

Mr. Chairman, members of the subcommittee,

Thank you all very much for this invitation and for the honor to testify about democracy and the rule of law in Brazil.

Opening remarks

On Jan 8, 2023, thousands of Brazilians invaded the headquarters of the three government branches, which they vandalized (**Figure 1**).

Figure 1. Scenes from Jan 8, 2023, in Brasilia, Brazil.



Photo credits clockwise: Ton Molina, Marcio Camargo, Joelson Alves, STF

This didn't happen out of nowhere. Rather, it was the result of a long process in which politicians, media influencers, and others, relying heavily on social media platforms, worked to discredit Brazilian electoral institutions and spread two "big lies"¹. One, that the Brazilian elections had been defrauded and Lula da Silva, inaugurated a few days before, was an illegitimate president. Another, that given tensions in society and between government branches, the military had constitutional authority to take over.

This was not the first action of Brazilian political factions unwilling to accept the results of the 2022 elections. In December, a few weeks after the votes had been counted and Lula was declared president, violent riots took place in the country, which included an attempted

¹ For a thorough investigation of the Jan 8, 2023, attacks, see: <https://legis.senado.leg.br/sdleg-getter/documento/download/264ac824-5d02-4463-b446-25eb22f4c96b>

bombing of the Brasilia airport on Christmas Eve (!). One individual arrested in this potentially tragic event said he received the bomb in one of the various “camps” where these insurrectionists gathered, usually set up in front of military barracks, where they continued to demand for a military “intervention”, intoxicated by social media posts. In a deposition to the police, this individual said, further, that he was “ready to kill or die”, he was “prepared for war” and awaited “a call from the army” for he was a “defender of freedom”².

The Brazilian Supreme Court has been a special target of these insurrectionists since at least 2020, when it ruled that the policies that former president Bolsonaro planned to adopt against COVID-19 were unconstitutional (**Box 1**). Simply put, Bolsonaro had planned to centralize the Brazilian response to COVID—or lack thereof—at the federal level. Brazil, however, similar to the United States, is a federal country. States and municipal governments also have the authority to develop their own health policies, the Court ruled, although it would have been best if they worked together with the federal government to maximize effectiveness.

“I’ve had enough”, shouted Bolsonaro. In fact, he shouted “acabou, porra!”. Ever since then, the former president stood up against judges and even said, in his rallies, that he was “no longer going to respect” court decisions³. Others joined his call to confront Justices, on the streets as well as on social media. One of their mantras has been that “The people are Supreme” (**Figure 2**). In this vision, courts must bow to what “the people” want. This is anything but a “rule of law” system. It’s actually a textbook definition of “rule of men”.

As for the Judiciary, it had to defend itself almost on its own. The Chief Federal Prosecutor (the PGR Augusto Aras), who had been appointed by Bolsonaro and has the authority to investigate high officials, was refusing to fulfill his duties, as thoroughly demonstrated in a study by my colleagues Eloisa Machado and Luiza Ferraro⁴. Congress, under new leadership, was becoming ever more complacent with Brazil’s growingly authoritarian leader.

One of the few resources available to Justices was to initiate an investigation themselves, which, in 2019, interpreting art. 43 of the Court’s bylaws (RISTF), they understood they have the power to do. Some of these investigations are still underway and they have produced substantial evidence that there was a plan to stage a coup, which counted on participation of Bolsonaro himself. Said evidence includes depositions by former Bolsonaro’s Aide-de-Camp Mauro Cid and the former Air Force Commander Carlos Baptista Junior⁵.

² <https://www.metropoles.com/brasil/ha-um-ano-golpistas-tentavam-explodir-bomba-no-aeroporto-de-brasilia>

³ <https://www.correiobraziliense.com.br/politica/2022/06/5013699-bolsonaro-volta-a-dizer-que-nao-cumprira-decisoes-do-stf.html>. In 2019, Bolsonaro and his allies in Congress also tried to explicitly pack the Court, by reducing the retiring age of Justices, which would enable him to appoint more of those. See: <https://www.camara.leg.br/proposicoesWeb/fichadetramitacao?idProposicao=2223878> Perhaps because this didn’t work, he chose the route of undermining their credibility.

