Executive Decrees: The American Executive Order and the Brazilian Medida Provisória (Provisional Measure), A Comparative Analysis

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Abstract

The evolution of how the Executive branch of both Brazil and the United States issue Executive decrees has changed over time. American Presidents have consistently increased the number of executive orders issued over the course of the last 50 years. The Brazilian Executive has also seen a resurgence in the government's power to conduct Legislative deliberation. This paper aims to compare and contrast both the medida provisória issued by Brazilian Presidents and the executive order issued by U.S. Presidents through a historic and analytical lens.

1. Introduction

The American press normally refers to Brazilian medidas provisórias as executive orders. To be fair, academia and think tanks also commit the same mistake. It is a comprehensible error. Journalists have a day-to-day approach regarding the news; they have *carte blanche* when dealing with technicalities. Academics may also receive a free pass on the subject, as long as they are not lawyers or jurists. In their case, law is a source of information, not a perspective or methodology.

There are major differences concerning executive orders and medidas provisórias. In fact, they differ in nature, definition, characteristics, usage and historical features among other things. Their differences shine a light on the very distinction between American constitutional foundations and Brazil's search for the rule of law.

Most of Latin America is said to have been born in blood and fire. Brazil largely escaped a bloody beginning; however, it was not free of dictatorship nor presidential strongmen. The presidential systems in many countries in the Western Hemisphere have pushed for a some type of executive decree or pronouncement. In the United States there is the executive order whereas in Brazil there is the medida provisória. This paper seeks to conceptualize and compare both American executive orders and the Brazilian medida provisoria.

2. American Executive Orders

Historical background

Several of the most well known executive orders have shaped the history of the United States, sometimes they have yielded a better social fabric for the nation or at times caused a dark stain on the American consciousness. The desegregation of the armed forces by Harry S. Truman pioneered the way to complete desegregation across the country. Franklin D. Roosevelt's executive order to intern Japanese Americans was a clear dark mark on the history of the nation while Dwight Eisenhower's executive order desegregating schools in 1957 generated the push that was needed to further *Brown vs. Board of Education*.

George Washington started issuing executive orders to prepare reports for inspection as well as one instituting the Thanksgiving holiday. Abraham Lincoln is notoriously infamous for suspending the writ of habeas corpus during the American Civil War. Lincoln cited the Constitution´s Suspension Clause to justify his order, "the privilege of the writ of habeas corpus shall not be suspended, unless when in cases of rebellion and invasion the public safety may require it." President Lincoln issued the first presidential directive to be formally designated as an "executive order." That directive was issued on October 20, 1862; however, it was not numbered as "Executive Order No. 1" until 1907.

The phrase "stroke of a pen" is now virtually synonymous with executive prerogative, and it is often used specifically to refer to the president's ability to make policy via executive order.[1] *Safire's Political Dictionary* defines the phrase as "by executive order; action that can be taken by a Chief Executive without legislative action."[2] Safire traces the political origins of the phrase to a nineteenth-century poem by Edmund Clarence Stedman, but it was in use long before this, at least as a literary metaphor signifying discretionary power or fiat.[3] The phrase became mostwidely known during the 1960 presidential election campaign, when Democrats made an issue of Eisenhower's refusal to issue an executive order banning discrimination in housing and federal employment.[4] Kennedy committed to ending discrimination in housing by executive order. During the second Kennedy-Nixon debate on October 7, 1960, Kennedy continued his criticism,"What will be the leadership of the President in these areas," he asked, "to provide equality of opportunity for employment?[5] Equality of opportunity in the field of housing, which could be done in all federal-supported housing by a stroke of the President's pen."[6] Kennedy eventually issued the fair housing order in November 1962.

