Presidential politics and the judicial facilitation of dialogue between political actors in new Asian democracies: Comparing the South Korean and Taiwanese experiences

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In the process of democratization, many new democracies have experienced contentious politics. In particular, when a winner-takes-all presidential system is chosen in the cause of reform, political divisions tend to center around the role of the president, as demonstrated in Taiwanese and South Korean politics. How constitutional courts adjudicate on contentious presidential politics in new democracies remains a significant issue in comparative constitutionalism.

This article looks into constitutional decisions by the constitutional courts of Taiwan and South Korea that involve divisive political disputes with respect to presidential powers and separation-of-powers conflicts. It finds that courts in both of these democracies chose not to directly confront the presidents but have resorted to methods of constitutional adjudication that promote dialogue and help diffuse the tensions associated with fractious presidential politics. The similarities between Taiwan and South Korea are striking, despite the divergent constitutional designs and social contexts that have presented some minor operational departures. The paper’s conclusion is that constitutional courts in Taiwan and South Korea are prodialogue courts that have been vigilant in dealing with contentious issues involving the role of the president by leaving space for political actors to resolve the issue.

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1. Introduction

New democracies are easily torn apart by political controversies that divide political parties as well as the citizenry at large. For instance, issues of transitional justice may arise in relation to the prosecution of former or even sitting presidents, and a serious political division may occur between political parties or among the people who strongly oppose or defend the president. Political competition between political parties or rising political leaders in national or local governments, albeit a common event in established democracies, may lead to grave, even bloody political conflicts, which often correspond with preexisting ethnic or social tensions persisting into the context of new democracies.¹ In the milieu of young presidential democracies, fierce political conflicts are more likely to arise, apparently, over matters relating to the presidency; namely, the scope of presidential powers and the relationship of that office with other political branches or with local governments. Willingly or unwillingly, presidents often find themselves standing at the center of these political storms, even becoming divisive figures themselves.² Consequently, some argue that presidential systems are prone to serious political divisions, which, if not handled properly, may lead to the disintegration of the polity.³

This raises an intriguing question: Why is it that presidents, as heads of state and symbols of the people and the nation, cannot act as a constructive force that promotes political integration but become, instead divisive figures? What are the underlying institutional, structural, or political explanations for this? More importantly, what would be a proper role for courts, particularly constitutional courts, when they are asked to resolve disputes that may bring them into direct confrontation with various political actors, particularly presidents, who often possess the power of judicial appointments? Can courts help resolve these disputes while protecting themselves from a political backlash? The role that courts play in helping to ease political tensions in fledgling democracies is an important issue in the study of comparative constitutionalism.

The past decades of constitutional development in Taiwan and South Korea seem to demonstrate the aforementioned perils of presidential democracies; constitutional courts in both countries were called upon, many times, to resolve constitutional disputes involving presidential politics and the political divisiveness these engender. Taiwan and South Korea underwent a similar process of democratic transition in the late 1980s and both have since operated under a presidential or semipresidential system.⁴ In Taiwan, after long decades of authoritarian rule by the Nationalist Party

1 See, e.g., D. L. Horowitz, Ethnic Groups in Conflict (2000) (arguing that new democracies could easily turn into divided societies).
2 There is a recent retelling by Bruce Ackerman of the early American constitutional history regarding Thomas Jefferson and how he became a divisive figure with the rise of competing national political parties. See BRUCE ACKERMAN, THE FAILURE OF THE FOUNDERING FATHERS: JEFFERSON, MARSHALL AND THE RISE OF PRESIDENTIAL DEMOCRACY (2005).
4 It took several incremental revisions to establish the current presidential system in Taiwan. For a more detailed discussion of these constitutional revisions, see Jiunn-Rong Yeh, Constitutional Reform and Democratization in Taiwan: 1945–2000, in Taiwan’s Modernization in Global Perspective 47–77 (Peter Chow ed., 2002).
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(Kuomintang, KMT), constitutional reforms were finally undertaken in the early 1990s to open up elections for the legislature and the presidency. The government system was revised from a parliamentary system, originally, to a semipresidential one. In 2000, the KMT lost the presidency to the longtime opposition, the Democratic Progressive Party (DPP), while retaining a strong majority in the legislature. This scenario, where the political branches of government were controlled by two different political parties, has led to many serious constitutional disputes that not only relate to presidential powers and separation-of-powers conflicts but are also entangled with political divisions that reflect or even result from past ethnic and social tensions which exist between different groups of peoples and between different political parties. In South Korea, the 1948 constitution adopted a presidential system that failed to provide sufficient checks and balances in relation to the presidency. The postdemocratization Constitution of 1987—while maintaining a presidential system—imposed a strong limit on the presidency, a nonrenewable term of five years. Thus far, South Korea has had five presidents, all of whom, to varying degrees, have been involved in serious disputes with the National Assembly or local governments. The most infamous confrontation was the parliamentary impeachment of President Roh Moon-Hyun who was reinstated by the decision of the Constitutional Court.

Hence, Taiwan and South Korea present two interesting case studies for examining why and how presidents become involved in divisive constitutional disputes, and how courts may resolve these disputes. Modeled on the European style of judicial review, constitutional courts in Taiwan and South Korea are vested with exclusive power to invalidate laws in response to constitutional petitions by governments, legislators, judges, and individuals. Both have the power to decide regarding presidential impeachment. This article analyzes how these two constitutional courts have sought to resolve constitutional disputes relating to presidential powers and separation-of-powers disputes. By analyzing these cases against their political and social contexts, this article seeks to identify the types of politically divisive conflicts that are likely to draw presidents into controversy and which end up in the dockets of constitutional courts. By identifying how the two constitutional courts have resolved these disputes, the article seeks to understand if there is any particular judicial approach that helps

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5 The original constitutional design leaned toward parliamentary system, where the premier was appointed with legislative consent and was made accountable to the legislature. However, in the past KMT party-state dictatorship, this parliamentary system was never put into practice. After the presidency became open for direct popular election, the constitution was revised to allow the direct appointment of the premier by president without legislative consent, and the legislature was given, instead, a vote of no confidence with regard to the premier. Since then, the government system has leaned toward a semipresidential system. Yeh, id. See also Tom Ginsburg, Confucian Constitutionalism? The Grand Justices of the Republic of China, JUDICIAL REVIEW IN NEW DEMOCRACIES: CONSTITUTIONAL COURTS IN ASIAN CASES 106–115 (2003).


7 Constitution of the Republic of Korea, art. 70.

8 See infra notes 83–115 and accompanying text.

9 See infra notes 93–94 and accompanying text.

10 Constitution of the Republic of Korea, art. 111; and Additional Articles, ROC Constitution (Taiwan), art. 2 (10).
diffuse the tensions associated with highly charged presidential politics. The article notes that while courts facing similar disputes in Western jurisdictions (for example, the U.S. and France) have intervened in a manner that exacerbates the conflict, the constitutional courts in these two Asian jurisdictions have, in the context of transitional democracies, adopted an approach that has diffused the conflicts and allowed the resumption of ordinary politics. Their case law provides a rich vein of resources through which constitutional scholars may appreciate the constitutional dynamics of presidential politics in new Asian democracies.

Section 2 analyzes selected constitutional cases and then groups them according to their respective disputes and the underlying political divisions. Through a structural analysis of these cases, we find some striking similarities between Taiwanese and South Korean constitutional practices. Both constitutional histories reveal that the most serious constitutional disputes, with respect to presidential powers, came after the first regime change, which began the democratization processes. During the years following the first regime change, political conflicts were intensified if they occurred at a time of when the political branches of government were controlled by different political parties, in other words, a divided government. Sections 3 and 4 examine how these disputes were judicially resolved, noting that both the Taiwan and South Korea constitutional courts never ruled directly against the presidents in ways that curtailed, substantially, presidential powers or prohibited their exercise of power. Instead, both courts were deferential and seemingly opted for a prodialogue attitude. They relied on technical devices, such as strategic dismissals or procedural requirements, to buy time for the development of political solutions and to encourage further political dialogue between the relevant political actors. Section 5 concludes that while this prodialogue attitude may be due to judicial self-interest, with an eye to the president’s power over judicial appointments, nevertheless, it can preserve the legitimacy of the important, yet fragile, institution of the constitutional court in a new democracy.

2. Presidential politics and political divisions

In examining the process of democratic transition in Taiwan and South Korea, one finds striking similarities in the shared Japanese colonial legacy, the experience of former authoritarian dictatorships, complications in formulating national identities, and their adoption of a presidential form of government with a constitutional court that has the power to invalidate laws and to adjudicate on presidential impeachment.

This section analyzes selected cases of the Taiwanese and South Korean constitutional courts that deal with issues relating to presidential powers and separation-of-powers conflicts, beginning with their respective, first democratically elected presidents, Lee Teng-Hui in Taiwan, in 1990, and Roh Tae-Woo in South Korea, in 1988. The Taiwan constitutional court has heard twenty cases while the South Korean has heard fifteen cases, in this respect. These cases are understood in the underlying social-political context and are first grouped in accordance with the types of political divisions they are associated with, as shown in table 1. They are next classified in
accordance to the nature of disputes they address with respect to presidential powers and separation-of-powers disputes, with some reference to succeeding presidencies, as displayed in table 2 (Taiwan) and table 3 (South Korea).

2.1. Political divisions and the role of president

Seen in their social and political contexts, constitutional cases concerned with disputes regarding presidential powers and the separation of powers often reflect political divisions that involve or correspond with the past ethnic or social struggles in the context of new democracies. For instance, the issue of whether to prosecute former presidents, as one way of realizing transitional justice, often invites divergent views of the legality and legitimacy of the former regimes, not to mention the inevitable conflicts between the old, dominant political party, to which former presidents belong, and other new and reformist parties.

In the context of new democracies, the tensions between political parties—especially between the previously dominant political party and the new reform parties—are more intense than in advanced democracies. This entails, for the once-dominant party, the prospect of facing many political persecutions by reform-minded actors. If these different political parties occupy different government branches or different levels of the government, the tensions between them not only are more likely to give rise to constitutional disputes over the scope of powers and jurisdictions but also are more difficult to resolve given their past histories of struggle against each other. Similarly, conflicting views on national identity in new democracies are also prone to cause conflict between the president and the legislature or between different political parties holding divergent views, especially if these actors belong to particular national or ethnic groups.

When a president becomes involved in politicized disputes, this may give rise to the issue of the scope of presidential powers or to the question of how the president should interrelate with the legislature or local government. Sometimes, presidents themselves become polarizing figures. The following examination of selected constitutional disputes heard before Taiwanese and South Korean constitutional courts, after the first democratically elected president came to power, illustrates this. The cases deal with four types of politically divisive issues relating to: (1) transitional justice, (2) political parties, (3) the contested powers and jurisdiction of national and local governments, and (4) national identity.

2.1.1. The division occasioned by transitional justice

Taiwan and South Korea shared a similar colonial experience: Japanese colonization in Taiwan and South Korea began in the late nineteenth century and ended with Japan’s surrender after World War II. Both, however, continued to experience a period of military, authoritarian rule that lasted until democratic reforms took place in the late 1980s. In both countries, the oppression of past authoritarian regimes sowed the seeds of anger and resentment that led to complex political conflicts, which erupted
during the period of democratic transitions and beyond. The debate on whether and how to punish the vicious deeds of past rulers has been a divisive and pressing one in Taiwan and South Korea, as it has been in many new democracies.

