Presidential Impeachment:
Impeachable Offenses in the Brazilian Version

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1. The Issue

Presidential impeachment is a traumatic process whatever the democratic environment subjected to it. In its recent democratic constitutional history, initiated in October of 1988, Brazil has undergone it a few times. President Fernando Henrique Cardoso was subjected to an unsuccessful vote [1] by the Brazilian House of Representatives in May 1999, and, in 1992 and 2016, Presidents Fernando Collor de Mello[2] and Dilma Vana Rousseff[3] were removed from office for crimes of responsibility. This paper aims to explore a few of the issues commonly discussed in the Brazilian version of the procedure, like the legitimacy of Congress to remove the directly elected President, what kinds of transgression render constitutionally admissible the removal of a sitting president, but especially, whether the judiciary should weigh in on the merit of the removal.

2. Importance

Most people find the unfolding of conflict in the political arena quite interesting, and some of the most heightened versions of this are impeachment proceedings. The author

[1] Fernando Henrique Cardoso Managed a strong two thirds support (342 nos, 100 ayes, and 3 abstentions) in the House of Representatives.

[2] Impeached in the House by 441 ayes, 38 no, 1 abstention and 23 absences, he resigned a day before the Senate trial, which still took place to decide on the removal and, especially, the temporary loss of political rights. The result was 76 yeas, 3 nays, and 2 abstentions.

[3] Impeached in the House by 367 ayes, 137 no, 7 abstentions and 2 absences, and tried and removed in the Senate by 61 yeas and 20 nays, surpassing the 2/3 requirement for removal but not for loss of political rights for eight years in the following vote (42 yeas, 36 nays, and 3 abstentions).

is a Federal Attorney for the Brazilian Senate, and the duties that come with this position include pleading before the Brazilian Supreme Court (*Supremo Tribunal Federal*) on behalf of the Senate and Congress regarding the many injunctions filed, most of them aimed at paralyzing the impeachment proceedings in their various stages. Having "watched the zeppelin burn from the inside", so to speak, has made for interesting conversation with legal professionals from around the world, especially in the United States, where, despite its remote likelihood, there is (or was) some speculation and theoretical talk of impeachment of the current President linked to interactions with a foreign government. The U.S. has undergone the full length of presidential impeachment proceedings up to a removal vote by the U.S. Senate, but there has never been a successful removal by trial, since the Senate has twice voted favorably on the incumbent (Presidents Johnson and Clinton), so the Brazilian experience might work as an analogous model to those interested in the subject.

3. Thesis

3.1 Grappling with what Constitutes an Impeachable Offense: Legislative Branch Should have the Last Word

The matter is charged, in ideological and partisan terms. Brazilian Law defines a specific type of transgressions for impeachable offenses, listed in an outdated statute from 1950 (number 1.079, enacted on April 10 of that year). They are not the "high crimes

and misdemeanors" as declared in Section 4 of Article Two[4] of the United States Constitution (the declared inspiration for the Brazilian Republic from its inception in 1889 as "United States of Brazil"). The Brazilian version presents us with so called "crimes of responsibility"[5]. Their definition, for the most part, is so broad, so vague, that these articles of the statute would themselves be unconstitutional under the new 1988 regime if the traditional restrictive application for common crimes should apply.

The thesis here is one already explicitly adopted by a few justices in the Brazilian Supreme Court: that despite all the shortcomings of members of Congress as *de facto* judges (lack of familiarity with the Law and political partiality, for instance), the Judiciary

[4] "The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other High Crimes and Misdemeanors."

[5] Note that the Brazilian translators for the Superior Electoral Court preferred the expression "crimes of malversation", with which we disagree, since malversation usually refers to corrupt or fraudulent behavior when in a position of trust (public office, for instance), and it is not necessarily the case in statute 1.079/50 or in the Brazilian Constitution, which lists the possible articles of impeachment:

"SECTION III
Liability of the President of the Republic

Article 85. Those acts of the President of the Republic which attempt on the Federal Constitution and especially on the following, are crimes of malversation:
I – the existence of the Union;
II – the free exercise of the Legislative Power, the Judicial Power, the Public Prosecution and the constitutional Powers of the units of the Federation;
III – the exercise of political, individual and social rights;
IV – the internal security of the country;
V – probity in the administration;
VI – the budgetary law;
VII – compliance with the laws and with court decisions.
Sole paragraph. These crimes shall be defined in a special law, which shall establish the rules of procedure and trial."
Brazilian Constitution available at http://english.tse.jus.br/arquivos/federal-constitution

should refuse to consider matters regarding the merit of impeachment votes and trials for removal.

In the Brazilian system, some impeachments are carried out by the Judiciary[6] (Ministers of the Cabinet, Brazilian Diplomats of the higher echelons, i.e., Ambassador Level), and, with the exception of the Supreme Court, the Justices of Superior Courts including the National Court of Audits-TCU), but the ones against the highest officials (President and Vice-President of the Republic, Brazilian Supreme Court Justices, the Attorney-General, the Solicitor-General, members of the National Council of Justice and the National Council of Public Prosecutors) are carried out at the Senate[7].

