

Rigging the Rule of Law: Judicial Independence Under Siege in Venezuela

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I. Summary

When Venezuelan President Hugo Chávez Frías faced a coup d'état in April 2002, advocates of democracy in Venezuela and abroad roundly condemned the assault on the country's constitutional order. Today Venezuela faces another constitutional crisis that could severely impair its already fragile democracy. This time, though, the threat comes from the government itself.

Over the past year, President Chávez and his allies have taken steps to control the country's judicial branch, undermining the separation of powers and the independence of the judiciary in ways that violate basic principles of Venezuela's constitution and international human rights law.

The most brazen of these steps is a law passed last month that expands the Supreme Court (*Tribunal Supremo de Justicia*) from twenty to thirty-two members. The National Assembly will choose the new justices by a simple majority vote. With the new Organic Law of the Supreme Court (*Ley Orgánica del Tribunal Supremo de Justicia*, LOTSJ), the governing coalition will be able to use its slim majority in the legislature to obtain an overwhelming majority of seats on the Supreme Court. It will also have the power to nullify existing justices' appointments to the bench. It will, in short, be able to both pack and purge the country's highest court.

A political takeover of the Supreme Court will only compound the damage already done to judicial independence by policies pursued by the Court itself. The Supreme Court, which has administrative control over the judiciary, has suspended a program that would reduce the large number of judges who do not have security of tenure. It has fired judges after they decided politically controversial cases. And it has allowed the country's second highest court to shut down by failing to resolve the legal appeals of its dismissed judges. Depriving judges of the security of tenure and allowing them to be summarily fired or prevented from exercising their due process rights violates basic principles of the Venezuelan constitution and international human rights law.

Human Rights Watch conducted research in Venezuela in May 2004, interviewing current and former judges and justices, justice officials, jurists, legislators, journalists and foreign observers about the legal and practical implications of these practices, as well as the justifications that might exist for pursuing them.

The president of the Supreme Court, the attorney general and a pro-Chávez legislator all sought to assuage our concerns about diminishing judicial independence by insisting that those wielding authority over judges and justices would show restraint and respect for the rule of law. Such assurances are beside the point, however. A rule of law that relies on the self-restraint of those with power is not in fact the rule of law.

Several officials stressed the need to understand the attitude of President Chávez's opponents, many of whom—they argued—are unwilling to engage in meaningful compromise or subject themselves to the rule of law. They insisted that judges and even Supreme Court justices decide cases based on their political convictions rather than the dictates of the law. As examples they cited the Supreme Court's failure to convict alleged participants in the 2002 coup and the failure of lower court judges to address allegedly illegal activities carried out as part of the general strike in 2003 that cost the country billions of dollars in oil revenue and did enormous harm to the economy.

It is true that some sectors of the opposition have subverted the rule of law in their efforts to bring down President Chávez. It might also be true that some opposition judges allow their political convictions to interfere with their application of the law. But rather than take steps to strengthen the rule of law, Chávez's allies and supporters have instead moved to rig the system to favor their own interests.

We have seen similar efforts before elsewhere in the region. During the 1990s, President Carlos Menem in Argentina and President Alberto Fujimori in Peru succeeded in remaking their judiciaries to serve their own interests. The changes ensured their influence over the courts and contributed to a climate of lawlessness that would facilitate the forms of corruption for which both former presidents face criminal charges today.

What makes the developments in Venezuela even more alarming is their potential impact on the country's already explosive political situation. Tensions have been mounting for months as President Chávez's opponents have sought a recall referendum to end his presidency. When the country's National Electoral Council (CNE) disqualified hundreds of thousands of signatures on a petition to authorize the referendum, thousands of people joined street protests, which culminated in violent confrontations with state security forces that left thirteen people dead, scores wounded, and hundreds more in police detention.

Whether the current crisis is resolved peacefully and lawfully will depend in large part on the country's judiciary. It is the courts that must ultimately determine whether the CNE's decisions are valid—as well as whether the actions of Chávez's supporters and

opponents, in the streets and elsewhere, are legally permissible. It is, in other words, the courts that must ultimately ensure that the political conflict does not result in the trampling of people's freedom of expression and association, due process guarantees, and other basic human rights. To do so effectively, it is imperative that judges and justices be able to act with the independence and impartiality that are mandated by the Venezuelan constitution and international human rights law.

Main Recommendations

The future of Venezuela's judiciary is now largely in the hands of its highest court. To salvage the autonomy of the judicial branch, the Supreme Court should strike down, on constitutional grounds, the provisions of the court-packing law that subject the court to the political agenda of the governing coalition. To promote the independence of judges, the Supreme Court, in its administrative capacity, should reactivate the suspended program that would create judgeships with security of tenure and ensure full and prompt due process for judges facing dismissal, especially those accused of mishandling politically sensitive cases.

The international community can help. In recent years, the World Bank and the Inter-American Development Bank have supported projects aimed at improving the administration of justice in Venezuela—from training prosecutors and police to developing court infrastructure. The most urgent improvement needed now is the strengthening of judicial independence and autonomy. Without that, other improvements may only help a fundamentally flawed system function more efficiently. To encourage progress where it is most needed, all future international assistance aimed at improving the Venezuelan justice system should be made contingent upon Venezuela taking immediate and concrete steps to shore up the independence of its judges and the autonomy of its highest court.

The Organization of American States (OAS) also has a vital role to play. The Inter-American Democratic Charter, signed in 2001 by foreign ministers of Venezuela and thirty-three other democracies, authorizes the OAS to respond actively to threats to the democratic order of its member states. It was this commitment to defending democracy that led the OAS to denounce the aborted coup against President Chávez in April 2002. Today Venezuela's democratic order is threatened in a different way, as the judiciary's increasing vulnerability to political manipulation undermines the country's rule of law. Unless concrete steps are taken immediately in Venezuela to reverse this course, the secretary general of the OAS should use his authority under Article 18 of the Charter to take actions, with the prior consent of the Venezuelan government, to assess the situation and possibly seek a collective response from the OAS.

The ultimate responsibility for the crisis in Venezuela's judiciary lies with President Chávez and his governing coalition. To prevent further erosion of the country's separation of powers, the president should instruct his supporters in the National Assembly to suspend implementation of the new court-packing law immediately and promote legislation that would modify those provisions that undermine the independence of the judiciary. The president should also be prepared to welcome and collaborate actively with the secretary general of the OAS, should the organization seek ways to help Venezuela address the crisis facing its judiciary.

