

IF TOMORROW COMES: POWER BALANCE AND TIME HORIZONS IN UKRAINE'S CONSTITUTIONAL POLITICS

SERHIY KUDELIA
BAYLOR UNIVERSITY

Abstract: This article analyzes two decades of contestation over Ukraine's constitutional provisions regulating executive-legislative relations using insights from the theories of interstate bargaining. It demonstrates how changes in the power balance between elite actors and the variation in the length of their time horizons affect the probability of them reaching an agreement. The article explains the reasons for elite acquiescence to the building of a powerful presidency in Ukraine in the 1990s, a successful shift to a semi-presidential system in 2004, repeated failures to amend the semi-presidential system, and an abrupt return to a super-presidential model in 2010.

Constitutional provisions regulating the distribution of political power have been at the center of elite struggles for most of Ukraine's independence. As a result, for just over twenty years executive-legislative balance and the division of power within the executive went through multiple transformations. Power domains of key institutional actors involved in constitutional bargaining went through substantive revision at least four times (1995; 1996; 2006; 2010), while in at least three instances elite groups came close to an agreement on further change, but ultimately failed to reach it. In addition, there have been numerous minor shifts in the power distribution between the president, prime minister and parliament achieved through mere legislative changes.

From a comparative perspective, however, Ukraine's constitutional volatility is hardly surprising. As Elkins and his collaborators show, an

Serhiy Kudelia is Assistant Professor, Department of Political Science, One Bear Place, P.O. Box 97276, Baylor University, Waco, TX 76798 (Sergiy_Kudelia@baylor.edu)

average constitution hardly survives for more than two decades. Such volatility is particularly common in countries with frequent regime shifts between authoritarianism and democracy.¹ In addition, the period of early statehood may similarly be accompanied by high constitutional instability, as in, for example, Mexico for most of the nineteenth century. Given the weakness of structural constraints and the promise of additional gains, political actors in new states or nascent regimes are likely to get involved in a “never-ending process of rule making and rule revision without ever reaching a state of stability.”²

If contestation over constitutional rules is so pervasive, what explains the few instances when it succeeds and how do these cases differ from those that fail? Existing theories of constitution-making pay scant attention to explaining variation in the outcomes of political struggles for constitutional adoption and change. Power-distributional theories assume that actors with power advantage would succeed in imposing their preferred design. By contrast, strictly functionalist approaches would expect failure to result from coordination problems that hinder collective pursuit of a mutually beneficial solution. These assumptions, however, ignore the frequent reality of ambiguous power distribution or actors’ conscious rejection of solutions to the coordination dilemma. Another account points to uncertain payoffs and hidden information as obstacles to successful completion of a bargain.³ Still, as Ukraine’s case shows, actors may reach an agreement without even coming close to overcoming these obstacles.

This article develops and tests a new theoretical framework to account for the different success rate of attempts to adopt or change constitutions. It takes a rationalist view of a constitution as a formalized elite bargain over the future distribution of gains.⁴ The article applies insights from game-theoretical literature on interstate bargaining to the analysis of interaction between domestic actors. Building on recent experimental findings, it employs two variables – time horizon and bargaining power – to account for actors’ ability to make a constitutional deal. The article looks at the effects of these variables on the outcomes of eight phases of constitutional politics in Ukraine. It distinguishes between an actor initiating a constitutional proposal and an actor with a veto power over it. Since the value of time horizons and the bargaining power of actors varied in each

¹ Zachary Elkins, Tom Ginsburg, James Melton. 2009. *The Endurance of National Constitutions*. Cambridge, UK: Cambridge University Press, 137.

² Jon Elster, Claus Offe, Ulrich Preuss eds. 1998. *Institutional Design in Post-Communist Societies: Rebuilding the Ship at Sea*. Cambridge, UK: Cambridge University Press, 29.

³ Elkins et al., pp. 68 – 71.

⁴ Jack Knight. 1992. *Institutions and Social Conflict*. Cambridge, UK: Cambridge University Press, 19.

phase, Ukraine's case makes it possible to trace the effects of these two variables on the outcome of the constitutional bargaining. In four phases an initiating actor proved successful in advancing his preferred proposal, while in four others the constitutional process stalled because of the resistance of a veto actor. The chief executive (president or prime minister) was driving the constitutional process in all eight cases, while the legislature acted as a potential veto player in seven of them. The Constitutional Court had veto power in one other phase. In all instances, the actors' disagreements centered on the strength of the presidency, the level of its control over the government and its influence over the legislature.

The article shows that when negotiating actors have a similarly high discount rate of the future, they are more likely to reach a bargain irrespectively of the power balance between them. By contrast, power distribution becomes decisive when actors have different time horizons and attach different value to the future. When an initiating actor with a low discount rate faces an opponent who prioritizes immediate rewards, the actor also needs to have a power advantage for an initiative to succeed. Efforts at constitutional change are likely to fail if actors value the future differently, but both sides are roughly symmetrical in their power balance.

This article proceeds as follows. I first outline a theoretical framework that explains the significance of the two variables for the bargaining process. I will then offer an overview of Ukraine's constitutional process focusing on the actors involved, their strategies and the main areas of conflict between them. Next I will analyze each of eight phases of Ukraine's constitutional process and explain their outcomes, applying the selected theoretical framework. In conclusion I will address the ongoing constitutional process in Ukraine and discuss its various possible outcomes in light of the article's findings.

Bargaining Power and the Shadow of the Future

The focus on winners and losers of institutional struggles has been a trademark of the power-distributional approach to institutional development. From this perspective, political institutions emerge out of elite conflict over the preferred design and this conflict naturally tends to favor the more powerful agent. Once established, as Margaret Levi points out, institutions are likely to "reinforce the bargaining and coercive power of certain members of a society relative to others."⁵ Institutional change, in her view, happens only in response to a change in the distribution of resources.⁶ Knight takes a similar position, arguing that formal institutions change in

⁵ Margaret Levi. 1990. "A Logic of Institutional Change," in *The Limits of Rationality*, ed. Karen Schweers Cook and Margaret Levi, Chicago and London: The University of Chicago Press, 406.

⁶ Levi (1990), p. 407.

response to “changes in the actors’ relative bargaining power.”⁷ In his view, actors mould institutions to “constrain the actions of others with whom they interact.” Hence, efforts at institutional change may come from either a new actor interested in redistributing resources in his favor or a once dominant actor concerned with protecting the status quo in the face of new threats. Since power asymmetries shape the institutional outcome, Knight operationalizes the concept of power as actors’ capacity to affect the set of alternatives available to their opponents.⁸ The outcome of the bargaining game over institutions then reflects the relative power advantage of particular actors. This view of institution-making, however, simplifies the strategic context of bargaining and fails to account for successful bargains when actors’ power is relatively balanced.

Theories of interstate bargaining recognize frequent fluidity and uncertainty over the direction of change in the distribution of power between actors.⁹ Given that major shifts in the power balance may happen rapidly, a weaker bargainer would feel less vulnerable to pressure if he attaches high probability to such a shift. This may complicate the ability of stronger actors to impose their preferred solutions. Moreover, power may also be distributed roughly equally between actors, which would then increase the likelihood that each side would exaggerate its own relative strength until a decisive test clarifies the actual power distribution. Finally, under certain circumstances neither actor would have a decisive bargaining advantage sufficient to move the opponent in a preferred direction.

Another characteristic of a strategic interaction critical to its outcome is the size of the “shadow of the future,” or the value that each actor attaches to future pay-offs compared to present ones.¹⁰ If the interaction is limited to one-shot games, the future casts no shadow on players’ choices. In iterated games, however, the shadow of the future varies depending on the actors’ discount rate – the current value of future pay-offs – and the probability of a continued game. The greater an actor’s confidence in having to play future rounds and the value that this actor gives to future pay-offs, the lower his discount rate. By contrast, an actor who strongly prioritizes immediate or near-term rewards and attaches low value to future pay-offs has a high discount rate.

Although the interaction of political actors often follows the logic of iterated games, politicians are often assumed to make institutional choices under short time horizons.¹¹ In a more nuanced view, however, the length of

⁷ Knight, p. 146.

⁸ *Ibid.*, p. 41.

