

# Peeking through the Blindfold: Judicial Off-Bench Response to Affective Polarization in Fragmented Constitutional Courts

André Moreno 

Department of Public Policy, Central European University, Vienna, Austria  
Email: andrefmoreno@outlook.com

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## Abstract

Literature generally advances that preserving constitutional courts' institutional trust is in the self-interest of justices, who mobilize their networks and adopt institution-preserving off-bench behavior vis-à-vis illiberal actors. In Brazil, however, the use of self-oriented off-bench rhetoric to safeguard individual external reputations regardless of the collegiate stands out. After analyzing two typical cases through process-tracing, this paper unveils the mechanisms leading from heightened audience pressure to self-oriented off-bench behavior, highlighting the inability of fragmented constitutional courts to filter its justices' individual strategies within a context of affective polarization and judicialization of politics. Against this backdrop, the constant public involvement of justices in political discourse might compromise the court's perceived impartiality, thereby exacerbating the erosion of judicial legitimacy and fueling cycles of negative reciprocity within society.

## Keywords

Affective Polarization, Constitutional Court, Institutional Trust, Judicial Off-Bench Behavior, Judicialization of Politics, Legitimacy-Preserving Narratives

## 1. Introduction

### 1.1. The Importance of the Judiciary in Mitigating Affective Polarization

Basic democratic trust entails a tacit belief that all democratic participants engage in reciprocal fair play, adhering to substantive (i.e., negotiable policy decisions) and procedural (i.e., formal rules and institutions) trust (Schedler, 2023a). Recently,

there have been physical assaults on democratic institutions and a rise in fake news in countries as varied as Brazil, Sri Lanka, and the United States, indicating an overall decline in basic democratic trust and a deepening division and emotional hostility between members of opposing political factions across different national contexts.

Within the social contract, the judiciary is a unique institution regarding trust, serving as an impartial triadic dispute resolution system (Shapiro, 1981). This implies that courts are tasked with upholding an autonomous normative reasoning, and are disproportionately reliant on their perceived legitimacy, namely being viewed by relevant audiences as justified, appropriate, and deserving of public support (Clark, 2009; Fallon, 2005).

Primarily, courts should maintain a commitment to two types of procedural justice: ensuring that actors and institutions comply with laws, and maintaining their own neutrality, transparency, respectfulness, and trustworthiness, hence allowing people to be heard (Tyler, 1990; Yam, 2021). Additionally, rulings are expected to be proportional to violations, free from external influences unrelated to the case, and consistent across jurisdictions (Matthews, 2020).

The judicialization of politics occurs when major political, moral, and social issues that are primarily political dilemmas, reach the courts through constitutional jurisdiction (Hirschl, 2008; Volcansek, 2019). Constitutional courts can overrule lower courts' decisions (appellate jurisdiction), and assess the constitutionality of legislative or executive acts (constitutional review). In this scenario, opportunistic actors may exploit justices' statutory interpretations of rather indeterminate rights provisions, portraying different rulings as undue favoritism, and judicial actors as rule-breakers.

The judiciary's perceived politicization facilitates the erosion of basic democratic trust, along with institutional trust, which is characterized by the belief that members of a polity share and consider binding institutions' constitutive rules, values, and norms (De Greiff, 2012). This leads to affective polarization, namely cycles of negative reciprocity based on mutually-exclusive imagined communities (Schedler, 2023b).

To shield courts' perceived legitimacy from illiberal actors, justices might engage in activities outside of their official duties, namely off-bench behavior. However, most studies do not consider that the efforts justices make to preserve their individual reputations or interests might differ from actions taken to protect the institution (Bakiner, 2016; Bogéa, 2023). Cognizant of that, the following research question emerges: How can the variation in justices' decisions to engage in self-oriented or institution-preserving off-bench behavior within affectively polarized political climates be explained? Or, more specifically, what are the mechanisms leading justices to resort to self-oriented off-bench behavior rather than institution-preserving off-bench behavior within affectively polarized political climates?

This paper hypothesizes that judges may prioritize individual reputations when they experience disproportional individual exposure to the judiciary's audiences.

The Brazilian Supreme Federal Tribunal (STF) is examined, because its fragmented character and contemporary judicial-political prominence enables the identification of individual judicial off-bench responses to audience pressure.

## 1.2. How Judges Decide

The legal model defines the first wave of judicial behavior scholarship, advancing that judicial decision-making primarily relies on reasoned analysis of recognized sources of legal authority, precedents, and predominant interpretations, with minimal influence from ideology or institutional constraints (Perino, 2006). The second wave, the attitudinal approach, proposes that judges' decisions align with their ideological and policy preferences, often reflecting the interests of the parties behind their nominations (Dyevre, 2010; Perino, 2006).

The third wave, the neo-institutional approach, emphasizes how institutional settings influence judges' ability to implement their beliefs, shape their ideas and sense of institutional propriety, and affect their strategic calculations (Clayton & Gillman, 1999). The latter approach branches out into four streams: historical, sociological, rational choice internalist and rational choice externalist neo-institutionalism.

**Table 1.** Main theories of judicial behavior.

Theoretical Approach	Importance of Individual Internal Constraints	Importance of External Constraints	Main Factors Influencing Judicial Decision-Making
Legal	Secondary	Primary	Laws, legal reasoning, and statutes.
Attitudinal	Primary	Secondary	Justices' individual beliefs.
Historical Neo-Institutionalist	Secondary	Primary	Political arrangements, legal paradigm, and society at large.
Sociological Neo-Institutionalist	Secondary	Primary	Justices' web of attachments and obligations.
Rational Choice Neo-Institutional Internalist	Secondary	Primary	Actors with retaliatory powers within judicial bodies (e.g., the collegiate).
Rational Choice Neo-Institutional Externalist	Secondary	Primary	Actors with retaliatory powers (e.g., executive, and legislative branches).

As per **Table 1**, historical neo-institutionalism contemplates justices' preference formation, underscoring the role of path-dependent institutions embedded in broader social and intellectual contexts in shaping dominant legal interpretations and legal meaning (Bloom, 2001). The sociological institutionalist approach

assigns greater importance to the obligations deriving from justices' social networks and affective bonds for cultural and organizational fields constitute one's self-interest and utility.

Meanwhile, the rational choice approach posits that self-interested and utility-maximizing actors consider strategic factors and run rational calculations to attain their a priori policy preferences (Clayton & Gillman, 1999). The rational choice neo-institutional internalist model advances that the structure and dynamics of judicial bodies and their deliberative processes influence whether judges will stick to their original positions, compromise, or neglect them (Dyevre, 2010).

Conversely, the neo-institutional externalist model considers that judges attempt to advance policy goals but are primarily bound by exogenous political and institutional circumstances like popular support or political cohesiveness of actors with retaliatory powers (Dyevre, 2010; Ip, 2019). These dynamics result in game equilibria such as judicial self-censorship (fearing non-compliance by other branches), contentious equilibrium (branches are similarly powerful), legislative self-censorship (fearing popular backlash if judicial rulings are ignored), and judicial or executive-legislative supremacy (Vanberg, 2001).

Dyevre (2010) convincingly unifies this section's approaches by introducing a nested model of macro, meso, and micro variables of judicial behavior, granting primary importance to macro-level variables (neo-institutional externalist), but admitting greater roles to meso-level (neo-institutional internalist) and micro-level (attitudinal) explanations as ideological fragmentation grows in other branches, and the judiciary's popularity increases.

### 1.3. How Judges Respond to Political Interference

Illiberal actors seek to undermine civil liberties, the rule of law, horizontal accountability, and liberal institutions (Lührmann, 2020). Whereas they may intimidate judges openly (i.e., rhetorical attacks, threats of violence, and physical assaults), covert intimidation involves indirect modes (i.e., bribes, unofficial communication, or clientelist/power pressure links) (Llanos, Weber, Heyl, & Stroh, 2016).

As per Table 2, physical assaults, threats of violence, bribes, and social obligations pose high risks for an autonomous legal practice. Although rhetorical attacks and unofficial communication present lower risks, they become riskier as their frequency and intensity rise, threatening the court's diffuse support. Llanos et al. (2016) observe that judicial institutions are carriers of regime legacies, and countries with more democratic experience and institutional autonomy are less keen to experience direct and severe modes of interference.

As illustrated in Table 3, active off-bench resistance to political interference manifests sequentially in five forms: 1) secret negotiations with the attacker, 2) secret mobilization of judicial allies, 3) public relations campaigns, 4) collective protests, and 5) open mobilization of allies of the judiciary (Trochev & Ellet, 2014: p. 72). Furthermore, considering justices' legal, social, and political networks,

their strategies can be implemented individually or collectively, activate local or international networks, rely on short- or long-term considerations, and vary in their degree of secretiveness (Dressel, Urribarri, & Stroh, 2017).

**Table 2.** Modes of political interference in the judiciary.

Type of Intimidation	Means for Intimidation
Direct (open)	Court packing (high risk), rhetorical attacks (low risk), threats of violence (high risk), and physical assaults (high risk).
Indirect (covert)	Bribes (high risk), unofficial communication (low risk), and clientelist/power pressure links (high risk).

Note. Adapted from *Informal interference in the judiciary in new democracies: A comparison of six African and Latin American cases* by Llanos et al. (2016).

