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Separation of Powers in Russia and Ukraine: A Comparative Perspective

Conference Proceedings

Edited by F. Joseph Dresen and William E. Pomeranz



OCCASIONAL PAPER # 306

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Washington, D.C.

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Separation of Powers in Russia and Ukraine: A Comparative Perspective

**Cosponsored by the Kennan Institute and U.S. Studies,
Woodrow Wilson Center**

May 18, 2010
Flom Auditorium, 6th Floor
Woodrow Wilson Center
Washington, DC

1:00 PM **Welcome and Introductory Remarks**

1:15 PM **Panel One: The Separation of Powers in Comparative Perspective:
Germany, Brazil, and the United States**

Chair: **Sonya Michel**, Director, U.S. Studies, Woodrow Wilson Center
Louis Fisher, Constitutional Law Specialist, Law Library, Library of Congress
Fernando Limongi, Professor of Political Science, University of São Paulo
Jeffrey Anderson, Graf Goltz Professor & Director of the BMW Center for
German and European Studies, Georgetown University

3:00 PM **Break**

3:15 PM **Panel Two: Separation of Powers in Russia and Ukraine**

Chair: **William Pomeranz**, Kennan Institute, Woodrow Wilson Center
Oleg Rummyantsev, President, Foundation for Constitutional Reforms
Oleksandr Zadorozhnyi, Professor and Head of Public International Law
Department, Institute of International Relations, Taras Shevchenko National
University of Kyiv
Maria Popova, Assistant Professor of Political Science, McGill University

5:00 PM **Closing Remarks**

Preface

One of the backbones of the American political system is the principle of the separation of powers. The U.S. Constitution established an executive, legislative, and judicial branch, each with its own assigned powers and jurisdiction. While controversies have arisen regarding attempts by one branch of government to usurp the powers of another, the underlying division of powers has been remarkably stable feature of American democracy

Many countries have emulated the U.S. system of separation of powers, adapting it to satisfy local conditions and customs. Yet attempts to transplant this principle to the former Soviet Union have met considerable resistance. In Russia, the notion of the separation of powers enshrined in the 1993 Russian Constitution has largely been replaced by the “power vertical,” where the executive branch exerts excessive influence on the other two branches of government. The Ukrainian Constitution envisions a mixed presidential-parliamentary system that results in persistent questions as to where the division of powers actually lies. In both countries, the judiciary has found it difficult to establish itself as a co-equal branch of government.

This conference addressed how different countries understand the separation of powers, and how this concept has been implemented in Russia and Ukraine since 1991. The first panel looked at the principle of separation powers in comparative perspective, focusing on the U.S., German, and Brazilian examples. Louis Fisher discussed how the principle of separation of powers contrasts with the notion of checks and balances within the American political system. As a result of these competing ideas, Fisher argued, the U.S. notion of separation of powers is extremely difficult to export. Fernando Limongi described the historical evolution of increased legislative powers assigned to the ex-

ecutive branch in Brazil, and the consequent trade-offs between government efficiency and representation. Finally, Jeffrey Anderson looked at the institutions of German federalism, and how center-regional institutions in Germany impact the broader understanding of separation of powers.

The second panel focused on Russia’s and Ukraine’s attempt to introduce this concept over the past 16 years. Oleg Rummyantsev commented that during the 1990s, Russia turned to Western notions of separation of powers in drafting its 1993 Constitution, whereas today, the country arguably looks more to the Kazakhstan experience as a model to emulate. Rummyantsev further outlined how the Russian parliament has steadily surrendered its power to the executive branch over the last 15 years. Oleksandr Zadorazhnyi noted that for present day Ukraine, the question of separation of powers can be reduced to the challenge of containing the executive, especially since the executive and legislative branches are currently controlled by the same political party. Finally, Maria Popova addressed whether a formal separation of powers on paper translates into real decisional independence for Russian and Ukrainian judges. On paper, both countries have adopted extensive judicial reforms, including life tenure for judges and judicial control over the drafting and administration of its budget, but as Popova described, informal practices and administrative realities have reduced the meaningfulness of these institutional reforms.

This edited transcript captures the outstanding presentations and spirited discussion that ensued at the conference. The event was co-sponsored by the U.S. Studies Program and the Kennan Institute, and made possible through the generous support of the Woodrow Wilson Center’s federal conference funds.

Panelist Biographies

JEFFREY ANDERSON

Jeffrey Anderson is the Graf Goltz Professor & director of the BMW Center for German and European Studies in the Edmund A. Walsh School of Foreign Service, Georgetown University. He is the recipient of the 2000 DAAD Prize for Distinguished Scholarship in German Studies. His publications include *German Unification and the Union of Europe* (Cambridge University Press, 1999) and *The Territorial Imperative* (Cambridge University Press, 1992), an edited volume entitled *Regional Integration and Democracy* (Rowman and Littlefield, 1999), and most recently a co-edited volume (with G. John Ikenberry and Thomas Risse) entitled *The End of the West?* (Cornell University Press, 2008). His current research involves contributing to and co-editing two special issues of *German Politics and Society* that will mark the 20th anniversary of German unification in 2010.

LOUIS FISHER

Louis Fisher is a specialist in constitutional law at the Law Library of Congress and author of more than 400 articles and twenty books, including *Constitutional Conflicts Between Congress and the President*, *Presidential War Power*, *In the Name of National Security*, and *Military Tribunals and Presidential Power*, winner of the Richard E. Neustadt Award. He previously worked at the Congressional Research Service from 1970 to 2006. During his service with CRS he was research director of the House Iran-Contra Committee in 1987, writing major sections of the final report. Fisher's specialties include constitutional law, war powers, budget policy, execu-

utive-legislative relations, and judicial-congressional relations.

He received his doctorate in political science from the New School for Social Research (1967) and has taught at Queens College, Georgetown University, American University, Catholic University, Indiana University, Johns Hopkins University, the College of William and Mary law school, and the Catholic University law school.

Fisher has been invited to testify before Congress on such issues as war powers, state secrets, NSA surveillance, executive spending discretion, presidential reorganization authority, Congress and the Constitution, the legislative veto, the line item veto, the Gramm-Rudman-Hollings Act, executive privilege, executive lobbying, CIA whistle blowing, covert spending, the pocket veto, recess appointments, the budget process, the balanced budget amendment, biennial budgeting, and presidential impoundment powers.

He has been active with CEELI (Central and East European Law Initiative) of the American Bar Association, traveling to Bulgaria, Albania, and Hungary to assist constitution-writers, participating in CEELI conferences in Washington, D.C., working with delegations from Bosnia-Herzegovina, Lithuania, Romania, and Russia, serving on CEELI "working groups" on Armenia and Belarus, and assisting in constitutional amendments for the Kyrgyz Republic. As part of CRS delegations he traveled to Russia and Ukraine to assist on constitutional questions.

FERNANDO LIMONGI

Fernando Limongi is a professor in the Political Science Department at the University of

São Paulo, where he has taught since 1986. He is the author or co-author of four books and dozens of book chapters and journal articles. His co-authored book, *Democracy and Development: Political Institutions and Well-being in the World, 1950-1990* (Cambridge University Press, 2000), received the Woodrow Wilson Foundation Prize and was named Best Book by the American Political Science Association. He was president of the Brazilian Center for Analysis and Planning (CEBRAP) from 2001-05. Limongi received his education at the University of São Paulo, the University of Campinas, and the University of Chicago, where he received his Ph.D. in Political Science.

SONYA MICHEL

Sonya Michel is director of United States Studies at the Wilson Center. Her research focuses on historical and contemporary analysis of social policy in the United States and in comparative and transnational perspective; civil society; global governance; race and gender equity. Before coming to the Wilson Center, she was a professor of history at the University of Maryland, College Park and director of the Nathan and Jeanette Miller Center for Historical Studies. Her most recent publications include two co-edited volumes, *Civil Society and Gender Justice: Historical and Comparative Perspectives* (Berghahn Books, 2008) and *Child Care at the Crossroads: Gender and Welfare State Restructuring* (Routledge, 2002), and a monograph, *Children's Interests / Mothers' Rights: The Shaping of America's Child Care Policy* (Yale, 1999). She is also a founding editor of the journal *Social Politics: International Studies in Gender, State, and Society*.

WILLIAM POMERANZ

William Pomeranz is the deputy director of the Kennan Institute, a part of the Woodrow Wilson International Center for Scholars located in Washington, D.C. In addition, Pomeranz has taught Russian law at the Center for Eurasian, Russian, and East European

Studies at Georgetown University. Prior to joining the Kennan Institute, Pomeranz practiced international law in the United States and Moscow, Russia. He also served as program officer for Russia, Ukraine, and Belarus at the National Endowment for Democracy from 1992-1999. He received his J.D. cum laude from American University in 1998. In addition, he was awarded a Ph.D. in Russian History from the School of Slavonic and East European Studies, University of London, where he wrote his dissertation on the emergence and development of the pre-revolutionary Russian legal profession (the *advokatura*). His research interests include Russian legal history as well as current Russian commercial and constitutional law.

MARIA POPOVA

Maria Popova is an assistant professor of Political Science and an associate of the Centre for Developing-Area Studies at McGill University. Her research focuses on the state of the rule of law in the post-Communist region. Her current project looks at the role of judicial institutions in the development of an effective judiciary, which is both capable and willing of tackling political corruption. She has published in *Canadian Slavonic Papers*, *Journal of East European Law*, and *Konstitutsionnoe Pravo: Vostochnoevropeiskoe Obozrenie*. Her most recent article, "Be Careful what you Wish For: A Cautionary Tale of Post-Communist Judicial Empowerment," appeared in *Demokratizatsiya* (Winter 2010). She received her undergraduate training at Dartmouth College and her Masters and Ph.D. from Harvard University in Political Science.

OLEG RUMYANTSEV

Oleg Rumyantsev is president of the Moscow-based NGO Foundation for Constitutional Reforms. He was educated at the Moscow State Lomonosov University and the Moscow State Legal Academy, and has also studied at the ELTE University in Budapest, the London

School of Economics, and the University of Toronto. He served in the Russian parliament from 1990-93, where he was the executive senior secretary of the Constitutional Commission and the head of its drafting Working Group. From 1994-96, he was a legal advisor to the State Duma Committee on Legislation, and from 1996-98 he was Deputy Secretary to the Parliamentary Assembly of the Union of Russia and Belarus. In addition to his government service, Rummyantsev's corporate career has included senior positions with Mars LLC, Shell EP Services (Russia), and TNK-BP Management. He is a widely published expert on political science, Russian constitutional law, and on Russia's investment climate as well as transparent government relations for business in Russia. He is also co-founder and director of the Rule of Law Program at the International Institute of Global Development, chaired by Mikhail Gorbachev and Aleksander Lebedev.

OLEKSANDR ZADOROZHNI

Oleksandr Zadorozhnii is a professor of International Law and the head of the International Law Department at the Institute of International Relations of Taras Shevchenko National University of Kyiv, where he has worked as an educator

and administrator since 1982. He received his undergraduate training and a Ph.D. in International Law from Taras Shevchenko National University of Kyiv.

Zadorozhnii founded the *Proxen* law firm in 1990, and served as its president until 1998. From 1998-2006, Zadorozhnii served as a member of the Ukrainian parliament (Verkhovna Rada of Ukraine). While in the Rada, was a member of the Foreign Affairs and Legal Policy Committees (which he chaired from 2000-02), and was the Permanent Representative of the President of Ukraine to the Verkhovna Rada from 2002-05. During his time in the Rada, he was the author or co-author of over 300 draft laws. From 2008-10, he was an advisor to the prime minister of Ukraine.

Zadorozhnii served as president of the Ukrainian Association of International Law in 1999. His professional honors include: Honored Lawyer of Ukraine (2000), Professor (2003), Corresponding Member of the Ukrainian Academy of Legal Sciences (2004), and Member of the Permanent Court of International Arbitration for Ukraine (The Hague) (2004). He is the author of over 100 publications and is editor-in-chief of the *Ukrainian Journal of International Law*.

Welcoming Remarks

WILLIAM POMERANZ

Good afternoon and welcome to our conference on “Separation of Powers in Russia and Ukraine: A Comparative Perspective.”

I would like to welcome you all here. There are a few people I need to thank before we get started. First of all, I would like to thank the Woodrow Wilson Center, who through its Federal Conference Fund gave us generous support in order to have this conference. I would also like to thank my colleagues at the Center: Sonya Michel, but also Paulo Sotero, Christian Ostermann, and Philippa Strum, who helped us to get the program up and running. I also like to give special thanks to Joe Dresen from our staff, who did great work in terms of organizing the travel and getting everything ready for the conference as well. We have a very distinguished group of speakers assembled here today.

One of the backbones of the American political system is this principle of separation of powers. The U.S. Constitution, as everyone knows, establishes an executive, legislative, and judicial branch, each with its own competencies. Many countries have referred to this document and have tried to follow the

U.S. system of separation of powers, while at the same time adapting this principle to satisfy local conditions and customs.

The attempts to transplant this notion to the former Soviet Union, however, have met with certain problems and resistance. Although the separation of powers is enshrined in the 1993 Russian Constitution, this principle has largely been replaced in practice by the so-called “power vertical” and an increasingly stronger and more assertive executive branch. Alternatively, the Ukrainian Constitution calls for a mixed presidential-parliamentary system, which has resulted in persistent political battles over the actual division of authority. The goal of this conference is to look at how other countries have understood the concept of the separation of powers and how it has, in turn, been transplanted to Russia and Ukraine. The first panel will look at the principle of separation of powers in comparative perspective focusing on the U.S., German, and Brazilian examples. The second panel will focus on Russia’s and Ukraine’s attempts to introduce this concept over the past 19 years. With that I will turn the program to Sonya Michel.

PANEL I

Separation of Powers in Comparative Perspective: Brazil, Germany, and the United States

SONYA MICHEL

Thank you, Will. My name is Sonya Michel and I am Director of U.S. Studies here at the Wilson Center. I just ran into a colleague who said, “What do you have to do with this panel, this program, it is about Russia and the Ukraine?” But what it is about, it is about comparing. And even though the U.S. Studies program is primarily concerned with aspects of American government, public policy, and society, we frequently find that we gain the greatest understanding into these issues when we view the U.S. in comparative, transnational, or historical perspective. The topic of today’s conference is certainly a case in point. We Americans tend to take for granted the separation of powers. In school we learn about the three branches of government, and when we come to Washington, D.C. as visitors for the first time, we follow the well worn path from Congress, duly noting its two chambers, to the Supreme Court, to the White House. But it is only when we view the structure of the United States government in comparative and historical perspective that we are fully able to grasp its significance, begin to understand its workings in all of their complexity, and to assess both the strength and the weaknesses of how things are organized here. So we are very pleased to have this opportunity to partner with the Kennan Institute in co-sponsoring today’s conference on the separation of powers in Russia and Ukraine in comparative perspective.

The focus here, of course, is not the United States; but nonetheless, I am sure that we Americanists, as everybody else, will have much to learn from the rich set of presenta-

tions we are about to hear, both on this panel and the next. This panel, as Will has explained, has been organized to provide a broad overview of different arrangements of the separation of powers in the United States, Brazil, and Germany. The three papers will allow us to see distinctive variations, as well as similarities among all these three cases. We are fortunate to have with us leading experts on all three.

We will go in the order of the program, so first Louis Fisher talking about the United States, Fernando Limongi talking about Brazil, and then Jeffrey Anderson talking about Germany. Louis Fisher is a specialist in constitutional law at the Law Library of Congress and the author of more than 40 articles and books. Fernando Limongi is a professor at the Political Science, Department at the University of São Paulo, where he has taught since 1986, and he is also the author of four books and many book chapters and journal articles. And, finally, Jeffrey Anderson is the Graf Goltz Professor and Director of the BMW Center for German and European Studies, in the Edmund A. Walsh School of Foreign Service at Georgetown University, and he, too, is the author of many books. So we are very fortunate to have these people with us, and I turn the podium over first to Louis Fisher. Thank you.

LOUIS FISHER

In the early 1990s I did a lot of work in Eastern Europe and Russia and Ukraine on helping people draft their constitutions. I realize that trying to make comparative statements gets complicated, particularly in translation. So I would tell them something in English – I think

in English it is pretty clear, but clearly in translation it took some time to get to the point. I told them that in graduate school I was taught under capitalism man exploits man, whereas under communism it is precisely the opposite. It took a long time to get that one across.

The American system is one with a separation of powers; how any country could ever adopt it and use it successfully, it is very, very complicated to understand. I think a big difference between the United States and Russia and Eastern Europe is that, as you know, this country started out with only one branch of government – it was the Continental Congress. It took a while to carve out the separate executive and the separate judiciary. So we started off with a strong legislative base. Other countries generally start off with a strong executive base. Although the framers cited Montesquieu very warmly, the great Montesquieu, they did not follow Montesquieu: They never attempted to separate the powers in a pure sense. In countries that did, such as France, after 1789, which tried to have a pure separation, government does not function, and so you end up with a Bonaparte.

