

MEMORANDUM

Re: Legal situation of the transition government in Honduras
Date: June 29, 2009

The following is a summary of the events leading to the formation of a transition government on June 28, 2009 for the Republic of Honduras.

On March 23, 2009, President José Manuel Zelaya Rosales, and his Cabinet, meeting as Council of Ministers (*Consejo de Ministros*) issued executive order PCM-005-2009, in which he ordered the National Institute of Statistics (*Instituto Nacional de Estadísticas*) to conduct a “popular consult” on June 28, 2009. The popular consult would ask Honduran citizens whether they wanted to add a fourth voting station at the national presidential, municipal, and congressional elections to decide whether a national constitutional assembly should be convened. A national constitutional assembly consists of a special meeting of representatives who would dissolve the current constitution and draft a new constitution. The Constitution of the Republic of Honduras, in effect since 1982, only contains three types of articles that may not be modified by the normal legislative process: those dealing with the boundaries of the national territory; those referring to the republican form of government; and the temporal limits of the presidential term.

As early as April, 2009, the president’s constitutional law experts, including attorney Efraín Moncada Silva, advised in an internal memorandum that the popular consult was illegal and that the Office of the Public Prosecutor (*Ministerio Público*) would be authorized to prosecute criminal proceedings for abuse of authority against its proponents. In fact the Office of the Public Prosecutor had begun its investigations into the possible illegality of the popular consult since March 25, 2009. As a result of these investigations, on May 8, 2009, the Office of the Attorney General petitioned for the annulment of executive order PCM-05-2009 in the Administrative Law Tribunal (*Juzgado de lo Contencioso Administrativo*). In interviews regarding this petition, the Public Prosecutor General (*Fiscal General de la República*), Luis Rubí, stated that any attempt to convene a national constitutional assembly would create an irregular condition and would itself violate the tenets of the current constitution. The Office of the Public Prosecutor also contended that the Supreme Electoral Tribunal (*Tribunal Supremo Electoral*) is the only organism authorized to conduct consults or polls with electoral purposes, in accordance with article 15 of the *Electoral and Political Organizations Law (Ley electoral y de organizaciones políticas)*.

The presiding judge of the Administrative Law Court, Jorge Zelaya Zaldaña, entered the petition under docket 151-2009. Because the Office of the Public Prosecutor demanded an injunction on the popular consult in order to suspend the poll of June

28, the tribunal considered the injunction before considering the merits of the case and issuing a final sentence.

In this process, the Office of the State Attorney (*Procuraduría General de la República*), as the legal representative of the State, interceded in the case, but stated a position, in agreement with the claims of the Office of the Public Prosecutor. In light of the foregoing, on May 12, 2009, the Administrative Law Tribunal granted the injunction on the grounds that there was a great likelihood that the popular consult was illegal and that the injunction was necessary to prevent the popular consult since its execution would cause irreparable damage. This decision effectively banned the popular consult until a final decision on the merits was issued.

Notwithstanding the foregoing, the President continued with his activities in preparation of the popular consult. However, he made no further executive orders in order to avoid any legal claims. It was not until June 25, 2009 that the President issued executive order PCM-019-2009, which cancelled executive order PCM-05-2009. Immediately following the cancellation order, on Thursday, June 26, 2009 the President and his Council of Ministers issued a new executive order PCM-020-2009,¹ this time ordering a “popular poll” on June 28, 2009 with the same question as the previous popular consult, about the installation of the national constitutional assembly. The new popular poll order alleges that under article 5, numeral 1, of the Citizen Participation Law (*Ley de participación ciudadana*) Zelaya’s Ministers collected signatures petitioning for the popular consult in March. Nonetheless, the Administrative Law Tribunal concluded that the Citizen Participation Law does not give the President, or any other citizen, powers to make any consultations in violation of the Electoral and Political Organizations Law. Therefore, executive order PCM-020-2009, even with the name change, still violates the sentence of the Administrative Law Tribunal. This tribunal also referred to executive order PCM-027-2009 in a separate order authorizing the Honduran Air Force to place into custody the poll materials on the ground that the president’s effort to obtain them also constituted a violation of the judicial decision.

