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Examining the Brazilian Supreme Federal Court's Expanded Powers in the Bolsonaro Era: A Win for Democracy or a Turn Toward Autocracy?

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Examining the Brazilian Supreme Federal Court's Expanded Powers in the Bolsonaro Era: A Win for Democracy or a Turn Toward Autocracy?

Théo G. de Sá-Kaye*

As Jair Bolsonaro rose to popularity and was elected the 38th president of Brazil in 2018, the global community grew concerned over his very public disdain for the country's democratic institutions and admiration for Brazil's 22-year-long military dictatorship. The Bolsonaro administration was marked by repeated attacks on the judiciary, a heavily criticized response to the COVID-19 pandemic, and, eventually, the storming of Congress and the Brazilian Supreme Court by Bolsonaro's supporters—mirroring the January 6th insurrection in the U.S. However, the most significant aspect of the Bolsonaro presidency may not lie solely in his actions, but in the

* Staff Editor, Inter-American Law Review, Volume 55; J.D. 2024, University of Miami; B.A. 2019, University of California, San Diego. First and foremost, I wish to express my deepest gratitude to Professor Emeritus Keith Rosenn—a fellow Pennsylvanian—Carioca—for helping me make sense of my home country's complex, ever-evolving, and fascinating constitutional framework. I would also like to thank my faculty advisor, Christie Anne Darias Daniels, and my student writing editor, Maggie Walsh, for their unwavering patience and trust placed in me during the writing process. This note would not be where it is today without the many conversations and invaluable insights provided by my friend and colleague, Danilo Knijnik. Finally, thank you to the 2023–2024 IALR editorial board for recognizing the effort put into this Note and honoring me with the Grey Quill Award for outstanding legal academic writing.

response from other branches of government. In particular, Brazil's Supreme Federal Court swiftly positioned itself as a check on Bolsonaro's authority by granting itself powers not explicitly authorized by Brazil's Constitution of 1988. These powers include the ability to unilaterally create investigations and assume simultaneous roles as victim, prosecutor, and judge. While praised by many individuals defending democratic and liberal values in Brazil, questions persist regarding the legitimacy of the Court's actions. This note discusses why the expansion of powers by the Court during the Bolsonaro era, ostensibly undertaken out of necessity to safeguard democracy, may lack legal and constitutional legitimacy under Brazil's current constitutional framework. Rather than fortifying Brazil's still-incipient democracy, the Court's extra-constitutional expansion of power can possibly destabilize it further and potentially threatens Brazilians' civil liberties.

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I. INTRODUCTION

In August of 2024, Brazil's Supreme Federal Court (*Supremo Tribunal Federal*) ("STF") became embroiled in an international controversy that caught the world's attention. This controversy did not involve a traditional diplomatic battle, like a land dispute with a neighboring country or a debate over a trade agreement. Rather, the controversy concerned a feud between the South American nation's highest court and the world's richest man, Elon Musk, over his company, X (formerly known as Twitter).

One of the Supreme Federal Court's ministers, Alexandre de Moraes, had recently ordered the removal of more than one hundred profiles for spreading what he described as fake news and hate speech on the social media platform.¹ After initially complying with the Court's orders, Musk announced a policy reversal, citing concerns over free speech and disapproval of what he perceived to be

¹ Barbara Ortutay et al., *On the First Day Without X, Many Brazilians Say They Feel Disconnected From the World*, AP NEWS, <https://apnews.com/article/x-brazil-musk-1e896a1daedeaed6a09cf27205feb08a> (last updated Sep. 1, 2024).

widespread censorship by Brazil's highest court.² De Moraes responded by stating that Musk would be investigated for obstruction of justice.³ He also said that Musk would face a fine of about \$20,000 every time an account was reactivated on X in Brazil.⁴

Musk closed X's offices in Brazil on August 17, 2024, after de Moraes threatened to arrest an X legal representative, according to a statement from X's Global Affairs team.⁵ On August 31, 2024, X was banned from Brazil after failing to follow orders to name a legal representative for the company in the country.⁶ De Moraes stated that the ban would remain in effect until over \$3 million in fines were paid and a legal representative was named.⁷ Ultimately, Musk complied with the Court's orders, and in October of 2024, X was reinstated in Brazil.⁸

While one would normally expect a head of state to issue directives such as the one to ban X from the country, the government body at the forefront of this battle has been Brazil's federal judiciary. Early in former President Jair Bolsonaro's term, the Supreme Federal Court quickly asserted itself as a check on his powers and his perceived threats to Brazil's young democracy.⁹ In response to

² *Id.*

³ See Jack Nicas & Ana Ionova, *Elon Musk's X Backs Down in Brazil*, N.Y. TIMES (Sept. 21, 2024), <https://www.nytimes.com/2024/09/21/world/americas/elon-musk-x-brazil.html>.

⁴ Ana Altchek & Lakshmi Varanasi, *How Elon Musk and X got Into a Messy Situation in One of its Biggest Markets*, AOL.COM, <https://www.aol.com/news/elon-musk-x-got-messy-183618223.html> (last updated Sep. 21, 2024).

⁵ *See id.*

⁶ *Id.*

⁷ *Id.*

⁸ *STF Autoriza o Retorno Imediato do X e Determina Que Anatel Adote Providências Para a Retomada do Serviço* [STF Authorizes Immediate Return of X and Determines that Anatel Take Steps to Resume Service], CIRDADÉ VERDE.COM (Aug. 10, 2024, 5:40 PM), <https://cidadeverde.com/noticias/422438/stf-autoriza-o-retorno-imediato-do-x-e-determina-que-anatel-adote-providencias-para-a-retomada-do-servico>.

⁹ See Adi Spezia, *STF Mantém Demarcações na Funai e Impõe Derrota ao Governo Bolsonaro* [STF Maintains Demarcations at Funai and Imposes Defeat on Bolsonaro Government] CONSELHO INDIGENISTA MISSIONÁRIO (Aug. 2, 2019), <https://cimi.org.br/2019/08/stf-mantem-demarcacoes-na-funai-e-impoe-derrota-ao-governo-bolsonaro/>.

the circulation of an increasing amount of fake news aimed at the Court in early 2019, the STF published a one-page document that vastly expanded its authority.¹⁰ The STF's then-president, José Antonio Dias Toffoli, issued an order granting the Court the authority to open criminal investigations against those verbally attacking the Court and its members.¹¹ This was the beginning of the so-called *Inquérito das Fake News* (the "Fake News Inquiry"), which, has spawned hundreds of criminal investigations of internet users across Brazil and ultimately led to the clash between Musk and the Court.¹²

The feud between Elon Musk and Alexandre de Moraes underscores a greater trend developing since Brazil's redemocratization in 1988: the Brazilian federal judiciary has drastically expanded its powers to fulfill its role as the ultimate guardian of the Brazilian Constitution. The STF's rise in power has become more accentuated since the advent of fake news, as evidenced by the temporary ban of X. As a result of this increased power, the Court may have taken a repressive turn. By initiating the Fake News Inquiry in 2019, the court has ventured into uncharted territory, often overlooking principles of due process, freedom of speech, and the constitutional limits on the judiciary.

Considering this political context, this Note aims to explore the legal and constitutional validity of the STF's recently expanded authority, focusing on the principle of separation of powers enshrined in the Brazilian Constitution of 1988. This Note will be divided into

For example, in early 2019, the STF ruled in favor of the National Indigenous Foundation (FUNAI), allowing it to maintain the authority to demarcate boundaries of indigenous territories, prohibiting Bolsonaro from transferring this authority to the Ministry of Agriculture. This was a major blow to Bolsonaro's agenda, an agenda which presented a threat to indigenous rights and sovereignty in Brazil.

¹⁰ See *Toffoli abre inquérito para apurar ameaças a ministros e ao Supremo* [Toffoli Opens Investigation to Investigate Threats to Ministers and the Supreme Court], CONSULTOR JURÍDICO (Mar. 14, 2019), <https://www.conjur.com.br/2019-mar-14/toffoli-abre-inquerito-apurar-ameacas-ministros-tribunal/>.

¹¹ *Id.*

¹² See S.T.F.J., Portaria GP Nº 69 [Order of the President's Office Nº 69], Relator: Min. Alexandre de Moraes, 14.03.2019, SUPREMO TRIBUNAL FEDERAL JURISPRUDÊNCIA [S.T.F.J.] (Braz.); see also Renata Galf, *Inquérito das Fake News no STF Faz 5 Anos Com Série de Controvérsias e Foco Amplo* [STF Fake News Investigation Turns 5 Years Old With Controversy], FOLHA DE SÃO PAULO (Mar. 13, 2024), <https://www1.folha.uol.com.br/poder/2024/03/inquerito-das-fake-news-no-stf-faz-5-anos-com-serie-de-controversias-e-foco-amplo.shtml>.

four sections. Section II will provide an overview of Brazil's judicial system, briefly touching on the historical separation of powers under previous constitutions and analyzing the framework of the federal judiciary laid out by the Constitution of 1988. Section III will delve into the STF's expanded powers under President Bolsonaro's administration, offering the pertinent historical and political context that led to such developments, namely, the rise of fake news in the age of social media. Section IV will assess the constitutionality of the STF's recent actions, ultimately suggesting that the judiciary likely exceeded its authority granted by the 1988 Constitution, posing a threat to the separation of powers in Brazil, and thus, its very democracy.

II. BRAZIL'S CONSTITUTIONAL FRAMEWORK

A. *The Brazilian Constitution of 1988*

Brazil's current Constitution, established in 1988, sets out a republican form of government, distributing power evenly among the executive, legislative, and judiciary branches.¹³ Prior to the adoption of this constitutional framework, Brazil underwent six attempts at constitution-making, many of which concentrated authority within the executive branch, limiting the effectiveness of checks and balances.¹⁴ Amid a series of military coups and subsequent dictatorships spanning from the late 19th century until 1985, Brazil grappled with the challenge of establishing a robust, liberal democracy that would safeguard individual rights.¹⁵ It also sought to find mechanisms for upholding those rights through judicial enforcement.¹⁶

i. Historical Background: Brazil's Previous Attempts at Democracy

A fundamental tenet of modern democracies is the division of powers to prevent the undue accumulation of authority within any

¹³ For a deeper discussion on Brazil's separation of powers under the Constitution of 1988, see discussion *infra* Section II.A.ii.

¹⁴ See Keith S. Rosenn, *Separation of Powers in Brazil*, 47 DUQ. L. REV. 839, 839 (2009)

¹⁵ See *id.* at 849–850.

¹⁶ See *id.* at 851.

single branch of government.¹⁷ Inspired by the ideas of French philosopher Montesquieu, a tripartite system of governance (encompassing the executive, legislative, and judiciary) was conceived to ensure that no branch could monopolize power. Montesquieu advocated for each branch to exercise authority solely within its designated sphere of influence.¹⁸ Specifically addressing the judiciary, he asserted that “there is no liberty, if the judiciary is not separated from the legislative and executive.”¹⁹ “Were it joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control.”²⁰ “Were it joined to the executive power, the judge might behave with violence and oppression.”²¹

Throughout Brazilian history, various constitutions have attempted to establish a system of checks and balances. However, the principle of separation of powers held little to no significance before 1988.²² Unlike other Latin American nations that immediately embraced a republican form of government, Brazil retained the monarchical system it inherited from Portugal.²³ In November of 1807, as Napoleon’s forces threatened to invade Portugal, the Portuguese monarchy fled to Brazil, eventually creating the United Kingdom of Brazil, Portugal and the Algarves.²⁴ In 1822, Dom Pedro, Prince Regent, declared Brazil’s independence from Portugal and drafted the newly founded country’s inaugural constitution.²⁵ Brazil’s 1824 Constitution established a hereditary monarchy with Dom Pedro I

¹⁷ See, e.g., Alexander Hamilton & James Madison, *Federalist No. 51*, *LIBR. OF CONG.* (Feb. 8, 1788), <https://guides.loc.gov/federalist-papers/text-51-60> (discussing the importance of the separation of powers).

¹⁸ See CHARLES DE SECONDAT, BARON DE MONTESQUIEU, *L’ESPRIT DES LOIS* [THE SPIRIT OF THE LAWS] 222 (Anne M. Cohler, Basia Carolyn Miller & Harold Samuel Stone trans. & eds., 1989) (1748).

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

²² See Rosenn, *supra* note 14, at 840.

²³ See CONSTITUIÇÃO POLÍTICA DO IMPÉRIO DO BRASIL [POLITICAL CONSTITUTION OF THE EMPIRE OF BRAZIL] Mar. 25, 1824, arts. 102–04.

