

CONSTITUTIONAL FRAMEWORKS AND THE RULE OF LAW:

Perils of Crony Presidentialism

Maxwell A. Cameron
Ana-Maria Blanaru
Lesley M. Burns
Department of Political Science
University of British Columbia
Vancouver, BC Canada, V6T 1Z1
Tel: (604) 822-2717
Fax: (604) 822-6606
www.politics.ubc.ca

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ABSTRACT

Presidential systems are less likely to survive and are more prone to political instability than parliamentary systems. The differences between the two constitutional types are greatest where the rule of law is precarious, allowing crony presidentialism to prevail. Minority presidents may rely on cronyism to build coalitions, making them vulnerable to court challenges and creating an incentive to stack courts. Their alternative is often to face the threat of executive-legislative deadlock, becoming lame ducks targeted by the opposition for extra-constitutional efforts to remove them from office or compelled to rule, often at the margin of the law, by means of the abuse of decree authority. The lower democratic survival and stability rates found among presidential systems where the rule of law and judicial independence are weak indicate that intrinsic features of each constitutional system form part of the explanation for the differences in performance. Presidentialism and weak legal enforcement interact to produce greater political instability and regime fragility.

INTRODUCTION

One of the most important and robust findings in comparative politics in recent years is that presidential systems are less likely to survive than parliamentary systems, and are more prone to political instability (Stepan & Skach, 1993; Cheibub, 2002, p. 284-285; Cheibub & Limongi, 2002, p. 151-153; Cheibub, Przeworski & Saiegh, 2004, p. 580; Bunce, 2000, p. 710-11; Przeworski, Alvarez, Cheibub & Limongi, 2000, p. 129-136; Lijphart, 2000, p. 270; see Gasiorowski and Power, 1998 and Power and Gasiorowski, 1997 for a dissenting view). Yet standard institutional explanations for this difference have been insufficiently convincing, leading to the premature conclusion that the differences between the systems have nothing to do with their basic constitutional principles (Cheibub, 2002, p. 307).

We argue that the problem is not that basic constitutional principles are irrelevant, but that most institutional accounts have ignored the most important explanatory factor: the rule of law. Constitutional principles do matter, but under conditions that can be more carefully specified. Specifically, the interaction between presidentialism and the lack of the rule of law explains most of the difference between the two systems. If our argument holds, differences in the survival and stability of parliamentary and presidential governments should be smallest among the set of countries where the rule of law is firmly entrenched, and largest where the rule of law is insecure. This is exactly what we find. Presidentialism without the rule of law is a particularly combustible mix; where the rule of law is strong, however, it does not matter much to the durability of democracy whether countries have presidential or parliamentary governments.

Our analysis goes beyond standard theoretical accounts, inspired by the work of Juan J. Linz (1990, 1994; see also Stepan & Skach, 1993; Linz & Valenzuela, 1994; Hartlyn & Valenzuela, 1998; Valenzuela 2004; Kenney 2004), according to which there are two main

perils of presidentialism. First, in presidential systems the president and the legislature have separate and fixed terms, and, since presidents often lack a legislative majority, they may be tempted to bypass the legislature and rule by decree. Second, short of impeachment, it is extremely difficult to remove a sitting president. Parliamentary governments, in contrast, require the support of a legislative majority and can be removed by a vote of non-confidence.¹ Notice, however, that critics of presidentialism focus exclusively on the executive and legislature, rarely addressing the judiciary or the rule of law.

In the spirit of enriching the study of institutional design, we make the case for bringing the judiciary back into the analysis of constitutional frameworks.² Constitutions specify the rules and conventions that determine how legislation is made and enforced, as well as the relations between branches of government. The judiciary is especially important because its strength and independence determines the degree to which formal rules are publicly known, predictably enforced, and applied equally to all citizens as well as agents of the state (O'Donnell, 2004, p. 33).

It is the design and application of legal codes and norms, we argue, that mediates the impact of constitutional types on democratic survival and political stability.³ Where the rule of law is well entrenched, the differences between presidential and parliamentary government fade with regard to regime survival or stability. Although presidentialism may generate certain tensions among the branches of government, they are, by and large, worked out in routine ways.⁴ However, the type of constitution matters a great deal when the rule of law is sufficient to sustain orderly government, but insufficient to resolve the specific problems associated with presidentialism.

The fragility of the rule of law figures centrally in recent work in comparative politics on the “delegative,” “illiberal,” or “neopatrimonial” nature of certain new democracies

(O'Donnell, 1994, 1999, 2001; Larkins, 1996a, 1996b; Diamond, 1999; Zakaria, 2004; Hartlyn, 1994; van de Walle, 2003, p. 306-313; see also Alexander, 2002, p. 1148; Bunce, 2000, p. 713, 720; Carothers, 1998, p. 97-98). Whether political leaders act in ways that reinforce the survival or stability of democracy depends on the expected probability that the formal rules of the game will be enforced and that "official authorities will sanction noncompliance" (Helmke & Levitsky, 2004, p. 728).

We argue that weak law enforcement facilitates the use of clientelistic payoffs to build coalition governments. Similarly, legislative-executive deadlock is more likely to result in violations of the constitution or abuse of the prerogative to rule by decree when presidents are not restrained by a strong and independent judiciary. The combination of fixed terms and the high propensity of presidents to break the law can result in severe constitutional crises. The rule of law, moreover, influences whether opponents will use extra-constitutional means such as manipulation of impeachment procedures, street demonstrations, or civil coups to remove unpopular or abusive presidents.

Our argument also offers an alternative to the view that we can dismiss the significance of intrinsic constitutional features in accounting for differences between the systems. This skeptical posture rests on two basic objections. The first is based on the problem of spurious causation: perhaps parliamentary governments have been adopted in countries that are stable for other reasons (Shugart & Mainwaring, 1997, p. 19). Another objection focuses on flaws in causal inference: constitutional types may differ, but for reasons other than the intrinsic features of their constitutions (Cheibub, 2002; Cheibub & Limongi, 2002; Cheibub, Przeworski & Saiegh, 2004).

