

A CONVENIENT PATH FOR THE BRAZILIAN BRANCHES OF GOVERNMENT: EXECUTIVE SUPREMACY* **

Initial Considerations

Studies of the separation of powers in presidential regimes have suggested a supremacy of the executive branch.¹ Throughout North America, this supremacy stems from crisis or calamity situations;² in Brazil, however, it is uninterrupted, and independent of any extraordinary events.³ The supremacy of the Brazilian executive branch stems from the *convenience status* of the other branches, which fail to or are unable to constrain the executive expansion. In addition, the historical and political factors, the constitutional design and the proactivity expected of the executive branch add to this inability. Some examples include constitutional amendments (CAs) and provisional measures (PMs), which this study uses to demonstrate that showdowns are avoided for the convenience of the branches, but the consequence of their avoidance is the supremacy of the executive.⁴ Progressive CAs produced by the executive with little risk of legislative rejection and judicial control over the

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¹ The dominance of the executive is a particular feature of presidential regimes. From a post-Madisonian perspective, given some of the inter-branch showdowns and economic and political crises, the executive appears to have assumed a "super-activist" status.

² The crises are significant because fundamental institutional reforms take place over a brief time even as existing institutions struggle to fulfill their mandate. Sometimes, the existing institutions simply claim more power than they were understood to have. At other times, Congress rouses itself to act, but only to confirm a seizure of power or discretion by the executive, or to impart vast new powers.

POSNER, Eric A. VERMEULE, Adrian. **The Executive Unbound: After the Madisonian Republic**. Oxford University Press: New York, 2010, p. 32.

³ While Brazil boasts an apparent judicial supremacy, whether through expressions that attempt to reiterate the prominence of the judiciary as "having the last word," the "last guardian of the Constitution," among others—or by statements from various authorities, including the President, in which the executive has shown sufficient capacity to avoid the final decisions of the Supreme Court, specifically in some cases of federal tax matters.

⁴ Episodes of confrontation between the institutions in a given context.

provisional measures are political-juridical maneuvers to maintain inter-branch *pax* while simultaneously promoting constitutional redesign.

Liberal legalism fails when it assumes that the executive will submit to the rule of law. In the case of the American Administrative State, party politics⁵ and public opinion⁶ clearly play decisive roles in constraining the executive branch. The Brazilian "State of Convenience," however, has not yet fully overcome its nearly two-hundred-year-old authoritarian and interventionist tradition. Even after the adoption of the 1988 Constitution, both the legislature and the judiciary as well as, in some ways, the executive, fail to undertake their minimum required institutional roles.⁷ Moreover, the Brazilian public is apathetic, with no well-defined public opinion, and rarely intervenes in governmental dynamics.

The present study aims to demonstrate that the Brazilian executive is an expanded branch that bypasses the formal distribution of constitutional competences and is supported, at the convenience of the other branches, through the use of constitutional instruments such as constitutional amendments and provisional measures that suit (i) the maintenance of an executive supremacy and governance, (ii) an uninterrupted constitutional redesign and (iii) the prospect of continuous constitutional emergency.

The Redesign of the Constitution: Constitutional Amendments

Despite the fact that amendments to the constitution have a high political cost,⁸ in both the Brazilian and American contexts, a significant number have been proposed by the Brazilian executive during the two presidential terms of Fernando

⁵ "Partisanship undermines the separation of powers during periods of unified government." POSNER, E.; VERMEULE, A. *op. Cit.* p., 27; LEVINSON, Daryl J.; PILDES, Richard H. "Separation of Parties, Not Powers." **Harvard Law Review**, 2006

⁶ POSNER, E.; VERMEULE, A. *op. cit.*, p. 4.

⁷ This problem stems from a failure of the mutual control mechanisms (checks and balances) and, *ipso facto*, the rule of law.

⁸ Art. 60 of the Brazilian Constitution provides for the legitimate proposal of amendments to the Constitution by the following: a) at least one third of either the Chamber of Deputies or the Senate members (the two parliamentary houses at the federal level), b) the President of the Republic, or c) more than half of the legislative assemblies of the federated states. The proposal must be examined by two chamber committees and then by the plenary, undergoing two rounds of voting, each of which requires three fifths of the votes for approval. Once approved in the chamber, the proposal is sent to the Senate, and examined by a committee and by the plenary, undergoing two rounds of voting, each of which requires three fifths of the votes for approval. Once approved by both houses, the proposal is promulgated by the Chamber of Deputies and the Senate Boards (management bodies) and published in the official dissemination media when it comes into force.

