

Of Presidents and Precedents:
The Role of Judicial Review in Recent Presidential Elections in Peru, Costa Rica and the United
States

by

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Draft: 5/15/06

Introduction:

There is no decision more important in a democracy than the popular election of the president. As straightforward as it is to state this proposition, we all understand that the actual ways and means of presidential elections are far more complex than any simple statement. Recent presidential elections in Peru, Costa Rica, and the United States have featured interesting contests and interplay between, or among, the executive and judicial branches of government, and between these branches and the populace these branches are meant to serve.

In this paper, I describe and analyze the role of judicial review in three relatively recent bids for presidential election or reelection. In 1996-97, the Peruvian Constitutional Court attempted unsuccessfully to exercise judicial review in a way that would have prevented then-President Fujimori from running for reelection. In 2003, the Sala Constitucional de la Corte Suprema de Justicia (Sala IV), ruled that a constitutional provision prohibiting the reelection of a former president was unconstitutional, therefore paving the way for Oscar Arias's recent, successful run for reelection as President of Costa Rica. And in 2000, the United States Supreme Court intervened in the election for United States President and effectively decided that George W. Bush won an extremely close election. These very different cases teach some interesting lessons about, on the one hand, the need for effective judicial review and, on the other, the need for limits on judicial review in democracies.

A. Peru:

In the Constitutional Court Case, decided January 31, 2001, the Inter-American Court of Human Rights finally resolved the Peruvian constitutional crisis of 1997 which resulted in the impeachment and harassment of three Justices of the Peruvian Constitutional Court.¹ The Peruvian case teaches lessons about the necessity for binding, final judicial review at the international level when respect for judicial independence and authority is low within a nation.

While the full procedural background and facts of the case are too complex to recount here, its basic elements are fairly straightforward. Alberto Fujimori was elected President of Peru in 1990. In 1992, President Fujimori dissolved the Congress, the Court of Constitutional Guarantees, and dismissed many of the justices of the Supreme Court. In 1993, a new Constitution was adopted. Article 112 of the new Constitution provided that a sitting President was immediately eligible for reelection for a single five-year term, then again eligible for reelection after a five-year hiatus.² In 1996, a new Constitutional Court was appointed.

Also in 1996, the Legislature passed the Law on Authentic Interpretation of Article 112 of the Constitution.³ The language of this statute seemed to make President Fujimori eligible for reelection. A lawsuit was filed by claiming that the statute conflicted with Article 112 and was therefore unconstitutional. In December, 1996 and January 1997, after internal struggle on the Court regarding the judgment to be reached, three justices decided, with four abstentions, that the

¹ Constitutional Court Case, Judgment of January 31, 2001, Inter-American Court of Human Rights (Ser. C) No. 71 (2001).

² Constitutional Court Case, par. 56.1.

³ Const. Court Case, par. 56.4.

statute was not applicable to President Fujimori's situation, and therefore Fujimori was ineligible to run for reelection. Under the Constitutional Court's rules, a judgment that the statute was not applicable could appropriately be reached by a simple majority of the justices voting.⁴

The decision of these three justices of the Constitutional Court, if adhered to, would have rendered Fujimori ineligible to run for reelection. In response to this judgment, the Peruvian legislature commenced a series of actions hostile to the deciding justices. These actions culminated in the impeachment of the three justices who decided the case, in addition to other forms of harassment. One of the justices, Delia Revoredo Marsano, sought and received exile in Costa Rica.

The Inter-American Commission on Human Rights subsequently filed a petition against Peru in the Inter-American Court of Human Rights.⁵ The petition sought to challenge the impeachment and harassment of the three justices as violations of the American Convention on Human Rights (hereinafter "the Convention"). In the Constitutional Court Case, the Court decided that Peru violated rights of the impeached justices guaranteed by the Convention. The Court decided that Peru had violated the impeached justices' rights to a fair trial guaranteed under Articles 8(1) and 8(2) of the Convention. In particular, the hurried impeachment proceedings violated the justices' due process rights and rights to present a meaningful defense against the offenses alleged against them. The Court also concluded that Peru's failure to provide adequate judicial recourse to the impeached justices violated Article 25 of the

⁴ Also under the Constitutional Court's rules, a judgment of unconstitutionality, as opposed to a judgment of inapplicability, would have required a supermajority of six of the seven sitting justices.

