Delegated Decree Authority In Contemporary South America: Comparative Study of the Radical Left and Their Threat to the Rule of Law

Kerry Mohan, University of Wisconsin - Madison

Available at: https://works.bepress.com/kerry_mohan/5/
Delegated Decree Authority In Contemporary South America:  
Comparative Study Of The Radical Left And Their Threat To The Rule Of Law  
Kerry Mohan

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” or “DDA,” has been common throughout Venezuela’s history and most of South America. This article seeks to determine DDA’s prevalence within South America, and in particular Venezuela, Ecuador, and Colombia, and determine whether DDA poses a threat to the rule of law within these nations. By focusing on Hugo Chávez of Venezuela, Rafael Correa of Ecuador, and Alvaro Uribe of Colombia, we have a unique opportunity to see whether these charismatic leaders have used DDA to increase their lawmaking authority and consolidate powers within the Executive branch.

TABLE OF CONTENTS

I. Introduction ........................................... 2
II. Democratic Rule Of Law ...................................... 6
III. Delegated Decree Authority .................................. 8
IV. Constitutional Grants of DDA In Venezuela, Ecuador, And Colombia .......... 23
   A. Venezuelan DDA .................................. 24
   B. Ecuadoran DDA .................................. 26
   C. Colombian DDA .................................. 28
   D. Overall Analysis of DDA Among These Countries .......... 30
V. DDA In Practice In Venezuela, Ecuador, And Colombia ....................... 32
   A. Venezuela ............................................. 32
   B. Ecuador .............................................. 59

1 2010 Graduate of University of Wisconsin Law School with dual degrees in Law and Latin American, Caribbean, and Iberian Studies. Thanks to Professors Alexandra Huneeus, Christina Ewig, and Alberto Vargas for their helpful comments and suggestions.
C. Colombia

VI. Is DDA Currently Threatening The Rule Of Law In Venezuela, Ecuador, and Colombia?

A. Venezuela

B. Ecuador

C. Colombia

D. Comparison of the Three Countries

E. Prescriptive Safeguards on DDA to Protect the Rule of Law

VII. Conclusion

I. Introduction

Since 2000, Hugo Chávez has captured international attention through his continued desire to bypass Venezuela’s Legislature to enact broad sweeping decrees with the force of law under Venezuela’s “enabling law.” This media attention increased to new heights in August 2008, after Chávez promulgated twenty-six decrees in a single day – the last of the eighteen month enabling law. Chávez’ use of Venezuela’s “enabling law” to promulgate broad-ranging laws has caused the international media to label Chávez as a socialist, a dictator, and authoritarian.

What the international media has continually failed to report, however, is that Chávez’ form of decree authority, “delegated decree authority” or “DDA,” has been common throughout

---


3 Id.
Venezuela’s history and most of South America. In fact, eight constitutions in South America specifically provide their Executives lawmaking authority through DDA. Thus, while it may be fair to criticize Chávez for some of his actions, it may not be fair to criticize him for using DDA considering its relatively frequent use by his predecessors in Venezuela and 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 (“Chávez”), Ecuador under Rafael Correa (“Correa”), and Colombia under Alvaro Uribe (“Uribe”). The article focuses on Venezuela due to the amount of media attention given to Chávez’ enabling laws and his decree authority. The article also focuses on Ecuador for two reasons. First, Ecuador presents a different form of DDA than Venezuela – post-approval DDA. As such, Ecuador provides an analysis different from Venezuela, thereby enriching our overall understanding of DDA in South America. Second, Ecuador’s current President, Rafael Correa, is another leftist leader who has often been placed in the same category as Chávez. While this categorization may be appropriate due to Correa’s overall leftist political ideology, this article seeks to determine whether Correa has acted similarly to Chávez regarding the use of DDA. Finally, this article includes Colombia for

---

4 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. Delia Ferreira Rubio & Matteo Goretti, When the President Governs Alone: The “Decretazo” in Argentina, in EXECUTIVE DECREE AUTHORITY 33, 40 (John M. Carey & Matthew Soberg Shugart, eds., 1998). If you count only the Latin American nations within South America, that would be eight out of ten nations.

5 Appendix of Constitutional Provisions Regarding Decree, in EXECUTIVE DECREE AUTHORITY 299 (John M. Carey & Matthew Soberg Shugart, eds., 1998). If you count only the Latin American nations within South America, that would be eight out of ten nations.

6 Those actions may include imprisoning opposition leaders or attacking media outlets.

7 Although Uribe is no longer Colombia’s President, this article continues to focus on Uribe due to infancy of Juan Manuel Santos’ presidential term.
several reasons. First, Colombia’s version of DDA is similar to that of Venezuela – pre-approval DDA. Accordingly, Colombia provides an analysis of how each country has its own unique form of DDA. Moreover, since Colombia is one of the strongest conservative bastions in Latin America, Colombia’s inclusion allows us to determine whether certain forms of DDA use are seen only through Chávez and his leftist allies, or if they are seen across the political spectrum.

Moreover, I selected these three leaders – Chávez, Correa, and Uribe – because they are the most charismatic and popular leaders in their nations’ modern histories. All three leaders have been elected multiple times, which had been uncommon in their nations’ recent histories. All three leaders have also succeeded in re-writing their nations’ constitutions to provide for consecutive presidential terms, longer presidential terms, or greater Executive powers. Accordingly, all three leaders possess an immense amount of political capital, which can be used to obtain powerful forms of DDA and promulgate numerous decrees with the force of law. Thus, the current political landscape within Venezuela, Ecuador, and Colombia provides us the 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 will first provide definitions of Latin American democracy and the rule of law. Because the rule of law is a contested concept, Section II does not challenge the current literature regarding the rule of law. Instead, Section II’s goal is to provide a generalized definition of the rule of law to create a framework for the subsequent analysis regarding whether Chávez, Correa, and Uribe’s use of DDA poses a threat to the rule of law.

Next, Section III focuses on delegated decree authority, or DDA. Section III first defines DDA. Section III then provides 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 regarding DDA. Finally, Section III 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, Ecuador, and Colombia. By examining the language of Venezuela and Ecuador’s old and new constitutions, Section IV will determine just how DDA powers have changed through new constitutions drafted under the tutelage of Chávez and Correa. Moreover, Section IV provides an analysis of Colombia’s 1991 Constitution to determine the constitutional background for Colombia’s form of DDA.

Section V analyzes how DDA has been used in practice in Venezuela, Ecuador, and Colombia. For each country, Section V includes an analysis of how DDA has been used before and under these leaders. Thus, Venezuela’s analysis will include both the pre-Chávez era and the Chávez era. A similar analysis will be done for both Correa in Ecuador and Uribe in Colombia. 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, Correa, or Uribe’s use of DDA poses a threat to the rule of law. As such, Section VI applies the principals adopted in Section II to the facts found in Section V. Section VI also provides a comparison of the threat DDA poses among the three countries studied to see if any common trends exist among Chávez, Correa, and Uribe. 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.”\(^8\) Accordingly, it can be argued that democracy fails without the rule of law. 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) accountability of rulers to be ruled through mechanisms of representation and the rule of law; and (4) civilian control over the military.\(^9\) Although DDA can have negative effects on many of these requirements, this article focuses solely the third component of the above definition. In particular, this article focuses 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.”\(^10\) Due to this disagreement over what the rule of law exactly is, this article does not seek to modify or challenge the current understanding of 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 the threat DDA poses in Venezuela, Ecuador, and Colombia.

Despite being a contested concept, the rule of law is universally defined to require that

---


\(^9\) Terry Lynn Karl, *Dilemmas of Democratization in Latin America*, 23 *Comparative Politics* 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.

“laws matter and should matter.” The rule of law also requires that all actors within society “be subject to limitation by law.” That is, the rule of law requires that no one, including the Executive, be beyond the reach of the law and that no political actor has the authority to “cancel or suspend the rules that govern his actions.” This requirement exists because the rule of law cannot survive without the “existence of a full network of legally defined accountabilities.” Thus, the democratic rule of law only works when “horizontal accountability functions effectively, without obstruction and intimidation from powerful state actors.” In the context of DDA, such horizontal accountability helps prevent the consolidation of power within the Executive branch.

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. This requirement of “formal equality” requires that legislation be sanctioned following “previously and carefully dictated procedures.” Without the use of carefully dictated procedures, politically powerful voices can silence weaker voices.

11 Reitz, supra note 8, at 436.
12 Id. at 440.
13 Reitz, supra note 8, at 435.
16 O’Donnell, Why Rule of law Matters, supra note 10, at 37.
18 Id; Walker, supra note 13, at 757.
voices, effectively denying political participation to smaller political parties.\textsuperscript{19} When carefully dictated procedures are not followed, portions of society are excluded from contributing to legislative content. Such an exclusion can result in sections of society removing themselves from the political process as they no longer believe that their interests are being represented.\textsuperscript{20} Over time, this decreased opposition voice and participation enables the politically powerful voices to further cement themselves in power by gaining super-majority status and re-writing procedures and laws to limit the political participation of other groups. In the end, 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 a nation’s Legislature to grant the Executive the authority to change the nation’s status quo by promulgating decrees with the force of law.\textsuperscript{21} DDA exists in two forms: (1) pre-approval DDA and (2) post-approval DDA. The two differentiate in that one form of DDA requires legislative approval, specifically granted through a piece of legislation, prior to the decrees (“pre-approval DDA”). The other requires legislative action, within a certain time period, after the Executive issues the decree (“post-approval DDA”). In both forms of DDA, the key component is an

\textsuperscript{19} See, generally, Id.

\textsuperscript{20} See, generally, Walker, supra note 13, at 757.

\textsuperscript{21} John M. Carey & Matthew Soberg Shugart, Calling Out the Tanks or Filling Out the Forms?, in EXECUTIVE DEGREE AUTHORITY 1, 13 (John M. Carey & Matthew Soberg Shugart, eds., 1998).
Executive-Legislative interplay, whereby the Legislature effectively grants the Executive the right to enact decrees with the force of law. In pre-approval DDA, this Executive-Legislative interplay occurs before the Executive has DDA powers and often involves the discussion over the scope and time-length of the DDA grant. 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.

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

Because Executive decrees under DDA have the force of law, those decrees become the new status quo for the nation. As such, decrees passed under DDA nullify prior laws of the same subject matter and establish new rights or obligations on a national scale. 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.

Both pre-approval and post-approval DDA are prevalent throughout South America. Figure 1 below provides an illustration of the DDA’s current prevalence throughout South America. Although prevalent, it is important to note that DDA is different in each country, with each country maintaining its own unique system of DDA. The one aspect common through all of these countries’ forms of DDA, however, is the Executive-Legislative interplay. Because each country maintains its own unique form of DDA, the length and scope of DDA differs throughout countries. Moreover, the amount of relative freedom the Executive has in issuing decrees under DDA differs substantially throughout the region. 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.

<table>
<thead>
<tr>
<th></th>
<th>Type of DDA</th>
<th>Length of DDA</th>
<th>Scope</th>
<th>Other Limitations</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Argentina</strong></td>
<td>Both</td>
<td>No limit</td>
<td>Pre-Approval: Administration and Public Emergency</td>
<td>None</td>
</tr>
<tr>
<td><strong>Brazil</strong></td>
<td>Post-Approval</td>
<td>Legislature has 30 days to act</td>
<td>No limit</td>
<td>None</td>
</tr>
<tr>
<td><strong>Chile</strong></td>
<td>Both</td>
<td>1 year</td>
<td>No limit</td>
<td>Post-approval decrees must be used to prevent serious detriment to the country</td>
</tr>
<tr>
<td><strong>Colombia</strong></td>
<td>Pre-Approval</td>
<td>6 months</td>
<td>Economic and Financial</td>
<td>None</td>
</tr>
<tr>
<td><strong>Ecuador</strong></td>
<td>Post-Approval</td>
<td>Legislature has 30 days to act</td>
<td>Economically Urgent</td>
<td>1 DDA decree at a time</td>
</tr>
<tr>
<td><strong>Peru</strong></td>
<td>Both</td>
<td>No limit</td>
<td>No limit</td>
<td>None</td>
</tr>
<tr>
<td><strong>Uruguay</strong></td>
<td>Post-Approval</td>
<td>Legislature has 45 days to act</td>
<td>No limit</td>
<td>1 DDA decree at a time</td>
</tr>
<tr>
<td><strong>Venezuela</strong></td>
<td>Pre-Approval</td>
<td>No limit</td>
<td>No Limit</td>
<td>None</td>
</tr>
</tbody>
</table>

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. 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
ideology. Moreover, by granting pre-approval DDA, a Legislature can avoid political
gamesmanship and allow more change to occur than would likely happen under the traditional
lawmaking process. 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.
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 the Legislature to address a pressing issue. Although the Legislature can approve, modify, or reject the Executive’s decree, post-approval DDA creates an impetus to address issues that may be politically unpopular. At the same time, however, post-approval DDA can be used as a burdening tactic by the Executive. Because the Legislature has a limited time to respond to a proposed decree, the Legislature often has to shift its focus from other issues to the Executive’s decree just to have a proper discussion on the subject. Moreover, an Executive can use post-approval DDA to derail an alternative legislative project involving the same subject matter by forcing the Legislature to address the Executive’s project rather than develop its own.

DDA is argued to be beneficial in several situations. Although DDA has the potential to grant the Executive legislative powers, many individuals favor the use of DDA during times of economic crisis. As Professor Scheuerman argues, “[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. Consequently, DDA can be favored because it enables the quicker decision-making that is necessary to address the constantly evolving situations seen in an economic crisis.

DDA is additionally seen to be beneficial in situations involving legislative deadlock. In such situations, DDA can overcome political obstacles to enact badly needed legislation to address a country’s ills. This use of DDA can be beneficial when the subject matter of the legislation is contentious and politically unpopular.

---

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. This broad grant of decree authority is known as “constitutional decree authority” or “CDA.” Within the broad grant of CDA exists several different decree powers, one of which is DDA. 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.

First, DDA is not “regulatory” decree authority, which permits the Executive to enact decrees to ensure the enforcement of pre-existing legislation. Second, DDA is not “administrative” decree authority, which allows the Executive to manage the effectiveness of the federal government. Although both “regulatory” and “administrative” decrees have the potential to affect the status quo through the establishment of rules and regulations, “these decrees are not the law; they are subordinate to the law.” Moreover, “courts, administrative tribunals, and controllers general” are typically authorized to nullify regulatory and administrative decrees when they exceed the scope of statutory authority. Thus, it is often much easier to annul regulatory and administrative decrees than it is to annul a DDA decree. Finally, and most importantly, regulatory and administrative decree authority does not involve

23 Matthew S. Shugart and Scott Mainwaring, Presidentialism and Democracy in Latin America: Rethinking the Terms of the Debate, in PRESIDENTIALISM AND DEMOCRACY IN LATIN AMERICA 12, 46 (Matthew Soberg Shugart and Scott Mainwaring, eds., 1997).

