

A Tale of Two Provinces:
Countervailing Power Centers and Judicial Autonomy in San Luis and Mendoza*

Rebecca Ann Bill
Department of Political Science
Stanford University
rabill@leland.stanford.edu

Prepared for delivery at the 2000 meeting of the Latin American Studies Association,
Hyatt Regency Miami,
March 16-18, 2000

Do not quote or cite without the author's permission.

*I would like to thank Larry Diamond and Terry Karl for their valuable advice and comments on earlier drafts.

In many third wave countries, the separation of powers is a fiction; the judiciary remains subordinate to the executive branch. Democratic transitions have occurred, yet the judiciary is unable to place real constraints on the executive. Many leaders have not taken advantage of the democratic opportunity to change the incentive structures that have encouraged the subordination of the judicial branch. A dependent judiciary is one of the most entrenched obstacles in the way of democratic consolidation in Latin America. In most of the ultrapresidential systems of Latin America, the power relationships embodied in informal practices diverge from the formal rules embodied in the Constitution. Although the mechanisms of horizontal accountability may already exist in theory as part of the formal institutional structure, informal practices allow presidents to control the courts. In fact, informal rules have become institutionalized.

The challenge for much of Latin America is to make the formal mechanisms a reality. This occurs primarily through judicial autonomy, which is part of an effective system of horizontal accountability. Guillermo O'Donnell describes horizontal accountability: "[A]ccountability runs not only vertically, making elected officials answerable to the ballot box, but also horizontally, across a network of relatively autonomous powers (i.e., other institutions) that can call into question, and eventually punish, improper ways of discharging the responsibility of a given official.¹ An autonomous judiciary can constrain and hold presidents accountable for their actions. As Richard Sklar writes, "In modern democracies, courts and judges back up the institutions of electoral representation as a second line of defense against the dangers of despotic government."² A necessary condition for horizontal accountability is the existence of state agencies with the autonomy, the authority, and the will to act as controls on other agencies and on the executive. O'Donnell argues that horizontal accountability requires "not isolated agencies but networks of agencies that include at their top... courts (including the highest ones) committed to such accountability."³

But how is judicial autonomy constructed where it has not previously existed? In this paper, I argue that the dispersal of power among competing political institutions of comparable strength is central to judicial independence. Judicial autonomy is in part a product of countervailing power centers. Concentration of political power in the hands of the executive stands in the way of an autonomous judiciary. The creation of competing rather than converging power centers can help change the illiberal institutional arrangements that allow the president to control the judiciary. In a competitive political environment, the judiciary can emerge as an arbiter among political actors rather than a tool held exclusively by a single dominant actor. This dispersal begins with a balance of power among political parties; political actors then see advantages in extending horizontal accountability to other agencies. Party balance fosters a system of overlapping agencies of horizontal accountability, which in turn contributes to judicial independence. The fragmentation of power among parties can lead to the creation of agencies of horizontal accountability or countervailing power centers that strengthen the judiciary relative to the executive branch. In contrast, dominant one-party configurations and other institutional arrangements that fortify the concentration of power in the hands of the executive obstruct the

¹Guillermo O'Donnell, "Delegative Democracy," *Journal of Democracy* 5, no. 1 (January 1994), 61-62.

²Richard L. Sklar, "Developmental Democracy," *Comparative Studies in Society and History* 29, no. 4 (October 1987), 694.

³O'Donnell, "Horizontal Accountability in New Democracies," in *The Self-Restraining State: Power and Accountability in New Democracies* Andreas Schedler, Larry Diamond, and Marc F. Plattner (Boulder, CO: Lynne Rienner, 1999), 39.

emergence of judicial autonomy. A single dominant party that controls the executive and the legislative branches fosters an asymmetry of institutional resources, which is unfavorable to judicial autonomy.

Stalemated power among parties contributes to divided government in which the legislature can check the executive. When the legislature acts a competing power center, it creates a climate in which other effective agencies of horizontal accountability are likely to emerge; the executive is unable to prevent their emergence and may even see advantages in creating them. In contrast, a single dominant party can denude potential horizontal accountability agencies of any autonomy and therefore the capacity to act as controls on the executive. Divided government is especially important when the president seeks to pass controversial bills that would establish executive control over horizontal accountability agencies by altering their institutional design. When the executive's party controls a majority in Congress, the executive can manipulate the institutional design of countervailing power centers, for example, by changing the appointment and removal process for their members. On the other hand, when at least two parties of comparable strength have representation in the legislature, the president's party is less likely to have a majority over time. In this case, coalition government is likely or the president may foresee that her party will be displaced in the future.⁴ Under these conditions, the executive will find it difficult to weaken agencies of horizontal accountability.

When agencies of horizontal accountability are in the hands of the opposition and are the seat of significant power resources, they act as countervailing power centers that can set the stage for judicial autonomy. In particular, the appointment and removal processes for agency members determine the organ's effectiveness. Executive control over the composition of countervailing power centers can strip them of their autonomy and potential to act as controls. The same formal structures of horizontal accountability may have different consequences in different countries. Political party balance in part determines how the formal structures work. An unbalanced party system not only neutralizes the legislature's potential as an agency of horizontal accountability, but it creates a climate that undermines the effectiveness of other agencies.

In this paper, which is based on seven months of field research in Argentina during 1998-1999,⁵ I illustrate my argument through a comparative case study of San Luis and Mendoza, two provinces with different levels of judicial independence within the same national context. The two provinces demonstrate that systems of horizontal accountability with the same formal structures can function very differently. These contrasting cases allow me to refine a theory about how hybrid regimes begin to construct judicial autonomy. In San Luis, the governor has totally

⁴Scott Mainwaring and Matthew Soberg Shugart, "Introduction," in Presidentialism and Democracy in Latin America eds. Mainwaring and Shugart (Cambridge: Cambridge University Press, 1997), 10. The nature of the party system, in particular the number of relevant parties in the legislature and the level of party discipline, determines the executive's "partisan powers" over policymaking.

⁵I conducted extensive field research in both San Luis and Mendoza. My research consisted of personal interviews and visits to the courts, Congress, and libraries. In each province, I interviewed Supreme Court Justices, federal judges, provincial judges, journalists, academics, lawyers, civil society actors focusing on judicial reform, and legislators from all relevant political parties. My primary sources included newspaper archives, congressional records, court rulings, personal archives of key actors, and working reports of civil society actors. In addition, while in Buenos Aires, I visited national civil society groups concerned with the issue of judicial autonomy on the provincial level. These centers of political activism enabled me to extend my analysis beyond the supply-side to look at the demand for justice.

subordinated the judiciary. Mendoza, on the other hand, has made considerable progress in the direction of judicial autonomy. A comparison of the contrasting cases facilitates the identification of the explanatory variables behind Mendoza's relative success in constructing an independent judicial branch. Moreover, remaining within the Argentine context allows for a high degree of control.⁶ The intraregional comparison involved in the analysis of San Luis and Mendoza lends itself to the comparative case method: "the cluster of characteristics that areas tend to have in common... can, therefore be used as controls."⁷ The two provinces share the Spanish colonial legacy, civil law traditions, and ultrapresidentialism. Moreover, the two neighboring provinces are both within the Cuyo region of Argentina, which helps mitigate the problem of comparing phenomena across diverse sociocultural contexts.⁸ Although they have many characteristics in common, San Luis and Mendoza vary on the dependent variable, judicial autonomy.⁹

In both provinces, potential countervailing power centers have constitutional status. The formal structures that indicate a system of horizontal accountability exist in San Luis and Mendoza. Both provinces have a Consejo de la Magistratura, a Jurado de Enjuiciamiento, a Ministerio Público, a Fiscal de Estado, and a Tribunal de Cuentas. In Mendoza, however, these agencies can check the executive, whereas in San Luis they are under the governor's control. Although San Luis and Mendoza have the same formal systems of horizontal accountability, the structures have very different consequences in the two provinces.

This paper proceeds as follows. Section I demonstrates that the two provinces lay at opposite ends of the judicial autonomy continuum. It contrasts the extreme executive subordination of the judiciary in San Luis with the high level of judicial independence in Mendoza. Section II illustrates how a single dominant party in San Luis undermines the ability of not only the legislature but of other potential agencies of horizontal accountability to check the executive. The resulting concentration of power in the governor undermines judicial independence. Section III explores how Mendoza's stalemated party system bolsters competing power centers. The presence of three parties of comparable strength is central to a system of horizontal accountability and judicial autonomy.

The Judicial Autonomy Continuum: San Luis and Mendoza

The judicial branch in San Luis has less autonomy than does its counterpart in the neighboring Province of Mendoza. Since Argentina's 1983 transition to democracy, Governor Adolfo Rodríguez Saá has dominated provincial politics. He has remained in office for five

⁶Argentina's federal structure provides a wealth of cases for analysis. Each of Argentina's 23 provinces has its own judicial branch that can be treated as a separate system. Moreover, each of the 23 judiciaries reflects a different degree of judicial autonomy.

⁷Arend Lijphart, "Comparative Politics and the Comparative Method," in The American Political Science Review 65 no. 3 (September 1971), 688. Lijphart advocates focusing on comparable as a means of overcoming the "many variables, small N problem."

⁸Neil J. Smelser, "The Methodology of Comparative Analysis of Economic Activity," in Essays in Sociological Interpretation (Englewood Cliffs, NJ: Prentice Hall, 1968).

⁹A focus on comparable cases using John Stuart Mill's Method of Difference involves comparing cases that are similar in ways that are treated as parameters but dissimilar with regard to the dependent variable. This method allows one to locate explanatory variables. Mill, "Two Methods of Comparison," in A System of Logic (1888), as excerpted in Amitai Etzioni and F. Dubow (eds.), Comparative Perspectives: Theories and Methods (Boston: Little Brown, 1970), 208.

consecutive terms, accumulating power over time. The combination of constitutional reform allowing for his indefinite reelection and legislation that weakens the judicial branch has contributed to his control of the judiciary. An analysis of the formal rules in San Luis reveals that the laws themselves provide for a judiciary that is subservient to the governor. At the national level, the Argentine president's manipulation of judges has occurred behind a facade of judicial autonomy, whereas in San Luis not even a facade remains. Although on its own the 1987 San Luis Constitution indicates an independent judiciary, an analysis of legislation and actual practices demonstrates a lack of respect for constitutional guarantees. Between 1995 and 1998, a Congress controlled by Rodríguez Saá's Partido Justicialista (PJ) sanctioned laws that permit the governor to control the judiciary, the only organ of control that remained in 1995. The executive already dominated Congress and other agencies of horizontal accountability such as the Fiscal de Estado.

