

Economic Analysis of Law Review

Government Appointment Discretion and Judicial Independence: Preference and Opportunistic Effects on Brazilian Courts¹

Crerios de Nomeação e Independência do Judiciário: Preferência e Efeitos nos Tribunais Brasileiros

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RESUMO

A prolífica literatura sobre independência judicial de fato sente falta de uma variável-chave para explicar o viés político: poder discricionário do governo sobre a nomeação de juizes da Suprema Corte. Neste artigo, exploramos uma característica distinta do sistema judiciário brasileiro para avaliar o viés político devido ao critério de nomeação do governo. Como existem dois tribunais, o STF (Supremo Tribunal Federal) e STJ (Superior Tribunal de Justiça), que lida com questões semelhantes e têm diferentes restrições sobre a nomeação de seus membros, é possível comparar o grau de influência política para que eles estão sujeitos. Nós testamos (1) se existem diferenças no grau de influência política, dependendo do critério do Presidente sobre a nomeação de uma justiça e (2) se os juizes ativamente beneficiam o partido do Presidente que os nomeou. Encontramos evidências do efeito do primeiro, mas pouco do segundo.

Palavras-chave: Independência do Judiciário, Suprema Corte, Critério de Nomeação

JEL: K40

ABSTRACT

The prolific literature on *de facto* judicial independence misses a key variable to explain political bias: the government's discretion over the appointment of Supreme Court Justices. In this paper, we explore a distinct feature of the Brazilian judiciary system to assess political bias due to government appointment discretion. As there are two courts, the STF (Supreme Federal Court) and the STJ (Superior Court of Justice), that deal with similar matters and have different restrictions on the appointment of their members, it is possible to compare the degree of political influence to which they are subject. We test (1) whether there are differences in the degree of political influence depending on the president's discretion over the nomination of a justice, and (2) whether the justices actively benefit the party of the president who has appointed them. We find evidence of the first effect, but little of the second.

Keywords: Judicial independence, Supreme Court, appointment discretion

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1. Introduction

This paper explores a Brazilian idiosyncrasy – the existence of two superior courts with different appointment rules – to investigate the presence of political influence on judicial decisions. The basic idea is that if there are more strict rules on the appointment process, then the Executive discretion is reduced, which lessens the degree of political influence on the court. As the competences of both courts overlap, they are frequently called upon to rule on similar matters, thereby allowing us to identify the effect which arises from the differences in the rules regarding the appointment of their members. Thus, we investigate a fundamental aspect of judicial independence, which is, admittedly, of great relevance to economic development, but hard to measure empirically (Feld & Voigt 2003; Voigt 2013; Shirley 2013; Robinson 2013).

Brazil has two separate and mutually independent superior courts, the Supreme Federal Court (Supremo Tribunal Federal in Portuguese; henceforth “STF”) and the Superior Court of Justice (Superior Tribunal de Justiça in Portuguese; henceforth “STJ”), the former of which is a constitutional court and the latter, an appellate court. Competences would be well defined if not for the hypertrophy of the Brazilian Constitution, which includes several topics that are usually treated elsewhere by ordinary laws. Consequently, both courts mainly work as appellate courts, with an extensive overlapping of subjects and cases. One essential difference between STF and STJ is the degree of discretion of the Executive over the appointment of their members, which allows for the investigation of the effect of this institutional feature on judicial independence.

The Executive’s influence on the decisions of those courts can take place via two different effects: the preference effect and the opportunistic effect. The preference effect is the phenomenon that occurs when a president appoints a justice that has a political or ideological position closer to his/hers, resulting in a preference alignment between the Executive and the court. The opportunistic effect takes place if the justice changes his/her decision according to the political context, that is, according to the political group incumbent in the Executive. While the literature is prolific on the identification of the former effect on constitutional courts, little is said about the latter.

Initially, this paper investigates if, indeed, the political bias is greater at the STF than at the STJ, given the difference in the appointment rules for the members of those courts. Then, we verify whether it is possible to find evidence of the opportunistic effect, in which justices actively benefit the party responsible for their appointment to the court.

This paper is organized as follows. Section 2 presents a discussion on the role of the judiciary in economic development, emphasizing the institutional characteristics that are relevant to the purpose of this paper. Section 3 discusses the empirical strategy, including hypotheses, the questions we seek to answer, and the database we use. Section 4 presents and discusses the results. Section 5 concludes this paper.

2. Independence of the Judiciary: Relevance and Characteristics of the Brazilian Superior Courts

2.1. Independence of the Judiciary and economic development

A myriad of studies has explored the relationship between development and the quality of the legal system and the judiciary. Within this literature, the investigation of characteristics and effects of judicial independence has particularly developed over the last decade (Feld & Voigt 2003; Hayo & Voigt 2007; Robinson 2013), mainly by distinguishing and measuring the *de facto* and *de jure* dimensions. An independent judiciary is a mechanism whereby promises are turned into credible commitments in all the three dimensions in which judicial intervention may occur: the relationship between individuals, the relationship between individuals and the State, and the conflict between components of the State, all mediated by an impartial judge. In all those situations, the credibility of promises, for example, the non-expropriation of rights, leads to increased investment and greater gain by specialization by reducing transaction costs. This is the foundation of a positive relationship between judicial independence and economic development.

For the measurement of the *de facto* independence of the judiciary, Feld and Voigt (2003) use eight variables that, in a complementary way, capture the ability of the judiciary to act independently. These variables measure the length of justices' tenures, the size of the courts, the payment of judges, and their stability with regard to external conditions, the stability of legal rules (excessive changes may represent interference, by legal means, in judicial decisions), and the requirement of additional actions by other state bodies to enforce the courts' decisions.

This long list does not contemplate a variable that has a plausible and fundamental importance for the independence of the courts: the process of appointment of their members. As Amaral-Garcia et al. (2009: 383) note, "the process of recruitment and appointment of judges is a major variable in the design of [...] courts". It is common, in many jurisdictions, for the Executive to have some discretion over the appointment of judges to superior courts. There is, however, considerable variability in the degree of discretion that is given to the Executive in the formation of courts, but it is expected that the higher the discretion, the greater the degree of influence over judicial decisions and, consequently, the lower the degree of judicial independence. Institutional design possibilities range from direct instatement by the Executive, which may or may not have to be ratified by the legislative (usually the upper house – the Senate), to the complete removal of any appointment right by the Executive, such right then being fully vested in the legislative, the judiciary, or the citizens through direct vote.

