Abstract

The purpose of this paper is to explain a particular strain of presidential power in Argentina called the decree of necessity and urgency (DNU). The discussion will begin with the presentation of a spatial model, which will suggest that the president’s decision to issue decrees depends on the anticipated response by two other branches of government, namely the legislature and judiciary. In particular, the constrained unilateralist model will argue that the president’s ability to issue decrees will be constrained by opposition in the courts and the legislature. The analysis of Argentina’s DNUs during 1916-2004 will reveal that the president is more inclined to exercise this power where the size of the pro-government or opposition party/coalition (relative to each other) in the legislature is small and if the president can secure majority support in the Supreme Court. The analysis will also show that other potential explanations, such as divided government, economic performance, and overall legislative productivity will not be significant determinants of DNUs if we account for these two factors.

1 Introduction

Much has been made of the problems associated with presidentialism ranging from individual policy failures to system-wide flaws associated with its institutional design (O’Donnell, 1994; Mainwaring & Shugart, 1997; Carey & Shugart, 1998; Linz & Valenzuela, 1994; Haggard & McCubbins, 2001). One highly controversial aspect of presidentialism, which continues to draw the attention of its critics is the president’s power to issue decrees. In large part, the criticism against decree authority stems from the fact that it allows the president to...
“make law” which, in principle, should be an exclusive privilege reserved for the legislature.\footnote{It is conceivable that this issue may be less controversial under a parliamentary context given that an executive which usurps legislative power would not be able to sustain the parliament’s confidence.} According to this view, executive decree violates the principle of separation of power and may even be the root of democratic instability. Upon further consideration, however, one may conclude that power sharing does not necessarily preclude the institutional context of checks and balances. In fact, a number of recent studies have shown that the president does not have a free rein on the exercise of her powers in a system of separated institutions sharing powers (Mayer, 2001; Howell, 2003; Carey & Shugart, 1998; Cameron, 2000; Epstein & O’Halloran, 2001). Likewise, this paper also argues that decrees must be considered within the broader context of checks and balances if we are to truly understand how and why a president can utilize them. In particular, it will be shown here that though the president may formally possess the power to make law, the decision to do so is largely constrained by potential opposition from other branches of government. As it will be shown through the analysis of Argentina’s decree of necessity and urgency (decreto de necesidad y urgencia – DNU) from 1914-2004, the president is less likely to flex the decree muscle if cohesive majority support is lacking in the legislature and the courts.

My argument applies mainly to constitutional or paraconstitutional decree authority, where the president does not need prior consent of the legislature in order to exercise the proactive power.\footnote{This does not mean that the argument developed in this paper cannot be applied to instances of rulemaking or delegative decrees where prior legislative consent is required for presidential decree-making. For instance, similar approaches to studying presidential decree power can be found in the study of executive orders in the United States (Mayer, 2001; Howell, 2003).} My interest in these forms of decrees stems from the fact that they are the most widely criticized. By revealing the conditions under which the president’s unilateral power becomes more or less salient, this paper intends to show that the president’s use of decrees depends largely on the robustness of the institutionalized checks on her power.

The discussion will be divided into three parts. In the next part, I discuss the sources of presidential power. It will be argued here that the theoretical basis for the importance of checks and balances on the presidential power to issue decrees. It is important to note here that I am concerned with the capacity of the president to issue decrees. In the second part, I present the constrained unilateralist model. Part three will present the data on Argentina’s decree of necessity and urgency (decreto de necesidad y urgencia – DNU) and analyze it. Although the President of Argentina has the power to issue several types of decrees, DNUs far outrank others in terms of controversy. I attempt to make sense of the president’s behavior with regards to the exercise of this power by utilizing various analytic methods. The findings will show that the size of the legislative majority as well as the ideological disposition of the court vis-à-vis the president will be important constraints on the president’s decree powers.
2 Sources of Executive Power

Past research suggests that there are two possible sources of executive power. One is the personality of the president. In particular the Neustadtian school of thought holds that the power of the president lies in her ability to persuade Congress; this is a personal quality that some presidents have while others do not. As Howell (2003) observes, “power” here is equated with “personal influence of an effective sort on government action” wherein the focus is less on “the office” of the presidency than it is on “the person as one among many in a set of institutions” (Neustadt, 1990:ix). If we follow this line of reasoning, a strong president is one who can effectively persuade Congress to enact her most preferred policies without resorting to the use of her formal powers; in effect, over-reliance on formal power can be a sign of weakness. While the personalistic approach may do well in explaining the variance of presidential power across different administrations, it is not as useful in explaining a consistent long term trend or lack of short term variance.

For this, one may fare better by considering the second source of presidential power: namely, the institution. In considering the effect of institutions on the president’s decree power, one can take one of two possible angles. One is to focus on the procedural aspects of presidential power. For instance, it is conceivable that the president is more likely to issue decrees because it is procedurally more convenient for her to do so. There exist many different types of decrees and the procedural requirements for their use may vary according to their constitutional design (Negretto, 2004). Drawing from past works, we can identify at least two types of decree authority: one that is established by the constitution or statute; and another that is invoked by the president as a form of Lockean executive prerogative power. The former often requires broad consent\(^3\) (active or passive) from other actors (i.e. legislature and courts) while the latter is akin to what Carey & Shugart (1998) label as “calling out the tanks.” Obviously, it will be more difficult for the president to exercise the decree option if the approval process is demanding.\(^4\) The functional purpose of decrees, whether it is to enforce existing legislation (i.e. rulemaking) or deal with emergencies and/or other urgent matters (i.e. emergency decrees, delegated decrees, constitutional decrees), can limit the scope of presidential decrees by allowing its passage only under special circumstances. Procedural requirement alone, however, does not fully explain the incentives or constraints underlying the President’s decision to pass decrees. This is especially true in those instances where we find a significant degree of variation in the number of decrees issued over time but no change in the legislative protocol for validating its use.

\(^3\) Constitutional decrees, for instance, can either require prior delegation of this authority by the legislature or do not require such approval at all.

\(^4\) Relatedly, many have argued that lack of constitutional conscription on decrees may actually allow the president to have more leverage and wiggle room to exercise her powers freely (Moe & Howell, 1999; Schmidt, 1998:128; Epstein & O’Halloran, 1999). Huber & Shipp (2002) make a similar but more thoroughly developed argument to this effect with respect to bureaucracies; but the logic of their argument is also applicable to presidential decrees as well.
Argentina can be a good case in point. Prior to the constitutional reform in 1994, the Argentine constitution did not provide any formal guarantees on the president’s power to issue DNUs yet several presidents like Mitre and Yrigoyen have exercised this option quite effectively in order to push through some important reforms that otherwise would have been difficult (Maurich, 1997). After 1989, presidents Alfonsín and Menem have opted to invoke this power more frequently than their predecessors. Although the Constitution of 1994 does have a provision for DNU, it does little to help us understand how presidents before democratization of the mid-1980s were able to exercise similar powers and why they relied less heavily on DNUs in comparison to Alfonsín and Menem.

Given that decree is an executive power and any branch-specific power in a presidential democracy is (in theory) checked by other branches of government, it may be more fruitful to consider the role of other branches of government with regards to the executive’s proactive lawmaking power. In fact, most recent studies on decrees have explored the role of interbranch relations quite extensively; however, the findings appear mixed. On the one hand, there are those who argue that the president is more inclined to issue decrees if there is policy gridlock. This is also referred to as the “unilateralist” (Cox & Morgenstern, 2002) or “evasion hypothesis” (Martin, 2000). Following Cox & Morgenstern’s (2002) typology, that is, the president is more likely to resort to unilateral measures if she is “politically weaker” or faces a hostile majority in the assembly since the president will have little to no chance of obtaining her most preferred policy via statute. Under conditions in which the president has a majority partisan support in Congress, however, she need not act unilaterally because the Congress can simply legislate away the president’s most preferred policy. In this case, the president is “politically stronger” in that she has a large subservient majority. If the evasion hypothesis is correct, we should see presidents relying more heavily on decrees during instances of divided government.5

Many critics point out, however, that the evasive unilateralists ignore the constraining effect of Congress (Howell, 2003; Figueiredo & Limongi, 1999; Carey & Shugart, 1998). That is, while the president may want to issue more decrees under a divided government, she may be restricted from doing so because it is easier for an opposition controlled Congress to repeal the president’s decree initiatives. If this is true, the president should pass more decrees during unified government since Congressional approval is likely to be higher when executive and legislative preferences are more likely to overlap. Empirical findings drawn from studies of the American presidency and the usage of rulemaking decrees suggest compelling evidence for constrained unilateralism. Mayer (2001), for instance, found that President Eisenhower issued over 1.2 more executive orders per month when he had majority support in Congress (1953-4) and President Clinton issued 2.5 fewer orders per month when he lacked majority support in Congress (1995-9). Likewise, Howell’s (2003) much improved analysis shows that five fewer important executive orders were issued for each two year interval...
of divided government.

Evidence from other countries, however, appear to contradict these results. For instance, Pereira, Powers, & Renno (2005) found that periods of divided government were linked to an increased reliance on the medida provisória during 1988-1998 (190). Schmidt (1998) also finds parallels in Peru where divided governments under the Belaúnde and Fujimori administrations have been linked with a heightened number of decrees (133). Brian Crisp’s (1998) discussion of Venezuela from 1961 to 1994 indicates that Herrera Campúns and Caldera also depended more heavily on the decree option during times of divided government (164). These patterns are not isolated to a specific region – Parrish (1998) and Huber (1998) each make similar discoveries in Russia and France, respectively.

What explains these discrepancies? On the one hand, one may conclude as do some of these studies that the findings support evasive unilateralism and that the US is an exception to this rule. It may also be tempting to add further that the differences here can be attributed to differences in procedures between rulemaking and lawmaking. However, it is important to not lose sight of the fact that these findings do not consider the nuances in the legislative process (i.e. filibuster and veto override), which cannot be captured by characterizing interbranch relations simply as being unified or divided (see Krehbiel, 1999). Moreover, these sorts of arguments fall short of explaining exactly why differences in procedures will lead to differences in outcomes.

Perhaps the constrained unilateralist approach may provide better clues for solving the decree puzzle. Although the debate is framed in terms of divided versus unified government, I would argue that the more crucial issue here is the saliency of opposition in the legislature. By saliency, I mean any recognizable cue (such as the size or relative cohesiveness of the opposition party) that will signal a credible threat to the president. In a relatively polarized two-party system, divided government and saliency of oppositional threat to the president can be one and the same; however, this may not necessarily be so in other contexts (e.g. unstable coalitions and/or low party discipline). Even where stability of coalition and party discipline are high, the relative magnitude of the majority’s presence in the legislature may matter given that it often takes a supermajority to override the president’s ability to block policy initiatives originating in the legislature.

Given this to be the case, we must reconsider the claims of constrained unilateralists to understand the limits on the president’s proactive powers. More specifically, it can be argued that the inclination to rely on extra constitutional means is high under conditions of divided government since the president is unable to depend on her party and routine legislative procedures to dictate her most preferred policies; but it is the lack of large opposition which further exacerbates and mitigates the possibility of an effective check on the president’s urge to issue decrees and thereby allow the president to follow through on her

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6 The empirical findings from the United States are restricted to rulemaking decrees (i.e. executive orders) while that of these other countries pertain to constitutional, delegative, and emergency decrees.

7 I assume here that both the president and parties are engaged in strategic interaction.
inclinations. During times of unified government, the president should be more inclined to flex her decree muscles if the marginal difference in the size of opposition and majority is small enough that the likelihood of president’s party having difficulty passing bills in line with the president’s policy preferences is higher. Again, the president should be more willing to follow through on this inclination since the likelihood that the opposition will successfully derail the president’s decree will be low during times of unified government. In both instances, the president intervenes when the potential for conflict in the legislature is high and the risk of taking the unilateral action is low. It can be hypothesized that this is most likely when the marginal difference in the number of seats held by the majority and opposition is relatively small.

The reasoning here has resonance in both the constrained unilateralist and delegationist views. Howell (2003), for instance, argues that the president is more likely to exercise her unilateral powers if the Congress cannot muster a large enough of a majority\(^8\) to make laws themselves (65-8). Likewise, Carey & Shugart (1998) suggest that the executive has the capacity to exercise her powers only to the extent that the legislative branch allows her to do so. In particular, the existence of “bargaining problems” and/or concerns with “agency loss” are possible reasons for the legislature “to delegate” lawmaking powers to the president rather than make laws themselves.\(^9\) Huber (1998) points out that while hypotheses related to agency loss are not applicable to the use of unilateral decree measures, those deriving from recognition of bargaining problems should. In particular, if the legislature cannot generate enough consensus on a given policy due to the multiparty makeup of Congress, the executive is more likely to use decrees in order to break this impasse. In essence, what Huber (1998) suggests is that the executive’s unilateral intervention is more likely if the legislature is experiencing a bargaining problem during small majorities and coalition governments.

The evidence appears to support these claims. Howell’s (2003) analysis of executive orders in the US, for instance, indicates that a large cohesive majority in the legislature is strongly associated with fewer significant executive orders (89-90). Schmidt (1998) also points out that a highly fragmented legislature allowed President Alberto Fujimori of Peru to issue more important decrees during the first two years of his term\(^{10}\) (118). Similarly, the Venezuelan case study suggests that the lack of viable majority opposition, which could have derailed the decree initiatives of Herrera-Campins and Caldera, allowed these two presidents with minority Congressional support to opt towards greater use of decrees (Crisp, 1998:152).

