

AN END TO THE POLITICAL QUESTION DOCTRINE IN KOREA?:

A COMPARATIVE ANALYSIS

by

MYEONGSIK KIM

(Under the direction of Professor Gabriel M. Wilner)

ABSTRACT

The political question doctrine is one of the controversial issues in Korea and U.S. The most important point is, however, that the current trend on political questions in Korea is in line with that of American judicial activism. In other words, both countries are trying to narrow the range of the doctrine. Nonetheless, the two are proceeding in sharply opposite directions. Fully matured, even excessively extended American judicial activism should return to the classical separation of powers doctrine. In contrast, a developing Korean judicial activism should be accelerated by the support and encouragement of the people, in support of the belief that the constitutional adjudication system is the last resort for protection of the constitutional rights of the people. These contradicting views on the political question urge reconsideration of the status of the judiciary and its role in democratic society.

INDEX WORDS: The University of Georgia, Master of Laws, Comparative analysis, Constitutional law, Political question doctrine, Justiciability, Independence of the Judiciary, Korea

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DEDICATION

To my wife Mikyeong and son Chanmin

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## CHAPTER 1

### INTRODUCTION

#### I. Laying Out the Problem

##### A. Background

Because the political ideology of the President can greatly affect the people's livelihood, citizens around the world have a vital interest in presidential elections. The influence of the President upon the people of the Republic of Korea (hereinafter, Korea) is much greater than that of the United States President. The unhappy Korean history has been one of monarchism (for 5 millennia) and dictatorship (for 40 years), leaving behind the concept of "royal prerogative" or "power to reign" as a power of the President, even under a modern republican form of government. This tradition and the bureaucratic nature of the court personnel system have made the judiciary reluctant to review so-called "executive prerogative actions," executive acts that require highly political judgments and therefore can best be resolved by political bodies rather than by courts.

During the summer of 1987, there were massive demonstrations for democratization. This social movement gained widespread popular support<sup>1</sup> and resulted in a constitutional revision to promote democratization. The new Constitution provided a strong system of judicial review, through which the freedoms enunciated in the Constitution could be protected and amplified. One of the changes was the foundation of the Korean Constitutional Court (hereinafter, the KCC) as a special court in 1988. While many

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<sup>1</sup> A leading constitutional scholar regarded this movement as a revolution by citizens in Korea comparable to France's Revolution. YEONGSOO KIM, *THE HISTORY OF KOREAN CONSTITUTION* 475 (2000).

people deemed that it would be no more than previous constitutional courts/committees, which made no decisions, but acted as mere rubber stamps for governmental action, the Court has continuously shown judicial activism. In particular, the Court has made a significant holding: that it can and shall review so-called “executive prerogative actions,” in order to protect the constitutional fundamental rights of the people.<sup>2</sup>

## B. Introducing the Problem

The Seoul Administrative District Court<sup>3</sup> in 2000 held that the exercise of the President’s pardon power was a highly political action, and therefore was not within its jurisdiction.<sup>4</sup> The court did not give any reasonable rationale for this decision. Many critics censured the decision as anachronistic, leading to fiery debates about whether the executive prerogative action doctrine is still needed, and, if so, what is the standard of the action. Moreover, some scholars broadly questioned whether the judiciary, including the KCC, can review highly political issues, similar to the “Political Question Doctrine” in the United States.

In comparison, in the United States, in the same year, there was a presidential election and the Supreme Court courageously reviewed the issues arising from the election, even though its subject was actually political in nature. Some commentators criticized that the Court eventually chose the President. This case can be interpreted as an indication that the political question doctrine has disappeared in the United States.

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<sup>2</sup> The Presidential Financial and Economic Emergency Order Case, 8-1 Korean Constitutional Court Report (hereinafter, KCCR) 111, 93 HunMa 186 (Feb. 29, 1996).

<sup>3</sup> The Seoul Administrative Court is one of the ordinary district courts, created in 1998. For a brief explanation of the judicial systems of Korea, *see* Chapter 3, Subchapter I and II.

<sup>4</sup> Seoul Administrative District Court Decision No. 99 Gu 24405 (Feb. 2, 2000). For a detailed discussion, *see* Chapter 3, Subchapter III.

## II. Purpose, Framework and Research Methodology

This paper closely examines the political question doctrine of the United States Supreme Court (hereinafter, the USSC), and assesses the possibility of future impact of the doctrine on Korean constitutional jurisprudence. In addition, this thesis examines the justiciability of so-called “executive prerogative action doctrine” in the constitutional jurisprudence of Korea, in light of the comparative perspective with American practice. The discussion will focus upon an analysis of the underlying policy considerations which lead the Korean Courts to abstain from adjudicating constitutional questions. Issues involving the proper scope of the judicial function are very much at the forefront in Korea. In spite of the great importance of the justiciability problem, the Korean Courts have not yet developed any general doctrine concerning justiciability. Until recently, this legal concept has been referred to with some uncertainty.

Although there has been a great deal of development in narrowing the scope of the “executive prerogative action” along with the establishment of the constitutional adjudication system, whether this development will lead to the establishment of a coherent doctrine in Korea is a question which cannot be answered with certainty. What is clear and important, however, is that current Korean jurisprudence does not include any generalized doctrine of justiciability, and that the KCC is unwilling to adopt one. Rather it has chosen not to rule on cases of this kind on a purely pragmatic basis. Without predicating its decision upon any articulated legal formulation, the Court seems to decide these questions on an *ad hoc* basis, focusing primarily on the merits of the case.

This paper will introduce the American political question doctrine, which has risen and fallen for more than two hundred years, as a beacon for the doctrine of justiciability, solving the universal problem of distinguishing between ‘law’ and ‘politics,’ despite significant differences between the constitutional systems of Korea and the United States.

Chapter 2 will analyze the rise and fall of the American political question doctrine, the common characteristics of the doctrine, and leading cases concerning the doctrine. This discussion will attempt to articulate the disparate considerations to which the Court refers in determining whether to intervene or abstain.

Chapter 3 will be parallel to the previous in aim and analytic procedure, but its concern will be the Korean doctrine of “executive prerogative action.” Recent Korean cases and legal theories will be explored, in order to show the change of attitude in the Korean courts and their tremendous endeavor to protect individuals’ constitutional rights. The major constitutional features of the Korean system are briefly described in the first part of this Chapter. This description will consider the judicial review power of the KCC, in the context of which issues of justiciability arise, since the justiciability problem touches the constitutional fabric of the legal system and a study of this problem cannot be disassociated from the overall constitutional system.

Chapter 4 compares the two doctrines, focusing on several theoretical aspects, and then evaluates whether the American doctrine can play an affirmative role in the area of political question through theoretical acculturation in Korea.

It seems likely that the factual settings of constitutional disputes are similar, and their outcomes should also be equivalent in every democratic society. In other words, the belief that constitutional fundamental rights and basic principles will be protected at any

occasion should be universal. On the other hand, each country may have dramatically different legal norms, theories, principles and dispute resolution systems, as well as sometimes differing outcomes in particular instances. Nevertheless, the comparative study is very important; its greatest strength is that we can acquire enhanced understanding of the problems and prospects of our own system and, perhaps, the potential for achieving beneficial change within it through deeper insight, rather than generalizations of a legal theory. The features of each system, seen in relief against the other, stand out more sharply than they do when either is viewed in isolation.

The crucial issue of this paper can be referred to as the proper resolution of the confrontation between law and politics. The USSC has, over time, acquired substantial experience in dealing with the tension between “law” and “politics.” American practice and theory show a continuous struggle with this tension, which remains a very real one. The perspectives gained from comparing the two countries help to focus on the central issues faced by each.

## CHAPTER 2

### THE POLITICAL QUESTION DOCTRINE IN THE UNITED STATES

#### I. The Confusing Definition of the Political Question Doctrine

Legal dictionaries differ on the definition of “political question doctrine,” reflecting differing standards used by courts. *BLACK’S LAW DICTIONARY* says that a ‘political question’ is “a question that a court will not consider because it involves the exercise of discretionary power by the executive or legislative branch of government” and that the ‘political question doctrine’ is “the judicial principle that a court should refuse to decide an issue involving the exercise of discretionary power by the executive or legislative branch of government.”<sup>5</sup>

On the other hand, *BARRON’S LAW DICTIONARY* defines a political question as “a question that a court determines to be not properly subject to judicial determination (i.e., which is not justiciable) because resolution of it is committed exclusively to the jurisdiction of another branch of government (legislative or executive), because adequate standards for judicial review are lacking, or because there is no way to insure enforcement of the court’s judgment,” adding that “Jurisdiction is not lacking, since the court has the power to decide political questions but chooses not to.”<sup>6</sup> *ORAN’S DICTIONARY OF THE LAW* also defines a political question as “an issue that a court may refuse to decide because it concerns a decision properly made by the executive or

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<sup>5</sup> *BLACK’S LAW DICTIONARY* 1179 (7<sup>th</sup> ed. 1999).

<sup>6</sup> STEVEN H. GIFIS, *BARRON’S LAW DICTIONARY* 358 (3<sup>rd</sup> ed. 1999).

legislative branch of government and because the court has no adequate standards of review or no adequate way to enforce the court's judgment.”<sup>7</sup>

In the meantime, even though many cases have been used in attempting to academically define the political question doctrine,<sup>8</sup> it is unlikely that there is a perfect definition for the doctrine. On the contrary, the Supreme Court has never tried to define the term.<sup>9</sup> It is not going too far to say that the Court's insufficient definition has increased confusion. As Professor Redish properly indicated, the doctrine has been the most confusing of the several justiciability requirements.<sup>10</sup>

This confusion seems to stem, first, from the terminology itself.<sup>11</sup> Despite the name, the doctrine does not mean that American federal courts will not decide a case that involves politics. The federal courts render decisions in cases involving “political” issues

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<sup>7</sup> DANIEL ORAN, *ORAN'S DICTIONARY OF THE LAW* 321 (2<sup>nd</sup> ed. 1991). This dictionary adds that “[M]ost political questions are international diplomatic issues (such as whether or not a foreign country is an independent nation) that are considered by the federal courts to be best left to the President of the United States.” Also, *BALLENTINE'S LEGAL DICTIONARY AND THESAURUS* gives “questions dealing with foreign affairs” as an example, saying that “[T]he political question doctrine states that, under the Constitution, certain questions belong to the non-judicial branches of the federal government to resolve.” JONATHAN S. LYNTON, *BALLENTINE'S LEGAL DICTIONARY AND THESAURUS* 500 (1995).

<sup>8</sup> One of the examples is a definition of Professor Corwin. He said that “A case is one ‘arising under this Constitution, the laws of the United States, and treaties’ of the United States, when an interpretation of one or the other of these is required for its final decision. But while the ‘judicial power’ extends to all such cases, there is a certain category of them in which the Court does not usually claim full liberty of decision. These are cases involving so-called ‘political questions,’ the best example of which is furnished by questions respecting the rights of duties of the United States in relation to other nations. When the ‘political departments,’ Congress and the President, have passed upon such questions, the Court will generally accept their determinations as binding on itself in deciding cases.” HAROLD W. CHASE & CRAIG R. DUCAT, EDWARD S. CORWIN'S *THE CONSTITUTION AND WHAT IT MEANS TODAY* 219 (14<sup>th</sup> ed. 1978).

<sup>9</sup> LEARNED HAND, *THE BILL OF RIGHTS* 15 (1958).

<sup>10</sup> Martin H. Redish, *Judicial Review And The ‘Political Question,’* 79 *NW. U. L. REV.* 1031, 1031 (1984) (“The doctrine has always proven to be an enigma to commentators. Not only have they disagreed about its wisdom and validity (which is to be expected), but they have also differed significantly over the doctrine’s scope and rationale.”).

<sup>11</sup> RONALD D. ROTUNDA & JOHN E. NOWAK, *1 TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE & PROCEDURE* § 2.16 (3<sup>rd</sup> ed. 1999) (“The political question doctrine-which holds that certain matters are really political in nature and best resolved by the body politic rather than by courts exercising judicial review- is a misnomer.”).

“all of the time.”<sup>12</sup> So, as Justice Holmes said, a claim that the matter is a political question because it involves the political process is “little more than a play upon words.”<sup>13</sup> Recently, in *I.N.S. v. Chadha*, the Court stated that, if a claim of legislative authority “turns the question into a political question, virtually every challenge to the constitutionality of a statute would be a political question,”<sup>14</sup> continuing:

It is correct that this controversy may, in a sense, be termed “political.” But the presence of constitutional issues with significant political overtones does not automatically invoke the political question doctrine. Resolution of litigation challenging the constitutional authority of one of the three branches cannot be evaded by courts because the issues have political implications in the sense urged by Congress.<sup>15</sup>

Indeed, in the language of Justice Jackson, “all constitutional interpretations have political consequences.”<sup>16</sup>

Even though there is some confusion in defining the doctrine, one common factor among the above-mentioned definitions is that the political question doctrine is one of the justiciability requirements of judicial review, i.e., federal jurisdiction. In other words, the political question doctrine is only one of several doctrines of justiciability.<sup>17</sup> However, it differs from other justiciability doctrines in three ways. First, “[u]nlike the other

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<sup>12</sup> ERWIN CHEMERINSKY, *FEDERAL JURISDICTION* 144 (3<sup>rd</sup> ed. 1999). For example, *Terry v. Adams*, 345 U.S. 461 (1953); *Smith v. Allwright*, 321 U.S. 649 (1944); *United States v. Classic*, 313 U.S. 299 (1941); *Nixon v. Condon*, 286 U.S. 73 (1932); *Nixon v. Herndon*, 273 U.S. 536 (1927); *Baker v. Carr*, 369 U.S. 186 (1962); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952); and *United States v. Nixon*, 418 U.S. 683 (1974).

<sup>13</sup> *Nixon v. Herndon*, 273 U.S. 536, 540 (1927).

<sup>14</sup> 462 U.S. 919, 941 (1983).

<sup>15</sup> *Id.* at 942-43 (emphasis in original).

<sup>16</sup> ROBERT H. JACKSON, *THE SUPREME COURT IN THE AMERICAN SYSTEM* 56 (1955).

<sup>17</sup> In order for a case to be heard by the federal courts, the plaintiff must get past a series of procedural obstacles which we collectively call requirements for “justiciability”: (1) the case must not require the giving of an advisory opinion; (2) the plaintiff must have standing; (3) the case must not be moot; (4) the

justiciability doctrines, the political question doctrine is not derived from Article III's limitation of judicial power to 'cases' and 'controversies.'"<sup>18</sup> Rather, the political question doctrine is grounded in the principle of judicial review, which was judicially created in *Marbury v. Madison*.<sup>19</sup> Second, other justiciability exceptions are procedural in nature, whereas the political question doctrine addresses the substantive content of the case.<sup>20</sup> Third, the Court's decision as to whether a category of cases constitutes a political question "is absolute in its foreclosure of judicial scrutiny."<sup>21</sup> With other justiciability exceptions, if certain facts changed, the Court could review the case without overturning precedent.<sup>22</sup> Therefore, it seems more suitable to call the doctrine one of non-justiciability, which means that the political subject matter is not excluded from judicial review on the ground that it is not susceptible to the judicial power, but rather that it is inappropriate for judicial consideration, by the judiciary's own judgments.<sup>23</sup>

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case must be ripe for decision; and (5) the case must not involve a non-justiciable political question. *See generally* KATHLEEN M. SULLIVAN & GERALD GUNTHER, *CONSTITUTIONAL LAW* 29-68 (14<sup>th</sup> ed. 2001).

<sup>18</sup> CHEMERINSKY, *supra* note 12, at 149; *See* U.S.CONST. art. III, § 2, cl. 1.

<sup>19</sup> Chief Justice John Marshall implicated that there were some matters which could not be decided by the courts: "The subjects are political. ... [B]eing entrusted to the executive, the decision of the executive is conclusive. ... Questions, in their nature political, or which are by the constitution and laws, submitted to the executive can be never be made in this court." 5 U.S. (1 Cranch) 137, 165-70 (1803).

<sup>20</sup> *See* CHEMERINSKY, *supra* note 12, at 149 ("[C]ritics of the political question doctrine argue that the doctrine's defenders demonstrate only that on the merits, the Court should hesitate in some areas before ruling against the other branches of government; it is wrong to deem those areas to be non-justiciable.").

<sup>21</sup> ROTUNDA & NOWAK, *supra* note 11, at § 2.16; *See* JOHN E. NOWAK & RONALD D. ROTUNDA, *CONSTITUTIONAL LAW* 106 (5<sup>th</sup> ed. 1995) ("An important consequence of the political question doctrine is that it renders the government conduct immune from judicial review.").

