

# ON THE EVASION OF EXECUTIVE TERM LIMITS

ZACHARY ELKINS

Assistant Professor of Political Science  
University of Texas at Austin

TOM GINSBURG

Professor of Law  
University of Chicago

JAMES MELTON\*

Postdoctoral Fellow in the  
Program on Political Systems and Institutional Change  
IMT Institute for Advanced Studies  
[james.melton@imtlucca.it](mailto:james.melton@imtlucca.it)  
Piazza San Ponziano, 6  
55100 Lucca (LU), ITALY

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ABSTRACT

Executive term limits are pre-commitments through which the polity restricts its ability to retain a popular executive down the road. But in recent years, many presidents around the world have chosen to remain in office even after their initial maximum term in office has expired. They have largely done so by amending the constitution, or sometimes by replacing it entirely. The practice of revising higher law for the sake of a particular incumbent raises intriguing issues that touch ultimately on the normative justification for term limits in the first place. This article reviews the normative debate over term limits and identifies the key claims of proponents and opponents. It introduces the idea of characterizing term limits as a variety of default rule to be overcome if sufficient political support is apparent. It then turns to the historical evidence in order to assess the probability of attempts (both successful and unsuccessful) to evade term limits. It finds that, notwithstanding some high profile cases, term limits are observed with remarkable frequency. The final section considers alternative institutional designs that might accomplish some of the goals of term limits, but finds that none is likely to provide a perfect substitute. Term limits have the advantage of clarity, making them relatively easy constitutional rules to enforce, and they should be considered an effective part of the arsenal of democratic institutions.

KEYWORDS

Comparative Constitutional Design, Term Limits, Incumbency Advantage, Constitutional Crisis

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INTRODUCTION

In late June 2009, the Honduran military escorted sitting President Manuel Zelaya out of the country for proposing a referendum that would eliminate constitutional term limits and potentially pave the way for his re-election.<sup>1</sup> The Honduran Constitution contains a “poison pill” clause directed against this very type of proposal, and Zelaya was promptly replaced after adjudication of the issue by the country’s Supreme Court.<sup>2</sup> The constitutional crisis quickly turned into an international one, unresolved as of this writing: a subsequent election (won by the conservative opposition candidate) has not been recognized by many countries, and Zelaya’s fate as well as that of those or orchestrated his removal is still undetermined.<sup>3</sup>

Zelaya can hardly be singled out for trying to overcome constitutional limits on his term. In the last fifteen years, many of Zelaya’s counterparts throughout Latin America have

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<sup>1</sup> Article 239 reads “A citizen who has held the title of the Executive Power may not be President or a Designate. He that violates this provision or advocates its amendment, as well as those that directly or indirectly support him, shall immediately cease to hold their respective offices and shall be disqualified for ten years from exercising any public function.” It was this provision that triggered the Honduran action. Zelaya’s proposed referendum would have asked voters whether they were in favor of *another* referendum to be held on the next election day on the question of whether to revise the constitution. Zelaya’s supporters point out that another President would have been elected on the same day as the second referendum, and so Zelaya himself would not benefit.

<sup>2</sup> The origins of the poison pill are uncertain though the general institution can be traced to Fifth century BCE Athens. Honduras’ constitutions of 1957 and 1982 adopted similar provisions, as did the constitutions of Peru 1933 and Guatemala 1945 (art. 133). Perhaps a more effective mechanism is to require that any amendments to the executive term apply only to successors and not the incumbent. See BOL. CONST. art. 135 (1880).

<sup>3</sup> At this writing, Zelaya is in exile in the Dominican Republic. New York Times Topics, *Manuel Zelaya*, available at [http://topics.nytimes.com/topics/reference/timestopics/people/z/jose\\_manuel\\_zelaya/index.html](http://topics.nytimes.com/topics/reference/timestopics/people/z/jose_manuel_zelaya/index.html) (last checked March 1, 2010). A similar story could be told with regard to Niger President Mamadou Tandja, deposed in a coup in February 2010. Tandja had forced through amendments to the constitution to allow himself to remain in office after his term expired. Adam Nossiter, *President Claims More Power in Niger’s Dispute Referendum*, New York Times, Aug. 7, 2009, available at [http://www.nytimes.com/2009/08/08/world/africa/08niger.html?\\_r=1](http://www.nytimes.com/2009/08/08/world/africa/08niger.html?_r=1) (last checked March 1, 2010).

successfully amended or replaced their constitutions to facilitate term extensions.<sup>4</sup> The past year seems to have been particularly hazardous. In January of 2009 Bolivian voters approved a new constitution relaxing limits on the presidential term thereby allowing incumbent Evo Morales to run again. Three weeks later, Hugo Chavez won a referendum amending the Venezuelan Constitution to do the same thing.<sup>5</sup> In October 2009, the Nicaraguan Constitutional Court declared executive term limits to be unconstitutional. In February 2010, the constitutional court in Colombia rejected an attempt to re-amend the constitution to allow a third term for President Uribe (the original 1991 constitution limited presidents to one term and a 2005 amendment facilitated a second Uribe term).

Attempts to overturn limits on executive term have little to do with the executive's ideology (Uribe and Chavez are hardly soulmates), nor are they restricted to Latin America. Last year Azerbaijan and Niger also adopted referenda overturning term limits.<sup>6</sup> Similar movements are afoot in the Philippines, though they have so far been unsuccessful.<sup>7</sup> Africa has had its share: just since 1990, term-limit reform (in the form of *relaxing* term limits) has been effected in Algeria, Cameroon, Chad, Gabon, Guinea, Namibia, Togo, Tunisia and Uganda.<sup>8</sup> The constitutional choice of presidentialism and semi-presidentialism in Eastern Europe has led to tension between temporal rules and ambitious executives there as well. Vladimir Putin opted to step down from the Russian presidency in favor of an informally empowered prime ministership, which provided him with an unlimited tenure, or at least one at the mercy of a sympathetic legislature controlled by his party.<sup>9</sup> Term limits have recently been relaxed in several Eastern European countries as well, including Belarus, Kazakhstan, Tajikistan, and Uzbekistan. The same dynamics operate at the subnational level where executives of regional and even municipal governments face many of the same incentives and institutional constraints. Indeed, Michael Bloomberg's successful amendment of New York City's charter in order to facilitate his third

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<sup>4</sup> A partial list includes Brazil (1997), Argentina (1994), Peru (1993), Venezuela (1999), and Colombia (2005).

<sup>5</sup> It was Chavez' second try, having failed in a similar referendum in 2007.

<sup>6</sup> A similar story could be told with regard to Niger President Mamadou Tandja, deposed in a coup in February 2010. Tandja had forced through amendments to the constitution to allow himself to remain in office after his term expired.

<sup>7</sup> This Spring the Philippines House of Representatives passed a resolution that would open the door for constitutional amendments. The current issue concerns the scope of foreign investment in certain sectors of the economy, but at the same time, the House has been pushing for procedural changes that would allow joint voting by both houses as a Constituent Assembly for constitutional changes. The proposal, known locally by the unfortunate nickname as Con-Ass, would allow the 254 member House to dominate the 24-member Senate. The real subtext, according to many observers, is President Arroyo's desire to stay in office when her current term expires next year. Every President since Corazon Aquino has sought to do the same thing. The Constitution currently only allows one six-year term.

<sup>8</sup> Daniel N. Posner & Daniel J. Young, *The Institutionalization of Political Power in Africa*, J. DEMOCRACY, July 2007, at 126, 126-40.

<sup>9</sup> Putin can run again for President once he has been out of office for a term, and there are indications that he plans to do just that.

mayoral term had some comparing the city to a banana republic.<sup>10</sup> These varied cases suggest that the evasion of term limits is widespread.

This latest wave of term limit evasions invites a number of questions. First, how should we think of this phenomenon from a normative perspective? Alexander Hamilton among others thought term limits would invite mischief by ex-presidents and argued against their inclusion in the United States Constitutions; others, including Thomas Jefferson, thought that term limits were necessary to curb executive ambition. As term limits have grown in popularity over time, some have called for their universal adoption in presidential systems as a core feature of democracy.<sup>11</sup> But term limits have been criticized on a number of grounds, most obviously that they restrict democratic choice. Section I of the article reviews the arguments for and against term limits. It considers motivations grounded in the prevention of tyranny and the protection of the institutional integrity of democracy, including countering the incumbency advantage in electoral competition. It also introduces the idea that term limits may be most profitably thought of as default rules that can be overcome through constitutional amendment processes. Even if term limits appear rigid, they can be overcome by executives with sufficiently strong political support.

Many of the theoretical arguments about term limits turn on empirical claims about the likely behavior of the incumbent in their last period of office, an issue about which we have little evidence. Other empirical data, however, can inform the broader normative debate. The Honduras situation suggests that term limits might themselves induce constitutional crisis in some circumstances. When a popular leader overturns term limits to remain in office, there may be significant collateral damage to the constitutional order. If such occurrences are frequent and their consequences severe, we ought think twice about the suggestion that term limits be seen as a core feature of democratic constitutions. To evaluate this possibility, Section II asks the positive question of how frequently term limit evasions occur. It begins by describing the prevalence and type of limits on executive tenure across time and space. I then ask whether term limits “work,” in the sense of actually and effectively constraining executives from remaining in office. This section takes advantage of a unique set of data on the content of historical constitutions (the Comparative Constitutions Project).<sup>12</sup> This dataset includes information on a host of constitutional provisions, including any restrictions on executive tenure. To these *de jure* data, we can compare the *de facto* record of executive tenure compiled by Goemans, Gleditsch, and Chiozza.<sup>13</sup> Together these sources can provide a sense of the manner and timing of executives leaving office. They also answer some basic empirical questions that have long gone unexplored. I conclude that term limits are surprisingly effective in constraining executives from extending their terms, at least in democracies. There is no evidence that term limits are associated with the death or disability of democracy, even if in some circumstances they may induce early constitutional replacement.

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<sup>10</sup> David W. Chen & Michael Barbaro, *Bloomberg Wins 3<sup>rd</sup> Term as Mayor in Unexpectedly Close Race*, N.Y. TIMES, Nov. 4, 2009.

<sup>11</sup> Gideon Maltz, *The Case for Presidential Term Limits*, J. DEMOCRACY, Jan. 2007, at 128, 128-41.

<sup>12</sup> See Comparative Constitutions Project, <http://www.comparativeconstitutionsproject.org> (last visited Feb.19, 2010).

<sup>13</sup> Henk E. Goemans, Kristian Skrede Gleditsch & Giacomo Chiozza, *Introducing Archigos: A Dataset of Political Leaders*, 46 J. PEACE RES. 269 (2009).

Notwithstanding the generally positive assessment, the third part of the article examines institutional alternatives to term limits. The normative question about term limits must be considered as one of comparative institutional choice, and we evaluate whether alternatives might mitigate some of the negative effects of term limits identified in the theoretical literature. This section considers several ideas, including manipulating the length of the executive term, shedding presidential powers, and inducing retirement. None of the conceivable alternatives to restrict executive tenure, however, is likely to substitute for term limits. As a normative matter, then, term limits seem to be an effective form of constitutional pre-commitment. Despite high-profile evasions in some countries, the overall story seems to be of an institution that operates as an effective constraint in most times and places.

## I. THE DEBATE OVER TERM LIMITS

Term limits have been part of the arsenal of institutional design for millennia, but have assumed particular significance in modern presidential democracies. Presidentialism is characterized by the election of a single executive for a fixed term of office, and critics of this form of government have focused on the resulting inflexibility, particularly as compared to parliamentary government. Limits on the number terms, not just their length, adds yet another dimension of inflexibility.<sup>14</sup> When the modern presidency was designed in Philadelphia, the founders engaged in extensive debates over the length of the term and whether the executive could stand for re-election. This section reviews the normative debate over term limits.

### A. *The Rationale for Fixed Terms: Temporary Insulation*

To understand term limits, we must begin by understanding why political systems have fixed terms for the executive in the first place. Fixed terms are a typical feature of presidential systems, and are contrasted with the prototypical parliamentary system in which the executive can be removed by the legislature at any time.<sup>15</sup> I do not wish to rehash the extensive debate over these two forms of government here, but rather to focus on one important trade-off.<sup>16</sup> Under either system, periodic elections provide a primary mechanism of ensuring accountability of office holders. Allowing an executive to remain in office for a set period insulates that executive from short-term fluctuations in political opinion. This can facilitate the undertaking of policies that might entail short term costs, but produce benefits in the mid-term. Thus fixed terms allow for periods of insulation set off by elections that secure legitimacy and accountability. In most parliamentary systems, the executive and the legislature exist in a certain co-dependence, in which one office may be dissolved by the other at any given time. In presidential systems, the president and the legislature enjoy fixed terms and are thus insulated

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<sup>14</sup> See, for example, Juan Linz, *The Perils of Presidentialism*, 1 JOURNAL OF DEMOCRACY (2009).

<sup>15</sup> To be sure this is an oversimplification, and some have argued that parliamentary systems can accommodate fixed terms. Richard Albert, *The Fusion of Presidentialism and Parliamentarism*, 57 AM. J. COMP. L. 531, 558 (2009). Albert also points out that the potential for recall in presidential systems is the functional equivalent of the vote of no confidence in parliamentary systems. *Id.* at 560.

<sup>16</sup> See generally JOSÉ ANTÔNIO CHEIBUB, *PRESIDENTIALISM, PARLIAMENTARISM AND DEMOCRACY* (2007) (reviewing scholarly debate over presidentialism and parliamentarism).

from one another and from short term fluctuations in public opinion. Insulation must be tempered with periodic elections, which confirm the mandate of the office holder for another term of office.

It is difficult *ex ante* to determine the “optimal” term for an office holder, by which I mean the length of time in which the benefits of policy insulation outweigh the costs of reduced accountability. As noted below, there is surprisingly little variation across written constitutions in length of executive term, even though the time required to develop, implement, and evaluate policies will co-vary across time and space with a number of factors. These factors may include other features of the constitutional structure (such as the existence of veto players) as well as exogenous conditions (such as the rate of social and political change). Other factors such as the structure of the party system and individual characteristics of the leader are surely relevant. It is likely that the optimal term would be different across policy areas, as costs and benefits of policies may be revealed at different rates, and so a fixed term for a single executive is simply the aggregate of an optimizing function over individual issue areas. The approach of fixing terms is to adopt a bright-line rule for periodic elections, notwithstanding the fact that the optimal amount of time for an executive to stay in office may in some instances be much shorter or longer.

Fixed terms have been at the center of criticisms of presidential democracy associated with Juan Linz, among others.<sup>17</sup> Among other vices, Linz sees presidential systems as institutionalizing conflict between branches, leading to deadlock and higher incentives to take extra-constitutional action. As Mainwaring and Scully put it: “because of fixed terms of office, if a president is unable to implement her/his program, there is no alternative but deadlock.”<sup>18</sup> While the current state of the literature is more agnostic,<sup>19</sup> the assumptions of the Linzian position are still widely held. The focus here is not on fixed terms *per se*, but on whether a system ought to limit the number of fixed terms a single individual can hold.

### *B. Arguments for Executive Term Limits*

The origins of executive term limits go back as far as the ancient Republics. In one of the earliest definitions of democracy, Aristotle listed as a key characteristic of democracy that “no man should hold the same office twice.”<sup>20</sup> Accordingly, Greek city states are known to have imposed one-year limits on some of the officials elected by random lottery.<sup>21</sup> In Athens, there was the additional restriction that no individual could serve more than two terms on the

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<sup>17</sup> Juan J. Linz, *Presidential or Parliamentary Democracy: Does It Make a Difference?* in *THE FAILURE OF PRESIDENTIAL DEMOCRACY*, 2 (Juan J. Linz & Arturo Valenzuela ed., 1994); Linz, *supra* n.14.

<sup>18</sup> BUILDING DEMOCRATIC INSTITUTIONS: PARTY SYSTEMS IN LATIN AMERICA 33 (Scott Mainwaring & Timothy R. Scully eds., 1995); *but see* Jide O. Nzelibe and Matthew C. Stephenson, *Complementary Constraints: Separation of Powers, Rational Voting and Constitutional Design*, 123 *Harv. L. Rev.* 618, 643-45 (2010) (separation of powers does not induce gridlock).

<sup>19</sup> CHEIBUB, *supra* n. 15.

<sup>20</sup> *THE POLITICS OF ARISTOTLE* 258 (Ernest Barker trans., Oxford University Press 1958).

