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Abstract

National security governance has predominantly been organized by the elected branches of government. The executive and legislative branches, many constitutional scholars contend, are institutionally more competent and democratically more legitimate in governing national security matters than courts. However, the conventional view that courts play limited roles in overseeing national security policies is not universally supported, and this is especially the case in ontologically contested democracies, where the boundary of the state or the core interests of national security are inherently contentious due to the prolonged geopolitical tensions these democracies experience. Owing to the distinct nature of ontologically contested democracies, national security governance involves the normalization of geopolitical tensions, uneven public support for the executive's decisive national security measures, and high-profile national security disputes. These three factors present a particular political and constitutional environment that may encourage courts to oversee national security policies in a rigorous manner.

In this dissertation, I examine the oversight of national security policy by constitutional courts in three ontologically contested democracies: South Korea, Taiwan, and Lithuania. Focusing on the behavior of the three constitutional courts, I present three major research findings: First, I show that the methodologies used by the constitutional courts to handle national security disputes have been shaped by their respective international and domestic political contexts. Second, I identify three conditions which contribute to the exercise of oversight by the Constitutional Courts of South Korea, Taiwan, and Lithuania in the national security context: judicial capacity, political schism, and judicial reputation.

Regarding judicial capacity, I argue that the three constitutional courts have been familiar with and thus capable of deciding on national security disputes related to civil liberties protections, mandatory military issues, and large-scale military reforms, given that the disputes within these categories have been handled by the courts regularly due to the normalization of national security concerns in these jurisdictions. Regarding political schism, I demonstrate that intense political divisions in South Korea, Taiwan, and Lithuania have given the three constitutional courts substantial leverage to mediate political elites. Finally, concerning judicial reputation, I show that the Constitutional Courts of South Korea, Taiwan, and Lithuania have rigorously exercised oversight in high-profile national security disputes. As these disputes attract widespread attention from domestic or even international audiences, judicial oversight, rather than deference, strengthens the reputation of the courts in the eyes of their target audiences.

Third, I demonstrate that by exercising oversight, the Constitutional Courts of South Korea, Taiwan, and Lithuania have stimulated legal reforms, mediated political conflicts, and strengthened the doctrinal significance of national security in their respective jurisdictions. Through these methods, the three constitutional courts have rigorously established the ground rules for formulating and enforcing national security policies. With these findings, I underscore the necessity of carefully considering the nuanced dynamics and effects of the judicial politics surrounding national security law from a comparative perspective. Comparative studies of national security law can broaden and deepen our understanding of the functions of courts within diverse national contexts.

CHAPTER 1

INTRODUCTION

National security law is contentious. To detect and defend against security threats, governments adopt and update a wide array of regulations that affect issues ranging from military operations,[1] critical infrastructure,[2] and technology regulations[3] to border control,[4] information surveillance, and censorship.[5] Governments use these regulations to stave off threats of a foreign[6] and domestic nature.[7] Perhaps not surprisingly, such regulations have sparked intense debates on the precise functions and responsibilities that should fall under the purview of governmental organs with respect to accurately assessed security risks and policy priorities.[8] In fact, few other fields of law have triggered as much political confrontation as national security law, given that it often gives

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[1] STEPHAN DYCUS, WILLIAM C. BANKS, PETER RAVEN-HANSEN & STEPHEN I. VLADECK, NATIONAL SECURITY LAW 2 (2020). ERIC A. POSNER & ADRIAN VERMEULE, THE EXECUTIVE UNBOUND: AFTER THE MADISONIAN REPUBLIC 122 (2011).

[2] Emily Frye, Gregory Staiti, *Hold the (Internet) Phone! The Implications of Voice-Over-Internet Protocol (VOIP) Telephony for National Security & Critical Infrastructure Protection,* 1 I/S: J. L. & POL'Y FOR INFO. SOC'Y 571, 571-572 (2005). Christopher S. Kulander, *Intruder Alert! Running The Regulatory Gauntlet To Purchase, Own, And Operate American Energy And Mineral Assets By Foreign Entities*, 46 TEX. TECH L. REV. 995, 1006-1008 (2014).

[3] Zachary D. Clopton, *Territoriality, Technology, and National Security*, 83 U. CHI. L. REV. 45, 45 (2016). A. Michael Froomkin, *The Death of Privacy?,* 52 STAN. L. REV. 1461, 1498 (2000). Robert Chesney, *Deep Fakes, A Looming Challenge for Privacy, Democracy, and National Security,* 107 CALIF. L. REV. 1753, 1753 (2019).

[4] Susan M. Akrama & Kevin R. Johnson, *Race, Civil Rights, and Immigration Law after September 11, 2001: The Targeting of Arabs and Muslims,* 58 N.Y.U. ANN. SURV. AM. L. 295, 316 (2002).

[5] Jack M. Balkin, *The Constitution in the National Surveillance State*, 93 MINN. L. REV. 1, 1-9 (2008). Neil M. Richards, *The Dangers of Surveillance,* 126 HARV. L. REV. 1934, 1934, 1960 (2013). John Yoo, *The Terrorist Surveillance Program and the Constitution,* 14 GEORGE MASON L. REV. 565, 565 (2007).

[6] Samuel Issacharoff & Richard H. Pildes, *Emergency Contexts Without Emergency Powers: The United States' Constitutional Approach to Rights During Wartime*, 2(2) I-CON 296, 296 (2004). Mark V. Tushnet, *Defending Korematsu?: Reflections on Civil Liberties in Wartime,* 2003 WIS. L. REV. 273, 279 (2003).

[7] *Id.*

[8] Cass R. Sunstein, *Minimalism at War,* 2 SUP. CT. REV. 47, 49-50 (2004).

rise to difficult questions about the theories, tools, and consequences that underlie attempts to safeguard a country's security and sovereignty.

National security governance poses acute challenges for ontologically contested democracies; that is, for democracies that the ontological foundation of "their" political status remains constantly contested.[9] Over the course of the 19th and 20th centuries, state institutions have undergone irregular developments interrupted at various historical junctures by wars, colonial rule, and authoritarian governments. These interruptions have posed critical challenges to political elites in ontologically contested democracies, where their collective senses of security and stability are usually unstable, if not entirely lacking.[10] Thus, political elites must simultaneously navigate their uncertain territorial boundaries, determine the composition of the demos, and negotiate the internal rules of collective governance.[11] Unlike ontologically established democracies, ontologically contested democracies may undergo a complicated process of national and democratic consolidation.[12] These challenges are prominently manifest in the indispensable policies that a country adopts for its national security.

One way in which ontologically contested democracies shore up their sense of security is to establish a powerful state, and one way to accomplish this goal is to arrange national security affairs in a way that discourages courts from exercising their power rigorously. Because foreign

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[9] SAMUEL ISSACHAROFF, FRAGILE DEMOCRACIES: CONTESTED POWER IN THE ERA OF CONSTITUTIONAL COURTS 2 (2015). Thomas Soehl & Sakeef M. Karim, *How Legacies of Geopolitical Trauma Shape Popular Nationalism Today,* 86(3) AMERICAN SOCIOLOGICAL REVIEW 406, 408-409 (2021).

[10] *Id.*

[11] *Id. See also* CHAIHARK HAHM & SUNG HO KIM, MAKING WE THE PEOPLE: DEMOCRATIC CONSTITUTIONAL FOUNDING IN POSTWAR JAPAN AND SOUTH KOREA 16 (2015). ("collective self-determination frequently connotes liberation not only from foreign or tyrannical rule but also from the past itself.").

[12] Soehl & Karim, *supra* note 9.

and domestic affairs are interconnected, a national government presumably needs substantial authority to assess the effectiveness and appropriateness of national security policies and their complicated implications on a wide range of domestic affairs.[13] Moreover, national security disputes tend to embody contentious political questions regarding the boundaries of the nation. Without sufficient political support, courts lack strong incentives to involve themselves in commenting on national security issues or indeed on any controversial political issues and certainly lack an incentive to override decisions made by the political branches of government.[14] Thus, in contexts where the ontological foundation of a political community is contested, the central government might encourage courts to embrace judicial deference, particularly with respect to national security affairs.

Nevertheless, the judiciary may be unexpectedly competent in adjudicating national security disputes in ontologically contested democracies. Individual judges, if equipped with sufficient capacity to process national security information, might be able to diffuse regional conflicts within the country and with neighboring countries.[15] Courts, therefore, need not be illiterate about the complicated nature of national security policies. What is more, high levels of political contestation create a political environment where courts have incentives to create a "win-win" situation by distributing political interests among various political actors.[16] Accordingly,

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[13] DYCUS, BANKS, RAVEN-HANSEN & VLADECK, *supra* note 1, at 2.

[14] GARY JEFFREY JACOBSOHN, CONSTITUTIONAL IDENTITY 110 (2010).

[15] Michael J. Sherman, *Military and National Security Deference in Judicial Decision Making: The Differing Cases of Israel and the United States*, 87 UMKC L. REV. 367, 391-392 (2019).

[16] Wen-Chen Chang, *Strategic Judicial Responses in Politically Charged Cases: East Asian Experiences*, 8(4) I-CON 885, 899-900 (2010).

courts may have considerable confidence in exercising vigilant oversight of the national government's more controversial security policies.[17]

The nuanced challenges of national security governance remind comparative constitutional scholars that critical questions surround how courts both behave and should behave when they face national security dilemmas. In fact, these questions have garnered attention from national security scholars in countries possessing widely accepted governmental practices that help distinguish external matters from domestic ones.[18] Having reflected on America's post-911 security governance, many legal scholars specializing in US security law have proposed the concept of national security exceptionalism (NSE) as a way to deal with courts' handling of national security disputes. According to NSE, judicial involvement in national security governance is—and should be—distinctly minimal in contrast to what judges do in adjudicating other legal matters.[19] Building on the theoretical accounts of NSE, some scholars have found its practical applications in a wide array of national security affairs,[20] whereas others demonstrate the limits of NSE in prescribing or even describing how courts should handle national security disputes.[21] Debates about the relative

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[17] *Id*, at 905-906.

[18] United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 315, 321.

[19] *See e.g.,* POSNER & VERMEULE, *supra* note 1, at 5. A. POSNER & ADRIAN VERMEULE, TERROR IN THE BALANCE: SECURITY, LIBERTY, AND THE COURTS 161-181 (2007); Eric Posner & Adrian Vermeule, *Emergencies, Tradeoffs, And Deference*, in DAVID DYZENHAUS, CIVIL RIGHTS AND SECURITY (Ashgate 2008). Eric Posner & Adrian Vermeule, *The Credible Executive*, 74 U. CHI. L. REV. 865 (2007); Eric Posner & Adrian Vermeule, *Accommodating Emergencies*, 56 STAN. L. REV. 605 (2003); Eric Posner & Adrian Vermeule, *Crisis Governance In The Administrative State: 9/11 And The Financial Meltdown of 2008*, 76 U. CHI. L. REV. 1613 (2009); Eric Posner & Adrian Vermeule, *Emergencies And Democratic Failure*, 92 VA. L. REV. 1091 (2006); Eric Posner & Adrian Vermeule, *Emergencies And Political Change: A Reply To Tushnet*, 56 STAN. L. REV. 1593 (2004); Eric Posner & Adrian Vermeule, *Originalism And Emergencies: A Reply To Lawson*, 87 B.U. L. REV. 313 (2007). JOHN YOO, THE POWERS OF WAR AND PEACE: THE CONSTITUTION AND FOREIGN AFFAIRS AFTER 9/11 (2005).

[20] *See e.g.* Cass R. Sunstein, *Judging National Security Post-9/11: An Empirical Investigation*, 2008 SUP. CT. REV. 269 (2008).

[21] *See e.g.* Aziz Z. Huq, *Against National Security Exceptionalism*, 2009 SUP. CT. REV. 225, 227-228 (2009). *See* my discussion in Chapter 2.

merits of NSE, therefore, reflect many of the questions faced by courts operating in ontologically contested democracies. In other words, these questions touch on the highly generalizable, if not universal, nature of national security law: particularly when contested, this field of law involves a nuanced interplay of distinct and sometimes opposing ideas, institutions, and contexts that can critically shape a nation's evolution on the global stage.

The critical challenges that national security governance imposes on ontologically contested democracies can be couched in a small number of useful questions: To what extent can NSE help scholars reflect on the experiences of ontologically contested democracies?[22] What regulatory concerns do judges, politicians, and citizens in such a country have when they face difficult national security disputes? How do these stakeholders try to resolve the disputes? And finally, to what extent are the national security practices of these stakeholders similar to or different from the corresponding practices in ontologically established democracies, such as the United States and Canada?[23]

In this dissertation, I analyze the judicial involvement of national security law and politics in South Korea, Taiwan, and Lithuania to unpack the nuanced roles that three constitutional courts have played in the scrutinizing and shaping of national security policies. Although these three countries made the transition from authoritarian rule to democracy in the 1980s and 90s, I selected them for my dissertation primarily because political members of each jurisdiction disagree on their national status, posing significant challenges to their security governance. Contrary to what

[22] David Dyzenhaus, *Introduction*, in DYZENHAUS EDS., CIVIL RIGHTS AND SECURITY xi (2008) (recognizing that terrorism is not the major cause of insecurity around the world).

[23] Frédéric Mégret, *Terrorism and Human Rights: A Decade of Canadian Practices*, in BALANCING LIBERTY AND SECURITY 147-170 (Ludovic Hennebel & Hélène Tigroudja eds., 2011).

adherents to NSE may expect, courts in these three national contexts have tended to exercise considerable oversight of national security disputes while striving to preserve the principles of constitutional democracy. In acknowledging the fact that the courts in these three countries are not indifferent to people's demand for constitutional rights, I formed three research questions that have guided this dissertation: (1) How do the constitutional courts exercise oversight of national security policies? (2) What are the conditions for constitutional courts to exercise oversight of national security policies? (3) What are the effects of the constitutional courts' oversight of national security policies? The three questions should yield empirically sound evidence capable of helping us find answers to a challenging normative question that has concerned constitutional scholars for decades: how should constitutional courts exercise oversight of national security policies?

1. Defining 'National Security Law': A Functional Approach

To compare the convergence and divergence of judicial practices in different jurisdictions, one must first establish an operational definition of 'national security law'. In this dissertation, the term refers to a collective body of laws, regulations, and institutions that structure a national government's power to safeguard the sovereignty, citizenry, and institutional integrity of the nation.[24] National security law creates security organs, provides legal frameworks, and establishes legal mechanisms empowering governmental branches to handle various national security challenges, including the detection and prevention of national security threats from foreign and domestic sources.[25] Moreover, national security law defines the scope within which governmental

[24] DYCUS, BANKS, RAVEN-HANSEN & VLADECK, *supra* note 1, at 1-2. Paul O'Neill, *Introduction,* in SECURING THE STATE AND ITS CITIZENS 1-2 (Paul O'Neill eds., Rusi 2022). Christopher Daase & Cornelius Friesendorf, *Introduction: Security Governance and the Problem of Unintended Consequences,* in RETHINKING SECURITY GOVERNANCE: THE PROBLEM OF UNINTENDED CONSEQUENCES 1-2 (Christopher Daase & Cornelius Friesendorf eds., 2010).

[25] Issacharoff & Pildes, *supra* note 6.

departments and agencies may exercise their national security powers and responsibilities. A well-defined scope of powers permits a democratic society to hold its government accountable in cases of inept or illegitimate policy arrangements.

By focusing on the functions of national security law in creating and structuring a government's national security power, the above definition should provide a solid foundation on which scholars can compare local particularities in ways that promote fruitful discussions about the divergence and convergence of national security laws in different jurisdictional contexts. The above definition should also help establish operational coding rules that will help cast light on various national security matters, including those that I study in this dissertation.[26]

There are two major categories of national security law. First, there are constitutional texts.[27] Many constitutions explicitly or implicitly authorize the executive branch, and in particular its head, to exercise powers pertaining to national security.[28] To check and balance the executive's exercise of national security powers, these constitutions stipulate mechanisms of legislative oversight, such as ex ante approval of war, requirements of delegation, and budget control.[29] Executive power and oversight of it are broad matters characterized by considerable ambiguity: they have sparked frequent constitutional disputes between executive and legislative bodies regarding the proper scope and oversight of the executive's national security power within a constitutional system.[30] Constitutional disputes over these matters can thus yield crucial lessons

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[26] Ashley S. Deeks, *The Observer Effect: National Security Litigation, Executive Policy Changes, and Judicial Deference*, 82(2) FORDHAM L. REV. 827, 876 (2013).

[27] DYCUS, BANKS, RAVEN-HANSEN & VLADECK, *supra* note 1, at 7-10.

[28] Jenny S. Martinez, *Inherent Executive Power: A Comparative Perspective*, 115 YALE L.J. 2480, 2480 (2006).

[29] *Id.*

[30] DYCUS, BANKS, RAVEN-HANSEN & VLADECK, *supra* note 1, at 25.

regarding the dynamics of national security, governmental power, and constitutional constraints, all subjects that are essential to my research project.

The second major category of national security law is statutory delegation.[31] Legislatures pass laws that empower state institutions with varying degrees of national security authority in diverse contexts.[32] Such a legislative delegation of power is sometimes explicit, confining the executive branch's exercise of power to a clearly defined range of actions. Nevertheless, legislatures, just as with people, cannot be expected to detail all possible circumstances and methods in and by which government agencies can and could wield their security power. On many occasions, legislatures' delegations of power, whether intentionally so or not, have been ambiguous or vague. Without an explicit statutory text defining their exercise of power, government agencies may have good reason to enter into disputes with legislatures or other interested parties regarding the appropriate range of powers with which these agencies can address national security matters.

There are four methods that can help determine whether or not legislators' delegations of power are of a national security nature. The first and second methods focus on explicit legislative intent, and the third and fourth methods focus on interpretation. The first method, which I call the title method, emphasizes the explicit title of a law. For example, does the title of a given law contain the words "National Security"? If yes, the law may very well delegate power of a national security nature. This method is, in my view, clearly the most straightforward of the four. Second is the clause method: does a law have an explicit purpose clause referencing national security? If

[31] *Id*, at 33.

[32] *Id*.

yes, there again we have evidence that the law is delegating power of a national security nature. This method is crucial because legislators frequently draft laws that, though they pertain primarily to matters other than national security, have a great bearing on it. When, in a clause, a legislature clearly states that national security is one of the purposes of a given law, the law is a likely factor shaping the government's exercise of national security authority.

Not all laws concerning the government's exercise of national security authority contain explicitly worded titles or purpose clauses about national security. Thus, it becomes necessary to rely on other methods for determining whether or not legislators' delegations of power are of a national security nature.[33] And thus, we have the third and fourth methods. The third, which I will call the judicial-interpretation method, relies on precisely that: judicial institutions' interpretations of laws. For example, if a court holds that a law pertains to national security matters, it is reasonable to argue that the legislature responsible for having drafted and passed the law was setting out to define the government's authority over some national security matters.

The function method, which is the fourth method, requires a more comprehensive interpretation of all relevant circumstances surrounding a law's possible delegation of national security power. This method exists because it is entirely possible that neither laws themselves nor courts assessing the laws' validity will explicitly address the laws' potential bearing on national security powers. Specifically, I rely on keywords to evaluate whether the practical function or outcome of laws are of a national security nature.[34] Does a law that seems unrelated to the

[33] DYCUS, BANKS, RAVEN-HANSEN & VLADECK, *supra* note 1, at 43.

[34] Sunstein, *supra* note 20, at 276.

delegation of national security authority and that has never been deemed as such by a court nevertheless delegate such authority? If yes, then the law likely is what it does.

2. National Security Law and Other Areas of Law

The above definition of 'national security law' renders the concept functionally distinct from four related domains of law and governance. The first of these—foreign relations law—is akin to, and is often discussed in tandem with, national security matters. Foreign relations law embodies normative principles on which state institutions exercise their foreign relations powers to engage with the global community.[35] Because foreign relations powers are often exercised in contexts involving national security, national security law intersects heavily with foreign relations law.[36] Nevertheless, we can distinguish the former from the latter on various fronts. The most obvious distinction lies in the two domains' functional relationship to homeland security institutions. A function of national security law is to protect homeland security by helping detect domestic threats. Because of its inward-looking nature, homeland security plans rarely address questions having to do with foreign relations.[37] Given the distinct functions of these two domains, it is inaccurate to consider national security law and foreign relations law as the same body of law.

Second, national security law is functionally distinct from the related domain of criminal law. Criminal law counters threats to individual people or institutions,[38] whereas national security

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[35] Curtis A. Bradley, *What is Foreign Relations Law?* in OXFORD HANDBOOK OF COMPARATIVE FOREIGN RELATIONS LAW 3-4 (Curtis A. Bradley eds., 2019).

[36] David H. Moore, *The Missing D In U.S. Foreign Relations Law*, 109 GEORGETOWN LAW JOURNAL 1139, 1148-1149 (2021). Campbell McLachlan, *Five Conceptions of the Functions of Foreign Relations Law*, in BRADLEY eds., *Id.*, at 34-35.

[37] Adam R. Pearlman & Erick S. Lee, *National Security, Narcissism, Voyeurism, and Kyllo: How Intelligence Programs and Social Norms are Affecting the Fourth Amendment*, 2 TEX. A&M L. REV. 719, 748 (2015).

[38] *Id*, at 745-746.

law counters threats to the country and its state apparatuses as a whole. To fulfill these two distinct functions, the two domains of law create and rely on two distinct sets of legal organs and mechanisms. Criminal law involves local networks of police departments, prosecutorial offices, and courts in an effort to combat disruptive actions that can surface in various corners of society. By contrast, national security law usually entails a centralized body of institutions that makes concerted efforts to fulfill broadly protective goals.[39]

The differences between national security law and criminal law do not mean that the two domains never intersect each other. For example, law enforcement organs have increasingly been conducting domestic intelligence operations that serve a national security purpose.[40] With the aid of local police and courts, national security agencies can broaden their scope, reaching into a wide array of local activities that usually have little to do with national security. An interesting outcome of this intersection is that national security activities, when performed by local law enforcement, may entail a more lenient level of judicial scrutiny than would similar activities performed by actual national security institutions.[41] These and other issues that arise at the intersection of national security law and criminal law are constantly evolving. To accurately dissect the roles and responsibilities of the two domains' respective organs and mechanisms is a vast task requiring a careful examination of facts and ideas.

The third domain of law distinct from, yet similar to, national security law is transitional justice. The institutions and mechanisms that comprise a country's transitional justice apparatus have the purpose of identifying—and offering redress for—past large-scale human rights

[39] DYCUS, BANKS, RAVEN-HANSEN & VLADECK, *supra* note 1, at 1165.

[40] Pearlman & Lee, *supra* note 37, at 748-754.

[41] *Id.*

violations.[42] Transitional justice initiatives typically embody the efforts of a government to acknowledge past national wrongdoings, hold perpetrators accountable, offer reparations to victims, and facilitate social dialogue and reconciliation.[43] As many human rights violations are committed by authoritarian governments in the name of national security, domestic efforts to redress these injustices are often part of a larger transitional project pivoting the formerly authoritarian country toward a viable democratic system of government. For this transition to be successful, state institutions and the public generally must reimagine and reconfigure the country's guiding principles.[44]

Although national security concerns are certainly components of the backdrop against which transitional justice initiatives are carried out, not all transitional justice mechanisms involve the detection and prevention of national security risks. Delivering justice to victims or declaring a past law unconstitutional, for instance, has little, if any, bearing on the task of strengthening a state's defense capacity in the face of domestic or external threats. However, security-specific lustration policies can have a bearing, and perhaps a significant one, on national security. Many post-communist democratizing countries, for example, have implemented lustration programs that bar former communist-era security-services personnel from serving in governmental positions.[45] Besides holding former functionaries and officials accountable for their unlawful or immoral

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[42] RUTI TEITEL, GLOBALIZING TRANSITIONAL JUSTICE xi-xii (Oxford University Press 2014) *See also* RUTI TEITEL, TRANSITIONAL JUSTICE 3 (2000). JOHN ELSTER, CLOSING THE BOOKS: TRANSITIONAL JUSTICE IN HISTORICAL PERSPECTIVE 1 (2004). Ruti Teitel, *The Law and Politics of Contemporary Transitional Justice,* 38 CORNELL INT'L L.J. 837 (2005). Harry Hobbs, *Locating the Logic of Transitional Justice in Liberal Democracies*, 39 UNSW L.J. 512, 516–517 (2016).

[43] Teitel, TRANSITIONAL JUSTICE, at 6. Ruti Teitel, *Transitional Jurisprudence, The Role of Law in Political Transformation,* 106 YALE L.J. 2009, 2014–2015, 2078 (1999).

[44] Teitel, TRANSITIONAL JUSTICE, at 5-6, 143.

[45] Roman Boed, *An Evaluation of the Legality and Efficacy of Lustration as a Tool of Transitional Justice,* 37 COLUM. J. TRANSNAT'L L. 357, 392 (1999).

behaviors, these lustration policies prevent people closely connected to the former communist security apparatus from inserting themselves in—and perhaps destabilizing—the democratizing country's newly reformed security apparatuses or indeed any of its state institutions.[46] Lustration policies of this kind are also integral to the composition and functioning of military institutions necessary for the undertaking of sundry national security functions. Consequently, some transitional justice measures can and should be considered part of a country's national security regime.

The fourth domain of law and governance that I would like to distinguish from national security law is the legal infrastructure creating, maintaining, and reinforcing national identity. National identity refers to a collective sense of community that unites a nation's citizens, that distinguishes them from other nations' citizens, and that rests on a real or imagined set of shared historical, cultural, linguistic, and ideological experiences and practices.[47] As a number of national security institutions are aimed at preventing national security threats and safeguarding a state's core interests, the purposes of a country's national security law sometimes echo the efforts of the country's political community to establish and preserve a national identity.[48] For instance, some commentators recognize that a country's cultural heritage law can embody security interests if the law serves to prevent foreign governments from taking possession of the country's inherited national assets.[49]

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[46] *Id*, at 359.

[47] RENÉ GROTENHUIS, NATION-BUILDING: IDENTITY AND IDENTIFICATION, PROCESS AND CONTENT 125 (2016). Eric Hobsbawm, *Language, Culture, and National Identity*, 63(4) SOCIAL RESEARCH 1065, 1066 (1996).

[48] Grotenhuis, *id.*

[49] Andrea Russell, *Warhorse: The Ongoing Conflict Between Cultural Heritage Protection and International Trade*, 25 CURRENTS: J. INT'L ECON. L. 92, 95 (2022). Nikita Lalwani, *State of the Art: How Cultural Property Became a National Security Priority*, 130 YALE L.J. FORUM 78, 78 (2020).

Nevertheless, it remains unclear how to determine the nature and scope of a government's "national identity power" when the concept of national identity itself lacks immediate and obvious normative implications.[50] Most governments do not have an established body of rules, whether normative or not, for the creation and consolidation of a country's national identity. Thus, even though national security and national identity intersect insofar as they are similarly concerned with the core interests of the state, this intersection is remote and the legal infrastructure of national identity remains extremely undeveloped, making it ill-suited for incorporation into the domain of national security law.

3. Eight Categories of National Security Law

Drawing on the significant body of literature devoted to the topic of national security law, I have developed an analytic framework that identifies eight categories of national security law based on two national security dimensions: (1) the sphere-of-influence dimension and (2) the domestic-versus-foreign dimension. The first dimension consists of four traditional spheres in which national security law plays a significant role: the military, the citizenry, the economy, and democratic government. The second dimension distinguishes a country's inward-looking agendas

[50] Article 4(2) of the Treaty on the European Union states the following: "The Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government. It shall respect their essential State functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security. In particular, national security remains the sole responsibility of each Member State." However, the concept of national identity is highly vague, as is the concept's doctrinal relationship with national security. Pietro Faraguna, *Taking Constitutional Identities Away from the Courts,* 41 BROOK. J. INT'L L. 491, 495 (2016). Monica Clares & Jan-Herman Reestman, *The Protection of National Constitutional Identity and the Limits of European Integration at the Occasion of the Gauweiler Case,* 16 GERMAN L.J. 917, 932 (2015). Sinisa Rodin, *Chapter 4 National Identity and Market Freedoms after the Treaty of Lisbon,* 51 IUS GENTIUM 51, 55 (2016).

(domestic matters) from its outward-looking agendas (foreign or international matters) relative to national security.[51]

In this dissertation, I use the above ideal-typical framework to compare the national security disputes in three countries: South Korea, Taiwan, and Lithuania. The framework directs our attention from the abstract concept of national security law to a more focused analysis of real-world events in distinct national jurisdictions. Moreover, the framework helps yield preliminary observations about whether or not—and, if so, how—courts dealing with national security law exhibit patterns of behavior unique to their national affiliation. Although my central aim in this dissertation is not to conduct a comprehensive examination of judicial behavior relative to categories of national security disputes, my analytical framework could plausibly serve such a research goal in the future.

Two caveats should be mentioned with respect to this ideal-typical framework. First, it imposed limits on my research by preventing me from integrating new forms of security challenges into my analysis. This limitation, though perhaps necessary for the sake of practicality, may limit the usefulness of the framework. Many scholars have devoted increasing attention to new kinds of domestic and foreign pressures that possibly disrupt the security capacity of democratic institutions[52] and that include, for example, climate change[53] and pandemics.[54] However, these

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[51] Joseph Landau, *Due Process and the Non-Citizen: A Revolution Reconsidered,* 47 CONN. L. REV. 879, 879 (2015).

[52] Alexandra Stark, Candace Rondeaux, Heather Hurlburt, *The Meaning of Security: Can A Divided Society Provide for the Common Defense?* (New America, Apr. 19, 2021), *available at* https://www.newamerica.org/political-reform/reports/the-meaning-of-security/ (latest review June 17, 2024). O'Neill, *supra* note 24, at 1-2.

[53] *See e.g.* Sarah E. Light, *Valuing National Security: Climate Change, the Military, and Society,* 61 UCLA L. REV. 1772, 1772 (2014).

[54] David P. Fidler, *Fighting the Axis of Illness: HIV/AIDS, Human Rights, and U.S. Foreign Policy,* 17 HARV. HUM. RTS. J. 99, 102 (2004).

studies have not yet established the means for developing a rigorous framework in which researchers can compare these novel pressures with traditional ones. Aware that a comprehensive analysis of both traditional and new forms of security issues is highly impractical at the moment, I have chosen to leave this task to future scholarship.

Second, I acknowledge that my proposed framework's categories are by no means perfectly non-overlapping, given that many laws and regulations stand at the intersection between multiple bodies of national security law. Thus, how I categorize instances of national security law may very well differ from how other researchers would perform the categorization. Even though I recognize the importance of objectivity, I have not set out to create an analytical framework that is universally applicable or devoid of all subjective judgment. (For a detailed record of my development of this study's framework, please see Appendix 1.)

Let me elaborate on my proposed framework by discussing the first dimension's four spheres of influence as they intersect with the second dimension's inward-looking and outward-looking agendas of national security matters. The first sphere of influence, the military, involves "core issues" of national defense.[55] This category encompasses disputes involving military personnel, materiel, facilities, and institutions that have the stated purpose of protecting the physical security of a state.[56] An inward-looking military encompasses a raft of topics ranging from the obligations and roles of military personnel to the management of military information. An important topic therein, and one that has attracted a good deal of scholarly attention, is the

[55] DYCUS, BANKS, RAVEN-HANSEN & VLADECK, *supra* note 1, at 2.

[56] Mark R. Shulman, *The Progressive Era Origins of the National Security Act,* 104 DICKINSON L. REV. 289, 289-290 (2000).

constitutionality of conscientious objectors' refusal to perform certain obligations in the armed forces on religious or conscientious grounds.[57]

Another important topic related to inward-looking military affairs is the regulation of state secrecy. These regulations go far in determining how a government should designate, manage, maintain, or declassify confidential information of significant interest to the state.[58] The issue of state secrecy has attracted sustained attention from legal scholars across the world, in large part because the issue sharply highlights the intrinsic tensions among national security, the rule of law, and rights protection. On the one hand, states must handle many national security matters with extreme confidentiality, so as to prevent the disclosure of critical information to unauthorized—and potentially adversarial—individuals. On the other hand, a certain degree of disclosure is necessary if government is to be held accountable in its duty to follow the rule of law and protect constitutional rights. To address this dilemma, scholars and practitioners have long debated the extent to which courts may demand the disclosure of state secrets in judicial proceedings or even in public settings.[59] This issue has been addressed by the constitutional courts of South Korea and

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[57] *See generally* Michael Koehler, *The Search for Balance Between Preventing Terrorism and Saving Lives: How one Citation Means More Than Just a Conviction*, 21 RUTGERS J.L.& RELIGION 97, 98-103 (2020).

[58] *See, e.g.*, Christina E. Wells, *"National Security" Information and the Freedom of Information Act*, 56 ADMIN. L. REV. 1195, 1197-1198 (2004). David E. Pozen, *The Mosaic Theory, National Security, and the Freedom of Information Act*, 115 YALE L.J. 628, 636-638 (2005). Margaret B. Kwoka, *Deferring to Secrecy*, 54 B.C. L. REV. 185, 185-188 (2013). Margaret B. Kwoka, *The Procedural Exceptionalism of Natonal Security Secrecy*, 97 B.U. L. REV. 103, 103-109 (2017). SUDHA N. SETTY, NATIONAL SECURITY SECRECY: COMPARATIVE EFFECTS ON DEMOCRACY AND THE RULE OF LAW (2017).

[59] In the U.S. context, the dilemma between confidentiality and public accountability is sharply highlighted in the discussion surrounding *New York Times Company v. United States*, 403 US 713 (1971). *See e.g.*, Heidi Kitrosser, *Free Speech Aboard the Leaky Ship of State: Calibrating First Amendment Protections for Leakers of Classified Information*, 6 J. NAT'L SEC. L. & POL'Y 409 (2013). Geoffrey R. Stone, *Secrecy and Self-Government*, 56 N.Y.U. SCH. L. REV. 81 (2011). Geoffrey R. Stone, *Government Secrecy vs. Freedom of the Press*, 1 HARV. L. & POL'Y REV. 185 (2007).

Lithuania, and I will carefully explore their handling of state secrets and governmental accountability in the following chapters.

In terms of outward-looking military affairs, an oft-discussed and oft-disputed example is the written or unwritten constitutionality of the executive or legislative branches' prerogatives to conduct military operations abroad.[60] A dispute of this type might involve a government's obligations under a transnational mutual-defense treaty, a scenario that would require courts to address complex international legal documents and geopolitical considerations. Thus, the question of how a court should deal with constitutional disputes linked to outward-looking military affairs can extend well beyond interpretations and applications of domestic constitutions, and this fact underscores the critically important cross-border dimensions of national security law.

Another prominent national security sphere is the citizenry. Governments worldwide identify, control, and eliminate security threats posed by citizens. The national security laws focusing on a country's own citizens are inward-looking, whereas the national security laws focusing on non-citizens I designate as outward-looking.

In terms of inward-looking citizenship, many scholars have directed their attention to the election rules that national governments establish in the name of national security.[61] These rules can easily create tensions between citizens protective of their voting rights and governments intent on protecting their country's national security. Not surprisingly, these tensions can lead to legal challenges. In South Korea, a number of constitutional disputes have addressed whether or not the

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[60] DYCUS, BANKS, RAVEN-HANSEN & VLADECK, *supra* note 1, at 329-374.

[61] Ming H. Chen & Hunter Knapp, *The Political (Mis)representation of Immigrants in Voting*, 92 U. COLO. L. REV. 715, 732 (2021). Michael T. Morley, *Election Emergencies: Voting in the Wake of Natural Disasters and Terrorist Attacks*, 67 EMORY L.J. 545, 557-558 (2018).

rules governing the rights of overseas South Korean voters to participate in national elections are constitutional. These disputes have focused primarily on underlying security concerns regarding the allegation that malicious foreign actors may use the rules to manipulate elections.[62]

A significant number of national security matters that are associated with a country's citizenry are of an outward-looking nature. Most of these emphasize the perceived link between border control and national security. Many outward-looking immigration laws contend with the possibility that a foreigner seeking entrance into the country poses a significant threat to the country's national security. These laws typically stipulate criteria for identifying foreigners who pose a security risk and for restricting their right to enter, travel in, and work in the country in question.[63] To assess the risks posed by a foreigner, security screeners must follow a prescribed set of steps before any constitutional protections can be granted to the foreigner.[64] Disputes arising from these rules tend to concentrate on the constitutional rights that governments should extend to foreigners.[65]

The third sphere is the economy. The economic strengths of a country significantly determine its ability to sustain well-functioning state institutions and the general welfare of its citizens in the face of disruptive events. To ensure these strengths, many governments designate specific industries or economic activities as "critical infrastructure," a step that places them under heightened governmental regulations. These designations occasionally spark judicial

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[62] *See* Chapter 3 regarding my discussion of South Korea's election law.

[63] DAVID WEISSBRODT, LAURA DANIELSON, HOWARD S. MYERS III, SARAH K. PETERSON & SARAH BRENES, IMMIGRATION LAW AND PROCEDURE IN A NUTSHELL 1, 63 (2023).

[64] Sudha Setty, *Obama's National Security Exceptionalism*, 91 CHI.-KENT L. REV. 91, 106-108 (2016). Jonathan Hafetz, *Immigration and National Security Law: Converging Approaches to State Power, Individual Rights, and Judicial Review*, 18 ILSA J. INT'L & COMP. L. 625, 629 (2012).

[65] Paulina D. Arnold, *How Immigration Detention Becomes Exceptional?* 75 STAN. L. REV. 261, 266 (2023).

controversies. In India, a number of investors in a multimedia company sued the government for demanding that this company annul a lease contract for a specific satellite-based telecommunications spectrum. Upholding the decision, the Permanent Court of Arbitration cited concerns over the negative impact that the contract would likely have not only on the defense capacity of the Indian Armed Forces but also on the "essential security" of the state.[66]

In the economic sphere, technology is another area that triggers concerns over national security.[67] For example, cyberattacks, whether perpetrated by domestic or foreign actors, have prompted governments to reassess the resilience of their country's technological infrastructure.[68] Because of these threats and reassessments, many stakeholders have raised critical questions regarding the precise point where security and economic liberty should intersect: To what extent can the government regulate citizens' or businesses' economic activities in ways that promote national security? And how do we reconcile the two goals within a constitutional system? Some aspects of these pressing questions have already been addressed by the Lithuanian Constitution, as I will demonstrate in the following chapters.

As with inward-looking economic affairs, outward-looking economic affairs are of vital importance to national security. The increasingly robust economic interactions among countries has likewise exacerbated the national security risks to which these countries are exposed, as such economic engagement may make them vulnerable to potentially hostile economic (including

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[66] J. Benton Heath, *Making Sense of Security*, 116 AM. J. INT'L L. 289, 303-304 (2022).

[67] *See supra* note 3.

[68] *See e.g.* Marko Milanovic & Michael N. Schmitt, *Cyber Attacks and Cyber (Mis)information Operations During a Pandemic*, 11 JOURNAL OF NATIONAL SECURITY LAW & POLICY 247, 247-284 (2020). Balkin, *supra* note 5, at 9-10.

financial) operations.[69] In response, governments have enacted economic policies such as export controls and foreign investment requirements to ensure that the cross-national interactions of private-sector entities do not imperil a country's national security.[70] The Committee on Foreign Investment in the United States (CFIUS), for instance, pursues a national security agenda by leveraging various economic tools. Pursuant to section 721 of the Defense Production Act of 1950, CIFUS reviews transactions involving foreign investments and persons to determine the risks that such transactions impose on the national security of the United States.[71] Other countries have adopted similar mechanisms to address potential national security risks emanating from external economic sources.

The fourth and final traditional sphere in which national security law plays a significant role is democratic government. I eschew the broad category of government in favor of the narrower category of democratic government because all three countries that I examine in this dissertation are constitutional democracies. I use the term 'democratic' here in a loose manner to encompass a wide range of issues related to the rules and mechanisms that structure and limit a government's exercise of power in various aspects of democratic affairs. This includes the separation-of-powers mechanisms, elections, as well as individuals' political freedoms and rights.

Among these matters is the vital field of law: democratic governments have the power to enact both inward- and outward-looking legislation that allows or disallows the circulation of

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[69] Joel P. Trachtman, *Managing Cybersecurity And Technology Appropriation Threats To International Investment: Trust or Verify*, 55 INT'L L. 193, 193-195.

[70] *See generally* Irene Yu, *Foreign Investment and National Security in the Data Age: An Assessment of the current Regime and Recommendations*, 74 HASTINGS L.J. 959 (2023).

[71] *Id*, at 965-966. *See also* the US Department of the Treasury, *The Committee on Foreign Investment in the United States (CFIUS), available at* https://home.treasury.gov/policy-issues/international/the-committee-on-foreign-investment-in-the-united-states-cfius (latest review: June 17, 2024).

certain information. Regarding inward-looking legislation, democratic governments worldwide enact various laws aimed at curbing the expression of ideas, participation in associations or assemblies, and the formation of political parties. Additionally, democratic governments—purportedly for national security purposes—establish intelligence and surveillance tools to monitor, limit, or otherwise manipulate the circulation of information.[72] In some cases, the severe national security threats that democratic governments claim to be opposing with information laws are real and substantiated, but more often, these laws serve as a means for power brokers in democratic governments to discredit and suppress domestic political opponents.[73] Such national security tools, when used for domestic political ends, can grossly stifle and ultimately sabotage not just democratic governance but all of civil society, as well.

Regarding outward-looking legislation, democratic governments pass laws and adopt policies that foster democracy internationally.[74] For example, some of these laws and policies encourage domestic actors to internationally disseminate information that helps the democratic governments perform security functions.[75] We know that authoritarian governments regularly seek to neutralize such information, which may include criticism of their authoritarian rule.[76] To

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[72] Yoo, *supra* note 24, at 565-566. Nathan Alexander Sales, *Secrecy and National Security Investigations*, 58 ALA. L. REV. 811, 813 (2007).

[73] Kuk Cho, *Tension Between the National Security Law and Constitutionalism in South Korea: Security For What?* 15 B.U. INT'L L.J. 125, 133 (1997).

[74] Carl Gershman, *Democracy as Policy Goal and Universal Value*, 6 WHITEHEAD J. DIPL. & INT'L REL. 19, 19 (2005).

[75] For example, South Korea's Development of Inter-Korean Relations Act requires the government to disseminate pro-democracy leaflets to North Korea. In 2020, the Constitutional Court of South Korea determined that the requirement is constitutional. *See* Case on the Restriction on the distribution of leaflets to North Korea [Const. Ct.], 2020 Hun-Ma 1724, Sep. 26, 2023 (S. Kor.).

[76] Tom Ginsburg, *Authoritarian International Law*, 114(2) AMERICAN JOURNAL OF INTERNATIONAL LAW 221, 228 (2020). Alexander Cooley, *Authoritarianism Goes Global: Countering Democratic Norms*, 26 J. DEMOCRACY 49, 49 (2015). Christopher Walker, *The Authoritarian Threat: The Hijacking of Soft Power*, 27(1) J. DEMOCRACY 49, 49-63 (2016). Christopher Walker, *What is Sharp Power*, 29(3) J. DEMOCRACY 9, 9-23 (2018). James Meernik, *United*

summarize the content of this section, I created the following table for readers to understand better the different categories and examples of national security laws and policies.

Table 1: Eight Categories of National Security Law

	Inward-Looking	Outward-Looking
Military	military service	international military operations
Citizenry	overseas-voter requirements	foreigners' entry into a country; the rights and benefits of foreigners residing in a country
Economy	critical infrastructure; technology	foreign investment; import controls
Democratic Government	censorship & surveillance; expression of ideas; participation in associations & assemblies; party bans; domestic information policies	international information policies

Source: Author

4. Case Selection: The Constitutional Courts of South Korea, Taiwan, and Lithuania

I adopt the most-similar-case method to compare how the constitutional courts in South Korea, Taiwan, and Lithuania have handled disputed governmental national security actions. The most-similar-case method enables researchers to isolate and analyze the "effect of the key

States Military Intervention and the Promotion of Democracy, 33(4) JOURNAL OF PEACE RESEARCH 391, 391-402 (1996).

independent variable on the dependent variable" by holding constant any alternative variables that are not central to the focus of the research.[77] Scholars have widely employed this method to identify and analyze the effects that specific constitutional changes arising from a court decision have on a polity. The method also enables cross-national comparisons of similar countries. Similar-case comparisons can help scholars "identify general trends as well as the particular features of individual cases."[78]

Let us start with South Korea. Ever since its establishment in 1948, anti-communist South Korea (officially, the Republic of Korea, or ROK) has competed with communist North Korea (officially, the Democratic People's Republic of Korea, or DPRK) for sole representation of the Korean Peninsula. This "competition" took the form of an enormously bloody conflict, the Korean War, which raged from 1950 to 1953 and which involved key Cold War stakeholders, most prominently the United States, the Soviet Union, and communist China. A hugely difficult and persistent policy question has been whether or not the South Korean government should engage with North Korea as an existential security threat to South Korea or as an annoying neighbor with which South Korea shares close historical and cultural traits. Different South Korean governments have adopted different policies toward North Korea, with much of the history of South Korea characterized by authoritarian anti-communist military rule, martial-law policies, and massacres of South Korean citizens. The fact remains, however, that, whether under authoritarian or

[77] RAN HIRSCHL, COMPARATIVE MATTERS: THE RENAISSANCE OF COMPARATIVE CONSTITUTIONAL LAW 246 (2014).

[78] ALEC STONE SWEET, GOVERNING WITH JUDGES: CONSTITUTIONAL POLITICS IN EUROPE 4 (2000).

democratic rule, South Korea has consistently contended with an existential threat from its northern Korean neighbor.[79]

Like South Korea, Taiwan (officially, the Republic of China, or ROC) has, since the late 1940s, struggled with an exceptionally strained international status produced by long-lasting concerns regarding national self-defense. Immediately after the Second World War, the ROC encompassed all of China, at least on paper, and was ruled by the Kuomintang (KMT), a nationalist party that found itself on the losing side of a civil war with the Chinese Communist Party (CCP). In 1949, having suffered a string of stinging military defeats at the hands of the CCP, the KMT government and its remaining forces retreated to the island of Taiwan. There, the KMT's version of China (i.e., the ROC) faced the constant threat of invasion by the CCP, which now ruled all of mainland China, known officially as the People's Republic of China (PRC). The result was, in effect, two Chinas, each laying claim to the other's land. In reality, however, the PRC became synonymous with 'China', and the ROC became synonymous with 'Taiwan'. The profound antagonism between these two states established the backdrop against which the KMT government exercised authoritarian governance over the island and justified this rule by invoking a national security narrative in which the ROC (i.e., Taiwan) had to protect itself from the constant threat posed by the PRC (i.e., China). The authoritarian CCP government in China has never given up its commitment to the "One China" policy; that is, to the view that Taiwan is a renegade province that rightfully belongs to—and will someday be reintegrated into—communist China.[80] Meanwhile, Taiwan, which democratized in the late 1980s, continues to grapple with a highly

[79] Lonnie Edge, *South Korea Relations with North Korea,* in ROUTLEDGE HANDBOOK OF CONTEMPORARY SOUTH KOREA 272-273 (Sojin Lim & Niki J.P. Alsford eds., 2021).

[80] Ming-sung Kuo, *Context Is Open to Interpretation, Too*, VERFASSUNGSBLOG (APRIL 20, 2023), available at https://verfassungsblog.de/context-is-open-to-interpretation-too/ (latest review: June 17, 2024).

ambiguous international situation. Indeed, many Taiwanese hold opposing views as to whether Taiwan is even an actual country. Thus it is that national security issues in Taiwan are more unresolved and more volatile today than they have perhaps ever been.

Far from the East Asian countries of South Korea and Taiwan is Lithuania, located in the Baltic portion of Northern Europe. Modern Lithuania came into being as a sovereign nation-state in 1918 but, for the next few years, found itself beset with threats orchestrated by the newly established Soviet Union. Successful in its resistance to these threats, Lithuania remained independent for twenty odd years before it was occupied by the Soviet Union (1939–1941) and then Nazi Germany (1941–1944/45). Soviet forces' reoccupation of Lithuania at the end of the Second World War resulted in the country's transformation into one of the Soviet Union's Socialist Republics (1944–1990). However, with the Soviet Union collapsing in 1990, Lithuania reclaimed its long-suppressed independence. Since then, the Lithuanian government has sought to reorient its security and foreign policies away from Russia's sphere of influence and toward the democratic West, as when Lithuania joined NATO in 2004.[81] This pro-Western orientation reflects not only the national security concerns arising from decades of brutal military occupation at the hands of Soviet Russia, coupled with ongoing security risks posed by the Russian Federation and its allies (e.g., Belarus), but also Lithuania's generally liberal approach to economics, politics, human rights, and other matters.[82]

I have chosen to hold a number of variables constant in order to isolate the effects that regional political contexts have on constitutional courts' handling of national security disputes.

[81] DAUNIS AUERS, COMPARATIVE POLITICS AND GOVERNMENT OF THE BALTIC STATES 197-200 (2015).

[82] Eugenijus Maldeikis & Gediminas Rainys, Estonia, Latvia, Lithuania: the way to Europe, in, TRANSFORMATIONS OF POST-COMMUNIST STATES 137 (Wojciech Kostecki, Katarizyna Żukrowska & Bogdan J. Góralczyk eds., 2000).

The main variable held constant is the duration of their democratic rule. Specifically the three countries under review—South Korea, Taiwan, and Lithuania—transitioned to democracy in the late 1980s and early 1990s amidst the third wave of democratization. By adopting new or amended constitutions, the countries demonstrated their commitment to consolidating democratic governance, including the protection of constitutional rights and the preservation of the rule of law. The three countries' similar political trajectories, rooted in a transition from authoritarianism to democracy, have two implications for the national security decisions of the countries' constitutional courts: (1) the self-empowering motives of the constitutional courts in their respective democratized regimes and (2) the nature of national security concerns that are faced by the courts. I briefly discuss these two implications below.