Henrique Cardoso (FHC) (1995–2002), a member of the Brazilian Social Democracy Party (Partido da Social Democracia Brasileira - PSDB). However, the number of amendment proposals by the executive branch decreased after the ascension of the Workers Party (Partido dos Trabalhadores - PT)—Lula (2003–2010) and Dilma (2011–2013)—to the presidency. This reduction was due to a decrease in partisan coalescence (internal cohesion) despite an increase in the government base’s coalition.

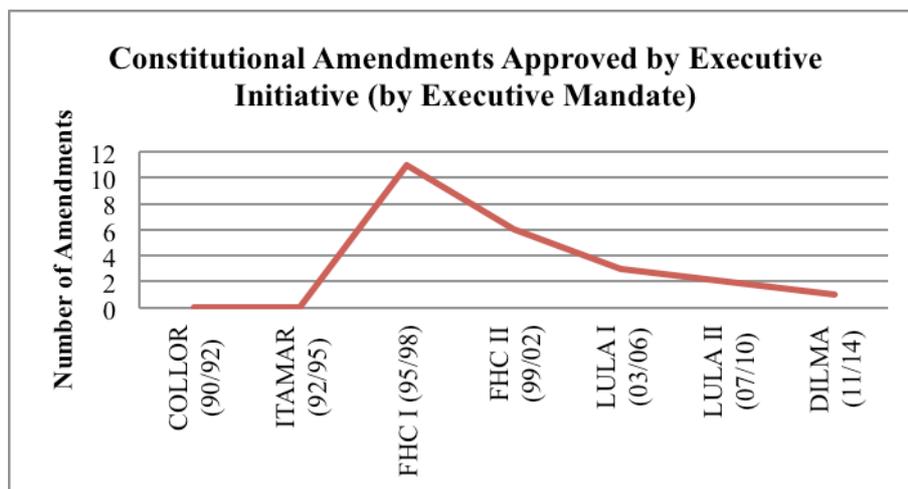
Composition of the National Congress ⁹								
Period	Base				Opposition			
	Chamber		Senate		Chamber		Senate	
1995–98	181	35.28%	34	41.98%	93	18.13%	7	8.64%
1999–02	303	59.06%	41	50.62%	109	21.25%	12	14.81%
2003–06	254	49.51%	31	38.27%	259	50.49%	50	61.73%
2007–10	353	68.81%	49	60.49%	160	31.19%	32	39.51%
2011–12	373	72.71%	62	76.54%	111	21.64%	18	22.22%

Assessing the level of governance largely depends on the presence of coalescence and not just on a partisan coalition. Although the PT governments formally formed coalitions that were numerically superior to those of the opposition, they lacked coalescence, creating a less unified government. Conversely, coalescence

