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to the
Tom Lantos Human Rights Commission
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Judicial Independence in Central America
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I am a US citizen with two degrees from Columbia University, and I have lived in Guatemala since 1972.

Guatemala has never had the rule of law. Its governance has suffered from centralization and abuse of power. The worst justice system in Guatemala's history was between 2016 and 2021. Guatemala now has a chance to recover and move toward the rule of law, which is why hearings like this are important.

Will the commission, Congress, and the administration seek truth based on the public record, or will they prioritize politics over law and evidence? The former would help Guatemala and other Central American countries improve their justice systems. The latter would require Guatemala to create the rule of law on its own despite US pressure to the contrary.

Most readers of this have never heard such assertions and might be surprised by them. Some who disagree for political reasons will try to discredit me personally. I am not doing this to promote myself, and I am not bothered by the inevitable personal attacks that will ensue if Congress takes what I say here seriously. I view whatever personal qualities I have or lack as irrelevant. The issue here is content. I do not ask anyone to take this statement at face value. Instead, I ask you to consider what I say and verify the facts.

Guatemala Justice System Background

Before 2010, Guatemala's justice system was not completely independent. However, it somewhat resembled an independent system, as long as powerful interests were not involved. Then, money was the primary motivation for judicial corruption. Beginning in 2016, ideology became the primary motivation for judicial corruption. Corruption regarding money is unacceptable. Stealing liberty is even worse.

From 2016 until 2021, the justice system completely dominated the other branches of government. The Constitutional Court (CC), the last word on judicial matters, ordered Congress to pass specific laws and to cease debate on laws, and it ordered the executive regarding foreign policy.

These CC acts violated the separation of powers mandated in Article 141 of the Constitution. Guatemala's Constitution has remedies for this, but neither the legislature nor the executive

branches have been willing to employ them. The reason has been US protection and support of the CC during this period.¹

As vice president, Joe Biden leveraged Alliance for Prosperity money to pressure² then President Otto Pérez in 2015 to extend the International Commission Against Impunity in Guatemala (CICIG). My purpose here is not to offer a thorough examination of the CICIG. However, background on it is an essential part of examining the judicial system.

CICIG proponents insist the commission fought corruption. That was not its stated mission. The CICIG described its mission as targeting “illegal security groups ... that affect the Guatemalan people’s enjoyment and exercise of their fundamental human rights and have direct or indirect links to state agents or the ability to block judicial actions related to their illegal activities.”³

Four Guatemalan civic organizations issued a report⁴ in March 2018 titled “CICIG and the Rule of Law.” It is part of the record of the US Helsinki Commission’s April 27, 2018, hearing “The Long Arm of Injustice.”⁵ This report, based on court records and other public information, covers many aspects of the CICIG, especially how it did not comply with its mission.

Three months after the report’s release, a court decision in southwest Guatemala prompted an addition.⁶ The court effectively absolved the defendants accused by Casimiro Pérez, a Mam indigenous man, of having tortured him and his family. The defendants were involved in the groups FRENA and URNG. The latter is a political party that evolved from the guerrilla umbrella organization that tried to overthrow the government by force. The four URNG member groups signed the 1996 peace accords.

Pérez testified the defendants had imprisoned him in 2013 and threatened to burn him alive if he did not perform forced labor, which he did together with his four minor children.⁷ The case continued, and two years later a mob again threw Pérez down a well and threatened to pour gasoline on him and ignite it.⁸

Fearing the mob would kill Pérez, US-Guatemala dual citizen and US Navy veteran Karen Ness filed a complaint with the CICIG. Two weeks later, the CICIG gave Ness a case number. Four weeks after that, on March 11, the CICIG sent a letter to the public prosecutor, Thelma Aldana, and a copy to Ness.⁹ The letter stated:

“Due to the CICIG having a policy of selection and prioritization of cases arising from the need to optimize its available resources during the term of its mandate, said complaint is remitted so that the Justice Ministry as an institution that executes criminal prosecution in Guatemala takes whatever action it deems pertinent.”

Aldana did nothing at all. As CICIG Commissioner Iván Velásquez noted in his letter to Aldana, Ness had complained “against FRENA and URNG for acts outside the law, protecting persons implicated in illegal processes and punishments to force communities to act against the law.” This fell exactly within the CICIG mandate.

The two groups deprived Pérez of his human rights.¹⁰ The state agent who protected the groups and blocked judicial actions was the CICIG. It had become what it was created to eliminate.

The CICIG intimidation factor applied to the judiciary and was undoubtedly a reason Pérez's persecutors avoided facing justice. However, the CICIG was to be a part of making the judiciary even worse.