Another demonstration of Executive Prowess regarding executive orders heralds from President Reagan's Execu-

[1] Kenneth R. Mayer, *With the Stroke of a Pen: Executive Orders and Presidential Power* (Princeton, NJ: Princeton University Press, 2001), Pg. 8.
[2] Ibid, 8.
[3] Ibid, 8.
[4] Ibid, 8.
[5] Ibid, 8.
[6] Ibid, 8.

tive Order 12532, Prohibiting Trade and Certain Other Transactions Involving South Africa (50 FR 36861; September 10,1985).[7] This executive order exemplified how the president can use a unilateral order to take policy in a different direction from Congress.[7] President Reagan and Congress wanted to penalize apartheid South Africa but were dissonant as to how to go about doing so, President Reagan wanted less harsher sanctions on the Cold War ally than Congress. Being the Commander-in-Chief during the waning days of the Cold War, Reagan realized how vital it was to maintain South Africa as a staunch ally in Africa whilst being forceful against human rights violations. Through political tenacity and by using the executive order President Reagan was able to walk the fine line between demands from Congress regarding apartheid South Africa and looking strong Cold War international relations.

American executive orders have become increasingly more routine and profound over time. With presidents using them more frequently vice sparingly. Abraham Lincoln issued less than 50 executive orders during his slightly over four years in office whereas several presidents such as Jimmy Carter and George H.W. Bush issued 320 and 166 respectively. Franklin Delano Roosevelt holds the record of executive orders issued with more than 3,400 executive due to his activities to mitigate the Great Depression and actions in preparation for WW2. Since FDR´s commandeering of the executive order there has been a penchant by American Presidents to use them. There has been a definitive upward trend in the power yielded by the Chief Executive of the United States in the second half of the twentieth century

Legal Nature of American Executive Orders

There is not an official definition of what constitutes an executive order; there is no law—or even an executive order—that defines what exactly is an executive order.[8] There is also no constitutional or statutory definition of "proclamation," or any other form of presidential directive.[9] It is enough to assert *where legally executive orders rank* for now. Executive orders are a kind of unilateral presidential directives (UPDs), according to the definition of academic Graham G. Doods. There are over two dozen different types of unilateral presidential directives.[10] A study by the Congressional Research Service (CRS) in 2007 identified twenty-seven distinct types ranging from administrative orders, certificates, designations of officials to letters on tariffs and international trade among others.[11] An executive order is a unilateral directive issued by the president to instruct agencies on how to implement the law.[12] They serve a variety of functions, including executive branch maintenance, creating or altering policy, and responding to crises.[13]

Presidential directives in the United States are the means of which the Executive acts. Article II of the Constitution restricts the president to an enforcement role. This mandates that presidential directives should be only limited to direct operations within the executive branch. In this regard, American directives are top-down obligatory instructions within the government Executive structure, not properly being law.[14] Their effects should not have valid legal repercussions in either the powers of the Judiciary, nor Legislative.

Article I of the United States Constitution vests lawmaking power in the congress, which in turn partially delegates discretionary power to the president. Such delegation is a symbol of autonomy granted to the Executive branch. It means, to a certain extent, that the president can run his own policies by legally enacting them in the manner he best sees fit. A president which is completely restrained by the Legislative would be ineffective, which would negate the inherent power of the Executive.

The question becomes how much of this discretionary capacity is bestowed to the president? Federalist number 70 written by Alexander Hamilton, whose title is "The Executive Department Further Considered," debates this very subject. Hamilton argues for a vigorous unitary executive structure that could more easily press its will and provide guidelines to government initiatives, especially when dealing with wars or national emergencies. He calls for an "energetic Executive", that would be more fit to quick decision-making, in plain contrast with the slow-pace deliberative nature of the Legislative. Although not originally being on the winning side on this debate, through the years Hamilton's ideas have gained momentum, given the consistent growth in the number of executive orders being issued and their broadening scope.

The Founding Fathers did not mention in detail *how* the Executive would act or follow through in the enforcement of his power. For practical reasons, it is difficult to establish a stark contrast between executive orders and unilateral presidential directives *per se*, although it is possible to distinguish them *in abstracto*. The crux of this inability to distinguish how U.S. presidents act is rooted in the oath of the president, "I do solemnly swear (or affirm) that I will

[7] Belco, Michelle, and Brandon Rottinghaus. "In Lieu of Legislation." *Political Research Quarterly* 67, no. 2 (2013): 413-25. doi:10.1177/1065912913501410. Pg. 415.

[8] Graham G. Dodds, Take Up Your Pen: Unilateral Presidential Directives in American Politics (Philadelphia: University of Pennsylvania Press, 2013), p. 5. http://www.questia.com/read/124312900/take-up-your-pen-unilateral-presidential-directives.