In order to clarify the issue further, the Administrative Law Tribunal stated that its order barred any act taken in furtherance of the illegal poll of the last Sunday in June. This prohibited any action related to executive orders PCM-019-2009, PCM-20-2009, and PCM-027-2009 or to the authorization for the Honduran Air Force to take custody of the poll materials.

¹ There is some confusion as to this last popular poll order, because it is labeled as if it were signed into effect on June 26, but it was simultaneously published at the same time as the cancellation order in the same edition of the official gazette on June 25, 2009.

Aside from the direct judicial processes, all of the State institutions, with the exception of the Executive Branch, issued opinions declaring the illegality of the poll, including the Supreme Electoral Tribunal, the National Congress, and the National Commissioner for Human Rights. Most private organizations, including the Honduran Bar Association (*Colegio de Abogados de Honduras*), the Tegucigalpa Chamber of Commerce and Industry (*Cámara de Comercio e Industria de Tegucigalpa*), and the Honduran Council for Private Enterprise (*Consejo Hondureño de la Empresa Privada*), agreed that the poll was illegal.

The Administrative Law Tribunal officially notified all of the parties involved in the organization of the poll to cease any action in violation of its sentence declaring the poll illegal. After being notified by the judiciary of its decision, the Chief of the Joint Military Council (*Jefe del Estado Mayor Conjunto*) of the Armed Forces, expressed to the President his reservations about commanding the Armed Forces to obey an illegal order. As a result, the President's dismissed the Chief of the Joint Military Council. Upon learning of the dismissal, the Office of the Public Prosecutor immediately petitioned the Supreme Court of Justice to declare the removal unconstitutional. The Supreme Court of Justice agreed with this claim, holding that the refusal to obey an illegal order is not legal grounds for dismissal. In solidarity against the illegal destitution, the Chief of the Honduran Air Force, Luis Prince, the Chief of the Army, Miguel Padgett, and the Chief of the Naval Force, Juan Pablo Rodríguez, all submitted their resignations to the President. The President's Minister of Defense also resigned as a result of the dismissal of the Chief of the Joint Military Council.

Despite the manifested declarations of the poll's illegality, the President and his Ministers continued their actions in furtherance of the poll. These actions resulted in widespread protests and open confrontation between the different government institutions. . Meanwhile, the Office of the Prosecutor and the Supreme Electoral Tribunal began to confiscate the poll material, in compliance with the orders of Judge Danery Antonio Medal Raudales of the Administrative Law Tribunal. However, the President defied the confiscation, and leading a mob of people, entered the warehouses of the Honduran Air Force, where the material had been confiscated, and seized it by force to proceed with the poll.

The Supreme Court of Justice held that Zelaya had committed various crimes as a result of the poll and issued an order for his detention by the Armed Forces. Pursuant to this order, the Armed Forces arrested Zelaya on the morning of June 28, 2009. The President was escorted to a plane, and left the country towards Costa Rica. During this time, the Office of the Prosecutor gathered evidence at the multiple poll centers to proceed with criminal accusations against the poll organizer, for crimes ranging from treason, disobedience, and malfeasance with regard to public funds.

That afternoon, the National Congress opened a special session and read a resignation letter signed by the President. Congress approved the letter and suspended the session. Following this vote, the National Congress unanimously approved a law impeaching the President's conduct and removing him from his office. Because the Vice-president had resigned in 2007, the Constitution of the Republic states that it is the President of Congress that must assume the office of President of the Republic. Consequently Roberto Micheletti Baín, then the President of Congress, was sworn in as President of the Republic. Thereafter, and because of the vacancy of the office of President of the National Congress, José Alfredo Saavedra was also sworn in as President of Congress at the same session.