Taken together, these arguments signal the need to integrate the study of institutions with broader contextual factors that influence how constitutional systems work (Munck,

2004; Cheibub, 2002; Mainwaring & Shugart, 1997a; Von Mettenheim, 1997). They do not, however, add up to sufficient grounds to dismiss the relationship between constitutional type and regime survival and stability. To be considered a spurious effect of other explanatory factors, a competing explanation should be provided to explain instability and regime fragility in countries where presidentialism is adopted.

Rather than accept the view that, by historical accident, there are simply more presidential systems in unstable parts of the world, we suggest that presidentialism and weak legal enforcement interact to produce greater political instability and regime fragility. As George Philip (2003, p. 30) recently suggested, “while it might not be convincing to assert an entirely a priori argument that pure presidentialism is bad for democratic consolidation, there do seem to be historical-institutional factors that can interact with formal institutional rules to produce this result.” Weak independent law enforcement is one such factor, according to Philips.

Since regime breakdown involves an interruption of the legal system, it would be surprising if the lower rate of survival of presidential systems had nothing to do with the rule of law. Yet no effort has been made to date, of which we are aware, to examine the differences between presidentialism and parliamentarism in this light. The following section seeks to remedy this omission by introducing new empirical evidence to establish the rule of law as an intervening explanatory variable in the causal relationship between constitutional type and democratic survival and stability.

NEW EVIDENCE

Constitutions can be classified as either parliamentary or presidential or a hybrid of the two.⁵ Alfred Stepan and Cindy Skach defined parliamentarism as a “democratic system of mutual

dependence” between legislature and executive, in which the “chief executive power must be supported by a majority in the legislature and can fall if it receives a vote of no confidence” (Stepan & Skach, 1993, p. 3). A presidential system is one of “mutual independence” in which the “legislative power has a fixed electoral mandate that is its own source of legitimacy” and the “chief executive power has a fixed electoral mandate that is its own source of legitimacy” (Stepan & Skach, 1993, p. 3-4).

We know that presidentialism is less enduring than parliamentarism. According to Stepan and Skach (1993), for example, the democratic survival rate between 1973 and 1989 was lower for presidential than for parliamentary systems. Although their path-breaking study suffered from minor methodological limitations—they used Freedom House data, which has been criticized for its lack of transparency in coding (Munck & Verkuilan, 2002), and removed OECD countries from their dataset in an attempt to control for economic development—their findings are sufficiently important to merit replication. We begin our discussion by reviewing their findings, replicating their study with more recent data, and then introducing the rule of law as an intervening variable between constitutional type and regime survival and stability.

Taking all the cases of non-OECD countries that were democratic for at least one year between 1973 and 1989, Stepan and Skach found that the countries that remained democratic for consecutive ten-year periods were disproportionately parliamentary systems. Their “democratic survival rate” was 61 percent, compared to only 20 percent for presidential systems. Replicating their method, we have updated the dataset to 2004⁶ and have included OECD countries.⁷ This yields a total of 61 pure parliamentary systems and 51 pure presidential systems, of which the democratic survival rates are 87 and 47 percent, respectively (see Table 1). Jürgen Rüländ was partly correct to note that “If Stepan and

Skach's 1993 study...had appeared 10 years later, a different picture with more stable presidential systems would emerge" (2003, p. 472). There are currently more stable presidential democracies, but there are also more stable parliamentary democracies and the gap in democratic survival rates between the two has remained virtually unchanged, decreasing from 41 to 40 percent (see Table 3, Stepan & Skach, 1993, p. 11).

Insert Table 1 about here.

Table 1 takes the analysis further by dividing countries into those above and below the average rule of law score for all democracies. The intuition behind this comes from the observation that parliamentary systems tend to rank higher on World Bank measures of the rule of law than presidential systems (this is true in OECD as well as non-OECD countries).⁸ The World Bank's rule of law score measures perceptions of the "incidence of crime, effectiveness and predictability of the judiciary, and enforceability of contracts."⁹ Countries are ranked, and then given a percentile rating. Whereas the average rule of law score for the parliamentary systems was 72 percent, the average score for presidential systems was 51 percent.¹⁰ This *prima facie* case for spurious causation prompted us to cross-tabulate democratic survival rates with rule of law scores for each constitutional type.¹¹

When presidential and parliamentary systems are divided by the rule of law, a number of remarkable patterns emerge. Firstly, presidential systems in countries with above average levels of the rule of law have an 82 percent survival rate, in contrast to their 29 percent survival rate at low levels of the rule of law. This underscores the strong impact of the rule of law on democratic survival. Moreover, the difference between presidentialism and parliamentarism narrows appreciably at high levels of the rule of law. With parliamentary systems having a survival rate of 93 percent, the gap between presidential and

parliamentary systems shrinks from 40 to 11 percent. However, there is still a 45 percent difference between presidential and parliamentary survival rates at below-average levels of the rule of law. Presidential systems with below average rule of law scores are more than twice as likely to break down compared to parliamentary systems, the latter of which have a 74 percent survival rate. These differences point to a mismatch between presidentialism and the weakness of rule of law.¹²

To probe further, we measured the susceptibility of parliamentary and presidential systems to democratic instability in situations of both high and low rule of law. Stepan and Skach measured the susceptibility of democracies to military coups, and found presidential democracies more than twice as likely as parliamentary democracies to break down as a result of coups (1993, p. 12, Table 4). We replicate their analysis but, in light of the infrequency of coups in recent decades, we use a broader measure of instability drawn from World Bank governance data.¹³ In our dataset, political instability includes the decline or collapse in central political authority due to domestic unrest in the form of protests, rebellions, coups and civil war.¹⁴

We classify cases into those countries that achieved a high level of political stability under democratic rule in the period 1996-2004 and those that did not, where political stability is measured on the basis of each case's percentile ranking on the World Bank Index of Political Stability relative to the average of all democracies in the sample. Rates of democratic stability by constitutional type are shown in Table 2. Of the 61 parliamentary systems, 44 experienced above-average levels of democratic stability. Among presidential systems, only 17 of the 51 cases were stable democracies. Presidential systems are twice as susceptible to instability as parliamentary systems. 72 percent of parliamentary democracies are stable compared with only 33 percent of presidential democracies.¹⁵

Insert Table 2 about here.