**Table 3.** Judicial responses to political interference.

Type of Response	Example
Resistance through off-bench action	Secret negotiations with the attacker (1 <sup>st</sup> step), secret mobilization of judicial allies (2 <sup>nd</sup> step), public relations campaigns (3 <sup>rd</sup> step), collective protests (4 <sup>th</sup> step), and open mobilization of allies of the judiciary (5 <sup>th</sup> step) (Trochev & Ellet, 2014).
Resistance through on-bench action	Judicial decisions (e.g., adherence to precedents that protect democratic principles and human rights, or reversal of precedents that hinder such values), generous interpretation of standing rules (i.e., encouraging and supporting litigation that challenges attempts of political interference) (Yam, 2021), robust dissent, among others.
Resistance through self-restraint	Refusal to change a ruling due to audience pressure (Trochev & Ellet, 2014), strategic deference to legislatures or executive officers by selectively refusing cases (docket power) (Yam, 2021), strategic silence, and delaying or postponing decisions (Arguelhes & Ribeiro, 2018).
Accommodation	Collaboration with illiberal actors for individual or collective self-preservation (Urribarri, 2017).

As justices leverage broader networks of nonlegal themes and actors, they may also perpetrate or accommodate interference, and turn to off-bench mobilization to further their individual goals (Trochev & Ellet, 2014; Urribarri, 2017). The latter occurs as intra-judicial disputes intensify, enabling justices to reshape inter-branch and intra-branch power relations (Bakiner, 2016).

Ultimately, justices' success in defending the legal profession from political encroachments depends on their intentions, depth and breadth of their networks,

and individual crisis management skills (Bakiner, 2016; Halliday, Karpik, & Feeley, 2007). In democracies, liberal justices must be seen as relatively equidistant from the major political players regardless of network mobilization to uphold institutional trust (Stroh, 2018). In hybrid regimes, judges may overcome liberal-authoritarian normative antagonisms by differentiating among cases according to political salience, and referencing comparative jurisprudence to leverage their credibility, normative authority, and deflect criticisms (Yam, 2021).

Overall, justices need to adopt strategically devised and self-reflexive responses to advance interbranch democracy-preserving reciprocity in democracies, or to ensure institutional survival, and certain public legitimacy in hybrid regimes (Schedler, 2021).

#### 1.4. Causal Mechanisms Behind Off-Bench Behavior

Judicial action is subject to internal audiences, which include court members and the collegiate, and four main external audiences: politicians, where political consequences are felt and retaliatory acts may follow; civil society, which holds judicial independence as a core value; the media, which reveals elite and societal preferences while also translating judicial messages to the public; and the legal community, which helps courts enhance their political and social influence as centers of excellence by upholding the principle of legality (Ginsburg & Garoupa, 2009; Linos & Twist, 2016).

Interestingly, all plenary sessions of the Brazilian Supreme Federal Tribunal (STF) are broadcast live via its own TV Justiça. On the one hand, rather than enhancing inclusive communication, research indicates that livestreaming has lengthened the voting process—often marked by scholarly and complex language—and reinforced the justices' rigidity in their positions (Falcão & Arguelhes, 2016; Hartmann et al., 2017). On the other hand, justices have openly recognized increased public pressure for favorable rulings, noting that livestreaming occurred without widespread efforts to educate the public on legal procedures (Band Jornalismo, 2018). The influence of livestreaming on judicial audiences is also visible on social media, where clips of justices expressing their opinions in plenary sessions are commonly posted.

Recalling the rational choice neo-institutionalist approach, justices adjust their behavior based on their audiences' significance. In the STF, in addition to having their plenary sessions livestreamed, justices are politically nominated and appointed for life. Furthermore, STF's rulings over socially and politically sensitive cases amidst a climate of affective polarization breed media focus on performance dissatisfaction of individual justices (Arguelhes & Hartman, 2017; Werneck Arguelhes & Molhano Ribeiro, 2018; Strother & Glennon, 2021). Accordingly, the importance of internal audiences seems to diminish relative to external audiences (Ginsburg & Garoupa, 2009).

This suggests that if the judiciary's audiences mobilize against individual justices, justices will engage in self-preserving off-bench behavior to safeguard their

individual external reputations regardless of the collegiate. This would, in turn, imply that scholarly and complex language would be replaced by a greater use of metaphors and politically charged terms to enhance inclusive communication. Instead, if a group of justices is targeted, justices will form cliques, prioritizing clique-preserving legitimacy efforts. Cliques minimize the transactional costs required for collective action while maximizing individual reputational payoffs (Ahrne & Brunsson, 2011). For clarity, this paper categorizes clique-preserving and self-preserving efforts as self-oriented, in contrast to institution-preserving efforts, which are more sociotropic and expected when the entire STF is targeted.

This paper focuses on judicial off-bench rhetoric, entailing public statements, writings, or speeches delivered outside formal judicial proceedings. As STF's plenary sessions are broadcasted, rhetoric manifestations that violate the court's decorum and divert from strictly legal discussions, are treated as a hybrid on-bench-off-bench behavior. This is because employing politically loaded rhetoric, such as showing explicit favoritism toward a worldview or partisan preference, and using inflammatory language with negative connotations, conveys messages unrelated to the legal aspects of the case and therefore falls outside the formal responsibilities of the justices (Oxford Reference, 2024). Most importantly, they may indicate an intention of building individual external reputations.

Institution-preserving narratives may focus on purpose, highlighting the organization's missions and values; politics, praising the institution's political autonomy; and performance, advocating legitimacy based on outstanding performance and competence (Von Billerbeck, 2023). Credit-taking and blame-avoidance rhetoric typically involve self-elevation in comparison to others, especially when accompanied by politically loaded language, but are not always self-oriented.

Once justices deem the judiciary's audiences contextually relevant, this paper anticipates similar causal mechanisms to unfold for all of them. Following **Table 4**, audience pressure leads to off-bench behavior through four mechanistic parts: 1) justices' assessment of audience significance and how to react, 2) mobilization of subjects targeted by the message, 3) assessment of institutional constraints and leveraging political capital, and 4) choosing self-oriented or institution-preserving narratives. Three hypotheses are advanced:

H\_0: Justices engage in institution-preserving behavior irrespective of the subjects targeted by the judiciary's audiences.

H\_1: If judiciary audiences' pressure targets individual justices or a group of justices, justices become more concerned with building individual external reputations, engaging in self-oriented off-bench rhetoric.

H\_2: If judiciary audiences' pressure targets the court, justices remain primarily concerned with the court's diffuse support, and engage in institution-preserving off-bench rhetoric.

If one accepts the null hypothesis, one may assume that the court's fragmented nature does not affect justices' decision to engage in self-oriented or sociotropic

off-bench behavior, being possibly explained by strong judicial socialization norms (Strother & Glennon, 2021; Wedeking & Zilis, 2018).

**Table 4.** Theorized causal mechanism linking audience pressure to judicial off-bench rhetoric.

Part of the mechanism	Conceptualization
Condition (x)	A context of affective polarization where the judiciary's audiences react to judicial decisions on politically or socially sensitive cases by targeting a justice (causal path 1), a group of justices (causal path 2), or the whole court (causal path 3) within a fragmented constitutional court.
Part 1 (n1)	The justice assesses the significance of the sender, whether the action/message undermines self-oriented interests, and decides to accommodate or react to the sender's action/message.
Part 2 (n2)	The justice mobilizes the subjects targeted by the action/message, organizing individually, in cliques, or cohesively as a court.
Part 3 (n3)	The justice assesses institutional constraints and leverages political capital.
Part 4 (n4)	The justice frames the judicial reaction along self-oriented or institution-preserving narratives.
Outcome (Y)	The justice engages in self-oriented off-bench rhetoric, prioritizing the preservation of individual (causal path 1), or clique (causal path 2) external reputations. Alternatively, justices engage in institution-preserving off-bench rhetoric (causal path 3).

## 2. Methodology

### 2.1. Process-Tracing

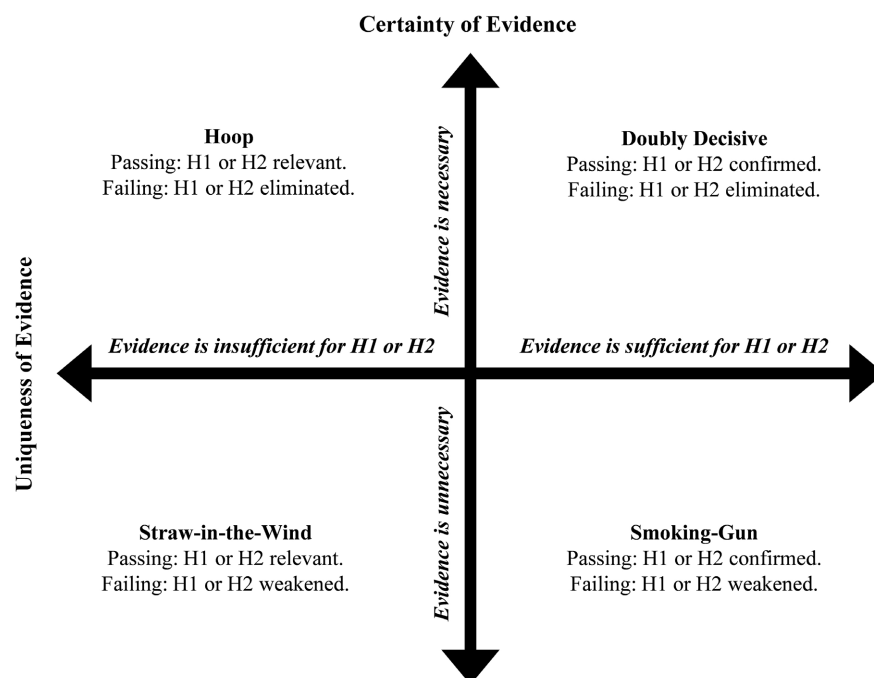
This paper combines theory-testing process-tracing to verify the complete or partial presence of the theorized causal mechanism, with theory-revising process-tracing to clarify the contextual conditions in which pressure from the judiciary's audiences (X) leads to off-bench behavior (Y) (Beach & Pedersen, 2019).

