

Taiwan's Constitutional Reform: The Coming Storm in the Troubled Straits

Yun-han Chu
Academia Sinica

The on-going debate over constitutional reform: some background

- Politics of constitutional reform is certainly not an enviable aspect of Taiwan's democratization.
- Between 1991 and 2005, the R.O.C. Constitution has been amended seven times.
- However, after so many rounds of constitutional revision, the existing constitutional order still lacks the kind of broadly based legitimacy that constitutions in consolidated democracies normally enjoy.
- Also the current constitutional design for the governing structure still suffers from quite a few deficiencies.

What complicated the process of constitutional crafting?

First, the process of constitution-making has been complicated by some wrenching structural constraints that Taiwan's young democracy inherited:

- The political standoff in the Straits and an unsettled sovereign status in the international system
- a polarized conflict over national identity at home
- an absence of core commitment among the contending elites to rule of law and constitutionalism in general

Second, it has been further complicated by the strategic choices of some key players, leaders and parties that orchestrated constitutional changes at particular junctures of democratization. The pact-making process was littered with their hidden-agenda, short-term political calculations and improvised compromises.

A House Divided?

- At the most fundamental level, there is no consensus among contending political elites as well as the general public about where the final destination of constitution change is or should be.
- For people who strongly believe in Taiwan independence, all the revisions undertaken within the framework of the R.O.C. Constitution were meant to be transitory.
- To them, the only acceptable final destination is the creation of a new constitution that manifests the general will of the Taiwanese people and signifies the island's independent sovereign status.

- On the other hand, for people who avow to preserve and defend the existing state structure, **the R.O.C. Constitution and all political symbols it carries constitute the cornerstone their political identity.**
- To them all the amendments adopted at each round of constitutional revision were meant to be binding and lasting, at least until when additional changes are demanded by a great majority of the people and materialized through the amending procedure prescribed in the constitution.
- They oppose any attempt to abolish the existing constitution through extra-constitutional means, such as plebiscite, which happens to be the favorite of Taiwanese nationalists.

No strong consensus among the contending political elites about the nature of the government structure

- When the representatives of the two major political parties, the KMT and the DPP, coalesced to craft the current government structure during the fourth round of revision, the newly amended system was sold to the public as a localized version of semi-presidential system which is featured with dual-headed executive and modeled after the French 5th Republic.
- But this bipartisan understanding of the moment has no binding power and is not always shared by some weighty members within each party who were not directly involved in the constitutional crafting process.

Some significant departures from the French model

- The president is elected by plurality. So Taiwan's system may elect a minority president with a weak popular mandate and possibly without a reliable majority support in the parliament.
- The old provision about parliamentary confirmation of the premier was removed, so the president has more leeway in appointing the premier.
- Taiwan's parliament is much more powerful than its French counterpart in steering the legislative agenda (and to strangle the government when the situation is called for).
- Under Taiwan's current system, the president cannot dissolve the assembly on his own initiative. The only tie-breaking device for resolving the conflict between two competing popular mandates is "the vote of no confidence".

The Built-in Uncertainty

- How the system will function is not very predictable when the majority party in the parliament is different from the president's party or no party has a parliamentary majority.
- A minority president may choose to avoid a French-styled “cohabitation” and take the risk of confronting with a hostile majority in the parliament.
- In its retaliation against the president, the majority of the parliament may choose to strangle the government piece by piece, rather than unseating the sitting cabinet and forcing a political showdown. By so doing it simply prolongs the political gridlock and push off the showdown until the next parliamentary election.