²⁴ See LAURENTINO GOMES, 1808: COMO UMA RAINHA LOUCA, UM PRÍNCIPE MEDROSO E UMA CORTE CORRUPTA ENGANARAM NAPOLEÃO E MUDARAM A HISTÓRIA DE PORTUGAL E DO BRASIL [1808: HOW A MAD QUEEN, A FEARFUL PRINCE AND A CORRUPT COURT DECEIVED NAPOLEON AND CHANGED THE HISTORY OF PORTUGAL AND BRAZIL] 67–68 (2007).

²⁵ See generally *id.*

as its Emperor under a unitary structure of power in which practically all authority was concentrated in a central government, headed by the Emperor.²⁶ In accordance with the 1824 Constitution, the central government comprised four branches: the executive, judiciary, legislative, and the so-called moderating power.²⁷ The judiciary was overseen by a Supreme Court vested with appellate jurisdiction and authority to resolve jurisdictional disputes.²⁸ However, the Court lacked the crucial power of judicial review; instead, the authority to review cases resided with the Emperor, who could also suspend judges at will.²⁹ This moderating power, a relatively unique feature, was designed to resolve conflicts among other powers of government.³⁰ In practice, however, the moderating power was solely exercised by the Emperor, once again concentrating power in the executive branch.³¹

Throughout the twentieth century, Brazil underwent a tumultuous series of coups and military regimes during its quest to establish a constitutional republic. The 1891 Constitution, which established a United States Constitution-inspired tripartite system of government, was overthrown by the 1930 military uprising that propelled Getúlio Vargas to power.³² Under Vargas's rule, Brazil adopted a new constitution in 1934, which only lasted three years.³³ During this period, the Vargas government decreased the number of ministers on the STF to eleven.³⁴ In 1937, Vargas orchestrated a self-imposed coup, citing the need to suppress a Communist uprising.³⁵ He

²⁶ CONSTITUIÇÃO POLÍTICA DO IMPÉRIO DO BRASIL arts. 98–101 (1824).

²⁷ *Id.* arts. 10, 43.

²⁸ *Id.* arts. 151–64.

²⁹ *See id.* arts. 151–55.

³⁰ *See* Rosenn, *supra* note 14, at 841.

³¹ *See id.* It is worth noting that despite the 1824 constitution concentrating power in the moderating power, this branch of government, in retrospect, is viewed as having been a source of stability and progress for Brazil at the time. During the reign of Dom Pedro II, Brazil advanced in many respects in terms of liberal and democratic values, such as guaranteeing freedom of speech and the press.

³² *Id.* at 834.

³³ *See id.* at 843–44.

³⁴ *See* O SUPREMO TRIBUNAL FEDERAL 7 (Brasília 1976), https://www.stf.jus.br/arquivo/cms/publicacaoPublicacaoInstitucionalCuriosidade/anexo/Plaqueta__O_Supremo_Tribunal_Federal__1976.pdf.

³⁵ *See* Rosenn, *Separation of Powers in Brazil*, *supra* note 14, at 844–45.

introduced a new Constitution, granting himself virtually unchecked authority and disregarding any effort to uphold the separation of powers.³⁶ In 1945, Brazil saw the overthrow of the Vargas dictatorship, leading to the adoption of the 1946 constitution.³⁷ Influenced by the U.S. Constitution, it reinstated the tripartite separation of powers.³⁸ However, abuses during Vargas's regime prompted restrictions on presidential authority.³⁹ Despite these reforms, the executive often bypassed the legislature by issuing administrative decrees.⁴⁰

The foundations of the 1946 Constitution began to erode in 1961, ultimately leading to the 1964 military coup.⁴¹ The 1969 Constitution repeated its predecessor's language on the separation of powers, but concentrated governmental authority in the executive branch.⁴² The number of STF ministers swelled to sixteen, and judicial review began to be exercised not only by the Court but also by the Attorney General of the Public Ministry.⁴³ Individual rights remained suspended until 1978, when the military finally repealed Institutional Act No. 5, which had suspended all civil liberties.⁴⁴ The 1969 Constitution, much like the 1937 Constitution, was utilized to disguise *de facto* authoritarian, anti-democratic practices within a constitutional framework.⁴⁵ In sum, Brazil's previous constitutions centralized power in the executive, distorting the principle of separation of powers and leaving little room for checks and balances from other branches of government.⁴⁶

ii. Separation of Powers in the Constitution of 1988

The redemocratization of Brazil resulting from the political liberalization (negotiated between the military and civilian political elites in 1985) culminated in the convening of a National

³⁶ *See id.*

³⁷ *Id.* at 845.

³⁸ *Id.*

³⁹ *See id.*

⁴⁰ *See id.* at 845–47.

⁴¹ *Id.* at 845–846.

⁴² *See id.* at 847–49.

⁴³ *See* O SUPREMO TRIBUNAL FEDERAL, *supra* note 34, at 8.

⁴⁴ *See* Rosenn, *Separation of Powers in Brazil*, *supra* note 14, at 849.

⁴⁵ *Id.*

⁴⁶ *See id.* at 847–49.

Constituent Assembly, aimed at drafting and approving a new Constitution in 1988.⁴⁷ As described by a Brazilian constitutional scholar, the Constitution of 1988 was “designed to weaken the executive and to strengthen the legislature and judiciary.”⁴⁸ Following decades of repressive military rule, the constituent assembly drafted a constitution focused on guaranteeing individual liberties and judicial and administrative means to vindicate them.⁴⁹ In this section, we will pay attention to how the 1988 Constitution allocates power among the Public Ministry, the Judiciary, and the Superior Electoral Court.

The principle of the separation of powers is explicitly enshrined in Article 2 of the 1988 Constitution, which states that “[t]he branches of the union are the legislative, executive, and judiciary, which are independent and harmonious with each other.”⁵⁰ Moreover, the separation of powers is one of the few permanent provisions in the Constitution that cannot be abrogated, even through a constitutional amendment.⁵¹ Additionally, the Constitution of 1988 created a completely independent *Ministério Público* (“Public Ministry”), which some scholars have argued functions as a “quasi-fourth power,” acting as a modern-day moderating power that was first envisioned by the Constitution of 1824.⁵² The Public Ministry is roughly the equivalent of the Department of Justice in the United States, with one key difference: it is completely autonomous from the executive branch and operates as a stand-alone sector of the federal government.⁵³

The Public Ministry is led by the *Procurador Geral da República* (“Prosecutor General”), who is appointed by the

⁴⁷ See *id.* at 849-50.

⁴⁸ *Id.* at 850.

⁴⁹ *Id.* at 849, 851.

⁵⁰ CONSTITUIÇÃO DA REPÚBLICA FEDERATIVA DO BRASIL [CONSTITUTION OF THE FEDERATIVE REPUBLIC OF BRAZIL] Sept. 22, 1988, art. 2 *translated in* Keith S. Rosenn, *Brazil 1988 (rev. 2017)*, CONSTITUTE, https://www.constituteproject.org/constitution/Brazil_2017.

⁵¹ See *id.* art. 60, § 4.

⁵² See Rosenn, *Separation of Powers in Brazil*, *supra* note 14, at 851.

⁵³ CONSTITUIÇÃO DA REPÚBLICA FEDERATIVA DO BRASIL art. 127, § 2 (1988) *translated in* Keith S. Rosenn, *Brazil 1988 (rev. 2017)*, CONSTITUTE, https://www.constituteproject.org/constitution/Brazil_2017.

president with approval by the Senate.⁵⁴ The duties of the Public Ministry are outlined in Article 129 of the Constitution of 1988 which, critically, confers this institution with exclusive jurisdiction to initiate public criminal prosecutions.⁵⁵ The 1988 Constitution significantly expanded the role of the Public Ministry by establishing a wide range of individual, collective, and social rights, as well as numerous public actions that can be pursued in court to uphold these rights.⁵⁶ To that end, the Public Ministry is also responsible for “defending the legal order, the democratic regime and indispensable social and individual interests.”⁵⁷ The 1988 Constitution explicitly requires the Public Ministry to file lawsuits to uphold the fundamental rights enumerated by the Constitution.⁵⁸

The Prosecutor General sits with the Supreme Court and is responsible for rendering advisory opinions on cases under consideration, but holds no voting power.⁵⁹ The Prosecutor General may be dismissed by presidential initiative, only if an absolute majority of the Senate votes for dismissal.⁶⁰ Critically, the Constitution states that the Public Ministry “exercise[s] external control over police activities” and is responsible for “request[ing] investigations and [the] institution of police investigations, indicating the legal basis for its procedural acts.”⁶¹ In other words, the Constitution of 1988 places the responsibility on an independent prosecutor to open a criminal case against a defendant, who will later bring the charges before a magistrate.⁶² This is typical of the adversarial system of litigation, the justice model followed in the United States.⁶³

Another important institution featured in the 1988 Constitution is the *Tribunal Superior Eleitoral*, or Superior Electoral Court

⁵⁴ See *id.* art. 128, § 1.

⁵⁵ See *id.* art. 129

⁵⁶ Rosenn, *supra* note 14, at 849, 851.

⁵⁷ *Id.* art. 127.

⁵⁸ See *id.* art. 129, paras. II, IV.

⁵⁹ See generally *id.* art. 129.

⁶⁰ CONSTITUIÇÃO DA REPÚBLICA FEDERATIVA DO BRASIL art. 128, § 2 (1988) translated in Keith S. Rosenn, *Brazil 1988 (rev. 2017)*, CONSTITUTE, https://www.constituteproject.org/constitution/Brazil_2017.

⁶¹ *Id.* art. 129, paras. VII, VIII.

⁶² See generally Ellen E. Sward, *Values, Ideology, and the Evolution of the Adversary System*, 64 IND. L. J. 301 (1989).

⁶³ See generally *id.*

(“TSE”). This court is based on the earlier “Electoral Justice” court established by the 1932 Electoral Code, which transferred the duty of overseeing elections from Congress to the Judiciary.⁶⁴ The TSE’s role is to oversee the integrity of Brazilian elections on a municipal, state, and federal level.⁶⁵

As per Article 121, § 3 of the 1988 Constitution, the Superior Electoral Court serves as the highest judicial authority within the Brazilian electoral justice system.⁶⁶ The Constitution asserts that decisions made by the TSE are final, except those deemed contradictory to the Constitution itself, which may be appealed to the STF.⁶⁷ The composition of the TSE is governed by Article 119 of the Constitution, which mandates that the Court shall be composed of at least seven members.⁶⁸ Three justices are to be elected by secret ballot from among STF ministers, while two additional judges are to be elected by secret ballot from among Superior Court of Justice (STJ) members.⁶⁹ The remaining two members are appointed by the President of Brazil from a pool of six lawyers distinguished for their legal expertise and moral integrity, nominated by the STF.⁷⁰

iii. Separation of Powers through the Lens of the Adversarial Model of Justice

Another crucial aspect of the Brazilian Constitution’s separation of powers is the adoption of an adversarial system of criminal justice, rather than an inquisitorial system. In the inquisitorial system—prevalent in most civil law countries—there is no distinction between the roles of the accusing party and the judge.⁷¹ In other words,

⁶⁴ JOSÉ AFONSO DA SILVA, *CURSO DE DIREITO CONSTITUCIONAL POSITIVO* 580 (São Paulo: Malheiros, 33rd ed. 2009).

⁶⁵ See generally *TSE The History of Electoral Justice in Brazil*, SUPERIOR ELECTORAL CT., <https://international.tse.jus.br/en> (last visited Apr. 13, 2025).

⁶⁶ See CONSTITUIÇÃO DA REPÚBLICA FEDERATIVA DO BRASIL art. 121, § 3 (1988) translated in Keith S. Rosenn, *Brazil 1988 (rev. 2017)*, CONSTITUTE, https://www.constituteproject.org/constitution/Brazil_2017.

⁶⁷ *Id.*

⁶⁸ *Id.* art. 119.

⁶⁹ *Id.* at art. 119, § 1.

⁷⁰ *Id.* art. 119.

⁷¹ Kristen DeBarba, *Maintaining the Adversarial System: The Practice of Allowing Jurors to Question Witnesses During Trial*, 55 VAND. L. REV. 1521, 1522 (2002).

the presiding judge holds the authority to initiate a criminal prosecution, oversee the investigation, actively engage in fact-finding, and ultimately adjudicate the outcome of the case.⁷²

Conversely, in the adversarial system, which is prevalent in common law countries like the United States, the judge acts as a neutral arbiter between the accuser—the government-led prosecution—and the defendant.⁷³ A key factor in the adversarial system is that the authority to adjudicate is separate from the entity accusing the defendant of criminal wrongdoing.⁷⁴ In the adversarial framework, the judge maintains a passive role in the collection of evidence, which is required for the preservation of their impartiality in the case.⁷⁵ The responsibility for investigating and presenting evidence lies with the parties involved, who must convince the judge to either include or exclude it based on law or questions of bias.⁷⁶ Importantly, the burden of supporting the alleged facts rests on the prosecution.⁷⁷ In the adversarial system, when the judge intervenes spontaneously in evidence production, it compromises their impartiality because it encroaches on the role of the prosecution.⁷⁸

The 1988 Constitution, under Article 129 § 1, explicitly adopted the adversarial system.⁷⁹ This system designates the initiation of public criminal actions as the primary responsibility of the Public Ministry, which is an independent government entity.⁸⁰ This constitutional stance underscores that the initiation of a criminal action is contingent upon the prompting of the party responsible for asserting punitive claims, thereby preventing the judge from taking actions incompatible with the impartiality that judges must maintain concerning the parties' interests.⁸¹

⁷² *See id.*

⁷³ *Id.* at 1527-28.

