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Misuse of Executive Power as an Obstacle to Democratic Institutional Reform in Argentina

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Abstract

This thesis explores three different institutions that underwent proposed reforms during the President of Cristina Fernández de Kirchner (2007-2015): the intelligence sector, the judiciary, and the media. Though the stated purpose of these reforms was to make more democratic institutions that had suffered under the military junta, in reality they were generally unsuccessful. Furthermore these institutions would be further changed under her successor, Mauricio Macri, still with little improvement to democracy. When examining these changes in the context of hyper-presidentialism, it is apparent that the misuse of executive power is a serious impediment to meaningful institutional reform.

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Introduction and Background

Since the collapse of the last military dictatorship in 1983, Argentina has been a democracy. That is, Argentina has held a series of free and fair elections and been free of the large-scale state-sponsored violence that characterized the period termed by the military junta the "National Reorganization Process". However, the transition from a military dictatorship and being governed by a succession of military generals to a democratic government has not been easy or smooth. In fact, transitioning from an oppressive authoritarian regime to a democracy requires significant reforms to institutions in order to make them more democratic, or at least to better serve democratic interests. Not surprisingly, institutional reform has been uneven and at times unsuccessful. Even more than 30 years since the military dictatorship, more remains to be done to make institutions more democratic. During the Presidency of Cristina Fernández de Kirchner (2007-2015) there were attempts to reform several institutions that had been severely impeded and perverted under the military junta. All of the institutions in question did need reforms in order to function more democratically. However, the misuse of executive power caused all three reforms to be largely ineffective at democratizing the institutions in question.

In connection with seeking to better understand Argentina's transition to democracy, I have elected to examine these three critical institutions-- the intelligence sector, the judicial branch, and the media. I maintain that these institutions are uniquely relevant to understanding Argentina's transition to democracy because during the military

government these institutions were either used in a manner directly counter to democracy (in the case of intelligence) or rendered functionally useless (in the case of the judiciary and media). Since each of these institutions significantly contributes to or otherwise impacts a democracy, and each had significant obstacles to overcome in order to function democratically, examining how each institution has changed is critical to a more complete understanding of Argentina's transition to democracy.

In addition, since each of these three institutions was the subject of proposed large-scale reform by Fernández de Kirchner they serve as recent case studies. Importantly for the context of this paper, all the attempted reforms had several things in common. First, they we all controversial, and labeled by critics as undemocratic, particularly in the way they related to presidential power. Second, they were positioned by supporters as necessary in order to further democracy. That is, the supporters of reforms framed them in contrast to the way in which these institutions operated during the military dictatorship so that to oppose the proposed reforms was tantamount to supporting the institutions functioning in the same way they functioned during the military dictatorship.

More recently, all these institutions have been subject to some form of modification by the new president Mauricio Macri. Macri’s election was looked at hopefully by international observers, particularly those more sympathetic to his center-right ideological position and economic views. Generally speaking, the fact that he was the first non-radical, non-Peronist president elected since before the dictatorship was seen as a positive indicator for Argentina's evolving democracy. His platform confirmed these hopes. He stated that his administration would “strengthen the rule of law, strictly

respecting the division of powers, the independence of justice and the constitutional principles and guarantees, together with full freedom of expression."[1] Even so, the first months of his presidency were marked by his own changes to the institutions that Fernández de Kirchner had attempted to reform, in different ways but often by decree. In this sense it is clear that the biggest threat to the development of a liberal democracy in Argentina does not lie with a single party or position on the ideological spectrum. Instead, the misuse of executive power (bolstered by the tradition of hyper-presidentialism) transcends ideology and impedes meaningful democratic reform.

After examining the literature on hyper-presidentialism and typologies of democracy and situating my argument in that context, I will examine each institution and compare the role each such institution conventionally or ideally plays in a liberal democracy to the role it played during the military dictatorship and throughout the transition to democracy. I will then critically examine the reforms proposed by Cristina Fernández de Kirchner, and how they demonstrate a misuse of executive power, and by extension the legacy of hyper-presidentialism. Then I will critically examine the Macri administration's response to these reforms, including what the changes are and the manner in which the changes were passed. To conclude I analyze what this means for the state of Argentine democracy.

Hyper-Presidentialism

Of the major forms of democracy (Presidential, Parliamentary, and Semi-Presidential) Latin American countries (due in part to the influence of the U.S.

[1] Andrés Del Río, Roldán "Macri and the Judges," *Open Democracy*, Jan. 21, 2016.https://www.opendemocracy.net/democraciaabierta/andr-s-del-r-o-rold-n/macri-and-judges

constitution on Latin American constitutions) have generally favored a presidential democracy. In a presidential regime, the executive is popularly elected to serve a fixed term, and during that term they have the exclusive ability to wield executive power. This is in contrast to a parliamentary system, in which most authority lies in the legislature, and the members of parliament elect the head of government. This results in theoretical differences in the functions of these government systems and how they allocate power, and both systems have supporter and detractors. In "Presidential or Parliamentary Democracy: Does it make a Difference?" Juan Linz argues that the presidential system is inherently inferior to the parliamentary system for several reasons. One reason was that it offered less fluidity than the parliamentary system, so far as it was very difficult to remove an executive who had lost the support of the people. Another reason was that the presidents executive power means there's little incentive for coalition building or power-sharing that exists in parliamentary governments, making politics more fragmented and polarized. Additionally there is the issue of executive-legislative gridlock, where government action is stalled by differences between the executive and legislative branch, both of which can claim some electoral legitimacy.[2] In order to avoid this gridlock, particularly in times of crisis, a president can take unilateral action to enact policy. While there are constitutional limits on executive power, they can generally be circumvented with presidential decrees and other mechanisms designed to allow quick action in times of emergency. In some countries, including Argentina, the result of this has been hyper-presidentialism.

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[2] Juan J. Linz, "Presidential or Parliamentary Democracy: Does it make a Difference?" in *The Failure of Presidential Democracy*, eds. Linz and Arturo Valenzuela(Baltimore: Johns Hopkins University Press, 1994), 3-87.

Hyper-presidentialism occurs either when there are not sufficient limits on presidential power or the president is able to subvert the limits in place. Essentially it is when the executive office has too much power, officially or unofficially. The capacity for the president to act unilaterally in areas that are not the role of the executive is a symptom of hyper-presidentialism. Cristina Fernández de Kirchner's intelligence, judicial, and media reforms each serve as examples of the executive making changes that could in practice strengthen the executive office, and reinforce hyper-presidentialism.

Contextualizing the role of the Argentinean president, they are similar in powers to the U.S. president, in that they act as Head of State, Head of Government, and Commander in Chief of the Armed Forces.[3] However, the Argentinean president can appoint many high office roles (including the cabinet) without legislative or independent electoral approval. In addition, the Argentinean president has significant control over the provinces, because they have significant control over the distribution of funds. Though the proposed 1994 reforms sought to limit this particular power, no law has been passed; the end result is that the President has enormous discretion over the distribution of much of the money that goes to the provinces.[4] A president's power comes from various sources. They have constitutional powers are the roles outlined in the constitution, and partisan powers which come from the president's ability to control their party in the legislature.[5] Beyond these main sources of power, presidents can wield influence to

[3] Susan Rose-Ackerman, Diane A. Desierto, and Natalia Volosin, "Hyper-Presidentialism: Separation of Powers without Checks and Balances in Argentina and the Philippines," *Berkeley Journal of International Law* 29, no. 1 (2011): 250.
[4] Ibid., 251.
[5] Peter H. Smith, *Democracy in Latin America: Political Change in Comparative Perspective* (New York: Oxford University Press, 2005), 161.

varying extents over the judiciary and local politics. As a result, if limits on power are subverted, the executive can operate with almost complete control of the country.

In addition to structural reasons for hyper-presidentialism, there are also historical reasons in all of Latin America, including Argentina. The instability that occurred in Argentina well before the final military government, since it's first attempts at democracy, made democratic institutions, generally, very weak. This included the institutions that were designed to check the executive (the legislative and judicial branch). With nearly constant regime change, policy programs became second to personalities. This resulted in significant control being vested in the executive.[6] Furthermore, after the brutality of the military junta, a democratic government that was able to offer some stability (even through executive strength) was better than a weak government that ran the risk of backsliding into military rule.

Particularly pertinent to the case of democracy in Argentina, both past and present is the case of presidential decrees. A presidential decree offers the opportunity for the president to sidestep the legislature and enact policy changes unilaterally. There are reasons for such an option to exist. As mentioned above, presidential systems often face gridlock. Situations could arise where waiting to navigate that gridlock to enact policy change could be detrimental if not dangerous. However, the use (and particularly the abuse) of these decrees has the power to substantially weaken democracy. In Argentina, presidents have more power to use decrees than in the United States for example, which

[6] Ibid., 155.

can lead to frequent abuse of decrees. Adam Prezworski described this rule by decree with the following "People get a regular chance to vote, but not to choose".[7]

This situation of Presidents abusing decrees arose many times in Argentina, specifically post-military government. While between 1853 and 1983 constitutional governments issued about 20 NUDs ("Necessity and Urgency Decrees") that number increased substantially after the re-transition to democratic rule.[8] Logically, it makes sense that a government with weakened democratic institutions and fear of backsliding into a military dictatorship would make use of NUDs more, however this increase led to both missteps and the beginnings of a dangerous legacy. The first democratically elected president after the military junta, Raul Alfonsín, issued 10 NUDs (to contextualize this with the previous figure, Alfonsín was in office 6 years).[9] This included his far-reaching Austral Plan.[10] Alfonsín inherited a weak economy, and the Austral Plan was his attempts to solve it. However, the result was actually a worsening of the economy, to the extent that riots eventually led to his resignation. This is indicative of the major problem with decrees: even in the case of a crisis that needs resolution, swift action that is not checked by other branches can lead to missteps. Alfonsín's successor was not more restrained, but actually was much more likely to use decrees. Carlos Menem became synonymous with ruling by *decretazo,* issuing 336 NUDs in one 5-year period.[11]

Use of decrees has not stopped in the 21st century. Eduardo Dunhalde and Fernández de Kirchner's husband and predecessor, Nestor Kirchner both issued a number

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[7] Adam Prezworski, *Democracy and the Market: Political and Economic Reforms in Eastern Europe and Latin America* (Cambridge: Cambridge University Press, 1991) 187.
[8] Smith, 162.
[9] Ibid.
[10] Ibid.
[11] Ibid.

of decrees. While Fernández de Kirchner issued less, she still used controversial decrees, especially pertaining to economic policy. In addition to the potential for missteps, this sort of presidency had implications for the quality and future of Argentine democracy. From a philosophical standpoint, the continual use of decrees normalizes unilateral executive action, and the idea that the executive branch should be able to act relatively unimpeded. From a practical standpoint, it contributes to the weakening of other institutions, making the executive office more powerful. This concentration of power means that even without the use of decrees, the president can act in their own self-interest since the checks on their power are weaker, and popular support for executive action is stronger. Fernández de Kirchner, for example, had substantial partisan power, since her own party dominated the legislature. As a result the reforms she was able to pass, about the intelligence sector, judiciary, and media, were approved by the legislature. This legislative approval however, was not able to stop them from being politically motivated and largely ineffective at promoting democracy.

