

## Student Note

### **Court in a Political Conflict: Note on South Korean Impeachment Case**

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#### ABSTRACT

*In March 2004, the Constitutional Court of Korea reviewed the impeachment resolution against President Roh Moo-Hyun brought by the National Assembly of South Korea. The judgment the Court made in serious political confrontation marks the first time in the history of modern constitutionalism that a president impeached by a legislative body has been reinstated by a judicial body. This note attempts to inquiry into the role of the Court in a serious political conflict through the analysis of the context and judgment of this case. After introducing political and legal backgrounds of the incident, as well as the judgment and relevant arguments, this note tries to identify the court's role from three models drawn from prevailing theories of judicial review. However, the court's decision is neither convincing nor able to identify its role in democratic politics. This note argues that the seemingly unreasonable decision can only be fully explained when we understand the Court as a political actor pursuing its political goals in the context of a divided society.*

**Keywords:** *South Korea, Constitutional Court, Divided Society, Impeachment, President*

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## I. INTRODUCTION

Chen Shui-Bian's win in the 2000 Presidential election was a milestone in Taiwanese history, which not only peacefully ended the fifty-five-year authoritarian Kuomintang regime in Taiwan, but also marked the first democratic governmental turnover. However, the movement to impeach President Chen was frequently mobilized from the beginning to the end. Opposition parties tried several times to impeach Chen on various grounds, such as suspending a nuclear power plan in 2000 and a corruption allegation in 2006. As the episode goes on, the impeachment procedure was revised to a two-step procedure: first, the legislative motion and then the adjudication of the Constitutional Court.<sup>1</sup> However, impeachment arguably is "a matter of political theory," and not only as "a matter of law."<sup>2</sup> When the Constitution assigns the court a role in it, how the court plays its role is a question that concerns constitutional scholars and judges. What is the proper standard to adjudicate impeachment in the two-step process? Is the distinctive judicialized impeachment procedure a wise constitutional choice?<sup>3</sup> A more fundamental issue beneath all these questions is the role of the court in democratic politics. What is the proper role of the court in dealing with politically sensitive cases in serious political conflicts?

Despite of all these crucial but unanswered questions, we lost further clues since no motion for impeachment has been successfully delivered to the Court so far in Taiwan. As we read into those made-in-America theories of judicial review, we wonder whether they are applicable since the distinctive contexts of democratic transitions and social cleavages have

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1. Article 2 of the 1997 R.O.C. Constitutional Amendment authorized the power to submit the impeachment of the President to the National Assembly initiated by the Legislative Yuan. However, due to the abolition of the National Assembly in the 2005 constitutional reform, the judgment and punishment in impeachment cases against the President was transferred to the Legislative Yuan and the Constitutional Court. Article 2 of the 7<sup>th</sup> R.O.C. Constitutional Amendment prescribes that, "the Impeachment of the President or the Vice President by the Legislative Yuan shall be initiated upon the proposal of more than one-half of the total members of the Legislative Yuan and passed by more than two-thirds of the total members of the Legislative Yuan, whereupon it shall be presented to the grand justices of the Judicial Yuan for adjudication." Constitutional Amendment, Article 2 (Taiwan).

2. RICHARD A. POSNER, *AN AFFAIR OF STATE: THE INVESTIGATION, IMPEACHMENT, AND TRIAL OF PRESIDENT CLINTON* 130 (1999). Many scholars believe impeachment is a typical example of a political question. See e.g., Rachel E. Barkow, *More Supreme Than Court?: The Fall of the Political Question Doctrine and the Rise of Judicial Supremacy*, 102 COLUM. L. REV. 237, 272 (2002); Michael J. Gerhardt, *Rediscovering Nonjusticiability: Judicial Review of Impeachments After Nixon*, 44 DUKE L.J. 231, 244 (1994).

3. Some commentators believe that the court is incapable and improper to deal with Presidential impeachment. For example, a commentator believes that American President Bill Clinton's impeachment "reinforced the presumption that ... the only role the judiciary has in the impeachment of a President is the role played by the Chief Justice as presiding officer" and that "[j]udicial review is likely to be limited at best." See Susan Low Bloch, *A Report Card on the Impeachment: Judging the Institutions That Judged President Clinton*, 63 LAW & CONTEMP. PROBS. 143, 166 (2000).

challenged their shared assumption.<sup>4</sup> We also wonder whether our distinctive political context demands a different version of constitutional theory. Interestingly, the same script was put on the stage of South Korea. President Roh Moo-hyun, who marks the successful democratic transition of South Korea, was impeached by the National Assembly in 2004. The Constitutional Court of South Korea then adjudicated the case. These episodes in two countries reveal a widespread social condition in new democracies: serious political divisions. As the third-wave of democratization began, a strong sense of identity intensified social conflicts and generated more and more divided societies around the world. When social cleavage is too deep to be compromised through democratic politics, certain feelings of animosity can result in undermined legitimacy of law and government. How courts in divided societies cope with political challenges grounded in global constitutionalism is a complex question of utmost practical importance.

The 2004 constitutional adjudication of South Korea on President Roh Moo-hyun Impeachment shed some light on these hard questions. It is the first case in which a constitutional court adjudicated an impeach motion passed by a legislative body in the history of modern constitutionalism. In this case, the court was asked to adjudicate a highly politically sensitive issue in a serious political conflict. The discussion of the case may not only help us understand more deeply about the operation of the two-step impeachment process, but also delineate better in terms of the role of court in democratic politics.

By introducing the South Korean presidential impeachment case, this note also attempts to delineate the way courts are involved in political conflicts, hoping to contribute a deeper understanding of the relationship between democracy and constitutionalism, and to inspire some thoughts about the conflict-management function of constitutionalism in divided societies. I will first introduce the backgrounds and judgment of the case, then inquire into the role played by the Constitutional Court of South Korea. I examine whether the conventional wisdom about judicial review can fully explain the South Korean judgment. However, rather than criticizing the court's decision with normative theories, I shift my focus to the political context underlying the impeachment controversy in an attempt to disclose the dynamics between the court and the complicated political context. A political analysis can better explain the Court's judgment. I argue that, rather than trying to play a "proper" role as a law interpreter or a guardian of

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4. Most theories of judicial review in American Jurisprudence presume that, all social differences can be resolved through democratic process. However, in some new democracies, democratic politics sometimes fails, either because the lack of experience or because serious cleavage deters discussion and cooperation.

democratic procedure, the judgment reflects the Court's political strategy to maintain its legitimacy and supremacy in political conflicts.

## II. POLITICAL AND LEGAL BACKGROUNDS

### A. *Democratic Transition and Regional Politics in South Korea*

Since the 1980s, South Korea has successfully transformed their democratic regime and made significant progress toward establishing pluralistic governing institutions and protecting the political and civil liberties of its citizens.<sup>5</sup> However, the legacy of authoritarianism and regional factionalism are among the variety of forces continuously testing the newly-established democratic procedures and institutions. Before President Roh Moo-hyun's presidency, regionalism and conservative political ideology still prevailed and deterred further democratic consolidation.<sup>6</sup>

In South Korea, political parties lack concrete organizational structures and specific programs of action, and they exist primarily to serve as platforms for their leaders, who operated regional political machines and more often than not had to fend off charges of corruption.<sup>7</sup> Three Kims, Kim Young-sam, Kim Dae-jung, and Kim Jong-pil, developed their leadership during the Park Chung-hee authoritarian regime and organized political parties with dominant control on political resources and the enthusiastic support of regional constituencies. Therefore, political antagonism among regions primarily manifested as confrontational regionalist voting in which voters cast their votes for candidates or parties only because they are based on their own regions.<sup>8</sup>

Regionalism significantly affects democratic consolidation of South Korea. Regionalism deters an equal and fully participative decision-making

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5. See e.g., Tom Ginsburg, *Confucian Constitutionalism? The Emergence of Constitutional Review in Korea and Taiwan*, 27 LAW & SOC. INQUIRY 763, 763-79 (2002).