It is interesting to notice that the Judiciary tries impeachments against lesser officials of the Executive and lesser Justices, while the Senate tries the highest official in the Executive (President), the highest Justices of the Land (Supreme Court Justices), and the Attorney-General, who also officiates before the Supreme Court.

If the final decision on impeachment trials of the President is justiciable, then so is the one delivered on an impeached Supreme Court Justice. Considering a Supreme Court Justice may be impeached by trial at the Senate, it is grossly incompatible with the checks and balances system to have the Judiciary review impeachment decisions made by the Legislative.

The Brazilian Constitutional defined with good precision the missions and prerogatives of each branch of Government. While jurisdiction is the typical function of

[6] Article 102 of the Brazilian Constitution.
Available at. http://www.planalto.gov.br/ccivil_03/constituicao/constituicao.htm
[7] Article 52 of the Brazilian Constitution.

the Judiciary, the Constitution placed one check on it: impeachment of Supreme Court Justices.

3.2 The Perceived Untouchability of Election Day Legitimacy

It is not unusual to simply accept that the People have spoken on election day, and will only speak again after a number of years, when a new electoral cycle takes place. This is not actually true. Voters elect the head the Executive Branch, but also members to the Legislative branch to, among other tasks, keep the Executive in check. Judges aren't elected in Brazil, so their legitimacy doesn't lie in fulfilling a popular mandate, but to carry out the constitutional duties to decide civil conflicts and try criminal cases.

So, the People may speak directly only once every four years when it comes to the Head of the Executive branch, but the members of Congress speak for them continually over this period, by proposing bills of legislation, voting on bills sent to Congress by the executive, overruling vetoes, and, on rare occasions, by considering the impeachment of the incumbent.

Apart from that, the perception that the legitimacy verified on election day remains untouched throughout the full term can be mistaken. It fluctuates, rising and ebbing according to the incumbent's actions and even to events arguably outside their control, especially economic ambiance, largely influenced in Brazil's case by external factors.

What Brazilian constitution implies (inspired by its American counterpart) is that popular mandate is to be upheld, so long as the incumbent can muster support from one third of either house of Congress. The implicit rationale is that if support languishes beneath such level, then popular support has also waned.

4. Relevant Elements

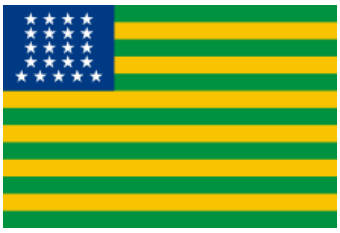
The similarities between the U.S. inspired Brazilian version of impeachment are many, but a few very important differences and relevant aspects are worthwhile noting.

4.1 Brazilian Republicanism

Under recent leftist governments, Brazil has been deemed a less than fraternal ally to the U.S., especially by more conservative administrations, but the truth is that Brazil was inspired, from the foundation of its republic, by the American model.

Even before the end of slavery in 1888, Brazilian monarchy faced many opponents. The military were discontent with speech restrictions, progressive political sectors resented the absence of universal vote (only males within a certain income bracket had right of vote), and the rise of positivist reasoning favored republican ideals over monarchist, as exemplified by the motto "order and progress" on the Brazilian Republican Flag[8]. The powerful ruralists, previously great supporters of the monarchy,

[8] Below, the flag used during the final years of the empire (1), the one used both on the ship that took the royal family to its French exile and at a public building during the first days of the republic (2), and the definitive version (3), inspired by the imperial flag, but carrying the positivist motto "ordem e progresso" across its center.

(1)  (2)  (3) 

were deeply disgruntled over losing their slave workforce the year before. It was a bloodless coup.

Ruy Barbosa, one of the greatest legal minds in Brazilian history, became very interested in the American experiment through the writings of Alexis de Tocqueville[9] and envisioned the northern nation as a good model for a republican Brazil. The country was renamed in 1891 from Empire of Brazil (*Império do Braz*il) to United States of Brazil (*Estados Unidos do Brazil*), until the imposed Constitution of 1967, when it became Federative Republic of Brazil (*República Federativa do Brasil*), a name kept under the current constitutional regime since 1988.

In 1891, the vote became universal among males (women were still excluded until 1932), the Supreme Court of Justice[10] (composed of career judges appointed by seniority) became the Supreme Federal Court (composed of justices appointed by the President of the Republic and approve by the Senate), the Brazilian Senate morphed from a House of Lords type institution to one similar to the U.S. Senate, but with three senators per state, instead of the American two. This is also when removal by impeachment is first introduced in the Constitution[11] (articles 53 and 54) as well as the expression “crimes of responsibility”.

[9] TOCQUEVILLE, Alexis de. **Democracy in America**. 1835 and 1840.
[10] Brazilian Constitution of 1824, stating that the Supreme Court of Justice should be: “composed of lettered Judges by virtue of their seniority”, available at: http://www.stf.jus.br/portal/cms/verTexto.asp?servico=sobreStfConhecaStfHistorico
[11] Available at: http://www.planalto.gov.br/ccivil_03/constituicao/constituicao91.htm

Removal instruments were present from the Imperial Constitution of 1824 onward: An Impeachment Statute from October of 1827, presidential Decree 30 from January 1892, and, finally, the impeachment statute of 1950 (Lei n. 1079), still in effect to this day.

