

## **Constitutions and Consequences Curbing Executive Abuse of Power**

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Many of the new constitutions created after the fall of the Berlin Wall responded to popular anger about governmental ineffectiveness. The late 1980s challenged governments, partly as a result of home-grown economic crises, partly because of austerity measures, and partly for highly local reasons. In some countries civil servants went without salaries for months at a time. Police resorted to predation in order to pay themselves. The proceeds of political corruption increasingly went abroad and ceased to trickle down, Tammany Hall style, to local communities. Bus service stopped for want of fuel. Roads deteriorated. Parents stepped in to pay and supervise teachers. Those who sought medical care discovered there were no drugs. Critics disappeared into jails. Between 1987 and 2002, a little over 51 percent of new constitutions or regime-changing amendments were responses to institutional crises of this sort, while about 20 percent were efforts to create governmental systems after secession or the collapse of a federation and another 21 percent were agreements to end civil wars.<sup>1</sup>

With varying degrees of commitment, the men and women who crafted new constitutions usually promised to curb profligacy and predation on the part of leaders. On paper, they created new ways to signal discontent through elections and a freer press. They levied stronger limitations on the ability of heads of state to do as they wished,

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<sup>1</sup> From Jennifer A. Widner, “Constitution Writing and Conflict Resolution Dataset” developed under the auspices of the U.S. Institute of Peace.

through the creation of courts, independent public service commissions, independent central banks, and independent auditors. They limited terms in office. In a few instances, as in South Africa, they built aspirations for improved social welfare into new founding documents and empowered the courts to play a large role in balancing the fiscal capacity of the state with the achievement of these new rights.

In spirit, the “founders” of the post-Cold War era had much in common with Madison, Hamilton, Jefferson, and the other founders of the American Republic in the late 1700s—and much in common with Alexis de Tocqueville. In the 1830s, *Democracy in America* tried to trace the effects of constitutional design on the behavior of citizens and institutions in an era of increasing equality. Tocqueville focused in particular on devolution of power to local governments and its consequences for a variety of outcomes, ranging from willingness to join associations, litigiousness, styles of self-presentation, and engagement in politics to government performance both in normal periods and in crises. Many of the constitution writers who took the stage after the fall of the Berlin Wall, whether in Central Europe, Africa, or Latin America, also believed that the terms they crafted would shape what institutions did and how well they worked.

Those who risked their lives to re-shape political life in their countries believed that the words they penned would have an impact, and I take this meeting’s mandate as a challenge to contemplate under what conditions their enthusiasm was well-placed. Thus the focus of this paper, is Walter Murphy’s question, “Why are the words of some constitutional documents effective and others unavailing?” (p. 186).

Of course, Professor Murphy recognizes the fiendish difficulty of the challenge he posed. Asking a social scientist “when do constitutions *fail* to create effective

institutions?” is likely to elicit the rejoinder, “but it is a miracle if a constitution is more than mere parchment!” The practical hurdles are many. A first issue is whether the language as drafted projects a clear and potentially workable institutional framework, appropriate to the context. Many constitutions contain serious internal contradictions or gaps that impede the translation of founders’ intentions into effective policy. These may be deliberate, the product of horse-trading among political blocs whose leaders do not share a common vision. Sometimes they are unwitting and simply reflect the efforts of an assembly to cobble together a constitution very quickly, cutting and pasting from other countries’ documents. Whatever the reason, the internal contradictions may sometimes presage failure, setting the stage for future disputes. Although most constitutions contain ambiguities, not all countries are equally well positioned to negotiate the conflicts that follow successfully.

A second issue is whether the constitutional provisions are transformed into legislation. Tocqueville took the constitution as practiced as his starting point, not the constitution as written, and his work is closer to John Ferejohn’s small-c constitution than to the focus Walter Murphy proposes in this regard. He was less interested in the formal written terms of the U.S constitution or the French constitution than in the functional constitution, the rules to which people actually hew. For the drafters, however, it is important to consider where the pressure to translate provisions into law will come from. Does the constitution writing process create pressure to implement the terms? Does the desire to join regional economic or political organizations or the need for financial assistance from aid donors spur efforts to convert the lofty language of a founding document into statute?

