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Anticorruption: How to Beat Back Political & Corporate Graft



Robert I. Rotberg, guest editor

with Alina Mungiu-Pippidi · Bo Rothstein

Michael Johnston · Matthew M. Taylor

Paul M. Heywood · Susan Rose-Ackerman

Zephyr Teachout · Louise I. Shelley · Mark L. Wolf

Sérgio Fernando Moro · Sarah Bracking

Rotimi T. Suberu · Jon S.T. Quah · Minxin Pei

Preventing Systemic Corruption in Brazil

Sérgio Fernando Moro

Abstract: This essay describes the Brazilian anticorruption operation known as Operação Lava Jato (“Operation Car Wash”), its findings, and its results based on cases tried up to March 2018. Told from the perspective of the federal judge of the Thirteenth Federal Criminal Court of Curitiba, in whose court most of the Lava Jato cases have been prosecuted, this massive criminal case offers lessons that may be useful to other anticorruption efforts. Preventing systemic corruption is a challenge, but it is a necessary step for the improvement of democracy.

What began as an investigation of an isolated instance of corruption within a Brazilian oil company expanded into an immense anticorruption operation known as *Operação Lava Jato* (“Operation Car Wash”). This investigative operation has penetrated deep within Brazil’s government and corporate elite to root out systemic state-sanctioned corruption. Its criminal cases also appear to be instating new legal norms for how corruption cases are handled in Brazil, giving citizens hope that Lava Jato’s impact will be felt far into the future. How Brazilian prosecutors and courts dealt with this immense anticorruption effort may provide important lessons for the battle against systemic corruption both in Brazil and elsewhere. This essay provides a comprehensive account of Lava Jato and its significance for Brazil going forward.

SÉRGIO FERNANDO MORO is a Federal Judge of the Thirteenth Federal Criminal Court of Curitiba, Brazil. He is also Professor of Procedure Criminal Law at the Unicuritiba – Centro Universitário Curitiba. He presided over the trial of many bribery cases in *Operação Lava Jato*.

It is important to note from the beginning that Lava Jato is not a single criminal case but several, in which federal prosecutors have decided to pursue separate charges against many defendants. So far, more than sixty criminal cases have been brought against about 289 defendants in Brazilian federal courts.¹ About thirty-three of those cases have already been tried, resulting in convictions of bribery and money laundering for about 157 people. The reflections I offer in

this essay are based on the cases that have been tried at the time of writing. I do not analyze or comment upon cases that have yet to be tried or that are awaiting sentences.

At the core of the Lava Jato cases are crimes connected to contracts with *Petroleo Brasileiro S/A* (Petrobras). Petrobras is a semipublic, majority state-owned Brazilian company engaged primarily in oil and gas exploration, refining, and transportation. It is Brazil's largest company and one of the world's major oil and gas companies. It was founded in 1953 to explore Brazilian oil and gas fields with the goal of transforming Brazil into a self-sufficient producer of petroleum products.

As the cases already tried reveal, multiple bribes were paid in contracts between Petrobras and its suppliers; these bribes were used for the criminal enrichment of Petrobras executives and politicians, as well as to finance electoral campaigns. Before describing what prompted the investigation and how it unfolded, however, it is important to provide some context, including some details concerning Brazilian criminal justice.²

White-collar crimes like bribery and money laundering represent a challenge for law-enforcement agencies all over the world. They are often difficult to discover, to prove, and to punish. Such crimes are usually committed in secret, by powerful people, and with some degree of sophistication. And police, prosecutors, and the judiciary are often not well prepared for the investigation, prosecution, and judgment of these highly sophisticated crimes. Sometimes powerful defendants also exploit the gaps in the criminal law and of the judicial system to prevent effective accountability.

Some countries are more successful than others in enforcing the law against these kinds of crimes. Brazil, at least prior to Lava Jato, did not have a strong tradition of enforcing the law against crimes committed

by powerful politicians or businessmen. There are likely two main reasons for this.

