



Special Update: Ecuador

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Outside the Rule of Law: Ecuador's Courts in Crisis

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Executive Summary

Ecuador no longer functions under an independent judicial system. Within the last few months, the majority of the sitting justices on the three highest courts of the land – the Constitutional Court, the Supreme Electoral Court and the Supreme Court of Justice – have been illegally removed and replaced. These courts are now composed nearly entirely of judges unconstitutionally appointed by a newly-formed congressional majority aligned with President Lucio Gutiérrez. Ecuador's executive, legislative and judicial branches of government are therefore now controlled by a single political coalition.

The new governing coalition's court machinations blatantly contravene Ecuador's own constitution as well as the country's obligations under the International Covenant on Civil and Political Rights and the American Convention on Human Rights.

Within Ecuador, the court purges were swiftly denounced as unconstitutional and opposition to the *de facto* courts has swelled, marked by major demonstrations and a strike by judges and other court employees. Ecuadorians are under no illusion that the nation's courts were impartial prior to the purges. But the purges have not solved the problem of politicization of the judiciary, and have created the additional problem of unconstitutionality.

The turmoil in Ecuador's courts has drawn the attention of key actors in the international community. The Inter-American Commission on Human Rights and the United Nations Special Rapporteur on the independence of judges and lawyers have recently issued sharply worded statements of criticism and concern. By contrast, the U.S. government has remained all but silent on the matter, despite the obvious breach of Ecuador's constitutional order and the ensuing political upheaval.

The importance of international attention should not be underestimated. Within Ecuador, desire for an independent and impartial judiciary is one thing, but achieving the broad political consensus for specific measures that could break the current deadlock is quite another. Ecua-

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dor's governing coalition now wields its influence in all three branches of government, and will not easily surrender the power it has attained. Opposition forces, for their part, have so far proven unable to coalesce around specific proposals. Ultimately, Ecuador's crisis of judicial independence and legitimacy must be resolved by Ecuadorians. But the court purges represent abreach of Ecuador's solemn international obligations, and the international community has a role to play in helping Ecuadorians to return their country to its constitutional order and to construct an independent judiciary worthy of the public's trust.

The near-silence from the U.S. government to date may all too easily be read by President Gutiérrez and his allies as tacit U.S. support for the court purges. The U.S. embassy in Quito and the State Department should therefore make unmistakably clear, through public statements, that the U.S. government condemns the court purges and urges Ecuadorians to return quickly and peacefully to constitutional order.

The Inter-American Commission on Human Rights has already issued a strongly worded denunciation of the court purges and will be considering petitions filed by the dismissed justices. Given the gravity of the situation and the potential for further deterioration, the IACHR now should take the next step of requesting permission from the Gutiérrez government to conduct an *in situ* evaluation of the crisis as soon as possible.

Purging the Courts

Every day since December 9, 2004, the following notice can be read in one of Ecuador's principal papers, *El Comercio*. Only the number of days changes.

114 DAYS SINCE THE UNCONSTITUTIONAL OVERTHROW OF THE SUPREME COURT *In the early morning of December 9th, the so-called 'institutional majority' of Congress dismissed and replaced the Supreme Court of Justice using illegal and unconstitutional procedures.*

Ecuador no longer functions under an independent judicial system. Within the last few months, the majority of the sitting justices on the three highest courts of the land – the Constitutional Court, the Supreme Electoral Court, and the Supreme Court of Justice – have been illegally removed and replaced. These courts are now composed nearly entirely of judges unconstitutionally appointed by a newly-formed congressional majority aligned with President Lucio Gutiérrez. These new judicial appointments were based on loyalty to one of the political parties within the new government coalition, rather than on candidates' legal qualifications. The new congressional majority includes the political party of President Gutiérrez, four other political parties, and several independent representatives. Ecuador's executive, legislative and the judicial branches of government are thus now under the control of this one group of political allies.