In May 1995, Congress approved Law 5062 that reduced judges' salaries, violating Article 192 of the San Luis Constitution. In opposition to the law, 90% of judicial employees filed suits against the government. The province's first instance and its appeals courts declared the salary reduction unconstitutional.¹⁰ The governor prevented the rulings from taking effect. In contrast to Mendoza where the courts effectively prevented the governor's 1984 attempts to lower judge's salaries, the San Luis courts were unable to prohibit the reduction.¹¹

In order to prevent legal challenges to the salary reduction, PJ legislators formulated laws that prohibit suits against the state. The Economic Emergency Law, Law 5067, declared that San Luis was in a state of economic emergency and suspended all sentences against the state.¹² Law 5071 of February 1996 acts as a disincentive to those who consider initiating judicial proceedings against the state. The law protects government resources from confiscation. When a judge rules against the government, private parties cannot immediately collect damages from the state. Instead, they either face a long delay or never collect the compensation. As a result, potential plaintiffs are less likely to accept the costs of suing the government.¹³

Law 5113 further weakened the judicial branch. It declared the judiciary in a state of emergency for a one-year period that the Superior Tribunal could extend for another 180 working days. The law released courts from their obligation to rule on suits against the state. The Tribunal extended the state of emergency, paralyzing the administration of justice for over 500 days.¹⁴ In addition, the Judicial Emergency Law violated the life tenure of *secretarios*, judicial functionaries who are second in importance only to judges, by permitting the Superior Tribunal to

¹⁰Daniel Casas, "Amo y señor de San Luis," *Tres Puntos* (Buenos Aires), año 2, no. 63, Dossier, 16 Sept. 1998, 46. Colegio de Abogados de San Luis, "Situación institucional en la provincia," 1998, 2.

¹¹In Mendoza, judges waged an effective campaign to force the administration of Santiago Felipe Llaver to respect Article 151 of the provincial Constitution that calls for salary protection. After a year and a half of struggle, the Mendoza Supreme Court declared the salary reduction unconstitutional. Aída Kemelmajer de Carlucci, Mendoza Supreme Court Justice, interview with author, Mendoza, 4 May 1999. Alberto Staib, former president of Mendoza's Asociación de Magistrados, who led the campaign, interview with author, Mendoza, 11 May 1999.

¹²"San Luis conflicto en la Justicia," *Clarín* (Buenos Aires), 6 March 1998. Santiago O'Donnell, "San Luis: el caso que revela la crisis judicial," *Nación* (Buenos Aires), 2 Nov. 1998.

¹³Colegio de Abogados y Procuradores de Villa Mercedes, "Comunicado," 23 Feb. 1998. Graciela Rosso, former Secretary of San Luis Colegio de Abogados, interview with author, San Luis, 20 May 1999.

¹⁴"San Luis, sin Justicia," editorial, *Nación*, 19 July 1997. Horacio Verbitsky, "El último emperador," *Página 12* (Buenos Aires), 8 March 1998.

dismiss them.¹⁵ The Tribunal removed 11 *secretarios*, all of whom had protested the salary reduction, and replaced them with individuals who were loyal to the governor and who lacked experience in the judiciary, demonstrating selection on the basis partisan of loyalty rather than professional merit.¹⁶

The government also passed laws that weakened the San Luis' two Colegios de Abogados (Bar Associations), civil society organizations that had actively struggled for judicial autonomy. In response to their attempts to check the governor's power, the legislature dissolved the Colegios in September 1997. Law 5123 replaced the two Colegios with three Asociaciones de Abogados (Lawyers' Associations) of thirty members each. In contrast to San Luis' independent Bar Associations, members of the new Associations are government allies.¹⁷

Rodríguez Saá's treatment of the province's highest court is illustrative of the executive subordination of the judiciary. The governor has discretion over the size of the Tribunal. According to Article 191 of the San Luis Constitution, the Tribunal is composed of "five or more members."¹⁸ This article gives the governor the ability to change the number of judges, or "pack" the Tribunal. Increasing the number of judges has allowed the governor to pack the Tribunal with loyal judges, thereby increasing his control over rulings. Until 1987, five members composed the Tribunal. In a move similar to President Carlos Menem's expansion of the national Supreme Court from five to nine, in December 1990 Rodríguez Saá expanded the Tribunal to nine members. The number fell to seven in 1993, and today four justices sit on the Tribunal.¹⁹ In contrast, despite Article 143 of the Mendoza Constitution that states that "the Supreme Court will be composed of at least seven members," Mendoza governors have not packed the Court.²⁰ The number of justices on Mendoza's Court has remained constant since 1983.

Rodríguez Saá has tremendous discretion over appointments to the Superior Tribunal.²¹ Since the PJ gained control of the Senate in 1987, the Senate has never rejected the governor's candidates. All seven members of the 1993 Tribunal had demonstrated loyalty to the governor before assuming their seats.²² Despite his power over the appointments, Rodríguez Saá viewed

¹⁵Argentine *secretarios* help the judge render judgments and manage the judge's personnel. The prestigious post is a stepping stone toward becoming a judge. A *secretario* must have a law degree and usually has extensive experience in the judiciary. Ricardo Li Rosi, federal judge, interview with author, Buenos Aires, 21 Oct. 1998.

¹⁶Superior Tribunal de Justicia, Acuerdo 25, San Luis, 9 Feb. 1998. Verbitsky, "El último emperador," 8 March 1998. The replacements included former executive officials, former PJ legislators, and relatives of functionaries.

¹⁷For instance, of the 60 attorneys that comprise two of the Associations, 57 have links to the government. Most are members of the Fiscal de Estado, an organ controlled by the governor, or related to functionaries. Roberto Pagano, former San Luis Congressman (UCR) and former Jurado member, interview with author, San Luis, 26 May 1999.

¹⁸Art. 196, Constitución de la Provincia de San Luis, 42-43.

¹⁹José Samper, San Luis: La (in)dependencia de los poderes (San Luis: Alta Editorial, 1993), 34.-35.

²⁰Art. 143, Constitución de la Provincia de Mendoza, 1916.

²¹Art. 196, Constitución de la Provincia de San Luis, 42. The governor appoints Tribunal members with Senate approval.

²²Only Carlos Maqueda and Cruz Ortiz had previous experience as judges. Ortiz had served as Rodríguez Saá's Minister of Education. Maqueda was director of the newspaper owned by the governor's family, Diario de la República. Julio Cesar Niño had been a PJ leader. Luis Escudero Gauna defended the governor's friend, Victor Hugo Hissa, against corruption charges. Luis Amitrano had served as President of the Banco de la Provincia. Carlos Nellar had been the governor's advisor. Samper, San Luis: La (in)dependencia de los poderes, 36-37.

the 1993 Tribunal as too independent. Its rulings sometimes challenged his interests. Thus, he replaced the 1993 members with judges who were even more loyal to his administration.²³

Rodríguez Saá has exercised the informal rule that allows the executive to dismiss Supreme Court justices with even greater zeal than have Argentine presidents. In Argentina, judicial terms tend to be coterminous with presidential terms, whereas in San Luis, three purges have occurred under a single governor. In contrast to PJ governors in Mendoza, Rodríguez Saá has repeatedly violated Article 201, the constitutional guarantee of life tenure for judges during good conduct. The final purge occurred in 1997 when the governor replaced four of the five justices.²⁴

Since Argentina's 1983 transition to democracy, the Mendoza Supreme Court has had a very different experience from that of the San Luis Tribunal. In Mendoza, informal practices uphold constitutional guarantees of judicial independence. In fact, Mendoza's judicial branch has gained autonomy since 1983. The executive respects the formal rules that guarantee the Supreme Court's autonomy such as Article 151 that calls for justices' life tenure. Moreover, the executive in Mendoza has not attempted to alter the size of the Court, thereby changing its majority.

An analysis of the tenure of members of the provincial Supreme Court since 1983 illustrates the respect for formal rules. Mendoza has had four governors between 1983 and 1999: Santiago Felipe Llaver, José Octavio Bordón, Rodolfo Federico Gabrielli, and Arturo Lafalla. Llaver was a member of the Unión Cívica Radical (UCR). Following the end of Llaver's term in 1987, Mendoza's three governors were members of the PJ. Despite their PJ affiliation, they respected the life tenure of Llaver's appointees. The UCR control of the Senate had allowed Llaver to appoint justices loyal to his party, a practice that has the potential to undermine judicial autonomy. The actions of later administrations, however, spared Mendoza from this potential consequence of united government. PJ governors' respect for judicial tenure beginning in 1987 bolstered the Court's independence. Aída Rosa Kemelmajer de Carlucci who remains from the 1983 Court reports, "it is easier for a judge to be independent when the current executive is of a different party than the executive who appointed the judge."²⁵ As of 1997, six of the seven justices had served on the Court for at least ten years; six members had been appointed by a UCR governor and approved by a UCR-controlled Senate. The PJ administrations accepted a Court dominated by the opposition.²⁶

Miguel Wiñazki, *El último feudo: San Luis y el caudillismo de los Rodríguez Saá* Ediciones Temas de Hoy (Planeta: Buenos Aires, 1995), 54. Fabián Alvarez, "Un feudo bajo sospecho," *Los Andes* (Mendoza), 25 Sept. 1997.

²³Carlos Jorge Cacace, San Luis Juez de Camara Civil, interview with author, San Luis, 9 Oct. 1998.

²⁴The 1997 replacements had demonstrated loyalty to the governor. Carlos Sergnese, who assumed the presidency of the Tribunal in 1997, illustrates the criterion for appointment: a good relationship with the governor. Sergnese was a leader in the provincial PJ organization and was behind the electoral fraud that allowed Rodríguez Saá to win the PJ primaries in 1983. In addition, during Rodríguez Saá's administration, Sergnese served as Minister of Government, Undersecretary of Housing, and President of the Banco de San Luis. Samper, *San Luis: La (in)dependencia de los poderes*, 46-50. O'Donnell, "Final anunciado para un fallo discutible," *Nación*, 7 Nov. 1998.

²⁵Kemelmajer, interview with author, 4 May 1999, Mendoza.

²⁶In a 1997 speech, Lafalla stressed the long tenure of Mendoza justices. Lafalla, Address before first session of Mendoza's legislature, 1997.