6. Kie-Duck Park, *Hanguo Zhengdang Zhengzhi Yu Minzhu Gong Gu* [Political Parties and Democratic Consolidation in Korea], 2 TAIWAN MINZHU JIKAN [Taiwan Democracy Quarterly] 23, 33-39 (2005) (arguing that unstable party politics could deter South Korean democratic consolidation).

7. The discussion of regionalism in South Korea, please see Keedon Kwon, *Regionalism in South Korea: its origins and Role in Her Democratization*, 32 POLI. & SOC. 545 (2004) (arguing that regionalism contributed to democratic consolidation in South Korea); CARL J. SAXER, FROM TRANSITION TO POWER ALTERNATION-DEMOCRACY IN SOUTH KOREA, 1987-1997, 93-197 (2000) (analyzing the 1990 party merger and the connection between election, parties, and regionalism during Roh-Tae-Woo presidency).

8. Analysts explain the rise of regionalism with three factors: the historical underdevelopment of Cholla in contrast to Kyongsang, the biased recruitment of elites and the manipulation of regional sentiment by political elites, and more recent causes such as the 1980 Kwangju incident. See David C. Kang, *Regional Politics and Democratic Consolidation in Korea*, in KOREA'S DEMOCRATIZATION 161, 165 (Samuel S. Kim ed., 2003).

process and led to endless political confrontations. However, the country's limited experience in democracy, thus far, has provided little time for democratic norms and values to take root among the citizens and political parties.

B. *A Reformist President in a Divided Government*

The 2002 Presidential election was a cornerstone in South Korean political history. Roh Moo-hyun's winning of the presidential election not only marked a liberalist turn in Korean political history, but also a break from the deep-rooted regional politics.<sup>9</sup> However, exactly because of his less regional background, he faced enormous counter forces from regional political powers, which resulted in the first presidential impeachment motion in South Korean history.

Although Roh has been regarded as a liberalist, his partisan affiliation is opportunistic. He started his political career in 1988 because of the invitation of Kim Young-sam. Just before the Presidential election in 1997, however, he was endorsed by Dae-Jung Kim and was appointed as the Minister of Maritime Affairs and Fisheries in August 2000. He was elected the presidential candidate of the ruling Millennium Democratic Party (hereinafter, MDP) and eventually won the presidency on December 19, 2002, defeating the Grand National Party candidate by a narrow margin. Roh then became the 16<sup>th</sup> President of South Korea, holding the position from February 2003 to February 2008. His winning of the election brought some fresh air to South Korea because of his commitment to promote human rights and democracy, and to eliminate regionalism. His ambitious agenda in his presidency also inspired many liberals and reformists.

However, his liberal character and attitude against regionalism soon invited animosity from existing political powers. In 2004, the year of impeachment, the Executive and the National Assembly was controlled by different and conflicting political parties, leading to a divided government and endless conflicts. The National Assembly, which was occupied by the opposition parties of the Grand National Party (hereinafter, GNP) and the New Millennium Democratic party (NMDP), became a significant courtforce for the President.<sup>10</sup> Their coalition dominated the supermajority of the

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9. Park, *supra* note 6, at 38.

10. The Grand National Party (GNP), holds the majority of the seats of the National Assembly. Because of the division between Roh's younger generation and old Kim Dae-jung's supporters in the MDP, Roh was not always able to count on the MDP's support in the Assembly. His support base became even more fragile when the pro-Roh forces left the MDP to form a new party, the Uri Party, in September 2003. A coalition consisted of GNP and NMD thus emerged on the shared position against President Roh. The GNP, holding 149 seats, and the MDP, holding 63 seats, together formed a supermajority in the National Assembly of 272 members.

National Assembly, which is sufficient to override the President's vetoes on legislation and to impeach him under the Korean Constitution. Therefore, the impeachment against President Roh was not unpredictable.

### C. *The Legal Backgrounds*

The South Korean Constitutional Court consists of nine justices. Although all nine justices are "appointed" by the President, the Constitution provides that three of the nine appointed by the President are to be selected by the National Assembly, and the remaining three appointees are to be designated by the Chief Justice of the Supreme Court.<sup>11</sup>

The Constitution of South Korea explicitly gives the Court jurisdiction over impeachment questions. According to Paragraph 1 of Article 65, the National Assembly may pass motions for impeachment if the President violates "the Constitution or other laws in the performance of official duties." A motion for President Impeachment "shall be proposed by a majority of the total members of the National Assembly and approved by two-thirds or more of the total members of the National Assembly." After an impeachment motion has been passed, the person is suspended from exercising his power until the impeachment has been adjudicated.<sup>12</sup>

The Court is the ultimate adjudicator on the President's impeachment; however, other than the requirement of violation of "the Constitution or other Acts," the text of the Constitution is silent on what is impeachable and what is not. In order for the Court to affirm the National Assembly's vote to impeach, six out of the nine justices must vote in favor of removal.<sup>13</sup> A new presidential election must take place within sixty days if the Court decides to impeach President Roh.<sup>14</sup>

## III. THE MOTION TO IMPEACH AND THE JUDGMENT

### A. *Resolution in Chaos*

Various political scandals and poor performance soon led President Roh to receive fiery criticisms in the hostile political environment. To struggle

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11. According to Articles 111 and 112 of the South Korean Constitution, each justice serves for a six-year term, which is renewable. The Court has jurisdiction over five areas: 1) review of constitutionality of statutes, 2) impeachments, 3) dissolution of political parties, 4) jurisdictional disputes among governmental bodies, and 5) constitutional petitions. TAEHANMIN' GUK HONBOP [HONBOP] [Constitution], Article 111 & 112 (S. Korea).

12. HONBOP, Article 65. For the text in English, available at [http://www.servat.unibe.ch/icl/ks00000\\_.html](http://www.servat.unibe.ch/icl/ks00000_.html).

13. *Id.* Article 113.

14. *Id.* Article 68.

against the hostile environment, he sought political support from friendly parties and the public. He promoted friendly parties, made controversial remarks towards the general election, and also proposed a national referendum, submitting himself for public confidence.<sup>15</sup> Although all these events triggered more political attacks and led to constant motions of impeachment since 2003,<sup>16</sup> however, none were passed until a turning event in February, 2004.

In a 2004 Press conference, he not only publicly supported the Uri party, but also urged voters to support the Uri Party at the April elections by connecting himself to the Uri party.<sup>17</sup> Opposition parties GNP and NMDP worried over losing power and filed a complaint with the National Election Commission (hereinafter, NEC), alleging that Roh had violated the neutrality principle of the election law. After the NEC's suggestion for him to remain neutral in the upcoming election, Roh denigrated the current Election laws and disagreed with the Commission's recommendation, saying that the

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15. During his speech at the National Assembly on October 13, 2003, he stated that "Although it is not a matter that I can determine, I think a national referendum is a correct way to do this. Although there are disputes as to legal issues, I think it is feasible even under the current law by interpreting the 'matters concerning national security' more broadly, should there be a political agreement," thereby suggesting a confidence vote to be instituted in December of 2003. Debates upon the constitutionality of the confidence referendum reached the Constitutional Court. The Constitutional Court dismissed the case on the ground that the "act of the President was not an act accompanying legal effect but an expression of a mere political plan, therefore did not constitute an exercise of governmental power." See The Decision on President's Proposition for National Confidence Referendum Case, 2003 Hun-Ma 694, (Nov. 27, 2003) [15-2(B) KCCR 350]. For the English text of this decision, *available at* <http://english.court.go.kr/>.