⁴ <https://valorinternational.globo.com/politics/news/2022/07/03/prosecutors-office-has-spared-federal-government.ghtml>

⁵ See Appendix IV

Box 1. A timeline with hostile remarks made by former president Bolsonaro against Supreme Court Justices.
Source: Poder 360.

OFENSAS A MINISTROS DO STF	
BOLSONARO HOSTILIZOU MINISTROS DO STF AO MENOS 23 VEZES	
Alexandre de Moraes e Roberto Barroso foram os que mais receberam críticas; levantamento considera casos de 2019 a 2022	
alvo/data	hostilização
Moraes 30.abr.2020	disse a apoiadores que Moraes chegou até a Corte por "amizade" com Michel Temer
Barroso 9.abr.2021	disse que Barroso fez "politicalha" ao determinar a abertura de uma CPI sobre a pandemia no Senado; no mesmo dia, disse que Barroso não tem "coragem moral" e é "defensor de terrorista"
Barroso 17.jun.2021	referiu-se a Barroso como "ditador" pela decisão de proibir que as pessoas fossem despejadas de suas casas durante a pandemia
Barroso 7.jul.2021	afirmou que Barroso é um "péssimo ministro" e insinuou que o magistrado atua por "interesse pessoal"
Barroso 9.jul.2021	chamou Barroso de "imbecil" e "idiota" ao defender o voto impresso
Barroso 10.jul.2021	declarou que Barroso defende a pedofilia e não deveria estar na Corte. Disse que o lugar dele é no Congresso, onde pode defender as suas opiniões
Barroso 3.ago.2021	acusou Barroso de "dever favores" a Lula
Moraes 5.ago.2021	afirmou que Moraes é a "mentira em pessoa" e que "a hora dele vai chegar" depois de ser incluído no inquérito das fake news
Barroso 6.ago.2021	chamou Barroso de "filho da puta" em encontro com apoiadores em Joinville (SC). No mesmo dia, ligou o ministro à pedofilia disse que Moraes cometeu "barbaridades"
Moraes 17.ago.2021	chamou Moraes de "canalha"
Moraes 7.set.2021	disse que Moraes "passou todos os limites" e usou o termo "canetada" para se referir a decisões do ministro
Edson Fachin 15.dez.2021	disse que o ministro Edson Fachin é "trotiskista lenista" por causa do seu voto pela revisão do marco temporal
TSE 18.abr.2022	afirmou que o TSE se tornou "um grupo fechado, o TSE futebol clube" e desafiou Moraes a prendê-lo ou cassá-lo por desconfiar do sistema eleitoral
Moraes 26.mai.2022	declarou que Moraes é "totalmente parcial" e que buscava "esgotar" as ferramentas da Constituição para apontar abuso de autoridade do ministro
Barroso 11.jun.2022	disse que Barroso é "mentiroso", "sem caráter" e "psicopata"
Fachin e Barroso 14.jun.2022	afirmou que Fachin deu "tremenda colaboração para o narcotráfico" e que Barroso interferiu nas atividades do Poder Legislativo para barrar o voto impresso
STF e TSE 18.jul.2022	crítico e fez acusações a ministros do STF que também eram magistrados do TSE
Barroso e Fux 2.ago.2022	chamou Barroso de "criminoso" e "mentiroso" e acusou Fux de divulgar fake news sobre urnas eletrônicas
Moraes 5.out.2022	chamou Moraes de "vagabundo"
Moraes 7.out.2022	afirmou que Moraes está "ajudando a enterrar o Brasil, por questão pessoal" e disse que "alguns" ministros do STF têm o "rabo preso"
Moraes 8.out.2022	declarou que Moraes tem "sintomas de ditador"
Moraes 14.out.2022	acusou Moraes de "arrastar votos para o outro lado" –referindo-se a Lula

metodologia: foram compiladas as falas do ex-presidente direcionadas a ministros da Corte durante o seu mandato (2019-2022). O jornal digital considerou as declarações em que Bolsonaro fez acusações e xingamentos aos magistrados
fonte: levantamento do Drive/Poder360

