

**Leveraging Presidential Power:
Separation of Powers without Checks and Balances
in Argentina and the Philippines**

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Abstract: Independently elected presidents invoke the separation of powers as a justification to act unilaterally without checks from the legislature, the courts, or other oversight bodies. Using the cases of Argentina and the Philippines, we demonstrate the negative consequences for democracy arising from presidential assertions of unilateral power. In both countries the constitutional texts have proved inadequate to check presidents determined to interpret or ignore the text in their own interests. We review five linked issues: the president's position in the formal constitutional structure, the use of decrees and other law-like instruments, the management of the budget, appointments, and the role of oversight bodies, including the courts. We stress how emergency powers, arising from poor economic conditions in Argentina and from civil strife in the Philippines, have enhanced presidential power. Presidents seek to enhance their power by taking unilateral actions, especially in times of crisis, and then assert that the constitutional separation of powers is a shield that protects them from scrutiny and that undermines others' claims to exercise checks and balances. Presidential power is difficult to control through formal institutional checks. Constitutional and statutory limits have some effect, but they also generate the search for ways to work around them. Both our cases illustrate the dangers of raising the separation of powers to a canonical principle without a robust system of checks and balances to counter assertions of executive power. Argentina and the Philippines may be extreme cases, but the fact that their recent constitutional revisions were explicitly designed to curb the president, should give us pause. 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 make them work effectively without the government grinding to a halt.

Introduction

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Conclusion: Perils of Presidentialism Redux

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Introduction

Politicians seek to enhance their power by creating institutions that give them freedom to act and by undermining institutions designed to check their influence. Presidents, in particular, will test the limits of their power—at least, that is our claim. Legislators must compromise with other politicians. Even in a pure parliamentary system with strong party discipline, party leaders must negotiate with back benchers over policy. The possibility of a vote of no confidence or of an internal party revolt limits their freedom of action. An independently elected president, in contrast, has space to act without seeking legislative approval or provoking judicial constraints. Impeachment is a background threat, but it is an extraordinary remedy invoked only in a crisis. That much is conventional wisdom for those who study presidential systems.² We accept that basic claim and build on it to study how presidents manage to subvert constitutional and legal structures nominally designed to check them.³ We do this through case studies of Argentina and the Philippines, two countries often criticized for their hyper-presidential systems where political actors and presidents, in particular, are only weakly controlled by the electorate.⁴

We go beyond the conventional focus on the tripartite division of democracies into legislative, executive and judicial branches to include the range of modern institutional structures that aim to limit a president's power and to increase public accountability and transparency.⁵ We show how presidents in both Argentina and the Philippines have molded these newly created institutions to serve their own political and policy purposes. When challenged, we document how presidents use the rhetoric of separation of powers to argue against the imposition of checks and balances.

Constitutional reformers explicitly recognized the dangers inherent in presidentialism in both Argentina and the Philippines during recent constitutional reforms in 1994 and 1987, respectively. The new texts sought to limit the power of the president. Nevertheless, we demonstrate how strategic presidents with help from their political allies were able to undermine most constitutional attempts at control. This occurred both because of flawed designs and because of the weakness of actors, such as opposition political parties, that might have constrained the president. We take the weakness of legislative oversight and of political pushback as background conditions and show how presidents subverted constitutional controls, mobilizing their political allies and sidelining opponents.

² For example, Juan J. Linz, "The Perils of Presidentialism" 1 *Journal of Democracy* 51 (1990)[hereinafter "Perils"]; responses to his article: Donald L. Horowitz, "Comparing Democratic Systems;" 1 *Journal of Democracy* 73 (1990) Seymour Martin Lipset, "The Centrality of Political Culture," 1 *Journal of Democracy* 80 (1990); and his reply, Juan J. Linz, "The Virtues of Parliamentarism," 1 *Journal of Democracy* 84 (1990). See also Juan J. Linz and Arturo Valenzuela, eds., *THE FAILURE OF PRESIDENTIAL DEMOCRACY: VOL I: COMPARATIVE PERSPECTIVES* and *Vol II THE CASE OF LATIN AMERICA*, 1994; Robert Dahl, Robert A. Dahl, *HOW 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." (Guillermo O'Donnell, "On Informal Institutions, Once Again," in Gretchen Helmke and Steven Levitsky, eds. *INFORMAL INSTITUTIONS AND DEMOCRACY: LESSONS FROM LATIN AMERICA* 2006, 285-289 at 287).

⁴ Linz, "Perils", supra; Guillermo O'Donnell, "Delegative Democracy," 7 *Journal of Democracy* 55 (1994).

⁵ Cf. Bruce Ackerman, *The New Separation of Powers*, 113 *Harvard Law Review* 633 (2000) and the critique by Steven G. Calasbresi, "Why Professor Ackerman is Wrong to Prefer the German to the U.S. Constitution, 18 *Constitutional Commentary* 51 (2001).

Our aim in this article is to alert reformers elsewhere to the inherent weakness of many structural efforts to limit presidential power. Time and again in our case studies determined presidents undermined efforts to limit their power either by finding legal loopholes or by skirting the boundaries of the law. Some of the institutional checks might be improved through redesign, but some were flawed in principle. Others may operate as effective controls in some presidential systems but work poorly in others without complementary institutions or norms of behavior. Our catalogue of problematic behavior is not meant to imply that Argentina and the Philippines are somehow special, but, in contrast, to suggest that all presidential systems will face difficulties in constraining a determined chief executive.⁶

The essence of presidentialism lies in the separation of powers. On the conventional view, the legislature is primarily responsible for legislation; the executive, for implementation of the law, and the judiciary, for enforcement. Two very different theories of democratic government justify such separation.

One emphasizes the division and specialization of labor. Each branch should do what it does best without interference from the other. Under this view, the executive should be organized as a hierarchical bureaucracy under the control of the elected chief executive and his or her cabinet. The separate election of the president to a fixed term permits the chief executive to administer the law independently of day-to-day political pressures coming from the legislature. Although the presidential election is a political contest, the goal is to select a person who can operate as a strong manager independent of the legislature and can concentrate on administering the law fairly and competently.⁷

The second model accepts the pervasiveness of politics, especially for elected officials--be they legislators or the president. Separation of powers goes along with checks and balances. Each branch has a set of specialized functions that includes constraining the other branches. The legislature 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 using legalistic categories. It also polices the 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. 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 has enough power to dominate the other branches.

⁶ Scott Mainwaring and Timothy R. Scully, "Latin America: Eight Lessons for Governance," 19 *JOURNAL OF DEMOCRACY* 113 at 120-121 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 constraint them.

⁷ This was the position taken in the 1937 Brownlow Report on administrative management prepared for US President Franklin Delano Roosevelt. D.R. Brand, "The President as Chief Administrator: James Landis and the Brownlow Report," 123 *Political Science Quarterly* 69 (2008)

Most modern governments have not left the separation of powers frozen in its original tripartite form inherited from Montesquieu. Most have created other institutions, such as specialized courts, autonomous regulatory agencies, central banks, supreme audit bodies, ombudsmen, electoral commissions, and anti-corruption bodies.⁸ Some of these 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. Government institutions combine the roles of specialized problem-solver and monitor. Problems arise, however, when apologists use one model to justify actions under the other. Thus, presidents invoke the separation of powers as a justification to act unilaterally without checks from the legislature, the courts, or other oversight bodies. Such actions are particularly problematic if the president takes an action that is overtly political and hence not easily justified under his or her role as “chief executive” of a large hierarchy. The president invokes the separation of powers in its division-of-labor form to justify unilateral action, appealing to the constitution to justify making these actions unreviewable.

We argue that such justifications are deeply antithetical to the democratic notion of limited government. Our studies of Argentina and the Philippines demonstrate the pathological consequences for democracy arising from presidential assertions of unilateral power. We show how the new constitutional texts have proved inadequate to check presidents determined to interpret or ignore the text in their own interests. At least in these two cases, the presidential system appears to have its own internal dynamic that can undermine constitutional efforts to limit presidential unilateralism. Determined presidents in both countries have expanded their power and faced only modest pushback from the legislature and the judiciary.

We review five linked issues: the president’s position in the formal constitutional structure, the use of decrees and other law-like instruments, the management of the budget, appointments, and the role of oversight bodies, including the courts. We particularly stress how 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 aspects of society. The thread that runs through our narrative is the way presidents seek to enhance their power by taking unilateral actions, especially in times of crisis, and then asserting that the constitutional separation of powers is a shield that protects them from scrutiny and undermines others’ claims to exercise checks and balances. In spite of differences in political party structure and in the underlying political cleavages across countries, this tendency is a general strategic imperative. It affects the potential for reform in presidential systems. There is a danger that the creation of new formal checks on the presidency will merely lull a polity into thinking that serious reform has occurred when in reality nothing much has changed.

⁸ Ackerman, *New Separation*, *supra*; Bruce Ackerman, “Goodbye Montesquieu,” in Susan Rose-Ackerman and Peter Lindseth, eds., *COMPARATIVE ADMINISTRATIVE LAW* (2010) O’Donnell, *Delegative*, *supra*, John Ackerman, “Understanding Independent Accountability Agencies” in Susan Rose-Ackerman and Peter Lindseth, eds., *COMPARATIVE ADMINISTRATIVE LAW* (2010).

One should not conclude, however, that a parliamentary system is necessarily superior. Especially, if a single political coalition can govern with little effective opposition, it may suffer from some of the same problems as a presidential system. Here, the Philippines can serve as a cautionary tale where support for the parliamentary alternative seems fueled by an effort to get around the term limits that are part of its existing presidential constitution.⁹ Even presidents who have successfully enhanced their power when in office have bowed to term limits and left office, or, as in the case of President Carlos Menem in Argentina, accepted limits on their power in return for an extra term.

I. Formal Constitutional Structure

Both Argentina and the Philippines have directly elected presidents with considerable constitutional authority. Recent amendments were nominally designed to curb their powers in reaction to a recent authoritarian past, but they have largely failed to accomplish that goal. Presidential power is partly built into the constitutional text and partly the result of specific actions taken by the incumbents.

A. Argentina

As in the United States, the President is both the Head of State and the Head of Government and is the Commander in Chief of the Armed Forces.¹⁰ The President's powers are similar to those of the US President with regards to the legislative process and the appointment of judges. Unlike the US President, she has the authority to appoint her Cabinet and many other high-level officials without approval by a legislative body. Thus, she can form her Cabinet quickly, has less need to appeal to political opponents in making appointments, and less reason to appoint "czars" in the Casa Rosada (equivalent to the White House) with overlapping portfolios.

The President has the authority to issue emergency decrees and decrees under delegated authority by the Congress. Under legislative declarations of emergency, the president can be authorized to make discretionary use of public funds. Although Argentina is formally a federal state, the chief executive has a good deal of influence over the provinces because of her discretionary distribution of funds.

The president and vice president can be impeached by a vote of two-thirds of members present in the House of Representatives for official misconduct or for crimes. The Senate then judges them in a public trial and can convict and remove them from office with the same qualified majority of votes.¹¹ This process is harder to initiate than in the United States where only a majority of the House members can vote to impeach an official. In Argentina, as in the US, impeachment is entirely a legislative responsibility; the courts have no role.

The 1994 constitutional amendment includes numerous new provisions related to the presidency. Some strengthen his or her popular mandate. Thus, under the original constitution the president and vice president were elected indirectly through the Electoral College, and his or her term was

⁹ "Charter Change Tops Arroyo Agenda," Philippines Daily Inquirer, December 3, 2009, http://services.inquirer.net/print/print.php?article_id=20091203-239839.

¹⁰ Argentine Const., Article 99(1 and 12).

¹¹ Argentine Const., Articles 53, 59.

six years with no reelection.¹² The 1994 amendment reduced the president's term from six to four years with one reelection, abolished the Electoral College, and introduced direct election of the president and vice president with the national territory as a single district. The amendment also established a run-off, or *ballotage* system.¹³

The main effort to limit the powers of the president was the creation of a new position of the Chief of Cabinet. The Chief of Cabinet executes the budget; is in charge of the general administration of the country; and makes all the appointments to the administration except those delegated to the President alone.¹⁴ He or she also plays a significant role in the constitutional procedure for enacting executive orders and in the exercise of budgetary authority by the executive.

The President appoints and removes the Chief of Cabinet, but he or she is also politically accountable to the legislature.¹⁵ The Chief of Cabinet has to attend Congress at least once a month to report on the progress of the government. Each House can summon the Chief of Cabinet to provide explanations or reports. An absolute majority of the members of each House can remove the Chief of Cabinet.¹⁶ These provisions reverse the usual pattern in the United States where presidential appointments to top cabinet positions require confirmation by the Senate but removal is at the discretion of the President. The Argentine process seems similar to a specialized impeachment process that requires a majority vote in each House.

In practice, the Chief of Cabinet has been ineffective in reducing the power of the president because the institutional design of the office is quite weak. Much of this weakness seems to have been designed in up front. Censure by the legislature is a difficult process, and there is no process to dissolve the government and call for new elections. The president is still politically responsible for the administration and directs the main functions of government. She formally makes all administrative appointments although many are delegated to her ministries and secretaries. Although the Chief of Cabinet is formally in charge of the execution of the budget, the president supervises that authority under the Constitution. The design of this position suggests the weakness of efforts that rely only on legislative removal powers but lack up-front legislative approval. Of course, the threat of removal will keep the president from appointing someone who is obviously unacceptable to the legislature, but that is likely to be a weak check especially in times of unified government.

B. The Philippines

The Philippines also has a strong president operating with a weak legislature and judiciary and with limited or ineffective constitutional checks. The president often refers to the separation of powers to justify assertions of power and to avoid oversight by other branches or bodies. As in the Argentine case, tensions have arisen between the Constitution's attempts to control the presidency and the de facto exercise of that power.

¹² Argentine Const. of 1853, Articles 77, 81-82.

¹³ Argentine Const., Articles 90, 94, 97, 98.

¹⁴ Argentine Const., Article 100, sections 1, 3, 7.

¹⁵ Argentine Const., Articles 99 (7), 100.

¹⁶ Argentine Const., Articles 71, 101.

The Philippine's Malolos Constitution of 1899 envisaged a powerful legislature dominating a relatively weak executive. Later, the executive became dominant in the Constitutions of 1935 and 1973. The 1987 Constitution, like the 1994 amendments in Argentina, attempted to rein in presidential power and to return to some of the goals of the original 1899 document. Nevertheless, as in Argentina, contemporary scholars agree that the Philippine president remains extremely powerful.¹⁷

Executive power is “vested in the President of the Philippines”. As in Argentina before its recent reforms, the President is “elected by direct vote of the people for a term of six years” and is not eligible for re-election.¹⁸ The constitution is unclear about whether a former president can run for office after a hiatus—a possibility raised by former president Joseph Estrada and approved by a division of the Electoral Commission in January 2010.¹⁹

Removal can only be made “on impeachment for, and conviction of, culpable violation of the Constitution, treason, bribery, graft and corruption, other high crimes, or betrayal of public trust.”²⁰ Any member of the House and any citizen endorsed by a member can file a complaint for impeachment which must be considered under time limits, and only one-third of the members need agree with the Articles of Impeachment for them to be forwarded to the Senate. Conviction, however, only occurs if voted by two-thirds vote of all members (not just those present).²¹ The Supreme Court has held that its power of judicial review extends to oversight of the constitutional processes of impeachment.²²

The President's express and implied powers have figured heavily in recent controversies. Asserting her constitutionally “implied” and “residual” powers, the incumbent Philippine President has issued executive orders without prior legislative sanction; unilaterally reorganized government agencies without regard for the functional objectives and constitutional independence of other institutions; controlled appointments to key public offices originally-intended to counterbalance executive authority; and on the whole, insulated herself from

¹⁷ See Irene Cortes, *THE PHILIPPINE PRESIDENCY: A STUDY OF EXECUTIVE POWER* (1966 ed., University of the Philippines College of Law); Froilan M. Bacuñgan (ed.), *THE POWERS OF THE PHILIPPINE PRESIDENT* (University of the Philippines Law Center, 1983 ed.); Vicente V. Mendoza, *FROM MCKINLEY'S INSTRUCTIONS TO THE NEW CONSTITUTION: Documents on the Philippine Constitutional System* (1978 ed.); Pacifico Agabin, *UNCONSTITUTIONAL ESSAYS* (1996 ed.); Joaquin Bernas, *CONSTITUTIONAL STRUCTURE AND POWERS OF GOVERNMENT* (2005 ed.).

¹⁸ Philippine Const., art. VII.

¹⁹ COMELEC: Estrada Can Run for Presidency, *Philippines Daily Inquirer*, January 20, 2010, at http://newsinfo.inquirer.net/topstories/topstories/view/20100120-248406/Comelec%3A_Estrada_can_run_for_president_in_May

²⁰ Philippine Const., art. XI, sec. 2.

²¹ Philippine Const., art. XI, secs. 1-3(8). See also Antonio R. Tupaz, and A. Edsel C.F. Tupaz, *FUNDAMENTALS ON IMPEACHMENT*, (2001 ed., Central Lawbook Publishing, Quezon City).

²² *Ernesto B. Francisco Jr. et al. v. House of Representatives et al.*, G.R. Nos. 160261 et seq., Nov. 20, 2003 (en banc).

accountability as a result of institutional deadlocks that were, in part, of her own creation.²³ Public accountability is elusive due to presidential assertions of wide “residual” prerogatives, immunities, and privileges. So long as the courts do not review these assertions of power, the President can act without constitutional accountability. Furthermore, even when assertions of executive power are raised in the courts, the judiciary has accepted a wide space for executive discretion, entrenching a strong model of presidential power in spite of the text of the 1987 Constitution.

II. Presidential Decrees

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 and stretched their legal limits especially in emergency situations.

A. Argentina

The Argentine President has the authority to issue executive documents with the force of law, at least for limited periods of time. Four institutional practices are significant: necessity and urgency decrees [*decretos de necesidad y urgencia* (DNU)]; delegated decrees; legislative declarations of emergency; and partial presidential vetoes. The issuance of decrees often goes along with the evocation of formal emergency powers. Thus, President Cristina Fernández de Kirchner, used a DNU in the fall of 2008 to increase the size of the budget by \$11.6 billion under “superpowers” granted to the President by Congress during the financial emergency and still in place. Some complained that her actions were unlawful because no emergency existed. Earlier in the year she had attempted to raise revenue by imposing a high tax on some agricultural exports, a decision made, not through an executive decree, but through a simple resolution issued by the Ministry of Economy. To give this action a stronger political base, she later issued a decree, and asked the Congress to ratify it. The lower house approved the tax on July 5 by a vote of 128-122, but on July 17 the Senate rejected the tax by 37 to 36 with the Vice President casting the deciding vote. The government repealed the tax the next day although it could have claimed that Congressional support was not strictly necessary. Recently the resignation of the Central Bank chief was engineered through issuance of a controversial DNU removing him from office. He resisted but ultimately resigned and abandoned his legal challenges after the Congress approved the president’s actions.

