Hyper-Presidentialism: Separation of Powers without Checks and Balances in Argentina and the Philippines

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INTRODUCTION

Politicians have an incentive to enhance their power by creating institutions that give them greater freedom to act and by undermining institutions designed to check their influence. Presidents are particularly likely to test the limits of their power. Legislators must compromise in order to pass statutes.[1] Judges are aware that the executive or the legislature may refuse to comply with their rulings. An independently elected President, in contrast, can sometimes act without seeking legislative approval or provoking judicial constraints. Although Presidents are generally subject to impeachment, this is almost always an extraordinary remedy invoked only in response to a crisis.[2]

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1. Even in a pure parliamentary system with strong party discipline, party leaders must negotiate with backbenchers over policy. The possibility of a vote of no confidence or of an internal party revolt limits their freedom of action.

2. *See, e.g.*, Juan J. Linz, *The Perils of Presidentialism*, 1 J. DEMOCRACY 51 (1990) [hereafter "Perils"]. *But see* Donald L. Horowitz, *Comparing Democratic Systems*, 1 J. DEMOCRACY 73 (1990) (responding to "Perils"), *and* Seymour Martin Lipset, *The Centrality of Political Culture*, 1 J. DEMOCRACY 80 (1990) (responding to "Perils"). *See also* Juan J. Linz, *The Virtues of Parliamentariism*, 1 J. DEMOCRACY 84 (1990) (responding to Horowitz and Lipset); THE FAILURE OF PRESIDENTIAL DEMCRACY: VOL I: COMPARATIVE PERSPECTIVES and VOL II: THE CASE OF LATIN AMERICA (Juan J. Linz & Arturo Valenzuela eds., 1994); ROBERT A. DAHL, HOW

In testing the limits of their power, Presidents may subvert constitutional and legal structures designed to check and balance them.[3] To show how this can happen, we study Argentina and the Philippines, two countries often criticized in the past for their hyper-presidential systems, where the electorate only weakly controls the President and other political actors.[4] In response to these concerns, both countries recently amended their constitutions and established modern accountability and transparency institutions designed to check their Presidents. Argentina enacted constitutional reforms in 1994, and the Philippines did the same in 1987. We demonstrate how strategic Presidents in both countries were able to undermine most of the constitutional attempts to control unilateral executive action. This occurred because of design flaws in the institutions established to control the presidency; the inability of other actors, such as weak opposition parties, to constrain the President; and the support of political allies.

The essence of Presidentialism is the separation of powers, but the overlapping notion of checks and balances is equally important. However, in a hyper-presidential system, Presidents who are challenged use the rhetoric of separation of powers to defend their actions and argue against the imposition of checks and balances by the other branches and institutions. To understand the difficulties these claims create it is important to unpack the notion of the separation of powers to see the contradictions at its core. According to the conventional view, the legislature is primarily responsible for legislation, the executive is responsible for implementation of the law, and the judiciary is responsible for enforcement. Two distinct but overlapping theories of democratic government justify such separation.

One theory emphasizes the division and specialization of labor: each branch should do what it does best without interference from the others. In this view, the executive branch should be organized as a hierarchical bureaucracy under the control of the elected President and his or her cabinet. The goal of the presidential election is to select a person who can operate as a strong manager independent of the legislature, and who can concentrate on administering the law fairly and competently.[5] To assure this independence, the president is

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DEMOCRATIC IS THE AMERICAN CONSTITUTION? (2002); TORSTEN PERSSON AND GUIDO TABELLINI, THE ECONOMIC EFFECT OF CONSTITUTIONS (2003).

3. Our focus is "not so much on the *institutions* themselves (formal and/or informal) but on how *actors* 'within' these institutions behave, and on how they strategically shift according to varying contexts." *See* Guillermo O'Donnell, *On Informal Institutions, Once Again, in* INFORMAL INSTITUTIONS AND DEMOCRACY: LESSONS FROM LATIN AMERICA 285, 287 (Gretchen Helmke & Steven Levitsky eds., 2006).

4. Linz, *Perils*, *supra* note 2; Guillermo O'Donnell, *Delegative Democracy*, 7 J. DEMOCRACY 55 (1994).

5. This was the position taken in the 1937 Brownlow Report on administrative management, prepared for US President Franklin Delano Roosevelt. *See* D.R. Brand, *The President as Chief Administrator: James Landis and the Brownlow Report*, 123 POL. SCI. Q. 69 (2008).

elected separately, governs for a fixed term, and cannot be removed by a legislative vote of no confidence. Each branch has a well-specified role. No branch can exceed its mandate, and the ideal is limited and effective government.

A second theory accepts the pervasiveness of politics, especially for elected officials—be they legislators or Presidents. The separation of powers operates conjointly with checks and balances. Each branch has a set of specialized functions, in part designed to constrain the others. The legislature, for example, reviews the performance of the executive and can call cabinet secretaries to testify. It sets budget priorities and negotiates with the President over policy. The President, operating under delegated legislative authority or constitutional mandates, makes policy subject to legislative oversight and override. The judiciary not only decides private law disputes and interprets vague statutory and constitutional terms; it also polices the outer limits of executive and legislative power vis-à-vis society and the other branches. Subject to professional qualifications, the appointment of judges is a political exercise under which the President and the legislature seek to reflect the nation's political balance. Thus, each branch is both an independent political actor and a check on the other two. This normative argument for checks and balances is the familiar Madisonian claim that they help assure that no part of the government holds enough power to dominate the other branches. Government is self-limiting because of the checks that each branch imposes on the others. If these checks do not operate properly, one or another branch may be able to dominate the other organs of state power.

Most modern governments have not left the separation of powers frozen in its original tripartite form inherited from Montesquieu. Governments have created other institutions, such as specialized courts, autonomous regulatory agencies, central banks, supreme audit bodies, ombudsmen, electoral commissions, and anti-corruption bodies.[6] Some of these institutions monitor the core branches of government; others operate with substantive authority to make policy or implement the law in individual cases.

In practice, all presidential systems have elements of both separation-of-powers models, and they rely on specialized government institutions with problem-solving and monitoring functions. Problems arise, however, when political actors use one model to justify actions under the other. For example, as

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6. The tripartite division of power is laid out in CHARLES DE MONTESQUIEU, THE SPIRIT OF THE LAWS (1748). For background information about modern multi-partite divisions, *see generally* Bruce Ackerman, *The New Separation of Powers*, 113 HARV. L. REV. 633 (2000) [hereafter "New Separation"]. *But cf.*, Steven G. Calabresi, *Why Professor Ackerman is Wrong to Prefer the German to the U.S. Constitution*, 18 CONST. COMMENT. 51 (2001). *See also* Bruce Ackerman, *Goodbye Montesquieu, in* COMPARATIVE ADMINISTRATIVE LAW (Susan Rose-Ackerman & Peter Lindseth eds., 2010); John Ackerman, *Understanding Independent Accountability Agencies, in* COMPARATIVE ADMINISTRATIVE LAW (Susan Rose-Ackerman & Peter Lindseth eds., 2010); *and* O'Donnell, *Delegative Democracy*, *supra* note 4.

we will see in our case studies, Presidents may justify unilateral action by invoking the first theory of the separation of powers, which divides the government into three distinct branches. The President claims to be able to act free of any checks from the legislature, the courts, or governmental oversight bodies. He or she seeks to use the constitutional text to avoid external review. This is particularly problematic if the President acts in an overtly political manner that does not correspond to the role as "chief executive" of a large hierarchical body or that neglects the interests of large segments of the population.

In examining the presidential systems in Argentina and the Philippines, we focus on presidential efforts to undermine constitutional controls in the face of weak legislative oversight and inadequate political pushback. We demonstrate how determined Presidents have repeatedly undermined institutional efforts to limit their power either by finding legal loopholes or by pushing the boundaries of the law. Redesign could improve some of the institutional checks, but others are flawed in principle. Still others may operate as effective controls in some presidential systems but work poorly in systems without complementary institutions or norms of behavior.

Although each case has its own distinctive features, we do not believe that the problematic behavior we describe is unique to Argentina and the Philippines. Rather, we suggest that all presidential systems, including the United States, face difficulties in constraining a determined chief executive.[7] Our broader aim, therefore, is to alert reformers elsewhere to the inherent weaknesses of structural solutions. Institutional reforms will often not be sufficient if they simply multiply nominal checks without real teeth. Reforms need to be structured in a way that acknowledges and confronts predictable efforts to limit their impact. Our studies of Argentina and the Philippines demonstrate the negative consequences for democracy from presidential assertions of unilateral power that undermine democratic notions of limited government. We illustrate how the new constitutional texts have proved inadequate in checking Presidents who are determined to interpret or ignore the text in their own interests. In our two cases, constitutional efforts to limit presidential unilateralism had little impact when faced with Presidents determined to expand their power. These efforts faced only modest pushback from the legislature, the judiciary, and other oversight bodies.

Emergency powers—arising from poor economic conditions in Argentina and from civil strife in the Philippines—have enhanced presidential power in spite of opposition from some political and social actors. The Presidents took

7. Scott Mainwaring & Timothy R. Scully, *Latin America: Eight Lessons for Governance*, 19 J. DEMOCRACY 113, 120-21 (2008) argue that the study of formal institutions is insufficient because in many cases "informal institutions counteract the effects of formal ones." They mostly focused on electoral institutions and party structures. We emphasize the interactions between Presidents and institutions nominally designed to constrain them.

unilateral actions, especially in times of crisis, and then asserted that the constitutional separation of powers shielded them from scrutiny. At times, they relied on the need for efficient and centralized management to overcome criticism of their actions. Whatever the merits of the administrative efficiency argument in a particular case, once a hyper-powerful presidency takes root, the existing checks and balances risk irrelevance even after the emergency or other special situation has passed.

To demonstrate these contentions, we review five linked issues. Section I sets the stage with a description of the President's position in the formal constitutional structure in Argentina and the Philippines. Section II concerns the use of presidential decrees and other law-like instruments. Sections III and IV discuss, respectively, the management of the budget and appointments powers. Section V considers oversight bodies, including the courts and the way outside, civil society groups have sometimes been able to mount successful challenges, especially in Argentina. We conclude by relating our case studies to research on the perils of presidentialism.

I.
THE PRESIDENT IN THE CONSTITUTIONAL STRUCTURE

In Argentina and the Philippines the citizens directly elect the President, who possesses considerable constitutional authority. This section outlines these formal powers. They are the background conditions against which incumbents act to test the limits of their authority.

A. Argentina

As in the United States, the Argentine President is Head of State, Head of Government, and Commander in Chief of the Armed Forces.[8] Her powers are similar to those of the American President with respect to the legislative process and the appointment of judges. Unlike the American President, the Argentine President has the authority to appoint her Cabinet and many other high-level officials without approval by a legislative body.[9] Thus, she can form her Cabinet quickly because she need not appeal to political opponents in making appointments.[10] The 1994 constitutional amendment has not provided effective checks either because its provisions have not been implemented or because of design flaws. Central/provincial relations illustrate the former, and the operation

8. Art. 99, Secs. 1, 12, CONSTITUCIÓN NACIONAL [CONST. NAC.] (Arg.).

9. Cristina Fernández de Kirchner assumed her duties as President of Argentina on December 10, 2007.

10. Unlike the U.S. President, she has less reason to appoint close advisors with portfolios that overlap those of cabinet departments. The growth of the White House staff including the appointment of "czars" with mandates similar to those of cabinet members is discussed in BRUCE ACKERMAN, THE DECLINE AND FALL OF THE AMERICAN REPUBLIC 152-56 (2010).

of the newly created Chief of Cabinet is an example of the latter.

The President has considerable authority vis-à-vis the provinces. Although Argentina is formally a federal state,[11] the chief executive's influence over the provinces is high because of her discretionary distribution of funds. Argentina has a system of revenue sharing: the provinces delegate the power to collect revenues to the central government, and they sign a comprehensive agreement to determine the distribution of revenues. The current agreement, dating from 1988, gives the executive discretion to distribute 1% of the revenues through a special fund, which is supposed to be used for situations of emergency or financial imbalance in the provinces.[12] Furthermore, several laws and regulations created special subsystems of revenue sharing that significantly reduced the share of revenue going to the provinces and increased the discretion of the central government,[13] and many tax laws have established specific allocations that are not shared through the general system.[14]

The 1994 constitutional amendment attempted to correct this situation, providing that most national taxes have to be divided through a system of revenue sharing determined through a formal legal agreement between the Nation and the provinces.[15] The agreement has to guarantee the automatic remittance of funds, use objective sharing criteria, and base the distribution on principles of equity and solidarity. The law has to originate in the Senate, and its enactment requires the vote of an absolute majority of all the members of each House, and approval by the provinces. But although the 1994 amendment stipulated that this law had to be enacted by the end of 1996,[16] after more than 15 years, the law has still not been passed. Thus, the 1988 system is still in force, with subsequent amendments and subsystems that allow the executive to distribute funds in a largely discretionary manner.

Other provisions of Argentina's 1994 constitutional amendment both strengthened the popular nature of the President's mandate and reduced its length in order to ameliorate political instability produced by the zero-sum game nature of the system. Thus, under the original constitution, the citizens elected the President and Vice President indirectly to six-year terms with no reelection

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11. Art. 1, CONSTITUCIÓN NACIONAL [CONST. NAC.] (Arg.).

12. Establécese el Régimen Transitorio de Distribución entre la Nación y las Provincias, Law No. 23548, Art. 3, Jan. 7, 1988 (Arg.), *available at* http://www.infoleg.gov.ar/infolegInternet/anexos/20000-24999/21108/texact.htm.

13. *See, e.g.*, Ratificase el "Acuerdo entre el Gobierno nacional y los gobiernos provinciales," Law No. 24130, Sept. 2, 1992 (Arg.), *available at* http://www.infoleg.gov.ar/infolegInternet/anexos/0-4999/17/norma.htm.

14. For a comprehensive account of the system of revenue sharing by source, *see generally* DIRECCIÓN NACIONAL DE INVESTIGACIONES Y ANÁLISIS FISCAL, DESTINO DE LA RECAUDACIÓN DE LOS IMPUESTOS AL 30/06/2010 (2010), http://www.mecon.gov.ar/sip/dniaf/destino_recaud.pdf.

15. Art. 75, Sec. 2, CONSTITUCIÓN NACIONAL [CONST. NAC.] (Arg.).

16. *Id.* Temporary Provision 6.

through an electoral college.[17] The 1994 amendment reduced the President's term from six years to four with the possibility of one reelection. The amendment replaced the electoral college with the direct election of the President and Vice President, in which the nation votes as a single district, and it established a run-off or *ballotage* system.[18] However, the main effort to limit the powers of the president was the creation of the new position of Chief of Cabinet. The aim was to create some distinction between the powers of the Head of State and those of the Head of Government, although not with as complete a division as in a non-presidential system. The Constitution still provides that the president is the Head of the Nation and the Head of Government,[19] so that the Chief of Cabinet is more a super minister than a weak prime minister.

The Chief of Cabinet executes the budget, overseas the country's general administration, and makes all administrative appointments with the exception of those delegated by the Constitution to the President alone.[20] He or she also plays a significant role in enacting the executive branch's emergency decrees and other law-like instruments, and in exercising its budgetary authority. Although appointed and removed by the President, the Chief of Cabinet is politically accountable to the legislature.[21] He must attend Congress at least once a month to report on the overall progress of the government. Each House can summon the Chief of Cabinet, like any other Minister, to provide explanations or reports.[22] Under the Constitution, and unlike any other Minister, he can be removed through a vote of censure by an absolute majority of the members of each House.[23] This contrasts with the United States, where, although top appointments require Senate approval, the President has the discretion to remove cabinet and sub-cabinet officials from their posts.[24] The Argentine process for removing a Chief of Cabinet is similar to a specialized impeachment process.

The Chief of Cabinet has been ineffective in reducing the President's power because the office's constitutional design is quite weak.[25] Censure by the

17. Arts. 77, 81-82, CONSTITUCIÓN NACIONAL DE 1853 [CONST. NAC. 1853] (Arg.).

18. *Id.* arts. 90, 94, 97-98, CONSTITUCIÓN NACIONAL [CONST. NAC.] (Arg.).

19. *Id.* art. 99, Sec. 1.

20. *Id.* art. 100, Secs. 1, 3, 7.

21. *Id.* art. 99, Sec. 7; Art. 100.

22. *Id.* art. 71.

23. *Id.* art. 101.

24. Article 2, Section 2 of the U.S. Constitution covers appointments but does not mention removals. *See* U.S. Const. art. I, § 2. Of course, many officials in independent agencies are only removable "for cause" or serve for terms fixed by statue. For a good compilation see the appendices to Justice Stephen Breyer's dissent in Free Enterprise Fund v. Pub. Co. Acct. Oversight Bd., 130 S. Ct. 3138 (2010).

25. In 2001, President Fernando De la Rúa resigned two years before completing his term, during an economic and financial crisis that generated massive street protests, supermarket lootings, and that resulted in the killing of approximately 33 people at the hands of police forces. De la Rúa,

legislature is a difficult process, and there is no process for the President or the Chief of Cabinet to dissolve the legislature and call for new elections. Although the Chief of Cabinet is in charge of the general administration of the country, the President is still politically responsible for that administration, so that the difference between these two functions remains unclear, and the main functions of government are still concentrated in the presidency[26]. Under the Constitution, she can make all administrative appointments, although in practice many are delegated to her ministers and secretaries.[27] Although the Chief of Cabinet is formally responsible for executing the budget, the President supervises that authority under the Constitution.[28]

The design of this position illustrates the folly of expecting a person unilaterally appointed by the President to act as a check on her power. Even if the Congress has the formal power of removal, this means little if not complemented by up-front legislative approval. Of course, the threat of removal should keep the President from appointing someone that the legislature strongly opposes. However, the difficulty of initiating the censure process implies that it is a weak check on the President, especially in times of unified government.

Countering the President's strong executive powers and the weakness of supposed checks, such as the Chief of Cabinet, impeachment represents a potential response to executive over-reaching. Two-thirds of members present in the House of Representatives may vote to impeach either the President or Vice President for engaging in official misconduct or committing a criminal offense. If this occurs, the Senate then holds a public trial to judge the President or Vice President.[29] It may convict and remove the guilty individual from office, subject to a two-thirds vote of those present.[30] The impeachment process is harder to initiate than in the United States, where the House of Representatives requires only a simple majority vote to impeach an official. In Argentina, as in the U.S., impeachment and the subsequent trial are entirely a legislative responsibility; the courts have no role.[31] Most importantly, it is an extraordinary remedy that does not function as a credible check on the President. It may provide some ultimate

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unable to gain support from a legislature dominated by the opposition, offered them effective control over the Chief of Cabinet's position in order to regain political stability. Given the position's weakness vis-à-vis the presidency, the opposition refused and, instead, insisted on discrediting the president until he resigned. *See* Gabriel Bouzat, *Presidential Power and Political Crisis in Argentina*, YALE LAW SCHOOL SEMINARIO EN LATINOAMERICA DE TEORIA CONSTITUCIONAL Y POLITICA at 24 (2006) *available at* http://www.law.yale.edu/documents/pdf/Presidential_Power_and_Political_Crisis.pdf.

26. Art. 99, Sec. 1, CONSTITUCIÓN NACIONAL [CONST. NAC.] (Arg.).

27. *Id.* sec. 9.

28. *Id.* sec. 10.

29. *Id.* arts. 53, 59.

30. *Id.*

31. *See* HELIO JUAN ZARINI, CONSTITUCIÓN ARGENTINA COMENTADA Y CONCORDADA 234-37 (1998).

background constraint on her power, but, in practice, it leaves a large space for discretionary action.

As we demonstrate in subsequent sections, the President's influence over the provinces and the weakness of the Chief of Cabinet are not the only sources of the President's power. In addition, she has standing authority to issue emergency decrees, and she may issue nonemergency decrees where Congress has delegated this authority to her. If the legislature declares a state of emergency, it may subsequently authorize the President to exercise discretion in the use of public funds. In practice, the President has wielded her decree powers in ways that stretch constitutional understanding, used her control over public spending to further partisan goals, and undermined legislated appointments' provisions to maintain control over regulatory and monitoring bodies. In all these situations, she asserted the legality and constitutionality of her actions, but as we will see, the net result is to extend, not limit, presidential power subject only to modest constraints imposed by the judiciary.

B. Philippines

The Philippines also has a strong President and a weaker legislature and judiciary. It therefore suffers from limited or ineffective constitutional checks on the executive branch. The President often further aggrandizes her power by referring to the separation of powers to justify assertions of authority and to avoid oversight from other branches or governmental bodies.[32] As in the Argentine case, a tension exists between constitutional checks on the President and the President's de facto exercise of that power.

When drafting the Constitution of 1899, the Philippine political community envisaged a relatively weak executive dominated by a powerful legislature. Later, the Constitutions of 1935 and 1973 changed the balance of power by establishing a strong executive. The 1987 Constitution, like the 1994 amendments in Argentina, attempted to restrict presidential power and to return to some of the goals of the original Constitution of 1899. Nevertheless, as in Argentina, contemporary scholars agree that the Philippine President remains extremely powerful.[33]

Executive power is "vested in the President of the Philippines" who is "elected by direct vote of the people for a term of six years" and is ineligible for re-election.[34] The constitution does not specify whether a former President can

32. When discussing the Filipino President, this article mainly refers to Maria Gloria Macapagal-Arroyo, who left office in Spring 2010.

33. *See* IRENE R. CORTÉS, THE PHILIPPINE PRESIDENCY: A STUDY OF EXECUTIVE POWER (1966); VICENTE V. MENDOZA, FROM MCKINLEY'S INSTRUCTIONS TO THE NEW CONSTITUTION: DOCUMENTS ON THE PHILIPPINE CONSTITUTIONAL SYSTEM (1978); PACIFICO AGABIN, UNCONSTITUTIONAL ESSAYS (1996); JOAQUIN BERNAS, CONSTITUTIONAL STRUCTURE AND POWERS OF GOVERNMENT: NOTES AND CASES (2005).

34. CONST. (1987) art. VII (Phil.).

run for office after a hiatus—a possibility that former President Joseph Estrada raised and that the Constitutional Commission on Elections approved in January 2010.[35]

Unlike Argentina, the Philippines is not a federal state. The 1987 Constitution states that "the President shall exercise general supervision over local governments,"[36] and devolution of powers to local government units refers to the "act by which the national government confers power and authority upon the various local government units to perform specific functions and responsibilities."[37] However, supervision is meant to exclude control, and the President exercises authority only to ensure local governments and their officials are performing constitutional and statutory duties.[38] The Local Government Code of 1991 provides for autonomy in the form of decentralization of administration while recognizing some devolution of power.[39] Local government units are entitled to a just share in the national taxes (through the Internal Revenue Allotment or IRA), and they can generate their own revenues.[40] According to the Supreme Court, the IRA should be automatically and promptly released to local government units.[41]

Over the past decade, however, the President delayed the release of the IRA to local government units. In 2000 the Supreme Court declared that such withholding was unconstitutional in a case filed by the Province of Batangas.[42] The incumbent President, however, did not order the release of the IRA differential until mid-2008.[43] The delay in IRA releases, as well as the

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35. Kristine L. Alave, *Comelec: Estrada Can Run For President In May*, PHILIPPINES DAILY INQUIRER, Jan. 20, 2010, *available at* http://newsinfo.inquirer.net/topstories/topstories/view/20100120-248406/Comelec%3A_Estrada_can_run_for_president_in_May.

36. CONST. (1987), art. X, sec. 4 (Phil.).

37. *See* An Act Providing for a Local Government Code of 1991, Rep. Act No. 7160, Sec.17 (1991) (Phil.), *available at* http://www.lawphil.net/statutes/repacts/ra1991/ra_7160_1991.html. This Act is known as the Local Government Code. *See* Plaza II v. Cassion, G.R. No. 136809 (S.C., Jul. 27, 2004) (Phil.), *available at* http://www.chanrobles.com/scdecisions/jurisprudence2004/jul2004/136809.php.

38. *Id.* sec. 25.

39. *See* Disomangcop v. Sec'y of the Dep't of Pub. Works and Highways, G.R. No. 149848, (S.C., Nov. 25, 2004) (Phil.) (en banc), http://www.chanrobles.com/scdecisions/jurisprudence2004/nov2004/149848.php.

40. Rep. Act No. 7160, *supra* note 37, sec. 18.

41. Pimentel v. Aguirre, G.R. No. 132988 (S.C., Jul. 19, 2000) (Phil.) (en banc), *available at* http://www.chanrobles.com/scdecisions/jurisprudence2000/july2000/132988.php.

42. Press Release, Senate of the Philippines, Drilon endorses automatic appropriation of IRA in national budgets (Aug. 3, 2006), http://www.senate.gov.ph/press_release/2006/0803_drilon1.asp; Province of Batangas v. Romulo, G.R. No. 152774, (S.C., May 27, 2004) (Phil.) (en banc), *available at* http://www.chanrobles.com/scdecisions/jurisprudence2004/may2004/152774.php. *See also* Alt. Ctr. for Org'l. Reforms and Dev., Inc. v. Zamora, G.R. No. 144256 (S.C., Jun. 8, 2005) (Phil.) (en banc), *available at* http://www.chanrobles.com/scdecisions/jurisprudence2005/jun2005/144256.php.

43. Lira Dalangin-Fernandez, *Arroyo orders release of P12.57B IRA differential to LGUs*, PHILIPPINE DAILY INQUIRER,May 14, 2008, *available at* http://newsinfo.inquirer.net/breakingnews/

preferential treatment of some local government units that received IRAs, led to criticisms that the President has used the IRA as political leverage to attract potential allies and pressure local opponents:[44] Instead of encouraging the development of "self-reliant communities" envisaged under the Local Government Code, in practice, the President's control over the allocation of funds has been a source of political influence.

As in Argentina, impeachment acts as the ultimate check on presidential misuse of power, but it is a remedy of last resort. The legislature can impeach the President and other high-level officials for a "violation of the Constitution, treason, bribery, graft and corruption, other high crimes, or betrayal of public trust."[45] Any member of the House of Representatives and any citizen endorsed by a member of the House may file a complaint for impeachment, subject to statutory limitations.[46] The complaint will be referred to a House Committee for investigation. If a majority of the House Committee members vote to endorse the complaint, a vote of one-third of all members of the House of Representatives will convert the complaint into formal Articles of Impeachment, which will then be forwarded to the twenty-four member Philippine Senate for trial. An impeachment conviction requires a two-thirds vote of the Senate.[47] The Supreme Court has held that its power of judicial review extends to oversight of the constitutional processes of impeachment, a check that is missing in the case of Argentina.[48]

In what follows we illustrate how the Filipino President's express and implied powers have figured in recent controversies. Former President Gloria Macapagal-Arroyo asserted her constitutionally "implied" and "residual" powers during nearly a decade as President in constitutionally questionable ways. First, she issued executive orders without prior legislative sanction. Second, she unilaterally reorganized government agencies without regard for the functional objectives and constitutional independence of other institutions. Third, she controlled appointments to key public offices originally intended to counterbalance executive authority. Fourth, she largely sought to insulate herself from accountability for impasses that resulted from institutional deadlocks,

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nation/view/20080514-136555/Arroyo-orders-release-of-P1257B-IRA-differential-to-LGUs.

44. Karen Tiongson-Mayrina, *Arroyo seeks allies in villages, doles out more power, perks*, GMA News Research (October 29, 2007), http://www.gmanews.tv/story/66355/Arroyo-seeks-allies-in-villages-doles-out-more-power-perks.

45. CONST. (1987), art. XI, sec. 2 (Phil.).

46. *Id.* secs. 1-3; *See* ANTONIO R. TUPAZ & A. EDSEL C.F. TUPAZ, FUNDAMENTALS ON IMPEACHMENT (2001).

47. CONST. (1987), art. XI, sec. 3 (Phil.). On the interpretation of "initiating" impeachment complaints, *see* Francisco v. House of Representatives, G.R. Nos. 160261 *et seq.*, (S.C., Nov. 20, 2003) (Phil.) (en banc), *available at* http://www.lawphil.net/judjuris/juri2003/nov2003/gr_160261_2003.html [hereafter "Francisco v. House"].

48. *Id.* n. 48.

which she partially created.[49]

II.
DECREE POWERS

The constitutions of both Argentina and the Philippines give Presidents authority to issue decrees with legal force in a wider range of situations than in the United States. Presidents have taken full advantage of these powers to stretch the constitutional limits of their office, especially in emergency situations. Nominal constraints, such as a requirement to seek ex post legislative approval are only sometimes effective and, in any case, cannot undo most harms imposed during the decree's time in force. We begin by discussing the use of Presidential decrees in Argentina, mostly in the context of financial and budgetary crises. Then we turn to the Philippines, where emergency decrees have been a central and controversial means of dealing with violent domestic conflict.

A. Argentina

In Argentina the President can issue executive documents that have legal force, at least for a limited period of time. However, they frequently require legislative approval ex post. Four practices are significant: (1) delegated decrees, (2) legislative declarations of emergency, (3) partial presidential vetoes, and (4) necessity and urgency decrees [*decretos de necesidad y urgencia* (DNUs)]. Under the first type, the legislature can delegate to the President the power to issue decrees with the force of law on specific issues, and the Supreme Court has upheld such delegations.[50] Article 76 of the Constitution provides that "legislative powers shall not be delegated to the Executive Power except for issues concerning administration and public emergency, with a specified term for their exercise and according to the delegating conditions established by

49. *See* Ensuring Observance of the Principle of Separation of Powers, Exec. Ord. No. 464 (Phil.), Exec. Ord. No. 474 (Phil.); Proclamation Declaring A State of National Emergency, Pres. Proc. 1017 (Phil.); Directing the Armed Forces of the Philippines in the Face of National Emergency, Gen. Ord. 5 (Phil.); Ban On Firearms, Gen. Ord. 6 (Phil.). *See also* Michael Lim Ubac, *Mining Out of DENR; Now Under President's Office*, PHILIPPINE DAILY INQUIRER,Jul. 27, 2007, *available at* http://newsinfo.inquirer.net/topstories/topstories/view/20100120-248406/Comelec%3A_Estrada_can_run_for_president_in_May; Purple S. Romero, *GMA Returns Shortlist to JBC (Judicial and Bar Council)*, ABS-CBN NEWS (Jul. 27, 2009), http://www.facebook.com/ext/share.php?sid=121754536227&h=yl14y&u=2RvMs&ref=nf; Raul Pangalangan, *The Arguments for Inaction*, PHILIPPINE DAILY INQUIRER,Feb. 21, 2008, *available at* http://opinion.inquirer.net/inquireropinion/columns/view/20080221-120384/The-arguments-for-inaction.

50. Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 20/06/1927, "A. M. Delfino y Cía," Fallos (1927-148) (Arg.); Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 17/05/1957, "Mouviel, Raúl O. y otros," Fallos (1957-237-636) (Arg.); Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 02/12/1993, "Cocchia, Jorge D. c. Estado nacional y otro," Fallos (1993-316-2416) (Arg.).

