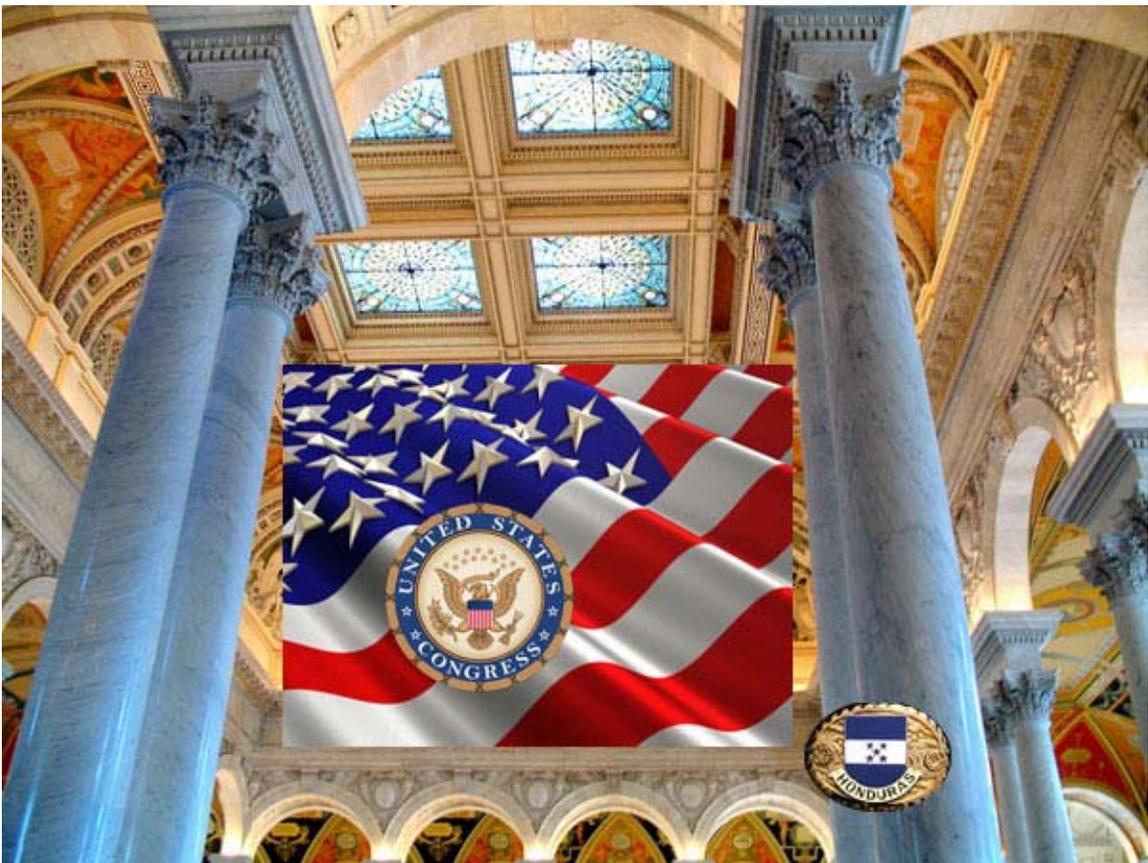


ERRORS ON THE REPORT TO U.S. CONGRESS:

“Honduras: Constitutional Law Issues”



By José María Rodríguez González
U.S. Foreign Policy International Analyst
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September 2009

SERIOUS ERRORS ON:

REPORT FOR CONGRESS

August 2009

(The Law library of Congress
Directorate of Legal Research for
Foreign, Comparative,
and International Law
LL File No. 2009-002965)

HONDURAS: CONSTITUTIONAL LAW ISSUES

Events

The National Congress, directed by Mr. Roberto Micheletti Bain, elected the 15 members of the current Supreme Court in January of this year, 2009, from a list of attorneys presented by Mr. Micheletti to the Congress.