⁷⁴ *See id.* at 1522.

⁷⁵ *See id.*

⁷⁶ *Id.* at 1528.

⁷⁷ Kristen DeBarba, *supra* note 71, at 1527-1530.

⁷⁸ *Id.* at 1527-1528.

⁷⁹ CONSTITUIÇÃO DA REPÚBLICA FEDERATIVA DO BRASIL art. 129, para. 1 (1988) *translated in* Keith S. Rosenn, *Brazil 1988 (rev. 2017)*, CONSTITUTE, https://www.constituteproject.org/constitution/Brazil_2017.

⁸⁰ *See id.*

⁸¹ *See* Aury Lopes, Jr., *O que sobrou do sistema acusatório após a decisão do STF?* [*What is Left of the Accusatory System After the STF Decision?*],

The preference for the adversarial system is also supported by other sources of authority in the Brazilian legal system, although the Criminal Procedure Code, despite originally prescribing an inquisitorial system, no longer supports this approach to criminal prosecutions.⁸² In its 2019 revision, following Congress's passage of the so-called Anti-Crime Package, the Criminal Procedure Code was revised to announce that "[t]he criminal proceedings shall have an accusatory structure, prohibiting the judge's initiate in the investigation phase and the replacement of the evidentiary action of the prosecution body."⁸³ Article 40 of the Code also states that "[w]hen, in records or documents that they are aware of, judges or courts verify the existence of a crime of public action, they shall forward to the Public Prosecutor's Office the copies and documents necessary for filing the complaint."⁸⁴ Thus, the appropriate conduct for a judge, in accordance with the adversarial system inscribed in the Brazilian Constitution and reiterated by federal statute, is to defer the investigative and prosecutorial functions of a criminal case to the Public Ministry.⁸⁵ This system goes hand-in-hand with the separation of powers, precluding the concentration of power of leading criminal prosecutions in one single branch of the government.

B. Brazil's Judicial System Under the Constitution of 1988

The Constitution of 1988 was marked by an important transfer of power to the judiciary. Whereas in the multiple preceding military regimes, any of the STF's decisions could be nullified by executive orders.⁸⁶ The current constitution created multiple tools extending the Court's jurisdiction to determine the legality of a multitude of issues affecting Brazilian society.

CONSULTOR JURÍDICO (Sept. 19, 2023), <https://www.conjur.com.br/2023-set-19/criminal-player-sobrou-sistema-acusatorio-decisao-stf/>.

⁸² See Lei Nº 13.964, "Pacote Anti-Crime" [Anti-Crime Bill], Dec. 14, 2019.

⁸³ CÓDIGO DE PROCESSO PENAL [C.P.P.] [CRIMINAL PROCEDURE CODE] art. 3-A, revised 2019 (Port.) (emphasis added).

⁸⁴ *Id.* art. 40.

⁸⁵ See *id.*

⁸⁶ See generally Rosenn, *supra* note 14.

i. Structure of the STF & the Role of the Rapporteurs

The STF serves as the final court of appeal within the Brazilian federal judiciary, comprising eleven ministers (the *plenário*, or “plenary”), led by a president elected by the Court’s members.⁸⁷ Unlike the United States Supreme Court, where justices collectively deliberate cases, the STF primarily operates with each of the eleven ministers handling separate caseloads.⁸⁸ When a case reaches the STF, it is assigned to one minister who assumes the role of the *relator*, or “rapporteur” of the case.⁸⁹ The Court’s internal regulations institute a random assortment process for cases to get assigned to rapporteurs.⁹⁰ In the STF, the rapporteur evaluates the case, prepares a detailed report outlining its merits, issues a ruling on the issues presented in the form of an opinion, and presents the opinion to the other ministers.⁹¹ Subsequently, the rapporteur casts their vote, which serves as a reference for the other ministers who may either join the rapporteur’s decision or dissent.⁹²

The role of the rapporteur includes additional functions, as set forth in Articles 21 and 22 of the STF’s internal regulations.⁹³ The rapporteur’s functions include handling cases involving public figures with qualified immunity and overseeing case proceedings, such as analyzing evidence production requests, hearing witnesses, and authorizing telephone surveillance.⁹⁴ In certain instances, rapporteurs may make unilateral decisions, particularly concerning injunctive relief, without approval from other STF ministers.⁹⁵ Additionally, rapporteurs are entrusted with overseeing and concluding

⁸⁷ CONSTITUIÇÃO DA REPÚBLICA FEDERATIVA DO BRASIL art. 101 (1988) translated in Keith S. Rosenn, *Brazil 1988 (rev. 2017)*, CONSTITUTE, https://www.constituteproject.org/constitution/Brazil_2017; REGIMENTO INTERNODO SUPREMO TRIBUNAL FEDERAL [STF INTERNAL REGULATIONS], art. 2 (Braz.), available at <https://www.stf.jus.br/arquivo/cms/legislacaoregimentointerno/anexo/ristf.pdf>.

⁸⁸ STF INTERNAL REGULATIONS, art. 21 (Braz.).

⁸⁹ *Id.*

⁹⁰ *Id.* art. 66.

⁹¹ See generally *id.* art. 21.

⁹² See generally *id.*

⁹³ *Id.* arts. 21, 22.

⁹⁴ See generally *id.*

⁹⁵ See *id.*

criminal investigations brought before them.⁹⁶ Although the STF's internal regulations mandate that all cases be reviewed by the entire Court, studies indicate that, in practice, ministers often defer to the decision of the rapporteur once it is issued.⁹⁷ For example, a study conducted by Virgílio Afonso da Silva, which interviewed former STF ministers, revealed that "[i]n the vast majority of cases, [justices] do not read the report, [due to their intense workload and each report's length]."⁹⁸

This stands in stark contrast with the judicial review system of the United States Supreme Court, where, in the few dozens of cases granted certiorari each year, all nine justices collectively hear oral arguments, engage in deliberations, and may issue majority, concurring, or dissenting opinions.⁹⁹ The rapporteur system in Brazil confers significant authority to individual justices when cases are brought before them.¹⁰⁰ Cases may remain unresolved for years, or even decades, before a rapporteur presents them for consideration by the other justices, affording rapporteurs considerable discretion in determining case resolutions.¹⁰¹ As a result, the rapporteur system ends up concentrating power in the hands of individual justices, rather than in the Supreme Federal Court as a whole.

ii. The STF's Original & Appellate Jurisdiction

The 1988 Constitution granted the STF a robust system of judicial review, giving it original jurisdiction on a number of constitutional issues, often in the abstract, as there is no "case or controversy" requirement as the U.S. Constitution explicitly imposes. It

⁹⁶ See generally *id.* arts. 21-22.

⁹⁷ See, e.g., Virgílio Afonso da Silva, *Um voto qualquer? O papel do ministro relator* [Any Vote? The Role of the Reporting Minister], 1 REV. ESTUDOS INSTITUCIONAIS 180, 189 (2015) (Braz.). Mr. Afonso da Silva is a professor of law at the University of São Paulo.

⁹⁸ *Id.* at 189 (Mr. Afonso da Silva is a professor of law at the University of São Paulo).

⁹⁹ *Supreme Court Procedures*, U.S. COURTS, <https://www.uscourts.gov/about-federal-courts/educational-resources/about-educational-outreach/activity-resources/supreme-court-procedures> (last visited Apr. 18, 2025).

¹⁰⁰ STF INTERNAL REGULATIONS, arts. 21-22 (Braz.).

¹⁰¹ Arkady Petrov, *Behind Closed Doors: Brazil's Supreme Court and the Rule of Arbitrariness*, THE RIO TIMES (Aug. 12, 2024), <https://www.riotimesonline.com/behind-closed-doors-brazils-supreme-court-and-the-rules-of-arbitrariness/>.

also established a series of measures for the Court to review the constitutionality of issues that may jeopardize its enumerated fundamental rights.

In the *Ação Direta de Inconstitucionalidade* (“Direct Action of Unconstitutionality”), the Constitution permits the President of the Republic, the Attorney General, Executive Committees of both houses of Congress or state legislatures, state governors, the Federal Council of the Brazilian Bar Association, any political party represented in Congress, and any syndical confederation or national class entity to bring an action directly before the STF challenging the constitutionality of any law or normative act in the abstract.¹⁰² Brazilian constitutional scholars have noted that “[t]his procedure deprives the STF of the opportunity to review opinions of lower courts, to review a factual record in which it can observe the effects of the statute on actual litigants, and of being able to decline to decide issues that are untimely or too sensitive on justiciability grounds.”¹⁰³

The Constitution also created two new procedural mechanisms for when Congress or an administrative agency *fails* to enact laws guaranteeing rights enumerated by the Constitution: these are called the *Ação Direta de Inconstitucionalidade por Omissão* (“Direct Action of Unconstitutionality for Omission”) and *Mandado de Injunção* (“Mandate of Injunction”).¹⁰⁴ Article 103 of the Constitution confers original jurisdiction for the STF to issue a declaration of unconstitutionality by omission whenever it determines that “measures [by Congress or an administrative agency] to make a constitutional rule effective are lacking[.]”¹⁰⁵ Similarly, an injunction is to be issued by the STF whenever the President or Congress fails to adopt or implements a regulatory rule making the exercise of constitutional rights or liberties impracticable.¹⁰⁶

¹⁰² CONSTITUIÇÃO DA REPÚBLICA FEDERATIVA DO BRASIL art. 102 (1988) translated in Keith S. Rosenn, *Brazil 1988 (rev. 2017)*, CONSTITUTE, https://www.constituteproject.org/constitution/Brazil_2017.

¹⁰³ Keith S. Rosenn, *Judicial Reform in Brazil*, 4 L. & BUS. REV. AM. 19, 21 (1998).

¹⁰⁴ CONSTITUIÇÃO DA REPÚBLICA FEDERATIVA DO BRASIL art. 102, § 1 (1988) translated in Keith S. Rosenn, *Brazil 1988 (rev. 2017)*, CONSTITUTE, https://www.constituteproject.org/constitution/Brazil_2017

¹⁰⁵ *Id.* art. 103, § 2.

¹⁰⁶ *Id.* art. 5, para. LXXI; see also *id.* art. 102, para. I, item q.

In 1999, Congress passed legislation creating a new direct action of unconstitutionality called the *Arguição de Descumprimento de Preceito Federal* (“Allegation of a Violation of a Fundamental Precept”, “ADPF”).¹⁰⁷ This action allows anyone with standing to bring a Direct Action of Unconstitutionality before the STF as a means to initiate a lawsuit alleging a violation of a fundamental precept, provided there is no other effective remedy.¹⁰⁸ An absolute majority of the Court may issue a provisional remedy suspending proceedings in any case before the state or lower federal courts, unless the matter has previously been settled by it.¹⁰⁹ The STF may also declare any law or act unconstitutional with binding effects.¹¹⁰

Crucially, in criminal cases, the 1988 Constitution only grants the STF original jurisdiction over charges facing the President, Vice-President, Congress members, the Court’s ministers, or the Attorney General.¹¹¹ In fact, if one of the above-mentioned actors is criminally indicted by the Public Ministry, the STF acts as a fact-finding trial court.¹¹² All other criminal cases, however, must make their way up to the STF after a defendant stands trial and subsequently exhausts their lower court appeals.¹¹³

III. THE STF’S RECENT EXPANSION OF POWERS

A. *Jair Bolsonaro, Fake News & Attacks on the STF*

i. Operation Car Wash: Brazil’s Biggest Corruption Scandal

Bolsonaro’s election came in the wake of intense social, political, and economic upheaval in Brazil, marking perhaps the most

¹⁰⁷ Decreto No. 9.882, de 3 de Dezembro de 1999, Diário Oficial da União [D.O.U.] de 06.12.1999 (Braz.).

¹⁰⁸ See Rosenn, *Separation of Powers in Brazil*, *supra* note 14, at 864.

¹⁰⁹ See CONSTITUIÇÃO DA REPÚBLICA FEDERATIVA DO BRASIL art. 102, para. I (1988) *translated in* Keith S. Rosenn, *Brazil 1988 (rev. 2017)*, CONSTITUTE, https://www.constituteproject.org/constitution/Brazil_2017.