<sup>21</sup> CHARLES C. HIGNETT, *A HISTORY OF THE ATHENIAN CONSTITUTION TO THE END OF THE FIFTH CENTURY B.C.* 237 (1952)

governing council in the course of a lifetime.<sup>22</sup> The rationale for term limits in these early democracies was the idea of rotation of office. Democracy required that citizens have the experience of both “ruling and being ruled in turn” and this principle was best effectuated with a strict limitation on tenure in public office, so as to maximize the number of citizens that could govern.<sup>23</sup>

In polities larger than a city-state, the ideal of each citizen having a real possibility of holding public office is a fiction. Accordingly, we have observed some evolution in normative thinking about the rationale for term limits. In the modern consideration of term limits, the themes of tyranny and the protection of electoral competition have come to the fore, with ideas about self-government losing salience.

The touchstone of current views is the American founding. The founding fathers in the United States debated the length of the presidential term, including the question of whether re-election ought to be allowed. The initial version of the Virginia Plan submitted to the Constitutional Convention provided that the president would be ineligible for a second term.<sup>24</sup> This position remained in place while various proposals for term length were debated. Until close to the end of the Constitutional Convention, the founders’ plan was to have the president limited to a single seven-year term.<sup>25</sup> Many of the framers were concerned that the prospect of re-election would force the president to curry favor with Congress, an undesirable outcome that they associated with failing to take into account the national interest.<sup>26</sup> In the end, of course, the U.S. constitution initially omitted term limits, much to the chagrin of Thomas Jefferson, who declared the omission to be one of the defects of the document.<sup>27</sup>

Those in favor of term limits focus on the potential for tyranny by an executive. As Simon Bolivar put it (before reversing his position once he assumed executive office himself) “Nothing is more perilous than to permit one citizen to retain power for an extended period. The people become accustomed to obeying him, and he forms the habit of commanding them; herein lie the origins of usurpation and tyranny....Our citizens must with good reason learn to fear lest the magistrate who has governed them long will govern them forever.”<sup>28</sup> Bolivar identifies the perverse advantages of incumbency: the current office-holder can, either intentionally or not, come to seem like the only alternative.

While it is possible that the incumbency advantage is simply a function of better information on the current office-holder than on the challenger, it is also possible that it results

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<sup>22</sup> GIDEON DORON & MICHAEL HARRIS, *TERM LIMITS* 5 (2001).

<sup>23</sup> *Id.*

<sup>24</sup> CHARLES W. STEIN, *THE THIRD TERM TRADITION: ITS RISE AND COLLAPSE IN AMERICAN POLITICS* 3 (1943).

<sup>25</sup> *Id.* at 2.

<sup>26</sup> *Id.* at 6 (describing position of George Mason of Virginia).

<sup>27</sup> Thomas Jefferson, Letter to James Madison, December 20, 1787 (expressing concern over incumbency advantage and stating that “the power of removing him every fourth year by the vote of the people is a power which will not be exercised.”)

<sup>28</sup> John M. Carey, *The Reelection Debate in Latin America*, in *LATIN AMERICAN DEMOCRATIC TRANSFORMATIONS: INSTITUTIONS, ACTORS, AND PROCESSES* 79, 80 (William C. Smith ed., 2009).



from cognitive biases in favor of stability: better the proverbial “devil you know” than a possibly unproven candidate. In modern psychological terms, this implicates the status quo bias, through which people stick with earlier choices without adequately considering alternatives.<sup>29</sup> In addition, incumbents have well-documented advantages in political competition because of agenda control, greater media coverage and control over the instruments of power. Incumbents may even be tempted to improperly utilize public resources in pursuit of remaining in office.

Besides these direct advantages, incumbency also has indirect effects on political competition. Incumbency can indirectly serve as a barrier to entry, so that other good candidates might refrain from entering a contest against an established incumbent.<sup>30</sup> Analogizing to antitrust law, regulation may be an appropriate solution to address these potential distortions in the political marketplace.

Term limits form a kind of pre-commitment by the polity to consider alternative candidates. Like all pre-commitments, term limits rest on a claim that some judgments are better made earlier rather than later because the agent cannot be trusted to make the right call down the road.<sup>31</sup> As an incumbent serves in office, the ability of the polity to evaluate performance and provide electoral discipline somehow becomes distorted. Hence there is a need to categorically restrict candidates from re-upping. At the time of adoption of the constitution, the polity limits its own will down the road, a paradigmatic pre-commitment.<sup>32</sup> The pre-commitment is grounded in the judgment *ex ante* that discarding all executives after a fixed term will produce aggregate benefits, even though we will lose the services of some executives that we would really want to keep.

A pre-commitment to change executives may have beneficial upstream effects on the selection of candidates who make themselves available to run for office. Knowing *ex ante* that their tenure in public office is (at least presumptively) limited, self aggrandizing agents may be deterred from seeking office in the first place. Agents who wish to rule for life will be screened out, or at least will be discouraged from running for public office. In contrast, a term limit will encourage agents who have moderate ambition to enter political competition. Term limits thus affect the labor pool of candidates.

Another positive effect of term limits might operate on potential challengers for power. In the absence of term limits, an incumbent may govern for too long, and potential challengers might grow impatient. The pre-commitment to rotating leaders will assure such challengers that they will indeed have a chance of winning office. Broadly speaking, then, term limits reduce the stakes of politics, and may prevent alternate candidates from resorting to unconstitutional action.<sup>33</sup>

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<sup>29</sup> Daniel Kahnemann, Jack L. Knetsch; Richard H. Thaler, *Anomalies: The Endowment Effect, Loss Aversion, and Status Quo Bias*, 5 J. ECON. PERSPECTIVES 193 (1991).

<sup>30</sup> Einer Elhauge, *Are Term Limits Undemocratic?*, 64 U. CHI. L. REV. 83, 154-65 (1997).

<sup>31</sup> STEPHEN HOLMES, *PASSIONS AND CONSTRAINT: ON THE THEORY OF LIBERAL DEMOCRACY* (1995).

<sup>32</sup> Indeed, term limits exemplify an institution that is better analyzed using pre-commitment theory than agency cost theories of constitutionalism. Term limits operate even if the agent retains popularity, and indeed only make sense *because* the agent may retain popularity. The Polity limits its own will down the road, *even if there are no agency costs*.

<sup>33</sup> Barry Weingast, *Designing a Constitution that will Last*, in *DEMOCRATIC CONSTITUTIONAL DESIGN AND PUBLIC POLICY: ANALYSIS AND EVIDENCE* (Roger Congleton and Birgitta Swedenborg, eds., 2006).

In preventing incumbent leaders from running, term limits change the incentives for politicians in their final period of office. Some have argued that term limits will lead executives to focus more on the public interest if not concerned about the need for re-election, even if they may be underpowered in their lame-duck status.<sup>34</sup> Certainly, term limits reduce the risk of manipulation of policy by the executive to maintain power, at least to the extent that the restrictions are effectively enforced.

Term limits also promote a party-based, as opposed to personality-based, vision of democracy. Term limits assume that, ultimately, no one individual, no matter how competent and exalted, has a monopoly on the skills needed to govern. By forcing even highly competent and popular leaders to stand down, term limits encourage the cultivation of successors as well as the creation of robust political parties to maintain the leader's policies into the future. Channeling ambition to others can have the important benefit of preventing personality from trumping policy.<sup>35</sup>

### *C. Arguments Against Executive Term Limits*

The primary objection to term limits is rooted in concerns about representation. Term limits serve as an artificial and illiberal constraint on the choice of the polity from retaining an executive who it may otherwise wish to keep. In theory, the polity can always vote the incumbent out of office if so chooses, and so there is no need to categorically limit candidates from continued participation in elections. This argument has been adopted by both scholars and courts.<sup>36</sup>

The standard rebuttal is that term limits are typically *adopted* by democratic majorities as part of a package of constitutional commitments. Like other pre-commitments, term limits can be reversed by downstream amendment. But inclusion of such limits in the constitutional text shifts the default position to removing office-holders. This may have illiberal consequences when the voters prefer to retain the person in office. Indeed, it is only because of such presumed efficacy that the founders adopt term limits in the first place.

Opponents of term limits also argue that governance, like other activity, requires experience, and that practitioners of government may get better over time.<sup>37</sup> This argument was associated with David Hume, who critiqued James Harrington's scheme of government in *The Commonwealth of Oceana* on the grounds that forcing executives out of power would deprive the polity of the best possible leaders.<sup>38</sup> Hume saw no benefit in artificial rotation among officeholders, and suggested that an ideal scheme of government would not have term limits.

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<sup>34</sup> Carey, *supra* note 28.

<sup>35</sup> For an example of a leader who has refused to create a party or designate a successor, consider Hamid Karzai of Afghanistan. See *Karzai, A Man with No Party*, CHRISTIAN SCIENCE MONITOR, OCT. 26, 2004, available at <http://www.csmonitor.com/2004/1026/p01s03-wosc.html> (last checked March 2, 2010).

<sup>36</sup> U.S. Term Limits v. Thornton, 512 U.S. 1286 (1994).

<sup>37</sup> Nelson W. Polsby, *Constitutional Mischief: What's Wrong with Term Limitations*, AM. PROSPECT, Summer 1991, at 40.

<sup>38</sup> David, Hume, *IDEA OF A PERFECT COMMONWEALTH* (1752 ("rotation is inconvenient, by throwing men, of whatever abilities, by intervals, out of public employments.") Hume's essay emphasizes the cultivation of expertise over time, limiting higher office to those who have already held lower office.

The argument about expertise was repeated by Alexander Hamilton, a principal opponent of term limits in debates over the United States Constitution. Hamilton thought that a limitation on the presidential term involved “the banishing [of] men from station, in which, in certain emergencies of the state, their presence might be of the greatest moment to the public interest and safety.”<sup>39</sup> Hamilton’s concern was not only experience but the related concern of a uniquely qualified leader. This may be particularly important in new states or fragile democracies, and many of the founders may have had George Washington in mind when thinking about the problem of term limits.<sup>40</sup> Artificially forcing uniquely qualified individuals from office, it is argued, can deprive the state of the best possible leadership and risk undermining the social basis for the state. (The list of people who have made such claims, however, invites skepticism.)<sup>41</sup>

Another issue expressed by opponents concerns the role of ex-leaders. In Federalist 72, Hamilton worried about the effects on politics “to have half a dozen men who had credit enough to be raised to the seat of the supreme magistracy wandering among the people like discontented ghosts, and sighing for a place which they were destined never more to possess.”<sup>42</sup> These sorts of ghosts sometimes seem to stalk the halls of power in Latin America: Peron in Argentina, for example, cast a long shadow over politics long after the term of office ended. In the United States, at least, ex-Presidents seem to thrive out of office (sometimes as minimally meddling statesmen) and cause very little mischief.<sup>43</sup> Gideon Maltz, who has written in favor of term limits, recommends the practice of maintaining the trappings of executive office (such as a security detail or honorary positions) as a way to incentivize more statesman-like behavior by ex-presidents.<sup>44</sup>

Hamilton was particularly concerned with the potential for manipulation by a term-limited leader to remain in office. As he put it, “(A)s the object of his ambition would be to prolong his power, it is probable that in case of a war, he would avail himself of the emergency to evade or refuse a degradation from his place.”<sup>45</sup> For this reason Hamilton favored a life term during good behavior, a kind of elective monarchy for the United States that in any event would not have a large quantum of power.<sup>46</sup>

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<sup>39</sup> See also STEIN, *supra* note 17, at 12 (Luther Martin expressing similar idea).

<sup>40</sup> Maltz, *supra* note 10, at 128-41.

<sup>41</sup> Contrast Nursultan Nazarbayev, who is in the process of amending the constitution to name himself President for life of Kazakhstan, with Nelson Mandela, the embodiment of South Africa’s democratic transition who retired on time, or George Washington, seen as the “indispensable man” at the founding. Washington, however, privately expressed concern that term limits might exclude the most qualified leader during a time of emergency. STEIN, *supra* note 17, at 12.

<sup>42</sup> Alexander Hamilton, James Madison, John Jay, THE FEDERALIST PAPERS 290 (WILDER PUBLICATIONS, 2008).

<sup>43</sup> Douglas Brinkley, *The Rising Stock of Jimmy Carter: The ‘Hands-On’ Legacy of our Thirty-ninth President*, 20 DIPLOMATIC HIST. 505 (1996); MAX J. SKIDMORE, AFTER THE WHITE HOUSE: FORMER PRESIDENTS AS PRIVATE CITIZENS (2004); PAUL B. WICE, PRESIDENTS IN RETIREMENT: ALONE AND OUT OF OFFICE (2009).

<sup>44</sup> Maltz, *supra* note 10, at 128-41.

<sup>45</sup> STEIN, *supra* note 17, at 7.

<sup>46</sup> *Id.*

Another founding father, Gouverneur Morris, eloquently made a similar argument that the final period would induce unconstitutional behavior by a leader.<sup>47</sup> Should the possibility of re-election be foreclosed, he argued, a leader may seek to retain it by the sword.<sup>48</sup> Furthermore, the short but definite period of a single term would tempt the president to accumulate wealth quickly while in office, as there would be no electoral discipline to induce public-regarding behavior.<sup>49</sup> It was this argument that seemed to carry the day in the heated final days of the Constitutional Convention: though the final text remains silent on re-eligibility, it was assumed to be permissible.<sup>50</sup>

One point of disagreement apparent in the debate is that opponents of term limits tend toward a different interpretation of likely executive behavior in the final term. While proponents argue that term limits will free up the executive to act in the public interest, opponents note that the lack of electoral check can also give way to corruption and pursuit of policies for personal gain.<sup>51</sup> It may therefore make sense to incentivize leaders with the possibility of continued office to avoid last-period problems. Ultimately, whether public- or private-regarding motivation predominates in the final period of office is an empirical question on which there has been little work.

Another empirical question unresolved in the current literature concerns the interaction of the incumbency advantage and time. Specifically, does the degree of incumbency advantage generally remain constant over time, or does it increase or decrease? If it generally decreases after a certain point, term limits may be unnecessary. On the other hand, if it continues to increase with the term of the incumbent, term limits are more justifiable. There is no literature that estimates the slope of the incumbency advantage as a function of time. With no other evidence, we assume that it is flat for purposes of the analysis in this article.

#### *D. A Qualified Approach: Term Limits as Default Rules*

Term limits involve a trade-off, restricting voter choice in order to preserve an equitable political marketplace. Limits are perceived as both anti-democratic and essential to preserve democracy, and much of the argument turns on underspecified claims regarding the optimal term of office, the effects of incumbency, and the nature of final-period problems. In this section, we analyze constitutional term limits from the perspective of default rules, showing that term limits are more flexible than they appear to be.

Return to the rationale for a fixed term in the first place. Fixed terms provide for insulation, allowing pursuit of mid-term over short-term considerations. Ex ante, however, the optimal duration of executive tenure is not obvious, and may vary with a number of considerations, including aspects of the international environment, domestic stability, and the

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<sup>47</sup> STEIN, *supra* note 17, at 9.

<sup>48</sup> *Id.* at 9. See also *id.* at 13 (Madison expressing similar views).

<sup>49</sup> *Id.*

<sup>50</sup> *Id.* at 11.

<sup>51</sup> Much of the debate over constitutional reform in South Korea, for example, focuses on the problems of the single term five-year presidency, most of whose occupants have engaged in massive corruption.

presence of alternative leaders. We cannot be sure that the blanket fixed term specified for the executive is ideal in any sense. A parliamentary system may allow for more flexibility in response to changing conditions, in that underperforming executives can be removed relatively easily. But while parliamentary systems address the problem of the underperforming leader staying too long, they allow for performing leaders to stay in office forever, and hence exacerbate incumbency advantages. Term limits, on the other hand, place an upper limit on the duration of service, mitigating incumbency advantages but raising the possibility that an effective leader will be forced out of office too early.

Term limits, however, are no more entrenched than any other constitutional provision (the unusual Honduran “poison pill” notwithstanding). The possibility that term limits can be bypassed by constitutional amendment (either negotiated or obtained through referendum) or replacement suggests that executive term limits might be usefully thought of as merely default rules. They can be effective only so long as the polity does not amend around them. To be sure they raise the cost of extending tenure. But a truly popular executive will find them of little constraint. Franklin Roosevelt, for example, initially denied wishing to run again in 1940 after his second term, in keeping with the unwritten constitutional norm of the time.<sup>52</sup> But with the New Deal in full swing, his popularity was such that his party insisted that he run again. Term limits did form some constraint, in that Roosevelt’s popularity had to be high enough to overcome the default norm of the unwritten constitution: no doubt some (unspecified) number of voters who might otherwise be inclined to vote for him declined to do so because of the unwritten limitation. But the threshold could be overcome. Once the 22<sup>nd</sup> amendment was adopted, the degree of political support necessary shifted again: a future president would require enough support to sustain a constitutional amendment reversing the 22<sup>nd</sup> amendment, a much higher threshold.<sup>53</sup>

Term limits can be thus said to raise the degree of political support required for an executive to maintain office from the ordinary electoral majority to the amendment threshold (which we can think of as a supermajority, although amendment provisions vary). It is not clear *ex ante* that the amendment threshold is always optimal, however, in terms of offsetting the incumbency advantage. It may be that the amendment threshold is too low, so that it does not constrain the executive in any real way. Alternatively, the amendment threshold may be so high as to exceed the incumbency advantage. In such instances, a popular president whom the polity would otherwise prefer to retain will be forced to leave office because of term limits.

