

BRAZIL INSTITUTE

A Conversation with Justice Teori Zavascki

A Panoramic View of the Supreme Court and Its Functions



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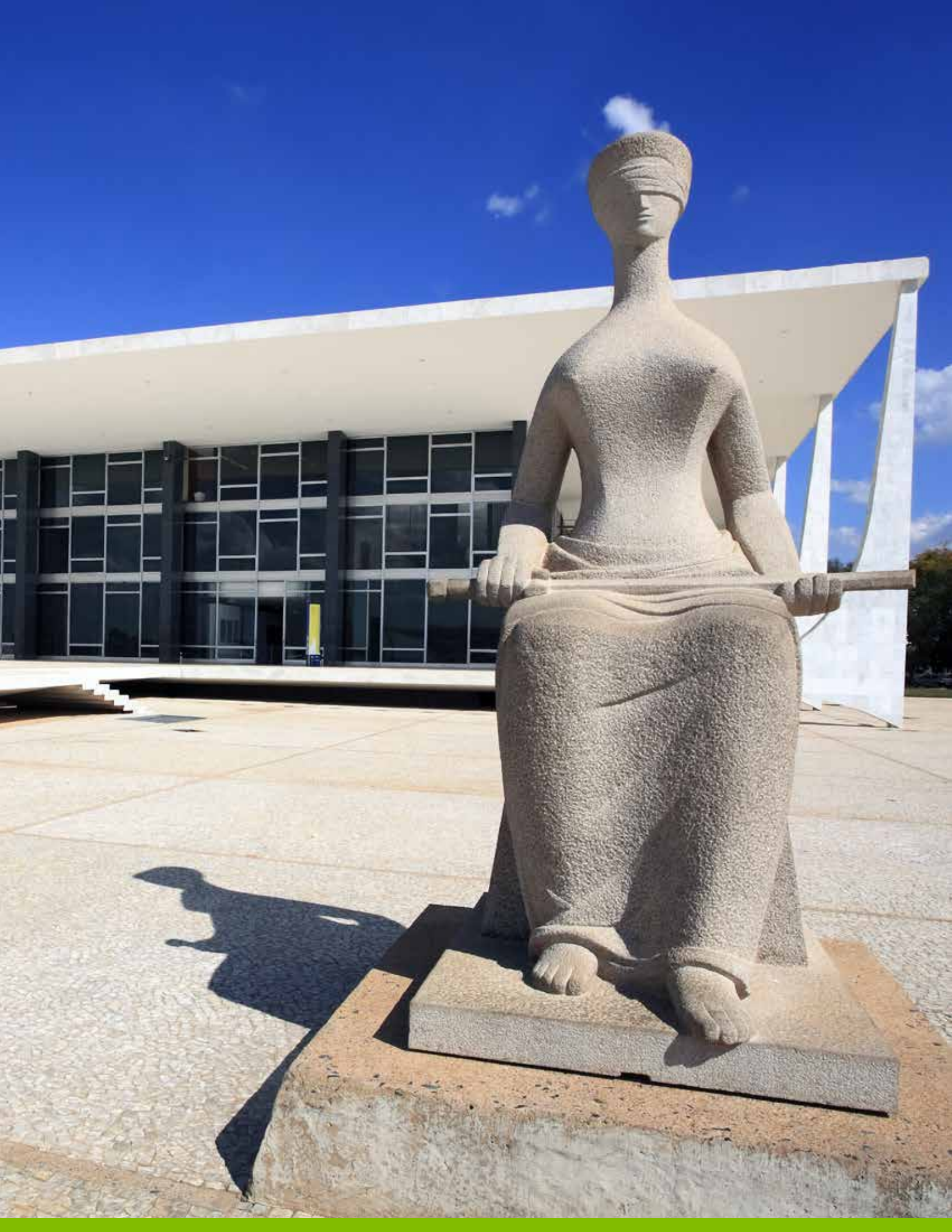
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A Note on the Rule of Law Series

Once seen as a mere formality in a land of impunity, especially for individuals in positions of power in society, Brazilian institutions have displayed in recent years a previously unsuspected capacity to bring people in high places to justice. Nowhere is this shift more evident than in two high profile cases separated by almost a decade and involving politicians, political operators, and business men accused of crimes of corruption.

The first involved a vote-buying scheme in Congress. The investigation originated in Congress with a Parliamentary Commission of Investigation (CPI) in 2005 and concluded in 2012 with guilty verdicts from Brazil's Supreme Federal Court for twenty-five of the thirty-nine persons indicted. Twelve were sentenced to unprecedented prison terms, including a former presidential chief of staff, the speaker of the lower House of Congress, and the president and the treasurer of the political party in power at the time of the crimes.