Third, do the laws matter? Are there any incentives for the executive to abide by the statutes? Is the distribution of political power such that trespass against the laws and the constitution is unwise? Do important political blocs gain by respecting constitutional provisions? Are there mechanisms by which disputes about adherence can be heard and resolved? Are these judgments enforced? If none of these conditions hold, is there an ideology or set of social norms that might promote adherence?

Fourth, the devil is usually in the details when it comes to making an institution work. Constitution writers don't always pay much attention to the costs of enforcement or the institutional capacity to carry out the terms. Further, economic conditions, regional wars, population dispersion, health conditions, and other variables inevitably shape the difficulty of carrying out a mandate effectively. Sorting out the effects of constitutionally enshrined terms on outcomes from financial resources, personnel, training, economic shocks, crises and bad neighbors, etc. poses a number of analytical difficulties, not least that there are too few cases (countries) and too many potentially important influences to permit clear causal inferences.

This paper offers a very modest response to the question, "Do constitution writing processes shape the substantive terms adopted and political outcomes?" It focuses on one aspect of institutions central to democracy: executive abuse of power. As Aghion, Alesina, and Trebbi have noted, "If, once elected, a leader cannot be restrained, society runs the risk of a tyranny of the majority, if not the tyranny of a dictator."<sup>2</sup> The paper singles out rights provisions, term limits, sources of "horizontal accountability" such as independent courts, and restrictions on partisan use of security forces. The domain is

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<sup>2</sup> Philippe Aghion, Alberto Alesina, Francesco Trebbi, "Endogenous Political Institutions," *Quarterly Journal of Economics*, May 2004, p.

further limited by period and income level. Because international events, organizations, and trends shape the content of constitutions, the analysis focuses on comparison of new documents or regime-changing amendments promulgated between 1987 and 2003 in countries outside the OECD. This period saw an explosion in constitution writing, partly because of the collapse of the Soviet Union, partly because of the spread of multi-party politics, and partly because an increase in the number of civil wars in the 1980s spawned regime changes in the 1990s and into this decade. In some instances, countries re-wrote their constitutions two or three times within this period.<sup>3</sup> Outside the OECD, only the Middle East was largely untouched by the fervor, although Yemen, Algeria, Oman, Qatar, and Tunisia were clear exceptions, and Egypt has more recently embarked on constitutional reform. (Iraq is outside the scope of this paper, and a few cases remain missing for want of access to the constitutions in question.)

The paper tries to gain some leverage on the subject matter by posing two questions. Drafting is the first potential point of failure in limiting executive abuse of power. Thus, one section of the paper is about what might loosely be termed “drafting quality”—about whether strong rights provisions are matched by restrictions on partisan use of security forces, creation of mechanisms for promoting “horizontal accountability,” and provisions for an independent judiciary. Under what conditions do we see documents that are less internally consistent or coherent? Second, under what conditions do heads of state respect the terms in the written constitution? If we take one restraint on executive abuse of power—term limits—what explains why executives break the rules in

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<sup>3</sup> One of the era’s jokes, oft-repeated among observers, comes from Russia: A hungry traveler walks into a shady restaurant in Moscow. He sits down and inspects the menu. "I'll have the pork chops," he says. "We don't have any," answers the waiter. "Well then, I'll have the meat balls." "We don't have those either," "How about liver then?" "Nope," answers the waiter. The annoyed customer finally asks: "Am I reading the menu or our constitution?" (ref)

some places, try to break the rules but fail in others, and live with the limits in still a third set of countries?