⁹ Robert Powell. 2006. “War as a Commitment Problem.” *International Organization*, vol. 60, Winter, pp. 169 – 203; James Fearon. 1995. “Rationalist Explanation for War,” *International Organization* 49: 3, Summer, pp. 379 – 414.

¹⁰ Robert Axelrod. 1984. *The Evolution of Cooperation*. New York, NY: Basic Books, 174.

¹¹ Paul Pierson. 2004. *Politics in Time: History, Institutions and Social Analysis*. Princeton,

actors' time horizon depends on the degree of their accountability to others and sensitivity to the dynamics of coalition politics.¹² Actors in democracies with frequent election cycles and unstable ruling coalitions may have a much shorter time horizon than governments in authoritarian states with lower electoral risks and higher elite cohesiveness. Hence, the shadow of the future for authoritarian actors will, on average, be much longer than for politicians in democratic settings. Similarly, democratic politicians in their first term might have a longer shadow of the future than politicians in their final term.¹³

While Axelrod expects greater cooperation from actors attaching higher value to future pay-offs, recent studies question this conclusion. Skaperdas and Syropoulos demonstrate that the time dependence of resources that increase in value over time may lead actors who discount the present to fight over control of these resources in the short term with long-term gains in mind.¹⁴ Toft argues that if both players discount the future then "on balance the risks of war are reduced because the rewards of cooperation and the costs of defection are both increased."¹⁵ Moreover, she also shows that the likelihood of violence increases under the condition of asymmetry in the actors' time horizons when one of them may value the future more than the other. By looking at the two Russian-Chechen wars, she demonstrates how asymmetry in the time horizons of the two sides exacerbated the conflict and hastened the onset of the war. Tingley corroborates this finding through laboratory experiments.¹⁶ He observes that "the dark side of the future" emerges when an actor expects an increase in the relative bargaining strength of an opponent and, hence, gains an incentive to attack early. This finding points to the importance of simultaneously looking at the actors' relative bargaining strength and their time horizons in order to explain the outcome of their strategic interaction. I will further use these theoretical insights to analyze variation in outcomes of elite bargaining over Ukraine's constitutional design.

NJ: Princeton University Press, 112-3.

¹² George Norman and Joel Trachtman. 2008. "Measuring the Shadow of the Future: An Introduction to the Game Theory of Customary International Law," *University of Illinois Law Review* 2008: 1, p. 147.

¹³ Dustin Tingley. 2011. "The Dark Side of the Future: An Experimental Test of Commitment Problems in Bargaining," *International Studies Quarterly* 55: 2, June, p. 3.

¹⁴ Stergios Skaperdas and Constantinos Syropoulos. 1996. "Can the shadow of the future harm cooperation?" *Journal of Economic Behavior and Organization*, 29: 3, pp. 355-72.

¹⁵ Monica Duffy Toft. 2006. "Issue Indivisibility and Time Horizons as Rationalist Explanations for War," *Security Studies*, 15: 1, January - March, p. 56.

¹⁶ Tingley.

Actors and Strategies in Ukraine's Constitutional Politics

The zero-sum view of political power has been guiding constitutional change in most post-communist states. As Elster et al. argue in their comparative study of Central European states, “nascent centers of political agency in post-communist societies typically seem to see the situation as one in which it is imperative for them to bring as many resources and spheres of action under their control.”¹⁷ One of the main incentives for the vicious circle of continuous power grabbing has been the mutually reinforcing relationship of formal and informal powers in post-Soviet states. As D’Anieri observes based on his study of Ukraine, “those with de facto power use it to change the formal rules (to gain more de jure power), and those with de jure power use it to acquire de facto power.”¹⁸ Another incentive for accumulating formal power is the need to minimize political competition and increase elite certainty about the persistence of the current power balance. According to Hale, constitutions that concentrate power in the presidency create expectations of the president’s long-term dominance and, hence, encourage coordination of potential elite competitors around the ruling political machine.¹⁹ By contrast, dual executive systems with the government accountable to the parliament foster greater political contestation.

Ukraine’s experience with constitutional politics fits the general post-communist pattern. All of the main battles around Ukraine’s constitutional design have been fought over the distribution of formal power between the president and the parliament and the degree to which each of them could influence the executive branch. The excessive weight of the executive agencies has been the result partially of the Soviet legacy of a hyper-centralized political system and the fractured nature of the new parliaments.²⁰ However, in the context of economic transition, the executive also became the largest source of rent-seeking opportunities and patronage resources. The prime minister and the heads of various state agencies could decide on the distribution of state subsidies, access to cheap credits, outcomes of privatization bids, monopoly powers of private companies, or selective enforcement of state regulations. Gaining control over the executive branch could, thus, open the way for dominance on Ukraine’s political scene.

The two key actors involved in the bargaining over the constitutional provisions over the last twenty years were the president and the coalition

¹⁷ Elster, p. 33.

¹⁸ Paul D’Anieri. 2007. *Understanding Ukrainian Politics: Power, Politics and Institutional Design*. M. E. Sharp, p. 61.

¹⁹ Henry Hale, 2011. “Formal Constitutions in Informal Politics: Institutions and Democratization in Post-Soviet Eurasia,” *World Politics* 63: 4, October, p. 584.

²⁰ D’Anieri, p. 73.

in the parliament. Only in 2008-2009 did the prime minister replace the president as the crucial bargainer on the part of the executive. The third institutional player – the Constitutional Court – consistently sided with the stronger political actor when exercising its power of judicial review and played no substantive role in the bargaining process. Most of its rulings, with the exception of the decision to reinstate the 1996 Constitution, only indirectly influenced the dynamics of the constitutional process by narrowing the range of choices available to elite actors. Its 2008 ruling, for example, prevented the president from holding a referendum on his constitutional draft by circumventing the parliament. In all eight phases the chief executive (president or prime minister) took the initiative in setting the agenda and the pace of bargaining. Parliament, by contrast, played a largely reactive role, amending the proposed drafts and leveraging its influence through implicit veto power over the proposals. Although on most occasions the president threatened to make unilateral changes to the constitution without the parliament's formal consent, he managed to circumvent the parliament successfully only in the latest phase of the constitutional process in 2010.

The bargaining balance clearly favored the president in four out of eight phases. In the other four periods, the power balance was either uncertain or gradually tilting to the side of the coalition in the legislature. In three cases of presidential dominance (June 1995; June 1996; July 2000), the bargaining ended with an agreement on the new rules. However, in one episode (December 2004), the bargainers reached an agreement under an even distribution of power. The discount rate of the future varied sharply for both actors. The executive actors operated under short time-horizon in five phases. They strongly discounted the future either when facing a serious political crisis threatening personal political survival (2001) or when acting near the possible end of their terms (2002-04; 2008-09). The legislature, by contrast, had a higher discount rate of the future when the parliamentary coalition was fractured and the leaders of the opposition factions lacked capacity to challenge the chief executive actor. The availability of popular leaders helped to lengthen time-horizon of the legislative coalition in three (2002-04; 2008-09; 2010) out of five phases. During one other phase the parliamentary opposition's time-horizon increased with the onset of a political crisis threatening the survival of the president (2001). Overall, the odds of an agreement were higher when a dominant actor operated with a long time-horizon or when actors both valued the present more. Table 1 summarizes variation in the values of the two key variables used in this study and their effect on the negotiation outcome.

Table 1: Eight Phases of Constitutional Politics in Ukraine, 1995 – 2010.

	June 1995	June 1996	July 2000	January 2001	Aug. 2002- Apr. 2004	Dec. 2004	Feb. 2008- June 2009	July-Sept. 2010
<i>Executive's Discount Rate</i>	High	Low	Low	High	High	High	High	Low
<i>Legislature's Discount Rate</i>	High	Low	High	Low	Low	High	Low	Low
<i>Power Balance</i>	Executive Advantage	Executive Advantage	Executive Advantage	Uncertain	Uncertain	Even	Uncertain	Executive Advantage
<i>Bargaining Outcome</i>	Success	Success	Success	Failure	Failure	Success	Failure	Success

Eight Phases of Ukraine's Constitutional Politics

Ukraine became the last post-communist state to replace the basic laws of the Soviet period with a new constitution. Central European states largely completed their constitution-making process by 1991, while most of the Soviet successor-states had new constitutions in place by the end of 1995. For over five years Ukraine was governed by the amended 1978 Constitution and ad hoc legislation that temporarily broadened the powers of various institutional actors. Constitution-making remained on the back burner due to the deepening economic crisis and high political uncertainties of the early transition period.²¹ It was jumpstarted in 1994 by the newly-elected President Leonid Kuchma who was keen on permanently formalizing his powers. Once adopted, however, the Constitution still failed to become a viable institutional basis for resolving political disputes. As a result, Ukraine's constitutional order has been under permanent challenge from various elite actors. Since 1994 the country's political elites have gone through at least eight distinct phases of intense bargaining around constitutional provisions regulating their power domains. The outcome of each of these phases, as I demonstrate below, depended crucially on the power balance between the bargaining sides and the length of their time horizons.

