

Brazil-United States Judicial Dialogue



GEORGETOWN LAW



Created in June 2006 as part of the Wilson Center's Latin American Program, the BRAZIL INSTITUTE strives to foster informed dialogue on key issues important to Brazilians and to the Brazilian-U.S. relationship. We work to promote detailed analysis of Brazil's public policy and advance Washington's understanding of contemporary Brazilian developments, mindful of the long history that binds the two most populous democracies in the Americas.

The Institute honors this history and attempts to further bilateral cooperation by promoting informed dialogue between these two diverse and vibrant multiracial societies. Our activities include: convening policy forums to stimulate nonpartisan reflection and debate on critical issues related to Brazil; promoting, sponsoring, and disseminating research; participating in the broader effort to inform Americans about Brazil through lectures and interviews given by its director; appointing leading Brazilian and Brazilianist academics, journalists, and policy makers as Wilson Center Public Policy Scholars; and maintaining a comprehensive website devoted to news, analysis, research, and reference materials on Brazil.

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Foreword

A firming the Rule of Law in a historically unequal and unjust society has been a central challenge in Brazil since the reinstatement of democracy in the mid-1980s. The evolving structure, role and effectiveness of the country's judicial system have been major factors in that effort. Most experts would agree that progress has been and continues to be made. Evidence of advancements can be found, for example, in the establishment of small claims courts and the creation a supervisory National Council of Justice. In addition, the successful implementation of an electronic voting system under the supervision of a specialized federal court as well as the historic trial of the largest political corruption scandal in Brazil's history by the nation's Supreme Federal Tribunal are further evidence that the rule of law is taking root.

An important ingredient of the continuous process of judicial reform in Brazil has been the openness of judges, prosecutors and legal scholars to exchange experiences with colleagues from abroad. Particularly relevant in that context have been interactions between Brazil and American judges and members of academia.

In the spring of 2011 the Brazil Institute of the Wilson Center and the Law Library of the United States Library of Congress organized a high level conference consisting of experts from America's two largest democracies in a comparative examination of their respective judicial systems. The Georgetown University Law Center participated as an institutional co-sponsor. Four members of the Brazilian Supreme Federal Tribunal came to Washington to exchange

experiences and views with American judges and legal scholars through a Brazil-United States Judicial Dialogue. The delegation was led by the Court's President at the time, Minister Cesar Peluzo. He was joined by Minister Ellen Gracie Northfleet, the first woman to sit on Brazil's highest court and a Former President of the Court, Minister Gilmar Mendes, also a former President of the Court, and Minister Ricardo Lewandowski, who will be elevated to the presidency of the Federal Supreme Tribunal in April 2014 for a period of two years.

The main event – a day and a half academic seminar - took place in the Member's Room of the Library of Congress' Thomas Jefferson Building. Participants made presentations and engaged in dialogue on topics ranging from controlling constitutionality and the process of judicial review to the challenges of administering courts. They also examined questions related to legitimacy, transparency and judicial security in decisions of the highest courts of Brazil and the U.S. and explored potential areas of collaboration on electoral justice.

With Brazil's Supreme Federal Tribunal about to hold an unprecedented trial of vote buying in Congress [NOTE: In Brazil, the trial would actually be conducted by the STF], participating judges and scholars compared notes on the prosecution of politicians indicted of crimes of political corruption in both countries.

An inaugural dinner offered by Brazil's Ambassador to the United States, Mauro Vieira, at his official residence, brought together the Chief Justice of the United States Supreme Court, John Roberts, and his Brazilian counterpart, Cesar Peluzo.

The Brazil-United States Judicial Dialogue of 2011 grew out of the pioneering work launched in the late 1990s by U.S. District Court Judge Peter J. Messitte, of the District of Maryland, which also brought together the judicial experiences of Brazil and the United States. A Peace Corps Volunteer in São Paulo in the 1960s, who has remained in close contact with Brazil since his time in Brazil, Judge

Messitte organized the first exchanges in 1998, with support from the World Bank and the United States Agency for International Development. Two conferences were held under the 1998 Brazil-United States Law Initiative, the first in Baltimore and Washington, in July, and the second in Brasilia and Rio de Janeiro, in December.

The present volume brings together fifteen contributions offered by the participants in the Brazil-United States Judicial Dialogue of May 2011. The texts are displayed in seven thematic chapters, according to the order in which they were presented, following the transcripts of remarks offered at the opening session by the Librarian of Congress James Billington, the President and Director of the Wilson Center Jane Harman, the Dean of the Georgetown Law Center William Treanor, and the then Law Librarian of Congress Roberta Shaffer.

The topics covered include Constitutions, Fundamental Rights and Democracy - Role of Supreme Courts in the Western Hemisphere's Two Largest Democracies; Controlling Constitutionality and the Process of Judicial Review - Legitimacy, Transparency and Judicial Security in Supreme Court Decisions; Challenges of Court Administration; Role of Alternative Dispute Resolution: Conciliation and Mediation in Brazilian and American Law; Due Process of Law, Constitutional Guarantees and Appeals; Electoral Justice and Democracy - Potential Areas for Bilateral Cooperation; and Prosecuting and Trying Political Corruption Cases.

The Embassy of Brazil in Washington, D.C. and the Georgetown Law Center were fully supportive of the Dialogue, as were four Brazilian and American law firms which co-sponsored the Dialogue: Mattos Filho Veiga Filho Marrey Jr. & Quiroga Advogados; Mattos Muriel Kestener Advogados; Boies, Schiller & Flexner LLP; and Arnold and Porter LLP.

The Initiative owes much to the efforts of Dr. João Batista Nascimento Magalhães, a diplomat who was, at the time, Adviser for

International Affairs to the Brazilian Supreme Federal Tribunal; Robert R. Newlen, Assistant Law Librarian of Congress for collections, outreach and services; Michael Darden, Brazil Institute Program Assistant; and Anna Carolina Cardenas, Brazil Institute Program Intern who contributed to this report. To them, and to participants and sponsors, our deepest gratitude.

Paulo Sotero
Director, Brazil Institute

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Opening Remarks

Roberta Shaffer, Law Librarian of Congress

Good morning. My name is Roberta Shaffer, and I have the pleasure every day of walking through this extraordinary building, serving as the Law Librarian of Congress. And I am so glad, today, that we were able to share that experience with you, and many more, of the pleasures of being at a cultural and knowledge-based institution.

Brazil is clearly on the minds of Americans, and I am assuming America on the minds of many Brazilians. Just this morning, in the Washington Post and the New York Times, there were two lengthy articles about Brazil, one having to do with new social policies and another having to do with land use and ecology. And every day we see Brazil in the press and it is constantly on our minds. And so it is not at all unusual that this dialogue would be reconvened after thirteen years. And the hope is that, just as thirteen years ago, many interesting and innovative initiatives were considered, so that will be the outcome of today.

My role is really that of mistress of ceremonies during the day and I will also be the official timekeeper. Let me just give you some background information about how the day will flow. It will be as an American playwright said, “A long day’s journey into night.” But I believe it will be well worth the trip. We will be recording the sessions because this is a philosophy that all the sponsoring institutions share; that we want knowledge not only to occur in a particular time frame, but be persevered for the future. So please embrace that and

share the ability to access knowledge over the course of centuries. We have an exhibit for you outside and we hope you will be able to enjoy that during the breaks and during the day. It is a presentation that includes some of the major works from our collections of the late-medieval Portuguese law that form the basis of the law of colonial Brazil, as well as legal works from the colonial period and the Era of Independence. And we also have equivalent exemplars from our collections of American law.

Our format today will be that we will not ask our presenters, commentators, and moderators to come to the front of the room. Rather, we will remain interspersed with the rectangle in the belief that this will help to foster more conversation. And that is truly the goal of today's event. So the plan will be that the moderators will introduce the panel, each of the presenters will have about 15 minutes to present their various viewpoints on the assigned topic. And then the commentators will follow with five to seven minutes. All of that will be followed by open discussion and we hope that will really be the most fruitful parts of the day. We'll break for lunch in our lovely Whittall Pavilion and the law library staff again will help you get to that room from here; it's a very short walk.

So without further ado, it is my pleasure to introduce some of the people who have made this event possible. I would like to start with the esteemed Ambassador from Brazil, Ambassador Vieira, if you will come to the podium and give us just a few remarks that would be wonderful.

Mauro Vieira, Ambassador of Brazil to the United States

Well, good morning. Thank you all very much: Minister Peluso, President of the Brazilian Supreme Court; Dr. James Billington, Librarian of Congress; Ministers Ellen Gracie Northfleet and Gilmar Mendes; President Jane Harman of the Woodrow Wilson International Center for Scholars; Dr. William Treanor, Dean of the

Georgetown University Law Center; the Law Librarian of Congress, Ms. Shaffer. Ladies and Gentleman, I wish to thank the Library of Congress, the Woodrow Wilson International Center for Scholars, and Georgetown University Law Center for organizing the second U.S. Judicial Dialogue. The first edition of the Brazil-U.S. Judicial Dialogue took place in 1998. It was undertaken by the International Judicial Relations Committee. At that time, Justice Ellen Gracie Northfleet and U.S. District Judge Peter Messitte coordinated discussions on judicial organization, the role of the president, judicial selection, and training and procedural reform, among other things. The exercise, which was hosted by the Brazilian Embassy, was very fruitful. Many of the discussions that took place in '98 are still present in our agenda. They are valid and are of great interest. Today and tomorrow some of the best and most distinguished legal scholars of Brazil and United States will be debating themes of mutual interest with a view to exploring areas for future cooperation between the two countries. I, as a diplomat, do not have much to contribute to this discussion. I came to attend and to learn. I attended law school many, many years ago but I never practiced, so I feel I am still a student and very interested in these discussions, but I will leave the floor to those who have a much more important contribution. But before I do that, I would like to once again thank the Library of Congress, the Law Library of Congress, the Woodrow Wilson Center, Georgetown University Law Center, The University of Baltimore School of Law, and also very important law firms such Mattos Filho, Veiga Filho, Marrey Jr. & Quiroga Advogados, Mattos Muriel Kestener Advogados, Boies, Schiller & Flexner LLP, and Arnold & Porter LLP, who have always been working very closely with Brazil and the embassy. I thank you very much for being here today, and I wish you a very productive period of discussions.

James Billington, Librarian of Congress

It is a great pleasure to welcome you all to the Members Room here in the Jefferson Building of the Library of Congress for the 2011

U.S.-Brazil Judicial Dialogue. We are very pleased that the dialogue is being held here at the Library of Congress in close proximity to the Capitol and also to the Supreme Court, but it is co-hosted, as you know, by the Woodrow Wilson International Center for Scholars, and the Georgetown University Law Center. You will shortly hear from the distinguished new president of the Wilson Center, a former, long-serving and highly respected Congresswoman who has now taken over those duties and started off well, in all kinds of promising ways. I must say when I myself became director of the Woodrow Wilson Center at a much earlier stage we already had some interesting contacts with Brazil. We had Mario Vargas Llosa, the future Nobel laureate, writing a book *The War of the End of the World*, on the *Antonio Conselheiro* movement in northern Brazil using material here at the Library, which actually was not altogether available in Brazil, and Fernando Henrique Cardoso, the future president of Brazil, was one of the principal advisors. There is a great tradition there, and of course the Wilson Center has a marvelous mission and memorial to a former president of interacting the world of affairs and world of ideas. So you will hear, following my brief remarks, from Ms. Harman and also from Bill Treanor, the dean of the Georgetown Law Center. You are here in the Library of Congress, particularly at the Law Library of Congress, which is the oldest statutorily-created subdivision of the Library. It was created in 1832. The Library itself was the oldest federal cultural institution. It is now an institution with the largest international law, and overall law collection, in the world, covering over 260 jurisdictions worldwide and comprised of nearly five-million items.

This dialogue places us again on the cusp of a new idea. We are meeting to discuss important issues; the similarities and differences among the laws of two great nations. We are honored by the presence of esteemed members of the Brazilian and American judiciary, who are with us today. You will hear shortly from the leaders of the two co-sponsoring organizations, the Wilson Center, for which I am still a board member, and the Georgetown Law Center, where I

serve on the board of the sister international institution within the Georgetown University Complex School of Foreign Service. The Law Library of Congress, as I have mentioned, is rather unique in its size, and Roberta Shaffer, who you have seen already, will be with you today, as will other members, to facilitate all your arrangements. I should say that the Law Library of Congress serves as a forum for comparing practices, illuminating best practices, inspiring innovative approaches, and addressing social and economic issues through the role of law. This dialogue, as I say, is a continuing phenomenon, and a very rich one. I should also point out that we have an office in Rio de Janeiro which has collected enormous quantity of Brazilian information. In fact, it is by far the largest library in Brazilian Portuguese, and Brazil is also a founding key member of the World Digital Library, which is the UNESCO project that we are quarter-backing, as it were, here in the Library of Congress. So Brazil is important. Our Rio office, purchases in Portuguese for all other research institutions in America that need to have primary materials on Brazil. My visit to Brazil, a rather extended one in this office, was one of the most inspiring ones, and has led us to have these wonderful collaborative relationships. But now it is my turn to turn things over to your co-host today. I believe Jane Harman, the new and dynamic president after a long and distinguished career on The Hill is, in a way, legitimizing our presence. (*In reference to the décor of the Members Room*) This is the mosaic that represents history, and the other mosaic represents the law. The painting on silk represents the different forms of inspiration that are supposed to rain down on members, but also on important dialogues such as this one in our common Western Hemisphere. Thank you all for being here and we look forward to the proceedings.

Jane Harman, Director, President, and CEO, Woodrow Wilson International Center for Scholars

Good morning everyone. Welcome to the most beautiful building in all of Washington. In fact, Roberta Shaffer just told me she thinks this is the most beautiful building in all of the United States. I know

that Brazil, which I have visited many times, has many beautiful buildings, but in Brasilia, the buildings are new. The Library of Congress is one of our older buildings and certainly our nicest. I like hearing from my friend James Billington that the picture behind me is of history. If you look at it, which I just did, they are all women.

Good start. Brazil has a woman president. The Wilson Center has a woman president. Better start. I am happy to you and welcome you. Let me say a few words about Dr. Billington, the Wilson Center's first pre-eminent president. He says he is no longer president; he is just a librarian. But the fact is that he brought excellence to the Woodrow Wilson International Center for Scholars, and he put on the map the Center's scholars program, which many of you may know of, and perhaps some of you have or will participate in. It is a wonderful facility, a very moving tribute to our first scholar president, and it is located just downtown on Pennsylvania Avenue in the Ronald Reagan building. I want to salute the excellence and public service of James Billington, who has served here for 22 years.

As you just heard, I served in the United States Congress until March of this year. I served for nine terms; 17 years in the United States House of Representatives. We have a saying that a dog year is seven years. So in dog years I served in the United States Congress for 119 years. It was a very, very long time, at a time in our politics which sadly is quite fractured. What was missing from that service was not love of policy, which I still have, and which I know you all have, but what was missing was the ability to make things happen. That is precisely why we need dialogue, like this dialogue, with jurists who can help us figure out what are the best practices between our countries, the two largest democracies in the Western hemisphere, and how it is that we can work not only on improving the relationship between our countries, but also on a way to improve the rule of law throughout the world. After 9/11, in this country, I believe we established certain practices which we have regretted, and it is time to put a better legal framework around what we do in the U.S., and I know that this conference can help.

It is also a pleasure to partner with Georgetown Law School, and I would like to recognize Dean William Treanor for his service and participation. I was once an adjunct professor at Georgetown Law School. It is a place of excellence just a few blocks from here. Let me also recognize a treasure of the Woodrow Wilson International Center for Scholars, the director of our Brazil Institute, Paulo Sotero.

Final Comments: As you know, President Barack Obama went to Brazil in March. This was the first time that a U.S. president traveled to Brazil as the first visit between the two presidents, and I think it was an appropriate thing to do. I salute him for doing this; it augers an improved relationship between our countries. Let me also recognize Brazil's Ambassador to the United States, Mauro Vieira, the president of the Brazilian Supreme Court, Minister Cezar Peluso, and his colleagues Ministers Ellen Gracie Northfleet, Gilmar Mendes, and Ricardo Lewandowski. I also want to recognize the members of the U.S. Federal Judiciary, Judge J. Clifford Wallace, from my own state of California, Judge Diane Wood of Chicago, Illinois, and Judge Peter Messitte of Maryland. A hearty welcome from a member of the Supreme Court Bar, who, like the ambassador from Brazil, no longer practices law.

The Wilson Center is grateful to the University of Baltimore School of Law, to Ari Oswaldo Mattos Filho, Ubiratan Mattos Howard Vickery, and Gregory Harrington for your participation and for the support of your law firms. Again, thank you to some of the brightest jurists in both countries for not only working on making your own rule-of-law system better, but working on improving the rule-of-law between our countries and in our world. This is a beautiful room. This will be a beautiful conference, and I look forward to participating in some of it briefly. Again, welcome, in my capacity as a woman who hopes to continue to make a little piece of the history of our country: Thank you.

William Treanor, Dean, Georgetown University Law Center

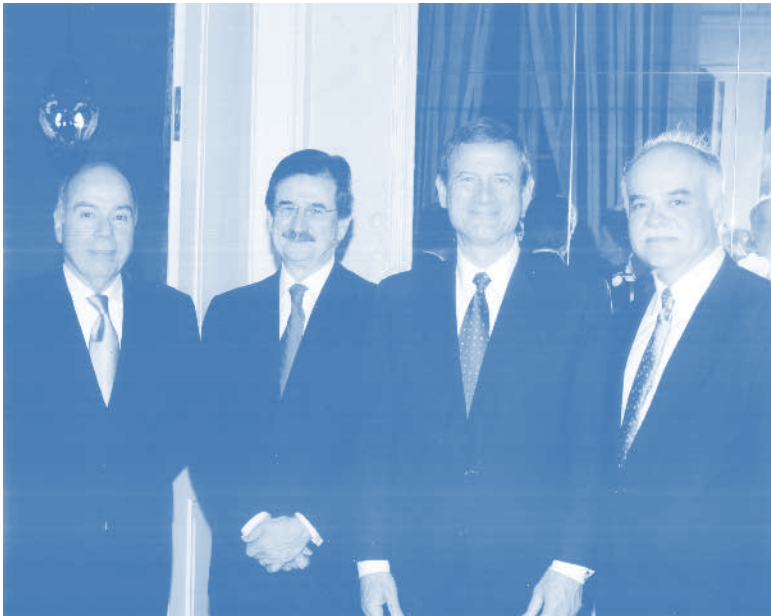
Thank you very much, Ms. Shaffer, and I have to say what a privilege it is for us at Georgetown to be a co-sponsor of today's event. I would like to acknowledge Mr. Billington, Ms. Harman, Ambassador Vieira, Ms. Shaffer, and everyone here. We are just so pleased to be able to advance today's program. Actually, if I can begin again with our frieze behind us, I am a legal historian and when I think about why legal history is of value, it is the idea that through speaking across generations we can learn from each other. Thinking about that role, the great thinker Santayana said, "The past is another country." That is why we can learn from the past. As I was thinking about that I realized that, in fact, we can learn even more powerfully from other countries, because they truly are other countries, it is not just a metaphor.

That is very much at the core of what Georgetown Law School does; it is a law school that has a great global focus. It has a great focus on Latin America and Professor Joe Page, who will be delivering closing comments, is really one of the great scholars in American law schools of Latin American law. And we are now particularly focused on Brazil, so when Judge Messitte talked to me in the Fall about whether we would be able to co-sponsor this event, I realized it was an extraordinary opportunity.

All of us in the United States are very focused on Brazil. I think, again, when I was in junior high school, and when I was choosing which language to learn, French was the obvious pick. But now I read, in the New York Times, for example, that there are more people who speak Portuguese than French, and it is because of Brazil. The tide of Brazil is very important to us. I was in Brazil for the first time in April, in São Paulo. We are, to echo Congresswoman Harman, the two largest democracies in the Western Hemisphere, two constitutional democracies, two democracies with great court systems, and we can learn profoundly from each other about best practices,

and we can work together towards, again echoing Congresswoman Harman, the goal of advancing the rule-of-law throughout the world.

So I have to say this is an extraordinary program. It is dazzling to look over the list of speakers, and we are privileged to be a part of it. I look forward to an extraordinary discussion. Thank you very much.



Inaugural dinner hosted by Ambassador Mauro Vieira on May 10, 2011, at the official residency of the Brazilian embassy. From left to right: Ambassador Mauro Vieira, Minister Cezar Peluso, Chief Justice John Roberts, Paulo Sotero.

Constitution, Fundamental Rights and Democracy. The Role of Supreme Courts in the Western Hemisphere's Two Largest Democracies

Cezar Peluso, President, Supreme Federal Tribunal of Brazil

**Retired in 2012*

Transformation, with positive impacts on social reality and on the country's insertion in the international arena. Many factors contributed to these changes. Two of them deserve special attention: the strengthening of the judiciary and the role of the Federal Supreme Court (STF) in the consolidation of democracy under the aegis of the 1988 Constitution.

The full force of the Charter of 1988 represented a decisive factor for the institutional building effort that Brazil has been developing in recent decades. Thinkers such as Douglas North and Nobel laureate Amartya Sen have been teaching us for years that legal institutions are “instruments” of development, not merely “results” or “consequences” of this process.

In the private field, a strong and effective legal system ensures legal certainty, predictability and dispute resolution within a reasonable time from an economic perspective. In the public sector, democracy under the rule of law ensures efficiency and transparency

of government decisions, the “accountability” of authorities and optimum allocation of public spending taking into account social issues. Thus, legal institutions operate as a major arena for productive investments, generating income and improving social conditions of the majority of the population.

The international comparison shows that countries with strong democratic and constitutional structures are able to place the political dimension of social and economic conflicts in its proper ‘locus’, which is congressional representation under temporary consensus and ongoing discussions - to find legitimate and efficient solutions to their problems.

This is what happens in Brazil since the promulgation of the 1988 Constitution. From its privileged position in the legal hierarchy, the 1988 Constitution has played key roles for the proper functioning of the Brazilian political-institutional system.

The first of these functions is symbolic. The 1988 is known as the “Citizen Constitution “ for having translated a kind of new deal for democracy as a substitute for extensive periods of institutional instability and military dictatorships. In this regard, besides being a legal document, the Constitution of 1988 embodied the political promise of the construction and maintenance of a sustainable democracy after a long period in which Brazil was marked more by a state of exception than by a democratic regime.

The 1988 Constitution, however, went beyond the promise of democracy as a system of government. Besides political rights and individual freedoms, our Constitution added an extensive cast of so-called economic and social rights. Brazilian democracy is marked by the guarantee of social rights typical of a State which has chosen goals of social transformation, reduction of inequalities in income and opportunities, as well as the elimination of regional disparities that still mark far-apart States within the Federation.

The Brazilian Constitution of 1988 thus translates the concept, developed by the portuguese Professor José Gomes Canotilho, that is to say the so-called “leading Constitution”. It is, as you know, that particular kind of a constitutional text, which besides from defining an organizational structure and the powers of regulatory processes within a given nation state, also acts as a kind of political statute, by establishing what legislators and rulers must do and how and when they should act to implement those constitutional guidelines and principles.

In analyzing the “constitutional wave” that followed the process of democratization in southern Europe and Latin America in the 70s and 80s, several authors have identified as a hallmark of these new regimes the institutionalization of robust constitutional jurisdictions, aimed at ensuring transition molded in ambitious constitutional texts. The constitutional courts thus established have taken upon themselves the responsibility not only of functioning as negative regulators (as defined by Kelsen), but they also acquired an obligation to ensure the fulfillment of promises positively inscribed in the Constitution.

The process of expanding the authority of constitutional courts gained specific contours in the Brazilian case. Brazilian constitutionalist Oscar Vilhena Vieira already noted that under the 1988 Constitution the Federal Supreme Court moved to the center of our political system. This institutional position, the researcher concluded, has been occupied by the Supreme Court in a substantive way in the enormous task of guarding such extensive Constitution.

The expansion of judicial review remedies and the legitimacy of the parties to invoke them - an issue to be addressed by eminent Gilmar Mendes - has led the Supreme Court to have the final word on many substantive issues, by either validating or rejecting decisions of the executive and legislative branches or sometimes supplying omissions of representative bodies.

The particularity of the Brazilian case lies in the scale and nature of the powers conferred upon the Federal Supreme Court. Such scale relates to the fact that, in Brazil, a large amount of issues acquired constitutional status and were recognized as justiciable.

As for its judicial nature, the Brazilian Supreme Court took upon itself many competences which in most contemporary democracies are distributed among at least three types of institutions: constitutional courts, specialized judicial fora (to, for instance, dismiss members of the Executive and Legislature, which is the subject of tomorrow's presentation by Justice Ellen Gracie) and appellate courts of last resort.

In its role as constitutional court, it judges direct unconstitutionality actions, providing judicial review of laws and normative acts edited in the federal and state levels. The Court was also given jurisdiction to judge eventual inertia by the constitutional legislature or the executive power to regulate a constitutional commandment. Therefore, it may through the writ of injunction, ensure immediate and direct implementation of fundamental rights.

Noteworthy is the power to assess the constitutionality of amendments to the Constitution that threaten the integrity of the wide array of entrenchment clauses, established by art. 60, paragraph 4 of the Constitution.

The court did not decline its responsibilities and has acted tirelessly as a guardian of the Constitutional. In fulfilling its constitutional responsibilities, it has acted decisively in resolving conflicts between powers or internal disputes between Congress and the Executive, as well as in effectively implementing the rights guaranteed by the Constitutional. The role of the Supreme Court has been described as "judicial activism under the Constitution".

The consistent performance and independence of the Supreme Court in particular and of the Judiciary in general, has contributed

decisively to the consolidation of Brazilian democracy. Under the leadership of the Federal Supreme Court, the Judiciary is, without doubt, the guarantor of democracy in Brazil.

The political history of the Brazilian republic was marked by military coups and dictatorships. As noted by the American historian Alfred Stepan, the role of ultimate arbiter of major institutional conflicts over the first hundred years of the Republic (1889-1988) was exercised by the Army. Military interventions to interrupt or to attempt to interrupt the regular political game in 1891, 1893, 1922, 1930, 1932, 1937, 1945, 1954, 1964 and 1968, not to mention numerous smaller movements in uniform.

This framework will no longer hold in our country. In contrast with a not too distant past, democracy and constitutionalism currently represent the “cornerstones” of the Brazilian political process, ensuring the legitimacy of both the decision making process and of the outcome (‘output legitimacy’, in Anglo-Saxon jargon) of the operation of the political system.

The democratic rule of law established itself as the model of organization of political power in the country. Under that particular form of fundamental arrangement of the State, democracy and the Constitution legitimize each other, defining, in the words of Norberto Bobbio, one set of rules of procedure - the “rules of the game” - for the formation of collective decisions.

In addition to ensuring fundamental rights and principles, the 1988 Charter has allowed for the formulation of demands for public policies by the majority of the population and the adoption of effective measures to safeguard their interests. The combination of these two factors form the social base of our democratic Constitution (or of our constitutional democracy), which never had such a high degree of legitimacy for such a long duration.

The transformations of the legal-institutional context in Brazil can be attested in several dimensions. First of all, no political actor, socially or economically relevant looks to pursue or to achieve his goals by means which may result in the establishment of an undemocratic political system.

It should also be underlined that the vast majority of the population evaluates democracy in a highly positive manner.

Finally, both governing bodies or the multifold sectors of society have understood they should seek to satisfy their claims and resolve any conflict under the Constitution.

In the process of consolidation of the democratic rule of law, the Brazilian judicial system has undergone major reforms. Constitutional Amendment 45, adopted in 2004 introduced an important modernisation of the Judiciary. That amendment had as main objective to increase the efficiency of Judicial Administration in order to attack delays in adjudication - a problem which, to a greater or lesser degree, affects the judicial system of all countries.

The main innovations of the 45th Amendment were: i) the creation of the National Council of Justice (CNJ) as the paramount instance in coordinating the actions of the judiciary administration, ii) a constitutional provision to allow the Supreme Court to issue binding precedents; iii) the establishment of the requirement of general repercussion as a requisite for the judgment by the Supreme Court of special appeals, and iv) the constitutional recognition of the fundamental right to a speedy trial (Article 5., XLVIII).

The National Council of Justice (CNJ), which is always presided over by the President of the Supreme Court, was conceived as the central integration and coordination organ of the various courts of the country, with powers to control and to supervise administrative, financial and correctional aspects. The CNJ is composed of representatives of the judiciary, prosecutors, attorneys and members of civil society.

Its mission is to define the strategy of the judicial power, even though without interfering with the exercise of judicial functions, which by express constitutional provision, remains an attribution of each court or judge in particular.

The CNJ has proved an essential tool for improving the Brazilian judicial system in achieving the ideal of a speedy and efficient justice. Much remains to be done, but significant advances have been achieved, as will be demonstrate in a moment by judge Fernando Marcondes, general secretary of the National Council of Justice.

The reform gave the Supreme Court, the highest body of the Judiciary, permission to edit binding precedents, which constitute binding precedent of mandatory compliance by the other judicial and administrative bodies. The institutionalization of the obligation to respect the guidance signed by the leadership of the judiciary strongly discourages procrastination by any court or else the judicialization of matters already decided in a repetitive manner.

The binding decision must be approved by a majority of 2 / 3 vote of the Justices of the Supreme Federal Court (eight votes, therefore) and deal with constitutional matters subject to repeated decisions of the Court. The approval, review or cancellation of *stare decisis* by the Court may be initiated by those same having *locus standi* to propose the direct action of unconstitutionality.

