of this model suggest that these mechanisms work correctly when judges and public share elites preferences.

5 Hypotheses and Variables

In this section, I formalize the theoretical discussion above into testable hypotheses (I derive these more formally in Nardi, unpublished). I then test the theories using data from the Indonesian Constitutional Court that I use to measure each variable. In taking this approach, I hope to overcome problems that often plague single-country case studies, such as causal inference, whilst also holding constant other potential explanatory variables, such as legal and political culture, that are impossible to isolate in a cross-national comparison.

For my primary data, I coded a sample of Constitutional Court cases during the period 2004-2009. I included constitutional review (PUU) and institutional disputes (SKLN) cases, but not elections disputes (PHPU) because the latter typically only assess vote tallies. In coding the cases, I used the Constitutional Review in Comparative Perspective web interface and followed the coding manual of Carrubba et al. (2011). I then supplemented this by coding for data relevant to Indonesia, including the number of relevant parties, questions of decentralization, and whether the executive or legislative had filed a statement (see Table 1). The main dependent variable is simply the court’s decision (outcome), which I code as 1 if it finds the government law unconstitutional and 0 if it rejects the petition on the merits or for lack of standing. One key assumption underling this dependent variable is that for courts strategic behavior essentially exhibits itself as deference. If the court decides to exercise review, it does so according to its preferences not because it was forced to (Staton, 2006, 101).

For practical reasons, I worked with official English-language translations of the cases.23 The Court has posted just over half of the cases it had heard before April 2009 in English on its website. I have no reason to believe that the distribution of English-language translations available on the website reflects any substantive bias.24 Moreover, the rate at which the court issued a ruling of unconstitutionality during October 2003 to April 2009 is approximately 27.88%, while for my sample of 119 cases it is 27.73% (see Table 1), suggesting that the sample is at least representative in that respect.

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22http://complaw.wustl.edu

23 Although I did routinely check the original version of the case whenever the English translation was ambiguous.

24 In personal communication with the Constitutional Court clerk, I have been assured that the abrupt halt in mid-2009 comes not from a change in policy or attitude towards transparency but rather the fact that the Court’s translator left that year to study in Australia. Moreover, I have been assured that while the Court tried to translate some of its more significant decisions earlier, no other bias exists in determining which cases were posted.
### Table 1: Descriptive statistics of variables

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#### 5.1 Public Response

As shown discussed, public support enhance the court’s bargaining position by making it less attractive for the executive or legislature to evade the court’s decision. Of course, public attitudes towards particular constitutional court cases are difficult to gauge. The number of petitioners filing suit (petitions) is an unreliable indicator because it often depends as much on legal technicalities, such as standing and class action rules, as it does on actual support for the suit. Ideally, we would want polls tracking public opinion for every case, but even scholars of the U.S. Supreme Court lack such data. More importantly, judges themselves possess limited information about public opinion. A very direct source of information comes from the number of amicus briefs (called “related party” statements in Indonesia) filed for or against constitutional review. Because filing a brief is not costless, the presence of such briefs is a useful indicator of how much citizens who are not directly involved in the case care about its outcome. Moreover, as noted by Epp (1998), in assessing public support the court is more concerned with active interest groups – exactly the class likely to file a related party brief – than the public at large.\(^{25}\)

Using the number of statements filed in support of the petitioner (amicus), I propose the following:

**Observation 1a:** All else equal, as the number of amicus briefs in favor of the petitioner increases, the court becomes more likely to find a law unconstitutional.

A hostile public can force the court, executive, and legislature to all act against their policy preferences. Because related parties in Indonesia can file briefs both on behalf and against

\(^{25}\)Another indicator of public opinion is pundit commentary in the media. Since the fall of the New Order, Indonesia’s media is perhaps the freest and most vibrant in Southeast Asia. While newspapers and magazines do not comment on every case the comes before the Constitutional Court, they will certainly comment on major cases. In the future I plan to code editorials from several sources, including *The Jakarta Post*, *Tempo*, and *Kompas* to gauge their positions on court cases.
the petitioner, related party statements also provide information about public opposition to constitutional review. Using the number of statements filed against the petitioner (\textit{negamicus}), I add a corollary:

**Corollary 1a:** All else equal, as the number of amicus briefs opposing the petitioner increases, the court becomes less likely to find a law unconstitutional.

However, public support or hostility alone is insufficient to sway the court and other branches of government. The public can better translate its preferences into political action in a transparent policy environment and when coordinating costs are low. While these are difficult concepts to quantify, I follow Vanberg (2001) and Carrubba and Zorn (2010) in arguing that the public is more likely to react to judicial decisions involving more comprehensible legal disputes. Vanberg (2005, 104) classifies the following as “complex” areas of law: economic regulation; state-mandated social insurance (e.g., unemployment, health, retirement); civil servant compensation; taxation; federal budget issues; and party finance. By contrast, the following are considered “not complex”: institutional disputes; family law; judicial processes; individual rights; asylum rights, and military conscription. For Indonesia, I add elections eligibility disputes and corruption prosecutions to the roster of “not complex” cases that often appear before the Constitutional Court.\textsuperscript{26} I code “complex” cases as 0 and “not complex” cases as 1 (\textit{transparent}). Using this coding, I propose the following:

**Observation 1b:** All else equal, as the complexity of the law increases, the court becomes less likely to find a law unconstitutional.