Phase 1: Reaching Constitutional Accord to Avoid Immediate Losses (June 1995)

Following his election victory in July 1994, President Kuchma immediately moved to consolidate his powers over the executive branch. One of his first decrees banned the government from making any decisions on economic policies without direct participation of the president. It also broadened the president's appointment powers to include all heads of state agencies and deputy ministers. Although the president still had to receive the parliament's approval before appointing a new prime minister, he could single-handedly appoint the rest of the cabinet. This new power enabled Kuchma to rotate two thirds of the government and appoint his allies as deputy prime ministers, while keeping Vitaly Masol, who had been selected by the previous president, as the head of the government. Once in office, Kuchma's appointees received substantial policy responsibilities while Masol was relegated to a subsidiary role.²² In addition to gaining de facto control over the government, Kuchma also broadened the powers of his Presidential Administration, which exercised oversight over

²¹ On the details of the constitutional process in 1992-1993, see Kataryna Wolczyk. 2001. *The Moulding of Ukraine: The Constitutional Politics of State Formation*. Budapest: Central European University Press, Ch. 4.

²² Charles Wise and Trevor Brown. 1999. "The separation of powers in Ukraine," *Communist and Post-Communist Studies* 32: 1, March, pp. 23 – 44.

policy-making in the executive branch.²³ His main goal, however, was the adoption of the special law “On state power and local self-government” (the so-called “power bill”) that would give the president formal powers not only over the composition of the government, but also over the judicial branch and local executive councils. Designed by a supposedly independent body consisting of the regional heads of oblast councils and first publicized in November 1994, the law would provide the president with vast new powers. According to its provisions, the president would now become the chairman of the government, appoint half of the Constitutional Court, the Chairmen of the Supreme Court, Supreme Arbitrage Court, National Bank, and all judges. The law also proposed to put the heads of local councils and local executive bodies under the president’s control. The power bill had thus to serve as a temporary substitute for the Constitution in establishing the new domain of presidential prerogatives.

The president’s attempts to push through the power bill, however, faced fierce resistance from most factions in the parliament who were reluctant to give up any of the legislature’s remaining levers over the executive. After months of bargaining with various parliamentary commissions, the revised power bill submitted for a vote to the Rada was essentially a lighter version of the presidential model – a reflection of Kuchma’s bargaining advantage.²⁴ Given that the bill contradicted many of the existing constitutional provisions, only the support of two-thirds of the parliament (an official constitutional majority) would make it effective. Having barely received a simple majority in the first round, it was defeated in the second vote on May 30, 1995. The main opposition came from the leftist factions, which advocated restoring the power of the “Soviets” or people’s councils and feared that even the revised bill would, instead, further marginalize the legislature. The parliament, thus, proved that it could still effectively veto the president’s initiatives despite being in a weaker position.

The leftist factions were clearly motivated by their concerns with the long-term effects of the proposed institutional changes. They believed that an initial concession on the power bill would further weaken them in the bargaining over the Constitution. By contrast, the president faced a much shorter term-horizon because of the immediate challenges to his rule. The parliament resisted endorsing Kuchma’s candidate for prime minister and the adoption of key economic legislation, raising the prospect of continued policy-making paralysis. This made him heavily discount the future and put higher value on achieving a breakthrough in the stalemate. This strategy was clear from his quick decision to leverage his bargaining power advantage by threatening the parliament with dissolution. The day

²³ Yuriy Lukanov. 1996. *Tretiy Prezydent. Politychnyi portret Leonida Kuchmy*. Kyiv: Taki Spravy, p. 130.

²⁴ Wolczuk, p. 194.

after the failed vote, on May 31, Kuchma issued a decree announcing a national plebiscite to measure public trust in the president and the legislature. Given that the parliament was increasingly unpopular at the time, the president was likely to come out on top in the confrontation.²⁵ After a failed attempt by the parliament to annul the decree, the president's threat became real. On June 7 the parliament adopted the power bill accompanied by a Constitutional Accord, which stipulated that the bill would operate only until the new constitution was adopted, but no longer than one year.²⁶ The Constitutional Accord recognized the president's full control over the executive branch and empowered him to appoint the prime minister without the parliament's consent and revoke any executive decisions. It also subordinated the heads of the local city councils to the president and gave him the power to dismiss them. Kuchma's limited concessions allowed the parliament to retain some appointment powers, particularly over the prosecutor general, the chairmen of the Supreme and Constitutional Courts and the head of the National Bank.

The reversal of the parliament's position came primarily as a result of the change in the rationale of the leftist factions. As Wise and Brown note, they supported the bill's passage because "they faced possible extinction in the policy process if the president won his proposed popular referendum."²⁷ When suddenly faced with the prospect of an early parliamentary election, many leftist MPs preferred the immediate pay-off of staying in the weaker parliament over the risk of losing their seats all together in a fight for parliament's future powers. Kuchma's threat thus shortened the time-horizons of the leftist opposition by lowering the probability that they would survive politically to gain any rewards from their continued intransigence. By limiting the bill's duration to one year, both sides could also address their short-term concerns more easily when agreeing on their first constitutional settlement. According to one local observer, it was a form of non-aggression pact between the parliament and the president that provided breathing space for both sides before their decisive confrontation over the final text.²⁸ In this phase the president's power advantage over the parliament thus proved less important for reaching an agreement than his ability to increase the opposition's discount rate and make it value short-term peace more than a future victory in a continued war.

²⁵ Aleksandr Makarov, "Den' raz'edineniya vlastei," *Zerkalo Nedeli*, June 9, 2005: http://gazeta.zn.ua/POLITICS/den_razedineniya_vetvey.html (last accessed: February 18, 2013).

²⁶ For the full text see "Konstytutsiynyi Dohovir," June 28, 1995: <http://zakon2.rada.gov.ua/laws/show/1%D0%BA/95-%D0%B2%D1%80> (last accessed: February 18, 2013).

²⁷ Wise and Brown, p. 33.

²⁸ Kost' Bondarenko. 2007. *Leonid Kuchma: Portret na Fone Epokhi*. Kharkov, p. 156.

Phase 2: Adopting the Constitution to Minimize Long-Term Losses (June 1996)

In the next phase of the constitutional bargaining process, the key disagreement between the president and the parliamentary factions again centered primarily on delineating the powers of the two branches. The Constitutional Commission charged with preparing a new constitutional draft publicized its text in early March 1996. Since it was staffed mostly with the president's loyalists, the draft favored an expansionist view of presidential powers.²⁹ It proposed creating a bicameral parliament with regional representation in the upper chamber. This would have given the president an additional lever to block undesirable legislation if it received support in the lower chamber. The president also favored acquiring broader powers to dissolve the parliament in case it failed to confirm the president's nomination for prime minister. The leftist factions, by contrast, insisted on ending the president's control over the government's policies and giving the parliament substantial oversight powers. As the speaker of the parliament Moroz stressed, the president should be the head of state rather than the head of the executive branch, while the government should be subordinated to the legislature.³⁰

The president's draft received criticisms not only from the left, but also from the national-democratic factions on the right. One of the national-democratic leaders Vyacheslav Chornovil accused the president of attempting to "paralyze the work of the parliament" rather than establish a presidential system with a strong role for the legislature.³¹ In general, however, national-democrats favored a stronger president to secure Ukraine's statehood and accelerate economic reforms and, hence, were closer to Kuchma's constitutional preferences.³² They also aligned with Kuchma in opposing the alternative bill put forward by the communist faction that proposed eliminating the presidency entirely.

