DELEGATED DECREE AUTHORITY IN CONTEMPORARY SOUTH AMERICA: COMPARATIVE STUDY OF THE RADICAL LEFT AND THEIR THREAT TO THE RULE OF LAW

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ABSTRACT

International attention regarding executive decree authority within Latin America has significantly increased following Hugo Chávez' 2007 Enabling Law in Venezuela. This attention has largely been negative, as the international media has often vilified Chávez for promulgating decrees with the force of law. What the international media has continually failed to discuss, however, is that Chávez' form of decree authority, "delegated decree authority" (DDA), has been common throughout Venezuela's history, as well as that of most of South America. This article seeks to determine DDA's prevalence within South America, in particular within Venezuela and Ecuador, and determine whether DDA poses a threat to the rule of law within these nations. By focusing on Hugo Chávez of Venezuela and Rafael Correa of Ecuador, we have a unique opportunity to see whether these charismatic leaders have used DDA to increase their law-making authority and consolidate powers within the Executive branch.

I. INTRODUCTION

SINCE 2000, Hugo Chávez has captured international attention through his continued desire to enact broad, sweeping decrees with the force of law under Venezuela's "Enabling Law."[1] This media attention increased to new heights in August 2008, after Chávez promulgated twenty-six decrees in a single day—the last day of the eighteen-month enabling law—causing the international media to label Chávez as a socialist, a dictator, and an authoritarian.[2]

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1. Stephen Lendman, *Corporate Media Bashes New Chávez Enabling Law Decrees*, ATLANTIC FREE PRESS, Aug. 18, 2008, http://www.atlanticfreepress.com/news/1/4840-corporate-media-bashes-new-chavez-enabling-law-decrees-.html.
2. *Id.*

What the international media has continuously failed to report, however, is that Chávez' form of decree authority, "delegated decree authority" (DDA), has been common throughout Venezuela's history and most of South America.[3] In fact, eight constitutions in South America specifically provide their Executives lawmaking authority through DDA.[4] Thus, while it may be fair to criticize Chávez for some of his actions,[5] it may not be fair to criticize him for using DDA, considering its relatively frequent use both by his predecessors in Venezuela and by other Latin American leaders.

This article seeks to determine the prevalence of DDA within South America and whether DDA presents a threat to the rule of law. In particular, this article focuses on DDA in Venezuela under Hugo Chávez and Ecuador under Rafael Correa. The focus on Venezuela is a result of the amount of media attention given to Chávez' enabling laws and his decree authority.[6] Additionally, the focus on Ecuador is due to the fact that Ecuador presents a different form of DDA than Venezuela—post-approval DDA—that will help enrich our overall understanding of DDA. Furthermore, Ecuador's current president, Rafael Correa, is a leader who has often been placed in the same "radical left" category as Chávez.[7] While this categorization may be appropriate due to Correa's leftist political ideology, this article seeks to determine whether Correa has acted similarly to Chávez regarding the use of DDA.

Moreover, I selected Chávez and Correa because I consider them to be the most charismatic and popular leaders in their nations' modern histories—for instance, each has been elected multiple times, an unusual occurrence in both of their nations' recent histories.[8] Both leaders have also succeeded in re-writing their respective nations' constitutions to pro-

3. Delegated decree authority may also have a more specific name depending on the country, *i.e.*, the *decretazo* in Argentina or the "enabling law" in Venezuela. *See* John M. Carey & Matthew S. Shugart, *Appendix of Constitutional Provisions Regarding Decree*, *in* EXECUTIVE DECREE AUTHORITY app. at 299 (John M. Carey & Matthew S. Shugart eds., 1998); Brian F. Crisp, *Presidential Decree Authority in Venezuela*, *in* EXECUTIVE DECREE AUTHORITY 142, 145-46 (John M. Carey & Matthew S. Shugart eds., 1998); Delia F. Rubio & Matteo Goretti, *When the President Governs Alone: The Decretazo in Argentina, 1989-93*, *in* EXECUTIVE DECREE AUTHORITY 33, 33 (John M. Carey & Matthew S. Shugart eds., 1998).

4. Counting only the Latin American nations within South America, this is eight out of ten nations. Carey & Shugart, *supra* note 3, at 299; John M. Carey & Matthew S. Shugart, *Calling Out the Tanks or Filling Out the Forms?*, *in* EXECUTIVE DECREE AUTHORITY 10 (John M. Carey & Matthew S. Shugart eds., 1998).

5. Those actions may include imprisoning opposition leaders or attacking media outlets. *See* Roger F. Noriega, *Venezuela Under Chavez: The Path toward Dictatorship*, Nov. 3, 2006, http://www.aei.org/docLib/20060606_LAOJuneg.pdf.

6. *See* Lendman, *supra* note 1.

7. Francisco Panizza & Romina Miorelli, *Populism and Democracy in Latin America*, 23 ETHICS & INT'L AFFAIRS 39, 39 (2009), *available at* http://onlinelibrary.wiley.com/doi/10.1111/j.1747-7093.2009.00188.x/pdf.

8. Gene Healy, *South of the Border, the Cult of the Presidency*, DC EXAMINER, Feb. 2, 2010, *available at* http://www.cato.org/pub_display.php?pub_id=11188; *Ecuador's Correa Aims for "Citizens' Revolution" in Second Term*, XINHUANEWS, Aug. 11, 2009, http://news.xinhuanet.com/english/2009-08/11/content_11863725.htm [hereinafter *Ecuador's Correa*].

vide for consecutive or longer presidential terms with greater Executive powers.[9] Accordingly, these leaders possess substantial political capital that can be used to obtain powerful forms of DDA.[10] Thus, the current political landscape within Venezuela and Ecuador provides a unique opportunity to analyze DDA and determine whether these leaders have used DDA to increase their lawmaking authority and consolidate power within the Executive branch.

This article is divided into six sections. After this introduction, Section II provides definitions of Latin American democracy and the rule of law. Because the rule of law is a contested concept, the Section's goal is to provide a generalized definition of the rule of law to create the framework for the subsequent analysis regarding whether Chávez and Correa's DDA use poses a threat to the rule of law.

Next, Section III focuses on delegated decree authority by first defining DDA, then by providing an analysis of what DDA is and, perhaps more importantly, what DDA is not. Section III also discusses critiques of the current state of academic literature concerning DDA. Finally, the Section addresses the theoretical threat DDA poses to the rule of law.

Section IV provides a textual analysis of the constitutional grants of DDA within Venezuela and Ecuador. By examining the language of Venezuela and Ecuador's old and new constitutions, Section IV determines just how DDA powers have changed through new constitutions drafted under the tutelage of Chávez and Correa.

Section V analyzes how DDA has been used in practice in Venezuela and Ecuador. For each country, Section V analyzes how DDA has been used before and under these leaders. Accordingly, Section V seeks to determine whether these leaders' use of DDA has been an unprecedented grab of lawmaking power by the Executive, or if these leaders are exercising the same scope of decree authority as their predecessors.

Finally, Section VI analyzes whether Chávez or Correa's use of DDA poses a threat to the rule of law. As such, Section VI applies the principles adopted in Section II to the facts found in Section V. Section VI will finish with a prescription of what limits must be placed on DDA in South America to protect the rule of law.

II. DEMOCRATIC RULE OF LAW

Contemporary democracy "is distinctive in being based on the rule of law."[11] Accordingly, it can be argued that democracy fails without the rule of law. But before we can begin an analysis over what the rule of law means, it is necessary to define what democracy means in Latin America. Democracy in Latin America requires: "(1) contestation over policy and political competition for office; (2) participation of the citizenry through partisan, associational, and other forms of collective action; (3) accounta-

9. Healy, *supra* note 8.
10. Healy, *supra* note 8; *Ecuador's Correa*, *supra* note 8.
11. THE RULE OF LAW 2 (Ian Shapiro, ed., 1994); *see* Lendman, *supra* note 1.

bility of rulers to the ruled through mechanisms of representation and the rule of law; and (4) civilian control over the military."[12] Although DDA can have negative effects on many of these requirements, this article focuses solely on how DDA affects the rule of law in Latin American democracies.

Although the rule of law is universally recognized, it is a "notoriously contested concept."[13] As such, this article does not seek to challenge the current understanding of the rule of law throughout Latin America. Instead, this paper simply seeks to use the generalized concept of the rule of law as a measuring-stick for determining DDA's threat in Venezuela and Ecuador.

Despite being a contested concept, the rule of law is universally defined to require that "law matters and should matter."[14] For laws to matter, they should be "general, public, prospective, clear, consistent, capable of being followed, stable, impartially applied, and enforced."[15] The rule of law also requires that all actors within society, including the Executive, "be subject to limitation by law."[16] This requirement exists because the democratic rule of law works only when "horizontal accountability function[s] effectively, without obstruction and intimidation from powerful state actors."[17] In the context of DDA, such horizontal accountability prevents the consolidation of lawmaking power within the Executive branch.[18]

One key aspect of the rule of law in relation to DDA is the argument that the rule of law demands that all political actors, regardless of their political orientation, have a "voice" and are able to participate in the creation of legislation.[19] Such "formal equality" in the legislative process requires that legislation be sanctioned following "previously and carefully dictated procedures."[20] Without the use of carefully dictated procedures, politically powerful voices can silence weaker ones, effectively excluding

12. Terry Lynn Karl, *Dilemmas of Democratization in Latin America*, 23 COMP. POL. 1, 2 (1990). Karl's definition of democracy is used because it is particularly relevant to Latin America and its long history of military governments.
13. John C. Reitz, *Symposium: Export of the Rule of Law*, 13 TRANSNAT'L L. & CONTEMP. PROBS. 429, 435 (2003) (*quoting* Martin Krygier, *Marxism and the Rule of law: Reflections After the Collapse of Communism*, 15 LAW & SOC. INQUIRY 633, 640 (1990)); Randall Peerenboom, *Human Rights and Rule of Law: What's the Relationship?*, 36 GEO. J. INT'L L. 809, 826 (2005).
14. Reitz, *supra* note 13, at 436.
15. *Id.* at 440.
16. *Id.* at 435; Guillermo O'Donnell, *Why the Rule of Law Matters*, 15 J. OF DEMOCRACY 32, 34 (2004).
17. O'Donnell, *supra* note 16, at 37; Guillermo O'Donnell, *Polyarchies and the (Un)Rule of law*, *in* THE (UN)RULE OF LAW AND THE UNDERPRIVILEGED IN LATIN AMERICA 303, 303 (Juan E. Mendez et. al eds., 1999).
18. Christopher J. Walker, *Toward Democratic Consolidation? The Argentine Supreme Court, Judicial Independence, and the Rule of law*, 18 FLA. J. INT'L L. 745, 760 n.3 (2006).
19. *Id.* at 757.
20. O'Donnell, *supra* note 16, at 32; *see generally* Walker, *supra* note 18, at 757.

portions of society from contributing to legislative content.[21] Such exclusion, in turn, can result in sections of society removing themselves from the political process because they no longer believe that their interests are being represented.[22] Over time, without formal equality, political competition turns into a one-party game where the politically powerful actors are able to skew the rules of the game to permanently hinder political participation from opposing voices.

III. DELEGATED DECREE AUTHORITY

A. WHAT IS DDA?

Delegated decree authority (DDA) is a constitutionally-provided power permitting the Legislature to grant the Executive the authority to change the nation's status quo by promulgating decrees with the force of law.[23] DDA exists in two forms: (1) pre-approval DDA and (2) post-approval DDA.[24] The two differ in that while one form requires legislative approval prior to the decrees ("pre-approval DDA"), the other requires legislative action after the decree ("post-approval DDA").[25] In both forms of DDA, the key component is the Executive-Legislative interplay, whereby the Legislature effectively grants the Executive the right to enact decrees with the force of law.[26] In pre-approval DDA, this Executive-Legislative interplay occurs before the Executive has DDA powers, with the Legislature granting DDA powers in a piece of legislation containing the scope and time-length of the DDA grant.[27] In post-approval DDA, the Executive-Legislative interplay occurs after the Executive sends his decree to the Legislature, whereby the Legislature has a specific amount of time—*i.e.,* thirty days—to approve, modify, reject, or acquiesce to the Executive's decree.[28]

The substantive scope and time length of both forms of DDA are limited by a nation's constitution and the Legislature.[29] For instance, while a constitution may provide a broad scope of DDA powers, the Legislature can limit the scope to specific areas of law.[30]

Because Executive decrees under DDA have the force of law, those decrees become the new status quo for the nation.[31] As such, decrees passed under DDA nullify prior laws of the same subject matter and es-

21. *See generally* O'Donnell, *supra* note 16, at 32; *see generally* Walker, *supra* note 18, at 757.
22. *See generally* Walker, *supra* note 18, at 757.
23. Carey & Shugart, *supra* note 4, at 13.
24. *Id.* at 10.
25. *Id.*
26. *Id.*
27. *Id.*
28. *Id.*
29. *Id.*
30. *Id.*
31. Scott Mainwaring & Matthew S. Shugart, *Presidentialism and Democracy in Latin America: Rethinking the Terms of the Debate, in* PRESIDENTIALISM & DEMOCRACY IN LATIN AMERICA 12, 44 (Scott Mainwaring & Matthew S. Shugart eds., 1997).

tablish new rights or obligations.[32] Moreover, because decrees enacted under DDA have the force of law, they can only be repealed or altered by subsequent legislation or a Supreme Court decision.[33]

Both pre-approval and post-approval DDA are prevalent throughout South America (see Figure 1). Although prevalent, it is important to note that each country maintains its own unique system of DDA. As such, the amount of relative freedom the Executive has in issuing decrees under DDA differs substantially throughout the region.[34] Nonetheless, the key aspect common through all of these countries' forms of DDA is the Executive-Legislative interplay.

Figure 1: Constitutionally-Established DDA in South America

	Type of DDA	**Length of DDA**	**Scope**	**Other Limitations**
Argentina[35]	Both	No limit	Pre-Approval: Administration and Public Emergency	None
Brazil[36]	Post-Approval	Legislature has 30 days to act	No limit	None
Chile[37]	Both	1 year	No limit	Post-approval decrees must be used to prevent serious detriment to the country
Colombia[38]	Pre-Approval	6 months	Economic and Financial	None
Ecuador[39]	Post-Approval	Legislature has 30 days to act	Economically Urgent	1 DDA decree at a time
Peru[40]	Both	No limit	No limit	None
Uruguay[41]	Post-Approval	Legislature has 45 days to act	No limit	1 DDA decree at a time
Venezuela[42]	Pre-Approval	No limit	No Limit	None

32. *Id.*
33. *Id.* at 45.
34. For instance, while post-approval DDA in Ecuador provides the Legislature thirty days to respond to the president's decree, Uruguay's post-approval DDA provides its Legislature forty-five days to respond. *See* Mainwaring & Shugart, *supra* note 31, at 44.
35. Carey & Shugart, *supra* note 3, at 299.
36. Gary Reich, *Executive Decree Authority in Brazil: How Reactive Legislators Influence Policy*, 27 LEGIS. STUD. Q. 5, 10 n.1 (2002).
37. SCOTT MORGENSTERN & BENITO NACIF, LEGISLATIVE POLITICS IN LATIN AMERICA 101 (2002).
38. Mainwaring & Shugart, *supra* note 31, at 45, 47; Carey & Shugart, *supra* note 4, at 11.
39. Mainwaring & Shugart, *supra* note 31, at 45.
40. *Id.*
41. *Id.* at 46.
42. Crisp, *supra* note 3, at 146; Carey & Shugart, *supra* note 3, at 307.