First, as the three countries democratized, their governments created or reconfigured their constitutional courts in line with the widespread political and popular expectation that the courts would be independent and endowed with rigorous powers of judicial review.[83] The similar background of these courts effectively constrains the variance in their motives and thus narrows the possible factors contributing to differences among the three courts regarding their judicial behavior in national security contexts.

Second, since they began undergoing democratization, the three countries—most likely because of their similar political trajectories—have confronted similar legal disputes about national security. This additional and rather striking similarity among the three countries further strengthens my comparison of their constitutional courts with an eye toward identifying the roles

[83] Tom Ginsburg, *The Global Spread of Constitutional Review*, in THE OXFORD HANDBOOK OF LAW AND POLITICS 87 (Keith E. Whittington, R. Daniel Kelemen & Gregory A. Caldeira eds., 2008).

played by independent variables. For example, all three constitutional courts have faced difficult questions about how a national security policy can be effective without betraying democratic accountability and constitutional rights. These questions concern an array of precise matters ranging from state secrets and national security policymaking to security-agency reforms, immigration control, obligatory military service, and conscientious objectors. The strikingly similar nature of these disputes, therefore, has helped me narrow my focus on the actual factors resulting in any differences among the three constitutional courts regarding their handling of national security disputes.

5. The Constitutional Courts' Review of National Security Affairs

Courts involve themselves in national security disputes in various ways. In this dissertation, I examine how constitutional courts, not ordinary courts, in three democratic countries—South Korea, Taiwan, and Lithuania—review, invalidate, and alter laws, administrative regulations, and judicial rulings pertaining to national security.[84] Constitutional courts are designed to engage in policymaking that is normally associated with the executive and legislative branches, and the courts accomplish this function by assessing the constitutionality of laws and regulations.[85] Thus, the decisions of constitutional courts offer an unparalleled window into a judiciary's approach to national security. Of course, it is entirely worthwhile to analyze how ordinary courts scrutinize national security disputes. However, a rigorous study encompassing all these courts and all their decisions would require a degree of time and effort that is simply beyond this dissertator's means.

[84] *Id*, at 81. ALEC STONE SWEET, GOVERNING WITH JUDGES: CONSTITUTIONAL POLITICS IN EUROPE 21 (2000).

[85] Ran Hirschl, *The Judicialization of Politics*, in Whittington, Kelemen & Caldeira eds., *supra* note 83, at 121-122. Please note that I do not critically examine the roles of courts in offering remedies to individuals deemed by the courts to be victims. Cf. Aziz Z. Huq, *supra* note 21, at 237.

Thus, I will leave the enormously large caseload of ordinary courts' national security decisions in these three countries to future research.

There are many questions concerning the power that constitutional courts are supposed to exert over national security affairs. Scholars often vehemently disagree with one another about such questions as whether or not—and, if so, how—courts should review national security issues, and many of these disagreements center on the task of striking an optimum balance between security and liberty. Scholars who adhere to NSE principles argue that courts lack both national security expertise and democratic legitimacy and, for these two reasons, should follow a hands-off approach to national security matters.[86] According to these scholars, judges should, at most, ensure that national security laws and regulations possess minimal levels of rationality.[87] Additionally, some interpretations of NSE theory suggest that courts in democracies should facilitate dialogue between the executive and legislative branches.[88] Critics of the NSE concept contend that courts can and should actively enforce national security law, impose meaningful oversight on the government's use of national security powers, alter the substance of poorly drafted national security laws, and safeguard constitutional freedoms and other rights under threat from overreaching national security laws.[89]

5.1. The Stages of Constitutional Review

[86] POSNER & VERMEULE, *supra* note 1, at 5. Sunstein, *supra* note 8, at 48-49.

[87] Sunstein, *supra* note 8, at 50-51.

[88] Deeks, *supra* note 26, at 864-872. Samuel Issacharoff & Richard H. Pildes, *Between Civil Libertarianism and Executive Unilateralism: An Institutional Process Approach to Rights during Wartime,* 5 THEORETICAL INQUIRIES IN LAW 1, 2 (2004).

[89] Huq, *supra* note 21, at 253. Shirin Sinnar, *Procedural Experimentation and National Security in the Courts,* 106 CALIF. L. REV. 991, 992, 1000 (2018).

Constitutional courts may exercise their power at various stages of constitutional review. For instance, courts may use the "political question" doctrine to refrain from reviewing a dispute in the first place.[90] Also, courts may practice "judicial deference" after they decide to review a dispute, acquiescing to national security policies established by elected branches of government.[91] In other words, courts may exercise power not only after they accept a case but also when they are deciding whether or not to accept one. To comprehensively understand the roles of courts in national security disputes, scholars would ideally want to study all pertinent disputes brought to the attention of a judiciary and then would want to analyze (1) whether or not the courts decided to review the disputes, (2) how the courts that reviewed the disputes approached the doctrine of judicial deference, particularly in relation to the executive and legislative branches, and (3) how these courts decided the cases.

In this dissertation, I address the NSE concept by analyzing how South Korean, Taiwanese, and Lithuanian constitutional courts have handled national security disputes after the courts had decided to review the disputes. Thus, I examine the courts' decisions to interpret (whether narrowly or loosely), uphold, or invalidate the disputed government policies. Only occasionally will I review courts' decisions to dismiss or review a dispute when such information is available and intellectually valuable, and when I do so, it will be solely to supplement my comparative analysis of the subsequent behavior of the courts in the three national jurisdictions being examined. My aim is to identify a manageable research scope and investigate whether constitutional courts

[90] DYCUS, BANKS, RAVEN-HANSEN & VLADECK, *supra* note 1, at 54. *See also* Anthony J. Colangelo, *"De Facto Sovereignty": Boumediene and Beyond,* 77 GEORGE WASH. L. REV. 623, 623 (2009).

[91] Robert M. Chesney, *National Security Fact Deference*, 95 VA. L. REV. 1361, 1362-63 (2009). *See also* Jonathan Masur, *A Hard Look or a Blind Eye: Administrative Law and Military Deference*, 56 HASTINGS L.J. 441, 446 (2005).

demonstrate a deferential attitude or, counter to what NSE contends, exercise their power rigorously over national security policy.

My decision not to engage with disputes the courts refuse to review is a result of practical concerns rather than of personal reluctance. My central practical concern is that I cannot access sufficient information regarding the disputes that the Lithuanian Constitutional Court has refused to review. This limited availability of data prevents me from critically comparing the judicial behaviors of the Lithuanian Constitutional Court with those of the Taiwanese and Korean Constitutional Courts. Despite this obstacle, I will occasionally address whether or not Korean and Taiwanese courts decided to take cases requiring constitutional review, and my hope in doing so is that this partial and occasional analysis will provide helpful insights into the standards of review for two of the three constitutional courts.

5.2. Defining 'Judicial Oversight'

The term 'judicial oversight' in this dissertation has a precise meaning intended to capture two forms of judicial behavior: (1) courts' declaration that a national security law, regulation, or previous court ruling is unconstitutional; and (2) courts' re-interpretation of the substance of a national security law, regulation, or previous court ruling when the courts do not declare it unconstitutional. By assigning this dual meaning to 'judicial oversight', I have tried to establish a relatively reasonable empirical rationale for determining how the courts of South Korea, Taiwan, and Lithuania have imposed meaningful oversight on the elected branches' exercise of power.

By adopting the term 'judicial oversight', I intentionally avoid the term 'judicial activism', given that describing a court as 'activist' often controversially entails a strong normative view,

whether from the liberal or conservative end of the spectrum.[92] Moreover, I avoid characterizing a court as engaging in 'strong' or 'weak' judicial review. Comparative scholars adopt various methods to define 'strong' or 'weak' judicial review.[93] Nevertheless, labeling a court as a 'strong' or 'weak' institution tends to obscure the genuine functions of courts in structuring the government's national security power, given that these notions themselves do not necessarily provide an operational benchmark for evaluating the strength of judicial review. Instead of that, by offering a reasonably clear definition of 'judicial oversight,' I aim to focus on how the courts constrain or modify a government's exercise of national security authority. Although it is possible to describe courts engaging in such forms of oversight as 'strong' or 'weak' institutions, this dissertation does not primarily focus on that aspect.

My definition of 'judicial oversight' allows me to address three challenging scenarios. First, under my definition, if a court declares the legislative or executive actions in a specific dispute partly unconstitutional, meaning that the court recognizes some parts of the actions as constitutional, the case counts as one in which judicial oversight plays a significant role. On the other hand, a court may sometimes request the elected branches of government to update a national security policy without deeming it unconstitutional. In this case, the court does not engage in oversight under my definition, given that the court does not consider this policy to be unconstitutional.

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[92] Kenneth M. Holland, *Introduction*, in JUDICIAL ACTIVISM IN COMPARATIVE PERSPECTIVE 1 (Kenneth M. Holland eds., 1991). CÉSAE RODRÍGUEZ-GARAVITO & DIANA RODRÍGUEZ-FRANCO, RADICAL DEPRIVATION ON TRIAL: THE IMPACT OF JUDICIAL ACTIVISM ON SOCIOECONOMIC RIGHTS IN THE GLOBAL SOUTH 9-11 (2015).

[93] *See e.g.,* Stephen Gardbaum, *Are Strong Constitutional Courts Always A Good Thing for New Democracies?* 53 COLUM. J. TRANS. L. 285, 310 (2015). Based on Gardbaum's definition, the judicial adoption of the method of "suspension of unconstitutionality" is an instance of 'weak' judicial review.

The second challenging scenario involves courts that employ the method of "conditional constitutionality" or "conditional unconstitutionality" to determine the constitutionality of legislative or executive actions, but that do so only on the condition that the elected branches acknowledge and accept the courts' precise interpretation.[94] Because courts in this scenario can narrow or expand the application scope of legislative or executive actions, the scenario is, at least in this dissertation, an example of judicial oversight.

The third challenging scenario is one in which judges declare that a legislative or executive action is constitutionally invalid but then suspend the declaration of invalidity on the directive that the legislative or executive branch must revise the action within a designated period of time.[95] Because my dual definition of 'judicial oversight' is based on courts' declarations of unconstitutionality, not on courts' immediate invalidation of a legislative or executive action, I categorize courts' declarations of "non-conformance" as instances of judicial oversight.

5.3. Describing the Constitutional Courts' Oversight of National Security Policies: A Two-Stage Research Design

The three constitutional courts presided over a series of cases that, as I will show, demonstrate a rather notable lack of "exceptional deference" to the elected branches of government and to national security arguments. This finding aims to answer the first research question: How do the constitutional courts exercise oversight of national security policies? To demonstrate this finding, I developed and followed a two-stage research design: in the first stage, I identified and

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[94] *See* Dominic J. Nardi, Jr., *Finding Justice Scalia in Burma: Constitutional Interpretation and the Impeachment of Myanmar's Constitutional Tribunal,* 23 PACIFIC RIM LAW & POLICY JOURNAL 633, 676 (2014).

[95] *See* Stephen Gardbaum, *Are Strong Constitutional Courts Always A Good Thing for New Democracies?* 53 COLUM. J. TRANS. L. 285, 310 (2015).

examined all disputatious national security cases reviewed by the constitutional courts after they had decided to hear the cases. Table 2 lists each of these cases, and each cell in the table presents two numbers: the first refers to the number of cases where courts struck down or reconstructed the substance of an act of government (i.e., a law, regulation, or previous judicial ruling); the second refers to the total number of national security disputes in a given category. Appendix 1 contains important details about court decisions: the dates of the decisions, the concerned legal acts, the petitioners, a short description of each decision, and consequences of the decisions.

Table 2: Judicial Oversight of National Security Policy: An Overview

	Constitutional Court of South Korea		Constitutional Court of Taiwan		Constitutional Court of Lithuania	
	Inward-Looking	Outward-Looking	Inward-Looking	Outward-Looking	Inward-Looking	Outward-Looking
Military	5/10*	0/0	5/7	0/0	4/9	2/2
Citizenry	4/4	1/2	2/2	2/4	0/0	2/2
Economy	0/1	0/3	0/0	0/0	3/6	0/1
Democratic Government	16/23	1/1	6/6	0/0	6/10	0/0
Total	25/38	2/6	13/15	2/4	13/25	4/5
Total (Per Country)	27/ 44		15/19		17/30	

Source: Author

* Each cell contains two numbers: the first refers to the number of cases where courts struck down or reconstructed the substance of an act of government, and the second refers to the total number of cases in the given category.

In the second stage of my research design geared toward demonstrating the three constitutional courts' lack of "exceptional deference," I compared each constitutional court's handling of national security law with the court's handling of law in two other domains: election law and education law. I selected them for two reasons: the "state secrets" element and the "local regulatory needs" element. First, state secrets play almost no role in either electoral law or education law, yet are central to national security law. This fact explains why NSE scholars so frequently argue that courts should grant exceptional deference to government bodies responsible for crafting and executing national security policies that are based on highly confidential state secrets.[96] Second, regarding the "local regulatory needs" element, both election law and education law require local resources to deal with a host of local regulatory needs, whereas national security law presumably requires a far more centralized set of resources for dealing with potential threats that have little or nothing to do with regional domestic variations.[97]

Being able to show that the three constitutional courts exhibit either similar levels of deference across the three bodies of law or even less deference in national security cases than in education or election cases would constitute strong support for my thesis, which is that courts in constitutional democracies can and do rigorously handle cases involving national security disputes. The results of my comparisons, as I will discuss in detail in subsequent chapters, strongly support my thesis: the Constitutional Court of Lithuania was similarly deferential across all three fields of law and the Constitutional Courts of South Korea and Taiwan were less deferential in national security law than in election law and education law (see Table 3).

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[96] POSNER & VERMEULE, TERROR IN THE BALANCE, *supra* note 19, at 208.

[97] Tom Ginsburg & Mila Versteeg, *The Bound Executive: Emergency Powers during the Pandemic*, 19(5) I-CON 1498, 1510 (2021). POSNER & VERMEULE, TERROR IN THE BALANCE, *supra* note 19, at 55.

Interestingly, even though both the "education law" findings and "electoral law" findings are supportive of my thesis, the former are more persuasive because education law is vastly different from national security law whereas there are a few important similarities between electoral law and national security law.[98] After all, democratic governments often invoke national security when crafting their electoral law, and electoral law, especially in the digital age, is often regarded as a national security issue.[99] For example, many regulations established in electoral law prohibit either the foreign funding of or foreign individuals' participation in domestic campaigns and elections; likewise, many regulations established in national security law establishes guidelines for conducting secure elections.[100] (Appendixes 2 and 3 present details about the relevant election decisions and education decisions, respectively.)

Table 3: The South Korean, Taiwanese, and Lithuanian Constitutional Courts' Oversight of National Security, Election, and Education Laws

	National Security Law	Election Law	Education Law
South Korea	61.36%*	46.81%	38.30%
Taiwan	78.95%	55.56%	60.00%

[98] Aziz Huq also examines the similarities between the US Supreme Court's handling of national security law (focusing on detention cases) and the Court's handling of education law. Huq, *supra* note 21, at 262-265.

[99] *See e.g.* Lori A. Ringhand, *Foreign Election Interference: Comparative Approaches to a Global Challenge*, 20(1) ELECTION LAW JOURNAL: RULES, POLITICS, AND POLICY 1 (2021). Yasmin Dawood, *Combatting Foreign Election Interference: Canada's Electoral Ecosystem Approach to Disinformation and Cyber Threats*, 20(1) ELECTION LAW JOURNAL: RULES, POLITICS, AND POLICY 10 (2021). Jacob Eisler, *Constitutional Formalities, Power Realities, and Comparative Anglophone Responses to Foreign Campaign Meddling*, 20(1) ELECTION LAW JOURNAL: RULES, POLITICS, AND POLICY 32 (2021). Galen A. Irwin and Joop J.M. van Holsteyn, *Keeping Our Feet Dry: Impediments to Foreign Interference in Elections in the Netherlands*, 20(1) ELECTION LAW JOURNAL: RULES, POLITICS, AND POLICY 70 (2021). Graeme Orr and Andrew Geddis, *Islands in the Storm? Responses to Foreign Electoral Interference in Australia and New Zealand*, 20(1) ELECTION LAW JOURNAL: RULES, POLITICS, AND POLICY 82 (2021). Irène Couzigou, *The French Legislation Against Digital Information Manipulation in Electoral Campaigns: A Scope Limited by Freedom of Expression*, 20(1) ELECTION LAW JOURNAL: RULES, POLITICS, AND POLICY 115 (2021).

[100] Samuel Issacharoff, *Fragile Democracies*, 120 HARV. L. REV. 1405, 1436 (2007) (arguing that the clear and present danger test can be used in election and national security contexts).

Lithuania	56.67%	56.52%	64.71%

Source: Author

* Each cell identifies the percentage of cases in which a constitutional court struck down or reconstructed the substance of an act of government in one of the three areas of law.

5.4. Two Variables Influencing the Behavior of the Three Constitutional Courts

Building upon the descriptive finding that the constitutional courts exercise significant levels of oversight of national security policies, I will examine the methodologies that the courts apply to their decision-making in their respective jurisdictions. I analyze the methodologies used by the three national judiciaries to adjudicate national security matters in light of the international and domestic contexts in which these judiciaries are established and operate. My examination of these methodologies builds upon the presumption that courts are attentive to political and social surroundings, in large part because courts want to enhance their standing in particular institutional contexts outside the judiciary.[101] Therefore, I will examine the judiciaries' interrelationships with other governmental and civil stakeholders, such as the elected branches of government, diverse political groups, citizens, and international actors.[102]

To be sure, the three national courts adopt their respective methodologies to exercise both oversight of and deference to national security policies, suggesting the lack of a direct association between these methodologies and judicial oversight. Nevertheless, examining the factors contributing to the judiciaries' adoption of these methodologies in national security can enhance

[101] RAN HIRSCHL, TOWARDS JURISTOCRACY: THE ORIGIN AND CONSEQUENCES OF NEW CONSTITUTIONALISM 11-12 (2004).

[102] Pablo T. Spiller & Rafael Gely, *Strategic Judicial Decision-making*, in Whittington, Kelemen & Caldeira, *Id*, at 34-35. Martin Shapiro, *Law, Courts and Social Science*, in MARTIN SHAPIRO & ALEC STONE SWEET, ON LAW, POLITICS AND JUDICIALIZATION 21 (2002).

our understanding of the dynamic relationships between courts, governmental bodies, political elites, and international environments involved in national security policies and politics.

I explore two significant variables that have greatly influenced how the constitutional courts of South Korea, Taiwan, and Lithuania have handled national security disputes: (1) international legal treaties and institutions; and (2) domestic political contestation on the ontological foundation of each jurisdiction. As for the first variable, international legal treaties and institutions play a significant role in shaping domestic courts' responses to legal disputes. A wide range of national security disputes involve accusations that a government has violated its citizens' constitutional rights in the name of national security, and when rendering decisions in these cases, courts may intuitively draw on human rights doctrines. For example, international legal treaties and institutions to which countries are bound may require or, at the very least, encourage these countries' judiciaries to align their assessment of domestic laws and regulations with international human rights principles.[103]

For example, Lithuania, being a member of the Council of Europe since 1993, is bound by the organization's rigorous human rights policies. By contrast, neither South Korea nor Taiwan is so tightly constrained by international human rights principles. This fact goes far in explaining the stark difference between Lithuania and the two East Asian countries regarding how their respective courts employ international human rights treaties to deal with accusations of government overreach in national security contexts.

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[103] Melissa A. Waters, *Mediating Norms and Identity: The Role of Transnational Judicial Dialogue in Creating and Enforcing International Law,* 93 GEO. K.J. 487, 490 (2005). *See also* Christopher McCrudden, *A Common Law of Human Rights?: Transnational Judicial Conversations on Constitutional Rights*, 20 OXFORD J. LEGAL STUD. 499, 527-530 (2000). Bruce Ackerman, *The Rise of World Constitutionalism*, 83 VA. L. REV. 771 (1997).

The second variable influencing constitutional courts' approach to national security disputes is domestic political contestation on the ontological foundation of each jurisdiction. It works by alerting a judiciary to the amount of public support an elected branch of government enjoys with respect to its involvement in a national security matter. Courts' assessment of this public support may influence their decisions in two main ways: when political contestation is vigorous, meaning that political elites lack a reasonably consistent view on the ontological foundation of their political community, courts may base their legal decisions on politically neutral principles in a bid to avoid political backlash from either end of the political spectrum.[104] On the contrary, when political elites share a reasonably strong consensus on the foundation of their polities, courts may be more willing to make substantive value judgments based on the common views shared by political elites.

In this dissertation, I assess how consensus and contestation among members of the public, especially members of the political elites, can affect the behavior of courts. South Korea and Lithuania represent two sovereign countries where political elites have a relatively consistent understanding of their respective countries' national status and national boundaries.[105] Taiwan, by contrast, is a "contested state," where neither the public nor political elites have a secure understanding of their island's national status.[106] Against this backdrop, party lines in Taiwan are drawn in response to not only issues typical of democratic governance, but also atypical issues

[104] Chang, *supra* note 16, at 903.

[105] Hahm & Kim, *supra* note 11, at 5.

[106] Brian C.H. Fong, *Introduction*, in CHINA'S INFLUENCE AND THE CENTER-PERIPHERY TUG OF WAR IN HUNG KONG, TAIWAN, AND INDO-PACIFIC 6 (Brian C.H. Fong, Wu Jieh-min & Andrew J. Nathan eds., 2021). *See also* DEON GELDENHUYS, CONTESTED STATES IN WORLD POLITICS 208-233 (2009).

concerning Taiwan's national status and the concept of national security that should be preserved. Table 4 summarizes my rationales for selecting and conceptualizing the three jurisdictions.

Table 4: Research Design: Independent Variables

		Domestic Political Contestation on the Ontological Foundation of Each Jurisdiction	
		Strong	Moderate
International Legal Treaties and Institutions	Strong		Lithuania
	Moderate	Taiwan	South Korea

Source: Author

6. Analyzing Judicial Oversight of National Security Policies

The above section has laid out my research design for answering the first research question. Subsequently, to answer the second research question (i.e., what are the conditions for constitutional courts to exercise oversight of national security policies?), I examine the nature and political stakes of national security disputes reviewed by the three constitutional courts. I identity three conditions contributing to the three constitutional courts' oversight of national security policies adopted by the elected branches of government: (1) the judges' capacity to adjudicate national security disputes ("judicial capacity"), (2) domestic political or ideological conflicts ("political schism"), and (3) courts' reputational motivation to appear as guardians of democracy,

civil liberties, and constitutionalism ("judicial reputation"). Let us now explore these three conditions in a little more detail.

First, although NSE literature argues that judges lack sufficient expertise in national security,[107] we know that this argument fails to account for the fact that judges, under certain conditions, are quite familiar with the national security issues that arise in a plethora of cases. Judges may be especially well-equipped to handle national security cases involving the kinds of issues that courts handle on a daily basis (e.g., issues involving civil liberties and mandatory military service regulations). When faced with disputes of this kind, courts can better process the available information to exercise oversight of national security policies.

As for the second factor, proponents of NSE emphasize that there is generally widespread domestic political support for democratic governments appearing to respond forcefully to national security threats. These proponents of NSE go on to argue that the existence of this support should dissuade courts from imposing judicial oversight of these popular actions.[108] This argument, too, ignores a vital dimension: not all seemingly forceful responses to national security threats are popular with the public, especially in countries where national security disputes involve deep, long-standing, ideologically rooted disputes. Against this backdrop of fractured support for national security actions, elected officials may have great difficulty coordinating with each other to oppose judicial actions. This difficulty, in turn, can relieve courts of considerable pressure that might otherwise compel them to practice judicial deference in a bid to avoid political backlash.

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[107] POSNER & VERMEULE, *supra* note 1, at 5-6.

[108] *Id.*

Finally, there is the third factor promoting judicial oversight of national security disputes: courts are likely to exercise vigorous oversight in high-profile national security disputes, given that doing so help the courts garner institutional reputation in the eyes of domestic or even audiences.[109] In high-profile cases, domestic and international audiences typically anticipate the courts to express their views on the constitutional responsibilities of the government in national security policymaking and enforcement. In order to obtain the public's trust of the judiciaries as independent institutions, courts may want to stand courageously against the government's monopolized use of national security authority.

7. Structure of the Dissertation

In the present chapter (Chapter 1), I have introduced the theme of this dissertation, my method of research, and the basic theses that I intend to establish through careful analysis and argumentation. In Chapter 2, I summarize the arguments for and against the NSE concept and fully articulate my central three-point thesis: (1) the informational asymmetry between a constitutional court and the elected branches is less pronounced in ontologically contested democracies than what the NSE concept would suggest, and thus, constitutional courts in these democracies possess considerable competence in reviewing national security disputes; (2) the less consensus there is nationally regarding how a government should promote national security, the better able the country's constitutional court will be to navigate divergent stands of political opinions; and (3) constitutional courts can strengthen their own institutional legitimacy without necessarily dodging their constitutional responsibility of practicing judicial oversight.

[109] Huq, *supra* note 21, at 264.

After presenting this three-point thesis, in response to the first research question, I identify two essential factors affecting the patterns of judicial involvement in national security disputes: (1) international legal treaties and institutions and (2) domestic political contestation on the ontological foundation of each jurisdiction. Finally in Chapter 2, I identify three alternative explanations for the constitutional courts' involvement in national security disputes: (1) constitutional provisions protecting the rights of citizens, (2) the relationships between the executive and legislative branches, and (3) the operation of civil society.

In Chapters 3, 4, and 5, I analyze the handling of national security disputes by the Constitutional Courts of South Korea, Taiwan, and Lithuania, respectively. In each of these three chapters, I examine the nature of the three countries' domestic political scene and situate it in the broader regional context. This contextualization-within-contextualization will help clarify how international factors influence domestic politics and how both of these factors influence a constitutional court's particular approach to national security affairs. I argue that the three constitutional courts adjudicate national security disputes in distinct manners that reflect the distinct domestic and international circumstances characterizing each of the three countries: in South Korea, the public's general consensus that North Korea is an existential threat enables the constitutional court to engage in substantive reviews of government actions; in Taiwan, the public's highly divergent views regarding national status and national security threats have led the constitutional court, when it reviews national security disputes, to emphasize procedure as a way of accommodating this divergence; and in Lithuania, the constitutional court rigorously reviews national security policies by formally acknowledging international laws and norms in ways that maintain national security and enhance economic prosperity, all while adhering to the Council of Europe's expectations for member countries.

Also in Chapters 3, 4, and 5, I test the robustness of my claim about the constitutional courts' non-exceptional roles in adjudicating national security disputes. To this end, I compare the respective court's adjudication of these matters with the court's adjudication of matters related to elections and educational affairs. Finally in these three chapters, I identify and examine the three factors contributing to the three constitutional courts' various patterns of adjudication in national security contexts.

In Chapter 6, the final chapter of the dissertation, I compare the behaviors of the three constitutional courts in the national security context. To this end, I employ my findings from the previous three chapters regarding the decisions of the South Korean, Taiwanese, and Lithuanian Constitutional Courts. I examine the differences and similarities in the ways the three courts invalidate or narrowly construe the substance of national security policies, laws, and judicial rulings. I then comparatively analyze two interrelated topics: how the three abovementioned factors (i.e., judicial capacity, political schism, and judicial reputation) intensify the constitutional courts' adjudication of national security disputes, and what the consequences of this judicial behavior are for national security in the three jurisdictions under discussion. In sum, when the three factors hold, the constitutional courts tend to strengthen national security governance through robust adjudication that encourages the elected branches of government to align their national security policies with the principles associated with the rule of law, the separation of powers, and constitutional-rights protections. In this way, the constitutional courts have helped maintain the democratic stability in their respective jurisdictions by exercising judicial power wisely.

CHAPTER 2

CONTEXTUALIZING COURTS IN NATIONAL SECURITY AFFAIRS

In framing a government which is to be administered by men over men,
the great difficulty lies in this:
You must first enable the government to control the governed;
and in the next place, oblige it to control itself.

James Madison, Federalist Papers No. 51 (1788)

1. Introduction

How should courts scrutinize national security measures adopted by the elected branches of government? On the one hand, to handle national security affairs in a rigorous manner, governments must possess great resources and wield great influence; in other words, governments must be powerful. On the other hand, governments endowed with such power have the potential to abuse it, a fact that necessitates a system of constitutional government in which courts can exercise judicial review to safeguard the rule of law and protect civil rights. In the United States, this polarizing issue has vividly manifested itself in the literature on national security law. Much of this literature has evolved primarily in response to the terrorist attacks on September 11, 2001 (the 9/11 attacks).[1] The events of that day have highlighted the unprecedented challenges that governments face in their pursuit of national security. To meet these challenges, the US government adopted a slew of sometimes novel policy measures, some of which have since come under criticism, prompting US courts to review the lawfulness of the measures. In turn, practitioners and scholars in the field of law have reengaged with a new sense of urgency the crucial debate surrounding courts' judicial review of governments' national security actions.

[1] David Dyzenhaus, *Introduction*, in CIVIL RIGHTS AND SECURITY xi (David Dysenhaus eds., 2008).

The accounts of national security exceptionalism (NSE) offer a provocative and influential perspective on the relationship between judicial review and national security. NSE treats national security as an "exceptional" domain of public affairs to which the ordinary principles of judicial review cannot fully apply. NSE thus states that courts should practice more judicial deference in the area of national security than in other areas of law.[2] Courts should, at most, offer moderate oversight of the national security actions undertaken by the elected branches of government.[3]

While this viewpoint has received praise from scholars and jurists,[4] the reasoning that underpins NSE warrants further scrutiny. Many constitutional and administrative scholars have called the premises of NSE into question by presenting counterexamples across various levels of courts.[5] Other scholars have argued that NSE may impede civil liberty protections and violate the rule of law.[6] This scholarly dialogue serves as a valuable starting point for an assessment of how judiciaries across a range of political, cultural, and geographic contexts should approach national security matters.

In the following discussion, I examine both the theoretical accounts in favor of and those in opposition to NSE. A good deal of these opposing accounts addresses two theoretical assumptions on which NSE rests: (1) of the three traditional branches of government, the executive

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[2] *See e.g.* Aziz Z. Huq, *Against National Security Exceptionalism*, 2009 SUP. CT. REV. 225, 227-228 (2009) (summarizing and criticizing national security exceptionalism). Sudha Setty, *Obama's National Security Exceptionalism*, 91 CHICAGO-KENT LAW REVIEW L. REV. 91, 92 (2016).

[3] Ashley S. Deeks, *The Observer Effect: National Security Litigation, Executive Policy Changes, and Judicial Deference*, 82 FORDHAM L. REV. 827, 864-869 (2013).

[4] ERIC A. POSNER & ADRIAN VERMEULE, THE EXECUTIVE UNBOUND: AFTER THE MADISONIAN REPUBLIC 5-6 (2011). *See also* Deeks, *id*, at 854-855. Cass R. Sunstein, *Judging National Security Post-9/11: An Empirical Investigation*, 2008 SUP. CT. REV. 269 (2008).

[5] Huq, *supra* note 2. Shirin Sinnar, *Procedural Experimentation and National Security in the Courts*, 106 CALIF. L. REV. 991 (2018).

[6] GEOFFREY R. STONE, PERILOUS TIMES: FREE SPEECH IN WARTIME FROM THE SEDITION ACT OF 1798 TO THE WAR ON TERRORISM (2004). *See also* David Cole, *Enemy Aliens,* 54 STANFORD LAW REVIEW 953 (2002).

is best equipped to arrange national security policies and (2) the public demands that the executive branch make decisive national security decisions. These two assumptions, however, fail to account for the relatively modest level of informational asymmetry that exists between the executive branch and courts particularly in ontologically contested democracies. In other words, the executive branches in many national governments do not enjoy any measurable advantage over their judiciaries when it comes to expertise in the handling of national security matters. In many countries, furthermore, there is no strong public demand for forceful executive-branch measures because political elites and citizens in these countries are divided in their views on the proper role of the executive branch, the legitimacy of the party in power, the substance of alleged national security threats, and the long-term efficacy of proposed national security measures. Moreover, the two NSE assumptions ignore that courts in democracies have reputational incentives to act as guardians of the given country's constitution and, more specifically, to ensure that their government's national security actions reasonably align with other areas of law.[7] Thus, courts are likely to adjudicate national security disputes with the same general degree of competence that marks courts' adjudication of disputes in other legal contexts. To put this issue in another way, because national security is not an "exceptional" domain of law for every country's judiciary, courts in these countries should not automatically feel compelled to defer to the executive and other branches of government in all matters related to national security.

2. Revisiting National Security Exceptionalism

[7] Huq, *supra* note 2, at 258.

The NSE concept holds that, among the many matters that governments must address, national security is unique.[8] The uniqueness is such that courts should exercise oversight of national security affairs in a manner quite distinct from how courts handle almost all other areas of law. This distinct manner, according to proponents of NSE, should take the form of deference: whether in ordinary times or times of crisis, courts should relax the judicial scrutiny with which they consider national security cases and should thus, in most circumstances, defer to the elected branches of government—especially to the executive branch.[9]

Proponents of NSE defend the concept by referencing several US Supreme Court decisions. The frequently cited early case *US v. Curtiss-Wright Export Corp.* (1936) paved the way for the eventual argument that national security affairs warrant distinct treatment in the courtroom.[10] In this case, which concerned the US response to the Chaco War between Paraguay and Bolivia (1932–1935), the US Supreme Court reviewed a joint resolution of Congress delegating extensive power to President Franklin D. Roosevelt aimed at (1) restricting arms sales to the Chaco region

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[8] Huq, *supra* note 2, at 226.

[9] Robert Knowles, *National Security Rulemaking*, 41 FLA. ST. U. L. REV. 883, 904 (2014). *See also,* Joseph Landau, *Chevron Meets Youngstown: National Security and Administrative State*, 92 B.U. L. REV. 1917, 1918 (2012). Eric A. Posner & Cass R. Sunstein, *Chevronizing Foreign Relations Law*, 116 YALE L.J. 1170, 1173 (2007). Cass R. Sunstein, *Administrative Law Goes to War*, 118 HARV. L. REV. 2663 (2005). Adrian Vermeule, *Our Schmittian Administrative Law,* 122 HARV. L. REV. 1095 (2009). John Yoo, *Administration of War*, 58 DUKE L.J. 2277 (2009). Curtis A. Bradley, *Chevron Deference and Foreign Affairs*, 86 VA. L. REV. 649 (2000). Julian Ku & John Yoo, *Hamdan v. Rumsfeld: The Functional Case for Foreign Affairs Deference to the Executive Branch,* 23 CONST. COMMENT. 179 (2006). Elad D. Gil, *Rethinking Foreign Affairs Deference,* 63 B.C. L. REV. 1603 (2022).

[10] *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936). Ganesh Sitaraman & Ingrid Wuerth, *The Normalization of Foreign Relations Law,* 128 HARVARD LAW REVIEW 1897, 1902-03 (2015). However, Sitaraman and Wuerth argue that, since the end of the Cold War, this "foreign relations exceptionalism" has been weakened by and replaced with a new paradigm of "normalized foreign relations law." Under the new paradigm, the US Supreme Court has generally refrained from treating foreign relations law as categorically distinct from domestic law. General constitutional rules and principles that had usually applied to only domestic affairs now apply to the adjudication of foreign affairs, as well. *C.f.* Stephen I. Vladeck, *The Exceptionalism of Foreign Relations Normalization,* 128 HARVARD LAW REVIEW FORUM 322 (2015). Curtis A. Bradley, *Foreign Relations Law And The Purported Shift Away From "Exceptionalism",* 128 HARVARD LAW REVIEW FORUM 294 (2015). Carlos M. Vázquez, *The Abiding Exceptionalism of Foreign Relations Doctrine*, 128 HARVARD LAW REVIEW FORUM 305 (2015).

and (2) punishing those who conspired to violate the restriction. In a 7-1 decision, the Court upheld Congress's delegation of power, explaining that the limits imposed on government by the Constitution's enumeration of powers apply only to domestic, not international, affairs. In defending the decision, Justice Sutherland further contended that "the President alone has the power to speak or listen as a representative of the nation."[11] Hence, this decision granted the US government—and especially the president—considerable discretion in foreign affairs.[12]

A little over fifteen years later, in *Youngstown Sheet & Tube Co. v. Sawyer (1952)*, the US Supreme Court further elaborated on the power of the president to handle foreign and domestic affairs. In *Youngstown,* the Court struck down President Harry S. Truman's decision, during the Korean War, to seize steel mills in the absence of any congressionally conferred power to do so.[13] Concurring with the Court's decision was Justice Robert Jackson, who proposed a tripartite framework for assessing the legitimacy of an executive action: a president's authority is strongest when resting on an explicit or implicit grant of power from Congress, is weakest when violating the expressed will of Congress, and is equivocal in its constitutionality when there is neither congressional authorization nor congressional proscription regarding the president's action. In the decades since, jurists and others have cited this framework when attempting to discern who has the power to do what in the context of the US Constitution's separation of powers.

Using the Youngstown framework proposed by Justice Jackson, the Supreme Court has occasionally acknowledged that some powers of the president are duly conferred upon that office

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[11] STEPHAN DYCUS, WILLIAM C. BANKS, PETER RAVEN-HANSEN & STEPHEN I. VLADECK, NATIONAL SECURITY LAW 31 (2020).

[12] *Id.*

[13] *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

from Congress. Take *Dames & Moore v. Regan* (1981) as an example. The case concerned President Jimmy Carter's executive order blocking the transfer of Iranian assets to the United States under the International Emergency Economic Powers Act. This order, which served as a diplomatic measure to pressure the Iranian government to release American hostages in Tehran, was challenged before the Supreme Court, which, in an 8-1 decision, upheld the order. The majority opinion, written by Justice William Rehnquist, held that Congress, having passed the International Emergency Economic Powers Act, had "implicitly" authorized President Carter to issue the executive order; in other words, the president was free to take these economic measures whose central purpose was to strengthen the government's hand in dealing with a foreign relations crisis.

Much more recently, the Supreme Court issued a decision in the controversial case *Trump v. Hawaii* (2018). In the decision, the Court again underscored the president's authority to make executive decisions based on national security needs.[14] The background of the case is instructive: in 2017, President Donald Trump issued several executive orders and proclamations (collectively called the "travel ban") to temporarily restrict the entry of nationals from countries deemed by the administration to pose a threat to US national security. That almost all of these countries had majority-Muslim populations raised concerns over the president's possibly discriminatory intent in his selection of the targeted countries, yet the Court held that he had broad discretion in making decisions related to immigration. Furthermore, the Court determined that the travel ban did not

[14] *Trump v. Hawaii, 585 U.S.* ___ (2018).

constitute a violation of Section 1152(a)(1)(A) of the Immigration and Nationality Act, which prohibited discrimination based on nationality as stipulated in visa documents.[15]

Building upon the cannons set by the above decisions, US courts constantly demonstrate exceptionally high levels of deference in various categories of national security disputes. Perhaps the most widely recognized disputes are those involving confidential information and secrecy.[16] Indeed, in the landmark decision *New York Times v. United States* (1971),[17] the US Supreme Court determined that the New York Times was entitled to publish the Pentagon Papers, a top-secret study commissioned by the US government to review its foreign policy toward Indochina in 1967.[18] To support its decision, the Court reasoned that such information has been disseminated and that there was little authority that the government could exercise to prevent its further circulation.[19] Due to the nature of this affair, the Court expressed that the general principle governing confidential information, which is that the elected branches of government hold extensive power to classify information, was inapplicable in the present case.[20] Nevertheless, this general principle has found application in the domain of the Freedom of Information Act (FOIA), where scholars have documented, both empirically and descriptively, that US courts regularly

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[15] *See e.g.*, Aziz Z. Huq, *Article II and Antidiscrimination Norm*, 118 MICH. L. REV. 47 (2019). L. Darnell Weeden, *Using Rational Basis Review in an Establishment Clause Challenge to an Alleged Muslim Travel Ban,* 18 CONN. PUB. INT. L.J. 165 (2019). Zainab Ramahi, *The Muslim Ban Cases: A Lost Opportunity for the Court and a Lesson for the Future,* 108(2) CALI. L. REV. 557 (2020). Shalini Bhargava Ray, *Plenary Power and Animus in Immigration Law*, 80 OHIO ST. L.J. 13 (2019). Avidan Y. Cover, *Quieting the Court: Lesson from the Muslim Ban Case,* 23 J. GENDER RACE & JUST. 1 (2020). Eric K. Yamamoto, Rachel Oyama, *Masquerading Behind a Façade of National Security,* 128 YALE L.J. FORUM 688 (2019). Shawn E. Fields, *The Unreviewable Executive? National Security and the Limits of Plenary Power,* 84 TENN. L. REV. 731 (2017).

[16] Geoffrey R. Stone, *Secrecy and Self-Government*, 56 N.Y.U. SCH. L. REV. 81 (2011). Geoffrey R. Stone, *Government Secrecy vs. Freedom of the Press*, 1 HARV. L. & POL'Y REV. 185, 192 (2007).

[17] 403 U.S. 713 (1971).

[18] Stone, *supra* note 16, at 197.

[19] Stone, *supra* note 16, at 199.

[20] *Id.*

uphold the government's decisions not to disclose certain pieces of governmental information in the interest of national security.[21]

One may respond to the above findings by speculating that courts only apply deference in the realm of confidential information and secrecy. Nevertheless, this speculation is not supported by the empirical findings of several scholars. Without limiting his research to cases involving confidential information, Cass Sunstein examined national security rulings made by the US courts of appeals between September 11, 2001, and September 10, 2008. He found that the courts upheld the executive branch's claims in 85 percent of all national security disputes, a rate higher than in many other fields of law.[22] For sure, Sunstein intentionally chose a period that could be considered a national security crisis. As numerous empirical studies have demonstrated how courts curtail civil rights protections during times of crisis,[23] Sunstein's choice of time period arguably diminishes the relevance of his findings when examining the judicial handing of routine national security issues.

This concern, however, is resolved reasonably by an ambitious study conducted by William Eskridge and Lauren Baer. They examined 1014 decisions of the US Supreme Court between 1984 and 2006 concerning how the Court reviewed government agencies' interpretations of statutes. Eskridge and Baer found that executive interpretations of statutes prevailed in 78.5 percent of all

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[21] Stone, *supra* note 16, at 89. Stone, *supra* note 16, at 192. Paulina Perlin, *Defense and Deference: Empirically Assessing Judicial Review of Freedom of Information Act's National Security Exemption*, 11 HARV. NAT'L SEC. J. 257, 258 (2020). Margaret B. Kwoka, *Deferring to Secrecy,* 54 B.C. L. REV. 185, 185-188 (2013). Margaret B. Kwoka, *Deference, Chenery, and FOIA,* 73 MD. L. REV. 1060, 1060-1061 (2014). Meredith Fuchs, *Judging Secrets: The Role Courts Should Play in Preventing Unnecessary Secrecy*, 58 ADMIN. L. REV. 131, 163-168 (2006). Christina E. Wells, *"National Security" Information and the Freedom of Information Act*, 56 ADMIN. L. REV. 1195, 1216-1217 (2004).

[22] Sunstein, *supra* note 4, at 270, 276-277. Deeks, *supra* note 3, at 878-879.

[23] *See e.g.,* Lee Epstein, Daniel E. Ho, Gary King, Jeffrey A. Segal, *The Supreme Court During Crisis: How War Affects Only Non- war Cases,* 80 N.Y.U. L. REV. 1, 4–6 (2005).

cases involved foreign affairs or national security, a rate much higher than the overall rate of executive victory, which was 68.8 percent.[24] Particularly, the executive won more cases of statutory interpretation in national security and foreign affairs than in many other categories, including immigration cases (67.7 percent), civil rights cases (61.0 percent), and criminal law cases (62.3 percent).[25] Accordingly, the research conducted by William Eskridge and Lauren Baer provides a strong case to demonstrate that US courts routinely exercise high levels of deference in the national security context.

Taken together, these scholarly inquiries demonstrate that US courts' use of deference has become a recognized practice across different domains of national security law. For sure, the aforementioned studies adopt different methodologies to conceptualize "judicial deference" and divergent benchmarks to measure the levels of judicial deference during disparate periods of time.[26] Nevertheless, the findings of these studies suffice to paint a picture of the prevalent and significant application of national security exceptionalism on American soil. For this reason, it is necessary for us to understand the theoretical grounds for national security exceptionalism, which I analyze in the following section.

3. Making Sense of NSE

NSE rests on two assumptions regarding the prudential roles of courts in national security affairs: (1) a high level of information asymmetry exists between the judiciary and the executive

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[24] William N. Eskridge, Jr. & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from Chevron to Hamdan*, 96 GEO. L.J. 1083, 1102, 1145 (2008). Deeks, *supra* note 3, at 878-879.

[25] Eskridge. & Baer, *Id,* at 1145.

[26] Deeks, *supra* note 3, at 879.

regarding national security matters; and (2) the public demands decisive executive action in response to national security threats. Given that the two considerations seem strikingly relevant in ontologically contested countries facing a significant—and perhaps even an existential—national security threat, I will examine these two assumptions and discuss my conclusions, against which I will later foreground my thesis.

3.1. The Executive's Comparative Competence in National Security Matters

The first NSE assumption, which concerns information asymmetry, has been tested by legal scholars. For example, Eric Posner and Adrian Vermeule compare the overall institutional performance of the judiciary and that of the executive in the US government. The scholars' emphatic conclusion is that the executive branch enjoys a comparative institutional advantage over the judiciary in making policy decisions. Thus, Posner and Vermeule assert that courts should exercise deference to the executive branch regarding a wide range of policy decisions but especially those related to national security: only in this way can the courts maximize policy accuracy and efficiency.[27]

To justify their conclusion, Posner and Vermeule assert that executive agencies tend to possess an accumulation of both specialized knowledge and institutional training indispensable for investigating, assessing, and formulating public policies that require "secrecy," "speed," and "flexibility."[28] Especially in the field of national security, the executive branch's access to and control of information about national security threats make this branch of government institutionally superior to the judiciary with respect to ascertaining both the "relative likelihood of

[27] POSNER & VERMEULE, *supra* note 4, at 5-6.

[28] *Id.*

threats to security" and "the overall costs of particular policies."[29] In contrast to the executive branch, courts are "slow, open, and rigid."[30] Moreover, the institutional design of courts makes them unable to access as much information as they need for the task of determining the strengths and weaknesses of a proposed or adopted policy.[31] Accordingly, courts are in a very poor position not only to assess the severity of national security risks and to conduct cost-benefit analyses, but also to obtain the information necessary for determining "whether and when intrusions on civil liberties are justified."[32] Therefore, even exceptionally motivated and intelligent judges will tend to lack the information necessary for sound decision-making that is usually the province of the executive branch.[33]

Building on similar considerations, Samuel Issacharoff and Richard Pildes worry that, during turbulent times, courts might struggle to strike a healthy balance between national security and civil liberties.[34] Therefore, the courts should engage in the process of "bilateral institutional endorsement," which occurs when courts identify and arrange an appropriate institutional framework that promotes better policy formulation by the two elected branches of government. In

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[29] ERIC A. POSNER & ADRIAN VERMEULE, TERROR IN THE BALANCE: SECURITY, LIBERTY, AND THE COURTS 31 (2007). Posner & Vermeule, *supra* note 27, at 29-30. *See also* Eric Posner & Adrian Vermeule, *Emergencies, Tradeoffs, And Deference*, In CIVIL RIGHTS AND SECURITY, *supra* note 1. Eric Posner & Adrian Vermeule, *The Credible Executive*, 74 U. CHI. L. REV. 865 (2007); Eric Posner & Adrian Vermeule, *Accommodating Emergencies*, 56 STAN. L. REV. 605 (2003); Eric Posner & Adrian Vermeule, *Crisis Governance In The Administrative State: 9/11 And The Financial Meltdown of 2008*, 76 U. CHI. L. REV. 1613 (2009); Eric Posner & Adrian Vermeule, *Emergencies And Democratic Failure*, 92 VA. L. REV. 1091 (2006); Eric Posner & Adrian Vermeule, *Emergencies And Political Change: A Reply To Tushnet*, 56 STAN. L. REV. 1593 (2004); Eric Posner & Adrian Vermeule, *Originalism And Emergencies: A Reply To Lawson*, 87 B.U. L. REV. 313 (2007). JOHN YOO, THE POWERS OF WAR AND PEACE: THE CONSTITUTION AND FOREIGN AFFAIRS AFTER 9/11 (2005).

[30] POSNER & VERMEULE, EXECUTIVE UNBOUND, *supra* note 4.

[31] POSNER & VERMEULE, TERROR IN THE BALANCE, *supra* note 29, at 31.

[32] Cass R. Sunstein, *Fear and Liberty*, 71(4) SOCIAL RESEARCH 967, 968 (2004).

[33] POSNER & VERMEULE, TERROR IN THE BALANCE, *supra* note 29, at 31.

[34] Samuel Issacharoff & Richard H. Pildes, *Between Civil Libertarianism and Executive Unilateralism: An Institutional Process Approach to Rights during Wartime,* 5 THEORETICAL INQUIRIES IN LAW 1, 2 (2004).

so doing, courts should view themselves as promoters of intergovernmental democratic deliberation in times of crisis, especially national security crises, rather than as the final arbiters of the fraught relationship between national security and civil liberties.[35]

In a similar vein, Cass Sunstein argues that it is both unrealistic and undesirable to expect courts to focus on protecting civil liberties in times of war.[36] After all, there are often substantial arguments justifying the government's use of potentially intrusive national security tools.[37] Therefore, Sunstein proposes the "minimalist approach": quite simply, courts ought to impose only modest oversight on the executive branch's use of power in times of national security crises.[38]

3.2. Public Demand for Decisive Executive Action

The second NSE assumption regarding the prudential roles of courts in national security affairs is that the safety of a country's citizenry depends on the executive's ability to make decisive national security decisions. Upon analysis, we can see that this assumption pertains to the countermajoritarian nature of courts.[39] Courts whose judges are appointed, not elected, are, it can be argued, detached from the electorate and thus less democratically legitimate than the elected members of the other two branches of government. The executive branch, in particular, strives to cultivate its "credibility" and "popularity" with the people, as only in this way can the executive maximize its political sway.[40] Therefore, the most effective oversight of the executive's unbridled

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[35] *Id.*

[36] Cass R. Sunstein, *Minimalist at War*, 2 SUP. CT. REV. 47, 51-52 (2004).

