

## Designing Presidential Impeachment

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### Abstract

*Impeachment is again a central preoccupation of United States constitutional law and politics. This article casts new light on this debate by examining the law and practice of presidential impeachment globally. It draws first on case studies from countries such as South Korea, Paraguay, Brazil, and South Africa, and then large-n empirical analysis of constitutional texts. Contrary to current American practice, it shows, impeachment is not primarily about removing criminals or similar “bad actors” from the presidency. Instead, it is a tool to exit deep political crises. At its best, impeachment enables a ‘hard reset’ of the political system by triggering new elections. This systemic, rather than individualistic, conceptualization of impeachment is normatively desirable. It ameliorates the rigidity that sometimes characterizes presidential systems, and as we show has no negative impact on the quality of democracy. This comparative analysis has significant implications for the design and practice of impeachment, especially in the United States. In particular, it supports a broader, more political gloss on the famously cryptic phrase “high crimes and misdemeanors.” It also implies that impeachment standards should vary for different kinds of actors such as presidents, judges, and cabinet members, rather than being uniform. Finally it shows how impeachment’s integrity, contra current caselaw, can be materially aided by judicial involvement.*

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## Designing Presidential Impeachment

*“Impeach Eisenhower. Impeach Nixon.  
Impeach Lyndon Johnson. Impeach Ronald Reagan.”<sup>1</sup>*

### Introduction

*The President must go!* So rings the call in the last few years across many democracies. Political opposition and civil society movements have targeted elected leaders who have become politically unpopular, ineffective, or allegedly (and perhaps actually) corrupt. Impeachment talk simmered in the United States even before President Donald Trump took office,<sup>2</sup> and dogged his predecessors.<sup>3</sup> But Americans should be under no illusions that discontent with their elected leader is unique in this regard. In France, the *gilet jaune* protest movement has been candid in its “hatred” for President Emmanuel Macron, and its desire to see him removed from office.<sup>4</sup> And in Venezuela, an opposition leader went so far as to declare himself ‘interim president’ as a way of (so far, vainly) attempting to accelerate the departure of a well-entrenched presidential incumbent.<sup>5</sup> Regime change has yet to arrive in Caracas, Paris, or Washington, DC—but presidents have no cause to rest easy. In democracies as diverse as Brazil, South Korea and South Africa, presidents have been removed in the middle of their term in the past decade.<sup>6</sup> Impeachment talk then is not necessarily idle chatter. At least in some instances, it is a credible position that can attract sufficient political and popular support to be realized.

The dispatch of a president from office by a mechanism other than through the regular operation of elections, term limits, and the default apparatus of political choice goes to the core of democratic performance around the world. This is a moment of increasing popular discontent with established regimes, coupled with a growing polarization within the voting publics of many democracies.<sup>7</sup> Under those conditions, it is perhaps unsurprising that elected tenures would prove to be fragile, and talk of preemptive removal and impeachment would become endemic.

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<sup>1</sup> *Annie Hall* (1977).

<sup>2</sup> See Emily Jane Fox, *Democrats are Paving the Way to Impeach Donald Trump*, VANITY FAIR, Dec. 15, 2016, at <https://www.vanityfair.com/news/2016/12/democrats-pave-the-way-to-impeach-donald-trump>

<sup>3</sup> See, e.g., Alexander Bolton, *White House Taking Impeachment Seriously*, THE HILL (July 25, 2014), at <http://thehill.com/homenews/senate/213329-white-house-gop-might-try-to-impeach>; CHARLOTTE DENNETT, THE PEOPLE V BUSH, ONE LAWYER'S CAMPAIGN TO BRING THE PRESIDENT TO JUSTICE AND THE NATIONAL GRASS ROOTS MOVEMENT SHE ENCOUNTERS ALONG THE WAY (2010).

<sup>4</sup> See Arthur Goldhammer, *The Yellow Vests Protests and the Tragedy of Emmanuel Macron*, FOR. AFF., Dec. 12 2018, at <https://www.foreignaffairs.com/articles/france/2018-12-12/yellow-vest-protests-and-tragedy-emmanuel-macron>

<sup>5</sup> See Alan Taylor, *A Venezuelan Opposition Leader Declares Himself ‘Interim President’*, THE ATLANTIC, Jan. 24, 2019, at <https://www.theatlantic.com/photo/2019/01/photos-venezuelan-opposition-leader-declares-himself-interim-president/581158/>.

<sup>6</sup> See *infra* Part I.

<sup>7</sup> On the relation of polarization to democratic crisis, see Jennifer McCoy, Tahmina Rahman, and Murat Somer, *Polarization and the global crisis of democracy: Common patterns, dynamics, and pernicious consequences for democratic politics*, 62 AM. BEHAV. SCI. 16, 16-19 (2018) (showing how popular polarization can lead to “gridlock and careening,” “democratic erosion or collapse under new elites and dominant groups,” or “democratic erosion or collapse with old elites and dominant groups”).

Nevertheless, legal scholars and social scientists have till now lagged behind the pace of popular sentiment. To be sure, there is a wealth of scholarship on the mechanism of impeachment in the U.S. Constitution.<sup>8</sup> That work—much of it excellent—starts from the Framers’ design, and then reasons from that design to present applications.<sup>9</sup> As a result, it explores a relatively narrow area within the space of possible constitutional design. It does not help that the “Constitution is surprisingly opaque as to how apex criminality should be addressed.”<sup>10</sup> The U.S. Constitution’s text, for example, uses the ambiguous term “high crimes and misdemeanors” to define a threshold for presidential removal. But it fails to specify a standard of proof either for impeachment or conviction. And it fails to specify clearly whether a sitting president can be indicted prior to the completion of impeachment proceedings.<sup>11</sup> The result is a text riddled with opacity.

Moreover, the body of U.S. focused scholarship also draws on a relatively weak empirical basis: American history is characterized by only two successful presidential impeachments; no sitting president, however, has ever been removed.<sup>12</sup> To be sure, the impeachment language in Articles I and II is largely (if not wholly) general, extending beyond presidents to encompass judges and certain officials.<sup>13</sup> But *presidential* impeachments plainly raise legal and normative concerns beyond those implicated by the removal of federal judges and other officials. Most obviously, the electoral mandate that presidents, unlike all other unelected actors, possess raises a distinctive question about the democratic legitimacy of non-impeachment removal mechanisms, such as criminal prosecution or declarations of incapacity, that bypass the people.<sup>14</sup> So it is not clear that nonpresidential impeachments help us understand how chief executives should be disciplined. As a result, the voluminous literature on impeachment by U.S. scholars tends to pick over the same limited body of textual arguments and historical exemplars. The prospect of diminishing analytic returns is not hard to discern.

At the same time as the focus of American scholars narrows, with cascades of new work appearing in response to current events, there remains a serious dearth of legal scholarship leveraging

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<sup>8</sup> See CASS SUNSTEIN, *IMPEACHMENT: A CITIZEN’S GUIDE* (2017); LAURENCE TRIBE AND JOSHUA MATZ, *TO END A PRESIDENCY: THE POWER OF IMPEACHMENT* (2018); ALLAN LICHTMAN, *THE CASE FOR IMPEACHMENT* (2017); ELIZABETH HOLTZMAN, *THE CASE FOR IMPEACHING TRUMP* (2018). Earlier treatments include CHARLES L. BLACK, *IMPEACHMENT: A HANDBOOK* (1974), RAOUL BERGER, *IMPEACHMENT: THE CONSTITUTIONAL PROBLEMS* (1974); Laurence H. Tribe, *Defining High Crimes and Misdemeanors: Basic Principles*, 67 *GEO. WASH. L. REV.* 712 (1998).

<sup>9</sup> Correlatively, much of the criticism of that work focuses on the “strategic” nature of the analysis. See Michael Stokes Paulsen, *To End A (Republican) Presidency*, 132 *HARV. L. REV.* 689, 690 (2018). For a vigorous and effective response to this criticism, see Laurence H. Tribe and Joshua Matz, *To (Pretend to) Review Our Book*, 132 *HARV. L. REV. F.* 78, 79 (2018) (accusing Paulsen of “repeatedly and egregiously misdescrib[ing] our thesis, reasoning, and conclusions”). The vehemence of this debate is indicative of how difficult scholarly discussion of impeachment can be.

<sup>10</sup> See Aziz Z. Huq, *Legal or Political Checks on Apex Criminality: An Essay on Constitutional Design*, 65 *UCLA L. REV.* 1506, 1508 (2018) [hereinafter “Huq, *Legal and Political Checks*.”] (discussing sources of ambiguity).

<sup>11</sup> For the Justice Department’s view, see U.S. Dep’t Just.: Office of Legal Counsel, *A Sitting President’s Amenability to Indictment and Criminal Prosecution* (2000), available at <https://www.justice.gov/file/19351/download>.

<sup>12</sup> See SUNSTEIN, *supra* note 8, at 88-116 (providing a characteristically incisive account of the Johnson and Clinton impeachments).

<sup>13</sup> See MICHAEL J. GERHARDT, *THE FEDERAL IMPEACHMENT PROCESS: A CONSTITUTIONAL AND HISTORICAL ANALYSIS* 77-83 (1996) (discussing the scope of the impeachment remedy under the federal constitution).

<sup>14</sup> See Daniel J. Hemel & Eric A. Posner, *Presidential Obstruction of Justice*, 106 *CALIF. L. REV.* 1277 (2018).

the experience of other countries in spite of the ubiquity of calls for removal around the world.<sup>15</sup> While some political scientists have documented the relatively low success rate of calls for removal,<sup>16</sup> no one has examined systematically the design dimensions of presidential impeachment systems from a comparative perspective. This is not for want of relevant evidence. As we shall show, the design of removal procedures for chief executives is almost uniformly a matter of constitutional design, rather than a question of statutory policy. This reflects a (perhaps undertheorized) assumption that the question is an important one to be insulated, to some extent, from transient politics. The constitutional design of impeachment implicates a number of questions that are fundamental to a democracy, and yet remain relatively unexplored.<sup>17</sup> Not least, it seems important to know whether the substantive and procedural elements of the U.S. system are distinctive, or else outliers as a matter of constitutional design. Relatedly, it is important to understand the extent of the constitutional design space for removing chief executives outside the default electoral or term-limit channel.

Depending on the answers to these descriptive questions, a number of normative puzzles arise: When should a democratic mandate be superseded because of the perceived costs of allowing the people's choice to maintain the reins of power? If supersession is to be allowed, should the alternative to electoral deselection be in a political process (defined and judged according to partisan standards), or a more formalized, law-governed process (say, defined by the criminal law)? Relatedly, what mechanisms, institutions, and procedures should be involved in the removal process? Should they be other elected actors, or else non-elected, professional institutions? What should be the result of a presidential removal: Should it be a new election, or should either an ally of the president or someone else take control of the government? Finally, how should the improper deployment of a presidential removal mechanism be remedied? The American debate provides at best a partial perspective on these questions.

This Article analyzes the non-electoral and non-term limits removal of chief executives in comparative perspective—the problem of *presidential removal* or *presidential impeachment* in our shorthand. We present the first comprehensive analysis of how constitutions globally have addressed this question, and what the consequences of different design choices are likely to be. Because actual removals of chief executives turn out to be rare (although calls to remove are frequent), we employ a two-fold empirical strategy. We begin by refining five case studies, including the United States, of removals that occur through a range of procedures and under quite different political conditions. This granular approach demonstrates some of the variation in constitutional technologies of presidential removal, and also offers clue as to what legal and political factors matter in practice. Next, we zoom out to offer a comprehensive, large-n, description and evaluation of the relevant constitutional design choices. In the final part, we draw carefully nuanced conclusions about the normative stakes of varying design decisions in this domain.

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<sup>15</sup> *But see* John K. M. Ohnesorge, *Comparing Impeachment Regimes* (March 9, 2019), Univ. of Wisconsin Legal Studies Research Paper No. 1468. Available at SSRN: <https://ssrn.com/abstract=3356929> or <http://dx.doi.org/10.2139/ssrn.3356929>

<sup>16</sup> *See infra* notes 153-162.

<sup>17</sup> Some of these questions are also likely to matter to authoritarian constitutions, which are also designed with the aim of minimizing agency costs. *See* Tom Ginsburg and Alberto Simpser, *Introduction*, in *CONSTITUTIONS IN AUTHORITARIAN REGIMES* 1, 6 (Tom Ginsburg and Alberto Simpser, eds., 2013).

Before summarizing our descriptive findings and normative suggestions, we should clarify the universe of cases that we are considering. Removal of a chief executive is a necessary power in any political system, whether presidential, parliamentary, or otherwise. Even traditional monarchies have some procedures for removing kings who are incapacitated or incompetent.<sup>18</sup> Our focus, however, is primarily on fixed-term executives, namely presidents. Such officials are found in an array of political systems, including presidential systems, semi-presidential systems,<sup>19</sup> and even some parliamentary systems.<sup>20</sup> Because our aim here is to stimulate thinking about the stakes of constitutional design on the removal of chief executives generally, we cast a wide net. We do not restrict our empirical analysis to chief executives with actual power. Rather, we include heads of state in parliamentary systems, who tend to have a more ceremonial role, but exclude prime ministers (who are often disciplined instead through a parliamentary ‘vote of confidence’ mechanism<sup>21</sup>).

We show first that impeachment is not well-explained by an exclusive focus on the criminal behavior or bad acts of an individual president. Rather, it invariably serves as a response to a systemic political crisis in a presidential system, and political conditions provide a kind of hard constraint on removal. In some recent impeachments, such as in South Korea, crisis combined with evidence of criminality to oust a president from office. But in other cases, such as in Brazil and Paraguay, there was scant evidence of criminality: Removal was rather used to push out weak presidents who had lost the ability to govern. Indeed, many constitutions around the world include a textual standard for removal that explicitly goes beyond criminality to include governance failures or poor performance in office, while others allow such an approach through ambiguity. Thus, impeachment globally reaches more widely and works more flexibly than the commonly understood modern U.S. practice. In practice, it is a device to mitigate the risk of paralyzing *systemic* political crisis, in addition to the risk of *individual* malfeasance. Consistent with this view of impeachment as a political safety valve, we find no evidence that impeachment of a president reduces the quality of democracy in countries where it is carried out.<sup>22</sup> Simply put, the fear that a more political impeachment process would necessarily be destabilizing has no empirical support.

Although we tread carefully in drawing out our normative implications, our analysis has important implications for the design and practice of impeachment, particularly in the United States. We argue that a model of impeachment focused only on the individual culpability of chief executives – what we call a “bad actor” model – is likely incomplete and undesirable as a functional matter.

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<sup>18</sup> Indeed, during the Middle Ages the question of monarchical removal became a central problem for English constitutional theory; between 1327 and 1485, five English monarchs were deposed. See William Huse Dunham and Charles T. Wood, *The Right to Rule in England: Depositions and the Kingdom's Authority, 1327-1485*, 81 AM. HIST. REV. 738, 738-9 (1976). Two centuries later, regicide was hedged with numerous defenses. See Mos Tubb, *Printing the regicide of Charles I*, 89 HIST. 89.296 (2004): 500-524.

<sup>19</sup> See Robert Elgie, *A fresh look at semipresidentialism: variations on a theme*, 16 J. DEM. 98, 105-07 (2005).

<sup>20</sup> For example, the Czech and Slovak states have nonelected presidents coexisting with elected parliaments. See Matthew S. Shugart, *Of presidents and parliaments*, 2 E. EUR. CONST. REV. 30, 30 (1993). On the increasing similarity between presidential and parliamentary systems, see Oren Tamir, *Governing by Chief Executives*, manuscript; Jose Cheibub, Zachary Elkins and Tom Ginsburg, *Beyond Presidentialism and Parliamentarism*, British J. POL. SCI. (2013); Richard Albert, *The Fusion of Presidentialism and Parliamentarism*, 51 AM. J. COMP. L 531 (2009); THOMAS POGUNTKE AND PAUL WEBB, *THE PRESIDENTIALIZATION OF POLITICS: A COMPARATIVE STUDY OF MODERN DEMOCRACIES* (2005).

<sup>21</sup> John D. Huber, *The vote of confidence in parliamentary democracies*, 90 AM. POL. SCI. REV. 269, 272 (1996) (describing vote of confidence mechanisms in eighteen democracies).

<sup>22</sup> See *infra* Table 2.

Instead, impeachment processes should be attentive to the broader political context, which we call a “systemic problems” model. Impeachment can be useful to ameliorate one of the major weaknesses of presidentialism – rigidity<sup>23</sup> – by removing poorly performing presidents during extreme crises. In the United States, this analysis suggests a critique of the prevailing modern view of impeachment. Stephen Griffin has recently tracked the history of impeachment discourse in the United States to show that partisan dynamics forced it into a Procrustean bed of “indictable crimes” and nothing more.<sup>24</sup> We think that the comparative evidence suggests that the equilibrium interpretation of the term “high crimes and misdemeanors” may well be problematic. A broader, more political meaning of this notoriously cryptic standard may make more functional sense.

Aside from shedding new light on the well-studied issue of “high crimes and misdemeanors,” our analysis also critiques a range of crucial but less-studied features of impeachment in the United States. Some of these are a product of judicial or political practice; others would require a constitutional amendment to fix. For example, we highlight the striking fact that the impeachment standard in the U.S. is uniform across different types of actors, such as presidents, judges, and cabinet members, rather than varying as in many other countries. We think a differentiated approach makes more sense, because impeachment of different kinds of actors serves different purposes. We also highlight the ways in which actors other than legislatures contribute fact-finding, legitimacy, and other benefits to impeachment processes in some contexts. In particular, contrary to the settled understanding in the United States and the leading precedent,<sup>25</sup> a more robust role for courts in impeachment processes may not be inconsistent with a political, regime-centered model of impeachment. Finally, our analysis highlights that impeachment design in the United States fails to maximize the value of impeachment as an exit from a crisis by having the vice-president (or similar actor) automatically succeed to office, rather than calling new elections. We think that calling new elections after a successful impeachment is a superior option because it increases impeachment’s ability to serve as a reset for a crisis-laden system.

A final caveat is warranted here. We recognize that this topic is of great current interest in the United States, largely because of the presidency of Donald Trump. There is a growing academic and nonacademic literature on the topic of his impeachment.<sup>26</sup> Some of these contributions confront Trump’s particular misdeeds while others are more abstract treatments that do not engage with the particulars of his case. We place ourselves in the latter camp, abstracting away from the current presidency, and avoiding inevitably partisan implications in the hope of generating more durable insights. At the same time, we also recognize that the occasion of the Trump presidency seems to be a particularly good moment to reconsider our system, and hope to use the opportunity to stimulate careful reflection on an important constitutional issue.

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<sup>23</sup> A point, of course, made in the classic essay by Juan Linz. See Juan J. Linz, *The perils of presidentialism*. 1 J. DEMOCRACY 51, 56-57 (1990).

<sup>24</sup> See Stephen M. Griffin, *Presidential Impeachment in Tribal Times: The Historical Logic of Informal Constitutional Change*, 51 CONN. L. REV. --(forthcoming 2019) (on file with authors).

<sup>25</sup> See *Nixon v. United States*, 506 U.S. 224 (1993) (rejecting a constitutional challenge to impeachment procedures of a federal judge as a “political question” beyond judicial competence).

<sup>26</sup> See, e.g., ALLAN J. LICHTMAN, *THE CASE FOR IMPEACHMENT* (2017); cf. ALAN DERSHOWITZ, *THE CASE AGAINST IMPEACHING TRUMP* (2018). At the very least, this tide of books provides evidence of the impoverished imagination of book publishers when it comes to titles.

The balance of our analysis is organized as follows. Part I introduces our topic by presenting case studies of recent instances of impeachment from around the world: South Korea, Brazil, Paraguay, and South Africa. We also briefly survey American law and experience to provide a benchmark of domestic experience. Part II draws on large-n empirical evidence to describe and analyze the history, rules, and practice of presidential removal globally. We find that impeachment is often a response to a broad array of governance problems, extending beyond the standard “bad actor” model that dominates American thinking on the topic. Systems vary in terms of both the predicate acts that can trigger impeachment along with the process, including both the actors involved and the various rules governing time and consequence. Part III draws on this evidence to theorize better impeachment institutions, focusing on implications for the United States. Part IV concludes.

## **I. The Irresistible Rise of Impeachment: Snapshots from the World of Presidential Removal**

We begin by considering the three most recent cases of successful removal by impeachment—in South Korea, Brazil and Paraguay—along with the removal of Jacob Zuma midway through his second term in South Africa as a consequence of a protracted corruption-related investigation. These case studies are useful for “their value in clarifying previously obscure theoretical relationships” and as a step toward “richer models” that would be enabled by purely large-n analysis.<sup>27</sup> The case study approach is especially appropriate here because, as we demonstrate in Part II, the rate of successful impeachments in the past half century or so turns out to be vanishingly small in comparison to the denominator of elected chief executives holding office in that period, or even the number of proposals for impeachment.<sup>28</sup> Impeachment is often proposed and rarely realized. Indeed, we will present case studies of exactly half of the formal impeachments that prevailed – and supply an out-of-sample instance of ‘successful’ ouster on the basis of a failed legal process. The result is a thick account of most of the relevant positive instances of impeachment or removal globally available that would be missed by a large-n analysis alone. Finally, by way of counterpoint (and to tee up our normative analysis in Part III), we recapitulate briefly the historical framing and practice of impeachment in the United States as a point of reference and contrast. The U.S. practice presents an immediate and striking contrast with other democracies’ approach to impeachment. By giving a relatively thick account of the former, we clarify the extent of potential constitutional design space for removing chief executives.

In each of the comparative case studies, directly elected presidents did not finish their terms, albeit for different reasons. South Korea’s Park Geun-Hye was removed from office in 2017 after an impeachment confirmed by the Constitutional Court. Brazil’s Dilma Rousseff was removed in 2016 shortly after her re-election to a second term in relation to an alleged fraud scheme. And Paraguay’s Fernando Lugo was removed from office in 2012, primarily on the grounds that he had botched policy decisions prior to and after a massacre involving a land invasion. In each of these cases, the ousted presidents were extremely unpopular; their ouster constituted a political opening, moreover, for political opponents, who gained new access to the levers of power. In South Africa, in contrast, president Jacob Zuma was replaced by a leader of his own party, after losing support within the party. In our view, all these removals had normative justifications. But the political outcomes they produced were radically different. For example, South Koreans elected a left-wing president Moon Jae-In after Park’s impeachment, while Brazilians elected a fiery right-wing populist, Jair Bolsonaro. His tenure is still too new to evaluate, but concerns about democratic backsliding and state violence have deepened.

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<sup>27</sup> Timothy J. McKeown, *Case studies and the limits of the quantitative worldview*, in *RETHINKING SOCIAL INQUIRY: DIVERSE TOOLS, SHARED STANDARDS* 139, 153 (Henry E. Brady & David Collier eds., 2004).