Under the Constitution, the President can issue DNUs in a state of emergency without prior legislative authorization or explicit delegation. The decree can concern matters that would

²³ See Executive Order No. 464; Presidential Proclamation No. 1017; General Order Nos. 5 and 6; Executive Order No. 474. See also Michael Lim Ubac, “Mining out of DENR; now under President’s office”, *Philippine Daily Inquirer*, July 27, 2007, at http://newsinfo.inquirer.net/inquirerheadlines/nation/view/2007072778988/Mining_out_of_DENR%3B_now_under_President%92s_office (last visited 10 March 2009); Purple S. Romero, “GMA Returns Shortlist to JBC (Judicial and Bar Council)”, *ABS-CBN News*, 27 July 2009, at <http://www.facebook.com/ext/share.php?sid=121754536227&h=y114y&u=2RvMs&ref=nf> (last visited 28 July 2009); Raul Pangalangan, “The Arguments for Inaction”, *Philippine Daily Inquirer*, February 21, 2008, at <http://opinion.inquirer.net/inquireropinion/columns/view/20080221-120384/The-arguments-for-inaction> (last visited 20 July 2009).

normally require legislative approval. Argentine presidents have issued emergency decrees since the beginning of constitutional government, but they rapidly increased in the 1990s.²⁴ As Gabriel Bouzat explains, “hundreds ... of decrees have been issued to govern such important decisions as changing the legal currency, modifying contracts, renegotiating the external debt, and freezing bank deposits.”²⁵ As the examples above illustrate, many of the most important relate to the economic emergency that gripped Argentina in recent years.

The 1994 constitutional amendment institutionalized DNUs, albeit with some important limitations. Although the Constitution 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,” it nonetheless authorizes the Executive to issue DNUs subject to several caveats (article 99.3). First, such decrees can only be issued when extraordinary circumstances make it impossible to follow the ordinary constitutional procedures for the enactment of statutes. Second, only the president can issue necessity and urgency decrees, and they have to be signed by the entire cabinet, including the Chief of Cabinet.²⁶ Third, these decrees cannot apply to criminal issues, taxation, electoral matters, or the party system. Fourth, no more than ten days after its enactment, the Chief of Cabinet has to submit the decree to a Permanent Bicameral Congressional Commission composed in proportion to the political representation of the parties in each House; the Commission has ten days to issue its opinion and send it to the plenary of both Houses for express and immediate treatment. These provisions constrain the President, but at the same time, they give a firm textual grounding to the use of decree power.²⁷

The amendment of 1994 provided that a special statute should regulate the procedure and scope of legislative participation. Congress did not enact this statute until July 2006, well after the economic emergency of late 2001.²⁸ The statute has three main problems. First, a vote of both Houses is required to reject the decree, allowing a DNU to be approved by the positive vote of only one of the Houses, and thus making it harder for the legislature to reject a DNU than to approve a law according to the formal procedure established in the Constitution.²⁹

Second, it does not impose time limits for Congressional action. Thus, a DNU is tacitly approved so long as Congress has not acted, which infringes an express constitutional rule forbidding tacit approval.³⁰ The law even provides that, if the legislature rejects a DNU, the rights acquired

²⁴ CENTRO DE ESTUDIOS NUEVA MAYORÍA, *En 15 Meses de Gobierno, Cristina Kirchner Firmó 5 Decretos de Necesidad y Urgencia* (Mar. 20, 2009), available at http://www.nuevamayoria.com/index.php?option=com_content&task=view&id=1304&Itemid=30 (last visited Jun. 19, 2009).

²⁵ Gabriel Bouzat, *Presidential Power and Political Crisis in Argentina 1* (SELA paper 2006), available at http://islandia.law.yale.edu/sela/SELA2006/papers/Gabriel%20Bouzat%20_English_.pdf (last visited Jun. 12, 2009), at 24. The translation is ours.

²⁶ See e.g. Agustín Gordillo, *TRATADO DE DERECHO ADMINISTRATIVO 27* (8^o ed., FDA 2006, T. 1, Capítulo VII), available at <http://www.gordillo.com/Pdf/1-8/1-8VII.pdf> (last visited Jun. 19, 2009).

²⁷ These provisions mostly codify the holding in Corte Suprema de Justicia de la Nación [CSJN], 27/12/1990, “Peralta, Luis A. y otro c. Estado Nacional,” FALLOS, 313:1513.

²⁸ Law No. 26.122, Jul. 20, 2006, ADLA 2006 - D, 3619, available at <http://www.infoleg.gov.ar/infolegInternet/anexos/115000-119999/118261/norma.htm> (last visited Jun. 19, 2009).

²⁹ *Id.*, Article 24.

³⁰ Argentine Const. Article 82 provides that: “The will of each House shall be expressly stated; the tacit or fictitious approval is excluded in all cases”.

before its rejection remain protected. Hence, even if the legislature eventually rejects a DNU, its action may have no real meaning because the DNU's prior effects would remain.³¹ Compare the situation in the Philippines described below in which the executive took actions during a short-term state of emergency that could not be undone once it had been repealed. Such exercises of presidential power are especially problematic when the president issues the DNU immediately after the Congress goes on a recess.³²

Third, the statute does not provide a time limit for the DNUs, and thus allows emergency decrees to stay in force even after the emergency has passed. In light of these shortcomings, in September 2006 the NGO *Asociación por los Derechos Civiles* filed a summary proceeding (*amparo*) requiring courts to declare the statute unconstitutional; courts rejected the request in first instance and in the appeal due to lack of standing. The issue is pending in the Supreme Court.

The Supreme Court decision in that case will be important because since 1994 the Court has not developed a consistent line of reasoning. In 1995, in *Video Club Dreams*, it held that DNU's cannot be ratified through legislative silence nor approved through an implicit ratification included in a budget statute.³³ The judiciary pulled back from active review in 1997, holding that, under the Constitution, the oversight of DNUs is an exclusive function of Congress, and that the judiciary cannot interfere. This language limits the judiciary's role as a check on executive power by evoking the separation of powers.³⁴ Although according to the Court, citizens can still challenge the constitutionality of DNUs, this holding seems incompatible with the rest of the decision.³⁵ As for the scope of review, the Court only analyzed whether the matter covered by the decree was expressly prohibited by the Constitution (taxation, criminal law, electoral system, and political parties). It did not consider, as it had done in the *Peralta* case, whether there was "a situation of grave social risk that endangers the existence of the Nation."

In 1999 the Court reinstated the stringent review of decrees in the *Verrocchi* case.³⁶ It held that in order for the executive legitimately to exercise legislative functions that are, in principle,

³¹ On March 1, President Fernández de Kirchner announced in her State of the Union speech that she had revoked a DNU ordering the use of Central Bank's reserves to pay external debt, which had been stopped by lower courts in response to injunctions requested by members of the opposition who claimed that the decree was unconstitutional, and was under review by the Supreme Court and about to be rejected by Congress, and issued an almost identical DNU. On a joint move with the board of the Central Bank, the funds were moved only hours after the President delivered her speech, and the DNU was formally published (a requirement for its validity) in the afternoon through an unusual special edition of the Official Bulletin. Since the funds have already been moved, if any creditor is paid, even if the legislature rejects the DNU, it will be too late to recover the funds.

³² This was the case for the DNU issued by President Fernández at the end of 2009 on the use of Central Bank reserves to pay the external debt.

³³ Corte Suprema de Justicia de la Nación [CSJN], 06/06/1995, "Video Club Dreams c. Instituto Nacional de Cinematografía," LA LEY 1995-D, 247. See GORDILLO, *supra* note, at 28.

³⁴ Corte Suprema de Justicia de la Nación [CSJN], 17/12/1997, "Rodríguez, Jorge en: Nieva, Alejandro y otros c. Poder Ejecutivo Nacional," LA LEY, 1997-E, 884.

³⁵ See María Angélica Gelli, *Controles sobre los decretos de necesidad y urgencia. De "Rodríguez" a "Verrocchi". ¿El regreso de "Peralta"?* LA LEY 2000-A, 86-DERECHO CONSTITUCIONAL - DOCTRINAS ESENCIALES TOMO I, 1125 (2000).

³⁶ Corte Suprema de Justicia de la Nación [CSJN], 19/08/1999, "Verrocchi Ezio Daniel c/ Poder Ejecutivo Nacional - Administración Nacional de Aduanas s/ acción de amparo," FALLOS 322:1726.

reserved to the Congress, one of the following two circumstances must occur: that it is impossible to enact the rule through ordinary Constitutional procedures, or that the situation is so urgent that it has to be solved immediately, in a period of time that is incompatible with normal legislative procedures. Thus, the Court seemed to reverse course and assert a role for itself in policing the legislative/executive boundary. The Argentine court is still struggling to establish a balance between staying in its “proper” realm under the separation of powers and acting to check and balance executive overreaching.

In the recent controversy between the President and the Central Bank a lower court held that no real emergency existed. This produced sharp criticism from the executive which claimed, on separation of powers grounds, that the courts had no authority to judge this supposedly factual matter. Some went so far as to accuse the courts of seeking to overthrow the government. The issue will remain unresolved because the court challenges were withdrawn when the bank president resigned and withdrew his legal challenges.

Constitutionally permissible DNUs are not the only route to executive action. The legislature can also delegate the power to issue specific types of decrees to the president. Prior to 1994, the Supreme Court upheld such delegations.³⁷ Article 76 in the 1994 amendment provides that “legislative powers shall not be delegated to the Executive Power save for issues concerning administration and public emergency, with a specified term for their exercise and according to the delegating conditions established by Congress.” Although some legal scholars argue that this language sharply limits such delegation,³⁸ in practice, this has not happened, and much delegated authority concerns policymaking. If the legislature declares an emergency (economic, social, sanitary, etc.), it usually gives broad powers to the president so that he or she can take measures to overcome the crisis. Furthermore, through declarations of emergency, the legislature empowers the president to make discretionary use of public funds by modifying budgetary accounts. For example, state reform and privatization under Carlos Menem’s government were implemented under economic emergency powers.³⁹ In a similar manner, President Fernández claimed the authority to issue the decrees mentioned above as responses to an ongoing economic emergency. Her critics asserted that the President’s power had lapsed as an emergency no longer existed. Her resort to the Congress in the export tax case was a tacit acknowledgement that her own claims were questionable.⁴⁰

³⁷ Corte Suprema de Justicia de la Nación [CSJN], 20/06/1927, “A. M. Delfino y Cía,” FALLOS 148:430; Corte Suprema de Justicia de la Nación [CSJN], 17/05/1957, “Mouviel, Raúl O. y otros,” FALLOS 237:636; Corte Suprema de Justicia de la Nación [CSJN], 02/12/1993, “Cocchia, Jorge D. c. Estado nacional y otro,” FALLOS 316:2416.

³⁸ Gordillo *supra* at 33.

³⁹ Bouzat, *supra*.

⁴⁰ Presidents also use the partial presidential veto, the “line-item veto” in US parlance, to amass further powers. Through this mechanism, the president can veto statutes either totally or partially, a power that permits her to affect the drafting of statutes in advance of a threatened veto. In 1967 the Supreme Court limited the president’s partial veto powers by holding that the statute in question was enacted by the Congress as a whole and thus could not be altered through its partial promulgation. It stated that, as a rule, a statute’s provisions should be understood as interconnected. In spite of this ruling, the partial veto persists and helps to enlarge the powers of the president. Corte Suprema de Justicia de la Nación [CSJN], 09/10/1967, “Colella, Ciriaco c/Fevre y Basset S.A. y/u otro s/despido,” FALLOS 268:352.

Turning to the Philippines we see a similar wide use of presidential decrees that have had particular importance because the emergencies faced by Philippines involve civil strife, not just economic emergencies.

B. The Philippines

In the Philippines the issuance of executive decrees is also associated with emergency situations although here the emergencies generally involve civil strife, not economic emergencies. Criticisms of their use centered on conflicting claims about the ability of the security forces to handle the situation without the suspension of legal protections that a state of emergency permits. However, executive orders are also 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) places the President's Ordinance Powers into five groups: executive orders of a general or permanent character that implement or execute constitutional or statutory powers; administrative orders that relate to governmental operations; proclamations that fix a date or declare a status or condition of public interest; memorandum orders and circulars that relate to administrative details; and finally, orders issued by the President in his or her capacity as Commander-in-Chief of the Armed Forces of the Philippines.⁴¹ We discuss only executive orders that affect broad policy choice and orders issued as Commander-in-Chief.

If the 1987 Constitution entrusts the subject-matter of the rule to the legislature, the President must obtain prior Congressional authority through statute to make rules as a matter of legislative delegation. To be valid, delegation must be "complete in all its terms and conditions when it leaves the legislature such that when it reaches the delegate, the only thing he will have to do is to enforce it. ... [Furthermore there must be] adequate guidelines or limitations in the law to determine the boundaries of the delegate's authority and prevent the delegation from running riot."⁴² This language 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 United States Supreme Court found a delegation unconstitutional. He wrote that the delegated power in that case was "unconfined and vagrant." He held that it was "delegation running riot."

In practice, the Philippine Supreme Court seems less conflicted than the Argentine Supreme Court and is as permissive as the US Supreme Court in allowing the delegation of policymaking authority. It has accepted as "sufficient" legislative terms such as, "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."⁴³ The President's administrative

⁴¹ Executive Order No. 292 (otherwise known as the Revised Administrative Code of 1987), Book III, Title I (Powers of the President), Chapter 2, Sections 2 to 7.

⁴²Romeo P. Gerochi et al. v. Department of Energy et al., G.R. No. 159796, July 17, 2007 (en banc).

⁴³See *Association of Philippine Coconut Dessicators v. Philippine Coconut Authority*, G.R. No. 110526, February 10, 1998 (dissenting opinion, J. Romero).

power “enables the President to fix a uniform standard of administrative efficiency and check the official conduct of his agents.”⁴⁴ 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 others. Permissible legislative delegations include: delegation of tariff powers to the President; delegation of emergency powers to the President; delegation to the people at large; delegation to local governments; and delegation to administrative bodies.⁴⁵

In addition to exercising delegated powers, President Arroyo frequently asserts implied and residual constitutional powers to make rules. She has issued a number of controversial documents mostly relating to national security.⁴⁶

B.1. The State of ‘National Emergency’

Presidential declarations of states of emergency raise important challenges to constitutional checks on executive power. It is worth examining the use of this power in some detail in the Philippines. We consider two recent cases that illustrate the risks of unchecked emergency power.

On February 24, 2006, President Gloria Macapagal-Arroyo issued Presidential Proclamation No. 1017 (PP 1017), declaring that the Philippines was in a “state of national emergency”, and commanding the Armed Forces of the Philippines (AFP) to “maintain law and order”.⁴⁷ 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”. One week after the issuance of PP 1017, she issued Presidential Proclamation No. 1021 lifting PP 1017, declaring that “the state of national emergency has ceased to exist”.

In the one week that PP 1017 was in force, many coercive acts occurred. The Office of the President cancelled all rally permits issued by local governments. Assemblies were dispersed, and the police raided “oppositionist” newspapers, confiscated news stories, documents, pictures, and mock-ups. The police arrested an opposition legislator and denied him contact with his relatives during his detention. The PNP also attempted to arrest five other perceived opposition legislators, but they were given extended refuge and “sanctuary protection” by the House of Representatives.

⁴⁴Blas F. Ople v. Ruben D. Torres et al., G.R. No. 127685, July 23, 1998 (en banc).

⁴⁵ Philippine Const., art. VI, sec. 23 (2), 24, 28(2); art. XVII, sec. 2. See Republic Act No. 6735 (otherwise known as the Initiative and Referendum Act), *in relation to* Miriam Defensor Santiago et al. v. Commission on Elections et al., G.R. No. 127325, March 19, 1997 (en banc) and Raul L. Lambino et al. v. Commission on Elections et al., G.R. No. 174153 and 174299, October 25, 2006 (en banc); Republic Act No. 7160, otherwise known as the Local Government Code of 1991.

⁴⁶ Presidential Proclamation No. 1017; General Orders Nos. 5 and 6; as well as Executive Order No. 464.

⁴⁷ Presidential Proclamation No. 1017, February 24, 2006:

Seven petitions 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, by a majority of eleven to three, partially affirmed the constitutionality of the Presidential actions in *Prof. Randolph S. David et al. v. Gloria Macapagal-Arroyo, as President and Commander-in-Chief*.⁴⁸

[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.

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 Randolph 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. 5.⁴⁹

The Court's inquiry was limited to "grave abuse of discretion amounting to lack or excess of jurisdiction on the part of any branch or instrumentality of the government". Its inquiry, therefore, did not extend to the correctness of the president's decision but could only consider whether her decision was arbitrary. The Court stated that none of the branches of government has a monopoly of public power in times of emergency: "...in times of emergency, our

⁴⁸ Prof. Randolph S. David et al. v. Gloria Macapagal-Arroyo, as President and Commander-in-Chief et al., G.R. Nos. 171396, 171409, 171485, 171483, 171400, 171489, 171424, May 3, 2006 (en banc) [David v. Arroyo].

⁴⁹ David v. Arroyo.

Constitution reasonably demands that we repose a certain amount of faith in the basic integrity and wisdom of the Chief Executive but, at the same time, it obliges him to operate within carefully prescribed procedural limitations.”⁵⁰ Although the Court explicitly rejected any authority for the President to “issue decrees” that directed the military to enforce obedience to all laws, the Court made virtually unreviewable the factual bases for the President’s characterization of a “national emergency”. The Court majority took the President at her word when she characterized the circumstances as a “national emergency” or “national security” situation.⁵¹ In these cases when the Supreme Court declined to review the factual bases for the declaration of “national emergency”, it lent weight to future attempts at presidential rule-making through implied or residual executive power exercised without legislative delegation.⁵²

The President’s response to a recent violent event illustrates the way the executive can use emergency powers to limit executive accountability. On November 23, 2009, over 67 journalists, civilians, and lawyers, most of them women, were on their way to file opposition candidate Ismael Mangudadatu’s certificate of candidacy for the governorship of Maguindanao Province. They were attacked by at least 100 armed men, and most were brutally raped and murdered.⁵³ Survivors as well as an alleged co-perpetrator identified Mayor Andal Ampatuan Jr., a member of prominent political family, as the leader of the massacre. However, Ampatuan Jr. was not preventively detained or arrested. Instead, the Office of the President encouraged the Ampatuan family to voluntarily surrender their family member, which it did. December 3 and 4 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 (PP 1959) placing Maguindanao in a state of martial law. She cited “deterioration of peace and order, and failure of the local judicial system” as reasons for the declaration.⁵⁴ Many questioned its necessity because standard criminal procedures and police enforcement measures were already well in motion, and there was no visible resistance to government forces. Before PP 1959, the President already had declared Maguindanao province to be in a state of emergency under which military troops took control of the area. Numerous arrests had been made (in addition to Ampatuan Jr.), forensic evidence had been gathered and was being examined, and criminal charges were being prepared. The Constitutional Commission on Human Rights deputized a public interest lawyers group, Centerlaw, to assist in bringing

⁵⁰ David v. Arroyo.