PODER 360

Bolsonaro was hostile to Supreme Court Justices at least 23 times

[The news media] *Poder 360* compiled speeches given by the former president Jair Bolsonaro targeting Justices during his term (2019–2022). The news media considered the statements in which the president accused or cursed Justices.

The issues discussed in this hearing stem from this painful and complex context.

Some, including witnesses in this hearing, question the decisions made by the Brazilian Judiciary in its investigations, as well as in its capacity to oversee elections.

They do so based on conceptions of freedom of speech that misrepresent Brazilian law and private files released by different sources.

Figure 2. Bolsonaro leads rally with sign “The people are supreme”. Photo credit: Alexandre Schneider.



In my written testimony, I provide this subcommittee with a more detailed and nuanced explanation of Brazilian law and why I see claims that Brazilians are living under a censorship regime controlled by a single Supreme Court Justice, Alexandre de Moraes, as nonsense.

I demonstrate, for instance, that Brazilian law fully allows judges to order the removal of social media posts and the suspension of accounts when balancing free speech with other rights and the public interest. I also highlight that the authority of the Supreme Court to initiate investigations of online attacks against the Court and its members was recognized even by Bolsonaro’s Solicitor General, Mr. André Mendonça, who currently sits on the Court appointed by Bolsonaro.

But in these initial and oral remarks, I want to make sure that we don't get lost among the trees and miss the forest. Is there a crisis in Brazilian democracy and rule of law?

If there is, it is not because judges are trying to do their job—imperfect as they might be, as all other human beings—but because we got very close to a point in which judges would have become insignificant, subjugated by mobs unwilling to play by rules.

And this is how democracy dies.

Comments addressing the specific motivations of this hearing

In September 2022, President Lula posted on YouTube two videos with references to a homicide that took place in Brazil, motivated by political disagreements. A Bolsonaro supporter killed a Lula supporter and Lula said that the dead man had been “a victim of... Bolsonaro”. Bolsonaro filed a lawsuit with the Superior Electoral Court, the TSE, claiming that Lula had incorrectly “associated a candidate’s behavior to a person’s death”. The TSE ordered the removal of the video by Instagram and YouTube in 24 hours⁶.

In October 2022, Lula posted that Bolsonaro wanted to reduce the minimum wage. He cited a news article by *Folha de São Paulo*, in which a plan of Bolsonaro’s Finance Minister was revealed that would set future raises at levels below inflation. Bolsonaro went again to the TSE, which ordered the removal of those posts, deeming them inaccurate^{7,8}.

These orders affected not just Lula’s social media account, but several others that had replicated his posts, including from Congresspeople, Unions, and individuals⁹.

I initiate this section of my testimony with these stories because this hearing seems to be based on the idea that democracy and the rule of law in Brazil are falling apart, and the country is moving toward a censorship regime controlled by a single Supreme Court Justice, Mr. Alexandre de Moraes. Yet, this just doesn’t hold up.

⁶ <https://www1.folha.uol.com.br/poder/2022/10/tse-manda-apagar-videos-em-que-lula-associa-bolsonaro-a-morte-de-apoiador-do-pt.shtml>

⁷ <https://www1.folha.uol.com.br/mercado/2022/10/tse-derruba-post-de-lula-sobre-ajuste-do-salario-minimo-no-governo-bolsonaro.shtml>

⁸ These are just two examples. Just last week, Lula was fined for promoting a video on social media in which he calls Bolsonaro “incompetent”, “liar”, and “inhuman” (<https://noticias.uol.com.br/politica/ultimas-noticias/2024/04/29/tse-lula-bolsonaro.htm>). Lula also recently attended a rally in which he asked his supporters to vote for Guilherme Boulos in the mayoral elections that happen later this year. This violates electoral law; campaigns don’t start until August and asking votes is forbidden before then. He will most likely be fined again (See analysis at: <https://www.youtube.com/watch?v=tpbg8M-oF-8>).

