THE HONDURAN CONSTITUTION IS NOT A SUICIDE PACT: THE LEGALITY OF HONDURAN PRESIDENT MANUEL ZELAYA’S REMOVAL

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"The report of my death was an exaggeration."

–Mark Twain, American author

I. INTRODUCTION

The reports of a Honduran coup d’état in June 2009 are greatly exaggerated. The widespread conclusion that Zelaya’s removal was a coup stems from the simplistic argument that the use of uniformed soldiers during Zelaya's arrest, ipso facto, makes the removal a coup. But a true coup d’état requires either some unlawful action that violates the status quo government or a military assumption of power. Simply put, the multitude of critics alleging that Zelaya’s removal constituted a coup d’etat made their decision based on an incomplete understanding of the factual predicate behind the decision to remove Zelaya.

The essential facts are undisputed. On March 23, President Zelaya announced his desire to conduct a referendum on whether to convene a National Constituent Assembly to rewrite the Honduran Constitution (the Constitution). On the same day, the Honduran Attorney General told the President to stop because such a referendum was unconstitutional. On May 27, the Court of Administrative Disputes concurred with the Attorney General and issued an injunction stopping all progress on the referendum.

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2 N.Y. JOURNAL, June 2, 1897.

3 See EDWARD LUTTWAK, COUP D’ÉTAT: A PRACTICAL HANDBOOK 3–12, 192 (1969). In this seminal work on the fundamentals of a coup d’état, Luttwak defines a coup as “the infiltration of a small but critical segment of the state apparatus, which is then used to displace the government from its control of the remainder.” Id. at 12. The sine qua non of a coup, then, is the act of “subverting the system of state security.” Id. app. B at 192. For a more robust discussion of what constitutes a coup, see infra Part IV.


5 A note on translations. The Honduran Constitution and the various Honduran legal codes do not have official English translations. This Article’s analysis requires a fairly rigorous exegesis of the Honduran Constitution, so I have made extensive translations throughout the Article. In an attempt to increase accountability, I have pasted the Spanish text of the relevant translated provisions in the footnotes. Additionally, where a particular word has several applicable English definitions, I have made a note and explained the different possible connotations of the word.


7 Juzgado de Letras de lo Contencioso Administrativo [Court of Administrative Disputes],
Zelaya nevertheless continued his efforts to administer the vote. The courts issued further orders on May 29 and June 16 to stop the referendum, which Zelaya also ignored. On June 28, 2009, the Honduran Supreme Court of Justice issued an arrest order for President Zelaya on the grounds that he had violated, and was continuing to violate, the Honduran Constitution. The Supreme Court also issued an order to enter Zelaya’s home to execute the arrest order. The Honduran military complied with the judicial mandates, and removed Zelaya from power. The military then escorted Zelaya to a plane that took him to Costa Rica. Finally, the Congress passed a resolution stripping Zelaya of the presidency.

The international community immediately condemned the removal as an illegal coup without explaining why the Supreme Court’s orders did not legitimate the action. The U.S. State Department’s analysis is typical of this kind of simplistic reasoning. When asked whether Zelaya’s removal should properly be classified as a military coup, a senior State Department official said that the military’s mere presence meant it did constitute a coup:


Id.

Orden del Corte Suprema de Justicia [Supreme Court of Justice], June 26, 2009 (Hond.) (Order to the Chairman of the Joint Chiefs), in DOCUMENTADA CASO ZELAYA, supra note 7, at 54.

Orden del Corte Suprema de Justicia [Supreme Court of Justice], June 26, 2009 (Hond.) (Order to Lieutenant Colonel Don Rene Antonio Hepburn Bueso), in DOCUMENTADA CASO ZELAYA, supra note 7, at 55.


Id.

While the United Nations, G.A. Res. 63/301, ¶ 1, U.N. Doc. A/Res/63/301 (July 1, 2009), the Organization of American States (OAS), Resolution on the Political Crisis in Honduras, ¶ 1, AG/Res. 1 (XXXVII-E/09) (July 1, 2009), available at http://www.oas.org/documents/OEA-Honduras/AG04661E02.doc, President Barack Obama, Transcript of Remarks Following a Meeting with President Alvaro Uribe Velez of Colombia and an Exchange with Reporters, DAILY COMP. PRES. DOC. 1, 3 (June 29, 2009) [hereinafter Obama Remarks], available at http://www.gpoaccess.gov/presdocs/2009/DCPD-200900518.pdf (“We believe that the coup was not legal and that President Zelaya remains the President of Honduras, the democratically elected President there.”), and Secretary of State Hillary Clinton, see Press Release, U.S. Sec’y of State Hillary Rodham Clinton, Situation in Honduras (June 28, 2009), available at http://www.state.gov/secretary/rm/2009a/06/125452.htm (“The action taken against Honduran President Mel Zelaya violates the precepts of the Inter-American Democratic Charter, and thus should be condemned by all.”), all characterized President Manuel Zelaya’s removal as a coup d’etat, the lawfulness of President Zelaya’s removal is a much more nuanced issue.
Well, I mean, it’s a golpe de estado. The military moved against the president; they removed him from his home and they expelled him from a country, so the military participated in a coup. However, the transfer of leadership was not a military action. The transfer of leadership was done by the Honduran congress, and therefore the coup, while it had a military component, it has a larger — it is a larger event.¹⁴

By failing to recognize that the Honduran military acted in accordance with lawful civilian orders, the State Department and most international actors misdiagnosed Zelaya’s removal as a coup d’état.

This Article argues that Manuel Zelaya’s removal did not constitute a coup d’état because the Honduran government had a constitutional basis for its actions against a president that openly ignored the constitution. The Supreme Court of Justice was justified, as the arbiter of Honduran constitutional law, to order Zelaya’s arrest for crimes against the Constitution. The Honduran military rightfully complied with a judicial order giving it explicit instructions in defense of the Constitution. The Honduran Congress was the only government instrument to operate on shaky legal footing, and even its actions had a reasonable basis in law. With a full knowledge of the facts, the unlawfulness of the Honduran government’s actions is not at all a clear case. Instead, lawfulness depends on a difficult balancing test between the letter of the law and its spirit. This kind of test should be conducted by the world’s authority on Honduran constitutional law: the Honduran Supreme Court of Justice. The court made its decision, and it is the world’s responsibility to respect it.

Part II of this Article provides the factual context for the current crisis, and describes how President Zelaya’s actions were intricately intertwined with a growing authoritarianism in the region. Part III analyzes the unconstitutionality of President Zelaya’s call for a “non-binding” referendum. Part IV examines the legal basis for the actions of the Honduran Supreme Court, military, and Congress. Part V concludes by arguing that the international community’s condemnation of Zelaya’s removal constituted an improper intrusion into the Honduran Supreme Court’s adjudication of the Honduran Constitution.

II. THE FOUNDATION FOR REMOVAL: ZELAYA’S CAMPAIGN FOR A POPULIST REVOLUTION

In order to understand the story behind Zelaya’s removal, one must understand the greater context surrounding President Zelaya’s unconstitutional actions. Zelaya had not simply violated the Honduran Constitution; he had begun to mirror the authoritarian measures propounded by his allies in Venezuela, Bolivia, and Ecuador. From the Honduran Supreme Court’s perspective, Zelaya’s actions were the beginnings of an attack on the fundamental nature of the Honduran state. The Justices believed that they were Honduran democracy’s last bastion against a president intent on undermining the rule of law and moving the nation towards autocracy. Put another way, the dispute between Zelaya and the Supreme Court was actually another chapter in the ongoing Latin American conflict between democracy and a strain of authoritarian thought known as “Bolivarian populism.”

This Article puts Zelaya’s actions in context by examining both international and domestic events. First, this Article describes how similar actions in Venezuela, Bolivia, and Ecuador have resulted in growing authoritarian governments. Second, this Article gives a detailed discussion of Zelaya’s actions and their legal justifications.

A. The International Context: Calling for a Constitutional Constituent Assembly is the First Step in the Bolivarian Blueprint for Converting a Democracy into an Autocracy

Bolivarian populism is a brand of Latin American socialism. Championed by Venezuelan President Hugo Chávez, Bolivarian populism advances an egalitarian agenda through progressively authoritarian measures. Over the past decade, several Latin American presidents have followed Bolivarian populism’s blueprint to power consolidation by: (1) calling for a constitutional convention to overhaul the existing legal regime, (2) removing term limitations in order to facilitate indefinite power, (3) undermining coordinate branches of government, and (4) implementing other authoritarian measures. The Honduran Supreme Court believed that Zelaya’s actions were the first steps in this process.

