

Potential Legal Immunity in Corruption Charges Against Brazil's Former President

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Millions of Brazilians are furious that former President Luiz Inácio Lula da Silva began as President Dilma Rousseff's new Chief of Staff on March 17 despite his being detained for questioning this month for alleged involvement in the colossal Petrobras corruption scandal. Yesterday morning wire-taped conversations between President Rousseff and Lula were released. Additionally, several judges including federal Judge Itagiba Catta Preta Neto, in Brasilia, temporarily suspended Lula's nomination, arguing that it presents a risk against continuing investigations against the former president. Government officials including Attorney General José Eduardo Cardozo appealed the suspension. Some say the judges have no legal competence to suspend the nomination, contending that the Supreme Court is the only federal institution that can do so and is currently reviewing Lula's nomination.¹

Word of Lula's appointment came amid mass protests demanding Rousseff's impeachment as president, which began March 13. The protests have been against Rousseff, Lula, and their Worker's Party (PT).² On March 16, Lula officially accepted a Ministry post in Rousseff's administration,³ attempting either to somehow spare the PT⁴ or to shield himself from the current corruption allegations by federal Judge Sergio Moro.⁵ Lula's statement from 1984, "In Brazil, when a poor man steals, he goes to jail, but when a rich man steals, he becomes a minister," has come back to haunt him in social media.

Rousseff previously offered the ex-president a Ministry post in 2015 and again earlier this month, which Lula declined both times.⁶ It seemed unlikely that he would accept an appointment now because of reports of his alleged deep involvement in what is considered not just Brazil's largest corruption scandal, but the largest corruption scandal ever in any democracy. All eyes now are on Brasilia as Lula enters a new post and thus can no longer be charged by Judge Sergio, the official responsible for the Operation *Lava Jato* investigation. Lula's investigation can now be carried only out by the Supreme Court due to the judicial right known as *foro privilegiado*, or privileged forum.⁷ On the evening of March 16, following reports of Lula's prevalent announcement, Brazilians had already begun expressing massive discontent through protests, which are planned to continue throughout the upcoming weekend.⁸

What is 'Foro Privilegiado'?

As defined in Article 102 in Brazil's 1988 Constitution⁹ enacted following the military dictatorship, *foro privilegiado* is a status given to public officials stating that only the Supreme Court has the authority to prosecute criminal actions against certain compromised public officials.¹⁰ According to the article, high-level government officials such as the president, vice-

president, members of the National Congress, government ministers, and the attorney general of the Republic can be prosecuted only by the Supreme Court.¹¹ Initially established as a way to hold those in high government positions accountable, the entitlement is now being used as a buffer to peremptorily delay any prosecution of allegedly corrupt public officials, since they can only be prosecuted by the Supreme Court.¹²

It is now necessary to raise questions regarding the application of *foro privilegiado* and how such a rule can be abused not only to shield a former president but to delay trials of other public officials in the enormous corruption case.¹³ Those who favor maintaining the rule believe that the Supreme Court should directly judge politicians because it streamlines a process that otherwise could take years to consummate. On the other hand, opponents argue that the status is used to benefit allegedly corrupt politicians because trials before the Supreme Court can extend on for years, as Brazil has seen in previous cases such as Mensalão.¹⁴ Due to the high number of allegedly corrupt officials, the Supreme Court is overloaded with potential indictments and many corrupt public officials have managed to remain in office unpunished.¹⁵

Motives Behind Offering Lula a Ministry Post

Now that Lula has assumed a ministry post, Judge Moro can no longer carry out his current Operation *Lava Jato* investigation against him.¹⁶ Only the Supreme Court may move forward on the corruption accusations against the former president,¹⁷ which to many seems like a step back considering Lula's detainment on March 4 marked an unprecedented step since the initiation of the process two years ago.¹⁸

According to President Rousseff, shielding Lula from the corruption investigations was not the main reason behind her mentor's appointment as a Minister: "Lula's arrival in my government strengthens it and there are people who don't want it to be stronger," she said.¹⁹ There are hopes that because the former president will now project a more prominent presence in Brasilia, he can play a crucial role in blocking the current impeachment process²⁰ that was revived after mass protests this past weekend.²¹ Additionally, his partisans hope that if Lula is present on a daily basis in Brasilia, he can collaborate with the PT's most important working ally, the Brazilian Democratic Movement Party, or PMDB. This is seen as a strategic plan to avoid a possible end to the PT/PMDB alliance with the PT. Such a termination was discussed at the PMDB's latest convention on March 12.²²

Lula is not the only public official facing corruption charges or that is temporarily shielded by *foro privilegiado*. Eduardo Cunha, current president of the Chamber of Deputies, was also declared a suspect in operation *Lava Jato* but remains in office as investigations continue.²³ This also could be the case for Renan Calheiros, current president of the Senate, who was cited in plea bargains in *Lava Jato*,²⁴ but continues to be a Senator since the corruption scandals were entered dating back to 2007.²⁵ Nearly one-third of the 594 members of the Brazilian Congress, including the leaders of the lower house and the Senate, are under scrutiny before the court over claims of violating existing laws.²⁶

Uncertainty for Brazil

While investigations advanced, they sometimes demonstrated the seriousness of having to hold even the highest public officials accountable, those possibly including the former president. Lula's detainment for questioning showed that not even a charismatic former president with a positive legacy could escape scrutiny for alleged involvement in the Petrobras corruption scandal. Additionally, the trial of so many high-level private-sector individuals and a variety of public officials in the *Lava Jato* investigations should demonstrate that the rule of law is alive and functioning in Brazil. Additionally, business figures like Marcelo Odebrecht, head of the diversified Brazilian conglomerate bearing his name, are not able to be shielded from corruption charges as their cases continue.