### **The Words on Paper**

Not all constitutions are created equal. It would be wrong to assume that the intention of all drafters is to produce well-functioning institutions, and, in particular, to limit the abuse of executive power. Yet the writers of recent constitutions have almost always told members of the public that they want to eliminate corruption and arbitrariness on the part of those in high office. Therefore it is not unreasonable to ask whether the language drafters have chosen is likely to effect such outcomes. Whether through inadvertence and lack of experience, or as a result of horse-trades that produce unwieldy compromises, some of the post-Cold War constitutions have appeared more likely to fail than others. Most display serious lacunae or contradictions, which may make them difficult to translate into effective constraints on heads of state, while others, like the South African constitution, have spelled out restraints fairly clearly and have specified that the courts will gradually sort out some of the deliberate ambiguities.

Discontinuities may mean that what a constitution offers its citizens with one hand may be easily removed by the other. “May” is the operative word, of course. Many documents written in earlier historical periods are vague but politicians and publics have gradually developed law and norms that provide functional substitutes for provisions that are now promoted as “best practice.” Conversely, constitutions that contain limits on executive abuse of power may never be enforced. There is no automatic correspondence between the language of a constitution and practice, but it would seem reasonable to

think that coordination of political elites and publics around shared norms is easier when the words that articulate those norms are clear and the powers maps set forth are consistent with those norms.

To assess “drafting quality” in this limited sense, I draw on data collected over the past several years as part of an on-going project. Although the project focuses on procedures used to develop constitutions, it also collects basic information about the content of new constitutions, including rights provisions, executive-legislative powers, control of security forces, and a limited list of other topics. Each new constitution or regime-changing set of amendments constitutes a case. There are 123 cases for which data exist both on the terms in the constitution and the process used to develop the constitution, excluding those from 2003 onwards that have not yet been added to the database. In eighteen cases from this period, the original versions of the constitution in question are not currently available in useable form (poor translations, or failure to separate more recent amendments from the original text).

“Drafting quality” as employed in this analysis is not necessarily constituted the way a lawyer would employ the term. I first compute a “rights score,” which assesses, very roughly, the degree to which a standard package of political and civil rights appear in a constitutional document. If a right is present and unqualified, a constitution receives a “2.” If it is present but qualified, a constitution receives a “1.” If a right is absent or too vaguely stated for coders to say whether it is present or absent, then the constitution receives a “0.” The sum across rights yields the country’s “rights score.” Similarly, with respect to an independent judiciary, a constitution is scored according to the presence, qualified presence, or absence of terms commonly understood to promote independence

(even if these do not guarantee that courts will so behave), including security of tenure, restrictions on the ability of other branches to lower the salaries of judges, etc. The “horizontal agencies of restraint” score reflects whether a constitution makes provision for all, some, or none of the institutions often presented as important for restricting the ability of incumbents to tilt the playing field in their favor: independent central banks, independent electoral commissions, independent auditors or comptrollers general, and independent public service commissions. The index for regulation of security forces measures restrictions on executive use of armed force. It includes eight provisions that are part of international “good practice” standards and are perhaps best represented currently by the South Africa case. With a few exceptions, the inclusion of these terms in constitutions is a relatively new phenomenon.

In an effort to make the patterns easier to see, visually, the tables on the next page further reduce the information to indicate in which quartile a constitution’s provisions for “restraint,” limits on partisan use of security forces, and judicial independence fall. That is, instead of the actual scores, the tables show whether the constitution scored relatively low (a “1”), just below the median (“2”), just above the median (“3”), or at higher levels (“4”). The constitutions are grouped by level of rights protection (actual scores shown).

Descriptively, what do the data tell us about the degree of coherence among selected provisions to limit executive abuse of power? Let me offer a few observations in bullet form.

- In the current era the individual right most likely to be omitted or phrased so vaguely as to be unrecognizable is the right to a fair trial. In a sense this right is one of the most fundamental, for one may have a right to assembly or a right to free speech, but if the right to a fair trial does not exist, it is perfectly possible to land behind bars for legitimate activity.



