

The Supreme Court Nominations in Brazil (1985-2010): Presidential or Coalitional Preferences?.

Barreiro Lemos Leany y Llanos Mariana.

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The Supreme Court Nominations in Brazil (1985-2010): Presidential or Coalitional Preferences?

Leany Barreiro Lemos

Oxford-Princeton Post-Doctoral Fellow – University of Oxford
leany.lemos@politics.ox.ac.uk

Mariana Llanos

GIGA German Institute of Global and Area Studies – Hamburg
llanos@giga-hamburg.de

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1. Introduction

In the last decades there has been a considerable growth of both legislative and judicial studies in the Latin American region. A prominent place among the first ones corresponds to works dealing with executive-legislative relations, whilst the study of executive-court relations has done remarkable progress among the second as well. Still, quite few works within these research areas address the nomination and appointment process for higher court justices, the central focus of this paper. Presidents and Congresses are usually key institutions in these processes, but the role they play in the dynamics of nominations are mostly unknown. Under what constraints do presidents select the nominees? Who else participates in the process? Is there anticipation of preferences of the different political actors, leading to a more centred candidate, or is it a unilateral unconstrained decision that ends up in overtly closed ideological choices? In this paper we concentrate mainly on the analysis of the nomination process for the Federal Supreme Court (STF) in Brazil since the new Constitution of 1988.

Brazil is a very interesting case for understanding president-court relations, combining powerful presidents *with* powerful and independent courts. Indeed, the Brazilian executive was granted a prominent position in the constitution of 1988, and many authors have stressed how presidents enjoy considerable legislative prerogatives (e.g. on budget and by issuing emergency decrees), as well as agenda power, informational advantages, and expertise (Carey and Shugart 1998; Shugart and Carey 1992; Mainwaring and Shugart 1997; Figueiredo 2001). Also, mirroring the US constitution, Brazilian presidents were granted the prerogative to nominate the members of the upper courts, after confirmation by the Senate. However, contrasting with the formal power they have to set the legislative agenda and organise the executive branch, the presidents' power over the nomination of higher courts' judges is relatively limited. Firstly, the rules for nomination in the higher courts are very tight: only for the Federal Supreme Court can the president choose "freely". For the other higher courts – military, higher justice court, higher labour court etc. – the president chooses over a short list of three that is prepared by the courts themselves. Secondly, presidents in Brazil do not discharge judges, and new appointments can only happen after the resignation, 70-year compulsory retirement or death of their members. Because resignations are very rare, presidents know in advance how many seats they will appoint, and when this will happen. Brazil is the only country in the region in which judicial turnover does not significantly change during the first months of a new administration (Perez Liñán and Castagnola 2009:

107). President Luiz Inácio “Lula” da Silva (2003-2010) was the first president in the democratic period initiated in 1985 to appoint more than 50 percent of the supreme court justices.

Because the Brazilian Senate hardly ever refused a nomination¹, it could in principle be affirmed that presidents select according to their preferences, and that the Senate rubber-stamps presidential candidates. Nevertheless, the features of particular appointment processes and those of the winning appointees suggest that politics plays a role in the process and that presidents often act under constraints. In the following pages, we depart from the established idea that Brazilian presidents are at the centre of a mixed political system with contradictory incentives –including both majoritarian and consensual elements (Lijphart 1999), which sometimes allows them to impose their view and sometimes forces them to negotiate. It is known that tensions within this system affect the contents of the presidential legislative agenda, and we assume that they will also have an impact on judicial appointments. Moreover, the study of judicial appointments in a political system characterised by “coalition presidentialism” adds new evidence to the fragmentation theory and its effects for judicial empowerment. Brazilian presidents run majority coalitions, as a result of which the two branches of government are coordinated and presidents get their policies/candidates approved. However, majority coalition governments do not work as typical single-party majority governments and presidential proposals succeed once they have passed the many filters posed by the system, particularly (but not only) those of the coalition partners located at the centre and centre-right of the political spectrum.

This paper is organized in five sections. Section two provides the literature review and introduces the analytical framework for the study of Brazilian appointments. The third section brings a brief description of the judicial system in Brazil, as well as the formal rules governing the nomination process for the upper courts. In section four we present a set of indicators of presidential and coalitional preferences that we use to analyse the 21 appointment processes that took place in the period of analysis. Section five brings some tentative explanations of the variations in appointment processes found out in the previous section. Section six concludes.

2. A Framework for the Analysis of Brazilian Nominations

¹ It happened only 5 times, all in the 19th century, under President Floriano Peixoto (1891-1894).

For a long time, political scientists have pointed at the concentration of power in the presidency as one of the main challenges to the rule of law in new democracies (Haggard, MacIntyre and Tiede 2008). During the third wave of democratization, different reform processes gave courts an increasingly important political role, which could be observed in growing judicial influence on policies and increased resort to the courts by different social and political actors (Gloppen, Gargarella and Skaar 2004; Sieder, Schjolden and Angell 2005). With courts increasingly making substantive policy as well as regulating political activities, there was also a growing political and public interest in who judges were and how they were chosen (Malleson and Russell 2006). Elected officials, in particular, regained interest to influence as far as possible who sits on the courts and who fills important positions in the judicial system, as some recent works on Latin America highlight (Domingo 2004). Since the 1990s, unaccountable presidents have been caught governing by bypassing the legislative branch, whilst their encroachments upon the judiciary and other agencies of government have been regarded as the most serious threat to “horizontal accountability” (O’Donnell 2003: 45). A recent comparative study on Supreme Court appointments in Latin America has demonstrated that, just as in the US case, Supreme Court vacancies and appointments have been influenced by political considerations. However, in Latin America, more common than not, presidents rather than justices themselves are those responsible for the timing of judicial retirements and nominations (Perez Liñan and Castagnola 2009).

In democratic regimes, extreme executive actions are more likely under particular contextual situations. A prominent theory within the judicial studies states that the level of political fragmentation among the branches of government – the executive and the legislature - has important consequences for the empowerment and independence of the courts (Chavez 2004; Ríos Figueroa 2007; Solomon 2007: 127). When the elective institutions of a political system are dominated by a single party, there are more risks that judicial decisions be overruled, challenged with non-compliance or with more aggressive policies, such as court-packing and impeachment. Instead, when fragmentation increases, coordination among those branches becomes more difficult, leaving them less able to enact policies and to check other agencies. Similarly, in the literature dealing specifically with US judicial nominations, divided government appears as a dominant factor in explaining whether a nominee faces a tough or easy senatorial confirmation (Segal and Spaeth 2002; McMahon 2007). There are different levels of political fragmentation. In presidential systems, it normally refers to a situation in

which the executive and the (one or two) houses of Congress are controlled by different political parties (something that is also known as divided government), but fragmentation can also occur vertically, especially in federal states, to indicate different political alignments at national, state and municipal levels.

The Brazilian political system is well known for its fragmentation at multiple levels. A proportional electoral system with open lists and no effective national threshold for representation at the federal Congress generates a highly fragmented electoral and legislative party system. Other crucial fragmentation elements are represented by a robust federalism, a symmetrical bicameral system, a judiciary with review powers, and the need of legislative super-majorities to reform an extensive constitution. In other words, these key “consensual” institutional features (Lijphart 1999) or considerable number of veto powers in the Brazilian political system (Tsebelis 2002), can potentially obstruct policy initiatives, diminish the ability of the executive to generate policies based on his/her own single preferences and induce, instead, an accommodative decision style.

