

7-1-2001

The "Enabling Law": The Demise of the Separation of Powers in Hugo Chavez's Venezuela

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Recommended Citation

Mario J. Garcia-Sierra, *The "Enabling Law": The Demise of the Separation of Powers in Hugo Chavez's Venezuela*, 32 U. Miami Inter-Am. L. Rev. 265 (2001)

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COMMENT

THE “ENABLING LAW”: THE DEMISE OF THE SEPARATION OF POWERS IN HUGO CHAVEZ’S VENEZUELA

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I. INTRODUCTION

On November 7, 2000, the Venezuelan National Assembly adopted the “Enabling Law,” which grants President Hugo Chavez the power to enact laws addressing a broad range of issues without legislative debate or approval.¹ President Chavez is now empowered to decree laws in areas ranging from banking

1. Jose de Cordoba, *For Venezuela’s President, a Long Leash*, WALL ST. J., Nov. 8, 2000, at A22.

to petroleum to land reform.² This article will examine the constitutionality of the "Enabling Law" along with its effects on the Venezuelan political system and foreign economic interests. Upon analyzing the relevant provisions of the recently adopted Venezuelan Constitution, it appears that President Chavez has overstepped the Constitutional boundary separating the executive and legislative branches. The negative effects of this extra-constitutional grab of power on the Venezuelan political system and foreign economic interests are cause for concern both within and beyond Venezuela.

The "Enabling Law" essentially eliminates the capacity of the elected opposition to exercise any power and grants President Chavez a very effective tool to chip away at the economic base of the Venezuelan upper class, which has been his traditional political opponent. Additionally, the "Enabling Law" further empowers President Chavez to pursue economic and social policies that may be inimical to foreign investment. In short, President Chavez, taking advantage of his immense popularity and the paralysis of the traditional political parties, has granted himself powers which are inconsistent with Venezuela's Constitution and potentially devastating to Venezuela's future political and economic development.

II. HISTORY

For most of the second half of the twentieth century, Venezuela was considered, by Latin American standards, to be a model democratic society. With the fall of the Perez Jimenez dictatorship in January of 1958, Venezuela embarked on an uninterrupted sequence of peaceful and democratic transitions of power.³ While other Latin American countries suffered through armed leftist insurgencies, constant threats of military coups, extreme polarization between political parties and huge inequalities in wealth, Venezuela became the exception to the rule.⁴ It possessed a professional military, which remained confined to their barracks, a political life dominated by two

2. BBC News, *Chavez given sweeping powers* (Nov. 7, 2000), available at <http://news.bbc.co.uk/1/hi/english/world/americas/newsid1011000/1011963.stm>

3. LESSONS OF THE VENEZUELAN EXPERIENCE 3 (Louis W. Goodman, et al. eds., 1995).

4. *Id.*

centrist political parties that shared power peacefully, and a progressive society with a growing middle class.⁵ This stable socio-political system was essentially founded upon three key elements: a professional military subservient to civilian authority, an understanding between the major political parties to collaborate and respect elections, and a high growth oil export economy.

How then did we arrive at the Venezuela of 2001, where an ex-"golpista" military officer, possessing no traditional party affiliation and espousing an extreme nationalist/militarist ideology, was elected President practically unopposed, has abolished the Constitution, adopted his own Constitution, and effectively deprived the National Assembly of its legislative powers? All of this unfolding while the gap between the wealthy and the poor widens and capital flies out of the country for the safety of foreign banks. The answer to this question can be formulated with reference to three February dates in recent Venezuelan history, February 18, 1983, February 27, 1989, and February 4, 1992.⁶ These dates served as harbingers for the decline of the Venezuelan economy, the collapse of the traditional party based political system, and the re-entry of the military into the political life of the country.⁷ These changed circumstances are what ultimately allowed Mr. Chavez to win the presidency in 1998, and bring about the new Constitution of 1999.

On February 18, 1983, a date known as "Black Friday" among Venezuelans, the "bolivar" was severely devalued as a result of the high level of foreign debt and the declining price of oil.⁸ Most Venezuelan's living standards were affected detrimentally and the flow of "petro-dollars" that had financed generous social policies and helped to maintain the political patronage machines of the two major political parties began to recede. The days of "Venezuela Saudita," as the oil rich nation had come to be known, were over.⁹ Many middle class Venezuelans would slip back into the ranks of the lower class as

5. *Id.*

6. Daniel H. Levine & Brian F. Crisp, *Legitimacy, Governability, and Reform in Venezuela*, *supra* note 3, at 225.

7. *Id.*

8. *Id.*

9. James Ferguson, IN FOCUS: VENEZUELA 6 (Duncan Green ed., 1994).

the value of their income and savings practically evaporated.¹⁰

In spite of economic hard times, the two traditional political parties, the Comité de Organización Política Electoral Independiente [hereinafter, "COPEI"], a slightly right of center Christian Democrat party, and the left of center Acción Democrática [hereinafter, AD], were able to maintain control of the political system throughout the 80's. In 1984, COPEI President Herrera Campíns handed power over to AD President Jaime Lusinchi who in turn was succeeded by his AD rival, and former president, Carlos Andres Perez in 1989.¹¹ This peaceful rotation of power was consistent with the understanding established between all the major political parties right after the fall of the Perez Jimenez dictatorship and embodied in the 1958 Pact of Punto Fijo.¹² The Pact of Punto Fijo obligated all of the political parties to commit themselves to democratic government and procedures when in power and to serve as a "loyal opposition" when out of power.¹³ As the decade came to a close, however, the order established by the Punto Fijo understanding began to show weaknesses. While COPEI and AD still demonstrated a willingness to respect elections and share power, the people's confidence in both parties began to wane because of the worsening economy and the ever-increasing revelations of public corruption.¹⁴ Popular expectations rose in early 1989, when Perez, promising a return to the prosperity of his previous term (1974-1979), was swept into power.¹⁵ However, the public mood quickly changed when Perez revealed that he had become an adherent of neo-liberal economic reforms which would demand short-term sacrifices.¹⁶

On February 27, 1989, popular frustration with the

10. Winfield J. Burggraaff & Richard L. Millett, *More than Failed Coups: The Crisis in Venezuelan Civil-Military Relations*, in LESSONS OF THE VENEZUELAN EXPERIENCE, *supra* note 3, at 59.

11. John D. Martz, *Political Parties and the Democratic Crisis*, in LESSONS OF THE VENEZUELAN EXPERIENCE, *supra* note 3, at 33.

12. *Id.* at 32.

13. Winfield J. Burggraaff & Richard L. Millett, *More than Failed Coups: The Crisis in Venezuelan Civil-Military Relations*, in LESSONS OF THE VENEZUELAN EXPERIENCE, *supra* note 3, at 56.

14. Andrew Templeton, *The Evolution of Popular Opinion*, in LESSONS OF THE VENEZUELAN EXPERIENCE, *supra* note 3, at 79.

15. John D. Martz, *Political Parties and the Democratic Crisis*, in LESSONS OF THE VENEZUELAN EXPERIENCE, *supra* note 3, at 42-44.