Since the Constitution would set the long-term rules of the game for all actors, they now faced a longer "shadow of the future." The division of formal powers that they were about to adopt would define the range of their available strategies and the dynamics of their further interaction. Hence, they were more prone to incur the immediate costs of continued conflict to increase the probability of achieving the sustained future gains from the new constitutional design. The special parliamentary commission created to revise the president's draft had to maneuver between the leftists

²⁹ Wolczuk, p. 198.

³⁰ "A Aleksandr Moroz protiv," *Zerkalo Nedeli*, March 15 – 22, 1995: http://gazeta.zn.ua/POLITICS/a_aleksandr_moroz_protiv.html (last accessed: February 18, 2013).

³¹ Lukanov, p. 142.

³² Wolczuk, p. 145.

pressuring for the parliamentary system and the national-democratic factions increasingly siding with the president. Since both sides had sufficient votes to block the passing of an unfavorable draft, neither Moroz nor Chornovil expected the parliament to muster sufficient support to adopt the Constitution.³³ Faced with the likely prospect of continued deadlock, Kuchma threatened to put the constitutional draft to a nationwide referendum. Given the low public support for the left, this move would nearly guarantee him the adoption of his preferred draft. The public was also supportive of circumventing the parliament, with 64 percent of Ukrainians favoring the adoption of the constitution via referendum.³⁴

The vote on the first reading of the revised bill on June 4 produced a surprising majority of 261 votes in favor. As observers concluded at the time, the leftist factions decided to support a revised parliamentary bill in order to preempt Kuchma from putting his constitutional draft to a popular vote.³⁵ Continued disagreements, however, prevented the parliament from voting on the bill in the second reading on June 19. A week later the president issued a decree that openly ignored the first parliamentary vote and put his own draft to a referendum set for September 25. The president's decision to push his draft forward came as a shock both to his allies and opponents in the parliament.³⁶ Motivated by the desire to forestall the referendum, they started a marathon session in the parliament that ended on the morning of June 28 with the adoption of a compromise bill making further concessions to the president. He now gained the power to veto any adopted legislation and could stall the implementation of unwanted bills by refusing to sign them. Additional temporary provisions lasting three years gave the president the power to issue decrees on economic policies without the parliament's approval. Kuchma displayed his satisfaction with the outcome by appearing in parliament moments before the decisive vote and then apologizing for using "dubious measures" to encourage the adoption of the Constitution.³⁷

Given the long-term implications of the Constitution's passage, Kuchma and the leftists heavily discounted the present in their bargaining over its provisions. However, neither side had a sufficient power advantage to push the preferred draft through the parliament. Kuchma's decision to

³³ Lukanov, p. 152.

³⁴ Aleksandr Stegnyy, "Kakuyu Konstitutsiyu primet narod Ukrainy?," *Zerkalo Nedeli*, March 6, 1996: http://gazeta.zn.ua/POLITICS/kakuyu_konstitutsiyu_primet_narod_ukrainy.html (last accessed: February 18, 2013).

³⁵ Irina Pogorelova, "Konstitutsiya prinyata? Zabud'te...," *Zerkalo Nedeli*, June 7 – 14, 1996: http://gazeta.zn.ua/POLITICS/konstitutsiya_prinyata_zabudte.html (last accessed: February 18, 2013).

³⁶ Lukanov, p. 153.

³⁷ Yulia Mostovaya, "Delo chesti," *Zerkalo Nedeli*, June 28 – July 4, 1996: http://gazeta.zn.ua/POLITICS/delo_chesti.html (last accessed: February 18, 2013).

put his own draft up for referendum shifted the bargaining power clearly to his favor. Leftist factions had no resources to prevent the holding of the referendum and its result was likely to favor the president.³⁸ As Moroz said, he feared a failed popular vote could diminish the institutional weight of the parliament even further.³⁹ Hence, the leftists opted to agree to a version that would guarantee the parliament relative autonomy over the long-term. The approved draft maintained the unicameral structure of the parliament and limited the president's power to dissolve the legislature. It also ensured that the parliament could still influence the executive by exercising its right to confirm the president's selection of prime minister and the government's program. Finally, it maintained control over several oversight agencies, particularly the Accounting Chamber, and acquired the power to dismiss the prosecutor general through a no-confidence vote. The president, by contrast, acquired vast appointment and dismissal powers over the key executive agencies and actors, including the prime minister. He could also revoke any governmental resolution, which gave him indirect control over the cabinet's decision-making. Although the Constitution stipulated that the government was subordinated to the parliament, the president's formal powers ensured his de facto dominance in relations with the cabinet. Far from what the leftists envisioned, the Constitution reflected the overall power balance tilted at the time in favor of Kuchma. The fact that all parliamentary factions recognized this power advantage proved decisive in bringing the two sides with low discount rates of the future to an agreement on Ukraine's new Basic Law.

Phase 3: Expanding Presidential Powers to Control the Parliament (April - July 2000)

For the three years following the adoption of the Constitution, Kuchma exercised full control over the policies of the central government and also subordinated the regional executives through the system of appointed governors. These powers gave Kuchma coercive, financial and administrative resources that proved critical in ensuring his re-election in 1999.⁴⁰ The president's formal power vis-à-vis the parliament, however, proved

³⁸ Irina Pogorelova, "Konstitutsiya prinyata? Zabud'te...", *Zerkalo Nedeli*, June 7 – 14, 1996: http://gazeta.zn.ua/POLITICS/konstitutsiya_prinyata_zabudte.html (last accessed: February 18, 2013).

³⁹ Wolczuk, p. 212.

⁴⁰ Darden attributes Kuchma's victory to the purposeful use of blackmail against lower-level officials, see Keith Darden. 2001. "Blackmail as a Tool of State Domination: Ukraine Under Kuchma," *East European Constitutional Review*, No. 2/3, vol. 10, Spring/Summer; Matsuzato describes how local elites built "electoral machines" to deliver votes for Kuchma, see Kimitaka Matsuzato. 2001. "All Kuchma's Men: The Reshuffling of Ukrainian Governors and the Presidential Election of 1999," *Post-Soviet Geography and Economics*, 6: 42, pp. 416-439.

insufficient to ensure their cooperative relationship. Bitter feuds with the opposition-filled parliament marked most of Kuchma's first term.⁴¹ The parliament could act as a constant spoiler because of the institutional set-up. The Constitution granted the parliament veto powers over several critical elements of policy-making, particularly adoption of the state budget and laws regulating property relations. Moreover, the Rada could use its veto power with impunity since the Constitution allowed the president to dissolve it only on one condition – if the parliament could not convene for more than thirty days. Acquiring the capacity to threaten parliament into submission became Kuchma's key objective immediately following his re-election.

The president pledged to implement a constitutional reform broadening his powers in dealing with the legislature already in his inaugural address.⁴² Given that Kuchma had never ruled out an intention to remain in office for a third term, his constitutional initiative should have reflected the president's long-term reasoning. If he finally managed to subdue the parliament, he could expect much weaker resistance to his policies and, thus, higher chances to stay on beyond 2004. After besting the opposition leaders in the presidential election, Kuchma clearly viewed opposition MPs as motivated primarily by near-term rewards. This should have made the president's credible threat to dissolve the parliament a strong incentive for them to remain loyal. As he reasoned at the time, the only way to make parliamentary factions stay in the pro-presidential majority was to have "an axe constantly hanging over their heads."⁴³

Kuchma offered to make four amendments to the Constitution that would substantially enhance his leverage in dealing with the parliament. First, the president sought the power to disband the parliament if it lacked a permanent majority (which Kuchma could interpret only as a loyal majority) for over a month or could not approve the state budget in 90 days. Second, the president wanted to lift the deputies' immunity from criminal prosecution that was automatically granted to all members of parliament. Up to then, the law-enforcement agencies could not arrest or detain a deputy without the prior consent of two thirds of the parliament. Thus, revoking the immunity would have made it easier for the authorities to blackmail or coerce disloyal members of parliament. Third, the size of the parliament should be reduced from 450 to 300, which would have lowered the cost of controlling it. Finally, following on the president's

⁴¹ On the dynamics of Kuchma's interaction with the parliament after the adoption of the Constitution, see Wolczuk, Ch. 8.

⁴² Charles Clover, "Kuchma snubs parliament by shifting venue," *Financial Times*, December 1, 1999.