So we never had any notion of pure separation and at the Philadelphia Convention it was clear there were two similar but competing values: separation of powers versus checks and balances. The framers very much understood the need for checks and balances. As far as separation of powers in the pure sense, by 1787-1788 the pure separation of powers was regarded as hackneyed and trite. Some of you who read *The Federalist Papers* know that Madison and Hamilton, in particular, had to beat back objections that branches would frequently overlap. Well, that is how you have checks and balances, very necessary.

There are a few things in the U.S. Constitution that are exclusive. Obviously, the president has his pardon power, the House has power on impeachment, and the Senate has impeachment trials. The Supreme Court has the exclusive authority to decide what is the “case

or controversy.” Otherwise, I think over history the three branches end up combining and joining powers to make government workable. Robert Jackson, justice of the Supreme Court, put it very nicely – I do not know how this might work in translation either, but I will read it, it is very, very nice. He says, “While the Constitution defuses power the better to secure liberty (very important point), it also contemplates that practice will integrate the dispersed powers into a workable government (very important).” And then he ends up by saying, “It enjoins upon its branches separateness but interdependence, autonomy but reciprocity.” It is a very complicated system – just try to export that to another country.

What I found over the years is that although some branches say they have the final word on this or that, it never is the final word. I worked on the Iran Contra Committee, and Secretary of State Schultz one day was asked a series of questions about when was this policy decided. Everyone broke out into laughter when he said, “In this town nothing is ever decided.” Everybody knew what he meant – it is the open dialogue as to what policy is acceptable.

The Supreme Court says it has the last word on the meaning of the U.S. Constitution, and everyone, including the Supreme Court, today will cite that language, that sentence in *Marbury v. Madison* (1803). I will give you the sentence again, and you can say if you see anything in there that sounds like the “final word by the Supreme Court.” The sentence is: “It is emphatically the province and duty of the judicial department to say what the law is.” There is nothing final about this. Fine, you say what the law is and maybe Congress comes back with another statute and you will say what the law is and keep going. If you think that sentence is true, how about this sentence, which I hope you’ll say it is true also: “It is emphatically the province and duty of the legislative department to say what the law is.” And you can get a lot of truth out of another sentence that is, “It is emphatically the prov-

ince and duty of the executive department, the president, to say what the law is.”

So how did we ever get into the notion that the Supreme Court is final? I think John Marshall would never have agreed to that. If you know his history at that time, there was a district judge, John Pickering, who was impeached and removed. Then they went after Justice Chase, and impeached him. He was not removed in the Senate, but if they had gotten Chase, they probably could have gone after Marshall. It was during that time that Marshall wrote to Chase: “I do not know why they are using impeachment. If they do not like our decision, just let them override us by regular statute.” So Marshall was not, in 1803, putting his head out to have it chopped off.

I think the notion of checks and balances that emerged in the 18th century held that when power is concentrated and abused it threatens liberties and freedoms. I think that 18th century notion applies to today and even more so to today. To me a turning point on separation of powers was after World War II, when President Truman goes to war on his own in Korea in June 1950. He never came to Congress—not before, not after—never. If you remember, what did he cite for authority? Not Congress, but the UN Security Council. I hope you will agree that there is no way the UN Charter, a treaty agreed to by the president and the Senate, can take from Congress and the House of Representatives their power under the U.S. Constitution, but that was the result. Now, you can go to Congress for authority, or you can just go to the Security Council. And when Clinton could not get the UN Security Council to support what he wanted to do in Kosovo, where did he go for authority? Not to Congress – to NATO countries. So, amazingly, a president has to get approval from all of the NATO countries, Luxemburg and Belgium and so forth, but not from Congress. That is where we are today.

Why doesn’t Congress push back? That is what the framers expected in separation of powers—that when one branch encroaches

upon your power you push back. But as we know often that is not the case. Congress has been way too passive. The War Powers Resolution of 1973 was supposed to be a reassertion by Congress: it was another giveaway. Congress told the president, “You can go to war on your own for any reason at any time for up to 60 to 90 days” – a giveaway. In the last couple of years there was the Baker-Christopher Commission, headed by two former Secretaries of State, James Baker and Warren Christopher. They came up with something, which again makes Congress subordinate to the president: namely, some kind of a committee of about 20 people, the president would consult with them, sometimes he could go to war without consulting with them. The odd thing about the Baker-Christopher proposal is that the only time Congress gets involved in full, it would have a choice of approving what the president had done, some military initiative, and if it did not approve it, then the second step would be for Congress to disapprove. Of course, the disapproval resolution would have to go to the president, he would veto it and then you would need two thirds in each branch to override it. Otherwise, the president could go to war whenever he wants to so long as he has one third plus one in either chamber. So that is a remarkable proposal.

The power of the purse is supposed to be essential to Congress. I think over the years Congress has done a relatively good job, but as you know it decided, in the Clinton years, to give away the line-item veto to the president. Did Congress protect itself? No. What Congress does on these matters, instead of protecting itself, is that it puts in the bill some expedited procedures, and if anyone wants to they can take it to the courts to see if it is constitutional or not.

But even today our Congress is still thinking of ways to give the president, in this case, Barack Obama, some type of line-item veto, which would be okay with the Supreme Court. Whatever bill is passed, it would again tilt the

balance towards presidential spending priorities and away from legislative spending priorities. There is no way around that, as I have testified many times.

I think I will end on the notion of emergency power. It is true that the framers, and John Locke, understood that there may be situations where the legislative branch is not in session and it would be necessary for the president to take certain action. In the George W. Bush administration many people looked to the precedent set by Abraham Lincoln. Yet Lincoln, when he took his actions after Fort Sumter, never said: “I have full authority to do exactly what I am going to do and I do not have to come to Congress.” He took certain actions when Congress was out of session, such as suspending writ of habeas corpus, taking money from the Treasury without an appropriation, putting a blockade on the South, and raising an army and navy, which is a legislative function. To his credit, when Congress returned, Lincoln said, “I did certain things when you were gone.” Then he had magic language, saying “whether strictly legal or not,” – that is a giveaway. Then he said very remarkably, “I do not think what I did is beyond the constitutional competency of Congress.” What he was saying was “I used not just my powers under Article II, I used your Article I powers, and therefore, I have to come to you and explain what I did, and I have to get your authority. Otherwise what I did is not legal.” And Congress, when it debated his request to give retroactive authority for what he did, did so with the understanding that there was no such authority. So that is an emergency power that protects the U.S. Constitution. The emergency power after 9/11 that did not protect the U.S. Constitution is the claim of presidential “inherent power.”

All three branches have express powers, all three branches have implied powers – these are powers that you can draw reasonably from an express power. The idea of an inherent power which is not subject to checks and balances is

totally different. I am surprised at how many people, including law professors, who think that “implied” and “inherent” are the same. They are vastly different. One is constitutional, the other is not. The first one to use inherent power, to my knowledge, was [President] Truman with the steel seizure, claiming he had “inherent” authority to seize steel mills and that no court could check him. He lost that in a steel seizure case. When I got to Congress in 1970, the Nixon administration already was claiming that the president has the inherent authority not to spend appropriated money – that was the Impoundment Dispute. I worked with Senator Ervin on hearings and legislation and that resulted in the Congressional Budget and Impoundment Control Act of 1974.

[President] Nixon also claimed he had “inherent” authority to do domestic surveillance. That was stopped by Congress under the FISA statute of 1978, which says “this is the exclusive means” to authorized domestic surveillance (meaning do not go for inherent power, this is exclusive means). You know what happened after 9/11: The Bush administration violated the FISA statute. The Bush administration invoked “inherent” powers for many things: the terrorist surveillance program, extraordinary rendition, various interrogations, torture, and the rest. All with the understanding that the president can do this without any checks by Congress or the courts, and in the face of statutes and treaties that make such actions illegal.

I would conclude on the state secrets privilege. The state secrets privilege means that if private parties go to court and say that the president or the executive branch is acting contrary to the U.S. Constitution, to statutes, or to treaties, then in response the Justice Department can say, “You cannot bring this case at all, it has to stop right now, because if the case proceeds it will risk the disclosure of information damaging to national security.” That is the state secrets privilege. It did not exist until the Court, in the very unfortunate

decision in the *Reynolds* case in 1953, upheld the “state secrets privilege.”

Both the House and the Senate have worked with the two judiciary committees on legislation to put more judicial teeth into checks on these claims by the executive branch. But I am amazed at how many decisions I read where the judge will say, “I am going to uphold separation of powers,” and I think, wrongly, that means the judge is going to provide a check against presidential power or executive power. Instead, the judge will say, “Well, under separation of powers, since I am in one branch and the president is in another branch, I cannot do anything at all, I cannot interfere.” That notion of separation of powers makes a nullity of checks and balances.

I will stop with that and will look forward to my other panelists and questions from you. Thank you.

FERNANDO LIMONGI

I would like to start by thanking the organizers of this conference for the invitation to speak here. I am most honored to participate in a conference at the Woodrow Wilson Center. The importance of the studies developed with the assistance of this Center for understanding the democratization around the world, and specifically in Brazil, is enormous. Thanks to the Kennan Institute for giving me this opportunity to be here. My presentation is based upon a joint work, a product of my long collaboration with Angelina Figueiredo.

Our objective in this presentation is twofold. First, we argue that the characteristics of the decision-making process, as opposed to the system of government and electoral laws, are the key variables for explaining variation in government performance and party behavior. The legislative powers of the executive are the primary explanatory variable. It takes precedence over the form of government and the electoral laws. The relevant distinction is not between the forms of government, presidential or parliamentary regimes, or even between presidential and semi-presidential regimes, but whether or

not the executive power controls the legislative agenda. The effects of the concentration of legislative powers in the hands of the executive are the same across regimes. Thus, we also question the highly accepted view that powerful executives constitute a threat to democratic order. We do not think that powerful prime ministers are [a threat], so there are no reasons to think that powerful presidents would be.

The paper centers on the analysis of two experiences with presidential democracy in Brazil: the 1946–64 and the post-1988 periods. The comparison of these two experiences offers a unique opportunity to assess the effect of specific institutional variables on policy outcomes and legislative behavior. Most institutional features are the same in the two constitutions. More specifically, the 1988 constitution kept the form of government and the laws regulating the electoral process and the party organization. Additionally, the 1988 constitution strengthened federalism by increasing the fiscal and administrative capacities of the lower units of the federation. Thus, both constitutions structured around the institutional mix that is deemed the worst possible by several authors. This continuity between these two experiences is stressed by several analysts.

These features are stressed by several analysts. But, at the same time, and this is less known and recognized, the 1988 constitution concentrated power in the executive in a way that considerably departed from the 1946 constitution. In fact, contrary to a widespread view, all the institutional reforms produced by the military to strengthen the legislative power of the executive branch were incorporated into the new constitution. The executive today has strong agenda-setting and legislative powers. The contrast between the two periods extends to intra-constitutional rules regulating the decision making process within the legislative power. More specifically, the structure of Congress provides party leaders with extensive powers to control the legislative process. Nowadays the Brazilian Congress is organized

in a centralized way. This model differs radically from the U.S. model, usually taken as the paradigmatic if not the unique and appropriate way the legislature should organize itself in a presidential regime.

So if the form of government and the system of representation played the role the literature attributes to them in determining government operation in democracies, we would expect to find little or no variation in the performance of the two Brazilian presidential systems. Similarly, if parliamentary behavior were a direct function of the incentives generated in the electoral arena, no significant change should be observed either.

However, the differences between these two democratic experiences could not be greater. We show that the two democratic

periods present completely different patterns in their policy output. The indicators we use refer to the control by the executive of legislative output, legislative success and dominance, and party cohesion. We show that in all these respects the two periods diverge sharply. We argue that the concentration of agenda powers in the hands of the executive and party leaders explain these differences.

Table 1 shows basic data referring to legislative output. We are using here two traditional indicators common in the study of parliamentary regimes. Executive success is just a proportion of bills introduced by the executive that become law. The closer to 100 percent, the more successful is the government.

The difference between these two democratic experiences could not be greater. Let

Table 1: Law production by administration Brazil (1949-64* & 1989-2007)

GOVERNMENT	PRESIDENT'S PARTY IN THE LOWER HOUSE (% SEATS)	GOVERNMENT COALITION IN THE LOWER HOUSE (% SEATS)	BILLS ENACTED (PER MONTH)	EXECUTIVE SUCCESS** (%)	EXECUTIVE DOMINANCE*** (%)
Dutra	52.8	74.0	26.3	30.0	34.2
Vargas	16.8	88.0	28.3	45.9	42.8
Café Filho	7.9	84.0	19.0	10.0	41.0
Nereu Ramos	33.9	66.0	26.3	9.8	39.2
Kubitschek	33.9	66.0	15.7	29.0	35.0
Quadros	2.1	93.0	9.1	0.80	48.3
Goulart*	23.5	72.0	3.2	19.4	40.6
Subtotal 1949-64	24.3	77.1	18.2	29.5	38.5
Sarney	40.8	63.2	21.3	73.5	74.5
Collor	6.3	32.4	19.5	64.5	75.3
Franco	0.0	55.6	16.7	72.6	90.1
Cardoso I	12.9	63.8	16.3	81.3	81.7
Cardoso II	18.3	58.7	18.7	76.2	78.0
Lula I	16.3	56.3	16.5	80.5	78.4
Subtotal 1989-2007	15.8	55.0	17.8	75.7	79.5

Source: Banco de Dados Legislativos, Cebrap.

* Until March 31, 1964. The first three years of Dutra administration (1946-1949) were excluded due to lack of information.

** Percentage of executive bills introduced and enacted in the same administration.

*** Percentage of laws initiated by the executive.

us concentrate on the two subtotals, i.e. the totals for the two democratic periods. Table 1 indicates that for the 1946–64 period, executive success is a mere 29.5 percent. If we look down the column, we will see that the recent president achieved a much better result – they received approval for 75.7 percent of the bills that they introduced. Note that the complement of success is not rejection, because several other things may happen. If we move to the last column, where data on dominance were presented, there are data on the proportion of enacted laws that were proposed by the executive. We again see a stark contrast between the two periods: 38.5 percent against 79.5 percent. It should be noted that the high dominance by the executive is the norm among parliamentary regimes.

The conclusion is obvious: nowadays the executive is responsible for changing the legal status quo and is extremely successful when it attempts to do so. Note that the 3rd column tells us that the overall output, the number of laws enacted per month, is almost the same in the two periods. So what changed is the distribution, the participation of both branches in the output. There is a profound change in the way the Brazilian political system operates from one period to the other. The differences are institutional in the following sense: today's pattern is stable and presents little variation from president to president, which we can see when we look at the data by administration, moving up and down through the 3rd, 4th, and 5th columns. Success and dominance is always around the overall coverage. The same is not true for the previous period as we may see by looking at the 1st and the 2nd column.

This stability does not depend on the size of the presidential party and it is more readily related to the size of the party coalition that sustains the president. Collor in the second period is the only one truly minority president and he is the least successful. I want to emphasize, the problem was not the size of his party,

but the size of his coalition. I will return to that point afterwards.

The emphasis on the form of government and electoral laws cannot explain such a profound divergence. The basic institutional setup was not modified. We should observe the same type of executive/legislative relations in the two periods. The maintenance of presidentialism should generate the same type of non-responsible legislators (i.e. legislators who do not care for the destiny of the government). Besides, given the maintenance of open-list proportional representation, we should observe a highly fractionalized legislature and weak parties. We do observe party fragmentation, but as we will see in a moment, we cannot say that the parties are weak within the contemporary Brazilian legislature.

Then how do we account for these profound differences? The answer, as I suggest in the opening remarks, are because of the other parts of the institutional structure. First the legislative powers of the president changed dramatically. They were reinforced, as we may see in Table 2.

As we can see, the constitutional rules regulating the distribution of power between the executive and the legislative branches of the government have changed drastically. The current 1988 constitution kept all legislative powers instituted by the military government. By contrast, under the 1946 constitution the president held only one of those powers: the exclusive initiative in administrative matters.

There is no doubt that nowadays the Brazilian president is a strong one. Let me discuss two of the office's prerogatives: decree power and control over the budget. As we may see in Table 3, most of the difference between the two Brazilian experiences with regard to the legal output is directly related to these two instruments.

We see that during 1946–64 the legislature could bypass the executive with regard to budgetary laws, but today all budgetary laws are initiated by the executive. Also, pro-

Table 2: Legislative powers of the executive according to Brazilian democratic constitutions

EXECUTIVE POWER	1946 CONSTITUTION	1988 CONSTITUTION
To have exclusive initiative for:		
-“administrative” bills*	Yes	Yes
-budget bills	No	Yes
-tax bills	No	Yes
To initiate constitutional amendments	No	Yes
To enact decree with the force of law	No	Yes
To issue laws upon request of delegation by Congress **	No	Yes
To declare bills urgent in which case they must be voted on in 45 days in each chamber	No	Yes
To impose restrictions on budget amendments by Congress	No	Yes

Source: *Constituição da República Federativa do Brasil, 1988; Constituição da República dos Estados Unidos do Brasil, 1946* (Brazilian Constitutions of 1988 and 1946).