⁵ Const. Court Case, par. 1.

Convention.⁶ In addition, the violations of Articles 8 and 25 also constituted violations of Article 1(1) of the Convention, which states the obligation of signatory states to respect the rights and freedoms stated in the Convention.⁷

The Court's reasoning with respect to Peru's violations of Article 8 emphasized the importance of judicial independence:

The Court considers that one of the principal purposes of the separation of public powers is to guarantee the independence of judges and, to this end, the different political systems have conceived strict procedures for both their appointment and removal. . . . This Court considers that, under the rule of law, the independence of all judges must be guaranteed and, in particular, that of constitutional judges, owing to the nature of the matters submitted to their consideration. As the European Court has indicated, the independence of any judge presumes that there is an appropriate appointment process, a fixed term in the position, and a guarantee against external pressure.⁸

Analysis:

These events in Peru, and the subsequent decision by the Inter-American Court, demonstrate the importance of judicial independence and binding judicial review as the only effective checks on unbridled executive and legislative power. During the time of these events, a weak judiciary with unenforceable judicial review was not able to check President Fujimori's will to power. When the judiciary is weak domestically and its judgments are not honored by the

⁶ Const. Court Case, Pars. 96, 97.

⁷ Const. Court case, pars. 110,113.

⁸ Const. Court case, pars. 73, 75.

other branches of government, then effective judicial review must come from outside the nation. In this case, the Inter-American Court of Human Rights asserted jurisdiction and was able to make a decision vindicating the impeached justices' rights and vindicating important principles of judicial independence and freedom from external pressure. Had there been no international court with jurisdiction, or had the Peruvian government not abided by the decision of the Court, there would have been no check on executive or legislative authority.

B. Costa Rica:

In Costa Rica, la Sala Constitucional de la Corte Suprema de Justicia, the constitutional court known as Sala IV, decided in 2003 that Article 132 of the Constitucion Politica was unconstitutional. Article 132, as modified by ordinary legislation in July, 1969, prohibited former presidents of Costa Rica from running for reelection. Sala IV declared that this modification of the Costa Rican constitution violated the constitution for several reasons. First, the reelection ban was contrary to a long-established constitutional tradition in Costa Rica permitting reelection.⁹ Second, the ban on reelection violated fundamental rights of Costa Ricans to vote for their candidates of choice and to run for elective office.¹⁰ These fundamental rights of Costa Ricans are also guaranteed in Article 23 of the American Convention on Human Rights.¹¹ Third, the principle of constitutional supremacy, according to Sala IV, properly limits the ability of the legislature to amend constitutional provisions in a way that abridges the fundamental rights of Costa Ricans.¹² Lastly, an amendment abridging the fundamental rights of Costa Ricans can only be accomplished through a full Constitutional Assembly, not through an ordinary act of the Legislative Assembly.¹³

The Court's first argument was to establish that amended Article 132 was contrary to

⁹ Sala Constitucional de la Corte Suprema de Justicia, Exp. 02-005494-0007-CO, Res: 2003-02771, Section V (April 4, 2003).

¹⁰ Id. at Section VI.

¹¹ Id. at Section VI-D.

¹² Id at Section VIII.

¹³ Id. at Section IX.

Costa Rican constitutional tradition. After a lengthy review of Costa Rican history with respect to reelection, the Court reached the following conclusions:

la tradicion constitucional costarricense es, definitivamente, proclive a la reserva de toda reforma relativa a la reeleccion presidencial al poder originario. Esta tradicion se instala con la independencia [en 1821], se ve confirmada desde la fundacion de la Republica y se mantiene inalterada durante ciento ochenta y ocho anos.