<sup>28</sup> See *infra* Table 1 (finding 10 removals in 154 attempts since 1990).



In contrast, Zuma was replaced by his co-partisan Cyril Ramaphosa, who went on to lead the African National Congress (ANC) party to a close election win. In most of these cases, the system has found a new equilibrium.

### A. South Korea: The Park Impeachment

South Korea's constitution allows a majority of members of the National Assembly to propose an impeachment bill for the president, which bill must be approved by a two-thirds vote.<sup>29</sup> The President is immediately suspended from serving; his or her duties pass on to the Prime Minister. In a second stage, the impeachment motion then goes to the Constitutional Court for final approval. The South Korean constitution allows impeachment for a "violation of the Constitution or other laws in the performance of official duties."<sup>30</sup>

In the first Korean impeachment of the twenty-first century, this last step proved dispositive. In 2004, President Roh Moo-hyun was impeached.<sup>31</sup> Before the Constitutional Court could decide on the question of removal, an intervening parliamentary election gave Roh's party a slim parliamentary majority.<sup>32</sup> The Court, perhaps in a move of political pragmatism, decided that although Roh was indeed responsible for the charges against him, they were not sufficient to warrant removal.<sup>33</sup> Roh went on to serve to the end of his term, though he eventually committed suicide during a corruption probe.<sup>34</sup> The Constitutional Court's decision was systemically important for clarifying many of the relevant rules.<sup>35</sup> Most importantly, it held that even if charges against a president were well-founded, removal should only occur if there was a "grave violation" of law and if removal was "necessary to rehabilitate the damaged constitutional order."<sup>36</sup> The Court also explained the division of labor in impeachment cases, holding that the Assembly had a political and fact-finding role, while the bench itself was the ultimate judge of whether the facts presented met the legal threshold for removal.<sup>37</sup>

A decade later, a second South Korean president faced defenestration. This time the judiciary ratified some of the grounds for impeachment. President Park Geun-Hye, like most Korean presidents, found her popularity dropping precipitously after her 2012 election.<sup>38</sup> In 2016, it was revealed that she had been taking instruction from, and acting on behalf of, a close confidant, Choi

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<sup>29</sup> CONST. S. KOREA, ART. 65 (1987).

<sup>30</sup> *See id.*

<sup>31</sup> Youngjae Lee, *Law, politics, and impeachment: The impeachment of Roh Moo-hyun from a comparative constitutional perspective* 53 AM. J. COMP. L. 403 (2005).

<sup>32</sup> *Id.* at 412.

<sup>33</sup> *Id.* at 418-19.

<sup>34</sup> *See* Martin Fackler, *Recriminations and Regrets Follow Suicide of South Korean Former President*, N.Y. TIMES, May 25, 2009, at <https://www.nytimes.com/2009/05/25/world/asia/25iht-korea.html>.

<sup>35</sup> *See* Lee, *supra* note 31, at 413.

<sup>36</sup> *See* 2004 Hun-Na 1, Constitutional Court of South Korea, May 14, 2004, available at <http://english.ccourt.go.kr>.

<sup>37</sup> *See id.*; Chin-Yuan Lin, *Court in Political Conflict: Note on South Korean Impeachment Case*, 4 NAT'L TAIWAN U. L. REV. 249, 259 (2009)

<sup>38</sup> *See* Yul Sohn and Won-Taek Kang, *South Korea in 2012: An election year under rebalancing challenges*, 53 ASIAN SUR. 198 (2013).

Soon-sil.<sup>39</sup> Choi's father had been the head of a secretive cult and an associate of Park's father. Choi had been extorting money from Korea's large business corporations. When these facts were revealed, the opposition party filed impeachment motions against Park.<sup>40</sup> The charges included seven counts, including, *inter alia*, abuse of power, violating the duty of confidentiality by shearing government documents with Choi, and violation of the right to life in the Sewol ferry disaster, which had taken the lives of hundreds of high school students in 2014. Several members of Park's own Saenuri party joined in passing the motion by the required two-thirds vote, and Park was suspended as president.<sup>41</sup> As in Roh's case, the Constitutional Court then initiated its proceedings.

On March 10, 2017, the Court delivered a verdict upholding Park's impeachment on three of the seven counts: violation of the obligation to serve the public interest, infringement upon private property rights, and violation of confidentiality.<sup>42</sup> Her interactions with the "shaman or mystic" Choi were central to this finding,<sup>43</sup> as they were to the growing tide of public anger at her administration's corruption.<sup>44</sup> The Court did not accept three other grounds for impeachment, including the one based on allegations related to the Sewol Ferry disaster, and it found a final charge -- the "obligation to faithfully execute the duties" of the President -- to be non-justiciable.<sup>45</sup> The Court then held that these charges met the test for seriousness laid out during the Roh impeachment case because they gave a private citizen influence over the office of the presidency, and noted Park's initial condemnation of those who brought the allegations forward.<sup>46</sup> Park was subsequently convicted in criminal court. She is currently serving a 25-year prison term.<sup>47</sup>

Under the South Korean constitution, an impeached president is replaced by the prime minister, a weak vice-presidential figure without independent executive authority. Moreover, the prime minister assumes presidential duties as soon as the impeachment charge is approved by the National Assembly, while the Constitutional Court conducts its trial. Importantly, though, the Acting Presidency lasts only until a new presidential election can be held, a period of no more than sixty days.<sup>48</sup> After Park's removal, Prime Minister Hwang Kyo-ahn remained in office until new elections in May 2017 brought in Moon Jae-In.<sup>49</sup>

In our view, the removal of President Park before her five-year term ended was a model of procedural integrity. The impeachment decision by the Constitutional Court laid out in depth the extent to which Park had given over the public trust to a private individual, with no official position or relevant experience. The Court's judgment, moreover, provides a model of sober evaluation of the

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<sup>39</sup> See *South Korea's president fights impeachment and other demons*, THE ECONOMIST, Dec. 17, 2016, at <https://www.economist.com/asia/2016/12/17/south-koreas-president-fights-impeachment-and-other-demons>.

<sup>40</sup> See Gi-Wook Shin and Rennie J. Moon, *South Korea after impeachment*, 28 J. DEMOCRACY 117, 117-118 (2017).

<sup>41</sup> See Shin & Moon, *supra* note 40, at 118-19.

<sup>42</sup> See 2016 Hun-Na 1, Constitutional Court of South Korea, Mar. 10, 2017.

<sup>43</sup> See Shin & Moon, *supra* note 40, at 120.

<sup>44</sup> See *id.* at 122.

<sup>45</sup> See 2016 Hun-Na 1, *supra* note 42.

<sup>46</sup> See *id.*

<sup>47</sup> See Choe Sang-Hoe, *Park Geun-hye, Ex-South Korean Leader, Gets 25 Years in Prison*, N.Y. TIMES, Aug. 18, 2018.

<sup>48</sup> See CONST. S. KOREA, art. 68 (1987).

<sup>49</sup> See Shin & Moon, *supra* note 40, at 122.

evidence, rejecting superfluous charges while upholding those for which the evidence was clear. At the same time, the Court's careful election of some impeachment grounds over others seems to have tracked the nature of public discontent at the perceived dysfunctionality of the Park government. Nonetheless, the law appears to have been strictly followed in the Park impeachment overall.

## **B. Brazil: The Rousseff Ouster**

Shortly after Dilma Rousseff had been elected to her second term in office as Brazil's President, a scandal known as "Car Wash" revealed massive corruption tied to Brazil's state-owned oil company during the period she had been in charge of the company before becoming president.<sup>50</sup> Though no evidence emerged that she was personally involved, Rousseff was held politically responsible for the failings of her party's (the Worker's Party, or "PT") long period in governance. With public discontent at PT's perceived corruption rising, opponents began to look for a hook to remove her. In late 2015, Rousseff was charged with a violation of article 85 of the Constitution, which details the grounds for impeachment. Just like previous presidencies, Rousseff's administration had engaged in an accounting maneuver to try to make it look as if the government had more assets than it did. The maneuver allowed it to allocate funds to social programs without direct allocation from Congress. A tax court held the maneuver to be illegal, opening the door to an impeachment that many analysts believed to be primarily partisan.<sup>51</sup>

The substantive grounds for impeachment in the Brazilian constitution are ambiguous. Article 85 states:

acts of the President of the Republic that are attempts against the Federal Constitution are impeachable offenses, especially those against the: I. existence of the Union; II. free exercise of the powers of the Legislature, Judiciary, Public Ministry and constitutional powers of the units of the Federation; III. exercise of political, individual and social rights; IV. internal security of the Country; V. probity in administration; VI. the budget law; [and] VII. compliance with the laws and court decisions.<sup>52</sup>

Article 85 of the Brazilian constitution thus lays out a fairly broad, and reasonably political (as opposed to legal) standard for impeachment, that seems to reach well beyond criminality. It also includes a "by law" clause giving legislation the power to further define both the standards and process for impeachment. The relevant law, Law 1079, was passed in 1950, and so predates the current constitution of 1988, although the law was amended more recently.<sup>53</sup> The law, oddly, conflicts with the constitutional text in certain key respects. Some commentators have suggested the law may play a bigger influence on impeachment in practice than the constitution itself.<sup>54</sup> The law fleshes out the broader categories found in Article 85, but still maintains a definition of those terms that is highly political in nature.

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<sup>50</sup> See Marcus André Melo, *Latin America's New Turbulence: Crisis and Integrity in Brazil*, 28 J. DEMOCRACY 50 (2016).

<sup>51</sup> For a particularly pugnacious account in these terms, see Teun A. van Dijk, *How globo media manipulated the impeachment of Brazilian president Dilma Rousseff* 11 DISCOURSE & COMM. 199, 199 (2017).

<sup>52</sup> See CONST. BRAZ., art. 85 (1988).

<sup>53</sup> See Law 1079 of 1950.

<sup>54</sup> For example, the law is broader than the constitution in terms of which officials are subject to impeachment, and it imposes a different term – 5 years rather than 8 – of potential disqualification from public office in the event of a successful impeachment and removal. See *id.* art. 68.

The allegations against Rousseff focused on crimes against the administration and the budget, chiefly as noted above that she disbursed public money without congressional authorization.<sup>55</sup> The allegations also linked Rousseff to the “Car Wash” scandal, albeit in a highly indirect way. More specifically, it was argued that she had failed to act with sufficient vigor against the scandal and its participants.<sup>56</sup> This latter allegation, however, did not become the basis for impeachment, which instead focused (at least formally) solely on the alleged illegal appropriations.<sup>57</sup>

Article 86 of the constitution fleshes out the bare bones of the process of impeachment of the president, which again is regulated more closely in Law 1079 and in internal congressional bylaws.<sup>58</sup> Under that process, the lower House investigates accusations and decides whether to impeach the president, by a two-thirds vote. Cases then proceed either to the Senate (in cases of “impeachable offenses” defined in article 85) or the Supreme Court (in cases of “common crimes”), for the final trial. Once the Senate begins removal proceedings, the president is suspended for up to 180 days during the trial. A two-thirds vote of the Senate is required to remove officials from office for commission of an “impeachable offense.” As in the United States, the President of the Supreme Court must be present and must preside over the trial that occurs in the Senate.<sup>59</sup>

In 2016, Rousseff was formally impeached by the required two-thirds vote in the lower house on a vote of 367 to 13, and trial commenced in the Senate. When the Senate voted to initiate removal proceedings, Rousseff was suspended and Vice-President Michel Temer took over as acting president. Temer retained this position after the Senate voted on September 1 to remove Dilma from office, again by a two-thirds vote of 61 to 20, from August 2016 until the end of 2018. But at the same time, the Senate failed to reach a two-thirds supermajority to deprive Rousseff or her political rights for eight years. As a result, she retained the ability to run for future office (and indeed ran unsuccessfully, for a Senate seat in 2018).<sup>60</sup>

The Supreme Court played a complex, multi-layered role throughout the episode as an agenda-setter and adjudicator of key procedural choices. Unlike its South Korean analogue, however, it exercised no ex post review once the legislative part of the impeachment process had come to its conclusion. Actors on all sides of the political spectrum bombarded the bench with a series of challenges and requests throughout the impeachment process. The Court’s response was mixed. On the one hand, the Court generally avoided judging the substantive question of whether the allegations against Rousseff were sufficient for impeachment, demurring to the legislature.<sup>61</sup> On the other hand, it issued some judgments that impacted the process in meaningful ways. For example, the Court issued

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<sup>55</sup> See Melo, *supra* note 50, at 51.

<sup>56</sup> See *id.* at 50-52.

<sup>57</sup> Cultural expectations about women’s appropriate role in public life may also have played a role. See Omar G. Encarnación, *The Patriarchy’s Revenge: How Retro-Macho Politics Doomed Dilma Rousseff*, 34 WOR. POL. J. 82, 83 (2017).

<sup>58</sup> See BRAZ. CONST., art. 86 (1988).

<sup>59</sup> See *id.*

<sup>60</sup> It is unclear under the constitution whether the Senate has the power to split the impeachment vote into two issues, one of removal and one loss of political rights, since the text of the constitution seems to state that loss of political rights for eight years is an automatic consequence of impeachment and removal, although the text of Law 1079 contemplates two distinct votes. See Rattinger, *supra* note 54, at 144-45.

<sup>61</sup> See Juliano Zaiden Benvindo, *Abusive Impeachment? Brazilian Political Turmoil and the Judicialization of Mega-Politics*, INT’L J. CONST. L. BLOG, Apr. 23, 2016, <http://www.icconnectblog.com/2016/04/abusive-impeachment-brazilian-political-turmoil-and-the-judicialization-of-mega-politics/>.

a ruling in December 2015, when the impeachment process was just beginning, that allowed the process to go forward but held that the committee investigating Rousseff needed to be reconstituted because it had previously been stacked with proponents of impeachment, in violation of the relevant laws and regulations.<sup>62</sup> The committee, directed the Court, needed to be proportional to the composition of the House.<sup>63</sup> The Court also held that the Senate, as well as the House, should issue a preliminary vote on whether to accept the impeachment allegation against Rousseff.<sup>64</sup>

The Court, and its individual justices, also issued further rulings that dealt indirectly with the issues in play. For example, a justice suspended the appointment of highly popular (and now imprisoned) former president Lula as Rousseff's chief of staff, a ruling that had an impact on the partisan balance of power by excluding a popular PT figure from quotidian governance.<sup>65</sup> Another ruling removed the president of the House on the grounds that he could not hold that role while himself under investigation for corruption.<sup>66</sup> This ruling, however, had little practical effect on the impeachment process since the House had already voted to impeach and the issue had moved to the Senate. Finally, the president of the Supreme Court, in his role presiding over the Senate impeachment trial, issued a number of substantive rulings that impacted the process as well, such as one that allowed two separate votes on the ultimate verdict in the Senate, one on whether to remove Rousseff from power and the other on whether to suspend her political rights.<sup>67</sup>

It is worth noting that, as in South Korea, the recent Brazilian impeachment had a historical precursor. This was Fernando Collor de Mello's ouster in 1992, shortly after Brazil's transition to democracy.<sup>68</sup> The latter shared key features with Rousseff's removal. As with Rousseff, political context made Collor vulnerable to impeachment. He was an 'outsider' president without strong ties to existing parties, and hence had great difficulty building a governing legislative coalition. Collor was also forced to resort aggressively to unilateral decree powers because of his lack of partisan support, often reissuing provisional decrees before they could expire.<sup>69</sup> Opponents alleged that this practice

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<sup>62</sup> See Steven Wildberger, *Brazil Supreme Court Sets Stage for President's Impeachment*, Jurist, Dec. 18, 2015, at <https://www.jurist.org/news/2015/12/brazils-supreme-court-sets-stage-for-presidents-impeachment/>; Juliano Zaiden Benvindo, *Institutions Matter: The Brazilian Supreme Court's Decision on Impeachment*, Int'l J. Const. L. Blog, Dec. 31, 2015, at <http://www.iconnectblog.com/2015/12/institutions-matter-the-brazilian-supreme-courts-decision-on-impeachment/>.

<sup>63</sup> See Benvindo, *Institutions Matter*, *supra* note 62.

<sup>64</sup> See *id.*

<sup>65</sup> See Bruce Douglas and Sam Cowie, *Brazil: Judge Halts Lula's Appointment to Cabinet Amid Corruption Scandal*, THE GUARDIAN, Mar. 17, 2016, <https://www.theguardian.com/world/2016/mar/17/brazil-judge-lula-da-silva-appointment-cabinet-wiretap-scandal-rousseff>.

<sup>66</sup> A justice also held in April 2016 that the House had an obligation to send a criminal complaint against then vice-president Temer to a House committee for investigation. See Renan Ramalho, *STF manda Cunha dar andamento a pedido de impeachment de Temer*, DO G1, May 4, 2016, at <http://g1.globo.com/politica/processo-de-impeachment-de-dilma/noticia/2016/04/ministro-do-stf-manda-cunha-iniciar-analise-do-impeachment-de-temer.html>

<sup>67</sup> See, e.g., Paolo Sotero, *Impeachment With Impunity Throws Spanner into Brazil's Recovery*, FINANCIAL TIMES, Sept. 6, 2016, at <https://www.ft.com/content/277655fb-0f52-32b6-be51-6a2aab8de60c>.

<sup>68</sup> See Theotonio Dos Santos, *Brazil's Controlled Purge The Impeachment of Fernando Collor*, 27 NACLA REP. ON AM. 17 (1994).

<sup>69</sup> See Carlos Pereira et al., *Under what conditions do presidents resort to decree power? Theory and evidence from the Brazilian case*, 67 J. POL. 178, 185 (2005).

was abusive. It was eventually restricted by the Supreme Court and then by a constitutional amendment.<sup>70</sup>

The immediate triggers for Collor's impeachment were corruption allegations. The House's charges did not allege crimes, but rather facilitating "the breach of law and order" and for behaving in a way that was inconsistent with the "dignity" of the presidential office.<sup>71</sup> Collor argued that non-criminal acts could not be the basis for impeachment. But the House and Senate proceeded to impeach him regardless. Collor technically resigned before the impeachment was completed, but the Congress nonetheless finished the process, with the Senate voting in favor by an overwhelming 76-3 vote. As in the Rouseff impeachment, judges played a major role in Collor's: the president of the Supreme Court, in his role presiding over the Senate trial, crafted special rules that simplified and streamlined some of the procedures found in Law 1079.<sup>72</sup>

What lessons does the Rouseff impeachment (and its echoes in the Collor impeachment) hold for the comparative study of presidential removal? To begin with, unlike the Park ouster in South Korea, it is hard to conceptualize Rouseff's impeachment as being about criminal behavior, or even serious moral wrongs, of the president herself. The acts that formed the basis of her impeachment – basically, accounting tricks and related devices to authorize additional social spending, allegedly with the intent of helping the PT retain power – had been engaged in by presidents prior to Rouseff. Even the broader context for the allegations and impeachment, which revolved around alleged involvement with the car wash investigation, did not yield much evidence inculcating Rouseff herself. Rather, she was accused of negligence in handling accusations and being connected to involved actors. But these accusations did not meaningfully distinguish her from the larger political class. It is perhaps unsurprising that Rouseff's impeachment prompted outcry in some quarters and was described by her and her allies as a coup.<sup>73</sup>

The political framing of the impeachment resonates even more when Brazil's recent political history is brought into the analysis. Rouseff's 2014 reelection campaign had been fought in a context where the revelations of the 'Car Wash' investigation started to discredit the country's political class as a whole. When she won reelection in 2014, it was by a much smaller margin than in 2010.<sup>74</sup> Indeed, her PT party lost support in Congress. In consequence, it was forced to rely on a more fluid pattern of support without a clear majority coalition to legislate. The president of the House, Eduardo Cunha, was never an ally of the regime and became strongly opposed to it in mid-July; his party (the second largest in the House) turned against Rouseff during the impeachment process, depriving her of needed support. According to one commentator, the theory of the case against Rouseff "echoed

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<sup>70</sup> See Thomas Skidmore, *The Impeachment Process and the Constitutional Significance of the Collor Affair*, in CORRUPTION AND POLITICAL REFORM IN BRAZIL: THE IMPACT OF COLLOR'S IMPEACHMENT 6 (Keith S. Rosenn & Richard Downes eds., 1999).

<sup>71</sup> See Rattinger, *supra* note 54, at 148.

<sup>72</sup> See *id.* at 149.

<sup>73</sup> See Benvindo, *Abusive Impeachment?*, *supra* note 61.

<sup>74</sup> See Vincent Bevins, *Brazil's President Dilma Rouseff Narrowly Reelected*, L.A. TIMES, Oct. 26, 2014, at <http://www.latimes.com/world/mexico-americas/la-fg-ff-dilma-rousseff-election-brazil-20141026-story.html>.

street protests” against the PT more generally.<sup>75</sup> At the time, the economy in Brazil was also experiencing an extended period of stagnation.<sup>76</sup>

But, crucially, the impeachment did not reset the political system. New presidential elections did not occur until 2018. Instead, Vice President Temer took over the chief executive’s role. As a result, PT allies saw the impeachment, as well as related actions like the jailing of former president Lula, as an effective attempt by more traditional and conservative actors to take down its most organized progressive force, the PT.<sup>77</sup> Temer served for about two and a half years after Rousseff’s suspension, but was a weak and extremely unpopular president. He had already been implicated in corruption in a more direct way than Rousseff, as were many of those who remained in Congress.<sup>78</sup> The discrediting of Brazil’s political class *en masse* continued; space thus opened for self-styled outsider and right-wing populist Jair Bolsonaro to win election in 2018.

### C. Paraguay: The Removal of Lugo

The removal of Paraguayan president Fernando Lugo by Congress in 2012 is another case which is difficult to understand as the removal of a criminal or morally depraved leader. A former Catholic bishop and political outsider, Lugo won the presidency in 2008 on the ticket of a small party and in alliance with seven other political parties, thus ending over sixty years of rule by the Colorado Party.<sup>79</sup> In return for the support of the largest opposition party, the Liberal party, he picked an insider vice president, Federico Franco, with Liberal bona fides.<sup>80</sup> Lugo and his vice-president were not close. There were rumors from early in Lugo’s term that the Liberals were seeking to supplant him with Franco.<sup>81</sup> Further, Lugo was unsuccessful at carrying out most of his initially ambitious political and economic programs, especially on his signature issue of land reform, and over time his popularity fell sharply.<sup>82</sup> He was unable to pass any significant legislation in a deeply divided Congress. His own coalition remained highly factionalized.<sup>83</sup> There was considerable instability during Lugo’s term, with other impeachment attempts prior to the successful one. A failed military coup led to Lugo’s replacement of the entire military leadership in 2009.<sup>84</sup>

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<sup>75</sup> See Emilio Peluso Neder Meyer, *Judges and Courts Destabilizing Constitutionalism: The Brazilian Judiciary Branch's Political and Authoritarian Character*, 19 GERMAN L.J. 19.4 727, 732 (2018).