The degree of political influence at the time of the appointment decreases with the autonomy of the justice and length of term, one of the variables used by Feld and Voigt (2003) to measure the *de facto* independence of the judiciary. In Brazil, as in the United States and other countries, the Executive is free to appoint the members of the Supreme Court. However, once instated, it is extremely difficult to remove a judge: in the United States, it has never happened; in Brazil, only in the dictatorial periods of the 20th century. Thus, in such jurisdictions, the moment of the appointment is crucial for the manifestation of political bias, as indicated by the work of Corporale and Winter (1998) and Spiller and Gely (1992) on the U.S. Supreme Court, and Salzberger and Fenn (1999) on the English Court of Appeal.

The model in force in Brazil provides a unique opportunity for empirical analysis with regard to the effect of the appointment process on the independence of the judiciary, since there are two superior courts (STF and STJ) with different rules for the appointment of their members, which are associated with different levels of discretion of the Executive. Still in this section, the institutional setting that allows us to identify the variation in the level of discretion of the Executive will be presented in detail. For now, it is necessary to show the mechanism through which the choice of the members of the judiciary, *ceteris paribus* the other dimensions of the *de facto* independence of the judiciary, can affect judicial decisions.

The capacity of the Executive to appoint members of the higher courts can affect judicial decisions in two ways: by the selection of judges whose preferences are aligned with those of the Executive, herein called “preference effect,” and the ability to influence judicial decisions, contingent upon the political context (i.e., according to the incumbent party), herein called “opportunistic effect.” In the former effect, the judge’s decisions are a function of their political (and policy) preferences, thus independent of the political context in which they are taken, as in the attitudinal model (Segal and Spaeth, 2002).

The opportunistic effect, on the other hand, reflects a bias in judicial outcomes that cannot be attributed to the judge’s preferences, but to the interest, in a particular case, of the political group that appointed the judge. That is, regardless of preferences, judges may issue decisions that favor the Executive precisely because their appointing party is the incumbent. Conversely, they may decide in ways that harm the Executive to inflict loss (political or financial) on an opposing party. This type of bias is therefore responsive to the casuistic political interest of the party that appointed a particular judge.

In both effects, the decision bias removes independence from the judiciary, since it results in greater alignment with the Executive. However, as the opportunistic effect makes judicial decisions sensitive to the incumbent in the Executive, it is arguably more damaging to the *de facto* independence of the judiciary. If the opportunistic effect is present, it means that judges actively use their position to favor the party of the president who appointed them. The preference effect, on the contrary, may just reflect a social choice mediated by the electoral process. If we consider that the president was elected by a majority of voters, then his/her preferences likely represent those of the majority. Thus, by transitivity, a judge who shares the same preferences as the president’s will also have his/her preferences aligned with those of the population that elected the president.

The literature is especially prolific in the analysis of the political (and policy) content of the decisions of the U. S. Supreme Court. Several models of judicial behavior, including perhaps the most popular, the attitudinal model (Posner, 2008:19-56; Segal and Spaeth, 2002:86-97), supply researchers with a multitude questions, which are verified by the empirical literature. As Epstein et al. (2013:90) point out, “[v]irtually no aspect of the work of the Supreme Court has escaped extensive, one might even say obsessive, analysis”.

There are, however, only a handful of studies that manage to separate the preference and opportunistic effects, which is probably due to the difficulty in identifying situations where political bias would manifest itself differently for each of those effects. One of these studies is that of Amaral-Garcia et al. (2009), who find that the judges in the Portuguese Constitutional Court are highly sensitive to the incumbent party in the Executive. While the authors never use

the term “opportunistic effect”, which we coined, they clearly had the same idea, as they note that “[...] not only does party affiliation matter in terms of aligned preferences, but some opportunism takes place. That is, party politics is more important when the stakes are higher.” (2009:402). Moreover, this analysis has never been conducted in the context of the Brazilian judiciary, and this is one of the main contributions of this paper, as detailed in Section 3, since our empirical strategy allows testing for the opportunistic effect.

The analysis of political bias in judicial decisions is particularly important, since, for the State’s commitment not to expropriate private property to be credible, courts should be an impartial medium of disputes between the State and its citizens. If the courts systematically favor the State in their rulings, often in violation of the law, the balance of power between State and private parties, already precarious under normal circumstances, would be harmfully undone. The consequences of this imbalance would be particularly harmful to economic development, since the commitment to the legal guarantee of private investment would be impaired. This proposition is particularly clear in North & Weingast (1989), in the following passage: “[f]or economic growth to occur the (...) government must not merely establish the relevant set of rights, but must make a credible commitment to them.” (North & Weingast, 1989: 803).

There is a vast empirical literature on judicial independence. In common law countries, apart from the already mentioned studies on the U.S. Supreme Court, it is possible to find studies on Canada (Green & Alarie 2008), the UK (Salzberger & Fenn 1999) and on the Israeli Constitutional Court (Eisenberg et al. 2011; Weinshall-Margel 2011). In civil law countries, there are studies on the Portuguese Supreme Court (Amaral-Garcia et al. 2009), on the Italian (Breton & Fraschini 2003; Fiorino et al. 2007), the French (Frank 2009), and the Chilean constitutional courts (Carrol & Tiede 2011). As a common ground, all those authors try to ascertain the level of political influence on those courts, but by different means. Some, such as Amaral-Garcia et al. (2009), explore the variation in the nature of the appointment of justices (whether a judge was chosen by the parliament or appointed by his/her fellow judges) to identify the presence of political bias. Others, such as Carrol & Tiede (2011), make use of an exogenous change (a constitutional reform) to identify such effects. None of these studies, however, explores the variation in the president’s discretion over the appointment of justices as a source of political influence on judicial decisions, something that the idiosyncratic organization of Brazilian superior courts allows for.

An interesting, albeit imperfect, comparison to what we propose here is found in the literature that investigates institutional aspects of U.S. state supreme courts. Many studies, such as Brace & Hall (1995) and Choi et al. (2010), explore the variation on the rules of appointment of judges (election or gubernatorial appointment) to explain judicial behavior. However, while the focus of this literature is usually on the consequences of an elected, rather than appointed, judiciary, here our focus is on the consequences of giving the Executive more or less latitude when appointing justices.