The requirement of general repercussion introduced significant changes in the most important feature of the Brazilian legal system: the extraordinary appeal. It's primary filter, in which eleven (11) Brazilian Supreme Court Justices evaluate whether the constitutional question referred to the court is economically, politically, socially or legally relevant or should be dismissed or else judged by the highest body of the Judiciary.

The 'general repercussion writ' was conceived, under the clear inspiration of the U.S. Supreme Court 'writ of certiorari' as a prerequisite

to separate relevant constitutional cases that merit the Court's analysis from other constitutional actions which, being devoid of an overall impact will thus be dismissed immediately and not undergo any analysis of its substance.

Thus, the overall impact of the 'general repercussion' institute aims to ensure that the Brazilian Supreme Court, then freed from a mountain of more than one hundred thousand (100,000) appeals which are directed to it every year, should have the possibility to look more thoroughly into cases of recognized impact on society as a whole.

Finally, the framework of the reforms brought upon under Constitutional Amendment. 45 is now completed with the regulation of electronic proceedings, which honor the fundamental right to a speedy trial and seek to expand the no less fundamental right of access to justice.

The use of information technology as a means of completion of legal proceedings, acts of communication and transmission of pleadings is already a reality in Brazil. The Supreme Court receives the initial procedures and appeals electronically and already has the technology to manage all the procedural requirements in fully electronic platforms.

Besides the speed of those procedures, the electronic processing of proceedings constitutes a valuable instrument for statistical control and management of litigation in the Supreme Court. Computerization helps to expand citizens' access to proceedings pending in court. It also extends the transparency of court operations, as well as the publicity and credibility of decisions.

The Brazilian judiciary has been a pioneer in the use of information technology to improve the quality of services provided to citizens. Five months ago, one hundred thirty-five million (135 million) Brazilian used electronic ballot boxes during the presidential elections.

Less than three hours after the vote, the country already knew the outcome of the election, in a safe and unquestionable way. I am sure that the lecture by Justice Ricardo Lewandowski, who besides being a Justice of the Federal Supreme Court also sits as member of the High Electoral Court, will provide relevant information on the institutional framework and practices in Brazilian elections.

Ladies and Gentlemen,

As in the famous play by Mark Twain on reading news about his own death, the Brazilian experience seems to confirm that they are premature the predictions of some theorists who saw the traditional role of constitutions to fall before historical phenomena such as globalization, the loss of autonomy of government decisions, the unification of markets on a single economic global system (the “world economy” mentioned by Braudel) and the advent of new normative orders alongside traditional state positive law.

Instead, the Brazilian political-institutional experience of the last 23 years confirms the obvious connections between the Constitution, fundamental rights and democracy. No constitution, no recognition of fundamental rights. Without fundamental rights recognized, protected and experienced, there is no democracy. Without democracy, there are no minimum conditions for the peaceful settlement of conflicts, no room for ethical coexistence.

The collective effort of building the future is a complex process. Sustainable development programs are - or should be - highly political processes. You need to identify the problems facing one of the priorities, assess the potential losses that depend on the success or failure of the measures adopted and enter into an agreement for the distribution of social benefits and costs.

For their ability to build consensus in spite of disagreements, the Democratic State appears to be the best way to engineer the most efficient

alternatives to overcome the present difficulties. No future will be built without the legitimacy that is attained within a regulatory framework on strong democratic foundations of constitutional fundamental rights. In Brazil, for 23 years we are proud to follow this lesson.

Constitution, Fundamental Rights and Democracy: The Role of the Supreme Courts in the Western Hemisphere's Two Largest Countries

Diane Wood, Chief Judge, United States Court of Appeals for the Seventh Circuit

It would be impossible to overstate the importance of the Supreme Court of the United States in developing, supporting, and maintaining democracy throughout U.S. history. It has done so in countless ways, expressed in many fields of law, but three areas in particular deserve close attention: the right to vote; the right to free expression; and the procedural protections that ensure fair, open, and reliable actions on the part of governmental actors. These three areas provide much of the foundation upon which the remainder of American democracy stands.

THE RIGHT TO VOTE

The right to vote is the hallmark of democracy, for it separates the right of government by the people (popular sovereignty) from the right of government over the people (whether in the form of aristocracy, monarchy, totalitarianism, or comparable systems). The United States, interestingly, has always had a complex relationship with democracy's cornerstone. The Constitution of the United States has never been purely democratic,¹ and the relation between the

text of the Constitution, the political branches, popular society, and the Supreme Court reflects an internal tension between popular democratic and republican governance.² As is true in other areas implicating fundamental rights, the Supreme Court's role in this balance is central, even though the Court is not the sole actor, or in some ways even "supreme." Instead, as the right to vote has progressed in the United States, the Court has been part of a dialectical response to external influences. Sometimes the Court moves ahead, but sometimes it drifts behind and comes about after the political branches of the government, or even the people, have taken the lead.

The development of the right to vote in the United States can be divided usefully into five periods: (1) the founding, (2) the First Reconstruction following the Civil War, (3) the fight for women's suffrage, (4) the Second Reconstruction, which culminated in the passage of the Voting Rights Act, and (5) the protection of the right to vote for those old enough to serve in the military, 18 year olds.

At the founding, the right to vote was limited essentially to property-owning, taxpaying white males over the age of twenty-one – restrictions that do not sound very democratic by modern standards.³ But things have changed—four of these five limitations have been eliminated and the fifth one relaxed. As Tocqueville anticipated, "the further electoral rights are extended, the greater is the need of extending them; for after each concession the strength of the democracy increases, and its demands increase with its strength. The ambition of those who are below the appointed rate is irritated in exact proportion to the great number of those who are above it. The exception at last becomes the rule, concession follows concession, and no stop can be made short of universal suffrage."⁴ The history of suffrage is one of "expansion and contraction, of punctuated equilibria, rather than gradual evolution."⁵ This is reflected in the evolution of the Constitution's text, legislative enactments, and responses by the Supreme Court.

The primary change that accompanied the founding of the country, on the heels of the Revolutionary War, was the elimination of economic status—expressed in both wealth and property requirement—as a condition of the franchise. Unlike subsequent changes in the right to vote, the change in this era was led by the states, rather than the federal government (whether Congress or the Court). By mid-nineteenth century, almost all states had eliminated wealth or property-owning qualifications. A significant part of the reason for this development had to do with the states' reliance on militias after the Revolution; asking men to serve regardless of economic status fueled and catalyzed their right to franchise.

Intimately tied to the next expansion of the right to vote was another violent conflict: the Civil War. This led to the first constitutional provisions directly protecting the right to vote. First, passed in 1868, the Fourteenth Amendment's Reduction-of-Representation clause provided that a state's representation in Congress would be reduced when the "right to vote in any election . . . is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or crime."⁶ Two years later, the Fifteenth Amendment, passed some 90 years after the founding, provides the Constitution's first affirmative protection for the right to vote, declaring: "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude."⁷

The Fifteenth Amendment had the formal effect of enfranchising nearly a million freedmen, but its practical effects fell far short of its promise. Disenfranchisement around the turn of the twentieth century crept in through state constitutions.⁸ In the same era, the Supreme Court reflected a similar ambivalence about voting rights, both for blacks and more generally. In *Minor v. Happersett*, the Court explicitly held that the Fourteenth Amendment did not provide

a right for universal suffrage.⁹ The Reduction-of-Representation clause's restriction to "male inhabitants," the Court held, permitted Missouri to have a law that excluded women from the franchise without running afoul of the Fourteenth Amendment's protection against limiting the "privileges and immunities" of citizenship.¹⁰ In so holding, *Minor* explicitly held that suffrage is not "one of the absolute rights of citizenship."¹¹ So, while the Fourteenth and Fifteenth Amendments were certainly monumental, by their text and interpretation, they were not enough on their own. The Court's decisions made it clear that, in keeping with Tocqueville's observations, further "concession follow[ing] concession" would be necessary to vindicate this fundamental right.

Nevertheless, just 13 years later the Supreme Court led the way ahead in *Yick Wo v. Hopkins*, where it began to chip away at harsh description of the right to vote that had appeared in *Minor*: "Though not regarded strictly as a natural right, but as a privilege merely conceded by society, according to its will, under certain conditions, nevertheless it is regarded as a fundamental political right, because preservative of all rights."¹² Ultimately, however, it was not until the women's suffrage movement gained steam, again coinciding with a war (World War I), that women would be guaranteed suffrage.¹³ Ratified in 1920, the Nineteenth Amendment provided that the "right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex."¹⁴

In the fourth significant period, the Second Reconstruction (usually thought to cover the 1950s through the early 1970s), the relation between the Supreme Court and political branches of government became more complex. Following the First Reconstruction of the 19th century, the country had seen massive disenfranchisement through the establishment of Jim Crow laws to prevent blacks, and eventually all minorities, from voting. Where women largely succeeded in effective enfranchisement immediately, their black counterparts failed. But again, the Supreme Court intervened. Picking up where it

left off in *Yick Wo*, in 1927 the Court struck down a Texas statute that provided that “in no event shall a negro be eligible to participate in a Democratic party primary election held in the state of Texas.”¹⁵ Texas went back to the drawing board, and the Court again struck down a white-only primary in Texas. In 1935, the State’s third revision finally passed muster, when the Court upheld a law that had the unfortunate effect of excluding blacks from the only primary that really mattered for them.¹⁶

As with the women’s movement, change came from beyond the Court. In 1942, for example, Congress passed the Soldier Voting Act, which authorized a commission to print absentee ballots and deliver them to local jurisdictions, and required that each vote be counted. The Act also exempted military men from paying a poll tax in order to vote. This proved to be pivotal; the statute effectively ended that exclusionary device for the more than one million black men in the military during World War II.¹⁷ Just two years later, in *Smith v. Allwright*, the Court reversed its prior holding on the white-primary in Texas on Fifteenth Amendment grounds.¹⁸

Over the next twenty years, a broad coalition of civil rights activists used every tool at their disposal – the courts, the legislatures, the press – to bring about the end of exclusionary practices like the white-primary in Texas. The right to vote was always a top priority, and one major achievement came when the Constitution was amended in 1964 to eliminate the poll tax entirely for federal offices.¹⁹ The culmination of these successes was the Voting Rights Act of 1965, which relied for its success on validation by the Supreme Court. In a series of opinions, the Court upheld the Voting Rights Act as valid legislation under the Fourteenth and Fifteenth Amendments, in the face of a wide variety of challenges.²⁰ In upholding the Act’s ban on literacy tests, the Court disapproved the understanding (still lingering in some minds) endorsed in *Minor*.²¹ In addition to upholding this legislation, the Court also established as a constitutional right the one-person, one-vote principle, to avoid

manipulative practices that might be used to dilute an individual person's right to vote.²² There can be little doubt that the Court has been one of the most important institutions in the United States in preserving this right over the last 50 years.²³

Finally, there is the Twenty-Sixth Amendment, which affirmatively extended the right to vote to anyone who has attained the age of 18 (and thus adding new voters between the ages of 18 and 21).²⁴ As with other changes to the right to vote, giving 18-year-olds the right to vote was deeply steeped in social conflict and, again, war. In 1942 Congress lowered the age at which young men could be drafted into the armed forces to eighteen, and this sparked proposals to lower the voting age as well—people reasoned that if someone was old enough to fight, he ought to be old enough to vote. Nothing happened, however, until the Vietnam War brought this issue to a head. As the U.S. involvement in Vietnam expanded, opposition to the war at home increased; and much of that opposition was led by young people, who took to the streets, burned draft cards, marched on Washington, and otherwise expressed their views.

The Supreme Court, addressing a First Amendment challenge to an arrest for burning a draft card, entered the fray with *United States v. O'Brien* in 1968, a case in which it upheld the federal statute that made burning the draft card a crime.²⁵ *O'Brien* ironically provided a further reason to lower the voting age to 18: if someone could be punished for opposing or evading the draft, but that person could not vote to change those punishments, a core part of the right to self-governance was missing. Congress responded in 1970 with an interim measure that extended the protections of the Voting Rights Act to 18 year-olds. Nonetheless, the Supreme Court held that Congress's power to take such action extended only to federal elections, not to state and local elections.²⁶ Within a year, the Twenty-Sixth Amendment was passed.

This brief overview of the history of the right to vote in the United

States provides important lessons into how U.S. democracy works. The Supreme Court has often been a step in front of the political institutions, as it was in *Yick Wo*. At other times, the Court has functioned as an important back-stop to reinforce congressional legislation or to prevent erosion of rights. Granted, there has been a long-standing debate in the country about what the proper role of the Court is.²⁷ No matter what view one takes on those broader questions, however, as a descriptive matter, there can be no denying the centrality of the role that the Supreme Court has played in ensuring that the core building block of democracy – the franchise – has been protected.²⁸

FREE EXPRESSION/FIRST AMENDMENT

A country cannot call itself a democracy unless its citizens are free to express themselves without fear of retribution. That truism is reflected in the United States Constitution in the First Amendment, and it is the Supreme Court that has been the primary guarantor of the rights, as that Amendment puts them, of free speech, free press, free assembly, free exercise of religion, and lack of any established church. It is axiomatic that a flourishing democracy requires the free flow of ideas and the protection of those that wish to contribute. At the same time, even something as basic as freedom of speech cannot be unfettered. Governments are entitled to classify sensitive information; people cannot shout “FIRE” in a crowded theater; and the government is entitled to forbid such harmful materials as child pornography. In short, the scope of the freedoms protected by the First Amendment is not always obvious, and it is the Supreme Court that has drawn the necessary lines. The Court has never endorsed the blanket proposition (advocated by Justice Hugo Black) that “‘No law’ means no law.”²⁹ Instead, its approach has necessarily been nuanced.

The most fundamental distinction the Court has laid down is that between content-based and content-neutral regulations. Even deeply

offensive speech, such as the hate-filled protests at the military funerals that were at issue in *Snyder v. Phelps*,³⁰ cannot be suppressed in a free society. It is also vigilant to ensure that speech is not filtered based on the viewpoint of the speaker. This is a paradigm violation of the First Amendment. For example, in *Brandenburg v. Ohio* the Court held that the Ku Klux Klan's advocacy of the violent overthrow of the government—under circumstances in which it appeared that the speakers were *not* inciting imminent lawless action—could not be made criminal.³¹

Subject matter restrictions are also treated with skepticism, but the Court has always allowed reasonable time, place, and manner restrictions on speakers. So, for example, even though political speech is at the top of the First Amendment's hierarchy, a candidate has no right to ride through a residential neighborhood at 3:00 in the morning blaring her message from a sound truck. In *Burson v. Freeman*,³² the Court upheld a state law prohibiting the solicitation of votes, the display of political posters, and the distribution of campaign materials within 100 feet of a polling location. The Court's opinion examined the restrictions closely (applying strict scrutiny), but in the end the Court concluded that the real evils of voter intimidation and election fraud justified this kind of limited channeling of opportunities to express views.

At the same time the Court has not let this kind of balancing analysis swallow the rule. In *Republican Party of Minnesota v. White*,³³ the Court invalidated a law that prohibited candidates for judicial office from announcing their views on disputed legal and political issues. *Boos v. Barry*³⁴ invalidated a statute of the District of Columbia that prohibited displays around a foreign embassy of signs that would bring that foreign government into disrepute. The Court's treatment of these cases has had to be sensitive; it has recognized that, in the limiting case, a restriction on subject matter can have the practical effect of a viewpoint restriction. One effective way to silence an unpopular view held by a small minority would be to ban discussion

of that subject altogether, and let the majority view flourish unchallenged. The Court has addressed this problem by requiring a compelling justification before any such restriction will be permitted.

Thus far we have focused on political speech, which is generally considered to rest at the core of the First Amendment. But one person's issue may be boring to the next person, and the genius of the First Amendment is to allow the marketplace of ideas to sort out what is worthwhile and what is not. As noted earlier, there is a small, but nonetheless important, set of areas in which the Court has recognized a distinctly lower level of protection for speech. Speech that operates primarily to incite violence; libelous and slanderous speech; and obscene material like child pornography are all unprotected, and may be subject to sanctions. Commercial speech – that is, advertising – is protected by the First Amendment, but in certain ways at a lower level. Indeed, until 1976, commercial advertising was considered outside of the confines of First Amendment protection; the Supreme Court had, for example, upheld a ban on the distribution of handbills advertising tours.³⁵ This changed with the Court's decision in *Virginia Pharmacy Board v. Virginia Citizens Consumer Council*.³⁶ There the Court invalidated a Virginia law that prohibited pharmacists from advertising the prices of prescription drugs. In an opinion authored by Justice Blackmun, the Court noted that the mere fact that speech is motivated by economic interest does not serve to remove it from the "exposition of ideas" and "truth, science, morality, and arts in general." In so holding, the Court recognized the principle that speech comes in myriad forms in a democracy. How and why it has been financed may cast light on the overall meaning of the message, but it does not change its fundamental quality as "speech." At the same time, however, the Court recognized that society has a strong interest in preventing misleading speech about commercial products, about professional services, or about many other points. It has thus held that false, deceptive, and misleading advertising is not exempt from regulatory oversight.

The general restriction against prior restraints of speech is another mechanism on which the Court has relied in protecting speech. For example, *Lovell v. Griffin*³⁷ dealt with an ordinance that required prior written permission before people could distribute literature in the city. Alma Lovell, a Jehovah's Witness, distributed religious pamphlets without obtaining prior permission and was convicted under the ordinance. The Court invalidated the ordinance, in large part because its breadth of application. It recognized the incompatibility of licensing and censorship with freedom of speech and recalled that this was a powerful motivation behind the original adoption of the First Amendment. At the same time, as already noted, the Court has left room for reasonable, viewpoint-neutral regulation. In *Cox v. Louisiana*,³⁸ Justice Goldberg wrote:

The rights of free speech and assembly, while fundamental in our democratic society, still do not mean that everyone with opinions or beliefs to express may address a group at any public place and at any time. The constitutional guarantee of liberty implies the existence of an organized society maintaining public order, without which liberty itself would be lost in the excesses of anarchy. The control of travel on the streets is a clear example of governmental responsibility to insure this necessary order. . . . One would not be justified in ignoring the familiar red light because this was thought to be a means of social protest. Nor could one, contrary to traffic regulations, insist upon a street meeting in the middle of Times Square at the rush hour as a form of freedom of speech or assembly.

These are the “time, place, and manner” restrictions mentioned earlier. The Court has held that this basic principle allows for certain types of prior restraints, like permit requirements based on content-neutral, objective criteria.³⁹

Prior restraints are viewed with so much suspicion precisely because of the danger of self-censorship, or as the Court likes to call it, a chilling effect. Even after-the-fact restrictions on speech can be

harmful, but if the government is prosecuting someone for leaking classified information, for instance, the full set of protections provided by the criminal law will be triggered. First Amendment jurisprudence is peppered with cautions about the dangers of “chilling speech.” Other principles, such as prohibition against overbroad or vague laws that restrict speech, are similarly justified by the concern that people may be deterred from engaging in lawful speech for fear of the law. This is no accident. Embodied in the First Amendment is a hope informed by the history of great ideas: Great ideas come from unexpected places, they are often unpopular, and they are good at hiding. By quieting speech we quiet our potential for progress. Together with the now-familiar point that speech and democratic rights are inextricably linked, it should come as no surprise that the Supreme Court’s explication of the First Amendment has been so influential in the path of the United States as a vibrant democracy.

RESTRAINTS ON GOVERNMENT—PLAY BY THE RULES

The last general area in which the Supreme Court has influenced the structure of American democracy is broadly concerned with process. Put in the most succinct way possible, this is the principle that requires government to play by the rules.⁴⁰ The Due Process Clauses of the Fifth and Fourteenth Amendments to the Constitution specify that no person shall be deprived of life, liberty, or property, without due process of law. The Fourth Amendment to the Constitution puts restrictions on police behavior by providing that there shall be no unreasonable searches and seizures, and also by stipulating that no warrants shall issue unless there is a showing of probable cause. The Fifth Amendment, as elaborated through the famous decision in *Miranda v. Arizona*, protects a person from being “compelled in any circumstance to be a witness against himself.” These provisions, taken together, help to ensure that the United States functions under the rule of law.

Procedural due process is a concept so well known that it may not need elaboration. And yet the Supreme Court continues to encounter cases in this area. One of the most fundamental components of fair proceedings, as the Court observed two years ago in *Caperton v. A.T. Massey Coal Co.*,⁴¹ is the right to a fair trial before a fair tribunal. Critically, the judicial officer presiding over that tribunal must be unbiased; he or she cannot have a personal, substantial pecuniary stake in the outcome, nor should he or she have any other stake in the outcome that would influence the result. While there are statutes on that subject that bind federal judges, and state judges are subject to comparable codes of ethics, the Supreme Court has left no doubt that lying underneath these more detailed rules is a fundamental principle of fair proceeding.

In the case of *Mathews v. Eldridge*,⁴² the Supreme Court looked carefully at the concept of what steps the government must take before depriving a person of an important interest. It wrote:

Procedural due process imposes constraints on governmental decisions which deprive individuals of “liberty” or “property” interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment. . . . This Court consistently has held that some form of hearing is required before an individual is finally deprived of a property interest. . . . The fundamental requirement of due process is the opportunity to be heard “at a meaningful time and in a meaningful manner.”

That does not necessarily mean a full, trial-type proceeding for everything. Instead, the Court clarified, “identification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally,

the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.²⁹⁴³

The framework established in *Eldridge* has proven to be a robust and flexible one. It has allowed the Court to consider when pre-deprivation hearings are necessary, and when it is enough to give the person a full opportunity to contest the governmental action in a post-deprivation proceeding; it has allowed for helpful informality in some instances and has justified greater formality in others.

The other area in which the Court has been the primary expositor of the rules is in the field of constitutional criminal procedure. Persons accused of crime are in a uniquely disadvantaged position to use the political process to protect themselves. They are likely to be unpopular, either for the moment or for always. They are not likely, either as individuals or as a group, to have much of a voice in legislative bodies. But for broader institutional reasons the Constitution assures everyone that the government will deal fairly even with supposed criminals. The Sixth Amendment assures them that they have a right to a speedy trial, and thus that they will not languish in prison without a day in court. The same amendment assures them that they have a right to counsel, so that they will receive as fair a hearing as is possible.

Other protections exist as well: a finding of guilt must be supported by proof beyond a reasonable doubt; under the Fifth Amendment's Double Jeopardy Clause, the government is forbidden to re-try a person if the first trial ends in acquittal; criminal defendants are entitled by the Sixth Amendment to confront the witnesses against them; and the Eighth Amendment forbids excessive bail, excessive fines, and cruel or unusual punishments. And the United States has adhered to the right to trial by jury from the community in all criminal cases except the most minor misdemeanors. The Supreme

Court has built up a rich jurisprudence around every one of these provisions. Most of them apply to all criminal prosecutions in the United States, whether in federal court or state court.

Ever since the Supreme Court decided *Marbury v. Madison*, it has been accepted that the Court is the final authority on the Constitution and its meaning. This paper has suggested a few of the most important ways in which the Court has carried out that responsibility. By ensuring that the right to vote is protected, by supporting the exchange of ideas through the expressive freedoms set out in the First Amendment, and by requiring the government itself to play by the rules, the Court has helped American democracy to become, and to remain, a reality – not just words on a piece of paper.

Judicial Review and Deliberation Process: Legitimacy, Transparency and Legal Certainty in Decisions of Supreme Courts

Gilmar Mendes, Minister, Supreme Federal Tribunal of Brazil

The Brazilian model of judicial review is one of the clearest examples of the mixed system, which combines the traditional concrete and diffuse system with abstract actions for concentrated control of constitutionality.

The diffuse control system adopted by the Brazilian system allows any judge or court to declare the unconstitutionality of laws and rules, with no restriction on the type of proceeding. As in the U.S. system, there is an ample authority granted to judges to exercise the control of constitutionality of government's acts.

Constitutional Jurisdiction in Brazil today can be characterized by originality and diversity of legal instruments aimed at the oversight of the constitutionality of government rules and protection of fundamental rights such as the *writ of mandamus* - a genuine creation of the Brazilian constitutional system - the *habeas corpus*, the *habeas data*, the *writ of injunction*, the *public civil action* and the *popular action*.

An important mechanism of diffuse control of constitutionality is the extraordinary appeal, by which the constitutional issues raised in the various courts of the country come to the scrutiny of the Supreme Court. The extraordinary appeal is the procedural-constitutional instrument intended to ensure the verification of a possible affront to the Constitution as a result of judicial decision in the only or the final judicial level (Federal Constitution, Art. 102, subsection III, letters a to d).

Until the entry into force of the 1988 Constitution, the extraordinary appeal was the most important action - as well as to the criterion of quantity - within the jurisdiction of the Supreme Court of Brazil⁴⁴. Under the previous Constitution, the extraordinary appeal was intended not only to protect the constitutional order, but the order under the federal law, so that the dispute could claim direct affront to both the Constitution and federal law.

This exceptional remedy developed according to the model of the American *writ of error*⁴⁵ and introduced in Brazil through the 1891 Constitution, in terms of its Art. 59, § 1, letter a, may be brought by the losing party⁴⁶ in the case of direct affront to the Constitution, declaration of unconstitutionality of a treaty or federal law or declaration of the constitutionality of state law expressly contested in the face of the Federal Constitution (Federal Constitution, Art. 102, subsection III, letters a to c). The Constitutional Amendment No. 45/2004 started to admit the extraordinary appeal when the decision appealed considers valid a law or act of local government in the face of the Constitution (Federal Constitution, Art. 102, subsection III, letter d).

It must be noted that under the 1988 Constitution, the crisis of numbers related to the extraordinary appeal, already existing under the previous model, has worsened. Although it appears correct the argument by which the direct system of constitutional review shall take precedence or priority after the 1988 Constitution, it is also true

that it is exactly after 1988 that the Supreme Court's quantitative problem has increased. This crisis manifests itself dramatically in the *diffuse system*, with the skyrocketing of extraordinary appeals.

Under the Judicial Reform implemented by Constitutional Amendment No. 45/2004, the Art. 102, § 3, of the Constitution, was amended to include the new institute of *general repercussion writ*, created with the goal of trying to tackle the number crisis of extraordinary appeals. That constitutional provision now establishes that “*in the extraordinary appeal the appellant must demonstrate the overall impact of the constitutional issues discussed in the case, in accordance with the law, so that the court review the admission of the appeal, and may reject it only by the manifestation of two thirds of its members.*”

The regulation of this constitutional provision was made by Law No. 11,418, of December 19, 2006, which amended Art. 543 of the Code of Civil Procedure, which now provides that “*the Supreme Court, in a ruling without appeal, will not know the extraordinary appeal when the constitutional issue versed in it does not offer general repercussion.*”

This is a significant change in the extraordinary appeal, whose admission will be screened by the Court in terms of the general repercussion of the constitutional issue versed in it.

According to this legal innovation, for purposes of overall impact, it will be considered the existence or not of relevant issues from the standpoint of economic, political, social or legal, which *exceed the subjective interests of the cause*. There will also be general repercussion when the general appeal challenge decision contrary to law or precedent ruling of the Court (Art. 543-A, § 3, of the Code of Civil Procedure). There is no doubt therefore that the adoption of this new instrument should *maximize the objective features of the extraordinary appeal*.

The diversity of constitutional actions inherent to the diffuse system is complemented by a variety of instruments aimed to exercise

abstract control of constitutionality by the Supreme Court, as the *direct action of unconstitutionality*, the *direct action of unconstitutionality due to omission*, the *declaratory action of constitutionality* and the *allegation of disobedience of fundamental precept*.

The Brazilian constitutional legislator introduced in 1965, along with incidental control of laws, the abstract control of rules before the Supreme Court, for gauging the constitutionality of federal law as well as federal and state rules. The right of filing was granted exclusively to the Attorney General.

Under the aegis of the 1988 Constitution, there was major change for the *abstract control of rules*, with the creation of direct action of unconstitutionality of federal or state law or rule (Federal Constitution, Art. 102, subsection I, letter a combined with Art. 103).

The constituent secured the Attorney General the right to file the action of unconstitutionality. This is however only one among several agencies or entities legitimated to file a direct action of unconstitutionality. Under Art. 103 of the 1988 Constitution, the following have the capacity to file the direct action of unconstitutionality the President of the Republic, the Directing Boards of the Senate and the Chamber of Deputies, the Directing Board of Legislative Assembly, the State Governor, the Attorney General, the Federal Council of the Bar Association, the political party with representation in Congress, the trade unions or professional associations nationwide.

This fact strengthens the impression that with the introduction of this system for abstract control of rules, with *wide legitimacy* and particularly with the granting of the right of filing to the different organs of society, the constituent sought to strengthen the constitutional control of norms in the Brazilian legal order as a unique tool for correction of the general incident system.

The Constitutional Amendment No. 3, from 17 March 1993, disciplined the institute of *declaratory action of constitutionality*,

introduced in the Brazilian system of judicial review, in the midst of an emergency tax reform. The Constitutional Amendment No. 3 established the jurisdiction of the Supreme Court to hear and decide the declaratory action of constitutionality of federal law or by-law, an action whose final decision on the merits possess *efficacy against all (erga omnes) and binding effect* on other organs of the Executive and Judiciary.

The allegation of disobedience of fundamental precept was set forth by the constitutional text in a quite simple way: “The allegation of disobedience of fundamental precept deriving from this Constitution shall be examined by the Supreme Court, as in the law” (Art. 102, § 1). The absence of any significant history behind it complicated enormously the infra-constitutional discipline of the institute. Law No. 9,882/1999 regulated the allegation of disobedience of fundamental precept, which can be used to – permanently and with overall efficacy – solve any controversy relevant to the legitimacy of ordinary pre-constitutional law in the face of the new constitution, which so far could only be conveyed through the use of extraordinary appeal.