The purposes behind pre-approval and post-approval DDA differ dramatically. Pre-approval DDA is often used during times of political, social, or economic change.[43] For instance, pre-approval DDA allows a leader to dramatically change a country's political institutions to increase popular involvement, restructure state resources, and even change the country's political ideology.[44] Moreover, by granting pre-approval DDA, a Legislature can avoid political bickering and allow more change to occur than would likely happen under the traditional lawmaking process.[45]

Post-approval DDA, on the other hand, is not as useful in creating wide-spread change. Rather, Executives often use post-approval DDA to force a deadlocked Legislature to address pressing issues that may be politically unpopular.[46] Because the Legislature has a limited time to respond to a proposed decree, it often must shift its focus from other issues to the Executive's decree to ensure a proper discussion of the subject.[47]

DDA is arguably beneficial in several situations. Many individuals favor the use of DDA during times of economic crisis because it enables the quicker decision-making that is necessary to address the constantly evolving economic climate.[48] DDA is additionally seen to be beneficial in situations involving legislative deadlock, particularly when the legislation's subject matter is contentious and politically unpopular.[49]

B. WHAT DDA IS NOT

To better understand what DDA is, it is important to understand what DDA is not. Nearly every democracy in the world provides its Executive with some constitutional authority to issue decrees that affect the status quo of the nation.[50] This broad grant of decree authority is known as "constitutional decree authority" (CDA).[51] Within the broad grant of CDA exist several different decree powers, one of which is DDA.[52] Thus, it is necessary to recognize that while DDA is a part of the broad package of CDA, it is only one small component of it, and, as such, it is necessary to distinguish DDA from the other forms of constitutional decree authority.

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43. *See* Crisp, *supra* note 3, at 148.
44. *See id.*
45. As will be later shown, pre-approval DDA has been used by Chávez in Venezuela as a tool to compliment the country's constitutional re-writing process.
46. Brian Sala, *The U.S. Presidency in Comparative Perspective*, *in* EXECUTIVE DECREE AUTHORITY 254, 256 (John Carey & Matthew Shugart eds., 1998).
47. *Id.*
48. *See* William E. Scheuerman, *Exception and Emergency Powers: The Economic State of Emergency*, 21 CARDOZO L. REV. 1869, 1892 (2000). "[I]t is no surprise that even liberal polities tend to delegate vast discretionary authority to executive. . .bodies typically seen as better suited to the tasks of quick, flexible forms of action" in capitalist economies. *Id.*
49. Sala, *supra* note 46, at 256.
50. Carey & Shugart, *supra* note 4, at 10.
51. *Id.* at 13-14.
52. *Id.* at 13.

First, DDA is not "regulatory" decree authority, which permits the Executive to enact decrees to ensure the enforcement of pre-existing legislation.[53] Second, DDA is not "administrative" decree authority, which allows the Executive to manage the effectiveness of the federal government.[54] Although both "regulatory" and "administrative" decrees can affect the status quo through rules and regulations, "these decrees are not the law; they are subordinate to the law."[55] Moreover, it is often much easier to annul regulatory and administrative decrees than it is to annul a DDA decree.[56] Finally, and most importantly, regulatory and administrative decree authority does not involve the Executive-Legislative interplay that is present under DDA. Instead, the Executive can act upon regulatory and administrative decree authority without Legislative involvement.[57]

DDA also differentiates from decrees enacted under "emergency powers," which allow the Executive to suspend specific constitutional rights during a time of national security or economic emergency.[58] A major difference between emergency decrees and DDA is that emergency decrees are temporary in nature to cure the national crisis and typically expire once the emergency threat has been extinguished.[59] DDA, on the other hand, is a permanent change in the status quo that can only be removed through future legislative action.[60] A simple way to distinguish the two according to Mainwaring and Shugart is "if the power is understood as enabling the president to new policy departures, we call it [DDA]. If it is understood to pertain to temporary suspension of some rights, we call it emergency power."[61]

It is, additionally, important to clarify the difference between an economic emergency and DDA that is used during times of economic crisis. This distinction is important because economic crises have been the main rationale for DDA in Latin America's history, as can be seen through the neo-liberal "shock treatments" that occurred in the late 1980s and early 1990s in Latin America.[62] The most notable difference is that whereas DDA used to solve an economic crisis results in permanent, long-lasting economic laws that remain in force until they are overturned by a later administration, decrees enacted during a state of economic emergency cease once the emergency ends.[63] Moreover, decrees enacted under an economic emergency often lack the Executive-Legislative interplay that is essential to DDA. For instance, while an economic emergency may be

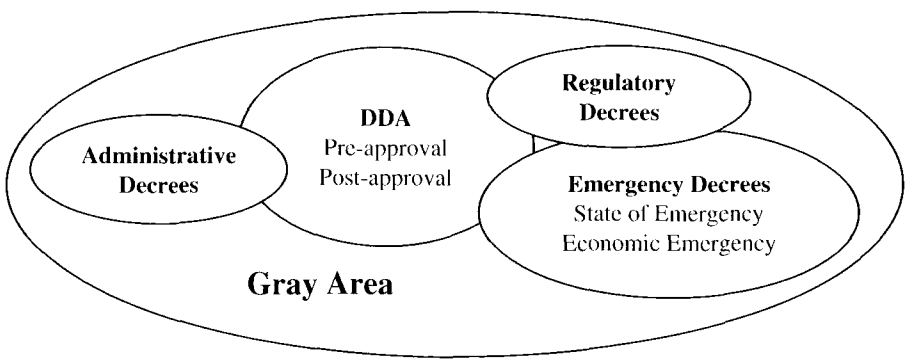
53. Mainwaring & Shugart, *supra* note 31, at 46.
54. *Id.*
55. Carey & Shugart, *supra* note 4, at 13.
56. *Id.*
57. *See* Mainwaring & Shugart, *supra* note 31, at 46.
58. *Id.* at 46-47.
59. *Id.*
60. *Id.*
61. *Id.* at 47.
62. Rubio & Goretti, *supra* note 3, at 38; Scheuerman, *supra* note 48, at 1872.
63. Scheuerman, *supra* note 48, at 1872.

declared by the Executive without legislative involvement, DDA used during an economic crisis always involves legislative approval.[64]

To truly understand DDA, it is necessary to conceptualize how DDA fits within CDA. Figure 2 below is a conceptualization of CDA, containing DDA, emergency decrees, administrative decrees, and regulatory decrees. Moreover, each sub-category contains its own group of "sub-sub-categories" of decree authority. For example, DDA includes both pre-approval and post-approval DDA. Alternatively, emergency decree authority includes both states of emergency and economic emergencies. Accordingly, it is necessary to understand that while DDA is CDA, CDA is not always DDA.

Moreover, the space outside of these specific categories of CDA consists of the "gray" area of CDA. This "gray" area is important because Executives may have a constitutional right to issue decrees that do not cleanly fit into any of the above-described categories. Nonetheless, Executives have used this "gray" area to enact decrees that do, in fact, change the nation's status quo. Such examples of the ability to issue decrees in this "gray" area include the creation of national companies, the canceling of contracts with private companies, and even the nationalization of private industry.[65] This "gray" area may become the most worrisome form of CDA in the future, as the only true constraints of the Executive's use of this decree authority is a country's Supreme Court, which may be hesitant to invalidate an Executive's decree due to political or social pressures. Although this "gray" area of CDA is beyond the scope of the current analysis, further investigation into the prevalence of "gray" area should be made to further develop and understand CDA's nuances.

Figure 2: CDA



64. *See id.* at 1881.

65. *See generally Decretos Emitidos de Ecuador de Período 2009-2013* [*Decrees issued in Ecuador from 2009-2013*], SIGOB, http://www.sigob.gov.ec/decretos/ (last visited Jan. 13, 2011).

C. Critique Of Current Theory Of DDA

Although I agree with the majority of the current literature regarding DDA, I must clarify what I consider to be two problems with the current state of DDA analysis. First, some authors argue that post-approval DDA is not a form of DDA, but instead a separate form of CDA. The rationale behind their argument is that because the decree is made without prior Legislative approval, the only authority permitting such a decree is the constitution, thus leading to CDA. I reject such an argument because it ignores the fact that both pre-approval and post-approval DDA are constitutionally provided for. Without the constitutional grant, it would be unlawful for a nation's Legislature to grant DDA, in any form, to the Executive. Moreover, the argument further ignores the fact that in both pre-approval and post-approval DDA the decrees are without effect without Legislative approval of some form. Thus, while post-approval DDA allows the Executive to promulgate decrees without Legislative approval, those decrees enjoy the force of law only after the Executive-Legislative interplay occurs. It is this Executive-Legislative interplay that makes DDA unique from the other forms of CDA and what makes post-approval DDA a form of DDA.

Second, although Mainwaring and Shugart provide an accurate analysis of the prevalence of DDA within Latin America, the authors fail in their attempt to distinguish between the dangers of pre-approval and post-approval DDA. They argue that post-approval DDA provides a greater danger than pre-approval DDA because pre-approval DDA involves a situation where "what congress delegates it can retract—or it can choose to not delegate in the first place."[66] On the other hand, the Legislature is not free to retract post-approval DDA from the Executive, but instead must wait to react once the Executive has issued such a decree.[67] As a result, the authors argue that Latin American Legislatures are more tightly bound by post-approval DDA since the Legislature's powers are retroactive and not proactive.[68] The authors' distinction turns out to be weak as both pre-approval and post-approval DDA involve situations where the Legislature is tightly bound by Executive action. In pre-approval DDA, the Legislature is bound by all decrees promulgated by the Executive under the DDA grant.[69] Meanwhile, post-approval DDA bounds the Legislature by requiring a response to the Executive's decree.[70] Additionally, the authors' argument that post-approval DDA grants the Executive far more power than pre-approval DDA fails because the substantive scope of both forms of DDA are limited by a na-

66. *See* Mainwaring & Shugart, *supra* note 31, at 47.
67. *See id.*
68. The authors cite to Article 62 of Brazil's 1988 Constitution as such an example. The Article permits an Executive to adopt "provisional measures" that must be immediately sent to Congress and are deemed ineffective unless they are approved by Congress within thirty days. *Id.* at 44.
69. *See id.* at 46-47.
70. *Id.*

tion's constitution, which tends to provide the Executive roughly the same scope of activity to decree new legislation.

I reject Mainwaring and Shugart's arguments and argue that pre-approval DDA currently contains a greater likelihood of abuse than post-approval DDA since many nations have amended their constitutions to provide the Legislature with greater power to nullify post-approval DDA. Although pre-approval DDA permits the Legislature to "choose not to delegate the power in the first place," pre-approval DDA requires the Legislature to take much more action than post-approval DDA to rescind any decree, even when the Executive exceeds the established boundaries given by the Legislature.[71] Moreover, as Executives have further consolidated power within the Legislative branch through new constitutions and the creation of a unicameral legislative branch, they have helped ensure that grants of pre-approval DDA provide the Executive with broader powers.[72] Thus, as more assembly seats are won by an Executive's political allies, the greater the likelihood that the Executive will be granted continually larger pre-approval DDA powers.

I do not mean to say that post-approval DDA poses no danger to democracy, but that, currently, post-approval DDA is not as dangerous as pre-approval DDA. While pre-approval DDA powers have been broadened over time, post-approval DDA powers have been constrained by constitutional changes providing longer time periods to address post-approval DDA decrees, and by restrictions on the use of the Executive's post-approval DDA to one decree at a time, except during states of emergency.[73] Accordingly, it is more difficult for the Executive to inundate the Legislature with post-approval DDA decrees, thereby forcing decrees into law simply because the Legislature is incapable of handling the legislative load within the constitutional time-frame. Finally, and possibly the most important characteristic, post-approval DDA is often constitutionally limited in terms of scope to areas of economic necessity, while the scope of pre-approval DDA can be left to the whims of the majority legislation.[74] Thus, even while post-approval DDA can absolutely be abused under certain situations, the likelihood of abuse is much less than in pre-approval DDA.

D. Does DDA Threaten the Rule of Law?

Theoretically, DDA's threat to the rule of law differs dramatically between pre-approval and post-approval DDA.[75] Before beginning a theo-

71. But, it is fair to note that the authors' work was conducted before the Chávez era in Venezuela, which has showcased an Executive's ability to consolidate substantial power through pre-approval DDA.
72. *See* Crisp, *supra* note 3, at 149-50.
73. Mainwaring & Shugart, *supra* note 31, at 444; Republic of Ecuador Constitution of 2008 art. 140.
74. Mainwaring & Shugart, *supra* note 31, at 444.
75. The following subsection involves a theoretical analysis over pre-approval and post-approval DDA's threat to the rule of law. Because this is solely a theoretical

retical analysis of DDA's threat to the rule of law, it is important to note that DDA does not threaten the rule of law's requirement that "laws matter." This is because once a DDA decree has been granted the force of law through the Executive-Legislative interplay, the Executive decrees are facially no different from any other law. Because DDA does not undermine the rule of law's requirement that "laws matter," the focus of DDA's threat to the rule of law is on "horizontal accountability" and "formal equality."

1. Pre-Approval DDA

Pre-approval DDA, in general, threatens the rule of law. First, pre-approval DDA threatens the rule of law in that it can provide little horizontal accountability. After the pre-approval DDA grant, an Executive, particularly a strong charismatic leader, can issue decrees without being held accountable for how he uses his DDA powers. So long as the Executive acts within the DDA grant's boundaries, he can decree whatever he chooses. Moreover, even when the Executive acts outside the DDA grant's boundaries, the Legislature or opposition must take affirmative action to hold the Executive accountable. Such action, often done through a new law annulling the decree, may take months, thereby allowing the Executive's unconstitutional decree to become the nation's status quo for that time period.[76]

Pre-approval DDA also threatens the rule of law because it denies "formal equality" as it is a departure from the "carefully dictated procedures" that are present in other forms of legislation.[77] In a sense, pre-approval DDA is the exception to the procedures that allow the rule of law to succeed since Executives can issue decrees with the force of law that have not been discussed with the Legislature or are not even in writing at the time of the decree. This lack of formal equality is particularly evident when the Executive is granted DDA by a majority Legislature. In such a situation, the majority Legislature can effectively exclude the opposition from any discussion regarding the scope and time-length of the DDA grant. Moreover, the Executive, after the DDA grant, has the ability to issue decrees without having to discuss the content of the legislation with minority parties. As a result, the political opposition is denied their voice both before and during the pre-approval DDA grant.[78]

Furthermore, pre-approval DDA's process of stifling opposition participation is significant as it can create a downward spiral of opposition participation and threaten both democracy and the rule of law. First, horizontal accountability disappears as the Legislature, particularly minority parties, demonstrates an incapacity or unwillingness to prevent the

analysis, the analysis does not look at how DDA's practical use threatens the rule of law. Such an analysis is included in a later section.

76. *See* Mainwaring & Shugart, *supra* note 31, at 444.

77. *See* O'Donnell, *supra* note 16, at 33.

78. *See id.*

Executive from obtaining lawmaking powers and issuing decrees without legislative involvement.[79] In turn, voters, viewing the DDA decrees as being arbitrary and believing that their votes no longer count, decide to abstain from voting. This decrease in voter participation enables the majority, including the Executive, to become more powerful through greater election results, which, in turn, allows the Executive to obtain continuously broader DDA powers. As a result, an asymmetric equilibrium forms where only one political voice determines the country's status quo, damaging the rule of law and democracy.

2. Post-Approval DDA

Post-approval DDA's threat to the rule of law is significantly less than pre-approval DDA's threat. This difference occurs because laws enacted under post-approval DDA still follow carefully dictated procedures: all post-approval DDA decrees must go through the Legislature before they obtain the force of law, post-approval DDA, unlike pre-approval DDA, specifically allows for legislative involvement regarding the content of the Executive's decree. Such legislative involvement inherently provides opposition leaders the opportunity to voice their opinion. Moreover, legislative involvement also ensures that horizontal accountability is in effect, as a Legislature can simply reject or modify the Executive's decree when they believe that the Executive is acting outside of his post-approval DDA powers.

At the same time post-approval DDA provides greater protections for the rule of law, it can also threaten the rule of law in several ways. Because post-approval DDA provides the Legislature a limited time-frame to respond to the Executive's decree, the Legislature must prioritize sections of the decree. Thus, the Legislature is often able to address only the major issues of the proposed law, which, in turn, means that it must ignore much of the law's text.

Post-approval DDA is also problematic when the Executive enjoys strong majority support within the Legislature, which can effectively silence the political opposition in a manner similar to that under pre-approval DDA. Because the majority party or coalition often sets the legislative agenda and schedule, the majority can manipulate the schedule to limit minority participation by providing little to no public discussion over the Executive decree.

