

# ***Personalization and Institutional Constraints: Pinochet, the Military Junta, and the 1980 Constitution***

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## ABSTRACT

The standard account of military dictatorship in Chile (1973–1990) portrays the case as a personalist regime, and uses the dynamics associated with this type of regime to explain General Pinochet's control of the presidency, the enactment of the 1980 Constitution, and the longevity of military rule. Drawing on records of the decisionmaking process within the military junta, this article presents evidence for a different characterization of the dictatorship. It shows that Pinochet never attained the supremacy commonly attributed to him, that the commanders of the other branches of the armed forces retained significant powers, and that the 1980 Constitution was not enacted to project Pinochet's personal power. More generally, this study suggests that personal power is not a necessary condition for regime longevity; collective systems can also produce cohesion and stability.

More than any other recent case of military rule in Latin America, dictatorship in Chile is associated with a single personage, General Augusto Pinochet Ugarte. Unlike contemporary dictatorships in Argentina, Brazil, and Uruguay, which instituted mechanisms to prevent the emergence of a strongman above the armed forces, in Chile after the coup of September 11, 1973, Pinochet quickly attained preeminence over the army and the original collegial military junta and emerged as the most powerful figure in the regime. In 1980 this personal power enabled Pinochet to impose a constitution that perpetuated his rule and included provisions that later allowed him to remain commander-in-chief of the army for eight years after the return to civilian rule and to be eligible for a lifelong seat in the Senate.

This exceptional concentration of power has led scholars to describe the "Pinochet regime" in terms of "one-man rule," uncontested control of the "executive army high command," and a "sultanistic" institutional structure (terms used, respectively, by Valenzuela 1991; Varas 1991; and Remmer 1989). Personalized power—both within the armed forces and within the dictatorship—is widely argued to have been the source of the regime cohesion that enabled Pinochet to retain power for 16½ years and to leave as a legacy an authoritarian constitution that, although reformed in 1989, so constrains civilians that many scholars

qualify the democratic character of the contemporary regime (Linz and Stepan 1996; Loveman 1991).

This study challenges that widely accepted characterization of dictatorship in Chile and shows that the commanders of the other armed forces played a far greater role in determining the course of the dictatorship than is generally recognized. Long-classified records reveal that Pinochet did not concentrate executive and legislative power or unilaterally determine the content of the new constitution. Instead, the junta, early on, instituted a quasi-constitutional framework to prevent the type of concentration of power in one individual usually ascribed to Pinochet, and later adopted the constitution as an intraservice compromise in response to army attempts to concentrate power.

In a striking way, these dynamics involved institutional constraints not usually associated with dictatorship. The constraints initially were internal to the junta; yet after March 11, 1981, the date the constitution went into partial force, institutions limiting the junta as a body, particularly a constitutional court, became operative and restricted the military's capacity to determine how the constitution was implemented. The plebiscite of October 5, 1988, which triggered the 1990 return to democracy, was shaped by these constraints and the nonpersonalist nature of the military regime.

These findings have ramifications beyond the characterization of the Chilean dictatorship. Personalist regimes figure prominently in recent comparative analyses of the performance of different types of nondemocratic regimes. A number of studies argue that personalist (and one-party) regimes are more enduring than military regimes because the former are free from the corrosive factionalism, intermilitary divisions, and subsequent military-institutional pressures to return to the barracks that usually beset military regimes. The Chilean case commonly is presented as exemplifying this difference (Remmer 1989; Geddes 1995, 1999).

This analysis, however, suggests that regime cohesion and longevity do not have to rest on a concentration of power in a single person or party. A plural body, such as a military junta, does not have to be unstable; if processed through institutions, internal differences can produce cohesion and regime stability. The identification here of institutional constraints within the dictatorship, furthermore, challenges a long tradition in political theory and comparative politics that holds the two to be incompatible, suggesting a need to rethink and further research the mechanisms whereby dictatorships structure their power.

## **AUTHORITARIANISM AND INSTITUTIONS**

By most accounts, authoritarian regimes are distinguished from democratic-constitutional forms of government by the absence in the former

of constitutional constraints on powerholders. At the most abstract level, institutional limits result from the operation of institutions understood as rules of the game that shape human interactions (North 1990). These rules constrain actors by defining how things can be done, who can do them, and under what conditions, usually along with some device to enforce these rules. Such rules are central to notions of limited government, constitutionalism, and rule of law. Government officials are subordinate to the rules that structure the political-institutional framework; incumbents gain access to office only in accordance with preestablished rules of eligibility and selection and act only within competencies and jurisdictions delimited by statutory and constitutional law, and in ways prescribed in these texts. Institutional rules provide limits by making available prior standards with which to distinguish proper from improper uses of authority. They often structure mechanisms intended to block transgressions and contain political power in this framework, such as the separation of powers, checks and balances, judicial review, and constitutional courts. In each, power is limited by dividing it and by requiring the concurrence or nonopposition of multiple organs as a condition for valid action.

In accounts of authoritarian rule, such institutional constraints are present only because of their absence. Thus, under dictatorship, "a person or a group of persons . . . arrogate to themselves and monopolize power in the state, exercising it without restraint" (Neumann 1957, 233). Dictatorial power is "unrestricted" (Stammer 1968, 161) and is associated with "unlimited arbitrariness and violence unchecked by any legal guarantees" (Fraenkel 1969, xiii). These definitions are not specific to presumably dated theories of totalitarianism. Scholars who have contributed to the study of authoritarianism and regime change also view authoritarian power as free from institutional constraint (Linz 1975, 183; Przeworski 1988, 60; O'Donnell 1999, 334). In their writings, authoritarian power is absolute not because it is monolithic or effectively all-pervasive, but because some actor or group concentrates power and claims for itself the authority to establish and modify rules without restriction by a higher power or institution.