The 1988 Brazilian constituent gave unique significance to the control of constitutionality of the omission with the institution of the procedures of writ of injunction and direct action of unconstitutionality due to omission. Under Art. 103, § 2, of the Federal Constitution, the *direct action of unconstitutionality due to omission* is aimed at rendering a constitutional provision effective and notifying the competent Power for the adoption of the necessary actions. In the case of an administrative body, it will be told to do so within thirty days. The object of this abstract control of constitutionality is the mere sluggish unconstitutionality of the bodies responsible for implementing constitutional norms. The formula used by the constituent leaves no doubt that it was aimed at not only the legislative duties but also the typical public activity that could in any way affect the effectiveness of constitutional rule.

The Supreme Court, the highest court of the Brazilian Judiciary, has the important role of interpreting the Constitution and ensuring that the rights and guarantees declared in the Constitution become an effective reality for the entire population. In the ever increasing demand of society, the Court has deep commitment to the materialization of fundamental rights.

In recent decades, since the advent of the 1988 Constitution, the Supreme Court has been asserting itself as true Constitutional Court. The Tribunal recently ruled important cases, in which it were discussed issues related to racism and anti-Semitism⁴⁷, the progression of the prison regime⁴⁸, banning nepotism in government⁴⁹, drug supply by the state⁵⁰, scientific research using stem cells⁵¹, the Indians' right to their land⁵², free press⁵³ and free exercise of journalism⁵⁴, as well as the recognition of homosexual unions⁵⁵, the latter ruled last week.

I emphasize that, in this context, the Court has developed the instruments for opening the constitutional proceedings to an increasing plurality of subjects. The legislation⁵⁶ allows the Court to admit the intervention in the case of agencies or entities, known as *amici curiae*, for them to express themselves on the constitutional issue under discussion.

Moreover, the Supreme Court, if necessary for clarification of material fact or circumstance, may request additional information, appoint experts or commission of experts to give their opinion on the matter for trial, or hold public hearings to gather the testimony from people with experience and authority in the matter.

The Court has largely used these mechanisms of procedural opening, especially the public hearings held to discuss the controversial topic of scientific research using embryonic stem cells⁵⁷, the issue of abortion of an anencephalic fetus⁵⁸, the problems of single system of public health and affirmative action for Afro-Brazilians⁵⁹.

This open and pluralistic character of the Constitutional Courts, essential for the recognition of rights and the fulfillment of constitutional guarantees in a democratic state, also implies the recognition by society, of the Court's role and its institutional strength. When deciding relevant cases, with responsibility and transparency, the Brazilian Supreme Court shall be consolidated as an institution vital to democracy.

In this regard, the process of deliberation adopted in the Supreme Court is very peculiar in respect to the various examples found in comparative law.

In the Supreme Court of Brazil, the ministers meet, ordinarily, three times a week for the trial of cases. On Tuesdays, there are sessions of the two panels, each one composed of five ministers, excluding the President of the Court. On Wednesdays and Thursdays the eleven ministers meet in sessions of the Plenary. The declaration of unconstitutionality of laws and normative acts is of exclusive jurisdiction of the Court plenary⁶⁰.

An interesting aspect of the Brazilian constitutional jurisdiction refers to the wide publicity and the organization of trials and of procedural acts.

Art. 93, subsection IX of the 1988 Constitution prescribes that *“all judgments of the bodies of the Judicial Power shall be public, and all decisions shall be justified, under penalty of nullity, but the law may limit attendance, in given acts, to the interested parties and to their lawyers, or only to the latter, whenever preservation of the right to privacy of the party interested in confidentiality will not harm the right of the public interest to information”*.

Contrary to what occurs in different systems of constitutional justice, in which actions of unconstitutionality are judged in private hearings, the trial sessions of the Brazilian Supreme Court, in exercising

its constitutional jurisdiction, are largely public.

The debates are broadcast live on “Justice TV”, an open channel of television, and by “Radio Justice”, both with ranges throughout the country.

Created by Law No. 10.461/2002, the “Justice TV” is a non-profit public television channel, coordinated by the Supreme Court, which aims to disseminate information on activities of the Judiciary, the Attorney-General, the Advocate-General and the Public Defender’s Offices. It is an approach channel between citizens and these agencies, as defined in the Constitution as essential to Justice. In a language easily assimilated by the common citizen, the TV Justice serves to enlighten, inform and teach people how to defend their rights. The role of TV Justice in recent years has become the activities of the Judiciary more transparent before the Brazilian population, contributing to the openness and democratization of this Power.

The trial sessions are conducted by the President of the Court. After reading, by the Minister rapporteur of the case, of the report describing the constitutional controversy, and the oral arguments of lawyers and the Public Prosecutor, the opportunity for each Minister to make its vote is open. In the process of abstract control of constitutionality, it is required a minimum quorum of eight Ministers. The constitutional question is decided with at least six votes for the allowing or dismissing the action.

The votes of the judges are revealed only at the trial session, in public. It is common that the votes produce intense debates between Ministers of the Court, all broadcast live on television. When a Minister feel the need to better reflect on the topic discussed, compared to the arguments raised in the course of the debate, they can ask the examination of the records. Expressly provided for in the Code of Civil Procedure, in Art. 555, § 2 (*“When not considering themselves able to immediately give their vote, to any judge it is granted to ask*

the examination of the records (...)”), the request for examination is a corollary of democracy, since it seeks the qualification of the debate, the increase in argumentation, the improvement of reasoning, ultimately, the regular and productive development of the trial.

We should not forget that the Constitutional Jurisdiction is legitimized by democratic reflection and argumentation produced according to the rationality of its own rules and procedures that conduct the trials.

Completed the trial, it is the rapporteur of the case, or the driver of the winning vote, that draft the ruling, which will be published in the Journal of Justice, daily publication, in national circulation, of the official press in Brazil.

In addition to publishing in the Journal of Justice (in print and digital), the whole tenor of the trial is available to all on the official Supreme Court website (www.stf.jus.br).

The published decision must contain the full texts of all votes cast and the transcript of the oral discussions that took place in the public session, as well as a synthesis (abstract) of the main reasons for the decision.

The wide publicity and the peculiar organization of the judgments make the Supreme Court a forum for debate and reflection with echo in the collective and democratic institutions.

Another evidence that the Court tries to adapt to new ways to approach society is the use of resources such as *YouTube* and *Twitter*. The Supreme Court was the first Court to have a special page on *YouTube*, where one can see the main sessions of the trial, as well as programs broadcast by TV Justice and other activities undertaken by the Court. On *Twitter*, the Supreme Court has over 90,000 followers, who receive constant update messages of what is happening at the highest organ of the Brazilian Judiciary.

In addition to stimulating release mechanisms of the Court to society, the Supreme Court has evolved in adopting new techniques to make decisions in the abstract judicial review. Succeeds, through them, in building a solid jurisprudence on the subject of fundamental rights and in adopting effective techniques for reaching a decision on judicial review. All in order to put into effect the normative force of the Constitution and to build a society immersed in this culture of protection of constitutional rights of the individual.

I emphasize that the Supreme Court also often use comparative law as a parameter for their decisions, even if it is not decisive in the formation of its jurisprudence.

Both doctrine and jurisprudence of comparative law are relied on votes cast by Ministers of the Court to do so as a means to qualify the debate and deepen the analysis and arguments developed in the trials. The result can be observed in well grounded decisions, with consequent improvement of the Court jurisprudence.

It is undeniable that comparative law has a strong influence on the jurisprudence of constitutional courts nowadays. One can not lose sight that today we live in a “Cooperative Constitutional State”, identified by Professor Peter Häberle as that which no longer presents itself as a constitutional state inward-looking, but which is available as a benchmark for other constitutional states, members of a community⁶¹. It should be taken into account that the comparison of fundamental rights can be qualified as the fifth method of constitutional interpretation, along with the classical methods developed by Savigny⁶².

Following this trend, the Supreme Court remains open to produce doctrine and jurisprudence developed in comparative law. This process is intensified by the prospect of an ever increasing growth of the exchange between the Courts and Constitutional Chambers of different countries. The cooperation between organs of constitutional

jurisdiction undeniably fosters the exchange of information between the Courts.

From this perspective, the Brazilian Supreme Court has, on its Web site, a specific area for the publication of translations - for English and Spanish – of its most significant case law summaries.

In a sign that it accompanies technological advances and based in the commitment to the environment, the Supreme Court entered the era of the electronic proceeding, with the goal of having an automatic judicial management, simple, accessible, faster and mainly more economic.

The petition to the court today is done electronically, via the Internet, with several scripts and protections that ensure credibility and acceptance by the legal community.

These are, in general, the main features that consolidate the role of the Supreme Court as a legitimate institution, transparent and secure, ensuring its status as a permanent body, whose history is intertwined with the consolidation of the democratic system and the Brazilian Judiciary.

Controlling Constitutionality and the Process of Judicial Review. Legitimacy, Transparency and Judicial Security in Supreme Court Decisions

Jeffrey Minear, Counselor to Chief Justice, Supreme Court of the United States

INTRODUCTION

Article III of the United States Constitution creates the Supreme Court of the United States, but it does not, by its express terms, answer several questions that are fundamental to the process of judicial review. Article III does not state whether the Supreme Court's decisions are binding on the executive and legislative branches of the federal government; it does not specify how the public may ascertain that the Court's actions are consistent with constitutional limitations; nor does it dictate the respect that the Court must give to its own past decisions. Over the past two centuries, the Court itself has had to address the legitimacy of its functions, the transparency of its processes, and the stability of its precedents. It has done so by reference to the vision of those who drafted the Constitution, the Anglo-American judicial tradition, and the need to create a workable system of government. In one sense, the concepts of legitimacy, transparency, and stability, may be viewed as central pillars of an effective supreme court. But closer inspection reveals that they also serve to brace one another in establishing a secure foundation for judicial review.

LEGITIMACY

Article III of the United States Constitution states that “[t]he judicial Power of the United States, shall be vested in one supreme Court,” U.S. Const. art. III, § 1, and it prescribes the jurisdiction of that court “shall extend to all Cases, in Law and Equity, arising under this Constitution, the laws of the United States, and Treaties made, or which shall be made, under their authority,” *id.* at § 2. But Article III does not expressly address a critical issue respecting the scope of the judicial power: May the Supreme Court declare, with binding force, that an act of Congress violates the Constitution? Leading American statesmen who had participated in the formulation of the Constitution had considered the issue. Most notably, Alexander Hamilton argued that the courts must have that power. In *The Federalist No. 78*, a famous essay urging ratification of the Constitution, Hamilton wrote:

The complete independence of the courts of justice is peculiarly essential in a limited Constitution. By a limited Constitution, I understand one which contains specific exceptions to the legislative authority Limitations of this kind can be preserved in practice no other way than through the medium of courts of justice, whose duty it must be to declare all acts contrary to the manifest tenor of the Constitution void. Without this, all the reservations of particular rights or privileges would amount to nothing.

The Judiciary Act of 1789 contained a provision that, more than a decade later, provided the Supreme Court with the opportunity to address the issue. That opportunity was, of course, the famous case of *Marbury v. Madison*, 1 Cranch (5 U.S.) 137 (1803).

In 1801, President John Adams appointed William Marbury to a minor federal position of justice of the peace, but Adams’s secretary of state failed to deliver the commission. When President Thomas Jefferson assumed office, Marbury sued James Madison, Jefferson’s secretary of state, to compel Madison to deliver the commission.

Marbury brought his suit as an original action in the Supreme Court, invoking Section 13 of that Judiciary Act of 1789, which empowered the Supreme Court to act as a court of first instance in issuing writs of mandamus commanding a federal officer to fulfill legal duties. While the suit was pending, Congress repealed the act that had authorized Adams to appoint Marbury.

Chief Justice John Marshall wrote the opinion for the Supreme Court in *Marbury*. The Court reasoned that Madison had wrongfully withheld Marbury's commission and that mandamus would normally be the appropriate remedy for Marbury to invoke a court's aid in obtaining it. But the Court ruled that it lacked jurisdiction to provide Marbury with a remedy because Section 13 was unconstitutional. The Court pointed out that Article III of the Constitution does not authorize it to exercise original jurisdiction to issue writs of mandamus to federal officers and that Section 13 accordingly violated the Constitution and was void. Chief Justice Marshall wrote, in words now famous, "It is emphatically the province and duty of the judicial department to say what the law is." 1 Cranch (5 U.S.) at 177.

The Supreme Court ruled that it had the power to declare acts of Congress unconstitutional, but merely pronouncing possession of that power could not, by itself, make it legitimate. The Court had to have a reasoned basis for its conclusion. The Court could draw on at least three sources to support its determination. First, it could point to the understanding of the Framers of the Constitution, ably articulated by Hamilton in *The Federalist No. 78*. Second, the Court could rely on the traditional role of the courts in the English system, which provided the model for American courts, to resolve the meaning of laws. As Chief Justice Marshall explained, the Constitution was law and amenable to judicial interpretation. Third, the concept of judicial review of legislative action was consistent with the fundamental theory on which the United States Constitution was based—the people secured their liberty by dividing the powers of government between three coordinate branches. The power of judicial review

placed a check on the executive and legislative branches. If either the body that made laws, or the body that enforced them, also possessed the power to determine their meaning, then—in the words of Hamilton—constitutional rights “would amount to nothing.”

The Court had the force of reason behind its decision, but history teaches that reason can be overborn by governmental power or the popular will. The question remains, why did the other branches of government, and the people themselves, acquiesce to the Court’s claim of authority? The answer is complex. As Justice Breyer explained in his recent book, *Making Democracy Work*, the Court faced the coordinate branches of government might refuse to enforce unpopular decisions. But the Court overcame that threat over time, because the public grew to trust the integrity of its decisions. Among the contributing factors, the Court drew support from the transparency of its process and the stabilizing force of precedent.

The Court benefitted immeasurably from its practice of deciding controversial issues through an open process in which the Court explains its rationale. The Court’s adjudicatory process includes oral and written adversarial submissions that are available for public view. It culminates in a written opinion articulating the basis for the decision and responding to contrary arguments. That process bolsters public confidence in the Court’s legitimacy because it demonstrates that the Court’s decisions are based on objective legal judgment. A transparent decision-making process provides an unobscured view of the Court’s rationale and confirms that the decision is in fact based in law. For example, in the case of *Marbury*, Chief Justice Marshall’s decision, written in plain language, was understandable to non-lawyers. Its publication helped to validate the legitimacy of the Court’s claim of authority by demonstrating the Court’s rationale was grounded in the rule of law.

The Court also benefitted from its practice, inherited from the English common law tradition, of adhering to its own decisions unless

there are powerful reasons for departure. Adherence to precedent bolsters public confidence in the Court's legitimacy because it provides assurance that the Court's decisions resolve disputes based on generally applicable legal principles that will guide future controversies, and not on the basis of the need to respond to the immediate exigencies of the day. Chief Justice Marshall's decision in *Marbury* also illustrates that point. The Court acknowledged that Mr. Marbury, in theory, had an entitlement to his commission, but the Court nevertheless declined to provide relief based on a principle of general application—the Court lacked jurisdiction under the Constitution to adjudicate the dispute. The Court's decision is especially remarkable because the Court declared its authority to invalidate an unconstitutional act of Congress in a decision that, as a matter of precedent, produced a permanent restriction of the Court's original jurisdiction.

TRANSPARENCY

Article III says little about the form of the Court's adjudicatory process. When the Court convened in 1790, it adopted English legal practices, which relied heavily on oral proceedings in a courtroom open to the public. The English practice was founded on a notion of transparency in the sense that judges were expected to gain their knowledge of a case, and base their decision solely, through what they learned in a courtroom open to the public. The Court has altered its practices over time, placing greater reliance on written submissions and reduced reliance on oral argument. In the early nineteenth century, oral argument could last days, and written briefs were modest. Today oral arguments are generally restricted to 30 minutes per side, but the written submissions are relatively lengthy—typically 15,000 words per party. *See* Sup. Ct. Rules 28 and 33. The Court has discretion to select which cases it will review, and it grants only a small fraction—about one percent—of parties' petitions for review. But it typically hears oral argument in every case in which it grants review.

Although the Court has placed increased emphasis on written briefs, over oral advocacy, it continues to provide opportunities for public observation of the adversarial process. Interested persons may examine the Court's docket, which provides the status of pending cases. Persons can access the docket "on-line" through its Website, which is located at <http://www.supremecourt.gov/>. They may also obtain copies of the parties' written briefs on-line. Members of the public can attend oral arguments in Court; they may also review oral argument transcripts and listen to the audio recordings of the hearings, both of which are posted on the Court's Website.

Transparent processes are beneficial in significant part because, as noted above, they reinforce the legitimacy of the Court's judicial review function. The public has far greater confidence in public institutions if they can see their operations and assess for themselves the fairness of their processes. The Court is no exception. But there are also significant limits to the benefits of transparency. The Court does not allow the public to observe the internal deliberations among the Justices. English and American courts have generally followed the rule that judges conduct their discussions of pending cases in private to encourage the utmost candor in reaching consensus. The Supreme Court has adhered to that practice; when it meets to discuss a case, only the Justices are present. Experience in a wide variety of fora and contexts—including international legal exchanges such as this one—suggest that confidentiality encourages candid deliberation, especially when dealing with controversial issues. The practice of confidential deliberations might be thought to diminish the transparency of the decision-making process to the public, but it has the important benefit of ensuring that the Justices can conduct transparent discussions among themselves.

Although the Court's internal deliberative processes are not open to public view, the Court's decisions are available for the public to read, evaluate, and critique. The resolution of the case—including the Court's opinion and any separate opinions of concurring and

dissenting Justices—is of course what is most important to the parties and the public at large. As in other endeavors involving reason and judgment, the quality of the final work product is vital. The answers to many difficult questions are not immediately apparent, and the views of judges may change in the course of their study, reflection, and discussion with colleagues. Initial conclusions may evolve. The legitimacy of the Court’s work depends on the persuasive force of the final reasoning that it puts forward in support of its judgment.

The transparency provided by the publication of final decisions is not only central to establishing the legitimacy of the Court’s judicial review function, but it is also critically important in maintaining a stable body of precedent. The Anglo-American system places heavy reliance on the concept that judges should decide no more than necessary to resolve the dispute before them and leave further questions to resolution when they arise. Under this common law process of step-by-step adjudication, the rationale of each decision provides a potential foundation for resolution of the next case. The Court’s practice of providing a written decision explaining its reasoning enables the Court to assess the stability of the legal structure that the Court is building while the construction is underway. The concurring and dissenting opinions are valuable parts of the edifice because they may reveal where the legal structure has weakness or is in need of repair. The repair takes the form, of course, of reconsidering past reasoning and refining or even overruling past decisions.

STABILITY

The drafters of Article III of the United States Constitution were familiar with the English system of common law adjudication, and they implicitly assumed that American courts, including the Supreme Court, would adhere to the practice of creating and following precedent. The Court ratified that assumption, early in its history, by following it in practice. For example, when Chief Justice Marshall described the scope of the writ of mandamus at the outset

of his opinion in *Marbury*, he relied on precedent from the English courts—Lord Mansfield’s decision in *The King v. Baker*—and he made reference to other precedents cited by the parties. See 1 Cranch (5 U.S.) at 168-169. The American practice of reliance on precedent not only has a long pedigree; it also has a practical virtue. As a future Justice of the Supreme Court, Benjamin Cardozo, noted in his famous lecture series, *The Nature of the Judicial Process*, “the labor of judges would be increased almost to the breaking point if every past decision could be reopened in every case, and one could not lay one’s own course of bricks on the secure foundation of the courses laid by others who had gone before him.”

The reliance on precedent, however, has other benefits as well. Adherence to precedent contributes to the legitimacy of judicial review because “it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process.” *Payne v. Tennessee*, 501 U. S. 808, 827 (1991). The existence of precedent constrains the discretion of judges and confines the reach of their judgments. Furthermore, it does so in a manner that is consistent with a constitutional system founded on divided governmental power and adherence to the rule of law. Judges who are bound by the reasoning of their predecessors and colleagues have far less latitude to act lawlessly. Instead, they must justify their decisions through reasoning that is consistent with the consensus of other judges expressed over time. As Cardozo described, the system of adherence to precedent requires a judge to lay his course of bricks on the foundation of others. That not only saves labor, but it provides greater assurance that, if time has proven the foundation strong, each new row will run straight and true.

But in the American system, adherence to precedent is not an inflexible command. It is a principle of policy that encourages the stepwise development of law in a predictable and intelligible way. If time and experience reveal that a past precedent is unsound, the

system allows for correction. A precedent can be limited or overruled. If the system works well, the need for those corrective actions is infrequent. The system, however, depends vitally on the transparency provided through the clear and carefully reasoned decisions. If the Court carefully articulates its reasoning, it not only demonstrates the correctness of its judgment, but also lays a cogent foundation for further development of the law. At the same time, if a Justice who disagrees with the outcome sets out a compelling contrary rationale in dissent, it may slow or redirect that development—or even provide a future basis for correcting past error.

CONCLUSION

The concepts of legitimacy, transparency, and stability are vitally important in any system for constitutional adjudication. The modest purpose of this paper is simply to suggest that they should not be viewed as independent concepts. Rather, they are mutually supportive principles. The legitimacy of a court's ruling can be enhanced through transparency; transparency is necessary to make precedents accessible; and adherence to precedent in turn reinforces the legitimacy of a court's rulings. Each bears a relation to the other in securing the ultimate objective of every sound court system—the promotion of justice through the rule of law.

The Challenges of Court Administration

James Duff, Director, Administrative Office of the United States Courts

**Retired in 2011*

Thank you very much Paulo. I am honored to be with you today and appreciate the opportunity to contribute to this useful dialogue between the Judiciaries of Brazil and the United States. I have been asked to address challenges in the court administration in the United States, and, as I am the Director of the Administrative Office of the United States Courts, I will focus on our federal court system. However, as you are aware, there are in each of our states individual state court systems, some of which parallel the federal court system in structure and some of which depart from the federal court system in significant ways. One of the notable differences between many of our state courts and our federal court system is that in our federal court system, our judges are appointed, nominated by the president and confirmed by the Senate, whereas in the state court system, in some states, judges are elected to the bench. So there are some significant differences in our two systems of judicial systems in the United States. I will focus on the federal court system and the challenges that we face.

There is a written outline that I have prepared that goes into a great deal of detail and background for your information. I will not go through all of that today at the luncheon; I will abbreviate it somewhat.

For the time that I have with you this afternoon, I would like to focus on two distinct arenas in which the Judiciary faces challenges. The first arena is with the other two branches of government in the federal court system, with the Congress and the Executive branch, Legislative and the Executive branches, and the second arena is the arena within the Judiciary itself. I will first start with the federal arena, with the other branches of government. Justice Robert Jackson, who served on the Supreme Court of the United States from 1941 to 1954, was an eloquent writer and many of his opinions contain sound observations about our system of government that are as applicable today as they were when he wrote his opinions for the court. He observed about our Constitution, and the famous [Steel Seizure case](#), that the Constitution enjoins upon the three branches of our government separateness but inter-dependence, and my job as head of the Administrative Office of the Courts, indeed the very existence of the Administrative Office of the United States Courts, is the living, breathing evidence of that separateness but inter-dependence of our three branches of government.

The Administrative Office was created in 1939 by statute, by the Congress of the United States, to serve the judicial branch and represent its interest's vis-à-vis the other two branches of government. Prior to the Administrative Office's existence, our Judicial branch was represented by the Department of Justice of the United States, which is within the Executive branch of our government, both in for seeking the budget for the Judiciary and for taking care of its administrative needs. There were emerging conflicts of interest in the Justice Department's representation of the Judiciary's interests, particularly as the federal Judiciary grew over time. In the Industrial Revolution, in the early and mid-1900s in the United States, our federal court system grew very significantly in size, in conjunction with the increase in federal laws and federal regulations. And so, the Administrative Office was created as a part of the judicial branch to not only provide administrative assistance to the courts but also to represent its interest before the Congress. We certainly remain

inter-dependent branches, however. Among other things, the Administrative Office seeks the Judiciary's budget from the Congress for each year. I do want to focus a bit on the federal arena, and the three branches on seeking the budget, as funding right now is currently one of our greatest challenges, and not only for our Judiciary but the country.

The Judiciary recently completed a strategic plan to address the issues and challenges facing the federal courts in the future. It identifies seven fundamental issues that the courts face, ranging from the delivery of justice and effective management of resources to technological advances to enhancing a public understanding of our branch. Funding from the Congress affects all of our identified plans, and because we as a country are going through challenging national budget issues, the Judiciary has prioritized its strategic plan to adjust to the budget constraints. We have also engaged in cost-containment efforts within our branch for the past seven years. We, in fact, were a little bit ahead of the budget crisis as we anticipated much more severe budget constraints in the future, and we were being good stewards of the funds that we were being given. So we have engaged in cost-containment efforts throughout the Judiciary for the last seven years.

Our appropriators have recognized those efforts recently. Our 2011 budget was a remarkable one in that we received more funds than we did in 2010. This is a very unique situation for the Judiciary because most of the other branches, and agencies within those branches of government, received cuts from the 2010 budget, or at least were frozen at the 2010 levels. Yet, because we had been such good stewards and met certain challenges that we faced years ago, anticipating this ahead of time, we were rewarded, I believe, by Congress. Congress recognized that the costs that we seek from them are hard numbers and much needed to preserve and protect the Judiciary and its functions.

Another challenge that we face with the other branches and with Congress in particular, is maintaining the independence of the Judiciary. Our Constitution created one Supreme Court and such lower courts as the Congress chooses to create. The Congress has created numerous lower courts, at the appellate and district court levels, and the president nominates our judges, confirmed by the Senate, but our judges' independence from the other branches is secured in the Constitution. Even the lower court judges' independence is secured in the Constitution by giving them life tenure during good behavior and providing that there may be no reduction in their salaries while they are serving in office.

I would add that institutionally, we help secure our independence by managing and administering our courts efficiently. It was alluded to earlier that I work with the Judicial Conference of the United States, which is a governing body existing of the 13 chief judges from the appellate courts around the country and 13 district court judges who are appointed to the Conference. It functions, in essence, as our Board of Directors with 25 committees serving under it, and those committees are inhabited by judges who are appointed by the Chief Justice. That administrative structure is crucial to helping us maintain the independence of our branch of government. We must demonstrate that we are managing our courts, the lower courts in particular, because, as I mentioned, the Constitution created the Supreme Court of the United States separately. It has its own administrative responsibilities and operates in its own orbit. In order for us to maintain our independence from the Congress, we have to demonstrate, regularly, that we are taking care of and managing our issues diligently and efficiently. We have to make certain that we are resolving our own conflicts of interest and that there be proper recusals when they come up, and we must be careful stewards of funds to convince Congress that there is no need for their interference.

We see legislation every year in Congress that would, if passed, impose requirements on the courts that are unnecessary or, in some

instances, threatening to the independence of the Judiciary. There is a bill pending now that would create an Inspector General to oversee the Judiciary. It is a needless piece of legislation in our view and would be a serious intrusion on the independence of the Judiciary to have the threat of an Inspector General over our judges. So we have successfully fended off such legislation in the past and, of course, we hope to do so this year as well, in large part because we have been such good stewards of the Judiciary.

The second arena I wanted to address, briefly, with regard to challenges facing our courts, is within the judicial branch itself. Our federal Judiciary has over 35,000 employees, over 2,000 judges, we have 683 court buildings, and a total of 802 structures throughout the country that house and serve the federal Judiciary. I have addressed the Judiciary's budget process very generally, and that consists of obtaining our budget from Congress, and it has been mentioned that it totals approximately seven billion dollars a year. For the first 45 years of the Administrative Office's existence, it did manage centrally, here in Washington, the entire budget setting, every employee's salary, and the buying of all of the equipment right down to the paper and pencils that the courts used, the furniture, the books, etc., which we found became extremely inefficient. So, between 1986 and 1993, the Administrative Office began decentralizing our budget process and the administration of the courts.

Each court now enjoys very broad authority to manage its own operations, to set its own budget priorities within the monies that it receives from us that are distributed to the courts and within certain national standards. The clerks of our courts and the other court administrators manage and spend court funds under the supervision of the chief judge and a committee of judges, or the court as a whole, depending on each district's preference. They use procedural guidelines provided to them by the Administrative Office of the courts, and within limits, the courts may shift spending from one category to another to meet their needs. For example, we have

established a work-measurement formula to determine the number of court support staff needed to handle the work associated with cases and certain other events. Courts may use the money allocated to them for personnel to hire as many, or as few, staff as is desired at each court. There is a whole list of other things that we have done to decentralize the management of the courts that are listed in the written materials that I have provided to you. I invite your attention to them in the written materials.

I would summarize that the challenges we face within the Judiciary revolve around finding the right balance between what should be run nationally, out of Washington, such as imposing a uniform operating procedure for all courts where that proves to be most efficient, and where it makes more sense to allow the local courts, the local federal courts, districts and circuits, decide for themselves how best to manage their own courts locally. The biggest challenge is finding the right balance. However, I am pleased to report that we are very close in finding that perfect balance. I think there is a very healthy and good operating atmosphere between the individual circuits and district courts and our Administrative Office of the Courts here in Washington. We work very closely together, and when we show up with auditing and other functions to assist the courts. I think we have persuaded them that we are really trying to help and are not just trying to interfere with their management and running of the courts. In conclusion, those are the primary challenges I see in two very distinct arenas, both within the Judiciary and with the other branches of government that we face in administering the court system in the United States. I am very grateful that you invited me to be with you today. I know there is a lot we could learn from you. These exchanges are so useful to both systems, and I am honored to be included in the exchange.

The Role of Alternative Dispute Resolution: Conciliation and Mediation in Brazilian and American Law

Morgana Richa, Minister, National Council of Justice of Brazil

The exchange of ideas between the American and Brazilian judicial systems began thirteen years ago, when we identified the challenges of the judiciary as follows: legal training and education; the selection, training and punishment of judges; procedural reform; small claims courts; and alternative solutions to disputes.