A total of four presidents were subjected to a proper impeachment vote by the House of Representatives: Getúlio Vargas, Fernando Collor, Fernando Henrique Cardoso and Dilma Rousseff.

Another two (Carlos Luz and Café Filho[12]) in 1955 were impeached and removed in lightning fast proceedings in both houses of Congress over in a few hours that disregarded statute 1.079/50, offered no opportunity of defense or any semblance of due process of law, actually coups in constitutional guise. Or preemptive countercoups, one might say, since they themselves, vice-president Café Filho (acting president) and House President Carlos Luz (acting vice-president) were articulating a coup to prevent president-elect Juscelino Kubitscheck from taking office in 1956 and were stopped by legalist sectors of the military.

Fernando Collor and Dilma Rousseff were the only ones impeached by the House. They also eventually lost the trial in the Senate. President Collor (1992) lost political rights for eight years, while President Rousseff was allowed to keep hers.

It might be useful to note that when it is said in the U.S. that an official was impeached, it means only that the House has authorized the Senate to try the accused on articles of impeachment, which may result in acquittal or removal (conviction). In Brazil, the term “impeachment” doesn’t appear in any legal text, but is used informally. When it

[12] Available at: http://www12.senado.leg.br/noticias/materias/2016/08/31/dois-presidentes-do-brasil-sofreram-impeachment-em-1955

is said that an official was “impeached”, it is usually understood that a successful vote of removal took place. In this paper, because it is written in English, the original U.S. usage is preferred.

4.2 Brazilian Impeachment vis-a-vis the American Version

It is interesting to notice that the American Senate has removed eight officials[13] from public office, but no presidents, while the Brazilian Senate has democratically removed two presidents (four in total, but two of them under duress), but no other lower officials.

In the American version of impeachment, the House Judiciary Committee usually inquires and internally decides if articles of impeachment should be brought to the House for a full vote. A simple majority in the House will authorize a trial by the Senate. It is important to note that the President remains in power until the final vote in the Senate. Only a two thirds majority of those present in the Senate results in removal, and, maybe, disqualification from holding any future office[14].

However severe, this is a departure from the British version, which allowed any punishment, imprisonment and death included. The American version clearly separates the political aspect of transgressions (to be addressed by Congress) from properly

[13] The House has impeached 19 officials: 15 federal judges, a member of cabinet, a Senator, and two Presidents. The Senate has carried out 16 impeachment trials, and ultimately removed eight federal judges.

[14] U.S. CONSTITUTION, ARTICLE I, SECTION 3, CLAUSE 7: “Judgment in Cases of Impeachment shall **not extend further than** to **removal from Office**, and **disqualification to hold and enjoy any Office** of honor, Trust or Profit under the United States: but the Party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law.”

criminal matters (to be tried in the Judiciary branch). The Brazilian constitution does so explicitly by creating two categories under which to try enumerated officials: common crimes (to be tried in the Judiciary) and crimes of responsibility (impeachable offenses to be tried in the Legislative).

In impeachment proceedings, the U.S. Senate has at least twice [15] voted separately on removal (by two thirds supermajority) and then disqualification barring any future appointment in federal government (by simple majority). There is also the very interesting case of Alcee Hastings[16], who was impeached in 1989 as Federal Judge and elected to the House of Representative a few years later, which was only possible because the Senate did not vote on his disqualification.

In the Brazilian version, any citizen may call for impeachment of the President (by petition directed to the House of Representatives) or other officials, such as Ministers, the Attorney-General, Supreme Court Justices (in those cases, directed to the Senate). In Presidential impeachment proceedings, the President of the House of Representatives decides whether the petition is baseless, and archives it, or if it should move forward. If it is deemed viable, a Special House Committee is formed, deliberates and votes on the admissibility of the charges. A full House vote is then scheduled, but the President is only impeached if two thirds of the Representatives vote favorably. The proceedings then move to the Senate, which then decides on the prima facie admissibility of the charges.

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[15] In 1862, judge West Humphreys and 1913, judge Robert Archibald were first convicted by a two thirds supermajority vote on removal, followed by a simple majority vote to disqualify.

[16] CASSADY, Benjamin. **You've Got Your Crook, I've Got Mine: Why the Disqualification Clause Doesn't (Always) Disqualify**. Quinnipiac Law Review, Vol. 32, No. 209, 2014
Electronic copy available at: http://ssrn.com/abstract=2447970

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If admitted, the trial begins, presided over by the President of the Supreme Court (Chief Justice), as is the case in the U.S. system. Removal can only take place if two thirds vote favorably on it — not of those present, as in the U.S. version[17] — but of the total members of the Senate.

Although it is more difficult to be impeached in the House under the Brazilian version, once the proceedings are admitted in the Senate, the President is temporarily removed from office and must articulate his or her acquittal without the support of federal government and, moreover, having the potential next incumbent temporarily acting as president, free to work politically for the president's definitive removal if it is in his/her interest. This substantially increases the chances of removal. It is a major difference from the American system, which keeps the President in power until his or her final removal, in this manner maintaining her or his chances of acquittal.

In the case of President Andrew Johnson, in 1868, eleven articles of impeachment were presented revolving around the removal and appointment of officials to Secretary of War against the dispositions of the Tenure of Office Act, a statute aimed at reducing the powers of the President by forbidding the removal of officers appointed under advice and consent of the Senate, except with advice and consent of the Senate to remove as well.