The first is the slow pace at which the judicial process progresses in Brazil. Until recently, the enforcement of a criminal conviction was possible only after the case reached a final decision that could no longer be appealed. Enforcement of a criminal sentence depended on the judgment of the last appeal. Only then would the case be seen as *transitado em julgado*, or tried with no possibility of appeal. Years might pass between an initial judgment and the final sentence.

This rule emerged from a 2008 Supreme Court decision regarding a controversial interpretation of the presumption of innocence in Brazil's Constitution.³ Theoretically, enforcing this rule would not be a problem, but because of a generous system of appeals and the heavy caseload of Brazilian Superior Courts, powerful defendants used it to manipulate the judicial process, initiating endless appeal proceedings to prevent their cases from ever reaching a conclusion and effectively avoiding accountability.⁴

Until recently, it was very common for no final decision to ever be reached in complex criminal cases involving powerful individuals. Even cases with strong evidence of criminal behavior or cases involving very serious crimes never reach conclusions in Brazil. As a rule, wealthy and well-connected defendants in these cases never go to prison, despite compelling evidence of their guilt. However, this rule changed recently, as I will explain below.

The second main reason for criminal impunity among the powerful is the fact that the Supreme Court of Brazil has original jurisdiction over criminal charges against high federal official authorities, including the president, vice president, cabinet ministers, and members of the federal Congress. This is ensured by a controversial provision in Brazilian law stating that high politicians and authorities in criminal cases must have *foro privilegiado* ("privileged

forum”). So if, for example, a criminal investigation in a lower court produces evidence of criminal conduct by a federal congressman, the judge must immediately send the case to the Supreme Court. However, as mentioned, the Brazilian Supreme Court’s heavy caseload (its docket contained over fifty-five thousand cases in the last year alone) makes it very difficult to adjudicate criminal charges in a timely fashion. Consequently, cases involving crimes committed by powerful defendants sometimes literally never end. In practice, the special jurisdiction of the Supreme Court over criminal charges involving high-ranking official authorities worked as a shield against accountability.

These are two primary structural reasons (though there are others) why law enforcement is so weak on crimes committed by powerful defendants in Brazil. The weak enforcement of the law against white-collar crimes is one of the likely reasons for the development of systemic corruption in Brazil. However, legal procedures have recently changed the system for the better, at least in part. Lava Jato is not alone, but rather is part of this broader effort.

Criminal Case 470, decided by the Brazilian Supreme Court in 2012, began to change the norm of weak enforcement of the law against white-collar crimes in Brazil.

In this case, also known as *Mensalão* (“monthly,” because the case involved monthly bribes to some congressmen), the Supreme Court convicted several highly placed politicians, including a powerful former minister of the federal government and several congressmen, political leaders, political party operatives, and bank directors, of bribery and money laundering.⁵ In this case, it was proven that the chief minister of the Brazilian federal government between 2002 and 2005 organized a bribery scheme to obtain political support from congressmen for federal legislative initiatives.

The charges were presented before the Supreme Court in 2006, though it took until 2012 for the case to go to trial. There was a great deal of skepticism about the Supreme Court’s judgment, especially about whether it would try the case in a reasonable time and convict the defendants. But in the end, the Supreme Court issued a guilty verdict for most of the defendants, including several powerful politicians. Of course, Brazilian courts had produced some convictions for white-collar criminals in the past. But these were the exception, not the rule, and none of them was as important or relevant as the decision in Criminal Case 470. These verdicts marked a clear break with the norm of weak enforcement of the law against white-collar or financial crimes. A Supreme Court decision has great influence across the whole judicial system. Beyond the importance of the criminal cases’ direct consequences, they worked as an example for all Brazilian law enforcement agencies and judges, showing that the shield against effective accountability for powerful defendants could be broken.

Two years after the judgment in Criminal Case 470, Operação Lava Jato began. As usually happens with criminal investigations, Lava Jato started small. The federal police opened an investigation targeting four individuals involved in what seemed at the time to be a money-laundering scheme involving black-market money exchanges. One of these individuals, professional money launderer Alberto Youssef, was connected to a former director of Petrobras, Paulo Roberto Costa. The investigation revealed that Youssef had bought a luxury car for Costa, concealing the origin of the resources used.