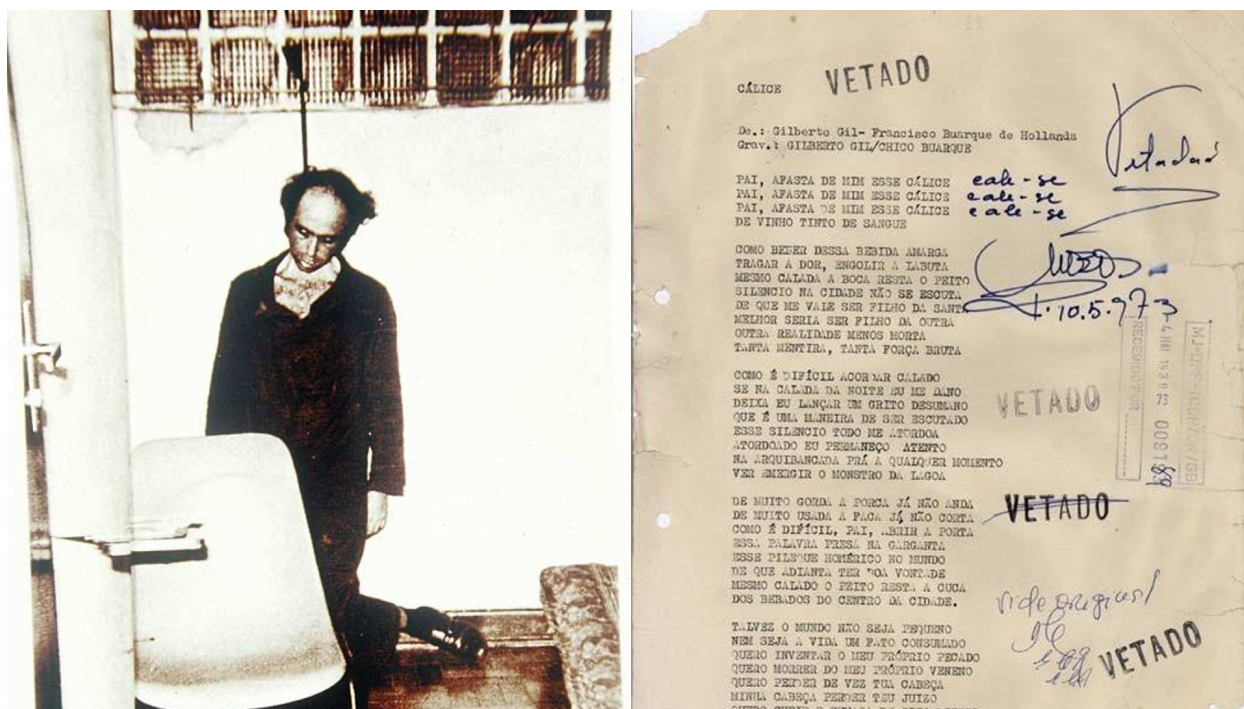
⁹ See details on footnotes 4 and 5 supra.

My goal in this section is to clarify aspects of Brazilian law that have been largely misunderstood—or maybe misrepresented—internationally in the last couple of weeks, after private files were published by various sources, which are being read—or misread—as evidence that Brazilians live under a “ditadura do Xandão”¹⁰.