¹¹⁰ See Rosen, *Separation of Powers in Brazil*, *supra* note 14, at 864.

¹¹¹ See CONSTITUIÇÃO DA REPÚBLICA FEDERATIVA DO BRASIL art. 102, para. I (1988) *translated in* Keith S. Rosenn, *Brazil 1988 (rev. 2017)*, CONSTITUTE, https://www.constituteproject.org/constitution/Brazil_2017.

¹¹² See *id.*

¹¹³ See *id.* art. 102, para. II.

significant disruption in the country since the fall of its dictatorship in 1985.¹¹⁴ Beginning in 2013, Brazil's governing center-left party, *Partido dos Trabalhadores* ("The Workers' Party," or "PT"), faced a major crisis with the emergence of several corruption scandals exposed by an investigation initiated by the Public Ministry known as *Operação Lava Jato* ("Operation Car Wash").¹¹⁵

The scandal began in 2012 when federal police arrested a high-profile money launderer in connection with the investigation of a car wash allegedly being used to launder money in the capital city of Brasília.¹¹⁶ The suspect testified that he was laundering money for executives from Petrobras, Brazil's state-owned oil company, as part of a sweeping corruption conspiracy.¹¹⁷ The criminal investigation, led by a Public Ministry task force in the southern city of Curitiba, eventually revealed that a cartel of construction firms systematically overcharged Petrobras for building contracts.¹¹⁸ In return, a group of high-ranking Petrobras employees agreed to turn a blind eye and allow the cartel to pocket the rewards of the inflated contracts, which they used to reward their Petrobras contacts, and donate heavily to the re-election campaigns of "friendly" politicians.¹¹⁹ The money laundered to the scheme amounted to more than \$5 billion and included a considerable inventory of gifts to politicians, like \$3,000 wine bottles, yachts, penthouses, and helicopters.¹²⁰

¹¹⁴ See generally Carolina Milhorance, *Policy Dismantling and Democratic Regression in Brazil Under Bolsonaro: Coalition Politics, Ideas, and Underlying Discourses*, 39 REV. OF POL'Y RSCH. 752 (2022).

¹¹⁵ For a more detailed analysis of Operation Car Wash, see Amelia Cheatham, *Lava Jato: See How Far Brazil's Corruption Probe Reached*, COUNCIL ON FOREIGN RELATIONS, <https://www.cfr.org/in-brief/lava-jato-see-how-far-brazils-corruption-probe-reached> (last updated Apr. 19, 2021).

¹¹⁶ See Valmar Huspel Filho, *O policial 'marco zero' da Lava Jato*, ESTADO DE SÃO PAULO (Apr. 7, 2016), <https://www.estadao.com.br/politica/o-policial-marco-zero-da-lava-jato/>.

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ See Felipe Neri & Mariana Oliveira, *Petrobras não era 'casa de negócios,' diz ex-dirigente investigado pela PF*, GLOBONews (Oct. 6, 2014), <https://g1.globo.com/politica/noticia/2014/06/petrobras-nao-era-casa-de-negocios-diz-ex-dirigente-investigado.html>.

¹²⁰ See *id.*; David Segal, *Petrobras Oil Scandal Leaves Brazilians Lamenting a Lost Dream*, N.Y. TIMES (Aug. 7, 2015), <https://www.nytimes.com/2015/08/09/business/international/effects-of-petrobras-scandal-leave-brazilians-lamenting-a-lost-dream.html>.

But the scandal did not end there. In 2017, the STF announced that it was investigating dozens of politicians implicated in the corruption scheme uncovered by the Public Ministry-led investigation.¹²¹ This eventually led to President Dilma Rousseff's impeachment and removal from office and her predecessor Lula's imprisonment.¹²² Both Lula and Rousseff were members of PT, the left-wing party in power since 2002.¹²³ The party was praised for its social reforms and push for Brazil to embrace a European-model welfare state.¹²⁴ But the corruption was omnipresent: by 2017, nearly one third of President Michel Temer's (Ms. Rousseff's vice-president, who replaced her following her impeachment) cabinet, from various political parties, were implicated in the scheme.¹²⁵

To make matters worse, the corruption scandal surfaced at the end of the worldwide commodities boom, while Brazil entered into its worst recession in thirty years, leaving nearly thirteen million people unemployed.¹²⁶ In 2014, 2015, and 2016—during the height of the Operation Car Wash scandal—the Brazilian economy shrank by over three percent annually.¹²⁷ Combined with the moral failure of public officials linked to Operation Car Wash, this economic

¹²¹ *Brazil Judge Targets Dozens of Politicians for 'Corruption'*, BBC NEWS (Apr. 12, 2017), <https://www.bbc.com/news/world-latin-america-39574355>.

¹²² See Shasta Darlington, *As 'Lula' Sits in Brazil Jail, Party Nominates Him for President*, N.Y. TIMES (Aug. 5, 2018), <https://www.nytimes.com/2018/08/05/world/americas/lula-brazil-election-luiz-inacio-lula-da-silva.html>.

¹²³ *Brazil Judge Targets Dozens of Politicians for 'Corruption'*, *supra* note 121.

¹²⁴ See Terry L. McCoy, *As Brazil Tilts Rightward, Lula's Leftist Legacy of Lifting the Poor is at Risk*, UNIV. OF FLA. CTR. FOR LATIN AM. STUD. (Oct. 4, 2016), <https://www.latam.ufl.edu/blog/2016/as-brazil-tilts-rightward-lulas-leftist-legacy-of-lifting-the-poor-is-at-risk.html>.

¹²⁵ *Id.*

¹²⁶ Silvio Cascione, *Brazil's Worst-Ever Recession Unexpectedly Deepens in Late 2016*, REUTERS (Mar. 7, 2017, 12:30 PM), <https://www.reuters.com/article/us-brazil-economy-gdp/brazils-worst-ever-recession-unexpectedly-deepens-in-late-2016-idUSKBN16E1EL/>.

¹²⁷ Rodrigo Paradella, *Revisão do PIB de 2016 Mostra Queda de 3,3% em Relação ao Ano Anterior*, IBGE (Sept. 11, 2018, 10:00 AM), <https://agenciadenoticias.ibge.gov.br/agencia-noticias/2012-agencia-de-noticias/noticias/22966-revisao-do-pib-de-2016-mostra-queda-de-3-3-em-relacao-ao-ano-anterior> (Port.).

decline fueled dismay and anger from Brazil's working class towards the center-left political establishment.¹²⁸

ii. The Rise of Jair Bolsonaro, Attacks on Brazil's Judiciary, and the Global Advent of Fake News

During the 2018 presidential election, Jair Bolsonaro capitalized on Brazil's political and economic turmoil by branding himself as a political outsider despite his twenty-seven-year tenure in Congress.¹²⁹ Bolsonaro presented himself as an alternative to the corrupt political class that had mismanaged the country for years.¹³⁰ Bolsonaro's anti-corruption, anti-establishment rhetoric resonated strongly with the public.¹³¹ At the time, polls indicated that ninety-four percent of Brazilians wanted Operation Car Wash to continue "at whatever cost," and systemic corruption frequently appeared as a top concern for voters.¹³² To exacerbate matters, PT attempted to nominate Lula to run against Bolsonaro, which the STF itself quickly shot down, ruling that running a presidential campaign from prison would violate Brazilian law.¹³³

Bolsonaro's presidential campaign raised significant concerns among Brazilians and international observers due to his authoritarian rhetoric and stances.¹³⁴ He openly praised Brazil's two-decade-long military dictatorship, claiming that the regime's only mistake

¹²⁸ *Id.*

¹²⁹ See Ernesto Londoño & Shasta Darlington, *Jair Bolsonaro Wins Brazil's Presidency, in a Shift to the Far Right*, N.Y. TIMES (Oct. 28, 2018), <https://www.nytimes.com/2018/10/28/world/americas/jair-bolsonaro-brazil-election.html>.

¹³⁰ *Id.*

¹³¹ Brian Winter, *System Failure: Behind the Rise of Jair Bolsonaro*, AMERICAS Q. (Jan. 24, 2018), <https://www.americasquarterly.org/fulltextarticle/system-failure-behind-the-rise-of-jair-bolsonaro/>.

¹³² *Id.*

¹³³ Dom Phillips, *Brazilian Court Bars Lula From Presidential Election*, GUARDIAN (Sept. 1, 2018), <https://www.theguardian.com/world/2018/sep/01/brazilian-court-bars-lula-from-presidential-election>.

¹³⁴ During his campaign, international media nicknamed Bolsonaro the "Trump of the tropics." See, e.g., Tom Phillips, *Trump of the Tropics: The 'Dangerous' Candidate Leading Brazil's Presidential Race*, GUARDIAN (Apr. 19, 2018), <https://www.theguardian.com/world/2018/apr/19/jair-bolsonaro-brazil-presidential-candidate-trump-parallels>.

was “tortur[ing] political dissidents instead of killing them.”¹³⁵ During legislative sessions, he lauded Colonel Carlos Alberto Ustra, a prominent figure in the military dictatorship’s repression, as a “national hero.”¹³⁶ Moreover, Bolsonaro’s presidential campaign featured recurring attacks on the judiciary and Brazil’s democratic institutions in general. At the time, he advocated for packing the STF with new appointees and expanding the court from eleven to twenty-one justices to, in his words, “change the fate of Brazil.”¹³⁷ He also claimed on multiple occasions that he would “not accept the results of the election if he lost.”¹³⁸

In October of 2018, Bolsonaro was elected the thirty-eighth president of Brazil, stunning international observers and many Brazilians scarred by memories of the dictatorship.¹³⁹ Notably, PT accused the Bolsonaro campaign of benefitting from disseminating fake news about his opponent, Fernando Haddad.¹⁴⁰ The purported fake news campaign was believed to have been bankrolled by business leaders desiring a pro-business, anti-regulation president in office rather than PT’s Haddad, who supported the expansion of the welfare state with more regulations.¹⁴¹ It is estimated that at least 90% of Bolsonaro’s voters were influenced to some degree by fake news, amplified through social media apps like WhatsApp and Telegram.¹⁴²

¹³⁵ *Veja 10 Frases Polêmicas de Bolsonaro Sobre o Golpe de 1964 e a Ditadura*, FOLHA DE SÃO PAULO (Aug. 8, 2019), <https://www1.folha.uol.com.br/poder/2019/03/veja-10-frases-polemicas-de-bolsonaro-sobre-o-golpe-de-1964-e-a-ditadura-militar.shtml> (Port.).

¹³⁶ *Id.*

¹³⁷ *Bolsonaro Quer Aumentar o Número de Ministros do Supremo Tribunal Federal para 21*, PODER 360 (July 2, 2018), <https://www.poder360.com.br/justica/bolsonaro-quer-aumentar-numero-de-ministros-do-stf-para-21/> (Port.).

¹³⁸ André Siqueira, *Em Entrevista, Bolsonaro Reafirma Que Não Aceitará Derrota Nas Urnas*, VEJA (Sept. 28, 2018), <https://veja.abril.com.br/politica/em-entrevista-bolsonaro-reafirma-que-nao-aceitara-derrota-nas-urnas> (Port.).

¹³⁹ Flora Charner, *Far-Right Candidate Jair Bolsonaro wins Presidential Election in Brazil*, CNN WORLD, <https://www.cnn.com/2018/10/28/americas/brazil-election/index.html> (last updated Oct. 29, 2018).

¹⁴⁰ Tom Phillips, *Bolsonaro Business Backers Accused of Illegal Whatsapp Fake News Campaign*, GUARDIAN (Oct. 18, 2018), <https://www.theguardian.com/world/2018/oct/18/brazil-jair-bolsonaro-whatsapp-fake-news-campaign>.

¹⁴¹ *Id.*

¹⁴² *90% dos Eleitores de Bolsonaro Acreditaram em Fake News, Diz Estudo*, FOLHA DE SÃO PAULO (Nov. 2, 2018), <https://www1.folha.uol.com>

In a statement following the election, the Workers' Party claimed that Bolsonaro's backers ran "a coordinated action to criminally influence the election" and called for the federal police to investigate Bolsonaro's "industry of lies."¹⁴³ This worry was also echoed abroad; Laura Chinchilla, president of the Organization of American States, an intergovernmental entity in charge of observing elections across Latin America, claimed that the extent to which WhatsApp and other social media sites were used to spread pro-Bolsonaro fake news during the election season was "without precedent," describing the election as a "misinformation tsunami."¹⁴⁴

B. The STF's Expansion of Powers Through Inquiry 4.781

i. Origins of the Inquiry

After the 2018 election, a segment of the Brazilian population very vocally expressed dissatisfaction with the Supreme Federal Court's performance, particularly concerning its decisions and judicial actions that conflicted with those resulting from Operation Car Wash.¹⁴⁵ This dissatisfaction led to a wave of criticism directed toward ministers and the Court itself.¹⁴⁶ The term "Lavajatismo" emerged to describe this diverse social group, including elements from the media, the national *intelligentsia*, and various other segments of the population.¹⁴⁷ For these individuals, the most debilitating issue facing the country was corruption within the public sector.¹⁴⁸ They believed that institutions, particularly the STF,

.br/poder/2018/11/90-dos-eleitores-de-bolsonaro-acreditaram-em-fake-news-diz-estudo.shtml (Port.).