Congress" (author's translation). Although some legal scholars argue that this language sharply limits such delegation,[51] in practice this has not happened, and much delegated authority concerns policymaking. Under the second type, if the legislature declares an emergency (economic, social, sanitary, etc.), it usually delegates to the President broad power to take measures designed to overcome the crisis, including the discretionary use of budgeted public funds.[52] Partial presidential vetoes are mostly used with respect to spending bills and are discussed in a later section.

Necessity and urgency decrees are the most important presidential documents from the perspective of understanding executive power. The issuance of such decrees often occurs simultaneously with the invocation of formal emergency powers. In the last two decades, Argentine Presidents have often relied on DNUs to achieve their political and policy agendas. We concentrate our analysis on them in this section.

Under the Constitution, the President can issue DNUs during a state of emergency, without prior legislative authorization or explicit delegation. Because the decree can concern matters that normally require legislative approval, and because its legal force is equivalent to an act of legislation, the President can use a DNU to encroach on Congress' law-making prerogatives. As Gabriel Bouzat has noted, "hundreds . . . of decrees have been issued to govern such important decisions as changing the legal currency, modifying contracts, renegotiating the external debt, and freezing banking deposits."[53] He also highlights how likely the Argentine presidency is to use decrees in times of emergency. They have issued emergency decrees since the beginning of the country's institutionalization in 1853. Their use, however, rapidly increased in the 1990s, when Argentina suffered from economic difficulties and initiated a wave of privatizations. DNUs increased from 0.1 per month during the first post-1983 government, when the country returned to democracy, to 4.4 per month in the 1990s.[54] Presidential reliance on DNUs continued once the 1990s crisis abated. They reached a high during the 2001-2003 crisis of 9.3 per month.[55]

As an example of how DNUs have been used, in the fall of 2008 President Cristina Fernández de Kirchner issued her first DNU to increase the size of the

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51. See Volume 1, Chapter VII in AGUSTÍN GORDILLO, TRATADO DE DERECHO ADMINISTRATIVO 27 (8th ed. 2006), *available at* www.gordillo.com/Pdf/1-8/1-8VII.pdf.

52. Under former President Carlos Menem's administration, for example, the executive branch largely carried out state reform and privatizations under economic emergency powers. Bouzat, *supra* note 25.

53. *Id.*

54. *En 15 Meses de Gobierno, Cristina Kirchner Firmó 5 Decretos de Necesidad y Urgencia*, CENTRO DE ESTUDIOS NUEVA MAYORÍA (Mar. 20, 2009), *available at* www.nuevamayoria.com/index.php?option=com_content&task=view&id=1304&Itemid=30.

55. *Id.*

budget by $11.6 billion.[56] To do this, she argued that there was an urgent need for budgetary increases that could not wait for the delay that the legislative procedure would entail. However, the opposition complained that her actions were unlawful because there was no real emergency.[57] In another example from Mrs. Kirchner's presidency, the Ministry of Economy attempted to raise revenue by issuing a simple resolution that imposed a steep tax on certain agricultural exports based on delegated legislation. In response to strong opposition from farmers and their powerful representatives in Congress, President Kirchner then sent a bill to Congress asking it to ratify the Ministry's resolution. The lower house approved the agricultural export tax on by a vote of 128 to 122, but the Senate rejected the tax by one vote, 37 to 36, with President Kirchner's Vice President casting the deciding vote.[58] The executive branch repudiated the agricultural tax the next day.[59] However, the President claimed that Congressional support was not strictly necessary and that she had submitted the bill of her own free will, not because of a legal mandate.[60]

As a second example, in January 2010, President Kirchner forced the Chief of the Central Bank to resign by issuing a controversial DNU removing him from office[61] when he refused to comply with another DNU requiring him to shift a massive amount of funds from the Bank to the government to pay Argentina's debt.[62] This DNU was stopped by lower courts in response to injunctions requested by members of the opposition who claimed that the decree was unconstitutional. The courts argued that there was no real urgency or emergency to issue a DNU, because payments were not due until August, and

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56. *See* Modificase el Presupuesto General de la Administración Nacional para el Ejercicio 2008, Decree No. 1472, Sept. 15, 2008 (Arg.), *available at* http://www.infoleg.gov.ar/infolegInternet/anexos/140000-144999/144600/norma.htm.

57. *See* Sebastián Premici, *Debate Sobre Números de la Discordia*, PÁGINA 12, Sep. 18, 2008, *available at* http://www.pagina12.com.ar/diario/economia/2-111785-2008-09-18.html.

58. *See La Cámara Baja Aprobó la Resolución 125, y Ahora el Debate Será en el Senado*, PÁGINA 12, Jul. 5, 2008, http://www.pagina12.com.ar/diario/ultimas/20-107291-2008-07-05.html; *see Tras una Dramática Sesión*, LA NACIÓN, Jul. 17, 2008, *available at* http://www.lanacion.com.ar/nota.asp?nota_id=1030952.

59. *See* Instrúyese al Señor Ministro de Economía y Producción de la Nación, Decree No. 1176, Jul. 18, 2008 (Arg.), http://www.infoleg.gov.ar/infolegInternet/anexos/140000-144999/142613/norma.htm; *see* Limítase la vigencia de las Resoluciones Nros. 125/2008 y N° 141/2008, Res. No. 180, Jul. 18, 2008 (Arg.), *available at* http://www.infoleg.gov.ar/infolegInternet/anexos/140000-144999/142614/norma.htm.

60. President Fernández de Kirchner's effort to obtain congressional approval constituted tacit acknowledgement that her claims regarding the resolution's validity were questionable. However, the fact that Congress rejected a bill that upheld the validity of the Ministry's resolution does not imply that the resolution was constitutionally invalid.

61. *See* Remuévese del cargo al Presidente, Decree No. 18, Jan. 7, 2010 (Arg.), *available at* http://www.infoleg.gov.ar/infolegInternet/anexos/160000-164999/162676/norma.htm.

62. *See* Créase el Fondo del Bicentenario para el Desendeudamiento y la Estabilidad, Decree No. 2010, Dec. 14, 2009 (Arg.), *available at* http://www.infoleg.gov.ar/infolegInternet/anexos/160000-164999/161506/norma.htm.

because, although the legislature was not in session, the President could have called for an extraordinary session.[63] While one of these cases was under review by the Supreme Court, and when the DNU was about to be rejected by Congress, the President revoked it and issued an almost identical DNU.[64] Legislators from the opposition requested injunctions against the new DNU, which were granted but eventually reversed by an appellate court.[65]

As for the DNU that removed the Central Bank's Chief from office, the courts stopped the DNU at his request, through an injunction holding that it violated provisions of the Central Bank Act that called for congressional involvement. The Act in Section IV requires the previous non-binding advice of a special congressional bicameral committee. The Chief finally resigned, the government did not accept his resignation, and the bicameral committee eventually advised in favor of his removal, which led the former Chief to end his judicial challenges. Hence, the courts could not rule on the substance of the President's actions.[66]

Although the legal challenges never led to a Supreme Court decision, the arguments pro and con merit review because they illustrate how the President used separation-of-powers language to try to insulate herself from judicial oversight. The executive branch argued that in light of the constitutional separation of powers the judiciary had no power to review the factual basis for issuing the DNU. The lower courts, however, asserted that the judiciary does have a strong role in reviewing the factual bases of DNUs and that in this case no emergency existed. This produced sharp criticism from the Executive, which again cited its authority under the separation of powers.[67] The basic issue of the role of separation of powers as a shield against review or as a justification for oversight remains unresolved.

In spite of the controversy surrounding the issuance of DNUs, they have strong constitutional grounding, granted by the Supreme Court's jurisprudence prior and post-constitutional amendment, and by the amendment itself, which institutionalized the DNU as a tool of the executive branch. The constitutional

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63. There were several rulings in different cases. *See, e.g.*, *Banco Central: la Cámara Ratificó Que no se Pueden Usar las Reservas,* CENTRO DE INFORMACIÓN JUDICIAL (Jan. 22, 2010), *available at* http://www.cij.gov.ar/nota-3301-Banco-Central--la-Camara-ratifico-que-no-se-pueden-usar-las-reservas.html.

64. Decree No. 298, Mar. 1, 2010 (Arg.), *available at* http://www.infoleg.gov.ar/infolegInternet/anexos/160000-164999/164707/norma.htm.

65. *See La Justicia Revocó las Cautelares Que Frenaron el Uso de Reservas,* CENTRO DE INFORMACIÓN JUDICIAL (Mar. 30, 2010), http://www.cij.gov.ar/nota-3724-La-Justicia-revoco-las-cautelares-que-frenaron-el-uso-de-reservas.html.

66. *See Con Fuertes Críticas, Redrado Renunció al BCRA, Pero el Gobierno ya Adelantó Que no Aceptará la Dimisión,* LA NACIÓN (Jan. 29, 2010), http://www.lanacion.com.ar/nota.asp?nota_id=1227491; Mariano Obarrio, *Marcó del Pont Presidirá el Central,* LA NACIÓN,Feb. 4, 2010, *available at* http://www.lanacion.com.ar/nota.asp?nota_id=1229371.

67. Some in the executive branch accused the courts of seeking to overthrow the government.

recognition of DNUs was a political decision intended to limit excesses.[68] DNUs have existed since the country's founding as an independent state in 1853. Furthermore, they were deemed constitutional by the Supreme Court in the 1990 case *Peralta Luis A. y otro c. Estado Nacional* (hereafter, *Peralta*),[69] which was forcefully questioned by a majority of legal scholars. Particularly severe were the words of constitutional law scholar Miguel A. Ekmekdjián, who referred to *Peralta* as "seventy pages of fallacies (. . .) inconsistent with both the letter and the spirit of the Constitution, and which have the sole excuse of supporting an arbitrary level of Executive Power."[70] In *Peralta* the Court accepted the constitutionality of an emergency decree, but also established three limits: (1) there has to be a situation of grave social risk that endangers the existence of the Nation and the State; (2) the measures have to be reasonable in terms both of the means chosen by the rule and their goals, and of the proportionality between the measures and the period in which they are in force; (3) the decree has to be recognized by Congress, either expressly or tacitly.[71]

The 1994 amendment provides that "[t]he Executive Power shall in no event issue provisions of legislative nature, in which case they shall be absolutely and irreparably null and void," but, nonetheless, it authorizes the President to issue DNUs subject to several limitations, set forth in Article 99.3. First, such decrees can only be issued when extraordinary circumstances make it impossible to follow ordinary constitutional procedures for the enactment of statutes. Second, only the President can issue DNUs, and the entire cabinet, including the Chief of Cabinet, must sign them.[72] Third, DNUs may not concern criminal issues, taxation, electoral matters, or the party system. Fourth, the Chief of Cabinet must submit the DNU to a Permanent Bicameral Congressional Commission no more than ten days after its enactment. The Commission's membership proportionally reflects the political representation of the parties in each House. The Commission then has ten days to issue its opinion and send it to the plenary of both Houses for immediate consideration. The amendment provided that a special statute should regulate the procedure and scope of legislative participation. The constitutional provisions constrain the President, but at the same time, they give a firm textual grounding to the use of decree power. These provisions mostly codify the holding in *Peralta*.[73]

In addition to the fact that the 1994 amendment retained a presidential tool

68. *See* ZARINI, *supra* note 31.

69. *See* Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 27/12/1990, "Peralta, Luis A. y otro c. Estado Nacional," Fallos (1990-313-1513) (Arg.).

70. MIGUEL ÁNGEL EKMEKDJIÁN ET AL., REFORMA CONSTITUCIONAL 27-8 (1994). The translation is the authors.

71. For an outline of these limits, see María Angélica Gelli, *Controles sobre los decretos de necesidad y urgencia. De "Rodríguez" a "Verrocchi." ¿El regreso de "Peralta?"* La Ley [L.L.] 2000-A-1125 (2000) (Arg.).

72. *See* Gordillo, *supra* note 51.

73. *See* Peralta, *supra* note 69.

that is uniquely tailored to circumvent constitutional prohibitions on lawmaking by the executive branch, the statute regulating the procedure and scope of legislative participation was not enacted until July 2006.[74] Congressional oversight of DNUs was thus absent for 12 years. Furthermore, the 2006 statute suffers from three main problems. First, a vote of both Congressional Houses is required to reject a DNU. De facto this means that Congress can approve a DNU by the positive vote of only one House, making it more difficult for the legislature to reject a DNU than it is to approve a new law according to the formal procedure established in the Constitution.[75] Second, it does not impose time limits for Congressional action. Thus, if Congress does not explicitly accept or reject a DNU, it remains in effect during congressional inaction. This infringes upon the constitutional prohibition against tacit congressional approval.[76] The 2006 law regulating the procedure and scope of legislative participation further provides that if the legislature rejects a DNU, vested rights remain unaffected. Hence, if the effects of a DNU are short-lived but far-reaching or permanent, later legislative action may be ineffectual or irrelevant.[77] The dangers of such exercises of presidential power are compounded if the President issues a DNU while Congress is on recess. This happened in 2009, when President Kirchner issued the DNU describe earlier that ordered the Central Bank to use its reserves to pay Argentina's external debt.[78] Third, the statute does not require sunset clauses for DNUs, thus allowing emergency decrees to stay in force even after the emergency has passed.

In light of these shortcomings, a civil rights nongovernmental organization filed an *amparo* suit—a remedy to protect constitutional rights, common to Latin America—in September 2006. The organization asked the court to declare the amendment unconstitutional. However, both the trial and appellate courts found that the plaintiffs lacked proper standing. The *amparo* is pending in the Supreme Court, which has developed an inconsistent line of reasoning with

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74. Regúlase el trámite y los alcances de la intervención del Congreso respecto de decretos que dicta el Poder Ejecutivo, Law No. 26122, Jul. 20, 2006 (Arg.), *available at* www.infoleg.gov.ar/infolegInternet/anexos/115000-119999/118261/norma.htm.

75. *Id.* art. 24.

76. Article 28 of the Argentine Constitution provides that: "The will of each House shall be expressly stated; the tacit or fictitious approval is excluded in all cases."

77. In March 2010, President Kirchner revoked the first DNU that ordered the use of Central Bank reserves to pay external debt. That DNU had been suspended by the lower courts, was under review by the Supreme Court, and was about to be rejected by Congress. Instead, she issued an almost identical DNU, and in a joint move with the board of the Central Bank, reserves to pay external debt were moved to the Ministry of Economy only hours after the President delivered her speech. That afternoon the DNU was formally published (a requirement for its validity) in an unusual special edition of the Official Bulletin. Because the funds had already been transferred, any payments to external debt creditors would not be recoverable, even if the legislature rejects the new DNU.

78. The DNU ordering the shift of funds had been issued only a few days after the end of the ordinary session. The government was arguably trying to avoid Congress because it had lost its legislative majority in the recent elections, and thus it would have likely lost the vote over a bill.

respect to the 1994 amendment over the last 15 years. We summarize this shifting pattern in the next paragraphs.

In 1995, in *Video Club Dreams c. Instituto Nacional de Cinematografía* (hereafter *Video Club Dreams*), the Supreme Court strengthened its oversight of DNUs compared with *Peralta*. It followed the first requirement of *Peralta*: a DNU requires a situation of grave social risk that endangers the survival of the Nation. Due to new constitutional provisions that were absent in *Peralta*'s time, it further held that the emergency had to involve exceptional circumstances that make it impossible to follow the ordinary constitutional procedures for the enactment of statutes.[79] The Court also followed *Peralta* in holding that the measures must be reasonable. But it tightened the case's third requirement and held that DNUs could neither be ratified by legislative silence nor implicitly ratified by their inclusion in a budget statute.[80]

In 1997, however, the judiciary refused to review a DNU, holding instead that oversight of DNUs is an exclusive power of Congress with which the judiciary cannot interfere.[81] The Court limited itself to analyzing whether the matter *covered* by the decree was expressly prohibited by the Constitution, that is, whether the decree concerned taxation, criminal law, electoral system, and political parties. Thus, the Supreme Court evoked the doctrine of the separation of powers to limit the judiciary's role as a check on the executive branch.[82] Unlike the *Peralta* case, the Court did not consider whether there was a situation of "grave social risk that endangers the existence of the Nation."

In 1999, the Court reinstated *Peralta's* stringent review of DNUs in *Verrocchi Ezio Daniel c/ Poder Ejecutivo Nacional—Administración Nacional de Aduanas* (hereafter *Verrocchi*).[83] It held that in order for the executive legitimately to exercise powers that are, in principle, reserved to the Congress, one of two circumstances must occur. Either, Congress cannot meet due to *force majeure* circumstances, or the situation is so urgent that it must be solved so quickly that normal legislative procedures cannot be used. Thus, the Court reversed course and asserted a role for itself in policing the legislative/executive

79. Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 06/06/1995, "Video Club Dreams c. Instituto Nacional de Cinematografía," La Ley [L.L.] (1995-D-247) (Arg.). See Section 16 of Justice Belluscio's concurring opinion.

80. *Id.*; *see also* Gordillo, *supra* note 51.

81. Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 17/12/1997, "Rodríguez, Jorge en: Nieva, Alejandro y otros c. Poder Ejecutivo Nacional," La Ley [L.L.] (1997-E-884) (Arg.).

82. *Id.* The Court held that citizens could still challenge the constitutionality of DNUs. This holding, however, is incompatible with the rest of the decision because if DNUs' oversight is an exclusive function of the legislature, then how can courts review their constitutionality? *See* Gelli, *supra* note 71.

83. Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 19/08/1999, "Verrocchi Ezio Daniel c/ Poder Ejecutivo Nacional - Administración Nacional de Aduanas s/ acción de amparo," Fallos (1999-322-1726) (Arg.).

boundary with respect to DNUs.

Finally, in May 2010 in *Consumidores Argentinos c/ EN* (hereafter *Consumidores Argentinos*), the Court reaffirmed its commitment to *Verrocchi's* stringent standard of review. It reasoned that the 1994 amendment intended to limit the President's use of the DNU and that the exercise of legislative functions by the executive branch was only constitutionally appropriate in exceptional circumstances. Hence, the judiciary must determine whether the circumstances invoked by the executive branch to justify a DNU indeed amount to a state of necessity and urgency. The Court reaffirmed that a DNU must meet one of the two situations established in the *Verrocchi* case to be constitutional.[84] It argued that its holding did not invade the executive branch's own powers but rather reflected the judiciary's independence and its role as a check on the executive.

The Supreme Court issued its decision in *Consumidores Argentinos* at an opportune time. First, the Central Bank controversy had just been resolved by the Chief's resignation and the withdrawal of legal challenges. Second, the case concerned a DNU issued by a previous administration. Thus, in issuing its decision, the Supreme Court revealed its position to the executive branch and seemed to warn against future presidential attempts to strong-arm the other branches through DNU orders such as the one used in the Central Bank controversy.

In spite of the *Consumidores Argentinos* decision, the civil rights organization's *amparo* suit before the Supreme Court challenging the constitutionality of the 2006 statute regulating congressional oversight of DNUs remains relevant. *Consumidores Argentinos* refers to a DNU issued before the enactment of the 2006 statute, and hence does not resolve the petitioner's challenge. Further checks on the executive branch's DNU power may be forthcoming. The lower House recently approved a bill amending the 2006 statute to require a positive vote of both Houses to consider a DNU approved by the legislature. This bill was still pending in the Senate when this article went to print.

B. The Philippines

Turning to the Philippines, we see a similarly wide use of emergency presidential decrees although its emergencies generally involve civil strife, not economic crisis. A degree that establishes a state of emergency permits the President to suspend legal protections for individuals. This produces conflicting claims concerning whether Filipino security forces can handle the civil strife without suspending such legal protections. More generally, executive orders are

84. Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 19/05/2010, "Consumidores Argentinos c/ EN - PEN -Dto. 558/02-SS - ley 20.091 s/ amparo ley 16.986," Fallos (2010-C-923) (Arg.).

issued in other situations simply to assert presidential prerogatives and limit oversight.

The Philippine President's quasi-legislative authority has statutory and constitutional dimensions. The 1987 Revised Administrative Code (Chapter 2, Sections 2-7) categorizes the President's Ordinance Powers into five groups: (1) executive orders of a general or permanent character that implement or execute constitutional or statutory powers; (2) administrative orders that relate to governmental operations; (3) proclamations that fix a date or declare a status or condition of public interest; (4) memorandum orders and circulars that relate to administrative details; and finally, (5) orders issued by the President in his or her capacity as Commander-in-Chief of the Armed Forces of the Philippines.[85] We discuss only the first and fifth types of executive orders, that is, those that make policy or affect national security.

If the President issues an executive order pertaining to a power that the Constitution entrusts to the legislature, the President must obtain prior statutory authority. Permissible legislative delegations to the President include: tariff rates and emergency powers. The legislature may also delegate to the people at large,[86] to local governments, and to administrative bodies.[87] Non-delegable matters include "appropriation, revenue or tariff bills, bills authorizing the increase of the public debt, bills of local application and private bills," among

85. Instituting the "Administrative Code of 1987," Exec. Ord. No. 292, secs. 2-7 (Phil.) [hereafter "Admin. Code 1987"], *available at* http://www.lawphil.net/executive/execord/eo1987/eo_292_1987.html.

86. Direct legislative delegation to the Filipino polity can take place in various forms. First, direct delegation can occur at the lowest level of government through the system of local initiative and referendum, where "registered voters of a local government unit may directly propose, enact, or amend any ordinance." *See* Rep. Act No. 7160, *supra* note 37.

A second form of direct delegation is through a system of 'statutory' initiative and referendum, which permits registered voters to enact or reject any law passed by Congress. *See* An Act Providing for a System of Initiative and Referendum and Appropriating Funds Therefor, Rep. Act No. 6735 (1989) (Phil.), *available at* http://www.chanrobles.com/republicactno6735.htm.

Finally, apart from the statutorily-created mechanisms for local and statutory initiative and referendum, the 1987 Philippine Constitution also gave Filipinos the direct power to amend the Constitution through a constitutionalized system of initiative and referendum. *See* CONST. (1987), art. XVII, sec. 2 (Phil.) ("Amendments to this Constitution may likewise be directly proposed by the people through initiative upon a petition of at least twelve *per centum* of the total number of registered voters, of which every legislative district must be represented by at least three *per centum* of the registered voters therein."). *See also* Garcia v. Comm'n on Elections, G.R. No. 111230 (S.C., Sept. 30, 1994) (Phil.) (en banc), http://www.chanrobles.com/scdecisions/jurisprudence1994/sep1994/gr_111230_1994.php.

87. CONST. (1987), art. VI, sec. 23-24, 28; art. XVII, sec. 2 (Phil.). *See also* Rep. Act No. 6735, *supra* note 86; *In re* Santiago v. Comm'n on Elections, G.R. No. 127325 (S.C., Mar.19, 1997) (Phil.) (en banc), http://www.chanrobles.com/scdecisions/jurisprudence1997/mar1997/127325.php; Lambino v. Comm'n on Elections, G.R. No. 174153, 174299 (S.C., Oct. 25, 2006) (Phil.) (en banc), *available at* http://www.chanrobles.com/scdecisions/jurisprudence2006/october2006/174153.php; *and* Rep. Act No. 7160, *supra* note 37.

others.[88] Further, to be valid, such delegation must be complete so that "the only thing [the delegate] will have to do is to enforce it." The statute must contain language that sets "the boundaries of the delegate's authority and prevent the delegation from running riot."[89] In spite of this restrictive language, in practice, the Philippine Supreme Court uses a permissive standard to assess congressional delegations of policymaking authority to the President. It has accepted the following terms as adequate: interest of law and order, adequate and efficient instruction, public interest, justice and equity, public convenience and welfare, simplicity, economy and efficiency, standardization and regulation of medical education, and fair and equitable employment practices.[90] The Court has held that the President's administrative power "enables the President to fix a uniform standard of administrative efficiency and check the official conduct of his agents."[91] In practice, this gives her broad discretion to manage administrative agencies mostly by relying on her executive power so long as there is no explicit statutory or constitutional language that vests discretion elsewhere in the constitutional system.[92]

In addition to exercising delegated powers, President Arroyo frequently asserted implied and residual constitutional powers. During her nine-year presidency, she wielded her powers as Commander-in-Chief of the Armed Forces and Chief Executive to issue a number of controversial orders. Relying on "residual" powers inherent in the presidency, the President issued controversial proclamations declaring a state of emergency and directing "the Armed Forces of the Philippines in the Face of National Emergency, to Maintain Public Peace, Order and Safety and to Prevent and Suppress Lawless Violence."[93] Also provoking criticism was an Executive Order that limited the appearance of executive branch officials before Congress.[94] We begin with

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88. CONST. (1987), art. VI, sec. 24 (Phil.).

89. Gerochi v. Dep't of Energy, G.R. No. 159796 (S.C., Jul. 17, 2007) (Phil.) (en banc), *available at* http://www.chanrobles.com/scdecisions/jurisprudence2007/july2007/159796%20.php. The language of *Gerochi* echoes Justice Cardozo's concurring opinion in *A. L. A. Schechter Poultry Co. v. United States*, 295 U.S. 495 (1935), one of only a few cases where the court declared the delegation of legislative powers to the President unconstitutional. Justice Cardozo wrote that the delegated power was "unconfined and vagrant" and that it was "delegation running riot." 295 U.S. at 551, 553.

90. See Justice Romero's dissenting opinion in Ass'n of Philippine Coconut Dessicators v. Philippine Coconut Auth., G.R. No. 110526 (S.C., Feb 10, 1998) (Phil.), *available at* http://www.chanrobles.com/scdecisions/jurisprudence1998/feb1998/110526_romero.php.

91. Ople v. Torres, G.R. No. 127685 (S.C., Jul. 23, 1998) (Phil.) (en banc), *available at* http://www.chanrobles.com/scdecisions/jurisprudence1998/jul1998/127685.php.

92. After assuming the presidency following President Joseph Estrada's resignation in 2001, President Arroyo earned a fresh six-year term in the 2004 presidential elections. *See* Diane Desierto, *The Presidential Veil of Administrative Authority over Foreign-Financed Public Contracts in the Philippines*, UCLA PAC. BASIN L.J. (forthcoming under submission).

93. Pres. Proc. 1017 and Gen. Ords. 5, 6, *supra* note 49.

94. Exec. Ord. 464, *supra* note 49.

proclamations of states of national emergency and then discuss assertions of executive privilege that seek to limit legislative oversight. We conclude with a brief section on the use of executive orders by the newly elected President Benigno Aquino III.

1. The State of "National Emergency"

Presidential declarations of states of emergency can override constitutional protections for individual rights. Because Filipino Presidents frequently have used decrees to declare states of national emergency, we examine these actions in some detail because of their potential threat to constitutional values. Two recent cases illustrate the risks of unchecked emergency power.

In February 2006, President Arroyo issued Presidential Proclamation No. 1017 (hereafter "PP 1017"), declaring that the Philippines faced a state of national emergency and commanding the Armed Forces of the Philippines (AFP) to "maintain law and order."[95] On the same day, she issued General Order Nos. 5 and 6 commanding the AFP to coordinate with the Philippine National Police (PNP) to carry out PP 1017. She cited national security threats posed by "authoritarians of the extreme Left" and "military adventurists of the extreme Right."[96] One week after the issuance of PP 1017, she issued Presidential Proclamation No. 1021 lifting PP 1017, declaring that the state of national emergency had ceased.

Many coercive acts occurred throughout the week that PP 1017 was in force. The Office of the President cancelled all rally permits issued by local governments. The police dispersed assemblies and raided "oppositionist" newspapers. They confiscated news stories, documents, pictures, and mock-ups. The police even arrested an opposition legislator and denied him contact with his relatives during his detention. The police also attempted to arrest five other perceived opposition legislators, but the House of Representatives extended "sanctuary protection" to these individuals.[97]

A lawsuit brought by seven petitioners challenged the constitutionality of PP 1017 and General Order No. 5 before the Supreme Court. Apart from assailing the government's ongoing violations of constitutional rights, the petitioners also questioned the factual and constitutional basis for declaring a state of emergency. The Court, in an eleven to three vote, partially affirmed the constitutionality of the Presidential actions in *Prof. Randolf S. David et al. v.*

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95. Pres. Proc. 1017, *supra* note 49.

96. Id.

97. David v. Arroyo, G.R. Nos. 171396 *et. seq.*, (S.C., May 3, 2006) (Phil.) (en banc), *available at* http://www.chanrobles.com/scdecisions/jurisprudence2006/may2006/G.R.%20No.%20171396.php. *See also* Amando Doronila, *Proclamation No. 1017: Policy Matrix of Slaughter,* PHILIPPINE DAILY INQUIRER, Sept. 4, 2006, *available at* http://newsinfo.inquirer.net/inquirerheadlines/nation/view/20060904-18819/Proclamation_No._1017%3A_Policy_matrix_of_slaughter.

Gloria Macapagal-Arroyo, as President and Commander-in-Chief.[98] However, the Court limited its inquiry to "grave abuse of discretion amounting to lack or excess of jurisdiction on the part of any branch or instrumentality of the government."[99] The Court explicitly rejected assertions of presidential authority to issue decrees that direct the military to enforce obedience to *all* laws. At the same time, it made the factual basis for the President's proclamation virtually beyond review.[100] Its inquiry did not consider the correctness of the President's decision, but only whether her decision was arbitrary. The Court stated that no branch of government has a monopoly over public power in times of emergency.[101] Rather, at such times the Constitution "reasonably demands that we repose a certain amount of faith in the basic integrity and wisdom of the Chief Executive."[102] The Chief Executive, however, must respect certain

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98. David v. Arroyo, *supra* note 97

> [The Court finds] ... that PP 1017 is constitutional insofar as it constitutes a call by the President for the AFP to prevent or suppress lawless violence. ... However, PP 1017's extraneous provisions giving the President express or implied power (1) to issue decrees; (2) to direct the AFP to enforce obedience to all laws even those not related to lawless violence as well as decrees promulgated by the President; and (3) to impose standards on media or any form of prior restraint on the press, are *ultra vires* and unconstitutional. The Court also rules that under ... the Constitution, the President, in the absence of legislation, cannot take over privately owned public utility and private business affected with public interest.
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> In the same vein, the Court finds G.O. No. 5 valid. It is an Order issued by the President --- acting as Commander-in-Chief --- addressed to subalterns in the AFP to carry out the provisions of PP 1017. Significantly, it also provides a valid standard --- that the military and the police should take only the 'necessary and appropriate actions and measures to suppress and prevent acts of lawless violence.' But the words 'acts of terrorism' found in G.O. No. 5 have not been legally defined and made punishable by Congress and should thus be deemed deleted from the said G.O. ...
>
> On the basis of the relevant and uncontested facts narrated earlier, it is also pristine clear that: (1) the warrantless arrest of petitioners Randolf S. David and Ronald Llamas; (2) the dispersal of the rallies and warrantless arrest of the KMU and NAFLU-KMU members; (3) the imposition of standards on media or any prior restraint on the press; and (4) the warrantless search of the *Tribune* offices and the whimsical seizures of some articles for publication and other materials, are not authorized by the Constitution, the law and jurisprudence. Not even by the valid provisions of PP 1017 and G.O. No. 5.