I begin by stating that the Brazilian 1988 Constitution ensures civil and political liberties broadly, including the right to free speech and to freedom of the press. This is not by chance. The Constitution was enacted after the country overcame civil-military dictatorship regime, initiated in 1964 after a coup was staged with support from the US. In 1968, the regime was further tightened with the issuing of AI-5, which suspended civil rights, including habeas corpus, allowed for the removal from office of oppositions, and prohibited judicial review.

This was also a time marked by arbitrary detention, torture, and the “disappearance” of dissidents, including journalists, as well as by institutionalized censorship of the cultural industry and the press. As a general rule, any scripts of musical, theatrical, and TV performances, in addition to press coverage, had to be approved by the executive before they could be released to the public (**Figure 3**).

Figure 3. Left-hand side: Journalist Vladimir Herzog was suicided by the civil-military dictatorship. Right-hand side: musical lyric “vetoed” by the civil-military dictatorship.



¹⁰ This nickname was given to Justice Moraes by his nemeses.

After 1988, expressing their “hate and distaste for dictatorship”¹¹ Brazilians adopted a legal framework for speech that is similar to that of many other advanced democracies. Speech rights are broadly ensured. They also must be balanced with other rights or the public interest.

This balance is found through democratic deliberation in Congress and Courts. For example, in 2003, in the *Ellwanger* case, the Court held that antisemitic ideas do not constitute protected speech. A 2-year sentence was confirmed against the defendant, a publisher of books that denied the holocaust¹².

This balancing between free speech and other rights or the public interest may well result in the removal of social media posts or the suspension of accounts if these violate legal norms. It has also been enacted and enforced equally across the political spectrum. In the stories I shared in the beginning of this section, it was Bolsonaro who asked for the removal of posts.

There are two forms of balancing between free speech and other rights or the public interest in the Brazilian context that I would like to call your attention to.

The first relates to the integrity of elections. In 2018, courts held that speech which, without any reasonable evidence, claims that Brazilian voting machines are not safe, is abusive and therefore not protected¹³. This decision was reviewed and confirmed by the Supreme Court. Therefore, in 2022, anybody who engaged in this kind of speech was knowingly violating the law-of-the-land and should be willing to accept the consequences.

The second stems from federal statute n. 14.197/21, signed by Bolsonaro himself, which made it a crime against democracy to “publicly incite animosity between the armed forces, or of armed forces against the constitutional powers, civil institutions, or society”¹⁴.

This, unfortunately, is a form of speech in which many individuals engaged after the 2022 elections¹⁵. They did not accept the results of the election and tried to create chaos to justify an undue intervention of the military in politics, which resulted in the terrible events of Jan 8, 2023¹⁶ I mentioned in the opening of this testimony.

¹¹ This is a quote from the speech of Ulysses Guimarães, the chairman of the Constitutional Assembly, given when the Constitution was being proclaimed.

¹² <https://jurisprudencia.stf.jus.br/pages/search?classeNumeroIncidente=%22HC%2082424%22>

¹³ See TSE decision attached as Appendix I.

¹⁴ See highlighted section in the Brazilian Criminal Code attached as Appendix II.

¹⁵ Besides the criminal investigations against individuals carried out by the Supreme Court and presided over by Justice Moraes, there is at least one *civil* investigation on these speeches carried out by independent São Paulo prosecutors, which has led to a civil lawsuit, currently under examination by the Federal Judiciary. This lawsuit focuses on Brazilian Radio Jovem Pan. The memo that initiates this investigation is attached as Appendix III.

¹⁶ The criminal investigations carried out by the Supreme Court have produced substantial evidence that this plot was intended to be executed and that former president Bolsonaro had participation in it, including through

Most of cases included in the private files published in the last couple of weeks relate to violations of these laws. Therefore, the investigations and decisions to remove social media posts or to suspend accounts referenced in the files are, in principle, entirely covered by Brazilian law. Moreover, many of these decisions were not issued by Justice Moraes.