⁵¹ David v. Arroyo.

⁵² As Desierto has argued, sensitivity to the universalist design, orientation, and philosophy of the 1987 Constitution should delimit the space of such executive discretion when the President characterizes prevailing factual situations as constituting a “state of national emergency.” See Diane Desierto, FREEDOM AND CONSTRAINT: UNIVERSALISM IN THE PHILIPPINE CONSTITUTIONAL SYSTEM AND THE LIMITS TO EXECUTIVE PARTICULARIST POWER (forthcoming).

⁵³ See “The Ampatuan Massacre: A Map and Timeline”, GMA-7 News, at <http://www.gmanews.tv/story/177821/the-ampatuan-massacre-a-map-and-timeline> (last visited 13 December 2009).

⁵⁴ “Full text of Arroyo’s report on declaration of martial law in Maguindanao”, Philippine Daily Inquirer, 6 December 2009, available at <http://media.inquirer.net/inquirer/media/PGMA-Report-on-Proclamation-No.1959.pdf> (last visited 13 December 2009).[PP 1959].

international forensic experts to conduct a parallel investigation of the massacre.⁵⁵ 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.”⁵⁶

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 the Marcos dictatorship imposed martial law in 1972. Under the Constitution, only cases of “invasion or rebellion, when the public safety requires it”, can justify the declaration of martial law and the suspension of the privilege of the writ of habeas corpus.⁵⁷ If any of these grounds exist, the President must make a report within 48 hours to Congress, showing the factual basis for the proclamation of martial law and/or the suspension of the privilege of the writ of habeas corpus. In a short report to Congress noticeably lacking any official on-the-ground reports from the Armed Forces of the Philippines,⁵⁸ the President simply asserted that there was an “ongoing rebellion” that justified the declaration of martial law and the suspension of the privilege of the writ of habeas corpus. Initially, the House majority (dominated by the President’s supporters) refused to convene Congress, citing their support for PP 1959. After public uproar, the House of Representatives agreed to convene a joint session with the Senate, which only 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.⁵⁹ In the meantime, numerous senators, citizens, lawyers, and public interest groups filed petitions with the Philippine Supreme Court questioning the constitutionality of PP 1959.⁶⁰ Sixteen out of 24 Senators passed a “sense of the Senate” resolution stating that PP 1959 was unconstitutional because there was no actual rebellion in

⁵⁵ “CHR looks for more possible massacre victims”, Philippine Daily Inquirer, 9 December 2009, *available at* http://newsinfo.inquirer.net/breakingnews/nation/view/20091209-241072/CHR_looks_for_possible_more_massacre_victims (last visited 13 December 2009); “Agency would not hesitate to bring case to the international court”, GMA News, 9 December 2009, *available at* <http://www.gmanews.tv/story/178938/agency-would-not-hesitate-to-bring-massacre-case-to-international-court> (last visited 13 December 2009).

⁵⁶ “AFP: no need for martial law in Maguindanao”, GMA News, 30 November 2009, *available at* <http://www.gmanews.tv/story/178190/no-need-to-declare-martial-law-in-maguindanao-afp> (last visited 13 December 2009).

⁵⁷ Philippine Const., Article VII, Section 18.

⁵⁸ PP 1959 *supra*.

⁵⁹ Solita Collas-Monsod, “No need for martial law”, 9 December 2009, Business World, *available at* <http://www.bworldonline.com/main/content.php?id=2962> (last visited 30 December 2009); “Congress suspends joint session on martial law”, 9 December 2009, Philippine Daily Inquirer, *available at* <http://newsinfo.inquirer.net/breakingnews/nation/view/20091209-241041/Congress-suspends-joint-session-on-martial-law> (last visited 30 December 2009).

⁶⁰ “Senators oppose martial law proclamation”, Philippine Daily Inquirer, 6 December 2009, *available at* <http://newsinfo.inquirer.net/inquirerheadlines/nation/view/20091206-240387/Senators-oppose-Arroyos-martial-law-proclamation> (last visited 13 December 2009); “Critics challenge martial law in the Philippines”, New York Times, December 7, 2009, *available at* <http://www.nytimes.com/2009/12/08/world/asia/08phils.html> (last visited 13 December 2009); “Supreme Court asked to rule on martial law proclamation”, Philippine Star, December 14, 2009, *available at* <http://www.philstar.com/Article.aspx?articleId=532388&publicationSubCategoryId=63> (last visited 14 December 2009).

Maguindanao.⁶¹ Before the Court could rule on the petitions and before Congress could take a formal vote, the President revoked PP 1959.⁶² Instead, the President has maintained a less constitutionally-stringent State of Emergency over Maguindanao and neighboring provinces.⁶³

The Philippine Supreme Court has not yet acted on the petitions challenging PP 1959. Regardless of the outcome of these petitions, the importance of this case is that the President relied on her sole executive discretion (e.g. characterizing events in Maguindanao as a “rebellion” notwithstanding the Armed Forces of the Philippines’ contrary assessment) to declare martial law and suspend the privilege of the writ of habeas corpus. With a few months left before the expiration of her term and the conduct of fresh presidential elections, the President’s action appears troubling because it was unconstrained by her Congressional majority 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 unchecked by the Legislature and the Supreme Court. During its time in force, independent evidence-gathering and evidence-preservation were severely impaired,⁶⁴ and former senior government officials worried that it could be a pretext to clear the Ampatuans of involvement in the massacre or at least to lessen their possible legal responsibility.⁶⁵

Both PP1017 and PP1959 illustrate the symbolic and substantive power of the “unitary executive” in the Philippines. Despite numerous limitations and the rigid structural design for dealing with emergencies in the text of the 1987 Constitution, in practice, the President has gotten around these constraints, mainly through her deft use of political influence over the key majorities in Congress and the Supreme Court.

B.2. Executive Privilege⁶⁶

In 2005 the Philippine Senate conducted inquiries and issued subpoenas to get various executive officials to testify in relation to allegations of bribery and the fraudulent execution of public

⁶¹ Aurea Calica and Jess Diaz, “16 senators: ‘1959’ unconstitutional”, *The Philippine Star*, 9 December 2009, available at <http://www.philstar.com/Article.aspx?articleId=530799> (last visited 30 December 2009).

⁶² “Arroyo lifts martial law in Maguindanao”, *Philippine Daily Inquirer*, December 12, 2009, available at <http://newsinfo.inquirer.net/breakingnews/nation/view/20091212-241634/Arroyo-lifts-martial-law-in-Maguindanao> (last visited 13 December 2009).

⁶³ “State of Emergency remains in Maguindanao – Remonde”, 14 December 2009 Press Release of the Office of the President, available at http://www.gov.ph/index.php?option=com_content&task=view&id=2002496&Itemid=2 (last visited 30 December 2009).

⁶⁴ “More mass graves in Maguindanao, says human rights chief”, *ABS-CBN News*, December 9, 2009, available at <http://www.abs-cbnnews.com/nation/12/09/09/more-mass-graves-maguindanao-says-human-rights-chief> (last visited 13 December 2009).

⁶⁵ “Petitions to high court stopping ‘1959’ now total 7”, *Philippine Daily Inquirer*, December 11, 2009, available at http://services.inquirer.net/mobile/09/12/12/html_output/xmlhtml/20091211-241314-xml.html (last visited 13 December 2009).

⁶⁶ See Diane Desierto, “Universalist Constitutionalism in the Philippines: Restricting Executive Particularism in the Form of Executive Privilege”, *Verfassung und Recht in Übersee/Journal of Law and Politics in Africa, Asia, and Latin America*, vol. 1, 2009, at pp. 80-105.

infrastructure/procurement contracts.⁶⁷ In response the President issued Executive Order No. 464 on September 28, 2005 that states the Executive's position on the doctrine of executive privilege. Under the Order, the separation of powers shields the executive from oversight, ignoring the complementary principle of checks and balances.

Section One 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. When the security of the State or the public interest so requires and the President so states in writing, the appearance shall only be conducted in executive session." Section Two states that: "The rule of confidentiality based on executive privilege is fundamental to the operation of government and rooted in the separation of powers under the Constitution." It then goes on to give a very broad definition of what and who is covered and states (in Section Three) that those officials as well "shall secure prior consent of the President prior to appearing before either House of Congress to ensure the 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 inquiries in aid of legislation." Challenges to the constitutionality of E.O. 464 were brought before the Philippine Supreme Court in 2006, which, in *Senate of the Philippines et al. v. Eduardo R. Ermita, in his capacity as Executive Secretary and alter-ego, et al.*,⁶⁸ unanimously declared parts of E.O. 464 unconstitutional.

Nearly two years later, however, another controversial government procurement contract sparked another investigation by Senate committees. In his testimony the Secretary of the National Economic Development Authority (NEDA) Romulo Neri, revealed that he was offered a bribe to endorse the contract. When Senators asked about the President's involvement in approving the contract, Neri invoked executive privilege under E.O. 464. After the Senate ordered his arrest for refusing to answer its questions, Neri filed a petition with the Philippine Supreme Court. Voting 9-6, the Philippine Supreme Court majority upheld the claim of executive privilege in its March 25, 2008 decision in *Romulo L. Neri v. Senate Committee on Accountability of Public Officers and Investigations, et al.* (hereafter, '*Neri v. Senate*'),⁶⁹ which expanded the doctrine of executive privilege beyond *Senate v. Ermita*. The decision imported doctrinal tests from foreign sources (particularly American jurisprudence) without undertaking any analysis of the nature of executive power under the 1987 Philippine Constitution. Ultimately, 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.

⁶⁷ See Gil C. Cabacungan Jr., Gil C., "Senate May Reopen Northrail Probe", *Philippine Daily Inquirer*, November 13, 2007, at

http://newsinfo.inquirer.net/breakingnews/nation/view_article.php?article_id=100560 (last visited 5 July 2008).

⁶⁸ *Senate of the Philippines et al. v. Eduardo R. Ermita, in his capacity as Executive Secretary and alter-ego, et al.*, G.R. Nos. 1697777, 169659, 169660, 169667, 169834, and 171246, April 20, 2006 (en banc).

⁶⁹ *Romulo L. Neri v. Senate Committee on Accountability of Public Officers and Investigations, Senate Committee on Trade and Commerce, and Senate Committee on National Defense and Security*, G.R. No. 180643, March 25, 2008 (en banc).

C. Conclusions

The Argentine and Philippines 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, but when presidents issue decrees under their emergency powers, court review is likely to be too slow to be effective. There are unresolved tensions in defining the president's residual or implied executive power as the basis for rule-making. If the President's quasi-legislative authority is not based on legislative-authorization, it is difficult to ensure the institutional accountability if the president asserts rule-making power. Even when that power is exercised under a legislative authorization, it has proved difficult to constrain presidents operating with weak or politically supportive legislatures.

Review of executive decrees by the supreme courts in each country has been limited and often deferential to the executive on separation of powers grounds. In Argentina the Supreme Court has been inconsistent in its review of Necessity and Urgency Decrees. In 1995, the Court held that DNU's 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 not possible or where immediate action is necessary. The Argentine Court has not yet found a consistent balance between the separation of powers and checks and balances. A pending case may indicate its current thinking on the issue.

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 and, then, simply referred to a "larger concept of executive privilege" within the Constitution, to justify transposing broader forms of executive privilege to limit the constitutional right to public information. Ultimately, the problem lies in the way the Supreme Courts have articulated the concept of "residual" executive power.⁷⁰ A narrow Court majority first articulated this notion in 1989 as something which is "traditionally considered as within the scope of executive power."⁷¹ 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 Constitutions.

Both the Argentine and the Philippines constitutions give presidents a range of decree powers but at the same time seek to limit the exercise of these powers. However, the legislatures in each country have seldom operated as an effective check on executive power. Although the supreme courts in both countries have periodically been asked to determine the limits of these powers, they have not been an effective check. Furthermore, they have been reluctant to review mixed questions of fact and law that might lead to charges of political interference. Appeals to tradition and the courts' acceptance of emergency justifications seem incompatible with the paradigm of diffuse powers and constitutional rights that lie behind the new constitutions in place in each

⁷⁰ See the discussion of residual executive power in *Provincial Government of Zamboanga del Norte et al. v. The Government of the Republic of the Philippines Peace Negotiating Panel et al.*, G.R. Nos. 183591, 183752, 183893, 183951, and 183962 (en banc).

⁷¹ *Ferdinand Marcos et al. v. Honorable Raul Manglapus et al.*, G.R. No. 88211, September 15, 1989 (en banc):

country. The Argentine court has not developed a consistent jurisprudence. In some cases it refuses to review executive action by claiming that that 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 use the separation of powers as a principle for limiting the reach of checks and balances. They do not invoke checks and balances as a necessary complement to executive power.

III. Budgetary Management and Government Reorganization

A key aspect of constitution design is the placement of responsibility for determining overall levels of government taxation and expenditures and budgetary allocations to particular programs. In all presidential systems the legislature is deeply involved in these decisions but at the same time the practical expedients day-to-day government activity require that the executive have some freedom to allocate funds and shift spending between categories to deal with unexpected contingencies. Thus, this aspect of government raises in particularly acute form 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 its revenue needs based on the general program of the government and on the public investment plan. 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. Still, the president oversees the Chief of Cabinet. The executive prepares the budget bill, and the Chief of Cabinet submits the bill to Congress with the prior consent of the Cabinet and the approval of the executive.⁷²

The National Budget Office, an office within the Ministry of Economy, prepares the budget bill based on submissions that the national administration submits. The final budget bill must be submitted to the legislature before September 15, and it has to 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.⁷³

Congress reviews past government spending through a document called the “investment account” that explains the execution of the budget; the situation of the treasury; the state of the public debt; the accounting and financial state of the administration; the economic and financial results; and, more generally, the degree of accomplishment of the goals and objectives of the budget bill. The Executive is supposed to submit the investment account to Congress before June 30 in the year after the respective budget bill was approved.⁷⁴ Within the legislature, a special

⁷² Argentine Const., Articles 75 (8), 99 (10), 100 (6) and (7).

⁷³ Articles 16-17, 26 of the Financial Management Act, Law No. 24.156, Sep. 30, 1992, B.O. 29/10/92, available at <http://www.infoleg.gov.ar/infolegInternet/anexos/0-4999/554/texact.htm> (last visited Jun. 19, 2009).

⁷⁴ *Id.* Article 95.

bicameral committee analyzes the investment account and submits a report to both Houses.⁷⁵ The legislature can either reject or approve the investment account.⁷⁶

This process operates poorly as an 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; it approved the 1992 account in 1996; and the 1993 account, in 1997.⁷⁷ Furthermore, in November 2007, the legislature passed a single statute that approved the investment accounts of the budgets for the period 1999 to 2004.⁷⁸ The General Audit Office (AGN), an external oversight body, assists the legislature in monitoring the executive and is itself controlled by the special bicameral committee that oversees the execution of the budget. The AGN has several weaknesses both organizational and practical that we outline below as part of our assessment of oversight institutions.

The congressional budgetary process lacks bite. First, although the legislature is supposed to estimate revenues and expenditures, in reality, it rarely adjusts the executive's formulation of the budget. Second, congressional review of the execution of the budget is quite weak. The legislative committee that is supposed to assess the investment account operates with considerable delay. Third, even after it submits its reports to the Congress, the legislature does not have many incentives to perform timely and adequate oversight. Finally, although the AGN is meant to control and limit executive powers, it does not have sufficient power or independence to carry out its duties.

Besides these general difficulties in controlling and limiting the executive, two specific practices enhance the discretionary authority of the executive: the use of secret funds, and the so-called "superpowers" of the Chief of Cabinet.

Two secret decrees in 1955 and 1956 first authorized the use of secret funds to maintain state secrets related to intelligence activities. They were later ratified by a secret decree-law in 1969.⁷⁹ Under these decrees, the executive can issue rules that are never published or subject to any sort of congressional control. In time, the intelligence agency *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, were authorized to use such funds. The funds allocated through secret executive decrees are not subject to any control although occasionally a shrewd journalist manages to obtain information about the allocation of secret funds.⁸⁰ An expert

⁷⁵ Articles 2 and 5 of the Law No. 23.847, Sep. 26, 1990, ADLA 1990 - D, 3692.

⁷⁶ Argentine Const., Article 75(8).

⁷⁷ Contaduría General de la Nación, Secretaría de Hacienda, Ministerio de Economía y Finanzas Públicas, LA CUENTA DE INVERSIÓN. EL CONTROL DE LA CUENTA DE INVERSIÓN, Oct. 07, 2005 (XX Congreso Nacional de Contadurías Generales) available at

http://www.mecon.gov.ar/hacienda/cgn/xxcongreso/trabajos/comision_mixta.pdf (last visited Jun. 19, 2009).

⁷⁸ Law No. 26.328, Nov. 28, 2007, B.O. 26/12/07, available at

<http://www.infoleg.gov.ar/infolegInternet/anexos/135000-139999/136123/norma.htm> (last visited Jun. 19, 2009).

⁷⁹ See *La Justicia Apunta a los Bienes Declarados por Ex Funcionarios*, CLARÍN, May 10, 2005, available at <http://www.clarin.com/diario/2005/05/10/elpais/p-00301.htm> (last visited Jun. 19, 2009).

⁸⁰ In 2005, Clarín reported that Duhalde and Kirchner had respectively assigned \$99 and \$12 million pesos to the SIDE through secret decrees. See *Fondos Reservados. Confirman que Kirchner y Duhalde Aumentaron los Gastos*

report, commissioned by the Supreme Court in connection with a corruption investigation, determined that from 1988 to 2001 secret funds totaled \$4 billion pesos and that SIDE allocated 70% of the total.⁸¹ Some secret funds are also believed to finance political campaigns, a suspicion supported by the fact that these funds significantly increase during electoral periods.⁸²

In 2001, the National Intelligence Act created a Bicameral Oversight Committee of Intelligence Agencies and Activities to monitor intelligence activities and specifically authorized it to monitor the secret funds.⁸³ However, the committee was not created until 2004, and its initial members explained that, although the SIDE would be subject to a tighter control, the Committee would not monitor secret funds.⁸⁴

At times, the Congress delegates “superpowers” to the executive that allow the executive to reallocate budgetary accounts at will, circumventing budgetary controls. This practice began in March 2001, when Ministry of Economy Domingo Cavallo asked the legislature for delegated legislative powers to handle a severe economic and financial crisis.⁸⁵ Although these special powers were later repealed, the following governments restored them by including emergency provisions in the budget acts from 2002 to 2006. In 2006, amendments to the Financial Management Act permanently established these superpowers so that the Chief of Cabinet can reassign budgetary accounts at will. The only limit is that the legislature must approve increases in budgetary lines related to secret funds or intelligence funds.⁸⁶ 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. The claimed misuse of these superpowers that has been at the heart of current controversies over President Fernández’s issuance of executive decrees is mentioned above.

