

BRAZIL INSTITUTE

A Conversation with Judge Sérgio Fernando Moro

Handling Systemic Corruption in Brazil



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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

JUDGE SÉRGIO FERNANDO MORO has been a central figure in efforts to confront corruption and affirm the rule of law in Brazil. He became a federal judge in 1995, one year after completing his bachelor of law degree at the Maringa State University in his home state of Paraná. Dr. Moro subsequently complemented his legal education through studying abroad, including at Harvard Law School, and received a Juris Doctor from the Federal University of Paraná in 2002.

Before being called to preside over cases in the Lava Jato Operation involving state-owned oil company Petrobras, Dr. Moro worked on a number of other high profile cases. Notably, at the request of a justice of the Supreme Court, Dr. Moro served as an auxiliary judge in the Mensalão case, which involved an unprecedented investigation into a vote-buying scheme in the Brazilian Congress and concluded in 2012.

The **BRAZIL INSTITUTE** was honored to receive Dr. Moro in Washington, D.C. on July 14, 2016. President and CEO of the Wilson Center **JANE HARMAN** provided opening remarks. **AMBASSADOR ANTHONY HARRINGTON**, former U.S. am-bassador to Brazil and chair of the Brazil Institute Advisory Council, introduced Dr. Moro. **JUDGE PETER MESSITTE**, the 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 Camila Velloso for transcribing the Q&A session and to Kathy Butterfield and Kerrin Cuison for the design.

Handling Systemic Corruption in Brazil

Sérgio Fernando Moro

*Federal Judge of the 13th Federal Criminal Court of Curitiba
Brazil Institute at the Woodrow Wilson International Center for Scholars
Washington, July 14, 2016*

I want to thank Mr. Paulo Sotero for the invitation and for the opportunity to speak here at the Wilson Center. I am grateful also to Ambassador Anthony Harrington for his kind introduction, and to Judge Peter Messitte and the Washington College of Law at American University for co-sponsoring this presentation on “Handling Political Corruption Cases in Brazil.”

It is an honor and a pleasure to be here.

I prepared some written remarks to explain Brazil’s criminal justice system and the Lava Jato Operation. I will be happy to answer questions after I speak and Judge Messitte offers his comments.

I apologize for reading the text of my lecture, but I am not so comfortable with English as to do it without the support of a written text.

First, let me say a few words about Brazilian criminal justice. I presume that most of you are not familiar with it and that sharing some basic information will help your understanding of the topic.

I am not an investigating judge. We do not have in Brazil anything similar to that,

which would be the equivalent to the *juge d’instruction* in France. The police have responsibility over the investigation of a crime. In this task, the police work with the Prosecutor’s Office, which we call the Ministério Público. Our Ministério Público is comparable to the Fiscalía General del Estado in the Spanish system. Prosecutors are responsible for producing, presenting, and sustaining in court the criminal charges or accusation against one or more defendants.

I am a federal trial judge—one approximately of 1,600 federal judges working at the “first instance” in Brazil: a role that corresponds in the United States to that of a federal district judge like Judge Peter Messitte. Criminal cases are usually tried and sentenced in Brazil by a trial judge sitting alone. He or she is a professional career judge. To become a judge, you have to pass a series of public tests.

In Brazil, we have jury trial only for murder cases. After a sentence, the prosecution or the defense can submit an appeal to an appeals court. Our appeals courts meet as a panel of career judges, usually three or five. The party that loses an appeal at this level is entitled to present a special appeal to one

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of our superior courts in Brasília: the Federal Supreme Tribunal, equivalent to the Supreme Court in the United States, if the case involves a constitutional question; or to the Superior Court of Justice, if the question raised on appeal involves a federal statute. It usually takes a long time to reach a final decision in complex cases, if the prosecution or the defense submit all these appeals, especially to the superior courts in Brasília, because these courts already have a heavy caseload.

The trial judge also has other responsibilities. For example, only he or she can order pre-trial detention or authorize wiretaps or searches and seizures. Only a judge can authorize the lifting of bank secrecy protections and request bank records during an investigation. There are a few exceptions, but this is the general rule. So, even before the trial, the judge can be involved in the case if one or more of the steps I just described are deemed necessary to the investigation. In this scenario, however, the judge plays a passive role as he or she rules on the requests from the police or the prosecutors.

Until recently, in Brazil the enforcement of a criminal conviction was possible only after the case reached a final decision that could no longer be appealed. Enforcement of a criminal sentence depended on the judgement of the last appeal. Only then would the case be seen as *transitado em julgado*: tried with no possibility of being appealed. In many, if not in most cases, it could take ten years or more to reach a final decision because of the heavy caseload I mentioned before. Our Supreme Court ruled in this way in a 2008 decision regarding a controversial interpretation of presumption of innocence in Brazilian Constitution.

Of course, as in United States and other countries, the judge in Brazil can order pre-trial detention if the defendant presents a danger to other individuals or to the society, or if there is a risk that the defendant will flee or obstruct justice. I am aware that the U.S. Criminal Code also allows a judge to order pre-trial detention or deny bail if there are similar risks (18 U.S.C. § 3142). If I am not mistaken, the U.S. Supreme Court ruled in

United States v. Salerno, a 1987 case, that this statute was constitutional (*United States v. Salerno*, 481 U.S. 739 [1987]).