To illustrate, suppose that the net advantage of being an incumbent in presidential elections is 10 percent, the average incumbency advantage for members of the U.S. Congress since 1975.<sup>54</sup> This means that a candidate will obtain the additional votes of 10 percent of the electorate relative to the support she would receive were she not an incumbent. Suppose further

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<sup>52</sup> GIDEON DORON & MICHAEL HARRIS, *TERM LIMITS* (2001); STEIN, *supra* note 17.

<sup>53</sup> Formal amendment procedures under the United States constitution are among the most difficult in existence. Donald Lutz, *Toward a Theory of Constitutional Amendment*, 88 AM. POL. SCI. REV. 355 (1994); Dixon and Holden 2009. On the ambiguities of the 22<sup>nd</sup> amendment, see BRIAN C. KALT, *CONSTITUTIONAL CLIFFHANGERS: A LEGAL GUIDE FOR PRESIDENTS AND THEIR ENEMIES*, (forthcoming 2010).

<sup>54</sup> Andrew Gelman & Gary King, *Estimating Incumbency Advantage Without Bias*, 34 AM. J. POL. SCI. 1142, 1242 – 64 (1990).

that the incumbent candidate is forbidden by the constitution from running for a second term, but the constitution can be amended by referendum with the support of two-thirds of the population. In this example, the amendment supermajority exceeds a majority plus the incumbency advantage. An incumbent who has the support of 62% of the population would have been elected by a majority (even without the incumbency advantage) but will be prevented from running by term limits. An incumbent who has the support of 70% of the public, on the other hand, will be able to secure an amendment and remain in office. Arguably the term limit rule in this example is excessively restrictive: it does more than simply offset the incumbency advantage.

By providing for an absolute upper bound on executive service, without regard to external conditions, term limits are a blunt instrument to deal with a delicate but real problem—the proverbial sledgehammer used to crack a nut. It is possible, of course, that in establishing a fixed maximum term to be applied to all executives, we manage to choose a period of years that is perfectly optimal, such that it allows the executive sufficient time to develop policies without fear of losing power. We may force some truly popular executives to stand down in favor of less competent candidates, but the cost is worth it because of the risks of declining performance from an executive that stays past their optimal date. In short, we might by chance set the maximum term for a period that is, as Goldilocks would put it, neither too hot nor too cold. But this seems unlikely given variation in the myriad factors that will affect the optimal term.

Most problematic is the possibility that term limits might induce constitutional crises. By constitutional crises, I mean a situation in which constitutional politics become so heated that they suspend the operation of normal politics.<sup>55</sup> Constitutional politics are those that involve struggles over the meaning and enforcement of the constitution; ordinary politics involve issues to be decided within the governance structure established by the constitution.<sup>56</sup> When an executive suspends the operation of term limits in order to remain in power, there is likely to be a severe reaction from other parts of the political system and this can suspend ordinary political processes. This was one of the concerns that Hamilton raised in opposition to the limited and fixed term of office.<sup>57</sup>

These crises do not always rise to the level of midnight abductions of the President à la the Honduran case. However, street protests, name calling, and lamentations about the country's standing as a “democracy” are not infrequent. It seems very clear that an executive who reaches the end of her allowed tenure, remains highly popular, and wishes to stay presents her citizens with an unhappy dilemma. The resulting conflict is one between a majority (or plurality) that yearns for “four [or five or six] more years” and a minority that demands the implementation of constitutional rules. Either side can make a compelling argument for their position from the perspective of democratic theory, but a satisfactory reconciliation of the two sides is unlikely. Furthermore, the personalization of the conflict—over whether a particular individual can retain

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<sup>55</sup> Compare Eric A. Posner & Adrian Vermuele, *Constitutional Showdowns*, 156 U. PA. L. REV. 991 (2008).

<sup>56</sup> JAMES M. BUCHANAN & GORDON TULLOCK, *THE CALCULUS OF CONSENT, LOGICAL FOUNDATIONS OF CONSTITUTIONAL DEMOCRACY* (1962).

<sup>57</sup> Text at note 42, *supra*.

office--distinguishes a term limits crisis from other types of constitutional crisis which might arguably have beneficial effects down the road.<sup>58</sup>

Four resolutions to the crisis are possible, all with varying welfare consequences. The possible resolutions are: (1) the executive departs; (2) the executive remains and *amends* the constitution; (3) the executive remains and *replaces* the constitution; and (4) the executive remains and *ignores* the constitution. The first outcome – the only one in which term limits work as designed -- is seemingly unproblematic, except for those who argue (reasonably) that the executive's departure denies the majority's will.<sup>59</sup> The second and third outcomes represent two methods of constitutional adaptation, with one preserving the constitution and the other eviscerating it. While I remain agnostic about the effects of amendment to abolish term limits, replacement seems to be of greater concern. In part this is because the welfare effects of constitutional replacement can be negative.<sup>60</sup> Replacing a constitution entails costly renegotiation along many dimensions and can perpetuate broader instability. The fourth solution, in which an executive remains without any legal basis, may undermine the very idea of a constitutional order more broadly. In short, replacement and ignoring the constitution will have systemic consequences, while the departure of the executive will also leave the polity devoid of an effective or popular leader.

Even the second solution (amendment) may be problematic, though it adheres nominally to constitutional guidelines. Democracy is ultimately about processes, not personalities, and there is something unseemly about rulers who re-engineer higher law to facilitate personal ambition. Of course, one might adopt a qualified approach to amendments designed to evade term limits by focusing on the *process* of evasion. Carey distinguishes extensions of executive term brought about by negotiations between the president and opposition from those brought about by plebiscite.<sup>61</sup> In the former case (which he associates with strategies chosen by Latin American leaders Carlos Menem, Fernando Cardoso, and Alberto Uribe) the extension of term is accompanied by limits on power, and so the risk of tyranny is mitigated. With referenda, subsequent constraints on the executive may be less effective. Another alternative is informal amendment through supreme or constitutional court interpretation, as in Nicaragua, Ukraine and Kyrgyzstan.

In short, the normative debate over term limits turns on various empirical and theoretical claims. Proponents fear executive tyranny, and more generally the effects of incumbency on political competition. They also believe there to be positive benefits from encouraging leaders to develop successors and political organizations that can extend their policies into the future. Opponents argue that term limits are anti-democratic and form an artificial restriction on choice.

Whatever benefits are associated with term limits, they seem to be a relatively crude instrument because we have no reason to think that the maximum legal term will always or even

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<sup>58</sup> Posner & Vermuele, *supra* note 36.

<sup>59</sup> The manner of the executive's departure may make a difference as well. For example, removal of the president through military intervention might be deemed more damaging to the constitutional order than allowing the executive to remain in place.

<sup>60</sup> ZACHARY ELKINS, TOM GINSBURG & JAMES MELTON, *THE ENDURANCE OF NATIONAL CONSTITUTIONS* (2009).

<sup>61</sup> Carey, *supra* note 18, at 88.

typically correspond with the optimal term of office. That optimal period will be determined by a whole array of exogenous factors, including the extent of dynamic inconsistency problems, the international environment, and the level of incumbency advantage. In addition, this article emphasizes that term limits, whatever their benefits, have the distinct disadvantage of inducing constitutional crises for which there exist few appealing solutions. The frequency of such crises is explored in the next section. To be sure, there are many settings in which term limits appear to function without inviting crisis, such as the United States and Mexico. One wonders whether these settings are immune from crisis, or simply whether an executive that is young enough and popular enough has not managed to tempt supporters to challenge the law.<sup>62</sup>

One implication of this analysis is that empirical inquiry can inform the normative debate. We have, as yet, very little information on the frequency with which term limits are adopted and subsequently evaded. We also need a better sense of how often crises arise historically and how they are typically resolved. The next section begins to provide some documentation of the frequency of term limits and evasions.

## II. EXECUTIVE TERM LIMITS: THEIR TYPES AND INCIDENCE

We define an executive term limit as a constitutional restriction on the number of fixed terms (consecutive or otherwise) the head of state can serve. In this sense it is a species of qualification for office, akin to age and other constitutional provisions that restrict candidate entry and, thus, voters' choice in some way. The focus in this article is exclusively on executives and not legislators, even though some of the same issues arise with limits on either office. Although most of the literature in the United States has focused on legislative term limits,<sup>63</sup> term limits on legislators are rare outside the United States. On the other hand, limits on the head of state's term are a characteristic of the majority of fixed-term (presidential) systems of government and apply to both "real" and figurehead heads of state.

As mentioned in Part I, the ancient Greeks developed the idea of term limits to promote rotation in office. This principle also seems to run through the architecture of the Roman republic, where consuls served for only one year.<sup>64</sup> Drafters at the beginning of the modern constitutional era (the turn of the eighteenth century) were informed by classical models of democracy and certainly saw term limits as a viable option as well. The U.S. founders engaged in a vigorous debate on the subject, both during and after the Philadelphia sessions, described briefly above, but allowed executive re-election. Regardless, George Washington left office after

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<sup>62</sup> Congressman Serrano has introduced a proposal in every congress since the 105th to repeal the 22<sup>nd</sup> amendment. See <http://www.govtrack.us/congress/bill.xpd?bill=hj111-5&tab=related> (last visited Feb. 20, 2010). Harry Reid introduced a similar proposal in the Senate in 1989. See <http://www.thomas.gov/cgi-bin/bdquery/z?d101:s.j.res.00036>: (last visited Feb. 20, 2010).

<sup>63</sup> JOHN M. CAREY, *TERM LIMITS AND LEGISLATIVE REPRESENTATION* (1996); *LEGISLATIVE TERM LIMITS: PUBLIC CHOICE PERSPECTIVES* (Bernard Grofman ed., 1996); Polsby, *supra* note 37; Doron and Harris, *supra* note 22.

<sup>64</sup> TITUS LIVIUS, *LIVY'S HISTORY OF ROME* 13 (Rev. Canon Roberts trans., Ernest Rhys ed. vol. 10 1905); *id.* at 6 (vol. 27)



two terms and set a precedent that would be followed by the next thirty presidents, including some such as Jefferson and Jackson that could easily have won a third term.<sup>65</sup> By at least the late nineteenth century, then, the two-term stay was considered an unwritten constitutional norm in the United States.<sup>66</sup> Only when Franklin Roosevelt violated this unwritten norm was the rule formalized in the form of 22<sup>nd</sup> amendment.<sup>67</sup> As we shall see shortly, constitution-makers in Latin America pointedly ignored the U.S. lead and explicitly adopted term limits almost universally from the start.<sup>68</sup> Executive term limits are thus a central democratic institution associated with national constitutions from very early on.

We can get a better sense of this history by consulting the data on constitutions in the Comparative Constitutions Project.<sup>69</sup> In that project, co-authors and I have collected the written constitutions for all independent countries since 1789 and recorded their characteristics across a wide number of dimensions. Our current sample includes 619 constitutional systems from the universe of 960 systems that we have identified as existing in independent states (including microstates) from 1789 to 2006. Overall, some forty-three percent of these constitutions (n=269) place some limit on the number of terms the head of state is eligible to serve. However, if we consider only the 428 constitutional systems that provide the head of state with a fixed term in office (i.e. presidential and semi-presidential systems) – a more relevant sample for our purposes and the one used throughout the remainder of this article – the share of systems with executive term limits is over sixty percent.<sup>70</sup> Another ten percent of fixed-term constitutions explicitly state that there are no term limits, leaving roughly thirty percent that are silent on the subject. For most of the last group I infer that there is no limit, although certainly some such limits may be imposed by ordinary law or unwritten custom (e.g. as many assert existed in the United States until the passage of the 22<sup>nd</sup> amendment).<sup>71</sup>

Executive term limits come in several varieties. Historically, the most common species (twenty-seven percent of all fixed-term constitutions) allows multiple terms, but not in

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<sup>65</sup> JAMES MORTON SMITH, *GEORGE WASHINGTON: A PROFILE* 245 (1969); JOHN E. FERLING, *THE FIRST OF MEN: A LIFE OF GEORGE WASHINGTON* 345 (1988); JAMES THOMAS FLEXNER, *WASHINGTON: THE INDISPENSABLE MAN* 347 (1974). Jefferson even hoped that his following Washington's precedent might lead to a constitutional amendment to prevent extensions of term. STEIN, *supra* note 15, at 36. Jackson, for his part, proposed such an amendment limiting presidents to one term.

<sup>66</sup> HERBERT W. HORWILL, *THE USAGES OF THE AMERICAN CONSTITUTION* (1925); CHRISTOPHER G. TIEDEMAN, *THE UNWRITTEN CONSTITUTION OF THE UNITED STATES: A PHILOSOPHICAL INQUIRY INTO THE FUNDAMENTALS OF AMERICAN CONSTITUTIONAL LAW* (1890); STEIN, *supra* note 17, at 62-3. John Quincy Adams may have been the first to identify it as such. He called it a "tacit subsidiary constitutional law" in 1839. STEIN, *supra* note 17, at 62.

<sup>67</sup> STEIN, *supra* note 17.

<sup>68</sup> Carey, *supra* note 18 (describing early Latin American thinking on the subject.)

<sup>69</sup> See Comparative Constitutions Project, *supra* note 11, for further details on data and coding.

<sup>70</sup> We exclude parliamentary systems with figurehead heads of state, such as India. Seventy-five percent of in force presidential and semi-presidential constitutions have term limits for the head of state.

<sup>71</sup> In this sense our data may under-state the true extent of actual term limits in operation.

succession, an approach that institutionalizes some alternation in power.<sup>72</sup> The United States model, in which only two terms are permitted (as of 1951), is also found with some frequency (twenty percent).<sup>73</sup> In addition, some eight percent of constitutions combine these two models, so that two successive terms are permitted, after which the candidate must sit out at least one term before returning. Some Latin American constitutions have a prohibition on consecutive terms combined with a specification of the number of terms the executive must remain out of office. For example, the constitutions of Ecuador 1830 and 1897, Panama 1956 and 1994, Uruguay 1918, and Venezuela 1961 require two terms to elapse before the executive can be reelected. Limitations of the executive to a single term, such as the provision at issue in Honduras' constitutional crisis this summer or Mexico's *sexenio*, are relatively rare.<sup>74</sup> Historically, only eighteen constitutions (or three percent of fixed-term constitutions) have included such a provision.

More obscure variants exist. Some constitutions specify an exceptional provision for a particular person holding the executive post as well as a more general provision to apply to subsequent office-holders. For example, the French constitution of 1852 specifies that "The government of the French Republic is confided for ten years to Prince Louis-Napoleon Bonaparte, now President of the Republic" (Article 2). The Constitution of Yugoslavia of 1963 specified a general four-year term for a president but provides unlimited tenure for Josip Broz-Tito, who served in that office until his death in 1980. This tendency towards personalization is not relegated to the dustbins of history. As of September 2009, reports suggested that leaders in Kazakhstan plan to introduce a law that will name long-time leader Nursultan Nazarbayev as "President for Life."<sup>75</sup> A more reasonable attempt to deal with a short-term political need was the Lebanese constitutional amendment of 1995, which included a one-time three-year extension of the term of the sitting president.<sup>76</sup>

Liberia's 1847 Constitution, as amended to 1943,<sup>77</sup> is a very interesting case in which a second eight-year term is prohibited but a shortened second term is allowed:

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<sup>72</sup> Some of these constitutions extend the succession limitation to the vice-president, to avoid the president and vice-president from alternately succeeding each other. *See, e.g.*, CONST. ARG. (1994).

<sup>73</sup> A small number of constitutions allow three terms. KIRIBATI CONST. (1995); RWANDA CONST. (1973); SEY. CONST. (1979); SEY. CONST. art. 53 §2 (1993); REPUBLIC OF VIETNAM CONST. (1962). The largest number of terms is found in the RWANDA CONST. art. 53 (1962), which allows four successive terms. Some of these allow a subsequent term after a term out of power.

<sup>74</sup> On Mexico, *see* ELKINS, GINSBURG & MELTON, *supra* note 60, at 194.

<sup>75</sup> Dana Rysmukhamedova, *Party Leader: Kazakhstan to Consider 'Lifelong Presidency'*, REUTERS, Sept. 14, 2009.

