

BRAZIL INSTITUTE

A Conversation with Justice José Antonio Dias Toffoli

The Evolving Role of Brazil's Supreme Court



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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 lecture 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

JUSTICE JOSÉ ANTONIO DIAS TOFFOLI was named to the Brazilian Supreme Court by former President Luiz Inácio Lula da Silva: one of the youngest justices to ever serve on on Brazil's highest court. Justice Dias Toffoli studied at the prestigious law faculty of the University of São Paulo. Before being appointed to the Court, Justice Dias Toffoli served as Federal Solicitor General and General Counsel of the Workers' Party.

Justice Dias Toffoli headed Brazil's Superior Electoral Tribunal from 2014 until earlier this year. The Tribunal supervises elections at every level throughout Brazil. In September 2018, Justice Dias Toffoli will become President of the Supreme Court, a position which rotates among the justices of the Court.

The **BRAZIL INSTITUTE** was honored to receive Justice Dias Toffoli in Washington, D.C. on July 6, 2016. **AMBASSADOR ANTHONY HARRINGTON**, former U.S. ambassador to Brazil and chair of the Brazil Institute Advisory Council, introduced Justice Dias Toffoli. **JUDGE PETER MESSITTE**, senior U.S. district judge for the District of Maryland, provided closing comments.

The speeches and dialogue contained in this volume have been edited for clarity by Paulo Sotero, Anna Prusa, and Natalie Kosloff. Special thanks go to Julia Fernandes Fonteles and Therese Kuester for transcribing the Q&As, and to Kathy Butterfield and Kerrin Cuisson for the design.

The Evolving Role of Brazil's Supreme Court

Justice José Antonio Dias Toffoli

Minister of the Federal Supreme Court of Brazil

Brazil Institute at the Woodrow Wilson International Center for Scholars

Washington, D.C. – July 6th 2016

Though the legal system of Brazil follows the civil law tradition in which laws issued by the legislative branch are the essential source of law, the similarities with the legal system of the United States are quite remarkable, despite the fact that the latter system is firmly rooted in the common law tradition. These similarities can be traced back to the reasons that led to creation of the respective Supreme Courts and, above all, to the historic influences of the U.S. model on Brazilian law, representing a major contribution to construction of our system of control of constitutionality

Both in the United States and in Brazil, creation of the Supreme Court was founded upon the need for attributing the roles of Guardian of the Constitution, Court of the Federation, and Moderator of political and social conflicts to a single specific entity.

Currently, the Brazilian Supreme Court's major role has been that of a Criminal Court, overseeing inquiries and criminal suits involving federal authorities entitled to the prerogative of privileged jurisdiction.

At this point, I will go into an analysis of each one of these functions of the Brazilian Supreme Court.

THE FEDERAL SUPREME COURT AS GUARDIAN OF THE CONSTITUTION

It was in the United States that the first written constitution arose and the theory of constitutional supremacy developed. This Constitution became, by the way, the paradigm of contemporary constitutionalism.

Although the 1787 U.S. Constitution does not expressly foresee the function of jurisdictional control of the constitutionality of legislation,¹ Alexander Hamilton, one of the authors of the Federalist Papers, defended the importance of the courts in declaring the nullity of legislative acts that conflicted with the Constitution. He argued that no legislative act contrary to the Constitution could be valid, since when the will of the legislative branch, as expressed in its laws, conflicts with the will of the people, as expressed in the Constitution, the

Justices would have the role of ensuring the supremacy of the fundamental law.²

Years later, in 1803, John Marshall defended this same reasoning in a decision handed down by the United States Supreme Court in the case *Marbury v. Madison*, declaring the unconstitutionality of a normative act that attributed authority to the Supreme Court to judge concrete cases not expressly foreseen in the Constitution. This came to be considered the first landmark decision involving constitutional jurisdiction and diffuse control of constitutionality, principles that later spread throughout much of the world.

One should note that the American model of judicial review resulted from a construction of the U.S. Supreme Court based upon the notion that all judges, when judging concrete cases, have authority to deny application of any law that conflicts with the Constitution (diffuse control).

In its turn, since the country was colonized basically by the Portuguese, there is no denying that Brazilian law is rooted in European continental law and the civil law tradition. Therefore, in detriment to jurisprudential precedents and customs, our legal system prioritizes written law, issued by the Legislative Branch as the essential source of law.

However, this essential difference did not prevent Brazilian constitutionalism from being influenced by the U.S. constitutional model, particularly with the advent of the republican system in Brazil. However, differently from American judicial review, Brazilian constitutional jurisdiction—even as a consequence of the primacy of law—did not result from a jurisprudential construction, but rather from an express provision in the Constitution.

The fact of the matter is that, during the monarchical period in Brazil, under the aegis of the 1824 Constitution, the legislative branch was charged with drawing up legislation, interpreting it, suspending it and even repealing it, while also acting as guardian of the Constitution (Art. 15). In the name of the separation of powers and the supremacy of the Parliament, there was no space for a system of judicial control of the constitutionality of laws.

