

Operation Car Wash on Trial

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On 8 March 2021, the legal and political world was surprised by a [judicial ruling](#) of Justice Fachin, from the Brazilian Federal Supreme Court, which annulled three criminal cases against the former President Lula da Silva in the context of the so-called Operation Car Wash. Justice Fachin stroke down, among other charges, Lula's conviction for over 12 years of imprisonment for allegedly receiving a flat in *Guarujá* beach, in the State of São Paulo, as a payback from contractors in exchange for illegal contracts with Brazil's national oil company (*Petrobras*). It was only because of this conviction that Lula da Silva was arrested for 580 days and became ineligible to run for the 2018 presidential elections, opening the way for Bolsonaro's victory. The main argument used by Justice Fachin in ruling the habeas corpus writ was that Judge Sérgio Moro – the one who became Minister of Justice of President Bolsonaro – had no jurisdiction over Lula's cases, a viewpoint argued by his attorneys a long ago.

On 9 March 2021, other Justices of the Federal Supreme Court started the trial of other habeas corpus writs that went beyond the main legal argument of the ruling of the previous day. They started debating the impartiality of former Judge Moro, certainly a stronger hit against Operation Car Wash.

In the following, we aim to recover some of the main arguments, positions and surrounding political scenario that involves Lula's cases.

Operation Car Wash and Its Impacts

Prior to this recent decision, Lula's liberty had been reestablished because the Federal Supreme Court reformed its controversial case law that authorized, in contradiction to the text of the 1988 Constitution, the detention of convicted persons pending a final appeal. Nevertheless, an electoral statute and a ruling by the Brazilian Superior Electoral Court prevented Lula da Silva from running for public office or in any other way exercising his political rights until the end of his sentence – in opposition to what the [UN Human Rights Committee](#) had indicated.

Although Lula's conviction in the Operation Car Wash has met sharp criticism by academics, international observers and practicing lawyers, Judge Moro received enthusiastic support in the judicial branch, since Lula's convictions have been unanimously upheld on appeal by a federal court and the Superior Court of Justice.

The confirmation of Lula's conviction seemed to take part in a broader "law and order" movement lead by the Operation Car Wash. As the [task force](#) was widely publicized with the help of traditional media outlets in reason of the huge amounts of money involved in corruption and money laundry scandals that were directly or indirectly connected to Petrobras, Brazilian public opinion was slowly mobilized to

support the prosecutors and judges. Former Judge Moro [himself](#) confirmed that he was mirroring the Italian *Mani Pulite* operation and that he should be backed by popular support. For judges and prosecutors with conservative profiles, it became easy to target specific political parties and politicians, support the wide [judicialization of mega-politics](#) and accept occasional breaches of the [rule of law](#). The operation was recently terminated in the presidency of Bolsonaro, despite the political capital that he inherited from the Operation Car Wash and the legal and political practices of its key participants.

Nonetheless, there are still some influential justices in the Federal Supreme Court who support the Operation Car Wash. Justice Fachin, for instance, recently [declared](#) that the model propelled by the operation still stands, although the operation itself has ended.

Strategic Behavior in the Federal Supreme Court

To see Lula's condemnations being annulled without major damages to the Operation Car Wash seemed to cohere with Justice Fachin's previous interpretations of the investigation scheme. Furthermore, that could be a way of the Federal Supreme Court to show its teeth to the [Armed Forces](#) among the recent frictions between both institutions, especially the confirmation of a [pact](#) to pressure the court in 2018 to avoid changing the case law that authorized Lula's imprisonment.

Furthermore, Justice Fachin's ruling also demonstrates the state of affairs of a court that has been praising [individual decisions](#) over institutional ones.

The scope of Fachin's decision is wide, inasmuch as it declares as *ultra vires* all of Judge Moro's judicial acts against the defendant. Nonetheless, many of Lula's supporters hesitated to celebrate this victory, for it does not represent a guarantee that the former mandatary will be eligible to run for the presidency in 2022. Justice Fachin's decision does not reach a verdict on Lula's culpability; it settles only that Judge Moro lacks competence to trial the cases, leaving it to a newly appointed first-instance judge in Brasília (rather the local federal court in Curitiba) to reexamine the evidence of the case and decide whether it can be employed as a ground for a new judicial pronouncement. If the illegality of the evidence brought to the case by former Judge Moro is not recognized, it remains possible that a new conviction is timely upheld. If a second-instance verdict is reached before the elections of 2022, Lula da Silva will become ineligible once again.

A decision redirecting the jurisdiction to a new judge would achieve three objectives with a single move: first, it would preserve the procedural acts, such as hearings, reports, experts opinions, and so on, which could be revalidated by the novel judge; second, it would limit the effects of the decision to Lula's cases, avoiding multiple allegations of partiality of the trial judge; finally, and perhaps more importantly, it would protect judicial authorities from public exposure and enhance the reputation of impartiality of the judicial branch.

The decision was criticized because the Federal Supreme Court failed to pronounce the incompetence of Judge Moro in several opportunities, and there was little reason to do it through a monocratic judicial settlement that arrived more than three years later. But the biggest problem with the decision is that it made an impact in the Court's agenda and tried to prevent the Court from reaching a more comprehensive ruling concerning the impartiality of Judge Moro himself. In this sense, and at least for now, Justice Fachin's strategy dominated the procedures.