Furthermore, in conditions of fiscal surplus the government can deliberately underestimate revenues and then use the excess revenues with no budgetary control. The government has run a surplus in every budgetary law since 2004, and a substantial part of that surplus, amounting to billions of dollars per year, has been managed outside the regular budgetary process. Finally, since 2003, the government has increasingly used fiduciary funds, which are subject to fewer budgetary constraints than other funds. The budget act does not determine the precise use of these funds or their geographical distribution. Although since 2003 the Chief of Cabinet is supposed to inform the legislature about the use of fiduciary funds, he made no reports in 2003

de la SIDE, CLARÍN, Feb. 13, 2005, available at <http://www.clarin.com/diario/2005/02/13/elpais/p-00315.htm> (last visited Jun. 19, 2009).

⁸¹ See *Revelan el Uso de Más de 4.000 Millones de Fondos Reservados*, CLARÍN, Feb. 01, 2004, available at <http://www.clarin.com/diario/2004/02/01/p-00315.htm> (last visited Jun. 19, 2009).

⁸² See Laura Saldivia, *Secret Expenditures and Record Voting* (unpublished, on file with authors) (providing data on SIDE’s expenditures in times of elections from 1993 to 2004).

⁸³ Article 37, Law No. 25.520, Nov. 27, 2001, B.O. 06/12/01, available at <http://www.infoleg.gov.ar/infolegInternet/anexos/70000-74999/70496/norma.htm> (last visited Jun. 19, 2009).

⁸⁴ See *El Congreso Vigila la SIDE, Pero Sin Controlar los Fondos Reservados*, CLARÍN, Jan. 04, 2004, available at <http://www.clarin.com/diario/2004/01/04/p-00601.htm> (last visited Jun. 19, 2009).

⁸⁵ Law No. 25.414, Mar. 29, 2001, B.O. 30/03/01, available at <http://www.infoleg.gov.ar/infolegInternet/anexos/65000-69999/66559/norma.htm> (last visited Jun. 19, 2009).

⁸⁶ See Law No. 26.124, Aug. 02, 2006, B.O. 08/08/06, available at <http://www.infoleg.gov.ar/infolegInternet/anexos/115000-119999/118648/norma.htm> (last visited Jun. 19, 2009).

and 2004, and the 2005 and 2006 reports were incomplete. Congress has never attempted to improve the use of these funds.⁸⁷ The combination of these discretionary mechanisms (secret funds, superpowers, budget underestimation, and fiduciary funds) has allowed successive executives to manage public funds with little or no control.

B. The Philippines

The Philippine president also has considerable freedom to redirect budgetary authority and to reorganize the government. Some of these powers are clearly delegated by the Constitution. However, some Presidential actions arguably violate Constitutional constraints on executive power. Thus, the issues for Philippine constitutional development are, first, whether the text is too permissive and, second, whether presidents' exercise of power goes beyond the strictures in the text designed to limit the reach of executive power.

The 1987 Constitution separates the Legislature's appropriations power and the President's authority to propose the annual budget for Congressional approval.⁸⁸ After Congress passes the General Appropriations Act (GAA), the President can "veto any particular item or items in an appropriation, revenue, or tariff bill, but the veto shall not affect the item or items to which he does not object". She cannot unilaterally add back items omitted from the final bill. The executive veto may be overridden by a vote of two-thirds of the membership of each legislative chamber.⁸⁹

The Legislature is responsible for approving the General Appropriations Act (GAA), and transfers of appropriations are expressly prohibited by the Constitution, unless the Legislature authorizes them. In practice, however, each GAA authorizes the President to augment items in the general appropriations law with savings from other items within the appropriations of the Executive Department.⁹⁰ The Administrative Code of 1987 requires the GAA to specify budgetary programs and projects for each government agency.⁹¹ Salary increases or adjustments cannot be funded from GAA appropriations unless specifically authorized by law or appropriate budget circular.⁹² The President can only realign the budget within the Executive Department if she has prior statutory authorization to do so.

In recent years, however, the President does 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. One observer claims that the "economic stimulus

⁸⁷ 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 Tratamiento por el Congreso* (CIPPEC & CEP 2006).

⁸⁸ Philippine Const., Art. VII, sects. 22, 25.

⁸⁹ Philippine Const., Art. VI, secs. 27 (1), (2).

⁹⁰ See for example Republic Act Nos. 9336, 9206, 9162, 8760, 6831.

⁹¹ Executive Order No. 292, otherwise known as the Administrative Code of 1987, Book IV, Chapter 4, Section 23 [Administrative Code].

⁹² *Id.*, at Book VI, Chapter 7, Section 60.

fund” signed into law in 2009 will be used as an “election-stimulus fund” to aid the President’s political allies.⁹³ There are also worries that discretionary funds are an invitation to corruption.⁹⁴ A recent Commission on Audit report shows that the President funded some of her foreign travel with the government’s Php 800 Million emergency fund earmarked for calamities. This left the government with few resources to respond to 2009’s numerous natural disasters and massive flooding.⁹⁵ Budget impounding contributes to the lack of transparency in the preparation of the national budget.⁹⁶ This situation appears to be similar to the Argentine case where much the same result can be achieved under legislative delegations which allow the president to reallocate budget items.

The President also uses administrative reorganization to erode Congressional authority over budgetary realignments or transfers of appropriation.⁹⁷ Under the Administrative Code the President can reorganize the administrative structure of the Office of the President. She may restructure the Office; transfer any function or agency under the Office of the President to any other Department or Agency as well as transfer functions and agencies to the Office of the President⁹⁸ Judicial review of administrative reorganizations only applies a test of “good faith” to limit to the President’s reorganization authority.⁹⁹

By invoking the need for “administrative efficiency”, the President has transferred functions from one agency to another, created new agencies, as well as conferred discretion on chosen agencies over investments, contracts, and other specialized economic issues.¹⁰⁰ 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-

⁹³ Tita Valderama, “P50-B ‘economic ‘ stimulus fund also ‘election stimulus fund’?”, Philippine Centre for Investigative Journalism, 1 February 2009, at <http://www.pcij.org/i-report/2009/budget-process2.html> (last visited 10 June 2009).

⁹⁴ Id., quoting Professor Leonor Magtolis-Briones, lead convenor of Social Watch Philippine.

⁹⁵ Jess Diaz, “GMA used P800-million emergency fund for foreign trips”, Philippine Star, August 15, 2009, at <http://www.philstar.com/article.aspx?articleid=496123> (last visited 25 February 2010).

⁹⁶ Jarius Bondoc, “Everything’s wrong with budget process”, Philippine Star, February 2, 2009, at <http://www.philstar.com/Article.aspx?articleid=436679> (last visited 10 June 2009).

⁹⁷ See Diane Desierto, “The Presidential Veil of Administrative Authority over Foreign-Financed Public Contracts in the Philippines” (under submission).

⁹⁸ Administrative code, *supra*, Book III, Chapter 10, Section 31.

⁹⁹ *Malaria Employees and Workers Association of the Philippines, Inc. (MEWAP) et al. v. The Honorable Executive Secretary Alberto Romulo et al.*, G.R. No. 160093, July 31, 2007.

¹⁰⁰ See Executive Orders Nos. 184 (March 10, 2003), 366 (October 4, 2004); Implementing Rules and Regulations of Executive Order No. 366, May 11, 2005; Executive Order No. 72 (February 11, 2002). See Isa Lorenzo and Malou Mangahas, “New CSC Chief Faces Pack of Ineligible Bureaucrats”, Philippine Centre for Investigative Journalism, April 24, 2008, at <http://www.pcij.org/stories/2008/ineligible-bureaucrats.html> (last visited 10 March 2009); Isa Lorenzo and Malou Mangahas, “Malacanang is No. 1 in excess exec hires”, *Malaya*, March 20, 2009, at <http://www.malaya.com.ph/apr25/news6.htm> (last visited 20 March 2009).

ranging authority over energy projects including partnerships with private firms.¹⁰¹ The power industry sharply criticized PSOGERPIO as an illegal encroachment on the functions of the Department of Energy, and as a mechanism to favor specific interests.¹⁰² Shortly after, the President abolished PSOGERPIO. Similarly, a year later the President issued an Executive Order,¹⁰³ which transferred the Philippine Mining Development Corporation (PMDC) from the Department of Environment and Natural Resources (DENR) to the Office of the President so that the President could directly oversee mining contracts with foreign investors.¹⁰⁴ Less than six months later, the President issued a tersely-worded Executive Order that transferred PDMC back to the DENR.¹⁰⁵

The Philippine Constitution provides for several independent constitutional offices that are supposed to weigh in on the President's use of her budgetary authority, such as the Commission on Audit (COA), the National Economic Development Authority (NEDA), the Bangko Sentral ng Pilipinas (BSP) and the Monetary Board (MB). The COA is a constitutionally independent office responsible for examining, auditing, and settling all accounts pertaining to the revenue, receipts, and expenditures of Government.¹⁰⁶ The Constitution also designates the NEDA as the "independent planning agency of government",¹⁰⁷ and the BSP functions as the "independent central monetary authority... [providing] policy direction in the areas of money, banking, and credit."¹⁰⁸ Finally, the President cannot contract foreign loans on behalf of the Republic without the "prior concurrence of the MB."¹⁰⁹

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).¹¹⁰ (As will be discussed later, CA confirmation is in reality, of little

¹⁰¹ Executive Order No. 474 (November 30, 2005). See Donnabelle L. Gatdula, "E0 474 seen to drive away investors in the power sector", *Philippine Star*, January 27, 2006, at p. B4:

¹⁰² See "Gov't may assume power firm's P43M debt: Palace", *Sun Star Manila*, December 19, 2005; "Mysterious energy superbody", *Manila Standard*, December 29, 2005.

¹⁰³ Executive Order No. 636 (July 18, 2007); Executive Order No. 665 (September 25, 2007). See Michael Lim Ubac, "Mining out of DENR; now under President's office", *Philippine Daily Inquirer*, July 27, 2007, at http://newsinfo.inquirer.net/inquirerheadlines/nation/view/2007072778988/Mining_out_of_DENR%3B_now_under_President%92s_office (last visited 10 March 2009).

¹⁰⁴ See Johanna Camille Sisante, "Solon: Mining contract with ZTE disadvantageous to the government", November 24, 2008, *GMA News*, at <http://www.gmanews.tv/story/135289/Solon-Mining-contract-with-ZTE-disadvantageous-to-govt> (last visited 10 March 2009); Carmel Crimmins, "Skepticism greets Philippine mining industry revival", Reuters, *International Herald Tribune*, April 3, 2008, at <http://www.ihf.com/articles/2008/04/03/business/mine.php> (last visited 10 March 2009).

¹⁰⁵ Executive Order No. 689 (December 27, 2007).

¹⁰⁶ Phil. CONST., art. IX(D), sec. 2(1).

¹⁰⁷ Phil. CONST., art. XII, sec. 9.

¹⁰⁸ Phil. CONST., art. XII, sec. 20.

¹⁰⁹ Phil. CONST., art. VII, sec. 20.

¹¹⁰ Phil. CONST., art. IX(D), sec. 1(2); Republic Act No. 7653, Art. III, Sec. 17.

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.) She wholly and exclusively appoints all members of the NEDA and the MB.¹¹¹ 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 the President's disbursements of public funds for allegedly personal political purposes.¹¹² A recent scandal 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.¹¹³

Presidential control over the national budget and over executive branch reorganization demonstrates how the incumbent President "wields the substantial powers of the presidency to keep herself in office, and in the process she exhibits no qualms about undermining the country's already weak political institutions."¹¹⁴ The President's broad executive interpretations of budgetary authority and administrative reorganization have not been adjudicated by the Supreme Court. 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.

C. Conclusions

Although the mechanisms are somewhat different, presidents in Argentina and the Philippines have considerable independent influence on government spending. They can redirect government spending by moving funds between budget categories, allocate secret funds, and reorganize government. In Argentina the president frequently delays submitting required reports to the legislature, thus limiting its ability to oversee spending. Some of their actions have led to legislative and popular protests, but in many cases there is no recourse to these exercises of power, in part, because they are not publicized and, in part, because there is no effective recourse in the legislature or the courts.

IV. Appointment Powers

Presidents seek to appoint their allies to important positions in the executive 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

¹¹¹ Executive Order No. 230, Sec. 4 (July 22, 1987); Republic Act No. 7653, Art. II, Sec. 6.

¹¹² "COA dared; Audit Arroyo's P2-B power doleout", GMA News, June 12, 2008 at <http://www.gmanews.tv/story/100813/COA-dated-Audit-Arroyos-P2-B-power-doleout> (last visited 26 February 2010). "COA asked to audit Arroyo's Pampanga projects", January 13, 2010, at <http://www.gmanews.tv/story/181484/coa-asked-to-audit-arroyos-pampanga-projects> (last visited 26 February 2010).

¹¹³ Diane A. Desierto, "The Presidential Veil of Administrative Authority Over Foreign-Financed Public Contracts in the Philippines", 27 UCLA Pacific Basin Law Journal (forthcoming)

¹¹⁴ Paul D. Hutchcroft, "The Arroyo Imbroglio in the Philippines", *Journal of Democracy*, Volume 19(1), January 2008, at pp. 141-155, at 142.

appointees and by the president's ability to make political appointments without input from other political actors.

A. Argentina

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 for administrative appointments in the core administration. However, her influence extends to some nominally independent agencies and the courts and prosecutors.

A.1. Executive Departments and "Independent Agencies"

The President alone makes core executive appointments in the national administration outside the civil service.¹¹⁵ The president has authority to appoint and remove the Chief of Cabinet and the Ministers, the officers of his 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 administration except those that the president is empowered to make.¹¹⁶ In practice, the president usually appoints high-level officials, and she delegates to the Chief of Cabinet and other ministries and secretaries the power to appoint rank-and-file officials. There are no constraints on the president's appointment powers, such as a requirement to obtain confirmation by the Senate (or the House, or both); a mechanism for citizen participation; or rules constraining, for instance, nepotism or requiring some minimum standards of proficiency.

High-level officials are not part of the merit-based civil service system.¹¹⁷ The civil service law excludes not only officials who, according to the Constitution, have to be appointed by the president (the Chief of Cabinet, Ministers, and Secretaries), but also Undersecretaries, the chief authorities of the decentralized agencies and institutions of the social security system, and the members of multi-member bodies and other similar officials.¹¹⁸ Civil service officials have stability in office, which is expressly granted by the Constitution and by statute.¹¹⁹ They can only be dismissed with cause. However, these provisions only apply to permanent employees. Those hired on a contractual basis do not have the right to stable employment. Contract officials not only include rank-and-file bureaucrats, but also high level officials. Many technical advisors who work directly for ministries are hired through this mechanism because it is assumed that they will only stay in their positions as long as the Minister does.

One might suppose that those appointed to supposedly "independent" agencies should be able to operate free of presidential control. In practice, this is not true. Many agencies are either not structurally independent, or even if they are legally independent, they are not functionally

¹¹⁵ Only ambassadors, ministers plenipotentiary and commercial attaches are appointed and removed by the president with the consent of the Senate. (Argentine Const., Art. 99(7)).

¹¹⁶ Argentine Const., Article 100(3).

¹¹⁷ See Decree No. 2098, Dec. 3, 2008, B.O. 05/12/08, available at <http://www.infoleg.gov.ar/infolegInternet/anexos/145000-149999/148090/norma.htm> (last visited Jun. 26, 2009).

¹¹⁸ Article 3, sections a, and b, Law No. 25.164, Sep. 15, 1999, B.O. 08/10/99, available at <http://www.infoleg.gov.ar/infolegInternet/anexos/60000-64999/60458/norma.htm> (last visited Jun. 26, 2009).

¹¹⁹ Argentine Const., Article 14 bis; Article 16, Law No. 25.164, *supra*.

insulated from the executive. To illustrate we discuss the Central Bank, the Pension Agency, the Revenue Agency, and several agencies that regulate public utilities.

The Central Bank is an autarchic entity of the State.¹²⁰ It is governed by a multi-member board (a president, a vice-president, and eight directors). The president appoints the members of the board with confirmation by the Senate, although the president can make temporary appointments pending Senate confirmation. Members have six-year terms, and they can be reappointed once to a second term. The President can remove them only for serious legal violations and with the previous non-binding advice of a special congressional bicameral committee.¹²¹ Although this structure seems adequate to insulate monetary and exchange policies from the executive, in practice, it has not worked as expected. Neither the bank's autarchy, nor the requirement of Senate confirmation, nor the fixed six-year term (which exceeds the executive's term by two years) has been observed.

The President expects that members of the board, and especially its president, will have policy views supportive of the executive. The board's members often resign when the executive requires them to do so. Furthermore, when the bank's president resigns, it is not unusual for the executive to make a temporary appointment who remains in office without Senate confirmation. This appointee is not submitted to the Senate under the argument that he is only completing the term of the official who resigned. On only two occasions did the bank's president who was appointed by one administration remain in office under a different president.¹²² Thus, even when the formal structure appears favorable to the establishment of independence, the practical political reality undermines the institutional protections. Since 1990, no president of the central bank has completed a six-year term.¹²³ In January 2010 the president resigned after an attempt by the President to force him out through a DNU after he refused to comply with another DNU requiring him to shift a massive amount of funds from the Bank to the government. The DNU was justified on the grounds that the congressional bicameral committee's advice was not required because Congress was in recess. The courts stopped the DNU through an injunction holding that the committee had to issue its advice before the President could remove the bank's president. The bank president finally resigned, the government did not accept his resignation, and the bicameral committee eventually advised in favor of his removal, which triggered the bank president's decision to call off his judicial challenges. But because this occurred before the courts could rule on the substance of the case, the legality of the President's actions will not be tested.¹²⁴

¹²⁰ Article 1, Law No. 24.144, Sept. 23, 1992, B.O. 22/10/92, available at <http://www.infoleg.gov.ar/infolegInternet/anexos/0-4999/542/texactley20539.htm> (last visited Jun. 26, 2009).