It was only with proclamation of the Republic—initially, with creation of the Federal Supreme Court by Decree No. 848, in 1890, and, following that, promulgation of the 1891 Constitution, which, as conceived by Brazilian lawyer and politician Rui Barbosa, a scholar of the U.S. legal system who was clearly inspired by the Constitution of that country—that Brazil adopted the diffuse model of control of the constitutionality of legislation, including an express provision in this sense in the nation's Constitution. This was the starting point for Brazilian constitutional jurisdiction.

Nonetheless, as already stated, exclusive adoption of this model, without the mechanism of *stare decisis*—an institute typical of countries adopting the common law tradition—ended up generating instability and insecurity. Although judges and courts, with the Federal Supreme Court as the highest level of appeal, could declare a specific piece of legislation unconstitutional, the effects of this decision were limited to concrete cases since no mechanism had been adopted that would make such decisions generally applicable. In an attempt to correct this deficiency, the 1934 Brazilian Constitution granted the Federal Senate authority to wholly or partially suspend execution of normative acts declared unconstitutional by the Federal

“...there is no way of avoiding comparisons between the Constitutions of Brazil and of the United States.”

Supreme Court, thus making declarations of unconstitutionality applicable throughout the nation. This authority of the Brazilian Senate still exists even today in Brazil.

Control of constitutionality was maintained in these terms, with no major alterations, until advent of Constitutional Amendment No. 16, dated 1965, when the 1946 Constitution was still in effect. At that point, the Brazilian system adopted abstract control of the constitutionality of laws, granting the Federal Supreme Court authority in actions brought directly before the Court to analyze questions of constitutionality in an abstract manner, without referring to specific concrete cases.

Thus, inspired by the Austrian model formulated by Hans Kelsen, the system of concentrated control of constitutionality was introduced into Brazil. Kelsen held the position that oversight of the constitutionality of legislation should be the exclusive responsibility of a constitutional court, designed specifically to be guardian of the fundamental law and an institution outside the ordinary jurisdictional structure.

This new model, denominated “concentrated control of constitutionality,” coexisted with the diffuse system of control and was preserved in all Brazilian constitutions subsequent to that of 1946, including the current 1988 Brazilian Constitution.

Consequently, although Brazil initially instituted a system of diffuse control of constitutionality (at the time of the founding of the Republic) under the undeniable influence of the U.S. system of judicial review of the constitutionality of legislation, the country has gradually evolved toward the Austrian system of concentrated control.

Currently, analysis of the 1988 Federal Constitution shows that the country does in fact have a model characterized as eclectic or mixed, a combination of diffuse or incidental control (U.S. system), exercised by all judges and courts, and of concentrated control centered on a single mechanism (Austrian model), exercised through abstract actions reserved exclusively to the Federal Supreme Court.

Therefore, Brazil has combined the characteristics of the two classical models of control of constitutionality, possessing a wide range of procedural instruments through which citizens and legal and political entities can exercise oversight of the constitutionality of the acts of public authorities, while guaranteeing the supremacy of the Federal Constitution.

With promulgation of the current 1988 Constitution in Brazil—following a military regime that lasted more than twenty years—the nation adopted an extensive

range of rights and principles that, in the classic affirmation of Konrad Hesse, possess normative force guaranteed by the Judiciary.

Here, there is no way of avoiding comparisons between the Constitutions of Brazil and of the United States. Though there are undeniable similarities between some instruments, while the U.S. Constitution is synthetic, possessing only seven articles (each of them with several sections), the Brazilian Constitution is analytical, being structured into 250 articles in the permanent part and 100 articles in the transitory provisions.

One should further stress that the U.S. Constitution dates to 1789 and has been amended on only twenty-seven occasions. Brazil, on the other hand, has already had seven constitutions and the one currently in effect, dated 1988—in just twenty-seven years of existence—has already received ninety-one amendments.

The truth is that our constitutional text, to some extent as a result of the recent military regime period, sought to exhaustively define all constitutional questions, while also disciplining various questions that could have been defined by infra-constitutional legislation. This wide-ranging proclamation of rights by the Constitution was further accompanied by creation of instruments designed to bring these positive intentions to judicial fruition, granting to the judiciary and, more specifically, to the Federal Supreme Court, a fundamental role in the consolidation of this fledgling democratic state and in safeguarding the fundamental rights and guarantees of both individuals and society as a whole.

Concentrated control, through which constitutional controversies can be directly analyzed in abstract terms by the Federal

Supreme Court, can be exerted through four types of constitutional challenges: (i) direct challenge of unconstitutionality (ADI); (ii) declaratory action of constitutionality (ADC); (iii) direct challenge of unconstitutionality by omission (ADO); and (iv) challenge of breach of fundamental precept (ADPF).

Parallel to this, the 1988 Constitution significantly broadened standing to raise challenges, granting this legitimacy to the Office of the General Prosecutor of the Republic, the president of the Republic, the leaders of the Federal Senate, the leaders of the Chamber of Deputies, the leaders of legislative assemblies or the Legislative Chamber of the Federal District, governors of the states and Federal District, the Federal Council of the Brazilian Bar Association, political parties with representation in the National Congress, labor confederations and professional entities that are national in scope.

Also in the context of constitutional challenges, we have the writ of mandamus, habeas corpus, habeas data, injunctions, class actions and public civil actions.