In essence, what these findings suggest is that even though the president may

\(^8\) They would need a supermajority to break the president’s veto.
\(^9\) "Bargaining problem" refers to those instances in which the legislators find it difficult to build and maintain the necessary majority to make law by themselves. "Agency loss," on the other hand, refers to the degree to which the legislature can control the executive in instituting the policy of their choice.
\(^{10}\) Although fragmented, the Peruvian Congress was more cohesive in repealing important controversial decrees during Fujimori’s term (Schmidt, 1998:111-2).
have the ability to exercise her proactive power, she is constrained from doing so. That is, she is limited in her ability to make law herself as long as the Congress is capable of enacting laws without the president’s support. Where the president does intervene, it is to move the policy making process forward. Nonetheless, in the event that the Congress cannot make laws themselves, the only remaining institutional damper on the president’s ability to act unilaterally is the courts. For this reason, it is important to not leave out the role of the judiciary as an important veto player against executive decrees (Cox & McCubbins 2002).

Interestingly, existing comparative research on the role of judiciary in presidential lawmaking is lacking. This may be due to the general view within the critical legal circles that the courts are ineffective when it comes to keeping other branches of government in check. Take the case of Venezuela, for instance. Given the lack of life tenure for court appointees and a precedence of executive control over court appointments by various administrations – most recently President Hugo Chavez Frías – it may be difficult to argue that the judiciary plays any critical role in restraining other branches of government, especially the president (Crisp, 1998; Wilkinson, 2004). More recent work on this topic, however, suggests that this is an oversimplified depiction of the judiciary. That is, the easier it is for the government to replace the composition of the judicial bench, the more likely it is for the court to undermine the appointment and removal process (Helmke, 2005). What this suggests is that the ideological and/or preferential dispositions of the justices do matter in the ability of the courts to constrain the president’s use of proactive lawmaking power.

Although not as overt, biased incentives whether in the form of appointments or promotions appear to have played an important role in guiding court decisions in cases like Japan (Ramseyer & Rasmussen, 1997). Even in a system with relatively strong foundation in the “rule of law” and where justices have life tenure, non-canonical institutional factors, such as Congressional preferences, have been shown to influence statutory interpretations (Spiller & Gely, 1992; Epstein & Walker, 1990; Ferejohn & Shipan, 1990). Whether the courts actually overturn or uphold the status quo, however, may depend on the likelihood that their decisions can be overridden by subsequent legislation (Spiller & Spitzer, 1992; Segal, 1997) or not enforced at all (Howell, 2003).

In other political contexts where the courts have had a tarnished reputation, research suggests that judges do not necessarily always rule in favor of the ruling party or the government (Helmke, 2005). An important lesson from these interpretations of the court’s behavior is that it, like any other branch of government, is a strategic player (Maltzman, Spriggs, & Wahlbeck, 1999). In making its decisions, the court must consider the reaction of other branches; otherwise, it risks the danger of having its decisions stand as “words empty as the wind.”

This, however, does not mean that the judges are incapable of making decisions on their own. Evidence suggests that ideology and values of individual justices can have a significant impact on their decisions (Segal, 1997; Segal & Cover, 1989). This is the so-called “sincere” characterization of judicial decision making. Although bounded, court appointees’ party alignments can be a use-
ful indicator for determining their attitudinal orientation (Iaryczower, Spiller & Tommasi, 2002). In this manner, judge’s decisions, whether strategic or sincere, must be considered within the unique institutional contexts where they find themselves (Segal, 1997; Clayton & Gillman, 1999).

To the extent that the court’s strategy in dealing with other branches is shaped by the institutional context, we cannot ignore its role in influencing the president’s decision to pass decrees. One strategy is to treat the courts as an exogenous constraint on executive power. Howell (2003), for instance, suggests that the court can act as a “discretionary parameter” in the president’s decree calculus. This is not an unreasonable assumption to make in a system with lifetime tenure since a newly elected president often inherits the judges that her predecessor(s) appointed. In other contexts, however, this may not be true. Depending on the constitutional requirements for appointments and tenure, the president may be able to change the composition of the court in her favor as in Argentina and South Korea. To account for these possibilities, it may be more fruitful to conceptualize the court as a strategic player with a preference of its own. This may challenge the ideal of the court as a cold administrator of justice; however, I would argue that such conception of the court (if it is true) is a statement of disposition about the court’s preferences – it prefers to be a non-parital administrator of justice. Having said this, if the Congress is unable to make law by themselves, the president will have the capacity to issue decrees only to the extent that the court will allow her to do so. The president’s perception of judicial opposition will play an important role in this decision. In particular, if the attitudinal disposition of the court is such that the likelihood of the president’s decree being declared “unconstitutional” by the court is high, it is unlikely that the president will risk passing decrees of this nature.

3 The Model

The logic of my argument as it applies to comparative politics can be illustrated by the following proposed adaptation of Howell’s (2003) unilateral politics model or a modified version of Krehbiel’s (1999) gridlock interval model. There are several key differences between these models and the heuristic presented in this paper. One important departure is that my model lacks the filibuster pivot, which is a unique feature of the Anglo-Western political systems. As the discussion will show, the absence of the filibuster pivot means that the “gridlock interval” will depend on the veto rule or the override threshold (Colomer, 2005; Nacif, 2003). Another distinction is that I do not restrict the role of courts to limiting the president’s equilibrium strategy. The court, by playing an integral role in any separation of powers setting, will influence the president’s decision by way of limiting other key players (i.e. legislature) as well. As the discussion will show, the basis for such view is founded upon a rather intuitive understanding about the notion of checks and balances. Thirdly, the model can also be adjusted to account for the court’s ability to be a viable check on the president.
As numerous skeptics of judicial check on the executive have suggested, the court’s decision can only have carrying power so long as the president is willing to comply with the court’s orders. As I will propose, some modifications to the existing model can be made to account for this problem. In particular, I suggest incorporating the public to the equation of checks and balances. Finally, unlike Howell (2003), my model is not restricted to rulemaking or executive orders. It seeks to address a broader phenomenon of presidential policy making. This, however, also does not mean that my model is not applicable to rulemaking decrees. My ultimate goal is to present a more general approach to the study of the president’s proactive power. The discussion will show that the procedural difference will matter little to policy outcome. Instead, I argue that the president’s power to issue decrees is constrained by both the courts and Congress. More specifically, the president’s ability to issue decrees depends on the anticipated response of these two other branches of government. That is, as I argue, what happens after the president issues the decree is less consequential to her strategy than how she perceives other branches to react ex ante. If the existing system of checks and balances function as proper mechanisms of constraint on the president, she is less likely to act unilaterally; or, even when she does ignore the checks on her power and decides to issue decrees, she is less likely to issue ones that she most prefers.

In my application of Howell and Krehbiel’s models, there are five players: the nature, the median voter in Congress ($M$), the president ($P$), the judiciary ($J$), and the veto pivot ($V$) or the 66th percentile member of Congress whose vote is necessary in order to override the president’s veto of a legislative bill. Except for nature, all other players’ ideal policy preferences are $m$, $p$, $j$, and $v$, respectively. Again, with exception to nature, I assume that all players have Euclidean preferences and that the president has the authority to make a choice $r$ from a subset $A$ of a policy space $X$. I will also assume that there is a status quo policy ($q$) which represents the legislation implemented by the previous government. The status quo ($q$) is exogenously predetermined.

The sequence of play in a presidential decree game is depicted in Figure 1. Initially, the nature picks the status quo and the level of discretion. In the next step, the president can decide to either decree $[p(q) \in X]$ or not issue any decree at all $[p(q) = \emptyset]$ and let the median voter in Congress legislate $[c(p,q) \in X]$. If the president chooses to issue a decree, the median legislator has two options: he can either (1) let the president’s decree stand as the new status quo and allow the Supreme Court to arbitrate ($r$) the constitutionality of the president’s decree or (2) propose a new bill $c(p,q)$ to challenge the president’s decree. The second path would lead to a legislative bargaining game scenario wherein the president can either sign the bill into law ($s = 1$) or veto ($s = 0$); in the latter instance, the Congress will have the option to override ($o = 1$). If the Congress successfully overrides the president’s veto, $c(p,q)$ stands. The court will again have the last word on this matter ($r$).
In the initial development of my model, I will not consider the role of courts in the president’s decree strategy. This means that the extensive form representation in Figure 1 will be truncated so that the last node will be pruned out. I will show here that under these circumstances, the president will have significant leverage in determining policy outcomes. Congress, nonetheless, can have some critical role to play in shaping the president’s decision if there is enough agreement on the floor to oppose presidential usurpation.

3.1 Evasion and Preemption

When the president contemplates the use of her power, she has a choice between two strategies: evasion and preemption. The former refers to all those instances where the president can simply usurp legislative power while the latter refers to an instance where the president issues a decree in order to prevent the median legislator from instituting a less preferable policy. It will be shown here that the president’s choice between these two strategies is largely constrained by the preference of the median legislator and the veto override player. In delineating the preference of the veto pivot, I follow Howell’s (2003) example and define its preference set in terms of the new reversion policy set by the president $p(q)$.

If the president chooses to not reset the status quo through new decrees, the override set will be defined in terms of the status quo (see Appendix).

**Definition 1**  
Veto pivot’s override set  
$$O[p(q), v] = \begin{cases} [p(q), 2v - p(q)] & \text{if } p(q) < v \\ [2v - p(q), p(q)] & \text{if } p(q) \geq v \end{cases}$$

**Remark 2**  
$p(q)$ can be replaced with $q$ if the president does not exercise the decree option and the median legislator proposes a bill $c(p, q)$. Hence, if , the veto pivot’s override set is the same as Krehbiel’s (1996) definition 3.

Stated in this manner, the veto pivot’s override set is simply all those policies that the veto pivot player will prefer at least as much as $p(q)$ (if $p(q) \in X$) or $q$ (if $p(q) = \phi$). It is suggested that should the president veto any of the bills proposed by the median legislator within $O[p(q), v]$, the veto pivot will vote to override. Notice that there are two veto pivots, on either side of the median legislator’s most preferred policy point ($m$). The other veto pivot’s ideal point will be denoted as $v'$, where $v' < v$.

The president’s decision rule for accepting the alternative bill proposed by the median legislator can be summed up in the following manner.

**Definition 3**  
The president’s acceptance set  
$$A[p(q), v] = \begin{cases} [p(q), 2p - p(q)] & \text{if } p(q) < p \\ [2p - p(q), p(q)] & \text{if } p(q) \geq p \end{cases}$$
Remark 4 Similar to Remark 1, the absence of presidential decree would mean that the president’s acceptance set would be identical to Krebski’s definition 2.

The median legislator, in turn, can shift the new status quo set by the president $p(q)$, given some constraints presented by the veto pivots. The most optimal bill $c(p, q)$ should be able to withstand a possible presidential veto and is at least as close to $m$ as is $p(q)$ or where $|m - c(p, q)| = |m - p(q)|$. If the veto pivot prefers $p(q)$ over $c(p, q)$, $c(p, q)$ will not be realized.

Knowing this, the president has one of two options. One is to set $p(q)$ such that the median legislator will not be able to present an alternative that is (more preferable for himself and the veto pivot but) less preferable for the president. This is where the president engages in an act of preemption. There are instances, however, where the president can do better than simply preempt the median legislator. These are instances where the president knows that the median legislator will not be able to suggest an alternative $c(p, q)$ that is strictly more preferable for the veto pivot than $p(q)$. This is the case where the president can proactively evade the median legislator. Considering several possible illustrative scenarios will prove useful.

It is clear that where $p > v$, the president will set $p(q)$ whose contents will be most favorable to $V$ since this will not be overturned by $M$’s subsequent legislation (Figure 2).

Insert Figure 2 Here

If the status quo is closer to $p$ (as in the case of $q'$), the president will set $p(q) = v$ in order to preempt the median voter’s desire to move the new status quo towards $m$. If the president should move the policy closer to herself ($q''$) and risk being challenged by the median’s attempt to move the policy closer to himself, the president’s veto will be overridden since the veto pivot is indifferent to $c(q)$ and $q' (|v - c(q)| = |q' - v|)$.

If $p$ happens to be located between $m$ and $v$ (Figure 3), $p(q) = p$ since the median voter cannot propose an alternative to $p(q)$, which the supermajority will support. Anything that the median prefers in comparison to $p(q)$ [or where $c(p, q) < p(q)$] does not have two-thirds support since $|p(q) - v| < |c(p, q) - v|$ or more than 33.3% of Congress members (all members with preferences to the right of $p(q)$) support $p(q)$ over $c(p, q)$. This outcome is more likely where the distance between $m$ and $v$ is large or where the interval between $m$ and $p$ is small.

Insert Figure 3 here

\footnote{I assume here that $|v - m| = |p - v|$.}
Notice that even where \( p \) is located on the opposite side of \( v \) in relation to \( m \), the president’s strategy will be the same. That is, the president will pass decrees \( p(q) \) and not fear reprisals from the median voter if the new status quo established by the president \( p(q) \) is preferred by at least 33.3% of legislature. I represent this point to be on the right side of \( v' \) where \( |m - v'| = |v - m| \). If the president’s ideal policy point is to the left of \( v' \), she will set \( r \) to \( v_0 \) in order to preempt \( M \)’s ability to propose an alternative that is indifferent to \( V_0 \) but further away from \( p \) (see Figure 4).

Insert Figure 4 here

The subgame perfect equilibrium can be summed up in the following manner.