The second case was brought to light by a federal criminal investigation launched in early 2014 on allegations of large scale corruption against state oil company Petrobras. Dubbed the "Brazilian Oilgate" or Petrolão, this investigation has led to dozens of indictments, including of a former president of the Republic, a sitting president of the Senate, a speaker of the Brazilian House of Representatives (who has been expelled from office by his peers), and a significant number of members of Congress. Other high profile individuals have also been convicted and sentenced to prison terms, among them the heads of Brazil's largest construction contractors.

Expected to keep the Brazilian judicial system occupied for the foreseeable future, the Petrolão has fueled a national crisis that led to the impeachment and removal of a president, deepened a severe recession, and exposed the limits of a political and economic system that has reached its point of exhaustion. Despite the obvious adverse short-term implications for Brazilian society, the corruption investigations have won solid and enduring support among voters and the public in general. Remarkably, it has not resulted in diminishing support for democracy. On the contrary, the unprecedented crisis has strengthened arguments for reform and affirmation of government by people's consent under the rule of law.

Inspired by the hopeful evolution of the nation's crisis, the Brazil Institute launched in July 2016 a lectures series to explore the various institutional aspects of this historic, ongoing transformation in Latin America's largest country. The initiative, reflective of a broader Wilson Center focus on the global fight against corruption, brings to Washington audiences the judges, prosecutors, defense lawyers, legal experts, and practitioners engaged in the evolution of justice and rule of law in Brazil. The series is conducted in partnership with the American University's Washington College of Law program on Legal and Judicial Studies. Edited proceedings of each lecture will be available online, with lectures from the entire series collected in a volume to be published in the second semester of 2017. It is our hope that the statements gathered in this series will shed light on the ongoing efforts of a diverse group of actors to strengthen Brazilian institutions, and deepen the dialogue on rule of law both within and beyond Brazil.

Paulo Sotero
Director, Brazil Institute



A Tribute to Teori Zavascki

January 2017

Peter J. Messitte

U.S. District Judge

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The tragic death of Brazilian Supreme Court Justice Teori Zavascki represents not only the loss of a great judge, but an occasion to reflect on the outsized role he and his Court have played in combating endemic corruption in Brazil.

Justice Zavascki, 68, who went down in a private plane crash near Rio de Janeiro, was appointed to the High Court in 2012 by then Brazilian President Dilma Rousseff. At the time of his appointment, he was a member of the Superior Tribunal of Justice, Brazil's highest non-constitutional court. Before entering the judiciary, he was an attorney for the Central Bank of Brazil, and from 1980 on he lectured on the subjects of administrative and tax law at the Federal University of Rio Grande do Sul, his alma mater. He received numerous prizes and awards from different public entities, the judiciary, and even the armed forces, in recognition of the relevant services he performed.

On the High Court, Justice Zavascki was all that he promised to be: brilliant, workmanlike, quiet and gentle.

But his break-out role came in connection with the Operation Carwash investigation and prosecution—the largest corruption investigation and prosecution in Brazilian history, an undertaking still in progress. Scores of political and business figures have been charged, many have pleaded guilty, and several are already serving jail terms. Although most of the recognition in this effort has been given to Federal trial court Judge

Sérgio Moro, overall supervision for the operation has been in the hands of Justice Zavascki.

His role, as a Supreme Court justice overseeing a criminal prosecution—much less one of the magnitude of Lava Jato—is one that an American audience is almost certainly unfamiliar with. The U.S. Supreme Court has no criminal jurisdiction, save for the possibility of reviewing criminal cases on discretionary appeal. Not so in Brazil. Not only does Brazil's highest court have criminal jurisdiction, it plays an active role throughout the criminal process. And, to do so, as indeed as it does in deciding all cases, the Brazilian Supreme Court designates one of its 11 members, called the relator, to be the principal reporter for the case.

That was the role that was bestowed upon Justice Zavascki in the Operation Carwash case.

And he took to the task with great aplomb. But always, in handling those politically sensitive cases that went directly to the Supreme Court or in contemporaneously reviewing hundreds of decisions from the trial courts, he was the brilliant, workmanlike, quiet, gentle soul that he had always been.

But Justice Zavascki also displayed a critical, most certainly innate, dimension. He was unfailingly independent.

He had been appointed by President Dilma Rousseff, but that did not deter him from impartially deciding cases, however those decisions might have reflected back upon his political benefactors.

Teori Zavascki was, in sum, an icon of the judiciary. His loss is not Brazil's alone. It is a loss for all of us everywhere who believe in the independence of the judiciary and the rule of law.