Single Party Control and Executive Dominance in San Luis

In contrast to Mendoza with its system of overlapping agencies of horizontal accountability, San Luis has no effective countervailing power center. Judicial autonomy in San Luis has decreased since the 1983 democratic transition as a result of the governor's deliberate assault on competing institutional power centers. Since Rodríguez Saá assumed the governorship 17 years ago, he gradually eliminated the independence of all potential agencies of horizontal accountability. In contrast to Mendoza where Lafalla made a conscious effort to empower a system of horizontal accountability, in San Luis, the governor's party control of the legislature translated into control of the Consejo de la Magistratura, the Fiscal de Estado, the Jurado de Enjuiciamiento, the Tribunal de Cuentas, and the Ministerio Público.

The Dominance of the Partido Justicialista in San Luis

The San Luis party system is a hurdle that stands in the way of an effective system of horizontal accountability. The dominance of the governor's party in San Luis encouraged the formation of converging rather than competing power centers. The combination of united government and a high level of party discipline has contributed to the concentration of power in the executive. Rodríguez Saá controls the PJ, and the PJ controls a majority in the legislature. In contrast to Mendoza with its three strong parties, in San Luis, the PJ has steadily gained strength since 1983. As a result, the governor finds it easy to achieve his policy goals, including changing the appointment and removal process for members of potential horizontal accountability agencies.

The UCR has been unable to establish a base of power in San Luis. In the twentieth century, the only period during which the UCR was a significant force was between 1983 and 1987 when it captured the support of San Luis' conservative parties. The UCR's brief success, however, was an aberration. Its failure to maintain its new status as a relevant party was in part due to deliberate PJ strategies. The Rodríguez Saá administration sabotaged UCR mayors in the towns of San Luis and Villa Mercedes by withholding funds from these communities. In addition, the governor successfully coopted many prominent UCR members. He tempted them to collaborate with the PJ in exchange for power in his administration. During Rodríguez Saá's first term, the PJ absorbed many UCR leaders. In addition, strong internal divisions contributed to the UCR's demise.²⁷

In contrast to Mendoza, third parties in San Luis do not help disperse power away from the governor. The demise of third parties has contributed to the concentration of power in the executive. Until 1983, conservative parties were a significant political force. In 1973, they received 27.3% of the vote, outperforming the UCR. Their decline began in 1983 when they received 7.4% of the vote. The percentage fell to 4% in 1985, and in 1987, they received 6.8% of the vote. By 1991 their support had dwindled to 2.8%.²⁸ Today, no third party has significant representation in the legislature, and the PJ does not have to bargain with other parties.

²⁷Samper, San Luis: La (in)dependencia de los poderes, 58-61. The governor withheld economic support from former mayors Juan Bautista Picco of San Luis and Miguel Bonino of Villa Mercedes.

²⁸Samper, San Luis: La (in)dependencia de los poderes, 59, 62.

United government under the PJ contributes to the inability of the legislature to act as an agency of horizontal accountability. In contrast to the divided government that characterizes Mendoza, opposition in the San Luis legislature has been weak. PJ dominance in both houses permits automatic approval of the governor's proposals and limits debate. Since Rodríguez Saá assumed power in 1983, the PJ lost only one legislative election to the UCR in 1985.²⁹ The PJ has gradually consolidated power in Congress since 1987.

*General Election Results*³⁰

Party	1973	1983	1985	1987	1991
PJ	40,205 (40.8%)	48,096 (40.3%)	57,735 (45.4%)	71,086 (52.4%)	72,995 (50.8%)
UCR	10,096 (10.2%)	44,810 (37.5%)	61,028 (48%)	44,810 (32.9%)	52,003 (37.1%)
Conservative	27,141 (27.3%)	8,882 (7.4%)	5,509 (4%)	9,322 (6.8%)	
MID	2,679 (2.7%)				

During Rodríguez Saá's first term as governor, he faced the challenge of divided government. From 1983 through 1987, the UCR represented a threat to the PJ. Rodríguez Saá's 1983 victory over the UCR candidate was slim; he won by less than 4,000 votes. The PJ received 48,096 or 40.3% of the votes, whereas the UCR received 44,810 or 37.5% of the votes.³¹ In the 1985 legislative election, the PJ suffered its only defeat to the UCR. As a result, the 30 member unicameral Congress was divided evenly with 15 UCR and 15 PJ legislators.³²

Divided government prevented the governor's control over judicial appointments. Between his December 10 assumption of power and December 31, 1983, Rodríguez Saá appointed only Peronists to the judiciary. In response, the UCR pressured him to nominate representatives of the opposition. The 1984 appointments of opposition members Carlos Cacace, Rosales Arnaldo, and Osvaldo Suriani were a result of this pressure.³³ Lack of control over appointments was one reason Rodríguez Saá sought united government.

After the 1985 elections, Rodríguez Saá used strongarm tactics to avoid divided government. He ordered the police to prevent the new UCR legislators from entering Congress. PJ legislators then voted to annul the elections. The UCR initially struggled against the governor's tactics. Ultimately, however, UCR leaders struck a deal with the PJ. Rodríguez Saá agreed to veto the annulment of the election in exchange for UCR support for constitutional reform. By agreeing to the reform, the UCR unwittingly gave Rodríguez Saá a tool to increase his power. The reform would permit the governor to restructure the legislature to avoid divided government in the future.³⁴

²⁹"San Luis: conflicto en la Justicia," *Clarín*, 6 March 1998.

³⁰Samper, *San Luis: La (in)dependencia de los poderes*, 59.

³¹Samper, *San Luis: La (in)dependencia de los poderes*, 58.

³²Samper, provincial Congressman (PJ), interview with author, San Luis, 21 May 1999.

³³Judge Cacace, interview with author, 9 Oct. 1998.

³⁴Juan José Laborda Ibarra, provincial Frepaso Congressman, Alianza candidate for vice governor in 1999, interview with author, San Luis, 18 May 1999. The Tribunal Electoral has the authority to judge the validity of elections; the legislature does not have the power to annul elections as it did in 1985. Rosso and Pagano, both UCR members, fault their party for cooperating rather than attacking the governor when the UCR was in a position of strength. Pagano, interview with author, 19 May 1999. Rosso, interview with author, 20 May 1999.

The PJ held the majority of seats at the Constitutional Convention. According to José Samper, the UCR based its decision to support the reform on a miscalculation. UCR leaders interpreted their 1985 victory and internal PJ divisions as indicators that they would win a majority of seats in the Constitutional Convention. Instead, the PJ won 33 of the 60 seats. Furthermore, the PJ was able to overcome division throughout the reform process. As president of the PJ bloc at the Convention, Samper kept his party unified.³⁵ In addition, the UCR did not have representation on the committees that dealt with the reform of Congress. As a result, the UCR did not participate in debate about the future bicameral legislature before the proposed reform reached the plenary session. UCR representatives could only raise their hands to vote in opposition during the plenary session.³⁶

The 1987 Constitution favors united PJ government. The reform replaced the unicameral legislature with a bicameral Congress that effectively excludes minorities from the Senate. The nine-member Senate contains one elected representative from each district, or departamento. Because each district elects only one senator, the PJ can have 100% of seats even if it wins only 50.5% of the votes. In fact, since 1987, all nine senators have been PJ. At the Constitutional Convention, the Committee on the Legislature modeled the San Luis Senate on the national Senate without considering the differences between a departamento and a province. The 1987 reform transformed departamentos, mere administrative divisions without their own political power or individuality, into entities like provinces at the federal level. As a result, senators do not respond to a local constituency; instead they respond only to the central power, the executive branch.³⁷

A central goal of the convention was to eliminate the possibility of divided government. The governor wanted to eliminate the opposition's use of the legislature as an agency of horizontal accountability. Between 1985 and 1987, as a result of the 15 PJ vs. 15 UCR split, the executive had difficulty pushing bills through Congress. Before the 1987 reform, which called for popular election of the vice-governor, the legislature selected the vice-governor. As a result of the 15 vs. 15 division, however, legislators were unable to agree on whom to select. The PJ advocated the creation of a bicameral Congress to eliminate such conflict.³⁸ The composition of the legislature since 1987 illustrates the effects of the reform on divided government. Since the reform, PJ has had an absolute majority in the Lower House and total control of the Senate.³⁹

³⁵Congressman Samper, interview with author, 21 May 1999. Of the 60 representative at the Constitutional Convention, Samper was one of 33 PJ representatives. The UCR had 25 representatives; the conservative parties had two.

³⁶Samper, San Luis: La (in)dependencia de los poderes, 27.

³⁷Verbitsky, "El último emperador," Página 12, 8 March 1998. Samper, San Luis: La (in)dependencia de los poderes, 27-28.

³⁸Congressman Samper, interview with author, 21 May 1999. Eduardo Angel Estrada, president of the Constitutional Convention, interview with author, San Luis, 26 May 1999. Both Samper and Estrada (PJ) point to deadlock in the legislature as the catalyst for the creation of a bicameral Congress. Estrada recalls that 95% of the reforms received unanimous approval. The conflict between the PJ and UCR arose over two issues: the governor's reelection and the reform of Congress. Both Samper and Estrada support proposals that would give the minority representation in the Senate and would limit the governor's reelection to two terms. Such reforms would represent a step toward overcoming united government and the executive dominance.

³⁹In 1991, the PJ had 25 and the UCR had 18 had seats in the House. In 1997, 27 supported the PJ and 15 voted with the UCR. Samper, San Luis: La (in)dependencia de los poderes, 30. Laborda Ibarra, interview with author, 9 Oct. 1998.

The high level of party discipline within the PJ enhances the governor's partisan powers, exacerbating the effects of unified government. PJ discipline gives the executive the congressional support necessary to avoid the override of vetoes and to pass decrees. The degree of discipline has increased during Rodríguez Saá's 17 years as governor. The San Luis PJ emerged from the 1976-1983 military dictatorship without the leadership necessary to unite the internal factions, the Lista Naranja (Orange List) and the Lista Azul y Blanca (Blue and White List).⁴⁰ Internal divisions plagued the PJ during Rodríguez Saá's first term. Miriam Agundez, a cabinet member from 1983-1985, reports that the governor began in a weak position and accumulated partisan power over time. Rodríguez Saá won the 1983 party primaries by fraud. His Lista Azul y Blanca defeated Agundez' Lista Naranja by a narrow margin of 52% to 48%. In recognition of his precarious victory, Rodríguez Saá had to grant concessions to the losing faction. Thus, he gave two of the four cabinet posts to the members of opposition list.⁴¹ Divisions remained strong during the 1985 PJ primaries when Rodríguez Saá's faction narrowly defeated the Lista Naranja with 52% of the votes.⁴² The PJ remained divided through 1987. During the 1987 Constitutional Convention, Samper's primary duty as leader of the PJ bloc was to keep his party united. He reports that in 1987 his task was difficult, whereas today it would be easy due to the governor's total control of the party.⁴³

Rodríguez Saá has gradually gained control of the party. In 1985, he became PJ president and his brother Alberto assumed the second highest post in the party, president of the PJ Congress.⁴⁴ As PJ president, the governor expelled his opponents from the party. By 1989, no internal divisions remained.⁴⁵ Thus, Cacace refers to Rodríguez Saá as the "owner of the party."⁴⁶ Moreover, if the governor were to step down as PJ leader, he would have the power to appoint his replacement.⁴⁷

Rodríguez Saá's dual role as both governor and PJ president encourages party discipline. As party leader, he determines party policy stances and uses a diverse set of tools to impose those stances on PJ legislators. The PJ bloc meets prior to every legislative session to determine the party's position. The party leader can punish or reward legislators depending on how they vote. The party leader determines PJ legislators' access to the ballot. Rodríguez Saá's power over the position of candidates on the PJ electoral list and over candidates' access to party financing gives him control over legislators' chances at reelection.⁴⁸ In addition, the PJ Junta Electoral (Electoral

⁴⁰Samper, *San Luis: La (in)dependencia de los poderes*, 50-53.

