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THE CASE FOR PROMOTING DEMOCRACY THROUGH EXPORT CONTROL

OONA HATHAWAY*

“Is the Separation of Powers Principle Exportable?” That is the question posed to the contributors to this Symposium. The answer I offer here turns not on abstract principles but on my assessment of the real-world consequences of exporting the presidential system of separation of powers to other countries. This approach is grounded in the belief that a system of governance should be judged in significant part by how well it serves the best interests of the people whose lives it governs. If fragile democracies that import our system of separation of powers are more likely to collapse as a result, then we should be exceedingly cautious about aggressively exporting our system to those countries.

I begin by clarifying the scope of the debate. I then turn to the normative question on which the debate turns: Is it wise to export the United States’s presidential system of separation of powers? Judging on the basis of the available empirical evidence, I conclude that usually it is not. The best empirical evidence points to the conclusion that fragile democracies that adopt a United States-inspired presidential¹ model of governance are, all else equal, more likely to collapse than those that adopt a parliamentary system.

I want to begin by making clear what is and is not the subject of debate in this Symposium. This debate is not about whether the presidential system is right for the United States. Most commentators would agree that the presidential system works well for the United States—warts and all—and few would advocate

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1. Following the convention in the literature, this Essay uses the term “presidential system” as a synonym for the U.S. system of separation of powers.

that the United States adopt a parliamentary system.² The debate is also not about whether there should be limits on the exercise of executive power. All of the contributors to this Symposium agree that there should be limits, although they disagree about what those limits should be. Finally, the debate is not about whether the rest of the world can learn from the United States's constitutional system. Clearly, the rest of the world can learn much from the United States's system, just as the United States can learn much from the rest of the world. Instead, the subject of this Symposium is whether the United States's particular model of separation of powers is right not only for the United States, but also for the rest of the world. It is on this question that the contributors to this Symposium part ways.

There are two central reasons that a general policy of seeking to export the United States's presidentialist model of separation of powers to other countries is ill-advised. First, it assumes that there is a one-size-fits-all solution to the problem of governance. This assumption is ill-founded. In order to know what kind of governing structure will work for a particular country, it is necessary to understand the local conditions in which that governing structure will work. Is federalism a concern? Are there regional divides? Are there significant ethnic divisions? What is the history of the country? Is the country in recent transition from a military dictatorship? Is there economic stratification that makes certain models of democracy less likely to work than others? And, most important, what form of governance do the citizens of the country prefer? The assumption that we can determine whether a parliamentary or presidential system is better for the rest of the world ignores the importance of these kinds of local conditions. And yet these conditions matter immensely when deciding whether a parliamentary or presidential system suits a particular country, and they are more important than any abstract comparisons scholars can make.

Second, the claim that the United States's model of separation of powers should be exported to other countries is contrary to the available empirical evidence. I preface this discussion by noting that I have not done the empirical work on this

2. I have recently completed an article that argues for even more robust separation of powers in the making of international law. Oona A. Hathaway, *Presidential Power over International Law: Restoring the Balance*, 119 YALE L.J. 140 (2009).

question myself. When I was asked to participate in this Symposium, I did not know what answer I would give to the question of whether the American-style separation of powers is exportable. But that was before I examined the empirical evidence. And that evidence gives the lie to the claim that our system is one that can be transported to other countries without difficulty.

Thanks to Professor Juan Linz's foundational and provocative work,³ the exportability of the presidential system has been the subject of debate, conversation, and empirical research by probably hundreds of political scientists. These studies point almost uniformly to the conclusion that democratic states that adopt the presidential system of separation of powers are significantly more likely to collapse than those that do not. A study of fifty-three democratic countries conducted in the early 1990s found that democracy survived sixty-one percent of the time in parliamentary systems and twenty percent of the time in presidential systems.⁴ In other words, a parliamentary democracy was roughly three times more likely to survive—that is, to remain a democracy—than a presidential democracy. In 2000, a study of 135 democracies between 1950 and either 1990 or 1999 came to a similar conclusion.⁵ The study predicted that the expected life of a new democracy that adopted a presidential system was about twenty-four years.⁶ But if the same democracy took a parliamentary system, its expected life was seventy-four years.⁷ A democracy was likely to last more than three times as long if it chose a parliamentary system than if it chose a presidential system. The authors of that study concluded that presidential democracies are less durable than parliamentary ones.⁸ The authors also concluded that the difference in durability was

3. See, e.g., Juan J. Linz, *The Perils of Presidentialism*, in *PARLIAMENTARY VERSUS PRESIDENTIAL GOVERNMENT* 118 (Arend Lijphart ed., 1992). Professor Linz was a participant in this debate at the Twenty-Eighth Annual Federalist Society National Student Symposium, held at Yale Law School, where contributors also discussed the exportability of the separation of powers.

4. Alfred Stepan & Cindy Skach, *Constitutional Frameworks and Democratic Consolidation: Parliamentarism versus Presidentialism*, 46 *WORLD POLITICS* 1, 10 (1993).

5. Adam Przeworski, *Democracy and Economic Development*, in *THE EVOLUTION OF POLITICAL KNOWLEDGE: DEMOCRACY, AUTONOMY, AND CONFLICT IN COMPARATIVE AND INTERNATIONAL POLITICS* 300 (Edward D. Mansfield & Richard Sisson eds., 2004).

6. *Id.* at 310.