A Normative Approach to Lula's Cases

One of the central arguments of Lula da Silva's defense is precisely that Moro lost his impartiality on several occasions. Lula da Silva's defense filed a writ of habeas corpus whose judgment has been delayed for more than two years. Justice Fachin's monocratic decision was pronounced precisely when Justice Gilmar Mendes, who retained the proceedings for detailed assessment of the files, announced that he would bring back the case, allowing for a collegiate judgment of the court.

Given the seriousness of the accusations against Judge Moro, it was widely expected that several vices in Lula's trial would be recognized, with an even more substantive defeat to the Operation Car Wash, inasmuch as Moro's malpractices spread over a vast number of cases. A formal recognition of judicial abuses could lead both to an annulment of all the hearings and gathering of evidence in Lula's case, and to a precedent that could quash several decisions pronounced by Moro against other political actors.

In the day after Fachin's decision, Justice Gilmar Mendes brought the case back to Court, and purported to resume the trial of Moro's partiality. Justice Fachin objected on the grounds that this matter could no longer be trialed, since he annulled in the previous criminal procedures that had been brought to court. His objection did not succeed.

Justice Fachin's strategy, however, was immediately perceived as *ad hoc*. The problem is that (1) the trial on Moro's partiality had already started, and (2) the Code of Criminal Procedure explicitly states that allegations of partiality must be resolved *in advance* of other defenses in the context of a criminal trial. The illegality of Justice Fachin's move was blatant, and the 2nd Panel of the Federal Supreme Court promptly recognized it on 9 March 2021, in a four-to-one decision.

The judgment of Judge Moro's impartiality resumed immediately after the dismissal of Justice Fachin's objection. In the previous session in which the court examined the case, in 2019, two votes had been delivered, by Justice Fachin and Justice Carmen Lúcia, who ruled in favor of Moro and denied the writ. But the new sitting of the court pended in a different direction. The two votes recently delivered denounce, in the words of Justice Mendes, the "biggest judicial scandal in Brazilian history". Justice Gilmar Mendes and Justice Ricardo Lewandowski presented ferocious criticisms against former Judge Moro and the Car Wash team. The trial, however, had to be suspended again because Justice Nuno Marques (indicated by President Bolsonaro) requested access to the files because he has taken office recently. After

this Justice's request, the two Justices who had voted in the previous session of the court – Justice Fachin and Justice Carmen Lúcia – informed the Chairman that as soon as Justice Nunes Marques delivers his opinion they will deliver a restatement of their votes. Two votes have been delivered to consider the former Judge Moro a *biased* and *political* judge. In effect, Justice Gilmar Mendes referred to seven facts that are indicative of judicial partiality: 1) the illegal seizure and relocation of Lula da Silva, in order to coercively take him to a hearing in advance of any formal communication and with massive media coverage that created a general impression of guilt; 2) the arbitrary interception of telephone conversations between Lula da Silva, his family members and, even the 25 counselors who have offices in the firm that took over his defense; 3) the disclosure of a conversation between Lula da Silva and former President Dilma Rousseff, which has been recorded by Judge Moro and leaked to the press in the waking hours of an impeachment process and with the intention to create social conditions favorable to the conviction of Rousseff; 4) the off-duty engagement of former Judge Moro with informal acts and ultra vires pronouncements to interfere in the Federal Police and avoid the release of Lula da Silva in virtue of an habeas corpus writ granted by a federal judge in July 2018; 5) the fact that Judge Moro's sentence convicting Lula da Silva for corruption was pronounced merely 2 minutes after the defense presented the final allegations and made several comments that revealed an animosity between the judge and the barristers responsible for the defense; 6) the fact that, "in the last week before the first round of the elections", and despite the lack of any request by the prosecutor's office, Judge Moro disclosed to the public part of a draft of a plea bargain agreement signed by Lula's former Minister of Revenue, which purported to interfere in the electoral process; and 7) the fact that shortly after convicting Lula da Silva, the judge accepted a position of Minister of Justice under Jair Bolsonaro's presidency.

Recovering the Rule of Law?

Although these facts were proved in advance of the disclosure of the *Intercept Leaks*, which exposed to the public Telegram messages between Judge Moro and the prosecutors, it has recently become very difficult to sustain the convictions of Lula da Silva. Former Judge Moro's reputation seems to be irremediably stained, and it is likely that Federal Supreme Court's 2nd Panel will support Justice Gilmar Mendes's opinion that Lula's trial was biased. According to Justice Gilmar Mendes, the Operation Car Wash could be compared to the former URSS: "The narrow bond between prosecutors and police officers allowed the Operation Car Wash to install a truly Soviet system of monitoring strategies utilized by the defense of the claimant".

The Federal Supreme Court seems to try to create a scenario for the reconstruction of the rule of law, which has been severely impaired in the past five years. For a long period of time, the judicial branch has been acting irresponsibly and incoherently to achieve Rousseff's impeachment, Lula da Silva's arrest and removal from the presidential run, and, last but not least, the ascension of Bolsonaro's populist rhetoric.