**Proposition 5** The equilibrium behavior is given by

\[
\begin{align*}
p^*(q) &= \begin{cases} 
v & \text{if } p > v \\ v' & \text{if } p < v' \\ p & \text{if } v' \leq p \leq v \end{cases} \\
c^*(p, q) &= \begin{cases} 
m & \text{if } p(q) \geq 2v - m \text{ or } p(q) \leq 2v' - m \\ 2v - p(q) & \text{if } v < p(q) < 2v - m \\ 2v' - p(q) & \text{if } 2v' - m < p(q) < v' \end{cases} \\
s^*(o, p, q) &= \begin{cases} 
\phi & \text{if } c(p, q) = \phi \\ 1 & \text{if } c(p, q) \in A \text{ or } c(p, q) \notin A \text{ and } c(p, q) \notin O \\ 0 & \text{if } c(p, q) \notin A \text{ and } c(p, q) \in O \\ 1 & \text{if } c(p, q) = \phi \text{ or } s = 1 \\ 0 & \text{if } s = 0 \text{ and } c(p, q) \notin O \end{cases} \\
o^*(c, p, q, s) &= \begin{cases} 
\phi & \text{if } s = 0 \text{ and } c(p, q) \notin O \\ 1 & \text{if } s = 0 \text{ and } c(p, q) \notin O \end{cases}
\end{align*}
\]

Equilibrium outcomes are \( v \) (where \( p > v' \)), \( v' \) (where \( p < v' \)) and \( p \) (where \( v' < p < v \))

**Proof.** See Appendix.

One interesting finding to be drawn from this interaction is that the president will always reset the status quo or \( p(q) \neq q \). Granted, she is constrained in the kind of decree that she can pass if she is more radical than the veto pivot (\( p > v \) or \( p < v' \)).\(^{12}\) However, both preemptive and evasive unilateralist scenarios suggest that the president will always be the first to move the status quo in such a way as to prevent the median voter from moving policies closer towards \( m \). In other words, policy outcome is a function of the president’s preference. On the one hand, this does not bode well for democracy and presidentialism since it

\[^{12}\text{As suggested, the president cannot pass decrees that she most prefers (p) if } |p - m| > |v - m|.\]
suggests that the president can always “call out the tanks” should she choose to do so. It is also the basis for criticizing the so-called “delegative democracy.” As O’Donnell points out “delegative democracy gives the president the apparent advantage of practically no horizontal accountability.” Critics of this system, however, downplay the importance of checks and balance. In plain truth, legislators do legislate and presidents do not always decree. At the very least, the above discussion shows that the Congress can prevent the president from issuing any kind of decrees she desires. Presidents are necessarily constrained. But exactly what prevents the executive from engaging in unilateralism? And how is this possible?

3.2 Judicial Constraint

This is where the courts come in. The courts can act as a viable constraint on the president by issuing opinions. What guides court opinions? In general, there are two dimensions of judicial constraint. One deals with the nature of judicial decision making; but there are several variations on this theme. On the one hand, there are those who suggest that judges make decisions based on strict legal principles and law; hence, in order to determine the conditions under which judges will rule against the president, we must look to the statutes as well as legal jurisprudence (Howell, 2003). This may be an appropriate assumption to make in the US political context; however, others have argued that justices can also act strategically in making their decisions on important cases. Helmke (2005), for instance, has shown through her study of the Argentine legal system that unstable institutional climate can create conditions favorable for a “reverse legal political cycle” whereby the judges can engage in acts of “strategic defection” by ruling against the current government. Other studies have also shown that judges rule against the president if they have different ideological tendencies (Iaryzkower, et. al.). While I agree that various conceptions of the court decision making behavior are substantively important to the extent that they define the kind of checks that the judiciary may impose on the executive, the president’s strategy will essentially remain unchanged regardless of how we conceptualize the nature of the judge’s decision making process. From the president’s point of view, the process of judicial decision making is of less importance than the viability and the direction of decisional outcomes. That is, if judicial check casts a lengthy shadow on the president’s decree calculus, then she will act accordingly in anticipation of the court’s response.

Second dimension of judicial constraint is the scope of influence within the separation of powers framework. On the one hand, we may delimit the court’s influence to its interaction with the president only. This interpretation of the court is consistent with Howell’s (2003) approach. An alternative is to give the courts a more expansive role – that is, to consider the judiciary as a constraint on both the president and Congress. It may be argued, for instance, that the court has the ability to influence the president’s unilateral power (both directly and indirectly) in a separation of powers context: directly by ruling against the president, where the president is one of the parties involved in a dispute; and
indirectly by not ruling against the median legislator when the constitutionality of any competing legislation is questioned. If we frame interbranch relations in this manner, the president as a strategic actor should not only consider how the Congress and the courts will react to her decree initiatives but how these two players will interact with one another. The model, therefore, should account for the judiciary’s decision based on its relative preferences of the status quo, median legislator’s bill, and the president’s decree. By doing so, we purport to take a more sophisticated approach to considering strategic interaction within the separation of powers context.

The argument stated more simply is that when the president decides to issue decrees, she acts first based on her anticipation of legislative and judicial reactions ex ante by considering the subsequent choices made available to both the courts and Congress. We have already considered how the legislature influences the president’s decisions. As I will show in this section, the level of constraints on the president’s ability to exercise the decree option will elevate with the addition of the judiciary.

To show this, I will need to make several additional assumptions. First, I will assume that the preference of the court is Euclidean. Of course, this implies that the court has an ideal preference \( \phi \) and that its actions depend on this preference. It is important to understand that this assumption does not necessarily violate the conception of the court as an objective dispute resolution mechanism that is guided by a principled interpretation of the law since this view itself is expression of a preference. Secondly, I will also assume that the court simply chooses among the various options laid before it, \( q, p(q), \) and/or \( c(p,q) \). What this means is that the court plays the role of an arbitrator deciding between what is or is not constitutional. In this manner, the court is less proactive than it is reactive in its ability to make policy. With this in mind, I define the court’s decision rule as the following.

**Definition 6** *Judiciary’s Decision Rule (r)*

The court’s decision rule, \( r \), can differ depending on the conditions under which it is asked to make a decision

If \( p(q) \in X \), and \( c(p,q) \neq \phi \)

1. \( |p(q) - j| \leq |q - j| \), then \( r = 1 \)
2. \( |p(q) - j| > |q - j| \), then \( r = 0 \)

where \( r = 1 \) implies that the court will rule in favor of \( p(q) \) while \( r = 0 \) means that the court will rule against \( p(q) \).

If \( p(q) \in X \), and \( c(p,q) \in X \)

1. \( |p(q) - j| \geq |c(p,q) - j| \), then \( r = 0 \)
2. \( |p(q) - j| < |c(p,q) - j| \), then \( r = 1 \)

If \( p(q) = \phi \)

1. \( |q - j| < |c(p,q) - j| \), then \( r = \zeta \)
2. \( |p(q) - j| \geq |c(p,q) - j| \), then \( r = \xi \)
where \( r = \xi \) implies that the court will rule in favor of \( c(p, q) \) while \( r = \zeta \) means that the court will rule against \( c(p, q) \).

Let us first consider a situation where \( m < v < p < j \) (See Figure 5). For \( q \leq p \) and \( q \geq 2j - p \), the president will be able to evade the legislature by locating \( p(q) \) at \( p \). \( p \) here is more preferable than \( q \) for both the court and the president. The Congress plays only a minimal role since any legislation that can defeat the president’s veto in these intervals will not overcome the judiciary’s ruling against legislations that are more favorable to Congress. For instance, if \( v < q < p \), then the president will set \( p(q) \) at \( p \). The median legislator would most definitely react to this by proposing a bill \( c(p, q) \) that can defeat the president’s veto yet is closer to \( m \). \( c(p, q) \) can withstand the president’s veto since the median would have enough support to override. The court, however, would not tolerate \( c(p, q) \) since \( |c(p, q) - j| > |p(q) - j| \). For \( j < q < 2j - p \), the president can set \( p(q) = 2j - q \), which is closer to \( p \) but indifferent to the court because \( |j - p(q)| \leq |j - q| \). Any Congressional act to challenge such decrees will meet judicial opposition in favor of \( p(q) \). In the interval of \( p < q \leq j \), however, the president’s hands are tied. This is because the president’s preference is to move \( q \) towards \( v \) and the court will oppose such a move since that would mean \( p(q) \) will be further away from \( j \) than is \( q \). The Congress will meet the same fate as the president if they decide to act. Hence, if the status quo is located between \( p \) and \( j \), we have a policy gridlock whereby neither the president nor Congress will be inclined to attempt a policy shift.

**Proposition 7** If \( m < v < p < j \), the equilibrium behavior will be

\[
p*(q) = \begin{cases} 
  p & \text{if } q \leq p \text{ and } q \geq 2j - p \\
  2j - q & \text{if } j < q < 2j - p \\
  \phi & \text{if } p < q \leq j 
\end{cases}
\]

\[
c^*(p, q) = \begin{cases} 
  m & \text{if } p(q) \geq 2j - m \text{ and } p(q) \in X \text{ or } p(q) \leq m \text{ and } p(q) \in X \\
  2j - p(q) & \text{if } q \geq 2j - m \text{ and } p(q) = \phi \text{ or } q \leq m \text{ and } p(q) = \phi \\
  2j - q & \text{if } j < p(q) < 2j - m \text{ and } p(q) \in X \\
  \phi & \text{if } j < q < 2j - m \text{ and } p(q) \in X \\
  \phi & \text{if } m < p(q) \leq j \text{ and } p(q) \in X \\
  \phi & \text{if } m < q \leq j \text{ and } p(q) = \phi 
\end{cases}
\]

\[
s*(o, p, q) = \begin{cases} 
  1 & \text{if } c(p, q) \in A \text{ or } c(p, q) \notin A \text{ and } c(p, q) \in O \\
  0 & \text{if } c(p, q) \notin A \text{ and } c(p, q) \notin O \\
  \phi & \text{if } c(p, q) = \phi \text{ or } s = 1 \\
  1 & \text{if } s = 0 \text{ and } c(p, q) \in O \\
  0 & \text{if } s = 0 \text{ and } c(p, q) \notin O 
\end{cases}
\]

\[
o^*(c, p, q, s) = \begin{cases} 
  \phi & \text{if } c(p, q) = \phi \text{ or } s = 1 \\
  1 & \text{if } s = 0 \text{ and } c(p, q) \in O \\
  0 & \text{if } s = 0 \text{ and } c(p, q) \notin O 
\end{cases}
\]
where \( m < v < j < p \) will not be tolerated by the court. The president will not be able to act since any attempt to defeat the president’s veto. For \( j \) will withstand any Congressional challenge against \( p \). Note of the fact that the critical pivot has changed from \( p \) to \( j \). The president will enact \( p \). If \( \text{Proposition 8} \)

\( \text{Proof.} \) See Appendix

Interesting dynamic emerges if we vary \( j \)’s location holding all else constant. As we move \( j \) to the right, the effective space of action for the president and Congress diminishes. If \( j > p \) and \( |j - p| \) increases, the gridlock interval also increases as well. In effect, the president’s ability to engage in preemptive politics will decrease in proportion to the amount that \( j \) shifts away from \( p \). The median is just as ineffective given that any attempt to move the status quo closer to itself will meet a strong resistance from the judiciary as well. If we move \( j \) to the left so that \( j < p \), we are left with two interesting scenarios. First, where \( m < v < j < p \), the president will engage in preemption by setting \( p^*(q) \) at \( j \). This is because any other strategy will be trumped by either the courts or the legislature.

**Proposition 8** If \( m < v < j < p \), the equilibrium strategy for the president will be

\[ p^*(q) = j \]

**Proof.** See Appendix

It is interesting to find the president here engaged in a preemptive strategy. As \( j \) moves farther away from \( p \) and approaches \( v \), the president’s ability to obtain a policy that coincides with her most favored outcome \( (p) \) diminishes.

If we allow \( j \) to shift further out to the left so that \( m < j < v < p \), the president will enact \( p^*(q) = v \) where \( q \geq v \) and \( q \leq 2j - v \). It is important to take note of the fact that the critical pivot has changed from \( j \) to \( v \). This outcome will withstand any Congressional challenge against \( p(q) \) since all alternatives to \( p(q) = v \) that (the median legislator may propose) \( c(p, q) \) will not be able to defeat the president’s veto. For \( j \leq q < v \), there will be a policy gridlock. The president will not be able to act since any \( p(q) \) that can move \( q \) towards \( v \) will not be tolerated by the court. \( M \) will also be unable to enact a policy
that will be closer to $m$ but indifferent to $J$ since the president will almost certainly exercise the veto option and her veto will stand. For $2j - v < q < j$, the president will be able to issue $p^*(q) = 2j - q$. These outcomes will be the same regardless of whether $j \leq m$ or $j \geq m$.

**Proposition 9** Given $m < j < v < p$, the equilibrium behavior for the president will be

$$p^*(q) = \begin{cases} v & \text{if } q \leq 2j - v \text{ or } q \geq v \\ 2j - q & \text{if } 2j - v < q < j \\ \emptyset & \text{if } j \leq q < v \end{cases}$$

**Proof.** See Appendix

Comparison of the equilibria derived in Propositions 7–9 yield interesting results (see Figure 5). First and foremost, we find that executive unilateralism faces significant constraints as the judiciary’s ideal policy point moves away from that of the president. As Figure 5 shows, when $p < j$, divergence between $j$ and $p$ leads to a corresponding growth in the gridlock interval. The shaded region represents the loss in policy outcome sustained by the president as a result of the rise in $|p - j|$. Likewise, given $j < p$, an increase in the distance between $j$ and $p$ leads to either a corresponding increase in the gridlock interval or divergence of the president’s preferred policy and the actual policy outcome. Again, the shaded area is used to represent the loss sustained by the president as a result of the rise in $|p - j|$. In sum, executive unilateralism as a viable or preferred option diminishes with growing divergence in the preferences of the president and the court. From this, I derive my first testable hypothesis called the judicial constraint hypothesis.