[9] Executive Orders and National Emergencies How Presidents Have Come to "Run the Country" by Usurping Legislative Power by William J. Olson and Alan Woll, p. 8.

[10] Graham G. Dodds, Take Up Your Pen: Unilateral Presidential Directives in American Politics (Philadelphia: University of Pennsylvania Press, 2013), p. 5.

[11] Ibid,.6.

[12] Graham G. Dodds, Take Up Your Pen: Unilateral Presidential Directives in American Politics (Philadelphia: University of Pennsylvania Press, 2013), p. 4.

[13] Ibid, 4.

[14] They are generally viewed by the courts as legally binding as long as they do not violate statutes or the Constitution (Cooper 2002; Mayer 2001). As such, executive orders are published in the *Federal Register* and viewed as part of the law. Paul Bengala, advisor to President Clinton, even said "Stroke of the pen, law of the land. Kind of Cool". It seems there is a consensus that unilateral presidential directives (more specifically executive orders) are not law itself, but functions like one.

faithfully execute the Office of President of the United States, and *will to the best of my Ability*, preserve, protect and defend the Constitution of the United States." Since the wording "the best of my Ability," highlights an individual's ability, it is sublime to the fact that the ability of one individual is different from another. Thus presidents inherently execute the office differently.

Aspects of U.S. Executive Orders

As a result of the barriers to decisive leadership and the natural dilemma between the legislative branch and the executive branch due to checks and balances, presidents have become naturally more eager to issue executive orders in order to comply as they see fit with their constitutional duty of enforcing the law. This more nuanced use of authority has given rise to Presidential Federalism where the Chief Executive of the United States exercises more power in order to promote what they see as the correct course of action in fulfilling their duties.

Presidents have a tendency to issue an executive order to appease a certain constituency. Presidential Federalism makes distinct subnational communities more dependent on the political success of their leader in the White House.[15] In nationalizing the political conversation and policy consequences of every administrative action, Presidential Federalism challenges the very idea of whether anything in contemporary U.S. politics is, "in the nature of things," truly local anymore.[16]

The propensity of Presidential Federalism has grown through the years as the nation's chief executive has used his power supported by Article II of the Constitution to advance what he perceives as the rightful execution of the Constitution even when congress is at odds with his programs. Since the concept of Presidential Federalism is based on who the Commander in Chief is, there will naturally be a disparity with the issuing president´s successor. Presidents continue to behave as if they are the nation's doctor, teacher, pastor, and engineer; meanwhile, those supposedly closest to the people remain hamstrung by federal directives and national party loyalties.[17]

The executive order may also be used as a tactic to push the president's agenda. When the Congress and the president are deadlocked and the president feels that he cannot garner the support he needs, he will issue an executive order. "Presidents are more likely to issue a preemptive order when the issue is on their political agenda. If the issue is on their agenda, presidents should be more likely to act unilaterally, even if they risk a negative reaction from Congress. Presidents often use this tactic to make progress on a legislative agenda item using executive orders."[18]

Since no president can serve more than eight years in office and as is often the case a member of the opposing political party takes charge of the executive branch from his predecessor the odds of an executive order being revoked or superseded is furthered by these possibilities. Of the 6,158 executive orders issued between 1937 and 2013, 18 percent have been amended, 8 percent have been superseded, and 25 percent have been revoked.[19] From those altered orders, it takes an average of five years until an order is first amended or superseded and 13 years until revocation.[20]

However, the possibility of an executive order being revoked can depend on the changing political climate it faces over time. Presidents may be more reluctant to revoke executive orders during election years.[21] For better or worse it can boil down to popularity and where the president may be positioned in light of being the most receptive to the widest range of the electorate. It can also be argued that the American President's executive orders cannot only aid the concept of "the bully pulpit," but it also can further the notion that it is a popular measure. These precepts lend to the pretense that the executive order may be transient in nature as over 50 percent of executive orders are altered in some capacity.

Presidents are more willing to revoke executive orders when it is less costly to do so and when issued by a political adversary; yet, this propensity to revoke opposing orders is diminished by the president's desire to preserve others based on a more legitimate authority.[22] It should also be noted that the U.S. Supreme Court can negate an executive order as unconstitutional as the U.S. Supreme Court did against President Harry S. Truman´s wish to nationalize the steel industry for the Korean War. The U.S. Congress also has the power to issue legislation to override an executive order however, it must have the votes needed to override a probable presidential veto.