With year 2000 power rotation came the litmus test

- From the very beginning, President Chen's governing capacity was severely circumscribed by the dual fact that he was elected as a minority president and the DPP controlled less than one third of the seats in the parliament.
- He refused the KMT's demand for a party-to-party negotiation over a power-sharing scheme on the conviction that the KMT might never put its act together again after a humiliating defeat.
- He also rejected proposals for forming a coalitional government with the People's First Party (PFP)

Six Years of Crippling Gridlock

- The confrontation between a combatant president and a hostile parliament steadily escalated from a fierce competition over the steering wheel of legislative agenda and national priorities to a **nasty and protracted political struggle**.
- The coalition of the KMT and FPF blocked virtually all the major legislative bills introduced by the DPP government.
- On the other hand, the Executive Yuan sometimes just refused to implement some of the legally binding resolutions passed by the LY accusing the opposition-controlled parliament transgressing on its executive power.
- In retaliation, the KMT-PFP coalition simply delayed pending budget bills and the vicious cycle went on. **Both sides exhausted all possible legal means to strangle one another.**

No light at the end of the tunnel

- Neither the December 2001 LY election nor the December 2004 LY election changed CSB's political fortune.
- Taiwan's electorate was appalled by extremely nasty and seemingly endless political battles and the political paralyses they brought.
- The only tie-breaking device under such circumstance turned out to be worthless. Under CSB's veiled threat of dissolving the parliament, the KMT-PFP coalition always chose to avoid a vote of no confidence and the risk of entering a snap re-election.
- The competitive logic as well as the high campaign cost imposed by the singular non-transferable vote (SNTV) system make members of the parliament extremely reluctant to use the no-confidence vote.

Debates over the right prescription

- The crippling political gridlock of the last six years prompted many discussions about the inadequacy of the existing constitutional design and what is needed to fix the problem.
- Three basic approaches to making the constitutional structure more balanced and coherent:
 - The Minimalist approach
 - The Fine-tune approach
 - The Big Bang approach

The Minimalist Approach

- Favoring a “good enough” remedy that would require **minimal surgical changes** to the constitution.
- It assumes that it is very difficult to get new amendments adopted, so we should place more emphasis on **alternatives to formal constitutional revision**. These alternatives include:
 - The introduction of new **constitutional conventions** through consensus building among political elite
 - Propelling the Council of Grand Justices to deliver more **constitutional interpretations** to do away with ambiguities and inconsistency
 - Introducing **detail-oriented laws** to fill up the gaps

Big Bang vs. Fine Tuning

- Followers of the big bang approach believe that the semi-presidential system is not a viable option and the system as is is full of ambiguities and contradictions. So the country will be better off if we **start all over again** by replacing the existing one with either a pure presidential system or a pure parliamentary system. They also avow to **abolish the five-power government** which was based on Sun Yat-sen's political theory.
- The fine-tune approach lies somewhere between the two. It wants to eradicate the loopholes and flaws in the current system in a more systematic way while upholding the belief that **a fine-tuned semi-presidential system** can be as viable as either a pure parliamentary or presidential system.

Prescriptions for Fine Tuning

- First, the parliamentary confirmation of the appointment of the premier should be restored.
- Second, the SNTV rules for electing the LY members should be replaced with either single-member district plurality rule or proportion representation (or a combination of the two).
- Third, an incoming president should be given the power to dissolve the parliament while at the same time there should be an electoral threshold (plus run-off election) for presidential race.
- Fourth, the terms of the president and that of the parliament should be unified and two elections should be synchronized to the extent possible

Pan Green vs. Pan Blue

- The leaders of the Pan Green are strongly in favor of the big bang approach. The leaders of the Pan Blue are strongly in favor of the minimalist approach.
- It is no coincidence that the big bang approach not only is more congruent with the core commitment of the Pan Green but also arguably suits the DPP's short-term political needs better. In a similar vein, the minimalist approach serves the KMT best both ideologically and politically.
- Many political scientists consider the fine-tune approach more desirable than the minimalist approach while treating the big bang approach either too idealistic or too radical

Presidential vs. Parliamentary

- The DPP and the TSU traditionally embraced a U.S.-styled presidential system.
- However, over the last few months, surprisingly more and more DPP and TSU political figures “rediscovered” the merit of parliamentary system.
- They echoed the view espoused vigorously by Shih Ming-Teh, who argued that the introduction of the popular election of president has polarized the electorate, excessively politicized the society, and produced demagogues as well as imperial presidency.
- The size of the LY should be restored to 200-plus seats to meet the requirement of a parliamentary system.