On June 29th, 2009, the National Congress of Honduras interpreted president Zelaya's disapproval, as removal of president Zelaya. The Congress then elected Mr. Micheletti, its president, as the president of Honduras based on a subjective absolute absence of President Zelaya, while President Zelaya's absence was not absolute. It was, instead, forced and temporary, as he was violently taken out of his office and expatriated by the Army, a day before.

The National Congress also had a letter of resignation by President Zelaya under consideration. The letter was signed three days before the coup. This resignation consequently would drop charges and close President Zelaya's case.

These National Congress actions were taken after a Congressional Decree dated Monday 29, 2009, at 12:45 AM - a day after President Zelaya was removed violently from his office and expatriated by the Army on Sunday June 28th at 5:30 AM.

The Supreme Court failed to address the original Executive Orders of President José Manuel Zelaya Rosales and allowed the Honduran lower Court of Letters and the Contentious Administrative to deal with the constitutional matter beyond the competence of this Court. The Supreme Court of Honduras played a passive and facilitative roll in such a high priority and serious case.

I. What are the provisions, if any, in the Honduran Constitution for their Judicial Branch and the Legislative Branch (National Congress) to remove an elected President?

If the case against President Zelaya's was built in the lower Court of Letters of the Contentious Administrative it is an unequivocally fact that this court has no jurisdiction over constitutional matters, unconstitutionality or any violation of the Constitution. Constitutional matters are exclusively handled by the Supreme Court of Honduras. (Honduras Constitution Art. 184¹, also here below)

Art. 323, section 2 stays that the Supreme Court has the power to "hear cases against the highest officers of the State and the Deputies." This is the exclusive duty of the Supreme Court, never a function of a lower court. This provision in the Constitution is ignored by the Honduran Supreme Court.

In addition to the Supreme Court overlooking its duties, the decrees focus of the ousting of President Zelaya - Executive Orders² # PCM-005-2009, PCM-019-2009, PCM-020-2009 and PCM-027-2009, would be a matter of unconstitutionality revision due to the fact that these decrees represent a challenge to Art. 51 of the Constitution, which states "Regarding elections acts and procedures will be a Supreme Electoral Tribunal, autonomous and independent, with jurisdictional entity, with jurisdiction and competence in all the Republic, whose organization and function will be established by this Constitution and the law, which will stay equally related matters of other electoral organisms."

Art. 184 stays "Laws can be declared unconstitutional by reason of form or content. It competes original and exclusively to the Supreme Court of Justice the knowledge and resolution of the matter, and must pronounce it with the requisites of definite sentences."

To determine if President Zelaya's decrees are unconstitutional is the sole province of the Honduran Supreme Court of Justice and not any other Court and definite not a lower Court, given the President's highest authority and the high legal level of his decrees.

¹ All references to Honduras Constitution are taken from the updated or amended CONSTITUCIÓN DE LA REPÚBLICA DE HONDURAS. Available online, at: <http://www.gobernacion.gob.hn/descargas/leyes/CONSTITUCION%20DE%20LA%20REPUBLICA.pdf>
The Constitution was originally published officially in LA GACETA, Jan. 20, 1982.

² Called Executive Decrees in Honduras. PCM-005-2009 was never published in LA GACETA, as required. PCM-019-2009 nullifies PCM-005-2009. The centerpiece document is **PCM-020-2009**, here attached. PCM-027-2009 follows up for execution of PCM-020-2009.

The U.S. Report for Congress, LL File No. 2009-002965, implies that by Honduran Constitution Art. 313, section 2 the Honduran Supreme Court has the provision, but in the case of President Manuel Zelaya the Supreme Court was not complying with its obligations and its negligence allowed the lower Court of Letters of the Contentious Administrative to build a case without hearings³, with subjective and a-priori sentences, and with improper filing of documents, not even published in the Official Journal “La Gaceta,” as required.

According to the Constitution of the Republic of Honduras, the Supreme Court violated its provision, its obligations and did not proceed according to the Constitution in the matter of its original and exclusive competence.

II. Did the Honduran Supreme Court have the authority under the Honduran Constitution to request that the military remove the President because the National Congress, the Supreme Court, the Human Rights Ombudsman, and the Attorney General found an action of the President unconstitutional?