* The administrative bills include: creation and structures of ministries and other bodies of the public administration; creation of jobs, functions and posts in public administration; salary increases for public servant; careers of civil servant; administrative and judicial administration; administrative units of the territories; size of the armed forces; organization of the offices of the Government Attorney and the Public Defender of the Union; general rules for the organization of the offices of Government Attorney and Public Defenders in the states, the federal district, and territories (article 61, 1,I and II); as translated by Scott Mainwaring, “Multipartism, Robust Federalism, and Presidentialism in Brazil”, in Scott Mainwaring and Matthew Shugart, eds, *Presidentialism and democracy in Latin America* (Cambridge: Cambridge University Press, 1997), p. 444.

** This is called “delegated decree authority” by Carey and Shuggart. “Calling out the Tanks, Or Just Filling the Forms?” in Carey and Shugart, eds, *Executive Decree Authority* (Cambridge: Cambridge University Press, 1998), pp. 12-13.

visional decrees – the decree power that the president now has – explains the increased executive advantage on the last line of the ordinary laws. So is executive control over the legislative output a direct consequence of the

constitutional text, i.e. of the prerogative that it was endowed with by the constitution?

With regard to the budget, the main point is that the legislature lost the power to initiate expenditures. Congress participates in delib-

Table 3: Enacted laws by type and initiator Brazil (1949-64 & 1989-2007)

TYPE OF LAW (NO. PER MONTH)	1949-1964*		1989-2007**	
	EXECUTIVE	LEGISLATURE	EXECUTIVE	LEGISLATURE
Budgetary Laws	3.3	3.4	7.3	–
Provisional Decree	–	–	3.8	–
Other Ordinary Laws***	3.7	7.7	2.5	2.8
Total	7.0	11.1	13.4	2.8

Source: PRODASEN; Banco de Dados Legislativos, Cebrap.

* Until March 31, 1964. The first three years of Dutra administration (1946-1949) were excluded due to lack of reliable information on the initiator.

** Until January 31, 2007.

*** Includes bills related to subject matters on which the executive and the legislature have concurrent right to initiate legislation. Administrative bills are also included in this category, although the executive has exclusive right in some areas.

eration of annual budget and in the bills that the executive introduces during the year to modify it. But the right to amend the budget or related bills is highly restricted. Most policy areas are protected from amendments and from congressional cuts. All things considered, Congress can only amend resources allocated to investment, but even in this area it cannot create new programs or expenditures. It may at most adjust and change privilege in some areas at the expense of the others.

What is important to remember is that the legislature also cannot set autonomously the overall pattern of spending. This limitation impedes the Congress from engaging in pork barrel policies. It may be true that open list proportional representation creates an incentive for the emergence of pork barrel policies or for the emergence of the so called “personal vote.” But the executive control over the budget neutralizes these incentives. They just do

not find an adequate institutional setup to develop. I will complement this point in a moment. Let me just add that some of these limitations were introduced by Congress itself by standing orders, i.e. by its own internal decisions, Congress tied its own hands. But before dealing with this issue, let me turn to decrees.

As we see on Table 4, the impact of decrees on the laws enacted is far from small. Around four decrees were converted into laws in a month. Since the role of decrees in a separation of powers system is always a source of debate, I will present detailed data on decrees to back my argument. As this table shows, all administrations since 1988 have made extensive use of the prerogative to issue provisional decrees. This is important, because decrees are usually interpreted as an indication of a weak president and of a resource the president uses when facing opposition; in essence, they are seen as a weapon to circumvent Congress.

Table 4: Provisional Decree by government - 1989-2007

GOVERNMENTS	SARNEY	COLLOR	FRANCO	CARDOSO I	CARDOSO II PRE EC32	SUBTOTAL PRE EC32	CARDOSO II POST EC32	LULA I	SUBTOTAL POST EC32	TOTAL
Decrees issued (per month)	7.1	2.8	5.2	3.3	3.2	4.0	6.8	5	5.4	4.4
Decrees reissued (per month)	1.2	2.4	13.5	50.9	73.9	35.2	-	-	-	35.2
Total Decrees (per month)	8.3	5.2	18.7	54.2	77.1	39.2	6.8	5	5.4	29.5
% Decrees enacted into laws *	86.3	77.6	85.0	89.9	84.6	85.5	82.4	90.4	88.0	86.4
% Decrees rejected*	12.1	18.8	10.7	3.1	1.0	8.5	15.7	7.1	9.7	8.9
% CB / total PDs enacted into laws	34.6	60.6	35.3	31.7	18.2	36.9	31.0	56.0	49.0	41.6
% executive bills introduced as Decrees**	55.6	28.2	47.6	43.2	42.6	42.8	50.5	56.9	54.8	46.4

Source: PRODASEN; Banco de Dados Legislativos, Cebrap.

* The decrees that were not enacted or rejected lost their efficacy, were cancelled or were still under consideration when the data was collected.

**This calculations excludes “Budgetary bills.”

Thus, decrees are either a weapon of a minority president, or a president with authoritarian inclinations, or sometimes both. If this is so, since we have already seen that Collor was the only minority president, then all other Brazilian presidents should be classified as having authoritarian inclinations. Well, I do not think so, and I will argue that this is not the case. First, let me note that despite giving the executive unilateral power to change the status quo, provisional decrees have to be approved by Congress. Besides, they may be amended. The executive power is not absolute and is, in fact, checked by the legislative.

In short, the executive cannot impose its will over Congress. Congress has the last word. It can reject and it can amend. And it does so more now than previously. True, regulations were highly favorable to the executive. But there were changes and some of them aimed to curb the executive. But they have not affected the use of the instrument. The number of de-

crees issued continues to be considerably high. Until September 2001, there were no limits on reissuing decrees. The decree had a provisional force of law for 30 days, but if Congress failed to deliberate during this period, the executive could reissue the decree.

As Table 5 shows, if we consider all aspects of the executive decree politics, both from the executive and the legislative sides, emission and approval with or without amendments were the mark. And they were highly stable among the periods and among the administrations. All presidents added a relatively large number of decrees, the great majority of them were approved, and only a small part of them were amended. The greater difference refers to reissuing, something that we can see in the second line. That led to a certain decrease of amendments because most of the reissued decrees incorporated changes in the text. But note that the decrees ended up being approved. So reissuing is not evidence of diffi-

Table 5: Provisional Decree by government - 1989-2007

GOVERNMENTS	SARNEY	COLLOR	FRANCO	CARDOSO I	CARDOSO II PRE EC32	CARDOSO II POST EC32	LULA I
Decrees issued (per month)	7.1	2.8	5.2	3.3	3.2	6.8	5.0
Decrees reissued (per month)	1.2	2.4	13.5	50.9	73.9	-	-
Total Decrees (per month)	8.3	5.2	18.7	54.2	77.1	6.8	5.0
% Decrees enacted into laws *	86.3	77.6	85.0	89.9	84.6	82.4	90.4
% Decrees rejected*	12.1	18.8	10.7	3.1	1.0	15.7	7.1
% CB / total PDs enacted into laws	34.6	60.6	35.3	31.7	18.2	31.0	56.0
% executive bills introduced as Decrees**	55.6	28.2	47.6	43.2	42.6	50.5	56.9

Source: PRODASEN; Banco de Dados Legislativos, Cebrap.

* The decrees that were not enacted or rejected lost their efficacy, were cancelled or were still under consideration when the data was collected.

**This calculations excludes "Budgetary bills."

culty in approving them. In fact, the focus of the agenda has moved during the Fernando Henrique administration. That was the period when Fernando Henrique government was reforming the 1988 constitution. Thus, Congress amended the 1988 constitution in September 2001 to cope with the reissuing of decrees. The decree validation period was extended to 60 days, but reissuing was limited to one occasion. That means that a decree may last for 120 days, or 4 months, but at the end of this period, if Congress does not deliberate, the decree is automatically rejected.

Thus, from September 2001 onwards, the president cannot circumvent Congress by issuing decrees. The data shows that there was not a big difference. If anything, the executive is issuing more decrees now than before. And that seems to be a paradox. The difference is small and it is accounted for, paradoxically, by the impossibility of reissuing decrees. That is, it does not pay to reissue a decree with modifications now. Thus, under a much more demanding rule, one in which a decree can in fact be rejected, if not confirmed with express support from the majority, the president has

not restrained his reliance on the practice. If the president was not sure he could count on support, he would opt for another course of action. For instance, he would use his constitutional urgency procedures. So presidents anticipate that they will be supported, and they are by Congress.

A compliment to the executive control of the legislative agenda comes from the fact that party leaders also had their agenda powers reinforced. As Table 6 shows, there were intra-constitutional changes in the standing orders of Congress between the two periods. Party leaders today are much more powerful than their counterparts in the previous periods. Party leaders have a greater control over the procedures that regulate the legislative agenda. The standing orders give them the right to represent their caucus on most procedural matters. Thus, the legislative organization does not follow the U.S. pattern. Committees are not that important, the floor is the real locus of decision. The basic way leaders affect the legislative process is through the approval of urgency procedures for specific bills. Once urgency is approved (and this does not originate from the

Table 6: Procedural Rights of Legislative Party Leaders – 1946-64 and Post 1989

PARTY LEADERS RIGHT	1946-64	POST 1989
To determine the plenary agenda	No	Yes
To represent all the party's members in the legislature (bancadas)	No	Yes
To restrict amendments and separate vote	No	Yes
To discharge legislation from the committees by means of urgency procedures	Restricted	Broad
To appoint and replace the members of the standing and the special committees	Yes	Yes
To appoint and replace the members of the joint committees to consider provisional decrees	No	Yes
To appoint and replace the members of the joint committee to consider budget legislation	No	Yes

Source: *Regimentos Internos da Câmara dos Deputados, 1955, 1989 (Lower Chamber Standing Orders, 1955, 1989).*

1988 constitution or from the presidency, but from congressional standard order), the committee is discharged, and the floor may vote the issue in days under restrictive procedures (i.e. only amendments supported by the leaders are considered).

Parties are much more important today than they were before the legislative process. This importance is not a function of electoral laws. The point is that the organization of the Brazilian Congress is different between the two periods. Today's Congress is highly centralized. The distribution of parliamentary rights and resources are extremely favorable to party leaders. The speaker and the party leaders exercise tight control of the legislative process. They are responsible for setting the legislative calendar. What this data indicates is that we are far from a conflict in executive/legislative type of relationship. Executive preponderance relies on institutional prerogatives attached to the presidential position and it is backed by party leaders.

Consequentially, to recognize presidential ascendancy is far from implying the so-called model of "imperial presidentialism" or that we have some sort of "delegative democracy" as O'Donnell has argued. Executive/legislative relations need not be confrontational.

Coordination between these two branches is also a possibility. Whether one or the other – confrontation or coordination – pertains, may be seen from data on party cohesion and support for the legislative agenda of the executive.

As one could expect, the two periods [in Brazilian political history] are marked by significant contrast. Party cohesion is low in the first period and high in the second. A comparison of Tables 7 and 8 shows that there was much weaker party cohesion for the main parties in the first period than the second period, where we see that most parties have party cohesion well above 70 percent. So for the second (current) period, we can provide a better picture of the relationship between the executive and the legislative and the type of support parties provide for the executive.

For the post-1988 period, we are able to analyze data on the position taken by the government leader and all party leaders. And we also know that those parties with portfolios are those that participate in the government. So we may test how the presidential coalition works. The members of the parties who received portfolios do provide support for the executive agenda. Explicit opposition to the government from those parties included in the government coalition amounts to less than 10

Table 7: Party discipline in roll calls on government proposals by administration - Rice Index - 1946-1964

PARTY*/ ADMINISTRATION	UDN	PR	PSD	PSP	PTB
Dutra	40.2	58.3	54.3	91.2	58.3
Vargas	40.4	52.2	48.4	52.7	47.3
Café Filho	44.4	44.9	36.4	53.5	43.1
Nereu	57.9	47.4	56.7	47.9	58
JK	47.3	47.6	48.8	45.2	49.8
Jânio	29.1	26.8	43.7	47.9	41.1
Jango	54.3	43.6	46.1	45.3	72.3
Mean	44.8	45.8	47.8	54.8	52.8

Source: *Diário do Congresso Nacional; Banco de Dados Legislativos, Cebrap.*

* Excludes small parties.

Table 8: Party discipline in roll calls on government proposals by administration - Rice Index - 1988-2007

PARTY*/ ADMINISTRATION	PDS>PP	PFL>DEM	PTB	PMDB	PSDB	PDT	PT
Sarney	67.45	78.20	68.40	65.19	69.14	75.85	93.25
Collor	78.57	80.84	72.50	73.29	74.15	85.19	95.90
Itamar	70.95	68.82	67.47	78.53	75.59	80.33	95.50
FHC I	68.27	89.51	79.94	64.83	84.79	85.46	95.66
FHC II	82.77	91.27	73.99	73.59	92.47	89.65	96.88
Lula I	71.92	67.21	81.69	75.63	74.95	80.89	91.98
Mean	75.61	83.12	78.66	73.28	83.83	86.75	96.05

Source: *Diário do Congresso Nacional; Banco de Dados Legislativos, Cebrap.*

* Excludes small parties.

percent of the cases. Congress members that belonged to parties included in the government coalition do provide political support for the executive agenda.

Table 9 measures coalition cohesiveness. These percentages are the percentage of votes of the members of the coalition in support of the president. We see that almost all presidents received support of around 85–88 percent of their coalition. We now can close the circle. We now know why the presidents have such high rates of approval – because they come with political support, because they are able to organize a working coalition. A comparison between the two periods shows a significant increase in party cohesion and shows the existence of workable and structured coalition support in the executive during this period. Again, the difference between the two periods is due to the difference in the organization in how the legislative branch works. The legislative process in the 1946 democracy was more decentralized. This means that individual member's initiatives had higher chances to reach the floor and to influence outcomes.

To conclude, the institutional debates tend to underscore the negative effects of the proportional system of representation and of separation of power on the performance of Brazil's democracy. The analysis presented here shows

that variables internal to the decision-making process may neutralize effects predicted by the emphasis on the system of representation and government. Agenda powers, decrees included, are not blunt instruments to confront congressional resistance; agenda powers provide leaders, including the president, the instruments to solve and enforce coordination among members of a political coalition. In these terms executive/legislative relations are not seen as comprising a vertical bargaining, a system in which one power wants to prevail over the other. Executive-legislative relations are, in a word, populated by parties involved in horizontal bargaining: the problem is one of coordination.

The conclusion that a concentration of institutional power increases government efficiency is by no means a defense of a centralized decision-making process or of an imbalance in the distribution of institutional powers between the executive and the legislative branches. Different organizations of the political system will always give rise to trade-offs between desirable political goals such as representation and efficiency. The objective here was to identify, in a study of a single country, the functioning and the effects of specific political institutions, of government performance, and policy outcomes. Since the Brazilian case is not unique

Table 9: Vote percentage of the government coalition parties to the presidential agenda - Roll call votes - 1989-2007*

CABINETS	UNIFIED COALITION		NON-UNIFIED COALITION		TOTAL	
	No.	% Disc	No.	% Disc	No.	% Disc
Sarney 2	6	90.68	2	41.57	8	78.40
Collor 1	18	95.87	–	–	18	95.87
Collor 2	4	76.18	1	40.21	5	68.98
Collor 3	24	93.37	17	54.19	41	77.12
Collor 4	9	94.85	1	76.92	10	93.06
Itamar 1	8	91.19	25	73.27	33	77.61
Itamar 2	2	93.90	1	78.31	3	88.70
Itamar 3	3	94.92	1	67.63	4	88.10
FHC I 1	83	90.35	13	60.82	96	86.35
FHC I 2	217	88.32	27	69.37	244	86.23
FHC II 1	188	93.55	19	69.69	207	91.36
FHC II 2	15	92.63	1	64.80	16	90.89
Lula I 1	78	95.03	7	78.86	85	93.70
Lula I 2	30	89.93	6	76.82	36	87.75
Lula I 3	10	76.50	2	44.83	12	71.22
Lula I 4	7	90.52	4	79.96	11	86.68
Lula I 5	24	88.64	14	67.24	38	80.76
Lula II 1	15	96.36	2	5.31	17	85.65
Lula II 2	123	94.99	31	75.53	154	91.07
Total	864	91.76	174	68.20	1038	87.81

Source: PRODASEN; Banco de Dados Legislativos, Cebrap.

* Until February 1999, the end of the 50th legislature corresponded to Cardoso's first term.

we believe it can provide a basis for a broader comparative investigation. Thank you.

JEFFREY ANDERSON

It is a pleasure to be here. I have to admit that I struggled a little bit with this assignment only because if I were to take a very narrow definition, actually a formal definition, of separation of powers, my story about Germany would be pretty boring.

Germany is a classic parliamentary system, in which there is a fusion of executive and legislative powers. We can go back to Bagehot's insights in the 19th century to learn about that important distinction. And although there are

distinctive Germanic qualities to German parliamentary democracy, the story is pretty familiar: it is one of executive dominance and a legislature that is largely subservient to the needs of the executive. You probably are aware of the distinction in Europe between the so called "working parliaments" and "talk-shops." Germany does have a working parliament; it has a very strong committee system in both the upper and lower house that lends it probably more influence than some of its counterparts, certainly its counterpart in the U.K.