16. *Id.*

traditional political order finally ignited as a three day riot, resulting in extensive looting and over 1000 deaths, broke out in response to a bus fare increase provoked by a Perez imposed hike in the price of gas.¹⁷ Ultimately, military force was necessary to quash what came to be known as the "caracazo."¹⁸ The "caracazo" not only demonstrated the discontent of a great many Venezuelans with the traditional political order, but it also focused the grievances and thoughts of many junior military officers.¹⁹ After the "caracazo," several junior military officers, prevented from further professional advancement because of their lack of political connections, began to complain that they were serving as the repressive arm of a corrupt civilian government.²⁰ Reflecting on the "caracazo," then Lieutenant Colonel Hugo Chavez stated that the "military was being transformed 'into a praetorian guard to protect a government that serves the interests of a small group of individuals.'"²¹ The Venezuelan government's decision to use military force to quell the "caracazo" and subsequent civil disturbances would later prove to be a motivating factor in bringing the Venezuelan military back into the political arena.

The Constitution of 1961, adopted in the wake of nearly continuous rule by military dictatorships, was designed to ensure military subservience to civilian authority. The document itself unequivocally stated:

[T]he National Armed Forces form a non-political, obedient and non-deliberative institution, organized by the State to secure national defense, the stability of democratic institutions and respect for the Constitution and Laws, the observance of which shall always be above any other obligation. The National Armed Forces shall be in the service of the Republic and in no case of that of any person or political partisanship.²²

17. Ferguson, *supra* note 7, at 5.

18. Winfield J. Burggraaff & Richard L. Millett, *More than Failed Coups: The Crisis in Venezuelan Civil-Military Relations*, in LESSONS OF THE VENEZUELAN EXPERIENCE, *supra* note 3, at 59.

19. *Id.* at 61.

20. *Id.*

21. *Id.* at 68.

22. Felipe Aguero, *Debilitating Democracy: Political Entities and Military Rebels*, in LESSONS OF THE VENEZUELAN EXPERIENCE, *supra* note 3, at 144.

This clear Constitutional mandate along with provisions providing for mandatory retirement after thirty years of service, the dissolution of an integrated command structure, and legislative oversight of promotions above the rank of lieutenant colonel, provided for peaceful and productive civil-military relations.²³ Military energies were also successfully transferred from political activities to other efforts such as the combating of the leftist insurgency of the 60's and participation in the developmental efforts of the 70's and 80's.²⁴

However, the provisions of the Constitution of 1961 were insufficient to maintain peace between government and military in the circumstances of the early 90's. The same small cadre of junior military officers, that had earlier complained of the politicized system of promotions and of their new found duties of repressing popular protests, organized themselves as the Movimiento Bolivariano Revolucionario - 200 (MBR - 200).²⁵ With no clear political ideology, the group's identifying principals were a nostalgic and romantic adherence to the legacy of Simon Bolivar and intransigent opposition to the status quo.²⁶ While the military high command continued to collaborate with the traditional political parties, these junior officers plotted to rid themselves of the political and military order they so despised. As the number of Venezuelans living in poverty reached eight percent, revelations of public corruption increased, and President Perez's approval rating sank below twenty percent, the Bolivarianos had reason to believe that the public would support a coup d'etat.²⁷

On February 4, 1992, the Bolivarianos decided to strike. As President Perez returned from an official trip to Switzerland, about ten percent of all Army units mutinied and attempted to take over government, military, and communication facilities.²⁸ President Perez, barely escaping assassination, was able to get to a safe television station, and made an appeal to the armed forces

23. *Id.* at 145-46.

24. *Id.* at 146-47.

25. Winfield J. Burggraaff & Richard L. Millett, *More than Failed Coups: The Crisis in Venezuelan Civil-Military Relations*, in LESSONS OF THE VENEZUELAN EXPERIENCE, *supra* note 3, at 65-68.

26. *Id.* at 66.

27. *Id.* at 69.

28. *Id.* at 65.

to remain loyal and defend the Constitution.²⁹ Within a few hours, the rebellion had been quelled and the coup plotters arrested, but the Venezuelan tradition of military restraint in political matters had been shattered. A later military uprising on November 27 of the same year would also be quashed, but the new reality remained unchanged. The Venezuelan military had reentered the political arena.³⁰ As was indicated by the words of one of the Bolivariano coup plotters, political change was almost certain: "What happened on February 4th was only a sneeze heralding a coming cold."³¹

What was surprising was the type of cold that infected the Venezuelan body politic. The Venezuelan electorate's strong commitment to democracy, as was evidenced by the almost universal lack of popular support for the attempted coups, forced the Bolivarianos to pursue power within the confines of the electoral system.³² Venezuelan's respect for constitutional order and procedures was further highlighted at this time by the fact that Carlos Andres Perez, instead of falling prey to a military coup, was peacefully removed from office on corruption charges in 1992.³³ The Venezuelan Congress installed Ramon Velasquez, a candidate acceptable to both AD and COPEI, as interim president.³⁴ However, due to the fact that most of their leaders, including Chavez, were in jail following the coups, the Bolivarianos were unable to effectively participate in the 1993 national elections. In a demonstration of popular disgust with the traditional political parties but a reluctance to depart from the political center, the Venezuelan people returned former President Rafael Caldera, who had broken away from COPEI, to power.³⁵

The Caldera presidency was characterized by low economic growth, high inflation, severe reductions in government

29. Ferguson, *supra* note 9, at 30.

30. Winfield J. Burggraaff & Richard L. Millett, *More than Failed Coups: The Crisis in Venezuelan Civil-Military Relations*, in *LESSONS OF THE VENEZUELAN EXPERIENCE*, *supra* note 3, at 71.

31. *Id.* at 65.

32. Andy Webb-Vidal, *After two years Chavez remains an enigma*, *FIN. TIMES*, Jul. 29, 2000, available at

<http://news.ft.com/ft/gx.cgi/ftc?pagenameView&c=Article&cid=FT3PLP9R8BC&live=true>.

33. *LESSONS OF THE VENEZUELAN EXPERIENCE*, *supra* note 3, at 400.

34. *Id.*

35. *No party for the parties*, *ECONOMIST*, Nov. 8, 1997, at 38.

spending, and a grudging reluctance to adopt even the most basic free market reforms.³⁶ Soon after entering office, President Caldera pardoned and released the coup plotters from jail.³⁷ The MBR-200 would subsequently unite behind the charismatic Chavez as their leader.³⁸ As AD and COPEI fortunes continued to decline because of their inability to present a persuasive vision of the future, effectively oppose Caldera, or shake off the tinge of corruption, the way was open for a true outsider to assume the presidency in the elections of 1998.

As the 1998 election campaign began, the early front-runner was Irene Saez, a former Miss Universe and former mayor of a wealthy Caracas suburb. As Saez's lead in the polls shrank, she made the colossal error of forsaking her independent status and accepting the nomination of COPEI.³⁹ Saez would ultimately see her lead in the polls drop from over fifty percent to the low single digits alongside the official AD candidate, Luis Alfaro Ucero.⁴⁰ Chavez, on the other hand, would see his lead soar from the single digits to almost fifty percent as his message of overturning the entire political and economic order proved to have more appeal to the impoverished masses who were eager for dramatic change.⁴¹ Fearing a Chavez victory, both the COPEI and AD candidates dropped out of the race and threw their support behind Henrique Salas Romer, an independent candidate who was closest to Chavez in the polls.⁴² This last ditch effort proved futile, however, as Chavez triumphed on election day with fifty-six percent of the vote.⁴³

AD and COPEI's nearly forty year monopoly on political power was put to an end by an ambitious military officer who skillfully manipulated popular discontent with public corruption and a faltering economy. The traditional political parties' inability to reform themselves, adjust to the changed economic circumstances, or effectively unite against a threatening outsider sealed their demise. More was at stake, however, in the elections of 1998, than who would occupy the Miraflores presidential

36. *It's all Chavez*, ECONOMIST, Jul. 4, 1998, at 30.