At the level of appeal, one should cite the extraordinary appeal in which the Federal Supreme Court is called upon to analyze the existence of violations of the Constitution in judicial decisions handed down by a single or final instance of other judiciary branch components.

In this point also, one encounters converging elements in more recent times between the Brazilian and U.S. models of judicial control of constitutionality.

The enormous quantity of cases brought before the Federal Supreme Court, mainly extraordinary appeals, has made it necessary

to adopt mechanisms capable of filtering the cases to be heard by the Court and granting the status of precedents to those applicable to analogous cases.

Exemplifying the numerical crisis, 20,000 cases were brought before the Brazilian Supreme Court in 1988, compared to a total of 127,000 in 2006.

In this framework, the 2004 Judicial Reform and particularly Constitutional Amendment No. 45/2004 introduced profound alterations into the extraordinary appeal, a procedural instrument typical of diffuse control of constitutionality.

Based on the concept of the counterpart of certiorari, the concept of “general repercussion”—what you in the United States would call “discretionary review”—was adopted as a requirement for admission of extraordinary appeals by the Brazilian Supreme Court. By way of clarification, the

appellants must demonstrate the general repercussion of the constitutional questions discussed in the case in order to have their appeal heard by the Supreme Court. In other words, appeals must be relevant from an economic, political, social or legal point of view and must extend beyond the subjective interests manifested in the cause.

Thus, the Court only agrees to decide constitutional controversies that it considers to be relevant. With this, upon deciding a specific extraordinary appeal with acknowledged general repercussion, the Federal Supreme Court not only judges the concrete case before it, but also defines the interpretative reasoning behind the constitutional question under discussion, which must then be followed by the lower courts in cases dealing with the same theme.

Following the same inspiration, another innovation introduced by Constitutional Amendment No. 45, dated 2004, was



From left to right: Brazil Institute Director Paulo Sotero, Ambassador Anthony Harrington, Justice José Antonio Dias Toffoli, and Judge Peter Messitsee at the Brazil Institute (July 6, 2016)

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authorization for the Federal Supreme Court to approve so-called “binding precedents,” by which reiterated decisions of the Supreme Court are defined as precedents applicable to the other levels of the judicial branch and the direct or indirect public administration at the federal, state, and municipal levels (Art. 103-A, CF/88).

One should observe that, at the end of 2006, the number of cases before the Federal Supreme Court totaled 153,936. Currently, almost ten years since regulation and implementation of the systems of general repercussion and binding precedents, the Court has sharply reduced the backlog to a current level of 62,038 cases.

The truth of the matter is that both mechanisms (general repercussion and binding precedents) have converged to form the current mixed Brazilian system of judicial review (diffuse and concentrated), making it possible to give added value to the jurisprudence of the Federal Supreme Court, while ensuring jurisprudential uniformity and enhancing the strength and generalist character of specific precedents defined by the nation’s highest court.

In summary, in attributing the role of protagonist to the Federal Supreme Court

in interpreting and solidifying constitutional norms, the 1988 Constitution has conferred a more active character on the Court in the sense that its decisions have clearly highlighted the institution’s overriding commitment to the defense of fundamental rights, as well as its untiring efforts to combat discrimination and intolerance, certainly elements of fundamental importance to any and all democratic societies.

Further on, I will cite several decisions that clearly demonstrate this role of the Court.

THE FEDERAL SUPREME COURT AS COURT OF THE FEDERATION

Hans Kelsen defended the position that it was precisely in the federal states that constitutional jurisdiction took on the greatest importance, since it was at that level that a constitutional court was needed, an objective instance capable of peacefully deciding conflicts among federative entities, as problems of a legal nature.

Therefore, aside from being a response to the need for ensuring the supremacy of their respective fundamental laws, the Brazilian and U.S. Supreme Courts also represent a response to the need for a national

jurisdictional organ charged with impeding violations of the constitutional limits imposed on the authority of the federative states.

It is the understanding of Charles Durand that true federalism demands that the constitution must rule both the member states and components of the federal government.³ This requires the existence of a neutral court that resolves conflicts between the federation and the member states, particularly with respect to the authority constitutionally distributed to the states.

Just as occurs in Brazil, the U.S. Supreme Court has original jurisdiction in conflicts between member states or between them and the federal government. Article 102, I (f) of the Brazilian Constitution determines that, as Court of the Federation, the Federal Supreme Court has the power to resolve those controversies that arise at the core of the Federal State, generating situations in which conflicts arise among the member states. The Brazilian Supreme Court has the political-institutional duty to defend the intangibility of the federative pact.

By way of exemplification, in 2011, the Federal Supreme Court denied the petition formulated in ADI No. 2,650, for which I was the rapporteur, declaring that, in hypotheses involving the breaking up of states and municipalities, the entire population directly impacted, including that of the area to be dismembered and that of the remaining area, must be heard through a plebiscite, as foreseen in Art. 18, § 3-4 of the Federal Constitution. The decision in this case generated important repercussions on those movements calling for territorial alterations in the Brazilian Federation, making the breaking up of the respective states considerably more difficult. It had a direct impact on the

first movement toward emancipation of member states after adoption of the Federal Constitution: of the state of Pará and creation of the states of Tapajós and Carajás, both of which were rejected in the 2011 plebiscite.