If there has been a larger narrative about the legislative/executive relations in Germany, it has more to do with the impact of the European

integration, which at least up until recently was tending to exacerbate the imbalance between executive and legislative, i.e. giving the executive in Germany more opportunities to assert its authority and to lead without much regard to the desires and wishes of the parliament. But that is actually starting to change a bit. There has been a backlash throughout Europe led in large part by the German parliament. But that story does not really have a counterpart to the Ukrainian/Russian context, so I think I will leave that to the side; I would be happy to get back to it in the discussion.

What I am going to do is adopt a much looser definition of separation of powers. It is one that probably stretches it beyond all recognition, but it allows me to get in some additional points that you might find interesting and that may be of greater relevance to the two cases that this conference is actually focusing on – Ukraine and Russia. I am going to be talking more about where power and authority are located in the system, and how it has played out since the federal republic's constitutional arrangement went into effect in 1949.

So I will use the term “separation of powers,” but I apologize in advance for misusing it. There are really two dimensions to this. One is formal, the separation of powers that is stipulated by Germany's institutional arrangements as defined by its constitution or the “Basic Law,” as it is called. Then there is an informal dimension, which is much more political and is related in fact to the political party system and the manner in which it expresses the distribution of political preferences in German society. I think these two dimensions, the formal and the informal, are very much linked and I will elaborate on this in a minute, but given the time constrains I am not going to go into the informal separation of powers much at all. Suffice it to say that it stems from Germany's electoral law, which is a kind of proportional representation law, which in turn results in a very vibrant, multi-party system, which in turn has resulted far more often than not in

coalition governments at the federal and state level. The kind of centralized majoritarianism that we see, for example, at least up until about three weeks ago, in the British parliamentary system, is simply not on display or has not been on display in Germany in the post-war period.

Turning to the formal constitutional dimensions of the power question in Germany, and looking at the 1949 Basic Law, one sees a number of lessons learned in this document—lessons in particular relating to the Third Reich. There is a host of protections of basic human rights, for example: the right of free speech and association, the right to refuse to serve in the army, the right of political asylum, and the abolition of the death penalty. There are a whole host of specific constitutional provisions that can be traced back in some sense to lessons of the 12 years of the Third Reich.

The most dramatic lesson learned, if you will, stemming from the period of Nazi rule is federalism, which I would consider to be a very important aspect of the separation of powers in the German system. Federalism in Germany is intended explicitly to prevent the kind of concentration of executive power that enabled the Nazis to do what they did during those 12 years. The contrast with American federalism, I think, is helpful. The American federalism is also called vertical federalism or I guess I remember it being called “marble cake federalism.” Germany's brand of federalism is described as administrative or horizontal federalism. The way I explain this to my undergraduates is that if you were walking down the street of a typical state capital in Germany, you would not find any appreciable evidence of federal agencies, i.e. national level agencies, during your walk. In fact, you would find almost nothing but state level agencies, and state level ministries, and state level departments. The reason why is because in Germany, federalism means that the federal entity, or the federal level, legislates within its spheres of competence and then turns implementation over to the states. There is no separate reach of the fed-

eral down to the local level, such as you have in the United States – and that sets up some interesting dynamics that are largely absent in the United States.

I am not going to go into great detail about the institutions of federalism; suffice it to say, there are 16 states, or *Länder*, in Germany, each of which has a written constitution, each of which has a directly elected state parliament and, because they have a parliamentary form of government, a regional prime minister, if you will. At the federal level, the upper chamber of the legislature is intended to represent the interests of the states. The so-called Federal Council, or *Bundesrat*, is the functional equivalent of our Senate, but with some very important differences. There are 69 members in that upper chamber; they are appointed by the *Länder* and are not directly elected to this body; each state has a delegation ranging in size depending on the population of the state (the largest state has over 7 million people and entitled to a delegation of 7, the smallest states, which are typically the city-states, send delegations of 2, and other states send between 3 and 5).

These members of the *Bundesrat* are all members of the respective *Länder* governments, and thus are really representatives of the *Länder* governments at the national level. The delegations are headed by the chief executives of the *Länder* governments, so it would be as if Arnold Schwarzenegger were to appoint a delegation of 6 members of his government to sit in the Senate and vote on legislative acts. The votes of each *Länder* are cast as a block, so in this example Arnold Schwarzenegger's delegation would be casting blocks of six votes on important matters in the Upper House. There is no such thing as an election to the *Bundesrat*; the composition of the *Bundesrat* changes as state elections occasionally turn out governments and install new coalition or single party governments at the *Länder* level.

The political relevance of the *Bundesrat* is hard to overstate. It is a coequal partner to the

lower house on legislative matters dealing with the Basic Law, as well as matters impinging directly on the interests of the *Länder* – education, regional planning, taxation, and a whole host of things. Approximately 50 percent of all legislative acts that are eventually considered by the legislature have to be approved by the *Bundesrat* if they are to become law. In that other 50 percent of acts, such as foreign treaties and other areas that are exclusively the preserve of the federal level, the *Bundesrat* can be overridden by the lower house.

Those are the lessons taken from the Nazi period, the most important of which is federalism. The Basic Law also expresses other lessons learned taken primarily from the Weimar period (1919 to 1933) that also speaks to a deep and abiding concern about separation of powers, but in the other direction. These laws actually are designed to try and address some of the weaknesses of the Weimar system, such as the dispersion of authority that hamstrung government and led to instability.

One was the rampant fragmentation and polarization in the party system that obtained during the Weimar years. Some of you have probably seen the charts showing the dramatic increase in support for the parties on the far left and for the main party on the far right – the Nazi Party, and the kind of attenuation or even complete collapse of support for the political center in Weimar. This had implications not just for political life in the streets, but also the stability of government. The solution to this problem was, among other things, a proportional representation law with a very high barrier to entry: parties must achieve 5 percent of the national vote total in order to claim any seats at all in the lower house, in the *Bundestag*.

This law has had its desired effect. If you track the number of political parties over the course of the 1950s as these election laws came into effect, you see a dramatic decrease in the number of viable parties competing for power. It goes from something on the order of 12 or 15 parties in the first German parliament in

1949 to the established three parties by the early 1960s: the Social Democrats, the Free Democrats, and the Christian Democratic/Christian Socialist Union Party. This dramatic winnowing of the competition can be traced directly to the impact of this electoral law. Needless to say, that has not prevented smaller parties from gaining access to parliament. In 1983 the Greens show up. Then, in the aftermath of unification, we have first the PDS (the successor of the party of the Eastern Communist Party), which has now transformed into the left party *Die Linke*. Germany now has a stable 5-party system, which is well short of the 20- to 30-party system that it had during the Weimar years.

The Basic Law has also strengthened the position of the chancellor since 1949. One of the great weaknesses of the Weimar parliamentary form of democracy was the very precarious position of the chief executive, the chancellor. Twenty cabinets fell in a 14-year period, which is about as unstable as democratic life gets. The German Constitution put in place a so-called “constructive vote of no confidence,” under which it is not sufficient to turn out the government of the day by denying the confidence of the parliament. Instead, the lower house must also agree by a majority on a replacement chancellor. So there is a somewhat higher bar to ousting a chancellor during the life of a parliament than exists, for example, in the U.K. or elsewhere, and that again was an explicit response to the situation that obtained in Weimar.

Finally, the Basic Law also sought to clarify the relationship between the chancellor, or prime minister, and the president. The tension between these offices and the lack of clarity in terms of who was responsible for what, and more importantly, the ability of the president under the Weimar system to enact emergency measures and rule by decree, also contributed to an undermining of the executive authority emanating from the parliament in ways that post-war Germans wished to avoid at all

costs. As a result, there is still a president in Germany, but it is mostly a ceremonial office. It has some minor functions to play, but not even as important, I would say, as the queen of England, which gives you some sense of where it stands in constellation of things in Germany. It leaves the chancellor as the center of authority and power within the executive.

Returning to the idea of federalism, I think that there is a story about separation of powers in Germany that has to do more with federalism than anything else. What are some of the implications of the German system when it comes to the vertical or territorial distribution of power? For one thing, the upper house has served for years as a potential veto point in the legislative process on a range of functional issues that cut across party lines. Whether it is education policy, or regional planning, or taxation, the *Länder* must be placated, and party affiliation is only of so much use in trying to achieve consensus among the sixteen *Länder*. This functional veto is very important. Moreover, this functional veto that the *Bundesrat* holds over the German federal legislative process is now increasingly carrying over into European Union affairs.

You are aware that the German government has just signed off on a 750 billion Euro rescue package for Greece. Well, in yesterday's *Financial Times*, the headline reads: “*Länder* Name Price for Supporting Berlin.” The upper house and, by extension, the 16 barons of the various *Länder* in Germany, are going to exact a political price for approving this 750 billion Euro package. You can imagine how badly Angela Merkel wants this to go through. These demands have little to do with partisan issues; they have everything to do with the structural position of the *Länder* within the grand scheme of things in Germany and Europe. So it is becoming a very important obstacle to federal legislating; not just on matters relating to Germany, but also relating to Europe.

The *Bundesrat* also serves as a political veto point. There is now, and has been since 1949,

the real potential for divided government in Germany, where the *Bundesrat* is controlled, again, informally, by a majority of *Länder* of a different partisan composition than the coalition government sitting now in Berlin. That just flipped over a couple of weeks ago with the legislative elections in North Rhine-Westphalia, which produced a center-left government that now tips the balance in the *Bundesrat*. The main casualty was tax cuts. The federal government is not going to be able to pursue its campaign promise of enacting tax cuts, because the Social Democrats are vehemently opposed to this. It is another check on executive power and on the coalition government's power, and, in this sense, plays a role in this informal separation of powers that I am trying to talk about here.

Finally, what is happening at the *Länder* level needs to be taken into account. The fact that you have 16 small state universes (some not so small – North Rhine-Westphalia is a pretty important and a pretty big place) offers up the potential for alternative government. A state like North Rhine-Westphalia, with 17 million inhabitants and some pretty important industry to boot, is now governed by an alternative, center-left model, which gives it the opportunity to prod the federal government in terms of providing alternative solutions to problems. It also gives the opposition a platform for contesting power at the national level, which is significant.

The existence of the *Länder* political system, the state political systems, also, interestingly enough, provides for internal competition within the existing coalition government at the federal level. By that I mean there are opportunities, to use the current example, for senior politicians in the center right party, the CDU, to subtly and sometimes not so subtly challenge the position of the leader of their own party and the leader of the country, Angela Merkel, by using the *Länder* level as a way of pushing her on important issues, be it immigration or taxation or what have you. And if you follow German politics you have, no doubt, known or seen that since that

bruising defeat in North Rhine-Westphalia, the voices of internal party criticism have risen dramatically. They are announcing pretty significant challenges to Angela Merkel's authority, and they come from these so-called *Fürsten*, or barons, at the *Länder* level, who control resources, who control access to the media, and are able to get their voices out in important ways.

Another important aspect or dynamic that results from Germany's federalism is that the *Länder* have become involved in the implementation of federal policy, and this gives the individual states the opportunity to fine tune federal policy decisions. Once a decision is reached at the federal level, what it means for voters and for citizens very much depends on how it is implemented. So, states have the opportunity to alter – sometimes at the margins, sometimes quite centrally – the content and meaning of federal legislation by virtue of their position within the system: they are the ones implementing laws.

That is the sort of interesting, potentially happy side of the equation. But there are some real costs, and I will conclude with this, to Germany's federal arrangements. One, as you might imagine, is this burdensome quality of decision making in the legislative process in Germany. You have a greater number of important actors, in this case the *Länder*, that have in many instances veto power over decisions or process. It makes for a very cumbersome set of arrangements, especially when it comes to reform – reform of education, reform of taxation. It is very hard to get consensus. It also tends to build redistributive conflicts into the system, because everyone is at the table. From a democratic standpoint, that is a good thing, but it means that the issue of redistributing from the wealthy *Länder* to the poor *Länder*, or making sure that the left and the right are accommodated, becomes very tricky in this highly institutionalized system.

Finally, and this alludes to the point I made just a minute ago about Angela Merkel, it makes

consensus building and leadership within the parties much more challenging and much more difficult. I will just leave you with a comparative example. In England, or in the U.K., the Labor Party leadership, in the aftermath of a series of bruising election defeats to Margaret Thatcher's Conservative Party, set about cleaning house, trying to limit the power of what was seen as the very damaging power of the far left within the party. And within a matter of 5 to 7 years, starting with Neil Kinnock, then John Smith, and finally Tony Blair, the left was thoroughly routed within the Labor Party. The militant tendency and other elements within the party were basically thrown out and completely marginalized and a new Labor Party emerged, the one that was much more effective in terms of competing for power. Gerhard Schroeder tried something very similar starting in the early 1980s, and although he won power eventually in the 1990s, he was incapable of cleaning house to the same extent as the Labor Party in the U.K. The institutional position of his counterparts within the party based at the *Länder* level gave them the opportunity to resist these kinds of reform efforts and left the party in a much more precarious position internally. I think what we are seeing are the effects of that in complete revolution within the Social Democratic Party today, where the Social Democrats, on the heels of a bruising election defeat of Merkel, are thrashing around a little bit. I am not sure where they are going.

So I do not want to leave you the impression that federalism was all happy talk and good things for Germany – it does have a cost. But it is an important part of the equation and I hope it at least sparks some questions on your part. Thank you very much.

DISCUSSION

SONYA MICHEL

Thank you very much for these three very rich presentations. So we have a spectrum here – from very strong executive/legislative

coalescence in Brazil to rather weak executive in Germany, and the United States somewhere in the middle I guess, if I am reading everything correctly. Anyway, I am sure you all have many questions, I have some too, but you have been listening for a long time, so I would like to open the floor.

Question

I have two questions. Dr. Fisher. Would you comment about executive orders and how they play into the separation of powers, and whether you think this is an “inherent” executive power constitutionally? And I would like to ask the other gentlemen whether there is an independent judiciary in Brazil or Germany, and if so, how that affects separation of powers? Thank you very much.

LOUIS FISHER

Executive orders – we could just use the word “proclamation,” since this represents unilateral presidential efforts to control not just the executive branch, but national policy. To the extent that executive orders control the agencies, there is a certain amount going for the practice. The president is, under the U.S. Constitution, obliged to see that the laws are faithfully carried out; he can give directions to agencies and departments. There are limits. Many times a president has tried to get legislation through Congress, was unable to, and as a substitute he tried get around that by an executive order, and that is a much dicier area. Now you are telling Congress that it is not part of the game anymore. That has happened a number of times.

There are some nice checks. One of the ones I liked very much: George Washington issued what we called a “trolley proclamation,” telling the people of the United States: “Do not take sides in the war between France and England.” Of course, people in the United States took sides, and as a result, the government began to prosecute people for violating the new Neutrality Proclamation. George

Washington got a lesson in democracy, because in order to prosecute people you had to go before jurors. And jurors (it does not matter whether they were farmers or carpenters) were asking the government, “What do you want done here? You want someone prosecuted for violating a proclamation? You think that is how to make criminal law? Maybe in England, maybe the king could issue a proclamation and nail it on a tree and have it be law, but not here. If you come here with a proclamation, we will just acquit. And you have nothing until you go to Congress and do what you should have done the first time. Get along.” And so they went to Congress and got a Neutrality Act. So there are some nice checks here.

Presidents can abuse every power, the Congress can abuse every power, and the courts can abuse every power. But when there is an abuse, you hope the system is vibrant enough to say, “Hey, you have just stepped over the line and you are going to pay a price for that.”

FERNANDO LIMONGI

I really do not study the judiciary, so I cannot comment on solid ground about its independence. But I would say yes, we have a very solid and independent judiciary, one that is playing its role and a bigger and bigger role in deciding several issues that involve politics. Whatever you may take as the indicators of an independent judiciary, I would say, we do have it – but I cannot say anything else.

SONYA MICHEL

Is it able to strike down laws?

FERNANDO LIMONGI

Yes. The Supreme Court even struck down a constitutional amendment, something that I think is unthinkable, right? They said that this constitutional amendment is against the Brazilian Constitution. It is true.

SONYA MICHEL

This sounds pretty independent to me.

JEFFREY ANDERSON

The German court system is a very active player within the system; the Federal Constitutional Court in particular. It retains the same kind of aura and prestige as our own Supreme Court does. It has the power to strike down laws and has done so. It has played a very important role in recent years on a number of issues; for example, when the German government sought to send German troops out of area in the 1990s to the Balkans, the court had to weigh on whether this was consistent with the Basic Law and it said it was.

It has played a very important role on European integration and was called on to determine whether treaty agreements like Maastricht and, most recently, Lisbon are consistent with the Basic Law. Even though much has been made of the extent to which European national court systems have become subservient to the European Union legal framework, the German Constitutional Court is probably the best example of judicial pushback. In its most recent decision, many think it has set non-negotiable barriers to further integration because of the way it is worded. It is taking care of German sovereignty, in other words. So yes, the court is an extremely important player and worth watching closely on these kinds of important issues, including this most recent decision on Greece.