[17] Article I, section 3: "The Senate shall have the sole Power to try all Impeachments. When sitting for that Purpose, they shall be on Oath or Affirmation. When the President of the United States is tried, the Chief Justice shall preside: And no Person shall be convicted without the Concurrence of **two thirds of the Members present**.
Judgment in Cases of Impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of honor, Trust or Profit under the United States: but the Party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law."

President Johnson was barely acquitted in the Senate. The majority needed to remove him was 36 Senators, and only 35 favorable votes were counted on three of the charges.

In the case of President Nixon, the vote on impeachment at the House never happened due to the incumbent's resignation. Articles of impeachment included obstruction of justice, abuse of power and contempt of Congress.

President Bill Clinton was impeached for perjury regarding his affair with an intern and obstruction of justice. He was acquitted in the Senate by 55 nays and 45 yeas on the perjury charge and 50 nays and 50 yeas on the obstruction of justice charge.

President Getúlio Vargas, charged with illegally aiding a newspaper in getting loans from a public bank, was subjected to an impeachment vote in June of 1954[18], but defeated it easily (35 ayes, 136 nos, 40 abstentions). This episode is rarely remembered, since it was eclipsed by his suicide in August of that year, under pressure to resign and sensing a military coup.

President Fernando Collor faced charges of corruption in 1992. Impeached in the House by 441 ayes, 38 nos, 1 abstention and 23 absences, he resigned a day before the Senate trial, which still took place to decide on the removal and, especially, the loss of political rights. The result was 76 yeas, 3 nays, and 2 abstentions.

Fernando Henrique Cardoso was charged with favoring banks in the establishment of the new banking protection system (PROER) injecting public funds (equivalent to roughly 16 billion USD) into the system. He managed a strong two thirds support (342 nos, 100 ayes, and 3 abstentions) in the House of Representatives.

[18] Available at: http://cpdoc.fgv.br/producao/dossies/AEraVargas2/artigos/CrisePolitica/InicioDoFim

Dilma Rousseff faced charges of violating the budgetary statute (the annual federal budget is voted as a statute in Brazil, but usually contains no abstract legal content, only concrete matters pertaining the budget). She was impeached in the House by 367 ayes, 137 no, 7 abstentions and 2 absences, and tried and removed in the Senate by 61 yeas and 20 nays, surpassing the 2/3 requirement for removal but not for loss of political rights[19] in the following vote (42 yeas, 36 nays, and 3 abstentions).

4.3 "High Crimes and Misdemeanors" vs. "Crimes of Responsibility"

The discussion on what would constitute a "high crime" or "misdemeanor" in the context of impeachment mirrors the one that goes on in Brazil regarding the scope of "crimes of responsibility".

The U.S. Constitutional text states that "treason, bribery, or other high Crimes and Misdemeanors" constitute impeachable offenses. Treason and bribery are clearer terms than "high Crimes and Misdemeanors", which aren't detailed in legal text. It is clear that crimes are included in the definition, but impeachment history shows that non-criminal behaviors are impeachable as well. The very first impeachment and removal was of a federal Judge, John Pickering[20], and one of the articles of impeachment was drunkenness.

[19] In Brazil, the loss of political rights is for eight years only, while disqualification in American removal is usually permanent.

[20] TURNER, Lynn W. **The Impeachment of John Pickering**. The American Historical Review Vol. 54, No. 3 (Apr., 1949), pp. 485-507. Available at https://www.jstor.org/stable/1843004?seq=3#page_scan_tab_contents

Over the history of impeachment proceedings, three categories[21] of offenses have proved to be impeachable: abuse of power, behavior deemed incompatible with the function/purpose of office, and use of office for personal gain or improper purpose.

Daniel Farber[22] points that, while some transgression is necessary to characterize a high crime or misdemeanor, it hard to delineate its boundaries:

> "…in Federalist 65, Hamilton said *"The subjects of its jurisdiction are those* ***offenses which proceed from the misconduct of public men, or, in other words, from the abuse or violation of some public trust. They are of a nature which may with peculiar propriety be denominated political, as they relate chiefly to injuries done immediately to the society itself."***
>
> (…) impeachment is very much a political question, not just in the technical legal sense of being unreviewable by a court, but in the broader sense of involving solely the judgment of elected members of Congress. The Constitution seems to clearly require something well beyond a disagreement with the President's policies or a judge's decisions, but just what that means in practice is in the hands of our elected representatives"

In any case, a definitive answer isn't likely to come from the Judiciary. In *Nixon v. United States, 506 U.S. 224 (1993)*[23], Walter Nixon was a Unites States District Court Judge impeached under bribery charges. He argued that Senate Rule XI, which permits

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[21] U.S. House of Representatives. Committee on the Judiciary. **Constitutional Grounds For Presidential Impeachment.** 93d Cong., 2d Sess. H. Comm. Pr.. "February 1974." Washington: GPO, 1974.-6. Available at: http://www.washingtonpost.com/wp-srv/politics/special/clinton/stories/watergatedoc.htm