II. International Norms on Judicial Independence

The OAS and the Inter-American Democratic Charter

Democracy is indispensable for human rights, and an independent judiciary is indispensable for democracy. The thirty-four foreign ministers of the Organization of American States (OAS) recognized these propositions when they adopted the Inter-American Democratic Charter in 2001.¹ The Charter defines the “[e]ssential elements of representative democracy” to include “access to and the exercise of power in accordance with the rule of law” and “the separation of powers and independence of the branches of government.”²

The Inter-American Commission on Human Rights emphasized this link between judicial independence and democratic rule of law in its 2003 report on Venezuela:

The observance of rights and freedoms in a democracy requires a legal and institutional order in which the laws prevail over the will of the rulers, and in which there is judicial review of the constitutionality and legality of the acts of public power, i.e., it presupposes respect for the rule of law. Judiciaries are established to ensure compliance with laws;

¹ Art. 7, Inter-American Democratic Charter. “Democracy is indispensable for the effective exercise of fundamental freedoms and human rights in their universality, indivisibility and interdependence, embodied in the respective constitutions of states and in inter-American and international human rights instruments.”

² Art. 3, Inter-American Democratic Charter. “**Essential elements of representative democracy include, *inter alia*, respect for human rights and fundamental freedoms, access to and the exercise of power in accordance with the rule of law, the holding of periodic, free, and fair elections based on secret balloting and universal suffrage as an expression of the sovereignty of the people, the pluralistic system of political parties and organizations, and the separation of powers and independence of the branches of government.**” (Emphasis added.)

they are clearly the fundamental organs for preventing the abuse of power and protecting human rights. To fulfill this function, they must be independent and impartial.³

It is important to note that the definition of democracy found in the Inter-American Charter and in the findings of the Inter-American Commission was informed in large part by recent history. During the 1990s, several countries in the region saw democratically-elected presidents pursue policies that undermined the separation of powers and rule of law, and thereby degraded their own democracies. In Argentina, President Carlos Menem pushed a court-backing law through congress in 1990, expanding the Supreme Court from five to nine members, and managed to get the new openings filled by his allies. The move assured him an “automatic majority”—as it came to be known in Argentina—that ruled regularly in his favor, often using highly dubious legal reasoning.

In Peru, President Alberto Fujimori undercut the independence of the country’s judges through mass firings and the denial of tenure, as well as the passage of laws that circumvented constitutional provisions aimed at guaranteeing judicial autonomy and restricting executive power. Fujimori justified these policies as efforts to combat corruption and inefficiency. But what he succeeded in doing—to an even greater extent than Menem—was to ensure his own influence over the courts. The resulting climate of lawlessness in both countries facilitated the forms of corruption for which both former presidents face criminal charges today.

Venezuela is currently pursuing both a court-packing scheme, similar to that of Menem, and an assault on judicial independence, similar in spirit (if not in scope) to that of Fujimori. As the experiences of Argentina and Peru demonstrate, these efforts do not bode well for Venezuela’s democracy.

International Human Rights Treaties

In addition to its commitment to democracy under the Inter-American Charter, Venezuela is party to human rights treaties—including the International Covenant on Civil and Political Rights and the American Convention on Human Rights—that require it to safeguard the independence of its judiciary.⁴ What that obligation entails is made

³ Inter-American Commission on Human Rights, Report on the Situation of Human Rights in Venezuela, December 29, 2003, paras. 150-1.

⁴ The American Convention on Human Rights (provides that: “Every person has the right to a hearing, with due guarantees and within a reasonable time, **by a competent, independent, and impartial tribunal**, previously

clear by a series of “basic principles” on the independence of the judiciary endorsed by the United Nations General Assembly.⁵ These principles include:

- Any method of judicial selection shall safeguard against judicial appointments for improper motives.⁶
- The term of office of judges, their independence, security, adequate remuneration, conditions of service, pensions and the age of retirement shall be adequately secured by law.⁷
- Judges, whether appointed or elected, shall have guaranteed tenure until a mandatory retirement age or the conclusion of their term of office, where such exists.⁸
- A charge or complaint made against a judge in his/her judicial and professional capacity shall be processed expeditiously and fairly under an appropriate procedure. The judge shall have the right to a fair hearing⁹
- Judges shall be subject to suspension or removal only for reasons of incapacity or behaviour that renders them unfit to discharge their duties.¹⁰
- All disciplinary, suspension or removal proceedings shall be determined in accordance with established standards of judicial conduct.¹¹

As this report shows, Venezuela is currently in contravention of *all* of these principles. In doing so, it undermines its rule of law and severely degrades its democracy.

established by law, in the substantiation of any accusation of a criminal nature made against him or for the determination of his rights and obligations of (. . .) any other nature.” (Emphasis added.) The International Covenant on Civil and Political Rights (art. 14, para. 1) also indicates the importance of the independence of the judiciary by establishing that: “All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, **everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law**” (Emphasis added.)

⁵ Basic Principles on the Independence of the Judiciary, endorsed by United Nations General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985.

⁶ *Ibid.*, art. 10.

⁷ *Ibid.*, art. 11.

⁸ *Ibid.*, art. 12.

⁹ *Ibid.*, art. 17.

¹⁰ *Ibid.*, art. 18.

¹¹ *Ibid.*, art. 19.

III. Background

The Judiciary's Disreputable Past

When President Chávez became president in 1999, he inherited a judiciary that had been plagued for years by influence-peddling, political interference, and, above all, corruption. In interviews with Human Rights Watch, lawyers from across the political spectrum described a system in which justice had often been for sale to the highest bidder. Attorney General Isaías Rodríguez recalled how the country's top administrative court in the past actually established set fees for resolving different kinds of cases.¹²

A 1996 report on the Venezuelan justice system by the Lawyer's Committee for Human Rights painted a grim portrait of the judiciary:

Rather than serving the constitutional role of defender of the rule of law and protector of the human rights of Venezuelan citizens against the government, the courts had often become highly politicized adjuncts of the parties. They were manipulated by groups of lawyers, judges, political and business actors for private economic gain. And court procedures had become so slow, cumbersome and unreliable that disputants avoided them at all costs.¹³

In terms of public credibility, the system was bankrupt. A 1998 survey by the United Nations Development Program found that only 0.8 percent of the population had confidence in the judiciary.¹⁴ That distrust translated into public outrage, and in the presidential election of that year, candidates across the political spectrum—including Hugo Chávez Frías—promised to clean up the system.