We further divide the cases into above- and below-average levels of the rule of law. In spite of the fact that we are using a different dataset to measure stability, the results are consistent with Table 1. At high levels of the rule of law, both parliamentary and presidential systems show a greater degree of democratic stability (93 and 82 percent, respectively). At low levels of the rule of law, both parliamentary and presidential systems are more likely to experience instability.¹⁶ However, presidential systems have only a 9 percent chance of being politically stable, and they are four times more likely to be unstable than parliamentary systems in which the rule of law is weak.¹⁷

Further confirmation of these findings comes from another measure of the rule of law, one germane to our focus on constitutions—judicial independence. The literature on the rule of law has stressed the centrality of judicial independence to the maintenance of an effective legal system (O'Donnell, 2004; Jensen, 2003; Larkins, 1996; Verner, 1984). According to data from the World Economic Forum, parliamentary systems are more likely than presidential systems to have an independent judiciary. Whereas parliamentary systems had an average of 5.4 (on a scale of 1-7 with 7 representing most independent), presidential democracies averaged only 3.6.

Table 3 presents the rates of political stability under presidential and parliamentary constitutions by levels of judicial independence. In spite of the fewer cases, due to lack of data, the rate of political stability was 77 percent among parliamentary and 30 percent among presidential systems. Whereas parliamentary and presidential systems have similar levels of stability when judicial independence is high (84 and 83 percent, respectively); where judicial

independence is low, parliamentary systems are more than twice as stable (50 and 17 percent respectively).

Insert Table 3 about here.

Are the differences in the performance of constitutions an artifact of the large number of presidential systems in areas of the world where the rule of law happens to be weak? According to Mainwaring and Shugart, “if parliamentarism occurs more frequently than presidentialism in societies that have relatively better background conditions for democracy, then the correlation may result from selection bias and not from inherent strengths or weaknesses of institutional design” (Shugart & Mainwaring, 1997, p. 19). Whereas presidentialism is commonly found in Latin America and Africa, parliamentary democracies outside the high income category are found in former British colonies (Shugart & Mainwaring, 1997, p. 26) and in small and microstates, many of which are island nations with distinctive political cultures (see Srebernik, 2004). One must therefore “be cautious about the observed correlation between constitutional form and democratic success, impressive though this correlation may at first appear” (Shugart & Mainwaring, 1997, p. 29).¹⁸

The issue of spurious causation will not be resolved by empiricism alone. Even if we leave aside whether presidential systems are selected to ensure there is a strong executive branch of government, a choice perhaps motivated by the desire for centralized government over accountability, two theoretical possibilities may be entertained.¹⁹ Either presidentialism is adopted in parts of the world such as Latin America and Africa that happen to be unstable due to the lack of rule of law, or the rule of law in Latin America and parts of Africa is too weak for presidentialism to be stable. In the first version, the instability of presidentialism is

the result of selection bias and spurious causation. In the second version, the rule of law is an intervening variable in the relationship between constitutional type and democratic survival and stability. The finding that the difference between constitutional types is significantly reduced in the presence of the rule of law but remains substantial when the rule of law is weak or absent, provides evidence in support of the latter. To pursue this insight, we review the logic behind the problems of presidentialism and suggest refinements.

MISSING CAUSAL LINKS IN THE CAUSAL CHAIN

Presidential systems are more likely to break down than parliamentary systems for reasons that, according to Stepan and Skach, are logical and predictable. Parliamentary systems have “two decision rules that help resolve crises of the government before they become crises of the regime” (Stepan & Skach, 1993, p. 19): first, governments cannot form unless they have a working majority in the legislature; and, second, a government that loses the confidence of the legislature may be voted out of office. The presidential system, in contrast, “systematically contributes to impasses and democratic breakdown” (Stepan & Skach, 1993, p. 19). First, presidents often find themselves frustrated in power by their lack of a majority in the legislature and, since both the legislature and the executive are elected separately and for fixed terms, there is a powerful temptation to rule by decree and bypass the legislature. Second, it is extremely difficult to remove a president, even one who has virtually no support and is acting unconstitutionally, except by means of “a political-legal-criminal trial (impeachment)” (Stepan & Skach, 1993, p. 19).

The problems of presidentialism are important, but the intrinsic features of presidentialism are rarely sufficient to make regime breakdown inevitable (Cheibub, 2002; Cheibub & Limongi, 2002; Cheibub, Przeworski & Saiegh, 2004). It is unclear that the

separation of legislative and executive powers alone explains instability in presidential systems (Cheibub, 2002, p. 10). To further specify the additional conditions under which breakdown is more likely, we argue that whether presidents will rule by decree, bypass the legislature, or otherwise operate “at the margins of the constitution” (Stepan & Skach, 1993, p. 5) depends on their calculation of the costs and benefits of challenging or respecting the constitutional rules of the game. This, in turn, depends upon the enforcement of the laws, and hence on the independence and effectiveness of the judiciary. Where laws are enforced in a predictable and non-arbitrary way, and agents of the state are subject to the law, the costs of violating the law and the constitution may exceed the benefits.

Where judicial enforcement of the law is weak, the coalitions formed by the executive to secure a legislative majority are more likely to involve cronyism. This is because minority government situations are aggravated by problems of coalition formation under presidentialism. In a presidential system, the decisions by members of congress to vote with or against the government rarely affect the incumbency of the executive or the legislature. Members of congress can vote against virtually any bill without bringing down the government and facing the imminent return to the election campaign—they can “defect without either risking their own seats or affecting the president’s ability to remain in office” (Valenzuela, 2004, p. 14). Endowed with the capacity to hold the government hostage without imperiling their own careers, they are free to decide whether to support the government based on the material benefits that flow from this—rather than on any calculus concerning the survival or stability of the government and their own careers. By the same token, the president may have no legislative capacity whatsoever yet wield substantial administrative power. This creates a temptation to cajole, bully, ignore or even illegally dissolve the legislature, which is often correctly regarded as obstructionist and irresponsible,

and in some cases to offer illicit payments (distributing benefits through substantial discretionary powers such as appointments and budgetary decisions) in return for support.