37. LESSONS OF THE VENEZUELAN EXPERIENCE, *supra* note 3, at 401.

38. *Id.*

39. *Closing the gap*, ECONOMIST, Oct. 10, 1998, at 35.

40. *Id.*

41. *Venezuela's humbled parties*, ECONOMIST, Dec. 5, 1998, at 38.

42. *Id.*

43. *A message from the people*, ECONOMIST, Dec. 12, 1998, at 35.

palace. Throughout the campaign, Chavez had consistently promised to convoke a Constitutional Assembly, which would create a new Constitution, once he was elected.⁴⁴ President Chavez was now determined to follow through on that promise, and Venezuela would soon embark upon a complete restructuring of its political, economic, social and legal system.

III. THE PROCESS OF CONSTITUTIONAL REFORM

Upon assuming office in February of 1999, President Chavez made clear that the centerpiece of his first year in office would be the creation of a new Constitution.⁴⁵ A new Constitutional Assembly would allow Chavez to create a whole new political and social framework to his liking and permit him to circumvent a Congress and Judiciary still dominated by the traditional political parties. In a demonstration of Chavez's strong popular appeal despite worsening economic times, the Venezuelan people, in April of 1999, voted by a margin of ninety-two percent to eight percent to convoke a Constitutional Assembly.⁴⁶ In elections for the Assembly in July of 1999, Chavez's followers won 123 of the 131 seats.⁴⁷ Among the newly-elected Constitutional drafters were Chavez's wife, brother, Chief of Staff, and twenty of his former military colleagues.⁴⁸ COPEI and AD, recognizing their demise, failed to participate in the elections.⁴⁹

Throughout the campaign for the Constitutional Assembly, Chavez had called on the Assembly, once elected, to dissolve Congress and the Supreme Court.⁵⁰ Not surprisingly, one of the first acts of the Assembly, meeting in the Venezuelan Capitol, was to bar the Venezuelan Congress from meeting and passing new laws.⁵¹ This occurred despite the fact that the April, 1999,

44. *Id.*

45. U.S. Dep't of State, *1999 Country Report on Economic Policy and Trade Practices - Venezuela* (2000), available at http://www.state.gov/www/issues/economic/trade_reports/1999/veneucla.html.

46. Political Database of the Americas, *Venezuela Referendum Results* (Apr. 26, 1999), available at <http://www.Georgetown.edu/pdba/Elecdata/Venezuela/ref99.html>.

47. CNN, *Venezuelan president gets big win assembly vote* (Jul. 26, 1999), available at <http://www.cnn.com/WORLD/americas/9907/26/venezuela>.

48. *Id.*

49. CNN, *Venezuela's president says national assembly will have broad powers* (July 25, 1999), available at <http://www.cnn.com/WORLD/americas/9907/25/venezuela.election>.

50. *Id.*

51. CNN, *Venezuelan president's fans, foes fight in streets of Caracas* (Aug. 27, 1999),

referendum question did not provide for the endowing of legislative powers to the Constitutional Assembly.⁵² The Assembly also reviewed complaints about the judiciary and removed eight lower court judges from the bench.⁵³ When opposition legislators scaled the fence surrounding the Capitol and attempted to meet in their chambers, they were thrown out by the use of armed force.⁵⁴ The Chief Justice of the Supreme Court, which had earlier ruled that the Constitutional Assembly would not have the authority to dissolve either Congress or the Supreme Court, resigned stating that "the court would commit suicide rather than wait to be killed by the Assembly."⁵⁵ By the end of the summer of 1999, Chavez had effectively vanquished the Congress and the Supreme Court and was well on his way to completing a new Constitution embodying his "Bolivarian" principles.

While Chavez pursued the adoption of a new Constitution, he also attempted to consolidate his power within the current Constitutional framework. On April 26, 1999, one day after Chavez obtained the ninety-two percent vote in favor of calling a Constitutional Assembly, he asked Congress to adopt an "enabling law," which would permit him to promulgate economic reforms without the consent of Congress.⁵⁶ The Congress, shell-shocked by the election results and an economy suffering an unemployment rate of 11%, a budget deficit that reached 9.5% of GDP and a price of oil that had fallen to \$8.43US, granted his request.⁵⁷

The Constitution of 1961 allowed for the adoption of such "enabling laws" with regards to economic and financial matters.⁵⁸ In fact, the Venezuelan Congress had granted decree powers via an "enabling law" five times since 1961.⁵⁹ Consistent with the five previous exercises of this power, the April, 1999, "enabling

available at <http://www.cnn.com/WORLD/americas/9908/27/venezuela.riot>.

52. Political Database of the Americas, *supra* note 46.

53. Steve Ellner, *Hugo Chavez takes on the Venezuelan Establishment* (Oct. 7, 1999), available at <http://www.neravt.com/left/ellner1.html>.

54. CNN, *supra* note 51.

55. *Id.*

56. CNN, *Venezuela's Chavez assumes new powers, readies new taxes* (Apr. 26, 1999), available at <http://www.cnn.com/WORLD/americas/9904/26/venezuela>.

57. U.S. Dep't of State, *supra* note 45.

58. VENEZUELAN CONST. art. 190:8.

59. Brian F. Crisp, *Presidential Decree Authority in Venezuela*, in EXECUTIVE DECREE AUTHORITY 146 (John M. Carey and Matthew Soberg Shugart eds., 1998).

law" was limited both in scope and duration.⁶⁰ Chavez proclaiming that the "enabling law is the first step toward reducing the deficit, toward leashing the devil" went on to impose a .5% tax on financial transactions and a 15.5% value added tax while decreeing a 20% pay raise for public sector workers.⁶¹ Chavez also promulgated legislation in different economic sectors, such as energy, mining, government procurement, income taxes, and agricultural credit.⁶² President Chavez's attempts to consolidate his power within and without the current Constitutional framework would ultimately merge once the draft of the new Constitution was complete.

On November 19, 1999, the Constitutional Assembly completed its work and submitted the new proposed Constitution to the National Electoral Council, which scheduled a referendum on its adoption for December 15, 1999.⁶³ On its face, the new proposed Constitution was distinguished by its repeated invocation of "Bolivarian" precepts. Indeed, the document officially changed the country's name to the Bolivarian Republic of Venezuela.⁶⁴ Consistent with the ambiguous nature of "Bolivarism," the new Constitution did not embody a clear set of ideological principles. One international observer described it as establishing a political and economic model that was "part Arab oil kingdom, part European cradle-to-grave welfare state, with a dash of Latin American authoritarianism thrown in."⁶⁵

In the economic and social realm, the new proposed Constitution called for increased state intervention in the economy, prohibited the privatization of the state-run national oil company, rescinded recent "management friendly" labor law reforms, mandated a minimum wage reflecting the costs of a "basic basket of goods and services," and made guarantees of universal health care, education, pensions, and employment.⁶⁶ Civilian oversight of the military was sharply curtailed with promotions now being vested within the military instead of

60. *Id.* at 154.