Macro-contextual scope conditions include court fragmentation, affective polarization, and the judicialization of politics. Micro-contextual conditions include individual strategies and targeting by audience pressure. The paper emphasizes an agent-centered mechanism within a short-term timeframe and translates mechanistic components into empirical indicators that are sufficient (uniqueness) and needed (certainty) to affirm causal inference (Beach & Pedersen, 2019; Collier, 2011).

First, media scrapping helps determine whether the STF or justices are mentioned in reports, declarations, or protests. The Nexis Uni database and open-source reviews of Brazilian mainstream media archives for the years 2018 and

2019 are the main data sources. As per **Figure 1**, such evidence is necessary to indicate higher judicial exposure but insufficient for admitting H1 or H2, characterizing a hoop test.

Second, direct and indirect public references to the sender or the message content could reveal concerns over the message's repercussions, constituting a smoking-gun test.



**Figure 1.** Uniqueness x evidence matrix and implications for the hypotheses. Note. adapted from understanding process tracing by Collier (2011).

Third, because cliques might covertly mobilize, such mobilization is retroactively assessed through the content of justices' off-bench rhetoric. If justices blame or defend targeted justices regardless of the STF's reputation, evidence becomes necessary and sufficient for admitting H1, characterizing a doubly decisive test. Similarly, H2 is confirmed if the STF is targeted, and justices defend the STF.

Fourth, to understand how justices view institutional constraints and build political connections, the paper uses media scraping and justices' official agendas to find meetings before major decisions or instances of off-bench behavior. This evidence is necessary but not sufficient for admitting H0, characterizing a hoop test. Fifth, the paper scrutinizes justices' interviews and public declarations, seeking self-oriented (i.e., credit-claiming and blame-avoidance) or institution-preserving (i.e., narratives of purpose, politics, and performance) messages, constituting a doubly decisive test.

## 2.2. Case Selection: The Brazilian Supreme Federal Tribunal (STF)

Two typical cases, which are members of X, Y, and scope conditions are selected

(Beach & Rohlffing, 2018). They refer to the 2018 and 2019 trials that revisited the STF's stance on the initiation of sentence execution following a second-degree conviction, henceforth "second-instance imprisonment." This article adopts an agent-centered approach, and while the series of trials concerning the matter spanned the years of 2009, 2016, 2018, and 2019, the case selection contemplates an alternation in the STF's Presidency between 2018 and 2019.

Moreover, the 2018 and 2019 trials unfolded in the context of the Lava Jato anti-corruption operation, and directly influenced the arrest and subsequent release of then-former President Lula, implying heightened audience pressure.

While the 1988 Constitution stipulates the non-culpability principle, that is, one cannot be deemed criminally guilty until the final appeal, it does not preclude the possibility of commencing sentence execution once evidence examination is exhausted at both trial and appellate levels (Brasil, 1988, Art. 5, subsection LVII). Because special (Superior Tribunal of Justice's jurisdiction) and extraordinary (STF) appeals do not review evidence and thus one's non-culpability, but rather ensure verdicts align with legislation or the constitution, respectively, collegiates have formed divergent understandings over time.

As presented in Table 5, justices formed understandings over decisions regarding two legal instruments: the Habeas Corpus (HC), namely a constitutional guarantee aimed at protecting an individual's right to freedom of movement, and the Action for Declaration of Constitutionality (ADC), which aims at establishing the constitutionality of a norm or federal law.

**Table 5.** Possibility of provisionally executing the sentence after second-instance conviction.

STF Presidency	Date	Case(s)	Outcome
Multiple	Until 05/02/2009	Multiple	Possible
Gilmar Mendes (2008-2010)	05/02/2009	HC 84.078/MG	Impossible (exceptions provided)
Cármén Lúcia Rocha (2016-2018)	17/02/2016	HC 126.292/SP	Possible
	05/10/2016	ADCs 43 and 44	
	04/04/2018	HC 152.752/PR	
Dias Toffoli (2018-2020)	07/11/2019	ADCs 43, 44, and 54	Impossible (exceptions provided)

The 2018 trial pertains to Lula's petition for a preventative HC (i.e., HC 152,752/PR) and contests the 2016 preliminary ruling over ADCs 43 and 44, which favored second-instance imprisonment and did not determine the ADCs' merit. Meanwhile, the 2019 trial evaluates the merit of the ADCs 43, 44, and 54, declaring second-instance imprisonment unconstitutional.

The STF is organized into two panels (each with five justices), the president,

and the plenary (formed by the eleven justices, also called ministers). Each case is randomly assigned to a rapporteur justice, who studies the matter and issues a preliminary decision that is binding and must be ratified later by the panel or plenary. Yet, because of the overwhelming quantity of cases at the STF, an average of 1278 days passed from a monocratic decision to the first collegial manifestation between 2007 and 2016, creating de facto individual judicial review (Werneck Arguelles & Molhano Ribeiro, 2018).

As per Figure 2, justices may exercise individual veto power at three decision-making nodes: authorizing the case to proceed to the STF's president as a rapporteur, including it on the plenary agenda as the President, and deciding whether to "request to view" a case during a plenary session (Arguelles & Hartmann, 2017). Each justice may file a "request to view" the case, suspending the discussion and giving the justice 90 days to better understand the case or reassess previous opinions (Arguelles & Hartmann, 2017).

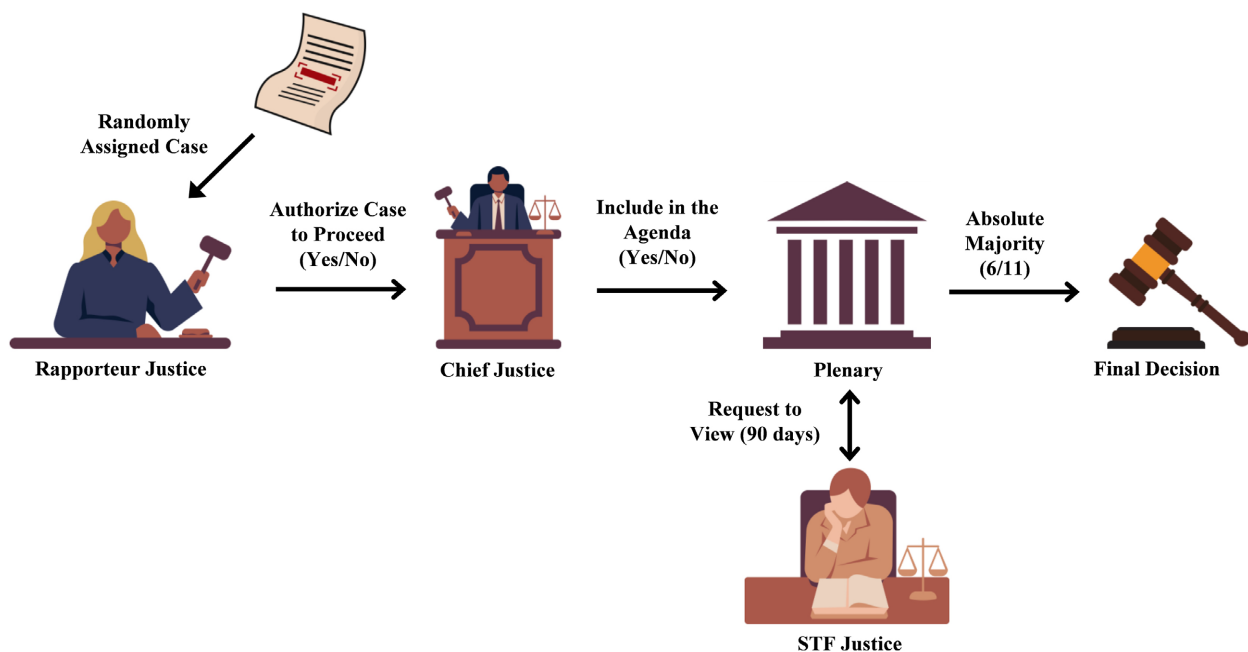


Figure 2. Simplified STF decision-making flowchart.