There is a team of academics, and I have kind of a mental image of them just poised with their finger over the “SEND” button any time the parliament does anything related to Europe, because they immediately file a complaint with the Federal Constitutional Court. They tried to do the same on this 750 billion Euro rescue package. The Federal Constitutional Court, if I understand correctly, would not issue an injunction on the law, but they are going to consider it, which means in a couple or three months we will hear from them on this issue. And, you know, people are starting to hold their breath about what might come out as a result, because it

will definitely alter what the government can and cannot do.

Question

My question is for Fernando and for Jeff. The United States has a very limited notion of the state. The state is quite weak and we are quite happy with that understanding of the state, whereas Germany and, I believe, Brazil, have a much more positive image of the role that the state plays in the government and so forth. And I am just curious how Brazil and Germany reconcile notions of separation of powers and the notion of the strong state.

JEFFREY ANDERSON

It is a great question. Certainly in relation to or comparison to the United States, there is a greater comfort level in Germany with an active state. But if you then throw in other comparative benchmarks, it starts to look a lot more like our approach rather than some other approach. The best example would be France, to anchor the other end of the spectrum. The typical German's approach to the state is very much conditioned by two things: one, the negative experiences of the war years, but also the kind of redefinition of the state's role in the post-war period.

You have to think of the state in conjunction with a larger economic philosophy, the so-called "social-market economy," where the emphasis is still very much on the market and on what the market can do, but the state has the role of compensating the losers in this difficult market struggle. So that has permitted the state, in the eyes of citizens and elites, to do much more by way of rescue of industry and of regulation and the like than one finds here in the United States, but it still falls well short of what is considered normal or fair in Paris or other parts of the continent.

So in this struggle over the rescue package, for example, the Germans have been very re-

luctant to sign checks and to allow anything that would undermine what they see as their basic economic fundamentals, which revolve around price stability and protection of the Euro. The state, in other words, in these areas, needs to be kept as far away as possible. And it is not clear they are winning this battle—events have kind of overtaken this philosophy. But if you ask them what their preferred state is, it would be well short of what Sarkozy and others would like to see.

FERNANDO LIMONGI

I think that we in Brazil also have this notion or acceptance of an active state, a strong state. And this has historical reasons, in the sense that the state played an important role in promoting development. There is sort of a consensus that without state intervention Brazil would remain an underdeveloped and poor country, and so the state must play a role to bring Brazilian society out of underdevelopment.

But more recently, I think, this has changed, and the idea that development has to be promoted or depends on state intervention has weaker acceptance now. But I would say that with regard to the struggle against poverty and against injustice, then I think that we Brazilians will still keep this notion that the state *has* to play a role, and I think that this is the basic political sentiment in Brazil. I think that the state changed a lot: changed its interaction with society and its relation with society since the democratization, beginning with Collor government specifically, then with Cardoso, and now with Lula. Despite his being a leftist president, he is not pursuing an interventionist policy the way we used to have. But, again, I would reinforce that with regard to poverty and the struggle against poverty the state keeps its role as a fundamental and active party.

LOUIS FISHER

I would agree that the United States does not have the same notion of the state as we see in other countries, and yet it occasionally raises its head. One time it did it was in the *Curtiss-Wright* case in 1936. This was a case in which Justice George Sutherland could have easily decided on straight grounds that Congress can delegate certain amount of discretion to the president in foreign affairs. He went beyond that with *dicta*, making this basic notion between internal affairs and external affairs. When it comes to external affairs he had the president exercising exclusive unchecked powers of sovereignty, very much like in a state system. I think we saw after 9/11, and it was not the only time we have done this, where this term “national security” or “national interests” arises. If you want to push national security and national interests a little bit, suddenly you are at the place where the nation is everything and the individual is nothing. So we flirt with it quite a bit.

Question

Thank you for three excellent presentations. I wanted to address all three panelists and re-frame the debate from state and separation of powers into the civil law systems in continental Europe versus the common law system in Britain and the United States, and to ask the three of you please to address that as we look for models for Russia and Ukraine.

LOUIS FISHER

We always talk about civil law and common law as though they are really distinct categories. I do not think they are. What is our system here? We start off with this statute as law, and then we have judges saying they thought this statute was bad, because it will mean this. And if it is a statute you are talking about, the Congress can always come back and say, “We mean it to say A, Supreme Court, we did not mean it to say B; and now we pass another statute, and we will say A again.” There is nothing

wrong with that. Everyone says the Supreme Court has the last word, but everyone has to recognize that if this is a statutory issue and the court interprets it, Congress has every right to come back and say, “You got it wrong.” We did it recently with the Lilly Ledbetter bill, where the Supreme Court interpreted a certain statute one way, and Congress had to pass legislation to better protect the rights of working women. That system is in effect all the time.

Of course, in Germany you have your *Länder*, but I think a lot of people forget that in the United States we do not have one constitution, we have 51 constitutions. If it is not a federal issue, it is not a national issue, there is no reason in the world why states cannot adopt a totally different system under their constitution. So if the U.S. Supreme Court says to the states that there is nothing wrong with giving funds to religious schools because there is nothing in the U.S. Constitution about education, then state constitutions can say, “No public funds shall be used for private or religious schools.” So even if the Supreme Court says it is OK, states can say it is not OK in this state, and that is part of a very vibrant system. Unfortunately, the Supreme Court in recent decades has more and more, every time they see 6 states going in one direction and then it gets up to 18, suddenly the Supreme Court will say that all 50 have to agree. So the diversity we used to have in our federalism is getting eaten away by these Supreme Court decisions, where they go for something they call a “national consensus.” Whenever they see a trend started they will say all 50 states have to accept it. That is unfortunate.

FERNANDO LIMONGI

It became fashionable among institutional economists to use this distinction as a factor of development, and to say that countries that have common law are the ones that develop and are successful, and the ones that do not tend to fail. I would say that I found no foundation for this argument on theoretical terms or on

empirical terms. It is just something exogenous that they found. And as economists are crazy to find some variable that is exogenous, they found this one and they made a carnival out of it. There is no reason in the world to make this huge distinction between the two systems and say that everything else follows from there. That is all I know about it. It does not seem to be that important, but, you know, when you come to one country and you have one position and then try to move to another one, this seems to me to be a wrong thing to do; so it is better to use whatever you have and improve whatever you have. You can always improve whatever you have.

JEFFREY ANDERSON

It is a great question, though I am not well equipped at all to answer it on specifics. I will say that to the extent there is debate or discussion about law or the role of law in society and contemporary Germany it is very much about rule of law, *Rechtsstaat*, and this comes from an understanding of one of the many things that were deeply fundamentally flawed about the Nazi regimes, that it was not the *Rechtsstaat*, it was the antithesis of *Rechtsstaat* – *Unrechtsstaat*. This debate has broken out again around the 20th anniversary of the fall of the Wall, where discussions of the GDR regime as an *Unrechtsstaat* has elicited howls of anger from some East Germans, who felt that this was in some sense tarring their entire life with the term that really ought to be reserved for just a Nazi regime.

And I will say, as Germans look East and see contemporary Russia at times struggling mightily with law and democracy, when they see entrepreneurs arrested for no apparent reason other than that they own things that someone higher up wants to have, they wonder whether there is such a thing as rule of law in Russia regardless of whether it is on paper a democracy or not. So I think that is really where the debate is right now, to the extent there is

one, about the role of law in a contemporary society: is the state bound by its own laws?

Question

In the political history of Ukraine, there are two examples of a very peculiar coalition. I mean especially with the Communist Party, because their program platform was “no coalitions at all,” but now they are taking part in two coalitions.

Is there a political reference or may be a constitutional framework for the possibilities to create a coalition? The former president of Ukraine was very deeply critical of a possible coalition of two parties. This even created a legal precedent – dissolving the parliament because of a possible coalition between two parties that had promised not to be in a coalition. That is a very interesting thing in the Brazilian example. You have stressed a great role of coalitions supporting the president. Who are the members, which are the members of these coalitions? I have the same question about coalitions in Germany.

Question

My question to all three of you gentleman is: in order for government to function, it must have quite stable services and institutions that allow the citizens to interact in commerce and other activities that provide a stable environment. And these institutions have to survive beyond the transfer of power between administrations or political parties. Could you comment on the lessons learned in each of the three cases on the genesis and evolution of stable institutions like that and how those might set examples for Ukraine and Russia?

SONYA MICHEL

As you answer, these will be the last concluding comments.

FERNANDO LIMONGI

What type of institutions: institutions that grant commerce or transitions between presidents?

Question

An example of an institution might be the regulatory practice for the licensing of businesses or utilities, or other things. And what I am getting at here is the ability of such a regulatory or legal framework, bureaucratic framework, to remain a stable provider of services to the citizens and business across transfers of power, so that it does not turn everything on end when you have one administration taking over power from another. And I think that is something we generally see, but where do you see it in terms of evolution to a stable operating government, where the change of power does not lead to having to reinvent the wheel all over again.

JEFFREY ANDERSON

I will take a stab at this question first. I think at least historically I would be tempted to say it turns on the capacity of the system and the rules of the game to promote the formation of a broad consensus about fundamentals among the major parties competing for power. That is certainly what you see throughout Western Europe in the aftermath of the end of the war. You will find, in case of Germany, that the left accommodated itself to the rules of the capitalist game over the course of the 1950s. If you compare the platform of the Social Democrats in 1950 to its platform in 1960, you would not recognize it. They essentially agreed to play by capitalist or market-oriented rules, with a twist obviously. They are more interested in redistribution and other things, higher taxation and so on, but the basic rules of the game such as you are describing are going to be left in place and that is more or less understood by the competitors and it is certainly understood at least implicitly by voters.

In the U.K. it is more the right accommodating to a status division established by Labor

in the immediate aftermath. Where those cross-party consensuses emerge, you have the makings for the kind of stable transitions of power that we like to see in democracy. It has to do with agreeing on the fundamentals and still also understanding that there will be differences, otherwise what would the parties be competing about? And this, I think, leads to the other point that was raised about coalitions. Certainly in the German case there is nothing written into the German Constitution that mandates coalitions; it is simply the outcome of elections under the prevailing rules of the game.

If no one party can garner a majority of the seats, by definition they are going to have to form a coalition if they are going to govern. And I think for many, many years that worked effectively, because this consensus was in place. The problem today is that this consensus is now being contested; there is no agreement really about what constitutes an accepted set of principles with respect to the economy or with respect to poverty. If you take the European Union into consideration, there is a question about where that is going. So coalition government then almost becomes a recipe for cynicism, because then it is all about power politics.

A classic case is in the recent German election, where Angela Merkel is, for lack of an alternative, forced to turn to the Free Democrats. The price of that move was a pledge to cut taxes. About the last thing she wanted to do in the set of economic conditions she faced was to turn around and cut taxes with a massive budget deficit, but she had to do that. And that, needless to say, caused many voters to think, "Where is principle here, if it is all about getting power, where are the principles that you campaigned on for the last few years?" Coalition government can thus become a recipe for growing cynicism and alienation. That is a problem, and it is hard to see how one is to get around it given the nature of the game and the way it is being played.

FERNANDO LIMONGI

The problem is that democracy is a very strange system, in which whoever loses an election accepts the result. And this is the tricky thing: why would I accept losing election? Moreover, if I am the government and I lose an election, why would I step down, leave the palace, and let the other people come in? This is the fundamental question of political science: to understand why this happens in some countries and does not happen in other countries. The first time a country experiences a transition of political parties, it is always a very tense and a very demanding situation. We know more or less what conditions we may observe that lead to this kind of agreement and which conditions do not lead to it. It all depends on the stakes, what is the size of the stakes, and what it means to lose and what to expect in the next election. Do I stay on the sidelines and campaign, and have a reasonable expectation that I will be able to return to power? If I expect my adversary to deny me that, then I may prefer to use force or to try a coup, anything like that.

In fact, this is related to coalition formation, because coalition formation is when people that come from different sides have to agree to govern together. It has political advantages and political disadvantages. You may lose votes because you joined a coalition or you formed a coalition. The idea is that, in general, parliamentary systems are systems in which the government's existence depends on support of the majority. They have built-in mechanisms that will force coalition formation, otherwise it will not work; there will be no formation of a government. It may happen that no government is formed, and no government may be formed. And then you will have to have successive elections; the system may not endure that.

What makes you enter a coalition is this kind of calculation: Do you prefer to wait on the sidelines or do you prefer to be part of the government? In general, presidential systems are farthest away from coalition formation; parties will not want to enter a coalition

because the president is too powerful and the president will not want to share power. This was maintained as a dogma in political science against the practical world. We, Brazilians, would think presidents would not make coalitions, but presidents would always form a coalition in a multi-party system – and they do form them. And we would see them forming – and then say they do not form.

So what kind of crazy set of mind do we have? We know that they form. The idea is always that it is about the pursuit of pork spending or other changes for immediate advantage. But I do not think so, because to be a member of a government has its advantages and disadvantages. You become responsible for some portfolios, for some ministries, and you have to implement them. And if you do not, then you are punished by voters. So the calculus is thus: do you want to join or not, given what you expect to happen?

If you look at it formally, usually what happens is that the president will form a government and will ask some parties to form the government with him, but the second largest party will not join, because this is the party that has an expectation of winning the next election. But the smaller parties have an incentive to participate, because they have no other life other than being a member of the government. If they wait at the sidelines, they know that the second largest party will do better in the next presidential election than them. The idea that too many parties are bad for coalition formation is another mistake that we used to have. It is better to have lots of parties, and lots of small parties, because they have much more incentive to join a coalition.

To conclude, there are some distributions of forces in which everybody expects to gain in the next election, and then coalitions cannot be formed. Then you may have conflict. But when there is a more certain distribution, in which there are parties that are expected to remain a minority and that know that there are small chances of gaining the prize, then those parties

will accept invitations to form a government. This does not mean that it is a harsh trade, because if they enter the government, they have to perform; otherwise they will disappear. So this emerges pragmatically.

SONYA MICHEL

And the question of stability, the question this gentleman asked about the continuity of one administration to the other to create a stable climate?

FERNANDO LIMONGI

I think that the issues are related, because what you gain by not cooperating depends on the distribution of forces and the expectations of what will be your role the next time around. But after some elections, the cost of the equilibrium emerges, in which parties respect the transition – then this goes on forever. It depends on certain conditions, but the main point is to get the first transition, the first power transition in terms of Adams stepping down and Jefferson coming in. This is the crucial moment, in which one party hands power over to the other. This is the tough decision, this is the moment in which things change qualitatively.

LOUIS FISHER

We do not have coalitions in the United States as you do in Brazil, but we do have a pattern over years of two parties working jointly. To do that, you need enough moderates in each party, and I think the Democratic Party has its middle, right, and left, and the Republican Party has been losing most of its moderates. I thought it was sort of amusing, but I do not think it was

amusing to Scott Brown after his election in Massachusetts for the Senate. He was considered a hero to the Tea Party and within a very short time he did what I think is a reasonable thing for a senator from Massachusetts to do: he voted with four other Republicans on a jobs bill. And he was immediately called Judas and Benedict Arnold. Well, no. He was someone who got elected in Massachusetts and would like to be re-elected from Massachusetts. But you know, the Republican Party does not have a lot of moderates. If you act as a moderate, you lose your standing. We have lost something very important in the United States, where people from both parties can agree to cooperate on a bill.

On stability of the environment, Congress has had a pattern of passing rather broad statutes in order to get a majority. We have very broad language, and of course you depend on executive agencies fleshing it out with rule-making. It is very true that every time a new administration comes in, they want to rewrite most of the rules from the earlier administration. So you necessarily have some instability. Every new administration will bring a different team of writers for new rules. And the courts get involved on that, too. They defer a fair amount to the agencies, but the courts are always in the rule-making process as well.

SONYA MICHEL

Thank you very much for all your questions, and thank you to the panelists for your wonderful presentations and laying the groundwork for the next panel, which I think will take up many of the same issues.

PANEL II

Separation of Powers in Comparative Perspective: Russia and Ukraine

WILLIAM POMERANZ

I want to thank Sonya Michel and our speakers on the first panel for their excellent presentations and for laying the groundwork for our discussion on separation of powers in Russia and Ukraine. As noted, we have three speakers on this panel and we are going in the order that they appear on the program. I will briefly introduce them. Oleg Rumyantsev is president of the Moscow-based NGO Foundation for Constitutional Reforms. He served in the Russian parliament from 1990 to 1993, and he was executive secretary of Russia's Constitutional Commission. Our second speaker will be Oleksandr Zadorozhnii, who is a professor of international law and the head of the International Law Department at the Institute of International Relations at the Taras Shevchenko National University in Kyiv. He previously served in the Supreme Rada, and was the permanent representative of the President of Ukraine to the Supreme Rada from 2002 to 2005. Our third speaker today will be Maria Popova, who is an assistant professor of political science and an associate for Developing Areas Studies at McGill University. Her research focus is the state of the rule of law in the post-communist regimes, including Russia and Ukraine. She has published widely, and her most recent article, "Be Careful What You Wished For: A Cautionary Tale of Post-Communist Tradition in Parliament," appeared in *Demokratizatsiya*. So we have a very distinguished panel and we will begin with Oleg Rumyantsev.