While Fernández de Kirchner and her reforms clearly continued the legacy of hyper-presidentialism, Macri, though he is different from Fernández de Kirchner from both an ideological and partisan perspective, has not indicated a significant departure from this trend in his first months in office. While congress was in recess, Macri passed a number of NUDs. Though some of these have been successful so far, and were responses to situations that could be considered necessary and urgent, others were criticized as ways to avoid sending his policies through a largely unfriendly legislature. Specifically, several of these decrees dealt directly with the institutions Fernández de Kirchner had reformed. This indicates that the risk of hyper-presidential tendencies did not end with the victory

of a new political party, and misuse of executive power remains the biggest threat to the development of fully democratic institutions in Argentina.

Typology of Democracy

For something to be a threat to the quality of democracy, it is important to establish what a democracy is, and the different variations that exist within it. One of the classic democratic theories is the one proposed by Robert Dahl in "Polyarchy". According to Dahl, what we think of as democracies are actually polyarchies. According to Dahl, polyarchies have the following defining characteristics: effective participation, equal vote, enlightened understanding, agenda control, and maximum inclusiveness. Polyarchies also require certain institutions, like elected officials, free and fair elections, inclusive suffrage, the right to try to be elected, freedom of expression, right to seek alternative information, and associational autonomy.[12]

While Dahl recognized democracy as an unachievable ideal in which governments were completely responsive to their people, he viewed a polyarchy as the popular manifestation of democratic ideals. In addition to the effective presence of the institutions described above, the primary indicator of a polyarchy was free and fair elections with universal suffrage. In that sense, polyarchy is a relatively minimalist definition of democracy, and one for which Argentina certainly qualifies. Dahl's definition does not, however, account for the association of democracy with a high degree of civil liberties. As a result, Dahl's model of a polyarchy does not account for the dangers of hyper-presidentialism and the resulting poorly functioning institutions that

[12] Robert Alan Dahl. *Polyarchy: Participation and Opposition* (New Haven: Yale University Press, 1971)

pose the greatest threat to Argentinean democracy. What is more useful is to examine two definitions that emerged in the 1990s to discuss the state of governance in more recent democracies worldwide, including those in Latin America. These definitions go beyond the procedural definition of democracy, to distinguish the shortcomings of governance that can exist within democracies.

One such idea can be found in Guillermo O'Donnell's definition of delegative democracy. First defined in his 1994 Journal of Democracy article, a delegative democracy meet's Dahl's criteria for a polyarchy, but is not a representative democracy. Specifically, he made the distinction between older, more consolidated liberal democracies, and more recent democracies (like many Latin American ones, including Argentina) which he termed "delegative democracies". Delegative democracies, he said, were neither at imminent risk of returning to authoritative control, nor were they on the course to become fully consolidated representative democracies.[13] His principle argument is that a government has two democratic transitions. This first transition was from authoritarian rule to an elected government. The second transition (which is often more difficult) is from an elected government to a fully consolidated democratic regime, with all the institutions and norms that come with it. O'Donnell argued that in the case of many Latin American (and other) countries that transitioned to democracy in the 1970s and 1980s, the second transition never occurred.[14] Instead, resilient (but not democratic in the traditional sense) governments emerged. These governments lacked the liberties that have come to be associated with democracies, but O'Donnell argued that they were

[13] Guillermo A. O'Donnell, "Delegative Democracy," *Journal of Democracy* 5, no. 1 (January 1994): 56.
[14] Ibid.

actually more democratic, just less liberal.[15] They are characterized by free and fair elections, which then give the victor mandate to rule relatively unimpeded. In delegative democracies, democratic institutions (with the exception of the executive and elections) are very weak, so there are few checks on the power of the executive. This results in comparatively swift policy making, but a large margin for error (as can be seen in the economic policies of Argentina).[16] Delegative democracies can rely heavily on presidential decrees or other means for an executive to act relatively unimpeded.[17] A delegative democracy is distinct from a liberal democracy in that they have different conceptions of what the role of a government, particularly of an executive should be. In a liberal democracy, elected government officials (including the executive) are elected on the basis that they will represent their constituents. In delegative democracy, however, elected officials view their election as a mandate for them to govern as they see fit.[18] This view explains the emergence of hyper-presidential tendencies, and the resulting institutional reforms of the Fernández de Kirchner administration.

The emergence of a delegative democracy from the military government follows logically from historical patterns. There are benefits to delegative democracy. As mentioned when discussing presidential decrees, if the executive is not impeded by a disagreeable legislative branch, they can take action quickly (though not always correctly). The ability to take quick action, particularly in the early days of the transition, when a military coup d'état loomed as a possibility, was valuable. However, it established an executive branch that went too unchecked, and the legacy of that still affects

[15] Ibid.
[16] Ibid., 60.
[17] Smith, 162.
[18] O'Donnell, 65.

Argentinean democracy today. According to O'Donnell, delegative democracies are consolidated in the sense that they do not face imminent risk of falling back into authoritarian government. However, they also have proven difficult to transition into liberal democracies.[19] This is important in the case of Argentina, where even in the face of major democratic victories (like a win for a formerly underrepresented party) the underlying tradition of hyper-presidentialism seems to have stubbornly remained, in no small part due to the president's capacity to act unchecked (either by decree or inefficient checks).

In addition to the concept of delegative democracy, in the late 1990s another way of describing the trend of emerging democracies that weren't fully consolidated and liberal Western democracies: illiberal democracies. Democracy that goes beyond elections to protect civil liberties and function in a representative manner constitutes a liberal democracy. According to Fareed Zakaria a liberal democracy is marked not only by the procedural elements of establishing a regime "but also by the rule of law, a separation of powers, and the protection of basic liberties of speech, assembly, religion, and property".[20] Though he acknowledges that those ideals do not share a theoretical or historical basis linking them to democracy, they have been linked for a century.[21]

The most important implication of examining Argentina through the ways it falls short of a liberal democracy is not an indication that it is going to backslide to authoritarianism. In his article (written during the Carlos Menem administration) Zakaria acknowledges that Argentina is a "modest offender" whose shortcomings primarily relate

[19] Ibid.
[20] Fareed Zakaria, "The Rise of Illiberal Democracy," *Foreign Affairs* 76 no. 5 (2007): 22.
[21] Ibid.

to the previously discussed issue of hyper-presidentialism and a lack of checks on executive power.[22] However, much like O'Donnell emphasized that delegative democracy was not a transitional stage, Zakaria notes that cases of liberal democracies emerging from illiberal democracies are rare.[23]

Both delegative democracy and illiberal democracy describe the ways recent democracies, like Argentina, have fallen short of fully consolidated liberal democracies. However, they describe different elements of democracy. Delegative democracy is used to describe where power is held, and the process of enacting policies. Illiberal democracy focuses more on the nature of the policies enacted in those democracies.[24] In the case of Argentina, that means that when the executive wields a high amount of power, it is exhibiting the characteristics of a delegative democracy. When that power is used to pass policies that limit civil liberties or other liberal ideals, then it is an illiberal democracy.

The theories of delegative and illiberal democracies can both be applied to Argentina. Illiberal democracies are often the result of delegative democracies, but not always. In the case of Argentina, these two theories are linked by their common outcome of hyper-presidentialism. Tendencies of Argentinean presidents to act delegatively, illiberally, or both threaten the quality of Argentinean democracy. The consequences of hyper-presidentialism are not just theoretical. It is not only a threat for the way it falls short of the democratic ideal. A government where the executive is not being checked is likely to make much bigger policy mistakes. Furthermore, the executive is freer to engage in corruption when it is not likely to be discovered or tried by a truly independent entity.

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[22] Ibid., 23.
[23] Ibid., 24.
[24] Smith, 12.

Given that both the Fernández de Kirchner and Macri regimes have faced accusations of corruption these concerns are real and important. The only way for Argentinean democracy to become truly liberal, consolidated, and transparent is to overcome hyper-presidentialism and executive power abuse in order to enact effective democratic reforms.

Intelligence Reform

The task of reforming intelligence services in Argentina has presented a unique challenge. Since 1983, the government has struggled with how to reform the institution that was responsible for a large amount of the state sponsored violence during the national reorganization process. In 2015, Fernández de Kirchner proposed reasonably comprehensive legislation, however critics called it politically motivated and ineffective at best, and undemocratic at worst. Ultimately, parts of the legislation could be used to give the executive more control over the intelligence sector, which creates substantial potential for abuse, while other elements were indeed more democratic. Ultimately intelligence reform is complicated by the multiple areas that must be considered, but Fernández de Kirchner's willingness to utilize reform for political gains, and Macri's subsequent willingness to use decree in opposition, make the task of reform even more challenging.

The Relationship between Intelligence and Democracy

When institutions are transitioning from a dictatorship to democracy, intelligence organizations offer a particular challenge. Intelligence requires a level of opacity, whereas democracy needs transparency.[25] Essentially a tension arises between the level of accountability a government needs in order to be truly democratic, and the level of secrecy an intelligence agency requires to truly be effective. This is further complicated

[25] Florina Matei and Thomas Bruneau, "Intelligence Reform in New Democracies," *Democratization* 18, no. 3 (2011): 605.

in the case of Argentina, where the intelligence agency during the military dictatorship was strongly linked to disappearances and other acts of state-sponsored terror.

Furthermore in Argentina, like many South American countries, the military maintained a powerful role without facing many (if any) external threats. As a result, the focus of the military was more on internal security.[26] In the case of Argentina, that meant combating a perceived communist threat. Military intelligence, then, was focused on monitoring political dissidents within the country. This information gathering of citizens is counter to the civil liberties a democracy is supposed to protect. When transitioning to democracy, Argentina was left with a secretive, military dominated intelligence sector that had been historically concerned with domestic spying. The democratization of the intelligence sector was not an easy process, and the challenges it posed are still pertinent today. How can an agency (or agencies) reliant on secrecy be democratized? All democracies confront the paradox of transparency with regard to their intelligence agencies, yet all countries have some sort of intelligence agency, including fully consolidated democracies.[27] It is possible to make an intelligence agency as democratic as possible (though inherently undemocratic in nature) while maintaining the agencies effectiveness. In the case of Argentina, and any democracy that transitioned from military rule, the first and foremost requirement is civilian control. An intelligence apparatus that is primarily controlled by the civilian government is theoretically more responsive to the will of the people, and therefore more democratic. Bringing intelligence

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[26] Juan Rial, "Armies and Civil Society in Latin America" in *Civil-Military Relations and Democracy*, ed. Larry Diamond and Marc F. Plattner (Baltimore: Johns Hopkins University Press, 1996), 51.
[27] Matei, 605.

under civilian control is complicated. Once intelligence is moved to civilian led agencies there are still factors to consider in order for it to function democratically.

