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Mr. Chairman, Ranking Members, and Members of the Committee, thank you for the invitation to testify today; I appreciate your interest in this important subject. I also stress that all the views presented here are solely mine, and do not reflect the views of the organizations I am affiliated with.

Let me start by saying that, after a long history of instability and on-and-off military rule, Latin American societies have overwhelmingly chosen competitive democracy. Since the transitions of the 1980s, most countries of the region have experienced uninterrupted turnovers of power from one elected government to another. Truly auspicious, in several nations of the region an entire generation of their citizens has not spent a day of their lives under any other political order. On this account alone, democracy would seem alive and well in Latin America.

But, is it? Not quite. Beyond this seemingly bright landscape, the picture is quite gloomy in several of these countries. Political competition is generally meaningful—in the sense that people vote freely and participation is high—but when it comes to constitutional procedures and civil liberties the state of “democracy” in Latin America is troubling, to say the least. It is probably no exaggeration to say that the impermanency of constitutional rules is the single most critical challenge to democracy in the region.

### **Constitutional Tricks and Perpetuation in Office**

Democracy is a method for choosing government, but it is also a series of institutional arrangements that determine how that government has to exercise power. While the former works relatively well throughout the region, the latter does not, subject to arbitrary change for the straightforward benefit of the president. Incumbents have often manipulated constitutional rules with the goal of staying in office longer than initially stipulated. To do so, they have concentrated inordinate amounts of power in the executive branch, altering checks and balances. When successful, they eliminate the very norm of alternation in office, eroding the principle of separation of powers together with basic civil liberties, especially press freedom.

In Venezuela, for example, Hugo Chavez managed to modify the constitution and eliminate term limits in pursuit of indefinite re-election. Deceased in office after fourteen years, it is now his successor Nicolas Maduro who will try to fulfill that goal. Elected in last April, the contest was widely believed to have been rigged by the electoral authorities, hardly an independent body, to give the official party’s candidate the victory against Henrique Capriles.

In Bolivia, Evo Morales had a new constitution approved in 2009, which stipulates in an article and accompanying legislation that previous presidential terms count, explicitly banning Morales to run for a third consecutive period. In 2013, however, the Constitutional Tribunal authorized yet another

candidacy of the sitting president. The reasoning invoked was that the new constitution refounded the state—the *Plurinational* Bolivian State—thus Morales’s first term happened in “another state.”

In Ecuador, Rafael Correa also modified the constitution, which now allows two consecutive presidential terms. His third period, however, was somehow resolved from the beginning, by a clause specifying that the term under the previous constitution did not count. That is, he turned the clock back to zero in 2009, so that he will be in power until 2017—for now, at least in terms of his intentions, if one read his recent statements on the subject carefully. In Nicaragua, in contrast, Daniel Ortega avoided to amend the constitution altogether, which bans immediate re-election. Instead, he presented his candidacy for re-election and had the Supreme Court ruled it legal—the highest tribunal violating the highest law to satisfy the whims of the chief executive.

In Argentina, government insiders used to talk, until very recently, about “eternal Cristina.” With three terms in office by 2015, two of her own and one of her deceased husband’s, it is unclear whether Cristina Kirchner will pursue her third consecutive presidency. To that end, she would need two thirds of the congressional votes and a constitutional convention to make it legal, that after the midterm elections next October. The problem is that recent primary elections throughout the country showed her popularity in decline. Though herself not in the contest, she still campaigned actively, framing the primary contest as an implied plebiscite on her. The idea backfired, as the ruling party’s 54 percent of October 2011 decreased to 26 percent last August, with forecasts of an even weaker performance next October.

It remains to be seen whether in this context—constrained by the constitution, with decreasing popularity, and a Supreme Court that has fought hard to maintain its independence—the president will abandon dreams of perpetuation, leave graciously and oversee a peaceful transition to a new government in 2015. If so, a much needed breadth of fresh air may come in support of democratic ideals, in Argentina as well as elsewhere in Latin America.

### **Executive Discretion: Congress Circumvented, Judges at Risk**

It is a fundamental premise of democratic theory that an election, however free and fair, does not automatically ensure a democratic exercise of power, but in much of Latin America the two appear rather incompatible. In fact, the former has been the pretext for deviating from the latter. Madison’s tyranny of the majority becomes more than a metaphor in countries where constitutional manipulation is the tool for executive discretion from the outset, a setting that erases the very principle of separation of powers.

A growing concentration of executive power has entailed what some experts have dubbed “hyperpresidential systems,” a polity in which the actions of the executive exceed its constitutional boundaries. As in Venezuela’s “enabling laws,” Ecuador’s “urgent bills” and Colombia’s “extraordinary powers,” to name three examples, the use, and sometimes abuse, of decrees has normalized a political system where the executive legislates and, riding on electoral majorities, legislates at will. An exaggerated version of this trend has been observed in Argentina under both Kirchners. It has been customary since 2003 that the president delivers the equivalent of the state of the union every year in Congress and in the same speech where they have boasted of record growth rates, they also requested a renewal of the presidential decree authority—often called *superpowers*—that the constitution reserves exclusively for times of economic emergency.

Executive discretion has also affected the independence of the judiciary and turned the principle of checks and balances into a hollow notion, a disturbing trend in the region. This has unequivocally

been the case when the Supreme Court was packed with cronies, as in Argentina in the 1990s under Carlos Menem, Ecuador in 2004 under Lucio Gutierrez, and Venezuela since 2004 under Chávez. Similarly, in Bolivia, and since his landslide victory in December 2009, President Morales passed a law of dubious constitutional status, so-called “Ley Corta,” which allowed him to fill 20 of 27 posts in the Supreme Court, the Constitutional Tribunal, and the Judicial Council. As of that moment, court proceedings against former government officials increased, all of them his opponents, sending many into exile and many more into jail without a sentence.