This was a decision considered historic in the sense that it involved defense of the idea of federation and of the limits on federative self-determination. If we observe the cases of Crimea, Cataluña, and Scotland, each in its own specific context, we will have a precise notion as to what this decision represents in terms of the future of the country and its view of the concept of federation.

In the positions I take in the Brazilian Supreme Court, I often stress that the history of Brazil—as colony, empire, and republic—demonstrates that many of the debates that reached the Supreme Court are the result of the permanent pendular movement of the Brazilian Federation. Just what is this pendular movement? It is that existing between granting greater authority to the local elite or to the national State; between attributing enhanced legitimacy or authority to the member states or to the Federation, to the central power; between fostering decentralization in favor of the states or centralization in the benefit of the Union.

As is evident, the Brazilian Supreme Court acts as a type of arbiter of the Federation, resolving Constitution-based conflicts that may arise. On occasion, with the endorsement of the Supreme Court, the states enjoy enhanced constitutional freedom; while on other occasions, this freedom is restricted in favor of the Federation. There is no doubt that these interpretations oscillate between broadening federal authority and defending states' rights, depending on historical moments and processes.

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THE SUPREME COURT AS A “MODERATING POWER”

Today, the Federal Supreme Court plays a highly relevant role in maintaining constitutional balance, intervening in moments of tension between the executive branch and the legislature, and avoiding situational political conflicts capable of leading to rupture of the constitutional system.

In Brazil, the Supreme Court acts as moderating power in political and social conflicts.

Looking back once again into the history of Brazil during the imperial period, it was the broad authority of the moderating power (the emperor) that preserved national unity, the borders of the Brazilian nation and made it possible to expand them.

The end of the monarchy and proclamation of the Republic as a result of an army-led coup, in an alliance with the upper and lower national middle-class, resulted in a new constitutional model for Brazil.

In the absence of the figure of the emperor, the final instance for resolution of public and private conflicts had to be defined, since that function had previously been performed by the emperor himself.

Following the model of the U.S. Supreme Court, it was this need that gave rise to the Federal Supreme Court, which assumed many of the responsibilities previously attributed to the emperor (the moderating power) and to the Council of State. However, it was a new institution with old ministers, since many of those nominated to the Court had been born in the decade of independence.

The truth is that, even with the renovations that occurred at a later date, the Court was unable to achieve the desiderata that had undergirded its creation.

Parallel to this, the military—responsible for the republican coup—disdained the Supreme Court as occurred, for example, in the episode in which Floriano Peixoto named a medical doctor (Barata Ribeiro) and two generals to the Court. When these names were rejected, the Court was forced



Justica (Justice) by Alfredo Ceschiatti, outside the Palace of the Supreme Court in Brasília

to spend a long period of time without the quorum required for its deliberations.

In its turn, the army played a role in all of the crises that marked the birth of the Republic, including both in wars and in support to national unity. However, only rarely did this reality impact the Supreme Court as it avoided coping with the military and political disputes of the period.

With the failure of the proposal of the Court as moderating power, the political culture of the nation sought to obtain authority by resorting to the armed forces and its officers.

Consequently, during the entire period of the Republic up to the 1988 Constitution, the role of moderating power in Brazil was exercised by the military which took on the joint roles of guarantor and mediator of crises, constantly interfering in the power structures and directly and periodically intervening in Brazilian democracy itself.

However, this approach consisted of a veritable usurpation of the role reserved to the judicial branch as principal actor and mediator of conflicts, especially at the level of the Supreme Court, as occurs in the United States.

There is no doubt that, in the United States, the Supreme Court effectively plays the role of horizontal and vertical moderating power, mediating the major themes faced by that society, whether they involve political, economic, social or cultural life. Examples of this are evident in decisions related to abortion (*Roe v. Wade*, 1973) and to elections (*Bush v. Gore*, 2000), among others.

At this moment, the Supreme Court seems to have begun assuming the role originally foreseen at the time of the proclamation of the Republic. As expected, complaints have

been raised regarding supposed judicial activism and interference in the other branches of government, in themes that should be the responsibility of the elected representatives of the people.

In this regard, one should recall recent moments of this so-called judicial activism in Brazil, with a brief, albeit summarized, glance at important decisions handed down by the Court in recent years.

By way of example, in May 2011, the Supreme Court recognized civil unions for couples of the same sex, recognizing that they have the same rights as heterosexual couples (ADI No. 4, 277 and ADPF No. 132). The Court stressed that Art. 3, IV of the Federal Constitution prohibits any type of discrimination based on gender, race or color, therefore prohibiting all forms of discriminating or diminishing any other person in light of one's sexual orientation.

Another relevant theme that has been the subject of decisions in both the United States and Brazil is that of racial quotas in universities.

In Brazil, in 2012, the Federal Supreme Court decided that this affirmative action policy was constitutional and consistent with utilization of social and ethnic-racial criteria in the process of admission to Brazilian public universities (ADPF No. 186 and RE No. 597,285). It is the understanding of the Brazilian Court that quota systems establish a pluralistic and diversified academic environment and aid in overcoming historically consolidated social distortions.