We are here representing the two largest democracies of the Americas, and consequently, the countries that hold the largest responsibilities in the hemisphere. Our role is undoubtedly of great importance. As stated by Minister Peluso, we are here to build bridges in the exchange of experiences and reflections. I stress, however, that these bridges exist and started to be paved thirteen years ago when we first had the opportunity to learn about the American model, which served as a source of inspiration for building a system in Brazil that was established years after.

Brazil is a country that shares a similar historical chronology with the United States. It differs drastically from the US, however, in terms of cultural and social aspects. Brazil is emerging in today's complex social and economic landscape. It is a country in transformation that aspires to become a world leader. As public officials in this process,

the responsibility assigned to us is very important. As stated earlier today, “justice makes Brazil” - this is perhaps the most important duty of the National Council of Justice (*Conselho Nacional de Justica, CNJ*).



21st century Brazil achieved rapid advancements, opening it up for a range of opportunities, featuring the country in two different dimensions of Alternative Dispute Resolution ADR. One part stems from the state itself, the other, refers to the citizens. Within the Brazilian Judicial Branch, The National Council of Justice has administrative jurisdiction over Brazil’s courts, but not over the Supreme Federal Tribunal. There are a total of 56 courts of mediation and reconciliation, 27 courts of justice, 24 regional labor courts, and five regional federal courts. We have 56 courts in a country of continental dimensions, filled with social, economic, cultural and structural disparities. Hence, the Council must aim to create a national justice system that is standardized and streamlined. The idea for the Council was born 13 years ago and was effectively installed in 2005.

In practice, the Council is a watershed between the judicial branch that existed before, where we had isolated judicial organs, and the system of reallocated justice we have today. Its functions include

planning, coordinating and administrative control in improving judicial services rendered. Other important responsibilities of the Council are the expedition of regulatory acts and the recommendation of solutions to problems that arise in the judicial process. .We can carry out public policy to the extent that we have jurisdiction over institutes directly involved. We monitor judicial public policy regarding making justice more readily accessible, appeasement and social responsibility and regarding citizen's rights and fundamental rights as written in the federal constitution.

Access to justice in Brazil is a constitutional right. However, this “access” to justice must not be viewed solely as an entry into the judicial process. Today we understand “access” also in terms of output, in other words, the right to a fair judicial order in which the resolution of a case in a reasonable timeframe is guaranteed. The judicial power is an instrumental power, it does not have an end goal in and of itself, but it provides a service with the same connotation. Hence, effectiveness is a part of its result. An aspect that stands out in relations to this is the legitimacy of the performance of the judicial power, in other words, the perceptions and social evaluations of its efficacy. These perceptions and evaluations were principal motives behind the decision for a reform of the judicial power given its bad social repercussion.

When we speak of public policy, we no longer envision a mere empirical model, but something structural. Therefore, along with the establishment of the National Council of Justice, we had the creation of “Justice in Numbers”. Justice in Numbers was established alongside the council to provide knowledge to policymakers. It served as a collector of precise data providing indicators and systemized data on the performance of courts.

In the Justice in Numbers report of 2009, the total number of lawsuits in process was 86.5 million. This means that if each case has at least two parts, there was approximately one case per citizen

in Brazil. This demonstrates a high level of activity. In 2009, 25.4 million new cases were filed, and 25 million cases were assigned, with a congestion level of 71% for 16 thousand magistrates and 312 thousands servants. Hence, in the scenario described, we have a culture of litigiousness, obstacles to the modernization and celerity of the Judicial System, and search for self- imposed solutions and alternatives for solving conflicts. This led to the creation of the national reconciliation weeks in 2006.

The National Weeks of Reconciliation began with the Day of Justice, December 8, 2006, and quickly became a permanent project with the strategic design of actions necessary to bring about change to the judicial landscape. Below is a graph of the evolution of the national weeks of reconciliation from 2006 to 2010, with increasing numbers of cases being processed through this model. There is an evolutionary sequence that shows steady annual growth in the number of attendees at these National Reconciliation Weeks. The statistics show a total of one million 590 thousand designated hearings, one million 200 realized hearings, 564 thousand agreements made, and 3 billion 384 million BLR raised. In total, two million 357 thousand people attended. This represents huge successes in terms of the effectiveness of reconciliation, including access to justice, social satisfaction, and the reduction of costs. We were able to add one of the best services that the judicial power could provide for the Brazilian population.

	2006	2007	2008	2009	2010
Designated Hearings	112,112	303,638	398,012	333,324	443,209
Realized Hearings	83987	227,564	305,591	260,416	365,880
Agreements Made	46,493 55.36%	96,492 42.40%	135,337 44.3%	122,943 47.2%	173,133 47.3%
Values		375M	974M	1Billion 59M	1Billion 76M
Collection of INSS + IR				77M	73M
People Attended		411,000	633,000	485,000	828,000

Due process is the most significant bottleneck in the Brazilian judicial system. The process of acquiring knowledge prior to sentencing should not pose a problem. However, when executed, our effectiveness is many times compromised. This is why agreements and conciliation are so important in these types of cases.

“Litigators in mass” is another important project we established that aims at improving the judicial system’s effectiveness. According to research conducted by the CNJ, twenty five percent of cases currently in process have the same litigators working on them. This means that the crises of the Brazilian judiciary are in large part represented by these litigators. We established a collective project with regulatory agencies for cooperation techniques and clear goals that will eventually result in a reform. Within the projects, we also included law enforcement agents. Among them were lawyers, representatives of the Public Ministry, associations, and law schools. The work was aimed at training through schools with an emphasis on communications strategies for visibility and a change in culture.

Another critical aspect is the empowerment of magistrates. This is why the CNJ proposed a resolution of criteria for recognition of magistrates that takes into account their empowerment and productivity, especially regarding reconciliation.

Over the past five years we successfully consolidated the national movements for reconciliation. In addition, the practice of ADR was officially incorporated into the agendas of the courts. The model became a national judicial policy on the adequate management of conflict through a resolution that was approved in 2010. The resolution has a principal basis: the presentation of motives where aspects of control, operational efficiency, and access to justice, social responsibility, incentives, and the improvement of the system are outlined. We also have a perspective on structuring, standardizing, and streamlining the process. There are three basic pillars to this public

policy: The first provides the courts with reconciliation groups. These reconciliation groups are the essence of the work the CNJ does within courts, in other words, they are the “intelligence” of the national public policy mirrored and projected to local courts. The centers for reconciliations become structured organisms to congregate and execute reconciliation activities where there is a process through collaborators, mediators and lay judges. The third pillar relates to the training of magistrates and public servants – we need professionals who are fully educated on the methods of reconciliation.

This is how ADR in Brazil has advanced, through the model I have outlined to you today. In conclusion, I leave with you the belief that in order to find solutions we must invert the logic. If we have the logic of dispute, we must find the logic of solution. We believe this is an adequate model considering our statistics, the possibility for effectiveness and for resolutions within the Brazilian justice system, contributing with approximately 46 percent of potential solutions for cases in process today.

Finally, I would like to emphasize that the debate here today revolves around democracy – ways to ensure security. ADR is one of the most important aspects, providing citizens with the instruments necessary to exert their rights. State intervention decreases, and a higher level of civil empowerment is achieved. This context is necessary for more advanced societies. This is a challenge, and we are hopeful that our work will contribute to advance democracy.

Alternative Dispute Resolution in the United States: In Pursuit of a Lawyer's True Function

**Jon Mills, Professor, Levin College of Law,
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[B]oth were happy over the result, and both rose in public estimation. My joy was boundless, I had learnt the true practice of the law. I had learnt to find out the better side of human nature and to enter men's hearts. I realized that the true function of a lawyer was to unite parties riven asunder.⁶³

—Mahatma Ghandi, relating his feelings after he persuaded a victorious client to agree to accept installment payments instead of a lump sum, which the defendant would have been unable to pay.

INTRODUCTION

Dispute resolution is an honorable and ancient endeavor. Humans have had disputes since before the evolution of spoken language. In the modern world, we constructed the court system to deal with our serious disputes. We have courts of all kinds from small claims to the United States Supreme Court. But there are means to resolve disputes other than the courts.

Some cultures have seen litigation as a shameful last resort that represents an embarrassing failure. In a Confucian view, a lawsuit symbolized disruption in the natural harmony because law was backed by coercion and sovereign force. Litigation led to a shameless concern for one's own interests.⁶⁴

There is little moral reluctance to litigate in modern America. Litigation is prevalent. The adversarial system taught in our law schools fosters the gladiator mentality of winners and losers on the field of battle in the law. However, Alternative Dispute Resolution (ADR) has become increasingly important in the last two decades.⁶⁵ There are at least five reasons that ADR has becoming increasingly more accepted and an important option in the United States justice system:

- Litigation is frequently costly and time consuming;
- The courts systems seek less costly alternatives because of shrinking budgets;
- Some matters and issues seem to be better handled in mediation;
- ADR has the potential for increased community involvement in the dispute resolution process; and,
- ADR may broaden access to justice.⁶⁶

Professor Jay Grenig has set forth several advantages of ADR over traditional litigation. ADR proceedings are typically voluntary and may be entered into without waiting for a lawsuit to be filed; ADR offers greater degrees of privacy, flexibility, efficiency, control, and participation; ADR may better preserve family and business relationships; ADR outcomes are not dependent on potentially adverse legal precedent; ADR may lead to creative remedies; and ADR may lead to better outcomes in certain cases through the use of arbitrators or mediators with specialized knowledge.⁶⁷

As our culture became more complex and our disputes more numerous, the courts were overburdened. As a consequence, court cases took more time, became more expensive, and became less

accessible. It is in this context that ADR has evolved. As the term has come to be used, ADR is a means of resolving a dispute other than in a judicial forum.⁶⁸ In its broadest sense ADR may include adjudicative processes such as arbitration, consensual processes such as negotiation, mediation, and conciliation, and mixed processes which include ADR methods used in combination.⁶⁹

ADR may be consensual or mandated by a court. ADR can also result in court-ordered solutions that grow out of mediation. The defining element is that someone other than a judge facilitated or made the decision in question. Arbitration and mediation have become very popular and have grown in use in the United States in recent years. There are multiple reasons for ADR's success including access, costs, and enhanced predictability.

ADR practices have been institutionalized at both the state and federal levels. Federal courts employ the summary jury trial, early neutral evaluation, and appellate mediation programs in addition to standard mediation and arbitration.⁷⁰ *The Federal Rules of Civil Procedure* recognize ADR in Rule 16, which provides for the use of “extrajudicial procedures to resolve the dispute.”⁷¹ The ADR Act of 1998 requires federal district courts to create ADR programs.⁷² At the state level, ADR programs are prevalent. In 2001, more than 175 ADR programs existed in state courts, administrative agencies, and executive branch offices.⁷³

Arbitration has been part of the fabric of the U.S. justice system for some time. For many years arbitration has been acceptable and utilized in issues such as international trade and labor disputes. The 1925 Farrell Arbitration Act, now the Federal Arbitration Act, states that “[a] written provision in any . . . contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction . . . shall be valid, irrevocable, and enforceable.”⁷⁴

Dispute resolution of all types is becoming increasingly popular. For

example, the American Bar Association now has a section on dispute resolution. It was founded in 1993 and currently has 19,000 members.⁷⁵

In examining the state of ADR in the U.S. there are certain basic issues that are key to its implementation and continued success. This article provides a concise overview of ADR in the United States, including its key principles and limitations, fields of law amenable to ADR, characteristics of conflicts in which ADR succeeds or does not work well, and the future of ADR in the United States. The paper also briefly addresses the use of ADR in Latin America and Brazil.

KEY PRINCIPLES OF ADR IN THE UNITED STATES

The concept of offering an “alternative” necessarily implies that it provides some added value or is better in some way than going to court. There is a series of articulated principles.⁷⁶

First, accessibility is cited. Because courts are busy, ADR can offer a faster alternative for some disputes. Second, ADR better protects parties’ rights when there is a disparity of resources. Third, cost and time savings are identified as an advantage. If ADR can resolve a dispute in a shorter period of time, that result often translates to lower costs. Fourth, ADR is fair and just, when properly implemented. Fifth, ADR assures finality. Sixth, ADR is credible, and all involved parties recognize it as an accepted system of justice. Seventh, ADR can create a result that can preserve relationships more effectively than protracted litigation. From the interpersonal scale to the national scale, preservation of long term relationships may be an important goal.

Arbitration has been a long standing tool for resolving multinational or international disputes and continues to be a component of multiple treaties and commercial contracts. Arbitration maintains some of the central characteristics of the ingrained adversarial system in the U.S. In arbitration there is a separate decision maker. There can be a

winner and a loser. The parties' need not agree to the final decision of the arbitrator. Thus, arbitration is not a cultural break with American lawyers. In fact, the structural and legal requirement for arbitration has built a cadre of individuals who specialize in certain fields of arbitration and of course there are organizations that provide arbitrators that are readily available.⁷⁷

Mediation has been a later development and has some very different characteristics than arbitration. By definition mediation does not compel a particular result but relies upon agreement among the parties. If there is no agreement then the parties may be free to seek other means of resolving their dispute such as the courts. In arbitration the matter may of course be final.

Key to the further development of ADR in the U.S. has been the evolving attitude of lawyers and judges towards the process. Both lawyers and judges have expressed concern about mediation for varying reasons. Judges have expressed concerns that decisions would be made that were reached outside the rules of courts. Facts and issues that were inadmissible in court could be used in discussions and resolutions of disputes. Parties could hypothetically agree to a resolution that might not be consistent with the law as interpreted by a court. Since the proceedings were confidential, the decision itself had no precedential value and was applicable only to the parties who agreed to the mediation. These statements are all true, but they also demonstrate some of the reasons to pursue ADR in particular cases.

Lawyers have expressed concerned that ADR may dilute their role as advocate. How were they to act in mediation? Are they to seek a result that may be "best for everyone" or should they seek total victory for a client even if it means that the mediation breaks down? Also, lawyers have expressed concern that the fact that mediation may take less time means that a lawyer will receive less compensation.

The paradigm of a lawyering taught in our law schools⁷⁸ has long been based on the lawyers' standard philosophical map⁷⁹:

1. that disputants are adversaries and one must win and one must lose, and
2. that disputes may be resolved by application by a third party of a general rule of law.

In contrast, the assumptions for mediation are:

1. that all parties can benefit from a creative solution to which each agrees, and
2. the situation is unique and not governed by general principles.

Ultimately, the progress and future of mediation depends on greater acceptance of the possibilities allowed by mediation as consistent with the role of lawyers and our justice system.

LIMITATIONS OF ADR

There are limitations and drawbacks to mediation and they must be understood in order for mediation to be used successfully and for appropriate purposes. ADR scholars tend to agree that there are topics for which mediation is difficult or inappropriate.⁸⁰

For example, is there any situation in which a criminal should be able to mediate with victims? Some argue that the wrong is against society and that punishment should be delivered by courts and the society at large rather than negotiated with a private person.⁸¹ Nonetheless, there are some places where criminal justice mediation is taking place.⁸²

Major constitutional or public policy issues cannot be mediated. Could a school system negotiate the constitutionality of a segregated school with the citizens of the area? *Brown v. Board of Education*⁸³

resolved a controversial social issue that required a nationwide policy and constitutional holding. Utilizing ADR in cases implicating constitutional or public law issues would foreclose adjudication's role in ensuring "the proper resolution and application of public values."⁸⁴

A recent case in which I served as counsel provides an example of how ADR is ill-suited to resolve major constitutional and public policy issues. I was asked if we could mediate a case filed in federal court. At issue was whether state constitutional provisions mandating redistricting standards for Congress were constitutional under the federal constitution. ADR was inappropriate for the case because the sole question was whether the provisions were constitutional. The court must answer yes or no; there is no mediated option.

In his seminal article *Against Settlement*, Owen M. Fiss argued that settlement is "a highly problematic technique for streamlining dockets."⁸⁵ Fiss argued that judges and courts, as opposed to a settlement proceeding, are in a better position to remedy the imbalance of power between the parties, to remedy the absence of litigant autonomy to consent to a settlement, to safeguard public values, and to ensure overarching justice as opposed to case-by-case "peace."⁸⁶ This view is far from universal. For instance, some scholars argue that ADR's capacity to foster reconciliation may outweigh the criticisms leveled by Fiss.⁸⁷

It is clear, however, that ADR will not work in cases involving constitutional issues. Although ADR may work to avoid adverse legal precedent with respect to non-constitutional issues, one cannot mediate around the constitution. A resolution cannot stand in contravention of the law.

FIELDS OF LAW AMENABLE TO ADR

Over time, ADR has become institutionalized in the American legal system. One can find ADR in the courts, in administrative

agencies, and in the private sector.⁸⁸ Courts most commonly employ ADR through mediation programs, “which deal with a wide range of civil disputes, including family, employment, commercial, and environmental matters.”⁸⁹ Federal and state agencies use mediation programs for a variety of conflicts, “from disputes over internal employment and procurement matters to administrative rulemaking on public policy issues delegated to agencies by the legislature.”⁹⁰ In the private sector, many businesses mandate through contract the use of ADR to resolve disputes.⁹¹

Principles of logic should dictate that the fields of law most amenable to ADR are those areas in which ADR has become most institutionalized. Such areas include, but are not limited to, international trade, labor law, landlord-tenant law, small claims, family law, probate law, and consumer law.

ADR is common in international trade disputes to combat problems associated with the involvement of multiple national legal systems: “[i]n the absence of agreement between the parties to international commercial disputes concerning a mutually acceptable forum and the governing law, there is often no predictable place where compulsory jurisdiction can be obtained and there is no certainty about the applicable law.”⁹² A recent survey of litigation trends found that while few corporations will submit to mediation, the use of arbitration has increased and is expected to increase, particularly in the area of international commercial disputes.⁹³ Corporate parties cite time and cost savings as principal reasons to use mediation and arbitration, and a lack of desire from senior management as the principal barrier to ADR use.⁹⁴ This suggests that public understanding of ADR principles, strengths, and weaknesses is key to its widespread use.

Labor and employment disputes are amenable to ADR because ADR may provide a more efficient, cost-effective solution to conflicts over unions and management, employment discrimination, employment termination, and a variety of other issues.⁹⁵ One recent example of

mediation used to resolve a labor dispute (also involving securities law) is federal judge Susan Nelson's order mandating that National Football League owners and players undergo mediation to address the players' antitrust lawsuit against the league.⁹⁶

ADR has enjoyed widespread implementation in the field of family disputes.⁹⁷ Professor Grenig notes three characteristics of family disputes that make them particularly well-suited to ADR:

1. Family disputes often involve continuing and interdependent relationships.
2. Family disputes involve a complex interplay of emotional and legal complaints.⁹⁸

While some ADR scholars have referred to domestic, land-lord-tenant, consumer and other everyday disputes as “minor,”⁹⁹ that term does not always ring true with respect to the size and complexity of the dispute. Mediation is often used in the resolution of both large- and small-scale domestic conflicts. For example, court-ordered or elective mediation is common in divorce cases, which run the gamut from simple to exceedingly complex. Frank and Jamie McCourt used a mediation process at the start of their divorce proceedings to try to divide a large and complex array of property that includes the Dodgers baseball team.¹⁰⁰

Appellate disputes represent another context in which courts employ ADR. Appellate mediation programs have been in place in a majority of federal circuit courts since 1990, and many state appellate programs developed in the 1990s.¹⁰¹ Such programs have enjoyed some success in courts including the Ninth Circuit.¹⁰²

Characteristics of Conflicts in Which ADR Succeeds or Does Not Work Well

In 2003, Dale Earnhardt was killed on the final turn of the Daytona 500 stock car race. Mr. Earnhardt was the best known auto racer in the United States. Consistent with Florida law, Mr. Earnhardt's body was autopsied. At that point electronic and other media sought access to the autopsy photos of Mr. Earnhardt. Some of the media said their justification was concern about safety issues for NASCAR drivers, while it was clear that others seeking access were websites seeking to publish gruesome photos for purposes of sensationalism. The Earnhardt family opposed the public release of those photos.

The court ordered mediation. As counsel for the Earnhardt family I did not see how any mediation was rational or possible, but here is what happened. Since the chief concern of the mainstream media was determining the cause of Mr. Earnhardt's death, the mediator focused on the value of autopsy photos in determining the cause of death. The written autopsy had concluded that what was termed "head whip" was the cause of death. In other words, the crash at over 100 miles per hour had whipped Mr. Earnhardt's head forward in a way that had broken his neck.

The mediator asked if it was possible to get an objective determination of cause of death from viewing autopsy photos. The parties could not agree. Ultimately, it was agreed that a medical expert in forensics would review autopsy photos and present a written report. The report concluded that the photos were consistent with the written autopsy report and viewing the photos added nothing to the ability to make that judgment. As a result, the mainstream media withdrew from the case. Some other parties did not, but the withdrawal of mainstream media was a success for the mediation and a major turning point in a very high profile case.

The Earnhardt case represents a conflict in which ADR should not have yielded a resolution, yet did. The following paragraphs describe characteristics typical of conflicts in which ADR succeeds and characteristics typical of conflicts in which ADR fails. It is important

to remember—as the Earnhardt case exemplifies—that the success or failure of ADR is dependent on the facts and context of the particular dispute; ADR may fail in spite of a dispute displaying several characteristics amenable to ADR, and vice-versa.

Characteristics of Conflicts in Which ADR Succeeds

ADR is amenable to conflicts comprising emotional—not just financial—issues. Courts cannot easily remedy the loss of nonmaterial values such as honor, respect, dignity, and security. In some cases, a wronged party may seek monetary compensation for such loss. When these values can be monetized, standard litigation may be a suitable dispute resolution procedure. If they cannot be monetized, ADR may provide a resolution. Apologies, for instance, may be negotiated through the ADR process.

In close cases in which both parties have something to lose at trial, ADR can provide a method of compromise. For example, in major antitrust cases where parties stand to lose large sums of money, a corporation is more likely to implement ADR than let a judge or jury decide its fate.

Attorneys may play a significant role in whether ADR succeeds. For instance, an attorney with mediation training may be better able to determine and understand client needs and work with clients, which may lead to a greater rate of success in mediation. Similarly, a good mediator, one with strong negotiation skills or specialized knowledge, may lead to successful ADR, as in the Earnhardt case.

ADR may be more likely to succeed when specific deadlines are in place, giving both parties an incentive to come to a resolution. In court-ordered mediation, deadlines are usually imposed by the court. In private mediations, a mediator may help parties by creating or enforcing deadlines.

Characteristics of Conflicts in Which ADR Does Not Work Well

ADR is less likely to succeed where parties are highly unequal in power and stature. ADR may not be the best avenue for recourse when a significant imbalance of power exists between the parties.¹⁰³ That is to say, mediation should not allow one party to bully a less powerful party. Presumably a mediator would not allow that to occur, but nonetheless the danger exists. Where one party has fewer resources or less influence or knowledge, “his or her rights may be jeopardized by choice of the forum.”¹⁰⁴ One setting in which the unequal power problem may exist is when an individual is facing a governmental body. In such a case, the individual faces a political disadvantage. For example, in an employment dispute with a city, an individual may need to obtain a majority vote of the city commission.

ADR may fail when one party feels as though they have nothing to lose. Without an incentive to compromise, a party is more likely to choose adjudication. Also, as noted above, attorneys may play a significant role in the success or failure of ADR. ADR is less likely to succeed if an attorney does not want to settle, either because he is unprepared or because he is opposed in principle.

When a conflict comprises strictly financial issues without emotional or relationship concerns, ADR may not provide the best procedure. However, that is not always the case, as evidenced by the high settlement rate in antitrust cases.¹⁰⁵

FUTURE GROWTH OF ADR – POSITIVE SIGNS

ADR programs in the United States have proliferated over the past several decades.¹⁰⁶ Interest in dispute resolution services occurred in the 1960s partially in response to civil rights issues. ADR continued to expand into various topical areas at both the state and the federal levels.

There are now numerous statutes supporting and regulating ADR in

the states and at the federal level.¹⁰⁷ Mediation is a profession that often requires certification and training. Many law schools now offer ADR courses and clinics. As further explained below, these facts are indicative of ADR's increasing role as an alternative to litigation.

By continuing to increase the level of competency required of mediators, the U.S. legal system reiterates and emphasizes the importance of the mediator's role in dispute resolution. Mediators may be regulated by focusing on characteristics such as credentials or ethical standards.

Although no state requires mediators to be licensed,¹⁰⁸ requirements that a mediator remain objective, conform to ethical standards, or undergo sensitivity training can create a result which the law does not require, although not one that the law does not allow.

ADR continues to grow in the realm of legal education. Professor Nancy Rodgers recently noted that “[l]aw schools in the United States now treat dispute resolution as a regular offering. Dispute resolution, in fact, occupies a place roughly equivalent to tax or administrative law.”¹⁰⁹ This year at our law school, students formed the first University of Florida ADR competition team.

The growth of ADR in certain types of disputes suggests that the adversarial system may be less conducive to resolution in those contexts. For instance, ADR is an increasingly important tool in the resolution of mass tort claims. In the early 1980s, the Philadelphia Court of Common Pleas relied on mandatory nonbinding arbitration to manage the flood of asbestos worker injury cases.¹¹⁰ In addition to mediation and arbitration, global settlement is another ADR strategy that has been implemented in mass tort cases such as those involving asbestos, Agent Orange, and silicone breast implants.¹¹¹ Global settlement structures continue to be implemented in mass tort cases today; recent examples include the September 11th Victim Compensation Fund and the Gulf Coast Claims Facility, established to compensate individuals harmed by the BP oil spill.¹¹²

Professional organizations devoted to ADR—such as the American Bar Association Section of Dispute Resolution and the Association for Conflict Resolution—continue to grow, and local and regional chapters continue to proliferate. Training opportunities for mediators are also on the rise.¹¹³

New and innovative dispute resolution strategies are developing, such as collaborative lawyering, partnering, and online dispute resolution.¹¹⁴ Collaborative lawyering focuses on a problem-solving approach to negotiation,¹¹⁵ partnering involves restructuring business relationships to facilitate dispute resolution in contexts such as the construction industry,¹¹⁶ and online dispute resolution utilizes technology to settle disputes.¹¹⁷

PERSPECTIVES ON ADR IN BRAZIL

Although Latin America has not historically embraced ADR, that attitude has softened to some degree over the past several decades.¹¹⁸ Efforts to institutionalize ADR in Latin America in the arena of international trade were not always successful, in part because international actors implementing ADR programs—organizations such as the World Bank and the United States Agency for International Development (USAID)—failed to consider Latin American cultural and social norms, coordinate reforms, provide education to the public and to legal professionals, or consider Latin American input in the design and implementation of the programs.¹¹⁹

In recent years, Brazil has taken significant steps to institutionalize ADR in the judicial system. In 1996, Brazil passed an arbitration act modeled after the United National Commission on International Trade Law (UNCITRAL) Model Law, and in 2001 the country ratified the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.¹²⁰ These laws may be affected, however, by the judicial power to invalidate arbitral awards determined to be

contrary to national public policy or of a subject matter not capable of settlement by arbitration.¹²¹

A proposed mediation law¹²² in Brazil would require mandatory pre-trial mediation,¹²³ “impose[] the duty of impartiality, independence, competence, diligence, and secret”¹²⁴ on mediators, set forth various mediator qualifications such as experience and training,¹²⁵ delineate specific mediation procedures, and provide for judicial recognition and enforcement of mediated agreements.¹²⁶ This law has the potential to increase judicial efficiency and access to justice, depending on the cost of mediation services and the amount of information available to the public regarding avenues for legal recourse.

CONCLUSION

Alternative dispute resolution has an important future in several diverse ways. Arbitration seems to be growing in the area of commercial disputes. Mediation seems to have growing importance as an alternative to slower and more expensive adjudicatory options in the arena of everyday conflicts; landlord-tenant, small claims, and family and domestic disputes may be well-suited to mediation. Economic realities and shortfalls will continue to seek these options.

The long term success of ADR, whether in the United States or Brazil, is tied to acceptance and leadership among the judiciary, lawyers and academics. That acceptance will be aided by public understanding and acceptance of the mission as well as the strengths and weaknesses of ADR for modern conflicts.

Due Process and the Appeals

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My speech will be brief. The theme of the due process and legal appeals will be treated in two distinct parts. At first I will defend the proposition that due process is now a heritage of world legal culture. I will try to describe the main characteristics and tensions of what is meant by heritage. And, as the due process has faced constant tension between being a universal joint while institutionalizing differently in democratic countries, especially in these days of multilateralism. How to be common and different at the same time?

The second part will describe to you the state of the art on this discussion in Brazil for the improvement of the due process. In this description, a main component is a practical resource as an essential tool for the implementation of the due process. Hence the theme of my speech: the due process of law and appeals. To what extent the current practice of judicial appeals in the Brazilian state meets the common requirements of the due process and how can it be improved? In this question, I will point out, just point out, how different are the historical processes of access to the supreme courts of both the United States and Brazil. How different and mysterious and surprising may have been the ways of the world, today, towards the rule of law and democracy.

By placing the two parts of my presentation together, it will raise a crucial question that Brazil today has done. A question so simple and obvious and yet behaves so different answers. I hope this question does not only enable you to better understand the ongoing process that, since 1988, Brazil is developing in relation to democratic consolidation. But also suggest the diversity of practices and institutions that the due process of law can assume. And it has assumed in the history of the countries.