This evidence led the federal police, working with judicial search-and-seizure warrants, to raid the offices and houses of Youssef and Costa in March 2014. During this process, Costa tried to destroy and hide

paper evidence and consequently was placed into pretrial detention. Youssef was also arrested on a pretrial detention order due to his status as a recidivist career criminal.

Looking at the banking records of Youssef's front companies, police and prosecutors discovered that his accounts had received millions of reais in credits from some of the biggest Brazilian construction companies, which also happened to be some of Petrobras's major suppliers. In another line of the investigation, it was discovered with the assistance of Swiss authorities that Costa had hidden millions of dollars in offshore accounts. Facing long prison terms, Alberto Youssef and Paulo Costa agreed in the second half of 2014 to conclude plea agreements with the prosecutors.

Youssef and Costa revealed that, as a rule, every contract Petrobras signed with the major Brazilian construction companies included kickbacks of 1 or 2 percent of the total value of the contract to the Petrobras officials who approved it. Youssef's role was to organize the money laundering scheme. Costa received a share of the bribes to work for the interests of the construction companies. Another share of the money went to politicians, including federal legislators of the Progressive Party (*Partido Progressista*), which was part of the ruling coalition and was in practice responsible for the nomination of Costa for his position at Petrobras.

Youssef and Costa testified that other Petrobras officials had received bribes and had worked with intermediaries and politicians from other parties in the governing coalition, such as the Workers' Party (*Partido dos Trabalhadores*) and the Party of the Brazilian Democratic Movement (*Partido do Movimento Democrático Brasileiro*). They also revealed that the Brazilian construction companies who paid the bribes were fixing Petrobras's bidding-process outcomes. Petrobras's major suppliers decided in advance which among them would

win each bidding process, and the chosen company could then offer a price proposition without real competition. They called themselves "The Club."

The investigations continued to produce new evidence based in part on plea agreements with other cooperating criminals. Of course, everything a cooperating criminal says has to be supported by additional evidence. For this reason, many investigations are still ongoing. But it has been possible in some cases thus far to obtain evidence that corroborates information revealed by cooperating criminals. There have been about twenty-eight criminal convictions and sentences specifically related to bribery in Petrobras contracts as a result of the Lava Jato cases tried up to March 2018. Convictions reached top executives of the biggest Brazilian construction companies acting as corruptors; top executives of Petrobras acting as facilitators and beneficiaries of bribes or kickbacks; and intermediaries between these two groups.

So far, four former directors of Petrobras have been convicted and sentenced to prison terms. Two of them decided, after serving part of their prison sentences, to cooperate with authorities. The police and prosecutors discovered that all four had millions of dollars or euros in bribes hidden in offshore accounts in countries such as Switzerland, Monaco, and Luxembourg. A Petrobras CEO was also convicted for taking bribes and money laundering.

At least six trials ended in convictions for former federal legislators who had received bribes in the Petrobras scandal. In four other cases, the Court found that money from bribes had been directed to finance illicitly a political party. Two of the former lawmakers convicted in the Lava Jato cases had also been involved in Criminal Case 470 (*Mensalão*). Amazingly, they continued to accept illegal payments from Petrobras even as the *Mensalão* trial was under way in the Brazilian Supreme Court.

These behaviors, which may appear absurd, are indicative of the impunity many corrupt officials enjoyed. In another example, in 2014, Congress created a special investigation commission for the Petrobras scandal. A senator was nominated as vice president of the commission. Instead of doing the investigation, he took the opportunity to request bribes from top executives of the biggest construction firms then under investigation so that they might avoid scrutiny. For this, the senator was eventually convicted of taking bribes himself.

Even a former Speaker of the House of Representatives was implicated in the scandal and was convicted. Again with the assistance of Swiss authorities, it was discovered that he had received about \$1.5 million in bribes, which were deposited in offshore accounts in a Swiss Bank. A former governor of the state of Rio de Janeiro, a former secretary of finance of the federal government, and even a former president of Brazil were also convicted for receiving a share of bribes in Petrobras's contracts.⁶ So far, dozens of executives from eleven of Brazil's largest construction companies have been convicted as bribe givers.