**Hypothesis 1** *Ceteris paribus, the president will issue more significant decrees when the preference of the majority opinion in the judiciary is closer to the president than the legislative majority.*

In addition to the judicial constraint hypothesis, another interesting pattern emerges if we consider Propositions 8 and 9 together. That is, if we hold the judiciary’s ideal point constant, the location of the veto pivot can be a critical determinant of the equilibrium. In particular, we see that the president’s strategy can differ as the distance between the veto pivot and the median legislator varies. Compared to Propositions 8 and 9, if $v$ shifts further to the right so that $m < j < p < v$, the president’s ability to promulgate the kind of decree that she desires will increase as well. Following the proofs for Propositions 7–9, we derive the president’s equilibrium behavior for $m < p < j < v$ in the following manner.
Proposition 10  Given \( m < j < p < v \), the president’s equilibrium behavior will be:

\[
p^*(q) = \begin{cases} 
  p & \text{if } q \geq p \text{ or } q \leq 2j - p \\
  2j - q & \text{if } 2j - p < q < j \\
  \phi & \text{if } j \leq q < p 
\end{cases}
\]

Proof. See Appendix ■

If we piece together Propositions 8 – 10, the president’s ability to decree her most favored policy is increased with the change in the distance between \( m \) and \( v \). In fact, evasive unilateralism is more likely with increase in \(|m - v|\) holding all else constant. This finding is somewhat trivial given the discussion about legislative constraints on executive unilateralism absent judicial check. That is, the Congress’ ability to constrain the president increases as the distance between \( m \) and \( v \) declines. Thus, as the preference of the members of Congress become more heterogenous or fragmented, the effective space of action for the Congress to challenge the president’s decree power will decrease. Even under extreme circumstances, where the judiciary can constrain both the president and Congress, the president cannot always have her way. From this, our second hypothesis can be derived accordingly:

**Hypothesis 2**  \( Ceteris paribus, \) when the legislature is more fragmented, the president will have more freedom to issue more significant decrees.

Together, these two hypotheses suggest that the president’s ability to exercise her power is constrained by the preferences distribution of the president, the courts, and the legislature. More specifically, the president is less able to exercise unilateralism where her preferences differ significantly from that of the courts and if the ideological makeup of the Congress is such that there is a significant degree of fragmentation.

4  Argentina as a Case of Constrained Unilateralism

It is unclear how the Neustadtian school or broad constitutional explanations of executive decrees can explain the variations in the number of decrees issued over time, especially if the time serial variance of decrees is high. It has been suggested here that an institutionalist approach, which assumes strategic interaction among key players in a system of separation of powers can prove useful. To test the hypotheses laid out in the previous section, I have elected to choose a case with high degree of variance on the dependent variable (i.e. frequency of decrees). Argentina is most fitting in this regard. In particular, I am mainly interested in the number of necessity and urgency decrees (decreto necesidad...
y urgencia – DNU) issued over time. My rationale for focusing on DNUs is twofold. First, DNUs have received a great deal of attention in recent years among students of Latin American politics (Ferreira Rubio & Goretti, 1998; Negretto, 2004; Mustapic, 2001; Maurich, 1997; Maurich, 1998). The controversy stems from the fact that this particular power was not constitutionally guaranteed before 1995 and the usage of its antecedent was limited to only a few instances in the pre-transition era. Presidents in recent years have utilized this power to legislate a broad range of economic and social reforms. This newfound reality begets the oft-controversial question of democracy in Argentina (Banks & Carrio, 1993; O’Donnell, 1992; Ferreira Rubio & Goretti, 1998; La Nación, 11/22/04). Secondly, because the DNUs have received so much attention, much of it has not gone unnoticed. Take, for instance, the highly unpopular yet controversial DNU 1570/01 which effectively imposed strict banking limitations on individuals in order to forestall an eventual financial crash; the public’s reaction can be summed up in a popular Volkswagen television commercial which ended by saying “at least when you put your money in the garage you can take it out whenever you want.” Although DNU 842/97 was declared unconstitutional by the Supreme Court, it stirred up some storm by hastening the process of privatizing national airports.\footnote{Details on exactly how many airports were available for sale are less than clear as the figures ranged from anywhere between 28 and 58 (LatinFinance, 10/97).} DNU 36/90 was also an important decree that allowed the government to freeze bank accounts and remit deposits with government bonds (instead of cash). All of these decrees were controversial and they were geared towards implementing important economic reforms, which were aimed at stabilizing the economy. It is true that not all DNUs were as important or controversial; however, the very fact that the president can promulgate laws and thereby dictate policy should make anyone feel nervous about prospects for democracy in Argentina. To my knowledge, the Argentine legislative annals (Anales de Legislación Argentina), which highlights selected legislations in a given year, has not failed to publish any of the formally declared DNUs. Without a doubt, there can be little disagreement to the fact that DNUs wield a significant amount of importance in Argentina.

This section begins with a brief overview of the data and the methodology deployed to analyze the possible determinants of executive decree and to consider the propositions derived in the previous section. In essence, the theoretical argument suggests that unilateral power cannot be considered separately from the built-in system of checks and balances. That is, when the president decides to issue DNUs, she anticipates legislative and judicial reactions ex ante. The analysis of DNUs and its antecedents in Argentina will show this to be the case.

4.1 DNU and Its Origin

Prior to the constitutional reform of 1994/5, the president of Argentina had the legal basis to issue only two types of decrees: rulemaking and delegated decrees (by explicit legislative guarantees). In practice, however, the president...
also exercised the right to issue a third type of decree (i.e. DNU), which had the force of law but did not require prior legislative approval. The uniqueness of this special privilege rests with the fact that its use did not have explicit constitutional guarantees before 1995. In fact, before the 1990 Supreme Court ruling of the widely cited *Peralta* case, there was no clear legal basis for the use of this type of decree (Negretto, 2004). The specifics of this ruling held that the president is empowered to assume certain duties entrusted to the National Assembly (i.e. legislation) during “a serious social crisis” (i.e. economic crisis) as long as the National Assembly did not affirmatively object. In effect, the *Peralta* Court held that the decree is valid as long as the National Assembly “has not adopted a contrary decision” or “has not rejected its terms” through other subsequent legislation (Banks & Carrio, 1993:42-3). According to Negretto (2004:552), the “social crisis” condition is not an important limitation because it is up to the president to diagnose and prescribe appropriate remedy for the declared “emergency.” The most crucial aspect of the court’s ruling, however, was the tacit approval dimension – namely that the only way to reject decrees of this nature was by a new legislation. The ruling, in effect, set an important precedent for the usage of these types of decrees.

The immediate antecedents of DNUs can be dated as far back as 1862 when it was first issued by General Bartolomé Mitre (Lugones, Garay, Dugo & Corcuera, 1992; Maurich, 1997). According to Mario Maurich, the principled justification for issuing antecedents of DNUs prior to the Alfonsín era can be found in its label and content. In particular, “necessity” refers to the inevitability of this type of decree, while “urgency” speaks to its non-deferrable nature. As such, unilateral promulgation of DNUs has been justified on the grounds that they must be implemented rapidly and without further reconsideration (Maurich, 1997; Maurich, 1998).

With the inclusion of Article 99.3, the reform of 1994/5 effectively formalized and made the DNU constitutional. Although the language of Article 99.3 suggests that the president should issue DNUs “only when exceptional circumstances make it impossible to follow the ordinary lawmaking process established by the constitution” and that the president cannot issue decrees on penal, fiscal, electoral or political party matters, de facto utilization of DNUs have not been constrained by these expressed limits. It is widely known, for instance, that

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14 The *Peralta* case involved a presidential decree (DNU 36/90) which provided banks relief from paying only a small portion of deposits to investors. Instead, term deposits were to be remitted not in cash but in government bonds. Problems loomed when the promised bonds were not issued until five months after the decree went into effect, which effectively lowered the market value of the bonds, and the accrued bond interest could not be collected for the first year of the life of the bonds.

15 Banks and Carrio (1993:27-8) attribute the key precedent setting decision for establishing executive discretion over emergency power as being the 1930 decision over the legitimacy of the military government. In its decision, the court ruled that “de facto” the new military government can carry out the functions of the elected government and be recognized as legally valid despite the unconstitutionality of its origin. That is, its legitimacy derived from basis of “necessity,” “public policy,” and the purpose of “protecting the citizens, whose interests could be affected because it is not now possible for them to question the legality of those now in power” (28).
President Menem instituted decrees that dealt with tax reforms and public debt among various other issues (Ferreira Rubio & Goretti, 1998; Negretto, 2004). Article 99.3 also requires that DNUs be submitted to a permanent bicameral committee within ten (10) days of its issuance; the committee then has another ten days to approve the DNUs. Should the joint committee fail to act, the tacit approval rule a la Peralta case ruling applies. In those rare instances that the legislature did attempt to challenge the president’s decree, it has often ended in failure. For instance, Negretto (2004) points out that less than 5% of all DNUs were modified by Congress, and not all of these reforms survived presidential vetoes (353-4).

4.2 Hypotheses

During negotiations for the new constitution, the chief negotiator for the opposition party (i.e. UCR) and former-President Alfonsín believed strongly that the inclusion of Article 99.3 would effectively curtail executive decrees. Faith in the benefits of formalizing proactive power is not unreasonable. As one recent study of executive rulemaking power in the US has suggested, it is precisely the absence of explicit constitutional basis for executive orders which allows the president expansive leverage and discretion over exactly how and when this power can be exercised (Moe & Howell, 1999). Applied to Argentina, data on President Menem’s use of DNUs at the outset of his second term provided some initial support for this belief. As Ferreira Rubio & Goretti (1998:59) point out, the rate at which the president issued DNUs declined by more than 50% relative to the period before the reform.

More recent recapitulation of the DNU indicates, however, that the initial decline during the mid-1990s was only temporary. According to another report published on June 21, 2004 (Centro de Estudios para Políticas Públicas Aplicadas – CEPPA), President Néstor Kirchner passed a record number of DNUs during his first year in office (LatinNews, 6/22/04). As one leading constitutional scholar in Argentina observes, “never, during the constitutional periods (at least), has a president possessed and consolidated as much power as [he does] today” (Gregorio Badeni quoted in La Nación, 11/22/04). This suggests that the mere formalization of proactive power does not necessarily explain the frequency of its use over time.

If not formalization of DNUs, what best explains the sudden drops and peaks in its passage over time? As hypothesized earlier, it can be argued that the president’s ability to utilize her proactive power rests on the institutional context. Several leading constitutional scholars, for instance, attribute the consolidation of proactive powers in the executive to Congressional delegation of important privileges to the president during the economic crisis of 2001~2 (La Nación, 11/22/04). Such an interpretation suggests that the important determinant of decrees is not only the formalization of proactive power but the extent to which the Congress is willing to tolerate or permit the use of this power.

As Ferreira Rubio and Goretti (1998) forewarn, the failure of Congress to institute an explicit approval rule for the DNUs can reinforce the concentration
of power in the executive. Almost ten years after the constitutional reform, Negretto (2004) points out that the lack of explicit approval rule (via legislation) by the National Assembly has allowed the president in Argentina more leverage over the use of DNUs. This remains true to this day. What explains this shortcoming on the part of the Argentine legislature?

As my Hypothesis II suggests, the Congress’ ability to act depends on the extent to which it can act as a legitimate check on the executive. That is, the president has more leverage to act unilaterally without legislative reprisal if it is difficult to override the president’s veto. This outcome is more likely when the opposition cannot sustain a supermajority in both Chambers of the National Assembly. As Ana Maria Mustapic (2002) observes, it was difficult for the legislature to constrain the president’s DNU initiatives during the Alfonsín and Menem years precisely because the opposition party did not have a special majority of two-thirds in both chambers of the legislature. In effect, a combination of high threshold for legislative override and lack of explicit rule for approving decrees means that the legislature would have a difficult time preventing the president from acting unilaterally.

Such pessimism, however, ignores the role of judiciary within the checks and balances framework. If Hypothesis I is correct, the Assembly’s inability to veto executive decrees does not necessarily lead to outright usurpation by the executive. If the courts can act as a legitimate check on the president’s power to issue decrees, both the Congress and the courts can act as salient constraints for keeping presidential usurpation at bay. That is, the president should not be able to issue DNUs when she anticipates a negative response to her unilateral directive by the court.

As mentioned earlier, however, saliency of the court as a viable check on the president may depend on the public’s response to her initiative. Given that the data on the public’s awareness and sentiment for the president’s DNUs is lacking, it is difficult to make definitive causal statement about the role of the voting public on the president’s decree strategy; however, one can reason that the existence of a genuine opposition party under a competitive electoral process can function as a potential “fire alarm” for the general public (McCubbins & Schwartz, 1984). In fact, we see examples of this as legislators draw media attention to sharp rises in DNUs. Subsequently, we should expect the court to act as a more viable check against presidential usurpation during periods of democratic rule where significant legislative opposition is present.

