



Turkey's Parliament

An Unlikely but Possible Counterweight to New Presidency

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The combination of post-coup emergency rule and the phasing in of the new presidential system has reinforced President Recep Tayyip Erdoğan's role as the virtually unassailable ruler of Turkey. Emergency rule has now been extended five times since the attempted coup in July 2016, with no end in sight. But even without emergency rule, the new presidential system affirmed in the April 16 referendum promises the hollowing out of institutions that once, for better or worse, were fairly autonomous. The judiciary is now little more than an arm of the Justice and Development Party, better known as AKP, government; its key positions are appointed by Erdoğan—who is AKP leader as well as president of the nation—and by the AKP-dominated Parliament. The military, too, is now mostly under the thumb of the government—unlike the judiciary, appropriately so, if not politicized. Following the next election, the prime ministry will be abolished. The president will stand alone atop the executive branch, his power of appointment unreviewable. The reach of the executive branch itself will be significantly broadened, including increased authority even over civil society.¹

Many observers expect that Erdoğan's position will remain unchallenged and that the AKP will hold onto power for many years to come. But AKP dominance of Turkish governance actually could be limited or removed entirely in elections that must be held by November 3, 2019—assuming those elections are conducted fairly.² The winning presidential candidate must win with a majority of votes cast, at least by the second round. This requirement is enshrined in the constitution; unlike the rules on parliamentary elections, it is not changeable without a constitutional amendment. And, although the polarizing Erdoğan is far ahead of other potential candidates in popularity thus far,³ it is by no means clear that he would win a majority of votes in a fairly conducted, head-to-head second round.⁴

As for Parliament, the AKP has won a sizable majority of seats in 4 of the 5 elections it has contested since its founding—winning a clear plurality of seats in the other election. The AKP has also captured more than 49 percent of the popular vote in 2 of the last 3 elections.⁵ Yet, the next election will be Turkey's first in which voters cast separate, simultaneous votes for president and Parliament. It is difficult to predict how that may affect voter preferences.

Significantly, the result of the parliamentary vote could still affect how Turkey is governed. As suffocating as presidential power is likely to be under the new system, there may nevertheless be some breathing room for a meaningful Parliament, and some measure of parliamentary checks and balances on the presidency, depending on the preferences of the Turkish voter. The following briefly details the duties and responsibilities of Parliament under the new system.

New Parliament: Authorities lost, retained, and gained

There are some misconceptions about the amendments passed April 16, which so dramatically enhanced the powers of the Turkish presidency. One of these misconceptions is that there will be no separation of powers. In fact, the new system will have more separation of powers—formally, that is—than the current, long-standing parliamentary system. In the current system, as is typical of parliamentary systems, the executive and legislative functions are intermingled. Most Cabinet ministers are members of Parliament (MPs) proposing their own legislation and voting on it.⁶ Under the new system, Cabinet members and other members of the executive will come from outside Parliament. If an MP accepts a Cabinet post or any other executive branch appointment, he will have to resign from Parliament. In short, Cabinet members and other executive branch officials will not be allowed to serve in Parliament—similar to the situation in the U.S. system—and all legislation, other than the budget, will be initiated from within Parliament, at least officially.

In reality, however, the division will not be quite so complete. If the president and the majority of Parliament are of the same party, legislation probably will be developed unofficially by the executive.⁷ Moreover, the president's right of decree means that the executive itself will have a semi-legislative function. Still, there will no longer be personnel serving in both branches of government.

Authorities lost

Another misconception is that the Parliament is shorn of all power. In Article 87 of the Turkish Constitution, the “General” powers of Parliament following the April 16 referendum are these:

*to enact, amend, and repeal laws; to debate and adopt the bills of budget and final accounts; to decide to issue currency and declare war; to approve the ratification of international treaties, to decide with the majority of three-fifths of the Grand National Assembly of Turkey to proclaim amnesty and pardon; and to exercise the powers and carry out the duties envisaged in the other articles of the Constitution.*⁸

These are precisely the powers as delineated in the constitution prior to April 16, minus two potentially important ones. Deleted from the list are the powers “to scrutinize the Council of Ministers [collectively] and the ministers” and “to authorize the Council of Ministers to issue decrees having the force of law on certain matters.”⁹ The first power was removed partly because, with the abolishment of the prime ministry, there will no longer be a Council of Ministers running the show, and this power is not being replaced with any similar right of oversight over the presidency or his ministers. The latter power was removed because the president will now have the constitutional right to issue decrees with the force of law at all times, without needing special authorization from Parliament. The establishment of the president’s right to issue decrees in areas of traditional parliamentary prerogative must be counted as a meaningful loss of parliamentary power, even though legislators will have the right to overturn those decrees.

Significantly, however, most of Parliament’s lost powers have little-to-no meaning in Turkey’s current situation, in which the president’s party enjoys a majority and the president is effective, if unofficial, head of government. Still, it is worth elaborating on the specifics. Additional lost powers include:

- Parliament will have no role in confirming presidential appointments. And, of course, the government will no longer require a vote of confidence from Parliament, as there will no longer be a parliamentary government.
- Parliamentarians will no longer be able to table censure motions against government officials.
- Parliamentarians will no longer have the right to put questions to the head of government—currently the prime minister but soon to be the president. They also lose the right to put oral questions to any official. They will be allowed only to put written questions to ministers and vice presidents.¹⁰ This is a significant loss, both substantively and symbolically—particularly the latter, as it emphasizes the elevation of the president virtually beyond the reach of Parliament.

- Parliament will no longer be able to call early elections with a majority vote; such a decision will require a 60 percent vote. Moreover, the president will be able to call early elections merely with a snap of his fingers.
- Overturning a presidential veto¹¹ of legislation will require a majority of the entire membership of Parliament—that is, 301 votes¹²—rather than a simple quorum majority.¹³
- Parliament will no longer have the final say in the removal of a president by impeachment; rather, the Constitutional Court, acting in its role as Supreme Court, or Yüce Divan, will.