Despite their shared historical background, South Korea and Taiwan have adopted different approaches toward these issues. South Korea enacted statutes that allowed criminal prosecutions of past wrongdoers including two former president Chun Doo-Hwan and Roh Tae-Woo.\(^\text{11}\) The Taiwanese government adopted legislation that established private foundations—albeit with government financial support—to provide monetary compensation for victims and their descendants.\(^\text{12}\) The Taiwanese Constitutional Court was called upon to look into the past persecutions of those who had been jailed under charges of rebellion, and it rendered a few judicial interpretations. Among these interpretations, J. Y. Interpretation No. 283, which probes the retroactive effect of granting amnesty by the president, was the decision most closely linked to the role of the president.\(^\text{13}\) There were also three constitutional cases in South Korea between 1995 and 1998 involving issues concerning criminal prosecutions of former presidents, to be examined at a further point.\(^\text{14}\)

### 2.1.2. The division of political parties

Partisan politics is inevitable in all new democracies, and Taiwan and South Korea are no exception. Under past authoritarian rule, a dominant party led by a strongman would be able to consolidate power and face few constitutional restraints. Once the process of democratization began, the previously dominant political parties, which often had acted oppressively, such as the KMT in Taiwan and President Chun Doo-Hwan’s Democratic Justice Party in South Korea, stood in sharp contrast with the rising opposing political parties that were cast in the mode of democratic reformers. Their ideological differences were sharper and more unyielding than those associated with political parties in advanced democracies.

Such unyielding partisan differences are intensified when direct presidential elections are held and where the tremendous political stakes further entrench the political divisions between competing political parties. For example, in Taiwan, the closely contested 2004 presidential elections and the notorious gunshot incident, which occurred one day before election day, triggered serious political confrontations that called for constitutional adjudication. The KMT-dominated legislature enacted a statute establishing an independent investigative commission to look into the gunshot incident; it had the power to revoke electoral results inconsistent with its findings.

\(^{11}\) See infra notes 95–98 and accompanying text.

\(^{12}\) In 1995, the Act Governing the Recovery of Damage of Individual Rights during the Period of Martial Law was promulgated. The same year, the Act Governing the Handling of Reparation for the February 28 Incident was also passed and the February 28 Incident Memorial Foundation was established in October. In 1998, the Act Governing Reparation of Compensation for Wrongfully Handled Rebellion and Communist Espionage Cases During the Period of Martial Law Decree was passed, and, the same year, the Foundation was established.

\(^{13}\) J. Y. Interpretation No. 283 (1991).

\(^{14}\) See infra notes 96–99 and accompanying text.
Arguing against this commission, the DPP petitioned the Constitutional Court (the case is discussed below). In South Korea, the last presidential election in 2007 resulted in the bringing of two cases to the Constitutional Court, one involving an extreme partisan stand taken by outgoing President Roh against the rising opposition presidential candidate, Lee Myung-Bak; the other involved a congressional investigation also against Lee, regarding his assets from unknown sources and allegedly illegal campaign contributions. Lee was nevertheless subsequently elected.

In addition, antagonism between the political parties is likely to result in conflict between government branches, particularly when political offices are held by people belonging to different political parties. This phenomenon was evident in Taiwan when it experienced a divided government after the first regime change between 2000 and 2008. To make matters worse, while the presidency became a directly elected office, the president’s role and relationship with the premier and the legislature became unclear after several rounds of constitutional amendments that changed the parliamentary system into a semipresidential one. Although the directly elected president now was given the unilateral power to appoint the premier, the constitutional revisions left it open as to which body—the president or legislature—the premier was ultimately accountable.

When the DPP won the presidency in 2000 but the KMT still held a parliamentary majority, the heightened partisan politics translated into many separation-of-powers conflicts. A series of constitutional decisions were rendered. A similar line of cases is also found in South Korea. However, because the Korean Constitution more clearly delineates the roles of political actors, the South Korean cases implicated jurisdictional disputes regarding the scope of presidential powers rather than separation-of-powers disputes. Prominent issues included such questions as whether the president could initiate a referendum regarding the people’s confidence in his administration, or whether the president could unilaterally dispatch troops to Iraq.

2.1.3. The division of national and local governments regarding their respective powers and jurisdictions

In Taiwan and South Korea, regions are divided by historical differences, varying geopolitical significance, and other, subtler political reasons, reflecting entrenched—often unjust—allocations of powers and resources. When the KMT retreated from the Chinese mainland to Taiwan in 1949, it made Taipei the capital of the Republic of China (ROC). The majority of Chinese people who followed the KMT to Taiwan, known as mainlanders, resided in Taipei. The capital city ever since has received more

15 J. Y. Interpretation No. 585 (2004). For detailed discussion of this case, see section 3.
16 See infra note 104 and accompanying text.
17 Special Counsel’s Case on the Suspicion to Lee Myung-Bak, 2007 Hun Ma 1468, Jan. 10, 2008. For detailed discussion of this case, see section 3.
18 ADDITIONAL ARTICLES, ROC CONSTITUTION (TAINAN), art. 3.
19 See infra notes 68–77 and accompanying text.
20 See infra note 92 and accompanying text.
21 See infra notes 101–103 and accompanying text.
in the way of government resources than other parts of the island. In South Korea, localism has historical and geographic origins. Southern coastal regions have been given fewer resources than Seoul and its surrounding areas.\textsuperscript{22} The absence of local governments was put to an end, finally, by the 1987 Constitution, and local elections were held in the early 1990s. Both South Korea and Taiwan adopted centralized, unitary systems.\textsuperscript{23} Their local governments have very limited self-governing powers, and most of these rely upon financial support from their national governments. It is thus reasonable for political actors to put most of their political effort into national politics and to channel local interests into national politics.

When national politics is organized around a presidential system of a winner-takes-all nature, the formation of the executive cabinet is often expected to integrate various local interests and influences from different political parties. If local interests are not well represented in the allocation of ministerial posts or through the distribution of national resources, it is foreseeable that severe conflicts between the national and local governments will arise. Those conflicts become even more acute when the president’s party does not control the local governments as well. In Taiwan, most serious confrontations between the national and local governments occurred during the period when the DPP controlled the national government while the rising KMT political figure, Ma Ying-Jeou, was mayor of Taipei. J. Y. Interpretation Nos. 550 and 553 are two such cases arising from this situation.\textsuperscript{24}

This national/local tension is even more acute in South Korea, where localism has become entrenched. Such entrenched localism is evident from the fact that the two leading democratic leaders, Kim Young-Sam and Kim Dae-Jung, despite their popularity within the opposition alliance, could barely win any votes in each other’s home provinces.\textsuperscript{25} These local differences may spark political tensions that can be manipulated to the advantage of national or local political actors. Once tensions are created, they often trigger political and institutional disputes that require judicial resolution. For instance, President Roh Tae-Woo postponed a scheduled local election because he was worried about the growing local popularity of some political opposition leaders. The constitutionality of this postponement was questioned and petitioned to the Constitutional Court.\textsuperscript{26} Other cases such as the relocation of the national capital or


\textsuperscript{23} The South Korean Constitution has only two provisions concerning local governments, articles 117 and 118, which primarily authorize the law to regulate all relevant matters. While the ROC Constitution has two chapters, chapters 10 and 11, altogether twenty-two articles, regarding provincial and local governments, these articles have never been put into practice due to the retreat from the Chinese mainland to Taiwan. The articles were suspended by the constitutional revision in 1994, which also authorized law to regulate all the matters applicable to Taiwan and all other islands.

\textsuperscript{24} Both cases were decided in 2002. See infra notes 101–103 and accompanying text.


\textsuperscript{26} See infra note 87 and accompanying text.
some administrative centers also sparked similar conflicts precipitating constitutional litigation.\textsuperscript{27} Although these cases may stem from regional disparities and the resulting political divisions that flow from this, the Taiwanese and South Korean presidents—given their institutional capacities and political influence—clearly play significant roles in exacerbating tensions within the context of centralized presidential systems.

2.1.4. Divided views toward national identity

Taiwan and South Korea both faced identity crises after World War II that continued throughout the Cold War. Taiwan became the ROC but confined to Taiwan, struggling against the People’s Republic of China (PRC) on the mainland. Korea was divided into the South and North. This splintering of national identity received constitutional recognition with little discussion or consensus.\textsuperscript{28} The process of democratization, inevitably, opened the debate on national identity that involved constitutional issues. As the symbol of both the state and the people, the scope and exercise of presidential powers associated with this elective office were even more likely to be implicated in such debates. Given the extremely delicate relationships between the PRC and the ROC, North Korea and South Korea, and their extended influence on Japan and the United States, the presidents’ foreign policies could also trigger political debates that might intensify to the point of becoming constitutional disputes.

In Taiwan, the line of cases that best displays this intricate relationship between presidential powers and the national identity includes J. Y. Interpretation Nos. 467 and 329. The first case dealt with the issue of the legal status of Taiwan Province, after the 1997 constitutional revision, which kept the name but suspended virtually all its administrative functions due to the geographic overlap between the national government (the ROC in Taiwan) and the province of Taiwan. This overlap had long caused administrative inefficiency but was maintained due to the KMT’s insistence on the myth of representing the “Whole China.” However, after the constitutional reforms provided that both the governor of Taiwan Province and the president of the ROC (in Taiwan) be elected directly,\textsuperscript{29} this overlap generated a severe power struggle between the two most popular political leaders, the governor and the president, as both shared almost the same electoral base. This power struggle became even more sensitive, since the PRC, which regards Taiwan as a renegade province, strategically bypassed the president and chose to interact with the governor, particularly in 1997 when Hong Kong was handed over to the mainland.

The second case dealt with whether the legislature should “ratify” the mutual agreements between Taiwan and the PRC, signed by delegates from the administrations on

\textsuperscript{27} See infra notes 112–114 and accompanying text.

\textsuperscript{28} The preamble of the Additional Articles of Taiwan Constitution states that, “To meet the requisites of national unification, the following additional articles are added to the ROC Constitution in accordance with Articles 27 (1.3) and 174 (.1).” In Korea, the article 4 of Korean Constitution prescribes that, “the Republic of Korea shall seek unification and shall formulate and carry out a policy of peaceful unification based on the principles of freedom and democracy.”

\textsuperscript{29} Additional Articles, ROC Constitution (Taiwan), art. 2. See also Yeh, supra note 4.
both sides of the Taiwan Strait. While this issue certainly implicated divergent views on national identity in Taiwan, it was also an important constitutional dispute with regard to which institution—the president or the legislature—should have the final say on this sensitive matters of high politics.

In South Korea, the debate over national identity has often been framed within the context of South Korea’s relationship with the United States and the South Korean government’s policies toward North Korea. Since the end of World War II, the United States has maintained a close relationship with South Korea on matters relating to regional peace and security. However, many South Koreans view American intervention in the affairs of the Korean peninsula as a cause for the north–south divide and a violation of South Korean national sovereignty. This deeply felt sentiment boiled over with regard to many political decisions, in particular, President Roh Moo-Hyun’s decision to dispatch Korean armed forces to Iraq, which was also disputed before the constitutional court.30

2.2. Presidency and presidential powers in dispute

The previous section shows how contentious constitutional cases in Taiwan and South Korea are associated with strong political divisions that involve, to varying degrees, presidential politics and the role of president. This section examines how these political disputes are related, in constitutional terms, to the exercise of presidential powers. The cases examined relate to disputes regarding presidential powers; they fall into four types of disputes arising from (1) presidential elections, (2) the exercise of presidential powers, (3) relating to the president and the separation of powers, and (4) presidential involvement in conflicts between national and local governments. The constitutional cases in Taiwan and South Korea are shown topically in table 2 (Taiwan) and table 3 (South Korea).