The courts are regarded as one of the veto powers of this complex political system. Taylor enumerates (2008:340) the reasons why the entire federal judiciary is considered to be a strong institution: it has budgetary and administrative autonomy; it is the best funded federal court system in the hemisphere; its decisions are adhered to by the executive and legislative branches; it operates according to historically consensual rules and norms; its members are a highly qualified, select group within the already elite legal profession; and there is “vociferous” opposition to attempts in curbing judiciary’s prerogatives. Such an independent and powerful judiciary contrasts with other experiences in Latin America, especially at the top of the pyramidal judicial system, as constitutionality rulings in Brazil lack significant bias in favour of any particular presidential administration. In other words, the Brazilian supreme federal tribunal has not exhibited “any overarching political preferences regarding the occupant of the executive branch” when assessing the laws the presidents have passed (Taylor 2008: 351), a point which stresses its independence as well as its capacity to act as a veto power of presidential policies.

However, the Brazilian political system is not a purely fragmented one. As we pointed out in the introduction, it simultaneously exhibits a number of “majority” components or institutions that tend to concentrate political power in the chief executive (and party leaderships). To start

with, presidents are equipped with such a wide array of constitutional legislative powers that the presidency of Brazil has been classified as one of the most powerful in the world (Shugart and Carey 1992). Other majority institutions follow to include the rules that centralized the decision process within Congress (Figueiredo and Limongi 1999; 2000) and the conformation of majority government coalitions (Amorim Neto 2006). All these institutions centralize the policy-making process, induce party cooperation and discipline, and improve governability. Within the Brazilian mixed system of contradictory incentives, the president will sometimes be able to impose his/ her view, but not rarely will be forced to negotiate. As the president is at the centre – or at least at the intersection (Pereira, Power and Raile 2009: 213) - of the political system, other contextual factors, such as presidential popularity, the electoral cycle (proximity to next presidential election) and the policy agenda of the executive might also determine the level of success of the president's agenda.

Different from other countries in the region, the categories divided and unified government do not work exactly so in Brazil. Due to the fragmentation of the party system, all Brazilian presidents since 1985 have been minority presidents, but with the only exception of impeached President Collor de Melo, all presidents have been running majority coalition governments.² There are different coalitions within the same presidential term as some of the parties may enter in conflict and leave the government, or presidents can invite new parties to the cabinet to adjust their relations with the legislative branch. Brazilian coalition politics drives attention to the presidential strategies to induce cooperation, to what kind of payment parties obtain in exchange for legislative support (typically, ministerial positions but also other benefits, such as pork), the number of parties involved in the cabinet vis-à-vis non-partisan members, the ideological heterogeneity of coalitions, and the proportionality in the distribution of cabinet posts and legislative seats (Amorim Neto 2006; Pereira and Mueller 2002). The most ideologically homogenous coalitions were those of Fernando Collor de Mello (1990-1992, the second and third ones), which included exclusively right-wing parties. The most heterogeneous can be found under President Luis Inácio “Lula” da Silva (2003-2010), since his late coalition included nine parties ranging from radical left through right-wingers. In addition, Lula's Partido dos Trabalhadores (PT) was itself the most heterogeneous of Brazilian parties, so that different internal factions had also to be represented in the cabinet (Pereira, Power and Raile 2009: 221). However, both Lula and Fernando Henrique Cardoso managed to negotiate with their respective coalitions, not rarely anticipating their preferences.

² Since 1990, no party has reached 25% of the seats in either the Senate or the Chamber of Deputies.

Cardoso's governments (1995-2002) were the most proportional of all. His second coalition involved six parties in the cabinet and included the support of 75 percent of seats in the lower house. Different from Lula's, Cardoso's coalitions did not have great internal differences. They rather showed a centre-right profile and considerable internal consensus on the presidential agenda.

The institutional features of the Brazilian political system pointed out above have consequences for the process of nomination of authorities. On the one hand, the majoritarian tendencies indicate that presidents can set the agenda. Brinks (2004) argues that Brazilian presidents select nominees who are sympathetic to their primary policy initiatives and who will not unduly restrict executive authority. Further, the fact that all presidents run majority coalition governments anticipates that getting the support of a simply majority in the upper chamber of Congress will not be a difficult task. On the other hand, the consensual features of the political system show that presidents do make concessions to be able to govern and that they renegotiate their coalition agreements quite often within their presidential terms. Thus, when choosing a nominee, presidents will be paying attention to other factors different from their individual preferences. Because of this and because coalition cabinets are per nature more ideologically diverse than single-party cabinets, the expectation that a "liberal" president will be appointing a "liberal" justice may turn to be wrong.

In the next sections we intend to find out what kind of politics prevails in the judicial appointment processes, whether consociative and coalitional, or a majoritarian and presidential one. Given the intervention of the Senate in the appointment process we assume a great deal of consociationism and negotiation of presidential candidates, but we still do not know what and how much presidents have been forced to compromise and also if some presidents were able to impose their first choice candidates. Section 4 develops and analyses the indicators of consensual and presidential politics. Before entering into that, the next section clarifies the general features of the Brazilian judicial system as well as the rules of the appointment process.

3. Brazilian Federal Courts: General Features and Nomination Rules

Forty-four out of the 250 articles of the 1988 Brazilian Constitution address the Judiciary (Verissimo, 2008), which in Brazil has a federal structure and separate branches for each state and the Federal District. The new Constitution defined the pyramidal nature of the Brazilian

judiciary: on top sits the Federal Supreme Court (art. 101, FC 1988), whose role is both to function as a constitutional court and as the highest appealing court in the judicial system in a number of cases, as well as a political judgement arena (art. 102); then come the four Superior Courts – the Superior Court of Justice (STJ), which is the court of last instance on non-constitutional matters, and the Superior Military Tribunal, Superior Electoral Tribunal, and Superior Labour Tribunal, each one performing as courts of last instance in their respective areas. Below, there are five appeal courts, for five different regional jurisdictions, and then the federal judges (art. 92). The STJ and the five appeal courts were created by the 1988 constitution. The members of the Federal Supreme Court (STF, *Supremo Tribunal Federal*) and the other superior courts are appointed by the president with the consent of the Senate. Despite the many changes in the judicial system approved in the constitutional reform of 1988, in terms of court membership the transition to democracy showed great continuity.

The STF was created in 1891, and it is the most important court in the system.³ According to the 1988 constitution, it is composed by 11 judges, so-called ministers, who have to be over 35 and under 65 years old by the entrance date, be Brazilian-born, and hold an “outstanding legal knowledge and unblemished reputation” (art. 12, 101). Its ministers are freely nominated by the president, after Senate approval through an absolute majority (42 votes) (art. 101).⁴ In the history of the Supreme Court, since its creation in 1891, only 5 appointees were not approved by the Senate, and they were all under President Floriano Peixoto (1891-1894) (Mello Filho, 2007). Impeachments to the members have never taken place in the history of the tribunal. The 1988 constitution did neither involve changes in the composition nor in the size of the court. With the transition to democracy, the judges or ministers appointed by the previous military regime were not removed, but periodically substituted according to the new constitutional rules, when the previous ones retired, resigned or died. Moreover, the 1988 Constitution enhanced the power and independence of the highest court, and included further dispositions for expanding access to justice. The STF prerogatives include three mechanisms of constitutional review: to rule the direct action of unconstitutionality of any federal or state

³ It existed previously as an appeal court under the names Casa de Suplicação (Appeal House, 1808-1829) and Supreme Court of Justice (1829-1891)

