Habeas Corpus and the Protection of Human Rights in Argentina

John P. Mandler

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Articles

Habeas Corpus and the Protection of Human Rights in Argentina

John P. Mandler†

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PREAMBLE

Disappearance of Carlos Ignacio Boncio: File No. 666

On 25 March 1976 at 9:45 a.m. uniformed personnel of the security forces raided the premises of the Mestrina shipyard located at the intersection of Calles Chubut and Río Luján in Tigre, Buenos Aires province, where my son worked[,] and arrested him in front of his workmates. As soon as he
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was arrested we began formalities to determine his whereabouts, and shortly afterwards we managed to locate him in Police Station No. 1 in Tigre. I got some food to him and received a few messages in his handwriting: I still have them. Then he was transferred and we lost trace of him. To this date we still don't know where he is... The habeas corpus [petition] presented to Dr. Guillermo F. Rivarola at Federal Court No. 3 (No. 39.930) was eventually rejected and the order given to send photocopies to the Army High Command so that they could investigate my son's supposed illegal deprivation of liberty.

On April 5, 1977, Boncio's mother wrote the following letter to the court dealing with the writ of habeas corpus:

Judge Rivarola. I am an Argentine citizen. My name is Ana Inés Mancebo de Boncio. I wish to inform you that my son Carlos Ignacio Boncio, L.E. 8,242,272, has not been released. Despite the response to my writ of habeas corpus, I know for a fact from the people released from Campo de Mayo that my son is still there. I beseech you, therefore, to use your good offices to determine why he has not been set free given that his release had been authorized. Thanking you in advance for your assistance, I am, yours sincerely, Ana I.M. Boncio.¹

I. INTRODUCTION

The right of habeas corpus has always been considered one of the foundations of the rule of law of Western civilization. It is the "great writ," the key to the protection of all other human liberties.² During the years of military dictatorship in Argentina, the "great writ" failed.³ From 1976 to 1984, between 9,000 and 30,000⁴ people were "disappeared"⁵ at the hands of the

¹ Comisión Nacional Sobre la Desaparición de Personas (CONADEP), NUNCA MÁS 410-11 (1984) [hereinafter NUNCA MÁS].
² See THE FEDERALIST No. 84 (A. Hamilton). Hamilton argued that there was no need for a bill of rights because the writ of habeas corpus ensures all rights.
⁴ The exact number of disappeared persons is contested and has become a political issue. CONADEP estimated the number of disappeared at 8,960, but noted that the actual number could be higher because fear likely deterred many from reporting disappearances. NUNCA MÁS, supra note 1, at 479-81. Human rights groups insist that the number is much higher, and estimates in press reports varied widely from 6,000 to 15,000. Mignone, Estlund & Issacharoff, Dictatorship on Trial: Prosecution of Human Rights Violations in Argentina, 10 YALE J. INT'L L. 118, 120 & n.2 (1984). Some human rights groups continue to insist on the figure of 30,000, but most acknowledge it is a lesser figure. See, e.g., Osiel, The Making of Human Rights Policy in Argentina: The Impact of Ideas and Interests on a Legal Conflict, 18 J. LATIN AM. STUD. 135, 145 n.24 (1986) (placing estimate at 12,000 disappearances).
⁵ The term "disappeared" is a euphemism for the forced and unacknowledged abduction of persons by the state military, security, or police forces or by other state-sanctioned groups. A number of other human rights abuses such as incomunicado detention, torture and/or arbitrary execution generally occur
Argentine military, police and security forces. Thousands more were detained for long periods by executive order without trial or without being charged with an offense. The habeas corpus petitions filed by relatives and friends on behalf of those detained provided virtually no relief.

In 1984, the democratically elected Congress passed Law 23.098 ("Habeas Corpus Act"), which updated, consolidated and reformed the habeas corpus process. The Act, however, did not confront many of the causes of the wholesale failure of habeas corpus under the dictatorship. Important questions remain concerning the effectiveness of habeas corpus protections. This study evaluates habeas corpus law during and after the dictatorship and argues that further fundamental changes are necessary before the guarantees of habeas corpus are adequate in Argentina.

This study addresses three central questions:
1. Has the right of habeas corpus been an effective method of protecting human rights in Argentina?
2. What is the state of the law of habeas corpus in Argentina today?
3. In what ways could Argentine habeas corpus be further strengthened to address past failures in the process?

In examining these questions, this study concentrates on certain aspects of habeas corpus to the exclusion of others. A petition for habeas corpus in Argentina can be corrective or preventive in nature. It can seek the liberty of a person or the removal or correction of an injurious situation during a legitimate detention. While acknowledging the right of all those arrested to the protections offered by habeas corpus, this study focuses on those petitions in connection with a disappearance. Because the phenomenon of disappearances is so wide-ranging in scope and currently has no adequate general or legal definition, the term is often accompanied by quotation marks.

6. NUNCA MÁS, supra note 1, at 479-82.
7. Id. at 408-16.
10. For a description of the various forms of habeas corpus and their uses in Argentine law, see N. SAGÜÉS, HÁBEAS CORPUS, supra note 8, at 144-45.
brought to question the legitimacy of arrests or detentions of individuals held for "political" reasons.\(^{11}\)

A. The Judicial - Executive Relationship

During the military dictatorship, the habeas corpus process was the sole method by which individuals could challenge the legality of detentions carried out by the military. Most habeas corpus petitions brought on behalf of the "disappeared" followed a set pattern.\(^{12}\) Individuals would be reported missing, often after they had been detained by bands of armed men claiming some type of military authority (either by showing military identification or orders or simply by appearing in military apparel).\(^{13}\) Family members or friends would then bring a habeas corpus petition to attempt to locate the missing individual. When a court of first instance directed a request for information to the Ministry of Interior, the armed forces or the federal or local police forces, these officials invariably replied that they had no information concerning the detention of the individual, often despite eyewitness reports of the presence of the person in one of the military's clandestine detention centers.\(^{14}\) Based on the military's response, however, the judge would issue an opinion that the individual was not being detained by the executive and would dismiss the habeas corpus petition. In short, the false reports submitted by the military to the courts and the failure of the judiciary to question those statements or to investigate further rendered the habeas corpus procedure useless.\(^{15}\)

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11. For purposes of this study, the term "political arrests" refers to arrests or detentions motivated by political objectives or a desire to restrict a person's freedom of speech or freedom of association, as opposed to arrests for common crimes, such as robbery, assault or murder. The author realizes that this distinction is often difficult to make (e.g., in the case of a murder that is motivated by political belief or the exercise of the freedom of speech in a manner that violates common law).

12. For a description of disappearances and subsequent attempts to locate individuals through habeas corpus petitions, see generally NUNCA MÁS, supra note 1; OAS REPORT, supra note 3.

13. The overall responsibility for conducting the "war against subversion" was given to the army, and local police forces remained under its control. Decree No. 404/75, promulgated Oct. 28, 1975. During the dictatorship, federal security forces operated in a "green zone" where local officials promised not to interfere. National Appeals Court (Argentina), Judgment on Human Rights Violations by Former Military Leaders, 26 I.L.M. 317, 336 (A. Garro & E. Dahl trans. 1987) [hereinafter Judgment on Human Rights]. The federal security forces maintained dozens of secretive detention centers throughout the country to hold, interrogate, and torture individuals who had been detained both officially and unofficially. NUNCA MÁS, supra note 1, at 54-78. The military junta also passed Law 23.383, which amended article 618 of the Criminal Procedure Code to provide that only federal criminal courts had jurisdiction to hear habeas corpus petitions, except for a limited number of cases. Law 23.383, promulgated Jan. 28, 1981, reprinted in XLI-A.D.L.A. 147 (1981); CÓDIGO DE PROCEDIMIENTOS EN MATERIA PENAL, art. 618 (Abeledo-Perrot 14th ed. 1986) [hereinafter CÓDIGO PROC. PENAL]. See also NUNCA MÁS, supra note 1, at 403.

14. Id. The NUNCA MÁS report found that more than 1,300 disappeared persons were seen in secret detention centers during a period when legal efforts to determine their whereabouts were ineffective. NUNCA MÁS, supra note 1, at 479.

15. Id. at 404.
The interaction of three factors thus caused the failure of habeas corpus: the noncompliance of the executive, the failure of the judiciary to effectively challenge the executive and the failure of Argentine society to react to the illegal actions of the military government once they became known. The Nunca más report of the Argentine National Commission on the Disappeared ("CONADEP Commission"), issued in 1984, determined that the failure of habeas corpus was not the result of inadequate statutory or constitutional protection, but was due to "a government which instructed its officials to ignore the norms governing its application." Other commentators claim that habeas corpus and the "rule of law" are inapplicable to detentions and noncompliance by illegitimate governments. This Article argues that the relationship between the judiciary and the executive determines the success of habeas corpus protections. Habeas corpus provided one of the only methods the judiciary could use to hold military governments to human rights standards established in Argentine law. The writ remains a tool that a conscientious and courageous judiciary must use to challenge unconstitutional actions of an authoritarian regime. The study of the judiciary's use of habeas corpus during the dictatorship and the executive's response point to ways in which the habeas corpus process could be strengthened to provide protection against future repression of individual rights.

B. Historical Context

1. Political History

During the last sixty years, Argentina has experienced a continuing cycle of political, economic and social instability. Beginning with the ouster of President Hipólito Yrigoyen in 1930, successive military governments have seized power, allowing an occasional period of civilian rule. Senator Carlos Menem's election to replace President Raúl Alfonsín in May, 1989, represented the first time in sixty-three years that one constitutionally elected president...
replaced another. A political system which creates such instability does not lend itself to respect for the rule of law.

Political instability has also weakened the force of the Argentine Constitution. Since 1939, Argentina has been under a "state of siege," during which the government suspends constitutional rights almost fifty percent of the time. The practice has been even more prevalent in the recent past. In the twenty year period between 1966 and 1986, Argentina was under a state of siege sixty-five percent of the time, while the military dictatorship from 1976 to 1986 observed a state of siege eighty percent of the time. This background of political instability profoundly weakened habeas corpus protections in Argentina.

2. Legal History

Argentine law has few, if any, original institutions. It has been influenced by Spain (criminal procedure), Italy (administrative law, commercial code, and civil code), France (civil code and administrative procedure), Germany (penal code), and the United States (constitutional law). The result is a complicated legal system that cannot be explained entirely under a civil or common law model. Most foreign contributions were partially accepted, then mixed together and adapted to political circumstances. Habeas corpus is an example of such a mixture. It was originally a constitutionally based common law institution that was governed by a criminal procedure code until the passage of the Habeas Corpus Act.

The process of _amparo_ is a complementary example of the peculiar nature of the Argentine legal system. _Amparo_ is a writ in Argentine law whereby the petitioner can seek protection from any government infringement of rights. Technically, habeas corpus is a subspecies of _amparo_, allowing individuals to seek relief from a restriction of ambulatory rights. Beginning in 1957, the Argentine Supreme Court developed _amparo_ as a method of granting injunctive relief for the violation of constitutional rights. In the case of _Angel Siri_, the

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19. President Juan Perón modified the 1853 Constitution in order to be reelected. Menem’s election was the first occasion in which a president from one party was replaced by a member of a different party elected through open, unbiased elections.
21. For example, the drafters of the Criminal Procedure Code explicitly acknowledged that the Code was in part derived from the Spanish Criminal Code. See CÓDIGO PROC. PENAL 7-27 (Abeledo-Perrot 14th ed. 1986).
23. Sagués considers habeas corpus a subspecies of _amparo_. The laws regulating _amparo_ can have a supplementary function in applying and interpreting the laws regulating habeas corpus process, allowing courts to look to the rule governing _amparo_ if habeas corpus law is silent on a particular point. N. SAGUÉS, HÁBEAS CORPUS, supra note 8, at 117-18.
Supreme Court invalidated an order from the executive to arrest Siri and to close his newspaper. The Court based its decision on its constitutional duty to protect individual rights. In the *Samuel Kot* decision, the Supreme Court noted that in Argentine law habeas corpus derives from article 18 of the Constitution of 1853, and follows the common law tradition of the Anglo-Saxon writ. The Court thus confirmed that the Constitution grants courts the power to issue both habeas corpus and *amparo* writs.

C. Constitutional Context

1. The Argentine Constitutional System

   a. The Sources and Evolution of the Argentine Constitution

   Argentina is currently governed by the Constitution of 1853, the oldest Latin American constitution still in force today. This fact is deceptive. The Constitution of 1853 was reformed in 1860, 1868 and 1898. In 1949, the Peronists replaced a major part of the 1853 text with their own constitution. In 1957 the government returned to the constitutional text of 1853, and reforms were made again in 1966.

   When the military took power in 1976, it quickly moved to enact its own reform of the Constitution of 1966 by promulgating the *Statute for the Process of National Reorganization* ("Process"). The Process provided that the Constitution was to remain in force only to the extent that it did not contradict provisions in the Process or laws promulgated pursuant to it. The Supreme Court later held that those laws were integrated into the Constitution. The restrictive laws of the military government thereby acquired the legitimacy of quasi-constitutional status.

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25. Id. at 463.
27. 241 Fallos at 298, 301.
b. Argentine Federalism

In Argentina, both federal and provincial constitutions govern habeas corpus procedures. Because the great majority of the detentions during the dictatorship were by federal authorities at federal institutions, this study will concentrate on the federal law of habeas corpus.

In Argentina there are three levels of federal courts, namely: courts or judges of first instance in specialized matter (e.g. criminal, civil, labor); equally specialized federal courts of appeal (e.g., Cámaras Federales de Apelación en lo Criminal y Correccional); and the Supreme Court of Argentina. The Federal Courts of Criminal Appeal are the highest level of criminal courts, but appeal is possible to the Supreme Court on questions of constitutional law. There are eleven federal courts of appeal in Argentina. The Federal Court of Criminal Appeals of Buenos Aires consists of six judges, normally sitting in panels of three judges each.

c. The Role of the Judiciary

The civil law role of the Supreme Court in the Argentine constitutional system and the absence of stare decisis create problems for the development of effective habeas corpus standards. In the Argentine judicial system, as in other civil law systems, Supreme Court decisions only have effect for the case at bar, and decisions are not binding on lower courts or future Supreme Court decisions. Nonetheless, Supreme Court decisions are said to exercise an influence "more moral than judicial" on other courts. The uncertain role of legal precedent, instead of freeing the Court from antiquated and conservative decisions, merely acts to inhibit the development of clear, concise and reliable legal standards. The Court is not bound to follow prior standards or decisions. Inconsistent prior decisions are never overturned or even discussed. Consistent prior cases, however, are cited for their precedential value, giving decisions the appearance of legal continuity. Because inconsistent decisions
are never overturned or reconciled with new standards, the courts, on any
given case, can choose from a wide range of precedent.\textsuperscript{35}

This limited flexibility complements judicial independence in other areas.
Judges in the Argentine civil law system have special investigatory powers
because of their dual role as judges and prosecutors. Judges of the first in-
stance have the power to conduct searches, require testimony or the production
of evidence, and perform other functions that, under the Anglo-American
adversarial system, are carried out by the prosecutor.

2. Habeas Corpus in the Argentine Constitution

a. Article 18

The various Argentine constitutions have treated habeas corpus with
differing degrees of specificity.\textsuperscript{36} The Argentine Constitution of 1853 does
not expressly provide for the right of habeas corpus. Article 18 provides in
part, "[N]o one can be compelled to testify against himself, nor be arrested
except by virtue of a written order from a competent authority."\textsuperscript{37} While
reforms to article 18 have not always specified habeas corpus as a constitution-
al right, courts and constitutional scholars have generally interpreted article
18 to implicitly incorporate the right of habeas corpus, adopting the common
law development of the right as the constitutional standard.\textsuperscript{38} Under the
Argentine constitutional system, constitutional rights are protected in the
federal courts; the Supreme Court has the power to develop habeas corpus law
to protect article 18 rights.\textsuperscript{39} The Supreme Court can also evaluate legislation

\textsuperscript{35} Reforma Constitucional II, supra note 32, at 52-53. The Argentine Council for the Consolidation
of Democracy has proposed a reform in the Argentine judicial system that would introduce a partial
practice of stare decisis. \textit{Id.} Under the proposed reform, Supreme Court decisions would be binding on
lower courts but not on future Supreme Court cases. This reform would give the Court incentive to clarify
precedent and aid in resolving the arbitrariness of many habeas corpus decisions. \textit{Id.}

\textsuperscript{36} For a history of the various constitutions of Argentina, see \textit{Constitutions of the World}, supra
note 28, at i-xiii.

\textsuperscript{37} Constitución de la Argentina, art. 18 (1853) (quotations are to the 1968 Pan American Union Translation)
[hereinafter Argentine Constitution], \textit{reprinted in Constitutions of the World}, supra
note 28. For an historical description of the development of habeas corpus in Argentine constitutional law,
see N. Sagóes, Habeas Corpus, supra note 8, at 61-81.

\textsuperscript{38} Fundamentos de proyecto de ley 23.098, \textit{Diario de sesiones de la cámara}, cámara de
[hereinafter Fundamentos]; H. Fix-Zamudio, La protección jurídica y procesal de los derechos humanos ante las jurisdicciones nacionales 71-72 & n.153 (1982); N. Sagóes, Habeas Corpus,
supra note 8, at 75; Feinrider, supra note 26, at 187-88.

\textsuperscript{39} The Supreme Court established this in the seminal case Samuel Kot, S.R.L., 241 Fallos 291, 296
(1958), in which it held that whenever the illegitimacy of a restriction on any essential rights clearly creates
a grave and irreparable injury, the issue shall be submitted through the appropriate administrative or judicial
procedures to allow the judiciary to immediately reestablish the restricted right.
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regulating habeas corpus to ensure that it does not restrict article 18's basic guarantees.  

b. Legislative Development

The development of habeas corpus law in Argentina also occurs legislatively.  

Subject to the provisions of article 28 of the Argentine Constitution, the legislature is expressly vested with the power to develop and regulate the law of habeas corpus.  

During the dictatorship, the regulations governing federal habeas corpus law were codified in the Criminal Procedure Code ("the Code").  

The Code established the federal criminal courts as the courts of first instance for habeas corpus petitions, with a right of appeal to the Federal Court of Criminal Appeals.  

The Code also provided a fairly comprehensive regulation of the habeas corpus process. The regulations required the detainee, or someone acting on his or her behalf, to submit a simple petition containing the detainee's name, the accusation of illegal detention, the name or position of the authority responsible for the allegedly illegal detention, and a copy of any writ or decree that ordered the detention.  

The judge hearing the petition was required to issue a writ that inquired of the responsible authority the status of the detained individual. If there was no apparent legitimate reason for the detention, the Code required the judge to order the release of the detainee.  

The process was to be completed within twenty-four hours. Finally, the regula-

40. Some scholars have suggested that the Court may also limit the application of legislation regulating habeas corpus if the legislation impinges on court created standards governing article 18 rights. This proposition, however, ignores the Supreme Court's civil law role, which is limited to the interpretation of statutes and not to the creation of law.  

41. N. SAGOUS, HABEAS CORPUS, supra note 8, at 112-13.  

42. ARGENTINE CONSTITUTION, supra note 37, at art. 67, cls. 11, 28. Article 28 provides that constitutional guarantees "may not be altered by the laws that regulate their exercise."  


44. CÓDIGO PROC. PENAL at art. 618. For an example of this process, see the summary of procedural history in Inds Ollero, 300 Fallos 457, 460 (1978).  

45. CÓDIGO PROC. PENAL at art. 622.  

46. Id. at arts. 619, 623, 634-35.
tions provided for the mandatory cooperation of the named authority in the habeas corpus process, including the presentation of the detained individual to the judge and the completion of a detailed report on the reasons for the detention.