After civilian control is securely established, the next issue that intelligence must face is checks on power. After being brought under civilian control, the intelligence apparatus must not be under the exclusive control of the executive branch. A certain degree of legislative oversight of operations and budgeting are important. In addition, the judiciary can play a role in checking intelligence. For example, in some democracies the judiciary is in charge of issuing warrants for information gathering, and determining the consequences for those that have abused their role in intelligence via a trial. However, as Priscila Carlos Brandão Antunes observes, "Although the judicial branch may be called on to solve disputes between citizens and the behavior of the services of intelligence, it rarely does so".[28] This is partially because judiciary often lacks the expertise to adequately fill roles that would limit the power of the intelligence sector. The capacity of each of the legislative and judicial branches to balance the autonomy of intelligence agencies and their relationship to the executive branch should be considered when democratizing an intelligence agency.

Another test in determining whether an intelligence agency can function in the framework of a democracy is assessing what the objectives of the agency are. When an intelligence agency focuses on internal security, it leads to violations of the civil rights of their citizens, and can be used as a tool of political repression. Though as mentioned, foreign wars are rare in South America, there are other threats (like terrorism) that create

[28] Priscila Carlos Brandão Antunes, "Establishing Democratic Control of Intelligence in Argentina," in *Reforming Intelligence: Obstacles to Democratic Control and Effectiveness*, ed. Thomas C. Bruneau, Steven C. Boraz (Austin: University of Texas Press, 2007),199.

a legitimate need for external security. That being said, the amorphous nature of these threats means that without particular guidelines in place outlining intelligence gathering, intelligence agencies are liable to act undemocratically in the name of national security.

When making their intelligence services as democratic as possible, Argentina faced these three primary challenges: subordinating the military's role, enacting checks on power, and limiting the functions of intelligence. The military question was resolved rather quickly and effectively in the reform process, but other questions pertaining to function and limits on power are on going.

Historical Origins of Intelligence in Argentina

To understand the transition of Argentina's intelligence agencies, it is necessary to understand their history. Argentina's modern intelligence history begins in 1946, when President Peron created the Office of Coordinated State Information, which would be replaced by the State Information Service under the presidency in 1951. At the same time, intelligence services for the branches of the military were set up. The State Information Secretariat (SIDE) was established, and 10 years after that a new intelligence body under the President was set up, the National Intelligence Center (CNI).[29] During the National Reorganization Process these intelligence agencies would become essential to achieving the politically repressive objectives of the state. During the military dictatorship, all intelligence was military intelligence. A law from 1973 (Secret Law 20,195) specified that both the secretary and undersecretary of SIDE had to be senior

[29] Eduardo E. Estevez, "Intelligence Community Reforms: The Case of Argentina," in *Intelligence Elsewhere*, ed. Phillip H.J. Davies, Kristian Gustafason (Washington, DC: Georgetown University Press, 2013), 222.

ranking members of the military.[30] SIDE was used to conduct information gathering on thousands of people determined to be political dissidents, from students to labor organizers. This information was then used to carry out the violent torture and disappearances of these dissidents.[31] This legacy created challenges during the reemergence of democracy.

Intelligence Reform During the Transition

When President Alfonsín was elected in 1983 one of his main objectives was a clean break with the past. He was responsible for the trials of many participants in the dirty war, both military junta members and guerillas. He was responsible for establishing the commission that published information on the disappeared.[32] In general, Alfonsín laid the groundwork for the transitional justice and historical memory that have aided Argentina's transition to democracy. He also emphasized that a subordination of the military under civilian rule was of primary importance, which included the intelligence sector. This proved to be incredibly difficult. Under Alfonsín, Roberto Pena became the first civilian head of SIDE.[33] This was a positive development for civil-military relations, but resulted in problems. Pena eliminated many military officers from SIDE, instead appointing a fellow civilian undersecretary. This was met with significant push back from the military, and resulted in a very tense period for civil-military relations.[34]

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[30] Ibid.
[31] Ibid.
[32] Ibid., 223.
[33] Ibid.
[34] Ibid., 224.

Part of this tension was a result of the National Defense Law 23,554 (1988), which significantly limited the military's monopoly on intelligence. As mentioned, an important part of reforming civil military relations for democracy is focusing the military on external threats. National Defense Law 23,554 did just that. Specifically, it replaced the previous National Security Doctrine, limiting the military to only addressing external threats. With regards to intelligence, this meant that the military could no longer engage in intelligence gathering practices for domestic political ends. This caused tension with the military, which steadfastly maintained that domestic surveillance was squarely within their domain.[35]

In the early 1990s, the first true interaction between the intelligence sector and congress began, with the ENI offering a course for advisers in both the legislative and executive branches, and organizing an International Seminar on Congressional Oversight of Intelligence Agencies and Activities, in collaboration with NGOS.[36] This was a positive step in checking executive power over intelligence, because some degree of legislative control in the structure of a country's intelligence agencies is necessary for democracy. However, the different political ideologies represented in the legislature made the process a difficult one. In 1993 when a bill was informally released for consideration of the executive debates in the legislature were ignited. The majority drafted a bill resembling the current system, in that intelligence was highly centralized, while the minority favored more defined distinctions between foreign and domestic

[35] Ibid.
[36] Ibid.,225.

intelligence and different legislative and judicial controls on different elements of intelligence.[37]

The Internal Security Law 24, 059, passed in 1992 was a positive step for legislative oversight of intelligence. The law established the National Congress Joint Committee for the Oversight of Internal Security and Intelligence Agencies. It also created the first democratic directorate, under the executive. This law was important in distinguishing between internal security and defense, and granting the Ministry of the Interior power over what was considered internal security, meaning that the Ministry of the Interior was responsible for coordinating police intelligence.[38] The Bicameral Commission for the Supervision of Intelligence Agencies and Activities, created by Internal Security Law 24, 059, was the first time that the legislative branch had been given the capacity for control and oversight of intelligence operations.[39]

One of the most sweeping intelligence reforms in recent Argentinean history was the National Intelligence Law 25,520, passed on November 27, 2001. The law was the result of an 8-month consensus building process in the legislature.[40] This law established the structure of the national intelligence system (before Fernández de Kirchner's reforms) as well as included important protections against abuse of intelligence.

The law defined the three bodies. The SI (formerly SIDE) is the highest ranking of the intelligence agencies, and is under the direct control of the presidency, and generally manages various intelligence activities.[41] It is also led by a civilian (as the

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[37] Ibid.
[38] Antunes, 201.
[39] Ibid.
[40] Estevez, 226.
[41] Ibid., 228.

SIDE was since 1983).[42] The second agency established was the National Directorate for Criminal Intelligence (DINIC) whose charter was to coordinate intelligence efforts by the police, including coordinating both national and provincial police forces. The DINIC is the body that controls intelligence pertaining to internal security, so they handle domestic surveillance. They are overseen by the Ministry of the Interior. National Intelligence Law 25,520 also established the National Directorate for Strategic Military Intelligence (DINIEM), which handled all military intelligence.[43]

As far as safeguards against abuse of power, the law explicitly states that no intelligence agency can "obtain information, produce intelligence or store data on individuals solely because of their race, religious faith, private actions, or political opinion, or because of their membership in partisan, social, union, community, cooperative, assistance, cultural, or labor organizations or for any legal activity in any sphere of action."[44] In addition the law explicitly makes the intelligence agencies apolitical, by prohibiting them from exerting influence over any realm of political affairs or public opinion.[45] In the realm of civilian control, National Intelligence Law 25,520 gave the Bicameral Commission on Intelligence permanent control over intelligence activities including the role of reviewing and suggesting alterations for the president's annual National Intelligence Plan and investigating any complaints made against intelligence services.[46]

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[42] Antunes, 213.
[43] Estevez, 228.
[44] Ley de Inteligencia Nacional 25.520,http://infoleg.mecon.gov.ar/infolegInternet/anexos/70000-74999/70496/norma.htm, translation by Brito.
[45] Estevez, 228.
[46] Antunes, 214.

Not unexpectedly, an issue that faced significant resistance from the intelligence community was the efforts for political control of the intelligence budget. Checks and oversight on the intelligence budget is an important democratic control to help combat issues including abuse of funds and bribery. Implementation of oversight and controls, the intelligence community argued, was an example of the legislature exerting too much power over what they saw as an executive branch issue. Nonetheless, control over the budget was imposed, which marked an important step in the democratization of intelligence in that intelligence agencies were held accountable for their spending and could no longer only provide an aggregated view of their expenditures.[47]

Given the legacy of illegal information gathering, a topic that resulted in a stark divide was communication interception (relating primarily at the time to wiretapping). Some believed that intelligence agencies should maintain this role, in spite of the history of using it for spying on citizens and repression. Others believed that the role should be given to the judiciary. Communication interception when used properly was solely for the purpose of prosecuting criminals, so some believed that the responsibility naturally fell to the judiciary. Critics of that stance cited lack of experience with such tasks and corruption as reasons that the job belonged to intelligence agencies. In the final law, communication interception did remain the purview of the SIDE (and the SI), though different checks were put on to attempt to ensure that the power was not abused. For example, the law requires that the SI prove a viable need for the wiretap, and the

[47] Ibid., 213.

secretary of intelligence or a delegate had to obtain a warrant from a federal judge.[48] This legislative decision would have significant implications for Argentinean politics.

In order to protect intelligence agencies and allow them to maintain effectiveness, the Bicameral Commission on Intelligence was subject to fines and legal penalties for disclosing information that would put security of the nation at risk or damage intelligence agencies capacity to fulfill their function. The penalties were comparable to what members of the intelligence community faced for disclosing sensitive information.[49] This allowed the legislature to have a role in controlling intelligence without damaging the level of secrecy needed for intelligence to function.

Intelligence Scandals

Even though reforms had taken place, the Argentinean Intelligence apparatus has not been able to fully break its association with past wrongdoings. This is partially because even after the transition to democracy, the intelligence community has been marred by scandals, which illustrate the challenges of democratizing intelligence after a military dictatorship. This included several scandals of purported ideological surveillance during the Menem presidency. The first occurred in 1993, when documents leaked to the press indicated that the government had been collecting intelligence on teachers, students, and trade unionists.[50] This surveillance had been ordered by the Ministry of the Interior, illustrating the civilian control is not enough to combat misuse of intelligence.

[48] Ibid., 211.
[49] Ibid., 215.
[50] Estevez, 224.

In 1998, another intelligence scandal broke, one that directly implicated the military. The Air Force had been conducting surveillance on a women's NGO, as well as several journalists. While the responsible officers were prosecuted, there was not any resulting structural or political change to military intelligence.[51] The next intelligence scandal, in 2000, resulted in much more substantial changes. It came to light that the Third Army Corps was using surveillance to target political parties, unions, and student groups in Cordoba. As a consequence of this scandal, not only were 1,000 personnel dismissed, but also the entire organizational structure was overhauled, with the secret budget being cut. However, later in 2000, the intelligence chief, Fernando De Santibedes resigned when it was revealed that through declaring expenditures that were not actually made, SIDE was retaining a funds that were not overseen by any sort of body, allowing them to essentially fund any operation they wanted.[52]

In addition to scandals regarding unlawful surveillance, there have also been concerns about legislation related to domestic surveillance. The Data Retention Law 25, 873 was known as the "Spy Law" and it required telecommunications and Internet companies to have the capacity to intercept communications for the Judiciary or Public Ministry.[53] In 2005, applications of the Spy Law were suspended by presidential decree, and in 2009 the Supreme Court ruled it unconstitutional.[54]

[51] Ibid., 226.
[52] Ibid.
[53] Ibid.
[54] Ibid.