⁴ The Supreme Court is internally divided in three bodies: the plenary, two committees, and the president (art. 3, Internal Statute, 1980). The president and the vice-president are elected by the full body of ministers (plenary) for a mandate of 2 years. For a judge to become a president again all the others have to have served as such, a rule that implies a constant reshuffle in the presidency of the Court and that helps to dispel succession conflicts among the members. The committees are composed of 5 ministers each. They are presided by the most senior minister for one year (renewal is forbidden), according to a rotating system in which all members are supposed to preside at some point (art. 4, IS/80).

law or statute (ADINs), declaratory action of constitutionality of federal laws or statutes, and to answer interpellation of non-compliance with fundamental constitutional precepts.⁵

The Superior Court of Justice (STJ) is the second most important court in the Brazilian judiciary. Besides being technically the last instance of appeal for non-constitutional matters, the STJ has many other prerogatives, such as being responsible for the judgment of governors on criminal offenses.⁶ It was created by the 1988 Constitution with the purpose of diminishing the workload of the STF as the last court of appeal.⁷ Its membership was taken from the Federal Court of Appeals (TFR), which was then dissolved. The STJ is a thirty-three judge court composed of former second instance federal judges, state judges, lawyers and members of the Public Ministry. Although its members are also appointed by the president after Senate approval by absolute majority (42 votes), the president is here more constrained, having to choose from a shortlist of three prepared by the STJ itself.⁸

Table 1 shows the appointments to the STF and the STJ in the last 25 years. It shows some 70 appointments unevenly distributed among five presidents (the last two re-elected). Cardoso was the only president appointing more of the half of the STJ members, with twenty new ones, and Lula the only one to appoint more than half of the STF members, a total of eight. The table is a clear indicator that presidents use their appointing prerogatives in a reactive

⁵ ADINs have become the most studied ones (Faro, 1997; Werneck Vianna, 2007; Taylor, 2006). The STF is also responsible for extraditions demanded by foreign states, and for judging on criminal offences the President, the Vice-presidents, members of Congress, its own members and the General Attorney, among other prerogatives.

⁶ Also, on criminal offenses and crimes of responsibility, it is responsible for judging senior judges of the state judiciary and of the appealing courts, second instance judges of the electoral and labour courts, members of the state and municipal auditing courts and councils, and members of the public ministry. It also decides over jurisdiction conflicts between different courts, or over administrative and judiciary disputes among the federation units (Union, States and Municipalities), among other prerogatives (art. 105). In the first year of its creation (1989), about three thousand cases were filed in the institution. In 2009, it reached 347.426 cases (Statistic Report STJ, 2009).

⁷ It did not have the desired effects, as a set of rules not only allows many cases to follow up from STJ to STF, but creates all the incentives to do so (Taylor, 2006). In 1997, 36.490 processes were filed at the STF. In 2000, the number was 105.307 and in 2002, 160.453. After 2004 the numbers are declining, but are still very high: in 2009, 84.369 cases were filed (Supreme Court Statistics, 2010). The increasing workload of the Supreme Court has been so significant since 1998, that a new constitutional reform was approved in 2004 so as to permit binding effect of decisions to lower levels (Constitutional Amendment 45, 2004). The same reform created the National Council of Justice, responsible for improving transparency and efficiency in the judiciary and that also holds ombudsman functions (art. 103-B).

⁸ The STJ seats are divided in three thirds. The first one is reserved for judges from the federal appealing courts, and the second third for the senior judges of state justice courts (*desembargadores*). In both cases, when there is a vacancy of the respective seat, the Court will ask the state or federal appealing courts that, within 10 days, they send the suggested names. The last one third is composed, in equal parts, by alternating lawyers with “outstanding legal knowledge and unblemished reputation” plus ten years of professional careers, and members of the Public Ministry (*Ministerio Publico*), with ten years of experience as prosecutors. Once the seat is vacant, the Court will demand within 5 days that the respective corporate association appoint a shortlist of six names – the Brazilian Bar Association (OAB) for the lawyers, and the respective prosecutors’ one, for the members of the Public Ministry.

way, that is, after vacancies appear in the judicial system. Despite this important constraint on presidential action, there is a perception within and outside the courts that appointments to upper courts are decided in a political way due to the intervention of the two elective branches of government.⁹

Table 2 – Upper Courts Nominations, per president, 1985-2010

President	Number of STF ministers appointed	Number of STJ ministers appointed	Total	Average/year
Sarney (1985-1990)	5	4	9	1,7
Collor (1990-1992)	4	6	10	5
Franco (1992-1994)	1	4	5	2,5
FHC (1995-2002)	3	20	23	4
Lula (2003-2010)	8	15	23	4
Total	21	49	70	2,8

Source: STJ and Prodasen (Senate).

In Table 2 we present further information on the STF ministers selected during the democratic period initiated in 1985. It shows that tenures are long and that the compulsory retirement rules are fully respected, with only 4 out of 21 early retirements, two of them related to political reasons, that is, moving into ministries. The STF is the final step in the career of most ministers, although this was not the case for three of them (Borja, Rezek and Jobim), who, as will be shown in the next sections, followed a noticeable political career path.

Table 2 – Tenure of Supreme Court (STF) Judges (1985-2010)

President /STF Minister	Dates / Tenure (months)**		Departure	
Sarney (1985-1989) <i>President of the transition</i>				
1. Carlos Madeira	1985-1990	64	Compulsory retirement	
2. Célio Borja	1986-1992	69	Early retirement	Left to be Minister of Justice for President Collor

⁹ Our interviews with members of both courts ratified this perception. Regarding the STJ, one of the interviewed judges claimed that two kinds of “politics” prevail: internal judicial politics to get a candidate to integrate the threesome, and partisan or coalition politics once the threesome has reached the president (STJ Minister Eliana Calmon). She went further to state that “you don’t have the best judges at the STJ, but the ones that best learned the rules of how to get there.” However, there is no perception of politization of the two upper courts, although one of the ministers mentioned that “it is spoken of politization of the superior labour court under the Lula government” (STF Minister Mendes).

3. Paulo Brossard	1989-1994	64	Compulsory retirement	
4. Sepulveda Pertence	1989-2007	219	Early retirement	Resigned before his 70 th birthday to open the door for Menezes Direito's appointment
5. Celso de Mello	1989-2015	-		
Fernando Collor (1990-1992) <i>Impeached President</i>				
6. Carlos Villoso	1990-2006	187	Compulsory retirement	
7. Marco Aurélio Mello	1990-2016	-		
8. Ilmar Galvão	1991-2003	144	Compulsory retirement	
9. Francisco Rezek*	1992-1997	57	Early retirement	Elected for Hague (9 years mandate)
Itamar Franco (1992-1994) <i>Collor's vice-president</i>				
10. Maurício Correa	1994-2004	113	Compulsory retirement	
Fernando Henrique Cardoso (1995-2002) <i>2 mandates</i>				
11. Nelson Jobim	1997-2006	105	Early retirement	Lula's minister of defence. Newspapers say he'd be running as vice-president of Lula.
12. Ellen Gracie Northfleet	2000-2018	-		
13. Gilmar Mendes	2002-2025	-		
Lula da Silva (2003-2010) <i>2 mandates</i>				
14. Cezar Peluso	2003-2012	-		
15. Carlos Ayres Britto	2003-2012	-		
16. Joaquim Barbosa	2003-2024	-		
17. Eros Grau	2004-2010	-		
18. Ricardo Lewandowski	2006-2018	-		
19. Carmen Lúcia	2006-2024	-		
20. Menezes Direito	2007-2009	28	Died	
21. Dias Toffoli	2009-2038	-		

Source: Supremo Tribunal Federal; newspapers

*He was a supreme court judge before, between 1983-90. He left in 1990 to become Minister of Foreign Relations. Returned in 1992.