<sup>76</sup> See Melo, *supra* note 50, at 51.

<sup>77</sup> See, e.g., van Dijk, *supra* note 51, at 203 (describing Temer as “the figurehead of what was generally seen as a political coup”).

<sup>78</sup> See Brian Winter, *Brazil's Never-Ending Corruption Crisis: Why Radical Transparency Is the Only Fix* 96 FOR. AFF. 87(2017).

<sup>79</sup> See Bryan Pitts et al., *21<sup>st</sup> Century Golpismo: A NACLA Roundtable*, 4 NACLA REPORT ON THE AMERICAS 334, 337-38 (2016).

<sup>80</sup> See *id.* at 337.

<sup>81</sup> See *id.* at 338.

<sup>82</sup> See Leiv Marsteintredet, Mariana Llanos, and Detlef Nolte, *Paraguay and the Politics of Impeachment*, 24 J. OF DEMOC. 110, 112 (2013).

<sup>83</sup> See Daniel Jatoba & Bruno Theodoro Luciano, *The Deposition of Paraguayan President Fernando Lugo and its Repercussions in South American Regional Organizations*, 12 BRAZ. POL. SCI. REV. 1, 7 (2018).

<sup>84</sup> See *id.*

The proximate cause for the Lugo impeachment was an incident on June 15, 2012, where 17 people (six police officers and eleven farmers) were killed.<sup>85</sup> Landless farmers occupied land estates that they alleged had been unlawfully acquired, leading to the clashes. The impeachment charges laid against Lugo focused on this incident, as well as four others,<sup>86</sup> and complained in general terms of “bad performance in office.”<sup>87</sup> Referring to the killings, the charging document also stated sweepingly that Lugo had exercised power in an “inappropriate, negligent, and irresponsible way, generating constant confrontation and war between social classes.”<sup>88</sup> It did not accuse Lugo, though, of committing any crimes. Like the Brazilian organic law, the Paraguayan constitution explicitly allowed impeachment for poor political performance.<sup>89</sup>

A “lightening” fast process of impeachment began and ended within the space of merely days. On June 21, 2012, the Chamber of Deputies voted to impeach Lugo by a 76 to 1 vote; the next day, on June 22, the Senate voted to remove him from office by a 39 to 4 vote. The rules required a two-thirds vote of those present in the Chamber of Deputies for impeachment; and a two-thirds absolute majority of members of the Senate for removal. Both thresholds were easily met.<sup>90</sup> Under the constitutional rules, the vice president and Liberal party member Federico Franco, who had become a manifest opponent of Lugo, became the new president.<sup>91</sup>

Lugo and his allies complained of a lack of “due process” in his impeachment – they pointed to the breathtaking speed of the impeachment and the fact that he was offered only two hours to appear before the Senate to present his defense. Like Rouseff and her allies, he condemned the removal as a “constitutional coup.” The leaders of many other countries in the region agreed.<sup>92</sup> Paraguay was in fact suspended from regional organizations Mercosur and Unasur until the next set of elections were held in the country, in 2013.<sup>93</sup> The Inter-American Commission on Human Rights issued a statement calling the speed with which the removal was carried out “unacceptable” and stating that it was “highly questionable” that the removal of a Head of State could be “done within 24 hours

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<sup>85</sup> *See id.* at 8.

<sup>86</sup> These other four incidents included : (1) authorizing a demonstration in front of the Armed Forces Engineering Command, with slogans against the “oligarchic sectors,” (2) supporting several land invasions of large estates, (3) growing insecurity and a unwillingness to confront a guerrilla movement, and (4) signing the Ushuaia II Protocol of Mercosur in a way that violated national sovereignty. *See id.*

<sup>87</sup> *See, e.g.,* Magdalena Loez, *Democracia en Paraguay: La interrupcion del “proceso de cambio” con la destitucion de Fernando Lugo Mendez* (2012), 31 CUADERNOS DEL CENDES 95, 112 (2014).

<sup>88</sup> *See id.* at 112-13.

<sup>89</sup> The constitution of Paraguay allows impeachment of the president and certain other high officials for “for bad performance in office, for crimes committed in exercise of office or for common crimes.” *See* CONST. OF PAR., art. 225 (1992).

<sup>90</sup> *See id.*

<sup>91</sup> *See* Marsteintredet et al., *supra* note 82, at 110.

<sup>92</sup> *See id.* at 114-16.

<sup>93</sup> *See* Jatoba and Luciano, *supra* note 83, at 2.



while still respecting the due process guarantees necessary for an impartial trial.”<sup>94</sup> It concluded that the speed of the procedure raised “profound questions as to its integrity.”<sup>95</sup>

It is hard to see the Paraguayan example, with its extraordinary speed, as a model of how impeachment should be done. At the same time, the case most clearly shows how impeachment is sometimes neither an exit from political crisis, nor even a judgment on the removed president. Like the Rouseff removal, but even more clearly, the impeachment of Lugo really did not focus on his culpable status as a ‘bad actor.’ The opponents of Lugo did not argue that he had committed a statutory crime. Instead, they relied on his “poor performance of duties” [*mal desempeño*] in office, a noncriminal ground of impeachment expressly contemplated in the Paraguayan constitution.<sup>96</sup>

As in the Park and the Rouseff cases, it appears that the decisive factor in Lugo’s impeachment was the fragility of his political support. Lugo was removed because he had lost the support of nearly the entire political class, including most of his own coalition, and was deeply unpopular. The Liberal party, for example, resigned en masse from Lugo’s cabinet just before the impeachment began.<sup>97</sup> Lugo appealed his removal to the Supreme Court, but the Court summarily dismissed the petition in a brief order, using reasoning similar to that of the U.S. Supreme Court when confronted with challenges to impeachment procedures. It held that the process of impeachment was delegated to the legislature and that the Court had no basis to intervene.<sup>98</sup> The loss of support of virtually the entire Congress, the judiciary, and the public, made it essentially impossible for Lugo to govern and created the potential need for an exit.

In effect, then, the Paraguayan impeachment process operated as a (super-majoritarian) vote of no confidence in the president. There are similar regime dynamics in the South Korean and (especially) Brazilian contexts as well, where the criminal allegations sometimes seem to be used as cover to remove unpopular presidents who had lost an enormous amount of congressional support. The Paraguayan impeachment is the clearest case of removal operating to address *systemic* rather than *individualistic* flaws.

#### **D. South Africa: The Ouster of Zuma**

We now turn to a case in which a president was in effect removed—albeit in the end through a resignation rather than the culmination of a formal process of removal – the ejection of President Jacob Zuma from office in the middle of his term as South Africa’s president in early 2018. Although South Africa has a President with a substantive rather than a ceremonial role, the 1996 South Africa Constitution is nonetheless more akin to a parliamentary one than a presidential one. The president is not directly elected by the public. He or she is instead chosen by the parliament. Since 1996, the position has always gone to the head of the dominant African National Congress (ANC). Under

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<sup>94</sup> Inter-American Commission on Human Rights, Press Release: IACHR Expresses Concern over the Ousting of the Paraguayan President, Jun. 23, 2012, at [http://www.oas.org/en/iachr/media\\_center/PReleases/2012/072.asp](http://www.oas.org/en/iachr/media_center/PReleases/2012/072.asp).

<sup>95</sup> *Id.*

<sup>96</sup> See Marsteintredet et al., *supra* note 82, at 114; CONST. PAR., art. 225 (1992).

<sup>97</sup> See Daniela Desantis and Didier Cristaldo, *Paraguay’s President Faces Impeachment Over Clashes*, REUTERS, Jun. 21, 2012, at <https://www.reuters.com/article/us-paraguay-lugo/paraguays-president-faces-impeachment-over-clashes-idUSBRE85K1T620120622>.

<sup>98</sup> See *Accion de Inconstitucionalidad en el juicio: Fernando Armino Lugo Mendez c/ Resolucion Nro. 878 de fecha 21 de junio 2012 dictada por la Camara de Senadores, Corte Suprema de Justicia*, Jun. 25, 2012, at <https://www.pj.gov.py/notas/7154-sala-constitucional-rechazo-accion-promovida-por-fernando-lugo> (holding that impeachment is an “exclusive competence” of the Congress).

conditions of ANC hegemony, the president will continue in office so long as he or she can maintain the support of members of the party. But, under Section 89 of the Constitution, the president can be removed in the event of a serious violation of the constitution or law, serious misconduct, or an inability to perform the functions of the office.

The Zuma presidency was characterized by an acute crisis of corruption. During the tenure of his predecessor Thabo Mbeki, an “ANC party state” developed in which party loyalists were assigned to high posts in public office, parastatals came under party control rather than state control, and ANC elites increasingly dominated the “commanding heights” of the private economy.<sup>99</sup> During the Zuma presidency, the state was captured by a small group of businesses, who steered public contracts to preferred businesses in exchange for kickbacks to ministers and other officials making allocative decisions.<sup>100</sup> Ministers who declined to cooperate were quickly relieved of their duties and office.<sup>101</sup> As a result of ineffectual or corrupt presidential leadership, a raft of structural, macroeconomic problems accumulated.<sup>102</sup>

Zuma himself did not keep his hands clean. His country “Nkandla” residence in KwaZulu Natal became an epicenter of public controversy as a result of publicly-funded security upgrade ultimately costing some R246 million.<sup>103</sup> At least initially, the ANC resisted attempts to hold him accountable. Without an internal check inside his party, and with that party playing a dominant role in the country’s politics, there was a real risk of the erosion of democracy itself. But the prosecuting and investigating institutions of the state were not particularly active in seeking to hold Zuma accountable. Only the Public Protector, an ombudsman-like body with relatively weak powers, seemed to be willing to challenge Zuma’s corrupt behavior and the larger problem of state capture.

In this context, the Constitutional Court played an interesting and important role. It intervened several times to both protect opposition rights within the parliament, but also to require parliament itself act to maintain and use mechanisms for presidential accountability. For the first issue, the court strongly suggested that votes on no confidence in the president had to be secret;<sup>104</sup> it also insisted that minority rights in parliament not be squelched.<sup>105</sup> It then held that the Speaker of the House could not simply ignore a motions of no confidence challenging Zuma’s continued tenure.<sup>106</sup> Parliament had a duty to hear such motions, the Court instructed.<sup>107</sup>

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<sup>99</sup> See Roger Southall, *The Coming Crisis of Zuma’s ANC: The Party State Confronts Fiscal Crisis*, 43 REV. AFR. POL. ECON. 73, 80 (2016).

<sup>100</sup> See Sarah Bracking, *Corruption & State Capture: What Can Citizens Do?* 147 DAEDALUS 169, 171 (2018).

<sup>101</sup> See Michaela Elsbeth Martin & Hussein Solomon, Understanding the Phenomenon of “State Capture” in South Africa, 5 S. AFR. PEACE AND SEC. STUDS. 21, 22-23 (2016).

<sup>102</sup> On corruption and the state-owned enterprises, see the insightful analysis in R.W. Johnson, *Cyril Ramaphosa’s Poisoned Chalice*, STANDPOINT, Mar. 28, 2018, at <https://standpointmag.co.uk/dispatches-april-2018-rw-johnson-cyril-ramaphosa-jacob-zuma-south-africa/>.

<sup>103</sup> See *Nkandla: Nxesi Explains Why Security Upgrade was Essential*, MAIL & GUARDIAN, Dec. 19, 2013, at <https://mg.co.za/article/2013-12-19-nxesi-nkandla-security-upgrade-was-essential>.

<sup>104</sup> See *United Democratic Movement v Speaker of the National Assembly*, [2017] ZACC 21.

<sup>105</sup> See *Oriani-Ambrosini v Speaker of the National Assembly*, [2012] ZACC 27; *Mazibuko v Sisulu*, [2013] ZACC 28; *Democratic Alliance v Speaker of the National Assembly*, [2016] ZACC 8.

<sup>106</sup> See *Mazibuko v Sisulu (Speaker of the National Assembly)*, [2013] ZACC 28.

<sup>107</sup> *Id.* para 43

In March 2017, the President dismissed the relatively independent finance minister. This prompted global rating agencies to downgrade the country's bonds to 'junk' status.<sup>108</sup> In response, three minority parties in Parliament requested that the Speaker of the National Assembly schedule a motion of no confidence in the President. One of the parties also requested that the vote be conducted by secret ballot. This request was refused by the Speaker, one of Zuma's close allies. The Speaker justified her refusal by contending that she had no legal power to direct a secret ballot. The minority party then brought an application to the Constitutional Court challenging the Speaker's decision. The Court again highlighted the importance of the motion of no confidence as a means for Parliament to hold the President accountable.<sup>109</sup> It held that the motion of no confidence acts to 'strengthen regular and less "fatal" accountability and oversight mechanisms.'<sup>110</sup>

In another critical decision, the Court empowered the Public Protector, whose findings were given legal force.<sup>111</sup> The Public Protector had issued a report that followed an investigation into the use of public funds for the improvement of the President's Nklanda residence. The report concluded that money misspent on portions of the upgrades were to be repaid by the President. The President failed to comply with the findings, claiming that they constituted mere "recommendations."<sup>112</sup> The Court, however, held that such findings *were* legally binding and that the President was not entitled to disregard them. It also held that Parliament had to come up with a mechanism to hold the president accountable. Importantly, the Public Protector's report concluded that in receiving undue benefits from the state, the President had "breached his constitutional obligations." Many regarded this statement, now imbued with the force of law, as fulfilling the criteria for impeachment set forth in section 89(1) of the Constitution.<sup>113</sup>

Despite this, Zuma subsequently survived a secret ballot of no-confidence in August 2017.<sup>114</sup> The narrowness of the vote margin, though, demonstrated the extent to which Zuma and his allies had lost support within the parliamentary ANC party. That information, aired publicly by the vote, generated a credible public signal of the extent of dissatisfaction with the Zuma presidency. This lowered the anticipated costs of defecting from that regime subsequently. It thus anticipated, and rendered more likely, Zuma's ultimate February 2018 ouster.<sup>115</sup> The ANC effectuating a removal of its own leader is a remarkable instance of an intra-party check on power. Such intra-party checks are quite rare in true presidential systems and are likely to reflect the strategic calculation of party insiders of how to minimize electoral losses due to an unpopular elected figurehead.

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<sup>108</sup> See Andrew England, *Rand Falls after Zuma Sacks South Africa Finance Minister*, FIN. TIMES, Dec. 9, 2015, at <https://www.ft.com/content/5c0da8b2-9eb5-11e5-b45d-4812f209f861>; Norimitsu Onishi & Sewell Chan, *Firing of South Africa's Finance Minister Widens a Political Rift*, N. Y. TIMES, Mar. 31 2017, at <https://www.nytimes.com/2017/03/31/world/africa/south-africa-pravin-gordhan-jacob-zuma.html>.

<sup>109</sup> See *United Democratic Movement and Speaker of the National Assembly*, [2017] ZACC 21.

<sup>110</sup> *Id.* para 34.

<sup>111</sup> See *Economic Freedom Fighters v Speaker of the National Assembly* [2016] ZACC 11.

<sup>112</sup> See Aziz Z. Huq, *A Tactical Separation of Powers*, -- CONST. COURT REV. -- (forthcoming 2019) [hereinafter "Huq, *Tactical Separation of Powers*"].

<sup>113</sup> See CONST. S. AFRICA, art. 89 (1996).

<sup>114</sup> See Simon Allison, *Jacob Zuma Narrowly Survives No-Confidence Motion in South African Parliament*, THE GUARDIAN, Aug. 9, 2017, at <https://www.theguardian.com/world/2017/aug/08/jacob-zuma-survives-no-confidence-vote-south-african-president>.

<sup>115</sup> See Huq, *Tactical Separation of Powers*, *supra* note 112, at 17-18.

In short, the South African Constitutional Court forced the political system to act. It did not directly remove the president, but it ensured that the processes of democratic accountability could not be ignored. The Public Protector also played the vital role of documenting “state capture” in a form that Zuma could not easily ignore. At least formally, the Zuma case is a “near miss” rather than an impeachment.<sup>116</sup> But it illustrates how institutional processes can cause a collapse in public support for a leader, which can make their continuance in office untenable. Across all these cases, the formal processes of removal operated in tandem with, and were entangled in, changing public sentiment in respect to the presence of not just personal malfeasance, but also a systemic crisis of governance. The South African case thus confirms that presidential removal operates as a way of expressing concern about systemic crisis, even if the causal relationship of legal censure mechanisms to public disapproval varies from the earlier cases.

## E. Impeachment in the United States

With the recent cases of South Korea, Brazil, Paraguay, and South Africa in mind, it is useful to return to the United States.<sup>117</sup> Removing a sitting president in the United States through impeachment has been described as “the most powerful weapon in the political armory, short of civil war.”<sup>118</sup> Yet this is in some tension with the thinking at the Philadelphia Convention, where there is some evidence of a rather more capacious concept. The delegates to that Convention borrowed the institution of impeachment from English law, where it had been a device to discipline and remove the king’s ministers.<sup>119</sup> Indeed, over the centuries, it provided a central power of parliamentary accountability in the United Kingdom, but was not limited to serious crimes.<sup>120</sup> Even while the debates about the Constitution were ongoing, for example, Edmund Burke was spearheading an effort to impeach Warren Hastings, the first Governor-General of India, for “high crimes and misdemeanors” in the form of gross maladministration.<sup>121</sup>

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<sup>116</sup> See Tom Ginsburg and Aziz Huq, *Democracy’s Near Misses*, 29 J. DEMOCRACY 16 (2019).

<sup>117</sup> The first two articles of the Constitution establish and describe the impeachment process for the President, Vice President, and other Civil Officers, in the following terms:

Art. I, § 2, cl. 5: ‘The House of Representatives . . . shall have the sole Power of Impeachment.’

Art. I, § 3, cl. 6: ‘The Senate shall have the sole Power to try all Impeachments. When sitting for that Purpose they shall be on Oath or Affirmation. When the President of the United States is tried, the Chief Justice shall preside: and no Person shall be convicted without the Concurrence of two-thirds of the Members present.’

Art. I, § 3, cl. 7: ‘Judgement in Cases of Impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of honor, Trust or Profit under the United States: but the Party convicted shall nevertheless be liable and subject to Indictment. Trial, Judgment and Punishment, according to Law.’

Art. II, § 2, cl. 1: ‘The President . . . shall have power to grant Reprieves and Pardons for Offenses against the United States, except in Cases of Impeachment.’

Art. II, § 4: ‘The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.’

<sup>118</sup> See T.F.T. Plunknett, *Presidential Address*, 3 TRANS. ROYAL HISTORICAL SOC. 145 (1953).

<sup>119</sup> See SUNSTEIN, *supra* note 8, at 35; BERGER, *supra* note 8, at 104.

<sup>120</sup> See Clayton Roberts, *The Law of Impeachment in Stuart England: A Reply to Raoul Berger*. 84 YALE L. J. 1419, 1432-34 (1974) (providing evidence for this, and also arguing that parliaments erred about the law).

<sup>121</sup> See Mithi Mukherjee, *Justice, War, and the Imperium: India and Britain in Edmund Burke’s Prosecutorial Speeches in the Impeachment Trial of Warren Hastings* 23 L & HIST. REV. 589 (2005).

The formation of the constitutional text on the substantive scope of impeachment followed from one of those exchanges between two delegates that admits of speculation, inference, and endless conjecture: One of the early iterations of the impeachment mechanism considered by the 1787 Constitutional Convention limited impeachment only to cases of treason or bribery.<sup>122</sup> But George Mason of Virginia worried that those bases would be insufficient to remove a president who committed no crime but was inclined toward tyranny.<sup>123</sup> Mason proposed adding “maladministration” as a basis for impeachment and removal from office, which would have made our system more like a parliamentary one. When James Madison objected that maladministration was a vague term, Mason then proposed the usage “treason, bribery, or other high crimes and misdemeanors.” It was that language that was ultimately adopted in the Constitution.<sup>124</sup> The Mason-Madison exchange suggests that a narrow ‘bad actor’ model fails to exhaust impeachment’s purpose. Yet it also allows a number of different inferences about how far beyond that model the text was initially intended to protrude.

As a congressional report issued during the Nixon impeachment recounts, the phrase “High Crimes and Misdemeanors” had been first used in 1386 during a procedure to remove Michael de la Pole, the first Earl of Suffolk.<sup>125</sup> The Earl’s failures included negligence in office, and embezzlement. He had failed to follow parliamentary instructions for improvements to the king’s estate and had failed to deliver the king’s ransom for the town of Ghent, letting it fall to the French as a result. For these failures, Suffolk became the first official in English history to lose his office through impeachment.<sup>126</sup> Impeachment was subsequently used episodically throughout English history,<sup>127</sup> before falling into desuetude with the creation of modern parties and the emergence of the “ministerial responsibility” principle.<sup>128</sup> Under ministerial responsibility, a minister can be removed simply on a lack of confidence, which makes removal a purely political matter without need for a legal proceeding. Impeachment was last used in the United Kingdom in 1806.<sup>129</sup> Drawing on this history, the Nixon-era congressional report concludes that “the scope of impeachment was not viewed narrowly.”<sup>130</sup>

The ratification debates contain further evidence of this “political” understanding. Hence, Alexander Hamilton put it in Federalist 65 explained that impeachment would be addressed at “those

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<sup>122</sup> See SUNSTEIN, *supra* note 8, at 51. This original formulation was subject to many changes. For instance, the Virginia Plan originally envisaged a judicial process for impeachments. JOHN R. LABOVITZ, *PRESIDENTIAL IMPEACHMENT 2* (1978).

<sup>123</sup> See SUNSTEIN, *supra* note 8, at 51-53.

<sup>124</sup> See U.S. CONST., art. II, sec. 4.

<sup>125</sup> See *Constitutional Grounds for Presidential Impeachment*, H. Comm. Rep. 28-959, 93rd Congress, 1974, at XX.

<sup>126</sup> See J.S. ROSKELL, *THE IMPEACHMENT OF MICHAEL DE LA POLE, EARL OF SUFFOLK IN 1386 IN THE CONTEXT OF THE REIGN OF RICHARD II* (1984).

<sup>127</sup> See 1 J. STEPHEN, *A HISTORY OF THE CRIMINAL LAW OF ENGLAND 158-60* (1883) (stating that “with insignificant exceptions, the present law and practice as to parliamentary impeachments was established . . . in the latter part of the reign of Edward III and the reign of Richard II”).

<sup>128</sup> See Sharon L. Sutherland, *Responsible government and ministerial responsibility: Every reform is its own problem*, 24 CAN. J. POL. SCI. 91 (1991).