The literature on the Brazilian Supreme Court, although not nearly as extensive as that on the U.S. Supreme Court, has been developing over the past decade. Among the detailed small N studies is Kapiszewski (2012), who compares the behavior of the Argentinian and Brazilian supreme courts through the post-authoritarian period (the mid-1980s) and their relationship with the Executive during the liberalizing reforms of the 1990s. The author notes that,

unlike in Argentina, in Brazil since the 1930s successive executives fostered the development of a *statesman* court, a strong court with high perceived legitimacy before its audience.

Also worthy of mention is Matthew Taylor's extensive work on the Brazilian judiciary. To name just a few of his studies, Taylor (2006) analyses the multiple veto players in the context of constitutionality actions (abstract review) in the STF and in Taylor (2008), the author conducts a quantitative analysis of constitutionality actions in the STF, highlighting the main actors that check policies through this means. In addition, Kapiszewski and Taylor (2008) provide a survey of judicial politics in Latin America, encompassing studies published between 1980 and 2006, with an emphasis on Brazil, Argentina, Chile, Colombia, and Mexico.

More recent studies of judicial politics in the context of the STF include Jaloretto & Mueller (2011) and Oliveira (2009). Also, Arlota & Garoupa (2014) examine cases of conflicts between the Federal Government and the States to detect political influences in the court. Finally, Ferreira & Mueller (2014) and Desposato et al. (2015) estimate ideal points for STF justices, with the latter concluding that a reform that gave some docket control to the court enabled the emergence of political cleavage. None of these studies, however, explores the different degrees of the president's discretion over the appointment of justices.

2.2. Characteristics of the Brazilian superior courts

At the top of the organization of the judiciary, the Federal Constitution of 1988 set up two separate and mutually independent institutions, the Supreme Federal Court (STF) and the Superior Court of Justice (STJ). Hierarchically (*de facto*, not *de jure*), it can be said that the Supreme Court decisions override those of the STJ, since the STF may reverse a decision of the STJ, but not vice versa. However, within their competences, each court is at the apex of their respective hierarchy.

The STF is a constitutional court, that is, its role is to enforce the Constitution by hearing some types of appeals (concrete judicial review) and actions that directly challenge the constitutionality of laws (abstract judicial review). On the other hand, the STJ is purely an appellate court. Its role is to harmonize the interpretation of federal laws in the country. Before the Constitution of 1988, the STF was in charge of both roles, but because of the overload of the legal system, the constituents decided to create the STJ to share some of the former competences of the STF. Thus, at least in theory, the competences of both courts are well defined (see Articles 102 and 105 of the 1988 Constitution): the STF has the final word on constitutional matters and the STJ on non-constitutional matters. Notwithstanding, the constituents in 1988 opted to include in the Constitution topics usually treated by ordinary laws, which led to a hypertrophy of the Constitution, thereby placing an enormous burden on the constitutional court.

Thus, the intended distinction between a constitutional court and a higher appeals court does not work well in Brazil, as the amount of constitutional matter is so extensive that the STF ends up acting much like a higher court of appeal. According to the "*Supremo em Números*" Report, the "purely" constitutional (abstract judicial review) caseload of the Supreme Court represents just 0.51% of all cases that have gone through the court between 1988 and 2009. In contrast, appeals on lower courts decisions (including grievances, embargoes, and the Extraordinary Appeal (RExt)) accounted for 91.69% of the caseload of the court in the same period. Thus, according to the report, "quantitatively, (...), the Supreme Court is not a 'constitutional

court' in the original sense in which such institution was conceived (...), it is much closer to a "supreme appellate court" (Falcão et al. 2011: 21).

Besides the different jurisdiction, the STF and STJ differ in several other aspects. For example, in the Supreme Court there are 11 justices who are divided into two panels. The STJ has 33 justices who are divided into three sections (six panels) according to the subject of the case. For the purpose of this paper, one of the fundamental differences between the STF and STJ are the rules for the appointment of their members.

The Brazilian Federal Constitution, in relation to the STF, states that:

Article 101. The Supreme Federal Court is composed of 11 justices, chosen from among citizens over 35 and under 65 years of age, of notable juridical learning and spotless reputation.

Sole paragraph. The justices of the Supreme Federal Court shall be appointed by the President of the Republic, after their nomination has been approved by the absolute majority of the Federal Senate.

As for the STJ, the text of the Constitution differs:

Article 104. The Superior Court of Justice is composed of a minimum of 33 justices.

Sole paragraph. The justices of the Superior Court of Justice shall be appointed by the President of the Republic chosen from among Brazilians over 35 and under 65 years of age, of notable juridical learning and spotless reputation, after the nomination has been approved by the absolute majority of the Federal Senate, as follows:

I – one-third shall be chosen from among judges of the Federal Regional Courts and one-third from among judges of the Courts of Justice, nominated on a list of three names prepared by the Court itself;

II – one-third, in equal parts, shall be chosen from among lawyers and members of the Federal Public Prosecution, the Public Prosecution of the states, the Public Prosecution of the Federal District and the Territories, alternatively, nominated under the terms of article 94.

Thus, an important distinction regarding the appointment process of the two courts becomes evident. While at the STF the only restriction on the presidential nomination (in addition to age and nationality, common to both courts) is the nebulous "notable juridical learning and spotless reputation," the STJ has well-defined ratios relative to the professional origin of future justices. Moreover, the STJ conducts internal elections to choose the names that form the triple list, thus making its nomination process even more different from the STF's. Articles 10 paragraph VI, 26 and 27 of the STJ's Internal Rules of Procedure establish and regulate the internal elections to compose the triple list. It is important to emphasize how relevant this mechanism is, since the choice of the president is restricted to a prior selection by the current justices, thus reducing the possibility of the Executive's influence on courts' decisions.

The constitutional rules give the president greater discretion over the appointment of judges to the STF when compared to the STJ. In this way, the different appointment rules have implications for the degree of autonomy of each court and, therefore, for the effectiveness of

the judiciary in exercising its role as a mediator of the relations between the State and its citizens. One can expect that, all other things constant, the STF is more subject to influences from the Executive than the STJ.