15 See discussion infra Parts II.A.1.—2.
16 See Brief of Alberto Rubi, Fiscal General de la República, Corte Suprema de Justicia [Supreme Court of Justice], June 25, 2009 (Hond.), in DOCUMENTADA CASO ZELAYA, supra note 7, at 35 (detailing the unconstitutional nature of Zelaya’s actions).
government, and (4) repressing any lingering discontent. As described infra, President Zelaya had started down this Bolivarian path. This Article now summarizes the way that leaders have followed the Bolivarian blueprint for altering democratic governments.

1. Venezuela Sets the Example

Hugo Chávez is the self-proclaimed leader of the Bolivarian populist movement. At his January 2007 inauguration, the Venezuelan President reaffirmed his commitment to his policy agenda, proclaiming “Socialism or death, I swear it!” But Chávez’s conception of socialism is not just state ownership of industries; rather, Chávez’s socialism includes extrajudicial killings to intimidate opponents, a centralization of power in the executive, and attacks on the coordinate branches of government. The Venezuelan President undertook these steps because he believed that any obstacle to his self-proclaimed Bolivarian Revolution, whether political or legal, should be cleared for the greater good.

In April 1999, Chávez announced a referendum for the establishment of a National Constituent Assembly (ANC) to craft a new constitution for the country. Eighty-five percent of the voters favored the referendum. Moreover, 72% of the voters accepted the idea that the newly created institution would define its own limitations. With an ANC composed

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20 See Larry Rohter, Venezuelan Congress Fights Loss of Power, N.Y. TIMES, Aug. 27, 1999, at A8 (discussing Chávez’s usurpation of Congressional authority to pass laws and hold special sessions).
21 See Venezuela Assembly Starts Purging Judges, N.Y. TIMES, Sept. 9, 1999, at A3 (discussing the ousting of eight judges by the Venezuelan Constitutional Assembly).
22 See Larry Rohter, Venezuela’s New Leader: Democrat or Dictator?, N.Y. TIMES, Apr. 10, 1999, at A3 (describing how Chávez vowed to overhaul the government in order to realize his Bolivarian agenda).
24 Id. at 259–61.
primarily of those politically and ideologically aligned with him, Chávez began to solidify his centralization of power.25

The ANC began to operate in August 1999.26 While the Venezuelan Congress and the ANC ostensibly operated under a relationship of "cohabitation,"27 in reality the Congress was under constant duress from the ANC.28 Eventually, cohabitation gave way to complete domination by the ANC. On August 25, 1999, the ANC stripped the Congress of its right to pass laws or even meet.29 The ANC had completely replaced the preexisting legislative authority in Venezuela.

Chávez then set his sights on the judiciary.30 In August 1999, the ANC declared a "judicial emergency"31 and appointed a commission, staffed by a majority of Chávez-supporters, to review claims of corruption and incompetence among judges and congressmen and the power to fire those found to be corrupt.32 While judicial oversight was in no way part of the ANC's legal mandate,33 the Venezuelan Supreme Court nevertheless upheld the appointed commission's constitutionality in an eight to six decision.34 Ironically, the Supreme Court based its argument on the principles of the rule of law: "The Supreme Court reaffirms its submission to the rule of law and its willingness to collaborate with other branches of government. It therefore offers to contribute to the principal aims of the Judicial Emergency Decree."

26 Rohter, supra note 20.
28 Id. Members of the Fifth Republic Movement (MVR) noted that Colombia, unlike Equador, had successfully suspended Congress in recent history, emboldening their resolve to do the same in Venezuela. Id.
29 Rohter, supra note 20.
30 Id.
33 El Tribunal Supremo de Justicia [The Supreme Court of Justice], Aug. 23, 1999 (Venez.) [hereinafter Decision on the Judicial Reorganization Decree], available at http://www.tsj.gov.ve/informacion/acuerdos/acp-23081999.html (discussing the limited nature of the ANC's mandate and the established Supreme Court precedent limiting the ANC's purview).
34 Id.
35 Id. (as translated by author).
The decision was so controversial that the Chief Justice of the Supreme Court, Cecilia Sosa, resigned in protest.\textsuperscript{36}

Chief Justice Sosa lamented that the court had "committed suicide to avoid being murdered."\textsuperscript{37} President of the Chamber of Deputies, Henrique Capules Radonsky, echoed Sosa's sentiments and said that the Supreme Court had acted out of self-preservation:

[T]his action by the [Supreme Court] was an action to preserve their existence within the republic . . . that there was great incertitude in these actions by the [Supreme Court] because in essence the ANC could[,] for example, at any moment in time, institute the Death Penalty, and there existed no judicial organism by which an action by the ANC could be declared illegal or unconstitutional.\textsuperscript{38}

Less than four months after the decision on the judicial reorganization, Chávez finally buried the Supreme Court. On December 27, 1999, the ANC created the Supreme Tribunal of Justice to replace the old Supreme Court.\textsuperscript{39} The old Supreme Court Justices were all removed from the judiciary as a new crop of pro-Chávez judges took the reins of Venezuela's highest court.\textsuperscript{40}

Finally, Chávez began to work on increasing the executive power by ensuring his own perpetual rule. Article 230 of the previous Venezuelan Constitution had allowed a president to be reelected only once.\textsuperscript{41} Chávez found this limitation too constricting, and on February 15, 2009 voters approved a constitutional amendment removing presidential term limits.\textsuperscript{42} Chávez now faces an easy reelection, and his policies remain unchecked by the coordinate branches of government.

\textsuperscript{36} Chávez's Power Grab, ECONOMIST, Aug. 28, 1999, at 27.
\textsuperscript{37} Id.
\textsuperscript{38} Brenda Brown Perez, Judicial Suspensions and Due Process Under Venezuela's New Democratic Model, 19 J. NAT'L ASS'N ADMIN. L. JUDGES 125, 128 (1999).
\textsuperscript{40} See Brown Perez, supra note 38, at 128.
\textsuperscript{41} CONSTITUCION DE LA REPÚBLICA BOLIVARIANA DE VENEZUELA [Constitution] art. 230.
2. Bolivia Follows Chávez's Example

Bolivian President Evo Morales was the first executive to follow Chávez's example. One of his first steps after coming to power was to convene a National Constituent Assembly to rewrite the Bolivian Constitution. The new draft constitution was put to the voters and approved on January 25, 2009. In standard populist fashion, Morales removed the constitutional term limitation on presidents and added a new Article 168 that will allow him to serve another term. The new constitution includes a litany of other changes that give the government greater control over the economy, broadens the nationalization of private industries, and increases the rights of indigenous people.

Morales also attacked judicial independence. For example, after several judges ruled against his expansive socialist programs, Morales publicly criticized the judges and called for members of the Constitutional Court to be tried by Congress. Morales's threats violated the judicial independence clause of the Bolivian Constitution, which reads: "The magistrates and judges are independent in the administration of justice and are subordinate only to the [c]onstitution and the law."

In short, Morales has strengthened the power of the Bolivian executive, undermined private property rights, and attacked the judiciary when it resisted his progressive agenda. The national referendum for a constituent assembly,

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45 See Carin Zissis, Bolivia's Nationalization of Oil and Gas, COUNCIL ON FOREIGN RELATIONS, May 12, 2006, http://www.cfr.org/publication/10682/ ("On his hundredth day in office, Bolivian President Evo Morales moved to nationalize his nation's oil and gas reserves, ordering the military to occupy Bolivia's gas fields and giving foreign investors a six-month deadline to comply with demands or leave."). Bolivia also recently joined the Bolivarian Alternative for the Americas, a socialist trade group that previously consisted of Cuba and Venezuela. The new three-nation pact is now calling itself the "Axis of Good." Id.
48 CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE BOLIVIA [Constitution] art. 116, ¶ iv ("Los Magistrados y jueces son independientes en la administración de justicia y no están sometidos sino a la Constitución y la ley. No podrán ser destituidos de sus funciones, sino previa sentencia ejecutoriada.").
as it was in Venezuela, was the critical first step in the path to Bolivarian populism in Bolivia.

3. Ecuador Follows Suit

While Ecuadorian President Rafael Correa started utilizing Bolivarian blueprint later than Morales, Correa was able to progress more rapidly toward authoritarianism than his Bolivian counterpart. Step one was to call for a referendum on whether to convene a constitutional constituent convention. Voters approved that referendum in April 2007. On September 30, 2007, Correa’s allies won a majority of the seats in the new Constitutional Constituent Assembly. In November 2007, the Constituent Assembly voted to dissolve the Ecuadorian Congress on its first day of work.