** Tenure Average: 105 months (8,75 years)

Before entering the analysis of the STF appointments processes, we should clarify the Senate's formal procedure, which is the same for all superior court judges. According to the formal rules, the president nominates the candidate by sending a presidential message to the Senate, where the message becomes a bill of resolution. It is read in the floor and submitted to the Constitution, Justice and Citizenship Committee (CCJ). In the committee, the chairman designates a *rapporteur*, who will instruct and analyse if the candidate has the requisites for the mandate. When the report is ready, the chairman schedules a public hearing (*sabatina*) where the nominee has to answer questions of all present senators, be them members or not of the committee. Once there are no more questions, the chairman proceeds to a secret ballot, in

which only the members of the committee will cast a vote. The session is then suspended and there is a non-public counting of the votes. After the session is resumed, the result is publicly announced and the bill follows to the floor, where the approved rapport of the committee will be read and voted upon. All present senators will cast a nominal and secret vote, and there is a need of absolute majority for the approval. The result is announced by the Senate speaker, published next day and sent to the president, who can finally appoint the minister.

4. Presidential or Coalitional Preferences: Indicators and Data

The abovementioned centralized organization of the Senate's works facilitates the approval of presidential nominees but does not automatically give the president the right to choose who he/she wants. In their study dealing with the presidential legislative agenda, Limongi y Figueiredo (2009: 86) have affirmed that there is no such thing as a presidential agenda - one previously and individually formulated by the president for which, at a second stage, he/she seeks support. Because Brazilian presidents govern through coalitions, the content of the agenda that comes to Congress mirrors the majority agenda, and it somewhat already meets the coalition views. By the same token, we could argue that presidents in Brazil do not impose unilaterally Supreme Court nominees to the Senate. Further, presidents have constrained agenda setting prerogatives concerning nominations because they do not control the timing of new nominations and, therefore, cannot choose the right political moment to face the Senate or the right time to nominate ministers with more approximate views with the presidency.¹⁰ This makes them particularly attentive to the needs of their coalition at the time of submitting a nominee for consideration.

Following this, we presume that the Senate always confirms candidates that have already been consented to by the coalition before reaching this chamber, which will be evinced in some features of the confirmation process –confirmation of all candidates, speedy processes, no or very few nay votes at the plenary, and all rapporteur positions controlled by coalition members. As a result, tensions in the Senate, when present, will mostly involve coalition-opposition relations. These indicators are discussed in Section 4.a. and data on 17 STF confirmation processes is summarised in Table 3 at the end of the paper.¹¹ Another aspect of

¹⁰ The president can delay or postpone for a couple of days, following negotiation with political actors, but cannot change dramatically the nomination setting.

¹¹ There are actually 21 appointees in the period 1985-2010. For the Senate confirmation processes we are still awaiting archive information regarding the first four cases occurring during the presidency of Sarney.

the same argument is that coalition politics affects the profile of the winning candidates that reach the Senate. In other words, it may happen that confirmation processes in the Senate do not differ too much just because attentive presidents took care of adjusting the candidate's profile to the political needs of the time. To observe this, we collect information on the STF appointees of the period 1985-2009 mostly in Brazilian newspapers, but also through interviews with some of the ministers and information published by the Federal Supreme Court. This helps to clarify the process of "building" a presidential candidate, the profile of the winning candidate, and the forces behind the presidential decision. Details on these indicators are presented in section 4.b.

4.a. The President and the Senate

As expected, presidential candidates have had an overwhelming success rate in the nomination of constitutional court judges: 100% of the appointees were approved in less than 33 days (TABLE 3), and with an average of 17 days. This is a very fast process, if compared to other authorities: elsewhere, we have shown that nomination processes usually take around two months (59 days), and that only central bankers have similar short process in the Senate (Lemos and Llanos 2007). It is true that most judges are approved in the floor without much controversy, and get easy majorities. But there are indeed cases where there is a huge pressure over the candidate, and in those cases about one-third of the total votes a candidate gets are contrary to his/ her appointment. Meanwhile, we can also stress two features in the Senate process that point out to some of the constraints he/ she may face: the level of political disagreement around the names and the management of the coalition.

The first point is illustrated by the variation on both the number of nay votes a candidate receives and the length of the process in the Congress stage. Out of the seventeen cases, in only three we could see this happening, and they were the nomination processes of ministers Francisco Rezek (1992), Gilmar Mendes (2002) and somewhat in Dias Toffoli's (2009). The main reason for that was the perception that they were "too political". Because they had previously fulfilled important roles in the government – Rezek as Minister of Foreign Affairs, and both Mendes and Dias Toffoli as juridical advisors to the presidency and General Attorneys - their appointments were considered too close to the president's preference. That would result in partial judgements, "subservient to the government", as Senator Jefferson Peres pointed out, on litigation at the Court. In Rezek's case, another argument was that he

had been a judge at the Court before, and resigned to become a Minister: it was an odd situation to have the same person being appointed twice for the same position at the higher court in the country, something unheard of.¹² In all cases, organized interests in society – the Brazilian Bar Association, universities, NGOs and pressure groups – also voiced their support or criticism of the candidate. During Mendes’ testimony, for instance, the chairman of the committee distributed for the members a list of those who support/ withdraw the candidate, and senator Jefferson Peres declared he had received hundreds of emails in favour or against the candidate. It was natural that having being exposed as public officials before, these candidates were also more prompt to criticism, in opposition to academics or appointees coming from the judiciary career, as their previous decisions had affected different interest.¹³ Although votes are secret, from the debates in the committees and in the floor we conclude that these “presidential candidates” were tolerated by the coalition. Harsh opposition and consequent nay votes rather came from outside the coalition framework, that is, were cast by opposition parties. This government-opposition tension, which is not present under other candidacies, was also due to the timing of the nominations. Mendes appointment, for instance, took place in 2002, when parties were already campaigning for the coming presidential elections.

As for the management of the coalition, let’s go back to the nominees’ process length and see the fastest processes. It is rather surprising that the process of two ministers lasted one or two days. The formal rules foresee interstices between the hearing (*sabatina*) in the committee and the vote on the Senate’s floor, as well as steps concerning the rapports’ writing and publicizing. That shows the level of political agreement and cooperation around such names – Maurício Correa and Menezes Direito, the first a former senator, and the latter a respected judge with more conservative views and a procedural approach, as his colleagues described him, but who also started his career in politics.¹⁴ Maurício Correa was considered to be a skilful politician and personal friend of the ruling president, and his nomination was confirmed in a 24-hour session, “one of the fastest processes in the history of Congress” (O Estado de S. Paulo, 27-10-94). Then, President Itamar Franco had managed to build a supporting coalition and pursued policies that allowed a member of his government, Cardoso to become the next (successful) presidential candidate. The senate confirmation took place after Cardoso’s election. The new president supported Itamar’s nomination and put the elected

¹² Senate plenary debates, Rezek (30/04/1992); Mendes (-); Toffoli (-).

¹³ Committee debate, Gilmar Mendes, (-).