Notably, judicial silence increases the costs for overruling monocratic decisions as they become *faits accomplis*, and justices may govern time once they anticipate changes in the Court's composition or political conjecture (Werneck Arguelles & Molhano Ribeiro, 2018; Gomes Neto, Lima, & Oliveira, 2019). Moreover, because STF justices can freely comment on cases if such comments do not constitute pre-judgement or bias, they enjoy signaling powers which may affect political calculations in other government branches (Arguelles & Hartmann, 2017).

Therefore, the STF holds a double counter-majoritarian capacity. This means that 1) individual justices have the power to act against the preferences of the majority in the STF plenary through the aforementioned decision-making nodes; and

2) both individual justices and the STF may influence representative government branches through signaling and plenary decisions (Werneck Arguelhes & Molhano Ribeiro, 2018; Falcão & Arguelhes, 2017). This might expose justices to interest groups due to their ability to stall or expedite plenary discussions. This suggests that even if justices appointed by the same President have greater voting cohesion, as argued by Oliveira (2012) for the period from 1999 to 2006, individual strategies play an integral part in enabling sympathy coalitions.

### 2.3. Case Study 1: Lula's Preventative HC Trial (2018)

#### 2.3.1. Tensions of the Pre-HC Trial Scenario

On January 24, 2018, the Federal Regional Court of the 4th Region (i.e., a second-instance court) found Lula guilty of corruption in the Lava Jato operation and scheduled the review of appeals for March 14, 21, and 26. At the time, there was a suspected shift in stance among STF justices regarding a 2016 decision toward rejecting second-instance imprisonment. Since the STF holds final authority over Habeas Corpus (HC) petitions and Actions for Declaration of Constitutionality (ADCs), the pressure on STF justices to reconsider ADCs 43 and 44, which addressed the constitutionality of second-instance imprisonment, rapidly increased (Borges & Bronzatto, 2017). Notably, ADCs have a broader constitutional impact, while HCs are limited to the defendant.

The STF President, Justice Cármen Lúcia Rocha, faced the most scrutiny because of her agenda-setting powers. On January 30, Rocha cautioned journalists that second-instance imprisonment had been discussed in 2016, and adding it to the agenda solely due to Lula's case would entail "greatly diminishing the Supreme Court" (O Globo, 2018). Rocha indirectly referred to the court's superior organizational mission (i.e., narrative of purpose), and the autonomy of its standard operating mechanisms vis-à-vis changing political conjectures (i.e., narrative of politics). Rocha's response to the general question posed by journalists aligns with her position in two other analyzed interviews, demonstrating general deference to the collegiate and initially suggesting robust internal socialization norms within the STF (Band Jornalismo, 2018; Roda Viva, 2016a).

In March, as the Federal Regional Court appreciation of Lula's appeals approached, Justice Rocha appeared to slightly shift her position, embedding blame-avoidant rhetoric within an institution-preserving discourse. While Rocha asserted that any STF justice could bring an HC petition to the plenary, the STF justice who oversaw the ADCs and the Lava Jato-rapporteur justice stated that they would wait for Rocha to schedule the discussion (Pupo & Pires, 2018).

On March 10, Rocha met with then-President Temer, who seemed to support second-instance imprisonment through a definitive decision over ADCs. By considering network mobilization, this paper muses that this meeting provided an opportunity for Rocha to mobilize or coordinate with allies beyond the meeting's official agenda (Cury & Monteiro, 2018).

In the following week, Rocha met with congressmen, and Lula's political allies

and attorneys, one of whom had previously been an STF President (Osakabe, 2018). Rocha had previously evaded the request for the latter meeting for weeks, and when confronted by journalists, asserted she did not yield to pressure.

Political, media, and legal community pressure growingly focused on Rocha. In a radio interview on March 19, Rocha again embedded blame-avoidant language within narratives of purpose and politics, as she recalled the STF's standard procedures and delegated the responsibility over scheduling the Habeas Corpus trial to a colleague: "[...] the rapporteur is responsible for saying the importance of the process" (Freitas, 2018).

Rocha's engagements with opposing and situational factions suggests an assessment of her political wiggle room, while her predominantly institution-preserving rhetoric indicates a self-reflexive stance. As targeted pressure grew, Rocha subtly resorted to blame-avoidant rhetoric without undermining the STF. Yet, Rocha's insistence on the STF's political autonomy and reluctance to resolve the second-instance imprisonment matter reveals the disparity between the timing of justice and the timing of politics, a tension that became more apparent as the Federal Regional Court's March sessions drew nearer.

On March 20, STF Justice Mello Filho informed reporters that he and STF Justice Fux had requested an informal meeting with Rocha to shield her from potential embarrassment during the following plenary sessions (Pires & Pupo, 2018). After Rocha did not schedule the meeting, Mello Filho expressed that "[...] this impasse does not serve institutional interests [...] This generates great perplexity" (Pires et al., 2018).



**Figure 3.** Outcome of the HC 152.752/PR voting.

His statements convey dissatisfaction with STF President Rocha, while highlighting his efforts to coordinate collegially to protect the institutional integrity of the STF. This constitutes credit-claiming faultily embedded within institution-preserving rhetoric, as he exposed Rocha in his public declaration. As per [Figure 3](#), which shows the results of an upcoming Habeas Corpus vote, Justice Mello Filho favored Lula's Habeas Corpus and opposed second-instance imprisonment, differing from the understandings of Justices Rocha and Fux. This suggests certain dispute mediation within the court, and reveals internal audience pressure.

On March 20, representatives of the Brazilian Bar Association met with STF Justices Toffoli, Aurélio Mello, Mendes, and Moraes to pressure for the scheduling of the ADCs trial. On March 21, major pro-Lava Jato civil society organizations planning a series of nationwide demonstrations in the upcoming days met with Rocha, who reassured them that the ADCs would not be scheduled ([Moraes, 2018a](#)).

As the day's plenary session started, Rocha announced that Lula's HC petition would be judged on March 22, a decision which was widely regarded as a "tactical node" ([Weterman, 2018](#)). STF's justices who rejected the highly popular second-instance imprisonment would have to declare themselves and risk being defeated on live television over a matter of individual repercussion. During the session, STF Justice Mendes harshly criticized Rocha's conduct, declaring that "[...] I may look silly and even drool on my tie, but respect my intelligence. Let's organize the habit of writing the agenda with a minimum of truthfulness" ([Supremo Tribunal Federal, 2018a](#)).

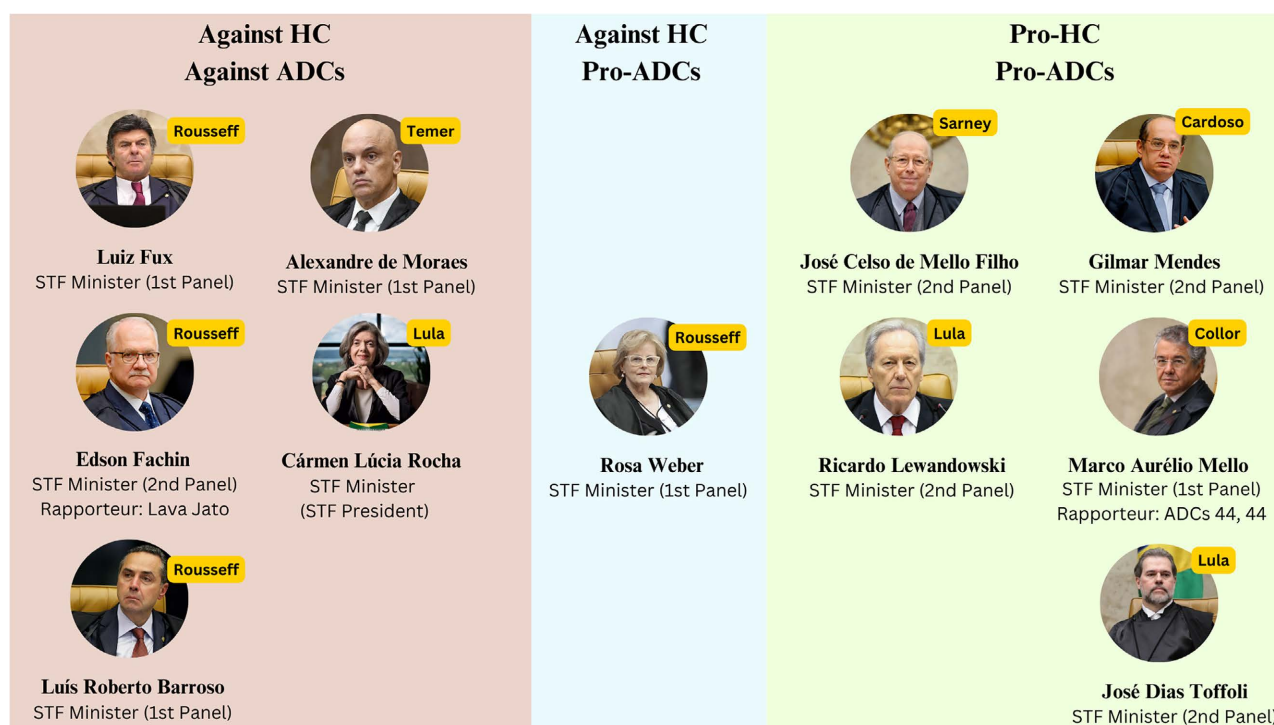
Justice Fux defended STF President Rocha, advocating against hasty judgments, while Rocha herself emphasized that Lula's HC had just been authorized by the Lava Jato-rapporteur judge ([Supremo Tribunal Federal, 2018a](#)). Next, Mendes accused Justice Barroso of altering panel jurisprudence in another case to suit Barroso's own interests. Barroso responded:

"[...] Leave me out of your bad feeling, you are a horrible person, a mixture of evil with delay and hints of psychopathy. This has nothing to do with what is being judged. It is absurd, Your Excellency, to come here and hold a rally full of insults and rudeness [...] you've already offended the president, you've already offended Minister Fux, now you've reached me. Life for Your Excellency is to offend people [...] Your Excellency demoralizes the court. It is very painful for us to have to live with Your Excellency. You are always after some interest other than justice [...]" ([Supremo Tribunal Federal, 2018b](#)).