OLEG RUMYANTSEV

It is very refreshing to have this conference. I mentioned to my colleague and friend Will Pomeranz that now we are moving eastward from the first panel, with its cast of Brazil, the United States, and Germany. In the Russian Federation we still have, I think, a fight over our civilization's self-image. Among the former Soviet Union republics and current CIS members, some, like Azerbaijan or Turkmenistan, have elected to have a sort of presidential monarchy model. Some, like our colleague from Ukraine will definitely say, have decided to implement constitutional reforms and move towards a government based on parliament.

Where is the Russian Federation on this spectrum? I really do not know its coordinates. Some 20 years ago, when we started drafting the Russian Constitution, we discussed the French model, for instance. Now quite often we are looking at the Kazakhstan experience with the "enlightened presidential monarch" Nazarbayev taking steps towards making the government more responsive to the parliament, yet leaving himself above the fray. So there is even a shift between the comparisons we made in the early 1990s when we started reforms and the current day.

I mentioned 20 years ago probably by chance, but last Saturday we had held a major conference devoted to 20th anniversary of the First Congress of People's Deputies. If you remember, it was that congress that adopted the Russian declaration of state sovereignty, formed the Constitutional Commission, decided in favor of large-scale constitutional reform in the Russian Federation, abol-

ished Article 6 of the Soviet Constitution, and elected Boris Yeltsin as Chairman of the Supreme Soviet, who later became Russia's first president. That conference was extremely symbolic for our society, because for the first time since 1993, when the parliament was split severely, just like the society, we managed to get together both the democratic proponents and their opposition this Saturday.

I think that is a very important symbol for the Russian Federation, because the history of what has happened in Russia has been silenced for a long time. Today we will talk about the doctrinal things like separation of powers and checks and balances. But during 1990-93, discussion of constitutional reform was rich, because the various doctrines came from the society—not only from libraries, or from U.S. experiences, but from the wide civic movement of ideas concerning constitutional drafting. The Russian Federation constitutional reform process was enriched by new formulas which we proposed, and also by ideas on the formation of government, our vision for the future of the Russian Federation.

Unfortunately, the events of 1993 have put a severe stamp on what has happened later with our Russian Constitution. The constitutional draft was changed drastically. It emerged as a merger between the 1990 draft written by the Constitutional Commission of the parliament, chaired by Boris Yeltsin at that time, and the subsequent 1993 presidential draft, supported by then-president Boris Yeltsin, which established the domination of the presidency and the executive over the other branches of power.

What we see today, and what we have seen in the last 17 years, is actually the big debate not on how to make more perfect and more efficient this division of power (how to use different checks and balances), but whether this 18th century concept is at all suitable for Russia with all its early bourgeois revolutions against tyranny and against monarchy. Right now in the Russian Federation we are concentrating on development, which needs the

efficient management of complex social systems, and this “management” requires more authoritarian features.

Interestingly enough, with the end of this “passionary” burst, which was in the early 1990s, the system has rejected the remnants of this “passionarism.” I am quoting our famous Russian geographer Lev Gumilev. Those who study Russia know his theories about the role of “passionarism” in the development of social and ethnic systems. The system immediately rejected these “passionarism” ideals and moved into the stabilization phase. This stabilization phase, unfortunately, is linked with the domination of the authorities over any civic movement and any civic initiatives. The citizens themselves have forgotten that under Article 3 of the Russian Federation Constitution every citizen is also the bearer of the people's sovereignty. That has been forgotten, and stabilization meant that somehow the monolith political subject, the power itself, should rise above the society and above the other branches of power, both the legislative and the judiciary.

The situation which we dreamed about was that the constitutional process would be a process of freedom. The constitutional process is the process of everyday interaction between the branches of power, where each of the branches is not just defending the borders of its competences, but also acting on the territory of the other branch, of the other body. The creation of a competition within power would accomplish those balances which we were dreaming about. Instead, the domination of the executive, somebody already mentioned here the “vertical of power,” has brought about a situation where those competences delegated in the Russian Constitution to the executive and to the president have been enlarged every year. In the 1990s this was done through the decisions and rulings of the Constitutional Court; starting from 2000 it was done through federal laws.

Those huge powers that Yeltsin put into the 1993 Russian Constitution were later volun-

tarily further enlarged by the Constitutional Court and later by both chambers of the Russian parliament. I will not list here all of these extra powers, but just mention some: the president now forms the Accounting Chamber, nominating its candidates and its chairman. But this power was clearly delegated to the parliament (the lower chamber names one half and the upper chamber names the other half). This means that the accounts, control over budget expenditures, and how state money is allocated and used are all overseen by people who are dependent on the president and on the executive.

The parliament has several times surrendered part of its authority to the executive. For instance, it rejected the draft law on parliamentary investigations and surrendered its control over the Reserve Fund, which is formed by the government outside the budget. This last move helped the government in 2009–2010 to use the enormous resources of the Reserve Fund without any parliamentary control. We know of examples when the United States Congress also delegated some of its authority to the executive, but not on that scale in the budgetary sphere, not at that scale concerning control of the budget expenditures, and not at that scale on the nomination of candidates to high posts.

The statistics are also astonishing concerning the interesting mechanism of vetoes of federal laws approved by the parliament and overruling these presidential vetoes: in 1996–1999, the later years of Boris Yeltsin, 42 percent of the laws approved by the Duma went through this procedure of veto and veto override. This shows that under Yeltsin, with all the faults of his rule, there was still cooperation, even competition, in the legislative process between parliament and the president. The upper house, the Federation Council, has the right to veto and the president has the right to veto, and the lower house, the Duma, can override it. By 2008, the percentage of laws passed through a veto override fell to 0.6 percent. You can see the difference. The unity, the harmony in

between the chambers of the parliament and the president reached the state of perfection. But 0.6 percent is still something that “needs to be improved,” so we probably will see the situation of 0.0 percent. I think that one of the causes of this shift is the political party structure of the parliament that we now have.

Everybody has been watching the Kyrgyz revolution recently, where people were shooting and fighting on the streets. But the constitutionalists looked at the draft of the new Kyrgyz Constitution. There are some interesting things, by the way. For instance, the norm or clause that the parliamentary majority party cannot have more than a certain share—for instance, if the parliament is 120 seats, no more than 65 seats can be occupied by the party of majority—is an interesting proposal, because we in Russia are now moving with such a high speed towards an absolute domination, uncontrolled domination, of the United Russia Party that we may start learning from the Kyrgyz experience. I must be precise: the Kyrgyz constitutional experience.

I think that we also should say a word about the strange concept of the hidden presidential powers. The concept probably has been stolen from the U.S. Supreme Court decision in the Nixon case, when the protection of the information has been acknowledged as the “natural constitutional right” or “privilege” of the executive. We in the Russian Federation have a flourishing of this concept. Some of you should definitely study this: how the U.S. Supreme Court decisions have affected the Russian Federation and its doctrinal development, because the competences given to the president in our constitution have nothing to do with his real competences. According to the famous clause in Article 80, part 2, the president is the source of internal and external policy. It is nearly the same wording of that infamous Article 6 of the Soviet Union Constitution, the RSFSR Constitution, on the ruling role of the Communist Party. And if we look at the Constitutional Court’s rulings in 1996, 1998,

2002, in all cases when some new competence of the president sprung from the commanding heights, the Constitutional Court has always approved these new competences, defending them with the phrase that the “president decides the internal and the external policies of the Russian Federation.”

As long as we are talking about the Constitutional Court, I think it is important to mention that this is not the same Constitutional Court that made wise and strong decisions in 1990 on Yeltsin’s edict on the Communist Party, or in 1992 against the case of Tatarstan referendum, or in 1993 in the case of President Yeltsin’s edict 1400 that dismantled the parliament. The Constitutional Court unfortunately has lost sight of its obligation to be the highest judicial body and to protect the constitutional order in the Russian Federation. We only have subjective reasons behind this change. The transformation of Chairman Valery Zorkin into a very conservative figure, the movement of the Constitutional Court to St. Petersburg, and its material connection to all these estates, buildings, dachas, etc.—this clearly shows that something should be done probably in the Russian Constitution itself to protect the Constitutional Court from moves by the executive to influence or control the Court.

Last year when I had a chance to speak at a conference here, I talked about the devolution of the principle of people’s sovereignty—a devolution that we clearly saw under George Bush here and, as we just analyzed, that we see every year in the Russian Federation. We do not know whether a change in course will come now that the Russian Federation needs to address its lagging economic and political development.

Right now a lot of projects, including the Russian Silicon Valley in Skolkovo, are being announced. Yet I analyzed with great interest the experience of Silicon Valleys all over the world, and those Silicon Valleys with liberal approaches and with freedoms of daily behavior (which is very important) were the ones that were successful. Skolkovo Valley, for

instance, may be set up under a special legal regime free of many Russian Federation laws. But when innovative products come out of this region, they may vanish, because of the practices outside of this valley, where these Russian laws are still in action.

The realization that the Russian Constitution itself is now a barrier to political and economic development should bring the Russian Federation to an understanding that constitutional reform should be continued. I think that this constitutional reform should not be as artificial as it was a year ago when a bunch of amendments were proposed by President Medvedev. There were some seemingly important amendments, like the obligation of the government to report annually to the Duma. Yet we already have a 1996 ruling of the Constitutional Court, which clearly states that this report is a “natural obligation” of the executive branch. Still, this was made an amendment, seemingly increasing the parliamentary control over the government.

Instead, the term of parliament deputies was increased from 4 to 5 years and the term of the president increased from 5 to 6 years. This in spite of the fact that the Russian Constitution forbids changing laws which decrease the people’s constitutional rights—and prolonging terms definitely diminishes the people’s constitutional right to control the authority, because elections are the only remaining instrument of control left to the citizens of the Russian Federation.

I would like to mention those changes to the Russian Constitution that I think are needed. First of all, we need to make very strong amendments to the political and electoral system. The electoral system is being diluted every year and there should be clear thresholds in the composition of the parliament. For example, half of the parliament should be elected by majority and half by party list; the party list threshold to receive seats in the Duma should be 5 percent; and there should be some upper limit to the seats awarded to the majority

party, etc. Something should be done about the role of the parties, because the Russian Constitution mentions a multi-party system, but is totally silent on the constitutional status of political parties. Without that I think there will never be checks from the opposition over how we are governed. For instance, the huge and uncontrolled expenditures of the Reserve Fund and the state budget during the crisis have demonstrated that nobody can report, or demand a report, on how transparently or non-transparently this money was spent. I think it would be the duty of the opposition to report on such things, but the opposition has absolutely no constitutional guarantees. This is the first block.

The second block I think should arise from the institutions of civil society, which are natural checks on authority. I already mentioned political parties, but in terms of education and other issues like self-government, there needs to be guarantees for such civic institutions in the Russian Constitution. The third area is to clarify the legal role of the president. If we already have a duumvirate, as they call it, between the president and the prime minister, then we should have in the Russian Constitution a definition of the interrelations between them. I think it may be a healthy source of internal competition within the executive, controlling each other, and this probably requires consideration of possible amendments. The last is an area I already mentioned: to clarify the role of the Constitutional Court and protect it constitutionally from the influence of the executive.

When we are thinking about these doctrinal things in the Russian Federation, we should never forget that these are very practical issues for us. That is why we will definitely read and study the results and papers of your conference. Thank you very much.

OLEKSANDR ZADOROZHNI

Thank you very much. Dear colleagues, let me express deep gratitude to the organizers of this conference. A year ago, even less than a

year ago, we were discussing the possibility of holding such a conference in Kyiv, and I am really happy to participate. As usual, we are trying to swiftly catch up with Russia, and, as I can see, we are almost moving.

I am not only a theoretician, but a practitioner, and I will tell you an anecdote. In 2002, when I was nominated by the president to be the presidential representative to the parliament, the first bill I was responsible for was introduced by the president. At first, I was very, very resolute to do everything very quickly, because the president had stressed that the law was very urgent. At that time, we even had a decision of the Constitutional Court, which read that if the president asked for an urgent bill, the parliament should react. The first reading went smoothly, receiving 236 votes, as I recall, with several not voting. Two weeks later, I was again urging the process, and there was a second reading without amendments. I then delivered the package myself to the presidential secretariat. Three days later the president vetoed the act. After that I finished my monograph about the presidential veto, and I understood that I understood nothing at all. I am brooding to this day over what happened, and the answer is: this is politics.

With regards to conceptual observations concerning the balance of powers in Ukraine, the strange thing is that the idea of the rule of law (*l'état de droit*, *Rechtsstaat*) is actually quite strong within Ukraine's circles concerned with constitutional matters. Despite their pragmatic legal and constitutional nihilism, the engaged elites are prone to regard the state in rather Kelsenian terms. It is believed that the state ought to guarantee rights and freedoms to each individual and its ultimate purpose consists in implementing law. It is seldom said that the state is here to do something, and that the law as well as the constitution itself are the means, though more preferable than extra-legal means, to do things.

However, I believe the state should live, not just function. The premise that the state should

be doing something, to be moving in some direction, leads to the conclusion that the balance of powers should never be perfect. For, in essence, such a balance is nothing but a way of preventing the state from doing anything. It is supposed that within a multiplicity of particular interests represented within different parts of a state, there should always be an overriding national interest with a way to superimpose itself over the others. Hence there should be a leading branch completely responsible for what is being done within the state at each moment of time. There should be a place for the buck to stop. From foreign experience, as our previous colleagues have shown, this can be done in two ways: either through the emancipated but controlled executive branch in the presidential model like that of the United States, or through a parliament-dependent executive in the parliamentary model like that of Germany. Hence the utmost responsibility lies either with the popularly elected president or with the most influential power within the popularly elected parliament.

The trouble is that in the Ukrainian model the constitution does not contain an *a priori* answer as to who is running the show, at least in strictly legal terms. On the one hand, the Ukrainian Constitution contains a unique coalition mechanism. I stress—*unique*, because the formation of a coalition of factions in the Verkhovna Rada, i.e. the Ukrainian parliament, is an important institutional and legal matter, not just a question of political arrangements. The existence or non-existence of a coalition is connected with important legal consequences. It is for an existent coalition to name a candidate prime minister. If there is no coalition for a month (I stress—for a month's term. Consider that the U.K. was agitated when there was no prime minister for 5 days: it was a great stress for the nation), then the president is entitled to dissolve the parliament. I stress—*entitled*, as it is written in the draft which we passed in 2004 and which was enacted into law.

On the other hand, some things prevent the coalition from being the ultimate focus of accountability. The most important such figure is the president of Ukraine. In Ukraine, the president is popularly elected, having thus his own base of legitimacy. And the president is also a stakeholder in the process of forming the cabinet, which looks like this: the coalitions or factions in the Verkhovna Rada chooses a potential prime minister and proposes him or her to the president. The president then proposes a candidate back to the parliament as a whole. Believe me, as a member of the Constitutional Commission in 2002 and 2003, we spent two weeks on this particular very short article. Everybody was brooding, "But if the president fails to introduce the candidate prime minister to the parliament, what will happen?" At that time we did not answer the question, and we still have no answer in legal terms. However, the constitutional history of Ukraine and its political history give us an answer: the president can effectively block the process of nomination of the prime minister by delaying the introduction of a candidate and demanding various political concessions.

The third step in establishing the cabinet is that the parliament appoints the candidate or refuses to do so. And the fourth step is that the prime minister proposes members of the cabinet to be in turn confirmed by the parliament, except for the minister of defense and minister for foreign affairs, who are to be proposed by the president.

Obviously it is impossible to set up a working cabinet without persuading the president in some way. There is more to this. Under the Ukrainian Constitution, the president is vested with a number of executive powers of his own. Thus, it is for him to propose a candidate for the Chief of the Security Service, Chief of the Central Bank of Ukraine, and his appointment powers are quite broad especially in the area of national security and defense. Moreover, it is for the president to appoint chiefs of the regional bodies of executive

power, though nominated by the cabinet, to say nothing of the president's power to suspend the regulations of the cabinet, which the former president of Ukraine used almost weekly.

Today, the question of the balance of powers or separation of powers can by and large be reduced to containing the executive. It rarely arises in relation to, say, the judiciary. In this respect, Ukraine is an example of a perfect balance of powers. The Ukrainian executive is divided within. The cabinet, which is mostly concerned with the economic and social situation in the country, needs to negotiate any steps it deems necessary to take. Today there is a unique situation, when it is possible to say who is in charge, as the legislative and executive branches are controlled by a single political party.