<sup>22</sup> *Id.*

<sup>23</sup> CHEMERINSKY, *supra* note 12, at 143-44 ("The Supreme Court has held that certain allegations of unconstitutional government conduct should not be ruled on by the federal courts even though all of the jurisdictional and other justiciability requirements are met. The Court has said that constitutional interpretation in these areas should be left to the politically accountable branches of government, the President and Congress. In other words, the "political question doctrine" refers to subject matter that the Court deems to be inappropriate for judicial review. Although there is an allegation that the Constitution has been violated, the federal courts refuse to rule and instead dismiss the case, leaving the constitutional question to be resolved in the political process.").

## II. The Standards of Political Questions

One view of the political question doctrine is that, if the court decides that a case presents a political question, it will not address the governmental conduct. Another perspective is that the fact that a case poses a political question acts as a limitation on the court jurisdiction. Therefore, it is of paramount importance to establish useful criteria for deciding what subject matter presents a non-justiciable political question.

Although it is usually said that the features of political questions were fully laid out and identified in *Baker v. Carr*,<sup>24</sup> the origin of the standard on the doctrine was in the famous *Marbury v. Madison*. Chief Justice Marshall implied that there could be a political sphere which was inappropriate for judicial review in stating:

“The province of the court is, solely, to decide on the rights of individuals, not to enquire how the executive, or executive officers, perform duties in which they have discretion. Questions, in their nature political, or which are, by the constitution and laws, submitted to the executive, can never be made in this court.”<sup>25</sup>

Even though this formulation emphasized separation of powers, it has also been noted that another standard was available to decide what a political question is, that is, the self-restraint of the courts themselves.

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<sup>24</sup> *Baker v. Carr*, 369 U.S. 186, 217 (1962) (“It is apparent that several formulations which vary slightly according to the settings in which the questions arise may describe a political question, although each has one or more elements which identify it as essentially a function of the separation of powers. Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for non-judicial discretion; or the impossibility of a court’s undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.”).

<sup>25</sup> *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 170 (1803).

The doctrine can be essentially summarized and categorized into two main factors: the classical political question doctrine and the prudential political question doctrine. The former is constitutional, while the latter is pragmatic.<sup>26</sup>

The first is a constitutional limitation based on separation of powers or textual commitments to other branches of government, not to the courts. If a case presents an issue which has been committed by the Constitution to another branch of the federal government, that is, to Congress or to the President, the court will refuse to decide the case on political-question grounds. Although this constitutional rationale behind the political question doctrine has continuously been confirmed by the case law since *Marbury*, Professor Wechsler has given shape to the classical version of the political question doctrine:

“[A]ll the doctrine can defensibly imply is that the courts are called upon to judge whether the Constitution has committed to another agency of government the autonomous determination of the issue raised, a finding that itself requires an interpretation.”<sup>27</sup>

Moreover, writing for the majority in *Baker*, Justice Brennan affirmed this position, by noting that political questions possess clearly identifiable elements, each of which is “essentially a function of this separation of powers.”<sup>28</sup> A concurring opinion by Justice

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<sup>26</sup> Among the definitions above-mentioned, *BLACK'S LAW DICTIONARY* focuses on the classical or constitutional political question doctrine. On the other hand, the other dictionaries seem to include both.

<sup>27</sup> Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 *HARV. L. REV.* 1, 7-8 (1959).

<sup>28</sup> *Baker v. Carr*, 369 U.S. 186, 217 (1962). Justice Brennan's review of the doctrine in *Baker* begins much earlier in the opinion, but even there he writes that “it is the relationship between the judiciary and the coordinate branches of the Federal Government, and not the federal judiciary's relationship to the States, which gives rise to the ‘political question.’” *Id.* at 210.

Douglas also affirmed the analysis. Quoting *Oetjen v. Central Leather Co.*,<sup>29</sup> he said, “Where the Constitution assigns a particular function wholly and indivisibly to another department, the federal judiciary does not intervene.”<sup>30</sup>

The second branch of political question doctrine is a prudential limitation as a tool for abstention from political questions. If there are no manageable standards<sup>31</sup> by which a court can resolve the issue, the Court cannot review the case, which is therefore termed a non-justiciable political question.<sup>32</sup> As the Supreme Court noted in *Coleman v. Miller*, “[i]n determining whether a question falls within [the political question] category, the appropriateness ... of attributing finality to the action of the political departments and also the lack of satisfactory criteria for judicial determination are dominant considerations.”<sup>33</sup>

Professor Bickel also emphasized the judiciary’s practical capacities and inherent limitations, arguing as follows:

“Such is the foundation, in both intellect and instinct, of the political-question doctrine: the Court’s sense of lack of capacity, compounded in unequal parts of (a) the strangeness of the issue and its intractability to principled resolution; (b) the sheer momentousness of it, which tends to unbalance judicial judgment; (c) the anxiety, not so much that the judicial judgment will be ignored, as that perhaps it should but will not be; (d) finally, ‘in a mature democracy,’ the inner

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<sup>29</sup> 246 U.S. 297, 302 (1918).

<sup>30</sup> *Baker*, 369 U.S. at 246.

<sup>31</sup> An example is *Luther v. Borden*, 48 U.S. (7 How.) 1 (1849). The Constitution, Article IV, Section 4 provides that “the United States shall guarantee to every state in this union a republican form of government.” Some unhappy Rhode Island citizens staged a rebellion. Ultimately, various Rhode Islanders asked the federal court to decide which of two competing factions was the lawful government of the state. The Court held that because there were ‘no criteria’ by which it could determine whether a particular ‘government’ was ‘Republican,’ the case presented a political question, which the Court could not decide.

<sup>32</sup> *HAND*, *supra* note 9, at 15-18.

<sup>33</sup> 307 U.S. 433, 454-55 (1939).

vulnerability, the self-doubt of an institution which is electorally irresponsible and has no earth to draw strength from.”<sup>34</sup>

Professor Scharpf is famous for taking a functional approach to the doctrine rather than unprincipled legal standards.<sup>35</sup> He proposed three functions of the political question doctrine, although he argued that the Court limited “the thrust of the functional rationales for the political question by a normative qualification: where important individual rights are at stake, the doctrine will not be applied.”<sup>36</sup> Therefore, he concluded that the doctrine cannot be applied to the Bill of Rights.

To the contrary, some scholars have taken the position that there is no such thing as the political question doctrine. Professors Brown,<sup>37</sup> Henkin,<sup>38</sup> Simard,<sup>39</sup> McCormack,<sup>40</sup> Nagel,<sup>41</sup> and Redish<sup>42</sup> have argued that “the political question doctrine should play no role whatsoever in the exercise of the judicial power.”<sup>43</sup>

It is apparent that the doctrine has been more fully developed through this academic debate. A resulting criticism is that it is uncertain whether the political question doctrine is constitutional, prudential, or both. Congress, for example, can direct the federal courts to determine a matter that the Supreme Court has deemed to be a political question based

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<sup>34</sup> ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 184 (1962).

<sup>35</sup> Fritz W. Scharpf, *Judicial Review and the Political Question: A Functional Analysis*, 75 *YALE L.J.* 517 (1966).

<sup>36</sup> *Id.* at 584.

<sup>37</sup> Rebecca L. Brown, *When Political Questions Affect Individual Rights: The Other Nixon v. United States*, 1993 *SUP. CT. REV.* 125.

<sup>38</sup> Louis Henkin, *Is There a “Political Question” Doctrine?*, 85 *YALE L.J.* 597 (1976).

<sup>39</sup> Linda Sandstrom Simard, *Standing Alone: Do We Still Need the Political Question Doctrine?*, 100 *DICK. L. REV.* 303 (1996).

<sup>40</sup> Wayne McCormack, *The Political Question Doctrine – Jurisprudentially*, 70 *U. DET. MERCY L. REV.* 793 (1993).

<sup>41</sup> Robert F. Nagel, *Political Law, Legalistic Politics: A Recent History of the Political Question Doctrine*, 56 *U. CHI. L. REV.* 643 (1989).

<sup>42</sup> Martin H. Redish, *Judicial Review And The ‘Political Question,’* 79 *NW. U. L. REV.* 1031 (1984).

only on the prudential rationale.<sup>44</sup> Furthermore, although the Court has elucidated the two main prongs of the doctrine, it has not always specified which standard was applied. Also, it should be noted that “the Court has rarely found constitutional questions non-justiciable ... since *Baker v. Carr*.”<sup>45</sup>

As seen above, it is scarcely surprising that the doctrine is described as confusing and unsatisfactory in laying down its definition and establishing its standards. Although it is unlikely for a federal court or a scholar to wholly apply the *Baker v. Carr* criteria to identify which cases present political questions, the political question doctrine can be understood by examining the specific areas according to “case-by-case inquiry,”<sup>46</sup> as the *Baker* Court indicated.

The next subchapter deals with the specific spheres in which the Court has considered the political question doctrine: foreign affairs; the electoral process; Congress’s ability to regulate its internal processes; the process for ratifying constitutional amendments; and the impeachment process.<sup>47</sup>

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<sup>43</sup> *Id.* at 1033.

<sup>44</sup> CHEMERINSKY, *supra* note 12, at 149-50.

<sup>45</sup> SULLIVAN & GUNTHER, *supra* note 17, at 37. This casebook exemplifies as non-justiciable political questions *Powell v. McCormack*, 395 U.S. 486 (1969); *Goldwater v. Carter*, 444 U.S. 996 (1979); and *Nixon v. United States*, 506 U.S. 224 (1993). In the meantime, the Court, in *Gilligan v. Morgan*, ruled that the Constitution left military training and procedures entirely to the elected branches, and accordingly dismissed a complaint by Kent State students that the killing of anti-Vietnam War protestors had resulted from the government’s negligent training of the National Guard. The Court said that allowing review “would plainly and explicitly require a judicial evaluation of a wide range of possibly dissimilar procedures and policies approved by different law enforcement agencies or other authorities.... It would be inappropriate for a district judge to undertake this responsibility, in the unlikely event that he possessed the requisite technical competence to do so.” The Court emphasized that relief would require ongoing supervision and control of the activities of the Ohio National Guard. 413 U.S. 1, 5-12 (1973). However, this decision was overruled in *Scheuer v. Rhodes*, 416 U.S. 232 (1974).

<sup>46</sup> *Baker*, 369 U.S. at 211-12.

<sup>47</sup> This grouping follows that of RONALD D. ROTUNDA & JOHN E. NOWAK, 1 TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE & PROCEDURE § 2.16 (3<sup>rd</sup> ed. 1999).

### III. Decisions Involving Political Questions by the USSC

#### A. Foreign Affairs

The Supreme Court repeatedly has held that cases presenting issues related to the conduct of foreign affairs present political questions.<sup>48</sup> But, in *Baker v. Carr*, the Court explicitly rejected the dictum that anything touching foreign affairs is immune from judicial review.<sup>49</sup> For example, the Court has held that the President's employment of executive agreements instead of treaties to implement main foreign policy agreements did not present a political question, upholding the constitutionality of the President's action on the merits.<sup>50</sup> Moreover, the Court has buttressed the constitutionality of the exercise of the treaty power for particular subject matters.<sup>51</sup>

In the meantime, when the Court have held that foreign affairs are not reviewable, its decisions are grounded primarily in the political question doctrine; however, in other

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<sup>48</sup> For a general justification of this use of the political question doctrine, see Theodore Y. Blumoff, *Judicial Review, Foreign Affairs And Legislative Standing*, 25 GA. L. REV. 227 (1991). Especially in *Oetjen v. Central Leather Co.*, the Court declared that "The conduct of the foreign relations of our Government is committed by the Constitution to the Executive and Legislature, 'the political' Departments of the Government, and the propriety of what may be done in the exercise of this political power is not subject to judicial inquiry or decision." 246 U.S. 297, 302 (1918).

<sup>49</sup> *Baker*, 369 U.S. at 211 ("[I]t is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance.").

<sup>50</sup> See, e.g., *Dames & Moore v. Regan*, 453 U.S. 654 (1981); *United States v. Pink*, 315 U.S. 203, 229 (1942).

<sup>51</sup> See, e.g., *State of Missouri v. Holland*, 252 U.S. 416, 433 (1920) (acknowledging the constitutionality of a treaty with Great Britain relating to migratory birds, "Acts of Congress are the supreme law of the land only when made in pursuance of the Constitution, while treaties are declared to be so when made under the authority of the United States. It is open to question whether the authority of the United States means more than the formal acts prescribed to make the convention. We do not mean to imply that there are no qualifications to the treaty-making power; but they must be ascertained in a different way. It is obvious that there may be matters of the sharpest exigency for the national well being that an act of Congress could not deal with but that a treaty followed by such an act could, and it is not lightly to be assumed that, in matters requiring national action, 'a power which must belong to and somewhere reside in every civilized government' is not to be found.") (citation omitted).

doctrines are sometimes cited allowing judicial abdication from those issues,<sup>52</sup> i.e., the “act of state” doctrine<sup>53</sup> and the “sovereign immunity” doctrine.<sup>54</sup>

Applying the two doctrines, judges have refused to decide large categories of foreign affairs claims, precisely because they believed politicians and diplomats were better positioned to resolve disputes involving the legitimacy of foreign governments’ laws and activities. While the courts claimed to be deferring to foreign laws and governments, in practice they were deferring to the U.S. political branches, which were thought to be better suited to dealing with the effects of laws and actions of foreign states.<sup>55</sup>

As Professor Franck argued, however, Congress can legislatively direct the courts to find certain foreign affairs cases justiciable, instead of accepting the judges’ reticence. Professor Frank regarded such initiatives as the Foreign Sovereign Immunities Act (FSIA)<sup>56</sup> and the Hickenlooper Amendment as a hopeful sign that the political branches have actually sought to propel the judiciary to say what the law is.<sup>57</sup> The judiciary, while not necessarily welcoming this role, has not seen in the Constitution any significant

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<sup>52</sup> For the more detailed discussion, *see generally* THOMAS M. FRANK, *POLITICAL QUESTIONS / JUDICIAL ANSWERS: DOES THE RULE OF LAW APPLY TO FOREIGN AFFAIRS?* 97-106 (1992).

<sup>53</sup> This doctrine articulated, for the first time in *Hudson v. Guestier*, 8 U.S. (4 Cranch) 293 (1808), technically did not make an issue non-justiciable but did bring to bear a judicially-fashioned choice of law rule that has the effect of taking the decision out of the hands of U.S. courts, with the same result and rationale as other principles of judicial abdication. This has led some Supreme Court Justices to treat the act of state and political question doctrines as more or less interchangeable. *Id.* at 98.

<sup>54</sup> This sovereign immunity doctrine, first approved by the USSC in *The Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116 (1812), has served to protect from legal process the governmental activities and entities of one state within the jurisdiction of another. *Id.* at 101.

<sup>55</sup> *Id.* at 97.

<sup>56</sup> Pub. L. No. 94-583, 90 Stat. 2891 (1976) (codified at 28 U.S.C. §§ 1330, 1332(a)(2)-(4), 1391(f), 1441(d), 1602-11 (1988)).

<sup>57</sup> *Id.* at 97-98, 100, 105.

barrier to its being vested with these new responsibilities in an area which it had previously abdicated.<sup>58</sup>

Therefore, it is troublesome to identify any principle that determines which foreign policy issues are justiciable and which ones present political questions. It is perhaps more reasonable, then, to simply describe the areas where the political question doctrine has been applied within the sphere of foreign affairs.

#### 1. The Duration of Hostilities

In *Commercial Trust Co. v. Miller*,<sup>59</sup> the Court held that the determination of when a war begins or ends belongs to the political branches of government. The issue in this case was whether a congressional declaration that World War I had ended suspended the application of the Trading with the Enemy Act. After Congress, with the approval of the President, passed a joint resolution ending the war with Germany and proclaiming peace in 1921, the Alien Prize Custodian attempted to seize a trust fund held for the benefit of a German citizen, under the Act.<sup>60</sup> In response to the petitioner's argument that the end of the war should end the Custodian's power, the Court ruled that this was a political question, because the power to decide when a war ends was vested exclusively in Congress.<sup>61</sup> Similarly, the Court has held that the political branches decide when hostilities begin, and therefore when it is proper to call up the militia.<sup>62</sup>

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<sup>58</sup> The Court has upheld and implemented the new system, thereby accepting the political branches' view that these sorts of cases, whatever their vestigial foreign relations aspects, would better be treated like any other suit. *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480 (1983).