[22] FARBER, Daniel. **An Impeachment Primer**. 2016

[23] Nixon v. United States, 506 U.S. 224 (1993) Available at: https://scholar.google.com/scholar_case?case=17675318889659087739&hl=en&as_sdt=6&as_vis=1&oi=scholarr

a committee of Senators to hear evidence and later report it to the full Senate, violates the Impeachment Trial Clause, Art. I, § 3, cl. 6 ("Senate shall have the sole Power to try all Impeachments."). In short, he argued that removal should be tried under the same rules as a judicial trial. The Supreme Court found that the *"controversy is nonjusticiable — i.e., involves a political question"*, and judicial review would be contradictory with the checks and balances system, under which impeachment is the single check on the Judiciary by the Legislative branch. A very relevant separation of powers issue. The opinion cites Hamilton[24] on this:

> "The precautions for their responsibility are comprised in the article respecting impeachments. They are liable to be impeached for mal-conduct by the house of representatives, and tried by the senate, and if convicted, may be dismissed from office and disqualified for holding any other. This is the only provision on the point, which is consistent with the necessary independence of the judicial character, and is the only one which we find in our own constitution in respect to our own judges."

The ruling states that the Senate is granted "sole Power" to try impeachments, and the term "try" isn't sufficiently precise to permit a reliable standard of review of the Senate's actions. Therefore, the "Senate alone shall have authority to determine whether an individual should be acquitted or convicted." Also, considerable political uncertainty would be created in the event, say, that an impeached President sued for judicial review.

However, some of the concurrent opinions mention a possibility of justiciability. Justice White (joined by Blackmun) concurred that:

> "The Court is in the view that the Constitution forbids us to even consider his contention. I find no such prohibition and would therefore reach the merits of the

[24] The Federalist No. 79, at 532-533 (J. Cooke ed. 1961)

claim. I concur in the judgement because the Senate fulfilled its constitutional obligation to "try" petitioner. (…) the Senate has very wide discretion in specifying impeachment trial procedures and (…) it is extremely unlikely that the Senate would abuse its discretion and insist on a procedure that could not be deemed a trial by reasonable judges. (…) I would not issue an invitation to the Senate to find an excuse, in the name of other pressing business, to be dismissive of its critical role in the impeachment process."

Justice Souter also concurred that procedural aspects might be justiciable:

"As the court observes (…), judicial review of an impeachment trial would under the best of circumstances entail significant disruption of government.

One can, nevertheless, envision different and unusual circumstances that might justify a more searching review of impeachment proceedings. If the Senate were to act in a manner seriously threatening the integrity of its results, convicting, say, upon a coin toss, or upon a summary determination that an officer of the United States was simply 'a bad guy' (…) judicial interference might well be appropriate. In such circumstances, the Senate's action might be so far beyond the scope of its constitutional authority, and the consequent impact on the Republic so great, as to merit a judicial response despite the prudential concerns that would ordinarily counsel silence."

The standard for the Brazilian "crimes of responsibility" is analogous. José Cretella Júnior[25] points out that there is no definition on what constitutes a crime of responsibility, but an enumeration of such crimes in statute 1.079/1950. Annual accountability on

[25] CRETELLA JÚNIOR, José. **Do impeachment no Direito Brasileiro**. Ed. Revista dos Tribunais. São Paulo, 1992. P.38

budgetary issues is also a manner to evaluate probity, and its infringement is included as an impeachable offense.

As stated before, the list of crimes of responsibility put forth in statue 1.079/50[26] includes very vaguely defined behaviors, such as “to allow, tacitly or expressly, the violation of federal statute of public policy”, ”to be remiss in taking the measures established in federal statute and necessary to its fulfillment”, ”to proceed in a manner that is incompatible with the dignity, honor and decorum of public office”, ”to clearly violate, in any way, any section of the budgetary statute”, “to neglect the collection of taxes and keeping of national public property”, ”to intervene in businesses peculiar to the states or municipalities in disobedience to constitutional law”, ”to order officials under one’s supervision to abuse power, or to tolerate such abuse without repression”, or ”to violate any individual right or guarantee”.

Notable Brazilian scholars revealed discomfort with this category of impeachable offenses separate from common crimes. Paulo Brossard[27] felt, in 1992, that too much discretion was given to Congress, that could perpetrate abuses during impeachment proceedings, including removal without evidence of wrongdoing.

During the Brazilian republican history, the Supreme Court vacilated at first in its view of the justiciability of impeachment trials. Decision nº 104 of 1895 stated that such

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[26] Available at: http://www.planalto.gov.br/ccivil_03/leis/L1079.htm

[27] BROSSARD DE SOUZA PINTO, Paulo. **O impeachment**. Ed. Saraiva, São Paulo, 1992. P. 51, 87 Apud LIMA, Ivanedna Velloso Meira. **O crime de responsabilidade do presidente da república e o Senado enquanto Tribunal**. 2005. 30 f. Monografia - Curso de Especialização em Direito Legislativo, Universidade do Legislativo Brasileiro e Universidade Federal do Mato Grosso do Sul, Brasília, 2005. Available at: http://www2.senado.leg.br/bdsf/bitstream/handle/id/50/Ivanedna_Velloso.pdf?sequence=4 Accessed in July 2017

decisions belonged to the political realm of the Legislative Branch. A 1916 decision, on the other hand, stated that impeachment proceedings were either criminal proceedings or mixed. In 1937, the Supreme Court returned to its original position by stating that there is no criminal aspect to impeachment, only the removal from office and disqualification from future service, purely political measures.