Declaring a Judicial Emergency

Once in office, President Chávez launched an ambitious effort to reform the Venezuelan state that included holding a referendum to convene a National Constituent Assembly,

¹² Human Rights Watch interview with Attorney General Isaías Rodríguez, Caracas, May 14, 2004.

¹³ "Halfway to Reform: The World Bank and the Venezuelan Justice System," A Joint Report by The Lawyers Committee for Human Rights and The Venezuelan Program for Human Rights Education and Action," 1996, available at <http://www.humanrightsfirst.org/pubs/descriptions/halfway.htm>.

¹⁴ United Nations Development Program, *Justicia y gobernabilidad. Venezuela: una reforma judicial en marcha*. Caracas: Editorial Nueva Sociedad, 1998, p. 143. Cited in Tribunal Supremo de Justicia, Dirección Ejecutiva de la Magistratura, Unidad Coordinadora del Proyecto de Modernización del Poder Judicial, "Proyecto para la Mejora de la Administración de Justicia en el Contexto de la Resolución de Conflictos en Venezuela," p. 8.

which then drafted a new constitution that went into effect in December 1999. Due to the overwhelming public consensus that judicial reform was needed, the Chávez administration initially found support for its efforts in this area even among its political adversaries.

One of the first acts of the National Constituent Assembly was to declare that the judiciary was in a state of emergency. It suspended the tenure of judges and created an emergency commission which it empowered to suspend judges who faced seven or more complaints or any type of criminal investigation, or who showed signs of wealth incommensurate with their salaried income. In the following months, the emergency commission removed hundreds of judges from their posts.¹⁵

Political Polarization under Chávez

The consensus around judicial reforms has largely dissolved as the country has grown increasingly polarized in response to President Chávez's policies and style of governance. Over the past three years the mounting political tensions have erupted into violence on several occasions and there have been three concerted efforts by sectors of the opposition to remove President Chávez from office: an aborted coup d'état in April 2002, a national strike that lasted from December 2002 through February 2003 (and had an enormously negative impact on the country's economy), and a petition drive held in December 2003 to authorize a referendum.

The polarization, which pervades Venezuelan society, has found its way into the Supreme Court as well. All twenty sitting justices were selected by the National Constituent Assembly in March 2000 through a 2/3 majority vote, which would suggest they had support from people across the political spectrum. Today, however, it is common wisdom within the legal community that the Court is deeply divided between opponents and allies of President Chávez. It is an even, ten-ten split, with each camp controlling some of the Court's six chambers. The opposition camp is said to have a majority of seats in the electoral chamber. The pro-Chávez camp has a majority in the constitutional chamber, as well as on the six-member Judicial Commission that handles many of the Court's administrative affairs. Supreme Court President Ivan Rincón Urdaneta, who is a member of both the constitutional chamber and the Judicial Commission, is viewed as an ally of President Chávez.

¹⁵ Tribunal Supremo de Justicia, Dirección Ejecutiva de la Magistratura, Unidad Coordinadora del Proyecto de Modernización del Poder Judicial, "Proyecto para la Mejora de la Administración de Justicia en el Contexto de la Resolución de Conflictos en Venezuela," p. 23.

IV. Disposable Judges

Provisional Judgeships

Venezuela denies its judges one of the most basic safeguards of judicial independence: security of tenure. While this problem existed long before President Chávez came to office, it has become particularly acute as the country has become politically polarized over the last few years. The vast majority of the country's judges hold provisional or temporary appointments. The tenuousness of their postings makes them more vulnerable to external pressures aimed at influencing their application of the law.

The Venezuelan constitution safeguards judicial independence by requiring that judges be selected through public competitions and removed only through legally sanctioned procedures.¹⁶ The constitution requires that these procedures provide the judges with due process (including the right to be heard).¹⁷ The laws regulating the procedures for removal require that it be motivated by misconduct on the part of the judge.¹⁸

Yet only 20 percent of the country's 1732 judges currently hold permanent appointments and enjoy the rights established in the constitution. The remaining 80 percent hold positions as "provisional" judges (52 percent), "temporary" judges (26 percent), or other non-permanent postings (2 percent).¹⁹ The provisional judges hold their posts until a public competition is held to select the judges who will fill them on a permanent basis. Temporary judges are appointed to fill temporary openings, such as those created when a sitting judge takes a parental or sick leave.

¹⁶ Art. 255, Constitution of the Bolivarian Republic of Venezuela. "Appointment to a judicial position and the promotion of judges shall be carried out by means of public competitions, to ensure the capability and excellence of the participants and those selected by the juries of the judicial circuits, in such manner and on such terms as may be established by law. The appointment and swearing in of judges shall be the responsibility of the Supreme Court of Justice. Citizen participation in the process of selecting and designating judges shall be guaranteed by law. **Judges may only be removed or suspended from office through the procedures expressly provided for by law.**" (Emphasis added.)

¹⁷ Art. 49, Constitution of the Bolivarian Republic of Venezuela. "Due process will be provided in all judicial and administrative proceedings; consequently . . . 2) Every person has the right to be heard in any type of proceeding, with the proper guarantees and within a reasonable time determined by law, by a competent, independent and impartial tribunal established previously. . . ."

¹⁸ Art. 3, Ley de Carrera Judicial (1998): "Judges will have the benefit of security of tenure in the fulfillment of their office. Consequently, they will only be subject to removal or suspension in the exercise of their function in the situations and through the process determined by this law." Art. 40: "Without prejudice to the criminal and civil penalties that might be applicable, judges will be dismissed from their posts, after receiving due process, for the following causes: . . ." (The article then lists types of conduct that provide cause for dismissal.)

¹⁹ Information provided through e-mail correspondence with Executive Director of the Magistracy, Supreme Tribunal of Justice, Ricardo Jiménez Dan, May 20, 2004.