Still on the institutional setting, it is important to highlight that justices in both courts enjoy life tenure, with mandatory retirement at seventy⁴. In addition, as previously noted, it is very difficult to remove a sitting judge. As Kapiszewski (2008:106) points out, only in the authoritarian periods of Brazil's history such event ever took place, the most recent one being in 1965-9, when the military government increased the STF's size from 11 to 16 justices and later forced three judges to retire. The STJ, created in 1988, never had a judge forcibly removed from its ranks.

A question frequently raised in the U.S. Supreme Court literature (Epstein & Segal 2005; Cameron et al. 1990) is the extent to which the Senate constraints the choice of the president when appointing a justice. As the mechanism of confirmation is very similar in Brazil, a perfectly valid question would be if, as in the U.S., the Senate effectively constraints the choice of the Executive. We, however, argue this is not the case. In Brazil, the relationship between the Congress and the Executive takes a peculiar form known in the political science literature as "coalitional presidentialism" (Power 2010). As Raile et al. (2011) show, the president's support in the legislative depends on his ability to keep his coalition satisfied and, to achieve that, he has two main tools: pork and coalition goods (cabinet positions). Also, the authors note that "[t]he reduced importance of ideology, evident in the party-switching behavior of the legislators [...] adds to the value of pork" (2011:326). Therefore, the ease to confirm presidential appointments to the judiciary (and other government agencies) is likely to be a reflection of the amount of pork distributed in that period. Accordingly, a president could easily adjust the pork should he desire to make a more controversial appointment.

A brief note on the day-to-day operation of the STF and STJ must be made before proceeding. When an appeal reaches the STF, a Justice Rapporteur is randomly assigned to the case. It is her (or his) job to make a summary of the case and present it to his/her peers. In the trial (*plenary sessions*, as they are known), he/she is the first to cast his/her vote, followed by his/her peers in reverse seniority order (meaning that the most recent appointee votes first). The president of the court only votes if he/she chooses to or if there is a tie. The Rapporteur can grant motions *in limine* (which can be appealed against) and handles the preliminary proceedings of the case.

At the STJ, the setup is quite similar. The main difference is that the STJ, unlike the STF, is divided into panels according to the subject of the case. Therefore, if there is an appeal on, for instance, a criminal law case, it will be heard by the specific panel that handles this type of case. As in the STF, a Justice Rapporteur is randomly assigned, but he/she is chosen from among the justices that form the panel that handles that area of the Law.

3. Empirical Strategy

3.1. Questions and hypotheses

⁴ The retirement age was increased to seventy-five in May 2015 by a constitutional amendment (PEC 457/05)
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As seen in Section 1, this paper aims to identify the effect of government discretion over the appointment of justices on judicial decisions. To accomplish this task, we formulate two fundamental questions:

Q1: What is the effect of government appointment discretion on the degree of political bias of the courts?

Q2: Are the justices at the superior courts of Brazil responsive to casuistic political interests?

The first question measures the effect of appointment discretion, but it does not distinguish between the preference effect and the opportunistic effect. The second question measures the opportunistic effect and, hence, allows for the decomposition of both effects.

In order to empirically answer these questions, we claim that the decisions of both courts, the STF and STJ, are comparable, that is, it is possible, within a certain topic of Law, to compare the final decisions from both courts. To make this comparison more plausible, the type and the subject of the cases were unified. The choice of a specific topic to reduce undesirable variability is not new in the literature. For example, Salzberger & Fenn (1999) chose to look only at Public Law cases in their analysis of the Court of Appeal of England and Wales. Here, we chose to restrict our analysis to Tax Law cases in which the interest of the government is identified straightforwardly, as presumably the incumbent government wants the judiciary to confirm its taxation claims. As to the type of case, we selected the Special Appeal (REsp) at the STJ and the Extraordinary Appeal (RExt) at the STF.

The choice of these two types of lawsuits resides in the fact that they are the dominant appeals heard by each court. There are various other routes of entry into these courts, as the Instrument motion (in both the STF and STJ) and the various types of actions of constitutionality at the Supreme Court (Direct Unconstitutionality Action - ADIN, Declaratory Action of Constitutionality, etc.). Nevertheless, the REsp and RExt concentrate a high proportion of cases heard by the two courts (according to the “Supremo em Números” Report, the RExt represents nearly half of the demand of the court) which, as mentioned earlier, are of special importance. Thus, we selected these two types of appeals to enable the comparison of the decisions of the two courts.

Still, a distinction must be made. The STF is a constitutional court and the STJ, a high court of appeals. Hence, a lawyer arguing his case before the STJ would have to convince the judges that the contested decision infringes a federal law (or the court’s understanding of that law). On the other hand, if the argument is before the STF, the type of complaint is different in that the contested decision would infringe a constitutional rule.

As stated in Section 2.2, however, the Federal Constitution, due to its abnormal length, allows both arguments to be quite similar. Moreover, nothing suggests that the two types of lawsuits would present any systematic difference due to the legal basis for the appeal. In a large database like ours, non-systematic errors will not affect estimations.

We use the vote of the Justice Rapporteur as the means of transmission of political influence. The Rapporteur has a large amount of influence on the outcome of the case, given that he/she is the judge that analyzes it more carefully and, therefore, leads the votes of the other

judges. As noted by Oliveira (2008:99), “the vote of the Rapporteur is by far the most influencing variable in the result [of a case] (...)” Further, the literature on judicial behavior posits that, in collegial courts, there is a pressure for consensus, as judges seek to create strong precedents and to appear unbiased (Epstein & Knight 1998). As the Rapporteur is always the first to vote, he/she naturally leads the votes of the other judges (who have very little time to handle anything else apart from the cases they themselves have to report on) and, given that all trials are televised (in the STF), the cost of casting a vote against the Rapporteur is potentially high.

To empirically test question Q1, we propose the model given by equation (1).

$$gov = \alpha + \sum_{i=1}^M \beta_i President_i + \sum_{i=1}^M \delta_i STF \times President_i + \sum_{k=1}^K \gamma_k Control_k + \varepsilon \quad (1)$$

Where *gov* is a binary variable that indicates whether the appeal decision was for or against the government’s interests and *STF* is a variable that indicates whether the case was heard by the STF. The president *dummies* indicate which president appointed the Justice Rapporteur. Therefore, if president *i* appoints a justice whose preferences is close to their own (preference effect), then the parameter β_i will reflect the president’s political position. In addition, we include in equation (1) *K* control variables to take into account case-specific characteristics and personal traits of the Justice Rapporteur (see more details in Section 3.4).