16. In April 2003, there was a dispute between Roh and the Assembly over Roh's choice of the head of the National Intelligence Service, and some members of the National Assembly mentioned impeachment as an option. In June 2003, the GNP adopted a resolution to impeach Roh if he did not apologize for his remark during his visit to Japan that a full democracy cannot be achieved in Korea until the Communist Party is legalized in Korea. Then, from September 2003 until Roh was in fact impeached in March 2004, the GNP and MDP came up with a different reason to impeach Roh every month. In September 2003, the Assembly passed a bill to dismiss the Government Administration and Home Affairs Minister, and the GNP again mentioned that it would consider pushing for impeachment if Roh vetoed the bill. In October, the GNP threatened to impeach if he continued to seek the referendum. And in November, the GNP again threatened to impeach Roh if he vetoed the bill passed by the Assembly authorizing the appointment of a special prosecutor to investigate the campaign contribution scandal focusing on Roh's aides.

17. Although he had not formally joined the party, he urged the public to support the Uri Party at the coming election. According to the court, President Roh stated at a press conference on February 18, 2004 with six of the Seoul-Incheon area news media organizations, that "I simply cannot utter what will follow should the quorum to resist the constitution revision be destroyed." At a press conference with the Korean Network Reporters Club, as an invited guest, which was broadcasted nationwide on February 24, 2004, President Roh stated that "I expect that the public will overwhelmingly support the Uri Party, ... I would like to do anything that is legal if it may lead to the votes for the Uri Party," and "when they elected Roh Moo-hyun as the President, the public will make it clear whether I will be backed to do it well for the four years to come or I cannot stand it and will be forced to step down." See Decision on Impeachment of the President (Roh Moohyun) Case, 2004 Hun-Ma 1, (May 14, 2004) [16-1 KCCR 609]. For the English text of this decision, *available at* [http://english.court.go.kr.](http://english.court.go.kr/)



election law is a wrongful legacy of the past regime.<sup>18</sup>

The MDP and NMDP thus restarted a motion to impeach President Roh. The members of the Uri party boycotted the motion and blocked the Speaker's Podium for three days, trying to obstruct the impeachment. In Responding to the boycott, the Speaker of the National Assembly changed the time of the general meeting without consulting representative members of the Uri Party and expelled the 47 Uri lawmakers from voting for the impeachment resolution. During the chaos, the motion to impeach President Roh was passed with 193 votes out of 272 members in the Assembly. As provided by the Constitution, Roh's presidency was immediately suspended, and the Prime Minister, traditionally powerless, assumed the duties of the office of the president.

The National Assembly listed twenty-one separate counts as grounds for impeachment in the resolution, ranging from Roh's support of the Uri Party to corruption scandals of Roh's relatives aides to his maladministration. Based on these grounds, the National Assembly asked the Constitutional Court to remove President Roh from his office according to the Constitution.

#### B. *Grounds to Impeach and Counterarguments*

The grounds for impeachment can be summarized as follows:

First, the National Assembly believes that the president has the obligation to preserve the basic order of free democracy and should remain neutral regarding to parties. However, he not only publicly supported a particular political party and violated the Public Officials Election and Election Malpractice Prevention Act (hereinafter referred to as the "Public Officials Election Act"), but also ignored NEC's suggestion. The president's act has violated the principle of neutrality and contempt the constitutional institutions. The president's suggestion on national referendum whether he should remain in office is not permitted by the constitution. The national law and order was corrupted as a result.<sup>19</sup>

Besides, the national assembly argued that the president was involved directly or indirectly in corruption and illegal campaigning, and violated various statutes such as the political funds act and criminal code.<sup>20</sup>

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18. The act of the President in response to the National Election Commission's March 4, 2004 decision that found a breach of election law by the President was in violation of the President's obligation to protect the Constitution as not in conformity with the principle of the rule of law. His other remarks concerning the general election also triggered discontent, and became grounds of impeachment later. However, these remarks were relatively unimportant in this case.

19. *Supra* note 17.

20. The National Assembly claims that the president had received illegal political funds concerning the Sun & Moon Group and concerning the presidential election camp. Besides, some close associates, including Choi Do-sul, Ahn Hee-Jung, and Yeo Taek-soo, were allegedly involved in corruptions. *Id.*

The third ground concerns his maladministration that may disrupt the national administration. The president should unify the nation, develop the economy, and promote public welfare. However, President Roh's performance has disintegrated the national opinion, exacerbated economic recession, and led people's livelihood into distress. Political chaos and economic collapse was the direct result of President Roh's unfaithful performance of official duties; thereby he has impeded the right to pursue happiness of the public under Article 10 of the Constitution<sup>21</sup> and violated his "obligation to faithfully perform official duties as president" as expressly provided under Article 69 of the Constitution.<sup>22</sup>

The National Assembly further argues that, "all" acts in violation of the Constitution or statutes in the performance of the President's official duty constitutes the grounds for impeachment, not limited to only grave violations. Even if the gravity is necessary requirement, the president's behavior has constituted grave violation of the Constitution and statutes. As a result, the court should uphold the impeachment motion.

In responding to the resolution, the president did not argue against those grounds one by one substantially. Instead, he pointed out procedural defects and believed the motion to impeach was illegal and invalid.

Roh attacked the legality of the impeachment voting because the GNP and NMDP distorted the voting rules and the will of assemblypersons. The two parties threatened to oust their members should they not participate in the impeachment resolution.<sup>23</sup> Besides, the voting was not conducted in secret.<sup>24</sup> The speaker of the National Assembly not only changed meeting schedules without consulting a representative member of the Uri party, but also prohibited them from voting. Thus, the resolution is invalid since it has infringed some assemblyperson's rights and is in violation of due process as the respondent was not provided with any notice to state his opinion at the impeachment process in the National Assembly.

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21. Article 10 of the Korean Constitution prescribes, "All citizens are assured of human worth and dignity and have the right to pursue happiness. It is the duty of the State to confirm and guarantee the fundamental and inviolable human rights of individuals." HONBOP, Article 10.

22. Article 69 of the Korean Constitution prescribes that, "The President, at the time of his inauguration, takes the following oath: *I do solemnly swear before the people that I will faithfully execute the duties of the President by observing the Constitution, defending the State, pursuing the peaceful unification of the homeland, promoting the freedom and welfare of the people, and endeavoring to develop national culture.*" *Id.* Article 69.

23. According to the Court's summary of the Respondent's Answer, the Grand National Party and the New Millennium Democratic Party threatened to oust party-member assemblypersons should they not participate in the impeachment resolution. *Supra* note 17.

24. The screen at the voting booth was not pulled down at the time of voting. Besides, some assemblypersons disclosed the content of their votes to the party whip of their respective party membership. *Id.*

C. *The Court's Judgment*

Against these backgrounds, the court was asked to adjudicate the impeachment resolution delivered by the Assembly. Would the court make a decision the same way we would expect from a mature and harmonious democratic society?

From the abovementioned resolution and responses of the President, the court has to deal with four major issues before it can reach their conclusion. First, the two-step impeachment is an intentional constitutional design; the court has to clarify its role and its relationship with the National Assembly. Second, the court has to review the legality of the National Assembly's impeachment resolution, seeing whether it violates due process of law as the President claimed. Third, if the resolution is valid, then the court has to further review the substantive grounds of impeachment, examining whether the President violates the Constitution and statutes. Fourth, the Court has to decide whether the President should be removed from the office after reviewing all these issues.

After a one month hearing, the Court announced its decision, rejecting the National Assembly's motion and reinstated President Roh. The judgment consists of four parts, separately responding to four issues stated above.

First, in terms of the nature of the impeachment and the role of the Court in it, the court characterized impeachment as a legal matter and the Court should determine the case with legal standards.

Instead of the traditional idea that impeachment is a political action to remove an unaccountable president,<sup>25</sup> the Court states that, "the purpose of impeachment is to protect constitutional order." The court further articulates the reasoning on the institutional arrangement in the Constitution.