This concentration of the power to make and unmake rules is why authoritarian powerholders are held incapable of subjecting their power to institutional limits, even those of their own making. This argument can be traced to Hobbes and Bodin's theories of sovereignty. For both theorists, sovereign power refers to the power to create and apply law, but only when exercised by agents at the apex of a given political-legal hierarchy, agents who are supreme in that their authority cannot be traced back to a superordinate rule or organ.

As the ultimate source of law, actors exercising sovereignty are incapable of binding themselves through rules and institutions, for at

least two reasons. First, if they are truly supreme and not subordinate, they cannot be subject to institutions because under such conditions, no higher legal machinery exists to hold them to rules. Second, though this situation implies that limiting institutions can only be created by the sovereign actors themselves, any such self-imposed constraints cannot be binding, given the rulemakers' continued capacity to decide and make law and therefore suppress any checks as expedient.<sup>1</sup> Any formal institutional limits therefore are always at the mercy of the authoritarian power bloc, the power of which is subject only to constraints of capability and context, not rules and institutions.

This structural freedom from institutional constraints is independent of the forms through which actors rule. The institutionally unlimited nature of authoritarian power implies neither that authoritarian regimes cannot be highly legalistic, with subordinate state agencies and actors subject to institutional constraints and rules, nor that authoritarian regimes necessarily rule arbitrarily, capriciously violating even their own rules. A legal organization of the state and a rule of law in which laws are publicly promulgated, prospective, general, and applied by a public authority; in which punishments are founded in law; can coexist with unconstrained power to make law.

This may not be common, as highly repressive dictatorships typically combine extrajudicial, arbitrary forms of repression with legal forms. Still, scholars have emphasized the legalism of many authoritarian and posttotalitarian regimes (Linz 1975, 287; Shain and Linz 1995, 10–16; Martínez-Lara 1996, chap. 1). They have also observed how generally capricious, arbitrary rule tends to be restricted to a relatively minor subclass of “sultanistic” regimes (Chehabi and Linz 1998). The point about authoritarianism and institutional limits does not turn on the presence or absence of formalized and institutionally bound structures and practices within a regime but on the impossibility of subjecting to rules actors at the apex of the regime who concentrate the power to make and unmake rules.

Similarly, this claim about institutional limits does not imply that authoritarian powerholders are free from all forms of constraint. The problem of institutional constraints concerns the effects of rules, not the way rivalries, factions, and intraregime power plays, or the need to hold together a diverse coalition of supporters, or the need to assure the cooperation of key economic actors may restrict the feasible choices before authoritarian rulers or even force them to accept outcomes they never desired.<sup>2</sup> Any dictator, or, for that matter, any ruler who thinks strategically and is concerned with retaining power will be constrained by the need to anticipate how his decisions effect other officials and powers that may have the capacity to disrupt the government or displace him from power. These forms of constraints, though, are very dif-

ferent from the types of institutional limits outlined above, and they do not affect the absolute character of authoritarian power. Thus, in the standard view, though subject to constraints of context and capability, authoritarian power nonetheless is absolute in that it stands above rules and is incapable of binding its own absolute power.

## **PERSONALIZATION OF POWER AND MILITARY RULE IN CHILE**

It is striking that interpretations of military rule as personalist not only disregard institutional constraints but also play down the political constraints just distinguished and, thus, take to an extreme the notion that dictatorships are free from constraints. In these accounts, personalization emerges as a strategy and mode of rule that allows rulers to increase their policy discretion and free themselves from the internal struggles, rivalries, and factionalism that, in purely military regimes, often terminate in pressures to withdraw from power in the name of military unity.

Successful personalist rulers use a number of strategies to increase their personal control over important policy decisions. They undermine power-sharing agreements with other factions in the military. They force officers from their same-age cohort into retirement to increase the status distance separating them from any eventual rivals. Rulers also may consolidate, into a single organization under their personal control, previously separate military intelligence services. This process of concentration of power in a single individual results in ongoing power asymmetries between the ruler and potential rivals. Therefore, the likelihood of a successful challenge to personal rule increasingly diminishes, and potential dissidents face few incentives other than cooperation with the preeminent figure (Geddes 1995, 16–18).

Thus personalist rulers attain a degree of control over policy and the armed forces that distinguishes them from military regimes in which the armed forces as institutions retain a significant role in exercising political power, either through the selection of successive presidents—sometimes with no other role in everyday governance—or power-sharing arrangements that grant each force direct government responsibilities.<sup>3</sup>

In comparative studies of authoritarianism in Latin America, the “Pinochet regime” figures prominently in the development of concepts of personal rule (see especially Remmer 1989). Previously secret primary documents, however, reveal that the Chilean navy and air force played a decisive role in defining the structure of the dictatorship and in prompting the enactment of the 1980 Constitution.<sup>4</sup> This influence, and the ongoing and institutionalized participation of other commanders, has gone unnoticed among scholars, partly because the military

never allowed its decisionmaking process to see the light of publicity. The junta operated behind a wall of secrecy, and its records were inaccessible to all but a handful of top officers.

The present availability of these documents warrants a reexamination of the standard characterization of the dictatorship. Contrary to the assertions of the advocates of personalization, Pinochet's command of the army and control of the executive never implied absolute dominance over the other branches or freedom from the limits set by the original collegial structure of the junta. The navy and the air force, though absent from the executive, always retained a substantial role in the legislative process and used this power at key junctures to block Pinochet's ambitions.