The State of Intelligence in the 21st Century

Though the intelligence community has seen a number of positive reforms, specifically with regards to the subordination of the military's role, intelligence reform as an issue is still being discussed in Argentinean politics. Specifically, in January 2015 major reforms were proposed when Fernández de Kirchner proposed dissolution of the SI.[55] In its place would be a new intelligence agency, the Federal Intelligence Agency (AFI).[56] Her argument for broad reform was based on the premise that not enough has been done to reform the structure of the intelligence apparatus since the end of the military dictatorship. The AFI, compared to the SI, would be smaller in size and more transparent with its funding. Kirchner advocated the reforms by saying "We need to make the intelligence services more transparent because they have not served the interests of the country"[57] and fellow Peronist Diana Conti agreed, claiming that reform would advance "the democratization of the country's intelligence services".[58]

It is true that while there have been a number of reforms to the intelligence sector since 1983, the process has been quite protracted with no defining moment or significant overhaul; and as a result, the intelligence sector of the past was, in the collective mind of the people, not that different from the dictatorship. Fernández de Kirchner made attempts to leverage that association in order to garner support for her reforms. Supporters of Kirchner's reform saw it as a step that was long overdue. Provincial legislator Marcelo Sain claimed, "The intelligence services have been used for political espionage, financing

[55] "Argentina Congress Votes to Dissolve Intelligence Agency." *BBC News*. February 26, 2015, http://www.bbc.com/news/world-latin-america-31633782.
[56] Ibid.
[57] Ibid.
[58] Ibid.

of political campaigns and control over the judiciary, there are judges, prosecutors and congressmen who are tied to SIDE".[59] The fact that Sain referred to the SI by its dictatorship-era name (as many people do) is evidence that the connection between the two was strong in spite of the previous attempts at reform.

The call for reform and the stated goal of transparency were not inherently controversial. However, as necessary as intelligence reforms may be in order to separate from the past, there were plenty of reasons to be skeptical of Fernández de Kirchner's proposals as a step forward. A major concern was how funding in the new agency would be controlled. Legislators who oppose the new agency say that it is unclear exactly what the controls on funding the bill specified are, and how they would work.[60] For a reform that was promoted on the grounds of transparency, this was an important question. The new bill also notably changed the way wiretapping is handled. As discussed previously, after debating the issue National Intelligence Law 25,520 made wiretapping the job of intelligence services, but the new law would move wiretapping to the office of the Attorney General.[61] This is particularly relevant when considering the relationship between Fernández de Kirchner and the Attorney General Alejandra Gils Carbó. She is viewed as a Kirchner and Peronist party loyalist.[62] This particular component of the legislation was an example of how an executive can reinforce the strength of their office indirectly. Though transferring wiretapping capability to the judiciary does not in theory

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[59] Jonathan Blitzer, "Argentina Debates Sweeping Intelligence Reform after Prosecutor's Death," *Al Jazeera America*, February 11, 201,. http://america.aljazeera.com/articles/2015/2/11/argentina-votes-on-sweeping-intelligence-reform-after-prosecutors-death.html.

[60] "Argentina Congress Votes to Dissolve Intelligence Agency." BBC News. February 26, 2015.

[61] Ibid.

[62] Joshua Partlowand Irene Caselli, "In Argentina, distrust over president's move to abolish intelligence agency," *The Washington Post*, January 27, 2015. https://www.washingtonpost.com/world/the_americas/in-argentina-distrust-over-presidents-move-to-abolish-intelligence-agency/2015/01/27/c46c5b1e-a632-11e4-a162-121d06ca77f1_story.html

strengthen the executive, in this case, previous relationships could grant the president substantial political control (and room for abuse). Still other critics were not concerned with the substance of the reform (because they believe there was no substantial change) but believed the reform to be the president's way of distracting from the death of prosecutor Alberto Nisman, who was found dead in mysterious circumstances right before he was supposed to testify against her.[63] Additionally, critics of the bill cited concerns that the AFI would be taking over investigative powers from other government agencies, like the Ministry of Security. Both the previous law and Fernández de Kirchner's reforms allow the government to justify some criminal investigations, which those who believe the operational functions of an agency should be as limited as possible saw as damaging the capacity of the reform to be meaningful.[64] Furthermore the reform bill was rushed to a vote, which even those who supported the content of the reform saw as negative.[65]

A commonality of these criticisms is that they all indicated that there were political reasons for the reforms that went beyond Fernández de Kirchner's stated purpose of democratizing the intelligence services. As previously discussed, though a security necessity, intelligence is often by its very nature opaque and undemocratic. As a result, if it does not operate independently enough it is easily abused. Parts of Fernández de Kirchner's reform, like the wiretapping, could be used for illegitimate purposes. In addition, the timing of the reforms, when many people were looking for answers about

[63] Ibid.
[64] Blitzer.
[65] Ibid.

the Nisman case, and the fact it was seemingly rushed to a vote, seemed to further confirm that the actions were not simply democratic for democracies sake.

Fernández de Kirchner's initial proposal underwent some changes in the legislature, but was eventually passed by congress.[66] The SI was dissolved, and replaced by the AFI, which though still under executive control, has a director and deputy who receive congressional approval, which is a positive step.[67] Wiretapping activities were moved to the office of the Attorney General.[68] Supporters of the reforms saw this as a way to end the "promiscuous relationship between the intelligence community and important sectors of the federal justice system" as Paula Litvachky, director of the Justice and Security Program at the Center for Legal and Social Studies, put it.[69] However, as mentioned, critics saw this as troubling given the close relationship Fernández de Kirchner shared with Gils Carbó.

One politician that adamantly opposed the reforms for the reasons stated above was then-Buenos Aires Mayor Macri, who said, "This is not an issue the president wants for her legacy. It is an effort to gain political advantage at a time of disillusionment, annoyance and anger."[70] In addition Macri was outspoken both during and after his election about looking into Nisman's death, which he believed the intelligence reform was partially used to distract from. As a consequence, he has taken particular measures to discredit the reforms of Fernández de Kirchner's government. A particular target has

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[66] Leonel Poblete Codutti, "The Key Points in Argentina's New Intelligence Law," *Telesur*, March 4, 2015, http://www.telesurtv.net/english/news/The-Key-Points-in-Argentinas-New-Intelligence-Law-20150304-0042.html.
[67] Ibid.
[68] Ibid.
[69] Blitzer.
[70] "Opposition Insists It Will Not Support Intelligence Reform," *Buenos Aires Herald*, January 29, 2015, http://buenosairesherald.com/article/180656/opposition-insists-it-will-not-support-intelligence-reform

been the Attorney General. As mentioned, Kirchner's reforms gave wiretapping power to Gils Carbó, and critics considered it a way for Fernández de Kirchner to gain control. Macri took away this power, with Decree 256/2015. Wiretapping powers had been shifted to the attorney general, and the decree gave the Supreme Court these powers.[71] Though changing a disputed part of had been done with the Kirchner reforms, Macri's use of decree was noteworthy, especially when contrasted with the passage of the law (in spite of criticisms) through the legislature.

Ultimately, in spite of her lofty claims about finally reforming the intelligence sector, Fernández de Kirchner's reforms offered little in the way of making intelligence agencies significantly more transparent or accountable. Though some elements of the legislation could have had actual negative consequences (the shift of wiretapping responsibility, for example), on the whole the reform was primarily a politically motivated reshuffling. In the context of hyper-presidentialism, Fernández de Kirchner used her considerable executive power to pass legislation that served her political interests (while doing little for the interest of democracy), thus protecting her considerable power. Alternatively, Macri used the executive strength (in the form of a decree) to undo part of the reform, which also served the political purpose of weakening the Attorney General's office. The capacity of the executive to enact legislation for primarily political purposes (instead of serving the interests of the people) is both a

[71] "Oficial: El Gobierno Suspendió La Aplicación Del Nuevo Código Procesal Penal Y Traspasó Las Escuchas Judiciales a La Corte Suprema," *La Nacion*, December 29, 2015, http://www.lanacion.com.ar/1857916-oficial-el-gobierno-suspendio-la-aplicacion-del-nuevo-codigo-procesal-penal-y-traspaso-las-escuchas-judiciales-a-la-corte-suprema.

symptom of hyper-presidentialism and a reason for its resilience, and an obstacle to meaningful intelligence sector reform.

Judicial Reform

In 2013, Fernández de Kirchner proposed a large and comprehensive judicial reform bill. The judiciary was debilitated by the military junta and had faced several reforms in the years that followed, but not all of them made it more democratic. As a result, though many presidents since 1983 have undertaken the project of judicial reform, the process is ongoing. Some reforms were useful in combating the institutional weakness, but other furthered the role of the court as a rubber stamp for the executive. When Fernández de Kirchner proposed her legislation few doubted necessity of reform, but many took issue with the nature her reforms. Though she advocated them as the solution to the malfunction that had plagued the judiciary, the content of the reforms served to give the executive substantial power over the judiciary, threatening judicial independence.

Judicial Independence and Democracy

An independent judiciary is critical for a well functioning democracy, while also being in tension with it. From an ideological standpoint, and independent judiciary serves as a check on other branches of government, and protects rule of law and civil liberties. From a practical standpoint, an independent judiciary is necessary to protect a countries global standing. However in Argentina, building an independent judiciary came with several challenges. The legacy of authoritarianism, as well as the presidential system with a historically strong executive presents structural challenges to judicial reform.[72] In

[72] G. Shabbir Cheems, Building Democratic Institutions (Bloomfield, Connecticut: Kumarian Press, 2005),

"Building Democratic Institutions" G. Shabbir Cheems lays out the four aspects of judicial independence. These are "autonomy from other branches of government, detachment of judges from conflicting parties, detachment of judges from specific ideologies, and avoidance of public pressures".[73] Cheems acknowledges there are elements of this that are counter to pure democratic ideals (for example there is no democratic way to ensure judges are not pressured by the public or the media). However the four criteria still offer a good framework for examining judicial reform since the end of the military dictatorship.

Judicial independence requires strong institutions. That is, the institutions that administer the courts must be capable of functioning independently (with proper institutional framework and adequate funding and expertise). In addition to empowering the judicial branch to function on it's own, the other branches (particularly the executive branch) must be restrained. Ideally, regulations have to be put in place that keep the executive from stacking the supreme court or otherwise wielding undue influence in the judiciary.

Essentially, judicial independence lies in both if the judiciary can challenge the executive (is there an institutional framework in which such a process could occur, that could not be superseded by the executive) and if it would want to challenge the executive (does the executive control the judiciary to such an extent that viewpoint counter to their own are not meaningfully represented).[74] Ensuring that the judiciary meets these

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175.
[73] Ibid., 173.
[74] Matias Iaryczower, Pablo T. Spiller and Mariano Tommasi, "Judicial Independence in Unstable Environments, Argentina 1935-1998," *American Journal of Political Science* 46, No. 4 (Oct., 2002): 699.

institutional criteria has been an ongoing challenge since the restoration of the democracy in 1983.