Finally, post-approval DDA can be problematic when the Executive inundates the Legislature with a continuous stream of decrees. While more recent constitutions have limited an Executive's ability to inundate the Legislature with decrees by prohibiting the Legislature from having more than one post-approval decree at a time, the Executive can limit legislative action through constant decrees. For instance, the Executive can disrupt any agenda a Legislature may have by constantly sending de-

79. *See id.* at 37.

crees. Because the Legislature must act on the Executive's decree within a certain time-period, it will continually have to reserve more resources to respond to the Executive's decrees, leaving the Legislature less time towards drafting its own laws. Accordingly, by sending a continuous stream of decrees to the Legislature, the Executive effectively places itself as the country's primary lawmaker, thereby limiting the Legislature's lawmaking authority.

IV. CONSTITUTIONAL GRANTS OF DDA IN VENEZUELA AND ECUADOR

As previously mentioned, a nation's constitution scopes the boundaries of the Executive's DDA powers. The text can limit the duration of a pre-approval DDA or how many decrees an Executive can send at any moment under post-approval DDA.[80] The text can also limit the scope of DDA to only economic or financial areas or be left intentionally vague to permit DDA in all areas of society.[81] While the constitutional language does not dictate how DDA is used in practice, it provides guidelines as to how much power an Executive can consolidate under DDA.

The following analysis provides textual comparisons of the old and new constitutions in Venezuela and Ecuador. Because the new constitutions of Venezuela and Ecuador were drafted under the tutelage of Chávez and Correa, respectively, such a comparison permits us to view if, and how, these leaders crafted the new constitutions to provide themselves greater DDA powers. Accordingly, Venezuela's analysis involves the country's 1961 and 1999 Constitutions, while Ecuador's analysis includes the country's 1998 and 2008 Constitutions.

A. VENEZUELAN DDA—THE "ENABLING LAW"

1. 1961 Constitution's DDA

Venezuela's 1961 Constitution provided its Executives pre-approval DDA powers.[82] Article 190, Section 8 provided the Executive to power to make decrees in economic or financial matters when the public interest required it and when it had been authorized by "special law."[83] What is notable in Venezuela's 1961 Constitution is that there are few limitations on this DDA grant. Aside from limiting the scope of DDA to economic or financial matters, there is no limitation on the time-length of the "special law."[84] Instead, the time-length of the DDA grants was limited to the Legislature's discretion.[85]

80. *See* REPUBLIC OF ECUADOR CONSTITUTION OF 2008 art. 140.
81. *See* Crisp, *supra* note 3, at 166.
82. REPUBLIC OF VENEZUELA CONSTITUTION OF 1961 art. 190, § 8 (reformed in 1983).
83. *Id.*
84. *Id.*
85. Even though the 1961 Constitution is silent on who has the authority to promulgate the "special law," past practice shows that the Legislative branch had the sole authority to promulgate such a law. *See* Crisp, *supra* note 3, at 146-49.

2. 1999 Constitution's DDA

After Chávez became president in 1998, he acted upon his campaign promise to re-write Venezuela's constitution.[86] During the 1999 re-writing process, Chávez actively sought to increase the scope and power of Venezuela's DDA because, to Chávez, the enabling law was the "Mother of All Laws," which could enable him to bring social revolution to Venezuelan society.[87] For Chávez, the enabling law went hand-in-hand with constitutional change, as the Constitution could bring large-scale change, while the Enabling Law could bring specific change. In fact, Chávez said:

> The Enabling Law and the Constitutional Reform are like two sister motors, two motors of the same machine. It is required that we coordinate the two quickly because there are laws that we have in mind that will only be possible when the reform is done, when part of the constitution is reformed.[88]

Similar to the 1961 Constitution, Venezuela's 1999 Constitution provides the Executive pre-approval DDA powers.[89] Article 203 states that the National Assembly, with three-fifths support of its members, can authorize the Executive to enact decrees limited in time and scope under an "enabling law."[90] Moreover, Article 236, Section 8 provides the Executive the power to dictate, with previous authorization under an "enabling law," decrees with the force of law.[91] Much like the 1961 Constitution, the 1999 Constitution is vague about the time-length of the DDA powers, leaving it to the Legislature's discretion.[92] Unlike the 1961 Constitution, however, the 1999 Constitution contains no textual language limiting DDA to economic or financial matters, permitting the Legislature to grant DDA powers in all areas of society.[93]

3. Comparing The 1961 And 1999 Constitutions

When comparing the two Constitutions, it is clear that Chávez and Venezuela's 1999 Constitution increased the Executive's DDA powers. Although both Constitutions contained no time limits on the DDA grant, the 1999 Constitution provides the Executive a much broader scope of DDA powers since there is no limitation on solely economic or financial matters.[94] Thus, the 1999 Constitution, which leaves the scope of the

86. *See* Clifton Ross, *Constitutions and Coups: The Honduras Case*, PM PRESS, Oct. 29, 2010, http://www.pmpress.org/content/article.php/20090629100908408.
87. Stacy Rentner, *Venezueula: How a HydroCarbons Law Crippled an Oil Giant*, 27 HASTINGS INT'L & COMP. L. REV. 351, 360 (2004).
88. Chris Carlson, *Controversy Surrounds 69 Articles in the Reform of Venezuela's Constitution*, VHEADLINE, Nov. 24, 2007, http://www.vheadline.com/printer_news.asp?id=77061.
89. *See* REPUBLIC OF VENEZUELA CONSTITUTION OF 1999 art. 236, § 8.
90. *Id.* The 1961 Constitution was vague as to whether a majority or three-fifths support was required.
91. *Id.*
92. *Id.*
93. *Id.*
94. *Id.*

DDA grant to the Legislature's discretion, effectively provides the Executive DDA powers in any and every facet of society.

B. Ecuadoran DDA—"El Proyecto Urgente"

1. 1998 Constitution's DDA

Ecuador's 1998 Constitution granted the Executive post-approval DDA.[95] Article 155 provided the Executive the authority to send economically urgent legislation, or *proyectos urgentes*, to the National Congress.[96] Once received, the National Congress had thirty days to approve, modify, or deny the *proyecto urgente*.[97] If the National Congress failed to act within this thirty day period, the Executive's proposed legislation became law.[98]

Article 155 also provided that the Executive could only send one *proyecto urgente* at a time, except during a state of emergency.[99] Accordingly, the Executive had to wait thirty days or until the Legislature was finished with the previous *proyecto urgente* before sending another.

2. 2008 Constitution's DDA

Ecuador's 2008 Constitution did little to change the Executive's DDA power. Similar to the 1998 Constitution, Article 140 of the Constitution provides the Executive post-approval DDA powers as he can send *proyectos urgentes* to the National Assembly.[100] Once the National Assembly receives the *proyecto urgente*, they have up to thirty days to approve, modify, or reject the proposed legislation.[101] If the National Assembly does not take proper action within the thirty day time period, the Executive can issue a decree making the *proyecto urgente* law.[102] After the Executive's decree, the National Assembly has the authority to modify or revoke the law just as if it is any other law.[103]

Like the 1998 Constitution, the 2008 Constitution prohibits the Executive from sending more than one *proyecto urgente* at a time, except during states of emergency.[104] Thus, Ecuador's Executive cannot inundate the National Assembly with *proyectos urgentes* to effectively bypass the thirty-day requirement.

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95. Republic of Ecuador Constitution of 1998 art. 155.
96. *Id.*
97. *Id.*
98. *Id.*
99. *Id.*
100. *See* Republic of Ecuador Constitution of 2008 art. 140.
101. *Id.*
102. *Id.*
103. *Id.*
104. *Compare* Republic of Ecuador Constitution of 1998 art. 155, *with* Republic of Ecuador Constitution of 2008 art. 140.

3. Comparing the 1998 and 2008 Constitutions

Comparing the 1998 and 2008 Constitutions, Ecuador's DDA powers are essentially identical. In fact, the only difference between the two constitutions is that the 2008 Constitution explicitly authorizes the Executive to decree the *proyecto urgente* into law after thirty days, whereas the 1998 Constitution did not explicitly authorize such Executive action.[105] Nonetheless, the end result of both the 1998 and 2008 Constitutions is the same, with all *proyectos urgentes* becoming law after being in the Legislature for more than thirty days. Based on this comparison, we see that Rafael Correa, unlike Chávez, did not use Ecuador's 2008 constitutional re-writing process to grant himself broader DDA powers.

C. Overall Analysis of DDA Among These Countries

The constitutions of Venezuela and Ecuador provide very different forms of DDA. One country—Venezuela—permits pre-approval DDA, while one country—Ecuador—permits post-approval DDA. Moreover, in Venezuela there is a broad and powerful form of DDA, while Ecuador provides its Executive with a narrower, but still powerful, form of DDA that enables the Executive to send *proyectos urgentes* to the Legislature.

The previous analysis further shows how Chávez used the 1999 Constituent Assembly to substantially broaden his DDA powers. In fact, prior limitations on Chávez' DDA powers have been removed altogether, as the scope of his DDA powers are limited only by Venezuela's Legislature, which is controlled by Chávez' allies.[106]

On the other hand, Correa acted with restraint during Ecuador's 2008 constitutional re-writing process. Instead of granting the Executive pre-approval DDA, Correa maintained the status quo and limited Ecuador's 2008 Constitution to post-approval DDA.[107] Moreover, the 2008 Constitution continues to limit the use of post-approval DDA to economically urgent matters and provides the Legislature thirty days to respond to any particular *proyecto urgente*.[108] Finally, and perhaps most importantly, Ecuador's 2008 Constitution continues to prohibit the Executive from inundating the Legislature with Executive decrees by limiting the Executive

105. *Compare* Republic of Ecuador Constitution of 1998 art. 155, *with* Republic of Ecuador Constitution of 2008 art. 140.

106. The 1961 Constitution's restriction *en materia económica o financiera* [in economic or financial matters] is not in the 1999 Constitution, thereby leaving the National Assembly, which issues "Enabling Laws," the only body that can restrict the powers of presidential decrees. *Compare* Republic of Venezuela Constitution of 1999 art. 236, § 8, *with* Republic of Venezuela Constitution of 1961 art. 190, §8 (reformed in 1983).

107. Under both constitutions, the President must submit decrees to the Legislature for approval, modification, or rejection. *Compare* Republic of Ecuador Constitution of 2008 art. 140, *with* Republic of Ecuador Constitution of 1998 art. 155.

108. The first sentence of article 140 retains the *en materia económica* [in economic matters] restriction. Republic of Ecuador Constitution of 2008 art. 140.

to one *proyecto urgente* at a time.[109]

V. DDA IN PRACTICE IN VENEZUELA AND ECUADOR

While constitutional text establishes DDA's boundaries, the text does not explain how DDA is used in practice. For example, the constitutional language does not explain how often a Legislature grants pre-approval DDA to its Executive, or how often an Executive uses his post-approval DDA powers. Moreover, the constitutional text does not show how broad or long any particular DDA grant is. The following analysis addresses these issues in Venezuela and Ecuador. For each country, the analysis includes two eras: (1) the pre-leader era—*i.e.*, Chávez and Correa; and (2) the leader era. By focusing on these two eras, this analysis seeks to determine how DDA has been used by these modern leaders and if these leaders have used their DDA powers differently from their predecessors.

A. VENEZUELA

1. Pre-Chávez Era[110]

Possibly more than any other Latin American nation, Venezuela has had a strong history of granting its Executive DDA through its "enabling law." From 1961, the first year of Venezuela's former constitution, to 1998, the Venezuelan Legislature granted the enabling law five times.[111] Three of the enabling laws occurred when the Executive enjoyed majority support within the Legislature: in 1961, 1974, and 1984.[112] Each enabling law granted the Executive DDA for one year in areas designed to restructure the public administration and address financial and economic issues.[113] Although these areas were relatively broad, they often included specific guidelines, limiting the substantive scope of the Executive's decrees to areas specifically stated in the legislative grant.[114] During the period in which these three enabling laws were in effect, the Executives enacted fifteen, fifty-three, and seventy-one decrees, respectively.[115] The decrees were restricted to financial, economic, and public administration areas, such as distributing oil wealth, cutting public salaries, restructuring the central government, enacting new tax laws, issuing government

109. *Id.*
110. The following analysis of the pre-Chávez era is not intended to be as in-depth as the Chávez-era analysis. This is because the use of DDA during the pre-Chávez era has been thoroughly chronicled by Brian Crisp. *See generally* Crisp, *supra* note 3.
111. *See id.* at 146-50; *see also* Mario J. Garcia-Serra, *The "Enabling Law": The Demise of the Separation of Powers in Hugo Chavez's Venezuela*, 32 U. MIAMI INTER-AM. L. REV. 265, 278 (2001).
112. Crisp, *supra* note 3, at 148-49.
113. *See id.* at 146-49.
114. *Id.*; *see also* Garcia-Serra, *supra* note 111, at 278.
115. It is important to note that thirty-six of the seventy-one decrees were used for the purpose of selling government bonds to refinance the public debt. Crisp, *supra* note 3, at 146-149.

bonds, and nationalizing the country's iron ore industry.[116]

The remaining two times the Legislature issued an enabling law from 1961 to 1998 were when the Executive enjoyed minority support in the Legislature.[117] These grants occurred in 1993 and 1994 and were used by the majority Legislature to force the Executive to deal with unpopular or difficult economic legislation.[118] Due to the minority support, the DDA grants involved a narrower scope of power, the decrees were more closely scrutinized by the Legislature, and the length of the DDA grant was significantly less.[119] For example, the 1993 enabling law lasted six months, while the 1994 enabling lasted only thirty days.[120] Because the minority-supported Executives were given far less freedom in their decree making, the Executives enacted only thirteen decrees in 1993 and four decrees in 1994.[121] Due to the limited scope of the enabling laws, the decrees largely consisted of banking reform, the sale of the national airline, and unpopular taxes.[122] Of significant importance, however, was that the Legislature, in granting these enabling laws, narrowly permitted the Executives to create criminal sanctions for disobeying the decrees.[123] The 1993 and 1994 enabling laws were the only instances under the 1961 Constitution where the Legislature granted the Executive power to modify the nation's criminal code through decrees.[124]

Although DDA was relatively common in the pre-Chávez era, the enabling laws were limited in several important respects. Professor Brian Crisp notes four important aspects of Venezuela's pre-Chávez DDA.[125] First, "the [1961 Venezuelan] Constitution restrict[ed DDA] to economic and financial matters."[126] Second, the time for which the authority had been granted was limited to a maximum of twelve months.[127] Third, legislatively provided instructions regarding the scope of DDA became more and more detailed over time, as was seen in the 1974, 1984, 1993, and 1994 DDAs.[128] Finally, "the provisions for [legislative] oversight [were] fairly rigorous."[129] Thus, although the Executive was granted the power to enact decrees with the force of law for upwards of a year, the Executive's ability to enact far-sweeping changes was restricted by the Legisla-

116. Brian F. Crisp, *Presidential Behavior in a System With Strong Parties: Venezuela 1958-1995*, *in* EXECUTIVE DECREE AUTHORITY 182, 187-89 (John M. Carey & Matthew S. Shugart eds., 1997).
117. Crisp, *supra* note 3, at 149-51.
118. *Id.*
119. *Id.*
120. *Id.* at 149-50.
121. *Id.* at 150-51.
122. *Id.* at 149-51.
123. *Id.* at 150.
124. *Id.* at 149-50.
125. *Id.* at 154.
126. *Id.*
127. *Id.*
128. *Id.*
129. *Id.*

ture. Moreover, we see that the Executive-Legislative interplay was balanced in favor of the Legislature during this time-period.

Despite the trend of providing more legislative oversight over the Executive decrees, one problematic aspect that developed was when the 1993 and 1994 enabling laws permitted the Executive to decree changes to the nation's criminal code.[130] These enabling laws created a dangerous precedent, making it appropriate for Venezuela's Legislature to grant the authority to change the country's criminal law to the Executive through DDA.

2. *Chávez Era*

Hugo Chávez has been granted DDA powers three times since he became President in February 1999.[131] The first enabling law occurred under the framework of the 1961 Constitution, while the other two grants occurred under the 1999 Constitution.[132] Because the constitutional framework between these two eras is different, the following section will first address the DDA grant under the 1961 Constitution and will then address the DDA grants under the 1999 Constitution.

a. DDA Grant Under the 1961 Constitution

Venezuela's Legislature first granted Chávez DDA powers on April 26, 1999, to issue decrees in economic and financial matters for six months.[133] While this time length and scope of the grant of DDA was not unusual in itself, the process by which Chávez obtained this grant is worth noting.