To illustrate the magnitude of these corrupt practices, a manager at Petrobras, after reaching a plea agreement with the authorities, agreed to return nearly \$97 million in bribes that he had received from Petrobras contracts and kept in secret bank accounts abroad. In the beginning of the investigation, Petrobras assumed a posture of general denial, refusing to admit any problem of governance publicly. As the investigation developed, however, the company gradually began to admit that crimes were committed, culminating in an official recognition in Petrobras's 2015 annual report to shareholders of losses from corruption of nearly 6 billion reais (about \$1.9 billion).

It took time, but some of the construction companies involved in the scheme also began to admit responsibility. Three

of the largest companies – Camargo Correa, Andrade Gutierrez, and Odebrecht – reached leniency deals with the prosecutors. In exchange for lighter punishments, they agreed to reveal illicit acts, abandon criminal practices, implement efficient systems of compliance, and compensate public coffers by returning billions of reais. One of them also revealed that it paid bribes for public employees abroad, in countries like Peru, Argentina, and Mexico, among others.

The cases already tried reveal that the payment of bribes on Petrobras's contracts was not an exception but, rather, the rule. Some of the cooperating criminals used that very word, describing the crimes they committed as simply “a rule of the game in contracts of the public sector.” Some alleged that this illicit practice went beyond Petrobras and was used by other state-owned companies and in other branches of the federal government.

Investigations are ongoing not only in the Federal Criminal Court of Curitiba, where the investigation started, but in other Brazilian federal courts that were assigned responsibility for trying certain Lava Jato cases. Because of *foro privilegiado*, dozens of highly placed politicians, especially congressmen, are being investigated by the chief federal prosecutor before the Supreme Court. In spite of the Court's heavy caseload, some of these high-profile defendants have been charged already.

The cases already sentenced suggest that an environment of systemic corruption was uncovered by the investigation. The payment of bribes was taken for granted in Petrobras's contracts; participants knew even before signing contracts that bribes would be paid, just like the construction companies knew in advance whose “turn” it was to win the contract, irrespective of the formal bidding process. They also knew that the bribes would be shared between

Petrobras executives and the federal politicians who gave them political support. There were even fixed rules to calculate the amount of the bribes: generally 1 or 2 percent of the total value of the contract.

Corruption, as an isolated crime, exists all around the world. But systemic corruption – the payment of bribes as a rule of the game – is not as common, and represents a severe degeneration in the functioning of the public and private spheres, especially in democratic nations.⁷ The costs of systemic corruption are enormous. First, the cost of the bribes is usually added by the offending company to their contracts with state-owned companies or with the government, affecting public budgets. If the payment of such bribes is not an isolated practice but a general rule, the management of public resources is severely affected. Moreover, the need to generate funds for bribes in systemic corruption schemes can affect investment decisions by public and private entities.

Some of Petrobras's bad investments may not be simply explained as a result of a bad judgment or unlucky bet, but instead as a deliberate choice by the corrupt directors of Brazil's largest enterprise to generate bribes rather than to make the best decision from an economic point of view. One example is the construction of the new Abreu e Lima refinery.⁸ Initially, Petrobras estimated the cost of the project at \$2.4 billion. However, by 2015, Petrobras had already wasted \$18.5 billion on the construction of the refinery, and it was only partially complete. Even if the refinery operated with full efficiency for the rest of its planned life, it would incur a loss of \$3.2 billion. Lava Jato cases have shown that bribes were paid in some construction contracts for the refinery. But the difference between \$2.4 billion and \$18.5 billion cannot be explained only by the additional costs of the bribes. Bad investment decisions were made because Petrobras executives were more concerned

with receiving kickbacks than doing their job in the company's best interests.

Another detrimental effect of systemic corruption is that it chases away local and foreign investors. If the market is not clean and transparent and if bribes and cheating are the rule, responsible investors will not have the confidence to put their money into that market. But above all, systemic corruption is damaging because it undermines confidence in the rule of law and in democracy. If the law does not apply to everyone and if crime and cheating are the norm, trust in democracy will progressively erode.