2.2.1. Disputes arising from presidential elections

Competitive and contested presidential elections often result in judicial disputes. Within a presidential system, the stakes of winning the presidency are much higher than winning a legislative seat and cabinet membership in a parliamentary system.31 Strong political divisions only heighten the adversarial quality of presidential elections. For example, in Taiwan the reelection of President Chen Shui-Bian in 2004 by a narrow margin, compounded by the scandalous gunshot incident that happened one day before the election (discussed below), gave rise to election-related disputes that the Constitutional Court dealt with, conclusively, in J. Y. Interpretation Nos. 585 and 633.32

The 1987 Constitution prescribes that Korean presidents hold office for one non-renewable term of five years.33 This prevents an incumbent president’s seeking...

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30 See infra notes 101–103 and accompanying text.
32 For detailed discussions, see section 3.
33 Constitution of the Republic of Korea, art. 70.
Table 1. Constitutional cases regarding political divisions and presidential powers in Taiwan and Korea

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Source: Author
reelection, which could precipitate tensions, as was often the case in Taiwan. However, certain disputes may take place if incumbents act in a manipulative manner to bypass legal or institutional restraints in order to help their preferred candidates by giving them their endorsement. For instance, many suspected that President Roh Tae-Woo’s decision to postpone the 1992 local elections involved a political manipulation meant to harm the prospects of opposition leaders increasing their popularity before a coming presidential election; success in the local elections would have increased their viability as presidential candidates.\footnote{Local Government Election Postponement Case, 6-2KCCR 176, 92 Hun-Ma 125, Aug. 31, 1994.}

A further example took place before the election of President Lee Myung-Bak in 2007, when, just two days before the presidential election, the parliament dominated by Lee’s rival Uri Party passed a law and appointed a special prosecutor to probe into allegations of stock price manipulation against Lee.\footnote{Special Counsel’s Case on the Suspicion to Lee Myung-Bak, 2007 Hun Ma 1468, Jan. 10, 2008.} Although Lee was later elected to the presidency, constitutional disputes concerning the investigation were subject to petition before the constitutional court. Apart from contesting the conduct of presidential elections, presidents may also become embroiled in political and legal disputes that also call for constitutional adjudication. The motion for the impeachment of President Roh, passed by rival political parties, which dominated the parliament regarding his alleged partisan campaigns, provides an excellent example of how easily presidents may become involved in constitutional disputes or become themselves become the objects of such dispute in a milieu of partisan presidential politics.\footnote{Presidential Impeachment Case, 16-1 KCCR 609, 2004 Hun-Na 1, May 14, 2004. For further discussion, see section 3.}

2.2.2. Disputes over the exercise of presidential powers

Taiwan and South Korea both opted for a presidential system during their periods of democratic transition, when politics was in a state of flux. While presidential powers are constitutionally specified, nonetheless, in the world of real politics, those powers may become the source of contentious political disputation, calling for constitutional adjudication. For instance, when the Taiwanese president’s emergency powers for dealing with natural disasters were called into question, the Constitutional Court, in J. Y. Interpretations Nos. 543 and 571, made an effort to facilitate the smooth exercise of the presidential powers in certain contingencies. And J. Y. Interpretation No. 419 was rendered in order to decide if the president could appoint the vice president concurrently as the premier. This involved a lingering constitutional issue, which various constitutional revisions had failed to resolve: Was the premier accountable to the president or legislature? Finally, the Court dealt with other cases related to the president’s power in making administrative and judicial appointments and the degree to which such exercises of power should be checked and balanced by the legislature.

A similar line of cases also appeared before the South Korean Constitutional Court. The most contentious cases related to the issue of transitional justice and involved the role of the sitting president in making decisions to prosecute former presidents for
past misdeeds. Other cases concerned presidential powers over foreign affairs and national defense, the president’s power to propose referenda and proper role in helping to campaign for his own party’s candidates in various elections. It appears from these cases that the role and powers of the president are more frequently targeted and disputed in South Korea than in Taiwan.

### 2.2.3. Disputes related to the president and separation of powers

The president within the constitutional orders of Taiwan and South Korea must exercise his powers in accordance with constitutionally established schemes based on the separation of powers. However, the lack of clarity in Taiwan’s Constitution, with respect to the design of government system, has rendered the issue of presidential powers and the president’s interrelationship with the other political actors a source of constitutional conflicts, particularly when rival parties occupy different constitutional branches. This situation has given rise to a series of cases. In contrast, in South Korea, disputes regarding the allocation of powers between the president and the legislature do not occur as frequently. The first constitutional dispute between the president and the National Assembly came about at the beginning of Kim Dae-Jung’s presidency; it concerned the appointment of the prime minister, which requires presidential nomination and legislative confirmation. Another serious confrontation between the president and the National Assembly occurred in 2004, which entailed rice imports and related trade agreements.

### 2.2.4. Disputes arising from the president’s involvement in conflicts between national and local governments

Presidents often become involved in major disputes between national and local governments regarding their respective powers and jurisdictions. Cases along this line occurred both in Taiwan and in South Korea. In Taiwan, J. Y. Interpretations Nos. 550 and 553 had to do with, first, constitutional controversies between the national and local governments with respect to the extent of financial contributions by the local governments to the national health insurance scheme and, second, the change of local election dates. In South Korea, the removal of the national capital from Seoul to a location further south, presumably to balance disparate regional developments and the relocation of administrative centers, provided the settings for these types of conflicts involving the president.

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37 Detailed discussions are provided in section 3.
38 Such as J. Y. Interpretations Nos. 329, 387, 419, 520, 543, 613, 632, and 645. The detailed discussions are included in section 3.
39 Appointment of Acting Prime Minister Case, 29 KCCG 583, 98 Hun-Ra 1, Jul 14, 1998. For detailed discussion of this case, see section 3.
40 Competence Dispute between Legislators and the Government, 19-2 KCCR 26, 2005 Hun-Ra 8, July 26, 2007. For detailed discussion of this case, see section 3.
41 The detailed discussions of these cases are included in section 3.
Table 2.  Constitutional cases regarding disputes of presidential powers in Taiwan

<table>
<thead>
<tr>
<th>President (years)</th>
<th>Presidential election</th>
<th>Presidential jurisdiction</th>
<th>Separation of power</th>
<th>National and local governments</th>
<th>Number of cases</th>
</tr>
</thead>
<tbody>
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<td>Lee Teng-Hui</td>
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<td></td>
<td></td>
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<td>8+(1)</td>
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<td>1991</td>
<td>J.Y. No. 283</td>
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<td>1992</td>
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<td>1993</td>
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<td>J.Y. No. 329</td>
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<td>1998</td>
<td>J.Y. No. 468</td>
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<td></td>
<td>2003</td>
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<td>J.Y. No. 550, J.Y. No. 553</td>
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<tr>
<td>Chen Shui-Bian</td>
<td>2004</td>
<td>J.Y. No. 585</td>
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<td>J.Y. No. 613</td>
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<td>2007</td>
<td>J.Y. No. 633</td>
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<td>(J.Y. No. 627), J.Y. No. 632</td>
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<td>Ma Ying-Jeou</td>
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<td>7+(2)</td>
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</table>

(): overlapping cases

Resource: Author
2.3. Presidential politics and political divisions: Taiwan and South Korea compared

The constitutional cases associated with the presidency and political divisions along geographical and party-political lines in Taiwan and South Korea have now been identified. The following discussion will now elucidate their significance in empirical and contextual terms. Following this, section 3 will examine these decisions, closely, in order to discern the salient features of the judicial role in confronting these types of political disputes, where even the fate of the office of the presidency may at times be at stake.

2.3.1. The significance of the first regime change and divided government

As shown in table 2 and table 3, the cases arranged in chronological order reveal a connection between the phases of democratic transitions and the number of cases before the Court. Three stages of democratic transition may be identified: the initial stage of democratization, the first regime change, and the second regime change. In Taiwan, the presidency of Lee Teng-Hui represented the initial stage of democratization (1990–2000), the presidency of Chen Shui-Bian (2000–2008) the first regime change, and the presidency of Ma Ying-Jeou (2008–present) the second. In South Korea, the presidencies of Roh Tae-Woo and Kim Young-Sam (1988–1997) represent the initial stage of democratization; the first regime change is associated with the presidencies of Kim Dae-Jung and Roh Moo-Hyun (1998–2007); and the second regime change with the tenure of Lee Myung-Bak (2007–present).

In temporal terms, in Taiwan, the disputes associated with the presidency took place in the early 1990s, which was the period when a large number of constitutional controversies arose. During the presidency of Lee Teng-Hui, which began with the early stage of democratization and ended with the first government turnover, eight cases were heard. Two of these case involved controversies regarding the presidential election, three related to presidential powers, two to separation-of-powers issues, and one involved disputes between the national and local governments. During this period, the issues concerning presidential powers and the relationship between other government branches were prominent.

The majority of cases appeared after the first government turnover. During the administration of President Chen Shui-Bian, which lasted eight years, there were eleven cases associated with the role of the president in the context of a divided government, where President Chen’s DPP did not control the majority in the legislature; five took place during Chen’s first term (2000 to 2004), while the remaining six occurred between 2004 and 2008. These disputes show that the issues concerning the government system and separation of powers were the continuous focus of debate, such that issues concerning the scope of presidential powers became extremely acute after the first regime change. After the second regime change in 2008, when the KMT took control of both the presidency and the legislature, there have been no significant cases along this line.\textsuperscript{42}

\textsuperscript{42} J. Y. Interpretation No. 645 was released in 2008; however, the issue arose during President Chen’s term and was brought to the Constitutional Court in 2004.
<table>
<thead>
<tr>
<th>President(years)</th>
<th>Presidential election</th>
<th>Presidential jurisdiction</th>
<th>Separation of power</th>
<th>National and local governments</th>
<th>Number of cases</th>
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<td>President(years)</td>
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<td>Presidential jurisdiction</td>
<td>Separation of power</td>
<td>National and local governments</td>
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<td>Roh Moo-Hyun</td>
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<td>2004</td>
<td>Presidential Impeachment</td>
<td>Forces to Iraq Case</td>
<td>Capital Relocation Case</td>
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<td>2005</td>
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<td>Administrative Center Case</td>
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<td>2007</td>
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<td>Lee Myung-bak</td>
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<td>(Rice Dispute)</td>
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<td>President’s Constitutional Complaint</td>
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<td>6+(1)</td>
<td>2</td>
<td>5</td>
<td>15+(3)</td>
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</tbody>
</table>

(): overlapping cases

Resource: Author
In South Korea, the first constitutional challenge regarding presidential powers occurred only during the presidency of Kim Young-Sam; none took place during the years of President Roh Tae-Woo, who became the first elected president after 1987. This is not surprising, as the new 1987 Constitution was primarily the result of a negotiation between President Roh’s party and other reformist political parties that later dominated the parliament. Even President Kim Young-Sam had to seek the collaboration of President Roh to contest and win the 1993 elections. During the period of these two presidencies, there were three cases regarding the issues of transitional justice during the initial stage of democratization; the other case concerned the elections of national and local governments.