Shortly after Chávez became President in February 1999, he demanded a six-month enabling law to address the country's economic crisis due to decreased oil prices.[134] Congress, in response to Chávez' request, drafted and approved an enabling law.[135] Chávez, however, rejected Congress' first version of the enabling law, arguing that it did not provide him broad enough powers to properly face the economic situation.[136] Chávez then threatened to declare a state of emergency and rule by decree if Con-

130. *See id.* at 150.
131. *Democracy and Human Rights in Venezuela*, INTER-AMERICAN COMM'N ON HUMAN RIGHTS, ¶ 325, http://www.cidh.oas.org/countryrep/Venezuela2009eng/VE09CHAPIIIENG.htm#B (last visited Jan. 12, 2011) (providing a brief temporal history of the use of DDA under Chávez).
132. *Id.* ¶¶ 325-26.
133. *Id.* ¶ 325. The 1999 grant of DDA to Chávez has not been thoroughly covered. There are two possible explanations for this lack of coverage. First, it can be in part due to the relevant lack of accessible information regarding Presidential decrees prior to 2000. Second, the 1999 enabling law could have been largely overlooked due to Chávez' subsequent use of a much broader forms of DDA granted under the 1999 Constitution.
134. Larry Rohter, *Venezuela's New Leader: Democrat or Dictator?*, N.Y. TIMES, Apr. 10, 1999, at A3. To show how much Venezuela's oil sector was hurting, oil prices were $7 a barrel when Chávez entered office, compared to the $80 a barrel or more now. *Id.*
135. *Id.*
136. *Id.*

gress, also facing the threat of being dissolved by the Constituent Assembly referendum, did not approve his own version of the enabling law.[137]

Congress balked under Chávez' threats, sending Chávez a much broader version of the enabling law on April 22, 1999.[138] Congress, however, did not grant Chávez the authority to issues decrees regarding the country's Hydrocarbons Law, which controlled the nation's oil reserves.[139] Even without the Hydrocarbons law, Chávez accepted the second version and backed away from his threat to declare a state of emergency.[140]

Under the 1999 enabling law, Chávez enacted fifty-four decrees that were limited to economic and financial matters.[141] Many of the decrees were innocuous. Those decrees included restructuring the country's tax system to decrease the federal government's dependency on oil income,[142] cutting the nation's short-term debt, and reforming the nation's public administration to promote government efficiency.[143] At the same time Chávez cut back on government programs, however, he increased government salaries by twenty percent.[144] While the enabling law specifically authorized Chávez to raise government salaries by twenty percent, such a grant was likely crafted by Chávez to promote a clientelistic relationship between he and the public sector.

Furthermore, Chávez modified the nation's Natural Gas Law, in what appears to be the complete opposite of his later economic ideology, to encourage $10 billion of foreign investment in Venezuela's natural gas sector.[145] The decree established a new pricing system to ensure returns on investment and set the general income tax on natural gas profits to thirty-four percent, subject to tax credits for new investments.[146]

While Chávez' decrees enacted under the enabling law were consistent with those of his predecessors, the 1999 grant of DDA reveals a change in control over the DDA grant from the Legislature to the Executive. The

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137. *Id.*

138. *See* Garcia-Serra, *supra* note 111, at 274-75; *Govt. Excludes Oil Bill From Enabling Law*, BUS. NEWS AMS., Apr. 23, 1999, http://www.bnamericas.com/news/oilandgas/Govt,_Excludes_Oil_Bill_from_Enabling_Law; Laurie Goering, *Venezuela's Charismatic Leader on a Roll But Some Worry as New President Adds to Powers*, CHICAGO TRIBUNE, Apr. 25, 1999, at 4. The new enabling law granted Chávez 90-95% of what he wanted. *Id.*

139. *Govt. Excludes Oil Bill From Enabling Law*, *supra* note 138.

140. Goering, *supra* note 138, at 4.

141. *Democracy and Human Rights in Venezuela*, *supra* note 131.

142. *Testimony of the Staff of the Joint Committee on Taxation Before the Senate Committee on Foreign Relations: Hearing on Tax Treaties and Protocols with Eight Countries*, JOINT COMM. ON TAXATION (1999), *available at* https://www.jct.gov/publications.html?func=startdown&id=2828 (testimony of Lindy Paul).

143. *Congress Approves Enabling Law: President May Reject its Terms*, BBC SUMMARY OF WORLD BROADCASTS (Apr. 26, 1999).

144. *President Raises Public Sector Wages, Sends Two Tax Laws To Congress*, BBC SUMMARY OF WORLD BROADCASTS (May 4, 1999).

145. Uisdean R. Vass & Ruben E. Lujan, *Venezuela Hatching Big Plans for Jump-Starting Natural Gas Sector*, 97:32 OIL & GAS J. 48, at *4-*6, Aug. 9, 1999.

146. *Id.*

fact that Chávez held the Legislature hostage and demanded that Congress enact the broader enabling law that he drafted himself reveals that Venezuela's Legislature no longer controlled the DDA grant. Instead, by placing such control in the Executive's hands, the 1999 enabling law created a dangerous precedent whereby the Executive-Legislative interplay became far more limited and one-sided in favor of the Executive.

b. DDA Grants Under the 1999 Constitution

Since the 1999 Constitution, Chávez has been granted DDA powers two times. The first time occurred in 2000, shortly after the passing of the 1999 Constitution.[147] The second time was in 2007, while Chávez was, once again, attempting to re-write Venezuela's Constitution.[148]

i. 2000 Enabling Law

In November 2000, Venezuela's Legislature granted Chávez an enabling law for one year in a broad range of areas, including: (1) finance; (2) the economy and society; (3) infrastructure; (4) personal and legal security; (5) science and technology; and (6) civil service.[149] Although the time length of the enabling law was no longer than previous enabling laws, the scope was far broader than the prior constitutional limitations of economic and financial matters. As such, Chávez could effectively control all aspects of the nation through these six designated areas. Finally, a Commission was created to monitor and receive Chávez' decrees.[150]

Chávez enacted forty-nine decrees under the 2000 enabling law to support his "Plan Bolívar."[151] The majority of the decrees were uncontroversial: many involved modernizing industries,[152] declaring sovereignty and providing better security over Venezuela's natural resources, and promoting investment in science and technology.[153] Chávez additionally enacted several decrees providing greater consumer protections by holding businesses and individuals accountable for fraudulent or unethical behavior.[154]

147. *Democracy and Human Rights in Venezuela*, *supra* note 131.
148. *Id.* ¶ 326.
149. *Id.* ¶ 325.
150. The Commission was argued to be useless considering the majority support Chávez maintained in Congress and the Commission. *National Assembly Passes Enabling Law Granting President Chávez Special Powers*, BBC SUMMARY OF WORLD BROADCASTS (Nov. 9, 2000).
151. *Democracy and Human Rights in Venezuela*, *supra* note 131; *see also Rule by Decree Passed for Chávez*, BBC NEWS, Jan. 19, 2007, http://news.bbc.co.uk/1/hi/world/americas/6277379.stm.
152. *See, e.g.*, Decreto No. 1.446, de 18 de Septiembre de 2001, GACETA OFICIAL DE LA REPUBLICA BOLIVARIANA DE VENEZUELA, No. 37.291, de 28 de Septiembre de 2001, *available at* http://www.gobiernoenlinea.ve/docMgr/sharedfiles/209.pdf.
153. Decreto No. 1.290, Titulo VI, Capitulo I, de 30 de Agosto de 2001, GACETA OFICIAL DE LA REPUBLICA BOLIVARIANA DE VENEZUELA, No. 37.291, de 26 de Septiembre de 2001, *available at* http://www.tsj.gov.ve/gaceta/septiembre/260901/260901-37291-07.html.
154. *See, e.g.*, Decreto No. 1.204, Capitulo VIII, de 10 de Febrero de 2001, GACETA OFICIAL DE LA REPUBLICA BOLIVARIANA DE VENEZUELA, No. 37.148, de 28 de

Several of Chávez' decrees, however, were extremely controversial, including: the Land Law, the Hydrocarbons Law, and the Fishery Law. Chávez' Land Law, promulgated with the goal of ending "*el latifundio*,"[155] permitted the government to expropriate land that was deemed to be underutilized or idle.[156] The law applied only to plots of land that exceeded 5,000 hectares.[157] After deemed idle and confiscated, the land would be redistributed to landless families.[158] Despite a later Supreme Court decision finding the law unconstitutional, Chávez has expropriated land from large foreign companies under the legal framework of the Land Law.[159]

Chávez also decreed a new Hydrocarbons Law, which greatly increased the state's presence in the country's oil industry.[160] The Hydrocarbons Law required that the state control at least fifty percent of all new oil developments and increased government royalties on oil profits from 16.7% to thirty percent.[161]

Chávez' other controversial decree was the Fishery Law, which increased taxes on industrial fishing companies by 740 percent.[162] Because the law defined industrial fishing companies to be those that used mechanized systems that are technologically or capital intensive, the law was viewed as an attack on the commercial and international fishers who made up roughly twenty-five percent of the nation's fishing industry.[163] Chávez alternately argued that the decree was enacted to protect artisanal fishers, who made up the remaining seventy-five percent of the

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Febrero de 2001, *available at* http://www.tsj.gov.ve/gaceta/febrero/280201/280201-37148-15.html.

155. Decreto No. 1.546, Art. 1, de 9 de Noviembre de 2001, GACETA OFICIAL DE LA REPUBLICA BOLIVARIANA DE VENEZUELA, No. 37.323, de 13 de Noviembre de 2001, *available at* http://www.tsj.gov.ve/gaceta/noviembre/131101/131101-37323-35.html. "*El latifundio*" refers to the consolidation of large tracts of land into the hands of few owners. *Latifundio*, SPANISHDICT, http://www.spanishdict.com/translate/latifundio (last visited Oct. 28, 2010).

156. *See* Gregory Wilpert, *Land for People Not for Profit in Venezuela*, LAND RESEARCH ACTION NETWORK, Sept. 20, 2005, http://www.landaction.org/display.php?article=334 (compensation was only required if the land was expropriated for redistribution); *see also Land Reforms Averted Food Crisis in Venezuela: Chavez*, THAINDIAN NEWS, Jan. 22, 2008, http://www.thaindian.com/newsportal/world-news/land-reforms-averted-food-crisis-in-venezuela-chavez_10062953.html (land was deemed idle if 80% of the property was not being used).

157. Wilpert, *supra* note 156.

158. *See id.*

159. *Id.*; *see, e.g.*, Daniel Trotta, *Chavez Vows to Radicalize After Venezuela Election*, YAHOO NEWS, Oct. 3, 2010, http://news.yahoo.com/s/nm/20101003/ts_nm/us_venezuela_chavez.

160. Decreto No. 1.510, Capitulo II, de 2 de Noviembre de 2001, GACETA OFICIAL DE LA REPUBLICA BOLIVARIANA DE VENEZUELA, No. 37.323, de 13 de Noviembre de 2001, *available at* http://www.tsj.gov.ve/gaceta/noviembre/131101/131101-37323-05.html.

161. *Id.* arts. 22, 44; Rentner, *supra* note 87, at 361-62.

162. *See generally* Argiris Malapanis & Camilo Catalan, *Venezuela Fisherman Fight For Living Income*, MILITANT, Nov. 17, 2003, http://www.themilitant.com/2003/6740/674060.html.

163. James Suggett, *Chavez Signs 26 Law-Decrees on Final Day of Enabling Law Power*, VENEZUELANALYSIS, Aug. 25, 2008, http://venezuelanalysis.com/news/3691.

fishing industry.[164] Thus, while the law was a direct attack on large foreign and domestic commercial interests, it must be noted that the law provided greater protections for the Venezuelan fishing population, whose interests were likely being hurt by their larger competitors.

One decree that was more ideologically than practically controversial was one that promoted the development of cooperative associations.[165] The decree provided for economic, educational, and public support for cooperative associations to promote a participatory society.[166] On paper, it seemed to support the inclusion of more sectors of society into the political process, but Chávez' opposition saw this as an attempt by Chávez to create clientelistic organizations, thereby allowing him to garner more political support.[167] Moreover, the opposition perceived this decree as a move towards Socialism through its encouragement of socialist organizations.[168]

But, the overwhelming majority of Chávez' decrees from the 2000 enabling law were uncontroversial—many benefited Venezuelan society in that they provided greater consumer protections, promoted economic development, and declared sovereignty over Venezuela's natural resources.[169] At the same time, several of Chávez' decrees actively attacked the interests of large domestic and international corporations.[170] As a result, these industries pushed back, vilifying Chávez as being a socialist and anti-democratic.[171] While those complaints may later ring true, the level of criticism at that point in Chávez' career was not entirely justified.

ii. 2007 Enabling Law

In February 2007, Venezuela's Legislature passed an enabling law prior to the 2007 constitutional referendum, granting Chávez DDA for eighteen months—six months longer than any previous enabling law.[172] The enabling law also provided Chávez a much broader scope of authority than had ever been granted before, permitting him to enact decrees in eleven areas, including: (1) energy; (2) infrastructure, transport, and ser-

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164. *See* Malapanis & Catalan, *supra* note 162.
165. Decreto No. 1.327, Art. 23, de 1 de Junio de 2001, GACETA OFICIAL DE LA REPUBLICA BOLIVARIANA DE VENEZUELA, No. 37.231, de 2 de Julio de 2001, *available at* http://www.tsj.gov.ve/gaceta/julio/020701/020701-37231-06.html.
166. *Id.*
167. *See generally* Steve Ellner, *A New Model with Rough Edges: Venezuela's Community Councils*, NACLA REPORT ON THE AMERICAS, May/June 2009, *available at* http://findarticles.com/p/articles/mi_go1653/is_200905/ai_n32334318/.
168. *See generally id.*
169. *See, e.g.*, *supra* notes 153-54.
170. *See, e.g.*, Suggett, *supra* note 163.
171. *See* Javier Corrales & Michael Penfold-Becerra, *Venezuela: Crowding Out the Opposition*, 18 J. OF DEMOCRACY 99, 102 (2007).
172. Decreto de 1 de Febrero de 2007, GACETA OFICIAL DE LA REPUBLICA BOLIVARIANA DE VENEZUELA, No. 38.617, de 1 de Febrero de 2007, *available at* http://www.tsj.gov.ve/gaceta/febrero/010207/010207-38617-01.html *and* http://www.tsj.gov.ve/gaceta/febrero/010207/010207-38617-02.html.

vices; (3) transformation of the state; (4) economic and social affairs; (5) finances and taxation; (6) grassroots participation; (7) the exercise of public office; (8) citizen and judicial security; (9) territorial order; (10) security and defense; and (11) science and technology.[173] Similar to the 2000 version, the enabling law created a legislative commission to oversee Chávez' decree authority.[174] Once again, the commission lacked any true power as it was controlled by Chávez' supporters.[175]

In total, Chávez enacted sixty-seven decrees.[176] Similar to the 2000 enabling law, many of Chávez decrees under the 2007 enabling law were uncontroversial. For example, Chávez issued several decrees promoting development and investment in underdeveloped regions,[177] protecting the natural environment,[178] and seeking to ensure Venezuela's sovereignty over its aquatic space and any oil interests that may be included within that territory.[179] Moreover, Chávez enacted several decrees providing Venezuelan citizens better housing opportunities,[180] ensuring them access to basic necessities and public resources,[181] and protecting consumers from dangerous, black-market, and adulterated products.[182]

Unlike the 2000 enabling law, however, the number of controversial decrees enacted under the 2007 enabling law was proportionately higher. Although Chávez' 2007 constitutional referendum failed, Chávez used the enabling law to push several of the proposed reforms through as law.[183] Twenty-six of Chávez' sixty-seven decrees, including more than a dozen that were similar to amendments of the failed 2007 constitutional