Equation 1 also measures the effect of government discretion when appointing members to both courts, captured by the interaction between the president dummies and *STF*. We expect that, as the Executive has less discretion when choosing STJ justices (compared to the STF), the STJ will be less subject to political influences than the STF. This effect will be captured by parameters δ_1 to δ_M .

Lastly, in order to address question Q2, we propose the model given by equation (2).

$$gov = \alpha + \sum_{i=1}^M \beta_i President_i + \sum_{i=1}^M \delta_i STF \times President_i + \sum_{i=1}^M \theta_i PiG \times President_i + \sum_{i=1}^M \varphi_i PiG \times STF \times President_i + \sum_{k=1}^K \gamma_k Control_k + \varepsilon \quad (2)$$

Where *PiG*, which stands for *Party in Government*, is a binary variable that is equal to one if the party that appointed the Justice Rapporteur is incumbent in the executive at the time each decision was issued, and zero otherwise. Hence, this variable, when interacted with the Court and presidential appointment variables, captures the opportunistic effect, as it detects changes in judicial behavior that arise from the presence of the justice’s appointing party in the executive. Therefore, in this latter model, the parameters that indicate the presence of the opportunistic effect are $\varphi_i, i = 1 \dots M$. To estimate models 1 and 2, we use the *logit* model, since the response variable *gov* is binary.

3.2. Brazilian Presidencies and Political Preferences

To identify the preference effect, we associate the president’s political affiliation with preferences for a particular level of state intervention. The first step is to identify the president

that appointed each justice, and his/her political affiliation. The period covered by our research begins in 1988, the year in which the STJ was created, and ends in 2012. In this period, justices that compose the STJ and STF were appointed by all presidents elected since democratization (1985) and by the last two presidents of the military regime: Ernesto Geisel and João Figueiredo.

For democratically elected presidents, political preferences are classified according to Power & Zucco (2009), who arrayed Brazilian political parties on a classic left-right scale. We expect leftist coalitions (e.g., Workers' Party (PT)) to appoint justices that tend to favor the state in judicial disputes; whereas rightist coalitions (e.g., Party of Brazilian Social Democracy (PSDB)/Party of the Liberal Front (PFL)) to appoint justices that tend to favor private parties in judicial disputes against the state. Moreover, this classification is consistent with the economic agenda of the two coalitions: PT is largely associated with more state intervention; and the PSDB/PFL coalition is associated with privatization and deregulation (Musacchio & Lazarini, 2014). For the Party of the Brazilian Democratic Movement (PMDB), we attribute a centrist position, as in Power and Zucco (2009). Furthermore, this party has had an ambiguous ideological position, having taken part of governments of diametrically opposite positions on the political spectrum, so as not to allow clear predictions.

As for the presidencies during the military regime, although positioned on the right of the political spectrum, we classify their preferences as more prone to state intervention. This choice is based on the military government economic agenda, which created several state-owned companies, such as Petroquisa, Usiminas, and Vale, and heavily regulated potentially competitive industries (Farina et al. 1997). The preferences of presidencies for state intervention are summarized in Table 1.

Table 1 – Brazilian Presidencies and Political Preferences

Presidency	Period	Main party in the coalition	Preference for state intervention
Geisel	Mar-1974 to Mar-1978	Military regime	+ + +
Figueiredo	Mar-1978 to Mar-1985	Military regime	+ + +
Sarney	Mar-1985 to Mar-1990	PMDB	+ -
Collor	Mar-1990 to Dec-1992	PRN	- - -
Franco	Dec-1992 to Jan-1995	PMDB	+ -
Cardoso	Jan-1995 to Jan-2003	PSDB*	- -
Lula	Jan-2003 to Jan-2010	PT**	+ + +
Dilma	Jan-2010 to May-2016	PT***	+ + +

Source: Partially based on Power and Zucco (2009)

* Coalition with PFL, a party situated to right in the political spectrum.

** The coalition included other left-wing parties, such as PCdoB and PSB.

*** Our sample does not contain any justices appointed by President Dilma.

3.3. Data

To estimate the models proposed in Section 3.1, we compiled decisions from both courts one by one with the online tools provided by the courts. As discussed in Section 3.1, to ensure greater procedural uniformity in the cases in the database, we restrict the research to one type of appeal in each court. In the STJ, we choose the Special Appeal (*Recurso Especial*), and in the STF the Extraordinary Appeal (*Recurso Extraordinário*). The option to select just one type of appeal is common in the related literature, as in Yeung & Azevedo (2011) and in Jaloretto & Mueller (2011), in order to reduce spurious unobservable variations.

Further, we chose to restrict our research to tax cases in which the federal government (or the Treasury Department) is a litigant, thus making it straightforward to identify the State's interest in the appeal.

Due to the high number of cases heard by the STJ, we conducted a stratified sample, randomly selecting 30 cases per year from 1989 to 2012. This resulted in a sample of 665 STJ cases, considering that there were no cases that matched the established criteria in 1989 (the first operational year of the STJ), and only five cases in 1990. This first survey selected only cases in which the Federal Government (or the Treasury Department) is a litigant.

However, these data would be insufficient to estimate the opportunistic effect for justices appointed by President Lula, the last president in our sample and the only one from PT,

whose appointees have not had the opportunity to rule having an opposing party as the incumbent in the Executive. To address this limitation, we collected a new sample with cases in which one of the litigants is a state that, at the time of trial, was governed by a party in opposition to the federal government. In this new sampling, we randomly selected 150 cases filed by the states of São Paulo, Minas Gerais, Rio Grande do Sul, Bahia, Paraná, Alagoas, and Paraíba, all governed by the PSDB (or its coalition allies) in a period when the Workers' Party was the incumbent in the federal government, thus bringing the total of cases from the STJ to 815.

From the STF, we obtained 117 decisions on tax matters where the Federal Government is a litigant. This constitutes the whole universe of cases that meet the aforementioned criteria. The STF's decisions involving the Federal Government, as with the database from the STJ, do not include cases in which justices appointed by President Lula voted when an opposing party was the incumbent in the Executive. Hence, we applied the same procedure, collecting cases involving states governed by opposition parties, which resulted in 49 more cases, thus totaling 166 cases from this court.

