



CARDOZO

Benjamin N. Cardozo School of Law

LARC @ Cardozo Law

---

CICLR Online

Journal Blogs

---

4-3-2023

## Bolsonaro: Extradition and The Limits of the Political Exception Doctrine

Allison Herstic

*Cardozo International & Comparative Law Review*, [aherstic@law.cardozo.yu.edu](mailto:aherstic@law.cardozo.yu.edu)

Follow this and additional works at: <https://larc.cardozo.yu.edu/ciclr-online>



Part of the [Comparative and Foreign Law Commons](#), and the [International Law Commons](#)

---

### Recommended Citation

Herstic, Allison, "Bolsonaro: Extradition and The Limits of the Political Exception Doctrine" (2023). *CICLR Online*. 78.

<https://larc.cardozo.yu.edu/ciclr-online/78>

This Blog Post is brought to you for free and open access by the Journal Blogs at LARC @ Cardozo Law. It has been accepted for inclusion in CICLR Online by an authorized administrator of LARC @ Cardozo Law. For more information, please contact [larc@yu.edu](mailto:larc@yu.edu).

# Bolsonaro: Extradition and The Limits of the Political Exception Doctrine

By: Allison Herstic



Former Brazilian President Jair Bolsonaro's recent move to Florida represents a potential clash between the immunity afforded to former political leaders and the notion of extradition – a treaty-based obligation to return individuals charged with offenses to their home country.[1]

Bolsonaro's exile to the U.S. on December 30th, 2022 is the culmination of a spectacular political defeat, as he fled Brazil in advance of his rival Luiz Inacio Lula da Silva's Presidential inauguration.[2] The political context surrounding Bolsonaro's departure is fraught, as the former President has openly questioned the validity of Brazilian election results and suggested a rigged processes since his October 2022 defeat.[3] During the transitional government of President Lula, Bolsonaro doubled down on these attacks, supplying a conspiratorial narrative which galvanized a grassroots movement united in the belief the former President was the rightful head of state.[4] Bolsonaro has refused to acknowledge President Lula's victory, instead tucking his tail between his legs, packing his bags, and quietly leaving Brazil.

Prior to his election loss, Bolsonaro was already named the subject of four separate criminal probes in Brazil for his alleged misuse of federal police, dissemination of known election falsehoods and deployment of digital messaging designed to spread disinformation.[5] While still the sitting Brazilian President, Bolsonaro was protected by the Brazilian constitution, which proclaims a sitting President cannot be arrested unless convicted by the Brazilian Supreme Court.[6] In losing his

Presidential status, Bolsonaro also lost this level of constitutional protection meaning that the criminal probes are now free to move through the Brazilian lower courts with fewer procedural hurdles and at a significantly quicker speed. Although an arrest warrant has not yet been issued for these charges, Bolsonaro's move to the U.S. while still the subject of active criminal investigations in Brazil seems to demonstrate an intent to evade the Brazilian legal system.

Bolsonaro's residency in the U.S. was initially protected by the special protection afforded to A-1 visa holders.[7] The A-1 visa, reserved for heads of state, no longer offers Bolsonaro absolute protection, as the end of his presidential term marked a change in his political position, and likely marked the end of his lawful presence in the U.S. on these grounds.[8] Recent coverage of Bolsonaro's U.S. presence uncovered evidence of the former President new tourism visa application,[9] a change in status which could mark the initial stages of a potential extradition inquiry.

Extradition is the process through which a state can bring criminal charges against an individual outside of its territory, while claiming in personam jurisdiction over the named defendant.[10] Bolsonaro, a former head of state seeking safe haven in the U.S. from ongoing prosecution at home, is evading the legal system of a well-established U.S. ally, Brazil.

Unlike deportation, extradition is not premised on the violation of terms and conditions upon which the individual's stay in the U.S. is contingent and requires criminal charges as defined by the treaty in question.[11] In order to properly extradite Bolsonaro, a criminal charge must first be filed in Brazil with sufficient evidence demonstrating probable cause. The Brazilian government then must request extradition, an option made possible through a bilateral treaty. The extradition treaty between the U.S. and Brazil does not guarantee either country an absolute right of return upon request, and any request for extradition must be premised upon an offense considered a criminal act under the laws of both countries.[12] It is unknown whether U.S. courts would agree with the hypothetical reasoning of a Brazilian court supporting charges brought against Bolsonaro, or if U.S. court would find these alleged crimes extraditable. Additional hurdles to extradition remain, as even if an extradition request was made by Brazil and even if U.S. courts ultimately held extradition was a treaty-based obligation, final authority regarding extradition ultimately rests with the U.S. Secretary of State.[13]

An additional barrier to Bolsonaro's extradition is the political offenses exception, which holds an individual cannot face extradition premised on prosecution for a criminal act that is political in nature. This exception does not clearly define what constitutes "political" conduct, but historically former political leaders, terrorists, and military personnel have attempted to evade prosecution in their home countries by emphasizing the inherently political considerations of their actions.[14] Historically, courts have found conduct "political" when presented with evidence of the conduct alleged to be criminal's connection to political disturbance, uprising or political revolt.[15] Additionally, courts have assessed the degree to which the alleged criminal offense was "fundamental [to the] effort to accomplish [political] change." [16] Thus, an ordinary criminal act primarily compelled by a variety of personally motivating factors is not within the political offense's exception to lawful extradition.[17]

The known allegations against Bolsonaro all involve offenses related to political disturbances, and supporters of Bolsonaro may be hoping for the exception's application to a potential extradition proceeding. While the political offense exception does consider evidence of political disturbance to be probative of the exceptions application, the disgraced leader should not get too cozy in the U.S. Past precedent indicates the U.S. courts clearly denied to extend the political offense exception's protection to criminal offenses "designed to quash political activism." [18] The political offenses exception, developed to protect from prosecution individuals acting against oppressive rule, does not shield former heads of state who themselves were oppressive rulers and whose political conduct contradicts the exception's very purpose.[19]

Should the Brazilian government request Bolsonaro's extradition, the Biden administration will face both a political dilemma and a unique international law predicament. The potential extradition of Jair Bolsonaro offers the U.S. an opportunity to send a political message and refuse to supply a refuge to a former right wing authoritarian leader currently relaxing peacefully within its domestic borders.