The late [JUSTICE TEORI ZAVASCKI](#) was named to the Brazilian Supreme Court by former President Dilma Rousseff in 2012 after serving as a judge on the Superior Court of Justice. Justice Zavascki first studied law at the Federal University of Rio Grande do Sul, and later returned to his alma mater to earn a Master and Ph.D. in civil procedural law.

Justice Zavascki passed away unexpectedly on January 19, 2017, after the plane he was on crashed off the coast of Paraty, in the state of Rio de Janeiro. Justice Zavascki gained national attention as a result of his involvement in the federal criminal investigations on massive corruption involving dozens of Brazil’s business executives and politicians, known as the Lava Jato (Car Wash) Operation. As the rapporteur of the case, he was directly involved in the decision to suspend former House Speaker Eduardo Cunha due to corruption allegations, and denied a request to stay President Rousseff’s impeachment case. His tragic death came as a shock to the country and raised many questions about the future of the Lava Jato investigations.

The [BRAZIL INSTITUTE](#) was honored to receive Justice Zavascki in Washington, D.C. on November 7, 2017—one of his final public statements. [AMBASSADOR ANTHONY HARRINGTON](#), former U.S. ambassador to Brazil and chair of the Brazil Institute Advisory Council, introduced Justice Zavascki as well as Justice Gilmar Mendes, who was also in attendance. [JUDGE PETER MESSITTE](#), senior U.S. district judge for the District of Maryland, and [PAULO SOTERO](#), Director of the Brazil Institute, also provided remarks.

The speeches and dialogue contained in this volume have been edited for clarity by Anna Prusa, with support from Paulo Sotero and Natalie Kosloff. Special thanks go to Camila Velloso and Julia Decerega for transcribing and translating the speech and Q&As, and to Kathy Butterfield for the design.

A Panoramic View of the Supreme Court and Its Functions

Justice Teori Zavascki¹

Justice of the Supreme Court of Brazil²

*Brazil Institute at the Woodrow Wilson International Center for Scholars
Washington, D.C. – November 7, 2016*

It is a pleasure to be here today to talk about the Brazilian judiciary and Brazilian Supreme Court. I have divided my remarks into three parts: First, a quick panoramic view of our judicial system; second, the Brazilian Supreme Court and its institutional role; and third, a discussion of several important decisions recently adopted by the Brazilian Supreme Court.

BRAZIL'S JUDICIAL SYSTEM

Brazil is a federative republic composed of 27 units, 26 states, the Federal District (DF) and more than 5,500 municipalities. This is reflected in the organization of Brazil's judiciary, which is an independent and autonomous power with the same degree of independence and autonomy as the executive power and the legislative power. Judicial organization takes place in the realm of the states, as well as within the scope of the federation.

The judicial organization in Brazil is similar to that of the United States. Within the states, we have judges and courts of law that have jurisdiction on issues related to the interest of citizens, including their

private relations and rights. Everything that does fall under the jurisdiction of the federal justice system belongs to the states. The Brazilian Constitution outlines the authority and reach of the federal judiciary system as well as the competencies of the states, which are basically structured around judges and courts of law.

At the federal level, the justice system is peculiar. We have a federal justice system similar in some respects to that of the United States, with concurrent jurisdiction, a common jurisdiction for criminal cases in which the Union has an interest, or in which the Union or some entity of the Union is a victim; but there are also certain criminal matters that the Constitution gives exclusively to the Union's justice, for example political crimes. Federal law also has a civil jurisdiction involving cases in which some of its ministries are parties to the federal government or direct administration.

Thus, federal justice is composed of federal judges and federal regional courts. Brazil has five federal regional courts—I believe the United States has seven federal regional courts.

The peculiarity of our justice system is that there are also specialized judicial bodies. The first specialized branch is responsible for all matters related to labor issues, including private contract disputes between employees and employers. The system for handling these cases is composed of labor judges, regional labor courts—one in each state with the exception of São Paulo, which has two—and a federal-level Superior Labor Court, which is the highest body of labor justice in the Union. The decisions of special judicial bodies, however, are subject to conditional control by the Supreme Court, which I will speak about later on.

The second specialized branch of justice is electoral justice. Electoral justice is also a federal organ with judges of first instance in regional electoral courts—again, one in each state—under the Superior Electoral Court, which is the highest electoral body and whose decisions are submitted to the Supreme Court to ensure constitutionality.

And third, we also have the military courts, which have jurisdiction to judge military crimes.

Broadly speaking, the Brazilian judicial system is overseen by two courts that control both federal and state court decisions. The first is the Superior Court of Justice, which is the court entrusted with ensuring the consistent interpretation of legislation and therefore oversees the decisions of the state and federal courts. It also serves as an appeals court for the Regional Federal Courts, which share this mission of upholding national laws. From a constitutional point of view, the decisions of the Superior Court of Justice are subject

to the oversight of the Supreme Court. The Superior Court of Justice also has criminal jurisdiction, not only as an appeals court but also to try crimes committed by certain authorities, for example state governors.