Presidential systems, moreover, tend to have higher rates of corruption, obtaining a lower average score on the World Bank Control of Corruption Index. The Index rates countries according to perceptions of their degree of corruption, defined as the “exercise of public power for private gain,”²⁰ and ranks them relative to all other countries.²¹ Presidential systems obtain an average score of 55 percent, compared to a 72 percent average score for parliamentary systems.²² As Jana Kunicová and Susan Rose-Ackerman note, “[o]pportunities for corruption are enhanced by centralized control over government.” Thus, they claim, “a president who controls the executive branch has rent-creating possibilities that can be used for personal gain” (forthcoming: 19). The flow of rents can also be used for cronyism. Diverting rents to cronies is easier in a presidential system than in “the more collegial system of cabinet government,” especially when the judiciary lacks independence (and, as we have show, this is frequently the case in presidential systems). In addition, fixed terms give the president “considerable leeway subject only to the threat of impeachment,” especially where checks and balances are weak (Kunicová & Rose-Ackerman, forthcoming, p. 19).

When judicial enforcement is so precarious that the inherent particularism of congress, and the buying and selling of influence, brings either or both branches into collision with the judiciary. For presidents who face the unenviable choice of sustaining coalitions by illicit means, or confronting legislative obstruction by members of congress unconcerned about the effects of their behavior on the survival or stability of the government, either strategy can lead to problems with courts. Those who opt for the former strategy are vulnerable to scandal and criminal prosecution, while those who opt for the

latter strategy are vulnerable to charges of unconstitutional behavior (often matched by extra-constitutional efforts by the opposition to remove the president). Although the use of illicit strategies to sustain coalitions can also occur in parliamentary systems, extra-constitutional approaches to overcoming deadlock and obstruction in congress are directly linked to the presence of fixed terms and distinct mandates for members of the executive and legislative branches in presidential systems.

In short, the problem is not presidentialism *per se*, but crony presidentialism. This points to five missing links in the debate on the problems of presidentialism. Table 4 offers a summary of the criticisms of presidentialism, with the responses of its defenders, and shows how a focus on the rule of law provides links between types of constitutions and regime stability or endurance.

Insert Table 4 about here

Minority Governments. Critics of presidentialism argue it is more susceptible to minority governments—that is, where presidents are elected without a legislative majority—and minority governments are more vulnerable to breakdown (Kenney, 2004, p. 262-269). Defenders of presidentialism, like José Antonio Cheibub, retort that while minority governments are more frequent in presidential systems, presidents often can govern in these situations by entering into coalitions. Cheibub, Przeworski, and Saiegh (2002, p. 8) find that coalitions are “less frequent but far from exceptional under presidentialism.” Moreover, while minority governments are somewhat more frequent in presidential than in parliamentary systems, this does not necessarily mean that regime breakdown is more likely (Cheibub, 2002, p. 301).

We argue that stability depends not only on the ability of governments to form coalitions, but also on whether they are formed in accordance with the law and the constitution. The lower incentive of legislators to form coalitions with the government in presidential systems presents the executive with sharp dilemmas where the rule of law is weak. Findings of recent research on coalition formation in presidential systems suggest variations according to the strength of the rule of law. David Altman (2000, p. 274) shows how Uruguayan presidents—among the most law-abiding in the world—routinely form coalitions to govern, and do so successfully even though they understand that coalitions progressively dissolve as the end of term nears.

However, as Andrés Mejía Acosta (2004 & forthcoming) shows, there is a greater tendency to rely on clientelism, vote buying, secret (“ghost”) coalitions, or bribery to induce opponents to become turncoats where the rule of law is weak. Mejía Acosta found that Ecuadorian presidents are expected to distribute clientelistic payoffs in exchange for cooperation. Maintaining the secrecy of an agreement is a precondition for effective legislative cooperation, and such agreements are often cemented with extensive patronage appointments, pork, and particular policy concessions (Mejía Acosta, 2004 & forthcoming). Such payoffs, which may involve outright corruption, make government vulnerable to scandal when secret agreements are publicly exposed, creating political instability. The use of presidential discretionary funds to bribe legislators played a role in the fall of both Guatemalan President Jorge Serrano in 1993 and Peruvian President Alberto Fujimori in 2000.

In many African countries, where “the formal rules of the political game do not effectively govern the conduct of rulers” (Jackson & Rosberg, 1982, p. 11), clientelistic exchanges are pervasive and serve to facilitate power-sharing arrangements among parties

and social elites (van de Walle, 2003, p. 312; see also Amundsen, 2001). These habits give rise to opposition parties whose very *raison d'être* is to “leverage resources from the party in power” (van de Walle, 2003, p. 314). These highly centralized systems provide presidents with access to significant state revenues, which are then used to fund their clientelistic networks. Presidents are often above the law and face few, if any, constraints on their power (van de Walle, 2003, p. 310; Nwabueze, 1974). Indeed, “power is intensely personalized around the figure of the president” (van de Walle, 2003, p. 310).

Deadlock. Another purported problem with presidentialism is that minority governments can cause deadlock—that is, presidents may not be able to fulfill what they believe to be their legislative mandate. Since there is no constitutional mechanism for resolving impasses when deadlock occurs in presidential systems, deadlock is a cause of instability as a result of the temptation to abuse the power to rule by decree.

Cheibub disagrees, arguing that situations of deadlock are “far from being the predominant condition of presidentialism,” occurring in about a third of the cases (Cheibub, 2002, p. 297). Deadlock is only weakly associated with other conditions believed to be at the root of breakdown (Cheibub, 2002, p. 297), and appears to have “no negative effect on the survival of presidential regimes” (Cheibub, 2002, p. 301). Cheibub defines deadlock very restrictively, however, as a situation of stalemate where neither the legislature nor the executive can override the policy preferences of the other (2002, p. 287-91). We argue that situations that do not count as deadlock in Cheibub’s definition, for example legislative dominance or obstruction, can provide a pretext for unconstitutional actions where the rule of law is weak.