Pre-trial detentions are of course exceptions and not the rule.

In the Brazilian judicial system, the Supreme Court has original jurisdiction over criminal charges involving high federal official authorities like the president, the vice-president, cabinet ministers and members of the federal Congress. So, in a criminal

investigation, if investigations produce evidence of criminal conduct by a federal congressman, for instance, the judge has to send it to the Supreme Court. But, as I already said, our Supreme Court has a heavy caseload, which makes it very difficult to have these criminal charges adjudicated in a timely way, as mandated by the Constitution and expected by the public.

In Brazil, we have federal courts and state courts. Federal courts have jurisdiction over cases involving violations of federal laws



Judge Sérgio Moro at the Brazil Institute (July 14, 2016)

“As a rule, [Brazilian criminal justice] does not work very well in complex cases, especially in white collar crimes, including bribery and money laundering cases.”

like crimes committed against a federal institution or a federal company.

This is, in general lines, a description of Brazilian criminal justice.

As a rule, it does not work very well in complex cases, especially in white collar crimes, including bribery and money laundering cases.

There are two main reasons. First, the slowness of the whole judicial process delays the final judgment and negatively impacts the chances of a serious enforcement of the criminal law in complex cases. In this sort of cases, it was very common, until recently, that you never saw a final decision—even in cases in which defendants who were accused and found guilty in a court of first instance (like mine) of very serious crimes, including taking millions in bribes. As a rule, these defendants would never go to prison. Second, because of the heavy caseload, the special jurisdiction of the Supreme Court over criminal charges involving high official authorities worked, as a rule, like a strong shield against the effective accountability of the people in high places.

Things started to change in a famous criminal case decided by our Supreme Court four years

ago, in 2012. In criminal case 470, also known in Brazil by as the Mensalão, our Supreme Court convicted highly-placed politicians, including a former chief-minister of the federal government and several congressmen, political leaders, political party operatives, and bank directors accused of bribery and money laundering. These verdicts marked a clear break with a past of weak enforcement of the law against these kinds of crimes.

Two year later came the Lava Jato Operation. I heard that here it is called the Car Wash Operation. But I prefer the Brazilian name Lava Jato, which has a double meaning.

The Lava Jato Operation is not a single case. Its core is the Petrobras scandal involving bribes paid in multiple public contracts to close to one hundred people. Maybe more.

In this case, prosecutors decided to pursue separate charges against dozens of defendants. So there is not a single accusation, but several. Some of them have already been tried. Some are pending cases.

I cannot say much about the criminal cases still pending. But I can share some of my reflections about the cases that have already been tried.

As usually happens in criminal investigations, Lava Jato started small. The Federal Police were investigating four individuals involved in what seemed to be, at the time, a crime of money laundering and illegal financial operations in the money-exchange black market.

One of these individuals, named Alberto Youssef, had connections with a former director of Petrobras, Paulo Roberto Costa. Petrobras is a big, federally-owned Brazilian company responsible for the exploration of oil and gas. It is a major state entity in Brazil, our country's largest company and one of the world's largest oil companies.

In March of 2014, I authorized searches and seizures in the offices and houses of the two individuals I just mentioned. When I learned from federal law enforcement officials that Paulo Costa had tried to destroy or to hide paper evidence from these searches and seizures, I ordered his pre-trial detention. Alberto Youssef was also arrested in pre-trial detention for different reasons.

Looking at banking records of Alberto Youssef's enterprises, police and prosecutors discovered that his accounts had received millions in credits from some of the biggest Brazilian construction companies. These companies were also major suppliers of Petrobras.

In another line of the investigation, it was discovered, with the assistance of Swiss authorities, that Paulo Costa had millions of dollars deposited in off-shore accounts in Swiss banks.

This is where and how the investigation started.

Facing long prison terms, Alberto Youssef and Paulo Costa agreed, in the second half of 2014, to make plea agreements with prosecutors.

In summary, the information they provided revealed that, as a rule, in every contract Petrobras had with top Brazilian construction companies, these companies paid kickbacks of 1-2 percent of the total value of the contract. Alberto Youssef was in charge of organizing the financial scheme. Paulo Costa received a share of the bribes. A share of the money went to politicians, including federal legislators of the Popular Party (PP), which was part of the ruling coalition. The Popular Party had nominated Paulo Costa for his job at Petrobras.

Youssef and Costa revealed also that other Petrobras officials had received bribes and had worked with intermediaries and politicians of other parties in the governing coalition, such as the Workers' Party (PT) and the Party of the Brazilian Democratic Movement (PMDB).

The investigations continued to produce new evidence, including from plea agreements with other cooperating criminals.

Of course, everything that a cooperating criminal says has to be supported by additional evidence. In that regard, there are lots of investigations still underway.

But it has been possible in some cases to get evidence which supports information revealed by cooperating criminals.