The second national court is the Supreme Federal Tribunal (STF)—our Supreme Court.³ The Supreme Court is charged with upholding the Constitution. It is composed of 11 justices appointed by the president and confirmed by the Federal Senate. In the Supreme Court, decisions can be made individually by one of the 11 judges or by one of its two subsidiary bodies or chambers—each composed of five judges. Most Supreme Court decisions are made by individual judges.

THE POWERS AND PEROGATIVES OF THE SUPREME COURT OF BRAZIL

As the guardian of the Constitution, the Supreme Federal Tribunal exercises judicial review over legislative provisions. This is a fundamental function that combines the European system with the U.S. system into what we call a mixed model of constitutionality control. [This system] allows for what we call “incidental” control, usually through extraordinary recourse or appeals. In other words, in the judgment of concrete civil and criminal cases, the Supreme Court can declare the constitutionality or unconstitutionality of a relevant law. The Court also has “concentrated” control in the sense that it can take direct action [without waiting for an appeal to be brought]. Direct action may be used to declare unconstitutionality or

constitutionality, to declare or not a breach of a fundamental precept (DPF), or even to declare an omission unconstitutional.

In matters of unconstitutional omission, we have the direct action of unconstitutionality and another important mechanism known as the order of injunction. A writ of injunction is akin to a writ of mandamus, allowing us to declare the omission of the legislator.⁴ Our very detailed Constitution left many of the regulatory aspects of its provisions to the legislature to determine. When a fundamental right cannot be exercised and depends on a rule that is not enumerated in the Constitution, the interested party can appeal to the Supreme Court, and the Court can rule that there is an omission.

Initially, the Supreme Court used the writ of injunction as a means of simply recognizing an omission and communicating the issue to Congress. It was the responsibility of Congress to provide the missing component. Yet over time it became clear that communication with the legislature had very little effect. So, the Court changed its view and now provisionally regulates injunctions [until Congress takes action]. This is a typical normative function of the Supreme Court. Because of the novelty of this type of judicial intervention, the Supreme Court has been criticized for infringing on areas normally delegated to the legislator.

Yet this has been an important function because a legislator may fail to amend a law not due to indifference, but because he or she cannot achieve the minimum consensus necessary to pass a new law or reform.

Perhaps the most important case of an injunction was related to the strikes of public servants. Our Constitution guarantees public employees the right to strike. But Congress never passed regulations for this right. So, after many communications from the Supreme Court to the National Congress, the Court decided to take over this issue provisionally. Today, public servant strikes are protected by a Supreme Court ruling, until Congress passes its own regulations.

So the Supreme Court has these prerogatives as guardian of the Constitution.

The Supreme Court also has competence on other issues of national and international importance. For example, the Supreme Court has original jurisdiction to investigate and judge criminal acts committed by the president and vice president of the Republic.

With respect to crimes of responsibility committed by the president and vice president, however, the jurisdiction belongs to the Federal Senate—our most recent experience with this situation being President Dilma Rousseff's impeachment. The Chief Justice of the Supreme Court presides over the Senate proceedings [to ensure their constitutionality], but the judgment comes from the legislature and not the judiciary, and this is an important distinction.

The Supreme Court also has jurisdiction to prosecute both common crimes and crimes of responsibility committed by other senior government figures—commanders of the armed forces, members of the superior courts, permanent diplomatic heads of

“ With respect to crimes of responsibility committed by the president and vice president, however, the jurisdiction belongs to the Federal Senate...The Chief Justice of the Supreme Court presides over the Senate proceedings [to ensure their constitutionality], but the judgment comes from the legislature and not the judiciary, and this is an important distinction. ”

missions, members of the Senate and the Chamber of Deputies—which we call the “privileged forum,” currently under debate in Brazil because of the large number of cases right now.⁵ The procedure for hearing these criminal cases before the Supreme Court is a bit peculiar, and is a time-consuming legal process. Criminal proceedings generally begin in the court of first instance and reach the Supreme Court only after passing through the appeals courts and the Superior Court of Justice. With these types of cases, however, criminal proceedings begin and end in the Supreme Court, as justified by the legislator’s option to have careful review [of the case]. This is why sometimes people criticize delays in the Supreme Court. I think this is an important criticism, but not always a fair one because [in these types of cases the Supreme Court must do the work of all the lower courts.] It is important to evaluate whether a trial has been delayed, instead of only measuring when the process begins in the Supreme Court and when it ends.