<sup>59</sup> 262 U.S. 51 (1923).

<sup>60</sup> The act provided that it continued in effect, and all property subject to it should remain under the control of the United States, until the German government had made acceptable provision for the satisfaction of all claims. *Id.* at 53.

<sup>61</sup> *Id.* at 57 ("The contention, however, encounters in opposition the view that the power which declared the necessity is the power to declare its cessation, and what the cessation requires. The power is legislative. A court cannot estimate the effects of a great war and pronounce their termination at a particular

## 2. Recognition of Foreign Governments

The Court has consistently held that the recognition of foreign governments poses a political question, in *United States v. Belmont*, which confirmed the President's power to recognize and assume diplomatic relations with the Soviet Union,<sup>63</sup> as well as in response to disputes about the diplomatic status of individuals claiming immunity.<sup>64</sup> In other words, issues regarding who represents a foreign government, and what capacity the state has, are non-justiciable. The Court has also held that the recognition and protection of Indian tribes are within the power and duty of the legislative and executive branches.<sup>65</sup>

## 3. Ratification and Interpretation of Treaties

In *Terlinden v. Ames*, the Court held that whether a treaty survives when one country becomes part of another presents a non-justiciable political question.<sup>66</sup> More recently, a plurality of the Court held that a challenge to the power of the President to terminate a

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moment of time, and that its consequences are so far swallowed up that legislation addressed to its emergency had ceased to have purpose or operation with the cessation of the conflicts in the field.”).

<sup>62</sup> *Martin v. Mott*, 25 U.S. (12 Wheat.) 19, 29-30 (1827) (“Is the President the sole and exclusive judge whether the exigency has arisen, or is it to be considered as an open question, upon which every officer to whom the orders of the President are addressed, may decide for himself, and equally open to be contested by every militia-man who shall refuse to obey the orders of the President? We are all of opinion, that the authority to decide whether the exigency has arisen, belongs exclusively to the President, and that his decision is conclusive upon all other persons. We think that this construction necessarily results from the nature of the power itself, and from the manifest object contemplated by the act of Congress.”).

<sup>63</sup> 301 U.S. 324, 330 (1937) (“...[T]he President recognized the Soviet government, and normal diplomatic relations were established between that government and the government of the United States, followed by an exchange of ambassadors. The effect of this was to validate, so far as this country is concerned, all acts of the Soviet government here involved from the commencement of its existence. The recognition, establishment of diplomatic relations, the assignment, and agreements with respect thereto, were all parts of one transaction, resulting in an international compact between the two governments. That the negotiations, acceptance of the assignment and agreements and understandings in respect thereof were within the competence of the President may not be doubted.”).

<sup>64</sup> *See, e.g., In re Baiz*, 135 U.S. 403 (1890).

<sup>65</sup> *United States v. Sandoval*, 231 U.S. 28, 45-46 (1913) (“Not only does the Constitution expressly authorize Congress to regulate commerce with the Indian tribes, but long continued legislative and executive usage and an unbroken current of judicial decisions have attributed to the United States as a superior and civilized nation the power and the duty of exercising a fostering care and protection over all dependent Indian communities within its borders, whether within its original territory or territory subsequently acquired, and whether within or without the limits of a state.”).

<sup>66</sup> 184 U.S. 270 (1902).

mutual defense treaty with Taiwan posed a non-justiciable political question. In *Goldwater v. Carter*,<sup>67</sup> Senator Goldwater argued that rescission of a treaty required approval of two-thirds of the Senate, and that just as the President cannot unilaterally repeal a law, neither is it constitutional for the President to rescind a treaty without the Senate's consent. The plurality<sup>68</sup> considered this case a political question, on the ground that there were no standards in the Constitution governing rescission of treaties and that the matter was a "dispute between coequal branches of our government, each of which has resources available to protect and assert its interests."<sup>69</sup>

#### 4. The President's War Power

During the Vietnam War, several dozen lawsuits were filed in the federal courts arguing that the war was unconstitutional, because there was no congressional declaration of war. Although the Supreme Court did not rule in any of these cases, either as to justiciability or on the merits, most of the lower courts deemed the challenges to the war to constitute a political question.<sup>70</sup> In the same way, challenges to the constitutionality of the President's military activities in El Salvador were dismissed by the lower federal courts as posing a political question.<sup>71</sup> Most recently, lower courts dismissed challenges to American involvement in the Persian Gulf War.<sup>72</sup>

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<sup>67</sup> 444 U.S. 996 (1979).

<sup>68</sup> Justice Powell concurred in the result, arguing that the matter was not yet ripe because Congress had not taken a position on the issue. *Id.* at 997.

<sup>69</sup> *Id.* at 1004.

<sup>70</sup> *See, e.g., Holtzman v. Schlesinger*, 484 F.2d 1307, 1309 (3rd Cir.), cert. denied, 416 U.S. 936 (1973); *DaCasta v. Laird*, 471 F.2d 1146, 1147 (2<sup>nd</sup> Cir.); *See also* Louis Henkin, *Vietnam in the Courts of the United States: Political Questions*, 63 AM.J.INT'L.L. 284 (1969).

<sup>71</sup> *See, e.g., Corockett v. Reagan*, 720 F.2d 1355 (D.C. Cir. 1983), cert. denied, 467 U.S. 1251 (1984); *Sanchez-Espinoza v. Reagan*, 770 F.2d 202 (D.C. Cir. 1985).

<sup>72</sup> *See, e.g., Ange v. Bush*, 752 F.Supp. 509 (D.D.C. 1990).

## B. The Electoral Process

Even though the Court declared non-justiciable a challenge to the congressional districting in *Colegrove v. Green*, it later made a big shift in the landmark decision of *Baker v. Carr*, concluding that the claims against malapportionment were not political questions and that it violated the equal protection clause.

After *Baker*, the Court has shown judicial activism based on equal protection, so the political question doctrine has been no longer applied in this area.<sup>73</sup>

### 1. Reapportionment

By the 1950s, many state legislatures were badly malapportioned, especially due to substantial growth in urban areas, which left rural residents overrepresented, while urban dwellers were substantially underrepresented, in many states. State legislators who benefited from this system were not eager to voluntarily redraw districts at the expense of their seats. Furthermore, they drew district lines for electing members of the United States House of Representatives that obviously favored their areas.

In *Colegrove v. Green*, in 1946, the USSC held non-justiciable a challenge to congressional districting.<sup>74</sup> Justice Frankfurter, writing for the Court, stated: “The appellants ask of this Court what is beyond its competence to grant.... Effective working of out government revealed this issue to be of a peculiarly political nature and therefore not fit for judicial determination. Authority for dealing with such problems resides elsewhere.”<sup>75</sup> He concluded that “[c]ourts ought not to enter this political thicket.”<sup>76</sup> Similarly, in *South v. Peters*, in 1950, the Court held that “[f]ederal courts consistently

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<sup>73</sup> For a detailed discussion, *see generally* J. Skelly Wright, *The Role Of The Supreme Court In A Democratic Society - Judicial Activism Or Restraint?*, 54 CORNELL L.REV. 1 (1968).

<sup>74</sup> 328 U.S. 549 (1946).

refuse to exercise their equity powers in cases posing political issues arising from a state's geographical distribution of electoral strength among its political subdivisions.”<sup>77</sup> Only in cases alleging racial discrimination in the drawing of election districts or in holding elections did the Court recognize federal court involvement.<sup>78</sup>

But this tendency changed in 1962, by the watershed decision in *Baker v. Carr*,<sup>79</sup> which declared justiciable claims that malapportionment violates the equal protection clause. Distinguishing cases brought under the equal protection clause from claims filed under the republican form of government clause, Justice Brennan stated that whereas “the Guaranty Clause is not a repository of judicially manageable standards which a court could utilize independently in order to identify a State's lawful government. ...[j]udicial standards under the Equal Protection Clause are well-developed and familiar.”<sup>80</sup> This is likely to be an illusory distinction because both clauses are equally vague and the principle of one-person-one-vote could have been articulated and enforced under either constitutional provision.<sup>81</sup> Nonetheless, the Court's holding that challenges to malapportionment are justiciable was one of the most important rulings in American history.<sup>82</sup> The political process did not seem to correct the constitutional violation and judicial review provided democratic rule.<sup>83</sup>

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<sup>75</sup> *Id.* at 552-554.

<sup>76</sup> *Id.* at 556.

<sup>77</sup> 339 U.S. 276, 277 (1950).

<sup>78</sup> *See, e.g.,* Gomillion v. Lightfoot, 364 U.S. 339 (1960) (redrawing of Tuskegee, Alabama districts to disenfranchise blacks); Terry v. Adams, 345 U.S. 461 (1953); Smith v. Allwright, 321 U.S. 649 (1944) (discrimination against blacks in political parties).

<sup>79</sup> 369 U.S. 186 (1962).

<sup>80</sup> *Id.* at 223-226.

<sup>81</sup> *See* Reynolds v. Sims, 377 U.S. 533 (1964) (articulating the one-person one-vote standard).

<sup>82</sup> Chief Justice Earl Warren remarked that the most important decisions during his tenure on the Court were those ordering reapportionment. The Warren Court: An Editorial Preface, 67 MICH. L. REV. 219, 220 (1968).

<sup>83</sup> *See, e.g.,* Louis Pollak, Judicial Power and the Politics of the People, 72 YALE L.J. 81, 88 (1962).

## 2. Gerrymandering

In 1986, the Court, in *Davis v. Bandemer*,<sup>84</sup> held that political gerrymandering cases are also justiciable under the equal protection clause, on the ground that the standards for adjudicating this claim are as manageable as the standards for racial gerrymandering claims.

The plaintiffs in *Davis* contended that the Republican-controlled Indiana legislature gerrymandered the drawing of election districts to maximize the election of Republican representatives, and thus unconstitutionally diluted the votes of Indiana Democrats.<sup>85</sup> The USSC held that the claim was justiciable, explaining that “the standards that we set forth here for adjudicating this political gerrymandering claim are [no] less manageable than the standards that have been developed for racial gerrymandering claims.”<sup>86</sup> Consequently, the Court held that “political gerrymandering cases are properly justiciable under the Equal Protection Clause.”<sup>87</sup> On the merits, however, the Court dismissed the claim, because proof of a constitutional violation required evidence of discriminatory vote dilution that was not present in the facts.<sup>88</sup>

## C. Congressional Self-Governance

The USSC has often held that Congressional judgments involving its internal autonomy, such as decisions concerning Congressional process and membership, should not be reviewed by the federal judiciary under the political question doctrine.

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<sup>84</sup> 478 U.S. 109 (1986).

<sup>85</sup> While the state legislature was careful to preserve one-person one-vote and to avoid racial discrimination, it also tried to divide the Democrats into separate districts where possible, and to combine Republican voters into districts where they would be the majority. The result was that Democrats obtained a majority of the popular vote in legislative elections, but only won a minority of the seats in the legislature. *Id.* at 113-18.

<sup>86</sup> *Id.* at 125.

<sup>87</sup> *Id.* at 143.

In *Field v. Clark*,<sup>89</sup> the Court dismissed a claim that a section of a bill passed by Congress was omitted from the final version of the law authenticated by the Speaker of the House and the Vice-President and signed by the President. The Court stressed that judicial review was unnecessary because Congress could protect its own interests by adopting additional legislation.

A leading case in this area is *Powell v. McCormack*.<sup>90</sup> In 1967, the House of Representatives refused to seat Powell due to his illegal payments to his wife with government funds, even though he had been elected by his constituents. The plaintiffs sued to be seated, to receive back pay,<sup>91</sup> and for a declaratory judgment that his exclusion was unconstitutional, arguing that the refusal to seat him was unconstitutional because he was properly elected and met all of the requirements stated in the Constitution for service as a representative.<sup>92</sup>

The Constitution explicitly provides that each house of Congress may expel a member by a vote of two-thirds of its members.<sup>93</sup> However, the Court noted that the issue was not expulsion, that is, he was excluded, not expelled.<sup>94</sup>

In response, the defendants contended that this case presented a political question because the Constitution textually provides that each house of Congress shall “be the Judge of the ... Qualifications of its Members.”<sup>95</sup> The Court, however, interpreted that

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<sup>88</sup> *Id.*

<sup>89</sup> 143 U.S. 649 (1892).

<sup>90</sup> 395 U.S. 486 (1969).

<sup>91</sup> Although he was not seated at all during that term of Congress, he was reelected in 1968 and seated in 1969. Nonetheless, the Supreme Court held that his suit was not moot because his claim for back pay for the time in which he was not seated remained a live controversy. *Id.* at 497-500.

<sup>92</sup> *Id.* at 489-497.

<sup>93</sup> U.S.CONST. art. I, § 5, cl. 2.

<sup>94</sup> *Powell*, 395 U.S. at 506-512.

<sup>95</sup> U.S.CONST. art. I, § 5, cl. 1.

the House had discretion only to decide whether a member met the qualifications stated in Article I, Section 2, that is, requirements of age, citizenship, and residence.<sup>96</sup> Consequently, the Court concluded that the case was justiciable, and not a political question, emphasizing that Article I, Section 5, is “at most a ‘textually demonstrable commitment’ to Congress to judge only the qualifications expressly set forth in the Constitution.”<sup>97</sup>

#### D. Amendments to the Constitution

Whether the Court should decide cases involving the amendment process<sup>98</sup> to the Constitution has long been controversial. Some scholars, such as Professor Tribe, argue that the courts generally should not become involved in the only mechanism that exists to directly overturn the judiciary’s interpretation of the United States Constitution.<sup>99</sup> Others, such as Professor Dellinger, contend that the federal courts must ensure that the proper procedures are followed in amending the Constitution.<sup>100</sup> The crucial point of his argument is that if the political process is allowed to circumvent Article V, the constitutional mechanisms in place to protect the Constitution from easy alteration can be evaded.

The leading case in amendment process review is *Coleman v. Miller*.<sup>101</sup> In this case, the issue was whether the time period for ratifying an amendment had expired. In 1924, Congress passed a proposed amendment to prohibit the use of child labor. The Kansas

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<sup>96</sup> The Court more recently relied on Powell to declare unconstitutional a state law that limited access to the ballot for candidates for the United States House of Representatives or the United States Senate after they had served a specified number of terms. *United States Term Limits v. Thornton*, 514 U.S. 779 (1995).

<sup>97</sup> Powell, 395 U.S. at 548.

<sup>98</sup> U.S.CONST. art. V.

<sup>99</sup> LAURENCE TRIBE, *CONSTITUTIONAL CHOICES* 22-23 (1985).

<sup>100</sup> Walter Dellinger, *The Legitimacy of Constitutional Change: Rethinking the Amendment Process*, 97 HARV. L. REV. 386 (1983).

legislature rejected the proposal in 1925, but approved it in 1937. Kansas legislators who opposed the amendment sued, arguing that the time period for ratification had lapsed and that the earlier rejection was controlling.<sup>102</sup>

A plurality opinion stated that the process of amending the Constitution is a “political question.... Article V grants power over the amending of the Constitution to Congress alone.... The process itself is political in its entirety, from submission until an amendment becomes part of the Constitution, and is not subject to judicial guidance, control or interference at any point.”<sup>103</sup>

#### E. The Impeachment Process

Most recently, in *Nixon v. United States*,<sup>104</sup> the Court applied the political question doctrine to one of the previously undecided issues, i.e. controversies concerning Senate impeachment trial procedures, by holding that challenges to the impeachment process are non-justiciable. This case involved federal district court judge Walter Nixon, who had been convicted of making false statements to a grand jury and was sentenced to prison. However, Judge Nixon refused to resign from the bench. The House of Representatives adopted articles of impeachment. The Senate created a committee to hold a hearing and make a recommendation to the full Senate. The Committee recommended removal from office and the entire Senate voted accordingly.

The defendant, however, claimed that the Senate had used improper procedures in convicting him following his impeachment, because the case was heard before a committee of Senators rather than the full Senate, though the full Senate voted after

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<sup>101</sup> 307 U.S. 433 (1939).