Some critics of the Lava Jato Operation say that it depends too much on information obtained under plea agreements. The truth is that the case involves the use of several other investigations methods.

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The old strategy of following the money remains the most important method of investigation. Especially important, in that regard, has been the legal suspension of secrecy protections of bank accounts used by these criminals, usually in combination with front companies or strawmen, and an extensive examination of banking records. International cooperation was used extensively to discover secret accounts that Petrobras officials and politicians maintained abroad.

It is true, however, that sometimes the only people who served as witness of complex criminal conduct are those who are themselves involved in the crime. With plea agreements, the prosecutors and the police could turn each accused against the other, and break the secrecy over complex criminal conduct.

Looking at the cases already tried, there have been to date about eleven sentences which were specifically related to crimes of bribery in contracts involving Petrobras. In eight of them, the persons convicted were top executives of the biggest construction companies (acting as corruptors), top executives of Petrobras (acting

as facilitators and beneficiaries of bribes or kickbacks), and the intermediaries between these two groups.

Four former directors of Petrobras have been convicted and sentenced to prison terms. Two of those decided, after serving part of their prison sentences, to cooperate with the investigation. The police and prosecutors discovered that all four of them had off-shore accounts with balances of millions of dollars in countries such as Switzerland, Monaco, and Luxemburg.

In at least three cases, there were convictions of former federal legislators who had received bribes in the Petrobras scandal. In a third case, it was proven that money from the bribes had been directed to illicit financing of a political party. An interesting fact is that two of these former federal legislators had also received bribes in the Mensalão case. The investigation also revealed that they received bribes from Petrobras scandal even as the trial of the Mensalão case by the Supreme Court was going on.

To illustrate the magnitude of these corrupt practices, a manager at Petrobras—after reaching a deal to collaborate with the authorities—agreed to return nearly \$97 million in bribes that he had received from Petrobras contracts and kept in secret bank accounts abroad.

In the beginning the investigation, Petrobras assumed a posture of general denial. It did not recognize any problem of governance. As the investigation developed, the company gradually started to admit that crimes were committed. This culminated in an official recognition, in its 2015 annual report to shareholders, of losses from corruption of nearly 6 billion reais (about \$1.7 billion at the current exchange rate).

It took time, but after a while, to their credit, some of the construction companies involved in the scheme also began to recognize their responsibility. Two large Brazilian companies reached leniency deals

with the prosecutors. They committed to reveal illicit acts, to abandon criminal practices, to implement efficient systems of compliance and to compensate public coffers by returning more than 1.5 billion reais.

The more troublesome aspect of the case was that it seems that payment of bribes on Petrobras contracts was not an exception but rather the rule. Some of the cooperating criminals used that word. They described the crimes they committed as “a rule of the game for public sector contracts.” Some of them stated that this criminal practice went beyond what happened with Petrobras and was used by other companies and in other branches of the federal government.

As I said, there are ongoing investigations not only in my court but also in others federal courts that received parts of the case. Dozens of highly placed politicians, especially congressmen, are being investigated by the chief federal prosecutor



Judge Peter Messitte at the Brazil Institute (July 14, 2016 in Washington, D.C.)

before the Supreme Court. Some of them have been charged already, including the former speaker of the House.

All of these disturbing facts, especially the cases already sentenced, allow us to conclude that an environment of systemic corruption was uncovered by the investigation.

Corruption, as an isolated crime, exists all around the world. But systemic corruption, the payment of bribes as a rule of the game, is not really that common, and it represents a severe degeneration of public and private customs, especially in democratic nations.

The costs of systemic corruption are enormous.

First, the cost of bribes, which are usually added by the offending company to a contract with the government or a state-owned company, affects public budgets. Imagine that this is not an isolated practice but a general rule, and you will understand how it can affect the management of public resources.

Moreover, the need to generate funds for bribes in systemic corruption schemes

can affect investment decisions by public and private entities. Perhaps some bad investments made by Petrobras can be explained not simply as a result of a bad judgment or unlucky choice, but instead as a deliberate choice by corrupt directors of Brazil's largest enterprise to generate bribes rather than make the best decision from an economic point of view. One example is the ongoing investigation over the purchase by Petrobras of an oil refinery in Pasadena, Texas. One witness said that they deliberately decided to buy an old refinery because they were already thinking about bribes that would be paid on a billion-dollar contract to renovate it.

Another detrimental effect of systemic corruption is that it chases away local and foreign investors. If the market is not clean and transparent, if bribes and cheating are the rule, a responsible investor will not have confidence in that market and you will not put its money in it.

Above all, systemic corruption is damaging because it impacts confidence in the rule of law and in democracy. If the law does not apply to everyone, there is a progressive erosion of trust in democracy.

“Corruption, as an isolated crime, exists all around the world. But systemic corruption, the payment of bribes as a rule of the game, is not really that common, and it represents a severe degeneration of public and private customs, especially in democratic nations.”

Faced with the revelation of systemic corruption, what should be done?

First, the judicial system must work.