### **FORMATION OF THE JUNTA AND DEFINITION OF THE PRESIDENCY**

The coup of September 11, 1973, brought to a close the deep economic, social, political, and constitutional crisis that followed Salvador Allende's 1970 election as president and the Popular Unity government's attempt to lay the foundations for socialism through democracy. In a move whose brutality came to be symbolized in the image of Hawker Hunter fighters bombing the presidential palace, the armed forces deposed Allende, declared a state of siege, imposed military control throughout the country, dissolved Congress, and initiated a vicious crackdown on government officials, leftist parties, and social organizations. The armed forces arrogated the *mando supremo de la nación* (supreme command of the nation) and constituted a *junta de gobierno* composed of Pinochet, Admiral José Toribio Merino Castro, General Gustavo Leigh Guzmán, and General César Mendoza Durán, the respective commanders of the army, navy, air force, and national police. General Pinochet was named president of the junta, and the junta pledged to respect law and the constitution insofar as conditions permitted.

Unlike their Argentine counterparts, who, on taking power in 1976, immediately enacted detailed legislation regulating the organization of military power, the Chilean armed forces arrived with no recent governing experience and ruled at first with no clear definition of specific powers or procedures. Yet by mid-1975, this informal powersharing gave way to rules that defined the nature and powers of the presidency and instituted an elaborate system for legislating and modifying the constitution. Because Pinochet emerged in control of the presidency, advocates of personalization have viewed these rules as proof of Pinochet's centralization of power. The internal record, however, reveals that Pinochet did not impose his terms; nor did the rules enacted assure his dominance. Instead, the legal-institutional framework of the dicta-

torship codified a compromise that gave the presidency to Pinochet but also assured the other commanders mechanisms with which to articulate and hold on to individual positions in the lawmaking process.

The first step, the 1974 definition of the nature of the presidency, put an end to initial talk of an annually rotating presidency. The events that precipitated this definition were part of an operation to strengthen Pinochet's standing in the army. Unlike Admiral Merino and General Leigh, Pinochet was in a relatively weak position within his own military branch. Not only had air force and naval officers been the principal instigators of the coup, but the most prominent plotters in the army had been generals and colonels ranking below Pinochet; he joined the conspiracy only two days before the coup (González 2000).

To consolidate his authority in the army and stabilize his position in the junta, Pinochet had to achieve ascendancy over these officers. One way was to step out of the coequality of the collegial junta and attain preeminence. An uncontested position in the junta also would allow Pinochet to modify legal procedures regulating army promotions and retirements. Although the sequence of events between the last months of 1973 and the promulgation of the *Estatuto de la Junta de Gobierno* (Decree-law 527, *Diario Oficial*, June 26, 1974), which settled the nature of the presidency, is sketchy, the evidence suggests that the promulgation of the statute was triggered by Pinochet's attempts to establish an absolute dictatorship over the army. (For a fully documented account of this process, see Barros forthcoming.)

The nature of these maneuvers is revealed by a preliminary version of the Statute of the Junta, which differs markedly from the eventual law (see Secretaría de Legislación 1974). The draft structured procedures that would have allowed Pinochet to dominate the executive and the legislative process. Article 3 made the president of the junta "President of the Republic"; it foreclosed any rotation by not mentioning a term of office and by tying the position to the commander heading an order of institutional precedence (army, navy, air force, *Carabineros*). In regard to legislating, Article 10 replaced unanimity with majority decision and gave Pinochet a fifth vote to settle ties. (Unanimity was to be retained only to modify the constitution.)

Had these norms been adopted, Pinochet would have dominated lawmaking in the manner incorrectly ascribed to him. Majority decision with Pinochet holding a second vote was a formula for a dictatorship of the army, because General Mendoza, the head of the *Carabineros*, was in an extremely weak and dependent position and rarely, if ever, adopted stances at odds with Pinochet. With Mendoza's vote largely assured, Pinochet would have been able to force ties and use his second vote to dominate. In effect, this proposal implied the end of the junta as a body for joint governance.

Although there is no record of the junta's deliberations on the statute, the eventual decree-law reveals that the other commanders resisted Pinochet and secured provisions that protected their positions within the junta and the autonomy of their military branches. The statute enacted the proposed formula of tying the presidency to the incumbent in the first slot of precedence (the title "President of the Republic" was denied, though granted by the junta in December 1974), but it did not allow Pinochet to dominate lawmaking or to manipulate the officer corps of the other branches.

Unanimity was inscribed in law. Although the executive powers it enumerated largely mirrored those in the 1925 Constitution, the junta restricted traditional presidential powers in key areas, particularly executive-military relations. Not only did the statute restrict the president's traditional powers regarding military promotions but, as did the 1980 Constitution, it removed the president's traditional prerogative of dismissing the commanders-in-chief.<sup>5</sup> This is significant because Decree-law 527 is usually seen as a first step in Pinochet's consolidation of personal power over the armed forces as a whole. Yet, as it did for the presidency, the statute locked in place the existing composition of the junta by providing for replacement of junta members only in the event of "death, resignation, or any type of absolute impediment" (Article 18). (In such circumstances, the remaining junta members were to designate the successor.) Like Pinochet, the other junta members—particularly after they enacted a decree-law in 1976 freeing themselves from obligatory retirement—were not subject to any term limit (Arriagada 1985, 138–42).

Thus, although the statute allowed Pinochet to consolidate his position as president, it did not allow him to control the legislative process and emerge as sovereign in the classical sense. Nor did Pinochet's capacity to mold the officer corps in the army (Arriagada 1985) extend to the other branches. In defining the presidency, as they would during the subsequent definition of legislative procedures, Admiral Merino and General Leigh defended their positions in the junta and protected their command structures from army intervention.

### **Regulation of Lawmaking and Legislative Commissions**

This same dynamic of attempts to concentrate executive and legislative power in Pinochet, followed by naval and air force opposition and subsequent codification of rules protecting the collegial status quo, was repeated in 1974 and early 1975 when the junta turned to legislative procedures. In both July 1974 and March 1975, Pinochet's advisers presented proposals that would have concentrated the preparation and analysis of legislative initiatives in the army-dominated *Comité Asesor de*



*la Junta*. On both occasions, the navy and the air force objected and demanded a separation of powers (see *AHJG* 1974). In Leigh's words, "The Advisory Committee is using its legislative organ for every matter, of any order, whether executive, legislative, or general. The spirit of what we want is to separate the legislative function, not leave it located in the Advisory Committee" (*AHJG* 1975). After much debate, the junta settled on an elaborate set of procedures that secured the collective character of the junta and guaranteed each commander institutional channels for modifying and blocking legislative initiatives.