D. The State of Siege Problem

1. Article 23

The Constitution of 1853 provides that the executive may declare a state of siege during a foreign attack or when internal disorder threatens the operation of the government.\(^{47}\) Article 23 provides that the declaration of a state of siege suspends the protection of constitutional rights. It does not, however, set a time limit on that suspension. Article 23 also permits the executive to arrest and transfer persons from one point of the nation to another during a state of siege. While articles providing similar powers to the executive are common in the constitutions of many Western democracies,\(^ {48}\) abuse of these powers has most drastically curtailed the protection of basic human rights in Argentina. In contrast to the high threshold guarding the state of siege provision in the United States Constitution,\(^ {49}\) article 23 sets a lower limit, allowing the executive to proclaim a state of siege in less extreme circumstances.\(^ {50}\)

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47. Article 23 of the 1853 Constitution states:
In the event of internal disorder or foreign attack endangering the operation of this Constitution and of the authorities created thereby, the Province or territory in which the disturbance of order exists shall be declared in a state of siege and the constitutional guarantees shall be suspended therein. But during such suspension the President of the Republic shall not convict or apply punishment upon his own authority. His power shall be limited, in such a case, with respect to persons, to arresting them or transferring them from one point of the Nation to another, if they do not prefer to leave Argentine territory.

ARGENTINE CONSTITUTION, supra note 37, at art. 23 (1853). Article 23 also limits the declaration to the province or territory of the disturbance. Which governmental body declares the state of siege depends on the nature of the precipitating crisis. If the declaration is due to foreign attack, the president may declare the state of siege with the consent of the Senate. Id. at arts. 53 & 86, cl. 19. If the declaration is due to internal disorder, the Congress must make the declaration; if the Congress is not in session, the president may declare the state of siege subject to the approval of the Congress when it reconvenes. Id. at art. 67, cl. 26. For a general discussion of the role of the state of siege provision in Argentine constitutional development, see REFORMA CONSTITUCIONAL I, supra note 20, at 293-305; N. SAGÜÉS, HABEAS CORPUS, supra note 8, at 233-99.

48. See CONSEIO PARA LA CONSOLIDACIÓN DE LA DEMOCRACIA, DISPOSICIONES RELATIVAS A ESTADO DE SÍTIO EN EL DERECHO CONSTITUCIONAL COMPARADO (1986); see also Snyder, supra note 3, at 506-07 (noting suspension of habeas corpus by President Lincoln during the U.S. Civil War).

49. The United States Constitution provides that "[t]he Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it." U.S. CONST. art. I, § 9, cl. 2. The United States Supreme Court, in the case of Ex parte Milligan, 71 U.S. 2, 121 (1866), held that martial law could not "be applied to citizens in states which have upheld the authority of the government, and where the courts are open and their process unobstructed." For a discussion of Milligan, see L. TRIBE, AMERICAN CONSTITUTIONAL LAW 179-80 (1978).

50. Snyder, supra note 3, at 506-07; REFORMA CONSTITUCIONAL I, supra note 20, at 304-05.
The wide range of executive powers under article 23 requires effective judicial oversight to protect civil rights during periods of institutional instability. Habeas corpus law in Argentina has functioned as the only, albeit weak, judicial mechanism to challenge executive detentions during a state of siege. Habeas corpus law has required courts to determine whether a particular state of siege has automatically suspended all constitutional rights or whether the executive only has the ability to suspend specific rights at its discretion. Only when the latter condition is met have courts been required to determine the legitimacy of the suspension.  


The Constitution limits the executive’s power to arrest and transport persons under a state of siege. First, the arrest may not amount to a conviction or punishment. Second, persons detained pursuant to article 23 executive power must be allowed to leave the country, should they choose, rather than remain in detention ("right of option"). Article 95 further provides, in effect, that the executive may not try an individual once he or she has been charged with an offense, but must turn the detainee over to the judiciary for processing.

In principle, the declaration of a state of siege does not suspend the right of habeas corpus. However, courts have been unwilling to extensively challenge executive action under a state of siege. While executing the habeas corpus process, courts usually denied petitions if the detainee was held pursuant to the executive’s article 23 powers. Argentine courts thus have historically held the executive’s decision to detain a person during a state of siege to be nonjusticiable. Conversely, in amparo proceedings, courts were willing to examine the executive’s suspension of other nonambulatory constitutional rights.

For example, in 1958 the constitutionally elected government of President Arturo Frondizi declared a state of siege throughout the country to control a
series of strikes that the government considered to be of an "insurrectional character." In reviewing the *amparo* petition of *Antonio Sofia* the next year, the Supreme Court for the first time asserted its power to review the reasonableness of the suspension of a constitutionally guaranteed right during a state of siege. While affirming that the declaration of a state of siege itself was a nonjusticiable political question, the Court asserted that it could review executive acts taken pursuant to the state of siege to determine whether they were "clearly and obviously unreasonable." Using this test, however, the *Sofía* Court upheld the executive action at issue. It found that the banning of a public meeting "organized by an entity that in the opinion of the competent authority [the police] 'has had a radical left political orientation' . . . does not appear to be irrational.

Later the same year, in reviewing the case of *Luis Trossi*, the Supreme Court refused to apply the *Sofía* reasonableness standard to the review of habeas corpus petitions. Trossi and twenty-seven other individuals were detained by the executive under its state of siege powers. The habeas corpus petitions filed on their behalf were denied by the court of first instance, and the denial was upheld by the Court of Appeals. Trossi appealed to the Supreme Court, arguing that there was no reasonable relation between his detention and the declared state of siege. The Court declined to review the habeas corpus petition, treating the restriction of liberty by the executive as a nonjusticiable political question:

It is prohibited for judges to substitute themselves for the President of the Nation in the ascertaining of the correctness or error, justice or injustice of the transitory measures of defense which he considers necessary to adopt in exercising the prerogatives that article 23 of the Constitution accord him solely.

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57. 243 Fallos 504, 511 (1959).
58. For a discussion of the *Sofía* case and its implications on judicial control of the executive's article 23 powers, see *REFORMA CONSTITUCIONAL I*, supra note 20, at 303; Feinrider, *supra* note 26, at 189; Garro, *supra* note 3, at 327-28; Synder, *supra* note 3, at 513.
59. 243 Fallos at 515. Earlier, the Argentine League for the Rights of Man had applied for authorization from the Chief of the Federal Police to hold a meeting to discuss the human rights situation in Paraguay. The Federal Police denied the request based on the state of siege declaration. 243 Fallos at 510-11. The Federal Court of Appeals overruled the decision of the Federal Police, holding that the article 23 power of the executive to suspend constitutional rights extended only to those rights "incompatible with the preservation of constitutional order and social peace." *Id.* at 511 (quoting the Court of Appeals decision). The Court of Appeals noted that the proposed meeting was not of a "union character and did not have any relation with the causes that motivated the state of siege." *Id.*
60. *Id.* at 514.
61. *Id.* at 515. The *Sofía* Court adopted the deferential "clearly and obviously unreasonable" standard over a minority that argued for a less deferential standard. The dissent stated that the denial of authorization by the police pursuant to the state of siege should be overruled since it "had no relation to" the underlying reason for the state of siege. 243 Fallos at 533 (Orgaz, J., dissenting).
62. 243 Fallos at 520.
63. 247 Fallos 528 (1959).
64. *Id.* at 529-30.
The *Trossi* decision thus implicitly limited the reasonableness standard in *Sofía* to nonambulatory constitutional rights.

Following *Trossi*, the Supreme Court reviewed the reasonableness of executive suspension only in cases of nonambulatory constitutional rights. In 1970, in the cases of *Primera Plana* and *Ricardo Alberto Canovi*, the Supreme Court upheld the *Sofía* and *Trossi* decisions and further defined the situations and the manner in which the judiciary would review executive article 23 actions limiting ambulatory rights. *Primera Plana* involved an *amparo* petition case in which the Supreme Court addressed the closure of a newspaper by the executive. The Court reaffirmed the judiciary's power to examine the reasonableness of executive actions made during a state of siege, using a two-part test for reasonableness. This test involved, first, an examination of the relation between the affected constitutional guarantee and the state of interior commotion and, second, a verification of whether the act of the authority was proportionate to the declared goals of the state of siege. The Court affirmed the judicial power to review executive action, but overturned the lower court's finding of unreasonableness by holding that the closure of the newspaper was not "manifestly irrational" in light of the declared purpose of the state of siege.

The Supreme Court continued to undercut the *Sofía* holding in *Canovi*. In *Canovi*, the Court determined that it could not review executive detentions unless they transgressed article 23 limits. The executive could not impose "punishment" and had to guarantee the detainee's right of option to leave the country. The *Canovi* Court went on to find that the arrest and transport of persons is not a punishment or penalty under article 23, but an exclusively political method of protecting the internal peace. Therefore, prior to the 1976 dictatorship, the Supreme Court had clearly established that the judiciary

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65. See, e.g., *Diarios Norte* [and] *Voz peronista*, 244 Fallos 59, 62 (1959) (upholding an executive suspension of certain publications while applying the reasonableness standard); *Semanario Azul y blanco*, 250 Fallos 832, 841 (1961) (upholding an executive order to close a newspaper, stating that executive orders pursuant to article 23 were subject to judicial review under the reasonableness standard).
68. 276 Fallos at 81.
69. *Id.*
70. *Canovi* was detained, along with ninety-three other individuals, pursuant to a general executive order under the Onganía state of siege. *Canovi* had no police record, and there was no allegation that he was involved in union activity. Rather, there was evidence that *Canovi* was a longtime employee of General Motors with a good work history. He was also a law student at the University of Buenos Aires and had no disciplinary record and no record of belonging to any student group. *Canovi* testified before the court of first instance that he had no political affiliations. The court of first instance granted the habeas corpus petition and freed *Canovi*. The Court of Appeals reversed and reinstated *Canovi*’s detention. 278 Fallos at 330-43.
71. *Id.* at 340. The decision left unclear what standard of review the Supreme Court intended to apply.
72. *Id.*
would not review the reasonableness of executive detentions during a state of siege. 73

II. HABEAS CORPUS UNDER THE MILITARY DICTATORSHIP: 1976-1983

A. Abuses of the State of Siege Powers

When the Argentine military replaced the civilian government of Isabel Martinez de Perón on March 22, 1976, to "save the country from economic chaos and the threat" of terrorism, it inherited a state of siege already over a year old. 74 The military also inherited a number of restrictions placed on the habeas corpus process by the Perón government pursuant to its article 23 powers. 75 General Tomás Sánchez de Bustamante summarized the military regime's attitude:

There are legal norms which do not apply in this instance, for example, the writ of habeas corpus. In this type of struggle, the inherent secrecy with which our special operations must be conducted requires that we not divulge whom we have captured and whom we want to capture; everything has to be enveloped in a cloud of silence. 76

The military established its "cloud of silence" by extending the state of siege restrictions and further limiting the right of habeas corpus.

73. However, the Supreme Court recognized a transgression of the limitations of article 23 by the executive in one habeas corpus action. In 1972 Fernando Luis Chaves was detained by executive order pursuant to a state of siege. Chaves petitioned the executive to leave the country, and upon denial of his petition brought a habeas corpus action to enforce his article 23 right. The judge of first instance determined that there was no charge or investigation pending against Chaves and found no reason to deny Chaves' petition. The executive continued to prevent Chaves from leaving the country. The Supreme Court found that the executive's denial of Chaves' petition to leave the country was a penalty or punishment in violation of article 23. It thus ordered that Chaves be allowed to leave the country within five days. 282 Fallos 63 (1972).

74. On November 6, 1974, the Perón government declared a state of siege over the entire country due to terrorist attacks. Decree No. 1368/74, promulgated Nov. 6, 1974. For a description of the circumstances surrounding this state of siege, see OAS REPORT, supra note 3, at 20 & n.12; Garro & Dahl, supra note 3, at 288 & n.13. The state of siege was continued by the Perón government in Decree No. 2717/75, promulgated Oct. 1, 1975, and was kept in place by the successive military juntas from 1976 to 1983. The government of President Reynaldo Bignone lifted the state of siege after the October, 1983 elections. Decree No. 2834/83, promulgated Nov. 28, 1983.

75. Decree No. 807/75, promulgated Apr. 1, 1975, established a process for the exercise of the article 23 right to leave the country. It provided that all petitions be submitted to the Minister of Interior, who would investigate whether an order existed for the capture or detention of the individual that prevented him or her from leaving the country. Decree No. 642/76, promulgated Feb. 17, 1976, provided that petitions to leave the country would be denied if the petitioner wished to go to certain countries. It further provided that writs of habeas corpus would be stayed while the lower court's decisions were appealed.

76. NUNCA MÁS, supra note 1, at 402, citing La Capital, Rosario, June 14, 1980.
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1. Elimination of an Independent Judiciary

The military government first instituted measures to eliminate the independence of the judiciary. The junta immediately dismissed the national Supreme Court, the federal Attorney General and the supreme courts of the provinces. The new members of the judiciary were required to swear allegiance both to the Constitution and to the Process. The military also required the president to automatically confirm its nominees to the vacant seats. While the Process retained the article 96 guarantee of life tenure during good behavior for the new appointees, this manipulation of the judiciary severely curtailed its ability to act independently. These measures were not expressly directed at the process of habeas corpus, but by significantly reducing judicial independence they reduced the judiciary's ability to challenge executive detentions through habeas corpus petitions.

2. Limitations on Habeas Corpus Procedure

The military regime also relied on its article 23 powers to limit habeas corpus procedures. The most direct limitation was a law that suspended a favorable decision on a writ of habeas corpus during appeal, requiring the detainee to remain under arrest. The regulation distinguished between those persons detained by the executive pursuant to its state of siege powers and those detained for some other reason. Those detained by executive order under article 23 could not be released until the government's final appeal of the decision.

The appeals provision eliminated any possibility that habeas corpus could function effectively during the military regime. Even if the judge of first instance ordered the release of an individual detained under the state of siege, the individual inevitably remained in jail while the public prosecutor appealed.

79. Many commentators argue that the courts lacked sufficient independence to carry out their role as investigators and enforcers of constitutional rights during the dictatorship. See, e.g., NUNCA MÁS, supra note 1, at 391-92; OAS REPORT, supra note 3, at 240-41; Feinrider, supra note 26, at 196 & n.183; Garro & Dahl, supra note 3, at 290 & n.21. Others note that the judiciary retained some degree of independence. See OAS REPORT, supra note 3, at 242 (report of Commission's interview with Dr. Adolfo Gabrielli, then President of the Argentine Supreme Court). See also A. GABRIELLI, LA CORTE SUPREMA DE JUSTICIA DE LA NACIÓN Y LA OPINIÓN PÚBLICA, 1976-1983, at 5 (1986).
the decision. Because federal prosecutors were under the authority of the Ministry of Interior (the branch of the executive responsible for article 23 detentions), they appealed habeas corpus judgments favorable to detainees. While the appeals law required appeal within 48 hours, the entire appeals process could last months or even years. In addition, individuals often disappeared after the courts of first instance granted their petitions and ordered their release.

The military further restricted the process of habeas corpus by limiting the number of judges competent to hear habeas corpus petitions. Article 618 of the Criminal Procedure Code established that "federal criminal judges of the capital and the national territories" were competent to hear habeas corpus petitions. This provision did not make clear whether both national and federal judges, or federal judges alone, would be competent to hear petitions. The military government also restricted the number of judges by passing Law 22.383, which provided that only federal judges with competence to hear criminal cases could hear petitions. This restriction reduced the number of judges available to hear habeas corpus petitions in the federal capital from thirty-seven to five and assured that the petitions would be heard by a controllable number of federal magistrates loyal to the military government.

The military adopted many unofficial restrictive practices in addition to the jurisdiction regulations and manipulation of the appeals process. For example, the military posted notices in the courts which stated that habeas corpus petitions would not be accepted without the signature of a lawyer. The attorneys general instructed the courts of first instance to record the names and attorney numbers of all attorneys submitting habeas corpus petitions as a method to control the process.

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82. NUNCA MÁS, supra note 1, at 401-02.
83. Id.; Garro & Dahl, supra note 3, at 295.
84. CODIGO PROC. PENAL at art. 618.
85. N. SAGÜES, HABEAS CORPUS, supra note 8, at 324-35. In the Argentine federal capital there are judges that are designated "national" (local judges equivalent to the provincial judges, but federal in the sense that their jurisdiction is a federal territory), and judges that are designated "federal" (judges with competency to hear federal questions). Id. at 324. Both national and federal judges could hear habeas corpus petitions until the military imposed these restrictions.
87. Interview with Dr. Luis Fernando Niño, Judge of Criminal Instruction, First Instance, No. 3, Capital Federal, Buenos Aires (June 1, 1989) (on file with author) [hereinafter Niño Interview]. See also NUNCA MÁS, supra note 1, at 403 (attributing the failure of habeas corpus in part to the restrictive standard of competence). Judge Niño described how federal judges summarily handled habeas corpus decisions, converted them to criminal complaints for the illegal deprivation of liberty and transferred them to national judges. The investigations of Judge Niño's predecessor, Judge Carlos Oliveri, in the illegal deprivation cases produced much of the evidence used in the eventual trial of the military commanders for human rights violations. Id. See also Judgment on Human Rights, supra note 13, at 339; AMERICAS WATCH REPORT, supra note 9, at 53.
88. This requirement was unprecedented and was never officially announced. See Mignone, Estlund & Issacharoff, supra note 4, at 121 & n.10.
od of intimidation. Large numbers of attorneys who assisted families of the disappeared were detained or disappeared.

3. Other Restrictions Under the State of Siege Powers

In addition to restrictions that directly limited the procedure of habeas corpus, the military passed numerous laws that sought to remove certain types of executive actions from the review of the courts. If a detention or practice could be categorized as within the executive’s state of siege powers, the judiciary could not issue a writ of habeas corpus ordering the release of the individual or the cessation of the practice. The junta enacted a number of decrees and laws manipulating article 23 to provide the military with the broadest possible latitude for the detention and treatment of those considered subversives.

The military first eliminated the restrictions provided by the "convictions and punishments" clause of article 23. The military defined a large number of actions that could be taken pursuant to the power of arrest and transport that were not to be considered "conviction or punishment." The military also gave itself the power to determine the manner of arrest and the site of detention, and decreed that the article 23 power of arrest and transport includes the power to detain an individual indefinitely, while the military would have the power to interrogate the individual and gather evidence for summary proceedings. The military also expanded its power to arrest a suspect either caught flagrante delicto, or when the military had "strong indications" or "half-conclusive" proofs of crimes. Finally, the military government included under its article 23 powers the authority to proceed with preliminary hearings that could result in prison sentences.

Additional manipulations involved a series of decrees and laws that limited the exercise of the article 23 right of option to abandon the country. The military government immediately suspended this right upon taking power and codified the suspension a few months later. The suspension was left in place

89. Niño Interview, supra note 87. The attorneys general during this period were Dr. Elías P. Guastavino and Dr. Mario Justo López.
90. Id. See also NUNCA MÁS, supra note 1, at 416-24.
91. Garro & Dahl, supra note 3, at 292-93; Snyder, supra note 3, at 511.
94. Id.
until September, 1977, when the military enacted a new process so complicated, and with so many discretionary controls that it almost never resulted in the successful release of a detainee.  

B. Judicial Control of Habeas Corpus Under the Dictatorship

1. Military Restrictions of Habeas Corpus Upheld

During the military dictatorship the Supreme Court denied every challenge to official and unofficial restrictions on the habeas corpus process. No court invalidated any of the restrictions on the grounds either that they impinged on the guarantees of articles 18 or 23 or that they restricted the process of habeas corpus as a constitutional right. Instead, the courts sanctioned those restrictions.

a. Right of Option

The Supreme Court expressly upheld the military’s restriction of the article 23 right to abandon the country. The Supreme Court had earlier characterized the right of option as a constitutional guarantee that remained intact during a state of siege and found that its denial violated article 23. Nonetheless, in the case of Maria Cristina Ercoli, the Supreme Court upheld the suspension of the right of option pursuant to Laws 21.275 and 21.488.