Crimes that are uncovered and proven, respecting due process, must be punished. Justice works when the innocent person goes home and the guilty person goes to prison. The outcome should not depend on the economic or political conditions of the defendant. There is still much to be done to advance in this respect.

Yet, the Lava Jato Operation, just as other recent cases in Brazil, reveals that much can be done, even under the current system, as long as the problem is confronted and treated with seriousness. Justice cannot be make-believe, with cases that never end and people who have been proven guilty of crimes but are never punished.

The adequate functioning of the criminal justice system is a necessary, though not a sufficient condition to eliminate systemic corruption. It is necessary that other public institutions, the executive and legislative branches of government, adopt public policies aimed at preventing and combating of corruption. Systemic corruption is not and cannot be a problem only for the judiciary branch.

Let's be clear: the government is the principal actor responsible for creating a political and economic environment free of systemic corruption. The government, with greater visibility and power, teaches by example.

Better laws can be approved to improve the efficiency of the criminal justice system and to increase the transparency and predictability of relations between the public

and private sectors, reducing incentives and opportunities for corrupt practices.

Freedom of the press and access to information is also essential.

The control of those who govern by the governed demands citizens that are well-informed about the management of public life.

Since the beginning of these investigations, it was our decision that we would not hide any information or evidence from the public. The Brazilian Constitution requires that the judicial process be open to public scrutiny. We cannot have cases prosecuted and tried in secret. No, we have to be able to assert that once the investigation is finished, everything—the prosecution, the evidence, the hearing of witnesses, the judgement and the sentencing—has been conducted under the light of the sun. In that regard, I take this opportunity to speak at the Wilson Center to celebrate the memory of Justice Louis Brandeis, who was elevated to the U.S. Supreme Court by President Woodrow Wilson 100 years ago. Justice Brandeis once said that “sunlight is the best of disinfectants.”

This is important. Not because we want to judge these cases in the realm of public opinion or to manipulate public opinion. It is important to prevent any attempt by powerful defendants to obstruct justice.

In fighting systemic corruption, private sector initiative has also a relevant role. Corruption involves those who make illicit payments and those who receive them. Both parties are guilty.

Companies must do their homework, saying “no” to the payment of a bribe, implementing mechanisms of internal control and denouncing requests or demands for



From left to right: Brazil Institute Director Paulo Sotero, Ambassador Anthony Harrington, Wilson Center President and CEO Jane Harmon, Judge Sérgio Moro, Judge Peter Messitte, and former Brazilian Finance Minister Joaquim Levy

payment of a bribe. It is also important to act collectively, so that companies involved in corrupt practices are identified and isolated from the market and are not allowed to assume a preeminent position. This is not only the legal and the right thing to do. It is also an obligation that we in Brazil, as a democratic nation, have voluntarily accepted by signing every relevant anti-corruption convention and agreement negotiated under the United Nations, the Organization of American States, and other international fora. Faced with allegations of corruption, we do not have the option of doing nothing. We must act.

Much can be done, and it is important to keep in mind that systemic corruption is a product of institutional and cultural weaknesses. No country is predestined to live with systemic corruption, since it's not a natural phenomenon. Discovering and revealing it, even if it generates impacts in the short term, is not part of the problem.

It is rather part of the cure. Once systemic corruption is discovered, necessary public policies should be adopted and implemented to overcome it. The problem cannot be resolved by sweeping it under the rug.

Perhaps more than any other case in the past, because of the dimension of the crimes that have been uncovered, Lava Jato Operation provides Brazil with the opportunity to take the necessary steps to overcome this shameful practice.

It is too soon to say whether that will happen or whether corruption will be contained and reduced to more reasonable size in Brazil. It is difficult today to make predictions.

There have been reactions to Operação Lava Jato, of course. These have come especially from some of the companies involved and from senior politicians. Some critics have complained that Lava Jato Operation is not impartial and has been used to play politics.

That is not right. Of course, if the crime involves bribes paid to senior politicians, the case will inevitably have political consequences. But this happens outside the court and the judge does not have control of it. Some critics say that Lava Jato Operation represents the criminalization of politics. The blame should not, however, be aimed at the judicial process, but rather at the politicians who committed the crimes. The judicial process is just a consequence. The judiciary system could not and cannot turn a blind eye in the face of the alleged crimes. Some critics says that due process is not being respected. I disagree. Every aspect of this judicial process is being conducted in open court, with respect for the rights of the defendants and based on extensive evidence obtained, processed, and publicized under the law. Lava Jato is not a witch-hunt. The problem is that the evidence of corruption revealed by the investigations was so widespread that the case took giant proportions, with numerous detentions and convictions. But nobody is being charged or convicted based on political opinion. Where there is evidence of illegal conduct, the accused are being charged and sometimes convicted because of the bribery and money laundering crimes they have been convicted of. Some have also been cleared and let go. Only a fraction, 4 percent, of hundreds of decisions made under the Lava Jato case have been modified by superior courts. That is obviously very different from a witch-hunt.

To summarize, reality has presented us in Brazil with an opportunity to face systemic corruption. I read sometimes, in foreign newspapers, criticism of the systemic corruption uncovered in Brazil. The critics are correct. What has been exposed is indeed shameful. But there is another way to look to look at this picture.