- [1] Amy Jeffress, Samuel Witten, Kaitlin Konkel, *International Extradition: A Guide to U.S. and International Practice*, Arnold & Porter (Nov. 10, 2020), <https://www.arnoldporter.com/en/perspectives/advisories/2020/11/international-extradition-a-guide> [<https://perma.cc/9UD7-237J>].
- [2] Press Release, White House, President Biden Announces Presidential Delegation to the Federative Republic of Brazil to Attend the Presidential Inauguration of His Excellency Luiz Inácio Lula da Silva (Dec. 22, 2022).
- [3] Anthony Faiola & Gabriela Sá Pessoa, *Bolsonaro Hasn't Conceded to Lula. Is He Following the Trump Playbook?*, Wash. Post (Oct. 31, 2022), <https://www.washingtonpost.com/world/2022/10/31/bolsonaro-lula-brazil-election/> [<https://perma.cc/ZQ2C-GYQP>].
- [4] Sanya Mansoor, *Why Bolsonaro Fled Brazil and What the U.S. Can Do About It*, Time Mag. (Jan. 11, 2023, 1:24 PM), <https://time.com/6246606/bolsonaro-florida-brazil-insurrection-extradition/> [<https://perma.cc/77TV-93QP>].
- [5] Ricardo Brito, *Bolsonaro Directly Spread Disinformation on Brazil's Voting System, Police Report Says*, Reuters (Dec. 17, 2021), <https://www.reuters.com/world/americas/bolsonaro-directly-spread-disinformation-brazils-voting-system-police-report-2021-12-17/> [<https://perma.cc/PJ57-MUBX>] (reviewing the Brazilian federal police report which concluded Bolsonaro had a “direct and relevant” role in spreading disinformation about the country’s election system, with the “clear purpose” of misguiding the citizenry regarding election integrity).
- [6] Constitutuicao Federal [C.F.] [Constitution] Oct. 5, 1988, art. 86, ¶ 1 (Braz.).
- [7] Diplomatic Visas, 22 C.F.R. § 41.26 (2021) (outlining the A-1 visa process for those defined as head of state).
- [8] Gabriel Stargardt, *Pressure Mounts on Biden over Bolsonaro's Florida Stay after Brasilia Riots*, Reuters (Jan. 9, 2023), <https://www.reuters.com/world/americas/bolsonaros-florida-stay-puts-ball-bidens-court-after-brasilia-riots-2023-01-09/> [<https://perma.cc/B9T5-6SNU>] (quoting State Dep’t spokesman Ned Price statement that “anyone in the United States on an A-1 visa no longer engaged in official business must depart the country within 30 days or apply for a change of immigration status.”).
- [9] Emily Olson, *Brazil's Jair Bolsonaro Has Applied for a 6-month Visa to Remain in the U.S.*, NPR (Feb. 2, 2023, 10:08 AM) <https://www.npr.org/2023/02/02/1152759904/jair-bolsonaro-florida-brazil-visa> [<https://perma.cc/YB78-EEW2>].
- [10] Sara Criscitelli, *The Extradition Question: Immunity and the Head of State* 6 Geo. J. Int’l Aff. 81, 82 (2005).
- [11] Treaty with Brazil on Mutual Legal Assistance in Criminal Matters, Braz.-U.S. Oct. 14, 1997, S. Treaty Doc. 105-42; *See generally* Treaty of Extradition, Jan. 13, 1961, Braz.-U.S., 15 U.S.T. 2093.
- [12] 18 U.S.C. § 3184; *In re Extradition of Atuar*, 300 F. Supp. 2d 418, 425 (S.D.W. Va. 2003) (noting that extradition is not a criminal proceeding, but an independent review functionally defined by the controlling statute).
- [13] 18 U.S.C. § 3186.
- [14] Treaty of Extradition, *supra* note 11, at art. V ¶ 6(a)–¶ 6(c).
- [15] *In re Ezeta*, 62 F. 972, 998 (N.D. Cal. 1894) (noting that the political offense exception does not apply to all political acts, but particularly to offenses committed in the effort to abolish or alter the government that controls their lives).
- [16] *Quinn v. Robinson*, 783 F.2d 776, 807 (9th Cir. 1986) (noting these acts are not political because they do not create the requisite amount of turmoil).
- [17] *Koskotas v. Roche*, 931 F.2d 169, 172 (1st Cir. 1991) (“Criminal conduct in the nature of financial fraud, even involving political corruption, traditionally has been considered outside the ‘political offense’ exception.”).
- [18] Aimée J. Buckland, *Offending Officials: For Government Actors and the Political Offense Exception to Extradition*, 94 Cal. L.R. 423, 451 (2006) (arguing that the exception had been built around the situation of rebels who commit violent acts in protest against their government).
- [19] *In re Suarez-Mason*, 694 F. Supp. 676, 704 (N.D. Cal. 1988) (“[T]he extension of the exception to former government officials serves only to protect their illegal action taken in the course of rebellions...[this] undermines the principles which form the basis of the exception.”).