No, it did not. The military is defined only by Army and Armed Forces in the Constitution of Honduras. Title V, Chapter X, Arts. 272 through 293 clearly state it.

The term Public Force, as it is in many other countries, is reserved for the Police.

The Police are trained with familiarity in criminal law, while military training is focused on war expertise. The law enforcement has been naturally and traditionally done by the providence of the police, not the military. As a matter of fact Honduran police normally attends to all Court enforcement needs. There is not a Honduras constitutional exception on this rule.

More conclusively, there was no other army that the military had the need to confront. The bottom line for this Supreme Court, or any other military coup facilitator, was that no military coup could be done without the military, because of, precisely, the overwhelming war force that makes a military coup successful.

The complicity of the Supreme Court in the military coup extends to not punishing the violations to the Constitution, the Criminal Code and the peace of the country inflicted by the military and their agents in the government:

³ These assertions can be corroborated by examining original Honduran courts documents compiled on a powerpoint presentation available on line at the military coup’s government site: <http://www.poderjudicial.gob.hn/NR/rdonlyres/FB12D38C-64BE-433A-A648-1D416F57623A/2464/CasoJoséManuelZelayaRosales3.pps>

- a. Violation of Constitution Art. 278. - The orders given by the President of the Republic to the Armed Forces, through their Chief, must be followed and executed. [The Army is under the Executive as the Police is under the Judicial branches of power].
- b. Penal Code⁴ Title XII, Chapter I, Art. 323. - Whoever offends the President of the Republic in his physical integrity or in his freedom will be punished by eight to twelve years in prison.
- c. Penal Code Chapter II, Art. 328.- Who delinquents against the form of government will be sanctioned with prison from six to twelve years, and who executes actions directly aim to obtain by force, or outside of the legal venues, some of the following objectives:
 - 1) To replace the republican, democratic and representative Govern by any other form of govern. [An elected President was replaced, after violent action and obscure Congress dealings, by a non-elected President].
- d. Penal Code Chapter VI, Art. 336. – Criminals of rebellion are who use arms to topple a govern established legally or to change or to stop in all or in part the constitutional regiment in existence in which refers to formation, functioning or renovation of public powers.
- e. Penal Code Art. 333. – It applies the punishment of reclusion from three (3) to five (5) years and fine from fifty thousand (L. 50,000.00) to hundred thousand (L. 100,000.00) to the official or public employee that:
 - 3) Makes victim of humiliation or illegal pressures to the people trusted in their custody;
 - 4) Does not process or resolve within legal terms an Habeas Corpus petition or protection or any other means to obstaculizing its processing; and
 - 5) Order, execute or allow the expatriation of a Honduran citizen.

III. Did the Honduran National Congress properly approve the Articles of Impeachment of the President as provided for by the Honduran Constitution?

No, it didn't. Because until June 26, 2009, Honduras Congress called only for an extraordinary session with the single agenda issue of electing the Congressional Commission, the first ever to investigate President Zelaya's conduct. This commission reported a day after the military Coup (Monday June 29 at 12:20 AM. Military Coup happened on Sunday June 28th, 2009, at 5:30 AM). The Commission's report did not present any article leading to President Zelaya's impeachment, only some consideration points.

⁴ All references to Criminal Law are taken from Honduras Penal Code, Decree 144-83, available on line at: <http://www.congreso.gob.hn/Codigos/DECRETO%20144-83.pdf>

It is not feasible that in less than three days, mostly during a weekend, a Congressional Commission could gather enough information about President Zelaya from different governmental offices, Congress members and the Executive Branch, as well as to classify this data, evaluate it, analyze it, reach conclusions and write a report. There was not enough time for an “extensive” investigation, but rather only time for cursory notes. And without such an extensive investigation on such a serious issue, the Congress did not have enough information to properly approve any impeachment against the President.

Congress claimed on Monday June 29th, 2009, at 12:37 AM to be in possession of a letter of resignation signed by the President four days earlier, coincidentally written in similar content as the considerations of the Congressional Commission. Why would the President have signed a letter of resignation and then not present it to the Supreme Court to avoid an order of arrest against him? A President who signs a letter of resignation is not a president who wants to be re-elected; all charges against him should have been dropped and his case closed.