¹⁴ Interview with STF minister, Eros Grau; O Globo, 1/09/09.

vice-president in charge of the negotiations with the Senate. Although there was some resistance in the beginning, the “loyal members of Itamar’s coalition” were mobilized in favour of Correa (Gazeta Mercantil 26-10-94).¹⁵ In the case of Menezes Direito, whose process took one day only, Lula asked the Senate to speed up the confirmation process as the candidate was reaching the 65-year age limit in September (Gazeta Mercantil, 30-08-07). It also involved the STF cooperation, as the outgoing minister, Sepúlveda Pertence, resigned some days before the due date. But it is not without notice that Menezes Direito had political networks – he had been a juridical advisor at the Ministry of Education in the 70’s, had run for the Chamber of Deputies in 1982 (as a PMDB candidate), and was a Secretary of Education in the State of Rio de Janeiro in the late 80’s. His appointment to STJ, in 1996, was due to political connections with the former governor of Rio de Janeiro (Moreira Franco), and to the STF, in 2007, Nelson Jobim, then Minister of Defense but who had previously been Minister of Justice during Cardoso’s presidency, was a fundamental support (O Globo, 01-09-2009). In other words, high cooperation levels are due to candidate’s choices that are supported by the majority parties and are oriented to the centre of the political spectrum.

The level of coalition management is also present in the indicator “who” is the rapporteur in the candidate process – who is responsible for leading the vote and defending the candidate publicly, in the committee and in the floor. Not surprisingly, in all but one case the rapporteurs were from the coalition, but not from the president’s party. That is, the nature of the choice for this key role shows the president’s teaming with the other parties in the coalition to bring support to a set of policies – as the constitutional court ministers will be responsible for judging as the last instance in the judiciary. To make it possible, the candidate cannot surely have radical preferences: on the contrary, it should be a name defensible by the other members of the coalition. In this case, PMDB and PFL – a centre and a right-wing party, respectively – were responsible for all but one nomination’s reports, from president Sarney to president Lula. PMDB – usually the largest party in the Senate – has an even more important role, as PFL during Lula’s mandates became opposition and was not granted the role as rapporteur. During Lula, it was also the small right-wing parties within the coalition which had key roles. The only exception for the coalitional rule on the rapporteur’s was Eliana Calmon’s, whose process was reported by Senator Azeredo, from PSDB – then at the opposition to Lula, but who was from the same state and reported favourably. Here, again, we stress the majoritarian character of the process, which puts control into the hands of the

¹⁵ The newspaper referred to the Senate’s speaker (from PMDB party) and the elected vice-president (from PFL party).

largest parties – which are centre-right parties. As such, even during Lula’s presidency, whose party is located at the left of the political spectrum, there was a need to resort to the majority’s preferences.

Another noticeable indicator in the process to explain variation on presidential constraint is the time elapsed between the vacancy of the seat in the STF and the presidential message reaching the Senate with the new candidate. As Table 3 also shows, this can vary from 1 to 46 days. Because of the independence of the judiciary in Brazil – the fact that judges cannot be dismissed by any president on the grounds of political disagreement –, presidents know exactly when they will fill vacancies: when the compulsory retirement age is reached or, more rarely, when any member passes away or resigns voluntarily. That means presidents try-on some names long before the vacancy, “releasing” them in the press so as to test if they are consensual enough among corporations, political actors, the STF itself and public opinion. What is surprising about this indicator is that even knowing when the seat will be available and trying-on, it might take some time to find a consensual name. In other cases, it is quite clear who the president wants – Mendes and Gracie’s cases illustrate it.

From what we have seen in this section, we first conclude that the senate’s confirmation process obliges the president to seek commitments with his coalition before sending the bill to the Senate. Second, that the dominance of PMDB, and to a lesser extent, PFL in the legislative scenario represents a filter for all presidential candidates and we expect that presidents will appoint according to the centrist preferences of these parties. Third, despite these “ideological” constraints, there is still a range of possible candidates that can be palatable for the coalition partners. Therefore, in the next section we explore whether candidates vary within the limits imposed by the influence of the president’s coalition by analysing the selection process and the candidates’ profile.

4.b. The Selection of a Candidate

Different from what happens with classical studies of U.S. judicial preferences (Cameron, Cover and Segal 1990), we can not report clearly or unanimously on the ideology –liberal or conservative- of an appointee. With some exceptions newspapers are not much concerned with ideology, but with documenting the proximity of a candidate to the president. They check career paths, where the candidate was recruited, the state of origin. They also report on

alternative names under consideration by the president. We use this information as a basis to build three indicators of presidential proximity.

The first one has to do with the position from where the candidate was recruited. A recent study based on the biographies of STF members reports that there are differences between the post-1988 Federal Supreme Court and the older Supreme (pre-1964) Court in terms of professionalization, as there has been an increase of “outsiders” of the technical judicial career – lawyers – rather than judges and prosecutors.¹⁶ However, only one-third of the ministers appointed between 1985 and 2003 have come from judicial careers –and two-thirds from positions in the elective branches-, which for the authors indicate the limits of the differentiation of the judicial branch from political realm (Marenco and Da Ros 2008: 46). From the perspective of this article, this fact would add evidence to sustain that presidents are capable of appointing close candidates. Having the possibility to select freely, candidates with exclusively judicial or academic careers suggest that the president is not politically strong to propose an equally qualified candidate directly identified with his/her government, which does not exclude that the latter be in line with the policy orientation of the government. Typical “presidential” candidates are ministers of justice, executive legal advisors, the general attorney of the federal government.

A further indicator concerns whether a presidential candidate received objections, as published in the press. We collected information on the source and on the type of objections (whether objecting to the candidate’s proximity to the president, his qualifications for the job and his reputation, the last two being constitutional conditions). We argue that objected candidates whose nomination is however pushed forward are close to the president. The second indicator intends to capture regional determinants of presidential choices. The press reported on one occasion the “not-always-followed tradition of the nominee being from the same state as the retiring minister” (Passos de Freitas, president of the association of federal judges of Brazil, *Folha* 14-08-94), and our indicator concerns the extent to which justices appointed since 1985 have come from the same state, or at least region, than their predecessors. If this is not so, presidents count on more leeway to appoint a close candidate.

¹⁶ During the 1946-1964 democratic period in Brazil, 40% of the composition of the Court was made up of judges and prosecutors; since 1988, this number fell to 27%, and the number of lawyers increased from 14% to 40% (Marenco and Da Ros, 2008).

As a result, we have identified that 9 of the 21 ministers directly come from executive positions (two general attorneys of the federal government, three ministers of justice, one minister of foreign affairs, two presidential advisors, and one general prosecutor of the federal government).¹⁷ Regarding the rest, 8 came from judicial careers, 2 were prosecutors acting at state level, one academic and one lawyer. As said above, many of these had political connections and even party identification, but did not belong to the inner presidential set of choices. A curiosity is that eight of the nine “presidential” judges belong to the period pre-Lula which means that the president that most STF ministers appointed was the one that less presidential candidates selected. In this respect, the only exception in the pre-Lula period was President Collor de Melo, who took three of his four candidates from the judiciary. Regarding the other two indicators, there is no clear division between Lula and the rest, but Lula’s candidates received mild criticisms and were often praised in the press. Lula was also more careful than other presidents regarding the “vertical” federal constraints. Let us see these points in more detail.