These legislative procedures were organized around four legislative commissions. The commanders of the navy, air force, and *Cara-bineros* each presided over their own commission, while a joint commission handled national defense matters. On the explicit grounds of the separation of powers, the junta decided not to create a legislative commission for Pinochet; although Pinochet did participate and hold a vote in the junta until March 1981.<sup>6</sup> With its detailed steps and timetables, the system of legislative commissions enabled each junta member independently to study bills and formulate observations ahead of any joint consideration or resolution and, as a result, gave substance to the unanimous decision rule.

With only minor modifications introduced by the constitution, this legal-institutional configuration of executive-legislative powers and procedures remained in force until the return to democracy in March 1990. Against this backdrop, it should be emphasized that Pinochet's uncontested retention of the presidency throughout this period is insufficient to establish personalist power. In 1974–75, Admiral Merino and General Leigh knowingly opted for naval and air force marginalization from the executive in exchange for a separation of powers and precise legislative procedures to safeguard against army dominance and to assure an institutionally protected role and veto in the legislative process.

Thus the well-documented (Huneeus 1988, 110–24) predominance of army officers in executive offices is not surprising. The crucial issue is whether Pinochet could also dominate the legislative process, and thereby act and legislate unchecked by any other institution or actor. On this point, advocates of personalization have consistently misunderstood the properties of unanimity by maintaining that Pinochet's vote in the junta allowed him to dominate the legislative process. It is asserted variously that "By 1975 General Pinochet had the power to legislate and to determine the application of the state of siege" (De Brito 1997, 43); that the junta was a "weak legislature beholden to executive initiatives" (Valenzuela 1991, 38); or that no legislation could pass without the General Pinochet's approval (Arriagada 1985, 162).

Each of these claims is partly true, with qualifications, yet none establishes that Pinochet could legislate over the will of the other junta

members.<sup>7</sup> Unanimity grants each participant an absolute veto, thereby guaranteeing each "the right to preserve his own interests against those of the other members" (Mueller 1989, 102). As a device typical of collegial organs, unanimity debars dominance; the minutes of the junta amply document that the body was not a rubber stamp legislature subservient to Pinochet. Pinochet was constrained by these potential vetoes and the subsequent need to attain agreement. Projects were modified until they satisfied everyone, or else the projects died in the system, because the executive would usually withdraw a bill rather than face a veto, though vetoes did occur.

These constraints were institutional and ongoing. Other institutional configurations and rules among the same actors would have had different consequences. Some, such as the proposal for majority decision with a tiebreaking vote for Pinochet, would have implied no constraints at all. Contrary to the personalization argument, what was unique about the Chilean dictatorship was not only the unipersonal president (a single president throughout the 16½ years of military rule) but the accompanying separation of a collegial legislative power that structured multiple vetoes. This division of powers introduced a first institutional limit within the dictatorship: the executive could not simultaneously act and legislate without the concurrence of another body. If sovereignty is understood as the power to create and apply binding norms to a territory and a people, then sovereignty within the Chilean military regime was divided.

Before examining the 1980 Constitution, two points are in order. First, the limits given by the collegial structure of the junta and the separation of executive and legislative powers were internal to the junta. When the junta was in agreement, no external institution, such as the Supreme Court or the *Contraloría General de la República* (an autonomous body which reviewed the legality of executive decrees), could hold the dictatorship to rules, because the junta could modify the constitution or statutes to override or circumvent a negative ruling as expedient. As a body, then, the junta was supreme.

Second, legislative control over the executive was relative. After the adoption of rules, autonomous organs, such as the DINA (National Directorate of Intelligence, the repressive apparatus linked solely to Pinochet), retained the capacity for uncontrolled unilateral action, even though their actions had ramifications for the armed forces as a whole, particularly in the international response they provoked. Yet insofar as repressive powers were regulated by decree-laws and the regime responded to external pressure by enacting legal and constitutional measures, the other commanders had an institutional channel to influence this response. Such internal strains, particularly those precipitated by the international reaction to the 1976 assassination of former Allende minis-

ter Orlando Letelier, who was killed by a car bomb in Washington, D.C., were major factors behind the decision to enact the 1980 Constitution.

## THE 1980 CONSTITUTION

Scholars have generally read the 1980 Constitution from the perspective of the standard account of the regime as a personalist dictatorship because, in the short run, the constitution appeared to do nothing but prolong Pinochet's hold on power. Although the main body of the text structured an essentially republican, albeit controversial, representative regime, a set of Transitory Dispositions (TDs) appended to the end of the document suspended much of this framework, reinstated the status quo of dictatorship, constitutionalized the structure of the junta, and prolonged military rule for one eight-year presidential term.<sup>8</sup> Insofar as it initiated neither a transition nor a liberalization of the regime, the constitution seemed to serve Pinochet's needs, correspond to his preferences, and reflect his hope of remaining in power "with popular legitimation, without modifying the structure of the regime" (Linz 1992, 454). For this interpretation see also Garretón 1986, 158–63; Constable and Valenzuela 1991, 136; Valenzuela 1991, 50–54; González Encinar et al. 1992; Ensalaco 1994, 411–12).