I will not be analyzing the drafts of the constitution, there are 12 published drafts and, please believe me, a number of unpublished ones. My situation is unique, because for 12 years I have been dealing practically with the making of the constitution. I was elected to the parliament in 1998 for the first time, and in 1999 President Kuchma called a national referendum. The idea was to lessen the power of the legislature, to decrease the number of its members from 450 to 300. The referendum was held in 2000. As concerns the constitutional changes, as a chief of the parliamentary committee on legal policy, I was responsible for analyzing the constitutional changes proposed and efficiently repelled by the parliament. Starting from 2000, we were, in practical terms, in a constitutional reformation. We succeeded in 2004 and changed the constitution towards empowering the parliament, as my colleague from Russia has stressed. As a counselor to the prime minister in 2006, after my parliamentary terms, I spent two years in a cell preparing a draft constitution, which was discussed by two major political parties. And in a two-year period the discussion was stopped and forgotten.

An interesting trait in the recent constitution drafting in Ukraine is a shift of accent in

the very concept of balancing power. The classical model is conceptualized around the division of state powers. Hence it is the contradiction of power branches that lies in the center, and it is the branches that are to counterbalance each other. The legislative/executive divide is of the highest importance. The shift I am talking about is not always visible from the presented drafts, but it can be deduced from the general discourse produced in the process. For instance, it can be evidenced by talks as to the necessity for the constitution to guarantee the rights of the parliamentary opposition. The shift consists in an attempt to substitute the balance of state powers with a balance of political powers institutionalized as the largest political parties or blocks of them. Hence the coalition/opposition divide would, according to this logic, take the place of the legislative/executive divide. This approach has strengths and weaknesses of its own.

The strong point is its realism. The classical branches of state power, the question of their relevance nowadays omitted, have no particular interests of their own, and they represent those fed by the most influential political actors. If two branches are dominated by a single party, like it is now in Ukraine or in Russia, to a certain extent there is not much sense in their balance. The weak point is that political actors are much less stable than a formal division of state power. Political parties are not guaranteed against disintegration, interpersonal conflict, and other contingencies of political life. Thus, it would be risky to model a constitution based upon the current or projected political configuration.

In conclusion, the problem of Ukraine's constitutional drafting or constitutional process is not the balance of powers, which is implemented in the present Ukrainian Constitution perfectly well. However, no development can take place in a situation of a perfect equilibrium, so the task might be to nudge it into some direction. The concept of responsibility should be returned to the politi-

cal discourse, and it should be made clear that the division of power and the system of checks and balances naturally adheres to this concept. When too many are responsible, nobody is. Thank you very much.

MARIA POPOVA

First of all, thank you to Will Pomeranz for inviting me to this conference and it is an honor for me to share the stage with these two gentlemen, who have extensive practical experience. My experience is purely analytical. So today I will talk about the separation of powers between the political branches and the judicial branch in Russia and Ukraine. I will focus on this comparison between the experience that Russia and Ukraine have had over the last 20 years. The questions that I will discuss today are: how isolated is the judiciary, institutionally speaking, from the executive and the legislature? And, does the institutional separation on paper actually translate into decisional independence for judges? Ultimately, we are more interested in that than in any separation of powers on paper. We are interested in seeing whether this functions in practice, whether that translates into judges who can reliably constrain political incumbents through the decisions that they adopt, or whether politicians can effectively pressure judges into delivering rulings in line with their own preferences. The rule of law requires equality of responsibility and protection under the law, and an independent judiciary is central to providing this.

Let me start with the separation of powers on paper. How insulated is the judiciary in the two countries? Well, both countries have actually adopted extensive reforms. They have significantly reformed the judiciary inherited from the Soviet period. Both countries have constitutional and legal provisions for judicial independence, so on paper the guarantee for judicial independence is there both in the constitutions and in additional legislation in both countries.

In terms of institutional insulation of the judiciary from the other branches, we want to know who controls judicial careers. The judiciary is more insulated if judicial careers are controlled by the judiciary itself, rather than by the political branches of government. In both countries there have been extensive reforms adopted in this regard: judges have life tenure; there are objective appointment criteria in legislation; in both countries the organizations that have control over judicial careers (meaning the organizations that control the promotion, demotion, and dismissal of judges) are organizations staffed mostly by judges; and both countries use the qualification commissions system—and the qualification commissions are dominated by judges. So the judiciary is in charge of its own careers.

In terms of the judicial budget, there have also been quite a few institutional reforms, whose aim has been to give control to the judiciary over its own budget. In both countries the judiciary participates in the drafting of its own budget and then in the administration of it. Though, however, I have to point out that Russia has actually gone further in this regard than Ukraine, because the Judicial Department that controls the appropriation of the judicial budget is attached to the Supreme Court. By contrast, in Ukraine the Ministry of Justice was in charge of the judicial budgets until 2002, and after 2002 the State Court Administration has taken over, but the State Court Administration is part of the executive rather than the judiciary. So Ukraine has not gone as far on paper in terms of providing judicial insulation.

I should also point out that in terms of judicial careers, again, Russia has probably, on paper, gone further, because in Ukraine the ultimate arbiter of decisions pertaining to the dismissal or disciplining of judges is the Supreme Council of Justice, which is not a predominantly judicial organ. The majority of its members are political appointees rather than judicial appointees. In Russia the ultimate ar-

biter is the Highest Qualification Commission, which is a purely internal judicial organ.

However, despite these structural reforms, there are informal practices in both countries that reduce the meaningfulness of these institutional reforms that have been adopted. And in both countries there are informal mechanisms through which extra-judicial actors can interfere in judicial affairs. I will briefly discuss some of them. One of them is the widespread and really quite acceptable practice of *ex parte* communication. There just is not as much of a stigma in either country connected to a situation in which a judge is directly called to discuss the specifics of a given case, often times by politicians or by parties to the case. *Ex parte* communication is a very important conduit for the informal application of pressure on judges.

There is also a high level of internal dependence within the judiciary, and this is not a uniquely Russian or Ukrainian phenomenon. It probably goes to the civil/common law distinction that we discussed earlier, where the internal dependence simply refers to the fact that lower court judges are much more constrained in their decision-making by higher courts and by the leadership of the judiciary, to the point where reversals of judicial decisions at the lower courts are not seen as a disagreement between different levels in the court hierarchy. In fact, reversals are seen simply as mistakes by the lower court judges, and, in fact, judges can often be fired for committing too many mistakes in their practice on the bench. This internal dependence really can also serve as a conduit for pressure from outside of the judiciary because of the cozy relationship of the judicial leadership and incumbent politicians. There is also the “judicial leadership,” meaning the people who are in leadership positions within the judiciary, either at the highest court or as court chairman, which is a very powerful figure in both countries.

Finally, another informal practice that reduces *de facto* judicial independence is that court administrators are often times seen by

judges as their supervisors rather than as their assistants. Court administrators are the link between the judiciary and the other branches of government. Once you appropriate the money to the judiciary, someone has to take care of the day-to-day administration of the courts. Court administrators in other countries (in Canada, for example, I am sure in the United States also) are really seen as the assistants to the judges, whereas in both Russia and Ukraine it seems that the relationship is rather informally seen as the reverse.

So what do we get if we compare the actual output of the Russian and the Ukrainian judiciaries, rather than simply the separation of powers on paper? Because on paper things do not really look bad, they look in line with international expectations and with what international organizations promoting judicial independence expect to see: budgetary independence and control over the judicial careers. All of this is in order, but this is not where the problem is. Once we start discussing how courts in the two countries actually function, and here I want to emphasize that I am really talking about what is often referred to in the civil law system as the “ordinary judiciary,” not the constitutional courts. I am talking about the district courts going all the way up to the Supreme Court. These are courts that deal with the everyday adjudication of cases, rather than constitutional interpretation. But obviously it is very important for us to compare the ordinary judiciary, not only because the majority of cases that are decided are not constitutional cases (the majority of cases are ordinary cases), but also because the ordinary judiciary and the routine cases that they decide are really crucial to the question of whether we have the rule of law or not. We want to know whether in these routine cases the litigants gets treated the same way. Equality, responsibility, and protection under the law are, basically, this: different litigants treated by the courts in the same way.

When we start talking about the comparison between Russia and Ukraine, I am sure that two cases that immediately come to mind from these two countries. There is Mikhail Khodorkovsky in Russia, sitting in jail convicted on fraud and embezzlement charges, as an example of how dependent the Russian judiciary is. And as a contrasting case from Ukraine, we will probably think of the Supreme Court's decision on December 3, 2004, when the Supreme Court reversed the results of the presidential run-off and ordered a third round of the presidential election, which is often hailed as an example of the independence of the Ukrainian judiciary.

I will not really go into these two cases in much detail, except to say that I think that the outcome of the Ukrainian case has much less to do with any sense and feeling of judicial independence among the Supreme Court judges of Ukraine and more to do with the fact that there were a million people camped outside right underneath their windows, and the opinion of how the case should be decided held by all of these people in Maidan was very, very clear. So we may talk about independence from politicians, but there is also such a thing as how independent you feel when a million people-strong crowd is right outside of your window. So I do not think we should focus very much on this case, because it is a unique circumstance that does not necessarily have much to do with how courts decide cases on a daily basis.

I want to present some data today that looks at the outcomes of politically important cases and how politically important (but nonetheless routine and not exceptional) cases are adjudicated in the two countries. The first example that I will give to you is electoral registration cases. The comparison that I am making is between the 2002 Ukrainian [Verkhovna] Rada election in Ukraine and the 2003 Duma election in Russia. I have collected information on every candidate who ran in a single mandate district in these two

elections, and then checked how many of these candidates were involved in a registration dispute that went to court. Either someone was challenging the legality of their registration or they were challenging the legality of the registration of their opponent. These are obviously politically important cases, because ultimately these court cases decided who stood in these elections and who did not. There were quite a few cases, over 150 court cases in each country, connected with these campaigns. What I have done is compare the probability of success in court depending on the political affiliation of the litigant. The goal was to get a sense of whether litigants of different types are treated differently by the courts or treated the same. Obviously, in a rule of law system we would like to see litigants of different political affiliations treated the same. So what do the results show?

There are two different sets of results: one for candidates who stood very little chance of being elected, what I called "non-viable" candidates, and different results for candidates who had a very realistic chance of being elected. In both cases, what the statistical model, that is based on the actual data, shows is that in Russia there is very little difference (in fact, this difference is not statistically significant) between the probabilities of success for opposition candidates versus pro-government candidates. In Ukraine, there is a very big, statistically significant difference. Pro-government candidates did much better than opposition candidates who were not really viable.

We see that in Russia viable candidates were much more likely to win their cases than non-viable candidates. But again, there was no great difference between opposition candidates and pro-government candidates. In Ukraine, again, there is a very significant difference, statistically significant difference, with pro-government candidates winning much more often when they go to court than opposition candidates.

I have also looked at a different type of politically important case, which is defamation lawsuits against media outlets. The data comes from 1998–2004 in both countries, and interestingly enough, it shows the same pattern. You see very little difference in the success rate. What this is checking is whether the political affiliation of the plaintiff who is suing for defamation matters in the outcome. Again, in the Russian cases, whether it is what I call ‘the average plaintiff’ or a plaintiff who is a central politician (a member of the Duma or a minister), the difference between all these groups in terms of their success in court is very small and not statistically significant. The difference in Ukraine for the average plaintiff is very significant: having a pro-government affiliation basically doubles your chances of winning your case in court. If you are a politician, whether you are part of the opposition or pro-government, there is again a little bit of difference, but you are very likely to win your case.

In defamation cases there are also damages awarded if you win your case. Sometimes you can win your case, but you might be suing for a million dollars in compensation and instead receive a \$1 award. So you won, but this is a much more symbolic victory. How much money you win also matters. Now look at the comparison again between these “victorious plaintiffs” in the two countries. In Russia, there is basically no difference: there is an average reward, and you basically see no difference between opposition plaintiffs and government-affiliated plaintiffs. In Ukraine, government-affiliated plaintiffs won almost three times more money, when they won, than opposition-affiliated plaintiffs.

Where does this leave us? I am not trying to suggest that in Russia the separation of powers has taken hold firmly and politicians there cannot pressure judges. Far from it. The point that I am trying to make is rather different, and it is not a very new point either. My point is that the Russian courts appear to be a bit more independent. They are less controlled, as you

have seen through these real outcomes of cases. But that is because they are much less relevant. This is an argument that has been made about the courts in Franco’s Spain, for example. The courts in Franco’s Spain were supposedly independent also, but basically because they were powerless. Well, this is sort of similar to the Russian story. My data, you have to remember, is from 1998 to 2004, which is, some may argue, qualitatively different than what we have in Russia now. I may agree with that, but the point is that even in that period the Russian political incumbents were much more secure in their hold on power than Ukrainian incumbents. As a result, they just did not need to resort to the courts to try to use them as political tools. If they wanted to, they could. And, in fact, the Khodorkovsky case has shown that. If they want to, they can. It is just that in the period there were weaker incentives to do that.

So the more interesting part of the data I think concerns Ukraine. The interesting thing is that the vibrant political competition that we do have in Ukraine, and we do have vibrant political competition that has led to the country now being classified as a full democracy by Freedom House, has not led to the establishment to the rule of law and it has not led to the establishment of independent courts. Rather, the courts are being used as a political battleground by the different factions that are vying for the political power in Ukraine. So this is the point that I hope you take away from this. Thank you.

DISCUSSION

WILLIAM POMERANZ

Thank you very much, Maria. I will open the discussion. Oleksandr and Oleg: you both have had proximity to actual political power. From your perspective, do political leaders actually take this question of separation of powers seriously, or is this something that is considered more as window dressing than actual substance?

OLEKSANDR ZADOROZHNI

Thank you, Will, for the question. The question is really timely, I would say. I think for those who have only been looking at the Ukrainian political landscape for the last five years, the concept of separation of powers would seem to have been used to effectively block action by the government. It is not a theoretical example. The president of Ukraine used his veto power daily to stop the action of the prime minister of Ukraine. He sacrificed himself politically in order to kill Prime Minister Tymoshenko politically by preventing the possibility of her winning. From that point of view, the Party of Regions is demonstrating a united political force – and that is why they are receiving popular support.

But people are sick and tired of that separation, and that was a bad result of what has been happening for the past five years. A distinguished colleague of mine spent a lot of time on very, very good research on judicial issues – but it is old, dating back to 2004. The result of what Yushchenko has done in five years is that we do have super-independent courts, but they are super-corrupted: nobody can influence them, nobody, no political force. And that raises another question: who is responsible for what is going on? By the way, having received his legitimacy from the decision of the Supreme Court, former President Yushchenko himself started an attack on the judiciary from the very beginning. He declared the necessity to reform it, because of the tremendous corruption.

It so happens that I was a co-author of the Judicial System Act of Ukraine. There is my share in the so called “small judicial reform” in 2001, 2002, and 2003. The idea was to make our courts more independent from the executive—from the president in particular, who was very powerful at that time. However, the Constitutional Court of Ukraine took it too far. By its judgment of March 5, 2007, the Court prohibited the

president from appointing chiefs of courts. *Finita la comedia.*

Now Ukrainian courts do whatever they want and support whomever they wish. The law does not always guide them in their choices. That is why the concept of separation of powers in the particular Ukrainian case is a very intricate thing. In a way, it allows Ukrainian courts to be, to use a bad word, corrupted. Again I emphasize that we need the concept of a responsible office: a person, a political power, or any other political actor should be responsible for what they do. Presently we have as a result from the last elections that the opposition wins again. Over the last 12 years the Ukrainian people have voted for the opposition every time. That means changes are needed. From that point of view, which is more sophisticated, more fundamental, more scientific, our conference will help make it happen. The correct approach to the separation of powers will help in the constitutional process. Thank you.

OLEG RUMYANTSEV

I think the answer to your question is a matter of the political and legal culture of our society. But this political and legal culture is influenced by the decisions taken within this or that system of separation of powers. In March of 1998, President Yeltsin nominated three times to the State Duma the young and unknown figure Sergey Kiriyenko to become prime minister of the Russian Federation. At that time, the State Duma was slightly dominated by the opponents of President Yeltsin. And the State Duma asked the Constitutional Court, whether if they rejected the same candidate twice, could the Duma be dismissed by the president if he submits the same candidate a third time and is rejected. The parliament definitely asked the Constitutional Court what a “constitutional norm” really means: do they have the right of consultation of the candidate for the post, or is this consultation purely meaningless? Can the president suggest a nominee that the parliament does not want three times, and they are

obliged to agree? The Constitutional Court decided in favor of the president.

By that time, obviously, the president did not want to suggest Mr. Kiriyenko anymore, and Mr. Primakov, you may remember, became the new prime minister of the Russian Federation. And it was not a bad government, by the way. It was the only government that really managed the crisis and the post-crisis period.

Nevertheless, this decision of the Constitutional Court against any, even symbolic, right of the parliament was a big blow to the consciousness of the political class in Russia. It is again and again the culture of domination and enforcement, not the culture of consultation or of cooperation. Checks and balances is a fairy tale: It is again who is the strongest.