4.3 Data

Existing data on Argentina’s DNU is shrouded in controversy due to large discrepancies over its estimated count. In particular, the most serious discrepancies are evident in the DNU estimates after 1989.\(^{16}\) Since much of this controversy

\(^{16}\)As far as I know there are four different estimates of the post-1989 DNUs and they all seem to differ on how they count these decrees (Ferreira Rubio & Goretti, 1998; Mustapic, 2002; Negretto, 2004; Molinelli, Palanza & Sin, 1999). The discrepancy stems in part from the different interpretation of DNUs. For instance, Ferreira Rubio & Goretti (1998) define
remains unresolved, I have decided to collect my own data. The difficulty of overcoming this challenge has been further compounded by the fact that there is no single comprehensive database of the Argentine law as of yet.\(^\text{17}\) To deal with this initial hurdle, figures for the post-1989 DNUs were obtained by cross-checking three different sources: the Official Gazette of the Argentine government (Boletín Oficial), the Annals of Official Gazette (Anales de Boletín Oficial de la República Argentina), and the Directorate of the Argentine System of Juridical Information (Dirección del Sistema Argentino de Informática Jurídica – SAIJ) within the Ministry of Justice and Human Rights. It is important to note here that my compiled database does not include the so-called “non-recognized DNUs.”\(^\text{18}\) This is not to discredit Ferreira Rubio & Goretti’s account about the existence of these types of decrees; however, until some serious reliability issues on the content and categorization of these non-recognized decrees are resolved (Mustapic, 2003:n.9), I will opt to rule in favor of using a more conservative estimate. Figure 6 shows the comparison of the year-to-year estimate of DNUs in Argentina for Ferreira-Rubio & Goretti (1998), Maurich (1999), Molinelli et. al. (1999), and Kim (2006). It is not surprising to find that my estimate is generally lower than that of others.\(^\text{19}\) It should also be noted that the direction and first-order derivative of the decree for the different estimates seem to correspond. Hence, bias should be less of a concern for us since it is all in a single direction; we need only to keep in mind that my analysis relies on more conservative “underestimates” of DNU.

Insert Figure 6 here

The estimates of pre-1989 antecedents of DNUs were obtained from Maurich (1997, 1998, 2003) and Maurich & Liendo (1996). As far as I know, this is the most comprehensive and exhaustive list thus far. As far as I know, this is the most comprehensive and exhaustive list thus far. Table 1 lists the presidents and DNUs as any and all decrees that repealed or modified existing laws without legal delegation. Their justification here is that neither the constitution nor Congressional delegation granted the president ex ante privilege for issuing the kinds of decrees that he promulgated. However, several subsequent studies of DNUs have avoided this interpretation (Mustapic, 2002; Molinelli, et. al., 1999; Negretto, 2004). Unfortunately, there seems to be little consensus among these scholars about the actual figures.

\(^\text{17}\)Law 24,967 of 1998 mandates the preparation of an Argentine Legal Digest (Digesto Jurídico Argentino) by establishing a Bicameral Commission of Search and Coordination for Preparation of the Argentine Legal Digest (Comisión Bicameral de Seguimiento y Coordinación para la Confección del Digesto Jurídico Argentino); however, the latest assessment of the Argentine gazettes suggest that existing references are less than fully comprehensive.

\(^\text{18}\)These are decrees that Ferreira Rubio & Goretti (1998) have claimed has the effect of DNUs but are not explicitly declared to be DNUs by the administration.

\(^\text{19}\)There are three exceptions to this rule – namely the DNU estimates for 1998 by Ferreira-Rubio & Goretti (1998), and 1992 and 1997 for Molinelli et. al’s (1999) estimate. It is important to note that all of the discrepancies are at the end of a continuous series (Molinelli’s data has a missing value for 1993). While my estimates include counts of DNUs up to the last day of that year, the other estimates at the end of each continuous series do not seem to include DNU counts for all of the months.
the DNUs that they enacted in each year of their administration from 1915-2004. Notice that the sheer number of DNUs enacted in recent years by Presidents Kirchner and Duhalde far surpasses that of any other presidents before them.

Insert Table 1 here

Insert Figure 7 here

Figure 7 depicts the time series scatterplot of the DNUs by corresponding presidents from 1916-2004. As expected, the number of DNUs shoots up to unprecedented heights during Menem’s first term; but in 1992, it takes a drastic dip and hits a new low in 1994. Notice that the sheer number of DNUs enacted in recent years by Presidents Kirchner and Duhalde far surpasses that of any other presidents before them. It is important to also note that the frequency of DNUs in 1994 is comparably higher than that of any other years before the Menem era. Structural break in the DNU was estimated using Zivot and Andrews’ (1992) unit root test for structural break on both trend and intercept. The result confirms that the structural discontinuity begins at 1990. Such a break in the data may necessitate a special analytic treatment, which I will consider. Another important pattern (or a surprising lack of pattern) in the dataset is the absence of a visible difference in the passage of DNUs during periods of democratic and authoritarian rule prior to the Alfonsín years. It is reasonable to assume that the dynamic of decree making would have been different under an authoritarian regime if the check on the executive by the legislature or judiciary would have been minimal. It may just as well be that the authoritarian leaders did not need to invoke DNUs in order to make laws that they most preferred. In any case, not accounting for this important difference may lead to biased estimates. In order to deal with these potentially problematic methodological issues, I segment the data into several parts and consider the impact of regime type and structural change on the president’s ability to pass decrees separately.

Given that the dependent variable is a count, I also ran a diagnostic plot to see whether the DNUs follow a Poisson distribution. Probability of the fitted Poisson prediction is lower than that of the raw dataset for 0 and 1 DNUs per year but is greater for DNUs greater than 1 and less than 13 per year. Such

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20 The data was matched to reflect the inauguration of each president. That is, if a new president had been inaugurated in the middle of the year, the date of DNU ratification was matched with the inauguration date to reflect this fact. For instance, Carlos Menem took over the presidency on July 8th, 1989 and there were 4 DNUs (570/89, 560/89, 400/89, and 377/89) issued in 1989; all of these were issued after July 8th so they were attributed to President Menem.

21 The military, for instance, made use of “decreto ley” (decrees law) as well as other decree measures under the 1853 constitution’s estado de sitio (state of siege) clause. While an argument can be made that these decrees can also be construed as DNUs, I do not treat them as such here because it is unclear whether the need for urgency and necessity was the driving motive behind these decrees. Nonetheless, the author thanks Vicky Murillo for her discussion and insights on this topic.
results are indicative of overdispersion, which suggests the need to fit a negative binomial regression to account for the different rate of DNU promulgation.

In order to test the legislative constraint hypothesis (Hypothesis II), I look to see if any significant relationships can be found between party size (as measured in percent) and the number of decrees issued. If Hypothesis II is correct, we should see a significant negative relationship between the marginal difference in the size of the pro-government and opposition parties in each Chamber and the number of decrees that the president has issued. That is, the president should be less constrained in her ability to exercise the decree option as the absolute marginal difference in the percentage of seats held by the pro-government parties in comparison to the opposition declines because a larger single party dominance would imply less fragmentation.

I have relied on Molinelli et. al.’s (1999) work to determine the composition of the legislature from 1912-1998; figures for the years after 1998 were gathered from the Interparliamentary Union’s database. The time series distributions of pro-government party seats in the two Chambers of National Assembly are displayed in Figure 8. As shown by this graph, legislative opposition was virtually non-existent throughout the period of military rule; where there existed a significant opposition in either Chamber, the opposition never really sustained anything near the supermajority required to annul the president’s decrees. It is also important to mention that with exception to Perón’s term in 1945-55, part of Frondizi’s term at the end of the 1950s, and Martínez-Perón’s term in the mid-1970s, the president’s party did not obtain more than 60% of both Chambers during democratic rule.

Since the empirical implication derived from Hypothesis II is that the president is less likely to issue decrees where the difference in the share of legislative seats between the pro and anti-government parties are large, I look to see if there is a significant difference in the number of decrees passed. In the event that there are more than two major parties, as has been the case, during the 1930s and early 1940s (la Concordancia) as well as the 1990s (Alianza por el Trabajo, la Justicia y la Educación – FREPASO and UCR), I take the difference between the pro-government coalition and the cumulated percentage of all potential opposition parties. At times, this would mean that the coalition of

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\[^{22}\]One may argue that the best way to test Hypothesis II is by calculating the gridlock interval using a measure comparable to NOMINATE or ADA scores as numerous empirical studies of US politics have done; however, this is not ideal in the case of Argentina. First, the author knows of no measure comparable to NOMINATE or ADA scores in Argentina during 1916-2004. There is data on roll calls provided by John Carey but it only covers 1984-1997. Second, even if one were to exist, it is questionable whether it can prove useful given strategic voting and agenda control (Clinton, 2006; Clinton, Forthcoming; Howell, 2003:209, n.7; Krebs, 1998:74, n.28). For some more recent developing literature on this topic, see Clinton (2006) and Clinton (Forthcoming).

\[^{23}\]For 1922, 1926, 1937-40, the lower house percentage of support for the president was an average between a lower bound and upper bound presented by Molinelli et. al.
opposition parties would become the de facto majority. Here, my main interest is in the absolute marginal percentage difference of seats among pro-government and non pro-government parties/coalitions.

By boldly dichotomizing the parliament in this manner, I make the first assumption that the parliament is polarized between pro and anti-government factions. I would argue that this is not an unreasonable assumption to make given that the number of effective political parties in Argentina has consistently been in the range of 2–3 using the Laakso-Taagepera Index\(^{24}\) (see Molinelli, et. al., 1999). Second assumption is that the members within each party are highly disciplined so as to vote along party lines. Again, this also has empirical support. As Jones (2002) points out in his analysis of the 218 roll call votes in the Chamber of Deputies between 1989 and 1997, the mean and median levels of relative party discipline for both the PJ and UCR were never below 94%. Jones & Hwang’s (2005) most recent work on the roll call votes in the Chamber of Deputies also indicates that while FREPASO and UCR maintained similar median ideal points during 1995-99, they were vastly different from that of the PJ during 1995-99. Although the median ideal points of FREPASO and UCR diverged by a significant margin during 1990-2001, they were still very different from that of the PJ. Even if the parliament is not split between two factions (those that support the president’s DNU and those that do not), my argument is that the president’s perception of potential opposition in the legislature will be the key determining factor in her decision to exercise the decree initiative since her action is carried out in anticipation of legislative response ex ante.\(^{25}\) Finally, the idea of the president usurping legislative powers is controversial enough so as to invoke relatively high level of polarized partisan behavior in the legislature.

Initial exploration of the marginal difference in the distribution of pro-government versus opposition forces in the two legislative Chambers and the relative year-to-year change in the rate of DNU passage suggests some support for Hypothesis II. As shown in Figure 11, during those instances where there was a sudden positive change in the percentage of DNUs,\(^{26}\) the difference in the level of pro-government and opposition parties in both legislative Chambers have been low in comparison to other periods when the difference between the pro-government and opposition forces were high. Although we see less volatility in the Senate than in the Chamber of Deputies, these patterns seem to be

\(^{24}\)Historical development of Argentina’s party system confirms that there have been, generally speaking, two major parties: the Peronist Party and the Radical Party. At times, the two party arrangement may meet the challenge of a third party off-shoot, such as Front for a Country in Solidarity (Frente por un País Solidario – FREPASO) most recently, but these third parties tend not to remain as a dominant force or typically end up becoming incorporated into one of the two major parties.

\(^{25}\)Here, I am making the assumption that the president is a pragmatic pessimist who seeks to minimize risk and thereby is prone to behave conservatively.

\(^{26}\)In order to plot the percentage change in DNU on the same axis as the distribution of seats in the two legislative chambers, I utilized a linear transformation of the DNU so that \((compnewDNU) = DNU + 1\). The percentage difference was calculated in the following manner: \(\% \triangle DNU = \frac{compnewDNU_{t} - compnewDNU_{t-1}}{compnewDNU_{t-1}}\).
consistent for most part of the data. Finally, although it may be trivial, it is important to note also that the passage of DNUs have all occurred under non-authoritarian rule.

How does the data fare with respect to the judiciary? Recall Hypothesis I, which suggests that the general preferences of the Supreme Court will be a significant factor influencing the president’s decision to issue DNUs. I test to see whether the president’s willingness to exercise her decree option is in any way affected by the distribution of seats in the Supreme Court. I have borrowed from both Molinelli et. al. (1999) and Gretchen Helmke’s recent work on Argentina’s judiciary to determine the composition of seats in the Argentine Supreme Court from 1916 to 2004. I then created a dichotomous variable for opposition majority in the Supreme Court, which is coded 1 if the opposition party members hold the majority of seats in the Supreme Court and 0 otherwise. If the constrained unilateralist model is correct, there should be a significant decline in the number of decrees issued by the president when the opposition controls the majority of seats in the judiciary.

In order to compare the actual behavior of the justices to the ideological tendencies of the judges, I have also included Helmke’s (2005) data on the number and percentage of individual anti-government judicial decisions on decree cases, salient decree cases, in government appeals of those cases, and in cases overturning pro-government decisions from 1983 – 2000. If Hypothesis I is correct, we should see that the number of decrees should be lower when there is credible opposition in the courts in the form of Supreme Court decisions that go against the government.