In the current system, a petition by one-third of all MPs is necessary to initiate an impeachment process; a vote by three-quarters of MPs is required for the president's actual removal. In the new system, a majority of MPs first would have to propose to open an investigation, or *soruşturma*, into an alleged crime. Following discussion lasting no more than a month, three-fifths of the MPs would have to vote actually to open the investigation. A commission of investigation would then be appointed, and, following the commission's report, two-thirds of MPs would have to vote to send the president to the Supreme Court for trial. Only if convicted by the Supreme Court—most of whose judges the president might have appointed—would the president be removed from office.¹⁴

Authorities retained and gained

On paper at least, Parliament retains some meaningful powers. In addition to the remaining Article 87 powers listed above, Parliament will still have the authority to overturn presidential decrees, and the president is not allowed to overturn by decree legislation that was passed by Parliament. Moreover, the president is not allowed to issue decrees in areas that the constitution specifically reserves for parliamentary legislation, for example, penalties for crimes,¹⁵ a declaration of war, or permission for foreign troops to enter Turkish territory.¹⁶

Parliament also apparently will have final say over the budget—at least, that is the apparent meaning of a somewhat nebulous amendment passed in the April 16 referendum.¹⁷ The president will submit a budget—which, under the new system, is the only legislation the government is allowed to submit—but Parliament apparently can alter it. Most of Parliament's budgetary power seems to reside in the Budget Committee, since, once the committee passes the budget, parliamentarians cannot propose changes that would increase expenditures or decrease revenue. If Parliament fails to pass a budget, the president can do no more than renew the previous year's budget with an across-the-board percentage increase. This appears to be mainly a power retained rather than gained, but it is one that could be exercised independently of the executive branch for the first time, if the president's party lacks a parliamentary majority.

Parliament will gain certain powers as well. One, though clearly a new parliamentary power, takes place in the context of an overall loss of judicial independence. For the first time, Parliament will have a role in appointing judges to the Council of Judges and Prosecutors—(HSK) or Hâkimler ve Savcılar Kurulu, in Turkish—probably better known by its former name, the High Council of Judges and Prosecutors, or HSYK in Turkish. The HSK is the nerve center of the judicial profession in Turkey. It regulates the entire profession—vetting and hiring new members, determining assignments and promotions, imposing discipline when deemed necessary, and speaking out on issues related to the judiciary.

Under the new system, Parliament will appoint seven members of the 13-member HSK, and the president will appoint the other six.¹⁸ Previously, this body consisted of 22 members, with four appointed by the president, two appointed by the prime minister, and the remaining 16 elected by bodies within the legal profession—and none appointed by Parliament. Thus, this key body has ceased to be primarily administered by the judiciary itself; rather, it is now fully under the sway of political appointees, albeit from among candidates constitutionally mandated to be of significant standing in the judiciary.¹⁹

Interestingly, the most significant substantive change that Parliament made in the government's proposed amendments package—before passing it and sending it to referendum—concerned the choosing of HSK members. As introduced, the HSK was supposed to consist of 12 members, with half appointed by the president and the other half by Parliament. Somewhat surprisingly, Parliament's Constitution Committee added an additional member to be appointed by Parliament, and that provision remained in the final version.

As for the other most important judiciary body, the Constitutional Court, the president continues to appoint 12 of its members and Parliament three, as previously.²⁰ Obviously, all parliamentary appointments reflect Erdoğan's guidance as long as there is an AKP parliamentary majority.

Parliament also has a slightly strengthened role in emergency law situations in the new system. As before, emergency rule declarations by the executive—previously the Council of Ministers, under the new system the president—must be confirmed by Parliament, including its duration and scope. Under the April 16 system, however, presidential decrees issued in the context of emergency rule cease to have validity if not confirmed by Parliament within three months. Under the current system, that limitation is set by parliamentary bylaw rather than by the constitution. In practice, Erdoğan seems to be abusing the current system by issuing decrees on many issues unrelated to the reason for emergency rule—of course, without any complaints from the AKP majority in Parliament. A president operating under the new system and lacking a parliamentary majority, however, might find it difficult to take that approach.

Time and practice will determine how executive-legislative balances play out in reality. Parliament still must determine its bylaws under the new system, and it still must pass an overwhelming amount of legislation—known as harmonizing legislation—to synch Turkey’s laws with the far-reaching amendments passed April 16. Sources estimate that some 80 major pieces of harmonization laws—some say far more—will be necessary for the latter purpose.²¹ No doubt, the completion of this process will be an important factor in determining exactly how Parliament is likely to exercise its authority, including in regard to the budget.

Comparing other strong presidencies

By any measure, the Turkish Parliament’s powers will be significantly less than those of the legislative branches in the United States and France, the two nations generally considered to have the strongest presidencies among major Western democracies. The U.S. Congress, for example, checks and balances the executive branch through the Senate’s advise and consent mechanism—that is, its power to approve or reject nominees for federal judgeships and for ambassadorial and other senior positions in the executive branch. In its oversight and investigation authority, Congress also generally can compel executive branch officials to testify publicly about issues in their domain. For its part, the French Parliament puts questions both orally and in written form to the prime minister, although not to the president. It can also censure ministers and even bring down the government—but not the president—with a no-confidence vote. The Turkish Parliament will have none of these powers under the new system.

Of course, the most important power any legislature can have is the power of the purse. When the executive branch relies on the legislative branch for the funds it uses to pursue programmatic initiatives and daily operations—as is the case in the United States and France²²—the legislative branch is naturally in a strong position to influence the behavior of the executive branch. It remains to be seen how the executive-legislative relationship over the budget will sort itself out under the new system in Turkey. Again, if the president is the leader of the majority party in Parliament—Erdoğan and the AKP being an obvious example—none of this will matter; one individual, in effect, will decide all. If the president’s party does not hold a parliamentary majority, however, the development of the budget and other legislation could become complicated and interesting.