We also have in the Supreme Court broad jurisdiction related to all other kinds of crimes. There is a door open to the Supreme Court—a matter of habeas corpus—that is practical and accessible to any defendant in a criminal case under any circumstances. In general, the Supreme Court has the last word on matters of constitutionality and the Superior Court of Justice (STJ)⁶ has the last word on matters of legality, on adherence to norms—as long as it is not a criminal matter, because there the Supreme Court has the final say on legality as well as constitutionality.

We had an important decision recently on the legitimacy of enforcing sentences after an appellate court upholds the decision of the lower court. Prior to 2009, appeals to the Supreme Court and to the STJ were appeals without extensive effects, allowing the defendant to begin serving a sentence [while the Supreme Court or STJ heard the case], provided the intermediate appellate court upheld the original conviction.

In 2009, the Supreme Court modified this principal—keeping in mind the presumption of innocence—to delay enforcement until the Supreme Court or Superior Court of Justice had issued a final ruling. The result was not good, because in many cases significant resources were mobilized to stall proceedings until eventually the statute of limitations for the sentence expired.⁷ From a technical point of view, it was a somewhat paradoxical interpretation of the law—recognizing the right to appeal while allowing the statute of limitations to continue running. It is hard to imagine that because you did not execute the sentence [during the appeals process] you can no longer execute the sentence [once the final ruling is issued]. So we had a number of technical reasons behind our decision [in 2016 to allow enforcement of sentences immediately after the appellate court votes to uphold a conviction].

In addition to this criminal jurisdiction, the Supreme Court also has competence to judge matters and controversies relevant to our foreign affairs, such as a question that involves a foreign state or an international organization. For example, we have the power to judge extradition requests by foreign states. Similarly, issues that involve the federal system—such as disputes between states or political crimes—and political crimes can also be matters for the Supreme Court to judge. As I mentioned earlier, the Court has many vehicles for these types of action, including direct action on constitutionality and injunctions against certain authorities, including the president and members of the Federal Chamber of Deputies and Senate.

AN OVERBURDENED COURT

The numerous ways of reaching the Supreme Court make our case load really frightening, especially compared to other constitutional courts. To put it into perspective, for the last five years the Supreme Court has received 67,598 cases on average per year.

This year alone, for example, more than seventy-four thousand cases were sent to the Supreme Court. The vast majority of these cases are judged by a single justice and many are obviously standardized judgments.

In Brazil, we have a certain spirit of seeking the judiciary. This validates the judiciary but also overloads it. With regards to extraordinary appeals, for example [which must have general implications beyond the specific complaint at hand], we receive many extraordinary appeals from special courts. This is curious because in Brazil the special courts (e.g., the labor courts) are designed to handle small claims at both the state and federal levels in order to speed up the judicial process. So the law does not allow appeals to higher courts in these cases, except extraordinary appeals to the Supreme Court. As a result, many of these small grievances come before the Supreme Court as extraordinary appeals with broad implications—but rarely do they merit such consideration. But clearly it is possible to reach the Supreme Court one way or another.

I would say that a chronic cultural issue in the history of Brazilian law has been our



From left to right: Justice Gilmar Mendes, Justice Teori Zavascki, and Judge Peter Messitte at the Brazil Institute (November 7, 2016)

reluctance to adopt a system—such as the one that exists in the United States—of *stare decisis*, or legal precedent. We resist the idea that a decision by the Supreme Court should have universal application.

We have tried to establish a culture that respects legal precedent in a normative sense. A resolution introduced in 1934 allows the Federal Senate to universalize decisions of the Supreme Court that declared the unconstitutionality of a normative precept. But this resolution had little practical relevance. Supreme Court decisions via concentrated control—declaring the constitutionality or otherwise of a measure—in effect expanded the scope of the decisions to include other cases. But again this was control over specific normative precepts, and did not impact decisions that fell under the other

jurisdictions of the Supreme Court, so it was insufficient.

Constitutional Amendment No. 45 in 2004 allowed the Supreme Court to start issuing binding decisions (*Súmula vinculante*).⁸ Yet this form of binding precedent not only failed to solve our congestion issues, but actually created more work for the Supreme Court. Any person in any legal process that believes that the binding decision has been unexecuted can file a claim directly to the Supreme Court. So it's a bit paradoxical to use these binding decisions, and we have approved very few, only around 50 since 2004. In the end, I believe it was not very successful, and we continue to have this this chronic issue of the excess cases before the Court.

Constitutional Amendment No. 45 also created a new requirement for extraordinary

appeals, which is the requirement of general repercussion. That, in my opinion, was an important modification with important consequences. We also created a process to assess the existence or not of a general repercussion through a judgment in a virtual plenary session. This was an important advance. In the end, however, the numbers are still very high.