3.4. Variables

From the analysis of each court ruling, we collected information on case features and on the justices that are (or used to be) members of either court. Table 2 presents all variables and definitions. The control variables are separated into two groups. The first group includes the variables related to the characteristics of the case, whereas the second group includes the variables related to the personal characteristics of the Justice Rapporteur.

Table 3 presents descriptive statistics for each court. More than half (65.66%) of STF's decisions favored the government and the vast majority were unanimous (80.72%), which corroborates the option to use the appointment of the Justice Rapporteur as a possible channel of political influence. It is interesting to note the high proportion of decisions that reversed the lower court's ruling (74.1%).

In the STJ the proportion of appeals won by the government is very close to 50%, indicating a greater balance here than at the STF. Also of note is that in the sample there are no rapporteurs appointed by presidents Itamar Franco or Ernesto Geisel. Moreover, the proportion of decisions that reversed the lower court's ruling is much smaller than in the STF, about 52%. Lastly, it is important to note the extremely high proportion of unanimous decisions at the STJ: 94.97%. Again, this corroborates the option made here to take the appointment of the Justice Rapporteur as the mechanism of political influence.

Table 2 – Variables

	Variable	Definition
Dependent variable	Pro Government	Indicates whether the court's decision was in favor of the Federal Union (or State)
	President Dummies	Indicates which president appointed the Justice Rapporteur
Target variables	STF	Indicates whether the case was heard by the STF
	State	Indicates whether the case has as a litigant a State (instead of the Union)
	Not Upheld	Indicates whether the upper court's decision changed, at least partly, the decision of the lower court

Controls 1: Characteristics of the Case	Unanimity	Indicates whether the decision was unanimous
	Opponent	Indicates whether the opponent of the Federal Union (or State) was a person (instead of a company)
	Time	Indicates the elapsed time between the filing of the appeal and the trial, in days
	Gender	Indicates whether the Justice Rapporteur was a woman
Controls 2: Characteristics of the Rappor- teur	Public Prosecution	Indicates whether the previous career of the Justice Rapporteur was at the Public Prosecution
	Private Lawyer	Indicates whether the previous career of the Justice Rapporteur was at a private law practice
	State Judge	Indicates whether the previous career of the Justice Rapporteur was at a State Court
	Federal Judge	Indicates whether the previous career of the Justice Rapporteur was at a Federal Court

Table 3 – Descriptive Analysis

	STF		STJ	
	Mean	Std. Dev.	Mean	Std. Dev.
Pro Government	0,656	0,475	0,496	0,500
President Lula	0,066	0,249	0,249	0,432
President Cardoso	0,126	0,332	0,377	0,485
President Franco	0,078	0,269	0,000	0,000
President Collor	0,458	0,498	0,265	0,441
President Sarney	0,084	0,278	0,067	0,251
President Figuei- redo	0,108	0,311	0,041	0,197
President Geisel	0,078	0,268	0,000	0,000
Public Prosecutor	0,151	0,357	0,116	0,321
State Judge	0,102	0,303	0,184	0,387
Federal Judge	0,446	0,497	0,496	0,500
Private Lawyer	0,301	0,458	0,204	0,403
Gender	0,072	0,259	0,122	0,327
Not Upheld	0,741	0,438	0,520	0,499
Unanimity	0,807	0,395	0,949	0,218
Opponent	0,096	0,295	0,216	0,412
Time	1100,2	950,8	452,4	531,1

4. Results

With the objective of answering questions Q1 and Q2, posed in Section 3.1, the econometric models (1) and (2) are estimated under four different specifications. The four specifications arise from the inclusion or exclusion of the two groups of control variables, as already defined in the previous Section. In all the estimated models, the variables indicating the justices appointed by military presidents (1964-1985) are used as a basis for comparison, and therefore omitted from the model specification.

Before proceeding with the presentation and analysis of results, it is useful to ponder which are the expected outcomes of the regressions, given the characteristics of the Brazilian judiciary, as presented in Section 2, and the hypotheses presented in Section 3.1. With respect to model (1), the coefficients associated with the interaction of *STF* with the president variables should be statistically significant, indicating that the STF is more subject to political influences than the STJ, where the president has less discretion over the appointment of justices.

As for their signals, they should be consistent with the political position of the respective presidents, as explained in Section 3.2. For instance, for the economically liberal presidents (Cardoso and Collor), the signal of the associated parameter is expected to be negative, so as to reveal that the justices appointed by these presidents decide, on average, against the State, when compared to the justices appointed by military presidents. As for the leftist presidents (in our sample, only Lula), we expect that the coefficient should not differ from zero since the political left and the Brazilian military regime share similar preferences for more state intervention, which leads to a greater inclination towards favoring the state in disputes with businesses and taxpayers. Still, with regard to the justices appointed by presidents from PMDB (Franco and Sarney), the coefficients should be negative or non-significant, given their centrist position and the comparison with the justices appointed by military presidents.

Finally, in model (2) we expect that, if the opportunistic effect is present, the parameters associated with the interaction of *STF* with president variables should be significant when interacted with the *Party in Government* variable, which indicates whether each decision was issued at the time the Justice Rapporteur's appointing party was incumbent in the executive.

The estimation results of model (1) are shown in Table 4. In this case, the fundamental hypothesis, as formulated in Section 3.1, is that the more discretion is given to the president over the appointment of justices, the higher the degree of political influence on courts' decisions. Therefore, we expect the coefficients of the interaction of *STF* and the president dummies to be significant.

Results presented in Table 4 corroborate the proposition that more presidential discretion when appointing justices is associated with a higher degree of political influence. The coefficients of the interaction of the *STF* with the variables of presidents Collor and Cardoso are negative and statistically significant in most specifications, consistent with their political preferences and with the greater presidential discretion over the appointment of justices to the STF.

Note that the coefficient associated with the interaction between the *STF* and President Lula's variable is not statistically significant in any of the four specifications, revealing, as expected, no significant differences between this group of justices and the ones appointed during the military regime, used as a basis for comparison. Finally, the parameter associated with the interaction of the *STF* and President Sarney has the expected signal but is statistically significant in only one specification.