The Judiciary During the Dictatorship

Even before the years of the final military dictatorship, the judiciary struggled with Argentina's political upheaval. Since 1930 (when there was the first coup) Argentina experienced 6 interruptions of democracy, the last being the junta that governed until 1983.[75] This general instability affected the capacity of the Supreme Court. Though appointments to the Supreme Court are for life, between the years of 1930 and 1998 (after the reintroduction of democracy) the average tenure for a Supreme Court justice was only 4.6 years.[76] Since the tenure for a president during that time period was only 2.6 years this turnover is not surprising, but it is still indicative of an alarming institutional norm that would take years of relative stability and institutional reforms to normalize. Before 1930, 82% of justices left because of death or retirement. In contrast between 1930 and 1998 only 9% left for those reasons, with 91% being impeached or irregularly removed or resigning.[77] This climate of instability has a very specific result on judicial independence. The longer a judge sits on the court, in a functional democracy, the more likely they are to be working under a president of a different political persuasion than them. Alternatively in the years of political upheaval only occasionally would judges be working under an executive they were in political opposition to. This meant that more often than not, the courts failed to fulfill the second institutional requirement of judicial

[75] Ibid., 701.
[76] Ibid.
[77] Ibid.,702.

independence, which is required for them to fulfill the first one. It didn't matter if the courts had political constraints allowing them to defy the government, because on the whole they didn't want to. When justices depart and are replaced at a natural rate, there aren't usually rapid shifts in the balance of the court, because replacements are generally made by presidents of different parties.[78] When the president has the power to appoint a large number of the court though, judicial independence suffers.[79]

During the years of the Dirty War, the judicial branch, operating under authoritarian control, was a tool of the military government[80]. The judicial branch during the dictatorship can be characterized much more by what it didn't do than by what it did. The National Reorganization Process was a time of massive, widespread atrocities. Thousands were disappeared and many more were tortured or experienced some other sort of unlawful treatment at the hands of the government. During the regime under which these crimes were committed, however, there were no trials for those perpetrating these human rights abuses (the state). Rather, it was the victims who were treated as criminals. Their crime in many instances was political or ideological opposition to the ruling government. Even so, they didn't receive due process or any other sort of conventional protections a democracy should have in place for the accused. In contrast, a genuinely independent judiciary would have been able to protect the civil liberties of citizens from the assault they faced from the rest of the government. As Cheems argues, however, "In a military dominated or other form of authoritarian government, the

[78] Ibid.
[79] Ibid.,703.
[80] Elin Skaar, *Judicial Independence and Human Rights in Latin America: Violations, Politics, and Prosecution* (New York: Palgrave Macmillan, 2011),48.

independent judiciary is the first victim".[81] This was certainly true in the case of Argentina. Not only was the Supreme Court stacked with judges that were all the ideologically aligned with the junta, but the majority of provincial and federal appellate judges were also appointed by the junta.[82] The justices appointed after the coup approved the use of military tribunals to try cases of suspected subversion because, the government argued, the country was in a state of war.[83] This lack of independence resulted in a judiciary that was incapable of acting as a check against government overreach and was a critical enabler in allowing the National Reorganization Process and the horrors it entailed to exist. The legacy of the judiciary during the dictatorship is one of public distrust and institutional weakness, and its consequences have carried into the 21st century, in spite of various attempts at reform.

Judicial Reform During the Transition to Democracy

When Alfonsín was democratically elected, he began an ambitious project of judicial reform. Alfonsín, in keeping with his objective of a clean break with the past, wanted to significantly reform the judiciary. The courts were institutionally weak after years of authoritarian rule. In addition, they were perceived not as independent and impartial arbiters of justice but as another tool of the authoritarian regime. According to Pilar Domingo the Argentinean Courts "reproduce an image of corruption and inefficiency and are not viewed as impartial administrators of justice of autonomous

[81] Cheems, 175.
[82] Skaar, 48.
[83] Smith, 279.

agents of constitutional and legal control".[84] Before the transition, the military had made efforts to keep the Supreme Court in place during the following government, and had tried to pass reforms to secure tenure. However, they were unsuccessful and the former judges had to step down. In keeping with attempts to democratize, Alfonsín appointed a new Supreme Court that was highly qualified and politically diverse. In addition, he replaced other federal courts, though not as completely (he kept the judges that were qualified a comparatively liberal). In addition Alfonsín wanted the courts to hold the criminals in the military accountable for their past wrongdoings, through trials.[85] While these were generally positive developments, Alfonsín's presidency was marked by political tension, and many of his reforms (particularly his diverse court) would not last after his government.

Alfonsín was succeeded by controversial Peronist president Carlos Menem. The Menem presidency would become known for the lack of judicial independence, particularly as it related to the Supreme Court. It was during Menem's presidency that the 1994 amendment to Argentina's constitution was passed. This amendment addressed a broad range of issues that were established by Alfonsín and Menem in 1993, with the Acuerdo de Olivios.[86] Judicial reform was among them. The reason that Menem approved reforms that might limit his power was that they came packaged in the amendment with the right to his reelection (which until the amendment, was prohibited in the Argentine constitution). The court was a high priority for the Radicals, and less so for the Peronists. As a result the issue of the court became a major stumbling block for

[84] Cheems, 174.
[85] Skaar, 49.
[86] Jodi Finkel, "Judicial Reform in Argentina in the 1990s: How Electoral Incentives Shape Institutional Change," *Latin American Research Review* 39, no. 3 (2004): 64.

negotiations. This changed when the sides were able to reach something of a compromise. Negotiators were informed that if "Menem's administration would be willing to concede increased Radical participation in the Court, and greater control in the naming and obligations of judges" the process of constitutional reform could be accelerated, meaning that the reelection amendment that was a priority for Menem would be passed.[87]

Many of the institutional reforms proposed were designed to limit the role of the executive in the judiciary.[88] Chief among these was the creation of the Council of Magistrates. First instance and appellate level judges were previously selected by the executive (though they did have to be approved by senate). With the creation of the Council, a new process was put in place. The Council gave exams when a judicial opening became available, and then the President would select a nominee from the top three candidates. Additionally, while the President was still responsible for nominating court candidates, approval by the Senate required 2/3 supermajority instead of the previous simple majority.[89] One ramification of this increase was a decrease in the capacity of an executive to pack courts, seeing as the opposition party would be necessary to approval. The 1994 amendment was an important reduction in executive power over the judiciary, but was not without its shortcomings. Primarily the constitution did not specify the practices for selecting the members of the Council of Magistrates. The only requirement was that members were "chosen periodically, with an equilibrium of representation from the political branches, judges from all instances, and members from

[87] Ibid., 66.
[88] Ibid.
[89] Ibid.,68.

the legal community."[90] Without any assurance that the selection of members was independent the Council of Magistrates was not guaranteed to be an impartial actor. This limits the effect it can have on judicial independence and the extent to which it can be considered a valid check on judicial subordination to the executive. Furthermore there were problems with implementation of the reforms. The Council of Magistrates was supposed to be operational by 1995, however this did not happen. [91]

Menem was not interested in an institutional body that would reduce his power to name judges. When the one-year period after the amendment was passed ended, 21 federal judicial posts were vacant due to the fact that Menem couldn't name them and the Council of Magistrates was not functioning.[92] Menem did not end up meaningfully changing the composition of the judiciary. In reality, Menem's greatest impact on the judiciary came before the constitutional amendment in 1989 when he packed the Supreme Court with people ideologically similar to him. He accomplished this in part by expanding the number of Supreme Court Justices from 5 to 9, and appointing the judges that filled the new positions.[93] Court packing inhibited judicial independence significantly. Since the executive appointed most of the justices, the court did not serve as an impartial third party when making political decisions. Rather, the Supreme Court's actions could be expected to be equivalent to the will of the executive.

When Nestor Kirchner was elected president in 2003, he made it clear that judicial reform was a priority for his presidency. The institutional climate he inherited was not conducive to an independent judiciary, however. Of particular concern was how

[90] Ibid.
[91] Ibid.
[92] Ibid., 70.
[93] Ibid., 63.

he would handle the practice of complete overhaul of the Supreme Court that traditionally came with each new presidency. Even though appointments were for life (according to the Constitution), regime change routinely meant a new Supreme Court. This was often cited as a primary cause of Argentina's weak judicial independence. Nestor Kirchner, then, was faced with the paradox of wanting to reform a Supreme Court that was highly partisan, while at the same time not wanting to stack the court himself.[94] As a result he took a deliberately limited approach to judicial reform. This included purposely restraining the executives powers to appoint judges by issuing a decree stating that in the event of a vacancy on the court, the President would propose a candidate or candidates, and their names would be published in the Boletín Oficial and the Ministry of Justice website for a period of 30 days. During this period the candidate (or candidates) are subject to a significant screening process. This includes requiring the candidate to file a sworn statement listing affiliations (professional and otherwise) as well as an investigation of their tax history. For the 15 days following the 30-day period of their names being published, objections and other comments can be filed (either by individuals or organizations). When this comment period ends, the president has another 15 days to decide to submit the nomination or nominations to the senate. Then the senate must approve the nominees by a two-thirds vote.[95] This marked a departure from previous practices. It allowed for the public to have a larger voice and requires the candidates to make significantly more information about themselves public. Prior to this decree, candidates were selected in closed (even middle of the night) sessions, without notifying

[94] Daniel Brinks, "Judicial Reform and Independence in Brazil and Argentina: The Beginning of a New Millennium?" *Texas International Law Journal* 40 (2005): 608.
[95] Ibid., 609.

the public.[96] In addition, he brought the Supreme Court back down to the size it had been before Menem's court stacking. Not all of Nestor Kirchner's judicial reforms were positive. While his handling of the Supreme Court was a democratic victory, he gave the executive a veto on the Council of Magistrates.[97] This allowed for more executive control over the lower courts. Overall though, Kirchner's presidency marked a small improvement from the past but there was still a ways to go before the judiciary could be considered functionally independent.

Judicial Reform Under Fernández de Kirchner

In spite of those improvements, the status of the judiciary in Argentina continued to be a point of political controversy. The role and level of autonomy of the judiciary is not a question that has been fully resolved. While Nestor Kirchner's reforms were generally considered to be some of the most democratic reforms his administration achieved[98], his wife's administration was not been nearly as successful in this respect. In 2012, a World Economic Forum report ranked Argentina 133rd of 144 countries in judicial independence.[99] This put them as the fourth worst in Latin America, above only Paraguay, Nicaragua and Venezuela.[100]

Fernández de Kirchner had long advocated for judicial reform, but made her most sweeping proposition in 2013. The six bills were promoted with rhetoric like at

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[96] Ibid.
[97] "Imbalance of Powers," *The Economist*, December 18, 2012, http://www.economist.com/blogs/americasview/2012/12/argentinas-courts.
[98] Daniel Politi, "Cristina and the Supremes," *The New York Times*, July 5, 2013, http://latitude.blogs.nytimes.com/2013/07/05/cristina-and-the-supremes/?_r=0.
[99] "Argentina and the Judiciary: Subverting the Rule of Law," *Transparency International*, April 18, 2013,http://www.transparency.org/news/feature/argentina_and_the_judiciary_subverting_the_rule_of_law.
[100] "Imbalance of Powers."