[37] *Id.*

[38] *Id*, at 53-56.

[39] Michael Comiskey argues that the countermajoritarian debate is overblown on normative grounds. *See* Michael Comiskey, *Is There Really A Countermajoritarian Problem?* in EXPLORING JUDICIAL POLITICS 205-212 (Mark C. Miller eds., 2009).

[40] POSNER & VERMEULE, EXECUTIVE UNBOUND, *supra* note 4, at 13.

exercise of power are not legal constraint enforced by courts, but political oversight, which manifest themselves most prominently in the rough and tumble world of politics and elections.[41] As then-Professor Elena Kagan argued, the head of the executive maintains "an electoral link" with the people.[42] Owing to their "visibility" and "personality,"[43] presidents exercise power in a way that encourages the public to identify them, evaluate them, and hold them accountable for specific policies, including those related to national security.

Courts do not possess such a visceral, direct link to the public. Because courts maintain their authority without a direct electoral link to voters, the courts' forceful disruption of controversial policies concerning, in particular, national security is likely to be "condemned as 'activism' by 'unelected judges'."[44] Courts' political vulnerability results in what Posner and Vermeule describe as a "legitimacy deficit," prompting them to exhibit greater attentiveness and practice greater caution when handling cases whose themes are trending in public opinion.[45] Courts that fail to take into consideration the power of public opinion can face accusations of countermajoritarian activism.

Countermajoritarian concerns are amplified in the context of national security. During national security crises, public fears about foreign-emanating acts of espionage, sabotage, and outright military interventions reduce the public's tolerance for governmental inaction. This state of affairs on the domestic front often empowers political leaders who promise to take swift,

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[41] *Id*, at 12-13.

[42] Elena Kegan, *Presidential Administration,* 114 HARV. L. R. 2245, 2332 (2001). C.f. Thomas O. Sargentich, *The Emphasis on the Presidency in U.S. Public Law*, 59 ADMIN. L. REV. 1, 29 (2007).

[43] *Id.*

[44] POSNER & VERMEULE, EXECUTIVE UNBOUND, *supra* note 4, at 30.

[45] *Id.*

forceful responses that satiate, at least in the short term, the public's demand for action rather than acquiescence.[46] Meanwhile, courts may lose any trust the public has in them if they appear to be hampering executive responses to national security threats.[47] In other words, a pressing national security situation is likely to generate, among members of the public, a high degree of intolerance for "bad" policy, as existential concerns about personal safety and national sovereignty take the place of everyday concerns about professional governance. Moreover, this intolerance can trigger profound political upheavals that destabilize the very foundation of judicial functioning, which consists of the trust and credibility that courts accumulate in the public eye. Aware of this possibility, courts tend to grant the executive branch the room it needs to make decisive national security decisions.[48]

3.3. The Relevance of NSE for Ontologically Contested Democracies

The two NSE assumptions that I summarized above (the "information asymmetry" assumption and the "public demand for decisive action" assumption) seem to rest upon the general relationships among courts, the executive branch, and the citizenry. The existence and importance of these relationships allow scholars to examine the role that the NSE assumptions play in broader topics related to national security. Legal scholars may find NSE a valuable theoretical tool for describing, analyzing, and critiquing judicial behavior in ontologically contested democracies.

There are two reasons why NSE can be a valuable tool in the above context. First, national security policies are closely entwined with other policy domains, given that maintaining the

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[46] STONE, *supra* note 6, at 544.

[47] *Id.*

[48] William G. Howell, Kenneth A. Shepsle & Stephane Wolton, *Executive Absolutism: The Dynamics of Authority Acquisition in a System of Separated Powers*, 18 QUARTERLY JOURNAL OF POLITICAL SCIENCE 243, 245 (2023).

security of the country is question requires improving foreign relations and strengthening homeland security at the same time. In contexts involving such complexity, there is sometimes little consensus regarding how the government should label and handle an international or external matter. What emerges from this lack of consensus is a kind of "twilight" zone in which no fixed, agree-upon boundary separates foreign affairs from domestic affairs. Of course, no country can draw a perfectly clean line separating the country's foreign policies from its domestic ones. However, in most constitutional democracies, executive and congressional branches have established long-standing practices to draw just such a line, and there is little contestation regarding the legitimacy of this line: the same cannot be said for ontologically contested countries.[49]

When foreign and domestic affairs are intrinsically interconnected, good national security governance requires a considerable amount of flexibility. This trait, according to Posner and Vermeule, is most likely to be found in the executive branch of a constitutional democracy. Because national security policies implicate (and are implicated by) a wide range of domestic affairs, various departments in an executive branch of government are functionally suited for the task of collaboratively formulating and executing these policies. Moreover, experts outside the executive branch can help it ascertain the severity of, the domestic and international implications of, and the proper responses to national security threats. In constitutional democracies, courts are designed to be insulated from political forces: hence the argument that these courts are ill-suited

[49] *Curtiss-Wright,* for example, emphasizes that foreign affairs differ from domestic affairs "in nature": a foreign-affairs event is "a situation entirely external to the United States." The assertion that there is a "marked difference" between these two realms of activity has been "recognized in the dealings of the houses of Congress with executive departments." In short, this ruling afforded the executive branch a great deal of power in executing the country's foreign policy, to the exclusion of the other two branches of government. United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 315, 321.

to second guess decisions made by the elected branches of government, which are usually staffed with experts in a vast array of fields and are equipped with top-tier institutional resources.[50]

The second reason why NSE can be a valuable tool for ontologically contested democracies has to do with the documented fact that the national security policies in this type of country tend also to be extraordinarily contentious: the existence of such contention presumably dissuades courts, which are a countermajoritarian institution, from involving themselves in the policies and in the issues that gave rise to the policies in the first place.[51] Political elites in an ontologically contested country often face great challenges regarding how it should engage with a foreign country from the perspective of national security. Moreover, the twilight zone of murkily overlapping foreign and domestic affairs in ontologically contested democracies can generate fierce political disputes regarding whether these countries, when dealing with another country, should approach the relationship primarily as a national security matter, as a more benign foreign-relations matter, or perhaps even as an ordinary domestic matter. In sum, national security issues have a pronounced tendency to spark multi-layered political debates in countries grappling with the contested foundations of their national status. In the absence of vigorous public or governmental support for a judiciary's involvement in these issues, the judiciary may want to refrain from such involvement, given that it might trigger a formidable backlash potentially endangering the judiciary's very survival.

4. Opposition to NSE

[50] POSNER & VERMEULE, TERROR IN THE BALANCE, *supra* note 29, at 31.

[51] GARY JEFFREY JACOBSOHN, CONSTITUTIONAL IDENTITY 110 (2010).

The NSE concept has faced criticism from various fronts. Some scholars have criticized the two assumptions cited by proponents of the NSE: these scholars reject the "information asymmetry" assumption and argue that the executive branch of government does not necessarily possess sufficient skills or institutional competence to make sound national security decisions; and other scholars reject the "public demand for decisive action" assumption by pointing out that public opinion is often divided for and against the government's actions.[52] Moreover, some other scholars emphasize that courts are strongly motivated to vigorously scrutinize executive decisions and do so for reputational reasons.[53] In the following section, I review these three areas of criticism, which will serve as an important basis for my thesis in this dissertation.

4.1. The Myth of Executive Competence

Some scholars contest the NSE assumption that the executive branch competently handles national security issues and is far better at this task than the judiciary. Aziz Huq employs organizational theory to critique the assumption.[54] He contends that, for example with respect to terrorism, national security institutions, including those ensconced in the executive branch of a government, "can hinder just as much as…foster rapid, informed responses."[55]

Robert Chesney also lays bare the myth of executive competence.[56] His argument unfolds in two parts. First, when troublesome national security litigation arises, administrative agencies in

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[52] Aziz Z. Huq, *The Political Psychology of Counterterrorism,* 9 ANN. REV. L. & SOC. SCI. 74, 83-84 (2013).

[53] Shirin Sinnar, *supra* note 5, at 1000. *See, e.g.* Jonathan Masur, *A Hard Look or a Blind Eye: Administrative Law and Military Deference*, 56 HASTINGS L.J. 441, 501-15 (2005).

[54] Aziz Z. Huq, *Structural Constitutionalism as Counterterrorism,* 100 CALIF. L. REV. 887, 904-05 (2012).

[55] *Id,* at 918.

[56] Robert M. Chesney, *National Security Fact Deference*, 95 VA. L. REV. 1361, 1404-1426 (2009).

the executive branch are likely to disclose information to courts in pursuit of an immediate desirable conclusion to the litigation. The fact that courts come into possession of this information challenges the notion that they are inherently less informed about national security issues than executive bodies are.[57] Second, Chesney contests the idea that institutional expertise invariably yields high-quality decision-makers or reliable decision-making processes. He emphasizes the lack of detailed evidence regarding how decision-makers employ their expertise in formulating national security policy; in short, the assumption of institutional expertise is more speculative than factual.[58]

Margaret B. Kwoka joins the ranks of the above scholars in challenging the NSE assumption that courts are ill-equipped to make good decisions in national security matters. Kwoka contends that, just as judicial deference may lead to poor government decisions, robust judicial review has been proven to strengthen policy accuracy and desirable policy outcomes.[59]

4.2. Political Competition

Scholars argue that the public does not invariably demand forceful executive action in response to national security threats. The uneven public preferences for a given national security policy result in competing political interests that elected officials play off of in order to win public support for themselves. What emerges is a divided or even fragmented body politic, one that lacks a cohesive public will. Borrowing insights from empirical studies, Aziz Huq demonstrates that the US public's attitudes toward reducing civil liberties have been uneven over the years.[60] In response

[57] *Id*, at 1407.

[58] *Id*, at 1411.

[59] Margaret B. Kwoka, *The Procedural Exceptionalism of National Security Secrecy*, 97 B.U. L. REV. 103, 104 (2017).

[60] Huq, *supra* note 52, at 83-84.

to a terrorist event, several recurring factors tend to have a distinctly partisan effect on citizens' political behavior and public preferences.[61] In turn, citizens' political preferences can pressure elected officials to act in a non-cohesive manner. Elected members of national legislatures play a role in this phenomenon: focused on securing as much support as possible from their electorate, these legislators vocally endorse or reject controversial national security policies, and these partisan expressions can influence executive action regarding a national security matter. Eventually, political competition between legislators or between legislators and the executive branch undermines the aggregate cohesiveness of the public's support for a foreign-policy stance taken by the executive branch. For this reason, opponents of NSE reject the view that democratic (i.e., legislative and public) oversight of an executive branch's national security policies is sufficient; judicial oversight, instead, may still be necessary.[62]

Other scholars oppose the assumption of cohesive public support for forceful executive action by revealing the complex dynamic among citizens, political elites, and the press.[63] Taking a critical approach, RonNell Andersen Jones and Lisa Grow Sun show that, in the US context, powerful media outlets try to shape public perceptions of national security narratives. For example, popular media platforms in the United States widely disseminated President Trump's narrative that Muslims constituted a "national security enemy." In addition, some of these media platforms endorsed the narrative and criticized its critics. Perhaps not surprisingly, therefore, the narrative not only received widespread public attention but also widespread public support.[64] According to

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[61] *Id*, at 84.

[62] *Id*, at 87.

[63] RonNell Andersen Jones & Lisa Grow Sun, *Enemy Construction and the Press*, 49 ARIZ. ST. L.J. 1301, 1301 (2017).

[64] *Id*, at 1308-1316.

Jones and Sun, these actions by certain media platforms undermined the ability of legislature-based political checks and balances to rein in the national security policies of the executive branch.[65] Whatever the case may be, it is quite clear that powerful interests, including the media, contest—and seek to shape—public support for or public opposition to national security policies. Thus, we should always critically examine how this support or opposition takes shape and never assume that it is its own starting point.

4.3. A Well-motivated Court

In addition to arguing judicial capacity as well as political competition, scholars have also demonstrated that courts can and do exercise their powers rigorously in the area of national security law. This line of descriptive analysis rests on the argument that a court intending to bring the national security actions of the government in greater alignment with other domains of law must first be sufficiently motivated to undertake this potentially daunting task. Aziz Huq's analysis of several US Supreme Court decisions concerning non-criminal detention exemplifies this point. Huq compares post-9/11 non-criminal detention cases with other categories of litigation, and contends that the Supreme Court, by employing similar judicial procedures in these two scenarios, has aligned the jurisprudence of non-criminal detention with general constitutional principles.[66] Huq argues that the Supreme Court's decisions may be explained by its "reputational or other judicial motivations," which have led the Court to adopt a generalized rather than exceptional approach to adjudicating national security disputes.[67]

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[65] *Id*, at 1316-1322.

[66] Huq, *supra* note 2, at 273.

[67] Huq, *supra* note 2, at 258.

Take *Hamdi v. Rumsfeld* (2004) as an example. Hamdi was a US citizen detained in Guantanamo Bay amidst the Afghanistan War for his alleged role as an "enemy combatant." Having learned that the detention was both indefinite and without any procedural guarantees, Hamdi's father filed a petition of habeas corpus for him. In *Hamdi*, the Court rejected the Bush administration's claim that both the rule of law and the separation of powers prevent the national government from handling detention cases.[68] The Court then forged a presumably more robust procedural mechanism for handling habeas corpus litigation—a mechanism that would protect the Fifth Amendment rights of detainees in times of war.

Hamdi dealt with a detainee possessing US citizenship. Proponents of NSE may attempt to reconcile the Supreme Court's decision in *Hamdi* with their belief in a strong executive by adopting a compromised interpretation of NSE: there exist limits on a government's national security powers when those powers infringe upon the individual rights of a citizen. Nevertheless, even this compromised interpretation of the NSE assumption has come under fire. In *Hamdan v. Rumsfeld* (2006), the Supreme Court applied procedural protections to a non-US citizen detainee. The Court demanded that the government demonstrate a strong likelihood that the defendant, whom the government brought to trial under military procedures, had committed an offense against the law of war.[69] The Court further concluded that the government must afford defendants a set of internationally recognized procedural protections, including those under Article 3 of the Geneva Conventions.

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[68] *Hamdi v. Rumsfeld*, 542 US 507 (2004).

[69] *Hamdan v. Rumsfeld*, 548 US 557 (2006).

Similarly, in *Boumediene v. Bush* (2008), the US Supreme Court underscored the constitutionally protected right of habeas corpus and applied due-process procedures to persons detained at Guantanamo Bay.[70] The Court criticized the procedural requirements under the Military Commissions Act, a law supported by and passed under the Bush administration to expedite the processes of investigating, prosecuting, and trying persons alleged to be enemy combatants. In short, the Court adopted a relatively robust position in the context of non-criminal detention, challenging the perception, embraced by proponents of NSE, that a judiciary should defer to the elected branches of government during a national security crisis.

Ally Scher's research also sheds light on why NSE fails to capture the true nature of judicial motivation in constitutional democracies. Citing numerous cases regarding the legitimacy of executive and legislative actions across the Bush, Obama, and Trump administrations, Scher makes two central arguments: in general, courts carefully reviewed all relevant evidence pertaining to these cases and rendered decisions whose main objective was to ensure the constitutionality of the disputed actions.[71] Thus, judges in the United States have a proven track record of prudentially evaluating whether and how to extend judicial deference to the elected branches of government, particularly the executive.[72] When reviewing national security disputes, US courts generally adopt an approach reminiscent of the "hard look doctrine" under the Administrative Procedure Act (APA): courts follow this doctrine when handling litigation concerning domestic affairs of a regulatory nature.[73]

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[70] *Boumediene v. Bush*, 553 US 723 (2008).

[71] Ally Scher, *The Role of Process in Determining Judicial Deference to the Executive*, 21 N.Y.U. J. LEGIS. & PUB. POL'Y 767, 771 (2018-2019).

[72] *Id*, at 769.

[73] *Id.*

Shirin Sinnar examines decisions concerning state secrecy made by federal and trial courts, and argues that they carefully, routinely, and on a case-by-case basis, review competing evidence and arguments.[74] This finding, Sinnar asserts, suggests that courts can (and should) adjudicate state-secrecy and other national security cases in a "tailored, pragmatic fashion" that accounts for all relevant evidence and arguments.[75]

The finding that courts are well motivated and well equipped to handle cases involving national security disputes is supported by several normative critiques of NSE. To be sure, these critiques ground their analysis not only in a detailed description of what courts have done but also in a prescription of what courts should do. Moreover, this prescription is, itself, grounded in the traditions of civil libertarianism, recommending US courts to exhibit a robust and judicially independent ability and protect civil liberties. In this regard, Geoffrey Stone argues that courts possess a comparative advantage over elected officials. He argues that judges' independence from political interference and their "more focused attention to the preservation of constitutional liberties" mean that courts are far better suited to interpret constitutional texts than are the elected branches of government.[76]

Similarly, David Cole questions the wisdom of Posner's and Vermeule's faith in the comparative competence of elected officials, arguing that the majoritarian nature of the elected branches of government diminishes the ability of elected officials to identify and assess conflicts between national security actions and constitutional rights. As Cole puts it, "elected officials'

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[74] Sinnar, *supra* note 5, at 995.

[75] *Id*, at 992.

[76] STONE, *supra* note 6, at 543. *See also* Cole, *supra* note 6, at 1341.

assessments of what serves our liberty and security interests will be necessarily skewed."[77] Cole then praises the relative independence of judges, and concludes that courts are better equipped than legislatures and presidencies to evaluate "a set of preferred values or fundamental cornerstones of our human and political existence"; in other words, judges serve as a reliable governmental bulwark against government—and especially executive—encroachment on constitutionalism in times of distress.[78]

So far, I have summarized critiques of NSE, with an emphasis on their responses to the two main assumptions that NSE proponents cite in support of judicial deference. Nevertheless, critical questions remain: How do these lines of critique hold up in constitutional democracies that are ontologically contested? Is the judicial branch in such countries better than, worse than, or about on par with the elected branches of government regarding national security decision-making? What does the public in such countries demand from courts when it comes to national security? Does the public call for the executive branch's nearly unilateral exercise of national security decision-making powers, especially in the face of grave national security threats? To address these questions, it is necessary to scrutinize the critiques of the main NSE assumptions in a way that accounts not only for courts, elected branches of government (especially the executive branch), and the citizenry, but also for the particular national security challenges faced by ontologically contested democracies.

5. National Security in Ontologically Contested Democracies

[77] Cole, *supra* note 6, at 1341.

[78] David Cole, *No Reason to Believe: Radical Skepticism, Emergency Power, and Constitutional Constraint*, 75 U. CHI. L. REV. 1329, 1364 (2008).

Posner and Vermeule recognize that not all constitutional democracies face a similar panoply of national security exigencies. The "balance between security and liberty," the authors argue, "is constantly readjusted as circumstances change."[79] A failure to acknowledge the contexts against which courts review national security disputes would almost certainly lead to the construction of an irrational, destructively decontextualized system of security governance. In the following section, I contextualize both the "information asymmetry" NSE assumption and the "public demand for decisive action" NSE assumption in ontologically contested democracies.

5.1. Judicial Competence in Adjudicating National Security Controversies

We know that proponents of NSE hold that courts are generally ill-informed with respect to national security affairs.[80] In *Terror in the Balance*, Posner and Vermeule emphasize how courts, being "generalists," can neither acquire nor process sufficient information about national security.[81] For sure, most courts do not regularly deal with "specialized national security affairs."[82] Moreover, some national security information needs to be kept confidential, even from courts, and this reality can prevent them from conducting a sufficiently comprehensive review of a disputed government action. Nevertheless, this portrait of courts seems to assume that national security issues are entirely distinct from the general affairs that courts review on a regular basis; in other words, this portrait of courts ignores their ability to adjudicate national security disputes on the basis of general legal principles typically applied to employment, business, marriage, and other everyday domestic disputes.

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[79] Posner & Vermeule, TERROR IN THE BALANCE, *supra* note 29, at 28.

[80] Posner & Vermeule, TERROR IN THE BALANCE, *supra* note 29, at 31.

[81] Posner & Vermeule, TERROR IN THE BALANCE, *supra* note 29, at 31.

[82] Posner & Vermeule, TERROR IN THE BALANCE, *supra* note 29, at 31.

Even though government agencies may prevent courts from collecting the fullest range of national security information available, the national security information that courts can obtain may be sufficient for proper adjudication of many, if not all, national security disputes. How can courts acquire enough information to achieve this aim? First, courts can demand that litigants in a national security case share information during the fact-finding or adversarial stages of the process. With this information, judges immerse themselves in national security information. Robert Chesney has elaborated on courts' tendency to demand litigation-related information from executive agencies.[83] If the executive agencies in question want a swift and desirable outcome to the litigation they are facing, they are likely to disclose the demanded information, at least to the extent that the disclosure would not impair their "long-term interests associated with intelligence collection."[84]

Ashley Deeks articulates a similar argument. She shows how executive agencies that are facing litigation adjust their behavior according to their assessment of possible judicial decisions in the case.[85] If the executive agencies are not entirely sure that they will win a case, they will likely exhibit a strong inclination to better align their policies with what the executive agencies anticipate the courts would demand in a decision.[86] Building on this analysis of anticipatory and conciliatory executive behavior, executive agencies that perceive an undesirable outcome to a case are quite likely, in the initial stages of the case, to comply with a court's request for sensitive information.

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[83] Chesney, *supra* note 56, at 1406-1408.

[84] Chesney, *supra* note 56, at 1407.

[85] Deeks, *supra* note 3, at 838-840.

[86] Deeks, *supra* note 3, at 827.

The judiciary's ability to assess national security information is likely be stronger in ontologically contested democracies. In this context, a wide array of national security concerns are diffused into the government's day-to-day handling of civil liberties cases.[87] Consequently, when hearing cases purportedly centered on civil liberties issues, courts in ontologically contested democracies are more likely than courts in other democratic countries to utilize their legal expertise to handle national security issues. The more national security disputes a court addresses in its day-to-day handling of cases, the more likely the court will familiarize itself with national security issues and equip itself with impressive national security skills.[88] Harnessing these resources, the court will be in a formidable position to strike a reasonable, workable balance between national security aims and civil liberties.

Another factor can explain why courts in ontologically contested democracies become so familiar with national security issues. A government in this national context often adopts military or other institutional arrangements requiring that ordinary citizens take part in collective projects dedicated to national self-defense.[89] These citizens are likely to have first-hand experience and information regarding the national security threat faced by their country, and this familiarity with the threat is likely to reduce any sense of detachment that they might feel when asked by their country to shoulder some form of national security responsibility.[90] Thus, these countries' judges—being citizens who, at some point in their lives, must also shoulder this personal national security responsibility—are all the more likely to be familiar with national security issues in a way

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[87] Knowles, *supra* note 9, at 891.

[88] SUDHA SETTY EDS., CONSTITUTIONS, SECURITY, AND THE RULE OF LAW 69 (2014).

[89] Michael J. Sherman, *Military and National Security Deference in Judicial Decision Making: The Differing Cases of Israel and the United States*, 87 UMKC L. REV. 367, 391-392 (2019).

[90] *Id.*

that improves the sense of competence that judges feel regarding their ability to review national security disputes.

Comparative studies of national security law in the United States and in Israel may help to substantiate this point.[91] Many scholars are often puzzled by the stark differences between US courts' pronounced deference to the executive branch and Israeli courts' far more active and even oppositional stance toward the executive branch with respect to national security disputes.[92] Several studies argue that Israel's mandatory military service may intensify the interest with which the country's judges handle national security disputes.[93] As the vast majority of Israeli adults have served in the armed services, Israeli judges usually have first-hand military experience that can help them maintain a critical eye on the government's national security arrangements. As a result, these judges "may be less likely to defer, at least around the edges, than those with none."[94]

One may argue that, even if all the above critiques of NSE's information-asymmetry assumption are true, courts are still unlikely to have a sufficiently comprehensive view of their country's national security circumstances. I readily concede that there are limits to courts' ability to obtain information through their regular practices, but I would never contend, regarding national

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[91] It needs to be pointed out that Israeli constitutional politics surrounding national security issues exhibit highly specific national features, making it challenging, and perhaps unnecessary, to draw direct parallels between Israel and other democracies facing ontological disputes, particularly those examined in this dissertation. Nevertheless, many studies on how the Israeli courts handle national security disputes are extraordinarily valuable, given that they offer theoretical insights into judicial behavior in contexts vastly distinct from those ontologically established democracies. Acknowledging the intricate nature of Israel's national security concerns, I focus on the theoretical significance of the observations regarding Israel's judicial institutions in the study of ontologically contested democracies, without aiming to establish analogies between Israel and any other democratic systems.

[92] *See e.g.* Haldor Mercado, *Resolving National Security Questions: A Comparative Analysis of Judicial Review in the United States, Israel, and Europe*, 51 GEO. J. INT'L L. 597 (2020). Eileen Kaufman, *Deference or Abdication: A Comparison of the Supreme Courts of Israel and the United States in Cases involving Real or Perceived Threats to National Security*, 12 WASH. U. GLOBAL STUD. L. REV. 95 (2013).

[93] Sherman, *supra* note 89, at 391-392.

[94] Eugene R. Fidell, *Justice John Paul Stevens and Judicial Deference in Military Matters*, 43 UC DAVIS L. REV. 999, 1018 (2010).

security matters, that courts can obtain an ideal volume, depth, and quality of pertinent information or that courts can replace the decision-making process of executive branches. Instead, what I am arguing is that courts adjudicating a national security dispute have a greater ability to obtain information than what proponents of NSE usually assume. Thus, the levels of information asymmetry between courts and executive agencies in ontologically contested democracies that have been structured around national security risks may be neither considerable nor disqualifying.

5.2. Uneven Public Demand for Decisive Executive Action

The second NSE assumption (i.e., the "public demand for decisive action" assumption) points to the relationship between citizens' psychological status and their policy preferences. In the realm of national security, the complexity of this relationship is attributable to, in part, the limited availability of information available to citizens, including those residing in democracies.[95] According to Huq, the public generally has difficulty accessing the information necessary to determine how successful a proposed policy would be. This issue is particularly acute in the realm of national security (or more specifically in his analysis, counterterrorism).[96] The government's monopolization of most national security information prevents the public from accurately ascertaining the national security threats posed by a country, group, or individual. Lacking sufficient information, citizens are unable to determine whether their country's solid track record in national security (e.g., no terrorist attacks) is due to the government's successful handling of threats or simply to the absence of threats.[97] The resulting uncertainty that citizens may feel about

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[95] Aziz Z. Huq, *supra* note 54, at 931-932.

[96] *Id.*

[97] *Id*, at 932. *See also* Aaron M. Hoffman & William Shelby, *When the "Laws of Fear" Do Not Apply: Effective Counterterrorism and the Sense of Fear from Terrorism,* 70(3) POLITICAL RESEARCH QUARTERLY 618, 618 (2017).

their government's national security performance may lead them to distrust the government and to experience insecurity—feelings that are associated with both hawkish foreign policy attitudes and a greater receptiveness to authoritarianism. The flipside of this phenomenon is that citizens tend to reward observable successful government actions taken against perceived national security threats, but that these observable actions are typically grounded in an exaggerated assessment of risks and excessive control of individual liberties.[98]

When a country suffers a military strike, a terrorist attack, or some other violation of national security, as what Americans experienced on September 11, 2001, the problem of insufficient publicly available information tends to persist, not diminish.[99] Recognizing the enormous psychological impact of 9/11 on the minds of Americans, Huq argues that the "new" national security information Americans received in the days and weeks thereafter was essentially partial.[100] Because it did not fundamentally strengthen their confidence in the US government's handling of national security issues, the resulting uncertainty and insecurity that Americans felt meant that they were quick to reward officials who advocated forceful action based on exaggerated and outright fallacious assessments of national security risks.[101]

Huq's analysis entails two elements about the 9/11 experience of Americans, both of which require further examination within the context of ontologically contested democracies. First, Huq argues that, in the immediate aftermath of 9/11, the amount of new national security information that became available to Americans was extremely scant. The scarcity of the information

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[98] *Id.*

[99] Huq, *supra* note 52, at 76.

[100] *Id.*

[101] *Id.*

exacerbated citizens' uncertainty about the effectiveness of their government's national security responses. However, it is reasonable to assume that, the more contested a democracy's national status is, the more likely the country's citizens will be able to seek out supplemental publicly available information regarding national security risks. In this context, national security issues tend to stand at the forefront of political debates in these countries, giving government officials, political elites, and media institutions an incentive to disseminate information that they regard as personally useful.[102] Thus, even though the vast majority of citizens have no access to information monopolized by the government, they are likely to receive bits of general information selectively supplied by government actors seeking to shape citizens' views of national security situations.

Citizens, however, are not only purely passive recipients of information. As stated above, citizens in ontologically contested democracies are likely to acquire national security information and national security experience in their daily life.[103] Thus, in their daily lives, these citizens are likely to discuss national security topics. The combination of these information-seeking behaviors and information-sharing behaviors among citizens in ontologically contested democracies is relatively substantial, giving these citizens an equally substantial opportunity to critically reflect on the extent to which their government effectively counters national security threats.

The above argument that citizens of ontologically contested democracies are relatively proficient information seekers and sharers is susceptible to criticism focusing on the correlation or causation between the availability of new information and public support for a powerful state. Some studies explore the effects that new publicly available information on national security issues

[102] YONGGHO KIM, SOCIAL MEDIA AND SOUTH KOREAN NATIONAL SECURITY 38-43 (2017).

[103] Fidell, *supra* note 94.

can have on public reactions to an executive branch's national security measures.[104] These studies suggest that what matters the most in the above scenario is not simply the amount of new information available to the general public, but also the "socially motivated cognition" that determines how people weigh varying levels of national security risks.[105] Accordingly, if the vast majority of a country's citizenry, for whatever reason, prizes national security over liberty, the citizens will likely be better disposed to a government that promises a muscular response to any and all national security threats.[106]

In ontologically contested democracies, people often disagree profoundly on how they should assess their own country's involvement in both the geopolitical complexities related to national security issues and the proper government responses to these complexities. The deep disagreement exhibited in ontologically contested democracies seems quite different from national security debates in countries like the United States, where, for example, despite their strong disagreement on the correct approach to counterterrorism policies, citizens and political elites generally agree, for example, that "terrorism presents serious risks."[107] Accordingly, there is reason to doubt that citizens of an ontologically contested democracy would impulsively support a government promising a robust national security and foreign policy platform.

The geopolitical circumstances in Israel and their implications for its constitutional debates on a wide array of citizenship issues may help clarify the considerable extent to which a contested national status can affect a citizenry's framing and assessment of national security disputes. In

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[104] Huq, *supra* note 54, at 936-938.

[105] *Id.* at 938.

[106] *Id.*

[107] CASS R. SUNSTEIN, #REPUBLIC: DIVIDED DEMOCRACY IN THE AGE OF SOCIAL MEDIA 67 (2018).

Israel, a constitutionally and politically intricate issue surrounds whether the Citizenship and Entry to Israel Law (2003) unconstitutionally violated the right of Arab citizens of Israel to enter the country and to reunify with their Israeli spouses.[108] Supporters of the law defended it on the basis of national security: issues related to citizenship and entry into the country were inextricably and directly linked not only to national security issues but also to long-term questions about the "right of the Jewish people to national self-determination."[109]

The Citizenship and Entry to Israel Law, however, had been opposed in Israel. They did not share the national security narratives espoused by the law's supporters. Particularly on the left side of Israel's political spectrum, national security narratives were believed to be a fundamentally wrong framing of the issues being disputed: an accurate and reasonable narrative would have focused on human rights.[110] Given the sharply different views that the Israeli electorate held regarding the nature and constitutionality of citizenship and entry issues, the Knesset (the Israeli legislature) frequently revised the scope and application of the law in response to shifting domestic and regional views. This particular example is one of many demonstrating how disputes regarding national security issues have become an integral part of Israel's constitutional and political landscape.

Courts in an ontologically contested democracy may want to act rigorously when adjudicating national security disputes in a cautious manner. When carefully exercised, rigorous adjudication can go far in helping these courts maintain, among other things, an air of proper independence in the eyes of the country's citizens. This process plays out because the greater the

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[108] Jacobsohn, *supra* note 51, at 289-301.

[109] *Id,* at 293.

[110] *Id,* at 291.

contestation is, the more incentivized the courts are to create a "win-win" solution for all the disputants; hence, there would be no ultimate or fundamental loser that could, at some later point in time, turn against the courts.[111] To promote this win-win outcome, courts often adopt a self-empowering legal doctrine with which they can have the final say about the substance of a given law.[112] Although the courts' plans to empower themselves may create concerns about self-serving motives and a possible abuse of power, political actors tend to be more concerned with the self-entrenching motives of their political rivals than with the possibly similar motives of judges and justices.[113] As a result, courts in ontologically contested democracies tend to have an impressive degree of leverage in determining what a law says and how it ought to be interpreted.

Of course, the degree of domestic contestation may hinge upon the existence of external shocks: where there are no external shocks politically and physically powerful enough to disrupt the national status quo, the citizenry may reject authoritarian tendencies, but in times of national despair, the citizenry may embrace or even demand that government institutions take authoritative—or even authoritarian—steps that are promised to restore security and bring life back to normal.[114] In these circumstances, government officials have reason to adopt a more visible stance toward external risks.[115] In short, a country's ontological contested status sets a critical baseline for scholars to determine citizens' sense of security and, on the premise of these determinations, to observe and assess the intensity of an external shock to the nation—a shock that

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[111] Wen-Chen Chang, *Strategic Judicial Responses in Politically Charged Cases: East Asian Experiences*, 8(4) I-CON 885, 899-900 (2010).

[112] *Id*, at 904-905.

[113] *Id.*

[114] STONE, *supra* note 46.

[115] Howell, Shepsle & Wolton, *supra* note 48, at 269.

can unify an otherwise fractious citizenry behind a government response to the shock. A central point to keep in mind is this: when studying the implications of national security threats, we must never isolate the implications from the specific contextual factors of the nation in question, and one such factor is whether and the degree to which the country is ontologically contested.

5.3. Judicial Motivation for Making "Non-Exceptional" Decisions

In ontologically contested democracies, courts may want to establish for themselves a reputation as guardians of constitutional rights. Aziz Huq has pointed out that many individual judges and courts desire individual or institutional prestige, and that, in acting on this desire, judges and courts adjudicate high-profile cases proactively.[116] In ontologically contested democracies, constitutionally or politically significant national security disputes can attract a great deal of public attention. Not a few politicians frame these disputes in terms meant to rile up domestic audiences, and some civil-society organizations argue that policy errors exacerbate national security disputes and that these errors cannot be solved by the elected branches of government. Thus, when national security disputes are under high levels of public scrutiny, judges and courts seeking a boost to their reputation may energetically intervene in the disputes.

Courts in ontologically contested democracies must justify their decisions by answering many difficult questions: For example, what counts as a national security issue? And what reasoning should courts use to justify the exceptional status of a national security matter? After all, in an environment where national security concerns are entwined with various matters of social and political salience, courts are constantly grappling with these questions. A court that

[116] Huq, *supra* note 2, at 264. *See also* Richard A. Posner, *What Do Judges and Justices Maximize? (The Same Thing Everyone Else Does)*, 3 SUP. CT. ECON. REV. 1, 13-14, 31-32 (1992).

unconvincingly justifies its decision not to review a significant legal dispute is a court that is jeopardizing its authority in the eyes of a domestic audience.

5.4. A "Non-Exceptional" Court in National Security Affairs

Drawing on the above reasons, I argue that courts in an ontologically contested democracy are more likely to exercise power rigorously than is typically assumed by NSE adherents. To be sure, my argument should not imply that courts are indifferent to the executive branch's institutional expertise or to the informational asymmetry between them and the executive branch. After all, the executive branch or indeed any elected branch of government is wont to take the initiative when designing and enforcing public policies, including national security policies. Elected branches do so on the basis of their assessment of what the public needs and demands. The institutional expertise of elected branches may dissuade courts from being proactively involved in a matter that they regard as being beyond their ability to review with competence. Moreover, courts may refrain from vigorously adjudicating a case that might entail a politically combustible decision—one that might elicit political retaliation against the courts. In other words, the concerns raised in NSE are by no means inconsequential, much less nonexistent, and they may indeed play some role in explaining the limited judicial involvement we see in various national security contexts.

Nevertheless, the "information asymmetry" assumption and the "public demand for decisive action" assumption made by NSE adherents cannot explain the proactive roles that courts belonging to ontologically contested democracies play in national security contexts. Because foreign and domestic affairs are intrinsically interrelated in these democracies, a firm binary

distinction between national security adjudication and ordinary adjudication is unlikely to stand.[117] There are several implications of a murky distinction in this regard. First, courts in ontologically contested democracies are familiar with national security issues because they are called on to review a significant number of national security cases and because the courts' judges have vital first- or second-hand experience with national security issues. This familiarity gives courts good reason to consider themselves competent when reviewing national security cases.

Second, the public demand for decisive executive action in ontologically contested democracies is not nearly as conspicuous as NSE supporters would have us believe. Citizens in such a country may access many information sources regarding its national security status, which help them make reasonably informed assessments about whether or not a past, current, or proposed policy can pass muster when it comes to strengthening the country's national security. Because ontologically contested democracies can have a fairly divided electorate, the executive branch will find it challenging to attract unified political support for a president's unilateral "decisive" actions.

A third implication of the murky distinction between national security adjudication and ordinary adjudication in ontologically contested democracies is that their courts have a strong incentive to align national security cases with general jurisprudence in the country. Because national security disputes in these countries tend to be politically and constitutionally high-profile, courts have some leeway in maintaining their institutional authority by acting rigorously.

6. Patterns of Judicial Empowerment in the National Security Context

[117] Knowles, *supra* note 9, at 883.

So far, I have demonstrated the theoretical foundations for answering the second research question of this dissertation (i.e., what are the conditions for courts in ontologically contested democracies to exercise a notable degree of engagement in national security contexts?). Nevertheless, I have yet discussed the theoretical framework upon which I will adopt to answer the first research question: How do courts exhibit their assertiveness in national security disputes? To address this question, I first examine the dynamic interplay between law, courts, and politics in national security contexts. Specifically, I examine two factors shaping the assessment that courts make regarding their political surroundings: (1) international legal treaties and institutions and (2) domestic political contestation on the ontological foundation of each jurisdiction. I then identify three alternative explanations of patterns of judicial behavior: (1) constitutional provisions protecting the rights of citizens, (2) executive-legislative relationships, and (3) the operation of civil society.

6.1. The Foundational Dynamics Between Law, Courts, and Politics

Even though courts are often seen as apolitical institutions tasked with objectively interpreting and applying laws to specific factual scenarios, courts take into consideration citizens' nuanced expectations regarding the political branches of government. For sure, judicial decision-making may be an endeavor primarily concerned with legal factors such as texts and precedents rather than with extra-legal factors such as the preferences of presidents, legislators, citizens, non-governmental organizations, and international actors. However, courts are motivated by a number of factors that one would not typically categorize as objective: the imperative to survive, the desire to minimize risks, and the pursuit of short- and long-term self-interests. In order to optimize their

own environment, courts scrutinize and evaluate the political environment in which they function.[118]

The global expansion of judicial power provides a kaleidoscopic universe in which comparative constitutional studies can describe, analyze, and evaluate the strategic behavior of courts worldwide.[119] These studies often begin their analysis with the foundational activity of judicial review and argue that political dynamics play a significant role in how courts organize their power to invalidate government actions.[120] Not all of these studies focus on courts' adjudication of national security disputes, as they tend to consider national security law as part of the larger legal system over which courts exercise their power.[121]

Tom Ginsburg analyzes how the South Korean Constitutional Court reviews laws that, in the name of national security, have suppressed—even criminalized—regime opponents including human rights activists.[122] Established after South Korea's transition from authoritarian to democratic rule, the South Korean Constitutional Court was often called on to handle intricate

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[118] Ran Hirschl, *The Judicialization of Politics*, in THE OXFORD HANDBOOK OF LAW AND POLITICS 133 (Keith E. Whittington, R. Daniel Kelemen & Gregory A. Caldeira eds., 2008).

[119] Mark Miller, *Introduction*, in MARK C. MILLER EDS., EXPLORING JUDICIAL POLITICS 5 (2009).

[120] KEITH E. WHITTINGTON, POLITICAL FOUNDATIONS OF JUDICIAL SUPREMACY 30-55 (2009).

[121] *See e.g.* RAN HIRSCHL, TOWARDS JURISTOCRACY: THE ORIGIN AND CONSEQUENCES OF NEW CONSTITUTIONALISM 11-12 (Harvard University Press 2004). Taking the perspective of political elites, Ran Hirschl uses what he calls *hegemonic preservation theory* to explain judicial review. His basic argument is that prominent political actors tend to favor judicial review because it serves their political interests. When sensing that the electorate may turn against them in an upcoming election, political elites seek to "preserve or enhance their political hegemony" by creating independent institutions and policy programs insulated from democratic politics. Such behavior can benefit legal professionals seeking to build their institutional authority domestically and even internationally. Therefore, the convergent interests of political elites and legal professionals can give birth to legal innovations with facially neutral or progressive features. And therefore, as Hirschl contends, the constitutionalization of rights need not be a "progressive revolution" but a rhetorical reflection of threatened elites' effort to reclaim their role in a distressed society.

[122] TOM GINSBURG, JUDICIAL REVIEW IN NEW DEMOCRACIES: CONSTITUTIONAL COURTS IN ASIAN CASES 236 (Cambridge University Press 2003).

issues (including those of a national security nature) associated with "the legacies of the authoritarian regimes" in the country.[123] Aware of the high political stakes in these cases, the South Korean Constitutional Court has proceeded with great caution when reviewing national security policies. This behavior somewhat mirrors the behavior exhibited by the Court when it has adjudicated politically charged issues not directly tied to national security.

The South Korean Constitutional Court's cautious approach to national security disputes has resulted from, in part, the dynamic legal and political environment that tends to characterize newly democratized countries, where new and old political forces are deeply uncertain about their political prospects. In this dynamic space, a constitutional court acts as an independent institution whose performance of constitutional review becomes a kind of insurance policy protecting all political stakeholders from a permanent loss of influence.[124] Founded on these political expectations, the South Korean Constitutional Court has thus retained an intricate, evolving space for itself in a much broader context of politically charged democratic politics.

6.2. Two Factors Contributing to the Patterns of Judicial Behavior in the National Security Context

6.2.1 International Legal Treaties and Institutions

International legal treaties and institutions have a significant impact on judicial reasoning and other forms of judicial behavior. In the national security context, a critical category of

[123] *Id.*

[124] *Id.*, at 22-30. *See also* Rosalind Dixon & Tom Ginsburg, *The Forms and Limits of Constitutions as Political Insurance*, 15(4) I-CON 988, 991-993 (2017).

international legal institutions is the human rights treaty.[125] Given that human rights issues are closely entwined with national security, courts adjudicating a national security dispute have an incentive to consult human rights treaties. In fact, in countries bound by rigorous human rights treaties, courts adjudicating national security disputes are often required or at the very least encouraged to consult these legal documents, address the given country's international legal responsibilities and obligations, and make decisions that align with internationally recognized principles.[126] Accordingly, these courts may end up integrating international human rights norms into domestic practices.

Research has shown, however, that there is variance in judges' willingness to consult international legal documents. Several factors may explain this variance. In monist countries, where international law is automatically integrated into domestic law, judges who engage in constitutional reasoning are prone to consult international legal principles. By contrast, courts in a dualist country may need the authorization of a national legislative body before they can effectuate international legal obligations in local jurisdictions. This complexity may undermine the willingness of dualist-country courts to engage with international legal principles.[127]

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[125] Christopher McCrudden, *A Common Law of Human Rights?: Transnational Judicial Conversations on Constitutional Rights*, 20 OXFORD J. LEGAL STUD. 499, 499 (2000). *See also* Claire L'Heureux-Dubé, *The Importance of Dialogue: Globalization and the International Impact of the Rehnquist Court*, 34 TULSA LJ 15 (1998). Anne- Marie Slaughter, *A Typology of Transjudicial Communication*, 29 U. RICH L. REV. 99 (1994). Sujit Choudhry, *Globalization in Search of Justification: Toward a Theory of Comparative Constitutional Interpretation*, 74 IND. LJ 819, 841 (1999). Sarah K. Harding, *Comparative Reasoning and Judicial Review*, 28 YALE J. INT'L L. 409 (2003). Bruce Ackerman, *The Rise of World Constitutionalism*, 83 VA. L. REV. 771 (1997). Nancy Maveety, *Comparative Judicial Studies*, in Miller, *supra* note 119, at 301-302.

[126] Sherman, *supra* note 89, at 396-400.

[127] Kathryn Sikkink, *The Transnational Dimension of the Judicialization of Politics in Latin America*, in THE JUDICIALIZATION OF POLITICS IN LATIN AMERICA 271-272 (Rachel Sieder, Line Schjolden & Alan Angell eds., 2005).

Judicial attitudes toward international legal obligations may also be affected by the surrounding geopolitical environment.[128] The geopolitical prominence of the United States goes far in explaining why US courts are less likely than the courts of other countries to cite foreign legal documents.[129] By the same token, courts seeking to strengthen their justifications may be keen to consult international or foreign legal documents if the courts operate in ontologically contested countries. Such countries typically have firm international commitments for the purpose of consolidating state institutions in an uncertain environment.[130] Thus, scholars seeking to understand how judges adjudicate national security disputes must recognize the geopolitical complexities that shape the domestic political and legal systems in which the judges exert their power.[131]

It needs to be pointed out that judges' reliance on international legal texts does not necessarily result in decisions of a more liberal-minded nature. Hence, I do not use this factor to explain the assertiveness of judicial opinions. Rather, what I argue is that international legal institutions broaden the interpretive tools with which courts can assess executive decisions. It is possible that these international legal documents boost the confidence of—and reduce the political costs incurred by—judges who take a stand against domestic national security actions.

6.2.2 Domestic Political Contestation on the Ontological Foundation of Each Jurisdiction

[128] Sherman, *supra* note 89, at 398-399.

[129] McCrudden, *supra* note 125, at 520. For a sophisticated discussion, *see* SIR BASIL MARKENSINIS & JÖRG FEDTKE, JUDICIAL RECOURSE TO FOREIGN LAW: A NEW SOURCE OF INSPIRATION? 220-248 (2006).

[130] *See* my discussion of the Constitutional Court of Lithuania in Chapter 5.

[131] McCrudden, *supra* note 125, at 499, 532.

Political contestation regarding a country's physical or definitional boundaries plays a significant role in shaping the patterns of judicial opinions in national security contexts. Contestation regarding national boundaries may center not on abstract definitions of nationhood but on normative assessments of the limits of state power. The more contested a country's national boundaries is, the more inclined a court will be to adopt neutral language and to exhibit objective jurisprudence when attempting to resolve politically charged disputes, as such judicial behavior tends to "narrow the site of what was being contested."[132] Courts that engage in complicated "methodological disputes"[133] regarding these boundary issues can find themselves in politically tumultuous and highly unenviable situations. To minimize the unpleasantness of such a scenario, courts may seek the most straightforward legal approach to adjudicating the most disputatious cases: the more arcane a court's legal reasoning is, the less convincing it will be. By contrast, courts adjudicating a dispute that does not involve sharp political or popular contestation on the definitional foundation of a country may be more willing to express complex views on the issue.

In addition to shaping patterns of judicial behavior, political contestation creates political conflicts between and within political parties, increasing the likelihood that these political parties will turn to the judiciary to resolve politicized conflicts. Of course, some of these conflicts concern national security. National security powers, among other institutionalized powers, are exercised by government institutions that are headed by elite political actors. Not surprisingly, these actors have divergent views about—and divergent stakes in—the arrangement and enforcement of national security policies. Especially in ontologically contested democracies, national security matters tend to spark political confrontations between these elite actors regarding the proper design

[132] Chang, *supra* note 111, at 903.

[133] *Id.*

and function of the government's national security powers. Politicians who cannot resolve these confrontations through the deft or blunt use of strictly political tools may seek assistance from the judiciary: courts can review the disputed action or power and perhaps offer a final resolution that suits the partisan objectives of a particular political circle.

6.3. Alternative Explanations

6.3.1 Constitutional Provisions Protecting the Rights of Citizens

Constitutional texts pertaining to rights presumably have a bearing on the patterns of judicial behavior in national security contexts.[134] Explicit constitutional texts strengthen the confidence and capacity of courts to make decisions compatible with the texts. Established constitutional doctrines have a similar effect on courts. The degree to which a constitutional text is explicit (i.e., clear) and the degree to which a constitutional doctrine is established (i.e., entrenched) are important factors influencing legal interpretation. In short, a well-elaborated constitution offers courts a useful set of tools for constitutional interpretation and, by doing so, relaxes the burden of justification that courts must shoulder when rendering decisions.

A constitutional bill of rights is perhaps the most famous type of constitutional-rights text. It is typically thought to facilitate the expansion of judicial power in various spheres, including the sphere of national security.[135] As courts normally adjudicate national security disputes with an eye toward striking a balance between national security interests and constitutional rights protections, a country's design and arrangement of constitutional rights substantially influence how courts understand, allocate, and constrain the government's national security powers. A formal

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[134] Sherman, *supra* note 89, at 385-391.

[135] C. Neal Tate, *Why the Expansion of Judicial Power?* in THE GLOBAL EXPANSION OF JUDICIAL POWER 29-31 (C Neal Tate & Torbjörn Vallinder eds., 1995).

constitutional bill of rights not only guides courts as they adjudicate matters pertaining to individual rights but also allows potential petitioners to seek judicial remedy based on explicit constitutional guarantees. Analogous to an explicit constitutional allocation of national security powers, a detailed bill of rights offers a plausible textual hook on which government and non-government bodies and individuals can constitutionally anchor their grievances.[136]

However, although the constitutions of South Korea, Taiwan, and Lithuania differ from one another regarding their stipulated rights protections, all three of the constitutions seem to align with one another regarding how they influence courts' handling of national security issues. For example, Taiwan's constitution—the Constitution of the ROC—focuses intensively on the separation of powers, but this factor has not weakened the concern exhibited by the Constitutional Court of Taiwan for human rights, including human rights relating to national security law. As a result, the presence or absence of explicit constitutional protections does not seem to be particularly relevant in explaining the variance or non-variance in the three courts' behaviors in this dissertation.