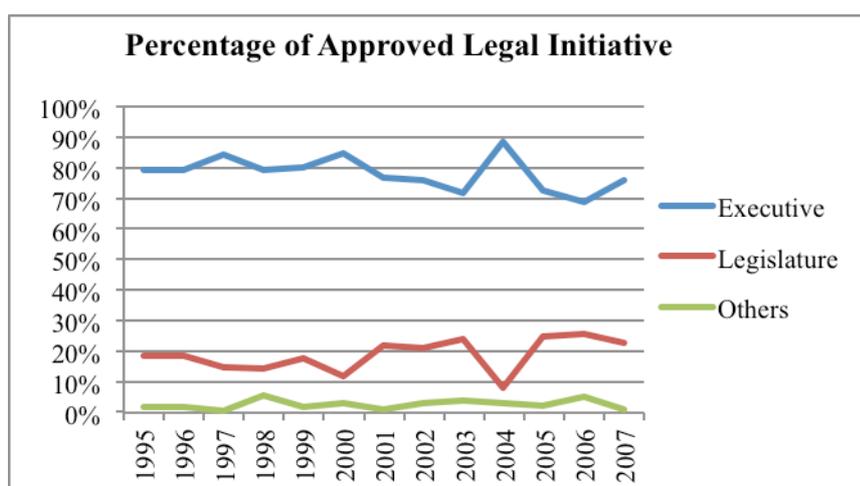
⁹ Considering the alliances for electoral support during the 1995–98 and 1999–02 periods, which were as follows: the PSDB, PFL [Partido da Frente Liberal/Liberal Front Party] and PTB [Partido Trabalhista Brasileiro/Brazilian Labor Party] and the PSDB, PFL, PPB [Partido Progressista Brasileiro/Brazilian Progressive Party], PTB and PSD [Partido Social Democrático/Social Democratic Party] (base), and the PT, PSB [Partido Socialista Brasileiro/Brazilian Socialist Party], PC of B [Partido Comunista do Brasil/Communist Party of Brazil], PPS [Partido Popular Socialista/Popular Socialist Party], PV [Partido Verde/Green Party] and PSTU [Partido Socialista dos Trabalhadores Unificado/United Socialist Workers' Party] and the PT, PDT [Partido Democrático Trabalhista/Democratic Labor Party], PSB, PC do B and PCB [Partido Comunista Brasileiro/Brazilian Communist Party] (opposition). The PMDB [Partido do Movimento Democrático Brasileiro/Brazilian Social Democracy Party] representatives were not aligned because they lacked uniformity of support or a base. From 2003–07 the support base consisted of the PT, PL [Partido Liberal/Liberal Party], PSB, PTB, PDT, PPS [Partido Popular Socialista /Popular Socialist Party], PC of B, PV, PMN [Partido da Mobilização Nacional/Party of National Mobilization], PSD, PST [Partido Socialista dos Trabalhadores/Socialist Workers Party], PSL [Partido Social Liberal/Social Liberal Party] and PSDC [Partido Social Democrata Cristão/Christian Social Democratic Party]; and the opposition was composed of the DEM [Democratas/Democrats] (formerly PFL), PMDB [Partido do Movimento Democrático Brasileiro/Brazilian Democratic Movement Party], PSDB, PP [Partido Progressista/Progressive Party], Prona [Partido da Reedificação da Ordem Nacional/Party of the Reconstruction of the National Order] and PSC [Partido Social Cristão/Social Christian Party]. From 2007–2010 the support base consisted of the PT, PMDB, PP, PR [Partido da República/Party of the Republic] (resulting from the merger of PL and Prona), PSB, PTB, PDT, PC of B, PV, PSC and PRB [Partido Republicano Brasileiro/Brazilian Republican Party]; and the opposition was composed of the PSDB, DEM, PPS, PSOL [Partido Socialismo e Liberdade/Socialism and Freedom Party], PMN and PTC [Partido Trabalhista Cristão / Christian Labor Party]. From 2011–12 the support base was composed of the PT, PMDB, PR, PDT, PSB, PC of B, PRB, PSC, PP and PTB; and the opposition consisted of the PSDB, DEM, PPS and PSOL.

was present in the PSDB governments in which the addition of a few independent parties in the Congress was sufficient for approving political programs, creating a more unified government.

These changes led to a reduction in the use of formal amendments to the Constitution, the procedures for which are relatively cumbersome.



Therefore, the government base lost its qualified majority in the Congress, transitioning to a less unified government. The governance by the executive branch, however, was not severely impaired because the executive could conveniently dismiss constitutional amendments using lower-cost mechanisms. Legislation initiated by the executive branch peaked in 2004 following the loss of a qualified majority.



Moreover, the executive branch already had the power of provisional measures, which do not require legislative intervention for immediate action.

According to this hypothesis, the legislative allocation of provisional measures does not stem from a showdown, crisis or delegation, but from a *de jure* primary constitutional provision.

The Legal Redesign: Provisional Measures

The Brazilian executive plays an *atypical legislative function* through regulatory decrees and delegated laws. Both require *a priori* legislative intervention by issuing legislation that lacks regulation and *a posteriori* legislative intervention by approving delegated laws. Moreover, the executive has the power to propose laws—which represent 80% of the ordinary Brazilian legislation¹⁰—and constitutional amendments. However, the provisional measures represent primary normative acts with immediate legal efficacy, submitted for subsequent assessment by the Congress. The executive plays a role equal to that of the legislators in these cases.

The Constitution provides that "*[i]n case of **relevance and urgency**, the President of the Republic may adopt provisional measures with the force of law, and shall immediately submit them to Congress.*" If examined by the Congress, a simple majority is sufficient to convert a provisional measure into law.¹¹ If rejected or voided in practice due to a lapse in time,¹² the legal relations both constituted and resulting from any acts performed during its validity shall be governed by them, according to