The crimes committed against the Brazilian state are becoming known because of the efforts by many Brazilians to face and fight the problem. The police, the prosecutors, and the judiciary are seriously dealing with it.

It is of course still an ongoing investigation. Some of the results of the cases already tried have no precedent in Brazil. We had several corruption scandals in our history. But never before Lava Jato were top executives at the country's biggest construction companies arrested, tried, and convicted. Never, before Lava Jato, had a director of Petrobras been charged with a crime. Today, we have four of them convicted and serving prison terms. Several congressmen are being investigated and prosecuted before the Supreme Court.

I believe this is progress in the implementation of the rule of law in our country. And it has had beneficial collateral effects. In a possible positive collateral effect of the investigations of the Petrobras' scandal, our Supreme Court overruled a past decision that postponed indefinitely the execution of a prison sentence, as I mentioned at the beginning. Now, thanks to a new interpretation by our Supreme Court, a criminal conviction can be enforced immediately after it is affirmed by a Court of Appeals. So, society no longer has to wait for a final decision at the highest level of appeal, which, as I said earlier, can take an eternity. This amounts to a judicial revolution of sorts in the enforcement of criminal law in complex cases in Brazil. Our Supreme Court has clearly demonstrated with this new ruling that it fully understands the connection between systemic corruption and impunity. For this ruling, it deserves a lot of compliments and our collective gratitude.

It is also true that until now the Federal Police, federal prosecutors and the federal

judiciary have been the main protagonists in our nation's efforts against systemic corruption. So far, the executive branch and Congress have made no significant contribution to Brazil's efforts against corruption. They could do so by proposing and approving better laws to prevent corruption. They could also help efforts of the law enforcement agents in other ways. Their omission is very disappointing.

In spite of that, it is important to highlight that last year and this year millions of Brazilians protested in the streets against corruption. It was under that sort of popular pressure that Congress expanded plea bargain agreements in late 2013. On March 13 of this year, more than three million people occupied streets in several state capitals and major cities of Brazil in peaceful demonstrations. It is true that these demonstrations were motivated by many causes, like dissatisfaction with the state of the economy and with the government. But it is also true that a common cause uniting the demonstrators and the country was to

rally in protest against systemic corruption and in support of the Lava Jato Operation. This attitude of our country's citizens give us great hope. The fight against corruption has definitely entered in Brazil's public policy agenda and will influence our political debates. This is positive.

Hopefully, some years from now we will be able to look back and say that Lava Jato Operation was part of the strengthening of the rule of law and democracy in Brazil. Maybe we will be able to say that systemic corruption existed in our country but was overcome and became a sad memory of the past. Obviously, we cannot take this for granted, but it is necessary to constantly remind ourselves that we are doing what needs to be done to advance the rule of law, and to have some hope. I am confident that the Brazilian judiciary, prosecutors, police, and other law enforcement officials will keep on doing their job.

I thank you very much for your attention. I will be glad to answer your questions.

Remarks from the Hon. Peter Messitte

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

I would like to offer some perspective as an American and as an American judge. In the United States we have had our share of scandals, from the Yazoo Land Scandal in the State of Georgia in the early days of the Republic to Tammany Hall, from Teapot Dome to Abscam. [The list] goes on. You will note that most of our prosecutions for political corruption occur in federal court.

Because Brazil historically was only one colony and not thirteen separate colonies as in the United States, issues of states' rights and states' sovereignty really do not arise in Brazil. This is why most laws in Brazil, not just bribery and money laundering crimes, are national in scope. Similarly, substantive and procedural civil and penal codes are national in scope. They are applied by both federal and state court judges in Brazil. This is not so in the United States, where everyday crimes are defined and prosecuted in each of the fifty different states. But we also prosecute a lot of state corruption cases in federal court, because if you are prosecuting a governor of a state and you happen to be a judge appointed by that governor, this obviously poses some problems.

This was the case with former Governor of Virginia Robert McDonnell, who was tried by the Federal District Court and convicted, but who was recently exonerated by the Supreme Court. The Supreme Court, I might add, decided unanimously that he was not guilty. Because all he did, said the Court,

despite receiving a Rolex watch and having his daughter's wedding paid for, was to set up meetings for a constituent. Still, the Court suggested that his actions were "tawdry," if not illegal.

Like Judge Moro, I am a federal district judge, which is to say a trial judge of "first instance." I have tried cases of political corruption, but nothing of the scale that he has. He has been a judge for a long time, since he was a young man. We do not have that sort of thing in the United States, since judging in this country is not a career choice. One ordinarily has to have a prior career as an attorney, earn a decent reputation, and then be appointed by the governor to a state court judgeship or by the president to a federal judgeship. But judging is a career option in Brazil, so Judge Moro began his career as a judge at an early age and was very accomplished because he had to pass a rigorous exam and be promoted along the way. I was first appointed a judge at age forty-four, which happens to be Judge Moro's age today.