Faced with the revelation of systemic corruption, what should be done? First, the judicial system must work. Crimes that are uncovered and proven through due legal process must be punished. Justice works when the innocent defendant goes home and the guilty defendant goes to prison, irrespective of their economic or political status. There is still much to be done to advance this concept in Brazil, yet Criminal Case 470 and Lava Jato, like other recent cases in Brazil, reveal that much can be done even within the current legal system, as long as allegations are dealt with seriously.⁹ Justice must be more than actors playing their parts in cases that never end with perpetrators who are never punished.

The adequate functioning of the criminal justice system is a necessary, though insufficient condition for the elimination of systemic corruption. It is imperative that other public institutions, like the executive and legislative branches of government, adopt public policies aimed at preventing and combating corruption as well. Systemic corruption is not and cannot be a problem only for the judicial branch.

The government is the principal actor responsible for creating a political and economic environment free of systemic corruption. Through its visibility and power, the government can lead by example. Better

laws can improve the efficiency of the criminal justice system and increase the transparency and predictability of relations between the public and private sectors, reducing incentives and opportunities for corrupt practices.

Another important step would be the significant reduction of party patronage in the civil service. The influence of party politicians in the recruitment of executives in state-owned companies, and other high positions in the state bureaucracy, is what made the criminal scheme at Petrobras possible. Based on cases tried and sentenced thus far, it seems that Petrobras executives were appointed with a mission: to obtain financial resources from suppliers for the illicit enrichment of politicians or the illegal financing of electoral campaigns. Reducing political influence in state-owned companies would help to prevent this evil.

Freedom of the press and access to information are also essential. For citizens to have meaningful checks on those who govern, they must be well informed about the management of public life.

Everything to do with the Lava Jato cases, from the prosecution, evidence, and hearing of witnesses to the judgment and sentencing, has been conducted openly and in the light of day. The Brazilian Constitution requires that the judicial process be open to public scrutiny. There is no possibility of having cases prosecuted and tried in secret. This rule of transparency was very important for the Lava Jato cases. Making every piece of evidence public was crucial for gaining the popular support necessary for the enforcement of the law, and helped preempt attempts by powerful defendants to obstruct justice.

In fighting systemic corruption, the private sector also plays a part. Corruption involves those who make illicit payments and those who receive them. Both parties are guilty. Companies must therefore do their homework, denouncing requests

or demands for bribes, as well as implementing mechanisms of internal control and accountability that make it difficult or impossible to pay or receive them. It is also important for private-sector actors to work collectively so that companies involved in corrupt practices are identified and isolated from the market and not allowed to assume a preeminent position. An outstanding example of this kind of private-sector responsibility can be found in Sicily, where businesses have joined together in associations like *Addiopizzo*, or “goodbye *pizzo*,” to collectively refuse to pay mafia money (*pizzo*).¹⁰ Acting together, they have more power to refuse to pay extortion money and to avoid retaliation from organized crime. Their slogan is “a whole people who pays *pizzo* is a people without dignity.” Collective mobilization on the part of private companies could be used to good effect in Brazil, with some situation-specific modifications.

It is also important to keep in mind that systemic corruption is a product of institutional and cultural weaknesses. Systemic corruption is not a natural phenomenon, and no country is destined to live with it. Even if discovering and exposing corruption generates new challenges and painful resistance in the short run, these effects are part of the cure. Once systemic corruption is discovered, necessary public policies should be adopted and implemented to overcome it. The problem cannot be resolved by sweeping it under the rug.

Because of the dimension of the crimes that have been uncovered, Lava Jato perhaps more than any other case provides Brazil with a golden opportunity to take the necessary steps to overcome this shameful practice. It is difficult to predict at this stage whether that will happen, whether corruption will be contained and reduced to more reasonable proportions, or whether Brazil will return to the pre-Lava Jato lev-

els of corruption. Some backlash and criticism against Lava Jato has arisen (especially from politicians and corporations involved), much of it driven by misconceptions about the nature of the enterprise.

Some critics have complained that the Lava Jato operation is not impartial and has been used to “play politics.” But this is not so. Of course, crimes involving bribes paid to politicians will inevitably have political consequences. But they arise outside the court and beyond the judges’ control.