PART ONE

Due process as a world heritage

Allow me to express my argument with an analogy. In 1972, the international World Heritage Convention was signed at UNESCO, the main UN body for the area of Culture, for purposes of preserving cultural and natural goods (physical goods, monuments, and physical, biological, geological and physiographic groups and formations) that have universal relevance value, that is, for all people and that are unique and irreplaceable. This concept originally covered physical, tangible and material goods. Then, were registered as world heritage the historic centers of the cities of Krakow, Poland, Rome, Italy, the monuments like the Grand Canyon, here in America, the Palace and Westminster Abbey, in London, the concentration camp Auschwitz, in Poland, the Palace of Versailles, in Paris, Kremlin and Red Square, in Moscow.

In 2003, the World Heritage concept was expanded to include intangible cultural goods, immaterials. More specifically, oral traditions and expressions and artistic, social practices, rituals and festive events, knowledge and practices concerning nature and the universe and traditional craftsmanship¹²⁷. The fact is that the world lives and respects as part of the civilization the Tibetan opera of China, the tango of Argentina and Uruguay, the Flamenco dance, of Spain, the Brazilian samba, the procession of The Holy Blood in Bruges, in

Belgium, the Dragon Boat Chinese Festival, the Chinese calligraphy, the Mediterranean diet, of Spain, Greece, Italy and Morocco. Not to mention the French cuisine.

These concepts of world heritage, or landmarks, the mark of the lands, the mark of the civilizations, those marks that guide walkers along the paths of history, are no strangers to you. The historical sites of importance to your culture are reserved to the National Heritage Area, as defined by Congress. Among them we have Niagara Falls, Abraham Lincoln... And you already know that this association between World Heritage and due process of laws, perhaps very alternative and unusual, was inspired by the place where we are, the Library of Congress. The program of this paradigmatic American Heritage Library of Congress, together with the American Folklife Center, the list of intangible marks of American identity from the cowboy ballads, the jazz of Billie Holliday, the movie Casablanca, and also stories of George Washington cutting down the cherry and the coyote tales of native American tribes.

The importance of this concept of national and world heritage is that they serve a maintenance function of heterogeneity within the homogeneity of a nation. They enable dialogues between differents. They don't turn difference into divergence. On the contrary, they make them the requirement of convergence. Through these goods the various world cultures respect, unite and interact with each other.

From this concept, we might ask the question and, when we do it, we are actually proposing. Should also the world, beyond the Universal Declaration of Human Rights, have a list of legal goods, institutions, procedures and practices which would include a record of what would be a legal world heritage? A record of the practices and institutions which embody the rule of law? What are the legal rights — and therefore intangible — that would participate in this list, these records? What are the legal rights that are unique and irreplaceable for all peoples, all nations that adhere more each day, of the West and

the East, of Europe, Americas, Africa and Asia, to the rule of law, as stipulated by the Convention? Increase the dialogue between nations and help to establish the democracy? What goods would be recorded in the legal patrimony of humanity's rule of law?

One feature of the world heritage, cultural or legal, is that it is contingent and temporal. That is, born in a certain place and historical time. But that just surpassing its contingency and temporality and becomes universal and timeless. In this case improves and becomes institutionalized differently. The very concept of rule of law is a good example. Article 1 of the Brazilian Constitution which deals with the rule of law, does not literally say that Brazil is a country commanded by the rule of law. Says more. It says that Brazil is a democratic state of law. It has added to the world tradition the word democratic. This is because in our history the concept of rule of law sometimes has been emptied of its democratic content. There are two rules of law: the only formal and the material. Some well-known countries are even trying to make anti-democratic reforms within the concept of formal rule of law. Other countries such as Mozambique, Uzbekistan, Hungary followed the Brazilian formula and included the phrase democratic rule of law.

For analytical purposes let's visualize what happened with this legal world heritage that is the separation of powers. Arises from the analysis of Montesquieu on the relationship between structure and practice of state power in Britain and the liberty of citizens. Notes the appropriation of powers by certain segments of society: the king, in the Executive, with the army, the nobles, in the Legislative, with the power of taxation. Uses its institutional imagination to propose a tripartite separation of powers. This concept of contingent and historical base is recovered and universalized here in the United States, which had neither kings nor nobles, with the idea of checks and balances. The idea *mor* limit state power and ensure the freedom of citizens is institutionalized in different ways.

In Brazil, for example, the period of the greatest political stability was from 1824 to 1891, in the Empire, when there weren't three, but four powers: the Legislative, Executive, Judiciary and the Moderating power. The greatness of an intangible universal heritage is precisely the multiplicity of models through which it is institutionalized. Unity in the idea and in the goal, plurality in the achievement. More than institutional plurality, the important thing is permanent improvement. The ongoing search for alternatives. As Mangabeira Unger says, the constantly extending of the institutional repertoire. On behalf of the finding of the past made by the different histories and cultures of peoples. And especially in the name of better future for the rule of law.

Just go through the proper legal literature to realize that here, in the United States, there are always new proposals for institutional improvement of the separation of powers, such as Bruce Ackerman when advocates the creation of a Democracy Branch and a Integrity Branch¹²⁸. Indeed, in Brazil, we do not have a “Democratic Power”, but we have a peculiar electoral court, almost an electoral judicial power, which works — and rightly so — as responsible for the regulation, supervision and also the administration of the elections.

The term due process of law is attributed to King Edward III in 1354 in England. The origin of the concept is commonly related to the *Magna Carta* of 1215, a result of the dispute between the English barons and King John I, when the king gave in to pressure from the barons and pledged to limit his power, exercising it through certain legal procedures and with respect to the law of the land. But even here, in U.S., for example, the due process of law has developed differently from their original idea in England. There, the due process of law was invoked in reference to the legal procedure whose implementation was expected to circumstances in which a case was inserted. Around here, the Supreme Court developed the idea of having a due process requirement, which is independent of the legal process effectively enacted by the legislator, allowing the judicial

review of those procedures and, thus strengthening the role of the judiciary.

It is also worth mentioning that the Constitution of India's independence, of 1949, it was decided to not include due process of law. And justifiably. There was influence of jurists in the U.S. (including Felix Frankfurter, of the Supreme Court) urging the in constituents in India to not use the term to avoid wrong interpretations of the concept by the judges as it had been done in the U.S. in the *Lochner* era (1905 to 1930s). In his meeting with Rau [a leader of the Indian Constituent Assembly], Frankfurter indicated that he believed that the power of judicial review implied in the due process clause was both undemocratic and burdensome to the judiciary, because it empowered judges to invalidate legislation enacted by democratic majorities. Frankfurter's opposition to inclusion of a due process clause in India reflected the opposition among New Deal liberals in the United States to substantive economic due process and the infusion of property rights into the Due Process Clause of the 14th Amendment". The paradoxical manner as the due process of law was applied in the colonial period, reversed its own meaning. Often, instead of being an instrument in favor of the rule of law, that is, democracy and freedom, was an instrument otherwise. An instrument of colonization more than liberation. Domain, rather than independence. Actually there is always a time of cultural cannibalism when a country has institutionalized a universal concept.

Being a world heritage does not mean that the universal is the same. Nor that one fits all. But unlike the need to increase the repertoire by which institutionalizes locally the common heritage, we enter the second part of our exhibition Due Process of Law and Appeals in Brazil today.

PART TWO

The due process of law as a barrier to exercise of power by the state

is established in the art. 5, LIV, of our Constitution, “Article 5, LIV. No one shall be deprived of liberty or property, without due process of law”, and it is indispensable for the construction of our political and economic stability. Safe haven for the decisions of our Supreme Court. Our current problem that is easy to understand and is as follows. It has two main components. The first is historical.

In the United States the access to the Supreme is not a matter of rights but of judicial discretion. Access is granted only for compelling reasons. In Brazil access to the Supreme has been seen as a matter of law. In the U.S., the Bylaws of USA Supreme Court says that an inadequate law enforcement does not justify access to the Supreme. There is no controversy about the facts. “A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law”. Diego Werneck remembers this important distinction. In Brazil, the Supreme Court, by its historic background, performs a strong role as guardian of individual rights since 1891 in the Republic. One more judicial level in search for justice, for what is constitutional. If we were to summarize the difference between the two roles, we would say that while in the Supreme Court the search for justice is made by the management system, in Brazil this search has become institutionalized as a search through the recognition of many forms of appeals to protect individual rights. So what? Good for us. What is the problem then?

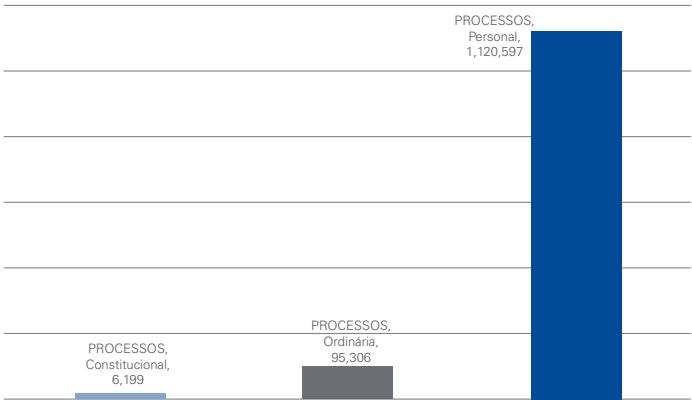
The problem is that this option to access the Supreme as a guarantee of individual right to a fair and a constitutional decision, as much as possible, has encouraged thousands of appeals that the Supreme has difficulty to refuse. An overload of work leads to a very slow decision-making. The slow decision-making creates legal uncertainty. Legal uncertainty infects the predictability needed to rule of law.

Allow me to better characterize the problem a brief word about the relationship between economic context and access to justice.

In the last two decades, Brazil has done the opposite of many countries. The Brazilians have gone out of misery and poverty and gradually entering the middle class. The redistribution of income has tendencies more egalitarian. And the polls show a significant association between income and access to justice. The higher the income the higher the search for justice. Researches also show that the slowness is the main criticism of the Brazilians to the judiciary. Now there is an excessive demand. The Brazilian is paradoxically extremely critical of the judiciary, but at the same time wants a more active judiciary, or more sentences. Brazil has made in recent years a remarkable effort to reform the administration of justice. Even so, the offer-making has always been lower than the demand for decisions. One of the hindrances mentioned is precisely the excessive appeals. The data speaks for itself.

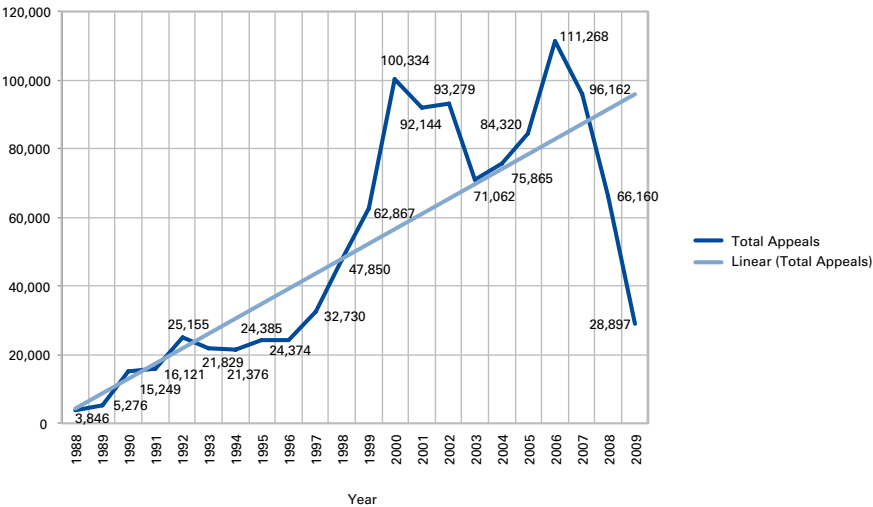
Between 1988 and 2009 the Supreme Court has received more 1.000.000 processes. In 2006 it has received 111 thousand cases. Now, thanks to adoption in the management of the Minister Nelson Jobim of the ‘writ of certiorari’ and the binding precedent that number dropped to about 30.000 cases per year. We do not know if the curve is downward. There are signs of stabilization. This is an excessively high number to 11 Ministers.

PROCESSOS PER CORTE NO SUPREMO



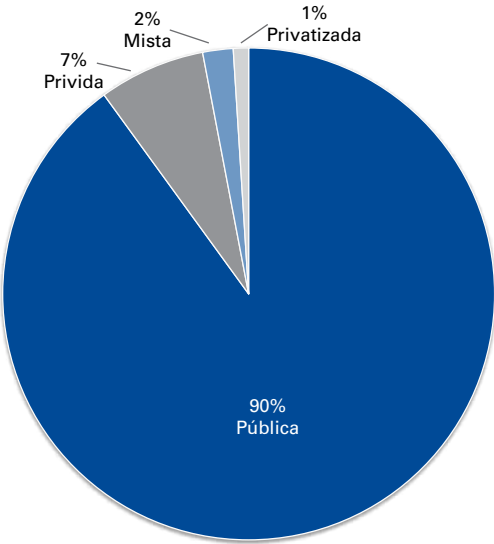
Survey of Brazilian Magistrates Association of 2006 shows that 88.4% of the judges themselves consider as an obstacle to development of the country the excess of appeals. And about 90% of our judges are in favor of reduction of appeals to higher courts.

Total Appeals



Here comes the second part of our problem, our discussion about the due process of law and appeals. The problem becomes clearer when the FGV Law School study shows that the largest user of appeals to the Supreme is the public sector. Within the public sector is the Federal Government, and within the Federal Government entities are tax and social welfare security. Consider also that over 82% of the funds that comes to the Supreme Court goes to the third or fourth instance of trial. But while the public sector uses their right to appeal, right of appeal, the citizen, taxpayer or pensioner, is in a situation of uncertainty. He stays with his freedom and wealth dependent on state power. He has, say the Greeks, the sword of Damocles over his head.

NATUREZA PARTES MAIS REPRESENTATIVAS DE *PERSONA* RECURSAL



ID	Parte	Processos	% de Processos	% Acumulado de Processos	Processos no Polo Ativo	Taxa de Litigância Ativa	Taxa Mínima de Derrotas no Polo Ativo
1	Caixa Economica Federal - CEF	211,420	18.87%	18.87%	206,675	97.76%	53.11%
2	União	184,629	16.48%	35.34%	126,677	68.61%	52.86%
3	Instituto Nacional do Seguro Social - INSS	166,653	14.87%	50.21%	125,351	75.22%	43.55%
4	Estado de São Paulo	47,771	4.26%	54.48%	22,983	48.11%	57.87%
5	Banco Central do Brasil	26,429	2.36%	56.84%	24,984	94.53%	62.74%
6	Estado do Rio Grande do Sul	23,432	2.09%	58.93%	131,329	56.88%	58.02%
7	Município de São Paulo	22,391	2.00%	60.93%	16,438	73.41%	62.47%
8	Telemar Norte Leste S/A	14,765	1.32%	62.24%	14,143	95.79%	61.46%
9	Banco do Brasil S/A	12,579	1.12%	63.37%	8,650	68.77%	50.43%
10	Estado de Minas Gerais	12,428	1.11%	64.47%	6,723	54.10%	46.76%
11	Instituto de Previdência do Estado do Rio Grand do Sul - IPERGS	10,724	0.96%	65.43%	3,486	32.51%	55.82%
12	Distrito Federal	10,366	0.93%	66.36%	5,686	54.85%	65.81%

Hence the question that we do today. To what extent the historical path of the due process of law in Brazil, which enabled a broad access to the Supreme as protection of individual rights, can be used by the state to maximize the potential financial gains in the cares involving taxation and welfare? Holds the due process of law a reduction in the number of appeals in Brazil today? Sandra O’Connors says that two instances are sufficient to meet the due process of law, the rule of law. How many decisions, sentences, instances are necessary to the due process of law?

The Brazilian Chief Justice’s mandate is of two years not renewable. In recent years, Minister Nelson Jobim spearheaded a new law creating the National Council of Justice focused on the planning and correctional ethics of the judiciary, and introduced the binding precedent and general repercussion. It was an important institutional improvement. The Minister Ellen Gracie, not only dignified the Supreme Court being the first woman elected its president, as also began a fundamental process of awareness and technological modernization. The Minister Gilmar Mendes, in turn, revolutionized the administration with the establishment of strategy planning nationwide. Now, the Minister Peluso continues, in his way, Brazil’s incessant quest for a more efficient judiciary. Proposes a discussion and prepare a new legislation on appeals. It is in this context of institutional reinvention of the rule of law then we ask: How many appeals are necessary to the due process of law?

The answer to this question leads us to recall the great pragmatist North American philosopher Richard Rorty in the sense that the criterion of truth is its utility. Its ability to move forward civilization. In our case the answer lies in the utility of a new law of appeals to advance democracy. The constitutional truth is in its democratic utility. Does the excess of appeals used by the federal government, in the name of the due process, go against the goals of due process? To what extent the U.S. judicial discretion can help us in this improvement? As pointed out by the great Russian novelist Tolstoy, “if you want to be universal, write about your village”.

Due Process of Law, Constitutional Guarantees and Appeals

J. Clifford Wallace, Senior Judge and former Chief Judge, United States Court of Appeals

There has been no shortage of studies identifying the surge of appellate courts' caseloads. The numbers tend to speak for themselves. I have witnessed this growth firsthand, and can vouch that the statistics and resultant workload are indeed startling. During my thirtynine- year tenure on the Court of Appeals for the Ninth Circuit, I have watched the circuit's appeals more than quintuple. I was appointed in 1972 to fill one of thirteen authorized judgeships. The ranks have grown to twenty-eight judgeships, and there are urgent pleas to add more. In 2010, the court disposed of 13,471 cases with 11,999 new filings, for a backlog decrease of 1,472. Although the rise in caseload has been striking, there is no crisis, so long as appellate courts continue to fulfill their two core functions: (1) to decide the appeals in a reasonable time by correcting material errors in the cases reviewed, and (2) in doing so, in my view, to establish clear precedent to provide guidance. The latter I will come back to. I believe that generally appellate courts are still delivering justice to individual litigants while laying the broad foundation for a just and orderly society.

True, courts probably will not succeed if they do not change the way they approach their duties, and the need to adapt, to be certain,

remains constant. But we do not have to throw our hands up in desperation. I have made it a point to think prospectively and constructively rather than yearn nostalgically for the past. That is, I focus on how appellate courts can evolve to preserve, in the face of the challenge presented by case-overload, the twin aims of deciding appeals. For example, as the Chief Judge of the Court of Appeals for the Ninth Circuit from 1991 to 1996, I worked to implement a series of structural reforms to mitigate the court's inefficiencies. I have been similarly influenced over the more than three decades I have worked directly with nearly 60 judiciaries in all parts of the world. Initially, I had little opportunity to apply appellate judge experience directly. Countries logically want to tackle first the problems plaguing trial courts, including their impossibly clogged dockets. As efficiency has improved at the trial level, cases arrive at the appellate court more quickly, and the backlog and delay have naturally shifted upward. The focus of reform efforts likewise is now being drawn to the appellate courts.

Is there an answer? Experience in every part of the globe has demonstrated that trial court reform is most successful if based upon two key aspects: case management and alternative dispute resolution (primarily mediation). Why not focus on these two principles, but adapt them to fit the situations facing appellate courts?

I will discuss the model of my court, but in doing so, I do not intend to suggest that courts in other jurisdictions should adopt our strategy in its entirety. Rather, each judiciary needs to consider those modifications which have the potential to improve its appellate courts, and tailor the methodology to fit its particular circumstances. I also do not mean to imply that this is a one-way street: United States courts have much to gain from the expanding practical knowledge of other courts. With this in mind, I will first discuss several changes that an appellate court can undertake to administer its caseload more effectively.

I.

As the largest appellate court in the United States, the United States Court of Appeals for the Ninth Circuit might have collapsed under the weight of its ever-heavier caseload had it not developed innovative ways to allocate its limited judicial resources. I detail here several of the case management techniques that have proven most useful.

A. Initial Review

We have learned from trial court reforms that early court intervention is indispensable. Similarly, it goes without saying that an appellate court must begin managing the life of a case the moment it arrives at the courthouse. When a party undertakes to file the appeal, the clerk should confirm that the party is remitting all the required fees and submitting all the necessary papers. Court staff should simultaneously chart the course to come by imposing an already approved schedule for the compilation of the appellate record, the submission of the parties' written arguments, and the completion of whatever else is needed for the court to decide the appeal. The court should apprise litigants of the consequences of failing to comply with deadlines, such as dismissal of the appeal, and enforce the schedule. While the parties are busy making these preparations, the court has the opportunity to conduct a potentially timesaving and court assetsaving initial review of the case, one geared toward rooting out dispositive defects early. For example, a preliminary inquiry into appellate jurisdiction prevents the court from expending much of its time and resources on a case over which it has no power. For example, as distinguished from Brazil, our system allows very few interim appeals – primarily preliminary injunctions – which we review with great deference to the trial court. Should the court staff discover a jurisdictional or other flaw, the litigant may be ordered to explain why its appeal should not be dismissed. If the litigant cannot, the court can dismiss the appeal at this early stage and bypass a

time-consuming preparation for review of its merits. It is important to highlight the role non-judge personnel play in this process. Judges can free themselves to attend to more important matters by assigning this initial investigation to well-trained court staff; only if a staff member detects a problem do the judges need to get involved during an appeal's infancy.

B. Special Considerations for Pro Se Cases

In the United States, different from Brazil, legal representation is not mandatory. In the United States, the doors of the appellate courthouse—like those of the trial court—are open to all litigants, regardless of whether they have the means to afford (or the desire to secure) legal representation. Preservation of this principle, however, often exacts a cost on the court. When a litigant chooses to represent him or herself, the court loses the valuable assistance of a trained lawyer; in the attorney's stead, the court frequently must contend with an individual untutored in court procedure and substantive law. Acknowledging the problems that pro se representation can pose, my court established a specialized unit – the “Pro Se Unit” – in 1992 to process all pro se appeals in civil and habeas corpus cases. The first task of the Unit, which currently consists of a staff attorney and paralegals, is to review carefully each case in which there is pro se representation on one or both sides. If the Unit concludes that the appeal contains a flaw that mandates its dismissal, the Unit prepares an order which judges can issue if they agree. The Pro Se Unit does much the same for unmistakably frivolous appeals. The Pro Se Unit monitors pro se appeals for inactivity and shepherds the appropriate cases toward dismissal for failure to prosecute. The Pro Se Unit also processes cases referred to it for inclusion in the Ninth Circuit's Pro Bono Program, which was created in 1993. The program is intended for appeals where counsel, by composing clearer briefs and presenting a more effective oral argument, could materially assist the court. Prime candidates are appeals raising issues of first impression or issues of some complexity. Once a case has been selected for our

court's Pro Bono Program, and with court approval, the Unit secures the services of an attorney (or supervised law student) willing to work on a pro bono basis; the court then appoints the attorney as counsel. The advantages are palpable: the litigant gains needed free legal services, and the court benefits by hearing a better researched, prepared, and argued appeal on a case requiring such representation.

I am not aware of any appellate court that has instituted a pro se program as comprehensive as the Court of Appeals for the Ninth Circuit.

C. Issue Identification and Case Grouping

Once written arguments – counseled or pro se – are filed, the court can effectuate further timesaving devices before sending the case to the judge or judges who will decide it. Our court utilizes an “inventory” process whereby non-judge personnel are trained to review the case to identify the basic legal issues it raises and assess its overall degree of difficulty. This exercise yields two principal advantages. First, the court can “group” together cases posing similar issues and assign all the cases in the group to one panel for hearing and decision (“issue grouping”).

Thus, in deciding one case, the court can quickly dispose of the others without duplication of effort. Second, the court can develop a system to classify cases according to their difficulty. Using a non-perfect, yet reasonable, method to weigh cases enhances the court's ability to apportion its workload more equally among judges – the court does not schedule a judge or panel to hear a certain number of cases, but rather a certain number of case points. Allocating cases according to weight prevents a decision from being held up unnecessarily because the luck of the draw dealt the heaviest cases to the same panel of judges. Modern technology makes issue identification and case weighting more effective by enabling the trained staff to search a computer database containing the inventory information for

all cases. Current software allows for word searches of the data. Cases that appear to present the same issue or issues can be “batched,” or placed before the same panel of judges for disposition. When the court issues a precedential opinion, the staff circulates a report to all of our judges indicating those cases that were not batched, yet nonetheless may be affected. Weighting appeals has a variety of functions. As an initial matter, it controls whether a case presumptively is without need of oral argument and thus appropriate for immediate disposition. If the case is hefty enough for an argument panel, its weight still plays a part in determining the number of appeals placed on a panel’s oral argument calendar on a particular day. Furthermore, it is common for a panel’s members to divide disposition-drafting responsibility according to case weight. The practice of weighting cases also generates useful administrative data. For example, as Chief Judge I analyzed appellate filings according to case weight and, over a period of time, found that approximately seventy-five percent consisted of relatively easy cases (1’s and 3’s on a ten-point scale). More important, the data demonstrated that the remarkable growth in our docket was attributable to a surge in these lesser-weighted cases; the average appeals (weighted 5) and harder ones (7’s and 10’s) remained fairly constant. I thus learned that our ability to absorb the increasing caseload depended on enhancing our efficiency in processing the simpler cases. This information was vital for a Chief Judge or Chief Justice of a burdened court. Prior to establishing this system, a Chief Judge was flying blind—treating each case the same with its resultant inefficiencies and inability to generate useful planning statistics. No business can succeed if it ignores the nature of its product. Neither, I suggest, can appellate courts.

D. Deciding the Appeal on the Written Argument

Once an appeal passes through all these channels and reaches the panel of judges who are to decide it, case management efforts do not cease; judges, too, play an active role in efficiently processing

the court's caseload. In practical terms, judges need to assess what stands between them and their final decision, and then plot their decisionmaking process accordingly. For courts that solicit both written and oral arguments, the judges must evaluate whether the materials submitted by the parties are a sufficient basis on which to make their decision, or whether hearing oral argument deserves that portion of their schedule it would consume. The amount of time saved by foregoing oral argument is significant, and it affords the court that many more minutes to allocate to more difficult cases. Dispensing with unnecessary oral argument also enables the parties to avoid the substantial costs associated with having their attorneys prepare presentations and attend the hearing. As for appeals complicated enough to require the parties to appear before the judges, the court still has other means to maximize the utility of oral argument. For example, the court may limit argument time according to the appeal's complexity. One shorthand method for doing so is to set tentative oral argument times based upon the case's weight. The court is always free to add or subtract minutes if the case weight turns out to have inaccurately gauged the appeal's difficulty. The judges also may instruct the parties to come prepared to focus on a particularly troublesome part of the appeal or perhaps binding legal authority overlooked in their written arguments. By announcing the time limits or calling attention to an issue in advance, counsel can prepare with such limitations in mind. Certainly the court may allow the argument to exceed the set time limit, but the judges control how much it spills over rather than a lawyer's propensity for speaking extravagance.

E. Non-Precedential Dispositions

Even when writing the opinion, time can be saved. As with other segments of the appellate process, the court should consider how it could, consistent with its purpose, shorten the time it has to invest in this venture. An appellate decision can further one or both of an appellate court's functions: dispute resolution (error correction) and,

in our system, establishing of precedent. Accomplishing the former does not always entail the latter; thus, the court might have the option, as my court does, of issuing a non-precedential disposition. This might be helpful in Brazil where the court has adopted the principle of uniformity, a similar theory but with a lesser bite than precedent. This procedural mechanism yields multiple advantages. First, the written product can be short. When the court decides the decision will not be precedential, the court can dispense with a recitation of the facts and ponderous discussions of the law. The court drafts the disposition for the benefit of only the trial court and the parties, all of whom are already familiar with the case's factual background and legal issues. Second, the non-precedential disposition is, by definition, of no precedential value for subsequent appeals. It should not be cited. Judges therefore do not have to craft the decision as if each word will bind the court in future cases. Only a clear, reasoned disposition is necessary to advise the trial court and the parties of the court's rationale. Third, limiting full opinions to only those decisions that are genuinely precedent-setting spares judges and parties in later appeals from having to research, read, and cite numerous, essentially identical, cases that stand for the same well-established legal proposition. I have read debates about the value of precedent in Brazil. While it is true that Brazil is a civil law country and that system does not embrace precedent – that argument eludes the more important question: would it be better for Brazil and its judicial system to embrace precedent? Many countries, both civil and common law, are taking an independent look at whether precedent is best for that country. I have worked with several civil law countries, such as Viet Nam and Thailand, who are adapting to a form of precedent for needed stability of the law in a developing country.

II.

I could continue exploring other important procedural devices, but I wish to focus now on a significant innovation developed during my Chief Judge tenure: appellate level mediation. The obvious aim of this

program is to resolve the dispute between the parties thereby ushering the case from the appellate docket. In general, conferences occur before the parties incur the expense of filing their written arguments. The process is cost-free, thus eliminating difficulties encountered by other court-annexed mediation programs that apparently failed because parties resisted paying mediator fees. Currently, nearly all civil appeals filed are eligible for our program. Appellate Mediators are lawyers trained and experienced in mediation, and employed full time by the court. Appeals are reviewed to determine which are amenable to settlement.

Our program confronted a unique challenge at the outset: the court's expansive geographical jurisdiction. Ninth Circuit appeals originate in all parts of the nine western states plus Guam and the Northern Mariana Islands – approximately two-fifths of the entire land mass of the United States. Attorney travel to our San Francisco headquarters was generally cost prohibitive, which spelled doom for the program, some thought, before it began. Common wisdom held that mediation could not be successful unless the participants were in the same room. We charted a new course: use the telephone. Nearly all conferences are currently held by telephone and are fruitful. There is no definitive list of criteria that mediators take into account when choosing cases for the program, although some aspects, such as the parties' willingness to participate, are obviously significant. Once an appeal is selected, the court informs counsel of the time and date of the settlement conference, as well as whether it is to be held in person or by telephone.