The peak in the number of constitutional cases heard in South Korea also occurred after the first regime change, during which time nine cases were considered. Among them, only three arose concerning President Kim Dae-Jung, with the other six cases all taking place during Roh Moo-Hyun’s presidency; these primarily concerned the jurisdictional scope of presidential powers. Since President Lee Myung-Bak took office in 2008, there have been two constitutional decisions. The first concerned President Roh Moo-Hyun’s partisan stand against his party’s rival presidential candidate, Lee Myung-Bak, in the 2007 presidential election, while the second related to the parliamentary investigation into Lee’s conduct that was suspicious of election manipulation.

From the chronological perspective, the patterns of case distribution in Taiwan and South Korea are strikingly similar. Even though constitutional controversies gradually came about in the initial stage of democratization, the number of cases heard did not reach their peak until the first regime changes in Taiwan and South Korea. During President Chen Shui-Bian’s presidency (2000 to 2008), eleven cases associated with the presidential system were heard, accounting for more than half of the cases examined here. In South Korea, nine cases—again, more than half the cases considered—were heard during the period of the first regime change from 1998 to 2007.

Furthermore, if the respective government structures are taken into consideration, the distribution of political powers bears stronger connotation to this line-up of constitutional controversies. The analysis shows that political conflicts took place more frequently during the phase when government was divided, in the sense that different political parties controlled the presidency and legislature, thus causing frequent interbranch rivalry and competitions. In South Korea, for example, among the nine constitutional decisions given during the presidencies of Kim Dae-Jung and Roh Moo-Hyun, there were fewer constitutional cases brought during Kim Dae-Jung’s presidency, when the president and the legislature were both from the same political party, than during President Roh’s tenure (six out of nine cases), when the two branches were divided between different political parties.

See, e.g., Chung-Si Ahn, Transformation of South Korea Politics and Prospects for Democratic Consolidation, in Politics and Economy of Regime Transformations: Case Study of South Korea and Central European Countries 23–40 (Chung-Si Ahn & Chon-Pyo Lee eds., 1999); and Chong Jong-sup, Political Power and Constitutionalism, in Recent Transformations in Korean Law and Society 11–32 (Dae-Kyu Yoon ed, 2000).
2.3.2. The significance of government design and political context

As shown in table 2 and table 3, the particular types of constitutional cases seem to implicate the significance of government design and particular political contexts. In Taiwan, for instance, among all the surveyed cases, seven cases dealt with separation of powers while six concerned presidential powers. Only four cases were about election disputes; three were concerned with national–local government disputes. The ambiguity in the system of government, with respect to which institution—the president or the legislature—should have the ultimate policy-making power and to which should the premier be made accountable, evidently shaped the kinds of constitutional disputes arising in Taiwan. In contrast, the role of the presidency dominated the cases heard in South Korea, where six cases implicated presidential powers, with five also involving the role of presidents in national–local conflicts. Only two cases were concerned with separation-of-powers disputes in South Korea.

In addition to the disputes concerning the nature of the government system, the historical and political contexts also contributed to the dynamics of constitutional development in Taiwan and Korea. One of the most obvious differences between Taiwan and South Korea was the volume of disputes over the national and local governments, which are disputes rooted in the history of central vis-à-vis local politics. Five cases were in the docket of the South Korean Constitutional Court while there were only two in Taiwan, which indicates a more intense central–local divide in South Korea. As explained in the previous section, the localism, which had originated in geographical and historical contingencies or from some entrenched unequal distributions of national resources, has been translated into varying degrees of local biases and political favoritism, with considerable impact for voting patterns and political competitions. For example, in 1987, Kim Young-Sam was supported by over half the population of Pusan and south Kyongsang yet gained barely any support from other regions. Kim Dae-Jung attracted over 90 percent of the votes in Kwangju and Jeolla, yet Roh Tae-Woo was elected, in the end, because he won more votes from Taegu, Gyeongsangbuk, Kangwon, and Chungbukwas.

Such regional divisions, manifested in terms of the political support for presidential contenders, continued after the period of democratization. In Taiwan, the KMT had dominated both the national and local governments until the democratization began in the late 1980s. Since 1994, the phenomenon of a “KMT north and DPP south” was evident in both presidential and parliamentary elections, since the KMT held strong support from the mainlanders who had followed it from China and had taken up residence, mostly in Taipei and the neighboring areas. However, as the dominant and

44 The 1997 amendments have revised some major elements of the parliamentary system vis-à-vis the original constitutional text. According to the original design, the Executive Yuan headed by the premier, not the president, remains the highest executive power according to the Constitution and was to be held responsible to the legislature. After several revisions, however, the president has been vested with the power of national security apart from appointing the premier without the parliamentary consent. Electoral practices and political exercises further move the system toward presidentialism.

entrenched political party, the KMT continued to win significant support even in the south, which indicates a weaker form of local influence on voting patterns in Taiwan, as compared with South Korea.

2.3.3. The impact of the presidency on political divisions

Juan Linz suggests there are several features of a presidential system that intensify the political divisions between different political parties or between national and local governments or that exaggerate the divide among the fundamental beliefs held by different individuals. These features include winner-takes-all election; fixed term of office; the tension inherent in a dualist system, where the president and parliament are subject to direct elections; and, last but not least important, the politics of personality.\(^46\)

This analysis seems to be borne out by the constitutional experiences of Taiwan and South Korea. First, presidential elections are at the center of the fiercely contested politics in both Taiwan and South Korea, which increases the number of controversies arising out of the electoral process.\(^47\) Such conflicts are much in evidence in the constitutional cases of Taiwan and South Korea. In addition, political divisions may be further exacerbated by fierce competition between elected presidents and parliaments. Elected by a direct popular vote, presidents are more likely to conceive of their powers as absolute, over which parliament seeks to impose constraints. The fight becomes even fiercer in the context of a divided government, with different political parties controlling different political branches of government. This is shown, clearly, in the rapid increase of political conflicts and their associated constitutional decisions during the period of divided government in both South Korea and Taiwan.

Lastly, the personality of the presidents may also affect political divisions.\(^48\) Both President Chen Shui-Bian of Taiwan and President Roh Moo-Hyun of South Korea grew up in very poor families and worked hard to become successful lawyers before entering politics, and both became the most controversial president in their respective countries. Both their presidencies brought about the majority of constitutional cases regarding presidential powers and separation-of-powers disputes in their jurisdictions.

3. Deferential judicial decisions on presidential politics and political divisions

This section discusses how the constitutional courts of Taiwan and South Korea handled these constitutional controversies involving the presidency with a view to assessing

\(^47\) Juan Linz, *supra* note 3
\(^48\) See also Thomas Baylis, *Presidents Versus Prime Ministers: Shaping Executive Authority in Eastern Europe*, 48 (3) *World Politics* 297, 297–323 (1996) (arguing the structural element, including the legacy of communism, the immature nature of new democracy, and the structure of Congressional democracy contribute to the conflicts between the president and the prime minister in East European countries).
the judicial approaches adopted as strategies for avoiding or surviving political retaliation.

3.1. Taiwan

From an analysis of Taiwanese judicial decisions pertaining to the conduct of presidential elections, jurisdictional disputes, separation-of-powers conflicts, and national–local government-related disputes, it may be inferred that the Constitutional Court has skillfully avoided direct confrontation with the presidency. It has sought to facilitate political dialogue between the competing political actors in different government branches.49

3.1.1. Disputes regarding residential election

The first direct presidential election was held in 1996, following the constitutional revisions of 1992 and 1994. This unprecedented election generated two cases before the Constitutional Court. The first case concerned presidential immunity for the incumbent president running for reelection,50 brought by opposition legislators worried that the incumbent president might gain an unfair advantage with the immunity. In response, the Constitutional Court issued J. Y. Interpretation No. 388,51 maintaining that the incumbent president continued to enjoy immunity, which served as a temporary bar against criminal prosecutions. The second case was concerned with the requirement of gathering a sufficient number of signatures and of providing a certain deposit, prerequisites which independent presidential candidates had to fulfill. An independent team of presidential and vice-presidential candidates, both famous feminists and women’s rights advocates, failed to meet these requirements and were barred from standing for election. The Constitutional Court rendered J. Y. Interpretation No. 468, two years after the first direct presidential election, which sustained the constitutionality of all the challenged provisions.52

The most controversial case concerned with presidential elections came before the Constitutional Court in the aftermath of the highly contentious 2004 presidential elections. In the afternoon before election day, President Chen and Vice President Lu were shot at while riding in a jeep to the last campaign rally, both sustaining minor injuries. They won the election by a razor-thin margin after several rounds of recounting.53

49 A similar argument has been formulated in one of my recent articles. See Jiunn-Rong Yeh, Democracy-Driven Transformation to Regulatory State: The Case of Taiwan, 3(2) NTU LAW REVIEW 31 (2008) [hereinafter, “Regulatory State”].
50 CONSTITUTION, art. 52; “The President shall not, without having been recalled, or having been relieved of his functions, be liable to criminal prosecution unless he is charged with having committed an act of rebellion or treason.”
53 On election day, President Chen won by the margin of about 30,000 votes out of 13 million cast. After the recount certified by the High Court. Chen won the election by the margin of 25,563 votes.
While asking for a recount before the Court, the KMT also alleged that President Chen was behind the gunshot incident, that it was designed to draw voter sympathy and, thus, electoral support. The KMT-controlled parliamentary majority quickly passed a special law creating an investigative commission, composed of an extremely partisan, primarily KMT, membership. The commission findings led to the revocation of judicial decisions relating to electoral disputes. Contending that the special commission was unconstitutional, the DPP was engaged in a parliamentary fight with the KMT and, at the same time, was petitioning the Constitutional Court. By the end of that year, the Court rendered J. Y. Interpretation No. 585, sending mixed signals with regard to the constitutionality of the investigative commission and what it could and could not do.\textsuperscript{54} The Court stated that establishing a special commission, if defined as an exercise of the powers of parliamentary investigation, fell within the legislative ambit and, hence, was constitutional. However, the Court noted, given its status as a parliamentary organ, the special commission could not command or supervise prosecutors, as well as other judicial personnel, for the investigation, and, further, the commission’s findings on the gunshot incident could never revoke judicial decisions. In other words, in the view of the Constitutional Court, while the parliamentary investigation might still proceed, the controversy over the presidential election of 2004 had come to an end after the recount was certified and related disputes resolved by lower courts and affirmed by the Supreme Court. Any subsequent parliamentary investigation would not affect this. While the KMT legislative majority was very dissatisfied with the Constitutional Court’s decision, nevertheless, it accepted the ruling by revising the special act for the commission to work within the narrowly defined jurisdiction.\textsuperscript{55} The presidential election dispute finally came to an end, and politics returned to normal.