The Turkish Parliament will have some powers its French and American counterparts do not. For one, it will make judicial appointments. Second, it has long had the right to override a presidential veto by simply repassing the same legislation by majority vote—although, as noted, under the new system a majority of the total membership of Parliament, rather than a simple quorum majority, is now required. In the United States, a two-thirds majority is required to override a presidential veto. In France, meanwhile, where the president famously wields broad authority, he surprisingly has no veto power whatsoever.

Prospects for a Parliament with real power

The key question, therefore, is whether the Turkish Parliament will be able to exercise the constitutional powers it has in a meaningful way. Could Parliament be Turkey's savior from a suffocating Erdoğan presidency? The answer: Unlikely, but possibly.

The reason that many people think that Parliament has no power under the new system is that they assume Erdoğan will win the presidency and the AKP will win a parliamentary majority. This is based on their reading of political currents in Turkey or their judgment that Erdoğan and the AKP will use extralegal means to win the elections. This is not an unreasonable assessment, and, if it turns out to be correct, Erdoğan will indeed call all the shots for an obedient AKP parliamentary caucus, as already pointed out.²³

One thing is clear: Under the new system, a Parliament with real power can emerge only if it meets the following criteria.

1. The president's party lacks a majority. If the president's party receives a majority, it will be obedient to his will and simply rubber-stamp his decisions. Of course, this is true under the current system as well.

2. Emergency rule has ended. Since the Constitutional Court has said it has no standing to rule on presidential decrees issued under emergency rule—a not unreasonable reading of the constitution,²⁴ although one apparently at odds with past practice²⁵—and since Erdoğan has shown no compunctions about issuing emergency-rule decrees on all manner of issues unrelated to the reasons emergency rule was imposed in the first place, Parliament is rendered meaningless as long as emergency rule persists.²⁶

3. Elections are conducted fairly. This is a new concern on the Turkish political scene, but it is a serious one. Many analysts believe the results of the April 16 referendum reflected tampering to such an extent that it may have determined the outcome of that close election.²⁷ As pro-Erdoğan figures control the Supreme Board of Election (SBE), whose rulings are final, opposition parties may have little-to-no chance to win appeals regarding perceived irregularities and, thus, no means to counter prospective cheating on behalf of Erdoğan or his party in future elections. Moreover, the Constitutional Court's current position is that it cannot overrule the SBE, even if the SBE has approved actions that are blatantly against the law.²⁸ A new bill the AKP recently introduced in Parliament would fortify the AKP's ability to dominate SBE operations and manipulate election results, raising serious concerns about potential government intent to interfere in future elections.²⁹ A meaningful Parliament can only emerge from a free and fair election.

In that regard, there is at least some reason to hope that Erdoğan will be less insistent on retaining a parliamentary majority than he will be on retaining the presidency—and thus perhaps less focused on or desirous of affecting the outcome of parliamentary elections. This is because a failure to achieve an AKP parliamentary majority could create some problems for Erdoğan’s ability to govern, which would be a nuisance. Failure to get elected president, however, could result in a revival of the corruption charges that swirled around Erdoğan and his family in 2013-14—a far more menacing outcome that could land him and members of his family in jail.³⁰

4. Erdoğan voters have a reasonable right-of-center alternative to the AKP to support for Parliament. This will be the first election in Turkish history in which voters will cast separate votes on the same day for president and Parliament, and it cannot be assumed that every Erdoğan voter will pull the lever for Erdoğan’s AKP in the parliamentary vote.

The only previous time that Turks voted for more than one office on the same day was April 18, 1999, when parliamentary and local elections were held simultaneously, and there was considerable ticket-splitting.³¹ That vote is far from a perfect analogy to the likely dynamic in simultaneous presidential and parliamentary elections, but it did demonstrate an independent streak in the Turkish voting public two decades ago.

The Israel effect

An example from Israel may be a useful point of comparison.³² When Israel tried a similar experiment in simultaneous but separate votes for Parliament and the head of government, voters demonstrated the potential orneriness of the system. Many Israelis opted to vote for a party parliamentary list that differed from the party of the person they voted for as head of government. Notably, in Israel, the head of government is the prime minister, not the president.

The apparent intent of these cross-voters was to limit the power of the directly elected leader—in effect, create checks and balances. As an alternative explanation of the split vote, some said the operative factor was that the system allowed voters to cast one vote with their heads and one with their hearts. Whatever the explanation, Israel ultimately abandoned the system because it proved unworkable. But in the two elections in which Israelis cast simultaneous and separate votes for prime minister and for Parliament—1996 and 1999—the elected prime minister got roughly double the vote of his party.³³ In 1996, for instance, Benjamin Netanyahu actually won the prime ministry even though his Likud party came in second to his opponent’s party in the parliamentary race.

An associated result in Israel was the fractionalizing of the Parliament, as the two leading parties received far few parliamentary seats than had ever happened previously, complicating the task of coalition building and governing. Primarily for this reason, Israel abandoned the system. However, the system has remained fractionalized ever since. Prior to 1996, no winning party in Israel ever received fewer than 40 seats in the 120-seat Parliament. In the seven elections starting in 1996, the highest winning total has been 38 seats, and it has become common for the winning party to score only in the twenties.³⁴

This doesn't mean that the same phenomenon will occur in Turkey. For one thing, Turkish political culture may be different than Israel's—its voters less disruptive, ornery, or more loyal to their party.

For another, there is a different structural context. When Israelis voted in 1996 and 1999, parties needed only 1.5 percent of the vote to enter parliament. Thus, Israelis could vote for small parties with a relatively high degree of confidence that the party they selected would actually meet the threshold for entering parliament. Turkey, on the other hand, has had a 10 percent threshold for entering parliament—the highest in the world—since 1983.³⁵ Although there is perennial talk of lowering this threshold for the sake of achieving a more representative parliament—and such ideas are once more being floated, including by the AKP³⁶—it seems unlikely that an AKP government would make that change. At any rate, doing so would seem to be contrary to AKP's interests. A lowering of the threshold would encourage formation of more parties and tempt more voters to vote for smaller parties, which suddenly would be more viable bets to enter Parliament. It thus would increase the likelihood of a so-called Israeli effect, in which Erdoğan voters might vote for a party other than the AKP for Parliament, and it would decrease the likelihood of AKP's winning a majority of Parliament as more parties would have a chance to surpass the diminished threshold.