24 Id. at 46.

25 Carey and Shugart, Calling Out the Tanks or Filling Out the Forms?, supra note 20, at 13.

26 Id.
the Executive-Legislative interplay that is present under DDA. Instead, the Executive can act upon regulatory and administrative decree authority without Legislative involvement.

Moreover, DDA 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. A major difference between emergency decrees and DDA is that emergency decrees are temporary in nature to cure the national crisis. As such, emergency decrees typically expire once the emergency threat has been extinguished. DDA, on the other hand, is a permanent change in the status quo that can only be removed through future legislative action. A simple way to distinguish the two according to Shugart and Mainwaring 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.”

It is, additionally, important to clarify the difference between an economic emergency and DDA that is used to during times of economic crisis. While this distinction may appear to be superficial, there are necessary distinctions between the two. 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. 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 declared by the Executive without legislative involvement, DDA used during an economic crisis always involves legislative involvement.

---

27 Shugart & Mainwaring, Presidentialism and Democracy in Latin America: Rethinking the Terms of the Debate, supra note 22, at 47.

28 Id.
approval. The distinction between economic crisis and economic emergency 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. 29

To better understand DDA, it is necessary to conceptualize how DDA fits within CDA and these other forms of decree authority. Below, in Figure 2, is a conceptualization of constitutional decree authority. As previously mentioned, CDA is the broad, all-inclusive category of decree authority, including many sub-categories of decree authority. Thus, CDA includes 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 include both decrees made under states of emergency and economic emergencies. Accordingly, it is necessary to understand that when a decree is promulgated under DDA, it is also CDA. At the same time, however, even though a decree is deemed CDA, it does not mean that it is 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 – i.e., administrative, regulatory, DDA, or emergency. Nonetheless, Executives have used this “gray” area to enact decrees that have far reaching effects and 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

29 Scheuerman, supra note 21, at 1872. Alfonso Menem of Argentina and Fernando Collor de Mello of Brazil are two examples of Latin American Executives who used DDA powers to enact neo-liberal economic reforms. See EXECUTIVE DECREE AUTHORITY, supra note 20, at 43, 218-219
companies, the canceling of contracts with private companies, and even the nationalization of private industry.\textsuperscript{30} This “gray” area may become the most problematic 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 stacked in the President’s favor or 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 the nuances of CDA.

C. \textbf{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 is, 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 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 Shugart and Mainwaring 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. The authors 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.” 31 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. As a result, the authors argue that Latin American Legislatures are more tightly bound by Executive decrees mandated under post-approval DDA since the Legislature’s powers are retroactive and not proactive. 32 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

---

31 Matthew Soberg Shugart & Scott Mainwaring, Presidentialism and Democracy in Latin America: Rethinking the Terms of the Debate, supra note 23, at 47

32 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 30 days. Appendix: Outlines of Constitutional Power in Latin America, in PRESIDENTIALISM AND DEMOCRACY IN LATIN AMERICA 440, 444 (Matthew Soberg Shugart and Scott Mainwaring, eds., 1997).
pre-approval DDA, the Legislature is bound by all decrees promulgated by the Executive under the DDA grant. On the other hand, post-approval DDA bounds the Legislature by having to respond to the Executive’s decree. 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 nation’s constitution, which tends to provide the Executive roughly the same scope of activity to decree new legislation.

I reject Shugart and Mainwaring’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.33 Furthermore, Legislatures have begun to grant continually broader powers under pre-approval DDA, further consolidating lawmaking power within the Executive.34 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. 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, thereby increasing the danger of pre-approval DDA.

33 However, 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.

34 See Brian F. Crisp, Presidential Decree Authority in Venezuela, in EXECUTIVE DECREES AUTHORITY 142, 149-150 (John M. Carey & Matthew Soberg Shugart, eds., 1998).
I do not mean to say that post-approval DDA does not pose a 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. Recent constitutions have lengthened the Legislature’s time-period to address post-approval DDA decrees, providing the Legislature a more effective voice in limiting the Executive’s use of post-approval DDA.\(^{35}\) Furthermore, recent constitutions have restricted the use of the Executive’s post-approval DDA to only one decree at a time, except during states of emergency.\(^{36}\) Accordingly, it is more difficult for the Executive to inundate the Legislature with post-approval DDA decrees, thereby forcing decrees into law 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.\(^ {37}\) 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. \textbf{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. The following subsection involves a theoretical analysis over pre-

\(^{35}\) \textit{See Appendix: Outlines of Constitutional Power in Latin America, in PRESIDENTIALISM AND DEMOCRACY IN LATIN AMERICA} 440, 444 (Matthew Soberg Shugart and Scott Mainwaring, eds., 1997); \textit{República del Ecuador: Constitución de 2008, Articulo 140}. \textsc{Political Database of the Americas.} \url{http://pdba.georgetown.edu/Constitutions/Ecuador/ecuador08.html#mozTocId273412}.

\(^{36}\) \textit{Id.; Id.}

\(^{37}\) \textit{Id.; Id.}
approval and post-approval DDA’s threat to the rule of law. Because this is solely a theoretical 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.

Before we begin the theoretical 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 all decrees, once promulgated under DDA, become law like any other law. Thus, 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. Moreover, the threat DDA poses to the rule of law does not involve the enforcement of the law because the inconsistent enforcement of law applies to both DDA decrees and legislative laws alike. 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 includes the rule of law’s requirements of “horizontal accountability” and “formal equality.”

1. Pre-Approval DDA

Pre-approval DDA, in general, threatens the rule of law. Pre-approval DDA’s threat the rule of law, however, can be limited if the Legislature provides specific guidelines and oversight to limit Executive abuse and ensure legislative involvement in the decree making process. To ensure that the rule of law is being adhered to in pre-approval DDA, the Legislature must provide the Executive specific guidelines over 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. Instead, the guidelines 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 is acting within his delegated powers and following the intent of the Legislature. Such a monitoring system is important as it also provides opposition leaders the chance to interact with the Executive and voice their concerns. 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.

Even with specific guidelines and legislative oversight, pre-approval DDA threatens the rule of law in several ways. First, pre-approval DDA threatens the rule of law in that it can provide little horizontal accountability. After the grant of pre-approval DDA, an Executive, particularly a strong charismatic leader, can issue decrees without being held accountable for how he/she uses his DDA powers. This threat is particularly strong where the Executive is limited only by the constitutional language and legislative text of the specific DDA grant. Thus, so long as the Executive acts within the boundaries on this grant, he/she can decree whatever he chooses. Moreover, even when the Executive acts outside the boundaries of the grant, the Legislature or opposition forces must take affirmative action to hold the Executive accountable for his missteps. Such opposition action, often done through the enactment of 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.

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. 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.

38 See O’Donnell, Why the Rule of law Matters, supra note 12, at 33.
This lack of formal equality is particularly evident when the Executive is granted DDA by a majority Legislature, which can negate the voice of the opposition. In such a situation, the majority Legislature can effectively exclude the opposition from any discussion regarding the content of the piece of legislation that grants DDA to the Executive. Moreover, the Executive, once given DDA powers from the Legislature, has the ability to issue decrees with the force of law without having to discuss the content of the legislation with minority parties. As a result, the political opposition is denied their political voice and lack the chance to protect their constituent’s interest through legislative debate – either before or during the pre-approval DDA grant.\(^{39}\) Thus, the Executive can create a situation where like cases are not treated alike and laws promote invidious motives against political opposition. Over time, opposition groups view the laws as being arbitrary. This, in turn, can cause sectors of society to lose faith in the rule of law, creating a situation where it, potentially, no longer exists.

Furthermore, pre-approval DDA’s process of stifling opposition participation is significant as it can create a downward spiral of opposition participation and threaten democracy. First, horizontal accountability disappears as the Legislature, particularly minority parties, demonstrates an incapacity or unwillingness to exercise their constitutionally delegated authority over the Executive.\(^{40}\) In turn, voters who no longer believe that their votes count will decide to abstain from voting. This decrease in voter participation enables the majority to become more powerful, which, in turn, makes the Executive more powerful, allowing him 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.

\(^{39}\) See Id.

\(^{40}\) Id. at 37.
2. Post-Approval DDA

Post-approval DDA’s threat to the rule of law is significantly less than the pre-approval DDA’s threat. This difference occurs because laws enacted under post-approval DDA still follow carefully dictated procedures. Because all post-approval DDA decrees must go through the Legislature before they obtain the force of law, post-approval DDA, unlike pre-approval, specifically allows for legislative involvement regarding the content of the Executive’s decree. Such legislative involvement, additionally, includes the political opposition, thereby providing opposition leaders the opportunity to voice their opinion and represent their constituents. Moreover, legislative involvement also ensures that horizontal accountability is in effect, thereby making sure the Executive is being held accountable for his actions. Thus, if the Legislature believes that the Executive is acting outside of his post-approval DDA powers, the Legislature can simply reject or modify the Executive’s decree.

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 amount of public dialogue regarding any particular issue is significantly stymied. In fact, because the Legislature has a limited time to address 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. With this strength, the majority can potentially delay or preclude discussion on the proposed law. Because the majority party or coalition with the Legislature 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. Thus, with majority support in the Legislature, an Executive can effectively silence his political opposition in a manner similar to that under pre-approval DDA.

Finally, post-approval DDA can be problematic when the Executive inundates the Legislature with 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 by sending a continuous stream of decrees to the Legislature. For instance, the Executive can constantly send decrees, one after another, and disrupt any agenda a Legislature may have. Because the Legislature must act on the Executive’s decree within a certain period of time, it will continually have to reserve more resources to respond to the Executive’s decrees. By having to constantly respond to the Executive’s decrees, the Legislature must spend 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 removing opposition groups from the process, and limiting the Legislature’s lawmaking authority.

IV. Constitutional Grants of DDA In Venezuela, Ecuador, And Colombia

As previously mentioned, DDA is specifically provided for in a nation’s constitution. As such, the constitutional text of the DDA grant 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. The text can also limit the scope of both pre-approval and post-approval DDA to only economic or financial areas. Alternatively, the text can be left intentionally vague to permit DDA in all areas of society. While the constitutional language does not dictate how DDA is used in practice, it provides guidelines as to
how DDA will be used and 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. In the case of Colombia, however, the analysis involves only the 1991 Constitution since that Constitution has been in effect for nearly twenty years and there have been no constitutional changes to Colombia’s form of DDA since 1991.

A. Venezuelan DDA – The “Enabling Law”

1. 1961 Constitution’s DDA

Venezuela’s 1961 constitution provided its Executives pre-approval DDA powers. 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.”

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.” Instead, the time-length of the DDA grants was limited to the Legislature’s discretion. Moreover, the 1961 Constitution is vague as to


42 Id.

43 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.
whether the Legislature could pass the “special law” with a mere majority of the Legislature, or if a higher percentage was required.

2. **1999 Constitution’s DDA**

Similar to the 1961 Constitution, Venezuela’s 1999 Constitution provides the Executive pre-approval DDA powers. 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.” 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. Much like the 1961 Constitution, the 1999 Constitution is incredibly vague in the temporal scope of the DDA powers, as it is left to the Legislature’s discretion. Unlike the 1961 Constitution, however, the 1999 Constitution contains no textual language limiting DDA to economic or financial matters. Accordingly, the Legislature can grant an Executive DDA powers in all areas of society.

3. **Comparing The 1961 And 1999 Constitutions**

When comparing the two Constitutions, it is clear that Hugo Chávez and Venezuela’s 1999 Constitution increased the Executive’s DDA powers. Although both Constitutions contained no time limitations on the grant of DDA powers, the 1999 Constitution provides the Executive a much broader scope of DDA powers. For example, while the 1961 Constitution limited DDA’s scope to economic or financial matters, the 1999 Constitution provides no such limitation. Thus, the 1999 Constitution, which leaves the scope of the Executive’s DDA powers to the Legislature’s discretion, effectively provides the Executive DDA powers in any and every 


\[\text{Id.}\]
facet of society. Considering Chávez enjoys majority support within the Legislature, the 1999 Constitution provides Chávez, and any subsequent majority-supported Executives, the ability to obtain pre-approval DDA whenever he desires and in any area of law that he chooses.

B. **Ecuadoran DDA – “El Proyecto Urgente”**

1. **1998 Constitution’s DDA**

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

   The 1998 Constitution also prohibited the Executive from inundating the National Congress with Executive legislation. Article 155 provided that while the National Congress discussed a *proyecto urgente*, the Executive could not send Congress another *proyecto urgente*, except during a state of emergency. Accordingly, the Executive could only send one *proyecto urgente* at a time and had to wait thirty days or until the Legislature was finished with the previous *proyecto urgente* before he could send another one.

---


47 Id.

48 Id.

49 Id.

50 Id.
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. Once the National Assembly receives the proyecto urgente, they have up to thirty days to approve, modify, or reject the proposed legislation. 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. 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.

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. Thus, Ecuador’s Executive cannot inundate the National Assembly with proyectos urgentes to effectively bypass the thirty day requirement.

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 under the 2008 Constitution the Executive now has the explicit authority to decree the proyecto urgente into law after thirty days, whereas the 1998 Constitution did not explicitly authorize such Executive


52 Id.

53 Id.

54 Id.

55 Id.
action. 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. Instead, Correa constrained himself within the status quo by maintaining the same DDA power as the 1998 Constitution.

C. Colombian DDA – “Las Facultades Extraordinarias”

As was previously explained, because Colombia has had the same Constitution since 1991, this analysis includes only the 1991 Constitution. The 1991 Constitution grants the Executive pre-approval DDA authority.\footnote{República de Colombia, Constitución de 1991, art. 150, § 10, POLITICAL DATABASE OF AMERICAS, http://pdba.georgetown.edu/Constitutions/Colombia/col91.html.} Article 150, Section 10 permits an absolute majority of the Legislature to grant the Executive facultades extraordinarias for up to six months to issue decrees with the force of law.\footnote{Id.} Article 150, Section 10 does not limit the amount of facultades extraordinarias the Legislature can give the Executive at any one time. Because the Legislature’s grant of facultades extraordinarias depends on each piece of legislation, the Legislature could potentially grant the Executive facultades extraordinarias in each piece of legislation and numerous times within the same piece of legislation. This, in turn, could theoretically provide the Executive a perpetual grant of facultades extraordinarias.

Article 150, Section 10 does, however, provide some protection against abuse of DDA powers by preventing the Executive from issuing decrees that are outside his authority. Once pre-approval DDA has been granted, the Legislature can continually monitor the Executive’s
actions and modify the decrees.\textsuperscript{58} Thus, the Legislature can substantially alter Executive’s decrees that do not conform to the legislative guidelines in the grant of \textit{facultades extraordinarias}. Nonetheless, such a result may be unlikely when the Executive enjoys majority support within the Legislature.