¹²¹ *Id.* article 6-9.

¹²² They 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.

¹²³ For a list of central bank's presidents and their terms, see www.bcra.gov.ar (last visited Jun. 26, 2009).

¹²⁴ See *Con Fuertes Críticas, Redrado Renunció al BCRA, Pero el Gobierno ya Adelantó Que no Aceptará la Dimisión*, LA NACIÓN, Jan. 29, 2010, available at http://www.lanacion.com.ar/nota.asp?nota_id=1227491 (last visited Mar. 2, 2010); *Marcó del Pont Presidirá el Central*, LA NACIÓN, Feb. 4, 2010, available at http://www.lanacion.com.ar/nota.asp?nota_id=1229371 (last visited Mar. 2, 2010).

The Pension Agency. In 1994 when the social security system was privatized, individuals were given the choice of keeping their retirement funds in the public system or transferring them to a private system administered by various firms.¹²⁵ In December 2008, under a statute enacted by the Congress, the government re-nationalized the system, confiscating the private retirement funds and transferring them to the State under the administration of the Administración Nacional de la Seguridad Social (ANSES) which administers the social security system.¹²⁶ Although created with an independent mandate, the executive is using pension fund assets to make loans to utilities, both privatized and nationalized, to automobile companies and to finance construction projects. In doing so, they are ignoring a 2007 Supreme Court decision that ordered the State to adjust pensions in line with the growth in the salaries of active workers.¹²⁷

These activities could not have been carried out without loyal leadership at ANSES. This has not been difficult to achieve because ANSES has no firm statutory basis; it was created through an executive decree in 1991 at the sole discretion of the president.¹²⁸ Furthermore, the Minister of Labor appoints the agency's director. In reality, the president appoints the director of ANSES even though this violates the decree that set up ANSES.¹²⁹ The last director was appointed by the president, not as the director of the ANSES, but as the director of a related agency that oversees the former private firms that administered retirement funds,¹³⁰ a position where the president does enjoy appointment authority.¹³¹ However, he is, in fact, operating as head of ANSES.

Although this lack of independence was problematic when the retirement and pension funds were private firms, it has become even more worrisome now that ANSES administers vast resources and has also acquired a significant ownership share in several private firms. An agency that manages billions of dollars of social security funds is directed by a single official who is de facto appointed by the president with no participation by the legislature. The legislature does have a bicameral oversight committee that controls the operation of these new funds so it could monitor the agency's behavior if it wished.¹³²

¹²⁵ Law No. 24.241, Sep. 23, 1993, B.O. 18/10/93, available at <http://www.infoleg.gov.ar/infolegInternet/anexos/0-4999/639/norma.htm> (last visited Jun. 26, 2009). 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. Law No. 26.222, Feb. 27 2007, B.O. 08/03/07, available at <http://www.infoleg.gov.ar/infolegInternet/anexos/125000-129999/126072/norma.htm> (last visited Jun. 26, 2009).

¹²⁶ Law No. 26.425, Nov. 20, 2008, B.O. 09/12/08, available at <http://www.infoleg.gov.ar/infolegInternet/anexos/145000-149999/148141/norma.htm> (last visited Jun. 26, 2009).

¹²⁷ Corte Suprema de Justicia de la Nación [CSJN], 26/11/2007, "Badaro, Adolfo Valentín c/ Administración Nacional de la Seguridad Social," FALLOS, 330:4866.

¹²⁸ ANSES was created by Decree No. 2741, Dec. 21, 1991, B.O. 08/01/92. This DNU was ratified by Congress through the law that privatized the social security system.

¹²⁹ Presidents argue that their authority to appoint the director arises from the general appointment powers under the Constitution (article 99, section 7 of the Constitution). For an example of an executive decree appointing the director of the ANSES, see Decree No. 1619, Dec. 07, 2001, B.O. 11/12/01, available at <http://www.infoleg.gov.ar/infolegInternet/anexos/70000-74999/70636/norma.htm> (last visited Jun. 26, 2009).

¹³⁰ Decree No. 1753, Oct. 22, 2008, B.O. 23/10/08, available at <http://www.infoleg.gov.ar/infolegInternet/anexos/145000-149999/146197/norma.htm> (last visited Jun. 26, 2009).

¹³¹ See article 121, Law No. 24.241, *supra*.

¹³² See Article 11, Law No. 26.425, *supra*.

The Revenue Agency: The Administración Federal de Ingresos Públicos (AFIP) is in charge of collecting tax and customs revenues and was created in 1997 through a necessity and urgency decree (DNU).¹³³ AFIP is an autarchic agency under the jurisdiction of the Ministry of Economy with a manager appointed by the executive upon a proposal by the Ministry of Economy.

In November 2001, the executive reorganized AFIP by delegated decree, using the “superpowers” it received in March 2001.¹³⁴ The decree aimed to give AFIP more independence from the executive by requiring that the federal manager be appointed by the executive no earlier than one year after assuming the presidency for a period of four years that can be extended for successive periods, as long as the official fulfills the management plan of the previous period. If the federal manager does not complete her term, the replacement will serve only 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 of the national administration, the legal and technical secretary of the presidency, and the director of the internal audit office of the executive.¹³⁵

Once again the practice falls short of the ideal. AFIP does not operate as a fully independent agency. For example, a scandal in March 2008 ended with the forced resignation of the federal manager and the director of the customs service (that depends on AFIP). The president forced both officials out after a public fight between AFIP and the customs service over the computerized system that controls customs duties.¹³⁶ The legal structure provides that the federal manager of AFIP appoints and removes the director of the customs service. However, when the head of AFIP attempted to remove the director, the president overturned his decision, and forced both to resign. Less than one year later, the president appointed the former director of customs, who had strong political connections, to head AFIP.¹³⁷

Regulatory agencies that oversee privatized utilities need to be insulated from the executive to avoid conflicts of interest and political interference with their activities. Although the legal structures that created these agencies provide some insulation, in practice, they do not function as real independent agencies.

Many operate under a system of “intervention,” which means that due to the existence of irregularities or bad management, the executive appoints a single person to direct the agency temporarily, without following legally required procedures to appoint the multi-member board. It is supposed to be used only in cases of grave mismanagement and should last for only a limited

¹³³ Decree No. 618, Jul 10, 1997, B.O. 14/07/97, available at <http://www.infoleg.gov.ar/infolegInternet/anexos/40000-44999/44432/texact.htm> (last visited Jun. 26, 2009).

¹³⁴ Decree No. 1399, Nov. 04, 2001, B.O. 05/11/01, available at <http://www.infoleg.gov.ar/infolegInternet/anexos/65000-69999/69716/norma.htm> (last visited Jun. 26, 2009).

¹³⁵ *Id.*, Articles 5 and 7.

¹³⁶ After both officials resigned, the media published stories claiming that the fight had been over a 90 million dollars 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 (last visited Jun. 26, 2009). See *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> (last visited Jun. 26, 2009).

¹³⁷ 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> (last visited Mar. 2, 2010).

period of time until the agency administration has returned to normal. The president's power to intervene in a national agency is implied by the general powers of administration in the Constitution (Article 99, section 1). But no detailed regulation defines when an intervention is appropriate and its time limits. Furthermore, even those agencies which have not been intervened are also frequently chaired by officials who have not been appointed in accordance with the law.

Most agencies were established by executive decrees, not statutes. They have multi-member boards with from three to eight members. All members are appointed by the president or a cabinet member subject to various conditions. Some agency decrees require appointees to have professional qualifications; others give non-executive bodies a role in recommending names to the president or the responsible cabinet secretary. Congress is generally consulted but has no veto power. Most board members have five-year, staggered terms so that the President cannot entirely control the agency because removal is only for cause. Some agency documents limit reappointment of sitting members. We survey the situation in the most important agencies.

The regulatory agencies for gas and electricity, Ente Nacional Regulador del Gas (ENARGAS) and Ente Nacional Regulador de la Electricidad (ENRE), set up in 1991-1992, each has a board of five members appointed by the president who serve for five year staggered terms and can be reappointed indefinitely.¹³⁸ For each board, the Secretary of Energy must organize a merit selection process limited to professionals with sufficient knowledge and background.¹³⁹ When appointing and removing members of the board, the executive must supply the reasons for its decisions to a bicameral congressional committee, which must make a statement within 30 days, after which the executive is permitted to act.¹⁴⁰ In the electricity sector, although the board is appointed by the executive, two of its members are to be chosen on a proposal by the Federal Council of Electricity, a body that includes representation of the provinces, manages funds that must be used in the energy sector, and advises on electricity policies.

The regulatory agency for the water and sanitation sector, Ente Regulador de Agua y Saneamiento (ERAS) has a three-member board appointed by the executive, two upon a proposal by the Government of the City of Buenos Aires and by the Government of the Province of Buenos Aires, respectively.¹⁴¹ Board members have four-year terms that can be extended for only one successive period, and the appointees have to have a technical and professional background in the area,¹⁴² but there is no formal process of merit recruitment.¹⁴³ Unlike

¹³⁸ Articles 53, 54 Law No. 24.076, May 20, 1992, B.O. 12/06/92, available at <http://www.infoleg.gov.ar/infolegInternet/anexos/0-4999/475/texact.htm> (last visited Jul. 03, 2009). The members of the board can only be removed through a reasoned act of the executive (Article 55). The members also have to have technical and professional background in the area. Article 57, Law No. 24.065, Dec. 19, 1991, B.O. 16/01/92, available at <http://www.infoleg.gov.ar/infolegInternet/anexos/0-4999/464/texact.htm> (last visited Jul. 03, 2009).

¹³⁹ Article 54, Decree No. 1738, Sep. 18, 1992, B.O. 28/09/92, available at <http://www.infoleg.gov.ar/infolegInternet/anexos/10000-14999/10239/texact.htm> (last visited Jul. 03, 2009).

¹⁴⁰ Article 55, Law No. 24.076 *supra*

¹⁴¹ Article 44, Law No. 26.221, Feb. 13, 2007, B.O. 02/03/07, available at <http://www.infoleg.gov.ar/infolegInternet/anexos/125000-129999/125875/norma.htm> (last visited Jul. 03, 2009). The decree that implemented the law established a period of 15 days for both jurisdictions to propose appointees. Article 7, Decree No. 763, Jun. 20, 2007, B.O. 22/06/07, available at <http://www.infoleg.gov.ar/infolegInternet/anexos/125000-129999/129384/norma.htm> (last visited Jul. 03, 2009).

¹⁴² *Id.*, Articles 44 and 46. The decree further required that the appointees need to have a degree in the field, and professional experience related to their tasks. Article 11, Decree No. 763, *supra*.

ENARGAS and ENRE, neither the appointment nor the removal of the members of the ERAS requires congressional participation.

Both the Comisión Nacional de Regulación del Transporte (CNRT), the regulatory agency for the transport sector, and the Comisión Nacional de Comunicaciones (CNC), the regulatory agency of the telecom sector, were created in 1996 through a delegated decree that enabled the executive to reorganize the public administration.¹⁴⁴ Another decree later specified the organization of the CNRT, establishing a board of five members, with five-year terms that can be extended for one successive period.¹⁴⁵ There is no merit-based appointment process and no involvement of the legislature. The CNC, under a resolution of the Secretary of Communications, is managed by a board of eight members appointed by the executive, also with five-year terms with one reappointment.¹⁴⁶ There are no requirements of professional experience, and no merit review for appointments, removal provisions, or any intervention of the legislature.

In all five cases, the formal provisions are seldom followed. Thus for ENARGAS, none of the 2004 appointees fulfilled the professional requirements established by the Secretary of Energy.¹⁴⁷ Although the executive claimed that it used the legally established procedure, a 2008 report documented numerous irregularities.¹⁴⁸ Later in May 2007 ENARGAS was intervened after its president was involved in a corruption scandal.¹⁴⁹ As a result, the executive replaced the agency board with a single official appointed by decree. The initial intervention was for six months but was extended for the same period four times.¹⁵⁰ ENARGAS has been managed for

¹⁴³ The members of ERAS can only be removed by the executive 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. Article 47, Law No. 26.221, *supra*.

¹⁴⁴ Articles 31 and 40, Decree No. 660, Jun. 24, 1996, B.O. 27/06/96, available at <http://www.infoleg.gov.ar/infolegInternet/anexos/35000-39999/37574/norma.htm> (last visited Jul. 03, 2009). Article 7, Law No. 24.629, Feb. 22, 1996, B.O. 08/03/96, available at <http://www.infoleg.gov.ar/infolegInternet/anexos/30000-34999/34209/texact.htm> (last visited Jul. 03, 2009).

¹⁴⁵ Article 10, Statute of the CNRT, Decree No. 1388, Nov. 29, 1996, B.O. 10/12/96, available at <http://www.infoleg.gov.ar/infolegInternet/anexos/40000-44999/40785/norma.htm> (last visited Jul. 03, 2009). The board is to be appointed by the executive among people with technical and professional background relevant in the sector. The members of CNRT can only be removed through a reasoned act of the executive for violation of their duties. *Id.*, Article 11.

¹⁴⁶ Secretary of Communications, Resolution No. 2065, Sep. 29, 1999, available at http://www.cnc.gov.ar/normativa/pdf/cnc2065_99.pdf (last visited Jul. 03, 2009).

¹⁴⁷ Decree No. 812, Jun. 23, 2004, B.O. 28/06/03, available at <http://www.infoleg.gov.ar/infolegInternet/anexos/95000-99999/96088/norma.htm> (last visited Jul. 03, 2009). ACIJ, DEMANDAN AL EJECUTIVO POR LA DESIGNACIÓN DE LAS AUTORIDADES DEL ENARGAS (Mar. 16, 2006), available at <http://www.acij.org.ar/> (last visited Jul. 03, 2009).

¹⁴⁸ ACIJ, LA SITUACIÓN INSTITUCIONAL ACTUAL EN LOS ENTES DE CONTROL DE SERVICIOS PÚBLICOS 6-7 (Mar. 2008) available at www.acij.org.ar (last visited Jul. 03, 2009).

¹⁴⁹ Decree No. 571, May 21, 2007, B.O. 22/05/07, available at <http://www.infoleg.gov.ar/infolegInternet/anexos/125000-129999/128376/norma.htm> (last visited Jul. 03, 2009).

¹⁵⁰ Decree No. 1646, Nov. 14, 2007, B.O. 16/11/07, available at <http://www.infoleg.gov.ar/infolegInternet/anexos/130000-134999/134573/norma.htm> (last visited Jul. 03, 2009). Decree No. 953, Jun. 17, 2008, B.O. 19/06/08, available at <http://www.infoleg.gov.ar/infolegInternet/anexos/140000-144999/141627/norma.htm> (last visited Jul. 03, 2009). Decree No. 2138, Dec. 11, 2008, B.O. 22/12/08, available at <http://www.infoleg.gov.ar/infolegInternet/anexos/145000-149999/148605/norma.htm> (last visited Jul. 03, 2009).

over two years by an official appointed at the sole discretion of the president, without any input from the legislature, and without a previous process of merit review.¹⁵¹

For electricity, although not operating under an intervention, appointments to the board of the ENRE have been made without the required input from the legislature and without merit review. During the previous administration, the executive appointed two members of the board unilaterally, and the new administration also unilaterally appointed a new president and vice-president.¹⁵²

In water and sanitation some board seats sat empty. Until September 2008, the board of the ERAS had only one member, who was appointed by the executive.¹⁵³ In September 2008, more than one year after the appointments were due, the executive appointed the candidate proposed by the City of Buenos Aires.¹⁵⁴ The candidate proposed by the Province of Buenos Aires has not yet been appointed.

The transport agency, CNRT, is not just a regulatory agency. It supervises private firms that receive several billion pesos each year in subsidies. Thus its decisions have political import and provide opportunities to favor allies. The agency has been intervened since 2001.¹⁵⁵ A single individual appointed by the president acts alone. The disconnection between the initial irregularities that allegedly justified the intervention and subsequent interventions is demonstrated by the fact that recent decrees appointing new intervention officials do not even mention the need to produce a plan to restructure the agency. After more than eight years and seven different top managing officials, CNRT has not produced a plan to reform the agency, nor made any move to select candidates for the board, and thus to normalize the institutional situation of the agency.¹⁵⁶ Similarly, in telecoms, CNC has been intervened for a long period of time. In March 2002, with the declared purpose of reorganizing the agency, all the members of the board resigned, and the executive intervened and put one individual appointed by the president in charge.¹⁵⁷ The first intervention was subsequently extended and continues to the present, allegedly because the process of agency reorganization is still under way.¹⁵⁸ The

Decree No. 616, May 26, 2009, B.O. 27/05/09, *available at* <http://www.infoleg.gov.ar/infolegInternet/anexos/150000-154999/153805/norma.htm> (last visited Jul. 03, 2009).

¹⁵¹ See ACIJ, LA SITUACIÓN INSTITUCIONAL ACTUAL EN LOS ENTES DE CONTROL DE SERVICIOS PÚBLICOS, *supra*, at 5-6.

¹⁵² See ACIJ, LA SITUACIÓN INSTITUCIONAL ACTUAL EN LOS ENTES DE CONTROL DE SERVICIOS PÚBLICOS, *supra* note, at 7-8.

¹⁵³ See Decree No. 702, Jun. 06, 2007, B.O. 08/06/07, *available at* <http://www.infoleg.gov.ar/infolegInternet/anexos/125000-129999/128989/norma.htm> (last visited Jul. 03, 2009).

ACIJ, LA SITUACIÓN INSTITUCIONAL ACTUAL EN LOS ENTES DE CONTROL DE SERVICIOS PÚBLICOS, *supra*, at 9

¹⁵⁴ Decree No. 1497, Sep. 16, 2008, B.O. 22/09/08, *available at* <http://www.infoleg.gov.ar/infolegInternet/anexos/140000-144999/144828/norma.htm> (last visited Jul. 03, 2009).

¹⁵⁵ Decree No. 454, Apr. 24, 2001, B.O. 26/04/01, *available at* <http://www.infoleg.gov.ar/infolegInternet/anexos/65000-69999/66779/norma.htm> (last visited Jul. 03, 2009).

¹⁵⁶ ACIJ, LA SITUACIÓN INSTITUCIONAL ACTUAL EN LOS ENTES DE CONTROL DE SERVICIOS PÚBLICOS, *supra*, at 10.

¹⁵⁷ Decree No. 521, Mar. 19, 2002, B.O. 20/03/02, *available at* <http://www.infoleg.gov.ar/infolegInternet/anexos/70000-74999/73007/norma.htm> (last visited Jul. 03, 2009).

¹⁵⁸ See, e.g., Decree 1983, Jun. 28, 2006, B.O. 16/01/07, *available at* <http://www.infoleg.gov.ar/infolegInternet/anexos/120000-124999/124174/norma.htm> (last visited Jul. 03, 2009).

subsequent intervention decrees set no time period for carrying out the reorganization nor do they set out specific provisions to regulate these procedures.