On September 28, 2008, Correa’s efforts towards a new constitution reached fruition: voters passed the new document “by a wide margin.” The new constitution gave the president extensive new powers and the ability to dissolve Congress at his discretion.


Timelime: Ecuador, supra note 50.


See CONSTITUCIÓN DE LA REPÚBLICA DEL ECUADOR 2008 [Constitution] art. 147 (listing the powers of the president).

Id. art. 148 (“La Presidenta o Presidente de la República podrá disolver la Asamblea Nacional cuando, a su juicio, ésta se hubiera arrogado funciones que no le competan constitucionalmente, previo dictamen favorable de la Corte Constitucional; o si de forma reiterada e injustificada obstruye la ejecución del Plan Nacional de Desarrollo, o por grave crisis política y convulsión interna. Esta facultad podrá ser ejercida por una sola vez en los tres primeros años de su mandato. En un plazo máximo de siete días después de la publicación del decreto de disolución, el Consejo Nacional Electoral convocará para una misma fecha a elecciones legislativas y presidenciales para el resto de los respectivos períodos. Hasta la instalación de la Asamblea Nacional, la Presidenta o Presidente de la República podrá, previo dictamen favorable de la Corte Constitucional, expedir decretos-leyes de urgencia económica, que podrán ser aprobados o derogados por el órgano legislativo.”).
B. The Honduran Context: President Zelaya Repeatedly Defied the Rule of Law in His Attempt to Hold a Referendum on a Constitutional Constituent Assembly

The Honduran context behind President Zelaya’s removal centers around the President’s quest to hold a referendum on whether the country should call a National Constituent Assembly to overhaul the constitution. As described supra, the convocation of a Constituent Assembly is usually the first step for populist leaders who hope to radically change their country’s government.

The fact that President Zelaya had come to champion Bolivarian populism was a surprise to most Hondurans. When Zelaya took office in 2006 as the leader of one of the country’s center-right parties, he advocated for a Central American Free Trade Agreement with the United States and drew much of his support from strong alliances with business organizations. In 2007, however, he suddenly proclaimed himself a socialist and incorporated Honduras into Petrocaribe, a mechanism set up by Hugo Chávez that exchanged oil subsidies to Latin American and Caribbean countries in exchange for “political subservience.” Zelaya then brought Honduras into the Bolivarian Alternative for Latin America and the Caribbean (ALBA), which is ostensibly a commercial alliance but in practice is a political force that works to expand Bolivarian populism.

But President Zelaya was not content with forging foreign policy alliances with Chávez and his allies. He also wanted to follow the next step in the Bolivarian populism playbook, which was to call a constituent assembly to overhaul the existing legal structure and consolidate power in the executive.

1. Zelaya Ignored the Judiciary’s Decision that the Populist Referendum was Unlawful

On March 23, 2009, President Zelaya announced Decree PCM-05-2009, which mandated the National Statistics Institute to conduct a national referendum on whether to convene a constitutional convention. In order to

57 Id.
58 Id.
59 See Brief of Alberto Rubi, Fiscal General de la República, Corte Suprema de Justicia [Supreme Court of Justice], June 25, 2009 (Hond.), in DOCUMENTADA CASO ZELAYA, supra
effectuate the referendum, Zelaya had ballots printed in Venezuela and shipped to Honduras.60

The Honduran courts found this referendum unlawful. On May 27, 2009, the Court of Administrative Disputes61 issued an interlocutory injunction to stop the referendum on the grounds that the referendum would cause “irreparable damage and prejudice to the country’s democratic system in clear violation of the Constitution of the Republic and other laws.”62 The injunction went on to forbid any action in furtherance of the referendum, suspending “all effects” of the referendum, including “any type of publicity” about the decree or “any further proceedings” by the President or the executive branch.63

Zelaya attempted to preempt the court’s interference by issuing Executive Decree PCM-19-2009 on May 26, the day before the Court of Administrative Disputes publically announced its opinion. In Executive Decree PCM-19-2009, Zelaya “annulled” his previous PCM-05-2009 decree, stating that it “held no value or effect.”64 Another new decree (PCM-020-2009), however, did exactly what PCM-05-2009 had done; it announced a public referendum on whether there should be a National Constituent Assembly.65 The fact that a ruling president was arguing that he could get around a judicial opinion by renaming the contested law would have been comical if it was not such a telling example of Zelaya’s disregard for the rule of law.

Zelaya’s transparent and simplistic attempt to make an end-run around judicial review was swiftly countered by the court. On May 29, the Court of Administrative Disputes issued a second order to clarify the scope of the injunction.66 In this May 29 order, the court stated that its previous May 27

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61 In Spanish, the “Juzgados de Letras de lo Contencioso Administrativo.”
62 Juzgado de Letras de lo Contencioso Administrativo [Court of Administrative Disputes], May 27, 2009 (Hond.) (Opinion of Jorge Alberto Zelaya Zaldaña), in DOCUMENTADA CASO ZELAYA, supra note 7, at 11 (as translated by author).
63 Id. (“[E]n consecuencia se suspenden todos los efectos del acto administrativo tácito impugnado, de carácter general que contiene el Decreto Ejecutivo PCM-05-2009, del 23 de marzo del 2009, así como cualquier tipo de publicidad sobre lo establecido en el mismo; de igual manera, la suspensión del procedimiento de consulta a los ciudadanos por parte del Poder Ejecutivo a través del Presidenta Constitucional de la República, o cualquiera de las instituciones que componen la estructura administrativa del Poder Ejecutivo.”).
65 Id. at A3.
66 Juzgado de Letras de lo Contencioso Administrativo [Court of Administrative Disputes],
order included "any administrative act . . . that has the same goal of the administrative act that has been suspended, which includes any change in name of the process, that implies an attempt to avoid compliance with the interlocutory opinion." President Zelaya contested the injunction, but the appellate court denied his request on June 16, 2009.

Read together, the May 27, May 29, and June 16 decisions make it clear that the Honduran court system had forbidden any affirmative action to advance the populist referendum. But the courts made one final clarifying step to ensure that President Zelaya would not proceed with his referendum. On June 18, 2009, the Court of Administrative Disputes delivered a Judicial Communication to President Zelaya that stated, in layman’s terms, the scope of the judicial orders. The Judicial Communication concluded by addressing President Zelaya directly and demanding that he follow the prohibitions in the May 27, May 29, and June 16 decisions.

President Zelaya was also told that his referendum was unlawful by the Honduran Public Ministry. The Public Ministry, in the Latin American legal tradition, functions autonomously from the rest of the executive branch and acts as the caretaker of the public interest. The Public Ministry is a cross between an ombudsman’s office and a special prosecutor; some conceptualize the Ministry as a fourth branch of government. The Public Ministry is designed to investigate all branches of government, including the president, free of interference and the subjectivity that typifies the more political branches of government.

June 18, 2009 (Hond.), in DOCUMENTADA CASO ZELAYA, supra note 7, at 17.

67 Id. (as translated by author).

68 Corte de Apelaciones de lo Contencioso Administrativo [Appeals Court of Administrative Disputes], June 16, 2009 (Hond.), in DOCUMENTADA CASO ZELAYA, supra note 7, at 22. The actual appeal was made in the form of an “amparo,” a legal instrument used in Latin America to vindicate constitutional claims. In the same way the Anglo Saxon writ of habeus corpus is used to vindicate personal liberty rights, the amparo is used to vindicate non-personal liberty rights.

69 Juzgado de Letras de lo Contencioso Administrativo [Court of Administrative Disputes], June 18, 2009 (Hond.), in DOCUMENTADA CASO ZELAYA, supra note 7, at 17.

70 Id.

71 On its website, the Public Ministry describes its mandate:

An independent entity, functionally [sic] unattached to all three branches of Government, the Public Ministry was instituted on January the 6th, 1994, through Legislative Decree No. 228-93. It’s main functions are the prosecution of all crimes and felonies, to ensure full compliance by all with the Constitution and the law of the land, and to represent, to defend and to protect the general interest of society.

On March 23, 2009, the head of Honduras’s Public Ministry, Attorney General Luis Alberto Rubí, announced that President Zelaya’s referendum was unconstitutional. Rubí explained that the Public Ministry was “plainly convinced that neither the Constitution of the Republic nor the Electoral Law for Political Organizations give the Republic’s President the power to administer any referendum.” The Public Ministry’s announcement concluded by stating that “each person [who continues to participate in the unlawful referendum] will be the subject of a criminal investigation and the Public Ministry will present a case with the goal of having the competent judicial authority impose the punishment previously established by the Penal Code.”