The Judicial Commission of the Supreme Court, made up of six justices including the Supreme Court president, is in charge of appointing and removing these non-tenured judges. The commission maintains that it can summarily dismiss temporary judges, without cause and without the due process protections afforded permanent judges.²⁰ Provisional judges, by contrast, are entitled to the same security of tenure as permanent judges, at least until the public competition are held to fill their posts. Yet, as described below, the Judicial Commission has also summarily fired provisional judges.

International human rights monitors have repeatedly criticized Venezuela's reliance on provisional judges. In 2001, the United Nations Human Rights Committee expressed its concern that, under the current system, Venezuelan judges could be removed for merely fulfilling their judicial duties.²¹ In 2003, the Inter-American Commission on Human Rights echoed this concern, observing that "having a high percentage of provisional judges has a serious detrimental impact on citizens' right to proper justice and on the judges' right to stability in their positions as a guarantee of judicial independence and autonomy."²²

Venezuelan justice officials, judges and jurists of all political stripes also acknowledge the problem. In interviews with Human Rights Watch, the Supreme Court president, other Supreme Court justices, the attorney general, the ombudsman, and current and former judges all conceded that the prevalence of provisional and temporary appointments undermines judicial independence.

A major obstacle toward translating this consensus into real change has been, ironically, the constitutional requirement that judges be selected through public competitions. When the constitution came into effect in 1999 there were already a large number of provisional judges in the country. Figures from 1997 show only 40 percent of judges holding permanent appointments.²³ The number of provisional judges increased considerably after the judicial emergency declared in 1999 led to large numbers of dismissals. (And it has increased further since then as the judiciary has opened new

²⁰ The Judicial Commission of the Supreme Court has asserted this authority explicitly in written responses to appeals filed by judges it has summarily fired. See note 37 below.

²¹ Concluding observations by the Human Rights Committee: Venezuela, 26/04/2001. "An extended reform process threatens the independence of the judiciary, given the possibility that judges could be removed as a result of the performance of their duties, thus infringing art. 2, paragraph 3, and art. 14 of the Covenant."

²² Inter-American Commission on Human Rights, "Report on the Situation of Human Rights in Venezuela," December 29, 2003, paras. 159-177.

²³ Tribunal Supremo de Justicia, Dirección Ejecutiva de la Magistratura, Unidad Coordinadora del Proyecto de Modernización del Poder Judicial, "Proyecto para la Mejora de la Administración de Justicia en el Contexto de la Resolución de Conflictos en Venezuela," p. 22.

courts in an effort to increase access to justice.) Turning this large—and growing—number of provisional judgeships into permanent ones requires holding public competitions for each one.

Toward that end, the judiciary launched a program of public competitions for judgeships in November 2000. It was the most ambitious program of its sort that Venezuela had seen, and produced over 200 permanent judges over the next two years.²⁴ This addressed only a fraction of the provisional judgeships, however, and in order to make a real difference, the program should have been expanded and accelerated.

Instead, in March 2003, the program was suspended. Human Rights Watch received contradictory explanations for what prompted the suspension. Supreme Court President Ivan Rincón Urdaneta said it was because the evaluation system had broken down due to a variety of factors, including efforts by powerful law firms to control some evaluation committees and the decision of numerous evaluators to abandon the program.²⁵ Others involved in the program dispute this account. René Molina, a former Inspector General of the Judiciary who helped design the competition program, insists that the “double-blind” procedure for selecting evaluators and administering the competitions made it virtually impossible for special interests to take over the committees.²⁶ (Molina further recalled receiving pressure from government officials to rig the competitions in favor of specific candidates.) The Network of Watchers (*Red de Veedores*), a nongovernmental organization that monitored the program, did report instances of possible collusion between participants and jurors and various administrative irregularities, but nothing that would justify suspending the program.²⁷

Critics of the government have suggested that the real motive for suspending the program was the desire of Judicial Commission members to continue naming and removing judges at their own discretion. Whatever the true motive might be, the outcome has been precisely that: the Judicial Commission continues to exercise virtually unchecked authority to appoint and remove judges.

²⁴ *Ibid.*, p. 23.

²⁵ Human Rights Watch interview with Supreme Court President Ivan Rincón Urdaneta, Caracas, May 13, 2004.

²⁶ Human Rights Watch interview with René Molina, Caracas, May 14, 2004.

²⁷ Red de Veedores, “Poder Judicial y Sistema de Justicia en Venezuela 2002-3.” Available at <http://veedores.org/nodos/veejudicial/informes/observacionpoderjudicial.htm>.

Judges Summarily Fired

The danger of denying judges secure tenure was apparent earlier this year when three judges were summarily fired after releasing people detained during anti-government protests. The firings occurred on March 2, when Venezuela was in the midst of the most serious unrest it had seen since the attempted coup against the government in April 2002. An opposition demonstration on February 27 had turned violent as civilians clashed with units of the National Guard in central Caracas. Street protests and confrontations continued through the next week, leaving thirteen people dead and over 100 wounded. Government forces detained hundreds of people and, after violently abusing some of them, sought court orders for their prolonged detention pending prosecution.

Three Caracas judges who received such cases were Miguel Luna, Petra Jiménez and María Trastoy. Luna received the case of two detained opposition legislators on Saturday, February 28; Jiménez received the case of a detained man on Monday, March 1; and Trastoy received the case of six other detainees at the end of that same day.

All three judges ruled that the public prosecutors had not presented sufficient evidence to warrant ongoing detention of the suspects and ordered their immediate and unconditional release.²⁸ Their rulings would all be upheld subsequently by appellate courts.²⁹

All three were dismissed from their posts on Tuesday, March 2. They received notices from the Supreme Court President Ivan Rincón Urdaneta informing them that the Supreme Court's Judicial Commission had decided that morning to nullify their appointments "due to observations that were presented before this office."³⁰ The notices did not reveal what the "observations" had been, nor why they might have warranted their dismissal.

²⁸ Human Rights Watch telephone interviews with María Trastoy and Miguel Luna, May 18, 2004.

²⁹ Ibid. Corte de Apelaciones del Circuito Judicial Penal de la Circunscripción Judicial del Area Metropolitana de Caracas Sala Quinta, Actuación No. SA-5-04-1442, Caracas, April 12, 2004 (upholding ruling by Petra Jiménez). Corte de Apelaciones del Circuito Judicial Penal de la Circunscripción Judicial del Area Metropolitana de Caracas Sala Quinta Accidental, Actuación No. SA-5-04-1436, Caracas, April 14, 2004 (upholding ruling by María Trastoy).