Furthermore, Article 150(10) significantly limits the scope of the decrees the Executive can make with his \textit{facultades extraordinarias}.\textsuperscript{59} The Constitution explicitly prohibits Congress from giving the Executive the power to issue codes, statutes, organic laws, decrees involving the administrative or technical services of the Legislature, or taxes. As such, as will be discussed later, the Executive’s DDA powers are generally limited to administrative matters, such as restructuring the federal government through the creation, consolidation, and liquidation of federal agencies. Accordingly, while the Executive can use his \textit{facultades extraordinarias} to create a new status quo through the restructuring of the central government, he cannot alter the individual rights of Colombia’s citizens.

Because Colombia’s pre-approval DDA powers largely involve areas that are administrative in matter, it begs the question of why such decrees are not considered “administrative decrees.” As previously discussed, the key factor of DDA is the Executive-Legislative interplay. Thus, even if Colombia’s Executive uses his \textit{facultades extraordinarias} for solely administrative matters, the mere fact that he must obtain Legislative approval before he can issue such decrees makes this decree authority DDA. Moreover, because the Executive must obtain legislative approval before enacting such decrees, a presumption is created that the Executive cannot issue similar decrees under his administrative decree authority. Finally, since

\textsuperscript{58} \textit{Id.}

\textsuperscript{59} \textit{Id.}
Delegated Decree Authority in Contemporary South America

Delegated Decree Authority

Decrees promulgated under administrative decree authority do not carry the force of law, a decree promulgated under facultades extraordinarias trumps any administrative decrees regarding the same subject matter. This, additionally, means that the Executive must obtain additional facultades extraordinarias, and cannot use his administrative decree authority, to modify or nullify any pre-existing decrees that were made under prior grants of facultades extraordinarias. Thus, although Colombia’s pre-approval DDA may appear similar to administrative decree authority, it is, in fact, more properly characterized as DDA.

D. Overall Analysis of DDA Among These Countries

The constitutions of Venezuela, Ecuador, and Colombia provide a wide variety of DDA. Of the three countries discussed above, two countries - Venezuela and Colombia - provide for pre-approval DDA and one country – Ecuador – provides for post-approval DDA. Moreover, two of the countries – Venezuela and Colombia – leave the scope of the DDA grant to the Legislature’s judgment. Thus, the scope of the grant likely depends on how much support the Executive maintains within the Legislature. An additional interesting aspect is that we see countries from both sides of the political spectrum providing constitutional grants of DDA powers. Thus, it cannot be argued that decree authority is limited to one political group of countries – i.e., left-leaning countries.

Although there are similarities between the pre-approval DDA grants in Venezuela and Colombia, there are also major differences between the two. For instance, whereas Venezuela’s DDA potentially grants the Executive a broad range of authority to change the nation’s status quo, Colombia’s DDA specifically limits the amount of change the Executive can make. Moreover, while Colombia’s DDA can be included in any piece of legislation and is tied directly to that piece of legislation, Venezuela’s DDA involves one “enabling law” that includes all DDA
powers for that particular grant of DDA.

The previous analysis also allows us to see how two of these leaders – Chávez and Correa – used Constituent Assemblies to modify their DDA powers. In Venezuela, we see how Venezuela’s 1999 Constitution substantially broadened Chávez’ DDA powers. In fact, prior limitations on Chávez’ DDA powers have been removed all together, and Chávez can use DDA to change all sectors of society.

On the other hand, Correa acted with restraint during Ecuador’s 2008 constitutional re-writing process and did not broaden the Executive’s DDA powers. Instead of granting the Executive pre-approval DDA, Correa maintained the status quo and limited Ecuador’s 2008 Constitution to post-approval DDA. Like the 1998 Constitution, the 2008 Constitution, additionally, limits the use of post-approval DDA to economically urgent matters and continues to provide the Legislature thirty days to respond to any particular *proyecto urgente*. Moreover, and perhaps most importantly, Ecuador’s 2008 Constitution continues to prohibit the Executive from inundating the Legislature with Executive decrees by limiting the Executive to one *proyecto urgente* at a time.

All together, the previous analysis reveals a wide variety of DDA powers. First, we see that Venezuela currently provides its Executive with an incredibly broad and powerful form of DDA. Second, we see that Ecuador provides its Executive with a narrow, but still powerful form of DDA by being able to send *proyectos urgentes* to the Legislature. Finally, we see that Colombia provides its Executive with a relatively weak version of DDA, since the Executive is limited as to the scope of his decrees.
V. DDA In Practice In Venezuela, Ecuador, And Colombia

While constitutional text establishes the boundaries for DDA, 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 chooses to use his post-approval DDA powers. Moreover, the constitutional text does not show how broad any particular DDA grant is or how long that grant last. The following analysis addresses these issues in Venezuela, Ecuador, and Colombia. For every country, the analysis includes two eras: (1) the pre-leader era – i.e., Chávez, Correa, and Uribe; 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

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. Three of the enabling laws occurred when the Executive enjoyed majority support within the Legislature. Those grants occurred in 1961, 1974, and 1984. Each enabling law granted the Executive DDA for one year and in relatively broad areas designed to restructure the

---

60 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 Presidential Decree Authority In Venezuela, in EXECUTIVE DECREE AUTHORITY 142, 147-150 (John M. Carey & Matthew Soberg Shugart, eds., 1998); Brian F. Crisp, Presidential Behavior in a System with Strong Parties: Venezuela, 1958-1995, in PRESIDENTIALISM AND DEMOCRACY IN LATIN AMERICA 160, 187-189 (Matthew Soberg Shugart and Scott Mainwaring, eds., 1997).

public administration and address financial and economic issues. 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.\footnote{Crisp, \textit{Presidential Decree Authority In Venezuela, supra} note 57, at 147-150.} During these three enabling laws, the Executives enacted 15, 53, and 71 decrees, respectively.\footnote{It is important to note that 36 of the 71 decrees were used for the purpose of selling government bonds to refinance the public debt. \textit{Id.} at 189.} In accordance with their legislative grants, the decrees were restricted to financial, economic, and public administration areas, such as: distributing oil wealth, cutting public salaries, increasing public access to credit, restructuring the central government, enacting new tax laws, promoting investment into developing industries, issuing government bonds, and nationalizing the country’s iron ore industry.\footnote{Crisp, \textit{Presidential Behavior in a System with Strong Parties, supra} note 57, at 187-189.}

The remaining two times the Legislature issued an enabling law from 1961 to 1998 were when the Executive enjoyed minority support in the Legislature. These grants occurred in 1993 and 1994. These enabling laws were used by the majority Legislature to force the Executive to deal with unpopular or difficult economic legislation. 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.\footnote{Crisp, \textit{Presidential Decree Authority in Venezuela, supra} note 57, at 149-150.} For example, the 1993 enabling law was given for six months, while the 1994 enabling was granted for only thirty days.\footnote{\textit{Id.} at 150-151} Because the minority supported Executives were given far less freedom in their decree

\footnote{Crisp, \textit{Presidential Decree Authority In Venezuela, supra} note 57, at 147-150.}
\footnote{It is important to note that 36 of the 71 decrees were used for the purpose of selling government bonds to refinance the public debt. \textit{Id.} at 189.}
\footnote{Crisp, \textit{Presidential Behavior in a System with Strong Parties, supra} note 57, at 187-189.}
\footnote{Crisp, \textit{Presidential Decree Authority in Venezuela, supra} note 57, at 149-150.}
\footnote{\textit{Id.} at 150-151}
making, the Executives enacted only thirteen decrees in 1993 and four decrees in 1994.\textsuperscript{67} Due to the limited scope of the enabling laws, the decrees largely consisted of banking reform, the selling of the national airline, investment in the agricultural area, and unpopular taxes.\textsuperscript{68} 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.\textsuperscript{69} 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.

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.\textsuperscript{70} First, the 1961 Venezuelan constitution restricted DDA to economic and financial matters. Second, the time for which the authority had been granted was limited to a maximum of twelve months. 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. Finally, the provisions for legislative oversight were fairly rigorous.\textsuperscript{71} 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-reaching changes was restricted by the Legislature.

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

\begin{thebibliography}{99}

\bibitem{67} Id.
\bibitem{68} Id.
\bibitem{69} Id. at 150.
\bibitem{70} Crisp, \textit{Presidential Decree Authority in Venezuela}, supra note 57, at 154.
\bibitem{71} Id. at 154.
\end{thebibliography}
Executive to decree changes to the nation’s criminal code. The Legislature had never before granted the Executive the authority to modify the nation’s criminal law without following carefully dictated procedures. From that point on, a dangerous precedent was created, 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**

Since the beginning of his Presidency in February 1999, Hugo Chávez has been granted DDA powers three times. The first enabling law occurred under the framework of the 1961 Constitution, while the other two grants occurred under the 1999 Constitution. Because the constitutional framework between these two eras is different, the following section will first address the DDA grant under the 1961 Constitution and then address the DDA grants under the 1999 Constitution.

a. **DDA Grant Under The 1961 Constitution**

Chávez’ first grant of DDA occurred on April 26, 1999, when Venezuela’s Legislature granted Chávez DDA to issues decrees in economic and financial matters for six months. 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 sought an enabling law to address the country’s economic crisis. Due to decreased oil prices, Venezuela’s economy was in

---

72 *Democracia y Derechos Humanos en Venezuela*, ¶ 325, COMISIÓN INTERAMERICANA DE DERECHOS HUMANOS, (Dec. 20, 2009), http://www.cidh.org/countryrep/Venezuela2009sp/VE09CAIIISP.htm. 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.
shambles, suffering from high inflation and unemployment.\textsuperscript{73} To address this economic crisis, Chávez demanded that Congress pass an enabling law, granting him the power to rule by decree for six months.\textsuperscript{74} Congress, in response to Chávez’ request, drafted and approved an enabling law. 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.\textsuperscript{75} Chávez then threatened to declare a state of national emergency and rule by decree if Congress did not approve his version of the enabling law.\textsuperscript{76} At the same time, moreover, Congress faced an imminent threat of being dissolved if Chávez succeeded in the upcoming Constituent Assembly referendum.\textsuperscript{77} As such, Venezuela’s Congress had enormous pressure to keep Chávez happy, both for the nation’s sake and for Congress’ sake.

As a result of Chávez threat to declare a state of emergency, and the imminent danger of Congress being dissolved by the future Constituent Assembly, Congress balked.\textsuperscript{78} Congress then sent Chávez a much broader version of the enabling law on April 22, 1999, granting Chávez around 90-95\% of what he wanted.\textsuperscript{79} Congress, however, did not grant Chávez the authority to

\textsuperscript{73}Larry Rohter, \textit{Venezuela’s New Leader: Democrat or Dictator?}, THE N.Y. TIMES (Apr. 10, 1999). To show how much Venezuela’s oil sector was hurting, oil prices were $7 a barrel when Chávez entered office, compared to over $80 a barrel, which is common now. Laurie Goering, \textit{Venezuela’s Charismatic Leader On A Roll: But Some Worry As New President Adds To Powers}, CHICAGO TRIBUNE (Apr. 25, 1999).

\textsuperscript{74}Id.

\textsuperscript{75}Id.

\textsuperscript{76}Id.

\textsuperscript{77}Id.

\textsuperscript{78}See Garcia-Serra, The “Enabling Law,” supra note 58, at 280-282.

\textsuperscript{79}Govt. Excludes Oil Bill From Enabling Law, BUSINESS NEWS AMERICAS – ENGLISH (Apr. 23, 1999); Laurie Goering, \textit{Venezuela’s Charismatic Leader On A Roll: But Some Worry As New President Adds To Powers}. 
issues decrees regarding the country’s Hydrocarbons Law.\textsuperscript{80} Even without the Hydrocarbons law, Chávez accepted the second version of the enabling law, backing away from his threat to declare a state of emergency.

Under the 1999 enabling law, Chávez enacted fifty-four decrees that were limited to economic and financial matters.\textsuperscript{81} Several of Chávez’ decrees involved restructuring the country’s tax system, such as adopting a worldwide tax system to increase tax revenues and align Venezuela’s tax system with other countries.\textsuperscript{82} Moreover, to decrease the federal government’s dependency on oil income, Chávez decreed a 15.5\% value added sales tax and a 0.5\% banking-debits tax.\textsuperscript{83}

Chávez also issued decrees cutting the nation’s short term debt and reforming the nation’s public administration. Chávez restructured Venezuela’s Central Administration to promote government efficiency, issued bonds to pay for short-term public debt, increased the country’s debt ceiling, and cut billions of dollars in the country’s budget deficit.\textsuperscript{84} At the same time Chávez cut back on government programs, Chávez increased government salaries by 20\%.\textsuperscript{85} While the enabling law specifically authorized Chávez to raise government salaries by 20\%, such a grant was likely crafted by Chávez to promote a clientelistic relationship between Chávez and

\textsuperscript{80} Id.; Id.

\textsuperscript{81} Democracia y Derechos Humanos en Venezuela, supra note 69, at ¶ 325.

\textsuperscript{82} Prepared Testimony of Lindy Paul – Joint Committee On Taxation Before The Senate Committee On Foreign Relations, FEDERAL NEWS SERVICE (Oct. 27, 1999).

\textsuperscript{83} Chávez Signs Reform Law, ENERGY ALERT (Apr. 28, 1999).

\textsuperscript{84} Congress Approves Enabling Law: President May Reject its Terms, BBC SUMMARY OF WORLD BROADCASTS (Apr. 26, 1999).

\textsuperscript{85} President Raises Public Sector Wages, Sends Two Tax Laws To Congress, BBC SUMMARY OF WORLD BROADCASTS (May 4, 1999).
the public sector. Thus, even though Chávez was forced to cut government programs and jobs, he was still able to obtain the support of the public sector through higher wages.

Furthermore, Chávez modified the nation’s Natural Gas Law. In what appears to be the complete opposite of his later economic ideology, Chávez’ modified the Natural Gas Law to encourage $10 billion of foreign investment in Venezuela’s natural gas sector.86 By establishing a uniform set of rules to increase investment stability, Chávez’ Natural Gas Law allowed an unprecedented amount of private involvement in the natural gas sector. The Natural Gas Law established a new pricing system to ensure returns on investment and set the general income tax on natural gas profits to 34%, subject to tax credits for new investments.87

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 fact that Chávez demanded that Congress enact the enabling law that he drafted himself reveals that Venezuela’s Legislature was not in control of its grant of its own powers. Instead, Chávez held the Legislature hostage and used the threat of a state of emergency and dissolution to force it to give into his demands. Thus, Chávez’ 1999 enabling law altered precedent by reversing the pre-existing power structure between the two branches. Whereas the Legislature had previously been in control of the content of prior enabling laws, the 1999 enabling law placed that control in the Executive. By placing such control in the hands of the Executive, the 1999 enabling law created a dangerous precedent whereby any Executive, let alone Chávez, could now threaten to declare a state of emergency to obtain a specific grant of DDA powers.

86 Cabinet Approves Gas Law, VENEZUELA OIL AND ENERGY (Aug. 16, 1999).
After Chávez became president in 1998, he acted upon his campaign promise and began re-writing Venezuela’s constitution. During the 1999 constitutional re-writing process, Chávez actively sought to increase the scope and power of DDA because, to Chávez, the enabling law was the “Mother of All Laws,” which could enable him to bring social revolution to Venezuelan society. 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. Since the creation of 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. The second time occurred in 2007, while Chávez was, once again, attempting to re-write Venezuela’s Constitution.