\subsection*{3.1.2. Disputes on presidential jurisdiction}

The first dispute over the scope of presidential jurisdiction took place when an assertive president was in office. President Lee Teng-Hui, having won the first direct elections in 1996,\textsuperscript{56} decided that his vice president elect, who was the premier before the election, would continue to serve as premier. This, however, raised two constitutional disputes. The first was whether the vice president could concurrently hold the office of premier, which the Constitution did not seem to prohibit, expressly. The more complicated second issue was whether the premier must resign upon the inauguration of a newly elected president, and if the new president appoints a new premier, whether this required legislative consent. As previously discussed, the ROC Constitution, originally, had adopted a parliamentary system, and thus it contained no provisions

\begin{footnotesize}
\begin{itemize}
\item[\textsuperscript{54}] J. Y. Interpretation No. 585 (2004), available at http://www.judicial.gov.tw/constitutio
court/p03_01.asp?expno=585.
\item[\textsuperscript{55}] One of the revised provisions was, again, invalidated by J.Y. Interpretation No. 633, where the Court insisted the parliamentary investigatory commission should not be given the power to impose fines on individuals, businesses, or government agencies that fail to cooperate on investigation. J. Y. Interpretation No. 633 (2007), available at http://www.judicial.gov.tw/constitutio

court/p03_01.asp?expno=633.
\item[\textsuperscript{56}] A similar story can be recalled in the Jeffersonian presidency in the early American history. See Ackerman, supra note 2.
\end{itemize}
\end{footnotesize}
dealing with the situations that would arise once the presidency had become a directly elected institution in 1996. When the 1994 constitutional amendment opened up the presidency to direct popular elections, it did not decide if the governmental organization would be changed into a presidential system per se, nor did it contain any provisions dealing with the relationship between the president, premier, and legislature after the presidency had become an elective office.

Given this lack of constitutional clarity, President Lee decided to have the same premier, now also vice president elect, continue his service, while the DPP legislative members insisted that the new president must appoint a new premier and ask for legislative confirmation. Filibusters and violent fighting broke out in the legislature for months. By the end of that year, the Constitutional Court rendered J. Y. Interpretation No. 419. With respect to the first constitutional issue, while stating that the constitutional preference would be to have two individuals in the office of premier and vice president, and that appointing the vice president to serve, concurrently, as premier would “not be completely in conformity with the Constitution,” the Court stopped short of invalidating such a concurrent appointment since there was no explicit prohibition in the Constitution. With respect to the second and more complicated constitutional issue, the Constitutional Court agreed with President Lee. The Court stated that the premier’s resignation upon the new president’s inauguration is “a matter of courtesy in deference to the nation’s leader, not an obligation under the Constitution.” President Lee’s decision to have the continuing service of his premier/vice president was sustained. Clearly, this was an instance of judicial deference to the strong will of the president at the time. However, the Court did not respond to the more complicated issues of whether making the presidency an elected office changed the interrelationships between the president, premier, and legislature. Subsequently, President Lee and his KMT party initiated a constitutional amendment providing that the premier be directly appointed by the president alone, without the need for legislative consent.

Judicial deference is also apparent in cases involving less contested aspects of presidential powers. For instance, a vacancy in the Constitutional Court occurred,

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58 It merely warned what “triggered the present Interpretation should be properly disposed of in accordance with the ruling.” Para. 1, Holding of J. Y. Interpretation No. 499. Notably, in its reasoning, the Court laid down a review standard to decide the unconstitutionality of public acts. It stated that “[b]efore an act is held illegal per se under a given public law, . . . it must be clearly and grossly flawed,” and that “[i]n the present case, the Constitution does not expressly prohibit the Vice President from concurrently serving as the Premier, nor does the case violate the principle of separation of powers, nor is there any incompatibility or conflict of interest between the natures of the two positions. . . . [I]t can hardly be said that it is grossly and clearly flawed, hence, to have clearly reached the level of being unconstitutional.”
60 ADDITIONAL ARTICLES OF THE CONSTITUTION, sec. 1, art. 3: “The president of the Executive Yuan shall be appointed by the president.” The Legislative Yuan however possess the power of a no-confidence vote against the premier.
unexpectedly, in 1998. It was not clear if the president could appoint a new justice, as the Constitution provided, expressly, that the next appointment should be made in 2003.\textsuperscript{61} In response to a request by the secretary-general of President Lee Teng-Hui, the Constitutional Court rendered J. Y. Interpretation No. 470, permitting the president to fill such vacancies with the consent of parliament at any time.\textsuperscript{62} A similar issue also arose during the DPP presidency, when the Constitutional Court again allowed President Chen to appoint new justices with legislative consent before 2003.\textsuperscript{63}

The Court again deferred to the president with respect to the exercise of emergency powers. President Lee issued the first emergency decree, which received subsequent legislative endorsement, in response to a devastating earthquake in the central part of Taiwan in September 1999.\textsuperscript{64} In the course of implementing the decree, the government issued supplementary regulations that were not submitted for legislative approval, creating doubts about their constitutionality. In J. Y. Interpretation No. 543, the Constitutional Court—while insisting that all emergency decrees, including subsidiary measures, must be either delegated or approved by the legislature—decided to make an exception this time and sustained the constitutionality of the challenged measures since they were already in force.\textsuperscript{65} Another case, challenging the reasonableness of compensation standards in the emergency decree, was also denied by the Court.\textsuperscript{66} Thus, the first presidential emergency decree was sustained.

It should be noted that, while apparent with greater frequency after 1996, judicial deference also occurred during the initial period of democratization in relation to President Lee’s capacity to deal with transitional justice. In J. Y. Interpretation No. 283, the Constitutional Court was asked if a pardoned political dissident, a leading member in the opposition party, could continue to serve his remaining tenure in the Legislative Yuan.\textsuperscript{67} The pardon was extended by President Lee, upon succeeding

\textsuperscript{61} It was due to constitutional revisions to the length of terms and the appointment process of justices. In the past, justices enjoyed a renewable term of nine years, but the revision changed it into a nonrenewable term of eight years with staggered appointments. Thus, in the constitutional revision of 1997, it was expressly written that half the justices appointed in 2003 would only have a nonrenewable term of four years and half with that of eight years. See Additional Articles of the Constitution, sec. 2, art. 5.


\textsuperscript{64} In response to disasters, the president may issue emergency decrees and take all necessary measures. However within ten days of such issuance, the emergency decrees must be presented to the Legislative Yuan for ratification. Should the Legislative Yuan withhold ratification, the said emergency decrees shall forthwith cease to be valid. See Additional Articles of the Constitution, sec. 3, art. 2.

\textsuperscript{65} The Court stated “although the issuance of the said emergency decree on September 25, 1999, by the President, and the draft of the contingent Executive Outline by the Executive Yuan failed to comply with the procedures set out above, there was no breach of the Constitution.” J. Y. Interpretation No. 543 (2002), available at http://www.judicial.gov.tw/constituionalcourt/p03_01.asp?expno=543.


President Chiang Ching-Kuo, and was deemed a good-will gesture toward political opposition. However, the Ministry of Interior insisted that the pardon had no retroactive effect and refused to reinstate the pardoned opposition leader to his parliamentary seat. The Constitutional Court, following the President’s generous attitude, resolved the issue by allowing the reinstatement.

3.1.3. Disputes on separation of powers

President Chen Shui-Bian’s victory in the 2000 presidential elections resulted in a divided government in which his DPP party controlled the executive while the KMT controlled the legislative majority. Predictably, this term of divided government saw the majority of separation-of-powers disputes between the president and the legislature. The first controversy came with the government’s suspension of the fourth nuclear-power-plant construction, a project initiated during the KMT administration. President Chen made the suspension of nuclear-power-plant construction one of his campaign promises and put it into effect six months after his inauguration. Infuriated, the KMT legislature launched filibusters on almost every government budget and legislation. The KMT argued that the decision regarding the nuclear power plant was within the power of the legislature, to which the premier was politically accountable. The KMT blamed President Chen for constitutional violations and even called for his impeachment and recall. As previously discussed, the constitutional amendments of the 1990s made the presidency subject to a popular vote and allowed the president to appoint the premier without legislative confirmation. These amendments, however, failed to provide a clear picture with respect to the relationship between the president, premier, and legislature. With the situation of a divided government in 2000, the government system itself became the center of the debate. While the KMT, which dominated the legislature, insisted that the government system was a parliamentary one, the DPP, which controlled the executive, contended it had been changed into a presidential one.

The Constitutional Court rendered J. Y. Interpretation No. 520 at the government’s request. Interestingly, the Court did not rely on determining whether the system of government was a parliamentary or presidential system as a basis for its interpretation. Rather, it stated that in “seeking to promote what was promised during the campaign,” elected presidents “may change previously existing policies or orientation not necessarily consistent with his political views.” At the same time, however, the legislature maintained its codecisional power over major government policies. Thus, the Court directed the government to report to the legislature explaining its decision to cancel the plant construction while compelling the legislature to listen and to formulate a policy solution acceptable to both. Upon its release, this decision was strongly

69 The Court indicated that the premier or related ministers of the Executive Yuan, within a reasonable time, had to submit a report to the Legislative Yuan, subject to interpellation.
criticized by both sides. Nonetheless, the procedural solution prescribed by the Court worked out eventually. The government and legislature issued a joint declaration, which affirmed the long-term goal of a nuclear-free homeland while agreeing that construction of the fourth plant should continue.  

The partisan confrontations between the KMT legislative majority and the DPP government worsened as President Chen entered his second term with the scandalous gunshot incident. The most serious legislative boycott took place during the confirmation of the Control Yuan commissioners, functional equivalents to modern-day ombudsmen. According to the Constitution, commissioners are appointed by the president with legislative confirmation. The third term of the Control Yuan commissioners expired at the end of January 2005. President Chen submitted a list of nominated individuals for legislative confirmation by the end of 2004. However, the KMT legislative majority blocked it from entering into floor discussion for an entire year. In February 2005, a newly elected legislature, where the KMT still enjoyed a majority, was inaugurated. President Chen submitted the list again; however, the KMT continued the boycott for another three years. At the request of the DPP legislators, the Constitutional Court rendered J. Y. Interpretation 632 in August 2007. The Court stated that the legislature must exercise the consent power in a timely manner to maintain the constitutional functions of the Control Yuan and directed the issue to be resolved appropriately in accordance with the ruling.

The creation of independent regulatory commissions was part of the DPP administration’s agenda of government reform. Against the backdrop of a divided government, even a technical and administrative issue of legal reform became severely politicized. In creating the first independent commission, the National Communication Commission, the KMT legislative majority tried very hard to influence the appointment of commissioners. It wrote into the law that independent commissioners were to be appointed directly by a legislative appointment committee whose membership was to be allocated in proportion to the seats that all parties occupied in the legislature.

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70 This joint solution was even written into the law. See Jiunn-Rong Yeh, Regulatory State, at 53.
71 Functions and powers of the Control Yuan commissioners, see Additional Articles of the Constitution, art. 7.
72 Article 7 of the Additional Articles of the ROC Constitution prescribes that the Control Yuan has twenty-nine commissioners with a term of six years, appointed by the president with legislative confirmation.
74 However, by this time, with the next presidential election in less than six months, the KMT decided to postpone this matter indefinitely even at the cost of ignoring the judicial ruling. Only after the KMT won the presidency in 2008, did the newly inaugurated president send his list of nominated individuals to the legislature, where the KMT dominated the majority.
75 However, this seems a common problem in many democracies undertaking administrative law reforms, particularly in creating technocratic-oriented independent commissions. See Jiunn-rong Yeh, Experimenting with Independent Commissions in a New Democracy with a Civil Law Tradition: The Case of Taiwan, in Comparative Administrative Law (Rose-Ackerman and Lindseth eds.) (upcoming) (hereinafter “Independent Commissions”); and, generally, J. Kornai & S. Rose-Ackerman ed., Building a Trustworthy State in Post-Socialist Transition (2004).
Another, similarly partisan appointment formula for the Public Referendum Review Committee, which was tasked with reviewing proposed referenda before these were submitted to the public, was also enacted.\(^{77}\) In the former case, the Constitutional Court rendered J. Y. Interpretation No. 613. While affirming that the legislature could exercise a significant degree of checks and balances on the appointment process, the Court held the partisan appointment committee unconstitutional as it removed, entirely, executive influence over the appointments, which would undermine the independence of the commission. In the later case (J. Y. Interpretation No. 645), in defining the referendum review committee as exercising purely executive functions, the Court held that the partisan appointment formula was unconstitutional, involving the transgression of executive authority by the legislature.