³⁰ ("... en razón de las observaciones que fueron formuladas por ante este Despacho.") Tribunal Supremo de Justicia, Sala Plena, Documents No. TPE-04-0231, Caracas, March 2, 2004 (notification to María del Carmen Trastoy Hombre); Tribunal Supremo de Justicia, Sala Plena, Oficio No. TPE-04-0231, Caracas, March 2, 2004 (notification to Petra Margarita Jiménez Ortega).

When asked about the three judges, Rincón told Human Rights Watch that they had been temporary judges, who had been in their posts for a short period, and were not entitled to the administrative procedures afforded permanent and provisional judges. He insisted, however, that this did not mean that they had been denied their due process rights, as they were entitled to challenge the decision through an “appeal for reconsideration” (*recurso de reconsideración*) to the Commission. Only one of the judges had chosen to do so, he said, and that one had been reinstated. The other two had chosen instead to take their claims to the press. He said they were working with an opposition political party and were “just doing politics.”³¹

Rincón’s account was inaccurate on several levels. None of the judges had temporary appointments. Two were provisional judges and therefore, by his own admission, entitled to the normal disciplinary procedure.³² The third judge, Petra Jiménez, who had an appointment as a “special substitute” (*suplente especial*), had been serving as a judge continuously for almost three years.

All three judges did in fact challenge their dismissals through “appeals for reconsideration” to the Judicial Commission. One of them, Luna, was indeed reinstated, (though he has since been summarily fired once again.) The other two, Trastoy and Jiménez, report receiving no response to their appeals.³³

The recourse provided by the appeal process does not change the fact that these judges were fired without a hearing. They may be able to present a defense, *ex post facto*, through the appeals process. However, this right to appeal is largely meaningless so long as they are not informed of the reasons for their dismissals (since it requires them to guess the charges they must defend themselves against)—and so long as the commission maintains that its decision is entirely discretionary.

Human Rights Watch obtained a copy of a ruling issued by the Judicial Commission in response to an “appeal for reconsideration” submitted by another judge who had been summarily fired under questionable circumstances. Mercedes Chocrón was removed from her post as a temporary judge in January 2003 after she attempted to carry a judicial inspection of a military base where a general was being held on charges of alleged crimes committed in the context of anti-government activity. (The purpose of the inspection

³¹ Human Rights Watch interview with Supreme Court President Ivan Rincón Urdaneta, Caracas, May 13, 2004.

³² Tribunal Supremo de Justicia, Dirección Ejecutiva de la Magistratura, “Designación del Martes, 02 de Marzo de 2004.” Available at http://www.tsj.gov.ve/designaciones/designacion.asp?fecha_id=93.

³³ Human Rights Watch telephone interview with María Trastoy, May 18, 2004

was to ensure that the government was complying with precautionary measures ordered by the Inter-American Commission on Human Rights.) The Judicial Commission's ruling did not address the reasons for Chocrón's dismissal but merely provided a legal basis for its claim to complete discretion in removing temporary judges, arguing that this faculty has "no substantive limit whatsoever" and that its reasons "cannot be questioned or subject to review."³⁴

Second Highest Court Shut Down

The problem of due process for dismissed judges is not limited to those who are summarily fired by the Judicial Commission. In one case from 2003, a court was effectively shut down after its judges were dismissed and the Supreme Court neglected to review their appeals.

Under existing procedures, permanent and provisional judges may be dismissed by an administrative body within the judicial branch, known as the Commission of Functioning and Restructuring of the Justice System, based on charges brought by the Inspector General of the Judiciary. The judges have an opportunity to defend their record before the commission. They are allowed five days to prepare their written defense, and the commission ten days to make its determination.³⁵ (The commission sometimes grants the judges more than their allotted time, and itself often takes more than its allotted time.) The judges may appeal the commission's decision to the Supreme Court, but in contrast with the hasty dismissal proceedings, the appeal process can drag out indefinitely, leaving the dismissed judges in limbo and the validity of their dismissals in doubt.³⁶ The resulting uncertainty is especially problematic when it involves judges who have handled controversial cases.

³⁴ Comisión Judicial, El Tribunal Supremo de Justicia, Magistrado Ponente: Luis Martínez Hernández, Exp. No. CJ-2003-0015, 16 de junio de 2003): "Given that the petitioner does not enjoy security of tenure [*estabilidad*] in her post, it is evident that the [Judicial Commission] . . . can freely revoke [her] appointment, which entails the exercise of a broad and discretionary faculty for which there is **no substantive limit whatsoever**, since she is not protected by the limits of security of tenure of a judicial officer. From this perspective the revocation of the appointment of the petitioner established by the Judicial Commission cannot be considered a disciplinary act, that is, it does not consist of the application of a penalty based on an offense, but rather it consists of an action based on discretionary concerns; concerns which, consequently, **cannot be questioned or subjected to review.**" (Emphasis added.)

³⁵ Human Rights Watch interview with member of Commission of Functioning and Restructuring of the Justice System, Laurence Quijada, Caracas, May 13, 2004.

³⁶ One provisional judge, Luis Enrique Ortega Ruiz, filed an appeal in September 2002 and has yet to receive a response over a year and a half later. Another provisional judge, María Cristina Reveron, who filed an appeal in April 2002, has yet to receive a response over two years later.