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[15] Jacobs, Nicholas F., and Connor M. Ewing. "The Law: The Promises and Pathologies of Presidential Federalism." *Presidential Studies Quarterly* 48, no. 3 (2018): 552-69. doi:10.1111/psq.12480. Pg. 565.

[16] Ibid, 565.

[17] Ibid, 565.

[18] Belco, Michelle, and Brandon Rottinghaus. "In Lieu of Legislation." *Political Research Quarterly* 67, no. 2 (2013): 413-25. doi:10.1177/1065912913501410.

[19] Thrower, Sharece. "To Revoke or Not Revoke? The Political Determinants of Executive Order Longevity." American Journal of Political Science 61, no. 3 (2017): 642-56. doi:10.1111/ajps.12294, pg. 644.

[20] Ibid, 644.

[21] Ibid, 647

[22] Ibid, 647.

[23] Ibid, 647.

[24] "Of the 6,158 executive orders issued between 1937 and 2013, 18% are amended, 8% are superseded, and 25% are revoked. From those altered orders, it takes an average of 5 years until an order is first amended or super- seded and 13 years until revocation".

3. Brazilian Medidas Provisórias

Historical background

Medidas provisórias which translated directly to English are called provisory/provisional measures". The Medidas Provisórias hails from Article 62 of the actual Brazilian Constitution

The medida provisória is a replacement to the *decreto-lei* (decree-law) Brazil used to have. Before 1937, there was no provision whatsoever on law-passing based on Executive measures. One may argue that the Imperial Constitution of 1824 already established some sort of Executive measure in this sense. However, it was not a direct reference, rather a government action made possible by specific circumstances such as crisis and wars.

Between 1891 and 1937, there were two different constitutions, but neither prescribed any form of Executive law-making discretion.. During that time, the Executive branch was not able to issue medidas provisórias, executive orders, and decree-laws.

The period between 1891-1930 is normally referred to as the "República Café com Leite" (The Republic of Coffee with Milk). Coffee was the main commodity produced in São Paulo state at that time, whereas milk production was mainly centered in Minas Gerais state. The República Café com Leite represented a moment in Brazilian history where oligarchical consensus between the two states was foundational to the very functioning of the government. As a consequence, there was arguably a relatively stable balance between the Executive and Legislative branches. Thus there was harmony in the Federal government brought about by oligarchal cooperation. Since there was implicit agreement during these years there was arguably no need for executive decrees.

After President Getúlio Vargas' historical revolution in 1930, which ended the República Café com Leite, it took him a few years to convoke the National Constituent Assembly. The convocation of which is fundamental to establishing a new constitution. In 1934 a new constitution was approved based on the American New Deal and the Weimar Republic's Constitution. However, what happened was a general agreement of various political groups and the 1934 Constitution became similar to the 1891 Constitution. As was the case with the 1891 Constitution, the 1934 Constitution had no provision on decree-laws, executive orders or provisional measures based on the Executive.

Given the fact that the 1930's was mainly predicated upon strong executive regimes throughout the world, the Brazilian Constitution of 1934 had a short lifespan. In 1937 it was replaced by an authoritarian constitution, initiating what is understood as the "Estado Novo" (the New State). Only then executive based decree-laws were introduced, as a means of concentrating President Vargas's power.

Article 180 of the 1937 Constitution stipulated that "while the National Parliament is not reunited, the President of the Republic will have the power of issuing decree-laws on all legislative powers of the Union." However, President Vargas never authorized the National Parliament to be reestablish. During nine years, Vargas gained full government control and passed significant legislation, through decrees-laws many of them are still in effect today. That is the case of the labor law code *Consolidação das Leis do Trabalho*, Civil Procedure Code (only replaced by the New Code in 2016), Criminal Code, Criminal Procedure Code, Law of Contraventions, Decree-law No. 406. To this very day every Brazilian person, while in Brazil, is submitted to labor and criminal laws passed by the exorbitant dictatorial powers that Getúlio Vargas had more than 70 years ago.