How to redo everything

- To expedite the big bang approach, many DPP-affiliated legal scholars are vigorously promoting the view that the “principle of popular sovereignty” is so fundamental that it is above all positive laws, including the existing constitution.
- It is intrinsically democratic if the majority of the people want to replace the existing constitution with a new one through a plebiscite.
- They encouraged the President not to be bound by the strenuous constitution-amending procedures stipulated in the existing constitution but to convene an *ad hoc* constitutional assembly and send a draft constitution through a plebiscite by invoking this democratic first principle.

The KMT's Counterpoints

- What the country urgently needs is to enhance the stability of the constitutional order and strengthen the authority of the constitution.
- It accuses the DPP government of running away from the real problems the country is facing (industrial hollowing-out, brain drain, aging population, crime, fiscal crisis, being marginalized in the region, etc.) and using the constitutional reform issue to divert people's attention away from its sagging performance and corruption scandals.
- The crippling political gridlock that the country has experienced could have been avoided had President Chen observed the letters and spirits of the current constitution

- The system of dual-headed executive can be augmented without further amendment to the constitution. The new electoral rules for the Legislative Yuan, to be applied in December 2007, shall make the vote of no confidence a more credible device for breaking the deadlock.
- Furthermore, the system can be augmented by the introduction of a sensible constitutional convention by which all future presidential candidates shall pledge to respect the will of the majority in the parliament over the appointment of the premier.
- To demonstrate his sincerity, Ma Ying-jeou publicly made the pledge that if in the future a KMT president faces a DPP-controlled parliament, the KMT will follow the French precedent of “cohabitation” and ask the DPP to form the government.

Looking through partisan lens

- KMT supporters strongly believe that the call for parliamentary system is just an unsavory political ploy to pull the rug under the feet of Ma Ying-jeou as well as to undermine the solidarity of the Pan Blue camp
- They also suspected that the DPP want to use the re-enlargement of the LY to lure the outgoing LY members to defect from the Pan Blue camp.
- Taking the recent county magistrate election as a bellwether event, the KMT is anticipating a landslide victory in the December 2007 LY election and a decisive win in the 2008 presidential race. It wants nothing to stand in the way.

Breaking up the five no's?

President Chen's **New Year** pledge:

- Abolishing the National Unification Guideline and the National Unification Council
- Creating a new constitution and putting the draft up for a referendum vote in 2007
- Launching a new bid for UN membership under the name of "Taiwan"

Setting the agenda for his remaining two years and signaling his intention of breaking away with the so-called "five-no's" pledge?

Status quo as we define it

Five No's (also known as "Four no's, one does not")

- No declaration of independence
- No changing Taiwan's formal name from the Republic of China
- No enshrining in the Constitution of former president Lee Teng-hui's redefinition of cross-strait relations as "state-to-state" in nature
- No holding a referendum on independence
- Does not abolish the NUG and NUC

This has been vehemently upheld by the United States as CSB's five assurances not to change the status quo unilaterally

Washington's tough response

- Washington failed to stop CSB from announcing the termination of the NUG and NUC, but it negotiated a face-saving way of branding the policy change. Taipei had to use “cease to apply and cease to function”, instead of “abolition” or “termination” (for the English version).
- After the State Department learned that Taipei overplayed the “lost in translation” game, it issued a humiliating statement asking the DPP government to reconfirm that the two legal entities were suspended but not abolished
- The State Department warmly welcome Ma Ying-jeou, offering him an unprecedented publicized meeting with Robert B. Zoellick and other ranking officials
- The DPP government is anxiously waiting for another shoe to drop when Hu Jingtao comes to D.C.

Why Washington was so upset?

- After all, the NUG was just a policy guideline without statutory authority.
- The NUG has been in dormant for six year anyway (or ever since the DPP's coming to power).
- Washington worried that abolishing the NUG is just a prelude to breaking up other no's.
- Despite of CSB's repeated promises of staying within the parameters of the existing constitution, his messages for domestic audiences suggests something very different
- Washington fears that if it let CSB off the hook this time, it would be much harder to stop CSB's future venturesome moves, which could be many times more explosive

An anatomy of CSB's political resolve to break up other no's

The Base Line: The State of His Presidency

A frustrated president

- Crippling gridlock at home
- Beijing's boycott

A politically wounded president

- A big setback in the latest local election
- The approval rate dropped to depressingly low