The 2016–2021 Constitutional Court

Former US Ambassador Todd Robinson used the CICIG as a battering ram to try to change Guatemala's Constitution and to make an electoral law in 2016. This was possible because the CICIG's extraordinary power derived from its diplomatic immunity and international support, especially from the United States. It could do anything illegally to anyone and did.

Robinson's core policy was to mold the CC to his political agenda. Robinson summoned some congressional leaders to his house and insisted they appoint Gloria Porras to the CC. He made it clear that lack of cooperation would result in US visa cancellations and criminal investigations. The CICIG made the latter threat credible.

Talking about the Porras vote, the president of Guatemala's Congress was recorded saying the orders come in English. Local media covered this extensively.¹¹

Porras won by 145-6 in a multi-candidate field, an impossible outcome under normal circumstances. Embassy personnel pressured other institutions with appointments to the CC, which helped Porras dominate it. From April 14, 2016, through April 13, 2021, the CC arbitrarily ruled Guatemala. The majority of CC magistrates were above the law.

Robinson's egregious and possibly illegal intervention under US law in Guatemala undermined the rule of law and judicial independence. Maybe this hearing would not have occurred had Robinson not acted improperly. Congress could obtain Robinson's testimony on this matter. You can check the embassy records to determine who was present at Robinson's residence for this meeting and take steps in Guatemala to obtain statements from the participants.

Many government officials in Guatemala enjoy immunity from prosecution. CC magistrates have immunity, which Congress can remove. Gloria Porras twice participated in rulings that stopped Congress from processing cases against her. Acting as judge when one is the defendant is illegal everywhere.

A key aspect of Guatemalan jurisprudence is the injunction (amparo). It is regulated by the Injunction, Habeas Corpus, and Constitutionality Law (Injunction Law) passed by the constituent assembly that drafted the 1985 Constitution still in effect.

According to Article 8 of the Injunction Law, the purpose of injunction is specifically to protect persons from official abuse. This means the petitioner must be the aggrieved party. Porras's majority of magistrates changed judicial doctrine to permit anyone to request an injunction. Any

person who wanted to stop any official action could request an injunction under the premise that the action harmed society instead of specifically harming the petitioner as the law provides.

Lawyers filed petitions to declare the ruling creating the new doctrine unconstitutional, and the Porras court upheld it as constitutional despite its obvious discrepancy with the Injunction Law. Three successive rulings regarding the same issue create new doctrine. A handful of magistrates changed what the 88-member constituent assembly elected by Guatemalans with 78 percent voter turnout in 1984 had made into law.¹² More than 100 rulings had created doctrine consistent with the law.

Ignoring the Constitution and precedent is not judicial independence. It is arbitrary rule.

This change of doctrine permitted political allies of the Porras court and the magistrates themselves, conspiring with each other, to use an unconstitutional precedent to wield power with a political agenda.¹³ They could and did order whatever part of the government they wanted to perform acts or prohibit them from performing acts. This happened without an aggrieved party, as the constituent assembly had provided and accepted doctrine demanded.

This was the basis for the CC to violate the constitutional separation of powers. It ordered Congress to pass a consultation law stemming from the CC decision in the Oxec hydroelectric case (see below) and cease deliberation of a national reconciliation law to correct violations of the 1996 peace accords. Most egregiously, the CC magistrates ordered Congress to cease processing a case pushing for the removal of official immunity for accused CC magistrates.

A lawyer had filed a complaint¹⁴ against some CC magistrates for criminal acts. As the law requires, because the magistrates enjoy immunity from prosecution, the lower court sent the case to the Supreme Court, which sent it as per law to the Congress for adjudication regarding removing the accused's immunity.

Congress should not have obeyed the CC order to cease processing the case against the magistrates. Article 156 of the Constitution states, "No functionary or public employee, civil or military, is obligated to comply with manifestly illegal orders or that imply committing a crime."

The CC also violated separation of powers when it granted an injunction against the expulsion of CICIG Commissioner Velásquez. Article 10 of the agreement with the United Nations that created the CICIG states "The Commissioner shall enjoy the privileges and immunities, exemptions, and facilities granted to diplomatic agents in conformity with the 1961 Vienna Convention on Diplomatic Relations."¹⁵ The text then lists six specific exemptions, including "immunity from criminal, civil, and administrative jurisdictions in conformity with the Vienna Convention."

Article 183 (o) of the Constitution holds that the president of the republic shall direct foreign policy and international relations. Article 9 of the Vienna Convention states "The receiving State may at any time and without having to explain its decision, notify the sending State that the head of mission or any member of the diplomatic staff of the mission is persona non grata."¹⁶

The CC ruled Velásquez was not a diplomat.

The CC later enjoined the president from expelling the Swedish ambassador. The CC also ordered a functionary in the Ministry of Foreign Relations to write a particular letter to a third party and warned the official that noncompliance would trigger a CC order to fire the official.