In 1946 democracy was restated and any executive order, medida provisória or decree-law constitutionally guaranteed was once again eliminated. During the fifties and beginning of the sixties, Brazilian politics suffered several tumultuous years, which led to a military coup d'état.

One year after the military coup, President Castello Branco issued *ato institucional number two* and inaugurated executive capacity regarding decree-law on homeland security/national emergence. The decree set the stage for the regime to establish itself. Once the military regime was established an economic upturn ensued and military government issued a new constitution. A few years later, there was an amendment somewhat resurrecting Vargas decree-laws' model that enabled the President to once again have considerable power.

Throughout Brazilian history it can be seen that Executive discretionary power is like a pendulum swinging back and forth. During democracy, there seems to be a complete lack of constitutional guarantee toward the executive, which led to clashes among the government branches, encroachments or inherent constraints. While in autocracy, the Executive vests itself with full law-making capacity and devoids the Legislative to more of a figurehead role.

Bearing the aforementioned in mind the constitutional architects in 1988 adopted a mild form of Executive legislative act: the medida provisória. It was partially influenced by the *decreto-legge,* from the Italian Constitution of 1947. Article 77 of the Italian Constitution establishes ,much like the Brazilian Constitution, the adoption of *decreto-legge* in which the executive (prime-minister) can only issue an order in case of extraordinary necessity and urgency (*in casi straordinari di necessità e d'urgenza*).

Legal Nature of the Brazilian Medidas Provisórias

Medidas provisórias can be understood as a legally binding provisional executive decree and an anticipated legal proposition at the same time. Thus, in American legal terms, these measures are a mixture of a finite executive order with a presidential request for a bill. During the first 120 days after the issuance of a medida provisória it is considered an executive order (a unilateral presidential directive, to be more precise), hence having the force of law during these 120 days. Nevertheless, at the end of that time, the act must be voted on by Congress, so that it per-

manently becomes law. Otherwise the medida provisória is terminated and no longer legally exists.

By provisional, one should understand this measure of executive power as temporary. Its full legal effectiveness right from the strike of a president's pen. Effectiveness modulation: if the Chamber or Senate rejects the medida provisória or if it loses its validity, the federal lawmakers must edit a legislative decree restricting medida provisória's effects while it was still valid.

Article 62, paragraph 3 of the Brazilian Constitution also states that medidas provisórias shall lose effectiveness from the day of their issuance if they are not converted into law within a period of sixty days, which may be extended once for an identical period of time under the terms of paragraph seven. The National Congress shall issue a legislative decree to regulate the legal relations arising from the medidas provisórias. This reveals the potential short lifespan of a medida provisória that does not obtain congressional approval to become law. The only exceptions to this rule are found in Paragraphs 11 and 12, within Article 62 of the medidas provisórias where the measure can commence as a presidential unilateral directive, but ends up as a law passed by the Congress. Article 62, paragraph 3 of Brazilian Constitution states that the medidas provisórias must be *converted into law* within 120 days. According to the Brazilian academic Marco Aurélio Greco, he concludes that since they must be *converted* they cannot inherently be law through the stroke of a pen as is the case in the American Executive Order.[25] Mr. Greco further declares that medidas provisórias as being pure executive normative acts are devoid of legislative discretion.[26]

Brazilian Supreme Court Justice, Eros Grau espouses a divergent viewpoint. In his perspective, medidas provisórias not only carry the force of a law, they are also laws themselves. This is the law in Brazil as established by the Brazilian Supreme Court (STF).

Aspects of the Brazilian Medidia Provisória

Given that Brazilian law had a continuous back and forth relation regarding Executive decree's issuance as a legitimate means of government legislative discretion, Brazilian lawmakers are still trying to figure out the most appropriate legal outcomes. Akin to what happens in the United States regarding executive orders, there is no established consensus on the precise nature of the current medida provisória.

There is also no agreement on the nature of medidas provisórias, because there is no agreement on the clear limitations of medidas provisórias and to what extent they should be used. The issue is in the interpretation of the medidas provisórias in the Brazilian Constitution. Medidas Provisórias were designed with a duality of power in mind. They grant the Brazilian president the power to conceive laws whilst the Brazilian congress uses the measure to mitigate the power of the Executive. Along with the time limitations, there are limitations based on situational grounds. Medidas provisórias can only be issued under two specific circumstances. The two situations are important and urgent cases, thus the confusion derives from what is an important and urgent case.