In the United States, as in Brazil, political corruption investigations are mostly conducted at the federal level. In Brazil, the Federal Police, who function much as the FBI does here, undertake most of the investigating and then turn the evidence over to the Public Ministry or Prosecutor's Office. That would be comparable to the U.S. Attorney's Office. In this country, the prosecutor develops the case and typically

presents it to a grand jury, which is an institution that you do not find in Brazil. You will remember that the grand jury is composed of twenty-three individuals who decide whether there is probable cause to charge someone with a crime before they can be charged. If the grand jury decides to charge someone with a crime, they return what is known as an indictment.

Judges in the United States for the most part are passive actors, but as in Brazil, the judge does have an active role when it comes to making certain decisions before trial. It is up to the judge to authorize searches and seizures, to authorize wiretaps and telephone taps, and to authorize the breaking of bank secrecy and access to bank records, even access to internet accounts. You have to go to the judge first. You need to show probable cause [as we say] here, or, similarly in Brazil, *justa causa*, to be able to do these things. There has to be a colorable claim of illegality.

In the United States, in political corruption cases, you can have a jury trial. The jury that hears the case on the merits is called a petit jury, which distinguishes it from the grand jury. In the federal system this consists of twelve citizens, selected randomly from the voter lists of the state, who must unanimously agree on someone's guilt before they can be found guilty. In the United States, any crime that carries a possible sentence of incarceration of more than six months has a right to be tried before a jury. Many defendants in the United States in political corruption cases opt for a jury, unless of course they choose to plead guilty. Brazil is one of few countries that has anything like a jury system, but it is limited to homicide cases. It is clearly a borrowing from Anglo-American judicial tradition.

Federal district court judges in the United States typically have the same authority as Judge Moro does in Brazil, but one of the differences I have noticed in the United States is that when you are preparing a criminal case [in Brazil], if you are a defendant, you will know the names of the government's witnesses and your own witnesses before trial and you will have an opportunity to speak to those witnesses. Again you must get the judge's approval to do so. Someone recently listed President Dilma Rousseff as a witness and Judge Moro ordered that she appear and be available to be deposed. She would be authorized to respond by writing but she could not refuse to appear. In the United States you can refuse to appear before a grand jury or at a trial, but you will be held in contempt. But in any case a witness does not have any obligation to speak to a defense attorney. In Brazil, as I have said, there is an obligation to speak with the defense attorney, if the judge approves it.

There has been mention of the concept of "privileged forum." This is something that is unfamiliar to an American audience. In the United States, if you are charged with a crime, it does not matter who you are, you go first to the ordinary trial court where you might ask for a jury trial. And if you are convicted you have the right to an intermediate appeal. You may even have the right to appeal to the U.S. Supreme Court or the state supreme court. But in the United States, these highest courts have what is known as "discretionary review," so they may choose not to hear the case. In contrast, 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. That means they are entitled to have

their cases heard in the first instance by the Supreme Court of Brazil. Our [U.S.] Supreme Court does not hear any criminal cases of original instance. That is why, for Judge Moro, some of his cases are in the Supreme Court and some are with him in the Curitiba Federal Court. He has to decide that some people ought to be before the Supreme Court and others before him in the Federal Court. It gets complicated, for example, when someone who is not the beneficiary of a privileged forum is caught on a wiretap discussing criminal activity with someone who is the beneficiary of the privileged forum. One would be tried for a crime before the Supreme Court and the other before the usual federal trial court. Considering how many times Judge Moro's decisions have been appealed to the Supreme Court, [it is notable that] less than 4 percent of those decisions have been turned around.

The use of plea bargaining is one of the most remarkable developments in Brazil. They have been in use in certain ways for some twenty-five years, but they have been used with great effect in the Lava Jato case. Plea bargaining occurs when the defendant is charged with a crime and then, in order to cooperate with the government by turning state's evidence against his colleagues, the prosecutor agrees not to charge the defendant with any crime at all or reduces the number of crimes that the defendant will be charged with or recommends to the judge that a reduced sentence be imposed. In exchange, the defendant makes a deal—a bargain—which is written down and sent to the federal court. The federal judge then needs to verify that the agreement is knowing and voluntary on the part of the defendant and has to approve it. It is much the same in Brazil.

The idea of plea bargaining in Brazil started with minor crimes, those carrying a possible penalty of no more than two years incarceration. Then very serious crimes were included and now more recently financial crimes. It has gotten to the point, depending upon the severity of the case and the extent of the defendant's cooperation, that the judge can even pardon the defendant from prosecution. This runs against the usual principle in Brazil and many civil law countries of what is known as "compulsory prosecution," meaning that the prosecutor is obligated to charge someone with all crimes of which he may be guilty. In the United States, the prosecutor is not obliged to proceed in that fashion: he has total discretion. Take, for instance, the case of Sammy "The Bull" Gravano, who was the underboss to John Gotti, the "Teflon Don" of the Mafia in New York. Sammy the Bull had committed eighteen homicides, but because of the extent of his cooperation with the prosecutor—his testimony got thirty-five mafioso to plead guilty—he was given a five-year sentence. It was sort of a pact with the devil.