*"Our Constitution, in order to fulfill the function of the impeachment adjudication process as a process dedicated to the preservation of the Constitution, expressly provides in Article 65 that the ground for impeachment shall be a 'violation of the Constitution or statutes' and mandates the Constitutional Court to take charge of the impeachment adjudication, thereby indicating that the purpose of the impeachment system lies in the removal of*

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25. The Congressional Quarterly argues that impeachment "is a political action, couched in legal terminology, directed against a ranking official of the federal government. The House of Representatives is the prosecutor. The Senate chamber is the courtroom; and the Senate is the judge and jury. The final penalty is removal from office and possible disqualification from further office." Some scholars, such as Judge Richard Posner, also suggest that impeachment "is clear as a matter of political theory," and not only as "a matter of law." *Impeachment and the U.S. Congress*, THE CONGRESSIONAL QUARTERLY (1974). See also POSNER, *supra* note 2, at 130.

*the President 'not for political grounds but for violations of law.'<sup>26</sup>*

However, the court didn't limit its role on determining proper impeachment procedure and legal interpretation as specified by Article 65(1) of the Constitution. The court assigned the National Assembly a role in identifying factual grounds but granted itself broad discretion in impeachment adjudication. Although the court "is restrained in principle to the grounds for impeachment stated in the impeachment resolution," the question of in which relations the grounds for impeachment are legally examined is absolutely for the constitutional court to determine. If we read carefully, the court determined the impeachable legal grounds, the President's legal violation, and the standard of impeachment.

Second, the court imposed almost no procedural restraint on the process of the National Assembly's impeachment resolution. It refused to apply due process of law in the impeachment process,<sup>27</sup> and claimed that the whole procedural matter is within the authority of the National Assembly's self-regulation.

In light of the doctrine of separation of powers, the status, and the function of the National Assembly, the court argues that,

*"The National Assembly, as the representative of the public and as the legislative body, possesses vast authority to self-regulate its administration, including its deliberation process and internal regulation."<sup>28</sup>*

The Constitutional Court should not intervene and judge the legitimacy of a decision reached by the National Assembly upon matters that fall within the scope of its self-regulating authority, unless "there is clear violation of the Constitution or statutes in the deliberative or legislative process of the National Assembly."<sup>29</sup> As a result, all procedural flaws, including the change of meeting time, non-secret voting, and the deprivation of certain Uri party Assemblypersons do not affect the legality of the impeachment motion.<sup>30</sup> Although self-regulation of the congress is a widely accepted

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26. See *supra* note 17.

27. The court argues that the due process principle that has been formed as a legal principle applicable to the exercise of governmental power by a state institution in its relationship with its citizens. Since the impeachment proceeding at the National Assembly concerns two constitutional institutions of the National Assembly and the President, and the resolution to impeach the President merely suspends the exercise of the power and authorities of the President as a state institution and does not impede upon the fundamental rights of the President as a private individual. Therefore, the due process principle shall not be directly applicable in the impeachment proceeding. *Id.*

28. *Id.*

29. *Id.*

30. The Court states that, "The question of the effect of such on the validity of the voting at the

doctrine, the Court left the impeachment process unrestrained by saying that the inapplicability of the due process in impeachment and emphasizing the status of the National Assembly.

The court then addressed the question of whether alleged instances of misconduct by Roh violated the Constitution or other Acts. The Court found that three of President Roh's acts are in violation of law.<sup>31</sup> First, the Court held, Roh violated the law mandating neutrality of public officials by openly advocating for the Uri Party.<sup>32</sup> Second, Roh violated his duty to observe the Constitution by challenging the validity of the election law that he was found to be in violation of by the National Election Commission. Third, Roh violated his duty to observe the Constitution by proposing a national referendum without a constitutional basis.<sup>33</sup>

Perhaps unexpectedly, after confirming the validity of the impeachment resolution and the President's legal violation, the Court developed a standard of gravity and shifted its focus to whether the violations were serious enough to warrant his removal from office. The court argues that legal violation does not necessarily constitute a valid ground for the petition for impeachment adjudication. Because of the request of the principle of proportionality, only grave violation of law is sufficient to justify removal of a public official from office.<sup>34</sup> The court further says, "since the President is empowered with democratic legitimacy vested through a national election and the 'public interest in continuity of performance of presidential duties' should be considered as important elements in determining whether to remove the

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National Assembly is a matter for which the decision of the National Assembly, with its self-regulating authority regarding the deliberation process, should be respected." *Id.*

31. The court dismissed other grounds delivered by the National Assembly, including the President's other remarks concerning general election, corruption involving the President's intimate associates and aides, and his unfaithful performance of official duties and reckless administration of state affairs. Regarding the President's other remarks concerning the election and the alleged corruption, the court found the evidence insufficient to support the claims. As for the grounds of maladministration, the court believes that the "obligation to faithfully perform the official duties" of the President is a constitutional obligation that cannot be normatively enforced. As such, as a matter of principle, this obligation cannot be a subject matter for a judicial adjudication. *Id.*

32. The court suggested that the President's public support of the Uri party at the Press conference violated the principle of neutrality, free election, and equal opportunity among parties. These principles are set forth separately in Articles 7(1), 41(1), 67(1) and 116(1) of the Constitution. *Id.*

33. Article 72 of the Constitution provides that the President "may submit important policies relating to diplomacy, national defense, unification and other matters relating to the national destiny to a national referendum if he deems it necessary." However, the Court believed that the President used the Article 72 power to call national referenda as a political weapon in partisan conflicts. Therefore, his referendum proposal amounted to an attempted abuse of the constitutional process to enhance his political standing and was in violation of the Constitution. However, this conclusion is contrary to its previous decision. *See supra* note 15.

34. The Court believed that, the principle of proportionality requests the punishment under the Constitution proportionally correspond to the obligation owed by the respondent. Therefore, only a "grave" violation of law is sufficient to justify removal of a public official from office. *See supra* note 17.

President from office, he can be removed from the office only for grave violation of law.” The Court then ruled that none of these violations were serious enough to remove President Roh from office.<sup>35</sup>

The impeachment resolution was dismissed as a result.

#### D. *Unconvincing Legal Arguments?*

The judgment perhaps surprised many observers; its argument is somehow unconvincing and inconsistent. For example, the court’s application of the neutrality principle is not shared by courts in other jurisdictions. The principle of neutrality is usually understood as a mandate to public servants or judges for the cause of judicial independence and administrative fairness.<sup>36</sup> Even applicable to the President, the content will be different from those of judges.<sup>37</sup> The president, as a politician who is accountable to voters, should be subject to less restraints of the neutrality principle. Besides, when the President belongs to the minority party in the National Assembly, it could be even more legitimate to promote certain candidates and parties in order to carry out his electoral promise. A president’s acts such as public support for particular parties are usually tolerable in comparative law. The South Korean Constitutional Court’s interpretation of the principle of neutrality is unusual if not arbitrary. In addition, its characterization of impeachment as a legal matter rather than a political action is also contrary to common understanding. Perhaps most astonishingly, the Court created a standard of gravity that is not written in the Constitution in order to save Roh’s Presidency. Many other arguments are not so reasonable for observers.

The judgment is inconsistent too. Its opinion about the constitutionality of referendum proposal is in contrary to its recent precedent.<sup>38</sup> The creation of an extra-legal standard of gravity is also incompatible with its position to limit the impeachment grounds on legal matters. In many ways, the judgment was imperfect and unconvincing from a legal standard.

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35. After reviewing the totality of the impacts the violation of law by the President has upon the constitutional order, the Court concluded that specific acts of violation of law by the President cannot be deemed as a threat to the basic order of free democracy since there was no affirmative intent to stand against the constitutional order therein. The president should not be removed from the office despite all the violation of law. The resolution was dismissed.

36. See e.g., O. P. DWIVEDI, JAMES IAIN GOW & LAIN GOW, FROM BUREAUCRACY TO PUBLIC MANAGEMENT: THE ADMINISTRATIVE CULTURE OF THE GOVERNMENT OF CANADA (1999).

37. For example, most statutes demand political neutrality in the performance of his duties but do not prohibit political party membership per se.