99. *Id.*, citing CONST. (Phil.), art. VIII, sec. 1.

100. *Id.*

101. *Id.*

102. *Id.* (the Court explaining: "Our Constitution has fairly coped with this problem. Fresh from the fetters of a repressive regime, the 1986 Constitutional Commission, in drafting the 1987 Constitution, endeavored to create a government in the concept of Justice Jackson's 'balanced power structure.' Executive, legislative, and judicial powers are dispersed to the President, the Congress, and the Supreme Court, respectively. Each is supreme within its own sphere. But none has the monopoly of power in times of emergency. Each branch is given a role to serve as limitation or check upon the other. This system does not weaken the President, it just limits his power, using the language of McIlwain. In other words, in times of emergency, our Constitution reasonably demands that we repose a certain amount of faith in the basic integrity and wisdom of the Chief Executive but,

procedural limitations.[103] Thus, the Court accepted the President's determination that a national emergency existed. However, because the Supreme Court declined to review the factual basis for a declaration of national emergency, it encouraged future attempts at Presidential lawmaking using implied or residual executive powers.[104]

The President's response to one particularly violent event illustrates the way that the executive can use emergency powers to limit its accountability. On November 23, 2009 in Maguindanao Province, over sixty-seven journalists, civilians, and lawyers, most of them women, were on their way to file an opposition candidate's certificate of candidacy for governor. They were attacked by at least 100 armed men, and most were brutally raped and murdered.[105] Survivors as well as an alleged co-perpetrator identified Mayor Andal Ampatuan Jr., a member of a prominent political family, as the leader of the massacre. However, Ampatuan Jr. was not detained or arrested. The Office of the President instead encouraged the Ampatuan family to voluntarily surrender their family member, which it did. Searches in and near Ampatuan Jr.'s mansion yielded large weapons caches, some containing material appropriated from the Department of Defense. On December 5, President Arroyo issued Proclamation No. 1959 (hereafter "PP 1959") placing Maguindanao under martial law, a level above military emergency. She cited "deterioration of peace and order" and "failure of the local judicial system" as justification for her declaration.[106] However, standard criminal procedures and police enforcement measures were already well in motion, and there was no visible resistance to government forces. Before PP 1959, in fact, the President already had declared Maguindanao province to be in a state of emergency, which allowed military troops to take control of the area. The police had made numerous arrests in addition to that of Ampatuan Jr., and they had gathered and were examining forensic evidence. Prosecutors were already preparing criminal charges. The Constitutional Commission on Human Rights deputized a public interest lawyers group,

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at the same time, it obliges him to operate within carefully prescribed procedural limitations.").

103. *Id.*

104. Diane Desierto, *A Universalist History of the 1987 Philippine Constitution (I)*, 10 HISTORIA CONSTITUCIONAL 383 (2009) (sensitivity to the Constitution of 1987's universalist design, orientation, and philosophy should constrain executive discretion, where the President characterizes an ongoing situations as a "national emergency."), http://www.historiaconstitucional.com/index.php/historiaconstitucional/article/viewFile/236/209; Diane Desierto, *A Universalist History of the 1987 Philippine Constitution (II)*, 11 HISTORIA CONSTITUCIONAL 427 (2010), http://www.historiaconstitucional.com/index.php/historiaconstitucional/article/view/277/244.

105. *See* Analyn Perez and TJ Dimacali, *The Ampatuan Massacre: A Map and Timeline*, GMA-7 NEWS (Dec. 9, 2009), http://www.gmanews.tv/story/177821/the-ampatuan-massacre-a-map-and-timeline.

106. *Report of Her Excellency President Gloria Macapagal-Arroyo on Proclamation No. 1959*, PHILIPPINE DAILY INQUIRER, Dec. 6, 2009, (complete report on the declaration of martial law in Maguindanao), *available at* http://media.inquirer.net/inquirer/media/PGMA-Report-on-Proclamation-No.1959.pdf.

Centerlaw, to assist in bringing international forensic experts to conduct a parallel investigation of the massacre.[107] Days before PP 1959 was issued, the Armed Forces of the Philippines said that Maguindanao Province was already restored to a "level of normalcy" and there was "no need for the declaration of martial law."[108]

PP 1959 was the first time that a President declared martial law and suspended the privilege of the writ of habeas corpus under the 1987 Constitution. Indeed, it was the first such declaration since Ferdinand Marcos, who ruled as a dictator, imposed martial law in 1972. Under the Constitution, only cases of "invasion or rebellion, when the public safety requires it" justify the declaration of martial law and suspension of the writ of habeas corpus.[109] If any of these grounds exist, the President must report to Congress within 48 hours on the factual basis for the proclamation of martial law and/or the suspension of habeas corpus.[110]

In her short report to Congress, President Arroyo asserted that there was an "on-going rebellion" that justified the declaration of martial law and the suspension of habeas corpus.[111] This report noticeably lacked an official report from the Armed Forces of the Philippines. The House majority, dominated by the President's supporters, initially refused to convene Congress while citing its support for PP 1959. After a public uproar, the House of Representatives agreed to convene a joint session with the Senate, which took place 96 hours after the declaration of martial law. Congress conducted a marathon public joint session, but later suspended it without reaching the constitutionally-required vote to extend or overturn the martial law declaration.[112] In the meantime, numerous senators, citizens, lawyers, and public interest groups filed petitions with the

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107. Nikko Dizon, *CHR looks for more possible massacre victims*, PHILIPPINE DAILY INQUIRER, Dec. 9, 2009, *available at* http://newsinfo.inquirer.net/breakingnews/nation/view/20091209-241072/CHR_looks_for_possible_more_massacre_victims; Mark D. Meruenas, *Agency would not hesitate to bring case to the international court*, GMA-7 NEWS, (Dec. 9, 2009), http://www.gmanews.tv/story/178938/agency-would-not-hesitate-to-bring-massacre-case-to-international-court.

108. Aie Balagtas See, *AFP: no need for martial law in Maguindanao*, GMA NEWS (Dec. 30 2009), http://www.gmanews.tv/story/178190/no-need-to-declare-martial-law-in-maguindanao-afp.

109. CONST. (1987), art. VII, sec. 18 (Phil.).

110. *Id.*

111. *Proclamation 1959: Proclaiming a State of Martial Law and suspending the privilege of the writ of habeas corpus in the province of Maguindanao except for certain areas*, GMA NEWS, Dec. 5, 2009 (text of martial law declaration as read by Executive Secretary Eduardo Ermita), *available at* http://www.gmanews.tv/story/178582/full-text-arroyos-declaration-of-martial-law-in-maguindanao.

112. Solita Collas-Monsod, *No need for martial law*, BUSINESS WORLD, Dec. 9, 2009, *available at* http://www.bworldonline.com/main/content.php?id=2962; Maila Ager and Lira Dalangin-Fernandez, *Congress suspends joint session on law*, PHILIPPINE DAILY INQUIRER, Dec. 9, 2009, *available at* http://newsinfo.inquirer.net/breakingnews/nation/view/20091209-241041/Congress-suspends-joint-session-on-martial-law.

Philippine Supreme Court questioning the constitutionality of PP 1959.[113] Sixteen out of twenty-four Senators passed a "sense of the Senate" resolution stating that PP 1959 was unconstitutional because there was no actual rebellion in Maguindanao.[114] Before the Court could rule on the petitions or Congress could take a formal vote, the President revoked PP 1959.[115] Instead, the President has maintained a less constitutionally-stringent state of emergency over Maguindanao and neighboring provinces.[116]

As of this writing, the Philippine Supreme Court has yet to act on the petitions challenging PP 1959. Regardless of the outcome of these petitions, the importance of this case lies in the fact that the President relied on her sole executive discretion (for example, characterizing events in Maguindanao as a "rebellion" notwithstanding the Armed Forces of the Philippines' contrary assessment) to declare martial law and suspend habeas corpus.[117] With a few months left before the expiration of her term and the conduct of fresh Presidential elections, the President's action was troubling because Congress did not constrain her and because of the inevitable time lag of judicial review.

During the ten days that PP 1959 was in effect in Maguindanao, the President exercised absolute power that neither the Legislature nor the Supreme Court was able to check effectively. While PP 1959 remained in effect, it severely impaired the ability of police and other actors to independently gather and preserve evidence.[118] Senior government officials worried that PP 1959 might have been issued as a pretext to clear the Ampatuan family's involvement in the massacre or at least to lessen their potential legal responsibility.[119] Both PP 1017 and PP 1959 illustrate the symbolic and substantive power of the

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113. Michael Lim Ubac and Leila Salaverria, *Senators oppose martial law proclamation*, PHILIPPINE DAILY INQUIRER, Dec. 6, 2009, *available at* http://newsinfo.inquirer.net/inquirerheadlines/nation/view/20091206-240387/Senators-oppose-Arroyos-martial-law-proclamation; Carlos H. Conde, *Critics challenge martial law in the Philippines*, N.Y. TIMES, Dec. 7, 2009, *available at* http://www.nytimes.com/2009/12/08/world/asia/08phils.html; Christina Mendez, *Supreme Court asked to rule on martial law proclamation*, PHILIPPINE STAR, Dec. 14, 2009, *available at* http://www.philstar.com/Article.aspx?articleId=532388&publicationSubCategoryId=63.

114. Aurea Calica and Jess Diaz, *16 senators: '1959' unconstitutional*, THE PHILIPPINE STAR, Dec. 9, 2009, *available at http://www.philstar.com/Article.aspx?articleId=530799.*

115. *Arroyo lifts martial law in Maguindanao*, PHILIPPINE DAILY INQUIRER (Dec. 12, 2009), http://newsinfo.inquirer.net/breakingnews/nation/view/20091212-241634/Arroyo-lifts-martial-law-in-Maguindanao.

116. *See* Paolo Romero, *State of emergency remains in Maguindanao*, THE PHILIPPINE STAR, Dec. 30, 2009, *available at* http://www.philstar.com/microsite/noynoy-first-100-days/article.aspx?articleId=536754&publicationSubCategoryId=63.

117. *See* Diane Desierto, *Universalist History I and II*, *supra* note 104.

118. Maria Althea Teves, *More mass graves in Maguindanao, says human rights chief*, ABS-CBN NEWS (Dec. 9, 2009), http://www.abs-cbnnews.com/nation/12/09/09/more-mass-graves-maguindanao-says-human-rights-chief.

119. Dona Pazzibugan, *Petitions to high court stopping '1959' now total 7*, PHILIPPINE DAILY INQUIRER, Dec. 11, 2009, *available at* http://services.inquirer.net/mobile/09/12/12/html_output/xmlhtml/20091211-241314-xml.html.

executive in the Philippines. Despite numerous constitutional limitations and a rigid structural design for dealing with emergencies, President Arroyo eluded these constraints by acting unilaterally, in a context where she could rely on key majorities in Congress and the Supreme Court to accept a *fait accompli.*

2. *Executive Privilege*

Allegations of bribery and the fraudulent execution of public infrastructure and procurement contracts led to a 2005 inquiry by the Philippine Senate. It issued subpoenas to obtain the testimony of various executive officials.[120] In response, the President issued Executive Order (E.O.) No. 464 that elaborated her office's position on the doctrine of executive privilege. The Order invokes the separation of powers to shield the executive from oversight and entirely ignores the complementary principle of checks and balances. Section One of E.O. No. 464 states that "to implement the Constitutional provisions on the separation of powers between co-equal branches of the government, all Heads of Departments of the Executive Branch of the government shall secure the consent of the President prior to appearing before either House of Congress."[121] In addition, it gives the President the authority to require hearings to be conducted in executive session. Section Two states that confidentiality based on executive privilege is "fundamental to the operation of government and rooted in the separation of powers under the Constitution."[122] It then gives a very broad definition of what and who is covered. Petitioners challenged the constitutionality of E.O. No. 464 in the Philippine Supreme Court in 2006 in *Senate of the Philippines et al. v. Eduardo R. Ermita, in his capacity as Executive Secretary and alter-ego, et al.*[123] The Court unanimously declared parts of E.O. No. 464 unconstitutional, but it upheld a number of key provisions.[124] The net result was that E.O. No. 464 continued to extend executive privilege to officials in the executive branch.[125]

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120. *See* Gil C. Cabacungan Jr. and Tonette Orejas, *Senate May Reopen Northrail Probe,* PHILIPPINE DAILY INQUIRER, Nov. 13, 2007, *available at* http://newsinfo.inquirer.net/breakingnews/nation/view_article.php?article_id=100560.

121. Executive Order No. 464 (series of 2005), sec. 1.

122. Id. sec. 2.

123. Senate of the Philippines v. Ermita, G.R. Nos. 1697777 *et seq.*, (S.C., Apr. 20, 2006) (Phil.) (en banc), *available at* http://www.lawphil.net/judjuris/juri2006/apr2006/gr_169777_ 2006.html.

124. *Id.* The dispositive portion of the decision states:

> Sections 2(b) and 3 of Executive Order No. 464 (series of 2005), "Ensuring Observance of the Principle of Separation of Powers, Adherence to the Rule on Executive Privilege and Respect for the Rights of Public Officials Appearing in Legislative Inquiries in Aid of Legislation Under the Constitution, and For Other Purposes," are declared **VOID.** Sections 1 and 2(a) are, however, **VALID.** (Emphasis and capitalization in the original.)

125. Executive Order No. 464 (series of 2005), sec. 2.

Nearly two years later, a controversial government procurement contract sparked a new investigation by the Senate. Romulo Neri, the Secretary of the National Economic Development Authority (NEDA), testified that he was offered a bribe to endorse a particular procurement contract. When Senators asked about the President's involvement in approving the contract, Neri invoked the executive privilege afforded to him by E.O. No. 464. After the Senate ordered his arrest for refusing to answer its questions, Neri filed a petition with the Philippine Supreme Court. In a nine to six vote, the Court majority upheld the claim of executive privilege in *Romulo L. Neri v. Senate Committee on Accountability of Public Officers and Investigations, et al.*, which expanded the doctrine of executive privilege beyond *Senate v. Ermita*.[126] The decision imported doctrinal tests from foreign sources, particularly American jurisprudence, without undertaking an analysis of the nature of executive power under the Philippine Constitution. The Court majority relied on a conception of broad residual executive power to justify the expansion of the privilege, even against constitutional rights to public information.[127]

3. *Executive Orders under President Benigno Aquino III*

The May 10, 2010 elections ushered in the new administration of President Benigno Aquino III, who earned a strong mandate from the Filipino electorate, leading the other presidential candidates by about five million votes.[128] At the same time, former President Arroyo moved to the legislature after winning the congressional race for her local district in Pampanga.[129]

During his first three months in office, President Aquino III issued four executive orders, three of which are presently subject to challenges before the Philippine Supreme Court for alleged subversion of constitutional checks and balances. Executive Order No. 1 created the Philippine Truth Commission. The Truth Commission is an investigative body charged with submitting "reports of graft and corruption of such scale and magnitude that shock and offend the moral and ethical sensibilities of the people, committed . . . during the previous administration."[130] It is also supposed to issue recommendations to the Office of the President, the Congress, and the constitutionally-independent Office of the

126. Neri v. Senate Comm., G.R. No. 180643 (S.C., Mar. 25, 2008) (Phil.) (en banc), *available at* http://www.chanrobles.com/scdecisions/jurisprudence2008/march2008/180643.php.

127. For the extended analysis of *Senate v. Ermita* and the current state of the doctrine of executive privilege in the Philippine constitutional system, see Diane Desierto, *Universalist Constitutionalism in the Philippines: Restricting Executive Particularism in the Form of Executive Privilege*, 1 VERFASSUNG UND RECHT IN ÜBERSEE/J.L. & POL. IN AFR., ASIA, & LATIN AMERICA 80 (2009).

128. Kate McGrown, *Benigno Aquino sworn in as new Philippine President,* BBC NEWS (Jun. 30, 2010), http://www.bbc.co.uk/news/10457448.

129. *Arroyo wins Congress seat in Pampanga*, GMA NEWS (May 12, 2010), http://www.gmanews.tv/story/190811/arroyo-wins-congress-seat-in-pampanga.

130. Executive Order No. 1 (series of 2010).

Ombudsman.[131] Arroyo allies in the House of Representatives have characterized the Commission as an unlawful creation of the Executive Branch,[132] claiming that the Commission requires a legislative mandate because it has considerable fact-finding, subpoena and investigative powers.[133] On

131. Creating the Philippine Truth Commission of 2010, Exec. Ord. No. 1 (Phil.), *available at* http://www.gov.ph/2010/07/30/executive-order-no-1/.

132. Paolo Romero, *Truth body faces legal challenge*, THE PHILIPPINE STAR, Aug. 1, 2010, *available at* http://www.philstar.com/Article.aspx?articleId=598633&publicationSubCategoryId=63; Sophia Dedace and Amita Legaspi, *Arroyo allies ask SC to void EO on Truth Commission*, GMA NEWS (Aug. 10, 2010), http://www.gmanews.tv/story/198384/arroyo-allies-ask-sc-to-void-eo-on-truth-commission.

133. Section 2 of Executive Order No. 1 states:

> **SECTION 2. Powers and Functions.** – The Commission, which shall have all the powers of an investigative body under Section 37, Chapter 9, Book I of the Administrative Code of 1987, is primarily tasked to conduct a thorough fact-finding investigation of reported cases of graft and corruption referred to in Section 1, involving third level public officers and higher, their co-principals, accomplices and accessories from the private sector, if any, during the previous administration and thereafter submit its finding and recommendations to the President, Congress and the Ombudsman. In particular, it shall:
>
> a) Identify and determine the reported cases of such graft and corruption which it will investigate;
>
> b) Collect, receive, review and evaluate evidence related to or regarding the cases of large scale corruption which it has chosen to investigate, and to this end require any agency, official or employee of the Executive Branch, including government-owned or controlled corporations, to produce documents, books, records and other papers;
>
> c) Upon proper request or representation, obtain information and documents from the Senate and the House of Representatives records of investigations conducted by committees thereof relating to matters or subjects being investigated by the Commission;
>
> d) Upon proper request and representation, obtain information from the courts, including the Sandiganbayan and the Office of the Court Administrator, information or documents in respect to corruption cases filed with the Sandiganbayan or the regular courts, as the case may be;
>
> e) Invite or subpoena witnesses and take their testimonies and for that purpose, administer oaths or affirmations as the case may be;
>
> f) Recommend, in cases where there is a need to utilize any person as a state witness to ensure that the ends of justice be fully served, that such person who qualifies as a state witness under the Revised Rules of Court of the Philippines be admitted for that purpose;
>
> g) Turn over from time to time, for expeditious prosecution, to the appropriate prosecutorial authorities, by means of a special or interim report and recommendation, all evidence on corruption of public officers and employees and their private sector co-principals, accomplices or accessories, if any, when in the course of its investigation the Commission finds that there is reasonable ground to believe that they are liable for graft and corruption under pertinent applicable laws;
>
> h) Call upon any government investigative or prosecutorial agency such as the Department of Justice or any of the agencies under it, and the Presidential Anti-Graft Commission, for such assistance and cooperation as it may require in the discharge of its functions and duties;

December 7, 2010, the Philippine Supreme Court voted 10-5 to declare the Truth Commission unconstitutional for violating the equal protection clause of the Constitution "as it singles out for investigation reports of graft and corruption in the previous administration".[134]

Executive Orders Nos. 2 and 3 were also challenged before the Philippine Supreme Court when they became the basis for President Aquino III's mass removal of President Arroyo's appointees.[135] E.O. No. 2 specifically revoked all midnight appointees made by the former President and other appointing authorities.[136] Executive Order No. 3 revoked former President Arroyo's E.O. No. 883, which had automatically vested government lawyers with a high civil service rank (CESO III) without complying with the rules and procedures of the Career Executive Service Board.[137] E.O. Nos. 2 and 3 have been challenged

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> i) Engage or contract the services of resource persons, professionals and other personnel determined by it as necessary to carry out its mandate;
>
> j) Promulgate its rules and regulations or rules of procedure it deems necessary to effectively and efficiently carry out the objectives of this Executive Order and to ensure the orderly conduct of its investigations, proceedings and hearings, including the presentation of evidence;
>
> k) Exercise such other acts incident to or are appropriate and necessary in connection with the objectives and purposes of this Order.

134. See the report at: http://www.abs-cbnnews.com/nation/12/07/10/sc-rules-truth-commission-unconstitutional.

135. *Aquino fires Arroyo 'midnight appointees'*, ABS-CBN NEWS (Oct. 7, 2010), http://www.abs-cbnnews.com/nation/08/04/10/aquino-fires-arroyo-midnight-appointees. *See also* Genalyn Kabiling and David Cagahastian, *EO No. 2 legal, Palace insists*, MANILA BULLETIN (Oct. 7, 2010), http://www.mb.com.ph/node/270920/eo-no-2-legal-palace-in; *see* Edu Punay, *Palace urged to wait for SC ruling on appointments*, PHILIPPINE STAR, Oct. 7, 2010, *available at* http://www.philstar.com/Article.aspx?articleId=602260&publicationSubCategoryId=63; *see also Joker chides Palace lawyers for 'rush jobs' on 3 EOs, toll VAT issue*, BUSINESS MIRROR, Oct. 7, 2010, *available at* http://businessmirror.com.ph/home/nation/155-joker-chides-palace-lawyers-for-rush-jobs-on-3-eos-toll-vat-issue.

136. Recalling, Withdrawing, and Revoking Appointments Issued by the Previous Administration in Violation of the Constitutional Ban on Midnight Appointments, Exec. Ord. No. 2 (Phil.), *available at* http://www.gov.ph/2010/07/30/executive-order-no-2/. This order defines midnight appointments in the following manner:

> **SECTION 1.** Midnight Appointments Defined. – The following appointments made by the former President and other appointing authorities in departments, agencies, offices, and instrumentalities, including government-owned or controlled corporations, shall be considered as midnight appointments:
>
> (a) Those made on or after March 11, 2010, including all appointments bearing dates prior to March 11, 2010 where the appointee has accepted, or taken his oath, or assumed public office on or after March 11, 2010, except temporary appointments in the executive positions when continued vacancies will prejudice public service or endanger public safety as may be determined by the appointing authority.
>
> (b) Those made prior to March 11, 2010, but to take effect after said date or appointments to office that would be vacant only after March 11, 2010.
>
> (c) Appointments and promotions made during the period of 45 days prior to the May 10, 2010 elections in violation of Section 261 of the Omnibus Election Code.

137. *See* An Executive Order Revoking Executive Order No. 883, Exec. Ord. No. 3. (Phil.),

both on the grounds of legislative encroachment and as an exercise in the arbitrary misuse of executive power.[138] On October 13, 2010, the Philippine Supreme Court issued a status quo ante order preventing President Aquino from implementing E.O. No. 2 while the petitions were being heard by the Court.[139] E.O. 3 is still before the Court.

C. Conclusions on the Use of Executive Decrees

Argentine and Philippine Presidents have used executive decrees to exercise power in ways that override or limit legislative oversight and control. The supreme courts in both countries have provided limited oversight, and even when it does occur, court review is likely too slow to be effective. If the President's quasi-legislative authority is not based on legislative authorization, it is difficult to ensure institutional accountability when the President asserts that she has residual or implied powers to make law under the constitution. Her basic claim is that if the legislature has not acted in certain areas, the President can act unilaterally unless Congress intervenes. Even when that power is exercised under legislative authorization, the Argentine and Filipino cases show how difficult it can be to constrain Presidents operating with weak or politically supportive legislatures.

Review of executive decrees by the Supreme Courts in Argentina has until recently been inconsistent. In 1995, the Court held that DNUs cannot be ratified through legislative silence, but in 1997 it held that the oversight of DNUs is an exclusive function of Congress, with no role for the courts as a check on executive action. In 1999 the Court swung toward stringent review of decrees by limiting DNUs to cases where ordinary constitutional procedures are impossible to follow due to force majeure circumstances, or where immediate action is necessary. By May 2010, the Argentine Court seemed to have found a consistent approach to handling the intertwined concepts of the separation of powers and checks and balances. It declared that it would review both the factual basis of DNUs and the underlying rationale while at the same time claiming to respect the separation of powers.

In contrast, the Philippine Supreme Court has been moving in a more consistently deferential direction. In two recent cases, it first chose not to review the factual basis for the President's declaration of national emergency despite having done so in previous cases. Then it simply referred to a "larger concept of executive privilege"[140] within the Constitution to justify transposing broader

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available at http://www.gov.ph/2010/07/30/executive-order-no-3/.

138. Edmer F. Panesa, *2 petitions vs. EO 2 filed with High Court*, MANILA BULLETIN (Aug. 9, 2010), http://www.mb.com.ph/node/271539.

139. Tetch Torres, *SC stops Aquino from revoking Arroyo midnight appointments*, PHILIPPINE DAILY INQUIRER, Oct. 13, 2010, *available at* http://newsinfo.inquirer.net/breakingnews/nation/view/20101013-297557/SC-stops-Aquino-from-revoking-Arroyo-midnight-appointments.

140. Neri v. Senate Comm., *supra* note 126.

forms of executive privilege in such a way as to limit the constitutional right to public information. Ultimately, the problem lies in the way the Supreme Court has articulated the concept of "residual" executive power."[141] A narrow Court majority first articulated this notion in 1989 as something, which is "traditionally considered as within the scope of 'executive power.'"[142] Under this nebulous formulation, that court later appeared to rely on conceptions of residual executive power that resonated with the strong executive model of the 1935 and 1973 Philippine Constitutions.

Both the Argentine and the Philippines constitutions give Presidents a range of decree powers, but at the same time they seek to limit the exercise of these powers. However, the legislatures in each country have seldom operated as an effective check on executive power. Nor have the supreme courts, despite periodically hearing cases that require them to determine the limits of these powers. Furthermore, they have been reluctant to review mixed questions of fact and law that might lead to charges of political interference, although the recent *Consumidores Argentinos* case in Argentina established that the judiciary may evaluate the factual circumstances supporting DNUs. The courts' acceptance of emergency justifications seems incompatible with the paradigm of diffuse powers and constitutional rights that lie behind the new constitutions in place in each country. Until the May decision, the Argentine court had not developed a consistent jurisprudence, in some cases refusing to review executive action by claiming that the legislature is the proper body to exercise oversight, not the courts. The Philippine Supreme Court also recognizes a sphere of unreviewable executive discretion as an indispensable aspect of the doctrine of separation of powers and the nature of executive power. Both courts used the separation of powers as a principle for limiting the reach of checks and balances. Until the Argentine Court's May 2010 decision, they did not invoke checks and balances as a necessary complement to executive power. It remains to be seen how this recent decision will play out in practice.

III.
BUDGETARY MANAGEMENT AND GOVERNMENT REORGANIZATION

A key aspect of constitutional design is the placement of responsibility for determining overall levels of government taxation and expenditures and for making budgetary allocations to particular programs. In all presidential systems the legislature is deeply involved in these decisions, but at the same time expediency requires that the executive have some freedom to allocate funds and

141. See the discussion of residual executive power in Province of North Cotabato v. Gov't of the Republic of the Philippines, G.R. Nos. 183591 *et seq.*, (S.C., Oct. 14, 2008) (Phil.) (en banc), *available at* http://www.lawphil.net/judjuris/juri2008/oct2008/gr_183591_2008.html.

142. Marcos v. Manglapus, G.R. No. 88211 (S.C., Sept. 15, 1989) (Phil.) (en banc), *available at* http://www.chanrobles.com/scdecisions/jurisprudence1989/sep1989/gr_88211_1989.php.

shift spending between categories to deal with unexpected contingencies. Thus, this aspect of government acutely raises the tension between separation of powers in its bureaucratic rationality form and checks and balances as an aspect of popular control.

A. Argentina

According to the Argentine Constitution, the legislature promulgates the government budget and estimates revenue needs. The executive, in turn, executes the budget. The 1994 amendment transferred the power to execute the budget from the President to the Chief of Cabinet; however, this has little practical effect because the President oversees the Chief of Cabinet.[143] In practice, the National Budget Office, an office within the Ministry of Economy under control of the executive branch, prepares the budget bill based on submissions from the national administration.[144] The President must submit the final budget bill to the legislature before September 15, and the bill must include an explanation of the objectives that the government intends to achieve, as well as of the methodology that it used to estimate revenues and expenditures.[145]

The Constitution provides several legislative checks on executive budgetary authority, but all of them work poorly. First, Congress reviews past government spending through a document called the "investment account" that explains the budget's execution, the treasury's state of affairs, the state of the public debt, the accounting and financial state of the government, and the economic and financial results of past government spending. It also paints a general picture of the degree to which the government has accomplished the goals and objectives of the budget bill. The President is supposed to submit the investment account to Congress before June 30 of the year following the budget bill's approval.[146] Within the legislature, a special bicameral committee analyzes the investment account and submits a report to both Houses.[147] The legislature can either accept or, if it considers that the executive infringed the budget law or any other statute regulating the budget's execution, reject the

143. Art. 75, Sec. 8; Art. 99, Sec. 10; Art. 100, Secs. 6-7, CONSTITUCIÓN NACIONAL [CONST. NAC.] (Arg.).

144. *See* Apruébase la estructura organizativa del primer nivel operativo del citado Departamento de Estado, Decree No. 1359, Oct. 5, 2004 (Arg.), *available at* http://infoleg.mecon.gov.ar/infolegInternet/anexos/95000-99999/99689/texact.htm.

145. Disposiciones generales. Sistemas presupuestario, de crédito público, de tesorería, de contabilidad gubernamental y de control interno, Law No. 24156, Arts. 16-17, 26, Sept. 30, 1992 (Arg.) [hereafter "Financial Management Act"], *available at* http://www.infoleg.gov.ar/infolegInternet/anexos/0-4999/554/texact.htm.

146. *Id.* art. 95.

147. Comision Parlementaria Mixta Revisora de Cuentas, Law No. 23847, Arts. 2, 5, Sept. 26, 1990, [1990-D] A.D.L.A. 3692 (Arg.) (establishing the functions of the Mixed Parlimentary Commission encharged with reviewing the national administration accounts).

investment account.[148] This process is a weak oversight mechanism. The main problem is delay, both in the committee and in the legislature. For example, according to a 2005 report of the General Accounting Office of the Ministry of Economy, the President submitted the 1990 investment account to Congress in 1993, and Congress approved it in 1994.[149] Congress approved the 1992 account in 1996, and the 1993 account in 1997.[150] Further, in November 2007, the legislature passed a single statute that approved the investment accounts of the budgets for the period from 1999 to 2004.[151]

Second, although the legislature is supposed to estimate revenues and expenditures, in reality it rarely adjusts the executive's formulation of the budget. The General Audit Office, which is an external oversight body, assists the legislature in monitoring the executive and is controlled by a special bicameral committee that oversees the execution of the budget.[152] In theory, the General Audit Office should help evaluate the budget and prevent delays. However, it does not have sufficient power or independence to carry out its duties due to several organizational and practical weaknesses. We will outline these in section IV.A.1 as part of our assessment of oversight institutions.