The consequent Congressional Decree⁵ had no articles of impeachment, only six general and subjective considerations. It jumps to an article disapproving the President and then to the next removing him from office, with the ill intention that Congress can interpret disapproval as removal. The military coup idea that the Honduras Congress has the right to remove the President if it only disapproves of him.

The Congressional Commission’s improvised report and the mysterious Presidential resignation letter are the only two documents the National Congress has to show for the designation of its president Roberto Micheletti as president of Honduras. This designation would have never taken place if President Zelaya was not violently removed from his office and forced into expatriation and absence by the military coup a day before.

IV. Did the Supreme Court follow up by holding a proper, constitutionally mandated trial of the President?

No. The Supreme Court could not follow up by holding a proper, constitutionally mandate trial of the President, because President Manuel Zelaya was violently removed from his office by the military coup that forced him to be absent as a result of his expatriation on June 28th, 2009, and without the Supreme Court ordering the immediate return of President Manuel Zelaya to stand trial, then the Honduran Supreme Court did not follow up by holding a proper, constitutionally mandated trial of the President.

⁵ Congressional Commission’s report and Letter of Resignation are not available. Congressional Decree is attached here.

V. Was the removal of Honduran President Zelaya legal, in accordance with Honduran constitutional and statutory law?

No, it wasn't. The previous four answers to the questions in the Report illustrate that the available sources used in the Report were insufficient. They missed the correlation of the facts, ignored Honduran law issues that were relevant to the case and did not show any awareness that the judicial and legislative branches of power were relentlessly seeking to criminalize President Zelaya.

Conclusions

The Honduran Congress and Supreme Court blamed President Zelaya for being the provocateur and the divisive one, but why the Supreme Court and Congress fall in a destructive spray to show who is most stubborn? This only brings Honduras to its knees, and everyone loses. It is time to stop it, to let President Zelaya finish his legal term. It was a mistake on the part of the Honduran Supreme Court to use the force in this matter, instead of trusting fully the rule of law. If the President would cheat with the Yes and No ballots then the world will be with Honduras for a just cause, but Army violence and dirty judicial play only damage Honduras. As demonstrated above, the removal of President Zelaya was not legal, it was not in accordance with Honduran constitutional and statutory law. Let us fully respect and trust the rule of law, and let democracy win.

It is important to note that the military coup's purpose is to dispose forever of a duly President elected by the people of Honduras, José Manuel Zelaya Rosales. The November 29th, 2009, elections seals, perpetuates, fulfill and completes fully the goal of the military coup. Therefore, elections as the last thrust of the military coup should be declared null immediately and defined without any effect. This military coup uses the "law" as a shield to prevail, claiming to defend democracy in Honduras. If these forced elections are not stopped, democracies themselves would be legitimizing and legally accepting the aim and completion of the military coup.

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U.S. Foreign Policy International Analyst
September 2009

Attachment 1A:

Executive Order PCM-020-2009
as published in the Official Journal La Gaceta
on June 25th, 2009,
three days before the military coup. First page.

Sección A Acuerdos y leyes

La Gaceta REPÚBLICA DE HONDURAS - TEGUCIGALPA, M. D. C., 25 DE JUNIO DEL 2009 No. 31,945

Poder Ejecutivo

DECRETO EJECUTIVO NÚMERO PCM/020-2009

EL PRESIDENTE DE LA REPÚBLICA EN CONSEJO DE MINISTROS

CONSIDERANDO: Que de conformidad con los Artículos 2 y 5 párrafo primero de la Constitución de la República, la soberanía corresponde al pueblo del cual emanan todos los Poderes del Estado y el Gobierno debe sustentarse en el principio de la democracia participativa del cual se deriva la integración nacional, que implica participación de todos los sectores políticos en la administración pública, a fin de asegurar y fortalecer el progreso de Honduras basado en la estabilidad política y en la coalición nacional.