173. *Id.*
174. *See* Corrales & Penfold-Becerra, *supra* note 171, at 110; *see also* ALLAN BREWER-CARIAS, DISMANTLING DEMOCRACY IN VENEZUELA: A CHAVEZ AUTHORITARIAN EXPERIMENT 73 (2010).
175. *See* BREWER-CARIAS, *supra* note 174, at 73.
176. Suggett, *supra* note 163.
177. *See Context Paper: Towards a Bolivarian Social Economy*, EMBASSY OF THE BOLIVARIAN REP. OF VENEZ. TO THE U.S. (Sept. 2008), http://venezuela-us.org/live/wp-content/uploads/2009/08/CP_Towards-a-Bolivarian-Social-EconomySep23.pdf.
178. *See* Decreto No. 6.070, Titulo VI, de 5 de Junio de 2008, GACETA OFICIAL DE LA REPUBLICA BOLIVARIANA DE VENEZUELA, No. 38.946, de 5 de Junio de 2008, *available at* http://www.tsj.gov.ve/gaceta/junio/050608/050608-38946-6.html.
179. *See* Decreto No. 6.126, de 3 de Junio de 2008, GACETA OFICIAL DE LA REPUBLICA BOLIVARIANA DE VENEZUELA, No. 5.890, de 31 de Julio de 2008, *available at* http://media.noticias24.com/0808/gac5890.pdf.
180. Decreto No. 6.072, de 14 de Mayo de 2008, GACETA OFICIAL DE LA REPUBLICA BOLIVARIANA DE VENEZUELA, No. 5889, de 31 de Julio de 2008, *available at* http://media.noticias24.com/0808/gac5889.pdf.
181. *See generally id.* (access to housing); Decreto 6.092, de 27 de Mayo de 2008, GACETA OFICIAL DE LA REPUBLICA BOLIVARIANA DE VENEZUELA, No. 5889, de 31 de Julio de 2008, *available at* http://media.noticias24.com/0808/gac5889.pdf (access to goods and services); Decreto 6.071, 14 de Mayo de 2008, GACETA OFICIAL DE LA REPUBLICA BOLIVARIANA DE VENEZUELA, No. 5.889, de 31 de Julio de 2008, *available at* http://media.noticias24.com/0808/gac5889.pdf (access to food).
182. Decreto 6.092, Arts. 142, 145-45.
183. Jose Orozco & Sara M. Llana, *Venezuela's Chavez Riles Critics With New Decree*, CHRISTIAN SCI. MONITOR, Aug. 12, 2008, http://www.csmonitor.com/World/Americas/2008/0812/p04s01-woam.html (as Maryclen Stelling said, "Chavez had a Plan A and a Plan B. Approving the Constitutional reforms through a vote—the revolu-

reform, were enacted immediately before the enabling law expired in August 2008.[184] The Venezuelan government, additionally, did not release the full text of the decrees until nearly a week after they were promulgated.[185] Chávez' opposition claimed that Chávez' promulgation of these decrees was in direct conflict with the 2007 constitutional referendum and the will of the people.[186] Chávez brushed aside such complaints, arguing that the decrees were lawfully promulgated under the Constitution, and that none of the decrees unlawfully modified any constitutional amendments.[187]

The decrees that were the most published, and possibly the most controversial, were Chávez' decrees nationalizing industries. Under the enabling law, Chávez nationalized: (1) the iron and steel industries in the region of Guayana;[188] (2) all private oil companies in the oil-rich Orinoco region;[189] and (3) all large, private cement companies.[190] The decrees required that these privately-owned companies become mixed public-private companies with the state owning, at a minimum, sixty percent of the company.[191] Chávez also issued several decrees that provided the framework for future nationalizations in the energy, railroad, and banking industries.[192] Currently, however, it is unclear whether Chávez will have to

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tion using democratic channels—represented Plan A, and the enabling law was Plan B.").

184. Simon Romero, *New Decrees From Chavez Mirror Spurned Measures*, N.Y. TIMES, Aug. 5, 2008, http://www.nytimes.com/2008/08/06/world/americas/06venez.html?_r=2&ref=World; *see also* Ian James, *Loss Not All Bad For Venezuela's Chavez*, HACER, http://www.hacer.org/current/Vene211.php (last visited Oct. 31, 2010).

185. Romero, *supra* note 184.

186. *Id.*

187. *Context Paper: Laws Approved Via the Enabling Law*, EMBASSY OF THE BOLIVARIAN REP. OF VENEZ. TO THE U.S. (Aug. 2008), http://venezuela-us.org/live/wp-content/uploads/2009/08/CPRecentLawsAprovedEnablingLaw-Aug-20081.pdf.

188. Decreto 6.058, de 30 de Abril de 2008, GACETA OFICIAL DE LA REPUBLICA BOLIVARIANA DE VENEZUELA, No. 38.928, de 12 de Mayo de 2008, *available at* http://www.tsj.gov.ve/gaceta/mayo/120508/120508-38928-5.html.

189. Decreto 5.200, de 26 de Febrero de 2007, GACETA OFICIAL DE LA REPUBLICA BOLIVARIANA DE VENEZUELA, No. 38.632, de 26 de Febrero de 2007, *available at* http://www.tsj.gov.ve/gaceta/febrero/260207/260207-38632-03.html.

190. Decreto 6.091, de 27 de Mayo de 2008, GACETA OFICIAL DE LA REPUBLICA BOLIVARIANA DE VENEZUELA, No. 5.889, de 18 de Junio de 2008, *available at* http://www.tsj.gov.ve/gaceta_ext/junio/180608/180608-5886-1.html.

191. Decreto No. 6.091, Art. 2, de 27 de Mayo de 2008, GACETA OFICIAL DE LA REPUBLICA BOLIVARIANA DE VENEZUELA, 5.886, de 18 de Junio de 2008 *available at* http://www.tsj.gov.ve/gaceta_ext/junio/180608/180608-5886-2.html (cement companies); Decreto No. 6.058, Art. 2, de 30 de Abril de 2008, GACETA OFICIAL DE LA REPUBLICA BOLIVARIANA DE VENEZUELA, 38.928, de 12 de Mayo de 2008 *available at* http://www.tsj.gov.ve/gaceta/mayo/120508/120508-38928-5.html (Guyana steel industries); Decreto No. 5.200, Art. 2,de 26 de Febrero de 2007, GACETA OFICIAL DE LA REPUBLICA BOLIVARIANA DE VENEZUELA, 38.362, de 26 de Febrero de 2007 *available at* http://www.tsj.gov.ve/gaceta/febrero/260207/260207-38632-03.html (Orinoco oil companies).

192. Decreto No. 5.330, Art. 7, de 2 de Mayo de 2007, GACETA OFICIAL DE LA REPUBLICA BOLIVARIANA DE VENEZUELA, 38.736, de 31 de Julio de 2007, *available at* http://www.tsj.gov.ve/gaceta/julio/310707/310707-38736-06.html (energy); *Venezuela's Chavez Decrees Reform to Banking Law*, REUTERS, Aug. 1, 2008, http://

wait for another enabling law to nationalize such industries, or if he can use the "gray" area of his constitutional decree authority to nationalize them when he sees fit.

Chávez additionally issued several decrees increasing the Executive's military strength. In his Law of the Bolivarian National Army, Chávez created the Bolivarian National Militia, which exists in addition to Venezuela's Army, Navy, Air Force, and National Guard.[193] Like the other arms of the military, the National Militia is under the control of the President.[194] The National Militia's duties are similar to the other armed forces in that the National Militia fights during a time of war, preserves internal peace, and assists in a time of emergency.[195] The biggest difference between the National Militia and the other military branches, however, is that the militia consists of all citizens who voluntarily organize to help defend the nation.[196] Because this definition was left intentionally broad, several questions arise regarding the National Militia. For example, are Chávez' supporters who, acting in the name of Chávez and Venezuela, engage in violence against opposition forces provided protection since they may be acting under the guise of "national defense?" These questions remain to be answered, but it appears that the militia's role in controlling the Venezuelan population may be increasing.[197]

Although Chávez enacted decrees that provided consumers with greater protection, those same decrees undermined the rights of workers and business owners. For example, the decrees that ensured Venezuelan citizens access to basic services, food supplies, and goods also criminalized many actions that were once legal.[198] Following the precedent established in the 1993 and 1994 enabling laws, these decrees created new felonies for individuals who *boycott*, or refuse to sell or produce, or impede—directly or indirectly—the production and transportation of goods

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uk.reuters.com/article/idUKN0126901820080801 (banking); *see* Decreto No. 6.069, Art. 13, de 14 de Mayo de 2008, GACETA OFICIAL DE LA REPUBLICA BOLIVARIANA DE VENEZUELA, No. 5.889, de 31 de Julio de 2008, *available at* http://media.noticias24.com/0808/gac5889.pdf (railroads).

193. Decreto No. 6.239, de 22 de Julio de 2008, GACETA OFICIAL DE LA REPUBLICA BOLIVARIANA DE VENEZUELA, 5.891, de 31 de Julio de 2008, *available at* http://media.noticias24.com/0808/gac5891.pdf; *Fact Sheet: Organic Law of the Bolivarian Armed Force*, EMBASSY OF THE BOLIVARIAN REP. OF VENEZ. TO THE U.S. (Aug. 2008), http://venezuela-us.org/live/wp-content/uploads/2009/08/FS-FANB-Law-Oct-20081.pdf.

194. *Fact Sheet: Organic Law of the Bolivarian Armed Force*, supra note 193.

195. *Id.*

196. *Id.*

197. *See* Ian James, *Chavez: Civilian Militia Should be Armed Full-Time*, YAHOO NEWS, Oct. 3, 2010, http://news.yahoo.com/s/ap/20101003/ap_on_re_la_am_ca/lt_venezuela_chavez_3.

198. *See* Decreto 6.092, de 27 de Mayo de 2008, GACETA OFICIAL DE LA REPUBLICA BOLIVARIANA DE VENEZUELA, No. 5889, de 31 de Julio de 2008, *available at* http://media.noticias24.com/0808/gac5889.pdf (goods and services); Decreto No. 5.197, Capitulo 5, de 16 de Febrero de 2007, GACETA OFICIAL DE LA REPUBLICA BOLIVARIANA DE VENEZUELA, No. 39.629, de 21 de Febrero de 2007, *available at* http://www.tsj.gov.ve/gaceta/febrero/210207/210207-38629-05.html (food).

that are deemed "basic" or under price controls.[199] Violations of these decrees may result in fines, seizure of goods or companies, temporary closings, or imprisonment for up to ten years.[200]

These decrees are problematic for several reasons. First, the decrees appear to be an attack on Chávez' labor opposition. By criminalizing actions that impede the production and transportation of necessary goods, the decrees essentially deny organized labor its right to strike.[201] Moreover, the decrees undermine the property rights of business owners because unprofitable businesses would still have to operate at a loss or face confiscation and/or prison.[202] Thus, while these decrees benefit consumers, they come at the cost of rights for other groups.

Another controversial decree was Chávez' "Law of Public Administration." The law created regional political leaders, directly appointed by the President, who possess national budgets separate from those given to regional governments.[203] Through this law, Chávez can create alternative governments in regions where Chávez' opposition is in control. Moreover, because the budget of these regional leaders is left intentionally vague, Chávez can pump oil-cash into these regional leaders who can distribute the money to ensure political patronage.

Additionally, Chávez enacted several decrees that were viewed as controversial because they further cemented "21st Century Socialism" in Venezuela.[204] For example, Chávez created the National Institute for Socialist Education and Training, issued a decree providing barter as an official alternative payment system to currency,[205] and promulgated the "Law for the Creation and Development of the Popular Economy" which created production, distribution, and consumption "brigades" to encourage the "socio-productive" economy.[206] While these decrees may not have much impact in the overall function of society, the decrees' emphasis on socialism is controversial as they help transform Chávez' ideal of socialism into the nation's status quo, which can only be changed through future action by opposition leaders.

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199. Decreto No. 5.197, Art. 24, de 16 de Febrero de 2007, GACETA OFICIAL DE LA REPUBLICA BOLIVARIANA DE VENEZUELA, No. 38.629, de 21 de Febrero de 2007, *available at* http://www.tsj.gov.ve/gaceta/febrero/210207/210207-38629-05.html.

200. *Id.*

201. *See Context Paper: Laws Approved Via the Enabling Law*, *supra* note 187 (a strike is cited as an example of activity that would be in violation of the law).

202. *See generally*, *Venezuela Law May Impact Property Rights*, OSAC, Mar. 8, 2007, http://www.osac.gov/Reports/report.cfm?contentID=64515.

203. Decreto No. 6.217, de 23 de Julio de 2008, GACETA OFICIAL EXTRAORDINARIO DE LA REPUBLICA BOLIVARIANA DE VENEZUELA, No. 5.890, de 31 de Julio de 2008, *available at* http://media.noticias24.com/0808/gac5890.pdf.

204. Suggett, *supra* note 163.

205. Decreto No. 6.068, GACETA OFICIAL DE LA REPUBLICA BOLIVARIANA DE VENEZUELA, No. 38.958, de 23 de Junio de 2008, *available at* http://www.tsj.gov.ve/gaceta/junio/230608/230608-38958-16.html.

206. Decreto No. 6.130, de 23 de Julio de 2008, GACETA OFICIAL EXTRAORDINARIO DE LA REPUBLICA BOLIVARIANA DE VENEZUELA, No. 5.890, de 31 de Julio de 2008, *available at* http://media.noticias24.com/0808/gac5890.pdf.

It is important to note that not all of Chávez' controversial decrees were successful. In May 2008, Chávez issued an extremely controversial decree modifying the "National Intelligence and Counterintelligence Law."[207] The law, described as a tool to protect the country from a U.S. invasion, required that all citizens cooperate with police investigations or be subject to jail time.[208] The law also authorized warrantless searches when they were done in the interest of national security, and created neighborhood leaders who actively sought to find incriminating information about their neighbors.[209] Both Chávez' supporters and opponents challenged the law, arguing that Chávez was creating a police state similar to that in Cuba.[210] Due to the unpopularity of the decree, Chávez revised the law in June 2008 to remove the most controversial aspects of it.[211]

Studying 2007's enabling law, we can see that Chávez' decrees were far more controversial than many of the decrees in prior enabling laws. First, Chávez nationalized many of the nation's key industries and created the framework for the future nationalization of other industries. Second, Chavez issued decrees that greatly changed the legal obligations of many individuals within society, particularly union workers and business owners. Finally, and most importantly, Chávez used the 2007 enabling law to further consolidate power around the Executive. By creating the National Militia, Chávez has equipped himself with the manpower to quell opposition protests. Furthermore, by establishing alternative regional political leaders, Chávez has provided himself a legal framework to undermine opposition leaders.

iii. Comparing The Two Eras

In comparing the two eras above, it is clear that Venezuelan DDA, under the enabling law, has been used much more frequently under Chávez than during any previous presidency. From 1961 to 1998, the enabling law was granted five times.[212] During Chávez' presidency, however, the enabling law has been granted three times. It is also apparent that the balance of the Executive-Legislative interplay has switched from the Legislature to the Executive, with Chávez controlling both the scope and length of any enabling law. Moreover, Venezuela's Legislature no longer provides specific details regarding their DDA grants. Instead, the details have been left intentionally vague to provide Chávez the most generous

207. Decreto No.6.067, GACETA OFICIAL DE LA REPUBLICA BOLIVARIANA DE VENEZUELA, No. 28.940, de 28 de Mayo de 2008, *available at* http://www.tsj.gov.ve/gaceta/mayo/280508/280508-38940-2.html; Chris Kraul, *Chávez Facing Pressure, Will Revoke Venezuela Spying Law*, L.A. TIMES, June 9, 2008, http://articles.latimes.com/2008/jun/09/world/fg-chavez9.

208. Kraul, *supra* note 207, at 2.

209. *Id.*

210. *Id.*

211. *Id.* at 1; Decreto No. 6.156, GACETA OFICIAL DE LA REPUBLICA BOLIVARIANA DE VENEZUELA, No. 38.949, de 10 de Junio de 2008, *available at* http://www.tsj.gov.ve/gaceta/junio/100608/100608-38949-23.html.

212. Crisp, *supra* note 3, at 146.

amount of deference. Finally, the system of oversight by the Legislature is no longer rigorous. The fact that Chávez refused for a week to give the exact language of his twenty-six last-minute decrees in 2008 reveals that there is little, if any, Legislative oversight of the Chávez' DDA power.