Finally, in addition to the difficulties that the legislative branch and independent governmental institutions face in controlling and limiting the executive branch, two specific practices enhance its discretionary authority. These are the use of secret funds and the congressional practice of giving the executive branch special powers to circumvent budgetary controls. These later powers are termed "superpowers," and they reside in the Chief of Cabinet. The Executive could seek to justify these practices on both national emergency and good management grounds. However, in practice they often do little more than enhance the powers of the President.

Two secret decrees issued in 1955-1956 first authorized the use of secret funds to maintain state secrets related to intelligence activities. These were later ratified by a secret decree-law (a "law" issued by a de facto president) in 1969.[153] Under these decrees, the executive can issue rules that are never published nor subject to congressional control. In time, the intelligence agency

148. Art. 75, Sec. 8, CONSTITUCIÓN NACIONAL [CONST. NAC.] (Arg.).

149. Ministerio de Economía y Finanzas Públicas, *La Cuenta de Inversión: El Control de la Cuenta de Inversión*, (Oct. 8, 2010), *available at*, http://www.mecon.gov.ar/hacienda/cgn/xxcongreso/trabajos/comision_mixta.pdf.

150. *Id.*

151. Apruébanse las Cuentas de Inversión presentadas por el Poder Ejecutivo, Law No. 26328, Nov. 28, 2007 (Arg.), *available at* http://www.infoleg.gov.ar/infolegInternet/anexos/135000-139999/136123/norma.htm.

152. *See* Art. 85, CONSTITUCIÓN NACIONAL [CONST. NAC.] (Arg.); *see also* Financial Management Act, Law No. 24156, *supra* note 144, at art. 127.

153. *See* Lucio Fernández Moores, *La Justicia Apunta a los Bienes Declarados por Ex Funcionarios*, CLARÍN (May 10, 2005), http://www.clarin.com/diario/2005/05/10/elpais/p-00301.htm.

Secretaría de Inteligencia del Estado (SIDE) and several other agencies, such as the Ministry of Defense, the Ministry of Interior, the Ministry of Foreign Affairs, and Congress itself, obtained authorization to use such funds. Little is known about the use of these secret funds because of this lack of oversight, although occasionally a persistent journalist manages to obtain information about their allocation.[154] An expert report, commissioned by the Supreme Court in connection with a corruption investigation, determined that from 1988 to 2001, secret funds totaled $4 billion pesos (about $1 billion dollars at current exchange rates), and that SIDE received 70% of these funds.[155] It is a common suspicion within society that secret funds are also likely used to finance political campaigns, a suspicion supported by the fact that these funds significantly increase during electoral periods.[156] In 2001, the National Intelligence Act created a Bicameral Oversight Committee of Intelligence Agencies and Activities to monitor both intelligence activities and the secret funds.[157] However, the committee remained inactive until 2004, and its initial members explained that, although the Committee would subject SIDE to tighter control, it would not monitor secret funds.[158] The Committee did not give any reason for ignoring the second part of its mandate, and there is no real reason—at least not a legal one—for that.

The Congress has also delegated "superpowers" to the executive that allow it to reallocate budgetary accounts at will, circumventing budgetary controls. This practice began in March 2001, when the legislature delegated to the executive broad legislative powers to handle the severe economic and financial crisis.[159] Although Congress later repealed these special powers, ensuing governments restored them by including emergency provisions in the budget acts from 2002 to 2006 that delegated the powers directly to the Chief of Cabinet.[160] In 2006, amendments to the Financial Management Act

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154. In 2005, Clarín reported that Duhalde and Kirchner had respectively assigned $99 and $12 million pesos to the SIDE through secret decrees. *See* Daniel Santoro, *Fondos Reservados Confirman que Kirchner y Duhalde Aumentaron los Gastos de la SIDE*, CLARÍN (Feb. 13, 2005), http://www.clarin.com/diario/2005/02/13/elpais/p-00315.htm.

155. *See* Gerardo Young, *Revelan el Uso de Más de 4.000 Millones de Fondos Reservados*, CLARÍN (Feb. 1, 2004), http://www.clarin.com/diario/2004/02/01/p-00315.htm.

156. *See* Laura Saldivia, Secret Expenditures and Record Voting (2004) (unpublished working paper) (on file with authors) (providing data on SIDE's expenditures in times of elections from 1993 to 2004).

157. Bases jurídicas, orgánicas y funcionales del Sistema de Inteligencia de la Nación, Law No. 25520, Dec. 3, 2001 (Arg.), *available at* http://www.infoleg.gov.ar/infolegInternet/anexos/70000-74999/70496/norma.htm.

158. *See* Alfredo Gutiérrez, *El Congreso vigila la SIDE, pero sin controlar los fondos reservados*, CLARÍN (Jan. 04, 2004), http://www.clarin.com/diario/2004/01/04/p-00601.htm.

159. Delegación del ejercicio de atribuciones legislativas, Law No. 25414, Mar. 29, 2001 (Arg.), *available at* http://www.infoleg.gov.ar/infolegInternet/anexos/65000-69999/66559/norma.htm.

160. *See, e.g.*, Apruébase el Presupuesto de Gastos y Recursos de la Administración Nacional

institutionalized these superpowers.[161] Today, the Chief of Cabinet may reassign budgetary accounts at will. The only restriction on the Chief of Cabinet is that the legislature must approve increases in budgetary lines related to secret funds or intelligence funds.[162] Hence, the Chief of Cabinet, who was meant to function as an escape valve in times of political crises, has become instead a means for the executive to acquire even more power. Alleged misuse of these superpowers has been at the heart of current controversies over President Kirchner's issuance of the DNUs in connection with the transfer of funds from the central bank, discussed in section II.A. In June 2010, the lower house approved a bill, which was still pending in the Senate when this article went to print, that eliminates the President's superpowers, although the executive has stated that if the bill is approved in the Senate, the President will veto the statute.[163]

Further, when the government faces a fiscal surplus, it can deliberately underestimate revenues and then use the excess revenues free from budgetary control. Every budgetary law since 2004 shows a surplus, and billions of dollars per year have been managed outside the regular budgetary process. The bill approved by the lower house in June dealing with superpowers also provides that the executive cannot reassign excess revenues without congressional approval.[164] It has yet to pass in the upper house, and its approval is highly unlikely, because the opposition does not control the Senate. Since the last legislative election, the Senate has been unable to approve major bills passed by the lower house that seek to check the executive.[165]

In addition to secret funds, the executive branch has increasingly made use of fiduciary funds, which, since 2003, are subject to fewer budgetary constraints than other categories. The budget act does not determine their precise use or their geographical distribution. Although the Chief of Cabinet is supposed to inform the legislature about the use of fiduciary funds, he made no reports in 2003 and 2004 and only incomplete reports in 2005 and 2006, but Congress did not attempt to improve its control over these funds.[166] The combination of these

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para el Ejercicio 2004, Law No. 25827, Nov. 26, 2003 (Arg.) (setting the budget for 2004), *available at* http://www.infoleg.gov.ar/infolegInternet/anexos/90000-94999/91229/texact.htm.

161. Modificación, Law No. 26124, Aug. 7, 2006 (Arg.), *available at* http://www.infoleg.gov.ar/infolegInternet/anexos/115000-119999/118648/norma.htm.

162. *Id.*

163. *See El Oficialismo Insiste en Amenazar Con el Veto al Recorte de los Superpoderes*, CLARÍN, Jun. 24, 2010, *available at* http://www.clarin.com/politica/congreso/superpoderes-kirchnerismo-oposicion-veto_presidencial_0_286171544.html.

164. *See* Atilio Bleta, *Diputados Dio Media Sanción a la Eliminación de los Superpoderes*, CLARÍN, Jun. 24, 2010, *available at* http://www.clarin.com/politica/congreso/Diputados-media-sancion-eliminacion-superpoderes_0_286171400.html.

165. *See* Gabriel Sued, *La Oposición, Sin Éxitos en el Congreso*, LA NACIÓN, Oct. 12, 2010, *available at* http://www.lanacion.com.ar/nota.asp?nota_id=1314018.

166. *See* Oscar Darío Rinaldi and Damián Staffa, *Control de la Ejecución de los Fondos Fiduciarios Estatales: Debilidades en la Presentación de Informes del Poder Ejecutivo y su*

discretionary mechanisms—secret funds, superpowers, budget underestimation, and fiduciary funds—has allowed successive executives to manage public funds with little or no control. The executive's discretion over budget management and the lack of adequate checks have systematically expanded opportunities for corruption.[167] The use of secret funds of the SIDE allowed three major cases of corruption to emerge. One case related to the cover up of a terrorist attack on the Jewish organization AMIA in 1994. A second case involved the alleged payment of bribes from the government to a group of Senators to ensure the passage of a labor law in 2000. A third concerned the payment of extra-salaries to high-level officials during Menem's ten years of government. Other recent scandals also show the consequences of these discretionary spending mechanisms, such as the Skanska scandal, where alleged bribes were connected to a procurement contract managed through a fiduciary fund, and the various investigations of ministries and secretaries, some of whom have been forced to resign, for the suspicious use of public funds.

B. The Philippines

The Philippine President has considerable freedom to redirect budgetary authority and to reorganize the government. The Constitution clearly delegates some of these broad powers to the President. However, the President appears simply to assume others in ways that could violate constitutional constraints on executive power.

The 1987 Constitution separates the legislature's appropriations power and the President's authority to propose the annual budget for Congressional approval.[168] The President can line-item veto "any particular item or items in an appropriation, revenue, or tariff bill," including the General Appropriations Act (GAA)—which outlines the annual government budget.[169] The President cannot unilaterally introduce or add items omitted from the final bill. A vote by two-thirds of the membership of each legislative chamber can override the executive veto.[170]

The legislature is responsible for approving the annual GAAs, and the Constitution expressly prohibits transfers of appropriations without legislative

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Tratamiento por el Congreso, ASOCIACIÓN MUTUA FEDERAL DE EMPLEADOS DE LAS ADMINISTRACIONES PÚBLICAS (Sept. 28, 2006), *available at* www.amfeafip.org.ar/seminarios/2006/jujuy/documentos/08.pdf.

167. *See* Natalia A. Volosin, *Presidential Corruption: a Case Study of Argentina 1989-2009* (unpublished, on file with authors) (connecting Argentina's hyper-presidential system to corruption at high levels of the executive branch through a study of major cases from 1989 to 2009).

168. CONST. (1987), art. VII, sec. 22; art. VI, sec. 25 (Phil.).

169. *Id.* art. VI, sec. 27(1)-(2).

170. *Id.*

authorization.[171] The Administrative Code of 1987 requires the GAA to specify budgetary programs and projects for each government agency.[172] Salary increases or adjustments cannot be funded from GAA appropriations unless specifically authorized by law or appropriate budget circular.[173] In practice, however, each GAA since 1996 has authorized the President to augment items in the general appropriations law with savings from other appropriated items within the Executive branch, in spite of the constitutional requirement that the legislature authorize transfers of appropriations in the budget bill.[174] The President can only realign its budget subject to prior statutory authorization.[175]

In recent years, the Arroyo presidency did not appear to have paid sufficient attention to the standard of specificity and accountability mandated under the Administrative Code. According to some critics, there has been a profusion of budget increases for some government projects with little, if any, description of their use. In 2008, the Alternative Budget Initiative, a budget reform advocacy NGO consortium, claimed that the "economic stimulus fund" signed into law in 2009 would be used as an "election-stimulus fund" to aid the President's political allies.[176] It also worried that discretionary funds invited corruption.[177] A recent audit report showed that, in 2009, the President funded some of her foreign travel with the government's emergency fund earmarked for calamities. She used almost the entire $16.6 million in the fund, leaving the government with few resources to respond to numerous natural disasters and massive flooding, which occurred that same year.[178] Budget impounding—that is, presidential actions withholding funds already appropriated "when revenues are scarce"[179]—thus creates a lack of transparency in the administration of the

171. *Id.* sec. 25(5).

172. Admin. Code 1987, Exec. Ord No. 292, *supra* note 85.

173. *Id.* book VI, ch. 7, sec. 60.

174. *See, e.g.*, General Appropriations Act of 2005, Rep. Act No. 9336, Sec. 59, *available at* http://www.dbm.gov.ph/dbm_publications/gaa_2005/gaa_2005.htm; General Appropriations Act of 2002, Rep. Act No. 9162, Sec. 53, *available at* http://www.dbm.gov.ph/dbm_publications/gaa_2002/d1/gaa2002.htm.

175. CONST. (1987), art. VII, sec. 25 (Phil.).

176. Tita Valderama, *P50-B 'economic stimulus fund' also 'election stimulus fund'?*, PHILIPPINE CENTER FOR INVESTIGATIVE JOURNALISM (Feb. 1, 2009), http://www.pcij.org/i-report/2009/budget-process2.html.

177. *Id.* (quoting Professor Leonor Magtolis-Briones, lead convener of Social Watch Philippines, the NGO that initiated the Alternative Budget Initiative). *See also* Claire Delfin, *Transparent as a Moonless Night: The Budget Process and Spending*, PHILIPPINE PUBLIC TRANSPARENCY REPORTING PROJECT (Mar. 12, 2010), http://www.transparencyreporting.net/index.php?option=com_content&view=article&id=51:transparent-as-a-moonless-night-the-budget-process-and-spending&catid=44:stories&Itemid=94.

178. Jess Diaz, *GMA used P800-million emergency fun for foreign trips*, PHILIPPINE STAR, Aug. 15, 2009, *available at* http://www.philstar.com/article.aspx?articleid=496123. *See also* Executive Summary of the COMMISSION OF AUDIT, COMMISSION ON AUDIT REPORT FOR 2009 ii-v (2009), *available at* http://www.coa.gov.ph/Audit/AAR.htm.

179. *See* Paolo Romero, *GMA to impound 'pork' when needed – Palace*, THE PHILIPPINE STAR,

national budget.[180]

President Arroyo also used administrative reorganizations to erode Congressional authority over budgetary realignments or transfers of appropriations.[181] Under the Administrative Code, the President can reorganize the administrative structure of the Office of the President by restructuring the office or transferring any agency or "function or agency under the Office of the President to any other Department or Agency . . . [or] to the Office of the President from other Departments or Agencies."[182] Judicial review of administrative reorganizations only applies a test of "good faith" to limit the President's reorganization authority.[183]

By invoking the need for "administrative efficiency," the President has transferred functions from one agency to another, created new agencies, and given specific agencies discretion over certain investments, contracts, or other specialized economic issues.[184] All of these acts bypass the legislature's constitutional power to promulgate statutes that restructure or create new governmental institutions and the legislature's constitutional power to allocate funds for such restructured institutions. These unilateral actions limit the legislature's impact on government operations and policymaking. The legal structure did not prevent the President from announcing drastic reorganizations of the Executive Branch. However, in practice there do appear to be some popular political limits on the President's reorganization efforts. For example, in November 2005, the President created an agency called the Philippine Strategic Oil, Gas, Energy Resources and Power Infrastructure Office (PSOGERPIO), which had nebulous but wide-ranging authority over energy projects, including

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Jan. 5, 2010, *available at* http://www.philstar.com/Article.aspx?articleid=538189; *see also* Paolo Romero, *GMA retains presidential power to impound 'pork'*, THE PHILIPPINE STAR, May 22, 2010, *available at* http://www.philstar.com/Article.aspx?articleId=577346&publicationSubCategoryId=63.

180. Jarius Bondoc, *Everything's wrong with budget process*, PHILIPPINE STAR, Feb. 2, 2009, *available at* http://www.philstar.com/Article.aspx?articleid=436679.

181. *See* Desierto, *Presidential Veil*, *supra* note 92.

182. Admin. Code 1987, Exec. Ord. No. 292, *supra* note 85, at Book III, Ch. 10, Sec. 31.

183. Malaria Emps. and Workers Ass'n of the Philippines, Inc. v. Romulo, G.R. No. 160093 (S.C., July 31, 2007) (Phil.), *available at* http://www.lawphil.net/judjuris/juri2007/jul2007/gr_160093_2007.html.

184. Rationalizing the Agencies Under or Attached to the Office of the President, Exec. Ord. No. 72 (Phil.), http://www.chanrobles.com/executiveorders/2002/executiveorderno72-2002.html; Directing the Reorganizing and Streamlining of the National Development Company, Exec. Ord. No. 184 (Phil.), http://elibrary.judiciary.gov.ph/index10.php?doctype=Executive%20Orders&docid=a45475a11ec72b843d74959b60fd7bd645f5cedceac; 91, Directing a Strategic Review of the Operations and Organizations of the Executive Branch, Exec. Ord. No. 366 (Phil.), http://elibrary.judiciary.gov.ph/index10.php?doctype=Executive%20Orders&docid=12102124281060479186. *See also* Isa Lorenzo and Malou Mangahas, *New CSC Chief Faces Pack of Ineligible Bureaucrats*, PHILIPPINE CENTRE FOR INVESTIGATIVE JOURNALISM, Apr. 24, 2008, *available at* http://www.pcij.org/stories/2008/ineligible-bureaucrats.html; Isa Lorenzo and Malou Mangahas, *Malacanang is No. 1 in excess exec hires*, MALAYA, Mar. 20, 2009, *available at* http://www.malaya.com.ph/apr25/news6.htm.

the right to create partnerships with private firms.[185] The power industry sharply criticized PSOGERPIO as an illegal encroachment on the functions of the Department of Energy and a mechanism to favor specific interests.[186] As a result of the criticism, the President abolished PSOGERPIO in 2006. Similarly, in mid-2007 President Arroyo issued an Executive Order that transferred the Philippine Mining Development Corporation (PMDC) from the Department of Environment and Natural Resources (DENR) to the Office of the President so that Arroyo could directly oversee mining contracts with foreign investors.[187] Less than six months later, Arroyo issued a tersely worded Executive Order that transferred PDMC back to the DENR.[188] Civil society groups had assailed the lack of transparency and corruption that resulted from her supervision of these contracts.[189]

The Philippine Constitution provides for several independent offices—such as the Commission on Audit (COA), the National Economic Development Authority (NEDA), the Bangko Sentral ng Pilipinas (BSP) and the Monetary Board (MB)—that are supposed to weigh in on the President's use of budgetary authority. The COA is a constitutionally independent office responsible for

185. Ensuring Separation of Powers, Exec. Ord. No. 474, *supra* note 49. *See* Donnabelle L. Gatdula, *EO 474 seen to drive away investors in the power sector*, THE PHILIPPINE STAR, Jan. 27, 2006, at B4.

186. *Gov't May Assume Power Firm's P43M Debt: Palace*, SUN STAR MANILA, Dec. 19, 2005, *available at* http://blogs.sunstar.com.ph/citizenwatch/?p=402; Ray S. Enano, *Mysterious Energy Superbody*, MANILA STANDARD, Dec. 29, 2005, *available at* Lexis Academic, File No. A2005122837-F921-GNW.

187. Transferring the Philippine Mining Development Corporation from the Department of Environment and Natural Resources to the Office of the President, Exec. Ord. No. 636 (Phil.), http://www.gov.ph/2007/07/18/executive-order-no-636/; Conferring Cabinet Rank Upon the Chairman of the Philippine Mining Development Corporation, Exec. Ord. No. 665 (Phil), *available at* http://elibrary.judiciary.gov.ph/index10.php?doctype=Executive%20Orders&docid=12101220691382859577; *see* Michael Lim Ubac, *Mining out of DENR; Now Under President's Office*, PHILIPPINE DAILY INQUIRER, Jul. 27, 2007, *available at* http://newsinfo.inquirer.net/inquirerheadlines/nation/view/20070727789888/Mining_out_of_DENR%3B_now_under_President%92s_office; *see* Johanna Camille Sisante, *Solon: Mining Contract with ZTE Disadvantageous to the Government*, GMA NEWS, Nov. 24, 2008, *available at* http://www.gmanews.tv/story/135289/Solon-Mining-contract-with-ZTE-disadvantageous-to-govt; *see also* Carmel Crimmins, *Skepticism greets Philippine Mining Industry Revival*, INTERNATIONAL HERALD TRIBUNE, Apr. 3, 2008, *available at* http://www.iht.com/articles/2008/04/03/business/mine.php.

188. Transferring the Philippine Mining Development Corporation from the Office of the President to the Department of Environment and Natural Resources, Exec. Ord. No. 689 (Phil.), *available at* http://elibrary.judiciary.gov.ph/index10.php?doctype=Executive%20Orders&docid=1210137999777230148.

189. Pat C. Santos, *Abrogate mining law, junk GMA EOs on sector*, THE DAILY TRIBUNE, Jul. 17, 2010, *available at* http://www.tribuneonline.org/nation/20100717natl.html. Note that the former House Speaker, Jose de Venecia, endorsed the first (failed) impeachment complaint against President Arroyo, which included allegations of corruption in the ZTE-Diwalwal mining contract. John Bramhall, *De Venecia endorses Arroyo impeachment, says corruption has 'got to stop,'* PINOY HERALD, Nov. 30, 2008, *available at* http://www.pinoyherald.org/news/herald-news/de-venecia-endorses-arroyo-impeachment-says-corruption-has-%E2%80%98got-to-stop%E2%80%99.html.

examining, auditing, and settling all accounts pertaining to the revenue, receipts, and expenditures of Government.[190] The Constitution also designates the NEDA as the "independent planning agency of government"[191] and the BSP as the "independent central monetary authority. . . [providing] policy direction in the areas of money, banking, and credit," as well as with bank supervision and financial institution regulation.[192] Finally, the President cannot contract foreign loans on behalf of the Republic without the "prior concurrence of the MB."[193]

In practice, the President exerts considerable influence over these independent agencies due to the vast and largely unchecked reach of her appointment power. The President appoints all COA commissioners and the BSP Governor, subject to confirmation by the Commission on Appointments (CA).[194] The President also wholly and exclusively appoints all members of the NEDA and the MB.[195] Except for the BSP, which has not figured in any controversy in relation to the President's powers, the other constitutional agencies have been weak in the face of presidential influence over the past decade. The CA does not appear to have made timely pre- and post-audits of some of the President's disbursements of public funds for allegedly personal political purposes, including expensive infrastructure projects in the district where President Arroyo ran for Congress as her term-limited presidency drew to a close.[196] Examples are the bridge across the Porac-Gumain River and other projects for which the audit requests were filed with the Commission on Audit.[197] A recent scandal involving the NEDA revealed that the President bypassed NEDA processes and the requirement that the MB approve foreign loans by giving a broad reading to her "residual" administrative power.[198]

Presidential control over the national budget and executive branch reorganization allowed President Arroyo to "[wield] the substantial powers of the presidency to keep herself in office, and in the process she exhibit[ed] no

190. CONST. (1987), Art. IX(D), Sec. 2(1) (Phil.).

191. *Id.* art. XII, sec. 9.

192. *Id.* sec. 20.

193. *Id.* art. VII, sec. 20.

194. *Id.* art. IX(D), sec. 1(2); The New Central Bank Act, Rep. Act No. 7653, art. III, sec. 17, *available at* http://www.chanrobles.com/republicactno7653.htm. Note that the CA confirmation is of little significance because the President can issue ad interim appointments pending confirmation. Moreover, the majority of CA members are dominated by the President's relatives or allies in Congress.

195. Reorganizing the National Economic and Development Authority, Exec. Ord. No. 230, Sec. 4 (Phil.), *available at http://www.lawphil.net/executive/execord/eo1987/eo_230_1987.html*; Central Bank Act, Rep. Act No. 7653, *supra* note 194, at art. II, sec. 6.

196. *COA dared; Audit Arroyo's P2-B power doleout*, GMA NEWS, Jun. 12, 2008, *available at* http://www.gmanews.tv/story/100813/COA-dated-Audit-Arroyos-P2-B-power-doleout; Johanna Camille Sisante, *COA asked to audit Arroyo's Pampanga projects*, GMA NEWS, (Jan. 13, 2010), *available at* http://www.gmanews.tv/story/181484/coa-asked-to-audit-arroyos-pampanga-projects.

197. Sisante, *Pampanaga Projects*, *supra* note 196.

198. Desierto, *Presidential Veil*, *supra* note 92.

qualms about undermining the country's already weak political institutions."[199] The Supreme Court has not adjudicated the President's broad executive interpretations of budgetary authority and administrative reorganization. Absent judicial review, the President wields budgetary authority that is reminiscent of the strong executive model of the 1973 Constitution, despite the existence of legislative checks on appropriations under the 1987 Constitution.

In his first State of the Nation Address (SONA) on July 26, 2010, President Benigno Aquino III—son of the reformist former President Corazon Aquino—pointed to former President Arroyo's misuse of her budgetary authority based on her broad view of executive power.[200] In the same SONA, he declared that his administration would lobby for the passage of laws on fiscal responsibility, procurement, and antitrust, as well as the re-codification of many laws for legal consistency. Whether legal reforms will include redefining the broad interpretation of the President's budgetary authority and power of administrative reorganization remains as yet unanswered by the new administration.

C. Conclusions

In Argentina, the President frequently delays submitting required reports to the legislature, thus limiting its ability to oversee spending. These exercises of presidential power largely go unchallenged because they are not publicized and there is no effective recourse in the legislature or the courts. In the Philippines, executive interference with budgets is often more direct and primarily takes the form of reorganizing the administrative or impounding funds allocated for specific items. However, even in that case there are political limits. Public outcry has reversed some of the President's reorganization efforts.

Although the mechanisms are somewhat different, Presidents in Argentina and the Philippines have considerable independent influence on government spending. They can redirect spending by moving funds between budget categories, allocate secret funds, and reorganize some government bodies and functions. This means that legislative decisions about spending priorities have less impact on actual public spending than might be expected from a review of budget documents. Using a mixture of legally delegated authority and shear power politics, Presidents have claimed a legal right to redirect funds to their favored projects.

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199. Paul D. Hutchcroft, *The Arroyo Imbroglio in the Philippines*, 19(1) J. DEMOCRACY 141, 142 (2008).

200. Benigno S. Aquino III, President, State of the Nation Address (Jul. 26, 2010), *available at* http://www.gov.ph/2010/07/26/state-of-the-nation-address-2010-en.

IV.
APPOINTMENT POWERS

Presidents seek to appoint their allies to important positions in the executive branch and in agencies, courts, and other nominally independent bodies. Complementary to this power, Presidents may seek the resignation of sitting officials to create vacancies that can be filled with political stalwarts. Presidential power is measured both by the relative status of civil servants and political appointees and by the President's ability to make political appointments without input from other political actors.

A. Argentina's President's Strong Appointment Powers

The Argentine President is very powerful both with respect to the civil service and to the appointment of political allies. The President's power is at its strongest when making appointments to administrative departments directly under her control in the cabinet structure of government. We also document the way her influence extends to appointments to the Supreme Court, prosecutors' offices, and some nominally independent agencies.

1. Executive Departments and "Independent Agencies"

The President alone makes top executive appointments to offices directly under her in the cabinet structure of government.[201] The President has authority to appoint and remove the Chief of Cabinet and the Ministers, the officers of her Secretariat, consular agents, and employees whose appointments are not otherwise regulated by the Constitution. The Chief of Cabinet, in turn, can make all appointments in the presidential administration, except those appointments delegated to the President by the Constitution.[202] In practice, the President usually appoints high-level officials, and she delegates the power to appoint rank-and-file officials to the Chief of Cabinet and other ministries and secretaries. There are no constraints on the President's appointment powers to such offices. The Constitution does not require that Congress confirm the President's appointees. No mechanism for citizen participation exists. Nor do rules exist to constrain nepotism or to require minimum standards of proficiency for presidential appointees.

The merit-based civil service is the one important exception to the executive branch's robust appointment powers.[203] However, the civil service

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201. Only ambassadors, ministers plenipotentiary and commercial attaches are appointed and removed by the President with the consent of the Senate. Art. 99, Sec. 7, CONSTITUCIÓN NACIONAL [CONST. NAC.] (Arg.).

202. *Id.* art. 100, sec. 3.

203. *See* Homológase el Convenio Colectivo de Trabajo Sectorial del personal del Sistema Nacional de Empleo Público, Decree No. 2098, Dec. 3, 2008 (Arg.), *available at*

law does not apply to officials whom the President has a constitutional right to appoint—the Chief of Cabinet, Ministers, and Secretaries—nor to Undersecretaries, the chief authorities of the decentralized agencies and institutions that comprise the social security system, and other similar officials.[204] Under the Constitution and associated statutes, civil servants enjoy professional stability in office.[205] They can only be dismissed with cause. This contrasts with other government employees—such as high-level appointees and those rank-and-file bureaucrats who are hired by contract—who usually occupy their positions only as long as the Minister remains in office.

However, not all public agencies are under the direct control of the President and the Cabinet. One might suppose that those appointed to such independent agencies should be able to operate free of presidential control. In practice, this is not true. Many agencies that are legally independent are not structurally or functionally insulated from the executive. The operations of the Central Bank, the Pension Agency, the Revenue Agency, and several public utilities boards illustrate the weakness of legal independence standing alone.

The Central Bank is a self-governing entity of the State.[206] The Central Bank's Board of Directors includes a president, a vice-president, and eight members. The Argentine President appoints the members of the board, who are subject to Senate confirmation, although the President can make interim appointments pending confirmation. Board members serve for six years and they can be reappointed once. The six-year term exceeds the executive's term by two years. The President can remove board members only for serious legal violations and with the previous non-binding advice of a special congressional bicameral committee.[207]

Although this structure seems adequate to insulate monetary and exchange policies from the executive branch's interference, in practice it has not. This is because the government has ignored the Central Bank's independent status, the Senate confirmation requirement, and the fixed six-year term. Thus, there have only been two instances in which the Central Bank's President continued to serve the federal government despite a change in administration.[208] The President expects that members of the Central Bank's board, and especially its Chief, will align their policy views with those of the executive. The board

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http://www.infoleg.gov.ar/infolegInternet/anexos/145000-149999/148090/norma.htm.

204. Marco normativo y autoridad de aplicación, Law No. 25164, Sept. 15, 1999 (Arg.), *available at* http://www.infoleg.gov.ar/infolegInternet/anexos/60000-64999/60458/norma.htm.

205. *Id.* arts. 14 *bis*, 16, CONSTITUCIÓN NACIONAL [CONST. NAC.] (Arg.); Marco normativo, Law No. 25164, *supra* note 203.