The president of the transition (Sarney 1985-1990) appointed five ministers: four of them were very presidential nominations (only the fifth had a judicial career, although according to the press was a personal friend of the president: Carlos Madeira from Sao Luis, MA). The other four had been carrying on functions within the government: the minister of justice, two general presidential advisers and the general prosecutor. In contrast, Fernando Collor de Melo, who was the first elected post-transition president (1990-1992), selected candidates with judicial careers. His mandate was short because he was impeached by Congress on allegations of corruption, but he had the chance to appoint four STF ministers. Three of his four appointees came from judicial careers (two from the superior court of justice and one from the superior labour tribunal). It was the first time that someone from the labour courts was chosen for the STF, but this candidate was also the president’s cousin, a fact very much criticised in the press (Folha de Sao Paulo 1-05-90).¹⁸ The fourth appointment was a clearly presidential one. It involved the re-appointment of Minister Rezek who had left the STF in 1990 to become Collor’s minister of Foreign Affairs. He resumed his position at the Supreme Court because STF Minister Celio Borja left to become Collor’s Minister of Justice! As we saw in section 4.a., this “reshuffle” was contested in Congress with 16 negative votes. The

¹⁷ The information presented in this section is systematized in Table 4 at the end of the paper.

¹⁸ A peculiarity of the appointments of STF Ministers Velloso and Melo was that President Collor asked the superior court and the labor court to propose a list of three names. The STJ answered putting all its members at presidential disposal and the TST sent a threesome that included the cousin of the president (Folha de Sao Paulo, 1-05-90).

next appointment, corresponding to Itamar Franco, was extremely political and controversial. Franco's candidate faced resistances within the STF, which objected to the candidate's presidential proximity and the fulfilment of the constitutional requirements of "notable juridical knowledge" (Correio Braziliense 26-10-94) and "unblemished reputation", the last due to a public scandal in which he was involved (Correio Braziliense, 25-10-94). However, as we saw in section 4.a., the president managed to build support in the Senate.

Regarding Fernando Henrique Cardoso's appointments, we found two out of three presidential candidates. The technical one was Minister Ellen Gracie, a candidate supported by STF Minister Jobim (also Cardoso's appointee), whose nomination responded to the "president's desire to promote a woman" (Valor, 1-11-00). She became the first woman in the history of the STF, despite having been questioned by members of the upper courts for coming from a federal regional court (TRF), and not from the superior court of justice (Valor 1-11-00): "This hierarchy should be respected" claimed a member of the STJ (Estado de Sao Paulo 10-11-00). However, the most controversial was the nomination of Gilmar Mendes, at the time general attorney, which was qualified by the press as "a polemic without precedent in the juridical environment" (Correio Braziliense 16-05-02). Mendes was a very close figure to Cardoso because of his successful performance in defending the economic programme from judicial paralysis. His bold and blunt style in defending the interest of the government won him many enemies among judges and lawyers. He received multiple objections –although his qualifications (with a PhD in constitutional law from Germany) were unquestionable- and this gave ground for political opposition in the Senate (see section 4.a). The opposition was afraid that Mendes became "the leader of the government in the STF" (Senator Suplicy, Folha de Sao Paulo, 23-05-02).

Let us now see the eight nominations of President Lula, which according to our records involved only one presidential candidate. Lula began his mandate facing the unique opportunity to nominate simultaneously three members of the STF, due to compulsory retirements occurring between April and May 2003. The nominations were regarded as "strategic" in the press (O Estado de Sao Paulo, 5-05-03), in connection with policies of the government such as the rent and the tax reforms (Journal de Brasilia 12-05-03). The minister of Justice, in charge of "testing the names" and advising the president, declared that "we want ministers of unblemished reputation, notable juridical knowledge, and connected with the fact that we are living a moment of change" (Minister of Justice, in O Estado de Sao Paulo, 6-05-

03).¹⁹ When the first three nominations were approaching, newspapers reported that Lula wanted another woman and an afro-descendent in the STF (O Estado de Sao Paulo 4-02-03). Many candidates were under consideration and negotiation (the press reported that 400 CVs had been under study), but agreement prevailed on the fact that one of them had to be an afro-descendent (see Journal fo Brasil, 4-04-03) and that a name would be reserved for Sao Paulo's juridical environment (Folha, 2-05-03). Lula nominated strategically: a lawyer (Britto, who had worked as a lawyer for Lula's *Partido dos Trabalhadores*),²⁰ a general prosecutor acting in Rio de Janeiro (Barbosa, an afro-descendant, with an outstanding CV that was unanimously agreed upon inside the government), and a judge (Peluso, coming from Sao Paulo as agreed, but resisted by PT sectors wishing to appoint a candidate more on the left). The three male nominations were objected by the female legislators of both chambers, signing a protest note (O Estado 8-05-03).

The fourth appointment went to Eros Grau, who would take the position of retiring minister Correa, president of the STF during Lula's first year and very much against the government's plans to cancel pension privileges that affected the judicial branch. Therefore, a sympathy for the judicial reforms –modernization and a council as external control- was at the nomination time a value taken into account in the government's selection process (Valor Econômico 19-04-04). Grau was a university professor specialized in economic law with excellent qualifications, close to Lula's PT but actually a supporter of the Brazilian Communist Party. This was not a presidential appointment, but certainly one that accompanied the government's policy orientation. At the end of 2005, Lula appointed two new ministers because of the compulsory retirement of Carlos Velloso and the decision of Nelson Jobim to return to politics. Jobim announced he would resign in April to run as PMDB presidential candidate or as governor in Rio Grande do Sul (Correio Braziliense 13-01-06). Newspapers reported that Lula's first choice candidate (a PT member, ex-minister of education, Tarso Genro) was resisted by sectors of his party and would be turned down at the senate (Correio Braziliense 9-01-06). The president of the Committee of Constitution and Justice (Antonio Carlos Magalhaes, PFL-BA) confirmed that there was an agreement among opposition and

¹⁹ The president's advisors –and contacts with the STF and the judicial branch- were the Minister of Justice Márcio Thomas Bastos, the General Attorney Ribeiro Costa, the PT federal deputy Sigmaringa Seixas, and members of the Civil House, such as the director José Dirceu and the juridical advisor Jose Antonio Dias Toffoli (Correio Braziliense 8-01-03).

²⁰ Britto was regarded as a "typical Lula candidate" in one of our interviews, because of his proximity to PT, Lula's party. We prefer not to classify him as a presidential candidate because it seems more to have been a compromise with his own party than anyone close to the president. Newspapers have later also reported "Lula's lack of satisfaction" with his performance as STF minister.

government parties to reject any political appointee to fill the vacancy of Minister Velloso (Tribuna do Brasil 19-01-06); the Ajufe (Association of Federal Judges of Brazil) also exerted pressure to select a judge because retiring minister Velloso was a judge himself (Correio Braziliense 27-12-05). The president desisted from the political appointment and opted by Lewandowski –a career judge from Sao Paulo- to occupy Velloso’s seat. The appointee had no connections with the left (Correio B. 7-02-06) and was characterised as “prudent” by the press. The role of the minister of justice was praised for these results (Gazeta Mercantil 13-02-06). On the other hand, the vacancy left by Minister Jobim was granted to a woman, Carmen Lucia Antunes Rocha, a prosecutor with connections to PMDB presidential pre-candidate Itamar Franco (Correio Braziliense, 11-05-06), who prevailed over Mizabel Abreu Derzi, who had a more PT profile.