In the political framework of our country, the reality of a coalition-based presidential system coupled with the fragmentation and composition of the political forces

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represented in Congress, together with the fragilities of our political party structure, also requires an institutionalized and legitimate space for mediation of conflicts in moments of political crises. In this sense, the Brazilian Supreme Court has also taken a number of pertinent decisions.

For example, altering previous positions, in 2007 the Court adopted the constitutional principle of party fidelity, in the understanding that shifts by elected members of Congress from one party to another without just cause entitles the party of origin to claim the lost seat in Congress. In other words, unjustified moves by members of Congress from one party to another results in loss of the member's mandate (MS No. 26,602/DF; MS No. 26,603/DF; MS No. 26,604/DF; MS No. 26,890/DF). This decision was a response on the part of the Brazilian Supreme Court to the routine practice of members of Congress in Brazil changing parties following an election.

In Brazil, just as occurs in the United States, the theme of political financing has also been targeted by the Supreme Court. In 2015,

the Brazilian Supreme Court declared the unconstitutionality of the rules that allowed private companies to donate funding to electoral campaigns and political parties. This represents an enormous innovation that will go into effect in the 2016 municipal elections.

It is also important to cite the ongoing process of impeachment of the president of the Republic and the fact that the Supreme Court has been called upon to define the ritual to be observed by the National Congress in this case (ADPF No. 378). In its decision, the Federal Supreme Court decided by majority vote—in which I was part of the minority—that, in cases involving the crime of abuse of office, the Chamber of Deputies is responsible for determining whether investigation of the process against the president is to be authorized or not. Furthermore, it is the responsibility of the Federal Senate to accept, decide, and judge the charges, with the president of the Republic being suspended from office only when the Senate decides to initiate the trial process.

The Court also denied injunctive relief that would have annulled processing of the

impeachment in the Chamber of Deputies (MS No. 34131).

Once these decisions had been handed down by the Supreme Court, the Chamber of Deputies authorized the impeachment and, following that, the Senate approved initiation of the process, suspending President of the Republic Dilma Rousseff from office for a maximum period of 180 days.

One should also emphasize that, just as occurs in the United States (Art I, § 3, cl. 6 of the U.S. Constitution), Article 52, II of the Brazilian Federal Constitution designates the chief justice of the Federal Supreme Court to preside over the process of impeachment of the president of the Republic. The proceedings are now moving forward at the Federal Senate.

These decisions are clear examples of the measures taken by the Federal Supreme Court in its role as moderating power, acting in situations of tension between the executive and legislative branches and as mediator in moments of institutional crises.

FEDERAL SUPREME COURT AS CRIMINAL COURT

Finally, it is important to highlight the outstanding role played by the Federal Supreme Court in Brazil, distinguishing it even from its source of inspiration, the Supreme Court of the United States: original criminal jurisdiction and the so-called prerogative of function for those entitled to it. In these cases, the Court functions as a criminal court starting with the investigation, gathering of evidence, and trial of those involved, and continuing during the stage of appeal.

In the United States, the concept of privileged jurisdiction by reason of prerogative of function does not exist for common crimes, since only the president of the Republic has temporary criminal immunity until leaving office. In contrast, countries like France, Germany, and Italy have rules that protect their highest authorities, granting them the right to be tried before higher courts.

In Brazil, there has been some form of special jurisdiction since the 1824 Constitution, the first Brazilian Constitution, when notification of crimes committed by members of the imperial family, ministers or members of the Council of State, senators or deputies was reserved exclusively to the Senate. With adoption of the first Republican Constitution (1891), the Federal Supreme Court was given authority to try the president of the Republic in cases involving common crime. In their turn, deputies and senators only received the prerogative of privileged jurisdiction before the Supreme Court with the 1969 Constitution.

Currently, Article 102, I (b) and (c) of the 1988 Constitution determines that, in cases of common crime, the Federal Supreme Court has original jurisdiction for trying and judging the president of the Republic, vice president, members of the National Congress, government ministers and the general prosecutor of the Republic and, when common crimes and abuse of office are involved, ministers of state and the commanders of the navy, army and air force, members of the higher courts, members of the Federal Budget Court and the chiefs of permanent diplomatic missions.

Although its existence is now the subject of heated controversy, I remain favorable to the rules governing privileged

“ In Brazil, just as occurs in the United States, the theme of political financing has also been targeted by the Supreme Court.”

jurisdiction, since it is my understanding that, in a federation, the one who judges the maximum authorities of the Brazilian nation should not be the local authority, in this case the lower court trial judge, but rather an entity of the Brazilian nation. The Constitution has chosen the Federal Supreme Court, the maximum level of the judiciary branch, to perform this task.

It is important to stress that privileged jurisdiction is not designed to benefit those who exercise the positions listed, but rather to guarantee the independence of the performance of their functions, while also avoiding political manipulation in the judgment process and subversion of the hierarchical structure.

