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Bald eagles, vultures and presidential falconers: Judicial independence at home and abroad



U.S. Federal Judge Thomas Griesa died on December 24, at age 87, and his passing reopened the debate over his handling of Argentina's epic dispute with holdout bondholders. The holdouts – widely known as “vultures” for their taste for distressed assets – had refused Argentina's offer to restructure their bonds following Argentina's 2001 \$100 billion sovereign default. Judge Griesa largely sided with these aggressively litigious investors – led by Paul Singer's Elliott Management – and for that the judge was vilified by Argentines, egged on by President Cristina Fernández de Kirchner. Supporters of Ms. Fernández de Kirchner conflated the judge, the plaintiffs and the international financial community, portraying the country as the

victim of a global cabal of rapacious capitalists. As the case progressed, and Argentina stumbled into default once again in 2014, the judge's image achieved the ubiquity and macabre notoriety of a bin Laden mug shot.

Outside Argentina, opinions about Judge Griesa (pronounced Gri-SAY) were quite a bit more nuanced. Analyst Russ Dallen, for example, praised the judge in Mr. Dallen's January 2 "Caracas Capital Markets" newsletter, saying Judge Griesa had done "so much to advance the jurisprudence on sovereign defaults."

The U.S. Department of Justice felt differently. Truly it did. But few in Argentina believe that, and their perception says a lot about Argentina's continued struggle to solidify judicial independence.

The U.S. government did not agree with Judge Griesa's novel conclusion that Argentina – by paying interest to bondholders who accepted its restructuring offer while refusing to pay holdouts who clung to their defaulted debt – had violated the *pari passu* (equal treatment) clause in Argentina's contract with creditors. In fact, it said so, in *amicus curiae* briefs. At the time, the United States had strained diplomatic relations with Argentina, and the Obama administration's decision to side with Buenos Aires over U.S. investors was not universally well received. In that awkward context, the U.S. government sought to distinguish its legal arguments from diplomatic affection, emphasizing in one court filing that "the United States does not condone Argentina's actions in the international financial arena." But the case made strange bedfellows, and the United States consistently echoed Argentina's principle legal arguments.

The Fernández de Kirchner administration appreciated that support. Truly it did. I handled Argentina issues at the U.S. Department of State at the time, and our agreement on this issue was a rare beam of sunlight in the troubled bilateral relationship. But Argentines – the cab drivers and cognoscenti, senior officials and opposition kibitzers – forever questioned the U.S. government's commitment to the issue. Why? Because, they insisted endlessly, had President Obama truly cared about the dispute, he would have instructed Judge Griesa to throw out the case.

There was simply no disabusing Argentines of this misunderstanding. No way to persuade Argentines that U.S. judges operate independently of the executive branch. No possibility of convincing Argentines that a call from Mr. Obama to Judge Griesa would have had no more impact than the U.S. Department of Justice's friend-of-the-court submissions. For all the imperfections in the U.S. democracy, judicial independence is sacrosanct. By contrast, in their reactions to Argentina's travails in the U.S. judicial system, Argentines revealed their profound, and justified, skepticism about judicial independence in their own system.

(Mr. Obama, who taught constitutional law at the University of Chicago, was so committed to judicial independence that he was anxious even to speak publicly about the *pari passu* saga, lest his personal opinions – rather than U.S. Department of Justice legal arguments – influence the case. I still recall the Casa Rosada press conference during his Buenos Aires visit in 2016, when Mr. Obama uncharacteristically dodged a question about the holdouts. "I have to be careful not to comment on the issue because of the nature of our legal system," he said. "These are judges typically that I appoint, and so in order for them to remain impartial, if there's a pending case, I do not talk about it publicly." President Trump, of course, has been less solicitous of judicial independence.)

There were reasons for Argentines to question Mr. Obama's interest in the *pari passu* litigation. Though Argentine diplomats quietly praised U.S. support in the case, it was "as if increase of appetite had grown by what it fed on." Justice Department lawyers did not weigh in at every opportunity, and that rankled the Fernández de Kirchner administration, which reflexively mistrusted the United States. Adding to its frustration, in 2013, the United States blocked the International Monetary Fund from filing an *amicus curiae* brief in support of Argentina. Finally, after judges repeatedly ruled against the arguments Argentina and the United States had offered in the case, the U.S. Department of State never joined Argentina in its public criticism of the rulings.

But fundamentally, the Argentine frustration was based on the false belief that when push comes to shove, U.S. judges are presidential puppets. Fortunately, that is not the case. Unfortunately, in Argentina, there is some truth to that perception. Today, as Argentine judges pursue criminal cases against Ms. Fernández de Kirchner and her allies – moving at a dizzying speed and with a liberal use of pre-trial confinement – trust in the Argentine judiciary continues to erode.

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