An important factor will be the election law that Parliament is discussing. The next election must be held by November 3, 2019, but could be held any time before. The constitution requires that any changes to the election law be made at least one year in advance of elections, but this requirement is suspended for the upcoming election.³⁷

To achieve a result in which Erdoğan wins the presidential election while his party fails to win a parliamentary majority, however, it seems obvious that Erdoğan voters must have an alternative conservative party for which to cast their ballots. It seems obvious that few, if any, Erdoğan voters would cast their parliamentary vote for the center-left Republican People's Party (CHP) or the liberal, pro-Kurdish Peoples' Democratic Party (HDP). The Nationalist Movement Party (MHP) is one possible conservative alternative to the AKP, although based on its positions over the past two years, it is unlikely to provide checks and balances regarding President Erdoğan; in fact, recent reports suggest the MHP would like to run in coalition with the AKP in the parliamentary elections. Meral Akşener's İyi (Good) Party may fill that bill as an alternative for Erdoğan voters

looking to soften the impact of his anticipated victory by providing checks and balances; it is not yet clear how viable her candidacy is or where precisely she will position herself on the political spectrum. Akşener, a former interior minister and former member of both the center-right True Path Party and the ultra-nationalist MHP, kicked off her new party in October 2017.

Implications of cohabitation government

If the president's party wins a majority of Parliament, there will be little role for the opposition parties and the president will be able to work their will virtually without obstacles. Even if the president's party lacks a majority—necessitating a form of cohabitation—it would not necessarily impede the president's plans. If opposition parties collectively hold a majority of Parliament but are unable to cooperate, the president would be able to pursue their agenda through decrees.

For the Parliament to overrule the president, the various opposition parties would have to set aside differences—in effect, they would have to care more about the issue at hand, or about inflicting defeat on the president, than about their overall differences. That wouldn't necessarily happen automatically. Following the only election to date in which the AKP has failed to capture a majority of seats, in June 2015, MHP lined up to provide the AKP a working majority in Parliament, ensuring that the speaker of Parliament would be from the AKP and that the AKP would win other decisive votes as well. MHP's stated rationale at the time was that it would not vote the same way the pro-Kurdish HDP voted; with this rationale, it guaranteed that it would never isolate the AKP by voting with the other two parliamentary parties, the CHP and HDP. In retrospect, it seems clear that the MHP was laying the basis for the cooperation with Erdoğan that later manifested itself when it supported Erdoğan's amendments to strengthen the presidency—cooperation that seems to have been crucial in saving Devlet Bahçeli's position as leader of the party.³⁸ Whatever the rationale, the principle applies: If the president can bring a key opposition party to his side, one that can compensate for his lack of a parliamentary majority, they'll have nothing to fear from the legislative body.

The president will also have many levers at his disposal—including an unchallengeable power of appointment to executive branch posts—that could be used to sway a recalcitrant opposition party leader or other opposition MPs to his side in any given parliamentary vote. For example, the president could appoint an opposition member's family member or close friend to a cabinet position or coveted agency slot in exchange for a parliamentary vote. As there is no process of parliamentary review of executive branch appointments, nothing would impede such a deal other than conscience and concern about the impact of public perceptions on one's political future. Obviously, the president would also retain all the powerful old levers that already attained prior to April 16, including control of the public procurement process.

Another advantage the president would have over an opposition-majority Parliament—at least in the broad realm of economic, social, and political issues where either presidential decrees or parliamentary legislation could apply—is speed. The president, for example, could issue a decree regarding taxes—again, with the snap of his fingers. Parliament could overrule it if it could muster the votes, but probably only after the cumbersome, time-consuming, committee-based process that most parliamentary legislation requires.

Were Erdoğan to retain the presidency in the next election, he would come into office with yet another advantage over Parliament: the presumed support of the Constitutional Court, the overwhelming majority of whose members have been appointed either by Erdoğan himself or by his predecessor as president, AKP co-founder Abdullah Gül. Although the new amendments restrict presidential decrees to areas where there is no existing parliamentary law and to areas where the constitution does not already require parliamentary legislation—and although the amendments also prohibit the president from issuing decrees regarding the basic freedoms and human and political rights enumerated in the constitution³⁹—it would presumably be the pro-Erdoğan Constitutional Court that adjudicates any questions of interpretation in grey areas of interbranch conflict. Even assuming the end of emergency rule, would the Constitutional Court as presently constituted stand up to Erdoğan if he issued a decree limiting freedom of expression using a security rationale as the justification? This seems highly unlikely.

If, however, opposition parties collectively hold a majority and are able to cooperate, they can do much to thwart the president's agenda by overruling decrees and through other means. As there will be no coalition per se that would reliably produce a binding majority on every issue, each issue would require its own so-called coalition for passage. This would become particularly important on legislation that must be passed by Parliament—for example, the budget or authorization for foreign troops to use Turkish territory.

If opposition parties hold 60 percent of Parliament, Parliament's leverage over the president would increase significantly, as the opposition would potentially then be able to call early elections. Early elections would also cut short the president's term in office, since the president can only be elected twice—or three times, if Parliament calls early elections during his third term.

Deterrence against early elections

It is sometimes argued that, under the new system, the president can simply dismiss Parliament and call new elections if he doesn't like what Parliament is doing. That is true, but it misses an important part of the story, namely, the cost to the president in doing so, as noted in the previous paragraph.