The same internal documents that force us to reconsider the significance of the dictatorship's early public law, however, also compel a different view of the origins, content, and effects of the 1980 Constitution. Like earlier institutional definitions, the constitution was not Pinochet's preferred outcome but rather the expression of an interforce settlement agreed on only after the navy and the air force, in the face of international pressure, again rejected bids to institute a dictatorship of the army. As a result, the constitution codified the range of agreement and difference present in the junta in the late 1970s. On the one hand, all commanders considered an immediate return to democracy premature and therefore agreed to maintain the dictatorship through the TDs. On the other hand, the commanders of the navy and the air force refused to countenance permanent authoritarianism and demanded an agreement on the nature of the successor civilian regime. This explains the specification of a strongly constitutional democracy in the permanent text and the inclusion of a transition plan and timetable.<sup>9</sup>

This conflictive underside to the constitution has long been lost in the secrecy surrounding its genesis. This background, however, must be recovered to explain why the constitution, although it apparently left the dictatorship untouched, actually did introduce important institutional changes, which ultimately constrained the dictatorship and led to Pinochet's defeat in the October 1988 plebiscite. Neither in its ori-

gins nor in its content and effects was the constitution primarily a device implemented and designed to perpetuate Pinochet's personal power.

### ***Actas Constitucionales* and Conflict over Permanent Military Rule**

The internal conflicts that provide the backdrop to the 1980 Constitution were precipitated by ploys to stave off international critics. Those strategies took the form of a series of Constitutional Acts (ACs). Unlike similar measures decreed in military Brazil or Franco's Spain, the ACs enacted by the junta were meant not to regulate dictatorial powers but gradually to put in place a new constitutional order. This partial, evolving constitution was intended to allow the military to counter critics by claiming to be engaged in constitutional normalization.

Announced on September 11, 1975, the package was to consist of six or seven ACs, though only three were ever enacted, all on the third anniversary of the coup. These were ACs 2, 3, and 4, which concerned the "Essential Foundations of Chilean Institutionality," "Constitutional Rights and Duties," and "Regimes of Emergency." (AC no. 1, decreed on January 9, 1976, created the purely advisory Council of State.)

The internal controversies over the future of military power followed the enactment of these three ACs. During their preparation, the junta's legal advisers recognized that if the ACs were presented as the only norms with constitutional rank, the junta might diminish the constitutional status of other decree-laws that gave the junta legal form as well as repressive powers. To eliminate this risk, the junta decided to repackage the many decree-laws regulating public powers as a single AC. Thus, although the junta did not want to assert openly the legal structure of military rule, this move inadvertently reopened the issue of the junta's organization, allowing Pinochet to use this opportunity to propose changes in the respective powers of the executive and the legislative junta.

Pinochet's bid followed a navy proposal that reaffirmed the existing division of powers, introduced checks to prevent the president from straying from junta agreements, and called for a four-year term limit on the presidency, with allowance for one reelection by the junta.<sup>10</sup> Pinochet's January 1977 counterproposal advocated a hardline turn to establish dictatorship as the normal form of regime in Chile. Pinochet's statute was thus titled "Statute of the Government of Chile," to avoid giving any impression of temporary rule. As his draft states, "The period of transitoriness has come to an end and it is necessary to present the Government of the Nation with a stable character" (Oficio CASMIL [R] No. 31000/2 de 04.ENE.77).<sup>11</sup> This "stable character" was to consist of a dictatorship of the army; the earlier formula for majority decisionmak-

ing reappeared—though this time for legislative and constituent acts—and the presidency was to be permanently linked to the army.

This proposal precipitated a sharp internal crisis. In a departure from usual practices, meetings were held to consult the general staff of each military branch. A document that tallies the positions in each branch reveals that the navy was the most unified force. Eleven of 12 admirals opted for the navy's stringent proposal. Although opinions among the 15 air force generals were more varied, they overwhelmingly opposed Pinochet's scheme and unanimously rejected the fusion of the presidency to the army; some demanded a deadline for calling elections. The *Carabineros* were equally divided among generals who stated no opinion and those who advocated maintaining the status quo (Guzmán n.d.).<sup>12</sup> Once again, the navy and the air force rejected Pinochet's bid to restructure the dictatorship.

Immediately following this resolution, Pinochet announced a timetable for a transition in his *Discurso de Chacarillas* (*El Mercurio* 1977). Although the junta had not agreed on this plan, the announcement signaled a new phase in the institutional debate. Only after the internal conflict over the AC on the junta had been resolved did advisers to the executive begin to elaborate strategies of institutionalization. Then a public "soft-line-hard-line" debate appeared in the proregime media. The backdrop for all of this was the dictatorship's increasing international isolation, which intensified as the Letelier investigation progressed. Once strong evidence linking the DINA to the assassination was uncovered in March 1978, the pressure to take steps toward institutional and juridical normalization mounted in the regime. Preparation of the constitution accelerated and proceeded through the known stages: in October 1978 the Constituent Commission completed its first draft; then followed review by the Council of State, which presented a revised version in July 1980; then, in a month of marathon sessions, the junta hammered out the final text (Carrasco Delgado 1981).

This hidden conflictive intramilitary backdrop explains the dualism of the 1980 Constitution and why it introduced no significant changes in the organization of the dictatorship. Liberalization in the form of a designated civilian Congress, which had been announced in Pinochet's Chacarillas speech and had been the focus of public proregime commentary, was precluded because the navy and air force commanders could not accept any formula that involved the suppression of their channel of influence, the junta. As a result, the constitution appeared only to prolong Pinochet's rule, although, less visibly, it also protected the junta by elevating its powers to constitutional rank.

In July 1978, in the midst of these events, General Leigh was forced to resign from the junta after giving an interview with an Italian daily in which he called for a return to democracy within five years.

Scholars have read this event as a confirmation of the personalization argument and as a turning point that allowed Pinochet freely to impose his constitution (Remmer 1989, 131; Valenzuela 1991, 39, 50). These arguments, however, are overstated. First, Leigh's main offense may have been simply to violate the unwritten convention that intrajunta differences remain behind closed doors. Second, this crisis is congruent with the logic of unanimous decisionmaking, which can result in irresolvable conflict and the use of force when persistent differences paralyze decisionmaking (Heinberg 1932, 453–54).