Only in 1967-69, when Article 132 was modified to prohibit reelection, was this tradition broken.

Second, the attempted modification of Article 132 abridged important fundamental rights of Costa Rican citizens. The Court described, and enforced, a fundamental right of citizens to vote for their candidate of choice:

El derecho de eleccion, como derecho politico, tambien constituye un derecho humano de primer orden, y por ende, es un derecho fundamental. La reeleccion . . . estaba contemplada en la Constitucion Politica de 1949 y constituye una garantia del derecho de eleccion, pues le permite al ciudadano tener la facultad de escoger, en una mayor amplitud de posibilidades, los gobernantes que estima convenientes.

Relying on Article 23 of the American Convention on Human Rights, the Sala Constitucional also suggested a fundamental right on the part of Costa Rican citizens to run for election. Article 23 provides that “Todos los ciudadanos deben gozar de los siguientes derechos y oportunidades [incluyendo los derechos] de votar y ser elegidos en elecciones periodicas autenticas.”¹⁴ According to Article 23, these rights exist without limitations other than lawful restrictions based on age, nationality, residence, language, education, mental or civil capacity, or

¹⁴ Art. 23 (1).

criminal conviction.¹⁵ Since Costa Rica bound itself to this Convention, the Court concluded that the legislature violated the fundamental rights of Costa Ricans by limiting eligibility for reelection for reasons other than those recognized as legitimate in Article 23. The Court described these fundamental rights as essential to the basic principles of democracy and popular sovereignty. Furthermore, the Court described other important principles vindicated by enforcement of these fundamental rights: prevention of arbitrariness; enforcement of the Constitution as a limitation on governmental power; enforcement of the equality of individuals under the Constitution; enforcement of judicial stability; and enforcement of the supremacy of the Constitution over conflicting legislation.

The Court described important principles of constitutional supremacy that limit the legislature's ability to amend constitutional provisions in a way that abridges the fundamental rights of Costa Ricans.¹⁶ The Court described the unique and supreme nature of a Constitution: "No es lo mismo establecer una Constitucion que reformarla, pues lo primero es un acto de maxima soberania popular, un acto creador; es la facultad soberana del pueblo para darse su propio ordenamiento juridico-politico."¹⁷ Accordingly, Constitutional norms protecting fundamental rights can only be abridged by a constituent, constitutional assembly as provided under Article 196 of the Costa Rican Constitucion Politica. While the Court concluded that the Legislature was unable to limit or curtail fundamental rights under ordinary legislative processes, the Court noted that the legislature retained the ability to enhance or enlarge the civil rights of

¹⁵ Art. 23 (2).

¹⁶ Id at Section VIII.

¹⁷ Section VII.

citizens, because enhancing the scope of fundamental rights did not threaten the destruction of the basic fundamental rights implied in the original, organic Constitution (“el poder constituyente originario”):

Estos derechos pueden ser objeto de reforma parcial, unicamente cuando se trate de modificaciones positivas, que son aquellas que amplian los contenidos de los derechos ciudadanos—particularmente el de libertad—por la Asamblea Legislativa. . . . Es decir, la Asamblea Legislativa puede ampliar los contenidos y alcances de los derechos fundamentales, pero no puede el poder constituyente derivado suprimir o reducir tales contenidos, pues de esta forma podria destruir el orden basico instituido por el poder constituyente originario.¹⁸

Analysis

The Sala Constitucional, in holding that a Legislative restriction on the reelection of a former president violated the original Constitution, invoked many of the same arguments for binding judicial review as advanced by Chief Justice Marshall in *Marbury v. Madison*, the early Supreme Court decision establishing judicial review in the United States. In addition, the Court used other conceptual and rhetorical strategies similar to those used by the United States

¹⁸ In articulating the principle that the Legislature retained power to enhance or enlarge, but not to curtail, the fundamental rights of Costa Ricans, the Sala Constitucional applied a principle articulated in United States constitutional law in the case of *Katzenbach v. Morgan*. In *Katzenbach*, Justice Brennan described the “ratchet effect,” under which the legislature could enlarge the meaning of equal protection under its powers under Section 5 of the Fourteenth Amendment, but that such a power to enlarge did not include a power to diminish the meaning of equal protection. The Supreme Court, under *Katzenbach*, would retain power to prevent the legislature from diminishing equal protection rights.