The president had the constitutional authority to ignore all three orders and even to declare a state of siege and arrest the magistrates who had issued manifestly illegal rulings. He surely would have provoked fierce resistance from the United States had he exercised this constitutional authority.

The term of Supreme Court and Appeals Court magistrates ended on October 12, 2019. The magistrates are still in their posts because of the illegal intervention of the CC. The majority magistrates and their political allies were unsatisfied with the appointment process because they were unable to force their choices onto the courts.

The majority CC magistrates apparently believed they would fare better with the new Congress, so they illegally delayed the new appointments. However, the new Congress that began in January 2020 also did not accommodate the CC magistrates and their allies. This prompted US interventions. A statement by the chairman and ranking members of the House Foreign Affairs Subcommittee on the Western Hemisphere prompted an interview with former Professor of Constitutional Law José Luis González.¹⁷

González explained the legalities of the various issues and processes related to the delayed appointment of magistrates for the constitutionally mandated 2019–2024 term for Supreme Court and Appeals Court magistrates. He identified various crimes, including by three CC magistrates who illegally ordered Congress not to process a case involving themselves for their actions in the appointment process.

The Oxec hydroelectric case provides an example of politics over law. Guatemala ratified the International Labour Organization Convention 169 in 1996. It obligates the government to consult indigenous peoples on decisions affecting their economic or social development.

In 2015, Bernardo Caal brought suit against the Oxec plants, alleging the company had failed to consult local communities. The company and the Ministry of Mines provided evidence they had consulted. Indigenous people from nearby communities testified they had been consulted and that Caal, not from the area as the case file confirms, did not speak for them. After losing in the Supreme Court, the ministry appealed to the CC.

Guatemala's ratification of the convention specifically states any provision that contradicts its Constitution is invalid. Article 204 holds that all courts of law must observe the principle that the Constitution prevails over any law or treaty. Article 3 of the Injunction Law states, "The Constitution prevails over any law or treaty."

The CC ruling violated the Constitution in multiple ways. It limited property rights of the state and individuals—applying criteria regarding consultations that did not exist previously—and it placed an international treaty above the Constitution. The language in the CC's sentence is

literally gobbledygook: language that is meaningless or is made unintelligible by excessive use of opaque, technical terms. The magistrates seemed to say the exigencies of the case required an “atypical” ruling, outside the Constitution but still constitutional. In other words, their arbitrary preference.

The CC’s Oxec ruling harmed the communities the magistrates claimed to protect by illegally closing the plants, depriving them of jobs and material improvements to their lives. It also harmed the country as a whole. The American Chamber of Commerce in Guatemala stated:

“We are in a period of radical ideological movements by social-conflict groups, with distortions and open opposition to any investment project, that do not show they legitimately or democratically represent the communities. This has led to vandalism, damages, disturbances, illegal seizure of private property, and loss of life that puts the safety of citizens and the development of the country at risk....

As a direct result of the CC’s rulings, more than 445,000 jobs and more than \$780 million in annual tax revenues are at risk... [Investment guarantees against expropriation without compensation puts at risk] about \$4 billion in the electric, agricultural, and mining sectors.”¹⁸

The 2021–2026 Constitutional Court

In 2016, Guatemalans would not have believed, as they do now, the United States would force on them a criminal judiciary that would do great harm. Guatemalans believed what turned out to be empty words about judicial independence and transparency. After five years of arbitrary, destructive CC rulings, Guatemalans resisted US attempts to impose the same type of magistrates on the CC for the 2021–2026 term.¹⁹

Guatemalan resistance to appointing the 2021–2026 CC magistrates the Biden administration and its allies wanted is, according to supporters of the 2016–2021 CC, due to the corruption of the past having reclaimed Guatemalan institutions. They fail to realize that supporting the 2016–2021 CC has destroyed US officials’ credibility.²⁰ Their claims to promote judicial independence and transparency have been exposed as hollow at best.

The 2021 Gloria Porras appointment to the new CC by the state university typifies the confrontation.²¹ The Biden administration and its allies complained Congress was acting corruptly by refusing to swear in Porras after the university’s supreme council certified her as their appointee.

The council had elected Porras by voice vote. The Injunction Law specifically requires a secret ballot. Various parties filed challenges to the procedure. The law states challenges must be resolved before the winner of the process can be sworn in by Congress. The supreme council committed a crime by certifying Porras while challenges were pending. Congress would have violated the law by swearing in Porras.²²

The same provision of the law applies to the Bar Association’s appointment, which also received a challenge. As the Injunction Law provides, the magistrate of the previous term appointed by

the Bar Association continued in her post until the challenges had been resolved. The magistrate for the new term appointed by the Bar Association took his post last week, almost two months after the beginning of the new term. The Biden administration and its allies had no concerns about the winner not having been sworn in, probably because he defeated their candidate.