Again, some initial analyses of the DNUs after accounting for Supreme Court opposition yield promising results. Figure 8 shows that for most of the 89 years during 1916 – 2004, the presidents of Argentina had pro-government partisan appointees dominate the Supreme Court. Altogether, the majority of Supreme Court justices were pro-government appointees for a total of 63 (out of 89) years during 1916-2004. This is in part due to the common practice of having Supreme Court justices be impeached under democratic government or removed by decree under a military junta. As Helmke (2005) points out, the precedence for such practice was set in motion under the first Peronist government where the Peronist Party Deputies impeached 4 (out of 5) in 1946-7. After Peron’s removal from power in 1955, every successive change in regime was accompanied by a corresponding removal of sitting Supreme Court justices by decrees. A clear exception to this rule is the de la Rúa administration in 2000 and 2001. The difficulty with impeachment of justices for de la Rúa may have had to do with the composition of the Chambers of Senate and Deputies where de la Rúa’s FREPASO-UCR coalition did not hold an outright majority.

Along with de la Rúa in the post-Peron era, the presidents in pre-Peron era have had to deal with a significant majority opposition in the Supreme Court
for 26 our of 89 years. For 25 of the 63 years (approximately 40%) that the presidents enjoyed a favorable Supreme Court, the presidents were able to promulgate DNUs (see Table 2). The chi-square significance test suggests that the probability of this distribution being due to chance is less than 10% ($p < 0.1$). This figure is significant if we compare it to the 5 out of 26 years (approximately 19%) when the president was able to issue DNUs in spite of a potentially significant majority opposition in the Supreme Court. If we disregard those years under the military rule, the figures jump to 56% and 23%, respectively (see Table 3). Again, the chi-square results confirm that the distribution is statistically significant at $\alpha = 0.05$ level. What this suggests is that the president is at least twice as more likely to issue DNUs when there is no potential opposition in the Supreme Court.

Insert Tables 2 & 3 here

Considering the variables for legislative chambers and the Supreme Court majority opposition provides some interesting results (Figures 8 and 9). It seems that whenever the opposition-appointed judges held a majority in the Supreme Court, the relative frequency of DNU passage was low. In those instances where there was no opposition majority, a large gap in the share of seats between the pro-government and opposition parties in the legislature coincided with the president’s lack of reliance on DNUs. Where we do see an initial explosion of DNU usage (i.e. 1982 – 1989), this is the first time since 1916 where the stars of institutional checks and balances line up in favor of the presidential exercise of unilateral powers. That is, it is the first time that Argentina’s president does not face an opposition in the Supreme Court and where she finds herself amidst a competitive partisan opposition in both two legislative Chambers.

The majority opposition in the Supreme Court, however, is not as useful in explaining the variability of the DNU passage in the post-transition period. For this, we may wish to rely on the actual decisions of the Supreme Court where the government is one of the parties in the dispute and/or where the cases themselves relate to the president’s decrees. Helmke’s (2005) data on Supreme Court decisions will be useful towards this end. If the president is cognizant of a hostile Supreme Court or a court that is engaged in “strategic defection”, then she is less likely to exercise her unilateral powers. As the pairwise time series plot of the DNU passage and Supreme Court decisions during 1983~2000 indicate, this hunch seems to have some initial support (see Figure 10). In general, where we see a sharp decline in the percentage of cases decided against the government, there is a corresponding increase in the number of DNUs issued by the same government. This appears to be the case especially for the early and latter half of the 1990s.

Insert Figure 10 here
Finally, examining fluctuations in the absolute and relative frequency of DNUs do not by itself explain whether the competitiveness of seats within the legislature and the level of judicial support explain the president’s decree calculus. If the constrained unilateralist model is correct, the president should also prevent legislation of bills that can effectively nullify her decrees. She can do this through the use of vetoes. As mentioned earlier, veto override is more difficult under a more competitive than non-competitive legislature because it takes more than 66% of both legislative Chambers to override the president’s veto; but the legislature’s attempt to undo the effects of DNUs through new bills should be greater when the opposition has a fighting chance to issue these kinds of bills. Of course, the veto will not matter even if the override is unlikely when the president does not have enough judicial support. Therefore, the president should be more inclined to exercise the veto option only if she has enough support in the courts and the marginal difference in the seats held by the opposition and her party is relatively small.

On the other hand, if either the opposition or the president’s party holds a supermajority in the legislature, the president will be less inclined to exercise the veto option. Conceivably, there are two reasons for this. First, should the opposition hold two-thirds or more seats in both legislative chambers, it is not likely for the president to issue DNUs or veto subsequent bills since she knows that both of these actions would be rejected by the legislature – both through active legislation and overrides. If the president’s party holds more than 66% of the legislature, then she need not issue any vetoes since her party is not likely to challenge her decrees. In the event that they do, however, the president should only veto bills when she has the support of the judiciary since the veto can serve as a signal to the judiciary that the president does not prefer her party’s bill to the status quo.

In all, there are four possible states under which the president is likely to exercise the veto option. The corresponding years and the average number of vetoes for those years are shown in Table 4. As the previous discussion suggests, the president should be most inclined to exercise the veto option when she has a majority support in the judiciary and difference in the number of seats held by the opposition and her party is relatively small. During those instances where the judiciary does not support the president, the president’s veto will matter little whether it is overridden or not. If the president decides to veto any bills, she should be more inclined to do so when she has a friendly court since the veto can serve as an important signal to the courts about the president’s preferences. Analysis of the annual average number of vetoes issued suggests that this is in fact the case. On average, the president issued approximately 14 vetoes per year when she had a competitive legislature and a friendly court. By comparison, she issued (on average) less than 2 vetoes per year when she did not have a sympathetic court. When the president decided to exercise the veto option during those instances where the legislative majority was significantly large, she did so only when she had majority support in the courts.
4.4 Analysis

While these first cut exploratory data analyses suggest some support for the two hypotheses, they are neither robust nor conclusive. They do not show, for instance, how these institutional factors measure up against other possible competing explanations (i.e. divided government). To consider the relative explanatory power of the constrained unilateralist model, these variables need to be the subject of a more rigorous analysis. That is, I compare the impact of these variables on DNUs to those of other variables, such as divided government and legislative productivity. If the prevailing view within the evasive unilateralist camp is correct, there should be a significant rise in the usage of DNUs during times of divided government; however, if recent works on rulemaking decrees are correct (Howell, 2003), there should be a significant rise in DNUs during unified government. It may also be possible, as I have suggested above, that divided government will not be a significant factor after accounting for other variables like opposition in the courts and/or the legislature. Delegationists have suggested that a significant decline in the level of legislation should grant the president more license to use her unilateral powers. Although the legislative productivity data here does not differentiate between important and unimportant bills, the findings should suggest some support for this theory if it is in fact true. Again, I rely mainly on Molinelli et. al.’s (1999) data for the figures on yearly legislations.

Finally, I also add an economic variable to account for the possible impact of economic crisis on the president’s decision to issue decrees. Although Ferreira-Rubio & Goretti (1998:55) point out that the DNUs were often passed in non-extraordinary circumstances, it is often the case that these decrees are invoked for the purpose of dealing with emergency situations. Some examples may be decrees such as the DNU 36/90, which established public loans for term deposits, and DNU 2071/91, which suspended Supreme Court’s authority to determine justices’ compensation. Both of these DNUs were issued by President Menem for the expressed purpose of dealing with economic emergencies. To account for such use of DNUs, I try to control for the impact of the economy on DNUs by including GDP per capita growth measure from 1916-2004. Data for the 1916-1950 were obtained from Randall (1978). Post 1950 data was amassed from the Penn World Tables and the World Bank.

It is important to point out that the data is a time series; but standard assumptions (i.e. normal error) required for running linear time series regression models do not apply in this case because the dependent variable is a Poisson process. Although the standard wisdom in econometrics is that a pure Poisson process should generate a time series of independent counts (Cameron & Trivedi, 1993:226), some recent methodological developments will allow us to apply a more sophisticated treatment to data with time series of counts. One is
by including a lagged dependent variable on the RHS of the regression equation. On the one hand, this approach makes intuitive sense in that the president’s inclination to issue DNUs today may depend on whether she was able to do so yesterday. First differencing via inclusion of lagged dependent variable on the RHS may adequately deal with the problem of spurious regression arising from non-stationarity of the dependent variable.\textsuperscript{27} However, such an approach may not be efficient in dealing with the problem of serial correlation since it introduces “endogeneity” into the model whereby the explanatory variables and the error term can be correlated.\textsuperscript{28} The best solution is to utilize a family of state-space or time varying parameters model, which allows conditional distribution of $y_{t-1}$ to depend on stochastic parameters that depend on both $x_t$ and $y_{t-1}$.\textsuperscript{29} The most notable empirical application of this approach can be found in Harvey & Durbin (1984).\textsuperscript{30} More specifically, the state-space representation of the DNU regression can be stated as

$$y_t = \mu_t + \gamma_t + \psi_t + \sum_{\tau=1}^{p} \phi_{\tau} y_{t-\tau} + \sum_{i=1}^{k} \sum_{\tau=0}^{q} \Delta_{i\tau} x_{i,t-\tau} + \varepsilon_t$$

(1)

where $\mu_t$ is the trend, $\gamma_t$ is the seasonal, $\psi_t$ is the cyclical component, respectively. There are $k$ predictors for time period $\tau = 0, 1, 2, \ldots, q$. In keeping

\textsuperscript{27}Initial diagnostics and unit root test results suggest that the DNU series may be an AR(1) process. That is, the Kwiatkowski, Phillips, Schmidt, and Shin (KPSS) test for trend stationarity indicates that the DNU process is not I(0) or not trend stationary; Augmented Dickey-Fuller (ADF) and Phillips-Perron tests confirm that the DNU is an I(1) process or is an AR(1) process. Analysis of the ACF for the dependent variable suggested that the DNU may be persistent.

\textsuperscript{28}That is, if $\varepsilon_t$ is correlated with $\varepsilon_{t-1}$, and $\varepsilon_{t-1}$ is also correlated with DNU$_{t-1}$ on the RHS of the regression equation, then it will naturally follow that $\varepsilon_t$ will be correlated with DNU$_{t-1}$ as well (see Hamilton, 1994:Ch.8). Hence, while the inclusion of DNU$_{t-1}$ on the RHS may adequately deal with the stationarity problem, it may also yield biased coefficient estimates. One possible solution around this problem is to add lagged predictors to the RHS as well but this is likely to introduce the problem of multicollinearity.

\textsuperscript{29}It must be pointed out that research on nonstationary stochastic trends in count regressions are lacking (Cameron & Trivedi, 1998:223). Of those that do exist, most have been criticized for difficulty in interpretation and estimation (Brandt, Williams, Fordham & Pollins, 2000). However, recent innovations in statistical software have allowed this once difficulty to be a possibility. Here, I utilize an approach advocated by Brandt, et. al. (2000) but is more common to the field of econometrics (Harvey, 1989; Harvey & Shepard, 1993; Harvey & Durbin, 1984).

\textsuperscript{30}This approach is not new to political science. Some works reach back as far as Beck (1984) and as recent as Park (2006). However, as Park (2006) points out, much work on state-space modeling has been in the area of continuous dependent variables. There have been some effort to deal with time series Poisson processes in the past using some innovative modeling techniques (Brandt, et. al., 2000; Brandt & Williams. 2001) but as I have pointed out earlier, application to this data is problematic. More recently several students have proposed using the Markov chain Monte Carlo (MCMC) methods (Park, 2006; Fruhwirth-Schnatter & Wagner, 2004). This is an innovative approach – one which I would argue is worthwhile pursuing and developing further. I propose here that the Gaussian state-space approach with log transformation is adequate given that the basic assumptions for time series regression are satisfied.
with the fact that the dependent variable behaves like an exponential function (see Figure 8), $y_t$ can be a log transformation of DNU. $\phi_t$ and $\Delta_t$ are the unknown parameters and $x_{it}$ is the set of corresponding exogenous predictors, which were identified in equation 1. $\varepsilon$ is the random disturbance term, which in essence is “white noise” or $\varepsilon \sim NID(0, \sigma^2_\varepsilon)$, $t = 1, 2, \ldots, T$. The trend term can be further decomposed into two parts: the level ($\mu_t$) and slope ($\beta_t$).

$$
\begin{align*}
\mu_t &= \mu_{t-1} + \beta_{t-1} + \eta_t, & \eta_t &\sim NID(0, \sigma^2_\eta) \\
\beta_t &= \beta_{t-1} + \zeta_t, & \zeta_t &\sim NID(0, \sigma^2_\zeta)
\end{align*}
$$

4.5 Results

First, I test the hypotheses derived from the constrained unilateralist model, using as key explanatory variables measures for opposition in the Supreme Court and competitiveness of the two legislative Chambers (see Table 5). Since the variables for the distribution of pro-government and opposition parties in the Chambers of Deputies and Senate are highly correlated ($r = 0.8174$), I consider these two variables separately. It is also important to point out that the likelihood ratio tests ($G^2$) confirm significant degree of overdispersion – meaning that negative binominal regression is preferred over Poisson regression.

The results confirm that competitive legislatures are significant determinants of DNUs whether we include or exclude the lagged dependent variable as one of the predictors. That is, a smaller marginal difference in the percentage of

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31 Given that the DNU data contains many zero entries, I have transformed $y_t$ in the following manner: $y_t = \log(DNU + 1)$

32 It is important to point out that I am assuming that the independent variables are exogenously predetermined. According to earlier discussion about the impeachment of Supreme Court justices, this assumption may not be realistic. That is, the composition of the Supreme Court may depend on partisan support in the legislature. There are two reasons why I do not directly address the endogeneity problem in my analysis. First, my analysis is driven by my theory about the president’s decree strategy and the theory assumes independence of these two variables. Secondly, test for correlation of the independent variables were conducted. With exception to the possible collinearity problem with respect to the two legislative chambers, I found no reason to believe any correlation between the legislative composition variables and the courts. For instance, $r = -0.2151$ for the Chamber of Deputies and the Court Opposition Majority variable; $r = -0.0736$ for the Chamber of Senates and the Court Opposition variable.