⁴¹Miriam Agundez, President of San Luis Colegio de Abogados, interview with author, San Luis, 24 May 1999. Agundez served as Secretaría General de Gobernación from 1983 until 1985. Rodríguez Saá also appointed a member of the Lista Naranja to serve as Ministro de Gobierno. According to Agundez, she resigned as Secretaria General in 1985 because Rodríguez Saá told her he would govern for 40 more years.

⁴²Samper, *San Luis: La (in)dependencia de los poderes*, 50-53. The Lista Naranja received 45%.

⁴³Congressman Samper, interview with author, 21 May 1999.

⁴⁴Agundez, interview with author, 24 May 1999.

⁴⁵Mario Otero, journalist, interview with author, San Luis, 24 May 1999.

⁴⁶Judge Cacace, interview with author, 9 Oct. 1998. Cacace refers to the governor as the "*dueño del partido*."

⁴⁷Congressman Samper, interview with author, 21 May 1999.

⁴⁸Congressman Laborda Ibarra (Frepasso), interview with author, 18 May 1999. For instance, Rodríguez Saá punished Angel Rafael Ruiz, vice governor from 1987-1989 and national PJ Congressman from 1989-1993, who planned to run for reelection in 1993. Shortly before the 1993 national congressional elections, the governor ordered Ruiz to oppose Menem's reelection. When Ruiz refused to comply with the governor's command, Rodríguez Saá eliminated Ruiz from the provincial PJ list of candidates to the national Congress. The fate of Ruiz

Commission) that runs PJ primaries responds to the party president. When a legislator opposes the official party stance, that legislator will miss the session rather than vote against the PJ.⁴⁹

PJ Dominance and the Subordination of the Consejo de la Magistratura

The combination of united government under the PJ and Rodríguez Saá's absolute control of the PJ has permitted him to prevent agencies such as the Consejo de la Magistratura from reaching their potential as countervailing power centers. The San Luis Consejo has failed to take appointment power from the executive, and the selection of judges remains politicized. Prior to the 1987 constitutional reform, the governor appointed judges with the approval of the unicameral legislature. The 1987 Constitution created a Consejo that would participate in selection of all judges other than members of the Superior Tribunal.

PJ dominance and party discipline permitted Rodríguez Saá to reform the Constitution in 1987 to provide for a Consejo that is weaker than its counterpart in Mendoza. The PJ majority at the Constitutional Convention achieved the party goal of placing limits on the Consejo's power. Article 196 of the San Luis Constitution permits the governor to disregard the Consejo's input. According to Article 196, for each vacant post, the Consejo proposes a terna, a three-person rank order list, from which the governor selects one member with Senate approval. If either branch rejects the proposed terna, the Consejo submits a second terna. Moreover, if the Senate rejects the candidate from first terna, the second terna cannot include anyone from the original terna.⁵⁰ Article 196 gives the governor the power to reject the Consejo's terna. In contrast to Mendoza, in San Luis, the first terna is not binding. The power to reject the terna gives the San Luis governor discretion over judicial appointments.⁵¹

The PJ-controlled San Luis legislature sanctioned laws that constrain the power of the Consejo. In October 1990, Congress passed Law 4872 that weakened the Consejo by modifying the terna system. Before 1990, if the governor rejected the first terna, the Consejo could include members of the original terna in the second terna. Only a candidate rejected by the Senate could not form part of the second terna.⁵² According to Law 4872, if the governor does not submit a member of the first terna for Senate approval within 30 days, the Consejo must propose three new candidates; no member of the original terna can be part of the second terna. This law permits the governor to tacitly reject all three individuals in the Consejo's first recommendation.⁵³

sent a clear message to other PJ legislators: Rodríguez Saá terminates the political careers of those who do not follow his orders.

⁴⁹Congressman Samper, interview with author, 21 May 1999. Samper asserts that Rodríguez Saá "*tiene los hilos del partido*."

⁵⁰Art. 196, *Constitución de la Provincia de San Luis*, (San Luis, Editorial del Interior), 42.

⁵¹Justicia Democrática, "Conclusiones del Semanario sobre la independencia de los poderes judiciales provinciales," March 1999, 2. Geronimo Sansó, federal judge and President of civil society organization "Justicia Democrática," interview with author, Buenos Aires, 18 June 1999. Sansó stresses the importance of binding *ternas*.

⁵²Art. 196, *Constitución de la Provincia de San Luis*, 41-43.

⁵³Samper, *San Luis: La (in)dependencia de los poderes*, 69. Verbitsky, "El último emperador," *Página 12*, 8 March 1998. Colegio de Abogados de San Luis, "Situación institucional en la provincia," 1998, 2. Agundez who represented lawyers on the Consejo from 1991 through 1993 reports that the governor took advantage of the law. He frequently rejected the first *terna* by allowing the 30-day limit to lapse. Agundez, interview with author, 24 May 1999.

In 1996, Rodríguez Saá used his decree power to shift appointment power from the Consejo to the executive. Decree 2163 stipulates that the Consejo has only 10 days to present a terna. The 10-day limit precludes the possibility of thorough examination of candidates.⁵⁴ Thus, it violates Article 199 that stipulates that the Consejo must organize examinations and conduct a thorough assessment of candidates.⁵⁵ In addition, the decree violates Article 200, which states that after the Superior Tribunal announces a vacancy, the Consejo has 60 days to submit a terna.⁵⁶

The PJ legislature passed Laws 5121 and 5141 that further erode the Consejo's strength. Law 5121's creation of a Tribunal de Evaluación de Aptitudes (an Aptitude Evaluation Tribunal), a commission that conducts technical evaluations of judges, violates judges' tenure. According to Law 5121, the commission administers exams for individuals who wish to enter the judiciary and for judges who want to retain their posts. Judges who fail the exams face dismissal.⁵⁷ San Luis' technical commission contrasts Mendoza's advisory commissions. In Mendoza, the function of the commissions is to appoint the most qualified candidates. The Mendoza commissions cannot dismiss judges. In response to opposition to Law 5121, the San Luis legislature replaced Law 5121 with Law 5141, which divides the judiciary into two groups: those who entered before the passage of Law 5141 and those who entered after its passage. Judges who assumed their posts before Law 5141 are not subject to the technical commission's examinations. All others, however, must take exams and can be removed for failing the exams.⁵⁸

With the help of his party, the governor has ensured that the composition of the San Luis Consejo is less balanced than its counterpart in Mendoza. The San Luis Consejo has become increasingly weighted in favor of the executive branch.⁵⁹ The Consejo has eight members: a Superior Tribunal justice, an executive official, a judge or public prosecutor from each of the two judicial districts, two provincial legislators, and two Bar Association members.⁶⁰ Agundez recalls that until 1995, the Consejo was balanced; the opposition typically occupied four of the eight seats. The two lawyers and one judge were independent of the executive. Moreover, one of the two legislators was usually a member of the opposition.⁶¹

By 1996, Rodríguez Saá eliminated opposition representation on the Consejo. Law 5123's replacement of the independent Bar Associations with the Asociaciones de Abogados gives the governor discretion over the lawyers who serve on the Consejo. As a result of his subordination of the Superior Tribunal and the lower courts, the Tribunal justice who presides over the Consejo and the two judges who serve on it are loyal to the governor. Moreover, as a

⁵⁴Verbitsky, "El último emperador," Página 12, 8 March 1998. Colegio de Abogados de San Luis, "Situación institucional en la provincia," 1998, 3-4.

⁵⁵Art. 199, Constitución de la Provincia de San Luis, 42.

⁵⁶Art. 200, Constitución de la Provincia de San Luis, 42.

⁵⁷Verbitsky, "El último emperador," Página 12, 8 March 1998. Justicia Democrática, "Conclusiones del Semanario sobre la independencia de los poderes judiciales provinciales," March 1999, 2.

⁵⁸Agundez, interview with author, San Luis, 24 May 1999.

⁵⁹Christian Courtis, Centro de Estudios Legales y Sociales (CELS) attorney, interview with author, Buenos Aires, 28 June 1999. Mendoza Supreme Court Justice Kemelmajer stresses the equilibrium of the Mendoza Consejo. Mendoza's Consejo contains two judges, three political functionaries, and two lawyers. Kemelmajer, interview with author, Mendoza, 4 May 1999.

⁶⁰Art. 197, Constitución de la Provincia de San Luis, 42.

⁶¹Agundez, former representative of attorneys on the Consejo, interview with author, 24 May 1999.

result of PJ control of the legislature, both legislators on the Consejo are members of the governor's party. The governor handpicks the executive representative.

Executive Control of the Fiscal de Estado

Although the 1987 Constitution grants the Fiscal de Estado the power to act as an agency of horizontal accountability, in reality, the Fiscal acts as part of governor's cabinet. According to Article 237, the Fiscal's duties include defending the province's interests. The Fiscal can declare any law, decree, municipal ordinance, resolution, or administrative act unconstitutional. In theory, the Fiscal has the power to oppose and paralyze any law or decree it deems unconstitutional. Moreover, the Constitution protects the Fiscal's autonomy. According to Article 236, the head Fiscal is appointed by the executive with Senate approval for a four-year term and cannot be removed except through the impeachment process.⁶² Despite the constitutional guarantees of independence, the governor has subordinated the Fiscal.