3.1.4. Disputes between national and local governments

When different political parties control the national and local governments, the differences between party policies and/or their connections with particular regions may be translated into serious policy debates or jurisdictional disputes. In Taiwan, the dispute as to how to allocate financial costs between national and local governments relating to the national health insurance program was a typical example.\(^{78}\)

The establishment of the national health insurance program in 1996 was a great leap forward for social welfare policy in Taiwan. In general, this ambitious compulsory program received a positive reception, although the issue of allocating costs remained controversial, particularly regarding the apportionment between central and local governments. Two major metropolitan cities, Taipei and Kaohsiung, have constantly complained about their financial burdens. In 2002, two years after President Chen of DPP was elected and the party in control of the national government, the KMT mayor of Taipei decided to stop paying the allocated contributions. In response to the complaint made by the national government, the Court issued J. Y. Interpretation No. 550, proclaiming that both the national and local governments bear constitutional duties in supporting the national health insurance program.\(^{79}\) It is constitutional, stated the decision, for the national government to demand that local governments share the financial costs. However, the decision fell short of specifying any particular proportion or formula for sharing financial burdens. Instead, it directed the national government to negotiate with local governments and provide them with sufficient opportunities to participate in the course of further policy formulation.\(^{80}\)


\(^{78}\) Yeh, *Regulatory State*, at 53.


\(^{80}\) Despite good intentions, bad partisan politics continued till the end of the DPP administration. In 2008, when the Taipei mayor himself was elected to the presidency, he had a hard time dealing with this issue. At the time of this paper’s writing, the Taipei government has only just come up with a plan to pay its dues to the national government.
The other example was J. Y. Interpretation No. 553. In 2002, the elections for city and county mayors and representatives were scheduled on the same day nationwide. However, the Taipei municipal government decided to postpone the election to a later date due to an earlier redistricting plan. The postponement was revoked by the Ministry of the Interior, which was concerned with electoral inconsistency. Arguing that the revocation was unconstitutional, the Taipei municipal government petitioned the Constitutional Court, which held that it was within the jurisdiction of the Ministry of the Interior to supervise local elections and even to revoke municipal decisions, if appropriate. However the Court indicated that “if the Taipei municipal government considered the revocation, an administrative disposition, illegal,” it could litigate against the said Ministry before the administrative court. In other words, the Constitutional Court passed the buck to the administrative court; however, as the time limits had passed, the case became moot.

3.2. South Korea

The 1987 Constitution of South Korea adopted a directly elected presidency and a government system leaning toward presidentialism. Like Taiwan, South Korea has seen—since democratization began—many constitutional disputes over the scope and exercise of presidential powers, which the Constitutional Court has been called upon to adjudicate. A detailed examination of these decisions reveals that, like its counterpart in Taiwan, the Korean Constitutional Court has also largely avoided direct confrontations with presidents with respect to the exercise of presidential powers. Taking advantage of its procedures and supermajority voting quorum, the Court has been able to let some of the most contentious disputes be resolved, subsequently, by politics.

3.2.1. Disputes over presidential election

In contrast to Taiwan, few South Korean constitutional disputes relate, directly, to the conduct of presidential elections. Although Korean presidents enjoy one nonrenewable

82 Based upon the European model, administrative courts in Taiwan are separated from ordinary courts of civil and criminal jurisdictions. Right now, there are two levels of administrative courts that hear individual cases that challenge administrative actions including, typically, administrative dispositions, administrative rules, and administrative contracts.
83 Constitution of the Republic of Korea, arts. 62, 63. Notwithstanding as aide to the president, the prime minister is answerable to the National Assembly and can be removed by parliamentary vote of no confidence.
84 The Constitution requires six votes out of nine justices to render a ruling that finds a law unconstitutional. Constitution of the Republic of Korea, sec. 1, art. 113: “When the Constitutional Court makes a decision on the unconstitutionality of a law, impeachment, dissolution of a political party, or a petition relating to the Constitution, the concurrence of at least six adjudicators is required.”
85 This might be also due to the fact that direct presidential elections were practiced, occasionally, before the democratization, and that when the 1987 Constitution was negotiated, the leader from the conservative party, Roh Tae-Woo, and the two rising opposition leaders, Kim Young-Sam and Kim Dae-Jung, came to a consensus on allowing the presidency a nonrenewable five-year term and then allowing each of three to take the presidency in turn. See Tom Ginsburg, The Politics of Courts in Democratization: Four Moments in Asia, paper delivered at the Constitutional Court of Korea, December 2009 (on file with author).
term of five years, which avoids the tensions associated with incumbent presidents seeking reelection. Tensions may still be triggered if the incumbent president or their political parties seek to manipulate political or even legal processes in order to help their candidates. Where constitutional issues are implicated, such actions pose a great challenge for judicial resolution. One such example was President Roh Tae-Woo’s decision to postpone the 1992 local election so as to curtail the attempts by opposition leaders to boost their popularity before standing in the next presidential election.\textsuperscript{86} When this case came before the Constitutional Court, it rendered no immediate response. The Court waited until political consensus was reached and a new statute enacted, which designated an election date, before it dismissed the case.\textsuperscript{87}

The other instance took place before the election of President Lee Myung-Bak.\textsuperscript{88} Two days before the presidential elections in December 2007, the National Assembly passed an act to appoint a special counsel to investigate Lee, the most popular candidate, who was accused of several instances of misconduct and embezzlement. Lee was nevertheless elected, and the case concerning the constitutionality of appointing a special counsel was brought to the Constitutional Court. The decision was released in less than two weeks, upholding the National Assembly’s power to pass the act and appoint the special counsel. However, the Court narrowly construed the scope and legal effect of the special counsel’s powers and jurisdiction, which ensured that further judicial appeals remained possible, following due process.\textsuperscript{89}

The most controversial presidency after Korea’s democratization was, undoubtedly, that of President Roh Moo-Hyun. While there was no judicial decision involved with his election directly, two related cases had the effect of deciding the fate of his presidency. The first concerned the constitutionality of the announcement made by President Roh expressing his intent to hold a public vote of confidence in himself, when his popularity ratings were at a record low.\textsuperscript{90} By a five-to-four vote, the Constitutional Court deemed President Roh’s announcement informal and unofficial and, therefore, not an exercise of official power subject to constitutional review. As a result, the Court dismissed the case.\textsuperscript{91}

\begin{itemize}
\item \textsuperscript{86} Local Government Election Postponement Case, 6-2KCCR 176, 92 Hun-Ma 125, Aug. 31, 1994. It was believed that the local election might help a presidential candidate other than Kim Young-Sam who had led the past opposition but was now collaborating with President Roh.
\item \textsuperscript{87} Local Government Election Postponement Case, 6-2KCCR 176, 92 Hun-Ma 125, Aug. 31, 1994. For the case’s official English summary, see Constitutional Court of Republic of Korea, Twenty Years of the Constitutional Court of Korea, 258–261 (2008) (hereinafter “Twenty Years”), available at http://english.ccourt.go.kr/home/att_file/ebook/1255848976370.pdf.
\item \textsuperscript{88} Special Counsel’s Case on the Suspicion to Lee Myung-Bak, 2007 Hun Ma 1468, Jan. 10, 2008, available at http://english.ccourt.go.kr/.
\item \textsuperscript{89} On February 21, a few days before the inauguration day of President Lee Myung-Bak, the special counsel dropped the case, stating that all charges were groundless.
\item \textsuperscript{90} Due to serious internal party struggles, President Roh had split from the New Millennium Democratic Party and formed his own Uri Party.
\item \textsuperscript{91} Referendum for Asking Citizens’ Confidence in the President, 15-2(B) KCCR 350, 2003 Hun-Ma 694, Nov. 27, 2003. For the case’s official English summary, see Constitutional Court of Republic of Korea, Twenty Years, at 329–331.
\end{itemize}
Despite the favorable judicial decision, President Roh’s political struggles continued and became worse. In March 2004, the National Assembly passed an impeachment motion against President Roh, and the case went before the Constitutional Court for final decision.\(^{92}\) Quite unexpectedly, after the National Assembly passed the impeachment motion, President Roh’s ratings rose, and his Uri Party won a parliamentary majority in the election held in April.\(^{93}\) About two weeks after the election, the Constitutional Court released its decision not to allow the impeachment of President Roh. While the Court found President Roh in violation of various constitutional duties, and his initiative to hold a public vote of confidence, inter alia, as constitutionally impermissible at this time, nevertheless, it acquitted him. Based on the standard of proportionality, the Court justified the acquittal on the basis that President Roh’s constitutional violations were not serious enough to warrant impeachment. Roh’s presidency was thus saved, and he continued to serve till the end of his term.

3.2.2. Disputes on presidential jurisdiction

One of the most difficult issues facing new democracies relates to transitional justice and dealing with past official misdeeds. This often involves the presidency: either the sitting president utilizes his powers to prosecute (or pardon) former presidents or the president himself is being prosecuted. The former opposition leader, Kim Young-Sam—despite urging the public to forgive\(^{94}\)—was compelled to confront such a difficult task after his election. Three cases were made before the Constitutional Court. The first case challenged the prosecutor’s decision not to prosecute the two former presidents, Chun Doo-Hwan and Roh Tae-Woo, for their involvement in a December 12 incident in 1979 as part of the military junta against then-president Park. Indicating that one of the charges might have passed the statutory limitation, the Court dismissed the case on the ground that the prosecutorial decision not to pursue the issue was not arbitrary.\(^{95}\)

A similar case before the Constitutional Court challenged the prosecutor’s decision not to prosecute wrongdoers—including the two former presidents—for their violent suppression of the May 18 Democratization Movement in 1980.\(^{96}\) Meanwhile, a secret fund of former President Roh Tae-Woo was discovered, and he was accused of embezzlement and arrested. Before the Constitutional Court officially released any

\(^{92}\) Presidential Impeachment Case, 16-1 KCCR 609, 2004 Hun-Na 1, May 14, 2004. For the case’s official English summary, see Constitutional Court of Republic of Korea, Twenty Years, at 290–293.

\(^{93}\) Id. at 290.

\(^{94}\) Since he was aided, largely, by former President Roh Tae-Woo in winning the presidential election and defeating his competitor, Kim Dae-Jung, also a leader from the past opposition, President Kim Young-Sam was unwilling to proceed with any prosecution against the former regime.

\(^{95}\) December 12 Incident Non-institution of Prosecution Case, 7-1 KCCR 15, 94 Hun-Ma 246, Jan. 20, 1995. For the case’s official English summary, see Constitutional Court of Republic of Korea, Twenty Years, at 261–264.

\(^{96}\) May 18 Incident Non-institution of Prosecution Case, 7-2 KCCR 697, 95 Hun-Ma 221 et al., Dec. 15, 1995. For the case’s official English summary, see Constitutional Court of Republic of Korea, Twenty Years, at 264–267.
decision, a draft ruling was leaked to the press indicating that the Court might find that the statutory limitation had passed.\textsuperscript{97} While no one was sure of its source or truthfulness, this release made many reformers worry that an upcoming judicial decision might foreclose any prosecutions. One of the litigants, therefore, withdrew the case and refocused on expediting the enactment of a special prosecution law. Acting on this, the Constitutional Court quickly dismissed the case.