It is important to emphasize that, unlike Vanberg (2001) and Carrubba and Zorn (2010), this hypothesis does not predict that the court automatically receives public support in a high transparency environment. After all, transparency can empower opponents of the court just as easily as supporters. As such, the measure of public support for the court must be interacted with the level of transparency, such that public support – through the number of amicus briefs – will only matter when the level of transparency is high.

Perhaps my most counterintuitive claim is that, when sufficiently large, the public response to judicial decisions can overwhelm the actions other two branches of government. The court’s beliefs about its ability to garner mass public goodwill probably go beyond related party briefs and the complexity of the law. In fact, because the court could still benefit more from public support than enforcement of the decision, its decision should not depend upon the level of transparency. Rather, the court will look for particularly high-profile or symbolic cases that demonstrate the court’s relevance to and sympathy for the wider public. For example, the court might believe that enforcing a socio-economic right might resonate strongly with citizens, especially in developing countries, even though it realizes the decision alone will not resolve the particular socio-economic problem.

In practice, assessing the importance of cases is a subjective exercise. Moreover, one must be careful to measure judges’ perceptions of the significance of cases, not historians’.

\textsuperscript{26}These elections cases typically involve constitutional challenges to thresholds for parties or candidates, so the public can assess the outcome by noting whether certain parties or candidates were allowed to compete in the elections.
In order to measure this belief, I assume that writing judicial opinions is costly and that longer opinions are costlier than shorter ones. Writing judicial opinions takes time and research and, given all of the other demands on judges’ time, they will invest in more and/or longer opinions when they view the case as more important. Moreover, judges will need to spend more time defending their logic in controversial cases, implying longer cases overall. I used a Word Counter program to count the number of words in the original Indonesian version of each case \( \text{words} \).\(^{27} \) Second, judges who disagree with the majority decision will be more likely to dissent in important cases in order to send a signal to supporters regarding their true allegiance. By contrast, judges have little incentive to dwell on trivial or obvious cases. Because the Indonesian justices sign their dissents, I can identify dissenting votes in each case \( \text{dissents} \). Overall, there was at least one dissent in 46 of the cases in my sample. Using the number of words and dissents in an opinion, I propose the following:

**Observation 1c:** All else equal, the court is more likely to find a law unconstitutional as the number of words in the judicial opinion increases.

**Observation 1d:** All else equal, the court is more likely to find a law unconstitutional as the number of dissents in the judicial opinion increases.

As seen in Table 2, both \text{words} and \text{dissents} are positively correlated with \text{outcome}, suggesting a possible relationship.

### 5.2 Interbranch Relations

While both the legislature and executive can respond to the court, the executive ultimately determines whether the decision is ultimately enforced. Even when it is not the defendant of a suit, it can and often does file a brief before the court whenever its interests are implicated. While the executive often has access to copious legal resources, filing a brief is not costless, especially for governments in developing countries. As such, an executive brief can be taken as an indicator of the executive’s preferences in the case. In my sample, the Indonesian government filed a statement opposing constitutional review in 73.95\% of cases (\text{exopp}). Using the number of executive briefs filed before the court, I propose the following:

**Observation 2a:** All else equal, the court is less likely to find a law unconstitutional when the executive files a brief in support of the law.

By contrast, Carrubba and Zorn (2010) the legislature’s preferences should not affect the court’s decisions. According to this logic, judges consider legislative briefs uninformative because they realize that the legislature cannot affect the final outcome without the cooperation of the executive. The DPR can and sometimes does file statements before the Constitutional

\(^{27}\)I take the log of the number of words because of skewed distribution. The amount of words necessary to convey the same idea does vary considerably between English and Indonesian (Huber and Shiman, 2002, 178).
Court, although less frequently than the president (63.87% of cases) (legopp). Using the number of legislative briefs filed before the court, I propose the following:

**Observation 2b:** All else equal, amicus briefs filed by the legislature before the court will not impact the court’s decision.

This hypothesis might not hold if legislative briefs are simply a reflection of popular will, in which case it would be difficult to ascertain whether the court is responding to legislative threats or popular opinion. However, legopp is not correlated with neither amics nor negamicus, implying a separate causal pathway.