- With respect to rights, the mean and median scores are highest in the “European” region, which includes the Baltic states, Central Europe, and the Balkans. Although the “Europe” group scores highest, the differences between this group of countries and those in other regional blocs (Africa, the Middle East-North Africa-Central Asia, Latin America, and East and Southeast Asia) are not large, mainly because of the impact of Belarus, Moldova, and a few other countries on the perimeter in the “Europe” group. The mean and median are lowest in the Middle East-North Africa-Central Asia group of constitutions, but recent African and Latin American constitutions contain many of the same terms as those in the “European” bloc.
- About 23 percent of the new constitutions include explicit provisions for agencies of restraint such as independent electoral commissions, independent central banks, etc. These are concentrated in countries outside the European region. About 44 percent of countries have very few of these provisions or none at all.
- About 28 percent of constitutions contain terms that support the creation of an independent judiciary. Most new constitutions contain some of these terms but skip several important elements, and 17 percent contain no provision for an independent judiciary or compromise stated independence in some significant way.
- Roughly 32 percent of new constitutions include substantial restrictions on partisan use of security forces. About 54 percent contain some limits. In only 15 percent of cases are there no serious written limits on the partisan use of security forces.
- The table of most interest displays the constitutions with the highest rights scores. In only a third of these cases did the documents also score above the median with respect to “agencies of restraint,” “protection against partisan control of security forces,” and “judicial independence.” In some instances, the gaps may prove insignificant for the behavior of chief executives because the country may have joined the EU or become subject to other pressures that executive limit abuse of power. Where these sources of countervailing power are not present, however, the discontinuities in drafting may fail to impede executive excess.

Is it possible to say anything about the conditions under which drafters include both strong rights provisions and terms that help limit executive temptations to trespass on these or to model themselves on the author of “l’etat c’est moi”? There are several possible plausible explanations. Here I address three possibilities, including colonial

heritage (tradition of centralization, perhaps), the extent to which the constitution making process was executive-directed v. more broadly representative, and the kind of dispute that gave rise to negotiations in the first instance. The intuition behind the first is that drafters tend to build on traditions they know, and where a country's institutional tradition is highly centralized and vests considerable power in a head of state, it may prove hard to break with these ideas. The intuition behind the second is that drafters who are subject to pressures from opposition parties or a broader range of social groups than an incumbent represents may be more inclined to design the limits on executive powers very carefully. The intuition behind the third observation is that popular anger about poor institutional performance may force drafters to be more attentive to curbs on abuse of power, while the collapse of a federation, secession, or even the end of a civil war may create fewer pressures of this sort.

What do the data say? If an effect is strong, simple crosstabs should provide a hint of its importance, although more complex techniques and more control variables would be required for a hard test of a theory. For our purposes, the crosstabs may prove sufficient. Table B1 suggests that a higher proportion of countries with a French colonial heritage display the low scores indicative of low rights protection and low scores on “restraint,” “limits on partisan control of security forces,” and “judicial independence.” Countries with Spanish colonial heritages and British colonial heritages are more likely to display higher levels of protection against executive abuse of power. The pattern may lend some credence to the theory that persistent information networks or models from the colonial era shape choice of constitutional provisions even today. In particular the models diffused through Francophonie or a reluctance to surrender traditions of

centralized power associated with the French colonial experience may account for some of the differences in protection against executive abuse of power observed.

Does the constitution building process matter for the provisions selected? Most constitutions today are prepared by elected bodies, whether constituent assemblies or legislatures. In a number of instances, countries have proceeded to create new constitutions or revise old ones via national conferences, which are generally unelected, large bodies, numbering between 600 and 2000 people. Although usually representative in a different sense from elected assemblies, these affairs sometimes permit little real deliberation and may have encourage grandstanding or undercut attention to consistency, so one might expect them to perform less well in generating restrictions on executive abuse of power. In some instances constitutions are crafted via executive directed processes or by roundtables, or roundtables conducted in the course of peace settlements. The data in Table B2 offer no clear support for the hunch that more deliberative processes have produced stronger protections against executive abuse of power in this most recent wave of constitution making, however.