In Brazil, while the judge has extensive discretion in connection with sentencing for certain financial crimes, it is more limited in respect of certain other crimes. Depending on the nature of the offense and the extent of the cooperation, the Brazilian judge may be limited to taking off only one-third or two-thirds of the possible statutory sentence for the crime.

Because of plea bargaining in Brazil, Judge Moro has gotten a lot of people to speak out, without which it would have been very hard to make a case. In the United States, as in Brazil, we have pre-trial or preventive detention, but

it is the exception, not the rule. In the federal system, in any case, we only keep people in jail before trial if they pose a risk of flight or present a danger to the community.

There is an interesting aspect about putting someone in jail after they are convicted by the trial court. In the United States, you ordinarily go to jail almost immediately following conviction even while your appeal is pending. In Brazil, you cannot be definitively put in jail until your case is entirely adjudicated which in the past meant it might go as far as the Supreme Court. That could take many years, whereas in the meantime the defendant would remain free (assuming there are no other valid reasons for detaining him before the final adjudication).

Recently, however, it has been provided that once the second highest court of Brazil, the Superior Tribunal of Justice, affirms the decision of the trial court to incarcerate, the defendant can be placed in jail even though there may be further appeal to the Supreme Court. That's very different from the practice in the United States.

There are also differences in the way the statutes of limitations are applied. In the United States, most federal crimes have a

statute of limitations of five years, which means that the case has to be filed within five years of the commission of the crime. (There are exceptions which I need not go into.) In Brazil, however, whatever period of limitation applies (and it varies depending on the seriousness of the charges) continues to run not only after charges are filed but until the matter is finally adjudicated on appeal. If it takes years for a case to get to the Supreme Court, and in the meantime the statute of limitations runs out, you will be exonerated. You will be determined to be not guilty.

Finally, one has to appreciate what Judge Moro has been doing. He is handling hundreds of cases and defendants. He has authorized many wire taps and searches and seizures. No federal judge in the United States has ever done anything like that. He has really done a signal job and has inspired the people of Brazil to believe that justice is a real possibility and that the days of impunity may be over. The Brazilian judiciary is looking very good; it is strong and independent, acting fully in accord with the Brazilian Constitution. In my view, what is happening in Brazil today is likely to become a model for what will happen in other countries that also suffer from political corruption.

Questions and Answers

Q: How long will you pursue the Lava Jato case? And why is it so important for you to constantly reveal your decisions to the press?

A: I think there is an obligation to make the details public. Public opinion in cases involving powerful companies and powerful politicians can help prevent obstruction of justice. And our federal constitution says that the case should be tried in public, in an open court.

I cannot say for sure [how long it will take] because it is an ongoing case, sometimes new evidence appears. The part of the investigation that is with us in Brazil could finish by the end of the year, because most of the enterprises that paid bribes have been already charged and tried. But, for example, the part that is with our Supreme Court—involving the politicians—will take more time because of the court's heavy caseload. For example, with the Mensalão case, the Supreme Court took six years to judge the case after receiving the charges.

The judicial process can be slow. I think the privilege [of politicians] to have a special forum is not working in Brazil. There are dozens of these cases, and the Supreme Court also must decide important constitutional issues. A number of people are now saying, and I agree, that we must limit the judicial privilege granted to politicians.

Q: Many people are wondering if you have avoided prosecuting people associated with the opposition (PSDB and its allies)?

A: The law imposes consequences for all those who commit a crime—it does not matter if you are from the left or the right or the center. Based on the cases already judged, it seems clear that Petrobras was used for political purpose. For example, a political party would nominate a director of Petrobras, and then the director would take bribes for himself and for the party. Given this situation, it is natural that many of the politicians under investigation are associated with the political parties that were in power, and the Workers' Party has been in the power since 2002. But there are also politicians from other political parties answering charges before the Supreme Court, including from the opposition. However, sometimes politicians strike back by saying you are playing politics.

Q: Could you talk about due process and original jurisdiction, in the context of the audio leaks involving President Dilma Rousseff? Was due process followed in that case?

A: This is a pending case, so I cannot say anything—just that I already sent information to the Supreme Court about this case.

Q: There are at least two big projects to fight corruption in Congress. How optimistic are you? And do you think Senate leader Renan Calheiros will attempt to limit plea bargains?

A: I believe Congress will make the right decision and reject laws that would obstruct justice in general, not solely because of their impact on the Lava Jato case. Plea bargains play an important role in our system, and it is also important for judges to retain judicial independence. I hope Congress will also deliberate on the ten bills against corruption presented by the Ministerio Publico. Of course, Brazilian citizens must demand that Congress do the right thing.

Q: How can the Brazilian people be sure that plea bargains are effective, and that those who sign plea bargains will actually return the money they stole?

A: You can use plea bargains without trusting the criminal. Everything that a criminal says in a plea agreement should be corroborated through additional evidence. If the criminal lies and the police or prosecutors discover later that he has more money, he will lose the plea deal and, since he has already confessed his guilt, he will suffer the full consequences of his actions. Moreover, police and prosecutors continue their investigation regardless of the plea deal.