What was previously perceived as subtler forms of credit-taking and blame-avoidance in external interviews manifests as outright self-oriented rhetoric in televised sessions: Justices Rocha, Fux, Barroso, and Fachin favoring second-instance imprisonment, and Justices Mendes, Mello Filho, and Aurélio Mello opposing second-instance imprisonment. Importantly, Rocha's previous responsibility delegation to Lava Jato-rapporteur Justice Fachin might be explained by

within-clique coordination and Fachin's avoidance of off-bench behavior, whereby direct pressure could decrease through the compartmentalization of responsibility within the STF's ranks.

After the session, Justice Mello Filho likened the distribution of HCs in the STF to a lottery, referring to the sharp contrast between decisions by STF's first and second panels regarding HC petition approvals (Cury, Pupo, & Pires, 2018). The former, pejoratively dubbed by Justice Mendes as the "Gas Chamber," approved 16% of HCs between June 2015 and October 2017, whilst the latter approved 40% of HCs, being called the "Eden Gardens" (Lôbo, 2017). As per Figure 4, one might include "Eden Garden" Justices Toffoli and Lewandowski in the anti-second-instance imprisonment clique, and "Gas Chamber" Justices Weber (temporarily) and Moraes in the pro-second-instance-imprisonment clique.



**Figure 4.** Identified cliques for March-April 2018, and respective presidential nominations.

From a mechanistic perspective, justices faced pressure collectively and individually from internal and external audiences (x). Although STF President Rocha was the main target of audience pressure, individual justices' stances and comments were consistently mentioned in demonstrations and media outlets (Borges & Bronzatto, 2017; Moraes, 2018a). Mechanistic parts overlap, as both political/legal pressure and the evaluation of the sender's significance by justices was evident through meetings with opposing parties (n1). Popular and media significance was observed through public declarations that emphasized the normativity and political autonomy of the STF, which are theoretically desired by civil society.

Justices' political capital and network mobilization manifested through meetings

with actors that favored similar legal approaches (n3). Institutional constraints were assessed through meetings with actors who favored different legal theses and the general socio-political climate, as evidenced by Rocha succumbing to pressures to schedule the HC trial as the Federal Regional Court appeals appreciation approached. Despite narrative attempts at credit-taking and blame-avoidance primarily focusing on individuals and being externally veiled behind institutional explanations (n4), televised plenary sessions revealed clear cliques (n2) and self-oriented rhetoric (y).

### 2.3.2. The HC Trial

Anticipating March 22's Habeas Corpus trial at the STF, nationwide campaigns by civil society organizations accused all anti-second-instance-imprisonment STF justices of "working behind the scenes to protect Lula" (Weterman, 2018). Furthermore, the campaign singled out pro-second-instance-imprisonment Justice Barroso, urging him to file a "request to view," and delay the process.

After a long session on March 22, the HC trial was postponed to April 4. When pressed by journalists in a radio interview, STF President Rocha underscored the importance of treating Lula with the same dignity and respect as other citizens—a message aiming at defending the STF's perceived impartiality after the previous day's tumultuous plenary session (Moraes, 2018b).

In the next days, prominent journalist Ricardo Boechat criticized major law firms that consistently pressured the STF in favor of Lula, highlighting how judicial conduct contributed to institutional distrust (Rádio Band News FM, 2018). Meanwhile, congressmen delivered a petition favoring second-instance imprisonment to Rocha, and then-President-Temer-nominated Federal Prosecutor contacted all justices for them to reject the HC (G1, 2018; Lindner & Truffi, 2018).

On March 29, Rocha stated to a respected journal that "[...] justice does not succumb to intimidation" (Moura, 2018). On April 3, while inaugurating a session of the National Council of Justice, Rocha appealed for society's "understanding" of the judiciary's role and universal adherence to the STF's decisions (Pupo, 2018a). These manifestations seek to elevate the STF above political considerations, while showing deep sociotropic concern for the impact of the STF's ruling.

On April 4, as the HC trial started, Justice Aurélio Mello interrupted Rocha when she mentioned the Actions for Declaration of Constitutionality, and declared that "[...] in terms of wear and tear, the strategy [of avoiding the ADCs] could not be worse. Your Excellency announced to the public that scheduling the ADCs would diminish the court, I don't think that way [...]" (Moura et al., 2018). To which Rocha responded: "It was not in this context that this was said. When the STF adjudicates, it adjudicates the issues, and does not diminish itself vis-à-vis this or that case [...]" (Moura et al., 2018).

In contrast, Mendes disclosed experiencing intense media pressure and personalized the case instead of defending his judicial thesis. Furthermore, he undermined the judiciary by calling an STF's precedent "nonsense" and criticizing the Lava Jato operation, which involved several law enforcement institutions:

“[...] If we must decide causes like this because the media wants this or that result, we’d better resign and go home. When we analyze the Lava Jato cases, second-instance arrest is nonsense [...] it’s unfair, it’s unworthy of me [...]” (Veja, 2018a).

Moreover, Barroso adopted inflammatory language against judicial and political institutions, revealing his own institutional distrust:

“[...] This is not the country I would like to leave to my children: a paradise of murderers, rapists, and corrupt people. I refuse to participate, without reacting, in a justice system that does not work, and when it does work, it is to arrest poor children, usually primary defendants [...]” (Veja, 2018a).

Arguably, justices were not merely defending their viewpoints, but leveraging televised sessions to appeal to their audiences through politically loaded language. Other justices, such as Rocha and Weber, wove their speeches in legalistic terms, avoiding affective escalation.

In the weeks following the trial, Justice Mendes overtly criticized STF President Rocha, while Justice Barroso engaged in narratives of performance to publicly criticize STF’s criminal jurisdiction over senior government authorities (Miranda, 2018; Passarinho, 2018). On May 5, representatives of lawyers’ associations met with Rocha to push for the scheduling of the ADCs judgment (Pupo, 2018b). Thus, internal and external audience pressure persisted after the HC trial.

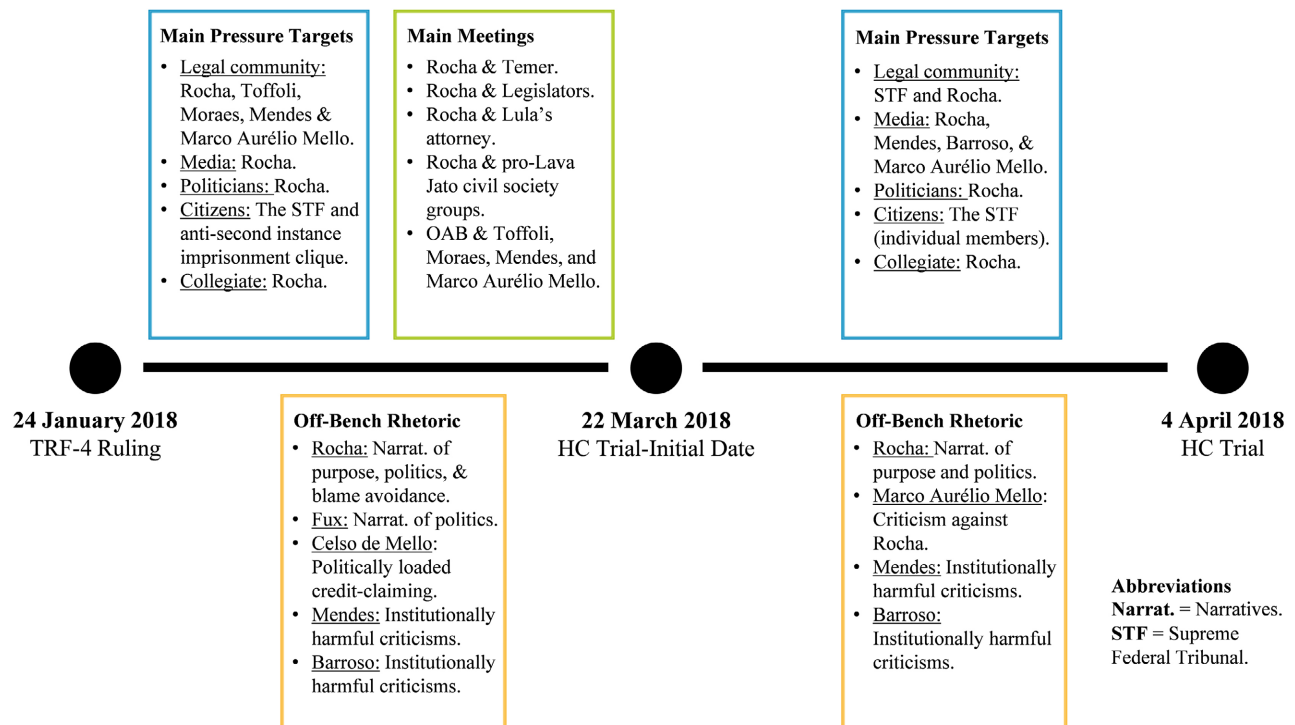
On May 21, Rocha conducted a one-hour interview on national television, where she argued for the quality and impartiality of Brazilian judges, explained the processes and “timing” of the STF bureaucracy, praised opposing-clique members, and contextualized her stance on the HC and ADCs within legal antecedents (Band Jornalismo, 2018). Rocha adopted a conciliatory tone and treated the STF as a cohesive, impartial whole.