And, according to a recent investigation conducted by the Brazilian news media *The Intercept Brasil*, 22 out of the 115 accounts that the publication of the files denounced as “suspended” are back to operation, authorized by the Judiciary. Out of those, 14 are deemed “big” accounts, having more than 500k followers. And 11 had a substantial increase in followers¹⁷. All of this makes further nonsense the idea of a “ditadura do Xandão”

I want to add that, when judges issue orders to remove social media posts or suspend accounts, platforms receive a notice that the order has been issued, which typically doesn’t include the details of the case. For instance, when a bank receives an order to freeze an account being used for criminal activities, it won’t learn which those activities are, it will just get the order to freeze the account. And this is obvious. The bank is not being accused of anything and exposing, to the bank, the details of the case would violate the privacy of the individuals being investigated.

All to say that these decisions are not “secret” and “unmotivated”, as stated by many. Simply, Twitter doesn’t have access to the full decision and its motivation—and it shouldn’t.

None of the above means that there aren’t issues in Brazilian democracy and “rule of law”. Brazil has serious problems with, for instance, police brutality, and some in the country still insist on the idea that the military should have a role in the civil government—an idea that should be repealed by all small-d democrats in this room^{18 19}.

But Brazilians are certainly *not* under a new “ditadura”. In fact, **the NGO Reporters Without Borders has recently released their latest Global Ranking on Press Freedom, in which Brazil moved up 20 positions in 2022, after Bolsonaro left power²⁰**. Similarly, reputable sources like **V-DEM**, often used by this committee to distinguish between democratic and authoritarian regimes, Brazil **(1)** became an electoral democracy in 1989, **(2)** improved its performance since

depositions by former Bolsonaro aide Mauro Cid and the former Airforce Commander Carlos Baptista Junior. A package of these depositions is attached as Appendix IV.

¹⁷ <https://www.intercept.com.br/2024/05/07/twitter-files-elon-musk-bloqueados-stf-ganham-seguidores-x/>

¹⁸ See footnote 13 supra.

¹⁹ The idea that the military should play any role in civil government was, by the way, recently rejected by the Supreme Court by a 11x0 vote. In other words, it was rejected even by the Justices appointed by Bolsonaro. See details at: <https://www.migalhas.com.br/quentes/404648/stf-rejeita-tese-de-poder-moderador-das-forcas-armadas>

²⁰ <https://www.rfi.fr/br/brasil/20240503-brasil-sobe-10-posicoes-no-ranking-mundial-de-liberdade-de-imprensa-em-2024>

then, **(3)** saw its performance decline precisely during the Bolsonaro years, and **(4)** is recovering its status as a democratic country after Bolsonaro is gone **(Figures 4 and 5)**.

Figure 4. V-DEM scores on freedom of expression for Brazil.