7. *Id.*

8. See *id.*

not due to the political conditions under which the countries were formed.⁹ Presidential democracies are “simply more brittle under all economic and political conditions.”¹⁰

Other studies have focused attention on the roughly thirty countries, including many in Latin America, that have adopted American-style presidential systems of government.¹¹ All of these countries have experienced constitutional crises, with presidents disbanding intransigent congresses.¹² Professor Giovanni Sartori examined this evidence and concluded that purely presidential systems are much more likely to be unstable than parliamentary ones.¹³ Professors Alfred Stepan and Cindy Skach found striking evidence to support this conclusion.¹⁴ They showed that during a ten-year period between 1980 and 1989, not one of the fifty-two countries that chose a non-parliamentary model evolved into a continuous democracy—that is, a stable and surviving democracy.¹⁵ By contrast, fifteen of the forty-one countries that started with parliamentary systems became continuous democracies.¹⁶

This evidence does not support the claim that, as a universal matter, the American-style presidential system is the right one for the rest of the world. That is not to say that it might not be the right one under some conditions. As noted earlier, the suitability of presidential-style democracy depends on local conditions. But we should be extraordinarily cautious about recommending our system to the rest of the world, given that new democracies that have adopted systems similar to our own have proven more likely to collapse.

9. *See id.*

10. ADAM PRZEWORSKI ET AL., *DEMOCRACY AND DEVELOPMENT: POLITICAL INSTITUTIONS AND WELL-BEING IN THE WORLD, 1950–1990*, at 136 (2000).

11. *See, e.g.*, *THE FAILURE OF PRESIDENTIAL DEMOCRACY: COMPARATIVE PERSPECTIVES* (Juan J. Linz & Arturo Valenzuela eds., 1994).

12. *See* Giovanni Sartori, *Neither Presidentialism nor Parliamentarism*, in 1 *THE FAILURE OF PRESIDENTIAL DEMOCRACY*, *supra* note 11, at 106, 107 (noting that all presidential systems other than the United States’s have been “intermittent”).

13. *See id.*

14. *See* Alfred Stepan & Cindy Skach, *Presidentialism and Parliamentarism in Comparative Perspective*, in 1 *THE FAILURE OF PRESIDENTIAL DEMOCRACY*, *supra* note 11, at 119, 124–26.

15. *Id.* at 124.

16. *Id.*

Professor Jide Nzelibe rightly raises the question of selection effect in these studies.¹⁷ Perhaps unstable democracies, the ones that are most likely to fail, are most likely to choose a presidential system just like that of the United States. And those countries that are much more likely to survive as democracies are more likely to choose a parliamentary system. If so, then the deck is stacked against countries that adopt the American presidential system: The countries that choose presidential systems are more likely to fail for reasons independent of their choice of a presidential system.

There is reason to believe, however, that a selection effect is not driving these results. A study addressing this question showed that the stronger the presidency, the more able the president is to block legislation, making a breakdown of the constitutional regime more likely.¹⁸ A separate study offered similar evidence, finding that the stronger the presidency in presidential and semi-presidential systems, the more likely the system is to result in impasse and in turn for the regime to end.¹⁹ The argument is that the more power the president has to stop legislation, the more likely the opposition is to become dissatisfied with the system and the more unwilling the opposition will be to participate in the government.²⁰ At the same time, presidents facing an intransigent legislature are more likely to respond by grabbing as much power as they can in order to retain control over policy.²¹

If this tendency is true, then it is no coincidence that leaders in presidential systems of government resort to emergency powers.²² The way the presidential system separates powers

17. Jide Nzelibe, Professor, Northwestern Univ. Law Sch., Remarks at the Twenty-Eighth Annual Federalist Society National Student Symposium (Feb. 27, 2009) (transcript on file with the Harvard Journal of Law & Public Policy).

18. See George Tsebelis, *Decision Making in Political Systems: Veto Players in Presidentialism, Parliamentarism, Multicameralism and Multipartyism*, 25 BRIT. J. POL. SCI. 289, 321 (1995) (“[T]he very factors that lead to policy stability would be associated with both government instability (in parliamentary systems) and regime instability (in presidential systems).”).

19. See MATTHEW S. SHUGART & JOHN M. CAREY, *PRESIDENTS AND ASSEMBLIES: CONSTITUTIONAL DESIGN AND ELECTORAL DYNAMICS* 154–58 (1992).

20. See Scott Mainwaring, *Presidentialism in Latin America*, in *PARLIAMENTARY VERSUS PRESIDENTIAL GOVERNMENT*, *supra* note 3, at 111, 114–15.

21. See *id.*

22. See *id.* at 114 (noting the practice of Colombian presidents declaring a “state of siege” to avoid traditional checks and balances).

sets it up for failure except under very special conditions. The president is elected separately from the legislature and is not a part of the legislature. Thus, it is more difficult for presidents to get their policies through the legislature than it would be for a prime minister operating in a parliamentary system where the chief executive—the prime minister—heads a majority or a coalition in the legislature. This difference can lead the president to seize more powers to push policies past an uncooperative legislature.²³ This is particularly true in new, weak democracies, where there is no robust civil society or background of democratic politics. The European Union, which Professor Steven Calabresi argues should adopt a presidential system,²⁴ does not have this problem. But in most of the countries that are realistically considering adopting an American-style presidential system of government, the expansion of presidential power is a very real fear. We ought to be attentive to that before we encourage countries to follow our example by adopting American presidential-style separation of powers.

The United States has much to teach the rest of the world—and much to learn from it. The ideas of democracy, of limited powers, of checks and balances, of federalism, and of liberty are among our most valuable exports. But each country must decide how to most effectively fit these concepts to its own needs and circumstances. Although the presidential system of separating powers *can* be exported, it is not clear that it always *should* be.

23. *See id.* at 115 (noting how presidents incapable of pushing critical legislation resort to “enhancing their power” to accomplish their goals).

24. Steven Calabresi, *Is the Separation of Powers Exportable?*, 33 HARV. J.L. & PUB. POL’Y 5 (2010).