The governor used his control of the legislature to consolidate power over the Fiscal. In September 1990, Congress approved Law 4879 that undermined the Fiscal's ability to act as a control on the governor. The new law violated the guarantee of tenure protection by giving the executive the power to replace the Fiscal with any lawyer from the within the organ. The governor can exercise this power whenever the head Fiscal is absent, either temporarily or permanently. In effect, Law 4879 created a sort of substitute Fiscal who lacks tenure protection yet has the same responsibilities as the head Fiscal. Moreover, this substitute Fiscal does not require Senate approval; the governor appoints him without legislative interference. Although in theory this substitute Fiscal acts only when the head Fiscal is absent, the substitute can serve indefinitely; Law 4879 does not require that the governor appoint a head Fiscal within a specific time frame.⁶³

In contrast to Lafalla who made a concerted effort to strengthen the Mendoza Fiscal as a control, Rodríguez Saá has deliberately weakened the organ. He appoints unconditional PJ allies who do not challenge his administration. Unlike Lafalla, Rodríguez Saá has never appointed a member of the opposition. For instance, former Fiscal Victor Nicanor Liceda was the governor's personal lawyer before becoming Fiscal. When Liceda took his oath as Fiscal, he delivered a speech praising the governor.⁶⁴ The political career of the current Fiscal, Eduardo Angel Estrada, demonstrates the governor's effort to appoint loyal PJ members. Estrada began a long career as a PJ functionary in 1960. Rodríguez Saá appointed him Minister of Government in 1987. From 1991 through 1995, Estrada was a PJ member of the provincial House.⁶⁵

⁶²Art. 236 and 237, Constitución de la Provincia de San Luis, 49. According to Article 236, the president designates the Fiscal de Estado for a four-year term with Senate approval.

⁶³Samper, San Luis: La (in)dependencia de los poderes, 42-43, 69. Art. 168, Constitución de la Provincia de San Luis, 36.

⁶⁴As a result, Juan José Laborda Ibarra presented a case to the Jurado for Liceda's dismissal. Laborda Ibarra argued that the speech demonstrated a bias and that Liceda was incapable of acting as a control on the Rodríguez Saá administration. Congressman Laborda Ibarra (Frepasso), interview with author, San Luis, 18 May 1999.

⁶⁵Estrada, interview with author, 26 May 1999. In 1960, he served as advisor to the Ministry of Labor. In 1966, he directed the Asesoría de Gobierno, the governor's advisory board. From 1973 through 1975, Estrada was the head attorney for the state-owned Banco de San Luis.

Despite the constitutional guarantee of removal only through the impeachment process, Rodríguez Saá has the informal power to dismiss Fiscales. His treatment of Sergio Calderón demonstrates the violation of tenure protection. Rodríguez Saá appointed Calderón because of Calderón's leadership in the PJ. Despite his background, however, Calderón challenged Rodríguez Saá. As a result, the governor asked for Calderón's resignation as Fiscal. Calderón acquiesced; otherwise, the PJ-controlled Senate would have followed the governor's orders to impeach him.⁶⁶

San Luis' current Fiscal, Estrada, provides a stark contrast to Mendoza's Fiscal, Aldo Giordano. In contrast to Giordano, Estrada performs none of the functions of an agency of horizontal accountability. Estrada interprets "defending provincial interests" as defending the governor. He acknowledges that he has never challenged the Rodríguez Saá administration. In contrast to Giordano, Estrada equates the Fiscal to an advisory body that works for the governor. Estrada and Giordano have different views on whether the Fiscal should be of the same party as the governor. For Estrada, his PJ affiliation helps him perform his primary function as Fiscal: defending the Rodríguez Saá administration. According to Estrada, when the Fiscal and the governor are of the same party, the Fiscal has greater access to the administration. In order to defend the governor, the Fiscal must have close relations with government officials. In contrast, Giordano argues that membership in an opposition party is critical to the Fiscal's ability to check the governor.⁶⁷

In San Luis, the Fiscal de Estado does not act as a countervailing power center. Estrada admits that in practice the Fiscal channels its work through the executive branch. Moreover, he acknowledges that although the Fiscal has the formal power to declare laws unconstitutional, the San Luis Fiscal does not perform this function. Estrada claims that it is the responsibility of the Superior Tribunal rather than the Fiscal to rule on the constitutionality of laws and decrees. Unlike Giordano whose activity as Fiscal produced the fall of two cabinet ministers, Estrada has never presented a suit against a government official.⁶⁸ The San Luis Fiscal de Estado does not hold functionaries accountable for their actions.

Executive Control over Other Agencies of Horizontal Accountability

The Jurado de Enjuiciamiento, the Tribunal de Cuentas, and the Ministerio Público all fail to act as countervailing power centers. Although in theory the Jurado reduces the governor's discretion in the removal of judges, the governor used his control of the legislature to reduce the Jurado to a tool to subordinate the judicial branch. According to Article 224 of the 1987 San Luis Constitution, the Jurado has the power to remove judges and members of the Ministerio Público.⁶⁹ The PJ-controlled Congress, however, approved legislation that obstructs the Jurado's

⁶⁶Samper, *San Luis: La (in)dependencia de los poderes*, 29.

⁶⁷Estrada, interview with author, San Luis, 26 May 1999. Aldo Giordano, interview with author, Mendoza, 3 May 1999. Giordano attacks the notion that the Fiscal is nothing more than an advisor to the governor.

⁶⁸Estrada, interview with author, San Luis, 26 May 1999.

⁶⁹Any citizen can present the Jurado with charges against a judge or public prosecutor. Art. 224, *Constitución de la Provincia de San Luis*, 47. The causes for removal include: "mal desempeño de sus funciones, incapacidad física o mental sobreviniente, faltas graves o la comisión de delitos comunes." According to Article 224, the Jurado is composed of three judges, including the president of the Superior Tribunal who presides, three lawyers, and three members of the House.

capacity to serve as an agency of horizontal accountability. Before the laws, the Jurado was more independent of the executive. Based on his experience in the Jurado, Pagano asserts that until the 1996 passage of Law 5102, the method of selecting the nine members protected the organ's autonomy; the executive did not control its composition. The three attorneys and the three judges were selected by a lottery of all their colleagues. Moreover, of the three House members, two were from the majority party, the PJ, and one was from the minority, the UCR.⁷⁰

In just one year, the legislature passed three laws that impede the Jurado's impartiality and its autonomy from the executive. The laws modified the Jurado's composition, allowing the governor to determine who serves on the important organ. Law 5102 called for the purge of the 1996 Jurado, creating nine vacancies. Thus, the governor had the opportunity to replace members such as Pagano and Cacace who had refused to dismiss judges who challenged the governor. The governor replaced them with individuals sympathetic to his administration.⁷¹ In addition, Law 5102 stipulates that undermining the judiciary's prestige, or "*desprestigio del poder judicial*," is sufficient cause to bring a judge before the Jurado. The decision whether a judge has undermined the judiciary's prestige is subjective. The vagueness of the term "*desprestigio*" allows the government to target independent judges.⁷²

Like Law 5102, Law 5123 increased the governor's control over the Jurado. Law 5102 modified the method for selecting the attorneys, violating the San Luis Constitution. The law gave the executive discretion over who represents lawyers on the Jurado. According to the Constitution, the three attorneys are to be chosen from a list of 20 attorneys compiled each year by the Colegio Forense. Prior to Law 5123, the 10 Colegio Forense members were members of the Colegios de Abogados. Law 5123 replaced the independent Colegios de Abogados with three Asociaciones de Abogados composed of the governor's allies. Since the passage of Law 5123, each Association sends two representatives to the Colegio Forense.⁷³ As a result of Association members' ties to the governor, allies of the governor dominate the Colegio Forense that selects the three lawyers who serve on the Jurado.⁷⁴ The 1998 composition demonstrates that the governor has used the laws to pack the Jurado with individuals who have ties to the governor.⁷⁵

⁷⁰Pagano, three time member of the Jurado, interview with author, San Luis, 19 May 1999. Pagano represented the minority in the House on the Jurado for three one-year terms between 1993 and 1996.

⁷¹O'Donnell, "San Luis: el caso que revela la crisis judicial," *La Nación*, 2 November 1998. Colegio de abogados y procuradores de Villa Mercedes, "Comunicado," 23 Feb. 1998.

⁷²Rosso, former secretary of San Luis Colegio de Abogados, interview with author, San Luis, 8 Oct. 1998.

⁷³Pagano, interview with author, San Luis, 26 May 1999. Prior to Law 5123, the Colegio Forense was composed of 10 members, three lawyers from the two legal districts, San Luis and Villa Mercedes; the president and the secretary of the San Luis Colegio de Abogados; and the president and secretary of the Villa Mercedes Colegio de Abogados.

⁷⁴The three Asociaciones elected Luis Escudero Gauna as president of the Colegio Forense. Escudero Gauna had served as an attorney for Rodríguez Saá's *Diario de la República* and as a Tribunal justice. Pagano, interview with author, 26 May 1999.

⁷⁵Sergnese presides over the body. Other members include Victor Nicanor Liceda and Julio César Agundez, both of whom had previously served as Fiscal de Estado. Luis Antonio Amitrano had been Rodríguez Saá's Minister of Industry, president of the Banco de la Provincia, the governor's personal attorney, and a Superior Tribunal justice. César Carmen Zucco had also served on the Superior Tribunal. Both Atilio Astudillo and Mario Alonso had been Undersecretary of Government. Colegio de Abogados y Procuradores de San Luis and Villa Mercedes. Colegio Forense de la Provincia de San Luis, statement for public opinion, 26 Feb. 1998.

The Tribunal de Cuentas also fails to act as an agency of horizontal accountability. PJ dominance has prevented it from emerging as a competing power center. Since it gained constitutional status in 1987, the Tribunal has had the formal power to review all government expenditures and either approve or reject them. In theory, the Tribunal is independent of the executive branch. Despite constitutional guarantees of autonomy, however, the Tribunal has been unable to control the government's economic activity. The governor controls its composition. The executive appoints three of the five members with Senate approval. The House selects the other two. The majority party appoints one and the first minority selects the second.⁷⁶ As a result, four of the five members are from Rodríguez Saá's PJ. According to Samper, the Tribunal is a bureaucratic agency that does not fill its constitutional obligations. In contrast to the Mendoza Tribunal that is dominated by an opposition party, the PJ has dominated the San Luis Tribunal since its creation.⁷⁷

Like the Jurado and the Tribunal, the San Luis Ministerio Público does not serve as an agency of horizontal accountability. An autonomous Ministerio Público is especially important in provinces such as San Luis with high levels of government corruption. In theory, the Ministerio Público should initiate proceedings against executive officials suspected of corrupt practices. In San Luis, however, the composition of the Ministerio prevents it from such action. The governor has the power to select the Procurador General (Attorney General) and the other public prosecutors. He appoints the Procurador General with Senate approval.⁷⁸ Because all nine senators are members of Rodríguez Saá's PJ, the Senate has never withheld approval for the governor's candidate. Rodríguez Saá can select individuals who are unlikely to investigate executive wrongdoings. The executive's discretion over who occupies the post of Procurador General is central to the governor's concentration of power and to impunity. In addition, the Procurador General acts as the prosecutor against judges before the Jurado. Thus, the Procurador is a key player when the governor seeks to remove independent judges.