In recent years, the Brazilian Supreme Court has decided that crimes of responsibility, when decided by the Legislative, are non-justiciable. As in the U.S. Constitution, the Brazilian Constitution delineated Congress as the forum for impeachment trial, specifically carving it out of the judiciary competency otherwise established.

In Brazil, the discussion also revolves around, among other aspects, the administrative or judicial nature of an impeachment ruling. It seems to be jurisdictional, however removed from the Judiciary, since it is presided over by the President of the Brazilian Supreme Court, who is responsible for settling all matters pertaining procedure.

The nature of the decision can be understood as political, with penal undertones. These matters were ventilated in 1992, by occasion of the impeachment of President Fernando Collor. This is what then Justice Carlos Velloso[28] said, quoting former Justice Pedro Lessa:

[28] Opinion of Justice (Minister) CARLOS VELLOSO, delivered in an injunction filed by the President Fernando Collor during impeachment proceedings
Mandado de Segurança n. 21.623/DF, page 9, available at http://www.stf.jus.br/arquivo/cms/sobreStfConhecaStfJulgamentoHistorico/anexo/MS21623.pdf page 9
Also, Brazilian Supreme Court Review (Rev. STF, XLV/H, 13)

> "What is the nature of impeachment? Is it its essence a constitutional, political or criminal measure? Having examined the articles of the Constitution, I gather it is not permitted to doubt that, for its origin and essence, it is a political element or has constitutional nature, and for its effects or consequences it is penal. It was engendered out of need to put an end to abuses by the Executive branch. Through it, the Legislative is empowered to remove the Executive Official from office, and undoubtfully imposes a penalty (…) it has, therefore, a double character, it is eccentric. If it were merely constitutional, one would understand the additional penalty of disqualification, beyond removal. If it were merely penal, one wouldn't understand the double jeopardy of being tried and convicted a second time in the Judiciary."

In the Brazilian version, the jurisdictional aspect seems evident given that the Constitution provided for the trial over crimes of responsibility of lesser non-elected officials to courts of law. No one would consider a decision by the Supreme Court to remove a Cabinet Minister to be administrative in nature, so the change of venue in the case of Presidential impeachment to the Senate, presided over by the Chief Justice of the Supreme Court of the Land (*Presidente do Supremo Tribunal Federal*) shouldn't change the perceived nature of the decision: definitely jurisdictional, however atypical. This is also the case in other instances, like extradition. The competence rests on the President of Brazil and is deemed an act of sovereignty, not justiciable, therefore.

In Presidential removal, the Chief Justice (President of the Supreme Court of Brazil) is responsible for deciding all matters that arise during the removal proceedings at the Senate, so that decision should be immune to judicial review.

More recently, the non-justiciability of impeachment proceedings became more explicit. During the impeachment proceedings of President Dilma Rousseff, a number of

petitions for injunctive relief (interruption of the impeachment proceedings) were filed and a pattern of decision arose. On occasion of MS 34.441[29], as in 34.193, this was the opinion of the late Justice Teori Zavascki[30]:

> "(...) circumstance that limits the justiciability is the nature of the proceeding. The plaintiff asks the Supreme Court to examine impeachment trial for crime of responsibility of the President of the Republic, which is not under competency of the Judiciary branch, but of the Legislative (Article 86 of the Constitution). **Therefore, there is no constitutional support for any judicial intervention that, directly or indirectly, involves an appreciation of the merit of the charges**. The constitutional judge here is the Senate, previously authorized by the House of Representatives, takes the role of definitive Tribunal, whose merit is insusceptible of judicial review even by the Supreme Court.
>
> (…)
>
> To admit the possibility of review in the merits of the deliberation of the Legislative by the Judiciary would mean to render useless Article 86 of the Constitution, which grants, not to the Supreme Court, but to the Senate, authorized by the House of Representatives, competency to try the President of the Republic for crimes of responsibility. For that same reason, **it is necessary to understand that the judges are invested as politicians, who produce votes that are charged by visions of a political nature and may be, consequently, inspired in values or motivations different from those adopted by members of the Judiciary branch**.
>
> (…)

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[29] file:///Users/admin/Downloads/texto_310585765.pdf or http://www.stf.jus.br/portal/autenticacao/ under the number 11907454.

[30] This opinion was handed down in late October of 2016, and Justice Zavascki perished in an unusual private plane accident in January of 2017. Available at: https://www.theguardian.com/world/2017/jan/24/brazil-corruption-teori-zavascki-plane-crash-investigation

Under these circumstances, only a definitive demonstration of the indispensability of immediate ruling to prevent disastrous damage to the institutions, or to democracy, or to the rule of law, could justify injunctive relief over the matters exposed."

4.4 The Relevance of Political and Economic Environment

While partisan affiliations have always weighed when it comes to impeachment, it is worthwhile to observe the general political and economic climate during these proceedings: Johnson's (highly conflictive post-civil-war ambiance and economic hardship), Nixon's (general perception of Vietnam war failure and oil crisis), and Clinton's (first decades of heightened polarization, when it became more difficult to find democrat conservatives and liberal republicans, but a favorable economic environment).