At the time, Leigh was blocking important privatizations backed by Merino and Pinochet.<sup>13</sup> Merino therefore may have supported Leigh's ouster so as to proceed with structural reforms, but in no case was he an advocate of entrenching authoritarianism on a permanent basis. Most significant, however, was that Leigh's removal did not result in any changes in the structure of the junta; nor did it prevent Admiral Merino and General Leigh's successor, General Fernando Matthei, from henceforth developing and defending in the junta positions at variance with those of General Pinochet.

### **Dictatorship Under the Constitution**

Although, in the short run, the 1980 Constitution did not appear to alter the dictatorship, when it took effect on March 11, 1981, it did introduce changes that ultimately constrained the military executive and legislature as a whole. The most visible changes, effected by the transitory dispositions, were Pinochet's removal from the legislative junta and his replacement by the army general next in seniority (to serve at the president's discretion), and a new rule whereby constitutional amendments would require plebiscitary approval in addition to junta unanimity (thereby precluding facile amendment).

Again, the first modification has been read from the personalist perspective. This view, however, rests on the misunderstanding of unanimity already discussed. The more significant constraints on the junta were to be institutions, structured by the main body of text, that became operative under the dictatorship. These included particularly the rights guaranteed by the constitution and the *Tribunal Constitucional*, a constitutional court empowered to uphold the constitution, settle conflicts among powers (including the military executive and junta), and review the constitutionality of organic legislation complementing the constitution.

Why the military allowed these institutions to operate under military rule becomes intelligible only when the permanent articles of the constitution are detached from the personalist interpretation. The main body of the text was not tailored to cloak Pinochet in constitutional

garb, or to grant permanent military tutelage over civilian politics. Rather, the intent was to rectify earlier points of institutional weakness and to contain democracy within effective constitutional limits. This design was elaborated by prominent civilian constitutionalists, who began work on a new constitution within days of the coup.

Aside from a handful of precepts devised to rectify problems revealed by the experience of military rule, the changes introduced by the constitution were designed looking backward at constitutional problems that had emerged during the 1960s and Allende's presidency.<sup>14</sup> In contrast to advocates on the extreme right, however, these jurists sought to correct deficient constitutional mechanisms, not to abandon democratic principles. Democracy was to be circumscribed within clear constitutional boundaries and protected by various layers of checks and reinforced organs of legal and constitutional control. In this context, the chapters on rights and the constitutional court became operative under military rule as part of a strategy to secure the validity of the constitution before any transition. The idea was that if the junta put into operation as much of the text as possible, it would have less chance of being dismantled later than if the main body took effect only on a return to civilian rule.

At this point, it is important to stress the skeletal character of the constitution, because this explains why all branches of the military could accept its terms. In 1980 the text left fundamental aspects of the future regime and the eventual plebiscite to regulation in organic constitutional laws (*leyes orgánicas constitucionales*, LOCs). These included states of exception, voter registration, elections, and political parties, among other things. This indefiniteness allowed actors to view the constitution as the vehicle for widely varying regimes and transitions. The range of possibilities was captured by one extreme rightwing commentator, Pablo Rodríguez Grez.

[W]ithin the present constitutional provisions there fits both a liberal democracy—with very few significant innovations—as well as a neo-organic democracy, capable of reducing the parties to being mere currents of opinion and of preventing the electoral game from being turned into a constant confrontation of social classes . . . .  
(Rodríguez Grez 1983)

These ambiguities allowed Pinochet and each member of the junta to attach specific, even divergent aspirations to the implementation of the constitution, such as a second term for Pinochet, a soft landing for the military institutions, or postmilitary political institutional stability and a return to a primary concern with defense preparedness. As a result, no commander could be indifferent to the constitution, and each had strong incentives to influence the content of the LOCs.

Unlike the making of the constitution, the specification of the terms of the constitution would be subject to review by an external

organ, the Constitutional Tribunal. Like the European courts on which it was modeled, the constitutional court's chief function was to uphold the constitution by resolving conflicts between public powers and by exercising obligatory, prior constitutional review of all LOCs. This meant that for the first time, the junta's legislative power was to be subject to review by an external institution that the dictatorship had created and mandated to hold itself to the terms of its own constitutional agreement. Though the constraints of the constitution and the constitutional tribunal were immediate (see Barros forthcoming), let us examine here only how the court blocked the armed forces from unilaterally defining the conditions and outcome of the plebiscite.

The most important political LOCs were approved in the junta only after the regime had weathered the 1981–82 economic crisis and the 1983–84 cycle of mass protests, which ended in November 1984 with the declaration of a state of siege. Although the political party law was hung as a carrot before the opposition during the 1983–84 de facto political opening, this LOC bogged down in the junta and was passed years later, in March 1987.<sup>15</sup> In the interim, the junta approved the LOC regulating the *Tribunal Calificador de Elecciones* (TRICEL), the special electoral court, and submitted it to the constitutional court for review.

The court's September 24, 1985, ruling on the TRICEL decisively limited the dictatorship's capacity to set the terms of the plebiscite. The ruling was congruent with a shift in the court's jurisprudence. Since it began operations in March 1981, the court, except for a first secret ruling, had never declared a norm unconstitutional; yet in the subsequent four years, it struck down norms approved by the junta on nine occasions. The ruling on the TRICEL had the greatest political consequences. The court struck as unconstitutional an article that left oversight of the plebiscite to an ad hoc electoral court, and ruled that the full electoral system as defined in the permanent text had to operate before the plebiscite took place. This ruling meant that the plebiscite, unlike the 1980 plebiscite held to ratify the constitution, would occur with electoral registries and independent oversight and counting. Through this ruling and subsequent decisions, the constitutional court created legal conditions for a fair electoral contest and structured incentives for the opposition to participate and eventually beat the military at its own game.