Ercoli was detained under the authority of a decree issued by the Perón government on December 3, 1975, and she asked to leave the country. When the request was denied, as the military had since suspended the article 23 right of option, Ercoli submitted a petition of habeas corpus to enforce her

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97. The Institutional Act of September 1, 1977, reprinted in XXXVII-D A.D.L.A. 3664 (1977), prolonged the suspension of the right of option, allowed the executive to carry out its article 23 power of arrest in jails and military institutions, limited "travel areas" to the subject’s home and gave the president the power to determine whether a detained individual would be allowed to leave the country according to the security needs of the nation. On the same day, the military government passed Resolution S/N, reprinted in XXXVII-D A.D.L.A. 3668 (1977), which created a commission to assist the president in analyzing the situation of those arrested pursuant to article 23 authority. Finally, the military established a permanent review process for petitions from individuals who sought to exercise their article 23 right to leave the country. Law 21.650, promulgated Sept. 26, 1977, reprinted in XXXVII-D A.D.L.A. 3746 (1977). For further discussion of the military’s restriction of the right of option, see N. SAGÔES, HABEAS CORPUS, supra note 8, at 286-90; Garro & Dahl, supra note 3, at 291-92 & n.26.

98. See supra notes 63-73 and accompanying text for a discussion of the judiciary’s ability to invalidate a regulation on the grounds that it unconstitutionally restricted the process of habeas corpus.


100. 296 Fallos at 374. For further discussion of the Ercoli decision, see N. SAGÔES, HABEAS CORPUS, supra note 8, at 287-88; Garro, supra note 3, at 322.
right. The federal court of first instance granted the petition and ordered the government to allow Ercoli to leave Argentina within ten days. The Court of Appeals upheld the decision, finding that to deny Ercoli's petition would convert Ercoli's detention to an indefinite imprisonment and a punishment in violation of article 23. The Court of Appeals gave the executive twenty days to grant Ercoli's request. The Supreme Court reversed, holding that Laws 21.275 and 21.448 constitutionally suspended the article 23 right of option for a limited period.

The Court based its decision on the premise that the guarantees and rights established in the Argentine Constitution were not absolute, but were subject to laws regulating their exercise. The Court reasoned that if all guarantees were subject to regulations, it need only look to the authority granted the executive by article 23 in determining whether the regulation in question was reasonable under the two-part test of Primera Plana. The Ercoli Court concluded that a suspension of the right of option for a limited period was reasonable under the threat posed to the security of the state by subversive activities.

Three years later, in 1975, the Court again addressed the constitutionality of Law 21.650 in the case of Benito Alberto Moya. Pursuant to a decree, the government detained the nineteen year old Moya. He twice petitioned the Ministry of Interior, seeking to exercise his right to leave the country. The Ministry of Interior denied the second petition under the authority of the Institutional Act of September 1, 1977 and Law 21.650, justifying the denial on the ground that Moya belonged to a "band of delinquent terrorists acting

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102. Id. at 372, 386.
103. Id. at 384.
104. Id. at 389-90.
105. Id. at 389.
106. Id. at 388, 390. The Argentine Supreme Court again addressed the constitutionality of the junta's restriction on the right of option in the case of Jaime Lokman, 299 Fallos 142 (1977). Lokman, detained pursuant to an executive order, brought a petition of habeas corpus to enforce his article 23 right of option. The court of first instance denied the petition and was upheld by the Federal Court of Appeals of Cordoba. Id. at 145. Lokman brought an appeal to the Supreme Court challenging the constitutionality of Law 21.275, reprinted in XXXVI-B A.D.L.A. 1040 (1976); Law 21.448, reprinted in XXXVI-D A.D.L.A. 2867 (1976); and Law 21.650, reprinted in XXXVII-D A.D.L.A. 3746 (1977). Unlike the Ercoli case, Lokman challenged not only the temporary suspension of the right of option by Laws 21.275 and 21.448, but the permanent regulation of the right by Law 21.650. The Supreme Court in Lokman found that institutional acts enacted pursuant to the Process, such as Law 21.650, were integrated into the Argentine Constitution, and would be sustained when based on a "true state of need" so long as the regulations under the state of siege were reasonable. 299 Fallos at 145. The Court concluded that Law 21.650 restrictions on article 23 were neither arbitrary nor irrational and upheld the lower courts' finding of reasonableness. Id. at 146. For further discussion of the Lokman decision, see N. SAGÚÉS, HABEAS CORPUS, supra note 8, at 288.

108. 303 Fallos at 707.
in the Province of Tucuman. Moya then brought a petition of habeas corpus to enforce his article 23 right of option. The Federal Court of Bahía Blanca granted Moya's writ, holding that continued detention was an unconstitutional restriction on his article 23 rights.\(^{109}\)

The Supreme Court, on appeal, attempted to reconcile Moya's unconditional right of option, guaranteed by article 23, with the restrictions placed on that right by Law 21.650. The \textit{Moya} Court noted that a state of siege declaration did not automatically suspend the article 23 right to leave the country because the right limits the executive's power during a state of siege.\(^{110}\) However, the Court concluded that the executive's power to deny the right of option (if the detained individual threatens the peace and security of the nation), derived from Law 21.650, must be "harmonized" with the detainee's article 23 rights. In order to "harmonize" Moya's unconditional right with the executive's restriction of that right, the Supreme Court applied the reasonableness test to the executive's actions.\(^{112}\) The Court held that the executive either had to allow Moya to abandon the country within fifteen days or reduce his detention to a form that would be reasonable, namely, a condition of house arrest.\(^{113}\) On July 9, 1981, the military government complied with the Supreme Court's decision by releasing Moya from detention and placing him under house arrest.\(^{114}\)

Thus the Supreme Court cautiously declined to investigate the constitutionality of any of the restrictions placed on the right of habeas corpus. Instead, the Court chose to exercise an ineffectual "control of reasonableness" over the junta's regulations and restrictions. The failure to directly challenge the constitutionality of these regulations contributed to the systemic failure of the habeas corpus process.

\textbf{b. Judicial Review of Detentions Under the Executive's State of Siege Powers}

\textbf{(i) Standard of Review for Article 23 Detentions}

When the military took power in 1976, there were already many individuals in prison who had been detained by the Perón government. The number of detainees increased dramatically under the military regime, and the courts were

\(^{109}\) \textit{Id.}

\(^{110}\) The court overturned the denial of Moya's petition by the court of first instance. \textit{Id.} at 703-04.

\(^{111}\) \textit{Id.} at 708-09.

\(^{112}\) \textit{Id.} at 711-12.

\(^{113}\) \textit{Id.}

\(^{114}\) \textit{NUNCA MÁS, supra} note 1, at 411.
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soon faced with a flood of habeas corpus petitions.115 Earlier, the Supreme Court had established in the Canovi decision that the judiciary could not reverse the exercise of article 23 powers to arrest and transport unless the executive transgressed article 23 limits.116 The Court concluded that while the act of arrest or transport could not be a "penalty or punishment," the judiciary could not consider the reasonableness of the arrests themselves.117

In the case of Carlos Mariano Zamorano, the Supreme Court returned to the question of the applicable standard of review governing executive detention of individuals during a state of siege.118 Zamorano, a defense lawyer with the Argentine League for Human Rights, was detained shortly after the Perón government declared a state of siege in 1974. Zamorano brought a habeas corpus petition to challenge the reasonableness of his detention, alleging that his detention amounted to a penalty or punishment.119 The court of first instance granted the petition. On appeal, the Court of Appeals requested information concerning the grounds for the detention from the Ministry of Interior.120 The Ministry of Interior responded that Zamorano was held pursuant to a legitimate executive decree and that the reasons for the arrest stated in the decree continued to exist. The Court of Appeals found that the response was insufficient and thus upheld the grant of Zamorano’s petition.121 The Supreme Court took up the appeal while Zamorano remained in detention.122

115. Id. at 403-04.
117. Id.
118. 298 Fallos 441 (1977). For further discussion of the Zamorano decision, see OAS REPORT, supra note 3, at 229-34.
119. 298 Fallos 441, 442-43.
120. OAS REPORT, supra note 3, at 229-30, quoting the Court of Appeals’ unpublished opinion. The decision of the Federal Court of Appeals is also quoted at length in 1 BULLETIN OF THE CENTRE FOR THE INDEPENDENCE OF JUDGES AND LAWYERS 13-14, 36 (1978) [hereinafter BULLETIN].
121. The Court of Appeals held:

[i]t is not possible to accept the argument that the President of the Republic is alone empowered to examine the situation of those who are detained at his order. Although it is clearly beyond the scope of judicial activity ... it is equally clear that it is the duty of the Judiciary of the Nation to examine exceptional cases such as the present as to the reasonableness of the measures taken by the executive[,] and this is set out in Articles 23, 29, and 95 of the National Constitution ... It is self-evident that if at the end of two years’ [sic] of detention of a citizen the Administration can show no other basis for this detention than the decree under which it was ordered, and if such an extended period of time has not been used diligently by the Administration to collect evidence against or in favor of the accused, this Court can only conclude that since there appear to exist no elements showing that Carlos Mariano Zamorano is particularly dangerous and in view of the time which has elapsed since his arrest, it would be unreasonable and unfounded to prolong such a situation ... Although it is evident that the factual information giving rise to the State of Siege continues in its entirety, this in itself is not sufficient to justify the extension of the detentions for such lengthy periods of time that they transform the exceptional character of the procedure in question into what is really a penal sanction.

BULLETIN, supra note 120, at 14.
122. Due to Law 21.312, promulgated May 4, 1976, reprinted in XXXVI-B A.D.L.A. 1097 (1976), detainees whose habeas corpus petitions were granted by a lower court remained in detention until the final
The Court in Zamorano held for the first time that the judiciary could consider the exercise of the power to arrest and transport by the executive, but only to the extent that the judiciary could assess the reasonableness of restrictions of liberty. The Court adopted the standard from the amparo decisions of Sofía and Primera Plana, the standard that had not been applied to article 23 detentions in the decisions of Trossi and Canovi. The Zamorano Court concluded that to be able to exercise the control of reasonableness, it needed precise information on the reason for the arrest and its relation to the state of siege, and therefore ordered the executive to provide precise information regarding Zamorano’s detention. The decision, however, was not much help to Zamorano. The executive provided the Court, ex parte, with information of Zamorano’s communist contacts. Based on this uncontested evidence, the Court reversed the order of release and denied Zamorano’s habeas corpus petition.

The Supreme Court applied the Zamorano analysis to free a detainee only once during the military dictatorship. The habeas corpus case of Jacobo Timerman became internationally known and discussed as an example of the success of the habeas corpus process during Argentina’s military dictatorship. However, human rights scholars discussing the Timerman case are quick to point out the peculiarities that set it apart from the thousands of unsuccessful habeas corpus petitions during that period. First, Timerman was the well-known and influential editor of La Opinión, a Buenos Aires daily newspaper. Second, Timerman was detained under a specific allegation that provided the judiciary with grounds for determining whether his lengthy detention was justified. Third, Timerman’s cause became internationally known and the military junta was subject to widespread pressure from international organizations and foreign governments, including President Carter and members of the U.S. Congress.

Timerman was arrested on April 21, 1977, under Executive Decree 1093/77, allegedly because of his association with David Graiver, the publisher of La Opinión. Graiver, who died in an airplane accident earlier that appeal. See supra notes 80-83 and accompanying text.

123. 298 Fallos 441, 444.
124. See supra notes 58-73 and accompanying text.
125. 298 Fallos at 445.
127. Id. at 231.
128. See, e.g., Garro, supra note 3, at 332-33; Snyder, supra note 3, at 516-17.
129. G. Carrió, EL CASO TIMERMAN (1987). Genaro Carrió acted as Timerman’s lawyer throughout the two year process of litigation and appeals to advance his habeas corpus petition. Carrió describes the litigation and presents copies of all documents submitted to and decisions received from the courts involved.
130. Garro, supra note 3, at 332.
131. Snyder, supra note 3, at 515.
month, had been accused by the military of laundering funds for a terrorist group known as the "Montoneros." On the day following Timerman's arrest, his wife commenced a habeas corpus action, claiming the arrest was arbitrary and had no reasonable basis in law. In response to the court's request for information, the Ministry of Interior declared that Timerman was arrested pursuant to the executive's article 23 powers and that his connection to Graiver was under investigation by a Special Military War Council. Timerman remained in custody while his habeas corpus petition was pending. The petition was denied by the court of first instance and then by the federal court of appeals. By the time the petition reached the Supreme Court, the Special Military War Council had tried and acquitted Timerman for his alleged participation in the Graiver matter. The Commander of the First Army Corps informed the Supreme Court that Timerman would remain in detention pursuant to Decree 1093/77.

The Supreme Court found Timerman's continued detention unconstitutional. The Court held that the executive must exercise its article 23 powers in an established and reasonable manner and declared that the judiciary (particularly the Supreme Court, as the court charged with protecting constitutional guarantees), is competent to control the executive exercise of state of siege powers. A state of siege, the Court found, is an extreme and transitory recourse meant to preserve, not extinguish, the Constitution. Therefore, the executive must, at the request of a competent judge, provide enough information on each concrete case to allow a court to apply the "control of reasonableness." To exercise this control, the Timerman Court resorted to the standard of reasonableness established in Primera Plana and held that there are two facets of the examination of reasonableness: first, an examination of the relation between the affected constitutional guarantee and the state of interior commotion; and second, verification of whether the restricting method is proportionate to the ends sought by the state of siege. Applying this standard, the Court found that under the generic explanation of Decree 1093/77 Timerman's arrest

132. Id. at 515.
133. G. Carrion, supra note 129, at 9 (entire petition and its amendments reproduced as Anexos 1-3, 5).
134. Id. at 9; see also Jacobo Timerman, 300 Fallos 816, 820 (1978).
135. Timerman was interrogated and tortured while in custody. For Timerman's description of his experiences, see J. TIMERMAN, PRISONER WITHOUT A NAME, CELL WITHOUT A NUMBER (T. Talbot trans. 1981).
137. Timerman, 300 Fallos at 822.
138. Id. at 820.
139. Id. at 822.
140. Id.
141. Id. at 819-20.
"bears a direct and immediate relationship to the causes that prompted the state of siege," but did not provide a reasonable basis for Timerman's continued detention. The Court further noted that if Timerman were arrested due to his alleged involvement in the Graiver matter, and if the War Council had acquitted him in this matter, the reason for his arrest and detention would no longer exist.

The Supreme Court's decision, however, did not free Timerman. He was placed under house arrest by virtue of a resolution issued by the military junta. The Supreme Court refused to determine the constitutionality of the resolution because its validity had not been challenged by the habeas corpus petition brought by Timerman's wife. Timerman then filed a second petition for habeas corpus, which also reached the Supreme Court. The Court concluded that the reasons for Timerman's detention stated in the executive's resolution were not reasonably related to the causes of the state of siege, and thus the detention amounted to a punishment not authorized by article 23.

(ii) Application of the Reasonableness Standard

While the Zamorano, Timerman and Moya decisions established a reasonableness standard of judicial review over arrests ordered by the executive during a state of siege, Argentine courts did not apply the standard to affect the release of any individuals. The courts generally accepted the executive's assertion that an individual's link to subversive activities constituted a well-founded basis for detention.

One representative example of this is the case of Hebe Margarita Tizio. Tizio was detained on May 14, 1976, pursuant to an executive decree. On August 10, Tizio solicited permission from the Ministry of Interior to leave the country. The petition was denied, and Tizio's father brought a habeas corpus petition on her behalf challenging the reasonableness of her continued detention. The court of first instance denied the petition, declaring that it could not question the motives for the detention. The Court of Appeals upheld the decision, finding that the length of the detention was not unreasonable and did not convert the arrest to a penalty or punishment in violation of article

142. Id. at 822.
143. Id.
144. G. Carrió, supra note 129, at 41.
146. Id. at 782-83.
147. See also Garro, supra note 3, at 330.
149. Id. at 295-96.
23. On appeal, the Supreme Court applied the Zamorano reasonableness standard. The Ministry of Interior had informed the Court that Tizio was being detained because she was "linked to subversive activities." The Court found that the assertion satisfied the duty of the executive to provide the courts with detailed information concerning the reasons for an individual’s detention, as required by Zamorano. The Tizio Court concluded that once information concerning subversive activity had been provided, the executive decision to arrest or transport was irreversible.

In numerous other cases following Zamorano, lower courts granted writs of habeas corpus on the grounds that the executive’s generic assertions, justifying the detention on the detainee’s connections with subversive elements, did not comply with the reasonableness standard elaborated in Zamorano and Timerman. In all these cases, the Supreme Court overturned the lower courts, finding that once the executive claimed the detained individual was involved in "subversive activity," the decision to arrest was within the article 23 discretion of the executive. Thus the Supreme Court refused to implement the Zamorano standard of reasonableness in reviewing detentions, holding that these executive actions were de facto nonjusticiable political questions.

150. Id. at 296.
151. Id. at 297.
152. See also Enrique Perelmutter, 301 Fallos 866 (1989). Perelmutter, detained pursuant to executive order, brought a habeas corpus petition challenging his continued detention. The court of first instance requested information regarding the detention from the executive, and the Subsecretary of the Interior responded that Perelmutter was detained for being "a participant in criminal activities against the state, characterized by action in secret cellular organizations designed to obtain financial resources to use in favor of subversive elements." Id. at 33-34. The Supreme Court upheld the dismissal of Perelmutter’s habeas corpus petition, determining that the executive acted within its article 23 powers. Id. at 34. The Court expressly adopted the argument of the Attorney General that the information provided by the Ministry of the Interior constituted sufficient information to comply with the rationality standard adopted in Zamorano and Timerman. Id.
153. See, e.g., Edith Staheli de Frias, 301 Fallos 867 (1980) (Supreme Court reversed lower court’s sentence ordering the freedom of Staheli de Frias, as it found executive’s report stating cause of detention sufficient to meet rationality standard of Zamorano and Timerman).

In 1983, the Supreme Court, securely independent from the weakened military junta, used the Zamorano reasonableness standard to negate restrictions placed on the return to the country of ex-Senator Yrigoyen. Hipólito Solari Yrigoyen, 305 Fallos 269 (1983). Ex-Senator Yrigoyen was arrested on September 1, 1976, on the basis that his activities "threatened interior peace and public order." Id. at 276. On April 25, 1977, Yrigoyen exercised his right to abandon the country. Yrigoyen subsequently initiated a habeas corpus petition seeking to overturn the executive decree that allowed him to abandon the country on the condition that he never return. The Supreme Court found that the executive’s regulation of the exercise of the right of option was subject to the judicial control of reasonableness. 305 Fallos at 299. The Court held that the arrest order did not establish a rational relation between Yrigoyen’s exclusion and the motives that prompted the state of siege, and ordered the executive to lift all restrictions on Yrigoyen’s return. Id. at 280. For further description of the brutal treatment of Yrigoyen and ex-Representative Amaya while they were under executive detention, see NUNCA MÁS, supra note 1, at 249. For additional information on the brutality suffered under executive detention, see OAS REPORT, supra note 3, at 155-63.
2. The Effectiveness of Habeas Corpus Process

a. The Problem of Executive Noncompliance

The military’s noncompliance with the habeas corpus process was manifest, systematic and overwhelming. The investigations by the Organization for American States’ Inter-American Commission for Human Rights and the report of the Comisión Nacional Sobre la Desaparición de Personas (CONADEP), revealed in case after case a systematic practice in which the military responded to judicial requests for information concerning detainees by asserting that the evidence was confidential.\textsuperscript{154} The Federal Court of Appeals of Buenos Aires, which conducted the trial of former members of the military junta on charges of human rights abuses, noted that "the defendants deliberately concealed the facts from the courts, from the families of the victims, from national and foreign institutions and organizations, from the Church, from the governments of foreign countries, and from society at large."\textsuperscript{155} In short, the patent-ly false and obstructive reports submitted to the courts by the military in the majority of habeas corpus investigations successfully hid the military’s illegal activities from the judiciary and the Argentine public.

b. The Problem of Judicial Independence

The Argentine courts facilitated the abuse and manipulation of the protections designed to be a part of the habeas corpus process.\textsuperscript{156} Argentine judges, for the most part, did not assert their power of investigation. Instead, judges accepted the security force’s routine statements that the person sought was not in detention. In none of the reported cases did the judges of first instance go to the security forces’ headquarters or to the reported detention sites.\textsuperscript{157} In spite of overwhelming evidence of the existence of illegal detention centers, no special methods of investigation were used, and the courts accepted the military’s denials as fact. In the final moments of the dictatorship, some courts assigned habeas corpus cases to special investigation magistrates, but the magistrates likewise failed to penetrate the wall of executive denial.\textsuperscript{158}

\textsuperscript{154} OAS REPORT, supra note 3, at 245; NUNCA MÁS, supra note 1, at 479.
\textsuperscript{155} Judgment on Human Rights, supra note 13, at 333-34 (1986).
\textsuperscript{156} NUNCA MÁS, supra note 1, at 404. The report nonetheless acknowledged that "there were judges who, in the face of tremendous pressure, carried out their duties with the dignity and decency expected of them." Sadly, the report found that most members of the judiciary exhibited complicity and indifference. Id. at 392, 404.
\textsuperscript{157} Id. at 404.
\textsuperscript{158} Id. The investigations of national criminal judges for the crime of illegal deprivation of liberty, while not leading to the discovery of disappeared persons, did provide much of the evidence used in trials of military commanders for human rights abuses. See Niño Interview, supra note 87.
In *Pérez de Smith*, the Supreme Court heard a consolidated habeas corpus petition on behalf of 1,542 detainees whose individual petitions had been rejected by the lower courts. The families asked the Court to accept original jurisdiction in the petition and to intervene directly. The Supreme Court declined to do so, citing articles 100 and 101 of the Argentine Constitution. The Court requested that the executive "intensify the investigations into the whereabouts and situations of those persons whose disappearances had been denounced before the courts." The *Pérez de Smith* Court further exhorted lower court judges to "exhaust all judicial procedures of the institution of habeas corpus established in the Constitution and in the law." Finally, the Court declared that the refusal of public authorities to cooperate with judges amounted to a "miscarriage of justice."