<sup>129</sup> See Jack Simson Caird, *Impeachment*, United Kingdom Parliament, June 6, 2016, available at <https://researchbriefings.parliament.uk/ResearchBriefing/Summary/CBP-7612>

<sup>130</sup> *Constitutional Grounds for Presidential Impeachment*, H. Comm. Rep. 28-959, 93rd Congress, 1974, at 5. See also Jack N. Rakove, *Statement on the Background and History of Impeachment*, 67 G.W. L. REV. 682 (1998).

offenses which proceed from the misconduct of public men, or, in other words, from the abuse or violation of some public trust. They are of a nature which may with peculiar propriety be denominated POLITICAL, as they relate chiefly to injuries done immediately to the society itself.”<sup>131</sup> Subsequently, Madison speaking at the Virginia ratification convention for the Constitution, intimated a fundamentally political purpose to impeachment. When George Mason raised concerns about the breadth of the pardon power and the possibility that a president would use it to establish tyranny, noting that a president could use it to pardon crimes that “were advised by himself.” Madison responded that impeachment would be the appropriate remedy in such a case: “There is one security in this case to which gentlemen may not have adverted: if the President be connected, in any suspicious manner, with any person, and there be grounds to believe he will shelter him, the House of Representatives can impeach him; they can remove him if found guilty; they can suspend him when suspected, and the power will devolve on the Vice-President.”<sup>132</sup>

But original understanding has not been destiny. Stephen Griffin’s examination of the historical record of presidential impeachments shows that “the historical reality of the Johnson, Nixon, and Clinton impeachments is quite different.”<sup>133</sup> Rather than hewing to the broader “Hamiltonian” reading of impeachment, as Griffin calls it, presidents and their supporters have since the early nineteenth century articulated a narrower alternative—and have largely prevailed. On this narrower view, “Presidents could be impeached only when the opposing party controlled Congress, and then only for committing indictable crimes, or at least significant violations of law.”<sup>134</sup> Debates on impeachment during both the Clinton and the Trump presidencies have reflected and deepened this conflation between serious crime and impeachment. The original understanding of impeachment thus finds considerable academic support—but the historical exegesis of scholars has remarkably (or predictably?) little influence on actual practice or political rhetoric. In practice, therefore, modern impeachments appear to be tied to the identification of “bad actors,” such as in the emphasis on finding crimes during the Clinton impeachment.

During the Johnson impeachment, for example, “Congress wanted to impeach Johnson for abusing his constitutional powers to obstruct the enforcement of federal laws.”<sup>135</sup> But the actual process centered mostly around Johnson’s supposed violation of the Tenure in Office Act by dismissing Edward Stanton from his post as Secretary of War.<sup>136</sup> Since this was not really a crime in any conventional sense, but rather something more akin to an abuse of power, the tension between different models of impeachment was apparent. In contrast, during the Clinton impeachment, the House of Representatives seemed to proceed under a more legalistic conception of the impeachment power. Three of the charges formulated by the House spoke directly to alleged crimes committed by Clinton: two counts of perjury and obstruction of justice. Two of these three counts passed the House

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<sup>131</sup> THE FEDERALIST No. 65 (Alexander Hamilton)

<sup>132</sup> During proceedings regarding the potential impeachment of Richard Nixon, the House judiciary committee also stated that a finding of criminality was “neither necessary nor sufficient” to constitute an impeachable offense. See *Constitutional Grounds for Presidential Impeachment*, *supra* note 130.

<sup>133</sup> See Griffin, *supra* note 24, at 5.

<sup>134</sup> See *id.*

<sup>135</sup> See *id.* at 13.

<sup>136</sup> See *id.*

and formed the basis on which Clinton was impeached; the third narrowly failed. In contrast, a single count of abuse of power failed overwhelmingly in a 148-285 vote.<sup>137</sup>

Another reason for the dominance of a narrow, criminally-focused understanding of impeachment that is not stressed by Griffin may be the manner in which the text is formulated. The Constitution is normally read to create a unified impeachment standard that includes judges, high political officials, and chief executives.<sup>138</sup> Removing only bad actors, essentially convicted criminals, makes good sense in the removal of judges as a way to protect judicial independence. But the same standard applied to chief executives may inhibit impeachment from playing an exit role during severe crises, or at least may force actors to make disingenuous statements during impeachment processes. If so, this would be an example of drafting choices having unanticipated, and perhaps pernicious, effects on major elements of constitutional operation. It is a matter to which we will return in Part III.

Beyond the question of impeachment's substantive threshold, the law and the historical record are relatively sparse. Since the founding, there have been many resolutions of impeachment brought up against federal officials. Nineteen were formally impeached in the House of Representatives.<sup>139</sup> Of these, fifteen were federal judges, one was a Senator, one a cabinet member, and two, Andrew Johnson in 1868 and Bill Clinton in 1999, were sitting presidents.<sup>140</sup> Of these, eight were convicted after a trial in the Senate, and removed from office. No chief executive has ever been removed from power following a Senate trial. The Clinton impeachment failed to achieve the requisite two-thirds vote by a significant margin; the Johnson removal failed by a single vote, 35 to 19.<sup>141</sup>

The difficulty and resulting infrequency of impeachment generates a perhaps troubling dynamic: It elicits a surfeit of impeachment talk, and arguably improper invocations of the procedure. Because impeachment attempts require a supermajority of two-third of Senators for removal, there is a moral hazard inducing individual congressmembers in the House to introduce resolutions of impeachment. Members can claim credit without having to take responsibility for the subsequent costs of an impeachment that will almost certainly not proceed. As a result, almost every president has faced an effort by members of Congress to use impeachment as a way to paint them as a bad actor. In particular, in an increasingly polarized era, motions of impeachment have become somewhat routine, even if the process has rarely advanced beyond the stage of introduction. (In the post-Watergate era, Jimmy Carter is the only president not to have had such a motion introduced.). The Clinton impeachment, in fact, was marred by these problems. Republicans wielded the report of special counsel Kenneth Starr as a way to paint Clinton as a bad actor. The crux of the debate focused on whether the acts that Clinton was accused of – essentially, lying under oath as part of a civil case about sexual misconduct – were sufficient to warrant impeachment. What got lost in this focus on the conduct of the actor were the broader issues of political context: Republicans controlled the House

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<sup>137</sup> See Richard A. Serrano and Marc Lacey, *Clinton Impeached: Split House Votes to Send Case Against President to Senate for Trial; Livingston to Leave Congress*, L.A. TIMES, Dec. 20, 1998, at <https://www.latimes.com/archives/la-xpm-1998-dec-20-mn-56070-story.html>.

<sup>138</sup> See U.S. CONST., art. II, sec. 4.

<sup>139</sup> See Jared Cole and Todd Garvey, Congressional Research Service, *Impeachment and Removal 3* (Oct 15, 2015), <https://fas.org/sgp/crs/misc/R44260.pdf>.

<sup>140</sup> See Lawrence Trautman, *Presidential Impeachment: A Contemporary Analysis* (Nov. 12 2018), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3290722](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3290722) [last accessed Jan. 11, 2019].

<sup>141</sup> See SUNSTEIN, *supra* note 8, at 103-06.

and thus were able to push through articles of impeachment, but they had nowhere close to the two-thirds majority in the Senate needed to remove Clinton from office without substantial Democratic party votes. And the prospect of Democrats turning on Clinton was remote, given that his popularity remained very high throughout the impeachment process. (Parallels to the current moment are, no doubt, lost to both sides).

At the same time, historical practice has generated a more stable and less obviously pernicious equilibrium with respect to judges. The failed impeachment of Chief Justice Samuel Chase at the turn of the nineteenth century helped establish some outer bounds on the impeachment power, at least as regards judges.<sup>142</sup> It set a precedent that mere disagreement with judicial decisions would not be grounds for ousting a judge.<sup>143</sup> In the modern period, those judges who have been removed have generally been implicated in serious crimes. To be sure, Congress has not always felt tightly tethered to the judicial process in carrying out impeachment. Then-judge Alcee Hastings, for example, was impeached and removed by Congress (and later elected to the House of Representatives!) for acts that he had previously been acquitted of before a criminal jury.<sup>144</sup> Even in the Hastings case, though, the impeachment of judges in the modern period has generally been understood to be tethered to involvement in criminal acts.

Beyond this, one of the most striking regularities of historical practice to emerge is (especially when laid alongside the South Korean, Brazilian, and South African examples) is the lack of any real role for the courts. The Supreme Court has identified impeachment as the quintessential political question that precludes virtually all judicial review.<sup>145</sup> The Court found issues related to impeachment non-justiciable, mostly because the text of the constitution committed them “sole[ly]” to the two houses of Congress.<sup>146</sup> The Court was also influenced by pragmatic factors, noting the chaos that could ensue if there was a constitutional challenge to the removal of the president, and by the difficulty of crafting standards to figure out what terms like “try” mean in the context of an impeachment. At the same time, the constitutional text states that the Chief Justice must preside over the impeachment trial of the president of the United States. The presence of the Chief Justice at the most important impeachments (those of the president) suggests perhaps some judicial role, but there is great uncertainty as to what the role entails.<sup>147</sup> In practice, it has been ceremonial. One implication of this relatively light judicial touch is that there has been no ‘over-legalization’ of impeachment. This at least leaves open the possibility of impeachment being deployed as an exit from severe political crisis.

In summary, impeachment in the U.S. context is marked by the gap between original expectations and incentive-compatible practice. Instead of a serious tool to remove a president in moments of systemic risk, impeachment talk has become an instrument of political harassment. On

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<sup>142</sup> See Richard B. Lillich, *The Chase Impeachment*, 4 AM. J. LEGAL HIST. 49 (1960).

<sup>143</sup> See KEITH WHITTINGTON, CONSTITUTIONAL CONSTRUCTION: DIVIDED POWERS AND CONSTITUTIONAL MEANING 21-27 (1999).

<sup>144</sup> See Michael J. Gerhardt, *Lessons of Impeachment History*, 67 GEO. WASH. L. REV. 603, 613 (1998).

<sup>145</sup> See *Nixon v. United States*, 506 U.S. 224 (1993).

<sup>146</sup> See *id.*

<sup>147</sup> For a useful discussion of the ambiguous circumstances in which the Chief Justice’s role was created at the Philadelphia Convention (by the Committee of the Eleven) and the absence of floor debate, see Michael F. Williams, *Rehnquist’s Renunciation? The Chief Justice’s Constitutional Duty to “Preside” over Impeachment Trials*, 104 W. VA. L. REV. 457, 468 (2002).



one view, therefore, it is possible to characterize the U.S. system of impeachment as marked by the worst of both worlds – an ineffective tool that nonetheless has become highly politicized.

## **F. Conclusion**

Across the board, these case studies suggest that impeachment or removal comprises a major and convulsive moment in a country's political history. Except for the United States—where the impeachment of chief executives has largely fallen into desuetude beyond the context of partisan cheap talk—there is a tight connection between removal mechanisms for chief executives and the presence of a systemic crisis. Where both political elites and the public perceive a regime as unable to operate effectively (for whatever reason), they are inclined to support removal.

These case studies suggest the possibility that impeachment will work best as a systemic remedy triggered in moments of deep confidence crises among the public. Whether this conclusion can be sustained by a broader consideration of comparative evidence is the question to which we turn next.

## **II. The Dynamics of Impeachment in Global Perspective**

The case studies presented in Part I suggest that the term “impeachment” is in practice a catch-all for a range of different practices. In this Part, we ask how frequently one observes different substantive and procedural versions of impeachment across different jurisdictions in different periods. As noted in the introduction, we focus on the removal of fixed-term presidents. The most important examples of these are in presidential systems like the United States, where a chief executive who selects the government and has at least some constitutional lawmaking authority is selected by direct elections and survives for a fixed term of years,<sup>148</sup> or in semi-presidential systems like France, where a fixed-term president coexists with a prime minister and both figures may have substantial power.<sup>149</sup> But some parliamentary systems (such as Austria) also have fixed-term presidents who serve as heads of state with no real governmental power; we include removal of these figures as well in our dataset, though the cases are rare. In appropriate instances, we provide separate statistics for subsets, such as presidential and semi-presidential systems. We draw many of the statistics and analyses that follow from the Comparative Constitutions Project, a comprehensive inventory of the provisions of written constitutions for all independent states between 1789 and 2006, with data updated through 2017.<sup>150</sup>

### **A. Impeachment from Text to Practice**

It is very common for democratic constitutions to provide for removal of the head of state under some conditions. As of 2017, 90 percent of presidential and semi-presidential regimes had constitutional rules that laid out a process for removal, either for incompetence, criminal action or some other basis.<sup>151</sup> The procedures differ widely on such issues as the basis for dismissal, the process of proposal for dismissal, the process of approval, the period of the term of office within which the President's mandate can be revoked, and the various timing of different steps. But they are matters of

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<sup>148</sup> See MATTHEW SOBERG SHUGART AND JOHN CAREY, *PRESIDENTS AND ASSEMBLIES: CONSTITUTIONAL DESIGN AND ELECTORAL DYNAMICS* 19-20 (1992).

<sup>149</sup> See, e.g., ROBERT ELGIE, *SEMI-PRESIDENTIALISM: SUB-TYPES AND DEMOCRATIC PERFORMANCE* (2011) (arguing as well that there are different sub-types of semipresidentialism).

<sup>150</sup> See Comparative Constitutions Project, at <http://www.comparativeconstitutionsproject.org>. For details on the conceptualization and measurement of constitutions and constitutional systems, see *Conceptualizing Constitutions*, Comparative Constitutions Project, <http://www.comparativeconstitutionsproject.org/conceptualizingconstitutions.htm>.

<sup>151</sup> Data on file with authors.

constitutional text, not of statutory enactment. Yet as the case of Brazil shows, the fact of constitutional entrenchment does not necessarily preclude the enactment of statutes with important effects on the process.<sup>152</sup> We focus here, however, mainly on constitutional text. Thus, due caution should be exercised in drawing inferences about how that text interacts with statutory supplements or institutional cultures. In this section we first provide some basic empirics about the frequency of impeachment, and then lay out some examples of the range of provisions.

The ubiquity of constitutional text on impeachment is matched by a similar pervasiveness of attempts to remove presidents. Although attempts are not rare, they are rarely successful. One scholar, Young Hun Kim, notes that some 45 percent of new presidential democracies faced an impeachment attempt in the period 1974-2003, and that nearly a quarter of presidents who served in this period were subjected to an attempt.<sup>153</sup> Such attempts can vary in seriousness, ranging from mere calls by some set of legislators for impeachment to full formal votes in the parliament. Defined as a mere proposal in the legislature, attempts are exceedingly common. Supplementing Kim’s data, we gathered data on all such attempts since 1990, and found at least 154 proposals in 63 countries, against 144 different heads of state. Using Kim’s fourfold framework for level of attempt, we identified the highest level of seriousness in each attempt, and report these in Table 1. While there is some difficulty distinguishing different attempts, the overall data indicates well over 200 proposals of various levels of seriousness.

**Table 1: Frequency of Impeachment Attempts 1990-2018**

Level	1990-99	2000-2009	2010-18	Total
1=proposal by some deputies to impeach	38	81	35	154
2=attempt to place the question on the parliamentary agenda	26	36	10	72
3=parliament votes on whether to impeach	3	11	6	20
4=parliament passes an impeachment vote	7	8	8	23
Head of state actually leaves office <sup>154</sup>	5	7	8	17

<sup>152</sup> See *supra* text accompanying notes 53-54.

<sup>153</sup> See Young Hun Kim, *Impeachment and Presidential Politics in New Democracies*, 21 DEMOCRATIZATION 519, 520 (2014).

<sup>154</sup> This row includes some cases in which an impeachment vote was held, but the president was either removed beforehand or resigned, and so does not count as being formally removed by impeachment. For example, President Victor Yanukovich was deposed in Ukraine’s Orange Revolution of 2014, fleeing to Ukraine. Parliament voted to remove him from office for being unable to fulfill his duties but did not pass formal articles of impeachment.

Removal through impeachment	3	4	3	10
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As the last row in Table 1 demonstrates, successful removal by impeachment is a rarity. We identify ten total cases since 1990, listed on Table 2 below.<sup>155</sup> Close inspection of these cases suggests that successful removal typically involves a situation in which the opposition has control of the parliament and is also able to convince some members of the president's party to defect. But this is not likely to occur because of certain structural features. Both attempts and removals are more frequent when the president is unpopular and does not have a majority of support in the legislature. They often occur in the context of structural shifts in the larger party system. This is consistent with Kim's analysis, which finds that impeachment attempts are more common when the president is involved in political scandal, and in systems with strong presidential powers.<sup>156</sup>

Presidential systems are characterized by single individuals who enjoy popular appeal but may not necessarily have strong roles within their own parties.<sup>157</sup> Party leaders may have a good deal of trouble controlling their presidential candidate once in office (and so the occasionally rocky relations between President Trump and congressional leaders of the Republican Party are less atypical than one might expect). While one might assume that this would lead to parties turning against their presidents on occasion, the linked electoral fates of parties in the legislative and executive branches mean that they have relatively weak incentives to do so (even if they do control the levers of impeachment or removal).<sup>158</sup> At the very least, to impeach one's own party leader implies that the party was incompetent in choosing the person as candidate. Worse, it might catalyze a fragmentation of the party, as the spurned leader breaks off with his or her own political coalition.

To illustrate why it is that removing presidents is so hard even when their party turns against them, consider the attempt to dismiss President Ranasinghe Premadasa of Sri Lanka. In 1991, a motion to impeach Premadasa was raised in the parliament, and was supported by some members of his own party who came from a higher caste.<sup>159</sup> Premadasa was able to expel dissident members, who then, in accordance with the text of the Sri Lankan Constitution, lost their seats in parliament. Other instances of failed attempts in presidential systems to use impeachment for intraparty conflict include South Korea's Roh Moo-hyun, as discussed above in Part I. Recall that Roh was impeached but not removed by the country's Constitutional Court, as it found that the violations were not so severe as to justify a removal from office.<sup>160</sup> Again, because Roh maintained public support, and his party was faring well at the polls, there was a close alignment of interests between chief executive and party. Under those circumstances, impeachment will rarely occur.

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<sup>155</sup> Writing earlier, Samuels and Shugart report that out of 223 individuals elected in presidential democracies from 1946 to 2007, only six were ultimately impeached. See DAVID S. SAMUELS AND MATHEW S. SHUGART, *PRESIDENTS, PARTIES AND PRIME MINISTERS: HOW THE SEPARATION OF POWERS AFFECTS PARTY ORGANIZATION AND BEHAVIOR* 108 (2010)

<sup>156</sup> See Kim, *supra* note 153.

<sup>157</sup> See SAMUELS AND SHUGART, *supra* note 155.

<sup>158</sup> See *id.* at 108.

<sup>159</sup> See *id.* at 112-114.

<sup>160</sup> See *supra* text accompanying notes 31-37.

In the context of pure presidential systems, we have been able to locate one case of a party's legislative majority voting to remove its own president. That was Raul Cubas Grau in Paraguay, in 1999, who resigned after his impeachment by the Chamber of Deputies and just before a Senate vote that would have completed his removal from office.<sup>161</sup> Cubas had won the party's nomination only because the party leader had been jailed for a coup attempt. After a political assassination, another faction in his party attempted to impeach him in favor of its preferred candidate. This was successful after a period of political turmoil. Samuels and Shugart attribute the success of removal to a rare instance in which the party in question truly dominates the political scene and all levers of power.<sup>162</sup> Intraparty fights thus take the place without the specter of party-against-party competition that typically characterizes general elections.

At the same time, it is sometimes the case that a handful of members of a president's party will join with others in an impeachment motion or threat. Such was the case when Richard Nixon resigned under threat of impeachment in 1974. Other examples involving impeachment or related mechanisms include Ecuador's Abdala Bucaram in 1997 and Jamil Mahuad in 2000, Paraguay's Raul Cubas Garu in 1999, Venezuela's Carlos Andres Perez in 1993, and Guatemala's Otto Perez Molina in 2015.<sup>163</sup> In 2005, Ecuador's Congress deposed Lucio Gutierrez from office for abandoning his duties, though they did not have to complete the impeachment process because of his resignation.<sup>164</sup> In these cases, individual legislators' interests plainly diverged from those of the party, perhaps because of differences in the consistencies represented by different legislators within the same party, or perhaps because of ideological divisions within the party.

Table 2 presents all the cases of successful removal of directly elected presidents through impeachment since 1990. It shows that the phenomenon is not unknown. But it is also not particularly common. It represents well less than half of 1% of all country-years in which impeachment might have occurred. The final column of Table 2 also offers a threshold piece of evidence of the impact of impeachment on the political system. It does so by tracking whether the country's level of democracy improves or declines as a result of impeachment. To measure democracy, we use the widely utilized Polity2 index, which rates democratic quality on a 21-point scale ranging from -10 (total autocracy) to +10 (total democracy). By convention, scores of 6 or higher are considered full democracies. It is first worth noting that *every* country that successfully impeached a president remained a full democracy thereafter, in most cases without any change in the level of democracy. Even Madagascar, where President Albert Zafy was impeached in 1996, remained a full democracy a few years later. The impeachment of Abdurrahman Wahid in Indonesia, which occurred just two years after the country became a democracy, was part of the country's democratic growing pains. As a result, it soon thereafter moved from the marginal score of 6 to an 8. Peru's impeachment of Alberto Fujimori occurred as part of the restoration of democracy after his period of autocratic rule, and hence we see a similar

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<sup>161</sup> See Clifford Krauss, *Paraguay Glides from Desperation to Euphoria*, N.Y. TIMES, Apr. 1, 1999, at <https://www.nytimes.com/1999/04/01/world/paraguay-glides-from-desperation-to-euphoria.html>.

<sup>162</sup> See SAMUELS AND SHUGART, *supra* note 155, at 117.

<sup>163</sup> In 2015 in Guatemala, the country's Attorney General moved a motion for impeachment that was unanimously approved by the Supreme Court. The President was facing allegations of corruptions. After the vote by the Supreme Court, the President submitted a resignation that was unanimously accepted by Congress. Congress also unanimously voted to strip him of his immunity from prosecution. This vote by Congress can thus be seen as akin to impeachment. See *Guatemala's President Otto Perez Molina Resigns*, BBC NEWS, Sept. 3, 2015, at <https://www.bbc.com/news/world-latin-america-34137225>.

<sup>164</sup> See *A Coup by Congress and the Street*, THE ECONOMIST, Apr. 25, 2005, at <https://www.economist.com/news/2005/04/25/a-coup-by-congress-and-the-street>.

movement in that case. (In unreported analysis, we further examined every instance in which a country held an impeachment vote in parliament.