Others have said that Lava Jato represents the “criminalization of politics.” The blame should not, however, be aimed at the judicial process, but rather at the politicians who committed the crimes. The judicial process is just a reaction against corruption, as the justice system cannot turn a blind eye to crime.

Some critics say that the judiciary has not respected due process in these cases. However, every aspect of the judicial process has been conducted in open court with respect for the rights of the defendants, and has been based on extensive evidence obtained, processed, and publicized in accordance with the law and the Brazilian constitution. Lava Jato is not a witch hunt. Investigators simply followed the leads from case to case, uncovering a widespread problem that mandated numerous convictions and detentions. Therefore, nobody is being charged or convicted based on political opinion. When there is evidence of illegal conduct, the accused are being charged and convicted because of the bribery and money laundering crimes they committed, not because of their political allegiances.

Finally, there has been concern about the use of pretrial detention in the Lava Jato cases. Pretrial detentions should, of course, be the exception and not the rule in any judicial system. However, a judge in Brazil can order a pretrial detention if the defendant presents a danger to other individuals or to society, or if there is a risk that the defen-

dant will flee or obstruct justice. There are similar laws in the United States: the U.S. Criminal Code allows a judge to deny bail if the defendant is potentially dangerous or a flight risk.¹¹ The U.S. Supreme Court case *U.S. v. Salerno* affirmed that this statute was constitutional.¹²

In the Lava Jato cases, pretrial detentions were ordered only when evidence against the defendant was particularly strong; when there was a risk that the defendant would flee or obstruct justice; or to prevent the defendant from committing new crimes while awaiting trial. It is important to understand that the crimes of the Petrobras cases were committed in a professional and serial manner in a context of systemic corruption. For example, one of the companies involved in this criminal network devoted a specific department solely to paying bribes, which was in operation for several years, even during the investigation. Operations ceased only when the company’s top executives were served with pretrial detention orders. Given the presumption of innocence, pretrial detentions should be exceptional; but the extraordinary nature of systemic corruption demands strong and urgent measures by criminal justice to break the vicious circle.¹³

Other critics have complained about the extensive use of plea agreements in the Lava Jato investigation, arguing that prosecutors and judges are still not being tough enough on white-collar criminals. However, crimes like corruption are committed in secret and usually only the criminals themselves are witness to their wrongdoing. Therefore, it is sometimes necessary to make a deal with a criminal to get evidence to build a case on more central players. As U.S. Federal Appellate Judge Stephen Trott has stated, sometimes such bargains are necessary, because without them “the big fish go free and all you get are the minnows.”¹⁴ It makes sense to offer a plea agreement, for example, to a

criminal responsible for a money laundering scheme in order to get evidence against bribe takers or bribe givers who are responsible for the national environment of systemic corruption.

Until now, the police, prosecutors, and the judiciary have been the main protagonists in Brazil's fight against systemic corruption. It is important also to acknowledge the Brazilian Supreme Court, which has handed down new precedents that strengthen some anticorruption rules. In a possible collateral effect of the investigation of the Petrobras scandal, Brazil's Supreme Court overruled the harmful provision I discussed above, which allowed wealthy defendants to postpone indefinitely, through endless appeals, the execution of a prison sentence.¹⁵ In 2016, the Supreme Court ruled that the enforcement of a criminal conviction is permitted immediately after a sentence is affirmed by a court of appeal; it is no longer necessary to wait several years for a final decision at the highest level of appeal.

This precedent represents a kind of judicial revolution in the enforcement of criminal law in complex cases in Brazil. Its impact is already visible in several other cases involving corruption. With this new ruling, Brazil's Supreme Court has clearly demonstrated that it fully understands the connection between systemic corruption and impunity.¹⁶

In another important case, Brazil's Supreme Court ruled against the legality of electoral contributions from companies.¹⁷ Brazilian electoral law previously lacked proper limits on large corporate contributions to elections. In light of endemic corruption, the Supreme Court understood that without safeguards, there would be a great danger of improper relations between companies and politicians via quid pro quo donations. So it ruled such contributions void until proper regulations could be approved.

