Commentary on Professor Pérez's Presentation

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# Professor Pérez's Essential Points

- As in all democracies, Latin American High Courts were created to play a crucial role in constitutional interpretation, which of course includes protecting fundamental rights and ensuring that the other two branches do not attain undue power.

- Due to their history of not being able to do this in recent decades, they face a crisis of legitimacy. They need to regain or achieve the trust of the population through their performance in order to overcome the damage done by past (and perhaps some present) authoritarian regimes.

- This is a big challenge and perhaps it can only be solved over time through their performance. Will the people begin to believe that they have integrity and they are impartial, reliable, consistent, and fair?

U.S Supreme Court's Approval Rating is Slipping

It is not only the high courts in Latin America that are suffering from a low goodwill reservoir.

Do you approve or disapprove of the way the Supreme Court is handling its job?

— % Approve   ···· % Disapprove
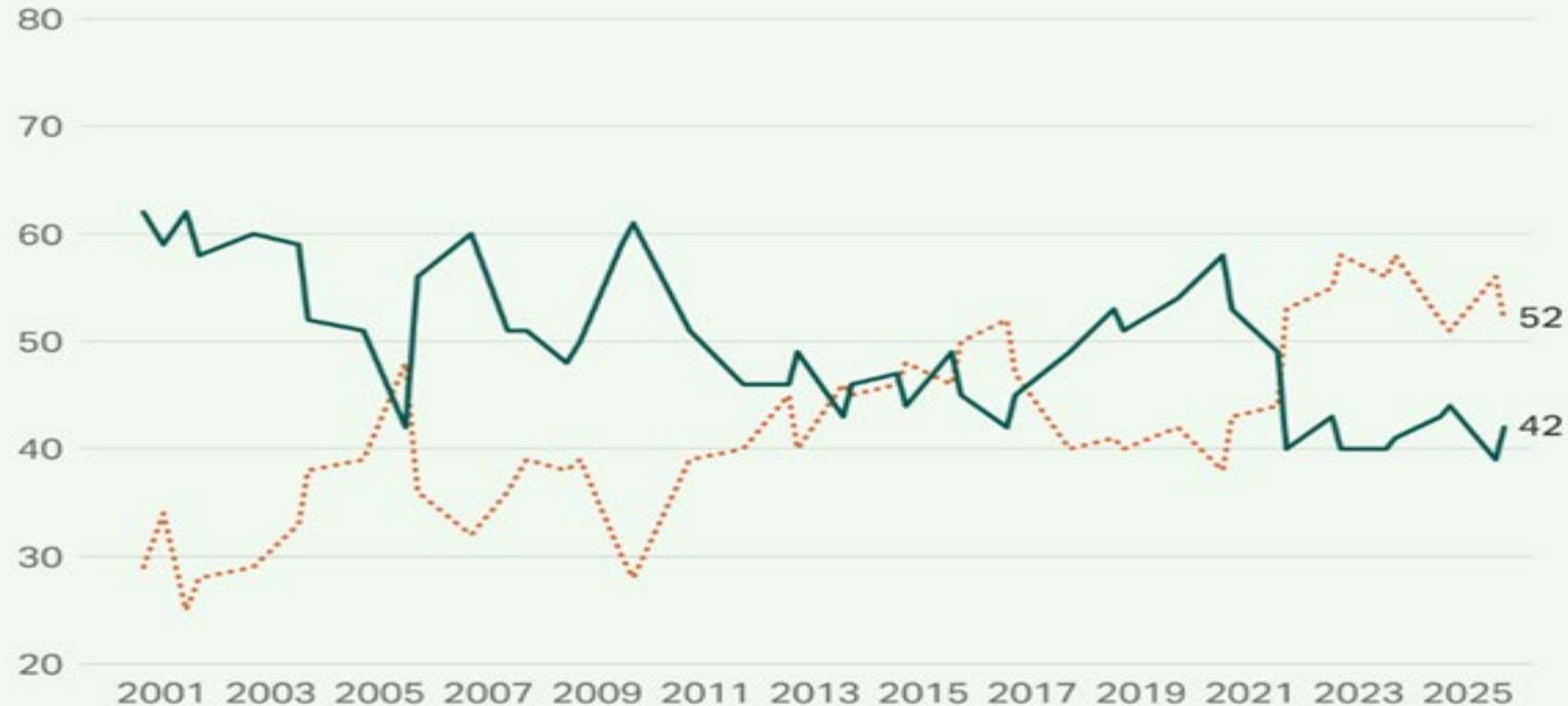
President Trump's Criticism of Our Court

- When our Court ruled against President Trump, in holding that his tariffs were not authorized by Congress, he went after the six justices in the majority (including two of them he appointed) saying,

- "They're just being fools and lapdogs for the RINOs and the radical left Democrats," using a term [Republicans in Name Only] that is applied by Trump supporters to disparage other Republicans deemed not sufficiently loyal to the party.