The executive's failure to respond prompted the renewal of the petition before the Supreme Court on three separate occasions. The Supreme Court continued to decline jurisdiction, but in its third decision, the Court stated:

Miscarriage of justice not only takes place when people are precluded from resorting to the courts of justice, or when a court decision is unreasonably delayed; it also arises when judges are unable to exercise those powers with the effectiveness demanded by the legal order. The legal system cannot be enforced without the aide of the courts, which are entrusted by the National Constitution to decide cases brought before them. These considerations are especially pertinent in the case at bar, where basic human rights are at stake.

These supplications had little or no effect on the fate of the disappeared.

The Supreme Court holdings in the cases of Inés Ollero, Osvaldo César Georgi, Roberto Grunbaum and Celia Sara Machado similarly failed to produce results. In these cases, the Court reiterated its holding in *Pérez de Smith*, remanding the petitions to the appropriate lower courts and instructing them to conduct additional investigations.

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159. 297 Fallos 338 (1977). For additional discussion of this case, see NUNCA MÁS, supra note 1, at 404; N. SAGÓFS, HABEAS CORPUS, supra note 8, at 421-23, 489; Garro, supra note 3, at 335-36; Mignone, Estlund & Issacharoff, supra note 4, at 122-23 & nn.14-16.
160. 297 Fallos at 340. Articles 100 and 104 of the Argentine Constitution establish when the Supreme Court may exercise original jurisdiction and appellate jurisdiction.
161. 297 Fallos at 341.
162. Id.
163. Id. at 340.
164. Habeas corpus petitions have no res judicata effects and can be repeated with the hope that the person may later be discovered in a detention center run by the executive or military authorities. The *Pérez de Smith* petition was renewed on July 20, 1978, 300 Fallos 832; December 21, 1978, 300 Fallos 1282; and December 26, 1980, 302 Fallos 1680.
165. 300 Fallos 1282, 1286 (1978).
166. 300 Fallos 457 (1978).
167. 301 Fallos 143 (1979).
169. 302 Fallos 772 (1980).
170. Inés Ollero, 300 Fallos at 460-61; Osvaldo César Georgi, 301 Fallos at 145; Roberto Grunbaum, 301 Fallos at 1048; Celia Sara Machado, 302 Fallos at 781-82.
In Ollero, the Supreme Court heard an appeal of a habeas corpus petition that had been rejected by lower courts despite substantial evidence of the detention by security forces.\textsuperscript{171} The Court acknowledged that if the relevant security force denied any knowledge of the person in whose favor the petition was brought, the Court could do little. The Court nonetheless found that the petition presented "proofs that formed a serious presumption" that Ollero was detained by military authorities.\textsuperscript{172} The Court stated that habeas corpus "was created to restore liberty immediately to those deprived of it and to do so the [C]ourt must take the steps necessary to make it efficient."\textsuperscript{173} The Supreme Court concluded that in the face of the prima facie evidence presented in the Ollero petition, the court must broaden the investigation.\textsuperscript{174}

The petition of Osvaldo César Georgi was also unsuccessful. In 1978, Alfredo Antonio Georgi was taken from his workplace by a group of unidentified armed individuals.\textsuperscript{175} Georgi's father brought a habeas corpus petition seeking his release, but military authorities denied any knowledge of Georgi's whereabouts, and the petition was dismissed. Georgi's father then directly petitioned the Supreme Court to intervene. While urging that the lower court conduct full investigations, the Supreme Court held that under the Argentine Constitution and the Pérez de Smith decision, the Court had no original jurisdiction over the case.\textsuperscript{176}

In Roberto Grunbaum, the Supreme Court again urged lower courts to broaden their investigations into the facts underlying habeas corpus petitions. Grunbaum was detained in his home in the presence of his father on June 16, 1977, by a group of persons claiming to be members of the security forces.\textsuperscript{177} The Grunbaum Court repeated its holding in Georgi that "habeas corpus was created to immediately restore liberty."\textsuperscript{178} The Court found that the

\textsuperscript{171}. 300 Fallos at 460. César Ollero brought the petition on behalf of his daughter, who disappeared from Buenos Aires in 1978.
\textsuperscript{172}. \textit{Id}. at 460.
\textsuperscript{173}. \textit{Id}. at 461.
\textsuperscript{174}. \textit{Id}. at 460-61. After the Court's remand, no further information on Ollero's whereabouts was discovered and the petition was eventually dismissed. See Snyder, \textit{supra} note 3, at 517.
\textsuperscript{175}. 301 Fallos at 143. According to evidence later obtained from the testimony of eyewitnesses, Georgi was held at various clandestine camps under the authority of the military and the federal police. \textit{Id}.
\textsuperscript{176}. \textit{Id}. Georgi's petition was converted into a criminal complaint for the illegitimate deprivation of liberty and was eventually heard in the Federal Court of Tucumán. On May 8, 1980, the case was dismissed for lack of evidence after all inquiries submitted to the military failed to produce evidence of Georgi's whereabouts. The dismissal was upheld by the Federal Chamber of Appeals and Correctional Division, and eventually by the Supreme Court. Mignone, Estlund & Issacharoff, \textit{supra} note 4, at 120, 123 & n.18, 124 & n.22.
\textsuperscript{177}. 301 Fallos at 1047, 1049. Grunbaum's father brought a habeas corpus petition to seek knowledge of his son's whereabouts and the reason for his detention. The judge of the court of first instance dismissed the petition without having received a response from the Armed Forces. \textit{Id}.
\textsuperscript{178}. \textit{Id}. at 1049.
judge of the court of first instance "could have and should have broadened the investigation, adopting the means necessary to duly clarify whether the beneficiary of the habeas corpus was detained at some time and place by public functionaries." Following the Grunbaum decision in 1979, the Supreme Court issued a number of decisions in which it criticized the brief investigations of the lower courts and remanded cases for further inquiries. Despite these decisions and the Pérez de Smith, Ollero and Georgi cases, the process of habeas corpus remained an entirely ineffective method of obtaining information concerning disappeared individuals.

In addition to being ineffective, the judicial treatment of habeas corpus petitions harmed the public image of the judiciary. The CONADEP report found that during the military dictatorship, the judiciary "became a sham jurisdictional structure, a cover to protect its image," creating the impression that the rule of law was functioning when in fact its protections were useless against the military. The report concluded that "the formal way in which habeas corpus was implemented operated in practice like the other face of disappearance." The habeas corpus petitions decided during the dictatorship had two significant consequences. First, the courts began to exercise judicial review over detentions ordered by the executive during a state of siege using the Zamorano reasonable relation standard. While the exercise of judicial review did not lead to the granting of more habeas corpus writs, it did begin to expose the lawlessness of the military regime. Second, the decisions established the principles of an executive duty to cooperate, a judicial duty to investigate, and the power of the courts to make demands on the executive. Nonetheless, none of the Supreme Court’s pronouncements led to the discovery and return of a single disappeared person. Despite the filing of thousands of habeas corpus petitions and the overwhelming evidence of military involvement in the disappearances, not one habeas corpus petition yielded information concerning disappeared individuals. All the actions of the judiciary and the subsequent attempts at habeas corpus reform must be measured against this sobering failure.

179. Id. at 1050.
181. NUNCA MÁS, supra note 1, at 803.
182. Id. at 804.
III. REFORM OF HABEAS CORPUS AFTER THE DICTATORSHIP

A. The Habeas Corpus Act of 1984

On September 19, 1984, Senator Fernando de la Rúa introduced Law 23.098 ("Habeas Corpus Act"), which was intended to reform and consolidate the regulations governing the process of habeas corpus. The Act addressed both the antiquated habeas corpus regulations and confused legal standards used by Argentine courts during the military dictatorship. While not significantly confronting the wholesale failure of habeas corpus during the dictatorship, the Habeas Corpus Act did accomplish several major reforms in the habeas corpus process: it explicitly addressed the relationship between the judiciary and the executive during a state of siege (article 4); it established habeas corpus as a constitutionally based procedure (article 1); it expanded the jurisdiction, scope, and standing of habeas corpus procedures and the de office powers of judges (articles 2-6); and it regulated habeas corpus procedures in general (articles 8-26).

1. Article 4: Regulation of Habeas Corpus During a State of Siege

Article 4 is the most important and innovative feature of the Habeas Corpus Act because it establishes a national standard for the treatment of habeas corpus petitions for persons detained under an executive state of siege. Given the frequent imposition of states of siege, judicial control of executive detentions pursuant to state of siege powers is crucial to any realistic reform.

Article 4 provides that a judge must verify the following when reviewing habeas corpus petitions:
1) **Clause 1**: the legitimacy of the declaration of the state of siege;
2) **Clause 2**: the correlation between the detainment order and the cause of the state of siege;

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183. N. SAGÜÉS, HABEAS CORPUS, *supra* note 8. For a list of authorities discussing the Habeas Corpus Act, see *supra* note 8.
184. FUNDAMENTOS, *supra* note 38, at 2029. Senator de la Rúa stated that "[h]abeas corpus, applied by an independent judicial power, will enable a more rapid material and ethical reconstruction of our country, a proposal ... shared by all Argentinians who hope for a democracy effective in the mark of the law and the respect of the dignity of man." *Id.* at 2033. De la Rúa introduced a similar project in 1973, but the project was sent to the General Legislation Committee and never reached the full Senate. *Id.* at 2029, 2033.
185. See N. SAGÜÉS, HABEAS CORPUS, *supra* note 8, at 233 ("[article 4] constitutes in some aspects an audacious step forward"); D'Albora, *supra* note 8, at 973 (article 4 leaves behind traditional Supreme Court temperament that avoided questioning executive action taken during state of siege).
3) **Clause 3:** the form or conditions of detention;

4) **Clause 4:** the practical availability of the right of option (voluntary exile) to the detainee.

The first clause of article 4 reverses the traditional position of the Supreme Court that a declaration of a state of siege is a political question and, as such, is nonjusticiable. The clause empowers the judiciary to review actions by the executive and legislature taken pursuant to their constitutional authority to declare a state of siege.

Clause 1 creates a separation of powers problem between the judiciary, the executive, and the legislature. In completing the review provided for in clause 1, a court reviewing a habeas corpus petition might impinge on the competency of the other branches, for example, by examining the validity of a declaration of a state of siege. However, so long as the court determines only whether a state of siege was declared by constitutionally permissible means and does not examine whether existing conditions merit the declaration, the judiciary will be within the constitutional exercise of its powers.

Clause 2 codifies the standard of reasonableness for the review of detentions developed by Argentine courts in the 1970s. The Zamorano, Timmerman and Moya cases established the duty of the judiciary in reviewing habeas corpus petitions to ensure that executive detentions during a state of siege were reasonably related to the causes that gave rise to the state of siege. The Act does not resolve the conflict between these cases and others (e.g., Tizio and Perelmuter), in which the Supreme Court found that an executive assertion that individuals were detained pursuant to the state of siege was sufficient to meet the reasonableness standard.

The Habeas Corpus Act fails to establish the degree of deference the judiciary should pay to the executive when the executive provides reasons for detentions. The Act does not elaborate on the

187. See, e.g., discussions of Sofia, supra notes 58-64, and Zamorano, supra notes 118-26, and accompanying text. In the legislative debate prior to the passing of the Habeas Corpus Act, Senator Menem argued that the declaration of a state of siege was left by the Constitution to the president and Congress and was not suited to judicial scrutiny. He argued that article 4, clause 1 was too broad and proposed amending the provision to clarify the limits of judicial examination of legitimacy. Senator de la Rda responded that the clause was not directed toward an examination of the need for or the decision to declare a state of siege, but rather was an examination of whether the state of siege was declared in the manner established by the Constitution. He gave the example of a state of siege declared by the executive while Congress was in session or for a reason other than foreign attack or internal disorder. He also explained that while the judiciary could assure that the stated reason for the declaration was foreign attack or internal disorder, the judiciary could not examine whether the attack or disorder actually existed or was sufficient to merit the declaration of a state of siege. Fundamentos, supra note 38, at 2038. Despite de la Rda’s interpretation of the clause, D’Albora feels that the judiciary may use the clause to ascertain whether the existing conditions actually constitute a state of “internal disorder.” D’Albora, supra note 8, at 973. Bisserier and Talón agree with Senator Menem that article 4, clause 1 of the Act should be clarified to set out the exact role of the judiciary. P. Bisserier & F. Talón, supra note 8, at 38-41.

188. See supra notes 118-46 and accompanying text.

189. See supra notes 148-53 and accompanying text.
degree to which the presiding judge must scrutinize the reasons given by the executive and does not allow for evidence to disprove these reasons.

Clause 3 establishes that during a state of siege habeas corpus also exists to protect against the unconstitutional deterioration of conditions for those legitimately detained. The clause thereby provides a mechanism to ensure that any executive detention during a state of siege does not amount to a punishment or conviction as prohibited by article 23 of the Argentine Constitution. Under clause 3 a detainee could, for example, challenge the constitutionality of restrictive measures of detention, interrogation and fact gathering, such as those established by the military during the dictatorship.

Finally, clause 4 gives the judge authority to determine the constitutionality of any impediment to the free exercise of the article 23 right of option. The right of option, along with the prohibition on punishment or conviction, forms the main constitutional control over executive detentions. During the dictatorship, the judiciary upheld the constitutionality of the many restrictions placed by the military on the right of option. Clause 4, however, requires the judiciary to review any restriction placed on the article 23 right of option. The clause fails to indicate what, if any, restrictions could be tolerated but creates a presumption that any restrictions placed on the right of option are unconstitutional.

2. Article 1: Constitutional Consolidation of Habeas Corpus

Article 1 establishes habeas corpus as a constitutionally based process by removing the federal habeas corpus regulations from the Criminal Procedure Code and establishing it as a separate "special law." Since the procedure directing the application of national substantive laws (e.g., the civil code, the criminal code) is determined by provincial legislatures, this change increases the potential power of all courts to oversee the habeas corpus process. When habeas corpus regulations were originally codified as a part of the Criminal Procedure Code, review was strictly limited to monitoring illegal detentions by public authorities. Rather than adhering to this rigid criminal code based on a nineteenth century inquisitional model, courts are now allowed to apply

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190. N. SAGÜES, HABEAS CORPUS, supra note 8, at 283.
191. See supra notes 98-114 and accompanying text.
192. Habeas Corpus Act, at art. 28. For further discussion of the significance of the removal, see FUNDAMENTOS, supra note 38, at 2030; N. SAGÜES, HABEAS CORPUS, supra note 8, at 112-13, 116-17; Bertolino, supra note 8, at 676, 679; D'Albora, supra note 8, at 971-72. The "special law" governing habeas corpus is similar to the law regulating the amparo process. See FUNDAMENTOS, supra note 38, at 2031. Some scholars have suggested creating a Code of Constitutional Procedural Rights that would include habeas corpus, amparo and other similar procedures for the enforcement of constitutional norms. Bertolino, supra note 8, at 675. Such a code has been created in Costa Rica. See H. FIX-ZAMUDIO, supra note 38, at 118.
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constitutional standards to the habeas corpus process. Article 1 also states that if the habeas corpus process, as developed in provincial constitutions and laws, provides greater protections than the Habeas Corpus Act, the stricter local provisions are to be applied. The Act thus serves as a national constitutional minimum.

3. Articles 2-6: Justiciability Requirements

a. Jurisdiction

Article 2 establishes jurisdictional limits by stating that jurisdiction depends on whether the alleged injurious act emanated from a federal or provincial authority. If the petitioner is not sure of the origin of the injurious act, article 2 allows the petition to be brought in any court until the authority responsible for the injury is known. This division of jurisdiction between federal and provincial courts is problematic given the limited access to federal courts in the interior of the country.

b. Scope

The Habeas Corpus Act significantly expanded the scope of habeas corpus. Article 3 establishes that a writ of habeas corpus is available not only for the traditional purpose of challenging detentions, but also for challenging the threat of detention and the worsening of conditions of legitimate detentions. This expansion of scope has been responsible for the largest number of habeas corpus petitions during the four years since the passage of the Act.

193. N. SAGUES, HABEAS CORPUS, supra note 8, at 112-13.
194. Bertolino, supra note 8, at 676; D'Albora, supra note 8, at 972. Bertolino considers that the "most significant change attributable to the [Habeas Corpus Act] is ... the field recently denominated as 'Constitutional Procedural Right,' the systematic area where the law places habeas corpus." Bertolino, supra note 8, at 676.
195. FUNDAMENTOS, supra note 38, at 2030, 2036, 2038, 2041.
196. See P. BISSEIER & F. TALON, supra note 8, at 28-31; N. SAGUES, HABEAS CORPUS, supra note 8, at 123; Bertolino, supra note 8, at 675; D'Albora, supra note 8, at 974.
197. Habeas Corpus Act, at art. 2.
198. Id.
199. FUNDAMENTOS, supra note 38, at 2042-43. Senator Laferriere argued in the legislative debate that basing jurisdiction on whether the authority responsible for the injurious act was federal or provincial could lead to a serious gap in the protection of habeas corpus in the outlying provinces. He offered as an example an individual detained by federal authorities in the border area of the northeast province of Misiones where the closest federal judge would be in the provincial capital of Posadas, some 300 kilometers away, making immediate judicial relief impossible to obtain. Id.
200. See P. BISSEIER & F. TALON, supra note 8, at 36-38.
201. Niño Interview, supra note 87.
c. Standing

Article 5 provides that a petition of habeas corpus may be brought by any person on his or her own behalf or on behalf of another. This standard perpetuates the preexistent rule found in article 622, which states that a "petition of Habeas Corpus may be offered by the detained person or by another in his name." Article 5 improves this standard by providing that a petition may be brought "in favor" of the affected individual instead of "in the name of" the affected individual. This change eliminates the implication of Article 622 that the petitioner must be authorized by the affected individual to act in his or her name.

d. Judicial Power

Article 6 empowers the judiciary to declare de oficce that a detention is invalid because its underlying law was unconstitutional. During the dictatorship, courts could not rule on the constitutionality of the laws or decrees under which detentions were ordered, based on the doctrine that, as a penal process, habeas corpus did not give courts jurisdiction to investigate the constitutionality of the laws and decrees.