6.3.2 The Executive-legislative Relationships

The executive–legislative relationships may affect how courts exercise judicial oversight of the government's use of national security authority. For example, the "bilateral institutional endorsement" account proposed by Samuel Issacharoff and Richard Pildes emphasizes the roles of courts in facilitating dialogue between two separate branches of government.[137] In their views, US courts have embraced neither an absolute civil libertarian nor an executive unilateralist view

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[136] *Id.*

[137] Samuel Issacharoff & Richard H. Pildes, *Emergency Contexts without Emergency Powers: The United States' Constitutional Approach to Rights During Wartime*, 2(2) I-CON 296, 296 (2004).

to deal with challenges arising from the complicated relationship between national security and civil liberties. Instead, US courts have encouraged the executive branch to seek congressional authorizations or, when no such authorizations are forthcoming, to scrutinize its own actions in greater detail.[138] Accordingly, Issacharoff and Pildes argue that US courts should assign appropriate decision-making models to the two political branches of government and should facilitate dialogue between the branches so that they can better handle major challenges.[139] Courts should not see themselves as decisionmakers overriding the two elected branches' normative assessments of the difficult balance between national security and civil liberties.

Issacharoff and Pildes have touted US courts' "bilateral institutional endorsement" of political activities as a way to resolve interbranch disputes in the *trias politica* model. In other words, Issacharoff and Pildes build their descriptive and normative accounts of judicial behavior on the institutional premise of a US-style separation-of-powers system. Nevertheless, the three constitutional courts examined in this dissertation have never proposed the kinds of models or facilitated the kinds of dialogue suggested by these two scholars. This fact is true even for the Constitutional Court of South Korea, which belongs to a governmental system that, among the three countries, is most similar to that of the United States. To put in another way, although Issacharoff and Pildes consider the separation-of-powers structure to be the key condition that allows for the enforcement of the "bilateral institutional endorsement," there are something more in play. In short, executive–legislative relationships alone cannot always describe or even prescribe how judiciaries in democracies adjudicate national security disputes.

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[138] *Id*, at 332-333.

[139] *Id. See also* Samuel Issacharoff & Richard H. Pildes, *Between Civil Libertarianism and Executive Unilateralism: An Institutional Process Approach to Rights during Wartime*, 5 THEORETICAL INQUIRIES IN LAW 1, 2 (2004).

While the executive-legislative relationships may have little to do with "how" the courts adjudicate national security disputes (i.e., the first research question), the executive-legislative relationships are likely to affect the nature and political stakes of national security disputes brought before a democracy's judiciary—a crucial issue for answering the second research question. In fact, understanding the nature and political stakes of these national security disputes helps us analyze the origin and features of conflicts that political branches have over national security matters, which is necessary for commenting on the second assumption of NSE, the "public demand for decisive action" assumption. Thus, it is critical to reflect on the dynamics among executive-legislative relationships, political conflicts, and courts.

National security disputes are likely to arise in democracies where constitutions do not clearly define the national security powers assigned to each branch of government. Scholars have articulated that, while most presidential systems entrust the president with substantial national security powers, some semi-presidential or parliamentary systems may require the head of the executive to acquire formal support from his or her legislative colleagues before any national security policy can be carried out.[140] In the latter circumstances, the executive–legislative relationships become ambivalent, and the two branches may become on the judicial branch when they are unable to resolve disputes through normal political channels. Fur sure, the above discussion is not to suggest that no national security disputes arise in a presidential system, as realities have taught us exactly the opposite lesson. Nevertheless, it demonstrates that the lack of established rules and practices governing executive-legislative interactions may lead to political controversies, allowing the judiciary to express opinions on national security matters.

[140] Jenny S. Martinez, *Inherent Executive Power: A Comparative Perspective*, 115 YALE L.J. 2480, 2489-2490 (2006).

6.3.3 Operation of Civil Society

Many national security disputes concern the deleterious effects that a government's national security powers can have on individuals' civil liberties. Thus, it is necessary to examine the roles of individuals in these judicial processes. Of particular importance is how civil-society organizations empower individuals to challenge certain legal practices or regulations incompatible with constitutional mandates. Charles Epp articulates how a well-functioning system of rights—a robust "support structure for legal mobilization"—enables activists and legal professionals to bring cases before courts in an effort to develop human rights jurisprudence.[141] In *The Rights Revolution,* Charles Epp argues that the evolution of individual-rights jurisprudence in the United States, India, the United Kingdom, and Canada has depended primarily on the sustained—and often litigious—efforts not of political elites but of non-elite actors.[142] This "pressure from below" pushes the judiciary to generate gradual legal changes, whether progressive or not. Eventually, the judiciaries have the potential to implement or improve "a host of new constitutional rights" by invalidating laws or by transforming legal doctrines.[143]

The idea of a "support structure for legal mobilization" is analogous to the idea of a "judicial support network" proposed by Tamir Moustafa.[144] Such a network comprises civil society groups and legal professionals who "monitor and document human and civil rights violations," "initiate constitutional litigation," and defend victims when they are "under attack" by

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[141] CHARLES R. EPP, THE RIGHTS EVOLUTION: LAWYERS, ACTIVISTS, AND SUPREME COURTS IN COMPARATIVE PERSPECTIVE 3, 18 (1998).

[142] *Id,* at 2.

[143] *Id.* at 2. *See also* Javier A. Couso, *The Judicialization of Chilean Politics,* in THE JUDICIALIZATION OF POLITICS IN LATIN AMERICA, *supra* note 127, at 108.

[144] TAMIR MOUSTAFA, THE STRUGGLE FOR CONSTITUTIONAL POWER: LAW, POLITICS, AND ECONOMIC DEVELOPMENT IN EGYPT 7 (2006).

government.[145] Moustafa studied the judicial support network in Egypt and found it rigorously engaged with international human rights associations and strengthened the capacity of domestic organizations to engage in rights advocacy.[146] Accordingly, Moustafa's observation is reflective of the efforts of numerous domestic and international organizations to redress violations of individual rights in the sphere of national security. The question then arises as to how the collaborative efforts of non-elite actors can influence constitutional courts' adjudication of national security disputes.

Both Epp's and Moustafa's theories illustrate how civil-society organizations facilitate progressive judicial handling of human-rights cases. This analysis is useful for analyzing the conditions for the judiciary to exercise oversight, i.e., the second research question. Particularly, civil-society organizations' activities are particularly relevant for examining the judiciary's motives to build its reputation, the third condition for courts to exert power rigorously. To illustrate, by bringing disputes before the courts or enhancing the public's awareness of a government's potential abuse of power, civil society organizations impose greater pressure on the judiciary. When judges do not want to be regarded as rubberstamps of the elected branches, they are likely to make courageous decisions and oversee governmental actions in a more rigorous way.

Nevertheless, while Epp's and Moustafa's theories play a significant role in answering the second research question of this dissertation, neither theory satisfactorily captures *how* the three constitutional courts studied in this dissertation arrive at their decisions, i.e., the first research question. Therefore, although I will address how civil-society organizations help engineer the three

[145] *Id,* at 6.

[146] *Id,* at 7.

courts' adjudication of national security disputes involving civil rights, I will not address the organizations' relevance (or non-relevance) to the courts' employment of specific legal methods of interpretation therein.

6.4. Concluding Remarks

I started this chapter by summarizing the NSE concept and by examining arguments for and against a robust court in national security matters. Then, I contextualized the discussion in the geopolitical context of the United States and offered a comparative perspective focusing on judicial behavior in ontologically contested democracies. I argued that, when reviewing national security disputes, courts in these countries are likely to exert their power rather robustly because these courts are likely to possess judicial competence in national security matters. Moreover, central governments in ontologically contested democracies often receive uneven public support for national security policies. And finally, courts in these countries often seek to strengthen their institutional authority by performing robust reviews of laws, decisions, and other government actions. Accordingly, these courts adjudicate national security disputes in ways that are substantially distinct from what NSE scholars would typically propose for the US context.

In addition, I argued that judicial behavior is a function of political context. I identified two pertinent factors (international legal treaties and institutions as well as domestic political contestation on the ontological foundation of each jurisdiction) and three alternative explanations (constitutional provisions protecting the rights of citizens, the executive-legislative relationships, and the operation of civil society). In the following three chapters, I will explore the two former factors and the three alternative explanations in relation to the three patterns of judicial behavior exhibited by the constitutional courts in South Korea, Taiwan, and Lithuania.

CHAPTER 3

NATIONAL SECURITY AND THE EXISTENTIAL THREAT TO THE STATE:

THE CONSTITUTIONAL COURT OF SOUTH KOREA'S SUBSTANTIVE REVIEW

The development of norms and values in a country
is not free from its internal dynamic process.

Tae-Ung Baik[1]

1. Introduction

In this chapter, I analyze how the Constitutional Court of South Korea (the KCC) adjudicates national security disputes. Established under the 1987 Constitution, the KCC since then has been rigorously involved in structuring and implementing South Korea's national security laws and policies. Notably, the KCC has adopted what I call substantive review to adjudicate national security controversies. The substantive review refers to the rigorous assessment of national security interests and their balance with constitutional rights protections. Having concluded that North Korea is an existential threat to the state, the Court uses this premise to ascertain whether or not a disputed governmental national security measure is constitutional. By these actions, the KCC has normalized the idea that North Korea poses an existential threat to South Korea. In turn, the KCC has managed to lay out the appropriate scope of power governing the state's national security obligations.

After elucidating the KCC's reliance on substantive review to adjudicate national security disputes, I will compare the Court's handling of national security law with the Court's handling of

[1] Tae-Ung Baik, *Stabilizing Democracy and Human Rights Systems in South Korea*, 35 U. HAW. L. REV. 877, 878 (2013).

election law and education law. The results of this comparison will show that there is nothing distinctly exceptional about how the KCC adjudicates national security disputes (a position that might run counter to what some scholars would contend) and that the KCC's reliance on substance review helps explain this lack of exceptionalness.

Subsequently, I will show three conditions that contribute to the KCC's non-exceptional handling of national security disputes: (1) the KCC's capacity to adjudicate national security disputes, (2) ideological conflicts among political elites, and (3) the KCC's motives to enhance its reputation.

2. Legitimacy Reinforcement in a New Democracy

In 1945, the Korean Peninsula gained independence from Japanese colonial rule, which had begun some thirty-five years earlier, in 1910. Almost immediately thereafter, the Korean Peninsula fractured into two blocs: the northern communists and the southern anti-communists. In 1948, the two political blocs agreed to divide the Korean Peninsula along the 38th Parallel. This division resulted in the formation of two countries: the Democratic People's Republic of Korea (the DPRK, commonly known as North Korea) and the Republic of Korea (the ROK, commonly known as South Korea). North Korea has been part of the communist bloc in Pacific Asia, whereas pro-Western, anti-communist South Korea has evolved from an unsteady democracy interrupted by years of military rule into a democracy.[2] The two countries have competed for the sole representation of the Korean Peninsula since 1948, culminating in the Korean War (1950–53). Though an armistice ended the combat, the two Koreas have maintained an intensely antagonistic

[2] Lonnie Edge, *South Korea Relations with North Korea*, in ROUTLEDGE HANDBOOK OF CONTEMPORARY SOUTH KOREA 261 (Sojin Lim & Niki J.P. Alsford eds., 2021).

relationship that has had immense implications for the respective governments' policies, ranging from domestic civil rights matters to national security matters.

Since the establishment of South Korea in 1948, security-based narratives have never ceased to influence the country's political sphere. Especially during the Third (1961–1972) and Fourth Republics (1972–1981), Park Chung-hee's military government introduced various laws and policies to prosecute North Korean sympathizers, silence human rights activists, and discredit opposition leaders.[3] Following Park's assassination in 1979 and the dissolution of the Fourth Republic, Chun Doo-hwan's authoritarian government during the Fifth Republic (1981–1987) promoted security-based platforms that curtailed individual rights and escalated the general fear of inter-Korean military confrontation.[4]

It was not until 1987 that South Korea entered a new democratic era, the Sixth Republic. To mark the country's shift from authoritarianism to democracy, South Korea adopted a new constitution.[5] The 1987 Constitution implemented a series of formal mechanisms to constrain the executive branch's exercise of power.[6] In Kim Lane Scheppele's words, the 1987 Constitution is an example of "aspirational constitutionalism"—it presents the goals and values the country aspires to deliver while explicitly condemning authoritarianism as an unacceptable, destructive

[3] DAE-KYU YOON, LAW AND DEMOCRACY IN SOUTH KOREA: DEMOCRATIC DEVELOPMENT SINCE 1987 259-260 (2010).

[4] Kuk Cho, *Tension Between the National Security Law and Constitutionalism in South Korea: Security For What?* 15 B.U. INT'L L.J. 125, 130-131 (1997). Woo-Hyung Kim, *Freedom of Political Speech vs. National Security in Korea — A Historical Survey*, 5(3) THE INTERNATIONAL LAWYER 488, 495-496 (2018). *See also* Marie Seong-Hak Kim, *Travails of Judges: Courts and Constitutional Authoritarianism in South Korea*, 63(3) AM. J. COM. L. 601, 602-603 (2015).

[5] YOON, *supra* note 3, at 18-19, 259-260.

[6] 대한민국헌법 (Constitution of the Republic of Korea), preamble (1987) (S. Kor.). YOON, *supra* note 3, at 23-25. Jenny S. Martinez, *Inherent Executive Power: A Comparative Perspective*, 115 YALE L.J. 2480, 2501-2503 (2006).

alternative form of government.[7] For instance, a president cannot seek a second term under the 1987 Constitution, a relatively rigid constraint on the president of a democracy. The 1987 Constitution also empowers the National Assembly to check and balance the president's use of power, including emergency power. A president seeking to proclaim an emergency decree must notify the National Assembly, and if it requests that the president lift the decree, the president must comply.[8]

The 1987 Constitution addresses the decades-old and highly intricate inter-Korean conflict.[9] Specifically, the Constitution demands that presidents devote themselves to the "peaceful unification of the homeland," though how such an outcome would take place is left unstated in the text.[10] Thus, since 1987, South Korean presidents, in accordance with their distinct ideological and policy inclinations, have crafted and implemented divergent foreign policies in fulfillment of these constitutional mandates. The policies are often interlocked with domestic political concerns, which can evolve rapidly in the context of South Korean democracy.[11]

South Korea's first democratically elected president was Roh Tae-woo (1988–1993). Before becoming South Korea's president, Roh had served as an army general and taken top-level positions in Chun Doo-hwan's authoritarian administration. Amidst the tides of democratization,

[7] Kim Lane Scheppele, *Aspirational and Aversive Constitutionalism: The Case for Studying Cross-Constitutional Influence Through Negative Models*, 1(2) I-CON 296, 299 (2003).

[8] 대한민국헌법 (Constitution of the Republic of Korea), art. 76 (1987) (S. Kor.).

[9] YOON, *supra* note 3, at 259-260.

[10] 대한민국헌법 (Constitution of the Republic of Korea), preamble (1987) (S. Kor.). 대한민국헌법 (Constitution of the Republic of Korea), art. 69 (1987) (S. Kor.).

[11] Chien-Peng Chung, *Democratization in South Korea and Inter-Korean Relations*, 76(1) PACIFIC AFFAIRS 9, 9 (2003).

Roh found himself propelled to the head of the executive branch, where he established the "Nordpolitik Policy" to promote inter-Korean dialogue and trade.[12]

When South Korea and North Korea joined the United Nations in 1991, they signed the Agreement on Reconciliation, Nonaggression, and Exchange and Cooperation, the first inter-Korean agreement governing the two countries' mutual collaboration and continued dialogue.[13] Meanwhile, the Roh administration relaxed his country's previous restrictions on travel and cultural exchanges with the neighbor to the north.[14]

The subsequent president, Kim Young-sam (1993–1998), showed little willingness to follow through with the principles laid out in Roh's Nordpolitik Policy.[15] Kim Young-sam's entire political life can be characterized by his intense rivalry with his lifelong political adversary, Kim Dae-jung, a progressive politician, activist, and the successor of Kim Young-sam (1998–2003). Kim Dae-jung was prosecuted and imprisoned in 1976 for advocating progressive manifestos, and later, in 1980, he was sentenced to death for his participation in the Gwangju Uprising, a student-led democratic protest that opposed Chun's installation of martial law and that was violently suppressed by the South Korean military. As an iconic figure of South Korea's progressive scene, Kim Dae-jung could count on loyal support from important liberal constituencies, a situation that

[12] YOON, *supra* note 3, at 33-34, 258.

[13] YOON, *supra* note 3, at 262.

[14] Kevin Gray, *Plus ça Change? South Korea's Democratization and the Politics of the Cold War*, in THE QUALITY OF DEMOCRACY IN KOREA: THREE DECADES AFTER DEMOCRATIZATION 247-248 (Hannes B. Mosler, Eun-Jeung Lee and Hak-Jae Kim eds., 2018).

[15] *Id*, at 248.

left Kim Young-sam in the awkward position of having to seek support from several conservative political parties.[16]

In fact, Kim Young-sam frequently mobilized domestic anti-communist discourses to discredit Kim Dae-jung.[17] Furthermore, when Kim Il-sung, the founder of North Korea, passed away in 1994, Kim Young-sam publicly warned that any South Koreans who publicly offered condolences to the North would face prosecution under the National Security Law, a notorious legal instrument infamous for its obscurity and vagueness (discussed below).[18] Accordingly, Kim Young-sam's administration made little progress in facilitating inter-Korea dialogue, as his political actions were informed mainly by the domestic dynamics of post-transition politics.

It was not until Kim Dae-jung became president that the relationship between the two Koreas underwent significant changes. Kim Dae-jung embarked on a famous series of progressive reforms called the "Sunshine Policy." Proponents of the Sunshine Policy sought to strengthen reconciliation and cooperation between the North and the South on the following conditions: the South would not tolerate any military provocation from the North, and the South would not seek to absorb the North or introduce a regime change there.[19] The Sunshine Policy was continued by the ninth president of South Korea, the lawyer-turned-politician Roh Moo-hyun (2003—2008),

[16] *Id*, at 248-249.

[17] *Id.*

[18] *Id*, at 248.

[19] Eric J. Ballbach, *Authoritarian Continuity or Democratic Change? Assessing the Democratic Quality of South Korea's North Korea Policy Making Process*, in THE QUALITY OF DEMOCRACY IN KOREA, *supra* note 14, at 288-289. Edge, *supra* note 2, at 264.

whose liberal government successfully formed the Kaesong Industrial Complex (KIC), a unique industrial project co-operated by the two Koreas to advance industrial collaboration.[20]

Lee Myung-bak won the presidential election in 2008 and reoriented Roh Moo-hyun's inter-Korean policies toward a confrontational position.[21] The conservative policies of Lee's government (2008–2013) escalated in 2010, when a small South Korean warship, the Cheonan, sank off the country's west coast. Lee's administration blamed the sinking on a torpedo fired by a North Korean submarine, and on the basis of this narrative, Lee's government imposed stringent controls on the internet in South Korea, with the aim of restricting domestic criticism of the government.[22] Even though many critics and media channels in South Korea questioned Lee's assessment of the sinking, his government imposed sanctions on North Korea, further intensified censorship of telecommunications activities, and prosecuted some South Korean critics of Lee's government on the charge of malicious dissemination of falsehoods.[23] These measures deeply undermined the previous presidents' efforts to strengthen inter-Korean relations and to cultivate

[20] Gray, *supra* note 14, at 248-249.

[21] Ballbach, *supra* note 19, at 291-292. Edge, *supra* note 2, at 264-265. Gray, id, at 250-251.

[22] Jong-sung You, *The "Cheonan" Incident and the Declining Freedom of Expression in South Korea*, 39(2) ASIAN PERSPECTIVES 195, 197 (2015). International Crisis Group, *South Korea: The Shifting Sands of Security Policy*; statistics of public opinions (December 2011), at 3-4, *available at* https://shorturl.at/LIZwZ (latest review: June 17, 2024).

[23] *Id*, at 203-204. In 2010, the Court struck down a Criminal Code provision that prohibited citizens from distributing false telecommunications content. President Lee Myung-bak exploited this provision to prosecute citizens and organizations criticizing his handling of the sinking of the Cheonan. Although on its face the prohibition did not have obvious national security relevance, as national security matters usually trigger strong political controversy in South Korea, political leaders have frequently adopted facially neutral tools to suppress individuals, political parties, and non-governmental organizations opposing the government's national security policies. Criminal Penalty on False Communication Case [Const. Ct.], Dec. 28, 2010, 22-2(B) KCCR 684, 2008 Hun-Ba 157, 2009 Hun-Ba 88 (Consol.) (S. Kor.).

South Korean democracy, which many citizens had regarded as solid enough to withstand a return to authoritarian practices.[24]

As the above analysis shows, the evolution of South Korea's national security affairs and its North Korean policies has often accompanied the enactment of new laws and other governmental measures. From time to time, these governmental actions provoke heated controversies regarding the scope and limit of governmental power in regulating national security and foreign policy affairs. Therefore, it is quite apparent that South Korea has needed a judicial institution capable of successfully adjudicating such disputes, and just such a court exists, the most paramount judicial institution in South Korea: the KCC.

3. The Constitutional Court of Korea: An Overview

While transitioning from military rule to democracy, South Korea promulgated a new constitution in 1987 with a new policy orientation toward North Korea. The 1987 Constitution created the KCC, an institution that represented the country's commitment to democratic constitutionalism.[25] The KCC is designed to be an independent constitutional institution that oversees the political branches of government. It comprises nine justices, three of whom are nominated by the president, another three by the National Assembly, and the final three by the Chief Justice of the Supreme Court. This tripartite approach to the appointment of justices insulates the KCC from political forces, at least in theory.

[24] *Id*, at 215-216. Gray, *supra* note 14, at 251-252.

[25] YOON, *supra* note 3, at 143-145.

The KCC reviews the constitutionality of legislation and adjudicates disputes involving state organs, impeachment proceedings, the dissolution of political parties, and constitutional petitions. The KCC reviews the constitutionality of legislation when lower courts petition the high court to do so. This petitioning process can be in response to a request from third parties objecting to legislation or can occur when the ordinary courts themselves object to the legislation. Moreover, if a lower court has rejected their request for a constitutional review, objecting parties can directly petition the KCC to review the constitutionality of legislation. The 1987 Constitution greatly broadened the access that South Korean people have to their country's court system, including the highest court of the land, the KCC.[26]

Since its inception, the KCC has actively engaged in judicial review to navigate the limits and substance of executive power in various matters of social and political relevance, including human rights issues and intra-governmental disputes.[27] The KCC's achievements lie in its endeavors to safeguard constitutional rights and to resolve intra-governmental disputes. Over time, the KCC has become a paramount institution in South Korea's post-democratized political arena and, by adeptly resolving high-profile, politically charged disputes, has earned widespread public trust.[28]

4. The KCC's Involvement in National Security Affairs

The approachability of the South Korean judiciary has prompted many citizens and politicians to make use of it for the resolution of all kinds of disputes, including those that pertain

[26] YOON, *supra* note 3, at 148.

[27] YOON, *supra* note 3, at 121-122, 143-145.

[28] *Id*.

to national security. And over time, the KCC has amassed a body of legal techniques to organically navigate the treacherous boundaries separating the dictates of constitutional texts, the demands of petitioners, and the realities of an ever-evolving political scene. Many of these techniques have proven useful in cases pertaining to national security.[29] As Figure 1 illustrates, the KCC's direct and indirect involvement in national security disputes has steadily grown from 1987 through 2023.

The Court has rejected to review certain controversial disputes occasionally. For example, in the case of 2016 Hun-Ma 364 (2022), the KCC dismissed a constitutional petition against President Park Geun-hye's decision in 2016 to suspend the operation of the KIC in response to North Korea's missile trials.[30] On January 6, 2016, North Korea conducted its fourth nuclear detonation in Kilju County, located in the southwestern region of North Korea, following previous tests in 2006, 2009, and 2013. A month later, on February 7, North Korea launched a Unha-type missile, purported for weather observation and scientific advancement. The demonstration of North Korea's military capacities and ambitions raised concerns within the South Korean government. Consequently, on February 10, 2016, Park Geun-hye ordered the shutdown of the KIC and the evacuation of all South Korean citizens from the complex, citing fears that products and materials of the KIC could be utilized by the North Korean government for military purposes.[31] Park's decision sparked domestic unrest among South Korean enterprises investing in the KIC and

[29] Hahm Chaihark, *Rule of Law in South Korea*, in Randall Peerenboom eds., ASIAN DISCOURSES OF RULE OF LAW: THEORIES AND IMPLEMENTATION OF RULE OF LAW IN TWELVE ASIAN COUNTRIES, FRANCE, AND THE US 407 (2004). Jong Ik Chon, *Effect of Constitutional Review on the Legislature and the Executive Branch for the Last 25 Years in Korea*, 14 J. KOREAN L. 131, 147 (2015). *See also* Chaihark Hahm, *Beyond "Law vs. Politics" in constitutional adjudication: Lessons from South Korea*, 10(1) I-CON 6, 6-34 (2012).

[30] Complete Suspension of the Operation of Kaesong Industrial Complex Case [Const. Ct.], Jan 27, 2022, 2016 Hun-Ma 364 (S. Kor.). Gray, *supra* note 14, at 253-254.

[31] *See* JH Ahn, *South Korea Temporarily Closes Kaesong Industrial Complex*, NK NEWS (February 10, 2016), *available at* https://www.nknews.org/2016/02/breaking-south-korea-temporarily-closes-the-kic/ (latest review: June 17, 2024).

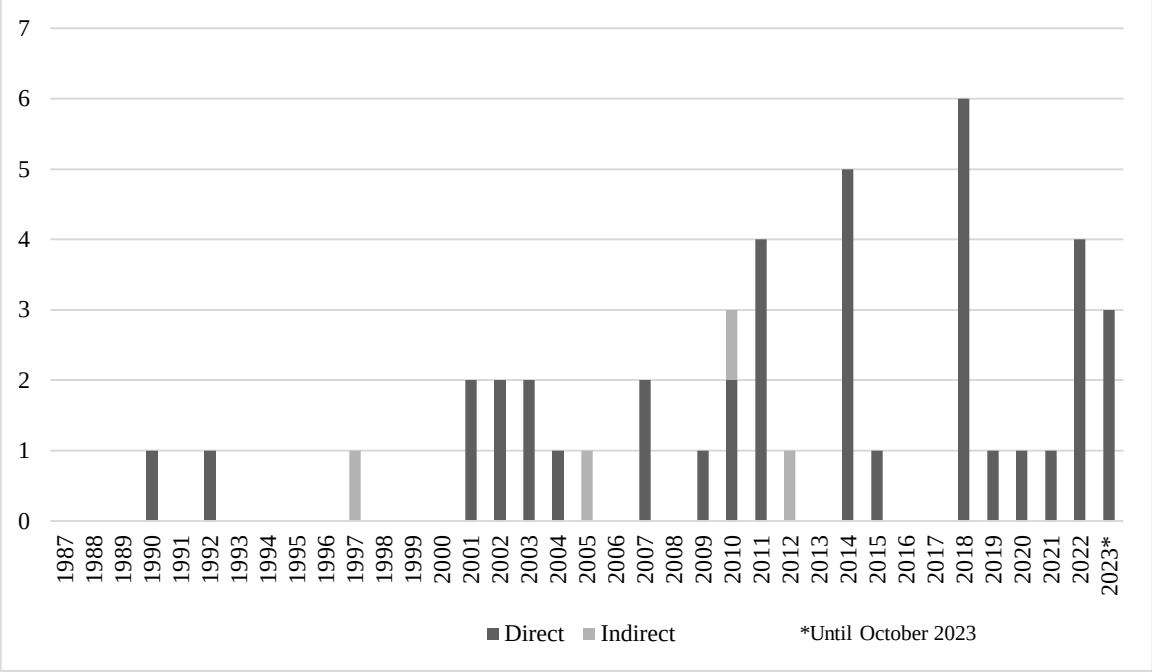
those engaging in trade with it. They petitioned the KCC to determine the constitutionality of the suspension. In response, the Court upheld Park's decision, stating that it was necessary for the president to protect the "independence, territorial integrity and continuity of the State."[32] Due to the political and professional nature of the decision, the Court decided to defer to the president and her administration by declining to review the measure.[33]

Excluding cases that the KCC declined to review, the KCC has made at least 44 decisions related to national security since democratization. These include 40 decisions directly involving the constitutionality of national security statutes or governmental actions (direct involvement) and four decisions that involved national security concerns under the Criminal Code or other statutes, without directly implicating national security statutes or governmental actions (indirect involvement). Among the 40 decisions of direct involvement, the Court has struck down at least one part of the concerned governmental actions or statutes in 23 decisions. Similarly, it invalidated all four decisions of indirect involvement. In summary, the KCC exercised oversight in 27 out of 44 decisions.

[32] *Supra* note 30. 대한민국헌법 (Constitution of the Republic of Korea), art. 66 (1987) (S. Kor.).

[33] *Id.*

Figure 1: The KCC's Involvement in National Security Law (1987-2023)



Source: Author

I analyzed the KCC's involvement in national security disputes based on the eight categories outlined in Chapter 1 (Table 5). In South Korea, military disputes accounted for nearly 22.73% of the total disputes under examination, ranking second to democratic-government disputes (54.55%). Most disputes include, but are not limited to, initiatives such as organizing a national capital referendum for national security reasons, implementing surveillance and censorship measures on online data, and prohibiting expressions supportive of North Korea within the domestic public sphere. Conversely, only six decisions have dealt with outward-looking affairs.

Table 5: Eight Categories of the KCC's National Security Case Law

	Inward-Looking	Outward-Looking	All

	Number	Oversight	Number	Oversight	Number	Oversight
Military	10	5	0	0	10	5
Economy	1	0	3	0	4	0
Citizenry	4	4	2	1	6	5
Democratic Government	23	16	1	1	24	17
Total	38	25	6	2	44	27

Source: Author

Notably, the extent of judicial oversight varies across different categories of decisions. The degree of judicial oversight is more pronounced in the Court's handling of domestic affairs than in foreign or international affairs, and it is more prevalent in cases related to democratic governance than in military affairs. It is noteworthy that the Court makes few decisions in specific categories, such as economic affairs, which pose challenges to conclusively determining the Court's overall level of oversight or deference based on limited evidence. Nevertheless, it is evident that the Court lacks a consistent stance on performing judicial deference in all matters of national security. Its involvement varies significantly across different types of cases. Accordingly, no evidence suggests that the KCC has adopted an exceptional approach to national security affairs.

When reviewing national security disputes, the KCC has been remarkably aware of South Korea's intricate historical, social, and geopolitical entanglements with North Korea within the complicated East Asian politics. For instance, the Court has rigorously crafted, mediated, and enforced South Korea's social and democratic membership by adjudicating the legal rights of

foreigners residing in South Korea and overseas citizens. This line of cases highlights the government's concerns about the loyalty of foreigners or overseas citizens to the country, prompting the government to invoke national security justifications to shape the legal regime.

A contentious issue revolves around the voting rights of Koreans living in Japan, known as Zainichi—a group of ethnic Koreans who immigrated to Japan before 1945 (the end of Japanese colonial rule) and their descendants. While many Zainichi hold South Korean citizenship rather than Japanese citizenship, their legal status under South Korea's legal system has remained ambiguous for a long time. Over the years, the government has enacted laws restricting Zainichi's legal rights and social benefits, citing national security concerns and citing difficulties in distinguishing between Zainichi who emigrated from the southern region and those from the northern region of the Korean Peninsula. The latter category would now be classified as North Koreans, exempting them from the application of all South Korean laws.

For instance, under the Referendum Act and other election laws, Zainichi cannot vote.[34] However, in the cases of 2004 Hun-Ma 644 (2007) and 2009 Hun-Ma 256 et al. (2015), the Court declared the restrictions unconstitutional and demanded that the National Assembly design a registration system for overseas electors that could prevent North Korean nationals and the Zainichi with North Korean citizenship from voting.[35] With regard to the social benefits of overseas Koreans, in the case of 99 Hun-Ma 494 (2001), the Court declared several provisions under the Act on the Immigration and Legal Status of Overseas Koreans unconstitutional. These

[34] Article 1 of the Referendum Act.

[35] The Voting Rights of the Nationals Residing Abroad Case [Const. Ct.], Jun. 28, 2007, 19-1 KCCR 859, 2004 Hun-Ma 644 (consol.) (S. Kor.). Voting Rights of Overseas Electors Case [Const. Ct.], Jul. 24, 2015, 26-2(A) KCCR 173, 2009 Hun-Ma 256, 2010 Hun-Ma 394 (consol.) (S. Kor.).

provisions arbitrarily distinguished overseas Koreans "who had emigrated after the establishment of the Republic" from those "who had emigrated before the establishment of the Republic." The Court believed that they unconstitutionally excluded social benefits for the latter category.[36]

In the case of 2012 Hun-Ba 192 (2012), the KCC determined the eligibility of North Korean refugees to receive social benefits from the South Korean government. North Korean refugees have been systematically marginalized in South Korean society, yet supporting their social and political inclusion remains a politically contested issue, partly due to the intricate tension between national security and human rights protection. In this decision, the Court upheld a provision under the North Korean Refugees Protection and Settlement Support Act, which stipulated that a North Korean refugee with a history of drug trafficking was not eligible for particular social welfare.[37] Nevertheless, the Court stated that such a North Korean refugee was still eligible for other social benefits, including settlement and residency support, medical care, and educational support, to ensure their livelihood satisfied the minimum living standards under the National Basic Living Standards Act.[38]

5. The KCC's Substantive Review

Against the backdrop of the Korean confrontation, the KCC has rigorously substantiated the link between national security interests and legal instruments by relying on a method of legal interpretation: the "substance review." I call it "substantive review" because the Court rigorously

[36] Case on the Immigration and Legal Status of Overseas Koreans [Const. Ct.] Nov. 29, 2001, 13-2 KCCR 714, 99 Hun-Ma 494 (consol.) (S. Kor.).

[37] Case on the Protection of North Korean Refugees Involved in Drug Trafficking [Const. Ct.], Mar. 27, 2014, 26-1(A) KCCR 468, 2012 Hun-Ba 192 (S. Kor.).

[38] *Id.*

ascertains what legal instrument is sufficiently legitimate and appropriate to further national security goals within the Korean context. Although it may seem natural or even granted for a court to determine whether and how a governmental intervention is constitutional based on the given circumstances, the Korean approach becomes worth noting when compared to the methods adopted by the Constitutional Courts of Taiwan and Lithuania. In this section, I will provide a descriptive account of the approach adopted by the Korean Constitutional Court.

With the substantive approach, the KCC has recognized the geopolitical tensions between the two Koreas and emphasizes that South Korea is under looming national security threats posed by its neighbor,[39] possibly because the two countries did not sign a peace treaty at the international level. In some decisions, the Court has considered the contentious circumstances as justifying the government's intervention in individuals' constitutional freedoms and rights, given that the concerned national security stakes at hand are exceptionally compelling. In these decisions, the KCC has prioritized national security over individuals' constitutional protections.

Nevertheless, the Court has exercised oversight in many other cases. The oft-discussed decisions are the KCC's decisions regarding Article 7 of the National Security Law (NSL). The South Korean government adopted the NSL in 1948 amidst the fierce confrontation between the North and the South right after Korean independence.[40] The 1948 version of Article 7 criminalized a wide range of expressive acts for the purposes of supporting anti-state activities: (1) the acts of "prais[ing], encourag[ing], propagandiz[ing], or sympathiz[ing] with the activities of an anti-State organization"; (2) the acts of "propagandiz[ing], instigat[ing] a disturbance of the State"; or (3) the

[39] Praising and Encouraging Enemy of the States [Const. Ct.], Apr. 2, 1990, 89 Hun Ka 113 (S. Kor.). YOON, *supra* note 3, at 216.

[40] Cho, *supra* note 4, at 132-135.

acts of "produc[ing], import[ing], duplicat[ing], [keeping] in custody, transport[ing], disseminat[ing], [selling] or acquir[ing] documents."[41] Due to its ambiguous and vague nature, Article 7 was excessively used by the military and authoritarian governments to prosecute, restrict, and discredit political activities that arguably expressed sentiments towards the North (*jongbuk*, pro-North Korea).[42] Over the years, many political dissidents and opposition figures were suppressed or imprisoned under the NSL.[43]

It was not until 1990 that, for the first time in Korea's history, Article 7 of the NSL was challenged before the newly established Constitutional Court, backed by international and public support. That year, the South Korean government ratified the International Covenant on Civil and Political Rights (ICCPR) and the Optional Protocol to the ICCPR.[44] Probably for this reason, the Court, in an 8-1 decision, explicitly recognized the unconstitutional elements of Article 7 in the decision of 89 Hun-Ka 113 (1990).[45]

Instead of striking down Article 7, the Court employed the canon of conditional constitutionality, a method of constitutional interpretation, to reconstruct the substance of a disputed provision without declaring it unconstitutional. With this method, the KCC declared that

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[41] Cho, *supra* note 4, at 135-136. Diane Kraft, *South Korea's National Security Law: A Tool of Oppression In An Insecure World*, 24 WIS. INT'L L.J. 627, 639 (2006).

[42] Cho, *supra* note 4, at 135-136, 139-140. Kraft, *Id*, at 632-634.

[43] Cho, *supra* note 4, at 132-134. For instance, Park Soo Gil, the South Korean delegate to the United Nations, made the following statement "[I]t was natural that a country which had been nearly overthrown by invasion should feel unable to relax its guard against further aggression. Armed forces totaling 1.5 million were in a military stand-off along the 38th parallel, and, despite the end of the cold war, the Armistice Agreement had still not been replaced by a peace settlement. The Republic of Korea was accordingly obliged to guard against subversion of its liberal democratic system... Accordingly, the National Security Law adopted by the Republic to protect its security and the integrity of the system still had its *raison d'etre*." U.N. GAOR, Hum. Rts. Comm., 45th Sess., 1150th mtg. at 4, U.N. Doc. CCPR/C/SR.1150 (1992) (statement of Park Soo Gil).

[44] Cho, *supra* note 4, at 141.

[45] Praising and Encouraging Enemy of the States, *supra* note 39.

Article 7 was constitutional "only if" interpreted as applicable to circumstances when individuals knowingly jeopardized the security of the state or the foundation of South Korea's democratic order.[46] The KCC determined this requirement necessary for balancing citizens' constitutional freedoms and rights with the government's interests in addressing the ongoing confrontations between North Korea and South Korea. To ascertain whether this requirement was met, courts must review "the proximity between conduct and its danger to society" and "the gravity of the evil."[47] In other words, they must ensure that only those posing high national security risks are punishable under the NSL. While the Court was reluctant to strike down Article 7 of the NSL, it altered its requirements and scope of application rather than comprehensively deferred to the political departments. Following the Court's decision, the National Assembly narrowed the application of Article 7 to only those with "the knowledge of endangering the sovereignty and security of the state or the freedom and democracy of the country."[48]

The Court not only reviewed the constitutionality of Article 7 of the NSL, but also other national security statutes. In the case of 99 Hun-Ma 480 (2002), the Court constrained the authority of investigative agencies to collect communication data from private entities in accordance with the Telecommunications Business Act (TBA).[49] The case dealt with Article 53 of the TBA, which prohibited citizens from producing and distributing communications content that could "harm the public peace and order or social moral and good customs," defined by presidential decrees.[50] To

[46] *Id.*

[47] *Id*. Cho, *supra* note 4, at 171.

[48] Cho, *supra* note 4, at 151.

[49] Ban on Improper Communications on the Internet [Const. Ct.], Jun. 27, 2002, 14-1 KCCR 616, 99 Hun-Ma 480 (S. Kor.).

[50] *Id.*

enforce this prohibition, the Minister of Information and Communication (MIC) could order a telecommunication business to suspend, refuse, or restrict these activities.

In 1999, a college student criticized President Kim Dae-jung's North Korean policies by posting a message titled "Exchange gunfire in the West Sea, Sloppy Kim Dae-jung!" in an online community. The message appeared to criticize the President's less confrontational policy toward North Korea.[51] Possibly due to the provocative nature of the speech, the student's posts were later removed, and his account was suspended by the manager of the online community, a measure that was instructed by the MIC under Article 53 of the TBA. The student petitioned the Court, arguing that the order and Article 53 violated the Constitution.

The Court invalidated several parts of Article 53. The KCC emphatically criticized the terms "public peace," "order," "social moral," and "good customs" as being too vague to provide citizens with any concrete idea of how to comply with these norms.[52] Notably, the Court dismissed the MIC's assertation regarding the clarity of the terms "public peace" and "order." According to the MIC, these terms were explicit enough from the public's perspective. Nevertheless, the Court determined that these terms were conflated with "national security" and "the maintenance of law and order," two legitimate governmental interests to regulate citizens' constitutional rights and freedoms according to Article 37 of the Constitution.[53] The Article failed to establish more concrete standards for enforcing constitutional rights protections.[54]

[51] *Id.*

[52] *Id.*

[53] *Id.*

[54] *Id.*

Moreover, the Court opined that this Article excessively infringed upon citizens' freedom of expression, the foundation of a healthy constitutional democracy. By exploiting the Article, political leaders could discourage and silence citizens from expressing and exchanging opinions about sensitive issues critical to South Korea's security governance, such as conscription requirements, punishment of conscientious objectors, and unification with North Korea.[55] Consequently, citizens failed to "present and solve social problems in a sound manner through free debates and exchange of comments expressing diverse opinions."[56]

Besides those justifications, the Court also opined, from a separation-of-power perspective, that the Article constituted a "blank authorization" to the executive: it granted the president so much authority to determine the scope of improper content that it made him/her uncheckable by the National Assembly.[57] Additionally, there were no functional guidelines to effectively guide and cabin executive agencies' exercise of power within the separation-of-power framework. Executive agencies could enforce the law based on their own judgment or preference, resulting in their unconstrained exercise of power in controlling online expression and silencing the public sphere.[58]

Furthermore, executive agencies should not adopt internal guidelines to restrict citizens' constitutional rights. Instead, citizens' liberties could only be limited by statutes enacted by legislators; they should not be constrained without explicit authorization from the law.[59] After the

[55] *Id.*

[56] *Id.*

[57] *Id.*

[58] *Id.*

[59] *Id.*

decision was made, the National Assembly amended the Telecommunications Business Act and removed the prohibition under Article 53, which the Court invalidated.

The KCC's decisions regarding the Communications Secrets Act also illustrate how the Court has strived to balance national security interests and constitutional rights protections. The Communications Secrets Act explicitly allowed investigative agencies, upon a court's permission, to investigate alleged violations of the NSL by intercepting any individuals' telecommunication activities multiple times.[60] In a number of decisions, the Court determined that the Communications Secrets Act granted unconstitutionally excessive power to law enforcement entities to investigate violations of national security laws and other national laws.[61]

In the case of 2016 Hun-Ma 263 (2018), the Court invalidated Article 5 of the Protection of Communicative Secrets Act for violating the plaintiff's freedom of communications and privacy.[62] In this dispute, the plaintiff's communicative activities were intercepted 35 times by the National Intelligence Service (NIS), the principal intelligence agency of South Korea, to investigate the plaintiff's alleged violation of the NSL. In fact, the NIS intercepted the plaintiff's telecommunications data transmitted and received through the internet line he bought six times over one and a half years, meaning that not just the plaintiff's data was under surveillance but also that of any third parties who interacted with the plaintiff on the targeted internet line.[63]

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[60] Interception of Internet Lines Case [Const. Ct.], Aug. 30, 2018, 2016 Hun-Ma 263 (S. Kor.).

[61] Case of Location Tracing Data under the Protection of Communications Secrets Act [Const. Ct.], Jun. 28, 2018, 2012 Hun-Ma 191, 2012 Hun-Ma 550, 2014 Hun-Ma 357 (consol.) (S. Kor.); Case of Investigations under the Protection of Communications Secrets Act [Const. Ct.], Jun. 28, 2018, 2012 Hun-Ma 538 (S. Kor.). Limitation on the Extension of Restrictions on Communications [Const. Ct.], Dec. 28, 2010, 22-2(B) KCCR 545, 2009 Hun-Ka 30 (S. Kor.).

[62] Interception of Internet Lines Case, *supra* note 60.

[63] *Id.*

The Court weighed the wide range of unspecified users and data intercepted by the NIS and condemned the scarcity of constraints on its exercise of power. Although the government had a compelling interest in intercepting citizens' internet lines to prevent crimes that endanger national security, intercepting information allowed the government to intrude into the intimate realm of individual privacy.[64] Hence, the Court declared that it was necessary to have "legislative safeguards aimed at preventing the abuse of power and minimizing the interferences with [citizens'] fundamental rights during and after the execution of interception."[65] Nevertheless, the procedural safeguards stipulated under Article 5 to oversee state intelligence agencies' activities were insufficient. In the context of data surveillance, because there was a third party whose constitutional rights could be inflicted by an investigative agency's interception or other investigative measures, state intelligence agencies must obtain extra authorization from a court before they undertake interceptive or investigative measures.[66]

The Court also exemplified alternative tools that the government could use to strengthen judicial oversight of intelligence measures, including requiring that agencies submit periodic reports of their interception activities to the presiding court and demanding that agencies seal, preserve, or destroy their intercepted data upon the court's request.[67] By acting as a quasi-legislative branch, the Court emphasized that intelligence activities must comply with the constitutional principle of proportionality, which requires that the government's exercise of power

[64] *Id.*

[65] *Id.*

[66] *Id.*

[67] *Id.*

satisfy the least intrusive infringement to prevent and minimize the risk of abuse by state intelligence agencies.

In addition to the aforementioned decisions regarding information control and surveillance, the Court has also involved itself in structuring South Korea's democratic processes by dealing with the legislative procedures of the National Assembly. In the case of 2018 Hun-Ma 1162 (2022), the Court invalidated a provision under the National Assembly Act, which required that all congressional committees be open to the public—except for meetings of the Intelligence Committee—to facilitate citizens' right to know.[68] To protect national security, all meetings of the National Assembly's Intelligence Committee must take place in a closed, non-public manner.[69]

In the case of 2018 Hun-Ma 1162, the Court held that absolute confidentiality of the Intelligence Committee's meetings was impermissible. To support their decision, the majority of justices underscored Korean citizens' right to know to supervise the operation of the Intelligence Committee and maintain the functioning of a democratic government. Unless there are compelling needs to justify a closed meeting, the public is entitled to review the debates and performance of

[68] Case on National Assembly Act Provision Providing for Closing of Intelligence Committee Meetings to Public [Const. Ct.], Jan. 27, 2022, 2018 Hun-Ma 1162 (S. Kor.). The Court emphasized the importance of allowing citizens to "form political opinions and participate in politics, supervise and criticize the Assembly's lawmaking activities." Coefficient Adjustment Subcommittee under the National Assembly's Special Committee of Budget Settlement, Confirmation of Unconstitutionality [Const. Ct.], Jun. 29, 2000, 98 Hon-Ma 443 (consol.) (S. Kor.). The Court also recognized citizens' right to know in Forests Survey Inspection Request Case [Const. Ct.], Sept. 4, 1989, 1 KCCR 17688, Hun-Ma 22 (S. Kor.).

After the KCC recognized the right to know within South Korea's constitutional system in 1989, the National Assembly passed the Law on Disclosure of Information in 1996. *See* Tom Ginsburg, *Introduction: The Politics of Legal Reform in Korea* in LEGAL REFORM IN KOREA 7-9 (Tom Ginsburg eds., 2004). Jongcheol Kim, *Government Reform, Judicialization, and the Development of Public Law in the Republic of Korea*, in ADMINISTRATIVE LAW AND GOVERNANCE IN ASIA: COMPARATIVE PERSPECTIVES 107-109 (Tom Ginsburg & Albert H.Y. Chen eds., 2008). *See also* Kyu Ho Youm, Inho Lee & Ahran Park, *Access to Government Information in South Korea: The Rise of Transparency as an Open Society Principle*, (7)2 J. IN T'L MEDIA & ENTERTAINMENT LAW 179, 190-191 (2017-2018). YOON, *supra* note 3, at 86-89, 92-94.

[69] Case on National Assembly Act Provision Providing for Closing of Intelligence Committee Meetings to Public, *Id*.

executive officials attending all congressional committees.[70] Tellingly, the majority rejected the dissenting Justices' view, who contended that the "exceptional situation of inter-Korean confrontation" justified an absolute "confidentiality of the content of the professional duties performed by the NIS—including collection, production, and distribution of intelligence on foreign affairs and North Korea."[71]

The Court recognized the significance of democratic oversight not simply because it naively ignored the intricacy of national security affairs. Instead, in 2018 Hun-Ma 1162, the Court stressed that the National Assembly could determine specific terms and conditions for closing their meetings under the National Assembly Act. Moreover, members of the Intelligence Committee could decide, at each meeting, whether to disclose their meeting on a case-by-case basis. In other words, the Court did not mindlessly require that all meetings of the Intelligence Committee must be open to the public.[72] Instead, the majority recognized the critical need for confidentiality in national security affairs and encouraged the National Assembly to adopt various tools to balance citizens' right to know and the need for confidentiality in their lawmaking process.

Indeed, under the Court's instruction, the National Assembly possessed extensive authority to craft rules and standards governing the disclosure of the Intelligence Committee's meetings. However, the Court's decision illuminated the generality of democratic oversight of national security affairs, which contrasted strikingly with the two Justices' dissenting opinions that considered national security affairs as absolutely exempting from public scrutiny. Based on their view, "all meetings of the Intelligence Committee need to be closed for the sake of national

[70] *Id.*

[71] *Id.*

[72] *Id.*

security" to maintain the confidentiality of all intelligence activities on foreign affairs and North Korea.[73] This view presumed that every matter deliberated in the Intelligence Committee entailed a confidential nature, making it inappropriate to be disclosed to the public. Nevertheless, the majority were more sympathetic toward the competence of judges in identifying and determining the need for confidentiality. They believed that the dissenting Justices failed to consider other alternatives that could possibly achieve the same outcomes without sacrificing citizens' opportunity to learn the meetings of the Intelligence Committee when appropriate.