A brief look at the data in Tables 1 and 2 already suggests some problems. First, exopp and legopp are highly correlated (0.79), which might make theoretical sense but will introduce bias into the regression estimates. Second, exopp, approval, legopp are all positively correlated with outcome, implying that the court is more likely to find a law unconstitutional when either the executive or legislature file a statement in support of it. If Observation 2a were true, we would expect the 27% of cases in which the court exercises constitutional review to fall within the 36% of cases in which the executive did not submit a statement. I discuss possible interpretations for this discrepancy below.

### 5.3 Observation 3: Sanctions

When governments are able to sanction judges for their decisions, judges become more reluctant to rule against government preferences. Quantifying sanctions remains a problem because of the diversity of sanctioning mechanisms against judges. However, the primary sanctioning mechanism available to the president and DPR is the decision whether or not to reappoint sitting justices. If the prospect of not being reappointed deters judges, we should see judges ruling in favor of the government more often as they reach the end of their first five-year term. Using the date of the case as a control variable (date), I propose the following:

**Observation 3:** As judges approach a deadline for decisions on their reappointment or retirement, they will be more likely to decide cases in accord with executive and public preferences.

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28I have not found tracking polls for the DPR’s approval ratings so I cannot test Corollary 2a using legislative polls. Moreover, I am not sure how the DPR submits statements to the Court. The DPR is notoriously divided and can only pass laws through consensus (Sherlock, 2010, 168-69), which would limit its ability to agree upon a statement. I suspect statements are instead filed by the DPR’s Judicial Committee, which has a corporate identity separate from the parties or larger DPR (Sherlock, 2010, 167).
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Table 2: Correlation matrix of variables
I use a logit estimator with robust standard errors.

6 Models & Results

First, I approximate Vanberg (2001, 2005) and Carrubba and Zorn (2010) as best I can with my data to assess whether their models extend to Indonesia. As is apparent in Table 3, I get strikingly different results. For the first two Vanberg models, relevant party statements on behalf of a petitioner slightly decreases the chances that the court will exercise constitutional review, although the effect is indistinguishable from zero. When taken alone executive or legislative statements actually significantly increase the chances of review.

Table 3: Approximation of Vanberg and Carrubba & Zorn with Indonesian data

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Note: ***Significant at p < 0.001, **significant at p < 0.01, * significant at p < 0.05.
Two-tailed test. Robust standard errors in parenthesis.

However, when both variables are included in models 3 and 4 the direction on all of the coefficient estimates matches what Vanberg and Carrubba and Zorn predict. Executive statements decrease constitutional review, while legislative statements increase it (the null hypothesis was no effect). Relevant party briefs in support of the petitioner have positive effect, while briefs against the petitioner have a negative effect, although neither effect is significant. A more transparent environment/less complex law increases the chances of review, although this result is not statistically significant. Overall, the weak results suggest at the
very least that the models used for the German Constitutional Court and the U.S. Supreme Court do not translate directly to Indonesia’s Mahkamah Konstitusi.

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N 119 119 119 119 119 119

Note: ***Significant at p < 0.001, **significant at p < 0.01, * significant at p < 0.05.
Two-tailed test. Robust standard errors in parenthesis.

Next, I rerun the model incorporating the additional variables described in the previous section, with results reported in Table 4. Executive statements in support of a law decrease
the odds of constitutional review, while legislative statements increase the odds of constitutional review. Related party briefs filed against the petitioner also consistently decrease the odds of review, although this effect is not significantly different from zero. However, the direction of amicus and transparent change depending on the model, suggesting the results are extremely sensitive to the introduction of new variables. Amongst the new variables introduced in models 4 and 5, both dissents and words have a positive effect, suggesting that as they increase the odds of constitutional review also increases, but neither is significantly different from zero. The final variable introduced in model 6, date, has a positive coefficient, which contradicts the predictions of Observation 3, although the estimate is not significant. It is not yet clear whether the lack of robust results stems from problems with the theory, the data, or the model itself. There are theoretical reasons to suspect that the variables used in Vanberg (2001, 2005) and Carrubba and Zorn (2010) for Western courts might not work as well in Indonesia. For example, because the Constitutional Court is still a new institution and Indonesia has had no history of public interest litigation, related party statements might not provide a reliable measure of public support. Moreover, filing a related party brief is not costless, which might preclude much of the population from ever filing one.

Upon reading the cases it seems clear that a large number of petitioners either filed “trivial” challenges or, even worse, petitions asking the court to sanction corruption or human rights abuses. While impossible to quantify, the quality of the petition might explain much about the Court’s decision to grant a request for constitutional review. By contrast, various filtering mechanisms, including certiorari and legal counsel, probably filter out trivial cases from the dockets of the U.S. Supreme Court and German Constitutional Court. As such, the sample might contain many cases that simply were not taken seriously enough to motivate strategic responses by the other branches of government or the public.

7 Conclusions

TBD...

References

Editorial: Focus on the constitution. The Jakarta Post, August 2011.