Under the new system, parliamentary and presidential elections will always be held simultaneously. Thus, if the president dissolves Parliament, he is also cutting short his own term—and he is only allowed to serve two terms, plus a third—but no more—if Parliament calls early elections during his second term.⁴⁰

For example, when the AKP failed to win a parliamentary majority in June 2015 elections, Erdoğan guided the system toward new elections five months later by effectively impeding formation of a governing coalition. That gambit was successful, as the AKP recaptured its parliamentary majority in November 2015. Under the new system, however, such a maneuver would have cost him a full five-year term in office—a cost so high that it would likely have been prohibitive.

The president's right to dissolve Parliament, however, could be of enormous significance in the case of an impeachment initiative. To pursue removal of a president under the new system, a majority of MPs would have to propose to open an investigation into an alleged crime. Following discussion lasting “no more than a month,” three-fifths of MPs would have to vote actually to open the investigation in order to begin the impeachment process. Once 60 percent of MPs vote to open the investigation, the president could no longer call new elections, according to one of the new amendments.⁴¹ The implication is that the president could indeed call new elections—and thus halt the impeachment initiative—during the period when there is discussion as to whether to open the investigation.

If Erdoğan loses the presidency, but the AKP retains its parliamentary majority—another unlikely but possible outcome—the courts initially would tend to side with Parliament, since they are currently dominated by AKP appointees. Over time, however, the new president would be able to appoint other judges. The president has the right to appoint 12 and the Parliament only three of the 17, soon to be 15, Constitutional Court judges⁴²—each of which serves one, nonrenewable 12-year term, or until age 65, whichever comes first.⁴³ The president appoints six of the judges to the all-important HSK, Parliament the other seven. Moreover, as the period between the June and November 2015 elections suggested, the courts tend to rule somewhat more independently when they perceive Erdoğan's power has diminished.

Conclusion

The president will wield a vast amount of power under the new system. Erdoğan will certainly fight hard to get re-elected, and he will do his best to make sure that he does so with an AKP majority in Parliament.

Yet, it cannot be denied that the new system, giving voters two votes instead of one, creates the possibility that Turkish voters may opt to vote for Erdoğan for president but not vote for the AKP in Parliament—or, less likely, vice-versa—provided there is an alternative they deem acceptable and viable. Voters may find this split-ballot approach an effective way to impose the checks and balances of which the system is otherwise bereft. This presents a potential opportunity for a center-right party that could appeal to non-hardcore Erdoğan voters. It remains to be seen whether Meral Akşener's Good Party fits the bill.

The new system also creates some potential for parliamentary independence, provided that the AKP fails to win a majority. At least on paper, Parliament will retain the right to initiate its own legislation, to overrule presidential decrees, to pass constitutionally required legislation, and, seemingly, to have the final say on the budget.

The vast enhancement of presidential powers under the new system has deflected public attention from the very real powers that Parliament formally retains. And the prospect of a close presidential race—few expect Erdoğan to score much more than 50 percent—has reinforced the focus on the presidency. Yet, the parliamentary race also bears watching, as the composition of Parliament might yet be critical to determining Turkey's fate in the years ahead. No one should bet on such a result, but neither should anyone dismiss the possibility.

If the next elections are conducted fairly, there is a chance they could produce a system that is more open than generally anticipated. If, however, a re-elected President Erdoğan presides over an AKP majority, as most now expect, Parliament is likely to be as sterile and as thoroughly dominated by Erdoğan as all of Turkey's other institutions now appear likely to be.