Unfortunately, it seems that as of this writing, the executive and legislative branches of government have made no such significant contribution to Brazil's efforts against corruption. For example, they could do so by proposing and approving better anticorruption laws. One necessary step would be to change Brazilian electoral law along the lines of the Supreme Court decision I describe above. Congress should discuss proper and strict regulations for electoral contributions from companies. For example, it could forbid any electoral contributions from companies with government contracts and establish low limits for other corporate donations.

Unfortunately, there are some signs of reaction against Lava Jato from Congress itself. In 2016, federal prosecutors presented a bill to improve anticorruption laws. Despite major popular support for the measures, the House rejected most of the reforms, and it is still uncertain whether the bill will be approved. More disturbing was an attempt in the House to approve an amnesty bill for illegal electoral donations, up to and including bribes. In another controversial act, the Senate drafted a new bill about abuses of power committed by judges, prosecutors, and police officers. Of course, official authorities who abuse their powers should be held accountable; this, also, is central to a working system of justice. But the text of the bill was written such that it could have a cooling effect on the independence of the judiciary and the autonomy of the prosecutors and the police to pursue criminal corruption as they see fit. As of this writing, the future of this bill is also uncertain.

It is possible to garner some lessons from Brazil's situation. Decades of weak law enforcement against crimes committed by high politicians and powerful businessmen have generated a breeding ground for bribery, kickbacks, and corruption. Weak

law enforcement may not be the first cause of this virulent corruption, but it certainly does not help to constrain it. However, new realities have presented Brazil with an opportunity to face systemic corruption, to confront past failures and set a new course for the future. The systemic corruption uncovered in Brazil is shameful. But there is another way to look at this picture. The efforts of many individual Brazilians to fight the problem of corruption have brought these crimes to light. The police, the prosecutors, and the judiciary are now dealing seriously with them.

There is no shame in the enforcement of the law.¹⁸ Lava Jato provides a measurement of the extent of Brazil's corruption, but also a measurement of Brazilians' dedication to anticorruption efforts. The Lava Jato operation is still ongoing, but it is already without precedent. Corruption scandals are not new to Brazil's history, but never before were top executives of the country's biggest construction companies arrested, tried, and convicted. Never before Lava Jato had a single director of Petrobras been charged with a crime. Today, four of them and a CEO are serving prison terms. Eight powerful politicians have been convicted and some arrested, including the former speaker of the House. Several congressmen are being investigated and prosecuted before the Supreme Court for bribery and money laundering (and not because of their political opinions).

Several measures have been essential to the success of Operação Lava Jato, including:

- The creation of task forces by the police and federal prosecutors to concentrate effort and resources on the investigation and to prosecute serious bribery and money laundering crimes.
- The use of pretrial detentions only in cases in which there was strong evidence of the crimes or in which deten-

tions would prevent new crimes from being committed.

- The use of plea agreements to disrupt complicity and secrecy between criminals and to advance investigations.
- Extensive international cooperation and support from Switzerland and other countries.
- Trying cases under public scrutiny, from evidence and arguments to judgments.
- Speedy criminal procedures and trials.
- Strong public backing to prevent attempts by powerful defendants to obstruct justice.

All of these factors have contributed to progress in enforcing the rule of law in Brazil.

Much more must be done in the fight against corruption, and it is too soon to say whether Brazil will exchange its current system for one fully committed to effective accountability for crimes committed by powerful politicians and businesspeople.

Even so, it is important to highlight that since 2015, millions of Brazilians have protested against corruption. For example, in March 2016, more than three million people occupied the streets in several state capitals and major cities in peaceful demonstrations. It is true that these demonstrations were also motivated by other causes, such as dissatisfaction with the state of the economy and with the former government. But the Lava Jato operation was a common cause that united demonstrators. The fight against corruption has definitively entered Brazil's public policy agenda and will influence political debates for years to come.

Hopefully, it will be possible to look back some years from now and say that Lava Jato made the national economy, the rule of law, and democracy stronger in Brazil. Maybe it will be possible to say systemic corrup-

tion was overcome and that it became a sad memory from Brazil's past. We cannot take this result for granted, but there is some hope. At the very least, the Lava Jato cases,

like Criminal Case 470, represent a clear break with a past of impunity and with tolerance for systemic corruption.