<sup>102</sup> *Id.* at 435-37.

receiving a transcript of the committee proceedings. The defendant claimed that this violated the Impeachment Clause.<sup>105</sup>

Chief Justice Rehnquist, writing for the Court, held that the language and structure of Article I, Section 3 demonstrate a textual commitment of impeachment to the Senate. The Court explained that the Framers of the Constitution intended that there would be two proceedings against office holders charged with wrongdoing: a judicial trial and legislative impeachment proceedings. Chief Justice Rehnquist noted that “[T]he Framers deliberately separated the two forums to avoid raising the specter of bias and to ensure independent judgments.... Certainly judicial review of the Senate’s ‘trial’ would introduce the same risk of bias as would participation in the trial itself.”<sup>106</sup>

Moreover, the Court stated that judicial review of impeachment would be inconsistent with the Framers’ views of impeachment in the scheme of checks and balances. The Framers saw impeachment as the only legislative check on the judiciary: judicial involvement would undercut this independent check on judges.<sup>107</sup>

*Nixon* leaves open the question of whether all challenges to impeachment are non-justiciable political questions, including impeachment of the President. In a concurring opinion, Justice Souter recognized the possible need for judicial review. He wrote: “If the Senate were to act in a manner seriously threatening the integrity of its results,

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<sup>103</sup> *Id.* at 457-459. Justice Black, furthermore, in his concurring opinion, said that Congress has “sole and complete control over the amending process, subject to no judicial review.” *Id.*

<sup>104</sup> 506 U.S. 224 (1993).

<sup>105</sup> U.S.CONST. art. I, § 3, cl. 6 (“The Senate shall have the sole Power to try all Impeachments. When sitting for that Purpose, they shall be on Oath or Affirmation. When the President of the United States is tried, the Chief Justice shall preside: and no Person shall be convicted without the Concurrence of two thirds of the Members present.”).

<sup>106</sup> *Id.* at 234.

<sup>107</sup> *Id.* at 233-237.

convicting, say, upon a coin toss, or upon a summary determination that an officer of the United States was simply ‘a bad guy,’ judicial interference might well be appropriate.”<sup>108</sup>

#### IV. Summing Up: The Narrowing of the Political Question Doctrine

The USSC has defined the political question doctrine very differently over the course of its history. The Court’s first definition of political questions in *Marbury v. Madison* was quite narrow. Chief Justice Marshall implied that only matters in which the President had unlimited discretion were included within the scope of the political question, and there was thus no allegation of a constitutional violation. Because the Constitution vests the President with plenary authority, there is no basis for a claim of a constitutional violation. But if there is a claim of an infringement of individual rights, in other words, if the plaintiff has standing, there is not a political question.

After that point, however, the political question doctrine grew in scope until the 1960’s.<sup>109</sup> As we have seen above, the doctrine definitely has not been limited to cases in which the President is exercising discretion. This course of alteration of the doctrine seems to be involved with the fundamental normative inquiry on the political question doctrine: whether those decisions invoking the doctrine constitute proper deference to a coordinate branch of government or unjustified judicial abdication.<sup>110</sup>

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<sup>108</sup> *Id.* at 253 (Souter, J., concurring).

<sup>109</sup> For a discussion of the rise and fall of the doctrine, see generally Rachel E. Barkow, More Supreme than Court? The Fall of the Political Question Doctrine and the Rise of Judicial Supremacy, 102 COLUM. L. REV. 237 (2002). Especially, she referred to *Baker v. Carr* as “the beginning of the end of the doctrine.” *Id.* at 263-64.

<sup>110</sup> *Id.* at 239-44; CHEMERINSKY, *supra* note 12, at 161 (“From one view, the federal courts appropriately have refused to become involved in internal legislative matters. But from a different perspective, the courts have unjustifiably failed to enforce constitutional provisions and have eliminated an important check on Congress.”).

This trend narrowing the scope of the doctrine has been accelerated since *Baker v. Carr*, along with the advent of the new judicial activism, as in *I.N.S. v. Chadha*,<sup>111</sup> *United States v. Lopez*,<sup>112</sup> and *United States v. Morrison*.<sup>113</sup> In particular, in *Bush v. Gore*,<sup>114</sup> the majority did not even consider the political question doctrine. In this case, the Court concluded that it violated equal protection to recount votes in Florida without clear, uniform standards. Some commentators criticized the Court's failure to raise justiciability on the ground that it is firmly established doctrine that courts are to raise justiciability even if the parties do not.<sup>115</sup> Subsequently, some commentators gave warning that the Court went too far, to the extent of encroachment upon other branches of government. These arguments accentuate Marshall's formulation presented in *Marbury v. Madison*, in sum, separation of powers and judicial self-restraint,<sup>116</sup> and revisit Justice Reed's opinion in *United Public Workers of America (C.I.O.) v. Mitchell*:<sup>117</sup>

“The Constitution allots the nation's judicial power to the federal courts. Unless these courts respect the limits of that unique authority, they intrude upon powers vested in the legislative or executive branches. Judicial adherence to the doctrine of the separation of powers preserves the courts for the decision of issues, between litigants, capable of effective determination. Judicial exposition upon political proposals is permissible only when necessary to decide definite issues between litigants. When the courts act continually within these constitutionally imposed boundaries of their power, their ability to perform their function as a balance for the people's protection against abuse of power by other branches of

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<sup>111</sup> 462 U.S. 919 (1983).

<sup>112</sup> 514 U.S. 549 (1995).

<sup>113</sup> 529 U.S. 598 (2000).

<sup>114</sup> 531 U.S. 98 (2000).

<sup>115</sup> Erwin Chemerinsky, *Bush v. Gore Was Not Justiciable*, 76 NOTRE DAME L. REV. 1093, 1094 (2001) (citing *Allen v. Wright*, 468 U.S. 737, 750-52 (1984); *Warth v. Seldin*, 422 U.S. 490, 498 (1975)).

<sup>116</sup> CHARLES ALAN WRIGHT, *LAW OF FEDERAL COURTS* 75 (4<sup>th</sup> ed. 1983) (“The political question doctrine goes back to the great case of *Marbury v. Madison*. Chief Justice Marshall there expressed the view that the courts will not entertain political questions even though such questions involve actual controversies. The non-justiciability of a political question is founded primarily on the doctrine of separation of powers and the policy of judicial self-restraint.”).

<sup>117</sup> 330 U.S. 75, 90-91 (1947).

government remains unimpaired. Should the courts seek to expand their power so as to bring under their jurisdiction ill defined controversies over constitutional issues, they would become the organ of political theories. Such abuse of judicial power would properly meet rebuke and restriction from other branches. By these mutual checks and balances by and between the branches of government, democracy undertakes to preserve the liberties of the people from excessive concentrations of authority.”

Those who subscribe to this point of view admonish excessive judicial intervention and stress the principle of separation of powers and the need for flawless protection of individual constitutional rights.<sup>118</sup>

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<sup>118</sup> Barkow, *supra* note 109, at 330. *See generally* ALAN M. DERSHOWITZ, SUPREME INJUSTICE: HOW THE HIGH COURT HIJACKED ELECTION 2000 (2001).

## CHAPTER 3

### THE POLITICAL QUESTION CASES IN KOREAN COURTS

#### I. Constitutional Background: The Constitution and Judicial Systems

As briefly reviewed in Chapter 1, the current Constitution of the Republic of Korea, which was revised on October 29, 1987 through a popular referendum based upon the Korean people's deep enthusiasm for democracy, provides for the democratic fundamental of separation of national powers, as did prior Constitutions.<sup>119</sup> The judicial power is vested in "courts composed of judges."<sup>120</sup> This provides an independent judiciary and guarantees Korean people the right to have all judicial matters tried before the courts, including those between citizens and the state arising from administrative actions. Furthermore, the Constitution grants these ordinary courts<sup>121</sup> the power to ask the Constitutional Court to decide the constitutionality of a law,<sup>122</sup> and the Supreme Court the

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<sup>119</sup> There have been ten constitutions from the Original Constitution to the current Constitution.

<sup>120</sup> Like the Constitution of the United States, the Korean Constitution explicitly stipulates the principle of separation of powers, by providing the Legislative Power in Article 40 ("The legislative power shall be vested in the National Assembly."); the Executive Power in Article 66, Section 4 ("Executive power shall be vested in the Executive Branch headed by the President."); and the Judicial Power in Article 101, Section 1 ("Judicial power shall be vested in courts composed of judges."). This distribution of national powers embodies the traditional method of checks and balances among the three national branches, none of which may misuse their constitutional powers.

<sup>121</sup> There are three tiers of courts in Korea: the District Courts (including the specialized Family Court and Administrative Court), which are the courts of original jurisdiction; the High Courts, the intermediate appellate courts; and the Supreme Court, the highest court. The High Courts and the District Courts are divided into geographic districts. The Court Organization Act grants the courts general jurisdiction to preside over civil, criminal, administrative, electoral, and other litigious cases. It also allows for decisions in non-contentious cases and other matters that fall under their jurisdiction in accordance with the relevant provisions. In addition, military courts may be established under the Constitution as special courts to exercise jurisdiction over criminal cases in the military. Nonetheless, in these cases the Supreme Court retains final appellate jurisdiction.

<sup>122</sup> S.KOREACONST. art. 107, § 1 ("When the constitutionality of a law is at issue in a trial, the court shall request a decision of the Constitutional Court, and shall judge according to the decision thereof.").

power to conclusively review the constitutionality or legality of administrative decrees, regulations or actions.<sup>123</sup>

On the other hand, the drafters of the Constitution of the Sixth Republic<sup>124</sup> agreed that they must create a new, revitalized Constitutional Court, anticipating that the rule of law would be accomplished via this Constitutional Court to safeguard the Constitution, bringing a more democratic, free society through special procedures for adjudication of constitutional issues.<sup>125</sup> Above all, the most important new feature of the Constitution is that it also bestows the Constitutional Court judicial review powers as follows:<sup>126</sup>

1. The constitutionality of a law upon the request of the (ordinary) courts;
2. Impeachment of certain listed officials;
3. Dissolution of a political party;
4. Competence disputes between State agencies, between State agencies and local governments, and between local governments; and
5. Constitutional complaints as prescribed by Act.<sup>127</sup>

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<sup>123</sup> S.KOREACONST. art. 107, § 2 (“The Supreme Court shall have the power to make a final review of the constitutionality or legality of administrative decrees, regulations or actions, when their constitutionality or legality is at issue in a trial.”).

<sup>124</sup> For an explanation of the demarcation of Republic period in Korea, *see* Gavin Healy, *Judicial Activism in the New Constitutional Court of Korea*, 14 COLUM. J. ASIAN L. 213, 214-218 (2000).

<sup>125</sup> However, it is not known in detail why and how the Constitutional Court system was adopted, because the government authorities have not officially released the deliberation records for the revision. Simply, based on the materials and records of journals at that time, it can be said that this system was the outcome of political compromise without deep knowledge. Jibong Lim, *A Comparative Study of the Constitutional Adjudication Systems of the U.S., Germany and Korea*, 6 TULSA J. COMP. & INT’L L. 123, 134 (1999).

<sup>126</sup> S.KOREACONST. art. 111, § 1.

<sup>127</sup> Under this Constitutional provision, the Constitutional Court Act was enacted as a Korean Act No. 4017 on August 5, 1988 and entered into force on September 1, 1988. The essential provisions on its jurisdiction are as follows:

A. Article 41 (Request for Adjudication on the Constitutionality of Statutes), Section 1: When the issue of whether or not statutes are constitutional is relevant to the judgment of the original case, the ordinary court (including the military court; hereinafter the same shall apply) shall request to the Constitutional Court, *ex officio* or by decision upon a motion by the party, an adjudication on the constitutionality of statutes.

B. Article 48 (Institution of Impeachment): If a public official who falls under any of the following violates the Constitution or laws in the course of execution of his or her services, the National Assembly may pass a resolution on the institution of impeachment as prescribed in the Constitution and the National Assembly Act: 1. President of the Republic, Prime Minister, Members of the State

This distribution of judicial determination powers can be characterized as a dual judicial review system.<sup>128</sup> In particular, it should be noted that the jurisdiction of the Constitutional Court is mostly involved with extremely political issues. It deserves considerable attention that the Korean Constitution explicitly grants the Ordinary Courts as well as the Constitutional Court the power to adjudicate the constitutionality of coequal branches' actions, while the Constitution of the United States does not.

## II. Historical Background: The Abuse of the Executive Prerogative Action Doctrine

In order to conduct fair trials and realize the ideal of the rule of law, all successive Constitutions have declared the principle of judicial independence by providing “[J]udges shall rule independently according to their conscience and in conformity with the Constitution and Acts.”<sup>129</sup> Independence of the judicial power of judges, based on the

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Council or Ministers; 2. Justices of the Constitutional Court, judges or Commissioners of the National Election Commission; 3. Chairman and Commissioners of the Board of Audit and Inspection; or 4. Other public officials as prescribed by relevant laws.

C. Article 55 (Request for Adjudication on Dissolution of a Political Party): If the objectives or activities of a political party are contrary to the basic order of democracy, the Executive may request to the Constitutional Court, upon a deliberation of the State Council, an adjudication on dissolution of the political party.

D. Article 61 (Causes for Request), Section 1: When any controversy on the existence or the scope of competence arises between state agencies, between a state agency and a local government, or between local governments, a state agency or a local government concerned may request to the Constitutional Court an adjudication on competence dispute.

E. Article 68 (Causes for Request), Section 1: Any person who claims that his basic right which is guaranteed by the Constitution has been violated by an exercise or non-exercise of governmental power may file a constitutional complaint, except the judgments of the ordinary courts, with the Constitutional Court: Provided, That if any relief process is provided by other laws, no one may file a constitutional complaint without having exhausted all such processes.

F. Article 68, Section 2: If the motion made under Article 41, Section 1 for adjudication on constitutionality of statutes is rejected, the party may file a constitutional complaint with the Constitutional Court. In this case, the party may not repeatedly move to request for adjudication on the constitutionality of statutes for the same reason in the procedure of the case concerned.

<sup>128</sup> This dual system has traditionally been chosen through the history of Korean Constitution. For the detailed history of the judicial review system, *see* Healy, *supra* note 124, at 214-218; Kyong Whan Ahn, *The Influence of American Constitutionalism on South Korea*, 22 S. ILL. U. L. J. 71, 85-88 (1997).

<sup>129</sup> S.KOREACONST. art. 103.

constitutional principle of separation of powers, is imperative to ultimately guarantee the fairness of trials. A judge who sits on the bench should be free from any pressure or coercion by another state institution.<sup>130</sup> In addition, the Constitution stipulates a scrupulous guarantee of the status of judges by prohibiting the removal of judges from office except by impeachment or imprisonment sentence.<sup>131</sup>

Despite this constitutional warranty, however, the practical and political surroundings have led the judiciary, catastrophically, to show extreme self-restraint. The hierarchical personnel system<sup>132</sup> and the ten-year tenure of lower court judges<sup>133</sup> have never insulated judges from pressure or coercion by other state institutions, especially from the Executive under the military dictatorship.<sup>134</sup>

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<sup>130</sup> Chang Soo Yang, *The Judiciary in Contemporary Society: Korea*, 25 CASE W. RES. J. INT'L L. 303, 312 (1993) (“No institution, whether it be legislative, executive, or judicial, is authorized to exercise control over or to give directions concerning trials. No institution may annul or reverse a judgment after a trial except by means of appeal.”).

<sup>131</sup> S.KOREACONST. art. 106, § 1 (“No judge shall be removed from office except by impeachment or a sentence of imprisonment without prison labor or heavier punishment, nor shall he be suspended from office, have his salary reduced or suffer any other unfavorable treatment except by disciplinary action.”).

<sup>132</sup> For example, under the former Court Organization Act, “the Chief Justice exercises exclusive authority over promotion (including demotion) and transfer of all the lower court judges. A judge can be moved from one court to another without his consent. This exclusive power of the Chief Justice may be used to influence decisions of an individual judge.” Yang, *supra* note 130, at 312.

<sup>133</sup> S.KOREACONST. art. 105, § 3. “They may serve consecutive terms, but after tenure is completed, they must be newly appointed by the Chief Justice who has exclusive power over judicial appointment. The reason given for not adopting a life tenure system is that it prevents the bench from becoming stale.” Yang, *supra* note 130, at 312.

<sup>134</sup> Until the 1960s, the Korean judiciary was independent from other governmental branches to a degree. However, this tradition came to be fiercely threatened by President Park Jeong-Hee in 1970, who was becoming a dictator at that time. The so-called “judiciary crisis” (1970) occurred because of President Park’s desire for revenge on the Supreme Court Justices who had declared the National Indemnity Act unconstitutional. Park became angry at the judiciary and, by many strategies, forced the Justices to retire. Because of this crisis, more than half of the Justices were replaced. At that time, the Constitution provided that Supreme Court Justices should be appointed by the President upon the proposal of the Chief Justice after he had secured the approval of the majority of the Council for the Recommendation of Judges, and their tenure of office was guaranteed for 6 years. However, the President compelled them to resign before the completion of the tenure. This judiciary crisis became a bad precedent and judges were reluctant to hold laws unconstitutional. At that time, judicial independence in the Korean judiciary received a great blow and judicial passivism has continued to spread widely over the Korean judiciary. Lim, *supra* note 125, at 161.