Importantly, narratives of purpose are challenged by ambiguous decisions, while narratives of politics are tested by prioritization decisions. When judging high-profile Lava Jato cases, the STF could easily be framed as partisan unless narratives and actions were coordinated among all judges to uphold the notion of equidistance within a socio-political environment that tends to interpret behaviors within a game frame. De Greiff (2012) neatly captures these challenges by questioning how one can endorse admittedly imperfect policies within the framework of impeccable notions of justice.

The judicialization of politics, scrutiny over individual justices, and affective polarization, facilitated the integration of moral hazard perceptions regarding corruption into identity-based grievances along pro-/anti-Lava Jato lines, which translated into pro-/anti-HC lines (Orjuela, 2014). On April 4, Brazil’s top-selling magazine, *Veja*, depicted gallows on its cover with the headline, “STF decides: Either Lula goes to prison, or Lava Jato ends,” capturing this division (Veja, 2018b). Hence, the normativity of justice reflected in Rocha’s narrative was directly challenged by her strategic tactical node and other justices’ self-oriented rhetoric,

confirming polarized expectations, and revealing *De Greiff's* (2012) dilemma.

As simplified by **Figure 5**, following audience pressure, justices increasingly engaged in self-oriented off-bench rhetoric to express their (dis)satisfaction with the STF and its members, even at the expense of the institution. This suggests that the fragmentation of the court exposes justices' individual strategies and characteristics, allowing them to adopt self-oriented rhetoric to enhance their individual external reputations. The contrast between Justice Mendes' self-oriented approach and Rocha's overall institution-preserving attitudes further underscores the significance of individualities.



**Figure 5.** Simplification of main pressure targets, meetings, and off-bench rhetoric in the HC trial.

## 2.4. Case Study 2: The ADCs Trial (2019)

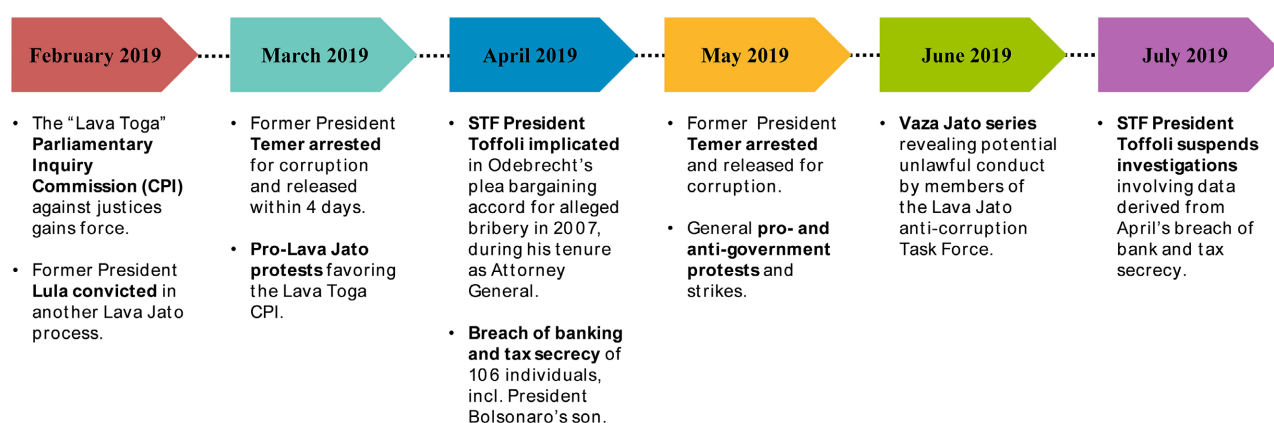
### 2.4.1. Tensions of the Pre-ADCs Trial Scenario

Since February 2019, congressmen mobilized to create the “Lava Toga” parliamentary inquiry commission (CPI) to investigate high-ranking justices, including STF President Toffoli and STF Justice Mendes, regarding dubious financial transactions flagged by the Federal Revenue Service (*Oliveira & D’Agostino, 2019a*). In parallel, after the breach of banking and tax secrecy of 106 individuals by the Federal Revenue Service and the Financial Activities Control Council, Rio’s Prosecution Office uncovered evidence of financial crimes by then-President Bolsonaro’s son and Senator, Flávio Bolsonaro (*Barbiéri & Costa, 2019*).

While Flávio reportedly lobbied senators to block the formation of the Lava Toga CPI, STF President Toffoli, on July 16, froze all investigations from the aforementioned financial oversight agencies that lacked prior judicial authorization

(Barbiéri & Costa, 2019). This decision followed a request from Flávio’s defense. These events led to a prevalent view among Brazilian political analysts that Toffoli’s decision was an exchange of political favors with Flávio, increasing public scrutiny over STF Justices Toffoli and Mendes (Rádio Band News FM, 2021).

As per **Figure 6**, the perceived politicization of the judiciary reached a new high when, in June 2019, unlawful transcripts of communications between key Lava Jato Task Force members and federal law-enforcement authorities were released, indicating collusion against defendants, which compromises due process (*The Intercept Brasil*, 2024). STF Justices Barroso, Fachin, and Fux, were implicated in the leakages, which remain officially and independently unverified to date. These events sparked intense media debates, and prompted calls for the annulment of convictions—mainly by Lula’s supporters.



**Figure 6.** Timeline of the main political events between February and July 2019.

Following meetings with prominent politicians and Lava Jato figures in July, Toffoli disclosed to Veja in early August discussions of an attempted coup against then-President Bolsonaro between April and May (Junior & Borges, 2019; Wiziack & Arbex, 2019). Toffoli claimed to have brokered an agreement, resulting, among others, in the suspension of the Lava Toga CPI, halting investigations into Bolsonaro’s son, and postponing the ADCs trial that Toffoli intended to schedule for April (Junior & Borges, 2019). Toffoli avoided controversial declarations regarding Lava Jato, and affirmed that the STF decides on abstract constitutional themes so that the to-be-scheduled ADCs trial should not incite political upheaval.

Throughout August, Toffoli met center-right and conservative congressmen to garner support against his impeachment in the Senate, while also meeting favorable union leaders and leftist factions (Rocha, 2019; Weterman, 2019). Additionally, Toffoli publicly defended the STF from judicial activism allegations and fake news campaigns, while slightly criticizing Lava Jato by declaring that it “[...] a country is not made of heroes, but of projects” (Nascimento, 2019).

Toffoli’s declarations generally seek to shield the court despite a series of individualized pressures against STF justices resulting from the Lava Jato leakages and

dubious financial transactions allegations. In his *Veja* interview, Toffoli frequently recalled legal protocols to either address or refrain from engaging in politically and socially contentious topics. His initial reluctance to comment on the Lava Jato leakages aligns with theorized expectations that courts must not consider aspects exogenous to the case at hand (Matthews, 2020). Yet, Toffoli's efforts to assert institutional and personal credit claiming by disclosing the inter-branch agreement brokered by him, later criticism of Lava Jato, and political articulations to bolster his political influence throughout August place the STF as a political entity involved in *quid pro quo* politics.

Conversely, STF Justices Barroso and Mendes openly used inflammatory language in the media. Barroso, implicated in the Lava Jato leakages, defended the operation, saying that "[...] it is difficult to understand the euphoria that gripped many sectors of society in face of this gossip produced by criminals" (Migalhas, 2019). Mendes, in turn, engaged in overt credit-claiming and asserted that both Toffoli and himself faced investigations because they represented "[...] some kind of resistance to the bad practices that were developing [...]" (Cavalcanti, Souza, Mader, & Dubeux, 2019).

In September, Mendes linked themes such as fascism, corruption, promiscuity, torture, dictatorship, repression, organized crime, and censorship to the Lava Jato operation (UOL, 2019). Additionally, Mendes consistently accused the media of pressuring the STF to indiscriminately support Lava Jato, while mentioning that late STF Lava Jato-rapporteur Justice Zavascki was constrained by institutional and media pressures. Such declarations implicitly cast doubt on the STF's autonomy.

Throughout the analyzed timeframe, various mechanistic elements are evident, albeit not always in a linear fashion. These include audience pressure directed at individual justices or cliques (x), the nominal recognition of the sender's significance (e.g., media and political pressures) (n1), the assessment of institutional constraints and leveraging of political capital (n3), and self-oriented off-bench responses (y).