Whether deadlock and rule by decree results in regime crisis depends on the constraints placed on leaders by legal institutions. In some cases, rule by decree may be part of the solution, not the problem. Some presidents are armed with significant legislative prerogatives in order to reduce the destabilizing potential of deadlock. Peter M. Siavelis (2002) has shown that Chilean presidents enjoy wide constitutional authority to initiate legislation, yet these powers have not been extensively abused nor have they contributed to constitutional crises. This is evidence of the strength of legal traditions in Chile.

Where the rule of law is weak, however, deadlock—or its threat—may be used as a pretext to bypass the legislature and rule by decree in violation of the constitution. Peruvian President Fujimori could have achieved his legislative agenda without closing congress, suspending the constitution and ruling by decree in 1992, but legislative obstruction was astutely used, even fomented, by the executive in order to make the case for an expansion of presidential powers (for a range of views, see McClintock, 1996; Cameron, 1997; Kenney, 2004). The closure of congress, suspension of the constitution, and stacking of the courts was not motivated by legislative obstruction alone, however, but by the need to create more pliant legislative and judicial institutions to enable President Fujimori and his increasingly influential allies within the military and the intelligence service to extend the president's tenure beyond the single term allowed in the 1979 constitution, to conduct human rights abuses in the war against subversion with impunity, and to use cronyism and corruption for the purposes of political control.²³ Thus, it is the combination of legislative-executive tensions with the lack of the rule of law that most destabilizes democracy.

Fixed Terms. Fixed terms, combined with the difficulty of removing a discredited or unpopular sitting president save by impeachment, can contribute to constitutional crises. As

Gonzalo Sánchez de Lozada, Bolivian president from August 2002 until his forced resignation in October 2003, put it (before his fall): “The reason we have had so many military coups is that many times, when we have had big problems, we haven't been able to really resolve them. We haven't had the flexibility that comes when you have the ability to change the prime minister of the party or take a vote of non-confidence.”²⁴ Bolivia's legal traditions are insufficient to counter its chronic instability, and the fact that convening early elections necessarily involves a bending the constitution only makes matters worse.

In defense of presidentialism, Aníbal Pérez Liñán (2000) conducted a study of the spread of legislative decisions to remove presidents in Latin America and found that this practice provided a mechanism not unlike the vote of non-confidence in parliamentary systems. Yet, while it enables governments to be dissolved without violating the constitution, it also poses a grave risk to the rule of law and can open the door to new abuses of power and abuses of political justice by legislators. According to Pérez Liñán (2005, p. 72), dissolution may occur within accepted constitutional rules and thus may pose less of a threat to instability. However, the degree to which dissolution is used according to constitutional procedures will depend on whether judicial independence and the rule of law are sufficiently strong to ensure compliance with those procedures.

The Philippines, a state where the rule of law is precarious and cronyism is endemic (Rogers, 2004, p. 116-119), illustrates how fixed terms can aggravate a crisis when the president is accused of legal wrongdoing and compliance with constitutional procedures is not guaranteed by the courts (Rüland, 2003, p. 467-468; 478). Opponents mobilized when it appeared that the president was going to be successful in an attempt to resist impeachment proceedings in spite of damaging evidence concerning his involvement in cronyism and corruption (Rüland, 2003, p. 466; Landé, 2001, p. 92-99). The ouster of President Estrada in

2001 occurred only after massive street demonstrations and the withdrawal of military support for the executive.

Term Limits. Critics of presidentialism suggest that while term limits are not an intrinsic feature of presidentialism they are often put in place to counteract the concentration of power in the hands of the president (Linz, 1994, p. 17). Defenders of presidentialism insist that this non-essential feature of some constitutions may have more to do with instability than anything intrinsic to presidentialism (Cheibub, 2002, p. 303-306). Here, too, we believe that the rule of law plays a role. Presidents are more likely to use unconstitutional means to defy or alter term limits when they feel they can ignore or circumvent the constitution with impunity. Mainwaring and Shugart hint at the problem when they argue that reelection should only be permitted in countries “where reliable institutions safeguard elections from egregious manipulation by incumbents” (Mainwaring & Shugart, 1997b, p. 452). Successive efforts to achieve legal constitutional change in the Philippines have been thwarted by fears that incumbents would use this very process to override term limits

The Judiciary. Finally, critics say little about the judiciary, and thereby neglect an important constitutional mechanism for resolving impasses when presidential systems confront problems of deadlock and possible impeachment. Although judicial independence is not more intrinsically important to presidential than parliamentary systems, an independent judiciary contributes to democratic survival by acting as a check on the powers of both the executive and the legislature. Linz and Stepan assert the importance of respecting and upholding the rule of law as a precondition of an established democracy (Linz & Stepan, 1996, p. 10). As Christopher Larkins (1996a, p. 606) put it: “The judicial branch, after all, is

the institution normally charged with the enforcement of the constitution, rights and other democratic procedures in constitutional democracies. Ideally, through the application of judicial or constitutional review, judges cannot only mediate conflicts between political actors, but also prevent the arbitrary exercise of government power. In fulfilling this role, the courts become powerful actors in maintaining the submission of the state to law.” In its impasse-breaking capacity, the judiciary can help resolve such issues as re-election, recall, electoral fraud, appointments, corruption, and the legality of decree laws. Costa Rica, with its robust rule of law, provides an example of a presidential democracy in which the judiciary is free from presidential interference (Larkins, 1996b, p. 610); it is also the only presidential democracy outside of the United States that Robert A. Dahl counts as “steadily democratic since at least 1950” (Dahl, 2003, p. 186).