206. Carta Orgánica. Régimen General, Law No. 24144, Sept. 23, 1992 (Arg.), *available at* http://www.infoleg.gov.ar/infolegInternet/anexos/0-4999/542/texactley20539.htm.

207. *Id.*

208. The two Presidents are Pedro Pou from 1996 to 2001, and Alfonso Prat Gay from 2002 to 2004. Pou eventually was removed due to his involvement in a corruption scandal, and Prat Gay resigned once the new administration realized that he did not share its views on bank policies.

members often resign when the executive requests or requires it of them, and it is unusual for a board member to resist resignation as the Chief of the Central Bank did when President Kirchner tried to oust him through a DNU in early 2010. Further, when the Central Bank's President resigns, it is not unusual for the executive to make a temporary appointment, who then remains in office without Senate confirmation. The interim appointment is justified by the argument that the appointee is only completing the term of the official who resigned. As a result, since 1990, no President of the Central Bank has completed a six-year term.[209] Thus, although the formal structure appears favorable to the establishment of independence, the practical political reality undermines the institutional protections.

Similar to the Central Bank, the Pension Agency also illustrates the impact of presidential appointments powers. In 1994, when Argentina privatized its social security system, individuals chose between leaving their retirement funds in the public system and transferring them to a private system.[210] In December 2008, under a congressional statute, the government re-nationalized the system. It confiscated the private retirement funds and transferred them to the State under the administration of the *Administración Nacional de la Seguridad Social* ("Pension Agency"), which is charged with administering the social security system.[211]

Although the Pension Agency's mandate specifies its independence from the executive branch, the President has co-opted its leadership. Consequently, the President has been able to use pension fund assets to make loans to private and national utilities, automobile companies and construction projects, in direct violation of a 2007 Supreme Court decision that ordered the State to align pensions with the growing salaries of active workers.[212] The President's ability

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209. For a list of the Central Bank's Presidents and their terms, *see* www.bcra.gov.ar.

210. Sanción, Law No. 24241, Sept. 23, 1993 (Arg.), *available at* http://www.infoleg.gov.ar/infolegInternet/anexos/0-4999/639/norma.htm. In March 2007, under Kirchner's administration, Congress passed a law giving workers an opportunity to move from the private system to the public system. Modificase la Ley N° 24.241, estableciendo la libre opción del Régimen Jubilatorio, Law No. 26222, Feb. 27 2007 (Arg.), *available at* http://www.infoleg.gov.ar/infolegInternet/anexos/125000-129999/126072/norma.htm.

211. Régimen Previsional Público. Unificación, Law No. 26452, Nov. 20, 2008 (Arg.), *available at* http://www.infoleg.gov.ar/infolegInternet/anexos/145000-149999/148141/norma.htm.

212. Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 26/11/2007, "Badaro, Adolfo Valentín c. Administración Nacional de la Seguridad Social," Fallos (2007-330-4866) (Arg.). This case shows that there is always an implicit threat in any Supreme Court decision that the President will refuse to comply, thereby undermining the judiciary as a strong check on the other branches. Two recent cases show this weakness. First, because the executive did not comply with the Court's decision in the *Badaro* case, Congress is attempting to enforce the decision through a law. The bill has already been approved—with a new tie-breaking vote by the Vice President in the Senate—and the executive has already announced that it will veto it. *See Aníbal Fernández Estimó que la Presidenta Vetará hoy el 82% Móvil y Tildó a Cobos de "Traidor,"* LA NACIÓN, Oct. 14, 2010, *available at* http://www.lanacion.com.ar/nota.asp?nota_id=1314792.

Second, a recent Argentinean Supreme Court decision, which also touches on hyper-presidentialism

to control the use of Pension Agency assets is a direct result of its legal foundation: it was created by executive decree in 1991. Hence, it operates at the sole discretion of the President.[213] The Minister of Labor, who is a presidential appointee, appoints the Agency's Director. In practice, therefore, the President appoints the Director even though this violates the executive decree that first established the Pension Agency as an independent institution.[214]

This lack of independence was problematic even when private firms administered the retirement and pension funds. However, it has become even more worrisome now. The government's re-nationalization of social security not only gives the Pension Agency control over vast resources, but also gives it a significant ownership share in several private firms, including banks, privatized utilities, real estate, foods and beverages, construction, and the iron and steel industry. This is because the private firms that until December 2008 managed retirement and pension funds had invested in many publicly traded companies, so that with the nationalization the State now owns those shares, and has consequently named officials to the boards of those companies.[215] A single official, who is appointed by the President without legislative oversight over the appointment process, manages an agency controlling billions of dollars of social security. Technically, the legislature does have a bicameral oversight committee that controls the operation of these funds and could monitor the agency's

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and federalism, put the Court's enforcement powers into question. In 1995, a local legislature removed the attorney general of the province through an irregular procedure and at the request of the governor of the province (former president Néstor Kirchner, who governed the province for about 10 years). Since then, the removed attorney general's case reached the Argentinean Supreme Court, and he obtained several decisions ordering the province to reinstate him. The province never complied. Recently, the Supreme Court ruled, once again, that he be reinstated, that the current Governor be criminally prosecuted, and it suggested to the Congress that it should intervene in the province to guarantee its ruling. *See* Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 14/09/2010, "Sosa, Eduardo Emilio c/Provincia de Santa Cruz," Fallos (Doc. No. 2083-XLI) (Arg.), *available at* http://www.csjn.gov.ar/cfal/fallos/cfal3/toc_fallos.jsp.

Articles 6 and 75 of the Constitution allow Congress to intervene in a province to ensure the republican form of government. However, both the national and provincial governments are claiming that an intervention would amount to a coup, and that the province's independence from the federal powers is at stake. *See El Gobernador Peralta Acusó a la Corte de Promover la "Desestabilización,"* LA NACIÓN, Sept. 15, 2010, *available at* http://www.lanacion.com.ar/nota.asp?nota_id=1304861.

213. The National Social Security Administration (ANSES) was created by Decree No. 2741, Dec. 21, 1991, *available at* Lexis No. LNACDE2741. Congress ratified this DNU through the law that privatized the social security system.

214. Presidents argue that their authority to appoint the director arises from the general appointment powers as set out by Article 99, Section 7 of the Constitution. An example of an executive decree appointing the ANSES director is Desígnase Director Ejecutivo, Decree No. 1619, Dec. 7, 2001 (Arg.), *available at* http://www.infoleg.gov.ar/infolegInternet/anexos/70000-74999/70636/norma.htm.

215. *See, e.g., La Anses Empieza a Meterse en la Gestión de Empresas Privadas*, LA NACIÓN, Mar. 20, 2009, *available at* http://www.lanacion.com.ar/nota.asp?nota_id=1110458.

behavior if it wished, although in practice it does not.[216] To strengthen its oversight role, Argentina's lower House approved a bill in June 2010—the same bill eliminating the "superpowers" referred to in section III.A.—preventing the executive from redirecting funds from agencies such as the Central Bank and the Pension Agency without congressional approval. As we saw, the bill was pending in the Senate at the time of writing.

A third example of the President's extensive use of appointment power to aggrandize her position is illustrated by her relationship with the Revenue Agency, or the *Administración Federal de Ingresos Públicos* ("Revenue Agency"). This agency collects tax and customs revenues. Similar to the Pension Agency, the Revenue Agency was created by a DNU, or necessity and urgency decree as previously discussed.[217] In November 2001, the executive issued a delegated decree reorganizing the Revenue Agency under congressionally granted "superpowers."[218] The decree's stated purpose was to afford the Agency more independence from the executive branch. It sought to achieve this by: (1) requiring that the President appoint the Agency's Federal Manager no earlier than one year after assuming the presidency, and (2) establishing a four-year term of appointment, with the possibility of successive terms, as long as the Federal Manager fulfills the previous term's management plan. If the Federal Manager fails to complete his or her term, the President may appoint a replacement who will serve for the remaining time. The Federal Manager can only be removed by the executive for cause and only upon the recommendation of a committee that includes the Chief Legal Advisor to the government, both the President's Legal and Technical Secretaries, and the Director of the Internal Audit Office of the executive.[219]

A scandal in March 2008 illustrates the Revenue Agency's susceptibility to the executive branch's authority. At that time, the President forced the Agency's Federal Manager and his Director of the Customs Services to resign after a public fight between the two over the computerized system that controls customs duties.[220] The Revenue Agency's legal structure provides that the Federal Manager may appoint and remove the Director of the Customs Service. When the Federal Manager attempted to remove the Director, however, the

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216. *See* Régimen Previsional, Law No. 26452, *supra* note 211.

217. Organización y Competencia, Decree No. 618 (Arg.), *available at* http://www.infoleg.gov.ar/infolegInternet/anexos/40000-44999/44432/texact.htm.

218. Establécense normas para la organización de su funcionamiento, Decree No. 1399 (Arg.), *available at* http://www.infoleg.gov.ar/infolegInternet/anexos/65000-69999/69716/norma.htm.

219. *Id.*

220. After both officials resigned, the media published stories claiming that the fight had been over a 90 million dollar contract to replace the old computerized system. *See En Plena Interna, Caen Abad y Echegaray,* LA NACIÓN, Mar. 19, 2008, *available at* http://www.lanacion.com.ar/nota.asp?nota_id=996984; *see also Detrás de la Pelea Abad-Echegaray, Hay un Negocio de US$ 90 Millones*, CLARÍN, Mar. 20, 2008, *available at* http://www.clarin.com/diario/2008/03/20/elpais/p-00801.htm.

President forced both to resign. Less than a year later, the President appointed the former Director of Customs Services to head the Revenue Agency. The new Director had strong political connections,[221] which raises the possibility that the President's involvement in the scandal had more to do with political patronage than efficient government management. Although the Revenue Agency is legally subject to the jurisdiction of the Ministry of Economy and the President, it operates under a decree designed to grant it considerable independence. However, in practice, its freedom of action depends upon a President willing to keep her distance, not on strong legal protections.

Finally, like the Central Bank, the Pension Agency and the Revenue Agency, the various regulatory agencies that oversee privatized utilities also suffer from undue executive influence. These agencies should be insulated to avoid conflicts of interest and political interference with their activities from the executive branch. Once again, the legal mechanisms that created these agencies theoretically insulate them from such interference. In practice, they do not function as independent agencies.

As we will see, many have operated under a system of "intervention" (*intervención*) for longer or shorter periods of time. In Spanish, this term identifies circumstances where the executive appoints a single person to direct an agency temporarily, without following the legally required procedures. The President's power to intervene in a national agency is implied by the general powers of administration in the Constitution as set forth in Article 99, Section 1. However, the constitutional language fails to define when and for how long an intervention is appropriate. In principle, intervention is supposed to be employed only in cases of grave mismanagement and for a limited period of time.[222] As we will see, in the case of certain regulatory agencies, however, the President has used interventions to appoint a single person where there ought to be a Board of Directors and permitted that person to serve for an extended period.

In addition to the use of interventions, the undue influence of the executive over most regulatory agencies is also attributable to the fact that many are established by executive decrees, not legislative statutes. These decrees usually call for executive boards with three to eight members, all of whom the President or one of the President's cabinet members appoints. The decrees impose various conditions on appointments. Some require appointees to have professional qualifications. Others give non-executive bodies a role in recommending names to the President or the responsible cabinet secretary. In some cases, the executive branch has to consult Congress during this process, but Congress has no veto power over such appointments by the executive or her cabinet members. In general, board members have five-year staggered terms; removal is often only

221. *See Claudio Moroni renunció como titular de la AFIP y lo reemplazará Echegaray*, CLARÍN, Dec. 29, 2008, *available at* http://www.clarin.com/diario/2008/12/29/um/m-01830644.htm.

222. Officials who have not been appointed in accordance with the law frequently chair even those agencies in which the President has not intervened.

for cause. Hence, the President cannot entirely control the agencies. The following is a survey of the appointment processes for Argentina's most important agencies.

Congress passed a law that established the regulatory agencies for gas and electricity, *Ente Nacional Regulador del Gas* ("Gas Agency") and *Ente Nacional Regulador de la Electricidad* ("Electricity Agency"), in 1991-1992. Both entities have a five-member board appointed by the President; members serve staggered five-year terms. Board members may be reappointed indefinitely.[223] For each board, the Secretary of Energy must organize a merit-based selection process, the purpose of which is to appoint professionals with sufficient knowledge and background.[224] When appointing and removing members of the board, the executive must state its reasons to a bicameral congressional committee. The committee must issue a response within 30 days, after which the executive is permitted to act.[225] In the electricity sector, although the executive appoints the board, the Federal Electricity Council provides input toward the selection of two members.[226]

The regulatory agency for the water and sanitation sector, *Ente Regulador de Agua y Saneamiento* ("Water and Sanitation Agency") has a three-member board with one member appointed by the executive, one appointed by the President at the suggestion of the Government of the City of Buenos Aires and one at the suggestion of the Government of the Province of Buenos Aires.[227] Board Members serve four-year terms, which can be extended by one successive period, and the appointees must have relevant technical and professional background.[228] There is no formal process for merit recruitment.[229] Unlike the

223. Marco Regulatorio de la Actividad. Privatización de Gas del Estado Sociedad del Estado, Law No. 24076, May 20, 1992 (Arg.), *available at* http://www.infoleg.gov.ar/infolegInternet/anexos/ 0-4999/475/texact.htm. The members of the board can only be removed through a reasoned act of the executive (Article 55). The members must also have technical and professional skills in the area. Regimen de la Energia Electrica, Law No. 24065, Dec. 19, 1991 (Arg.), *available at* http://www.infoleg.gov.ar/infolegInternet/anexos/0-4999/464/texact.htm.

224. Apruébase la "Reglamentación de la Ley N° 24.076", que regula la actividad de transporte y distribución de gas natural como servicio público nacional, Decree No. 1738, Sep. 18, 1992 (Arg.), *available at* http://www.infoleg.gov.ar/infolegInternet/anexos/10000-14999/10239/texact.htm.

225. Privatización de Gas, Law No. 24076, *supra* note 223.

226. The Federal Electricity Council is a body that includes representation of the provinces, manages funds that must be used in the energy sector, and advises on electricity policies.

227. Apruébase el Convenio Tripartito, Law. No. 26221, Feb. 13, 2007 (Arg.), *available at* http://www.infoleg.gov.ar/infolegInternet/anexos/125000-129999/125875/norma.htm. The decree that implemented the law - Servicio público de agua potable y desagües cloacales [Potable Water and Sewers], Decree No. 763, Jun. 20, 2007 (Arg.), *available at* http://www.infoleg.gov.ar/infolegInternet/anexos/125000-129999/129384/norma.htm - established a period of 15 days for both jurisdictions to propose appointees.

228. The appointees need to have a degree in the field and professional experience related to their tasks. Water and Sewers, Decree No. 763, *supra* note 227.

229. The members of the Water and Sanitation Agency can only be removed by the executive

Gas and Electricity Agencies, neither the appointment nor the removal of the members of the Water and Sanitation Agency requires congressional participation.

In 1996, a delegated decree authorized the executive to reorganize the public administration. This decree gave rise to both the *Comisión Nacional de Regulación del Transporte* ("Transport Agency") and the *Comisión Nacional de Comunicaciones* ("Telecoms Agency").[230] Another decree specified the organization of the Transport Agency, establishing a board of five members, with five-year terms that can be extended for one successive period.[231] There is no merit-based appointment process and no involvement of the legislature. A board of eight members appointed by the executive manages the Telecom Agency, under a resolution of the Secretary of Communications; members have five-year terms with one reappointment.[232] There are no requirements of professional experience, no merit reviews for appointments or removals, and no role for the legislature.

In all five cases, the formal provisions are seldom followed. Thus for the Gas Agency, none of the 2004 appointees fulfilled the professional requirements established by the Secretary of Energy.[233] Although the executive claimed that it used the legally established procedure, a 2008 report by an NGO documented numerous irregularities that pointed to the violation of the law's merit-based requirements.[234] Later, in May 2007, the Gas Agency experienced an executive intervention after its President was involved in a corruption scandal.[235] As a result, the executive replaced the agency board with a single official appointed

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in case of violation of any of the provisions of the regulatory framework, conviction for intentional crimes, or for falling under one of the provisions determining ineligibility. Convenio Tripartito, Law No. 26221, *supra* note 227.

230. Modificación de la actual estructura de la Administración Nacional, Decree No. 660, Jun. 24, 1996 (Arg.), *available at* http://www.infoleg.gov.ar/infolegInternet/anexos/35000-39999/37574/norma.htm; Sancionada, Law No. 24629, Feb. 22, 1996 (Arg.), *available at* http://www.infoleg.gov.ar/infolegInternet/anexos/30000-34999/34209/texact.htm.

231. The board is to be appointed by the executive from among people with technical and professional backgrounds relevant in the sector. The members of the board can only be removed through a reasoned act of the executive for violation of their duties. Establécese la integración de la mencionada Comisión Nacional, Decree No. 1388, Nov. 29, 1996 (Arg.), *available at* http://www.infoleg.gov.ar/infolegInternet/anexos/40000-44999/40785/norma.htm.

232. Aprobación del Manual de Misiones y Funciones de la CNC, Res. No. 2065, Sept. 29, 1999 (Arg.), *available at* http://www.cnc.gov.ar/institucional/nuestro_org_introduccion.asp (PDF link at the bottom of the page).

233. Desígnase Presidente del Directorio, Decree No. 812, Jun. 23, 2004 (Arg.), *available at* http://www.infoleg.gov.ar/infolegInternet/anexos/95000-99999/96088/norma.htm; *Demandan al Ejecutivo por la designación de las autoridades del Enargas,* ASOCIACIÓN CIVIL POR LA IGUALDAD Y LA JUSTICIA (2006), http://www.hardineros.com.ar/acij/mostrarNoticia.php?id=217.

234. *La situación institucional actual en los entes de control de servicios públicos,* ASOCIACIÓN CIVIL POR LA IGUALDAD Y LA JUSTICIA (2008), http://www.acij.org.ar/ [hereafter "Servicios Publicos"].

235. Dispónese la intervención del citado Organismo, Decree No. 571, May 21, 2007 (Arg.), *available at* http://www.infoleg.gov.ar/infolegInternet/anexos/125000-129999/128376/norma.htm.

by decree. The initial intervention was for six months, but the President extended it for the same period four times.[236] An official, appointed by the President without legislative oversight or merit-based review, has managed the Gas Agency for over two years.[237]

In a similar exercise of power over appointments to regulatory agencies, the executive has appointed Board Members to the Electricity Agency without congressional approval or merit review, although it does not operate under an intervention. During the previous administration, the executive unilaterally appointed two members of the board. The current administration followed suit and unilaterally appointed a new president and vice-president.[238]

In the Water and Sanitation Agency all but one board seat remained empty until 2008. The executive had appointed the single Board Member.[239] Finally, in September 2008, more than one year after the appointments should have been made, the executive appointed the City of Buenos Aires' candidate.[240] At the time of writing, however, the Province of Buenos Aires' candidate continues to wait for a presidential appointment. The reason for this situation is unclear. Although partisan issues might in theory be at play, this is highly unlikely, because the city is governed by a political opponent of the national administration, while the province's government belongs to the same party ruling the nation. The case does illustrate, however, the need for reformers carefully to consider hyper-presidentialism not only with regards to the three branches of government but also with respect to federalism at both the provincial and municipal levels, a topic not directly covered in this article for reasons of space.

The Transport Agency is unique relative to the other regulatory agencies because it supervises private firms that receive about $2.5 billion dollars a year in subsidies.[241] Thus its decisions are important because it can provide

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236. Prorrógase la intervención al citado Ente, Decree No. 1646, Nov. 14, 2007 (Arg.), *available at* http://www.infoleg.gov.ar/infolegInternet/anexos/130000-134999/134573/norma.htm; Prorrógase la intervención del citado organismo autárquico de la Secretaría de Energía, Decree No. 953, Jun. 17, 2008 (Arg.), *available at* http://www.infoleg.gov.ar/infolegInternet/anexos/140000-144999/141627/norma.htm; Prorrógase la intervención del Ente Nacional Regulador del Gas, Decree No. 2138, Dec. 11, 2008 (Arg.), *available at* http://www.infoleg.gov.ar/infolegInternet/anexos/145000-149999/148605/norma.htm; Prorróganse la intervención del Ente Nacional Regulador del Gas y la designación del Interventor, Decree No. 616, May 26, 2009 (Arg.), *available at* http://www.infoleg.gov.ar/infolegInternet/anexos/150000-154999/153805/norma.htm.

237. *See* Servicios Publicos, *supra* note 234.

238. *Id.*

239. *Id.*; *see also* Desígnase Presidente del Directorio, Decree No. 702, Jun. 06, 2007 (Arg.), *available at* http://www.infoleg.gov.ar/infolegInternet/anexos/125000-129999/128989/norma.htm.

240. Desígnase Directora en representación del Gobierno de la Ciudad Autónoma de Buenos Aires, Decree No. 1497, Sept. 16, 2008 (Arg.), *available at* http://www.infoleg.gov.ar/infolegInternet/anexos/140000-144999/144828/norma.htm.

241. *See Subsidios al Transporte Irán Directo a Jubilados y Beneficiarios de Planes*, PERFIL, Sept. 19, 2010, *available at* http://www.diarioperfil.com.ar/edimp/0505/articulo.php?art=

opportunities to political allies. The executive has exercised power over the Transport Agency by intervention since 2001;[242] a single Director appointed by the President governs the agency. Although the Transport Agency allegedly suffered from irregularities that justified the initial intervention, the President continues to issue decrees maintaining the intervention and appointing new Directors. These decrees, however, do not set forth plans to restructure the agency nor make any move to select candidates for the board. This suggests that the intervention has improperly become a mechanism to validate the President's control over a politically useful agency, rather than as an interim mechanism to normalize the institutional situation of the agency. After more than seven years and seven different Directors, the government has yet to produce a plan to reform the Transport Agency and to select candidates for its Board.[243] No government action exists to suggest that the executive will normalize the Transport Agency's institutional situation anytime soon.

Similarly, the executive has operated the Telecom Agency under a state of intervention for many years. In March 2002, all the Telecom Agency Board Members were forced to resign, and the President appointed a single Director in the Board's place, publicly declaring that the purpose of the intervention was to reorganize the agency.[244] The executive has continued to maintain the intervention, claiming that the reorganization process is still under way.[245] The subsequent intervention decrees set no time period for carrying out the reorganization, nor do they set out specific provisions to regulate this process. Thus, as in the other agencies and with the tacit support of the 2002 incumbents, the President has been able to undermine the statutory scheme.

2. *Judges and Prosecutors*

We give separate consideration to presidential influence on the appointment of judges and prosecutors because these offices are so central to the oversight of executive power. In both cases the Argentine President plays an important role during the selection process. Nevertheless, as we will see below, some judges have asserted their independence from the executive branch in a few instances. Even judges appointed by an incumbent President have sometimes ruled against his or her unilateral exercises of power.

Those who drafted the 1994 amendment sought to enhance the judiciary's

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242. Interviénese al citado organismo, Decree No. 454, Apr. 24, 2001 (Arg.), *available at* http://www.infoleg.gov.ar/infolegInternet/anexos/65000-69999/66779/norma.htm.

243. Servicios Publicos, *supra* note 234.

244. Dispónese su intervención, Decree No. 521, Mar. 19, 2002 (Arg.), *available at* http://www.infoleg.gov.ar/infolegInternet/anexos/70000-74999/73007/norma.htm.

245. *See, e.g.*, Prorrógase la Intervención del citado organismo descentralizado de la Secretaría de Comunicaciones, Decree 1983, Jun. 28, 2006 (Arg.), *available at* http://www.infoleg.gov.ar/infolegInternet/anexos/120000-124999/124174/norma.htm.

ability to check executive power adequately by improving its competence and independence. The amendment established a Judicial Council and an examination system to oversee the appointment of all federal judges except those of the Supreme Court. The Council selects the judges and oversees administration of the judiciary. It consists of representatives chosen by the political parties in the legislature, by the judges of all courts, and by lawyers admitted to practice at the federal level. It must also include scholars and academics. After each election, the Council is "refreshed." Those members who were chosen by the legislature must resign and new members are appointed. This is done to assure that the Council reflects the present political composition of Congress. The Council functions initially as a public competition, after which it issues a binding proposal with a list of three candidates. The President then selects one candidate from that list, who the Senate confirms after holding a hearing in which it publicly vets the candidate's qualifications.[246]

The Judicial Council also plays a role in the removal of judges, deciding when to open proceedings and bringing accusations before the Impeachment Jury. Judges can be removed for the same causes as Justices, that is, misconduct, crimes committed in the fulfillment of their duties, or ordinary crimes. After the Judicial Council makes an accusation, the Impeachment Jury, whose members are legislators, judges, and lawyers with federal registration, has six months to decide whether to remove the judge.[247] The structure of this process aims to create a non-politicized, impartial, transparent, and technical procedure to appoint and remove federal judges.[248]

The Judicial Council, however, has not curtailed the influence of the executive in appointing judges. It is common knowledge that if a Judicial Council's approved candidate is not politically connected, the President will never select that person, and the Senate will never confirm the candidate. Further, in February 2006, Congress passed an amendment to the Judicial Council Act, which compromised the impartiality and independence of the Council. The legislation reduced the Council's size from twenty to thirteen members and augmented the influence of the members representing the ruling party by giving them veto power over the Council's major decisions.[249] Congress justified these reforms on efficiency grounds. The result, however, was to increase the majority's control over the Judicial Council from at most 25% to having veto power over every major decision.[250] In July 2010, the lower

246. Art. 99, Secs. 4, 114, CONSTITUCIÓN NACIONAL [CONST. NAC.] (Arg.).

247. *Id.* arts. 114, 115.

248. Funcionamiento. Autoridades. Comisiones y secretaría general, Law No. 24937, Dec. 10, 1997 (Arg.), *available at* http://www.infoleg.gov.ar/infolegInternet/anexos/45000-49999/48231/norma.htm.

249. Modificase la Ley N° 24937, Law No. 26080, Feb. 22, 2006 (Arg.), *available at* http://www.infoleg.gov.ar/infolegInternet/anexos/110000-114999/114258/norma.htm.

250. The original Judicial Council had twenty members. These included the Chief Justice, four judges, eight legislators, four lawyers, one representative of the executive, and one scholar. The

House approved a bill (pending in the Senate) that would reinstate some of the Council's independence by increasing the Council's size by five members and allocating the members in such a way as to eliminate the ruling party's veto power.[251] If this bill becomes law, it will be important to track the impact of these changes on the judicial appointment process.

Appointments to the Supreme Court do not go through the Judicial Council. Instead, the President appoints its members subject to confirmation by two-thirds of the Senate members who are present. The Justices have secure tenure and can only be removed for serious misconduct. If and when this happens, an impeachment process further protects the Justices' positions.[252] This process should in theory be more or less likely to produce strong nonpartisan candidates depending upon the political composition of the Senate. However, beyond the partisanship issue, expert NGOs have claimed that, both at the executive and the legislative stages, the process is highly deficient in terms of transparency, independence, and fairness, and does not guarantee the selection of competent, independent and honest individuals.[253] As with Supreme Court appointments, the General Prosecutor and the General Defense Attorney are appointed by the President subject to Senate confirmation.[254] The 1994 constitutional amendment gave the General Prosecutor and the General Defense Attorney functional autonomy and financial independence in order to reduce these appointees' susceptibility to directives from the executive branch.[255]

In an additional move to improve public accountability, President Néstor

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eight-legislators included four per house, with two representing the majority party, one from the first minority, and one from the second minority. The political sector, composed of nine members, thus represented 45% of the total Council. The majority and minorities of the legislature were equally represented. Assuming that the ruling party had a majority in the legislature, it would control five members of twenty. In contrast, according to the new Act, the Council has 13 members: three judges (the Chief Justice and one judge were removed); six legislators (three per house, two from the majority party and one from the first minority); two lawyers; one representative of the executive; and one scholar. The political sector thus represents 54% of the total (seven members); and, if the ruling party has a majority in the legislature, it would have five out of 13 members or 38.5% of the total—more than one third. Most important decisions (selection and accusation) require a two-thirds vote (nine votes). Hence, the governing party has veto power over every major decision.

251. The new bill increases membership from 13 to 18 people. These would be allocated as follows: the Chief Justice (who would also chair the Council and vote only to break a tie or if necessary due to a qualified majority requirement); three judges; six legislators (three per house, one from each of the three largest political parties); four lawyers; one representative of the executive; and three scholars. The political sector would thus represent 38.8% of the total (seven members); and if the ruling party has a majority in the legislature, it would only have three out of 18 members, and thus would therefore cease to have veto power.

252. Arts. 53, 59, 110; Art. 99, Sec. 4, CONSTITUCIÓN NACIONAL [CONST. NAC.] (Arg.)

253. *See* Asociación por los Derechos Civiles et al., *Una Corte para la Democracia I* (2002); *see also* Asociación por los Derechos Civiles et al., *Una Corte para la Democracia II* (undated), http://www.adccorte.org.ar/verarticulo.php?iddocumento=91.

254. Organización e integración, Law No. 24946, Mar. 11, 1998 (Arg.), *available at* http://www.infoleg.gov.ar/infolegInternet/anexos/45000-49999/49874/texact.htm.

255. Art. 120, CONSTITUCIÓN NACIONAL [CONST. NAC.] (Arg.); *See* ZARINI, *supra* note 31.

Kirchner—husband of current President Cristina Kirchner—issued two decrees that limited the executive branch's discretion over appointments to the Supreme Court,[256] the General National Prosecutor's office, the General National Defender's office, and all other federal prosecutorial and defenders offices that require Senate confirmation.[257] The decrees set up a participatory process that allows private citizens, nongovernmental organizations, human rights organizations, academic associations and professional associations (for example, the bar) to present comments, observations, and information regarding the President's potential appointees. The executive must publish the names and professional resumes of its candidates.[258] The participatory process must remain open and active for fifteen days, so that interested parties may submit written comments.[259] However, this system exists only by presidential decree. If at any time the President were to find that the process is too burdensome, she could end it. The system also fails to account for potential presidential influence after appointments are made—a possibility that we illustrate below in connection with the anti-corruption prosecutor.

For a while during the past few years, the Prosecutor of Administrative Investigations, an office within the General Prosecutor's office, was quite independent. This position is charged with investigating and prosecuting crimes committed by officials in the public administration, by firms partially or totally owned by the state, and by any institution or association receiving public funds.[260] Largely due to the last Prosecutor's personal commitment to fight corruption, and thus not to the agency's institutional structure, the office accused many high level executive officials, including even Presidents Kirchner and Fernández de Kirchner.[261]

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256. Procedimiento para el ejercicio de la facultad, Decree No. 222, Jun. 19, 2003 (Arg.), *available at* http://www.infoleg.gov.ar/infolegInternet/anexos/85000-89999/86247/norma.htm.