One may further note the continued alignment of STF Justices Toffoli and Mendes within the same anti-second-instance-imprisonment clique, and Justices Barroso, Fux, and Fachin within the opposing pro-second-instance-imprisonment clique (n2). Whereas Toffoli sought to embed credit-claiming within a strategically questionable institution-preserving rhetoric, Barroso and Mendes utilized politically loaded language (n4).

Interestingly, STF Presidency norms and awareness of institutional representation seem to favor institution-preserving rhetoric, which focuses on legal explanations and collegial preeminence rather than on individual dissenting opinions. Indeed, whereas Mendes consistently reiterated his warnings about alleged inherent mistakes in previous collegiate decisions, STF President Toffoli and former STF President Rocha (in 2018) sought to adopt more conciliatory tones (Roda Viva, 2016b, 2019).

### 2.4.2. The ADCs Trial

On October 6, STF President Toffoli affirmed in an interview the constitutional importance of scheduling the ADCs trial for judicial security, while refraining from discussing controversial topics and emphasizing institutional dialogue (SBT, 2019). Toffoli also employed credit-claiming rhetoric within a narrative of performance without undermining the STF, by mentioning that collegial decisions increased by 15% during his presidency. Moreover, he stated that the STF was not opposed to Lava Jato, for previous STF decisions had enabled it from the start, highlighting a previous decision by fellow clique member Justice Mendes.

The next day, Justice Mendes, who had recently been individually targeted in an aborted murder plot by a former Federal Prosecutor, gave an hour-long interview, escalating his attacks against Lava Jato and the media (Roda Viva, 2019). Mendes criticized Justice Barroso and implied that an old decision by Justice Fux regarding financial assistance to magistrates was *contra legem* and probably influenced by overlapping interests with the at-the-time STF Presidency and pressure from the magistrature. Furthermore, Mendes called second-instance imprisonment the indicative of penal totalitarianism, asserting that “[...] I was the one who put my finger on the wound of provisional prisons. I was the one who visited prisons, all these dungeons. Which Supreme Court minister has done the same since then?” (Roda Viva, 2019).

In mid-October, Toffoli set the ADCs trial for October 23. Internal pressure automatically increased, as pro-second-instance-imprisonment Justice Barroso publicly cautioned against the potential negative repercussions of overruling the STF’s 2016 understanding (Estadão, 2019). Meanwhile, anti-second-instance-imprisonment Justice Aurélio Mello revealed certain within-clique tension by declaring that Toffoli was the STF’s coordinator rather than a hierarchical superior (Moura, 2019a). Popular pressure, in turn, was ubiquitous following widespread threats of strikes by pro-second-instance-imprisonment truck drivers (Monteiro & Lindner, 2019).

Despite urging colleagues to shorten their votes, possibly to expedite proceedings and prevent prolonged political turmoil, the October 23 plenary session on the ADCs trial remained unfinished, being rescheduled for November 7 (Moura, 2019b). During the session, pro-second-instance-imprisonment Justice Fux voiced his confusion about the timing of the ADCs trial, which could be interpreted as insinuating secondary interests by STF President Toffoli, who scheduled the session.

In the following days, Toffoli announced that he was still undecided, because the STF’s presidential chair incurred the responsibility of “representing the court as a whole” (Pupo & Moura, 2019). Concurrently, he met with legislators and lobbied Congress to amend the penal code to halt the statute of limitations for special and extraordinary appeals in an apparent attempt to please pro-second-instance-imprisonment factions (Moura, 2019c). Still, dozens of legislators favoring the 2016 ruling pressured Toffoli by going to his office (Prata, 2019).

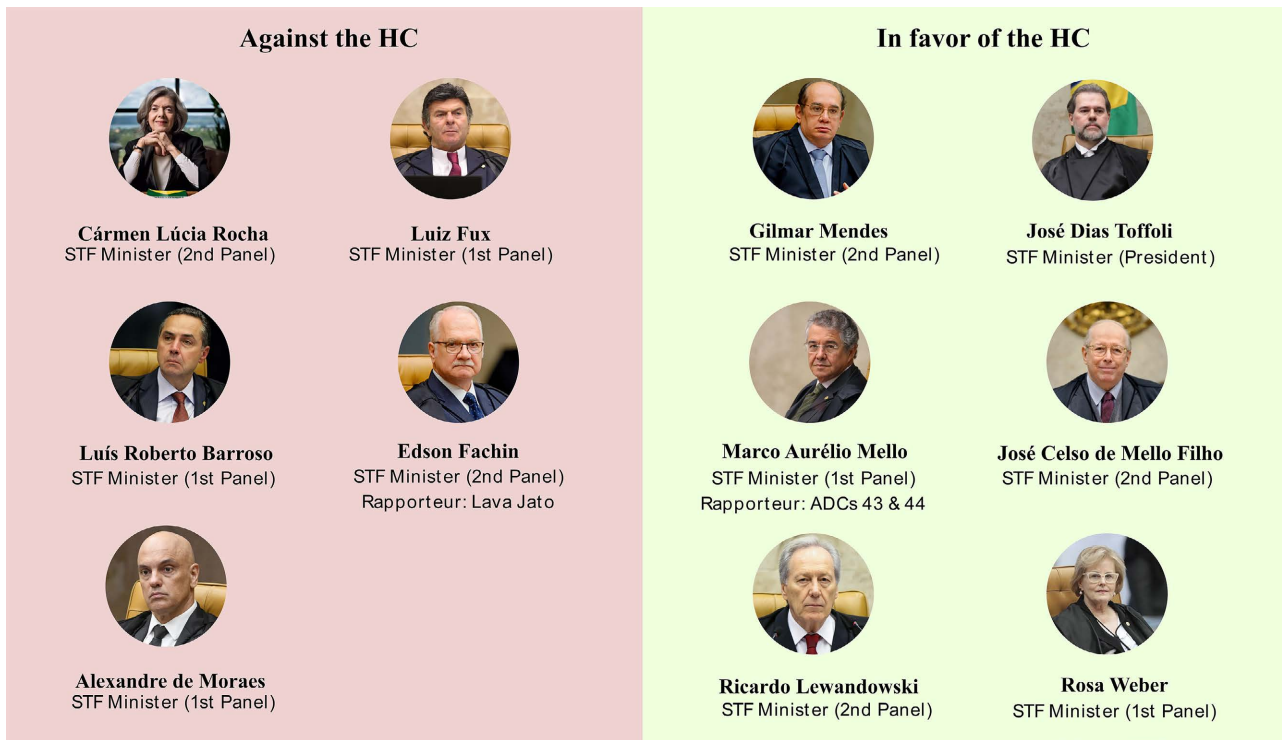


Figure 7. Outcome of the ADCs 43, 44, and 54 voting.

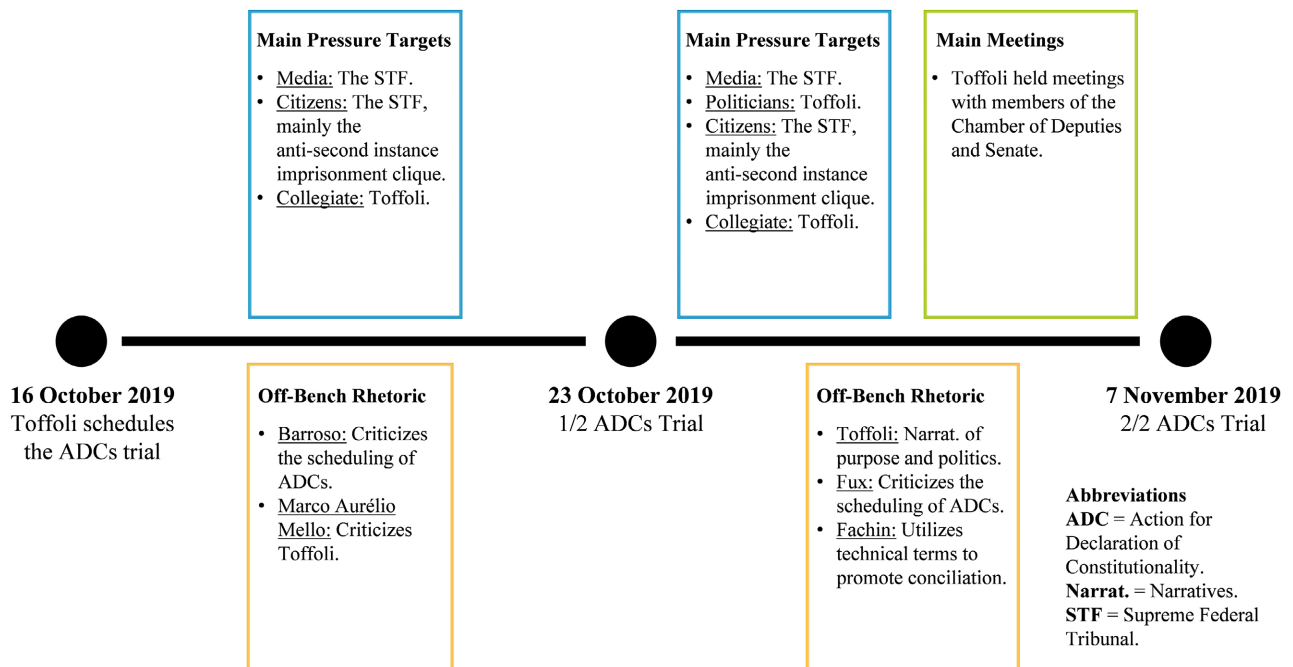


Figure 8. Simplification of main pressure targets, meetings, and off-bench rhetoric in the ADCs trial.