**Table 2: Successful removals involving impeachment since 1990**

Country	Year	President	Change in Polity score from t-2 to t+2
Brazil	1992	Fernando Collor	0
Venezuela	1993	Carlos Andreas Perez	0
Madagascar	1996	Albert Zafy	-2
Peru	2000	Alberto Fujimori <sup>165</sup>	+8
Philippines	2001	Joseph Estrada	0
Indonesia	2001	Abdurrahman Wahid	0
Lithuania	2004	Rolandes Paksas <sup>166</sup>	0
Paraguay	2012	Fernando Lugo	+1
Brazil	2016	Dilma Rouseff	0
Korea	2017	Park Geun-hye	0

Source: Archigos dataset supplemented by authors

To this list could be added several instances in which impeachment occurred but the President was not removed, either because he or she was not convicted or because of extraconstitutional action. Of course, U.S. President Bill Clinton was an example of the former. Russian president Boris Yeltsin was impeached in the early 1990s but dissolved parliament to stay in office.<sup>167</sup> Similarly, Alberto Fujimori’s “self-coup” in 1992 was followed by a vote to remove him, but Fujimori had already dissolved Congress.<sup>168</sup> There are also cases in which some kind vote was held and the president departed, but not through impeachment.<sup>169</sup> In addition there have been at least eight formal

<sup>165</sup> Fujimori had already fled the country in response to allegations of corruption and attempted to resign, but Congress insisted on completing the impeachment proceeding. See ANIBAL PEREZ-LINAN, PRESIDENTIAL IMPEACHMENT AND THE NEW POLITICAL INSTABILITY IN LATIN AMERICA 184-85 (2007).

<sup>166</sup> Paksas was impeached for violating the Lithuanian constitution and his oath of office. His impeachment followed news that he had granted citizenship to a Russian businessman who was the main contributor to his campaign. After being found guilty by the Seimas (National Parliament), he was removed from office on the same day. See Terry D. Clark, Egljė Verseckaitjė & Egljė Verseckaitjė, *PaksasGate: Lithuania Impeaches a President*, 52 PROBS. OF POST-COMMUNISM 16 (2005).

<sup>167</sup> See Edward Morgan-Jones and Petra Schleiter, *Governmental change in a president-parliamentary regime: The case of Russia 1994-2003*, 20 POST-SOVIET AFF. 123 (2004).

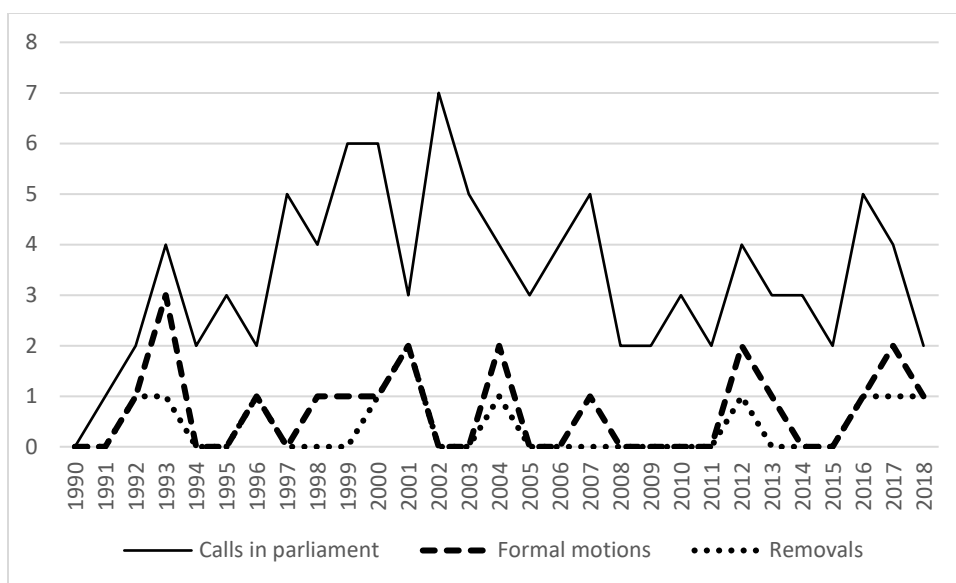
<sup>168</sup> CATHERINE M. CONAGHAN, FUJIMORI’S PERU: DECEPTION IN THE PUBLIC SPHERE 31-32 (2006).

<sup>169</sup> The case of Abdulla Bucaram, discussed below, is one example. See text at notes 224-230 *infra*. Viktor Yanukovych of Ukraine was deposed in the Orange Revolution of 2014, and fled to Russia. A vote was held stripping him of his power because he was unable to fulfill his duties, but no articles of impeachment were involved. See Maria Popova, *Was Yanukovych’s Removal Constitutional?* PONARS Eurasia, Mar. 20, 2014, available at

impeachment attempts that did not pass the legislature since 1990. Only the Russian case, which occurred when Russia could be characterized as a semi-democracy in the midst of a tenuous (and ultimately failed) transition from authoritarianism, led to a significant decline in the Polity score. Finally, we note that the ultimate results of the Brazilian case are still ambiguous: Although Temer's rocky tenure was followed by a competitive election, it remains to be seen whether, or to what extent, Jair Bolsonaro damages Brazil's democratic structure.<sup>170</sup> Early signs suggest that he has been effectively constrained by the legislature.<sup>171</sup>

How have these instances of removal, as well as the calls for removal that inevitably precede and surround them, emerged over time? Has there been a global 'moment' of impeachment? Figure 1 provides a visual representation of the frequency of removal attempts since 1990, distinguishing calls by a party in parliament from formal motions of impeachment. The data shows a rather constant frequency of calls and removals around the world: Intriguingly, there is no uptick in the wake of the 2008-09 financial crisis, which is generally thought to have triggered a surge of populist discontent and anti-democratic moves.<sup>172</sup> Our prior was that this would have been an inflection point, triggering a wave of calls to remove elected leaders who had forced by economic exigency to make unpopular decisions. Contrary to our expectations, however, there is no concentrated moment of global impeachments. We rather find a constant background drone of calls for impeachment.

**Figure 1: Frequency of calls and removals**



<http://www.ponarseurasia.org/article/was-yanukovych%E2%80%99s-removal-constitutional> [last accessed Oct. 1, 2019]

<sup>170</sup> See, e.g., Robert Muggah, *Can Brazil's Democracy be Saved?* N.Y. TIMES, Oct. 8, 2018, at <https://www.nytimes.com/2018/10/08/opinion/brazil-election-bolsonaro-authoritarian.html>.

<sup>171</sup> Julio Zaiden Benvido *The Party Fragmentation Paradox in Brazil*, ICONnect blog, Oct. 24, 2019, available at <http://www.iconnectblog.com/2019/10/the-party-fragmentation-paradox-in-brazil-a-shield-against-authoritarianism/> [last accessed Oct. 24, 2019]

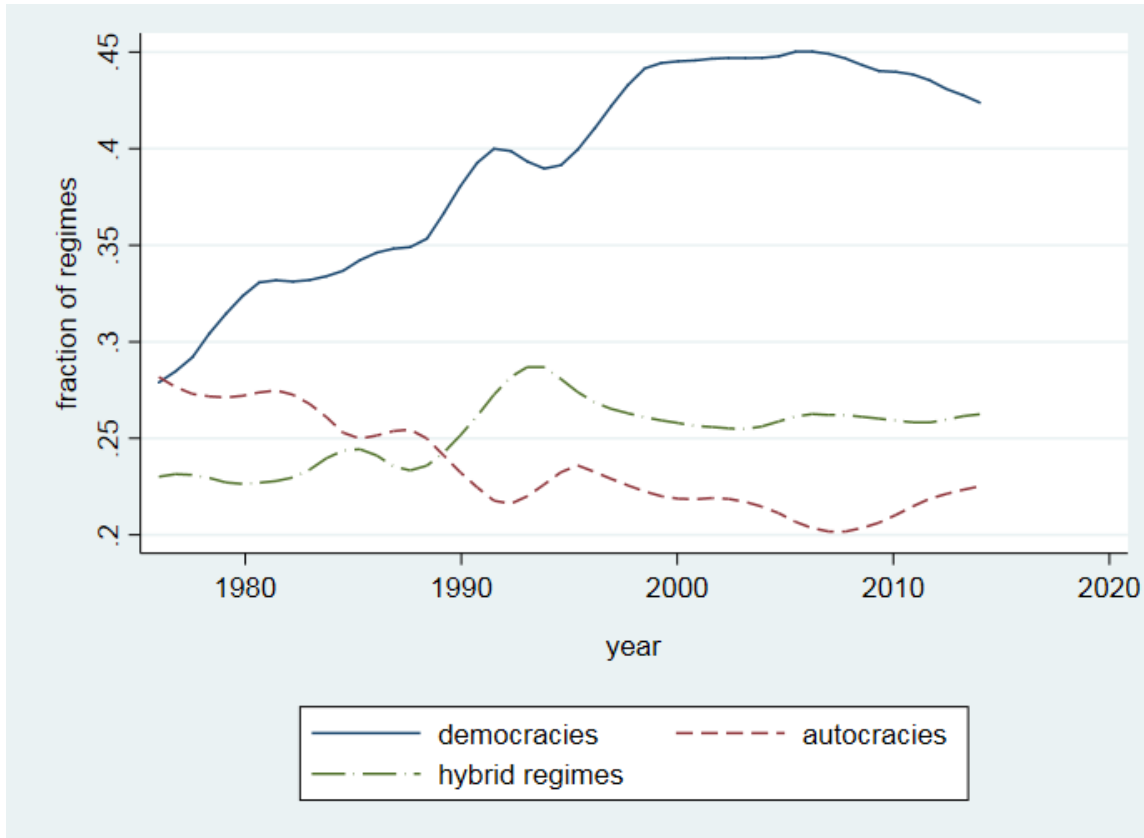
<sup>172</sup> See ADAM TOOZE, *CRASHED: HOW A DECADE OF FINANCIAL CRISIS CHANGED THE WORLD* (2018). For a more general analysis of the relation of economic crisis and democracy, see Wolfgang Streeck, *The Crises of Democratic Capitalism*, 71 NEW LEFT REV. 5 (2011).

Source: **Data on file with authors**

It is instructive to set this alongside Figure 2, which describes the relative frequency of democracies, autocracies, and hybrid regimes in the same period.



Figure 2. The relative frequency of democracies, autocracies, and hybrid regimes



Source: Adapted from Freedom House data 2016

Comparison of these statistics and figures suggests that, in general and at least in terms of average effects, there is little evidence that either talk of impeachment or impeachment itself is unhealthy for a democratic political system. While there is one instance in which a president used the attempt at impeachment to overthrow the parliament, few would argue that Russia in the early 1990s was a democracy in any real sense, and Yeltsin’s parliamentary opponents were largely unreformed communists.<sup>173</sup> In virtually every other case, impeachment is used to remove an unpopular leader and to recalibrate the political system. The relative ease of doing so, of course, depends on the substantive basis for removal and procedural aspects. We turn now to these topics.

## B. The Global Grounds for Removal and Impeachment

This section presents data on the formal rules invoked in removal. The first necessary step here is to map out the predicate conditions for removal. Table 3 summarizes the bases for removal of heads of state as of 2017, as set forth in national constitutional texts. (Note that many constitutions provide for multiple alternative grounds for removal and so there is no reason we would expect the percentages to sum to one.) We first look at the universe of the 149 constitutional systems that provide

<sup>173</sup> Writing in 2001, Lilia Shevtsova noted that the “fundamental problems of democratic development ... have still not been resolved.” Lilia Shevtsova, *Ten Years After the Soviet Breakup: Russia’s Hybrid Regime* 12 J. DEMOCRACY 65, 65 (2001).

for some such procedure, and then examine a subset of presidential and semi-presidential democracies only. The vast majority of serious attempts at impeachment have taken place in such countries.

**Table 3: Basis for removing heads of state**<sup>174</sup>

Basis	Number of all constitutions providing for removal (n=149)	%	Presidential & semi-presidential democracies only (n=68)	%
Crimes	88	59	43	63
Violations of the Constitution	69	46	19	28
Incapacity	55	37	19	28
Treason	51	34	19	28
General dissatisfaction	20	13	7	10
Other	29	19	10	15

As Table 3 illustrates, the most common basis for head of state removal is criminal misconduct. Apart from the United States, constitutions do not stipulate a requirement that crimes be “high.” Indeed, the phrase “high crimes” seems to be limited to constitutions directly influenced by the American one, including those of Palau, the Marshall Islands, and the Philippines. Of these, only the Philippines is a true presidential system.<sup>175</sup> Its formulation is that the president and other high officials can be removed “on impeachment for, and conviction of, culpable violation of the Constitution, treason, bribery, graft and corruption, other high crimes, or betrayal of public trust.”<sup>176</sup> At first glance this seems quite similar to the language of the American Constitution. But note that the Philippine model of impeachment sweeps beyond the domain of criminal offenses to cover *constitutional* wrongs, as well as “corruption,” which might include but not be exhausted by formal criminal offenses. In this regard, the Philippine model may sweep beyond the focus on individual criminality that is emphasized in the U.S. context.

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<sup>174</sup> Presidential and semi-presidential democracies are coded by the Democracy and Dictatorship Dataset, as supplemented by Christian Bjørnskov and Martin Rode. See Jose Antonio, Jennifer Gandhi, and James Raymond Vreeland. 2010. *Democracy and Dictatorship Revisited*, 143 PUBLIC CHOICE. 67 (2010); Christian Bjørnskov and Martin Rode, *Regime Types and Regime Changes: A New Dataset*, manuscript, August, 2018, available at <http://www.christianbjornskov.com/wp-content/uploads/2018/08/Regimes-and-Regime-Change-August-2018.pdf> [last accessed August 1, 2018].

<sup>175</sup> The head of state in the Marshall Islands is called a President, but can be removed on a vote of no confidence. CONST. MARSHALL ISL., art. V., sec. 7 (1979).

<sup>176</sup> CONST. PHILIPPINES, art IX, sec 2 (1987).

Beyond criminal offenses, violations of the constitution or the president's oath of office are also a common predicate for removal. A violation of the constitution may or may not be a crime in a particular political system, but obviously goes to the core of the constitutional order. Several countries in Africa stipulate that the violation must be "willful."<sup>177</sup> As Griffin has demonstrated, this possibility has gradually fallen out of constitutional practice in the United States (although the Johnson impeachment contains traces of the idea).<sup>178</sup> That said, the "cheap talk" of impeachment that echoes through the halls of Capitol Hill still contains the idea that removal of a president can be grounded on his or her constitutional infidelity.<sup>179</sup>

For our purposes, the most interesting category is what we label "general dissatisfaction" in Table 3, which covers a variety of situations. In many countries, more general grounds for removal blur the canonical distinction between presidential and parliamentary systems. For example, besides misconduct, the Constitution of Ghana allows the president to be removed by a two-thirds vote in the legislative assembly for conducting himself in a manner "i. which brings or is likely to bring the high office of President into disrepute, ridicule or contempt; or ii. prejudicial or inimical to the economy or the security of the State," as well as for reasons of incapacity or "violations of the oath of office."<sup>180</sup> This formulation blends two different grounds for removal: policy dissatisfaction and misconduct. Similarly, in Tanzania, the President can be removed if he "has conducted himself in a manner which lowers the esteem of the office of President of the United Republic."<sup>181</sup> Uganda's Constitution allows the president to be removed for "conduct that brings hatred or contempt to office of president."<sup>182</sup> Honduras allows impeachment to proceed against "actions contrary to the Constitution of the Republic or the national interest and for manifest negligence, inability, or incompetence in the exercise of office."<sup>183</sup> These standards seem to spill over into the distinctly political bases of removal that characterize the parliamentary system, in which the head of government is dependent on the parliament for continued tenure. Like parliamentary systems, we see that in many cases a legislature in a presidential system can remove the executive for relatively broad conditions. The implication of the case studies—that formal impeachment operates in practice as a vessel for the implementation of broad discontent with a particular regime—thus carries through in the text of many constitutions.

### C. The Procedural Apparatus of Presidential Removal

Processes of removal typically involve multiple phases and different institutions. They are also characterized by different voting thresholds (sometimes within the same document) and time limits. These procedural details also sometimes vary along with the basis of the removal charge. This

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<sup>177</sup> See CONST. GAMBIA, art 67(1) (1996); CONST. UGANDA, art. 107(1) (1995); CONST. ZIMBABWE, art.97(1) (2013); CONST. GHANA, art. 69(1)(a) (1996).

<sup>178</sup> See Griffin, *supra* note 24, at 1-2.

<sup>179</sup> See, e.g., Katie Zezima, *Obama Action on Immigration Should Spark Impeachment Talk, GOP Lawmaker Says*, WASH. POST, Aug. 3, 2014, at <http://www.washingtonpost.com/blogs/post-politics/wp/2014/08/03/obama-action-on-immigration-should-spark-impeachment-talk-gop-lawmaker-says/>.

<sup>180</sup> CONST. GHANA, art. 69(1)(b) (1996).

<sup>181</sup> CONST. TANZANIA, art 46A (1977).

<sup>182</sup> CONST. UGANDA, art. 107(1)(b)(i) (1995).

<sup>183</sup> CONST. HOND., art 234 (1982).

means that there is a good deal of complexity and variety. Table 4 provides the most common thresholds and actors for all independent countries as of 2017.

**Table 4: Most common removal procedures as of 2017 for all constitutions (n=194)**

<b>Who can propose? (n)</b>	<b>Legislative threshold to propose (n)<sup>184</sup></b>	<b>Who approves? (n)</b>	<b>Legislative threshold to approve (n)<sup>185</sup></b>
<i>Lower house (100)</i>	2/3 (53)	<i>Court/ constitutional council (61)</i>	2/3 (54)
<i>Both houses required (19)</i>	Majority (20)	<i>Lower house (50)</i>	3/4 (10)
<i>Court/ constitutional council (9)</i>	3/4 (7)	<i>Upper house (17)</i>	Majority (7)
<i>Upper house (6)</i>	3/5 (3)	<i>Both houses required (17)</i>	Other (3)
<i>Cabinet (5)</i>	Other (30)	<i>Public through referendum (12)</i>	-
<i>Prime minister (4)</i>	-	<i>Cabinet (2)</i>	-
<i>Public through recall (4)</i>	-	-	-

Because of the complexity of the procedures, we organize our discussion by examining the roles of distinct constitutional actors in the proposal, approval and confirmation of decisions to remove a president.

1. *Legislatures*

Impeachment is, as Hamilton noted long ago, a legislative procedure, which means that it requires the aggregation of votes in one or more houses of a legislative body. Even if not called impeachment, head of state removal typically begins with action in the legislature, either in the lower house, the upper house, or both houses acting jointly. The most common vote threshold, as flagged in Table 4, is a two-thirds vote. Whether or not the legislature proposes removal, it often has a role in approving the process. Again, the modal threshold is a two-thirds vote. There are some interesting variations. When the legislature is bicameral, it is quite common for an upper house or the two chambers acting jointly to be the body to approve the motion to remove a leader. In Ireland, which

<sup>184</sup> Calculated by summing Comparative Constitutions Project variables HOSPDM1, HOSPDM2 and HOSPDM3, corresponding to lower, upper and both houses.

<sup>185</sup> Calculated by summing Comparative Constitutions Project variables HOSADM1, HOSADM2 and HOSADM3, corresponding to lower, upper and both houses.

has a non-executive president, two-thirds of either house can propose an impeachment, in which case the other house tries the case and can remove with a two-thirds vote. In a small number of cases, however, the legislative role is nondiscretionary. For example, in Fiji, the Prime Minister can propose the removal of the President. Whether removal occurs in the case of allegations of misbehavior is then determined by a tribunal of three judges.<sup>186</sup> Parliament is required to accept the judgment of the panel.<sup>187</sup>

Legislative procedures sometimes involve constitutionally mandated actions by legislative committees or other subparts of the chamber.<sup>188</sup> In Tanzania, a written notice must be signed and backed by at least 20 percent of Members of Parliament to be submitted to the Speaker of Parliament at least 30 days prior to the sitting at which the motion of dismissal is to be moved.<sup>189</sup> The next stage entails a Special Committee of Inquiry, whose membership is to be voted upon by members of Parliament.<sup>190</sup> This is formed to investigate the charges levied against the President. During this period of inquiry, the office of President is deemed vacant. After receiving a report from the Special Committee, the National Assembly discusses the report, and can approve the charges by a two-thirds supermajority vote of all MPs, in which case the President is removed.<sup>191</sup>

## 2. *Courts*

The role of the judiciary in impeachment processes is complex and varied. At one end of the spectrum is the United States, where the Constitution gives no role to the courts, and where the Supreme Court has signaled that the national judiciary should play essentially no role in impeachment procedures, and instead should deem cases challenging impeachments to be political questions.<sup>192</sup> On the other end of the scale is Honduras, where until a 2013 amendment, the *only* body with the power to remove high officials such as the president was the country's Supreme Court.

Most constitutions steer a middle course between these extremes. Rather than adopting a corner solution, and more in keeping with a quasi-legal conception of impeachment, courts in many countries have a role in approving the removal of the president. But the judicial role in impeachment varies quite widely. In some cases, courts may be limited to ensuring that impeachment procedures are being carried out using the proper procedures by political actors. In others, such as the South Korean constitution,<sup>193</sup> courts may become involved at the final, trial-like stage of impeachment, after the legislature has made an initial decision as to whether impeachment is justified.<sup>194</sup> A few constitutions also have multiple tracks for impeachment, some dominated by the courts and some by legislators. For example, the Colombian constitution provides that if the president is impeached for a

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<sup>186</sup> See CONST. FIJI, art. 89

<sup>187</sup> See *id.* (“In deciding whether to remove the President from office, Parliament must act in accordance with the advice given by the tribunal....”).

<sup>188</sup> See generally Adrian Vermeule, *Submajority Rules: Forcing Accountability upon Majorities*, 13 J. POL. PHIL. 74 (2005) (defining and exploring the use of submajority rules).

<sup>189</sup> See CONST. TANZANIA, art. 46A(3)(a).

<sup>190</sup> See *id.* art. 46A(3)(b), (4).

<sup>191</sup> See *id.* art. 46A(9).

<sup>192</sup> See *Nixon v. United States*, 506 U.S. 224 (1993).

<sup>193</sup> See *supra* Part I.A.

<sup>194</sup> This is also a fairly common design in Latin America, at least for some kinds of impeachments (such as those involving common crimes). See, e.g., CONST. EL SALVADOR, arts. 236-37 (1983); CONST. VEN., art. 266 (1999).

“crime in the exercise of functions” or “unworthiness for bad conduct,” the House impeaches and the final trial for removal is before the Senate.<sup>195</sup> But where a president is impeached for a common crime, the final trial instead occurs before the Criminal Chamber of the Supreme Court.<sup>196</sup> The Brazilian constitution contains a similar provision, with roughly the same bifurcation of trial procedures between the Supreme Court and the Senate.<sup>197</sup>

The identity of the judicial body tasked with impeachment-related functions can also vary. In some cases, a special chamber is established while in others a constitutional court takes on the role as one of its ancillary powers.<sup>198</sup> Lebanon utilizes a mixed committee, called a Supreme Council, whose sole task is to impeach the President and Ministers.<sup>199</sup> That Council comprises seven Deputies specially elected by the Chamber of Deputies, and the eight highest-ranking judges in the country. These fifteen members then can make final impeachment decisions with a two-third vote.