"democratizing the judiciary," but critics saw it as the opposite.[101] Though the reform came with some democratic benefits (such as mechanisms to limit judicial nepotism and making some information on lawsuits more publically available) the Supreme Court took issue with several elements that it saw as a major threat to judicial independence.[102]

The element that was most discussed as threatening judicial independence were the proposed reforms to the Council of Magistrates. As mentioned, the council is responsible for selecting judges (though not the Supreme Court). Made up of 13 members (comprised of representatives from all branches of the government, lawyers, and academics) members of the council have been internally elected by their peers.[103] However, under the reforms proposed in law 26,855, the majority would be popularly elected. The idea of a popular election is one of the ways Fernández de Kirchner defended her reforms as advancing democracy. However in practice, her proposed reforms would have a much different effect. To be popularly elected, council members must be listed on party ballots during the election. This gives the ruling party substantial control over the council, which translates to their control of the courts.[104] Going back to the framework established in “Building Democratic Institutions”, this is a clear example of a threat to the principle of detachment of judges from specific ideologies. Furthermore it contributes to the problem that plagued Argentina during the periods of instability, of courts not having enough ideological diversity to check the president.

Though critics saw the part of the reform package concerning the Council of

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[101] Hugh Bronstein and Guido Nejamkis, "Argentine Congress Passes Judicial Reform Bill," *Reuters*, May 08, 2013, http://www.reuters.com/article/us-argentina-courts-idUSBRE94801H20130509.
[102] Ibid.
[103] Ibid.
[104] Politi.

Magistrates as the most blatant threat to judicial independence, another controversial part of the bill was how it handled injunctions against the State. The reforms would significantly limit injunctions against the state. While there are practical reasons for not wanting injunctions against the state, there are also major democratic drawbacks. Injunctions, like many mechanisms designed to protect, can be abused. They can prolong cases that should be swiftly resolved. However, by establishing more stringent requirements for injunctions against the state than in other sorts of disputes, the State has privileges that no other party has.[105] In addition, there were serious political reasons that Fernández de Kirchner would want to limit injunctions against the state. Her controversial media law (discussed in the following chapter) had been rendered functionally ineffective by injunctions that projected Grupo Clarín.

As a result, the law was widely condemned by various members of the judiciary and international human rights community as diminishing judicial independence.[106] Nonetheless, in April 2013 all 6 bills were narrowly passed through congress. However a federal judge ruled the election of the council of Magistrates unconstitutional. The government filed an appeal with the Supreme Court. On June 18, 2013 the Supreme Court ruled (6-1) that several parts of the legislation were unconstitutional.[107] In their statement on the decision to rule the law unconstitutional, the Supreme Court reaffirmed that "The judiciary has democratic legitimacy given by the Constitution, which is not

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[105]Lucia Duretta, "A Light at the End of the Tunnel for the Dramatic Decline of Justice and Protection of Fundamental Rights in Argentina," *International Judicial Monitor***,** Spring 2013, http://www.judicialmonitor.org/archive_spring2013/judicialreformreport.html.
[106] "Argentina's Judicial Reforms Foiled," *The Economist*, June 21, 2013, http://www.economist.com/blogs/americasview/2013/06/argentina-s-judicial-reforms.
[107] Politi.

derived from direct election".[108] As a result of this legitimacy, they argued the law was unconstitutional as it damages judicial independence by politicizing the judiciary.[109]

Though the Supreme Court's decision was a victory for judicial independence, the fact remains that the judiciary functions no better than before Fernández de Kirchner's proposal. There is widespread public concern, exacerbated by the death of Alberto Nisman, that the judiciary is one of many parts of the Argentinean government overrun by corruption. On January 19th, 2015 over 400,000 protestors marched In Buenos Aires after Nisman's death. While organizers stated the demonstration was an apolitical show of support for the family of the deceased, the demonstrators themselves had a wide range of grievances with the government, most related to what they perceived as widespread corruption and attempts to concentrate power in the Fernández de Kirchner administration.[110] Even though the 2013 reform attempts largely failed, they served as confirmation of Fernández de Kirchner's willingness to subvert democratic checks on power to reinforce executive control.

Macri and Judicial Independence

Throughout his campaign for presidency, Macri discussed judicial reform as a major issue. Upon his inauguration he reaffirmed this promise, citing his support for an independent judiciary as a major tenant of his administration. This in particular was a jab

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[108] "Consejo De La Magistratura: Los Puntos Más Destacados Del Fallo De La Corte Suprema," *La Nacion*, June 8, 2013, http://www.lanacion.com.ar/1593259-corte-suprema-declaro-inconstitucional-la-reforma-del-consejo-de-la-magistratura-puntos-sali. Translation by Brito.
[109] Ibid.
[110] Simon Romero and Jonathan Gilbert, "March to Honor Dead Prosecutor Highlights Tensions Over Government in Argentina," *The New York Times*, February 18, 2015, http://www.nytimes.com/2015/02/19/world/americas/argentines-march-to-honor-dead-prosecutor-alberto-nisman.html.

at the way the court had functioned under Kirchner. At his inauguration Marci reiterated this sentiment, stating, "Under our government there will be no *Macrista* judges. Justice and democracy simply do not exist without an independent judiciary. But we must go along with justice in a process to clean it from political vices. Judges cannot be party militants."[111] The issue of the judiciary in general, but especially the Supreme Court was of particular relevance. Since one Supreme Court Judge resigned in December 2014 and another in December 2015, there were two vacancies on the Supreme Court.[112] These spots had remained vacant because of increasing opposition displeasure with Fernández de Kirchner had caused the opposition to make a pact not to approve any judges she proposed.

Macri took action almost immediately after his election to fill the two spots on the Supreme Court. However, since congress was in recess he completed it by decree. Specifically he used a constitutional clause that states that in situations like this the President "may fill up employment vacancies, which require an agreement by the Senate, and which may come up during its recess, through appointments in commission which will expire at the end of the following legislature."[113] What this means is that Macri was able to fill the positions without legislative oversight. He sidestepped the process as constitutionally outlined, which requires the nominees to go through a public hearing process and then receive a two-thirds vote of the Senate.

There were practical reasons for Macri's decision. The Supreme Court at the time

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[111] Del Río Roldán, Andrés. "Macri and the Judges"
[112] Valentiana Iricibar, "Macri Appointed Two Supreme Court Justices And Everyone's Claws Came Out," *The Bubble Argentina News*, December 15, 2015, http://www.bubblear.com/macri-appointed-supreme-court-justices.
[113] Luciana Bertoia, "President Skips Senate to Name Two Supreme Court Justices," *Buenos Aires Herald*. December 15, 2015. http://www.buenosairesherald.com/article/205006/president-skips-senate-to-name-two-supreme-court-justices.

only had three judges. The Court can technically function with three judges, because Argentine law states that for resolution to be passed, three judges must agree (a full court has five judges).[114] However, it is functionally more difficult to get the only three judges to agree unanimously then to get three out of five to agree. By filling the vacancies, Macri was attempting to create a more functional Supreme Court.

Even so, because of his choice to use a decree, his decision proved controversial. Across the spectrum of Macri's opposition the decision to use the decree was criticized as a setback for democratic rule in the country. The fact that he was able to use a decree was criticized, because it relied on an interpretation of the constitutional clause that was not universally accepted. In order for Macri to be able to appoint the justices by decree, he had to interpret the constitutional clause, which only specified "employment vacancies" to include Supreme Court Justices. Many people, like former Presidential Candidate and leader of the Generation for a National Union party, Margarita Stolbizer, believed that this interpretation was too liberal, saying not only that it was intended to refer to employment other than the Supreme Court (like army leaders and ambassadors) but saying that "Not even Cristina Fernández de Kirchner dared to do something like this."[115] Even other more sympathetic political leaders, like Sergio Massa said, "The names [the candidates] are impeccable, but the manner, to me, was horrible". [116] In addition to the discussion of whether or not the clause covered Supreme Court appointments is the issue of whether the vacancies met the dual criteria of necessity and urgency to warrant an

[114] Iricibar.
[115] Ibid.
[116] Ibid.

emergency decree.[117] Macri had significant political reason to issue the decrees. Going through the senate would subject his nominees to approval by the opposing Peronist majority. As a result, critics saw his use of decree as a means to circumvent that. This is supported by the argument of the necessity and urgency. In terms of urgency, filling the vacancies would allow the Supreme Court to function at a better level, and Macri had prioritized judicial reform. However, in terms of necessity, just because congress was in recess, did not mean that the only option was a decree. If Macri did want to fill the positions quickly, while keeping democratic mechanisms in place, he could have convened an extraordinary session.[118]

Beyond mere criticism a Federal Judge, Alejo Ramos Padilla, granted an injunction to suspend the judges a week after their appointment. The resolution stated "if the mechanism to appoint Justices to the Supreme Court is not valid, if neither the Constitution's wording nor its spirit support it, if it affects the separation of powers and the judges' independence, it's necessary to put the constitutional mechanisms in motion as soon as possible to prevent the measure."[119]Macri eventually decided to go through Senate with the nominations.

Ultimately, Macri's decision to initially use an emergency decree to appoint two judges, and his claim that he was improving judicial independence is revealing of the

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[117] Andrés Del Río, "President Macri and Judicial Independence on the Argentine Supreme Court," *Blog of the International Journal of Constitutional Law*, Feb. 5, 2016, http://www.iconnectblog.com/2016/02/president-macri-and-judicial-independence-on-the-argentine-supreme-court/

[118] Uki Goñi, "Argentinian president under fire for 'anti-democratic' decrees," *The Guardian*, January 10, 2016, http://www.theguardian.com/world/2016/jan/10/argentinian-president-mauricio-macri-anti-democratic-decrees.

[119] Demien Bio, "Macri's Controversial Supreme Court Appointments Suspended By Judge," *The Bubble Argentina News*, December 21, 2015, http://www.bubblear.com/32821-2.

greatest issue that faces Argentinean democracy today. Though Macri was elected on the hope that he could improve Argentina's democracy, he attempted to improve the functioning of the judicial branch through the least democratic means possible. Though the public pushback caused him to send the judges to Senate after all, his willingness to use Presidential decree (which was reliant on a liberal interpretation of the constitution) indicates that Macri has a place in the hyper-presidential tradition. The major issue with Macri's attempt at Supreme Court appointments is not the appointments he made, or even a demonstrated desire to control the judiciary. Rather his use of decree indicates that he is willing for Argentina to remain a delegative democracy, which always runs the risk of being an illiberal one. Overextension of executive power, seen in different ways by both Fernández de Kirchner and Macri, can weaken judicial independence, which encourages further overextension of the executive. This cycle is a hurdle that must be overcome to significantly reform the judiciary.

Media Regulation

In 2009, Fernández de Kirchner proposed legislation that would entirely replace the dictatorship-era laws relating to the media. Law 26.522, according Fernández de Kirchner, was aimed at breaking up the media monopolies that had existed since the re-institution of democratic rule. The law was polarizing for the manner in which it gave the government involvement in regulation, and was one of the first things to be reformed when Macri took office.