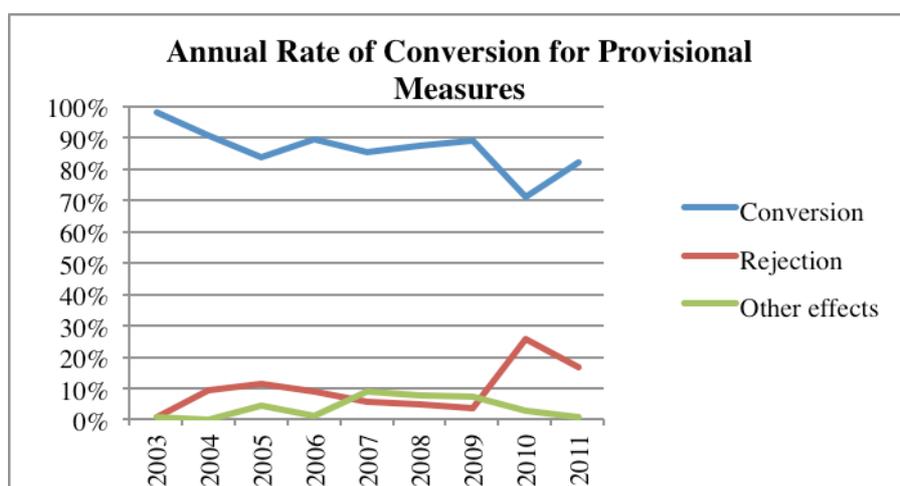
¹⁰ Article 47 of the Constitution stipulates that the deliberations of each house and its committees shall be taken by a majority vote, provided the presence of an absolute majority of its members. Thus, for the approval of an ordinary law in the Senate, which is composed of 81 members, 21 votes in favor are required, highlighting the ease of the procedure as compared with constitutional amendments, which require a three-fifths majority of the parliamentarians for approval (in the Senate, 49 votes out of the 81 senators).

¹¹ In agreement with articles 84, subsection XXVI, and 62 and paragraphs of the 1988 Constitution, the President of the republic has the exclusive responsibility to issue provisional measures (PMs). Such norms have the force of ordinary law, upon publication, although the President must immediately submit them to the National Congress for examination. Once sent to the Congress, the PM will be examined by a joint committee of deputies and senators, which shall provide an opinion regarding its constitutionality. Later, the PM will be submitted to a vote by the plenary of each house, starting with the chamber, and will be approved by a simple majority in both plenaries, being thus converted into law. The PMs can be approved and converted into law within a maximum of sixty days, which is extendable for only one equal period. If this limit is exceeded, the PM becomes void dated to its issuing. The Congress can adopt four attitudes when analyzing a PM: (a) approve it without changes; b) approve it with amendments to the text prepared by the presidency of the republic; (c) not examine the PM within the maximum time limit; or d) reject the PM. If the Congress does not examine or rejects the PM, a legislative decree must be promulgated, regulating the legal relations brought about by the PM, for the period in which it was effective. If the parliamentarians do not issue this legislative decree until sixty days after the PM becomes valid, those legal relations will be governed by the unexamined or rejected PM itself, providing the executive with a preponderance of will if the Parliament does not pronounce itself.

¹² In this case, a legislative decree is rarely issued by the parliament.

the determinations of the executive.

However, "*relevance*" and "*urgency*" are not required of the legislative or judicial examination. The convenience of passing provisional measures is largely justified by the *institutional capacities* of the executive, which are higher than those of the National Congress. However, this convenience essentially results from the potential risk and burden that might arise from the possible showdown upon rejection of the measures.

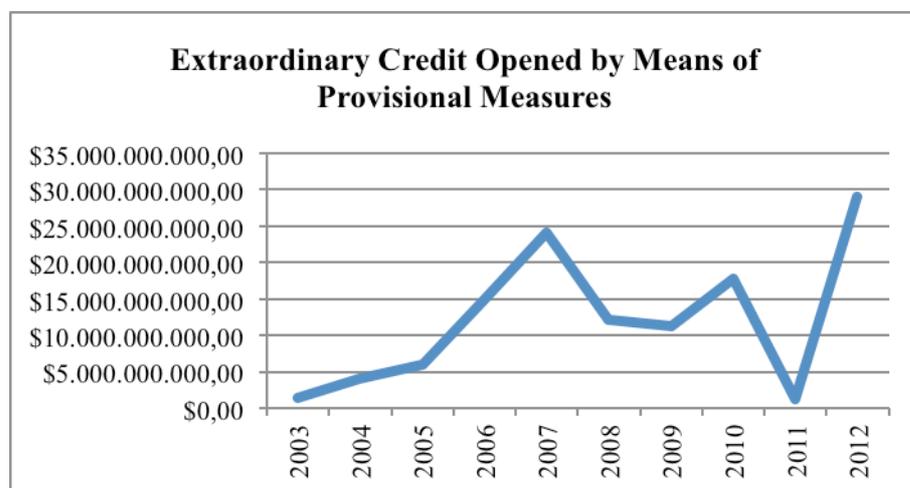


As shown in the above figure, the legislative branch converted 87% of the provisional measures into law. Moreover, the 32nd constitutional amendment ratified in 2001, though originally conceived to constrain the issuance of provisional measures, was approved after expanding the executive discretion provided therein. The PMs could therefore be considered a constitutional evil that many people regard as necessary or positive, although it is a constitutional imperfection.¹³