61. *Venezuela's Chavez assumes new powers, readies new taxes*, *supra* note 56.

62. U.S. Dep't of State, *supra* note 45.

63. *Id.*

64. CNN, *Venezuelan assembly begins final talks on new constitution* (Nov. 12, 1999), available at <http://www.cnn.com/WORLD/americas/9911/12/venezuela.constitution>.

65. Christina Hoag, *Commentary: This Constitution Could Wreck Venezuela* (Dec. 13, 1999), available at http://www.businessweek.com/1999_50/b3659210.htm.

66. *Id.*

Congress and with the appointment of a military comptroller instead of the national comptroller to oversee its finances.⁶⁷ In the political realm, the new Constitution would empower the President to call referendums on national issues at will, name an Executive Vice President, which would essentially have the role of a prime minister, and to dissolve the National Assembly under certain circumstances.⁶⁸ The presidential term was extended from five to six years and immediate re-election was permitted.⁶⁹ The old bicameral National Congress would be replaced with a unicameral National Assembly that could empower the President to promulgate laws in any policy area, not just economic and financial matters, through the passage of an "enabling law."⁷⁰ Despite the protests of opposition leaders and prominent economists, the Venezuelan people, by a margin of seventy-one percent to twenty-nine percent, approved the newly proposed Constitution.⁷¹

IV. THE CONSTITUTIONALITY OF THE "ENABLING LAW"

After new elections for President and for the National Assembly, which Chavez and his followers handily won, the National Assembly adopted another, more far reaching "enabling law." This "enabling law" authorized the President to promulgate legislation in the areas of finance, the economy and society, infrastructure, personal and legal security, science and technology, and the civil service.⁷² President Chavez explained his view on the difference between the two enabling laws enacted during his tenure thus far: "This is an enabling law for the revolution. The other was for the transition."⁷³

The fact that adoption of an "enabling law" is provided for in the Constitution and that said Constitution was adopted through a democratic process, which expressed the consent of the people

67. CubaNet News, *Critics Compare Chavez to Castro* (Nov. 26, 1999), available at <http://64.21.33.164/Cnews/y99/26e8.html>.

68. CONST. OF THE BOLIVARIAN REPUBLIC OF VENEZUELA (1999), 5:2 art. 236.

69. *Venezuelan assembly begins final talks on new constitution*, *supra* note 64.

70. CONST. OF THE BOLIVARIAN REPUBLIC OF VENEZUELA (1999), 5:2 art. 203.

71. Political Database of the Americas, *supra* note 46.

72. Gaceta Legal No. 1005 (Nov. 15, 2000), 1226-1230.

73. Reuters, *Venezuela's Chavez plans land reform* (Nov. 12, 2000), available at <http://live.altavista.com/scripts/editorial.dll?ei=2309508&ern=y>.

is beyond reproach.⁷⁴ What has yet to be addressed, however, is whether the "enabling law" provision of the Constitution, Article 236(a), and the manner in which President Chavez has exercised it is consistent with the rest of the Constitution. If the "enabling law" provision or its use were inconsistent with the Constitution, it would be the duty of the Supreme Tribunal of Justice, Venezuela's highest court, to resolve this dilemma. Upon review of the relevant provisions of the 1999 Constitution, a central conclusion of this article is that the November, 2000, "enabling law" violates the doctrine of separation of powers embodied in the 1999 Constitution. Such a sweeping grant of legislative power for over a year is inconsistent with the Constitution's mandate of legislative powers to the National Assembly and its command that the separate branches of government should collaborate and avoid the usurpation of power. The unlikelihood that a Chavez influenced Supreme Tribunal of Justice will nullify this "enabling law," only reinforces the impression that a domineering and popular President, whose commitment to democratic principles is questionable, has rendered the doctrine of separation of powers irrelevant in Venezuela.

At this point, it is prudent to engage in an analysis of how the separation of powers doctrine has been applied to the executive/legislative relationship in Latin America, in general, and Venezuela, in particular. Such an analysis will hopefully prevent Anglo-American concepts of civil government from imposing themselves too harshly in the context of a Latin American political environment. One should not condemn a certain system of democratic government just because it deviates from the familiar models of the United States and Western Europe.

Only three Latin American constitutions, those of Argentina, Brazil, and Colombia, permit the president to establish new legislation without first having been granted explicit authority to do so.⁷⁵ The "enabling law" provisions of both the 1961 and 1999

74. Approval of how the 1999 Constitution was created and ratified should not be confused for approval of all actions taken by the Constitutional Assembly. It is the author's opinion that the Constitutional Assembly exceeded the boundaries of its authority when it dissolved Congress and forced the Supreme Court to disband.

75. Scott Mainwaring and Matthew Soberg Shugart, *Presidentialism and Democracy in Latin America: Rethinking the Terms of the Debate* in *PRESIDENTIALISM AND DEMOCRACY IN LATIN AMERICA* 45 (Scott Mainwaring and Matthew Soberg Shugart eds. 1997). Colombia's president was included because of his extensive decree authority

Venezuelan Constitutions fall into the category of what has been called "delegated legislative authority" or legislative authority, which has been explicitly delegated to the president by an act of the legislature.⁷⁶ This sort of decree authority is fairly common in Latin America with the Constitutions of five nations, including Venezuela, permitting the legislature to delegate lawmaking authority to the executive.⁷⁷

A review of the five instances, between 1961 and 1999, when the Venezuelan Congress enacted an "enabling law" indicate that these grants of authority, at least in the Venezuelan context, have always been characterized by limits on scope and time. An "enabling law" was adopted in the administrations of Romulo Betancourt, Carlos Andres Perez (1974-79), Jaime Lusinchi, Ramon Velasquez, and Rafael Caldera (1993-98).⁷⁸ The Bentancourt, Perez, and Lusinchi "enabling laws" each lasted one year while the grant of power to Velasquez lasted only four months and Caldera's only thirty days.⁷⁹

More importantly, for the purposes of this article, each of these five "enabling laws" was characterized by specific limitations on the scope of the authority granted. The Perez "enabling law," which is considered to be the one which granted the broadest authority, allowed President Perez to reform the national finance system, nationalize the iron ore industry, pay off the debt of the Venezuelan Social Security Institute, uphold the pension and seniority rights of workers, and to establish a new minimum wage.⁸⁰ In a reaction to what was perceived as Perez's excessive use of his "enabling law" authority, the "enabling laws" of the Lusinchi, Velasquez, and Caldera administrations were characterized by more carefully defined scopes of authority.⁸¹ Lusinchi was authorized to decrease government spending by cutting government salaries by ten percent, to increase revenues by increasing the tax on alcohol by a range of five percent to thirty percent, and to reorganize the public sector more

under his emergency powers.

76. Crisp, *supra* note 59, at 146.

77. John M. Carey, Et. AL, *Appendix: Outlines of Constitutional Powers in Latin America*, *supra* note 75, at 440-60. The five countries are Chile, Colombia, Peru, Uruguay, and Venezuela.