Under these unfortunate circumstances, the ordinary courts could not employ their comprehensive autonomous power as guaranteed by the Constitution, particularly in cases carrying even the slightest political overtones. As a reflection of this trend, political question decisions by Korean ordinary courts have been primarily connected with the executive action of the President. Also, in declining to decide certain political questions, the Korean judiciary has used the dubious terminology “Executive Prerogative Action,” which owes its origin to the “King’s Royal Prerogative” of the United Kingdom,<sup>135</sup> to provide theoretical justification for both the judiciary’s “self-constraint” strategy and the President’s “above-the-law” attitude.<sup>136</sup>

In a word, the executive prerogative doctrine has been abused literally “politically.” Virtually any action taken by the President or his cabinet members has been given a kind of safe harbor from judicial intervention.

However, this chapter deals with decisions on a wide range of political issues, including politics, elections, and competence disputes among state agencies and local governments.

### III. Decisions by the Ordinary Courts

#### A. The Early View of the Supreme Court

At the beginning, the Korean Supreme Court (hereinafter, the KSC) held that it could not appraise some political questions because reviewing the issues was beyond its competence. The court refused to review the constitutionality of proclaiming martial

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<sup>135</sup> Hideo Chikusa, Japanese Supreme Court: Its Institution and Background, 52 SMU L. REV. 1719, 1729 (1999) (“Traditionally, any highly political act of the state is outside of judicial review, and this tradition persists in the United Kingdom, as the so-called ‘act of state’ doctrine. The equivalent notion is also supported in France as the ‘acte de gouvernement’ and in Germany as the ‘Regierungsakt.’”).

<sup>136</sup> Ahn, *supra* note 128, at 93-94.

law,<sup>137</sup> alleging the Congress should decide whether martial law was proclaimed in conformity with the Constitution and laws, and when it should be withdrawn.<sup>138</sup> Also, the court held that it could not review the lawfulness of the exercise of the President's rule-making power.<sup>139</sup> Further, the Court impliedly accepted the application of the political question doctrine to judicial review of internal congressional decisions.<sup>140</sup>

In the 1990's, there was a very dramatic legal incident: the indictment of two former Presidents, Chun Doo-Hwan and Roh Tae-Woo. After the collapse of the Fourth Republic and the consequent vacuum of governmental authority as a result of the assassination of President Park Jeong-Hee in 1979, these two former Presidents and their followers successfully seized political power by using the military force under martial law. In May of the next year, the rebellious troops cruelly killed hundreds of civilian demonstrators calling for democratization in Kwangju City. In 1993, the surviving victims and the families of the deceased brought a suit against Chun and Roh.

Contrary to citizens' expectations, a public prosecutor refused to indict them at first, arguing that, after the incident, Chun Doo-Hwan was elected President through the indirect election process and Roh Tae-Woo also became a President in succession. Since the two eventually established the Fifth Republic and a new constitutional order through the revision of the Constitution, they could not be punished by the old legal order according to the prosecutor. The plaintiffs appealed the prosecutor's refusal to the court.

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<sup>137</sup> However, there was a noteworthy dissent opinion in the so-called Kang Shin-Ok Case. Supreme Court Decision No. 74 Do 3501 (Jan. 29, 1985) (Justice Lee Hoe-Chang said that, because the judiciary has a legal duty which protects the individuals' basic rights and the Constitution, it should have the power to review the executive prerogative actions limiting citizens' constitutional basic rights.).

<sup>138</sup> Supreme Court Decision No. 79 Cho 70 (Dec. 7, 1979); No. 81 Do 1833 (Sep. 22, 1981).

<sup>139</sup> Supreme Court Decision No. 83 Nu 279 (Jan. 22, 1985); No. 83 Nu 43 (Jun. 13, 1983).

<sup>140</sup> Supreme Court Decision No. 71 Do 1845 (Jan. 18, 1972).

In 1995, the Supreme Court also dismissed this appeal, alleging that this was a political question.<sup>141</sup>

#### B. The Recent View of the Supreme Court

A further obstacle to legally solving this dispute also existed. The statute of limitations, as provided in the Code of Criminal Procedures, strictly construed, appeared to have afforded the two former military generals the benefit of time. There is no mention of tolling the statute of limitations against the President, either in the Constitution, or in any statute.

After the 1995 decision, the National Assembly passed special legislation<sup>142</sup> extending the statute of limitations against those who were involved in the Kwangju Democratization Movement in 1980, and the military insurrection in 1979.

In the course of a trial reopened according to the special law, Chun and Roh brought a constitutional complaint with the KCC, arguing alternatively that the law was unconstitutional because it was a private law for this individual case, was retroactive legislation, or was against the principle of prohibition of double jeopardy. The KCC decided that the law was not unconstitutional for any of these reasons.<sup>143</sup>

At this point, the generals argued that they could not be held liable for their successful coup d'etat, because their conduct had been legitimized by revision of the Constitution. But a majority (10 of 13) of the Grand Bench of the Supreme Court found that the

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<sup>141</sup> Supreme Court Decision No. 95 Mo 61 (Apr. 12, 1996).

<sup>142</sup> For analysis of the constitutional faults of this legislation, and concerns related to the prosecution of the two former Presidents, *see generally* David M. Waters, Korean Constitutionalism and the Special Act to Prosecute Former Presidents Chun Doo-Hwan and Roh Tae-Woo, 10 COLUM. J. ASIAN L. 461 (1996).

<sup>143</sup> 8-1 KCCR 51, 96 HunKa 2, etc. (Feb. 16, 1996).

generals were punishable, and that the matter could no longer be called a political question.<sup>144</sup>

According to the holding of the Court, through enactment of the founding constitution in 1948, the Republic of Korea has established the constitutional order, in which sovereign power in the people, liberal democracy, fundamental rights of the people and rule of law stand for underlying ideologies and principles of the nation. Although amendments have been made nine times since then, the crucial constitutional spirit has been firmly preserved to date. However, the rebellious troops seized political power by violent insurrection and the resulting junta made the legitimate exercise of power of national government virtually impossible. Notwithstanding that the military regime subsequently amended the constitution through national referendum and governed the nation in accordance with the amended constitution, the rebellious acts of the military force could not be deemed establishment of a new legal order. Under the continuing constitutional order of the Republic of Korea, any violent acts which made the legitimate exercise of power of constitutional institutions impossible, or seizure of political power by disrupting the democratic process stipulated in the Constitution cannot be tolerated. Accordingly, the military coup d'état and the rebellious acts were held to be subject to punishment.

#### C. A Case in the Seoul Administrative District Court

Even though they were eventually convicted after lengthy, controversial trials, and were respectively sentenced to terms of seventeen and fifteen-year imprisonment, the two generals were released after serving about two years in prison as part of an amnesty

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<sup>144</sup> Supreme Court Decision No. 96 Do 3376 (Apr. 17, 1997).

granted by the President. Ironically, no one appealed the President's action, because the pardon power has been deemed another "executive prerogative."

Similarly in 1999, when the incumbent President pardoned the former President's second son, who was sentenced to two years in jail on conviction of taking bribes and tax evasion, a citizen brought an administrative litigation against the President, seeking withdrawal of the amnesty. However, the Seoul Administrative District Court held that the exercise of the President's pardon power was a highly political action, and therefore could not be reviewed by the court,<sup>145</sup> with no reasonable explanations. After this decision, the Lawyers' Association for a Democratic Society requested the Department of Justice to disclose data on the President's pardon under the Korean Sunshine Act.<sup>146</sup> The Department refused and the Association brought an administrative action against the head of the Department seeking withdrawal of the refusal. At this time, the Administrative court unexpectedly held that there was no political question and the Head had to release the data.<sup>147</sup> Unfortunately, however, this decision was reversed in the appellate court,<sup>148</sup> and now is pending in the Supreme Court.

#### IV. Decisions by the Constitutional Court

From the beginning, the KCC has not hesitated to review so-called executive prerogative actions. This subchapter introduces the seminal cases in several categories,<sup>149</sup> which are arbitrarily classified to facilitate comparison with decisions of the USSC.

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<sup>145</sup> Seoul Administrative Court Decision No. 99 Gu 24405 (Feb. 2, 2000).

<sup>146</sup> Korean Act No. 5242 (Act on the Disclosure of Information Possessed by Public Agencies).

<sup>147</sup> Seoul Administrative Court Decision No. 99 Gu 26517 (Dec. 3, 2000).

<sup>148</sup> Seoul High (Appellate) Court Decision No. 2000 Nu 15783 (Sep. 13, 2001).

<sup>149</sup> The decisions cited in this subchapter came from THE CONSTITUTIONAL COURT, THE TEN-YEAR HISTORY OF THE CONSTITUTIONAL COURT (1998), which digested the Court's seminal decisions.

## A. Politics

### 1. Legislative Autonomy of the National Assembly

Traditionally, legislative autonomy has been deemed a political question. But, in *Legislative Railroading Case*,<sup>150</sup> the KCC showed judicial activism in contrast to the KSC's attitude.<sup>151</sup> In this case, the Court held that the National Assembly Speaker's railroading of a bill violated the rights of opposition party members to review and vote on proposed legislation. Strictly speaking, this case could be seen as unrelated to the political question doctrine of the USSC, because the Korean Constitution and the Korean Constitutional Court Act (hereinafter, the KCCA) provide that the KCC shall have the power to decide "competence disputes between State agencies."<sup>152</sup> Nevertheless, this case is important because it acted as a reversal of direction from the first railroading case brought before the Court.<sup>153</sup> The earlier case narrowly interpreted Article 62, Section 1, Clause 1 of the KCCA as allowing competence disputes only among the entities enumerated above, and held that an individual assemblyperson or a party with negotiating rights is only a component of the National Assembly that cannot petition for competency disputes, and dismissed the petition.<sup>154</sup>

The 182<sup>nd</sup> Extraordinary session of the National Assembly convened on December 23, 1996. The proposed revisions to the National Security Planning Agency Act, the Labor Standards Act, the Labor Relations Commission Act, the Labor-Management Consultative Council Act, and the revised Trade Union and Labor Relations Adjustment

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<sup>150</sup> 9-2 KCCR 154, 96 HunRa 2 (Jul. 16, 1997).

<sup>151</sup> Supreme Court Decision No. 71 Do 1845 (Jan. 18, 1972).

<sup>152</sup> Article 62, Section 1, Clause 1 of the KCCA defines competence disputes as between various state agencies and limits them as among the National Assembly, the Executive, the Courts and the National Election Commission.

<sup>153</sup> 7-1 KCCR 140, 90 HunRa 1 (Feb. 23, 1995).

Act were on the agenda. However, opposition party members, in opposing premature passage of the bills, occupied the Speaker's Office and otherwise interfered with the proceeding, and the National Assembly could not operate in a regular course of proceeding. Three days later, the Vice-Speaker, acting on behalf of the Speaker, convened the first Plenary of the 182<sup>nd</sup> Extraordinary session around 6:00 A.M. by notifying only the 155 members of the ruling New Korea Party of the meeting. He declared passage of the bills after a vote by those present. Four days after this, the members of the opposition National Congress for New Politics and the United Liberal Democrats petitioned for review of a competence dispute. They argued that the Plenary convened in secret while the Speaker failed to notify them of the meeting, and that the passage of the bills in violation of the procedures specified by the Constitution and the National Assembly Act usurped their powers as independent constitutional entities to review and vote on the bills, and therefore was unconstitutional.<sup>155</sup>

The Court held that the individual members and the Speaker of the National Assembly could be parties to a competence dispute and also that the railroad passage of the bills by the Vice-Speaker acting on behalf of the Speaker on December 26, 1996, took away the plaintiffs' powers to review and vote on them. But the Court held that these actions did not amount to a clear violation of the provisions of the Constitution.<sup>156</sup>

The majority of the Court, interpreting Article 111, Section 1, Clause 4 of the Constitution as an illustrative, rather than definitive or enumerative provision, held that the individual representatives and the Speaker are state agencies under the Clause and

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<sup>154</sup> *Id.* at 148-50.

<sup>155</sup> *Id.* at 159-60.

<sup>156</sup> *Id.* at 154-55.

therefore can be parties to competence disputes. The petition met the justiciability requirements.<sup>157</sup> Furthermore, the Court stated that the individual representatives' right to review and vote on the proposed bills was violated for the following reasons:

Representatives' power to review and vote on bills is not explicitly mentioned in the Constitution. But, the principle of parliamentary democracy, Article 40 granting exclusive legislative power to the National Assembly, and Article 41, Section 1 forming the National Assembly with the representatives elected by the people lend themselves to a guarantee of those powers to all representatives. Around 5:30 A.M., the deputy floor leader of the New Korea Party notified, by phone, the deputy floor leader of the National Congress for New Politics and the floor leader of the United Liberal Democrats Union of the change of the meeting time to 6:00 A.M. of December 26, 1996. The opposition party members cannot be expected to be present at the meeting on such a short notice. Such a late notification or lack of notification altogether clearly does not meet the requirements of Article 76, Section 3 of the National Assembly Act. Since the respondent Speaker's violation of Article 76, Section 3 of the National Assembly Act extinguished the plaintiffs' opportunity to attend the meeting and to review and vote on the proposed bills, such act of the respondent clearly violated the plaintiffs' power granted by the Constitution without any further violation of the National Assembly Act procedures.<sup>158</sup>

Meanwhile, the respondent, the Speaker of the National Assembly, argued that the case was encompassed within the legislative autonomy or its internal governance, which should not be reviewed by the Court. The Korean Constitution specifically provides, in Article 68,<sup>159</sup> the National Assembly's proceedings, rules, and internal regulation, the qualifications of its members and disciplinary actions against them, and the expulsion of any member. Specifically, Section 4 is the only provision which textually commits

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<sup>157</sup> *Id.* at 164-65.

<sup>158</sup> *Id.* at 162-66.

<sup>159</sup> S.KOREACONST. art. 68, § 1 ("The National Assembly may establish the rules of its proceedings and internal regulations: Provided, That they are not in conflict with Act."); § 2 ("The National Assembly may review the qualifications of its members and may take disciplinary actions against its members."); § 3 ("The concurrent vote of two thirds or more of the total members of the National Assembly shall be

review power to another branch, i.e. the National Assembly itself, not to courts. However, the Court noted that the issue was not expulsion, qualifications of its members and disciplinary actions, but the status of the individual representatives and the Speaker as state agencies, which can be parties to competence disputes.<sup>160</sup>

This decision had great constitutional and historical significance as a check against the anti-representative legislative practice of ‘bill railroading’ and also as a show of the Court’s strong commitment to break away from the past practice of deifying legislative activities under the name of legislative autonomy and to guarantee procedural legitimacy of the legislative processes.

## 2. *Appointment of Acting Prime Minister Case*<sup>161</sup>

Three years later, however, the Court showed self-restraint against political questions. When the National Assembly could not vote on ratification of the new Prime Minister, the President appointed him as the so-called Acting Prime Minister. In this case, the entire group of opposition party members brought a competence dispute against the President under Article 111, Section 1, Clause 4 of the Constitution and Article 62, Section 1, Clause 1 of the Constitutional Court Act,<sup>162</sup> but their request was dismissed for lack of justiciability.

On February 25, 1998, the respondent, the President, took office, and on the same day appointed the Prime Minister and sought the consent of the National Assembly on that

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required for the expulsion of any member.”); and § 4 (“No action shall be brought to court with regard to decisions taken under §§ 2 and 3.”).

<sup>160</sup> *Id.* at 165-66.

<sup>161</sup> 10-2 KCCR 1, 98 HunRa 1 (Jul. 14, 1998).