4. Articles 8-26: Habeas Corpus Procedures

The habeas corpus process created by the Habeas Corpus Act largely follows that of former articles 617-645 of the Criminal Procedure Code, with some notable exceptions:

a. Parties Involved

The Habeas Corpus Act affects all parties involved in the process, namely: judges, prosecutor, detainees, third party petitioners, and the authority named in the petition. Article 8 removes the restrictive rule of competence established

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202. Habeas Corpus Act, at art. 5.
203. CÓDIGO PROC. PENAL at art. 622. During the dictatorship, the military narrowed this permissive standard. See supra notes 88-90 and accompanying text.
204. N. SAGUÉS, HABEAS CORPUS, supra note 8, at 303.
205. Habeas Corpus Act, at art. 6.
206. D'Albora, supra note 8, at 974. Article 11 of the Habeas Corpus Act also provides that when a court or judge of competent jurisdiction has reliable knowledge that a detainee will be transported outside the court's jurisdiction or will suffer irreparable harm, the judge may order the individual to be brought before the judge to resolve the situation. FUNDAMENTOS, supra note 38, at 2027. The power of a judge to issue a de oficce writ is consistent with the broad standard in article 5 for standing to bring a habeas corpus petition.
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during the dictatorship by Law 22.383 and makes both national and federal judges in the capital and all judges in the interior competent to hear habeas corpus petitions. Article 21 requires that the public prosecutor be notified of every petition received; the prosecutor can then intervene at any stage to protect the process. Article 25 requires the presence of both the affected individual and a representative of the detaining authority at an oral hearing; the former has the right to an attorney. Article 22 provides the petitioner the right to intervene with the assistance of an attorney at any stage of the process including the oral hearing, but the petitioner does not have the same rights as the other parties to the proceedings. Finally, article 11 requires the judge to send a writ ordering the named authority to produce the affected individual within a given period. The named authority must then respond immediately by producing both the affected individual and a report on the factual situation surrounding the detention.

b. The Petition

Article 9 requires a petitioner to state the authority responsible for the detention or threat, the cause or pretext of the injurious act, and a statement of the illegitimacy of the act. Unlike the former law, article 9 allows the petitioner to provide the facts as they are best known even if some information is still missing. A court cannot dismiss habeas corpus petitions for mistakes in form but must take the steps necessary to acquire needed information.

207. Both article 618 and its revision by Law 22.383 limited the number of federal judges competent to hear petitions in the interior to those presiding in criminal courts. CÓDIGO PROC. PENAL at art. 618; Law 22.383, promulgated Jan. 28, 1981, reprinted in XLI-A A.D.L.A. (1981). Article 8 is thus a compromise between the restrictive competence rule of Law 22.383 and the desire by some for universal competence for judges to entertain habeas corpus petitions. Compare N. SAGÜÉS, HÁBEAS CORPUS, supra note 8, at 324-35 (article 8 equitable as it limits judges who will have necessary expertise) with P. BISSERIER & F. TALÓN, supra note 8, at 31-34 (need for availability and choice of magistrates requires making all judges competent to hear petitions).

208. Habeas Corpus Act, at art. 21. In Argentina, the ministerio público or the ministerio público fiscal is a position much like the office of district attorney in the United States. However, in the civil law system, the position is more related to the judicial branch than is the corresponding position in common law systems. For this reason the author translates the position as "public prosecutor." Senator de la Rúa, introducing the legislation, made it clear that the role envisioned for a public prosecutor was not to defend the authority responsible for the challenged injury, but rather to fulfill the "function of controller of legality." FUNDAMENTOS, supra note 38, at 2031-32. See infra Section IV.B.6 for a discussion contrasting the role of a public prosecutor with that of an ombudsman.

209. The petitioner, however, is limited by article 22 to an appeal challenging a contrary award of costs or sanctions. There is no obligation for the court or other parties to give the petitioner any of the required notifications. Habeas Corpus Act, at art. 12.

210. Id. at art. 9.

211. Id. See also N. SAGÜÉS, HÁBEAS CORPUS, supra note 8, at 372-73.
c. The Writ

The Habeas Corpus Act reduces the rambling writ provisions of articles 619-24 of the prior Criminal Procedure Code to two succinct articles.212 Article 11 requires the judge to order the named authority to present the detained individual and to report the reasons for the detention.213 Article 11 further requires that the writ be sent in writing unless the judge considers it necessary to appear personally at the detainee’s location. If the judge goes to the place of detention, he or she may give the order orally, but must leave proof of having done so.214 Finally, article 11 mandates that if the authority responsible for the detention ignores the order, the judge must deliver the order to the superiors of that authority.215

d. The Hearing and Decision

One of the most substantial reforms of the Habeas Corpus Act is the oral hearing requirement.216 A major problem during the dictatorship was the summary nature of the procedure. Judges would consider and dismiss petitions solely because the security forces denied that the individual was being held or the executive asserted that the individual was being held for participating in subversive activity. Petitioners or detained individuals were not given the opportunity to appear before the judge, present arguments or offer evidence. Articles 14-18 of the Act create a process of oral hearing that addresses these past failures, including the opportunity to testify (article 14), to present evidence (article 15), and to receive an immediate final decision (article 17).217

e. Costs and Sanctions

Article 23 provides that when a petition is granted, the costs of the procedure will be charged to the functionary responsible for the injurious act.218

213. Habeas Corpus Act, at art. 11. The role of the written report is significantly less important under the Act, with its provision for an oral hearing, than under the previous regulations of articles 630-31. See Código Proc. Penal at arts. 630-31.
214. Habeas Corpus Act, at art. 11.
215. Article 12 requires the named authority to comply with the writ immediately or within the period set by the judge, and the judge must rule expressly on compliance. Id. at art. 12.
216. De la Rúa, when introducing the legislation, stated that the most important procedural innovation of the new law was the requirement of an oral hearing. He felt that the oral hearing was the most effective means of protecting the habeas corpus right. Fundamentos, supra note 38, at 2031. See also P. Bisserier & F. Talón, supra note 8, at 56-57; N. Sagués, Habeas Corpus, supra note 8, at 429-30.
217. Habeas Corpus Act, at art. 17.
218. Id. However, in the case of article 6 (de ofﬁce declaration of unconstitutionality) decisions, the costs must be borne by the party who incurred them. This provision corresponds to the idea that an existing
Habeas Corpus Law in Argentina

When a petition is denied, the costs are charged to the party who incurs them, unless the judge finds "manifest inappropriateness" in the petition, in which case the judge may charge the costs to the petitioner or the injured individual or both jointly, according to their conduct. The article 23 treatment of costs is decidedly more lenient toward individuals who bring habeas corpus petitions than was the old standard.

The Habeas Corpus Act also addresses the overwhelming failure of the Argentine security forces to cooperate with the process of habeas corpus during the time of the dictatorship. Although the duty of the security forces to comply with legitimate judicial orders from a constitutional court -- especially in matters concerning constitutional rights -- is implicit in Argentine law, the experience with habeas corpus during the dictatorship made explicit recognition of this fact necessary.

f. Appeal

Articles 7, 10, 19 and 20 of the Habeas Corpus Act establish the right of appeal from decisions at various stages of the habeas corpus process. These include appeals for a denial in limine of a petition or a finding of incompetence by the court of first instance (article 10), appeals from a decision of a judge of first instance (articles 19-20), appeals to a federal court of appeals (article 20), and appeals of extraordinary recourse (article 7). Furthermore, the detainee is released if the government appeals (article 19).
B. Judicial Control of Habeas Corpus Under Civilian Rule

1. Judicial Review of the Legitimacy of States of Siege

From the years 1984 to 1989, the constitutionally elected government of Raúl Alfonsín declared two separate states of siege of sixty and thirty days, respectively.

a. The 1985 State of Siege

President Alfonsín declared the first state of siege in response to civil unrest prior to the November 1985 elections. These first term elections were an important step for the Alfonsín Administration. Since they were the first consecutive democratic elections in ten years, the government was extremely concerned that they take place without incident. A series of bombing attacks on both military installations and political organizations threatened to disrupt the elections.

On October 21, 1985, the administration, based on evidence that the bombings were the work of a paramilitary right-wing organization, issued Decree No. 2049/85 that ordered the arrest of a group of individuals allegedly responsible for the attacks. The group consisted of both civilians and active and retired members of the armed forces. Several of the members of the armed forces detained under the executive order were indicted for human rights violations committed during the time of the dictatorship.

226. AMERICAS WATCH REPORT, supra note 9, at 51.
227. Id.
229. Decree 2049/85 ordered the arrest of General Carlos Guillermo Suárez Mason, Colonel Pascual Oscar Guerrieri, Colonel Alejandro Agustín Arias Duval, Captain Osvaldo Rodolfo Antinori, Captain Leopoldo Cao, Major Jorge Horacio Granada and others. Id. At the time of the decree, Suárez Mason was in hiding in the United States, having fled Argentina in 1984 after a federal judge issued a warrant for his arrest in connection with human rights violations committed during the period 1976-80, while he was Commander of the First Army Corps. AMERICAS WATCH REPORT, supra note 9, at 51-53. In 1986, Federal Judge Luis Fernando Niño ordered the prosecution of Suárez Mason and, in 1987, he was captured in the United States and extradited to Argentina. Id. Suárez Mason was held in preventive detention pending trial of the commanders of the First Corps for human rights violations. Página 12, July 4, 1989, at 7, col. 1. Recently, however, President Carlos Menem pardoned Suárez Mason, among others. See J. Timmerman, Fear Returns to Argentina, N.Y. Times, Jan. 5, 1991, at 21, col. 1. At the time of the decree, Colonel Pascual Oscar Guerrieri was also charged in connection with human rights violations that took place under the jurisdiction of the Second Army Corps. Guerrieri eventually benefitted from the "due obedience" law of June 4, 1987. See CENTRO DE ESTUDIOS LEGALES Y SOCIALES, CULPABLES PARA LA SOCIEDAD, IMPUNES POR LA LEY 66 (1988) (on file with author).
Decree 2049/85 also ordered the detention of civilians Ernesto Raúl Luciano Rivanera Carlés, Enrique Gilardi Novaro, Daniel Horacio Rodríguez, Jorge Antonio Vago, Alberto Hernán Camps, and Rosendo María Fraga. Ernesto Rivanera Carlés brought a habeas corpus petition that asserted that his arrest was the result of misidentification. 1986-A A.L.L. 139. The executive acknowledged the mistake, released Ernesto Raúl Rivanera Carlés, and ordered the detention of Raúl J. Roberto Rivanera Carlés. Decree No. 2052/85,
Decree No. 2049/85 placed the named individuals under a sixty day executive detention not subject to judicial review. The executive stated that the detention order, enacted by executive decree because Congress was in recess, was based on the powers accorded to the executive by articles 23 and 86 of the Argentine Constitution. Decree No. 2049/85 did not, however, declare a state of siege. During the following days, a number of habeas corpus petitions were submitted challenging the constitutionality of the detentions made without a declaration of a state of siege. Several federal judges found that Decree No. 2049/85 was unconstitutional for that reason.

In response to those decisions and to increased social unrest, the executive issued Decrees No. 2069/85 and 2070/85 on October 25, 1985, declaring a state of siege of sixty days throughout the nation and reordering the detention of the individuals named in Decree No. 2049/85. The executive made the declaration under its article 86 powers in the absence of congressional approval. Several more habeas corpus petitions challenging the constitutionality of Decree No. 2070/85 were brought on behalf of the detained individuals. The petitioners argued that the continued detention of the named individuals, after the presumably unconstitutional arrest order of 2049/85, violated article 23.

The Supreme Court granted an appeal of extraordinary recourse in the case of Jorge Granada to clarify the Court's position on the examination of the legitimacy and reasonableness of executive detentions during a state of siege. A number of federal courts of first instance and the Court of Appeals of Buenos Aires had held that the state of siege declared by Decree No. 2069/85 was legitimately declared within the bounds established by the Constitution. The Court of Appeals based its decisions primarily on the fact that

232. The judge of first instance in Antinori found Decree 2049/85 unconstitutional and ordered Antinori's release. 1986-A L.L. at 142. In both Rodriguez, 1985-E L.L. at 305-07, and Guerrieri, 1986-A L.L. at 151-52, the Court of Appeals of Buenos Aires also found Decree 2049/85 unconstitutional. Relying on article 6 (the unconstitutionality provision) of the Habeas Corpus Act, the Court found that article 23 powers could not be exercised without the declaration of a state of siege, and ordered the release of Rodríguez and Guerrieri.
236. See 307 Fallos at 2330; 307 Fallos at 2317 (Supreme Court cases citing federal court of first instance); see also Antinori, 1986-A L.L at 142; Duval, 1986-A L.L. at 145; Fraga, 1986-A L.L. at 152.
President Alfonsín acted within his powers as established by article 23 and article 86, clause 19.237

On appeal, the Supreme Court found that the legislators, by adopting the control of legitimacy provision of article 4, clause 1 intended to adhere to past Supreme Court jurisprudence regarding the limitations on judicial control over the declaration of a state of siege.238 The Granada Court expressly found that the Habeas Corpus Act grants the judiciary the power to examine four elements of a state of siege, namely: 1) the competency of the organ that pronounced the state of siege (e.g., the president when Congress is in recess or the president with the Senate's approval in case of foreign attack); 2) the form of the legislation or decree that established the state of siege (e.g., technical requirements that laws be in written form and transmitted to the proper minister); 3) the establishment of an express period for the state of siege; and 4) the establishment of a territorial limitation for the state of siege.239 After the resolution of these issues, the Alfonsín government lifted the state of siege and released those detainees not indicted on criminal charges.240

The justification for the last two reviewable elements was not clear. The Court may have intended to limit review to verifying whether the state of siege declaration contained temporal and territorial limitations.241 Or, as Sagüés maintains, the Court may have intended to permit a judge to review whether these temporal and territorial limitations were themselves reasonable under the circumstances.242 The Granada decision established, however, that the judiciary cannot rely on article 4, clause 1 to evaluate whether there in fact exists an interior commotion or exterior attack to justify the declaration of a state of siege.243

b. The 1989 State of Siege

In February, 1989, the Argentine economy began a rapid decline. High interest rates, an extremely weak national currency and hyperinflation devastated the standard of living and contributed to political instability.244 In May,
1989, Argentina held its first presidential election in sixty-three years to replace a constitutionally elected government, electing the Peronist candidate Carlos Menem. The election did little to resolve the insecurity caused by the severe economic crisis. The resulting social unrest culminated in a series of attacks on supermarkets in the cities of Rosario and Córdoba.\textsuperscript{245} The attacks were accompanied by violent clashes between looters and police forces and threatened to spread throughout the country. During the last days of May and the first week of June there were over 300 separate incidents of looting, which involved over 40,000 people.\textsuperscript{246} The government alleged that the lootings were provoked by members of left-wing organizations.\textsuperscript{247}

In response, on May 29, 1989, President Alfonsín declared a national state of siege for a period of thirty days.\textsuperscript{248} After the declaration of the state of siege, lootings continued to spread to areas of greater Buenos Aires, Mendoza and Tucumán.\textsuperscript{249} Fifteen people died, at least a hundred were wounded and approximately two thousand were detained on criminal charges.\textsuperscript{250} In addition to those arrested and charged with criminal offenses, over fifty individuals were detained for political reasons by the executive, using its article 23 powers.\textsuperscript{251} Several detainees brought habeas corpus petitions, challenging the constitutionality of the detentions and the rational relation between the arrests and the declared causes of the state of siege.\textsuperscript{252}

As Congress was in session, the executive submitted legislation to implement the state of siege.\textsuperscript{253} Before Congress could consider it, however, the
executive issued decrees banning public political meetings and ordered the arrest and detention of several individuals accused of organizing loottings. These orders included the arrest and detention of César Christian Barrionuevo and Roberto Daniel Medina, two directors of the Communist Youth Federation. On June 1, Congress passed the legislation and approved the state of siege.

In considering Barrionuevo and Medina's habeas corpus petitions, the court had to determine the legitimacy of the state of siege under article 4, clause 1 of the Habeas Corpus Act. The pair had been arrested and charged with "endangering public tranquility" under the executive's article 23 powers. The judge found Barrionuevo and Medina's detention to be unconstitutional and ordered their release. He held that the state of siege declaration was unconstitutional because President Alfonsín had declared the state of siege while Congress was in session, in violation of article 67, clause 26 of the Constitution. The judge further determined that the executive decrees issued before the June 1 congressional approval of the state of siege (e.g., the suspension of the right of association and the ordering of executive detentions) were also unconstitutional because Congress could not rectify the unconstitutionality of executive decrees by approving a state of siege declaration at a later date. Finally, the judge found that the executive had to publish Law 23.662 (the act declaring the state of siege) in the Boletín Oficial before applying powers taken under the declaration to individuals.

The Court of Appeals of Buenos Aires overturned the lower court's decision, holding that the events in Rosario and other parts of the country constituted a "state of emergency." The Court reasoned that in a state of emergency the executive may act as if Congress is in recess and declare a state


258. Pettigiani Decision, supra note 257, at 2, 8, 15. The two federal police officers that arrested Barrionuevo and Medina testified that neither individual was involved in acts of looting, pillaging or other criminal acts. Id. at 8.

259. Id. at 16.

260. Id. at 10-12.

261. Id. at 13.

of siege because Congress retains its power to approve or suspend the declaration.\textsuperscript{263} The Court held that subsequent approval by Congress corrected any constitutional deficiencies that might have accompanied the declaration of the state of siege. Finally, the Court of Appeals found that the widespread press coverage that accompanied congressional approval of the state of siege amply fulfilled the publication requirements of Argentine law.\textsuperscript{264}

On June 12, 1989, the Supreme Court rejected a petition of \textit{avocamiento} (action to seek removal to a superior court) brought by the appellants, holding that the appeal must proceed through the recourse of extraordinary appeal.\textsuperscript{265} On June 20, 1989, before the Supreme Court had an opportunity to consider the extraordinary appeal, the executive ordered Barrionuevo and Medina released.\textsuperscript{266} The important issues raised by the decision of the Court of Appeals regarding the relevant powers of the executive and Congress in declaring a state of siege went unresolved.

\textbf{2. Application of the Standard of Reasonableness}

As noted above, the reasonableness standard adopted by article 4, clause 2 of the Habeas Corpus Act did not resolve the question of the degree of proof needed to be offered by the executive to establish a rational relationship between any given arrest and the justification of the state of siege declaration.\textsuperscript{267} Nor does the Act articulate the extent to which the judiciary must accept the reasons offered by the executive for detentions, or what type of investigation or hearing of proof must be conducted by the judge of first instance. The cases that have been decided pursuant to article 4, clause 2 are contradictory and have done little to clarify these important issues.

a. \textit{The 1985 State of Siege}

Following the second decree declaring the 1985 state of siege, several federal courts of first instance used article 4, clause 2 of the Habeas Corpus Act to invalidate the executive detentions of several individuals.\textsuperscript{268} The Fed-
eral Court of Appeals of Buenos Aires overturned these decisions based on the information provided by the executive in the original state of siege decree. The executive stated in an earlier state of siege decree that the attacks that gave rise to the emergency were the work of "a group of persons acting in coordination within and without the country to fulfill a common purpose of violence against democratic institutions and the people." The Court of Appeals found this sufficient justification under the standard of reasonableness.

In the case of Jorge Granada, the Supreme Court considered the issue of the reasonable relationship between executive detentions and causes of states of siege. The Supreme Court found that article 4, clause 2 of the Habeas Corpus Act adopted the Primera Plana two-part "control of reasonableness" test. Adopting the standard set forth in Tizio and Perelmutter rather than the standard established by the decisions of Zamorano, Timerman, Moya and Yrigoyen, the Court added that "the Executive does [not] need to judicially prove the bases of the decision that motivated the arrest." The Court held that the executive's original state of siege decree unequivocally expressed the relationship between the state of siege and the arrest of Granada.