The most notorious case of this sort is that of three judges who were dismissed from the First Administrative Court (*Corte Primera de lo Contencioso Administrativo*, CPCA) in October 2003. The CPCA is the second highest court in Venezuela and has national jurisdiction over cases involving challenges to administrative actions by the government (with the exception of those taken by cabinet-level officials, which are reviewed directly by the Supreme Court). In the year prior to their dismissal, the CPCA judges had granted numerous appeals challenging policies and programs of the Chávez government. In several cases the court ruled on behalf of municipal governments (run by opposition mayors) who challenged military interference with their own police forces. In another notable case, in August 2003, it ruled that hundreds of Cuban doctors sent by the Cuban government to work as volunteers in poor communities could not practice medicine in Venezuela without being certified by the Venezuelan medical association.³⁷

President Chávez publicly denounced the court and its judges on several occasions. After the August 2003 decision on the Cuban doctors, for instance, he referred to them as “judges who shouldn’t be judges,” and said:

I’m not telling them what I’d like to because we’re in front of the country. But the people are saying it. Go take your decision where you want, you can carry it out in your home if you want . . . Do you think the Venezuelan people are going to pay attention to an unconstitutional decision, well they’re not going to pay attention to it.³⁸

In September, in a highly unusual move, members of the Directorate of Services of Intelligence and Prevention (DISIP) arrested the driver of one of the judges as he was delivering a court document to someone outside the courthouse. The driver’s action violated regulations on the handling of court documents, though the Supreme Court would rule (after the driver had spent 35 days in jail) that he had not committed a crime and order his release.³⁹ Two days after the arrest, President Chávez spoke out against the court, reportedly calling its chief judge a “criminal.”⁴⁰ Three days later, a public prosecutor accompanied by police, reportedly armed with high-power weapons, conducted a surprise search of the CPCA courthouse.

³⁷ “Corte Venezuela ordena dejar de ejercer médicos Cuba en Caracas,” Reuters, August 21, 2003.

³⁸ Unofficial transcript of radio and television program, “Aló Presidente,” No. 161, Aug. 24, 2003, pp. 22 – 24.

³⁹ Human Rights Watch interview with Supreme Court Justice Blanca Rosa Mármol de León, Caracas, May 13, 2004.

⁴⁰ Unofficial transcript of address by President Chávez, September 20, 2003.

Two weeks later, the Inspector General of the Judiciary submitted a recommendation to the Commission of Functioning and Restructuring of the Judicial System that the five CPCA judges be dismissed on the basis of an entirely unrelated issue: a determination by the Supreme Court the previous May that the CPCA had committed an “inexcusable error” in a decision rendered in 2002. After reviewing the charge and the judges’ defense, the commission ordered the dismissal of four of the judges (the fifth had already retired and therefore was not subject to sanction).⁴¹

Three of the judges appealed the decision to the Supreme Court, filing two appeals the following month. Venezuelan law obligated the Supreme Court to respond to each type of appeal within specified periods of time. A “hierarchical appeal” (*recurso jerárquico*), which they filed on November 13, warranted a ruling within 90 days.⁴² And the “nullification appeal” (*recurso de nulidad*) filed on November 27 warranted a ruling within three days.⁴³

Over half a year later, the Supreme Court has failed to rule on either of the appeals. When asked why not, Supreme Court President Ivan Rincón Urdaneta told Human Rights Watch that it was because these cases were “not a high priority.”⁴⁴

There are several reasons, however, why the Supreme Court should consider these appeals to be of highest priority. First is the simple matter of the due process rights of the dismissed judges. A second is the fact that, lacking a quorum of judges, the country’s second highest court has ceased to function, leaving a huge backload of unresolved cases (by one estimate as many as 2000 cases, all involving challenges to administrative actions by the government). While Supreme Court President Rincón said the Court intends to fill the vacancies with new judges, they have yet to do so after over half a year. Moreover, it is unclear what would happen to the new appointees if the dismissed judges were to win their appeals.

A final reason the appeals should be treated as high priority is the extremely controversial nature of the case—and specifically the perception created by President Chávez’s public comments, as well as the unusually aggressive police actions against the CPCA, that the dismissal reflected the will of the executive rather than the application of the law. This perception, which was shared by many of the people Human Rights

⁴¹ Gaceta Oficial de la República Bolivariana de Venezuela, Caracas, November 4, 2003, p. 330, 848.

⁴² Art. 91, Ley Orgánica de Procedimientos Administrativos.

⁴³ Art. 10, Código de Procedimiento Civil.

⁴⁴ Human Rights Watch interview with Supreme Court President Ivan Rincón Urdaneta, Caracas, May 13, 2004.

Watch interviewed, has only been reinforced by the Supreme Court's failure to review the legality of the dismissals.

V. Separation of Powers Under Assault

The National Assembly passed a law in May 2004 that severely undermines the independence of the country's judicial branch. The new Organic Law of the Supreme Court (*Ley Orgánica del Tribunal Supremo de Justicia*) changes the composition of the country's highest court, as well as its relationship to the other branches of government.

The manner in which the law was passed was highly questionable. The Venezuelan constitution seeks to safeguard the autonomy of state institutions—including the judiciary—by requiring a 2/3 majority vote to approve any modification of the legislation (known as “organic laws”) that govern their structure and operation.⁴⁵ The National Assembly appears to have violated this provision with the passage of the new law. The governing coalition disregarded the requirement that such laws must be passed with a super-majority of 2/3, passing instead with a simple majority. Moreover, that majority engaged in irregular parliamentary maneuvers, which appear to violate the spirit and perhaps even the letter of the constitution, such as making substantive changes to the law's text after it had been voted on, and fusing multiple articles to avoid a full discussion of each one.

Power to pack the court

The new court-packing law increases the Supreme Court from twenty to thirty-two justices, adding two justices to each of the court's six chambers.⁴⁶ The new justices can be designated with a simple majority vote of the National Assembly: a nominee who fails to receive a 2/3 majority in the first three votes can be designated by a simple majority on the fourth vote.⁴⁷ In contrast, the twenty current members of the Supreme Court also received at least a 2/3 majority confirmation vote.⁴⁸

⁴⁵ Art. 203, Constitution of the Bolivarian Republic of Venezuela.

⁴⁶ Art. 2, *Ley Orgánica del Tribunal Supremo de Justicia*.

⁴⁷ Art. 8, *Ley Orgánica del Tribunal Supremo de Justicia*.

⁴⁸ While there is disagreement among Venezuelan jurists as to whether this 2/3 majority was or is actually required by the former or current Constitution, most agreed that Supreme Court nominees generally did receive such a vote.

Proponents of the law have justified this increase as a measure for alleviating the justices' current workload.⁴⁹ This justification is dubious, at best. The four justices (as well as one ex-justice) who spoke to Human Rights Watch all agreed that only two or three of the chambers have any difficulty keeping up with their caseloads (the constitutional chamber and the "political administrative" chamber).⁵⁰ According to Supreme Court President Ivan Rincón Urdaneta, the only justification for increasing the number of justices in the other chambers is to help them handle administrative tasks. However, it is not difficult to imagine other means to alleviate the administrative responsibilities of the justices by delegating the work to their staff. Nor, for that matter, is it difficult to imagine ways to alleviate the caseload of those chambers with more cases, such as assigning them more clerks or creating adjunct tribunals to handle cases in which the jurisprudence is already clearly established.