On November 9, 2004, the Social Christian Party (PSC) initiated impeachment proceedings in the Congress against President Gutiérrez on allegations of illegal use of public funds to finance his party's political campaigns. The impeachment bid was supported by the Democratic Left (ID) and by Pachacutik, the political arm of the national indigenous federation. However, other congressional representatives forged a new coalition in support of the President based on mutual interests and they successfully blocked the impeachment. Emboldened by this victory, the new coalition and the Gutiérrez administration set their sights on a political takeover of Ecua-

dor's judiciary.

On November 25, the new congressional majority voted in one of their own, Jorge Montero, as second vice-president of the Congress. That afternoon, Montero took charge of the session after the president of the Congress and others had departed. Montero accepted the motion by a member of the majority coalition that Congress vote on whether to remove the sitting judges on both the Constitutional Court and the Supreme Electoral Court. The new majority prevailed, and then proceeded to elect new judges for each court. However, summarily dismissing and then appointing new judges clearly exceeded the Congress' constitutionally mandated authority.

On December 5, President Gutiérrez called an extraordinary session of Congress focused on the functioning of the courts. During the December 8 session, 52 of the 101 members of Congress voted to summarily dismiss the 31 sitting judges on the Supreme Court, and then elected a replacement for each one of them – this, despite the fact that under the constitution, Congress has no role in the dismissal or appointment of Supreme Court justices. Police were summoned to the Supreme Court building to physically remove justices who refused to step down.

How Did It Come to This?

For decades, Ecuador has been largely controlled by the Social Christian Party (PSC), representing the elite of the country. In 2004, the PSC, led by the powerful ex-president León Febres Cordero, declared political war on President Gutiérrez's administration and his party, the Patriotic Society Party (PSP). But Gutiérrez and congressional allies ultimately turned back an impeachment bid led by the PSC. Politically strengthened by their victory, Gutiérrez and his allies have since maneuvered to strip the courts of their political opponents and consolidate their new majority coalition in Congress.

The new majority was originally composed of the President's small party, the PSP; the Popular Democratic Movement (MPD); the Socialist Party; the Roldosista Party of Ecuador (PRE); and the New Party for National Action (PRIAN). Of the five parties, the PRE and the PRIAN wield the most power nationally. PRE's leader is the exiled ex-president Abdalá Bucaram, who runs his party and power base from Panama. He faces several corruption charges in Ecuador from the time he occupied the presidency; in one case, government witnesses saw him leave the country with "bags" of money from government offices. PRIAN is run by Alvaro Noboa, son and heir of one of the richest men in Ecuador's history. Noboa has always insisted that he actually won the 1998 presidential election. He ran and lost the 2002 elections and plans to run again in 2006.

It is no secret that Febres Cordero's PSC, through its congressional majority status over the years, has exercised enormous influence throughout Ecuador's judicial system – including efforts to affect the outcomes of legal proceedings against PRIAN and PRE partisans. PRE, PRIAN and President Gutiérrez and his PSP have little in common except that they have all been weakened at one point or another by PSC's powerful influence within Ecuador's public institutions, and therefore all consider PSC and Febres Cordero as a common adversary. Gutiérrez and his congressional allies have cited PSC's influence over the courts as justifying their steps to "de-politicize" Ecuador's judicial system.

Beyond the manifestly unconstitutional nature of the congressional actions *vis-à-vis* the courts, the new governing coalition elected a new congressional president using less than fully transparent parliamentary maneuvers. On January 5, 2005, during a heated battle to elect a new president of Congress, out-going President Guillermo Landázuri abruptly terminated the session. After Landázuri and other representatives left the chambers, Second Vice-President Jorge Montero re-opened the session. In a move apparently coordinated in advance,¹ those representatives still present in the chambers proceeded to vote into power their choice for congressional president. As a result, Omar Quintana Baquerizo, a PRE member and Bucaram ally, now presides in Congress. The ascendancy of Bucaram's allies in the courts and in Congress has persuaded many in Ecuador that the exiled ex-president is gaining power behind the scenes and laying the groundwork for his "legal" return.