Judicial independence may be especially critical to the stability of presidential systems because of the tendency for presidents to deliberately politicize judicial institutions. As Jonathan Hartlyn (1994) found in the case of the Dominican Republic, the combination of presidentialism and neopatrimonialism can result in crisis-ridden elections in which the central electoral oversight agency is so politicized it has no credibility. When allegations of fraud become an electoral ritual and adherence to the rule of law a charade, confidence in the democratic process is obviously undermined. Taiwan provides a contrasting example where the rule of law is much stronger. The dispute over the March 2004 election in Taiwan was resolved by an immediate recount after opponents challenged the narrow margin of victory—29,000 votes out of 13 million—for incumbent President Chen Shui-bian’s Democratic Progressive Party. The opposition alleged the election was influenced by a failed presidential assassination attempt and the last-minute mobilization of the police (who were consequently unable to vote) yet there was no saber rattling by the military, nor deadly

violence. To this day, Taiwan remains a stable presidential democracy (Wong, 2003; Rigger, 2002).

An Illustrative Example: Ecuador 2004-2005. The problems of presidentialism often compound one another, as in the case of Ecuador. President Lucio Gutiérrez, elected in 2002 with a minority in congress, governed for two years in a coalition that ultimately collapsed when his coalition partners initiated impeachment proceedings on the grounds of corruption. In response, Gutiérrez made a pact with two parties that had been excluded from the initial governing coalition. “As part of the agreement, the involved parties also proceeded to illegally purge—and stack with their own cronies—nearly all Supreme Court Judges, as well as Constitutional Tribunal members, the Electoral Authority and the leadership of Congress” (Mejía Acosta 2005, p. 2). This opened the path for the return of exiled former leader Abdalá Bucaram, himself a victim of an earlier breakdown of the constitutional order, who was wanted by the courts in Ecuador. The return of Bucaram sparked a popular outcry that enabled a simple majority in congress to remove Gutiérrez, in violation of the normal constitutional impeachment procedures, by declaring the presidency vacant. When the armed forces withdrew their support from the executive, the president’s fate was sealed and, in April 2005, he fled.

Although Ecuador epitomizes the problems of crony presidentialism, it is typical of the Andean region. All Andean countries can be categorized as presidential systems where the rule of law is precarious. With the exception of Colombia,²⁵ where instability has roots in a protracted guerrilla war fuelled with narco-trafficking, presidentialism has correlated closely with political instability in every country in the Andes during the past decade. In Bolivia, Peru, and Venezuela uprisings or impeachment efforts of dubious legality have been

directed against presidents who, in turn, abused their power because all were frustrated in attempts to fulfill their mandates in minority government situations. In contrast, there is little evidence that parliamentarism has exacerbated instability in systems with low levels of the rule of law such as Jamaica, Suriname, India, Bangladesh, Nepal and Papua New Guinea.²⁶ However, those countries that have jettisoned parliamentary systems and sought order in a presidential form of government (the Comoros and Nigeria) are among the world's most unstable. These cases confirm that presidentialism and the weakness of the rule of law are a flammable combination.

We end this section on a broader-gauged theoretical note. Criticisms of presidentialism resonated among scholars in the early 1990s as they became more aware of the weak constitutional underpinnings of many new democracies. More than anyone else, Guillermo O'Donnell captured this unease with his concept of "delegative democracy," polyarchies lacking checks and balances (or "horizontal accountability") (1993, p. 20). Delegative democracy refers to a style of rule in which presidents, feeling they have a personal mandate to rule even though they do not have legislative majorities, adopt a discourse that attacks key parts of political society and relies on a state-people nexus that bypasses organized groups in civil society. It is a form of polyarchy lacking "state agencies that are legally enabled and empowered, and factually willing and able, to take actions that span from routine oversight to criminal sanctions or impeachment in relation to actions or omissions by other agents or agencies of the state that may be qualified as unlawful" (O'Donnell, 1998, p. 16; and 1999, p. 38). A complete analysis of the connection between presidentialism and delegative democracy, therefore, must encompass the rule of law.²⁷

CONCLUSION

This article has sought to understand a critical condition that makes presidentialism more or less viable. To the list of factors that contribute to the proper functioning of presidentialism and make some presidential systems more stable than others—such as strong political parties and party systems, presidential powers to build legislative coalitions, and legislative powers to resist presidential encroachments—we add the rule of law. Our focus on the rule of law offers a new line of inquiry into the systematic variation in institutional rules and procedures and the underlying conditions that influence their operation.

Cheibub has asserted that “even though no one really knows why presidential regimes appear to be considerably more frail than parliamentary regimes, we know with a fairly high degree of certainty that it is not due to reasons that follow from presidentialism’s basic principle” (Cheibub, 2002, p. 307). In moving beyond a restricted analysis of the intrinsic features of constitutional types and into a broader examination of institutional factors and background conditions that affect the ways in which these intrinsic features are manifested (Cheibub, 2002, p. 308; Cheibub & Limongi, 2002; Cheibub, Przeworski & Saiegh, 2002), however, it is important that presidentialism’s basic principles not be dismissed as a source of instability and breakdown. Those principles may interact with other conditions to explain higher levels of instability. The focus on the basic principles of constitutional frameworks should be retained, even as we specify more carefully the conditions under which they matter.

Differences in rates of survival and political stability between presidentialism and parliamentarism matter most in countries where the rule of law is relatively weak. Presidentialism is brittle, but its problems are manageable where laws are duly enforced. Where the rule of law is precarious, however, the same problems may result in grave political

crises or even regime collapse. The significantly lower democratic survival and stability rates found among presidential systems in comparison to parliamentary systems at lower levels of the rule of law indicate that intrinsic features of each constitutional system form part of the explanation for the differences in performance. The fact that there are problems with presidentialism does not mean that adopting parliamentarism would automatically improve democracy—far from it. *Ceteris paribus*, presidentialism without the well-established rule of law is a bad combination. However, improvements in the rule of law are likely to be helpful where constitutional change is impossible. Features of presidentialism may weaken the rule of law, but the latter can be improved without abandoning the former.