<sup>76</sup> This turned out to set a precedent, adopted by the successor president as well.

<sup>77</sup> The length of term and term limits in Liberia's 1847 constitution were heavily amended throughout years. The length of term was originally 2 years with no term limits. This was extended to 4 years with no term limits in 1907 and extended to 8 years without the possibility of re-election in 1935. This was changed to the final configuration (the one quoted here) in 1943 during William Tubman's tenure as President.

### *Executive Term Limits*

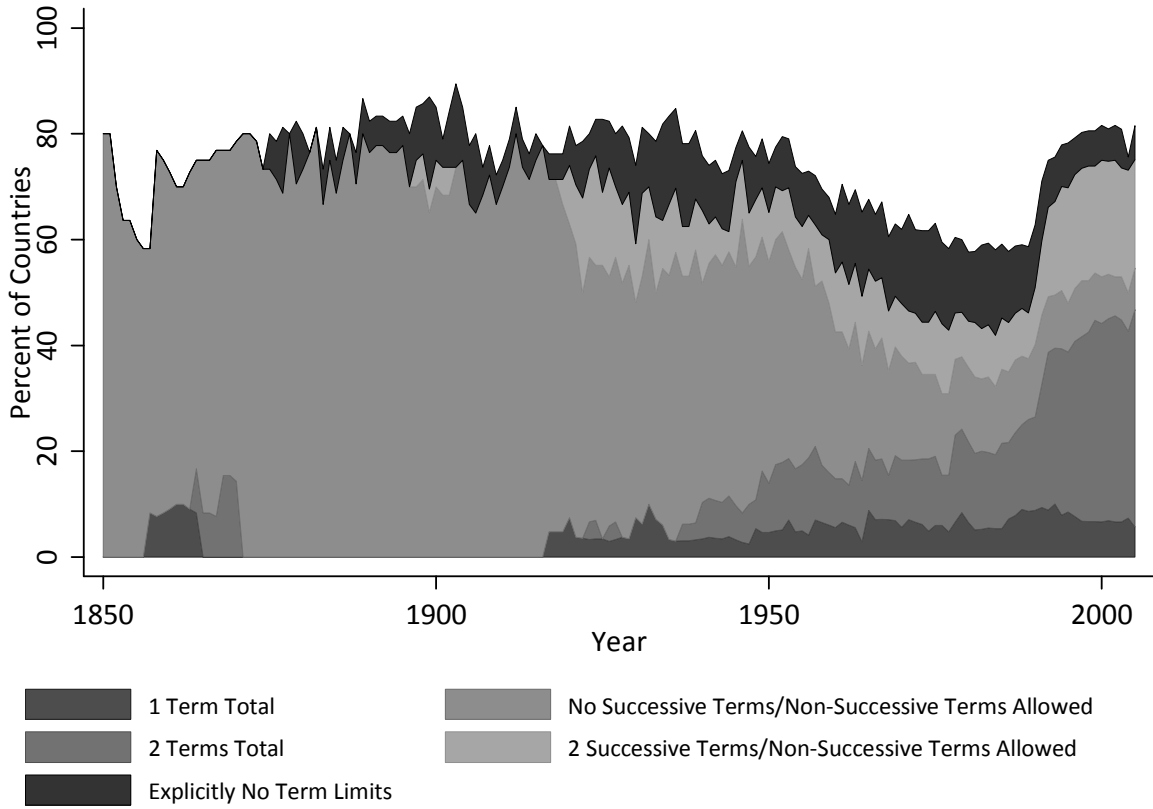
The Supreme Executive Power shall be vested in a President who shall be elected by the people, and shall hold his office for a term of eight years. No President may be elected for two consecutive terms of eight years, but should a majority of the ballots cast at a second or any other succeeding election by all of the electors voting thereat elect him, his second or any other succeeding term of office shall be for four years.<sup>78</sup>

Figure 1 provides a historical sense of the distribution of executive term limits. The majority of fixed-term constitutions have always had term limits. In the post World War II era, however, we observe a drop in their popularity, mostly due to an influx of non-Latin American constitutions to the population. Since the third wave of democratization, executive term limits have come back into fashion and are now as popular as ever. While term limits retain great popularity, constitutions now provide executives with a more generous period to govern than did early constitutions. Prior to World War II, few countries with limits allowed their heads of state to serve more than one consecutive term. Since World War II, most countries with term limits have settled on two terms as the appropriate threshold, with roughly half of those allowing a return to office following a sitting-out period and the other half not allowing any return.

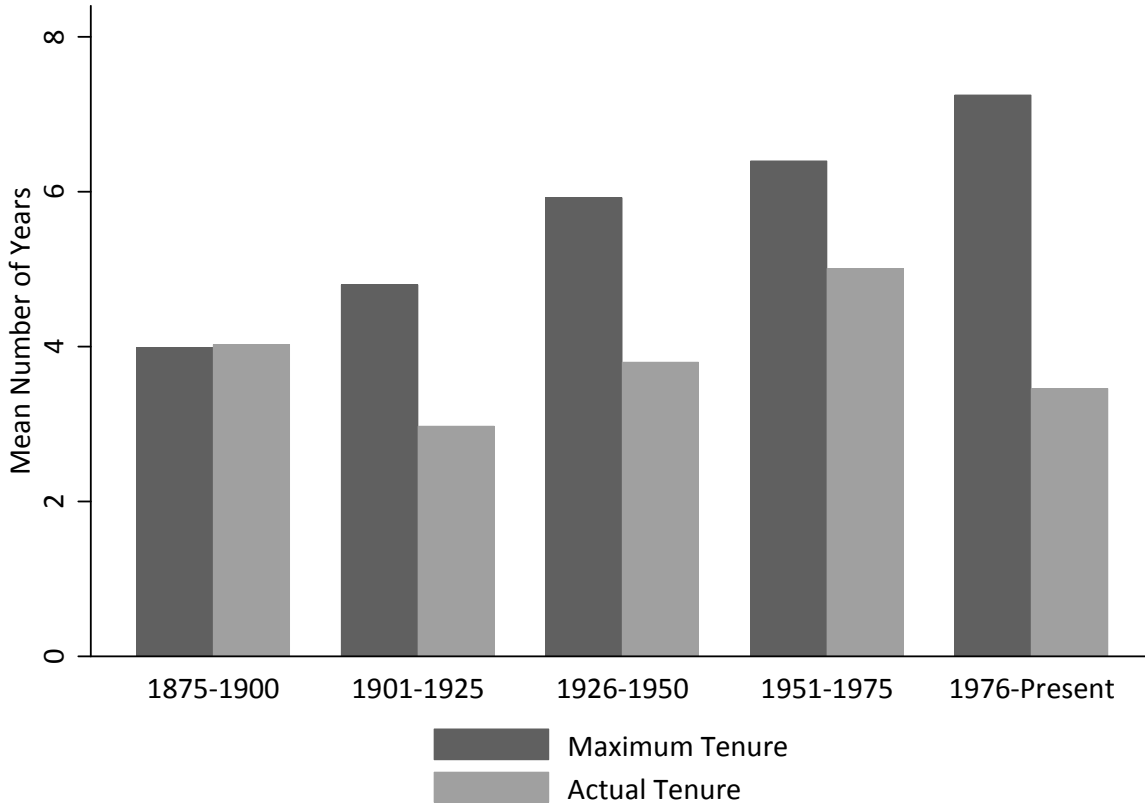
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<sup>78</sup> CONST. LIBERIA 1943, Art. 3.1.

**Figure 1 Percent of Countries with Executive Term Limits, by Type of Limit**  
Universe: Constitutional systems with fixed-term heads of state, since 1850



**Figure 2 Mean Tenure and Mean Permitted Tenure<sup>79</sup> over Time**  
 Universe: All leaders with a limited term, since 1875



Not only is the *number* of permitted terms on the rise, but so too is the *length* of terms. The most common term lengths for heads of state are four, five, and six years – eighty-four percent of constitutions specify one of these term lengths. The prevalence of four-year terms has been on the decline since early 1900s. In 1900, sixty percent of constitutions that had a specified term length for the head of state provided for a four-year term. By 2000, however, that number had decreased to eighteen percent. This drop may be yet another indicator of the decline of popularity of the U.S. constitutional model.<sup>80</sup> The share of constitutions granting a five-year term, on the other hand, has increased dramatically since 1930s from almost none to about sixty percent of those constitutions with a specified term.

The combination of longer terms and an increase in the number of permitted terms has stretched considerably the maximum time heads of state are constitutionally allowed to hold office; indeed, the average permitted tenure has *doubled* since 1875. As Figure 2 shows, the average maximum tenure for executives has increased from just over four years in 1875 to nearly

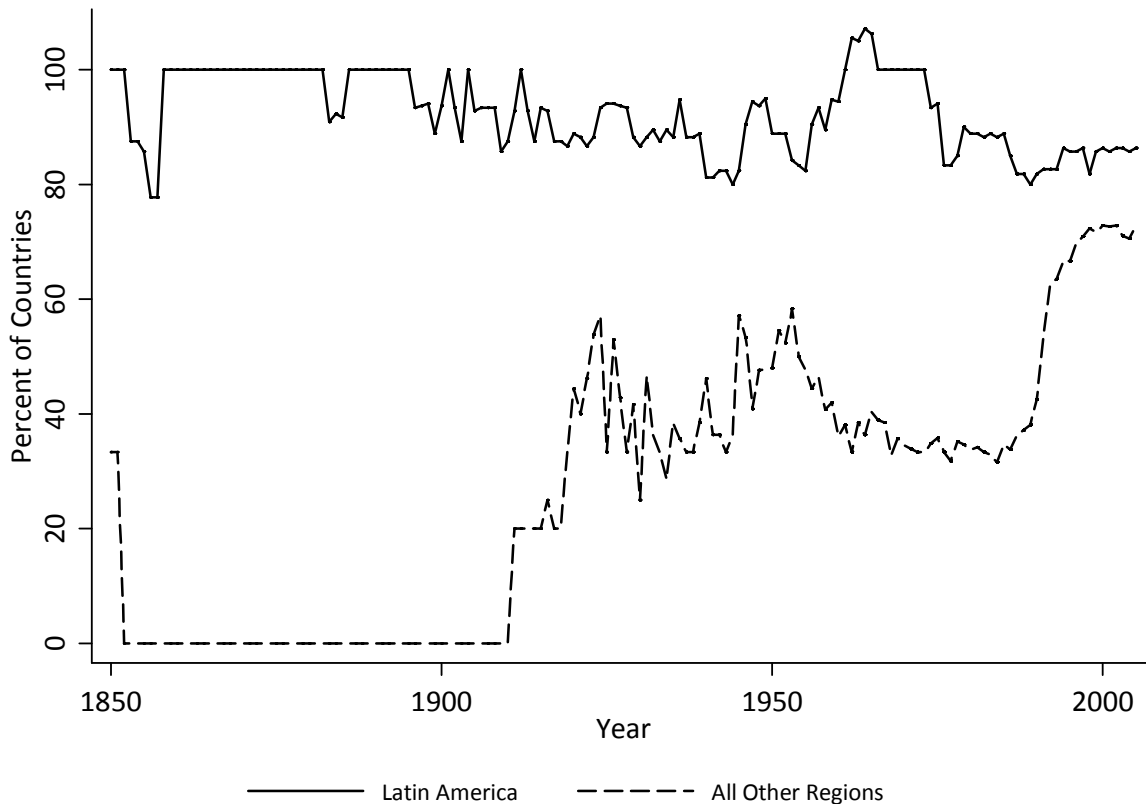
<sup>79</sup> By “permitted tenure” we mean the product of term length and the number of terms allowed.

<sup>80</sup> See ELKINS, GINSBURG & MELTON, *supra* note 60, at 194, for others.

eight years in 2006. For much of this time period, the observed tenure of executives has also increased. Recent years, however, have witnessed a drop in actual time served.

**Figure 3 Percent of Countries with Executive Term Limits, by Region**

Universe: Constitutional systems with fixed-term heads of state, since 1850



There is an interesting regional pattern to these data (Figure 3). In Latin America, a region that has been universally presidentialist since state formation, nearly all constitutions through the turn of the twentieth century and well over ninety percent of constitutions through World War II contained executive term limits. In the post-war era, however, the proportion of cases in Latin America with limits has dropped. Among constitutions currently in force in Latin America, only eighty-five percent contain executive term limits, down from ninety-five immediately after World War II. On the other hand, constitutions in the rest of the world have gone the other direction. While only forty-seven percent of constitutions outside of Latin America provided for term limits in 1950, seventy-three percent now do. With respect to term limits at least, Latin America is starting to look more like the rest of the world at the same time the rest of the world becomes more like Latin America.

Upon closer inspection, the data also suggest distinctive regional and temporal styles with respect to the type of limits. While one-term limits are relatively rare in the modern era, they are nearly all found in Latin America (with most such cases allowing non-successive terms). In the post-Soviet and Sub-Saharan African countries, on the other hand, two-term limits are more

popular, and while the post-soviet countries are split on non-successive terms, the Sub-Saharan African countries tend to explicitly prohibit such a return by the executive.

Overall, the data suggest that term limits are an almost universal and enduring part of presidential democracy. They are prominent not only in Latin America – a region where their usage has eroded in recent years – but also in other regions where presidentialism and (especially) semi-presidentialism have become fashionable. It does appear, however, that restrictions on executives have softened over the years. Leaders are permitted to stay twice as long as they used to be. Still, the cases cited at the outset of this article suggested that even these longer limits may not be enough to contain executive ambition. I turn now to an analysis of these sorts of evasions.

### III. HOW OFTEN ARE TERM LIMITS HONORED?

A crucial question for the study of comparative constitutions is under what conditions their provisions are observed. We know, of course, that in many times and places, constitutions do not provide any effective constraint on power-holders, while in other instances they seem to be effective.<sup>81</sup> Term limit provisions provide one lens through which to analyze this issue. Are term limits mere parchment barriers, to be set aside whenever an ambitious executive wishes to stay in office? Or do they form real constraints that are observed in practice? This section tackles these questions.

#### *A. Understay, Punctual Exit, and Overstay*

Conceptually, executives subject to a fixed term can (1) leave office early (*understay*), (2) serve through their maximum tenure and leave punctually, or (3) *overstay*, defined as staying longer than the maximum term as it stood when one originally came to office. The focus here is on the latter two categories. We can classify leaders into one of the three categories by comparing *de jure* constitutional information on term limits with the period of time that leaders actually served. The former can be assessed with data from written constitutions, combining information on both the *number* and the *length* of terms that leaders are permitted. These two elements combine to produce a measure of the maximum allowed tenure. Figure 4 describes the distribution of this measure, whose mean of roughly eight for this sample corresponds to the U.S. model of two terms of four years and out. The modal value of ten, likewise, corresponds to the increasingly popular formula of two terms of five years.

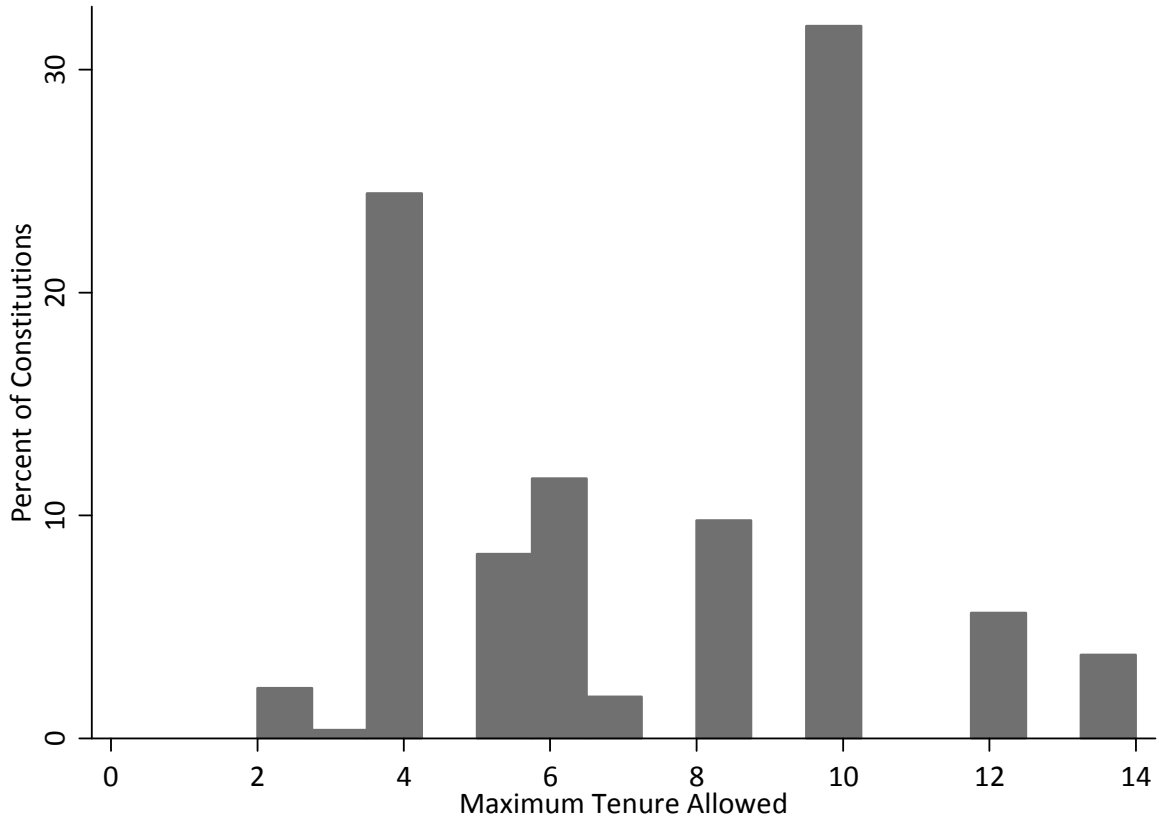
This measure is fairly easy to compare with the career of leaders who served consecutive terms. Of course, any such comparison depends upon good information on the tenure of world leaders and for that I employ a very useful set of data from the Archigos Project,<sup>82</sup> which records the date which leaders took and left office and by what means they left, for leaders across the world since 1875. The analysis of the two sets of data thus begins in 1875, even though we have data on constitutional provisions dating to 1789. The sample includes 644 heads of state subject to limits, of whom 45 percent (292) understayed, 44 percent (281) served their maximum tenure and then stepped down, and 11 percent (71) overstayed.