The Media and Democracy

Liberal democracies have some sense of freedom of the press and of public communication. These rights are generally laid out in the constitution, however they must also be put into practice. A free press includes the obvious absences of violent censorship. However it is not only that. Any monopoly on information, whether that monopoly is coming from the government or corporate interests, limits the capacity of the media to fulfill the optimal function of a free press in a liberal democracy. In a liberal democracy the media should hold the government accountable and preserve a level of transparency with regards to government activities.

There are a number of criteria for a truly democratic media. Constitutional freedom of the press is only one part of the picture. Democracies must be a safe place for the press to function, which the government can ensure by not enacting violence against journalists themselves (commonly seen in non-democracies) and seeing that those who

do are held legally accountable.[120] In addition those who use the media as a means of whistle blowing must be able to do so without fear of retribution, via libel laws. Internationally, libel is generally held to two standards. The first is that of "actual malice" That is, for something to be libelous plaintiffs have to prove that not only is the information false, but that the journalist knew or should have known that the information was false when they reported it. The second standard is "neutral reporting" which ensures that journalists cannot be sued for accurately reproducing information from an explicitly mentioned source, even if the information turns out to be false. This is counter to the prevailing idea in traditional Latin American (including Argentinean) laws of "*desacato*" which allowed for journalists to be punished criminally for what vaguely amounted to "disrespect of legal authorities". [121] This is a legacy of the authoritarian government, and combined with the weakness of the press during and after the dictatorship, made media reform since 1983 challenging but necessary.

Media During the Dictatorship

During the military dictatorship, media was for all intents and purposes, completely silenced. The period was marked by overt censorship. This is largely because the national reorganization process was dependent on secrecy regarding the widespread disappearances and other state-sanctioned violence against the political dissidents (real and perceived). Because of this (and because journalists were often politically minded and critical of the government) during the dictatorship journalists were natural targets. The chapter of CONADEP's official Nunca Más report that deals with the press

[120] Smith, 266.
[121] Smith, 269.

concludes “If one is to point to a sector of Argentine society that was singled out to be closely watched by the whole repressive and persecutory apparatus of the military government, then, inevitably, one must mention journalists”.[122] Specifically, foreign journalists were expelled from the country, the Argentine Journalist’s Federation was taken under government control, and journalists themselves were targeted for disappearance by the reorganization process. Officially, government control of the media was codified in a law stating the offense of publishing opinions that were considered to be “upsetting, prejudicing or demeaning the activity of the Armed, Security, or Police Forces” was punishable by up to ten years in prison.[123] Unofficially, the government controlled the press by creating a climate of fear among journalists. Though exact figures are difficult to find, it is estimated that in the first few months of the reorganization process more than 45 journalists were illegally detained and disappeared. The total number of journalists disappeared throughout the process is estimated to be more than 100. In addition, this does not include the many journalists that were imprisoned without trial, nor the number of journalists that left Argentina out of fear of the government.[124]

The result was that the military was relatively effective at silencing any opposition, and was for practical purposes in control of the media. There were some notable exceptions, however. Traditionally leftist newspaper La Opinion was at times critical of the military government, albeit inconsistently. In addition, English language daily “The Buenos Aires Herald” was consistently critical, and made efforts to publicize

[122] "Part II. The Victims," *CONADEP*, 1984, Web Feb 28, 2016. http://www.desaparecidos.org/nuncamas/web/english/library/nevagain/nevagain_245.htm.
[123] Ibid.
[124] Ibid.

the violence undertaken by the military governments.[125] Both of these papers often found themselves threatened by the military, however, and were only a few voices, compared to the government-controlled press apparatus. As a result, the media was not a meaningful check on government power.

Media During the Transition

An end to the military dictatorship brought an end to direct censorship, but the institutional weakness of the media means it did not result in an immediately functional press system. A 1997 New York Times article discussing press freedom in Latin America put it thusly "freedom of the press remains a goal rather than a reality across much of the region [Latin America], and often the antagonists of free speech are the democratically elected governments promising to protect it".[126] Though no longer explicitly threatening journalists, the government still managed to exert control.

The issue of restraints on instigative journalism was present during the transition. In 1992, Menem charged an investigative reporter with *descato*, which was then still a criminal offense. The reporter, Horacio Verbitsky, appealed to the Inter-American Commission on Human Rights. The IAHR ruled in Verbitsky's favor, which resulted in negotiations that would end in the repeal of the *descato* law in Argentina. This did not establish standards of actual malice and neutral reporting. In fact, several years later Verbitsky would attempt to introduce those standards in relation to other defamation

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[125] Tim R. Samples, *Of Silence and Defiance: A Case Study of the Argentine Press during the "Proceso" of 1976-1983*. The University of Texas at Austin, 2004. http://lanic.utexas.edu/project/etext/llilas/ilassa/2008/samples.pdf

[126] David J. Park, "Media, Democracy, and Human Rights in Argentina," *Journal of Communication Inquiry* 26, no. 3 (July 2002):242.

cases, with little success. In 1999, new President De La Rua tried to take action, however when a scandal broke out and journalists reported 11 senators were involved in a bribery scandal, backlash against the press stalled the bill, halting efforts to establish those standards.[127]

Another way to look at the limits on press freedom during the transition is through the lens of "media politics", or how various institutions, including the government and the church, influenced different media outlets.[128] In the early days of the transition, the press was dominated by more conservative voices. These outlets included La Razón, which had historically been linked with the intelligence sector, and La Nación, which was considered "the voice of the establishment" and deeply connected to the Catholic Church.[129] Clarín was one of the only major newspapers that was not right leaning, however in the late nineties it did "not practice anything akin to day-by-day aggressive investigative reporting".[130] This weak press was a direct legacy of the dictatorship. If the military junta suffocated all press outlets that were not sympathetic (or at least indifferent) to them, even after the dictatorship ended the media would be skewed.

The transition to democracy was also marked by economic reforms that would have a profound impact on the press. Like the other neoliberal reforms that took place during the Menem regime, these reforms favored the liberalization of markets, reforms that would profoundly shape the Argentinean media landscape. The results of these reforms were a series of mergers and acquisitions that resulted in the increasing

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[127] Smith,. 269.
[128] Park, 243.
[129] Ibid.
[130] Ibid., 244.

concentration of media outlets in a few hands. By the end of the 1990s, Argentinean media was dominated by three major media conglomerates. [131]

One major conglomerate that achieved dominance during the period of transition was Grupo Clarín. Grupo Clarín consists of the largest newspaper (by circulation) in Argentina as well as partnerships with various provincial newspapers. They also own one of the main television channels in Buenos Aires and several channels in the interior, and a radio station network. On the distribution side, they own the leading cable television distribution system, and several cable television signals. The also have numerous other involvements in things like Internet and movie production.[132] Media concentration, as emerged in the period after military dictatorship, can threaten a democratic press. Less diversity of media outlets translates to less diversity of ideas.

The 1980s and 90s also featured some attempted government actions that threatened the media. The government considered increasing the sentence for a libel conviction, as well as amending the constitution to include a right-of-reply rule that would allow anyone who believed they were wronged in the press to publish a reply. In addition the Senate proposed a rule that would allow congressmen to arrest and detain anyone who wrote or broadcast anything that was offensive to them.[133] Although these laws did not pass, they indicate that the media was still struggling to become a fully democratic institution. Furthermore, the government's control of media licenses allowed them a degree of control over the airwaves. [134]

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[131] Ibid., 245.
[132]Martin Becerra and Guillermo Mastrini, "The Audiovisual Law of Argentina and the Changing Media Landscape," *The Political Economy of Communication* 2, No. 1 (5 July 2014).
[133] Park, 248.
[134] Ibid., 249.

The transitional period exemplified part of the reason that creating a dynamic media after an authoritarian government is so difficult. In addition to the difficulties posed by an industry recovering from overt censorship, creating a democratic media requires a level of balance. It is easy for government policies to restrict the functioning of the media (be it by libel laws, controlling media licenses, or other means). However, government non-intervention can also be dangerous when it results in too much corporate control. After the return to democracy, government policy generally favored non-intervention with the media. It was the presidency of Fernández de Kirchner, her conflicts with the media, and her subsequent proposal of Law 26.522 that marked a shift away from this trend.

Fernández de Kirchner and the Media

Cristina Fernández de Kirchner had several conflicts with the media. In 2009, the government nationalized the broadcast of all televised soccer games under an initiative called Fútbol para Todos (Football for All). Broadcasting the games on the state-run public television channel, instead of the Grupo Clarín-owned network was controversial.[135] The primary reason for the controversy stemmed from the fact that the soccer games, which have a high viewership (which would only increase on the public network) could now be used for unlimited government advertising. This criticism was not unfounded, as since the decision, soccer matches heavily feature advertising supporting

[135]Juan Forero, "Argentina scores points with free broadcasts of soccer games," *The Washington Post*, November 1, 2009, http://www.washingtonpost.com/wp-dyn/content/article/2009/10/31/AR2009103102092.html.

the government.[136]

Tension between the media and the government became particularly strong when Fernández de Kirchner proposed a wide-ranging media reform law, aimed largely at Grupo Clarín. Though Grupo Clarín was at one time generally supportive of Kirchner and her policies, that began to change in 2007. The newspaper Clarín published an article insinuating that the Kirchner campaign may have received a large secret contribution. In addition, in 2008 Clarín sided with striking farmers, in conflict with Kirchner's increased export taxes on agricultural products. That's when the president entered what was a largely adversarial relationship with the media conglomerate, culminating in her largest reform proposal, Law 26.522, or "the Audiovisual Law".[137] Kirchner and her supporters claimed the law aimed to further democratize the media, by limiting what they claimed was a dangerous monopoly.

The law was proposed to replace a law that had been enacted in 1980, during the military dictatorship. This law, Law 22285, gave a few major media companies nearly complete control over the Argentine media. Law 26.522 marked several basic changes from the military era law. It lowered the number of broadcasting licenses a company could hold from 24 to 10. Controversially, it gave companies that had more than that allotted amount 1 year to sell them. Companies claimed that not only would this force them to sell licenses at a very low price but that these licenses would eventually end up in the hands of groups and businesses close to the government. The law also divided the airwaves into thirds, with one third going to the private sector one to the government and

[136]Sara Rafsky, "In government-media fight, Argentine journalism suffers," *Committee to Protect Journalists*, September 27, 2012, https://cpj.org/reports/2012/09/amid-government-media-fight-argentine-journalism-suffers.php.
[137] Park, 249.

one to non-profits. The law gave the executive branch the right to assign licenses in cities where the population exceeded 500,000. Seventy percent of radio and sixty percent of television had to be produced in Argentina. Unless they arranged a partnering cooperative, telephone companies could not participate in the cable business. Additionally, the law regulated the distribution of advertising available to private channels, but did not regulate official advertising that promoted governmental work or actions.[138]

An important part of the law was the establishment of a new regulatory agency for communications, the Federal Administration of Audiovisual Communication (AFSCA). Kirchner appointed Martín Sabbatella as the first Director of AFSCA.[139] He was a loyalist to Kirchner and her party. This exemplified what a major criticism of the law was: if the president how the power to control the leadership of the independent regulatory body, it could not effectively serve as an independent regulatory body. Instead, it would act as a method for carrying out the will of the executive. This was further exemplified by the makeup of the board. The board was made up of seven members. Two of these members were chosen by the executive. Three were chosen by the Comision Bicameral, based on the composition of congress. The other two are chosen from candidates nominated by the Federal Council for Audiovisual Communication (CFCA).[140] This composition gave the executive (especially when considering the ruling party) significant influence over the composition of the board.