Table 4 – Estimation Results for Model (1)

Y = Pro Government	(1)	(2)	(3)	(4)
President Lula	0.423 (0.378)	0.571 (0.518)	0.419 (0.381)	0.570 (0.524)
President Cardoso	0.152 (0.371)	0.496 (0.479)	0.165 (0.385)	0.437 (0.494)
President Franco	0.134 (0.776)	0.323 (0.799)	0.119 (0.787)	0.282 (0.810)
President Collor	0.355 (0.374)	0.378 (0.421)	0.448 (0.400)	0.349 (0.453)
President Sarney	0.687 (0.443)	0.613 (0.484)	0.710 (0.452)	0.572 (0.495)
STF * President Lula	0.032 (0.961)	-0.555 (1.018)	-0.028 (0.969)	-0.540 (1.028)
STF * President Cardoso	-0.956 (0.706)	-1.323* (0.779)	-1.285* (0.751)	-1.346* (0.791)
STF * President Collor	-0.997* (0.603)	-1.116* (0.651)	-1.190* (0.666)	-1.126* (0.630)
STF * President Sarney	-1.166 (0.822)	-1.472* (0.894)	-1.256 (0.844)	-1.418 (0.922)
STF	1.376** (0.540)	1.494** (0.601)	1.498*** (0.562)	1.485** (0.631)
States	0.170 (0.172)	0.095 (0.194)	0.158 (0.174)	0.084 (0.195)
Controls:				
Group 1	No	Yes	No	Yes
Group 2	No	No	Yes	Yes
Constant	-0.357 (0.348)	0.522 (0.692)	-0.379 (0.360)	0.608 (0.724)
Pseudo-R ²	0.018	0.056	0.019	0.057
Observations	981	981	981	981

Notes: Standard errors in parentheses. P-values: *** if $p < 0,01$, ** if $p < 0,05$ and * if $p < 0,1$.

Still, note that *STF* is positive and statistically significant in all specifications. This indicates that there is something other than the effect of greater presidential discretion over the appointment of its members that makes this court's decisions, on average, more pro-State than those of the STJ. There are two factors that could explain the significance of this variable. First, there may be a bias in the profile of the cases selected to the sample. They may be more pro-State than other cases that were not selected, although, as argued before, the choice of the type

of appeal and subject has reduced the possibility of such bias. Second, there may be other ways through which the government influences the STF other than the appointment of its members. This second hypothesis is more plausible since it is easy to observe that the political nature of the STF is stronger than that of the STJ. As anecdotal evidence of that, we recall the various STF justices who had a political career after their retirement. For example, Justice Nelson Jobim, who was appointed to the Supreme Court by President Fernando Henrique Cardoso, became Minister of Defense in Lula's administration. Also, Justice Francisco Rezek, appointed by President Figueiredo to the STF, retired before his time to become Foreign Minister in Fernando Collor's administration, who, in turn, reappointed him to the STF at the end of his government (in 1997, Rezek became a judge of the International Court of Justice in The Hague). These strong political connections may explain the closer alignment between the STF and the Executive in comparison with the STJ.

The results in Table 4 do not allow us to quantify (in terms of probabilities) the effect of the presidential appointment on the outcomes of the courts. To do so, we obtain the marginal effects of each dependent variable, available in Table 5.

Table 5 – Marginal Effects Results for Model (1)

Marginal Effects	(1)	(2)	(3)	(4)
President Lula	0.102 (0.088)	0.129 (0.114)	0.100 (0.088)	0.129 (0.115)
President Cardoso	0.037 (0.088)	0.111 (0.103)	0.039 (0.092)	0.098 (0.107)
President Franco	0.033 (0.187)	0.074 (0.179)	0.029 (0.190)	0.064 (0.182)
President Collor	0.085 (0.088)	0.086 (0.094)	0.107 (0.093)	0.079 (0.102)
President Sarney	0.161* (0.096)	0.137 (0.104)	0.165* (0.097)	0.129 (0.107)
STF * President Lula	0.007 (0.234)	-0.126 (0.224)	-0.007 (0.236)	-0.123 (0.227)
STF * President Cardoso	-0.220 (0.144)	-0.279** (0.135)	-0.264* (0.138)	-0.283** (0.139)
STF * President Collor	-0.226* (0.118)	-0.239** (0.120)	-0.262** (0.119)	-0.237* (0.134)
STF * President Sarney	-0.261* (0.153)	-0.303** (0.144)	-0.277* (0.150)	-0.294* (0.150)
STF	0.303*** (0.093)	0.311*** (0.102)	0.323*** (0.091)	0.309*** (0.108)
States	0.041 (0.042)	0.022 (0.045)	0.038 (0.042)	0.019 (0.045)

Notes: Standard errors in parentheses. P-values: *** if $p < 0,01$, ** if $p < 0,05$ and * if $p < 0,1$.

It is interesting to see that some of the marginal effects are remarkably large. For instance, considering Specification (1), the probability that the result of an appeal heard at the STF, in which the Justice Rapporteur was appointed by a military president, is pro-government is approximately 73%. However, if the justice was appointed by President Cardoso, this probability decreases to 41%, which is over 20% smaller.

For every single specification, the marginal effect of the presidential discretion over the appointment is statistically significant for presidents Collor and Sarney and, for President Cardoso, it is significant in every specification but the first one. Also, considering the marginal effect of the STF variable, the probability that a given decision by the STF is pro-government is over 30% larger than a decision by the STJ, everything else remaining constant.

To estimate the opportunistic effect (Q2), we create a dummy variable, called *Party in Government*, which indicates the cases that were decided when the party responsible for the Justice Rapporteur's appointment to the Court was the incumbent in the executive. Table 6 shows the estimation results and Table 7 displays the marginal effects.