2. Zelaya Attacks the Military After It Supports the Judiciary

The head of the Honduran armed forces, Chairman of the Joint Chiefs General Romeo Orlando Vásquez Velásquez, responded to the judiciary’s decisions by announcing that the military would abide by the court’s decision and not support the referendum. General Vásquez said the military was caught in a difficult position because the Supreme Court had ruled earlier that the referendum was illegal, but Zelaya had proceeded anyway and had ordered the armed forces to provide security. Zelaya rewarded Vásquez’s respect for the rule of law by removing him from command. The heads of the army, navy, and air force resigned to show their support for Vásquez.

The Supreme Court of Justice responded by reinstating General Vasquez a little more than twelve hours after Zelaya had suspended him. Following the

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72 While Rubí’s position is generally translated to “Attorney General,” his position is unlike the general Anglo-Saxon conception of the term. As head of the Public Ministry, the Attorney General is an independent advocate for the people against the government. See Decreto Numero 228-93, 27,241 LA GACETA, Jan. 6, 1994, available at http://www.ciprodeh.org.hn/Leyes%20Descargables/MP.pdf.
73 Honduras: Fiscalía desautoriza llamado a consulta popular, supra note 6.
74 Id. (as translated by author).
75 Id. (as translated by author).
77 Id.
78 Id.
79 Id.
80 Corte Suprema de Justicia: Scala Constitucional [Supreme Court of Justice: Constitutional Branch], June 25, 2009 (Hond.), in DOCUMENTADA CASO ZELAYA, supra note 7, at 31; see also Honduras President Challenges Government over Referendum, supra note 76.
Supreme Court’s decision, President Zelaya quipped that the Court should be called the “Supreme Court of Injustice.”

Zelaya also confronted the military in order to obtain his election materials. The ballots Zelaya had printed in Venezuela had been impounded by the Honduran military and were being kept at Fort Hernán Acosta Mejía. On June 25, 2009, Zelaya organized a number of his supporters and marched on Fort Mejía, confiscating the 814 boxes of Venezuelan-printed ballots. The same day, President Zelaya published Decree PCM-020-2009, which stated that the June 28, 2009 election would include a fourth ballot box for a vote on the question: “Do you agree that the general election of 2009 should include a Fourth Box where the populace can decide whether to convene a National Constituent Assembly?”

As the public referendum was nearly about to proceed, Zelaya boasted to President Chávez that over 70% of the Honduran public supported the referendum. Upon hearing the news, Chávez said that the events in Honduras were a product of his government’s influence on the continent. Chavez went on to say that Honduras would follow the same path as Bolivia, Venezuela, and Ecuador in convening a constituent assembly.

3. The Supreme Court of Justice Takes Action

On June 25, 2009, Attorney General Rubí followed up on his March 23 promise and charged President Zelaya with four crimes against the Honduran state. The next day, the Supreme Court of Justice acted on the charges and issued an arrest warrant for President Zelaya and a separate order to allow the

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81 Honduras President Challenges Government over Referendum, supra note 76.
83 See O’Grady, supra note 60 (noting that Zelaya “led a mob that broke into the military installation where the ballots from Venezuela were being stored”).
85 Honduras: Fiscalía desautoriza llamado a consulta popular, supra note 6.
86 Id.
87 Id.
88 Brief of Alberto Rubí, Fiscal General de la República, Corte Suprema de Justicia [Supreme Court of Justice], June 25, 2009 (Hond.), in DOCUMENTADA CASO ZELAYA, supra note 7, at 35.
89 Orden del Corte Suprema de Justicia [Supreme Court of Justice], June 26, 2009 (Hond.) (Order to the Chairman of the Joint Chiefs), in DOCUMENTADA CASO ZELAYA, supra note 7, at 54.
military to arrest President Zelaya in his home.\textsuperscript{90} According to one of the arresting officers, the actual arrest was a "clean operation" that did not result in injury to any party.\textsuperscript{91} President Zelaya, on the other hand, suggested that the arrest was more turbulent.\textsuperscript{92} After the arrest, Zelaya was put on a plane bound for Costa Rica and told not to return to Honduras.\textsuperscript{93}

Even before President Zelaya's plane had landed in Costa Rica, the Court of Administrative Disputes issued a three-part order: first, the court ordered the armed forces to confiscate all materials related to the referendum; second, the court ordered all governmental employees to assist the armed forces in their confiscation efforts; and third, the court ordered the armed forces to use whatever state institutions it believed necessary to complete the confiscation order.\textsuperscript{94} President Zelaya's referendum had finally been put to rest.

4. The Congress Removes Zelaya from Power and Swears in a New President

Following Zelaya's removal, the Honduran Congress convened to discuss the actions taken by the Court and the military. The Congress overwhelmingly voted "to strip Zelaya of his powers, with a resolution stating that Zelaya 'provoked confrontations and divisions' within the country."\textsuperscript{95} The Congress then named Roberto Micheletti the new President of the Republic.\textsuperscript{96} On

\textsuperscript{90} Orden del Corte Suprema de Justicia [Supreme Court of Justice], June 26, 2009 (Hond.) (Order to Lieutenant Colonel Don Rene Antonio Hepburn Bueso), in DOCUMENTADA CASO ZELAYA, supra note 7, at 55.

\textsuperscript{91} Marc Lacey, Leader's Ouster Not a Coup, Says the Honduran Military, N.Y. TIMES, July 2, 2009, at A6.

\textsuperscript{92} See Paul Kiernan et al., Coup Rocks Honduras, WALL ST. J., June 29, 2009, at A1 (quoting Zelaya as stating, "I was awakened by shots, and the yells of my guards, who resisted for about 20 minutes[,] . . . [w]hen (the soldiers) came in, they pointed their guns at me and told me they would shoot if I didn't put down my cellphone").

\textsuperscript{93} Id.

\textsuperscript{94} Comunicación, Juzgado de Letras de lo Contencioso Administrativo [Court of Administrative Disputes], June 26, 2009 (Hond.) (Order from Danery Antonio Medal Raudales), in DOCUMENTADA CASO ZELAYA, supra note 7, at 59.


\textsuperscript{96} Id. The congressional session also included a reading of a document that proponents claimed to be President Zelaya's resignation letter. The letter's authenticity is highly suspect, and the American State Department believes that it is a forgery. The letter was not a basis for the Congress's decision to remove Zelaya from the presidency. See id.; Orden del Corte Suprema de Justicia [Supreme Court of Justice], June 26, 2009 (Hond.) (Order to the Chairman
June 28, 2009, the Supreme Court of Justice issued another opinion ratifying Congress’s actions and remanding Zelaya’s case to the Unified Penal Court of Tegucigalpa.\(^7\)

### III. ZELAYA’S ACTIONS WERE UNLAWFUL BECAUSE HE VIOLATED THE HONDURAN CONSTITUTION

The decision to arrest President Zelaya was based on a sound legal foundation because the President had violated the law in at least four ways. Zelaya was charged with four crimes: (1) one count of Crimes Against the Form of Government; (2) one count of violating Articles 373, 374, and 375 of the Honduran Constitution; (3) one count of Abuse of Authority; and (4) one count of Usurpation of Duties. Additionally, President Zelaya arguably violated Article 239 of the Honduran Constitution and could have automatically been relieved of his presidential duties. This Article now examines these crimes in turn.

#### A. A Crime Against the Form of Government

Zelaya’s first crime stems from the manner in which he pursued his referendum. Article 5 of the Honduran Constitution clearly states the two rules for public referendums and consultations. First, referendums can only be approved by a 2/3 vote of Congress.\(^9\) Second, only the Supreme Electoral Tribunal can “convene, organize, and direct the public consultations.”\(^9\) The detailed role of the Supreme Electoral Tribunal exists for a reason; in order to protect the integrity of a referendum, the Honduran Constitution mandates that institutions outside of the inherently political presidency conduct elections.

President Zelaya violated Article 5 in two ways. First, he pursued his referendum even though the legislature had not approved the measure by a 2/3 margin. Zelaya actively ignored these provisions and proceeded with his referendum despite the lack of congressional approval. Second, President Zelaya also violated Article 5 by ordering the National Statistics Institute, and

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\(^7\) Corte Suprema de Justicia [Supreme Court of Justice], June 29, 2009 (Hond.), in DOCUMENTADA CASO ZELAYA, supra note 7, at 54.