78. Crisp, *supra* note 59, at 146-51.

79. *Id.*

80. Crisp, *supra* note 59, at 147.

81. Crisp, *supra* note 59, at 148-49.

efficiently.⁸² President Velasquez was given powers to reform the tax system, provide credit for low cost housing, stimulate growth in the agricultural sector, and to sell a government owned airline.⁸³ By 1994, the Caldera "enabling law" only authorized the President to engage in the unpopular tasks of imposing a luxury tax, a wholesale sales tax, and a tax on savings accounts, and to abolish the value added tax.⁸⁴ President Caldera issued only four decrees pursuant to this "enabling law."⁸⁵

As will be demonstrated later, the "enabling law" of November, 2000, grants President Chavez decree authority far beyond the scope of any previous "enabling law." While Latin democracies differ from their Anglo-American and Western European counterparts in the dynamics of the executive/legislative relationship, the ceding of legislative authority embodied in the November, 2000, "enabling law" is without precedent in recent Venezuelan and Latin American history.

Articles 136 through 139 of the 1999 Constitution provide for a clear separation of powers between the three branches of government and mandate that each branch collaborate in power and refrain from usurping power from another branch. Article 136 provides "[e]ach one of the branches . . . has its own functions, but the organs on which the exercise of the functions is incumbent will collaborate among themselves in the realization of the goals of the State."⁸⁶ Articles 138 and 139 attempt to prevent any usurpation of power by stating, "[a]ll usurped authority is ineffective and its acts are null The exercise of the Public Power carries individual responsibility for abuse or deviation of power for violation of this Constitution or the law."⁸⁷ These provisions presumably establish that the sphere of each branch's authority and power is established by the Constitution, that any usurpation of power by one branch is prohibited and will be considered null, and that individuals serving in an official capacity are responsible for maintaining the separation of

82. Crisp, *supra* note 59, at 148.

83. Crisp, *supra* note 59, at 149.

84. Crisp, *supra* note 59, at 151.

85. *Id.*

86. CONST. OF THE BOLIVARIAN REPUBLIC OF VENEZUELA (1999), 4:1 art. 136.

87. CONST. OF THE BOLIVARIAN REPUBLIC OF VENEZUELA (1999), 4:1 art. 138-139.

powers. Furthermore, these articles aim to protect the integrity of each branch and thereby ensure a system in which each coordinate branch "checks and balances" the others.

Articles 186 to 224 define the structure, composition, and powers of the National Assembly. Article 187 enumerates the powers of the National Assembly and, in clause 1, unequivocally grants that body the power "to legislate on the matters of national competence and on the functioning of the different branches of the National Power."⁸⁸ Other clauses of the same Article grant the National Assembly the power to "function control over the Government," to "approve the national budget," and to "approve the general guidelines of the plan of economic and social development of the Nation."⁸⁹ The 1999 Constitution, following the traditional three-branch model, grants legislative power to a popularly elected, multi-membered, and deliberative body.

Within these articles, the one exception to the overall grant of legislative powers to the National Assembly is Article 203. This article asserts that "laws sanctioned by the National Assembly by three-fifths of its members, in order to establish the directives, purposes, and the framework of the matters that are delegated to the President of the Republic are enabling laws with rank and value of law. The framework laws must specify the period of their exercise."⁹⁰ Article 203 essentially allows the National Assembly to delegate lawmaking authority to the President in certain areas but requires that this grant of authority be limited both in substance and time. Considering the clear Constitutional mandate that the National Assembly is the legislative power of the Nation, Article 203 should be interpreted narrowly so as to protect that branch's sphere of power. The National Assembly may grant the President lawmaking powers in a very limited fashion, but it cannot broadly abandon its duty to legislate. A loose interpretation of Article 203 that would allow the National Assembly to summarily hand over a broad range of its authority to the President makes a mockery of the

88. CONST. OF THE BOLIVARIAN REPUBLIC OF VENEZUELA (1999), 5:1 art. 187(1).

89. CONST. OF THE BOLIVARIAN REPUBLIC OF VENEZUELA (1999), 5:1 art. 187(3), (6), (8).

90. CONST. OF THE BOLIVARIAN REPUBLIC OF VENEZUELA (1999), 5:1 art. 203.

very institution which was created and elected to legislate. Such a ceding of legislative powers is contrary to the doctrine of separation of powers and system of checks and balances enshrined in the 1999 Constitution.

An "enabling law" specifically limited in scope and duration would probably be consistent with both the rest of the Constitution and recent Venezuelan history. For example, an "enabling law" granting the President authority to make laws regulating oil exploration for a period of ninety days would most likely pass Constitutional muster, but a grant of authority to enact "whichever law the President deems appropriate" for a period of one year would not be Constitutional. The "enabling law" adopted in November of 2000, has more in common with the latter example than the former. The National Assembly handed over complete lawmaking authority to the President in six very broad categories for a period of a year. These six broad categories can be stretched to cover practically any aspect of Venezuelan life. Complete power over the finance, economic, and social sectors can be used to control every particular detail of the nation's economic life. Regulatory powers in the areas of infrastructure and the civil service will permit Chavez to single-handedly restructure government agencies, programs, and projects. The ability to rule by decree in the fields of personal and legal security and science and technology, give the President potentially repressive powers in matters of civil society, communication, and technological advancement. It is difficult to contend that the 1999 Constitution, which commits Venezuela to a democratic type of government in which power is separated among branches and in which the legislative authority is granted to the National Assembly, would permit the National Assembly to abdicate to the President its duty to make the nation's laws over a broad range of topics for a year.

Articles 225 to 237, which establish the President's sphere of power reinforce the argument that the Constitution does not permit the ceding of nearly complete lawmaking authority to the President. Article 236, which enumerates the President's powers, assigns to him the powers of Commander and Chief of the military, the power to conduct the nation's foreign relations, appoint Ministers, negotiate loans, issue pardons, call for referendums, and the power "to comply with and secure

compliance with this Constitution and the law.”⁹¹ All of these powers are executive in nature and are exercised, in one form or another, by most of the chief executives in other democracies. Where Venezuela’s enumerated presidential powers do not reflect a typically executive authority is in clause 8 of Article 236, which allows the President “to issue, with prior authorization by an enabling law, decrees with the force of law.”⁹² While an “enabling law” provision did exist under the Constitution of 1961, the delegation of authority under that Constitution was restricted to economic and financial matters and was always made with a fairly well-defined scope. Considering the overall executive nature of the President’s powers, the limited scope of previous “enabling laws” and Venezuela’s recent history of striving to prevent a return to its authoritarian past, one could reasonably infer that the Venezuelan people did not intend to confer complete lawmaking powers on the President when they ratified this Constitution.

While the Venezuelan people have demonstrated disgust with the traditional political parties and a desire for dramatic change, nothing has indicated that they want to abandon the separation of powers or the system of checks and balances. Despite a severe economic downturn and military activism, Venezuelans have remained remarkably committed to the three-branch form of government. Throughout all the sessions of the Constitutional Assembly no other structural model was even entertained.⁹³ The sort of dramatic change that Venezuelans presumably desire can still be realized without empowering the President with nearly complete lawmaking powers. After all, the Chavistas did win a majority in the National Assembly.⁹⁴ As long as President Chavez can maintain party discipline, he should be able to adopt through the legislative process the very same reforms which he now wants to issue by decree.⁹⁵ The amount of time Chavez might save by issuing decrees instead of going through the National Assembly is probably outweighed by the

91. CONST. OF THE BOLIVARIAN REPUBLIC OF VENEZUELA (1999), 5:2 art. 236.

92. CONST. OF THE BOLIVARIAN REPUBLIC OF VENEZUELA (1999), 5:2 art. 236(8).

93. Ellner, *supra* note 53.

94. *Assembly likely to back Chavez* (August 14, 2000), FINANCIAL TIMES, available at <http://www.FT.com/>.