The Court Purges: Violations of Ecuador's Constitution and International Obligations

There is no question that Ecuador's justice system has suffered from politicization, and that as a result public confidence in the fairness and professionalism of the courts is understandably lacking. But the court purges carried out by Congress in alliance with President Gutiérrez were no remedy for politicization. Moreover, they were undertaken in flagrant violation of Ecuador's constitution, which mandates specific procedures for the selection and dismissal of judges to the three tribunals in question.²

Ecuador's constitution, as amended in 1998, allows for dismissal of judges on the three tribunals only through formal impeachment proceedings, involving the filing of specific charges and hearings to determine the validity of such charges.

In the Constitutional Court and the Electoral Court, the constitutionally-mandated process for selecting new judges provides civil society with the right to present a certain number of candidates for consideration. In addition, civil society has the right to publicly challenge the fitness of any proposed candidates on professional or ethical grounds. Only after such public processes are completed can the final candidates then be presented to Congress for a vote.

Ecuador's 1998 constitution provides absolutely no role for Congress in the selection of Supreme Court justices, who are appointed for indefinite terms. The sitting justices of the Supreme Court themselves, by two-thirds majority vote, are to elect replacements for any justices who step down – whether by choice or as a result of constitutionally-sanctioned challenges to their fitness to serve, i.e., impeachment.

In summarily emptying these courts and naming replacement judges, the new congressional majority, in alliance with the Gutiérrez administration, acted in blatant disregard of the constitutional requirements for dismissing and naming judges. As such, the court purges contravene the country's obligations to ensure the separation of powers of the executive, legislative and judicial branches of government, and to ensure an independent and impartial judiciary.³ These obligations are clear in Ecuador's constitution and in treaties ratified by Ecuador, including the International Covenant on Civil and Political Rights and the American Convention on Human Rights.⁴

As a result, what had been a constitutionally-bounded judiciary in Ecuador – albeit under the sway of one political party – has been replaced by an unconstitutionally derived judiciary.

The Public Outcry in Ecuador

Immediately after the ousting of the sitting judges on the Supreme Court, there was a public outcry across the country by professional legal organizations, the national association of mayors, national and local chambers of commerce, national leaders of the Catholic Church and major national media. The dismissed justices, in coordination with the law school of the Catholic University of Ecuador (Pontificia Universidad Católica del Ecuador), presented a petition to the Inter-American Commission on Human Rights (IACHR) of the Organization of American States (OAS), seeking a ruling as to whether the court purges represent a violation of the American Convention on Human Rights.⁵ The non-governmental organization Justices for Life also worked with the Catholic University to present a petition to the UN High Commissioner for Human Rights (UNHCHR), requesting that the UN Special Rapporteur on the independence of judges and lawyers conduct an *in situ* assessment of Ecuador's judiciary.

In the meantime, many Ecuadorian citizens have attempted to hold the Gutiérrez administration and the Congress accountable for their actions. Shortly after Congress purged the Supreme Court on December 9, a coalition of legal, civic and human rights organizations held a wake in Quito for the "rape and murder" of the Ecuadorian constitution. The wake took place over a number of days, featured presentations by legal and political experts, and concluded with a public funeral held outside the Congress. National newspapers are running regular editorials denouncing the court purges, and public protests continue. Participants in a daily vigil outside the Supreme Court building ask cars to honk their horns in opposition to the *de facto* court. The constant noise has bothered some of the new judges. On January 26, several of them announced at a press conference that they would be taking legal action against those individuals and groups leading the daily street demonstrations. Ironically, they threaten to bring charges based on Article 132 of the Penal Code: "[those] that by word or in writing attack, in a subversive manner, the Constitution or the law or incite its disregard, will be reprimanded by six months to three years in prison."⁶

Many civic leaders and academics are calling President Gutiérrez and his alliance with PRE and PRIAN a dictatorship. Even so, there have been problems uniting the majority of Ecuador's population to take concrete action against the new government coalition. The takeover of the judicial system also curtailed the long-abused power of the PSC, the party of the elite, and their leader, Febres Cordero. Some of those protesting against the abuse of the constitution fear that their disagreement with the government and the congressional majority may be interpreted as support for the PSC to return to power. Real concerns over the flouting of constitutional and international law have therefore been mixed with applause from many that Febres Cordero, and to a certain extent the PSC, appear to have lost their grip on the reins of power. President Gutiérrez, along with PRIAN and PRE, explicitly cast the new political dynamic in populist terms, calling it a struggle of the people vs. the elite. In this rendition, Gutiérrez and his new coalition depict themselves as having thrown out the corrupt and arrogant elite of the PSC and now being determined to give justice back to the people.