257. Establécese que el procedimiento para el nombramiento de Magistrados de la Corte Suprema de Justicia de la Nación, Decree No. 588, Aug. 13, 2003 (Arg.) (establishing the procedure to name Supreme Court justices), *available at* http://www.infoleg.gov.ar/infolegInternet/anexos/85000-89999/87634/norma.htm.

258. Ejercicio de la facultad, Decree No. 222, *supra* note 256; Decree No. 588, *supra* note 257 (establishing that a publication must include a local newspaper to consider federal judges with standing in a province).

259. *Id.*

260. *See* Organización e integración, Law No. 24946, *supra* note 254.

261. The Prosecutor's major actions were: (a) prosecuting two consecutive Ministers of Economy who authorized a suspicious compensation payment to a private firm; (b) prosecuting the Secretary of Media, who was forced to resign, under charges of having awarded official publicity contracts to companies to which himself, his family members, and close friends were associated, an investigation that also yielded another prosecution for illicit enrichment; (c) performing a joint investigation with the General Audit Office over a contract for power lines construction in the Province of Santa Cruz, governed for ten years by Kirchner, for a 48% overpricing; (d) prosecuting the Secretary of Transport, who was forced to resign, for suspicious concessions, contracts, and subsidies related to the trains and subways sectors, and for influence peddling with regards to free plane tickets for private flights that he and his family received from several privatized companies

However, that commitment did not last long. The Prosecutor of Administrative Investigations is under the direction of the General Prosecutor, who is nominally independent under the Constitution. However, Presidents have managed to undermine their independence. In 2004, for example, former President Kirchner appointed Esteban Righi as the Nation's General Prosecutor. Arguably, a conflict of interest existed because Righi's law firm had defended President Kirchner when he was investigated for illicit enrichment during his term as Governor of the Province of Santa Cruz.[262] Congress, nevertheless, approved his appointment.

In 2008, Righi, who was still in office, severely restricted the powers of the Prosecutor of Administrative Investigations, denying the office direct authority to launch cases that it had not initiated and, in cases initiated through its own accusation, limiting it to instances where the regular prosecutor had decided to drop the charges.[263] Righi explained his decision as an effort to reorganize the special prosecutor's caseload to reduce conflicts with the regular prosecutor's activities.[264] In practice, these actions reduced the power of an agency that had been attacking misconduct, excesses, and corruption in the national administration.[265] In March 2009, the Prosecutor of Administrative Investigations resigned. As a justification, he said that although corruption is present everywhere in greater and lesser degrees, Argentina "stands out for the almost absolute impunity of this phenomenon, and for the lack of will and seriousness to attack it."[266] Not surprisingly, when a federal judge closed the illicit enrichment case against the Kirchners in December 2009, neither the regular prosecutor of the case nor the one who temporarily replaced the resigned Prosecutor of Administrative Investigations appealed.[267] Although a politician promoted the impeachment of the judge before the Judicial Council because of the suspiciously swift closure of the case, the ruling party's representatives and allies in the Council cast a majority vote against it.[268]

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under his supervision and to which he directed subsidies; and (e) prosecuting the Kirchners for illicit enrichment. *See* Volosin, *Presidential Corruption*, *supra* note 167.

262. *See* Rodrigo Alegre, *Esteban Righi, el Amigo de Kirchner que Limitó el Poder del Fiscal Anticorrupción*, PERFIL, Nov. 8, 2008, *available at* http://www.diarioperfil.com.ar/edimp/0310/articulo.php?art=10873&ed=0310.

263. *See* Res. No. 147, Nov. 5, 2008 (Arg.), *available at* http://www.mpf.gov.ar/resoluciones/pgn/2008/pgn-0147-2008-001.pdf.

264. *Id.*

265. *See* Paz Rodríguez Niell, *Limitan las Facultades de la Fiscalía Que Investiga la Corrupción*, LA NACIÓN, Nov. 7, 2008, *available at* http://www.lanacion.com.ar/nota.asp?nota_id=1067547&high=skanska.

266. *See Renunció el fiscal Garrido en medio de la polémica por el recorte de funciones*, CLARÍN, Mar. 12, 2009, *available at* http://edant.clarin.com/diario/2009/03/12/um/m-01875888.htm.

267. *See Enriquecimiento K: Piden el Juicio Político de Oyarbide*, CLARÍN, Mar. 13, 2010, *available at* http://edant.clarin.com/diario/2010/03/13/elpais/p-02158414.htm.

268. *See El Consejo de la Magistratura Vuelve a Salvar a Oyarbide*, LA NACIÓN, Jul. 8, 2010, *available at* http://www.lanacion.com.ar/nota.asp?nota_id=1282850.

In short, the combination of the Judicial Council and Senate confirmation for top posts does not provide an adequate check on presidential power. President Kirchner instituted more transparent and participatory processes in connection with his own high level appointments. Although a positive step, this process does not apply to federal judges other than the Supreme Court Justices. As we saw, these lower level judges are crucial for corruption prosecutions within the executive branch, but close political allies with few qualifications are sometimes still appointed and/or "saved" by the ruling party in the Judicial Council. Nevertheless, there are some situations where the courts do act independently, as suggested by the cases we summarize in the next section. As for the prosecutors, although the 1994 amendment purported to grant them real independence, their prosecutorial decisions are not fully insulated from the President, especially for high profile cases.

B. The Philippines

Like her Argentine counterpart, the Philippine President has considerable influence over appointments under the 1987 Constitution.[269] In the Philippines, only two institutions limit the President's power to appoint: Congress, through the Commission on Appointments (CA),[270] and the seven-member Judicial and Bar Council (JBC).[271] Neither of these operates as a strong check on the President.

Instead of full Senate confirmation, the 25-member Commission on Appointments must consent to high-level appointments, including heads of executive departments, ambassadors and top military officials. The CA must also give its consent to appointments to oversight bodies that perform checking functions vis-à-vis the executive.[272] Outside of the CA process, the President, on her own, appoints many less senior officers in cabinet departments although the Congress may assign some appointment authority elsewhere.[273] The President can make recess appointments when Congress is not is session, which are "effective only until disapproval by the Appointments Commission or until the next adjournment of the Congress." The appointment provisions—copied

269. *See* CONST. (1987), art. VII, sec. 16 (Phil.).

270. *Id.* art. VI, sec. 18.

271. *Id.* art. VIII, sec. 8(1).

272. These include the top posts at the Commission on Audit, the Civil Service Commission, and the Commission on Elections. *Id.* art. IX(B), sec. 1; art. IX(C), sec. 1; art. IX(D), sec. 1; art. IX, sec. 9. The Governor of the Central Bank is also included by statute. New Central Bank Act, Rep. Act No. 7653, *supra* note 194, at sec. 6(a). The Ombudsman and his deputies must be recommended by the Judicial Council.

273. Prominent examples include the members of the Monetary Board, pursuant to the New Central Bank Act and members of the Securities and Exchange Commission, pursuant to the Securities Regulation Code. Central Bank Act, Rep. Act No. 7653, *supra* note 194; Securities Regulation Code, Rep Act No. 8799 (Phil.), *available at* http://www.chanrobles.com/republicactno8799.htm.

almost verbatim from the 1935 Constitution—also permit Congress to dilute the President's appointment power by sharing or reallocating the President's authority.[274] For example, in statutes that create new government agencies, Congress has included provisions that limit the President's appointees to specific people recommended by another government body or to a list of candidates.[275]

The second institution that checks the executive's influence is the Judicial and Bar Council (JBC). The JBC makes recommendations to the President regarding appointees to the judiciary[276] and to constitutional commissions such as the Civil Service, Elections, and Audit Commissions.[277] In a few cases, the President is prohibited from even proposing potential appointees; for example, she must appoint members of the Supreme Court, the Ombudsman and the Ombudsman's deputies from a list provided by the JBC.[278]

In the last decade, however, neither institution has meaningfully counterbalanced the President's vast appointment power. If the Appointments Commission fails to act on a proposed appointment while Congress is in session, the President can keep renewing the appointment on an interim basis until the Appointments Commission acts.[279] The Philippine Supreme Court has held that the President can also make a temporary stopgap appointment "to fill an office for a limited time until the appointment of a permanent occupant to the office."[280] This broad interpretation of the President's appointment power therefore limits the Appointments Commission from acting as a meaningful check on the President.[281] Instead of keeping a vacancy in the office or permitting the incumbent official to remain, the President can virtually appoint her original CA nominee to the ad interim appointment despite the absence of approval from the CA.

Although the President must select nominees to the Supreme Court from a list prepared by the JBC, the incumbent President can influence the list. In mid-summer 2009, for example, President Arroyo returned the shortlist of nominees

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274. Rufino v. Endriga, G.R. No. 139554 (S.C., July 21, 2006) (Phil.) (en banc) ("The original text of Section 16, Article VII of the 1987 Constitution, as written in Resolution No. 517 of the Constitutional Commission, is almost a verbatim copy of the one found in the 1935 Constitution."), *available at* http://www.chanrobles.com/scdecisions/jurisprudence2006/july2006/G.R.%20No.%20139554.php.

275. CONST. (1987), art. VIII, sec. 8(2), (5); sec. 9 (Phil.)

276. *Id.* sec. 8(2), (5).

277. *Id.* art. IX(B), sec. 1; art. IX(C), sec. 1; art. IX(D), sec. 1; art. IX(D), sec. 1.

278. *Id.* srt. VIII, sec, 9; art. XI, sec. 9.

279. Matibag v. Benipayo, G.R. No. 149036 (S.C., April 2, 2002) (Phil.) (en banc), http://www.lawphil.net/judjuris/juri2002/apr2002/gr_149036_2002.html.

280. Pimentel v. Ermita, G.R. No. 164978 (S.C., Oct. 13, 2005) (Phil.) (en banc), http://sc.judiciary.gov.ph/jurisprudence/2005/oct2005/164978.htm.

281. *See* Isagani Cruz, *President Arroyo's Unconfirmed Appointments*, PHILIPPINE DAILY INQUIRER, Sept. 14, 2008, *available at* http://opinion.inquirer.net/inquireropinion/columns/view/20080914-160503/President-Arroyos-unconfirmed-appointments. Cruz is a former member of the Supreme Court.

for the Philippine Supreme Court to the JBC, despite the fact that it exceeded the three-person minimum requirement.[282] She declared: "the President cannot be too careful about the selection and appointment of the associate justices of the [Supreme Court]. It is respectfully submitted that the two positions deserve a wider array of nominees to be submitted for the President's consideration."[283] This was the second time that President Arroyo had rejected the JBC's list of nominees and requested another.

The President appoints officials intended to check the use of her appointing authority—the members of the Supreme Court, the Office of the Ombudsman, and the Civil Service Commission. The incumbent President moved from the vice-presidency to the presidency in 2001, following the resignation of former President Joseph Estrada. She was then elected in 2004 for a full six-year term. This means the incumbent legally occupied the presidency for nearly a decade by the time her term expired in 2010. Thus, the deliberate staggering of terms for various constitutional officials under the 1987 Constitution has had little impact. Consequently, the President's political allies now dominate these key institutions.[284] The Ombudsman, who is supposed to implement an anti-corruption mandate, was an Arroyo ally during her presidency. He was notably inactive in pursuing allegations of graft against government insiders.[285] In late 2009, the former President made her sixth appointment to the Supreme Court in that year, bringing the total number of her appointees to fourteen out of fifteen members.[286] She also sought to appoint a new Chief Justice before leaving office.[287]

In her final months as President, she aggressively pushed to appoint the next Chief Justice of the Supreme Court, despite an explicit constitutional prohibition on making presidential appointments two months prior to the expiration of the executive's term.[288] The prohibition in Art. VII, Sec. 15 of the Constitution states:

> Section 15. Two months immediately before the next presidential elections and up to the end of his term, a President or Acting President shall not make appointments, except temporary appointments to executive positions when

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282. CONST. (1987), art. VIII, sec. 9 (Phil.).

283. Evangeline De Vera, *GMA wants more SC nominees from JBC*, MALAYA NEWS, Jul. 29, 2009, *available at* http://www.malaya.com.ph/jul29/news7.htm.

284. Purple S. Romero, *GMA Appointees dominate SC, Anti-Corruption Bodies*, ABS-CBN NEWS, Jul. 23, 2008, *available at* http://www.abs-cbnnews.com/node/14593.

285. *Id.*

286. The incumbent's term expires within a two-month window before the end of her term when the President is not constitutionally permitted to make judicial appointments. *See Chiz: GMA Wants to an "all Arroyo" Supreme Court*, ABS-CBN NEWS, Jan. 12, 2010, *available at* http://www.abs-cbnnews.com/nation/01/12/10/chiz-gma-wants-all-arroyo-appointed-supreme-court.

287. *Id.*

288. CONST. (1987), art. VII, sec. 15 (Phil.); Edu Punay, *Supreme Court asked: Let GMA name Chief Justice*, PHILIPPINE STAR, Mar. 1, 2010, *available at* http://www.philstar.com/Article.aspx?articleId=553965&publicationSubCategoryId=63.

> continued vacancies therein will prejudice public service or endanger public safety.[289]

In the landmark ruling in *De Castro et al. v. Judicial and Bar Council et al.*,[290] nine out of the fifteen justices of the Supreme Court held that the constitutional ban against midnight appointments did not extend to appointments to the Supreme Court. Notwithstanding the plain and ordinary letter of Art. VII, Sec. 15, the *De Castro* majority strangely relied on the ordering or sequence of provisions in the Constitution, declaring, among others, that since the ban on midnight appointments was located in Article VII, Sec. 15 (The Executive Branch) and not in Article VIII (The Judiciary), the ban could not extend to the Supreme Court.[291] Moreover, the *De Castro* majority purposely "reversed" a decade-long precedent, *In Re Appointments Dated March 30, 1998 of Hon. Mateo A. Valenzuela and Hon. Placido B. Vallarta as Judges of the Regional Trial Court of Branch 62, Bago City and of Branch 24, Cabanatuan City, respectively (Valenzuela)*,[292] where the Court explicitly held that the ban against midnight appointments extended to the Judiciary. The *De Castro* decision came under tremendous criticism from legal experts as well as the public, more so since the nine-member *De Castro* majority was composed of all Arroyo appointees,[293] and her appointee would also have presided over the Presidential Electoral Tribunal, that could have heard any election controversies arising from the presidential election in 2010,[294] a factor that may well have motivated the former President Arroyo. President Arroyo appointed then Senior Associate Justice Renato Corona as the next Chief Justice of the Philippine Supreme Court. In the days leading to his presidential inauguration, however, President-elect Benigno 'Noynoy'Aquino declared that he would not recognize Chief Justice Corona's appointment.[295] Contrary to settled tradition, President-elect

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289. CONST. (1987), art. VII, sec. 15 (Phil.).

290. Castro v. Judicial and Bar Council et al., G.R. Nos. 191002 *et seq.*, (S.C., Mar. 17, 2010) (Phil.) (en banc), *available at* http://sc.judiciary.gov.ph/jurisprudence/2010/march2010/191002.htm.

291. *Id.* ("Had the framers intended to extend the prohibition contained in Section 15, Article VII to the appointment of Members of the Supreme Court, they could have explicitly done so. They could not have ignored the meticulous ordering of the provisions. They would have *easily* and *surely* written the prohibition made explicit in Section 15, Article VII as being equally applicable to the appointment of Members of the Supreme Court in Article VIII itself, most likely in Section 4 (1), Article VIII. That such specification was not done only reveals that the prohibition against the President or Acting President making appointments within two months before the next presidential elections and up to the end of the President's or Acting President's term does not refer to the Members of the Supreme Court.").

292. Castro v. Judicial Bar Council, G.R. No. 191002 (S.C., Apr. 20, 2010) (Phil.) (en banc), *available at* http://www.lawphil.net/judjuris/juri2010/apr2010/gr_191002_2010.html.

293. Edu Punay, *Supreme Court: GMA can appoint the next Chief Justice*, THE PHILIPPINE STAR, Mar. 18 2010, *available at* http://www.philstar.com/Article.aspx?articleid=558957.

294. CONST. (1987), art. VII, sec. 4 (Phil.) ("The Supreme Court, sitting *en banc*, shall be the sole judge of all contests relating to the election, returns, and qualifications of the President or Vice-President, and may promulgate its rules for the purpose.").

295. *Noynoy urged anew to accept Corona as Chief Justice*, ABS-CBN NEWS (May 16, 2010),

Aquino did not take his oath of office before the Chief Justice, choosing another member of the Court instead to administer his Presidential Oath.[296] In October 2010, when the Supreme Court reversed President Aquino's Executive Order No. 2 which was meant to revoke midnight appointees of Arroyo, President Aquino sharply criticized the decision and invoked the separation of powers under the Constitution.[297] As of this writing, the controversy over the wide breadth of Presidential appointment power as wielded by former President Arroyo has not yet been resolved.

Political appointments permeate the civil service. The President directly appoints 3,500 third-level officers and another 6,500 lesser officials that are not reviewed by the Commission on Appointments. Over half have not fulfilled civil service eligibility criteria, which require an examination, a simulation exercise testing managerial ability, on-the-job validation, and an interview.[298] Many of her key appointments to specialized agencies requiring technical expertise have been of military officers—a move which has not improved administrative agency performance but has helped her stave off coups and ensure the loyalty of the majority of the armed forces.[299]

The President's power has several sources, none of which has been substantially checked by the Supreme Court. First, the President can make *ad interim* appointments or appointments in an "acting capacity," thus avoiding Appointment Committee approval. Second, presidential appointees dominate the JBC, making it vulnerable to presidential pressure. The recent case, where the President asked the JBC for new shortlists of nominees, illustrates this point. Third, political appointees, whose qualifications are effectively waived by the President, enable her political allies to occupy positions even in the career civil service. Accountability is difficult to achieve because most institutions that were constitutionally designed to check the President's exercise of power contain at least a majority of her direct appointees and, as a result, quality has suffered.

The current controversy over the revocation of President Arroyo's "midnight appointees," through President Aquino III's Executive Order Nos. 2 and 3, continues to reflect the executive branch's notion of the scope of its appointment power. As one Senator observed, the executive branch's recent orders demonstrate its preference for unilateral action and for avoiding

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http://www.abs-cbnnews.com/nation/05/16/10/noynoy-urged-anew-accept-corona-chief-justice-0.

296. Edu Punay, *Corona respects Noynoy's decision on oath-taking*, ABS-CBN NEWS (Jun. 11, 2010), http://www.philstar.com/microsite/noynoy_aquino_inauguration_2010/article.aspx?articleId=583260&publicationSubCategoryId=63.

297. Jam Sisante, *Aquino hits SC decision on midnight appointee*, GMA NEWS (Oct. 14, 2010), http://www.gmanews.tv/story/203387/aquino-hits-sc-decision-on-midnight-appointee.

298. Isa Lorenzo & Malou Mangahas, *New CSC Chief Faces Pack of Ineligible Bureaucrats*, PHIL. CENTRE FOR INVESTIGATIVE JOURNALISM (Apr. 24, 2008), http://www.pcij.org/stories/2008/ineligible-bureaucrats.html.

299. Joel D. Adriano, *Arroyo's risky politics of patronage*, ASIA TIMES ONLINE (Dec. 9, 2008), http://www.atimes.com/atimes/Southeast_Asia/JL09Ae01.html.

coordination with the legislative branch.[300]

C. Conclusions

The Presidents of Argentina and the Philippines both face relatively weak constraints on their appointment powers. They have each been able to circumvent even the limits that do exist through a mixture of personal pressure and extensive use of emergency and temporary powers. Even bodies that exercise independent regulatory and oversight functions are dominated by the President's appointees. There is little distinction between cabinet departments, where the President should arguably have considerable discretion to appoint and remove high level officials, and supposedly independent agencies. Most appointments do not require confirmation by the Senate, and other procedures to reduce the President's discretion do not function effectively. Regulatory and oversight agencies, courts, and prosecutors should, in theory, be insulated from undue executive influence. In practice, however, they are unable to operate free of presidential influence in either country.

V.
CHALLENGES TO PRESIDENTIAL POWER

Most modern democracies include institutional mechanisms to challenge presidential overreaching. Presidents may try to co-opt these institutions, but they are sometimes effective counterweights to presidential power. We show how such challenges have had limited positive effects in Argentina but do not work well in the Philippines. We concentrate on the role of the judiciary and of specialized independent agencies that seek to bring transparency and accountability to the operation of government.

We leave impeachment to one side. It is an extreme method for challenging an incumbent president and does not function as a routine form of oversight. Rather, it serves as a blunt legislative response to a crisis. Both the Argentine and Philippine constitutions contain impeachment mechanisms for the President and other high-level officials.[301] Argentina's legislature has never attempted to impeach the President. The Philippine legislature did initiate the impeachment process against President Joseph Estrada in 2001, and he resigned before the process was complete. Thus, this option is always a possibility, but if used frequently would represent a breakdown of the constitutional compact. Furthermore, it may be a less credible threat if the President perceives the

300. Gil C. Cabacungan Jr., *Joker tells Aquino's legal team: Don't act rashly*, PHILIPPINE DAILY INQUIRER, Aug. 16, 2010, *available at* http://newsinfo.inquirer.net/inquirerheadlines/nation/view/20100816-287029/Joker-tells-Aquinos-legal-team-Dont-act-rashly.

301. Arts. 53, 59, CONSTITUCIÓN NACIONAL [CONST. NAC.] (Arg.); CONST. (1987), art. XI (Phil.).

legislature as politically weak.

A. Argentina

Neither judicial review of the executive's constitutional powers nor congressional oversight of her behavior has significantly limited the President, despite the fact that she occasionally loses a congressional vote. Two structural mechanisms, however, serve as more effective ways to challenge or limit presidential powers, and these have met with some success. First, independent agencies specifically designed to control and monitor the executive have won modest victories. Second, court cases sometimes enable ordinary citizens, the ombudsman, and civil society groups to challenge the powers of the executive.

1. Independent Agencies

In Argentina, three major independent agencies check the executive: the General Audit Office, the Anticorruption Office, and the National Ombudsman. Both the Audit Office and the Ombudsman report to the Congress. The Anticorruption Office reports to the Ministry of Justice. This hierarchy suggests that the Audit Office and the Ombudsman are in a better position to control excesses of presidential power than the Anticorruption Office, which is better positioned to sanction low-level malfeasance. In practice, the Ombudsman appears to be the most effective of the three at checking executive power, as we illustrate below.

The Audit Office reports to the Congress on the legal aspects, management, and auditing of all the activities of the administration, and it participates in the approval or rejection of the revenue and investment accounts for public funds.[302] The Audit Office has seven members who serve eight-year terms, which can be renewed once. The Senate and the House each appoint three members, so as to reflect the political composition of each House.[303] The presidents of both Houses appoint a seventh auditor by joint resolution to serve as the Audit Office's Chair.[304] The law requires that the auditors must have professional qualifications and specifies that they may only be removed for grave misconduct or evident violation of their duties.[305] The removal process follows the same procedure established for appointments.[306] The law does not further clarify the removal procedure, but the reference to the appointments

302. Art. 85, CONSTITUCIÓN NACIONAL [CONST. NAC.] (Arg.). The 1994 Constitution requires Congress to pass a special law to regulate the creation and operation of the GAO, but it has never been passed. The 1992 Financial Management Act continues in force even though it does not fulfill the constitutional requirements.

303. Financial Management Act, Law No. 24156, *supra* note 145.

304. *Id.*

305. *Id.*

306. *Id.*

process means that each House removes the members it appoints, and both jointly remove the Chair. In order to strengthen the legislature's role, a special bicameral committee oversees the Audit Office's review of the national budget.[307] Further, the Constitution requires that the Audit Office's Chair be a member of the political opposition.[308] This gives the opposition a prominent role in the external control of the executive, and theoretically it should help give an incentive to the Audit Office to increase the transparency and accountability of government through its work.

In practice, however, the Audit Office does not operate as independently of the executive branch as the 1994 reformers might have hoped. This is because the Financial Management Act, which rules it, was not amended after the constitutional reform and, in many respects, is against its spirit.[309] First, the Audit Office makes decisions collectively and by majority rule. This greatly reduces the chairman's ability to act independently.[310] Second, because the Audit Office's composition is proportional to the composition of Congress, if the ruling party has a majority in Congress, the opposition's role is limited. This typically reduces the Audit Office's ability to uncover mismanagement and wrongdoing. In addition, the requirement that the Audit Office reflect the political composition of the Congress is incompatible with the auditors' eight-year term. Congressional elections occur every two years; thus, the composition of the legislature varies every two years. As a result, it is impossible for the auditors both to fulfill eight-year terms and for the Office to maintain a party balance that tracks the legislature.[311]

The selection process for auditors, problems with day-to-day operations, and lack of follow-up mechanisms also compromise the effectiveness of the Audit Office. Despite the requirement that the Audit Office's appointees' have professional backgrounds that fit with their mandate, the political parties simply select those whose political views align with their own, rather than conduct investigations into their qualifications. There is also no public hearing to enable citizen participation in choosing auditors. Because the system does not guarantee transparency, publicity, citizen participation and merit qualifications, but instead reflects partisan interests, conflicts of interest can easily arise that may jeopardize the Audit Office's objectivity.[312] The agency's day-to-day

307. *Id.*

308. Art. 85, CONSTITUCIÓN NACIONAL [CONST. NAC.] (Arg.).

309. Asociación Civil por la Igualdad y la Justicia, *En Busca del Control Perdido III: Informe Sobre el Trabajo y Estructura de la Auditoría General de la Nación y Propuestas para su Modificación* 10-11 (2007), www.acij.org.ar [hereafter "ACIJ Control Perdido"].

310. Financial Management Act, Law No. 24156, *supra* note 145.

311. *See* ACIJ Control Perdido, *supra* note 309, at 14.

312. ACIJ's report mentions the infamous case of Rodolfo Barra, chairman of the GAO in 1999, who had been Minister of Justice and Supreme Court Justice of the administration which he was supposed to control, and who had even provided consultancy services for major privatized utilities that the GAO had to audit. *Id.* at 12-13.

operations also suffer from several weaknesses including the lack of sufficiently qualified personnel, the failure to carry out management audits, the excessive technicality of its reports, and a general delay at every stage of the auditing process.[313] Very few follow-up mechanisms exist to monitor and ensure that investigated parties implement the agency's recommendations.[314] Also, the Audit Office does little to coordinate its reports with other agencies that should logically take an interest in its work, such as the Anticorruption Office or prosecutors.[315]

Finally, the ruling party has used its authority to curtail the powers of the Audit Office. As a result, the Office does not function as a strong check on executive power. This occurred, for example, in January 2009, when it became public that the GAO was investigating a contract for power line construction that was to be performed by a firm related to government officials in the Province of Santa Cruz, which Néstor Kirchner had governed for ten years. According to the investigations, the construction of the second section of the project had cost, per kilometer, 48% more than the first section. Almost immediately after the report was published, the government attempted to limit the GAO's powers. After the scandal went public, the GAO's members aligned with the government proposed to constrain the chairman's authority to control the issues to be investigated, to direct the debates, and to publish the reports. However, the proposal failed due to a vigorous resistance from both opposition legislators and NGOs committed to transparency issues.[316]

Next consider the Anticorruption Office, created by law in 1999 and invested with investigative and policy-making functions. It can investigate corruption in the national public administration, in state enterprises, and in any other public or private entity in which the State participates or that has public funds as its main source of resources.[317] In this role, the Anticorruption Office receives accusations, undertakes preliminary investigations, files accusations before the judiciary, and acts as plaintiff in those cases in which the State's property is at stake. The Office also plays a major role in controlling unjustified increases in a public official's assets, as well as identifying potential conflicts of interest. It maintains a register of officials' financial disclosure statements and

313. *Id.* at 17-21.

314. *Id.* at 21-22.

315. *Id.* at 23-25.

316. *See, e.g.*, Gabriel Ziblat, *Electroingeniería Está Sospechada Pero Puede Controlarse a sí Misma*, PERFIL, Jan. 17, 2009, *available at* http://www.diarioperfil.com.ar/edimp/0330/articulo.php?art=12182&ed=0330; *see also Una Salida Que Debilita Aún Más a los Órganos de Control*, LA NACIÓN, Mar. 13, 2009, *available at* http://www.lanacion.com.ar/nota.asp?nota_id=1108180.

317. *See* Modificación. Créase la Oficina Anticorrupción en el ámbito del Ministerio de Justicia y Derechos Humanos, Law No. 25233, Dec. 10, 1999 (Arg.), *available at* http://www.infoleg.gov.ar/infolegInternet/anexos/60000-64999/61394/norma.htm; Objeto y ámbito de aplicación, Decree No. 102, Dec. 23, 1999 (Arg.), *available at* http://www.infoleg.gov.ar/infolegInternet/anexos/60000-64999/61724/norma.htm.

evaluates these statements to check for situations that indicate illicit enrichment or activities incompatible with the public office.[318] The Office, however, is constrained by its small budget. In 2008, for instance, it had a budget of only $9.4 million pesos,[319] which at the current exchange rate amounts to about $2.35 million dollars. As with any other non-independent agency, the Office's budget is decided by its superior, which in this case is the Ministry of Justice. This lack of financial autonomy limits its ability to provide any real oversight of the executive.

Even without sufficient resources, the Anticorruption Office has achieved some results in using the data it collects to support the prosecution of cases. Although it has obtained almost no convictions, the Office has a well-functioning system that connects preliminary investigations and information arising from the officials' financial statements to formal investigations within the judiciary. This is a minor achievement in absolute terms, but a significant one when compared to how the financial statements system works in the other branches of government.[320] During 2007, the Anticorruption Office issued 725 resolutions pertaining to the investigation of potential corruption allegations, 100 of which were sent to the judiciary. Of these 100 files, 58% were criminal accusations; 18% were files where the OA had no jurisdiction; 21% cases that did not meet the OA's criteria of significance; and three percent were cases where the OA decided to act as plaintiff.[321]

Argentina has a general system of financial disclosure, but each branch of government has its own subsystem. In 1999, Congress passed an act concerning ethics in public office that established mandatory financial disclosure statements for certain public officials. These reports were to be presented to their respective agencies and then sent to an independent body that would be in charge of receiving and reviewing the statements. However, opposition by the Supreme Court prevented the creation of this general agency.[322]

The Anticorruption Office is the only body that systematically evaluates these disclosure statements and that can seek to connect these evaluations to the

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318. *See* Decree No. 102, *supra* note 317.

319. *See* Oficina Anticorrupción, Informe Anual de Gestión 6 (2008) [hereafter "OA Informe Annual"], *available at* http://www.anticorrupcion.gov.ar/documentos/Informe%20anual%202008%20OA.pdf.

320. *See* Natalia A. Volosin, *Medidas Para Prevenir y Detectar Transferencias del Producto de la Corrupción Pública en la Argentina, in* GUILLERMO JORGE ET AL., RECUPERACIÓN DE ACTIVOS DE LA CORRUPCIÓN (Editores del Puerto 2008) (describing the different financial statements systems of the different branches of the federal government).