A.2. Judges and Prosecutors

The appointment of judges and prosecutors is heavily influenced by the executive. Nevertheless, as we will see below, some judges are taking an independent line that in a few cases raises important challenges both to executive actions and to failures to act.

Justices of the Supreme Court are appointed by the president with confirmation by a vote of two-thirds of Senate members present. The Justices have secure tenure and can only be removed for serious misconduct through an impeachment process¹⁵⁹ Furthermore, in a rare example of presidential self-restraint, one month after assuming the presidency, President Kirchner limited the executive's discretion through two decrees governing appointment to the Supreme Court¹⁶⁰ and the General National Prosecutor, the General National Defender, and all federal prosecutors and defenders requiring Senate confirmation.¹⁶¹ These appointments were to be made after a participatory process that allows citizens in general, NGOs, professional associations including the bar, academic institutions, and human rights organizations to present comments, observations, and information with regard to candidates being considered by the president. The executive has to publish the names and curricular profile of those who are being considered for these positions.¹⁶² During a period of fifteen days, those interested can submit written comments.¹⁶³ This more open system is, however, only governed by a presidential decree, which can be rescinded at any time. It also does not deal with the potential for presidential influence after appointments are made—a possibility we illustrate below.

For the appointment of all federal judges except the Supreme Court, the 1994 amendment established a Judicial Council and an examination system designed to increase the competence and independence of courts. The Council is in charge of the selection of the judges and of the 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. Those chosen by the legislature must be reconstituted after each election to assure a balance that reflects the composition of the legislature. For judges, the Council carries out 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 will be appointed after confirmation by the Senate in a public meeting in which the qualifications of the candidates must be taken into account.¹⁶⁴

¹⁵⁹ Argentine Const., Articles 53, 59, 99 (4), 110.

¹⁶⁰ Decree No. 222, Jun. 19, 2003, ADLA 2003 - C, 2698, *available at* <http://www.infoleg.gov.ar/infolegInternet/anexos/85000-89999/86247/norma.htm> (last visited Jul. 10, 2009).

¹⁶¹ Decree No. 588, Aug. 13, 2003, ADLA 2003 - D, 3886, *available at* <http://www.infoleg.gov.ar/infolegInternet/anexos/85000-89999/87634/norma.htm> (last visited Jul. 10, 2009).

¹⁶² Article 4 of the Decree No. 222, *supra* note 194; and Article 5 of Decree No. 588, *supra* (for the designation of federal judges with standing in a province, the publication has to include a local newspaper).

¹⁶³ Article 6 of the Decree No. 222, *supra*; and Article 6 of Decree No. 588, *supra*.

¹⁶⁴ Argentine Const., Article 99, section 4, and 114.

The Judicial Council is also involved 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 the Justices (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.¹⁶⁵ Hence, the Judicial Council was designed to create a non-politicized, impartial, transparent, and technical procedure to appoint federal judges.¹⁶⁶

The Judicial Council has not been sufficient to curtail the executive's discretion in the appointment of judges. It is widely believed that even if a candidate is approved by the Judicial Council, she will not have any chance of being selected by the president and confirmed by the Senate if she does not have sufficient political connections. Furthermore, the impartiality and independence of the Judicial Council has been compromised. In February 2006, with the declared purpose of improving the Council's efficiency, the government had the legislature pass an amendment to the Judicial Council Act reducing its members from 20 to 13, increasing the influence of the members representing the ruling party, and giving them, in fact, a veto power in the decisions of the Council.¹⁶⁷

The original Judicial Council had 20 members: five judges (four plus the Chief Justice); eight legislators (four per house, two representing the majority party, one from the first minority, and one from the second minority); four lawyers; one representative of the executive; and one scholar. The political sector thus represented 45% of the total (nine members); 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 20.

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, accusation, and sanctions) require a two-thirds vote (nine votes). Hence, the governing party has veto power over every major decision.

In spite of the presidential decrees that created a more participatory appointments process, the executive's discretion remains quite large in the appointment of the General Prosecutor and the General Defense Attorney. Both are appointed by the president and confirmed by the Senate with a two-thirds vote of the members present.¹⁶⁸ The 1994 constitutional amendment gave the General Prosecution and the General Defense functional autonomy and financial independence. This provision was intended to counter the view that they were part of the executive branch and

¹⁶⁵ Argentine Const., Articles 114, 115.

¹⁶⁶ The Judicial Council Act is Law No. 24.937, Dec. 10, 1997, B.O. 06/01/98, *available at* <http://www.infoleg.gov.ar/infolegInternet/anexos/45000-49999/48231/norma.htm> (last visited Jul. 10, 2009).

¹⁶⁷ Law No. 26.080, Feb. 22, 2006, B.O. 27/02/06, *available at* <http://www.infoleg.gov.ar/infolegInternet/anexos/110000-114999/114258/norma.htm> (last visited Jul. 10, 2009).

¹⁶⁸ Article 5, Law No. 24.946, Mar. 11, 1998, B.O. 23/03/98, *available at* <http://www.infoleg.gov.ar/infolegInternet/anexos/45000-49999/49874/texact.htm> (last visited Jul. 10, 2009).

subject to its directives.¹⁶⁹ However, real political practice has undermined these efforts. In 2004, for example, then President Kirchner appointed Esteban Righi as General National Prosecutor, and he was confirmed by the Senate despite the fact that his law firm had defended Kirchner when he was investigated for illicit enrichment during his term as Governor of the Province of Santa Cruz.¹⁷⁰ Later, in 2008, Righi showed his loyalty by severely restricting the powers of the Prosecutor of Administrative Investigations, Manuel Garrido. That prosecutor is in charge of investigating and prosecuting crimes committed by officials of the public administration, of firms partially or totally owned by the state, and of any institution or association receiving public funds.¹⁷¹ Although Righi explained his decision as an effort to reorganize the special prosecutor's caseload so that it would not be in conflict with the regular prosecutor's activities, it had the effect of reducing the power of an agency that had seriously attacked misconduct, excesses, and corruption in the national administration.¹⁷² In March 2009, Garrido resigned and stated that although corruption is present, to a greater or lesser degree, in every country, Argentina "stands out for the almost absolute impunity of this phenomenon, and for the lack of will and seriousness to attack it."¹⁷³

B. The Philippines

The Philippine president also has considerable influence over appointments under the 1987 Constitution (article VII, section 16). Instead of the Senate confirmation, a 25-member congressional Commission on Appointments (CA) must consent to high level appointments such as heads of executive departments, ambassadors, and top military officials. The President also appoints "all other officers of the Government whose appointments are not otherwise provided by law, and those whom he [or she] may be authorized by law to appoint. The Congress may, by law, vest the appointment of other officers lower in rank in the President alone, in the courts, or in the heads of departments, agencies, commissions, or boards." The President can make recess appointments when Congress is not in session, but they "shall be effective only until disapproval by the Commission on Appointments or until the next adjournment of the Congress." The appointment provisions, although almost a verbatim copy of language in the 1935 Constitution, also permit Congress to dilute the President's appointing power by sharing or relocating his or her authority.¹⁷⁴

¹⁶⁹ Article 120 of the Constitution. See HELIO JUAN ZARINI, *CONSTITUCIÓN ARGENTINA COMENTADA Y CONCORDADA* 450-451 (Astrea 1998).

¹⁷⁰ See Esteban Righi, *el Amigo de Kirchner que Limitó el Poder del Fiscal Anticorrupción*, PERFIL, Nov. 08, 2008, available at <http://www.diarioperfil.com.ar/edimp/0310/articulo.php?art=10873&ed=0310> (last visited Jul. 10, 2009).

¹⁷¹ See Article 45, Law No. 24.946, *supra*.

¹⁷² See *Limitan las Facultades de la Fiscalía Que Investiga la Corrupción*, LA NACIÓN, Nov. 07, 2008, available at http://www.lanacion.com.ar/nota.asp?nota_id=1067547&high=skanska (last visited Jul 10, 2009).

¹⁷³ See *La última denuncia de Garrido*, CRÍTICA DE LA ARGENTINA, Mar. 13, 2009, available at <http://criticadigital.com/imprensa/index.php?secc=nota&nid=21198> (last visited Jul. 10, 2009). The translation is ours.

¹⁷⁴ *Armita B. Rufino et al. v. Baltazar N. Endriga et al.*, G.R. Nos. 139554 and 139565, July 21, 2006 (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."

The CA must also give its consent to appointments to bodies that perform oversight or checking functions vis-à-vis the Executive. Thus, it must approve appointment to the Judicial and Bar Council (JBC, that recommends appointees to the Judiciary) (article VIII, Secs. 8(2) and 8(5)); to Constitutional Commissions such as the Civil Service Commission, the Commission on Elections, and the Commission on Audit.¹⁷⁵ In a few cases, in addition to *ex post* consent from the CA, the President's freedom to propose names is limited. Thus, she must appoint members of the Supreme Court and the Ombudsman and his deputies drawn from a list provided by the JBC (article VIII, section 9; article XI, sec. 9).

Hence, only two institutions limit the President's power to appoint: Congress, through the CA,¹⁷⁶ and the seven-member JBC.¹⁷⁷ In the last decade, however, neither institution has meaningfully counter-balanced the President's vast appointment power. If the CA fails to act while Congress is in session, the President can keep renewing the appointment until the appointee qualifies into office through CA confirmation.¹⁷⁸ Likewise, the President can also make an appointment "in an acting capacity", a temporary appointment intended as a "stop-gap measure... to fill an office for a limited time until the appointment of a permanent occupant to the office."¹⁷⁹ In this manner, the Supreme Court's broad interpretation of the President's appointing power limits the checking potential of the Commission on Appointments.¹⁸⁰

Although the president must select nominees to the Supreme Court from a list prepared by the JBC, the incumbent President can influence the list of nominees. In mid-summer 2009, for example, the incumbent President returned the shortlist of nominees to the Philippine Supreme Court to the JBC, despite the fact that it exceeded the three-person minimum requirement for nominees.¹⁸¹ She declared that "the President cannot be too careful about the selection and appointment of the associate justices of the SC. It is respectfully submitted that the two positions deserve a wider array of nominees to be submitted for the President's consideration."¹⁸² This is the second time that the President rejected the JBC list and requested the JBC to submit another list of nominees.

¹⁷⁵ Philippine Const., articles IX-B, sec. 1(2); IX-C, sec. 1(2); IX-D, sec. 1(2)) IX-D, sec. 1(2).

¹⁷⁶ Philippine Const., art. VI, sec. 18.

¹⁷⁷ Philippine Const., art. VIII, sec. 8(1).

¹⁷⁸ Ma. J. Angelina G. Matibag v. Alfredo L. Benipayo et al., G.R. No. 149036, April 2, 2002 (en banc).

¹⁷⁹ Aquilino Pimentel Jr. et al. v. Executive Secretary Eduardo Ermita, et al., G.R. No. 164978, October 13, 2005 (en banc).

¹⁸⁰ See former Supreme Court Justice Isagani Cruz, "President Arroyo's Unconfirmed Appointments", Philippine Daily Inquirer, September 14, 2008, at <http://opinion.inquirer.net/inquireropinion/columns/view/20080914-160503/President-Arroyos-unconfirmed-appointments> (last visited 10 June 2009).

¹⁸¹ Philippine Const., art. VIII, sec. 9.

¹⁸² Evangeline De Vera, "GMA wants more SC nominees from JBC", July 29, 2009, at <http://www.malaya.com.ph/jul29/news7.htm> (last visited 29 July 2009).

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), and she was then elected in 2004 for a full six-year term. This means the incumbent will occupy the presidency for nearly a decade by the time her term expires in 2010. Thus, the deliberate staggering of terms for various constitutional officials under the 1987 Constitution has little impact. Consequently, the President’s political allies now dominate these key institutions.¹⁸³ The Office of the Ombudsman, which has an anti-corruption mandate, is filled by an Arroyo ally who has been notably inactive in pursuing allegations of graft against government insiders.¹⁸⁴ In late 2009 the President made her sixth appointment to the Supreme Court for that year, bringing the total number of her appointees to the Court to 14 out of 15 members, and she is seeking to appoint a new chief justice before she leaves office.¹⁸⁵ In her last months in office, the President aggressively pushed to appoint the next Chief Justice of the Supreme Court, when the incumbent retires on May 17, 2010, despite an explicit constitutional prohibition on Presidential appointments two months before the expiration of her term.¹⁸⁶ (He or she would also be the presiding head of the Presidential Electoral Tribunal governing election controversies between Presidential candidates in 2010).

Due to generous judicial interpretations of the President’s appointing authority, 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.¹⁸⁷ 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.¹⁸⁸

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

¹⁸³ Purple S. Romero, “GMA Appointees dominate SC, Anti-Corruption Bodies”, Newsbreak, ABS-CBN News, July 23, 2008, at <http://www.abs-cbnnews.com/node/14593> (last visited 26 July 2008).

¹⁸⁴ *Id.*

¹⁸⁵ 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-CBNNEWS.com, January 12, 2010, at: <http://www.abs-cbnnews.com/nation/01/12/10/chiz-gma-wants-all-arroyo-appointed-supreme-court>

¹⁸⁶ Phil. CONST., art. VII, sec. 15. See “Supreme Court asked: Let GMA name Chief Justice”, Philippine Star, March 1, 2010, at <http://www.philstar.com/Article.aspx?articleId=553965&publicationSubCategoryId=63> (last visited 1 March 2010).

¹⁸⁷ Isa Lorenzo and Malou Mangahas, “New CSC Chief Faces Pack of Ineligible Bureaucrats”, Philippine Centre for Investigative Journalism, April 24, 2008, at <http://www.pcij.org/stories/2008/ineligible-bureaucrats.html> (last visited 10 June 2009).

¹⁸⁸ Joel D. Adriano, “Arroyo’s risky politics of patronage”, Asia Times Online, December 9, 2008, at http://www.atimes.com/atimes/Southeast_Asia/JL09Ae01.html (last visited 26 February 2010).

“acting capacity”, thus avoiding CA approval. Second, the JBC is dominated by Presidential appointees making it vulnerable to Presidential pressure, as seen in the recent cases where the President asks the JBC for another shortlist of nominees. Third, even the career civil service can be populated by political appointees whose qualifications are effectively waived by the President to enable her political allies to occupy career positions. 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 quality has suffered.

C. Conclusions

Both presidents face relatively weak constraints on their appointment powers compared to the US President, and they have been able to circumvent even the limits that do exist through a mixture of personal pressure and extensive use of emergency and temporary powers. The distinction between core executive departments, where arguably the president should have considerable discretion to appoint and remove high level officials, and agencies with independent regulatory and oversight functions does not work well in practice. Most appointments do not require confirmation by the Senate, nor is there any other procedure to reduce the president’s discretion. Regulatory and oversight agencies, courts, and prosecutors should arguably be insulated from the executive; in practice, they are unable to operate free of presidential influence in either country.

V. Challenges to Presidential Power

Impeachment is the most obvious way to challenge an incumbent president. Although the details differ, both constitutions provide for the impeachment of the president and other high officials.¹⁸⁹ Impeachment, however, is a blunt instrument that is not a routine form of oversight but is rather a legislative response to a crisis. In Argentina there have been no efforts to impeach the president; the Philippines’ legislature did initiate the process against President Joseph Estrada in 2001, but he resigned before the process was complete.

Clearly, other institutional checks must provide the primary checks on executive power. We demonstrated above that presidents assert 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 exercises of presidential power that test constitutional and statutory limits. We explore the strengths and weaknesses of these institutions in Argentina and the Philippines. Sometimes these bodies are able to check excesses of presidential power, particularly when independent civil society organizations use them to challenge presidential overreaching. In Argentina the system operates better than in the Philippines, where the levers of oversight seem weak. However, even in Argentina constraining a president determined to exercise power is difficult and problematic in the absence of an active legislature. Courts and

¹⁸⁹ Argentine Const., articles 53, 59; Philippine Constitution, article XI.

oversight agencies cannot entirely make up for the relative weakness of the legislature as an independent source of oversight.

A. Argentina

In spite of occasional losses in the legislature, the President has not been significantly limited by judicial review of her constitutional powers or by congressional oversight of her behavior. However, two other ways to challenge or limit presidential powers have had some success. First, independent agencies specifically designed to control and monitor the executive have had 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

Three major independent agencies check the executive: the General Audit Office, the Anticorruption Office, and the National Ombudsman. Outsiders (members of political parties, NGOs, activist lawyers, the media, etc.) then sometimes use their reports or accusations to pursue court challenges. Both the Audit Office and Ombudsman report to the Congress. The Anticorruption Office reports to the Ministry of Justice and is not in a good position to control excesses of presidential power, as opposed to low level malfeasance. Of the three, the Ombudsman appears to be the most effective check on executive power within the limits of its official jurisdiction.

The *General Audit Office (AGN)* reports to the Congress on legal aspects, management, and auditing of all the activities of the administration, and it must take part in the approval or rejection of the revenue and investment accounts of public funds.¹⁹⁰ The AGN has seven members with eight-year terms that can be renewed once. Three are appointed by the Senate and three by the House, in a way that takes account of the political composition of each house. The seventh auditor, who chairs the agency, is appointed by a joint resolution of the chairs of the Senate and the House upon a proposal by the opposition party with the largest number of legislators.¹⁹¹ The auditors must have professional qualifications and can only be removed for grave misconduct or evident violation of their duties using the same procedure established for their appointment. The AGN is itself controlled by a special bicameral committee that oversees the execution of the national budget. The 1994 Constitution requires Congress to pass a special law to regulate the creation and operation of the AGN, but it has never been passed. The 1992 Financial Management Act continues in force even though it does not fulfill the constitutional requirements.

A member of the opposition chairs the AGN (as required by the Constitution). This gives the opposition a predominant role in the external control of the executive.¹⁹² In other respects, however, the operation of the AGN is against the spirit of the 1994 amendment. First, the AGN

¹⁹⁰ Articles 116-127, Law No. 24.156, *supra*.

¹⁹¹ Argentine Const., article 85.