¹⁴³ *Nota do PT: Caixa 2 de Bolsonaro Financia Indústria de Mentiras nas Redes*, PT, <https://www.pt.org.br/nota-do-pt-caixa-2-de-bolsonaro-financia-industria-de-mentiras-nas-redes/> (Port.).

¹⁴⁴ *How Much Is Fake News Influencing Latin Elections?*, INTER-AM. DIALOGUE (Nov. 6, 2018), <https://www.thedialogue.org/analysis/how-much-is-fake-news-influencing-latin-elections/>.

¹⁴⁵ Matheus Magenta, *O Que é Ser Lavajatista?*, BBC NEWS BRASIL (Sept. 29, 2022), <https://www.bbc.com/portuguese/brasil-62550844> (Port.).

¹⁴⁶ *See id.*

¹⁴⁷ *Id.*

¹⁴⁸ *See* Esther Solano, *O Lavajatismo é Maior do Que a Lava Jato. E Sobre-viverá*, CARTACAPITAL (Mar. 1, 2021), <https://www.cartacapital.com.br/opinioao/o-lavajatismo-e-maior-do-que-a-lava-jato-e-sobrevivera/> (Port.).

Congress, and the political class at large, required a thorough “cleansing” to address the pervasive corruption.¹⁴⁹

In March of 2019, José Antonio Dias Toffoli—at the time the president of the STF—initiated a criminal inquiry into insults against the Court.¹⁵⁰ The inquiry began on the day that the STF was designated to review a fundamental issue relevant to Operation Car Wash: whether crimes associated with electoral campaigns should be tried before the Electoral Court (under the Supreme Court’s jurisdiction) or whether they should be heard by regular trial courts exercising criminal jurisdiction, as the Car Wash prosecutors argued for.¹⁵¹

In a six to five decision, the STF ruled that these cases should be referred to the Electoral Court, dealing a blow to the Car Wash prosecution team’s argument.¹⁵² Before the session, Diogo Castor de Mattos, one of the prosecutors, published a dramatically phrased article claiming that the STF was plotting a “new coup” against Operation Car Wash and that “the electoral justice system historically does not convict or send anyone to prison.”¹⁵³ During the hearing, Toffoli harshly reprimanded Mattos.¹⁵⁴ Toffoli asserted that Mattos’s comments surpassed legitimate criticism of the Court and instead characterized them as defamatory, declaring that such behavior “shall not be tolerated.”¹⁵⁵

On the same day, Toffoli published a one-page order announcing the commencement of *Inquérito 4.781*, later dubbed the “Fake News Inquiry.”¹⁵⁶ The order aimed to investigate individuals accused of disseminating fake news, slander, and defamation against the honor and safety of the Court, its members, and families.¹⁵⁷ Additionally,

¹⁴⁹ *Id.*

¹⁵⁰ *Rocurador Que Enfurece o Supreme Tribunal Federal Pedo para Deixar a Lava Jato*, VEJA (Apr. 6, 2019), <https://veja.abril.com.br/coluna/maquiavel/procurador-que-enfureceu-o-stf-pede-para-deixar-a-lava-jato> (Port.).

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ S.T.F.J., Portaria GP Nº 69 [Order of the President’s Office Nº 69], Relator: Min. Alexandre de Moraes, 14.03.2019, SUPREMO TRIBUNAL FEDERAL JURISPRUDÊNCIA [S.T.F.J.] (Braz.).

¹⁵⁷ *See id.*

Toffoli appointed STF minister Alexandre de Moraes as the inquiry's rapporteur, deviating from the mandatory random selection process of rapporteurs to oversee the Court's cases.¹⁵⁸

To justify the Fake News Inquiry, Toffoli cited Article 42 of the STF's Internal Regulations, which provides that "[i]n case of a violation of criminal law at the premises of the Court, the President will start an investigation, if it involves an authority or person subject to its jurisdiction, or delegate this assignment to another Minister."¹⁵⁹ Despite the supposed attacks on the STF not taking place in the Court's premises—as explicitly required under Article 42—Toffoli later defended his decision by claiming that in the world of modern technology, online attacks do not have to occur physically in the Court to affect the Court and its members.¹⁶⁰ He also interpreted this provision in a way that equates the STF with the ministers themselves, with the result that any attack on the Court would constitute an attack on its ministers.¹⁶¹

ii. Actions taken by the STF under the Fake News Inquiry

The week following the initiation of the inquiry, de Moraes ordered the blocking of all social media accounts that had spread "hate speech" against the Court and the search and seizure of items at the homes in multiple Brazilian states of those in charge of the accounts.¹⁶² On April 16, 2019, the Federal Police launched an operation with search and seizure warrants, collecting cell phones and computers in São Paulo, Goiás, and Brasília under the Fake News Inquiry's jurisdiction.¹⁶³ Additionally, de Moraes ordered the immediate suspension of the X, Facebook, Instagram, and WhatsApp

¹⁵⁸ *Id.*

¹⁵⁹ REGIMENTO INTERNO DO SUPREMO TRIBUNAL FEDERAL [STF INTERNAL REGULATIONS], art. 43 (Braz.), available at <https://www.stf.jus.br/arquivo/cms/legislacaoregimentointerno/anexo/ristf.pdf>.

¹⁶⁰ R.T.R.F., Arguição de Descumprimento de Preceito Fundamental [ADPF] 572 Relator: Edson Fachin, 18.06.2020, 177 Revista do Tribunal Regional Federal [R.T.R.F.] 1, 169.

¹⁶¹ *Id.*

¹⁶² *Alexandre de Moraes Determina Bloqueio de Contas Que Atacam STF*, CONSULTOR JURÍDICO (Mar. 22, 2019, 3:04 PM), <https://www.conjur.com.br/2019-mar-22/alexandre-moraes-manda-bloquear-perfis-atacam-stf/> (Port.).

¹⁶³ *Id.*

accounts of all individuals under investigation prior to the commencement of a trial.¹⁶⁴ Among the targets was retired general Paulo Chagas, a candidate for government of the Federal District in the 2018 elections, who criticized the STF on social media. De Moraes accused Mr. Chagas of “defending the creation of an ad hoc court to judge the STF ministers or even substitute them.”¹⁶⁵

One of the inquiry’s most controversial moves involved the censorship of the magazine *Crusoe* and the news site *O Antagonista*, in April of 2019.¹⁶⁶ At the time, de Moraes ordered both news outlets to remove an article suggesting the possible implication of Dias Toffoli in the Car Wash corruption scandal.¹⁶⁷ Both outlets were subject to a R\$100,000 daily fine if they did not comply with the order.¹⁶⁸ De Moraes justified his decision by citing the Public Ministry’s statement that it did not receive any documentation indicating Toffoli’s involvement in the scandal.¹⁶⁹ This move drew criticism from various civil society organizations, including the Brazilian Bar Association, multiple journalism associations, and even some STF ministers themselves, who denounced it as an infringement on the right to freedom of the press.¹⁷⁰ Subsequently, after the Public Ministry and the STF became “aware of the content of the document,”

¹⁶⁴ *Id.*

¹⁶⁵ *Alexandre de Moraes Manda Bloquear Redes Sociais de 7 Suspeitos de Atacar o STF*, OLHAR DIGITAL (Apr. 14, 2019, 4:51 PM), <https://olhardigital.com.br/2019/04/16/noticias/alexandre-de-moraes-manda-bloquear-redes-sociais-de-7-suspeitos-de-atacar-o-stf/> (Port.).

¹⁶⁶ *Ministro do STF Manda Revista e Site Excluírem Reportagem Que Cita Dias Toffoli*, ESTADO DE MINAS (Apr. 15, 2019, 4:23 PM), https://www.em.com.br/app/noticia/politica/2019/04/15/interna_politica,1046478/ministro-do-stf-manda-revista-e-site-excluirem-reportagem-que-cita-dia.shtml (Port.).

¹⁶⁷ *Id.*

¹⁶⁸ R.T.R.F., Inquérito [INQ] 4781 Relator: Alexandre de Moraes, 13.04.2019, Revista do Tribunal Regional Federal [R.T.R.F.] 1, 3 available at <https://www.estadao.com.br/blogs/blog/wp-content/uploads/sites/41/2019/04/report-26.pdf> (port.).

¹⁶⁹ Camila Bonfim, *Alexandre de Moraes Revoga Decisão Que Censurou Reportagens de ‘Crusoe’ e ‘O Antagonista’*, GLOBO NEWS (Apr. 18, 2019, 5:49 PM), <https://g1.globo.com/politica/noticia/2019/04/18/alexandre-de-moraes-revoga-decisao-que-censurou-reportagens-de-crusoe-e-antagonista.ghtml> (port.).

¹⁷⁰ *See id.*

de Moraes revoked the measure and rejected all accusations of censorship.¹⁷¹

In a subsequent measure in February 2021, de Moraes ordered the arrest of Congressman Daniel Silveira under the authority of the Fake News Inquiry. Silveira had posted videos online insulting and threatening STF ministers, advocating for the dissolution of the Court, and calling for the reinstatement of “AI-5,” regarded as the most oppressive legal measure approved by the military dictatorship that allowed torture of political dissidents.¹⁷² Silveira was sentenced to eight years in prison by the STF for his remarks but was later pardoned by Bolsonaro, a decision that the Court later annulled.¹⁷³

In August 2022, shortly before the presidential election between Lula (who the STF eventually released from prison) and Bolsonaro, de Moraes ordered the search of homes, seizure of phones and passports, blocking of social media accounts, and freezing of bank accounts of eight high-profile businessmen who supported Bolsonaro.¹⁷⁴ This action came after a journalist leaked inflammatory messages exchanged by the businessmen in a private WhatsApp group, including statements indicating their preference for a military coup over Lula’s election.¹⁷⁵ Facing intense scrutiny from Bolsonaro, his allies, and the media, de Moraes later provided additional legal documentation claiming to present evidence of the businessmen’s connections with right-wing operatives disseminating fake news on behalf of Bolsonaro.¹⁷⁶ None of the men in the WhatsApp group were ever arrested, and one year later, de Moraes closed the investigation into all but two of the businessmen.¹⁷⁷

¹⁷¹ *Id.*

¹⁷² Márcio Falcão et al., *Moraes Manda, e PF Prende em Flagrante Deputado Que Defendeu AI-5 e Fechamento do STF*, GLOBONEWS (Feb. 16, 2021, 11:28 PM), <https://g1.globo.com/politica/noticia/2021/02/16/moraes-determina-prisao-imediata-de-deputado-que-fez-video-atacando-ministros-do-stf.ghtml> (port.).

¹⁷³ STF, *STF Tem Maioria Para Anular Indulto ao Ex-Deputado Daniel Silveira* S.T.F.J. (May 04, 2023), <https://portal.stf.jus.br/noticias/verNoticia-Detalhe.asp?idConteudo=506778&ori=1>.

¹⁷⁴ Jack Nicas, *To Defend Democracy, Is Brazil’s Top Court Going Too Far?*, N.Y. TIMES (Sept. 26, 2022), <https://www.nytimes.com/2022/09/26/world/americas/bolsonaro-brazil-supreme-court.html>.

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

¹⁷⁷ Thais Bilensky, *Moraes Arquiva Inquérito Contra Empresários Acusados de Defender Golpe de Estado no WhatsApp*, PIAUÍ (Aug. 21, 2023),

iii. Challenge to the Inquiry: Rede Sustentabilidade's ADPF N° 572 & Results

1. Rede's Arguments

In 2020, the political party *Rede de Sustentabilidade* (“Rede”) filed ADPF Action N° 572 to challenge the Court’s internal regulations used to justify the Fake News Inquiry and the constitutionality of the inquiry itself.¹⁷⁸ In its complaint, Rede likened the Court’s actions to the infamous AI-5, alleging that they “provided tools to freely intimidate anyone who dared to question the moral integrity of the Court’s members, simultaneously acting as judge and litigant.”¹⁷⁹ Additionally, the complaint argued that the Public Ministry was being “unjustifiably pushed away from the criminal investigation.”¹⁸⁰ Lastly, it alleged that the STF’s opening of Inquiry 4.781 violated the 1988 Constitution’s guarantee of due process and its prohibition on convening ad hoc courts, as the party claimed that the STF was violating.¹⁸¹

Furthermore, Rede contended that the conditions outlined in Article 43 of the STF’s Internal Regulations, which grants the STF its internal police powers, were not met.¹⁸² These conditions declare that an incident under investigation must occur *within* the Supreme Federal Court’s premises and involve an authority or individual subject to the court’s jurisdiction.¹⁸³ Rede argued that without meeting such criteria, the responsibility of the investigation should fall within the judicial police’s purview or, if legal action is pursued, to the Public Ministry, in conformity with the adversarial system guaranteed by the Constitution.¹⁸⁴

<https://piaui.folha.uol.com.br/moraes-arquiva-inquerito-contras-empresarios-acusados-de-defender-golpe-de-estado-no-whatsapp/> (port.).