RECENT SUPREME COURT DECISIONS WITH POLITICAL IMPLICATIONS

Finally, I would like to refer to some important and recent STF judgments, including in the field of communications rights—freedom and expression of thought, freedom of the press, freedom of television programming.

In 2009, the STF considered legislation—a “Press Law”—dealing with the forms and actions of various press organs. It was an important decision that profoundly marked the Court’s commitment to freedom of the press in Brazil. This commitment was reiterated in a 2010 ruling on a law that prohibited humoristic criticism of election campaigns. The Supreme Court found this prohibition unconstitutional and once again affirmed its jurisprudence and its commitment to freedom of expression and freedom of the press.

Recently, we also declared unconstitutional an article of the Statute on Children and Adolescents that imposed certain penalties on radio and television broadcasters that deviated from fixed schedules, because our Constitution does not allow for prior censorship. Our Constitution tells us

that the age group indications are only nonbinding guidelines.

In the context of political rights, the Supreme Court made an important decision in 2010, ruling that the Amnesty Law was legitimate when applied to political crimes committed during the dictatorship (1964-1985). And in 2012, the Court ruled that limitations on the right to run for office imposed by the *Lei da Ficha Limpa* (the “Clean Slate Law”⁹) were constitutional, which was also an important decision.

We are currently in session and this week we considered a question that has important political repercussions: the impossibility of an individual assuming, even temporarily, the office of president of the Republic via the line of succession if he or she is a criminal defendant before the Supreme Court.¹⁰ We have not concluded this judgment but we already have a majority affirming that this is impossible.

Last year, the Court ruled on campaign financing, in a decision that found the financing of campaigns by corporations and other private entities to be unconstitutional. I think that this decision should be reconsidered and that it was likely heavily influenced by the funding model we currently have [in Brazil]. As Justice Gilmar [Mendes] mentioned, the Brazilian model of financing establishes limits. The donation limit is important and, above all, the most important goal is for the STF to have the possibility to control and supervise donations effectively. There was another period when there was a ban on corporations, and it was a period with many instances of the so-called *Caixa Dois* [unreported political donations and bribes].

“The Supreme Court is not a political court...The Supreme Court judges political issues legally through the application of the Constitution. It will continue to judge these issues legally—with important policy implications and economic consequences—as long as it remains an impartial tribunal.”

I think it's going to be very difficult to halt the flow of illegal campaign financing to candidates. In the end, the ban was the Supreme Court's decision on the matter.

We have also issued several important judgments during the recent impeachment process, much as we did during the impeachment process of President Collor [in 1992]. Since the 1950 law regulating the process of judging the president of the Republic is outdated, the Supreme Court oversaw the impeachment process. Many judicial mechanisms [in the 1950 law] are not compatible with the 1988 Constitution. The Supreme Court had an important role judging the process, and is still working on several pending injunctions filed by former President Rousseff or by other interested actors involved in the impeachment issue.

Finally, there has been an important series of recent Supreme Court judgments involving human dignity, the right to life, and the pursuit of happiness—all of which are universal issues. For example, the Supreme

Court ruled in 2012 on the issue of the legitimacy of abortion in cases where the fetus has encephalitis. The STF also ruled on the issues of the right to the pursuit of happiness, human dignity, and gay marriage. It considered legitimate the issue of the enforceability of the Hague Convention on the civil aspects of international kidnapping of children.

An important decision that the Supreme Court made concerning judicial review of public policies was in regard to the possibility of collective actions, [where the Court ruled] that the judiciary can determine certain administrative measures. One concrete example of this was prison reform.

The Supreme Court has ruled that the judiciary can define the roles of the judiciary and the executive branch, which is a sensitive issue and an important one.

We have made important decisions regarding financial compensation for physical damage to incarcerated persons.



From left to right: Justice Teori Zavascki, and Judge Peter Messitte at the Brazil Institute (November 7, 2016)

We have a very serious prison problem in Brazil, so much so that the Supreme Court considered declaring the state of affairs of prison administration unconstitutional, thereby allowing for certain important welfare reforms.¹¹

The Supreme Court has ruled on bankruptcy, the right of access to tax returns directly from the Internal Revenue Service, which I consider to be a relevant question.

In Brazil and around the world there is currently a debate regarding decriminalization of drug possession. In my opinion, the most appropriate venue for this debate is the legislative branch.

We also have an ongoing case on the parliament's participation in the process of denouncing international treaties, which is a very important issue from the point of view of external relations.

We are in the process of discussing public health policy, especially commitments or state duties with regards to health care, medications, and treatment. This is a sensitive issue as well.