There is a tendency in the literature on presidentialism and parliamentarism to focus exclusively on the patterns of mutual dependence or independence of the legislature and the executive and to ignore the fact that there is another branch of government—the judiciary—which is responsible for upholding an essential ingredient of the stability of democracy: the rule of law. The analysis of variation among constitutions should be widened to encompass the judiciary, because differences between presidential and parliamentary systems matter most when the rule of law is weak.

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NOTES

¹ We refer to regime stability and survival rather than consolidation throughout this article (see O'Donnell, 1996).

² A growing literature has emphasized the importance of the judiciary and the rule of law in the comparative study of political institutions (see Larkins, 1996a, 1996b; Weingast, 1997; Smithey & Ishmiyama, 2000; Helmke, 2002; Iaryczower, Spiller & Tommasi, 2002; Maravall & Przeworski, 2003), but none of it addresses the debate on presidentialism versus parliamentarism.

³ For the definitions of the rule of law, see World Bank (2001), p. 92; O'Donnell (2001); Weingast (1997), p. 245; Carothers (1998), p. 96; and various essays in Maravall and Przeworski (2003).

Predictability of enforcement and of penalties as a consequence for violations of the law is a core tenet of legal theory (see Hart, 1994; Raz, 1980), but the rule of law encompasses two distinct subsets of rules. The first subset includes laws that forbid or enjoin certain actions under penalty (Hart, 1994, p. 79). The second sub-set refers to constitutional laws “conferring legal powers to adjudicate or legislate” (Hart, 1994, p. 79). While these laws cannot be construed as orders backed by threats, they represent the highest level of the legal hierarchy and sustain the overall framework of the rule of law within a country (O'Donnell, 1999). Constitutionality, and hence judicial independence (see Larkins, 1996b, p. 611; and Iaryczower, Spiller & Tommasi, 2002, p. 713), is critical to the rule of law.

⁴ By the same token, differences among constitutions matter little when the rule of law is absent; at a certain level of lawlessness no constitution can endure.

⁵ We use Stepan and Skach's definition of pure parliamentary and pure presidential systems to classify our cases. A country is presidential if direct elections are held for both the president and the legislature, if the president holds executive powers, and political offices are held for fixed terms. If the executive is selected by the legislature, the country is classified as parliamentary. Although separate treatment of mixed systems is important, their existence does not alter the need to explain the important differences between pure systems. From the point of view of stability and the rule of law, the key difference lies between parliamentary systems, on the one hand, and presidential or

mixed systems, on the other (Andrew & Montinola, 2004, p. 81). We acknowledge that the democratization of post-soviet and central European countries has increased the number of semi-presidential (or premier-presidential) regimes, but the number of cases remains small. Shugart and Carey (1992, p. 53-75) identify a number of premier presidential regimes, including France, Finland, Portugal, Sri Lanka, Ireland, and Iceland (see also Metcalf, 2000). Of these countries, three are classified as parliamentary in our dataset (Austria, Iceland and Ireland) and two as presidential (Finland and Sri Lanka). France and Portugal, which Stepan and Skach classified as mixed systems, have been excluded from our dataset for this reason. A more differentiated classificatory system would not alter the central findings of our research, or those of Stepan and Skach. As Arturo Valenzuela puts it: “Although ‘presidentialism’ and ‘parliamentarism’ are types that admit of considerable internal variation...the two systems can be sharply differentiated on several key dimensions” (2004, p. 15).

⁶ A country is classified as a democracy in a given year if its average score on the Freedom House ratings of Political Rights and Civil Liberties is no higher than 2.5. Each country obtains a score for every year between 1973 and 2004. Political rights and civil liberties scores are obtained from “Freedom in the World” (1973-2004 editions), Freedom House, available online at www.freedomhouse.org/research/index.htm. Countries that receive average ratings of 2.5 or below for ten or more consecutive years within this period are considered to be continuous democracies. The democratic survival rate represents the proportion of continuous democracies from the universe of countries that were democratic for at least one year between 1973 and 2004 for each constitutional type. The classification of countries according to their constitutional types is based on Stepan and Skach (1993, p. 14-15, Table 5), the Freedom House “Freedom in the World” annual survey of Political Rights and Civil Liberties (1999-2004 Editions), and the Freedom House Country Reports (*Freedom in the World* 2003, <http://www.freedomhouse.org/research/freeworld/2003/countries.htm>) checked against *The World Factbook 2004* (Central Intelligence Agency, <http://www.cia.gov/cia/publications/factbook/index.html>).

⁷ Stepan and Skach removed OECD members from their dataset in an attempt to “control for economic development as an intervening variable that might independently influence political stability” (1993, p. 10). We include OECD members because eliminating them is not an adequate method to control for economic development. The patterns we report are, however, unaffected by whether OECD cases are included or excluded (see endnotes 12 and 16).

⁸ See also Andrews and Montinola (2004, p. 81).

⁹ See: <http://info.worldbank.org/governance/kkz2002/q&a.htm#2>

¹⁰ For rule of law data, see the World Bank’s “Governance Matters IV: Governance Indicators for 1996-2004” dataset, (available online at: <http://www.worldbank.org/wbi/governance/govdata/>).

¹¹ We also replicated Stepan and Skach’s analysis of “democratic overachievers” and brought it up-to-date using more recent data published by Tatu Vanhanen through the Finnish Social Science Data Archive. Following their method, we considered the outlying cases from Vanhanen’s regression of the Index of Democracy (ID) and the Index of Power Resources (IPR). Outlier cases, or Vanhanen’s unexplained variance, are cases that deviated from the regression line by more than one standard error of estimate. In our reconstruction, these included thirty-six countries from 1980, thirty-four countries from 1988 and thirty cases from 1998. We found a very strong association between parliamentarism and “overachievement” and between presidentialism and “underachievement” among democracies, consistent with Stepan and Skach’s earlier results (1993, p. 10). Of the ninety-two cases, fifty-six were found in pure parliamentary systems and thirty-six were found in pure presidential systems. The underachievement rate was twice as high for presidential systems as it was for parliamentary systems; sixty-one percent of presidential cases were underachievers compared to only thirty percent of parliamentary cases. Moreover, seventy percent of parliamentary systems were democratic over achievers, compared to only thirty-nine percent of presidential systems, making parliamentary systems almost three times more likely than presidential systems to be democratic overachievers. This difference prompted us to probe deeper and hypothesize that tendency to over- or underachieve among democracies is related to the rule of law. Presidential democracies tend to

underachieve because the rule of law is weak in more cases than parliamentary democracies. In order to test our hypothesis on the relationship between constitutional frameworks and the rule of law, we divided parliamentary and presidential systems and compared their scores on the World Bank Rule of Law Index. From this dataset Fifty-six percent of the presidential systems score below average on the rule of law while fifty-nine percent of the parliamentary systems score above average.