An insecure president

- The lame duck syndrome looming large
- Mounting criticism from within the DPP

The imperative to cover the base

- Political instinct directs CSB to cover the base, i.e., diehard supporters of Taiwan independence.
- He has to invest his limited time and political capital on an agenda that his core constituency craves about and is not entirely beyond his control
- Launching the “New Constitution Movement” becomes almost a political necessity (not a choice)
 - To ward off lame duck syndrome
 - To squelch criticism from within
 - To fight for his legacy
 - To define an issue that could stop Ma Ying-jeon’s presidential bid in 2008
- Insiders believe CSB has already make up his mind

Addressing the agony toward the R.O.C. Constitution

- For Taiwanese nationalists the R.O.C. Constitution symbolizes the imposition of the Chinese rule over Taiwan as it was adopted by the Nationalist in mainland China around 1947 and with only a token participation of a few Taiwan-elected National Assembly deputies.
- For them the existing constitution is an eye-souring proof of the undisrupted political lineage passing down from the Chinese Republic founded by Sun Yat-sen to the current political system.
- Taiwan cannot claim to be an independent state without severing this legal bond.
- Most leading DPP figures had long avowed to abolish the existing constitution before coming to power.

The Maddening One-China Principle

- Upon his first inauguration, the United States coached CSB's to make the “five no's” pledge, which disappointed many DPP diehard supporters. As long as CSB sticks to the “five no's”, their aspiration for a new constitution remains unfulfilled.
- They were especially agonized by the constant reminder by the Pan Blue that the one-China principle is enshrined in the R.O.C. Constitution and prominently reiterated in **the Preamble** of the section of constitutional amendments.
- The Preamble stipulates, “All the following amendments are adopted to cope with needs of the circumstance before the country becomes reunified.”

The coming clash between the Blue and the Green

- Julian Kuo, a DPP LY member, once vividly described this agony as something like “a Taiwanese nationalist soul being locked inside a one-China cage”.
- To Taiwanese nationalists, the “five no’s” were simply imposed by the U.S. to reinforce the structure of this cage (in the name of managing the status quo).
- For that very reason, the Pan Blue camp views the big bang approach as a deliberate effort to undermine the existing state structure and to purge the One China principle out of the Constitution.

Second Guessing CSB's Next Move

- Everyone is watching CSB's next move as he is the key player in setting the parameters of constitutional change.
- The most critical question is whether he will abide by the constitution-amending process prescribed in the existing constitution.
- Up to this point, CSB has pledged repeatedly that he will do so. He restated this pledge in his seven-point statement that came with his announcement of the termination of the National Unification Guideline.
- On the other hand, his new year pledge (“to create a new constitution and put this new constitution through a referendum in 2007”) sounds like that he wants to abandon the existing constitution and go straight for the adoption of a new constitution.