38. Regarding the President’s proposal of confident referendum, the Constitutional Court set aside the legal challenge on the ground of “not ripe for adjudication” with a close decision on November 27, 2003. While four justices alleged Roh had violated the constitution, a majority of five justices maintained that Roh’s call for a referendum was not detailed enough. Hence, this case was not yet ripe for the court to make a substantive decision. See *supra* note 15.

#### IV. IDENTIFYING THE COURT'S ROLE IN A DEMOCRACY

Setting aside the legal argument, the court's role in democracies is hard to categorize into any conventional theory of judicial review.

##### A. *Three Models in Conventional Theories*

Regarding the role of the court in a democracy, three major models can be derived from the prevailing theories of judicial review. Most scholars see the Court as a neutral and legal institution; it should be either a legal interpreter or a procedural guardian. I call first a legalistic model, and, later, a procedural model. In addition to the normative theories, critical legal schools doubt the neutrality and legitimacy of the Court. They argue that a court's judgment reflects only a judge's personal attitude. I call this approach an Attitudinal Model. Does the judgment of South Korea Court fit into any one of these models?

##### 1. *Legalistic Model*

For legalists, a constitution is considered a legal document and the justices of the constitutional court are trained in law; the job of interpreting the Constitution is taken to be a legal one.<sup>39</sup>

Moral or political judgment is the task of the legislature, and it is not for the court to dissent with a legislature's judgment of what is right for the country. Legalists argue that any theory which gives politics a role in legal judgment works to systematically undermine democracy.<sup>40</sup> Despite various ways of constitutional modality, the constitutional text is taken as the basis for interpretation under the legalism model. Accordingly, political judgment of other political branches should be respected if it does not go astray from the constitutional text.

Article 53(1) of the Constitutional Court Act provides that the

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39. Scholarly writing has identified six forms of constitutional argument or construction that may be used by courts or others in deciding a constitutional issue. These are (1) historical, (2) textual, (3) structural, (4) doctrinal, (5) ethical, and (6) prudential. See P. BOBBITT, *CONSTITUTIONAL INTERPRETATION* (1991). Of course, other scholars may have different categories, but these largely overlap these six forms. See e.g., Fallon, *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 HARV. L. REV. 1189 (1987); Richard Post, *Theories of Constitutional Interpretation*, in *LAW AND THE ORDER OF CULTURE* 13, 13-41 (Richard. Post ed., 1991).

40. Antonin Scalia, perhaps one of the most prominent advocator of this view, holds that, even if constitutional provision is abstract and ambiguous, the judge should interpret the constitution in a legalistic way by looking to the original meaning of the constitution. Through looking back to original meaning of constitutional provisions, judges can avoid bringing their own value and make constitutional adjudication legitimately. ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL CURT AND THE LAW* (1997) (arguing the legitimacy of a written Constitution derived from the agreement of the political society at the time of constitution's passage).

“Constitutional Court shall issue a decision removing the public official from office when there is a valid ground for the petition for impeachment adjudication.” A fair literal reading of it is that the Court shall automatically issue a decision removing the public official from office as long as there is any valid ground for impeachment set forth in Article 65(1) of the Constitution. If the Court is a legalistic one, it should either remove the President from his office because of his legal violation, or dismiss the case and claim no violation of law by the President.

## 2. *Procedural Model*

Another stronger argument is the procedure-oriented theory of judicial review. According to it, a court should be a guardian of democratic procedure and step in political decisions when significant procedural flaws exist.<sup>41</sup> According to the most prominent advocator, Ely, judicial review should secure the procedural conditions necessary to ensure that the political process, especially the legislative one which gives rise to substantive decisions, is fair and open to all actors in the political marketplace. The court would then act as guardians over the process of democracy, and should adopt a “participation-oriented, representation-reinforcing” approach to judicial review. Judicial intervention is necessary when laws or policies do not represent minority interest.<sup>42</sup> In other word, the legitimacy of judicial review derives from its function on overseeing a sound democratic procedure, with which the legitimacy of democratic constitutionalism can be derived. Some followers enrich the proceduralist argument with the theory of deliberative democracy.<sup>43</sup> They argue that democratic legitimacy derives from an inclusive and deliberative democratic discussion. Judicial involvement to create an ideal communicative environment is not only legitimate but also

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41. The most prominent and early proposal of purely proceduralist theory of constitutional adjudication was made by John Hart Ely. Ely argues that, a tension between two fundamental constitutional values — democratic majority and minority protection exists since the majority cannot be trusted to protect the minority “from the value judgments of the majority.” In this tension, the court can neither replace its own judgment to majority ones nor subject the minority to majority will. The only legitimate way for courts to overrule a majority decision is on procedural grounds — whether the procedure is open and equal to minorities. *See* ELY, *DEMOCRACY AND DISTRUST* 69 (1980).

42. Ely suggests that the court should not do political or moral judgment. Instead, he claims that since courts are experts on procedure and are essentially neutral, they should safeguard a sound political procedure to reinforce the minority’s participation and representation. “A body that is not elected or otherwise politically responsible in any significant way is telling the people’s elected representatives that they cannot govern as they’d like.” *Id.* at 4-5.

43. For example, Habermas argues a justification for judicial involvement in political process is to enhance the communication and deliberation of democratic decision. *See* Jürgen Habermas, *Popular Sovereignty as Procedure*, in *DELIBERATIVE DEMOCRACY: ESSAYS ON REASONS AND POLITICS* 33-65 (J. Bohman & W. Rehg eds., 1997).



desirable in democracy.<sup>44</sup>

According to this model, a court in impeachment adjudication should shift its focus from substantive grounds to procedural flaws. In the South Korean case, since President Roh has centered his argument on the procedural flaws of the impeachment motion, the court had the chance to review the case from the procedural perspective. The court may either see president Roh or the Assemblyperson of the Uri Party as a minority who was unfairly deprived rights of participation, or demand a more deliberative procedure of impeachment.

### 3. *Attitudinal Model*

Some derive their argument from observation of judges' behavior. Many positive-empiricists insist that law has little influence on judges' behaviors. Decades of social science research designed to test these impressions has demonstrated instead that ideological and political considerations drive decision-making.<sup>45</sup> In other words, judges make decisions by their personal preference, and use legal argument as mere rhetoric to create a legitimate but false appearance. We might find it difficult to legitimize judicial review under this model; however, to understand the real dynamic is the point here. If the Court is an attitudinal court, we might be able to predict the outcome from a judge's personal backgrounds and their previous decisions.

#### B. *An Unconventional Court?*

Can we characterize a court into any one of the three models from the decision it delivered? Unfortunately, the result is disappointing.

First, the impeachment decision indicates that the Constitutional Court of South Korea is not a procedure-oriented court: it did not take procedure seriously.

Perhaps unexpectedly, the court weighs little on procedural matters. Its decision could lead to an unrestrained impeachment process by leaving all procedural rules to the self-regulation of the National Assembly. The decision seems to be improper, especially in the context of democratic transition. Many have argued, since democratic politics can easily go astray

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44. See e.g., CHRISTOPHER F. ZURN, DELIBERATIVE DEMOCRACY AND THE INSTITUTIONS OF JUDICIAL REVIEW (2007) (arguing that Constitutional review is necessary to ensure the Procedural requirements for legitimate democratic self-rule through deliberative cooperation).

45. Spaeth and Segal have tested the force of precedent on the U.S. Supreme Court and suggested that justices who dissent from a precedent-setting case generally maintain their position in related cases decided subsequently. They concluded: the Justices are rarely influence by stare decisis. See JEFFREY A. SEGAL & HAROLD J. SPAETH, THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED (2002).

in democratic transition, the court has more legitimacy and function in leading democratic politics in the correct path and imposing rule of law to consolidate democracy.<sup>46</sup> However, the court neither attempted to regulate the crazy politics nor insisted rule of law by creating an extra-constitutional standard of gravity. Despite the recognition of the self-regulation authority of the congress, to what extent this authority can immune all procedural requirements is the key concern for new democracies. For example, in Judicial Yuan Interpretation 499 of Taiwan,<sup>47</sup> regarding to the constitutionality of constitutional Amendment, the court required a due process of constitution-amending and invalidated the constitutional Amendments passed by the National Assembly as unconstitutional. Therefore, excluding all procedural restraints on the impeachment process made the Constitutional Court of South Korea a non-procedure-oriented court.