Table 6 – Estimation Results for Model (2)

Y = Pro Government	(1)	(2)	(3)	(4)
President Lula	0.207 (0.509)	0.488 (0.608)	0.233 (0.513)	0.483 (0.613)
President Cardoso	0.107 (0.389)	0.941 (0.619)	0.149 (0.405)	0.907 (0.628)
President Franco	0.130 (0.777)	0.340 (0.800)	0.096 (0.788)	0.305 (0.812)
President Collor	0.209 (0.379)	0.413 (0.464)	0.331 (0.405)	0.412 (0.494)
President Sarney	0.687 (0.443)	0.628 (0.495)	0.718 (0.452)	0.601 (0.506)
STF * President Lula	-1.443 (1.540)	-1.901 (1.615)	-1.695 (1.569)	-1.848 (1.647)
STF * President Cardoso	-1.401 (0.952)	-1.770* (1.045)	-1.792* (1.005)	-1.870* (1.095)
STF * President Collor	-0.812 (0.609)	-1.055 (0.682)	-1.081 (0.672)	-1.099 (0.758)
STF * President Sarney	-1.170 (0.823)	-1.622* (0.936)	-1.305 (0.845)	-1.599* (0.961)
Party in Gov. * President Lula	-0.615 (0.556)	0.574 (0.825)	-0.689 (0.563)	0.558 (0.829)
Party in Gov. * President Cardoso	-0.836* (0.468)	-0.413 (0.740)	-0.890* (0.475)	-0.458 (0.746)
STF * Party in Gov. * President Lula	4.020*	3.818*	4.283*	3.758

	(2.223)	(2.274)	(2.247)	(2.301)
STF * Party in Gov. * President Cardoso	2.662	2.596	2.867*	2.640
	(1.631)	(1.698)	(1.643)	(1.708)
STF * Party in Government	-1.979	-1.894	-2.062	-1.895
	(1.307)	(1.347)	(1.311)	(1.353)
Party in Government	0.882**	-0.0838	0.931**	-0.0547
	(0.382)	(0.632)	(0.386)	(0.636)
STF	1.363**	1.447**	1.542***	1.468**
	(0.541)	(0.623)	(0.564)	(0.651)
States	0.230	0.468	0.211	0.464
	(0.241)	(0.366)	(0.244)	(0.368)
Controls:				
Group 1	No	Yes	No	Yes
Group 2	No	No	Yes	Yes
Constant	-0.357	0.110	-0.388	0.155
	(0.348)	(0.767)	(0.360)	(0.794)
Observations	981	981	981	981
Pseudo - R ²	0.025	0.060	0.027	0.071

Notes: Standard errors in parentheses. P-values: *** if $p < 0,01$, ** if $p < 0,05$ and * if $p < 0,1$.

Table 7 – Marginal Effects Results for Model (2)

Marginal Effects	(1)	(2)	(3)	(4)
President Lula	0.049	0.112	0.056	0.111
	(0.123)	(0.139)	(0.123)	(0.140)
President Cardoso	0.026	0.216	0.036	0.208
	(0.094)	(0.142)	(0.097)	(0.143)
President Franco	0.031	0.078	0.023	0.069
	(0.187)	(0.184)	(0.189)	(0.186)
President Collor	0.050	0.095	0.079	0.095
	(0.091)	(0.106)	(0.097)	(0.113)
President Sarney	0.166	0.144	0.173	0.138
	(0.106)	(0.113)	(0.108)	(0.116)
STF * President Lula	-0.348	-0.436	-0.408	-0.424
	(0.371)	(0.370)	(0.376)	(0.377)
STF * President Cardoso	-0.338	-0.406*	-0.431*	-0.429*
	(0.228)	(0.239)	(0.240)	(0.250)
STF * President Collor	-0.196	-0.242	-0.260	-0.252
	(0.146)	(0.156)	(0.161)	(0.173)
STF * President Sarney	-0.282	-0.373*	-0.314	-0.367*
	(0.198)	(0.214)	(0.202)	(0.219)
Party in Gov. * President Lula	-0.148	0.132	-0.166	0.128

	(0.134)	(0.189)	(0.135)	(0.190)
Party in Gov. * President Cardoso	-0.202*	-0.095	-0.214*	-0.105
	(0.112)	(0.170)	(0.114)	(0.171)
STF * Party in Gov. * President Lula	0.969*	0.877*	1.030*	0.862
	(0.533)	(0.520)	(0.537)	(0.525)
STF * Party in Gov. * President Cardoso	0.642	0.596	0.689*	0.606
	(0.391)	(0.388)	(0.393)	(0.390)
STF * Party in Government	-0.477	-0.435	-0.496	-0.435
	(0.314)	(0.308)	(0.314)	(0.309)
Party in Government	0.213**	-0.019	0.224**	-0.013
	(0.091)	(0.145)	(0.092)	(0.146)
STF	0.329**	0.332**	0.371***	0.337**
	(0.129)	(0.142)	(0.134)	(0.148)
States	0.055	0.108	0.051	0.106
	(0.058)	(0.084)	(0.059)	(0.084)
Observations	981	981	981	981

Notes: Standard errors in parentheses. P-values: *** if $p < 0,01$, ** if $p < 0,05$ and * if $p < 0,1$.

The evidence in favor of the opportunistic effect, on tables 6 and 7, is weaker. For instance, while the interaction of President Lula's variable with *STF* and *Party in Government* is statistically significant in the first three specifications (at 10%), it loses significance in regression (4), the most complete. For President Cardoso, the effect is only significant (again, at 10%) in regression (3). Hence, even though there is some evidence for the opportunistic effect, results are not robust to the inclusion of all control variables. These findings indicate that the government discretion over the appointment of justices affects judicial preferences, but not the use of the court in the political game.

5. Conclusions

Government discretion over the appointment of justices is an important but neglected feature of *de facto* judicial independence. The existence of two courts in Brazil with different appointment rules, but that deal with similar cases, provides the empirical setting to explore the effect of this channel of political influence on judicial decisions. Moreover, our empirical strategy disentangles two types of political influence, one given by the choice of justices whose preferences are aligned with the president's (preference effect), and another one given by the strategic alignment with the incumbent politician (opportunistic effect).

We find that judicial decisions are sensitive to the political preferences of the president who appointed the Justice Rapporteur only in the STF, where the Executive has greater discretion over the appointment of its members. This is evidence that restrictions on the presidential appointment in place at the STJ make this court less subject to political influences than the STF. As to the second effect, we find little evidence that justices make opportunistic use of their positions. This effect is not robust to the inclusion of all control variables.

The fact that there is little evidence of the opportunistic effect but, at the same time, there is evidence that the preference effect is stronger in the STF, is an indication that, in this court, successive presidents managed to install justices whose ideological position is close to their own but also that they do not systematically deviate from their preferences depending on political context.

Still, it is important to note that some questions remain unanswered. We observe that there is something specific to the STF that makes its decisions more pro-State than the STJ's. Something that is not channeled through the political appointment and cannot be explained by any of the control variables collected for this study. Therefore, a possible field for future investigation is to identify additional channels of political influence on judicial decisions that can explain the propensity of the STF to favor the State in judicial disputes.

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