The Honduran case, as noted, is especially interesting because removal, before 2013, was concentrated only in judicial hands. High officials had the right to be criminally tried only by the Supreme Court; the Court had the power to suspend them during the pendency of the trial and could remove them permanently upon conviction.<sup>200</sup> The legislature had no textual removal power.<sup>201</sup> These provisions were important during the constitutional crisis involving President Manuel Zelaya in 2009, which ended with a military coup that deposed Zelaya.<sup>202</sup> Most of the Congress and other political officials clashed with Zelaya over his plans to hold a referendum on a potential Constituent Assembly to replace the constitution; they alleged that his plans violated that law and constitution, and that he was disobeying judicial orders.<sup>203</sup> Zelaya initially had a sizable amount of support from his own Liberal party (one of the two major parties in the Congress at the time), but his intra-party support eroded sharply after his proposal for a Constituent Assembly and his forging of an alliance with Hugo Chavez.<sup>204</sup> However, the Congress was powerless to remove Zelaya from power directly, despite his broad loss of elite support.

Early one morning shortly before Zelaya had planned a “non-binding” consultation on his Constituent Assembly proposal, the heads of the branches of the military arrived at his residence and

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<sup>195</sup> CONST. COL., art. 175 (1991).

<sup>196</sup> *See id.*

<sup>197</sup> *See* CONST. BRAZ., art. 86 (1988).

<sup>198</sup> *See* Tom Ginsburg and Zachary Elkins, *Ancillary Powers of Constitutional Courts*, 87 TEX. L. REV. 1431 (2008) (finding that presidential removal is a fairly common ancillary power).

<sup>199</sup> *See* CONST. LEBANON, art. 80 (1926).

<sup>200</sup> CONST. HOND., art. 312(2). *See also* Norma C. Gutierrez, Law Library of Cong., *Honduras: Constitutional Law Issues* (2009), <http://www.loc.gov/law/help/honduras/constitutional-law-issues.php>.

<sup>201</sup> *See* Noah Feldman, David Landau, Brian Sheppard, and Leonidas Rosa-Suazo, *Report to the Truth and Reconciliation Commission of Honduras: Constitutional Issues* 74-75 (2011), at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1915214](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1915214) (discussing this unusual feature).

<sup>202</sup> *See, e.g.,* Tom Ginsburg et al., *On the Evasion of Executive Term Limits*, 52 WM. & MARY L. REV. 1807, 1810 (2011); David E. Landau et al., *From an Unconstitutional Constitutional Amendment to an Unconstitutional Constitution? Lessons from Honduras*, 8 GLOB. CONST. 40, 50 (2019).

<sup>203</sup> *See* Landau et al., *supra* note 202, at 50.

<sup>204</sup> *See* Mark J. Ruhl, *Trouble in Central America: Honduras Unravels* 21 J. DEMOCRACY 93, 96-97 (2010) (discussing Zelaya’s relationship with the Liberal Party).

put him on a plane to Costa Rica.<sup>205</sup> They later produced a supposed charging document and arrest warrant issued by the Supreme Court for his detention, although there is evidence it was back-dated, and at any rate it would not explain why Zelaya was put on a plane to Costa Rica, rather than being brought before the Supreme Court.<sup>206</sup> The Congress met later that same day and declared the presidency to be “vacant”; following the rules in the constitution, it voted then to ratify the vice-president to serve as president for the rest of Zelaya’s term. Most of the rest of the world deemed the incident a coup—for example, Honduras was suspended from the OAS for violating its democracy clause because of an “unconstitutional interruption” in the democratic order, a suspension that was lifted only after the next set of presidential elections in 2011.<sup>207</sup>

The highly legalistic nature of the Honduran impeachment process likely contributed to the problems experienced during the removal of Zelaya. First, the process required an indictment and conviction for an actual crime. It did not hinge, either formally or de facto, upon a broad and durable loss of support or very poor political performance on Zelaya’s part. Second, the process was technically in the hands of a court, rather than the legislature (although in fact, the motor for the removal was provided by the military). The country subsequently amended its constitution to create a legislative impeachment procedure in 2013, after Congress had (illegally at the time) removed several members of the Constitutional Chamber of the Supreme Court.<sup>208</sup> This suggests that leaving impeachment exclusively in the hands of a judicial body can present risks of elite capture and can squeeze out considerations of system-wide stability, preventing an exit even in situations where a system desperately needs one.

### 3. *Public involvement*

The public has a role in impeachment in several countries. In some cases the public can approve the removal of the President by referendum. For example, in the Gambia, the Constitution allows a vote of no confidence by the legislature, proposed by one-third of members and approved by a two-thirds majority, in which case a referendum is called for the public to endorse or reject the decision.<sup>209</sup> In the Austrian semi-presidential system, the legislature can call a referendum on the president’s impeachment, requiring a two-third vote of the upper house; if the referendum fails, the upper house is disbanded.<sup>210</sup> In Colombia, members the public may file complaints against the President or other officials to the House of Representatives, which must then assess as the basis for any impeachment resolution before the Senate.<sup>211</sup> A two-thirds vote in the Senate is also required.

In keeping with their populist rhetorical emphasis on the “people,”<sup>212</sup> several of the so-called Bolivarian constitutions of Latin America also give the public a role in a recall procedure that shares

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<sup>205</sup> See Scott Mainwaring and Anibal Pérez-Liñán, *Cross-Currents in Latin America*, 26 J. DEMOCRACY 114, 118 (2015).

<sup>206</sup> See Feldman et al., *supra* note 201, at 15-16, 46 (explaining the content of the warrants and the difficulty with verifying when they were issued).

<sup>207</sup> See Ruhl, *supra* note 204, at 102.

<sup>208</sup> See Matthew Pomy, *Honduran Lawmakers Approve Impeachment Process*, JURIST, Jan. 24, 2013, at <https://www.jurist.org/news/2013/01/honduras-lawmakers-approve-impeachment-process/>.

<sup>209</sup> See CONST. GAMBIA, art. 63 (1997).

<sup>210</sup> See CONST. AUSTRIA, art. 60(6) (1920).

<sup>211</sup> See CONST. COLOMBIA, art. 178(4) (1991).

<sup>212</sup> See, e.g., Susan Spronk, *Pink tide? Neoliberalism and its alternatives in Latin America*, 33 CAN. J. LATIN AM. & CARIBBEAN STUD. 173 (2008).

some features with impeachment. In Bolivia and Ecuador, the public can initiate the revocation of the mandate of the President with 15 percent of registered voters proposing it.<sup>213</sup> There are temporal restrictions: in Bolivia it can only be invoked after at least half the term has elapsed, while in Ecuador after the first year (and in both countries so long as at least one year remains in the term).<sup>214</sup> Similarly, in Venezuela, 20 percent of registered voters can petition for a referendum to dismiss the President, after at least half the term has elapsed.<sup>215</sup> Only one petition to remove the President can be filed during the term of office.<sup>216</sup> The absolute number of voters in favor of dismissal must be equal to or greater than the number of voters who elected the President, and voters in favor of the dismissal must be equal to or greater than 25 percent of the total number of registered voters.<sup>217</sup>

#### D. Substitutes for Impeachment

We have focused so far impeachment and cognate removal devices. But it is worth noting some constitutions also contain other provisions that might be taken to be a substitute for the impeachment and removal of a president under certain circumstances. For example, in the United States some recent work has pointed to a possible role for the 25<sup>th</sup> Amendment.<sup>218</sup> This provision gives “the Vice President and a majority of either the principal officers of the executive departments or of such other body as Congress may by law provide” the ability to certify to Congress “their written declaration that the President is unable to discharge the powers and duties of his office.”<sup>219</sup> When such a declaration is made, the President is removed and the Vice President assumes the powers of the presidency.<sup>220</sup>

The most obvious application of the 25<sup>th</sup> Amendment is in cases where the president is physically incapable of performing his or her duties because of complete incapacitation, say following a catastrophic stroke.<sup>221</sup> But some recent commentary has suggested applying it on far broader grounds like mental instability or obvious unfitness to hold office, arguing further that these grounds might apply to President Trump.<sup>222</sup> This broader application of the 25<sup>th</sup> amendment (which remains as of

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<sup>213</sup> See CONST. BOLIVIA, art. 250 (2009); CONST. ECUADOR, art. 105 (2008).

<sup>214</sup> See CONST. BOLIVIA, art. 250 (2009); CONST. ECUADOR, art. 105 (2008).

<sup>215</sup> See CONST. VEN., art. 72 (1999).

<sup>216</sup> See *id.*

<sup>217</sup> See *id.*

<sup>218</sup> See, e.g., Joel K. Goldstein, *Talking Trump and the Twenty-Fifth Amendment: Correcting the Record on Section 4*, 21 U. PA. J. CONST. L. 73, 73-74 (2018) (canvassing debates on the meaning of the 25<sup>th</sup> amendment).

<sup>219</sup> U.S. CONST., amend. XXV (1967).

<sup>220</sup> See *id.*

<sup>221</sup> See Roy E. Brownell II, *What to Do If Simultaneous Presidential and Vice Presidential Inability Struck Today*, 86 FORDHAM L. REV. 1027, 1033 (2017).

<sup>222</sup> See, e.g., Richard Cohen, *How to Remove Trump from Office*, WASH. POST (Jan. 9, 2017), [https://www.washingtonpost.com/opinions/how-to-remove-trump-from-office/2017/01/09/e119cc36-d698-11e6-9a36-1d296534b31e\\_story.html?utm\\_term=.0aa71173d2b1](https://www.washingtonpost.com/opinions/how-to-remove-trump-from-office/2017/01/09/e119cc36-d698-11e6-9a36-1d296534b31e_story.html?utm_term=.0aa71173d2b1); Lawrence M. Friedman & David M. Siegel, *The Most Important Qualification for a Post in President Trump's Cabinet*, NEW ENG. L. REV. FORUM (Feb. 15, 2017), <https://newenglev.com/tag/david-siegel> (discussing the importance of Cabinet members to be willing to fulfill responsibilities under the Twenty-fifth Amendment and the failure of senators to question Cabinet nominees on the subject).



this writing purely hypothetical) may render it a partial substitute for impeachment, using a rather different procedure.

Ecuador offers one cautionary example of how a similar substitute for impeachment might be used to remove an incumbent president from office. The populist Abdala Bucaram was elected to the presidency and took office in August 1996. His term would be a short one. His party was not the largest party in Congress and in Ecuador's highly fragmented party system, did not hold anywhere near a majority of seats, making it hard for Bucaram to govern.<sup>223</sup> In addition, he took office in the midst of serious economic problems, and shifted from his prior populist stance to propose highly unpopular neo-liberal austerity measures to deal with the crisis.<sup>224</sup> Many of his former allies, such as Ecuador's indigenous parties and movements, abandoned him after he made these proposals.<sup>225</sup>

Bucaram, nonetheless, retained sufficient support to avoid impeachment and removal, which would have required a two-thirds supermajority in the Congress. Faced with this problem, opponents of Bucaram turned to another constitutional provision providing that the president would "cease in his [or her] functions and leave the position vacant" for "physical or mental incapacity declared by the Congress."<sup>226</sup> The key point is that the "incapacity" clause could be activated by a majority of Congress, rather than the two-thirds supermajority needed for impeachment.<sup>227</sup> By a vote of 44 to 34, the Congress declared Bucaram "mentally incapacitated" and removed him from power in February 1997, only about six months after he had taken office. They initially ignored the constitutional article governing succession and appointed the president of Congress Fabian Alarcon, rather than the vice-president, as the new national president, before technically complying with it and having the vice-president serve as president for two days before resigning to make way for Alarcon.<sup>228</sup>

Bucaram was a colorful and unstable figure, who led a populist party with no clear ideology. He even embraced the seemingly derogatory nickname "the crazy one" [*el loco*].<sup>229</sup> But he was not mentally incapacitated by any reasonable definition. His dubious removal deepened the political crisis in Ecuador and ushered in a period of extraordinary instability.<sup>230</sup> Between 1997 and 2007, the country had seven distinct presidents, none of whom served a full constitutional term of four years. The incident may thus suggest concerns about the use of substitute clauses such as incapacity clauses to evade the normal rules and voting thresholds of impeachment. It suggests that those clauses may best be limited to a narrow set of circumstances in which their criteria are clearly met. Broader interpretations may destabilize the constitutional order because of the deep contestability and malleability of the category of mental incapacity. Furthermore, impeachment itself may need to be constructed in such a way that it is usable during a significant crisis, so as to avoid political actors from

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<sup>223</sup> See Anibal Perez-Linan, *Impeachment or Backsliding: Threats to Democracy in the Twenty-First Century*, 33 REVISTA BRASILEIRA DE CIENCIAS SOCIALES 1, 2 (2018) (noting that Bucaram's party had only 23 percent of legislative seats).

<sup>224</sup> See SUSAN C. STOKES, MANDATES AND DEMOCRACY: NEOLIBERALISM BY SURPRISE IN LATIN AMERICA 1-2 (2001).

<sup>225</sup> See *id.*

<sup>226</sup> CONST. ECUADOR, art. 100 (1979).

<sup>227</sup> See *id.*

<sup>228</sup> See Gabriel Escobar, *Ecuadorian Lawmaker Renamed President*, WASH. POST., Feb. 12, 1997, at [https://www.washingtonpost.com/archive/politics/1997/02/12/ecuadoran-lawmaker-renamed-president/d8a6f94b-0a84-45fe-a4dc-e9fd480a0838/?utm\\_term=.88c5faa1c620](https://www.washingtonpost.com/archive/politics/1997/02/12/ecuadoran-lawmaker-renamed-president/d8a6f94b-0a84-45fe-a4dc-e9fd480a0838/?utm_term=.88c5faa1c620).

<sup>229</sup> See CARLOS DE LA TORRE, THE POPULIST SEDUCTION IN LATIN AMERICA 92 (2d ed. 2010).

<sup>230</sup> See Laurence Whitehead, *High anxiety in the Andes: Bolivia and the viability of democracy*, 12 J. DEMOCRACY 6 (2001).

turning to either dubious alternatives such as in Ecuador, or clearly illegal steps such as the military coup in Honduras.

### **E. The Consequences of Successful and Failed Removal Efforts**

A successful impeachment process will typically lead to the immediate removal of the chief executive. Sometimes, the president is suspended from serving after the initial vote, until the complete resolution of the process. Failed procedures can also have consequences, however. For example, Tanzania also involves a feature of removal procedures that looks somewhat parliamentary in character.<sup>231</sup> If at the end of the process the vote for removal fails, no new motion can be brought for 20 months. This means the president can be somewhat insulated from repeated use of the legislative procedures, an institutional design that resembles parliamentary systems, which typically insulate prime ministers from votes of no confidence for a period after a failed attempt.

On the other hand, where an impeachment does go through, ouster may not be its sole effect. In addition to removal from office, constitutional impeachment provisions also envisage lifetime (or more limited) bans on holding public office, and criminal punishment. Consider these in turn.

One important dimension of difference concerns whether an impeached executive may run again. Some constitutions ban a convicted president from ever running again for the presidency.<sup>232</sup> In 2004, shortly after being impeached, Rolandas Paksas of Lithuania made clear his desire to run again in the next presidential election. In anticipation, the legislature passed a constitutional amendment prohibiting an impeached leader from competing again for office.<sup>233</sup> Other constitutions impose shorter prohibitions. In Brazil, for instance, the constitutional text states an eight-year ban from office upon removal.<sup>234</sup> This ban was imposed after Collor was removed. During the impeachment of Rouseff, the Congress was allowed to hold two separate votes, removing her from office but imposing no ban on future runs.<sup>235</sup>

In general, presidents are not protected from responsibility for their crimes, but as in the United States, the process of prosecution this is often separated from that of removal from office. For example, in the Ukraine,<sup>236</sup> a president can be removed from office by the Senate after a hearing. Although the Senate cannot impose criminal charges, it can refer the matter to a court for prosecution after removal.<sup>237</sup> Many constitutions allow for prosecution after leaving office. Collor, for example,

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<sup>231</sup> See CONST. TANZANIA, art. 46A(2) (“[N]o such motion shall be moved within twenty months from the time when a similar motion was previously moved and rejected by the National Assembly.”).

<sup>232</sup> See, e.g., CONST. ANGOLA, Art 127(2) (2010).

<sup>233</sup> The European Court of Human Rights struck down this ban in 2011, holding that it was disproportionate. See Case of Paksas v. Lithuania, Judgment 34932/04, January 6, 2011 (Grand Chamber, ECHR).

<sup>234</sup> See BRAZ. CONST., art.52 sole paragraph.

<sup>235</sup> See *supra* Part I.B.

<sup>236</sup> CONST. UKRAINE, art 175 (1996).

<sup>237</sup> *Id.* (“If the charge refers to crimes committed in the exercise of his/her functions or that he/she becomes unworthy to serve because of a misdemeanor, the Senate may only impose the sanction of discharge from office or the temporary or absolute suspension of political rights. But the accused shall be brought to trial before the Supreme Court of Justice if the evidence demonstrates that the individual to be responsible for an infraction deserves other penalties.”)

was tried for corruption after he was out of office but acquitted in 1994 by the Supreme Court for lack of evidence.<sup>238</sup>

One of the most important design decisions about removal is whether or not it triggers a new election. In the United States, of course, removal leads to the Vice President assuming the office of the presidency for the remainder of the term. However, it is worth noting that this is neither necessary nor particularly common. For any political system in which the president is indirectly elected, for example by parliament, the removal of the president will typically trigger a new selection process.<sup>239</sup> But remarkably, it is far more common for presidential and semi-presidential systems to respond to the removal of a president with new elections rather than to allow a substitute to serve out the remainder of the term. In other words, the South Korean model described in Part I.A is more common than the American one described in Part I.E. We consider the normative benefits of this model in the next section.

**Table 5: Consequences of removal in presidential and semi-presidential systems as of 2017**

New elections	Vice-President or other substitute completes remainder of term	Unable to determine
51	18	21

## F. Conclusion

Our large-n analysis suggests three broad conclusions. First, most constitutions allow impeachment for the commission of crimes, although many sweep beyond this to allow removal for a range of grounds including violations of the constitution or poor performance in office. General dissatisfaction, however, is a relatively uncommon textual ground for impeachment. In many systems, impeachment is not just about removing criminals, but also has broader purposes such as resolving political crises. There is also variation in the process of removal. Legislatures are the modal vehicle for removing a president, although courts often have a (limited) additional role, especially in approving findings of other institutions.

Second, there are some empirical regularities in the use of impeachment: (1) impeachment is exceedingly rare; (2) the risk of misuse of “maladministration” as a ground of impeachment seems to be quite small; (3) impeachment is almost always channeled through partisan politics; and (4) impeachment is usually a response to systemic problems rather than, or in addition to, individual culpability on the part of a president. These patterns do not appear to have changed over time (although the universe of cases is admittedly small), and do not appear to be affected by exogenous shocks such as the 2008-09 economic crisis and the austerity regimes that followed it.

Third, the substantive predicates for removal and the choice between different procedures likely interact. In criminal law, it is generally recognized that regulators can choose between substantive

<sup>238</sup> See Rattinger, *supra* note 54, at 149.

<sup>239</sup> For all constitutional systems, we count 48 in which another official serves out the remainder of the term, and 83 in which there are new elections, with 7 that we are unable to determine.

and procedural law as levers to make convictions either easier or harder.<sup>240</sup> A simple index capturing their interaction is presented in Table 6. We separate out two dimensions: the substantive standard required for removal, and procedural difficulty. The substantive standard is coded as high, medium or low depending on whether there is no basis for removal other than illness (high), restricted to serious constitutional violations or crimes (medium), or alternatively has looser language allowing for more general removal (low). We code silence on the substantive standard as equaling the most difficult level of removal. To calculate the difficulty of the procedure to remove, we draw on the idea of institutional “veto players,” or “individual or collective actors whose agreement is necessary for a change in the status quo.”<sup>241</sup> We code an impeachment as “easy” if it requires fewer than the modal number of decision-makers to effectuate (two), “intermediate” if it has two decision-makers with no higher than a two-thirds vote threshold in one house, and “difficult” if it involves more than two decision-makers.<sup>242</sup> In addition, if two decision-makers are involved, the process is considered difficult if it involves more than the modal legislative super-majority of two-thirds, *or* two-thirds majorities in more than one house of parliament.

**Table 6: Index of the Difficulty of Impeachment**

	<b>Substantive standard</b>	<b>Procedural difficulty</b>
Low	35	47
Medium	92	60
High	9	29

These two margins of impeachment difficulty are positively correlated at a level of 0.27. This means that, in general, countries that have lower thresholds for predicate acts also tend to make the process of removal easier, although the relationship is not perfect. Figure 3 below presents the range of different countries in sequence on the horizontal axis in terms of the level of predicate and procedural difficulty, with the vertical axis measuring difficulty on our index.