This is not a question of privilege. Quite to the contrary, those who have this prerogative are also subject to a lesser number of levels of appeal and lesser chance of future application of the statute of limitations, since the process of judgment is more rapid, considering that the case is tried only by the Supreme Court. Execution of sentences is immediate, without possibility of appeal.

The fallacious idea that this prerogative is a privilege and that those entitled to it

benefit from this jurisdiction as a result of impunity resulting from delays, is in fact a consequence of the existence of formal immunity for deputies and senators since the 1824 Constitution until 2001. This immunity determined that deputies and senators could not be criminally tried without the permission of the respective House of Congress. In 2001, Constitutional Amendment No. 35 altered this formal immunity in such a way that it is no longer necessary to receive that permission. What is now required is notification of acceptance of the charges by the Federal Supreme Court to the respective House of Congress, which is empowered to suspend processing of the case (Art. 53, §3, CF/88). In other words, the control exercised by the House of Congress is no longer prior to acceptance of the charges, but occurs after they have been accepted by the Supreme Court.

With this constitutional reform, investigations have moved forward on a regular basis and criminal activities have been judged, resulting in convictions of several members of Congress. One should add that, since 1988, 628 criminal suits were processed at the Court, with 622 of them being initiated after passage of Constitutional Amendment No. 35/2001.



Justice José Antonio Dias Toffoli at the Brazil Institute (July 6, 2016)

An emblematic case of the role of the Brazilian Supreme Court as a criminal court and the figure of jurisdiction based on prerogative of function was Criminal Action No. 470/DF, known popularly in Brazil as the Mensalão, which, among other things, involved the practice of financial crimes and crimes against the public administration by business persons, members of Congress and of the Brazilian government.

After accepting the charges against forty suspects of involvement in these crimes, Criminal Action No. 470 was processed over a period of five years, during which it was prepared for judgment by the full Court. Of the forty persons initially charged, thirty-seven of them, including Brazilian businesspersons and politicians, were tried by the Federal Supreme Court.

It should be emphasized that not all of the defendants were entitled to privileged forum due to the prerogative of function. Despite this fact, the case remained under the jurisdiction of the Federal Supreme Court, which processed and tried all of the defendants. This situation was a result of a legal fiction foreseen in Brazilian process law and known as connection which, according to Article 76 of the Criminal Process Code, exists in most cases when two or more crimes have been committed at the same time by various people together; concurrent offenses have been committed by various people, albeit at different times and in different places; or by various persons, one against the others (item I).

Parallel to this, an effort is made to avoid possible prejudgment without overall understanding of the facts and the pursuit of the real truth of the case, a trial of defendants who had participated in a highly

complex system of money laundering and concealment of wealth.

In this specific case, by acting in this way, the Federal Supreme Court ensured equal treatment to all of the accused, while also avoiding contradictory decisions that could potentially have occurred if the case had been dismembered and part of the process remitted to lower level courts considered competent to judge those not entitled to the jurisdiction of the Supreme Court.

This was a historic case for the Brazilian system of justice and required significant alterations in the routine of the Court, while also demanding a tremendous joint effort on the part of its members in order to avoid upsetting the normal operations of the Supreme Court and the exercise of its other functions.

In order to better demonstrate the reasons underlying the need for alterations in the Court's routine, I would like to cite some relevant data drawn from Criminal Action No. 470/DF that deserve mentioning to those present so that one can more fully understand the dimensions of this leading case.

The process itself contained approximately 50,389 pages distributed into 234 volumes and 500 appendices; and was initiated on August 2, 2012 and concluded on December 17, 2012, with the handing down of the sentences imposed on the accused. In other words, in just over four months, the Court dedicated fifty-three plenary sessions to the case, involving a total of 203 hours and forty minutes of debates before finalizing the trial of the thirty-seven persons charged, who were represented by thirty-six lawyers, resulting in twenty-five convictions and twelve acquittals of the

crimes indicated by the Office of the Federal Prosecutor in the original charges. The sum total of the punishments meted out by the Federal Supreme Court ministers to the twenty-five convicted persons surpassed 200 years of incarceration.

It is important to stress that, if Criminal Case No. 470 had not come under the authority of the Federal Supreme Court, it may not have been concluded even today, particularly when one considers the fact that other cases referring to the same episode or to episodes correlated to Criminal Case No. 470 that were sent to the trial court only began to be judged after the Supreme Court had issued its decision.

On the other hand, this case represented an apprenticeship for the Court and, since its conclusion, the Court has been constantly improving the way in which it processes and judges criminal actions of this type.

Just by way of example, insofar as the processing of criminal acts is concerned, the Court already permits the so-called "electronic petitioning system," which allows both the prosecution and defense to send documents of interest to the Court over the Internet utilizing highly secure software already approved and made available by the Federal Supreme Court itself. One should mention that several of these systems were developed by employees of the Court.

These cases are simultaneously available to both the defense and prosecution in digital form twenty-four hours a day. These systems are very secure and, as a result, simplify the measures required for preparation and often reduce the time required for compliance to less than that permitted by legislation.

From the point of view of the judgment of these criminal actions, the Federal Supreme Court amended its internal bylaws and shifted authority to judge these cases from the full Court, composed of eleven members, to what are termed the First Panel and Second Panel, each of which is composed of five ministers. As determined by the bylaws of the Court, only the chief justice does not participate.