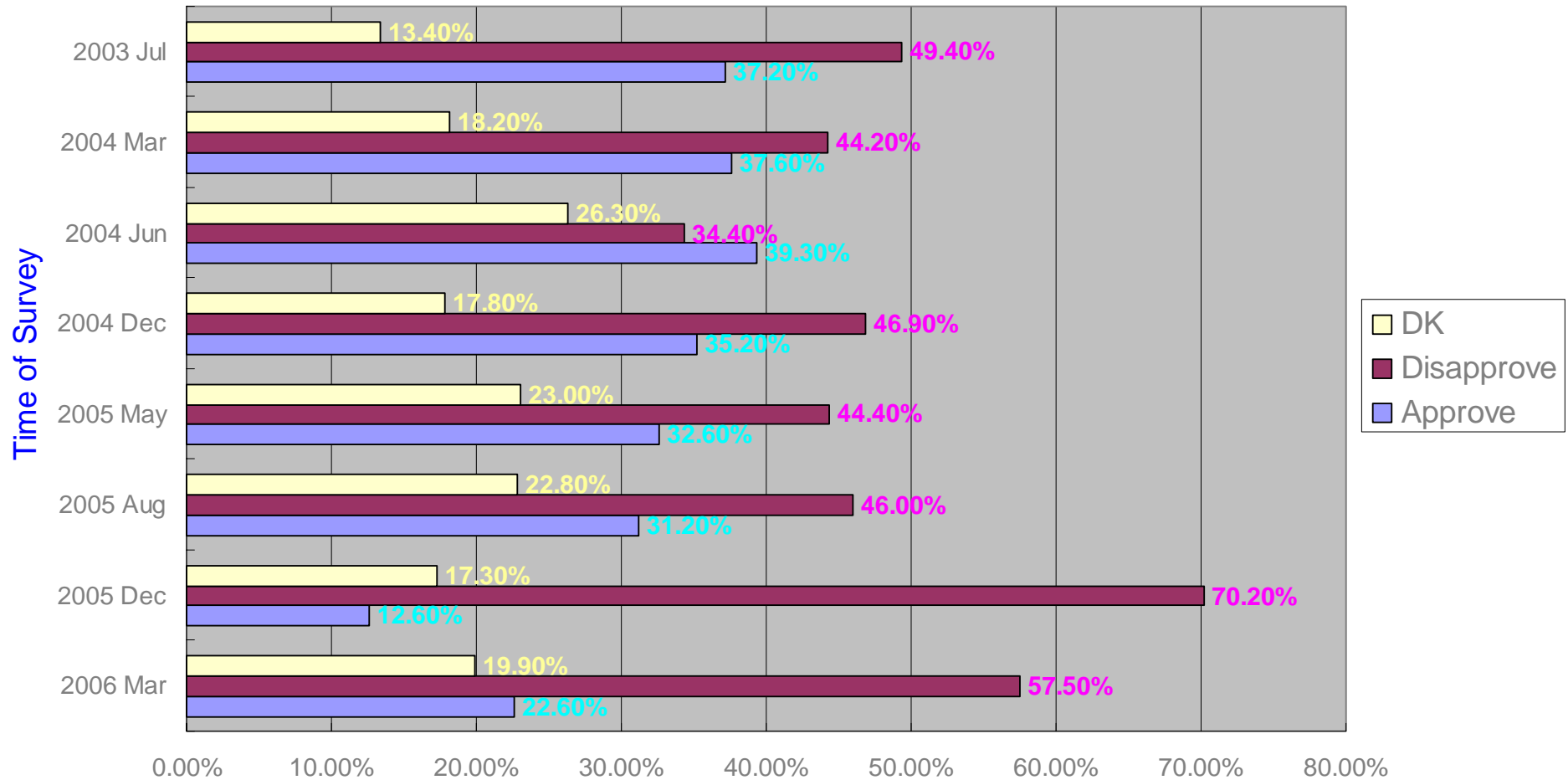
Baffling Questions

- Many scholars are deeply baffled by the two seemingly contradictory pledges. They ask “how “a new constitution” can be created through amending an existing constitution?”
- At this point, the prospect of getting a three-quarter majority in the LY for any kind of constitutional reform proposal initiated by the DPP looks very dim.
- In a recent interview by Washington Post, CSB actually acknowledged this dim prospect and used this scenario to assure the audiences in the United State that it is unlikely that any controversial issues, such as redefining the country’s jurisdiction, name and national flag, will eventually be put on the table.
- So what’s all the fuss about the “New Constitution Movement”?

The Growing Anxiety

- The time is not on Taiwan independence movement's side. There is no way that Taiwan can keep up with China in terms of economic might or military build-up. Sooner or later China will become too strong for the United States to contain.
- The trend of economic integration is scary and Taiwan will soon become too dependent on China to maintain its political autonomy and separate cultural identity.
- Alarmed by muted international responses to the passage of the Anti-Secession Law last year
- Shaken by the potency of Beijing's united front strategy, especially after Lien Chan and James Soong's visits to PRC.
- They fear that once the Pan Blue comes to power in 2008, the KMT will open the flood gate, and thus introduce irreversible change and close off the independence option forever.
- **Now or never.** Year 2008 is the last window of opportunity.

Figure 2: Recent Trend of Chen Shui-bian's Approval Rate



Source: ERA TV News Poll

The Straits as the flash point again?