¹² These findings remain consistent when OECD countries are removed from the dataset. At high levels of the rule of law, 23 out of 27 parliamentary systems and 13 out of 15 presidential systems survive, yielding survival rates of 85 percent and 87 percent respectively. At low levels of the rule of law, 8 out of 12 parliamentary systems survive (a rate of 67 percent), while only 8 out of 30 presidential systems do so (a rate of 27%). The difference between constitutional types is therefore virtually non-existent at high levels of the rule of law, but is substantial at low levels, with parliamentary systems more than twice as likely to survive.

¹³ This approach is similar to Aníbal Pérez-Liñán's analysis of the impeachment of presidents as a present day alternative to military coups (Pérez-Liñán, 2005).

¹⁴ This methodological alteration was made for two reasons. First, since 1993 when Stepan and Skach completed their study, only two new cases of military coups have occurred in democratic states in the set of cases they examined (Banks, 1989-2003). Additionally, there were concerns about the methodological consistency of measuring stability based on military coups, the majority of which occurred decades ago, when rule of law scores are only available beginning in 1996. Second, while coups represent one of the most serious forms of instability, their small number over the last decade does not reveal the extent to which states have experienced other forms of serious political instability. A broader definition of instability is therefore more appropriate. As such, in order to update Stepan and Skach's study, a departure from their methods was necessary.

¹⁵ The relationship between the rule of law and political stability is confirmed using standard statistical methods. There is a negative and significant correlation between presidential systems and the rule of law as well as between presidential systems and political stability. Logit analysis reveals

that the impact of regime type on stability is greatest in middle levels of rule of law. Presidential systems have a 35% probability of being stable for the average rule of law score, whereas parliamentary systems have a 60% chance of being stable. At high or low levels of rule of law, differences tend to converge.

¹⁶ Once again, these findings remain consistent when OECD countries are removed from the dataset. At high levels of the rule of law, 24 out of 27 parliamentary systems and 13 out of 15 presidential systems survive, yielding survival rates of 89 percent and 87 percent respectively. At low levels of the rule of law, 5 out of 12 parliamentary systems survive (a rate of 42 percent), while only 6 out of 30 presidential systems do so (a rate of 20%). The difference between constitutional types remains virtually non-existent at high levels of the rule of law, but is again substantial at low levels, with parliamentary systems more than twice as likely to be stable.

¹⁷ To further refine our analysis, we took the lowest quartile of rule of law scores among democracies in our dataset. Stability rates were very low for both systems (1 of 7 parliamentary and 1 of 21 presidential systems). These number of stable countries also demonstrates, however, that at very low levels of the rule of law, the differences between constitutions do not matter: almost no democracy is likely to be stable in a lawless environment. While presidential and parliamentary systems continue to diverge where the rule of law is insufficient for the effective functioning of constitutional government, both constitutional types have very low stability rates under such circumstances.

¹⁸ Although Shugart and Mainwaring's point is well taken, we note that there are differences among parliamentary and presidential systems *within* each group of states. Former British colonies do indeed outperform Latin American and African democracies on the Rule of Law index (1996-2002), scoring on average 57 percent, compared to 45 percent among Latin American democracies and 42 percent among African democracies that are not former British colonies. All Latin American and African democracies that are not former colonies are presidential systems. We are thus only able to measure for the presence of a correlation within the group of 36 former British colonies. Within this group, however, we find that the 26 parliamentary democracies score eight percent higher on the Rule of

Law index than the ten presidential systems, obtaining average scores of 59 percent and 41 percent respectively. The difference between constitutional types is most striking when we examine the subgroup of 10 African democracies that were former British colonies. Within this group, parliamentary systems score on average 14 percent higher than presidential systems (62 percent and 48 percent respectively). Thus, despite the small sample size, parliamentary systems obtain higher ratings on the Rule of Law index even when background conditions are taken into account.

¹⁹ The choice of institutions, as opposed to the impact of institutional design, is a topic relatively neglected by institutionalist scholars.

²⁰ <http://info.worldbank.org/governance/kkz2002/q&a.htm#2>

²¹ Control of Corruption scores were obtained from “Governance Matters IV: Governance Indicators for 1996-2004”, World Bank Policy Research Working Paper 3106 (available online at <http://www.worldbank.org/wbi/governance/govdata/>). Scores for 1996, 1998, 2000, 2002 and 2004, and were averaged independently for each country that was democratic for at least one year between 1996 and 2004 and for which data was available (this yielded 53 parliamentary cases and 39 presidential cases). Sample averages for each constitutional type were calculated using the average country scores.

²² Gerring and Thacker (2004, p. 298) also find a lower level of corruption in parliamentary systems.

²³ Charles Kenney makes the case that legislative-executive conflict contributed to the Fujimori coup. Fujimori’s project was, however, incompatible with the checks and balances inherent in any presidential democratic system.

²⁴ For full interview with PBS, see:

http://www.pbs.org/wgbh/commandingheights/shared/minitextlo/int_gonzalodelozada.html

²⁵ Although there is little evidence that presidentialism has contributed to instability in Colombia, the collapse of the bipartisan system has resulted in calls for a shift to parliamentarism (Fernández de Mantilla 2003).

²⁶ This assessment is based on a review of Keesings Record of World Events (London: Longman, various years) for presidential and parliamentary systems with low levels of rule of law.

²⁷ See Croissant (2003) for a similar analysis.