CONSIDERANDO: Que la sociedad hondureña ha experimentado cambios sustanciales y significativos en los últimos veintisiete años, cambios que demandan un nuevo marco constitucional para adecuarlo a la realidad nacional, como una legítima aspiración de la sociedad.

CONSIDERANDO: Que los diferentes Tratados y Convenios Internacionales suscritos y ratificados por Honduras garantizan el Derecho a la libertad de opinión y de expresión, entre ellos: el Pacto Internacional de Derechos Civiles y Políticos de la Organización de las Naciones Unidas (ONU) en su Artículo 19, el cual incluye el de no ser molestado a causa de sus opiniones, el de investigar y recibir informaciones y opiniones y el de difundirlas y la Carta Interamericana Democrática en su Artículo 6 consagra la participación directa de la ciudadanía en las decisiones fundamentales del Estado y la obligación que tienen los Gobiernos de promoverla.

CONSIDERANDO: Que de conformidad con la Ley de Participación Ciudadana contenida en el Decreto No. 3-2006 del 27 de enero de 2006 y publicada el 1 de febrero de 2006, su ejercicio implica la inclusión del ciudadano en la formulación, ejecución y evaluación de todas las políticas y acciones del Estado, convirtiéndolo en protagonista y gestor de su propio destino.

CONSIDERANDO: Que es deber del Poder Ejecutivo contribuir al fortalecimiento y consolidación de la democracia, dirigir la política general del Estado y representarlo, así como atender en su condición de Administrador General del Estado los asuntos de interés nacional y promover soluciones que garanticen la gobernabilidad democrática con amplia participación ciudadana.

CONSIDERANDO: Que miles de ciudadanos y ciudadanas en forma individual y voluntaria así como sectores y grupos sociales organizados del país, en ejercicio de la iniciativa ciudadana que la Ley de Participación Ciudadana en su Artículo 5 numeral 1 les confiere, han solicitado al Poder

Ejecutivo que por medio del Instituto Nacional de Estadística (INE) realice una encuesta nacional de opinión, mediante el uso de procedimientos estadísticos a más tardar el último domingo del mes de junio de 2009 con el objeto que la ciudadanía hondureña se pronuncie sobre lo siguiente: “

¿Está de acuerdo que en las elecciones generales del 2009 se instale una Cuarta Urna en la cual el pueblo decida la convocatoria una Asamblea Nacional Constituyente?

SI _____ NO _____ ”

CONSIDERANDO: Que en virtud de todas las solicitudes de ciudadanos y ciudadanas en forma individual o por medio de sectores y grupos sociales organizados del país, el Poder Ejecutivo, ha decidido convocar a la ciudadanía en general para que emita su opinión y formule propuestas de solución a problemas colectivos que les afecte; como ser la instalación de una cuarta urna que permita un eficaz ejercicio de su derecho.

CONSIDERANDO: Que el Instituto Nacional de Estadística (INE), de acuerdo a su Ley, tiene como primer objetivo asegurar la producción de estadísticas confiables y oportunas, necesarias para el permanente conocimiento de la realidad nacional, la planificación del desarrollo y la eficiente gestión en la toma de decisiones del sector público, para lo cual puede ejecutar o coordinar la generación de datos, mediante consultas o investigaciones solicitadas por los poderes Legislativo, Ejecutivo y Judicial.

POR TANTO: En aplicación de los Artículos 1, 2, 245 párrafo primero y atribución número 2 de la Constitución de la República; Artículos 1, 3 numeral 4) y 5 numeral 1) de la Ley de Participación Ciudadana; Artículos 1, 4 numeral 1), 5 numerales 3) y 12) de la Ley del Instituto Nacional de Estadística (INE); Artículo 2 Párrafo final del Reglamento de la Ley del Instituto Nacional de Estadística (INE); Artículos 11, 17, 19, 20, 22 numerales 9) y 10) de la Ley General de la Administración Pública; Artículos 10 y 11 del Reglamento de Organización, Funcionamiento y Competencias del Poder Ejecutivo; Artículo 19 del Pacto Internacional de Derechos Civiles y Políticos de la ONU y Artículo 6 de la Carta Interamericana Democrática.