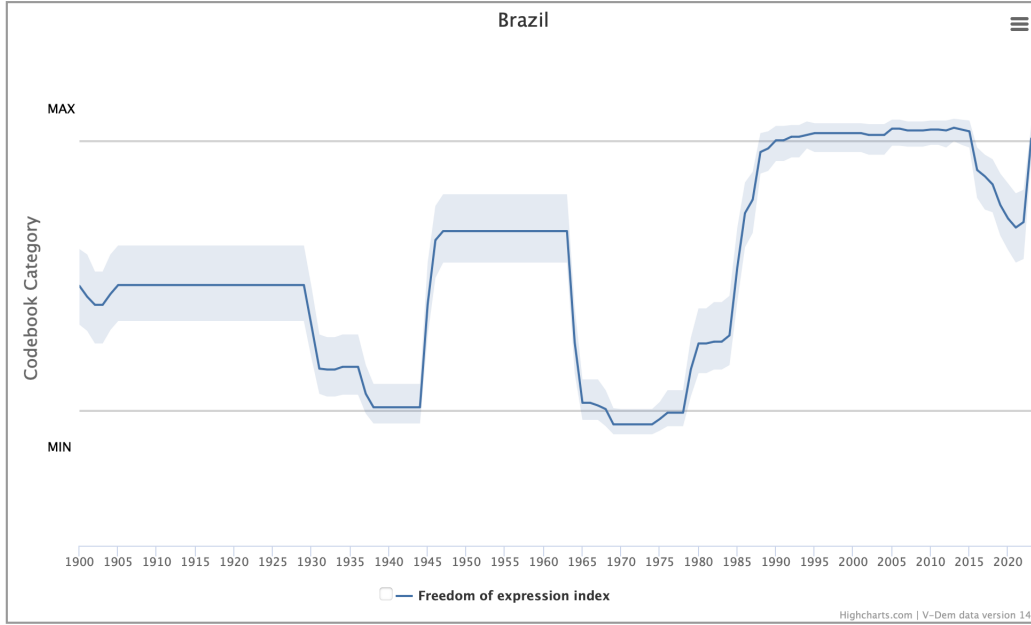
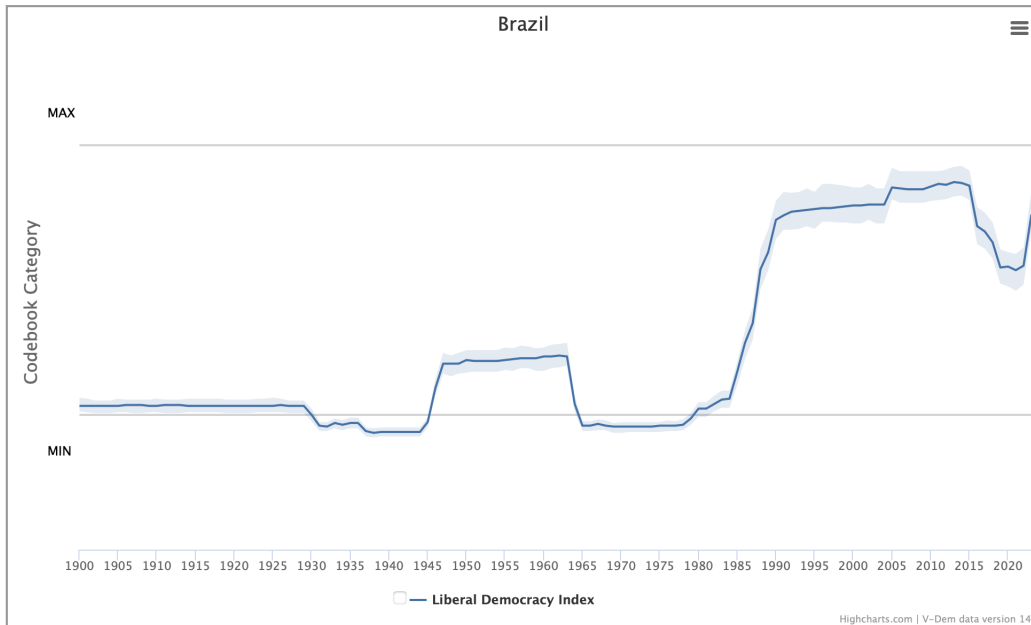


Figure 5. V-DEM scores on liberal democracy.



Brief comments on the authority of the Supreme Court to launch investigations

Another topic that might raise curiosity among members of this subcommittee is the fact that some of the investigations behind the files are being carried out by the Supreme Court and are presided over by a Supreme Court Justice—Mr. Alexandre de Moraes.

This question has been debated in the Brazilian Judiciary since 2019, when the first of these investigations was launched—the IP 4781, popularly known as the “fake news inquiry”. IP 4781 was launched because the Court and its members became targets of online hate speech and threats which, at the time, did not come from Bolsonaro and his supporters.

The Chief Justice understood that the Court had authority to investigate crimes against its own members, based on an interpretation art. 43 of the Court’s bylaws, which also would grant him the authority to appoint a Justice of his own choice to carry out the investigative proceedings. This decision was contested, leading to a deliberation by the full Court. The sitting Justices validated, by a 10x1 vote, the Chief Justice’s interpretation of art. 43 (**Appendix V**).