Interestingly, the current United States Supreme Court has restricted legislative power under Section 5 and under the commerce clause dramatically, such that the Congress can only act in a narrow remedial fashion, largely dependent on preceding decisions of the Supreme Court.

Supreme Court. The Sala Constitucional invalidated legislative action that curtailed the fundamental rights of Costa Ricans, as defined and described by the Court. In identifying fundamental rights to elect one's candidate of choice and to run for election, the Sala Constitucional used strategies similar to those of the United States Supreme Court in identifying fundamental rights. The Sala Constitucional relied on Costa Rican history and tradition in identifying the continuous importance of reelection as a constitutional value. The Sala constitucional also relied on explicit statements of these rights in the American Declaration of Human Rights. In the United States, by contrast, it remains very controversial to refer to international norms of Human Rights as sources of values to be enforced in United States constitutional law.¹⁹

The reasoning of Sala IV was grounded in fundamental rights of the people to have access to a greater range of candidates. The Court thus supported and amplified democracy by enlarging the range of possible candidates. This kind of democracy-enhancing judicial review stands in marked contrast to the use of judicial review by the United States Supreme Court in *Bush v. Gore*.

¹⁹ Cite to debate between Scalia and Breyer

C. The United States:

If the recent decision of Sala IV illustrates how judicial review can support fuller democracy in Costa Rica, then *Bush v. Gore* illustrates the more troubling possibility of judicial review interfering in democracy. In *Bush v. Gore*, the United States Supreme Court effectively decided the outcome of the 2000 presidential election in favor of George W. Bush. As I will discuss, the Court's controversial decision, and the reasons for its decision, had the potential to raise serious questions about the Court's legitimacy. The Court violated several important doctrines and even circumvented federal law in deciding the case. While these questions and issues have certainly been raised by scholars of constitutional law, the Court's intrusive foray into the United States political process has not eroded the Court's legitimacy in the least. One could conclude that in the United States the Supreme Court may be too powerful, receiving too much deference from the public and from the executive and legislative branches of government.

In *Bush v. Gore*, the United States Supreme Court effectively decided the outcome of the 2000 presidential election in favor of George W. Bush. In effect, there was a statistical tie between Al Gore and George W. Bush in Florida, whose electoral votes would determine the winner of the election. The Supreme Court's decision, which halted the manual counting of ballots previously unrecorded by voting machines in Florida, resulted in the certification of the prior vote total, which narrowly favored Bush. The Court's decision effectively ended the election, with thousands of ballots remaining uncounted, and resulted in victory for President Bush.

The Supreme Court's intervention was unprecedented, extraordinarily intrusive upon the political process, and profoundly troubling in many respects. First, the Supreme Court actually

halted the democratic process which it presumably sought to protect by deciding the case in the first place. The Court interrupted and prevented a more democratic ending of the most important decision that we make in a democracy. Actually and symbolically, the Court stood for the proposition that certain “ballots shall not be counted,” a paradoxical and ironic result in a nation that claims special stature as a democracy.