DECRETA:

ARTÍCULO 1.- Ordenar que se realice, de conformidad con la Ley, una Encuesta Nacional de Opinión que se llevará a cabo el domingo veintiocho de junio del presente año y planteará la siguiente pregunta:

Attachment 1B:

Executive Order PCM-020-2009
 as published in the Official Journal La Gaceta
 on June 25th, 2009,
 three days before the military coup. Last page.

La Gaceta	REPUBLICA DE HONDURAS - TEGUCIGALPA, M. D. C., 25 DE JUNIO DEL 2009	Sección A. Acuerdos y leyes	No. 31,945
<p>“¿Está de acuerdo que en las elecciones generales del 2009 se instale una Cuarta Urna en la cual el pueblo decida la convocatoria una Asamblea Nacional Constituyente?”</p> <p>SI _____ NO _____ ”</p> <p>ARTÍCULO 2.- Se instruye a todas las dependencias y órganos de la Administración Pública: Secretarías de Estado, Instituciones Descentralizadas y Desconcentradas, para que se incorporen y ejecuten activamente todas las tareas que le sean asignadas para la realización del proyecto denominado: “Encuesta de Opinión Pública Convocatoria Asamblea Nacional Constituyente” que constituye una actividad oficial del Gobierno de la República.</p> <p>ARTÍCULO 3.- Esta Encuesta Nacional de Opinión se realizará, bajo la coordinación técnica del Instituto Nacional de Estadística (INE), órgano encargado de la producción de estadísticas confiables y oportunas, necesarias para el permanente conocimiento de la realidad nacional, la planificación del desarrollo y la eficiente gestión en la toma de decisiones del Sector Público.</p> <p>ARTÍCULO 4.- El Consejo Directivo como órgano Superior del INE, de acuerdo con el Artículo 8 numeral 1) de la Ley del Instituto Nacional de Estadística (INE), supervisará la eficaz ejecución del proyecto de “Encuesta de Opinión Pública Convocatoria Asamblea Nacional Constituyente”. El Secretario de Estado en el Despacho Presidencial, en su condición de Presidente del Consejo Directivo del INE, será el funcionario encargado de informar los resultados de la Encuesta de Opinión.</p> <p>ARTÍCULO 5.- Este Decreto es de ejecución inmediata y deberá publicarse en el Diario Oficial “La Gaceta”.</p> <p>Dado en Casa Presidencial, en la ciudad de Tegucigalpa, municipio del Distrito Central, a los veintiséis días del mes de mayo del dos mil nueve.</p> <p>COMUNIQUESE.-</p> <p>JOSÉ MANUEL ZELAYA ROSALES PRESIDENTE DE LA REPÚBLICA</p> <p>JOSÉ RICARDO LARA WATSON SECRETARIO DE ESTADO EN LOS DESPACHOS DE GOBERNACIÓN Y JUSTICIA, POR LEY</p> <p>MARLON BREVÉ REYES SECRETARIO DE ESTADO EN EL DESPACHO DE EDUCACIÓN</p> <p>CARLOS ROBERTO AGUILAR SECRETARIO DE ESTADO EN EL DESPACHO DE SALUD</p>	<p>JORGE ALBERTO RODAS GAMERO SECRETARIO DE ESTADO EN EL DESPACHO DE SEGURIDAD</p> <p>ENRIQUE FLORES LANZA SECRETARIO DE ESTADO EN EL DESPACHO PRESIDENCIAL</p> <p>BEATRIZ VALLE SECRETARIA DE ESTADO EN EL DESPACHO DE RELACIONES EXTERIORES, POR LEY</p> <p>REBECA PATRICIA SANTOS SECRETARIA DE ESTADO EN EL DESPACHO DE FINANZAS</p> <p>FREDIS ALONSO CERRATO V. SECRETARIO DE ESTADO EN LOS DESPACHOS DE INDUSTRIA Y COMERCIO</p> <p>MARCO VELÁSQUEZ SECRETARIO DE ESTADO EN LOS DESPACHOS DE OBRAS PÚBLICAS, TRANSPORTE Y VIVIENDA, POR LEY</p> <p>MAYRA MEJÍA DEL CID SECRETARIA DE ESTADO EN LOS DESPACHOS DE TRABAJO Y SEGURIDAD SOCIAL</p> <p>HÉCTOR HERNÁNDEZ AMADOR SECRETARIO DE ESTADO EN LOS DESPACHOS DE AGRICULTURA Y GANADERÍA</p> <p>TOMÁS VAQUERO SECRETARIO DE ESTADO EN LOS DESPACHOS DE RECURSOS NATURALES Y AMBIENTE</p> <p>RICARDO ALFREDO MARTÍNEZ SECRETARIO DE ESTADO EN EL DESPACHO DE TURISMO</p> <p>RODOLFO PASTOR FASQUELLE SECRETARIO DE ESTADO EN LOS DESPACHOS DE CULTURA, ARTES Y DEPORTES</p> <p>KAREN ZELAYA SECRETARIA TÉCNICA Y DE COOPERACIÓN INTERNACIONAL</p> <p>FRANCISCO FUNES MINISTRO-DIRECTOR DEL INSTITUTO NACIONAL AGRARIO</p> <p>GUSTAVO CÁCERES SECRETARIO DEL INSTITUTO NACIONAL DE LA JUVENTUD</p>		