The Court also closely scrutinized a handful of military-based disputes. Among other issues, whether the government can prosecute conscientious objectors is a particularly controversial topic in South Korea's politics. Military services have been obligatory for Korean males once they reach the age of 18, and the old Article 5 of the Military Service Act prosecuted those who refused to perform their military duties for conscientious and religious reasons.[74] More than 19,300 conscientious objectors have been imprisoned since 1953, the year when the Korean War ended.[75]

The Court upheld Article 5 of the Military Service Act in a number of decisions on national security grounds.[76] Nevertheless, the KCC altered its pro-security inclination and struck down

[73] *Id.*

[74] YOON, *supra* note 3, at 216-217.

[75] Choe Sang-Hun, *South Korea Must Offer Alternatives to Military Draft, Court Rules*, NEW YORK TIMES (Jun., 28, 2018), *available at* https://www.nytimes.com/2018/06/28/world/asia/south-korea-military-service-conscientious-objectors.html?fbclid=IwAR3kD1C9KaYH7lJC1oZ0N9_b6UwzgKvxrSX5iL8lTfWSrE3F_s-FphD0xdQ (latest review: June 17, 2024).

[76] Conscientious Objection of Military Service Case [Const. Ct.], Aug. 26, 2004, 16-2(A) KCCR 141, 2002 Hun-Ka 1 (S. Kor.). Conscientious Objector Case [Const. Ct.], Aug. 30, 2011, 23-2(A) KCCR 174, 2008 Hun-Ka 22, 2009 Hun-Ka 7·24, 2010 Hun-Ka 16·37, 2008 Hun-Ba 103, 2009 Hun-Ba 3, 2011 Hun-Ba 16 (consol.) (S. Kor.). Imposition of Duties of Military Service only on Men [Const. Ct.], Nov. 25, 2010, 22-2(B) KCCR 446, 2006 Hun-Ma 328 (S. Kor.) Conscientious Objector of Military Service Case [Const. Ct.], Aug. 26, 2004, 16-2(A) KCCR 141, 2002 Hun-Ka 1 (S. Kor.). YOON, *supra* note 3, at 217.

Article 5 in 2011 Hun-Ba 379 (2018), a case brought by several Jehovah's Witnesses who failed to perform military service. In this 6-3 decision, the Court criticized the National Assembly's failure to offer alternative service programs to the plaintiffs.[77] Recognizing the critical importance of national security interests, the Court emphasized that these interests could be achieved by enforcing an alternative service system without causing severe harm to conscientious objectors. Instead of imprisoning them for a long period of time, requiring them to serve alternative military services can fulfill more public interests, including national security.

Holding that Article 88 violated the plaintiffs' constitutional freedom of conscience, the KCC demanded that the government implement alternative military services by the end of 2019.[78] On December 27, 2019, the National Assembly revised the Military Service Act by offering a number of alternative service programs based on the Court's instruction.[79]

The KCC's above decisions demonstrate the Court's reluctance to consider national security as "the" sole public interest exempt from judicial oversight. Instead, national security is "one" of several legitimate governmental interests that should be scrutinized through a standard constitutional lens. This understanding allows the KCC to emphasize the Constitution's commitment to democracy, individual rights protections, and the rule of law. When necessary, the Court has prioritized constitutional rights protections over national security interests.

6. Comparing the KCC's Involvement in National Security, Election, and Education Laws

[77] Conscientious Objectors Case [Const. Ct.] Jun. 28, 2018, 2011 Hun-Ba 379 (consol.) (S. Kor.).

[78] *Id.*

[79] Choe, *supra* note 75. *South Korea: Drop charges against first conscientious objector to refuse alternative service*, AMNESTY INTERNATIONAL (Aug. 22, 2022), *available at* https://rb.gy/fjhg2l (latest review: June 17, 2024).

So far, I have demonstrated how the KCC determines the constitutionality of national security policies by taking the approach of substantive review. These findings provide a clear piece of evidence to argue for judicial oversight in the national security context. On top of these findings, to demonstrate that courts are "not distinctly" deferential in the field of national security, we need to compare the KCC's behavior in the national security context and the other two areas of law. This section aims to fulfill this goal.

Table 6 indicates the KCC's exercise of oversight in three areas of law: national security, election, and education laws. Notably, the level of judicial oversight is more pronounced in national security law than in election and education laws, contesting the views of NSE that courts exercise less oversight in national security law.

Table 6: The KCC's Oversight of National Security, Election, and Education Laws

	National Security Law	Election Law	Education Law
Oversight	61.36%	46.81%	38.30%

Source: Author

The KCC has also reviewed electoral and educational disputes with the substantive approach. In the domain of election law, the KCC has repeatedly emphasized that regulations constraining the right of imprisoners to vote must be proportionate to a legitimate legislative goal. Moreover, the KCC has frequently struck down electoral regulations because they deprived constitutional rights of a wide range of individuals. By emphasizing the wide implications of these regulations, the KCC's rulings demonstrate similar concerns with that in the case of 2016 Hun-Ma 263. In that decision, the Court also underscored the significant number of third parties potentially

wiretapped by the NIS, and for this reason, the Court exercised oversight and demanded the National Assembly to amend the TBA.

The first example is the case of 2012 Hun-Ma 409 (2014). In this dispute, the KCC was called to determine whether the Public Official Election Act (Election Act) could prohibit imprisoned individuals from voting in elections for the National Assembly.[80] In this decision, the KCC recognized two legislative purposes of the restriction: (1) maintaining the capacity of citizens to construct the governing structure of the democratic system as well as (2) maintaining social control.[81] Premised on this understanding, the Court declared the Election Act unconstitutionally restricted the right "*all* (emphasis added) prisoners and probationers" to vote.[82] The Election Act failed to distinguish different types and severity of crimes committed by imprisoners, and it thus failed to meet the least restrictive means of the proportionality test.

In 2018 Hun-Ma 456 (2021), the KCC handled a dispute concerning several provisions of the Election Act that required news websites to verify the real names of their users posing elections-related information during an election campaign period.[83] According to the Act, a news website failing to take necessary measures to process and handle data related to the verification would be subject to administrative fines. Again, the KCC focused on the ambiguous concept of "news website" stipulated in the Election Act, which could affect a large number of enterprises.

[80] Restriction on Right to Vote of Prisoners and Probationers with Suspended Sentence [Const. Ct.], Jan. 28, 2014, 2012 Hun-Ma 409 (S. Kor.).

[81] *Id.*

[82] *Id.*

[83] Case on Real-Name Verification on the Internet During Periods of Election Campaigns [Const. Ct.], Jan. 28, 2021, 2018 Hun-Ma 456 (S. Kor.).

Because the National Assembly failed to distinguish different types of news websites and their application of the law, the KCC struck down the impugned provisions.[84]

The KCC has also reviewed education law in a similar manner. In 2003 Hun-Ka 1 (2004), the Court determined that the School Health Act unconstitutionally restricted the operation of theaters within a designated zone adjacent to schools, including kindergarten, elementary, middle, and high schools.[85] The prohibition was challenged by several operators of art-house cinemas and theaters near elementary schools and kindergartens, arguing that their freedoms of occupation, art, and speech were seriously violated. In response, the Court recognized the broad nature of "theaters" or "cinemas," which encompass a diverse body of recreational and cultural enterprises that should not be invariably subject to identical regulations.[86] Thus, the Court demanded the National Assembly refrain from "completely prohibiting theaters and cinemas regardless of their nature." Instead, the National Assembly should adopt a more sophisticated classification system to carefully regulate different types of theaters and cinemas.[87]

The above decisions demonstrate the KCC's use of substantive review to invalidate unconstitutional electoral and educational policies. In fact, the KCC's approach reflects similarity with its approach to national security policies. In the cases of 2012 Hun-Ma 409, 2018 Hun-Ma 456, and 2003 Hun-Ka 1, the KCC confirmed the legitimacy of the concerned legislative instruments, but criticized their excessive violation of individuals' constitutional rights. When doing so, the KCC has focused on the accuracy of legal concepts and how sophisticate a legal

[84] *Id.*

[85] Case on the Prohibition against Operating Theaters in a School Cleanup Zone [Const. Ct.], May 27, 2004, 16-1 KCCR 670, 2003 Hun-Ka 1 (consol.) (S. Kor.).

[86] *Id.*

[87] *Id.*

program can be to further its legislative ends. The KCC's focus reminds us of the case of 2018 Hun-Ma 1162, in which the KCC also stressed the need to craft the disclosure rules governing legislative meetings in a sophisticated manner. In that case, the KCC encouraged the National Assembly to adopt a case-by-case system determining how to disclose meetings of the Intelligence Committees. The KCC criticized an absolute restriction on disclosure, not the idea of closed meetings itself. Consequently, the KCC's rulings on national security policies are similar to its rulings on education and election laws.

7. The KCC's Substantive Review in National Security Affairs

I have shown, in sections 5 and 6, that the KCC invokes substantive review to adjudicate national security, electoral, and educational disputes. Following the description, a critical question emerges: What factors affect the KCC's adoption of this approach? To answer this question, it is crucial to recognize the strands of domestic contention on South Korea's geopolitical contextualities in the context of national security. As Tae-Ung Baik correctly comments, "[h]uman rights principles are not adopted as a replica of foreign experience, but they develop through responding to the challenges they are faced" in Korea.[88] In practice, it means that the political dynamics in South Korea wield significant influence over the KCC's jurisprudence on human rights and their intersection with other domains of law, notably national security law. Therefore, it is imperative to undertake a critical reflection on the Court's engagement with national security matters while carefully considering the domestic dynamics and challenges that Korean citizens and politicians encounter on a daily basis.

[88] Baik, *supra* note 1, at 880.

At the forefront of the Koreans' public thinking lies the complex political reality of the ongoing military confrontation between North Korea and South Korea. Political elites share a consistent view rooted in the acknowledgment that the North Korean government is no longer regarded as a target for annihilation or negation.[89] Indeed, the KCC has refrained from nullifying the government's persistent categorization of North Korea as an "anti-state organization" under the NSL, asserting that this issue pertained to the application of the law rather than its abstract constitutionality.[90] However, in practice, North Korea is recognized internationally as a distinct sovereign entity with which the South Korean government must engage in some capacity.[91] Over time, South Korean citizens have come to perceive the North as a volatile and unpredictable state, leading to divisions within the public and political parties regarding the appropriate approach to engagement with their northern neighbor.[92]

Furthermore, the perception of the inter-Korean military conflict as a matter between two sovereign states reverberates with the widening disparity between the economic capabilities of South Korea and North Korea. South Korea's remarkable economic advancement since the war has placed North Korea in a position of greater dependence on South Korea's financial aid, rather than vice versa. In essence, economic factors serve to heighten South Koreans' concerns regarding the "uneven distribution of costs and benefits of unification" in the event of peninsula reunification.[93] It is improbable that South Korea would become dependent on North Korea's

[89] YOON, *supra* note 3, at 261.

[90] *See* Constitutional complaints such as Article 7 of the National Security Law [Const. Ct.], Aug. 11, 2015, 2015 Hon-Ba 261 (S. Kor.).

[91] Eun-Jeung Lee, *Dealing with Unification: The Politics of Fear*, in THE QUALITY OF DEMOCRACY IN KOREA, *supra* note 19, at 273.

[92] Lee, *Id*, at 272.

[93] *Id*. Hyug Baeg Im, *South Korean Democratic Consolidation in Comparative Perspective*, in CONSOLIDATING DEMOCRACY IN SOUTH KOREA 42-43 (Larry Diamond & Byung-Kook Kim eds., 2000).

market in return, which would fundamentally alter Koreans' understanding of the conflict's origins and its economic implications on their lives.

The understanding of Korea's sovereign status and its relation with the North has enabled the KCC to grasp the nature of North Korea as a persistent existential threat to the state. The Court has frequently invoked concepts such as "existential threat," "military confrontation," and "national security risks" to interpret the ongoing geopolitical conflicts on the Korean Peninsula as a foundational constitutional premise, serving as a legitimate national security rationale for justifying legal intervention.[94] Without South Korea's settled international status and the relatively unified public consensus on this point, it would be challenging to envision the KCC, a politically sensitive institution, taking the bold step of dismantling one of the most intricate issues in South Korea's contentious political landscape.

The KCC's substantive review accompanies its occasional reference to international legal instruments in its adoption and interpretation of domestic constitutional doctrines.[95] The adoption and interpretation of international legal discourses in domestic constitutional activities has been widely discussed not only in international legal scholarship, but also in constitutional legal studies.[96] In the context of South Korea, the KCC rarely cites international treaties or covenants to support its decisions, despite Article 6 of the Constitution of South Korea mandating that the government respect generally recognized international law.[97] This tendency might not be extraordinarily noteworthy in cases where the KCC rejects human rights claims made by plaintiffs,

[94] Praising and Encouraging Enemy of the States, *supra* note 39.

[95] David Law, *Judicial Comparativism and Judicial Diplomacy*, 163 U. PA. L. REV. 927, 963 (2015).

[96] *Id.*

[97] *Id.*

as the KCC may find it challenging to justify its pro-government decisions based on international human rights principles. However, even in cases where the Court grants human rights protections, it seldom invokes international covenants to reinforce its stance.

The KCC has acknowledged that international human rights protections do not automatically take into force within the domestic sphere. Take the case of 2008 Hun-Ka 22 for example: 2008 Hun-Ka 22 (2011) is one of the several decisions that the KCC upheld the punishment of conscientious objectors. In this decision, the Court explicitly emphasized that neither the ICCPR *automatically* (emphasis added) recognized "the right to conscientious objection," nor did it create legally binding obligations for the government to offer alternative military programs to conscientious objectors.[98] In 2018, the KCC reversed its previous holding in the case of 2011 Hun-Ba 379. The KCC formulated this pro-rights decision solely based on constitutional texts, not international legal principles.[99]

The occasional use of international legal references by the KCC can be understood through various lenses. While Wen-Chen Chang argues that the Constitution of South Korea provides sufficient textual resources for the judiciary to make decisions, thereby lowering the incentives to consult foreign or international legal documents, there are additional factors at play.[100] In fact, courts cite international legal documents not only to help interpret and apply available legal texts but also to convey their commitments to international human rights norms to international or domestic audiences.[101] Considering this, it seems plausible to suggest that the KCC is less

[98] *Id.*

[99] *Supra* note 76.

[100] Wen-Chen Chang, *The Convergence of Constitutions and International Human Rights: Taiwan and South Korea in Comparison*, 36 N.C. J. INT'L L 594, 609-610 (2011).

[101] Law, *supra* note 95, at 943.

motivated to demonstrate its commitment to international human rights norms. In a country where intense international legal constraints are not prevalent, the KCC's domestic audiences, including political elites and citizens, may not prioritize whether the Court discursively engages with international legal principles to support its judicial opinions.[102] As a result, the KCC may perceive less urgency in citing international legal principles to bolster its authority in the eyes of domestic audiences.

8. Explaining the KCC's "Non-exceptional" Approach to National Security Disputes

In this section, I argue that three conditions jointly contribute to the KCC's "non-exceptional" approach to national security disputes: (1) the KCC's capacity to adjudicate national security disputes, (2) ideological conflicts among political elites, and (3) the KCC's motives to enhance its institutional reputation.

8.1. The KCC's Capacity to Adjudicate National Security Disputes

The KCC has handled a significant number of national security disputes that implicated the civil liberties protections of ordinary individuals. These disputes do not involve complicated considerations of counterterrorism policies, allowing the KCC to review them with the ordinary methods of legal interpretation that it commonly employs in adjudicating other areas of law. For instance, in the case of 2014 Hun-Ma 346 (2018), the KCC found that the decision of the head of Incheon Airport to detain a Sudanese individual under the Immigration Act constituted an unconstitutional violation of his rights to physical freedom and movement.[103] As this Sudanese

[102] *See* Delegate Park's statement in *supra* note 43.

[103] Case on the Right to Meet Counsel of A Refugee Detained for Repatriation at Incheon International Airport [Const. Ct.], 2014 Hun-Ma 346, May 31, 2018 (S. Kor.).

individual did not pose immediate national security risks to South Korea, the KCC relied on its knowledge of civil liberties protections to exercise oversight in the case of 2014 Hun-Ma 346.

Similarly, in the case of 99 Hun-Ma 480, the KCC determined that the Telecommunications Business Act unconstitutionally empowered the Minister of Information and Communication to silence a college student's public comments on national security issues. Since 99 Hun-Ma 480 did not involve complicated policy considerations regarding national security threats, the KCC prioritized the student's freedom of speech based on its understanding of constitutional rights protections.[104]

In addition to the KCC's expertise in civil liberties protections, it is capable of processing information related to military affairs for two primary reasons. Firstly, mandatory military service of two years is obligatory for all South Korean men.[105] Consequently, many judges in South Korea inevitably gain firsthand experience with the inner workings of military institutions at some point in their lives. Even for those judges who lack direct experience, it is common for them to acquire secondhand knowledge about the strengths and weaknesses of these institutions. Consequently, participation in military institutions is an integral aspect of the lives of Korean citizens, providing the KCC with ample opportunities to adjudicate disputes related to mandatory military service. In fact, the KCC has reviewed four disputes concerning conscientious objection, which were brought before it by lower courts and individuals, constituting 40.00% of all military disputes (see Appendix 1).

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[104] *Supra* note 49.

[105] 대한민국헌법 (Constitution of the Republic of Korea), art. 39 (1948) (S. Kor.).

Also, the KCC has frequently expressed opinions about the weaknesses of military institutions in its judgments. In the case of 2005 Hun-Ma 1139 (2007), the majority of justices criticized the corruptions of military institutions, recognizing the importance to improve their transparency and accountability.[106] In the case of 2011 Hun-Ba 379, the KCC also emphasized the challenges of social exclusion faced by conscientious objectors, given that they were likely to be criticized or even discriminated by society due to their lack of military experiences.[107] Recognizing the severity of these problems, the KCC exercised oversight of the Military Service Act and demanded the National Assembly to implement alternative military service programs.

8.2. Ideological Conflicts among Political Elites

Political elites in South Korea are deeply divided on national security policies.[108] Specifically, the conservative faction advocates for a hardline or confrontational approach to inter-Korean relations, along with endorsing stricter control over North Korea-related discourse in South Korea's public sphere. In contrast, the liberal coalition leans towards ideas of engagement and mutual dialogue. They express discomfort with governmental censorship of media and comments related to North Korea, partly due to the state's traumatic experiences with military authoritarianism.[109] Consequently, there is little consensus among the public regarding policy

[106] Disclosure of Military Health Records of Public Officials [Const. Ct.], May 31, 2007, 19-1 KCCR 711, 2005 Hun-Ma 1139 (S. Kor.). The Court determined that Article 65 of the Public Official Election Act unconstitutionally require the disclosure of the health conditions of public servants of a particular rank.

[107] *Supra* note 76.

[108] Victor Cha, *Security and Democracy in South Korean Development,* in Samuel S. Kim eds., KOREA'S DEMOCRATIZATION 204 (2009). J. James Kim, Kang Chungku & Ham Geon Hee, *Fundamentals of South Korea Public Opinion on Foreign Policy and National Security* (Sep. 2021), at 26, *available at* https://en.asaninst.org/contents/fundamentals-of-south-korean-public-opinion-on-foreign-policy-and-national-security/ (latest review: June 17, 2024).

[109] *Id*, at 272. You, *supra* note 22, at 199-200, 202-206 (2015).

orientations towards North Korea and the governance of South Korea's domestic sphere. In response, the KCC has cautiously mediated the ideological conflicts inherent in the dynamics of party competition by determining the specifics of national security policies.

The KCC's utilization of conditional constitutionality is manifested in the case of 89 Hun-Ka 113 (1990). In 89 Hun-Ka 113, the KCC deliberated on the constitutionality of Article 7 of the NSL.[110] Acknowledging that Article 7 conferred excessive powers upon police and security departments to restrict the dissemination of North Korea-related information, the Court was reluctant to nullify it. One factor influencing this decision was the fact that Article 7 represented the symbolic foundation for the military governments to exert their power over decades, particularly in maintaining a hardline stance against South Korea's peaceful engagement with North Korea.[111] Given the enduring strength of military institutions and conservative parties within South Korea's political landscape at the time, there were heightened concerns regarding potential political backlashes if the Court were to invalidate Article 7 without reservations.[112]

Meanwhile, progressive forces advocating for a less confrontational policy stance toward North Korea emerged as prominent political actors. Progressive parties have vehemently criticized Article 7 of the NSL, partly due to the incarceration of numerous prominent progressive politicians under this law for their sympathies towards communist or progressive ideologies, which included advocating for peaceful engagement with North Korea.[113] The abolition of Article 7, or even the

[110] Praising and Encouraging Enemy of the States, *supra* note 45.

[111] Cho, *supra* note 4, at 141.

[112] *Id*, at 131-135.

[113] *Id*, at 135.

entire NSL, has been brought to the forefront of the political agenda by major liberal-leaning parties frequently.

Eventually, the ideological conflicts between conservative and liberal political elites concerning the foundational principles of South Korea prompted the KCC to reinterpret the content of Article 7 in a more nuanced manner. This competition encouraged the Court to introduce novel concepts cautiously, rather than excessively disrupting the prevailing operational patterns and institutions within the military. As a result, the employment of conditional constitutionality serves as a reminder of the conflicting perspectives on the nature of national security authority held by two major opposing forces.

8.3. The KCC's Motives to Enhance Institutional Reputation

The third reason contributing to the KCC's oversight of national security policies is judicial reputation. Many national security disputes have received widespread attention from the public. For example, issues about conscientious objectors frequently stand at the center of public debates.[114] When facing these high-profile disputes, the KCC is motivated to strengthen its institutional authority as the interpreter of constitutions by exercising oversight. In so doing, the KCC has "cater[ed] to the public to shore up their political base."[115] It has thus strengthened its public trust and authority among an extensive base of society.[116]

[114] YOON, *supra* note 3, at 217.

[115] Randall Peerenboom, *Varieties of Rule of Law,* in ASIAN DISCOURSES OF RULE OF LAW, *supra* note 29, at 23. YOON, *supra* note 3, at 121-122, 143-145.

[116] *See* Jongcheol Kim and Jonghyun Park, *Causes and Conditions for Sustainable Judicialization of Politics in Korea,* in THE JUDICIALIZATION OF POLITICS IN ASIA 47 (Björn Dressel eds., 2012).

The KCC's self-empowering motives are compatible with the activities of civil society organizations to strengthen public awareness by bringing disputes in court. Civil society organizations frequently collaborate with public interests lawyers to identify human rights violations, provide legal and social support to the victims, and seek judicial remedy in the courtrooms.[117] The Lawyers for Democratic Society (Minbyun), the People's Solidarity for Participatory Democracy (PSPD), and Sarangbang Human Rights Group have actively advocated for human rights protections and called for reforming and remedying the government's human rights violations in an energetic way.[118] These lawyers and NGOs have thus enabled many individuals and lower courts to continuously challenge the rulings of the KCC regarding controversial military statutes and measures.[119] Hence, they have increased the visibility of certain national security disputes, imposing significant pressures to the judiciary.

The efforts of civil society organizations in enhancing public awareness through judicial channels result from various factors. Among others, it is crucial to acknowledge the challenges faced by civil society organizations in exerting sustained influence on the legislation and enforcement of national security laws. South Korea's "strong and hyper-centralized state" has amplified the government's power in national security affairs, making it difficult for external entities to provide oversight.[120] State power in South Korea is structured and exerted through a hierarchical bureaucracy, with decision-making powers typically concentrated at the apex of this

[117] YOON, *supra* note 3, at 218-219. HYUK-RAE KIM, STATE-CENTRIC TO CONTESTED SOCIAL GOVERNANCE IN KOREA: SHIFTING POWER 64 (2013).

[118] Sunhyuk Kim, *Civil Society in Democratizing South Korea,* in KOREA'S DEMOCRATIZATION 89-90 (Samuel S. Kim eds., 2007). Baik, *supra* note 1, at 882-883.

[119] Cho, *supra* note 4, at 171-173. Chien-feng Wei, *Public Interest Lawyers in South Korea: Rising, Evolution, and Practice*, 1 THE LAWYERS (律師法學期刊) 23, 33 (2018).

[120] Choi, *supra* note 126, at 29.

administrative structure, including inner groups of governmental heads, bureaucrats, and experts. Especially in the realm of national security, the 1987 Constitution empowers the president to shape the composition and operation of the National Security Council—an advisory body to the president on foreign, military, and domestic policies.[121] Consequently, presidents often rely on close circles to arrange foreign policy and security decisions. This state-centric nature has empowered the executive branch, enabling presidents and other governmental institutions to craft and implement national security policies.[122] Consequently, external actors such as opposition parties in the National Assembly typically find it difficult to participate in the formulation and oversight of relevant policies.[123]

Of course, the state-centric nature of South Korea's decision-making mechanisms does not imply the government is insulated from external influences. After all, non-governmental organizations have persistently monitored governmental performances since democratization.[124] Nevertheless, external forces have not consistently enhanced administrative accountability in Korean policymaking. Administrative decision-making has frequently been influenced by *chaebols*, large industrial conglomerates, possibly through political corruption or other forms of exchange.[125] The convergence of state agencies and industrial conglomerates has created a complex administrative governance structure shielded from democratic scrutiny, complicating the

[121] Ballbach, *supra* note 19, at 297-298. YOON, *supra* note 3, at 28-29.

[122] Ballbach, *supra* note 19, at 293.

[123] Ballbach, *supra* note 19, 300-301.

[124] Jennifer S. Oh, *Strong State and Strong Civil Society in Contemporary South Korea: Challenges to Democratic Governance*, 52(3) ASIAN SURVEY 528, 528 (2012). Larry Diamond & Byung-Kook Kim, *Introduction: Consolidating Democracy in South Korea*, in CONSOLIDATING DEMOCRACY IN SOUTH KOREA, *supra* note 93, at 13-14. Kim, *supra* note 118, at 82.

[125] *Id*, at 29. BYONG-MAN AHN, ELITES AND POLITICAL POWER IN SOUTH KOREA 10-11 (2003).

identification of inherent issues in national security governance by human rights advocates or organizations.

Moreover, the National Assembly's capacity to oversee the government is often weak and limited.[126] Fragmented and weakly institutionalized political parties require extensive coordination for collective action, hindering their ability to check and balance government policies and legislative proposals effectively.[127] In the national security domain, the government has frequently relied on classified information to thwart meaningful oversight by the National Assembly.[128] Intelligence agencies tend to reject requests from the National Assembly to disclose classified information without significant pressure.[129]

Additionally, intelligence agencies frequently release classified information to deflect media attention and mitigate public scrutiny, exacerbating the challenge for legislative members to scrutinize agency accountability in designing and enforcing specific national security policies.[130] Consequently, members of the National Assembly often resort to leaking information from unauthorized sources to raise public awareness of potential government abuses of power and prevent the implementation of controversial policies.[131] This prevalent use of "informal checks

[126] Byung-Kook Kim, *Electoral Politics and Economic Crisis, 1997-1998*, in CONSOLIDATING DEMOCRACY, *supra* note 93, at 195-196. Jang-Jip Choi, *Korean Democracy in a Hyper-Centralized State*, in THE QUALITY OF DEMOCRACY IN KOREA, *supra* note 19, at 35-36. YOON, *supra* note 3, at 102-103.

[127] *See, e.g.* Jin-young Kwak, *Why Do Parties Spit and Merge in South Korea?* in THE NEW DYNAMICS OF DEMOCRACY IN SOUTH KOREA 116-142 (Chae-Han Kim eds., 2021).

[128] YONGHO KIM, SOCIAL MEDIA AND SOUTH KOREA NATIONAL SECURITY 38 (2017).

[129] *Id.*

[130] *Id.*

[131] *Id*, at 38-39. In 2011, the Court determined whether the Protection of Communications Secrets Act could constitutionally prohibit a member of the National Assembly from disclosing conversations between two significant political figures, as the conversations were illegally wiretapped by the National Security Agency. The Court upheld the Protection of Communications Secrets Act. Nevertheless, the Court stressed that the legislator could be exempt from penalty because his actions served legitimate public interests. Case on the Disclosure of Others' Conversation

and balances," while occasionally effective, underscores the dysfunctionality of the National Assembly in the face of a dominant state controlling national security policies.[132]

The National Assembly's ineffective system of checks and balances also stems from the significant influence exerted by the heads of the political parties to which elected representatives are affiliated, who are typically concurrently served by the president. In essence, presidents wield control not only over the bureaucracy as heads of state but also over the legislative arena, which is tasked with overseeing governmental conduct. Consequently, when the ruling party holds the majority in the National Assembly, opposition parties or independent representatives face limited opportunities to offer substantial oversight of the government's policies and actions. This dominance places presidents at the apex of the executive branch, effectively overshadowing the legislative and judicial branches and rendering them relatively impotent.[133] Unless met with significant public opposition to specific policies, there is little scope for opposition or minority parties to form alliances and effectively scrutinize the government's proposed policies or legislative initiatives.[134]

Illegally Obtained Under the Protection of Communications Secrets Act [Const. Ct.], Aug. 30, 2011, 23-2(A) KCCR 286, 2009 Hun-Ba 42 (S. Kor.).

[132] *Id*, at 39-43.

[133] AHN, *supra* note 125, at 11.

[134] In 2021, a bill concerning fake news was introduced, initially granting courts the authority to demand that media outlets or journalists provide compensation to individuals portrayed under a "false or manipulated" light. The definition of this portrayal was broadly construed as "the act of reporting or disseminating false information or information manipulated to appear as factual." However, the bill faced substantial criticism from opposition parties, journalist associations, and NGOs for encroaching upon civil liberties protections. Ultimately, in response to the outcry, the bill was suspended. *See* Human Rights Watch, *South Korea: Reject Amendments to Press Law* (Sep. 15, 2021), *available at* https://www.hrw.org/news/2021/09/15/south-korea-reject-amendments-press-law (latest review: June 17, 2024). Hyonhee Shin, *S. Korea's Ruling party retreats on "Fake News" Law After Backlash,* REUTERS (Sep. 29, 2021), *available at* https://rb.gy/j7c1pz (latest review: June 17, 2024).

In response to the difficulties inherent in establishing effective checks and balances within the legislative branch, civil society organizations have often brought national security cases before the KCC. Article 5 of the Military Service Act has been the subject of at least four cases brought before the KCC.[135] The initial deferential stance adopted by the KCC has faced considerable criticism from the National Human Rights Commission.[136] In the case of 2011 Hun-Ba 379, the KCC opted to invalidate Article 5 of the Military Service Act rather than deferring the determination of military service programs to the National Assembly.[137]

9. Concluding Remarks

South Korea represents a contested state where political elites debate the boundary of its nation due to the geopolitical contextualities inherent in the Korean Peninsula. Given the nuanced political, cultural, and historical layers surrounding Korea's security and stability, the KCC has adopted the substantive review to determine the boundary of state power in the realm of national security. The Court has carefully assessed the scope, density, and breadth of constitutional rights protection against the government's interests in maintaining national security. In doing so, the KCC has upheld constitutional principles governing national security affairs while mediating the divergent forces contesting the nature of national security threats and their implications.

The turbulent geopolitical atmosphere on the Korean Peninsula has created and will continue to create tremendous uncertainties that the government, courts, and citizens must confront and manage on a daily basis. At present, there appears to be no immediate resolution to the

[135] *See, e.g.* Conscientious Objection of Military Service Case, 16-2(A) KCCR 141, 2002Hun-Ka1, August 26, 2004.

[136] YOON, *supra* note 3, at 217-218.

[137] Conscientious Objectors Case, *supra* note 77.

antagonistic relationship between North Korea and South Korea. Owing to the rapidly evolving circumstances on the Korean Peninsula and beyond, security-based narratives have gained attraction in the domestic political arena. Indeed, anti-communist narratives waned in appeal among younger generations lacking direct memories of war.[138] Nevertheless, new narratives of counterterrorism and security have emerged as renewed discourses to stifle citizens' constitutional liberties, employing tools such as the National Security Law and other security-based legal instruments.[139]

The Anti-Terrorism Act of 2016, for example, defines terrorism in highly vague terms, granting law enforcement agencies excessive discretion to curtail citizens' constitutional rights.[140] Despite not being the first instance of the Korean government's attempt to expand its power in the name of national security, it is precisely this recurrence of history that raises alarms among lawyers and legal scholars concerned with the balance of national security and constitutional rights protections. As such, only time will reveal the enduring relevance of the North Korean factor in South Korea's politics and the KCC's rulings on national security affairs.

[138] Edge, *supra* note 2, at 273-274.

[139] Patricia Goedde & Weonwu Kim, *Balancing the Act on Anti-Terrorism in South Korea,* 35 UCLA PAC. BASIN L.J. 67, at 71-72, 77-78 (2017). *See also* Gray, *supra* note 14, at 255.

[140] *Id.*

CHAPTER 4

A CONTESTED DEMOCRACY WITH AMBIGUOUS BOUNDARIES OF NATION:

THE CONSTITUTIONAL COURT OF TAIWAN'S PROCEDURAL APPROACH

Identity emerges dialogically
and represents a mix of political aspirations and commitments
that are expressive of a nation's past,
as well as the determination of those within the society
who seek in some ways to transcend that past.

Gary Jeffrey Jacobsohn[1]

1. Introduction

This chapter examines how the Constitutional Court of Taiwan (the TCC) navigates national security controversies within an ambiguous international environment. Taiwan's ambiguous international circumstances stem from various factors, including the postwar geopolitics surrounding the Taiwan Strait, characterized by the intricately complex relationship between China and Taiwan. This geopolitical ambiguity affects Taiwan's international status, particularly in its representations to global audiences, a subject pertinent to international law.[2] Furthermore, cross-strait geopolitics are intricately interwoven into the implementation of the Constitution of the Republic of China (1947), subsequent constitutional developments in Taiwan, and domestic political debates regarding Taiwan's sovereignty and national identity. Consequently, the ambiguous cross-strait geopolitics offer a richly complex backdrop against which the TCC deliberates on issues concerning the identification, management, and exclusion of external threats.

[1] GARY JEFFREY JACOBSOHN, CONSTITUTIONAL IDENTITY 7 (2010).

[2] Lung-chu Chen & W. M. Reisman, *Who Owns Taiwan: A Search for International Title*, 81 YALE L.J. 599, 599-671 (1972).

The Taiwanese story is exceptional in that few other countries face a comparable level of ambiguity and complexity in their foreign relations. Consequently, Taiwan may appear too distinct from Lithuania and South Korea to warrant direct comparison. Nevertheless, Taiwan's story holds generalizable lessons, illustrating how the judiciary, amidst looming security concerns, adjudicates national security disputes. Meanwhile, the judiciary faces moderate constraints from international legal institutions, including human rights treaties, compared to European countries that are subject to substantial human rights obligations. In this context, Taiwan's experience is not entirely unique, as South Korea also operates within a framework lacking stringent international legal constraints. Moreover, Taiwan shares significant similarities with South Korea insofar as both jurisdictions possess mutual historical legacies with their respective sources of antagonism, resulting in cultural, historical, and political nuances that shape citizens' perceptions of national security threats.

Against this backdrop, the TCC underscores the critical importance of procedural requirements in governing issues related to national security. For example, the TCC has mandated sufficient legislative authorization for military affairs governance. Unlike the KCC, the TCC refrains from defining the core meaning of national security. The TCC perceives its role primarily as safeguarding procedural requirements that political actors must meet when formulating and implementing concrete national security policies. Through the procedural approach, the TCC has sought to align its national security jurisprudence more closely with the governing norms of the ordinary body of law.

The chapter is structured as follows: The next section provides an overview of the international and domestic politics surrounding Taiwan's constitutional development. Subsequently, I introduce the TCC in Section 3, followed by a summary of its involvement in

national security affairs in Section 4. Section 5 analyzes how the TCC employs the procedural approach to national security disputes. Section 6 examines the TCC's use of the procedural approach in the realms of election and education law to illustrate the "non-exceptional" role of courts in national security affairs. Following this analysis, I explore factors contributing to the TCC's procedural approach in Section 7. Section 8 identifies three conditions under which the TCC exercises oversight in the context of national security law (i.e., the judiciary's capacity to adjudicate national security disputes, political schism, and the judiciary's will to strengthen its reputation). Section 9 concludes this chapter.

2. International Ambiguities and Domestic Politics in Taiwan's Constitutional Changes

In 1945, the Kuomintang (KMT), then the governing party of the Republic of China (ROC), assumed control of Taiwan following the end of its Japanese colonial rule (1895—1945).[3] Two years later, the KMT government promulgated the Constitution, initially intended to govern the ROC, with Taiwan being considered a province alongside the geographically extensive mainland China. The Constitution incorporated democratic institutions, including elections, five branches of government ("Yuan")[4], and the constitutional court (the TCC, originally known as the Council of Grand Justices). Tellingly, the Constitution adopted a tricameral legislative system comprising the

[3] Lung-chu Chen, *The Postwar Transformation of Taiwan's International Status*, in A COLLECTION OF THESES REGARDING TAIWAN'S SOVEREIGNTY (I) 94-97 (Editorial Group of Theses regarding Taiwan's Sovereignty eds., 2001) [referred to as THESES REGARDING TAIWAN'S SOVEREIGNTY].

[4] The five branches of government are the Executive Yuan, the Legislative Yuan, the Judicial Yuan, the Control Yuan, and the Examination Yuan. Specifically, the Control Yuan is vested with the authority to impeach government officials, audit the budgets of the Executive Yuan, and rectify any misconduct by the Executive Yuan and governmental agencies following investigations. The Examination Yuan oversees the administration of examinations, training, protection, and retirement benefits for civil servants.

National Assembly, Legislative Yuan, and Control Yuan to represent the citizens of the ROC, a body of nearly 525 million people in 1945.[5]

In 1949, the KMT lost the Chinese Civil War to the Chinese Communist Party (CCP) and retreated to Taiwan. In contrast, the CCP assumed control in mainland China and established the People's Republic of China (PRC). Both the KMT and CCP governments have since then asserted themselves as the sole representative government of China, encompassing mainland China and Taiwan, a status recognized only during the period from 1945 to 1949. For the KMT, the ROC Constitution has become the primary symbol of political legitimacy, supporting its claim to sovereignty over China.[6] Hence, the KMT did not revise and adapt the Constitution to reflect Taiwan's political realities. To preserve the "important symbol of political legitimacy,"[7] the KMT consistently insisted that the Constitution should remain unchanged in its original form, with the intention of enforcing it in mainland China after the KMT's victory over the CCP.

In 1948, one year earlier to the KMT's defeat of the Chinese Civil War, it declared national mobilization by implementing the Temporary Provisions under the Period of National Mobilization in 1948 (1948—1991, referred to as Temporary Provisions).[8] In so doing, the KMT government suspended the principles of separation of powers and national elections. Additionally, the government imposed martial law in 1949 (1949—1987), resulting in the curtailment of civil

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[5] Z Jiang, H Mi, Y Zhang, *An Estimation of the Out-Migration from Mainland China to Taiwan: 1946-1949,* 8(4) CHINA JOURNAL OF POPULATION SCIENCE 403-419 (1996).

[6] Cheng-Yi Huang, *Unpopular Sovereignty: Constitutional Identity through the Lens of the Sunflower and Umbrella Movements*, in, LAW AND POLITICS OF THE TAIWAN SUNFLOWER AND HONG KONG UMBRELLA MOVEMENTS 121 (Brian Christopher Jones eds., 2017).

[7] *Id.*

[8] Article 47 of the Constitution stipulated that the term limit for presidents was six year, who could be reelected only for once. The KMT government suspended this Article, enabling presidents to be reelected without limitation.

liberties protections and the erosion of the rule of law.[9] Many of these security-focused practices were upheld by the TCC, which was reluctant to preserve the separation of powers and citizens' constitutional rights and freedoms.[10]

Despite the KMT government's vigorous assertion of its political legitimacy to both domestic and international audiences, the international landscape surrounding the Taiwan Strait underwent rapid and irreversible transformation in the 1970s. In 1971, the General Assembly of the United Nations (UN) adopted Resolution No. 2758, recognizing the PRC, not the ROC, as the sole legitimate representative of China in the UN. Furthermore, because the KMT government refused to be recognized in any capacity other than as the Chinese government, including as the Taiwanese government, Taiwan lost not only its UN membership representing China but also its own voice within the organization.[11] Subsequently, many countries severed diplomatic ties with the ROC and established official relations with the PRC. As of 2024, Taiwan has 12 formal diplomatic allies, leaving it nearly entirely isolated from the international community.

In the 1970s, the international environment grew increasingly hostile for the KMT government led by Chiang Ching-kuo, the son of Chiang Kai-shek, to assert its political legitimacy. Moreover, citizens' discontent with the KMT's repressive rule intensified. Numerous political and social movements emerged in the streets, public squares, and outside government buildings, protesting various political and non-political issues, including democracy, gender equality, social justice, labor rights, environmental concerns, and indigenous affairs. The vigorous momentum of

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[9] Wen-Chen Chang, *The Right to Free Assembly and the Sunflower Movement,* in Jones eds., *Id, at* 30-31.

[10] Judicial Yuan (J.Y.) Interpretation No.31 (Jun. 5, 1954). The TCC upheld the government's suspension of national elections was constitutional because it was necessary in times of exceptional political calamities. *See also* TOM GINSBURG, JUDICIAL REVIEW IN NEW DEMOCRACIES 128-129 (2003).

[11] Chen, *supra* note 3, at 98-100.

these grassroots movements led to the formation of the Democratic Progressive Party (DPP) in 1986, one year before the lifting of martial law in 1987. Subsequently, the government abolished the Temporary Provisions in 1991. In 1991 and 1992, the National Assembly and the Legislative Yuan (Taiwan's two national legislative bodies at the time) held their respective first elections ever since 1948, effectively renewing the democratic legitimacy of these institutions.[12] In 1996, Lee Teng-hui won the first presidential election under the PRC's missile operations in the Taiwan Strait, becoming Taiwan's first democratically elected president despite China's continued pressures.

Due to the ambiguity of Taiwan's political status, the evolving international political landscape, and the evolution of Taiwan's democratic politics, it became challenging to assert, from the perspective of living constitutionalism, that the ROC Constitution drafted in 1947 has effectively governed or should naturally govern political practices in Taiwan since 1991. Indeed, following the KMT's nearly four-decade authoritarian rule and ideological rivalry with the CCP, many politicians and citizens were entrenched in the ideological orthodoxy of Chinese nationalism, maintaining the belief in the "unamendability of the ROC Constitution."[13]

However, as the disparity between the ROC Constitution and the evolving constitutional practices in Taiwan became increasingly apparent, some began to contemplate the possibility of amending the Constitution, rather than completely rewriting it.[14] Given the PRC's persistent assertions of sovereignty over Taiwan, any acts of expression declaring the independence or self-

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[12] J.Y. Interpretation 261 (Jun. 21, 1990).

[13] Huang, *supra* note 6.

[14] Chien-Chih Lin, *Book Review: The Constitution of Taiwan: A Contextual Analysis*, 16(2) I-CON 702, 703 (2018). *See* Jiunn-rong Yeh & Wen-chen Chang, *Path Dependence or Collective Institutional Choice? Modeling Constitutional Changes in the Context of Democratic Transitions*, 45 WENTI YU YANJIU 1-31 (2006).

governance of Taiwan—such as the 1996 presidential election—could potentially provoke military action from the PRC.[15] Therefore, since the first constitutional amendment in 1991, the National Assembly, the governmental body responsible for constitutional amendment at the time, retained the main body of the Constitution and made revisions in the form of additional provisions to the Constitution. Building on this progress, the ROC Constitution underwent six rounds of amendments, with the latest one completed in 2005.[16]

These constitutional amendments ushered in significant changes in the structure and functions of Taiwan's government and its cross-strait relationship. Following seven rounds of amendment, the three national legislatures stipulated in the 1947 Constitution were consolidated into a single body: the Legislative Yuan. The main objective was to centralize the official platform for political representation into a unified entity, enhancing the efficiency of legislative negotiation and competition on this small island.[17] Meanwhile, according to the constitutional amendment, democratic representatives of the "national legislature" were to be elected in Taiwan. In other words, the Taiwanese government would be chosen by the Taiwanese people, with mainland China excluded from participating in Taiwan's elections under the designation of "ROC Chinese."[18] The processes of constitutional amendment highlighted politicians' and citizens' achievement of

[15] Jau-Yuan Hwang, *A Constitutional Analysis of the "Two-State Theory": Challenges and Breakthroughs of Constitutional Interpretation*, 278-279, in THESES REGARDING TAIWAN'S SOVEREIGNTY, *supra* note 3.

[16] Lin, *supra* note 14.

[17] *Id.*

[18] Hwang, *supra* note 15, at 258.

"Taiwanizing" the Constitution, meaning that the Constitution was no longer designed for China in 1947 but specifically for Taiwan.[19]

Within the preamble, the constitutional amendments addressed the intricate dynamics between China and Taiwan, the historical and contemporary perceptions of the ROC, and the domestic divisions between those supporting Chinese orthodoxy and those who did not. The preamble articulated that the purpose of amending articles to the ROC Constitution was "to meet the needs of the nation prior to national unification."[20] With their ambiguous and indefinite terms such as "requisites" and "national unification," these texts reflected the drafters' strategies for navigating the conflicts arising from different interpretations of Taiwan's sovereign status. On the one hand, some advocated for the legitimacy and unalterability of the ROC Constitution, while others consistently called for its revision to address Taiwan's practical needs. This preamble, for better or worse, facilitated compromise among various political forces during the uncertain period of democratization, envisioning new forms of constitutional governance for Taiwan.

The hallmark of Taiwan's political liberation and "the changing complexity of the geopolitical environment engulfing the Taiwan Strait"[21] underscored the significant need for adopting a new constitutional system designed for Taiwan. For instance, the 1991 amendment established the National Security Council to subject the president's exercise of national security powers to formal checks and balances, a departure from the situation during authoritarian rule.[22]

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[19] MASAHIRO WAKABAYASHI, THE "REPUBLIC OF CHINA" AND THE POLITICS OF TAIWANIZATION: THE CHANGING IDENTITY OF TAIWAN IN POSTWAR EAST ASIA (Trans. Yu-ru Hung, 2016).

[20] The ROC Constitution, preamble.

[21] Ming-sung Kuo, *Context Is Open to Interpretation, Too*, VERFASSUNGSBLOG (Apr. 20, 2023), *available at* https://verfassungsblog.de/context-is-open-to-interpretation-too/ (latest reviewed: June 17, 2024).

[22] The ROC Constitution, art.9 of the Additional Articles (1991).

Moreover, the 1991 amendment mandated that the legislature handle legal matters concerning cross-strait relations under the principle of the rule of law—a constitutional principle widely embraced by citizens and politicians on the island.[23]

Based on the constitutional amendment, the legislature created the Mainland Affairs Council under the Executive Yuan to govern cross-strait affairs under the Act governing Relations between the People of the Taiwan Area and the Mainland Area (the Cross-Strait Relations Act). The purposes of the Act are to "ensur[e] the security and public welfare in the Taiwan area, [to] regulat[e] dealings between the peoples of the Taiwan Area and the Mainland Area, and [to] handl[e] legal matters arising therefrom before national unification."[24] Specifically, the Cross-Strait Relations Act regulates the entry, residency, and employment of Chinese individuals in Taiwan, as well as their social and economic interactions with Taiwanese citizens. Additionally, it prohibits individuals who have held high-ranking positions in Taiwan's national defense, foreign affairs, Mainland affairs, or other agencies related to national security and intelligence from participating in any events organized by political parties, government institutions, or organizations on the Mainland.[25] The Cross-Strait Relations Act has served as the primary foundation for the government to regulate cross-strait interactions. These interactions had been previously interrupted during authoritarian rule, but were relaxed after martial law was lifted. Frequently, the Cross-Strait Relations Act became the focal point of contention among citizens and politicians regarding controversial cross-strait policies.

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[23] For the development of national security law in Taiwan, *see* Hsin-Hsuan Lin, *Tightwire of National Interests and Publicity in the Evolved Process of Democratization and Constitutional Transformation: Lessons from Taiwan,* 5 CARDOZO INTERNATIONAL AND COMPARATIVE LAW REVIEW 329, 329-373 (2022).

[24] Article 1 of the Cross-Strait Relations Act

[25] Article 9-2 of the Cross-Strait Relations Act.

3. The Constitutional Court of Taiwan: An Overview

The Constitutional Court of Taiwan was established in 1948 under the ROC Constitution. The TCC comprises 15 justices, the nominees of whom are selected by the president and approved by the Legislative Yuan. Justices must have diverse backgrounds, having served as judges, prosecutors, lawyers, university professors, academic researchers, or in other public positions with distinguished reputations. This design aims to foster a dynamic environment where justices with varied backgrounds can contribute diverse opinions and enrich the reasoning process of constitutional adjudication.

The TCC has the following duties: it reviews the constitutionality of laws and constitutional complaints, adjudicates disputes between constitutional organs, impeaches the President and the Vice President, dissolves unconstitutional political parties, handles local self-governmental disputes, and provides a unified interpretation of statutes and regulations.[26] With authority at hand, the TCC has cautiously navigated the turbulent politics and strived to establish its authority by invalidating unconstitutional statutes, garnering a reputation as an "instrument for democracy and human rights."[27]

Before the Constitutional Court Procedure Act (CCPA) was enacted on January 4, 2019, the Constitutional Court adopted abstract review to review the constitutionality of regulations or statutes. After the CCPA was enacted, individuals can lodge a petition with the Constitutional

[26] Article 1 of the Constitutional Court Procedure Act.