Secondly, strong arguments can be made that the Supreme Court lacked jurisdiction to decide this case because the issues the Court decided were not ripe for decision and because the question presented was a political question.²⁰ The conceptual heart of the per curiam opinion was that the counting of uncounted ballots without uniform standards violated equal protection because identical ballots might be treated and counted differently. The problem with this reasoning is that it was hypothetical; the case was not ripe for decision. Because the Court halted the counting of ballots, there were no actual instances of identical or similar ballots treated differently under the recount procedure ordered by the Florida Supreme Court. The recount procedure provided that a single judge would hear and resolve all disputes arising during the ballot count. The judge could have applied uniform standards and thus could have avoided the potential denial of equal protection that concerned the Supreme Court. Justice Stevens commented on this in his dissent:

the use of differing substandards for determining voter intent in different counties employing similar voting systems may raise serious concerns. These concerns are alleviated—if not eliminated—by the fact that a single impartial magistrate will ultimately adjudicate all objections arising from the recount process.²¹

²⁰ See generally Erwin Chemerinsky, How Should We Think about Bush v. Gore, 34 Loy. U. Chi. L. J. 1 (2002).

²¹ 531 U.S. at 126 (Stevens, J., dissenting)

The fact that there was no actual instance of the harm that the Court relied upon for its decision means that the case was not ripe for decision.

As a prudential matter as well, the Court probably should have refrained from deciding the case because it presented a political question.²² The political question doctrine enforces the separation of powers by keeping the Supreme Court from deciding cases that the Constitution commits to other branches of government. Under the political question doctrine, the Court routinely stays out of controversies that are committed to either the executive or legislative branches to preserve the separation of powers. The resolution of difficult situations in the electoral process such as arose here is committed prominently to the legislative branch. Notwithstanding, the Court decided to decide the case, and in so doing intruded prominently into the electoral process and halted the counting of ballots.

The Court also acted inconsistent with the robust vision of federalism enforced by the Rehnquist court in numerous opinions.²³ The Rehnquist Court had been limiting the scope of federal power in the name of an important, independent role for the states and state legislative and judicial bodies.²⁴ In marked contrast, the Court in *Bush v. Gore* repeatedly flouted its oft-stated federalism rationales and ignored entirely the decisions and interpretations of the Florida Supreme Court with regard to the meaning of Florida law. For example, the Court decided that the counting of ballots previously unrecorded by voting machines ordered by the Florida

²² See generally Erwin Chemerinsky, *How Should We Think about Bush v. Gore*, 34 *Loy. U. Chi. L. J.* 1 (2002).

²³ See generally Erwin Chemerinsky, *How Should We Think about Bush v. Gore*, 34 *Loy. U. Chi. L. J.* 1 (2002).

²⁴ See, e.g., *Lopez*; *Morrison*

Supreme Court could not be accomplished with appropriate standards by December 12, 1999, a date stated as a matter of Florida state law. There was, however, nothing necessarily fixed about the December 12 date. This date was named in an interpretation of Florida law by the Florida Supreme Court, and the Florida Court could have either adhered to that date or named another, had it been permitted to decide the case on remand from the Supreme Court.

Lastly, the Supreme Court decision also circumvented the legislative process already in place for deciding controversies such as this one. If, in the most complex case, there had been two conflicting slates of electors from Florida, one for Bush and one for Gore, then the decision on which slate of electors to accept would have been made by members of the House of Representatives and the Senate, if they agreed. If the House and Senate disagreed, then the governor of Florida, Jeb Bush, would have decided, obviously in his brother's favor.

One can attempt to justify the Court's decision in *Bush v. Gore* on the grounds of speed and certainty. The Court certainly ended promptly the period of uncertainty about the electoral results in Florida. However, considering that the electoral stakes could not have been higher than a contested election for the presidency, neither speed nor finality provide persuasive justifications for ignoring federal law and halting the counting of ballots in a democracy.

Perhaps I have persuaded you that *Bush v. Gore* was a bad decision, or at least highly problematic. Or perhaps I have demonstrated that the Court reached intrusively into the electoral process and distorted the election of a president. But so what? Who cares, besides a coterie of disgruntled constitutional law professors? The sobering answer to this question seems to be nearly no one. It is remarkable that in the United States, the Supreme Court can intervene decisively in a presidential election and determine its outcome with no significant repercussions.