¹⁷⁸ STF, *Medida Cautelar na Arguição de Descumprimento de Preceito Fundamental 572* [Provisional Measure for Claim of Non-Compliance with a Fundamental Precept N° 572] 2 S.T.F.J. (June 17, 2020).

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

¹⁸¹ *Id.*

¹⁸² *Id.*

¹⁸³ *Id.*

¹⁸⁴ STF, *Medida Cautelar na Arguição de Descumprimento de Preceito Fundamental 572*, 2 S.T.F.J. at 2.

Rede further contended that the STF's Fake News Inquiry would violate the foundational principle of separation of powers as contemplated in Article 2 of the Constitution.¹⁸⁵ They asserted that the judiciary does not possess the authority to conduct criminal investigations, except against individuals specified in Article 102—the president, members of Congress, and the Attorney General.¹⁸⁶ Additionally, Rede asserted that the inquisitorial nature of the Fake News Inquiry contradicted both constitutional and international principles advocating for the adversarial system.¹⁸⁷

2. The Supreme Federal Court's Decision

The Court reviewed Rede's petition (ADPF N° 572) in June of 2020. As required for this type of claim, the STF heard the case en banc.¹⁸⁸ By a vote of ten-to-one, the Court rejected the challenge, thereby upholding the constitutionality of the Fake News Inquiry.¹⁸⁹ The decision, authored by Dias Toffoli, stated that the inquiry was an “institutional reaction that became necessary due to the escalation of attacks on the Court” and to decrease the “inertia or complacency of those who should adopt measures to prevent the increase in the number and intensity of such attacks.”¹⁹⁰ In light of the numerous calls to shut down the STF, death threats against its ministers, and publicized disobedience to court rulings, the Court concluded that the Fake News Inquiry was constitutional, based on its valid interpretation of Article 43 of the Court's Internal Regulations.¹⁹¹

Minister Edson Fachin sided with the majority but presented a different reasoning.¹⁹² In his view, the scope of the Fake News Inquiry “should be confined to expressions that indicate a tangible

¹⁸⁵ *Id.*

¹⁸⁶ *Id.*

¹⁸⁷ *Id.*

¹⁸⁸ See *The Case of the Brazil Fake News Inquiry*, COLUM. UNIV. GLOB. FREEDOM OF EXPRESSION, <https://globalfreedomofexpression.columbia.edu/cases/the-case-of-the-brazil-fake-news-inquiry/> (last visited Apr. 18, 2025).

¹⁸⁹ *Id.*

¹⁹⁰ STF, *Medida Cautelar na Arguição de Descumprimento de Preceito Fundamental* 572, 2 S.T.F.J. at 11.

¹⁹¹ *Id.*

¹⁹² STF, *Medida Cautelar na Arguição de Descumprimento de Preceito Fundamental* 572, 2 S.T.F.J. at 52.

threat to the independence of the Judiciary, through threats against its members, thus jeopardizing the established powers, the rule of law, and democracy.”¹⁹³ Fachin based his opinion on three constitutional principles: freedom of speech versus responsibility, the adversarial system, and the principle of the natural judge (only the former two will be discussed).¹⁹⁴

Starting with freedom of expression versus responsibility, Minister Fachin emphasized that disobeying a court order is so grave that it may constitute a crime of responsibility, contingent upon the actor, as per Article 85, VII of the Constitution. Inciting disobedience, suggesting the closure of the Court, or threatening its members also constitutes a crime of responsibility, depending on the actor.¹⁹⁵ However, he underscored the caveat that unconstitutional practices that infringe on fundamental rights, such as freedom of the press and freedom of expression, cannot be shielded.¹⁹⁶ Hence, “the legal framework safeguarding freedom of expression ensures, on one hand, the impossibility of prior censorship, and on the other, the possibility of subsequent civil and criminal liability.”¹⁹⁷

Next, as for the adversarial system, Minister Fachin clarified that the Public Ministry bears responsibility for initiating criminal prosecutions, as outlined in Article 129 § I of the Constitution.¹⁹⁸ However, Fachin argued that Article 4 of Brazil’s Criminal Procedure Code does not grant exclusive authority to the judicial police during the pre-procedural or investigatory phase of a case, which is inquisitorial by nature.¹⁹⁹ Fachin thus concluded that an investigation may indeed be initiated by a branch of government other than the Public Ministry, as provided for by the law.²⁰⁰ He further explained that the exercise of police authority within the purview of the Court

¹⁹³ *Id.*

¹⁹⁴ STF, *Medida Cautelar na Arguição de Descumprimento de Preceito Fundamental* 572, 2 S.T.F.J. at 52.

¹⁹⁵ *Id.* at 14.

¹⁹⁶ *Id.*

¹⁹⁷ *Id.*

¹⁹⁸ *Id.* at 82.

¹⁹⁹ *Id.*

²⁰⁰ STF, *Medida Cautelar na Arguição de Descumprimento de Preceito Fundamental* 572, 2 S.T.F.J. at 82.

emanates from the STF's institutional commitment to maintaining Brazil's constitutional order.²⁰¹

The sole dissenter, Minister Marco Aurélio, argued that “the victim [of a crime] cannot initiate an investigation.”²⁰² Aurélio's dissent emphasized the adversarial nature of Brazil's legal system where, unlike the inquisitorial system, there are sharp boundaries between those who investigate crimes (the police), accuse (the prosecutor), and preside over trials (the judge).²⁰³ To support his point, Minister Aurélio cited Raquel Dodge (Attorney General at the time), who explained this point as follows:

So that the central principle that animates the adversarial system is actually achieved (guaranteeing trials by an impartial and neutral judge), it is not enough that the judge who judges is not the same as the one who accuses, it is also necessary that the judge who judges is not the same one who investigates the facts that, subsequently, appear in the accusation. This is because the judge who investigates is linked – and the emotion is present in all of our lives – even unconsciously, to the results of his investigation, which reduces his ability to evaluate with detachment the accusation later made by another body.²⁰⁴

Thus, Aurélio positioned himself against Inquiry 4.781, concluding that the initial constitutional defect tainted the entire existence of the Court's action.²⁰⁵ However, as mentioned above, the minister's vote was insufficient to grant Rede's request to find the Fake News Inquiry unconstitutional.²⁰⁶

VII. ANALYSIS: ARE THE SUPREME FEDERAL COURT'S ACTIONS CONSTITUTIONAL?

²⁰¹ *Id.*

²⁰² STF, *Medida Cautelar na Arguição de Descumprimento de Preceito Fundamental* 2 S.T.F.J. (June 17, 2020) (Aurélio, J., dissenting).

²⁰³ *See id.*

²⁰⁴ *Id.*

²⁰⁵ *See id.*

²⁰⁶ *Id.*

A. The Supreme Federal Court: Contemporary Brazil's Moderating Power?

i. The Court's Arguments: Acting Out of Necessity to Protect Brazilian Democracy

Many observers in Brazil and around the world have commended the actions of the STF as an effective means of combating disinformation and fake news, particularly concerning elections, which have become a growing concern for democracies worldwide.²⁰⁷ In March 2023, Alexandre de Moraes spoke in a lecture about the Fake News Inquiry and argued that initiating the investigation was “done out of necessity”.²⁰⁸ He emphasized that without the investigation, attacks against the Brazilian judiciary “would have increased exponentially until a point of rupture.”²⁰⁹ According to de Moraes, by the time the inquiry was launched, the Court had sent more than thirty letters to the federal police—then under Bolsonaro’s supervision—reporting insults and attacks against the Court, which had gone largely ignored.²¹⁰

In a February 2020 interview, Minister Toffoli also defended the inquiry’s creation, noting that its opening immediately led to a reduction in acts causing “institutional instability.”²¹¹ He further claimed that “overnight, more than 70% of accounts spreading fake news circulating on social media vanished.”²¹² Toffoli likened the effects of the Fake News Inquiry to “pulling the plug from a computer” and thus halting the dissemination of fake news in Brazil altogether.²¹³

²⁰⁷ See, e.g., Luã Marinatto, *Inquérito das Fake News Ultrapassa Cem Perfis Bloqueados em Quatro Anos e Vira ‘Arma Política’ de Governo e Oposição*, O GLOBO (Apr. 13, 2023), <https://oglobo.globo.com/politica/noticia/2023/04/inquerito-das-fake-news-ultrapassa-cem-perfis-bloqueados-em-quatro-anos-e-vira-arma-politica-de-governo-e-oposicao.ghml>.

²⁰⁸ *Id.*

²⁰⁹ *Id.*

²¹⁰ *Id.*

²¹¹ “*Para País Dar Certo, Instituições Têm Que Dialogar. Criminalizar Isso é Absurdo*”, CONJUR (Feb. 9, 2020), <https://www.conjur.com.br/2020-fev-09/entrevista-jose-antonio-dias-toffoli-presidente-stf/>.

²¹² *Id.*

²¹³ *Id.*

Moreover, since the initiation of the Court's Inquiry, other key actors in Brazil's democratic sphere have mobilized to combat the spread of fake news. The Superior Electoral Court's ("TSE") efforts are a notable example.²¹⁴ In 2022, the TSE passed Resolution 23.714, prohibiting the "dissemination or exchange of facts known to be false or seriously decontextualized that affect the integrity of the electoral process, including the voting, counting and vote counting processes."²¹⁵ This resolution also empowers the president of the TSE to extend decisions to remove disinformation from identical republished content.²¹⁶ This demonstrates an effort from other institutions to take the concentration of power away from the STF in the fight against fake news and potentially provide grounds for redress beyond the criminal prosecution context.²¹⁷

The indictment of former president Bolsonaro for allegedly plotting a coup against Lula, current president in 2022, has further justified the Court's actions in the eyes of its supporters. Following President Lula's release from prison in 2021, he ran for president in the 2022 election against Bolsonaro, the incumbent.²¹⁸ Echoing former President Trump's strategy in the 2020 U.S. presidential election, in the months leading up to the Brazilian election, Bolsonaro spread numerous unsubstantiated claims of voter fraud and warned that the election would be stolen from him, without any proof.²¹⁹ In late 2022, Bolsonaro lost the election to Lula by a razor-thin margin.²²⁰ Early the following year, shortly after Lula's inauguration, a

²¹⁴ See generally T.S.E.J., Resolução No. 23714 Relator: Alexandre de Moraes 20.10.2022, 213 Tribunal Superior Eleitoral Jurisprudência [T.S.E.J.] 24/10/2022, 1 (Braz.).

²¹⁵ See *id.*

²¹⁶ *Id.*

²¹⁷ See *id.*

²¹⁸ Tom Phillips, *Brazil: Lula Has Convictions Quashed, Leaving Him Free to Challenge Bolsonaro*, GUARDIAN (Mar. 8, 2021), <https://www.theguardian.com/world/2021/mar/08/lula-convictions-annulled-by-brazil-judge-bolsonaro-election-2022>.

²¹⁹ Shannon Bond, *Brazilians are About to Vote. And They're Dealing with Familiar Viral Election Lies*, NPR (Sep. 27, 2022), <https://www.npr.org/2022/09/27/1124835910/2022-brazil-election-presidential-disinformation>.

²²⁰ See Vanessa Buschschlüter, *Brazil Election: Lula Makes Stunning Comeback*, BBC NEWS (Oct. 31, 2022), <https://www.bbc.com/news/world-latin-america-63451470>.

group of 2,000 Bolsonaro supporters stormed the halls of Congress, the Supreme Federal Court, and the Palácio da Alvorada (the official residence of the Brazilian president) to protest Lula assuming office.²²¹ Following a years-long investigation, in November of 2024, Bolsonaro was indicted by the federal police, alongside dozens of other members of his inner circle, for the crimes of plotting a coup d'état, violent abolition of the democratic rule of law, and the criminal organization to overthrow President Lula and oust several STF members, notably Alexandre de Moraes.²²² For many, the STF's aggressive stance and zero-tolerance approach to disinformation served as a guardrail against Bolsonaro's worst impulses and enabled investigations to take place that led to his indictment.²²³ Following Bolsonaro's indictment, former STF minister Celso Mello claimed that despite getting dangerously close to a military coup, "the Brazilian state, thanks to its brave public servants, loyal to the democratic order and faithful to the Constitution, knew how to investigate [in a lawful manner] these enemies of democracy."²²⁴ Actions such as the Fake News Inquiry have contributed to the STF's hardline stance against anti-democratic actions and potential crimes committed by Bolsonaro and those working closest to him.