\(^8\) CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE HONDURAS [Constitution] art. 5.

\(^9\) Id. Also, the Supreme Electoral Tribunal must report the official results of the referendum to the Congress no more than ten days after the election. \textit{Id.}\(^8\)
not the Supreme Electoral Tribunal, to conduct the referendum. Zelaya’s
decision to have the ballots printed in Venezuela, instead of having the
Supreme Electoral Tribunal administer the publication of the ballots, also
constituted an unlawful incursion upon the Supreme Electoral Tribunal’s area
of responsibility. The Court of Administrative Disputes cited Article 5's
limitations in its initial March 27, 2009 decision.

Under the Honduran Penal Code, Crimes Against the Form of Government
can result in six to twelve years of prison time. Acts that result in the,
“removal of all or part of the National Congress’s, the Executive Power’s, or
the Supreme Court of Justice’s constitutional prerogatives and powers” are
considered Crimes Against the Form of Government.

Crimes Against the Form of Government constitute an existential threat to
the Honduran republic. President Zelaya’s wanton disregard for the separation
of powers and for explicit constitutional processes was exactly the type of
threat envisioned by the Constitution’s inclusion of Crimes Against the Form
of Government.

B. Violation of Articles 373, 374, and 375

President Zelaya’s second crime stems from his concerted attempt to
destroy the Honduran Constitution via a constituent assembly. Unlike its
American cognate, the Honduran Constitution includes a number of safeguards
against tampering with the form and structure of government. Article 373 of
the Honduran Constitution specifies that only one way exists to change the
Constitution: two-thirds of all members of Congress must vote in favor of the
change at two consecutive regular annual sessions. Article 374 goes on to

100 Brief of Alberto Rubí, Fiscal General de la República, Corte Suprema de Justicia
[Supreme Court of Justice], June 25, 2009 (Hond.), in DOCUMENTADA CASO ZELAYA, supra
note 7, at 35.
101 O’Grady, supra note 60.
102 Juzgado de Letras de lo Contencioso Administrativo [Court of Administrative Disputes],
May 27, 2009 (Hond.) (Opinion of Jorge Alberto Zelaya Zaldaña), in DOCUMENTADA CASO
ZELAYA, supra note 7, at 11.
103 CÓDIGO PENAL [CP] art. 328(3) (Hond.), available at http://www.unhcr.org/refworld/co
untry,,NATLEGBO,,HND,4562d94e2,46d7cebe2,0.html.
104 Id.
105 CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE HONDURAS [Constitution] art. 373 (“La
reforma de esta Constitución podrá decretarse por el Congreso Nacional, en sesiones ordinarias,
con dos tercios de votos de la totalidad de sus miembros. El decreto señalará al efecto el artículo
o artículos que hayan de reformarse, debiendo ratificarse por la subsiguiente legislatura

specify that no amendment can ever change the country's democratic nature, the Constitution's amendment procedure, or the limitations on presidential reelection.16

In fact, in a chapter entitled the Inviolability of the Constitution, Article 375 explicitly forbids all constitutional changes that do not comply with the procedure contained in Article 373:

This Constitution does not lose its validity... even when it has been supposedly revoked or modified by any means or procedure other than those provided for by the Constitution itself. In such cases, any citizen, with or without political authority, has the duty to help maintain or restore respect for continued validity.107

Zelaya’s referendum directly violated Articles 373, 374, and 375. The public referendum was an end run around Article 373’s amendment process, and the subject of the referendum was forbidden by Article 374. Indeed, Zelaya’s constituent assembly is exactly the kind of “procedure other than those provided for by the constitution” that prompts action by all citizens to restore the constitution under Article 375.108 The constitution is clear in its limitations on amendment; even if he did not like those limitations, Zelaya was lawfully bound to follow them.

President Zelaya defended his “non-binding” referendum by saying that it was allowed under Article 5 of the Civil Participation Act of 2006.109 Under

ordinaria, por igual número de votos, para que entre en vigencia.”).

106 Id. art. 374 (“No podrán reformarse, en ningún caso, el artículo anterior, el presente artículo, los artículos constitucionales que se refieren a la forma de gobierno, al territorio nacional, al periodo presidencial, a la prohibición para ser nuevamente Presidente de la República, el ciudadano que lo haya desempeñado bajo cualquier título y el referente a quienes no pueden ser Presidentes de la República por el periodo subsiguiente.”).

107 Id. art. 375 (“Esta Constitución no pierde su vigencia ni deja de cumplirse por acto de fuerza o cuando fuere supuestamente derogada o modificada por cualquier otro medio y procedimiento distintos del que ella mismo dispone. En estos casos, todo ciudadano investido o no de autoridad, tiene el deber de colaborar en el mantenimiento o restablecimiento de su afectiva vigencia.”).

108 The Honduran Public Ministry characterized the violations of Articles 373, 374, and 375 as “Treason against the Nation” because it argued that the President had engaged in a forbidden “supplanting of popular sovereignty or the usurpation of the powers therein.” Brief of Alberto Rubí, Fiscal General de la República, Corte Suprema de Justicia [Supreme Court of Justice], June 25, 2009 (Hond.), in DOCUMENTADA CASO ZELAYA, supra note 7, at 35 (as translated by author); see CONSTITUCIÓN POLITICA DE LA REPÚBLICA DE HONDURAS [Constitution] art. 375.

Article 5, all civil servants can convene a non-binding referendum to gauge public opinion. The Civil Participation Act is a general statute that allows civil servants to gauge the public opinion when "formulating proposed solutions to the collective problems" the populace faces. The Act can thus be applied to most laws, referendums, and policy initiatives. Zelaya argued that his referendum was lawful because the Honduran Congress had recognized the use of opinion polls.

Zelaya's argument fails because the Honduran Constitution trumps the Civil Participation Act; the Civil Participation Act cannot be used to ratify an unconstitutional mechanism. As discussed supra, Article 373 of the constitution states that there is only one way to amend the constitution and Article 375 declares that all other attempts to amend the constitution are invalid. Thus, the use of a non-binding referendum to convene a constitutional revision assembly conflicts with Article 375's ban on extra constitutional amendment procedures. Indeed, Article 4 of the Civil Participation Act acknowledges that it is subordinate to the constitution: "the plebiscite, referendum and caucuses, as instances of civil participation, will be executed in conformity with those that established the Constitution and the laws . . . ."

Honduran law is substantially similar to Anglo-Saxon jurisprudence with respect to constitutional supremacy over statutory law. The Honduran Constitution contains its own Supremacy Clause that declares constitutional provisions control when a statute and the constitution conflict. Therefore, a question about a "Fourth Box" that would empower an unconstitutional
revision assembly is forbidden under Articles 373 and 375 of the Honduran Constitution. President Zelaya’s best legal argument is thus fatally defective to a common constitutional principle that any first-year Honduran or American law student should know.

C. Abuse of Authority

President Zelaya’s third unlawful act was a result of his decision to ignore repeated judicial opinions. Under Honduran law, a public servant is guilty of “an abuse of authority and a violation of the duties of a civil servant” if the public servant “fails to comply with the sentences, decisions or orders of a superior authority made within the limits of its respective competency and according to formal legal requirements.”

The Honduran judiciary was crystal clear about its injunction against the constituent assembly referendum, and President Zelaya was equally clear in his refusal to comply. Various Honduran courts attempted to halt the referendum on May 27, May 29, June 16, and June 18. Zelaya was undeterred, and as late as June 25, 2009, believed that he was going to hold his referendum despite the various judicial orders. As the Public Ministry’s brief stated: “[Zelaya] refused, without reason or justification, to act in accordance or compliance with the order given by a competent authority . . .”

Under the Honduran Penal Code, an abuse of authority could carry a sentence of three months to six years. Additionally, civil servants who continue to act in a judicially prohibited manner can be further fined.