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. Although the time-length of the enabling law was no longer than previous enabling laws, the scope was far broader than the previously accepted limitations of economic and financial matters. As such, Chávez could virtually control all aspects of the nation through these six designated areas. The enabling law also created a commission that would monitor and receive Chávez’ decrees, which was argued to be useless considering the majority support Chávez maintained in Congress and the Commission.

Chávez enacted forty-nine decrees under the 2000 enabling law to support his “Plan Bolivar.” The large majority of the decrees were uncontroversial. Many of the decrees involved modernizing industries, declaring sovereignty and providing better security over Venezuela’s natural resources, conserving Venezuela’s national environment, providing credit to the agriculture sector, and promoting investment in science and technology. Chávez also encouraged economic development through decrees that promoted investment in smaller and medium size businesses and in riskier industries that provided greater growth opportunities. Chávez additionally enacted several decrees providing greater consumer protections by holding

90 Id.

91 National Assembly Passes Enabling Law Granting President Chávez Special Powers, BBC SUMMARY OF WORLD BROADCASTS, (Nov. 9, 2000).


businesses and individuals accountable for fraudulent or unethical behavior. Thus, while Chávez may have increased the central government’s presence within the economy and throughout the country, the large majority of the decrees was largely innocuous and benefited both individuals and the nation as a whole.

Several of Chávez’ decrees, however, were extremely controversial. Those decrees include Chávez’ Land Law, the Hydrocarbons Law, and the Fishery Law. Chávez’ Land Law, promulgated with the goal of ending “el latifundio,” provided that the government would tax underutilized land and even expropriate, without compensation, land that was deemed to be idle. The law applied to plots of land that exceed 5,000 hectares, and land was deemed to be idle if 80% of the property was not being used. After land was deemed idle and confiscated, the Land Law dictated that the land be redistributed to landless families. Though there was concern that Chávez would be able to personally determine which lands were or were not idle, the law provided administrative steps before any land was expropriated. Accordingly, administrative protections existed to ensure that state action was not completely meritless or with invidious motives. Due to the law’s ability to expropriate land without compensation, Venezuela’s Supreme Court later found the law to be unconstitutional. Despite this decision, Chávez has expropriated land from large foreign companies under the legal framework of the Land Law.

---


97 El Latifundio refers to the consolidation of large tracts of land into the hands of few owners.


99 Stephen Temple, Supreme Court of Venezuela Declares Land Law Decree Unconstitutional, WORLD MARKETS ANALYSIS (Nov. 21, 2002).
Chávez also decreed a new Hydrocarbons Law.\textsuperscript{100} The new law greatly increased the state’s presence in the country’s oil industry. The Hydrocarbons Law required that the state control at least 50\% of all oil developments and increased government royalties on oil profits from 16.6\% to 30\%\textsuperscript{101}. Chávez’ critics argued that this law would discourage foreign investment in the nation’s oil industry, as foreign companies would not be able to recuperate the large investments they put into their developments. Despite these concerns, Chávez has used these changes to the Hydrocarbons Law to increase the country’s oil wealth and exert more control over foreign corporations, who have continued to invest in Venezuela’s substantial oil deposits.

Chávez’ other controversial decree was the Fishery Law, which increased the taxes on industrial fishing companies by 740\%.\textsuperscript{102} Defining industrial finishing companies to be those that used mechanized systems that are technologically or capital intensive, the law was viewed as an attack on the commercial fishers who made up roughly 25\% of the nation’s fishing industry.\textsuperscript{103} Chávez, however, argued that the decree was enacted to protect artisanal fishers, who made up the remaining 75\% of the fishing industry. Chávez, additionally, promoted the decree as a tool to avoid over-fishing and protect the country’s fish population.\textsuperscript{104} Despite the benefits of the new Fishery Law, the law was a direct attack on large foreign and domestic commercial interests. At the same time, it must be noted that the law provided greater

\begin{itemize}
\item \textsuperscript{103} Id.
\item \textsuperscript{104} Id.
\end{itemize}
protections for the Venezuelan fishing population, whose interest were likely being hurt by their larger competitors.

One decree that was more ideologically controversial was Chávez’ decree promoting the development of cooperative associations. The decree provided for economic, educational, and public support for cooperative associations to promote a participatory society. On paper, the decree seemed to support the inclusion of more sectors of society into the political process. Chávez’ opposition, however, saw this as an attempt by Chávez to create clientelistic organizations, thereby allowing him to garner more political support. Chávez’ opposition, moreover, saw this decree as a move towards Socialism by encouraging socialist organizations.

Overall, the overwhelming majority of Chávez’ decrees were uncontroversial. Many of Chávez’ decrees benefited Venezuelan society in that they provided greater consumer protections, promoted economic development, and declared sovereignty over Venezuela’s natural resources. At the same time, several of Chávez’ decrees actively attacked the interests of large domestic and international corporations. As a result, these industries pushed back, vilifying Chávez as being a socialist and anti-democratic. While these complaints may later become justified, 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. The 2007 enabling law granted Chávez decree authority for eighteen months – six months longer than any previous enabling law. The enabling law also provided

---


Chávez a much broader scope of authority than had ever been granted before. The enabling law’s scope permitted Chávez to enact decrees in twelve areas, including: (1) energy; (2) infrastructure, transport, and services; (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; (11) science and technology; and (12) land-use planning. 107 Similar to the 2000 version, the enabling law created a legislative commission to work with and oversee Chávez’ decree authority. Once again, however, this commission lacked any true power as it was controlled by Chávez’ supporters.

In total, Chávez enacted sixty-seven decrees. Similar to the 2000 enabling law, many of Chávez decrees under the 2007 enabling law were not controversial. For example, Chávez issued several decrees promoting development and investment in underdeveloped regions, protecting the natural environment, 108 and preventing the spread of animal and plant disease. 109 Chávez also enacted decrees seeking to ensure Venezuela’s sovereignty over its aquatic space and any oil interests that may be included within that territory. 110

Chávez additionally issued several decrees increasing taxes to provide the central government income sources alternative to the oil industry. For instance, Chávez decreed a value-added tax, which raised taxes on luxury and imported items. 111 Chávez also raised taxes

---

107 Id.
on cigarettes and alcohol.\textsuperscript{112}

Moreover, Chávez enacted several decrees seeking to better the lives of Venezuelan citizens. For example, one decree provided better housing opportunities for Venezuelan citizens. Furthermore, Chávez enacted several decrees that protected consumers, and in particular the poorest individuals, by ensuring them access to basic necessities and public resources.\textsuperscript{113} These decrees also provided consumers with protection against dangerous, blackmarket, and adulterated products.

Unlike the 2000 enabling law, however, the number of controversial decrees enacted under the 2007 enabling law was much higher. Although Chávez’ 2007 Constitutional Referendum failed, Chávez used the enabling law to push several of the proposed reforms through as law.\textsuperscript{114} Twenty-six of Chávez’ sixty-seven decrees, including more than a dozen that were similar to amendments of the failed 2007 constitutional reform, were enacted immediately before the enabling law expired in August 2008.\textsuperscript{115} The Venezuelan government, additionally, did not release the full text of the decrees until nearly a week later.\textsuperscript{116} Chávez’ opposition claimed that Chávez’ promulgation of these decrees was in direct conflict with the 2007

\textsuperscript{112} Decretos Nos. 5,618 and 5,619, GACETA OFICIAL NO. 5.852 EXTRAORDINARIO DE LA REPUBLICA BOLIVARIANA DE VENEZUELA VIERNES 5 DE OCTUBRE DE 2007, \url{http://www.tsj.gov.ve/gaceta_ext/octubre/051007/051007-5852-03.html}.


\textsuperscript{114} As Maryclen Stelling, a sociology professor at the Andres Bello Catholic University in Venezuela said, “Chávez had a Plan A and a Plan B. Approving the constitutional reforms through a vote - the revolution using democratic channels – represented Plan A, and the enabling law was Plan B.” Llana Miller, Joe Roe Rozco, Sara Rozco, Venezuela’s Chávez Riles Critics With New Decree, CHRISTIAN SCIENCE MONITOR (Apr. 11, 2008).

\textsuperscript{115} Ian James, Loss Not All Bad for Venezuela’s Chávez, YAHOO NEWS (Dec. 3, 2007), news.yahoo.com/s/ap/20071204/ap_on_re_la_am_ca/chavez.; Simon Romero, New Decrees from Chavez Mirror Spurned Measures, NY TIMES.COM (Aug. 6, 2008), \url{http://www.nytimes.com/2008/08/06/world/americas/06venez.html?ref=world}.

\textsuperscript{116} Romero, New Decrees from Chávez Mirror Spurned Measures, supra note 110.
Constitutional Referendum and the will of the people. 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.\textsuperscript{117}

The decrees that were the most published, and possibly the most controversial, were Chávez’ decrees nationalizing industries. For example, Chávez nationalized the iron and steel industries in the region of Guayana.\textsuperscript{118} The decree required that all privately owned iron and steel companies within the region become mixed public-private companies with the state owning, at a minimum, 60\% of the company. Chávez, additionally, decreed that all private companies in the oil-rich Orinoco oil region become mixed public-private companies, with the state owning 60\% of the companies.\textsuperscript{119} Finally, Chávez’ “Cement Law” required that large, private cement companies become mixed public-private companies with the state owning at least 60\% of the company.\textsuperscript{120}

While none of these decrees specifically allowed for the entire nationalization of private companies, the decrees inserted the Venezuelan government into private industrial projects and substantially limited a private company’s access to profits. At the same time, however, these decrees benefited Venezuela, as these nationalizations ensured that Venezuela received a higher percentage of income from these industries and that key industrial goods – i.e., steel and cement – were not being exported and remained within the country.

Chávez also issued several decrees that provided the framework for future

\textsuperscript{117} Context Paper: Recent Laws Approved Via The Enabling Law, EMBASSY OF THE BOLIVARIAN REPUBLIC OF VENEZUELA (Aug. 2008). The paper cites a strike as an example of activity that would be in violation of the law.


nationalizations. In the “Law of the Reorganization of the Energy Sector,” Chávez’ decree provided for the future nationalization of privately-owned energy companies. Moreover, Chávez’ National Railroad Law and banking law provided the framework the future expropriation of privately owned railroads and banks. Currently, however, it is unclear whether Chávez will have to wait for another enabling law to nationalize such industries, or if Chávez can use the “gray” area of his constitutional decree authority to nationalize these industries when he sees fit.

Chávez additionally issued several decrees modifying the military and national police to further centralize control of these groups under the Executive. In his “Law of the Bolivarian National Army,” Chávez created the Bolivarian National Militia, which is in addition to Venezuela’s Army, Navy, Air Force, and National Guard. Like the other arms of the military, the National Militia is under the control of the President. 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. 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. 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?” Moreover, to what extent can the National Militia monitor and control the daily lives of the country’s citizens?

Chávez also obtained greater control over the country’s security forces under the “National Police Law.” The National Police Law placed all of the country’s police officers under the control of the Minster of Popular Power. Accordingly, the law incorporated all federal, state, and municipal police into one authority. Once again, several questions linger as to the extent of control the President will have over the country’s security forces. Chávez’ opposition fears that Chávez is creating a police state similar to Cuba, where Chávez will be able to use the nation’s security forces to quell any protests and silence all opposition. However, due to the ambiguities of both laws, the true force of the National Militia and the National Police Law will only be seen once Chávez uses them in practice.

Although Chávez enacted decrees that provided consumers with greater protection, those same decrees undermined the rights of workers and business owners. For example, although Chávez’ “Law of Food Security and Sovereignty” provides consumers the right to access to basic food supplies, the law involved dramatic changes to the country’s private economic system. The law modified the nation’s criminal code and created new felonies for individuals who block a consumer’s access to goods that are deemed basic. The law, additionally, allows for fines, seizures, temporary closings, and prison for up to three years for people found guilty of violating the law. Additionally, Chávez’ “Law for the Defense of Persons In Access To Goods and Services,” which guarantees citizens the right to have access to certain fundamental goods and

---


services, undermines the rights of the producers of those goods and services in that it allows for the expropriation of businesses during states of exception. The law also modified the criminal code to create prison sentences for up to ten years for people who *boicot*, or refuse to sell or produce, these items. Finally, under the “Law for the Popular Defense of Goods Under Price Controls,” which, once again, ensures citizens access to basic goods, Chávez modified the criminal code to punish individuals who deny citizens access to goods that are under price controls. The new law creates prison sentences for up to six years for individuals who impede, directly or indirectly, with the production and transportation of goods subject to price controls.

These decrees are problematic for several reasons. First, the decrees appear to be an attack on Chávez’ labor opposition. By creating criminal sanctions for actions that impede the production and transportation of necessary goods, the decrees essentially deny labor their right to strike. Moreover, the decrees undermine the property rights of business owners because unprofitable businesses would still have to operate at a loss. If the businesses refused to continue operating, goods could be confiscated and owners could be sent to jail. Thus, while these decrees provide additional benefits to 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 who are directly appointed by the President and possess

---


national budgets separate from those given directly to regional governments. While Chávez argued that this law was to provide greater political participation, Chávez’ critiques viewed the new law as a tool to undermine political opposition. Such a fear is legitimate as the law effectively allows Chávez to 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.

Chávez, additionally, enacted several decrees that were viewed as being controversial by further cementing “21st Century Socialism” in Venezuela. For example, Chávez created the National Institute for Socialist Education and Training and issued a decree providing barter as an official alternative payment system to currency. Chávez, additionally, decreed the “Law for the Creation and Development of the Popular Economy” which sought to encourage the “socioproductive” economy. This law created production, distribution, and consumption “brigades” to encourage communal development. Finally, Chávez replaced one development fund with the “Fund for the Socialist Agrarian Development,” which placed emphasis on small and medium agricultural producers. While these decrees may not have much impact in the overall function of society, the decrees’ emphasis on socialism is controversial in that they further cement the ideology of socialism into the public sector. Moreover, these decrees help

transform Chávez’ ideal of socialism into the nation’s status quo, which can only be changed through future action by opposition leaders.

It is important to note that not all of Chávez’ controversial decrees were successful. In May 2008, Chávez issued a controversial decree modifying the “National Intelligence and Counterintelligence Law.” The law, described as a tool to protect the country from an invasion from the United States, was criticized as being fascist in its requirement that all citizens cooperate with police investigations or be subject to jail time. The law also authorized searches without a court order when they were done in the interest of national security. Furthermore, the law created neighborhood leaders who actively sought to find incriminating information about their neighbors. Both Chávez’ supporters and opposition challenged the law, arguing that Chávez was creating a police state similar to that in Cuba. Due to the unpopularity of the decree, Chávez revised the law in June 2008 to remove the most controversial aspects of the law.