As per Figure 7, on November 7, the STF ruled in favor of the ADCs, leading to Lula’s release on November 8 and subsequent demonstrations. After the plenary session, STF President Toffoli and Lava Jato-rapporteur Justice Fachin gave a joint press conference explaining that the decision would not hinder the fight

against corruption, and that it did not imply the automatic liberation of all those convicted in second instance (Oliveira & D'Agostino, 2019b). By calling Justice Fachin to the conference and focusing on the ruling's technicalities, Toffoli sought to convey the image of a cohesive and strictly legalistic STF.

Overall, the constant incidence and anticipation by justices of new rounds of audience pressure (x) triggered mobilization of allies and network expansion (n3). As exemplified by Figure 8, Toffoli used off-bench rhetoric to signal moderation to all relevant audiences, while engaging in political articulations (n1, n3, y). Yet, his deployment of institution-preserving narratives was hindered by his admitted political role and fellow justices' controversial statements (n4). Besides, clique-preserving discourse is clearly seen as Toffoli and Mendes generally defended each other, while Mendes openly criticized Barroso and Fux (n2).

### 3. Discussion

#### Discussion of Findings

The analyzed material generally supports that individually or clique-targeted pressure leads to self-oriented off-bench behavior under the macro-contextual conditions of court fragmentation, affective polarization and the judicialization of politics (H1). Institutional mechanisms aimed at externally minimizing collegial divisions seem unable to filter individual strategic responses to audience pressure. Sufficient evidence to confirm that STF-targeted messages lead to institution-preserving strategies (H2) was not found.

Audience pressure remained elevated in both case studies, targeting the STF and individual justices. Despite judicial reaction being varied, the STF Presidency chair appeared to incentivize rhetorical restraint. Still, the analysis detected instances of credit-claiming and blame-avoidance by STF presidents. Likewise, overt criticisms of the STF and its members by fellow justices, and perceived political articulations by magistrates, reinforce the STF's perceived politicization. Significantly, this paper offers insight into how politically loaded rhetoric during live-streamed judicial proceedings shapes justices' external reputations, blurring the lines between on-bench and off-bench behavior.

While the rhetoric of STF justices largely reflected their individual preferences in both cases and often attributed opposing views to institutional bias, some notable shifts emerged. First, a within-case shift can be seen in Rocha's HC trial scheduling. She shifted from a rhetoric focused solely on preserving the institution to one that incorporated elements such as blame-avoidance as the appeals to be judged by the Federal Regional Court of the 4th Region neared. Second, Rocha faced frequent criticism from justices of the opposing clique in the first case study, as Lava Jato was widely popular and criticizing Rocha might have become a way to express dissatisfaction with the situation.

In contrast, Toffoli received more indirect criticism from opposing-clique justices, potentially due to the predictability of trial scheduling and the erosion of Lava Jato's legitimacy following Vaza Jato. Third, Justice Mendes began using

language that evoked a global narrative of totalitarianism in the second case study, drawing a connection between the newly elected, rhetorically pro-Lava Jato Bolsonaro and the operation, while highlighting alleged abuses of power. This shift can be traced to the Vaza Jato and Mendes' personal political preferences. Although Toffoli sought to navigate the political landscape cautiously, he also alluded to possible misconduct within Lava Jato and coordination attempts with an Executive branch that symbolized the polarization within society.

The analysis considers justices' personal biases by examining the frequency with which they engage in off-bench activities and the types of narratives they use. As systemic pressures and individual justices' levels of exposure increase, their personal biases become more evident in the frequency and content of their off-bench behavior. For example, justices Moraes and Barroso were often vocal, while justices Weber and Lewandowski were more reserved. Likewise, justices Rocha and Toffoli adopted different approaches when presiding over the court, with justice Rocha being more assertive in defending the institution as a whole and rejecting any political role.

Evidence suggests that all mechanistic parts of the theorized causal mechanism proposed in Table 4 were present. Nevertheless, they did not necessarily abide by temporal linearity and sometimes overlapped. Alternative explanations include multiple rounds of audience pressure and the cases' embeddedness within the Lava Jato context, where individual preferences and support networks might have been known by justices and their audiences.

The findings support [Dyevre's \(2010\)](#) nested model, illustrating that as other branches (and the court itself) lose their ability to retaliate against individual justices, attitudinal approaches and individual off-bench strategies become more prominent. Before going off-bench, STF presidents distinctively consider internal factors such as social capital, majority composition, and agenda-setting tools, as well as external factors like assessing external constraints through meetings and conciliatory statements. However, they still implemented their personal preferences, as seen in Rocha's tactical decisions and Toffoli's scheduling of the ADCs trials.

Additionally, this paper contributes to [Trochev and Ellet's \(2014\)](#) active resistance model by revealing that its five forms do not always manifest sequentially. Moreover, whereas intra-judicial disputes manifested through clique formation and clique-preservation efforts, off-bench rhetoric appeared insufficient in reshaping inter- and intra-branch power dynamics, as suggested by [Bakiner \(2016\)](#). Instead, off-bench rhetoric served as limited efforts to bolstering individual external reputations.

Notably, events that reinforced the court's or judiciary's perceived politicization (e.g., Lava Jato leaks) seem to have enabled political elites to craft credible narratives about themselves and adversaries. Tactics such as retracting misinformation selectively, or engaging in information laundering may have been employed to sow confusion and doubt about trustworthy sources, possibly nudging sections of

the electorate into echo chambers (Rhodes, 2021).

Methodological limitations include limited generalization due to scope conditions, the embeddedness among analyzed cases which might hinder process' autonomy, and potential over determination due to chronological and information availability biases (Rohlfing & Schneider, 2018). Still, the paper boosts significant internal validity, and contributes to understanding the drivers and conditions behind self-oriented off-bench behavior.

The findings in this article can be generalized to other judicial systems facing similar or different pressures. In established democracies struggling with acute affective polarization, such as the United States, life appointments, discretion over case-selection, and open dissent encourage self-preserving off-bench behavior (Dyevre, 2010). Although less polarized and boasting a judicial culture of collegial decision-making, attitudinal voting and open dissent suggest that increased audience pressure could similarly trigger self-preserving off-bench behavior in Canada and Australia (Weiden, 2011). In hybrid regimes like Türkiye, the interplay between systemic constraints and audience expectations, coupled with justices' use of deference-resistance strategies, creates compelling opportunities for judges to adopt roles as opinion leaders, protesters, and network-builders in their off-bench behavior (Oder, 2024; Bakiner, 2016).

In Indonesia, a developing democracy, the Mahkamah Konstitusi (MK) has been notoriously active in socially and politically sensitive cases, despite being enmeshed in clientelist-political structures (Dressel & Inoue, 2018). Similarly to Brazil, the courts' perceived impartiality was questioned by sundry political actors when judging politically charged cases, and individual justices became visible agents in Indonesian politics. In India, the Supreme Court paralleled concerns over eroding institutional trust vis-à-vis sitting judges' non-legalistic remarks, labelling a High Court justice's statement as "unnecessary, gratuitous, and unwarranted" (Mahapatra, 2024). All these cases illustrate how self-preserving off-bench judicial strategies may develop across diverse institutional set-ups depending on macro-contextual conditions.

Future research should select a deviant case to identify omitted factors that lead to a similar outcome, or complement process-tracing with in-depth discourse analysis. Another interesting research avenue involves exploring the impact of broadcasting on within-court polarization.

#### 4. Conclusion

This paper found evidence of a causal mechanism between targeted pressure from the judiciary's audiences and self-oriented off-bench rhetoric to protect individual or clique external reputations in the Brazilian Supreme Federal Tribunal. The mechanism includes 1) justices' assessment of audience significance and how to react, 2) mobilization of subjects targeted by the message, 3) assessment of institutional constraints and leveraging political capital, and 4) choosing self-oriented or institution-preserving narratives. Although self-oriented rhetoric was largely a

response to political interference efforts from pressure groups, it often proved detrimental to the court's perceived legitimacy and diffuse support.

The broader implication beyond Brazil is that judicial systems allowing public dissenting opinions, numerous monocratic decisions, live streamed sessions, or disproportionate individual exposure of justices may be less effective at filtering justices' strategies for building individual external reputations under audience pressure. Reforms in institutional design that strengthen collegial decision-making, offer guidelines for dissenting opinions, enhance codes of conduct, include public education campaigns, or show how collective decisions are made are potential ways of reducing individual exposure as well as the intensity and reach of potential self-oriented off-bench behavior.

Crucially, this paper acknowledges the normative and physical threats that affective polarization poses to the judiciary and its members, and does not question the necessity of their response. Yet, it underscores the significance of off-bench behavioral restraint and perceived impartiality in preserving institutional trust and countering the exacerbation of affective polarization. After all, in terms of institution-preserving behavior, it is futile to exchange insults while addressing each other as "Your Excellency".

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## Conflicts of Interest

The author declares no conflicts of interest regarding the publication of this paper.

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