Finally recent criminal actions have provided the Supreme Court with significant exposure to the issue of "privileged forum" and prerogative of function. In the STF we currently have 103 criminal cases in progress involving investigations and criminal actions against parliamentarians. We have 357 inquiries in progress specifically related to the so-called Lava Jato Operation. We have 44 inquiries that could end up generating formal complaints in the Court—of these, 14 complaints have been lodged, and four have already been received by the Supreme Court. The others are in the response phase before the receiving court. The accused persons have a deadline to defend themselves.

The Supreme Court of Brazil is a multipurpose court. It is not only a constitutional court, but also serves as the court of last instance for appeals. It has the final say in relation to all other organs in the judiciary system, both the criminal and civil sides. To some degree, the Court can be considered a moderating power. This does not mean that it is a political court, as is sometimes suggested. The Supreme Court passes judgment on political issues but it does not judge politically. It does not judge by its own discretion or will. The Supreme Court judges political issues legally through the application of the Constitution. It will continue to judge these issues legally—with important policy implications and economic consequences—as long as it remains an impartial tribunal. This is how the Court legitimizes itself and its judges.

Thank you very much.

“The procedure for hearing criminal cases [and crimes of responsibility] before the Supreme Court is a bit peculiar, and is a time-consuming legal process. Criminal proceedings normally begin in the court of first instance and reach the Supreme Court only after passing through appeals... With these types of [privileged forum] cases, however, criminal proceedings begin and end in the Supreme Court.”

- Teori Zavascki

Questions and Answers

Q: How long will it be before the Supreme Court hears cases regarding the Lava Jato Operation?

A: There are two types of proceedings for these criminal cases. One begins in the court of first instance and ends in the Supreme Court, so it is difficult to say when it will get to the Supreme Court—it is a long process. We do have a few penal matters that have come directly to the Supreme Court and are already under judgment, which starts as soon as the Court receives the complaint. Next there is an investigation, done by the Public Prosecutor's Office and the Federal Police to find evidence pertinent to the case. The Court issues the final judgment based on the conclusion of this investigation.

The Supreme Court has no control over the investigation, but does provide authorization (or deny authorization) for measures that require judicial decisions, such as requests for pre-trial detention. In the case of members of Congress (we basically try only members of Congress), they generally cannot be detained according to the Constitution. This is different than in courts of first instance, where pre-trial detentions take place [with greater frequency]. We did have the detainment of one Senator—a very singular occasion—because there was evidence of a crime in the process of being committed. Our Constitution only allows for the pre-trial detention of active members of Congress in these types of cases.

We have received four complaints at the moment, which means that the judgment process has begun for these complaints. Ten other complaints have been filed, but are pending a formal response by all relevant parties. The primary job of the Supreme Court at the moment is simply to oversee certain requests and actions, such as search and seizures—and this is being done at the rate that these measures are being requested. There is nothing pending.

Q: Should defendants before the Supreme Court be able to occupy posts in the line of succession of the presidency?

A: No, this should not be allowed. I already ruled on this matter in the case of the president of the Chamber of Deputies, when I decided that he had to be removed from his duties, especially from his duty as president of the Chamber of Deputies. One of the considerations was exactly that: If he's a defendant in a criminal case before the Supreme Court he cannot occupy the office of the president of the Republic. My decision had the approval of the Supreme Court, unanimous approval if I'm not mistaken.

Q: What is your opinion on the "pedido de vista" of Minister Dias Toffoli and do you think a vote on this case will be possible this year?

A: The judgment process has not concluded

because there was a “pedido de vista” [a request to examine a case further before voting] by Minister Dias Toffoli. I have no doubt that his reasons are important. Clearly, new things are deduced from these requests, especially when it comes to the [previous] President of the Senate [Renan Calheiros], who would be second in line to the presidency, but as far the current president of the Senate, he is not facing any criminal charges yet.

Q: What is your opinion on the Military Police crackdown on Brazilians protesting the federal spending cap (PEC) and the recent decision of a Federal District judge to authorize the use of techniques compared with torture to make invaded schools uninhabitable, despite the presence of minors?

A: Regarding the school invasions case, I am not going to give an opinion for two reasons. First, I am not familiar with the specific situation that was mentioned. Second, it is always hard for a Supreme Court judge to comment on a specific case because it might reach the Supreme Court.

Speaking more generally, the freedom to protest must be assured under any circumstance, with one very important limitation. There is no right without a limit. There is no law without a limit. Not even the right to life is limitless in our system. In certain circumstances, the Constitution allows one to kill. We have many cases where abortion is permitted—I use this as an example because even the right to life, in certain situations, has its limits. And these limits are generally determined in

reference to the rights of other individuals or the rights of the general public. So we need to consider the right to protest within this context, understanding that nothing is unlimited.

Q: Do you think it is time to discuss the “privileged forum” in Brazil, to make the job of the Supreme Court easier?