⁴³ Yulia Mostovaia, "Leonid Kuchma: "Ja ved ne zria skazal, chto Ukraina uvidit novogo Prezidenta," *Zerkalo Nedeli*, No. 1, January 15 – 21, 2000.

earlier demand in 1996, the parliament had to become bicameral, with the upper chamber representing the interests of the regions.

The referendum proved a resounding success for the president, with each of the four questions receiving the support of more than 80 percent of voters. Yet, from a legal standpoint the results of the referendum were not automatically binding for the parliament. In order to take effect, the proposed constitutional amendments still had to be approved during two consecutive sessions of the parliament first by a simple majority and then by two thirds of the parliament. Kuchma, however, expected to use public support for his initiatives as leverage in pushing his amendments through the Rada. Just four days after the referendum results had been officially certified, the president sent to the parliament a bill on enacting the constitutional changes. The leader of the socialist faction Moroz tried to counter Kuchma's initiative with his own draft law that would transfer the power to form the government to the parliament. However, the Constitutional Court dismissed Moroz's draft as unconstitutional and allowed the parliament to vote only on the president's amendments. The first round of voting for Kuchma's bill on July 13 garnered the majority of 251 votes sufficient to overcome the first threshold and move the bill to final confirmation at the next session. The majority coalition consisted of oligarchic factions led by Kuchma's financial supporters and several liberal and national-democratic factions, which earlier were either hesitant or negative about the proposed constitutional changes.⁴⁴ In the end, only communists and socialists voted against Kuchma's draft law.

The vote reflected the deputies' recognition of the president's power advantage and their short time horizons. The largest potential challenger was Yulia Tymoshenko's "Bat'kivshyna" faction, which expected to trade its votes for the continued presence of its leader in the government as deputy prime minister. Similarly, two Rukh factions as well as some liberals in the faction "Reforms-Congress" feared that resistance to the president would endanger the stability of the government with their informal leader Viktor Yushchenko at the helm. For the new "Solidarity" faction, created by an up and coming oligarch Petro Poroshenko, the vote was a first test of its political loyalty to the presidential administration.⁴⁵ All of them feared that the ultimate price for sticking to their true preferences would be either a government reshuffle or the parliament's dissolution. This made them discount the future value of maintaining a strong parliament in comparison to the current value of continued access to government spoils.

⁴⁴ Andriy Tychyna, "Promizhnyi balans," *Den'*, July 15, 2000: <http://www.day.kiev.ua/uk/article/podrobici/promizhniy-balans> (last accessed: February 28, 2013).

⁴⁵ The Solidarity faction was created in March 2000 as a refuge for the leftist deputies, who were no longer willing to remain in opposition to President Kuchma.

Phase 4: Resisting Presidential Expansion (December-January 2001)

Just five months after the first successful vote on the constitutional amendment, the pro-presidential majority fell apart. On December 7 the new majority coalition voted to postpone the second reading of the constitutional amendments. In addition to the leftist factions, this majority now included MPs from three right-center factions – Reforms, Rukh and Solidarity – that earlier had endorsed expanding presidential powers.⁴⁶ This reversal took place in the midst of the largest political crisis in Ukraine's independent history provoked by the allegation that Kuchma had ordered the murder of investigative journalist Georgiy Gongadze. Apart from postponing the vote on the constitutional amendments, the parliamentary majority voted for the dismissal of Kuchma's key allies – the chief of the Security Service Leonid Derkach and the Interior Minister Yuriy Kravchenko. Both of them were also implicated in plotting the journalist's murder. The parliament was turning against Kuchma as hundreds of protesters occupied the central square of Kyiv demanding the president's resignation and calling for the establishment of a parliamentary system. The scandal centering on the extreme abuse of power by the president discredited the idea of reinforcing his power and severely weakened his bargaining position.

Despite facing growing public and elite discontent, Kuchma still insisted on having his constitutional amendments adopted. In January 2001 he made a last-ditch effort to achieve his goal by asking the legislature to agree only to the one constitutional provision he had sought most – the power to dissolve parliament.⁴⁷ The crisis, however, had two major effects on the constitutional bargaining. First, it changed the time horizons of the actors. Kuchma's longer time horizon now shortened because of the immediate threat to his rule. His desperate attempts to pass the constitutional amendment were now motivated by the need for short-term political survival rather than a long-term strategy for extending his presidency. After all, much of the renewed opposition activity was concentrated in the Rada, which the president could not control. By contrast, the center-right factions now faced a longer "shadow of the future" since they suddenly saw the growing prospect of Kuchma's successful ouster. The value of keeping the parliament as an independent institutional arena for future opposition activity now seemed more important than helping Yushchenko or Tymoshenko keep their jobs. Hence, Yushchenko's appeal to the parliamentary factions to support Kuchma's draft legislation went unheeded.⁴⁸

Additionally, the crisis eliminated the president's bargaining

⁴⁶ "Pershi oznaky oslablyennia Kuchmy," *Ukrains'ka Pravda*, December 7, 2000.

⁴⁷ "Kuchma potribna nova sokyra," *Ukrains'ka Pravda*, December 27, 2000.

⁴⁸ "I Yushchenko tudy zh..." *Ukrains'ka Pravda*, January 17, 2000.

advantage based on popular backing of his proposals and coercive potential. The murder charges tarnished both his political reputation and the rationale behind a stronger presidency. Since both the Interior minister and the Security Service chief were similarly implicated in the scandal, Kuchma could no longer make credible threats to coerce the parliament into submission.

In a decisive vote on January 18, only 163 MPs supported the president's amendment, which was a far cry from the 300 he needed for the changes to take effect. Along with the communists and socialists, all the center-right pro-governmental factions – Bat'kivshyna, Reforms, and the two Rukhs – either abstained or voted against the constitutional law. In retaliation, Kuchma dismissed Tymoshenko from the government the day after her faction sabotaged the vote. Still, he had to accept his failure to push his preferred constitutional arrangement through the parliament. With the low discount rate of the future and the lack of a power advantage, Kuchma faced a similar uphill battle in the next constitutional phase.

Phase 5: Weakening the Presidency for Safe Succession (September 2002 – April 2004)

Kuchma reached the mid-point of his second term with record low approval ratings and extinguished hopes for prolonging his rule. His political weakness was reflected in the failure of two pro-presidential parties to receive more than 20 percent in the April 2002 parliament election. While still in control of the main power levers, Kuchma also faced a resurgent opposition in the parliament now led by his former subordinates – Yushchenko and Tymoshenko. Most importantly, after ten years in politics he failed to create a strong political party and a circle of trusted allies who could ensure a safe power transfer. Faced with a short time horizon and an uncertain power balance, Kuchma decided on an “exit strategy” that would amount to a radical reversal of his earlier views on constitutional design. In a television address on August 24, 2002, the president suddenly pushed for transforming Ukraine into a “parliamentary-presidential republic.” The core of the new system, according to Kuchma, would be the institution of a coalition government formed by the parliamentary majority.⁴⁹ In essence, the president embraced the very idea that the leftist opposition had been vigorously promoting since the early 1990s.

Kuchma's newly envisioned constitutional reform sought to lay the groundwork for the eventual transfer of power in November 2004. As one of his close advisors, Dmytro Tabachnyk, explained at the time, the president was considering two possible ways of handling the succession.⁵⁰ One of them would be to select a successor giving him all the powers of

⁴⁹ “Sobi u nastupnyky Kuchma obrav...”, *Ukrains'ka Pravda*, August 28, 2002.

⁵⁰ Interview with Dmytro Tabachnyk, *Kievskiy Telegraf*, July 29 – August 4, 2002.

the office to ensure political continuity and Kuchma's personal safety. The other was to allocate more power to the parliament, which would make it possible to divide power more evenly among various loyal groups. In Tabachnyk's view, the latter option was preferable since "a successor could turn out to be someone who does not keep his word." Another key official from the president's entourage favoring this option was Viktor Medvedchuk, whom Kuchma had appointed as the head the Presidential Administration in June 2002. He ultimately was responsible for implementing this policy.