33 If there is overdispersion, the standard errors in the Poisson regression model will be underestimated, resulting in an overestimated z-value and an underestimated p-value. In effect, results from the Poisson regression output will show that certain variables are significant, when in fact they are not. Negative binomial regression does not suffer from this problem.
seats occupied by the pro-government and opposition forces is associated with a greater number of DNUs. Notice that the variable for Supreme Court opposition is not significant for the static regression results when we account for the effect of the upper house (Models IV and V).

However, this is not the case when we take serial correlation into consideration (Model VI). It is important to point out that the state-space models (Models III and VI) appear in general to perform better if not worse than other models with respect to the amount of variation in DNUs that is explained by the regression ($R^2$). Both the Durbin-Watson (DW) test statistic and the Box-Ljung Q statistic indicate that the residual assumptions for time series regression hold. Diagnostic plots of residuals for Models I and II indicate that the normal error assumptions are satisfied for the structural modeling approach (Figure 11). The general fit of the model also seems good (see Figure 12). Coefficient estimates suggest that while the impact of the legislature is small in relation to the courts, it is nonetheless significant. While these results lend support to the claim that both the existence of credible opposition in the courts and competitive legislatures are significant determinants of DNUs in Argentina, they do not show how the constrained unilateralist model fare against other competing hypotheses.

One possible competing explanation may have to do with the personal attributes of the individual presidents themselves. That is, could it be possible that the effects of Supreme Court or legislative chambers are less important than the individual president’s personal leadership skills in explaining DNU passage? We can consider this question analytically by comparing how the variables derived from the constrained unilateralist model perform against presidential fixed effects (see Tables 6 and 7). One caveat to this kind of analysis is that the models presented in Table 6 suffer from lack of power. The standard error estimates for the coefficients are not likely to be useful since we are trying to gauge the relative significance of 17 (at times as many as 18) predictors with a sample size of $n = 89$; not only does this inflate the standard error estimate but it is also likely to deflate the value of the critical test statistic. Subsequently, we should expect very little or none of the coefficients to be statistically significant. Nonetheless, this kind of analysis can be useful in considering general expectations about how these variables will behave if the hypothesized relationship was true. If

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34 Both the Durbin Watson (DW) and Box-Ljung Q test statistics test for autocorrelation or correlation of error terms. The DW statistic is distributed approximately as $N(2, 4/T)$ where $t = 1, \ldots, T$. In general, $DW = 0$ indicates that there is positive autocorrelation while $DW = 4$ indicates that there is negative autocorrelation. $Q(P, d)$ indicates that the Box-Ljung Q-statistic is based on the first $P$ residual autocorrelations and distributed approximately as $\chi^2_d$. The Q statistic needs to be compared to the corresponding $\chi^2_d$ to determine whether or not it is significant.

35 In other words, the small sample size would increase the likelihood of making Type II error (ruling in favor of the null when the alternative hypothesis is true). Therefore, we can assume that the alternative is true and see if the results meet our expectations on an ad hoc basis even if the significance threshold is not met.

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the constrained unilateralist model is correct, the institutional variables should be negatively associated with DNUs regardless of what the presidential fixed effects coefficients look like.

Insert Table 6 here

Table 6 confirms our expectation with respect to the direction of the coefficients. That is, the competitiveness of the legislature (both the upper and the lower chambers) appears to be a significant determinant of DNUs. Although the static regression models indicate that some of the presidential fixed effects are statistically significant (Models VII-VIII, X-XI), this is shown not to be true once the stochastic trend component is accounted for by the state-space model (Models IX and XII). In fact, the results from the state-space model most closely match our expectations about the coefficients if the predictions held out by the constrained unilateralist model is true. Even though the magnitudes of the coefficients for the two chambers are small, they are negative (as expected) with relatively small standard errors.

Insert Table 7 here

Results in Table 7 also parallels that of Table 6. That is, the coefficient estimates of the negative binomial and structural time series regression confirm that there is some evidence of a negative relationship between an opposition in the Supreme Court and the number of DNUs issued. There may be some concern about the significance of several presidential fixed effects coefficients in Models XIII and XIV; however, it is important to note that the results from these two models are inconsistent. Again, the state space model shows us that the results are more consistent after accounting for the effect of time (Model XV). On the one hand, these findings confirm the outputs from Table 5 in that the institutional factors are shown to be just as (if not more) important than the personal attributes of individual presidents in explaining the number of DNUs.

Insert Table 8 here

This is not to discount other competing institutional explanations of DNUs. As mentioned earlier, there may be some reason to believe that the presence of a divided government is one of the reasons behind the high number of DNUs since divided government may mean that the president does not have enough support in the legislature to promote his policy through ordinary means. It is possible that under these circumstances, DNUs are often invoked in order to promote the president’s agenda or break legislative gridlocks in the legislature.
If this hypothesis is true, we should expect to see a significant rise in the number of DNUs during times of divided government and/or when the number of legislation in the National Assembly declines. As shown in Table 8, neither the static nor state-space regression results suggest that the existence of divided government is more important than the opposition in Supreme Court or the competitiveness of the legislature.

Table 9 shows the static regression results for legislative productivity, but the discussion must be preceded by some caveats. Given that the data on legislation only goes up to 1997 and has missing values for those years under authoritarian rule, I have truncated my analysis to 1997 and utilized only the static regression method. Utilizing this approach can raise several problems. First, by truncating the data, I am losing information on a significant portion of my data; therefore, the results may not be consistent with the findings presented in the analysis using the full data.\footnote{There is an alternative to truncating the data – that is, to fill-in the missing data using some type of multiple imputation method using interpolation. However, this would mean that over 35\% of the data would be imputed by such method. Nonetheless, comparable analyses presented here using fill-in values will produce same results.} Secondly, by relying solely on the static regression results, I may end up with biased coefficients (as discussed earlier). The first of these problems may be true, but I would argue that comparing results from full and truncated data is still useful in the sense that it can be used to consider the validity of the statistical model that I have derived from a complete data set. With regards to the second issue, previous comparisons of the static and time series regression can be used as a hint about the relative performance of these data. While it is true that statistical inference from these results may be difficult, plausibility of the hypothesized relationship can still be checked.

With these caveats, I proceed with some caution about my findings presented here. Notice that the static regression models with and without the lagged dependent variable produce similar results. As the constrained unilateralist model predicted, the coefficients for both the opposition in court and legislatures are shown to be significant and negatively associated with DNUs passage. Legislative productivity has been found to be non-significant when we account for opposition in the courts and legislature.\footnote{Even if I imputed the missing values and deployed state-space method, I obtain similar results.}
Finally, I consider the relative significance of the environmental factors. For instance, it is conceivable that economic difficulties can be just one among many other justifications for the president’s use of decrees. In fact, many critics of DNUs have noted that one argument in favor of DNUs during Menem’s presidency was the need to make important structural adjustments in the economy. Viewed in this way, national crises may necessitate implementation of rapid and broad reforms, which would be difficult and time consuming if left to normal legislative channels (i.e. National Assembly). Therefore, there is an incentive to tolerate presidential decrees during times of economic hardships. If this is true, the frequency of DNUs should increase when economic performance is poor; and if this is what we observe, we may conclude that institutional factors may be less important than the economic factors when it comes to determining the reasons behind the president’s decrees. To consider this possibility, I compare the relative performance of the economic variable (GDP growth rate) to the variables for judicial opposition and competitive legislature (Table 10). Again, Table 10 shows that GDP growth rate is not a significant determinant of DNUs after controlling for the role of the courts and the legislature. The results are generally consistent whether we do or do not account for the effect of time.

Insert Table 11 here

With respect to democracy, it is important to not ignore the shift in the pattern of DNUs after the third wave transition in the early 1980s. Although the state-space method did account for the structural break at year 1990, the analysis did not treat the historical significance of the democratic transition in October–December of 1983 seriously. To account for this important event, I have segmented the data into two parts and examined DNU activity during the years preceding and following 1983. First, I present the results from the pre-1983 data (Table 11). Given that the log likelihood ratio test indicates that there is no overdispersion for this subsample, I utilize the Poisson regression method to obtain the static regression results. I do not present the results with lagged dependent variables because they are nearly identical to the result without the lags. As Table 11 shows, none of the key institutional variables are found to be significant when we consider DNU activity pre-1983. The results do not change even if we utilize the state-space approach. Clearly, there is not enough variation in the pre-1983 DNU data to suggest a significant difference. Nonetheless, it is important to note that the signs of the coefficients for the institutional factors are all negative as expected.

For the post-transition period, distribution of seats in the Supreme Court does not have enough variation to warrant any meaningful analysis (see Figures 8 and 9). Instead, I utilize the data on Supreme Court decisions. Individually, I look to see if the percentage of different cases decided by the Supreme Court against the government is in any way related to the number of DNUs. If the president is made aware of the court’s opposition from its decisions, the constrained unilateralist model would predict that she will be less likely to resort to
evasive unilateralism. Since Helmke’s (2005) data on Supreme Court decisions only go up to 2000, the data is truncated to cover only the period between 1983 and 2000. I have also included the variables for the distribution of seats in each legislative chambers but I consider the impact of the lower and upper Chambers simultaneously given that multicollinearity is not a problem during this period (r = 0.0369).

The results of the static and state-space regressions are presented in Table 12. It is important to note that in almost all types of decisions, the distribution of seats in the Chamber of Senate is significant. After accounting for the effect of time, the decisions that went against the government on appeals and overturned pro-government appeals have been found to be statistically significant. Although other coefficients are not significant, the signs of coefficients for the Supreme Court opposition are consistently negative as expected. The static regression with lagged dependent predictor reveals that the relationship between the predictors and the response is negative as expected. Including the lagged dependent predictors leads to more of the variance in DNU explained ($R^2$ is higher). However, there is little doubt that the structural time series regression outperforms both static regression results in terms of the amount of the variance explained. Overall, there is general support for the view that the relationship between unfavorable court rulings and the DNUs are negative as expected.

Insert Table 12 here

An interesting result here is that the coefficients for the Chamber of Deputies and Senate contradict each other. On the one hand, this is largely due to the unique political circumstances surrounding Menem’s first term in office. As Jones (2001) points out, the Peronist Party (PJ) was less cohesive in the Chamber of Deputies than in the Senate during Menem’s first term because the PJ in the Lower Chamber had a more coalitional characteristic than in the Upper Chamber. For instance, some of deputies elected on the PJ list in the Lower Chamber were actually members of other political parties in alliance with the PJ. Moreover, there was even an instance of defection by few former PJ loyalists (i.e. Grupo de los Ocho) when Menem began to implement his neoliberal economic reforms. Molinelli et. al.’s (1999) data on the distribution of seats in the legislature reflects this fact. Between 1989 and 1991, for instance, the effective percentage of support for Menem in the Chamber of Deputies declined from 47.2% to 45.1%. Meanwhile, the support in the Senate remained steady at 56.3%. It is also important to point out that the marginal difference in seats among the pro-government and opposition party/coalition was relatively small compared to that of the Senate. In fact, the difference in the percentage of Lower Chamber seats among pro-government and opposition party/coalition during this period ranged from as low as 1.2% to 9.8%. That translates into about 2 to 20 seat difference.

A president guided by the constrained unilateralist logic would look to the Chamber of Deputies and see only more justifications to rule with the stroke
of her pen. In the Senate, however, the difference was more substantial and meaningful enough (ranging from 10.2% to 37.2%! ) as to make the president think twice before she decides to issue more DNUs.

There are two disclaimers to the results presented in Table 12. First of all, it is important to not overestimate the findings presented here. Although the results suggest that there exists a significant relationship between the above mentioned factors and the DNUs, the small sample size precludes enough confidence to make conclusive claims to this effect. It must be noted, however, that the results presented in Table 12 do not stand alone by themselves. They are just a part of broader findings, which support the constrained unilateralist model. Secondly, the results in Table 12 do not stand on equal footing with other findings from the aggregate dataset since the analysis in Table 12 do not include the years before 1983 and after 2000. As the results from the aggregate data indicate, including these years will provide more a robust support for the constrained unilateralist theory.

4.6 The Tale of Two Presidents: Why did DNUs fall under Menem and de la Rua?

Empirical findings provide ample support for the constrained unilateralist model. Except for those instances where there was not enough variation in the relative percentage of legislative seats occupied by the president’s party/coalition, there is overwhelming evidence in favor of the constrained unilateralist model that a large difference in the distribution of seats among pro-government and opposition parties and an unsympathetic judiciary will preclude the president’s excessive reliance on decrees. The relationship has been shown to be robust even after controlling for the effect of divided government, legislative productivity, and economic conditions. Critical evaluation of recent DNU activity further substantiates these claims.

Take the sudden drop in the DNUs during 1993-96 under Carlos Menem and 2000-01 under Fernando de la Rúa. The total number of DNUs declined from 75 to 19 under President Menem if we compare with the four years preceding 1993 (1989-92). President de la Rúa issued 50 DNUs during 2000-01 but President Menem issued 64 during the final two years of his term (1998-99). President Duhalde outdid his predecessor with over 100 DNUs in a single year of his short-lived presidency in 2002. How do we make sense of these variations? What explanations are most useful?