¹⁹² ACIJ, 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), available at www.acij.org.ar (last visited Jul. 24, 2009).

is a collective body whose decisions are made through majority rule, so that the chairman has little independent power.¹⁹³ Second, the AGN's composition under the Financial Management Act is proportional to the parties' representation in the legislature. Hence, if the ruling party has a majority in Congress, the opposition's role is limited. In addition, that requirement is inconsistent with the auditors' eight-year term. The composition of the legislature varies every two years; hence, it is impossible for the auditors both to fulfill an eight-year term and to maintain a party balance that tracks the legislature.¹⁹⁴

In spite of a professional requirement in the Act, in practice, the respective parties simply select auditors. There is no check on their qualifications and no public hearing to enable citizen participation. Conflicts of interest can easily arise that could jeopardize their objectivity.¹⁹⁵ The agency's day-to-day operations also have several weaknesses including collective decision-making, the lack of a merit appointment process for officials, and a failure to carry out management audits. There are almost no follow-up mechanisms with regards to the agency's recommendations; and little coordination between the AGN's reports and other agencies with interests in its work, such as the Anticorruption Office, or prosecutors.¹⁹⁶ The ruling party has also used its authority to curtail the powers of the AGN. In short, the audit office is not a strong check on executive power.

The *Anticorruption Office (OA)*, created in 1999, is housed in the Ministry of Justice and invested with investigative and policy-making functions with regards to 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.¹⁹⁷

In its investigative role, the OA can: receive accusations; make preliminary investigations; file accusations before the judiciary; and act as plaintiff in those cases where the State's property is at stake, within the sphere of its jurisdiction. In its policy-making role, the OA: elaborates programs to prevent corruption and to promote transparency, and assists State agencies to establish programs to prevent corruption. Finally, the OA also plays a major role in controlling unjustified increases in a public official's assets, as well as potential conflicts of interest. The OA maintains a register of the officials' financial disclosure statements, and it evaluates these statements to check for situations that might amount to illicit enrichment or activities incompatible with the public office.¹⁹⁸ However, the OA is contained by its small budget. In 2008, for instance, the OA had a budget of only \$9.4 million pesos.¹⁹⁹

¹⁹³ See Article 125, Law No. 24.156, *supra*.

¹⁹⁴ See ACIJ, *supra*, at 14-15.

¹⁹⁵ *Id.*

¹⁹⁶ *Id.*

¹⁹⁷ See Law No. 25.233, Dec. 10, 1999, B.O. 14/12/99, available at

<http://www.infoleg.gov.ar/infolegInternet/anexos/60000-64999/61394/norma.htm> (last visited Jul 24, 2009); and

Decree No. 102, Dec. 23, 1999, B.O. 29/12/99, available at

<http://www.infoleg.gov.ar/infolegInternet/anexos/60000-64999/61724/norma.htm> (last visited Jul. 24, 2009).

¹⁹⁸ See Article 2, Decree No. 102, *supra*.

¹⁹⁹ See OFICINA ANTICORRUPCIÓN, INFORME ANUAL DE GESTIÓN 6 (2008), available at

<http://www.anticorruccion.gov.ar/documentos/Informe%20anual%202008%20OA.pdf> (last visited Jul. 24, 2009).

Even without sufficient resources, the OA has achieved some significant results. Although it has obtained almost no convictions, the OA has a well-functioning system that connects preliminary investigations and information arising from the officials' financial statements to formal investigations within the judiciary. During 2007, the OA issued 725 resolutions, 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 3% were cases where the OA decided to act as plaintiff.²⁰⁰

Moreover, Argentina has a general system of financial disclosure, but each branch of government has its own subsystem.²⁰¹ The OA is the only agency that systematically evaluates these disclosure statements and can connect these evaluations to the investigations of corruption before the judiciary. The OA is also charged with controlling potential conflicts of interest. The agency uses the information in financial disclosure statements to control possible conflicts of interest, and to propose measures that officials should take to limit such conflicts.

Finally, in its policy-making role, the OA has sponsored initiatives to prevent corruption and promote transparency, and has promulgated regulations to improve access to information and 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.²⁰²

Although the OA has limited resources, the main obstacle to its success lies elsewhere. The OA has a single head, the Administrative Control Prosecutor, who is appointed by the president upon a recommendation from the Ministry of Justice.²⁰³ Hence, the OA is a specialized office within the Ministry. Each new administration can appoint the director so that the agency is always directed by a political appointee of the president.²⁰⁴ The influence of the Ministry of Justice was clear in 2008 when it amended the OA's internal regulation. Until 2008, the OA staff attorneys

²⁰⁰ See OFICINA ANTICORRUPCIÓN, INFORME ANUAL DE GESTIÓN 16-17 (2007), available at <http://www.anticorrupcion.gov.ar/documentos/Informe%20anual%202007%20OA.pdf> (last visited Jul. 24, 2009). The 2008 report does not include any statistics with regards to the files that the OA sent to the judiciary.

²⁰¹ In 1999, Congress passed an act of ethics in the public office, which established mandatory financial disclosure statements for certain public officials, which were to be presented before their respective agencies and then sent to an independent agency that would be in charge of receiving and controlling the statements. However, this general agency was never created due to opposition by the Supreme Court. See Law No. 25.188, Sep. 25, 1999, B.O. 01/11/99, available at <http://www.infoleg.gov.ar/infolegInternet/anexos/60000-64999/60847/texact.htm> (last visited Jul. 24, 2009).

²⁰² Decree No. 1172, Dec. 3, 2003, ADLA 2004 - A, 174, available at <http://www.infoleg.gov.ar/infolegInternet/anexos/90000-94999/90763/norma.htm> (last visited Jul. 28, 2009).

²⁰³ Article 6, Decree No. 102. *supra*.

²⁰⁴ The only requirements for appointment are citizenship, age (at least 30 years of age) and at least six years of practice as a lawyer or in the prosecutor's office or the judiciary (*id.*, Article 7).

could initiate investigations on their own.²⁰⁵ The new regulation allows only the director of the OA, a political appointee, to initiate investigations without receiving an accusation.²⁰⁶

The *National Ombudsman* was established by law in 1993²⁰⁷ and given constitutional status in 1994 (article 86) as an independent agency within the sphere of 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 ombudsman has functional autonomy and does not receive instructions from any other authority. Its mission is the defense and protection of human rights and other rights, guarantees, and interests established in the Constitution and the laws, in the face of deeds, acts or omissions of the Administration; as well as the control of public administrative functions. The ombudsman can 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 gravely inconvenient exercise of their functions, including those that might affect diffuse or collective interests.²⁰⁸ The ombudsman must also pay special attention to behavior that shows a systematic and general failure of the administration and should promote reforms.²⁰⁹ The ombudsman's power to investigate acts that are "gravely inconvenient" allows her to investigate actions that judges cannot evaluate.²¹⁰ She can issue warnings, recommendations, or reminders of the duties of public officials and propose new measures. The official has to answer in writing within 30 days. If the official does not take adequate measures within a reasonable time, or if he or she does not explain the reasons not to act, the ombudsman can inform the ministry or the official's superior. And if she does not receive an adequate justification through this mechanism, she must include the issue in her report to the legislature.²¹¹

According to statistical data provided by the ombudsman's office, from 1994 to 2007 the agency initiated 181,043 files.²¹² Of the total, 95.4% were initiated by an individual complaint; only

²⁰⁵ See Article 1, section b, Ministry of Justice and Human Rights, Resolution No. 749, Aug. 11, 2000, B.O. 24/08/00, available at <http://www.infoleg.gov.ar/infolegInternet/anexos/60000-64999/64100/norma.htm> (last visited Jul. 28, 2009).

²⁰⁶ See Article 1, section b, Ministry of Justice and Human Rights, Resolution No. 1316, May. 21, 2008, B.O. 23/05/08, available at <http://www.infoleg.gov.ar/infolegInternet/anexos/140000-144999/140863/norma.htm> (last visited Jul. 28, 2009).

²⁰⁷ Law No. 24.284, Dec. 01, 1993, B.O. 06/12/93, available at <http://www.infoleg.gov.ar/infolegInternet/anexos/0-4999/680/norma.htm> (last visited Jul. 28, 2009). After the 1994 amendment, the law was adapted to the constitutional provisions through Law No. 24.379, Sep. 28, 1994, B.O. 12/10/94, available at <http://www.infoleg.gov.ar/infolegInternet/anexos/0-4999/766/norma.htm> (last visited Jul. 28, 2009).

²⁰⁸ Article 14, Law No. 24.284 (as amended), *supra*.

²⁰⁹ *Id.*, Article 15.

²¹⁰ See, e.g., Corte Suprema de Justicia de la Nación [CSJN], 22/06/1960, "Cine Callao," FALLOS, 247:241; Corte Suprema de Justicia de la Nación [CSJN], 13/07/1990, "Dromi, José R. (Ministro de Obras y Servicios Públicos de la Nación) – Avocación en autos 'Fontela Moisés E. c/ Estado Nacional s/ amparo,'" Fallos, 313:630; and Corte Suprema de Justicia de la Nación [CSJN], 27/12/1990, "Peralta, Luis A. y otro c. Estado Nacional," FALLOS, 313:1513.

²¹¹ Articles 27, 28, and 31, Law No. 24.284 (as amended), *supra*.

²¹² DEFENSOR DEL PUEBLO DE LA NACIÓN, INFORMES DE ACTUACIONES, DATOS ESTADÍSTICOS, TOTAL GENERAL (2007), available at <http://www.defensor.gov.ar/informes/estad01-sp.htm> (last visited Jul. 28, 2009).

4.5% originated in another agency; and 1.9% 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; 3.33% were sent to a different agency; 13.52% were suspended; 2% have not been followed; and only 3.32% 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 activism with respect to the executive and the regulatory agencies. The ombudsman is arguably the most significant state agency overseeing the executive although, as we demonstrate below, 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 is beginning to operate as a route for civil society to check executive and regulatory agency excesses. The amended constitution incorporated several provisions to protect diffuse and collective rights, particularly those related to the environment and to consumers. These rights are mainly substantive, but the amendment concerning the environment requires the authorities to "provide for environmental information and education" (article 41), and article 42 on consumer affairs provides for "the necessary participation of consumer and user associations and of the interested provinces." Consistent with the recognition of these collective rights, article 43 also provides for a prompt and summary judicial proceeding or *amparo*.²¹³

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 thus constrained the executive's discretion. The following cases illustrate the way public interest litigation is beginning to be a tool for citizens to 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.

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

²¹³ 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], 27/12/1957, "Siri, Ángel s/interpone recurso de hábeas corpus," FALLOS 239:459; Corte Suprema de Justicia de la Nación [CSJN], 05/09/1958, "Kot, Samuel S.R.L. s/habeas corpus," FALLOS 241:291

the Constitution required the participation of public utility users and consumers through public hearings.²¹⁴ The legal struggles highlight the sometimes vexed 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 Gordillo 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.”²¹⁵ 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.”²¹⁶

The regulatory framework varies. Hearings are legally mandatory for electric and gas utilities but are optional for telecommunications and water. In all cases the judiciary has influenced hearing requirements. Thus, in telecommunications regulation the Federal Administrative Court ruled that public participation is constitutionally required for decisions with grave social repercussions, such as extension of a monopoly franchise.²¹⁷ Public participation can occur either through public hearings or through other procedures that guarantee users and consumers access to the relevant 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.²¹⁸

In the regulation of gas and electricity, battles erupted when utility rates were “pesified” in 2002. 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.²¹⁹ 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

²¹⁴ At issue are articles 41, 42, and 43 of the Argentine Constitution.

²¹⁵ Agustín Gordillo, *TRATADO DE DERECHO ADMINISTRATIVO* (8^o ed., FDA 2006), T. II, Capítulo XI, at 2-4, available at <http://www.gordillo.com/Pdf/2-8/Capitulos/XI.pdf>.

²¹⁶ *Id.*

²¹⁷ Cámara Nacional Federal en lo Contencioso Administrativo [CNFed. Cont. Adm.], Sala IV, 6/11/1997, “Youssefian Martín c/Estado Nacional-Secretaría de comunicaciones s/ amparo, causa 22.776/97”, LL, 1997-F, 270.

²¹⁸ Cámara Nacional Federal en lo Contencioso Administrativo [CNFed. Cont. Adm.], Sala V, 30/08/2000, “Defensor del Pueblo de la Ciudad de Buenos Aires c/Sec. de Comunicaciones.” 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], 31/08/2006, “Defensoría del Pueblo de la Ciudad de Buenos Aires c. Secretaría de Comunicaciones - resolución 2926/99,” FALLOS, 329:4542.

²¹⁹ Law No. 25.561, Jan. 6, 2002, ADLA 2002 - A, 44 - DT 2002 - A, 314, available at <http://www.infoleg.gov.ar/infolegInternet/anexos/70000-74999/71477/texact.htm> (last visited Jul. 28, 2009). Decree No. 293, Feb. 12, 2002, ADLA 2002 - B, 1644, available at <http://www.infoleg.gov.ar/infolegInternet/anexos/70000-74999/72323/norma.htm> (last visited Jul. 28, 2009).; and Decree No. 370, Feb. 22, 2002, B.O. 27/02/2002, available at <http://www.infoleg.gov.ar/infolegInternet/anexos/70000-74999/72554/norma.htm> (last visited Jul. 28, 2009).

lawsuit by the consumers' association, the courts called off the hearings.²²⁰ The executive then ordered the increase through a simple decree,²²¹ which was also struck down in court. 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,²²² but the courts suspended this decree upon a presentation by the ombudsman.²²³

The new Administration that took office in 2003 dissolved the previous renegotiating commission, allowing consumers' participation only through public hearings carried out just before the executive signs the tariff agreements.²²⁴ The original Emergency Act was modified to allow the executive to reach partial agreements with the companies and to avoid the participation of the regulatory agencies and of consumers.²²⁵ 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.²²⁶ During 2004-2005, most contracts were renegotiated and tacitly "approved" by the legislature. This case illustrates the weakness of mandated hearings, especially when carried out by unsympathetic actors. 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.²²⁷ 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) filed a collective *amparo* along with a law

²²⁰ Juzgado Nacional de 1a Instancia en lo Contencioso Administrativo Federal [Juzg. Fed. 1ª Inst. Cont. Adm.] No. 3, 24/09/2002, "Unión de Usuarios y Consumidores y Otros c/M. Economía e Infraestructura- Resol. 20/02 s/Amp. Proc. Sumarísimo."

²²¹ Decree No. 2437, Dec. 2, 2002, ADLA 2003 - A, 94, available at <http://www.infoleg.gov.ar/infolegInternet/anexos/80000-84999/80098/norma.htm> (last visited Jul. 28, 2009).

²²² Decree No. 120, Jan. 23, 2003, ADLA 2003 - A, 145, available at <http://www.infoleg.gov.ar/infolegInternet/anexos/80000-84999/81711/norma.htm> (last visited Jul. 28, 2009).

²²³ Juzgado Nacional de 1a Instancia en lo Contencioso Administrativo Federal [Juzg. Fed. 1ª Inst. Cont. Adm.] No. 7, 03/03/2002, "Defensor del Pueblo de la Nación c. Poder Ejecutivo Nacional," LA LEY 2003-B, 796.

²²⁴ Decree No. 311, Jul. 3, 2003, ADLA 2003 - D, 3853, available at <http://infoleg.mecon.gov.ar/infolegInternet/anexos/85000-89999/86606/norma.htm> (last visited Jul. 28, 2009).

²²⁵ Law No. 25.790, Oct. 21, 2003, ADLA 2003 - E, 4966, available at <http://www.infoleg.gov.ar/infolegInternet/anexos/85000-89999/89434/norma.htm> (last visited Jul. 28, 2009).

²²⁶ Article 82 of the Constitution provides that: "The will of each House shall be expressly stated; the tacit or fictitious approval is excluded in all cases".

²²⁷ See Gustavo Maurino, Ezequiel Nino & Martín Sigal, LAS ACCIONES COLECTIVAS. ANÁLISIS CONCEPTUAL, CONSTITUCIONAL, PROCESAL, JURISPRUDENCIAL Y COMPARADO 114 (Lexis Nexis 2005).

student of the University of Buenos Aires 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 the decision to be communicated to the President and the Chief of Cabinet.²²⁸ The executive did not observe the deadline.²²⁹ In August 2000 the first instance judge established a new deadline which was also infringed. 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. This decision was appealed by the State.

The Court held a hearing to assess the situation and assign responsibility for the infringement of its order.²³⁰ It subpoenaed the Minister of Health, and ordered him to identify the obstacles to the production of Candid 1, to give reasons for the infringement of 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.

The second, prison reform, case is one of the clearest examples of judicial policymaking in Argentina. In *Verbitsky*, 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.²³¹ The NGO *Centro de Estudios Legales y Sociales* (CELS) filed a collective action case 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.²³² 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. This decision was brought before the Supreme Court of the Province of Buenos Aires that also rejected the case. The case finally came before the Supreme Court.

²²⁸ 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.

²²⁹ The information about the process of execution of the ruling is based on Maurino, Nino & Sigal, *supra*, at 117-120.

²³⁰ See Maurino, Nino & Sigal, *supra*, at 117.

²³¹ Corte Suprema de Justicia de la Nación [CSJN], 03/05/2005, "Verbitsky, Horacio s/hábeas corpus," FALLOS 328:1146.

²³² According to a report of the NGO *Asociación por los Derechos Civiles* (ADC), when the CELS filed the habeas corpus 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> (last visited, Jul. 28, 2009).

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.

Unlike its usual practice, the Court held two public hearings with representatives of the CELS, of the Province of Buenos Aires, and of Human Rights Watch, and it also accepted amicus curiae from eight organizations.²³³ 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; it explained what those standards were; it exhorted the local executive and legislative branches to adjust its legislation in matters of imprisonment; and it 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.

The final case demonstrates a similar level of judicial activism in an 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; it also ordered the firms to inform the Court about the measures that they were taking to prevent and reverse the contamination of the river.

In September 2006, the Court held the first public hearing in which the three governments presented a plan for cleaning the river and creating an inter-jurisdictional authority that later initiated a participatory process to discuss policy related to the clean-up of the river. One week later, the Court heard from four NGOs.²³⁴ 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. A final hearing was held in July 2007 where all the parties made comments on the cleanup plan.

²³³ 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], 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> (last visited Jul. 28, 2009). As for public hearings, the Court used them without a formal recognition until in November 2007 it issued a resolution establishing them formally. See Corte Suprema de Justicia de la Nación [CSJN], Acordada No. 30, Nov. 05, 2007, ADLA 2008 - A, 427.

²³⁴ These NGOs were Fundación Ambiente y Recursos Naturales; CELS; Greenpeace; and Asociación de Vecinos de la Boca.

The Court held the three governments responsible for the cleanup of the river and for the prevention of further environmental damages.²³⁵ The decision distributed responsibility for carrying out the necessary actions, as well as set time limits. The Court left open the possibility of imposing fines in case of infringement, which would be paid to the head of the inter-jurisdictional authority, the Secretary of Environment. Finally, the Court ordered the national ombudsman and the NGOs that intervened in the case to form a collective body to monitor the implementation of the cleanup plan.