- He also, without giving any evidence, said, "It's my opinion that the Court has been swayed by foreign interests." He even said, "their votes were an embarrassment to their families."

Two Other Crucial Attributes of High Courts

- ☐ <u>Independence:</u>
  - ■ In the United States, federal judges have lifetime tenure under our Constitution. While producing the highest level of independence, many people think this goes too far. It may have made sense in 1789 when life expectancy was much lower, but today, Presidents put a premium on selecting young nominees who now often serve for more than 30 years. Tellingly, only one state (Rhode Island) follows this approach. There have been serious proposals to restrict Supreme Court terms to eighteen years, but it is unclear whether this can be done without amending the Constitution, which is extremely difficult in the U.S.

Two Other Crucial Attributes of High Courts

☐ Ability to Enforce Decisions:

■ It is often said that the Court "does not have an army." It depends on its moral authority and its legitimacy in the eyes of the American people. In its early days, the Court was somewhat weaker than the executive and legislative branches. President Andrew Jackson is famously—and likely apocryphally—quoted as saying, "[Chief Justice] John Marshall has made his decision, now let him enforce it," in response to the 1832 Supreme Court ruling in *Worcester v. Georgia*. While he may not have said these exact words, the statement does reflect Jackson's refusal to enforce the court's decision protecting Cherokee Indian land rights.

Two Other Crucial Attributes of High Courts

- <u>Ability to Enforce Decisions:</u>
  - But this has been a rare event. More recently, in the 1974 case of *United States v. Nixon*, the Court ordered President Richard Nixon to release secret audio recordings to a Special Prosecutor. He complied, and not long after, resigned. And in the 2000 case of *Bush v. Gore*, the Court in a 5-4 vote forced Florida to stop counting ballots and declared George W. Bush to the winner of the Presidency. Despite extreme unhappiness among Democrats, Gore acceded to the result. But now, due to some highly controversial decisions that have overturned long-standing precedents, and our polarized political landscape, the Court is at risk of losing its moral authority.

Criteria for Evaluating *Administrative* Procedures

1. Fairness
2. Efficiency
3. Accuracy (Rationality)
4. Acceptability (Satisfaction)
5. Consistency (Predictability, Reliability)
6. Accountability

Can AI Help With Any of These?

1. Fairness
2. Efficiency
3. Accuracy (Rationality)
4. Acceptability (Satisfaction)
5. Consistency (Predictability, Reliability)
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Can AI Help With Any of These?

Fairness?—Probably not, though AI might help judges write decisions based on the record. But I emphasize, "help write"—not be the ultimate author. That has to have a "human face."

Accuracy? Perhaps generative AI could be fed the briefs and oral arguments to see whether it agreed with the court's decision. But this would likely be viewed by the courts as unreliable second-guessing, and it might lead to more public dissatisfaction if the AI results were conflicting.

Acceptability? Probably the best way to assess this would be to survey participants—both government and non-government parties.

Accountability? The main question here is whether it is it apparent from the decision who has taken responsibility for it—as it is clear in most decisions by the U.S. Supreme Court (except for those denominated "per curiam" decisions).

AI Can Help With Efficiency

■ To measure the success of this we would need fiscal indicators—to compare costs of administering courts before and after implementation of AI processes. But this is one area where I am confident that AI can help meet this goal. Over ten years ago I co-wrote an article that showed that:

❑ In the past several years, data analysis has played a key role in transforming the Social Security Administration's ("SSA") disability adjudication process. Data analysis efforts, particularly those undertaken primarily by the SSA Appeals Council, an administrative appellate body. . . have led to significant improvements in the quality and consistency of disability case review. These efforts have provided information that has led to breakthroughs in how SSA conducts training and gives feedback to staff, which has in turn led to improved productivity and accuracy of work products.*

*Gerald K, Ray & Jeffrey S. Lubbers, *A Government Success Story: How Data Analysis by the Social Security Appeals Council (with a Push from the Administrative Conference of the United States) is Transforming Social Security Disability Adjudication* (with Gerald K. Ray), 83 Geo. Wash. L. Rev. 1575, 1576 (2015).

AI Can Help With Consistency

- This value assures equal treatment of similarly situated litigants and provides enhanced stability. To measure this we would ask (1) Can an assessor look after-the-fact at decisions involving similar cases to see whether the outcomes were consistent? (2) Are the decisionmakers referring to prior decisions as precedent for later decisions?

- AI could presumably help with this task.

AI Guidelines

- Two sources that have provided useful guidelines for using AI in government.
  - The OECD's Recommendation to the Council on Artificial Intelligence
  - The Administrative Conference of the United States, adopted a Statement on agency use of AI:
    - (1) Transparency
    - (2) Harmful Bias
    - (3) Technical capacity
    - (4) Obtaining AI Systems
    - (5) Data
    - (6) Privacy
    - (7) Security
    - (8) Decisional Authority
    - (9) Oversight