Lula’s last nomination also showed the prevalence of coalition politics over presidential politics.²¹ The nomination of Menezes Direito was regarded in the press as a triumph of the second and the main coalition party, the PMDB (for instance, Gazeta Mercantil 29-08-07), but was also accepted by the opposition right-leaning party DEM (Journal do Brasil, 29-08-07). It also counted on the support of the then STF president, Gilmar Mendes. Lula’s party was in a complicated situation at the moment of this nomination: the STF was opening a criminal case against 40 politicians accused of corruption charges with the *mensalao* scandal (an scandal involving the buying of votes at the Chamber of Deputies). Certainly, it was not the right moment to push a presidential candidate, and Alberto Menezes Direito came from the superior court of justice (which had not obtained support for any of its members in the last 16 years.). As we saw in section 4.a., he also had good political connections. When Direito died last year, Lula nominated his general attorney, the first candidate coming from a position close to the president. This proximity was somehow questioned in the press and in the Senate, in conjunction with his qualifications because he was regarded as very young for the job.

We only found seven out of 21 appointees with explicit objections published in the press.²² They pointed either to the candidate’s proximity to the president or his qualifications for the job and reputation (the last two points being constitutional provisions). The most objected to candidate was, as already stated, Gilmar Mendes, for having been such a strong defender of the policies of the appointing president from his position of general attorney. Many even

²¹ Actually it turned out to be his last nomination as the nominee died two years later.

²² We did not find much in the press on Sarney’s candidates, but there were some comments regarding their proximity to the president.

argued that he did not pass the constitutional requirement of unblemished reputation because of the many trials he had for his actions. In general, presidents have chosen highly qualified people, but particularly regarding Lula's candidates the press reports more on praises than on objections. Even on the objected candidates, criticisms were restricted: Peluso was actually only questioned within Lula's rank-and-file for his conservative ideology, some timid objections appeared in the press regarding Minister Barbosa (his ex-wife had once accused him of aggressions), which did not transcend, and, Diaz Toffoli was a too presidential candidate, but the last one in a chain of very respected appointments.

Regarding the geographical origin of the candidates, our interviews stressed that presidents are little constrained by demands of this kind. Apparently, the only informal rule to be followed dictates that one of the STF vacancies "belongs" to the important state of São Paulo, and when this vacancy occurs, judges from São Paulo mobilise to get a candidate appointed.²³ To confirm this, we compared the state of origin of both the retiring and the new minister in order to observe if there was some sort of correspondence. As can be seen in Table 4, the bulk of candidates come from four Brazilian states, which are the most populated and economically prosperous, and also where the most important law schools are located: São Paulo, Rio de Janeiro, Minas Gerais and Rio Grande do Sul. As there is a lot of circularity among candidates coming from this region, we rather checked if the new appointment entailed an abrupt change of region, such as a Minas Gerais candidate replacing a north-east minister and also if this move was compensated in another appointment of the same president. We only found asymmetries in the first two presidencies of Sarney and Collor, where the north and north-east region lost a place in each case, whilst Cardoso introduced a candidate of the capital Brasília and appointed two others of Rio Grande do Sul. Lula, on his part, was careful enough to respect the only vacancy of the north region he had to fill. In perspective, Lula has been the most respectful president regarding geographical concerns, although the other two presidents that had to fill vacancies from north or north-east candidates also appointed at least one candidate from this region.

5. Discussion

There is a range of constraints that Brazilian presidents must face while nominating supreme court justices. Let us summarise the main ones identified in the previous pages:

²³ Interview with STF Minister, Gilmar Mendes.

- 1) the 1988 Constitution obliges them to select candidates of outstanding legal knowledge and unblemished reputation, which in practice circumscribes the options to a confined elite of jurists and academics.
- 2) the power of the judiciary forces them to involve ruling STF members in the selection process and, in fact, we did not find more than one candidate objected to by the supreme court.²⁴ On the other hand, STF justices are aware that appointments are a political matter and seem prone to accept a presidential candidate, provided he is qualified and respected.
- 3) there are also pressures to keep some STF seats for career judges. Lower judicial instances and judges associations will take care that they do not lose representation at the highest court, as happened on the occasion of Velloso's vacancy.
- 4) presidents do not face strong "vertical" constraints, but Sao Paulo's seat at the STF should be respected. They also should pay some attention to the north and north-east region if a vacancy held by this region is at stake.
- 5) presidential candidates must pass the "PMDB filter", the biggest political party located at the centre of the ideological spectrum that not only integrated Cardoso's, Lula's and other governments but also held most relevant authority positions at the Senate. For instance, this filter led Lula to appoint a justice, Minister Menezes Direito, who was considered a conservative, far away from his ideological preferences and those of his party.

Then, what can Brazilian presidents do within these limits? We could argue that presidents want to select close candidates, people of their trust identified with their administration and policies. As shown in the previous section, most candidates have been "presidential" in this sense. Only two presidents failed imposing candidates according to this profile. Impeached President Collor de Melo, the weakest of the third wave Brazilian presidents, chose one out of four of his candidates from within his government and his only presidential choice was contested in the Senate with a high number of opposing votes. Here the candidate himself (Minister Rezek) was problematic, but Collor also had a minority coalition as well as complicated relations with Congress. On his part, President Lula da Silva appointed his attorney general at last, this being the first presidential choice preceded by other seven quite balanced and "strategic" nominations.

We can think of a number of reasons why majority president Lula did not appoint like his predecessors. The first one relates to the fragmentation factor pointed out above. Although

²⁴ Also ratified in our interview with Edmundo Carreiro, General Secretary of the Senate Directorate until 2007.

Lula was a majority president, he presided over a large and heterogeneous coalition and was the head of a party with many internal streams. The fragmented character of his government led to compromises and accommodative decisions that concerning judicial appointments translated into candidates of different origins with a centrist tendency pulled by the PMDB filter. Conversely, the more homogenous character of the coalitions of previous presidents involved a greater level of coincidence between presidential and coalition preferences, so that nominations did not involve major compromises for any of the coalition partners. The second reason could be named the Lula factor and points to personal features of Lula's leadership. Lula is often regarded as a "statesman" and someone who knows perfectly the difference between government and state will not make partisan appointments.²⁵ A related personal factor, very much cited in the press and in our interviews, was the contribution of the president's main advisor in terms of appointments, Márcio Thomas Bastos, the minister of justice of his first government. Many attribute the outstanding profile of Lula's nominees to this respected (and well connected) criminal lawyer. Thirdly, we can think of structural factors conditioning the free choice of nominees during Lula's government. Judicial stability in Brazil allows to anticipate how many ministers a president will appoint. A low number of ministers, as usually happened before Lula, may lead to an attitude of "presidential deference" or, in other words, to respect the presidential choices as these will not alter the supreme court composition in a relevant way. Instead, many appointments may lead to warnings of politization, which immediately activates the many controls present in the political system.

To conclude we would like to stress that the straitjacket of the consensual politics has not curtailed modernising choices from the side of the president. Both Fernando Henrique Cardoso and Lula could use their nominating prerogatives to innovate and/or channel social demands, such as those claiming for a female appointee. The first introduced the first STF female justice in the 1990s and the second the first afro-descendent in the 2000s.

6. Conclusion

In a system where judicial tenures are long and compulsory retirement rules are fully respected, supreme court justices are insulated from political pressures while on the bench and are expected to act quite independently. In such a system, judicial appointments acquire crucial importance as they constitute the only instance presidents have to induce favourable

²⁵ Interview with STF minister Eros Grau.

judicial outcomes through the selection of candidates who share their policy preferences and with the expectation that they will comply by acting sincerely (Brinks 2004). Brazilian presidents must co-appoint with the Senate, though, in a legislative process in which their parties do not control this chamber's authority positions and where the responsible for leading the debates and defending the candidates are their coalition partners. Irrespective of the political orientation of the presidents – for instance, Cardoso was at the centre-right and Lula at the centre-left- legislative appointment processes have had centre-right and right parties as rapporteurs. What we called in Section 5 “the PMDB filter” has been particularly notable during the presidency of Lula da Silva, with several first choice presidential candidates being compromised for other more neutral and centrist figures.