The Supreme Court also established that the intended length of the state of siege is an important element for the judiciary to consider when examining the reasonableness of the decision to detain an individual. The Court held that for a detention to be reasonable, the state of siege must be brief. The indefinite extension of a state of siege, the Court stated, violates the Constitution that the state of siege is meant to defend. The Court's reasoning thus allows the executive to detain individuals without offering proof of any connection to the cause of the state of siege, so long as the period of the state of siege is "brief."

Justice Belluscio dissented on the point of the judicial "control of reasonableness" of detentions during a state of siege. His dissenting opinion

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269. See, e.g., Antinori, 1986-A L.L. at 143-44.
270. Id.
271. Id.
273. 307 Fallos at 2308.
274. Id. at 2311. See also Bidart Campos, supra note 239, at 337-38.
275. 307 Fallos at 2310.
276. Id. at 2309.
277. Id.
278. Id. at 2318-19 (Belluscio, J. dissenting). For a discussion of the Belluscio dissent, see Bidart Campos, supra note 239, at 341; Morello & Loñ, supra note 272, at 623. Bidart Campos notes that the Belluscio dissent is more consistent with Supreme Court jurisprudence of the 1976-83 period than the majority opinion.
argued that in addition to the *Primera Plana* standard adopted by the majority, the cases of *Zamorano*, *Timerman*, *Moya* and *Yrigoyen* indicate that article 4, clause 2 of the Habeas Corpus Act should also include the observation of the following standards:

[A] duty of the executive to provide the judges of each case sufficient information concerning the causes that give rise to the detention in question; [and] . . . a consideration by the court of the factual and judicial situation at the time of the resolution of the petition.\(^{279}\)

Belluscio noted that the judge of first instance in the *Granada* petition had requested more information from the Ministry of Defense. The Minister of Defense had replied that the executive could not be compelled to provide information that was at the time classified. The Minister instead relied on the statements of the original state of siege decree. Justice Belluscio concluded that under these circumstances the executive had not complied with its duty to provide information, and it was impossible for the judiciary to exercise the control of reasonability.\(^{280}\)

b. *The 1989 State of Siege*

In the *Barrionuevo/Medina* petition during the 1989 state of siege, the judge of first instance found that the detentions of Barrionuevo and Medina were not rationally related to the causes of the state of siege.\(^{281}\) The two communist leaders had been ringing doorbells and stopping individuals to hand out pamphlets encouraging residents of the neighborhood of Soldati, in greater Buenos Aires, to attend a march and *cacerolazo* (banging of pots and pans) to protest hunger among the city’s poor. The judge found that when the detainees were stopped for questioning they freely exhibited their national identity cards and were not at that time actively taking part in or encouraging acts of pillage, looting or other criminal acts. Given that the executive had stated that acts of looting were the cause of the state of siege, the judge observed no rational relation between Barrionuevo and Medina’s actions and the causes that gave rise to the state of siege.\(^{282}\)

The Court of Appeals overturned the judge of first instance, ignoring the article 4, clause 2 reasonableness standard discussed by both the majority and the dissent in the *Granada* case.\(^{283}\) The court instead reverted to the standard established in the 1959 *Sofía* case, which held that the executive’s decision to

\(^{279}\). 307 Fallos at 2318-19.
\(^{280}\). Id. at 2319-20.
\(^{282}\). Id. at 15.
detain an individual during a state of siege should not be overturned unless "clearly unreasonable, arbitrary, persecutory or discriminatory." 284

Under the "clearly unreasonable" test, the Court of Appeals found that Barrionuevo and Medina were "surprised in the act of agitation without being able to explain their presence." 285 The Court concluded that such behavior had the potential of creating a grave conflict and that therefore the detention of the petitioners was not clearly unreasonable. The Court further reasoned that the thirty day limit to the state of siege added to the reasonableness of the executive detentions. Barrionuevo and Medina were released before the Supreme Court could hear their appeal of extraordinary recourse and consider the issue of the proper standard of review for the article 4, clause 2 reasonableness standard. 286

Two other federal courts considered the relation between executive detentions of individuals and the causes of the 1989 state of siege. A judge of the federal court of Buenos Aires rejected a habeas corpus petition on behalf of a member of the Liberation Party who had been detained for distributing pamphlets urging people to "take to the streets and fight." The judge found that a correlation existed between the acts of the detainee and the causes of the state of siege. The judge inferred, without examination, that the claims of the executive concerning the basis of the arrest were correct. 287

Finally a federal judge in San Miguel de Tucumán granted the habeas corpus petition of two communist party activists who had been detained for "inciting the formation of a demonstration." 288 The judge noted that the detention was based on a request from the Governor of Tucumán, stating that the two activists had been "surprised while inciting a group of persons to assault a supermarket." 289 The judge found that the Governor's request was

284. *Id.* at 17. The application of three different tests for the reasonableness standard contained in article 4, clause 2 is another example of the difficulties caused by the lack of stare decisis in the development of judicial standards. *See supra* notes 32-35 and accompanying text.


289. Lanoel Decision, *supra* note 288, at 2. Lanoel and Sosa were arrested at four in the morning, 50 meters from Lanoel's residence and eight blocks from Tucumán's commercial district. The judge found that these facts, and the lack of credible testimony from the arresting officers, indicated that the petitioners were not involved in inciting lootings. *Id.* at 6-7.
not only absurd and unbelievable, but a naked intentional political twist.\textsuperscript{290} The Court went on to find that the executive had not in any way established a connection between the activists’ detention and the causes of the state of siege. The judge adhered to the dissent of Justice Belluscio in \textit{Granada} and held that the executive must always provide unequivocal and precise information concerning the cause of the detention, even during a state of siege.\textsuperscript{291}

3. \textit{Judicial Control of Executive Detentions}

\textbf{a. Detentions Without Declarations}

Despite prior judicial holdings the Alfonsín government attempted to exercise its article 23 powers of detention without actually declaring a state of siege.\textsuperscript{292} The executive argued that the detentions were necessary to protect the democratic form of government established by the Constitution. The executive also claimed that the detentions could be ordered as a necessary action in a true state of emergency.\textsuperscript{293}

One federal court upheld the detentions based on the assumption that the executive had implicitly declared a state of siege.\textsuperscript{294} The assumption of an implicit state of siege is questionable given the circumstances. The executive first expressly declared that it did not wish to declare a state of siege, then declared a state of siege three days after making the detentions. Thus, at the time of the detentions, no state of siege had been declared.\textsuperscript{295}

Other federal courts refused to allow the executive to order detentions without the prior declaration of a state of siege. One court of appeals used the

\textsuperscript{290} Id.
\textsuperscript{291} Id. at 8.
\textsuperscript{292} In addition to the powers the Argentine Constitution grants to the executive in article 23 and article 86, clause 19 the government argued that it had the power to order the executive detention of the named individuals pursuant to articles 1 and 33 (establishing a republican form of government), article 22 (defining crime of sedition), and article 86, clauses 1 and 15 (naming executive as supreme general administrator and commander-in-chief); Criminal Procedure Code, article 4 (authorizing arrests for crimes discovered \textit{flagrante delicto}); Law 23.077, article 15 (authorizing actions in defense of republican-democratic form of government); and the Code of Military Justice. For a discussion of the authorities cited by the executive in Decree No. 2049/85, see N. SAGÜÉS, \textit{HÁBEAS CORPUS}, supra note 8, at 269.
\textsuperscript{293} Various Argentine constitutions have provided for a "state of emergency" in addition to a state of siege. The original text of the Constitution of 1853, article 83, clause 20 provided for a state of emergency that would lapse in 10 days if not approved by Congress. During this time, the executive could detain individuals who would regain their liberty if a state of siege was not called. This provision was removed by the reform of 1860. The Constitution of 1949 provided for a state of prevention and alarm during which time individuals could be detained for 30 days without the declaration of a state of siege. For a discussion of the state of emergency problem, see \textit{REFORMA CONSTITUCIONAL I}, supra note 20, at 295-301, 305-66; N. SAGÜÉS, \textit{HÁBEAS CORPUS}, supra note 8, at 276-77, 282-83; Morallo & Loh, supra note 272, at 623-25.
\textsuperscript{295} N. SAGÜÉS, \textit{HÁBEAS CORPUS}, supra note 8, at 271-72.
article 6 power of the Habeas Corpus Act to declare Decree 2049/85, the first
1985 state of siege declaration, unconstitutional. The courts reasoned that
if the executive were allowed to order detentions without declaring a state of
siege, the result would be to grant the executive expansive powers without the
important safeguards provided in article 23 of the Constitution. The exercise
of such powers by the executive, the courts held, goes beyond the scope of
the Constitution.

b. Extrajudicial Detentions

During the 1989 state of siege, the executive and the judicial branches
came into conflict regarding state of siege detentions. President Alfonsín
declared a state of siege and ordered the detention of several individuals before
Congress, which was in session, could consider the measures. As described
above, a federal judge of first instance ordered the release of two of the
detainees based on the lack of any reasonable relation between the detentions
and any possible state of siege.

The executive nonetheless continued to maintain that the declaration was
constitutional. The Ministry of Interior appealed the habeas corpus decision,
and the executive ordered the redetention of the released petitioners. The
redetention of the petitioners for the same reasons that they were originally
detained conflicted directly with article 19 of the Habeas Corpus Act. Further-
more, by ordering redetention on the same grounds, the executive directly
opposed an order of a federal court, which had already held those grounds to
be not reasonably related to the state of siege.

On appeal, the Court of Appeals overturned the decision of the judge of
first instance on the constitutionality of the executive detention. The Court
nonetheless questioned the propriety of the executive ordering the redetention
of the individuals freed by the habeas corpus petition while the appeal was
pending. The Court of Appeals noted that article 19 of the Habeas Corpus
Act provides that individuals freed by a habeas corpus decision remain free
during the course of an appeal. The Court held that the "new detention orders
signify a rebellion toward the judicial power which should be addressed by the
Supreme Court as the head of the judicial power to resolve as it sees fit."
Before the Supreme Court had the opportunity to hear the appeal of extraordinary recourse brought by the detained individuals, the executive released the detainees, thus averting a potential conflict with the Supreme Court.

4. Treatment of Petitions on Behalf of the Disappeared

a. Petitions for Past Disappearances

Following the passage of the Habeas Corpus Act in 1984, a number of habeas corpus petitions were brought on behalf of persons who had disappeared during the years of military dictatorship. Not surprisingly, the filing of these petitions did not result in the discovery of any new information concerning the disappeared. Nonetheless, the courts hearing these petitions recognized that the Act incorporated the duty to investigate, established by Supreme Court rulings during the dictatorship. 302

In the case of Beatriz, Arango y Otros, the Federal Court of Buenos Aires heard a habeas corpus petition brought on behalf of a number of individuals who had disappeared during the dictatorship. 303 The judge of first instance emphasized that he was entertaining the petition in accordance with the Supreme Court’s jurisprudence during the time of the dictatorship. The judge articulated the judiciary’s duty to investigate and pursue information when considering petitions presented on behalf of individuals whose whereabouts were uncertain. According to the judge, this duty involves a thorough investigation, including the contacting of the Interior and Defense ministers, the armed forces’ chiefs, the security forces, the federal police, the Director of the Federal Penitentiary Service, the CONADEP Commission and the President. 304 The judge in Beatriz, Arango y Otros held that neither his investigation nor that of the CONADEP Commission found that the beneficiaries of the petition were detained illicitly anywhere in the country. Therefore, the federal judge ruled that the petition failed to address one of the requirements of the Habeas Corpus Act, mandating use of the habeas corpus process only when public authorities illegally threaten or detain individuals. The judge then dismissed the petition and forwarded all the information he had obtained to the

302. Immediately after the democratically elected Alfonsín government came to power, the Supreme Court decided appeals of two habeas corpus petitions submitted on behalf of persons detained during the military dictatorship. Edmundo Daniel Zsapiro, 306 Fallos 448 (1984) and Ricardo René Haider, 306 Fallos 551 (1984). The Supreme Court cited Pérez de Smith, 297 Fallos 338 (1977), and Inés Ollero, 300 Fallos 457 (1978), to find a judicial duty to provide a reasonable investigation into the whereabouts of missing persons. The Court, however, found that the individuals were not being detained by public authorities and therefore dismissed the petitions.


304. Id. at 80-81.
public prosecutor to investigate possible crimes. The Court's decision was upheld by the Court of Appeals for Buenos Aires. The Supreme Court, in *Laura Noemi Creature*, similarly affirmed the Habeas Corpus Act's incorporation of the judicially created duty to investigate. The Court expressly recognized the gravity and uncertainty surrounding the plight of the disappeared and reiterated that it was the duty of the courts to fully investigate all habeas corpus petitions. However, the Court found that all illegal detentions had ceased when the constitutional government came to power on December 10, 1983. The Court reasoned that the purpose of habeas corpus petitions was to locate individuals possibly detained by public authorities. The Court concluded that the evidence offered by the petitioner to establish the criminal activity of those who had detained the disappeared was inappropriate for a habeas corpus petition and should have been directed to judges who were investigating and trying such criminal cases.

b. The Attack on La Tablada

After passage of the Habeas Corpus Act, no substantial accusations of disappearances carried out by either the government security forces or paramilitary terrorist groups were raised. However, the question of terrorism and the role of the armed forces in combatting terrorism resurfaced after the 1989 armed attack on the army regiment, La Tablada, by members of a leftist organization.

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305. *Id.*

306. Laura Noemi Creature, 307 Fallos 93 (1984) (summary), reprinted in P. Bisserier & F. Talón, *supra* note 8, at 86 (complete decision). In *Creature*, a federal judge in Buenos Aires heard a habeas corpus petition on behalf of a person detained by the military government in March 1976. After conducting an investigation the judge determined that Creature was not held anywhere in the country. The petitioners sought to enter into evidence past petitions and negative replies from the security forces on behalf of Creature. The court did not admit this evidence and dismissed the petition. The Court of Appeals upheld the decision. *Id.* at 89.

307. *Id.* at 89-90. The Supreme Court referred to and incorporated the opinion of the Solicitor General, in which he cited the standard created by the Pérez de Smith, Ollero and Giorgi decisions. *Id.* at 87-89, 92. For a discussion of these decisions, see *supra* notes 159-76 and accompanying text.

308. *Id.* at 91-92. The Solicitor General noted the government's actions upon coming to power of dismantling the detention centers and investigating the disappearances. *Id.* at 88.

309. *Id.* at 91.

310. While the number of disappearances dropped sharply after 1982, *Nunca Más*, *supra* note 1, at 298, deaths due to political violence have continued. The Center for Studies for the New Majority reported that during the period from September 1, 1985 to February 1, 1989, 297 deaths were due to political violence. *La Nación*, Feb. 20, 1989, at 4.

311. On the morning of January 23, 1989, a group of approximately 50 armed persons, members of the All for the Fatherland Movement (Movimiento Todos por la Patria (MTP)), carried out an attack on La Tablada, capturing the barracks of the motorized infantry regiment. Members of the regiment and other armed forces quickly resisted the attack and surrounded the barracks. President Alfonsín ordered the army to recapture the barracks. Fighting lasted for two and a half days and left 15 members of the armed forces
Following the attack, serious accusations were made that members of the armed forces had committed basic human rights violations during and immediately after the fighting at La Tablada. The most serious allegations concerned attackers who were allegedly wounded, taken as prisoners, and later executed. Additionally, some of those who allegedly participated in the attack did not appear among those listed as dead or detained.

In response, a group of human rights attorneys submitted a habeas corpus petition on behalf of Carlos Jose Samojedny, one of the persons said to have disappeared in the course of the attack. The petition sought to determine if Samojedny had been detained by the security forces and, if not, whether an order was pending for his arrest. The Samojedny petition was submitted to Federal Judge Gerardo Larrambebere, who had been placed in charge of processing those individuals detained in the course of the attack. After making inquiries to the armed forces, the judge rejected the petition, finding that the armed forces had neither detained Samojedny nor ordered his arrest.

5. The Problem of Judicial Detentions

Article 18 of the Argentine Constitution and the Habeas Corpus Act establish that habeas corpus can be used to challenge detentions made without a written order by a proper authority. Authorities competent to issue orders of detention are primarily judicial, but also include, under the appropriate circumstances, the executive power (state of siege), the houses of congress (for noncriminal matters), and the police (in situations of flagrante delicto). The procedure established by the Act cannot be used to challenge judicially ordered

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313. Salinas Interviews, supra note 17. The petition alleged that at the time of the surrender, MTP members Berta Calvo, Francisco Provenzano and Carlos Jose Samojedny were seen wounded but alive. Calvo and Provenzano later appeared among those listed as killed during the attack, but Samojedny did not appear on either the list of those killed or detained. Provenzano reportedly was slightly wounded in one arm, but was well enough to carry Calvo, who was allegedly bleeding from the head and had been severely wounded in the stomach. Samojedny was reportedly injured in the neck. After the surrender, the captured attackers were hooded and told to give their names. The names of Provenzano, Calvo and Samojedny were heard by other detainees. The three were then reportedly separated from the others and taken away. Salinas Interviews, supra note 17; see also Liga Argentina Press Release, supra note 312; Madres Press Release, supra note 312.
detentions. Instead, the regular judicial appeals process is meant to protect individuals from arbitrary action by the judiciary.

Nonetheless, certain provisions of the Argentine Criminal Code enacted by past military governments empower judges to order detentions for extended periods of time on largely ideological grounds. For example, article 213 bis of the Argentine Criminal Code provides that:

Any person who organizes or takes part in permanent or transitory groupings which, without being covered by article 210 of this code [illicit association], have as their principal or secondary object the imposition of their ideas either by force or by fear shall, from the sole fact of being members of such an organization, be restrained by preventative isolation or detention for a period of three to eight years.

The article, which acts in addition to the regular conspiracy provision of the Criminal Code, targets group activity included in the broadly defined area of "imposing ideas by force or fear." There need not be a finding of criminal action or criminal intent in connection with the group activity; any person may be detained solely because of his or her membership in a particular organization.

Under article 213 bis, judges may order persons charged to be detained until trial. The pretrial period of investigation in Argentina is normally at least six months. During this period the judicially ordered arrest and detention may not be challenged by habeas corpus, amparo or any of the other extraordinary recourses available under Argentine law. Habeas corpus does not apply because the order of detention presumably emanates from a competent authority. Amparo is generally a recourse against unconstitutional administrative actions and, as such, is also not applicable to judicially ordered detentions. Finally, a detainee may not bring an appeal of extraordinary recourse until there is a definitive sentence. Until tried and sentenced, persons arrested under article 213 bis of the Criminal Code may be detained without the opportunity to challenge the constitutionality of their detention.

314. N. SAGÜES, HABEAS CORPUS, supra note 8, at 166-67.
316. CÓDIGO PROC. PENAL at art. 213 bis.
During the June 1989 state of siege, Federal Judge Gerardo Larrambebere, pursuant to article 213 bis, ordered the arrest and detention of the leadership of the Argentine Workers Party (Partido Obrero (PO)), in connection with widespread lootings of supermarkets. The judge also ordered the search, seizure and closure of all the party's offices and printing presses. The judge based his detention order on pamphlets that members of the organization had distributed at the time of the lootings and an edition of the party newspaper published a few days prior to the lootings. The pamphlets and the newspaper urged people to congregate in the Plaza de Mayo to protest the state of siege and called for the nation's unions to convene a general strike and demand higher wages. Neither the pamphlet nor the newspaper called for lootings or any other criminal activities.

The judge ordered the PO leaders to be held in preventive detention for five days, during which time they were questioned in camera concerning the actions of the PO. On June 6, 1989, the judge freed the leaders under the bail provision of the Argentine Criminal Code.

The actions of Judge Larrambebere illustrate the possible abuses judges may commit under article 213 bis. The PO leaders could have been held as long as six months before they were sentenced and were thus able to petition a further judicial review of the detention order.

IV. ANALYSIS AND RECOMMENDATIONS

A. Judicial Oversight of State of Siege Declarations

Judicial control of executive action taken pursuant to state of siege powers is critical to the protection of human rights in Argentina. Recent military governments have frequently employed the state of siege. Constitutionally elected civilian governments have relied on the state of siege to a lesser extent, but with regularity. During these occasions the judiciary has been unable to guarantee human rights in any form.