The governor's control over the Consejo gives him discretion over the selection of all Ministerio Público officials. The Consejo intervenes in the appointment of all public prosecutors other than the Procurador General. When a vacancy in the Ministerio Público appears, the Consejo recommends a terna to the executive. The executive then selects a public prosecutor from that terna with Senate approval.⁷⁹ The laws that weakened the Consejo's discretion over the appointment of judges also undermined its discretion over the selection of prosecutors. For instance, Law 4872 allows the governor to reject all members of the Consejo's first terna.

In addition, like prosecutors at the national level and in Mendoza, San Luis prosecutors only initiate investigations. Judges rather than prosecutors actually conduct investigations. Although the San Luis Ministerio shares some defects with its counterpart in Mendoza, the obstacles that hinder the San Luis Ministerio are much more entrenched than in Mendoza. In contrast to San Luis where the governor handpicks public prosecutors, the Mendoza Ministerio is insulated from the executive.

⁷⁶Art. 238-246, Constitución de la Provincia de San Luis, 49-50.

⁷⁷Samper, San Luis: La (in)dependencia de los poderes, 43-44.

⁷⁸Art. 196, Constitución de la Provincia de San Luis, 42.

⁷⁹Art. 196, Constitución de la Provincia de San Luis, 42.

Party Balance and the Creation of Countervailing Power Centers in Mendoza

In stark contrast to San Luis, judicial autonomy in Mendoza has increased over the past 17 years. An increase in judicial independence accompanied a growth in competing power centers. A stalemated party system set the stage for strong, independent agencies of horizontal accountability including a Congress dominated by the opposition, a Consejo and Jury de Enjuiciamiento that are not politicized, a Fiscal de Estado that is led by an opposition member, and a Tribunal de Cuentas in which the governor's party is the minority. Moreover, although the Mendoza Ministerio Público faces challenges due to a lack of resources, in contrast to the San Luis Ministerio, it is independent of the executive. The strength of opposition parties encourages the distribution of power among these agencies and away from the executive, thereby promoting judicial autonomy. As a result of the balance among three political parties, the governor's party is unable to dominate the agencies. Like the distribution of seats in the legislature, representation in the competing power centers is balanced among parties.

The Three Party Stalemate in Mendoza

Mendoza's party system has fostered a healthy system of overlapping agencies of horizontal accountability. Stalemate among three strong parties, the PJ, the UCR, and the Partido Demócrata (PD), contributes to the system's effectiveness.⁸⁰ In contrast to San Luis where the UCR has always been weak, in Mendoza, the UCR has been a relevant party since early in the twentieth century.⁸¹ The founding of the PD in 1931 and of the PJ in the 1940s were important steps toward the dispersal of power. Throughout most of its history, the PD has been even stronger than the UCR.⁸²

The difference in electoral performance among the three parties is rarely large. Although the PJ is usually the strongest, the other two parties are close behind.⁸³ Today the division of seats among the parties in both houses is fairly even. Members of the provincial legislature report on the positive effects of this parity. Senator Omar Pérez Botti (PJ) and Representative Sergio Bruni (UCR) argue that it has fostered the politics of consensus; the electoral parity demands the formation of coalitions that check the governor's power.⁸⁴ Cooperation characterizes relations among the three parties. Throughout history, the parties have had to work together toward the passage of laws. This cooperation, or "convivencia," among political parties has helped insure the

⁸⁰Along with the three principal parties, smaller parties have at times had an impact in Mendoza. For instance, in the 1946 elections, the Partido Comunista won three seats in Mendoza's Congress. Claudia Lacoste, "El proceso de reforma constitucional de Mendoza (1943-1956) a través de la prensa y los debates constituyentes," in La Legislatura y Las Ciencias Sociales ed. Cámara de Senadores, Provincia de Mendoza (Mendoza: Cámara de Senadores, 1995), 134.

⁸¹Pablo Lacoste, La Unión Cívica Radical en Mendoza y en la Argentina 1890-1946 (Mendoza: Ediciones Culturales de Mendoza, 1995), 17.

⁸²Pablo Lacoste, Los 'gansos' de Mendoza: Aporte para el estudio de los partidos provincianos y del modelo conservador (1880-1943) (Buenos Aires: Centro Editor de America Latina, 1991), 8. The PD is a descendant of the conservative familial oligarchy that dominated politics from the late nineteenth century until the birth of UCR.

⁸³Alejandro Pérez Hualde, attorney, interview with author, Mendoza, 7 May 1999. Historically, the PD has been the second force, and the UCR has been third. The PD has usually won when it has resorted to electoral fraud or when the PJ has been divided.

⁸⁴Omar Pérez Botti, provincial Senator (PJ), interview with author, Mendoza, 4 May 1999. Sergio Bruni, UCR member of provincial House of Representatives, interview with author, Mendoza, 6 May 1999.

dispersal of power.⁸⁵ Despite the PJ's 1995 loss of absolute majority in the House, the House approved important PJ initiatives such as the privatization of certain provincial industries.⁸⁶

The balance among the three parties also promotes rotation of the party in power. This rotation differentiates Mendoza from San Luis where the Rodríguez Saá's PJ controlled both the legislative and executive branches since 1983. Moreover, Supreme Court Ministers Jorge Nanclares and Aída Rosa Kemelmajer de Carlucci point to the rotation among parties as a principal factor behind judicial independence. An analysis of electoral results over the past 50 years demonstrates that a single party has not dominated provincial politics. The PD occupied the governorship until 1943 when the PJ captured the post. From 1958 until 1961, Ernesto Ueltschi (UCRI) was governor. In 1961, Francisco Gabrielli (PD) took over. Emilio Jofre (PD) won the 1965 election but never assumed his seat because of a military coup. The PJ took power from the PD in 1973. Following the de facto government of 1976 through 1983, Llovera (UCR) became governor.⁸⁷ Although all three governors who served from 1987 through 1999 were members of the PJ, the PJ faced limits because divided government characterized part of Bordón's term and all of Lafalla's term.

The three party balance encourages divided government which enhances the capacity of the legislature to act as an agency of horizontal accountability. In contrast to San Luis, divided government has been frequent in Mendoza, contributing to judicial autonomy. Provincial legislators report that their power relative to the executive branch is greatest under divided government. Mendoza's Congress acts as a control because the executive generally does not have a majority.⁸⁸ Moreover, since the 1983 transition, a gradual deconcentration of power has accompanied the emergence of divided government. Divided government reappeared in 1995 when Lafalla became governor, the year when the strengthening of competing power centers began to accelerate.

Even before the military seized power in 1976, divided government was common in Mendoza. Throughout most of Mendoza's history, when the UCR controlled the governorship, it

⁸⁵ Congresswoman Teresa Peltier (PD), Supreme Court Justice Jorge Nanclares, and Congressman Bruni (UCR) stress the importance of "convivencia" in Mendoza. Mendoza Supreme Court Justice Nanclares argues that the convivencia permits judges to be independent. According to Bruni, the leaders of all parties have promoted convivencia, which has permitted judicial independence even before creation of a Consejo. Peltier, interview with author, 5 May 1999. Nanclares, interview with author, 4 May 1999. Bruni, interview with author, 6 May 1999.

⁸⁶ Lehman Brothers, *Offering Circular Province of Mendoza*, 2 August 1996, 40. Ana María Mosso de Mortarotti reports that during her tenure as Lafalla's Economy Minister, the legislature approved all of her proposals despite the fact that the PJ did not have the majority. Mosso de Mortarotti, national Congresswoman (PJ, 1997-2001) and Lafalla's former Minister of Economy (1995-1997), interview with author, Buenos Aires, 29 June 1999.

⁸⁷ Justice Nanclares, interview with author, 4 May 1999. Justice Kemelmajer, interview with author, 4 May 1999.

⁸⁸ Carlos M. Balter, former PD member of the provincial House of Representatives, president of PD bloc (1987-1991), interview with author, Buenos Aires, 27 April 1999. León Victor Chade, former provincial UCR Senator, (1987-1991), interview with author, San Martín, Mendoza, 7 May 1999. Jorge Zapata Mercader, former provincial PD Senator, (1987-1991), Buenos Aires, 27 April 1999. Congresswoman Peltier, interview with author, Mendoza, 5 May 1999. Members of Mendoza's Senate and House who represent different parties agree that divided government is a variable that affects the legislature's capacity to check the governor. Balter reports that from 1987 through 1991, the Congress did not function as a control due to the governor's PJ majority in the legislature.

did not hold a majority of seats in the legislature.⁸⁹ Since the 1983 transition, divided government has been on the rise. United government characterized the years immediately following the transition, but Lafalla faced divided government throughout his term; the PJ was the minority in the legislature. Unlike previous UCR governors, when Llaver assumed power in 1983, the UCR had a majority in both houses. The UCR won by a wide margin; 45.5% of voters supported UCR, whereas the PJ received 34.8% and the PD obtained only 12.6% of the vote.⁹⁰ When Bordón became governor in 1987, the PJ had a majority in the House but not in the Senate. From 1987 until 1991, UCR and PD senators often joined forces; they agreed on judicial appointments. The UCR and PD senators together outnumbered PJ senators by one. Although they never formally rejected one of Bordón's candidates, they warned Bordón that if he did not retract his nominee, they would not approve the appointment.⁹¹ United government returned under Gabrielli when the PJ regained a majority in both houses. Thus, under Gabrielli, checks on the executive were limited.⁹²

When Lafalla assumed the governorship in 1995, his PJ lost its majority in the legislature. Throughout his entire term, Lafalla's party did not have a majority in the Senate, and for his final two years as governor, the PJ did not have a majority in the House. In 1995, the PJ lost its absolute majority in the Senate; the PJ had 45% of seats, the UCR had 24%, PD had 18%, and Frepaso/PAIS had 13%.⁹³ After the partial renovation of the Senate in 1997, the PJ had 17 seats, Alianza had 10 seats (9 UCR and 1 Frepaso), PD had 10 seats, and PAIS had 1 seat. Moreover, in the 1997 elections, the PJ lost its majority in the House.⁹⁴

Divided government facilitates the appointment of independent judges. The governor has more difficulty in securing Senate approval for his nominee his party does not have a majority. From 1995 through 1999, none of the three parties had an absolute majority in the Senate. As a result, the appointment process was slow, divided government helped insure the designation of qualified judges; the governor could not push through his party's candidate. The agreement of at least two parties was necessary to name a judge. Such agreement often requires intense debate in the Senate. Senator Pérez Botti points to the example of the May 4, 1999 Senate debate over Lafalla's nominee. The UCR and PD joined forces to reject the governor's candidate. The fate of Lafalla's candidate demonstrates that divided government hinders the governor's ability to select judges based on partisan preferences rather than professional merits.⁹⁵

The Dispersal of Power and an Effective Consejo de la Magistratura

Mendoza's Consejo de la Magistratura has acted as an agency of horizontal accountability by reducing the governor's discretion in the appointment of judges. Stalemate among three parties has contributed to the agency's effectiveness. When Mendoza has been under divided government, the Consejo has acted as a countervailing power center. The Consejo has been part

⁸⁹Lacoste, "El gobierno de Llaver se pone en marcha (1983-1984)," chapter in forthcoming book Santiago Felipe Llaver, gobernador de Mendoza (1983-1987), 2.