Congress is the one in charge of deeming what constitutes an important or urgent case. The Brazilian Supreme Court already ruled its own limitation regarding the analysis of what is importance and urgent[27] A judicial review by the Brazilian Supreme Court can only be done in certain cases, when both conditions are evidently absent.[28] This judicial understanding follows Montesiqueu's separation of powers principle.[29]

Medidas provisórias can be struck down by Congress at any given time. A medida provisória can be converted into law and a few years later be altered by a new Congress..

Extremely unlikely, but possible, would be the termination of the entire medidas provisórias provision in the Brazilian Constitution. The only requirement would be amending the Brazilian Constitution and the revocation of Article 62. The Brazilian Congress is capable of undertaking such an action.

The executive can also amend medidas provisórias. If a medida provisória is converted into law, the president can issue another medida provisória to suspend the previous one. The Supreme Court of Brazil (STF) in a recent ruling upheld this notion, due to the fact that medida provisória is temporary.[30] If the new medida provisória is passed by Congress, the previous medida provisória is revoked; if the medida provisória is not, the suspension is uplifted, and the previous medida provisória regresses into effect.

The Brazilian Supreme Court can exercise common law judicial review and civil law abstract review. The goal of this article is not to delve into these subjects; however, it is worth mentioning that the conversion into law of medida provisórias does not validate legal flaws that occurred during the formal proceedings to determine its legality. If validation were possible then there would be no judicial review to be established on formal grounds.

Aside from time and situational requirements, a third limitation would be the subject. Unlike what happens in the U.S., where Lincoln suspended *habeas corpus* at the stroke of a pen, certain legal matters cannot be subjected to medida provisória. These limitations are framed under the auspices of article 62, paragraph 1:

"Paragraph 1. The issuance of provisional measures is forbidden when the matter involved: I – deals with: a) nationality, citizenship, political rights, political parties, and election law; b) criminal law, criminal procedural law, and civil procedural law; c) organization of the Judicial Branch and of the Public Prosecution, the career and guarantees of their members; d) pluriannual plans, budgetary directives, budgets, and additional and supplementary credits, with the exception of the provision mentioned in article 167,

[25] Greco, Marco Aurélio. Medidas Provisórias. São Paulo: Revista dos Tribunais, 1991, p.15.
[26] Ibid, 15.
[27] http://redir.stf.jus.br/paginadorpub/paginador.jsp?docTP=AC&docID=495496
[28] Ibid.
[29] http://redir.stf.jus.br/paginadorpub/paginador.jsp?docTP=AC&docID=347250
[30] http://redir.stf.jus.br/paginadorpub/paginador.jsp?docTP=TP&docID=750209316

paragraph 3; II – aims at the detention or seizure of goods, people's savings, or any other financial asset; III – is reserved for a supplementary law; IV – has already been regulated by a bill of law passed by the National Congress which is awaiting sanction or veto by the President of the Republic."

4. Comparing Executive Orders and Medidas Provisórias

A major distinction between executive orders and Brazilian medidas provisórias is highlighted by an executive order from the Grant Administration.[31] One of the earliest executive orders still in force is executive order 9, issued on January 17, 1873, by President Ulysses S. Grant to curb abuses of power by individuals who concurrently held state and national political offices.[32] This measure received considerable fanfare when it was modified by Executive Order 4439 issued on May 8, 1926, by President Calvin Coolidge for the purpose of aiding Prohibition enforcement by allowing the same people to be simultaneously state and federal enforcement officers.[33] Executive orders are not temporally constrained by the Constitution or any other legal arrangement as medidas provisoríos are in Brazil.

In contrast to the American executive order, medidas provisórias are temporally limited by the Constitution. They produce their effects once signed by the president, but they must comply with article 62 of the Brazilian constitution. After 120 days (60 + 60 days), if not voted on the medida provisória ceases to exist.