Jaime Nebot, the popular PSC mayor of Guayaquil and Febres Cordero's protégé, is using the ferment to push for the support of his own political and regional agenda. There is an historical regional rivalry between Guayaquil (the country's largest city and commercial port representing the Coast) and Quito (the country's political capitol, representing the Sierra). Nebot tied

together these regional issues with the new majority's court purges to rally his supporters. Nebot called for a massive march in the streets of Guayaquil for January 26, and an estimated 83,000 Guayaquileños showed up.

Although the press was hard put to clearly define why so many answered Nebot's call – was it regionalism, a protest against the actions taken by the government coalition or a call for a larger share of national government resources? – Nebot clearly had won this round. PRE and others in the government coalition sponsored a counter-march for the same day and were able to garner only 15,000 supporters. Quito held an anti-government march on February 16, and turned out an estimated 130,000 people. The government and its supporting parties sponsored a counter-march on the same day, attended by an estimated 50,000 people. On March 15, judges and other court workers across the country (except for Guayaquil) began an open-ended strike in opposition to the court purges.

The International Response

Notwithstanding the popular marches in both Quito and Guayaquil, it is clear that there is profound disillusionment about democracy within Ecuador's civil society. As sociologist Milton Benítez of Ecuador's Catholic University states, he and other Ecuadorians are not represented by either side of the political struggle. President Gutiérrez does not have enormous popularity, but he does have power. In the view of Benítez, some of that power comes from his obvious support for U.S. economic and military policies.⁷

On December 28, 2005, the *Los Angeles Times* published an op-ed by Michael Shifter, who chastised the U.S. government for remaining silent in the face of “an overwhelming concentration of power, brought about by manifestly unconstitutional means [not witnessed in Ecuador] in a generation.”⁸ In response to the op-ed and the Ecuadorian media coverage that it sparked, the U.S. embassy's press attaché stated that Ambassador Kristie Kenny had indeed spoken with President Gutiérrez and communicated her concerns regarding the recent actions taken by Congress. For his part, Gutiérrez acknowledged that the U.S. Ambassador had called and questioned the restructuring of the courts. Beyond this, the U.S. government has apparently had little to say about the court purges in Ecuador. The State Department's latest report on human rights practices in Ecuador, issued February 28, 2005, noted merely that “[c]ritics charged Congress with overstepping its constitutional authority” and that the dismissed justices had appealed to the IACHR.⁹

This cursory mention of Ecuador's court purges does not owe to any general reluctance by the State Department to comment forcefully on matters pertaining to judicial independence. Indeed, the State Department's February 2005 human rights report rightly criticizes Venezuelan President Hugo Chávez and his congressional allies for passage of a May 2004 law that increases executive and legislative power over the judiciary. The State Department cites Human Rights Watch's concern that the new legislation threatens the independence of Venezuela's judiciary by subjecting it to political control.¹⁰ The situations in Ecuador and Venezuela are different in many respects, but the gravity of the threat to judicial independence in Ecuador – as well as the overt breach of constitutional order – certainly merits a more principled and critical U.S. response than has been the case to date.

The U.S. reaction appears all the more tepid by comparison with that of the UN Special

Rapporteur, Leandro Despouy, who sought the Gutiérrez government's approval to conduct an *in situ* evaluation of the crisis in February. Concerned that the government would delay an invitation until May – by which time the UN Commission on Human Rights 2005 session would have concluded – Despouy signaled the urgency with which he viewed the situation. In a statement on February 18, the Special Rapporteur noted that the court purges appeared to constitute “grave interference by the executive and legislative into the judicial sphere and hence a violation of the independence of the judiciary.”¹¹ Ten days later, as noted above, the U.S. human rights report barely saw fit to mention the matter at all.