<sup>162</sup> For the contents of these provisions, *see* the previous case.

matter.<sup>163</sup> The Speaker of the National Assembly, on the same day, tried to convene the 189<sup>th</sup> Extraordinary Session but could not due to the abstention of the opposition party members. The National Assembly did not meet in their Extraordinary Session cycle for that year because of the partisan confrontation. The 189<sup>th</sup> Extraordinary Session began on March 2, 1998 with bipartisan presence, and the Speaker brought out the above appointment as an item on the agenda. Soon after, the representatives began anonymous voting according to Article 112, Section 5 of the National Assembly Act. The members of the ruling parties interrupted the vote, accusing the opposing party of casting blank votes, by blocking access to the ballot dispensers and the poll boxes. A noisy altercation with pushing and shoving ensued, making it difficult to continue the proceeding. The Speaker suspended the proceeding and resumed soon after, but the voting stopped again. Although the Speaker encouraged the assemblypersons to finish voting, the voting did not continue in a normal course and passed midnight, automatically adjourning the 189<sup>th</sup> Session.<sup>164</sup>

As ratification of the appointment failed, the President received the outgoing Prime Minister's recommendations on appointment of ministers on March 2, 1998; and, on that day, appointed all the Cabinet positions based on his recommendations and appointed a candidate as the Acting Prime Minister. The plaintiffs, all 156 Representatives of the opposition party, submitted a competence dispute before the Court, contending primarily that the President infringed upon the power of the National Assembly and the plaintiffs to ratify appointment of the Prime Minister, or alternatively that he infringed upon their

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<sup>163</sup> S.KOREACONST. art. 86, § 1 ("The Prime Minister shall be appointed by the President with the consent of the National Assembly.).

<sup>164</sup> 10-2 KCCR 1, at 9-10.

power to review and vote on the same issue. They sought invalidation of the appointment of the Acting Prime Minister.<sup>165</sup>

The majority opinion of five Justices dismissed this claim, although they were split into three reasonings.<sup>166</sup> One Justice reasoned that the power to ratify appointment of the Prime Minister belongs to the National Assembly, which, therefore, must be a party to this competence dispute. Only when the majority in the National Assembly does not consent to becoming a party, the Court may grant third-party standing to partial components of the National Assembly in order to protect the minority. In this case, the plaintiffs accounted for a majority in the National Assembly, and therefore could contemplate venues to restore the power of the legislature through its proceedings. Therefore, third-party standing was not necessary for this case, and was not statutorily sanctioned in any event. As to the claims of prospective infringement, this Justice held that the power to review and vote concerned a legal relationship among the

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<sup>165</sup> *Id.* at 10-11.

<sup>166</sup> Four dissenters, who argue the claim should be reviewed on the merits, also are split into two opinions. First, three Justices held as follows:

The legislature is a conferential body. Its position is the aggregate of individual representatives' position expressed through their votes. The plaintiffs can file a competence dispute alleging simultaneous infringement on the ratification powers of the legislature and on their own power to review and vote. Also, even if the legislature still can disapprove the appointment in the future, there is legal interest subject to competence dispute in the meantime. Ratification by the Assembly is an indispensable substantive prerequisite to appointment of Prime Minister. Appointing one without ratification clearly violates the Constitution and cannot be justified by existence of such custom in the past. Custom does not take precedence over the Constitution just because it has been repeated. Neither can it be justified as a measure to prevent vacuum in administration when a system of stand-ins is already in place. *Id.* at 24-32.

Next, one Justice stated that the appointment in principle required the consent of the legislature before it became effective. But, the vacuum in constitutional provisions for the possibility of vacancy can be mended by various means within a reasonable scope of interpretation under such special circumstances as the Assembly's failure to reach a decision, the anticipated vacuum in administration, the need for swift policy-making in the economic crisis. Under the circumstances of this case, the President could appoint an Acting Prime Minister until the decision is made in the Assembly. His action did not infringe upon the ratification power of the National Assembly. *Id.* at 32-38.

representatives themselves or between them and the speaker, and not the relationship between the President and the representatives. The appointment made by the President was not likely to infringe upon the representatives' power.<sup>167</sup>

Second, two Justices pointed out that the President neither refused to submit the appointment for ratification nor finalized it against the legislature's disapproval. His action amounted to merely appointing a temporary substitute to the Prime Minister as authorized by Article 23 of the Governmental Organization Act. Even if there had been any procedural fault in his action, it did not and was not likely to infringe upon the power of the legislature or its members. The National Assembly could still vote on the appointment, and the plaintiffs who formed the majority could influence the outcome of the vote and resolve the dispute thereby. The Justices therefore held that there was no legally protectable interest in this case.<sup>168</sup>

Third, the other two Justices continued to maintain their previous position that the permissible parties to competence disputes under Article 62, Section 1, Clause 1 of the Constitutional Court Act do not include such components or parts of the legislature as individual representatives or negotiating bodies.<sup>169</sup>

The main controversies in this case were whether to consider the ratification power of the legislature and the review and vote power of the representatives separately and whether the plaintiffs, composed of all the members of the majority party, needed legal protection. These controversies made it difficult for the Court to proceed to a review on the merits. If this competence dispute had been approved by a majority vote in the

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<sup>167</sup> *Id.* at 16-18.

<sup>168</sup> *Id.* at 19-21.

<sup>169</sup> *Id.* at 21-24.

Assembly and submitted under its name, the Court should have had no reason to dismiss it.<sup>170</sup>

## B. Elections

### 1. *Excessive Electoral District Population Disparity Case*<sup>171</sup>

An issue similar to that raised in *Baker v. Carr* was presented to the KCC in the *Excessive Electoral District Population Disparity Case*. In this case, the Court held that the National Assembly Election Redistricting Plan, which had excessive population disparities, violated the constitutional principle of equality.<sup>172</sup>

According to the census conducted on March 1, 1995, by the Ministry of Internal Affairs and the National Assembly Election Redistricting Plan of the Act on the Election of Public Officials and the Prevention of Election Malpractices,<sup>173</sup> the smallest district is the ‘Chonnam Changheung County’ district with a population of 61,529. The ‘Seoul Kangnam-Eul’ has a population 4.64 times larger, and the ‘Pusan Haewoondae and Kijang County’ district is 5.87 times larger. Overall, about one fifth of the 260 electoral districts in total showed a population disparity larger than 3:1 to the smallest district. In addition, the new ‘Chungbuk Boeun and Youngdong Counties’ district was originally linked to the district of ‘Okchun County,’ the three counties forming one electoral

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<sup>170</sup> On August 17, 1998, about one month after this decision, the appointment of the candidate as the Prime Minister was ratified in the National Assembly in the presence of 225 members: 171 in favor, 65 opposed, 7 abstentions and 12 invalid votes.

<sup>171</sup> 7-2 KCCR 760, 95 HunMa 224, etc. (Dec. 27, 1995).

<sup>172</sup> The voting patterns of electorate in Korea could be characterized by the prevailing rural support for the ruling party and the countervailing urban support for the opposition. Therefore, the ruling party has tried to reduce the number of urban electoral districts and increase the number of rural districts. However, when the provincial voting pattern began to prevail in the 1980s, resulting in sweeping support for a particular party in each region, the parties did not welcome the reduction in the number of districts in their base region. Even within each district, a smaller version of provincialism dictated the outcome. Accordingly, the parties and incumbents tried to draw the electoral districts in a manner advantageous to them, and electoral districts with extreme population disparities emerged as a result.

<sup>173</sup> Revised by Korean Act No. 4957 (Aug. 4, 1995).

district. The new Table turned the ‘Okchun County’ into a separate district, leaving the new district composed of the ‘Boeun and Youngdong Counties,’ which are geographically separated.<sup>174</sup>

The complainants who reside in over-populated districts such as ‘Seoul Kangnam-Eul’ filed a constitutional complaint, arguing that their right to vote and right to equality were violated because their votes are unreasonably diluted compared to the voters in the ‘Chonnam Changheung County’ district. Other complainants, residing in ‘Chungbuk Boeun County,’ brought a complaint asserting that their right to vote and equal weight of votes were infringed when their county was combined with the geographically separate ‘Youngdong County.’<sup>175</sup>

The Court, for the first time, gave its opinion on the principle of equal election and the permissible limit on population disparity and later found the ‘Pusan Haewoondae and Kijang County’ electoral district violative of the permissible limit. The Court also found the ‘Chungbuk Boeun and Youngdong Counties’ district arbitrarily defined and struck down the entire Plan in accordance with the inseparability of electoral district plan.<sup>176</sup>

The principle of equal election is a manifestation of the principle of equality in elections. It not only refutes multiple votes, carries a meaning of equality in the number of votes, and recognizes one-person-one-vote for all, but also mandates equality in the weight of the votes, that is, the extent that one vote contributes to the entire system of election. Although the constitutional mandate of equal weight of votes is not the sole absolute standard and the National Assembly may seek other rational policy goals in

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<sup>174</sup> 7-2 KCCR 760, at 766-67.

<sup>175</sup> *Id.* at 767.

<sup>176</sup> *Id.* at 777.

particular instances of redistricting, it is the most important and basic standard after which other goals can be factored in. When there is inequality in the weight of votes, the Court reviews the rationality behind such inequality as a product of discretion within the constitutional limit, and when it cannot be perceived as reasonable even in light of various non-population-related factors that the National Assembly may consider, it is deemed unconstitutional.<sup>177</sup>

However, Justices differed on the permissible limit of population disparity.

Five Justices set the permissible maximum ratio between the most populous district and the least at 4:1, equivalent to a permissible maximum deviation from the average district of 60%. Since the average population per district is 175,460, the most populous district should not have more than 280,736 voters and the least should not have less than 70,184. Therefore, they found the ‘Pusan Haewoondae and Kijang County’ and ‘Seoul Kangnam-Eul’ districts exceeded the permissible limit and found that the redistricting plan violated the scope of legislative discretion.<sup>178</sup> On the other hand, four Justices set the maximum deviation from an average district separately for different types of districts, and found that no district could exceed 50% deviation. They found the ‘Pusan Haewoondae and Kijang County’ in violation of the limit of legislative discretion.<sup>179</sup>

On the issue of gerrymandering, the Justices unanimously held that a district should be composed of a contiguous geographical area except for certain extraordinary and inevitable circumstances. In this case, without any extraordinary reason or inevitability, ‘Boeun County’ and ‘Youngdong County,’ which are completely separated from each

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<sup>177</sup> *Id.* at 771-73.

<sup>178</sup> *Id.* at 777-80.

<sup>179</sup> *Id.* at 787-88.

other by ‘Okchun County’ in the middle, were joined in one electoral district. Such arbitrary redistricting departed from the scope of legislative discretion, and was found to be invalid.<sup>180</sup>

Even though some criticized the maximum population disparity set by the decision as being too generous, and the Court’s stance as being too passive in realizing political equality, the central principle of democracy, this decision carried a historical meaning in that it stopped the give-and-take collusion of politicians around electoral redistricting and placed a cap on their discretion.

Further, the case made clear that issues of the election process are no longer “non-justiciable political questions” in Korea.

## *2. Local Government Election Postponement Case*<sup>181</sup>

A decision on the merits in this case would have questioned the constitutionality of the presidential measures postponing the first local government heads election ever in Korean history. The majority opinion of the Court, however, dismissed this claim on the ground that a statute was enacted during the review to justify the postponement, eliminating the justiciable interests.

The National Assembly revised the Local Autonomy Act on the basis of Article 118, Section 2 of the Constitution and set the date of the first election of local government heads as December 30, 1991<sup>182</sup> and later revised again to change the date to “December 30, 1992 or earlier.”<sup>183</sup> Then, when some members of the media and business advocated further postponement, citing the likelihood of economic instability and social confusion

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<sup>180</sup> *Id.* at 788-89.

<sup>181</sup> 6-2 KCCR 176, 92 HunMa 126 (Aug. 31, 1994).

<sup>182</sup> Korean Act No. 4162 (Dec. 30, 1989).

accompanying the election, the respondent President Roh Tae-Woo announced at the 1992 New Year Conference that he would postpone the election to 1995 or later, and that he would discuss the appropriateness of this action at the 14<sup>th</sup> National Assembly. Afterwards, the 14<sup>th</sup> National Assembly Election was held on March 24, 1992. Because a preliminary negotiation on whether to conduct the local government heads election stalled, the 14<sup>th</sup> National Assembly did not even open its regular session. In the meantime, the Administration submitted to the Assembly a bill postponing the election to June 30, 1995 or later, and the June 12, 1992 statutory deadline to announce the date of the election passed.<sup>184</sup>

At that point, fifty-nine petitioners who were planning to run or vote in elementary or regional local government heads elections filed a constitutional complaint, claiming that their right to vote and to hold public office (right to be elected) was violated when the government failed to announce the date of the election by June 12, 1992, as required by the then-effective statutes, the amended Local Autonomy Act<sup>185</sup> Supplement Article 2, Section 2, the repealed Election of the Heads of Local Governments Act<sup>186</sup> Article 95, Section 3 and its Supplement Article 6.<sup>187</sup>

The respondent President argued that this claim should be rejected on the ground of the executive prerogative action doctrine, that is, that there was no judicially manageable standard.<sup>188</sup> He raised as a defense the issue of the Continental doctrine of “an executive

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<sup>183</sup> Korean Act No. 4310 (Dec. 30, 1990).

<sup>184</sup> 6-2 KCCR, at 184.

<sup>185</sup> Korean Act No. 4741 (Mar. 16, 1994).

<sup>186</sup> Repealed by Korean Act No. 4739 (Mar. 16, 1994).

<sup>187</sup> 6-2 KCCR, at 184.

<sup>188</sup> *Id.* at 186.

prerogative action” or the American doctrine of “a political question” among many others.

Although the Court’s majority dismissed the case on the grounds that the changes in the relevant statutes during their constitutional review extinguished the legally protected interests related to the postponement of the local government heads election without regard to the ‘executive prerogative action question,’<sup>189</sup> Justice Byun Jeong-Soo, in his dissenting opinion,<sup>190</sup> emphasized that the executive prerogative action doctrine should be repealed, that even highly political actions which are repugnant to constitutional orders and, especially, actions which infringe individuals’ constitutional rights should be reviewed by the Court.<sup>191</sup>

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<sup>189</sup> While the case was pending, the National Assembly set up the Political Relations Laws Special Review Committee and sought to remedy the omission politically. On March 4, 1994, the Plenary Session of the National Assembly passed the Act on the Election of Public Officials and the Prevention of Election Malpractices Act as well as the revisions to the Local Autonomy Act and the Political Fund Act on a bipartisan agreement. The respondent signed them into effect on March 16. The amended Local Autonomy Act specified the postponement to June 30, 1995 or earlier in its Supplement 2. The new Act on the Election of Public Officials and the Prevention of Election Malpractices Act abolished advance announcements of election dates and instead fixed them statutorily (Articles 34 or 36, Supplement Article 2 and 7, Section 1). As a result, the state of the respondent’s violation of the old law by failing to announce the date of election was extinguished (by revision of that law). However, even if the changes in law or fact during the review extinguished legally protectable interests, a justiciable interest would be exceptionally recognized for those violations of basic rights that are likely to repeat or for those disputes, resolution of which are vital to defense of the constitutional order. The repeatability is not an abstract or theoretical possibility but a concrete and real possibility. The importance of constitutional resolution means a lasting constitutional importance. In this case, advance announcements are abolished and election dates are statutorily fixed; therefore, there is neither repeatability of no-announcements nor importance of constitutional clarification. Hence there was no justiciable interest. *Id.* at 190-94.

<sup>190</sup> “It can easily be derived from Articles 24, 25 and 118, Section 2 of the Constitution and the essence of local autonomy that the representative of a local government should be elected by the willing support of the locals. Therefore it is a constitutionally guaranteed basic right. The respondent’s duty to enforce the statute is also pursuant to Articles 66, Section 4, 69 and 118, Section 2 and the complainants’ right to run and vote in elections are subjective rights. The complainants had a right to demand the election at the time they did. Furthermore, the prerequisite repeatability of the same violations should be measured by repeatability of the President’s disruption of the legal order or failure to discharge his statutory duty. Also, the importance of constitutional resolution is immediately recognized upon a showing of possibility of basic rights violations. The complaint met the justiciability requirements.” *Id.* at 218-25.

<sup>191</sup> *Id.* at 220-21.

In response to criticism of the decision for its tardiness,<sup>192</sup> the Court defended itself by explaining that, while seriously examining the constitutional issues involved in the complaint, it awaited an appropriate resolution to be reached in the National Assembly, in consideration of that body's policy-making privilege and role.<sup>193</sup> Paradoxically, this justification implied that it could not decide the case because there were no judicial standards.<sup>194</sup>

### C. Presidential Pardon

As we have seen in the previous subchapter, the exercise of the President's pardon power has been deemed an "executive prerogative power" and the KSC is currently considering a case pertaining to this issue. In 2000, the Court dismissed a prisoner's constitutional complaint concerning the President's grant of amnesty to another prisoner.<sup>195</sup>

The petitioner, sentenced to penal servitude for life, filed a constitutional complaint with the Court, alleging that his equal protection right was invaded when the President granted a limited pardon to the son of a former President. The son, who was sentenced to two years in jail on conviction of taking bribes and tax evasion, was exempted from serving the one-and-a-half-years remaining in his prison term.