Chávez, however, has followed precedent established in one area of the 1993 and 1994 enabling laws by using the enabling laws to change the country's criminal code. The difference between the two eras, however, is that Chávez has gone far beyond precedent by modifying the criminal code to include a broad range of criminal offenses that could have long-lasting effects on the nation's labor laws, property laws, and economic rights of individuals.

Figure 3, below, provides a visual comparison of all of the enabling laws granted since Venezuela's 1961 Constitution. I use four criteria in comparing the two eras: (1) length of DDA grant; (2) scope of the grant; (3) number of decrees issued during the grant; and (4) the number of controversial decrees. The analysis of controversial decrees is largely a subjective one, however it is not used to determine whether the decrees are good or bad and merely applies to decrees that were controversial in nature or substantially altered the pre-existing economic, social, or legal conditions of Venezuela.

Figure 3

	Length of Enabling Law	Scope of Enabling Law	Num. Decrees Enacted	Num. of Controversial Decrees
1961	12 Months	Economic and Finance	15[213]	0
1974	12 Months	Economic and Finance	53[214]	1
1984	12 Months	Economic and Finance	71[215]	0
1993	4 Months	Economic and Finance	13[216]	1
1994	1 Month	Economic and Finance	4[217]	0
1999	6 Months	Economic and Finance	54[218]	0
2000	12 Months	Finance Economy and Society Infrastructure Personal and Legal Security Science and Technology Civil Service	49[219]	4
2007	18 Months	Energy Infrastructure, Transport, and Services Transformation of the State Economic and Social Affairs Finances and Taxation Grassroots participation The Exercise of Public Office Citizen and Judicial Security Territorial Order Security and Defense Science and Technology Land-use Planning	67[220]	18

Time-Length of the Enabling Law: The data shows that Chávez has lengthened the time-length of DDA in Venezuela from twelve months to eighteen month—a quarter of Chávez' current term. Moreover, the data shows that Chávez has enjoyed DDA powers for three of the ten years he has been president—over one-fourth of his presidency. Alternatively, in the thirty-eight years prior to Chávez, the Executives enjoyed DDA powers for a combined total of three years, five months.

213. Francisco Monaldi, *Political Institutions. Policymaking Processes, and Policy Outcomes in Venezuela*, LATIN AMERICAN RESEARCH NETWORK, http://www.iadb.org/res/laresnetwork/projects/pr231finaldraft.pdf (last visited Jan. 12, 2011).
214. *Id.* at 16.
215. Thirty-six of the seventy-one decrees were used for the purpose of selling government bonds to refinance the public debt. Crisp, *supra* note 3, at 149.
216. *Id.* at 150.
217. *Id.* at 151.
218. *Id.*
219. *Venezuela: Country Reports on Human Rights Practices*, U.S. DEP'T OF STATE, Mar. 4, 2002, http://www.state.gov/g/drl/rls/hrrpt/2001/wha/8229.htm.
220. *Democracy and Human Rights in Venezuela*, *supra* note 131, ¶ 327.

Scope of the Enabling Law: The data shows that the scope of enabling laws has dramatically increased under the Chávez presidency. Although Chávez' last two enabling laws contained a much larger scope than the prior six enabling laws, it is necessary to note that the first six enabling laws were constitutionally limited to economic and financial matters. As a result, Venezuela's Legislature could not extend DDA powers in areas outside of economic and financial matters. Nonetheless, Chávez has obtained continuously broader enabling laws since the 1999 Constitution. In fact, Chávez 2007 enabling law doubled the 2000 enabling law in the amount of areas permitted. Even though the overall scope of the 2000 and 2007 enabling laws might be the same, the mere fact that the 2007 enabling law contained twelve distinct areas signifies that Chávez had the authority to enact decrees in any possible area, thereby making it much more difficult to challenge Chávez' decree authority.

Number of Decrees Issued: When compared to any one grant of the enabling law, Chávez has not issued the largest number of decrees.[221] Even though Chávez did not issue the most decrees during any one enabling law, the total number of decrees Chávez issued during his presidency is more than the total number of decrees issued by his predecessors combined. Whereas Chávez' has issued 170 decrees under enabling laws, Chávez' predecessors issued only 156 decrees combined.[222] Based on these numbers, it is clear that not only has Chávez been more prolific in obtaining DDA powers, but he has also been prolific in issuing decrees under his DDA powers. Moreover, considering Chávez has enjoyed DDA powers five months less than all prior Executives, Chávez' decree rate is substantially higher than those of his predecessors.

Furthermore, through the use of DDA, Chávez has become the nation's leading legislator. During the 2007 and 2008 enabling law, Chávez issued sixty-seven decrees into law.[223] At the same time, Venezuela's Legislature approved only twenty-five laws.[224] Thus, seventy-three percent of all laws passed during the 2007 enabling law were drafted by Chávez.

Number of Controversial Decrees: As previously mentioned, this criterion is a subjective element measuring the content of the decrees. Thus, the following figures apply to those decrees that were controversial in nature or substantially altered the pre-existing economic, social, or legal conditions of Venezuela. Examples of such decrees include the nationalizing or privatizing of industries, the changing of the criminal code, and the altering of legal rights and obligations of the nation's citizens. Moreover, this criterion also applies to decrees that altered the federal government to consolidate power within the Executive branch or undermine the

221. It is, however, important to note that during the 1984 enabling law, thirty-six of the seventy-one decrees were for the sole purpose of selling government bonds to restructure the country's public debt. Crisp, *supra* note 3, at 149.
222. *See* fig. 3.
223. *Democracy and Human Rights in Venezuela*, *supra* note 131, ¶ 327.
224. *Id.*

power of opposition parties. Finally, this criterion applies to ideological changes made through decrees. Although these decrees may not have a practical impact, the ideological make-up of the federal government is an essential component of the government's overall policy and shapes the nation's status quo.

Based on the subjective analysis, it is clear that Chávez, unlike his predecessors, has used the enabling law in a much more controversial manner. In the 1961, 1984, 1994, and 1999 enabling laws, the Executives did not promulgate any controversial decrees. Under the 1974 enabling law, the Executive issued one controversial decree, which nationalized the country's iron ore industry.[225] Moreover, the 1993 enabling law had one controversial decree when he privatized the national airline.[226]

Since the 1999 Constitution, Chávez issued four controversial decrees under the 2000 enabling law and eighteen controversial decrees under the 2007 enabling law. What is important to note about this trend is that Chávez used his DDA powers to parallel, or even substitute constitutional change. Because Chávez' 2007 Constitutional Referendum failed, Chávez used his DDA powers to make several broad changes that had previously been denied under the referendum. Essentially, Chávez used his DDA powers as a "back-up" plan to the failed referendum, thereby ensuring that he was going to bring these controversial changes regardless of the national vote.[227] Furthermore, it appears that Chávez enacted decrees designed to protect himself and his movement from future political, economic, and social unrest by allowing him to take immediate action against any opposition challenging his authority.

Overall, the figures show that Chávez' use of DDA powers has increased dramatically when compared to his predecessors. Chávez has lengthened the time-grant of the enabling law, enjoyed DDA powers more than any prior president, issued more decrees than all prior presidents combined, enjoyed a substantially broader scope of DDA authority, and issued far more controversial decrees than any prior president. Based on this trend of obtaining continuously broader grants of DDA, it seems clear that Chávez will continue to obtain powers under the enabling law and seek to further broaden those powers to include a longer time-length and even broader, if possible, scope of powers.

B. ECUADOR[228]

As was previously discussed, Ecuador provides its Executive post-ap-

225. Crisp, *supra* note 3, at 147.

226. While some may argue that privatizing national industries is not as controversial as nationalizing industries, the effects are significant and both cases must be included in the analysis. *See* Crisp, *supra* note 3, at 149-51.

227. *See* Jose Orozco & Sara Llana, *Venezuela's Chávez Riles Critics With New Decree*, CHRISTIAN SCI. MONITOR, Aug 12, 2008, http://www.csmonitor.com/World/Americas/2008/0812/p04s01-woam.html.

228. The following information on Ecuador is accurate as of Oct. 15, 2010. I must note that the accuracy of the data is limited to the accuracy of the data available on

proval DDA.[229] Ecuador's post-approval DDA is limited, however, as the Executive can only send one *proyecto urgente* at a time, and the scope of the *proyectos urgentes* are limited to economic matters.[230] Moreover, since the Legislature has up to thirty days to act upon the *proyecto urgente*, the amount of *proyecto urgentes* an Executive can send in one year is effectively limited to twelve.[231] Consequently, the use of DDA in Ecuador is inherently less than is seen in Venezuela.

The following analysis of the Executives' use of post-approval powers in Ecuador focuses on the differences between the pre-Rafael Correa era and the Correa era. This section will determine if, and to what extent, Correa's use of post-approval has differed from his predecessors Gustavo Noboa, Lucio Gutierrez, and Alfred Palacio.

1. Pre-Correa Era[232]

a. Gustavo Noboa Presidency

Gustavo Noboa's presidency lasted from January 20, 2000 to January 15, 2003.[233] During this period, Noboa sent twelve *proyectos urgentes* to the Ecuador's National Assembly.[234] The *proyectos urgentes* created a "petroleum fund" to help pay off state debt and increase investment in the oil sector,[235] restructured the financial system,[236] provided tax credits,[237] and increased foreign investment in the oil industry.[238] Noboa also sent several *proyectos urgentes* that merely renewed prior laws that were on the verge of expiring. None of Noboa's *proyectos urgentes* were controversial in nature.

Ecuador's online version of the *Registro Oficial*, http://www.derechoecuador.com/index.php?option=com_content&task=view&id=2&Itemid=11. Despite any problems with the online database, I believe that the following analysis is accurate and provides a true depiction of DDA in Ecuador.

229. REPUBLIC OF ECUADOR CONSTITUTION OF 1998 art. 155.
230. *Id.*
231. *Id.*
232. Although an analysis of the entire period after the 1998 Constitution would have been optimal, information regarding *proyectos urgentes* before 2000 is not readily available. Accordingly, the analysis includes only 2000 to the present.
233. *Biografías Líderes Políticos: Gustavo Noboa Bejarano*, CIDOB (2003) http://www.cidob.org/es/documentacio/biografias_lideres_politicos/america_del_sur/ecuador/gustavo_noboa_bejarano (last visited Jan. 18, 2011).
234. *See Registro Oficial*, *supra* note 228.
235. *Se Aprobó La Reforma Fiscal Con Cambios* [*Fiscal Reform was Passed with Changes*], EL COMERCIO, Apr. 26, 2002, http://www.elcomercio.com/solo_texto_search.asp?id_noticia=22504&anio=2002&mes=4&dia=26.
236. *La Deuda Extern Tiene Un Limite* [*External Debt has a Limit*], EL COMERCIO, Sept. 12, 2002, http://www.elcomercio.com/solo_texto_search.asp?id_noticia=37185&anio=2002&mes=9&dia=12.
237. *El Malecón 2000 Con Más Beneficios* [*The Malecón 2000 With More Benefits*], EL COMERCIO, Oct. 5, 2001, http://www.elcomercio.com/solo_texto_search.asp?id_noticia=2345&anio=2001&mes=10&dia=5.
238. *Registro Oficial 31 De Octubre Del 2002-Proyecto 23-918*, REVISTA JUDICIAL, Oct. 31, 2002, *available at* http://www.derechoecuador.com/index.php?option=com_content&task=view&id=1562&Itemid=308.

Noboa did not face much resistance from the National Assembly regarding his *proyectos urgentes* as the National Assembly rejected only one of them.[239] The National Assembly rejected Noboa's *proyecto urgente* involving the income of public employees.[240] Rather than face the issue through a *proyecto urgente*, the National Assembly wanted the law to be sent through ordinary means by incoming President Lucio Gutierrez.[241]

b. Lucio Gutierrez Presidency

Lucio Gutierrez' presidency lasted from January 2003 to April 2005.[242] Gutierrez sent ten *proyectos urgentes* during his presidency.[243] Gutierrez' *proyectos urgentes* restructured the public sector to reduce nepotism, created a unified public employment income standard, and increased government efficiency.[244] Gutierrez also sent a *proyecto urgente* increasing taxes on cigarettes and liquor to help pay for pensions.[245] Moreover, shortly before the end of his presidency, Gutierrez sent a broad *proyecto urgente* intended to reform many aspects of the country's economic sector.[246] This *proyecto urgente* sought to modernize the nation's economy by increasing foreign investment in the oil sector, lowering energy costs, and improving the operation of Social Security.[247] While Gutierrez' *proyectos urgentes* may have been broad in nature, none of those mentioned above were controversial. Instead, they were viewed as measures necessary to address issues that prior administrations had ignored.

Although the National Assembly approved many of Gutierrez' *proyectos urgentes*, it rejected, perhaps, two of Gutierrez' most important

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239. While it would have been best to have looked at how drastically the National Assembly modified individual *proyectos urgentes*, such data is not readily available. Thus, the most that could be considered was whether the National Assembly rejected or accepted the Executives' *proyectos urgentes*.

240. *El Pleno Niega El Proyecto Urgente* [*The plenary Denies Urgent Project*], EL COMERCIO, Dec. 12, 2002, http://www.elcomercio.com/solo_texto_search.asp?id_noticia=46250&anio=2002&mes=12&dia=11.

241. *Id.*

242. *Biografías Líderes Políticos: Lucio Gutiérrez Borbúa*, CIDOB (2006), http://www.cidob.org/es/documentacion/biografias_lideres_politicos/america_del_sur/ecuador/lucio_gutierrez_borbua (last visited Jan. 18, 2011).

243. *See Registro Oficial*, *supra* note 228.

244. PROYECTO. LA INICIATIVA QUE LLEGÓ AYER AL CONGRESO FIJA UN TECHO A LAS INDEMNIZACIONES: LA UNIFICACIÓN SALARIAL SE CUMPLE [*The initiative that came to Congress yesterday sets a ceiling on compensation: It Marks The Unification of Salaries*], EL COMERCIO, JUNE 14, 2003, http://www.elcomercio.com/solo_texto_search.asp?id_noticia=64063&anio=2003&mes=6&dia=14; LA REFORMA A LA LEY DE SERVICIO CIVIL A ESTUDIO [*Reform of the Civil Service Act Studied*], EL COMERCIO, DEC. 23, 2003, http://www.elcomercio.com/solo_texto_search.asp?id_noticia=81876&anio=2003&mes=12&dia=23.

245. *Registro Oficial-Proyecto 25.394*, REVISTA JUDICIAL, July 28, 2004, *available at* http://www.derechoecuador.com/index.php?option=com_content&task=view&id=1112&Itemid=329.

246. *Gobierno Del Ecuador Impulsa Reforma Económica Integral* [*Government of Ecuador Promotes Comprehensive Economic Reform*], XINHUA NEWS AGENCY–SPANISH, Mar. 16, 2005.

247. *Id.*

ones. First, the National Assembly rejected Gutierrez' *proyecto urgente* restructuring of the oil industry. It sought to encourage foreign investment in the oil industry by reducing the percentage PetroEcuador, Ecuador's national oil company, would take from profits of new oil extractions to thirty-five percent.[248] In essence, this *proyecto urgente* was an attempt by Gutierrez to force the National Assembly to deal with the inefficiencies of PetroEcuador and the oil industry—something the National Assembly had refused to do. Second, the National Assembly rejected Gutierrez' *proyecto urgente* that would have issued government bonds to invest in a new generation of hydro-electric energy.[249] Once again, this *proyecto urgente* sought to encourage private investment in the energy sector by prioritizing payment to private companies over state companies. The National Assembly thought it unpopular and rejected it.

c. Alfredo Palacio Presidency

Alfredo Palacio was President of Ecuador from April 2005 to January 2007.[250] During his fifteen-month presidency, he sent eight *proyectos urgentes* to the National Assembly.[251] Palacio's *proyectos urgentes* created a uniform credit verifying system,[252] redistributed the funds of the Stabilization, Social Investment, and Reduction of Public Debt Fund,[253] re-approved tax credits,[254] and enabled the Central Bank to obtain loans to pay the country's balance of payment problems.[255]

The remainder of Palacio's *proyectos urgentes* involved the country's energy sector. Palacio sent *proyectos urgentes* recognizing the inefficiency of the country's energy companies and the need to invest in infrastructure to reduce future losses,[256] calling for contract renegotiations

248. LAS REFORMAS PETROLERAS EN UNA ETAPA DECISIVE [OIL REFORMS IN A DECISIVE STAGE], EL COMERCIO, JUNE 28, 2004, http://www.elcomercio.com/solo_texto_search.asp?id_noticia=97374&anio=2004&mes=6&dia=28.