Whatever the justification, however, the impact of the increase on the judiciary's independence is unmistakable. It will allow the majority coalition in the National Assembly to radically alter the balance of power within the country's highest court, ensuring that each of its chambers is controlled by justices sympathetic to its own political agenda.

Power to purge the court

The Venezuelan Constitution seeks to guarantee the independence of justices by granting them a single twelve-year term and establishing an impeachment process that requires a 2/3 majority vote by the National Assembly, after the "citizen branch" (which consists of the attorney general, the ombudsman, and the comptroller) has determined that the justice has committed a "serious offense" (*falta grave*).⁵¹

The new law eliminates this guarantee. While the impeachment of justices still requires a 2/3 majority vote, the law creates two new mechanisms for removing justices that do not share this requirement. One entails suspending justices pending an impeachment vote, the other entails nullifying their appointments.

⁴⁹ Human Rights Watch telephone interview with National Assembly member Calixto Ortega, May 6, 2004. Human Rights Watch interview with Supreme Court President Ivan Rincón Urdaneta, Caracas, May 13, 2004.

⁵⁰ Human Rights Watch interviews with Supreme Court President Ivan Rincón Urdaneta, Caracas, May 13, 2004, Juan Rafael Perdomo, Caracas, May 13, 2004, Supreme Court Justice Blanca Rosa Marmol, Caracas, May 13, 2004, Supreme Court Justice Carlos Martini, Caracas, May 14, 2004. Human Rights Watch telephone interview with former Supreme Court Justice Carlos Escarrá, May 16, 2004.

⁵¹ Articles 264-5, Constitution of the Bolivarian Republic of Venezuela. Article 265 states: "Supreme Court Justices will be subject to removal by the National Assembly by a super-majority of two-thirds of its members, after a hearing is granted the affected party, in cases of serious offenses found by the Citizen Branch, in accordance with the law."

The first mechanism is found in a new provision which establishes that, when the “citizen branch” determines that a justice has committed a serious offense, and unanimously recommends the justice’s dismissal, then the justice will be automatically suspended pending an impeachment vote by the National Assembly.⁵² The law requires that the president of the assembly call for a hearing and an impeachment vote within ten days. However, such deadlines are habitually disregarded by the assembly, and there is no effective mechanism for enforcing them. Consequently, if the president of the assembly chooses not to bring the issue to a vote, the justice could remain suspended indefinitely.

The definition of “serious offense” for justices is broad and includes highly subjective categories such as “threaten or damage public ethics or administrative morale” and “made decisions that threaten or damage the interests of the Nation.”⁵³

The National Assembly has also bestowed upon itself the power to nullify justices’ appointments by a simple majority vote in one of three circumstances: the justice provided false information at the time of his or her selection to the court; the justice’s “public attitude . . . undermines the majesty or prestige of the Supreme Court” or of any of its members; or the justice “undermines the functioning” of the judiciary.⁵⁴

⁵² Art. 23, Number 3, Ley Orgánica del Tribunal Supremo de Justicia. “Supreme Court Justices will be subject to suspension or removal from their responsibilities, in cases of serious offenses, by the National Assembly, following the petition and determination of offenses by the Citizen Branch. In case of removal, the [decision] must be approved by a super majority of two thirds (2/3) of the members of the National Assembly, following a hearing for the Justice. At the moment that the Citizen Branch determines that an offense is serious and unanimously seeks removal, the Justice will be suspended from his or her post, until the definitive decision of the National Assembly. Likewise, [the Justice] will be suspended if the Supreme Court declares that there are grounds to prosecute him or her; in which case, this measure is different from the suspension sanction established by the Organic Law of the Citizen Branch.”

⁵³ Art. 11, Ley Orgánica del Poder Ciudadano. “The following are considered a serious offense on the part of Supreme Court Justices: 1. When they attempt to harm [atenten], threaten, or damage the public ethics and the administrative morale established in the present Law 4. When they adopt decisions that attempt to harm [atenten] or damage the interests of the Nation.”

⁵⁴ Art. 23, Number 4, Ley Orgánica del Tribunal Supremo de Justicia: The National Assembly, by a simple majority, will be able to annul the administrative act by which a Justice is appointed, principal or substitute, when this person has supplied false information at the time and for the purposes of his or her nomination, which prevented or distorted the fulfillment of the requirements established in this Law and in the Constitution of the Bolivarian Republic of Venezuela; **or when the public attitude of these, which [sic.] aims to harm [atente contra] the majesty or prestige of the Supreme Court, of any one of its Chambers, of the Justices of Judicial Branch [sic.]; or when it aims to harm [atente contra] the functioning of the Supreme Court, one of its Chambers, or the Judicial Branch.**” (Emphasis added.)

This provision is a clear ploy to circumvent the constitutional requirement that justices can be removed with a 2/3 majority vote of the National Assembly. Calling this action the “nullification of appointment” cannot disguise the fact that it entails firing the justice.

What makes the provision particularly dangerous is the fact that two of the three criteria for “nullification” are entirely subjective and will, therefore, allow the assembly’s majority to persecute justices identified with the political opposition. In fact, one member of the governing party of President Chávez, Iris Valera, has explicitly acknowledged this as the law’s intent, saying “the 10 coup-backing justices (*magistrados golpistas*) who supported the de facto government of Pedro Carmona Estanga, should be off the Supreme Court and the new law passed in the National Assembly will achieve this goal.”⁵⁵

Implications for the referendum

The packing and purging provisions of the new law—which would be objectionable under any circumstances—are particularly troubling given the current political context.

The prime target of any packing and purging efforts is likely to be the electoral chamber of the Supreme Court that, under the Venezuelan constitution, has jurisdiction over all legal disputes surrounding electoral activity. The chamber currently contains two members (out of three) who are identified with the opposition and voted to order the CNE to count the disqualified signatures on the referendum petition. By appointing two new justices to the chamber, the governing coalition will be able to tip the balance its own way. (The electoral chamber handles the fewest cases and, by all accounts has the least need for additional justices—which may explain the insistence on expanding the number of justices in all the court’s chambers.)