Interestingly, the Solicitor General in the Bolsonaro administration at that time, Mr. André Mendonça, issued an opinion supporting the idea that art. 43 of the Court’s bylaws gave the Court the authority to launch and conduct its own investigations (**Appendix VI**). Mr. Mendonça was later appointed by Bolsonaro to serve on the Court and is currently a Justice there. In other words, the Bolsonaro administration initially approved this solution, and only came to complain about it when those being investigated were their supporters or sympathizers.

None of this is to say that this is an ideal legal design and that there are no more controversies about RISTF art. 43 in the Brazilian legal community. One sensitive issue is where the public prosecutor’s office fits in this model, given that Brazil adopts an accusatory approach to criminal justice. Moraes—himself a former criminal prosecutor—has attempted to address this critique by ensuring participation of the Chief Federal Prosecutor in the proceedings.

Brazilian legal scholars broadly understand that the provision in art. 43 of the Court’s bylaws must be used with self-restraint. I have personally made the case that Moraes must “land this airplane²¹,” concluding the investigations and sending a report to the Chief Federal Prosecutor, who should determine who is going to be indicted and for what crimes.

What I want to ensure this subcommittee, anyhow, is that this issue has been deeply thought through by the Brazilian legal establishment and there is contestation of it in the Brazilian public sphere. From this perspective, Mr. Moraes is not ruling without any accountability. Brazilians are vigilant and will navigate well the delicacy of these legal and political issues, as they have done in the past.

²¹ <https://www.intercept.com.br/2024/04/17/cinco-pontos-para-uma-discussao-seria-sobre-a-ditadura-do-xandao/>

Brief comments on this hearing and the US's best interest

I want to finish with a discussion of where the best interest of the US lies in the topics discussed in this hearing. Those promoting the hearing online say explicitly that they hope this can be the first step toward more aggressive measures by the US against Brazil.

Decisions on whether or not to take these measures belong to this Congress and are sovereign to the US. But taking these measures, in my humble opinion, would not add to a productive relationship between the two countries and would be detrimental to US leadership and the country's national interest.

In addition to being a vibrant democracy, as the indicators from V-DEM and Reporters Without Borders cited above can testify better than I could, Brazil is a key player in global governance. It currently presides over the G20. It will host the next COP, where important decisions regarding a sustainable future to the world are to be made. Recently, the Secretary-General of the OECD reinforced his intent to bring Brazil into this important organization²².

Does it make sense any for the US to alienate a country of this stature?

Thank you for your attention and I look forward to your questions.

²² <https://www.metropoles.com/colunas/guilherme-amado/ocde-reforca-interesse-de-ter-brasil-como-membro>

Appendix I

TSE ruling holding that speech which, without any evidence, claims that Brazilian voting machines are not safe, is abusive and therefore not protected

Appendix II

Brazilian Criminal Code. Highlights indicate the stipulations from federal statute 14.197/21, signed by Bolsonaro, which made it a crime against democracy to “publicly incite animosity between the armed forces, or of armed forces against the constitutional powers, civil institutions, or society”

Appendix III

Civil investigation (currently a lawsuit) launched by the Public Prosecutor's Office
against Jovem Pan Radio Station

Appendix IV

Depositions in the current investigations by the Supreme Court, which detail the plot that Bolsonaro and others allegedly wanted to carry out, involving the production of chaos to create an opportunity for the military to intervene

Appendix V

10x1 decision by the Supreme Court validating the interpretation that art. 43 of the Court's bylaws authorizes it to launch investigations in case of online crimes and threats committed against the Court and/or its Justices

Appendix VI

Opinion by Mr. Andre Mendonça, then-Solicitor General in the Bolsonaro administration, supporting the view that art. 43 of the Supreme Court's bylaws authorizes it to launch investigations in case of online crimes and threats committed against the Court and/or its Justices