Unfortunately, political practices are being dictated by such decisions of the Constitutional Court. Now we have come to the situation when the political system is dominated by United Russia, the general secretary of which is Prime Minister Putin. They need nobody in this situation. They have a successor in the position of president, and he has the soft power. He is suggesting strategy programs, he is talking to the federal parliament, he is in charge of IT innovations, he is in charge of information, etc. And then there is hard power. It is the prime minister, who is controlling all the security forces, the army, the military, the entire executive, the ruling party, etc. So again, who has who? Definitely the strong, hard power, has the soft power. That is the situation of the political culture, which is very strongly influenced by the constitutional developments in the Russian Federation.

Question

Thank you. I would like to take on Maria's presentation on the judiciary and ask a question of both Professor Zadorozhnii and Oleg Rumyantsev. What prospects do you see for a more independent judiciary? It seems to be the central point in separation of powers. I believe that a more independent judiciary would lead

to absolutely different political situations in both countries. A sub-question to that is what factors might lead to a more independent judiciary? Also do you see any opportunity coming from the rulings of the European Court of Human Rights?

MARIA POPOVA

I will start from my answer from the last item, on the question on the European Court of Human Rights. The European Court can play a role, but it is really the last resort. We cannot expect the European Court to matter in the routine cases that get decided daily. As we saw with Alexanyan case, it can make a difference on the margins at the very last moment. In terms of the prospects for judicial independence, I have to say I am not very optimistic, and it is very hard to come up with an explanation about how it is going to come about. What the literature on judicial independence has been telling us is that political competition was going to produce it. Now I think we have seen from Ukraine that does not always happen. Political competition has not produced it in Ukraine.

And I would agree with your assessment of the situation that it is harder to control the courts in Ukraine now, but for sure politicians keep trying. So whatever we have now, it is not the judicial independence that we have in mind when we are thinking of the rule of law. So I do not really know, but I do not have an optimistic answer.

OLEKSANDR ZADOROZHNI

The president of Ukraine, the newly elected president, has started his term again declaring the necessity of reforming the judiciary. It is an eternal task. I am happy to have a very good friend who also happens to be my teacher and a former chief of the same department which I have the honor to preside over now, the Department of International Law. I am talking of Mr. Volodymyr Butkevich. Recently he completed his term as a judge at the European

Court of Human Rights from Ukraine. Two months ago we were discussing that situation with him. There is no European country in which the reform of the judicial system is not underway. He told me a very peculiar example. When he was sitting in the European Court, they had a tradition: on a weekly basis, the president of the European Court of Human Rights would gather members at a roundtable and one by one they would discuss the topic of reforming of the judicial system in their own country.

So there are mainly three points on which we agree, or more or less have a consensus in the legal sense. First, there are some very peculiar things, as Maria has stressed, which can be decided on a procedural basis, such as procedural laws. I mean the prohibition of a judge to disclose the details of the consideration of a case and so on. There are several points which can be done very quickly and easily.

Second, there are several points concerning the judicial system which need to be decided at the constitutional level. First of all (and there are variants) on the constitutional level there is the status of the judges, meaning their accountability. Just think about one particular aspect: the legislature stands for election once in five years, and the executive stands almost yearly (this is a unique situation). But the judicial power is not elected and is not nominated by anyone. They are a closed corporative system. At least we should think about it: they are not accountable. If we are to say that they are accountable to the Qualification Commission, which is 51 percent composed of the judges, here is a story. In 2007, as a member of the High Council of Justice, I presented a case before the High Council of Justice about some judges of the Pechersk District Court in Kyiv. When the case was completed, the Pechersk District Court in Kyiv ruled the decision of the High Council of Justice null and void. Then those judges submitted a petition to the president, and president fired me

from the High Council of Justice. You know, they are independent.

The third point is that in the contemporary political landscape of Ukraine (I am not talking about Russia), talks about judicial reform is a way of blackmailing the judicial system. I have stressed from the very beginning that the former president started with a concept of the judicial system reform, and now the current president has started with it again. One part of this reform is the liquidation of the Supreme Court of Ukraine. Why? Because the chairman of the Supreme Court of Ukraine is not a member of the same political party as the president.

So let's do changes slowly, gradually as part of the day-to-day routine, beginning with procedural laws, which is the responsibility of the parliament. Let's not think about constitutional changes before we have 300 parliamentarians ready to vote for them. And let's forget about any reforms, because it means blackmailing judges and blackmailing the whole judiciary. It means continuing to press them, preparing the ground for jailing the former prime minister. That is the idea. I think that before national and international scientific circles decide what is to be done—theoretically, in those thick journals and papers—there is no place for more judicial reform, at least in Ukraine. This is my opinion. Thank you.

OLEG RUMYANTSEV

Very shortly, just for the record, I made a mistake in my previous story about Kiriienko, because Mr. Kiriienko was first before the parliament in the spring of 1998, and by the time the disaster came in August of 1998, Mr. Primakov was asked to become prime minister.

Back to the judicial reform, as I said in my speech, the guarantees of the Constitutional Court's independence should be fixed in the Russian Constitution itself, because we have in Russia what I call the death of independent constitutional judiciary. And it is a pity, because the Constitutional Court was one of my dear children in 1991. The head of our ex-

pert group in our commission, Mr. Zorkin, was asked to become the first judge on the Constitutional Court and then he was elected by the judges to become chairman of the Constitutional Court. It is a pity that that was the result after nearly 20 years. It should be fixed in the constitution.

As for other departments of the judiciary, first of all, we should introduce administrative and juvenile legislation. Second, I think we should definitely go for very strong restrictions over requirements for judiciary candidates. Society should find an optimum balance on who the court should protect—the state or the citizen. There should be an optimum; nobody knows yet what the optimum for the Russian Federation might be, but that work should be done by society. Lastly, I think that in judicial discretion much more space should be left not for independence, but some dependence on public opinion. There should be transparent influence of public opinion on judicial discretion, I think.

Question

The talk here was mainly about the micro-social actors of the process, about the institutional factors like the executive and legislative branches, and so on. Could you say in your view whether there is any eloquent and detectable public demand for the separation of powers in both countries?

OLEKSANDR ZADOROZHNI

That is exactly what I have said: the people are sick and tired of the separation and of squabble, and that is why they are ready to vote for a “strong hand.” What are we really afraid of? We are really afraid that the Russian scenario might repeat in Ukraine. But I think that the Ukrainian mentality, and, more or less, the unnatural Ukrainian presidential subdivision into west and east, will prevent that. There are, let’s say, different aggravating factors of that separation, which includes the possible creation of a federation. That is not a

new idea, but it is not a preferable idea, for the Ukrainian discourse at least.

OLEG RUMYANTSEV

Why not?

OLEKSANDR ZADOROZHNI

Well, that is a good question. But in any case I think that the situation in Ukraine is changing a little bit almost daily. If we consider the situation prior to the Ukrainian-Russian Agreement on Sevastopol, we’ll find it totally different from the one we have now. What have we seen? We have seen the unification of the opposition after that, but we have not analyzed the sociology; at least, I have not seen any studies on the sociology.

From the other point of view, just before this conference we were discussing one very interesting result and that is why, together with the organizers of the committee, I was stressing a year ago that the constitutional topic is quite interesting to the Ukrainian society. The presidential administration, or the secretariat of President Yushchenko that you have mentioned, was using the idea of constitutional amendments in his presidential campaign quite efficiently, but they were based on sociological data. Approximately a year ago, 56 percent of Ukrainians considered constitutional matters very important and appropriate to discuss during the election campaigns. This gives us optimism that people do care about such matters as separation of powers. Of course, there are other factors that are influencing this situation, like the economic crisis. But the fundamental values of state creation mean something to Ukrainians.

The state itself is a little bit different than in Russia, because we have had the state for only 20 years, even less. We should also take into consideration the factor that some high-ranking Russian officials are now trying to use this situation to support their view that the Ukrainian state was a mistake from the outset. That creates tension within

the Ukrainian society. So that quick surrender to the Russians was a big mistake of the newly elected president. And that is why I draw the difference between the situation before the Sevastopol Agreement and after the Sevastopol Agreement. I think that in the nearest future we will see proper developments in this regard.

MARIA POPOVA

I could comment on the public demand. I have seen some data on what the public in the two countries thinks of the courts. And the Ukrainian public is much, much more dissatisfied with how the courts are functioning than the Russian public.

OLEKSANDR ZADOROZHNI

Russians are so satisfied with that...

MARIA POPOVA

Yes, but in fact if you compare how much confidence Russian respondents have in the courts, you see that the level of confidence in the courts is higher if you have dealt with the court than if you have not. So whatever the situation is in Russia, there is no strong demand to change it, whereas there is a lot of dissatisfaction with the courts in Ukraine.

OLEKSANDR ZADOROZHNI

Another anecdote, but from my real life: I was an official at the presidential administration for several years. In 2004, we were conducting a sociological survey rating the popularity of various figures. The Pope occupied the first place, insurance agents—the last. Just one position before the last was for members of the Verkhovna Rada, and judges just before them. So, out of 100 choices, that was the result. This is really true.

Question

Back in the late 1990s, Larry Holmes, an American legal scholar who was involved in legal reform efforts in Russia, came up with a

notion of the Russian state as a hovercraft state. The notion was that the Russian state sailed across the surface of society without having any contact, totally independent from the society. I want to ask Oleg, do you view the judiciary as a potential way of slowing up the hovercraft, of linking the hovercraft to society? And I wanted to ask Oleksandr: is the situation different in Ukraine? Is the Ukrainian state so meaningful and connected with the society?

OLEKSANDR ZADOROZHNI

I think my political experience gives a little bit of a different approach. I mean, I was elected and I was not hovercrafting. I was working in my constituency. The particular situation which was created after the elections of 2004, when Mr. Yushchenko was elected as president, and the particular situation which is now in Ukraine after the presidential election of 2010 are the result of...I cannot find the right word...excessive or the excesses of democracy. And I think that the majority of the population seems to be participating in the governmental process. That was an achievement of the Maidan I cannot deny. But that was a result of that particular situation, which was created in the Ukrainian mentality of 2004.

You know, Yushchenko was regarded not as the father of the nation, but as a son. And that is why when he was not an efficient ruler, he was regarded like a son who was created by this nation. I think that in this particular case, in contemporary situation, the Ukrainians, the majority of them, feel that they can take an active part. That is why we see these figures: 56 percent consider the constitutional matters very important. Six years ago, President Kuchma was considering an analysis that indicated that 75 percent of Ukrainians considered the news to be the most interesting TV program. That was what they watched on TV, not TV shows, not soap operas, not “CSI.” They were watching TV news, 75 percent! And they considered themselves as part of the governmental process.

And I think that is a creative, a healthy part of Ukrainians, which will make it possible to survive even situations of total dismay that we have now. It is a little bit different. What we were joking about two or three years ago was: “Unfortunately, we do not have a Putin like the Russians.” Now we are joking: “Fortunately, we do not have a Putin.” That is a little bit of a different situation.

OLEG RUMYANTSEV

First of all, we need a society; we do not have a society anymore. I am very pessimistic right now about what has happened in the Russian Federation, because of the lack of any civil participation in the life of the Russian Federation. It has been stopped. They have closed all the taps, and it is now obvious that the situation cannot be any worse. I do not think that judiciary can play any role here, because we have absolute lack of justice, absolute lack of fairness – justice like *spravedlivost*’ – in the Russian Federation.

The authorities, unfortunately, have killed this value. There is the value of egoism, of consumerism, of the society as a wilderness. You can rush on the red light if you have a strong car. If you have a Hummer, you will definitely rush against the red light at the intersection. The rule of force, the rule of aggression, unfortunately, has killed everything. People do not participate in the elections, because there is no need to participate in the elections. Something should be done. That is why I am looking with this very slight, minor hope at what Dmitry Medvedev is doing, although he is, as I told you, the “soft power” in comparison with the “hard power” of Mr. Putin.

Nevertheless, everybody, including Khodorkovsky, had thought that there should be a figure of arbiter, and that the president should become an arbiter. The right-wingers, and the conservatives, also say we should have an uncrowned monarch in the person of the president, but who should nevertheless have some responsibility before the society and think

about what can be done and what should be done. At least this last part brings some hope.

Democratic participation should put an end to the injustice that we have. It should bring some more sense of social responsibility towards society, because society is now ruled by the very rigid front of those winners of 1993–1996 who are now combined with the winners from 2003–2007. Those two groups of winners are definitely against any changes in the Russian Constitution, or any change of the rules of the game, and they are really very strong. They are those “old oligarchs” and the new participants in the redistribution of the property that was carried out over 2003–07, which obviously shows that they do not need any fresh air or any fresh movement.

But, as I told you, my hope is that when this national idea of innovation fails under the current conditions, then probably they will understand that without a much more liberal approach towards civil life and towards the link between the state and the society, we will continue lagging behind not only probably Ukraine, in some political terms, but in economic terms behind Kazakhstan, to say nothing about Europe. Thank you for awakening me with your question.

WILLIAM POMERANZ

I have one follow-on question then based on what we have heard on the first panel. There are two points, I thought, that were raised and I just want to see where they might be going.

The first was the question Jeff Anderson raised about federalism and the role that federalism can play in the notion of separation of powers. Russia, theoretically, is a federal state. So is there any possibility of reviving the notion of federalism and its role in separation of powers? And for Oleskandr, I want to get back to the question of coalition building that was raised in the discussion about Brazil, and whether the current coalition that supports the president is fundamentally different from the previous coalition, and whether coalition

politics is beginning to change as a result of the change in the administration.

OLEG RUMYANTSEV

Well, federalism was one of the victims of the developments of the last 10 years. You know that the governors are not elected anymore, and the Constitutional Court has approved this. Members of the Federation Council are elected, but are first nearly nominated by the federal executive authorities. So I asked my neighbor to the left why Ukraine so rigidly wants to become a unitary state. For me federalism is a blessing. The unitary Ukraine, I think, will constantly fight with its inner problems, because they are not presidential/parliamentary problems. They are problems because of this, what you call “unnatural” but is in fact a very natural civilized division of Ukraine. And without federalism, this problem probably will not be resolved. That is in my humble opinion. I do think that the situation is the same in the Russian Federation; where there are several entities within the Russian Federation that can definitely only survive on the basis of federalism, which we now have in the Russian Federation.

OLEKSANDR ZADOROZHNI

I would rather not start a discussion of federalism in Ukraine...

OLEG RUMYANTSEV

I did not direct this question to you, fortunately... *(Laughter)*

OLEKSANDR ZADOROZHNI

Yes, I understand, thank you. I am not against federalism, but this is again a different situation. As to the coalition, you see, the former president used the coalition to blackmail the prime minister daily. What was he doing? He exerted control over a part of the coalition, his *Nasha Ukraina* party, and through them he was pressing and demanding on a daily basis that the prime minister should do whatever

he wished. At the end of the day, we ended up with no coalition, no support for the prime minister, and no support for the government, because of the corrupted part of the presidential party, which could not decide what to do at that time. Now, with a new president in place just a month ago, they have not received even a suggestion to join a new coalition. It is the Ukrainian game.

Here is another anecdote. These guys came to the new president and asked, “What will we receive for our participation in the coalition?” The president said, “Nothing. You will stay free. And that will be the price.” They replied, “Well, we will not participate then.” The Communists have taken their part. These are power politics, you know. The former president had invented the term “political corruption,” which means, and I wrote an article about this, the creation of a coalition that is not supported by the president, because all the other ways are not political corruption. He invented this term and it was very widely used. He even dissolved the parliament in 2007 because of “political corruption.”

That is why the problem of the coalition, and I would thank my distinguished colleagues analyzing this topic, is a modern buzz in Ukrainian political science, or near-political science. It is yet unclear who are to be the members of the future coalition, whether the former prime minister or the party of the prime minister in the parliament (presently she is not a member of the parliament) will create a new coalition or a new opposition. You know, there is also a constitutional game. To change the Ukrainian Constitution 300 votes are needed. That can be achieved if members of the former coalition join a new one, so that there may be two thirds of the parliament. And that will create a possibility to change the Ukrainian Constitution. But how shall it be changed? You see, there are lots of questions. But this game is going on.

I think that the most important thing is that, first of all, nobody in today’s situation

(and I am two days out of Kyiv, so this is true as of two days ago) is officially interested in dissolving the parliament. Second point, there are no legal reasons to dissolve the parliament. That is nothing in contemporary Ukraine; if there are no legal reasons, there will be political reasons. But the most important thing is this: there is no reason for parliamentary elections if the election law is not changed. If there is a return to the former electoral system, then there will be the reasons.

And that is what the new president is doing now. They are pressing to change the system in order to get what they want. What do they want? They want half of the parliament elected by the party system and half of the parliament to be elected on a majority system. That would give them approximately 300 votes, which would give them the possibility to change the Ukrainian Constitution without

having any partners. There are other ways to change the constitution; but still, these coalition games are quite...Sorry, I can speak about this for hours and hours.

WILLIAM POMERANZ

Unfortunately, we have come to the last hour. I would like to thank all of our participants on this panel and all the panels today for their excellent presentations. I would like to thank Sonya Michel and the U.S. Studies Program for agreeing to enter into this venture and thank you all for coming. We look forward to seeing you at future Kennan Institute programs.



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