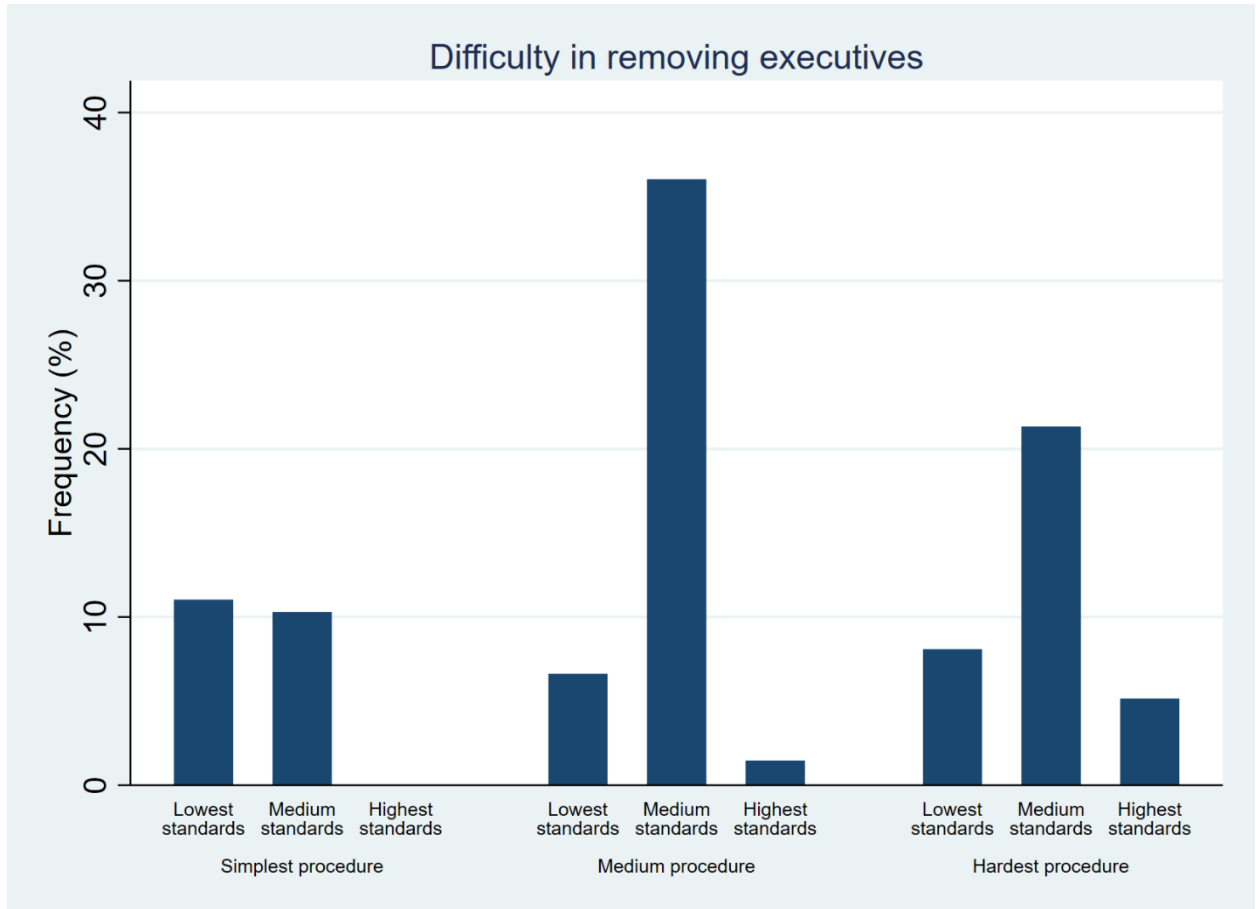
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<sup>240</sup> For the canonical formulation of this point, see William J. Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 YALE L.J. 1, 55-57 (1997). *See also* Donald A. Dripps, *The Substance-Procedure Relationship in Criminal Law*, in PHILOSOPHICAL FOUNDATIONS OF CRIMINAL LAW 409, 432 (R. A. Duff & Stuart P. Green eds., 2011).

<sup>241</sup> *See* GEORGE TSEBELIS, VETO PLAYERS: HOW POLITICAL INSTITUTIONS WORK 18 (2002).

<sup>242</sup> For our purposes, votes by a joint session of two houses are considered as a single actor. *See, e.g.*, BURUNDI CONST., art. 117.

**Figure 3: Distribution of index of impeachment difficulty**



As the figure demonstrates, most countries tend to have similar levels for the two variables. Moreover, there is a clumping of countries in the center of our index. The United States and South Korea would fall in the center of the figure; Brazil in the third bar from the right. Overall, this analysis suggests that constitutional design at the global level has converged on a moderate level of difficulty for the removal of chief executives, with a few countries to be found at each of the extremes.

### **III. Theorizing Impeachment Design: Improvements and Pitfalls in the U.S. and Beyond**

The analysis so far has developed an empirical account of the design and practice of impeachment in constitutions around the globe. In this Part, we turn to normative considerations. What role *should* impeachment of a chief executive play in a presidential system? And given that role, what implications follow for constitutional design, either in terms of the substantive standard for removal or in terms of its procedural channels? We focus here largely, although not entirely, on ways in which the design and practice of impeachment in the United States might be improved. We hence bear in mind normative values such as democratic governance and the rule of law that should be widely accepted across the political spectrum. Some of our suggestions here (like broadening the substantive standard for impeachment or giving some role to the judiciary) might be carried out through changes in practice. Others would probably or certainly require a constitutional amendment.

In either case, we aim to use comparative evidence to contribute to the ongoing conversation about how presidential impeachment should be operationalized in the United States, as well as globally.

By way of caveat, we are mindful of the limited state of knowledge. For instance, we have largely analyzed constitutional provisions in Part II, although our discussion of Brazil and other cases in Part I revealed that statutory frameworks can also matter. A focus on formal law also brackets a host of considerations related to the political environment and socioeconomic considerations. Moreover, we are skeptical of the idea of a single ideal or optimal design.<sup>243</sup> Given variation in political, social, and economic conditions, we doubt that there is one “right” way of doing things when it comes to constitutional design. Institutions must fit their political and social context. At the same time, it would be bizarre to suggest that *nothing* could be learned from the global history of constitutional design and practice. Perhaps the best we can offer is how to avoid bad choices,<sup>244</sup> and to infer likely downstream consequences from what is known of past practice. At the same time, we suspect that readers will have different views on the appropriate trade-offs between stability and the potential for error correction, depending on whether they have a Burkean, conservative streak, or a more perfectionist one. At the same time, there is likely a large domain of “easy cases” where the dominance of impeachment is clear to all. In this spirit we proceed to assess the costs and benefits of the various institutional dimensions we have laid out, beginning with the overall conceptualization of the purpose of impeachment.

#### **A. Conceptualizing Impeachment: Bad Actor vs. Systemic Problem Models**

One might usefully distinguish two ideal types of impeachment, following the analysis above. The first is what we call the “bad actor” model. Here impeachment is about removing serious criminals from office; elections ought to settle everything else. This is the model, as we have indicated above, that seems to inform most modern U.S. scholarship on impeachment.<sup>245</sup> A second model one might call a “systemic problem” model. Here impeachment is not really about the individual criminality or unfitness of the chief executive, but instead about the political context. In this model, impeachment may provide an exit from a situation of ungovernability, such as where a president has lost a massive amount of popularity and no longer has anything close to a governing coalition in Congress.

One of the major lessons of the case studies and empirical evidence reviewed above is that impeachment is not, or at least not only, about the bad actor model. Thus, theories of impeachment, such as those common in the United States, that focus exclusively on individual wrongdoing may miss some of the core functions played by impeachment in constitutional democracies. Impeachment will always be about systemic problems in the political environment, either in addition to, or instead of, evidence of serious individual wrongdoing by the chief executive.

Politics typically forms a hard constraint on executive removal. As we have seen in our case studies, even a bad actor will not be removed if she has sufficient support in her own legislative party. Indeed, without a sufficient level of bipartisan opposition, presidents tend to survive in office

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<sup>243</sup> See generally Tom Ginsburg, *Constitutional Knowledge*, \_\_ KNOW \_\_ (forthcoming 2019); Aziz Z. Huq, *Hippocratic Constitutional Design*, in *ASSESSING CONSTITUTIONAL PERFORMANCE* 39, 40 (Tom Ginsburg and Aziz Z. Huq, eds., 2016).

<sup>244</sup> See Huq, *Hippocratic Constitutional Design*, *supra* note 243, at 41.

<sup>245</sup> See *supra* Part I.E.

whatever individually culpable act they have committed. This suggests that a chief executive is most likely to be successfully ousted when he or she is perceived to be linked to a governance situation perceived as fundamentally unacceptable across the partisan spectrum, rather than as a function of individual foibles. In Part I, we saw a number of different ways in which “fundamentally unacceptable” can be understood: In South Korea, the president’s reliance on a “shaman” and fortune teller was perceived to be inconsistent with minimally acceptable forms of lawful government.<sup>246</sup> In Brazil<sup>247</sup> and South Africa,<sup>248</sup> the central question was the systemic corruption of the ruling class—and the need for some kind of “fresh start” in which law-abiding actors would putatively have a chance to mitigate corruption and graft. No doubt the way in which systemic problems are perceived, described, and evaluated will vary: The important point here is that absent a sufficiently shared sense of such a crisis, impeachment is unlikely to occur in practice—even if the *formal* terms of constitutional text sound more in the “bad actor” model. The U.S., it should be noted, is no exception to this trend: Efforts to impeach Clinton, Obama, and Trump have all (so far) failed because there is an insufficient consensus on the systemic nature of the problems associated with their presidencies.

In some cases, we concede, individual wrongdoing formed a key predicate for impeachment. But even then, there were also significant problems in the political system that made removal of the chief executive likely. South Korea offers the best example – President Park Geun-hye was implicated in serious criminal wrongdoing that landed her a lengthy prison sentence, but impeachment was also made possible by a political context in which she had become deeply unpopular and lost support from members of her own party.<sup>249</sup> South Africa, although again not technically an impeachment, is another instance where individual wrongdoing by President Zuma underpinned a forced resignation that was made possible because of fissures in the ruling ANC over systemic problems of state capture.<sup>250</sup> In these cases, the identification of the president as a bad actor is at the core of the issue, although a troubled political context still must exist for the removal to occur.

In contrast, in some other cases and constitutional designs, impeachment does not respond to serious individual failings of chief executives. It is almost exclusively about the political context. Consider Brazil and Paraguay: in the former, President Rouseff was implicated at most in failing to suppress a corruption scandal engulfing the entire political class, and more directly in budgetary accounting “tricks” engaged in by administrations before her.<sup>251</sup> In the latter, the allegations against President Lugo were aimed squarely at his performance in office, not at individual wrongdoing. Both constitutions have broad, political standards for impeachment, and removal occurred because of weaknesses in the chief executives that made it possible.<sup>252</sup> In these cases, in other words, individual wrongdoing or the removal or “bad actors” is at most incidental to a process driven by broader concerns.

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<sup>246</sup> See *supra* Part I.A.

<sup>247</sup> See *supra* Part I.B.

<sup>248</sup> See *supra* Part I.D.

<sup>249</sup> See *supra* Part I.A.

<sup>250</sup> See *supra* Part I.D.

<sup>251</sup> See *supra* Part I.B.

<sup>252</sup> See *supra* Part I.C.

Is the broader model of impeachment that we present, focused on systemic rather than individual wrongdoing, a good or a bad thing from a normative perspective? This is a difficult question to answer. But we tend to answer the question at least as a tentative yes.

It is useful to develop the case for a “systemic problem” conception of impeachment by situating that conception within the contrast between presidential and parliamentary systems of government.<sup>253</sup> Recognition of the “systemic problem” paradigm, in effect, is a way of seeing how the two forms of governance can converge toward each other in practice, even as they remain formally distinct. Parliamentarism, according to one fairly representative definition is “a system of government in which the executive is chosen by, and responsible to, an elective body (the legislature), thus creating a single locus of sovereignty at the national level.”<sup>254</sup> The essence of parliamentarism is a logic of mutual dependence between the legislative and executive branches: either institution has the ability to bring down the other.<sup>255</sup> The government can dissolve the legislature. Likewise, a legislature can bring down the government by voting no confidence in it. In contrast, presidentialism works off of a logic of mutual independence, where the president and the legislature are separately elected for fixed terms, and under ordinary conditions neither has the ability to curtail the term of the other.<sup>256</sup>

Impeachment is an exception to the rule of independent and durable electoral mandates in a presidential system. Correlatively, it is conceptualized as a rare and exceptional measure, one that violates the usual structural independence of the two institutions. The opposite is supposed to be true in a parliamentary system. Indeed, the very fact that in parliamentary systems the legislature may generally vote no confidence in the government for any reason at all is indicative of the very different conception of legislative/executive relations as mediated through removal protocols. The latter, of course, are quite distinct from appointment-related arrangements. This shows that the arrangements for executive removal are a core element of the distinction between presidential and parliamentary systems. Interestingly, although some prior work has explored various ways in which presidential systems can evolve parliamentary features (and vice versa), this line of inquiry has not focused on removal of the chief executive, where the two types are still seen as quite distinct.<sup>257</sup>

The contest between presidentialism and parliamentarism has spurred an enormous literature with few clear conclusions. At a very minimum, the performance of each regime type clearly depends on a number of other variables, such as the nature of the political party system in which the regime is embedded.<sup>258</sup>

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<sup>253</sup> See, e.g., DAVID SAMUELS AND MATTHEW SOBERG SHUGART, *PRESIDENTS, PARTIES, PRIME MINISTERS* (2010); Matthew Soberg Shugart and Stephan Haggard, *Institutions and Public Policy in Presidential Systems*, in *PRESIDENTS, PARLIAMENTS, AND POLICY* 64 (Stephan Haggard and Mathew D. McCubbins, eds., 2001).

<sup>254</sup> See John Gerring, Strom C. Thacker, and Carola Moreno, *Centripetal Democratic Governance: A Theory and Global Inquiry*, 99 *AMERICAN POLITICAL SCIENCE REVIEW* 567, 581 (2005).

<sup>255</sup> See Stepan and Skach, *supra* note 254, at 3.

<sup>256</sup> See *id.*

<sup>257</sup> See, e.g., Cheibub et al., *supra* note 20.

<sup>258</sup> For an elegant demonstration of the difficulty of drawing simple comparisons, see JOSÉ ANTONIO CHEIBUB, *PRESIDENTIALISM, PARLIAMENTARISM, AND DEMOCRACY* 140 (2007) (suggesting that military legacies, rather than the choice between presidentialism and parliamentarism, lead to democratic breakdowns).



That said, one of the core arguments against presidentialism rests on the personalization and centralization of power in a single individual, the president. Some work has argued that this may pose a heightened risk of moves towards authoritarianism.<sup>259</sup> Others have pointed out that especially when the president and legislature are dominated by different parties or movements, presidential systems may calcify into policy gridlock.<sup>260</sup> Gridlock may feed perceptions that government is ineffective, or stimulate expansions in executive power that spark moves towards authoritarianism. A well-known example is Chile in 1973, where the administration of Salvador Allende faced a hostile Congress, navigated around that Congress through increasingly aggressive decree powers, and amidst rising tensions was removed in a military coup that led to a brutal dictatorship.<sup>261</sup> In a well-functioning parliamentary system, a government that lacked at least implicit parliamentary support would likely fall in short order, leading either to a new government that had such support, or new legislative elections.<sup>262</sup>

But some of the criticisms of presidential systems can be blunted by tweaking the design and practice of impeachment to avoid or mitigate the kind of deep crisis to which presidentialism sometimes seems to succumb. Impeachment can play instead the same sort of ‘resetting’ function that is played by votes of no confidence, or dissolutions, in well-functioning parliamentary systems. It does not follow that impeachment should be “easy,” or become routinized. In comparative terms, impeachment is a relatively rare, and fairly traumatic, event in essentially all presidential democracies. But so too are no-confidence motions in parliamentary democracies, as they tend to be deployed with “great discretion.”<sup>263</sup> Rather than thinking of impeachment as distinct and more infrequent than a no-confidence motion, impeachment can be conceptualized as a similar tool for navigating between the rigid and undesirable extremes of a strict rule of fixed-term electoral independence for the executive and the complete reliance on legislative confidence. At least in certain deep, systemic crises, permitting the legislature to remove the executive may ameliorate some of the most problematic features of a presidential system of government. Exactly which such crises should trigger use of impeachment is primarily a question for constitutional designers and practitioners in individual countries. But the core point here is that the ‘systemic problems’ conception of impeachment should be recognized as a useful adaption that may ameliorate one of the weaknesses of presidentialism.

Impeachment may make “outsider” presidents who are weakly tied to the existing party system in a country especially vulnerable to removal. These kinds of figures may be more likely to lose the support of a coalition in Congress that is sufficient to ward off impeachment, or to have support erode from within their own nominal party. Several of the presidents removed under threat of impeachment or similar mechanisms over the past several decades – Lugo in Paraguay, Gutierrez in Ecuador, Zelaya in Honduras, and Collor in Brazil – constituted such figures. But notice that these kinds of actors may be especially problematic for the health of a presidential system. Because of their weak ties to existing parties, they may be less willing and able to get things done through ordinary political routes and may

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<sup>259</sup> See, e.g., Linz, *supra* note 23, at 51-52.

<sup>260</sup> See Arturo Valenzuela, *Latin America: Presidentialism in Crisis*, 4 J. DEMOCRACY 3, 6 (1993). For an insightful challenge to this view, see Josh Chafetz, *The phenomenology of gridlock*, 88 NOTRE DAME L. REV. 2065 (2013).

<sup>261</sup> See ARTURO VALENZUELA, *THE BREAKDOWN OF DEMOCRACY IN CHILE* (1973).

<sup>262</sup> The 2011 Fixed Parliament Act in the United Kingdom may have inadvertently created friction on this dynamic by making it harder for resets to occur. Petra Schleiter and Sukriti Issar, *Constitutional rules and patterns of government termination: The case of the UK fixed-term parliaments act*, 51 GOV'T & OPP. 605 (2016).

<sup>263</sup> See Huber, *supra* note 21, at 270.

turn to more problematic paths as alternatives.<sup>264</sup> Outsiders may also be more likely to use populist modes of governance that undermine the democratic order.<sup>265</sup> Perhaps then, the greater vulnerability of political outsiders to impeachment is a feature, not a bug, of the model.

Of course, moving towards a “systemic” conception of impeachment is not without costs. One is that impeachment may exacerbate rather than defusing political crises. Consider Brazil, where a number of commentators have argued that the removal of Rousseff drew Brazil deeper into a crisis of political distrust and corruption.<sup>266</sup> The removal of Rousseff further destabilized the political system, leaving the country with a weak, corrupt, and unelected successor, and creating a vacuum in which the hard-right populism of Jair Bolsonaro could take power in 2019. We recognize the force of the point, but we argue (as emphasized below) that it can be partially dealt through other procedural designs, such as requiring that impeachment trigger new elections immediately rather than allowing automatic accession by a pre-set successor like a vice-president.

## **B. The Substantive Standard for Impeachment**

Viewing impeachment as an exit from severe political crisis suggests that the standard for impeachment should be framed in terms that are more political than legal, or at least which leave room for ambiguity. The danger of conceptualizing impeachment in purely legal terms, say by tying it to a finding of criminality by the president, is that this may stop political actors from being able to impeach in some cases where there is truly a deep political crisis, but legislators struggle to identify a clear crime committed by a president. If legislators respond by stretching the meaning of the criminal law, they may undermine public confidence in the process; if they fail to take action because of legalistic doubts or because of the threat of judicial intervention, they may prolong the crisis. The Honduran case briefly explored above perhaps best illustrates the risk.<sup>267</sup> Substantively, a president in Honduras could only be removed from power for committing crimes. Procedurally, the legislature played no role in removal, which was delegated entirely to the Supreme Court. The result was a process that was too perhaps too rigid to remove an exceptionally crisis-ridden and ineffective president who had lost the support of his own party, leading to a military coup. In effect, the opposition to Zelaya struggled to identify prosecutable crimes that he had committed, and had to make awkwardly framed arguments to square their purpose with the available legal tools.

The U.S. standard for impeachment, “treason, bribery, or other high crimes and misdemeanors,” is notoriously ambiguous, as we have noted, and debate continues to rage about whether the term should be limited to certain classes of prosecutable crimes, or should take on a broader meaning.<sup>268</sup> As *practiced* in the modern period, however, it is relatively narrowly focused on

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<sup>264</sup> See Miguel Carreras, *Outsiders and Executive-Legislative Conflict in Latin America*, 56 *LAT. AM. POL. & SOC'Y* 70 (2014) (finding that risks of interbranch conflict and attempted dissolution of Congress increase significantly when the president is an outsider).

<sup>265</sup> See STEVEN R. LEVITSKY & DANIEL ZIBLATT, *HOW DEMOCRACIES DIE* 13-15 (2018) (explaining the risks to democracy posed by the “charismatic outsider”); David Landau, *Populist Constitution*, 85 *U. CHI. L. REV.* 521 (2018).

<sup>266</sup> See, e.g., Meyer, *supra* note 75; Fabiano Santos & Fernando Guarnieri, *From Protest to Parliamentary Coup: An Overview of Brazil's Recent History*, 25 *J. LAT. AM. CULT. STUDS.* 485 (2016).

<sup>267</sup> See *supra* text accompanying notes 200-208.

<sup>268</sup> Many U.S. scholars are in fact critical of the modern practice, although they maintain a focus on finding criminal or non-criminal “bad acts.” See, e.g., SUNSTEIN, *supra* note 8, at 118 (rejecting requirement of common crime but requiring “egregious abuse of official power”); TRIBE & MATZ, *supra* note 8, at 45; BLACK, *supra* note 8, at 36 (impeachment not limited to common crimes, but criminality “helps”); GERHARDT, *supra* note 8, at 105. Many also emphasize that the

crimes.<sup>269</sup> So read, the U.S. standard is subject to the same critique as the Honduran model. As one of us has argued in another context, there is a risk that the *policy* disagreements that are endemic to a polity will be treated as points of *legal* infidelity. Rather than domesticating the polity's endogenous conflict, the law's decision to treat policy disagreements as a justification for punishment might escalate the stakes of political disagreement.<sup>270</sup> As the Johnson impeachment and the Clinton impeachment respectively illustrate, it inexorably impels president's political opponents to reframe legal disagreements as matters of deep infidelity or to manufacture criminal offenses about the sexual veniality and vanity of the modal middle-aged politico. To paraphrase Raymond Carver, politics—and the deep politics of perceived structural crisis—is what we talk about really when we talk about impeachment.<sup>271</sup>

In contrast to the Honduran and U.S. cases, the Brazilian and Paraguayan constitutions (as well as many other constitutions around the world) supply the relevant institutional actors with a broader and more flexible concept of impeachable offenses. The Paraguayan text, which explicitly allows impeachment for “bad performance” in office as well as common or high crimes, is perhaps the best example.<sup>272</sup> The Brazilian formulation, which differentiates common crimes from vaguer and more highly political “acts against the constitution,” gets at similar ideas.<sup>273</sup> The advantage of these formulations is that they may make it easier for impeachment to serve as a reset during a deep political crisis, even if evidence of individual criminality is scarce.

A relatively broad reading of “high crimes and misdemeanors” would of course be plausible. Such a view, which also seems broadly consistent with the Framers' understandings, would sweep beyond criminal acts to include presidents who created systemic risks.<sup>274</sup> Whether a broad reading would be available given present partisan dynamics, though, is another question.

A similar analysis illuminates the appropriate voting threshold for impeachment. It is, to be sure, difficult to generalize about this issue. The consequences of any given voting threshold are very sensitive to context especially the fragmentation and strength of the party system. But if a key function of impeachment is to serve as an extreme form of a no-confidence vote in situations of crisis, then allowing removal by a demanding (but not impossible) supermajority makes sense. In particular, actors probably should become vulnerable to impeachment when they lose high levels of support from their own parties and coalitions, something that comparative experience bears out. Not all presidents who lose such support are impeached, of course, but that is the kind of context in which impeachment becomes a realistic option. All this is to say that we think that most constitutions have answered the design question properly by using demanding (but not insurmountable) supermajority rules.<sup>275</sup>

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standard cannot be so broad as to reach acts such as “maladministration,” given its explicit rejection at the Convention. See, e.g., SUNSTEIN, *supra* note 8, at 76; BLACK, *supra* note 8, at 27.

<sup>269</sup> See Griffin, *supra* note 24.