95. Cordoba, *supra* note 1.

quality of legislation which can be produced by a deliberative body and the damage being perpetrated on the institutional integrity of the National Assembly.⁹⁶

In his work concerning presidential authority in Venezuela, Brian Crisp cited five factors which indicated that the "enabling law" provision of the 1961 Constitution did not undermine the separation of powers or the system of checks and balances in Venezuela. These five factors are as follows:

1. [T]he Constitution restricts delegated decree authority to economic and financial matters;
2. the authority has been delegated only five times;
3. the time for which such authority is granted is limited (increasingly so as of late);
4. the instructions provided to the president by Congress can be quite detailed; and
5. the provisions for oversight can be fairly rigorous.⁹⁷

It is important to note that the "enabling law" provision of the 1999 Constitution and the November, 2000, "enabling law" do not meet any of Crisp's five criteria. The 1999 Constitution, unlike the 1961 Constitution, does not limit the subject area for delegated decree authority. President Chavez has been granted decree authority pursuant to an "enabling law" twice in two years. Bucking the recent trend, the grant of decree authority under the November, 2000, "enabling law" lasts for a year and granted authority in very broad and poorly defined policy areas. Lastly, there are no provisions for oversight under either the 1999 Constitution or the November, 2000, "enabling law."

The 1999 Constitution does provide a process by which unconstitutional usurpations of power, such as the November, 2000, "enabling law," can be corrected. Article 335 declares the following:

[T]he Supreme Tribunal of Justice will guarantee the supremacy and effectiveness of the constitutional norms and principles; it will be the

96. *Id.*

97. Crisp, *supra* note 59.

maximum and final interpreter of the Constitution and will see to its uniform interpretation and application.⁹⁸

Article 336 goes on to grant the Supreme Tribunal the power to "declare the total or partial nullity of the national laws and other acts with rank of law from the national legislative bodies that conflict with this Constitution" and "to declare the total or partial nullity of the acts with rank of law dictated by the National Executive that conflict with this Constitution."⁹⁹ Consequently, the Supreme Tribunal has the power to overturn both the November, 2000, "enabling law" and any Presidential decrees issued pursuant to it. Following the earlier conclusion that the November, 2000, "enabling law" is inconsistent with the doctrine of separation of powers embodied in the Constitution, there are grounds to, entertain, at the very least, a challenge to this law.

However, any challenge to the November, 2000, "enabling law" faces two obstacles, a Supreme Tribunal sympathetic to President Chavez and the adoption of previous enabling laws. The Supreme Tribunal could distinguish the November, 2000, "enabling law" from previous "enabling laws" on the basis of its poorly defined scope. However, the fact that an "enabling law" was utilized under the previous Constitutional framework can also be used to argue that "enabling laws" are an acceptable exercise of the legislative function. The second obstacle is the composition of the high court whose justices were elected to twelve year terms during Chavez's landslide re-election in July of 2000. While the justices' judicial philosophies are not well known, they have been reluctant to confront President Chavez's expansion of presidential powers, as will be evidenced *infra* in the summary of President Chavez's relations with the national labor unions. It seems unlikely that the Justices of the Supreme Tribunal will antagonize a President who helped get them elected and who already demonstrated a willingness to ignore the unfavorable rulings of the previous Supreme Court. The chances that the Supreme Tribunal will exercise its power of judicial review to overturn the November, 2000, "enabling law" are very slim. President Chavez's usurpation of legislative powers will

98. CONST. OF THE BOLIVARIAN REPUBLIC OF VENEZUELA (1999), 8:1 art. 335.

99. CONST. OF THE BOLIVARIAN REPUBLIC OF VENEZUELA (1999), 8:1 art. 336(1), (3).

apparently proceed unhindered.

In brief, the November, 2000, "enabling law" violates the 1999 Constitution because it is inconsistent with the doctrine of separation of powers embodied in that document. The National Assembly is obligated by the Constitution to act as the nation's legislature, and any ceding of its legislative powers, via the adoption of an enabling law, must be limited in substance and time. The Supreme Tribunal's potential reluctance to overrule the November, 2000, "enabling law" is more likely a product of political circumstances than a demonstration of sound judicial review, but the possibility still exists that the high court will correct the present Constitutional imbalance. The entire text of the 1999 Constitution, along with recent Venezuelan history, and the will of the Venezuelan people as expressed in recent elections, indicate that a President empowered to decree laws over a wide range of issues is not consistent with the letter and spirit of the Constitution.

V. THE ENABLING LAW'S EFFECT ON THE VENEZUELAN POLITICAL SYSTEM

The November, 2000, "enabling law" weakens President Chavez's political opposition in two ways. In an immediate and direct manner, the "enabling law" effectively silences the elected opposition in the National Assembly. In an indirect yet more far reaching way, the "enabling law" threatens to deprive the Venezuelan upper classes of their vested interests in the present economic system. At a time when an effective opposition should be forming to serve as a democratic check on Chavez's power, the "enabling law" has essentially silenced the opposition legislators who could possibly serve that role. More ominous still is the possibility that a democratic opposition will never form if President Chavez follows through on his promises of economic reform and the social pledges made in the 1999 Constitution. By increasing state intervention in the economy, the Venezuelan business class could be forced out of politics either by impoverishing or exiling them. One of the centerpieces of Venezuelan democracy between 1958 and 1998, was the presence of a strong opposition party.¹⁰⁰ As President Chavez continues to

100. John D. Martz, *Political Parties and the Democratic Crisis*, *supra* note 3, at 32-34.

turn over all the traditional, political institutions, consolidates more powers to himself, and threatens to redistribute the nation's wealth, the tradition of a competitive political system may be at an end.

During the July, 2000, elections for the National Assembly, President Chavez's party, the Movement for the Fifth Republic [hereinafter, "MVR"], and its political partner the Movement to Socialism [hereinafter, "MAS"] fell ten seats short of a two thirds majority.¹⁰¹ AD along with COPEI and a few smaller parties won sixty-five of the 165 seats in the National Assembly.¹⁰² This could have potentially proved to be a complicating factor for Mr. Chavez because the 1999 Constitution required a two thirds vote of the National Assembly for the adoption of "organic laws," defined by the Venezuelan Constitution as laws "dictated to organize the public powers or to develop constitutional rights and those that serve as the normative framework for other laws."¹⁰³ The opposition in the National Assembly was in a position to block or obtain concessions from Chavez's major reform efforts. However, President Chavez was able to circumvent this obstacle just as deftly as he had done with the previous AD and COPEI dominated legislature. While passage of an "organic law" required 110 votes, adoption of an "enabling law" only required a three fifths vote or ninety-nine votes, and Chavez had one more vote than was necessary. The Venezuelan Congress of 1998 to 1999 was rendered impotent through the election of a Constitutional Assembly and the use of force. In 2000, Chavez dispatched a potentially troublesome legislative opposition by loosely interpreting his 1999 Constitution and obtaining passage of an "enabling law," which gave him almost limitless power to decree laws.