Our appellate mediation program has been very successful. In 2010, for example, of the 1,556 cases selected, the program resolved 1023 of them. In practical terms, mediators therefore assumed the workload of approximately two appellate judges. My last discussions with judges and lawyers in Brazil was ten years ago. I was on a team appointed by ISDLS, a non-profit organization that had been successful in implementing mediation in many countries. My focus was

drawn to the state court of appeals in Sao Paulo which was inundated with appeals. I was told that, with the assistance of ISDLS, there has been a remarkable mediation success in this appellate court. I hope that success will be helpful to other overburdened appellate courts in Brazil.

III.

What does all of this show? Appellate courts potentially have a number of tools at their disposal for the efficient management of their caseloads. The options range from the more obvious to those that cut against the traditional mold of appellate decisionmaking. Some involve minor procedural modifications, while others require a more radical reallocation of duties. It is up to each appellate court to select those mechanisms that will be most productive in its particular circumstance. That brings me to my discussion dealing with whether these changes would be constitutional and within the required due process of law. The United States Constitution does not refer specifically to requirements for appeals in the federal court. It is generally held that one appeal is necessary to satisfy the due process clause. That leaves our Supreme Court to set its own calendar by permission, which has been around 75 cases in recent years. That is, for 99% of the federal appeals, the Court of Appeals is the court of finality. But does the due process of the law allow the type of appellate case management and mediation described above? Judges, for example, speak in terms of according litigants due process of law. Due process, literally, is the amount of process due – that is, the proceedings to which a party is entitled to protect its rights.

Flexibility inheres in this concept: surely not every appeal is “due” extensive procedures. If it is patently obvious to the court the first time it reviews an appeal that it lacks jurisdiction, that should mark the end of the court’s consideration. The party who filed the appeal cannot seriously contend it was deprived “due process” if not afforded an opportunity to argue the merits. Similarly, if the court has repeatedly rejected the appellant’s sole contention, the court need not

plod through lengthy briefs or listen to an extended oral argument – the issue has been decided, the litigant’s reasoning disapproved. A short disposition pointing this out and citing a controlling precedential opinion suffices. Litigants should remain free to shed the rigid structures of litigation and meet with independent mediators who will work toward mutually acceptable settlements, not winner-take-all judgments. This basic due process application is echoed in many countries, particularly in jurisdictions that have been taking the largest strides toward case management reform. Thus, as more demands are placed on scarce appellate judicial resources throughout the world, more courts are recognizing that case management and mediation efforts are not in violation of due process. Rather, these courts are coming to understand that the opposite holds true: well-oiled case management and mediation mechanisms actually ensure that the due process principle is enhanced.

The 2010 General Elections in Brazil

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Allow me to initiate registering that, in the recent visit of President Barack Obama to Brazil, it was signed a memorandum in regard to the understanding between USA and our country, this one represented by President Dilma Roussef, in which it was evident, as one of the items, that both countries:

“Agreed to cooperate on the promotion of Democracy, of human rights and freedom of all peoples, bilaterally and by means of the United Nations and of other multi-lateral forums, (...) including through the fostering of human rights in the context of the elections and of the increase of accessibility for special needs individuals.”

That being said, I remark that Brazil, when becoming independent of Portugal, in 1822, adopted Monarchy as its form of government, constituting itself as a unitary State. However, with the proclamation of the Republic in 1889, it turned itself to a Federal State. The option for the federative form of State remains until the current days, meaning, by the Judiciary's point of view, that we basically have a

local or common Justice, organized by member-states, and a federal one, that belongs to the Union.

In the judiciary system cupola, there is the Federal Supreme Court, which is both a constitutional court and court of final appeal.

The Electoral Justice, in its turn, was created in 1932, as a section of the Judiciary, charged of gathering voters, of organizing the elections and of verifying the votes, constituting one of the 1930 Revolution results, which intended to end the political abuses existing in the called “Old Republic” (1891/1930).

With the creation of the Electoral Justice and the promulgation of an Electoral Code, it was introduced in Brazil secret and universal vote, woman suffrage and proportional vote. It – the Electoral Justice – essentially works in the elections period, every two years, alternating the General Elections with the Municipal Elections. During elections, the local judges – from state Justice –, spread all over the country, convert themselves into electoral judges, assisted by board members – citizens convoked to help in vote collecting.

At the top of this system there is the Electoral Superior Court, that is integrated by three judges from the Federal Supreme Court, two from the Justice Superior Court and two lawyer-judges, indicated by the Supreme Court and nominated by the President of the Republic. These judges carry out a two-year mandate, renewable for other two years. There is yet 27 Regional State Courts, integrated by state and federal judges and lawyers, which attend for the same period.

The recent General Elections of 2010 that elapsed in an atmosphere of civic and popular festivity were marked by greatness, efficiency, planning, safety and transparency.

Concerning the grandiosity, it is relevant to stress that, in a plural country with continental dimensions like Brazil, with about 190 million inhabitants, there were 136 million people able to vote,

who chose candidates for six elective positions: the President of the Republic, the State Governor or the Federal District Governor, two Senators, Federal Deputy, State or District Deputy.

Of the total of registered voters, 81.88% appeared to vote in the first round, and 78.50%, in the second one. Thus, there was an abstention of 18.12% in the first round, and an abstention of 21.50% in the second. These rates can be considered reasonable, taking into consideration the fact that the vote, among us, though formally compulsory is, in practice, almost optional, because of the absence of rigid sanctions.

The elections were held in 5,567 municipal districts, in 3,024 electoral districts, in 94,938 voting locals and 418,748 electoral sections. In the elections, there was 9 candidates running for the President position, 171 for the Governor's, 276 for the Senator's, 6,057 for the Federal Deputy's, 14,418 for the State Deputy's and 882 for the District Deputy's, composing an amount of 21,813 contestants.

Overseas, there was about 200 thousand voters, in 126 cities of 86 countries. And, because of innovations brought by the law number 12,034/2009, the country counted on 172 electoral sections for the transit vote in the state capitals, to which approximately 80 thousand voters attended. Besides, 328 voting spots were prepared for temporary prisoners and minor transgressors, so as to serve 19 thousand registered voters.

So as to accomplish such a complex task, the Electoral Justice had the cooperation of about 2 million and 200 thousand of board members, with a fifth of them consisting of voluntaries. Besides, 480 thousand of voting machines were used, of which about 10% were strategically distributed, as a technical reserve, in various spots of the national territory for the substitution of those that presented eventual flaws. And, in a pioneer way, at about 1,1 million voters were identified by means of biometric data, at around 4 thousand electoral sections of 60 municipal districts pertaining 23 States. This number shall be

enlarged to 10 million in the Municipal Elections of 2012, hoping that, in 2018, every Brazilian voter is registered by that form.

Alongside with the natural troubles inherent to the organization of elections of such proportions, in this election, more than 1,200 places of difficult access, spread through 400 Municipal Districts of 15 States, specially indigenous settlements, whose electoral results were transmitted via satellite, properly ciphered.

The realization of the General Elections of 2010 cost R\$ 490 million (US\$ 284 million), what can be considered a relatively low price, because if you share this quantity of money by the number of voters, you reach the value of R\$ 3.61 (US\$ 2.09) per voter. This amount of money comprehends, among other things, expenses with personnel, including board members. It also comprises institutional propaganda, renovation of equipment and the use of Armed Forces.

In relation to efficiency, I point out that the rate of voting machines substituted was, in the first round, of 0.71% and, in the second one, it corresponded to 0.40%. At the electoral sections with biometric voting machines, the rate of recognition corresponded to 92.6% in the first round and 94.5% in the second one. An additional information: the percentage of manual voting, because of equipment flaws in the first round was only 0.004% and, in the second, it was 0.001%.

Another accomplishment worth mentioning: the announcement made by the Electoral Superior Court stating that Dilma Rousseff was mathematically elect was published at 20h40, October 31st, 2010. At that time, 92.23% of the voting machines were verified, which means that it happened 1 hour and 4 minutes after the end of elections, at 19h, in consequence of the different time zones in the nation. The end of the counting of all votes for the President of the Republic was concluded at 15h24 of the following day, that means, just 22 hours and 24 minutes past the beginning of the verification of the votes.

Regarding the planning, I remember that the organization of the

subsequent elections starts right after the ending of the previous ones, involving from negotiations with the Executive and the Legislative so as to obtain financial resources, renewal of the equipment, personnel training and elaboration of the normative directives, until the preparation of the institutional propaganda for the clarification of the voters, apart from other measures. Planning, it is important to note down, also involves contacts with the Armed Forces, the Federal Police and local authorities. So that we can learn from mistakes and solidify what is correct, after the elections, one of the first arrangements made by the Electoral Justice is the execution of regional and national meetings. Judges and public servants take part in these meetings so that they can evaluate the positive and the negative points of the finished elections.

The Armed Forces, in the precise fulfillment of its constitutional functions, contributed decisively with the Electoral Justice so the last year elections were successful, providing logistic support in the transportation of people and materials for distant or difficult access municipal districts. They acted in 127 places, in the first round, and in 117 in the second one. And, authorized by the Electoral Superior Court, the Armed Forces were called to guarantee order during the voting and the verifying of the votes in 257 municipal districts, in the first round, and in 257, in the second one.

Referring to the safety of the system, I recall that the Electoral Superior Court made a public test with the intention to measure the possibility of penetration in the electronic and mechanic systems of the voting machines by non-authorized people, which occurred yet in 2009. External investigators tested the safety of the voting system, accompanied by international observers, however nobody succeeded to violate it. Besides, in the last elections, aiming to assure a greater safety, the Electoral Superior Court made several simulated tests of partial character and three major integration tests of the system in national ambit.

Relative to transparency, I remember that, in the period between September 31st and October 31st, the Electoral Superior Court broadcasted a public campaign about the 2010 elections. During three months, the Electoral Justice took daily 10 minutes in every television and radio station to transmit to the voters messages of awareness and orientation, as the law 9,504/1997 disposes.

The campaign was divided in 4 phases, counting on 26 movies for TV, 26 radio spots and a jingle in 5 distinct rhythms. There had also been distributed 54 million “hints” (papers to be filled in with the candidate numbers) to the voters and near 3 million of elucidative placards. The Electoral Superior Court kept a hot site on the internet, urban furniture and built digital totems in the airports.

The Electoral Superior Court also built the 2010 Election’s Publicity Center, that worked from the period of September 30th to November 5th, something that was considered essential by the communication professionals. The Center, with a built area of near 1,000 square meters, counted on 12 TV cabins, 18 radio cabins, 62 group of benches for the written press, filming sets, collective interview room and studio so as to record the interview and the TV shows.

Moreover, the Electoral Justice amplified its communication with society. It created a specific site about voting machines, apart from maintaining an Electoral Superior Court channel on YouTube and on Twitter for informative ends. The News Agency of the Electoral Superior Court website was accessed by over half a million people.

Something else new was the Voter Central, made in May 2010, a channel of communication between the Electoral Superior Court and the citizens, that consulted over 11 thousand times, since its creation until the month of October, 2010.

Something important to realize was that the standardization of the publication of the data and statistic information contributed to

accredit more safety and agility to the attending of the demands of researchers and press professionals.

With the certification of the elect candidates, represented by a diploma-like document, there was a feeling of accomplished duty in everyone who worked in these elections. Even more: the satisfaction of watching the country fully pacified and back to normality after de publication of the elections' results, registering no refutation towards the vote counting made throughout the units of the Federation.

This feeling was fully confirmed by an issued research to *Sensus* institute, short after the elections, that showed that 87% of the voters had positively evaluated the Electoral Justice and 94.4% approved the use of voting machines.

Electoral Justice in Brazil and the United States

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Both Brazil and the United States are federal systems with a wide variety of federal, state and municipal elections. But they differ greatly with respect to the mechanisms for resolving election disputes. Like many countries of Latin America,¹²⁹ Brazil has a uniform Electoral Justice System, whose broad details are set out in the 1988 Constitution. This Electoral Justice System oversees all elections and adjudicates all election disputes. Brazil also has an Electoral Code, a comprehensive federal law, supplemented by several other federal statutes governing election matters. This makes the conduct of elections in Brazil far simpler, more efficient, and much less contentious than in the United States. The United States has no such uniform system for running elections, nor does it have comprehensive federal legislation that compares to Brazil's Electoral Code. Instead, elections and election disputes in the United States are governed by a bewildering variety of federal, state, and municipal laws. Election disputes are adjudicated in state or federal courts, and it is not uncommon for the same dispute to be adjudicated by both state and federal courts.

I. BRAZIL'S ELECTORAL JUSTICE SYSTEM

Brazil's Electoral Justice System dates back to the 1930 Revolution, which overthrew a government because of widespread accusations

of electoral fraud. One of the first acts of the provisional government was to appoint a commission to reform the electoral laws. The work of this commission was subsequently embodied in the Electoral Code of 1932, which created the Electoral Justice System. Since its creation, the Electoral Justice System has had the administrative responsibility for the conducting and supervising all federal, state, and municipal elections, including enrolling voters, organizing election supervisors, counting the votes, and determining which candidates have been elected. It has also had the judicial function of resolving all electoral disputes. To be sure, since 1932 Brazil has gone through periods when elections were not held, or, if they were, only the votes of generals counted. Brazil has also gone through periods in which the independence of the Judiciary has been compromised by military dictatorship. Fortunately, today Brazil has a democratic form of government that makes voting optional for virtually all Brazilians between the ages of 16 and 18 and those over 70, and makes voting mandatory for all Brazilians between the ages of 18 and 70. Brazil also has a Judiciary with a well-earned reputation for independence, particularly in its highest courts.

The original Electoral Code has been replaced several times. The version currently in force was enacted in 1965.¹³⁰ The Electoral Justice System has constitutional status, set out in articles 118-121 of the 1988 Constitution. Article 121 mandates that the Brazilian Congress enact a complementary law providing for the organization and jurisdiction of the electoral tribunals, state court judges, and the electoral boards, but Congress, as it has so often been the case, has yet to enact this complementary law. In 1990, Congress did, however, enact a complementary Law of Ineligibilities, which prevents certain categories of persons from running for public office.¹³¹ It has also enacted a Law on Political Parties¹³² and an Election Law.¹³³ These three statutes, together with the Electoral Code and the Constitution, provide the basis of election law for the entire country.

The Electoral Justice System consists of five bodies: (1) the Superior

Electoral Tribunal, (2) Regional Electoral Tribunals, (3) Electoral Judges, (4) Electoral Boards, and (5) Electoral Public Ministry. The Constitution deals with only the first two bodies, and says nothing with respect to the last three.

A. The Superior Electoral Tribunal

The Superior Electoral Tribunal, which is Brazil's highest electoral court, has seven members, five of whom simultaneously serve on Brazil's two highest tribunals. Three members are selected by secret ballot from the Supreme Federal Tribunal (STF), Brazil's highest court, and two from the Superior Tribunal of Justice, the second highest court. The other two members are selected by the President of the Republic from a list of six eminent lawyers submitted by STF.¹³⁴ At the same time and by the same procedures, an equal number of alternate judges are selected. Like the other electoral judges, members of the Superior Electoral Tribunal serve for a minimum of two years and a maximum of four years.¹³⁵ The Tribunal has national jurisdiction and generally addresses national electoral issues. While the Constitution and the Electoral Code provide as a general rule that the decisions of the Superior Electoral Tribunal are not appealable, they create three broad exceptions that in theory might easily swallow up the rule. The exceptions are for decisions declaring a law or act unconstitutional, denials of habeas corpus, and denials of writs of security (*mandado de segurança*).¹³⁶ The only appeal is to the Supreme Federal Tribunal, and such appeals must be taken within three days. As a practical matter, given the close interrelationship between the two tribunals, rarely does the Supreme Federal Tribunal reverse a decision of the Superior Electoral Tribunal.¹³⁷

B. The Regional Electoral Tribunals

Directly beneath the Superior Electoral Tribunal are Regional Electoral Tribunals. Every state and the Federal District have a Regional Tribunal, which also consists of seven members. Two are selected

by secret ballot from the members of the respective State Tribunals of Justice, the highest courts in each state. Two are selected by the respective Tribunal of Justice from the lower court judges in the state courts. One is a member of the Federal Regional Tribunal that sits in the capital of the respective state, or in the absence thereof, a federal judge chosen by the respective Federal Regional Tribunal. The other two judges are selected by the President of the Republic from a list of six eminent lawyers submitted by the respective Tribunal of Justice.

C. The Electoral Judges

The electoral judges are selected by the Regional Electoral Tribunals from among the state court judges. The jurisdiction of the electoral judges is an Electoral Zone. These judges participate in the administration of voting and serve as the judges of first instance for electoral disputes.

D. The Electoral Boards

The Electoral Boards are made up of one law judge and two to four citizens with outstanding legal knowledge and good moral character. They are convened sixty days before an election. These boards are temporary and their only function is to administer the particular election for which they were convened.

E. The Electoral Public Ministry

The Public Ministry is an autonomous governmental agency charged with responsibility for defending the legal order, the democratic system, and prosecuting criminal defendants. The Electoral Public Ministry consists of an Electoral Procurator General, Regional Electoral Procurators, and Electoral Prosecutors. The function of the Electoral Public Ministry is to safeguard the law within the Electoral Justice System.

F. The Electoral Justice System in Practice

These five parts of the Electoral Justice System plan, administer and regulate elections in Brazil. They maintain voter and candidate lists, insure eligibility of both voters and candidates, regulate free political advertising, control the content of campaign advertising, insure that candidates have a right of reply, oversee campaign spending, and prosecute electoral crimes. With very limited personnel and budget, the Electoral Justice System has done a very effective job in administering and supervising the formal aspects of federal, state, and municipal elections over a geographic area larger than continental United States with an electorate that numbers 130 million and 29 political parties.

Since introduction of electronic voting machines in 1996, the Superior Electoral Tribunal and Regional Electoral Tribunals have constantly cultivated societal trust in the accuracy and the trustworthiness of the electronic voting system. The machines are made by Unisys and ProComp, a Brazilian company owned by Diebold Election systems, at a cost of about \$420 each and can operate on batteries. The software is changed for each election by the Superior Electoral Tribunal. Technical experts from each political party, the Brazilian Bar Association, the Public Ministry, and any citizen are given the opportunity 180 days before the election to make sure that the new source code complies with the law. The software is sealed 60 days before the election in a public ceremony in which representatives of civil society and political parties digitally sign the software code. The digitally signed and encrypted software applications are then distributed to the Regional Electoral Tribunals. Several days before the election, each Regional Electoral Tribunal loads all the voting machines with the name, number, party, and photo of each candidate, voters tables, and the software applications, an event that must be attended by the representatives of the political parties. The loading process is then validated on a 3% sample of all voting machines selected randomly by the representatives of the political

parties. On the day before the election, a certain percentage of the machines are taken to the Regional Electoral Tribunal for a simulated voting session to compare electronic ballots with traditional ballots. A random sample of both types of ballots is then compared for consistency. At the start of election day, the electronic machines are turned on in the presence of the representatives of the Electoral Board and the political parties to make sure that they each print out a report certifying that the machine is empty and contains no preprogrammed votes.¹³⁸

Brazilian electronic voting machines, which have been used in all elections since 2002, are easy to use and have greatly facilitated voting, particularly for illiterates. First, voting board representative verifies a voter's identity by typing into the voting machine the voter's identification number. If registered in the precinct, the voter's name will be displayed on the screen. Then, in the voting booth, the voter types the candidate's number and party affiliation on a set of keys resembling a touch tone phone, after which the candidate's picture appears on the screen. The voter can then either confirm or cancel the vote.

Since the compulsory use of electronic voting in Brazil, the election results have been deemed honest and credible. There has no known evidence of electoral fraud connected with the counting of the votes from the electronic machines. According to a 2008 survey, 97% of Brazilians approved of the electronic voting system and deemed the Electoral Justice System as the most trusted institution in the country.¹³⁹

The electoral courts have also performed credibly in removing certain state and local officials from office for blatant violations of election laws. Between 2000 and 2007, over 600 politicians, the great bulk of whom were mayors and municipal assembly members, were removed from office by the electoral courts.¹⁴⁰ Since 2002, some fourteen state governors were tried before the Superior Electoral

Tribunal, and four have actually been removed from office for illegal use of the state bureaucracy to secure election.¹⁴¹

On the other hand, Brazil's electoral courts have not a very good job at detecting and punishing less obvious forms of political corruption, such as vote buying. Brazil is a country where companies frequently keep two sets of books, and it is estimated that roughly half of campaign finance is not officially registered and comes from off-the-books slush funds. The electoral courts have not been capable of reliably auditing campaign expenditures. The Superior Electoral Tribunal has only five staff members to audit campaign expenditures across the entire nation. As Tomaz Bastos, a former Minister of Justice observed, campaign accounts in Brazil are “an electoral fiction” in which the electoral courts “pretend” they have audited the campaign books, while the parties and candidates “pretend” they were audited.¹⁴²

Members of Congress are barred constitutionally from owning, controlling, being a director, or occupying any paid position in any media company. Nevertheless, it has been estimated that half the members of Congress are major shareholders in radio or TV stations.¹⁴³

Nor have the electoral courts or the regular courts been very successful in preventing corrupt politicians from becoming members of the National Congress or in removing them once their corruption has become apparent. Since the return of democracy in the late 1980s, Brazil has experienced successive waves of scandals involving corruption by members of Congress. For example, in 1993, a group of short Congressmen nicknamed the “Seven Dwarfs” were fortuitously discovered to have been systematically looting the Treasury in the preparation of the annual budget. In 2006, an investigation discovered that over 70 members of Congress were involved in a scheme to rig the bidding process for ambulances purchased with funds from the Ministry of Health. In 2005, a Congressman under

pressure because of his involvement in another scandal with the Post Office revealed that aides to President Lula were paying monthly allowances to members of Congress in exchange for their voting support. Forty persons, including ten members of Congress, were indicted in this scandal. Thus far, no one has gone to jail for any of this criminal activity.

Being a member of Congress has its privileges. The Brazilian Constitution confers both the privilege of parliamentary immunity¹⁴⁴ and the right to be tried exclusively by the overburdened STF. Although criminal proceedings have been filed against 152 members of Congress, many of whom have multiple accusations and some even multiple convictions in state courts,¹⁴⁵ between September 1988 and April 2010, the STF had not convicted even a single member of Congress. In a signal that perhaps the law of Congressional impunity may be in the process of revision, between May and September 2010, the STF managed to find the time to convict three members of Congress, although none was actually sentenced to serve hard jail time.¹⁴⁶ Even more surprisingly, in October 2010, a panel of the STF convicted and sentenced Natan Donadon, a deputy from the State of Rondônia, to prison for a substantial term.¹⁴⁷ Despite this conviction, Donadon is currently back in Congress. In December 2010, a member of the STF issued a preliminary injunction overriding a decision of the Superior Electoral Tribunal and allowing Donadon to retake his seat in Congress pending the outcome of his appeal.¹⁴⁸

In June 2010, a popular initiative, reflecting popular discontent with the high level of political corruption, led to the enactment of a controversial statute called the Law of the Clean Slate.¹⁴⁹ This law prohibits any candidate from running for political office for eight years if he or she has been convicted of certain crimes. But this prohibition applies only if one of the following three criteria are met: (1) the conviction has become final and nonappealable; (2) the conviction was rendered by a collegiate tribunal, or (3) the candidate resigned a mandate to avoid its cancellation.¹⁵⁰ Initially, the

constitutionality of the Law of the Clean Slate as applied to the 2010 elections was upheld by a short-handed and evenly divided STF.¹⁵¹ However, on March 23, 2011, after appointment of a new minister, the STF reversed its earlier decision and by a vote of 6-5 held that the Law of the Clean Slate could not constitutionally be applied to the 2010 elections because of the year delay rule set out in Article 16 of the Constitution.¹⁵² Moreover, it is not clear whether the constitutionality of the Law of the Clean Slate on the merits will be sustained when the issue comes before the full court.

II. ELECTION LAW IN THE UNITED STATES

In sharp contrast with Brazilian election law, election law in the United States is a confusing hodgepodge of federal, state, and municipal legislation, combined with numerous provisions of the U.S. Constitution, constitutional amendments, and critical decisions of the U.S. Supreme Court.

Curiously, the U.S. Constitution originally granted the right to vote to no one. Rather it committed determination of voting qualifications and the conduct of elections for members of the federal Congress to the individual states. The Constitution still provides:

The Times, Places and Manner of holding Elections for Senators and Representatives shall be prescribed in each State by the legislature thereof, but the Congress may at any time by Law make or alter such Regulations, except as to the places of chusing Senators.¹⁵³

Originally, members of the Senate were elected by the state legislatures, but in 1913 adoption of the 17th Amendment changed this method of selection to popular voting. Although the 12th Amendment modified the Electoral College in 1804, to this day, electors, chosen in a manner directed by state legislatures, choose the President of the United States, but if no candidate has a majority

of the votes cast in the Electoral College, the election is decided by the House of Representatives, an event that has occurred twice in U.S. history.¹⁵⁴ Today, in nearly all states, whichever candidate wins a majority of the popular vote wins all of the state's electoral votes, but there are a few states that allocate electors proportionately.

In the United States, in sharp contrast with Brazil, every state has its own election laws. There are no uniform standards for voter registration, voting equipment, or procedures for counting the votes. Moreover, there are significant variations within the states themselves because elections are administered by counties, independent cities, and townships. Overall, there are 10,071 separate jurisdictions with responsibility for administering elections in the United States. Many are run by very small, understaffed and underfunded offices that operate upon a part-time basis.¹⁵⁵ In the 2008 elections, 34.3% of the counties used 17 types of electronic voting machines, 58.9% used 25 different types of optical scan equipment, .35% used punch cards, 1.99% used lever systems, 1.8% used paper ballots, and 2.69% used some form of mixed system.¹⁵⁶

The debacle of the 2000 presidential election between George W. Bush and Al Gore, which made Florida election officials look incompetent and the Florida courts and the U.S. Supreme Court look partisan, starkly revealed the major problems that beset the United States in administering elections. Although Gore comfortably won the popular vote and was ahead by 267 to 246 in the electoral votes, the outcome of the entire election depended upon which candidate won Florida's 25 electoral votes. The vote was close, with the Florida Division of Elections reporting that Bush had received 2,909,135 votes versus 2,907,351 for Gore, a margin of 1,784. After a legally mandated machine conducted recount showed Bush ahead by only 537 votes, Gore requested a manual recount of the votes in the four largest counties to try to determine whether punch card ballots that were not machine readable indicated how the voter intended to vote. The four counties began the requested manual recounts, but were

told by Katherine Harris, Florida's Secretary of State, who had been campaign manager for Jeb Bush, Florida's Governor and brother of candidate George Bush, that unless the recounts were completed within one week of the election, they would not be counted. Gore supporters challenged her decision in the state courts, and the case ultimately went before the Florida Supreme Court, all of whom had been appointed by Democrats. That court held that the ambiguous (and apparently inconsistent) provisions of Florida's election statutes required Harris to give the counties an additional five days to complete their recounts. Bush lawyers challenged that decision before the U.S. Supreme Court as violative of Article II of the Federal Constitution, which states that state legislatures are to fix the method of choosing each state's electors, and a federal "safe harbor" statute, which insulates a state's chosen electors from congressional challenge, provided all controversies concerning their selection have been resolved by a certain date.¹⁵⁷ Initially, the U.S. Supreme Court did refused to stop the manual recounts but unanimously remanded the case to the Florida Supreme Court for a better explanation of how its ruling complied with the requirements of Article II. Simultaneously, Bush supporters sought to enjoin the recount procedure in the federal district court on the ground that it was so discretionary that it deprived Bush of due process, but this suit was dismissed on the basis that there was no ground to circumvent the state courts, which could decide the federal constitutional claims.

On November 26, 2000, Secretary of State Harris certified all 25 Bush electors to the Electoral College. Gore challenged that action on the ground that enough legal votes had been rejected by Florida's voting machines to change the outcome of the election. By a vote of four to three, the Florida Supreme Court on December 8 ordered a manual recount of all the uncounted undervotes. Although the 12th Amendment to the Constitution provides that Congress is to be the ultimate arbiter of a contested presidential election, the U.S. Supreme Court stepped in and decided the election by a five-four vote that halted the recount and sent the case back to the Florida Supreme Court

with instructions that made clear that George W. Bush had won the election. The majority's unconvincing opinion reasoned that because there was no clear state rule for how to treat ballots with hanging chads or dimpled attempts to punch a card, identical-looking ballots might be counted differently at different times or places by persons trying to determine the intent of the voter, there was a violation of equal protection and due process. Since there was no time to formulate such uniform standards before December 12, the safe harbor date, George W. Bush is the winner.¹⁵⁸

The Bush-Gore election dispute reveals starkly some of what is wrong with the way in which the United States conducts elections. Even though the dispute focused upon a single state, it is clear that the mishaps of Florida can be replicated in all states. Each Florida county was responsible for deciding which voting equipment to buy, how to design the ballot, and which registration procedure to use. Some counties used optical scanners, others punch card machines. The latter led to a substantial number of ballots going uncounted, either because the voter elected not to vote for a presidential candidate, or because the voter imperfectly perforated the ballot, leaving a dangling chad or a dimple in the paper ballot. An election official, concerned that elderly voters would have difficulty reading the small print on the ballot, designed for Palm Beach County a so-called “butterfly ballot,” which was larger but so confused voters that many who thought they had voted for Al Gore had actually voted for Patrick Buchanan, a third party candidate who did not even campaign in the state. Many voters claimed that they had been denied the right to vote because their names had been purged from the voter lists, a fact that they discovered only upon election day. The officials in charge of determining election disputes within the state are partisan politicians with no credible claim to impartiality.