321. *See* OA Informe Annual, *supra* note 318, at 16-17. We refer to 2007 figures because the 2008 report, cited in note 319, does not include any statistics with regards to the files that the OA sent to the judiciary.

322. *See* Deberes, prohibiciones e incompatibilidades aplicables, sin excepción, a todas las personas que se desempeñen en la función pública, Law No. 25188, Sep. 25, 1999 (Arg.), *available at* http://www.infoleg.gov.ar/infolegInternet/anexos/60000-64999/60847/texact.htm. *See also* Volosin, *Medidas*, *supra* note 320.

investigations of corruption before the judiciary. The Office is also charged with controlling potential conflicts of interest. The agency uses the information in financial disclosure statements to identify possible conflicts of interest and to propose measures that officials should take to limit such conflicts. In its policy-making role, the Anticorruption Office has sponsored initiatives to prevent corruption and promote transparency by promulgating regulations that improve access to information and promote the participation of civil society in the decision-making processes of the federal administration. As a result, in 2003 the executive issued a decree regulating public hearings, lobbying disclosure, the participatory elaboration of rules, access to public information, and open meetings of the regulatory agencies that oversee public utilities.[323] Although the Anticorruption Office has limited resources, the main obstacle to its success lies elsewhere. The Administrative Control Prosecutor, who heads the office, is appointed by the president upon a recommendation from the Ministry of Justice.[324] It is thus a specialized office within the Ministry. Each new administration can appoint the director so that a political appointee of the president always directs the agency.[325] The influence of the Ministry of Justice was clear when it amended the Anticorruption Office's internal regulation in 2008. Until then, the Anticorruption Office staff attorneys could initiate investigations on their own, that is, they did not need to wait to receive a complaint.[326] The new regulation, however, only allows the director of the Anticorruption Office, a political appointee, to initiate investigations without receiving an accusation from someone outside the office.[327]

Finally, we turn to consider the National Ombudsman, established by law in 1993[328] and given constitutional status in 1994 (article 86) as an independent agency accountable to the legislature. The Ombudsman is appointed and removed by Congress with the vote of two thirds of the members present in each House, and has a five-year term that can be renewed for one more period. The

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323. Apruébanse los Reglamentos Generales de Audiencias Públicas, Decree No. 1172, Dec. 3, 2003 (Arg.), *available at* http://www.infoleg.gov.ar/infolegInternet/anexos/90000-94999/90763/norma.htm.

324. Decree No. 102, *supra* note 317.

325. The only requirements for appointment are citizenship, age (at least 30 years) and at least six years of practice as a lawyer or in the prosecutor's office or the judiciary. *Id.*

326. *See* Res. No. 749, Aug. 11, 2000 (Arg.), *available at* http://www.infoleg.gov.ar/infolegInternet/anexos/60000-64999/64100/norma.htm.

327. *See* Apruébanse el Reglamento Interno de la Dirección de Investigaciones, el Reglamento Interno de la Dirección de Planificación de Políticas de Transparencia y las Disposiciones Comunes a ambos Reglamentos, Res. No. 1316, May. 21, 2008 (Arg.), *available at* http://www.infoleg.gov.ar/infolegInternet/anexos/140000-144999/140863/norma.htm.

328. Créase en el ámbito del Poder Legislativo de la Nación la citada institución, Law No. 24284, Dec. 01, 1993 (Arg.), *available at* http://www.infoleg.gov.ar/infolegInternet/anexos/0-4999/680/norma.htm. After the 1994 amendment, the law was adapted to the constitutional provisions through Modificación, Law No. 24379, Sep. 28, 1994 (Arg.,), *available at* http://infoleg.mecon.gov.ar/infolegInternet/anexos/0-4999/766/norma.htm.

Ombudsman has functional autonomy and, thus, does not receive instructions from any other authority. In addition to the control of public administrative functions, the ombudsman's task is to defend and protect human rights, as well as other rights, guarantees, and interests established in the Constitution and the laws, in the face of deeds, acts or omissions of the Administration. As we will see below, the Ombudsman's main method of checking executive—as well as legislative—excesses is to bring cases before the judiciary.

The Ombudsman can initiate investigations in order to uncover actions of the national administration that amount to an illegitimate, defective, irregular, abusive, arbitrary, discriminatory, negligent, or seriously incompetent exercise of their functions, including those that might affect diffuse or collective interests.[329] He must also pay special attention to behavior that shows a systematic and general failure of the administration, and promote mechanisms to eliminate or reduce them.[330] The Ombudsman's powers allow him to investigate actions that judges cannot evaluate. Indeed, according to the political question doctrine elaborated by the Supreme Court, judges cannot assess the opportunity, merit, or convenience of a decision made by the political branches of government.[331] In contrast, the Ombudsman can issue warnings, recommendations, or reminders of the duties of public officials and propose new measures to which the official has to answer in writing within 30 days. If the official does not take adequate measures within a reasonable time, or does not explain the reasons not to act, the Ombudsman can inform the ministry or the official's superior. If he does not receive an adequate justification through this mechanism, he must include the issue in his report to the legislature.[332]

According to statistical data provided by the Ombudsman's office, from 1994 to 2007 the agency initiated 181,043 files.[333] Of the total, 95.4% were initiated by an individual complaint, four-and-a-half percent originated in another agency, and almost two percent were initiated by the ombudsman's office alone. Complaints about public utilities represented 38.30% of the files, followed by social security and employment (33.90%); human rights, justice, women, and children (14%); health, education, and culture (13%); environment and sustainable development (0.50%); and legal services (0.20%). The data show that the ombudsman's office has been quite efficient: 77.83% of the files have been concluded, three-and-one-third percept were sent to a different agency, 13.52% were suspended, two percent have not been followed, and only

329. Reglamento Interno, Law No. 24284, *supra* note 328 (as amended).

330. *Id.* at art. 15.

331. *See, e.g.*, Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 22/06/1960, "Cine Callao," Fallos (1960-247-241) (Arg.); Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 13/07/1990, "Dromi, José R. c. Estado Nacional / amparo," Fallos (1991-313-630) (Arg.); *see also* Peralta, *supra* note 69.

332. Reglamento Interno, Law No. 24284, *supra* note 328 (as amended).

333. DEFENSOR DEL PUEBLO DE LA NACIÓN, DECIMOS CUARTO INFORME ANNUAL 235 (2007), *available at* http://www.dpn.gob.ar/informes/ianual2007.pdf.

three-and-one-third percent are still under way.

The Ombudsman's most celebrated actions involve privatized utilities, an area where abuses abound. It has appealed to the judiciary to force the executive or the regulatory agencies to call for public hearings, to stop rates hikes that are considered illegal or unfair, and, in general, to gain access to administrative policy-making in this area. We discuss a few of these cases below in documenting judicial actions with respect to the executive and the regulatory agencies. In comparison with the weaker GAO and the Anti-Corruption Office, the Ombudsman is arguably the most significant state agency overseeing the executive. However, as we demonstrate in our discussion of the judiciary, it is most effective when it is able to appeal to the courts.

2. *The Judiciary*

In the absence of other checks on the executive, the judiciary has begun to operate as a route for civil society to check the excesses of the executive and regulatory agencies. The 1994 amendments to the Constitution incorporated several provisions to protect diffuse and collective rights, particularly those related to the environment and to consumers. These are mainly substantive constitutional rights. However, the amendment concerning the environment requires the authorities to "provide for environmental information and education," (Article 41) while the amendment concerning consumer affairs provides for "the necessary participation of consumer and user associations and of the interested provinces" (Article 42). The Constitution also provides for a prompt and summary judicial proceeding or *amparo* to enforce both individual and collective rights (Article 43).[334]

The recognition of collective rights and of a specific procedural remedy for their enforcement led to new options for those interested in constraining the executive. Public interest litigation has increased judicial activism, in general, and has sometimes influenced administrative policymaking, and thereby constrained the executive's discretion. The following cases illustrate the way public interest litigation has emerged as a tool by which citizens can influence administrative policymaking. Examples of judicial activism spurred on by civil society lawsuits fall into three categories: cases where plaintiffs seek more participatory processes inside public agencies, cases initiated by public interest groups with the aim of changing substantive policy, and cases in which the courts, reacting to civil society lawsuits, directly intervene in the management of a program.

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334. The *amparo* had been previously recognized by the Supreme Court in the leading cases *Siri* and *Kot*. *See* Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 27/12/1957, "Siri Ángel / hábeas corpus," Fallos (1957-239-459) (Arg.); Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 05/09/1958, "Kot, Samuel S.R.L. / hábeas corpus," Fallos (1958-241-291) (Arg.).

Consumers' associations and national and local Ombudsmen have attempted to force the administration to carry out public hearings before making important decisions involving public utilities. After the 1994 amendment, scholars and practitioners initiated a debate over whether the Constitution required the participation of public utility users and consumers through public hearings.[335] The legal struggles outlined in this section highlight the sometimes fraught connection between public hearings, advisory committees, and the terms of contracts with privatized firms. Rather than limiting public power, hearings can sometimes be part of the strategy used by regulators to rein in regulated firms and limit the impact of advisory committees.

Agustin Gordilllo argues that in the regulation of public utilities due process demands a public hearing "before issuing legal administrative rules and even legislative rules of general character, or before approving projects of great significance or impact on the environment or the community."[336] Furthermore, general principles of public access and participation demand that the public be heard "before adopting a decision, when it consists of a measure of general character, a project that affects the user or the community, the environment, the designation of a judge to the Supreme Court, etc."[337]

Other scholars claim that public hearings are not mandatory in the absence of a specific legal rule or regulation because the Constitution does not mandate this process. They argue that their position is supported by the regulatory frameworks of privatized public utilities that specify the cases in which public hearings are mandatory.[338] Although we agree with Gordillo's position, it is certainly the case that public hearings are not uniformly mandated in Argentine regulatory agencies. The legal framework varies. Hearings are legally mandatory for electric and gas utilities, but are optional for telecommunications and water. Within this context, the judiciary has influenced hearing requirements, but not always in the direction of requiring more participation. Consider several examples.

In telecommunications regulation the Federal Administrative Court ruled that public participation is constitutionally required for decisions with grave social repercussions, such as the extension of a monopoly franchise.[339] Public participation can occur either through public hearings or through other procedures that guarantee users and consumers access to the relevant

335. At issue are Articles 41, 42, and 43 of the Argentine Constitution.

336. Gordillo, *supra* note 51.

337. *Id.*

338. *See, e.g.*, Máximo Fonrouge, *Las audiencias públicas,* 9 REVISTA DE DERECHO ADMINISTRATIVO 3-4 (1997), *available at* http://www.cassagne.com.ar/publicaciones/Fonrounge/AUDPUB.pdf.

339. Cámara Nacional Federal en lo Contencioso Administrativo [C.N. Fed. Cont. Adm.], 6/11/1997, "Youssefian Martín c/Estado Nacional-Secretaría de comunicaciones s/ amparo, causa 22.776/97," La Ley [L.L.] 1997-F-270 (1997) (Arg.).

information and a way to submit their points of view. Subsequent cases in other courts extended the range of issues to include, for example, charging for a service that was previously free.[340]

In the regulation of gas and electricity, battles erupted when utility rates were "pesified" in 2002.[341] Here, the consumers' association *opposed* public hearings because they could undermine a parallel process that included them as a privileged member of an advisory committee under the 2002 Emergency Act.[342] The executive and the regulatory agencies called for public hearings in order to approve an increase in tariffs without going through the renegotiation process that included a consumers' representative and the Ombudsman as participants. In response to a lawsuit by the consumers' association, the courts called off the hearings.[343] The executive then ordered the increase through a simple decree,[344] which was also struck down in court.[345] At last, it issued a decree authorizing itself, allegedly in virtue of the Emergency Act, to modify the rates of all the contracts subjected to the renegotiation process,[346] but the courts suspended this decree upon a presentation by the Ombudsman.[347]

The new Administration that took office in 2003 dissolved the previous renegotiating commission, allowing consumers' participation only through

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340. *Id.* In 2006, the Supreme Court reversed, although for reasons not related to the public hearings issue. *See* Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 31/10/2006, "Defensoría del pueblo de la ciudad de Buenos Aires c. Secretaría de comunicaciones / resolución 2926/99," Fallos (2006-329-4542) (Arg.).

341. This refers to the fact that, since the beginning of the 1990s, Argentina was governed by a convertibility statute that set a fixed rate of $1 peso = $1 dollar. This regime was eliminated after the crisis of 2001 through an emergency law that reinstated a system of administered flotation and froze utility rates until new contracts were agreed upon. *See* Declárase la emergencia pública en materia social, económica, administrativa, financiera y cambiaria, Law No. 25561, Jan. 6, 2002 (Arg.), *available at* http://www.infoleg.gov.ar/infolegInternet/anexos/70000-74999/71477/texact.htm.

342. *Id.*; Encomiéndase al citado Departamento de Estado la misión de llevar a cabo el proceso de renegociación de los contratos de obras y servicios públicos, Decree No. 293, Feb. 12, 2002 (Arg.), *available at* http://www.infoleg.gov.ar/infolegInternet/anexos/70000-74999/72323/norma.htm; Establécese que la Comisión de Renegociación de Contratos de Obras y Servicios Públicos será presidida por el Ministro de Economía e Infraestructura, Decree No. 370, Feb. 22, 2002 (Arg.), *available at* http://www.infoleg.gov.ar/infolegInternet/anexos/70000-74999/72554/norma.htm.

343. Juzgado Nacional de 1a Instancia en lo Contencioso Administrativo Federal [1ª Inst.] [Lower Courts of Ordinary Jurisdiction], 24/09/2002, "Unión de Usuarios y Consumidores y Otros c/M. Economía e Infraestructura- Resol. 20/02 s/Amp. Proc. Sumarísimo."

344. Decree No. 2437, Dec. 2, 2002 (Arg.), *available at* http://www.infoleg.gov.ar/infolegInternet/anexos/80000-84999/80098/norma.htm.

345. *See La Luz y el Gas, Otra Vez al Freezer*, PÁGINA 12 (Dec. 13, 2002), http://www.pagina12.com.ar/diario/economia/index-2002-12-13.html.

346. Decree No. 120, Jan. 23, 2003 (Arg.), *available at* http://www.infoleg.gov.ar/infolegInternet/anexos/80000-84999/81711/norma.htm.

347. Juzgado Nacional de 1a Instancia en lo Contencioso Administrativo Federal [1ª Inst.] [lower courts of ordinary jurisdiction] No. 7, 03/03/2002, "Defensor del Pueblo de la Nación c. Poder Ejecutivo Nacional," L.L. 2003-B, 796.

public hearings carried out just before the executive signed the tariff agreements.[348] The Administration also modified the original Emergency Act to allow the executive to reach partial agreements with the companies and to avoid the participation of the regulatory agencies and of consumers.[349] The new law also allows Congress 60 days to either approve or reject the new contracts, but once this period expires, the contracts are considered implicitly approved, which violates Constitutional provisions regarding legislative procedure.[350] From 2004 to 2005, several contracts were renegotiated and tacitly "approved" by the legislature, illustrating the weakness of mandated hearings, especially those carried out by unsympathetic actors.[351] Judicial review has had an impact on the process, but input from citizens and civil society seems weak and variable.

In a few cases, judges have taken aggressive action, including direct oversight of executive actions and holding their own public hearings. We summarize three recent cases concerning vaccines, prison reform, and water pollution to illustrate the potential of judicial review in a political system that has few other checks.

The first case involves a vaccine for Argentine hemorrhagic fever (AHF), an acute viral disease that can lead to death in one to two weeks. The most effective way to fight AFH is a vaccine known as Candid 1, which has 95% effectiveness.[352] The State initially acquired the vaccine through a contract with the U.S. Department of State and the Salk Institute. However, because the number of doses was insufficient, the State decided to build laboratories to produce Candid 1. Although some laboratories were built, the vaccine was never produced. As a consequence, the NGO *Centro de Estudios Legales y Sociales* (CELS), along with a law student of the University of Buenos Aires, filed a collective constitutional suit (the *amparo*) to force the State to produce the vaccine and to provide it to the potentially affected population.

After losing in the lower court, the Court of Appeals reversed, ruling that the State was obliged to produce the vaccine and establishing a period of time for its production according to a schedule from the Ministry of Health. The opinion also made the ministers involved personally responsible, and ordered

348. Decree No. 311, Jul. 3, 2003 (Arg.), *available at* http://infoleg.mecon.gov.ar/infolegInternet/anexos/85000-89999/86606/norma.htm.

349. Law No. 25790, Oct. 21, 2003 (Arg.), *available at* http://www.infoleg.gov.ar/infolegInternet/anexos/85000-89999/89434/norma.htm.

350. Article 82 of the Constitution states: "The will of each House shall be expressly stated; the tacit or fictitious approval is excluded in all cases."

351. *See, e.g., Diputados Avanza en la Prórroga de los Contratos de las Privatizadas*, INFOBAE.COM (Dec. 15, 2005), http://www.infobae.com/notas/nota.php?Idx=228134&IdxSeccion=0; *see also Las Privatizadas se Quedaron Sin Lobby*, CLARÍN (Dec. 18, 2005), http://edant.clarin.com/diario/2005/12/18/elpais/p-01301.htm.

352. *See* Gustavo Maurino, Ezequiel Nino & Martín Sigal, LAS ACCIONES COLECTIVAS. ANÁLISIS CONCEPTUAL, CONSTITUTICIONAL, PROCESAL, JURISPRUDENCIAL Y COMPARADO 114 (Lexis Nexis 2005).

the decision to be communicated to the President and the Chief of Cabinet.[353] The executive did not observe the deadline.[354] In August 2000, the first instance judge established a new deadline, which the executive also failed to meet. Eventually, the judge froze the funds in the pertinent budgetary account and instructed the executive to use those funds only for the fulfillment of the Court's order. The judge also imposed a fine of $300 pesos per day of infringement. The State appealed the decision.

The Court held a hearing to assess the situation and assign responsibility for the infringement of its order. It subpoenaed the Minister of Health, and ordered him to identify the obstacles to the production of Candid 1, to give reasons for the failure to comply with the decision, and to submit a new schedule. The Court put the national Ombudsman in charge of monitoring compliance and informing the Court. Furthermore, the Court ordered the executive's internal audit agency to audit the management of the funds assigned to the production of the vaccine, to oversee fulfillment of the schedule presented by the Ministry of Health, and to be sure funds were included in the budget bill for 2002.[355] From 2002 to 2006, when the government announced that it had finally completed the vaccine's development, the execution of the Court's decision was delayed, and several more hearings were held.[356]

The second case, prison reform, is one of the clearest examples of judicial policymaking in Argentina. In *Veribitsky*, decided by the Supreme Court in May 2005, the Court went outside of normal judicial procedure to hold public hearings, and it mandated heavy judicial involvement in implementing the decision.[357] The NGO *Centro de Estudios Legales y Sociales* (CELS) filed a collective habeas corpus before the Court of Cassation of the Province of Buenos Aires in 2001. It asked the court to find that prison conditions in police stations in the province were unconstitutional and to order the province to remedy the situation.[358] The Court of Cassation rejected the case on the grounds that it was up to the judges in each individual case to decide on these matters.

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353. Cámara Nacional en lo Contencioso Administrativo Federal [Cám. Nac. en lo Cont. Adm. Fed.], Sala IV, 02/06/1998, "Viceconte, Mariela C. c. Ministerio de Salud y Acción Social," LA LEY 1998-F, 102.

354. Maurino, Nino & Sigal, *supra* note 352, at 117-120.

355. *See id.* at 117.

356. *See* Joaquín Millón, *Triunfos de Papel. A Propósito de Viceconte* (unpublished, on file with authors).

357. Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 03/05/2005, "Verbitsky, Horacio s/hábeas corpus," FALLOS 328:1146.

358. According to a report of the NGO *Asociación por los Derechos Civiles* (ADC), when the CELS filed the habeas corpus petition in November 2001, 6364 people were detained in police stations and 23,264 people were detained in prison units. By the end of 2004, the number of people detained in the province was 30,414. At the beginning of 2005, detainees in police stations were 5951, and the overpopulation of prisons was 55.97%. *See* ADC Report of the decision "Verbitsky, Horacio s/habeas corpus," *available at* http://www.adccorte.org.ar/recursos/243/DOCUMENTO+CASO+HABEAS+CORPUS.pdf.

This decision was brought before the Supreme Court of the Province of Buenos Aires, which also rejected the case. The case finally came before the Supreme Court in early 2004.

Before the Court, CELS argued that the Court had to set the minimum standards of protection for detainees to comply with the rights established in the Constitution and in several human rights conventions; that the Court had to order the provincial authorities to follow those standards; and that the Court should establish a process for the execution of its ruling that guaranteed a dialogue between CELS and the provincial authorities subject to the Court's oversight.

In a departure from its own record, the Court held two public hearings with representatives of CELS, the Province of Buenos Aires, and Human Rights Watch, and it also accepted amicus curiae from eight organizations.[359] In its final ruling, the Court explained that it would not analyze public policies of security, crime, and imprisonment but would only examine whether those policies infringed on fundamental rights. Still, the Court found that the state of imprisonment violated minimum standards of detainment according to UN rules; it explained what those standards were; and it demanded that the local, executive and legislative branches adjust legislation related to imprisonment. It also instructed the Supreme Court of the Province and other provincial judges to intensify their vigilance over the fulfillment of those standards, to urgently determine whether there were violations of human rights, and to cease any cruel, inhuman or degrading treatment.[360] The province did not comply with the Court's decision. In November 2009 the CELS went back to the Supreme Court to denounce the infringement. In March 2010, the Supreme Court notified the provincial court, urging it to respond to CELS's claims and to preserve the security and physical integrity of those imprisoned.[361] The provincial government has not yet complied. Thus, in practice the Supreme Court's decisions did not have much consequence in reforming Buenos Aires' prisons.

The final case demonstrates a similar level of judicial activism in an

359. These were the ADC; the National Commission of Jurists; Human Rights Watch; the World Organization against Torture; the Public Interest Law Clinic of the Province of Córdoba; the civil association "*El Ágora*;" the civil association "*Casa del Liberado*" of the Province of Córdoba; and the *Centro de Comunicación Popular y Asesoramiento Legal*. The amicus curiae were formally recognized by a Supreme Court resolution in 2004. *See* Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], Acordada No. 28, Jul. 14, 2004, B.O. 20/07/2004, *available at* http://www.infoleg.gov.ar/infolegInternet/anexos/95000-99999/96742/norma.htm. As for public hearings, the Court used them without formal authorization until, in November 2007, it issued a resolution establishing them formally. *See* Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], Acordada No. 30, Nov. 05, 2007, A.D.L.A. 2008-A-427 (2007) (Arg.).

360. *See* Verbitsky, *supra* note 357, at XII (1-8).

361. *See Cárceles: la Corte Suprema Advierte por Incumplimiento del Gobierno Bonaerense*, CENTRO DE INFORMACIÓN JUDICIAL (Mar. 19, 2010), *available at* http://www.cij.gov.ar/nota-3651-Carceles--la-Corte-Suprema-advierte-por-incumplimiento-del-Gobierno-bonaerense.html.

ongoing dispute over the pollution of the Matanza-Riachuelo River. A group of neighbors sued the Federal Government, the Government of the Province of Buenos Aires, and the Government of the City of Buenos Aires, as well as 44 firms for damages suffered as a consequence of the contamination of the river *Matanza-Riachuelo*. In June 2006, the Court ordered the National, Provincial, and Local governments to present a plan to clean up the river. The Court also ordered the firms to keep the Court informed of any measures taken to prevent and reverse the contamination of the river.[362]

Just as with the prison reform case, this case was particularly novel because the Court decided to hold public hearings with all the parties involved. In September 2006, the Court held a hearing in which the three governments presented a plan for cleaning the river and creating an inter-jurisdictional authority, called ACUMAR, that later initiated a participatory process to discuss policy related to the clean-up of the river.[363] One week later, the Court heard from four NGOs.[364] A second hearing was held in February 2007 where the Secretary of the Environment explained the progress made in the implementation of the plan presented six months before. Later hearings were held in July and November 2007, where all the parties made comments on the clean-up plan.[365]

The Court finally held the three governments responsible for the cleanup of the river and for the prevention of further environmental damages.[366] The decision set time limits and distributed responsibility for carrying out the necessary actions. The Court made the ACUMAR's head personally responsible for fulfillment of its ruling, who would have to pay fines in the event of non-compliance, and it empowered a local federal judge to oversee compliance. The Court also instructed the General Audit Office to oversee the allocation of the funds and their execution by ACUMAR as it implemented the clean-up plan. Finally, the tribunal created a collective ad hoc oversight body formed by the National Ombudsman and the NGOs that intervened in the case. Although the river has not been cleaned-up yet, the Supreme Court's decisions had some real

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362. *See* Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 08/07/2008, "Mendoza, Beatriz Silvia y otros c/ Estado Nacional y otros s/ daños y perjuicios (daños derivados de la contaminación ambiental del Río Matanza-Riachuelo)," E.D. 18-7-08 (supl.), nro. 365, *available at* http://www.csjn.gov.ar/documentos/verdoc.jsp.

363. The creation of an interjurisdictional authority for the Cuenca Matanza Riachuelo (ACUMAR) came about by law a few months after the first Supreme Court ruling. *See* Créase la Autoridad de Cuenca Matanza Riachuelo, Law No. 26168, Nov. 15, 2006 (Arg.), *available at* http://www.infoleg.gov.ar/infolegInternet/anexos/120000-124999/122769/norma.htm. The Province and the Autonomous City of Buenos Aires then adopted this law's provisions.

364. These NGOs were the Fundación Ambiente y Recursos Naturales, CELS, Greenpeace, and the Asociación de Vecinos de la Boca.

365. For a detailed description of this case, see the *amicus curiae* presented by a group of legal scholars to the Supreme Court of the Province in September 2010 to support the CELS' position (especially pp. 4-6), *available at* http://www.cels.org.ar/common/documentos/Amicus-Curiae.pdf.

366. Mendoza, *supra* note 362.

bite. Its first ruling yielded the congressional decision to create the ACUMAR. Although the execution of the Court's orders by the local federal judge has been difficult and even required the Supreme Court to issue a new ruling in August 2010,[367] the new agency represents real progress. The ACUMAR is functioning; it systematically includes civil society through participatory policy-making processes; it periodically informs the local federal judge on the progress of the plan's execution, and it has created some important technical tools, such as the creation of a unified registry where firms operating in the area have to be registered so that the agency can oversee them with regards to environmental damage.[368] Scholars have also highlighted that, by giving enhanced publicity to its decisions and hearings, the Supreme Court put environmental issues on the public agenda, a result that is of great importance when it comes to remedying structural violations of rights.[369]

Thus, we see that the 1994 reforms encouraged many civil society groups to bring court challenges. These challenges have produced some significant judicial rulings that reined in the executive, particularly in cases involving privatized utilities. More recently, judicial activism over administrative policy-making has increased, with the Supreme Court paving the way for structural litigation. It will be important to trace future developments to see if these rulings are unusual events or the beginning of a trend toward more judicial oversight.

B. The Philippines

Institutional checks on presidential power work poorly in the Philippines. Under the Constitution the primary institutions for challenging unlawful exercises of presidential power are the Supreme Court and the Office of the Ombudsman. Under President Arroyo, neither was an effective, independent voice, largely because the incumbents were politically beholden to the President. No other bodies are effective substitutes, and impeachment is a remedy of last resort. It remains to be seen whether the recently elected President Aquino will take advantage of these weaknesses or whether he will seek to govern in a more accountable manner.

The Supreme Court was strengthened in the 1987 Constitution. Article VIII, Section 1 states that the judicial power includes review of cases of "grave abuse of discretion amounting to lack or excess of jurisdiction on the part of any branch or instrumentality of the Government."[370] The rationale for this provision was the experience of martial law under the Marcos dictatorship when the Court failed to resolve crucial human rights cases due to the obstacle of the

367. *See id.*

368. This information stems from the agency's website, www.acumar.gov.ar.

369. *See* the amicus curiae presented by a group of legal scholars to the Supreme Court of the Province in September 2010 to support the CELS' position, *supra* note 365, at 5.

370. CONST. (1987), art. VIII, sec. 1 (Phil.).

political question doctrine that was taken to limit the Court's ability to check even obvious excesses of presidential power.[371]

Given this power of judicial review, individuals and citizens' groups have filed petitions for writs to annul, enjoin, or prohibit governmental acts that violate fundamental human rights and civil liberties, and/or to compel the government to observe such rights and liberties. In the words of the Court, this expansion of judicial power "is an antidote to and a safety net against whimsical, despotic, and oppressive exercise of governmental power."[372] The Court's power of judicial review can extend to any governmental deprivation of rights within the penumbra of the individual's constitutionally guaranteed rights to life, liberty, and due process.[373]

The 1987 Constitution also gives the Supreme Court the completely new authority to promulgate rules "concerning the protection and enforcement of constitutional rights." [Article VIII, Section 5(5)][374] No case has yet interpreted the constitutional intent behind this expansion of the Court's rule-making power. When the Court promulgated the Rule on the Writ of *Amparo* in October 2007, it also authorized the release of its Annotation.[375] This Annotation states that the Supreme Court's rule-making power "is the result of our experience under the dark years of the martial law regime . . . In light of the prevalence of extralegal killing and enforced disappearances, the Supreme Court resolved to exercise for the first time its power to promulgate rules to protect our people's constitutional rights." [376] However, the Annotation goes on to limit its power by stating that the right "should be allowed to evolve through time and jurisprudence and

371. Francisco v. House, *supra* note 47 (citing I Record of the Constitutional Commission). *See also* Estrada v. Desierto et al., G.R. Nos. *et seq.*, 146710, Mar. 2, 2001 (Phil.) (en banc) ("To a great degree, the 1987 Constitution has narrowed the reach of the political question doctrine when it expanded the power of judicial review of this court not only to settle actual controversies involving rights which are legally demandable and enforceable *but also to determine whether or not there has been a grave abuse of discretion amounting to lack or excess of jurisdiction on the part of any branch or instrumentality of government.* Heretofore, the judiciary has focused on the 'thou shalt not's' of the Constitution directed against the exercise of its jurisdiction. With the new provision, however, courts are given a greater prerogative to determine what it can do to prevent grave abuse of discretion amounting to lack or excess of jurisdiction on the part of any branch or instrumentality of government.") (Emphasis in the original.), *available at* http://www.lawphil.net/judjuris/juri2001/mar2001/gr_146710_2001.html.

372. Macabago v. Comm'n on Elections, G.R. No. 152163, (S.C., Nov. 18, 2002) (Phil.) (en banc), *available at* http://www.lawphil.net/judjuris/juri2002/nov2002/gr_152163_2002.html.