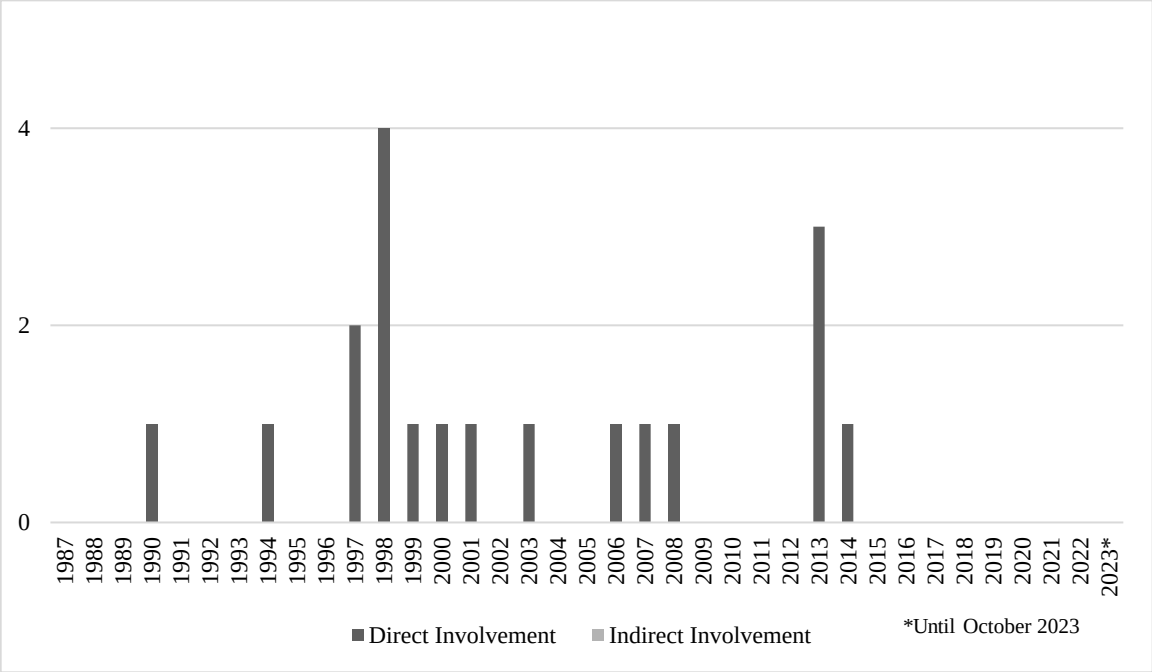
[27] GINSBURG, *supra* note 10, at 106. PO YEN YAP, COURTS AND DEMOCRACIES IN ASIA 7-8 (2019). Wen-Chen Chang, *Strategic Judicial Responses in Politically Charged Cases: East Asian Experiences*, 8(4) I-CON 885, 910 (2010). Jiunn-rong Yeh, *Presidential Politics and the Judicial Facilitation of Dialogue between Political Actors in New Asian Democracies: Comparing the South Korean and Taiwanese Experiences*, 8(4) I-CON 911, 911 (2010).

Court for a judgment when (1) a final court decision is found against her or him or (2) a legal provision applied in such a court decision contravenes the Constitution.[28]

4. The TCC's Involvement in National Security Affairs

Between 1987 through 2023, the TCC's decisions related to national security have been sporadic without any significant increase (see Figure 2). I analyzed the TCC's involvement in national security disputes based on the categories I developed in Chapter 1. Particularly, military disputes account for 36.84% of the total disputes, ranking first among all categories of national security disputes (see Table 7).

Figure 2: The TCC's Involvement in National Security Law (1987-2023)



Source: Author

[28] Article 59 of the Constitutional Court Procedure Act.

Table 7: Eight Categories of the TCC's National Security Case Law

	Inward-Looking		Outward-Looking		All	
	Number	Oversight	Number	Oversight	Number	Oversight
Military	7	5	0	0	7	5
Economy	0	0	0	0	0	0
Citizenry	2	2	4	2	6	4
Democratic Government	6	6	0	0	6	6
Total	15	13	4	2	19	15

Source: Author

The TCC's involvement in national security law warrants discussion for several reasons. Firstly, the Court has not accepted cases concerning economic policies that implicate national self-defense. While administrative cases concerning military procurement [29], agricultural development[30], and publication policies[31] have arisen occasionally in Taiwan's administrative courts, the TCC tends to refrain from adjudicating economic disputes involving national security considerations. Many economic disputes of this kind likely involve cross-strait relationships due to Taiwan and China's close economic engagement, making them politically controversial that dissuades the TCC's exercise of power. Secondly, the TCC handles very few outward-looking disputes, likely because Taiwan's exclusion from the international community provides fewer disputes for the TCC to adjudicate.

[29] Supreme Administrative Court, 107-Pan-Tze Decision No. 25 (Jan. 11, 2018).

[30] Supreme Administrative Court, 101-Pan-Tze Decision No. 931 (Oct. 25, 2012).

[31] Supreme Administrative Court, 93-Pan-Tze Decision No. 433 (Apr. 22, 2004); Supreme Administrative Court, 93-Pan-Tze Decision No. 129 (Apr. 19, 2004).

The TCC's handling of national security affairs reflects a transforming nature in the post-transition context. For example, in J.Y. Interpretation No. 461 (1998), the TCC established the authority of the Chief of the General Staff within the separation-of-power framework.[32] Under Taiwan's semi-presidential system, the premier, ministers, and heads of agencies under the Executive Yuan are constitutionally subject to interpellation by members of the Legislative Yuan.[33] In 1998, a dispute arose regarding whether the Chief of the General Staff should attend legislative committees when they are requested to answer questions made by the Legislative Yuan. In response, the TCC determined that, unless justified on national security grounds, the Chief of the General Staff should participate in such legislative committees and answer questions made by representatives of the Legislative Yuan. While the strength of such justifications remained unclear, the TCC formalized the norm that the Chief of the General Staff should be subject to legislative scrutiny, thus recognizing the principle of checks and balances in the newly democratized regime.

5. The TCC's Procedural Approach to National Security Affairs

In this section, I analyze how the TCC relies on procedural review to adjudicate national security matters. The procedural approach scrutinizes the procedures that the executive and legislative departments must follow when exercising power. Similar to substantive approach discussed in Chapter 3, the TCC's procedural approach seeks to control the abuse of power and safeguard constitutional rights. However, unlike substantive approach, which delves into an assessment of the balance between legislative ends and means, the procedural approach focuses

[32] J.Y. Interpretation No. 461 (Jul. 24, 1998).

[33] The ROC Constitution, art.3, para.2, subpara.1 of the Additional Articles (1997).

on establishing and maintaining a neutral and impartial system of rules to guide the executive's exercise of power, irrespective of the category of legislative ends.

The TCC has implemented procedural requirements and protections in a number of military disputes. In J.Y. Interpretation No.436 (1997), the Court established the fundamental principle of judicial independence in the military system.[34] Brought by a group of DPP members of the Legislative Yuan, J.Y. Interpretation No. 436 discussed several provisions under the old Military Justice Act, a legal regime governing the criminal acts of active military soldiers in times of war.[35] The original Military Justice Act designated the Ministry of National Defense as the highest governmental body supervising the operation of military tribunals. For example, a military tribunal shall be composed upon the approval of military officers. Senior officers in the military system could approve and review judgments made by the military tribunals. Additionally, defendants tried by a military tribunal could not appeal their decisions in an ordinary court.[36]

The Court declared all these provisions unconstitutional, emphasizing the importance of creating and operating a neutral and independent trial system within the military institution.[37] The Court rejected the defendant's argument, which emphasized the need for governing military trials on exceptional terms. The defendant invoked Article 9 of the Constitution, which stipulated that unless individuals were an active military duty, they were not subject to military trials. Nevertheless, the Court interpreted Article 9 as not prohibiting those on active military duty from

[34] J.Y. Interpretation No. 436 (Oct. 3, 1997).

[35] *Id.*

[36] *Id.*

[37] *Id.* Nevertheless, in J.Y. Interpretation No. 272, the TCC upheld a provision of the National Security Law that prohibited individuals from appealing their criminal court judgments made by military tribunals during the martial law period (Jan. 18, 1991).

being tried under ordinary judicial procedures. Indeed, it was deemed necessary to establish a special military tribunal for individuals on active military duty to address national security and military needs.[38] However, Article 9 of the Constitution did not justify an exceptionally exclusive jurisdiction of the military tribunal over all criminal allegations against military members.[39] In other words, military tribunals should not usurp the power of ordinary courts to adjudicate disputes involving ordinary criminal codes.

Moreover, a military tribunal's authority to adjudicate legal matters is considered part of the state's power, thereby subject to legal control.[40] Hence, the most fundamental principles of criminal procedures still apply to individuals on active military duty, who are constitutionally protected individuals no different from civilians.[41] The Court criticized the Military Justice Act for subordinating the need for judicial independence under executive control, excluding the application of ordinary legal principles. Nevertheless, military trial procedures must adhere to standard legal procedures: the judge should be independent of the influence of military seniors. Additionally, defendants are entitled to appeal to ordinary courts to review the correctness of the laws applied in their cases, based on their right to litigation; any restrictions on their rights must adhere to the principle of proportionality.[42] As the provisions of the Military Justice Act failed to meet these principles, the Court demanded the Ministry of National Defense revise it within two years. Additionally, the Court requested the Ministry of National Defense to reform the military

[38] *Id.*

[39] *Id.*

[40] *Id.*

[41] *Id.*

[42] *Id.*

trial system by differentiating regulations governing military trials during times of war and ordinary times.[43]

J.Y. Interpretation No.436 prompted the Ministry of National Defense to embark on a series of fundamental reforms in the military tribunal system, notably the 1999 amendment to the Military Justice Act. In addition to the provisions struck down by the Court, the new Military Justice Act required that rules of detention under the Code of Criminal Procedure governing the investigation and trials of ordinary criminal cases be principally applied, mutatis mutandis, to the detention of military trial defendants and criminal suspects under military investigations.[44] Additionally, the new Act made defendants and criminal suspects entitled to appoint defense attorneys; the rights and obligations of defense attorneys are generally aligned with the rules of the Code of Criminal Procedure as well.[45] Additionally, the Ministry of National Defense also amended the Criminal Code of the Armed Forces in 1999, which governs criminal procedures for those who are on active military duty during ordinary times. The Criminal Code of the Armed Forces also aligns the structure and procedures of criminal trials with those of ordinary criminal procedures.

J.Y. Interpretation No.436 is not the sole instance where the TCC is extensively involved in military disputes. In J.Y. Interpretation No. 443 (1997), the Court invalidated an administrative rule that empowered the Ministry of Domestic Affairs to prohibit draftees from leaving the country, who were subject to various legal obligations stipulated under statutes and administrative

[43] *Id.*

[44] Article 11 of the Military Justice Act.

[45] Articles 79 and 80 of the Military Justice Act.

regulations.[46] In response to these regulations, in J.Y. Interpretation No. 443, the TCC established a "hierarchical" or "layered" system of legal reservation, demanding varying levels of requirements for legislative authorization based not on the legislative purpose of national security, but on the significance of rights or public affairs being regulated by the government. In other words, whether the legislation is aimed to facilitate national security is not the focus of the Court here; instead, it is the significance of rights or public affairs that matters the most.

The TCC exemplified three types of circumstances. First, limitation on an individual's physical freedom must satisfy procedural requirements stipulated by Article 8 of the Constitution, which requires prior consent from a court and grants the individual the right to habeas corpus. Second, restrictions on an individual's freedom of movement must be regulated by statutes or administrative rules authorized by the legislature, provided that such authorization is specific and precise. Third, as to details or technical matters related to law enforcement, executive agencies can adopt internal guidelines to regulate these matters, as long as they do not impose a severe burden on an individual's rights and freedoms.[47] Consequently, a national security law or measure will be reviewed based on the exact same principle of legal reservation developed by the TCC as other public laws. The government's interests in national security do not necessarily trigger different legal treatments.

The Court also emphasized the significance of procedures in J.Y. Interpretation No. 631 (2007).[48] J.Y. Interpretation No. 631 is associated with Article 5, paragraph 2 of the Act on Protection and Surveillance of Communications, the legislative ends of which were to protect

[46] J.Y. Interpretation No. 443 (Dec. 26, 1997).

[47] *Id.*

[48] J.Y. Interpretation No. 631 (Jul. 20, 2007).

national security and maintain social order.[49] Article 5 empowered prosecutors to issue a communications surveillance warrant, which could be applied by law enforcement departments or by virtue of their prosecutorial power. In response, the Court criticized the Act for not notifying the person under surveillance and for not offering them any opportunity to consent to the surveillance activities.[50] Moreover, such surveillance activities typically continue for a specific period of time without tangible space barriers. Without knowledge of being monitored, individuals are deprived of their rights to defend themselves (such as the right to remain silent, the right to counsel, and the right against self-incrimination) under the Code of Criminal Procedure. Therefore, the Court demanded that the Legislative Yuan amend the Act to align the protection of individuals under surveillance with that under the Code of Criminal Procedure. Consequently, the Legislative Yuan amended the Act by requiring judicial consent for communications surveillance based on the Code of Criminal Procedure.[51]

The Court's emphasis on procedures is also evident in a couple of citizenship-based disputes. Due to the intricate post-war development of the ROC Constitution, the status of Chinese citizens under the ROC Constitution has been contested. On the one hand, many scholars argue that Chinese citizens should be recognized as a special category of foreigners instead of citizens.[52] On the other hand, many statutes do not identify Chinese citizens as foreigners, creating doctrinal confusion in many scenarios. For instance, under the Cross-Strait Relations Act, "Chinese citizens" are convolutedly defined as "people who have household registration in Mainland Area." In other

[49] Article 1 of the Act on Protection and Surveillance of Communications.

[50] J.Y. Interpretation No. 631, *supra* note 48.

[51] Article 5 of the Act on Protection and Surveillance of Communications.

[52] Chien-Liang Lee, *A Legal Analysis of the "Status-Connection" between the People and State: And Focus on the Problems about the Nationality of the Taiwanese*, 36(4) NTU L.J. 1, 28, 31 (2007). Hwang, *supra* note 15, at 248.

statutes, they are defined as "nationals who do not have household registration in Taiwan."[53] These terms are widely adopted in laws governing residency and citizenship in Taiwan, with an undertone that both the Chinese and Taiwanese people are members of the same state: the ROC.

Putting aside these issues and assuming that Chinese people are foreigners, depriving them entirely of constitutional freedoms, including personal liberties and freedom of movement, is problematic from a human rights perspective. Especially in the post-transition context, the TCC has proactively strengthened the protection of individuals' constitutional freedoms and rights in various settings.[54] As such, how does the TCC ascertain an individual's freedom of movement based on his or her national status? How are the ambiguous geopolitical circumstances factored into the constitutional court's exercise of power?

The TCC has required the government to implement sufficient procedures protecting the physical freedom of Chinese citizens and foreigners. The TCC has rigorously monitored the new National Security Law of 1992, initially titled "National Security Law during the Period of National Mobilization" (old National Security Law) when enacted in 1987, right after martial law was lifted. The new National Security Law adopted similar regulations to the old National Security Law, which aimed to prevent potential security risks and control social and political disruption in the aftermath of democratic transition.

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[53] *Id.*

[54] In J.Y. Interpretation No. 567 (Oct. 24, 2003), the Court invalidated the Statute on Preventing Communist Espionage Criminals' Recidivism during the Period of National Mobilization. It gave police agencies unconstitutionally extensive discretion to indefinitely control criminals' physical freedom and freedom of movement by demanding them to perform reeducation and disciplinary measures. The Court stated that the government's restrictions on citizens' physical freedoms should be subject to the rule of law, regardless of whether under authoritarian or democratic regimes.

Similar to what it was under the old National Security Law, Article 3 of the new National Security Law demanded that all "nationals" obtain official approvals from police departments before planning to exit or enter Taiwan. "Nationals who had no household registration in Taiwan" must leave the country within a specified period if they failed to satisfy the conditions for long-term residency and household registration. Failure to comply with this regulation would result in criminal punishment. To enforce the Article, police departments must ascertain whether an applicant posed a substantial danger to national security or social order. In practice, they must consider whether the applicant satisfied conditions stipulated by the Ministry of Domestic Affairs, the Executive Yuan, in a series of administrative guidelines.

In J.Y. Interpretation No. 454 (1998), the Court invalidated several sections under an administrative guideline stipulating the conditions to enforce Article 3 of the new National Security Law.[55] The Court determined these sections as unconstitutional, using the principle of legal reservation established in J.Y. Interpretation No. 443. Specifically, the Court emphasized that these conditions imposed severe restrictions on an individual's rights to residence and movement. Therefore, they should have been stipulated by law or by administrative agencies with explicit authorization from the law. However, no provision of the National Security Act or other statutes explicitly empowered the Ministry of Domestic Affairs to implement these conditions. Consequently, the Court declared these sections incompatible with the Constitutional and instructed the Legislative Yuan to revise relevant arrangements within one year.

The TCC also extended procedural protections to those who entered Taiwan, including foreigners and Chinese citizens. In J.Y. Interpretation No. 708 (2013), the Court invalidated Article

[55] J.Y. Interpretation No. 454 (May 22, 1987).

38 of the Immigration Act, given that it failed to stipulate sufficient procedures to deport and detain foreigners as mandated by Article 8 of the Constitution.[56] According to Article 8, the restriction of an individual's physical freedom must be determined by a court, and such a restriction must afford the individual sufficient opportunities to seek judicial remedy. However, Article 38 of the Immigration Act failed to do so. Despite the need for expeditious handling of immigration affairs, especially those related to national security purposes, the Immigration Act must afford detained individuals with adequate and timely legal opportunities to appeal administrative decisions against them in court.

By acting as a quasi-legislative branch, the Court instructed the Legislative Yuan to amend Article 38 of the Immigration Act within two years based on the following points. If a detained individual decides to appeal a detention decision made by the Bureau of Immigration, the appeal must be submitted to a court within 24 hours for determination.[57] Additionally, language assistance must be provided to the detained individual to ensure comprehension of the reasons for detention and possible remedies.[58] When the deadline for detention is nearing expiration and the Bureau of Immigration deems it necessary to extend the detention, it must petition the court, as such prolonged detention constitutes a deprivation of the individual's freedom of movement.[59]

Based on the Court's instructions, the Legislative Yuan amended the Immigration Act in 2015. Among other revisions, the Act explicitly stipulated the time period for detention, the procedures for the Bureau of Immigration to make detention decisions, and the requirements for submitting the decision for court approval. Moreover, the Act guaranteed the right of a detained

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[56] J.Y. Interpretation No. 708 (Feb. 6, 2013).

[57] *Id.*

[58] *Id.*

[59] *Id.*

person to appoint attorneys as well as the right to defend themselves against decisions regarding detention, prolonged detention, and deportation.

A parallel case of J.Y. Interpretation No. 708 was J.Y. Interpretation No. 710 (2013).[60] In J.Y. Interpretation No. 710, the TCC addressed the detention and deportation of Chinese citizens under Article 18 of the Cross-Strait Relations Act. This article stipulated that police authorities could detain and deport a Chinese individual if the former reasonably believed that the latter had posed a threat to national security or social order.[61] Nevertheless, similar to its approach in J.Y. Interpretation No. 708, the TCC criticized Article 18 for not specifying the procedural requirements to deport and detain individuals.

For example, Article 18 failed to specify that police departments must not deport an individual when his or her circumstances meet the conditions for detention enforcement. In other words, deportation is the least desirable tool; police departments must ascertain whether temporary detention sufficed to protect national security and maintain social order. Additionally, Article 18 failed to stipulate the duration and grounds for detention. And it provided detainees with almost no judicial remedies when they were detained or when their detention was extended. The TCC thus determined Article 18 as violating the principles of due process of law, freedom of movement, and other physical freedoms under the Constitution. Consequently, the Court urged the Legislative Yuan to craft procedures for detaining and deporting individuals within a two-year timeframe, considering factors such as the severity of the national security threat posed. In response, the Legislative Yuan amended the Cross-Strait Relations Act similarly to its revisions of the Immigration Act.

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[60] J.Y. Interpretation No. 710 (Jul. 5, 2013).

[61] *Id.*

In summary, the procedural approach focuses on neutral requirements that executive agencies must adhere to when their policies infringe upon individuals' constitutional rights, including the principle of legal reservation, access to judicial remedies, and, where applicable, prior approval from a court.[62] When an individual's physical freedom is infringed upon, the Court has demanded heightened procedural requirements to ensure that individuals can access judicial remedies.

Specifically, the TCC has ruled that the design and operation of military trials should adhere to legal principles governing the design and operation of ordinary criminal trials—restrictions on citizens' exit from the country based on national security justifications are no exception. The TCC has also determined the need to comply with ordinary criminal procedures by requiring court approval to conduct surveillance on individuals. Moreover, the TCC has affirmed that Article 8 of the Constitution applies to the detention and deportation of foreigners and Chinese citizens. In this regard, national security interests do not retain a special status to justify exceptional judicial deference. The procedural approach has allowed the TCC to establish and reinforce the governing norm of national security law based on fundamental principles of constitutionalism that guide the operation of all other statutes and governmental actions.

6. Comparing the TCC's Behavior in the National Security, Election, and Education Contexts

So far, I have described how the TCC exercises oversight by emphasizing procedural elements in its national security jurisprudence. In fact, the TCC's oversight of national security matters is not more deferential than that of electoral and educational affairs. Table 8 demonstrates

[62] Yeong-chin Su, a constitutional scholar and a former Justice of the TCC, contended that the rule of law was the guiding principle of the cross-strait relationship as the public disagreed on whether the nature of the relationship was state vis-à-vis state. Yeong-Chin Su, *Constitutionalism and National Identity*, in CONSTITUTIONALISM STEPPING INTO AN NEW ERA 165-167 (2002).

the percentage of the TCC's oversight within the respective bodies of national security, election, and education laws. It reveals that the TCC is more rigorous in the domain of security law than in the other two areas, providing clear evidence against the arguments of NSE.

Table 8: The TCC's Oversight of National Security, Election, and Education Laws

	National Security Law	Election Law	Education Law
TCC	78.95%	55.56%	60.00%

Source: Author

Moreover, the TCC emphasizes the need for procedural elements when adjudicating the constitutionality of electoral and educational regulations.[63] In the domain of election law, the Court has crafted procedural protections for those who participated in democratic politics. In J.Y. Interpretation No. 546 (2002), the TCC dealt with Yuan-Tze No. 2810 (1945), a judicial interpretation made by the Judicial Yuan in 1945 in Nanjing, China.[64] Yuan-Tze No. 2810 (1945) pertains to an individual's right to make administrative appeals in the context of national examinations. Administrative appeals are a remedial procedure within the administrative system, which often serve as a prerequisite for individuals seeking judicial remedy for an administrative decision against them. Yuan-Tze No. 2810 holds that individuals can only make administrative appeals to the presiding administrative agency as long as the violation of their rights is repairable or remediable.[65] After Yuan-Tze No. 2810 was made, administrative courts frequently invoked it to rule against petitions brought by individuals who failed to register to participate in electoral

[63] Po Yen Yap characterizes the TCC as a non-partisan and even-handed court in the domain of election law. YAP, *supra* note 27, at 104-106.

[64] J.Y. Interpretation No. 546 (May 31, 2002).

[65] *Id.*

campaigns, possibly because the right to take national examinations and the right to serve in public offices were both stipulated in Article 18 of the Constitution.

J.Y. Interpretation No. 546 (2002) dealt with a petitioner of this kind.[66] In J.Y. Interpretation No. 546, the petitioner registered to participate in a local election but was rejected, and when he made administrative appeals to a local election committee, the committee dismissed his case by invoking Yuan-Tze No. 2810.[67] The petitioner brought the case to the TCC. In response, the TCC narrowly interpreted Yuan-Tze No. 2810 by articulating that rights that could be repeatedly exercised, such as the right to serve in public offices, shall be exempted from its application.[68] In doing so, the Court extended the remedies for individuals who intended to make appeals against administrative decisions against them.

The TCC has also emphasized the significant importance of procedural protections in its education jurisprudence. In Taiwan, disputes over educational law often revolve around students' access to the judiciary to challenge disciplinary actions imposed by teachers or schools. These actions may include warnings, demerits, suspensions, or, in some cases, corporal punishment. Allegedly, such actions infringe upon students' various constitutional rights, including physical freedom and freedom of movement. Thus, Taiwan's education law implicate similar categories of normative stakes as those impacted by the regulatory regime of national security.

Instead of focusing solely on whether a teacher or a school has the authority to exercise disciplinary power over students, the TCC has recognized students' rights to seek remedies for damages resulting from disciplinary actions by teachers or schools. Many cases in this regard

[66] *Id.*

[67] *Id.*

[68] *Id.*

stemmed directly from a 1952 precedent of the Administrative Court under the old system, which denied students the right to seek administrative appeals when expelled from schools.[69] This precedent opines that the relationship between schools and students differs from that between a government and citizens. Consequently, when a school or teacher requires a student to transfer to another school for violating conduct rules, the student can only urge the presiding authority to rectify any mistakes made by the school, if any, but cannot make administrative appeals.[70] In practice, this interpretation has prevented students from seeking judicial remedies, as making administrative appeals is often a prerequisite for seeking judicial remedies in administrative cases.

Against this precedent, the TCC first recognized students' right to seek remedies in J.Y. Interpretation No. 382 (1995).[71] The TCC recognized the 1952 precedent correctly prohibited students from seeking administrative appeals for disciplinary actions that did not deprive their right to education, such as warnings or demerits. However, when disciplinary actions deprived the student of his or her right to education, such as suspension or expulsion decisions, the Court emphasized that "the disciplined student is entitled to make an administrative appeal and later engage in administrative litigation when all remedies available within the school have been exhausted."[72] Accordingly, J.Y. Interpretation No.382 granted students the right to seek judicial remedies when their right to education is deprived.

Without explicitly defining "a deprivation of the student's right to education," J.Y. Interpretation No. 382 provided influential—but limited—procedural protections to students. This limited scope of judicial remedies was later expanded in J.Y. Interpretation No. 684 (2011). In J.Y.

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[69] J.Y. Interpretation No. 382 (Jun. 23, 1995).

[70] *Id.*

[71] *Id.*

[72] *Id.*

Interpretation No. 684, the TCC held that a college student could bring judicial cases against the college's any decisions upon him or her, including grading criteria, course selection, and even poster regulations without limiting it to suspension or expulsion decisions.[73] Nevertheless, J.Y. Interpretation No. 684 applies only to college students. Non-college students cannot seek such judicial remedies until the TCC made J.Y. Interpretation No. 784 (2019). In J.Y. Interpretation No. 784, the TCC determined that students at all levels of schools can bring cases their school's decisions or measures upon them.[74]

Similar to the TCC's jurisprudence on national security law, the TCC has frequently emphasized students' access to judicial remedies. In J.Y. Interpretation No. 708, the Court did not addressed how to assess whether the government's deportation or detention decisions violated a foreigner's constitutional rights; instead, the Court emphasized that the foreigner must be offered with access to judicial remedies. Similarly, in the education context, the Court has confirmed that students can seek judicial remedies, regardless of what constitutional rights or freedoms are infringed by a school. The TCC has left the substantive questions about whether the school is empowered to exercise power over the student to the interpretation of lower courts. In this regard, the TCC's jurisprudence on national security law exhibits strong similarities with that of education law.

7. Analyzing the TCC's Procedural Approach

Section 6 has illustrated the Court's emphasis on procedural protections in adjudicating various legal matters, using election and education disputes as examples. In fact, the TCC's

[73] J.Y. Interpretation No. 684 (Jan. 17, 2011).

[74] J.Y. Interpretation No. 784 (Oct. 25, 2019).

procedural approach offers a crucial benefit: it does not necessitate an in-depth assessment of national security interests as needed in the substantive approach. The procedural approach ensures that the judiciary's role is to determine the procedures to be implemented in light of the rights at stake. In other words, the judiciary is not obligated to provide an authoritative understanding of the substance of national security interests and their balance with constitutional rights protections.

The neutral nature of the procedural approach is particularly valuable in a contested environment like Taiwan, where political actors hold differing views on the political status of Taiwan, amidst an ambiguous situation surrounding the Taiwan Strait.[75] Since 1971, Taiwan has been obstructed from holding formal membership to major international legal regimes, including the UN system.[76] Due to international exclusion, while Taiwan has many features of an independent country, the government's legal discourses about national security have been somewhat limited, if not entirely absent, to avoid blunt confrontations with China.[77] Hence, the statecraft of Taiwan, although desired by a small portion of the Taiwanese people, cannot be pursued through provocative narratives of nationalism, broadly defined. This structural constraint makes it challenging to discuss Taiwan's national security interests transparently, as such discussions can be interpreted by China as the Taiwanese government's explicit defiance of China's sovereignty over Taiwan, potentially sparking undesirable cross-strait crises.

Furthermore, domestic debates about national security are contentious due to differing understandings of Taiwan's boundaries. National security issues and identity issues are intertwined in Taiwan, given the lack of consensus regarding the state's boundary, making it challenging to

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[75] GINSBURG, *supra* note 10, at 108.

[76] Wen-Chen Chang, *An Isolated Nation with Global-minded Citizens: Bottom-up Transnational Constitutionalism in Taiwan,* 4(3) NATIONAL TAIWAN UNIVERSITY LAW REVIEW 203, 205-206 (2009).

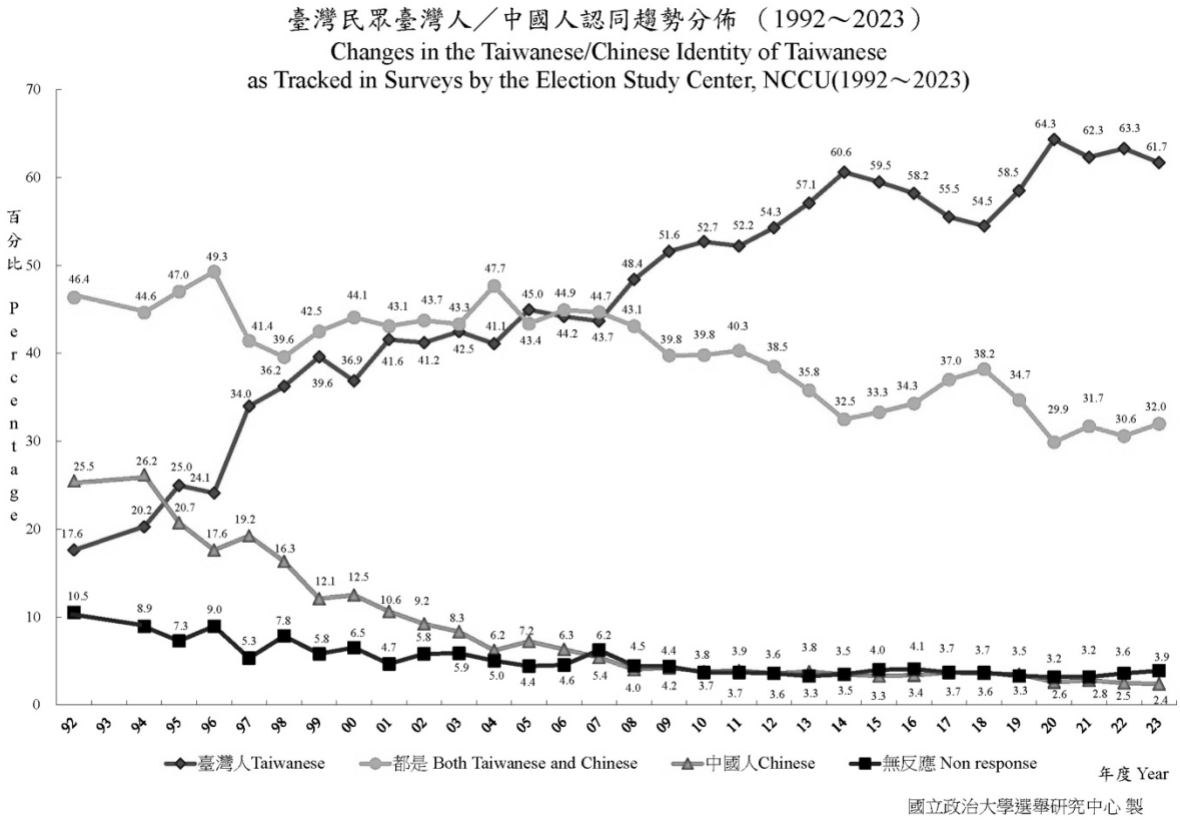
[77] GINSBURG, *supra* note 10, at 108.

determine and defend the core interests of the state. Presently, while most people in Taiwan identify themselves as Taiwanese, this was not the case during the early stages of democratization, let alone the authoritarian period.

Figure 3 shows that in 1992, 46.4% of citizens considered themselves both Chinese and Taiwanese, 25.5% identified exclusively as Chinese, and 17.6% identified exclusively as Taiwanese. Importantly, the survey intentionally left the concepts of "Chinese" and "Taiwanese" to be defined by the respondents themselves, leading to ambiguity regarding whether these categories were based on ethnicity/culture or politics. The fact that 25% of the population held a distinct national identity from the 17.6% who identified exclusively as Taiwanese demonstrates the significant divergence in how people perceived themselves and how these perceptions evolved over time.

While this divergence has decreased over time, it has still significantly influenced citizens' views and preferences on various critical public affairs, creating a contested political backdrop against which constitutional practitioners—including judges—must navigate when assessing constitutional frameworks for governing public policies of significant public interests.

Figure 3: Changes in the Taiwanese/Chinese Identity of Taiwanese as Tracked in Surveys (1992-2023)



Source: The Election Study Center, National Chengchi University, Taiwan[78]

These structural factors often result in political debates about Taiwan's national security, incorporating a procedural element to accommodate different understandings of national security interests. The 2014 Sunflower Movement serves as a notable example. The Sunflower Movement is one of the most influential student movements in Taiwan's history, sparked by President Ma Ing-jeou's attempt, as the leader of the KMT, to establish a controversially vigorous economic tie

[78] Election Study Center of National Chengchi University, *Changes in the Taiwanese/Chinese Identity of Taiwanese as Tracked in Surveys (1992-2023), available at* https://esc.nccu.edu.tw/upload/44/doc/6960/People202312.jpg (latest review: June 17, 2024).

between Taiwan and China through the signing of the Cross-Strait Service Trade Agreement. The goal was to purportedly boost Taiwan's economy by opening a wide array of industries for free trade between China and Taiwan, which generated widespread criticism in Taiwan. Opponents of the agreement expressed concerns that its implementation could harm small and medium-sized Taiwanese companies, the backbone of Taiwan's economy. Additionally, they feared that increased investment in news media and other industries could lead to more pro-China discourse and distort the political environment in Taiwan.

Although the agreement was required to undergo review by the Legislative Yuan before taking effect, on March 17, 2014, Chang Ching-Chung, a KMT legislator and the presiding chair of the Internal Administrative Committee, expedited the agreement's passage through legislative review in a matter of seconds, without the clause-by-clause review typically conducted for agreements with high political and economic stakes. The following day, March 18, students, academics, and NGOs breached police barricades and occupied the entire building of the Legislative Yuan. The occupation persisted for nearly one month, remaining peaceful throughout. During this period, students, academics, and NGOs organized numerous grassroots and voluntary activities to protest against the government's perceived abuse of power, discuss democratic oversight of cross-strait and national security policies, and reinforce the public's understanding of the rule of law and democracy.[79]

These debates concerning the rule of law and democracy largely reflect how political controversies regarding the cross-strait relationship evolved into procedure-based, law-oriented issues—a shift that is arguably more acceptable to the public, given their varied understandings of

[79] Huang, *supra* note 6, at 121.

the ontological foundation of Taiwan's political status and the public's diverse preferences regarding national security policies. Despite differing perspectives on the origin and extent of external threats, as well as on how to establish a secure and stable system of national security and cross-strait relations, there is a general consensus on the importance of the rule of law, at least at a very abstract level.

The Court's adoption of the procedural approach aligns with its avoidance of politically contentious issues. In 1993, the TCC addressed a dispute concerning the types of international agreements that should be submitted to the Legislative Yuan for legislative approval in J.Y. Interpretation No. 329.[80] Under the ROC Constitution, "treaties," defined as agreements signed between states, require approval by the legislature. However, it remained unclear whether agreements between Taiwan and China should be classified as "treaties" under the ROC Constitution due to the ambiguous relationship between the two entities. In J.Y. Interpretation No.329, the TCC concluded that such agreements fell outside its scope of interpretation. The Court opted to defer this political conundrum to democratic debates and refrained from adjudicating it, given that it could not be resolved based on existing legal doctrines.[81]

More recently, in the case of 112 Shen-Tsai-Tze No.1704 (2023), the Court dismissed a petition challenging Article 33 of the Cross-Strait Relations Act, which prohibited citizens of Taiwan from holding positions in political parties, military institutions, or other entities of a political nature in China.[82] According to the petitioner, the concept of "political nature" was

[80] J.Y. Interpretation No. 329 (Dec. 24, 1993).

[81] *Id.*

[82] Constitutional Court of Taiwan, 112 Shen-Tsai-Tze No. 1704 (Sep. 20, 2023).

excessively broad and vague, which arguably authorized the government excessive power to prohibit citizens' right of employment.

Nevertheless, the TCC reasoned that the petitioners failed to provide sufficient constitutional grounds to warrant judicial review, and they did not demonstrate the necessity of protecting their constitutional rights against government intervention.[83] Consequently, the Court's ruling implied that the Article in question is constitutional and thereby not subject to review. Furthermore, by declining to hear the case, the Court refrained from engaging with this politically contentious dispute.

While the TCC has refrained from directly addressing contentious issues regarding the boundary of Taiwan, it has adopted alternative approaches to define the membership of Taiwan's political community. One such approach involves referencing foreign and international legal documents. Due to moderate constraints from the international legal system, the TCC's utilization of international human rights laws is relatively limited.[84] However, the mere quantity of international legal citations does not fully represent the TCC's nuanced application of international and foreign legal discourses. In reality, the TCC has prudently incorporated international legal doctrines to ascertain the status of Chinese individuals within Taiwan's constitutional framework.

In J.Y. Interpretation No.710, the case regarding detention and deportation of Chinese individuals, the TCC expressly referenced Article 12 of the ICCPR and CCPR General Comment No.15 (The Position of Aliens under the Covenant) concerning the protection of aliens lawfully

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[83] *Id.*

[84] Wen-Chen Chang, *An Examination on the Implementation of the Two Covenants After Two Years: With a Focus on Judicial Practice*, 50(4) THOUGHT AND WORDS: JOURNAL OF THE HUMANITIES AND SOCIAL SCIENCE 7, 25-31 (2012). Wen-Chen Chang, *The Convergence of Constitutions and International Human Rights: Taiwan and South Korea in Comparison*, 36 N.C. J. INT'L L 594, 604-605 (2011) (comparing the judicial use of international human rights law in Taiwan and South Korea).

entering foreign territories. In alignment with the principles outlined in the ICCPR and the General Comment, the TCC underscored that Chinese individuals, upon their lawful entry, are entitled to constitutional protections in Taiwan.[85] The Court also cited Article 13 of the ICCPR[86] and Article 1 of Protocol No.7 to the European Convention on Human Rights "Regarding the Procedural Safeguards Relating to the Expulsion of Aliens" to support its stance that due process requirements applied to the detention and deportation of Chinese persons.[87] In line with international norms, the TCC extended procedural requirements to limit an individual's physical freedom and freedom of movement under Article 8 of the Constitution.[88]

One may argue that the citation is not particularly noteworthy because the Legislative Yuan ratified the ICCPR and ICESCR in 2009 and enacted the Act to Implement the ICCPR and ICESCR, a domestic legal act, in the same year. Consequently, the TCC and lower courts are bound by these international treaties when adjudicating human rights cases, particularly concerning the protection of minorities, including foreigners.[89] However, in J.Y. Interpretation No. 708, the TCC did not explicitly cite international covenants to adjudicate the detention and deportation of foreigners. Nonetheless, the Court reached similar conclusions as in J.Y. Interpretation No. 710 by considering similar provisions under Article 13 of the ICCPR, CCPR General Comment No.15, and Article 5 of the European Convention on Human Rights.[90]

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[85] J.Y. Interpretation No. 710, *supra* note 60.

[86] Article 13 of the ICCPR reads: "Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law."

[87] J.Y. Interpretation No. 710, *supra* note 60.

[88] *Id.*

[89] Chang, *The Convergence of Constitutions and International Human Rights*, *supra* note 84, at 598-599.

[90] Chang-fa Lo, concurring opinion, J.Y. Interpretation No. 708, at 1-20.

Therefore, one might question why the TCC did not extend due process of law to Chinese individuals without directly referencing international legal principles.

The significance of foreigners in J.Y. Interpretation No.708 may be apparent, but this is not necessarily the case for J.Y. Interpretation No.710. By citing international legal texts in J.Y. Interpretation No.710, the TCC not only provides procedural protections for detained individuals but also signals that the rights of Chinese individuals are protected as aliens, rather than citizens, under the ROC Constitution. By drawing on international legal discourses, the TCC has effectively designated the status of Chinese people within Taiwan's constitutional system as a distinct category of foreigners. In doing so, the Court implicitly narrows the scope of the ambiguous terms regarding the "ROC nationals" in the Constitution.

8. Conditions for the TCC's Non-exceptional Approach to National Security Affairs

8.1. The TCC's Capacity to Handle National Security Disputes

The TCC has played a crucial role in handling national security disputes that impact individuals' civil liberties. These disputes often occur in contexts without immediate national security risks, allowing the TCC to draw on its expertise in civil liberties and prioritize human rights protections. For instance, in J.Y. Interpretations No. 708 and No. 710, the Court addressed cases involving immigrants who posed remote national security risks to Taiwan. Rather than emphasizing national security exceptionalism in enforcing detention and deportation, the TCC focused on these immigrants' access to the judiciary.

Additionally, given that military service is mandatory in Taiwan, the TCC possesses a certain degree of knowledge about military regulations, stemming from judges' first-hand or

second-hand experiences.[91] The broad scope of individuals subject to mandatory military services makes national security considerations not only a professional concern for a specific group but also a general public interest that many judges are familiar with. Possibly for this reason the TCC has expressed its opinions regarding the weaknesses of Taiwan's military institutions. In his concurring opinion to J.Y. Interpretation No. 490 regarding conscientious objection, Justice Tieh-Cheng Liu criticized the practice of imprisoning conscientious objectors as a misuse of state resources that military institutions failed to recognize fully.[92] Moreover, in J.Y. Interpretation No. 443, the TCC used the principle of legal reservation to determine that regulations affecting the entry and exit of draftees must be regulated with proper legislative authorization. In other words, the TCC did not view national security policies of this kind as exempt from ordinary judicial scrutiny.

Furthermore, the TCC has handled several cases related to large-scale legal reforms in military institutions that affected a significant number of people in Taiwan's society. For instance, J.Y. Interpretation No. 436 addressed the constitutionality of military trials, applicable to all soldiers in active military service during times of war. In fact, this decision was made amid debates among political elites about how the government should enhance the transparency and accountability of military institutions.[93] Such public discussions likely deepened the judges' understanding of military regulations, enabling them to scrutinize whether the executive branch exceeds its authorized powers under the law more critically.

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[91] 中華民國憲法 (Constitution of the Republic of China), Art. 20 (1947) (Taiwan (ROC)).

[92] J.Y. Interpretation No.490 (Oct. 1, 1999).

[93] Concurring and dissenting opinions for J.Y. Interpretation No.436 (Oct. 3, 1997).

8.2. Ideological Conflicts Among Political Elites

As examined in Section 7, the TCC has exercised its power over national security disputes within a contentious landscape. In Taiwan, the KMT and the DPP disagree on two types of national security issues: (1) disagreements about the ontological basis of Taiwan's political nature—the basis upon which the state could exercise its national security powers; (2) the limits and scope of national security authority. These two categories of national security issues have been intertwined and factored into various disputes addressed by the TCC. In response, the TCC has carefully exercised oversight of national security disputes.

J.Y. Interpretation No. 445 (1998) illustrates this point. J.Y. Interpretation No. 445 addressed several sections under Article 11 of the old Assembly and Parade Act of 1988, which imposed prior restraints on a wide range of assemblies and parades.[94] The Act was enacted right after martial law was lifted, aimed to maintain national security and stability based on the KMT's interpretation after democratization. On the issue of Article 11, of particular interest was Section 1, which empowered police departments to impose prior restraints on those advocating "secession of the national territory" and "communism."[95] Section 1 of Article 11 was built upon the tenets underlying Article 4 of the Act, which stipulated that assemblies and parades were not allowed to advocate for "communism" and "secession of the national territory."[96] Other sections of Article 11 stipulated that the government could impose prior constraints on expression that could destabilize social order or imperil national security.

[94] J.Y. Interpretation No.445 (January 23, 1998).

[95] *Id.*

[96] *Id.*

In J.Y. Interpretation No. 455, the TCC invalidated the impugned sections of Article 11. Article 11 unconstitutionally authorized police departments to conduct content-based prior restraints on citizens' freedom of speech and assembly in the absence of a clear and present danger.[97] The Court stressed that the "appearance" of danger was insufficient for the government to disapprove assembly activities based on their viewpoints.[98] The Court thus required that the government could only trigger the use of prior constraints when the concerned political activities cause a clear and present danger to national security and public order. Accordingly, the Legislative Yuan amended Article 11 by requiring that prior constraints were applicable only when there was "clear evidence indicating a threat to national security, social order, or public interests" or "clear evidence indicating a threat to life, physical integrity, freedom, or significant property damage."[99]

Nevertheless, the Court remained silent on Article 4 regarding whether it was constitutional for citizens to advocate for communism or secession of the national territory or other political activities in stringent terms.[100] As a result, Article 4 prohibiting advocation of communism or secession of the national territory remains intact today. The TCC's strategy in J.Y. Interpretation No. 445, therefore, reflects its cautious attitudes toward issues involving the ideological conflicts regarding the boundary of the nation. In response, the TCC exercised oversight of rules that allocated national security power to police departments; the TCC refrained from mediating controversies regarding the ontological basis of Taiwan's national status.

8.3. The TCC's Motives to Enhance Its Reputation

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[97] *Id.*

[98] *Id.*

[99] Article 11 of the Assembly and Parade Act.

[100] *Supra* note 94.

The TCC has been motivated to enhance its institutional authority by adjudicating high-profile cases. In so doing, the TCC can garner its institutional prestige as a guardian of the people in the eyes of domestic audiences. For example, in J.Y. Interpretation No. 558 (2003), the TCC invalidated a provision under the National Security Act of 1992, which required that overseas citizens must seek the government's approval before entering Taiwan.[101] As mentioned earlier, the National Security Act of 1992 inherited many requirements under the old National Security Act of 1987, and this entry requirement was no exception. The entry requirement made numerous individuals blacklisted by the KMT government during the authoritarian period unable to enter Taiwan. The entry of overseas Taiwanese thus became a high-profile issue testing the TCC's attitudes toward the government's national security governance. In response to the public attention to the issues surrounding border control and the freedom of movement, the TCC struck down the requirement in J.Y. Interpretation No. 558.

Indeed, one may criticize that the judiciary does not always want to act courageously. In fact, courts may be concerned with backlashes from political elites if they take an overtly rigorous position. This reserved attitude was manifested in J. Y. Interpretation No. 265 (1990). In this decision, the TCC upheld the old National Security Law requiring ROC nationals to seek approval for their entry or residence in Taiwan.[102] J.Y. Interpretation No. 265 was concerned with a Chinese person whose application to reside in Taiwan was rejected by police departments. In this decision, while the TCC encouraged the government to revise the old National Security Law in accordance

[101] J.Y. Interpretation No. 558 (Apr 18, 2003).

[102] J.Y. Interpretation No. 265 (Oct. 5, 1990).

with the changes in the cross-strait relationship, it determined that the restriction was constitutional.[103]

Nevertheless, civil society organizations have likely created significant pressure on the TCC by bring cases before the judiciary and strengthening public awareness. Domestic civil society groups, including human rights lawyers, often work with victims to make their cases visible in the eyes of domestic audiences by accessing courts to advocate for various remedies, such as abolishing statutes constraining individuals' freedoms and rights.[104] In fact, these efforts are compatible with the TCC's self-empowering motives, encouraging it to enhance institutional authority by exercising oversight.

For example, the detained plaintiffs in J.Y. Interpretation No.708 were represented by Kao Jung-Chih, a famous lawyer and human rights activist, in their legal petitions handled by lower courts and the TCC.[105] Moreover, J.Y. Interpretation No. 558 was brought by Peter Huang, a political activist who attempted to assassinate Chiang Ching-kuo in New York in 1970 and would later be prohibited from returning Taiwan for more than 30 years. With the help of civil society organizations, Huang returned to Taiwan and brought his case to the TCC.[106] Eventually, the TCC changed its previous position in J.Y. Interpretation No. 265, invalidated part of the new National Security Act, and demanded legislative revisions. These examples demonstrate how civil society

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[103] *Id.*

[104] Chang, *supra* note 9. After martial law was lifted, Taiwan witnessed a proliferation of civil society organizations because the restrictions on their establishment and activities were relaxed. As of 2001, there were nearly 15,000 membership-based civil associations. More than 60% of them were established in the 1980s and 1990s. Moreover, the categories of these civil society organizations were very diversified, meaning that they could concentrate their expertise and resources on specific fields. Hsin-huang Michael Hsiao, *NGOs and Democratization in Taiwan: Their Interactive Roles in Building A Viable Civil Society*, in CIVIL SOCIETY IN ASIA 183-186 (David C. Schak and Wayne Hudson eds., 2003).

[105] Constitutional Court of Taiwan, Additional Documents to J.Y. Interpretation No.708.

[106] *Supra* note 101.

organizations use the judiciary to advocate for their goals, creating a certain degree of pressure upon the TCC to exercise oversight of national security policies.

9. Concluding Remarks

This chapter has examined how the TCC addresses legal disputes related to national security. Given Taiwan's ambiguous national status, asserting sovereignty could provoke complex cross-strait military tensions. This uncertain environment, coupled with the close social and economic ties between China and Taiwan, has led to divergent public opinions on national security affairs. Consequently, the Court has adopted procedural protections in national security issues as a common ground for the majority.

By implementing oversight of national security affairs with a procedural approach, the TCC has stimulated legal reforms in various statutes, including the Military Justice Act, the Act on Protection and Surveillance of Communications, the Cross-Strait Relations Act, and the Immigration Act. Furthermore, the Court has motivated executive agencies to seek legal authorization from the Legislative Yuan when handling military affairs that affect individuals' constitutional rights and freedoms. In essence, the TCC has established norms of national security governance aligned with principles governing other areas of law.