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<sup>81</sup> Nathan Brown, *CONSTITUTIONS IN A NON-CONSTITUTIONAL WORLD* (2001).

<sup>82</sup> Goemans, Gleditsch & Chiozza, *supra* note 12.

**Figure 4 Maximum Tenure for Heads of State (Combines Term Length and Term Limits)**  
 Universe: Constitutional systems with fixed-term heads of state, since 1789



For the purposes of this article, we are primarily interested in the last two groups of executives, but since the plurality of leaders understay, a brief look at this group seems warranted. Leaders might leave early for a number of reasons. Table 1, which draws on the reasons for exit as coded by Goemans et al., sheds some light here. Most understayers (fifty-one percent) are removed from office through “regular means,” which for the executives in this set means regularly scheduled elections (although these elections may not be “free and fair”). Another twelve percent either died of natural causes or retired citing health reasons. Thus, over sixty percent of executives who did not serve their maximum tenure left through “regular” means, leaving the formal constitution intact.<sup>83</sup> On the other hand, a non-trivial number of understaying executives (32.3%) were forced from office by some extra-constitutional leadership change, such as a military coup. The third row of Table 1 concerns those who serve their maximum time in office and then leave punctually. Roughly ninety percent of these executives leave office through “regular” means. Thus, it appears that those who leave office early are

<sup>83</sup> Some four percent of understaying executives are still in office. The fate of these executives is undecided. They may turn out to be understayers. They may also serve their maximum tenure or beyond.



unlikely to leave through constitutionally prescribed procedures, while those who leave “on time” do.

Some subset of those leaders that understay or leave on time would likely have preferred to remain in office. Another subset probably tried to remain in office, despite limits, but without success. (Indeed, Honduran President Zelaya “understayed” only because he failed in his attempt to overstay.) At this stage, we cannot estimate the population in these groups precisely. Unrealized attempts to extend power do not reveal themselves easily, at least in the large sample we consider here. We can, however, say something about the degree and kind of overstays.

**Table 1 – Punctuality and Mode of Exit**

Universe: Fixed-term executives, since 1875

Punctuality of Exit	Mode of Exit					N
	Still in Office	Regular Means	Died in Office	Retired	Irregular Means	
[Not Subject to Term Limits]	6 (2.9%)	153 (74.3%)	10 (4.9%)	2 (1.0%)	35 (17.0%)	206
Understay	11 (3.8%)	150 (51.4%)	26 (8.9%)	11 (3.8%)	94 (32.3%)	292
Exit at maximum permitted tenure	22 (7.8%)	228 (81.1%)	4 (1.4%)	6 (2.1%)	21 (7.5%)	281
Overstay	18 (25.4%)	26 (36.6%)	7 (9.9%)	0 (0.0%)	20 (29.0%)	71
<b>Means of Overstay</b>						
Amendment	14 (48.3%)	8 (27.6%)	2 (6.9%)	0 (0.0%)	5 (17.2%)	29
Replacement	2 (7.4%)	13 (48.2%)	2 (7.4%)	0 (0.0%)	10 (37.0%)	27
Coup/Emergency/Suspension	1 (20.0%)	1 (20.0%)	1 (20.0%)	0 (0.0%)	2 (40.0%)	5
Disregarded/Not Specified	2 (22.2%)	4 (33.3%)	1 (11.1%)	0 (0.0%)	3 (33.3%)	9
<b>ALL</b>	57 (6.7%)	557 (65.5%)	47 (5.5%)	19 (2.2%)	170 (20.0%)	850

Overall, overstayers do not constitute a significant segment of the population of leaders (eleven percent). Yet, if we restrict the analysis to those executives who actually had the opportunity to overstay (i.e. omitting understayers), the overstayers are a significant group. This sort of restriction makes sense since an executive’s age, popularity, and other factors restrict opportunities for overstaying. So, of those leaders who served at least their maximum tenure, *more than twenty percent stayed longer than allowed*. Overstayers managed this through various means. As we have noted, sometimes the executive may engineer a constitutional amendment or judicial interpretation to ensure continued tenure in office, either by extending the current term

or by removing prohibitions on re-election.<sup>84</sup> If an amendment is unavailable, the executive may formally suspend the constitution's operation, perhaps through the use of emergency powers, or simply ignore the constitution. In some cases, the executive may commission the writing of a new constitution more amenable to longer terms. Such re-writing can extend the term of the executive, remove the limit on the number of terms the executive is able to serve, or simply reset the clock, so to speak, by reducing the number of full terms the executive served under the in force constitution. Thus, both overstay and understay can come in both constitutional and extra-constitutional varieties. Some recent work suggests that extra-constitutional modes of term limit transgression are becoming less common.<sup>85</sup>

To examine this claim in more detail, I analyze every instance of potential executive overstay, meaning all leaders who stayed until at least the expiration of their term. This more careful examination resulted in a smaller number of overstays than observed in the Archigos data. Out of 352 potential overstayers, 89 (25.3%) attempted stay beyond their term.<sup>86</sup> Of these, 79.8% (n=71) were successful. This means that in 20.2% of cases (71 of 352), term limits were not effective predictors of actual term served. The cases of unsuccessful attempts to overstay might also be considered constitutional failures from an ideal of self-enforcement, but from another perspective they reflect the effective (albeit active) enforcement of the constitution.<sup>87</sup>

Of the 71 cases in which executives successfully overstayed, 29 involved constitutional amendment and hence are relatively unproblematic from a normative point of view.<sup>88</sup> In another 27 cases the constitution was replaced, and in 5 cases the constitution was suspended or set aside. The remaining 10 cases indicate the constitution simply being disregarded or are cases for which the mechanism of overstay is unclear, at least according to the historical sources we consulted. Setting aside those who overstayed through constitutional amendment, we can say that roughly 42 cases of overstay (11.9% of all potential overstayers) resulted in a severe break to the

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<sup>84</sup> As noted above, the latter is exactly what occurred in Nicaragua in October 2009. Our data cannot capture such reinterpretations of term limits.

<sup>85</sup> Posner & Young, *supra* note 7.

<sup>86</sup> The most common method of *seeking* an overstay was a constitutional amendment (n=40) followed by constitutional replacement (n=29). Constitutional suspension or coup occurred in 5 cases, and in 15 cases the constitution was simply disregarded or the mechanism of overstay was unclear.

<sup>87</sup> Our data suggests that many of these are failed amendments. Attempts to overstay through amendment succeed in 72.5% of attempts, while attempts through replacement and suspension were successful in more than 95% of cases.

<sup>88</sup> From an empirical standpoint, overstay through amendment also seems relatively unproblematic. Executives who extend their maximum tenure through the amendment process typically only stay in office for an extra four years, about one term. However, executives that extend their maximum tenure through replacement or suspension of the constitution typically stay in office for 6 or 10 extra years, respectively. These numbers would likely be even higher if such a large number of executives who overstay via replacement or suspension were not removed through irregular means (see Table 1). Of course, there are exceptions to this general rule, like Zine El Abidine Ben Ali of Tunisia who has served as president since 1987 via an amendment in 2002 that abolished term limits in the country, but in general, those who extend their term limits through constitutional amendment overstay fewer years than those who use other means. Moreover, as discussed below, the consequences of overstay tend to be less severe when overstay is achieved through amendment.

constitutional order (and another 18 attempts to overstay were unsuccessful). Whether this is considered a large or small number depends on a view of the proverbial glass being half full or half empty, but it is at least arguable that a figure of 1 in 8 represents a serious level of risk for the constitutional order, even if we can celebrate the fact that the constitution “works” in the other seven cases.

Even these numbers may overstate the incidence of punctual exit. Sometimes an executive can leave on time yet violate the spirit of term limits. Vladimir Putin’s amendments that created a more powerful prime ministerial office, and thus provided a “golden parachute” for the ex-President, is one example. Dominican dictator Rafael Trujillo cited American practice of limiting the presidency to two terms when in 1938 he stated that he refused to run, despite what he interpreted to be the wishes of his people.<sup>89</sup> Trujillo proceeded to step down in favor of his Vice-President. But, after President Roosevelt ran for a third term in 1942, Trujillo followed suit and reassumed the presidency for two more terms, stepping down again in favor of his brother Hector in 1952.<sup>90</sup> The analysis of evasions of term limits in this article does not fully capture these “false negative” instances of overstay.<sup>91</sup>

Figures 5 and 6 illustrate patterns of term limit evasion both over time and across space. Both figures report the number of evasions among potential overstayers (that is, the number of leaders who were supposed to leave in a given year) as well as a smoothed (lowess) line that indicates the probability of overstay. These figures provide a sense of the incidence of term limit evasion over time. Figure 5, which plots the incidence for all potential overstayers, reminds us that overstaying term limits is a time-honored practice. The incidence of term limit evasion has remained fairly stable since 1875, albeit with an apparent increase in the last ten years. Although term limit evasion is not a modern problem, it appear to be growing more acute.

Figure 6 describes the offenders by region and over time. Latin America clearly has the longest history of evasion, as it does the longest history of presidential democracy. We count forty-two instances of tenure evasion in Latin America since 1875. But the overall rate of overstay is lower in Latin America than in other regions: only 15.6% of potential overstayers actually overstay. If anything, term limit evasion is on the decline in Latin America relative to the historical pattern.<sup>92</sup>

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<sup>89</sup> Jonathan Hartlyn, *THE STRUGGLE FOR DEMOCRATIC POLITICS IN THE DOMINICAN REPUBLIC* (1998).

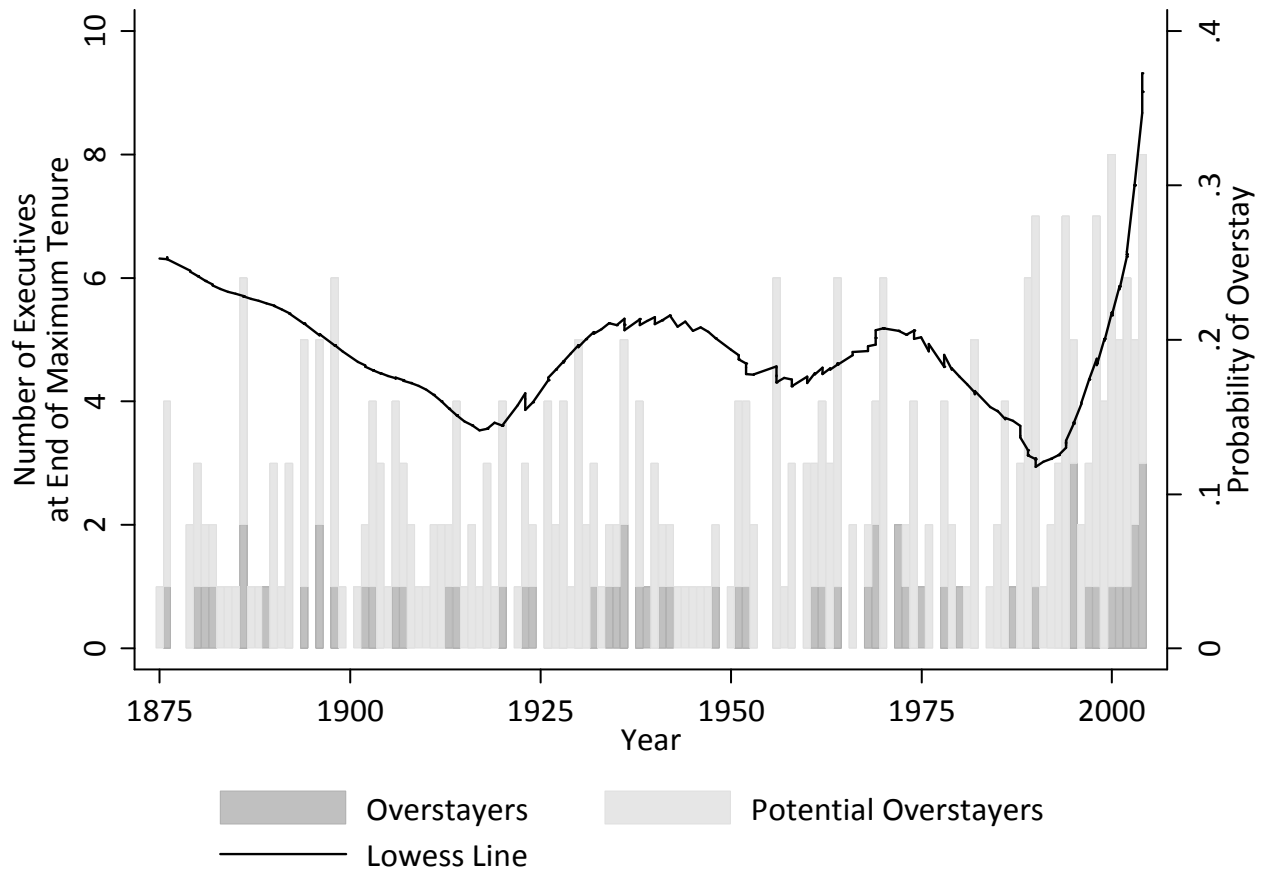
<sup>90</sup> *Id.* Perhaps anticipating such manipulation, some Latin American constitutions forbid relatives from succeeding the president. *See* Constitución Política de la República de Nicaragua [Cn.] [Constitution] art. 171 (1948).

<sup>91</sup> Another type of term evasion involves those who violate the limit on the number of non-consecutive terms. As noted in Figure 1, constitutions increasingly eliminate executives’ ability to serve non-consecutive terms. With these new limits on executive tenure comes the possibility that an executive may run after an intermediary term when they are constitutionally barred from office. The only such evasion we were able to identify was by Rafael Nunez of Colombia. Nunez was president from August 11, 1884 to April 1, 1886, and despite a restriction in the 1863 constitution that a full two-year term must elapse before a president is eligible to serve again, he took office again on June 4, 1887. However, it is unclear whether this is an overstay because Nunez’s two terms were served under two different constitutions. For the sake of inclusiveness, we count it as one.

<sup>92</sup> It should be noted, however, that this analysis does not incorporate the most recent round of evasions in Latin America that have occurred since 2006.