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’ promulgated decrees directly attacking large domestic and foreign commercial interests. 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

---


134 Id.; Id.

many individuals within society. Although many of the decrees greatly increased consumer protections, those same decrees infringed on the rights of workers and business owners. Finally, and most importantly, Chávez used the 2007 enabling law to further consolidate power around the Executive. By reorganizing the military and the national police, Chávez has equipped himself with the man-power to quell opposition movements. Furthermore, by establishing alternative regional political leaders, Chávez has provided himself a legal framework to undermine opposition leaders.

3. **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. On the other hand, during Chávez’ presidency, the enabling law has been granted three times. It is also apparent that the control over the DDA grant has transferred from the Legislature to the Executive, where Chávez dictates what powers he will obtain in any enabling law and the Legislature has little recourse to argue otherwise. 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 amount of deference. Finally, the system of oversight by the Legislature is no longer rigorous. The fact that Chávez refused to give the exact language of his twenty-six last-minute decrees in 2008 for a week 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 through. The difference between the two eras, however, is that Chávez has gone far beyond the precedent
established during the prior era by modifying the criminal code to include a broad range of criminal offenses. In fact, Chávez’ changes to Venezuela’s criminal code have broad ranging effects as it could modify the nation’s current labor laws, property laws, and economic rights of individuals.

Figure 3, below, provides a visual comparison of all of the enabling laws granted to the Executive 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. The subjective analysis, however, is not used to determine whether the decrees are good or bad. Merely, the subjective analysis applies to decrees that were controversial in nature or substantially altered the pre-existing economic, social, or legal conditions of Venezuela.
### Figure 3

<table>
<thead>
<tr>
<th>Year</th>
<th>Length of Enabling Law</th>
<th>Scope of Enabling Law</th>
<th>Number of Decrees Enacted</th>
<th>Number of Controversial Decrees</th>
</tr>
</thead>
<tbody>
<tr>
<td>1961</td>
<td>12 Months</td>
<td>Economic and Finance</td>
<td>15</td>
<td>0</td>
</tr>
<tr>
<td>1974</td>
<td>12 Months</td>
<td>Economic and Finance</td>
<td>53</td>
<td>1</td>
</tr>
<tr>
<td>1984</td>
<td>12 Months</td>
<td>Economic and Finance</td>
<td>71&lt;sup&gt;136&lt;/sup&gt;</td>
<td>0</td>
</tr>
<tr>
<td>1993</td>
<td>4 Months</td>
<td>Economic and Finance</td>
<td>13</td>
<td>1</td>
</tr>
<tr>
<td>1994</td>
<td>1 Month</td>
<td>Economic and Finance</td>
<td>4</td>
<td>0</td>
</tr>
<tr>
<td>1999</td>
<td>6 Months</td>
<td>Economic and Finance</td>
<td>54</td>
<td>0</td>
</tr>
<tr>
<td>2000</td>
<td>12 Months</td>
<td>Finance</td>
<td>49</td>
<td>4</td>
</tr>
<tr>
<td></td>
<td></td>
<td>- Economy and Society</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>- Infrastructure</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>- Personal and Legal Security</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>- Science and Technology</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>- Civil Service</td>
<td></td>
<td></td>
</tr>
<tr>
<td>2007</td>
<td>18 Months</td>
<td>Energy</td>
<td>67</td>
<td>18</td>
</tr>
<tr>
<td></td>
<td></td>
<td>- Energy, Transport, and Services</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>- Transformation of the State</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>- Economic and Social Affairs</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>- Finances and Taxation</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>- Grassroots participation</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>- The Exercise of Public Office</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>- Citizen and Judicial Security</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>- Territorial Order</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>- Security and Defense</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>- Science and Technology</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>- Land-use Planning</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

<sup>136</sup> 36 of the 71 decrees were used for the purpose of selling government bonds to refinance the public debt. Brian Crisp, *Presidential Behavior in Venezuela*, supra note 57, at 189.
a. **Time Length of the Enabling Law**

The data shows that Chávez has lengthened the time length of DDA in Venezuela to eighteen months. Although previous Executives were granted DDA for twelve months, no prior Executive was granted DDA for eighteen months, which is, currently, 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. Thus, Chávez has enjoyed DDA powers for over ¼ 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 in thirty-eight years. Accordingly, it took Chávez less than a decade to nearly surpass the previous total time length of all DDA grants of his predecessors.

b. **Scope of the Enabling Law**

In measuring the scope of the enabling laws, it is necessary to look at the specific grants of each particular enabling law. The data shows that the scope of enabling laws has dramatically increased under the Chávez presidency. Whereas the first six grants of the enabling law, including Chávez’ first grant, were limited to economic and financial matters, the scope of Chávez’ 2000 and 2007 enabling laws were considerably larger, with six and twelve different areas, respectively.

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 offer the enabling law 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 different areas signifies that Chávez had the authority to enact decrees in any possible area. That is, by doubling the number of areas from 2000 to 2007, the ability to challenge Chávez’ decrees for being outside the scope of the enabling law is severely hindered as it becomes more difficult to argue that any decree is outside all of the twelve possible areas.

c. Number of Decrees Issued

When compared to any one grant of the enabling law, Chávez has not issued the largest number of decrees. While the most decrees Chávez issued during any enabling law is sixty-seven, the highest number of decrees issued by any Executive occurred during the 1984 enabling law when the Executive issued seventy-one decrees. Thus, on a pure numerical basis, Chávez has not issued the highest number of decrees during any one enabling law. It is, however, important to note 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.137

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. Chávez’ has issued 170 decrees under enabling laws. On the other hand, Chávez’ predecessors issued only 156 decrees during their enabling laws. Based on these numbers, it is clear that not only has Chávez been most 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.

137 Brian Crisp, Presidential Behavior in Venezuela, supra note 57, at 189.
Furthermore, through the use of DDA, Chávez has become the nation’s leading legislator. During the 2007 enabling law, Chávez issued sixty-seven decrees into law. At the same time, Venezuela’s Legislature approved only twenty-five laws. Additionally, while 73% of all laws passed in 2007 and 2008 were drafted by Chávez, 27% of the laws passed were drafted by Venezuela’s Legislature.

d. 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 power of opposition parties. Finally, this criterion applies to ideological changes made through decrees. Although these decrees may not have a substantial impact in practice, the ideological make-up of the federal government is an essential component of the overall policy of the government 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 or drastic decrees. Under the 1974 enabling law, the Executive issued one controversial decree, which nationalized the country’s iron ore industry. Even though the 1974 enabling explicitly directed that the Executive

138 Democracia y Derechos Humanos en Venezuela, supra note 69, at ¶ 325.
139 Id.
nationalize the iron ore industry, the decree, by itself, is substantial enough to be included in this analysis. Under the 1993 enabling law, the Executive issued one controversial decree when he privatized the national airline. 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.

Under the Chávez era, Chávez issued four controversial decrees under the 2000 enabling law and eighteen controversial decrees under the 2007 enabling law. The controversial decrees are those that were previously discussed above. 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.¹⁴⁰

Overall, the figures show that Chávez use of DDA powers through the enabling law 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**

As was previously discussed, Ecuador provides its Executive post-approval DDA. 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. 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. Consequently, the use of DDA in Ecuador is inherently less than is seen in Venezuela under pre-approval DDA.

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**

   e. **Gustavo Noboa Presidency**

   Gustavo Noboa’s (“Noboa”) presidency lasted from January 20, 2000 to January 15, 2003. During this period, Noboa sent twelve *proyectos urgentes* to the Ecuador’s National Assembly. Noboa’s *proyecto urgentes* all focused on economic or financial matters. The *proyectos urgentes* created a “petroleum fund” to help pay off state debt and increase investment

---

141 While I believe that the following data is accurate, I must note that the accuracy of the data is limited to the accuracy of the data available on Ecuador’s online version of the *Registro Oficial*. Despite any problems with the online database, I believe that the following analysis is accurate and provides true depiction of DDA in Ecuador.

142 Although an analysis of the entire period after the 1998 Constitution would have been optimal, information regarding *proyectos urgentes* prior to 2000 is not readily available. Accordingly, the analysis is limited to 2000 to the present.
in the oil sector,\textsuperscript{143} restructured the financial system,\textsuperscript{144} provided tax credits,\textsuperscript{145} and increased foreign investment in the oil industry.\textsuperscript{146} Noboa also sent several \textit{proyectos urgentes} that merely renewed prior laws that were on the verge of expiring. None of Noboa’s \textit{proyectos urgentes} were controversial in nature.

Noboa did not face much resistance from the National Assembly regarding his \textit{proyectos urgentes} as the National Assembly rejected only one of Noboa’s \textit{proyectos urgentes}.\textsuperscript{147} The National Assembly rejected Noboa’s \textit{proyecto urgente} involving the income of public employees.\textsuperscript{148} Rather than face the issue through a \textit{proyecto urgente}, the National Assembly wanted the law to be sent through ordinary means by incoming President Lucio Gutierrez.

\textbf{f. Lucio Gutierrez Presidency}

Lucio Gutierrez’s (“Gutierrez”) presidency lasted from January 2003 to April 2005. Lucio Gutierrez sent ten \textit{proyectos urgentes} during his presidency. Gutierrez’s \textit{proyectos urgentes} restructured the public sector to reduce nepotism, created a unified public employment


\textsuperscript{147} While it would have been best to have looked at how drastically the National Assembly modified individual \textit{proyectos urgentes}, such data is not readily available. Thus, the most that could be observed was whether the National Assembly rejected or accepted the Executives’ \textit{proyectos urgentes}.

income standard, and increased government efficiency.\(^{149}\) Gutierrez also sent a *proyecto urgente* increasing taxes on cigarettes and liquor to help pay for pensions.\(^{150}\) 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.\(^{151}\) 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. While Gutierrez’ *proyectos urgentes* may have been broad in nature, none of the *proyectos urgentes* 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 *proyectos urgentes*. First, the National Assembly rejected Gutierrez’ *proyecto urgente* involving the restructuring of the oil industry. The *proyecto urgente* 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 35%.\(^{152}\) 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


\(^{151}\) *Gobierno Del Ecuador Impulsa Reforma Económica Integral*, XÍNHUA NEWS AGENCY – SPANISH (Mar. 16, 2005).

Gutierrez’ *proyecto urgente* that would have issued government bonds to invest in a new generation of hydro-electric energy.153 Once again, this *proyecto urgente* sought to encourage private investment in the energy sector by prioritizing payment to private companies over state companies. This prioritization also meant that private energy companies would be paid before the central government paid the administrative costs, including employee salaries, of the public energy companies. The National Assembly saw this proposal as being politically unpopular and rejected it.

g. **Alfred Palacio Presidency**

Alfred Palacio was President of Ecuador from April 2005 to January 2007. During Alfred Palacio’s fifteen month presidency, he sent eight *proyectos urgentes* to the National Assembly. Palacio’s *proyectos urgentes* created a uniform credit verifying system,154 redistributed the funds of the “Stabilization, Social Investment, and Reduction of Public Debt Fund,”155 re-approved tax credits,156 and enabled the Central Bank to obtain loans to pay the country’s balance of payments problems.157

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

---


154 *Proyecto 26-810*, Registro Oficial De Ecuador – 12 de Septiembre del 2005, DECRECHOECUADOR.COM

155 *El Lavado de Activos entrará a debate*, EL COMERCIO.COM (June 14, 2005)

156 *Las donaciones a favor del Municipio serán indefinidas*, EL COMERCIO.COM (Dec. 1, 2006)

157 *Un proyecto urgente para contratar créditos*, EL COMERCIO.COM (Oct. 7, 2005)
and the need to invest in infrastructure to reduce future losses,\textsuperscript{158} calling for contract renegotiations with foreign companies,\textsuperscript{159} and creating a fund for investment into the energy sector.\textsuperscript{160} Unlike his predecessors, Palacio’s \textit{proyectos urgentes} were not rejected by the National Assembly. While they were likely modified, the fact that Palacio’s \textit{proyectos urgentes} were not rejected tends to reflect that the National Assembly did not view them to be controversial.

\textbf{h. Characteristics of the Pre-Correa Era}

The pre-Correa era has several key characteristics regarding the use of the country’s post-approval DDA powers. First, during this pre-Correa era, the use of post-approval DDA powers was quite limited. None of the Executives attempted to inundate the National Assembly with \textit{proyectos urgentes}. Noboa sent only twelve \textit{proyectos} during his thirty-six month presidency, Gutierrez sent merely ten \textit{proyectos} during his twenty-seven month presidency, and Palacio sent eight \textit{proyectos} during his fifteen month presidency. Second, Noboa, Gutierrez, and Palacio’s \textit{proyectos urgentes} were also limited to the economic and financial arena, with the focus largely being 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’ \textit{proyectos urgentes}. Although they rejected only a small percentage of the \textit{proyectos urgentes} - one during the Noboa administration and two during the Gutierrez administration - the rejections show that


\textsuperscript{159} \textit{El miércoles se debate la Ley de Hidrocarburos}, EL COMERCIO.COM (April 6, 2006) \url{http://www.elcomercio.com/solo_texto_search.asp?id_noticia=22514&anio=2006&mes=4&dia=6}.

\textsuperscript{160} \textit{El proyecto de ley urgente es la prioridad del Congreso}, EL COMERCIO.COM (Sept. 5, 2006) \url{http://www.elcomercio.com/solo_texto_search.asp?id_noticia=39943&anio=2006&mes=9&dia=5}. 
the National Assembly was not powerless to respond to the Executives’ *proyectos urgentes*. In fact, the rejections reveal that the Legislature was an active partner in Ecuador’s post-approval DDA, 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.\(^{161}\) 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,\(^\text{162}\) financed $220 million for education,\(^\text{163}\) and limited the maximum interest rate on consumer credit.\(^\text{164}\) Correa also sent a *proyecto urgente* modifying the country’s Hydrocarbons Law. The *proyecto urgente* sought to combat the black-market sale of oil and its byproducts.\(^\text{165}\) This *proyecto urgente* is significant in that it proposed altering the criminal code to increase criminal sanctions, including fines and jail time, for individuals violating of the law. Although the *proyecto urgente* directly addressed issues involving Ecuador’s economy, this appears to have been the first instance where an Executive sent a *proyecto urgente* involving criminal measures.

Since the 2008 Constitutional Referendum, Correa has sent three additional *proyectos*

---

\(^{161}\) Even though Correa sent *proyectos urgentes* to the National Assembly before and after the 2008 Constitution, it is not necessarily to formally distinguish the two areas since the 2008 Constitution did not substantially change Ecuador’s DDA.


Delegated Decree Authority In Contemporary South America

*urgentes* to the National Assembly. One *proyecto urgente* placed a 1% tax on currency leaving the country to combat capital flight. More recently, Correa sent a *proyecto urgente* suspending fines for Haitian tourists whose visas had expired due to Haiti’s February 2010 earthquake.