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114 CÓDIGO PENAL [CP] art. 349(1) (Hond.), available at http://www.unhcr.org/refworld/country,NATLEGBO,HN,4562d94e2,46d7cebe2,0.html.
115 O’Grady, supra note 60.
116 Brief of Alberto Rubí, Fiscal General de la República, Corte Suprema de Justicia [Supreme Court of Justice], June 25, 2009 (Hond.), in DOCUMENTADA CASO ZELAYA, supra note 7, at 35 (as translated by author).
117 CÓDIGO PENAL [CP] art. 349 (Hond.), available at http://www.unhcr.org/refworld/country,NATLEGBO,HN,4562d94e2,46d7cebe2,0.html (“Será castigado con reclusión de tres (3) a seis (6) años e inhabilitación especial por el doble del tiempo que dure la reclusión, el funcionario o empleado público que: (1) Se niegue a dar el debido cumplimiento a órdenes, sentencias, providencias, resoluciones, acuerdos o decretos dictados por las autoridades judiciales o administrativas dentro de los límites de sus respectivas competencias y con las formalidades legales.”).
118 Id. art. 355 (“El funcionario que, legalmente requerido de inhabilitación continúe actuando antes de que quede resuelta la cuestión de competencia, será sancionado con multa de cinco mil (L. 5,000.00) a diez mil Lempiras (L. 10,000.00).”).
D. Usurpation of Duties

President Zelaya's fourth unlawful act stems from his attempt to unlawfully usurp the functions of the Supreme Election Tribunal. Article 354 of the Penal Code forbids encroachment on another civil servant's duties: "[t]he civil servant or [p]ublic employee who usurps duties belonging to another will be punished with a term of two (2) to five (5) years, and a fine of five thousand (L. 5,000.00) to ten thousand Lempiras (10,000.00) and a disqualification for double the time of his term." Zelaya violated this provision by attempting to administer his own referendum.

The Honduran Election and Political Organizations Law clearly defines the duties of the Supreme Electoral Commission: "[t]he Supreme Electoral Tribunal has the following responsibilities: . . . (5) [o]rganize, direct, administer, and safeguard the electoral processes . . . [and] (8) convene elections, . . . ." The law entrusts the Supreme Electoral Tribunal, and only the Tribunal, with the administration of elections in order to avoid the perverse incentive structure that would result if the political branches ran their own elections. The Honduran democracy, less than thirty years old, has battled corruption its entire life. The wall between the administration of elections and the President is an important step in ensuring the integrity of Honduran elections.

Despite the Supreme Electoral Tribunal’s clear mandate to conduct “public consultations . . . elections, referendums, and plebiscites,” President Zelaya nevertheless planned on having the National Institute of Statistics, an

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119 The Penal Code uses the word “funciones.” While I have translated this word to mean “duties,” the word could also be translated as “functions.”

120 CÓDIGO PENAL [CP] art. 354 (Hond.), available at http://www.unhcr.org/refworld/countr y,,NATLEGBOD,,HND,4562D94e2,46d7cebe2,0.html (“El funcionario o empleado público que usurpe funciones propias de otro cargo será sancionado con reclusión de dos (2) a cinco (5) años, más multa de cinco mil (L. 5,000.00) a diez mil Lempiras (L. 10,000.00) e inhabilitación especial por el doble del tiempo que dure la reclusión.”).

121 In Spanish, “Ley Electoral y de las Organizaciones Políticas.”


123 Id. art. 9, at A2 (“Corresponde al Tribunal Supremo Electoral, todo lo relacionado con los actos y procedimientos electorales. Su integración, organización y funcionamiento se regirá por lo preceptuado en la Constitución de la República y la presente Ley.”).

124 Id. art. 15(5)–(8), at A3.
organization firmly within his political control, administer the referendum.\textsuperscript{125} Zelaya’s desire to have the election conducted in-house is especially apparent given the fact that he had the referendum’s ballots printed in Venezuela.\textsuperscript{126} President Zelaya was guilty of an Usurpation of Duties, but if he had been able to complete his plan he would have been liable for the far greater wrong of casting doubt on the entire Honduran electoral process.

\textit{E. An Attempt to Remove Term Limits}

In addition to the charges included in the Public Ministry’s brief, President Zelaya might have been liable for other constitutional infractions as well. Former Assistant to the Solicitor General of the United States Miguel Estrada, a native Honduran, has argued that Zelaya’s true goal was to remove presidential term limits.\textsuperscript{127} If Zelaya was attempting to change the constitution’s prohibition on reelection, then he would be liable for treason.\textsuperscript{128}

The Honduran Constitution flatly forbids presidential reelection: “The change in the exercise of the President of the Republic is obligatory. The breach of this rule constitutes a crime of treason against the Nation.”\textsuperscript{129} The Constitution goes on to say that “under no circumstances” can the ban on presidential reelection be amended.\textsuperscript{130} If a civil servant even proposes an amendment to the prohibition on reelection, then that civil servant is immediately relieved of his duties for ten years.\textsuperscript{131} The constitution’s defense

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\footnotesize{\textsuperscript{125} Ejecutivo Número PCM-020-2009, 31,945 LA GACETA, June 25, 2009, at A3 (Hond.), in DOCUMENTADA CASO ZELAYA, supra note 7, at 115.}
\footnotesize{\textsuperscript{126} See O’Grady, supra note 60.}
\footnotesize{\textsuperscript{127} See Miguel Estrada, Op-Ed., Honduras’ Non-Coup: Under Honduras’ Constitution, the Ouster of President Manuel Zelaya Was Legal, L.A. TIMES, July 10, 2009, at A29 ("[I]t was easy to conclude . . . that [the referendum] was nothing but a backdoor effort to change the rules governing presidential succession.").}
\footnotesize{\textsuperscript{128} CONSTITUCIÓN POLITICA DE LA REPÚBLICA DE HONDURAS [Constitution] art. 4.}
\footnotesize{\textsuperscript{129} Id. ("La alternabilidad en el ejercicio de la Presidencia de la República es obligatoria. La infracción de esta norma constituye delito de traición a la Patria.").}
\footnotesize{\textsuperscript{130} Id. art. 374 ("No podrán reformarse, en ningún caso, el artículo anterior, el presente artículo, los artículos constitucionales que se refieren a la forma de gobierno, al territorio nacional, al periodo presidencial, a la prohibición para ser nuevamente Presidente de la República, el ciudadano que lo haya desempeñado bajo cualquier título y el referente a quienes no pueden ser Presidentes de la República por el periodo subsiguiente.").}
\footnotesize{\textsuperscript{131} Id. art. 239 ("El ciudadano que haya desempeñado la titularidad del Poder Ejecutivo no podrá ser Presidente o Designado. El que quebrante esta disposición o proponga su reforma, así como aquellos que lo apoyen directa o indirectamente, cesarán de inmediato en el desempeño de sus respectivos cargos, y quedarán inhabilitados por diez años para el ejercicio de toda.")}
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against presidential reelection is thus threefold: (1) reelection is prohibited under Article 4, (2) the constitution cannot be changed to allow reelection under Article 374, and (3) even proposing a change in the prohibition subjects an individual to a ten year suspension under Article 239.

The Honduran Constitution’s prohibition of presidential reelection is the result of the country’s tumultuous past. Honduras has bounced between military dictators for decades: General Enrique Lopez Arellano ruled from 1963 to 1970 and again from 1972 to 1975; General Juan Melgar Castro ruled from 1975 to 1978; and General Policarpo Paz Garcia ruled from 1978 to 1983. The framers of the Honduran Constitution developed this tripartite prohibition to protect the nation from power centralization in the president.

Miguel Estrada writes that Zelaya’s actions evidence a clear intent to alter the constitution’s reelection prohibition:

Earlier this year, with only a few months left in his term, [Zelaya] ordered a referendum on whether a new constitutional convention should convene to write a wholly new constitution. Because the only conceivable motive for such a convention would be to amend the un-amendable parts of the existing constitution, it was easy to conclude -- as virtually everyone in Honduras did -- that this was nothing but a backdoor effort to change the rules governing presidential succession.133

Estrada is correct in arguing that President Zelaya’s actions, especially when considered in the large Bolivarian populist context, suggest that Zelaya did have his sights set on another presidential term (even if he would have had to take some time off while the Constituent Assembly composed a new constitution). But Zelaya never made reelection his explicit goal, and establishing his intent in a court of law would be difficult. However, an inability to establish Zelaya’s intent to win reelection does not make his removal unlawful; Zelaya was demonstratively guilty of the four violations discussed supra. Put another way, President Zelaya broke enough laws in his quest to break the Honduran Constitution’s “Big Law” to justify his removal.

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132 Llosa, supra note 56.
133 Estrada, supra note 127.
IV. DYING BY THE CONSTITUTION'S LETTER OR LIVING BY ITS SPIRIT: 
THE LAWFULNESS OF THE DECISION TO REMOVE PRESIDENT ZELAYA

The other half of the coin in the debate surrounding the legality of Zelaya's removal centers on the actions of the coordinate branches of government. The actions of the Supreme Court of Justice and the Honduran Congress were complicated by a 2003 amendment to the Constitution that removed the presidential impeachment provision. As explained more fully infra, the amendment failed to specify an alternative approach for removing a president. Thus, the Supreme Court of Justice, the military, and the Congress were forced to deal with a president who ignored the Constitution while not having a clear constitutional mechanism to remove that president.