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<sup>192</sup> It took two years and two months, only to result in dismissal.

<sup>193</sup> THE KOREAN CONSTITUTIONAL COURT, THE TEN-YEAR HISTORY OF THE KOREAN CONSTITUTIONAL COURT 238 (1998).

<sup>194</sup> A commentator also censured that "the President's legislative proposal and a number of optional actions which the National Assembly could have taken are indeed matters of political questions whose constitutionality or legality the Constitutional Court should restrain itself from acting upon." Dai-Kwon Choi, An Analysis of The Constitutional Grievances Filed Against The Government's Decision to Postpone Local Elections For Governors and Mayors Statutorily Mandated in 1992, 92 SEOUL NATIONAL UNIVERSITY JURISPRUDENCE 122 (1993).

<sup>195</sup> Not yet officially published, 99 HunMa 499 (Apr. 27, 2000).

However, the Court turned down the complaint due to lack of standing requirements,<sup>196</sup> not on the ground of the executive prerogative action doctrine. Therefore, the Constitutional Court also left this issue unresolved.

#### D. Presidential Rule-Making

The presidential emergency rule-making power had traditionally been regarded as an “executive prerogative power,” one of the President’s emergency powers along with the power to proclaim martial law. But the KCC made a big shift on this doctrine in *Presidential Financial and Economic Emergency Order Case*.<sup>197</sup> In this case, the Court made a considerable change in attitude toward this issue, holding that every state action, even those which have highly political components, shall be reviewed by the constitutional court, as long as the issue is relevant to an individual’s constitutional fundamental rights.

The President issued an Emergency Financial and Economic Order on Real Name Financial Transactions and Protection of Confidentiality, which was ratified by the National Assembly, according to the Constitution. A citizen filed a constitutional complaint, alleging that the Presidential Order was unconstitutional because it was issued in the absence of certain prerequisite circumstances prescribed by Article 76, Section 1 of the Constitution.<sup>198</sup> The complaint held that the National Assembly violated the petitioner’s right to know, right to petition, and property rights by failing to impeach the

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<sup>196</sup> The KCC has interpreted the KCCA art. 68, § 1 to mean that a petitioner must have a present and direct harm to himself in order for the KCC to have jurisdiction over the merits of a case.

<sup>197</sup> 8-1 KCCR 111, 93 HunMa 186 (Feb. 29, 1996).

<sup>198</sup> S.KOREACONST. art. 76, § 1 (“In time of internal turmoil, external menace, natural calamity or a grave financial or economic crisis, the President may take in respect to them the minimum necessary financial and economic actions or issue orders having the effect of Act, only when it is required to take urgent measures for the maintenance of national security or public peace and order, and there is no time to await the convocation of the National Assembly.”).

President, pursuant to Article 65 of the Constitution,<sup>199</sup> for issuing an allegedly unconstitutional Order.<sup>200</sup>

The main issues, in this case, were whether a Presidential Financial and Economic Emergency Order can be the subject of a constitutional complaint, even though the rule-making action can be regarded as an executive prerogative action; whether the National Assembly's omission to impeach can be reviewed by the Constitutional Court; and whether the circumstances preceding the issuance of the Order met the requirements prescribed in Article 76, Section 1 of the Constitution.<sup>201</sup>

In this case, the Court examined whether the so-called executive prerogative actions were subject to constitutional review. According to the Court's reasoning, all governmental activities, including executive prerogative actions, should exist only to protect the people's constitutional rights and to promote the free exercise of these rights. Even high-level political decision-making must be subject to constitutional review if it directly involves infringement upon constitutional rights. In particular, the financial and economic emergency decree has the same effect as a statute, and the exercise of such a power should be subject to constitutional scrutiny.<sup>202</sup>

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<sup>199</sup> S.KOREACONST. art. 65, § 1 ("In case the President, the Prime Minister, members of the State Council, heads of Executive Ministries, Justices of the Constitutional Court, judges, members of the National Election Commission, the Chairman and members of the Board of Audit and Inspection, and other public officials designated by Act have violated the Constitution or other Acts in the performance of official duties, the National Assembly may pass motions for their impeachment."); art. 65, § 2 ("A motion for impeachment prescribed in § 1 may be proposed by one third or more of the total members of the National Assembly, and shall require a concurrent vote of a majority of the total members of the National Assembly for passage: Provided, That a motion for the impeachment of the President shall be proposed by a majority of the total members of the National Assembly and approved by two thirds or more of the total members of the National Assembly.").

<sup>200</sup> 8-1 KCCR 111, at 113-14.

<sup>201</sup> *Id.* at 114.

<sup>202</sup> *Id.* at 116-17.

The Court, for the first time, held that the Presidential Order was subject to review by the KCC when it directly involved a violation of fundamental rights of citizens, and therefore this was not a political question. However, the Court declined to review the constitutionality of the National Assembly's failure to impeach the President, because the National Assembly has sole discretion to make impeachment decisions and it has no affirmative duty to act, and therefore dismissed the complaint because the Presidential Order in question was properly issued.<sup>203</sup>

#### V. Recent Ambiguous Trend

A prominent feature of the political question doctrine is the slightly different views of the Korean ordinary courts and the Constitutional Court. The ordinary courts should have shown more judicial activism, because they are also invested with “the power to make a final review of the constitutionality or legality of administrative decrees, regulations or actions in a trial” by the Constitution. It may be that they are still afraid of the “executive prerogative power.”

In recent cases<sup>204</sup> involving political questions, the Constitutional Court has rejected claims because of the lack of the plaintiff's standing, without regard to the political question doctrine. It is still not obvious whether the KCC has repealed the “executive prerogative action doctrine.”

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<sup>203</sup> *Id.* at 118-19.

<sup>204</sup> Not yet officially published, 99 HunMa 499 (May 27, 2000); 10-2 KCCR 563, 97 HunMa 404 (Sep. 30, 1998).

## CHAPTER 4

### POLITICAL QUESTIONS: A COMPARATIVE PERSPECTIVE

Comparison of the political question doctrines of the two countries shows different features in several aspects.

#### I. Is There Any Difference in the Definition and its Scope?

Even though it is difficult to precisely define the concept of the political question doctrine,<sup>205</sup> it is also hard to reject an argument that “an examination of the relevant case law reveals that such a doctrine is very much alive in the USSC decisions.”<sup>206</sup> Withholding observation upon its nature, therefore, the doctrine may be described as a judicially self-imposed restriction on the powers of judicial review.<sup>207</sup> From this perspective, although the terminologies and their scope have been slightly different in the United States and in Korea through both countries’ histories,<sup>208</sup> the recent decisions by the Korean judiciary show that it deals with political questions as a matter of

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<sup>205</sup> John P. Roche, *Judicial Self-Restraint*, in *THE COURT: A READER IN THE JUDICIAL PROCESS* 380 (ROBERT SCIGLIANO ed., 1962) (“The extent to which this doctrine is applied seems to be a direct coefficient of judicial egotism, for the definition of a political question can be expanded or contracted in accordion-like fashion to meet the exigencies of the times. A juridical definition of the term is impossible, for at root the logic that supports it is circular: political questions are matters not soluble by the judicial process; matters not soluble by the judicial process are political questions. As an early dictionary explained, violins are small cellos, and cellos are large violins.”).

<sup>206</sup> Redish, *supra* note 10, at 1033.

<sup>207</sup> Roche, *supra* note 205, at 380 (“Once a case has come before the Court on its merits, the justices are forced to give some explanation for whatever action they may take. Here self-restraint can take many forms, notably, the doctrine of political questions, the operation of judicial parsimony, and – particularly with respect to the actions of administrative officers or agencies – the theory of judicial inexpertise.”).

<sup>208</sup> As we have seen above, the “executive prerogative action doctrine” of Korea primarily focused on the President’s power, with a few exceptions. On the other hand, the “political question doctrine” extended its scope from the President’s discretion area to every political disputes area. In the meantime, the comparison on the object of the political question doctrine shows both countries are a little bit different. But this is not important, because the particular raised issues depend on the social and political circumstances of each country. It is important to add, however, that cultural and political conditions in Korea have constituted a favorable environment for effective judicial review.

justiciability. Korean scholars also do not usually distinguish the meaning of political question and executive prerogative action so far as they use the terms to refer to a justiciability requirement.

Furthermore, from this viewpoint, the terminology ‘executive prerogative action doctrine,’ as a relic of the past colonial and autocratic period, which finds its origin in ‘the King’s prerogative power’ of the United Kingdom, is unlikely to be appropriate to the usage of non-justiciability. An inflexible lexical definition by generalization can result in confusion or misunderstanding. Although ‘political question doctrine’ is a misnomer creating unnecessary misunderstanding, it seems more suitable to express the character of non-justiciability than ‘executive prerogative action doctrine.’

## II. Is There Any Difference in Constitutional Ground?

With respect to the Constitutional provisions giving authority to review the constitutionality of another government branch’s action, the two doctrines are significantly different. The Constitutional basis is the most different feature, and it makes possible a criticism that the Korean judiciary should have employed its full autonomous power as guaranteed by the Constitution.

In the United States, there is no explicit constitutional provision to give this authority. The judicial review authority of federal courts stems from the famous decision in *Marbury v. Madison*.<sup>209</sup> Concurrently with establishment of the Court’s power to

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<sup>209</sup> 5 U.S. (1 Cranch) 137, 177-78 (1803) (“If an act of the legislature, repugnant to the constitution, is void, does it, notwithstanding its invalidity, bind the courts and oblige them to give it effect? ... This would be to overthrow in fact what was established in theory; and would seem, at first view, an absurdity too gross to be insisted on. ... It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. ... So if a law be in opposition to the constitution: if both the law and the constitution apply to a particular case, so that the court must either decide that case conformably to the law, disregarding the constitution; or conformably to the constitution, disregarding the law: the court must determine which of these conflicting

adjudicate the validity of a Congressional act, Chief Justice Marshall limited judicial interference with executive action, as we have seen above. *Marbury* was the result of Marshall's political motive and consideration.<sup>210</sup> This fact has led to much controversy and confusion in decisions by the USSC as well as in academic debates.<sup>211</sup> In other words, it means that there is no controlling standard to decide whether certain matters constitute political questions. This results in the changing of the scope of the political question doctrine over time. In sum, the scope of the political question depends on the attitude of the judiciary. When the judiciary exercises self-restraint, the scope will be broadened. In contrast, when the judiciary engages in activism, the scope will be narrowed.

On the contrary, in Korea, there are provisions both in the Constitution and in pertinent statutes.<sup>212</sup> Strictly construed, there is no room for the political question,<sup>213</sup> except in the case where the Constitution itself commits to other branches.<sup>214</sup> Theoretically, Korean courts, in particular the KCC, should review all actions and

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rules governs the case. This is of the very essence of judicial duty. If then the courts are to regard the constitution; and the constitution is superior to any ordinary act of the legislature; the constitution, and not such ordinary act, must govern the case to which they both apply.”); ROBERT G. MCCLOSKEY, *THE AMERICAN SUPREME COURT* 25-28 (3<sup>rd</sup> ed. 2000).

<sup>210</sup> CHRISTOPHER WOLFE, *THE RISE OF MODERN JUDICIAL REVIEW: FROM CONSTITUTIONAL INTERPRETATION TO JUDGE-MADE LAW* 86-87 (Rev. ed. 1994).

<sup>211</sup> Many scholars cannot agree on several aspects of the doctrine: its definition, its scope, its validity, or even its existence. For example, Redish, *supra* note 10, at 1031 (pointing out that many commentators have “disagreed about its wisdom and validity ... [and] the doctrine’s scope and rationale”). There are several articles criticizing the political question doctrine. Some of these authors believe that the political question doctrine does not exist. See Louis Henkin, *Is There a “Political Question” Doctrine?*, 85 *YALE L.J.* 597 (1976). Other commentators argue that the political question doctrine is dangerous to the concept of judicial review. See Robert F. Nagel, *Political Law, Legalistic Politics: A Recent History of the Political Question Doctrine*, 56 *U. CHI. L. REV.* 643 (1989). But see J. Peter Mulhern, *In Defense of the Political Question Doctrine*, 137 *U. PA. L. REV.* 97, 175 (1988) (arguing that “the political question doctrine is an integral part of [our constitutional] tradition.”).

<sup>212</sup> See Chapter 3, Subchapter I and II.

<sup>213</sup> HAND, *supra* note 9, at 15-6 (“As we all know, the Supreme Court has steadfastly refused to decide constitutional issues that it deems to involve “political questions”...although this feature of the doctrine has been a stench in the nostrils of strict constructionists.”).

functions of the public authority, especially when the actions are involved with the individual's basic rights. Especially, the Korean Constitution explicitly provides the Constitutional Complaint Adjudication System to more perfectly protect the people's constitutional rights. Under the constitutional rationale, therefore, the KCC would never abdicate authority on the ground of the political question doctrine. Nevertheless, some scholars have argued that, under the purposiveness<sup>215</sup> or self-restraint theory,<sup>216</sup> the Korean judiciary can have discretion to decide whether the case before it is justiciable.

Unfortunately, however, Korea's unhappy political history shows that the so-called executive prerogative action doctrine has been politically abused and the purposiveness or self-restraint theory has come to be involuntary abandonment or avoidance of judgment theory. In order for Korean courts to be fully enabled to test whether a governmental decision is based on an abuse of public power, it is imperative to establish some reasonable standards. In doing so, Korean courts might consult decisions where the USSC has tried to protect individual rights from the discretionary exercise of public authority.

### III. Is There Any Difference in the Standard?

In every democratic society approving modern constitutionalism, every state action or function shall be in conformity with the Constitution and laws made by the legislature, i.e. the representatives of the people, and therefore the judiciary may review the legitimacy of such actions and functions. Reviewing legitimacy is the duty which the Constitution commands to the judiciary. Strictly construed, it is a constitutional

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<sup>214</sup> S.KOREA CONST. art. 68, § 4.

<sup>215</sup> YOUNG-SUNG KWON, THE PRINCIPLES OF CONSTITUTIONAL LAW: A TEXTBOOK 793-94 (Rev. ed., 2000).

command, binding all government branches including the judiciary, and not a matter of the proper scope of judicial activism and self-restraint in democracies. This is a general and basic principle of democratic constitutionalism. Nevertheless, some cases include highly political issues, and sometimes highly political judgments are needed to resolve the issues. Therefore, if the court decides that the issue is really political and so might be best resolved by the political branches, the court can (not should) refuse to decide. The most fundamental point is that only the judiciary can voluntarily decide whether the case is a political question.<sup>217</sup>

However, even though the judiciary can refuse to decide issues raising a political question, it is evident that there may be compelling interests or policies superior to the plaintiff's right to be tried in the courts. Furthermore, to reject the plaintiff's claim on the ground of the political question doctrine, there should be some reasonable standards, which the judiciary should be subject to, although these standards can be different according to the constitutional, historical, and societal circumstances of each country.

Although the Korean judiciary has recently acknowledged the basic principle that so-called "executive prerogative action" should be amenable to judicial review when it is involved with the individual's constitutional rights, it is not clear that the judiciary has repealed the "executive prerogative action doctrine." Moreover, the judiciary seems to admit that some cases include highly political issues, which might be better resolved by political branches, not by the judiciary. Thus, there should be some standards to decide which claims present the non-justiciability problem. Some commentators have tried to set up criteria to govern the executive prerogative action. Arguing that because the executive

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<sup>216</sup> UN-YOUNG KIM, *THE PRINCIPLES OF JUDICIAL REVIEW* 484-91 (1998).

prerogative action doctrine might infringe the individual's right to be tried before the courts and the rule of law principle, its scope should be extremely narrow, Professor Kwon proposes the standards as follows: a textually demonstrable constitutional commitment of the issue to a coordinate governmental branch; and/or non-involvement with the individual's constitutional rights.<sup>218</sup> Unfortunately, however, no decisions by Korean judiciary have tried to establish standards, unlike the USSC.

At this point, it seems useful to examine whether the standards of the USSC can play an important role in Korean political question jurisprudence. As we have seen in Chapter 2, the American doctrine is summarized into two main factors: the classical version and prudential rationale. More closely observed in the light of its historical background, the doctrine has employed several detailed standards in practical experience and many decisions. Professor Frank divided practical grounds for the doctrine into four categories which overlap and which frequently buttress each other, as follows:

1. the need for quick and single policy;
2. judicial incompetence;
3. clear prerogative of another branch of the government; and
4. avoidance of unmanageable situations.<sup>219</sup>

Also, in *Baker v. Carr*, Justice Brennan employed six comprehensive criteria as follows:

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<sup>217</sup> Bickel, *supra* note 34, at. 184.