Simultaneously, justices who fall into disfavor with the governing coalition could be subject to removal. The attorney general has already opened investigations into the electoral chamber’s handling of the referendum case. It is unclear whether or not the suspension provision of the new law would be applicable should the “citizen branch” determine that the justices had committed a “serious offense.” The attorney general told Human Rights Watch that he believed that the new sanction could not be applied

⁵⁵ National Assembly member Iris Varela, quoted by government news agency, Venpres, May 3, 2004. (“[L]os 10 magistrados golpistas que apoyaron al gobierno de facto de Pedro Carmona Estanga, deben quedar fuera del Tribunal Supremo de Justicia y la nueva Ley aprobada en la Asamblea Nacional, servirá para lograr ese propósito.”)

retroactively.⁵⁶ In any case, the fact that the justices are under investigation for their rulings on the referendum issues sends a clear message that they will face similar scrutiny—and possible sanction—for any future decisions on this controversial topic.

VI. Recommendations

To President Hugo Chávez Frías:

It is critically important that the issues here not be reduced to partisan wrangling and that the criticisms offered here not be mischaracterized as partisan attack. Human Rights Watch does not take a stand on the political conflict currently underway in Venezuela. When sectors of the opposition launched a coup d'état in April 2002, we denounced their actions forcefully—just as we denounce any actions that jeopardize respect for fundamental human rights anywhere in the world, regardless of the political persuasion of their perpetrators.

Today the gravest threat to human rights in Venezuela is the potential political takeover of the Supreme Court made possible by the new court-packing law. It is not too late, however, for Venezuela to reverse course and salvage the independence and autonomy of its judiciary. Toward that end, the president should:

- instruct his supporters within the National Assembly to suspend implementation of the new court-packing law immediately;
- promote legislation that would modify those provisions of the new law that undermine the independence of the judiciary;
- collaborate actively with the secretary general of the OAS, should the organization seek ways to help Venezuela address the crisis facing its judiciary (as described below).

To the Supreme Court:

The Venezuelan Supreme Court still has an opportunity to fix the aspects of the court-packing law that threaten its autonomy. Since the law was passed last month, the court has received several appeals that challenge the constitutionality of its most harmful provisions. The Supreme Court should:

⁵⁶ Human Rights Watch interview with Attorney General Isaías Rodríguez, Caracas, May 14, 2004.

- act quickly to review these appeals, paying particularly close attention to the provisions of the court-packing law that allow for justices to be removed or suspended without the 2/3 majority vote required by article 265 of the Constitution.

The Supreme Court should take steps to strengthen the independence of judges. Specifically, it should:

- reactivate the program of public competitions for selecting permanent judges;
- cease from dismissing judges without cause and without due process, regardless of the nature of their appointment;
- make it a priority to provide a prompt and impartial review of the appeals from judges who have been dismissed after handling controversial cases.

To international lending agencies:

The World Bank and the Inter-American Development Bank can play a significant role in strengthening Venezuela's justice system, as is clear from their involvement in the country to date. The Inter-American Development Bank provided a loan for \$75 million in 2001 for projects in the Attorney General's Office and Ministry of the Interior and Justice aimed at improving the efficiency, professionalism and equity of the criminal justice system.

The World Bank has supported the Venezuelan judiciary in recent years with a \$30 million loan for a project (authorized in 1993 and completed after multiple delays in 2003) that aimed to modernize the infrastructure of the judiciary, as well as a \$4.7 million loan for a project (authorized in 1997 and completed in 2000) that aimed to improve the functioning of the Supreme Court. The Venezuelan judiciary has since developed a proposal for a third loan from the Bank.

The most pressing issue facing the Venezuelan justice system now is the threats to its independence and autonomy. Until these threats are addressed, improvements in other areas may only help a fundamentally flawed system function more efficiently.

Therefore, international lending agencies interested in supporting the Venezuelan judiciary should:

- direct aid toward efforts to strengthen the independence of its judges and autonomy of its courts.
- suspend all future assistance for justice sector projects until Venezuela takes concrete steps to address the threats to judicial independence documented in this report.

To the Organization of American States:

The Inter-American Democratic Charter, adopted by the thirty-four foreign ministers of the OAS in 2001, recognizes that “one of the purposes of the OAS is to promote and consolidate representative democracy,” and reasserts the proposition (originally articulated in the Declaration of Managua for the Promotion of Democracy and Development) that the organization’s mission is not limited to the defense of democracy wherever its fundamental values and principles have collapsed, but also calls for ongoing and creative work to consolidate democracy as well as a continuing effort to prevent and anticipate the very causes of the problems that affect the democratic system of government.⁵⁷

Toward that end, article 18 of the Charter establishes that “[w]hen situations arise in a member state that may affect the development of its democratic political institutional process or the legitimate exercise of power,” the secretary general and the Permanent Council of the OAS may take steps to investigate and respond to the situation, “with prior consent of the government concerned.”⁵⁸

The current crisis facing the Venezuelan judiciary threatens to have a profoundly negative affect on the country’s democracy. Unless Venezuelan government takes concrete steps immediately to reverse this course, the secretary general of the OAS:

⁵⁷ Preamble, Inter-American Democratic Charter.

⁵⁸ Art. 18, Inter-American Democratic Charter. “When situations arise in a member state that may affect the development of its democratic political institutional process or the legitimate exercise of power, the secretary general or the Permanent Council may, with prior consent of the government concerned, arrange for visits or other actions in order to analyze the situation. The secretary general will submit a report to the Permanent Council, which will undertake a collective assessment of the situation and, where necessary, may adopt decisions for the preservation of the democratic system and its strengthening.”

The Inter-American Charter also authorizes the OAS to act without obtaining prior consent of the member state “[i]n the event of an unconstitutional alteration of the constitutional regime that seriously impairs the democratic order” of that state (art. 20). Under such circumstances the secretary general or any other member state “may request the immediate convocation of the Permanent Council to undertake a collective assessment of the situation and to take such decisions as it deems appropriate.”

- should use his authority under Article 18 of the Charter to engage with the Venezuelan government to address the threats to its judicial independence that affect the country's democratic system of government.

VII. Acknowledgements

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