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Endnotes

- 1 For an overall review of the impact of the new system in Turkey, particularly its effects on the presidency and judiciary, see Alan Makovsky, "Erdoğan's Proposal for an Empowered Presidency" (Washington: Center for American Progress, 2017), available at <https://www.americanprogress.org/issues/security/reports/2017/03/22/428908/erdogans-proposal-empowered-presidency/>. Regarding the point on civil society, see Henri Barkey, "Turkey will never be the same after this vote," *The Washington Post*, April 11, 2017, available at https://www.washingtonpost.com/news/democracy-post/wp/2017/04/11/turkey-will-never-be-the-same-after-this-vote/?utm_term=.92458844bf97.
- 2 A standard that many Turks feel was not met in the April 16, 2017, referendum. According to one prominent post-referendum poll, 52 percent of voters, including 18 percent of yes-voters, felt the campaign was not handled fairly; 31 percent felt emergency rule had a negative impact on the fairness of the referendum itself. See Ipsos Sosyal Araştırmalar Enstitüsü, "İpsos: 16 Nisan Anayasa Değişikliği Referandumu Sandık Sonrası Araştırması," April 19, 2017, available at http://www.arastirmakutuphanesi.com/wp-content/uploads/2017/04/AnayasaReferandum_SandikSonrasi_Rapor_Ipsos_19042017-FINAL.pdf.
- 3 In a mid-November poll, Erdoğan's popularity rating was 52 percent. Closest to him was his own prime minister, Binali Yıldırım, from the AKP, at 47 percent. Among non-AKP politicians, the most popular was MHP leader Devlet Bahçeli at 39 percent, followed by CHP leader Kemal Kılıçdaroğlu at 29 percent, Meral Akşener (leader of the recently founded Good Party) at 19 percent, and imprisoned HDP leader Selahattin Demirtaş at 10 percent. See MetroPOLL Strategic And Social Research Center, "Turkey's Pulse," November 2017, p. 28, on file with the author.
- 4 Recent reports suggest that Erdoğan is unhappy that his advisers blessed this system, which has been in place since direct election of the president was authorized in 2007. Affirmation of this system, which replicates the French system, was included in the provisions voted on in the April 16 referendum. If reports of Erdoğan's unhappiness are true, Erdoğan either did not read the package of amendments carefully, which is difficult to believe, or only belatedly came to believe that he might be better served by a system based on one round and a plurality of votes. In fact, that is the system used for electing mayors in Turkey.
- 5 Official results of all Turkish elections, including referenda, can be found on the website of Turkey's Supreme Board of Election (SBE) (in Turkish, Yüksek Seçim Kurulu, or YSK), "Deputy General Election Archive," available at <http://www.ysk.gov.tr/tr/milletvekili-genel-secim-arsivi/2644> (last accessed December 2017). The SBE is also sometimes referred to in English as the Higher Election Council (HEC). The SBE is the rendering in the official English translation of the Turkish Constitution, article 79.
- 6 See, for example, (pre-referendum) Article 88 of the Turkish Constitution: "The Council of Ministers and deputies are empowered to introduce bills." An official English translation of the Turkish Constitution can be found at the Turkish Parliament, "Constitution of the Republic of Turkey," available at https://global.tbmm.gov.tr/docs/constitution_en.pdf (last accessed December 2017). This version includes all pre-2016 amendments, that is, all except one regarding parliamentary immunity, passed by Parliament in 2016, and the 18 articles of amendments passed by referendum on April 16, 2017, and discussed in this brief. Hereafter, all references to the Turkish Constitution will be to the one cited here; the constitution will be cited as TC, followed by a slash-mark and the relevant article number, as in TC/88.
- 7 In the U.S. system also, the president and his team develop initiatives that are formally introduced in Congress by members of his own party. A primary difference, however, is that congressmen have standing to disagree with a president, even one of their own party, because they are answerable to an independent constituency; in Turkey, in the AKP and most other parties, the party leader selects all the parliamentary candidates, so parliamentarians hoping to keep their jobs inevitably bow to the party leader's wishes. (The CHP is somewhat an exception to that rule, since many of its candidates are determined via primaries.)
- 8 Article 5 of the 18-article amendments package submitted to referendum on April 16, 2017. The official text of the amendments package (in Turkish) is contained in a parliamentary report, "Parliament 26/legislative year 2, [report] number 447 [2017]," pp. 104-126, right-hand column, available at <https://www.tbmm.gov.tr/sirasayi/donem26/yil01/ss447.pdf> (last accessed December 2017). (The left-hand column is the version of the package as originally submitted to Parliament on December 10, 2016. The right-hand column is the version as passed by Parliament's Constitution Committee on January 3, 2017, which is precisely the version that was passed by Parliament on January 21, 2017, and submitted to referendum roughly three months later.) Article 5 of the amendments package, amending Article 87 of the Turkish Constitution, is found on p. 106 of the report cited. Hereafter, all references to the amendments package will be to the text cited here; the amendments package will be cited as AP, followed by a slash-mark and the relevant article number only, as in AP/5. (The page numbers of the cited parliamentary report will not be given in subsequent endnotes.) To my knowledge, no English-language, article-by-article version of the amendments package exists. However, the Venice Commission has published a very useful (if occasionally imprecise) "unofficial translation" showing how the (then-prospective) amendments would affect the various articles of the existing constitution. See the European Commission for Democracy Through Law (Venice Commission), "Turkey: Unofficial Translation of the Amendments to the Constitution" (Strasbourg: Council of Europe, 2017), available at [http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-REF\(2017\)005-e](http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-REF(2017)005-e).
- 9 As found in TC/87.
- 10 Under the new system, the president will be able to appoint an unlimited number of vice presidents. AP/9.
- 11 Actually, the Turkish Constitution does not use the word "veto." It says "send laws back ... to be reconsidered." See TC/10.
- 12 Under the new system, Parliament will be enlarged by fifty seats, to a total of 600.
- 13 AP/16 (C). The quorum for the Turkish Parliament is one-third of the total membership. Passing a bill, however, requires a minimum vote of one more than one-quarter of the total membership. In the enlarged Parliament, that will mean at least 151 votes.
- 14 Makovsky, "Erdoğan's Proposal for an Empowered Presidency."
- 15 TC/38.
- 16 TC/92.
- 17 AP/15.
- 18 AP/14, 17. Most provisions of the 18-article amendments package will not come into force until the next elections take place, no later than November 3, 2019. The HSK provisions came into force immediately, however. As required by AP/17 (C), HSK members were selected within 30 days of the referendum, with the AKP majority carrying the day in Parliament.
- 19 AP/14.
- 20 As a result of the referendum, the overall size of the Constitutional Court will shrink from 17 to 15 members, as the two slots reserved for military judges cease to exist when the incumbents depart.