<sup>218</sup> For example, the President's power submitting important policies relating to diplomacy, national defense, unification and other matters relating to the national destiny to a national referendum (S.KOREACONST. art. 72); the President's power to request for reconsideration of a bill to the National Assembly (art. 53, § 2); and the President's power on foreign relations. KWON, *supra* note 215, at 794-95.

1. a textually demonstrable constitutional commitment of the issue to a coordinate political department;
2. a lack of judicially discoverable and manageable standards for resolving it;
3. the impossibility of deciding without an initial policy determination of a kind clearly for non-judicial discretion;
4. the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government;
5. an unusual need for unquestioning adherence to a political decision already made; or
6. the potentiality of embarrassment from multifarious pronouncements by various departments on one question.<sup>220</sup>

Although these criteria look somewhat partial and arbitrary, they can play an affirmative role through theoretical acculturation suitable for the constitutional, political, and social surroundings. As Professor Rostow has put it,<sup>221</sup> a wise Court will take account of the likely reactions of the political departments and of public opinion when it reaches its decision.<sup>222</sup> However, it should be remembered that this kind of consideration shall not be raised by the Korean judiciary when the issue raised is involved with the constitutional rights.

#### IV. Is There Any Difference in Application to Particular Areas?

Listing areas in which the political question doctrine seemed to be reasonably applied over its history in the United States, those are (1) republican form of government; (2) enactment of statutes; (3) constitutional amendment; (4) duration of state of war; (5)

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<sup>219</sup> John P. Frank, Political Question, in SUPREME COURT AND SUPREME LAW 38-40 (EDMOND CAHN ed., 1954).

<sup>220</sup> 369 U.S. 186, 217 (1962).

<sup>221</sup> EUGENE V. ROSTOW, THE SOVEREIGN PREROGATIVE 34 (1962) ("Exercising high political powers, the Court must have a high sense of strategy and tactics. Its influence on our public life depends in large part on the Court's skill in advocacy and its sensitivity to the powerful forces which from time to time, in different combinations, must resist its will.").

<sup>222</sup> See generally MARTIN M. SHAPIRO, LAW AND POLITICS IN THE SUPREME COURT: NEW APPROACHES TO POLITICAL JURISPRUDENCE 1-49 (1964).

international boundaries; (6) abrogation of treaties; (7) recognition of foreign governments; (8) other matters affecting foreign policy;<sup>223</sup> and (9) impeachment.

In contrast, in Korea, the executive prerogative action doctrine has been used in a sphere involving with (1) presidential rule-making action; (2) exercising presidential pardon power; (3) proclaiming martial law; and (4) legislative autonomy.

At a glance, it seems as though the executive prerogative action doctrine in Korea is much narrower than the political question doctrine in the United States. But, it should be noted that the particular areas raising political question issues depend on the social and political circumstances of each country. Therefore, it does not seem important to simply compare the objects of the political question doctrine to each other.<sup>224</sup> More important points are legal, cultural and political conditions constituting favorable environments for effective judicial review.

Furthermore, the “case-by-case inquiry”<sup>225</sup> is more useful than generalization of each doctrine. Thus, from now on, the most controversial area today in Korea, i.e. the President’s pardon power, will be compared with the American practice and theory.

As discussed above, in 1999, when the incumbent President pardoned the former President’s second son, a citizen brought an administrative litigation against the President, seeking withdrawal of the amnesty. However, the Seoul Administrative District Court held that the exercise of the President’s pardon power was a highly

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<sup>223</sup> Up to here, *see* HENRY M. HART, JR. & HERBERT WECHSLER, *THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 192-96 (1953).

<sup>224</sup> It seems usual that the issue of the executive prerogative action doctrine is indispensable in Korean textbooks on constitutional law. In discussing this loosely defined issue, textbook authors often seem to be satisfied with introducing as many foreign theories as available in their information box. A typical way is to list up the issues on a flat ‘comparative’ scale. This necessarily invites unnecessary confusion and misunderstanding.

<sup>225</sup> Baker, 369 U.S., at 210-11.

political action, and therefore it could not be reviewed by the court,<sup>226</sup> with no reasonable explanation. After this decision, the Lawyers' Association for a Democratic Society requested the Department of Justice to disclose data on the President's pardon. But the Department refused and the Association brought an administrative action against the Head of the Department seeking withdrawal of the refusal. At this time, the Administrative court unexpectedly held that this was not a political question and the Head had to release the data.<sup>227</sup> Unfortunately, however, this decision was reversed in the appellate court,<sup>228</sup> and now is pending in the Supreme Court.

Also, in 2000, the Court dismissed a prisoner's constitutional complaint concerning the President's grant of amnesty,<sup>229</sup> arguing that his equal protection right was invaded, when the President granted a limited pardon to the son of a former President. However, the Court turned down the complaint due to lack of standing, not on the ground of the executive prerogative action doctrine.

Therefore, the Korean judiciary has left this issue unresolved, and one constitutional scholar argues that the pardon power is not an example of executive prerogative action.<sup>230</sup>

The history of the presidential pardon power<sup>231</sup> in the United States is old and rich with decisions by the Supreme Court on the issue.

In 1833, for a unanimous court in *United States v. Wilson*,<sup>232</sup> Chief Justice Marshall defined a pardon as follows:

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<sup>226</sup> Seoul Administrative Court Decision No. 99 Gu 24405 (Feb. 2, 2000).

<sup>227</sup> Seoul Administrative Court Decision No. 99 Gu 26517 (Dec. 3, 2000).

<sup>228</sup> Seoul High (Appellate) Court Decision No. 2000 Nu 15783 (Sep. 13, 2001).

<sup>229</sup> Not yet officially published, 99 HunMa 499 (Apr. 27, 2000).

<sup>230</sup> KWON, *supra* note 215, at 795.

<sup>231</sup> U.S.CONST. art. II, § 2, cl. 1 ("The President...shall have Power to grant Reprieves and Pardons for Offenses against the United States,")

<sup>232</sup> 32 U.S. (7 Pet.) 150 (1833).

A pardon is an act of grace, proceeding from the power intrusted with the execution of the laws, which exempts the individual, on whom it is bestowed, from the punishment the law inflicts for a crime he has committed. It is the private, though official, act of the executive magistrate, delivered to the individual for whose benefit it is intended, and not communicated officially to the court.<sup>233</sup>

On the other hand, in 1927, also for a unanimous court in *Biddle v. Perovich*,<sup>234</sup>

Justice Holmes gave a different definition of a pardon:

A pardon in our days is not a private act of grace from an individual happening to possess power. It is a part of the Constitutional scheme. When granted it is the determination of the ultimate authority that the public welfare will be better served by inflicting less than what the judgment fixed.<sup>235</sup>

As Professor Buchanan properly observed and concluded, Holmes' conception of a pardon better promotes the policy goals of the Constitution than does Marshall's definition.<sup>236</sup>

In addition, Buchanan acknowledged that the Court might avoid the issue by classifying the scope of the pardon power as a 'political question,' and thus non-justiciable.<sup>237</sup> Rejecting the Marshall proposition that the validity of a pardon turns upon its acceptance by the pardonee, he nonetheless stressed Chief Justice Taft's opinion that

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<sup>233</sup> *Id.* at 160-61.

<sup>234</sup> 274 U.S. 480 (1927).

<sup>235</sup> *Id.* at 486.

<sup>236</sup> In defining the nature of a pardon in our "constitutional scheme," he emphasized that the following policy goals are importantly relevant: (1) fidelity to the text of the Constitution; (2) fidelity to the historical bases for inclusion of the pardon power in the Constitution; (3) fidelity to the structural implications of our constitutional system; (4) the preservation of executive capacity to promote the public welfare; and (5) the preservation of executive capacity to bestow mercy. G. Sidney Buchanan, *The Nature of a Pardon Under the United States Constitution*, 39 OHIO ST. L.J. 36, 49 (1978).

<sup>237</sup> *Id.* at 65 ("[T]his article has proceeded on a dominant underlying assumption: It is in accord with our constitutional scheme to maximize the areas in which the President has unreviewable discretion in the exercise of the pardon power.").

human dignity suffers if the pardonee is denied the right to choose between acceptance or non-acceptance. In other words, a requirement of acceptance is necessary to give the pardonee adequate protection against presidential abuse.<sup>238</sup>

Although the issue of the exercise of the presidential pardon power might present a political question in both countries, it seems evident that the individual's constitutional right to freely choose for himself is superior to the presidential discretion with respect to a pardon.

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<sup>238</sup> Ex parte Grossman, 267 U.S. 87, 121 (1925).

## CHAPTER 5

### CONCLUSION

In 2000, the political question doctrine was one of the controversial issues in Korean courts and the USSC. While a Korean court reacknowledged the concept of the executive prerogative action,<sup>239</sup> the USSC declined to consider the political question doctrine.<sup>240</sup> The more important point is, however, that the current trend on political questions in Korea is in line with that of American judicial activism. In other words, both countries are trying to narrow the range of the doctrine. Nonetheless, the two are proceeding in sharply opposite directions. Fully matured, even excessively extended American judicial activism should return to the classical doctrine, i.e. the separation of powers doctrine and judicial self-restraint. On the contrary, a developing Korean judicial activism should be accelerated by the support and encouragement of the people, in support of the belief that the constitutional adjudication system is the last resort for protection of the constitutional rights of the people. These contradicting views on the political question urge reconsideration of the status of the judiciary and its role in democratic society.

Two democracies, both strong and dynamic, are linked by the political question doctrine: Korea, one of the youngest representative democracies, and the United States, the oldest. While the latter has already celebrated its bicentennial, Korea is only in its sixth decade of independence. Notwithstanding the history of independence as a democracy, the history of independence of the two judiciaries is also divergent: Korea is

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<sup>239</sup> Seoul Administrative Court Decision No. 99 Gu 24405 (Feb. 2, 2000).

just in its second decade,<sup>241</sup> whereas judicial independence has been alive in the United States for much more than two hundred years. Nonetheless, both countries share the values of judicial activism and the vibrating heartbeats of democracy. Both countries' courts today try to achieve social and constitutional goals, beyond examining the technical limits of the judicial power. If a goal has been set and legitimized by consistent judicial decisions, Courts can proceed confidently, without fear of obstacles to intervention.

From a social jurist's viewpoint, a constitutional case should be analyzed in the concrete political-social context out of which it arises, and the question of what constitutional law is to be applicable to the case should be answered in the political-social context, not by use of abstract lexical definitions.<sup>242</sup>

It seems somewhat ironical to try to find the solution to legal problems concerning the political question doctrine, as a theory, by drawing a line between "laws" and "politics" in the social-political context. However, as we have seen in the history of the USSC, the scope of a political question corresponds to the self-confidence and degree of independence of the judiciary, in other words, judicial activism. Self-assurance of the judiciary also depends upon the confidence of and encouragement by the people.<sup>243</sup>

It is dubious whether the executive prerogative action doctrine is now in a defensive posture in Korea, although the thorough surgical operations which have been performed

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<sup>240</sup> *Bush v. Gore*, 531 U.S. 98 (2000).

<sup>241</sup> I count this history from 1987, when the current Constitution was revised and the new Constitutional Court was founded by the Constitution resulted from the democratization movement by the Korean people.

<sup>242</sup> *See Choi, supra* note 194, at 123-24.

<sup>243</sup> Public confidence on the USSC denied the Court Packing Plan by the President Roosevelt. WILLIAM BURNHAM, *INTRODUCTION TO THE LAW AND LEGAL SYSTEM OF THE UNITED STATE* 11 (2<sup>nd</sup> ed. 1999).

on the doctrine in the last decade revealed and displayed its weakness and inherent ills. The doctrine should have more exceptions than rules, and more pragmatic and flexible applications than dogmatic and rigid contours. To achieve this goal, the most important thing is the independence of the judiciary from the political branches, especially the executive. Also, to abide by the constitutional command to protect the basic constitutional rights of the Korean people, the independence of the judiciary is imperative to the encouragement and support by the Korean people.<sup>244</sup>

In sum, at a point in time when judicial activism and independence of the judiciary are needed by society, Korea should pay attention to Justice Marshall's momentous opinion in *Cohens v. State of Virginia*;

“It is most true that this Court will not take jurisdiction if it should not: but it is equally true, that it must take jurisdiction if it should. The judiciary cannot, as the legislature may, avoid a measure because it approaches the confines of the constitution. We cannot pass it by because it is doubtful. With whatever doubts, with whatever difficulties, a case may be attended, we must decide it, if it be brought before us. We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the constitution. Questions may occur which we would gladly avoid; but we cannot avoid them. All we can do is, to exercise our best judgment, and conscientiously to perform our duty. In doing this, on the present occasion, we find this tribunal invested with appellate jurisdiction in all cases arising under the constitution and laws of the United States. We find no exception to this grant, and we cannot insert one.”<sup>245</sup>

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<sup>244</sup> KIM, *supra* note 216, at 491-93.

<sup>245</sup> 19 U.S. (6 Wheat.) 264, 404 (1821).

## EPILOGUE<sup>246</sup>

[JOONGANG ILBO (Newspaper), April 8, 2002]

[EDITORIAL] Judge on the Wrong Track

The (Korean) Constitutional Court has been asked to decide whether or not the current personnel system of judges is constitutional. Moon Heung-Soo, a senior judge at the Seoul District Court, filed a constitutional complaint with the Court, arguing that the current personnel system for promotion and reappointment of judges and their wage system are unconstitutional. This is an unprecedented move by a senior judge.

Mr. Moon says in the complaint that promotion to a bench on the High (Appellate) Court based on a performance evaluation by his superiors violates the constitutional right to pursue happiness, equality, individuality and obligations of public service. He also says that the reappointment system for judges after 10 years in office and judges' wage system also violate their constitutional rights. He proposes a system that allows judges to be evaluated on the basis of specific and objective facts; for example, the number of cases handled and the number of cases repealed. He also calls for a guaranteed retirement age for judges and same-time promotion of judges appointed in the same year to high court positions. He says he has thought about these matters over the last 20 years. He says he is making an issue of them now because he wants to enhance the people's trust in the courts and the problems in the personnel system of the courts must change.

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<sup>246</sup> This epilogue is actually not a part of this paper. However, I would like to introduce these editorial and article from a Korean newspaper, in order to show commencement of the movement for the independence of the judiciary.

But there are problems with the points in his petition. We cannot agree with his saying, “Judges can gain the respect and trust of the people and handle the cases more for the benefit of the people if they are guaranteed a seat on the bench for life.” Promoting all judges appointed in the same year to high courts at the same time is impossible. Guaranteeing the retirement age of judges in order to get rid of the bad old practice of giving special favors to retired judges who open a law office is ludicrous.

Lively debate is the best way to improve the judicial personnel system. Mr. Moon’s complaint can be a good start for public discussion. But it is not desirable to depend on outside institution like the Constitutional Court. More desirable is discussion among the judges themselves and a consensus from such internal debate.

[JOONGANG ILBO, April 7, 2002]

[ARTICLE] Judge Challenges Promotion System

A judge at the Seoul District Court filed a constitutional complaint against the Chief Judge (of Korean Supreme Court) Saturday, insisting that the present personnel system of judicial officers is unconstitutional.

A Judge Moon Heung-Soo said that the Chief Judge has been selecting candidates from only certain district courts for elevation to chief judge at higher courts.

The personnel system violates the constitutional right to pursue happiness, equality, individuality and the obligations of public service, Mr. Moon wrote.

He asserted that the personnel system is a relic of the past colonial and autocratic period that compelled judges to follow seniority, adding that the personnel system is hindering the independence and democratic operation of the judicial branch.

Since a limited number of judges are promoted to the high court, Mr. Moon said, the bench tries to avoid offending the Chief Judge, who holds personnel authority. He argued that a new personnel administration that would evaluate the judges by their abilities should be introduced.

He also proposed that senior judges at high courts and district courts should be treated as equals so that when a judge is not promoted he would not have to leave the bench.

Mr. Moon asserted that the existing personnel system forces judges into early retirement. The average age of a sitting judge is usually under 40. Courts are sometimes called the incubator of future lawyers, since judges open up private practices after failing to get promoted.

“I have handed in the petition because I could not expect the court to ameliorate personnel matters on its own,” said Mr. Moon.

The court’s administrative office dismissed Mr. Moon’s proposals as unrealistic. It said an average of 150 persons are appointed as judges, therefore it is inevitable that only a limited number will be promoted, since only 10 or so seats are available for high court chief judge positions every year.

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