The executive has made use of provisional measures even when their consequent constitutional redesigns violate the permitted constitutional limits, which not only violates the separation of powers, but the Constitution itself; art. 62, § 1, I, *d*, provides that *it is forbidden to issue provisional measures on matters related to budgets and additional or supplementary credits, except for, pursuant to art. 167, to meet unforeseeable and urgent expenses, such as those resulting from war, internal commotion or public calamity.*

¹³ GRABER, Mark. **Dred Scott and the Problem of Constitutional Evil**. Cambridge University Press: New York, 2006, p. 9.

However, as shown in the following figure the values of the aforementioned expenses surpass any concept of extraordinariness.



The path convenient for the branches also has implications with respect to judicial convenience. The Brazilian Supreme Court (Supremo Tribunal Federal - STF) has repeatedly held that it is not competent to assess "relevance" and "urgency,"¹⁴ a pre-requisite for the issuance of PMs. Moreover, when consulted on the opening of extraordinary credits, the STF has stated that "the foreseen credits have either been used or lost their validity, and therefore, no emendable situations subsist at the present time."¹⁵

In another example, in the judgment of the direct action of unconstitutionality 4029/AM (03/2012), the STF "backed out"¹⁶ one day after a decision that declared the formal unconstitutionality of the provisional measure that created the Chico Mendes Institute (Instituto Chico Mendes) due to a procedural flaw in the examination of the measure by the Congress following a point of order raised by the Attorney General of the Union, a representative of the executive. By *sweeping unconstitutionality under the rug*, the STF attributed the potential effects to the decision, which threatened 500

¹⁴ Thus, the following should be noted: (i) "The understanding of this Court is that examination of urgency and importance requirements can only be submitted to the judiciary when there is abuse of discretion by the head of the executive branch. Regimental appeal that shall be withheld" (AI 489108, 2006); (ii) the "relevance and urgency requirements for issuing provisional measure are a discretionary power of the head of the executive branch, hence should not be examined by the judiciary branch, except in the case of a misuse of power. Understanding decided upon STF jurisprudence. Action dismissed" (ADI 2150, 2002).

¹⁵ ADI n° 4.041, 2011.

¹⁶ "The Switch in Time that Saved Eleven." The radical change in the STF behavior is similar to that of the US Supreme Court in 1937, after the failed court-packing plan of President Roosevelt.

prior provisional measures.¹⁷

The *status quo* of a "permanent crisis" and 400 claims of relevance and urgency between 2003 and 2011 have prevented showdowns, eventual crises, higher lawmaking or even judicial doctrine.¹⁸ The Brazilian "state of convenience" thus surpasses the administrative state, though it does not necessarily make the executive more effective. The continuous constitutional emergency, which derives from the executive convenience and connivance, negates all other branches, causing them to be frequently ignored and reserved.

Final Considerations

One can conclude that the supremacy of the Brazilian executive branch also stems from the convenience of the other branches, a condition that avoids institutional crises or confrontations. The present study presented two constitutional instruments, constitutional amendments and provisional measures, that demonstrate those relationships of convenience and the prestige enjoyed by the executive. The executive has progressively and conveniently reduced the number constitutional amendments, given the political burden of a formal constitutional amendment and the loss of a qualified majority in the government base. However, the low-cost political tools remain in use to preserve governance. The other branches rarely interfere with provisional measures to avoid constitutional showdowns. The judiciary does not precisely define relevance and urgency, abstaining itself from examining the constitutionality of most provisional measures, and eventually modulates the effects of its own decisions, making them "more beneficial" to the executive. Likewise, the legislature ratifies the legislative assignment to the executive, converting provisional measures into law and approving executive initiatives. Thus, the Brazilian executive not only enjoys supremacy due to the convenience of the other branches but also conveniently preserves the existence of these branches.

¹⁷ "We have found that, in spite of declaring the measures unconstitutional, it could generate a serious social crisis of legal uncertainty and institutional crises, indicating that we should be careful with the consequences of our decision" (Luiz Fux – Brazilian Supreme Court Justice).

¹⁸ "We suggest that the central mechanism of constitutional change is not amendment, higher lawmaking or even judicial doctrine, but episodes of conflict between institutions over the distribution of policymaking authority." POSNER, E.; VERMEULE, A. *op. Cit.* p. 67.