Unlike what happens in Brazil, where medidas provisórios are extensively regulated by the local constitution, executive orders boundaries lack constitutional limits in America. In fact, the practice of exercising executive order authority is evolutionary, following the growth and history of the Executive branch itself.[34] Robert B. Cash best advocates this by stating, "The history of executive orders is, to a great extent, a narrative of the evolution of presidential power."[35]

As Article II of the American Constitution states that the President must be the Chief Enforcer of the rule of law, this is under the purview of the American President and what he deems as enforcing the law. This purview of "enforcing the law" inevitable varies as the American President is also an individual and the resident of the office changes.

Following the same steps, the Brazilian Constitution vests the president as the Chief Executive. Article 84, clause IV grants exclusive power to the President of the Republic to "sanction, promulgate and order the publication of laws, as well as to issue decrees and regulations for the true enforcement thereof."

5. Present Practices of Executive Power

President Trump recsendid several Obama-era guidance directives—Title IX on college campuses, restroom accessibility for transgender students, prohibiting military-grade-weapons sales to local police—are all noteworthy instances of presidential federalism's inherent mutability. By the stroke of the presidential pen, policy was reversed.[36] Blasting the usurpation of presidential power through unilateral directives during the 2016 campaign that the Obama Administration implemented, President Trump has now jumped on the presidential directive bandwagon by being an ever-increasing proponent of executive action. At the time of this writing President Trump was more than well on his way to 310 executive orders with 121 of his own, 310 being the average number of executive orders issued by two-term Presidents Clinton, Bush and Obama. Though it may not be an explicit tactic of the Trump Administration, the current president is aptly using Presidential Federalism to further his goals. Nowhere can this be more seen in the recalcitrant way that he limited Medicaid after unable to undo the Affordable Care Act.

President Temer was the Brazilian President who issued the most medidas provisórias since 1994 even though he did not serve a full term. Most of these medidas provisórias were done in an effort to stimulate the economy. He is only surpassed by two former vice-presidents who also became presidents themselves: Itamar Franco, substituting the impeached Collor de Mello, and José Sarney, who replaced Tancredo Neves, after his death. Temer is a constitutional professor and he was one of the architects of the 1988 Brazilian Constitution. Ironically, he was a stark critic of medidas provisórias in his book *Constituição e Política*, written in 1994.[37] Temer´s criticism concerning medidas provisórias as being an artificial borrowing from the Italian Constitution still reverberates.[38]

President Bolsonaro follows differs from his predecessor.. Although being perceived as a trouble maker regarding Executive-Legislative relations, Bolsonaro does not implements its policies through medidas provisórias as much as the former presidents did. Indeed, most of his medidas provisórias so far have been struck down. Howev-

[31] Yet, as previously shown, executive orders are often amended or revoked by subsequent presidents, thus altering or invalidating their content. As a result, these orders often have a time limit on the influence they wield. While there is a substantial body of research exam- ining when presidents decide to use this unilateral tool, little is known about why and how long executive orders remain a part of the law. Consequently, there exists a facet of presidential power left unexplored—the power to change or overturn previous orders.

[32] https://www.britannica.com/topic/executive-order

[33] https://www.britannica.com/topic/executive-order

[34] Greco, Marco Aurélio. Medidas Provisórias. São Paulo: Revista dos Tribunais, 1991, p.15.

[35] Robert B. Cash, Presidential Power: Use and Enforcement of Executive Orders, 39 Notre Dame L. Rev. 44 (1963), p. 55. Available at: http://scholarship.law.nd.edu/ndlr/vol39/iss1/4

[36] Jacobs, Nicholas F., and Connor M. Ewing. "The Law: The Promises and Pathologies of Presidential Federalism." *Presidential Studies Quarterly* 48, no. 3 (2018): 552-69. doi:10.1111/psq.12480. Pg. 561.

[37] https://oglobo.globo.com/brasil/temer-o-presidente-que-mais-enviou-medidas-provisorias-ao-congresso-21895565

[38] Temer, Michel. "Elementos de Direito Constitucional". *Malheiros Publisher*, 22th edition, 2008, pg. 153-154.

er, MP 881 which bolstered economic freedoms is one of the most iconic, was passed with few modifications.

Medida provisória proceedings are undergoing significant changes. One of them is related to modifications throughout the approval process in Congress.[39] Senators complained of the short deadlines allocated to legal alterations once the medida provisória is presented in Congress. Thus, the new proceedings may dilute time limits.