The essence of the constitutional changes amounted to decentralizing presidential powers by limiting the president's influence on the key appointments to the Cabinet of Ministers and other government agencies. Under the new institutional arrangement, the parliament, alongside the president, would also have veto power over the actions of the law-enforcement agencies (by way of the Rada's expanded control of appointments to the top positions in the Interior Ministry and General Prosecutor's office). The new system would thus make it almost impossible for Kuchma's successor to prosecute single-handedly the ex-president or his allies without majority support in the parliament. Since the parliament remained fractured, Kuchma could expect safety at least for the near term. His intense support for this strategy revealed the extent to which he discounted a more distant future for the sake of immediate security guarantees in 2004.

In an attempt to gain the needed parliamentary majority to change the Constitution, Kuchma entered into an alliance with his long-standing opponents – the communist and socialist factions. By the end of August 2003, the two leftist opposition leaders Moroz and Symonenko reached an agreement with Medvedchuk over a set of constitutional amendments that would take away the president's authority to appoint any minister without the parliament's approval. The president retained some influence only over foreign and defense policies, as well as oversight functions. Since neither of them had a realistic chance to win the upcoming presidential election, the two leftist leaders were similarly motivated by the immediate gains of acquiring greater influence through their sizeable parliamentary factions. Kuchma hailed the deal as a "historic compromise between those, who were for long on the opposite sides of the barricades."⁵¹

By contrast, two other opposition factions led by Yushchenko and Tymoshenko launched fierce resistance to the new constitutional bill even though just a few months earlier they endorsed the idea of introducing a parliamentary model.⁵² Since the amendment would come into effect two months before the presidential election, Yushchenko viewed any limits on the powers of the president as weakening his own political authority if he

⁵¹ "Kuchma blagoslovyyv novyi stsenariy politreformy," *Ukrains'ka Pravda*, August 23, 2003.

⁵² "Kuchma yak ob'ednavche nachalo opozytzii," *Ukrains'ka Pravda*, April 14, 2003.

were to win the race. At the time, he maintained a wide lead in the polls over all potential opponents. Meanwhile, Tymoshenko could count on becoming prime minister only if Yushchenko retained control over forming the government after winning the presidency. Hence, both of them heavily discounted the present and approached the constitutional bargaining with a long time-horizon. Kuchma's repeated suggestion that the adoption of the constitutional change would make the upcoming campaign less intense had no effect on their decision-making.

Despite the opposition's vehement attempts to obstruct the voting, the pro-presidential majority managed to push the constitutional changes through the first reading. In January 2004 the bill gained 304 votes with the socialists and communists offering vital support needed to pass the minimal constitutional threshold. However, by the bill's second reading, there was growing uncertainty about the ultimate result of the vote. Yushchenko reached out to former Kuchma loyalists, who had developed an extremely acrimonious relationship with Medvedchuk and were ready to defect. By exploiting the latent hostilities within the ruling coalition, Yushchenko hoped to leave Kuchma a few votes short of the needed constitutional majority. In the end, fifteen deputies representing the majority factions did not attend the parliament's meeting on April 8. The pro-amendment coalition ended up just six votes short of the minimum needed to approve the constitutional changes. After the vote, one of president's allies Stepan Havrysh was most forthright: "We had all the resources of influence, television, everything else, and we lost to the political forces, which had nothing but political zeal and still won."⁵³

Apart from the intense zeal, however, Yushchenko also benefited from his status as a clear front-runner in the upcoming presidential race. In a hypothetical run-off with Kuchma's likely successor Viktor Yanukovich, he received the support of 48 percent of the polled against 19.7 percent willing to support his opponent.⁵⁴ This stature gap could have been decisive in persuading some to defect to his side. With popular support strongly on Yushchenko's side, the power balance between the authorities and the opposition remained ambiguous.

Phase 6: Amending the Constitution to End the Revolution Peacefully (December 2004)

The bargaining around constitutional amendments resumed in early December in the midst of the Orange Revolution – the largest protest wave in Ukraine's history. Despite the large-scale demonstrations against

⁵³ "Sviato na vulytsi opozytsii. Traur na vulytsi Bankovii," *Ukrains'ka Pravda*, April 8, 2004.

⁵⁴ "Reformu povynen provodyty ne Kuchma, a Yushchenko," *Ukrains'ka Pravda*, May 12, 2004: <http://www.pravda.com.ua/ukr/news/2003/05/12/2993772/> (last accessed: February 28, 2013).

the electoral fraud that handed victory to Kuchma's chosen successor Yanukovych over Yushchenko, the authorities held their ground and refused to fulfill the opposition's demands. Apart from minor individual defections, they maintained control over their "hard power" arsenal - the interior troops, the military personnel and the security service. However, they could no longer give orders to disband the protesters by force.⁵⁵ This constraint brought the standoff between the authorities and the opposition to a virtual standstill. Round-table talks with the participation of foreign intermediaries became the only mechanism to resolve the deepening political crisis.

At the very onset of negotiations on December 1, Kuchma identified the adoption of constitutional changes limiting the president's powers as the centerpiece of any possible compromise: "We will never get out of this deadlock without immediate acceptance of the political reform."⁵⁶ The failure to reach a compromise, the president stressed, could lead to a disaster for both sides. Yanukovych endorsed Kuchma's proposal, while Yushchenko objected, demanding a repeat vote with new election rules first. The changes to the election law had to eliminate loopholes used to falsify the election results in the previous rounds, Yushchenko demanded. In response, Kuchma reversed the conditionality: "It is possible to hold voting only when this party [Yushchenko] accepts the political reform before the repeat election."⁵⁷ International mediators shared the short time horizon of the authorities and heavily discounted the future. As Yushchenko's ally at the time Petro Poroshenko recalled: "The mediators needed a peaceful resolution of any kind. They were pushing hard if not against us than definitely not on our [opposition] behalf. Mediators had to leave having fulfilled the mission of peace. Since they already arrived there should be peace. Peace at any cost."⁵⁸ As a result, they added pressure on the opposition to agree to a constitutional deal.

The differences in views of the two opposition leaders on the offered deal reflected a variation in their value of the future. For Tymoshenko, adoption of constitutional amendments meant losing any guarantees that she would remain as prime minister beyond the parliamentary election in March 2006. Hence, she opposed making any compromise with the authorities, arguing in favor of holding a repeat election by the existing rules.⁵⁹

⁵⁵ Taras Kuzio. 2010. "State-led violence in Ukraine's 2004 elections and orange revolution," *Communist and Post-Communist Studies* 43: 4, December, p. 391.

⁵⁶ Jason Campbell, with Anika Binnendijk and Andrew Wilson. 2007. "The Mariynsky Palace Negotiations: Maintaining Peace through Ukraine's Orange Revolution," Program on Negotiations at Harvard Law School, p. 58.

⁵⁷ *Ibid.*, p. 79.

⁵⁸ Andrei Kolesnikov, 2005. *Pervyi Ukrainskiy. Zapiski s peredovoi*, Kiev: Vagrius, p. 345.

⁵⁹ Tatiana Ivzhenko, "Ugovarivat' Kuchmu my ne budem," *Nezavisimaya Gazeta*, December 7, 2004.

Most of Yushchenko's advisors, however, believed that without voting for a new election law, their candidate would lose again. As one of them Taras Stetskiv argued, "if there were ten election rounds, Kuchma would try to falsify them ten times."⁶⁰ Moreover, some believed that continued confrontation might lead to a violent conflict. According to another opposition activist Yuri Lutsenko, without the constitutional compromise "there would be unforeseen waves of violence, and then all administrative buildings would be stormed, and then people in the East of Ukraine would see it as evidence of the illegitimacy of revolutionary actions. And Ukraine would have to face division into two halves." Yushchenko's final decision to agree to constitutional amendments reflected his shortened time horizon and interest in the immediate benefits of a peaceful resolution of the crisis. As he later explained, "we decided that this [compromise] was the payment which had to be made so that the confrontation on the streets would not turn into civil war. And we were very close to it."⁶¹ After two years of conflict, the Rada passed the compromise "package" on the morning of December 8, 2004, with an overwhelming 402 votes. Only Tymoshenko's faction refused to support the vote.

The successful outcome of this phase of bargaining again demonstrates the importance of having symmetrically short time horizons for both actors to reach an agreement. While Yushchenko initially rejected the constitutional amendments, he agreed to vote for the same bill as the risks of continued crisis made him less concerned about the future. The benefits of a peaceful election victory now seemed more important to him than the range of presidential powers he would exercise a year later. The authorities' consent to have the constitutional amendments enter into force only in 2006 also appealed to the opposition given its higher premium on immediate pay-offs. As in June of 1995 Kuchma managed to secure his preferred institutional design by raising the stakes of continued confrontation and shortening the opposition's time-horizon.