Therefore, it was not the military's commitment "to observing Chile's legal tradition of fair contests" (Valenzuela 1991, 62) that leveled the playing field in the October 5, 1988, plebiscite. The navy and air force were concerned that the plebiscite be fair, but, like the army, they were willing to enact norms that limited the opposition's capacity to organize and compete. The constitutional court, however, consistently struck clauses that restricted free political competition or allowed arbitrary intervention in the political process.



Here, the constitution's specification of a full bill of rights was the decisive limit on the junta. Chapter 2's guarantee of such rights as equality before the law, equal protection of the law, due process, and freedom of association, as well as political rights, gave the court grounds to strike any norm introducing inequalities. During the period leading up to the plebiscite, the court struck from the political LOCs any number of articles that established inequalities or enabled arbitrary restrictions of rights at the different stages of the political-electoral process: party formation and registration, internal party organization, voter registration, electoral and plebiscitary campaigns, the convocation of elections and plebiscites, voting and the qualification of elections (see appendix). One ruling even compelled the junta to enact further organic legislation to grant both sides in the plebiscite equal, free time on television and paid access to the print media and radio.

These rulings, even when they turned against the junta, were tolerable because the piecemeal implementation of the electoral system meant that the battle never appeared irretrievably lost. It is known that Pinochet, who was being fed doctored polling data, finally faced the reality that he could lose the plebiscite on the night of October 5, 1988, and by then he had lost. Furthermore, as we have suggested, Merino and Matthei never viewed the constitution as essentially a vehicle for perpetuating Pinochet in power. These differences were vividly evident late the same evening as Matthei, on his way to see Pinochet, remarked to reporters that he knew that the "No" had won, and he was calm. These comments signaled that any moves to precipitate violence and disavow the results of the plebiscite would not enjoy the institutional backing of the armed forces as a whole. Such unity had also been decisive in the coup d'état that brought the military to power on September 11, 1973.

## **PERSONALIZATION, INSTITUTIONAL CONSTRAINTS, AND DICTATORSHIP IN CHILE**

Contrary to the dominant interpretation, Pinochet was not the principal actor molding the course of the extended dictatorship in Chile. Advocates of personalization correctly stress that Pinochet's continuous control of the executive distinguished the Chilean regime from recent Latin American cases in which military institutions secured rotation among multiple military presidents. That control, however, never translated into the type of dominance often suggested in the literature. As this study has documented, the commanders of the navy and air force in 1974 and 1975 accepted their exclusion from the executive in exchange for rules and procedures that structured channels of effective participation in lawmaking and protected their military branches from army manipulation of

promotions and retirements. Pinochet repeatedly attempted to reformulate these institutions in his favor; yet on each occasion, these bids to centralize executive and legislative power were blocked. These interservice conflicts explain the enactment of the 1980 Constitution and its dual character as a device that both perpetuated military rule and provided a framework for a transition to a postmilitary constitutional order.

Unlike the constraints mentioned in accounts of other authoritarian regimes, the limits on Pinochet and the dictatorship as a whole after 1981 were not set by an interplay of shifting factions or immediate power plays but were institutional and ongoing. Pinochet never exercised absolute power in the political-theoretical sense. His control of the executive and the policy discretion this implied notwithstanding, insofar as policy required the creation or modification of law, Pinochet could not act unilaterally. The unanimity rule set a fundamental institutional constraint on Pinochet's power. Until the constitution went into force in March 1981, this limit was internal, and primarily affected the relationship between Pinochet and the junta. Henceforth, those internal limits were supplemented by the constitutional court, which, in areas subject to its review, held the junta to the terms of the constitution. In this manner, the constitution came to have a life apart from its makers, constrained them, and provided a legal-institutional framework that enabled the opposition to defeat Pinochet on October 5, 1988.

It might be argued that rules were insignificant; that if the other commanders had been in agreement with Pinochet, the military could have suppressed the constitution and the court and held on to power; that the stability of rules was contingent on differences among the armed forces. This claim is not a challenge, as it merely points to a general condition for institutional stability: institutions are at peril whenever overwhelming majorities can modify and suppress constitutional limits. It is the point of this article that ongoing differences at the apex of a regime allow limiting institutions to be sustained. This was the case in Chile. From the outset, differences stemmed from the prior plural structure of the armed forces. Each branch was an independent service, with its own traditions, identity, organizational style, and no precedent of subordination to another branch. This pluralism, because it emerged naturally from the earlier format of the armed forces, could be institutionalized at its peak without fostering the downward politicization and fragmentation likely in a junta formed of officers from a single branch.

This original plural structure was protected and mediated by rules that separated powers and precluded executive predominance over the junta as legislature. Here, Pinochet's inability to mold the composition of the junta by manipulating the officer corps of the navy and the air force was the fulcrum that allowed the junta to limit his actions and to accommodate the articulation of differences. This point is amply con-

firmed by the weakness of legislatures in cases where an authoritarian executive holds the power to designate and remove legislators or to enact norms without the legislature's concurrence, such as in Franquist Spain and military Brazil.<sup>16</sup>

Comparison with Argentina (1976–83) also highlights the importance of the separation of executive and legislative powers in Chile. The Argentine junta also was structured on a prior pluralism of military forces; but unlike Chile's junta, each branch retained a stronghold in the executive. According to some scholars, this fostered centrifugal tendencies that ultimately caused the demise of the regime (Fontana 1987; Remmer 1989; Arceneaux 1997). Contrary to the personalist interpretation, then, the "Pinochet regime" was distinctive not only because of the unipersonal presidency but because a collegial junta limited Pinochet, impelled the constitution, and allowed for the operation of institutional checks on the dictatorship, a combination that renders the appellation "Pinochet regime" a misnomer.