- 21 *Deutsche Welle*, “TBMM ‘yükü gündemle’ açılıyor,” October 1, 2017, available at <http://www.dw.com/tr/tbmm-yükü-gündemle-açılıyor/a-40764814>. In fact, the total number of laws to be amended for the sake of harmonization with the April 16 amendments is probably in the thousands. For example, with the abolishing of the prime ministry and its replacement by the presidency as the head of government, every law that mentions the prime minister will have to be amended. According to a temporary article of the amendments package passed April 16, Parliament was supposed to pass the relevant harmonization laws and parliamentary bylaws within six months after the referendum. Parliament in July adopted a series of bylaws—avowedly intended to facilitate that process—that limited debate time, provoking howls of protest from the opposition. See, for example, *Hürriyet Daily News*, “Turkish parliament passes bylaw changes,” July 28, 2017, available at <http://www.hurriyetaidailynews.com/turkish-parliament-passes-bylaw-changes---116055>; *Daily Sabah*, “Turkish parliament finalizes discussions, approves new by-laws,” July 27, 2017, available at <https://www.dailysabah.com/legislation/2017/07/28/turkish-parliament-finalizes-discussions-approves-new-by-laws>. Perhaps more seriously, the new bylaws allow for temporary bans from Parliament—or, in some cases, fines—if MP’s defame, inter alia, the president, the Parliament, the speaker, the Turkish nation, or Turkey’s territorial integrity. This seems to be a serious limitation on the parliamentary immunity guaranteed in Article 83 of the Turkish constitution. *Daily Sabah*, “Parliament prepares for busy schedule ahead,” October 2, 2017, available at <http://www.pressreader.com/turkey/daily-sabah-turkey/20171002/281736974653889>. See also Mecliste, “İçtüzük Değişikliği: Yasalaşırsa Ne Olacak?,” July 12, 2017, available at <http://mecliste.org/dosya/ictuzuk-degisikligi/yasalasilarsa-ne-olacak>. The first application of this restriction on parliamentary speech occurred on December 12, 2017, when MP Osman Baydemir, speaking in parliamentary debate, described himself as representing “Kurdistan”; he was suspended from Parliament for two days and fined TL 12,000 (approximately \$3,100). Bülent Sarıoğlu, “TBMM’de bir ilk... HDP’li Osman Baydemir ‘Kurdistan’ cezası,” *Hürriyet.com.tr*, December 13, 2017, available at <http://www.hurriyet.com.tr/hdp-li-osman-baydemir-kurdistan-cezasi-40677021>; Ari Khalidi, “Kurdish MP banished from Turkey Parliament for uttering ‘Kurdistan,’” *Kurdistan24*, December 13, 2017, available at <http://www.kurdistan24.net/en/news/9c7f453a-2dae-4f85-aa63-ef321a251ea2>. Notwithstanding the new bylaws—and the six-month deadline imposed by one of the recent constitutional amendments—the relevant harmonization laws have not been passed thus far. With Parliament having to pass a budget in December, it is likely that harmonization laws will begin to emerge from Parliament only in January. If the parliamentary process of passing harmonization laws is not completed before the next election, it is likely that Parliament will authorize the Council of Ministers to issue the relevant laws as decrees having the force of law prior to the election; constitutional provisions allow for this arrangement. The prime minister and Council of Ministers will remain in place until the next election, which will mark the final phasing-in of the new system. Alternatively, the president could issue the laws under his emergency-rule authority—as long as emergency rule continues—since he has interpreted that authority as limitless, and the Constitutional Court has ruled that it has no right to impose limits on that authority. A third possible backup plan, in the event that Parliament does not pass all the harmonization laws in time, is for the president to issue them by decree after the election. For reporting on some of the harmonization laws under discussion by the AKP, including those regarding the presidential campaign, see *Hürriyet.com.tr*, “İşte 2019’a uyum paketi,” September 24, 2017, available at <http://www.hurriyet.com.tr/iste-2019a-uyum-paketi-40589182>.
- 22 In France, the government can issue a budget by decree if the parliament fails to produce one; this has never happened, however.
- 23 In the AKP, as in most Turkish parties, the leader determines the parliamentary candidates list, without the benefit of primaries or other “bottom-up” expression of preference. As a result, MPs need to please their leader, rather than their constituents, in order to keep their jobs. This is in contrast to constituency-based systems, such as those in the United Kingdom and United States.
- 24 TC/148: “However, decrees having the force of law issued during a state of emergency, martial law or in time of war shall not be brought before the Constitutional Court alleging their unconstitutionality as to form or substance.” With the amendments passed by referendum April 16, 2017, the phrase “decrees having the force of law” has been replaced by “Presidential decrees,” and the phrase “martial law” has been dropped, as the very concept of martial law has been eliminated from the constitution. The essential meaning of the constitutional provision remains intact, however. See also Stockholm Center for Freedom, “Head Of Top Court In Turkey Confirms They Don’t Have Authority To Review Statutory Decrees,” April 26, 2017, available at <https://stockholmcf.org/head-of-top-court-in-turkey-confirms-they-dont-have-authority-to-review-statutory-decrees/>.
- 25 Selin Esen, “Analysis: Judicial Control of Decree-Laws in Emergency Regimes — A Self-Destruction Attempt by the Turkish Constitutional Court?,” Blog of the IACL, AIDC, December 19, 2016, available at <https://iacl-aidc-blog.org/2016/12/19/judicial-control-of-the-decree-laws-in-emergency-regimes-a-self-destruction-attempt-by-the-turkish-constitutional-court/>. See also Başak Bağlayan, “The Turkish State of Emergency Under Turkish Constitutional Law and International Human Rights Law,” *insights*, Vol. 21, Issue 1, January 3, 2017, available at <https://www.asil.org/insights/volume/21/issue/1/turkish-state-emergency-under-turkish-constitutional-law-and>.
- 26 According to former European Court of Human Rights Judge Rıza Türmen, “Unfortunately, many of the measures that Turkey has taken with state of emergency decrees are not even related to the coup or proportionate. Even under the Turkish Constitution, state of emergency decrees must [be] related to the subject of the state of emergency. But many such decrees in Turkey are completely unrelated to the coup, and this method of making laws has now become a permanent governing system in Turkey.” Barçın Yinanç, “Turkey has failed to adapt to Europe’s legal sphere: Former ECHR judge Rıza Turmen,” *Hürriyetaidailynews.com*, November 20, 2017, available at <http://www.hurriyetaidailynews.com/turkey-has-failed-to-adapt-to-europes-legal-sphere-former-echr-judge-riza-turmen-122657>.
- 27 Peter Klimek and others, “Election forensic analysis of the Turkish Constitutional Referendum 2017,” July 4, 2017, available at <https://arxiv.org/pdf/1706.09839.pdf>. An OSCE observer mission reported that the referendum “took place on an unlevel playing field and the two sides of the campaign did not have equal opportunities [to promote their arguments] ... While the technical aspects of the referendum were generally well administered and referendum day proceeded in an orderly manner, late changes in counting procedures removed an important safeguard...” See Office for Democratic Institutions and Human Rights, “Republic of Turkey: Constitutional Referendum 16 April 2017: OSCE/ODIHR Limited Referendum Observation Mission Final Report” (2017), hereafter: OSCE/ODIHR, available at <http://www.osce.org/odihr/elections/turkey/324816?download=true>.