Comparisons have been drawn between the STF's zero-tolerance approach to fake news and insurgency and the United States Supreme Court's comparatively lackadaisical stance when dealing with the same issue.²²⁵ This became apparent when both countries—the largest democracies in the Americas—dealt with an increasing amount of disinformation during election cycles, culminating in

²²¹ See Ricardo Brito, *Brazil Marks Anniversary of Jan. 8 Attack on Democracy*, REUTERS (Jan. 8, 2024, 4:29 PM), <https://www.reuters.com/world/americas/brazil-mark-anniversary-january-8-attack-democracy-2024-01-08/>.

²²² See Gabriela Sá Pessoa, *Brazilian Police Formally Accuse Former President Bolsonaro and Aides of Alleged 2022 Coup Attempt*, AP NEWS (Nov. 22, 2024, 4:07 p.m.), <https://apnews.com/article/brazil-jair-bolsonaro-indictment-0d62fe0a7399483aee48cf3c845560ea>.

²²³ See *Estado Brasileiro está Preparado Para Enfrentar Ameaças de Ruptura, Afirma Celso de Mello*, CONSULTOR JURÍDICO, (Nov. 21, 2024, 8:43 PM), <https://www.conjur.com.br/2024-nov-21/estado-brasileiro-esta-preparado-para-enfrentar-ameacas-de-ruptura-diz-celso-de-mello/>.

²²⁴ See *id.*

²²⁵ See, e.g., Ishaan Tharoor, *After insurrections, the U.S. and Brazil Went Down Very Different Paths*, WASH. POST (Jan. 6, 2025), <https://www.washingtonpost.com/world/2025/01/06/us-brazil-insurrection-jan6/>.

respective attacks on their capitols following the loss of the incumbent, conservative president.²²⁶ Some argue that the United States could take guidance from Brazil, particularly given the similar attacks (both physical through the respective riots, and through fake news) on the democratic institutions of both countries following the loss of right-leaning incumbent presidents.²²⁷

ii. Brazil's Judiciary: An Increasingly Dominant Role in Brazilian Society

The STF's creation of the Fake News Inquiry also fits into a broader trend observed in Brazil since its redemocratization—the increasingly dominant role of the judiciary in the political realm. This trend has been coined as the “judicialization of politics.”²²⁸ This term refers to an increasingly active intervention of the judiciary within modern states, abandoning the supposed political “neutrality” contemplated by traditional tripartite theories of government, as well as the increased usage of courts to vindicate political and social rights.²²⁹ This term has also been frequently employed to describe the increasingly central role enjoyed by the STF since the country's redemocratization in 1985.²³⁰

As discussed in previous sections, before the fall of the last military dictatorship, most of the political power in Brazil was traditionally concentrated in the executive branch over the legislative and

²²⁶ *Id.*

²²⁷ See Jack Nicas, *Two Capital Riots. Two Very Different Results*, N.Y. TIMES (Jan. 8, 2024), <https://www.nytimes.com/2024/01/08/world/americas/brazil-us-capitol-riots.html>.

²²⁸ See, e.g., Guilherme Sandoval Góes, *Ativismo Judicial, Judicialização da Política e Politização da Justiça no Estado de Direito Contemporâneo*, 88 REVISTA DO MINISTÉRIO PÚBLICO DO ESTADO DO RIO DE JANEIRO 193 (2023).

²²⁹ See generally Eduardo Meira Zauli, *Judicialização da política, Poder Judiciário e Comissões Parlamentares de Inquérito no Brasil*, 47 REVISTA DE INFORMAÇÃO LEGISLATIVA 7, 22 (2010).

²³⁰ See, e.g., Leandro Molhano Ribeiro & Diego Werneck Arguelhes, *Contextos da Judicialização da Política: Novos Elementos para um Mapa Teórico*, 15 REVISTA DIREITO GV 2, 5 (2019). For more context on this concept, one could argue, for example, that the process of judicialization of politics in the United States began with the decision of *Marbury v. Madison* in 1803, when the Supreme Court granted itself the power of reviewing the constitutionality of executive and legislative actions.

judiciary.²³¹ The expansion of power by the judiciary has been credited, in large part, to the great number of civil and social rights guaranteed by the 1988 Constitution and the various enforcement mechanisms that come with them.²³² When the executive and legislative branches fail to ensure those constitutionally guaranteed rights, the federal judiciary provides grounds for redress through direct actions of unconstitutionality and other enforcement mechanisms.²³³ The STF's judicial review through Direct Actions of Unconstitutionality provides a framework to analyze the judicialization of politics in Brazil.²³⁴ The losers within the majority institutions—namely, the executive and legislative branches—bring lawsuits under the Direct Actions to essentially transfer normative decisions to the judiciary.²³⁵ This positions the constitutional tool as a mechanism for the Court to either sanction or disavow congressional acts or executive orders being challenged by opposing parties.²³⁶

Additionally, the 1988 Constitution granted jurisdiction to federal courts, particularly the STF, that they did not possess before. Accordingly, in recent decades, the STF and federal courts have enjoyed more influence in the Brazilian political sphere.²³⁷ The judiciary's influence is so palpable that in 2021, at the 9th Judicial Forum of Lisbon, STF Minister Dias Toffoli boldly proclaimed that the STF serves as modern-day Brazil's "moderating power," the extinct fourth branch of government from Brazil's imperial days.²³⁸ Advocates of the STF's actions assert that the Court stepped in due to the perceived ineffectiveness and inertia of the Public Ministry's Attorney General at the time, Raquel Dodge.²³⁹ Indeed, viewed from this perspective, those in defense of the Fake News Inquiry may argue that the STF is merely fulfilling its role as guardian of Brazil's

²³¹ See *supra* Section II.B.ii.

²³² See *id.*

²³³ See Leandro Molhano Ribeiro & Diego Werneck Arguelhes, *supra* note 230.

²³⁴ *Id.*

²³⁵ *Id.*

²³⁶ *Id.*

²³⁷ *Id.*

²³⁸ IDP, *IX Fórum Jurídico Brasileiro – 16/11 – Auditório* [IX Brazilian Legal Forum - 11/16 - Auditorium], YOUTUBE at 3:28:22 (Nov. 16, 2021), <https://www.youtube.com/watch?v=sXso93sW7c4>.

²³⁹ See Marinatto, *supra* note 207.

Constitution as the present day moderating power where both the executive and legislative branches have become ineffective in combating the increasingly widespread challenges of misinformation and assaults on democracy.

Finally, legal commentators in Brazil suggest that it is in the nature of the jurisdictional power to determine its own limit, a concept known as *Kompetenz-Kompetenz*, of German origin. Under this view, the STF, the greatest interpreter of the Constitution, decided to grant itself the competence, or jurisdiction, to initiate the inquiry.²⁴⁰ Dias Toffoli, discussing the scope of the Fake News Inquiry in an interview, went so far as to claim that “the Federal Supreme Court was created to be the heir of the moderating power.”²⁴¹

B. A Critical Look at the Fake News Inquiry

i. Separation of Powers Concerns

The Fake News Inquiry was created with the goal of investigating fake news, threats, and slander against the reputation and safety of the STF, its ministers, and their respective family members.²⁴² It was initiated under Article 43 of the STF’s Internal Regulations, which authorizes the Court’s president to open a police investigation in cases involving crimes at the Court’s headquarters or premises, particularly if it involves an authority or person subject to its jurisdiction.²⁴³ Minister Alexandre de Moraes was immediately appointed to lead the investigation as the *rapporteur*, bypassing the random draw required by the Internal Regulations.²⁴⁴

²⁴⁰ See Eugênio Aragão, Opinion, *A competência do STF O Presidente do Supremo e o Ministro Alexandre de Moraes Agiram em Função da Inoperância da PGR*, *O GLOBO* (Apr. 2, 2023), <https://oglobo.globo.com/opiniaio/artigos/coluna/2023/02/a-competencia-do-stf.ghtml>.

²⁴¹ *Supremo e Judiciário Atuam Como “Editores” do País*, *Diz Dias Toffoli*, *CONSULTOR JURÍDICO* (July 28, 2020), <https://www.conjur.com.br/2020-jul-28/dias-toffoli-stf-nao-abandonar-combate-fake-news/>. For a discussion on the historic role of the moderating power in Brazil, see *supra* Section II.A.ii of this note.

²⁴² See *supra* Section III.B.i.

²⁴³ *Id.*

²⁴⁴ See S.T.F.J., Portaria GP Nº 69 [Order of the President’s Office Nº 69], Relator: Min. Alexandre de Moraes, 14.03.2019, SUPREMO TRIBUNAL FEDERAL JURISPRUDÊNCIA [S.T.F.J.] (Braz.).

The 1988 Constitution established the adversarial model as Brazil's procedural system in the criminal arena, where investigating, accusing, defending, and judging are distinct and separate functions.²⁴⁵ This model underscores the importance of impartiality and independence inherent in the judicial process.²⁴⁶ It thus precludes a judge who is a victim of a possible criminal offense from participating in the case, as they have a direct interest in the matter, which constitutes a reason for disqualification under Brazil's Code of Criminal Procedure.²⁴⁷

In the adversarial system, the function of investigation is entrusted to the federal police, while the function of accusation is entrusted to the Public Ministry.²⁴⁸ The latter is responsible for initiating public criminal action, with its institutional function being to promote it independently.²⁴⁹ When a judge assumes the powers to investigate, accuse, and adjudicate, the system deviates from an adversarial to an inquisitorial one, which is incompatible with the 1988 Constitution and the expressed intent by Congress through the passage of the Code of Criminal Procedure.

Moreover, Article 43 of the Court's internal regulations grants the STF the authority to establish a police investigation.²⁵⁰ This investigative activity is inherently at odds with the judge's role in the adversarial system, without the participation of the Public Ministry. Even if the provision is considered constitutional, it is essential to examine whether the requirements for its establishment were properly observed and detailed by the then-president of the STF, Minister Dias Toffoli, when he issued Ordinance N° 69 in March of 2019.²⁵¹ The criteria include the infraction of criminal law at the Court's headquarters or premises involving an authority or person

²⁴⁵ See *supra* Section II.A.iii.

²⁴⁶ *Id.*

²⁴⁷ See CÓDIGO DE PROCESSO PENAL [C.P.P.] [CRIMINAL PROCEDURE CODE] art. 252 § 4.

²⁴⁸ See *supra* Section II.A.iii.

²⁴⁹ *Id.*

²⁵⁰ See STF INTERNAL REGULATIONS, art. 43 (Braz.).

²⁵¹ See S.T.F.J., Portaria GP N° 69 [Order of the President's Office N° 69], Relator: Min. Alexandre de Moraes, 14.03.2019, SUPREMO TRIBUNAL FEDERAL JURISPRUDÊNCIA [S.T.F.J.] (Braz.)

subject to its jurisdiction (which, as discussed above, are enumerated in Article 102 of the Constitution).²⁵²

It is abundantly clear that Article 43 of the Internal Regulations was never properly balanced with the Constitution of 1988 through amendment. As per the criminal process contemplated by the Brazilian Constitution, investigative activity cannot be initiated spontaneously by a judge if such authority has not been specifically outlined in the constitution itself.²⁵³ In the adversarial system, the judge must maintain distance from prosecutorial functions to preserve impartiality and can only intervene in a criminal prosecution in order to ensure compliance with individual rights and guarantees.²⁵⁴ Investigative measures must be initiated by the Public Ministry, which holds jurisdiction over all criminal matters not granted to the STF, per the Constitution.²⁵⁵

In fact, the Supreme Federal Court's own case law reflects this understanding, as it has already declared the unconstitutionality of the provision of the Internal Regulations of the Supreme Court of Bahia (a state in northeastern Brazil), which excluded the participation of the state's Public Ministry in a criminal investigation opened by that court itself.²⁵⁶ Less than one year before launching the Fake News Inquiry, the STF issued an opinion for the Direct Action for Unconstitutionality Nº 4.693, brought by the Attorney General against the state of Bahia's Supreme Court's own internal regulations, which allowed the court to open inquiries *sua sponte* for crimes committed by its own members.²⁵⁷

In its opinion, authored by Minister de Moraes, the STF reaffirmed the Constitutional principle that "the adversarial system constitutionally enshrines the exclusive ownership of the criminal action to the Public Ministry's Office . . . who is responsible for

²⁵² See STF INTERNAL REGULATIONS, art. 21 (Braz.).