In Brazilian cases, Fernando Collor (1200% inflation in 1992, isolation in Congress except for his small political party, PRN, which no longer exists, and a 9% approval rate[31]), Fernando Henrique Cardoso (aftermath of the Asian financial crisis of 1997, strong devaluation of the Real against the USD, 13% approval rate but a strong coalition of supporting political parties), and Dilma Rousseff (record low approval rate of 8%, popular unrest with public demonstrations and riots from 2013 on, 3.8% GDP recession with a similar prognosis for 2016, involvement of relatively close associates in the Lava Jato criminal scandal).

[31] Available at: http://www1.folha.uol.com.br/poder/2015/08/1665135-reprovacao-de-dilma-cresce-e-supera-a-de-collor-em-1992.shtml (in fine)

In the Brazilian experience, it seems that economic circumstances are paramount, more than the actual individual acts of the impeached Presidents. It is worthwhile to note that Fernando Henrique Cardoso may have eluded impeachment by crediting himself with a major economic victory: the success of Plano Real (economic plan of 1994), which ended hyperinflation in Brazil, and the shallower depth of the economic crisis of the late 90's when compared to 1992 and 2016.

4.5 The 2016 Impeachment Proceedings

President Dilma, who had never run for office before the presidential race of 2010, was elected largely because of the great support her charismatic predecessor, President Lula, who campaigned relentlessly for her. Besides being very inexperienced at negotiating with Congress, her first term was marked by a change in the prospect of Brazilian economy, from a booming 2000's to slower and slower growth over her first term.

By 2013, street demonstrations began, and some of them turned into riots. A unprecedented polarization among Brazilians began, some identifying markedly as leftists, some as liberals, and some as right-wing conservatives. There was also great popular dissatisfaction with the large expenses incurred in the preparation of the 2014 World Cup and the 2016 Olympic Games, amidst rumors of government corruption involving both FIFA and the IOC.

After barely getting reelected (51.64% of the vote) under promises of continuing support for social support measures, the reality of impending recession had her defaulting on most of them. In 2015 a 3,8% GDP recession ensued with a similar prognostic for

2016 (3.6% recession). Towards the end of 2015, President Dilma is accused of violating the budgetary statute and several petitions for removal are filed by citizens before the House of Representatives. On December 15, 2015, a petition for impeachment proceedings is accepted by the president of the house of representatives and sent to a Special Committee. In April 2016, the full House votes and impeaches the President. The proceedings move to the Senate which rules favorably on the admissibility of the charges by a greater than two thirds majority, when a simple majority would suffice. This meant that the President would be temporarily removed for a duration of no longer than 180 days, according to Article 86 §2 of the Brazilian Constitution.

This temporary removal works almost as a kiss of death on the incumbent. In American politics, the President and the vice-President belong to the same political party. Not so in Brazil. In what is called “coalition presidentialism” candidates must make themselves viable by creating coalitions with several parties in order to be elected and have a majority of supporters in Congress, without which a presidential tenure would be fruitless. Therefore, the president and vice-president are usually from different political parties, and although they work in relative harmony most of the time, the opportunity to become president is a chance most politicians would jump at. So, the temporary removal of a weakened president strengthens the vice-president by granting him, albeit in theory temporarily, the full use of federal government: positions to appoint, policies to enforce, some discretion in using the budget. The temptation to use it to ensure the definitive removal of the predecessor has revealed itself to be irresistible both in 1992 and in 2016.

Alas, in August 31, 2016, the Brazilian Senate voted to remove President Rousseff from office (61 yeas to 20 nays), but did not achieve the two thirds supermajority for

disqualification to hold future office (42 yeas to 36 nays, with 3 abstentions). That means that her political rights were preserved, so she could run for office again, should she choose to. Authorizing disqualification to be voted in separate was a controversial decision, since it was unclear whether the conviction to remove could be separable from disqualification.

There is no doubt on the matter in the American version. If the Senate doesn't vote to disqualify (by simple majority) there is no disqualification. Actually, such penalty was only imposed twice, both times on federal judges. In Brazil, not only separation was deemed possible by presiding Justice Lewandowsky, but a two thirds supermajority would also be necessary to disqualify President Rousseff, and that vote only achieved a simple majority.

On September 30th of 2016, President Dilma's defense filed a last petition for injunctive relief, which would carry her back to the presidency, since the 180 days would have elapsed since her temporary removal, but the Supreme Court Justice in charge of monocratically ruling on such petition (Teori Zavascki) decided that the matter was non-justiciable. The full court hasn't decided on the matter as of July 2017, but a departure from Justice Zavascki's opinion seems extremely unlikely.

5. Arguments Against Thesis and Counter-Arguments

5.1 The Democratic Issue and the Legitimacy of the Legislative

The best argument against the position that Congress should be granted latitude of action when it comes to impeachment is, in the specific case of the sitting President,

the democratic issue. If “all power emanates from the People”, as the section on Article 1 of the Constitution states, then direct democratic decisions should probably supersede indirect ones. Dozens of millions elect the President under the expectation of a full 4-year term. The penalty for poor management skills, the argument goes, should be to not get reelected for another four years come next electoral cycle. Impeachment proceedings, particularly in the case where articles of impeachment did not constitute a common crime, like corruption, is tantamount to disregarding the vote of all those million citizens.