Finally, the initial hunch that countries which faced a crisis of confidence in government institutions were more likely to curb executive powers than others does not receive support from the crosstabs. Table B3 suggests that bigger proportions of countries emerging from civil wars, or constituting themselves after the collapse of a federation, a secession, or a coup, display higher protection scores than those whose constitutions were a response to institutional incapacity.

### **When Do Executives Abide by Constitutional Provisions?**

If the language of a constitution is relatively clear, when does it attract respect from those who must put it into effect? There are often incentives for executives and legislatures not to abide by provisions or translate them into law. The bargains struck during the constitution writing process may not last long in the face of great temptation, especially if there are few sources of countervailing power. Under what conditions might presidents, in particular, be willing to live with restraints that constitutions put in place?

To dodge at least a few of the difficult problems of causal inference, let me focus on one provision that almost always appears in new constitutions as a device to limit executive abuse of power: presidential term limits.<sup>4</sup> Presidential term limits are “institutions” in a limited sense. They are one of a number of devices for reducing incumbency advantage, checking the ability to use the public treasury to create a perpetual gravy train for friends and allies, and limiting the perception that military coups or armed insurrection are the main means of leadership succession. Further, unlike “an independent judiciary” and many other constitutional provisions, the now common term limit on presidential office-holding is about as close as one gets to a bright-line rule that does not entail the application of malleable standards or the cooperation of a variety of organizations and units of government. The rule is easy to recognize, in theory, although it is not without complications. The contemporary practice is generally a two-term limit, but there are some differing regional preferences, most notably Latin American countries’

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<sup>4</sup> One of the analytical problems that arises in trying to evaluate the effects of written constitutions on practical outcomes is that apparent causal links between provisions and outcomes may be spurious. Whatever underlying characteristic shapes the choice of provision may, separately, shape the outcome, leading to incorrect inferences about the effect of the provisions. Because term limits are such a strong international norm currently, they appear in almost all new constitutions regardless of the underlying configuration of power.

emphasis on limits to one term, sometimes renewable if non-consecutive. Phrasing also has great importance in the actual meaning of a term limit. Note the difference between “can be re-elected one time” and “may serve no more than two consecutive terms,” for example, as well as the difference between a limit on terms versus a limit on numbers of years in office. Despite these twists, of the restraints on presidential power currently built into most constitutions, compliance with term limits are comparatively easy to assess and thus hold out some prospect of helping us understand when heads of state comply and when they don’t.

Although the independence-era constitutions of the 1960s and 1970s generally contained no mention of these limits, most of the constitution writing exercises that took place beginning in 1989 have mandated that presidents step down after two consecutive or discontinuous terms. By my count, 85 percent of the new constitutions introduced between 1989 and 2003 included such restrictions. About 10 percent did not specify limits and most of the remainder were parliamentary systems or left the matter ambiguous. (These figures treat “regime changing amendments” as “new constitutions” and embrace 123 cases.) Using a different metric, Gideon Matz has estimated that 87 out of 92 partially free countries over two million in population with presidential or semi-presidential systems had term limits in place at some point between 1992 and 2006.<sup>5</sup> However one counts countries, presidential term limits are now common outside of the Middle East.<sup>6</sup>

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<sup>5</sup> Gideon Matz. “The Case for Presidential Term Limits,” *Journal of Democracy*, 18, 1 (January 2007), p. 128.

<sup>6</sup> Countries without term limits (and without new constitutions) include, for example, Bahrain, Bhutan, Cote d’Ivoire, Equatorial Guinea, Egypt, Jordan, Kuwait, Libya, Morocco, Myanmar, Oman, Qatar, Saudi Arabia, and Zimbabwe, as well as countries that have recently overturned limits and are the subject of this discussion.