Article 4 of the Habeas Corpus Act attempts to resolve any ambiguity concerning the role of the judiciary during a state of siege. Nonetheless, court decisions applying article 4 leave major constitutional issues unresolved. The following four constitutional and legislative actions are necessary to increase habeas corpus protections during a state of siege.

317. See Decision of Judge Gerardo Felipe Larrambebere, Cámara de Instrucción Criminal del Corte Federal de Morón, June 5, 1989 (unpublished decision on file with author) [hereinafter PO Decision].

318. Interview with Juan Carlos Capurro, Legal Advisor to Partido Obrero (June 14, 1989) (on file with author). Capurro maintained that the measures urged by the pamphlet are traditional means of social protest in Argentina. Id.

319. PO Decision, supra note 317, at 10-11.
First, article 23 of the Argentine Constitution should be amended to distinguish clearly between states of siege declared in response to foreign attack and those declared because of internal disorder. A state of siege declared for reason of internal disorder should be constitutionally limited to thirty days. Article 23 should limit the suspension of constitutional rights during such time to those constitutional rights directly and specifically related to the cause of the internal disorder.\textsuperscript{320} Second, article 4, clause 2 of the Habeas Corpus Act should be amended to explicitly provide for review of the reasonableness of executive detentions during a state of siege, assigning the burden of proof to the executive to establish the reasonable relation between the detention and the causes of the state of siege. Third, article 18 of the Constitution should be amended to specifically recognize the right of habeas corpus. Finally, Law 16.986, the law regulating \textit{amparo}, should be amended to expressly allow persons to challenge regulations that unconstitutionally restrict procedures designed to protect constitutional rights, including liberty.

1. Article 23 Reform

The Argentine Constitution currently allows the executive to exercise its power of detention only after declaring a state of siege. In the case of internal disorder, the state of siege must be declared by Congress if that body is in session and must be approved by Congress if declared by the president while Congress is in recess.

In the two most recent states of siege declared by constitutionally elected governments, the executive exercised the power of article 23 detentions outside those constitutional restraints. In 1985, the executive ordered detentions without declaring a state of siege.\textsuperscript{321} In 1989, the executive declared a state of siege and ordered executive detentions while Congress was in session.\textsuperscript{322} In both instances, the executive justified these apparently extra-constitutional acts on the theory that they were inherent in the executive's emergency powers. As a result, the constitutional authority of the president to order executive detentions outside the provisions of articles 23, 67 and 86 is not clear.

\textsuperscript{320} This suggestion does not imply that all constitutional rights should be suspended during a state of siege declared in response to foreign attack. International law establishes that certain rights such as the rights to life, freedom from torture and slavery, and freedom of religion shall not be suspended even during states of emergency. Article 4(2) of the International Covenant on Civil and Political Rights, Dec. 16, 1966, G.A. Res. 2200A (XXI), 21 U.N. GAOR, Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), (entered into force Mar. 23, 1976).


\textsuperscript{322} Pettigiani Decision, \textit{supra} note 257.
Various Argentine provincial constitutions have provided for a state of emergency in addition to a state of siege. Recent proposals for the reform of article 23 of the current Argentine Constitution suggest the inclusion of a state of emergency provision and allow executive detentions without the declaration of a state of siege. The Council for the Consolidation of Democracy suggests replacing article 23 with three separate articles. The first article would provide for the suspension of constitutional rights in the event of exterior attack. The second article would provide for the suspension of constitutional rights in the case of internal disorder. If Congress were in session, only it would be able to declare the suspension. While in recess, Congress would have to convene and approve a suspension declared by the executive. According to this proposal, the power to detain individuals must be reasonably related to a need to forestall or restrain the emergency, should not amount to the application of a conviction or penalty, and must include the right of option to leave the country. Finally, the third article would allow the executive, with the advice of his or her ministers, to declare a state of prevention and alarm similar to that provided in article 34 of the Constitution of 1949. The state of prevention and alarm would be declared for thirty days, could not be reintroduced within one calendar year and would allow for judicial detentions while leaving other constitutional guarantees in place.

These proposals assume that if the executive could declare a state of emergency and exercise the power of detention for a limited time, there would be a lesser need to resort to the more restrictive state of siege provision. The vast majority of the states of siege declared in Argentina are not the result of foreign attack. If the executive had the ability to detain individuals during a state of emergency without resorting to the state of siege, all nonambulatory constitutional guarantees could remain in place during periods of relatively less severe instability.

In summary, foreign attack and internal disorder are basically different situations and require different treatment. A provision allowing for the declara-

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323. See, e.g., ARGENTINE CONSTITUTION supra note 37, at art. 34 (1949) (allowing declaration of state of emergency in addition to state of siege); Id. at art. 86 (1853) (allowing executive to declare state of emergency that would lapse in 10 days if not approved by Congress); Id. at art 18 (1949, repealed 1957) (allowing president to declare "state of prevention and alarm" during which individuals could be detained for 30 days without calling of state of siege).
324. Morello & Loñ, supra note 272, at 623-25. Morello and Loñ suggest a legislative solution to the state of emergency question. They urge passage of a law that would allow the president to declare a state of emergency for 30 days in circumstances similar to that required by the Constitution of 1949.
325. See REFORMA CONSTITUCIONAL I, supra note 20, at 305-06.
326. Id. at 306.
327. Id.
328. In 1865, during a war with Paraguay, a state of siege was declared in response to a foreign attack. All other Argentine states of siege have been declared in response to internal disorder. REFORMA CONSTITUCIONAL I, supra note 20, at 304.
tion of a state of siege in the case of internal disorder must be narrowly drawn; it should be invoked solely by the Congress when in session and should be limited constitutionally to thirty days. In addition, the amendment should allow the suspension of only those rights directly related to the causes of the state of siege. While a state of emergency provision of the type proposed by Morello-Loñ and the Council may reduce the instances in which a full state of siege is called, such a provision runs the risk of creating yet another mechanism by which civil rights may be easily suspended. The proposed provision for states of siege during periods of internal disorder is sufficient to address the need of the executive to suspend constitutional rights during times of emergency. Any constitutional reform should not expand the ability of the executive to detain individuals during a state of emergency.

2. The Reasonable Relation Standard of Review

The ambiguity surrounding the reasonable relation standard of review of the Habeas Corpus Act stems from a conflict among Supreme Court decisions from the past decade. In Zamorano, Timerman and Moya, the Supreme Court established that the executive must provide the judiciary with reports detailed enough to allow the court to make an informed decision concerning the reasonableness of the detention. In cases such as Tizio and Perelmuter, on the other hand, the Supreme Court held that the judiciary must yield to executive assertions that the detained individual was engaged in conduct related to the cause of the state of siege.

The cases that have been decided pursuant to the Habeas Corpus Act have done little to clarify this important issue. In the Granada case, the Supreme Court, apparently adopting the Tizio/Perelmuter standard, found that "the Executive does not need to judicially establish the bases of the decision that motivated the arrest." The Granada dissent, however, found that the executive had a duty to provide the court with sufficient information concerning the causes that gave rise to the detention in question. In decisions since Granada, courts have applied standards ranging from the permissive "clearly unreasonable" test to the stricter standard proposed by the Granada dissent.

329. For a discussion of Zamorano, Timerman and Moya, see supra notes 107-46 and accompanying text.
330. For a discussion of Tizio and Perelmuter, see supra notes 148-52 and accompanying text.
331. For a discussion of Granada, see supra notes 272-80 and accompanying text.
332. See supra notes 281-91 and accompanying text.
The article 4, clause 2 examination of reasonable relation needs to be clarified. The position adopted by the Supreme Court in *Granada* is overly permissive and would result in the same ineffectiveness that plagued the habeas corpus procedure during the years of the military dictatorship, when the executive merely had to assert that a detention was linked to the causes of a state of siege. This standard, established during the dictatorship, reduces a judge's role to verifying whether the executive has in fact made this assertion. Conversely, if the judiciary follows the view of the *Granada* dissent, the executive would need to provide detailed information regarding the relation of the detention to the state of siege so that the judiciary could make an informed decision regarding its reasonableness.

The detained individual should also be allowed to present evidence in accordance with articles 14 and 15 of the Habeas Corpus Act. Finally, the habeas corpus judge should be required to make an explicit ruling concerning the evidence and reasonableness of the relation between the arrest and the causes of the state of siege.

3. Unconstitutional Regulation of Habeas Corpus

The Habeas Corpus Act consolidated habeas corpus as a constitutionally based procedure but did not provide protection from restrictive regulations in the future. First, the Act does not prevent the reapplication of the restrictions placed on habeas corpus during the period 1976-1983. Second, because habeas corpus is not constitutionally entrenched, a future repressive government could repeal the Act and completely negate the use of habeas corpus procedure to challenge unconstitutional detentions.

As the law now stands, there are several ways in which unconstitutional regulations on habeas corpus could be controlled. The Habeas Corpus Act allows judges hearing habeas corpus petitions to question the constitutionality of laws permitting detentions. Article 6 expressly permits the judiciary to declare *de officio* the unconstitutionality of a deprivation of liberty if a law is

333. N. Sagüés, HABEAS CORPUS, supra note 8, at 263-64. Sagüés proposes a clarification that adopts parts of the majority and minority positions in *Granada*. The Sagüés proposal would establish a flexible period (approximately 30 days) during which time the courts would accept executive assertions that a detainee is being held for reasons related to the state of siege. Under the proposal, only a claim of mistake of person would require a court hearing a habeas corpus petition to accept offered evidence. At the end of the period, the detainee would be allowed to bring a second habeas corpus petition to challenge the reasonableness of the detention, and the executive would be required to prove the claimed connection between the detention and the state of siege. The Sagüés proposal does not require the executive to establish that the detainee committed a crime or is guilty in connection with some aspect of the state of siege. This 30 day extra-judicial detention period exceeds all international standards for these types of detentions.

334. For a discussion of the restrictions placed on habeas corpus during the most recent military regime, see supra Sections II.A.2-3.
contrary to the Constitution.\textsuperscript{335} The appeal of extraordinary recourse and the process of \textit{amparo} could also be used to challenge restrictions on habeas corpus. Under Argentine law, the appeal of extraordinary recourse is a method to challenge the constitutionality of a lower court decision before the Supreme Court.\textsuperscript{336} If a lower court rejected a petition of habeas corpus applying a restrictive habeas corpus regulation, the petitioner could bring an appeal of extraordinary recourse to challenge the constitutionality of the regulation.

An \textit{amparo} action challenging restrictions on the habeas corpus process would be more difficult. \textit{Amparo} generally provides a recourse against unconstitutional administrative actions, not a method of challenging the constitutionality of regulations. The law regulating \textit{amparo} specifically excludes limitations on liberty from the scope of the recourse.\textsuperscript{337} Nonetheless, the Supreme Court has held that under certain circumstances the process of \textit{amparo} may be used to challenge the constitutionality of regulations.\textsuperscript{338} While \textit{amparo} does not apply to unconstitutional restrictions on liberty, it may possibly be invoked to challenge unconstitutional restrictions on the quasi-constitutional process of habeas corpus. The law regulating \textit{amparo} must be amended to expressly allow for the challenging of regulations that unconstitutionally restrict procedures designed to protect constitutional rights.

However, these protections are insufficient to prevent attack by an extra-constitutional regime. While no strictly legal provision is an absolute guarantee against abuse, a declaration that habeas corpus is an inalienable right of detained persons must be included in the Constitution.\textsuperscript{339}

\textsuperscript{335} Habeas Corpus Act, at art. 6.
\textsuperscript{336} For a discussion of extraordinary recourse, see N. SAGÜÉS, RECURSO EXTRAORDINARIO (1984).
\textsuperscript{337} For a discussion of the recourse of \textit{amparo}, see supra notes 22-27 and accompanying text.
\textsuperscript{338} In Carlos Outon, 267 Fallos 215 (1967), and Sanchez Sorondo, 270 Fallos 289 (1968), the Argentine Supreme Court allowed petitioners to challenge the constitutionality of laws. In these cases, the Court found that the purpose of the \textit{amparo} regulating law must have been to facilitate the ability of citizens to challenge laws that limited constitutional rights in an arbitrary and manifestly unconstitutional manner. For a discussion of Outon and Sorondo, see Feinrider, supra note 26, at 192-93.
\textsuperscript{339} The Council for the Consolidation of Democracy has proposed reform of article 18 to include a prohibition against all restrictions to ambulatory liberty. REFORMA CONSTITUCIONAL I, supra note 20, at 280-81. The proposed reform of article 18, in relevant part, is as follows:
\textit{n}o one shall be arrested or restrained in any form in their ambulatory liberty, except in virtue of a well-founded judicial order. A restriction without a previous order will only be valid when there exists certain risk that a judicial order may not be obtained in time and a condition in which exist certain suspicions and some indication of guilt.
\textit{Id.} at 280-81. These reforms do not go far enough. They do not include an express statement guaranteeing the right of habeas corpus (or similar writs of extraordinary recourse). Any future reform of article 18 must expressly recognize the habeas corpus right.
B. Effectiveness of Habeas Corpus Procedures

The following changes to the Habeas Corpus Act are necessary to improve the effectiveness of habeas corpus procedures in protecting against disappearances and illegal detentions. First, the Act's coverage should not depend on whether the detention or threat of detention is officially sanctioned but on whether the individual authorizing such an act appears cloaked with governmental authority. Second, the Act's coverage should also include judicially-ordered detentions if those detentions are ordered by a judge as prosecutor and involve crimes that are defined by membership in or adherence to the beliefs of a political organization. Third, the Act should establish the failure to cooperate with habeas corpus procedure as a criminal offense punishable by imprisonment and large fines. Fourth, the Act should clearly establish judicial authority over security forces and other governmental agencies during investigations of habeas corpus petitions.

1. Coverage of Individual Acts

The Habeas Corpus Act made important advances in the scope of habeas corpus procedure. The Act extended the reach of habeas corpus to cover the threat of illegal detention and the worsening of conditions of legitimate detention. This widening of scope was responsible for the largest number of habeas corpus petitions during the five years following the Act's passage. The Act did not resolve, however, whether the acts of individuals who do not represent a public authority are covered, leaving the question to be decided under provincial law.

The Habeas Corpus Act allows for the filing of a habeas corpus petition when the petitioner has only minimal information about the detainers. Supreme Court jurisprudence establishes that the judiciary has a duty to fully investigate the source of such detentions. However, the Act does not clarify whether habeas corpus procedure will apply once it is shown that a private individual is responsible for the detention. Experience during the dictatorship makes this issue important. Paramilitary groups with possible, but unestablished, ties to the military were often involved in the sequestering of individuals. During the dictatorship, innumerable habeas corpus petitions were rejected because of the lack of a detention by a public authority. The criminal provision applying to the illegal deprivation of liberty was also found to be inadequate to combat disappearances at the hands of paramilitary groups.

Given this history, the Habeas Corpus Act must be clarified to specifically include acts by private individuals. Numerous provinces currently allow the
procedure of habeas corpus to be applied to the actions of individuals. The Act's application to the federal capital and the federal territories should similarly be expanded to include the acts of private individuals.

2. Coverage of Judicially Ordered Detentions

The Habeas Corpus Act should apply to those detentions ordered by a judge acting as prosecutor, those authorized by certain provisions of the Argentine Criminal Code, such as article 213 bis, and those involving crimes that are defined by membership in or adherence to the beliefs of an organization.

Judges have the power to order extended periods of detention for ideologically based crimes without the protection of habeas corpus. Because judges are considered "competent authorities," the constitutionality of these detentions may not be challenged through the habeas corpus procedure. Courts allow habeas corpus petitions against judicially ordered detentions only in special circumstances. The appellate courts should have jurisdiction over this type of petition. This expansion of coverage would allow protection against arbitrary detentions regardless of their source.

3. Control of Noncompliance

The Habeas Corpus Act should be amended to make noncompliance with the habeas corpus procedure a criminal offense punishable by imprisonment and large fines to severely sanction officials who violate their legal duties. The Act does not adequately address the problem of noncompliance. It simplifies the complex system of sanctions against officials who do not cooperate with the habeas corpus process by creating a single sanctions article that is much less specific and less rigorous than former provisions. While the Act establishes that it is the duty of the security organizations to comply effectively with the habeas corpus process, violation of this duty is not defined as a criminal offense, nor are any other serious sanctions attached to such violations. To prevent illegal detentions by governments through the habeas corpus process,

340. The provinces that allow actions of individuals to be challenged through the process of habeas corpus include Buenos Aires, Catamarca, Chaco, Entre Ríos, Formosa, Jujuy, La Pampa, Neuquen, Río Negro, Salta, San Luis and Santiago de Estero. See FUNDAMENTOS, supra note 38, at 2036. See also N. SAGÚES, HÁBEAS CORPUS, supra note 8, at 140-41. Senator Martínez, when introducing the compromise, specifically stated that the scope of the habeas corpus law for the federal capital would be left to subsequent regulation. FUNDAMENTOS, supra note 38, at 2047.

341. These statutes can be distinguished from the statutes covering conspiracy or illicit association by intent. In the latter, the individuals involved must have intended to perpetrate another defined crime.

342. N. SAGÚES, HÁBEAS CORPUS, supra note 8, at 165-67.
noncompliance by the executive or the security forces must be established as criminal behavior, thus meriting serious punishment.

4. Judicial Authority During Investigations

While it is true that civilian judges are basically powerless when confronting a noncooperative military, judges could better assert investigative authority if such authority was guaranteed in the Habeas Corpus Act. The Act should grant judges the power to summon military personnel to testify in the oral proceeding, empower investigating judges to visit and inspect any and all military or police detention centers, and give judges the power to subpoena all data concerning the detainee, regardless of the security rating of that data.

5. Data on Detainees

During the dictatorship, the military maintained extensive files that included information on a wide range of possibly "subversive" individuals. These individuals were observed and marked for possible detentions. Once individuals were detained, the military kept records that tracked their detentions and eventual "transfers." When habeas corpus petitions were filed for these individuals, the security forces invariably informed the habeas corpus magistrate that the person was not being detained and the military had no information concerning the individual.

Since 1983, there have been several studies and a legislative proposal concerning the protection and right of access to personal data files maintained by governmental agencies. The legislative proposal, completed in 1986, included an article that provided for a petition of "habeas data." The habeas data petition process would allow a person to obtain access to his or her files and to challenge any misrepresentation of fact contained therein. The proposed process would also be subject to certain restrictions in the context of defense or public security matters.

The new habeas data proposal would be an important addition to the existing protections guarding against illegal detentions. A streamlined process providing petitioners with information about a given individual compiled by the security forces would greatly assist in determining whether disappearances

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346. Id.
347. Id. at 5.
were related to the government or the security forces. However, the problem of military noncooperation would also apply to habeas data. Unlike article 5 of the Habeas Corpus Act, the proposed right of access would only be exercisable by the individual and not by any other person acting on the individual’s behalf. The legislative proposal was based on the right of privacy articulated in the Argentine Constitution and the Universal Declaration of Human Rights; information contained in government files is considered private and therefore accessible only to the subject individuals.348

Nevertheless, a habeas data variation could be fashioned to allow petitions asserting the right of access to files on behalf of a disappeared person if a certain threshold showing was met. For example, a petition could be granted where the petitioner: 1) asserted the right of access on behalf of another individual; 2) made a showing that the individual had disappeared; 3) presented evidence that the disappearance was related to the security forces or other government officials; and 4) simultaneously submitted a petition of habeas corpus on behalf of the individual. A sanctions provision similar to that of article 24 of the Habeas Corpus Act would further deter abuse by petitioners. This evidentiary showing and the threat of sanctions would maintain the personal right of privacy while still allowing the right of access to be asserted for the disappeared. Strict sanctions could also be attached to the failure of officials to cooperate with the habeas data process. This latter change is necessary to assure military cooperation.