The latter is a contribution to a further refinement of the theory of the fragmentation of the political arena. Majority coalition governments do not work similarly to single-party majority governments in the sense that presidential proposals are not individually and unilaterally formulated, but that those reaching the Senate already contain the majority preferences. As shown in these pages, majority coalitions drive attention to the coherence of the coalition that supports the president: the more homogeneous it is, the more chances the president will have to appoint a close candidate because his preferences will be near those of coalition partners. Instead, majority heterogeneous coalitions involve more compromises and, as a result, presidents may nominate candidates that are away from their set of first choices –such as President Lula's appointment of Minister Menezes Direito, a catholic conservative. The nature of Brazilian legislative parties pulls nominations at the centre of the ideological spectrum, in a rather conservative tendency where great ideological moves will apparently never take place.

Brazil adds further evidence to support the fragmentation theory because of the multiple veto powers present in the system. Not only are the political parties sitting in the Senate involved in appointment processes, there are also strong constitutional and technical constraints for the selection of nominees, which include rounds of consultation with the courts and professional organizations when a vacancy approaches. All in all, it seems that winning candidates need political connections, many even have had a party identification and about half of them could be linked to the presidential circle of advisors. This is not surprising considering that final decisions correspond to the two political branches of government. However, a political

process in a highly fragmented system producing strong consensual politics does not entail the politization of the supreme court.

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Table 3 – Legislative Process of Supreme Court Nominations, Brazil, 1989-2010

Minister	Time elapsed between vacancy-presidential message (days)	Rapporteur	Rapporteur Party-State	Party belongs to presidential Coalition?*	Number of “no” votes	Length of Process in the Senate (days)
Sarney (1985-1989)						
5. Celso de Mello	14/03/1989 04/05/1989 N=21	Leite Chaves	PMDB-PR	YES	3	33
Fernando Collor (1990-1992)						
6. Carlos Villoso	15/03/1990 27/04/1990 N=43	Lourival Batista	PFL-SE	YES	1	25
7. Marco Auoélio Mello	17/03/1990 02/05/1990 N=46	Mauro Benevides	PMDB-CE	YES	3	20
8. Ilmar Galvão	22/04/1991 31/05/1991 N=39	Lourival Batista	PFL-SE	YES	0	11
9. Francisco Rezek	31/03/1992 15/04/1992 N=15	Élcio Alvares	PFL-ES	YES	16	15
Itamar Franco (1992-1994)						
10. Maurício Correa	24/10/1994 25/10/1994 N=1	Francisco Rollemberg	PFL-SE	YES	3	2
Fernando Henrique Cardoso (1995-2002)						
11. Nelson Jobim	05/02/1997 07/03/1997 N=30	Pedro Simon	PMDB-RS	YES	3	11
12. Ellen Gracie Northfleet	28/10/2000 01/11/2000 N=4	José Fogaça	PMDB-RS	YES	0	21
13. Gilmar Mendes	24/04/2002 25/04/2002 N=1	Lúcio Alcântara	PSDB-CE	YES	15	27
Lula da Silva (2003- 2010)						
14. Cezar Peluso	27/04/2003	João Alberto	PMDB-MA	YES	3	21

	07/05/2003 N=10	Souza				
15. Carlos Ayres Britto	03/05/2003 07/05/2003 N=10	Marcelo Crivella	PRB-RJ	YES	3	21
16. Joaquim Barbosa	20/04/2003 07/05/2003 N=10	César Borges	PR-BA	YES	3	21
17. Eros Grau	08/05/2004 13/05/2004 N=5	Pedro Simon	PMDB-RS	YES	5	26
18. Ricardo Lewandowski	19/01/2006 07/02/2006 N=19	Ramez Tebet	PMDB-MS	YES	4	7
19. Carmen Lúcia	29/03/2006 12/05/2006 N=37	Eduardo Azeredo	PSDB-MG	NO	1	12
20. Menezes Direito	17/08/2007 28/08/2007 N=11	Valter Pereira	PMDB-MS	YES	2	1
21. Dias Toffoli	01/09/2009 18/09/2009 N=17	Francisco Dornelles	PP-RJ	YES	9	12

*From Amorim Neto, 2002.

Source: Prodasen (Senate), Supreme Federal Court (STF).

Table 4 – Winning Candidates Profile – Brazilian Supreme Court Judges (1985-2010)

President /STF Minister	Winning Candidate Features				Objections (published in the press)	
	Presidential Proximity	Position at the moment of selection	Origin (place of professional activity)	Origin of previous minister	Source (who objected)	Type
Samney (1985-1989)						
1. Carlos Madeira	No	Judge	<i>Maranhao</i>	<i>RJ y Brasilia</i>	-	
2. Célio Borja	Yes	Presidential advisor	RJ	RJ	-	
3. Paulo Brossard	Yes	Minister of justice	<i>Rio Grande do Sul</i>	<i>Pernambuco</i>	-	
4. Sepulveda Pertence	Yes	General prosecutor	MG	MG	-	
5. Celso de Mello	Yes	Presidential advisor (consultoría geral)	<i>SP</i>	<i>PB (NE)</i>	-	-
Fernando Collor (1990-1992)						
6. Carlos Velloso	No	STJ minister; career judge	MG	MG	-	-
7. Marco Aurélio Mello	No	TST minister	<i>RJ</i>	<i>Maranhao</i>	Press	Proximity (cousin of the president)
8. Ilmar Galvão	No	STJ minister; career judge	Acre (N)	PI (NE)	-	-
9. Francisco Rezek	Yes	Minister of Foreign Affairs; ex-STF minister	MG	RJ	-	-
Itamar Franco (1992-1994)						
10. Maurício Correa	Yes	Minister of justice	MG	RS	STF	Reputation; Qualifications
Fernando Henrique Cardoso (1995-2002)						
11. Nelson Jobim	Yes	Minister of justice	Rio G do Sul	MG	-	-
12. Ellen Gracie Northfleet	No	Prosecutor	Rio G do Sul	RJ	STJ members	Qualifications

13. Gilmar Mendes	Yes	Attorney general	<i>Brasilia</i>	RS	AMB, OAB, Public Ministry, academic centres, lower federal justice	Proximity; Reputation
Lula (2003- 2010)						
14. Cezar Peluso	No	Career judge	SP	SP	PT sectors; SP juridical sectors	Ideology
15. Carlos Ayres Britto	No	Lawyer	Sergipe	Acre	-	-
16. Joaquim Barbosa	No	Prosecutor	RJ	RJ	(Press)	(Reputation)
17. Eros Grau	No	Academic	RS	MG	-	-
18. Ricardo Lewandowski	No	Judge*	SP	MG		
19. Carmen Lúcia	No	Prosecutor	MG	RS		
20. Menezes Direito	No	STJ minister**	RJ	MG		
21. Dias Toffoli	Yes	Attorney general	SP	RJ	Press	Proximity; qualifications

*A lawyer, becomes a member of SP tribunal in representation of the “constitutional fifth”.

**With a previous political career in RJ.

AMB: Asociación de Magistrados Brasileños (Brazilian Association of Magistrates)

OAB: Orden de Abogados de Brasil (Brazilian Bar Association)

RJ: Rio de Janeiro State; MG: Minas Gerais State; SP: San Paulo State; RS: Rio Grande do Sul