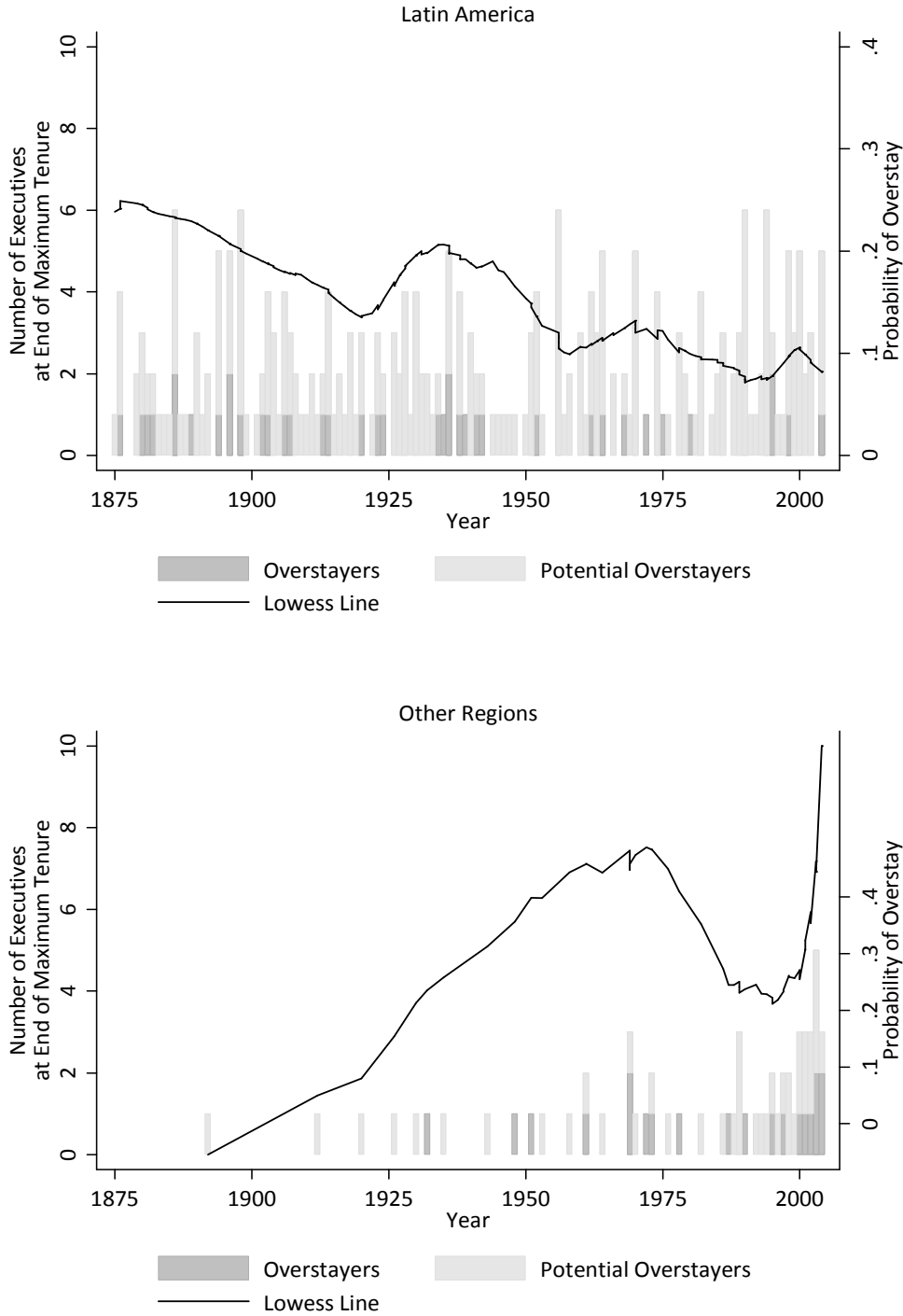
Our primary concern in this section has been to estimate the overall risk of term limit evasion. While tolerance for term-limit evasion will no doubt vary, an overall risk of 11.9% of constitutional rupture (overstay without following amendment procedures) seems somewhat high and worthy of further analysis. The upward trend in term limit evasion also invites a more thorough evaluation of the causes and consequences of evasion. The next two sections take on these tasks.

**Figure 5 Probability of Maximum Tenure Evasions by Executives by Year**  
Universe: Fixed-term executives who served their maximum tenure, since 1875



**Figure 6 Probability of Maximum Tenure Evasions by Executives by Year and Region**

Universe: Fixed-term executives who served their maximum tenure, since 1875



B. Determinants of Overstay

This section explores the determinants of overstay more rigorously in a multivariate analysis. The dependent variable in this analysis is the odds of overstay, and the sample is all potential overstayers. The analysis includes several variables that might be thought to predict overstay. I ask whether *age of the leader* matters, with the hypothesis being that older leaders will be more likely to overstay under the assumption that they are less likely to assume another powerful position in their working life. (I also include a squared term to test whether this effect is non-linear due to the debilitating effects of aging.) I examine the *leader's profession*, categorized as lawyer, military, or other. The former two categories were most frequent, and the expectation is that military leaders would be more likely to violate on the grounds that they have more opportunity because of military support. Lawyers might be less likely to overstay, at least if they have a professional habit of law-abidingness.<sup>93</sup> Other leader characteristics in the analysis include the *number of terms* the leader has previously served and whether the leader himself came into power through *irregular means* such as a coup.

Besides characteristics of the leader we examine the type of term limit at issue to see whether single or multiple terms increase the propensity of violation. We also look at country characteristics such as the number of previous overstays in the country's history, the democratic health of the country at the time the leader took office (using the widely used Polity database),<sup>94</sup> the age of both the regime (i.e., democratic or authoritarian) and that of the constitution,<sup>95</sup> and the number of executives to account for differences in executive-legislative relations. The hypothesis is that older constitutions are more likely to be enforced and thus discourage violators of term limits.<sup>96</sup> Finally, the model includes dummy variables for different regions of the world and the decade in which the potential overstay occurs. To estimate the model I employ logistic regression, which is appropriate for binary dependent variables.

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<sup>93</sup> We surmise that lawyers who do overstay would be more likely to do so through formally constitutional means such as amendment.

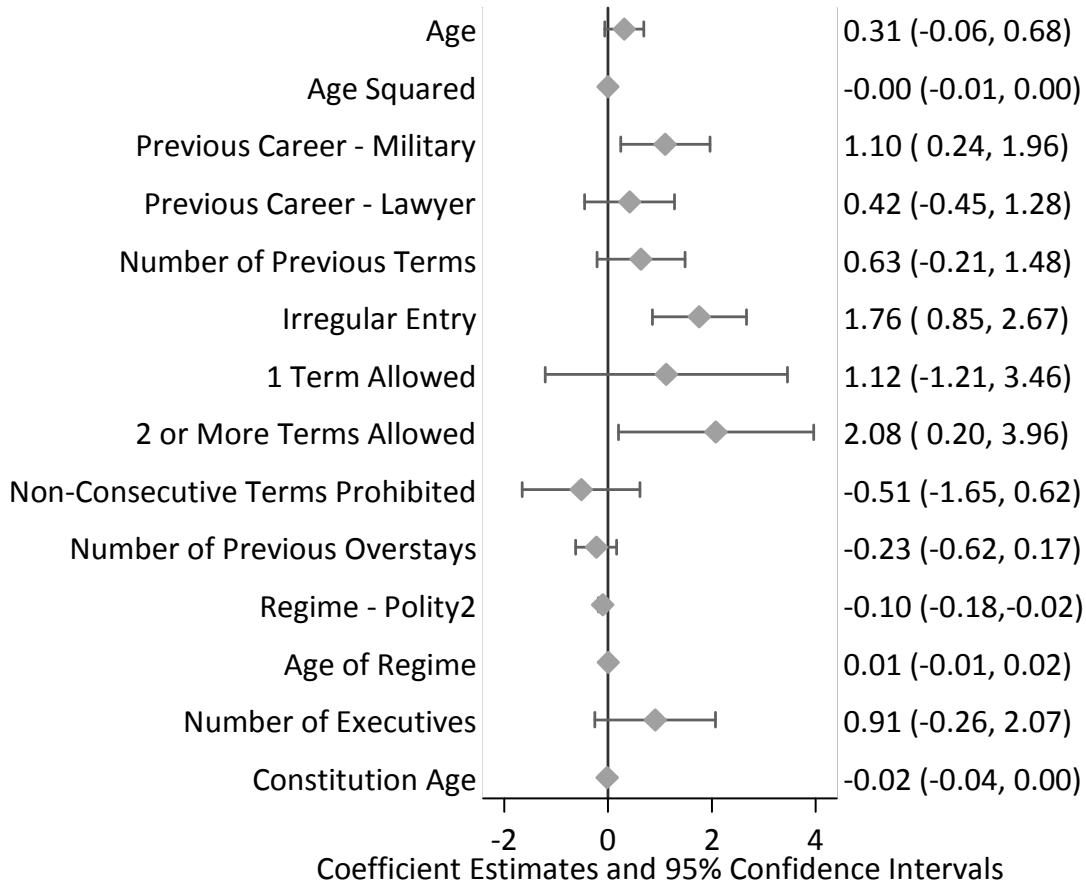
<sup>94</sup> Polity IV Database: Political Regime Characteristics and Transitions 1800-2008, available at <http://www.systemicpeace.org/polity/polity4.htm> (last checked February 22, 2010).

<sup>95</sup> One might suspect that the age of the constitution will be highly correlated with the age of the regime. In the sample we analyze, the correlation is moderately high ( $R = 0.54$ ) but not sufficiently high to suggest that multicollinearity will be a problem.

<sup>96</sup> See Elkins, Ginsburg and Melkins, *supra* note 60, at 111.

**Figure 7 Logistic Regression Model Predicting Successful Term Limit Violations<sup>97</sup>**

Universe: Fixed-term executives who served their maximum tenure, since 1875 (n = 350; 87% classified correctly)



<sup>97</sup> The figure contains results from a logistic regression model with coefficient estimates indicated by the markers and 95% confidence interval indicated by the bars. Positive coefficients indicate that the variable is associated with higher levels of term limit evasion, while negative coefficients indicate a lower likelihood of evasion. Variables whose 95% confidence interval does not overlap 0 – as indicated by the vertical reference line – are considered statistically significant. Regional and decade dummies are omitted from the figure. The full results of this model as well as results from several additional models are available from the author.

*Executive Term Limits*



Figure 7 provides the results, which are largely consistent with the hypotheses. Older leaders are indeed more likely to violate term limits (though the negative sign on the squared term indicates that this is not true of very old leaders). Leaders around ages 30 and 54 exhibit the baseline predicted probability of overstay (model baseline = 0.10),<sup>98</sup> with leaders in their mid-40's having the highest probability.<sup>99</sup> The probability that military leaders will overstay is 0.13 higher than that of non-military leaders, but we find no apparent "law-abidingness" effect for lawyers.<sup>100</sup> Leaders who themselves took office through irregular means have a probability of overstaying that is 0.26 higher than those who took office through regular means. Leaders who previously served non-consecutive terms are just as likely as leaders who served no previous terms to violate.

The results show that executives who are initially allowed to serve two or more terms have a probability of overstaying 0.33 higher than executives who initially face either a single-term limit or no term limit at all, an interesting finding we discuss below. The presence of both democracy and older constitutions tends to decrease the propensity to overstay. This suggests that constitutional enforcement plays a role in deterring violations.<sup>101</sup> The coefficient for the number of executives is close to statistically significant, indicating that the probability that executives in presidential systems will overstay is 0.09 lower than that for executives in semi-presidential systems. On the other hand, a number of country-level variables have no significant effect on overstay, including the prohibition of non-consecutive terms, a history of previous overstays, and the age of the regime. We also find no regional or temporal effects (except for an apparent dearth of overstays in the 1890s). These null findings suggest a certain universality of term limit evasion in that the attributes of violators do not correspond to a particular political, geographic, or historical profile.

One might suspect that the mechanisms affecting leaders' desires and ability to overstay might vary by regime-type. To test this possibility, I re-ran the logistic regression models in

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<sup>98</sup> This baseline is calculated while holding the values of all independent variables (except age) at their means. All of the marginal effects discussed in this paragraph and the next are in reference to this baseline and are also calculated while holding all other independent variables at their means. For example, when we state that leaders in their mid-40's have a 0.07 higher probability of overstay than leaders aged 30 or 54, this means that leaders in their mid-40's have a 0.17 probability versus a 0.10 probability for leaders aged 30 or 54.

<sup>99</sup> 0.07 higher than the baseline.

<sup>100</sup> We do not yet examine whether those lawyers who do overstay do so through more legalistic means. Analyzing the means of overstay in a multivariate framework would require the use of a multinomial logit or probit model, and our data do not satisfy the independence of irrelevant alternatives (IIA) assumption required by such a model. A two-way analysis of this relationship, though, suggests that lawyers who overstay are no more likely to use amendment than executives with other professions.

<sup>101</sup> Barry R. Weingast, *The Political Foundations of Democracy and the Rule of Law*, 91 AM. POL. SCI. REV. 245 (1997).

Figure 7 on samples restricted to autocracies or democracies, measured at the first year of the leader's term.<sup>102</sup> Interestingly, the variables that predict overstay in democracies are different from those that do so in autocracies. In democracies, only the military background of the leader and the age of the constitution remain statistically significant. In autocracies, many of the same variables that were statistically significant in the full sample remain so, including age, military background, form of entry, number of terms allowed, and Polity score.<sup>103</sup>

To summarize, several interesting findings emerge from the analysis of the determinants of term limit violation. The results demonstrate that former military leaders are significantly more likely to overstay, regardless of the kind of regime in place when they take office. In autocratic regimes, the term limit faced by the executive influences their decision to overstay, as leaders are much more likely to overstay if they are initially allowed two or more terms than if they face no term limit or are only allowed 1 term. Perhaps leaders develop a taste for power in their second term, or have accumulated sufficient power to be able to manipulate the tools of government to allow an overstay. The results also show that executives elected in democracies are less likely to violate constitutions. This is consistent with the general idea that constitutions “matter” more in democracies than in autocracies.

### *C. Consequences of Overstay*

Even if overstay through constitutional rupture occurs with some frequency (one in eight cases), it does not follow that these actions result in constitutional crisis, as opposed to something closer to a consensual shift in constitutional norms. A more thorough investigation of the consequences of term limit violations is required. The remainder of this section offers some suggestive evidence.

To evaluate the effect of term limits on crisis propensity, we need some sense of the baseline incidence of crisis. Unfortunately, there is no generally accepted indicator of constitutional crisis of the type we are considering. One way to get at the question is to examine the percentage of constitutional deaths (instances in which a constitution is suspended or replaced, as opposed to merely amended) that result from the quest for overstay.<sup>104</sup> By this metric, term limits pose a moderate threat to constitutions. 32 constitutions (less than 5% of all constitutions) have met their demise as a result of term limit violations. When compared to some important environmental threats to constitutions (e.g. war, coups, and regime change, etc.), term limit violations are not associated with a large number of deaths.<sup>105</sup>

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<sup>102</sup> These models are on file with the authors. For this analysis, we classify country-years as democratic if their Polity score is 3 or greater and as autocratic if their score is less than 3. This is a relatively low threshold compared to the one traditionally used in the literature, because we wanted to be sure to include new and marginal democracies in the sample.

<sup>103</sup> The only differences between the autocracy-only model and the full-sample model are that, in the autocracy-only model, the confidence intervals of the number of executives variable shrink and the age of the constitution is no longer statistically significant. Thus, the only variable that predicts overstay regardless of regime-type is military background.

<sup>104</sup> See ELKINS, GINSBURG & MELTON, *supra* note 60, at 55-59 (amendments typically do not change the fundamental constitutional structure.)

<sup>105</sup> See generally ELKINS, GINSBURG & MELTON, *supra* note 60.

Examining formal constitutional changes alone, however, does not fully capture the extent that the conflict over term limit violations interrupts normal politics. Perhaps a better measure of constitutional crisis is the occurrence of political conflict. To operationalize political conflict, I use Bank's data on assassinations, strikes, guerilla warfare, government crises, purges, riots, and revolutions.<sup>106</sup> Table 2 captures the average number of years of political conflict for all years of rule by category of leader (with respect to the punctuality of their exit). One observes that overstayers experience fewer years of conflict than do non-overstayers. This is somewhat understandable, in that an overstay will either be sufficiently popular to minimize political conflict or sufficiently strong to repress it. A similar trend is apparent even if we account for crisis during the last two years of executives' terms, that during the two years prior to a term limit violation, and even for the means of overstay. Furthermore, the level of political conflict is relatively low in systems in which there are no term limits at all. It is hard to sort out the story here because of selection effects, but the overall conclusion seems inconsistent with the conjecture that term limits induce higher levels of political conflict through overstays. Alexander Hamilton, it seems, was wrong about this point.