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[138] Ibid.
[139] Ibid.
[140] Robbie Macrory, "Dilemmas of Democratisation: Media Regulation and Reform in Argentina," *Bulletin of Latin American Research* 32, No. 2 (2013):185.

Congress passed the law on October 10, 2009.[141] However, the law was subject to immediate criticism from the opposition, who viewed it as simply transferring the power of the media monopoly from larger corporations (like Grupo Clarín) to the government, a clear threat to democracy. As a result, supporters and opponents of the law entered a legal battle that would last for years, effecting the implementation of the law. The law placed the executive branch under Kirchner at odds with the judicial branch, as the implementation of the law was blocked by a series of injunctions and appeals. There were several specific parts of the law that Grupo Clarín challenged. Article 41 makes media licenses non-transferrable. Article 45 includes measures to limit the amount of media licenses a company can hold. Article 48 ruled out the legal concept of "vested rights" and Article 161 limited the adaptation term to one year.[142] In 2012, Grupo Clarín won a victory, when a court ruled that it could not be forced to sell its licenses before the Supreme Court ruled on the constitutionality of articles 45 and 161.[143]

Throughout the legal battle the legacy of the dictatorship was ever-present. Proponents of the law cited Grupo Clarín's dealings during the dictatorship as reason for its dismantling. In a more personal case, the Kirchner government led an investigation into the children of Clarín's largest stakeholder and heirs to the shares, Marcela and Felipe Noble Herrera. Specifically, claims were made that Marcela and Felipe were the

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[141] Simon Romero and Emily Schmall, "Battle Between Argentine Media Empire and President Heats Up Over a Law," *The New York Times.* Nov. 30, 2012, http://www.nytimes.com/2012/12/01/world/americas/media-law-ratchets-up-battle-between-kirchner-and-clarin-in-argentina.html

[142] "The Supreme Court declares the constitutionality of the Media Law," *Télam,* November 29, 2013, http://www.telam.com.ar/english/notas/201310/852-the-supreme-court-declares-the-constitutionality-of-the-media-law.html.

[143] Simon Van Woerden, "Media Law Reform Pits Argentine Executive Branch Against Judiciary," *Americas Quarterly,* December 7, 2012, http://www.americasquarterly.org/content/media-law-reform-pits-argentine-executive-branch-against-judiciary

children of women killed during the dictatorship.[144] Though DNA tests would eventually disprove this, it is indicative of the manner in which the legacy of the dictatorship was used to tarnish Grupo Clarín in the court of public opinion. Kirchner supporters often repeated the tagline "Clarín Lies" in relation to the media group.[145] Kirchner and her supporters framed the new law as a way to break apart a monopoly, and specifically one that was complicit and therefore culpable in the military dictatorship. At the same time critics of the law viewed it as equally undemocratic.

Indeed the main concerns were not with the general goals of the law (to break up large media conglomerates) but rather with how they could (and presumably, would, be used). While international groups and human rights activists across the political spectrum supported taking the control of the media out of so few hands, the primary concern would be that it would silence critics of the government. These concerns proved themselves not unfounded. A 2013 report by the IAPA found that 96 percent of new media licenses granted since the law went to government or pro-government entities, indicating that the law was being abused.[146] Even so, the law had considerable support. The UN Special Rappatour on Freedom of Expression went as far as to call it a model for the continent.[147] In 2013, 4 years after the law was passed by congress, it was held up in it's entirety by the Supreme Court.[148]

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[144] Romero Battle Between Argentine Media Empire and President Heats Up Over a Law".
[145] Ibid.
[146] "Freedom of the Press: Argentina," *Freedom House*, https://freedomhouse.org/report/freedom-press/2015/argentina.
[147] "Para un representante de la ONU, la ley de medios 'es un modelo para todo el continente'," *Diario Ambito*, October 15, 2012, http://www.ambito.com/658710-para-un-representante-de-la-onu-la-ley-de-medios-es-un-modelo-para-todo-el-continente.
[148] Bennett, Tess, "Supreme Court Delcares Media Law Constitutional," *The Argentina Independent*, October 29, 2013, http://www.argentinaindependent.com/currentaffairs/supreme-court-declares-media-law-constitutional/

Macri and the Media Law

When Kirchner left office and was replaced by Macri, her controversial media law was one of the first things to go. Specifically, Macri eliminated the AFSCA and the AFTIC, instead establishing the ENACOM and sponsoring a new law to replace Law 26.522. In charge of the ENACOM, Macri appointed a long time ally of his, Miguel de Godoy.[149] By eliminating the organizations that were critical to the Audiovisual Law, and stating intentions to re-loosen restrictions on media corporations, Macri was reverting to the pre-Fernández de Kirchner practice of general non-intervention with the media. In addition, two things are notable about how these changes were brought about. The first is that much like Fernández de Kirchner and her supporters claimed Law 26.522 was protecting and furthering democracy, Macri and his supporters used democratic rhetoric to defend his changes to the law. According to his cabinet chief, Marcos Pena, Macri's reforms marked "the end of the war against journalism". [150] The second and most relevant part is that these changes were made very quickly after Macri was elected, while the legislature was in recess. They were made, therefore, by decree.[151]

The use of decree immediately faced criticism from the opposition, and much like opposition to the original Media Law, it is framed as a subversion of democracy. Legislator Diana Conti claimed "The Media Law is not a law that came from the political power but from the people, so they are not only closing down the AFSCA but

[149] "Argentine President Macri Guts Media Law Through Decree," *Telesur*, December 30, 2015, http://www.telesurtv.net/english/news/Argentine-President-Macri-Guts-Media-Law-Through-Decree-20151230-0025.html.
[150] Ibid.
[151] Ibid.

also freedom of expression and popular will".[152] The use of decree to quickly limit a law that had been passed by congress indicates an abuse of executive power.

A country where the government controls too much of the media is not a country where the press operates democratically. Though the press is extra-governmental, they can and should still operate as a check on the power of the government through warranted criticism and increased transparency. While the press is separate from the government, it still subject to government regulation, meaning the government can stop the media from functioning democratically. That was happened in Argentina during the Fernández de Kirchner administration. Macri's decision to gut her media law through emergency decree, however, was also undemocratic. Furthermore, a media controlled by corporate interests, when those are entwined with government interest will also not meaningfully serve a democracy. Looking forward, Macri's changes to the media law could have different outcomes. In the best-case scenario for democracy, Macri was using a non-democratic mechanism for ultimately democratic objectives (taking control of the media out of government hands). In the worst-case scenario he was using a non-democratic mechanism for non-democratic objectives (putting control back into the hands of monopolistic companies).

Overall, both Fernández de Kirchner's law and Macri's subsequent dismantling of much of the law fail to achieve the necessary balance between government regulation and non-intervention necessary for the media to function democratically. Fernández de Kirchner's hyper-presidential tendencies tainted the stated democratic intentions of her

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[152] "'They Are Subjugating Popular Will, Freedom of Expression,'" *The Buenos Aires Herald*, December 30, 2015, http://www.buenosairesherald.com/article/205830/they-are-subjugating-popular-will-freedom-of-expression.

reforms, by allowing them to be used to reinforce executive strength. Alternatively, Macri's hyper-presidentialist use of decree to undo a critical piece of the reform allows for the same problems that limited the media's capacity to function dynamically (corporate monopolies) before the legislation to continue to plague Argentina.

Conclusions on the Future of Institutional Reform

Upon closer examination, three of Cristina Fernández de Kirchner's most far reaching reforms (her intelligence reform bill, her judicial reform bill, and her media law), though all purported to be democratizing institutions that had suffered under the dictatorship, actually ranged from inefficient to harmful to democracy. They were both a result of and a contribution to the tradition of hyper-presidentialism in Argentina, which has plagued both early Argentinean democracy and the recent democracy that emerged after the military junta. Further changes to these institutions by President Macri also indicate an emphasis on executive power that is likely to hinder substantive institutional reform.

This is because, for several reasons, hyper-presidentialism is self-reinforcing. When the president has a lot of authority, officially or unofficially, through the powers in the constitution or the power they gain from control of their party, they are able to act in a way that gives them more power. By strengthening their power over the judiciary, or using presidential decree to appoint Supreme Court justices, for example, the judiciary is then less likely to serve as a meaningful check. If a president uses a friendly legislature to pass laws granting them more control over intelligence service, then they are going to able to use that for more political gain.

Furthermore, the longer a country exhibits the signs of hyper-presidentialism, the less likely they are to go away. More often than not, the strengthening of the executive means the weakening of other institutions. When the intelligence sector is less autonomous, the judicial branch less independent, and the media less separate, they are

not only legally constrained, but also less capable of performing their democratic functions. Re-establishing them becomes more difficult, intensive, and costly.

Finally, history proves to be a difficult thing to overcome. In the early days of the transition, recent instability and the threat of military intervention could be indicated as justifications for presidential decrees and the role of a strong executive. Though in recent years that threat seems far less imminent the legacy of the dictatorship still plays an important role in politics. This is encapsulated by the fact that all three of Fernández de Kirchner's reforms were touted by her and supporters as increasing the quality of democracy. Often direct references to the dictatorship were made. When a democratic government emerges from a period of state-sponsored repression the willingness of the people to support democracy, even when that democracy is not strictly liberal, because it is so far superior to the alternative can contribute to hyper-presidentialism and prevent the full consolidation of democracy.

In order to predict what Fernández de Kirchner's reforms, and Macri's subsequent responses, indicate about the future of hyper-presidentialism and democracy in Argentina, it is necessary to consider the typologies of democracy discussed in chapter 1, keeping in mind that delegative democracy generally refers to how policy is enacted, and illiberal democracy primarily refers to the nature of those policies. Fernández de Kirchner's intelligence reform, judicial reform, and media law all passed through the legislature (albeit one dominated by her own party). However they all served her political interests more than they improved democracy. Additionally, Macri's responses, for the most part, have been delegative, even when they were not illiberal. His decree that shifted wiretapping away from the office of the attorney general (which had given substantial

power to Fernández de Kirchner) was a re-strengthening of the capacity of the intelligence sector to function democratically (though there were also likely political motivations). His (eventually failed) attempt to appoint two Supreme Court judges by decree would have resulted in a more highly functioning court, and they were not unqualified, but he completely sidestepped the constitutionally outlined process. The most controversial of the steps was his media law, wherein he dismantled a crucial element of the law passed by the legislature with a decree. All of these responses also were motivated, not by democracy, but rather by the political motives of the executive. This indicates that, hyper-presidentialism is far from over in Argentina. Argentina's intelligence sector, judiciary, and media still need reforms in order to function democratically, however the continued use of executive power to protect presidential political interests indicates that significant reforms will not come without ending the hyper-presidentialist tradition.

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