Q: What legal reasoning or standard allows for bank secrecy to be suspended? Has bank secrecy been lifted in previous white-collar cases in Brazil?

A: Bank secrecy has been lifted in a number of previous cases over the years, but following the money has become more complicated. Criminals use accounts

abroad—off-shore accounts in other jurisdictions—or accounts in Brazil with front companies. From a legal point of view, however, a Brazilian judge can lift bank secrecy if there is probable cause (*justa causa*) and a request from the prosecutors or from the police.

Q: How can civil society—international organizations such as Transparency International as well as Brazilian ones—effectively demand better governance in Brazil?

A: The public has powerful means for pressuring Congress, and the government as a whole, to do the right thing. You can go to the streets, you use civil society organizations to present demands to elected officials. The private sector can also have a huge impact because if no one is willing to pay bribes, the problem is solved. There is more than a single way to fight this problem, but central to these efforts will be mobilizing public opinion in favor of really fighting corruption, not only in this case with the Petrobras scandal, but everywhere.

Q: Could you discuss Brazil's collaboration with foreign governments on these cases?

A: International cooperation is often key in these complex cases, especially in money laundering cases, because the criminal hides money overseas and sometimes also flees abroad.

The prosecutors and the federal police are in charge of contact with international authorities, so they would know more than I do. Portugal recently decided to extradite a Brazilian who sought to evade justice, and we have several cases involving international cooperation with the United



States. Switzerland also cooperates with us, and we have gained a great deal of evidence in these cases from Switzerland—such as the fortune kept in offshore accounts by the former Petrobras director, for example.

Q: Lava Jato has led to multiple proceeding in different courts. Are there concerns about double jeopardy issues, where the defendant may be tried several times on the same charge?

A: The different court systems judge different types of cases. The TCU [the Federal Accounting Court], for example, decides only administrative issues. There is a chance that some of these people or companies could be tried by the criminal courts and by the administrative courts, but it would not be for the same conduct, so I think there is no risk of double jeopardy. This may be more a problem for people who commit transnational crimes, because they can sometimes be tried in both countries.

Q: There is a civil lawsuit going on in New York against Petrobras, which has 183 complainants, with a ruling expected at the end of September. What effect it will have on the criminal cases in Brazil?

A: I have not knowledge of the case beyond what I have read in the newspapers, but I do not think the ruling will impact our cases. It could impact Petrobras, but that is not something we in Brazil—the judges, prosecutors, and police—have any control over. I will note that Petrobras is a state-owned company, so I view it as a victim of these crimes because at the end of the day, it is the Brazilian people who will pay for the damage.

Q: In the United States, the American Law Institute and the American Bar

Association are sometimes significantly involved in law reform. Where does the Brazilian bar stand on these challenges?

A: The Brazilian bar association (OB) has a long history: it fought the military government and demanded democracy. Now, they are officially against systemic corruption. They demand, for example, that politicians charged with committing serious crimes should be expelled from office. But it sometimes seems that everyone is against corruption and yet nothing changes.

A: (from Peter Messitte) Just a quick supplement. Our [U.S.] bar association may be a little more neutral, but there are institutions in Brazil which do look at judicial and legal reform. The Ministry of Justice has a secretary for judicial reform—we have nothing like this in the U.S. Department of Justice. There is also a National Council of Justice in Brazil, which considers judicial and legal reform issues. These are institutional, semi-governmental, or governmental organizations. So the association of lawyers is really only one piece of the picture.

Q: Can you speak about the pressures you are facing in your work? And do you feel safe, given the nature of your work?

A: I have not received any direct threats that would interfere with my work. I sometimes think people overestimate my job, since the cases depend on the jobs of judges across all levels of the judiciary and I am not an investigating judge. I only rule on the requests of the prosecutors and the Federal Police. As to my safety, the rule is that you never talk about your security procedure, so I am not going to say anything.

Q: With over 50 percent of the Brazilian Congress under investigation for one reason or another, would you consider running for public office in the future?

A: I'm running for vacation only.

Q: Could you explain the difference between the Portuguese "Lava Jato" and the English "Car Wash," and the double meaning?

A: One of the first individuals investigated was owner of a gas station in Brasilia, and he was convicted for using that gas station to launder money—not just bribes, but also drug money. The gas station also had a car wash, so the case became known as "Lava Jato." But the words have a second meaning: that you are laundering the money very quickly.


Q: Ambassador Melvyn Levitsky gave an interview in the 1990s in which he said Brazil had endemic corruption. Brazilians were, at the time, quite angry over his

statement—although everyone knew it was true. What I find positive is that now there are judges in Brazil saying yes, we have systemic corruption and we are fighting it. What do you think of this perspective?

A: Yes, we have systemic corruption, but Brazil's institutions and people are facing the problem and taking serious steps in the fight against system corruption. It is not guaranteed that we will get there—we have to work at it, and Brazilians should not wait for the government to deal with the problem. We all need to work together. But I think this change shows that there is a light at end of the tunnel.




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