On March 4 in Washington, D.C., the Inter-American Commission on Human Rights (IACHR) held hearings on the recent upheaval within the Ecuadorian judicial system. In the coming months, the IACHR will also be taking up the petitions filed by the dismissed Supreme Court justices. In a statement issued at conclusion of its sessions on March 11, the IACHR highlighted its concerns about the crisis in the courts as well as apparent retaliation by the government or its supporters against vocal opponents of the court purges:

The Commission observes with deep concern the institutional fragility of the rule of law in Ecuador. In recent years, the Ecuadorian political system has been one of the most unstable in the region... This situation has been aggravated in the last few months by the removal of five of the nine members of the Constitutional Tribunal, the members of the Supreme Electoral Tribunal, and all 31 Justices of the Supreme Court... Additionally, in the last few months, there has been a series of acts of violence, harassment and threats aimed at leaders of labor unions, social organizations, indigenous groups and students, who have expressed their public opposition to the aforementioned decisions.¹²

UN Special Rapporteur Despouy carried out his *in situ* evaluation of Ecuador's judicial situation from March 13-18. He will make a preliminary report to the UN Commission on Human Rights in early April in Geneva, and submit a final report and recommendations to the commission in spring 2006.¹³

International organizations such as the International Commission of Jurists, the Andean Commission of Jurists, and Human Rights Watch have also weighed in regarding their concern for the absolute disregard for both constitutional and international safeguards reflected by recent congressional actions.¹⁴

A Way Out?

After the February 16 anti-government march in Quito, the dynamics within the Ecuadorian Congress began to shift. Several independent and Socialist members of Congress joined in calling for removal of the unconstitutionally selected justices. In response to national and international criticism, the President appears to be making an effort to distance himself from the court purges and the turmoil in Ecuador's judicial system. Gutiérrez claims that the restructuring of the courts was never meant to be permanent, but was a stop-gap measure until a national referendum on the de-politicization of the courts can be held.

The problem remains, however, as to how the *de facto* justices might be removed and new ones named. President Gutiérrez and his party in Congress are pushing the president's ver-

sion of a referendum, but that proposal has yet to gain traction. For their part, coalition partners PRE and PRIAN have no interest in doing away with their newly gained powers, and the minority parties in Congress distrust the president but lack the unity to make a compelling counter-proposal.

Separately, León Roldos, former vice president of Ecuador, is leading a drive to collect enough citizen signatures to call for a national referendum on the removal of the illegally appointed judges. But even if the requisite signatures are gathered, implementation of such a referendum would fall to the newly seated judges on the Supreme Electoral Court.

The organizers of the Quito march announced a list of demands arising from what they call the Quito Assembly. The demands include an immediate vote by Congress to disband the illegally constituted Courts and to name a “Comisión de Notables” (a special commission of five legal experts from civil society such as representatives from attorney federations, academics, etc.). This commission would then select 22 magistrates based only on professional and constitutional criteria to replace the *de facto* justices.

In addition, a group of legal academics has proposed the dismissal of the present *de facto* Supreme Court and restitution of the justices who were purged in December. These returned justices would then resign their positions in the manner specified by the constitution, but only after having elected their own replacements, also according to the procedures laid out in the constitution.

President Gutierrez and the Congress have been affected by the growing national and international pressure. The president’s proposal for a referendum is a result of that pressure. The changing dynamics within Congress are also a sign that such pressure can be effective. During the last week of March, the President presented yet another proposal to the Congress for a complete reform of the judicial system. However, there is no consensus support for this new proposal and the deadlock persists. Ecuador’s governing coalition now wields its influence in all three branches of government, and will not easily surrender the power it has attained. The sustained attention of the international community will be required to help Ecuadorians return their country to its constitutional order and build a justice system worthy of the public’s trust.