Although Correa has not frequently used his post-approval DDA powers, Correa, after the 2008 Constitution, used “political gamesmanship” when sending a *proyecto urgente*. 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. Although this *proyecto urgente* was significant in itself by increasing the amount employers had to pay for each employee, Correa 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. As a result of this timing, the National Assembly’s thirty day review period was essentially cut in half. Although the National Assembly held a special hearing during its recess to discuss Correa’s *proyecto urgente*, Correa angered his opposition who argued that the recess period should not count against its thirty day period. Despite opposition claims to the contrary, the National Assembly was forced to address

---


168 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.


Correa’s *proyecto urgente* within the constitutionally established thirty day time period, regardless of national elections or congressional recess. Notwithstanding the drama that surrounded the timing of Correa’s *proyecto urgente*, the National Assembly approved Correa’s *proyecto urgente*.

Even though Correa has only sent seven *proyectos urgentes* during his now three-year presidency, this figure may be skewed due to the country’s Constituent Assembly and subsequent dissolution of the National Assembly.\(^\text{171}\) After the Constituent Assembly was formed in the fall of 2007, it dissolved the National Assembly for six months.\(^\text{172}\) Thus, while the National Assembly was dissolved, Correa could no longer use his post-approval DDA powers and send *proyectos urgentes* to the legislature since no National Assembly existed to receive them. Moreover, since the Constituent Assembly had the authority to make laws during the National Assembly’s dissolution, Correa could have used the overwhelming support he had in the Constituent Assembly to push through laws.\(^\text{173}\)

Overall, during the Correa era, we see a decrease in the use of post-approval DDA. Although this figure may be skewed due to outside circumstances, it does reveal that DDA may not be Correa’s method of choice in exerting his executive power. In fact, it appears that Correa, particularly since the 2008 Constitution, has begun using more of his “gray” decree powers to effectuate change, such as the creation of national companies and the nationalization of hospitals.

---

\(^\text{171}\) This figure is accurate as of May 2010.


\(^\text{173}\) *Id.* Correa’s political party, Alianza País, had 80 out of 130 seats in the Constituent Assembly.

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*. While it would have been useful to determine how much the National Assembly has modified the particular *proyectos urgentes*, such information is not readily available. 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.

<table>
<thead>
<tr>
<th>President</th>
<th>Number of Proyectos Urgentes</th>
<th>Average Rate of Proyectos Urgentes Sent (# divided by months as president)</th>
<th>Number of Proyectos Urgentes Rejected by the National Assembly</th>
<th>Number of Controversial Proyectos Urgentes</th>
</tr>
</thead>
<tbody>
<tr>
<td>Gustavo Noboa</td>
<td>12</td>
<td>1:3</td>
<td>1</td>
<td>0</td>
</tr>
<tr>
<td>Lucio Gutierrez</td>
<td>10</td>
<td>1:2.7</td>
<td>2</td>
<td>0</td>
</tr>
<tr>
<td>Alfred Palacio</td>
<td>8</td>
<td>1:1.9</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>Rafael Correa</td>
<td>7</td>
<td>1:5.5</td>
<td>0</td>
<td>2</td>
</tr>
</tbody>
</table>

Figure 4

**Ecuadoran DDA**
a. **Number of Proyectos Urgentes**

Comparing the two eras, we see that the use of post-approval DDA has decreased in the Correa era. Numerically, 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 proyectos urgentes, respectively, Correa has only sent seven proyectos urgentes to the National Assembly.

b. **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, Noboa sent, on average, one proyecto urgente every three months. Gutierrez, additionally, sent a proyecto urgente, on average, once every 2.7 months. Palacio, moreover, sent, on average, 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 proyectos urgentes.

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 5.5 months. Although Correa’s figure may be skewed due to the dissolution of Ecuador’s National Assembly, the National Assembly was dissolved for six months. Thus, even assuming that Correa sent a proyecto urgente for each of those months, Correa’s frequency would have been one proyecto urgente for every three months, which would be similar to that of Noboa. Accordingly, the data shows that Correa’s use of post-approval DDA has been significantly less than his predecessors.
c. **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 proper 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.

d. **Number of Controversial Proyectos Urgentes**

Substantively, the Executives’ *proyectos urgentes* during both eras cannot be considered controversial. In fact, all of the presidents limited their *proyectos urgentes* to economic matters, keeping the subject of their DDA within the constitutional grant. At the same time, however, we see that Correa has used post-approval DDA powers two times in a manner that must be considered controversial. Unlike his predecessors, Correa 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. Even though this *proyecto urgente* focused on Ecuador’s economy, none of Correa’s predecessors used *proyectos urgentes* to impose criminal sanctions. Accordingly, Correa’s attempt to modify the criminal code established a new precedent that will allow future Ecuadoran Executives to use *proyectos*
urgentes to modify Ecuador’s criminal code. Thus, even though the substance of the proyectos urgentes was not controversial, the methods used by Correa and the precedence established were controversial.

C. Colombia

Colombia’s 1991 Constitution provides for pre-approval DDA, permitting Colombia’s Legislature to grant the Executive facultades extraordinarias for up to six months to enact decrees with the force of law. The Executive’s authority, however, is limited, as he cannot issue codes, statutes, organic laws, decrees involving the administrative or technical services of the Legislature, or taxes.

The following analysis involves both the pre-Uribe period and the Uribe era. Under the pre-Uribe era, the analysis is limited to the presidencies of Ernesto Samper and Andrés Pastrana. As such, the analysis does not involve the Presidency of César Gaviria, the first President under the 1991 Constitution. I excluded Gaviria from the present analysis for several reasons. First, because part of Gaviria’s presidency occurred before the 1991 Constitution, some of the facultades extraordinarias granted to Gaviria occurred before the 1991 Constitution and under a different legal framework. Second, since Gaviria was the president immediately after the 1991 Constitution, he was provided broad powers to alter the state in accordance with the new constitution that were outside the traditional facultades extraordinarias. Thus, to provide as accurate of an analysis of Colombia’s DDA as possible, it is necessary to limit the comparison to only those presidents whose presidency occurred entirely after the 1991 Constitution.
2. **Pre-Uribe Era**

a. **Samper Presidency**

Ernesto Samper (“Samper”) enjoyed sixteen different grants of *facultades extraordinarias* from August 1994 to August 1998. Samper’s first three grants of *facultades extraordinarias*, however, were inherited from the Gaviria presidency. The first grant of *facultades extraordinarias* that Samper acted upon was granted under *Ley 115 de 1994*. *Ley 115* granted the Executive six months to modify the structure and administrative procedures of the Ministry of National Education.\(^{175}\) The interesting aspect of *Ley 115* is that it did not explicitly grant the Executive *facultades extraordinarias*. Nonetheless, Samper issued a decree under the claim of *facultades extraordinarias* on the second day of his presidency, which restructured the Ministry of Education.\(^{176}\) Thus, even though Colombia’s Legislature did not explicitly grant *facultades extraordinarias*, Samper invoked such authority to fulfill the spirit of the law. Moreover, even though the grant of *facultades extraordinarias* was granted to the prior president, the fact that the grant lasted for six months and extended into Samper’s presidency meant that he had the authority to issue decrees under that law just like the prior president.

The other of grants of *facultades extraordinarias* Samper inherited from Gaviria were under *Leyes 134 y 136 de 1994*. Under *Ley 134*, Samper, following the specific instructions of the grant, issued one decree creating the Fund of Citizen Participation.\(^{177}\) Under *Ley 136*, Samper inherited several different grants of *facultades extraordinarias* within the same piece of

---


For instance, Article 196 granted the Executive the authority to modify the School of Public Administration for three months, which Samper accomplished in one decree in September 1994. Moreover, Ley 136 granted the Executive *facultades extraordinarias* to compile the constitutional provisions and laws for the organization and functioning of municipalities. Samper issued one decree regarding this specific grant, which was later declared to be unconstitutional.

Samper’s first grant of *facultades extraordinarias* during his presidency was under Ley 160 de 1994. That law granted the Executive the authority to issue norms regarding the National System of Agrarian Reform and Rural Development. The law included specific details as to what Samper could do, including restructuring the Ministry of Agriculture and reassigning, combining, or eliminating divisions within the national system. Samper issued one decree in response to this grant, which restructured the Ministry of Agriculture and Rural Development and the Colombian Institute of Agrarian Reform.

The Colombian Legislature next granted Samper *facultades extraordinarias* for ninety

---


181 See id. The constitutionality or unconstitutionality of the Executive’s use of *facultades extraordinarias* is not important in this analysis. Instead, the analysis is merely trying to determine the prevalence of Colombia’s form of DDA within modern practice.


days to create and develop the new category of National Police at the Executive Level.\textsuperscript{184} The grant also specifically dictated that the Executive modify previous decrees to comply with the new police category.\textsuperscript{185} In response, Samper issued five decrees. The first decree created the new category of National Police at the Executive Level.\textsuperscript{186} The other four decrees modified previous decrees.\textsuperscript{187}

Samper was next given facultades extraordinarias under Ley 181 de 1995 for six months to restructure the nation’s Institute of Sports, revise pre-existing legislation regarding the nation’s physical education and sport system, and to create a special sports group within the National Police.\textsuperscript{188} Samper, subsequently, issued four decrees following the specific guidelines established under Ley 181. Those decrees included creating the special sports group within the National Police, promoting the development of physical education and national sports, restructuring the Colombian Institute of Sports, and revising previous sports legislation.\textsuperscript{189}

Congress next granted Samper facultades extraordinarias under Ley 190 de 1995 for six months to abolish or reform unnecessary procedures and regulations within the National Administration.\textsuperscript{190} The goal of the grant was to reduce corruption within the government.

\textsuperscript{184} Ley 180 de 1995, Secretario del Senado, SECRETARIOSENADO.GOV 

\textsuperscript{185} Id.

\textsuperscript{186} Decreto 132 de 1995, Decretos en Linea, PRESIDENCIA DE LA REPUBLICA DE COLOMBIA, 

\textsuperscript{187} Decretos 572-575 de 1995, Decretos en Linea, PRESIDENCIA DE LA REPUBLICA DE COLOMBIA, 


\textsuperscript{189} Decretos 1228 – 1231 de July 18 1995, Decretos en Linea, PRESIDENCIA DE LA REPUBLICA DE COLOMBIA, 
Samper, following the specific instructions of the grant, issued one decree restructuring the National Administration and combating corruption.\textsuperscript{191}

Samper was granted \textit{facultades extraordinarias} two more times in 1995. Samper issued one decree under each grant. Under \textit{Ley 222}, Samper issued a decree reorganizing the Superintendent of Society.\textsuperscript{192} Under \textit{Ley 223}, Samper created a regional body for the Management of National Taxes and Customs.\textsuperscript{193} Both grants of \textit{facultades extraordinaras} lasted for six months and contained specific guidelines as to what the Executive could decree.

In October 1996, Samper was granted \textit{facultades extraordinarias} for six months to create a disciplinary system for firefighters.\textsuperscript{194} Samper issued one decree under this grant of \textit{facultades extraordinarias}. Unsurprisingly, the decree followed the specific details provided under the law and established a disciplinary system for firefighters.\textsuperscript{195}

A couple months later, in December 1996, Congress granted Samper \textit{facultades extraordinarias} for six months to reduce public spending. This law provided Samper a broad grant of power to eliminate or combine areas of the Executive branch that were inefficient or


performed the same or similar functions. Unlike previous grants of facultades extraordinarias, this grant did not include specific instructions regarding which agencies to combine or what prior decrees needed to be modified. Instead, those determinations were left to Samper’s discretion. In response to this grant, Samper issued twenty-seven decrees combining and eliminating government agencies in all areas of society, including: energy, education, agriculture, defense, health, and economic investment. Moreover, all of these decrees were issued on the last day of the six month grant of facultades extraordinarias. Several of these decrees was later declared invalid by the country’s Supreme Court, arguing that they violated separation of powers by infringing on activities that were outside the realm of the Executive branch.

Following the broad grant under Ley 322, Colombia’s Legislature reverted back to its traditional ways and provided Samper more specific grants of facultades extraordinarias under Ley 388 de 1997. Ley 388 included two separate grants of facultades extraordinarias. Article 50 granted Samper facultades extraordinarias for six months to develop norms to balance the interests of economic development with the interests of preserving the environment. Article 115, additionally, granted Samper facultades extraordinarias for six months specifically directing him to restructure the Vicemistry of Housing, Urban Development, and Potable Water and rename it the Vicemistry of Urban Development. Article 115 also directed

---


197 See id.


199 Id.
Samper to redefine the functions of the new Viceministry.\textsuperscript{200} Samper issued two decrees in total, one under each specific grant of \textit{facultades extraordinarias}.\textsuperscript{201} Both decrees followed the directions given by the Legislature and developed norms regarding the preservation of the environment and the creation of the new Viceministry of Urban Development.

Samper’s last grants of \textit{facultades extraordinarias} occurred two months before the end of his presidency. \textit{Ley 443 de 1998} granted the Samper \textit{facultades extraordinarias} for six months to issue decrees to establish a general classification system of public employment, including: salary levels, training and bonus requirements, and performance evaluations.\textsuperscript{202} Under \textit{Ley 443}, Samper issued three decrees before the end of his presidency following the specific guidelines given to him by the Legislature. Those decrees included establishing a procedural system for performance evaluations, creating a general classification system for public employees, and establishing a National System for Training and System for Bonuses for public employees.\textsuperscript{203} Finally, Samper received a grant of \textit{facultades extraordinarias} under \textit{Ley 454 de 1998} to specifically create a Secured Fund of Cooperative Entities.\textsuperscript{204} Samper, however, failed to issue any decrees regarding this grant.

\textsuperscript{200} \textit{Id.}


\textsuperscript{202} \textit{Ley 433 de 1998}, ALCADIABOGOTA.GOV, \url{http://www.alcaldiabogota.gov.co/sisjur/normas/Norma1.jsp?i=190}.

\textsuperscript{203} See Decretos 1567-1569 de 1998, Decretos en Linea, PRESIDENCIA DE LA REPUBLICA DE COLOMBIA, \url{http://www.presidencia.gov.co/prensa_new/decretoslinea/}.