B. The Philippines

Under the Constitution, in addition to impeachment, the primary institutions for challenging unlawful exercises of presidential power are the Supreme Court, and the Office of the Ombudsman. At present, neither is an effective independent voice largely because the incumbents are politically beholden to the President. No other bodies are effectively substitutes.

Supreme Court: The 1987 Constitution (article VIII, section 1) states that 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.” 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 political question doctrine.²³⁶

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.”²³⁷ The Court’s power of

²³⁵ Corte Suprema de Justicia de la Nación [CSJN], 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> (last visited Jul. 28, 2009).

²³⁶ Ernesto B. Francisco Jr. et al. v. House of Representatives, G.R. Nos. 160261, 160262, 160263, 160277, 160292, 160295, 160310, 160318, 160342, 160343, 160360, 160365, 160370, 160376, 160392, 160397, 160403, and 160405, November 10, 2003 (en banc), citing I Record of the Constitutional Commission 434-436 (1986). See also Joseph E. Estrada v. Aniano A. Desierto et al., G.R. Nos. 146710-15, March 2, 2001 (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.)

²³⁷ Sabdullah T. Macabago v. Commission on Elections et al., G.R. No. 152163, November 18, 2002.

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.²³⁸

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)].²³⁹ No case has yet interpreted the Constitutional intent behind this expansion of the Court's rule-making power. However, when the Court promulgated the Rule on the Writ of Amparo in October 2007, it also authorized the release of its Annotation.²⁴⁰ This Annotation states that the Supreme Court's rulemaking 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."²⁴¹ However, the Annotation goes on to limit its power by stating that the right "should be allowed to evolve through time and jurisprudence and through substantive laws as they may be promulgated by Congress."²⁴²

Judicial review of impeachment convictions could serve to restrain an overzealous legislature. However, it could 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,²⁴³ the Supreme Court expressly declared that impeachment proceedings are within the scope of its expanded power of review.²⁴⁴ 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." Because such limits exist, "our courts are duty-bound to examine whether the branch or instrumentality of the government properly acted within such limits."²⁴⁵ Here, the Court is acting as a check against possible legislative overreaching. Of course, if the Court itself is not

²³⁸ See *Jurry Andal et al. v. People of the Philippines, et al.*, G.R. Nos. 138268-69, May 26, 1999 (en banc).

²³⁹ Reynato S. Puno, "No Turning Back on Human Rights", speech delivered on Aug. 25 2007 at Silliman University, Dumaguete City, Philippines. *Full text at:* <http://ia341243.us.archive.org/3/items/TextOfChiefJusticeReynatoPunoSillimanSpeech/PunoOnHumanRights.doc> (last visited 5 May 2008).

²⁴⁰ See full texts at http://www.supremecourt.gov.ph/RULE_AMPARO.pdf (last visited 15 May 2008) and http://www.supremecourt.gov.ph/Annotation_amparo.pdf (last visited 5 May 2008).

²⁴¹ Annotation to the Writ of Amparo, http://www.supremecourt.gov.ph/Annotation_amparo.pdf (last visited 5 May 2008) at 2-3.

²⁴² *Francisco v. House of Representatives*, supra

²⁴³ 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.

²⁴⁴ *Francisco v. House of Representatives*, supra.

²⁴⁵ *Id.*

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*, dubbed as “protector of the people” under the 1987 Constitution (art. XI, secs. 5-14), is designed to be a powerful independent constitutional office. The Ombudsman must have at least ten years experience as a judge or a practicing lawyer. Unlike Argentina’s ombudsman, who is appointed by the legislature, the Philippine Ombudsman and his Deputies shall be appointed by the President from a list of nominees prepared by the Judicial and Bar Council. Such appointments require no confirmation. They serve seven year terms 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.” It can direct officials to perform duties required by law or to correct abuses. It can demand documents and other information from officers and can report irregularities in the use of funds to the Commission on Audit. 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 standards of ethics and efficiency”.²⁴⁶

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,²⁴⁷ unlike Argentina’s ombudsman, who lacks such functions. In Argentina, these functions are performed by regular prosecutors and/or by the Prosecutor of Administrative Investigations. 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.²⁴⁸ It is only after leaving office that the Ombudsman can investigate, and if warranted, prosecute the President even for criminal acts committed while in office. The most high-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.²⁴⁹

²⁴⁶Ronaldo P. Ledesma v. Court of Appeals et al., G.R. No. 161629, July 29, 2005, *citing* Camanag v. Guerrero, G.R. No. 121017, February 17, 1997, *citing* II Record of the Constitutional Commission 268 (1986).

²⁴⁷ George Uy v. Sandiganbayan, et al., G.R. Nos. 105965-70, March 20, 2001 (en banc).

²⁴⁸For statements of the Ombudsman’s administrative disciplinary authority, *see among others* Erlinda F. Santos v. Ma. Carest A. Rasalan, G.R. No. 155749, February 8, 2007; Office of the Ombudsman v. Heidi M. Estandarte et al., G.R. No. 168670, April 13, 2007; Corazon C. Balbastro v. Nestor Junio et al., G.R. No. 154678, July 17, 2007.

²⁴⁹Joseph E. Estrada v. Aniano Desierto in his capacity as Ombudsman, et al., G.R. Nos. 146710-15, and Joseph E. Estrada v. Gloria Macapagal-Arroyo, G.R. No. 146738, March 2, 2001 (en banc); Joseph E. Estrada v. Aniano Desierto et al., G.R. Nos. 146710-15, Joseph E. Estrada v. Gloria Macapagal-Arroyo, G.R. No. 146738, April 3, 2001 (en banc); *See* Joseph E. Estrada v. Aniano A. Desierto et al., G.R. No. 156160, December 9, 2004 (en banc).

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 a mode of 'respect' for the Ombudsman, who, 'beholden to no one, acts as the champion of the people and the preserver of integrity in the public service'.²⁵⁰ In its view the Ombudsman is constitutionally designed precisely to give individuals direct recourse and remedial means against abusive excesses of governmental power.²⁵¹ However, the current incumbent is a Presidential ally and so is unlikely to mount a fundamental challenge to her leadership. Because the appointee and her deputies are not subject to approval 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 independence and authority vis-à-vis the executive branch.

Other Bodies: Lack of independence, both de jure and de facto, limits the impact of other bodies such as the Constitutional Commission on Audit (COA), the Department of Justice and the Presidential Anti-Graft Commission.

The COA has significant reporting and auditing 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."²⁵² However, it cannot compel or restrain executive action acting on its own. However, COA reports (albeit issued long after the executive action has been committed) can form the basis for private challenges to executive power, usually through complaints filed with the Office of the Ombudsman, or through Rule 65 *certiorari* actions filed with the Supreme Court.²⁵³ 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 COA mainly conducts belated post-audits of government contracts executed by the Office of the

²⁵⁰Presidential Ad-Hoc Fact Finding Committee on Behest Loans v. Ombudsman Aniano Desierto et al., G.R. No. 136192, August 14, 2001 (en banc).

²⁵¹See among others Jose M. Galario v. Office of the Ombudsman (Mindanao) et al., G.R. No. 166797, July 10, 2007; Office of the Ombudsman v. Court of Appeals et al., G.R. No. 160675, June 16, 2006; Gregorio B. Honasan II v. Panel of Investigating Prosecutors of the Department of Justice et al., G.R. No. 159747, April 13, 2004; Manuel C. Roxas et al. v. Conrado M. Vasquez et al., G.R. No. 114944, June 19, 2001; Presidential Ad Hoc Fact-Finding Committee on Behest Loans v. Aniano A. Desierto et al., G.R. No. 130140, October 25, 1999; Leonila Garcia-Rueda v. Wilfred L. Pascasio, et al., G.R. No. 118141, September 5, 1997; Amor D. Deloso v. Manuel C. Domingo et al., G.R. No. 90591, November 21, 1990.

²⁵²Phil. CONST., Art. IX(D), Sec. 2(1).

²⁵³"New impeachment complaint filed vs. Arroyo", ABS-CBN News, October 13, 2008, at <http://www.abs-cbnnews.com/nation/10/13/08/new-impeachment-complaint-filed-vs-arroyo> (last visited 26 February 2010); "Drilon dares Ombudsman to file charges versus execs in fertilizer scam", Senate of the Philippines Press Release, February 3, 2006, at http://www.senate.gov.ph/press_release/2006/0203_drilon1.asp (last visited 26 February 2010); "Opponents Seek Probe of Philippine President Over Corruption Scandal", Associated Press, February 24, 2008, at <http://www.foxnews.com/story/0,2933,332109,00.html> (last visited 26 February 2010).

President and executive agencies. The COA 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.²⁵⁴

Other executive agencies, such as the Department of Justice and the Presidential Anti-Graft Commission,²⁵⁵ have investigative and prosecutorial jurisdiction over executive officers. However, because these agencies are dependent on the Office of the President and because 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.²⁵⁶

C. Conclusions

In Argentina, if civil society and law reform groups collaborate to bring court challenges to administrative actions on constitutional and other grounds, they are frequently given a hearing and sometimes succeed not only in obtaining a favorable judgment but also in getting it enforced inside the government. Furthermore, internal control bodies can sometimes provide a check, although they operate better if they can connect with institutions outside of government. Thus, in spite of the high level of executive power that we have documented, marginal victories have occurred although their impact on the overall operation of government seems modest. In the Philippines the Supreme Court has had some limited success in restraining excesses in presidential power,²⁵⁷ but usually only after these excesses have ripened into justiciable controversies. However, 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

²⁵⁴ Karen Tiongson-Mayrina, “COA confirms problems with ODA projects; billions of pesos wasted”, GMA News, February 21, 2008, at <http://www.gmanews.tv/story/81658/COA-confirms-problems-with-ODA-projects-billions-wasted> (last visited 1 March 2010); COA Circular No. 2009-002, May 18, 2009, at http://www.coa.gov.ph/COA_Issuances/COA_Circulars/Circ2009/COA_C2009-002.pdf (last visited 1 March 2010); Reinir Padua, “Commission on Audit to conduct pre-audit of big-ticket projects”, Philippine Star, May 10, 2009 at <http://www.philstar.com/Article.aspx?articleId=466113> (last visited 1 March 2010).

²⁵⁵ Executive Order No. 12, April 16, 2001, at <http://www.pagc.gov.ph/File/Exec%20Orders/Exec%20Order%2012%20s%202001.pdf> (last visited 26 February 2010); Executive Order No. 292, (otherwise known as the Revised Administrative Code of 1987).

²⁵⁶ See “How credible is PAGC cash gifts probe?”, Philippine Centre for Investigative Journalism, October 18, 2007, at <http://www.pcij.org/blog/?p=2015> (last visited 26 February 2010); “Loyal and unrepentant: the passion of Raul Gonzalez”, GMA News, July 29, 2009, at <http://www.gmanews.tv/story/168584/loyal-and-unrepentant-the-passion-of-raul-gonzalez> (last visited 26 February 2010).

²⁵⁷ For example, *David v. Arroyo* (insofar as the Court denied the President's attempt to takeover media companies on a claim of national emergency); *Metropolitan Manila Development Authority et al. v. Concerned Residents of Manila Bay et al.*, G.R. Nos. 171947-48, December 18, 2008 (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); *Province of North Cotabato et al. v. Government of the Republic of the Philippines Peace Panel et al.*, G.R. No. 183591, October 14, 2008 (en banc) (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).

are not presently viable means to call the incumbent President to account.²⁵⁸ Despite charges being brought against the incumbent President's family (her spouse, the First Gentleman, in particular) for graft and corruption, no cases have been filed against them under the Anti-Graft and Corrupt Practices Act. The present Ombudsman is herself the subject of 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".²⁵⁹ Hence, she is also unlikely to mount a challenge to presidential power.

Conclusion: Perils of Presidentialism Redux

Twenty years ago Juan Linz published a now famous essay entitled "The Perils of Presidentialism"²⁶⁰ His concern was the possibility of divisive conflict between the legislature and the president under constitutions that try to balance "the desire for a strong and stable executive and the latent suspicion of that same presidential power".²⁶¹ The winner-take-all nature of presidential elections generates rivalry rather than compromise with opposition party legislators, and a directly elected president may be attracted to a "certain populism that may ... bring on a refusal to acknowledge the limits of the mandate."²⁶² Similarly, Andrew Arato pointed out 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 hyperpresidentialism, which can be introduced without changing the formal constitution."²⁶³ Both Linz and Arato held up the United States as an exception to the majority of presidential democracies that suffer from the pathologies they mention, but the contrast seems less sharp today.

Linz and Arato emphasize presidential/legislative interactions and possibility of gridlock. We accept their claim that, if well matched, the two branches may be unable to act effectively. Our own focus, however, is the risk of hyperpresidentialism stressed by Arato. We have provided specifics on exactly how presidents manage to exercise power in spite of legal structures designed to limit their power. Our case studies of Argentina and the Philippines demonstrate how elected presidents can manipulate or ignore legal and constitutional constraints to enhance their power and freedom of action. Like the United States, both systems have written constitutions under which presidents are both heads of state and of government. Chief executives are charged with managing the bureaucracy and are their states' top political personages. They are elected by the public to fixed terms with limited reelection. Both constitutions have an impeachment

²⁵⁸See "Arroyo escapes impeachment bid", BBC News, September 6, 2005, at <http://news.bbc.co.uk/2/hi/asia-pacific/4217952.stm> (last visited 20 July 2009).

²⁵⁹Gil C. Cabacungan Jr. and Lira-Dalangin Fernandez, "Impeach rap filed vs Ombudsman Gutierrez", Philippine Daily Inquirer, March 2, 2009, at <http://newsinfo.inquirer.net/topstories/topstories/view/20090302-191829/Impeach-rap-filed-vs-Ombudsman-Gutierrez> (last visited 10 June 2009); Wendell Vigilia, "Impeach Gutierrez: Salonga cites betrayal of public trust, gross incompetence", Malaya News, March 3, 2009, at <http://www.malaya.com.ph/mar03/news1.htm> (last visited 26 February 2010).

²⁶⁰ Juan J. Linz "Perils" supra note.

²⁶¹ Id. at 55

²⁶² Id. at 61.

²⁶³ Andrew Arato, *The New Democracies and American Constitutional Design* 7 CONSTITUTIONS 316 (2000) at 322.

process for the president and other high officials with indictment by the lower house and a trial in the upper house.

Within these parallel frameworks, the presidents in Argentina and the Philippines have acted in very 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. Presidents seek to maneuver around or ignore constraints, and the legislature, the courts, and civil society try, with more or less success, to hold the president and the administration to account.

Take decree powers first. These 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 beyond the limited ability to issue executive orders and policy statements that do not have external force.²⁶⁴ Furthermore, unlike both the Argentine and the Philippine constitutions, the American constitution contains no provisions for 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.

Outside of international affairs and national security, explicit legislative delegations of policymaking power to the executive are common in the United States and are permitted by the Supreme Court within very wide limits.²⁶⁵ At first glance, Argentina and the Philippines have constitutional texts that seem to severely limit delegation to an unrealistic degree given modern realities. In practice, there are few practical constraints. De facto delegation in both countries is very common and quite open-ended. The Supreme Court in the Philippines has tolerated extensive delegation by reading the constitutional text generously. Necessity and urgency decrees in Argentina and states of emergency in the Philippines are common substitutes for delegated authority. The courts have placed only modest limits on decree powers.

There seems to be a clear tradeoff here. 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, and even if there is such a threat, the president's action may either extend to policy areas with only a tangential relationship to the immediate problem or impose excessively harsh restrictions. The Argentine and Philippine presidents have sought to avoid legislative consultation and judicial oversight by invoking the separation of powers and downplaying its companion—checks and balances.

The allocation of funds is another source of presidential power. 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. US presidents have tried to

²⁶⁴ Brian R. Sala, "In Search of the Administrative President: Presidential 'Decree' Power and Policy Implementation in the United States," in J. M. Carey and M. S. Shugart, eds. *EXECUTIVE DECREE AUTHORITY*, 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 that requires cost-benefit analysis of major rules. [cite to OIRA]. See Oona Hathaway, *YALE LAW JOURNAL* (2009).

²⁶⁵ The most recent important discussion of this issue by the Supreme Court is *Whitman v. American Trucking Assn.*, 535 U.S. 457 (2001).

impound funds appropriated by Congress and signed into law. President Nixon's efforts were blocked by successful court challenges based on statutory interpretation, not the constitution, and the practice is now limited by statute.²⁶⁶ The US Supreme Court has also found the line-item veto unconstitutional.²⁶⁷ Reorganizing the executive branch requires congressional acquiescence. Such reorganizations were 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.²⁶⁸ 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.

Finally, the power to appoint high officials is a key perquisite of office. The United States is often held up as an example of an excessively politicized bureaucracy with thousands of positions subject to political appointment.²⁶⁹ However, 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 appointments can be made by the president without Senate confirmation. Those that require confirmation may be left empty for years. In the Philippines some appointments are made by the president 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 emergency powers to place an agency under a "temporary" presidential appointee.

Our conclusion is a rather pessimistic one. Presidential power is difficult to control through formal institutional checks. Not surprisingly chief executives seek to expand their scope for policymaking and seek to entrench their political position. Constitutional and statutory limits have some effect, but they also generate the search for ways to work around them. Our case studies of Argentina and the Philippines show how presidents assert their power while pushing the bounds of legality because of the weakness of checks and balances. Both cases illustrate the dangers of raising the separation of powers to a canonical principle without a robust system of checks and balances to counter assertions of executive power. Argentina and the Philippines may be extreme cases, but the fact that their recent constitutional revisions were explicitly designed to curb the president, should give us pause. 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 make them work effectively without the government grinding to a halt. At the very least, our cases suggest that when presidents have enhanced

²⁶⁶ The Nixon Administration cases are *Train v. the City of New York*, 420 US 35 (1975) and *Train v. Campaign Clean Water*, 420 US 136 (1975). The statute is the Balanced Budget and Emergency Deficit Control Act of 1985 (P.L. 99-177, 995 Stat. 1037), 2 UCA § 901 et seq.

²⁶⁷ *Clinton v. The City of New York*, 524 US 417 (1998).

²⁶⁸ The legislative veto was held unconstitutional in *INS v. Chadha*, 462 US 919 (1983). The statute is the Homeland Security Act of 2002, P.L. 107-296, 116 Stat. 2135.

²⁶⁹ Ackerman, *New Separation*, supra. 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), at <http://www.gpoaccess.gov/plumbkook/2008/index.html>. Overall the president has the authority to make 3000 political appointments. David E. Lewis, *The Politics of Presidential Appointments: Political Control and Bureaucratic Performance* 56 (2008).

powers to issue decrees, declare emergencies, make appointments, redirect funds, and reorganize the Executive, this can lead a country down a risky path that can undermine the checks and balances that provide some constraints on presidents' efforts to enhance their power.