Term limits have found their way into the most recent wave of constitution making, even though they have their detractors as well as their supporters. The perceived advantages in opening up political participation and limiting excesses by the head of state have attracted support of publics in many parts of the world, including Africa. The head of the Global Coalition for Africa offered his support for term limits in 2001, and in 2007, some of the states of the African Union sought to pass a resolution that would suspend the membership of any country whose president exceeded the two-term limit. At about the same time, Mo Ibrahim, a Sudanese-born cell phone magnate, created a \$5 million prize to be awarded to African heads of state who leave office on time and have made a contribution to the welfare of their citizens. In a recent referendum, the citizens of Mauritania voted overwhelmingly to approve the insertion of limits into their constitution.

Term limits have their detractors as well. For instance, in 2006, Libya's leader, Colonel Muammar el-Qaddafi, urged politicians to lift restrictions on office holding.<sup>7</sup> He said that term limits were "an obstacle to the development and good functioning of States on the continent." He also argued that they were anti-democratic: "If people want to keep their presidents longer, why prevent them from doing so?"<sup>8</sup> Similarly, others have pointed to the lack of evidence connecting term limits to improved standards of living for ordinary people and highlight the fact that China has no term limits.

Once term limits are enshrined in a constitution, when do they elicit compliance and when are they subject to evasion? The tables in the appendix to this paper show the

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<sup>7</sup> See "Kadhafi ends official visit to Senegal," PanAfrican News Agency Daily Newswire April 6, 2006 accessed via Nexis-Lexis.

<sup>8</sup> "Kadhafi Against Presidential Term Limits in Africa," Panafrican News Agency Daily Newswire, April 5, 2006 accessed via Lexis-Nexis.

distribution of cases, including countries where no president has yet bumped up against the term limits. The focus is on constitutions introduced or substantially revised since 1989, and the list includes only countries outside the OECD.

What do these tables show, descriptively? First, what is remarkable is that almost all leaders who seek to abrogate term limit restrictions seek to use the language of law. That is, with very few exceptions, no matter how much real power they control, contemporary leaders outside the Middle East don't just ignore the constitution. Instead, they argue that their first terms shouldn't count because they won office before important constitutional changes took place or they seek amendments to eliminate the restrictions or increase the number of permissible terms to three--or they respect the limits but assume a different office through which they may retain their former portfolios. In a few instances we also see efforts to expand the time in office not by overturning term limits but by extending the length of the term from four or five years to seven.

If one defines non-compliance as successfully amending the constitution to remove all term limits, then there are more successes than failures among these countries. In Africa, 38 percent of countries whose leaders have reached the end of their tenure as prescribed by new constitutions successfully won amendments to suspend the limits. The exemplar of this kind of case is Uganda, where Yoweri Museveni persuaded the legislature to eliminate limits, despite considerable public protest. The proportion of failures in Africa is smaller if South Africa, Botswana, and Senegal are included. In South Africa, the president is indirectly elected, although the system is not clearly parliamentary. Thabo Mbeki has voiced his intention to step down this year. In Botswana, the president is also indirectly elected and the head of state, Festus Mogae, has

announced plans to step down in March. The constitution of Botswana, the continent's longest-standing multi-party system, has not been modified recently, however, and doesn't appear in the charts for that reason.

In the rest of the world, outside the OECD countries, about 18 percent of leaders who have reached the end of their constitutional tenure in office in countries with constitutionally enshrined term limits have successfully secured the repeal of restrictions. If we count as "failures" countries whose heads of state have evaded the immediate effect of restrictions either by claiming that their first term or terms don't count or by assuming another high office and ruling indirectly, the picture is not quite so happy, but even so, the cases of compliance out-number the cases of non-compliance.