Recent debates have sparked demands for greater protection of national security, particularly concerning regulations on China's misinformation campaigns and the increased number of immigrants from Hong Kong. These discussions present potential challenges for the judiciary in determining their current approach to national security issues. Controversies emerge regarding how the government should balance constraints on citizens' freedom of speech amidst China's disinformation campaigns targeting Taiwan's democracy. President Tsai Ing-Wen

(2016—2024) announced in 2019 that the government would tackle the issue of disinformation, supported by the DPP majority in the Legislative Yuan between 2016 and 2024. Subsequently, new regulations were enacted to address both foreign and domestic disinformation. Notably, in 2019, the Legislative Yuan extended regulation to cyberspace under the National Security Act, a departure from its traditional focus on physical territory. Additionally, just before the presidential and legislative elections in 2020, the Legislative Yuan introduced the highly controversial Anti-Infiltration Act (AIA) to restrict citizens from engaging in certain forms of democratic participation on behalf of vaguely defined "exterritorial hostile powers."[107] This legislative move ignited intense political disputes over the ambiguity of terms and the extensive powers granted to law enforcement entities.[108]

Furthermore, political departments have grappled with the design and enforcement of immigration policies for Hong Kong immigrants, as the geographical and cultural proximity between Hong Kong and mainland China complicates the national security stakes in these issues.[109] Following China's passage of the National Security Law in 2020 and the uncertainties surrounding Hong Kong's future, many individuals in Hong Kong opted to relocate elsewhere,

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[107] Sean Quirk, *Lawfare in the Disinformation Age: Chinese Interference in Taiwan's 2020 Elections*, 62 HARV. INT'L L.J. 525, 530-531, 553-556 (2021).

[108] For discussion on other new legal instruments, *see* Chun-Yuan Lin, *Misinformation, Disinformation and the Courts' Response in Taiwan: An Analysis of the Social Order Maintenance Act Cases from 2007 to July 2020*, 31 ACADEMIA SINICA L.J., 255 257 (2022). Nai-Yi Sun, *Development in the Laws in 2019: Constitutional Law*, 49 NTU LAW JOURNAL 1471, 1507-1509 (2020).

[109] *See* Lily Kuo & Alicia Chen, *Taiwan offered hope after they fled Hong Kong. Now, they are leaving again.* WASHINGTON POST (May 31, 2022), *available at* https://www.washingtonpost.com/world/2022/05/31/taiwan-hong-kong-immigration-china/ (latest review: June 17, 2024). Johnson Lai & Huizhong Wu, *Hong Kongers Reflect on Taiwan, An Imperfect Exile*, AP NEWS (June 23, 2022), *available at* https://apnews.com/article/politics-china-hong-kong-immigration-ba64836c313584752c30036dff03cc41 (latest review: June 17, 2024). Lee Cheng-hsin, *Hong Kong Immigration Tides:* The legal and national security predicament of Hong Kongers in Taiwan; Is the second immigration tide coming? BBC CHINESE (January 20, 2023), *available at* https://www.bbc.com/zhongwen/trad/chinese-news-64316121 (latest review: June 17, 2024). Hong Kong: China Fury Amid Global Pressure over Security Law, BBC NEWS (May 29, 2020), *available at* https://www.bbc.com/news/world-asia-china-52852661 (latest review: June 17, 2024).

with Taiwan being a prominent destination. According to the National Immigration Agency under the Ministry of the Interior, Taiwan experienced a rapid surge in Hong Kong immigrants between 2019 and 2020.[110] However, many politicians and citizens have expressed concerns about whether granting more approvals for permanent residency and temporary stay to Hong Kong residents would heighten risks to Taiwan's national security.

In addition to these examples, other legal experiments and narratives are emerging and evolving, likely to become sources of constitutional debates in the near future. Until then, how the TCC handles national security disputes will serve as a litmus test for evaluating the analysis presented in this chapter and, more importantly, for assessing the state of democratic governance on the island during increasingly uncertain times.

[110] Ministry of the Interior National Immigration Agency, *Statistics*, *available at* https://rb.gy/vwca3f (latest review: June 17, 2024).

CHAPTER 5

NATIONAL SECURITY AND THE TRANSFORMING EUROPEAN GEOPOLITICS:

THE CONSTITUTIONAL COURT OF LITHUANIA'S INCORPORATED APPROACH

The history of these countries is marked by constant attempts
to catch up with the more advanced Western countries
on the road of civilization.

Egidijus Jarašiūnas[1]

1. Introduction

This chapter analyzes how the Constitutional Court of Lithuania (the LCC) adjudicates national security disputes. Established under the 1992 Constitution, the LCC has rigorously evaluated Lithuania's evolving international and domestic politics following its independence and democratization. Lithuanian policymakers have since then considered foreign and national security policies as a key focus of the government's political agenda.[2] Owing to the prolonged and delicate tensions between Lithuania and Russia, the Lithuanian government has strived to distance itself from the sphere of Russian influence. Also, Lithuania has endeavored to formulate and maintain meaningful connections with the Western community by joining the Council of Europe, the European Union (EU), and the North Atlantic Treaty Organization (NATO), among other regional and international organizations.[3] The participation of the European community has garnered widespread support from Lithuanian political elites and citizens. In response, the LCC adopts what I call the incorporated approach to national security disputes, incorporating international legal

[1] Egidijus Jarašiūnas, *The Control of Constitutionality of Legal Acts and the Establishment of the Constitutional Court in Lithuania*, in CONSTITUTIONAL JUSTICE IN LITHUANIA 10 (Constitutional Court of Lithuania eds., 2003).

[2] DAUNIS AUERS, COMPARATIVE POLITICS AND GOVERNMENT OF THE BALTIC STATES 195-200 (2015).

[3] *Id.*

principles into Lithuania's domestic legal system. In so doing, the LCC has aligned Lithuania's domestic jurisprudence on national security in greater alignment with international legal norms.

The chapter is organized as follows: Section 2 examines Lithuania's constitutional developments following its independence and democratization in the early 1990s, focusing on the participation of the EU and NATO. Section 3 delves into the functions of the LCC within Lithuania's rapidly evolving politics. Section 4 analyzes the LCC's involvement in national security law. Subsequently, section 5 studies the LCC's use of the incorporated approach to national security disputes, with section 6 focusing on its similarity with the LCC's electoral and educational jurisprudence. Section 7 studies three conditions that enable the LCC's non-exceptional approach to national security disputes: court knowledge, domestic schism, and judicial reputation. Section 9 concludes this chapter.

2. Democratic Reforms Under A Changing Geopolitical Norm

In 1990, Lithuania declared independence from the Soviet Union, ending its nearly 50 years of totalitarian governance.[4] Immediately after its statehood was restored, Lithuania experienced processes of rapid transformation at both the domestic and international levels. Domestically, the end of domestic totalitarianism epitomized the commencement of Lithuania's democratic governance. In 1989, the Communist Party of the Soviet Union collapsed, splitting into smaller parties with socialist platforms.[5] Thanks to the open political environment, new political parties started grappling with innovative legal frameworks that could fortify the collective commitments

[4] CAROLINE TAUBE, CONSTITUTIONALISM IN ESTONIA, LATVIA, AND LITHUANIA: A STUDY IN COMPARATIVE CONSTITUTIONAL LAW 28, 36 (2001).

[5] DIANA JANUŠAUSKIENĖ, POST-COMMUNIST DEMOCRATISATION IN LITHUANIA: ELITES, PARTIES, AND YOUTH POLITICAL ORGANISATIONS 1988-2001 30 (2011).

of the Lithuanian people.[6] Among all legal innovations, the most important one was the 1992 Constitution.

The 1992 Constitution demonstrated Lithuania citizens' commitments to constitutional governance, notably constitutional rights protections, the rule of law, and separation of powers. It was approved through a popular referendum by more than 70 percent of registered voters, in which more than 70 percent of the voters voted for the Constitution.[7] The 1992 Constitution thus proved Lithuania to be a new member of the bloc of constitutionalism, following the global trend of democratization and the proliferation of constitutional instruments.[8] As Egidijus Jarašiūnas proudly stressed, "the constitutional process in Lithuania [was] in full conformity with this trend of global constitutional development."[9]

The Lithuanian Constitution was a victory of constitutionalism, but its implications for democracy were far from it. The Lithuanian Constitution also demonstrated the struggles of political elites to negotiate and compromise, a task that all newly democratized countries strove to learn and practice. Constitutional drafters' discussion about Lithuania's governmental system highlighted their struggles. During the constitution-making process, the drafters failed to agree upon the installation of parliamentarism.[10] While many reform-minded politicians favored parliamentarism with a weak or even powerless president, adhering to the European practices,

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[6] *Id,* at 33-34.

[7] RICHARD ROSE & NEIL MUNRO, PARTIES AND ELECTIONS IN NEW EUROPEAN DEMOCRACIES 174 (2009).

[8] Jarašiūnas, supra note 1, at 6-7.

[9] Jarašiūnas, supra note 1, at 7.

[10] Algis Krupavičius, *Semi-Presidentialism in Lithuania: origins, development, and challenges*, in Robert Elgie & Sophia Moestrup, SEMI-PRESIDENTIALISM IN CENTRAL AND EASTERN EUROPE, 65-73 (2008). *See also* Dainius Urbanavicius, *Lithuania,* in SEMI-PRESIDENTIALISM IN EUROPE 150-169 (Robert Elgie eds., 2009).

right-wing political parties embraced strong presidentialism. Eventually, constitutional drafters agreed to install semi-presidentialism as a compromise: the president would be elected for a five-year term through free and fair elections. The president could, upon the approval of the Seimas (the Lithuanian parliament), appoint the prime minister and charge him or her to form the government. In doing so, constitution drafters opted for a genuine head of state who could represent the public consensus bound by meaningful constitutional constraints.[11] On February 14, 1993, Algirdas Mykolas Brozauskas, the candidate of the Lithuanian Democratic Labor Party, became the first democratically elected president of Lithuania.

Internationally, Lithuania was recognized by the international community as an independent state in 1991.[12] The end of the Soviet occupation revitalized Lithuania's self-determination, as citizens could now collectively decide on their alliances and partners.[13] Following the fundamental change in Lithuania's international status, official talks about its membership of the Council of Europe, the EU, and NATO began.[14] For Lithuanians, membership in multinational organizations indexed the goal of being "back to Europe," which broadly included a series of positives, notably shared human rights values, economic development, and security.

First, many Lithuanian political parties supported protecting human and constitutional rights based on European standards.[15] After having satisfied the human rights conditions of

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[11] Krupavičius, *id*, at 68-69.

[12] *Id*, at 37.

[13] Janusz Stefanowicz, *The New East-Central Europe and European Security*, in TRANSFORMATIONS OF POST-COMMUNIST STATES 60 (Wojciech Kostecki, Katarizyna Żukrowska & Bogdan J. Góralczyk eds., 2000).

[14] TAUBE, *supra* note 4, at 55.

[15] Vygantė Milašiūtė, *Lithuania: Subtle Material Impact* in 60 YEARS OF THE UNIVERSAL DECLARATION OF HUMAN RIGHTS IN EUROPE 367 (Vinodh Jaichand and Markku Suksi eds., 2009).

European integration, the government successfully joined the Council of Europe in 1993. Since then, European human rights principles and practices have become essential binding sources that all Lithuanian courts, legislative organs, and governmental agencies must consider when adopting, interpreting, and enforcing Lithuania's domestic laws and policies.[16]

Second, participation in international organizations has also indexed economic prosperity. Since 1940, Lithuania had suffered from stagnant economic development for nearly half a century; by the late 1980s, it became the least industrialized country of the three Baltic states.[17] At the end of the communist governance, Lithuania's bleak economic outlook highlighted the appeal of the EU market system, offering the promise, if not the assurance, of a more-welfare-oriented approach to economic development and prosperity. Therefore, most of Lithuania's political elites, even including the Communist Party of Lithuania, supported economic and political reforms.[18] Public support for a free-market system has remained consistently high in Lithuania. In 1991, 87% of respondents expressed that the free market was suitable for the country. To provide a comparative perspective: in the same survey, only 43% of Ukrainian respondents, 58% of Russian respondents, and 38% of Belarusian respondents concurred with this statement.[19]

Soon after gaining independence, the Lithuanian government embarked on radical reforms of the economic structure with the backing of public demand. In the 1990s, the Lithuanian government gradually prepared for a new economic system without haste by adopting a wide array

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[16] Milašiūtė, *id*, at 365.

[17] VERENA FRITZ, STATE-BUILDING: A COMPARATIVE STUDY OF UKRAINE, LITHUANIA, BELARUS, AND RUSSIA 250 (2007). Eugenijus Maldeikis & Gediminas Rainys, *Estonia, Latvia, Lithuania: the way to Europe*, in KOSTECKI, ŻUKROWSKA & GÓRALCZYK, *supra* note 13, at 142.

[18] JANUŠAUSKIENĖ, *supra* note 5, at 25.

[19] FRITZ, *supra* note 17, at 257, 350. The interview for Ukraine was conducted in 1992, and Belarus in 1996.

of legislative measures.[20] These legislative measures included, among others, the incorporation of individual property rights into the 1992 Constitution, the liberation of market prices, the establishment of a central bank responsible for currency policies, and the privatization of state-owned assets.[21] Naturally, not all these changes progressed at the same speed; some properties underwent privatization more smoothly and comprehensively than others.[22] However, the Lithuanian government's efforts to enact and enforce these fundamental reforms underscored Lithuania's pro-EU stance and its commitment to a novel economic framework.[23] Throughout the accession process, there existed a strong consensus among political elites and citizens regarding EU integration.[24] For instance, during EU accession negotiations, 71% of the Lithuanian population endorsed EU membership, with particularly strong support among individuals under under thirty years old, where approval stood at 75.7%.[25]

The EU's response to Lithuania's membership was predominantly positive.[26] Renowned for its imperatives in facilitating human rights governance and promoting economic integration across Europe, the EU has also acknowledged the potential threat posed by an unstable Baltic region to the economic stability and security of other European countries. European countries have been highly interconnected in terms of economic activities, population movement, shared values, cultural norms, and military defense. Although historical trajectories might have led some

[20] Rolf Winkelmann, *Lithuania*, in FROM EASTERN BLOC TO EUROPEAN UNION: COMPARATIVE PROCESSES OF TRANSFORMATION SINCE 1990 73 (Günther Heydemann & Karel Vodička eds., 2017).

[21] *Id.*

[22] *Id*, at 73-74.

[23] FRITZ, *supra* note 17, at 257, 258-259.

[24] Maldeikis & Rainys, *supra* note 17, at 137.

[25] Winkelmann, *supra* note 20, at 82.

[26] *Id*, at 72.

European countries to be more interdependent with those in the adjacent region than others, the survival and prosperity of all member states are inextricably linked. In James Gow's words, "[t]he well-being of a collective body of which a state is a member is an interest of each member state."[27]

This intricate network, characterized by a sense of regional collectivity, has fostered a unique understanding of collective security in Europe: security is perceived through the lens of interdependence, suggesting that it transcended the interests of any single state.[28] Consequently, the EU had strong incentives to enlarge its collaboration bloc, driven by concerns for regional security. To achieve this goal, the EU implemented numerous policies, initiatives, and measures aimed at preventing the occurrence and escalation of regional conflicts.[29] Following the resolution of various challenges encountered on the path to EU membership, Lithuania formally became a member of the EU on May 1, 2004. Eleven years later, in 2015, Lithuania joined the eurozone after meeting the necessary criteria in 2014.[30]

The Lithuanian public also regarded NATO as a crucial instrument for enhancing security, primarily focused on military affairs.[31] Situated in the Baltic region, characterized by its "high military-political risk," [32] Lithuania has cautiously navigated the intersection of diverse geopolitical and ideological forces, striving to maintain a secure position for centuries. For

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[27] James Gow, *Security and Democracy*, in BACK TO EUROPE: CENTRAL AND EASTERN EUROPE AND THE EUROPEAN UNION 24 (Karen Henderson eds., 1999).

[28] Håkan Wiberg, *East-Central Europe—where and how?* in KOSTECKI, ŻUKROWSKA & GÓRALCZYK, *supra* note 13, at 33-35.

[29] Paul Eavis & Stuart Kefford, *Conflict Prevention and the European Union: A Potential Yet to Be Fully Realized*, in, SEARCHING FOR PEACE IN EUROPE AND EURASIA 3-4 (Paul van Tongeren, Hans van de Veen & Juliette Verhoeven eds., 2002).

[30] Winkelmann, *supra* note 20, at 80.

[31] Maldeikis & Rainys, *supra* note 17, at 139.

[32] Maldeikis & Rainys, *supra* note 17, at 137.

Lithuanian citizens and those in other Baltic states, the achievement of freedoms and constitutional rights would remain incomplete if the nation's physical security were compromised by external hazards.[33] Recognizing the potential risks facing the Baltic States, NATO officials welcomed Lithuania's accession to the alliance. Established in 1949, NATO served as a military bulwark against Soviet influence during the Cold War. Following the collapse of the Soviet Union, NATO expanded its network of alliances to prevent destabilization in the now-democratized countries. While negotiations centered on the practicalities of the accession process, they did not impede the determination of Lithuania and NATO to finalize the accession.[34] Ultimately, Lithuania joined NATO in 2004, the same year it became a member of the EU.

3. The Constitutional Court of Lithuania: An Overview

With the promulgation of the Constitution and the commencement of public discussions on international cooperation, the Constitutional Court of Lithuania was established.[35] This development was part of the post-transition reforms and came into being in 1993 under the Law on the Constitutional Court, in accordance with the 1992 Constitution.[36] Endowed with the authority to scrutinize the constitutionality of statutes and regulations, as well as to arbitrate intergovernmental disputes, the newly formed LCC adopts a German-style model, ensuring its separation from other branches of government. This design is intended to safeguard judicial independence, a fundamental constitutional principle crucial for the nascent democracy to enforce

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[33] Lucas Kello, *The Advantages of Latitude: Estonia's Post-Communist Success Story* in DEMOCRATIZATION AND SECURITY IN CENTRAL AND EASTERN EUROPE AND THE POST-SOVIET STATES 24-25 (David Bosold, Petr Drulák & Nik Hynek eds., 2012).

[34] *Id.*

[35] Aušra Rauličkyté, *Lithuania's Courts and the Rule of Law*, in 32(2) JOURNAL OF BALTIC STUDIES 182, 182-183 (2001).

[36] TAUBE, *supra* note 4, at 179.

the separation of powers, uphold the rule of law, and safeguard constitutional rights and freedoms.[37]

To preserve judicial independence, the framers of the constitution instituted several key mechanisms, including term limits for justices and nomination rules. The Constitutional Court comprises nine justices, each serving a nine-year term. The constitution expressly prohibits executive branch interference in the selection and administration of justices.[38] Every three years, one-third of the Justices are replaced by new appointees, nominated by the President, Chairperson of the Seimas, and Chairperson of the Supreme Court, subject to approval by the Seimas.[39] Furthermore, justices enjoy complete immunity from criminal prosecution; disciplinary measures are applied only to salary reductions in cases of failure to fulfill constitutional duties without just cause.[40] Because no single political department can dictate the selection process, the Constitutional Court is theoretically immune from political interference.

For the Constitutional Court to review a case, petitioners must file a case and await the Court's determination of whether it warrants a review. Three types of petitioners are eligible to file a claim: the government, a group comprising one-fifth of Seimas members (28 out of 141 members), or lower courts. Notably, only courts or Seimas members can bring a case against

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[37] Nida Gelazis, *Defending Order and Freedom: The Lithuanian Constitutional Court in First Decade,* in CONSTITUTIONAL JUSTICE, EAST AND WEST: DEMOCRATIC LEGITIMACY AND CONSTITUTIONAL COURT IN POST-COMMUNIST EUROPE IN A COMPARATIVE PERSPECTIVE 397 (Wojciech Sadurski eds., 2002). On the relationship among democratization, constitutional courts, and the European human rights law, *see* WOJCIECH SADURSKI, RIGHTS BEFORE COURTS: A STUDY OF CONSTITUTIONAL COURTS IN POSTCOMMUNIST STATES OF CENTRAL AND EASTERN EUROPE (2014, 2nd ed.); DEMOCRATIZATION AND THE EUROPEAN UNION: COMPARING CENTRAL AND EASTERN EUROPEAN POST-COMMUNIST COUNTRIES (Wojciech Sadurski & Leonardo Morlino eds., 2010).

[38] Lietuvos Respublikos Konstitucija (Constitution of the Republic of Lithuania), art. 104 (1992) (Lith.).

[39] Gelazis, *supra* note 37, at 398.

[40] *Id*, at 399.

presidential actions.[41] In other words, unless democratic representatives in the Seimas or lower courts are willing to advocate for individuals whose constitutional rights may be infringed by presidential actions, these individuals lack avenues to petition the Court.[42] In response to petitioners, the Court decides whether to dismiss a petition on procedural grounds.[43]

Owing to the LCC's unique design, a significant number of constitutional disputes are initiated by opposition forces in the Seimas, rather than individuals. Lithuania's multiparty system, evolving in the post-communist era, has fostered a dynamic environment in the Seimas, where political parties must continually negotiate, collaborate, and compromise.[44] Furthermore, Lithuania's semi-presidential system vests substantial legislative power in the Seimas, empowering it to enact laws, ratify governmental appointments, and scrutinize state budgets.[45] Consequently, the Seimas assumes a pivotal role in shaping Lithuania's major policies.

When elected representatives find proposed bills or governmental decisions unsatisfactory or encounter challenges in delineating their authority, they often resort to the LCC for adjudication.[46] Additionally, when various factions within the political landscape struggle to reach consensus on contentious policies, they either directly petition the LCC or do so through democratic representatives. This practice shifts the focus of justification onto the LCC, thereby

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[41] *Id*, at 402.

[42] *Id*, at 397, 402.

[43] For example, the Court declined to accept a petition challenging the *Law on the Protection of Objects of Importance for Ensuring National Security*, as the petitioner did not demonstrate a potential violation of individuals' constitutional rights. Constitutional Court of Lithuania, Ruling on Sep. 22, 2022 [On Irremovable Reasons Threatening National Security Interests].

[44] Krupavičius, *supra* note 10, at 65-75.

[45] Krupavičius, *supra* note 10, at 76-77.

[46] Andrius Kubilius, *Constitutional Arguments in Political Decision-Making: Lithuania*, in THE CONSTITUTION AS AN INSTRUMENT OF CHANGE 70 (Eivind Smith eds., 2003).

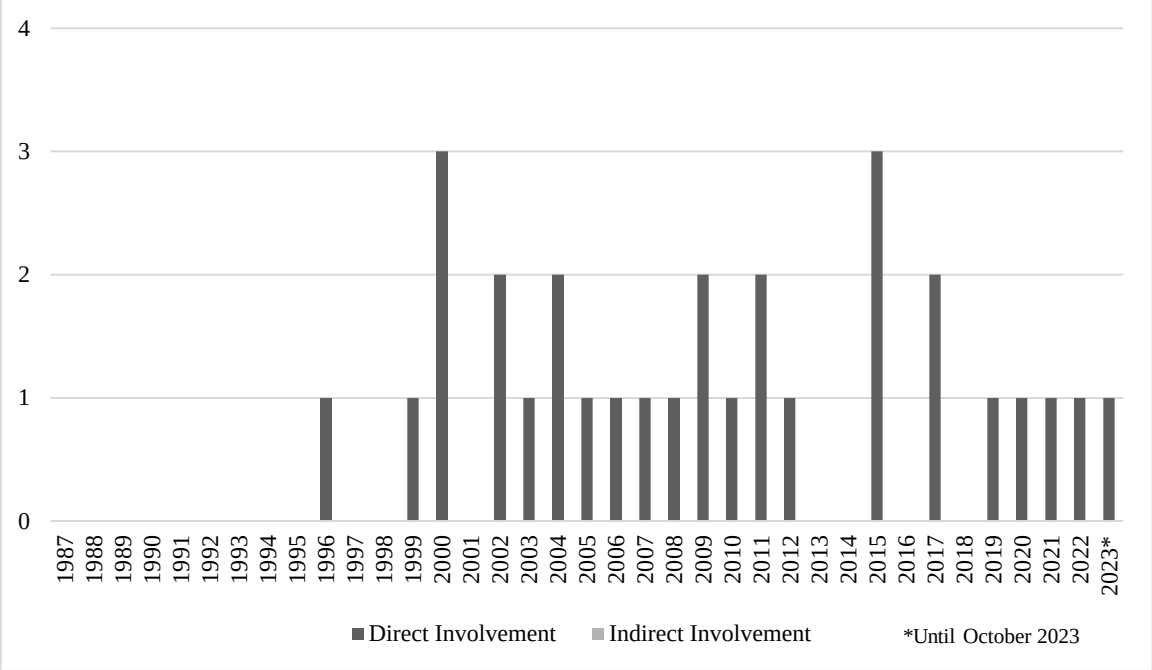
positioning it as a crucial institution responsible for mediating conflicts arising from divergent public values.[47]

4. The LCC's Involvement in National Security Matters

The LCC has frequently engaged in matters of significant political conflicts, with issues related to national security being no exception. Since Lithuania regained independence and underwent democratization, the LCC has rendered at least 30 decisions concerning national security policies from 1990 through October 2023. The Court's involvement in national security affairs has remained relatively consistent. Unlike the scenario in the Korean case, there is no discernible increase or decrease in the LCC's involvement in national security disputes over time (see Figure 4). Table 9 illustrates the Court's engagement in various categories of national security law. Specifically, military disputes accounted for 36.67% of the total number of disputes, while democratic-government disputes constituted 33.33% of the total.

[47] Gelazis, *supra* note 37, at 403.

Figure 4: The LCC's Involvement in National Security Law (1987-2023)



Source: Author

Table 9: Eight Categories of the LCC's National Security Case Law

	Inward-Looking		Outward-Looking		All	
	Number	Oversight	Number	Oversight	Number	Oversight
Military	9	4	2	2	11	6
Economy	6	3	1	0	7	3
Citizenry	0	0	2	2	2	2
Democratic Government	10	6	0	0	10	6
Total	25	13	5	4	30	17

Source: Author

The LCC rigorously exercises its authority in disputes situated at the nexus of national security and democratic governance. Lithuania's unique geopolitical position in Europe presents a significant challenge for the government in formulating national security policies. This position essentially shapes public expectations regarding the conduct of elected officials and underscores the necessity for effective checks and balances on their exercise of power. The dynamic interaction among security, democracy, and constitutional oversight is evident in the Court's judicial rulings pertaining to the constitutional obligations of elected representatives, whose corrupt actions jeopardize the state's security. Through many decisions, the LCC engages in establishing and shaping constitutional norms governing democratic oversight of political conduct with national security implications, thereby emerging as a prominent institution in Lithuania's post-communist landscape.

Consider Case No. 14/04 (2004), one of the Court's landmark decisions, for instance.[48] This case centered on the impeachment of President Rolandas Paksas during his term from 2003 to 2004.[49] Paksas assumed office in February 2003, following his term as the mayor of Vilnius from 1997 to 1999 and his role as Prime Minister under President Valdas Adamkus from 2000 to 2001. As an active politician, many of Paksas' political decisions garnered widespread public attention. However, few were as politically and legally contentious as those alleged by the Seimas for grossly violating the Constitution, which formed the constitutional basis for the Seimas to impeach the president.

[48] Constitutional Court of Lithuania, Case No.14/04 [On the Impeachment of the President of the Republic] (Mar. 31, 2004).

[49] Krupavičius, *supra* note 10, at 75-76.

Of particular interest are several instances of corrupt behavior by Paksas within the context of national security. During Paksas' term, security agencies grappled with countermeasures against international organized crime, a new challenge to Lithuania's criminal justice system and security apparatus, anticipated to increase following Lithuania's accession to the EU.[50] Seeking to enhance their security capabilities, security agencies found it deeply concerning that President Paksas maintained unusual ties with Jurij Borisov, a Russian entrepreneur who actively contributed to and supported Rolandas Paksas' political endeavors. Specifically, Paksas was suspected of collecting and disclosing classified information to Borisov in exchange for financial backing, raising serious concerns about Lithuania's security and the integrity of its institutions.[51] Additionally, Paksas issued a presidential decree, Presidential Decree No. 40, granting Jurij Borisov Lithuanian citizenship, despite Borisov lacking any notable qualifications warranting such citizenship under the Law on Citizenship.[52]

In December 2003, in response to the profound concerns expressed by security departments regarding President Paksas' loyalty and the potential threat his behavior posed to Lithuania's national security, the Seimas established a provisional commission to investigate Paksas and his close advisers for corrupt behavior.[53] This commission was established under the Law on Seimas Provisional Investigation Commissions, which granted the Seimas investigative powers to request relevant documents and files, summon government officials, and question them regarding Paksas'

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[50] Krupavičius, *supra* note 10, at 75.

[51] Krupavičius, *supra* note 10, at 75-76.

[52] ECtHR, Case No. 34932/04, Case of Paksas v. Lithuania (2011), *available at* https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-102617%22]} (latest review: June 17, 2024).

[53] In Case No. 43/03-46/03 (2004), the Court determined the creation and operation of the provisional commission was constitutional. Constitutional Court of Lithuania, Case No. 43/03-46/03 [On the Powers of Seimas Provisional Investigation Commissions] (May 13, 2004).

alleged corruption.[54] Upon the completion of the investigation, the Seimas submitted a motion of impeachment to the LCC, contending that the president should be removed from office due to gross violations of the Constitution. Concurrently, the Seimas challenged the constitutionality of Presidential Decree No. 40 in a separate case.[55]

Several months later, in Case No. 14/04, the Court emphatically declared that Rolandas Paksas had grossly violated the Constitution by breaking his oath and violating the Law on State Secrets and Official Secrets, among other statutes.[56] This decision provided strong grounds for the Seimas to remove Paksas from office on April 6, 2004, making him the first leader in Europe whose term was terminated by impeachment.[57] Prior to the LCC's ruling in Case No. 14/04, it had revoked Presidential Decree No. 40 in Case No. 40/03 (2003), holding that the grant of citizenship not only violated the Law on Citizenship but also contravened the Constitution, as it served no state interests, only Paksas' personal interests.[58]

The LCC announced a similar decision in Case No. 12/2017 (2017) concerning the impeachment of Mindaugas Bastys, a member of the Lithuanian Social Democratic Party in the Seimas.[59] In this ruling, the LCC confirmed that Bastys had endangered Lithuania's security and grossly violated the Constitution by concealing his close relationship with former KGB members

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[54] *Id.*

[55] Constitutional Court of Lithuania, Case No. 40/03 [On A Decree of the President of the Republic] (Dec. 30, 2003).

[56] *Supra* note 48.

[57] Krupavičius, *supra* note 10, at 75.

[58] *Supra* note 55.

[59] Constitutional Court of Lithuania, Case No. 12/2017 [On the actions of Seimas member Mindaugas Bastys] (Dec. 22, 2017).

and seeking access to classified information.[60] Subsequently, despite attempts by the Seimas to impeach Bastys, their efforts failed, and he later resigned from office in 2018.

Additionally, the LCC has issued decisions related to the investigative powers of the Seimas in matters of national security. In Case No. 17/2018 (2020), the Court revoked two resolutions of the Seimas regarding the establishment and operation of a temporary investigation commission under the Committee of the Seimas on National Security and Defense. This commission was established under the same law that authorized the investigation into Paksas and aimed to probe potential undue influence on Lithuanian politicians, state officials, and political processes.[61] The LCC determined that the resolutions failed to appropriately limit the investigatory powers of the commission. By granting unlimited authority to investigate the activities of any interested parties, the resolutions violated the principles of separation of powers and the rule of law.[62]

The LCC has also stood at the intersection of the economy and national security. As a relatively small country, many of Lithuania's energy activities, including production, distribution, management, and service of various energies, are highly dependent on the policies and politics of neighboring countries. Any external hostility toward Lithuania's economic arrangements can significantly impact fundamental infrastructure, public welfare, or even the very idea of its existence. Consequently, strengthening Lithuania's economic or energy independence from foreign hazards has been particularly essential for the government to maintain national security.

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[60] *Id.*

[61] Constitutional Court of Lithuania, Case No.17/2018 [On the Limits of An Investigation Entrusted to An Ad Hoc Investigation Commission of the Seimas] (Jun. 12, 2020).

[62] *Id.*

Numerous disputes have arisen among politicians, governmental institutions, and interested parties regarding the design and implementation of Lithuania's post-transition economic policies, focusing on their potential implications for national security.

The interplay between national security and the economy is vividly evident in questions about the privatization of state-owned energy companies. Although privatization is not necessarily an issue of national defense per se, the privatization of state-owned companies often results in foreign ownership of significant shares of these Lithuanian companies. Thus, determining the qualifications and procedures of privatization inevitably concern which foreign companies could become owners—an issue concerning the identification of reciprocal or hostile external elements.[63]

Recognizing that economic security is vital to Lithuania's state security,[64] the Court has considered a series of decisions regarding the reorganization of state-owned companies such as Mažeikių Nafta, Būtingės Nafta, and Naftotiekis, involved in oil refinery, production, and distribution.[65] In 1998, the government passed the Law on the Reorganization of the Joint-stock

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[63] Constitutional Court of Lithuania, Case No.05/07 [On the Allocation of Lots of Land not Subject to Privatization to the Lithuanian Veterinary Academy and the Weaponry Fund] (May 20, 2008). The Court determined that the Lithuanian government constitutionally allocated specific parcels of land to the Lithuanian Veterinary Academy and the Weaponry Fund for national security purposes.

[64] Agnė Juškevičiūtė-Vilienė, *Some Aspects of Economic Regulation in Lithuanian Constitutional Law: From Planned Economy to the Fourth Industrial Revolution*, in LEGAL DEVELOPMENTS DURING 30 YEARS OF LITHUANIAN INDEPENDENCE: OVERVIEW OF LEGAL ACCOMPLISHMENTS AND CHALLENGES IN LITHUANIA 68 (Gintaras Švedas & Donatas Murauskas eds., 2021). Other energy laws also stress that a secure energy system is indispensable to Lithuania's national security. For instance, the Act on the Construction of Liquefied Natural Gas Terminal (No. XI-2053, firstly introduced in 2012), the Procedures For the Provision of Public Interest Services in the Electrical Energy Sector (No. VIII-978, firstly introduced in 1998), as well as the Atomic Electricity Law (No. X-1231, firstly adopted in 2007) all recognized natural security as a significant public interest necessary for the operation and maintenance of national security.

[65] Constitutional Court of Lithuania, Case No.29/98-16/99-3/2000 [On the Reorganization of the Joint-Stock Companies "Būtingės Nafta", "Mažeikių Nafta," and "Naftotiekis"] (Oct.18, 2000); Case No. 39/01-21/02 [On the Law on the Reorganization of "Mažeikių Nafta" and Its Subsidiaries] (Mar. 17, 2003); Case No. 20/02 [On the Law on the Reorganization of the Joint-Stock Company "Mažeikių Nafta"] (Dec. 12, 2005).

Companies "Būtingės Nafta," "Mažeikių Nafta," and "Naftotiekis" (Act on the Reorganization of Mažeikių Nafta), governing the terms and requirements of foreign ownership. However, the passage of the Act on the Reorganization of Mažeikių Nafta failed to follow the procedures stipulated by the Law on the Basics of National Security (National Security Law), firstly introduced in 1996, which prescribed the procedures for the Seimas to deliberate on and resolve national security policies. In Case No. 29/98-16/99-3/2000 (2000), the Court declared that the National Security Law was inapplicable to the reorganization of these three companies. Thus, the legislative procedures were constitutional.[66]

5. The LCC's Incorporated Approach

Since its inception, the LCC has exercised oversight of national security policies by integrating internationally recognized principles into domestic legal practices. It can be argued that when adjudicating constitutional matters, the LCC must consult international human rights treaties, considering Lithuania's membership in the UN (since 1991) and the ECHR (since 1993), thus confirming the LCC's obligation to adhere to international legal principles. However, this obligation does not necessarily determine the specific application of international legal principles in domestic courts. Particularly in the realm of national security, the EU has acknowledged the central roles of member states in ensuring territorial integrity and safeguarding national security.[67] In other words, the LCC is empowered to invoke internationally recognized principles of national

[66] *Id*. The government sold more than 25 percent of the shares of Mažeikių Nafta to the Williams International Company, a US company, in 1999. In 2000, the government further approved the Williams International Company's cooperation plan with Yukos Oil Corporation, a Russian company. *See* Case No. 20/02, *id*.

[67] Article 4(2) of the Treaty on the European Union states that "The Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government. It shall respect their essential State functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security. In particular, national security remains the sole responsibility of each Member State."

security if it prioritizes national security over human rights protections. For example, should the Court invoke national security justifications to compromise human rights protections? If not, what types of human rights justifications should be invoked to support the Court's decisions. To put it in another way, the LCC retains autonomy in determining the categories, weights, and justifications of international legal principles it utilizes to support its decisions? The LCC's power to make these judgements is not entirely compromised in light of its human rights obligations under the European Union system.

Case No.3/96 (1996) illustrates how the Court rejected to consider national security as an exceptionally salient public interest that outweighed constitutional rights principles.[68] The case addressed several paragraphs of Article 5 of the Law on State Secrets and their Protection (1995) (the old State Secrets Law), which empowered the government to determine state secrets based on its own procedures. Under the old State Secrets Law, the Lithuanian government issued two resolutions to classify a list of state secrets. In the present dispute, a district court was tasked with determining whether several pieces of confidential information could be disclosed and used as evidence in a civil procedure. Believing that the old State Secrets Law violated the Constitution, the court referred the case to the LCC.

In response, the LCC considered these paragraphs of Article 5 unconstitutional.[69] The Court acknowledged the state's imperative to safeguard vital military, economic, political, or other information from disclosure to ensure the state's territorial integrity and national security. However, the "protection of common interests in a democratic state" cannot fundamentally deny

[68] Constitutional Court of Lithuania, Case No.3/96 [On State Secrets of the Republic of Lithuania and Their Protection] (Dec. 19, 1996).

[69] *Id*.

an individual's right to information—a globally recognized right under the ECHR.[70] Including the right to information, the safeguarding of rights and freedoms cannot be infringed upon by an unjustified exercise of public power—and national security power is no exception.

Understanding that an individual's rights protections cannot be deprived for national security purposes, the LCC held that the government should classify and administer state secrets within a clearly defined scope of power authorized by the law.[71] However, the old State Secrets Law did not provide any explicit and concrete criteria for the government to determine state secrets, leaving it in a position that faced virtually no checks and balances from other branches of government.[72] Notably, the Court did not accept the defendant's argument that state secrets were practically defined as pieces of "political economic, military, law enforcement, scientific, technological or other information" whose disclosure or loss could violate the "sovereignty of Lithuania, military or economic power, cause damage to the constitutional system and public interests," in large part because this definition was not stipulated under Article 5.[73]

Owing to its vagueness, Article 5 of the old State Secrets Law was considered unconstitutional because it not only violated an individual's right to information, but also contravened the separation of powers, given that the government's practices faced no checks and balances from the Seimas. After Case No. 3/96 was made, the Seimas revised the entire old State Secrets Law and implemented the Law on State Secrets and Official Secrets (the new State Secrets

[70] *Id.*

[71] *Id.*

[72] *Id.*

[73] *Id.*

Law) in 1999. Article 2 adopted and slightly revised the definition of state secrets that the government argued to employ in Case No. 3/96.[74]

In Case No. 34/2000-28/01 (2002), the LCC invalidated several provisions under the Law on Telecommunications and the Law on Operational Activities.[75] Article 27 of the Law on Telecommunications required that telecommunications operators trace "all telecommunications events and their participants" to "control the content of the information transmitted via telecommunication networks" and "supply information gratis in the scope established by the Government" for criminal and security investigation.[76] The petitioners of the case claimed that this Article enabled operators to collect enormous data about the private lives of their subscribers, taking into account that telecommunications stations and mobile phones operated by the operators "continually and regularly"[77] sent each other details about their telecommunications events and their participants under specific frequencies. Similarly, Article 7 of the Law on Operative Activities allowed governmental entities of operational activities to "make use of information"[78] held by enterprises, establishments, and organizations under the procedures stipulated by the government. The petitioners argued that the information stipulated in this Article encompassed a

[74] Article 2.2 of the Law on State Secrets and Official Secrets State Secret (No. VIII-1443, amended as of Aug. 29, 2000 No. VIII-1907) read that "State secret means political, economic, military, law enforcement, scientific and technical information, loss or illegal disclosure whereof could violate the sovereignty of the Republic of Lithuania, defence or economic power, pose harm to the constitutional system and political interests of the Republic of Lithuania, pose danger to the life, health and constitutional rights of individuals. This Law shall determine the list of categories of State secrets."

[75] Constitutional Court of Lithuania, Case No.34/2000-28/01 [On the Law on Telecommunications, the Law on Operational Activities, and the Code of Criminal Procedures] (Sep. 19, 2002).

[76] *Id.*

[77] *Id.*

[78] *Id.*

wide range of data, including those pertaining to "the private life of a person."[79] The collection and use of such information was impermissible under Article 22 of the Constitution.

The Court recognized the petitioners' argument, invoking Article 8 of the ECHR to emphasize two requirements that all domestic legislative schemes must follow, including those serving national security interests: legal reservation and the principle of proportionality. First, Article 8 of the ECHR stipulates that interference with an individual's private life must adhere to the law; second, it must be necessary in the interests of national security, public safety, economic well-being, or crime prevention. The requirements applied to all legislative schemes regardless of whether they served national security interests or not.[80]

Based on the principle that all domestic laws must adhere to the ECHR, the LCC declared that Article 27 unconstitutionally required that operators collect and supply data to the government in an amount "more than necessary" to ensure the operators can sustain their businesses without prior consent from the court.[81] Moreover, Article 7 of the Law on Operative Activities granted the government excessive power to collect private information under procedures stipulated by the government, not the law, violating an individual's right to privacy and the rule of law.[82]

In Case No.10/2016 (2017), the Court invalidated part of Article 3 of the Law on National Conscription. [83] Article 3, item 7 exempted priests of state-endorsed traditional religious

[79] *Id.*

[80] *Id.*

[81] *Id.*

[82] *Id.*

[83] Constitutional Court of Lithuania, Case No.10/2016 [On Exempting Priests from Mandatory Military Service] (Jul. 4, 2017).

communities and associations from mandatory military service as stipulated by Article 139 of the Lithuanian Constitution.[84] A priest from a "non-traditional" religious community brought a case to the Vilnius Regional Administrative Court, which later petitioned it to the LCC.

The LCC examined the dispute through the lens of conscientious objectors under international and European Union laws. Article 9 of the ECHR protects the freedom of thought, conscience, and region. Based on the LCC's interpretation of the jurisprudence of the European Court of Human Rights (ECtHR), while Article 9 does not expressly guarantee an individual's right to refuse military service on religious or moral grounds, the prosecution of conscientious objectors seriously encroaches upon their freedom of thought, conscience, and religion.[85] Moreover, the Court recognized that Article 18 of the International Covenant on Civil and Political Rights (ICCPR) has protected conscientious objectors, and this stance has been acknowledged by the United Nations Commission on Human Rights.[86]

The LCC affirmed the right to conscientious objection as an integral component of constitutional norms and principles guiding the organization and operation of military service. The Seimas was entrusted with the authority to devise and implement an effective military service system, encompassing military or alternative national defense services, to reconcile an individual's freedom of thought, conscience, and religion with national security imperatives. However, the national defense system, safeguarding "constitutional values of the utmost importance," such as independence, territorial integrity, and constitutional order, does not exempt the state from its

[84] Article 139 requires that all citizens must perform military or alternative national defense service, and they should perform obligatory military service for a limited time if they meet the requirements prescribed by law. Lietuvos Respublikos Konstitucija (Constitution of the Republic of Lithuania), art.139 (1992) (Lith.).

[85] *Supra* note 83.

[86] *Id.*

constitutional obligations.[87] When regulating the military service system, the Seimas must adhere to constitutional requirements, including the prohibition of discrimination, the principles of proportionality, reasonableness, and justice.[88]

The Seimas violated its constitutional obligations to prevent discrimination and enact reasonable legislation on several grounds. First, the Seimas breached the principle of non-discrimination by establishing differential obligations to serve in the military forces based on whether a religious organization was deemed "traditional" or not. The Court deemed this distinction irrelevant to the objective circumstances that may affect a citizen's ability to fulfill their duty. Second, the Seimas could have required members of traditional religious organizations to serve in alternative military services, rendering such an exemption unreasonable. It could have also postponed an individual's duty to perform military or alternative national defense services if necessary.[89] Consequently, Item 7 of Article 3 of the Law on National Conscription was deemed unconstitutional.

Beyond the domain of rights protection, the LCC has frequently been called upon to mediate conflicts between the Seimas and the executive branch concerning the constitutional delineation of their respective authorities in handling national security affairs. These conflicts raise questions about the expected roles of the elected branches of government and the complex foreign relations between Lithuania and Russia, underscoring the nuanced position of the LCC in

[87] *Id.*

[88] *Id.*

[89] *Id.*

adjudicating profoundly sensitive matters. In several decisions, the LCC exercised oversight over the exercise of national security powers by the elected branches of government.

In Case No.23/08 (2011), the Court addressed Article 14, paragraph 5, along with other provisions, of the Law on International Operations, Exercises, and Other Events of Military Cooperation (the Law on International Operations).[90] Article 14 authorized the government to accept military units, service members, and civil servants belonging to the armed forces of the Commonwealth of Independence States (CIS) to operate on Lithuanian territory for various purposes, including international search, rescue operations, or responses to major accidents (paragraph 2), as well as for exercises organized by NATO and other international organizations (paragraphs 3 and 4). Paragraph 5, however, lacked specificity regarding the purpose of the operation, stating that military units, servicemen, and other related personnel of the CIS countries could participate "in other events" organized on the territory of Lithuania.[91]

The Court addressed the issue within a series of challenges brought by the Seimas against the president's authority to conduct international operations and deploy foreign military forces.[92] The decision arose amidst debates over President Dalia Grybauskaitė's pursuit of increased authority under international mutual defense treaties, particularly in the domains of foreign relations and national security. However, several Seimas members challenged her exercise of power under the Law on International Operations due to security concerns.

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[90] Constitutional Court of Lithuania, Case No.23/08 [On International Military Operations, Exercises, and Other Events of Military Co-operation] (Mar. 15, 2011).

[91] *Id.*

[92] *Id.*

Beneath the tensions between Seimas members and the President lay a complex set of issues regarding Lithuania's nuanced policy orientations toward CIS countries. Notably, the President's imperative to fulfill the state's obligations of mutual defense under transnational treaties appeared to conflict with a significant constitutional imperative—the Constitutional Act "On the Non-Alignment of the Republic of Lithuania with Post-Soviet Eastern Alliances" (Non-Alignment Act), enacted in 1992. Drawing from Lithuania's historical lessons, the Non-Alignment Act mandated careful distancing from Russian influence, including refraining from participation in the CIS. Not being a contracting country of the CIS incurred costs: following independence, Lithuania faced challenges in negotiating the withdrawal of Russian troops from its territory. Because it was not part of the CIS community, Lithuania was unable to negotiate such an issue via mechanisms afforded under the CIS framework.[93] Despite regaining control of its territory in 1993, concerns about foreign occupation persisted. This apprehension resurfaced when several elected representatives of the Seimas questioned whether several parts of the Law on International Operations might potentially empower the president to invite the deployment and utilization of foreign military units on Lithuanian territory.

In response, the LCC ruled that the president's exercise of national security power, akin to his or her exercise of power in other domains of law, must adhere to constitutional principles, including the rule of law and the separation of powers. While the president, in the capacity as the Commander-in-Chief, may lead the Lithuanian government in implementing collective measures to prevent and mitigate national threats, suppress acts of aggression, foster reciprocal foreign relations, enhance international dispute resolution mechanisms, and promote international peace,

[93] Auers, *supra* note 2, at 198.

security, human rights, and freedoms under regional mutual defense treaties, such actions must be consistent with universally recognized international and constitutional principles.[94] In this context, Article 14, paragraph 5 of the Law on International Operations failed to provide sufficient justification for the presence of CIS troops on Lithuanian territory. Furthermore, the government lacked explicit control over these operations.[95]

Three months later, the Seimas amended the Law on International Operations and clarified the conditions under which the government may establish joint military units with member states of the CIS or other former Soviet Union states. Military units from CIS countries could only participate in events aimed at ensuring the security of Lithuania and other parties to the collective defense treaty, as well as international and regional security, as recommended and overseen by Lithuania.[96]

All the decisions mentioned above were made within the context of widespread acknowledgment and acceptance of EU norms regarding constitutional protections, the separation of powers, and the rule of law by the Lithuanian public. However, as Lithuania has progressively integrated into the EU community, new challenges to the security of its national borders have emerged when new tides of transformation started hitting the pillars of the European norms. Questions have arisen regarding the extension of European norms of human rights protections to non-Europeans seeking entry into EU member states. In particular, member states situated on the frontiers of the community have faced external pressure, manifested in the form of increasing

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[94] *Id.*

[95] *Id.*

[96] *Law on International Operations, Exercises, and Other Events of Military Cooperation,* No.I-555, amended on Jun. 23, 2011.

numbers of migrants and refugees from Africa and the Middle East. At times, these migrants are manipulated by other countries with hostile intentions, exacerbating tensions between the principle of universal human rights and the imperative of border management and national security.[97]

In 2021, Lithuania faced a migrant crisis during which tens of thousands of migrants from Iraq, among other Middle Eastern countries, entered the EU border via Lithuania, Latvia, and Poland's border with Belarus. Viewing the crisis as a "migration attack" initiated by Alexander Lukashenko, the president of Belarus, the Lithuanian government, along with the other two countries, promptly declared a state of emergency.[98] Alongside the state of emergency declaration, the Lithuanian government introduced the mechanism of "automatic detention" under Article 5 of the Law on the Legal Status of Foreigners (Foreigners Law). According to Article 5 of the Foreigners Law, in the event of an emergency caused by a state of war, a state of emergency, an emergency situation, or a mass influx of foreigners, the government may house foreigners in specific facilities, with immigration approval decisions to be made within no longer than six months. The 28-day period specified in the Law for processing immigration applications under standard immigration procedures did not apply.