A. The Supreme Court of Justice Correctly Interpreted the Constitution in Light of a 2003 Amendment's Heavy Hand

The Honduran government substantially resembles the United States government in that there are three branches of government: executive, legislative, and judicial. In this tripartite system of government, the Supreme Court of Justice is entrusted with the interpretation of Honduran constitutional law. The Constitution grants the Supreme Court of Justice wide jurisdiction; the Court can hear all claims over events that occur within Honduran territory. Additionally, the Court is specifically empowered to hear cases on the constitutionality of presidential actions. In fact, the Constitution mandates that the Supreme Court of Justice must make a decision after the Public Ministry presents charges against a president. Given Zelaya's

135 See Constitución Política de la República de Honduras [Constitution] art. 4 ("La forma de gobierno es republicana, democrática y representativa. Se ejerce por tres poderes: Legislativo, Ejecutivo y Judicial, complementarios e independientes y sin relaciones de subordinación.").
136 See id. art. 308 ("La Corte Suprema de Justicia es el máximo órgano jurisdiccional; su jurisdicción comprende todo el territorio del Estado y tiene su asiento en la capital, pero podrá cambiarlo temporalmente, cuando así lo determine, a cualquier otra parte del territorio.").
137 Id.
138 See id. art. 313 ("La Corte Suprema de Justicia, tendrá las atribuciones siguientes: . . . (5) Conocer de los recursos de casación, amparo, revisión e inconstitucionalidad de conformidad con esta Constitución y la Ley . . . ").
139 See id. art. 305 ("Solicitada su intervención en forma legal y en asuntos de su competencia, los jueces y magistrados no pueden dejar de juzgar bajo pretexto de silencio u oscuridad de las
grievous and systematic violations of the law outlined supra, the Court also had little choice in finding the President guilty.

The Supreme Court of Justice faced a dilemma, however, in fashioning a remedy for a president who increasingly ignored the Constitution. Prior to 2003, the Constitution regulated the conduct of high government officials in two ways. First, there was a broad immunity provision for congressional delegates, who benefitted from “personal immunity . . . if the National Congress did not first declare just cause.” Second, impunity could be removed by the Congress because it had the power to impeach and “declare if there is or is not just cause” against the President, Presidential Appointees, Congressional delegates . . . .” In 2003, the Honduran Congress decided to abolish the broad immunity explaining that “the institution of immunity has, over time, suffered a gradual loss in its intrinsic value and original purpose . . . coming to be wrongly considered as a synonym of impunity.” The Congress passed Decree 175/2003, which amended the Constitution by repealing Article 200’s grant of immunity and Congress’s power under Article 205(15) to find “just cause.”

Decree 175/2003 was a sloppy act of constitutional draftsmanship because, in repealing the impeachment provision as part of the repeal of immunity, the 2003 reform threw the baby out with the bath water. Article 205(15) served a purpose independent of stripping Article 205’s immunity; Article 205(15) also explained how the judiciary and legislature could check a president’s unconstitutional behavior. By removing the constitution’s explicit mechanism for bringing charges against a sitting president, Decree 175/2003 opened the door for future presidents to claim that there was no constitutional check on their exercise of power. Decree 177/2003 had unwittingly advanced the cause of presidential impunity in its attempt to subject public officials to the law.

When faced with President Zelaya’s continued intransigence in the face of repeated judicial mandates, the Supreme Court of Justice had no clear course
of action. On one hand, the Court could not allow a sitting president to openly flout the Constitution and numerous judicial orders. On the other hand, the obvious course of action, impeachment, had been precluded by the Decree 175/2003’s heavy-handed excision of constitutional text.

The Court correctly decided that a president was subject to the same judicial mechanisms as all other Honduran citizens. The fundamental goal behind the Decree 175/2003 was to remove immunity and to acknowledge “[t]hat all men are born free and with equal rights, that in Honduras there are no privileged classes and all are equal before the law.” Consequently, the repeal of the immunity and impeachment provisions should properly be interpreted to mean that all citizens, regardless of position, would be subject to the same judicial procedures. A president, or any other citizen, who violated the Constitution and ignored judicial decrees would be subject to judicial authority. The Court’s decision to arrest President Zelaya reaffirmed Decree 175/2003’s fundamental goal by affirming that, in Honduras, no one is above the law.

B. The Military Acted Lawfully in Removing the President Pursuant to a Lawful Judicial Order

For many claiming that Zelaya’s removal was a coup d’état, the gravamen of the argument centers on the involvement of the Honduran armed forces. In short, the presence of the military does not a coup d’état make. In his seminal work on the anatomy of a coup d’état, Edward Luttwak defined a coup as “the infiltration of a small but critical segment of the state apparatus, which is then used to displace the government from its control of the remainder.” Other scholars have articulated this concept by stating that “true coups d’etat” involves “assumptions of power.” Either way, the focus is on whether the coup conspirators “displace” the lawful functioning of governments or “assume power.”

The Honduran military did not usurp power, nor did it assume power over the Honduran State. Rather, the military remained wholly subject to civilian control and only acted when directly ordered to do so by the Supreme Court of Justice or the Court of Administrative Disputes. Power over the

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145 Id.
146 LUTTWAK, supra note 3, at 12.
147 SAID & COLLIER, supra note 4, at 44.
148 See LUTTWAK, supra note 3, at 12 (“[T]he coup is not necessarily assisted by either the intervention of the masses, or, to any significant degree, by military-type force.”).
149 Corte Suprema de Justicia [Supreme Court of Justice], June 26, 2009 (Hond.) (Order to
government remained within the lawful chain of civilian succession, and following Zelaya’s removal, the Congress swore in Roberto Micheletti as provisional president. At no point did the military take control of the process, and at no point did the military violate its constitutional mandate to remain subordinate to the Constitution and civilian law.

In fact, once the Supreme Court of Justice signed Zelaya’s arrest warrant, the armed forces had to comply with the order. Article 375 of the Constitution states that both the originators of unconstitutional activity as well as those who subsequently go along with the unconstitutional activity, will both be held accountable for their actions. In other words, the “I was just following orders” defense does not work under Honduran constitutional law. The military did not have a choice in arresting President Zelaya pursuant to a lawful judicial order; the military, just like the president, was subject to judicial authority.

C. The Basis for Zelaya’s Exile and the Congressional Decision to Remove Him

The strongest argument in favor of the claim that Zelaya’s removal constituted a coup d’état centers on Zelaya’s exile and removal from power. It is generally conceded that the military’s decision to put President Zelaya on a plane bound for Costa Rica was an arbitrary exile that suffered from a lack of due process. But the exile would be nothing more than a “meritorious
immigration beef if the Congress had not relied on the exile as the basis for stripping Zelaya of his presidential duties. In the congressional resolution removing Zelaya from power, the basis for removal centered on Articles 242 and 243 of the Constitution. Those articles discuss the transfer of presidential power in cases of presidential absences or when the president "fails to appear." The problem is that the presidential absence was the result of government action; Zelaya was attempting to return to the country but was unable to do so.

A number of jurists have claimed that the Congress’s actions were an unlawful usurpation of power, thus qualifying the entire episode as a coup d’état. Probably the best articulation of this argument comes from the American Society of International Law’s (ASIL) Doug Cassel. In his July 2009 article in the ASIL’s Insights magazine, Cassel condemns the Honduran government’s actions:

In short, after being forced out of the country in breach of the Constitution, President Zelaya was formally deposed by a Congress with no clear constitutional power to remove him in the circumstances at hand, let alone summarily, without so much as a hint of due process of law. This was indeed a coup d’état . . .

Cassel is correct in stating that the Honduran Congress had no “clear constitutional power” to remove Zelaya, but his argument falters after that point.

Cassel begins to have problems when he explains that the Honduran Congress erred in not following the Constitution’s lawful procedure for removing Zelaya:

But a determination of whether or not Zelaya committed treason is a matter for the Honduran Supreme Court, not Congress.