6. Ombudsman or Defensor del Pueblo

As discussed above, article 21 of the Habeas Corpus Act provides for the intervention of the public prosecutor in the habeas corpus procedure. The Act envisions the role of the public prosecutor in the process of habeas corpus not as a defender of the authority responsible for the challenged injury, but as a "controller of legality."349 In that role, the public prosecutor is meant to fulfill the important duty of ensuring constitutional order. The public prosecutor should adequately protect article 18 rights independent from the executive, judiciary or legislature. However, the institution of the public prosecutor in Argentina is too closely tied to the executive to effectively carry out these duties. The public prosecutor, while considered a semi-independent judicial official, is appointed by the Ministry of Justice, which is under the control of the executive.

348. Id. at 1.
349. FUNDAMENTOS, supra note 38, at 2031-32.
Some countries have created the position of ombudsman or \textit{defensor del pueblo} to supplement the role of the public prosecutor as a controller of legality.\textsuperscript{359} For example, in the Scandinavian countries, the institution of the ombudsman was created as a position independent of the executive that would ensure executive compliance with guarantees of individual freedom.\textsuperscript{351} In the Spanish Constitution of 1978, the role of \textit{defensor del pueblo} was similarly created to supervise the activity of the executive and defend constitutional rights.\textsuperscript{352} A number of Latin American countries have also created such positions to provide for an independent monitor of constitutional rights.\textsuperscript{353}

A number of legislative initiatives both before and after the past military dictatorship have proposed the creation of an ombudsman or \textit{defensor del pueblo} in Argentina.\textsuperscript{354} The most recent proposal would create a \textit{defensor del pueblo} charged with controlling and supervising the administrative entities of the executive.\textsuperscript{355} The \textit{defensor del pueblo} would be elected by both houses of the Argentine Congress for a term of four years and would be eligible for a single reelection. In order to complete the mission of the office, the proposal grants the \textit{defensor del pueblo} the power to subpoena official and executive reports and/or testimony concerning topics under investigation, to examine any site under the control of the government, and to examine all documentation, including information classified as "secret" or "reserved."\textsuperscript{356} If the \textit{defensor del pueblo} encounters constitutional violations, the legislation empowers the \textit{defensor del pueblo} to bring criminal charges through the office of the public prosecutor, solicit the application of sanctions against the public authorities,

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351. \textit{Id.} at 284-92.
352. \textit{CONSTITUCIÓN ESPAÑOLA} art. 54 (Spain). \textit{See also} H. FX-ZAMUDIO, \textit{supra} note 38, at 329-36; F. MURILLO FERROL & M. RAMIREZ JIMÉNEZ, \textit{ORDENAMIENTO CONSTITUCIONAL DE ESPAÑA} 64-65 (1980).
354. A proposal to create the institution of ombudsman in Argentina based on a study by Prof. Miguel M. Padilla was submitted to the House of Deputies in 1975, but the proposal was abandoned when the military came to power in 1976. H. FX-ZAMUDIO, \textit{supra} note 38, at 339. On May 18; 1988, Rep. Jorge R. Vanossi again introduced in the House of Deputies a bill that would create a \textit{defensor del pueblo} in Argentina. The bill was assigned to the Commission of Constitutional Matters and has not advanced to legislative consideration. Diario de sesiones, Cámara de diputados de la nación, 100 Reunión, 30 Sesión Ordinaria, at 65-68 (1988) [hereinafter \textit{Defensor Project}]. The Council for the Consolidation of Democracy, in its proposal of constitutional reform, enumerated some potential difficulties with the creation of the institution of ombudsman. \textit{REFORMA CONSTITUCIONAL II}, \textit{supra} note 32, at 119-20. The Council for the Consolidation of Democracy later made several recommendations that addressed some of these difficulties. Consejo para la consolidación de la democracia, Incorpación de la institución del ombudsman - defensor del pueblo - en la República Argentina, Doc. No. 284 (Buenos Aires, 1987) (on file with author).
356. \textit{Id.} at art. 16.
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formulate recommendations for reforms of administrative procedures, and propose the adoption of legal norms controlling certain unconstitutional behavior.357

The office of defensor del pueblo could play an important supplemental role in the process of habeas corpus in Argentina. As the proposed position would be primarily responsible for monitoring organizations of national administration, it is not clear what control the defensor del pueblo would have over security forces or intelligence gathering organizations of the executive. If empowered to review and inspect locations and documents of the security forces, the defensor del pueblo could serve as an additional investigator for habeas corpus petitions. In addition to the investigative powers of the habeas corpus magistrate, the defensor del pueblo could act to ensure that the security forces were providing all the information they possessed concerning disappeared individuals. With these powers, the defensor del pueblo in Argentina could fulfill an important role in the protection of the right to liberty.

V. CONCLUSION

The writ of habeas corpus has often been referred to as the key procedure protecting human rights. It has been called the law most feared and hated by dictators. In the darkest moments of Argentine history, however, habeas corpus failed to ensure the most basic right of liberty. This failure resulted in the continuation of thousands of illegal detentions, acts of torture, and summary and arbitrary executions, resulting in untold human suffering.

If the process of habeas corpus -- the rule of law -- cannot protect citizens against arbitrary and capricious detentions by the very government that is meant to represent the rule of law, then the reason for the existence of government is no longer valid, and anarchy may present a more benign societal arrangement. Some suggest that habeas corpus and the rule of law will never be adequate to confront those who rule from a position of both constitutional illegality and absolute power. Nonetheless, society continues to turn to the rule of law as the best and most equitable path available for the protection of basic human rights and human dignity. In this context, governments and peoples must strive to find more effective means to protect basic rights and dignities even, perhaps especially, during times of unconstitutional, illegitimate governments.

In the six years since the return to civilian government in Argentina, the Argentine judiciary, legislature and executive have taken steps to confront the failure of habeas corpus during the time of the dictatorship and the tragic

357. Id. at art. 18.
Habeas Corpus Law in Argentina

consequences of that failure in terms of human suffering. The Habeas Corpus Act of 1984, sought to reform important aspects of the habeas corpus process, including judicial control of executive action during a state of siege. The judiciary actually applied that law to provide a degree of protection against arbitrary arrests during two states of siege. However, present habeas corpus procedures are not effective in controlling the executive’s state of siege power or forcing compliance by noncooperative or illegitimate regimes. The Act’s scope is also too narrow and the investigatory power of habeas corpus magistrates too small. Despite the reform efforts, the overwhelming failure of habeas corpus during the period of military rule from 1976 to 1983 in Argentina remains unresolved. The issues presented in this article must be brought to the forefront of debate and must be adequately resolved for the process of habeas corpus to protect the right of liberty in Argentina.
Appendix

Law 23.098
(Habeas Corpus Act of 1984)

CHAPTER I: GENERAL DISPOSITIONS

Article 1. Applicability of the Law. This law will be effective from the date of its publication. The first chapter shall apply in every court in the Nation. It shall not obstruct the application of provincial constitutions or laws enacted pursuant to them, when those constitutions and laws grant more efficient protection of the rights to which this law refers.

Article 2. Jurisdiction of Application. This law shall apply in either national or provincial courts, according to whether the act denounced as injurious emanates from a national or provincial authority. When the injurious act is by an individual, the jurisdiction shall be that established by the law violated.

If a party is initially unaware of the authority from which the act denounced as injurious emanated, any court may hear the petition, according to the rules regulating its territorial competence, until it is determined, under the previous paragraph, which court has jurisdiction.

Article 3. Procedure. The procedure of habeas corpus shall apply when a party denounces an act or omission of a public authority that implicates:

1. A limitation or present threat to ambulatory liberty without a written order from a competent authority; or,
2. An illegitimate aggravation of the form and conditions under which one is detained, irrespective of the legitimacy of that detention.

Article 4. State of Siege. When the liberty of a person is limited by virtue of the declaration provided for by article 23 of the National Constitution, the process of habeas corpus has the authority to verify, in the concrete case:

1. The legitimacy of the declaration of the state of siege;
2. The correlation between the order of deprivation of liberty and the situation that gave rise to the declaration of the state of siege;
3. The illegitimate aggravation of the forms and conditions under which one is deprived of liberty, which in no case can take place in centers where sentences are served;
4. The effective exercise of the right of option provided for in the last part of article 23 of the National Constitution.

Article 5. Standing to Bring a Petition. The petition of habeas corpus may be brought by any person who affirms that they find themselves in the conditions described by articles 3 and 4 or by any other person in their favor.

Article 6. Unconstitutionality. The judiciary may declare the unconstitutionality of the deprivation of liberty in any particular case, when the deprivation is made by an authority pursuant to a written order based on a law that is contrary to the National Constitution.

Article 7. Recourse of Unconstitutionality. The sentences dictated by superior courts in deciding habeas corpus petitions shall be considered conclusive for the purpose of a claim of unconstitutionality before the Supreme Court. Recourse shall proceed in the cases and forms provided by the laws in effect.

CHAPTER II: PROCEDURE

Article 8. Competence. When the act denounced as injurious emanates from a national authority, the following shall hear the habeas corpus petition:

1. In the Federal capital the judges of first instance in the criminal division.
2. In the national territory of the provinces the section judges, according to the rules that regulate their territorial competence.

Article 9. Petition. The petition of habeas corpus should contain:

1. Name and address of the petitioner;
2. Name, address and other personal facts known of the person for whom the petition is made;
3. The authority from which emanated the act denounced as injurious;
4. Cause or pretext of the act denounced as injurious to the best of petitioner's knowledge;
5. Statement of how the act is illegitimate.
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If the petitioner is unaware of some of the requisites contained in nos. 2, 3, and 4 the petition shall furnish the facts that would best lead to their ascertainment.

The petition may be presented at any hour of the day in writing or in oral testimony before the clerk of court. In either case, the identity of the petitioner shall be immediately confirmed, and when this is not possible without prejudice to the petition, the court may take the steps necessary to do so.

**Article 10. Dismissal or Incompetence.** The judge shall dismiss a petition that does not refer to one of the conditions established in articles 3 and 4 of this law. If the judge considers himself or herself to be without jurisdiction, the judge shall so declare.

In either case, the resolution shall be sent immediately for consultation to the Court of Appeals, which shall decide the appeal within twenty-four hours. If the Court confirms the resolution of incompetence, the Court shall send the complete testimony by the quickest method possible. If the Court of Appeals reverses the resolution of incompetence, the Court shall notify the judge by telegram of the decision and order the judge to continue the proceeding immediately.

The judge shall not dismiss a petition for defects in form, but shall immediately provide the necessary measures for their correction, without prejudice of the corresponding sanctions (article 24).

**Article 11. Writ of Habeas Corpus.** When the petition concerns the deprivation of liberty, the judge shall immediately order the named authority to bring before the judge the detained individual with a report of the grounds for the detention, the form and conditions of the detention if by written order from a competent authority, in which case the detaining authority should bring the order, and if the detained individual has been turned over to another authority, to whom, for what reason, and in what manner the transfer was made.

When the petition concerns a present threat of deprivation of liberty of a person, the judge shall order the named authority to present the report referred to in the proceeding paragraph. If the authority that has detained the person deprived of their liberty or from which has emanated the act denounced as injurious ignores the order, the judge shall deliver the order to the superior of the government branch indicated by the petition.

The order shall be sent in writing and with the date and hour, unless the judge considers it necessary to appear personally in the place where the detained individual is being held, in which case the judge may give the order orally, but shall leave proof of having done so.

When the court or judge of competent jurisdiction has knowledge by satisfactory proof that a person is being maintained in custody, detention or confinement by an administrative, police or military functionary within the court's jurisdiction, and the judge fears that the detained individual will be transported outside the territory of the court's jurisdiction, or that the detained individual will suffer irreparable harm before he or she could be aided by a writ of habeas corpus, the judge may issue the writ de officé, ordering the person carrying out the detention, or any commissioner, police agent, or other employee, to bring the detained or threatened individual to the judge’s presence to resolve the situation according to the law.

**Article 12. Answering the Writ.** The named authority shall comply with the writ immediately, or within the period that the judge determines, in accordance with the circumstances of the case.

If due to a physical impediment the detained individual cannot be brought to the presence of the judge, the named authority shall present within the same period a report on the cause that impedes compliance with the order, estimating the time within which it will be possible to comply with the order. The judge shall expressly rule on the question of the protection of the detainee. The judge may visit the place where the individual is detained if the judge believes it necessary to observe the situation, and may authorize a family member or a person of confidence to observe the situation of the detained individual.

From the effective date of the order the detained individual shall remain at the disposition of the judge who gave the order until the completion of the procedure.

**Article 13. Summons to the Hearing.** The Order shall provide the named authority a summons to the hearing provided for by the following article, at which time the authority may appear by representation of a duly authorized functionary, with the right of legal representation.

When the affected individual has not been deprived of his or her liberty the judge shall immediately summon the individual for the hearing provided for in the following article, informing the individual that, in his or her absence, the individual shall be represented by the public defender.

The affected individual may name a defense attorney or exercise the defense pro se, so long as it does not prejudice the efficacy of the defense, in which case the public defender shall be named as defense attorney.
In the procedure of habeas corpus there shall be no recusal, but the moment that a judge feels incompetent for reason of partiality the judge shall declare it, ordering that the hearing be completed before the next judge of turn or before that judge's legal assistant.

**Article 14. Oral Hearing.** The hearing shall take place in the presence of the cited individuals who make appearances. The individual who has been deprived of his or her liberty shall always be present. The presence of the public defender shall be obligatory in the situation described by paragraphs 2 and 3 of article 13.

The hearing shall begin with the reading of the petition and the report. Then the judge shall question the petitioner and question such others as the judge may order. The judge shall give the named authority and the petitioner the opportunity to testify either personally or with the assistance of an attorney.

**Article 15. Evidence.** If de officio or by petition of one of the parties the judge believes it necessary to admit evidence, the judge shall determine its admissibility according to its probative value and relevance to the case at hand. The evidence shall be admitted at the time of the hearing, or, if not possible, the judge shall order the evidence produced and the hearing continued within twenty-four hours.

At the close of the admission of evidence the judge shall hear the testimony of the parties as provided for by the previous paragraph.

**Article 16. Transcript of the Hearing.** The clerk of court shall maintain a transcript of the hearing provided for by articles 14 and 15, which shall contain:

1. The names of the judge and the parties.
2. An account of the various parts of the hearing, with an indication of the names and addresses of the attending experts, interpreters or witnesses.
3. If there was an offer of evidence, a brief summary of what was admitted or excluded, and why.
4. If the parties so request, a summary of the substantive part of the petition or pronouncement of what was taken into account.
5. The day and hour of the hearing, the signatures of the judge and clerk, and of parties that wish to sign it.

**Article 17. Decision.** At the termination of the hearing the judge shall immediately issue a decision, which shall contain:

1. The day and hour of the decision.
2. An account of the act denounced as injurious, of the authority from which it emanated, and the name of the person who suffered from the act.
3. The reasoning of the decision.
4. The resolution, which should discuss the dismissal or granting of the petition. If the latter, the resolution shall order the immediate freedom or the cessation of the injurious act.
5. Costs and sanctions according to articles 23 and 24.
6. The signature of the judge.

If the judge has knowledge of the probable commission of a crime of public action, the judge shall order the corresponding testimony delivered to the Public Prosecutor.

**Article 18. Pronouncement.** The decision shall immediately be read by the judge before the parties and shall be posted in case some of the parties are not present. The public defender, if required to be present pursuant to article 13, paragraphs 2 and 3, shall not leave until the reading of the decision.

**Article 19. Recourse.** An appeal of the decision to the Court of Appeals may be brought within twenty-four hours, in writing or orally, before the Clerk of the Court.

The appeal may be brought by the injured individual, his or her lawyer, the named authority or its representative, or the petitioner, only for sanctions or costs that impose hardship.

During the appeal the decision shall be suspended, except with respect to the liberty of the person (article 17, clause 4), which shall remain in effect.

The Court of Appeals shall grant or deny the appeal in the case of a denied writ within twenty-four hours. If the court grants the appeal it shall issue the summons provided for in the first paragraph of the following article.

**Article 20. Procedure of Appeal.** Upon granting the appeal the parties shall be summoned by the judge to appear within twenty-four hours before the superior court, placing the detained individual at the superior court's disposition. If the Court of Appeals is located in a place other that the superior court, the judge shall summon the parties to appear within a convenient time considering the distance.

Within the period of the summons the parties may establish the appeal and present writings on the merits of the appeal or the decision.
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The Court of Appeals may order the renewal of the oral hearing provided for in articles 13, 14, 15, and 16, saving the inferior court from the errors or omissions which may have occurred before the judge of first instance. The Court shall render the decision in accordance with the provisions of articles 17 and 18.

Article 21. Intervention of the Public Prosecutor. When the petition of habeas corpus is presented, the Court shall notify the Public Prosecutor in writing or orally, in either case leaving proof of the act. The Public Prosecutor will have all rights provided other parties, but it shall not be necessary to summon or notify the Public Prosecutor at subsequent points.

The Public Prosecutor may appear at the instances that he or she believes to be proper and may appeal the decision regardless of the outcome.

Article 22. Intervention of the Petitioner. The petitioner may intervene in the procedure with the assistance of counsel and shall have all the rights provided to the other parties, except those set forth in paragraph 2 of article 19, but it shall not be necessary to summon or notify the petitioner.

Article 23. Costs. When the decision grants the petition, the costs of the procedure shall be charged to the functionary responsible for the injurious act, except in the case of article 6, where the costs shall be borne by the party who incurred them.

When the petition is denied the costs shall be charged to the party who incurred them, except in the case of manifest inappropriateness, in which case the costs shall be charged to the petitioner, or the injured individual, or both jointly, according to whether the misconduct corresponds to the activity of one or both together.

Article 24. Sanctions. If the petition is malicious due to omitted or false declarations the judge may impose on the petitioner in the decision a fine of fifty to a thousand Argentine pesos or an arrest of one to five days in the jail of the court, or in an establishment that the judge determines, according to the degree of misconduct. The decision of sanctions may be deferred when it is necessary to conduct investigations, in which case the appeal may be brought once the decision is announced, the notification of which shall be in conformance with the first book, title VI of the Criminal Procedure Code.

The fine shall be executed in conformance with the provisions of the Penal Code, but the conversion shall be 200 Argentine pesos for each day of arrest.

The judges and the functionaries which unjustifiably fail to comply with the time periods the law provides shall be sanctioned with a fine determined according to the previous paragraph. The judge shall apply the sanctions to named authorities or to judicial magistrates without prejudice to article 45 of the National Constitution.

CHAPTER III: LAWS OF APPLICATION

Article 25. Judicial Turn. To effect the procedure provided for in the present law, turns of twenty-four hours shall govern in the Federal Capital, as determined by the Honorable National Court of Appeals in the Criminal and Correctional Divisions.

In the national or provincial territory the same turns shall govern as determined by the respective Court of Appeals, without the obligation of the judge and auxiliary functionaries to remain in court, but in a place visible to the public shall be posted the particular judge of turn with respect to the rights of intervention provided by article 9.

The turn of the day in the respective jurisdictions shall be published in the papers as well as posted in advisories in a place visible to the public in the judicial and police buildings.

The Court of Appeals shall regulate the dispositions applicable to the other functionaries or employees that should intervene or assist in the procedure.

Article 26. Security Organizations. The national authorities and the security organizations shall take the steps necessary for effective compliance with the present law and shall place at the disposition of the intervening court all their available resources for the fulfillment of the procedures that this law provides.

Article 27. Register. The judiciary of the Nation shall report the sanctions imposed pursuant to article 24 of this law to the Supreme Court, which shall organize them, through its Secretary, in a register.

* In 1985 the Argentine peso was replaced by the austral, at a rate of one austral to 100 pesos and approximately one U.S. dollar. As of Jan. 24, 1991, one austral had fallen in value to .0017 of a U.S. dollar. Thus the fines provided in the Habeas Corpus Act are meaningless today.
Article 28. Repeal. Article 20 of Law 48, Section II of the form book of Law 2371 (Criminal Procedure Code) is hereby abolished.

Article 29. Notification of the Executive Branch.