Could the court take the legalistic approach? In many ways it did.

The court first characterized the nature of impeachment a legal matter and positioned itself as an interpreter of law in the whole process. In addition, it seems to strictly follow the textual modality to interpret the election laws. Moreover, by refusing to step into the impeachment procedure, the court also denied an active role in democratic decision-making. It is reasonable to say that the court sees itself as having a passive role in democratic politics, a role that is to take charge of legal interpretation only. For example, in interpreting the principle of neutrality, it adopted an overly-rigid textual reading.

For instance, the court argued that, since the President is a public official, it is within the meaning of “public official” in the election law. As a result, he is prohibited to support particular parties or candidates by identifying themselves with such particular political parties, even if he is a “constitutional institution of a political nature.” The court applied the neutrality principle to the President on the bases of Article 7(1) of the Constitution, saying that the President is obligated to oversee a fair electoral process and to unify the social community. The president should restrain himself from exercising “influence in the free competition among political factions by identifying itself with a particular political party or a candidate or taking sides with a particular political party or a candidate in electoral campaigns by use of the influence and authority vested in the office.”<sup>48</sup>

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46. See e.g., Ruti Teitel, *Transnational Jurisprudence: The Role of Law in Political Transformation*, 106 YALE L.J. 2009, 2011 (1997).

47. *J. Y. Interpretation No. 499* (2000/3/24). For the text in English, available at <http://www.judicial.gov.tw/>.

48. “In order to provide a forum for free competition where the political parties can compete fairly at the election,” the court says, “the constitution also prohibits the state institutions from either favoring or prejudicing any particular political party or candidate in the electoral campaign.” In order

However, the court did not carry this approach throughout its judgment. The creation of the gravity standard is the most obvious deviation. Although the Court shall automatically issue a decision removing the public official from office as long as there is any valid ground for impeachment set forth in Article 65(1) of the Constitution, according to the literal interpretation of Article 53(1) of the Constitutional Court Act,<sup>49</sup> the court created a standard of gravity to adjudicate the impeachment. The creation of a certain standard absent from the Constitutional Provision or precedents is always criticized as judicial rule-making, which runs counter to rule of law. If the court is legalistic, it is not consistent.

Can we see through the judgment from the attitudinal model? We try to trace out a judge's political preference from his or her backgrounds and previous judgments to see whether the Court made the decision based on a Justices' political attitude.

Among the nine Justices who made the impeachment judgment, Justice Yun Young-chul, Song In-jun, and Choosun-hoe were nominated in 2000 by former President Kim Dae-jung. Justice Lee Sang-kyung was nominated by the National Assembly at that time. These justices might be politically affiliated with the NMDP and GNP, who were the major opposition forces against President Roh.<sup>50</sup> It's fair to guess they might vote to pass the impeachment against President Roh. If we look back to another related case concerning the constitutionality of confident referendum, we can further find that, four Justices delivered dissenting opinions and claimed the referendum proposal as unconstitutional. Since the referendum controversy is also listed as a ground to impeach President Roh, we might also categorize Justices Kim Young-il, Kwon Seong, and Kim Kyung-il as Justice, who are politically unfriendly to President Roh.<sup>51</sup> Altogether, there should be seven Justices who vote against President Roh, which is enough to pass the impeachment. The court's decision not to disclose opinions deters us from finding more clues from this decision.<sup>52</sup> However, the result does not verify

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for any election to properly represent the political will of the public, the voters should be able to form and decide their own opinions through a free and open process without undue extraneous influence. The principle of free election forms the obligation for public officials to maintain neutral in the context of state institution. The principle of equal opportunity among the political parties is a constitutional principle derived from the interrelationship of Articles 8(1), 11 and 116(1) of the Constitution that guarantees the equal opportunities among political parties. *Supra* note 17.

49. Article 53(1) of the Constitutional Court Act provides that the "Constitutional Court shall issue a decision removing the public official from office when there is a valid ground for the petition for impeachment adjudication."

50. *See supra* note 10.

51. Justice Song In-jun was nominated by Former President Kim Dae-jung and also claimed President Roh's referendum proposal unconstitutional. Decision on President's Proposition for National Confidence Referendum Case, *supra* note 15.

52. The Court did not disclose the final vote breakdown. Instead, the Court released a statement announcing that it would not reveal individual justices' votes and that no dissenting opinion would be

the attitudinal hypothesis.

The Court's position and approach is not easy to categorize. It is neither a procedure-oriented court, nor a consistent legalistic court. It is not a reflection of a judge's preference either. The decision is contrary to some conventional wisdom or prevailing discourse, however, without convincing arguments. Does this indicate the court is an inconsistent, unprincipled, or arbitrary court? Could this unconventional judgment be explained or even be justified?

#### V. A POLITICAL COURT?

A recent emerging school of judicial review borrows force from political science and sees courts or judges as other political actors who happen to be in charge of judicial adjudication. They think it is naïve to see the court as neutral and un-political, and the effort to eliminate politics from constitutional decision-making is impossible. They argue that, to the extent the Court is a constitutional court, it is a political body since constitutional text is old and vague and most constitutional issues are political.<sup>53</sup> Because constitutional cases are not susceptible from confident evaluation on the basis of professional legal norms, "they can be decided only on the basis of a political judgment."<sup>54</sup> When a court makes a decision, it may take the relevant political context into consideration, seeking the best strategy to achieve its political goals. Although the Court is political, it is more than a machine gathering judges' political preferences. It pursues particular political goals and acts with strategy and interacts with other actors. In other words, the court is just one of many political players in politics. A political analysis of the court's decision, however, cannot be easily simplified to certain results. Instead, it requires us to read into the political context, the court's political goals, and the strategy it used.

##### A. *A Court's Goals in Political Conflicts*

In the context of political conflicts, the Court's legitimacy is usually seriously challenged. On the one hand, the Court's legitimacy highly relies on its capacity to manage the conflicts since all conflicting parties and the public demand it. On the other hand, the Court is most vulnerable to political attacks. The shutdown of the Russian Constitutional Court<sup>55</sup> and the salary

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released. *Supra* note 17.

53. Richard A. Posner, *Forward: A political Court*, 119 HARV. L. REV. 31 (2005).

54. *Id.* at 40.

55. In 1993 Boris Yeltsin's decree suspended work of the Constitutional Court because it made several decision that are in contrary to his idea. On December 24 another presidential decree repealed

cut of a Taiwanese Grand Justice after making “unpopular” decisions are all vivid examples.<sup>56</sup>

In addition to maintaining legitimacy, the court may also compete for political power with other political branches. It may prefer certain judgments and seek alliances with others, may empower itself through judgments, and may attempt to influence decision-making of the government. Therefore, in the context of political conflicts, the political goals of the Court are maintaining its legitimacy and empowering itself. In pursuing its goals, the Court has to avoid political attacks, resolve conflicts, and maintain its supremacy at the same time.

#### B. *Political Strategy of the Court*

Although there is no way to understand the gives-and-takes of the Court behind the veils, however, if we take a closer look, we might find the strategy of the Court lies beneath the words of its judgment.

##### 1. *Avoiding Political Attacks*

In the impeachment controversy, the court was vulnerable to political attacks from the two parties, as well as from the public. Some may argue for a sounder legal argument and think it is the only way to trump passion with reason.<sup>57</sup> Nevertheless, the Court’s judgment, although not very convincing, appears to be the best way to reduce the risk of political attacks.

Firstly, the decision not to remove President Roh from his office prevents public discontent and future political attack. At that time, the National Assembly’s motion to impeach was highly unpopular politically, with the polls indicating that seven out of ten Korean citizens were against the impeachment, and there were demonstrations nationwide protesting the National Assembly’s actions.<sup>58</sup> As the Constitutional Court deliberated, the impeachment vote became a campaign issue in the General Elections.