249. *La Ley Eléctrica fue rechazada* [*The Electricity Law was Rejected*], EL COMERCIO, Sept. 22, 2004, http://www.elcomercio.com/solo_texto_search.asp?id_noticia=104588&anio=2004&mes=9&dia=22.

250. *Alfredo Palacio*, MUNDOANDINO, 2009, http://www.mundoandino.com/ecuador/alfredo-palacio.

251. *Id.*

252. *Registro Oficial-Proyecto 26.810*, REVISTA JUDICIAL, Sept.12, 2005, *available at* http://www.derechoecuador.com/index.php?option=com_content&task=view&id=1363&Itemid=343.

253. EL LAVADO DE ACTIVOS ENTRARÁ A DEBATE [MONEY LAUNDERING ENTERS THE DEBATE], EL COMERCIO, JUNE 14, 2005, http://www.elcomercio.com/solo_texto_search.asp?id_noticia=131958&anio=2005&mes=6&dia=14.

254. LAS DONACIONES A FAVOR DEL MUNICIPIO SERÁN INDEFINIDAS [DONATIONS FOR THE MUNICIPALITY WILL BE INDEFINITE], EL COMERCIO, DEC. 1, 2006, http://www.elcomercio.com/solo_texto_search.asp?id_noticia=50960&anio=2006&mes=12&dia=1.

255. *Un Proyecto Urgente para Contratar Créditos* [*Urgent Project for Hiring Credits*], EL COMERCIO, Oct. 7, 2005, http://www.elcomercio.com/solo_texto_search.asp?id_noticia=3562&anio=2005&mes=10&dia=7.

256. *Registro Oficial-Proyecto 27-1194*, REVISTA JUDICIAL, July 14, 2006, *available at* http://www.derechoecuador.com/index.php?option=com_content&task=view&id=2031&Itemid=353.

with foreign companies,[257] and creating a fund for investment into the energy sector.[258] Unlike his predecessors, Palacio's *proyectos urgentes* were not rejected by the National Assembly.

d. Characteristics of the Pre-Correa Era

The pre-Correa era has several characteristics regarding the use of the country's post-approval DDA powers. First, the use of post-approval DDA powers was quite limited. None of the Executives attempted to inundate the National Assembly with *proyectos urgentes*. Noboa sent only twelve *proyectos* in thirty-six months, Gutierrez sent ten *proyectos* in twenty-seven months, and Palacio sent eight *proyectos* in fifteen months. Second, Noboa, Gutierrez, and Palacio's *proyectos urgentes*, constitutionally limited to economic and financial areas, focused largely on increasing foreign investment and reducing costs of the nation's public oil and energy sectors. Finally, the National Assembly did not hesitate to reject the Executives' *proyectos urgentes*. Although they rejected only a small percentage of the *proyectos urgentes*—one during the Noboa administration and two during the Gutierrez administration—the rejections show that the Executive-Legislative interplay was quite active and balanced, and that the Legislature limited the amount of change an Executive could undertake in any one *proyecto urgente*.

2. *Correa Era*

Rafael Correa became Ecuador's president on January 15, 2007.[259] Prior to the 2008 Constitution, Correa sent four *proyectos urgentes* to the National Assembly. Those *proyectos urgentes* increased taxes to improve Quito's transportation infrastructure,[260] financed $220 million for education,[261] and limited the maximum interest rate on consumer credit.[262]

257. *El Miércoles se Debate la Ley de Hidrocarburos* [*They Will Debate the Hydrocarbons Law on Wednesday*], EL COMERCIO, Apr. 6, 2006, http://www.elcomercio.com/Generales/Solo-Texto.aspx?gn3articleID=42186.

258. *El Proyecto de Ley Urgente es la Prioridad del Congreso* [*The Urgent Project Bill is Congress' Priority*], EL COMERCIO, Sept. 5, 2006, http://www.elcomercio.com/Generales/Solo-Texto.aspx?gn3articleID=58575.

259. *Ecuador Politics: Crisis Overcome, Risks Linger*, ECONOMIST INTELLIGENCE UNIT, Oct. 1, 2010, http://www.eiu.com/index.asp?layout=VWArticleVW3&article_id=397476624&region_id=&country_id=1790000179&refm=vwCtry&page_title=Latest+analysis&fs=true. Even though Correa sent *proyectos urgentes* to the National Assembly before and after the 2008 Constitution, it is not necessary to formally distinguish the two areas since the 2008 Constitution did not substantially change Ecuador's DDA. *Id.*

260. *Registro Oficial-Proyecto 28-004*, REVISTA JUDICIAL, February 2, 2007, *available at* http://www.derechoecuador.com/index.php?option=Com_content&task=view&id=4488&Itemid=360.

261. Marco Arauz Ortega, BUENA EDUCACIÓN, ¿Y POR QUÉ NO? [A GOOD EDUCATION, AND WHY NOT?], EL COMERCIO, Feb. 11, 2007, http://www.contratosocialecuador.org.ec/home/contenidos.php?id=43&identificaArticulo=274.

262. SEGÚN EL SÚPER DE BANCOS, LA LEY FINANCIERA ES RIESGOSA [*According to the Head of the Banks, the Finance Act is Hazardous*], EL COMERCIO, MAY 23, 2007, http://www.elcomercio.com/solo_texto_search.asp?id_noticia=73507&anio=2007&mes=5&dia=23.

Correa also sent a *proyecto urgente* modifying the country's Hydrocarbons Law. It sought to combat the black-market sale of oil and its by-products.[263] This *proyecto urgente* is significant in that it proposed altering the criminal code to increase criminal sanctions, including fines and jail time for individuals who violate the law.[264] This appears to have been the first instance an Executive sent a *proyecto urgente* involving criminal measures.

Since the 2008 Constitutional Referendum, Correa has sent six additional *proyectos urgentes* to the National Assembly to push through his "Citizens' Revolution." Several of these *proyectos urgentes* were largely uncontroversial and included placing a one percent tax on currency leaving the country to combat capital flight,[265] suspending fines for Haitian tourists whose visas had expired due to Haiti's January 2010 earthquake,[266] revaluing the country's retirement pension system,[267] and promulgating a new public finance law to increase the government's access to debt-financing.[268]

Since 2009, Correa has faced stiff resistance from his opposition in the National Assembly. A unifying opposition has denied Correa and his party, *Alianza País* (AP), the majority needed to pass key pieces of legislation through normal legislative channels.[269] As a result, several of Correa's key pieces of legislation that were intended to coordinate with the constitutional reform have been stalled or substantially changed by a deadlocked National Assembly.[270] Due to Correa's inability to pass leg-

263. *Correa Submits Anti-smuggling Bill to Congress*, BUS. NEWS AM., May 30, 2007, http://www.bnamericas.com/news/oilandgas/Correa_submits_anti-smuggling_bill_to_congress.

264. *Id.*

265. *Se Tratará Proyecto de Ley Urgente de Reformas Tributarias Ante Crisis Económica Mundial* [*They Will Seek a Bill for Tax Reform Before Global Economic Crisis*], ASAMBLEA NACIONAL REPUBLICA DEL ECUADOR COMISION DE LEGISLACION Y DE FISCALIZACION, Nov.21, 2008, http://comision.asambleanacional.gov.ec/index.php?option=com_content&task=view&id=16526&Itemid=1.

266. *Ministro de Justicia, Secretaria del Migrantey Subsecretarios De Gobierno y de Cancilleria Defienden Proyecto Urgente* [*Minister of Justice, Secretary of Migration, Secretaries of Government, and Foreign Ministry Defend Urgent Project*], ASAMBLEA NACIONAL REPUBLICA DE ECUADOR, Feb. 24, 2010, http://www.asambleanacional.gov.ec/201002242564/noticias/boletines/minsitro-de-justicia-secretaria-del-migrante-y-subsecretarios-de-gobierno-y-de-cancilleria-defienden-proyecto-urgente.html.

267. *See Asamblea Inició Debate de Reforma Que Revaloriza Pensiones de Jubilacion* [*The Reform Assembly Began a Debate That Reassesses Retirement Pensions*], ECUADORENVIVO, Aug. 5, 2010, http://www.ecuadorenvivo.com/2010080555592/politica/asamblea_inicio_debate_de_reforma_que_revaloriza_pensiones_de_jubilacion.html.

268. Hugh Bronstein, *Ecuador's Rafael Correa Gets Grip on Congress After Riots*, POST CHRONICLE, Oct. 8, 2010, http://www.postchronicle.com/cgi-bin/artman/exec/view.cgi?archive=228&num=326478.

269. *Ecuador Politics: Setbacks for Correa*, ECONOMIST INTELLIGENCE UNIT, Sept. 2, 2010, http://www.eiu.com/index.asp?layout=VWArticleVW3&article_id=474025 89&region_id=&country_id=1790000179&refm=vwCtry&page_title=Latest+analysis&rf=0. *Alianza País* currently holds 53 of the National Assembly's 124 seats. *Id.*

270. *Id.*

islation through normal channels, Correa has begun to use *proyectos urgentes* as a means to bypass the deadlocked Legislature and push through legislation without opposition approval.[271] For instance, in April 2009, Correa sent a *proyecto urgente* that required each employer to give 8.33% of an employee's salary to the Social Security Fund.[272] Correa used political gamesmanship and sent the *proyecto urgente* on April 6, knowing that the National Assembly was going to be in recess from April 13 to April 27 due to national elections on April 26.[273] As a result of this timing, the National Assembly's thirty-day review period was essentially cut in half, as the thirty-day time period is not tolled during national elections or congressional recess.[274] Notwithstanding the drama that surrounded the timing of Correa's *proyecto urgente*, the National Assembly approved it.

Moreover, on June 25, 2010, Correa sent the National Assembly a *proyecto urgente* modifying the nation's Hydrocarbons Law.[275] The law requires foreign corporations to sign service contracts or face expropriation.[276] Such service contracts require the state to pay the companies to pump oil, with the state owning all oil pumped within Ecuadorian territory.[277] Recognizing that neither the AP nor the opposition had enough votes to modify, approve, or deny the *proyecto*, Correa and his allies merely delayed any discussion of the *proyecto* for the thirty-day time-period.[278] As a result, Correa's *proyecto urgente* became law without any legislative debate including the opposition.[279]

Due to Correa's inability to pass key pieces of legislation through normal channels, there is some concern that Correa will dissolve the National Assembly and rule by decree until national elections are held.[280] It is unclear, however, whether the recent coup attempt has emboldened Correa to do so, or if he will seek to work with his opposition to build a

271. *See generally Ecuador Industry: Taking Control of Oil*, ECONOMIST INTELLIGENCE UNIT, July 27, 2010, http://www.eiu.com/index.asp?layout=VWArticleVW3&article_id=497302834&region_id=&country_id=1790000179&refm=vwCtry&page_title=Latest+analysis&fs=true.

272. *Report on the Legislative and Oversight Commission Ecuador*, CARTER CENTER 1, 8 (April 2009), http://www.cartercenter.org/resources/pdfs/CLF%20Report%20April%202009.pdf [hereinafter *Report on the Legislative and Oversight Commission Ecuador*].

273. *Id.* at 4. I define "political gamesmanship" to be the use of tactical methods to increase one's chances of succeeding in their desired objective. While political gamesmanship does not involve illegal tactics, it often involves unethical tactics.

274. *See Report on the Legislative and Oversight Commission Ecuador*, *supra* note 272.

275. *Ecuador Industry: Taking Control of Oil*, *supra* note 271.

276. *Id.*; Mercedes Alvaro, *Ecuador's Correa to Enact Hydrocarbons Reforms on Monday*, FOXBUSINESS, July 24, 2010, http://www.foxbusiness.com/markets/2010/07/24/ecuadors-correa-enact-hydrocarbons-reforms-monday/; *Ecuador Industry: Risky Hydrocarbons Reform*, ECONOMIST INTELLIGENCE UNIT, Sept. 2, 2010, http://www.eiu.com/index.asp?layout=VWArticleVW3&article_id=197402604&region_id=&country_id=1790000179&refm=vwCtry&page_title=Latest+analysis&fs=true.

277. *Ecuador Industry: Risky Hydrocarbons Reform*, *supra* note 276.

278. *Ecuador Politics: Setbacks for Correa*, *supra* note 269; Alvaro, *supra* note 276.

279. *Ecuador Politics: Setbacks for Correa*, *supra* note 269.

280. *Ecuador Politics: Crisis Overcome, Risks Linger*, *supra* note 259.

consensus of pieces of legislation.[281]

Overall, during the Correa era we see a decrease in the use of post-approval DDA. Nonetheless, there appears to have been a recent uptick in Correa's DDA use due to his inability to pass legislation through normal channels. As such, Correa and his allies in the National Assembly have been able to push through *proyectos urgentes* without permitting open legislative discussion. Thus, while DDA may not have been Correa's first method of choice in seeking legislative change, it appears that he is more willing to issue *proyectos urgentes* in an attempt to bypass his opposition and push through legislation.

3. Comparing The Two Eras

Because the use of post-approval DDA is different from that of pre-approval DDA, the qualitative factors for measuring post-approval DDA are different. Under this analysis we will look at the number of *proyectos urgentes* sent to the National Assembly. To ensure that the number of *proyectos urgentes* is not skewed by the length of a presidency, this number will be compared to the time length of each presidency. The analysis additionally looks at the number of times the National Assembly has rejected a *proyecto urgente*.[282] Finally, the analysis includes a subjective element to determine whether any of the *proyectos urgentes* were controversial in nature or whether they substantially altered pre-existing legal, political, or economic rights of the nation's citizens. Figure 4 below provides a visual comparison on the use of post-approval DDA during the previously discussed eras.

Figure 4: Ecuadoran DDA

President	**Number of *Proyectos Urgentes***	**Average Rate of *Proyectos* Sent (# divided by months as president)**	**Number of *Proyectos* Rejected by the National Assembly**	**Number of Controversial *Proyectos***
Gustavo Noboa	12	1:3	1	0
Lucio Gutierrez	10	1:2.7	2	0
Alfred Palacio	8	1:1.9	0	0
Rafael Correa[283]	10	1:4.6	0	3

Number of Proyectos Urgentes: Comparing the two eras, there does not appear to be much of a difference between Correa and his predecessors regarding the total number of *proyectos urgentes* sent to the Legislature. Whereas Correa's predecessors each sent twelve, ten, and eight

281. *See* Lindsay Green-Barber, *From Ecuador, What Correa's "Coup" Means For Democracy*, AMERICAS Q., Oct. 7, 2010, http://www.americasquarterly.org/node/1862.
282. While it would have been useful to determine how much the National Assembly has modified the particular *proyectos urgentes*, such information is not available.
283. Note that these figures are accurate as of October 15, 2010.

proyectos urgentes, respectively, Correa has sent ten *proyectos urgentes* to the National Assembly.

Frequency of Proyectos Urgentes: While the numbers of *proyectos urgentes* sent to the National Assembly appear relatively similar, the frequency of *proyectos urgentes* has decreased significantly under Correa. For instance, on average Noboa sent one *proyecto urgente* every three months, Gutierrez sent a *proyecto urgente* every 2.7 months, and Palacio sent one *proyecto urgente* every 1.9 months. Although the frequency of *proyectos urgentes* increased over time, no Executive tried to inundate the Legislature with a continuous stream of them.

The trend of increased frequency of *proyectos urgentes* has been dramatically reversed under the Correa era. During Correa's presidency, he has sent, on average, one *proyecto urgente* every 4.6 months.[284] It is important to note, however, that Correa's figure of sending ten *proyectos urgentes* during his now three-year presidency may be skewed due to the country's Constituent Assembly and subsequent six-month dissolution of the National Assembly in 2007.[285] While the National Assembly was dissolved, Correa could not send *proyectos urgentes* to the legislature since no Assembly existed to receive them. It is important to note, however, that the frequency of Correa's post-approval DDA may be increasing as Correa has recently begun to send *proyectos urgentes* to the National Assembly much more frequently.