\textsuperscript{204} \textit{Ley 454 de 1998}, Fondo de Garantias de Entidades Cooperatives, FOGACOOP.GOV, \url{http://www.fogacoop.gov.co/Normatividad/Ley_454_de_1998.PDF}. 
**Figure 5**

DDA During The Samper Presidency

<table>
<thead>
<tr>
<th>Grant of Facultades Extraordinarias</th>
<th>Length of the Grant</th>
<th>Specificity of the Grant</th>
<th>Number of Decrees Issued</th>
<th>Other Factors</th>
</tr>
</thead>
<tbody>
<tr>
<td>Ley 115 de 1994</td>
<td>6 Months</td>
<td>Specific</td>
<td>1</td>
<td>Inherited from Gaviria</td>
</tr>
<tr>
<td>Ley 134 de 1994</td>
<td>6 Months</td>
<td>Specific</td>
<td>1</td>
<td>Inherited from Gaviria</td>
</tr>
<tr>
<td>Ley 136 de 1994</td>
<td>3 Months</td>
<td>Specific</td>
<td>1</td>
<td>Inherited from Gaviria</td>
</tr>
<tr>
<td>- Article 196</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Ley 136 de 1994</td>
<td>6 Months</td>
<td>Specific</td>
<td>1</td>
<td>Later declared unconstitutional</td>
</tr>
<tr>
<td>- Article 1999</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Ley 160 de 1994</td>
<td>6 Months</td>
<td>Specific</td>
<td>1</td>
<td></td>
</tr>
<tr>
<td>Ley 180 de 1995</td>
<td>90 Days</td>
<td>Specific</td>
<td>5</td>
<td></td>
</tr>
<tr>
<td>Ley 181 de 1995</td>
<td>6 Months</td>
<td>Specific</td>
<td>4</td>
<td></td>
</tr>
<tr>
<td>Ley 190 de 1995</td>
<td>6 Months</td>
<td>Specific</td>
<td>1</td>
<td></td>
</tr>
<tr>
<td>Ley 222 de 1995</td>
<td>6 Months</td>
<td>Specific</td>
<td>1</td>
<td></td>
</tr>
<tr>
<td>Ley 223 de 1995</td>
<td>6 Months</td>
<td>Specific</td>
<td>1</td>
<td></td>
</tr>
<tr>
<td>Ley 322 de 1996</td>
<td>6 Months</td>
<td>Specific</td>
<td>1</td>
<td></td>
</tr>
<tr>
<td>Ley 344 de 1996</td>
<td>6 Months</td>
<td>Broad</td>
<td>27</td>
<td>Some decrees later declared unconstitutional</td>
</tr>
<tr>
<td>Ley 388 de 1997</td>
<td>6 Months</td>
<td>Specific</td>
<td>1</td>
<td></td>
</tr>
<tr>
<td>- Article 50</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Ley 388 de 1997</td>
<td>6 Months</td>
<td>Specific</td>
<td>1</td>
<td></td>
</tr>
<tr>
<td>- Article 115</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Ley 443 de 1998</td>
<td>6 Months</td>
<td>Specific</td>
<td>3</td>
<td></td>
</tr>
<tr>
<td>Ley 454 de 1998</td>
<td>6 Months</td>
<td>Specific</td>
<td>0</td>
<td></td>
</tr>
</tbody>
</table>
b. Pastrana Presidency

Andrés Pastrana presidency lasted from August 8, 1998 to August 7, 2002. Similar to Samper, Pastrana’s inherited grants of *facultades extraordinarias* from his predecessor. In fact, Pastrana inherited two grants of *facultades extraordinarias* from the Samper presidency. The first grant was under *Ley 443*, discussed above, which authorized the Executive to establish a general classification system of public employment. Pastrana issued one decree under *Ley 443*, creating six classifications of public employees: director, advisor, executive, professional, technical, and healthcare.\(^\text{205}\) The decree also established minimum and maximum qualifications for these classifications and for several specific positions within the federal government.\(^\text{206}\) Pastrana’s other grant of *facultades extraordinarias* that he inherited from Samper was *Ley 454*, which specifically provided for the creation of Secured Fund of Cooperative Entities. Similar to other grants of *facultades extraordinarias*, *Ley 454* did not include any specific language of *facultades extraordinarias*. Nevertheless, Pastrana used the spirit of the law to issue one decree under the grounds of *facultades extraordinarias* and establish such a fund.\(^\text{207}\)

The first legislative grant of *facultades extraordinarias* that occurred under Pastrana’s presidency was under *Ley 488 de 1998*. That law provided three separate grants of *facultades extraordinarias*.\(^\text{208}\) One grant lasted for four months and the other two grants lasted for six months. Despite possessing three different grants of *facultades extraordinarias*, Pastrana only


\(^{206}\) *Id.*


issued decrees under one grant, which authorized the Executive to create and organize the Management of National Taxes and Customs, define the makeup of this new entity, and create several funds for the implementation of this new system. Pastrana enacted four decrees under this specific grant. Those decrees created the new Management of National Tax and Customs and the administrative structure of the new agency.

Pastrana’s next grant of facultades extraordinarias occurred at approximately the same time as the grant under Ley 488. Ley 489 de 1998 granted Pastrana a broad grant of facultades extraordinarias for six months to restructure the entire Public Administration under the Executive branch. Similar to the broad restructuring grant under Samper, Ley 489 was vague as to what agencies Pastrana could restructure. While the law cited three particular agencies that needed to be modified – the Controller General, the Attorney General, and Prosecutor General – Pastrana was free to modify other agencies as he saw fit. To promulgate such large-scale change, Pastrana issued thirty-five decrees eliminating, combining, and restructuring the Public Administration. The decrees affected all areas of Public Administration, including: finance, social welfare, development, banking, energy, and oil.

After Ley 489, Pastrana had to wait over a year for his next grant of facultades extraordinarias. Ley 573 de 2000 provided Pastrana two grants of facultades extraordinarias. The first grant of facultades extraordinarias existed for fifteen days to issue decrees to:

---

209 Id.


modify the office of the General Controller; (2) determine the organization of the External Auditor of the General Controller; (3) modify the Attorney General’s office; (4) modify the Prosecutor General’s office; (5) regulate the Foreign Service; and (6) liquidate public entities.\footnote{Ley 573 de 2000, Secretario de Senado, SECRETARIOSENADO.GOV, http://www.secretariasenado.gov.co/senado/basedoc/ley/2000/ley_0573_2000.html.}

The second grant of \textit{facultades extraordinarias} lasted for 120 days and specifically instructed Pastrana to modify the Office of the National Registry.\footnote{Id.} Overall, Pastrana issued fifteen decrees under \textit{Ley 573}, twelve under the first grant and three under the second. All of the decrees addressed the areas that were specifically outlined in the law.\footnote{Decretos Extraordinarias de 2000, Secretario de Senado, SECRETARIOSENADO.GOV, http://www.secretariasenado.gov.co/senado/basedoc/decreto/2000/decreto_0269_2000.html.}

Nearly one month after \textit{Ley 573}, the Legislature provided Pastrana another grant of \textit{facultades extraordinarias}. \textit{Ley 578 de 2000} provided Pastrana \textit{facultades extraordinarias} for six months to decree norms regarding employment of the military forces and the national police.\footnote{Ley 578 de 2000, Secretario de Senado, SECRETARIOSENADO.GOV, http://www.secretariasenado.gov.co/senado/basedoc/ley/2000/ley_0578_2000.html.} Although the law’s grant of \textit{facultades extraordinarias} was broad in the sense that it covered the nation’s military forces, the law specifically addressed what areas Pastrana was to address. The law also provided a specific list of decrees that Pastrana could abolish or modify. Following the guidelines given to him under the law, Pastrana issued ten decrees. The decrees largely changed the employment system of the military forces and the national police, including employment classifications, qualification requirements, and the system’s hierarchical structure.\footnote{Id.}
Pastrana’s last grant of *facultades extraordinarias* occurred approximately twenty months later under *Ley 715 de 2001*. Under the law, Pastrana enjoyed *facultades extraordinarias* for six months to create a new regimen for the teaching profession and to modify the education and health sectors of the country.\(^\text{218}\) Pastrana issued four decrees under his *facultades extraordinarias*. The decrees modified the teaching profession, organized a system of inspection and oversight over education, organized a system of inspection and control over the health sector, and established norms for the use of resources for the health sector.\(^\text{219}\)


### Figure 6

**DDA During The Pastrana Presidency**

<table>
<thead>
<tr>
<th>Grant of Facultades Extraordinarias</th>
<th>Length of the Grant</th>
<th>Specificity of the Grant</th>
<th>Number of Decrees Issued</th>
<th>Other Factors</th>
</tr>
</thead>
<tbody>
<tr>
<td>Ley 443 de 1998</td>
<td>Six Months</td>
<td>Specific</td>
<td>1</td>
<td>Inherited from Samper</td>
</tr>
<tr>
<td>Ley 454 de 1998</td>
<td>Six Months</td>
<td>Specific</td>
<td>1</td>
<td>Inherited from Samper</td>
</tr>
<tr>
<td>Ley 488 de 1998 - Article 21</td>
<td>Four Months</td>
<td>Specific</td>
<td>0</td>
<td></td>
</tr>
<tr>
<td>Ley 488 De 1998 - Article 79</td>
<td>Six Months</td>
<td>Specific</td>
<td>4</td>
<td></td>
</tr>
<tr>
<td>Ley 488 de 1998 - Article 93</td>
<td>Six Months</td>
<td>Specific</td>
<td>0</td>
<td></td>
</tr>
<tr>
<td>Ley 489 de 1998</td>
<td>Six Months</td>
<td>Broad</td>
<td>35</td>
<td></td>
</tr>
<tr>
<td>Ley 573 de 2000 - Articles 1:1-7</td>
<td>15 days</td>
<td>Specific</td>
<td>12</td>
<td></td>
</tr>
<tr>
<td>Ley 573 de 2000 - Article 1:8</td>
<td>120 days</td>
<td>Specific</td>
<td>3</td>
<td></td>
</tr>
<tr>
<td>Ley 578 de 2000</td>
<td>Six Months</td>
<td>Specific</td>
<td>10</td>
<td></td>
</tr>
<tr>
<td>Ley 715 de 2001</td>
<td>Six Months</td>
<td>Specific</td>
<td>4</td>
<td></td>
</tr>
</tbody>
</table>

### c. Characteristics of the Pre-Uribe Era

The pre-Uribe era has several key characteristics. First, and possibly the most important, the Legislature’s grant of *facultades extraordinarias* often includes specific instructions as to what the Executive can do. In fact, all but two grants of *facultades extraordinarias* under the pre-Uribe era specifically instructed the Executive as to what to do, thereby removing much of the Executive’s discretion. The two exceptions to these specific instructions occurred when the Executive was broadly granted *facultades extraordinarias* to restructure the Executive branch of
the government. While it is not entirely clear as to why the broad grant was likely due to the understanding that the Executive can control his own branch without interference from the Legislature.

Second, the Executive’s facultades extraordinarias were limited to what can be considered administrative matters. Many of the grants involved reorganizing the National Administration or reducing public spending. These decisions are generally left to the Executive branch, as the President is the individual responsible for the operation of the federal government and the agencies that are included within it. Third, legislative grants of facultades extraordinarias can be numerous, as a single piece of legislation can contain several grants of facultades extraordinarias regarding different subject matters. Fourth, the Executive can possess facultades extraordinarias in several different pieces of legislation at the same time. Alternatively, we also see that the Executive can go through an extended period of time, including over a year, without being granted facultades extraordinarias. Fifth, the length of the grants varies greatly, from fifteen days to a maximum of six months. Sixth, grants of facultades extraordinarias does not extinguish when an executive leaves office. Instead, that grant continues over time, thereby allowing a succeeding executive the authority to promulgate new decrees or alter previous decrees under the grant of facultades extraordinarias. Finally, even though the Executive may possess facultades extraordinarias, he is not required to act on them if he chooses not to. The Executive, instead, can choose to let the grant of facultades extraordinarias expire without issuing any decrees.

---

220 Refer to Section IV:C regarding discussion of why such decrees are actually DDA and not administrative decree authority.
3. *Uribe Era*

Alvaro Uribe began his presidency on August 8, 2002. Unlike his predecessors, Uribe did not inherit any grants of *facultades extraordinarias*. Uribe’s first grant of *facultades extraordinarias* occurred under *Ley 789 de 2002*. That law provided him *facultades extraordinarias* for six months to decree norms regarding the terms and conditions of the monthly payment of the System of Family Compensation, including the organization and schedule of the system.\(^{221}\) Uribe issued only one decree under this grant, following the specific guidelines of the law and implementing a system regarding the monthly payment of the System of Family Compensation.\(^{222}\)

On the same day as *Ley 789*, Colombia’s Legislature granted Uribe additional *facultades extraordinarias*. *Ley 790 de 2002* granted Uribe *facultades extraordinarias* for six months to completely renovate the structure of the Public Administration.\(^{223}\) Similar to his predecessors, this was a fairly broad grant, as the law lacked specifics as to what ministries or agencies Uribe could modify. Instead, Uribe had the broad authority to eliminate, combine, split-up, modify, and reassign ministries and administrative departments. Under *Ley 790*, Uribe enacted thirteen decrees. Uribe split up several government entities, including the Institute of Social Security and the National Petroleum Company of Colombia, and made them into new agencies.\(^{224}\) Uribe also


created a new public telecommunications company under Ley 790.\textsuperscript{225}

The Colombian Legislature next granted Uribe \textit{facultades extraordinarias} under Ley 797 de 2003. Ley 797 provided Uribe \textit{facultades extraordinarias} for six months to decree norms to reform the pension systems of the President, the military forces, and the national police.\textsuperscript{226} The law also provided Uribe the authority to create norms regarding the pension system of employees who work in high-risk areas. Uribe issued four decrees under this grant. The decrees reformed the pension system for the president, the military forces, the national police, and the department of security. Uribe also issued a decree that defined what constituted high-risk employment activities and established the rules for the pension system of those employees.\textsuperscript{227}

Uribe next obtained \textit{facultades extraordinarias} under Ley 909 de 2004, which granted him the authority to issue decrees regarding public employment for six months. The law included six specific guidelines as to what Uribe could decree. Those guidelines included establishing general classification systems for public employment and creating specific employment systems for the National Public Administration of the Special Unit of Civil Aeronautics, the Management of National Taxes and Customs; and the employees of the President.\textsuperscript{228} In response to these guidelines, Uribe issued seven decrees, which addressed the


\textsuperscript{226} \textit{Ley 797 de 2003, EL ABEDUL.NET, http://www.elabedul.net/Documentos/Leyes/2003/Ley_797.pdf.}

\textsuperscript{227} \textit{See Decretos 2070, 2090, 2091, and 2092 de 2003, Secretario de Senado, SECRETARIOSENADO.GOV, http://www.secretariasenado.gov.co/senado/basedoc/arbol/4379.html.}

specific guidelines provided under the law. 229

After Ley 909, Uribe had to wait over a year for his next grant of facultades extraordinarias. The Colombian Legislature next granted Uribe facultades extraordinarias for six months under Ley 1033 de 2006. Ley 1033 granted Uribe facultades extraordinarias to address public employment within the “defense sector,” which included the Ministry of National Defense, the military, and the National Police. 230 In response, Uribe issued two decrees. One decree modified the classification system of employees within the defense sector, while the other involved more specific norms regarding the terms and conditions of employment within the defense sector. 231

The last grant of facultades extraordinarias Uribe received from Colombia’s Legislature was in July 2007 under Ley 1151. Under that law, Uribe possessed two separate grants of facultades extraordinarias, with both grants lasting six months. One grant specifically instructed Uribe to increase the number of public attorneys within the federal government. The other grant specifically instructed Uribe to modify and create a new employment system for the Unidad Administrativa Especial de Gestión Pensional y Contribuciones Parafiscales de la Protección Social. 232 In total, Uribe issued four decrees - two for each grant. As such, Uribe issued two

---

decrees creating additional prosecutors and Department of Justice attorneys. The other two
decrees established the functions of the Unidad Administrativa Especial de Gestión Pensional y
Contribuciones Parafiscales de la Protección Social and created an employment system for the
agency.