While business leaders are not able to escape corruption allegations, public officials are not being fully tried because of an overload of cases within the Supreme Court system. The answers to many of the questions being raised in Brazil's current political crisis can only begin to have answers as these cases further develop over time. One question that remains is what role has corruption played and will continue to play in Latin America's largest democracy.

Many high level politicians, either allies or opponents of the current administration, keep asserting that they are clean and would never engage in corrupt actions. Yet as the finger-pointing continues, all actors in this mega-scandal are blameworthy for having been under-concerned with the plague of corruption. Even if those being accused can prove that no charges against them will stick, they still have not done everything in their power to show commitment to end corruption. Much is still unknown, but it is certain that nothing will be the same after the last two weeks of revelations and outrage over the vastness of corruption in Brazil.

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² Manifestantes fazem o maior protesto nacional contra o governo Dilma". G1. March 13, 2016. Accessed March 17, 2016. <http://g1.globo.com/politica/noticia/2016/03/manifestacoes-contra-governo-dilma-ocorrem-pelo-pais.html>.

³ Camarotti, Gerson. "Lula vai para a Casa Civil; Jacques Wagner, para chefia de Gabinete". G1. March 16, 2016. Accessed March 16, 2016. <http://g1.globo.com/politica/blog/blog-do-camarotti/post/lula-vai-para-casa-civil-e-jacques-wagner-para-chefia-de-gabinete.html>.

⁴ Camarotti, Gerson. "Dilma telefona para Lula e reforça convite para ministério". G1. March 14, 2016. Accessed March 16, 2016. <http://g1.globo.com/politica/blog/blog-do-camarotti/post/dilma-telefona-para-lula-e-reforca-convite-para-ministerio.html>

⁵ "Lula pode virar ministro e ganhar foro privilegiado no STF". G1. March 15, 2016. Accessed March 16, 2016. <http://g1.globo.com/politica/noticia/2016/03/lula-pode- virar-ministro-e-ganhar-foro-privilegiado-no-stf.html>.

⁶ Dias, Marina. "Lula rejeitou virar ministro de Dilma para evitar prisão". Folha de S. Paulo. March 04, 2016. Accessed March 07, 2016. <http://www1.folha.uol.com.br/poder/2016/03/1746333-lula-rejeitou- virar-ministro-de-dilma-para- evitar-prisao.shtml>.

⁷ Lula pode virar ministro e ganhar foro privilegiado no STF". G1. March 15, 2016. Accessed March 16, 2016. <http://g1.globo.com/politica/noticia/2016/03/lula-pode- virar-ministro-e-ganhar-foro-privilegiado-no-stf.html>.

⁸ Brasileiros saem às ruas em protestos". Portal Todo Dia. March 16, 2016. Accessed March 17, 2016.

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⁹ "Art. 102 da Constituição Federal de 88". JusBrasil. Accessed March 15, 2016. <http://www.jusbrasil.com.br/topicos/10688723/artigo-102-da-constituicao-federal-de-1988>.

¹⁰ 22 mil pessoas têm foro privilegiado no Brasil, aponta Lava Jato". Estadão. May 20, 2015. Accessed March 16, 2016. <http://politica.estadao.com.br/blogs/fausto-macedo/22-mil-pessoas-tem-foro-privilegiado-no-brasil-aponta-lava-jato/>.

¹¹ 22 mil pessoas têm foro privilegiado no Brasil, aponta Lava Jato". Estadão. May 20, 2015. Accessed March 16, 2016. <http://politica.estadao.com.br/blogs/fausto-macedo/22-mil-pessoas-tem-foro-privilegiado-no-brasil-aponta-lava-jato/>.

¹² 22 mil pessoas têm foro privilegiado no Brasil, aponta Lava Jato". Estadão. May 20, 2015. Accessed March 16, 2016. <http://politica.estadao.com.br/blogs/fausto-macedo/22-mil-pessoas-tem-foro-privilegiado-no-brasil-aponta-lava-jato/>.

¹³ Ibid.

¹⁴ Gadelha, Igor. "Líderes no Congresso defendem fim do foro privilegiado". Estadão. June 23, 2014. Accessed March 16, 2016. <http://politica.estadao.com.br/noticias/geral,lideres-no-congresso-defendem-fim-do-foro-privilegiado,1516580>.

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²⁰ Camarotti, Gerson. "Dilma telefona para Lula e reforça convite para ministério". G1. March 14, 2016. Accessed March 16, 2016.

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²¹ "Manifestantes fazem o maior protesto nacional contra o governo Dilma". G1. March 13, 2016. Accessed March 17, 2016.

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²² Lima, Daniela, Mariana Haubert. "PMDB proíbe filiados de assumir novo cargos no governo federal". Folha de S. Paulo. March 12, 2016. Accessed March 13, 2016. <http://www1.folha.uol.com.br/poder/2016/03/1749259-convencao-do-pmdb-comeca-com-gritos-de-fora-dilma-e-fora-pt.shtml>.

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²⁴ Falcão Márcio, Aguirre Talento, Mariana Haubert. "Delcídio cita Renan Calheiros e Aécio Neves em delação". Folha de S. Paulo. March 09, 2016.

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²⁶ Romero, Simon. "Ex-President 'Lula' Joins Brazil's Cabinet, Gaining Legal Shield". The New York Times. March 16, 2016. Accessed March 17, 2016.

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