Despite this, in a residual sense, the Full Court maintains original jurisdiction to try and judge common crimes involving the president of the Republic, vice president of the Republic, the speaker of the Federal Senate, the speaker of the Chamber of Deputies, ministers of the Court, and the general prosecutor of the Republic (Art.5, I, updated by ER No. 49/2014). All other Brazilian authorities entitled to jurisdiction of the Court by determination of the Federal Constitution will be judged by the Court's two panels.

By proceeding in this fashion, the court has sharply reduced the waiting time for trying these criminal actions.

Besides this, the Federal Supreme Court has become much stricter in relation to maintaining persons not entitled to privileged jurisdiction, making a point of dismembering criminal cases and maintaining only those defendants entitled to such jurisdiction at the Supreme Court.

In this sense, the cases resulting from the so-called "Car Wash" Operation now before the Court are moving forward with considerable efficiency. Charges against members of Congress, including two against the speaker of the Chamber of the Deputies—whose congressional mandate

“Privileged jurisdiction is not designed to benefit those who exercise the positions listed, but rather to guarantee the independence of the performance of their functions...This is not a question of privilege. Quite to the contrary, those who have this prerogative are also subject to [fewer] levels of appeal...”

was recently suspended as a result of attempts to tamper with investigations—have already been accepted by the Court, while a senator was arrested in the act of committing a crime.

These examples of improvements in the processing and judgment of criminal actions have resulted in the enhanced expertise required by the Supreme Court for greater celerity and uniformity in the performance of its adjudicatory function, while serving as a parameter for other judges and courts belonging to the Brazilian judicial branch.

Therefore, the Federal Supreme Court has demonstrated that it is prepared, apt and competent to perform the function of criminal court in rapidly judging those criminal actions now before the Court involving the highest authorities of the Brazilian nation in an independent and impartial manner.

A TITLE CLOSE

I would present my conclusions, synthesizing in one word the mission of the Supreme Court in Brazil: “challenge.”

The Brazilian Constitution embodies an extensive list of rights and guarantees and also establishes the jurisdiction of our Supreme Court, bringing the judiciary enormous “challenges.” Therefore, I would emphasize the following points:

- a) Fostering fundamental rights of the individuals not only on a vertical but also on horizontal criteria;*
- b) Mediating conflicts of federative nature, such as tax “wars” between states of the Federation, even if such issues are effectively due;*
- c) Trying criminal cases against specific politicians, such as ministers, congressmen, and senators, as defined by the Constitution;*
- d) Balancing the separation of powers as the “moderator power,” in order to enhance the harmony and effectiveness of the Republic;*
- e) By political and legal circumstances, currently trying the process of impeachment of the president of the Republic, observing the “due process of law.”*

“Charges against members of Congress, including two against the speaker of the Chamber of the Deputies...have already been accepted by the Court, and a senator was arrested in the act of committing a crime.”

The fact is that there are challenges and the Supreme Court has sought to overcome them with fairness, efficiency, and transparency. Regarding transparency, all of your judgments are allowed to the public, and simultaneously broadcasted through internet, radio and TV. It is clear that the mission to judge with fairness over 11,000 cases per year, many of them of interest to the whole nation, cannot be ignored.

All this effort to comply with its challenges has placed the Supreme Court in the center of the country's attention. That is true to the point that, currently, Brazilian citizens would not remember all the names of the eleven players of the Brazilian soccer team, but certainly do know the name of each of the eleven justices of the Supreme Court.

In short, one must stress the tremendously important role that the rule of law and the system of justice now play in Brazil, with the Federal Supreme Court acting as the guardian of this democratic state of law and as an institution of fundamental importance to democratic stability in Brazil.

The challenges established for us at the Supreme Court by our Constitution undoubtedly demand a daily and heavily effort of all professionals, not only the Court itself, but also the whole justice system. However, the Supreme Court is aware of the importance of its mission, sustaining the strength of each of its members.

Thank you for receiving me.

Remarks from the Hon. Peter Messitte

Senior Judge, U.S. District Court for the District of Maryland

I want to start with a few points of historical and geographical relevance. Brazil and the United States are roughly the same size. In terms of population, the United States has 320 million people and Brazil has a little over 200 million people. We have fifty states, they have twenty-six states and the Federal District. Brazil was a colony for 300 years, and does not have quite the same distinction regarding states' rights as we do in the United States

Brazil's independence was not a bloody revolution: it was a peaceful transition with Dom Pedro I remaining in Brazil while his father returned to Portugal. Until the beginning of the Republic in 1889, the emperor was the moderating power in Brazil. The Republic was somewhat democratic, but there were some military interventions which left an important legacy on rule of law in Brazil. The moderating power is now the Supreme Court.

I also want to discuss the structure of Brazil's government and legal system. Brazil follows a strong civil law tradition—referred to as the Romano-Germanic tradition—whereas the United States follows a common law tradition. As Minister Toffoli pointed out, the Constitution of 1988 is very large and detailed, which differs greatly from the American one—although Brazil has also incorporated aspects of U.S. constitutional history, in addition to elements from European systems.