The only positive aspect of Bush v. Gore is that spurred Congress to enact the Help America to Vote Act (HAVA) of 2002,¹⁵⁹ the latest of a relatively small number of federal statutes designed to improve the

election process.¹⁶⁰ This statute produced three significant, although clearly insufficient, reforms: (1) it created the Federal Election Assistance Commission, (2) it authorized nearly \$4 billion in federal funding to help states improve administration of elections and to replace obsolete election equipment, and (3) for the first time set minimum standards for states in administering elections.

Title III of HAVA imposes a set of requirements upon the states in the areas of voter registration and election administration. One such requirement is that by January 1, 2006, every state must create a single, uniform, official, centralized, periodically updated computerized database for its registration rolls, and that each registered voter must be linked to a unique identification number in this database.¹⁶¹ Voters are required to provide on their registration application forms either the last four digits of their Social Security numbers or their driver's license numbers; if a voter has been issued neither number, then the state is required to assign to that voter a unique identification number for entry into the database. HAVA also directs each state to determine according to its own laws whether the information provided by the registrant "is sufficient to meet the [federal] requirements" and to update the list by periodically removing ineligible and duplicate registrations. Unfortunately, HAVA intentionally left the details of implementing this requirement to the individual states. With no single recommended approach, the states have used a great variety of private contractors and in-house personnel to construct a hodgepodge of systems that frequently differ significant from one another. A dozen states failed to meet the deadline. Others had glitches with the systems they adopted and had to replace contractors. Costs varied from a low of \$1 million in South Dakota to a high of \$20 million for Pennsylvania. Systems are not designed to be interlinked from one state to another. Since millions of Americans move from one state to another each year, this failure results in significant costs in time to reregister into a different system that could have been avoided with a single national system.

HAVA requires state polling locations to have at least one voting system that can be used by persons with disabilities, such as those who are blind. It also requires that voters deemed to be ineligible at the polling place be given a provisional ballot so that their votes may count if later election officials determine these persons are in fact eligible voters.¹⁶²

HAVA grants funds to states to replace punch card and lever voting systems with electronic or optical scanner systems. It also allocates funds to the states for use in training personnel to use the new systems. HAVA also establishes various requirements for all voting systems. They must permit the voter to verify privately his choices before finally casting his ballot and to be able to correct any errors therein. All voting systems have to be auditable and produce a paper record so that any recount can be conducted manually.

Finally, HAVA has created a bipartisan Election Assistance Commission to perform a variety of tasks. These include acting as a clearing house for information about administering elections, creating a testing and certification program for voting systems, developing and maintaining a system of voluntary voting guidelines, and making grants to persons or entities for research and development to improve the reliability of voting machines and election systems.

CONCLUSIONS

The United States could improve enormously its electoral system, or perhaps better its lack thereof, by adopting the Brazilian model. While replacing the Electoral College method of selecting the President would require a constitutional amendment, which is exceedingly unlikely to happen, Congress could adopt legislation federalizing the rest of the election process to make elections uniform and administered throughout the United States by a supposedly political neutral federal authority. The Supreme Court has held that

article I § 4 bestows broad powers on Congress to regulate the entire area of qualifications for voting in congressional elections.¹⁶³ The Supreme Court has also held that Congress has the same broad powers over presidential elections as it does with respect to congressional elections.¹⁶⁴ But the Constitution does not confer upon Congress any general authority to regulate voter qualifications in state elections, which are the exclusive province of the states. When Congress tried to lower the minimum voting to 18 in all federal and state elections, the Supreme Court sustained the legislation as to federal elections but not as to state elections.¹⁶⁵

Thus, while it is constitutionally possible for Congress to create a uniform system of voting in federal elections, the political will is lacking, perhaps because the influence of our federalism and our long tradition of entrusting the election machinery to the states. Not even a political and judicial disaster of the magnitude of Bush v. Gore in 2000 produced any serious momentum to reform the Electoral College or to create a uniform, federalized system for voting in presidential and congressional elections. Instead the United States continues to allow each state to demonstrate serious incompetence in conducting both federal and state elections. On the other hand, adoption of HAVA is a small step in the right direction, for it strongly encourages the states to adopt electronic or optical scanners as voting equipment. Unlike Brazil, however, serious doubts have been raised about the security of the source codes of the electronic voting devices in the United States, perhaps because the United States has no institutional analogue to Brazil's Electoral Justice System to insure the integrity of the voting process. Moreover, judges in Brazil, with the exception of the Supreme Federal Tribunal, are selected upon the basis of competitive examinations, whereas state judges in the United States are usually elected. There is not the same insulation from the political processes in both countries.

Brazil also offers a solution for one problem plaguing the U.S. electoral process. Only about half of those Americans eligible to vote

actually do so, even in presidential elections. Brazilian turnout is a much higher percentage of the electorate because for most citizens voting is compulsory. This sometimes leads to bizarre results, such as voters in São Paulo voting for a hippopotamus in the zoo rather than any of the candidates on the ballot, or simply leaving their ballots blank. There seems to be no serious political support, however, for making voting compulsory in the United States.

On the positive side of the ledger, the United States has a much better track record for placing its corrupt politicians behind bars. There is no presumption of innocence once someone has been convicted of a crime, and there is a much more limited ability to postpone serving one's sentence while appealing. Moreover, criminal defendants in the United States do not have four bites at the apple, as they do in Brazil. The appeals process usually ends after a single appeal. The number of appeals heard by the U.S. Supreme Court annually is only a tiny fraction of those heard by the Brazilian high court.

The United States also has a more democratic system of representation than Brazil, where both houses of Congress are seriously malapportioned. In the Brazilian Senate, each state and the Federal District elect 3 senators, while in the United States each state elects two senators. California, the most populous state, has 66 times the population of Wyoming, the least populous state, which gives each Wyoming vote for senator 66 times the weight of a similar California vote. But the heavily populated of São Paulo has 144 times the population of the thinly populated state of Roraima, yet each state elects three senators. This makes the Brazilian Senate one of the most malapportioned territorial chambers in the world.¹⁶⁶ The House of Representatives in the United States is reapportioned every ten years upon the basis of population, and since the Supreme Court's decision in *Reynolds v. Sims*,¹⁶⁷ both Congressional districts and state legislative districts must be apportioned upon the principle of one person one vote. In Brazil, on the other hand, the Constitution provides that each state is entitled to a minimum of 8 and a maximum of 70

deputies in the lower house of Congress.¹⁶⁸ If Brazil operated with the one-person-one vote principle, the state of São Paulo would have had 114 deputies, and the least populous states of Acre, Amapá, and Roraima would have had only one deputy each.¹⁶⁹ Instead, São Paulo elects only 70 deputies, and each of the three sparsely populated states receives 8. Brazil might well improve the quality of its democracy were it to borrow a page from the United States and amend its Constitution to insure that at least one house of Congress is elected pursuant to the principle of one-person-one-vote.

Prosecuting and Trial of Political Corruption Cases before the Supreme Federal Court of Brazil

Ellen Gracie, Minister, Supreme Federal Tribunal of Brazil

**Retired in August 2011*

Bronislaw Malinowski formulated the principle that, in society, one adheres to the law, by the desire to be recognized as a good citizen rather than properly for fear of suffering some penalty.

Although this occurs in many instances, it is clear that the impunity of those who repeatedly transgress rules has a corrosive effect on the social fabric. And when these transgressions are held in the “upper floor”, which is the headquarters to those who hold higher positions (and are thus more exposed to public scrutiny), the effects on the moral of society are even more severe.

In Brazil, the pursuit criminal characters of the political world, in special of Members of the Parliament, was efficiently impossible for a long period. Not that there was some rule in the law of absolute immunity as “*The King can do no wrong*”, but because the action of the Judiciary was dependent on the express authorization of the Legislative House to whom the accused belonged. The original text of Article 53, § (paragraph) 1 of the Constitution of May 10th of 1988 stated in this sense: “*Since the issuance of the certificate, members of the National Congress shall not be arrested—unless when in flagrante delicto of an unbailable offence—nor criminally processed, without prior acceptance of his House.*”

The erosion of democratic institutions caused by the systematic refusal of such permits to judge was enormous. It was only on December 21st of 2001, that the Constitutional Amendment number 35 was enacted. It reversed the prevailing logic. Since then, the Supreme Federal Court is authorized to assess the complaints offered by Prosecutor's Office against Senators or Representatives. Once the prosecution is received, such fact is communicated to the correspondent Legislative House. Excesses and abuses of the parliamentary institution can be controlled by interruption of the process. The measure is proposed by the initiative of a political party, assessed within a not extendable term of 45 days and approved by majority. Thus, the restraining takes immediate effect on the judicial process and suspends the prescription of the investigated crime, by the end of the parliamentary mandate.

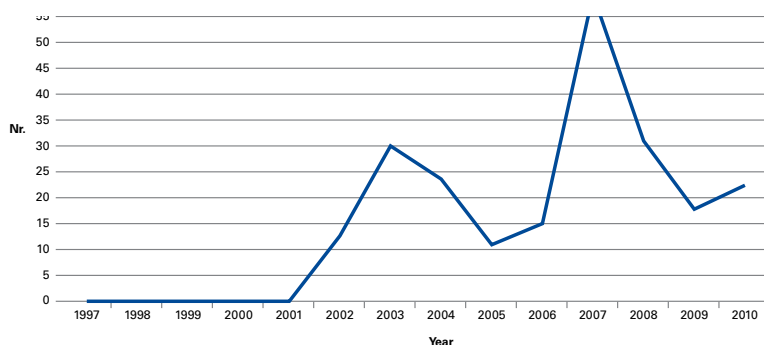
The political duty of this inhibitory action of criminal prosecution, however, is too large. This reduces the chances of its use for the exceptional cases in which the parliamentary institution sees itself as being in danger. The prerogative has never been used, which is something normal to happen at the time of full institutional peace in which we live.

On the other hand, the constitutional amendment allowed the Supreme Federal Court of Brazil to consider around 11,194 complaints against personalities of the public world, mostly related to the neglect of the former public functions.

Nevertheless, the criticism on the inaction of the Judicial Power has not ceased—as if, to each accusation there might be a necessary conviction; as if the prescription terms of many crimes have not inured; and, as if the full right of defense could be ignored, when dealing with public men.

The table displayed shows the evolution of criminal prosecutions since 1997, with the significant change that occurs after 2002.

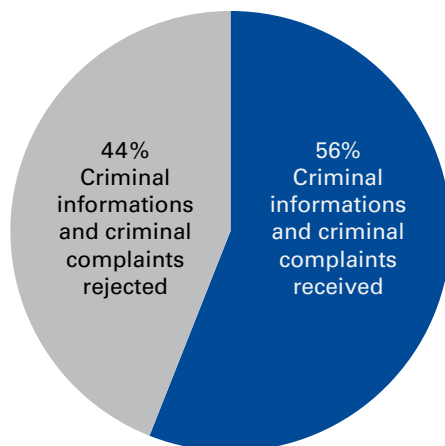
There are currently 12,303 criminal cases pending before the Supreme Federal Court¹⁷⁰, many of them returned to the Prosecutor's Office for some manifestation.



As investigations for determination of crimes committed by holders of privileged jurisdiction, there are currently 353,275 being processed¹⁷¹. From the Constitutional Amendment number 35, complaints have been received (6245) or rejected (49) in similar numbers, as well shown in the chart on the next page:

The most publicized criminal cases among these is the Nr. 470, known as the Bribery Scandal. In August 2007, after 30 hours (5 days) of oral arguments, discussion and deliberation, the Supreme Court received a complaint against 40 legislators and members of the Executive by the alleged practice of various acts of corruption. The case attracted considerable attention, given the proximity of some of the parties with the core of the Executive.

**INVESTIGATIONS: CRIMINAL INFORMATION AND
CRIMINAL COMPLAINTS JUDGED BY THE
SUPREME FEDERAL COURT OF BRAZIL
2002-2010**



This case, the first to be fully digitized, has today a total of 206 volumes, and 43,656 pages, besides 463,170 annexes, or 19,000 extra pages attached, which together occupy approximately a total of 8.2 gigabytes of memory from our central server. By ways of comparison, another highly publicized criminal case, Criminal Action Nr. 307/92, which charged the ex-President himself with corruption, did not exceed 47 volumes and 111 annexes.

PROCESS	VOLUMES	PAGES	ANNEXES	ELECTRONIC VERSION
Criminal Action 307 (Collor)	47	5.527	111	NO
Criminal Action 470 (Bribery Scandal)	206	43.656	463	YES (8.2 GB)

Thanks to the use of technological resources, the *Rapporteur*, Justice Joaquim Barbosa, is able to provide simultaneous examinations to all the defenders. This accelerates the development of the work. In only two years nearly 600 defense witnesses have been heard. It is good to bear in mind that the Brazilian criminal procedure and its protective interpretation by the Supreme Federal Court allow lawyers to use any kind of deferring appeals in attempt to expire the prescriptive term of the offences before the final decision. These maneuvers are currently delaying the trial of the criminal action, since all the instruction of evidences is already completed.

Recently, the popular initiative, a constitutional measure, led to the enactment of the so-called Law of Clean-Record (Complementary Law Nr. 135 of April 06th, 2010), according to which citizens that have been convicted by a decision in the second instance—even without the force of *res judicata*—are ineligible.

In consequence, the general elections of 2010 (for the posts of President and Vice-President, Governors and Vice-Governors, Federal Deputies, State Deputies and District Deputies and one third of the Senate) bring the following scheme:

22.538	Requests for records of nominations	
2.000	Rejected by disrespect to the Electoral Law	
400	Rejected by the application of the Complementary Law 135/2010	
149	Rejections maintained by the Superior Electoral Courts, of which:	
	108	State Deputies
	3	District Deputies
	29	Federal Deputies
	5	Senators
	2	Governors
	2	Vice-Governors

The understanding of the Superior Electoral Court (TSE) towards immediate applicability of the law was challenged before the Supreme Federal Court, where, by a tight majority, it was considered that the restriction to the 2010 elections correspond to the retroactivity of the more onerous law and that, therefore, it could only affect the candidates in the upcoming election.

Nevertheless, it is important to note that among the 149 candidates whose rejections were maintained by the Superior Electoral Court, only 133, i.e., the percentage of 8.73% of them, obtained enough votes to be elected.

The fact that a tiny portion of these candidates has obtained enough votes to be elected demonstrates a trend within Brazilian society: to consider the candidates for public functions with more accuracy. And, to require political parties to present candidates whose past history would not discredit the electorate.

The case of Complementary Law Nr. 135 demonstrates well that the improvement of democratic institutions requires constant surveillance of citizens (which, in this case, is expressed either through the popular initiative—2,300,000 million signatures—that initiated the legislative process, and later by the ultimate rejection of candidates with the “dirty-record”), as well as the constructive role of the constituted powers: the Legislative, to elaborate restrictive rules (such as the unanimous approval of the Complementary Law Nr. 135/2010), and the Judiciary to apply them properly.

Prosecuting and Trying Political Corruption in the United States¹⁷²

Peter Messitte, Senior Judge, United States District Court, District of Maryland

One can debate what the most comprehensive meaning of “political corruption” is, but I think we all understand its core meaning. Quite simply, it means using public office for private gain. Most commonly one thinks of a direct payment of cash to a public official to influence a specific official decision, but it may also involve the grant of benefits to the official, his family or friends (*e.g.* travel and entertainment) in exchange for the expectation of unspecified political favors in the future. The solicitation of the bribe may originate with the public official or with the individual seeking to influence the official’s action. There may also be an unspoken understanding in a particular political culture that certain private individuals are disposed to offer inappropriate favors to public officials while certain public officials are inclined to accept them. At the same time, political corruption may simply consist of a public official helping himself to public funds he is not entitled to.

Political corruption is of course not a new phenomenon. It has been part of the fabric of government virtually from the beginning. The United States has a long history of political corruption.

Among the early scandals:

At the end of the 18th and into the early 19th century, several Governors of the State of Georgia and that state's legislature perpetrated a massive fraud by selling large tracts of land to insiders at ridiculously low prices (the Yazoo Land Scandal).

Also just after the Civil War, the company that built the Union Pacific Railway gave low-cost stocks to members of Congress to influence their votes (the Credit Mobilier Scandal).

In the early 1920's, Albert B. Fall, the Secretary of the Interior, leased government-owned oil fields, one of which was known as Teapot Dome, to private companies in exchange for interest-free loans (the Teapot Dome Scandal).

Corrupt activities in the first part of the twentieth century generated a massive public backlash in America such that journalists known as "muckrakers" achieved fame by exposing the corruption of public officials and politicians. But while there have been major prosecutions of the worst practices since the 1920's, political corruption in America has continued undiminished into recent times and has involved the highest officials in government. In the United States, Richard Nixon's Vice-President, Spiro T. Agnew, resigned after declining to contest charges of tax evasion and money laundering.

Political corruption extends to the judicial and legislative branches of government as well as the executive.

Some years back a major corruption scandal involving the sale of sentences by traffic judges in the City of Chicago was uncovered in an FBI sting operation known as "Operation Greylord."

Congressmen have been equal transgressors.

The largest operation against corrupt U.S. Congressmen was the Abscam scandal that became public in early 1980, in which FBI

agents posed as representatives of Arab businessmen looking to connect with U.S. politicians for the purpose of making questionable investments in the U.S. Six members of the House and one Senator went down in flames in connection with that scandal.

A few years ago, a major scandal in the United States involved members of the Congress and their assistants who accepted benefits from lobbyist Jack Abramoff, who was trying to win special favors (including casino benefits) for Indian tribes he represented. In 2006, Congressman Bob Ney of Ohio pled guilty to conspiracy to defraud the U.S. and to falsifying financial disclosure forms. Also, in 2006, Congressman Randy Cunningham of California pled guilty to fraud, bribery, and tax evasion. (I'll mention their sentences later on.)

In November 2010, a Texas state jury convicted former U.S. House of Representatives Majority Leader Tom DeLay of money laundering and conspiracy in connection with campaign contributions.

In the summer of 2010, Illinois Governor Rod Blagojevich was convicted by a federal jury on 18 counts of political corruption charges (including trying to sell Barack Obama's Senate seat) and was sentenced to 14 years in prison.

In 2008, Detroit Mayor Kwame Kilpatrick pled guilty to obstruction of justice, resigned his office, and was originally sentenced to 4 months in jail, but later sentenced to an additional 18 months to 5 years for violating his probation. He is currently being tried in federal court on additional corruption charges where, if convicted, he could be sentenced for up to 30 years.

In the fall of 2010, New York State Comptroller Alan Hevesi pled guilty in New York State Court to a single felony of official misconduct, after receiving benefits from a businessman whose pension fund received public funds Hevesi was responsible for.

Also in the summer of 2010, top officials in the small city of Bell,

California (population 38,000) were charged with illegally boosting their pension and benefits by hundreds of thousands of dollars. They pled not guilty and are awaiting trial in January 2013.

Some of these cases amuse us.

One U.S. Congressman who was convicted of crimes of corruption, William Jefferson of Louisiana (who coincidentally and sadly was the head of the Brazilian caucus in the U.S. House of Representatives) solicited some \$400,000 in cash and stock from individuals wishing to do business in Africa, where he promised to use his personal influence with African governments. When the FBI searched Jefferson's home, they found \$90,000 in cash stored in the freezer in his kitchen.

In the Abscam scandal:

Representative Meyers, who took \$50 thousand in bribes and demanded another \$85 thousand, told prosecutors he was "play acting" and never intended to introduce legislation or guarantee asylum to his supposed "fat-cat" clients; he just wanted to "rip them off."

Another Congressman convicted in Abscam, Representative Kelly, took \$25 thousand, then argued that he was conducting his own investigation, although he could produce no documents or evidence to that effect.

Representative Jenrette, a third Abscam defendant, claimed he was in a state of intoxication for several months before and after he demanded and received \$50 thousand in bribes.

But political corruption is no laughing matter. It's a serious problem. International conventions against political corruption have been enacted by the United Nations, the Organization of American States and the OECD, all signed by both the United States and Brazil, and all ratified by Brazil (the U.S. has signed all 3, but has not yet ratified the U.N. Convention).

The fact that international conventions such as these have been drafted obviously demonstrates that many people around the world refuse to accept political corruption as an inevitable fact of life. To the contrary, they believe it should not be tolerated.

Let's look at how such prosecutions of political corruption typically proceed in the United States:

First, you will recall that the U.S. is a federal system, which means that both federal laws and the laws of the different states define and criminalize various acts of political corruption. But the fact is that federal laws permit federal prosecution of many crimes even when corruption occurs at the state or local levels. I am going to confine my remarks to the prosecution of criminal corruption at the federal level, which accounts for some 80% of the prosecutions, although it is worth noting that there have always been significant prosecutions at various state levels, especially for example in the State of New York.

Let's look first at some of the federal statutes that apply. They include:

- Bribery, 18 U.S.C. § 201(b) and 18 U.S.C. § 666, and the lesser offense of illegal gratuities, 18 U.S.C. § 201(c);
- Conflicts of interest, 18 U.S.C. § 203, 205, 207, 208 and 209;
- Perjury, 18 U.S.C. § 1621 and 1623;
- False statements, 18 U.S.C. § 1001;
- Election crimes, 18 U.S.C. § 241;
- The Hobbs Act, 18 U.S.C. § 1952, which prohibits extortion, and which is the most popular statutory tool used by federal law enforcement for combating state and local corruption;
- The Racketeer Influenced and Corrupt Organizations (RICO) statute, 18 U.S.C. § 1961 *et seq.*, which allows for federal prosecution based on state statutes including state bribery statutes;

- The Travel Act, 18 U.S.C. § 1952, which prohibits interstate travel to distribute the proceeds of unlawful activity, including proceedsunlawfully obtained under state law or using an interstate facility to do the same;
- Mail and Wire Fraud, 18 U.S.C. § 1341 and 1343;
- Conspiracy to Defraud the United States, 18 U.S.C. § 371; and
- Tax Charges, 26 U.S. § 7201(1) (tax evasion), *et seq.*

These laws are applied by the United States Attorneys in the 94 federal districts of the United States. The U.S. attorneys are appointed by the President and serve at the President's pleasure, but they have a strong tradition of independence. The Department of Justice in Washington, which is often referred to as "Main Justice," also has a strong tradition of independence, and in fact has a Public Integrity Section with approximately 25 attorneys who are responsible for prosecuting the highest profile political corruption cases, *i.e.* those involving major political figures, for example national Congressmen and federal judges. The 94 U.S. attorneys across the country have considerable discretion in terms of prosecuting middle and even high level political corruption on their own, but it is the Public Integrity Section of Main Justice that handles the major prosecutions, though frequently in collaboration with the local U.S. attorneys.

Consider how political corruption cases typically develop in the United States as opposed to Brazil. My impression is that many political corruption cases in Brazil begin with Parliamentary Committee Inquiries (CPIs), which may lead to formal charges being filed by the Ministry of Justice but which also may lead to the resignation or exclusion of the political figure from political office before those charges are brought, if indeed they ever are brought.

We, too, have Congressional investigations of suspected political corruption, but insofar as they proceed simultaneously with investigations by the Justice Department, they can create problems of

immunizing a witness from subsequent prosecution and for that reason the Congressional investigators often hold off and let the Department of Justice prosecution proceed first.

Potential political corruption cases come to the attention of prosecutors in a number of ways. The FBI or other investigative agencies have their people on the street who are in constant touch with what's going on in political arenas. Word may circulate that a particular politician is open to approaches that are corrupt, *i.e.* that he has favors for sale.

Investigative journalists may publish stories which are read by the FBI and the prosecutors. Occasionally an individual who has been the victim of an extortion or bribery attempt, someone who does not want to make an illegal payment, will bring the matter to the attention of the prosecutors. Ex-wives and ex-girlfriends can be a very fruitful source of information about the activities of corrupt politicians. Even individuals, who have participated in the corruption, when faced with serious penalties themselves, may come in and try and negotiate a deal with the prosecutors to cooperate and testify against other corrupt individuals in exchange for a lesser sentence in their own cases. This is what lobbyist Jack Abramoff, the individual at the heart of one of the more widespread Congressional scandals, sought to do.

Once there is reason to believe that corruption has occurred, the prosecutors may engage in a number of investigative actions on their own. Bank records may be subpoenaed *ex parte* pursuant to judicial warrants. Phones may be tapped, also pursuant to judicial warrants. Cooperating witnesses may wear a wire and secretly record conversations with the suspect. Undercover FBI agents may pose as corrupt individuals to gather incriminating evidence from the corruptible politicians, which is what happened in the Abscam scandal when a number of FBI agents posed as representatives of Arab businessmen. Most of the Abscam transactions were videotaped, which of course

was very compelling evidence when the jury considered those cases.

Invariably political corruption cases end up with formal charges being filed. The federal prosecutor will take his evidence of probable cause to believe that a crime has been committed to the Grand Jury, which is a group of 23 citizens who under the U.S. Constitution have to find that there is probable cause to believe that a crime has been committed before the crime may actually be charged. This is a relatively easy thing to do, however. Political figures, by the way, are tried for corruption just as ordinary defendants are for ordinary crimes. They have no right to a privileged forum, such as the Supreme Court, but have their cases heard in the ordinary federal and state trial courts reserving, of course, the right to appeal adverse decisions.

I should say, of course, that even before the matter gets to the Grand Jury, the press and the public have often gotten wind that a political corruption investigation is under way and that a prosecution is likely. The suspects, after all, tend to be high profile individuals, elected officials or highly placed functionaries, and, as in Brazil, the public has a real appetite for reading about that sort of thing. So facts of the investigation will often be leaked by interested parties and the press will begin to publish stories.

One of the characteristics of political prosecutions in the United States is that the targets, rather than sitting meekly by and waiting for Judgment Day, very often will vigorously protest their innocence and claim that the charges against them are politically motivated. In consequence, the target may conduct a vigorous counter-campaign in the media, complete with accusations against the prosecutors, who themselves need to be very careful about what they can say so as to avoid ethical problems.

Another problem with political corruption cases in the States is that pre-trial publicity may prejudice the defendant's right to a fair trial. This is apt to be less of a problem in a place like Brazil where there are no jury trials, but in the United States where jury trials involving

everyday citizens acting as fact-finders are common, the jury pool could quite possibly become tainted. Jurors who have read and heard a great deal about a case before it begins may, despite any effort on the part of the judge and the prosecutor to eliminate them, bring preformed opinions to the case which will affect their verdict.

But the fact is that, in the great majority of cases, the pre-trial publicity and public indignation at what is likely to be very strong evidence of guilt will often cause the target of the investigation to resign his office in advance of actually being charged and convicted. But the criminal prosecutor almost always goes forward in any case.

And, what takes place in political corruption cases in the U.S., as indeed in most ordinary criminal cases in the U.S., are plea negotiations between the prosecutor and the defendant and his attorney before trial actually commences. As you may know, prosecutors in the United States enjoy virtually unlimited discretion both in terms of what crimes they choose to prosecute and in terms of being able to reach agreements with defendants whereby they recommend to judges that lesser punishments be imposed for the crimes that are being pursued. This is the well known system of “plea bargaining” and of course every defendant in every case, not just political corruption cases, needs to give plea bargaining serious thought. If a defendant faces the prospect of substantial jail time, he will quite obviously want to try and negotiate a better deal for himself, one which the prosecution may be willing to give because it will save the government the time and expense of a trial. This unquestionably is how most political corruption cases get resolved (as indeed how most criminal cases prosecuted in the United States get resolved) -- by pleas. Part of the plea bargain may be that if the target agrees to resign from his office, the prosecutor will recommend to the judge that he spend no time in jail. Spiro Agnew, Vice-President under Richard Nixon, agreed to that. (He actually pleaded *nolo contendere*, no contest, meaning that he did not admit his guilt but agreed that the prosecution had evidence that could lead to his conviction.) But

it is rare that a defendant does not receive at least some jail time in a political corruption case.

Another component of plea agreements that is very common and very important is an agreement on the part of the defendant to testify against other individuals who may also have been involved in the scandal.

Let me detour for a moment and mention a few other ways in which political corruption cases are sometimes handled in the U.S.

One of these, particularly insofar as the President of the Republic or federal judges are concerned, is an impeachment proceeding held by the Congress. To be sure, these are difficult proceedings to bring, much less to bring successfully. I mentioned the case of Vice-President Spiro Agnew who, in fact, plea bargained his case. Impeaching a federal judge in the States is also a difficult proposition; only seven have been impeached over the more than 200 year history of the Federal Judiciary. In late 2010, the United States Senate voted to impeach and remove U.S. District Judge G. Thomas Porteous, Jr. of Louisiana for receiving cash and favors from lawyers who had dealings with his court, who used a false name to elude creditors, and who intentionally misled the Senate during his confirmation proceedings. Judge Porteous was not charged criminally, because the Department of Justice was sufficiently satisfied to turn the matter over to the House of Representatives for impeachment proceedings. In 1989, a member of the Federal Judiciary, Alcee Hastings, was impeached by the House of Representatives and convicted by the Senate of accepting a bribe in exchange for a lenient sentence and for committing numerous acts of perjury at his Senate trial and was removed from office. As I'll tell you in a moment, however, Judge Hastings has made a rather remarkable come-back since then.

While members of Congress do not automatically forfeit their offices upon indictment or even upon conviction of a crime, under the rules of the House of Representatives, the chairman of a committee or a

party leader who has been indicted (*i.e.* charged) must temporarily relinquish his leadership position and any member who has been convicted of certain crimes may be reprimanded, censured or expelled. The House has actually expelled only five members in its history, but several more have resigned their office rather than face disciplinary proceedings. The Senate has only expelled one member following his conviction for corruption, but there, too, in several other cases the Senate was considering expulsion when the member resigned.