In Ecuador, President Correa has managed to subordinate Congress and the courts alike. The 2008 Constitution grants the executive broader legislative prerogatives and veto powers, in turn protected by laws that can only be reversed by super-majorities. The new constitution also determined the expansion of powers of the Constitutional Tribunal, and at the expense of the Supreme Court, which politicized the judiciary. Last but not least, 19 new judges were selected to serve on the Constitutional Court through a mechanism that was highly controlled by the executive. The new Court will be responsible for the oversight and approval of laws, most notably the reforms passed in May 2011 that gave the president more authority to regulate the content of information.

In Argentina, the executive’s attempt to curb the independence of the judiciary also has to be seen as a tool aimed at silencing critical media—both instrumental for another reelection. As reported by international press freedom watchdogs, for a long time many news organizations have suffered from systematic legal and administrative acts of harassment. Independent journalists have been subjected to various forms of intimidation. And the government has effectively bought itself control of media content through preferential placement of state advertising, even ignoring a 2007 Supreme Court ruling that ordered the government to advertise in a nondiscriminatory fashion.

This case is revealing of the frequent dual attack on judicial independence and press freedom, and it goes back to 2009 when a law was passed to diversify media ownership. While the text of the media statute is simple and couched in the language of antitrust law, the subtext was clearly more significant, as the government sought to stifle dissent and to create an environment of friendly press. This was particularly revealed when new licenses and frequencies were granted to government allies in a non-competitive fashion, and when the break-up and expropriation of the Clarín Group, the largest media organization in the country, became the main function of a newly created agency in charge of overseeing that process.

When the case got to the Supreme Court in 2012, which granted a temporary stay in favor of Clarín and ordered the lower court to rule on the constitutionality of the law, the advance on the press became an explicit attack on the judiciary. To this end, the government, in control of Congress since 2011, passed a law meant “to democratize the judiciary,” namely, to make the members of the *Consejo de la Magistratura*, the body that appoints judges, run for office through party lists. When the Supreme Court ruled the law unconstitutional in June 2013, which sparked the support of hundreds of thousands of citizens on the streets, a symbolic and unprecedented reaffirmation of liberal democracy took place in the country.

### **The Mutilation of Press Freedom**

If several Latin American democracies are substandard in terms of their constitutional processes, the record is dismal when it comes to the infringement of basic civil liberties, especially the freedom of the press, which in some places has become truly tragic. In Mexico and Brazil press organizations have regularly been targeted by narco-traffickers and, in Colombia, also by guerrillas and paramilitary. Journalists investigating drug-related corruption suffer threats, kidnappings, and

assassinations, generally carried out with gruesome cruelty, and when the reporter is a female, rape has also taken place.

Several governments in the region have to be held accountable for this situation, as they have failed to protect the rights of journalists, either because they have fostered a climate of intolerance under which violence thrives, or because they have been the perpetrators themselves. The latter is particularly the case at the subnational level, where local authorities don't have enough monetary and coercive resources to confront illegality, and so they end up colluding with, or captured by, all too powerful criminal organizations. When the state fades, lawlessness reigns supreme.

In Honduras attacks against journalists have been rampant since the 2009 coup. Even under the Lobo presidency, pro-Zelaya reporters continued to be gunned down, which has since placed the country among the top of the world in per capita assassinations of journalists. There is less violence in Ecuador, yet President Correa has re-criminalized defamation, as in the days of military rule, and regularly files lawsuits against "media excesses." As in Argentina, the government has withdrawn official advertising from critical media outlets, and regularly places limitations on media coverage of electoral campaigns.

In Venezuela the president's discretion to grant, revoke, and suspend media licenses has been, for way over a decade now, the preferred strategy to curb their independence. But censorship and intimidation has intensified once the opposition MUD (United Opposition Table) began to improve its electoral performance. In fact, as Freedom House reported, in the 2012 election, incumbent president Chavez benefited from massive use of state resources that enabled him to dominate media time by a margin of 25-to-1, and used it to convince many voters that the state could punish them if they were to cast their ballot for the opposition.

## **Conclusion**

I have referred elsewhere to this disturbing trend in terms of "a new authoritarianism in Latin America." To be sure, long gone are the days of systematic torture and forced disappearances in Latin America, yet the right to political dissent remains unfulfilled. A generation after the sweeping transitions of the 1980s, democracy is endangered today, not because of the threat of military takeovers, but at risk of losing its meaning and purpose in the hands of presidents that, while freely elected, crush freedom once in office. The result has been the creation of a personalistic, civilian, yet undemocratic regime.

Curiously, the international community has remained silent on these anti-democratic practices. One after the other, regional summits go on with long discussions and speeches about a variety of topics—trade, integration, infrastructure, you name it. Hardly a word has been heard, however, on the decay of democracy in the region. These proto-authoritarian leaders have thus walked by with not even a slap on the wrist. It is time to go back to the 1980s, perhaps, when abuse was so vigorously condemned, and condemn the violation of rights today, whichever those rights are and wherever that happens.

Several analysts have used the label "Illiberal Democracy," to capture the essence of these polities. They are wrong. While all democracies are susceptible of some degree of illiberalism, there is a fundamental question of proportion. In the end, as in Latin America today, Illiberal Democracy is an oxymoron.