373. *See* Andal v. People, G.R. Nos. 138268-69 (S.C., May 26, 1999) (Phil.) (en banc), *available at* http://www.lawphil.net/judjuris/juri1999/may1999/gr_138268_1999.html.

374. Reynato S. Puno, No Turning Back on Human Rights, Speech at Silliman University (Aug. 25, 2007), *available at* http://ia341243.us.archive.org/3/items/TextOfChiefJusticeReynatoPunoSillimanSpeech/PunoOnHumanRights.doc.

375. *See* Rule on the Writ of Amparo, *available at* http://www.supremecourt.gov.ph/RULE_AMPARO.pdf.

376. *See* Annotation to the Write of Amparo, *available at* http://www.supremecourt.gov.ph/Annotation_amparo.pdf.

through substantive laws as they may be promulgated by Congress."[377]

Judicial review of impeachment convictions might restrain an overzealous legislature; however, they might also limit the force of the provision. In a 2003 ruling, involving a second impeachment complaint filed against the Chief Justice of the Supreme Court,[378] the Supreme Court expressly declared that impeachment proceedings are within the scope of its expanded power of review.[379] Impeachment is not a purely political action according to the Court because "there are constitutionally imposed limits on powers or functions conferred upon political bodies."[380] Because such limits exist, "our courts are duty-bound to examine whether the branch or instrumentality of the government properly acted within such limits."[381] Here, the Court is acting as a check against possible legislative overreaching. Of course, if the Court itself is not independent of the president and the administration, it cannot serve as independent check. Further, if, as here, the process involves a justice of the Court, it will hardly be a neutral arbiter.

The Ombudsman is hailed as the "protector of the people" (Constitution, Art. XI, Secs. 5-1,4), but in practice it has failed to be a strong check on the President. Unlike Argentina's Ombudsman, who is appointed by the legislature, the Philippine Ombudsman and his Deputies are appointed by the President from a list of nominees prepared by the Judicial and Bar Council. Such appointments require no confirmation. This means that the President can veto anyone expected to be a particularly independent voice.

The Ombudsman must have at least ten years of experience as a judge or a practicing lawyer. He or she serves a seven-year term with no reappointment and cannot immediately run for office. The Ombudsman can investigate "on its own, or upon complaint by any person, any act or omission of any public official, employee, office or agency, when such act or omission appears to be illegal, unjust, improper, or inefficient." [382] He or she can direct officials to perform duties required by law or to correct abuses. The office can demand documents and other information from officers and can report irregularities in the use of funds to the Audit Commission. It can: "determine the cause of inefficiency, red tape, mismanagement, fraud, and corruption in the Government and make recommendations for their elimination and the observance of high

377. *Id.*

378. Based on its close interpretation of the Constitutional text and intent from 1986 Constitutional Commission records, the Court held that the second impeachment complaint filed by two legislators against the Chief Justice violated the constitutional prohibition against the initiation of impeachment proceedings against the same officer within a one-year period.

379. Francisco v. House, *supra* note 47.

380. *Id.*

381. *Id.*

382. CONST., art. XI, sec. 13(1).

standards of ethics and efficiency."[383]

The Philippine Legislature increased the powers of the Ombudsman in Republic Act No. 6770 ("Ombudsman Act of 1989"), which provided the office with prosecutorial functions.[384] In contrast, Argentina's Ombudsman lacks such functions, which are assigned to the Prosecutor of Administrative Investigation and/or regulator prosecutors. In the Philippines, the Ombudsman's administrative authority and his prosecutorial jurisdiction over public officers are broad but exclude the President herself, who enjoys immunity from suit during her incumbency.[385] It is only after the President has left office that the Ombudsman can investigate, and if warranted, prosecute her, even for criminal acts committed while in office. The highest profile prosecution involved the Ombudsman's criminal prosecution of former President Joseph Estrada for plunder, graft and corruption, among other serious crimes. This prosecution was possible after the Supreme Court declared Estrada to have "constructively resigned" from office.[386] The current Ombudsman, whose term ends in December 2012, was appointed by President Arroyo and is unlikely to challenge her past performance.

The Supreme Court has generally not interfered in the Ombudsman's constitutionally-mandated investigatory and prosecutorial powers, unless for "good and compelling reasons." The Court explains its policy as one that is respectful of the Ombudsman, who, "beholden to no one, acts as the champion of the people and the preserver of integrity in the public service."[387] In its view the Ombudsman is constitutionally designed precisely to give individuals direct recourse and remedial means against abusive excesses of governmental power.[388] Because the appointee and her deputies are not subject to approval

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383. Ledesma v. Ct. of App., G.R. No. 161629 (S.C., Jul. 29, 2005) (Phil.), *available at* http://www.chanrobles.com/scdecisions/jurisprudence2005/jul2005/161629.php.

384. Uy v. Sandiganbayan, G.R. Nos. *et seq.*, 105965 (S.C., Mar. 20, 2001) (Phil.) (en banc), *available at* http://www.chanrobles.com/scdecisions/jurisprudence2001/mar2001/105965_70.php.

385. For statements of the Ombudsman's administrative disciplinary authority, *see among others* Santos v. Rasalan, G.R. No. 155749 (S.C., Feb. 8, 2007) (Phil.), *available at* http://www.chanrobles.com/scdecisions/jurisprudence2007/feb2007/155749.php; Office of the Ombudsman v. Estandarte, G.R. No. 168670 (S.C., Apr. 13, 2007) (Phil.), *available at* http://www.chanrobles.com/scdecisions/jurisprudence2007/april2007/168670.php; Balbastro v. Junio, G.R. No. 154678 (S.C., Jul. 17, 2007) (Phil.), *available at* http://www.chanrobles.com/scdecisions/jurisprudence2007/july2007/154678.php.

386. Estrada v. Desierto, *supra* note 370; Estrada v. Macapagal-Arroyo, G.R. No. 146738 (S.C., Mar. 2, 2001) (Phil.) (en banc), http://www.lawphil.net/judjuris/juri2001/mar2001/gr_146738_2001.html. *And see* Estrada v. Desierto, G.R. No. 156160, (Dec. 9, 2004) (Phil.) (en banc), *available at* http://www.chanrobles.com/scdecisions/jurisprudence2004/dec2004/156160.php.

387. Salvador v. Desierto, G.R. No. 136192 (S.C., Aug. 14, 2001) (Phil.) (en banc), *available at* http://www.chanrobles.com/scdecisions/jurisprudence2001/aug2001/135482.php.

388. *See among others* Galario v. Office of the Ombudsman, G.R. No. 166797 (S.C., Jul. 10, 2007) (Phil.), *available at* http://www.chanrobles.com/scdecisions/jurisprudence2007/july2007/166797.php; Office of the Ombudsman v. Ct. of App., G.R. No. 160675 (S.C., Jun. 16, 2006) (Phil.), *available at* http://www.chanrobles.com/scdecisions/jurisprudence2006/june2006/G.R.%20No.%

even by the Commission on Appointments, the President has considerable influence over appointments, just as with the Supreme Court Justices. Impeachment is available as an *ex post* method of legislative control, but it is a difficult and controversial method of oversight. Thus, in spite of stronger prosecutorial powers than her Argentine counterpart, the office's dependence on presidential appointment undermines the Ombudsman's independence and authority vis-à-vis the executive branch.

Other oversight bodies exist, but they lack independence, both de jure and de facto. We briefly discuss three of them. They are the Constitutional Commission on Audit (hereafter "the Audit Commission"), the Department of Justice and the Presidential Anti-Graft Commission.

The Audit Commission has significant power to "examine, audit, and settle all accounts pertaining to the revenue and receipts of, and expenditures or uses of funds and property, owned or held in trust by or pertaining to, the Government, or any of its subdivisions, agencies, or instrumentalities, including government-owned and controlled corporations with original charters."[389] It then reports on these activities to the President and Congress.[390] Although Audit Commission reports cannot compel or restrain unilateral executive action, they can form the basis for private challenges to executive power, albeit issued long after the executive action has been committed. Plaintiffs usually mount private challenges through complaints filed with the Ombudsman, or through Rule 65 *certiorari* actions filed with the Supreme Court.[391] So far, however, this has not been an effective method of control, in part because of the lack of independence of the Ombudsman and the Supreme Court discussed above, and also because the Audit Commission mainly conducts belated post-audits of government

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20160675.php; Honasan II v. Panel of Investigating Prosecutors, G.R. No. 159747 (S.C., Apr. 13, 2004) (Phil.), *available at* http://www.lawphil.net/judjuris/juri2004/apr2004/gr_159747_2004.html; Roxas v. Vasquez, G.R. No. 114944 (S.C., June 19, 2001) (Phil.), *available at* http://www.lawphil.net/judjuris/juri2001/jun2001/gr_114944_2001.html; Presidential Ad Hoc Fact-Finding Comm. On Behest Loans v. Desierto, G.R. No. 130140 (S.C., Oct. 25, 1999) (Phil.) (en banc), http://www.lawphil.net/judjuris/juri1999/oct1999/gr_130140_1999.html; Garcia-Rueda v. Pascasio, G.R. No. 118141 (S.C., Sept. 5, 1997) (Phil.), *available at* http://www.lawphil.net/judjuris/juri1997/sep1997/gr_118141_1997.html; Deloso v. Domingo, G.R. No. 90591 (S.C., Nov. 21, 1990) (Phil.).

389. CONST. (1987), art. IX(D), sec. 2(1).

390. *Id.* sec 4.

391. *New impeachment complaint filed vs Arroyo*, ABS-CBN NEWS (Nov. 21, 1990), http://www.abs-cbnnews.com/nation/10/13/08/new-impeachment-complaint-filed-vs-arroyo; Press Release, Senate of the Philippines, Drilon dares Ombudsman to file charges versus execs in fertilizer scam (Feb. 3, 2006), http://www.senate.gov.ph/press_release/2006/0203_drilon1.asp; *Opponents Seek Probe of Philippine President Over Corruption Scandal*, FOX NEWS (Feb. 24, 2008), http://www.foxnews.com/story/0,2933,332109,00.html. *See also* Leslie Jamie Cobar, *Checks and Balances: Audit and Accountability in Philippine Public Finances*, PHILIPPINE PUBLIC TRANSPARENCY REPORTING PROJECT (May 11, 2010), *available at* http://www.transparencyreporting.net/index.php?option=com_content&view=article&id=87:-checks-and-balances-audit-and-accountability-in-philippine-public-finances-&catid=55:background-papers#au1.

contracts executed by the Office of the President and executive agencies. The Audit Commission reinstated pre-audit review of these contracts and other instances of executive spending only in mid-2009, after public uproar over allegations of corruption in government procurement contracts during the Arroyo administration.[392]

Other executive agencies, such as the Department of Justice and the Presidential Anti-Graft Commission,[393] have investigative and prosecutorial jurisdiction over executive officers. However, because these agencies are dependent on the Office of the President and their top officials serve at the pleasure of the President, these agencies unsurprisingly have not attempted to check the incumbent President's use of executive power.[394]

C. Conclusions

In spite of Argentina's strong executive power, marginal victories have had a modest impact on the overall operation of government. When civil society and law reform groups collaborated to bring court challenges to administrative actions on constitutional and other grounds, they have often succeeded in obtaining a favorable judgment, especially in cases related to consumers' issues. In a few cases, these groups have also obtained enforcement of judgments in complex, structural litigation cases. Furthermore, oversight bodies can sometimes provide a check, although they operate more effectively if they can connect with institutions outside of government.

In the Philippines the Supreme Court has had limited success in restraining excessive presidential power,[395] but only after these excesses have ripened into

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392. Karen Tiongson-Mayrina, *COA confirms problems with ODA projects; billions of pesos wasted*, GMA NEWS (Feb. 21, 2008), http://www.gmanews.tv/story/81658/COA-confirms-problems-with-ODA-projects-billions-wasted; Commission on Audit Circular No. 2009-002 (May 18, 2009), http://www.coa.gov.ph/COA_Issuances/COA_Circulars/Circ2009/COA_C2009-002.pdf; Reinir Padua, *Commission on Audit to conduct pre-audit of big-ticket projects*, THE PHILIPPINE STAR, May 10, 2009, *available at* http://www.philstar.com/Article.aspx?articleId=466113.

393. Admin. Code 1987, Exec. Ord No. 292, *supra* note 85; Creating the Presidential Anti-Graft Commission, Exec. Order No. 12 (Apr. 16, 2001), *available at* http://www.pagc.gov.ph/File/Exec%20Orders/Exec%20Order%2012%20s%202001.pdf.

394. *See* Isa Lorenzo, *How credible is PAGC cash gifts probe?*, PHILIPPINE CENTER FOR INVESTIGATIVE JOURNALISM BLOG (Oct. 18, 2007), http://www.pcij.org/blog/?p=2015; Sophia Dedace, *Loyal and unrepentant: the passion of Raul Gonzalez*, GMA NEWS (Jul. 29, 2009), http://www.gmanews.tv/story/168584/loyal-and-unrepentant-the-passion-of-raul-gonzalez.

395. *See, e.g.*, David v. Arroyo, *supra* note 97 (insofar as the Court denied the President's attempt to takeover media companies on a claim of national emergency); Metro. Manila Dev. Auth. v. Concerned Residents of Manila Bay, G.R. Nos. 171947-48 (S.C., Dec. 18, 2008) (Phil.) (en banc) (where the Court ordered executive and administrative agencies to undertake the clean-up and remediation of Manila Bay years after these agencies refused to comply), *available at* http://www.lawphil.net/judjuris/juri2008/dec2008/gr_171947_2008.html; Cotabato, *supra* note 140 (where the Court nullified the President's attempted execution of a Memorandum of Agreement that would have conferred territorial sovereignty for the Moro Islamic Liberation Front, without the required constitutional amendments).

justiciable controversies. Because the Court does not issue advisory opinions, presidential excesses—as in the use of budgetary authority and the conduct of administrative reorganizations—may remain unchallenged. Impeachment and the Office of the Ombudsman are not presently viable routes to executive accountability.[396] Despite charges brought against the then-incumbent President's family (particularly her spouse, the First Gentleman) for graft and corruption, no suit was filed under the Anti-Graft and Corrupt Practices Act. The Ombudsman herself faced impeachment charges for betrayal of public trust through "inaction, mishandling, or downright dismissal of clear cases of graft and corruption, some leading to the President herself or that of her closest associates."[397] Hence, the Ombudsman was unlikely to mount a challenge to presidential power.

Because impeachment is such a blunt tool, other institutional mechanisms must provide the primary checks on executive power. We demonstrated above that the Presidents of Argentina and the Philippines have asserted their power through decrees, public spending, and appointments, and that they face insufficient institutional checks in all of these areas. That leaves national courts and more targeted institutions, such as ombudsmen, audit offices, and anti-corruption agencies, to impose limits on presidents who transgress constitutional and statutory limits. We have explored the strengths and weaknesses of these institutions in Argentina and the Philippines. Sometimes these bodies check excesses, particularly when independent civil society organizations use them to challenge presidential overreaching. In Argentina this system operates better than in the Philippines, where oversight mechanisms are weak. However, even in Argentina constraining a president determined to exercise power is difficult and problematic without an active legislature. Courts and oversight agencies cannot entirely make up for the relative weakness of the legislature as an independent source of oversight. These case studies demonstrate that once presidents succeed in exercising excessive levels of power, challenges to their authority have only marginal success, particularly where there is little or no opportunity to act before a controversy has become justiciable.

VI.
CONCLUSION: PERILS OF PRESIDENTIALISM REDUX

Critics of presidential systems argue that they tend toward hyper-presidentialism, on the one hand, or gridlock, on the other. If gridlock prevails, it

396. *See Arroyo escapes impeachment bid*, BBC NEWS (Sept. 6, 2005), http://news.bbc.co.uk/2/hi/asia-pacific/4217952.stm.

397. Gil C. Cabacungan Jr. and Lira-Dalangin Fernandez, *Impeach rap filed vs Ombudsman Gutierrez*, PHILIPPINE DAILY INQUIRER, Mar. 2, 2009, *available at* http://newsinfo.inquirer.net/topstories/topstories/view/20090302-191829/Impeach-rap-filed-vs-Ombudsman-Gutierrez; Wendell Vigilia, *Impeach Gutierrez: Salonga cites betrayal of public trust, gross incompetence*, MALAYA NEWS, Mar. 3, 2009, *available at* http://www.malaya.com.ph/mar03/news1.htm.

can justify presidential power grabs in the eyes of the Chief Executive. Juan Linz's now famous essay of 1990, "The Perils of Presidentialism,"[398] highlights the possibility of divisive conflict between the legislature and the President, particularly under constitutions that possess an inherent tension between "the desire for a strong and stable executive and the latent suspicion of that same presidential power."[399] The winner-take-all nature of presidential elections, combined with the attraction to a "certain populism that may . . . bring on a refusal to acknowledge the limits of the mandate,"[400] gives rise to a directly elected President's rivalry rather than compromise with opposition party legislators. Andrew Arato adds that under crisis conditions, "Presidential gridlock has repeatedly justified authoritarian departures from the rules of the game . . . [so that] Presidentialism can easily become a mere mask for or a road to hyper-presidentialism, which can be introduced without changing the formal constitution."[401] Although we accept their claim that, if evenly matched, the two branches may be unable to act effectively, the risk of hyper-presidentialism stressed by Arato gives particular cause for concern because it presents obstacles that cannot be addressed through structural change alone. Argentina and the Philippines provide specific examples of how Presidents manage to exercise power in spite of legal structures designed to limit their influence.

These case studies demonstrate how elected Presidents can manipulate or ignore legal and constitutional constraints to enhance their authority and flexibility. The broad structural contours are very similar: both systems have written constitutions under which the President heads both the state and the government, as well as manages the bureaucracy. In both countries, the public elects the President to a fixed term, with limited reelection. Both constitutions have an impeachment process for the President and other high officials, consisting of an indictment by the lower house and a trial in the upper house.

In addition, the Supreme Courts have accepted legislative provisions that delegate policymaking power to the Executive and to independent agencies. At first glance, Argentina and the Philippines have constitutional texts that severely limit delegation to an unrealistic degree given modern realities. However, in practice there are few practical constraints. De facto delegation in both countries is very common and quite open-ended.

Within these parallel frameworks, the Presidents in Argentina and the Philippines have acted in similar ways to enhance their power. They issue decrees, especially under declarations of emergency or states of necessity; they manipulate budget and spending priorities; and they seek to control appointments to supposedly independent bodies, including the courts. Generally

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398. Linz, *Perils*, *supra* note 2.

399. *Id.* at 55.

400. *Id.* at 61.

401. Andrew Arato, *The New Democracies and American Constitutional Design* 7 CONSTITUTIONS 316, 322 (2000).

these Presidents seek to maneuver around or ignore constraints. The legislature, the courts, and civil society try, with more or less success, to hold the President and the administration accountable.

Using these techniques, chief executives seek to expand their scope for policymaking and to entrench their position of political dominance. Constitutional and statutory limits have some effect, but they invite the search for loopholes. These cases demonstrate that Presidents can push the bounds of their authority where there is a weak structure of checks and balances. Checks and balances ought to complement the separation of powers. Both cases illustrate the dangers of raising the separation of powers to a canonical principle that ignores the role of each branch as a check and monitor of the power of other branches.

The separation of powers is defended both as a way to permit the Executive to concentrate on efficient administration and as a way to facilitate inter-branch oversight. As we have seen, these dual justifications can clash in practice. If policymaking delegation is too heavily restricted, Presidents will have strong incentives to find other ways to make policy and may turn to methods that are less accountable, such as necessity and urgency decrees and declaration of states of emergency. These actions may have little to do with security threats. Even if there is a threat, the President's action may extend to policy areas only tangentially related to the immediate problem or may impose excessively harsh restrictions. The Argentine and Philippine Presidents avoid legislative consultation and judicial oversight by appealing to the importance of an independent executive that can act unilaterally, deliberately downplaying the value of checks and balances as reflected in one view of the separation of powers.

We have focused on the weakness of institutional checks on the presidency in Argentina and the Philippines, but the full story of their democratic functioning would require a much broader compass that includes both electoral politics and the accidents of history.[402] Opposition political parties can challenge executive overreaching, but for different reasons they have not been particularly effective in either country. Electoral rules and political mobilization at the grass roots can also limit or enhance presidential power. Regional/central government relations determine the strength of the central governments. Term limits assure presidential turnover and help prevent a slide into outright authoritarianism. However, special circumstances in each country helped extend the last incumbent's time in office in the Philippines and permit a husband and

402. *See* CARLOS S. NINO, FUNDAMENTOS DE DERECHO CONSTITUCIONAL. ANÁLISIS FILOSÓFICO, JURÍDICO Y POLITOLÓGICO (2005); ALFRED W. MCCOY, AN ANARCHY OF FAMILIES: STATE AND FAMILY IN THE PHILIPPINES (2009); JOHN W. LANGFORD AND K. LORNE BROWNSEY, ECONOMIC POLICY-MAKING IN THE ASIA-PACIFIC REGION 111-12 (2001); DANTE C. SIMBULAN, THE MODERN PRINCIPALIA: THE HISTORICAL EVOLUTION OF THE PHILIPPINE RULING OLIGARCHY (2005).

wife team to keep the Presidency in the family in Argentina. One would need to incorporate all of these factors and more to produce a full account of these democracies as they struggle to balance political power and public accountability. Our aim is merely to suggest that those who study these more conventional aspects of democratic functioning not forget to look at the impact of structural factors that shape the separation of powers.

Both Linz and Arato claim that the United States is an exception to the majority of presidential democracies that suffer from the pathologies of gridlock and hyper-presidentialism, but this sense of exceptionalism should be re-examined. Argentina and the Philippines may be extreme cases, but the ineffectiveness of their recent constitutional revisions should serve as a warning. Despite the obvious and substantial differences between the United States and our cases, they should lead Americans to ponder both the need for checks on the executive and practical ways to maintain government effectiveness and efficiency. Our cases suggest that when Presidents have enhanced powers to issue decrees, declare emergencies, make appointments, redirect funds, and reorganize the Executive, the government structure can become unbalanced so that legislatures and the judiciary take on secondary roles, undermining democratic legitimacy.

Legislative delegations of policymaking power are a reality in all modern states. Complex regulatory and spending programs could not function without grants of rulemaking authority to the President and to Ministers and Cabinet Secretaries.[403] Although such delegations occur in the US under different constitutional constraints compared with Argentina and the Philippines, the de facto results are similar. Outside of international affairs and national security, explicit legislative delegation of policymaking power to the Executive is common in the U.S., and the Supreme Court permits such delegation within very wide limits.[404] As long as the Executive exercises delegated authority in politically responsible ways using procedures, such as notice and comment rulemaking under the US Administrative Procedures Act, that invite public participation and oversight, democracy can co-exist with extensive policymaking in the Executive.[405]

Risks arise when Presidents assert broad authority to act absent legislative delegation, especially in times of crisis. Necessity and urgency decrees in Argentina and states of emergency in the Philippines are common substitutes for delegated authority. The courts in both countries have placed only modest limits on these decree powers with corresponding risks for democracy. These decree

403. SUSAN ROSE-ACKERMAN, FROM ELECTIONS TO DEMOCRACY: BUILDING ACCOUNTABLE GOVERNMENT IN HUNGARY AND POLAND 1-7, 216-39 (2005).

404. The most recent important discussion of this issue by the Supreme Court is Whitman v. Am. Trucking Ass'n, Inc., 531 U.S. 457 (2001).

405. 5 U.S.C. Sec. 553. *See* ROSE-ACKERMAN, ELECTIONS TO DEMOCRACY, *supra* note 403, at 216-239.

powers are perhaps the aspect of the Argentine and Philippine constitutions that are least familiar to an American audience. The American President has no formal, constitutional decree power, but frequently issues executive orders and policy statements that do not have external force.[406] Unlike both the Argentine and the Philippine constitutions, the American constitution contains no provisions for the declaration of a state of emergency. Nevertheless, in the absence of such provisions, unilateral actions by the US President are a common way to deal with national security threats.[407] As long as US Presidents find ways to act unilaterally under the national security umbrella, the US risks taking on some aspect of hyper-presidentialism.

In all three countries, the reallocation of budgeted funds has become another tactic for Presidents to implement their priorities. However, US efforts to curb this practice have been significantly more successful. In Argentina and the Philippines, as in the US, the legislature is a central player in the budgetary process. Nevertheless, all three Presidents have developed methods to undermine legislative limits. President Richard Nixon tried to impound (that is, refuse to spend) funds appropriated by Congress and signed into law. His efforts were blocked by successful court challenges based on statutory interpretation, not the constitution, and the practice of redirecting funds is now limited by statute.[408] The US Supreme Court has also found the line-item veto unconstitutional.[409] Reorganization of the executive branch was often subject to legislative vetoes, but since that practice has also been held to be unconstitutional, major reorganizations, such as the creation of the Department of Homeland Security, require a statute.[410] In both Argentina and the Philippines, the redirection of funds and the reorganization of government by presidential fiat are much easier and more common; they occur both within the bounds of permissive laws and at the outer edges of legality. In the US, the allocation of funds and restructuring of the executive are areas where the judicial and legislative branches have consistently curbed the President's unilateral

406. Brian R. Sala, *In Search of the Administrative President: Presidential "Decree" Power and Policy Implementation in the United States, in* EXECUTIVE DECREE AUTHORITY (John M. Carey and Matthew Soberg Shugart eds., 1998). Executive orders importantly influence the President's relations with the cabinet departments and agencies, and executive actions are crucially important in foreign affairs and national security. For example, E.O. 12866 requires the cost-benefit analysis of major rules. Exec. Order No. 12866, Secs. 3(d)–(e), 3(f)(1), 6(a)(3)(C), 3 C.F.R. 638, 641, 645–46 (1993), reprinted as amended in 5 U.S.C. Sec. 601 (2006). *See* Oona A. Hathaway, *Presidential Power over International Law: Restoring the Balance*, 119 YALE L.J. 140 (2009).

407. For a discussion of this issue see BRUCE ACKERMAN, BEFORE THE NEXT ATTACK: PRESERVING CIVIL LIBERTIES IN THE AGE OF TERRORISM (2006).

408. The Nixon Administration cases are Train v. N.Y.C., 420 U.S. 35 (1975) and Train v. Campaign Clean Water, Inc., 420 U.S. 136 (1975). The statute is the Congressional Budget and Impoundment Act of 1974, 2 U.S.C.A. §§681-88, PL No. 93-377, 88 Stat 297.

409. Clinton v. N.Y.C., 524 U.S. 417 (1998).

410. The legislative veto was held unconstitutional in I.N.S. v. Chadha, 462 U.S. 919 (1983). The statute is the Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135.

actions. However, priority setting in regulatory areas is largely left to the Executive, beyond statutory deadlines that are hard for Congress or the courts to enforce. It is unclear why this variation exists beyond the obvious point that the failure to spend appropriated funds seems more clearly to flout Congressional wishes than failure to prioritize certain regulatory requirements.

Finally, the politicization of appointments is arguably just as significant in the US as in Argentina and the Philippines, raising similar questions about the balance between the President's desire to choose political allies and statutory requirements for partisan balance or professional expertise. The United States is often held up as an example of an excessively politicized bureaucracy with thousands of positions subject to political appointment.[411] Argentina and the Philippines seem at least as politicized especially when one takes into account appointments to regulatory agencies, nominally independent oversight bodies, and the courts. Many presidential appointments do not require Senate confirmation. Those that require confirmation may be left empty for years. In the Philippines, the President makes some appointments from lists prepared by independent bodies, but the President can reject all names on the list and otherwise seek to control the process. In Argentina, partisan balance in regulatory agencies is undermined when the President uses her regular powers to place an agency under a "temporary" presidential appointee. The US President has no such powers, but he can just leave seats vacant if the Senate will not approve his favored appointees.[412] At the same time, the President may appoint people to White House positions who do not require confirmations but whose portfolios overlap with those of Cabinet departments.[413] Future research might evaluate whether these efforts to avoid Senate approval have yielded policy decisions that track presidential priorities and fail to accommodate a broad spectrum of political interests.

We hope that our analysis of hyper-presidentialism in Argentina and the Philippines will help reformers in those countries understand how weaknesses in their constitutional structures provide openings for presidential action. The

411. Ackerman, *supra* note 6 ("New Separation"). The number of top-level positions requiring Senate confirmation has grown from 196 under Kennedy administration to 786 under Clinton to 1141 under Bush II. S. Comm. on Homeland Security and Governmental Affairs, *Policy and Supporting Positions* 199 (2008), *available at* http://www.gpoaccess.gov/plumbook/2008/index.html. Overall, the President has the authority to make 3,000 political appointments. DAVID E. LEWIS, THE POLITICS OF PRESIDENTIAL APPOINTMENTS: POLITICAL CONTROL AND BUREAUCRATIC PERFORMANCE 56 (2008).

412. Anne Joseph O'Connell, *Vacant Offices: Delays in Staffing Top Agency Positions*, 82 SOUTHERN CALIFORNIA LAW REVIEW 913 (2009); Anne Joseph O'Connell, *Waiting for Leadership: President Obama's Record in Staffing Key Agency Positions and How to Improve the Appointments Process*, CENTER FOR AMERICAN PROGRESS (Apr. 2010), http://www.americanprogress.org (last accessed Nov. 3, 2010). The Supreme Court recently held that a regulatory agency with only two or its five seats filled could not make legally binding decisions. *See* New Process Steel LP v. Nat'l Labor Relations Bd., 130 S.Ct. 2635 (2010).

413. *See* ACKERMAN, DECLINE AND FALL, *supra* note 10.

problem lies not only in the personalities and political allegiances of those in power but also in the institutional frameworks in which they operate. Our study of the interactions between institutional structure and political power illustrates how often nominal legal constraints are undermined by determined Presidents. Going further, we believe that some features of Argentine and Filipino democracy are shared by the US so that our cases can serve as a warning to American political actors. The use of decrees for emergency and national security purposes is growing, and even economic crises have provoked the executive to seek unusually open-ended delegations of authority. Policymaking delegation is essential in the modern state, but for that very reason must be constrained by institutions that permit public participation and monitoring. The budgetary process risks descending into partisan bickering, and Presidential appointments are routinely delayed by individual holds and filibuster threats in the Senate. To the extent that the President and the Congress cannot resolve these partisan conflicts, Presidents are likely to seek end runs around these blockages. The federal courts may provide a backstop form of oversight, but the Supreme Court's often-mechanical views of the separation of powers and of Presidential power do not inspire confidence.[414] Perhaps our broader comparative focus can help reorient the debate over the presidency in a way that realistically recognizes the President's role as both chief executive of a large and complex bureaucracy and as a political leader who must be accountable to the population during his or her four years in office, not just at election time.

414. *See* Chadha, *supra* note 409. STEPHEN CALABRESI AND CHRISTOPHER S. YOO, THE UNITARY EXECUTIVE: PRESIDENTIAL POWER FROM WASHINGTON TO BUSH (2008).