- 28 This issue arose in dramatic form during and in the aftermath of the April 16 referendum. The SBE ruled that ballots lacking a stamp of authenticity could be counted, provided there was no clear intent to cheat. In doing so, it directly countermanded Turkish law that said unstamped ballots could not be counted. Once the SBE issued its ruling, election officials stamped the already-marked ballots, as a result of which it was impossible to distinguish the originally unstamped ballots from the originally stamped ballots—and it was impossible to know how many originally unstamped ballots were counted. Opposition parties claimed as many as 1-2.5 million unstamped ballots were counted. The CHP, the leading opposition party, appealed the SBE decision to Turkey's top administrative court, the Council of State, and then to the Constitutional Court. In line with TC/79 ("No appeal shall be made to any authority against the decisions of the Supreme Board of Election."), both courts ruled that they had no jurisdiction over the SBE. The CHP then appealed to the European Court of Human Rights (ECHR), which ruled that it has no jurisdiction over referenda. See OSCE/ODIHR, pp. 21-22; *Hürriyetdailynews.com*, "Main opposition CHP applies to Euro court over unstamped ballots during referendum," July 4, 2017, available at <http://www.hurriyetdailynews.com/main-opposition-chp-applies-to-euro-court-over-unstamped-ballots-during-referendum-115072>; Jennifer Amur, "Why Turkish opposition parties are contesting the referendum results," *The Washington Post*, April 17, 2017, available at https://www.washingtonpost.com/news/worldviews/wp/2017/04/16/heres-why-turkish-opposition-parties-are-contesting-the-referendum-results/?utm_term=.ee03c83b452b; and Hajer M'tiri, "ECHR dismisses Turkish opposition referendum case," *aa.com.tr* [Anadolu Agency], November 30, 2017, available at <http://aa.com.tr/en/europe/echr-dismisses-turkish-opposition-referendum-case/986131>. See more detailed information about the decision at European Court of Human Rights, "Turkish opposition party complaint about April 2017 referendum on President's powers declared inadmissible," Press release, November 30, 2017, available at <https://hudoc.echr.coe.int/app/conversion/pdf/?library=ECHR&id=003-5929609-7574711&filename=Decision%20Cumhuriyet%20Halk%20Partisi%20v.%20Turkey%20-%20complaint%20about%20Turkish%20referendum%20inadmissible.pdf>.
- 29 *Hürriyet Daily News*, "AKP submits draft law changing Turkey's top electoral board," November 22, 2017, available at <http://www.hurriyetdailynews.com/akp-submits-draft-law-changing-turkeys-top-electoral-board-122862>.
- 30 A close reading of the April 16 amendments suggests that the president cannot be impeached for malfeasance committed in a previous office.
- 31 Nihal İncioğlu, "Local Elections and Electoral Behavior." In Sabri Sayan and Yılmaz Esmer, *Politics, Parties, and Elections in Turkey* (2002), pp. 73-90, esp. pp. 82-3.
- 32 For analyses of the Israeli experience in simultaneous but separate votes for Parliament and head-of-government, see, inter alia, Dana Arieli-Horowitz, "Split-ticket Voting in the 1996 and 1999 Elections," pp. 45-66. In Asher Arian and Michal Shamir (eds.), *The Elections in Israel 1999* (Israel Democracy Institute, 2002); Reuven Y. Hazan, "The Electoral Consequences of Political Reform: In Search of the Center of the Israeli Party System," pp. 163-185. In Asher Arian and Michal Shamir (eds.), *The Elections in Israel 1996* (Sunny Press, 1999); Bernard Susser, "The Direct Election of the Prime Minister: A Balance Sheet," pp. 237-257. In Daniel J. Elazar and Shmuel Sandler (eds.), *Israel at the Polls 1996* (London: Frank Cass, 1998).
- 33 Israel's third and final direct election of the prime minister came in 2001, but it was not held in conjunction with Parliamentary elections.
- 34 Official results of Israeli parliamentary elections can be found on the website of the Israeli Parliament (Knesset), "Knesset Elections Results," available at https://www.knesset.gov.il/description/eng/eng_mimshal_res.htm (last accessed December 2017).
- 35 The 10 percent threshold was decreed by Turkey's 1980-1983 military government as it prepared for a return to civilian rule. The stated rationale was to ensure that Turkey would be governed by strong and stable governments and avert the parliamentary paralysis that plagued it in the 1970s, dramatized by Parliament's inability to elect a president during 115 rounds of voting in 1980, prior to the September 12, 1980, coup. (In the 1977 parliamentary election, the last before the coup, seven parties won seats in the 450-seat Parliament. Only two of them won more than 10 percent; two parties entered Parliament with less than 2 percent of the national vote.) Despite the new 10 percent threshold, Turks managed to elect a series of weak coalition governments in the 1990s. The system worked as the military envisioned in the 1980s, when Turgut Özal's Motherland Party (ANAP) won sizable parliamentary majorities with less than a majority of the popular vote, and again with the emergence of the AKP in 2002, which has consistently won parliamentary majorities out of proportion to its nevertheless impressive popular vote. The most radical impact of the threshold occurred in 2002, when only two parties were able to enter Parliament, the AKP (with 34 percent of the vote) and the CHP (17 percent). With one-third of the popular vote, the AKP came within a whisker of taking two-thirds of Parliament; nearly half the country voted for parties that failed to make the threshold.
- 36 *Hürriyet Daily News*, "New law could lower electoral threshold: AKP," November 9, 2017, available at <http://www.hurriyetdailynews.com/new-law-could-lower-electoral-threshold-akp-122224>.
- 37 AP/17, final paragraph (H).
- 38 Makovsky, "Erdoğan's Proposal for an Empowered Presidency."
- 39 See part 2, chapters 1, 2, and 4 of the Turkish Constitution.
- 40 For reasons the legal basis for which are unclear, Erdoğan is presumed to be eligible for two full terms under the new system, even though the presidency was already limited to two terms under the standing constitution, and even though the new system is not a change of regime or constitution or even a change in title of the office. The new system is simply an amended version of the standing 1982 constitution.
- 41 AP/9.
- 42 See endnote 20.
- 43 TC/147.