The counter-argument here is that Congress is also elected, and therefore, as a whole, carries the same level of legitimacy as the elected President. Congressmen and Congresswomen speak for their respective constituencies, collectively to the same level of relevance as the President’s constituency has. Considering there is a clear constitutional provision for removal, it is perfectly legitimate if Congress should decide to consider articles of impeachment.

5.2 No Vote of No Confidence in the Brazilian Model of Republic, but Who has Legitimacy to Decide on Impeachment?

A referendum in 1993 decided by a large margin that Brazil should be a Republic, not a Monarchy, and it government Presidential, not Parliamentarian. The President is not a decorative figure. She or he are not only Head of State, but also Head of Government. The Constitutional grants considerable power to Presidents, who are in charge of the Executive, of carrying out the budget, and may even enact provisional statutory measures, to be ratified by Congress in 120 days.

Parliamentarian regimes have a quick instrument of removal: the vote of no confidence, which doesn't require the incumbent to commit any serious transgression. It's a non-culpable removal, in most cases. A Presidential regime, especially one that grants such powers to the President as the Brazilian version does, cannot allow for this. Because there is no such thing as a vote of no confidence in a Presidential Republic, impeachment proceedings should be carried out only in proved cases of serious transgressions, crimes which make it unbearable to society to have incumbents carry out their terms. Removal proceedings under "lesser" charges would be equivalent to this non-existing figure, a deformation of the very serious institute of impeachment: a veritable coup.

Impeachment proceedings are, of course, not a vote of no confidence, which requires no imputation of crime. However, the Brazilian Constitution was very careful to separate common crimes from crimes of responsibility. It is actually possible to answer for a crime of responsibility before Congress, and later, for the Common Crime indictment of the same facts. Such double jeopardy would be unconstitutional in Brazil for a single criminal transgression, so the only possible conclusion is that different aspects are under consideration in each case. The Judiciary will consider the criminal penalty applicable to a certain act under criminal law, and the Legislative will consider the political consequence of that same act, certainly not under criminal law considerations, but political ones.

The 1992 impeachment is an example of that. President Collor resigned, but was tried and convicted nonetheless to establish his disqualification. He lost his political rights for eight years. Later, he was criminally charged and acquitted due to lack of evidentiary support to the indictment.

It is appealing to nurture the idea of having a panel of Judges to review impeachment proceedings. They are usually well versed in the Law, trained to be impartial, and, in general, more dignified than members of Parliament. Many of the members of Congress aren't well educated, and most of them stand to lose or gain politically on the outcome of the vote.

But again, the legitimacy issue rears its head. Supreme Court Justices are not elected. If the People have spoken to elect, it is only the People who may speak to remove, even if indirectly. Also, Supreme Court Justices are appointed by the President under advice and consent of the Senate, so some political consideration is taken to their appointment, and some may argue that the are somewhat beholden to the political group that supported them.

Most important, the Constitution carved out the only check on the Judiciary at the Supreme Court level: impeachment. If review is accepted on Presidential impeachments, it must also be when members of the Judiciary are impeached. It shatters the system of checks and balances.

In any case, it is dangerous to try to establish any other panel of judges on the merits of impeachment outside of the Legislative. Any attempt to have the Judiciary create objective limits to judgment of Congress will create enormous political uncertainty.

5.3 Economic Crises are Not Directly Imputable to the President, but Congress Should Decide Which Transgressions are Impeachable

A third good point is that economic crises do not constitute a "crime of responsibility" imputable to the President, and therefore cannot be the declared or

subjacent motivation for impeachment. It might constitute a violation of the substantive due process clause.

Again, we return to the previous point. While it is absolutely true that economic downturns are not impeachable offenses, the only constitutionally authorized and legitimate arbiters to whether an impeachable offense has occurred are the members of Congress, who are not technically trained in the legal system and are usually politically biased. That was the option of the Brazilian constitutional framers. The only protection the sitting president gets is the hardest quorum in the Brazilian Constitution: two thirds of representatives must authorize the Senate to judge, and two thirds of Senators must vote to remove the President.

6. Conclusion

In the Brazilian constitutional system, while the Executive does have the power of the sword, with limitations, and the Legislative has the power of the purse, with limitations, the Judiciary was not designed to be the weakest branch.

The Brazilian Constitution explicitly grants the Supreme Court powers to defend the Constitution. It may assert the unconstitutionality of statutes and constitutional amendments, both in the course of appeals and in objective lawsuits, where the only matter in question is the constitutionality of a legislative enactment or act of government. It also tries, in criminal matters, the President and Vice-President of the Republic, Ministers of the Cabinet, Senators and Federal Representatives (Members of Congress), the Attorney-General and its own Justices.

There will always be the temptation to garner more power, but that would be deeply detrimental to the delicate checks and balances established in the Brazilian constitutional system.

For the reasons exposed along this paper, it is essential that the merit of decisions in impeachment trials by the Brazilian Senate stay non-justiciable, as it seems most of the Brazilian Supreme Court Justices now agree.

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