In particular, it is crucial that the U.S. government make clear that it in no way supports the court purges, and that the Inter-American Commission on Human Rights keeps a spotlight on the situation.

Indeed, the near-silence from the U.S. government to date may all too easily be read by President Gutiérrez and his allies as tacit U.S. support for the court purges. The U.S. embassy in Quito and the State Department should therefore make unmistakably clear, through public statements, that the U.S. government condemns the court purges and urges Ecuadorians to return quickly and peacefully to constitutional order.

The Inter-American Commission on Human Rights has already issued a strongly worded denunciation of the court purges and will be considering petitions filed by the dismissed justices. Given the gravity of the situation and the potential for further deterioration, the IACHR now should take the next step of requesting permission from the Gutiérrez government to undertake an *in situ* evaluation of the crisis as soon as possible.

In the meantime, new developments within the Congress and civil society continue to unfold daily. WOLA will also continue to monitor this dynamic situation as Ecuador struggles to achieve a just and independent judicial system.

The Washington Office on Latin America (WOLA) promotes human rights, democracy and social and economic justice in Latin America and the Caribbean. WOLA facilitates dialogue between governmental and non-governmental actors, monitors the impact of policies and programs of governments and international organizations, and promotes alternatives through reporting, education, training, and advocacy. Founded in 1974 by a coalition of religious and civic leaders, WOLA works closely with civil society organizations and government officials throughout the hemisphere.

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Notes

¹ *Diario Hoy*, “PRE y Lucio con todos los poderes”, January 6, 2005.

² Political Constitution of Ecuador, Articles 118, 119, 130 and 202.

³ Author interview with Dr. Julio Cesar Trujillo, law professor and nationally-recognized constitutional scholar, Quito, January, 21, 2005.

⁴ Ecuador ratified the International Covenant on Civil and Political Rights on March 23, 1976, www.unhchr.ch/html/menu3/b/a_ccpr.htm. Ecuador ratified the American Convention on Human Rights on December 8, 1977, www.oas.org/juridico/english/Sigs/b-32.html.

⁵ “Petición al Secretario Ejecutivo de la Comisión Interamericana de Derechos Humanos,” Quito, December 24, 2004. The petition to the Inter-American Commission asserts that Ecuador is in violation of the following articles of the American Convention on Human Rights: Article 8 (Right to a Fair Trial); Article 9 (Freedom from Ex-Post Facto Laws); Article 23 (Right to Participate in Government); Article 24 (Right to Equal Protection); Article 25 (Right to Judicial Protection); and Article 1 (Obligation to Respect Rights).

⁶ *El Comercio*, “La Corte quiere la cabaza de sus opositores,” January 27, 2005.

⁷ Milton Benítez, “Buenas Dias con Diego Oquendo,” *Radio Vision*, January 27, 2005.

⁸ Michael Shifter, “Looking Away as Democracy Dies,” *Los Angeles Times*, December 28, 2004.

⁹ U.S. Department of State, *Country Reports on Human Rights Practices – 2004: Ecuador*. February 28, 2005.

¹⁰ U.S. Department of State, *Country Reports on Human Rights Practices – 2004: Venezuela*. February 28, 2005.

¹¹ “Concerned for judicial independence in Ecuador, UN legal expert seeks early visit,” UN News Service, February 18, 2005.

¹² “IACHR analyzes human rights situation in the Americas, OAS press release, March 11, 2005.

¹³ “United Nations expert on independence of judges and lawyers to visit Ecuador,” United Nations press release, March 11, 2005.

¹⁴ “Declaración con relación a la destitución de los magistrados de la Corte Suprema del Ecuador,” Comisión Andina de Juristas, Lima, 12 de diciembre, 2004 www.cajpe.org.pe; “Ecuador: Remoción en masa de magistrados de al Corta Suprema,” International Commission of Jurists, December 14, 2004, www.icj.org; “Ecuador: “Supreme Court Purged”, Human Rights Watch, December 17, 2004, www.hrw.org.