The tragic events of September 11, 2001 and the ensuing war in Iraq eclipsed and silenced questions about the legitimacy of the Bush presidency. These events probably had some similar silencing effect on questions about the legitimacy of the Supreme Court's role in Bush's presidency.

Notwithstanding, it remains remarkable that there was no widespread or sustained outrage at the Supreme Court's decisive role in the Bush presidency. National outrage could have taken several forms, none of which materialized in any significant way. There could have been continuing protests over the Bush presidency. There could have been congressional efforts to impeach some of the Justices of the Supreme Court. Given Republican control over the Congress, impeachment of Supreme Court justices who helped install a Republican president was unlikely politically. There could have been some amendment to the Constitution to prevent Supreme Court interference in future elections. While the 9/11 tragedy likely preempted national attention to any of these possibilities, it remains noteworthy that none of these expressions of outrage materialized significantly even prior to 9/11.

It remains remarkable that there has been no deterioration in the Supreme Court's legitimacy, or in the perception of its legitimacy, since its unprecedented decision in *Bush v. Gore*. The United States Supreme Court is a remarkably powerful institution, and the public accepts its role in deciding controversial questions, even the outcome of a presidential election. There is great irony, in a democracy, when unelected judges decide the outcome of a presidential election. There should also be great concern about the social and political dynamics that allow an unchecked, and apparently uncheckable, judiciary to make such decisions with impunity.

Conclusion:

These three examples of judicial involvement in Presidential elections in Peru, Costa Rica and the United States teach us important lessons about the nature of judicial review in a democracy. The Peruvian example illustrates the importance of judicial independence and binding judicial review as the only effective check on potentially unbridled executive and legislative power. In 1996-97, the Peruvian Constitutional Court was too weak and too vulnerable to attack from a hostile legislature to provide any check on President Fujimori's desire for continuation in power. This Peruvian case also demonstrates the importance of an international court with appropriate jurisdiction in the event that effective domestic judicial review is unavailable. The Inter-American Court of Human Rights was able to exercise independent, binding judicial review and explicitly to support principles of judicial independence and freedom from political pressure by deciding in favor of the three impeached justices of the Peruvian Constitutional Court.

In Costa Rica, the decision of Sala IV to declare unconstitutional the relatively recent prohibition on reelection of a former president illustrates the use of judicial review to support and amplify democracy. The reasoning of Sala IV, steeped in Costa Rican constitutional tradition, identified and relied explicitly on fundamental rights of Costa Ricans to elect the candidate of their choice and to run for office. By identifying and enforcing these fundamental rights, Sala IV exercised judicial review in a way that supported and expanded democratic possibilities.

The supportive stance of Sala IV relative to democracy in Costa Rica stands in striking, and perhaps remarkable, contrast to the essentially anti-democratic role played by the United States Supreme Court in *Bush v. Gore*. The Supreme Court, rather than allowing the counting of

more votes, halted the counting of ballots and interfered with a more democratic resolution of the presidential election in 2000. While there are many troubling aspects of the Bush v. Gore decision, perhaps most troubling is the disparity between what the Court said and what it did. The Court said it was concerned about the possibility of unequal treatment of votes under Florida standards. But the Court actually produced unequal treatment of votes by halting the counting of uncounted ballots altogether, rather than allowing the electoral process to proceed under revised Florida standards. Rather than supporting the democratic process, the Supreme Court halted it with the result still uncertain. The unelected Court avoided, rather than engaged, more democracy.

Remarkably, however, despite its intrusive role in the 2000 presidential election, the Court seems to have suffered no ill effects, no diminution in its prestige, no accountability. If the Peruvian case illustrates that a weak judiciary with ineffective powers of judicial review is not a good thing, then the United States case may illustrate that an intrusive, powerful, and essentially unaccountable Supreme Court may also not be such a good thing.