Phase 7: Changing the Constitution to Avoid Losing Power (August 2008 – June 2009)

The new parliamentary-presidential model that went into effect in January 2006 produced a series of political crises marked by intense confrontation between the president and prime minister. As a result, all the main political actors made efforts to revise it. However, President Yushchenko's low popularity and lack of support in the parliament prevented him from leading the process of renegotiating the constitution. Although he

⁶⁰ Taras Stetskiv, interview by Steve York, Kyiv, February 2, 2005, Archive of York Zimmerman Inc., Washington, DC.

⁶¹ Viktor Yushchenko, interview by Steve York, Kyiv, September 2, 2005, Archive of York Zimmerman Inc., Washington, DC.

ultimately submitted his official constitutional draft to the Rada in March 2009, it never became a matter of serious elite bargaining.

The key actors of another negotiating phase over the Constitution were Prime Minister Tymoshenko and the leader of the largest opposition faction in the parliament Viktor Yanukovich. Their talks started in February 2008 and intensified particularly in spring 2009 as both sides faced the prospect of the presidential campaign. The driving force behind negotiations was Tymoshenko's strong insecurity over the future election outcome. She conveyed it in a conversation with the US Ambassador William Taylor in February 2009. In her view, Yushchenko's attacks left her with less than half of her earlier public support and made Yanukovich's victory highly probable.⁶² At the time she gave Yanukovich's successful run for the presidency a no less than fifty percent chance.⁶³ She also believed that if elected president, Yanukovich would revive the powerful Kuchma-style presidency by revoking the 2004 constitutional amendments. This increased her sense of urgency for a bargain with Yanukovich's Party of Regions. When designing a new constitutional proposal, she was thus strongly discounting the future and concentrated mainly on ensuring continued benefits from her position as prime minister. This short time-horizon made her agree to expansion of the presidential powers, particularly over the law-enforcement agencies. In addition to nominating and dismissing ministers of defense and foreign affairs, as well as the prosecutor general, the new constitutional deal expanded the president's control over the Security Service (SBU), Foreign Intelligence and Border Patrol Service by giving him the powers to appoint and dismiss their chairmen, deputy chairmen and heads of SBU oblast units.⁶⁴ He would also nominate the chairman of the National Bank.⁶⁵ In order to commit herself to the bargain with Yanukovich, she agreed to support an indirect election of the president by at least two thirds of the parliament's members.⁶⁶ This concession should have minimized Yanukovich's election costs and guaranteed him the presidency. Furthermore, all government

⁶² Cable by U.S. Ambassador William Taylor, "Tymoshenko Asks for USG Assistance to Address Crisis," February 2, 2009: <http://www.wikileaks.org/cable/2009/02/09KYIV228.html> (last accessed: January 4, 2012).

⁶³ Cable by U.S. Ambassador William Taylor, "Tymoshenko Mulls Coalition with Regions, Constitutional Changes," April 22, 2009: <http://www.wikileaks.org/cable/2009/04/09KYIV694.html> (last accessed: January 4, 2012).

⁶⁴ "Konstytutsiya Tymoshenko-Yanukovycha. Dokument." *Ukrains'ka Pravda*, June 4, 2009: <http://www.pravda.com.ua/articles/2009/06/4/3998046/> (last accessed: January 2, 2012).

⁶⁵ "U Yanukovycha rozpovily, pro sho vony domovylys z Tymoshenko," *Ukrains'ka Pravda*, June 2, 2009.

⁶⁶ Cable by U.S. Ambassador William Taylor, "Tymoshenko Mulls Coalition with Regions, Constitutional Changes," April 22, 2009: <http://www.wikileaks.org/cable/2009/04/09KYIV694.html> (last accessed: January 4, 2012).

positions should have been divided equally between Tymoshenko's party and the Party of Regions.⁶⁷ Yanukovich's allies, however, were uncertain about the benefits of the power-sharing deal.⁶⁸ One of his funders Dmytro Firtash and Yanukovich's near circle were confident of his single-handed victory and questioned the need for dividing political power.⁶⁹ By May 2009 Yanukovich was already ahead of Tymoshenko in the polls and this distance could continue to grow given the shaky economic conditions.

Yanukovich unilaterally ended the talks in a public statement on June 7.⁷⁰ His doubts about the feasibility of the strategy given his low trust in Tymoshenko should have been an important factor behind the decision. However, the fact that his talks with Tymoshenko lasted for almost a year shows that the lack of trust could have been somehow addressed. More importantly, Yanukovich gained a growing lead in the presidential polls, which could have expanded his time-horizon beyond the election date. The increasing likelihood of future benefits associated with having a fully loyal government had to be more attractive than having to share power with a capricious partner. Moreover, as Tymoshenko herself recognized, Yanukovich could have planned to reclaim the full presidential powers by annulling the 2004 constitutional amendment. The rewards associated with a further-empowered presidency would certainly exceed any near-term costs he had to bear during the campaign or benefits of controlling a truncated presidency following a bargain with Tymoshenko. As his election chances improved by mid-2009, Yanukovich clearly saw a longer "shadow of the future" than Tymoshenko. With the power balance between them hanging in the air, but tilting in favor of Yanukovich, the asymmetry of their time horizons led to another failed attempt at constitutional revision.

Phase 8: Reviving the Strong Presidency to Consolidate Power (July - September, 2010)

The final phase (so far) in the constitutional process returned Ukraine's Basic Law to its original form. It was characterized by the unprecedented dominance of the president and the absence of any bargaining with other elite actors. This unilateral victory was partially the result of the quick and successful subjugation of the parliament by the president's loyalists combined with his informal control over the majority of judges in the Constitutional Court. The creation of the pro-presidential majority based on the Party of Regions eliminated the legislature as a serious actor in the

⁶⁷ Mustafa Nayem, "Yanukovich i Tymoshenko: Yak i sho vony dilyat," *Ukrains'ka Pravda*, June 2, 2009.

⁶⁸ "Yanukovich rozpoviv, sho "shyrka" maizhe gotova," *Ukrains'ka Pravda*, June 4, 2009.

⁶⁹ Mustafa Nayem, Serhiy Leshchenko, "Shyrokaia koalitsiya. Gotovnost nomer odin!," *Ukrains'ka Pravda*, June 5, 2009.

⁷⁰ Mustafa Nayem, Serhiy Leshchenko, "Yulia Tymoshenko: "Propalo vsio!," *Ukrains'ka Pravda*, June 8, 2009.

constitutional process. While the president and his supporters had been among the most vocal supporters of the 2004 constitutional amendments, he was now publicly critical of the reform. Speaking on the occasion of Constitution Day on June 28, 2010, Yanukovich blamed the amended Constitution for producing the “loss of balance and the serious power crisis.”⁷¹ Formally, however, the president seemed to have nothing to do with the constitutional revision. The appeal to the Constitutional Court to recognize the 2004 amendments as unconstitutional because of violations in the adoption procedures came from 252 MPs in the parliament. However, since most of them were members of the Party of Regions, the president’s hand in the initiative was obvious. The president’s influence over the Constitutional Court became similarly clear in April when it allowed the Party of Regions to form a majority coalition by attracting individual deputies from the opposition factions, overturning established precedent. In the run-up to the vote on the amendments, the Court dismissed three of the judges who disagreed with its April ruling and could have potentially voted to reject the appeal.⁷²

Yanukovich’s support for annulling the constitutional amendments finally became public during the Court’s hearings on the case at the end of September. Olena Lukash, who put forward the president’s position to the judges, argued that the 2004 amendments were adopted without prior review of the Constitutional Court. As she stressed, “everyone who voted for the Law knew that it was the result of political agreements, that it was an unconstitutional procedure.”⁷³ Lukash relayed the president’s view that these procedural violations undermined the Constitution’s legitimacy and had “ruinous implications for the entire legal system.” Displaying an unprecedented unanimity of views, the representatives of the parliament and the government sided with the president’s position at the hearings. The Court was similarly near unanimous in its decision. On September 30, 2010, all eighteen judges voted to recognize the 2004 Law unconstitutional with two expressing special reservations regarding the implications of the ruling. The court also ruled that the original 1996 Constitution had to be immediately reinstated in order to ensure “stability of the constitutional order.”⁷⁴ As the Venice Commission later noted, apart from the rarity of similar cases, that verdict was inconsistent with the Court’s earlier decision

⁷¹ Statement of the President of Ukraine Viktor Yanukovich, June 28, 2010: <http://www.president.gov.ua/news/17506.html> (last accessed on February 13, 2013).