**Table 2 – Average Number of Years with a Conflict by Overstay Status<sup>107</sup>**

Universe: Fixed-term executives, since 1875

	<b>All Years of Term</b>	<b>Last 2 Years of Actual Tenure</b>	<b>Last 2 Years of Permitted Tenure</b>	<b>N</b>
No Term Limits	2.4 (54.2%)	0.8	-	97
Understay	1.7 (75.4%)	1.1	-	209
Exit at maximum permitted tenure	3.3 (60.0%)	1.1	1.1	202
Overstayer	6.5 (46.5%)	0.6	0.7	54
<b>By Means of</b>				
Amendment	4.7 (44.0%)	0.4	0.4	35
Replacement	7.6 (58.4%)	1.1	0.9	21
Coup/Emergency/Suspension	5.3 (20.1%)	0.5	0.5	4
Disregarded/Not Specified	9 (58.9%)	0.8	0.4	9
<b>All</b>	<b>2.9 (63.4%)</b>	<b>1.0</b>	<b>1.0</b>	<b>562</b>

<sup>106</sup> Cross National Time Series Data Archive, <http://www.databanks.sitehosting.net/Default.htm> (last visited Feb. 20, 2010)

<sup>107</sup>The percent of country-years leaders experienced conflict during their terms is the variable analyzed in the table. A country-year is coded as experiencing a conflict if there were any of the following events in that year: assassinations, strikes, guerilla warfare, government crises, purges, riots, or revolutions. The data for this variable are from Banks (2001) and spans from 1919-2003. We prefer this measure to Bank's conflict index, because we are interested in instances of conflict rather than the severity of conflict.

Despite little evidence that term limit violations induce constitutional crisis, term limit violations may have other negative effects. One potential consequence is an increased likelihood of future overstay. But, perhaps surprisingly, a national history of overstay does not seem to predict future occurrences. Executives in a country with no history of overstay are *more* likely to violate than are those in a country with at least one previous occurrence (24.9% vs. 15.1%). And the probability generally declines with the number of previous overstays in the country (Table 3).<sup>108</sup> Thus, it appears that overstay does not breed future overstay.

**Table 3 – Analysis of Overstay Recurrence**

Universe: Fixed-term executives who served their maximum tenure, since 1875

<b>Previous Overstays</b>	<b>Number of Executives</b>	<b>Number of Overstays</b>	<b>Percentage of Overstays</b>
None	165	41	24.9%
At Least 1	185	28	15.1%
<b>Number of Previous Overstays</b>			
1	57	16	28.1%
2	75	8	10.7%
3	42	2	4.8%
4	1	1	100%
5	10	1	10.0%
<b>Means of Previous Overstay</b>			
Amendment	75	7	9.3%
Replacement	64	14	21.9%
Coup/Emergency/Suspension	5	1	20.0%
Disregarded/Not Specified	41	6	24.0%
<b>ALL</b>	<b>350</b>	<b>69</b>	<b>19.7%</b>

Another potential consequence of term limit violations is that they might degrade democracy. Table 4 assesses this possibility. Democracy in these figures is measured by the widely used Polity index.<sup>109</sup> The results demonstrate that levels of democracy do not tend to change much across leaders' tenures, regardless of whether the leader is an overstayer or not, and

<sup>108</sup> Leaders who take office in a country with a history of overstay through means other than amendment show a higher propensity for future violation (greater than 20%), but this higher propensity is still less than that of leaders who take office in a country with no history of overstay.

<sup>109</sup> The raw scores from Polity should be interpreted with some caution, as the rating methodology is likely to include the fact of overstay as part of its explicit criteria through the executive constraint subcomponent. If this was driving our results, then we would expect overstay to lead to large changes in democracy, which is exactly the opposite of what we find. Nonetheless, to ensure that our results are not influenced by our choice of democracy measure, we checked them with the Unified Democracy Scores (UDS), which deliver substantively similar results.

this trend is the same regardless of initial regime-type or the means of overstay. In fact, if there is any trend, it is that in initially democratic regimes, democracy increases slightly during the tenure of overstayers. This is especially surprising since the removal of term limits might itself penalize a country's score on democracy, based on the conceptualization employed by Polity.

**Table 4 – Mean Level of Democracy (as Measured by Polity) by Initial Regime-Type and Overstay Status<sup>110</sup>**

Universe: Fixed-term executives, since 1875

	N	Autocracies (Polity < 3)			Democracies (Polity ≥ 3)		
		Start Year	Violation Year	End Year	Start Year	Violation Year	End Year
No Term Limits	225	-4.8 (2.80)	-	-4.5 (2.80)	8.7 (1.85)	-	8.7 (1.77)
Understay	304	-3.0 (3.02)	-	-3.0 (2.98)	6.9 (2.05)	-	7.0 (2.00)
Exit at maximum permitted tenure	279	-2.5 (3.16)	-	-2.3 (3.19)	7.3 (2.28)	-	7.3 (2.31)
Overstay	69	-4.4 (3.37)	-4.6 (3.44)	-4.4 (3.49)	6.6 (1.76)	7.1 (1.36)	7 (1.34)
<b>By Means of</b>							
Amendment	38	-5.0 (3.38)	-4.7 (3.68)	-4.4 (4.05)	7.2 (1.57)	7.75 (1.71)	7.8 (1.72)
Replacement	29	-4.2 (2.95)	-5.1 (3.33)	-4.6 (3.34)	6.0 (2.00)	6 (-)	8 (-)
Coup/Emergency/ Suspension	5	-5.0 (4.24)	-5 (4.24)	-4.8 (3.95)	5.0 (-)	-	-
Disregarded/Not Specified	15	-2.3 (3.80)	-4.2 (4.21)	-3.1 (3.98)	6.0 (1.41)	6.5 (0.71)	6 (1.00)
<b>ALL</b>	877	-3.3 (3.18)	-	-3.2 (3.18)	7.7 (2.19)	-	7.8 (2.15)

Another way to get at the consequences of term limit evasion is to trace particular case histories. The appendix lists every violator of term limits, sorted by whether the country was a democracy or autocracy at the time the leader took office. Of the democratically elected leaders who overstayed in recent years, several did so through amendment and thus may fit the model of the popular leader who works around the default rule to remain in office. Carlos Menem in Argentina and Fernando Cardoso in Brazil revised their constitutions to allow a second term, and both turned over the office to opposition parties after their second terms were over (though Menem tried to stay on before his attempt was ruled unconstitutional). Alexander Lukashenko in Belarus, on the other hand, used amendment to consolidate power and moved his country from

<sup>110</sup> The cells contain the mean level of democracy with the standard deviation in parentheses.

the ranks of democracies to a “competitive authoritarian” regime. Others who pursued this strategy either replaced the constitution wholesale (Alberto Fujimori, Ferdinand Marcos) or simply suspended it after failing to secure amendment (Tandja Mamadou in Niger).

The 19<sup>th</sup> century cases are also mixed. For example, Costa Rica enacted a single four-year term limit with its 1871 constitution. President Tomás Miguel Guardia Gutiérrez, who had been part of a coup ousting the previous president, overstayed several months, then ceded power to a puppet leader briefly before being re-elected to continue his overstay until his own death. Term limits were then observed for some time. In 1889, President Ramón Bernardo Soto Alfaro attempted to overstay after holding the “first honest election” in the country—but mass protests prevented him from succeeding.<sup>111</sup> The regime of his successor Jose Joaquin Rodriguez marked a turning point for democracy.<sup>112</sup> Thereafter, only one leader has overstayed (Castro in 1898) and has done so through constitutional amendment.<sup>113</sup> The Costa Rican story appears to be one in which attempted evasion leads to mass enforcement, ultimately leading to stable democracy.

Contrast Venezuela, the country in the sample with the largest number of overstays (six). Five of these occurred in the forty years prior to 1913 (see Appendix), a period of successive military strongmen, who sometimes overstayed while other times governed through puppet leaders that would leave office on time. There was no effective enforcement of term limits, and their application seemed to depend on the whim of the ruler. After democracy was re-established in 1959, term limits were regularly observed. Hugo Chavez, however, initiated constitutional reform after his initial election in 1999, and then in 2007 attempted to amend the new constitution to remove term limits. His first referendum attempt failed narrowly, but Chavez was able to hold another referendum in 2009 which succeeded. Chavez seems to represent a return to an earlier, less democratic tradition in Venezuela.

Ferdinand Marcos of the Philippines exemplifies an executive who suspended democracy to remain in office. The Philippines was considered a democracy at the time of his initial election in 1965. The presidential term was four years, with a limit of eight consecutive years in office.<sup>114</sup> In 1969, Marcos won an unprecedented second term, but thereafter became increasingly dictatorial and developed a cult of personality. With rising insecurity and a communist uprising, Marcos declared martial law in 1972, suspending Congress. He then wrote a new constitution that allowed him to remain in power, and his dictatorship continued until the “People Power” revolution of 1986. Since the re-establishment of democracy, however, the Philippine political system has weathered many attempts to engineer overstay, and has rebuffed them all.<sup>115</sup> Like Costa Rica, an incident of successful enforcement seems to have facilitated a pattern of observance of term limits thereafter.

To summarize the main results of the empirical analysis: some form of constitutional rupture occurs in roughly twelve percent of cases in which a leader has the potential to overstay,

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<sup>111</sup> James L. Busey, *The Presidents of Costa Rica*, 18 *THE AMERICAS* 55, 58 (1961).

<sup>112</sup> *Id.*

<sup>113</sup> Castro attempted another constitutional amendment in 1902 to allow himself to remain in power, but was defeated. See Wikipedia Rafael Yglesias Castro, [http://en.wikipedia.org/wiki/Rafael\\_Yglesias\\_Castro](http://en.wikipedia.org/wiki/Rafael_Yglesias_Castro) (last visited Feb. 20, 2010).

<sup>114</sup> CONST. (1946), Art. VII, §5 (Phil.).

<sup>115</sup> See *supra* note 6.

and in eighteen additional cases an executive attempted to overstay. But overstayers are not associated with higher levels of violent political conflict. Overstay does not breed future overstay, nor does it lead to regular decline in levels of democracy. Furthermore, many overstayers seem to leave office after one additional term, particularly those who achieve their extended term through constitutional amendment.<sup>116</sup> Democracy, on the other hand, seems to reduce the prospect of overstay. In sum, these results suggest that executive overstay is not as problematic as recent events suggest.

#### *D. Implications and Discussion*

Our analysis also has a number of implications for the question of whether and how constitutions “work”.<sup>117</sup> From one perspective, term limits seem to be observed with remarkable frequency, though it is not clear what a baseline level of enforcement of such provisions ought to be. The results suggest that the function of term limits differs across regime type, and that broadly speaking, they tend to function better in democracies than dictatorships. We do not have a clear view of the mechanism by which term limits function in democracies: it may operate through selection of better agents, through the prospect of enforcement by elites or the people, or some other mechanism. Nevertheless, the effect is strong enough to suggest that constitutional provisions seem to be observed more frequently in democracies than in dictatorships. The gap between constitutional provision and practice is narrower.

Examining each leader who has violated the term limit provisions (see Appendix) reveals only 15 violations by leaders who took office in a democratic regime (n=160), with the remaining 56 violations occurring in non-democracies (n=192).<sup>118</sup> One unanswered question, then, is why leaders in autocracies adopt term limits in the first place. While at the margin term limits may provide some constraint, in many cases they provide none. Furthermore, the examples of Putin and Trujillo demonstrate that even apparently-effective term limits can be illusory. To speculate, the answer may have something to do with the achievement of internal coordination within the regime—a term limit may signal to potential rivals that they may have a chance to replace the leader down the road.<sup>119</sup> But this question requires further micro-study of authoritarian constitutionalism.

Even if term limit evasions are sometimes associated with constitutional crises of a negative sort, it is necessary to disaggregate democracies and autocracies from a normative perspective. A “crisis” in a dictatorship might lead to democratization and hence be desirable from a normative point of view. For democracies, the reverse presumption holds. We cannot therefore posit a global recommendation for both regime types.

Despite these limitations of the present analysis, those who are skeptical about term limits can point to the Zelaya and Tandja cases to argue that term limits are associated with *some* risk

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<sup>116</sup> See footnote 88.

<sup>117</sup> BEAU BRESLIN, *FROM WORDS TO WORLDS: EXPLORING CONSTITUTIONAL FUNCTIONALITY* (2009).

<sup>118</sup> Our measure of democracies are those countries with a Polity score of 3 or greater. This is a relatively low threshold compared to the one traditionally used in the literature, because we wanted to be sure to include new and marginal democracies in the sample.

<sup>119</sup> Robert Barros, *CONSTITUTIONAL DICTATORSHIP* (2002).

of constitutional rupture. From a constitutional design perspective, then, we ought to consider institutional alternatives to term limits. The normative question about whether term limits ought to be adopted will depend on the existence of alternative institutional schemes that might accomplish the same goals without some of the costs. The next section considers a number of such schemes.

#### IV. INSTITUTIONAL ALTERNATIVES

Term limits are designed to address real problems with democratic governance, namely the incumbency advantage which distorts political choice and may hamper optimal selection of representatives. In the absence of term limits, we might have underperforming representatives that stay too long, and so we decide *ex ante* to precommit to selecting a new agent. But term limits are a blunt instrument to address the incumbency advantage. Not only is the maximum legal length of a limited term unlikely to correspond to a hypothetical optimal term for an executive, but this mismatch might induce popular executives to try to adjust the constitution to stay in power. If opposition is significant, the resulting crisis can lead to the death of the constitution and even a descent into tyranny. This section considers several alternatives that might accomplish some of the desirable goals of term limits without entailing all the costs. These include mechanisms to adjust term length; adjust the powers of the presidency through “unbundling”; handicap the incumbent; and incentivize the challenger.

##### *A. Adjusting Term Length*

We briefly mentioned the Liberian model of 1943, which featured a halving of the term length after the first two terms. This reduction in term length might provide for greater accountability of the incumbent, and in party-based systems might incentivize the political party to cultivate successors to the current leader. A rational political party would rather retain office with a new candidate for a longer term, as opposed to retaining office with the incumbent for a shorter period.

Adjusting term length might serve to address the concern with executive tyranny that motivates some critics of term limits. More frequent elections would allow the public to continuously scrutinize executive performance, enhancing accountability. However, this proposal would not directly address the incumbency advantage. There is nothing in more frequent elections *per se* that would reduce undue advantages an incumbent holds in electoral competition. Indeed, it might give added legitimacy to an incumbent who frequently faces the voters.

A related substitute for term limits would be to promote the institution of recall. A president subject to potential recall from voters is somewhat akin to a prime minister in a parliamentary system, in that every period of governance is potentially her last.<sup>120</sup> Recall provisions are not popular in presidential democracies, for they undermine the advantages of having a fixed term in the first place, namely the insulation to pursue policies that are valuable in the mid-term. A feasible hybrid would be to have recall available in later terms only: thus the system would have features of a presidential system during the first term and of a parliamentary

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<sup>120</sup> Albert, *supra* note 13.



system in subsequent terms. I know of no system that has tried it, but it seems like a feasible option.

There is, of course, no reason that candidates to office need to stand for symmetrical terms. We might think about term length as a variable that candidates could themselves manipulate within constraints. Suppose, for example, that candidates for a second term to the United States presidency could choose to run for (a) a single term of four years or (b) a three year term with the possibility of a final third term. Again, this idea seems to incorporate into a presidential system some of the irregular rhythm of elections in a parliamentary system. There would be some coordination costs in aligning terms of the House of Representatives with the presidency. But there is nothing sacred about the four year rhythm of the presidential cycle, and creative institutional design might exploit variation in term as a device to accomplish some of the ends of term limits.

### *B. Adjusting Powers*

Another alternative to term limits might be to reduce formal executive powers as the tenure of the office holder goes on. This could take two forms: unbundling of powers and raising constraints. Either of these options involves the weakening of the executive, and hence reduces the incentives to remain in office after the term ends.

Unbundling refers to the possibility of breaking up executive functions typically concentrated in a single office.<sup>121</sup> This might involve the adoption of plural executives, such as found in many American states with directly elected attorneys general, vice presidents and other officials. In this context case, unbundling might be thought of as shorthand for the idea that the formal powers of the executive might be reduced as the number of terms increases. Such powers might be transferred to another executive (for example to the prime minister in a semi-presidential system) or to another branch of government entirely. Raising constraints refers to the idea that one might calibrate constraints on executive decision-making by empowering other actors, such as legislatures.

To illustrate, imagine a presidency with the constitutional powers to appoint officers, to issue executive decrees, and to veto legislation, subject to over-ride by 2/3 of the legislature. An unbundling strategy might take the power to issue decrees and transfer it to another executive, say the vice-president or member of the legislature. Raising constraints would make override of the executive veto easier, say by reducing the vote threshold to 60%.

Many term limit adjustments may already proceed under some version of this proposal. As mentioned earlier, Carey notes several cases in which an extension of executive term was secured through negotiation with Congress.<sup>122</sup> For example, Carlos Menem in Argentina was able to secure an extension for a third term in exchange for policy concessions to Congress. Menem stepped down after the third term. In cases such as this one, the negotiation may involve new implicit or explicit limitations on the institutional power of the presidency, in which case de facto unbundling may have taken place.