In these two cases the Constitutional Court never stood directly against President Kim’s reluctance to prosecute past presidents and other offenders in dealing with transitional justice. After President Kim was compelled, politically, to agree to support the special prosecution act, the Constitutional Court, again, did not oppose this initiative.\textsuperscript{98} The Court upheld the special act, which it found did not violate the law against retrospective laws. While five justices indicated that they found the act unconstitutional, to a limited extent, they fell short by one vote of rendering a finding of unconstitutionality. As a result, the special prosecution began, and the two former presidents, Chun and Roh, were found guilty and jailed for several months before being pardoned by President Kim’s amnesty.\textsuperscript{99}

Other disputes regarding presidential jurisdiction also seem to elicit considerable judicial deference. In supporting the global war against terrorism, President Roh Moo-Hyun decided to dispatch Korean troops to Iraq in 2003. A constitutional complaint against this decision was made but was quickly dismissed by the Constitutional Court for lack of standing. Another similar challenge was also dismissed by the Court on the ground that the issue involved a decision of a highly political nature not apt for judicial review.\textsuperscript{100} While the Court has not adopted any “political question” jurisprudence, such as the U.S. Supreme Court’s \textit{Baker v. Carr},\textsuperscript{101} it took a similar position in stating that “[j]udicial self-restraint over the matters concerning diplomacy and national defense that require a resolution of highly political nature in other nations with a long tradition of democracy is also deemed to be in the very same vein.”\textsuperscript{102}

Toward the end of his presidency, Roh Moo-Hyun, who had almost lost his presidency for making partisan comments in 2004, repeated this mistake again in 2007, just before presidential elections were held by making an openly partisan comment against the rival party’s candidate. Consequently, President Roh was officially warned by the National Election Commission not to violate his duty of neutrality, which was an unwritten duty the Court had found in its 2004 impeachment decision. Roh then made a novel constitutional complaint against this official warning. In a five-to-four

\textsuperscript{97} Id. at 265.
\textsuperscript{98} The Special Act on the May Democratization Movement, etc. Case, 8-1 KCCR 51, 91 Hun-Ka 2 et al., Feb. 16, 1996. For the case’s official English summary, see CONSTITUTIONAL COURT OF REPUBLIC OF KOREA, Twenty Years, at 267–271.
\textsuperscript{99} Id. at 271.
\textsuperscript{100} Dispatching National Armed Forces to Iraq, 16-1 KCCR 601, 2003 Hun-Ma 814 et al., Apr. 29, 2004. For the case’s official English summary, see CONSTITUTIONAL COURT OF REPUBLIC OF KOREA, Twenty Years, at 288–290.
\textsuperscript{101} 369 U.S. 186 (1962).
vote, the Constitutional Court upheld the law in favor of the National Election Commission, also confirming its earlier interpretation.\textsuperscript{103} While this decision appeared to oppose the president, this judicial act was much less significant than it appears, as it merely confirmed an administrative warning against an outgoing president whose party had lost the election.

3.2.3. Disputes on separation of powers

The first constitutional dispute between the president and the National Assembly occurred at the beginning of Kim Dae-Jung’s presidency.\textsuperscript{104} Following his inauguration in February 1998, President Kim appointed Kim Jong-Pil as prime minister and sought the consent of the National Assembly. However, the confirmation process was disrupted and turned violent when the largest opposition party boycotted the vote.\textsuperscript{105} After failing to obtain parliamentary approval, President Kim appointed Kim Jong-Pil as acting prime minister. All 156 opposition members in the National Assembly then requested that the Constitutional Court invalidate this acting premiership. In a five-to-four opinion, however, the Court dismissed the case, contending that since all 156 opposition members already constituted a sufficient parliamentary majority, they could have resolved this issue in parliament rather than petitioning the Court as a third party.\textsuperscript{106} This decision was fiercely criticized by the opposition. Interestingly, despite the previous political confrontation, Kim Jong-Pil was confirmed as prime minister, albeit after tremendous political efforts, a month after the Court’s decision.\textsuperscript{107} In hindsight, it was certainly a wise dismissal, given that a political solution was found.

Another serious confrontation between the president and the National Assembly occurred in 2004.\textsuperscript{108} In negotiations with certain member states of the World Trade Organization on special arrangements for rice imports, President Roh made various agreements with different states but failed to send them to the assembly for legislative approval. A group of legislators, before the Constitutional Court disputed the president’s competence to make these agreements, arguing that such action deprived individual legislators as well as the National Assembly, as a whole, of the right to ratify treaties. However, by a seven-vote majority opinion, the Constitutional Court dismissed the case, indicating that individual legislators enjoyed no standing in this type of dispute.


\textsuperscript{104} Appointment of Acting Prime Minister Case, 29 KCCG 583, 98 Hun=Ra 1, Jul 14, 1998. For the case’s official English summary, see CONSTITUTIONAL COURT OF REPUBLIC OF KOREA, Twenty Years, at 316–320.

\textsuperscript{105} To win the presidential election, Kim Dae-Jung broke away from his past political alliance and formed another party, National Congress for New Politics, to seek the collaboration of Kim Jung-Pil, a political conservative. This angered the Grand National Party, the largest parliamentary majority, which subsequently staged filibusters of all political appointments.

\textsuperscript{106} CONSTITUTIONAL COURT OF REPUBLIC OF KOREA, Twenty Years, at 318.

\textsuperscript{107} Id. at 320.

\textsuperscript{108} Competence Dispute between Legislators and the Government, 19-2 KCCR 26, 2005 Hun-Ra 8, July 26, 2007. For the case’s official English summary, see CONSTITUTIONAL COURT OF REPUBLIC OF KOREA, Twenty Years, at 335–337.
of dispute regarding presidential competence. Only the National Assembly, acting on the authority of a majority vote, could bring such competence disputes to the Court. This judicial view was applied subsequently, when the Court dismissed an attempt by individual legislators to bring a case regarding the Korean free trade agreement with the United States.\(^{109}\)

### 3.2.4. Disputes between the national and local governments

The influence of local interests and issues on politics has been stronger in South Korea than in Taiwan. Any attempt to transform or manipulate local sentiments often has backfired, politically, in South Korea. The Constitutional Court, while often showing deference to divisive political issues including those involving local governments (such as the local election postponement case discussed earlier)\(^{110}\) sometimes delivers unexpectedly strong decisions against attempts at manipulating local sentiments. The *Capital Relocation* case was such an example.\(^{111}\) As a part of his presidential election campaign, President Roh Moo-Hyun pledged to relocate the national capital to the south to promote more balanced development. He worked with the National Assembly to pass the law for the capital’s removal and relocation. However, a group of residents in Seoul filed a constitutional complaint against it. Again, by a seven-vote majority, the Constitutional Court found the law unconstitutional. It reasoned that the residence of the national capital in Seoul had been so entrenched as to form a part of constitutional customs, as part of the unwritten constitution, so that to change it would require a constitutional amendment or public referendum. Although the decision did not completely foreclose the relocation plan, which could be done if supported by a public referendum, the plan, nevertheless, was halted. However, such an unprecedented strong stand taken by the Constitutional Court received mixed responses.\(^{112}\)

The Court seemed to learn the lesson from this response in the following case.

\(^{109}\) 2006 Hun Ra 5, Jan 17, 2007. *See id.* at 320, 337. It should be noted that, unlike many constitutional courts modeled on the German system that allow a legislative minority to bring constitutional litigation, the Korean Constitutional Court Act does not explicitly provide for such a possibility. Both in the *Appointing Acting Prime Minister Case* and in this case the majority of justices have shown disfavor toward such possibility unless the law specifically grants it.

\(^{110}\) Local Government Election Postponement Case, 6-2KCCR 176, 92 Hun-Ma 125, Aug. 31, 1994. *See supra* note 87. In another case involving a dispute between a city government and a provincial government, the Constitutional Court showed a balanced approach. The Kyung-Gi provincial government sought to develop a golf course inside a park in the City of Sung-Nam. The City sought, successfully, a provisional order—the first issued by the Constitutional Court—to stop temporarily the development. In the final decision, while the Court sustained certain rights of the City, it also affirmed that some parts of the development, such as road access, belonged to the jurisdiction of the provincial governments. *See Competence Dispute Provisional Order Case, 11-1 KCCR 264,98 Hun-Sa 98, Mar. 25, 1994.* and Competence Dispute Case, 98 Hun-Ra 4. For the two cases’ official English summaries, *see Constitutional Court of Republic of Korea, Twenty Years,* at 271–273.

\(^{111}\) Relocation of the Nation’s Capital Case, 16-2(B) KCCR 1, 2004 Hun-Ma 554 et al., Oct. 21, 2004. For the case’s official English summary, *see Constitutional Court of Republic of Korea, Twenty Years,* at 298–303.

\(^{112}\) The Court also admitted that it received a mixed response. *See id.* at 302.
A year later, President Roh tried again and avoided the constitutional issue by characterizing his plan as one of building an alternative administrative center in the south. The law was passed to relocate six ministries, including the ministries of Justice, Defense, Gender Equality, National Unification, Government and Home Affairs, and Foreign Affairs and Trade to the south. Another constitutional challenge was made but was dismissed by a seven-vote majority opinion.\(^\text{113}\) Four justices indicated that because the law was about an administrative center rather than the national capital, the passage of the law itself was sufficient and no constitutional amendment was necessary. Three justices even hinted in their opinion that they no longer held the view that the residence of the national capital in Seoul formed part of the unwritten constitution.\(^\text{114}\) After nearly two years of constitutional disputes, President Roh finally succeeded in implementing his campaign agenda to move the capital or the administrative center to the relatively poorer south in order to realize a more balanced regional distribution of power in the peninsula.

### 4. Judicial facilitation of political dialogue as a deferential response to presidential politics

In politically contentious cases involving the presidency, it appears that the courts of South Korea and Taiwan manifest a strikingly similar attitude—that of judicial deference. Neither court has ever confronted the president, directly, over politically divisive issues nor stood in the way of the exercise of presidential powers in dealing with those issues. When both courts were asked to make decisions that could end a presidential term, both saved the sitting president and helped clear political hurdles to the exercise of presidential powers. In the only case where the South Korean Constitutional Court seemed to act directly against the president on the issue of the capital’s removal, the Court left open the resolution of the issue by constitutional processes; when the president proposed a narrower plan the following year, it deferred.

It would be a mistake to characterize the workings of these two constitutional courts as conservative. They are not. Since the late 1980s, both courts have built an excellent record in protecting individual rights and freedoms; further, the number of cases where unconstitutional statutes have been invalidated in both dockets is substantial.\(^\text{115}\) Both courts have not hesitated to intervene in cases affecting socioeconomic welfare, where women’s rights, for example, are upheld against patriarchal

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\(^{113}\) The Administrative Center Case, 17(B) KCCR 481, 2005 Hun-Ma 579 (consolidated), Nov. 24, 2005. See id. at 303.

\(^{114}\) Id. The full English translation of this decision is available at http://english.ccourt.go.kr/.