Attachment 2:

**Congress Decree
as published by military coup's sympathizer newspaper La Tribuna
on Monday June 29, 2009:**

Decreto de destitución de Zelaya

Congreso Nacional Considerando: que la conducta del Presidente de la República ha provocado en el pueblo un clima de confrontación, división y zozobra al grado de poner en peligro inminente de rompimiento del Estado de Derecho y la gobernabilidad. **Considerando:** que de conformidad con los artículos 245 numeral 1, 321 y 322 de la Constitución de la República, es deber del ciudadano Presidente de la República ser fiel a la República, cumplir y hacer cumplir la Constitución y sus Leyes, los tratados y convenciones y las demás disposiciones legales.

Considerando: Que es potestad del Congreso Nacional, velar, aprobar o improbar la conducta de los poderes constituidos y demás instituciones del Estado.

Considerando: que los funcionarios del Estado no tienen más facultades que lo que expresamente les confiere la ley, que todo acto que ejecuten en contra de la ley es nulo e implica responsabilidad, que los funcionarios son depositarios de la autoridad, responsables de su conducta oficial, sujetos a la ley y jamás superiores a ella.

Considerando: que es manifiesta la conducta irregular del Presidente de la República, ciudadano Manuel Zelaya Rosales, al violentar de manera reiterada la fidelidad de la República y el estamento jurídico de nuestro país, poniendo en inminente peligro el Estado de Derecho y el sistema de gobierno democrático que el pueblo por voluntad democrática ha escogido y que por ende el CN está llamado a observar y hacer cumplir.

Considerando: que de conformidad al artículo 242 de la Constitución de la República, en ausencia absoluta del Presidente y del Vicepresidente de la República, el Poder Ejecutivo será ejercido por el Presidente del Congreso Nacional.

Por tanto decreta

Artículo 1.-El Congreso Nacional en aplicación de los artículos 1, 2,3,4, 205, 220 numeral 20, 218, 242, 321, 322, 323 de la Constitución de la República, acuerda:

a. Improbar la conducta del Presidente de la República, ciudadano José Manuel Zelaya Rosales por las reiteradas violaciones a la Constitución de la República y las leyes y la inobservancia de las resoluciones y sentencias de los órganos jurisdiccionales.

b. Separar al ciudadano Manuel Zelaya Rosales del cargo del Presidente constitucional de Honduras.

Artículo 2.- Nombrar constitucionalmente al ciudadano Rigoberto Micheletti Bain actual presidente del Congreso Nacional en el cargo de Presidente Constitucional de la República por el tiempo que falte para terminar el periodo constitucional y que culmina el 27 de enero del 2010.