Brazil has a tripartite government: executive, legislative, and judicial. It is a

federal system in the sense that there is a federal government and separate state governments, but there is less tension between the federal government and the states than in the United States. The law is applied nationally, including the electoral law.

Brazil has courts of “first instances” (i.e., trial courts), as well as an intermediate appeals court at the federal level, called the Superior Tribunal of Justice. This court has the final word regarding infra-constitutional issues, and sits beneath the Supreme Federal Tribunal, which is a constitutional court. The United States has twelve regional courts; we do not have a superior court of appeals. Nor does the United States have labor courts or an extensive system of military courts. Brazil also has a Federal Tribunal of Accounts, which monitors government spending—this is the issue behind the impeachment proceedings against President Dilma Rousseff—and does not exist in the United States. Brazil's Supreme Court has eleven ministers, whereas there are just nine justices in the United States. Brazil has more restrictions for who can be appointed to the court: you have to be between 35-65 years of age and have a sterling reputation. In the United States, you just need to be a lawyer. In Brazil, you also have to resign once you turn seventy-five, whereas in the United States, you can be in court until the day you die. Moreover, the chief justice does not stay forever in Brazil. The position rotates every two years and Minister Toffoli will serve

next beginning in 2018. John Marshal [in the United States] served as chief justice for twenty-three years.

In both countries the president nominates and the senate approves. However, and

I say this with all deference for in Brazil nominating a minister to the superior court is important, but in the United States [nomination to the court] is a major event and a topic of great discussion and controversy in the current elections.

Questions and Answers

Q: If you could change one provision in the Brazilian Constitution to help the Supreme Court perform its functions, what provision would you change?

A: I would change the electoral system, because much of our current political challenges are due to the need for coalition-building in Congress. In 2014, for example, President Rousseff was reelected from the Workers' Party, but her party occupied only sixty-eight of the 513 seats in Congress—about 11 percent. Twenty-seven other parties occupied the rest of the seats. How can a president govern with such a divided parliament? So, I believe there should be a stricter electoral system. When I was president of the Electoral Court [until May 2016], I was able to speak before Congress and the public about this issue.

Q: The Brazilian Senate is going to hold the impeachment vote soon. There have been indications that, should President Rousseff be removed from office, she will appeal the decision to the Supreme Court. Is this possible?

A: Yes, this is possible because anyone can file an appeal with the judiciary branch in Brazil. The real issue is whether the judiciary branch is able to address the actual decision or only address the formal legal process. I believe that we can only talk about the formal processes and not the material case, since that is the decision of the Senate.

Q: I believe many people will contest the procedures of the Lavo Jato cases [involving the Petrobras corruption scheme] in the Supreme Court. Do you believe the Supreme Court can handle these cases, and what is your opinion of Judge Sergio Moro's role?

A: The Car Wash investigation is going very well. If defendants appeal, the court could overturn a ruling that falls outside of the Constitution, like pretrial detention. Of course, we expect that defendants will make as many appeals as they can, but the Court strictly follows the rule of the Constitution.

Our Supreme Court has the power to hear the appeal of anyone in Brazil, whether they are rich or poor. The data shows that the majority of those granted habeas corpus by the Supreme Court and intermediate appeals court are people who do not have a private lawyer. And in more than 50 percent of the cases decided in favor of the defendant, the defendants themselves brought the case.

Regarding Moro, it is important to recognize that without recent laws approved by the Congress, it would have been impossible to have the Car Wash investigation. For example, many of the politicians currently under investigation voted in favor of laws that allow plea bargains. One single judge has not changed the path of the country; this moment is the result of two decades of collaboration among institutions and society.

Q: What role should the Supreme Court play when a judge orders pretrial detention? Is it the role of the Supreme Court to revoke the order, as happened last week in the Lavo Jato case with Paulo Bernardo?

A: Nowadays, no one can hide anymore. We had famous case of a doctor, who worked with in vitro fertilization and was charged with raping his clients. He tried to escape the country and was caught and put in prison. In the Mensalão case, one of the individuals convicted was a dual citizen and fled to Italy—

but Italy extradited him back to Brazil. Few people pose a genuine flight risk, because it is very hard to get away with it. In the particular case of Paulo Bernardo, he never did anything that led us to suspect infringement of the law.

In Brazil, pretrial detention has become very frequent, instead of being the exception. This is unconstitutional. Defendants have a right to be tried before they are sent to jail. Pretrial detention is only acceptable, according to our laws, if the defendant does not have a legal residence or interferes with the investigation.

Endnotes

- 1 Art. VI, §2 of the 1787 U.S. Constitution restricts itself to proclaiming the following: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."
- 2 James Madison, Alexander Hamilton, and John Jay, *The Federalist Papers*, trans. Maria Luiza X. de A. Borges (Rio de Janeiro: Nova Fronteira, 1993), 480-1.
- 3 Charles Durand, "El Estado Federal em El derecho positivo," in *Federalismo y federalismo europeo* (Madrid: Tecnos, 1965), 171-213.



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• Ji-Paraná
(Rondonia)

• Itaúba

• Carolina

• Porto Nacional


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