Surely, divided government is of little use to us in explaining these trends since no individual president’s party/coalition had complete majority control of both legislative chambers except in 1996-97. Economic explanation may seem useful if we consider the fact that the decline in the number of DNUs during the mid-1990s followed the temporary success of President Menem’s neoliberal reforms during 1991-93 when Argentina recorded double digit growth rates. On the other hand, the record usage of DNUs during Duhalde’s year in office was accompanied by an economic disaster. These patterns would suggest that the use of DNUs is necessitated by the existence of national crisis following the logic of...
of the majority opinion in Peralta ruling. Economy, however, can only account for a part of the story since it does not adequately explain why President de la Rúa refrained from using DNUs like his counterparts during his shortened term even though Argentina was in the midst of a severe social and economic crisis.

Unlike these ad hoc explanations, the constrained unilateralist model provides a more useful approach to understanding the president’s decree making behavior by pointing us to the judiciary and legislature. A sudden drop in the number of DNUs during President de la Rúa’s term, for instance, can be attributed to the fact that the Supreme Court was dominated by Peronist appointees. Only a small minority faction within the court consisting of Augusto Belluscio, Carlos Fayt, and Enrique Petracchi were UCR judges from the Alfonsín administration. The rest (i.e. Julio Nazareno, Moliné O’Connor, Antonio Boggiano, Gustavo Bossert, Guillermo Lopez, and Adolfo Vázquez), which made up the majority, were all Menem appointees. The constrained unilateralist model would suggest that conditions were not favorable for the UCR-FREPASO supported de la Rúa to make use of DNUs. This explanation is even more persuasive if we consider the political context surrounding de la Rúa’s presidency. In 1999, for instance, the Court issued a ruling which effectively limited the discretion of the executive to rule by decree; as Helmke (2004:140) points out, although the ruling was issued during the final days of Menem’s term, it affected de la Rúa more so than it did Menem. Instead of challenging the court, de la Rúa’s response was largely conciliatory. That is, he maintained the Peronist line and issued decrees that he knew would not be rejected by the court. For instance, shortly after the Supreme Court upheld Menem’s DNU 290/95, which aimed to reduce government expenses by cutting public employees’ wage, de la Rúa issued a similar DNU 461/2000 (Helmke, 2005:156). The number of DNUs issued by de la Rúa provides further support.

De la Rúa’s reaction to the Court may appear somewhat puzzling given that one of his campaign promises was to clean up the Supreme Court when he became the president. He looks even more quirky when we compare his relationship with the Court to that of his Peronist counterparts like Menem and Duhalde. Menem’s response was to pack the court by expanding the number of seats in the Court from five to nine after becoming the president. Duhalde, although unsuccessful, sought to renovate the justice system by impeaching the entire Court with the help of the legislature (Helmke, 2004). Why did de la Rúa refrain from taking these types of approach?

In order to understand the different responses to the Court, we must look to the president’s relationship with the legislature. Therein we find the key difference which sets de la Rúa apart from Menem and Duhalde – the relative degree of legislative support. De la Rúa’s Alianza (UCR-FREPASO) coalition occupied about 46% of the seats in the Chamber of Deputies, but it only accounted for about 31% of the Senate. Both Menem and Duhalde had over 56% of the Senate during the first year of their term. Menem could also expect to have close to 47% of the Deputies support his cause while Duhalde had over 45%. Relatively speaking both Menem and Duhalde could expect greater degree of support behind their policies within both Chambers. Condition was more precarious for
de la Rúa.

If de la Rúa wanted to renovate the Court through legislative reforms, he would have needed an overwhelming support of the Peronists. Given the high degree of party discipline among the Peronists, such an undertaking would have been a tall task. In fact, just before leaving the presidential palace by helicopter on December 20th of 2000, de la Rúa lashed out against the Peronists for failing to cooperate with him by granting him the unity government in order to deal with the protests and lootings. His words spoke to the nature of his relationship with the PJ: “The Peronists made a mistake” (Notisur, 01/11/02). Impeachment of the Court would have been even more difficult since de la Rúa would have needed two-thirds of both Chambers to make this possible (Articles 53 and 59; Helmke, 2004:38). Still, a case can be made that impeachment could have been possible if de la Rúa chose to embark on this path since the Court was largely unpopular. 38 Even if this was true, it would have been nearly impossible for de la Rúa to achieve the necessary two-thirds support from the Senate in order to confirm his most preferred nominees (Article 99). Since the Peronists controlled over 57% of the Senate, this would have been difficult. In each step of the way, de la Rúa would have had to overcome the difficult adversity of collective action within the legislature to reform the judiciary, impeach justices, or gain confirmation for his Supreme Court nominees. 39

Unlike de la Rúa, conditions within the legislature were more favorable for Menem and Duhalde to push the envelope vis-à-vis the Court. A little less than three months after taking office, Menem initiated a bill, which would eventually be called the Ley de Ampliación (The Extension Law). 40 The bill, which passed through the Senate and the Deputies within a few months, effectively raised the number of seats in the Supreme Court from five to nine. With two of the original five “Alfonsinista” justices relinquishing their posts after the Ley de Ampliación passed the Senate vote, Menem was able to nominate six candidates of his choosing thereby ensuring an automatic majority (mayoría automática). Senate confirmation hurdle for the nominees of Menem’s choice was relatively low given that the Peronists occupied over 56% of the upper Chamber.

Similar to Menem, Duhalde also had a significant legislative support within both legislative Chambers. After three interim and acting presidents have taken their turns at the Casa Rosada between December 20, 2001 and January 1, 2002, the Congress agreed to forego open elections and choose an interim president

38 Helmke (2005:149) points out that an anti-Menem coalition of Alianza and Duhalde supporters in the Senate began discussions on the impeachment of Supreme Court judges in 1998 when the constitutionality of Menem’s re-election bid was being questioned. Clearly, this suggests that impeachment could have been possible if de la Rúa wanted to pursue this option by negotiating with the legislature.

39 As Helmke (2005:155-6) speculates, foregoing complete renovation of the Court may have had to do with the possibility that de la Rúa desired to strengthen the legitimacy of the democratic institution and he considered the Court as a potential ally.

40 Although administrative inefficiency of the judiciary was cited as the main reason for initiating such reform, Helmke (2004:85-6) claims that the real reason was politically motivated. That is, the administration sought to “renovate” the Court so that it will not undo the government’s reforms.
through an internal vote. The result was an overwhelming support for Eduardo Duhalde, who was confirmed by 262 lawmakers with 21 opposing and 18 abstentions (Notisur, 01/11/02). In addition to asking Congress for special powers to reform the economy, the Duhalde administration also maneuvered to renovate the court. By the end of January, the Congress began formal proceedings for impeachment; but as Helmke (2004:146-9) chronicles the events that followed, this attempt would fail as a result of some strategic maneuvering by the Court. In particular, as a result of a single controversial decision, the Court opened the gate to a flood of individual public demand for injunctions against unconstitutional state controls on personal assets. As much as Duhalde and the legislature wanted to renovate the court, they had no other choice but to make compromises with the Court.

Do the same explanations apply for Menem during the mid-1990s? If the judiciary served as an important check on de la Rúa’s ability to issue DNUs, the lack of opposition in the Courts should have allowed Carlos Menem carte blanche on the DNUs throughout his two terms. As mentioned earlier, however, this was not the case. In fact, the pattern of DNUs during 1993-97 contrasted sharply from that of 1989-92. While Menem relied more heavily on the DNUs in 1989-92 and 1997-99, he exercised more restraint during the years in between. Most striking is the pattern of sustained moderation in the usage of DNUs during the economic recession of 1995. What explains this sudden change in behavior?

Again, the constrained unilateralist model provides useful clues to solving this mystery. That is, the legislative constraint hypothesis suggests that the president should be more restrained in the use of DNUs when there is less overall fragmentation within the legislature. This, in fact, was the case. With the opposition split between a heavily fragmented UCR and the newly emerging Frente para un País Solidario (FREPASO), the Peronist Party (PJ) was clearly the most dominant majority force in the legislature. In terms of numbers, Menem’s PJ had an absolute majority control of both Chambers after the election of 1995. The PJ also maintained a near majority (over 49%) in the Chamber of Deputies and a close supermajority in the Senate (over 62%) during 1993-95. Without a viable opposition in the legislature, therefore, the PJ did not need to depend on Menem’s intervention in order to implement the kinds of reforms that it wanted.

Moreover, there was a growing concern within the Peronist circle that the opposition may very well coalesce around a common goal of creating a united

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41Helmke (2004) points out that the administration requested the Supreme Court to reduce its budget by 13% and forego the special tax exemption privilege.

42The Supreme Court’s now infamous Smith decision, which was issued on February 1, 2002, rejected the constitutionality of DNU 1570/01 (Mercado Digital, 2/1/02). In essence, the decree enacted by de la Rúa in early December implemented strict banking limitations on private accounts to prevent the financial system from crashing. More specifically, the decree prevented individuals from withdrawing more than $1,000 per month and taking more than $1,000 in cash out of the country. All large transactions were to be carried out by check, credit card, or debit card since this would guarantee the collection of sales tax (La Nacion, 12/02/01).
front against the PJ. Neither the UCR nor FREPASO was expected to be able to pose much threat to PJ dominance in the legislature (Notisur, 08/08/97). However, had Menem reverted back to heavy reliance on DNUs, it may have created an opportunity for the opposition to coalesce against the PJ. Instead of relying on DNUs, therefore, Menem had to make use of more conventional legislative processes.

But a problem with this approach was that Menem’s preferences did not match that of his own party. In particular, the Peronist party was especially weary of Menem’s neoliberal reforms (Negretto, 2004). Menem, on the other hand, was determined to see through the continuation of this policy through his second term. But he could not act unilaterally while ignoring the policy preferences of his party because doing so would only further alienate the base of membership support, which he would have needed in order to legislate the kind of policy he desired. Just as he was able to extend his time in office after engineering the constitutional reform of 1994/5 through negotiation with his UCR counterpart, Menem needed to find a common ground with his own party to keep his reforms standing. One way to do this is by engaging in a legislative bargain through the use of veto. At the very least, Menem needed to avoid using DNUs if he expected active opposition from his own party or organized interests like labor (Negretto, 2004:557).

The data on legislations and vetoes during the early and mid-1990s provide some basis for this thinking. As I have mentioned above, while the number of DNUs declined dramatically during 1993-96, the number of legislations promulgated during this period increased noticeably from an annual average of 134 legislations during 1989-92 to about 146 in 1993-96. Comparison of the average annual number of line item (partial) veto indicates that there was a slight increase from approximately 9 to 10 per year. Similarly, the figures for bill specific vetoes rose from about 16 to 20 per year. These trends paint a picture of the president who is working through his own party instead of around it. That is, the rise in the number of vetoes and legislations enacted during this period, coupled with a significant decline in the DNUs, suggest that the president is engaged in a legislative bargaining game. It is important to not lose sight of the fact that these patterns were due to a solid Peronist dominance in both Chambers of the legislature. Once a viable opposition emerges in the legislature, Menem reverts back to his old ways. That is, with the rise of the Alianza coalition in 1997 (Notisur, 08/08/97), we see a significant rise in DNUs from 4 in 1996 to 23 in 1997. The numbers are more striking when we consider fact that 14 of the 23 DNUs were issued after August 3rd when the agreement between UCR and FREPASO was formally announced. 18 of the 23 DNUs were passed when initial talks about a coalition began to surface in the media (El Cronista, 07/06/97).

The evidence is persuasive. While the reasons for sudden dips in the number of DNUs during 1993-96 and 2000-01 were specific to the political circumstances surrounding Menem and de la Rúa’s presidencies, the constrained unilateralist
model serves as a useful framework for making sense of the variations in proactive lawmaking power. As shown here, the judiciary played a key role in constraining de la Rúa’s ability to rule by decree while conditions in the legislature seems to have been more critical for Menem during the mid-1990s.

5 Conclusion

Moving beyond the simple presidential-parliamentary divide, recent wave of research on the institutions of contemporary democracies have allowed both its spectators and practitioners to discover some important understandings about how different systems of democratic governance work. Some of this include a more balanced assessment about its institutions ranging from constitutional design (Shugart & Carey, 1992) to legislative processes (Morgenstern & Nacif, 2002; Haggard & McCubbins, 2001), to electoral systems (Jones, 1995; Cox, 1997) and party politics (Jones, Saiegh, Spiller, & Tomassi, 2000). One aspect of democracy that has often eluded but raised questions and concerns among many has been that of executive decrees. Carey & Schugart’s (1998) seminal work along with that of others have been catalytic in making this research agenda a priority for students of comparative democracy. This study attempts to build upon this foundation. At minimum, it teaches us something about a special type of (paraconstitutional/constitutional) executive decree in Argentina. However, it is hoped that this study will also reveal something about the dynamics of decree authority in other settings. In particular, it has been argued that the political dynamic of executive decree is constrained by opposition in the courts and the relative size of seats held by the majority party in the legislature. The analysis reveals that the president is more inclined to exercise her unilateral powers where the relative size of the pro-government or opposition party in the legislature is small and if the president can secure majority support in the Courts. It has also been suggested here that if we account for these two factors, other factors, such as divided government, economic performance, and overall legislative productivity, may not be as important as some have argued.
References