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<sup>121</sup> Christopher R. Berry & Jacob E. Gersen, *The Unbundled Executive*, 75 U. CHI. L. REV. 1385 (2008); Jacob E. Gersen, *Unbundled Powers* (Jan. 10, 2010) (unpublished manuscript, on file with Virginia Law Review).

<sup>122</sup> Carey, *supra* note 18.

Adjusting powers has several advantages. By reducing formal power over time, it has the effect of mitigating the concern for tyranny that motivates term limits in the first place. Reducing powers also serves to disincentivize incumbent candidates from running for office. Indeed, a strong political party might insist that the incumbent leave office on time, so as to facilitate another candidate who might win and acquire the full range of executive powers. By reducing the stakes of the presidency, adjusting powers might facilitate on-time departure and build stronger parties.

To be sure, shedding powers is no panacea. It may introduce a new veto player over key policies and so encourage delay and gridlock. And in any case, a formal reduction in powers may not offset the tremendous informal powers that long-serving executives have. These might more than compensate for the lack of formal authority. One might also imagine an executive would seek to re-acquire the lost powers through constitutional amendment after gaining office.

### *C. Handicapping Incumbents and Incentivizing Retirement*

Beyond manipulating the design dimensions of term length and constitutional powers, we might consider calibrating the electoral process more directly. One common mechanism is that used in many Latin American countries, in which an incumbent seeking re-election must step down from office during the period of the electoral campaign. This device prevents the incumbent from using the advantages of office to maintain power. To be sure, a well-known incumbent may still have advantages due to cognitive biases and to media familiarity. But this modest step does serve to handicap incumbents somewhat, and may do little harm. I am aware of no literature evaluating the institution.<sup>123</sup>

A version of this is the notion of caretaker governments. In some parliamentary systems, a new caretaker government is installed when the government loses a vote of no-confidence. For example, in Bangladesh, the caretaker government is an advisory council headed by a former Chief Justice, who governs for three months prior to a new election.<sup>124</sup> This device is designed to prevent self-dealing by a more conventionally political caretaker government.

If one cannot effectively handicap incumbents, one could consider the inverse: incentivizing incumbents to leave office. Providing for some *ex officio* constitutional power for ex-presidents might induce them to step down. Consider France, which makes all living ex-presidents *ex officio* members of the constitutional court (the *Conseil Constitutionnel*). Alternatively, international actors can induce presidents to step down. Ernesto Zedillo, for

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<sup>123</sup> Another approach would focus not so much on the incumbent, but on incentivizing challengers through leveling the playing field so as to overcome the excessive advantages of incumbency. Consider, for example, a situation in which elections involve public financing. We might provide *more* public funds to challengers than to incumbents so as to overcome the advantage of the incumbent. The Vermont campaign finance restrictions struck down in *Randall v. Sorrell*, 548 U.S. 230 (2006) imposed lower expenditure limits on incumbents than on challengers, though this was not a dispositive issue in the case. We might also insist on *more* media time for the challenger than for the incumbent to offset greater public information on the latter. Such overcompensation would be particularly helpful in reducing the barriers to entry associated with incumbency. Of course, there are technical issues of valuation which will not be easy to overcome. But this mechanism holds the greatest promise for overcoming the incumbency advantage. Monetizing the incumbency advantage would surely help to overcome it.

<sup>124</sup> WILLIEM VAN SCHENDEL, *A HISTORY OF BANGLADESH* (2009).

example, is a professor at Yale University. The African entrepreneur Mo Ibrahim offers an annual prize for the African head of state who steps down, leaving a legacy of good governance (though he has had some difficulty finding a recipient in recent years).<sup>125</sup>

This approach to institutional design is orthogonal to term limits, in that the two mechanisms can be adopted separately or in conjunction. Its utility will depend on the relative sweetness of the inducements relative to the potential gains of remaining in office. Where the latter potential gains are high—such as in non-democracies with resource-rich economies—no level of public sector inducement to leave office is likely to be sufficient. Perhaps this explains why the well-intentioned Ibrahim prize has gone unclaimed.

A related concern is the risk of stepping down. Replacement leaders need to be able to credibly commit not to extort the wealth and other benefits accrued by leaders, and this is an issue that has caused some concern about the International Criminal Court for example.<sup>126</sup> Ensuring that retiring leaders have immunity, asylum possibilities and other such security guarantees should help to induce them to leave office after successful overstay. This suggests the approach Peru has taken with regard to Alberto Fujimori, extraditing him from Japan and Chile, is precisely wrong.<sup>127</sup> A subsequent overstayer in Peru will be less likely to step down (though arguably less likely to overstay in the first place).

#### *D. Summary*

Each of these three approaches—adjusting term length, adjusting powers, and manipulating the incentives of incumbents and challengers—offers some promise for addressing problems associated with executive overstay. Each can operate in conjunction with or as an alternative to term limits, serving as either a complement or substitute to accomplish the same goals. Yet none is an unambiguously better alternative. If term limits raise problems of calibration, so do each of the alternatives. With term limits, calibration issues arise because we never know *ex ante* what the optimal term length might be. The identical issues arise in any scheme to adjust term length of the incumbent. Shedding powers also raises calibration issues, as we do not know what configuration of powers is sufficient to properly motivate the incumbent. Incentivizing or handicapping incumbents also raises questions of monetization of the incumbency advantage and of sufficient inducements to retire. In short, while each institutional alternative has promise, none provides an obviously superior alternative.

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<sup>125</sup> The prize is set at \$5 million plus an annuity of \$200,000 for life. See Ibrahim Foundation, <http://www.moibrahimfoundation.org/en> (last visited Feb. 20, 2010); BBC, *Prize Offered to African Leaders*, (October 26, 2006), available at [http://news.bbc.co.uk/2/hi/uk\\_news/6086088.stm](http://news.bbc.co.uk/2/hi/uk_news/6086088.stm) (last visited Feb. 20, 2010).

<sup>126</sup> Tom Ginsburg, *The Clash of Commitments at the International Criminal Court*, 9 CHI. J. INT'L L. 499 (2009). See also Julian Ku and Jide Nzelibe, *Do International Criminal Tribunals Deter or Exacerbate Humanitarian Atrocities?* 84 WASH U L Q 777 (2006).

<sup>127</sup> *Fujimori extradited from Chile*, AP News Wire, March 2009.

V. CONCLUSION

Term limits are designed to discourage tyranny and to address real problems of incumbency in democratic governance, but have been subject to competing claims by proponents and opponents. Some, such as Bolivar, have argued that term limits are necessary to curb executive ambition. Others, including Hamilton and other American founders, argued that term limits would induce executives to seek to remain in office, and perhaps even generate crises to allow themselves to do so. The theoretical debate has proceeded without the benefit of much empirical analysis. One of the objectives of this article has been to inform the normative debate with data on the frequency of overstay, and to consider some alternative institutions that might accomplish some of the ends of term limits without some of the costs in terms of constitutional crises.

Our evidence is not definitive, but on balance suggests that, for democracies at least, constitutional crisis induced through term limit violations is relatively rare. Constitutional enforcement of term limits appears to operate routinely in democracies, and even in many autocracies (such as Mexico before 1994). Term limits seem to “work” in the vast majority of cases, in that those who have the possibility of overstaying do not frequently seek to do so. Of those who do seek to overstay, 20% fail in the attempt, which can also be considered a kind of constitutional enforcement of sorts, even if it sometimes coincides with a crisis as defined here.

Even when term limits are violated, the consequences are not always negative. Our large-n evidence suggests that overstay does not lead to the denigration of democracy on average. Of the recent overstayers in democracies, some (Menem and Cardoso for example) fit the profile of popular leaders who were able to amend around the default rule so as to serve a single extra term. Only a small number of leaders in recent years—Fujimori in Peru, Marcos in the Philippines, and Chavez in Venezuela—have completely replaced the constitution to allow themselves extra time. Some such leaders, such as Niger’s Mamadou Tandja, have subsequently found themselves replaced through military coup.

The finding that term limits operate as default rules whose amendment need not always lead to future disruption has implications for the study of executive-legislative relations. One of the canonical distinctions between presidential and parliamentary systems is that the executive in the former is subject to a fixed term, whereas the latter is subject to parliamentary confidence and hence not constrained by a fixed term.<sup>128</sup> Yet if executives in presidential systems frequently overstay (or understay) their term, we might think of presidential systems as *de jure* rigid, but in practice flexible in the number of years an executive serves. This highlights Professor Albert’s recent argument that the two canonical regime types may not, in fact, be so different in actual operation.<sup>129</sup>

Our consideration of institutional alternatives to term limits includes several new ideas not yet identified in the literature, including adjusting term length for incumbents only, reducing the powers of executive office with successive terms, or manipulating the incentives of incumbents to remain in office. Each of these alternatives, however, has costs. Furthermore, each alternative relies on the possibility of calibrating a more complex institutional design to mitigate incumbency advantages. The challenges to such calibration are quite real.

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<sup>128</sup> Cf. Albert, *supra* note 13.

<sup>129</sup> Albert, *id.*

This suggests that the very simplicity of term limits—easily comprehensible by the average citizen—may have something to do with their effectiveness. Simple and clear rules, it seems, can facilitate effective constitutional enforcement.<sup>130</sup> Constitutional text provides a focal point for enforcement behavior, and such enforcement is likely to be easier when everyone understands the rules. While drawing a line of four or eight years as a maximum term in office has elements of arbitrariness, the very clarity of a bright-line rule ensures that the line will, more often than not, be observed. In contrast with Alexander Hamilton’s conjecture, term limits restrain rather than promote conflict. In the matter of constraining executive ambition, then, most constitutions seem to work most of the time.<sup>131</sup>

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<sup>130</sup> Barry R. Weingast, *The Political Foundations of Democracy and the Rule of Law*, 91 AM. POL. SCI. REV. 245 (1997); Russell Hardin, *Why a Constitution?*, in THE FEDERALIST PAPERS AND THE NEW INSTITUTIONALISM 100 (Bernard Grofman & Donald Wittman eds., 1989); Peter C. Ordeshook, *Constitutional Stability*, 3 CONST. POL. ECON. 137 (1992).

<sup>131</sup> Compare LOUIS HENKIN, HOW NATIONS BEHAVE 47 (1979) (“almost all nations observe almost all principles of international law and almost all of their obligations almost all of the time.”)

VI. APPENDIX

**Table A1 – List of Democratic Overstayers (Democracy = Polity $\geq$ 3)**

Country	Year	Leader	Means of Overstay	Overstay Year	Level of Democracy	Age of Democracy
Argentina	1988	Menem	Amendment	1995	8	5
Belarus (Byelorussia)	1994	Lukashenko	Amendment	2006	7	3
Brazil	1995	Cardoso	Amendment	1998	8	10
Colombia	1884	Nunez	Replacement	1886	8	17
Colombia	2002	Alvaro Velez	Uribe Amendment	2006	7	45
Costa Rica	1870	Guardia	Disregarded/Not Specified	1876	5	29
Costa Rica	1885	Bernardo Alfaro	Soto Disregarded/Not Specified	1886	7	44
Costa Rica	1894	Rafael Castro	Yglesias Amendment	1898	10	4
Honduras	1933	Carias Andino	Replacement	1936	5	7
Namibia	1990	Nujoma	Amendment	2000	6	0
Niger	1999	Mamadou	Coup/Emergency/Suspension	2009	5	0
Peru	1990	Fujimori	Replacement	1995	8	10
Philippines	1965	Marcos	Replacement	1973	5	15
Uruguay	1931	Terra	Replacement	1935	3	27
Venezuela	1999	Hugo Chavez	Replacement	2004	7	30

**Table A1 – List of Autocratic Overstayers (Autocracy = Polity<3)**

<b>Country</b>	<b>Year</b>	<b>Leader</b>	<b>Means of Overstay</b>	<b>Overstay Year</b>	<b>Level Democracy</b>	<b>of Age Democracy</b>	<b>of</b>
Algeria	1999	Bouteflika	Amendment	2009	-3	4	
Angola	1979	Dos Santos	Disregarded/Not Specified	2007	-7	4	
Argentina	1946	Peron	Amendment	1952	-8	0	
Bolivia	1920	Saavedra	De Facto Control	1924	2	40	
Bolivia	1971	Banzer Suarez	Disregarded/Not Specified	1975	-7	0	
Brazil	1930	Vargas	Replacement	1938	-4	0	
Chad	1990	Deby	Amendment	2006	-7	4	
Chile	1973	Pinochet	Replacement	1980	-7	0	
Colombia	1904	Reyes Prieto	Amendment	1907	-5	0	
Congo, Democratic Republic Of	1965	Mobutu	Replacement	1969	-9	0	
Ecuador	1895	Aloy Delgado Alfaro	Replacement	1896	-1	65	
Ecuador	1906	Aloy Delgado Alfaro	Coup/Emergency/Suspension	1906	-3	76	
El Salvador	1871	Gonzalez	Replacement	1873	-1	12	
El Salvador	1876	Zaldivar	Replacement	1880	-1	17	
El Salvador	1935	Hernandez Martinez	Replacement	1939	-9	4	
Eritrea	1993	Afeworki	Disregarded/Not Specified	2007	-6	0	
Gabon	1967	Bongo	Amendment	2003	-7	7	
Guatemala	1885	Barillas	Amendment	1889	2	6	
Guatemala	1898	Estrada- Cabrera	Disregarded/Not Specified	1903	2	0	
Guatemala	1931	Ubico Castaneda	Amendment	1934	-9	0	
Guinea	1984	Conte	Amendment	2001	-7	26	
Haiti	1957	Duvalier,	Replacement	1962	-5	7	

*Executive Term Limits*

<b>Country</b>	<b>Year</b>	<b>Leader</b>	<b>Means of Overstay</b>	<b>Overstay Year</b>	<b>Level Democracy</b>	<b>of Age Democracy</b>	<b>of</b>
		Francois					
Honduras	1963	Lopez Arellano	Replacement	1968	-1	27	
Kazakhstan	1991	Nazarbaev	Amendment	2005	-3	0	
Lebanon	1943	EL Khoury	Amendment	1948	2	0	
Lebanon	1989	Elias Hrawi	Amendment	1995	0	0	
Lebanon	1998	Emile Lahoud	Amendment	2004		0	
Liberia	1944	Tubman	Amendment	1951	-6	60	
Lithuania	1926	Smetona	Replacement	1932	0	0	
Mali	1968	Traore	Amendment	1987	-7	8	
Nicaragua	1893	Zelaya	Amendment	1896	-5	55	
Nicaragua	1911	Adolfo Diaz	Disregarded/Not Specified	1914	-3	73	
Nicaragua	1937	Anastasio Somoza Garcia	Replacement	1942	-8	1	
Nicaragua	1967	Anastasio Somoza Debayle Belisario	Replacement	1972	-8	31	
Panama	1920	Porras Barahona	Amendment	1920	-3	17	
Paraguay	1880	Caballero	Disregarded/Not Specified	1882	-4	10	
Paraguay	1954	Stroessner	Coup/Emergency/Suspension	1964	-9	0	
Peru	1919	Leguia	Replacement	1923	-4	0	
Peru	1933	Benavidez	Disregarded/Not Specified	1936	2	0	
Rwanda	1973	Habyarimana	Replacement	1990	-7	12	
Sierra Leone	1968	Stevens	Replacement	1978	1	0	
Sudan	1989	Al-Bashir	Replacement	2008	-7	0	
Taiwan	1950	Chiang Kai-shek	Coup/Emergency/Suspension	1961	-8	1	
Tajikistan	1992	Rakhmonov	Amendment	2003	-6	0	
Togo	1967	Eyadema	Amendment	2002	-7	7	



*Executive Term Limits*

<b>Country</b>	<b>Year</b>	<b>Leader</b>	<b>Means of Overstay</b>	<b>Overstay Year</b>	<b>Level Democracy</b>	<b>of Age Democracy</b>	<b>of</b>
Tunisia	1957	Ben Ali	Amendment	1969			
Tunisia	1987	Bourguiba Zine Ben Ali	Amendment	2004	-5	0	
Uganda	1986	Museveni	Amendment	2005	-7	0	
Uruguay	1938	Baldomir	Coup/Emergency/Suspension	1941	0	4	
Uzbekistan	1991	Karimov	Amendment	1997	-9	0	
Venezuela	1870	Guzman Blanco	Replacement	1873	-5	40	
Venezuela	1879	Guzman Blanco	Replacement	1881	-5	49	
Venezuela	1894	Joaquin Crespo	Replacement	1894	-3	64	
Venezuela	1899	Cipriano Castro	Replacement	1902	-3	69	
Venezuela	1908	Gomez	Replacement	1913	-3	78	
Yugoslavia (Serbia)	1945	Tito	Amendment	1972	-7	0	