155 Id.
158 Id. art. 243 (as translated by author).
Unlike common law constitutions, the Honduran Constitution does not provide for impeachment and trial of a president by the legislature. Instead, like most civil law constitutions in Latin America, it grants Congress the initial power to determine whether there are grounds to accuse the president of a crime. Once Congress makes that determination, however, the Honduran Constitution mandates that the case be adjudicated by the Supreme Court, not by Congress.\textsuperscript{160}

Cassel is factually incorrect. The procedure he describes, and the constitutional provision he cites, was repealed by Decree 175/2003.\textsuperscript{161} Simply put, the procedure he advocates is no longer good law. Cassel’s faulty assertion of law highlights the central problem with congressional action: there was no impeachment provision. If we lived in the world Cassel described, then the Honduran Congress would have acted unconstitutionally by ignoring a clear impeachment procedure in favor of another approach. But we do not live in that world, and the Honduran Constitution did not have an easy constitutional option for removing presidents.

The Congress thus faced a Hobson’s Choice similar to the dilemma the Supreme Court of Justice had faced: the Congress could either allow a president who disregarded the Constitution to continue to serve, or they could remove him from power. They could either strictly adhere to the Constitution in a way that would lead to its destruction, or they could construe the constitution liberally in order to save the document. The Congress chose the latter option.

As described supra, the legal authority the Congress cited in its resolution to remove Zelaya was unpersuasive because the Congress argued that Zelaya’s absence warranted his removal. The Congress’s best argument (but by no means a perfect line of reasoning) would have instead relied on (1) the Congress’s power to “approve or disapprove” administrative conduct,\textsuperscript{162} (2) the Congress’s power to confiscate, by majority vote, any profits from unconstitutional activity,\textsuperscript{163} and (3) the Honduran Penal Code’s provision that a crime against the form of government can result in the “removal of all or part

\textsuperscript{160} Id.

\textsuperscript{161} Decreto No. 175-2003, 30,269 LA GACETA, Dec. 19, 2003, at A2 (Hond.). The current version of the Honduran Constitution, hosted by the Honduran government, has replaced the text of Article 205(15) with the phrase “Repealed by Decree 175/2003.”

\textsuperscript{162} CONSTITUCI\textsuperscript{C}N POLITICA DE LA REP\textsuperscript{U}BLICA DE HONDURAS [Constitution] art. 205(20).

\textsuperscript{163} Id. art. 375.
of the National Congress’s, the Executive Power’s, or the Supreme Court of Justice’s [c]onstitutional prerogatives and powers.” These three explicit grants of power could be read to give Congress the right to take action against unconstitutional administrative conduct that it disapproves of. Again, this is not a completely satisfying legal argument, but a colorable one given President Zelaya’s unconstitutional behavior.

The situation the Honduran Congress faced is not unlike the situation faced by American President Abraham Lincoln during the Civil War. The U.S. Constitution allows the writ of habeas corpus to be suspended when two qualifications are met (1) the suspension must involve a case “of [r]ebellion or [i]nvasion,” and (2) Congress must be the branch of government that suspends the writ. While the first qualification was met, President Lincoln did not wait for Congress’s approval before ordering his generals to detain any individuals that presented a security risk. Lincoln defended his policy in a Special Session to Congress on July 4, 1861, arguing that an ongoing insurrection “[i]n nearly one-third of the States’ had subverted the ‘whole of the laws . . . are all the laws, but one, to go unexecuted, and the government itself go to pieces, lest that one be violated?’” Lincoln’s argument was simple: blind adherence to the letter of the law could sometimes destroy the very constitution that adherence was meant to protect.

Similarly, the Honduran Congress decided that it would not allow Zelaya to convene a constitutional convention to overthrow the existing Constitution. In the face of an existential threat to the Republic, and aided only by a constitution that included no impeachment provision, the Congress attempted to carry out its charge to protect the Constitution. Strictly following all of the constitution’s provisions was no longer an option; the Congress would either read its impeachment power liberally or fail in Title VII’s mandate to protect the inviolability of the Constitution. The Congress could either die by the letter of the law, or live by its spirit. While reasonable minds might disagree over the sufficiency of the Congress’s constitutional basis, the

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164 CÓDIGO PENAL [CP] art. 328(3) (Hond.), available at http://www.unhcr.org/refworld/country,_NATLEGBO, HND, 4562d94e2,46d7cebe2,0.html (emphasis added).
165 U.S. CONST. art. I, § 9, cl. 2.
167 See CONSTITUCIÓN POLITICA DE LA REPÚBLICA DE HONDURAS [Constitution] art. 322 (stating that any public official in office makes a promise to enforce the constitution and its laws).
important point is that the Congress’s action was not a reckless act of legal neglect.

V. CONCLUSIONS: THE HUBRIS OF THE INTERNATIONAL COMMUNITY TELLING THE HONDURAN SUPREME COURT HOW TO INTERPRET THE HONDURAN CONSTITUTION

The legality of President Zelaya’s removal collapses into whether the Honduran Supreme Court, military, and Congress had the right to take their respective actions. Several answers are clear: President Zelaya committed numerous unconstitutional acts, the Supreme Court of Justice had the power to order his arrest, and the military had the power to arrest Zelaya. An open question exists as to the lawfulness of the Congress’s actions to remove Zelaya from power, but the legislature had several defenses, including: (1) a textual line of reasoning stemming from Articles 205(20) and 375 of the Constitution and Article 328(3) of the Honduran Penal Code; and (2) a policy argument based on the holistic need to defend the Constitution in the face of an existential threat. This Article does not claim that the Honduran government’s case is airtight; rather, this Article illustrates that the both sides have presented reasonable cases.

The proper adjudicator of this Honduran constitutional law question is obvious: the Honduran Supreme Court. They are the world’s experts on the Honduran Constitution, and they alone have jurisdiction over the issues. The Supreme Court of Justice was therefore uniquely and supremely qualified to issue its June 29, 2009 opinion finding that the Congress had lawfully removed Zelaya from power.168

But the Supreme Court of Justice’s opinion was not good enough for the international community, and the nations of the world have already begun punishing Honduras.169 The hubris inherent in the international community telling the Honduran Supreme Court how to interpret the Honduran Constitution is astounding. From tautologies that any forcible removal of power constitutes a coup170 to polemics against any involvement by the

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168 Corte Suprema de Justicia [Supreme Court of Justice], June 29, 2009 (Hond.), in DOCUMENTADA CASO ZELAYA, supra note 7, at 85.
170 See U.S. Permanent Mission to the Org. of Am. States, Teleconference Background Briefing by Two Senior Department Officials on the Situation in Honduras (July 1, 2009), http://
military, international critics have rushed to condemn without pausing to consider the Honduran government’s case. Just as the American Supreme Court was justified in determining the scope of President Richard Nixon’s executive power in United States v. Nixon, so too was the Honduran Supreme Court justified in determining the scope of the Honduran legislative power. Simply put, the opinion of the Honduran Supreme Court trumps the opinion of the world’s pundits on issues of Honduran constitutional law.

Those who have called Zelaya’s removal a coup are implicitly arguing that the only valid doctrine of constitutional interpretation is strict textualism. Otherwise, the Honduran Congress and the Supreme Court of Justice could read the Constitution to give them the right to defend against rogue presidents who trample the Constitution. But it is not for the international community to tell Hondurans how to interpret their Constitution; their approach is theirs to decide.

There is a fine line between the pretextual rationalizations that accompany any coup d’état and bona fide constitutional questions. It is the province of rational men and women to differentiate between the two. Put another way, the issue is not whether the Honduran government’s argument is stronger than the international community’s argument; the proper inquiry is whether the Honduran government has established a reasonable basis for its actions. If the government has established a reasonable basis, then the argument is not a pretext and adjudication therefore falls to the Honduran Supreme Court. As this Article has painstakingly detailed, the Honduran government has met this burden in showing the constitutional basis for its actions.

Calling President Zelaya’s removal a coup d’état cheapens the disdain with which a true coup d’état should be regarded. A true coup d’état involves an assault on a constitution and not its defense. It is indeed ironic that, while it was Zelaya who espoused a disdain for the Constitution, it was the Constitution’s defenders who have faced the world’s wrath. Hopefully, time will show the true wisdom behind the actions of the Honduran government.

www.usoas.usmission.gov/ga_honduras ("In regard to the first question, both the President and the Secretary have described events in Honduras as a coup, which they certainly were once the current claimant to the presidency swore – was sworn in before the congress after the forcible removal of the legal and constitutional president, Mel Zelaya.").

171 See Obama Remarks, supra note 13 ("I think it’s — it would be a terrible precedent if we start moving backwards into the era in which we are seeing military coups as a means of political transition rather than democratic elections. The region has made enormous progress over the last 20 years in establishing democratic traditions in Central America and Latin America.").

Zelaya’s opponents recognized that a constitution is more than just a list of rules; it is a way of life. And it is worth defending.