As with the Bar Association, the magistrate appointed by the state university from the previous term has remained in his post. He will remain there until the university appoints a magistrate for the new term according to the law. Almost surely, the university will have to repeat the election of its appointee for the new term.

The Bar Association directors gave every advantage possible to the candidate backed by the US embassy and CC magistrates. The corrupt State Department-supported special prosecutor, Juan Francisco Sandoval, filed bogus criminal charges against several people in the process to help the embassy candidate. The opponent still received about 30 percent more votes. Lawyers know the judiciary better than anyone. Their vote shows the corruption of the 2016–2021 CC.

Those who want a truly independent Guatemalan judiciary should applaud Congress's proper application of the Constitution and the laws. Instead, there appears a concerted effort, including by the Biden administration and some in the US Congress, to discredit the Guatemalan government and the new CC to circumvent the law and impose their agenda. That cannot lead to a good result for either country.

Guatemalans have for the last five years looked into the precipice of disaster. They have seen what can happen with centralized, arbitrary rule. They need only look at nearby Nicaragua, where similar discourse occurred years ago.

Some of Guatemala's wealthy elite have come to understand the only way to protect themselves is for the society to be healthy. That requires the rule of law and economic development with competition based on price and quality of goods and services instead of through government power.

The masses, battered by violence and lack of opportunity, would positively respond to development. The middle class is tired of corruption. All factors are converging to make this the moment for Guatemala to begin to establish the rule of law. They must take the lead and do it themselves, but the United States can help them.

Guatemalans will get there even without us because they are a good and resilient people. They will welcome our help if it is consistent with US principles and not imposition. We Americans would best recognize the new realities and help ourselves by helping them.

¹ <https://twitter.com/LigaProPatria/status/1299401167907311616>

² <https://dailycaller.com/2016/04/04/jailed-guatemalan-president-reveals-phone-call-with-hillary-clinton/>

³ This quote comes from <https://www.cicig.org/?page=about>, quoted in 2015. It now opens to a page in Spanish that uses different language. In light of posterior events, the 2015 quote more closely reveals CICIG's failure.

⁴ <https://ligapropatria.com/en/2018/06/03/un-commission-in-guatemala-the-enemy-of-its-own-mandate/>

⁵ <https://www.csce.gov/sites/helsinkicommission.house.gov/files/CICIG-AND-THE-RULE-OF-LAW.pdf>

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- ⁶ <https://ligapropatria.com/en/2018/06/03/un-commission-in-guatemala-the-enemy-of-its-own-mandate/>
 - ⁷ <https://soundcloud.com/impunity-observer/guatemala-report-from-kpfa-radio-14-jan-2015?in=impunity-observer/sets/playlist#t=0:00>
 - ⁸ <https://soundcloud.com/impunity-observer/guatemala-report-from-kpfa-radio-23-jan-2015?in=impunity-observer/sets/playlist>
 - ⁹ <https://impunityobserver.com/2017/06/04/cicig-defers-complaint-to-justice-ministry/>
 - ¹⁰ <https://youtu.be/T8hiZ8BnVFo?t=1047>
 - ¹¹ <https://dailycaller.com/2016/04/21/john-kerry-the-captain-obvious-of-american-diplomacy/#ixzz4UpYCc9Eb>
 - ¹² https://en.wikipedia.org/wiki/1984_Guatemalan_Constitutional_Assembly_election
 - ¹³ <https://twitter.com/LigaProPatria/status/1316103254514728961?s=20>
 - ¹⁴ <https://ligapropatria.com/en/2020/07/08/corrupt-guatemalan-high-court-grants-itself-immunity-socialists-in-tow/>
 - ¹⁵ https://www.cicig.org/history//uploads/documents/mandato/cicig_acuerdo_en.pdf
 - ¹⁶ https://legal.un.org/ilc/texts/instruments/english/conventions/9_1_1961.pdf
 - ¹⁷ <https://sires.house.gov/media-center/press-releases/chairman-sires-ranking-member-rooney-call-for-transparent-selection-of>
<https://impunityobserver.com/2020/07/17/guatemalas-constitutional-crisis-explained/>
 - ¹⁸ <https://impunityobserver.com/2017/02/27/amcham-demands-guarantees-for-foreign-investment/>
 - ¹⁹ <https://twitter.com/LigaProPatria/status/1364765231721951233>
 - ²⁰ <https://twitter.com/LigaProPatria/status/1386898847595696131>
 - ²¹ <https://twitter.com/LigaProPatria/status/1386753172740390920>
 - ²² <https://twitter.com/LigaProPatria/status/1382056346904895503>