The debilitating effects of this move on the opposition are obvious. Individuals who should be serving in a capacity as lawmakers and enacting laws that are a product of executive and legislative compromise are now forced to accept legislation decreed by President Chavez. The powerlessness of the opposition may have a cumulative effect as others opposed to Chavez give up their efforts because of the futility of

101. Bloomberg Latin America, *Venezuelan National Assembly Leaders Set Ambitious Agenda* (Aug. 15, 2000), available at <http://quote.bloomberg.com/news2>.

102. *Id.*

103. CONST. OF THE BOLIVARIAN REPUBLIC OF VENEZUELA (1999), art. 203.

participating in the political system. Worse yet is the possibility that Chavez continues to enact "enabling laws" at one-year intervals and thereby extinguishes the chance of there ever being an effective elected opposition.

Chavez, however, may not have to rely on more "enabling laws" to silence the opposition if he is able to deliver on his promises of social and economic reform. A great part of Chavez's opposition comes from the business sector and other wealthy groups in Venezuelan society.¹⁰⁴ The political strength of this group is not its small size but its superior resources. If Chavez were to redistribute the nation's wealth, this group's political strength would be greatly diminished, and many of its members may even be forced into exile. The immigration of middle and upper class Venezuelans to the United States has already greatly increased in recent years.¹⁰⁵

Every indication thus far has been that Chavez will pursue a course of redistributing the nation's wealth. At a celebration of Simon Bolivar's birthday, Chavez "unsheathed the Liberator's sword outside his birthplace in the old colonial center of Caracas and declared: 'We won't rest until we have wiped out the last vestiges of the oligarchy.'"¹⁰⁶ When discussing his plan for land reform the President declared, "Big landowners, your time has come."¹⁰⁷ If Chavez's rhetoric and the commitments made by the 1999 Constitution are taken seriously, there is ample reason to believe that the "enabling law" figuratively places the head of the Venezuelan political opposition on the executioner's block as it awaits the "guillotine blade" of Chavez's economic and social reforms.

Concerns for the future of Venezuelan democracy are, of course, to a great extent premised upon the notion that President Chavez, despite pronouncements otherwise, desires dictatorial powers. It is impossible to conclusively prove what Chavez's motives are but, aside from the previously mentioned indications of authoritarian tendencies, a good idea of how he wants to

104. Juan O. Tamayo, *Tension between Chavez, army spur talk of coup*, THE MIAMI HERALD, Feb. 21, 2001, at 5A.

105. *Exodus from South America Biggest Since 1980's*, THE MIAMI HERALD, Dec. 5, 2000, at A11.

106. *After two years Chavez remains an enigma* (Jul. 29, 2000, FINANCIAL TIMES, available at <http://www.FT.com>).

107. Reuters, *supra* note 73.

government is provided by how he has confronted, not the wealthy, but Venezuela's organized labor unions.

The Confederation of Venezuelan Workers [hereinafter, "CTV"] and its 900 constituent member unions were one of the last remaining bastions of AD/COPEI power.¹⁰⁸ In the latter part of 2000, Chavez moved to eliminate this source of opposition also.¹⁰⁹ In September of 2000, Chavez organized a rival confederation, the Bolivarian Workers Force [hereinafter, "FTB"] and declared at its first meeting: "Gentlemen of the CTV, the Bolivarian Workers Force is going to crush you and toss you away."¹¹⁰ Chavez proceeded to call a national referendum in which all voters were to decide whether the union members should hold elections for new leaders.¹¹¹ Despite protests from international labor organizations that this was a violation of union autonomy and challenges filed but later rejected by the Supreme Tribunal of Justice, the referendum took place and the Chavez supported "Yes" option carried sixty-five percent of the vote.¹¹²

In what seems to have become a sort of Chavez formula for governing, any opposition that the President encounters within the system is overcome by resorting either to legislative maneuvers to grant him increased powers or the calling of a referendum in which Chavez utilizes his personal popularity to do away with the opposition. If President Chavez continues on this course, the inevitable outcome will be the elimination of the political opposition and a complete consolidation of political power under his authority. Contrary to Chavez's claims of preserving democracy in Venezuela, he may very well be engaging in its dismantling.

Chavez's style of governing has had much in common with that of former Peruvian President Alberto Fujimori. Both men

108. *Chavez turns on union leaders* (Nov. 22, 2000), *FINANCIAL TIMES*, available at <http://www.FT.com>.

109. *Id.*

110. Bloomberg Latin America, *Venezuela's Chavez Seeks to Create Single National Labor Union* (Sept. 4, 2000), available at http://quote.bloomberg.com/news2.cgi?T=sa_politics.ht&s=AObPCYhZtVmVuZXp..fEa.

111. *Chavez turns on union leaders*, *supra* note 108.

112. *Voters shun Chavez's unions drive* (Dec. 4, 2000), *FINANCIAL TIMES*, available at <http://www.FT.com>. In an indication of how apathetic the Venezuelan electorate had become to Chavez called elections, abstention in the labor union referendum was somewhere between eighty-five percent and ninety percent.

were elected as populist outsiders pledging to end the rule of the old political order and usher in dramatic reforms. When encountered with entrenched opposition in the other branches of government, both Fujimori and Chavez found ways to circumvent these obstacles. Fujimori engaged in an "auto coup" in which he summarily dissolved Congress and the Judiciary and then called for the election of a new Constitutional Assembly.¹¹³ Chavez, perhaps learning from the international condemnation which greeted Fujimori's actions, reversed the Peruvian's tactics and called for the election of a new Constitutional Assembly before paralyzing the other branches of government thereby lending his actions a more democratic veneer. Where the two strong presidents differ is in their economic and social views. In contrast to Fujimori's embrace of free market reforms and pro-business policies, Chavez has called for increased state intervention in the economy and a redistribution of the nation's wealth. President Chavez's statist and leftist economic policy views and his ability to enact them via the "enabling law" will not only effect the domestic political and economic scene but the interests of foreign capital as well.

VI. THE ENABLING LAW'S EFFECT ON FOREIGN INVESTMENT IN VENEZUELA

As opposed to the domestic political sphere, the concept of the "enabling law," on its own, has no effect on foreign investment. What will effect foreign investment is how and to what ends President Chavez utilizes the "enabling law." While Chavez has not directly threatened foreign investments, his use of the enabling law to redistribute wealth within Venezuela and to meet the social goals of the 1999 Constitution will most likely have a "chilling effect" on foreign investment. It is highly unlikely that foreign interests will want to invest in a nation whose government is not friendly to or respectful of the rights of local capital and whose priority appears to be the creation of a social welfare state and not economic growth.

Not much information is available concerning the details of the economic reforms Mr. Chavez wants to enact under the auspices of the "enabling law" but, thus far, all indications are

113. John M. Carey and Matthew Soberg Shugart, *Calling Out the Tanks or Filling Out the Forms*, in EXECUTIVE DECREE AUTHORITY, *supra* 59, at 15.

that foreign investments, unlike domestic capital, will not be a target of the intended reforms. While the 1999 Constitution prohibits the privatization of PDVSA, the state oil company, Chavez has announced that the possibility of joint ventures between foreign companies and PDVSA in related fields, such as the manufacture of petrochemicals, will be possible.¹¹⁴ While Chavez has been bombastic in his criticism of domestic capital interests, he has refrained from calling for the nationalization of any economic sectors highly penetrated by foreign investment and from espousing any return to high tariff import substitution policies.