These figures give some grounds to think that constitutions are not mere pieces of parchment, even in parts of the world where the orientation toward law and courts is not especially strong. More leaders under these new constitutions step down on time than do not do so. Of the four cases in which heads of state have tried to repeal limits and been rebuffed by their citizens, three were in Africa (Malawi, Nigeria, and Zambia) while one was in Latin America (Venezuela). As Daniel Posner and Daniel Young have suggested, there is now some evidence that state law and state institutions may be beginning to matter. More leadership succession now takes place by legal means in Africa, for example, than was the case in the 1960s, 1970s, and 1980s.<sup>9</sup>

As in much comparative politics research where the country is the unit of analysis, it is hard to draw clear inferences about the roots of compliance versus non-compliance because there are many possible causes and a relatively small number of

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<sup>9</sup> Daniel Posner and Daniel Young, "The Institutionalization of Power in Africa," *Journal of Democracy*, 18, 3 (July 2007),



cases. Some observations are nonetheless in order about when the terms of a written constitution matter and when they don't. Several explanations appear plausible, considered from the point of view of the cost-benefit analysis a sitting president might undertake. These might work singly or in tandem. The first is the presence of attractive regional models, countries that offer standards of living to which political elites and many citizens in neighboring countries aspire and that also happen to have term limits. The second is the prospect of membership in a club of such countries, whether the European Union (EU) or a powerful equivalent. The third is the individual's belief that s/he and key members of the entourage will find a soft landing place after leaving office and the costs of clinging to power exceed the benefits. The fourth is whether an incumbent's predecessor stepped down or left office after defeat at the polls and thus provided a point for coordinating popular expectations about leadership succession, or whether the incumbent came to power after winning a war or after a decisive win in a first election. Finally, the design of the term limit itself may have some impact on behavior in some settings. It is conceivable that one-term limits with the possibility of a return to office in non-consecutive elections may provide incentives more favorable to preserving the possibility of real alternation of parties in power than the now more standard two-term limit.

The suggestive evidence for the importance of local models and "club" incentives comes mainly, but not exclusively, from the experience of East and Central Europe and the Balkans. Although leaders in many of these countries have not yet bumped up against a two-term limit, and thus few have yet been sorely tempted, bucking the OECD pattern is unlikely. None of the presidents in countries bordering the EU, whether in

presidential systems or semi-presidential systems, have witnessed the successful removal of term limits and in the overwhelming majority of these cases no one seems inclined to try. At one time the possible exception was the Ukraine, where Leonid Kuchma argued to judges that term limits did not apply to him because he was already in power when the limits were added to the constitution. The judges agreed, but the Orange Revolution of 2004 changed the landscape. As with human rights provisions, the possibility of accession to the EU at some time in the future, and substantial cultural identification with European OECD countries, likely encourages leaders to refrain from aggressive action to alter this particular kind of limit on their power in two ways. Because compliance brings the prospect of increased economic opportunities and of association with like communities, publics are more likely to rebuff those who seek to become presidents for life. Further, the incumbent's ability to win approbation from fellow leaders will diminish if s/he is out of line with counterparts. Some of these kinds of causal relationships may come into play in Latin America, currently, and possibly in Africa as well, where Ghana, Tanzania, Benin, and several other countries with growing economies provide local models and where the African Union is beginning to talk about willingness to abide by term limits as a condition of membership.

The "George Washington" effect may also shape outcomes, for similar reasons. Behavior of predecessors coordinates citizen expectations much as regional models and regional organizations do. Breaking with past tradition creates a focal point for resistance. Whether an incumbent's predecessor stepped down, as George Washington did, or whether the incumbent came to power after winning a war potentially matters. This kind of effect is not likely to be observable until countries are about 20 years after

new constitutions. However, there is some anecdotal evidence that the calculus weighs in executive decision making. For example, President Festus Mogae of Botswana (indirectly elected) cited the honor he wished to do to the example set by his predecessors. Benjamin Mkapa in Tanzania could look to the example of Julius Nyerere, who, although long in power during Africa's single-party period, nonetheless stepped down and encouraged his countrymen to enter a new political era. Mkapa followed suit when his turn in office ended.