\(^{115}\) See, e.g., Tom Ginsburg, Judicial Review in New Democracies: Constitutional Courts in Asian Cases (2003) (two chapters on Taiwan and South Korea detailing cases regarding the protection of individual rights and freedoms), and Wen-Chen Chang, The Role of Judicial Review in Consolidating Democracy: the Case of Taiwan, 2 Asia L. Rev. 73 (2005).
Confucian traditions.\textsuperscript{116} This broader appreciation of the courts make it even more intriguing to try to understand why both courts have decided not to directly confront the government in cases involving the divisive politics that so often have embroiled presidential powers. In South Korea and Taiwan, presidents possess, in varying ways, the power to appoint justices to the Constitutional Court, which may affect how the courts approach politically contentious cases involving the presidency.

Also particularly noteworthy is the seemingly similar adjudicative pattern apparent in how both Courts deal with divisive cases. Notwithstanding a deferential attitude toward the president, both courts have tried, in distinct and different ways, to facilitate political dialogue and create sufficient political space for further debate or policy change. While the South Korean Constitutional Court has done this, largely, through the strategic dismissal of cases, the Taiwanese Constitutional Court has often demanded that the political actors enter into dialogue. It is evident that the combination of judicial deference and dialogue facilitation has been key to maintaining the institutional integrity of both courts in the face of heated political disputes.

4.1. Structural constraint: The role of the president in judicial appointments

In South Korea, the Constitutional Court is composed of nine justices who must satisfy qualifications for the judgeship.\textsuperscript{117} Justices enjoy a renewable term of six years. The president of the Constitutional Court is appointed by the president with the consent of the National Assembly.\textsuperscript{118} Except for the president of the Constitutional Court, the appointment of three justices is decided by the National Assembly, three by the chief justice of the Supreme Court,\textsuperscript{119} and the rest by the president.\textsuperscript{120} Modeled this way, the three constitutional branches all have a certain say in the composition of the Constitutional Court, while the influence of the president and the National Assembly are stronger in this respect.

Thus far, since its launch in 1988, there have been four terms of the Constitutional Court: the first (1988–1994), second (1994–2000), third (2000–2006), and the current one (2006–2012). The appointment calendar has been scheduled in such a way that every president has been able to appoint justices who would serve during the

\textsuperscript{116} For instance, the South Korean Constitutional Court held the prohibition of marriage between same surnames unconstitutional as violating right to choose the spouse in marriage. See the Same Origin Marriage Ban Case, 9-2 KCCR 1, 95 Hun-Ka 6 et al., Jul. 16, 1997. The Constitutional Court in Taiwan also rendered J. Y. Interpretations Nos. 365, 410, and 452, invalidating laws that failed to provide for women’s equal rights in marriage, child-rearing, and property inheritance. See also Ginsburg, \textit{id}; and Chang, \textit{id}.

\textsuperscript{117} \textit{Constitution of the Republic of Korea}, sec. 2, art. 111. They are, however, not necessarily serving as judges prior to the appointment. They just must pass the examination for judges, which is considered more difficult compared with the examination of lawyers.

\textsuperscript{118} \textit{Constitution of the Republic of Korea}, sec. 4, art. 111.

\textsuperscript{119} The chief justice of Supreme Court along with all justices of the Supreme Court are appointed by the president with the consent of the National Assembly. \textit{Constitution of the Republic of Korea}, art. 104.

\textsuperscript{120} \textit{Constitution of the Republic of Korea}, sec. 4, art. 111.
period of the next presidency. Structured this way, at least in theory, justices are more likely to be independent from the politics of the day. However, the terms of the justices are renewable and, if reappointment is sought, justices may be less likely to act in a way which would anger any of the institutional actors involved in deciding reappointments. This may explain why the Constitutional Court in South Korea has skillfully used the dismissal of cases as a strategy to avoid many direct confrontations, particularly with the President and the National Assembly.

In Taiwan, the Constitutional Court is composed of fifteen justices whose backgrounds are more diverse than those of their Korean counterparts. Traditionally, half of the justices are appointed from those serving in the judiciary, while the others come from scholarly backgrounds, mostly university law professors. Prior to 2003, justices of the Constitutional Court were appointed by the president with parliamentary consent and enjoyed a renewable term of nine years. After 2003, justices held nonrenewable eight-year terms with staggered appointments every four years. Structured this way, every president will have at least one opportunity—twice, if reelected—to decide one half of the composition of the Constitutional Court. However, the requirement of parliamentary consent ensures that the president and the legislature participate equally in determining the Court’s composition. In theory, structured this way, the appointment process will allow justices to strike a much better balance between the president and the legislature—as both have equal say—as well as between two presidencies, as each can appoint half the justices.

However, political manipulation of judicial appointment does exist. While judicial appointments made by President Chen of the DPP in his first term were consented to by the KMT legislative majority, those made in the second term were not. In anticipation of winning the presidency in 2008, the KMT boycotted judicial appointments in 2007 and left them to be made during the term of the next president. After President Ma of KMT came to the power in 2008, he acted immediately to fill up these vacancies. Evidently, judicial appointments in Taiwan became much more politicized as a result of the divided government. This helps explain why the Constitutional Court has exercised considerable caution in dealing with hard cases and has tried to strike an equal balance between the executive and parliament.

121 For instance, the chief justice of the Constitutional Court, now, was appointed by President Roh Moo-hyun, but the current president Lee Myung-Bak will be able to appoint the next chief justice of the Court in 2012 before he leaves his presidency.

122 Prior to the fifth term of the Constitutional Court, parliamentary consent was given by the Control Yuan, an indirectly elected body. After the Control Yuan was transformed into a quasi-judicial organ as a result of constitutional revision, the consenting power was transferred to the National Assembly, an elected body whose primary constitutional function was to revise the Constitution. After the abolishment of the National Assembly in 2000, the consenting power was handed back to the ordinary legislature, the Legislative Yuan.

123 In 2003, half of the justices appointed were given a shorter nonrenewable term of four years in order to allow staggered appointments in every four years to take place. See ADDITIONAL ARTICLES OF THE CONSTITUTION, sec. 3, art. 5.

124 The president has a term of four years and can be reelected only once.
4.2. Judicial facilitation of political dialogues

Both constitutional courts have tried to facilitate political dialogue and create a political environment for the discussion of politicized issues. The South Korean Constitutional Court often has done this through the strategic dismissal of cases, while the Taiwanese Constitutional Court has sought to facilitate dialogue.

For instance, in the local-election postponement case, the Korean Constitutional Court strategically waited for more than two years for political consensus to be reached before dismissing the case. Had the Court not waited, its decision would have angered some political parties, and impacted the following presidential election since the opposition might have won the local elections. Another strategic dismissal took place in the context of transitional justice when the Court quickly seized on the withdrawal of litigants, thus allowing for legislative solutions. As discussed earlier, in several confrontations between the president and the National Assembly—whether stemming from the majority or the minority—the Court dismissed those cases on the basis that the entire National Assembly should decide the matter or because highly political cases are not appropriate for judicial review. It is clear that the Korean Constitutional Court utilized procedural dismissals, strategically, to avoid negative repercussions affecting the Court and to provide space for political discussions.

With a somewhat different strategy, the Taiwanese Court avoided deciding these divisive issues on the merits but, instead, has required political dialogues to develop further solutions. The clearest example was J. Y. Interpretation No. 520. The Court laid out four possible solutions and demanded that the executive and legislature fulfill their respective procedural duties and reach consensus. In the end, an interbranch joint declaration was eventually achieved. Another example was J. Y. Interpretation 550, which involved a serious confrontation between the national and local governments. Again, the Court took a pronegotiation approach, requiring that the national government enter into settlements with local governments.

In cases where certain points were, in fact, decided on the merits, the Court tried very hard to strike a delicate balance between executive and legislative powers, given that these branches are occupied, often enough, by different political parties. In cases regarding the presidential election gunshot incident, the Court clarified that the legislature possessed investigatory powers while limiting their scope and legal effect. In disputes regarding the creation of independent commissions, similar reasoning, again, was utilized. While affirming that the legislature has some role in the appointment of

125 Constitutional Court of Republic of Korea, Twenty Years, at 260.
126 There has been no precedent regarding a litigant’s withdrawal, and since there were still other litigant parties in that case, the Court could also continue releasing its final decision. But clearly it decided not to do so. See The May 18 Indictment Non-institution of Prosecution Decision Case. Id. at 264–267.
127 For instance, the Acting Prime Minister Case and the Rice Dispute Case. Id. at 316–320, 335–337.
128 For instance, the Force to Iraq Case. Id. at 288–290.
130 Yeh. Id. at 54.
131 J. Y. Interpretations No. 585 and No. 633.
independent commissioners, the Court ensured that the executive was not deprived, entirely, of its role and powers in this respect. In these decisions, the Court often leaves such delicate lines to be revised by future legislation, which clearly requires interbranch and interparty collaborations. This demonstrates the consistent willingness of the Taiwanese Constitutional Court to directly intervene in substantive issues while adopting a procedural approach that encourages and cultivates further political dialogues.

In new democracies such as Taiwan and South Korea, political divisions have sometimes encompassed irreconcilable stalemates calling for judicial solutions. Courts are often expected to provide solutions in a neutral, fair, and effective manner. However, as the experiences of Taiwan and South Korea indicate, due to structural constraints, courts prefer to deal indirectly with the substance of politically divisive issues, choosing, rather, to give way to political solutions, if any, or to create the potential for political solutions to develop. In so doing, the courts, by remaining in the background, play a role in stabilizing the existing regime and in minimizing the effects of political upheavals.

Admittedly, there are limitations to the judicial role in resolving politically contentious conflicts. Courts deal with issues in a passive fashion. They can neither effectively allocate social resources nor resolve sensitive political disputes regarding national identities. If constitutional mandates are obscure, then courts contribute best by providing procedural solutions or solutions that facilitate dialogue between political actors. This is precisely what both constitutional courts in South Korea and Taiwan have succeeded in doing thus far.

5. Conclusion

The causes of contentious political disputes within new democracies abound. In the context of transitional democracies in Asia, the choice of presidential systems in Taiwan and South Korea may have profound implications for the formation and entrenchment of political divisiveness, which, in turn, precipitates constitutional disputes involving the presidency. With regard to these types of dispute, this article has identified and analyzed some twenty-five decisions rendered by the constitutional courts of Taiwan and South Korea, finding striking similarities in this comparative study. Both Taiwanese and South Korean constitutional practices reflect the fact that the first regime change, not democratization in general, sparked critical and serious political confrontations. Despite striking similarities, there are subtle differences in the kinds of political divides as well as historical and institutional contexts to be found in these two jurisdictions. Most of the cases from Taiwan concern disputes arising from the ambiguous scope of presidential powers and separation-of-powers conflicts; other cases relate to the involvement of the presidency in disputes between the national and local government, reflecting the intense political divisions on the national–local government plane.

J. Y. Interpretations No. 613 and No. 645.
The institutional design of constitutional courts in Taiwan and South Korea, despite their divergent historical and institutional context, has helped smooth over political confrontations in both presidential democracies. The constitutional courts have refrained from explicitly confronting the presidents in their exercise of presidential powers; neither have the courts made substantive decisions when mediating conflicts between the president and the legislature, which could heighten political conflict further. Instead, both resorted to a prodialogue way of resolving these divisive constitutional disputes involving the president. While the courts may have concerns of self-preservation, given the presidential power of judicial appointment, this judicial approach, which seeks to cultivate dialogue between the political branches, has both diffused the conflict and protected the legitimacy of constitutional courts facing disputes relating to high politics within transitional democracies in Asia.