⁹⁰Lacoste, "El gobierno de Llaver se pone en marcha (1983-1984)," 3-4.

⁹¹Chade, interview with author, 7 May 1999. Chade was a UCR Senator at the time.

⁹²Félix Pesce, Ministro de Gobierno under Lafalla, Mendoza, 4 May 1999.

⁹³Lehman Brothers, Offering Circular, Province of Mendoza, 2 August 1996, 40.

⁹⁴Pérez Botti, provincial Senator (PJ), interview with author, 4 May 1999.

⁹⁵Pérez Botti, interview with author, 4 May 1999.

of the gradual development of a transparent and merit-based appointment process that fosters judicial autonomy. With each administration since 1983, the process has become less secretive and politicized. Bordón and Gabrielli issued decrees that called for a Consejo. Under Lafalla, the Consejo achieved constitutional status. With each of the three iterations, the Consejo gained strength.

United government under the UCR gave Llaver power over judicial appointments. Before 1987, the governor could easily appoint loyal judges. Llaver filled the courts with members of the UCR. Senator Alberto Montbrun (UCR) recalls that during Llaver's administration, "if you were a friend, you were a judge."⁹⁶ Moreover, until 1987, Senate approval sessions were secret. The secrecy enhanced the governor's ability to appoint judges on the basis of partisan loyalty.⁹⁷ Bordón's 1987 creation of a Consejo was an important step toward improving the appointment process. Decree 5299 called for a Consejo of five members: an executive official, a Supreme Court justice, an attorney, a judge, and a House member. Although this early version of the Consejo had defects, in the words of Bruni, it placed a "brake" on the governor's appointment power.⁹⁸

The limits on the Mendoza Consejo's ability to disperse appointment power away from the governor became evident under united government. The Consejo did not function well after Bordón's PJ gained a majority in the Senate in 1989. Before 1989, Bordón had to choose the first member in the Consejo's terna. If he did not select the first, the Senate did not grant approval. After 1989, however, the PJ majority in the Senate permitted Bordón to choose the last candidate in the terna.⁹⁹

The evolution of the appointment process continued under Gabrielli. United government allowed Gabrielli to select the member of the terna proposed by the executive representative on the Consejo.¹⁰⁰ By 1993, the Consejo was close to collapse. In late 1993, the governor resolved to change the Consejo system.¹⁰¹ With Gabrielli's 1994 decree, Mendoza became first province to designate judges through a demanding system of competitive examinations. Gabrielli's decree also created advisory commissions to evaluate the candidates based on their background and theoretical and technical knowledge. The Consejo used the commission's evaluation to form the terna.¹⁰²

⁹⁶Montbrun, provincial UCR Senator (1991-1995, 1995-1999), interview with author, Mendoza, 6 May 1999. Mendoza Judge Staib claims friendship, or "*amiguismo*," was Llaver's primary consideration when selecting judges. Staib, interview with author, 11 May 1999.

⁹⁷"Designación de magistrados," *Hoy* (Mendoza), 28 March 1987.

⁹⁸Congressman Bruni (UCR), interview with author, 6 May 1999. The Consejo was a "*freno*" on the governor's power.

⁹⁹Judge Staib, interview with author, 11 May 1999. Senator Montbrun, interview with author, 6 May 1999.

¹⁰⁰Judge Staib, interview with author, 11 May 1999. By appointing the executive representative's candidate, Gabrielli continued the practice that Bordón began in 1989.

¹⁰¹Senator Montbrun, interview with author, 6 May 1999. Attorneys, judges and members of the opposition criticized the way the Consejo was functioning.

¹⁰²"Concursos para jueces," *Los Andes*, 1 July 1994. "Jueces por concurso," *Los Andes*, 21 Nov. 1994. "El PE no have cálculos políticos con las designaciones de jueces," *Los Andes*, 11 June 1994. Flavio Arjona, Sergio Olivieri, and Fernanda MacIntosh, "Mendoza: La Administración de justicia," *Novedades Economicas* June 1996, 38-39. The advisory commission contained only one executive representative.

In 1998 when the Consejo gained constitutional status, Lafalla's PJ did not hold a majority in either house of Congress. The stalemate among Mendoza's three parties permitted the constitutional amendment calling for the creation of a Consejo with the power to check the executive. The Consejo proposes candidates for lower court judges and members of Ministerio Público based on competitive examinations. By a vote of the absolute majority of all members, the Consejo suggests a terna. The executive then selects one member of the terna with Senate approval.¹⁰³ The composition of the seven-member Consejo reflects the balance among Mendoza's three parties. The balanced composition of the Consejo reduces the chances of politicization. The executive does not dominate the body, which contains two judges, two members of Congress, one executive representative, and two lawyers. The two House members represent different parties. In addition, any citizen can initiate proceedings to remove a Consejo member.¹⁰⁴

The Consejo is independent of the executive branch. As Article 150 stipulates, the Consejo proposes "ternas vinculantes," or binding ternas, from which the governor must select one of the three members. The governor cannot propose anyone who is not part of terna or refuse to select one of the three. Furthermore, if the Senate does not approve the executive's nominee, the governor must select a different member of the original terna; the governor cannot demand that the Consejo present a new terna. The binding nature of the terna contrasts San Luis where the governor is not compelled to select a member of terna; he can effectively reject all three members.

Article 150 maintains the competitive examination system introduced by Gabrielli's 1994 decree. In addition, a provincial law calls for the participation of advisory commissions similar to those created by Gabrielli.¹⁰⁵ The exams and the advisory commissions enhance objectivity and take discretion from the executive.¹⁰⁶ The exams facilitate the appointment of the most technically qualified candidates.¹⁰⁷ Furthermore, the Consejo has the exclusive power to dictate

¹⁰³Article 150, Constitución de la Provincia de Mendoza. The Consejo does not play a role in the designation of Supreme Court members or of the Procurador General. Consejo members serve two-year terms. The Supreme Court justice, the executive representative, and the two members of Congress are selected by the organs that they represent; the organs can also remove their representatives. The judges and lawyers are selected by their colleagues.

¹⁰⁴In order to begin proceedings against a Consejo member, the citizen must allege that the member's action represented one of the causes for impeachment laid out in Article 109 of the provincial Constitution. According to Article 109, causes for impeachment include "*mal desempeño, desorden de conducta, faltas o delitos en el ejercicio de sus funciones o por crímenes comunes.*" See Ley Provincial 6514, Art. 1, Constitución de la Provincia de Mendoza, 113-114.

¹⁰⁵See Law 6561, art. 4. Pérez Hualde, "El Consejo de la Magistratura en la Constitución de Mendoza," 25 May 1998, 14-16.

¹⁰⁶Based on the examination results, the commission submits a list to the Consejo that contains each candidate's score of between one and ten points; the commission assigns up to five points for both the oral and the written exam. Thus, when the list reaches Consejo, the candidates have already passed through a technical filter, the exam. The next phase in the appointment process consists of oral interviews by the Consejo. Each candidate appears before the Consejo and responds to a series of questions. Each of the seven members of the Consejo assigns the candidate a score between one and ten. The Consejo adds the average of the seven scores to the commission's score. Based on the final ranking after combining the scores, the Consejo proposes a *terna* to the governor. Congressman Bruni, member of the Consejo, interview with author, 6 May 1999.

¹⁰⁷Supreme Court Justice Kemelmajer argues that although exams may not always guarantee the selection of the very best candidates, they exclude the worst. Kemelmajer, interview with author, 4 May 1999.

the rules that govern the examinations. The executive has no power to intervene in the exams. Exams are open and public, and any citizen with an objection can denounce the process. In addition, a number replaces the candidate's name on the written portion; those who grade the exam do not know the identity of the test taker.¹⁰⁸ The Consejo also has the power to set the rules that guide its functioning. According to Article 4 of Law 6561, no other branch of government can enter this terrain. The Consejo's sole discretion in this arena differentiates the Mendoza Consejo from its counterpart in San Luis where the governor has dictated the guidelines that govern the body.

Stalemated Power and a Strong Fiscal de Estado

In Mendoza, a member of the opposition heads the Fiscal de Estado, contributing to its effectiveness as an agency of horizontal accountability. The Fiscal's capacity to serve as a check on the governor has increased under Lafalla and has been central to the dispersal of power. According to Article 177 of Mendoza's Constitution, the Fiscal's responsibilities include defending the province's patrimony in all cases that affect state interests. In addition, the Fiscal can appear before the provincial judiciary to challenge any law, decree, contract, or resolution on the basis that it is unconstitutional or against Mendoza's economic interests.¹⁰⁹ While performing this second role, the Fiscal acts as an organ of control and emerges as a competing power center. Moreover, the Constitution protects the Fiscal's autonomy. Like judges, the Fiscal de Estado has life tenure during good conduct and is removable only by the Jury de Enjuiciamiento.¹¹⁰

The effectiveness of the Fiscal depends largely on the appointment and removal processes. Although the Fiscal gained constitutional status in 1916, it did not reach its potential to act as an effective check on the governor until 1995. Until 1995, most governors appointed pliant individuals who were unlikely to challenge the executive. The Fiscal was nothing more than an advisor to the governor. As a result, the public viewed the Fiscal as just one more bureaucrat; they did not know the name of the person who occupied the post.¹¹¹ When Lafalla appointed Aldo Giordano, however, the Fiscal became a household name associated with checking the governor.