One cluster of potential explanations focuses on the material consequences of a timely departure for the head of state and his entourage. In theory, winning compliance with a term limit might be harder in places where government is the main source of employment and the head of state can influence most civil service hiring decisions. In these cases, even if the soon-to-be ex-president can find a landing place in an international organization or his own foundation or in business, many hangers-on will not, and the social pressures on the incumbent to remain in office as a conduit for opportunities and resources are likely to be higher than they would be in other circumstances. Where countries have engaged in economic liberalization and have buffered civil service appointments from partisan influence, this sort of temptation may be more limited, unless an economy offers few alternative ways to earn a living. One might also anticipate that as the stakes of holding office go up, as they do with discovery of oil reserves and other mineral windfalls, the opportunity cost of leaving office increases and leaders are less inclined to depart. The temptation to remain in office is simply greater. Thus, the problem spots are likely to be the countries that haven't engaged in economic liberalization, have stagnating or declining job opportunities or

farm opportunities, or that have mineral resources. These characteristics may account for part of the pattern observed in Africa, though not all of it by any means, as well as part of the pattern observed in Central Asia.<sup>10</sup>

Finally, the design of the term limit itself may have some impact on behavior. It is conceivable that in settings where economic conditions provide non-governmental means of employment for political elites, one-term limits with the possibility of a return to office in non-consecutive elections may create some self-enforcing incentives, although they may also create some risks. If respecting the limits creates the opportunity to return later, while an unsuccessful fight to overturn limits may generate opposition and preclude subsequent office-holding, it is conceivable that an incumbent might be willing to toe the line. By contrast, if there is a strict limit of one or two terms, whether consecutive or non-consecutive, there is no political future associated with good behavior. Of course, the incentive to try to move surrogates into office may increase when a country employs one-term limits with additional terms possible in non-consecutive elections. (Noting that possibility, El Salvador has extended its term limits to apply to a president's relatives by blood or marriage and has also specified the number of years that must elapse between a campaign for the presidency and holding each of several important public offices.)

Tests of any explanation will remain largely indeterminate for now, because there simply aren't enough cases to help us winnow a large number of plausible accounts, controlling for a variety of other factors that might influence outcomes. However, the

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<sup>10</sup> In the African cases, Sao Tome has oil but term limits remain important, while in Nigeria, Gabon, Chad, Angola, Namibia, and Uganda (where there was a rumor of oil strikes at the time the president sought to remove term limits) minerals correlate with the behavior of the head of state in the way anticipated. In all of the African countries where heads of state departed on time, economic liberalization had been underway for at least ten years before the first challenge point, with the possible exception of Kenya.

case studies are suggestive and may help us think about the challenge that Walter Murphy has set us.

### **Conclusion**

The paper has tried to provide some leverage on the question, “When do constitutions fail to create effective institutions?” by two modest forays into relatively tractable aspects of the subject. Drafting is the first potential point of failure in limiting executive abuse of power. Review of discontinuities in provisions designed to restrain executive abuse of power suggests that less than a quarter of the documents crafted in the most recent wave of new constitutions back up strong rights provisions with terms that create (on paper) institutions important for the monitoring and enforcement of these. Quite open and representative constitution making processes often yield few restraints on executive power, thus we can’t account for the discontinuities on the basis of process so defined. Regional and colonial traditions do seem to affect choice of terms, however. The second part of the paper asks under what conditions heads of state respect the terms of a new constitution. The case in point focuses on term limits, which are now almost universally specified in constitutions that establish presidential or semi-presidential systems (as well as a few parliamentary systems). Because of the limited number of cases, clear causal inference is impossible, but again the analysis is suggestive. Outside the OECD, heads of state in countries with mineral resources appear to be somewhat more likely to disregard limits than others. Regional norms and regional organizations also appear to have an impact on respect for terms, just as they exercised some influence on the kinds of provisions selected.