I should also say a few words about the punishments that are imposed on individuals convicted of political corruption in the United States because in this respect there also seems to be a marked difference between the United States and Brazil. The fact is that simply resigning one's office in the United States rarely if ever means that there will be no criminal conviction or no jail sentence to follow. In other words, criminal convictions in political corruption cases almost always follow, notwithstanding resignation from office. And, as I have said, those convictions almost always result in some jail time for the person convicted. Even though there may be appeals, the individual does not remain free during the appeal; he will go to jail where he will remain while the appeal is pending. House arrest is the exception rather than the rule. There is no such thing as special prison, although it is almost certain that the defendant will be sentenced to be with white-collar criminals, rather than hardened, violent types. An individual's conviction may eventually be reversed, but the fact is that he still will have spent time in jail (as was the case of a Maryland Governor some years ago). Here are some examples of criminal sentences in political corruption cases:

Lobbyist Jack Abramoff received a sentence of just under 6 years in prison and was ordered to pay \$23 million in restitution. Congressman Ney of Ohio resigned from the House of Representatives and was sentenced to 30 months in prison. Congressman

Cunningham of California was sentenced to 8 years and 4 months in prison, ordered to return the \$2.4 million in bribes he received from defense contractors and ordered to pay \$3.6 million in back taxes. Majority Leader DeLay received a sentence of 3 years in prison. (His case is currently on appeal.) New York State Comptroller Hevesi received a sentence of one to four years in prison.

Individuals convicted of political corruption do their jail time and eventually re-enter society, but rarely if ever do they achieve any political success later on. One exception was James Michael Curley, who, in the first part of the 20th century, served variously as U.S. Congressman, Mayor of Boston, and Governor of Massachusetts and who, in his final term as Mayor of Boston, spent 5 months in prison for mail fraud. And then there is the case of former Federal Judge Alcee Hastings, whom I mentioned previously, who was impeached by the House of Representatives and convicted of corruption and perjury by the Senate and removed as a judge, but was later elected to Congress from Florida where he continues to serve today. But apart from these cases, there have been very few cases in the States where people who were actually removed from office came back and were elected to some other political office, much less a high profile one. Some convicted politicians in fact have ended up with rather bizarre livelihoods. Vice-President Spiro Agnew, once he was removed from the Vice-Presidency, actually wrote a novel about a Vice-President who was “destroyed by his own ambition,” became a follower of Frank Sinatra’s Rat Pack, and engaged in questionable dealings with foreign investors in the United States. In conclusion, what can one say about the prosecution of political corruption in the United States?

A survey taken a few years back of 23 countries showed that 18 of the 23 countries thought that corruption, particularly political corruption, was the most serious obstacle to an independent judiciary. Of these, 6 of 9 Latin American countries (Brazilians were not asked) said this was the case.

That is not, in my view, the general perception in the United States. The feeling here in the States, I believe, is that the current prosecutorial apparatus which investigates and prosecutes political corruption (particularly the federal apparatus) is reasonably effective and that the most serious malefactors have been caught and punished and will continue to be caught and punished. We still have, no doubt we will always have, political corruption and it is unquestionably a serious problem. But the procedures we have in place to reveal it, to prosecute it, and punish it, are essentially working.

Still, the unpleasant truth is that political corruption continues to be a problem throughout most of the world and stands as a real obstacle, not only to public confidence in government but to the full and efficient development of national democracies.

Endnotes

- 1 See generally James S. Fishkin, *When the People Speak: Deliberative Democracy and Public Consulting*; Sanford Levinson, *Our Undemocratic Constitution* (2006). A good example of the internal tension between republic and democracy, and between state and federal sovereignty, as reflected in the Constitution at the founding, appears immediately Article I with the rules governing the House of Representatives, which was then the only popularly elected federal body. Rather than creating a federal rule for voter-qualification “the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature.” U.S. Const. art. I, 2 cl. 1 The right to vote, therefore, hinged on how it was defined, and could be refined, by the varied laws in each of the states.
- 2 See Cass R. Sunstein, *Beyond the Republican Revival*, 97 Yale L.J. 1539 (1988); The Federalist Papers, at *Federalist* 10, 39 (Rossiter, ed., Signet Classic ed. 2003).
- 3 Pamela S. Karlan, *Ballots and Bullets: The Exceptional History of the Right to Vote*, 71 U. Cin. L. Rev. 1345, 1345 (2003); but see Bruce Ackerman, *We The People: Foundations* 7-9 (1991) (discussing how radically democratic the ratification of the Constitution for its time, when it was the most democratic constitution ever written).
- 4 Alexis De Tocqueville, *Democracy In America*, ch. IV
- 5 Karlan, *Ballots and Bullets*, *supra*, at 1345.
- 6 U.S. Const. amend. XIV, § 2.
- 7 U.S. Const. amend. XV, § 1. (ratified February 3, 1870).
- 8 Karlan, *Ballots and Bullets*, *supra*, at 1350, 1371 n. 158.
- 9 88 U.S. 162 (1873).
- 10 *Id.* at 174; see U.S. Const. amend XIV § 1.
- 11 88 U.S. at 175.
- 12 118 U.S. 356, 370 (1886).
- 13 For more on the evolution of this movement and its ups and downs before the War, see Sandra Day O'Connor, *The History of the Women's Suffrage Movement*, 49 Vand. L. Rev. 657 (1996).

- 14 U.S. Const. amend. XIX.
- 15 Nixon v. Herndon, 273 U.S. 536, 540 (1927).
- 16 Nixon v. Condon, 286 U.S. 73 (1932); Grovey v. Townsend, 295 U.S. 45 (1935).
- 17 See Karlan, Bullets and Ballots, *supra*, at 1354-55 (describing the Soldier Voting Act); Michael J. Klarman, From Jim Crow to Civil Rights: The Supreme Court and the Struggle for Racial Equality ch. 4-5 (2003) (describing the World War II era).
- 18 321 U.S. 649 (1944).
- 19 See U.S. Const. amend. XXIV.
- 20 See, e.g., Katzenbach v. Morgan, 384 U.S. 641 (1966); Louisiana v. United States, 380 U.S. 145 (1965).
- 21 See *Katzenbach*, 384 U.S. at 652 (quoting *Yick Wo*).
- 22 See Reynolds v. Simms, 377 U.S. 533 (1964).
- 23 See, e.g., Harper v. Virginia State Board of Election, 383 U.S. 663 (1966) (poll tax); Baker v. Carr, 369 U.S. 186 (1962) (announcing one-person, one-vote rule); Reynolds, *supra*, 377 U.S. 533 (1964) (holding racially unequal apportionment scheme unconstitutional).
- 24 U.S. Const. amend. XXVI (ratified July 1, 1971).
- 25 391 U.S. 367 (1968).
- 26 Oregon v. Mitchell, 400 U.S. 112 (1970).
- 27 See, e.g., Larry Kramer, The People Themselves (2004); Mark Tushnet, Taking the Constitution Away from the Courts (1999); Jeremy Waldron, Law and Disagreement (1999).
- 28 Cf. Barry Friedman, The Will of The People (2009).
- 29 U.S. Const. amend. I (“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.”); New York Times Co. v. United States, 403 U.S. 713, 714 (Blackmun, J., concurring).
- 30 131 U.S. 1207 (2011).
- 31 395 U.S. 444 (1969).
- 32 504 U.S. 921 (1992),
- 33 536 U.S. 765 (2002).
- 34 485 U.S. 312 (1988).
- 35 Valentine v. Christensen, 316 U.S. 52 (1942).
- 36 425 U.S. 748 (1976) (internal citations omitted).

- 37 303 U.S. 444 (1938).
- 38 379 U.S. 536.
- 39 *Thomas v. Chicago Park District*, 534 U.S. 316 (2002).
- 40 Cf. Tocqueville, *supra*, at ch. V. (“In the United States the Constitution governs the legislator as much as the private citizen: as it is the first of laws, it cannot be modified by a law; and it is therefore just that the tribunals should obey the Constitution in preference to any law. This condition belongs to the very essence of the judicature; for to select that legal obligation by which he is most strictly bound is in some sort the natural right of every magistrate.”).
- 41 129 S.Ct. 2252 (2009).
- 42 424 U.S. 319 (1976).
- 43 *Id.* at 335.
- 44 4,124 extra appeals were filed only in 1986 (see, incidentally, CORREA, Oscar Dias. O Supremo Tribunal Federal, Corte Constitucional do Brasil, cit. p. 38-9).
- 45 The writ of error was replaced by the appeal on American law (see, incidentally, HALLER, Walter. *Supreme Court und Politik in den USA*. Bern, 1972, p. 105).
- 46 The extraordinary appeal, as well as other appeals, can also be proposed by the injured third party (Code of Civil Procedure, Art. 499).
- 47 Habeas Corpus (HC) 82424/RS, Plenary, Rapporteur Minister Moreira Alves, editor for the ruling Minister Maurício Corrêa, published at Justice Journal (Diário da Justiça-DJ) of 19.3.2004.
- 48 HC 82.959/SP, Rapporteur Minister Marco Aurélio, DJ 1º.9.2006.
- 49 Direct Action of Constitutionality (ADC) 12/DF, Rapporteur Minister Ayres Britto, decided 20.8.2008.
- 50 Suspension of Interim Relief (STA) 175/CE. Rapporteur Minister Gilmar Mendes, DJ 28.9.2009.
- 51 Direct Action of Unconstitutionality (ADI) 3.510, Rapporteur Minister Carlos Britto.
- 52 Petition 3888, Rapporteur Minister Carlos Britto.
- 53 Allegation of Disobedience of Fundamental Precept (ADPF) 130, Rapporteur Minister Carlos Britto.
- 54 Extraordinary Appeal 511.961, Rapporteur Minister Gilmar Mendes.
- 55 ADPF 132; ADI 4277, Rapporteur Minister Ayres Britto, decided 05.5.2010.
- 56 Law No. 9,868/1999.
- 57 ADI Nº 3,510/DF.
- 58 ADPF Nº 54.

- 59 ADPF N° 186, Rapporteur Minister Ricardo Lewandowski.
- 60 Art. 97 of the 1988 Constitution.
- 61 HÄBERLE, Peter. *El estado constitucional*. Trad. de Hector Fix-Fierro. México: Universidad Nacional Autónoma de México, 2003. p. 75-77.
- 62 HÄBERLE, Peter. *El concepto de los derechos fundamentales*. In: *Problemas actuales de los derechos fundamentales*. Madrid: Universidad Carlos III de Madrid y Boletín Oficial del Estado - B.O.E; 1994, p. 109.
- 63 Mohandes K. Ghandi, *An Autobiography: The Story of My Experiments with the Truth* 134 (Beacon Press 1993) (1957).
- 64 Jerome Alan Cohen, *Chinese Mediation on the Eve of Modernization*, 54 Calif. L. Rev. 1201, 1207 (1966).
- 65 See Jerold S. Auerbach, *Justice Without Law? Resolving Disputes Without Lawyers* (1983).
- 66 Riskin et al., *Dispute Resolution and Lawyers* 13 (4th ed. 2009).
- 67 Jay E. Grenig, 1 *Alternative Dispute Resolution* § 1:2 (3d ed. 2010)
- 68 *Id.* § 1:1.
- 69 Riskin et al., *supra* note 4, at 15–19.
- 70 Dorothy Wright Nelson, *ADR in the Federal Courts—One Judge’s Perspective: Issues and Challenges Facing Judges, Lawyers, Court Administrators, and the Public*, 17 Ohio St. J. on Disp. Resol. 1, 6 (2001).
- 71 Fed. R. Civ. P. 16.
- 72 28 U.S.C. §§ 651-658 (2006). Thus far, Congress has not provided the necessary funding to implement the reforms contemplated in the statute. Nelson, *supra* note 8, at 7.
- 73 Christine N. Carlson, *ADR in the States: Great Progress Has Been Made, But There Is Still Much to Do*, 7 Disp. Resol. Mag. 4, 4–5 (2001).
- 74 Federal Arbitration Act, 9 U.S.C.A. § 2 (1947).
- 75 *About Us*, ABA Section of Dispute Resolution, http://www.americanbar.org/groups/dispute_resolution/about_us.html (last visited May 5, 2011).
- 76 The principles articulated in the following paragraph are drawn from Nat’l Inst. for Dispute Resolution, *Paths to Justice: Major Public Policy Issues of Dispute Resolution* 16–17 (1983).
- 77 Major providers of arbitration services include the American Arbitration Association, the Judicial Arbitration and Mediation Service, the CPR International Institute for Conflict Prevention and Resolution, and the Federal Mediation and Conciliation Service, among others. Arbitrators may belong to professional organizations such as the National Academy of Arbitrators. See Riskin et al., *supra* note 4, at 557.

- 78 Leonard L. Riskin, *Mediation and Lawyers*, 43 Ohio St. L.J. 29, 44 (1982).
- 79 See Lon L. Fuller, *Mediation—Its Forms and Functions*, 44 S. Cal. L. Rev. 305, 316 (1971).
- 80 See, e.g., Grenig, *supra* note 5, § 1:11 (providing examples of situations where ADR may not be appropriate).
- 81 See, e.g., Jennifer Gerarda Brown, *The Use of Mediation to Resolve Criminal Cases: A Procedural Critique*, 43 Emory L.J. 1247, 1249 (1994).
- 82 One example is the case of victim offender mediation (VOM) programs, which mediate “restitution, the relationship between the victim and the defendant, or other terms that may be appropriate to the particular case.” Riskin et al., *supra* note 4, at 357.
- 83 347 U.S. 483 (1954).
- 84 Harry Edwards, *Alternative Dispute Resolution: Panacea or Anathema?*, 99 Harv. L. Rev. 668, 676 (1986). Professor Edwards notes that “often our nation’s most basic values—such as equal justice under the law—conflict with local nonlegal mores.” *Id.* at 677 (citing J. Anthony Lukas, *Common Ground: A Turbulent Decade in the Lives of Three American Families* 127 (1985); J. Anthony Lukas, *Community and Equality in Conflict*, N.Y. Times, Sept. 8, 1985, at E5).
- 85 Owen M. Fiss, *Against Settlement*, 93 Yale L.J. 1073, 1075 (1984).
- 86 *Id.* at 1976–1085.
- 87 Andrew W. McThenia & Thomas L. Shaffer, *For Reconciliation*, 94 Yale L.J. 1660 (1985). See also Kenneth R. Feinberg, *Reexamining the Arguments in Owen M. Fiss, Against Settlement*, 78 Fordham L. Rev. 1171, 1171–72 (2009) (arguing that Fiss presents an aspirational benchmark undercut today by “two hard, practical realities”—“the inefficiency of the civil justice system,” and “the political inertia of the other branches of government”).
- 88 Riskin et al., *supra* note 4, at 35–56.
- 89 *Id.* at 35.
- 90 *Id.* at 48.
- 91 *Id.* at 50.
- 92 Grenig, *supra* note 5, at § 16:1.
- 93 Fulbright & Jaworski, LLP, Seventh Annual Litigation Trends Survey Report (2011), available at <http://www.fulbright.com/litigationtrends> (last visited May 5, 2011).
- 94 David B. Lipsky & Ronald L. Seeber, *The Appropriate Resolution of Corporate Disputes: A Report on the Growing Use of ADR by U.S. Corporations* 17, 26 (1998).
- 95 Grenig, *supra* note 5, at § 19:1.
- 96 See Mark Maske, *Judge Orders NFL Players, Owners to Begin Mediation Thursday*,

- Wash. Post, Apr. 12, 2011, at D3.
- 97 See Sandra G. Musser, *Family Law Disputes*, in Atlas et al., *Alternative Dispute Resolution: The Litigator's Handbook* 257, 257 (2000).
- 98 Grenig, *supra* note 5, at § 21:1.
- 99 See Riskin, *supra* note 16, at 31.
- 100 See Bill Shaikin & Carla Hall, *Jamie McCourt Turns Down Deal*, L.A. Times, Dec. 1, 2010, at C1.
- 101 Joseph A. Torregrossa, *Appellate Mediation in the Third Circuit—Program Operations: Nuts, Bolts, and Practice Tips*, 47 Vill. L. Rev. 1059, 1060–61 (2002).
- 102 Nelson, *supra* note 8, at page 7–8.
- 103 See Grenig, *supra* note 5, at §1:11.
- 104 Nat'l Inst. for Dispute Resolution, *supra* note 14, at 16.
- 105 Albert A. Foer, *United States of American Antitrust Institute* 9 (American Antitrust Institute., AAI Working Paper 06-04, 2005), available at <http://www.antitrustinstitute.org/files/502.pdf>.
- 106 Riskin, *supra* note 17, at 31.
- 107 For example, Professor Riskin notes that “a number of jurisdictions now have statutes requiring conciliation attempts for certain kinds of issues before adversary processing.” Riskin, *supra* note 17, at 55 (citing Cal. Civ. Code § 4607 (West Supp. 1980); Wis. Stat. Ann. § 767.081 (West Supp. 1980)).
- 108 Riskin et al., *supra* note 4, at 379.
- 109 Nancy H. Rodgers, *The Next Phase for Dispute Resolution in law Schools: Less Growth, More Change*, 25 Ohio St. J. on Disp. Resol. 1, 1 (2010).
- 110 Deborah R. Hensler, *A Glass Half Full, A Glass Half Empty: The Use of Alternative Dispute Resolution in Mass Personal Injury Litigation*, 73 Tex. L. Rev. 1587, 1607 (1995).
- 111 *Id.* at 1612, 1615–18.
- 112 See generally Robert M. Ackerman, *The September 11th Victim Compensation Fund: An Administrative Response to a National Tragedy*, 10 Harv. Negot. L. Rev. 135 (2005) (criticizing the fund); Ronen Perry, *The Deepwater Horizon Oil Spill and the Limits of Civil Liability*, 86 Wash. L. Rev. 1 (2011).
- 113 For example, Professor Riskin has studied “mindfulness” training for mediators, and other trainings have focused on the relationship of neuroscience and conflict resolution. Riskin et al., *supra* note 4, at 965.
- 114 *Id.* at 837.
- 115 John Lande, *Possibilities for Collaborative Law: Ethics and Practice of Lawyer Disqualification and Process Control in a New Model of Lawyering*, 64 Ohio St. L.J.

- 1315, 1315 (2003).
- 116 See John G. Bickerman, *Partnering in the Construction Industry: Teaming up to Prevent Disputes*, 9 Prob. & Prop. 61 (1995).
- 117 See Haitham A. Haloush & Bashar H. Malkawi, *Internet Characteristics and Online Alternative Dispute Resolution*, 13 Harv. Negot. L. Rev. 327 (2008).
- 118 See Linn Hammergren, *Envisioning Reform: Improving Judicial Performance in Latin America* (2007).
- 119 Mariana Hernández Crespo, *A Systematic Perspective of ADR in Latin America: Enhancing the Shadow of the Law Through Citizen Participation*, 10 Cardozo J. Conflict Resol. 91, 105, 112–14 (2008).
- 120 Global Corporate Governance Forum: International Finance Corporation—World Bank, *Resolving Corporate Governance Disputes—Volume 2: Implementation* 47 (2011), [http://www.ifc.org/ifcext/cgf.nsf/AttachmentsByTitle/ADR+Toolkit++V2/\\$-FILE/ADR_Toolkit_Volume2.pdf](http://www.ifc.org/ifcext/cgf.nsf/AttachmentsByTitle/ADR+Toolkit++V2/$-FILE/ADR_Toolkit_Volume2.pdf) (last visited May 5, 2011).
- 121 Int'l Bar Ass'n, *Mediation in Brazil* 4 (2008), www.ibanet.org/Document/Default.aspx?DocumentUid6A29 (last visited May 5, 2011).
- 122 Rafael Alves de Almeida, *New Perspectives with the Forthcoming Bill for a Law of Mediation* (Oct. 3, 2008), <http://www.mediationworld.net/brazil/articles/full/170.html> (last visited May 5, 2011).
- 123 Global Corporate Governance Forum: International Finance Corporation—World Bank, *supra* note 58, at 47.
- 124 Paulo Brancher, *Flexibility in Strategizing ADR Proceedings in Brazil*, in *ADR Client Strategies in Central and South America* 49 (2009).
- 125 Almeida, *supra* note 60, at 10.
- 126 Brancher, *supra* note 62, at 49.
- 127 As Article 2.2 of the Convention for the Safeguarding of the Intangible Cultural Heritage of UNESCO, on October 17, 2003.
- 128 See: <http://www.google.com/cse?cx=013269018370076798483%3Aaerc-2nymcs&cof=FORID%3A1&q=bruce+ackerman+the+new+separation+of+powers>
- 129 Bolivia, Costa Rica, Ecuador, México, Panamá, Romanía, Sweden, Uruguay, and Venezuela all employ specialized electoral tribunals. Steven F. Huefner, *What Can the United States Learn from Abroad about Resolving Disputed Elections?*, 13 N.Y.U. J. LEGIS. & PUB. POL'Y 523, 541 (2010).
- 130 Law 4.737 of July 15, 1965.
- 131 Complementary Law No. 64 of May 18, 1990.

- 132 Law No. 9.906 of Sept. 19, 1995, as amended by Law 9.504 of Sept. 30, 1997 and Law No. 112.034 of Sept. 29, 2009..
- 133 Law No. 9.504 of 1997.
- 134 CONST. OF 1988, art. 119.
- 135 *Id.*, art. 121 § 2.
- 136 *Id.*, art. 121 § 3; Electoral Code, art. 281. A writ of security is a unique Brazilian summary procedure that combines aspects of the common law's writ of mandamus, injunction and quo warranto. It can be used to protect any liquid and certain right unprotected by habeas corpus or habeas data from abuse of authority or illegality by a governmental authority.
- 137 Vitor Marchetti, *Governança Eleitoral: o Modelo Brasileiro de Justiça Eleitoral*, 51 DADOS (No. 4, 2008) asserts that no decision of the Superior Electoral Tribunal has been overturned by the STF, and that the latter court reinforces the electoral decisions of the former.
- 138 Chrisanthi Avgerou, Andrwa Ganzaroli, Angeliki Poulymenakou & Nicolau Reinhard, *ITC and Citizens' Trust in Government: Lessons from Electronic Voting in Brazil*, in Proceedings of the 9th International Conference on Social Implications of Computers in Developing Countries, São Paulo, Brazil, May 2007.
- 139 The survey of 2,000 voters was carried out by Instituto Nexus. Tribunal Regional Elitoral Santa Catarina, "Pesquisa Confirma Aprovação de Urna Eletrônica e Confiança na Justiça Eleitoral," Jan. 15, 2009, online at <http://www.tre-sc.gov.br/site/noticias/noticias-antiores/lista=de-noticias-anteriorers/noticia-...>
- 140 Matthew M. Taylor, *The Federal Judiciary and Electoral Courts*, in CORRUPTION AND DEMOCRACY IN BRAZIL: THE STRUGGLE FOR ACCOUNTABILITY 162, 180, note 5.
- 141 *Id.* Two governors were acquitted, and others are awaiting decision.
- 142 *Id.* at 169.
- 143 *Id.* at 169.
- 144 From the date of investiture, members of Congress may not be arrested except *in flagrante delicto* for a non-bailable crime, in which case the respective chamber decides whether the accused should be imprisoned. CONST. OF 1988, art. 53 § 2. If a member of Congress is accused of a crime after investiture, the respective chamber may suspend the criminal proceedings any time prior to a final decision. *Id.* at art. 53 § 3. Prior to a 2001 Amendment to this provision, criminal charges could not be brought against a member of Congress without prior authorization from the respective house of Congress.
- 145 For a list of all charges against Congressional members from STF records as of May 20, 2010, see "A Lista dos Parlamentares Processados, por Estado," online at http://congressoemfoco.uol.com.br/noticia.asp?cod_canal=21&cod_publicacao=29847.

- 146 On May 13, 2010, José Gerado Arruda Filho became the first Congressman to be convicted by the STF, which sentenced him to 2 years and two months of community service. On May 20, 2010, Cássio Taniguchi became the second Congressman to be convicted by the STF for diverting funds from the Inter-American Development Bank when he was mayor of Curitiba. He was sentenced to six months in jail, but actually will serve no time because of the running of the limitations period. On September 27, 2010, Deputy José Fuscaldi Cesilo (Tatico) became the third Congressman to be convicted by the STF but the first to be sentenced to prison, albeit soft core. The STF sentenced Tatico to seven years of a semi-open prison regime (at liberty by day, prison at night) for misappropriating income tax payments his firm had collected from employees.
- 147 On October 28, 2010, the STF convicted Deputy Natan Donadon, who had just been re-elected despite two convictions in the state courts of Rondônia and had resigned the day before the judgment to try to send the case back to Rondônia. The STF sentenced Donadon to 13 years and 4 months in prison, initially in a closed regime.
- 148 Ação Cautelar 2.763 Rondônia, Dec. 16, 2010 (STF, Rep. Celso de Mello). The preliminary injunction suspended for one year a decision of the Superior Electoral Tribunal that had refused to register Donadon's candidacy for reelection because of the Law of the Clean Slate. Minister Celso de Mello relied upon an illogical constitutional provision which states that "no one shall be considered guilty until his criminal conviction has become final and nonappealable." CONST. OF 1988, art. 5 (LVII).
- 149 Complementary Law No. 135 of June 4, 2010. This law was only the second statute to result from a popular initiative.
- 150 The eight-year period of ineligibility runs from the date that the sentence is completed.
- 151 The issue originally came before the STF in an appeal taken by Joaquim Roriz, ex-governor of the Federal District. The STF, which had only ten members because of a retirement, deadlocked five-to-five. Roriz then withdrew his candidacy in favor of his wife. Notícias STF, Sept. 29, 2010, available at www.stf.jus.br/portal/cms/verNoticiaDetalhe.asp?idConteudo. The same issue was then presented in RE 63.1102 brought by Jader Barbalho, whose election as a senator was cancelled by the Superior Electoral Tribunal for violation of the Clean Slate Law. After the same 5-5 tie, the STF, by a 7-3 vote, decided to break the tie by resorting to art. 205, sole paragraph, of its Internal Rules, which provides that the constitutionality of the statute should be upheld in case of a tie. Notícias STF, Oct. 28, 2010.
- 152 RE 633703, Dec. Mar. 23, 2011 STF *en banc*, Rep. Gilmar Mendes). Art. 16 of the CONST. OF 1988, as modified by Amendment No. 4 of Sept. 14, 1993, provides: "A law altering the electoral process shall enter into force on its publication date and shall not apply to elections that occur within one year from the date it enters into force."

- 153 U.S. CONST., art. 1, sect. 4.
- 154 No presidential candidate received a majority of electoral votes in the elections of 1800 and 1824, which were decided by the House of Representatives. In the 1876 presidential election between Rutherford Hayes and Samuel Tilden, a dispute over competing sets of electors sent by Florida, Louisiana, Oregon and South Carolina was resolved by Congress enacting the Electoral Count Act of 1877, 24 Stat. 373, which created a special commission composed of 3 Democratic and 2 Republican representatives, 3 Republican and 2 Democratic senators, and five Supreme Court Justices (2 Democrats, and 3 Republicans). Even though Tilden won the popular vote handily and needed only one vote from the twenty disputed electoral votes, the commission voted on party lines to award all twenty electoral votes to Hayes, who became the President. DONALD GRIER STEPHENSON, JR., *THE RIGHT TO VOTE: RIGHTS AND LIBERTIES UNDER THE LAW* 113-114 (2004).
- 155 Election Data Services, "Nation Sees Drop in Use of Electronic Voting Equipment for 2008 Election—A First," Oct. 17, 2008, online at kbrace@electiondataservices.com.
- 156 *Id.*
- 157 3 U.S.C. § 5. In this case the date turned out to be Dec. 12, 2000.
- 158 531 U.S. 98 (2000). This decision has received a huge amount of doctrinal criticism, almost all of it negative. See, e.g., VINCENT BUGLIOSI, *THE BETRAYAL OF AMERICA: HOW THE SUPREME COURT UNDERMINED THE CONSTITUTION AND CHOSE OUR PRESIDENT* (2001); ALAN DERSHOWITZ, *SUPREME INJUSTICE: HOW THE HIGH COURT HIJACKED ELECTION 2000* (2001).
- 159 Public Law 107-252, 42 U.S.C. § 15301 et seq.
- 160 These include the Voting Rights Act of 1965, which prohibited the states from using any voting qualification in a way that denied any citizen the right to vote on account of color or race; the 1975 Federal Campaign Finance Law, which requires public disclosure of campaign contributions, restricts the amounts of campaign contributions, and creates public financing for Presidential elections; and the 1993 National Voter Registration Act, which made voter registration more convenient and simpler by requiring all states but three, to allow voter registration when qualifying voters applied for or renewed their driver's license or applied for social services, or by mail.
- 161 42 U.S.C. § 15483(a).
- 162 Some 1.9 million voters cast provisional ballots in the 2004 election, and ultimately nearly 65% of these ballots were deemed eligible and counted.
- 163 *Smiley v. Holm*, 285 U.S. 355, 366 (1932).
- 164 *Oregon v. Mitchell*, 400 U.S. 112 (1970).
- 165 *Id.* This decision triggered promulgation of the 26th Amendment, which lowered the voting age to 18 for all elections.

- 166 Alfred Stepan, *Brazil's Decentralized Federalism: Bringing Government Closer to the*
167 *Citizens?*, 129 DAEDALUS 145, 149 (No. 2, 2000).
- 168 377 U.S. 533 (1964)
- 169 CONST. OF 1988, art. 45 § 1.
- 170 Alfred Stepan, *supra* note 38, at 150.
- 171 Survey conducted on May 5th, 20011.
- 172 Survey conducted on May 2nd, 2011.
- 173 Judge Messitte's paper was updated as of December 2012, in particular, to reflect
sentences that had actually been imposed on some of the convicted public officials.

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