A: Regarding the privileged forum, I think it is an issue that needs to be discussed. As I have said several times, I think we need to reduce the number of defendants who have the privilege of going straight to the Supreme Court.

The Supreme Court has jurisdictions. I think it should have fewer jurisdictions in many areas, including this one. I don’t think another forum should be created—there is an idea that there should be a separate forum under a separate judge, and it would be another privileged forum. I think that if we get rid of the privileged forum of the Supreme Court we should leave these cases to the normal forum, as we do with any other citizen.

Q: You are in a merits review of the impeachment, which has been questioned by former President Dilma Rousseff. Are you taking this to the floor?

A: As far the impeachment question, the attorney general filed a writ of mandamus—an injunction request—on behalf of President Rousseff, and I was the justice tasked with handling this request. We are analyzing several aspects of the impeachment process. I denied the

injunction at the time because there was not what we call a “likelihood of success”— but the review process will continue normally nonetheless. The next steps are to collect information, hear involved parties, hear the Prosecutor’s Office, and then eventually bring this to the full Supreme Court for a judgment. Unfortunately, the agenda is packed, and we have, if I am not mistaken, over 600 judgments awaiting trial. The agenda is put together every week by the chief justice of the Supreme Court. It is hard to give an estimate on when the Court will issue its final judgment.



Justice Teori Zavascki of the Supreme Court of Brazil presides over a hearing related to the Lava Jato investigations (Image credit: Agência Brasil)


ENDNOTES

- 1 Editor's Note: In Brazil, all judges on the superior federal courts are referred to using the title of "Minister." In this publication, we make the distinction between judges on the Brazilian Supreme Court and judges on the other superior courts (such as the Superior Electoral Tribunal) by referring to the former as "Justices" in the U.S. style (e.g., Justice Teori Zavascki) and referring to the latter as "Ministers."
- 2 Editor's Note: Brazil's highest constitutional court, the Supremo Tribunal Federal, is referred to interchangeably in English as the Supreme Court or the Supreme Federal Tribunal (STF). The court consists of eleven justices, appointed by the president and approved by the Federal Senate.
- 3 Editor's Note: The Supreme Court has three main roles: 1.) to judge the constitutionality or unconstitutionality of laws; 2.) to try cases involving members of Congress, the president, the vice president, and other high ranking members of the government; and 3.) to hear appeals of rulings issued by lower courts. Due to the complexity and length of the 1988 Constitution and the Court's broad range of prerogatives, the Brazilian Supreme Court is one of the busiest and most overburdened in the world, reviewing on average 70,000 cases a year, compared to the U.S. Supreme Court's roughly 150 cases a year.
- 4 Editor's Note: A writ of mandamus is an order from a court to a government official ordering the government official to properly fulfill their official duties or correct an abuse of discretion.
- 5 Editor's Note: In Brazil, certain individuals at a high level of government, such as the president and members of Congress, have the right to what is known as a "privileged forum." They are entitled to have their cases heard in the first instance by the Supreme Court of Brazil (instead of beginning in a lower court and ultimately appealing to the Supreme Court).
- 6 Editor's Note: The Superior Court of Justice (STJ) is responsible for standardizing the interpretation of federal law, but does not judge the constitutionality of those laws (that prerogative is reserved for the Supreme Court). The STJ is the court of last instance for appeals in cases not directly related to the Constitution.
- 7 Editor's Note: White collar and other high-level criminals often explicitly tried to run down the clock through exhausting their appeals options, effectively winning impunity despite a conviction.

- 8 Editor's Note: The Supreme Court may issue these binding decisions (Súmula vinculante) only after repeatedly ruling in favor of a similar interpretation or application of the law with regards to a constitutional matter in previous decisions. Moreover, the decision will be binding only if two-thirds of the justices rule in its favor.
- 9 Editor's Note: The Lei da Ficha Limpa decrees that anyone who has been impeached or resigned to avoid impeachment or who has been convicted by collective decision of a judicial body (more than a single judge) is ineligible to run for political office for eight years.
- 10 Editor's Note: The current line of presidential succession is: speaker of the Chamber of Deputies, president of the Senate, and chief justice of the Supreme Court (there is currently no vice president, as the former vice president is now president of Brazil).
- 11 Editor's Note: Since the late Justice Zavascki's speech in November 2016, Brazil experienced a series of prison riots that left over 140 inmates dead. The violence is thought to be the latest manifestation of an escalating feud between two powerful gangs. Due to overcrowding and underfunding in the prison system, officials are often unable to separate rival factions or even maintain control. Gangs frequently take over prisons, bribing guards and smuggling cell phones and weapons to their incarcerated members. In 2016, 372 inmates died at the hands of other prisoners, according to Folha de S. Paulo.




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