After July 2007, Uribe did not obtained additional grants of facultades extraordinarias. This lack of facultades extraordinarias could be due to several reasons. One is that Uribe has
been more focused on bringing constitutional change to remain in office for a third term. Another possibility is that since Uribe enjoys popular support within Colombia’s Legislature, he
does not need facultades extraordinarias to accomplish his prerogatives. Finally, it could be that
Uribe has used more “gray” decree powers to achieve his prerogatives, considering the large
amount of popular support Uribe maintains throughout Colombia.

---

233 See Decreto 4795 de 2006 and Decreto 122 de 2007, Secretario de Senado, SECRETARIOSENADO.GOV,

234 See Decretos 168 and 169 de 2008, Secretario de Senado, SECRETARIOSENADO.GOV,

235 Colombia’s Uribe Wins Second Term, BBCNews.Com (May 29, 2006),
http://news.bbc.co.uk/2/hi/americas/5024428.stm. Uribe won the 2006 Presidential Election with 62% of the vote in
the first round of voting.
Comparing the Two Eras

In comparing the two eras of pre-approval DDA in Colombia, the criteria used is different from that of Venezuela. Because none of the Executives’ decrees under the grant of facultades extraordinarias can be considered controversial, the criteria is limited to: (1) the number of grants of facultades extraordinarias; (2) the number of broad grants; and (3) the total number of decrees promulgated under the grant of facultades extraordinarias. Figure 8 below provides a visual representation of these criteria. I also excluded the time length of the grants from the analysis because each president largely enjoyed grants of facultades extraordinarias lasting for six months. Although Samper and Pastrana both received some grants that lasted for less than six months, these grants were the exception and not the norm.
In comparing the two eras we see that Uribe’s use of DDA powers decreased significantly when compared to his predecessors. Not only did Uribe enjoy fewer grants of facultades extraordinarias, but he also issued fewer decrees under the grants he enjoyed. Moreover, Uribe did not expand the scope of the facultades extraordinarias to use these powers in areas broader than what was granted to his predecessors.

a. **Number of Grants of Facultades Extraordinarias**

The biggest difference we see between the two eras is the significant decrease in the grants of facultades extraordinarias over time. During the Samper presidency, Samper enjoyed sixteen separate grants of facultades extraordinarias. Moreover, Pastrana enjoyed ten grants of facultades extraordinarias. Thus, combined, Colombia’s Executives enjoyed twenty-four grants of facultades extraordinarias, including grants that were inherited, during the pre-Uribe era. In

---

Because Pastrana inherited two grants of facultades extraordinarias from Samper, it is necessary that we do not double count the grants. Thus, even though Samper and Pastrana both enjoyed grants of facultades extraordinarias under the same laws, those laws will only be counted once.
comparison, Uribe enjoyed only seven grants of *facultades extraordinarias*, which is less than half the number of grants Samper obtained. Moreover, because Uribe’s presidency lasted nearly eight years, the more appropriate analysis is to compare Uribe’s grants of *facultades extraordinarias* with those of Samper and Pastrana combined. When looking at this comparison, Uribe enjoyed less than 1/3 of the total number of grants that Samper and Pastrana enjoyed. Thus, the data clearly shows that Uribe enjoyed *facultades extraordinarias* substantially less than his predecessors.

b. **Number of Broad Grants of *Facultades Extraordinarias***

Despite the obvious decrease in the number of grants of *facultades extraordinarias* over time, both eras shared many similarities. In both eras, the grants of *facultades extraordinarias* often included specific details and instructions guiding the Executive on the substantive content of their decrees. Moreover, the Executives adhered to these guidelines in making their decrees. In fact, the only instances when the Executives were not given specific details over what decrees to issue occurred only when the grant of *facultades extraordinarias* involved the restructuring of the Executive branch. Such grants occurred one time for each president. Even though each president was provided a broad grant of *facultades extraordinarias*, Uribe issued the fewest number of decrees under such a grant when compared to Samper and Pastrana. In fact, Uribe issued only thirteen decrees, where Samper issued twenty-seven and Pastrana issued thirty-five.

The evidence also shows that the use of *facultades extraordinarias* during both periods is limited to largely administrative functions consisting of the makeup and operation of the federal government. While it is clear that the combining, eliminating, and creating of government agencies can have a significant impact on society through the operation and availability of social programs and services, the operation of the federal government has long been considered a key
component of the Executive’s job duties. Moreover, none of the decrees altered the legal rights and obligations of Colombia’s citizens nationwide.

c. **Number of Total Decrees Promulgated**

Similar to the decrease in the number of grants of *facultades extraordinarias*, Uribe also promulgated fewer decrees under his grants. Samper issued fifty decrees using *facultades extraordinarias*. Pastrana issued seventy decrees using *facultades extraordinarias*. Thus, Samper and Pastrana combined issued 120 decrees under their grants. Uribe, on the other hand, issued only thirty-one decrees under the grant of *facultades extraordinarias*. While the number of decrees under *facultades extraordinarias* during the Uribe era is substantially less than what occurred under each Samper and Pastrana administration, this disparity is even more pronounced when you combine Samper and Pastrana’s figures together. When doing so, we can see that Uribe issued roughly ¼ the number of decrees Samper and Pastrana issued combined. The numbers, however, reveal that Uribe’s use of DDA was not even close to that of his predecessors.

Overall, the numbers reveal that the use of DDA in Colombia has decreased dramatically during Uribe’s eight years as President. Not only has Uribe’s use of DDA paled in comparison to the individual Samper and Pastrana administrations, but it is also only ¼ to 1/3 the amount of the Samper and Pastrana administrations combined. Accordingly, the numbers demonstrate that DDA is not a preferred tool for Uribe and that DDA is a weak Executive power in Colombia. This argument is further supported by the fact that Uribe has not enjoyed *facultades extraordinarias* since July 2007, nearly three years ago.
VI. Is DDA Currently Threatening The Rule Of Law In Venezuela, Ecuador, and Colombia?

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, Correa, and Uribe’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. That is because if Chávez or Correa’s use of DDA currently poses a threat to the rule of law, any future use of DDA 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 and substantially change the framework of Venezuelan society.

Furthermore, through the use of DDA, Chávez has become the nation’s leading legislator. During the 2007 enabling law, Chávez issued sixty-seven decrees into law.\(^\text{237}\) At the same time, Venezuela’s Legislature approved only twenty-five laws. Additionally, while 73% of all laws passed in 2007 and 2008 were drafted by Chávez, 27% of the laws passed were drafted by

\(^{237}\text{Democracia y Derechos Humanos en Venezuela, supra note 69, at ¶ 325.}\)
Essentially, Chávez, through the enabling law, has consolidated both Executive and Legislative powers within the Executive branch. Because Chávez has obtained a substantial amount of lawmaking power, it is necessary that Chávez’ laws satisfy the requirements of the rule of law to prevent Chávez from drafting laws that intentionally undermine his political opposition, which, in turn, undermines democracy’s strength in Venezuela.

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 satisfies formal equality. In fact, Chávez has undermined Legislature’s control over the enabling law. Essentially, Chávez has switched the control over the grant of the enabling law from the Legislative branch to the Executive branch. In 1999, Chávez threatened Venezuela’s Legislature with a State of Emergency to obtain his version of the enabling law. In the subsequent enabling laws, Chávez has used the immense support he maintains in Venezuela’s Legislature to obtain continuously broader grants of DDA. In both situations, Chávez has negated the Legislature’s, let alone the opposition’s, voice regarding the content of the enabling laws. Consequently, because Chávez determines the scope of the enabling laws, 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.

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. Chávez, however, did not release the actual text of the decrees until a week later. Thus,

\[238\]Id.
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 under the new criminal laws.

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. Additionally, as Chávez has acquired more power
over the grant and content 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 of the boundaries established under any enabling law. As such, because Chávez is the ultimate authority, 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 provides little threat to the rule of law. Although Correa has shown a penchant to use *proyectos urgentes* in a controversial manner, there appears to be little concern over whether Correa poses a threat to the rule of law through his use of post-approval DDA. Correa’s small threat to the rule of law is based on two factors: (1) Ecuador’s 2008 Constitution; and (2) Correa’s own use of post-approval DDA.

Ecuador’s 2008 Constitution significantly limits the Executive’s use of post-approval DDA. The 2008 Constitution limits the number of *proyectos urgentes* the Executive can send at any one time and provides Ecuador’s Legislature thirty days to effectively evaluate and respond to any *proyecto urgente*. Based on these procedural safeguards, all laws based on *proyectos
urgentes follow the requirement of “formal equality” since they are enacted under carefully dictated procedures. “Formal equality” is, additionally, satisfied as opposition groups can voice their opinions about the content of the proyectos urgentes before they are decreed into law.

Moreover, Correa’s use of post-approval DDA, for the most part, has not threatened the rule of law as he has rarely sent proyectos urgentes to Ecuador’s National Assembly. As such, Correa has not attempted to inundate the National Assembly with proyectos urgentes. Even though Correa can send at most one proyecto urgente per month to the Legislature, an Executive could severely disrupt the Legislature’s process by sending proyectos urgentes each and every month. Correa has stayed away from such a practice. In fact, the data shows that Correa has sent proyectos urgentes to Ecuador’s Legislature far less frequently than his predecessors.

Furthermore, horizontal accountability continues to exist within Ecuador under the Correa era. Although the National Assembly has not rejected any of Correa’s proyectos urgentes, the National Assembly still maintains the authority to do so. Thus, if Correa sends a proyecto urgente that is outside the constitutional boundaries, the National Assembly can hold Correa responsible for his transgression by rejecting his proyecto urgente.

While Correa has used his DDA powers sparingly when compared with his predecessors, Correa has demonstrated several characteristics that are potentially problematic for the rule of law. First, 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 are part of the legislative process. Moreover, such gamesmanship limits the voice of Correa’s political opposition as they have a decreased chance to engage in political debates or hold public hearings.
regarding the *proyecto urgente*.

The second 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 all 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. While this is largely due to the constitutional protections provided for in Ecuador’s 1998 and 2008 Constitutions, Correa has also not used his post-approval DDA powers enough to have it become a legitimate threat to the rule of law. Nonetheless, Correa’s use of political gamesmanship has increased some of the concern regarding the rule of law. 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, or if it continues to remain a small threat.

C. Colombia

Even though Colombia’s Executives possess pre-approval DDA, Uribe’s use of DDA posed little, if any, threat to the rule of law. Similar to Correa in Ecuador, Uribe’s use of pre-approval DDA posed little threat to the rule of law in Colombia for two reasons: (1) Colombia’s 1991 Constitution; and (2) Uribe’s infrequency of obtaining and using *facultades extraordinarias*. 
Colombia’s 1991 Constitution substantially limits the amount of change any Executive can bring under DDA, or *facultades extraordinarias*. Due to the fact that Colombia’s Executives cannot use their *facultades extraordinarias* to issue new laws that would alter individual rights or obligations, Uribe’s ability to alter the status quo through DDA was significantly limited. In fact, Colombia’s Executives can only use DDA to change the status quo by modifying the public administration. While this may affect an individual’s employment within the public sector or alter a citizen’s ability to access public goods and services, it does not change individual rights or obligations on a national scale. Thus, the inherent threat to the rule of law under Colombia’s pre-approval DDA is significantly less than pre-approval DDA in Venezuela.

Furthermore, the fact that the grant of *facultades extraordinarias* almost always contains specific guidelines for what the Executive may decree implies that “formal equality” is being satisfied in the initial grant of pre-approval DDA. Formal equality is shown by the specific guidelines included in the DDA grants, which demonstrate that the Legislature discussed the scope and content of the DDA grant. Even assuming that the Executive drafted the portion of the legislation that granted him the *facultades extraordinarias*, the Legislature had to approve such language before it granted the *facultades extraordinarias*. Thus, by providing such specificity in the grants of *facultades extraordinarias*, it appears that all parties, including the opposition, had the chance to voice their opinion by specifically limiting Uribe’s DDA powers.

Moreover, DDA’s threat to the rule of law in Colombia decreased under the Uribe presidency due to Uribe’s infrequency of obtaining and using *facultades extraordinarias*. Uribe obtained far fewer grants of *facultades extraordinarias* than his predecessors. Uribe also issued significantly fewer decrees when using his *facultades extraordinarias* than his predecessors. Most significantly, Uribe did not obtain or use DDA powers from July 2007 to the end of his...
presidency in August 2010. As a result, Uribe had no opportunity to threaten the rule of law through DDA since he did not enjoy the power for the last quarter of his presidency. Thus, Uribe’s use of DDA during his presidency posed little to no threat to the rule of law in Colombia.

D. Comparison of the Three Countries

Of the three 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 as was seen during the 2007 enabling law where Chávez promulgated sixty-seven laws, while Venezuela’s Legislature promulgated only twenty-five laws. As such, Chávez has consolidated an unprecedented amount of Legislative power within the Executive branch, and it is likely that Chávez will continue to consolidate more power unless constitutional reform is taken to limit DDA in Venezuela.

At the same time Chávez has increased his DDA powers, Correa in Ecuador and Uribe in Colombia have restrained their DDA use. Although Correa has shown some tendencies towards using Ecuador’s post-approval DDA in a way that could threaten the rule of law, DDA does not present a threat to the rule of law in Ecuador 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 much less than that is seen in pre-approval DDA. However, if Correa continues to use political gamesmanship to limit the amount of time Ecuador’s National Assembly can respond to 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.
Uribe, moreover, demonstrates how pre-approval DDA does not always pose a threat to the rule of law. Based on the constitutional protections provided, and Uribe’s own lack of obtaining *facultades extraordinarias*, DDA posed no threat to the rule of law in Colombia. As such, Uribe showed how a strong leader, who sought to re-write his nation’s constitution several times, can be limited in his use of pre-approval DDA. Moreover, Uribe demonstrated that not all powerful leaders resort to using DDA to consolidate power within the Executive branch.

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. Although Chávez is the only leader examined under this article who currently poses a threat to the rule of law, Chávez 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. Thus, 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.

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 leader uses pre-approval DDA in a way that threatens the rule of law – i.e., Uribe. 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.

E. 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 to the rule of law, I believe that every South American country offering DDA should have several key safeguards in place so as to limit DDA’s threat to the rule of law. In pre-approval DDA, a nation’s constitution must contain several safeguards to protect the rule of law. First, 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 by limiting any particular grant of DDA to six or less months ensures 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. These guidelines 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 is acting within his delegated powers and following the intent of the Legislature.

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 three 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 and Alvaro Uribe in Colombia pose(d) little threat to the rule of law through their DDA powers. Although Correa has 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. Additionally, because Uribe’s use of DDA was virtually non-existent for the last three years of his presidency, Uribe’s DDA powers could not pose a threat to the rule of law. It is important, however, that we continue to monitor DDA use in these three countries to ensure that Chávez does 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.