Reasons for being alarmists

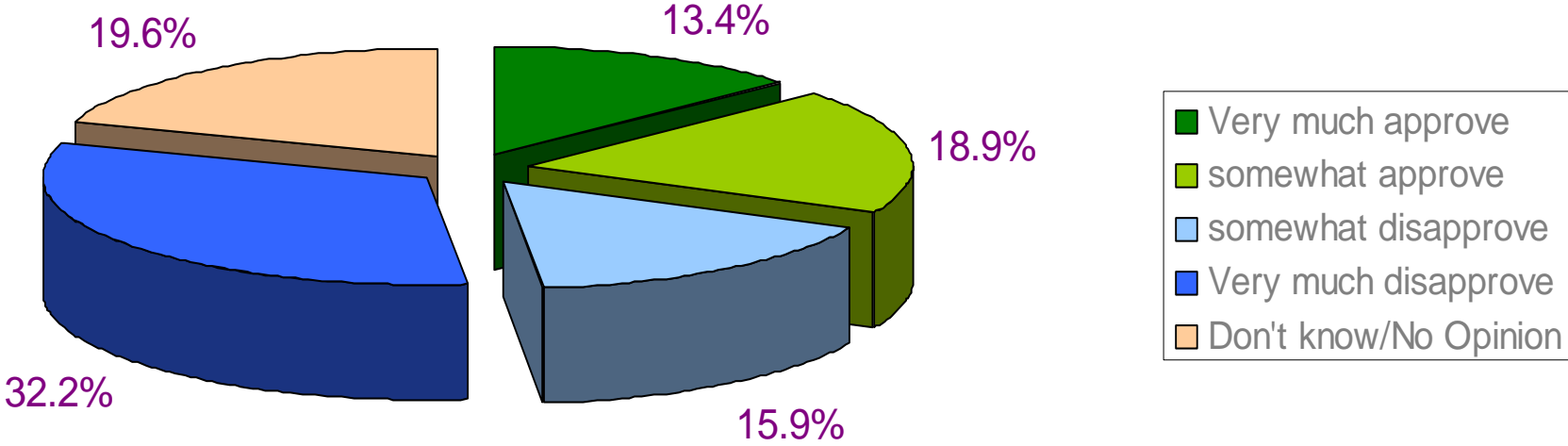
- No one really knows where is the tipping point or what might trigger the volcano of Chinese nationalism to erupt.
- It costs CSB very little to push the envelop, so he will keep pushing until he inadvertently passes the point of no return.
- Since all parties concerned are militarily prepared for all kinds of contingency, including a full-scale engagement, a tiny spark can start a prairie fire.
- Difficult to prevent escalation because there is no exit strategy in the event of military showdown on all sides.
- Politically, all parties concerned have hardening their positions. Leaders in Beijing and Washington cannot afford a political back-down.

Reasons for guarded optimism

- With dwindling popular support for constitutional overhaul, so it is difficult to build up the momentum.
- The Pan Blue, which is now more confident of itself, will stop CSB's extra-constitutional moves.
- US remains a credible and effective status-quo manager. It will rein in CSB before the situation gets out of control.
- There will be many alarm bells along the way before the situation reaches the boiling point.
- A head-on military confrontation between the two nuclear-armed giants is unthinkable, so it will be avoided by all means.
- In the end, the saga of new constitution movement will turn out to be “a storm in a tea kettle” on Taiwan.

Figure 1: "Now the NUG and NUC have been terminated and President Chen is going to push for constitutional revision or even for a new constitution, do you approve and disapprove that?"

ERA TV News Poll, March 20, 2006



The beginning of the end?

- The New Constitution Movement might will be the last episode of the Taiwan independence crusade especially if CSB embarks on the extra-constitutional route.
- Most likely, the controversial move will be abruptly stopped by Washington, possibly in a very humiliating way. Afterward, it will become very difficult for future DPP leaders to re-ignite the momentum.
- Many DPP LY members of the younger generation want to re-open the debate on some of the DPP's fundamentalist doctrines, especially the existing approach toward China. They believe it becomes increasingly a political liability.
- They also believed that CSB has depleted both the credibility and the political fuel of the Taiwan independence cause.