6. Conclusion

It is unlikely that the power of the American Executive vis-à-vis Congress will diminish anytime soon as the executive order has become a formidable staple of the American President. Executive orders may be revoked or amended but they are likely to stay in vogue until a cataclysmic event tarnishes the office of the president. Another scenario that is unlikely to occur is that of an individual assuming the presidency that is an acute enthusiast of legislative power, someone who is willing to cede power.

In Brazil, the future of medidas provisórias does not seem clear. At first, article 62 was followed by just one paragraph. Two decades later, one paragraph became twelve, limiting considerably what was previously established. Following the same path, ongoing new proceedings that may alter the Brazilian Constitution, which can expand legislative power over medidas provisória. These moves towards restricting the influence of medidas provisórias can be interpreted as a mitigated attack on executive discretion. The President of the Chamber of Deputies, Rodrigo Maia, has recently been making overtures in Congress to bring about the end of medidas provisórias.

The ultimate question posed by comparing the American executive order to the Brazilian medida provisoria is which one has more power? It is without a doubt that the American executive wields more power through the executive order. It can be clearly ascertained that the reasoning behind this is that the American President has in a way garnered more power throughout the preceding decades due to a more gridlocked Congress and a nuanced usurpation of presidential power that has significantly increased in the previous several decades. The Brazilian President relies on the Brazilian Congress to validate the medida provisória, no such validation is required for an American executive order.

[39] https://www12.senado.leg.br/noticias/materias/2019/06/06/mudanca-no-rito-das-mps-chega-ao-senado

Annex

ASPECT/INSTRUMENT	EXECUTIVE ORDER (US)	MEDIDA PROVISÓRIA (BR)
FORCE OF LAW	Yes	Yes, though temporary.
LEGAL NATURE	No consensus	No consensus
HISTORY	Unofficially: George Washington, Officially: Abraham Lincoln, 1862.	Started in 1988.
REQUIREMENTS	No requirements	In important and urgent cases
BASIS	Partially in the Constitution, because neither its text, nor Founding Fathers expressly mentioned it.	Art. 62
POLITICAL INFLUENCE	Not clear, since there is no consensus.	The Italian Constitution of 1947 via *decreto-legge*.
USAGE (OBJECT)	For practical Administration internal endeavours, although there were cases beyond Executive's discretion.	Art. 62, § 1º The issuance of provisional measures is forbidden when the matter involved: I – deals with: a) nationality, citizenship, political rights, political parties, and election law; b) criminal law, criminal procedural law, and civil procedural law; c) organization of the Judicial Branch and of the Public Prosecution, the career and guarantees of their members; d) pluriannual plans, budgetary directives, budgets, and additional and supplementary credits, with the exception of the provision mentioned in article 167, paragraph 3; II – aims at the detention or seizure of goods, people's savings, or any other financial asset; III – is reserved for a supplementary law; IV – has already been regulated by a bill of law passed by the National Congress which is awaiting sanction or veto by the President of the Republic. IV – has already been regulated by a bill of law passed by the National Congress which is awaiting sanction or veto by the President of the Republic.

ENDING	EXECUTIVE ORDER	MEDIDA PROVISÓRIA
CANCELATION	1. By Congress 2. By the Supreme Court 3. Succeeding Presidents or the same President	1. By Congress 2. By the Supreme Court[82]: 2.1. Abstract review 2.2. Concrete review 3. Succeeding Presidents or the same President[83]
SUPERSEDING	The issuing president or a succeeding one may modify the executive order as President Coolidge did to U.S. Grant´s Executive Order No. 9.	The issuing president or a succeeding one may modify the executive order.
AMENDMENT	Does not exist	Voting process
DEADLINE	No term limit.	Constitutional provision: 60 + 60 days, without Congress approval. art. 62, § 3º of Brazilian Constitution.

[82] Brazil does adopt both abstract constitutional review (like the US does) and concrete review (like most of continental Europe does). We do not intend to focus on Provisional Measures vis-à-vis Brazilian dual constitutional review system, due to the fact that it requires a proper study, only devoted to this subject.

[83] https://www.conjur.com.br/2007-out-21/medida_provisoria_revogar_outra_mp_supremo