The men who occupied the post prior to Giordano were loyal to the governor. Lafalla broke the tradition of pliant Fiscales by appointing Giordano who had strong ties to the UCR. Giordano had advised the Llaver administration.¹¹² Lafalla made a concerted effort to strengthen the Fiscal as a control. For Lafalla, selecting a member of the opposition to occupy the post is of

¹⁰⁸Claudia Pagliarulo, "Comienzan los exámenes para cargos judiciales, *Uno*, 13 Sept. 1998.

¹⁰⁹Art. 177, *Constitución de la Provincia de Mendoza*, 1916. For Lafalla's Fiscal, Aldo Giordano, the province's patrimony ("*patrimonio del estado*") is the people. He sees his constitutional role as defending the people of Mendoza. Giordano, interview with author, Mendoza, 3 May 1999.

¹¹⁰Art. 180, *Constitución de la Provincia de Mendoza*, 1916. The governor appoints the Fiscal with Senate approval.

¹¹¹Andres Gabrielli, journalist, interview with author, Mendoza, 5 May 1999. Alejandro Luis Cazaban, interview with author, Justice Minister under Lafalla, Mendoza, 3 May 1999.

¹¹²Giordano, interview with author, 3 May 1999.

utmost importance. When he was elected in 1995, Lafalla composed a list of ten potential Fiscales; none of the ten was a member of the PJ.¹¹³

Under Lafalla, the Fiscal de Estado indeed acted as a competing power center. Giordano's suits against government functionaries produced the fall of two cabinet ministers.¹¹⁴ Giordano also initiated proceedings against former Governor Gabrielli regarding the privatization of the Banco de Mendoza.¹¹⁵ Although Giordano's initiatives challenged the governor's interests, Lafalla defended the Fiscal. Lafalla's support bolstered the autonomy of the office the Fiscal. The governor's reaction to Giordano's investigation of Banco de Mendoza officials bolstered the autonomy of the office. Immediately upon assuming his post, Giordano began to file suits against members of Gabrielli's administration who worked for the Banco, many of who were provincial PJ legislators by 1995. As a result, many members of Lafalla's party opposed the new Fiscal. In 1996 when the PJ had sufficient majority to use the Jury de Enjuiciamiento to remove Giordano from office, Lafalla defended him. In addition, Giordano reports that he never received calls from the governor to pressure him.¹¹⁶

Party Balance and Other Agencies of Horizontal Accountability

In Mendoza, party balance has stood in the way of executive subordination of the Jury de Enjuiciamiento, the Tribunal de Cuentas, and the Ministerio Público. The Jury is a competing power center that has bolstered judicial autonomy in Mendoza. The Jury, which gained constitutional status in 1916, disperses power away from the executive by reducing the governor's discretion in the removal of judges. The Jury has the power to remove first instance and appeal court judges. In contrast to provinces where the executive has the power to remove judges, Mendoza judges are less likely to accept subordinate and passive roles. Judges do not face the threat of removal from office if they challenge the governor.

The governor's party does not dominate the Jury. The 21 member Jury is composed of the seven Supreme Court justices, seven senators, and seven members of the House. The majority of the 14 legislative representatives are members of the two opposition parties. The partisan affiliation within the Jury reflects the balance among the three parties in Congress.¹¹⁷ Moreover, as a result of the respect for judicial tenure, the seven justices on the Jury are not subordinate to the executive. Many were appointed by opposition administrations.

The Jury functions well in Mendoza. During his 1999 campaign for governor, Carlos Balter (PD) declared that if he were to win the election, he would be unable to remove judges. In Mendoza, governors respect the power of the Jury.¹¹⁸ Based on 17 years of experience on the

¹¹³Lafalla, interview with author, 7 May 1999. See Andres Gabrielli, "Arturo y la gata Flora," *Uno* (Mendoza), 28 July 1998 for more on Lafalla's treatment of agencies of horizontal accountability such as the Fiscal de Estado.

¹¹⁴Giordano's investigations led to the Minister of Education's June 1997 resignation and the Housing Minister's February 1999 resignation. Giordano, interview with author, 3 May 1999.

¹¹⁵Gabrielli, interview with author, 5 May 1999.

¹¹⁶Giordano, interview with author, 6 May 1999.

¹¹⁷The president of the Supreme Court presides over Jury, and eleven members are necessary for a quorum. The requirement to remove a judge is the quorum plus one, or twelve members. In the case of a tie, the president of the Jury casts the deciding vote. Art. 164, *Constitución de la Provincia de Mendoza*, 1916.

¹¹⁸Balter, interview with author, 27 April 1999.

Jury, Kemelmajer concludes that the Jury fulfills its constitutional role. The Jury removes those who deserve to be dismissed.¹¹⁹ Jorge Zapata Mercader, a Jury member during his term as provincial senator from 1987 until 1991, argues that the Jury is independent from the executive; it never receives pressure from the governor.¹²⁰

The Tribunal de Cuentas is another control on the Mendoza executive. The governor's party does not have a majority in the oversight agency. Like the Fiscal de Estado, the Tribunal is a product of the 1916 Constitution. Article 181 gives the Tribunal the power to approve or reject government officials' administration of public funds. Article 182 obliges all state agencies, municipalities, and individual functionaries that administer provincial funds to submit an annual account documenting their spending. The Tribunal uses this account to either approve or reject the spending at the end of each year.¹²¹ Since the Tribunal began to function by law in 1931, it has acted as a check on the government's economic activity. The Tribunal exercises control over all three branches as well as over municipalities and the few state-owned companies that remain. The Tribunal can compel the government return money or pay a fine if its spending violate the law.¹²²

Balanced composition permits the Tribunal to act as competing power center. The respect for the life tenure of Tribunal members has contributed to its independence from the executive. Many members of today's Tribunal have served since 1983; the opposition dominates. In fact, like the president of the Supreme Court, the president of the Tribunal is a former provincial UCR senator. The PJ governments inherited a Tribunal president who Llaver had appointed. Of the seven-member Tribunal, PJ governors appointed only three.¹²³

In Mendoza, a lack of resources rather than subordination to the executive stands in the way of an effective Ministerio Público. The Ministerio Público is the weakest of Mendoza's potential agencies of accountability. A strong Ministerio can serve as a check on the executive branch, especially when corruption scandals plague the government.¹²⁴ Mendoza, however, has a low level of corruption, especially when compared to San Luis. Moreover, in contrast to San Luis, Mendoza has other countervailing power centers such as the Fiscal de Estado that help compensate for the weak Ministerio. In Mendoza, the available resources do not meet the large number of cases that reach prosecutors' offices. Moreover, a personnel shortage contributes the inability to conduct efficient investigations. Prosecutors are understaffed and work with small teams that consist of a law clerk and three or four assistants.¹²⁵

¹¹⁹Justice Kemelmajer, interview with author, 4 May 1999.

¹²⁰Zapata Mercader (PD), interview with author, 27 April 1999. According to Supreme Court Justice Nanclares, the Jury has functioned well in 80 to 90 percent of the cases. Since he joined the Jury in 1987, the Jury has removed two judges and dismissed approximately six suits per year. Nanclares attributes the dismissals to a lack of evidence rather than complacency on the part of the Jury. Nanclares, interview with author, 4 May 1999.

¹²¹Art. 181-182, Constitución de la Provincia de Mendoza, 1916.

¹²²Julio Gomez, Secretario Relator (legal advisor) to the Tribunal de Cuentas, interview with author, 5 May 1999.

¹²³Lafalla, interview with author, 7 May 1999.

¹²⁴Federal Judge Leiva gives an example of the central role a public prosecutor can play. He points to the prosecutor with whom he collaborates, Alejandra Obregon. She was critical to his ability to prosecute 26 former Banco de Mendoza officials. Leiva, interview with author, 10 May 1999.

¹²⁵Leiva, interview with author, 10 May 1999. Obregon concurs with Leiva that the problem has to do with the huge quantity of cases. Alejandra Obregon, interview with author, Mendoza, 10 May 1999. In addition, the Mendoza Ministerio shares some of the defects that undermine its counterpart on the national level. Prosecutors

V. Conclusion: Systems of Horizontal Accountability

San Luis and Mendoza share the same formal structures of horizontal accountability, yet the rules that govern the composition of the competing power centers vary across the cases. In particular, the two provinces use different processes for the appointment and removal of agency members. In San Luis, the dominance of Rodríguez Saá's PJ has allowed the executive to subordinate all agencies of horizontal accountability. The governor used his control of the legislature to systematically dismantle the autonomy of the Consejo, the Jurado, the Fiscal de Estado, the Tribunal de Cuentas, and the Ministerio Público; he has total discretion over their composition. In contrast, in Mendoza, the stalemate among three strong parties strengthened the capacity of agencies of horizontal accountability to check the governor. Mendoza's competitive politics has led to countervailing power centers that have become embedded. The governor's party does not dominate the legislature or the horizontal accountability agencies. In fact, a member of an opposition party is at the helm of each of Mendoza's five agencies.

Political leadership can be critical to an initial change in the direction of judicial autonomy, but systems of horizontal accountability are durable once competing power centers are institutionalized. In cases like San Luis where agencies of horizontal accountability are totally ineffectual, however, a leader's values, orientation, and objectives matter. San Luis would require committed democratic leadership to begin to build up the little institutional autonomy that remains. By stripping potential countervailing power centers of autonomy, Rodríguez Saá triggered a process of enormous path dependence. As power became increasingly concentrated in the governor, he gradually gained total control of all agencies of horizontal accountability. In contrast, in Mendoza, Lafalla made a deliberate effort to consolidate institutions that check his power. As a result of Lafalla's decision to strengthen these institutions, the intentions of future governors are no longer as central to horizontal accountability and judicial autonomy. As a result of stalemate, the institutions that would remove a governor like Rodríguez Saá from office are firmly in place in Mendoza.

only initiate investigations, which judges actually conduct. Recent legislative proposals that seek to strengthen the Ministerio, however, would give the prosecutor a greater role in the investigations. A proposed reform of the Código Procesal (Procedural Code), for instance, would transfer the investigation from the judge to the prosecutor. Giordano argues that the reform would facilitate efficient sentences in cases involving government officials. Giordano, interview with author, 6 May 1999. Cristián Pérez Barceló, "Por mes un juzgado recibe case 1.000 denuncias y resuelve 60," Los Andes, 21 Sept. 1998.