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the Constitutional Court of the RSFSR Act itself. In July 1994 the new Constitutional Court Act was adopted. However, the new Constitutional Court started working only in February 1995, because the Federation Council of Russia refused several times to appoint judges nominated by Yeltsin.

56. After the Constitutional Court of Taiwan made the interpretation 585, in which the Taiwanese Constitutional Court invalidated the Act of the Special Commission on the Investigation of the Truth in Respect of the 319 Shooting, the legislature axed their supplementary income. See interpretation 585 of Taiwanese Constitutional Court, for the text in English, available at [http://www.judicial.gov.tw/constitutionalcourt/EN/p03\\_01.asp?expno=585](http://www.judicial.gov.tw/constitutionalcourt/EN/p03_01.asp?expno=585) (last visited Jan. 20, 2009). See also, *Grand Justice Cutbacks*, FTV ENGLISH NEWS (Jan. 21, 2005), available at <http://englishnews.ftv.com.tw/news.asp?fsarticulo=2005012105> (last visited Jan. 20, 2009).

57. See e.g., RONALD DWORKIN, *LAW’S EMPIRE* 13-14 (1986).

58. The support for President Roh raised 20% after the impeachment, from 30% to 50%. Samuel Len, *President’s Impeachment Stirs Angry Protests in South Korea*, N.Y. TIMES, Mar. 13, 2004.

Believed to be a result of the unpopularity of the impeachment, the Uri Party gained a majority, with 152 out of the 299 Assembly seats, while the GNP won 121 seats and the MDP ended up with merely nine seats.<sup>59</sup> The Constitutional Court's decision was rendered a month later; its decision followed the public opinion and the dominating political power.

Second, in the stalemate between the President and the National Assembly, the court's decision comforted both sides. On the surface, the President remained in his position and won the case. In fact, the majority of the National Assembly did not lose the game. By confirming the President's legal violation claimed by the National Assembly and rendering the impeachment process a matter of self-regulation, the judgment became a pacification policy to comfort the National Assembly. In that way, the Court reduced the dissatisfaction of losers and the risk of counterforce. By following the public majority and comforting the loser, the seemingly unconvincing judgment reduced the risk of political attacks.

## 2. *Resolving Conflicts*

When facing political confrontation, the most crucial goal for the court is to end the confrontation and eliminate any future risk of recurrence. Two of the most controversial arguments, regarding the President's duty of political neutrality and the standard of gravity, however, could contribute the most in managing the political conflicts.

As a political court, the South Korean Constitutional Court must take the consequence of its decision into consideration. The Court could have interpreted the Constitution in a literal way and impeached President Roh whenever there was legal violation. In that way, it may trigger more dissatisfaction among the public and the President's alliance, as well as their animosity toward other parties. Reelecting the President could continue the confrontation or even exaggerate it.

The court may also have allowed Roh to remain in office and prevent the reelection and animosity of the President's alliance. Nevertheless, the public of South Korea did not really accept and support the President's performance. They opposed impeachment simply out of their resentment against the partisan manipulation. Dismissing the case can easily be interpreted into a confirmation of his controversial acts. Their bad feelings toward President Roh need to be comforted, too. From a long term perspective, it is undesirable to endorse acts and speeches that may lead to more animosity. The President's remarks and acts deserve no judicial

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59. James Brooke, *South Korea's Impeached President Gains Support in Vote*, N.Y. TIMES, Apr. 16, 2004, at A6.

endorsement.

Another choice for the Court was to invalidate the impeachment on procedural bases, either on the basis of due process or some other procedural restraints. This could result in a second round boycott in the National Assembly. Moreover, the merits of this choice depended on the result of the 2004 general election. If the GNP and NMDP got the majority of votes and passed a resolution through the right procedure again, the court could have faced a similar dilemma: to impeach or not to impeach. If the Uri Party dominates the National Assembly, the procedural judgment actually eliminates the possibility of further impeachment. However, the Court loses the opportunity to denounce the President's wrongdoings.

In the face of the dilemma, none of the abovementioned choices are sound. The denouncement of the President's legal violation and his remaining in office through the gravity standard seems to be a win-win policy. It compensated for the public resentment of the President's performance, deterred future similar acts, and prevented political conflicts from converging into constitutional politics. Although decisions of legal violation and impeachment seem to be contradictory and unpersuasive, they became a better solution for the political deadlock. It at least temporally resolved the conflicts and helped the court to free itself from the dilemma.

### 3. *Self-empowerment*

In the effort to avoid attacks and resolve the conflicts, the Court did not forget to carve out a legitimate role for itself in the impeachment process; however, it was a powerful one.

The Court first legitimized its role in the impeachment. The Court inferred from Article 65 and argued that the Constitution limited grounds for impeachment to violations of law and designated the Constitutional Court as the ultimate decision-maker because the purpose of the impeachment process was to protect the Constitution and to prevent the abuse of power by members of the executive and judicial branches. By saying that impeachment was a legal, not political, process and that a President can be impeached only on legal, not political, grounds, the Court provided itself a legitimate role in adjudicating the president's impeachment. The Court can adjudicate the impeachment, not only because of a single constitutional provision, but also because of its institutional character and responsibility in determining the law. Based on the legal nature of impeachment, the Court further allocated the impeachment power.

As a commentator points out, the Court could have assigned itself the narrow role of determining whether the impeachment vote followed the proper procedures in the National Assembly and whether there was a

violation of “the Constitution or other Acts,” as specified by Article 65(1) of the Constitution.<sup>60</sup> The National Assembly urged the Court to accept the narrow role, but the Court opted for a broader reading of its role and limited the National Assembly’s role to identifying which facts the Court could consider in its decision.<sup>61</sup> The allocation is fair on its face: The National Assembly decides the factual grounds and the Court determines the law. In fact, the court granted itself a much larger power. It can decide what kinds of legal violation constitute grounds for violation,<sup>62</sup> what kinds of acts are in violation of the involved statutes,<sup>63</sup> as well as the standard of impeachment.

The Court further made itself an unchallengeable final arbiter by creating the standard of gravity. In order to see if the gravity of the president’s legal violation was grave enough to impeach him, the Court borrowed the concept of the “constitutional order” as a “legal” standard to rank the seriousness, meaning that the relevant question to ask is how much damage to the existing constitutional order has been inflicted by the particular legal violation. By invoking the concept of constitutional order in judging whether a President was impeachable, the Court took the impeachability decision outside the realm of politics.<sup>64</sup> However, in absence of any constitutional provision or doctrine, the Court has full authority to say whether constitutional order is in danger. It possesses ultimate and discretionary power on impeachment even if the President’s legal violation is confirmed.

One may question that, if the Court really struggles for political power, why would it grant full authority to the National Assembly on regulating its procedure? The Court can grab more power if it can fully control the procedural and substantive matters. As discussed above, this outcome could be necessary to prevent political attacks and endless conflicts for a political court.

Rather than arbitrary and inconsistent, the South Korean Constitutional Court’s judgment on President Roh’s impeachment represents a thoughtful and deliberated strategy of a political court. The Court used the judgment and legal discourse to achieve its goals in political confrontation, avoiding political attacks, resolving conflicts, and empowering itself. The inconsistency and fragments of the impeachment judgment can be fully

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60. HONBOP, Article 65.

61. See Lee Youngjae, *Law, Politics, and Impeachment: The Impeachment of Roh Moo-Hyun From A Comparative Constitutional Perspective*, 53 AM. J. COMP. L. 429 (2006).

62. For example, the court argued that the “obligation to faithfully perform the official duties” of the President is a constitutional obligation that cannot be normatively enforced.

63. For example, the court upheld the constitutionality of President Roh’s referendum proposal in the President’s Proposition for National Confidence Referendum Case, but claimed it violated constitutional obligations in this impeachment decision. See *supra* note 17 and *supra* note 38.