## **APPENDIX: KEY RULINGS OF CHILE'S CONSTITUTIONAL TRIBUNAL**

*Sentencia* Rol No. 33, October 3, 1985, on the organic constitutional law (LOC) regulating the *Tribunal Calificador de Elecciones*, the special electoral court. Stipulates that this court, the function of which was to oversee and certify elections, has to operate during the plebiscite. Also stipulates that the full constitutional electoral system has to be in place. This implies voter registration and use of electoral registries.

*Sentencia* Rol No. 38, October 1, 1986, on the LOC regulating voter registration and the electoral service. Strikes provisions enabling the director of the electoral service arbitrarily to challenge and cancel individual registrations.

*Sentencia* Rol No. 43, March 23, 1987, on the LOC on political parties. Strikes numerous provisions as unconstitutional restrictions of freedom of association, including a ban on the use of former party names and regulations concerning internal party organization.

*Sentencia* Rol No. 53, April 13, 1988, on the LOC on popular votes and counts. In addition to striking unconstitutional provisions, notifies the military government that specific articles are incomplete and must be complemented by further legislation providing equal, free television time to both sides during the campaign preceding the plebiscite, as well as nondiscriminatory, paid access to the print media and radio. Also establishes the sole constitutionally valid interpretation of an ambiguity that left open the possibility of a sudden, "snap" plebiscite.

## NOTES

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1. This same argument is restated from a different theoretical perspective in the literature on credible commitments: actors possessing discretionary authority cannot credibly commit themselves to a set of policies because nothing prevents them from later exercising their discretion to stray from their initial commitment (Shepsle 1991).

2. Stepan (1971, 248–66) and Cardoso (1973, 168–72) have emphasized the importance of intramilitary factionalism as a constraint on authoritarian presidents in Brazil.

3. For Remmer (1989, 34–42), these variants respectively correspond to “oligarchical” and “feudal” regimes, with Brazil (1964–85) and Uruguay (1973–85) exemplifying the former and Argentina (1976–83) the latter. Remmer refers to personalist regimes variously as “neopatrimonial” or “sultanistic.”

4. These records include the *Actas de la Honorable Junta de Gobierno (AHJG)*, official transcripts of the junta’s secret meetings; the junta’s legislative archive, which contains legislative histories for most decree-laws and laws enacted by the dictatorship; the *Actas oficiales de la Comisión Constituyente (AOCC)*, the official minutes of the commission that prepared the first draft of the 1980 Constitution; and the personal papers of Jaime Guzmán, the most important civilian adviser during the first ten years of military rule. The first three sets of documents are held in the Departamento de Servicios Legislativos y Documentales, Biblioteca del Congreso Nacional, and the Guzmán papers in the Fundación Jaime Guzmán, both in Santiago.

5. Under Article 72, no. 7 of the 1925 Constitution, the president conferred all higher ranks (colonel, captain of the navy, and the various grades of general and admiral), subject to Senate confirmation. The statute limited these appointments to the ranks of general and admiral, though always subject to junta agreement. Given the veto held by each commander under the unanimous decision rule, Pinochet could not unilaterally interfere with the chain of command in the other services.

6. This situation changed when the constitution went into force in 1981. At that point, Pinochet was separated from the system, and a legislative commission was created for the army.

7. Given the unanimity rule and Pinochet’s presence in the junta through March 1981, the general’s assent was indeed necessary to enact decree-laws. In this sense, the junta was a weak legislature in that it could not impose legislation without executive concurrence. In a similar way, as president, Pinochet did determine how state of siege powers were applied, but he had no power unilaterally to declare a state of siege; such a declaration required the unanimous consent of the junta.

8. This was done in TDs 14–20, 14 and 18–19, and 13, respectively. Only at the end of this period was the constitution to come into full force, following a noncompetitive plebiscite to ratify the junta’s nominee for the next presidential term (TD 27). Regardless of the plebiscite’s outcome, congressional elections were to follow, and military rule would cease once Congress was inaugurated,

nine years after the constitution went into effect (TD 28). If the junta's candidate lost, presidential elections would be held simultaneously with these congressional elections (TD 29).

9. For an English translation, see Blaustein et al. 1980.

10. The document is titled *Acta Constitucional No. de los Poderes del Estado*. Though undated, the document has scribbled on it, "Remitted by the Navy of Chile on 14-X-76."

11. The document, stamped *Secret*, is an undated but numbered copy. My reference is the identification given to the document in General Leigh's response; the cross-references in his response fully accord with the copy I possess. The Leigh document is an official letter to the president, whose subject reference states, "*Emite opinión sobre Anteproyecto de Estatuto de Gobierno*." The response that absolutely rejects Pinochet's proposal is also undated, but was presumably written in late March 1977 or afterward, as it includes a reference to Pinochet's March 18, 1977, speech. I have a copy of this document on file.

12. This document, too, is undated, yet the cross-references establish that it concerns the 1977 debate on the junta AC.

13. During the drafting of the ACs, Leigh vetoed norms allowing education and mining to be privatized. See *AHJG* 1976a, b.

14. The most significant changes from this perspective were 1) a constitutional ban on antisystem parties; 2) more meticulous specification of rights; 3) a second round for presidential elections; 4) the nonelectoral generation of slightly less than one-third of the Senate; 5) constitutionalization of the *Contraloría's* review authority; 6) restrictions on the president's military authority, particularly the removal of any exclusive power to dismiss commanders-in-chief; 7) the constitutionalization of a National Security Council, with a military majority; and 8) more demanding requirements to modify the constitution (three-fifths majority of all members of Congress and a two-thirds absolute majority in two successive congresses to amend expressly entrenched chapters).

15. The political party LOC was a carrot because Transitory Disposition 10 of the constitution stipulated that the ban on political party activity would cease once the law went into force. The law, therefore, would have triggered a formal opening of the dictatorship.

16. On the Franquist Cortes, see Gunther 1980, 38–39, 312. On Brazil, see Fleischer 1983; Alves 1985; and Martínez-Lara 1996, chap. 1.

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