⁷² Mustafa Nayem, “Sudebna nenasytnist na sluzhbi Vitkora Yanukovycha,” *Ukrains'ka Pravda*, September 14, 2010: <http://www.pravda.com.ua/articles/2010/09/14/5382062/> (last accessed: February 22, 2013).

⁷³ “U Yanukovycha ziznalysh, sho Regiony porushyly Konstytutsiyu,” *Ukrains'ka Pravda*, September 23, 2010.

⁷⁴ Rishennya Konstytutsiynogo Sudu Ukrainy, September 30, 2010: <http://zakon4.rada.gov.ua/laws/show/v020p710-10> (last accessed: February 20, 2013).

(February 2008) on an identical appeal. In that ruling, the Court refused to assess the 2004 Law's constitutionality "since the amendments already became an integral part of the Constitution and the Law itself ceased to exist."⁷⁵

Less than a week after the Court's verdict, the parliament adopted a new Law on the Cabinet of Ministers, broadening the presidential powers even beyond the limits set by the 1996 Constitution. Now the president has the power to appoint ministers, their deputies, as well as the entire hierarchy of the Security Service. Furthermore, the president could issue obligatory instructions both to the government and individual ministries, while the government has to carry out strictly the president's program. Finally, the parliament's power to dismiss the government appeared in doubt since the president could now decide on whether to accept the government's resignation or keep it in an acting capacity indefinitely.⁷⁶ The parliament further lost some of its key oversight functions in controlling the state budget and the activities of the Security Service. As the Venice Commission concluded, the president of Ukraine now "enjoys far more powers than could be foreseen by the voters when he was elected."⁷⁷

Political power in Ukraine, as D'Anieri observed, tends to concentrate very quickly – "those that have it get more and more."⁷⁸ Having quickly subordinated the two possible veto players – the Rada and the Constitutional Court - Yanukovich pursued extended powers virtually unconstrained. The members of the Party of Regions dominating the government and leading the parliamentary majority linked their future to Yanukovich's continued dominance. By strengthening his power they were, hence, pursuing their own long-term interests. For most of the judges, the immediate benefits of job security should have trumped any reputational costs associated with the Court's ruling. Meanwhile, the statements of the opposition leaders condemning the Court's decision no longer played any role since the opposition lacked power to block the constitutional revision. The final phase of Ukraine's constitutional process, hence, was completed without the intense contestation that characterized all seven previous stages. The president's long time-horizons and complete dominance led to the build-up of the super-presidential model that all of Yanukovich's predecessors would have certainly been envious of.

⁷⁵ "Opinion on the Constitutional Situation in Ukraine," Adopted by the Venice Commission, December 17 – 18, 2010.

⁷⁶ Vysnovok na proekt Zakonu Ukrainy "Pro Kabinet Ministriv Ukrainy," Golovne naukovokspertne upravlinnia Verkhovnoi Rady Ukrainy, October 6, 2010: http://gska2.rada.gov.ua/pls/zweb_n/webproc4_1?pf3511=38680

⁷⁷ Venice Commission Opinion, December 17-18, 2010.

⁷⁸ D'Anieri, p. 51.

Conclusion

After fifteen years of elite contestation, Ukraine returned to a hyper-centralized constitutional model that strongly empowers the president. The success or failure of elite bargains in various phases of constitution-making were largely the function of power distribution and the time horizons of the key actors – the head of the executive and the legislature.

With the shortening of the executive's time-horizon the cooperative outcome depended on a similarly short time-horizon of his opponents in the legislature. By contrast, when the president's discount rate of the future was low, the power distribution was decisive in predicting the outcome of contestation. In those instances when the president had a clear power advantage, he could impose the institutional design closer to his ideal preferences. By contrast, when none of the actors had a clear advantage, the legislature could hold sway. The Ukrainian case therefore bears out the recent findings that longer time-horizons and ambiguity about the power distribution may contribute to the breakdown of negotiations and the onset of conflict.

While the constitution-making process in Ukraine is clearly far from over, it is unlikely to move closer to a stable institutional arrangement under the current president. The constitutional overhaul that Yanukovich initiated in February 2011 has so far been a mere political façade. As scholars of post-Soviet politics observed, state actors use such façades to deceive domestic and foreign public opinion and rely on “some members of the public as paid extras” to give them a dose of legitimacy.⁷⁹ In this case the “extras” are mainly legal scholars and NGO experts who joined the so-called Constitutional Assembly tasked with preparing the draft law on new constitutional changes by 2014.⁸⁰ This Assembly, filled with compliant academics, became Yanukovich's risk-free response to the demands of the Venice Commission to launch “genuine constitutional reform.”⁸¹ While the Commission identified “lack of checks and balances especially with respect to the powers of the president” as the fundamental problem of Ukraine's Constitution, the Assembly has addressed all other parts of the Constitution with the exception of executive-legislative relations. In his address at the opening of the Assembly, Yanukovich omitted mentioning the topic of excessive centralization of executive power altogether.⁸² He

⁷⁹ Jessica Allina-Pisano. 2010. “Legitimizing facades: civil society in post-orange Ukraine,” in Paul D’Anieri ed., *The Contest for Social Mobilization in Ukraine: From Revolution to Civil Society?* Baltimore, MD: Johns Hopkins University Press.

⁸⁰ Ukaz Prezydenta Ukrainy N328/2012 Pro Konstytutsiynu Asambleyu, May 17, 2012: <http://president.gov.ua/documents/14752.html#328skl> (last accessed: February 22, 2013).

⁸¹ Venice Commission Opinion, December 17-18, 2010, p. 11.

⁸² Vystup Prezydenta na pershomu zasidanni Konstytutsiynoi Asamblei, June 20, 2012: <http://president.gov.ua/news/24550.html> (last accessed: February 22, 2013).

also did not address another of the Commission's main recommendations: to develop new mechanisms of "parliamentary control over the actions and intentions of the executive." While Yanukovich's priorities do not overlap with those of the Venice Commission, they are likely to guide the Assembly's work.

In addition to setting the agenda, and the scope and the pace of constitutional changes, Yanukovich may also personally decide the outcome of the process by implementing the amendments without the parliament's consent. The recently adopted Law on the Referendum now gives the president the power to hold a popular vote on the constitutional changes and single-handedly enact them on the basis of a majority of popular support.⁸³ This law effectively eliminated two veto players – the parliament and the Constitutional Court – from the constitution-making process. As long as the president maintains his political dominance, he can now use the mechanism of the referendum to shape constitutional norms in accordance with his preferences and without any bargaining with other elite groups, assuming he has majority popular support. This reliance on a popular mandate will further weaken the legitimacy of the Constitution and intensify elite contestation over various constitutional provisions once Yanukovich leaves office.

The incentive structure of a super-presidential system, however, can turn it into a self-enforcing equilibrium with key actors avoiding any alternative paths. As Hale observes, in clientilistic states, such as Ukraine, presidentialist constitutions foster "self-fulfilling prophecies encouraging expectations about the current and future balances of power that then prove themselves true."⁸⁴ Even if the incumbent is replaced, however, his challenger is unlikely to propose limiting his acquired powers and strengthening oversight unless he had credibly bound himself to a different institutional model prior to the election. As this article has demonstrated, elite agreement to dismantle the presidentialist system may emerge only out of deep crisis conditions when actors share short time horizons and seek immediate political or personal survival. Without that kind of urgency, the refined pyramid of power that Yanukovich inherited from Kuchma will lure many other political actors willing to stake their careers on reaching for the top.

⁸³ Zakon Ukrainy "Pro vseukrains'kyi referendum": <http://zakon4.rada.gov.ua/laws/show/5475-17> (last accessed: February 22, 2013).

⁸⁴ Hale, p. 585.