Sérgio
Fernando
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ENDNOTES

- ¹ Basic information about *Operação Lava Jato* is available at Ministerio Publico Federal, "Caso Lava Jato," <http://www.mpf.mp.br/para-o-cidadao/caso-lava-jato> (accessed March 10, 2018).
- ² I am a federal trial judge in Brazil working in a role analogous to that of a district federal judge in the United States. Criminal cases are normally tried and sentenced in Brazil by a trial judge sitting alone, while jury trials are only used in murder cases. Federal judges in Brazil also have other responsibilities, such as ordering pretrial detentions and authorizing investigative measures such as wiretaps or searches and seizures. My court in Curitiba is responsible for trying most of the Lava Jato cases.
- ³ HC 84.078, Supremo Tribunal Federal, February 5, 2009. All Brazilian Supreme Court decisions are available at Supremo Tribunal Federal, <http://www.stf.jus.br>.
- ⁴ The Brazilian Supreme Court received 56,257 new cases in 2017. These statistics are available at Supremo Tribunal Federal, "Movimento Processual," <http://portal.stf.jus.br/textos/verTexto.asp?servico=estatistica&pagina=movimentoProcessual>.
- ⁵ Ação Penal 470, Supremo Tribunal Federal, December 17, 2012. The opinion for the Court was delivered by Justice Joaquim Barbosa.
- ⁶ It is important to note that there are pending appeals against several of these convictions that could overrule them.
- ⁷ The *Mani Pulite* operation also revealed systemic corruption in contracts of the public sector in Italy. For a description, see Alberto Vannucci, "The Controversial Legacy of Mani Pulite: A Critical Analysis of Italian Corruption and Anti-Corruption Policies," *Bulletin of Italian Politics* 1 (2) (2009): 246.
- ⁸ Regarding the cost of the Abreu e Lima Refinery, see Raquel Landim, "Refinaria Abreu e Lima dará prejuízo de US\$ 3,2 bi," *Folha de S. Paulo*, December 18, 2015, <http://www1.folha.uol.com.br/poder/2015/01/1576627-refinaria-de-abreu-e-lima-dara-prejuizo-de-us-32-bi.shtml>.
- ⁹ For example, the "Calcutta Operation" (*Operação Calicute*) was inspired by Lava Jato and resulted in several criminal convictions against corrupt officials of the State of Rio de Janeiro. Some information about the Calcutta Operation is available at https://pt.wikipedia.org/wiki/Operação_Calicute (in Portuguese, accessed March 20, 2018).
- ¹⁰ See Addiopizzo, <http://www.addiopizzo.org>.
- ¹¹ Title 18, Section § 3142.
- ¹² *United States v. Salerno*, U.S. 739, 107 (1987).
- ¹³ About ninety-seven pretrial detentions were ordered in *Operação Lava Jato*; however, most of them were later followed by criminal convictions. At the time of this writing, there were only six defendants in pretrial detention who had still not been tried.
- ¹⁴ Stephen S. Trott, "The Use of a Criminal as a Witness: A Special Problem," *Hastings Law Journal* 47 (5/6) (1996).
- ¹⁵ HC 126.292, Supremo Tribunal Federal, February 17, 2016; and ADCs 43 and 44, Supremo Tribunal Federal, tried on October 5, 2016. These judgments overruled HC 84.078, Supremo Tribunal Federal, tried on February 5, 2009.

¹⁶ Unfortunately, in August 2017, information emerged that some justices were again considering changing their votes about the rule.

¹⁷ ADI 4.650, Supremo Tribunal Federal, September 17, 2015.

¹⁸ President Theodore Roosevelt, in a speech before the U.S. Congress in 1903: “The exposure and punishment of public corruption is an honor to a nation, not a disgrace. The shame lies in toleration, not in correction. No city or state, still less the nation, can be injured by the enforcement of law.” Theodore Roosevelt, “Third Annual Message, December 7, 1903,” The American Presidency Project, <http://www.presidency.ucsb.edu/ws/?pid=29544>.