²⁵³ See generally CÓDIGO DE PROCESSO PENAL [C.P.P.] [CRIMINAL PROCEDURE CODE] (calling for an adversarial model of criminal justice).

²⁵⁴ See DeBarba, *supra* note 71.

²⁵⁵ CONSTITUIÇÃO DA REPÚBLICA FEDERATIVA DO BRASIL art. 127 (1988) *translated in* Keith S. Rosenn, *Brazil 1988 (rev. 2017)*, CONSTITUTE, https://www.constituteproject.org/constitution/Brazil_2017.

²⁵⁶ See S.T.F.J., Ação Direta de Inconstitucionalidade [ADI] Nº 4.693 Relator: Alexandre de Moraes, 11.10.2018, Supremo Tribunal Federal Jurisprudência [R.T.R.F.] 1, 3 (port.).

²⁵⁷ *Id.*

deciding whether to offer a complaint or request to archive the investigation or pieces of information, and it is the Judiciary's duty to exercise the 'judicial supervision activity . . . ceasing any and all illegal coercion on the part of the accusing State.'"²⁵⁸ The STF went on to find the Bahia Supreme Court's internal regulations "flagrantly unconstitutional" for "excluding the participation of the Public Ministry in the investigation and the decision of halting the investigation."²⁵⁹

When considering the manner in which the STF created the Fake News Inquiry, it is puzzling that the Court did not extend the same legal reasoning to Article 43 of its Internal Regulations. This provision confoundingly grants the president of the Court the authority to initiate a police investigation on its own volition—which is entirely outside the framework of criminal procedural legislation and the Constitution itself.²⁶⁰ The situation becomes even more concerning, as on April 16, 2019, Minister Alexandre de Moraes, the rapporteur, dismissed the request for archiving made by then-Attorney General, Raquel Dodge.²⁶¹ Moraes argued that the request was too general, rendering it unconstitutional and legally invalid.²⁶²

At this time, it becomes abundantly clear that the STF is not conforming to the neutral and detached role of a magistrate that oversees criminal proceedings to safeguard fundamental rights, as contemplated by the Constitution of 1988. Instead, extrajudicial actions like the Fake News Inquiry, have encroached upon the specific functions of the prosecutorial body, which is in clear defiance of the adversarial system and the Court's own established jurisprudence. All of this is based on a provision outlined in the Internal Regulations, published before the Constitution of 1988 went into effect, ultimately never being adopted into the Constitution.²⁶³ As a result, one of the hallmarks of a healthy democracy—the separation of powers—is beginning to lose its meaning when the judiciary takes on the role of the Public Ministry to investigate and prosecute alleged crimes.

²⁵⁸ *Id.* at 1.

²⁵⁹ *Id.*

²⁶⁰ STF INTERNAL REGULATIONS, art. 43 (Braz.).

²⁶¹ *See* Supremo Tribunal Federal (STF), Decisão que nega a suspensão do Inquérito nº 4.781 (Braz.).

²⁶² *See id.*

²⁶³ *See generally* STF INTERNAL REGULATIONS (Braz.).

ii. Weaponization & Delegitimization of the Brazilian Judiciary

While some advocate for the Fake News Inquiry as a safeguard for Brazil's democratic institutions, there is growing concern that the STF's newfound authority could pave the way for the weaponization of the judiciary.²⁶⁴ There is apprehension that the Inquiry is already being exploited to target political adversaries, potentially transforming Brazil's judiciary into a tool for political suppression.²⁶⁵ Since its inception, the Fake News Inquiry has resulted in the suspension of more than one hundred social media profiles and dozens of arrests, almost exclusively against Bolsonaro-aligned politicians, including sitting Congress members.²⁶⁶

In March of 2024, Flávio Dino, President Lula's Minister of Justice, petitioned the Court to include Deltan Dallagnol, a congressman who previously served as a lead prosecutor in Operation Car Wash, as an investigation target for falsely claiming that he visited a *favela* in Rio de Janeiro out of connections to drug trafficking groups.²⁶⁷ Merely four days later, in response, Senator Rogério Marinho, who had served as a minister in the Bolsonaro administration, petitioned the STF to include Lula as a target of the investigation due to Lula's unfounded accusation that a federal judge had "set up" a police operation that foiled a plan by the country's largest drug-trafficking gang to have him killed.²⁶⁸

²⁶⁴ See, *Juristas Ouvidos Pelo CCJ Criticam Inquerito das Fake News no STF* [Jurist Heard by the CCJ Criticize the Fake News Investigation at the STF], CAMARA DOS DEPUTADOS (May 12, 2024), <https://www.camara.leg.br/noticias/1118465-juristas-ouvidos-pela-ccj-criticam-inquerito-das> (Port.). For instance, in May of 2024, the Brazilian Chamber of Deputies (lower house of Congress) held a hearing in which numerous jurists expressed concern about the STF's continued prosecution of individuals via the Fake News Inquiry. *Id.*

²⁶⁵ See *id.*

²⁶⁶ See Galf, *supra* note 12.

²⁶⁷ *Dino Pedu ao STF a Inclusão de Deltan no Inquérito Das Fake News Ministro Diz Que Deputado Vinculou Ida à Maré a Uma Suposta Relação Com o Crime Organizado*, O GLOBO (Apr. 05, 2023), <https://oglobo.globo.com/politica/noticia/2023/04/dino-pede-ao-stf-a-inclusao-de-deltan-no-inquerito-das-fake-news.ghtml> (Port.).

²⁶⁸ *Líder da Oposição no Senado Pedu Para Que STF Inclua Lula no Inquérito das Fake News Rogério Marinho Apresentou Queixa Crime Contra Presidente por Declaração de Que Plano de Facção para Atacar Moro era "Armação" do Ex-Juiz*, O GLOBO (Mar. 24, 2023), <https://oglobo.globo.com/politica/>

According to a study conducted by the nonprofit “Democracy Institute,” Brazilians’ confidence in the judiciary has diminished to an all-time low since the initiation of the Fake News Inquiry. As of September 2023, only 14% of respondents declared having “full faith” in the Brazilian Supreme Court, while 36% declared having “no faith at all.”²⁶⁹ The Supreme Court and the Superior Electoral Tribunal were the institutions that saw the most decline in the public’s confidence for them between the years 2022 and 2023.²⁷⁰ This decline in confidence could be due to the large audience that Bolsonaro and his allies’ discourse reaches when they seek to delegitimize the judiciary.²⁷¹ However, it could also stem from public disapproval of the Fake News Inquiry and the judiciary’s expanded influence across Brazilian society.

A critical point of concern surrounding the Fake News Inquiry is that by maintaining it, the STF is arguably engaging in a prior restriction of otherwise free speech, a fundamental right guaranteed by the Constitution of 1988.²⁷² As discussed in previous sections, the STF has, through the inquiry, routinely ordered the removal of online publications before any adjudication of whether such publications consist of defamation or fake news.²⁷³ Such was the case with the article in the magazine *Crusoe*, an action which the Court later backtracked.²⁷⁴ Actions such as these have led to fierce criticism from different sectors of the Brazilian population, including sitting members of the Senate.²⁷⁵ For example, in early 2024,

noticia/2023/03/lider-da-oposicao-no-senado-pede-para-que-stf-inclua-lula-no-inquerito-das-fake-news.ghtml (Port.).

²⁶⁹ Nicolas Ivory, *Partidos, Congresso, Igrejas, STF: O Quanto o Brasileiro Confia Nessas e em Outras Instituições?*

Órgãos do Poder Judiciário e Forças Armadas Perderam Prestígio Desde o Ano Passado, Aponta Pesquisa ‘A Cara da Democracia,’ O GLOBO (13 Sept. 2023), <https://oglobo.globo.com/blogs/pulso/post/2023/09/partidos-congresso-igrejas-stf-o-quanto-o-brasileiro-confia-nessas-e-em-outras-instituicoes.ghtml> (Port.).

²⁷⁰ *Id.*

²⁷¹ *Id.*

²⁷² See CONSTITUIÇÃO DA REPÚBLICA FEDERATIVA DO BRASIL art. 5, § 9 (1988) translated in Keith S. Rosenn, *Brazil 1988 (rev. 2017)*, CONSTITUTE, https://www.constituteproject.org/constitution/Brazil_2017.

²⁷³ See *supra* Section III.B.i–ii.

²⁷⁴ See *id.*

²⁷⁵ Agência Senado, *Girão: Após Cinco Anos, Inquérito “do fim do Mundo” Gerou Censura e Caos Institucional*, SENADONOTICIAS (Mar. 21, 2024),

Senator Eduardo Girao denounced the continued existence of the inquiry, claiming that “for the past five years, Brazil has suffered a festival of abuses, including the persecution of public servants.”²⁷⁶

VI. CONCLUSION

The election of Jair Bolsonaro in 2018 signaled a shift in Brazilian society and desire for change by the population following years of systemic corruption by the political class. In an increasingly digital world, Bolsonaro’s election was accompanied by the rampant spread of fake news and attacks on institutions, making the need for robust protections against disinformation more necessary than ever. Viewing inaction from other branches of government, Brazil’s Supreme Federal Court took it upon itself to address the spread of disinformation and protect democracy.

Indeed, the STF, the highest court of Brazil’s federal judiciary, bears the responsibility of interpreting the Constitution and ensuring that the country’s laws and policies respect individual rights guaranteed by the Constitution.²⁷⁷ However, in recent years, the STF has taken an increasingly heavy-handed approach when dealing with constitutional issues that often appear political in nature. In many respects, the judiciary’s increased presence as the final arbiter of both political and legal questions evinces the shortcomings of the executive and legislative branches, which have traditionally played a more central role in the Brazilian legal-political setup and are now in a more secondary position.

Nonetheless, when the judiciary takes the role of other branches of government for the sake of democracy, it can paradoxically undermine democracy itself. Following its redemocratization in the 1980s, Brazil embraced the adversarial system in its Constitution and application of laws, with the goal of safeguarding the rights of the accused to a robust defense while upholding fundamental legal principles of fairness and impartiality.²⁷⁸ This approach sets a precedent for the current criminal trial structure, ensuring an impartial

<https://www12.senado.leg.br/noticias/materias/2024/03/21/girao-apos-cinco-ano-inquerito-das-fake-news-gerou-censura-e-caos-institucional>.

²⁷⁶ *Id.*

²⁷⁷ *See generally supra* Section II.B.

²⁷⁸ *See supra* Section II.A.iii.

process respecting the distinct roles of each party—prosecution and defense—while avoiding the involvement of an inquisitorial judge.²⁷⁹

Upon examining the jurisdiction bestowed upon the STF by both the Constitution and subsequent legislation, glaring defects in the Fake News Inquiry come to light. Specifically, Article 43 of the STF's Internal Regulations and its lack of alignment with the 1988 Constitution render the establishment of the investigation unconstitutional. Even if it were deemed constitutional, Article 43 clearly states that the STF is tasked with probing crimes committed within its premises—criteria not met in this case, as the alleged offenses against ministers occurred on social media platforms, well outside the physical confines of the Court.²⁸⁰

Moreover, the initiation of the Fake News Inquiry by the STF to probe crimes against its own members blurs the lines of Brazil's procedural identity, effectively introducing the role of an inquisitorial judge. This is a departure from the adversarial system endorsed by the Constitution. By assuming the roles of victim, accuser, judge, and defender simultaneously, the STF compromises judicial impartiality. Consequently, the decisions stemming from this inquiry are rife with illegality, arbitrariness, partiality, and censorship. This is reminiscent of darker periods in Brazilian history when democratic principles were undermined and the pursuit of justice rested in the hands of one single branch of government.

While Congress largely supported the STF's power grab during the Bolsonaro presidency with the intention of protecting Brazil's fragile democracy, the Court's self-granted powers can now be used against anyone who speaks up against it. Today, the Fake News Inquiry remains open, more than six years since its launch in 2019. With Bolsonaro rendered ineligible as a result of his attempt to overturn the 2022 election, the STF has, for many, fulfilled its purpose in safeguarding democracy and preventing a coup during his term.²⁸¹

²⁷⁹ See *id.*

²⁸⁰ See CONSTITUIÇÃO DA REPÚBLICA FEDERATIVA DO BRASIL art. 5, § 9 (1988) translated in Keith S. Rosenn, *Brazil 1988 (rev. 2017)*, CONSTITUTE, https://www.constituteproject.org/constitution/Brazil_2017; STF INTERNAL REGULATIONS, art. 43 (Braz.).

²⁸¹ See Mauricio Savarese, *Brazil's Jair Bolsonaro is Ineligible From Running for Office Until 2030*, A.P. NEWS (June 30, 2023),

The maintenance of this inquiry at the Court's discretion puts civil liberties, such as freedom of speech, at risk, reminiscent in many respects of the dictatorship that Brazilian citizens fought so hard to break free from in the late twentieth century.