Number of Proyectos Urgentes Rejected: The evidence also shows that Ecuador's National Assembly has only rejected three *proyectos urgentes* since January 2000. In fact, the National Assembly has not rejected any *proyectos urgentes* since the Palacio presidency, which began in April 2005. This trend can be due to several possibilities. One is that the Executives have become wiser in sending certain pieces of legislation through *proyectos urgentes*. That is, when a *proyecto urgente* contains complex issues, the Executives may believe that it is more appropriate to send the proposed legislation through ordinary means instead of through DDA. Another possibility is that the National Assembly has become more adept at modifying the Executives' *proyectos urgentes* and no longer needs to completely reject a *proyecto urgente*. Finally, the Executives may simply enjoy majority support within the Legislature, thereby making rejection unlikely.

Number of Controversial Proyectos Urgentes: Substantively, only one *proyecto urgente* during both eras can be considered controversial—Correa's *proyecto* modifying the Hydrocarbons Law. Even though the *proyecto* gives Ecuador control over all of its native resources, it does provide for the potential nationalization of the oil industry. Thus, it is

284. Even if the number reflected the six-month dissolution of the National Assembly, the frequency would be one *proyecto* for every four months.

285. *Ecuador Forum Dissolves Congress*, BBC NEWS, Nov. 30, 2007, http://news.bbc.co.uk/2/hi/americas/7119373.stm.

necessary to see what future effect this *proyecto* will have on private companies in Ecuador's oil industry.

Moreover, we see that Correa has used post-approval DDA powers three times in a manner that must be considered controversial. Unlike his predecessors, Correa has used political gamesmanship when sending a *proyecto urgente* to give the National Assembly a shorter time-frame to react. Moreover, we see that Correa extended the scope of his post-approval DDA by modifying the criminal code through his *proyecto urgente* combating the illegal sale of oil. Finally, Correa has taken advantage of the National Assembly's legislative deadlock to push through *proyectos urgentes*. Since Correa's allies are the largest political block in the Assembly, Correa has been able to use *proyectos urgentes* and the opposition's inability to override the AP to prevent his political opposition from having a political discussion over the *proyectos*.

VI. IS DDA CURRENTLY THREATENING THE RULE OF LAW IN VENEZUELA AND ECUADOR?

As previously discussed, both pre-approval and post-approval DDA pose threats to the rule of law. The following analysis seeks to determine whether Chávez and Correa's use of DDA has threatened the rule of law in their countries. Because two of these leaders—Chávez and Correa—have several years remaining in their current presidential terms, it is necessary to determine whether their use of DDA currently poses a threat to the rule of law. If Chávez or Correa's use of DDA currently poses a threat to the rule of law, any future DDA use by the two leaders will further threaten the rule of law.

A. VENEZUELA

It is clear that Chávez has threatened, and continues to threaten, the rule of law through his use of pre-approval DDA. As the scope of Chávez' DDA powers have increased, so has DDA's threat to the rule of law in Venezuela. Since 1999, Chávez' scope of DDA powers have extended from economic and financial matters to twelve different areas under the 2007 enabling law. Based on the broad scope of DDA powers, Chávez has used his DDA powers to enact laws in every area of Venezuelan society.

Furthermore, DDA has allowed Chávez to become the nation's leading legislator. During the 2007 enabling law, Chávez issued sixty-seven decrees into law, totaling seventy-three percent of all laws passed.[286] Essentially, Chávez, through the enabling law, has consolidated both Executive and Legislative powers within the Executive branch.

Accordingly, Chávez' use of DDA threatens the rule of law as it fails to satisfy the requirement of "formal equality" in several regards. First, Chávez' initial grant of the DDA powers under an enabling law no longer

286. *Democracy and Human Rights in Venezuela*, *supra* note 131, ¶ 327.

satisfies formal equality. In fact, Chávez has undermined Legislature's control over the enabling law, thereby disrupting the Executive-Legislative interplay that is key to DDA. As such, Chávez has negated the Legislature's, let alone the opposition's, voice regarding the content of the enabling laws. Consequently, the initial grant of pre-approval DDA powers does not follow "carefully dictated procedures" as the Legislature is nominally involved in determining the scope of Chávez' DDA powers.[287]

Moreover, Chávez' promulgation of decrees under the enabling law fails to satisfy the formal equality requirement as Chávez does not involve the Legislature regarding the content of the decrees. For example, Chávez issued twenty-six decrees on the last day of this 2007 DDA grant.[288] Chávez, however, did not release the actual text of the decrees until a week later.[289] Thus, Chávez changed Venezuela's status quo without any legislative involvement and without providing the text of the decrees at the time they were promulgated. Accordingly, Chávez explicitly excluded Venezuela's Legislature, and his political opposition, from any discussion regarding the content of these decrees. As such, Chávez' use of DDA did not follow the "carefully dictated procedures" that are required in the lawmaking process.

Furthermore, Chávez' DDA powers fail to satisfy the "formal equality" requirement by changing Venezuela's criminal code through decrees. When a law or decree substantially changes the rights and obligations of a nation's citizens, it is imperative that carefully dictated procedures be followed to ensure that the decrees were not made with invidious motives. Here, no such procedures were followed. Instead, Chávez altered the nation's criminal code without providing any public dialogue. Since no public dialogue occurred, Chávez effectively denied any individuals whose rights would be affected by the new criminal standards a chance to challenge the laws before they were promulgated. Even though these individuals may challenge these decrees in court, the decrees enjoy the force of law until they are found to be unconstitutional. Because it often takes months, if not years, before a law is struck down by Venezuela's Supreme Court, Chávez will have a substantial amount of time to confiscate goods and send individuals to prison under these decrees. Thus, although these individuals may be able to repeal the decrees in the future, there is nothing they can do in the short-term to protect themselves from any invidious actions taken by Chávez.

Chávez' DDA use has additionally nullified horizontal accountability by making the content of his decrees virtually untouchable. Even though the 2000 and 2007 enabling laws had commissions monitoring Chávez' DDA use, those commissions were filled with Chávez' cronies who readily acquiesced to Chávez' demands.[290] Additionally, as Chávez has ac-

287. *See* Section V.A.2.a, *supra*.
288. *See* Romero, *supra* note 184
289. *Id.*
290. *See* BREWER-CARIAS, *supra* note 174, at 73.

quired more power over the grant of the enabling law, Chávez has positioned himself to be the only individual who can challenge his DDA powers. Thus, because Chávez sculpted the enabling laws with decreased involvement by the Legislature, he has become the ultimate authority as to the Legislature's intent over whether he is acting outside the boundaries established under any enabling law. As such, Chávez' political opposition, or the Legislature itself, has little recourse to reprimand Chávez for acting outside of those boundaries.

Overall, the use of DDA during the Chávez era has progressively become a larger threat to the rule of law in Venezuela. Considering Chávez has several years left under his current term and is not limited by any term limits, it seems evident that Chávez will continue to obtain longer and broader grants of DDA. If Chávez succeeds in obtaining broader and longer grants of the enabling law, DDA's threat to the rule of law will continue to increase until the rule of law no longer exists in Venezuela.

B. Ecuador

Correa's use of post-approval DDA in Ecuador presents a growing threat to the rule of law. Although Correa, overall, has used his DDA powers less frequently than his predecessors, he has recently shown a penchant of using *proyectos urgentes* in a controversial manner. Nonetheless, Correa's threat to the rule of law is limited by Ecuador's 2008 Constitution.

Ecuadoran DDA's threat is limited due to the 2008 Constitution's limit of one *proyecto urgente* at a time and the thirty-day time-period the National Assembly has to respond.[291] Because of these procedural safeguards, laws based on *proyectos urgentes* follow the requirement of "formal equality" since they are enacted under carefully dictated procedures. "Formal equality" is also generally satisfied as opposition groups can voice their opinions about the content of the *proyectos urgentes* before they are decreed into law.

While the 2008 Constitution provides procedural safeguards to guarantee formal equality, Correa and his allies in the National Assembly have been able to take advantage of the Assembly's legislative deadlock to push through *proyectos* without much opposition involvement. In fact, little, if any, opposition involvement occurred when Correa sent the controversial Hydrocarbon *proyecto* to the National Assembly. Moreover, Correa's use of political gamesmanship by sending *proyectos urgentes* to the Legislature, knowing that it would be in recess for half of the constitutionally guaranteed thirty day time period, is problematic. By cutting the time period for Legislative involvement in half, Correa effectively limits some of the "carefully dictated procedures" that ensure opposition participation in the legislative process.

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291. *See* Republic of Ecuador Constitution of 2008 art. 140.

Furthermore, it is questionable whether horizontal accountability continues to exist within Ecuador under the Correa era based on the National Assembly's legislative deadlock. Since neither Correa's allies nor his opposition currently maintain enough votes to challenge Correa's *proyectos urgentes*, it remains unclear whether the National Assembly would reject one of Correa's *proyectos* for being outside the scope of his authority. Accordingly, it appears that the Executive-Legislative interplay that is at the core of DDA currently is lacking in Ecuador considering the small likelihood of legislative action checking Correa's Executive decrees.

An additional concern is that Correa, unlike his predecessors, has used a *proyecto urgente* to change the nation's criminal code. This issue is not as problematic as it would be under pre-approval DDA since Ecuador's Legislature still maintains the chance to discuss and approve, modify, or reject the changes. Nonetheless, the use of *proyectos urgentes* to change the criminal code is problematic in that Correa has actively tried to broaden the scope of his DDA powers to include non-economic matters. Moreover, Correa's attempt to change the criminal code through *proyectos urgentes* creates a dangerous precedent, whereby Correa and future presidents will be able to use *proyectos urgentes* to modify the nation's criminal code.

Overall, Correa's use of DDA has posed a nominal threat to the rule of law within Ecuador, which is largely due to the constitutional protections provided for in Ecuador's 1998 and 2008 Constitutions. Correa, however, has shown a trend towards using DDA is a manner that undermines the Executive-Legislative interplay and limits his opposition's ability to voice their opinion over the *proyecto urgente's* content. Accordingly, it will be necessary to see how Correa uses *proyectos urgentes* in the future to determine whether Correa's use of post-approval DDA becomes an increased threat to the rule of law.

C. Comparison of the Countries

Of the countries studied in this article, only Venezuela's DDA under Chávez presents a legitimate threat to the rule of law. Chávez' use of DDA through the enabling law has threatened the rule of law in Venezuela by denying formal equality and horizontal accountability. Moreover, Chávez' use of DDA has substantially consolidated lawmaking power within the Executive branch. Unless Venezuela rewrites its constitution to limit the Executive's pre-approval DDA powers, future Venezuelan Executives will continue to obtain longer and broader DDA powers, which, in turn, will continue to threaten the rule of law in Venezuela.

At the same time Chávez has increased his DDA powers, Correa in Ecuador has restrained his DDA use. Although Correa has recently shown some tendencies towards using Ecuador's post-approval DDA in a way that could threaten the rule of law, Correa's DDA use does not present nearly as larger of a threat to the rule of law due to the limited use of

proyectos urgentes. Furthermore, we see that because of the constitutional limits that are inherent in post-approval DDA, the potential for abuse is must less than that is seen in pre-approval DDA. However, if Correa continues to use political gamesmanship to limit his opposition's opportunities to voice their opinion regarding any *proyecto urgente*, DDA's threat to the rule of law could increase. Nonetheless, at this moment, Correa's use of DDA is not comparable to that of Chávez, and it is not appropriate to categorize Correa with Chávez regarding their DDA use.

Overall, it appears that Chávez is a unique instance where a leader has used DDA to consolidate lawmaking power within the Executive branch and threaten the rule of law. Chávez, however, provides the framework for future leaders on how to obtain broader DDA powers. Moreover, Chávez' DDA use also provides precedential support for Venezuela's future leaders.

Based on the above analysis, there appears to be some causality between different forms of DDA and their threat to the rule of law. For instance, we see that when an Executive possesses an immense amount of political power, that Executive can use pre-approval DDA in a manner that undermines the rule of law—*i.e.*, Chávez. At the same time, however, we see that not every popular leader uses pre-approval DDA in a way that threatens the rule of law—*i.e.*, Correa. Moreover, even though post-approval DDA does not generally present as large of a threat to the rule of law due to constitutional limits that are in place, a leader—i.e., Correa—may use his DDA powers in such a way as to manipulate the legislative system and present a threat to the rule of law. Thus, it is important to recognize that each unique form of DDA offers its own unique threat to the rule of law. As such, I recommend that future studies further explore the relationship between different forms of DDA and their threat to the rule of law so as to better understand what DDA characteristics, in practice, threaten the rule of law.

D. Prescriptive Safeguards on DDA to Protect The Rule of Law

Even though it remains unanswered as to what specific DDA characteristics present the greatest threat the to the rule of law, I believe that every South American country offering DDA should have several safeguards in place so as to limit DDA's threat to the rule of law. In regards to pre-approval DDA, the constitution must limit the scope of DDA powers to specific areas. Although the DDA powers need not be limited to solely economic or financial matters, it is important that the powers not extend to criminal or individual rights, which can be used by an Executive to attack the political opposition. Moreover, the constitution should contain temporal limits on the length of the DDA grant. A nation's Legislature should function as the country's lawmaking body and limit any

particular grant of DDA to six or less months to ensure that lawmaking authority is not being completely usurped by the Executive.

Furthermore, when drafting a grant of pre-approval DDA, a nation's Legislature must remain active in the drafting process. The Legislature must provide specific details as to the substantive scope of the Executive's decrees. Such guidelines need not provide a checklist of everything that must be included within any one decree. These guidelines, however, should provide enough detail to indicate that the Legislature thought through its DDA grant and intended to limit the Executive's DDA powers to specific areas and criteria. Moreover, pre-approval DDA should also provide for a monitoring system to ensure that the Executive-Legislative interplay is healthy and active. Although the Executive may choose to ignore the opposition, the monitoring system is symbolically important in that it provides the political opposition a voice, albeit a small one, in the legislative process.

In post-approval DDA, a nation's constitution should contain several safeguards to provide the Legislature adequate opportunity to respond to any Executive decree and to prevent the Executive from inundating the Legislature with decrees. Accordingly, the constitution should provide a Legislature the absolute authority to modify, amend, or deny any post-approval decree. Furthermore, the Legislature must be given adequate time—*i.e.*, a minimum of thirty days—to respond to any such decree. Finally, the constitution should limit the Executive to one post-approval decree at a time, so that the Legislature is not forced to address numerous post-approval decrees at any given moment.

While these safeguards are not perfect, they do help limit DDA's threat to the rule of law. These safeguards help ensure that "formal equality" exists by providing weaker political figures a voice, albeit a small one, in the drafting and enforcement of pre-approval DDA grants. Moreover, they allow minority voices the opportunity to openly discuss post-approval DDA decrees through legislative dialogue. These safeguards also help provide "horizontal accountability" in that the Legislature can annul any decrees that are outside of the Executive's DDA powers, thereby ensuring that the lawmaking authority remains within the Legislature and not the Executive.

VII. CONCLUSION

DDA is prevalent throughout South America and is used by leaders of all political ideologies. Although both pre-approval and post-approval DDA pose their own unique threats to the rule of law, the threat can be limited through careful constitutional drafting and legislative oversight. Constitutional text can limit the scope and time-length of pre-approval DDA and the amount of post-approval decrees an Executive can send at any one time. Moreover, a country's Legislature can monitor an Executive's DDA use to ensure that the Executive does not consolidate lawmaking power within the Executive branch.

Of the countries and leaders studied under this article, only Hugo Chávez in Venezuela poses a legitimate threat to the rule of law through his DDA use. On the other hand, Rafael Correa in Ecuador poses a smaller, but increasing, threat to the rule of law. Although Correa has recently shown some tendencies to use DDA in a manner that potentially threatens the rule of law, Correa has not used DDA enough to present a real threat to the rule of law. It is important, however, that we continue to monitor DDA use in these countries to ensure that Chávez and Correa do not continue to consolidate Legislative powers within the Executive branch to further threaten the rule of law, and to prevent future Executives from using their DDA powers in ways that may increase DDA's threat to the rule of law.