<sup>270</sup> See Huq, *Legal and Political Checks*, *supra* note 10, at 1522-23.

<sup>271</sup> RAYMOND CARVER, *WHAT WE TALK ABOUT WHEN WE TALK ABOUT LOVE* (1981).

<sup>272</sup> See CONST. PARAGUAY, art. 225 (1992).

<sup>273</sup> See CONST. BRAZ., art. 85 (1988).

<sup>274</sup> See *supra* Part I.E and note 268.

<sup>275</sup> See *supra* Table 4.

### C. One Standard or Many?

Our argument also has implications for the uniformity of impeachment standards across different types of elected officials. Consider the U.S. case. As normally glossed,<sup>276</sup> the U.S. constitution establishes the same standard for impeachment for several different types of actors – the president and vice president, lesser executive officials like cabinet secretaries, and federal judges.<sup>277</sup> Some other constitutions around the world adopt the same uniform approach. But others, like Brazil, adopt different substantive standards (and different procedures or institutions) for the impeachment of different kinds of actors.<sup>278</sup>

The differentiated approach adopted by Brazil seems to us the superior one, and the uniform U.S. approach deeply problematic. A single impeachment standard bundles together several different types of actors who have different constitutional functions, distinct democratic mandates, and whose removal will precipitate radically divergent repercussions. The president is the sole head of a branch of government and generally remains in place at least until the next fixed election is held. Cabinet secretaries and similar officials often have much more fluidity, since they can often be removed at will by the president. Judges, of course, also serve fixed terms (for life in the United States), but generally have no electoral accountability and serve in positions where political independence is often deemed essential. Lumping all these different actors together makes little sense. The standard for impeachment should be tailored to the function played by each actor, and not automatically set the same for all officials.<sup>279</sup>

For example, we have argued that removal of presidents will sometimes be desirable to allow a reset during a deep political crisis. This suggests a relatively broad, ambiguous standard for removal of presidents, perhaps incorporating poor performance in office, abuse of power, or similar notions. In contrast, allowing removal of judges on similarly broad grounds may give the political branches too much power to retaliate against the judiciary. For this reason, it may make sense to tether judicial removal to a narrower set of grounds tied to serious criminality.

### D. The Process of Impeachment

It is even harder to generalize about the process of impeachment, for which our case studies and empirical evidence show massive variation. However, one core point that we draw from the evidence is that process should follow from the purpose of impeachment. The set of considerations that may be dominant where the core purpose of a removal is cleansing a “bad actor” may be different from the core purpose where the impeachment responds to a systemic failure. Relatedly, different institutions may usefully play different roles during an impeachment.

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<sup>276</sup> We say “normally” because federal judges may benefit from an additional textual protection: They cannot be fired unless they fail to show “good behavior.” U.S. CONST., art. III, §1, cl. 2.

<sup>277</sup> U.S. CONST., art. II, § 4.

<sup>278</sup> See CONST. BRAZ., arts. 51, 52, 85, 86, 93, 96, 102, 105, 107-08 (1988) (setting out different procedures and standards for different actors, including the president, vice-president, cabinet members, and different types of judges).

<sup>279</sup> Sunstein argues that although the constitutional standard for impeachment for judges and presidents “is the same,” judicial impeachment should have a “mildly different and somewhat lower bar” because of pragmatic factors, especially the “uniquely destabilizing” consequences of presidential removal. See SUNSTEIN, *supra* note 8, at 115-16. This argument may be reconcilable with ours: the predicate grounds of judicial impeachment should be narrower than presidential impeachment, but deliberations on whether a president eligible for impeachment should be removed ought to take greater account of pragmatic considerations.

Contrary to the U.S. process for impeachment, our analysis in Part II showed that many constitutions involve actors other than the legislature in presidential removal. Some go so far as to adopt different kinds of impeachment procedures for different offenses. In some countries, for example, allegations of criminal wrongdoing involve the courts, while those alleging poor performance in office or similar political allegations involve only the legislature.<sup>280</sup> This represents a rough sorting of cases in which the bad actor model is dominant, and those in which the removal is mainly about systemic effects. It seems to us very difficult to take a firm normative position on this issue of differentiated standards, which may provide some benefits but also may create new problems, such as determining how an allegation should be routed between processes.

Still, comparative exploration of process helps to show how impeachment may help to build or undermine the credibility of allegations, and thus how process and substance interact. The South Korean and South African removals were greatly aided by the presence of independent institutions that would investigate facts and weigh the credibility of allegations – the Constitutional Court and Public Protector, respectively.<sup>281</sup> In South Africa, the Constitutional Court helped to lend additional credibility to the Public Protector by ruling that its report was legally binding on the political branches.<sup>282</sup> At any rate, the independence and reputation of both institutions seemingly helped to enhance the credibility of the removals.

A comparison to the contemporary U.S. context is instructive. Here impeachment investigations are often left to Congress itself, which may undermine confidence in its own findings. Two recent discussions of impeachment, of course, were impacted by independent investigations, the Starr investigation into President Clinton and the Mueller investigation into President Trump. As is well-known, special counsel Mueller was not well-insulated from the president, raising concerns about potential interference or firing.<sup>283</sup> Similar concerns materialized during the investigations of President Nixon.<sup>284</sup> Thus, one problem is that U.S. constitutional design has a dearth of constitutionally insulated institutions analogous to the Public Protector in South Africa. Of course, even seemingly independent investigations that have been involved in recent impeachments have not been trusted and instead have been portrayed as politicized. The Mueller investigation, for example, has been widely derided by the right (not least by the president himself) as a partisan “witch hunt.”<sup>285</sup> The Starr investigation, which

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<sup>280</sup> See, e.g., CONST. BRAZ., art. 86 (1988); CONST. COL., art. 175 (1991).

<sup>281</sup> See *supra* Parts I.A, I.D.

<sup>282</sup> See *supra* text accompanying notes 114–**Error! Bookmark not defined.**

<sup>283</sup> See, e.g., Matt Ford, *Can the Senate Save Robert Mueller*, THE NEW REPUBLIC, Apr. 12, 2018 (discussing legislative proposals to provide more protection to Mueller’s office and tenure).

<sup>284</sup> See, e.g., Daphna Renan, *Presidential Norms and Article II*, 131 HARV. L. REV. 2187, 2209 (2018) (discussing how the firing of the special prosecutor investigating Nixon, as well as several Attorney Generals, sparked normative changes in the executive branch).

<sup>285</sup> See, e.g., Michael D. Shear and Lola Fadulu, *Trump Says Mueller Was ‘Horrible’ and Republicans ‘Had a Good Day’*, N.Y. TIMES, Jul. 24, 2019.

was carried out by a statutorily independent Special Counsel,<sup>286</sup> received a similar reception on the left and was in fact broadly seen as tainted by politics.<sup>287</sup>

The broad point is that U.S. constitutional design and scholarship could benefit from thinking of the ways in which other institutions might play a useful role in carrying out specialized functions (such as fact-finding) or in enhancing the credibility of removals, especially in cases where they are tied to the finding of criminal wrongdoing (or something similar) by a sitting president. Similarly, it may be worth thinking of ways in which institutions might be used to spur the political branches to take their responsibilities seriously when confronted with the fruits of independent investigations, as the Constitutional Court did in South Africa.

## **E. The Role of Courts and Due Process**

The role of courts is an especially interesting issue in impeachment processes. As we surveyed above, the U.S. constitutional text is silent on the role of the courts during impeachment, with the exception of noting that the Chief Justice presides over Senate trial of the president of the United States, a role that was understood by Rehnquist during the impeachment of Clinton to be ceremonial.<sup>288</sup> U.S. courts have nonetheless stayed out of impeachment processes.<sup>289</sup> The U.S. is not alone in taking such a position; the Paraguayan Supreme Court, for example, took a similar stance after the impeachment of Lugo.<sup>290</sup> But the comparative evidence shows that the posture of no judicial involvement is one end of a broad spectrum. In some cases, such as South Korea, courts play a formal role in the impeachment process, often as the final step in the process after an initial political determination has been made.<sup>291</sup> In other cases, like Brazil, courts may accept some role of judicial review, for example to determine whether the procedure for impeachment has been followed or the substantive standard has been met.<sup>292</sup> In the rare extreme, as in Honduras prior to 2013, courts may be imbued with the sole power of removal.<sup>293</sup>

The comparative evidence is too thin to establish exactly how to fix the best point on this spectrum for any given polity. This likely depends on context. As we have noted, the Honduran solution of placing removal power *exclusively* in the hands of the courts seems deeply problematic, because it ignores the essentially political nature of removal. It required that the president be charged with a crime before impeachment proceedings could even begin. It may even have allowed Zelaya to cling to power for a long time after he had lost the support of virtually the entire political elite,

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<sup>286</sup> The Ethics in Government Act under which Starr was appointed was examined and upheld in *Morrison v. Olson*, 487 U.S. 654 (1988). The law provided for an independent counsel who was appointed, under certain conditions, by a panel of judges, and who could be removed by the Attorney General only for good cause. *See id.* at 660-64. The independent counsel was also required to report to the House of Representatives any “substantial and credible information . . . that may constitute grounds for impeachment.” *Id.* at 664-65. The law was permitted to lapse in 1999, in the wake of the failed Clinton impeachment.

<sup>287</sup> *See, e.g.*, TRIBE & MATZ, *supra* note 8, at 21; SUNSTEIN, *supra* note 8, at 100-01.

<sup>288</sup> *See supra* Part I.E.

<sup>289</sup> Scholarly treatments of the U.S. generally also find this non-involvement to be a good thing. *See, e.g.*, BLACK, *supra* note 8, at 55.

<sup>290</sup> *See supra* note 98.

<sup>291</sup> *See supra* Part I.A.

<sup>292</sup> *See supra* Part I.B.

<sup>293</sup> *See supra* text accompanying notes 200-208.

including his own party. The legislature lacked any way to initiate removal proceedings against him, even though they complained repeatedly about his conduct.

Aside from this extreme position, though, a range of forms of judicial involvement may work at least tolerably well. In the South Korean case, the role of the Supreme Court in confirming the removal of the president may have helped to build confidence in the outcome by showing that the removal was not merely the continuance of ordinary politics by other means. There is an obvious danger in a court playing this kind of confirmation role: It may stymie removals that are politically necessary but harder to justify legally. The countervailing benefit of models like the South Korean one is that direct judicial involvement of this type may bolster the credibility of impeachment processes and make it harder to argue that they are just a politically motivated, “constitutional coup,” as in Brazil and Paraguay.

The Brazilian Supreme Court was heavily criticized for its various interventions into the Rousseff impeachment.<sup>294</sup> But the Court’s interventions, as well as those of the South African high court, may still illuminate the ways in which a judiciary could potentially shape impeachment without outstepping their reach. The Brazilian Court did not adjudicate any direct attacks on the impeachment process. Rather, it issued several rulings that shaped its procedures. The President of the Court as presiding official of the impeachment trial in the Senate also issued rulings that shaped the process. More powerfully, the South African Constitutional Court’s interventions had the effect of keeping the channels of political redress for corruption open, and ensuring that Zuma could not bury charges against him.<sup>295</sup> It provides a salutary model of a high court effectively and deftly defending constitutional democracy under the rule of law, even though the Court there made no substantive decisions on the merits of removal of President Zuma.

In short, there are forms of judicial involvement in impeachment that do not immediately risk the “over-legalization” trap that makes would make impeachment unduly rigid. In this sense, the strict U.S. position of permitting virtually no impeachment controversy to be justiciable may be unnecessary, and perhaps even undesirable.

Relatedly, our analysis also has implications for due process arguments of the kind lodged during the removal of President Lugo of Paraguay.<sup>296</sup> From the perspective of the individual official, these seem reasonable claims because the transparency of a process, and its perceived fairness, seem potentially important to popular acceptance and legitimacy of the result. But at the same time, invocations of due process, or similar concepts, during impeachment procedures should be used with great care. It is not just, as the U.S. Supreme Court suggests in the *Nixon* decision,<sup>297</sup> that an impeachment trial in the Senate is by necessity quite different from a standard criminal trial. It is also that it may serve a purpose of political reset that goes well beyond the character of the individual president, and instead goes more to the political context within which that president is working. In such structural debates, individual claims to “due” process ought to have less weight.

## **F. Impeachment and the ‘Hard Reboot’ of a Democratic System**

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<sup>294</sup> See, e.g., Aaron Ansell, *Impeaching Dilma Rousseff: the double life of corruption allegations on Brazil’s political right*, 59 CUL. THEORY & CRITIQUE 312, 318 (2018).

<sup>295</sup> See Huq, *Tactical Separation of Powers*, *supra* note 112.

<sup>296</sup> See *supra* text accompanying notes 93-95.

<sup>297</sup> *Nixon v. United States*, 506 U.S. 224 (1993).

In many systems, impeachment works as a “hard reboot” of the democratic process by triggering new elections upon removal. The South Korean system provides an example: It requires a new election within 60 days of removal, resetting the schedule of presidencies.<sup>298</sup> Indeed, we found above in Table 6 that in most systems, impeachment triggers a new election. This design avoids one of the key problems with the U.S., Paraguayan, and Brazilian systems (among many others): namely that removal of a president means he or she will be replaced by his own vice-president, usually of the same party and political persuasion, who then completes the full term. Restarting with a new election is closer to the design of a parliamentary system, and allows the system to avoid gridlock, which as noted above is one of the risks of a presidential system.<sup>299</sup> Allowing the constitutional order to hit the “reset button” in this fashion seems to us like a useful tool.

In contrast, allowing the vice president to ascend to power once the president is removed, as in the United States, seems a problematic design. Allowing a pre-selected official of the same political coalition to ascend to power for the remainder of the ousted president’s term invites abuse of impeachment by allies of the presumptive heir to the throne, and it may at any rate prolong the crisis by preventing a true political reset. The vice-presidential succession model raises an obvious possibility of manipulation, where vice presidents or their allies seek to engineer the removal of presidents knowing that they will then ascend to power. This is not just a theoretical risk, but rather a likely description of dynamics in Brazil and Paraguay. In both countries, the successor (Michel Temer and Federico Franco) were affiliated with a different party than the president. In both, there were credible rumors that the vice-presidents were plotting to remove presidents long before the impeachment.<sup>300</sup> The description of events across both countries as a “constitutional coup,” despite the fact that formal impeachment procedures were followed, depended in large part on the fact that the movements appear to have been engineered by supporters of the two vice-presidents as a way to gain political advantage, and as “reactionary movements” by conservative forces against progressive presidents.<sup>301</sup>

Further, allowing the vice-president to ascend to power for the remainder of an ousted president’s term does not allow for a political reset. If the vice-president is still somewhat close politically to the deposed president, impeachment may well do little to resolve the political crisis. Imagine, for example, if Al Gore had succeeded to Bill Clinton in 1999, or if Mike Pence were to succeed Donald Trump. In both cases, the new leaders would likely have continued many of the same political dynamics as the old. Even in cases where the vice president is distant from the old president politically (as in both Paraguay and Brazil), the successor is fairly likely to be embroiled in similar scandals as the old president. Temer, for example, was embroiled in a series of corruption scandals during his two-and-a-half year interim presidency. Indeed, months following the end of his term in December 2018, he was arrested for alleged involvement in a corruption enterprise.<sup>302</sup> In Paraguay, Franco similarly was embroiled in corruption-related controversies during and after his roughly one-

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<sup>298</sup> See CONST. S. KOREA, art. 68(2) (1987) (requiring a new election within 60 days of a vacancy in the presidency, including those caused by disqualification via judicial decision).

<sup>299</sup> See Linz, *supra* note 23, at 51.

<sup>300</sup> See *Brazil’s Dilma Rousseff Accuses Deputy of Coup Plot*, BBC NEWS, Apr. 13, 2016, at <https://www.bbc.com/news/world-latin-america-36025506>; *Paraguay’s Impeachment: Lugo Out in the Cold*, THE ECONOMIST, Jun. 30, 2012, at <https://www.economist.com/the-americas/2012/06/30/lugo-out-in-the-cold>.

<sup>301</sup> See, e.g., van Dijk, *supra* note 51, at 119.

<sup>302</sup> See *The arrest of Michel Temer*, THE ECONOMIST, Mar, 21, 2019, <https://www.economist.com/the-americas/2019/03/21/the-arrest-of-michel-temer>.



year term in office.<sup>303</sup> Furthermore, neither Temer nor Franco was popular. Neither could have won an election.

What should happen instead? We think the case studies of Part I suggest the superiority of the South Korean design, which allows impeachment to play a hard reset function in cases of political crisis. Holding a new election shortly after an impeachment reduces the possibility of strategic initiation of a removal process. The relevant players will have more uncertainty about who will benefit from the impeachment. In particular, supporters of impeachment will need to worry that backers of the deposed president may win the subsequent election, especially if there is a perception that impeachment was undertaken abusively or for a narrow agenda. A new election is also more likely to create an exit from a political crisis, since a new president will be able to claim a renewed popular mandate.<sup>304</sup>

In this way, impeachment followed by new elections helps to ease the much-criticized rigidity of presidentialism by giving it a bit of the flavor of parliamentarism. In parliamentary systems, governmental crises and drastic losses of governmental support by the legislature are often, albeit not inevitably, resolved not just through a change in the executive cabinet, but through new popular elections. Even if new elections do not occur after a change in government, the new government is reliant on at least implicit legislative support. In contrast, the fixed electoral calendar of presidentialism generally prevents the holding of new elections as an escape valve, even during a deep crisis. Indeed, this fixed calendar is often seen as one of the biggest vulnerabilities of presidentialism, sometimes feeding deadlock and even leading to breakdown. The removal of a chief executive through an extraordinary process like impeachment seems to us to be a strong candidate for an exception to the general rule of a fixed calendar: it allows a new election to help provide an exit from a crisis, but at the same time, impeachment is too rare an event to lead to very frequent elections that might themselves destabilize the system.

Our argument for a new election rather than vice-presidential succession following a successful impeachment, to be sure, leaves many important questions of constitutional design open. One is who should serve as interim president for the period of time before the new election is held. Elevating a relatively weak figure as in South Korea (or even an outsider such as a judge) may make sense in such a context; designers may also want to consider whether this caretaker should be eligible to run in the special election, given particularly its emphasis on resetting the political system. Another key question is how quickly a new election should be held. Again, the Korean solution of 60 days seems like a fairly reasonable solution. It gives political groups some time to organize, while ensuring that a reset happens quickly and limiting time for the new incumbent and his or her allies to consolidate their position.<sup>305</sup>

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<sup>303</sup> See Attorney-General Opens Investigation into Former President, ECONOMIST INTELLIGENCE UNIT, Oct. 26, 2015, <http://country.eiu.com/article.aspx?articleid=573622641&Country=Paraguay&topic=Politics&subtopic=Forecast&subsubtopic=Election+watch&u=1&pid=1023589086&oid=1023589086&uid=1>.

<sup>304</sup> We focus here on impeachment, but the logic of our argument also applies to other forms of political control of chief executives such as recall. In Venezuela, for example, the consequence of a successful referendum to recall the president is peculiarly sensitive to time. A president can only be recalled during the second half of his or her six-year term. *See* CONST. VEN, art. 72 (1999). However, if recall happens during the last two years of the term, then the vice president takes over for the remainder of the original term, instead of a new election being held within 30 days. *See id.* art. 233. The combination of these provisions provides only a narrow window of one year (the fourth year of a presidential term) in which recall can be planned and carried out in a way that triggers a reset.

<sup>305</sup> A related question is whether there should be a *de minimus* exception to the rule requiring new elections in cases where the old president had very little time left in their term. If such an exception exists, we would suggest, it should likely be

A third question, perhaps the most interesting, is whether a successful impeachment should trigger new elections just for the president, or for the legislature as well. Having an impeachment trigger legislative elections in addition to presidential ones may risk deterring even meritorious impeachments, and perhaps it seems illogical to “punish” the legislature for removing a corrupt, criminal, or incompetent chief executive. However, having impeachment trigger mutual dissolution may help to facilitate exit from a crisis by allowing voters to weigh in on the composition of both institutions that were involved. There are at least a few examples of presidential constitutions allowing the kind of mutual dissolution that is usually a hallmark of parliamentarism,<sup>306</sup> and impeachment may again be a strong case for this kind of design. Moreover, triggering mutual elections may help to avoid abuse of impeachment by making legislators think long and hard about the consequences of presidential removal.<sup>307</sup> Finally, it would avoid unintended consequences in terms of the political rhythm of the constitutional order, in that it would not lead to asymmetric terms as between presidencies and legislatures.

### Conclusion

Based on a broad range of comparative evidence, we have argued that presidential impeachment in practice is about far more than removing criminals or other bad actors; it often serves as an exit from the deep structural crises that presidential (and semi-presidential) systems of government sometimes undergo. We have also argued that such a conceptualization of impeachment is not only descriptively accurate in comparative terms, but also normatively desirable.

Our analysis has important normative implications for the debate and design of impeachment in the United States by clarifying the function of impeachment. Some of our findings shed new light on old problems, for example when we argue for a broader and more political understanding of “high crimes and misdemeanors.” Others highlight overlooked problems in U.S. impeachment, which could be fixed through reinterpretations or constitutional amendment: that judicial abdication of any role during impeachment might be neither necessary nor desirable; that impeachment standards arguably should not be uniform across types of political actors; and that successful impeachments should trigger new elections, rather than simply allowing the vice-president to succeed to the presidency for the remainder of an ousted chief executive’s term.

Following our normative recommendations could make impeachments more frequent, both in the United States and elsewhere around the world. Would this be desirable? As noted above,<sup>308</sup> Brazil is one of the few countries in the world to have made fairly frequent use of impeachment in modern times, removing Collor through this route in 1992 and then Rouseff in 2016. While there are certainly many problems in modern Brazilian democracy, impeachment as an occasional tool to remove weak and ineffective presidents unable to forge a governing coalition in a fragmented Congress may sometimes ameliorate crisis, rather than exacerbating it. This would be truer, of course, if the design of the impeachment mechanism allowed for new elections and thus a full reset following impeachment, rather than automatic succession of the vice president.

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fairly short (say, no more than six months or a year) in order to allow impeachment to play the reset function that we lay out here.

<sup>306</sup> See, e.g., CONST. ECUADOR, art. 148 (2008).

<sup>307</sup> Alternatively, one could include a rule that failed attempts at impeachment mean that no new motion can be brought for a set period, as described above for Tanzania. See CONST. TANZANIA, art. 46(A)(2) (1977).

<sup>308</sup> See *supra* Part I.B.

We have also shown that there is no evidence that impeachment generates immediate destabilizing consequences, or is correlated in practices with reductions in democratic quality. Increasing the availability of impeachments for systemic problems (although not for bad actors) thus holds the prospect of mitigating some of the worst aspects of presidential democracy without generating new costs. It is a constitutional possibility, in short, that seems well worth exploring.