At present, there appears to be no direct threat to foreign investment such as expropriation or nationalization. What should be, and most likely is, causing concern in international business circles is the increased business costs arising from President Chavez's domestic reforms along with the uncertainty as to how the President will fund his ambitious social programs. Chavez's newly proposed hydrocarbon law raises the amount of royalties charged to foreign contractors doing business with PDVSA.¹¹⁵ His new job creation program, described as similar to that of Sandinista Nicaragua, along with an expected dramatic increase in the minimum wage will make Venezuelan labor considerably more costly.¹¹⁶ President Chavez has admitted that the government cannot presently afford to fund the social commitments made by the 1999 Constitution.¹¹⁷ Foreign investors may then suspect that Chavez will not hesitate to erect tariffs and increase taxation on foreign interests in order to fulfill his guarantees of universal education, health care, employment, and social security.

If history is a reliable indicator, foreign economic interests have reason to worry about President Chavez. Juan Domingo Peron, the president of Argentina from 1946 to 1955, was, like Chavez, a former military officer who was elected president as a result of the lower classes frustration with the traditional political order. Peron also espoused his own political ideology, justicialism, which, like Bolivarism, evoked fierce nationalism

114. Hoag, *supra* note 65.

115. Cordoba, *supra* note 1.

116. Chavez details economic vision, FINANCIAL TIMES, (Aug. 2, 2000), available at <http://www.FT.com>.

117. Hoag, *supra* note 65.

and called for greater state intervention in the economy to improve the living standards of the lower classes.¹¹⁸ Unlike Chavez, Peron pursued the nationalization of foreign-owned industries. However, he also pursued certain domestic economic reforms which led to significant reductions in foreign investments.¹¹⁹ Peron's indexing of the minimum wage to inflation, his price controls on industrial goods, his constant favoring of organized labor over management (by 1951, it was estimated that the ordinary Argentine worker took a day off for every two spent on the job) had devastating effects on foreign investment. Between 1945 and 1949, foreign investment in Argentina declined (in constant 1950 dollars) from \$4.26 billion to \$41.74 million.¹²⁰ To the extent that Peron and Chavez's economic beliefs coincide, Peronist economics demonstrate that Chavez's government centered economic policies and foreign capital cannot peacefully co-exist.

Chavez's domestic economic reforms combined with the prospect that he may turn to foreign investment as a funding source for the creation of his egalitarian Bolivarian society may have the disastrous effect of decreasing foreign investment in Venezuela. As Venezuela faces an unemployment rate of fourteen percent, an inflation rate of fifteen percent, a poverty rate of eighty percent, and a constantly fluctuating price of oil, it seems that the "enabling law," should be utilized not for the goals of Chavez's economic and social revolution but for the luring of much needed foreign investment.

VII. CONCLUSION

At a public address in April of 2000, John Maisto, the United States Ambassador to Venezuela, stated that "[d]emocracy in Venezuela is alive and well."¹²¹ While Ambassador Maisto may have desired to reflect favorably upon the plethora of elections and referenda which have recently taken place in Venezuela, it is difficult to support his statement when one looks at the tendency of President Chavez to consolidate an increasing amount of

118. Paul H. Lewis, *THE CRISIS OF ARGENTINE CAPITALISM* 162 (1992).

119. *Id.* at 181-182.

120. *Id.* at 205.

121. Ambassador John F. Maisto, Address to the World Affairs Council of Pittsburgh (Apr. 10, 2000), available at <http://www.worldaffairspittsburgh.org/Maisto.html>.

power under his authority. A democratic system of government involves more than the holding of periodic elections, but also encompasses some sort of structural limitations preventing the concentration of political power in one individual. It is not a democracy if the people elect a dictator every four or five years. Venezuela's 1999 Constitution attempts to provide such limitations but the November, 2000, "enabling law" disregards them by granting President Chavez nearly limitless legislative powers. This Constitutional violation also has the further detrimental consequences of weakening Chavez's political opposition and discouraging much needed foreign investment.

Every democratic "presidential" system of government in the world is characterized by a separation of powers among different branches of government.¹²² Venezuela's 1999 Constitution follows the traditional separation of powers among executive, legislative, and judicial branches of government. Even in systems characterized by very strong presidents, such as Fujimori's Peru, the legislature exercises effective checking powers as has recently been demonstrated by the Peruvian Congress' removal of President Fujimori.¹²³ What the November, 2000, "enabling law" threatens to accomplish is the ceding of legislative authority to the executive and the consequent diminishing of the National Assembly's checking power. This transfer of authority is not tolerated by the 1999 Constitution, which clearly empowers the National Assembly with legislative functions and mandates that neither branch usurp the powers of another. Nor is the November, 2000, "enabling law" consistent with previously adopted "enabling laws." In order for democratic government to continue in Venezuela, this imbalance in the separation of powers must be corrected either by fiat of the Supreme Court or by remedial measures taken by the National Assembly or the President.

The political effects of the "enabling law," however, are not only limited to the doctrine of separation of powers. The "enabling law" by depriving opposition legislators of their role in enacting legislation further weakens the forces aligned against President Chavez and the institutional integrity of the branches

122. Mainwaring and Shugart, *supra* note 75, at 14-16.

123. *Fujimori Found Unfit to be President*, THE MIAMI HERALD, Nov. 22, 2000, at A3.

which are supposed to balance the executive's power. For over forty years, Venezuelan politics was characterized by intense competition between political parties. At present, due to a combination of Chavez's political machinations and the opposition's ineptness, President Chavez has not faced any effective opposition and the National Assembly appears to be serving a greatly reduced legislative function. If this course of events continues, complete consolidation of power seems inevitable.

Expanded powers for President Chavez also means that he will more easily be able to enact his economic and social reforms. The fact that these reforms will increase the cost of doing business in Venezuela along with the uncertainty as to how Chavez will fund his ambitious social programs will most likely create a "chilling effect" on foreign investment prospects. At a time when developing nations need to adhere to free market orthodoxy in order to receive the help of international financial organizations and foreign investors, rhetoric about revolutionary change is counter productive. The "enabling law" hinders Venezuela's ability to attract the foreign capital it will need if oil prices remain within the range of the last twenty years. This perhaps will lead to one of the great ironies of Venezuelan history: the nation's most powerful president of the last forty years, a president who has written a new Constitution and been granted the power to decree laws will be unable to relieve the suffering of the impoverished masses which elected him to do just that. With these considerations in mind, to say that "[d]emocracy in Venezuela is alive and well," is premature.¹²⁴ A more accurate assessment would be that democracy is "alive" in Venezuela, but its future health depends on a new respect for Constitutional limitations on presidential power.

MARIO J. GARCIA-SERRA*

124. Maisto, *supra* note 121.

*Juris Doctor candidate, May 2002, University of Miami School of Law. The author dedicates this article to the Venezuelan people, whose commitment to democracy and the rule of law and not to individual politicians, will ultimately guide them to realizing Bolivar's dream. The author would like to thank his family and friends for their support and encouragement in all his endeavors and extends his appreciation to Professor Keith S. Rosenn for his help and advice.