64. See Lee, *supra* note 61.



explained only if we analyze it with a political mind. The Court is not a neutral institution in charge of legal interpretation or procedural overseeing. It is a political institution in the dynamic politics.

## VI. CONCLUSION

Law students in a divided society with immature democratic experience are trying to have a clear understanding of constitutional controversies in the society; however, we find that no single perspective provides a full picture. The great bulk of scholarship on judicial review suffers two shortcomings: it lacks any serious attention to what goes on outside the United States, and even within the American context, it has been marred by the work of a generation of scholars who came of age during the highly unusual era of the Warren Court.

We stand in the intersection between law and politics, in the transition to democracy, in the Western Jurisprudence and non-western local context. We wonder how Courts exercise judicial review in immature democratic politics. We don't know whether the constitutionalization of politics is a good phenomenon,<sup>65</sup> and sometimes, we wonder whether there is a division between law and politics, between objectivity and subjectivity.

President Roh's impeachment case represents all these intersections, complexities, and puzzles. Although it is a single case, I attempted to explore some initial inspirations for broader and fundamental questions. In many ways, the case represents the context and dilemma we Taiwanese are facing.

From President Roh's impeachment case, we see how the South Korean Constitutional Court played its role in political conflicts. The Court's judgment is neither convincing nor consistent from a law perspective. It is not a result of immature experience or careless decision. Instead, the seeming imperfect judgment could be a deliberate strategy of the Court. In turbulent politics, the Court did not assigned itself a passive role as an interpreter, a procedural guardian, or rights protectors as conventional theories of judicial review expected. The judgment, however, is neither a mirror of a judges' personal preference. The Court is more like a strategic political player in a struggle for political power. It interacts with other political institutions and the public, and seeks to achieve its political goal in

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65. Constitutionalization of Politics refers to the ever-accelerating reliance on courts and judicial means for addressing core moral predicaments, public policy questions, and political controversies. More and more political issues rely on the Courts to decide with Constitutional bases. It is understood as the product of strategic interplay among hegemonic yet threatened political elites, influential economic stakeholders, and judicial leaders. The assigned role of the court in impeachment in the two-step process in both Taiwan and South Korea can be part of the enterprise. See Ran Hirschl, *The New Constitutionalism and The Judicialization of Pure Politics Worldwide*, 75 *FORDHAM L. REV.* 721, (2006).

the field of politics. In the face of a highly sensitive political issue in a seriously divided society, the Court aims to maintain its legitimacy and supremacy by avoiding political attacks, temporarily resolving conflicts, and empowering itself. Through a political analysis of a court's judgment, we find that the Court strategically developed its arguments to maintain its legitimacy in political conflicts. It assigned a powerful role to itself in the impeachment process and created a standard for its full discretion. It also avoided serious political attacks and successfully alleviated political animosity and crisis, at least temporarily. It also empowered itself far beyond the concept of judge-made policy-making during the process. Of course, there is no sufficient evidence for me to inquire into the mind of judges; however, I believe this perspective can help us understand better the seemingly unpersuasive South Korean judgment.

However, should we celebrate a political court? Should we celebrate a political court because it can manage political conflicts better? Should we justify the political character of the court?<sup>66</sup> Or, as Ran Hirschl pointed out, we should worry that the unrestrained expansion of judicial power will eventually move decision-making power from democracy to an unaccountable juristocracy?<sup>67</sup> These are questions that, while beyond the scope of this article, should receive further study.

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66. Some scholars argue for an openly political role for the Court of judicial review. *See e.g.*, TERRI PERETTI, IN DEFENSE OF A POLITICAL COURT (2001) (arguing that politically motivated constitutional decisionmaking is not only inevitable, it is legitimate and desirable).

67. As Ran Hirschl pointed out, a new political order — juristocracy — has been rapidly establishing. RAN HIRSCHL, TOWARD JURISTOCRACY 222-23 (2004).

REFERENCES

- Barkow, R. E. (2002). More Supreme Than Court?: The Fall of the Political Question Doctrine and the Rise of Judicial Supremacy. *Columbia Law Review*, 102, 237-335.
- Bloch, S. L. (2000). A Report Card on the Impeachment: Judging the Institutions That Judged President Clinton. *Law and Contemporary Problems*, 63, 143- 168.
- Bobbitt, P. (1991). *Constitutional Interpretation*. Blackwell.
- Brooke, J. (2004, April 16). South Korea's Impeached President Gains Support in Vote. N.Y. TIMES, p. A6.
- Congressional Quarterly, inc, (1974). *Impeachment and the U.S. Congress*.
- Dwivedi, O. P., Gow, J. I. & Gow, L. (1999). *From Bureaucracy to Public Management: The Administrative Culture of the Government of Canada*. Baker & Taylor Books.
- Dworkin, R. (1986). *Law's Empire*. Harvard University Press.
- Ely, J. H. (1980). *Democracy and Distrust*. Harvard University Press.
- Fallon, R. H. (1987). A Constructivist Coherence Theory of Constitutional Interpretation. *Harvard Law review*, 100, 1189-1286
- Gerhardt, M. J. (1994). Rediscovering Nonjusticiability: Judicial Review of Impeachments After Nixon. *Duke Law Journal*, 44, 231-275.
- Ginsburg, T. (2002). Confucian Constitutionalism? The Emergence of Constitutional Review in Korea and Taiwan. *Law & Social Inquiry*, 27(4), 763-779.
- \_\_\_\_\_. (2003). *Judicial Review in New Democracies-Constitutional Courts in Asian Cases*. Cambridge University Press.
- Habermas, J. (1997). Popular Sovereignty as Procedure. In J. Bohman & W. Rehg (Eds.), *Deliberative Democracy: Essays on Reasons and Politics* (pp. 33-65). Cambridge, Massachusetts: The MIT Press.
- Hirschl, R. (2004). *Toward Jursitocracy*. Harvard University Press.
- \_\_\_\_\_. (2006). The New Constitutionalism and the Judicialization of Pure Politics Worldwide. *Fordham Law Review*, 75, 721-754.
- Kang, D. C. (2003). Regional politics and democratic consolidation in Korea. In Samuel S. Kim (Eds.), *Korea's Democratization* (pp. 161-180). Cambridge University Press.
- Kwon, K. (2004). Regionalism in South Korea: its origins and Role in Her Democratization. *Politics and Society*, 32, 545-574

- Lee, Y. (2006). Law, Politics, and Impeachment: The Impeachment of Roh Moo-Hyun from A Comparative Constitutional Perspective. *American Journal of Comparative Law*, 53, 403-431.
- Park, K.-D. (2005). Hanguo zhengdang zhengzhi yu minzhu gong gu [Political Parties and Democratic Consolidation in Korea]. *Taiwan Minzhu Jikan (Taiwan Democracy Quarterly)*, 2(1), 23-50 (in Chinese).
- Peretti, T. (2001). *In Defense of a Political Court*. Princeton University Press.
- Posner, R. A. (1999). *An Affair of State: The Investigation, Impeachment, and Trial of President Clinton*. Harvard University Press.
- \_\_\_\_ (2005). Forward: A political Court. *Harvard Law Review*, 119, 31-101.
- Post, R. (1991). Theories of Constitutional Interpretation. In Richard Post (Ed.), *Law and the Order of Culture* (pp. 13-41). University of California Press.
- Saxer, C. J. (2000). *From Transition to power Alternation-Democracy in South Korea, 1987-1997*. Routledge.
- Segal, J. A. & Spaeth, H. J. (2002). *The Supreme Court and the Attitudinal Model Revisited*. Cambridge University Press.
- Teitel, R. (1997). Transnational Jurisprudence: The Role of Law In Political Transformation. *Yale Law Journal*, 106, 2009-2081.
- Scalia, A. (1997). *A matter of interpretation: Federal Court and the Law*. Princeton University Press.
- Zurn, C. F. (2007). *Deliberative Democracy and the Institutions of Judicial Rview*. Cambridge University Press.