An asylum seeker, who was detained for this reason, petitioned his case to the LCC, claiming that the "automatic detention process" violated his right to freedom of movement within the territory of Lithuania. In 2023, the Court issued Case No. 10-A/2022 (2023), striking down the automatic detention process under Article 5 of the Foreigners Law.[99] In its decision, the LCC

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[97] *Id*, at 136.

[98] Constitutional Court of Lithuania, Case No.10-A/2022 [Regarding the Temporary Accommodation of An Asylum Seeker Due to a Mass Influx of Foreigners in the Event of a Declared State of Emergency, State of Emergency or War] (Jun. 7, 2023).

[99] *Id.*

referenced the 1951 Refugee Convention (the Geneva Convention of 28 July 1951) and the 1967 Protocol on the Status of Refugees, as well as other international legal instruments such as the ECHR and decisions of the ECtHR and the International Covenant on Civil and Political Rights (ICCPR). These international legal documents, considered collectively, stipulated that exceptional measures should not be applied by the government in response to emergency events involving security concerns.

Citing Recommendation CM/Rec (2003) of the Committee of Ministers of the Council of Europe, the Court emphasized that national security justifications did not exempt the government's exercise of power from adhering to constitutional principles such as the rule of law and the protection of constitutional rights. Building on these considerations, the Court outlined the limits of executive power in restricting individuals' freedom of movement. While the government was authorized to detain foreigners pending immigration decisions, the "purpose of detention is not to punish asylum seekers, but rather to ensure national security or public order." [100] Therefore, Lithuania was required to carefully assess the individual circumstances of each person and to apply "specific, temporary, non-arbitrary" measures only when necessary. In other words, individuals could not be detained on general grounds "solely on the basis of a state of emergency declared due to a threat to the constitutional order of the state or societal seriousness, without evaluating the actual threat posed by the individual to the Constitution, society, and national security." [101] Even in a state of security emergency, the government was obligated to conduct tailored, individualized

[100] *Id.*

[101] *Id.*

assessments of the risks posed by each person to national security and the severity of the infringement on their freedom of movement.

Furthermore, the Court emphasized the procedural protections afforded to foreigners during such a security crisis. The LCC acknowledged the concerns raised by the United Nations High Commissioner for Refugees (UNHCR) regarding Lithuania's implementation of the automatic detention process. The UNHCR highlighted that the automatic detention process infringed upon the rights of asylum seekers, as they were housed in confined and overcrowded facilities for extended periods without access to official channels for administrative or judicial review. Additionally, their access to essential living support was inadequate, resulting in a deterioration of their quality of life and well-being. As a result, the UNHCR urged the Lithuanian government to provide adequate procedural protections to asylum seekers and ensure that they receive necessary living resources.[102] For instance, the government was required to explain to applicants the reasons for their detention and inform them of any judicial remedies available to challenge the government's decision.[103]

After the LCC invalidated the procedure, the Lithuanian government contested the court ruling, arguing that it did not adequately reflect the urgent circumstances at Lithuania's border.

[102] *Id.* UN High Commissioner for Refugees (UNHCR), UNHCR legal observations on the amendments to the Law of the Republic of Lithuania on Legal Status of Aliens (No XIV-506) , 28 July 2021, *available at* https://www.refworld.org/docid/610d26971a1.html (latest review: June 17, 2024). UNHCR, UNHCR observations on draft Amendments to the Law of the Republic of Lithuania on Legal Status of Aliens (No 21-29207), 27 September 2021, available at: https://www.refworld.org/docid/615322844.html [accessed 19 Oct. 2023] UNHCR, *Acknowledging the extraordinary situation in Lithuania, UNHCR raises concerns about legislative response and accommodation conditions* (UNHCR), Oct. 11, 2021, *available at* https://rb.gy/3yijng (latest review: June 17, 2024).

[103] *Id.*

However, the Seimas resolved to comply with the Court's decision in July,[104] and subsequently, it amended the Foreigners Law in December based on the Court's decision.[105] Under the amended Foreigners Law, an asylum seeker was entitled to lodge a complaint with the district court based on their place of residence to challenge the legality of their accommodation. Furthermore, when determining the accommodation of asylum seekers, the Migration Department, along with other competent authorities, was required to consider individual circumstances, such as age. Failing to take these circumstances into account could otherwise result in a significant violation of individuals' freedom of movement.[106]

6. Comparing the LLC's Involvement in National Security, Election, and Education Laws

The previous section illustrated how the LCC has explicitly invoked universally recognized principles to ascertain national security matters. The Court has emphasized the significance of international human rights norms in safeguarding citizens' rights against governmental intervention. The Court has established the boundaries of the government's authority in determining the objectives, categories, and methods of international military collaboration. It has underscored the universality of United Nations' human rights principles in addressing a refugee crisis, thereby mandating that the Lithuanian government afford procedural protections to migrants without exception. In summary, the LCC regards national security law as integral to the broader body of public law that it must prudently evaluate.

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[104] Document No. SV-S-1015 (2023.7.5)-- Regarding the Constitutional Court of the Republic of Lithuania in 2023 June 7 resolution no. KT53-A-N6/2023 "On the implementation of the provisions of the Law of the Republic of Lithuania 'On the Legal Status of Foreigners' with the Constitution of the Republic of Lithuania."

[105] Law of the Republic of Lithuania "On the Legal Status of Foreigners" No. IX-2206 Law amending Articles 5, 79, 113, 115, 125, 126, 130-1, 140-8, 140-10, 140-13, 140-14 and 140-19 (No. XIV-2427) 2023-12-19.

[106] *Id.* Amendment to Article 140.

We can compare the LCC's oversight of national security, election, and education laws. Table 10 illustrates the percentage of oversight exercised by the LCC in each legal domain. While the LCC's use of oversight is slightly higher, albeit statistically insignificant, in education law compared to the other two areas, it generally exercises similar levels of oversight across all three domains. Therefore, the Court's involvement in these legal spheres does not support the assertion that the judiciary acts distinctly deferential in the national security context.

Table 10: The LCC's Oversight of National Security, Election, and Education Laws

	National Security Law	Election Law	Education Law
Lithuania	56.67%	56.52%	64.71%

Source: Author

The LCC has also relied on international legal principles to invalidate or reinterpret regulations related to elections. For example, in Case No.06/07 (2007), the Court addressed a provision in the Law on Elections to Municipal Councils, which focused on whether only political parties could nominate candidates for municipal council member elections.[107] In its decision, the Court referenced Directive 94/80/EC of the European Council dated 19 December 1994 to criticize the provision. This Directive affirmed the rights of EU citizens residing in another member state to vote and participate in municipal elections as candidates. Given the similarities between the legal issues and normative concerns in the Directive and Case No. 06/07 (2007), the LCC invoked the Directive to emphasize that the provision unconstitutionally infringed upon the rights of citizens and permanent residents to stand as candidates in the election and to vote.[108]

[107] Constitutional Court of Lithuania, Case No. 06/07 [On elections to Municipal Councils] (Feb. 9, 2007).

[108] *Id.*

In Case No.10/2015 (2015), the Court addressed a provision under the Law on Elections to the Seimas, which allowed for a "higher than 10-percent deviation in the number of voters in a single-member constituency from the average number of voters in all single-member constituencies."[109] The Court determined that this provision violated the widely recognized one-person-one-vote principle because it disproportionately amplified the voices of voters in smaller constituencies compared to those in larger ones. The Court based its assessment of the 10-percent deviation on "internationally accepted good electoral practice," [110] primarily referencing documents and reports from the European Commission for Democracy through Law. This body, an advisory body of the Council of Europe on constitutional matters, aims to "provide legal advice to the Council of Europe's member states wishing to align their legal and institutional structures with European standards and international practices."[111] As the 10-percent deviation has been acknowledged in official Council of Europe documents and in the constitutional practices of various member states, the LCC used it to declare the provision unconstitutional.[112]

Comparing the LCC's involvement in election law and education law, it appears less inclined to invoke universally recognized principles to support its decisions, with a few exceptions, in the context of education law. In Case No. 11/2018 (2019), the Court was tasked with determining whether several paragraphs of Articles 22 and 24 of the Law on Employment unconstitutionally defined an unemployed person as someone who did not study at a higher

[109] Constitutional Court of Lithuania, Case No. 10/2015 [On the Different Member of Voters in Single-Member Constituencies] (Oct. 20, 2015).

[110] *Id.*

[111] *Id.*

[112] *Id.*

education school in a full-time program.[113] The LCC referred to Annex I to Commission Regulation (EC) No.1897/2000 of September 7, 2000, to define the concept of "unemployment" in two ways: (1) a person aged 15-74 actively seeking work by all available means; (2) a person in education or training could be classified as unemployed if they met other criteria for seeking the status of an unemployed person.[114] Building on this interpretation, the Court ruled that it was constitutionally unjustifiable to impose a condition that significantly hinders individuals from pursuing higher education and employment simultaneously. Furthermore, it deprived individuals studying in higher educational institutions of eligibility to receive social insurance for unemployed people.[115] Consequently, these paragraphs violated Articles 48 and 52 of the Constitution concerning individuals' right to receive social security.

The above examples illustrate the LCC's reliance on international legal principles in national security and other areas of law. In essence, while the European Union recognizes national security affairs as the exclusive prerogative of its member states, the LCC still extensively invokes European legal standards and human rights norms to restrict the elected branches of government's exercise of national security power. What factors contribute to the LCC's adoption of this approach? What factors lead to the LCC's less exceptional approach to national security affairs? The following two sections will identify a couple of explanations in response to these questions.

7. Analyzing the Court's Incorporated Approach

[113] Constitutional Court of Lithuania, Case No. 11/2018 [On the Right of Students who Study at a High Education School] (Oct. 31, 2019).

[114] *Id.*

[115] *Id.*

The LCC's adoption of the incorporated approach results from several factors, most notably the efforts of the Lithuanian government and the public to be part of the Western or international community.[116] In democratized Lithuania, there has been a strong consensus among most domestic political forces regarding various fundamental goals, including integration with the Western community.[117] Although conflicts among different political actors regarding the functions and limits of state institutions exist, these disputes have not fundamentally challenged the collective demand for recognition as a sovereign state in the international realm. The participation of the EU community presumably brings positive impacts, with little to no objection to this fundamental goal.[118]

Article 135 of the Lithuanian Constitution is a clear reflection of this collective consensus across different societal sectors and distinct political forces. Article 135 mandates that the Lithuanian government participate in international organizations—an explicit demand not explicitly seen in the Constitutions of Latvia and Estonia.[119] According to Article 135, when implementing its foreign policies, the Republic of Lithuania shall adhere to universally recognized principles and norms of international law and seek to ensure national security and independence.[120] Thus, Article 135 of the Lithuanian Constitution provides an explicit textual basis for the Court to engage with these principles and norms in a meaningful manner, contributing to the Lithuanian

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[116] Dainius Žalimas, *The Impact of the Case-law of the European Court of Human Right and the Jurisprudence of the Constitutional Court of the Republic of Lithuania*, in SNU ASIA-PACIFIC LAW INSTITUTION EDS, GLOBAL CONSTITUTIONALISM AND MULTI-LAYERED PROTECTION OF HUMAN RIGHTS 72 (Constitutional Court of Korea 2016).

[117] Fritz, *supra* note 17, at 275.

[118] Fritz, *supra* note 17, at 277.

[119] Irmantas Jarukaitis, *Report on Estonia, Latvia and Lithuania*, IN, THE NATIONAL JUDICIAL TREATMENT OF THE ECHR AND EU LAWS 170-171, 169-204 (Giuseppe Martinico & Oreste Pollicino eds., 2010).

[120] Lietuvos Respublikos Konstitucija (Constitution of the Republic of Lithuania), art. 135 (1992) (Lith.).

Court's explicit reference to international principles when mediating political conflicts about national security. The Court has often invoked the Universal Declaration of Human Rights, the European Convention for the Protection of Human Rights (ECHR), and decisions of ECtHR to safeguard constitutional freedoms and rights[121], such as freedom of assembly and association[122], freedom of the press[123], privacy and personal development[124], and occupational rights[125]. The application of international legal norms or universal principles, as interpreted by the LCC, is profoundly significant for Lithuania in demonstrating its commitment to participate in the international community.

The explanation does not imply that public and international legal requirements are never in tension. On many occasions, the LCC has faced not only its obligations under the European human rights system but also domestic opposition to the imposition of more stringent legal requirements. In response, the Court mediates between international legal norms and domestic needs by establishing new legal jurisprudence regarding sovereignty and international legal obligations. In this sense, the Court does not passively accept international legal norms; instead, it cautiously navigates its position within different understandings of international norms and sovereignty, human dignity and social control, as well as judicial deference and constraints.

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[121] Gelazis, *supra* note 37, at 406.

[122] Constitutional Court of Lithuania, Case No.11/99 [On the Right of Municipalities to Set Permanent Places for Meetings of Citizens] (Jan. 7, 2000).

[123] Constitutional Court of Lithuania, Case No.36/2000 [On the Protection of the Private Life of a Public Person and the Right of the Journalist Not to Disclose the Source of Information] (Oct. 23, 2002).

[124] Constitutional Court of Lithuania, Case No.12/99-27/99-29/99-1/2000-2/2000 [On Operational Activities] (May 8, 2000).

[125] Constitutional Court of Lithuania, Case No.24/98 [On the Employment of USSR KGB Regular Employees] (March 4, 1999); Case No.2/2014 [On A Limitation on the Right of Servicemen of Professional Military Service to Work in Another Job] (Nov. 4, 2015).

Case No.2/98 (1998) lucidly illustrates this point.[126] Case No.2/98 concerned the abrogation of the death penalty in Lithuania. At the time of the case's deliberation, more than half of the electorate supported the death penalty, but the Court abrogated it.[127] The LCC considered the abrogation of the death penalty as integral for Lithuania to participate in the international world as a sovereign state.[128] Adopting and implementing international legal norms is part of the state's efforts to exercise its state sovereignty.[129] Therefore, the Lithuanian conception of sovereignty necessitates a democratically elected government to defend the nation or fulfill Lithuania's international obligations.[130] By adhering to international principles and norms, Lithuania can showcase its full state sovereignty and integrate itself into the international community as a natural part of the world's culture.[131] Based on Egidijus Kūris' understanding, this interpretation of state sovereignty has successfully harmonized the conceptual discrepancy between self-determination and observance of international norms.[132] Hence, this interpretation allows the LCC to establish the legal system and make the country a natural part of the international community.

Furthermore, regional human rights courts have profoundly contributed to the incorporation of regional and international norms into Lithuania's domestic laws. For instance, the ECtHR has rigorously addressed the legal controversies of its member states. Before being adjudicated in the ECtHR, many legal controversies are addressed by constitutional courts or other

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[126] Constitutional Court of Lithuania, Case No.2/98 [On the Death Penalty Provided for By the Sanction of Article 105 of the Criminal Code] (Dec. 9, 1998).

[127] *Id.*

[128] *Id.*

[129] Gelazis, *supra* note 37, at 401.

[130] Egidijus Kūris, *Constitutional Principles in the Jurisprudence of the Constitutional Court* in CONSTITUTIONAL COURT OF LITHUANIA, *supra* note 1, at 469-470. Gelazis, *supra* note 37, at 401-402.

[131] Gelazis, *supra* note 37, at 401.

[132] Kūris, *supra* note 130.

high courts in specific jurisdictions, but the results are sometimes deemed to have violated the rights and freedoms of the plaintiffs. In response, the ECtHR sometimes makes decisions that override constitutional courts' decisions, pressuring domestic courts to abide by the rules, principles, and norms developed by international or regional legal systems. State authorities are obligated to enforce ECtHR decisions that are adverse to their previous rules or practices.[133]

The ECtHR has made a handful of decisions demanding the Lithuanian government's observance of the ECHR, among other European and regional human rights norms. From the time the Convention took force in relation to Lithuania in 1995 until the end of 2012, the judiciary has made 87 decisions in cases against Lithuania, and in 67 decisions, at least one violation of the ECHR was ruled.[134] Many of these decisions entailed national security concerns, as the Lithuanian government often invoked national security arguments to justify its exercise of power on particular domains of public affairs. For instance, in the context of transitional justice, the ECtHR, in the Case of *Rainys and Gasparavičius v. Lithuania* (2005), addressed issues concerning the Law on the Evaluation of the USSR State Security Committee (NKVD, NKGB, MGB, KGB) and the Present Activities of Permanent Employees of the Organisation (Law on Former USSR Employees).[135] The plaintiffs, Rainys and Gasparavičius, were two former KGB employees who lost their jobs in private companies according to the Law on Former USSR Employees. After exhausting all domestic legal channels, they petitioned the ECtHR to remedy their loss of

[133] Dia Anagnostou, *Introduction,* in THE EUROPEAN COURT OF HUMAN RIGHTS: IMPLEMENTING STRASBOURG'S JUDGMENTS ON DEMOCRACY POLICY 1 (Dia Anagnostou eds., 2013).

[134] Danutė Jočienė, *Lithuania—The European Convention on Human Rights in the Lithuanian Legal System: The lessons learned and perspectives for the future*, in THE IMPACT OF THE ECHR ON DEMOCRATIC CHANGE IN CENTRAL AND EASTERN EUROPE 241-242, 234-265 (Iulia Motoc and Ineta Ziemele eds., 2016).

[135] ECtHR, Applications Nos. 70665/01 and 74345/01, Case of Rainys and Gasparavičius v. Lithuania, Apr. 7, 2005, *available at* https://rb.gy/myi13f (latest review: June 17, 2024).

employment. The ECtHR ruled that restricting a person's opportunity to seek employment based on national security justifications was unjustified. Lacking loyalty to the state cannot be weighed the same in the contexts of employment in private entities and public service.[136]

The aftermath of President Rolandas Paksas' impeachment, as mentioned earlier, was another vivid example. After Paksas was removed from office, he sought to run for the next presidential election. However, the Seimas revised the election law, prohibiting any officials who had been removed from office from being elected president for at least five years. Paksas petitioned the LCC. The LCC struck down this revision, opining that while disqualifying a person who had been removed from office from running in presidential elections was constitutional, they should be "permanently" disqualified from standing in any elections requiring an oath.[137] In other words, the Court extended the restriction further than the Seimas originally proposed. Under the Court's interpretation, Paksas would not be allowed to stand in any presidential or Seimas elections.

Paksas then petitioned the ECtHR. In the *Case of Paksas v. Lithuania* (2011), the ECtHR declared that the LCC's decision violated Paksas' right to free elections when it permanently and irreversibly deprived Paksas of the ability to stand for elections—a pushback against the LCC's exercise of power.[138] Pursuant to the ruling in the Case of Paksas v. Lithuania, the Seimas amended the Constitution in April 2022, stipulating that a person who has been removed from office according to the procedure for impeachment proceedings may take office if ten years have passed

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[136] For discussion, *see* Vygantė Milašiūtė, *Transitional Justice Cases Against Lithuania at the European Court of Human Rights*, in LEGAL DEVELOPMENTS DURING 30 YEARS OF LITHUANIAN INDEPENDENCE: OVERVIEW OF LEGAL ACCOMPLISHMENTS AND CHALLENGES IN LITHUANIA 3-18 (Gintaras Švedas & Donatas Murauskas eds., 2021).

[137] Constitutional Court of Lithuania, Case No.24/04 [Regarding the Law on Elections of the President of the Republic] (May 25, 2004).

[138] ECtHR, Case No. 34932/04, *supra* note 52.

since the decision of removal.[139] In other words, the Seimas fully adopted the ECtHR's ruling and decided not to permanently or irreversibly ban any officials from participating in public elections.

By incorporating international legal requirements into domestic practices, the LCC has strengthened its authority in the eyes of domestic and even international audiences. According to Ran Hirschl, the "expansion of judicial power through the constitutionalization of rights and judicial review"[140] reinforced its "symbolic power" by fostering its engagement with domestic actors and foreign jurists.[141] In the context of Lithuania, the KCC has become a critical forum where politicians seek to resolve their disputes. Moreover, it is a discursive arena to facilitate public discussion of various public policies, statutes, and governmental actions.[142] Through incorporating international legal narratives into domestic legal debates, the LCC has reinforced domestic conversations regarding fundamental questions of the tensions between human rights protections and national security in light of Lithuania's historical and geopolitical complexity.

8. Explaining the LCC's Non-exceptional Involvement in National Security Disputes

8.1. The LCC's Capacity to Handle National Security Disputes

The LCC wields its power rigorously in national security disputes implicating civil liberties of ordinary individuals when there lacks an immediate threat to the security of the state. The LCC's Case No.10-A/2022 (2023) is a lucid example of this point.[143] Notwithstanding the exigency and

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[139] Lietuvos Respublikos Konstitucija (Constitution of the Republic of Lithuania), art. 74 (2022) (Lith.)

[140] RAN HIRSCHL, TOWARDS JURISTOCRACY: THE ORIGINS AND CONSEQUENCES OF THE NEW CONSTITUTIONALISM 48 (2007).

[141] *Id.*

[142] Kubilius, *supra* note 46, at 70.

[143] Constitutional Court of Lithuania, Case No.10-A/2022 [Regarding the Temporary Accommodation of An Asylum Seeker Due to a Mass Influx of Foreigners in the Event of a Declared State of Emergency, State of Emergency or War] (June 7, 2023).

unexpectedness of the 2021 migrant crisis, the Court determined the automatic detention process unconstitutional. Although handling the chaotic circumstances at the border definitely required sophisticated considerations, the crisis did not seriously challenge the operation of Lithuania's political and economic centers.[144] Consequently, the crisis presented remote considerations regarding the handling of exigent national security risks, allowing the LCC to rely on its ordinary tools of legal interpretation to determine whether the government's intervention was justified within Lithuania's constitutional system.

Moreover, the LCC has a significant level of knowledge about military affairs. For instance, the LCC addressed issues related to mandatory military service in Case No.10/2016. As Lithuanian citizens, the judges are likely familiar with Lithuania's military service. Their understanding of the operation of mandatory military services likely aided them in determining that the government invoked irrelevant causes to exempt members of traditional religious organizations from fulfilling their mandatory military obligations.

Additionally, the LCC exercised oversight in cases concerning the government's reforms of state secrets regulations. Case No.3/96 (1996) highlights the Court's awareness of the implications of state secrets law on a wide range of ordinary individuals. Similar to other Central and East European countries, Lithuania undertook state-initiated reforms to reconfigure intelligence agencies in the early 1990s.[145] These efforts, whether successful or not, revealed the significant challenge for state institutions in dealing with their past, characterized by secret police, confidential files, and intelligence operations. Lithuanian politicians have seriously debated the

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[144] *Id.*

[145] MONIKA NALEPA, SKELETONS IN THE CLOSET: TRANSITIONAL JUSTICE IN POST-COMMUNIST EUROPE 3-4, 201-202 (2010).

roles of their security institutions alongside other state functions.[146] Being part of the state machinery, it appears that courts and individual judges have established their own accounts of the balance between security secrets and public accountability, efficient handling of security issues, and the rule of law. The familiarity with the stakes of security secrets regulations likely prompted the Court to issue Case No.3/96 (1996), in which the LCC declared that the procedures by which the government designates state secrets violated the rule of law and the separation of powers.[147]

8.2. Ideological Conflicts Among Political Elites

The LCC has frequently handled disputes among different governmental institutions regarding the scope and limits of the government's national security power.[148] In Lithuania, the ambivalent design of the executive-legislative relationship results in frequent disagreements among different branches of government with respect to the boundary of their power in foreign and national security policies.[149] Article 84 of the Constitution empowers the president to make foreign and national security policies.[150] It also requires the president to work with the government, of which the head, the Prime Minister, is subject to the Seimas' checks via a vote of non-confidence. That is to say, the government, or even the Seimas, can exert more or less influence on the president's decision-making, creating room for different political actors to contest their divergent understandings of the functions of security institutions as well as the boundary of the

[146] *Id.*

[147] Constitutional Court of Lithuania, Case No.3/96 [On State Secrets of the Republic of Lithuania and Their Protection] (December 19, 1996).

[148] Andrius Kubilius, *Constitutional Arguments in Political Decision-Making: Lithuania*, in THE CONSTITUTION AS AN INSTRUMENT OF CHANGE 70 (Eivind Smith eds., 2003).

[149] Krupavičius, *supra* note 10, at 76-77.

[150] Lietuvos Respublikos Konstitucija (Constitution of the Republic of Lithuania), art.84 (1992) (Lith.).

state. As various political actors hold different views regarding the limits and scope of governmental power in securing the state, the LCC has incentives to handle their political turbulences in a vigilant and delicate fashion.

Furthermore, the dynamism in Lithuania's party system also contributes to a high number of conflicts between the Seimas members. Unlike many countries, whose party systems are considered a two-party system, Lithuania's party system is best characterized as "moderate pluralism with three to five parties as the leaving political actors."[151] Moreover, due to their lack of experience, political parties have taken a long time to organize, stabilize, and familiarize themselves with public governance.[152] Political forces in the Seimas have been in stringent need to negotiate and compromise on various public issues, prompting them to consult the Constitutional Court to resolve disputes regarding the meaning, adoption, and enforcement of laws, regulations, and governmental actions.[153]

In light of these reasons, the LCC is motivated to exercise oversight in a minimal sense to alleviate the confrontation among different political actors regarding the allocation of national security power by different branches of government. For example, Case No. 23/08 illustrates the contested nature of Lithuania's political environment and its impact on the Court's rulings.[154] This decision was concerned with, among other disputes, whether non-military operations participated

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[151] Algis Krupavičius, *Lithuania's Political Parties and Party System*, 1990-2001, in POLITICAL PARTIES IN POST-SOVIET SPACE: RUSSIA, BELARUS, UKRAINE, MOLDOVA, AND THE BALTICS 183 (Anatoly Kulik & Susanna Pshizova eds., 2005).

[152] JANUŠAUSKIENĖ, *supra* note 5, at 33-34.

[153] Winkelmann, *supra* note 25, at 83. On this topic, *see, e.g.,* ANTON STEEN, BETWEEN PAST AND FUTURE: ELITES, DEMOCRACY, AND THE STATE IN POST-COMMUNIST COUNTRIES: A COMPARISON OF ESTONIA, LATVIA, AND LITHUANIA (1997).

[154] Case No.23/08, *supra* note 90.

in by countries of the Commonwealth of Independent States were allowed on the land of Lithuania. This issue pertained not only to how Lithuania should collaborate with foreign countries for mutual defense but also to how Lithuania should engage with the CIS countries due to its intricate historical and geopolitical backgrounds. The fundamental issues regarding the functions and limits of national security power, as well as the core interests of the state, made the dispute inherently contentious and challenging.

Eventually, the LCC upheld most provisions disputed in Case No. 23/08 but struck down a paragraph regarding the participation of the CIS countries in certain non-military operations. The Court stressed the importance of explicit and constitutionally reasoned grounds for arranging the participation of CIS armed forces in non-military operations on the territory of Lithuania. Moreover, such operations must be directed by the government of Lithuania, ensuring its ultimate control over these operations.[155] By requiring the Seimas to revise the Law on International Operations, the LCC cautiously offered a meaningful degree of oversight over the elected branches of government.

8.3. The LCC's Motives to Enhance Its Reputation

The LCC may also be inclined to exercise oversight as a means of asserting institutional authority in high-profile disputes. This tendency is exemplified by Case No. 10-A/2022, which unfolded against the backdrop of the 2021 migrant crisis, attracting significant attention both domestically and internationally. Numerous civil society organizations advocated for limitations

[155] *Id.*

on the Lithuanian government's exercise of national security power over asylum seekers.[156] It is plausible that under the influence of these public pressures, the LCC prioritized the rights of asylum seekers over deferring to the government's decisions.

The roles played by civil society organizations in drawing attention to national security issues among the public are worthy of consideration. A substantial body of literature has examined the functions of Lithuanian civil society organizations in the policymaking domain.[157] Although these analyses typically emphasize how such organizations contribute to enhancing individuals' social welfare rather than focusing on national security law specifically, they likely exert influence on the government's efforts to uphold individuals' human rights protections within the sphere of national security law.

Furthermore, researchers have demonstrated the pivotal role of NGOs and legal activists in shaping the adoption and enforcement of human rights laws in East and Central European countries by mobilizing litigation before the ECtHR.[158] Despite this, the extent to which civil society organizations in Lithuania contribute to legal changes has received scant attention from scholars of comparative judicial politics. Therefore, future researchers can contribute to this

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[156] *LITHUANIA: 'Civil Society Must Humanise The Public Narrative Around Irregular Migration',* Civicus.Org., *available at* https://www.civicus.org/index.php/media-resources/news/interviews/6432-lithuania-civil-society-must-humanise-the-public-narrative-around-irregular-migration (latest review: Jun. 4, 2024).

[157] SAULE MACIUKAITE-ZVINIENE, CIVIL SOCIETY IN THE BALTIC STATES: IMPACT ON DEMOCRACY 94-95 (2010). There were about 3000 non-profit organizations in Lithuania in 1998, 2753 NGOs in Latvia in 1997, 11,500 non-profit organizations in Estonia in 1999—the largest number in the three Baltic States. Walter Rothholz, *Some Theoretical Remarks on Civil Religion and Civil Society* in CIVIL SOCIETY IN THE BALTIC SEA REGION 87 (Norbert Götz & Jörg Hackmann eds., 2003). *See also* ANDERS UHLIN, POST-SOVIET CIVIL SOCIETY: DEMOCRATIZATION IN RUSSIA AND THE BALTIC STATES (2006).

[158] Rachel A. Cichowski, *Civil Society and the European Court of Human Rights* in THE EUROPEAN COURT OF HUMAN RIGHTS BETWEEN LAW AND POLITICS 77-78 (Jonas Christoffersen & Mikael Rask Madsen eds., 2011). *See also* ALBERTO GASPARINI & VLADIMIR YADOV, SOCIAL ACTORS AND DESIGNING THE CIVIL SOCIETY OF EASTERN EUROPE (2015). GARY BRENT MADISON, THE POLITICAL ECONOMY OF CIVIL SOCIETY AND HUMAN RIGHTS (1998). RACHEL A. MAY AND ANDREW K. MILTON, (UN)CIVIL SOCIETY: HUMAN RIGHTS AND DEMOCRATIC TRANSITIONS IN EASTERN EUROPE AND LATIN AMERICA (2005).

discourse by delving into the roles of civil society organizations in facilitating the judicialization of Lithuania's politics before the ECtHR.

9. Concluding Remarks

The case study of the LCC illustrates the efficacy of the incorporated approach, a useful method through which the judiciary can navigate complex security issues. By upholding Lithuania's international commitments in the realm of national security, the Court has established the bounds of national security authorities entrusted to different branches of government and mediated conflicts of values among diverse societal sectors. Moreover, the LCC has played a pivotal role in Lithuania's pursuit of development. As Lithuania has navigated its survival amidst the dynamics of its neighbors over centuries, accession to international organizations has been a crucial endeavor for Lithuania's development for various Lithuanian state institutions and the majority of citizens. Integration into the international community serves as a vital benchmark of the country's progress, affording Lithuanian citizens human rights protections, democracy, economic prosperity, and security. By adopting the incorporated approach, the LCC has participated in the formulation and enforcement of Lithuania's developmental goals, redefining the government's role in response to the surrounding geopolitical dynamics.

CHAPTER 6

JUDICIAL OVERSIGHT OF NATIONAL SECURITY POLICIES: A COMPARATIVE PERSPECTIVE

Chapter 6 concludes this dissertation by summarizing and discussing the key findings of this comparative study. It also sheds light on the contributions and limitations of this study and identifies future research possibilities. To recap, in this dissertation I aimed to examine judicial behavior and national security governance in ontologically contested democracies, i.e., democracies that have experienced ongoing geopolitical tensions over the boundaries of "their" territories. Against this backdrop, the nature and political stakes of national security affairs remain uncertain and contested, making national security governance particularly challenging: first, national governments must utilize their power wisely to fortify the collective safety and security of the public; second, national governments must also arrange the laws of internal governance as national security policies within this context frequently raise profound questions about how democratic communities should define themselves and implement the rules of self-governance.

The particular legal issues taking place within the context of ontologically contested democracies raise questions about how courts adjudicate, and should adjudicate, national security disputes. In response, the primary purpose of this dissertation was to examine the unique dynamics between national security and constitutional courts in ontologically contested democracies. Specifically, I aimed to investigate if and when NSE, a rationale frequently used to govern national security matters in the United States, an ontologically established democracy, is applicable to ontologically contested democracies. In so doing, I aimed to offer abundant resources for reflecting

on the appropriate roles of courts in resolving national security disputes in ontologically contested democracies.

I formulated three research questions to achieve the above goals: (1) How do the constitutional courts exercise oversight of national security policies? (2) What are the conditions for constitutional courts to exercise oversight of national security policies? (3) What are the effects of the constitutional courts' oversight of national security policies? To answer these questions, I defined the scope of my research in Chapter 1, and I summarize three major points here: (1) the body of national security disputes under examination, (2) the eight categories of national security law, and (3) case selection.

To begin with, I defined a body of constitutional disputes as pertaining to national security characterized by two criteria: constitutional texts and statutory delegation. The first category includes disputes involving constitutional texts that empowered executive and legislative departments to exercise national security authority. The second category encompasses disputes involving laws that empowered executive and legislative departments with varying degrees of national security power. I identified this body of laws based on four methods: the title method, clause method, judicial interpretation method, and function method. The title and clause methods require explicit titles or clauses stipulating "national security," while the judicial interpretation method and function method require a holistic interpretation of the purposes, functions, and outcomes of a national security regulation by either the judiciary or common legal sense.

Second, I identified eight categories of national security law based on two dimensions: (1) the sphere-of-influence dimension and (2) the domestic-versus-foreign dimension. The first dimension includes four spheres of national security law: the military, the citizenry, the economy,

and democratic government. The second dimension distinguishes a country's inward-looking or domestic issues from its outward-looking or foreign issues regarding national security. I used the eight categories to analyze the constitutional courts' different behavior in response to different categories of national security disputes in a more focused manner.

Third, I selected the constitutional courts of three ontologically contested democracies: South Korea, Taiwan, and Lithuania. All three jurisdictions are grappling with the ontological foundations of their national status, including the boundaries of their nations, their demos, or both. The contested nature of the three jurisdictions' ontological foundations prompted me to examine the behaviors of the three constitutional courts concerning national security disputes. Nevertheless, due to data availability restraints, not all cases reviewed and dismissed by the three constitutional courts were available for examination. Therefore, I focused on studying national security disputes that were accepted for review by the three constitutional courts rather than all national security disputes. Disputes dismissed by the constitutional courts were addressed if they were available and of significant constitutional importance.

1. Research Question 1: The "How" Question

I developed a two-stage research design to address the "how" question (i.e., how do the constitutional courts in ontologically contested democracies exercise oversight of national security policies?). The first stage focused on the behavior of the three constitutional courts in the context of national security, whereas the second stage compared their behavior in national security with their behavior in two other areas of law: election law and education law. Below I elaborate on the methodologies and results of each research stage.

In the first stage, I identified the number of cases in which each constitutional court exercised oversight of a national security policy. As discussed in Chapter 1, I defined judicial oversight in two ways in this dissertation: (1) courts' declaration that a national security law, regulation, or previous court ruling is unconstitutional, and (2) courts' re-interpretation of the substance of a national security law, regulation, or previous court ruling in the absence of (1). In other words, in scenario (2), courts reconstruct the substance of a law, regulation, or previous court ruling without declaring it unconstitutional. Based on this definition, I found that the three constitutional courts exercised oversight in more national security judgements than otherwise, a phenomenon I referred to as the rigorous exercise of power by the three constitutional courts (Appendix 1 lists all court cases studied in this dissertation).

Recognizing that the three constitutional courts rigorously exercised oversight of national security policies, I identified the distinct approaches taken by the three constitutional courts in resolving national security disputes: (1) the KCC's substantive review; (2) the TCC's procedural review; and (3) the LCC's incorporated review. As explored in Chapter 3, the KCC has demonstrated greater confidence in reviewing the balance between means and ends of national security policies. In contrast, as demonstrated in Chapter 4, the TCC has emphasized the constitutional values of procedures when the executive and legislative departments craft national security policies; it has also strengthened an individual's right to judicial remedies. As examined in Chapter 5, the LCC has relied more than other courts on international legal discourses to reconcile international obligations with domestic circumstances. It is true that Lithuania is a member of the Council of Europe, binding the LCC to adhere to international human rights treaties, necessitating the use of international legal discourses. However, the LCC has invoked these discourses with little hesitation on national security grounds. This attitude demonstrates the LCC's

inclinations toward judicial oversight rather than other approaches in the context of national security.

Distinct international and domestic political contexts have contributed to the three constitutional courts' divergent approaches to national security disputes. I utilized two variables to analyze the different approaches taken by the three constitutional courts: (1) international legal treaties and institutions, such as the European Union, and (2) domestic political contestation on the ontological foundation of each jurisdiction. As outlined in Chapter 1, for (1) international legal treaties and institutions, I identify Lithuania as a country facing intense pressure from such institutions, whereas South Korea and Taiwan do not face the same level of pressure. Regarding domestic contestation, I identify South Korea and Lithuania as having moderate levels of domestic disagreement regarding their national boundaries, whereas Taiwan experiences intense contestation because of its ambiguous international status.

Table 11: Results for the "How" Question

		Domestic Political Contestation on the Ontological Foundation of Each Jurisdiction	
		Strong	Moderate
International Legal Treaties and Institutions	Strong		Lithuania Incorporated Approach
	Moderate	Taiwan Procedural Approach	South Korea Substantive Approach

Source: Author

As explored in Chapter 3, South Korea is a ontologically contested country, experiencing moderate domestic disputes over its national boundaries. Although domestic political elites hold differing views on how to engage with North Korea, there is a consensus that North Korea poses substantial challenges to South Korea's national security. It is perhaps because of this recognition that the KCC assesses the legitimacy of national security interests and the means–ends balance of national security policies. Moreover, the KCC views geopolitical tensions as a constant constitutional premise that does not automatically lead to an increased level of legitimacy for the government to curtail citizens' constitutional rights and freedoms. In a series of disputes, the KCC explicitly acknowledged national security as a significant governmental interest in response to the country's geopolitical circumstances (2011 Hun-Ba 379 (2018)).[1] Nevertheless, this legislative objective did not warrant extensive restrictions on citizens' freedom of conscientious objection and right to information respectively.

Unlike South Korea, Taiwan's ambiguous international status has resulted in citizens' different understandings of the meaning of Taiwan as a state and how Taiwan should engage with China. As examined in Chapter 4, whereas most Taiwanese people identify themselves as "Taiwanese" today, the concept of Taiwanese identity has been contested. Perhaps for this reason, not every Taiwanese citizen views the relationship between Taiwan and China as inherently hostile. Consequently, the TCC has rarely characterized China as "a national security risk." Unlike the KCC, the TCC does not prioritize substantiating the meaning and importance of national security interests against constitutional rights protections. The TCC infrequently considers national security risks and evaluates the legitimacy and necessity of national security policies.

[1] Conscientious Objectors Case [Const. Ct.] Jun. 28, 2018, 2011 Hun-Ba 379 (consol.) (S. Kor.).

Instead, the TCC has emphasized procedural requirements, including individuals' rights to seek judicial remedies in immigration detention cases (J.Y. Interpretations No. 708 and No. 710).[2] The TCC has also demanded that state institutions adopt national security policies following statutory procedures if these policies affect individuals' most important constitutional freedoms, such as freedom of movement or physical freedom (J.Y. Interpretation No. 443).[3]

Accordingly, although South Korea and Taiwan have experienced prolonged military tensions with North Korea and China respectively, the KCC and TCC have developed distinct approaches to national security disputes. This difference is largely informed by the distinct nature of political contention in South Korea and Taiwan regarding their respective national boundaries, which have been shaped by their divergent domestic political contexts in response to their international environment. In short, South Korea and Taiwan's domestic political debates regarding the boundaries of their political community have played a significant role in shaping the KCC's and TCC's methodologies for national security disputes.

Similar to South Korea, political elites in Lithuania show moderate levels of disagreement on the nation's boundaries. Nevertheless, unlike their Korean and Taiwanese counterparts, Lithuanian elites agree on safeguarding national security through rigorous international engagement. Their emphasis on international involvement is less common in Korean and Taiwanese politics. As I examined in Chapter 5, Lithuanian political elites largely agree on positioning Lithuania within the international community through active participation in international treaties. Consequently, Lithuanian elites strive to align the country with international

[2] J.Y. Interpretation No.708 (Feb. 6, 2013). J.Y. Interpretation No.710 (Jul. 5, 2013).

[3] J.Y. Interpretation No.443 (Dec. 26, 1997).

(or Western) legal, political, and economic standards following democratization, conveying to the LCC that adhering to international legal principles is imperative for the country's future.

In contrast to the KCC and TCC, which are less inclined to embrace international legal discourses to adjudicate national security disputes, the LCC embraces international human rights discourses rather than resting upon national security grounds to adjudicate national security disputes. As I examined in Chapter 5, the LCC invalidated Article 5 of the old State Secrets Law in Case No. 3/96 (1996) because it violated an individual's right to information under the ECHR.[4] In Case No. 10-A/2022 (2023), the LCC also struck down the automatic detention process under the Foreigners Law because it contravened migrants' freedom of movement under the ECHR.[5]

The divergent approaches taken by the LCC, KCC, and TCC underscore that the availability of a constitution with a comprehensive list of constitutional rights does not deter courts from invoking international legal discourses to support their decisions. Comparing the TCC's and KCC's judicial reference to international legal treaties, Wen-Chen Chang argues that the absence of human rights clauses in the Constitution of the ROC prompts the TCC to reference more international human rights texts in its practices.[6] However, this conclusion is not supported by the experience of the LCC as the Constitution of Lithuania includes a sophisticated list of constitutional rights protections. Consequently, how international legal institutions affect judicial politics warrants closer examination.

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[4] Constitutional Court of Lithuania, Case No.3/96 [On State Secrets of the Republic of Lithuania and Their Protection] (December 19, 1996).

[5] Constitutional Court of Lithuania, Case No.10-A/2022 [Regarding the Temporary Accommodation of An Asylum Seeker Due to a Mass Influx of Foreigners in the Event of a Declared State of Emergency, State of Emergency or War] (Jun. 7, 2023).

[6] *See* my discussion in Chapter 3 and Chapter 4.

In the second research stage, I compared the behavior of all constitutional courts in national security law and two other areas of law: election law and education law. I found two research results: a quantitative and a descriptive result. Quantitatively, three constitutional courts were not "exceptionally" deferential in national security disputes: the LCC was similarly deferential across three domains of law, whereas the KCC and TCC exercised more oversight in national security disputes than in election and education disputes (see Table 3 in Chapter 1). Descriptively, I also compared the approaches adopted by the three constitutional courts in handling national security and the other two domains of disputes. In Chapters 3, 4, and 5, I demonstrated that each constitutional court has adopted the same methodologies for national security, election, and educational disputes: the KCC has carefully balanced national security interests and constitutional rights, the TCC has prioritized individuals' right to judicial remedies, and the LCC has emphasized international legal norms across all three areas of law.

My research findings for the first research question offer strong evidence that the KCC, TCC, and LCC exercised oversight, not exceptional deference, in national security law in distinct ways. Premised on this understanding, I summarize my response to the second research question (i.e., why the three constitutional courts exercised oversight in national security disputes) in the following section.

2. Research Question 2: The "What Conditions" Question

For the second research question, namely the "what conditions" question, I presented three conditions contributing to the constitutional courts' exercise of oversight in national security disputes: (1) judicial capacity, (2) political schism, and (3) judicial reputation. The three conditions were foregrounded against the assumptions of NSE outlined in Chapter 2: the judiciary's lack of

expertise and its lack of democratic legitimacy. The primary focus of my discussion was on the distinct political and legal contexts of ontologically contested democracies, leading to the oversight of national security policies by constitutional courts. In the following section, I explore the three conditions by summarizing their theoretical relevance regarding NSE and discussing my comparative findings for each. I also explore the similarities and differences among the three constitutional courts in relation to these conditions.

2.1. Judicial Capacity

As summarized in Chapter 2, adherents of NSE argue that courts in the United States do not possess sufficient expertise to assess professional considerations of national security policies.[7] To avoid making policy errors by overriding executive or legislative decisions, adherents of NSE propose that courts exercise deference. Nevertheless, in Chapters 3, 4, and 5, I argued that constitutional courts in South Korea, Taiwan, and Lithuania possess a significant degree of expertise in handling national security disputes for two reasons: (1) judicial expertise in relation to civil liberties protections and (2) judicial expertise in military affairs. I elaborate on the two reasons in the following paragraphs.

2.1.1 Judicial Expertise in Relation to Civil Liberties Protections

First, as national security affairs are interwoven into various aspects of the public's lives, judges in these national contexts have more opportunities to engage with them in relation to individuals' civil liberties protections. In fact, the three constitutional courts have encountered

[7] ERIC A. POSNER & ADRIAN VERMEULE, THE EXECUTIVE UNBOUND: AFTER THE MADISONIAN REPUBLIC 5-6 (2011).

numerous constitutional disputes that have involved considerations about civil liberties protections rather than immediate national security concerns. Issues such as the right to movement, freedom of speech, and conscientious objection have been present in these cases.

In contrast, the three constitutional courts have not faced disputes involving clear and urgent national security concerns, such as those arising from counterterrorism policies. They have encountered questions about laws that recognize national security interests in the context of prolonged geopolitical pressures without a materialized national security threat. Accordingly, national security considerations provided the backdrop against which the governments exercised power, but they were not the primary concerns of the courts. The three constitutional courts have skillfully balanced rights protections with specific public interests, imposing limitations in national security disputes on the government.

The KCC, TCC, and LCC have all encountered disputes regarding foreigners' freedom of movement within their respective jurisdictions. Central to these constitutional inquiries were detention and deportation procedures. However, national security considerations remained in the backdrop rather than taking center stage. The plaintiffs in these disputes presented varying degrees of national security risks, but none were as apparent as the risks posed by a terrorist act. For instance, in J.Y. Interpretations No.708 (2013), the TCC recognized the national security interests that underlaid the Immigration Law in regulating foreign immigrants.[8] However, the TCC prioritized procedural protections for individuals whose national security risks had not materialized. In a similar case, the KCC's decision of 2014 Hun-Ma 346 (2018) found that the Incheon Airport's decision to detain a Sudanese violated his constitutional rights of physical

[8] *Supra* note 2.

freedom and movement.[9] As these foreigners did not pose immediate national security risks to Taiwan or South Korea, the TCC and KCC used their expertise in civil liberties protections to exercise oversight in J.Y. Interpretation No. 708 and 2014 Hun-Ma 346.

Unlike Taiwan and South Korea's immigration laws, which have acknowledged remote national security risks posed by foreign immigrants, the Lithuanian government explicitly labelled the 2021 migrant crisis a national security issue.[10] Although the migrant crisis occurred rapidly, it primarily occurred at the border rather than in the country's economic and political centers, as was the case with the events of 9/11. While the migrant crisis caused immediate chaos at the border, it did not directly challenge Lithuania's core interests, and thus exerted relatively little pressure on state institutions to protect the country's stability and security. Consequently, the constitutional questions raised in this dispute focused on how to protect the rights of ordinary immigrants amid geopolitical pressures. The nature of rights protections allowed the LCC to decide Case No. 10-A/2022 with relatively little concern about making policy errors through exercising oversight.[11]

It is important to note that the judiciary's expertise in safeguarding civil liberties protections may not always extend to resolving disputes that require expertise from different fields of public policies. When confronted with disputes that involve economic, social welfare, and other considerations, the three constitutional courts have exercised deference. In the case of 2007 Hun-Ma 1083 (2011), the KCC upheld the National Assembly's decisions regarding the frequency with which foreign workers could change their workplaces, citing reasons related to national security,

[9] Case on the Right to Meet Counsel of A Refugee Detained for Repatriation at Incheon International Airport [Const. Ct.], 2014 Hun-Ma 346, May 31, 2018 (S. Kor.).

[10] *Supra* note 5.

[11] *Id.*

economy, and social order.[12] Similarly, in J.Y. Interpretation No. 618 (2006), the TCC upheld the ten-year residence requirement for a Chinese immigrant to serve in public services in Taiwan. This decision considered various factors, including the differences in political regimes, social structures, and economic markets between Taiwan and China.[13] Finally, in Case No. 23/2012-38/2014-54/2014 (2015), the LCC determined that the government's natural gas arrangement, a critical national security issue in Lithuania, was neither erroneous nor irrational.[14] In all of these disputes, economic considerations, border control, and national security were intertwined. Due to the specialized nature of these affairs, the three constitutional courts exercised deference to ensure that policy decisions were based on professional expertise.

2.1.2 Judicial Expertise in Military Affairs

2.1.2.1 Mandatory Military Service

The three constitutional courts possess a significant level of expertise in military affairs for two main reasons: (a) mandatory military service and (b) fundamental reforms in military institutions. First, because military service is mandatory in the three countries,[15] individuals have more opportunities to interact with the state's military arrangements, increasing the likelihood that they have disputes over these military arrangements. Accordingly, judges are likely to equip themselves with the capacity to process military information by adjudicating these disputes. Moreover, citizens, many judges, or their family members are subject to these obligations, which

[12] Case on Foreign Workers [Const. Ct.], Sep 29, 2011, 2007 Hun-Ma 1083 (S. Kor.).

[13] J.Y. Interpretation No. 618 (made on Nov 3, 2006).

[14] Case on the Construction of Liquefied Natural Gas Terminal [Const. Ct.], on Apr. 3, 2015, Case No. 23/2012-38/2014-54/2014 (Lithuania).

[15] 대한민국헌법 (Constitution of the Republic of Korea), art. 39 (1948) (S. Kor.). 中華民國憲法 (Constitution of the Republic of China), Art. 20 (1947) (Taiwan (ROC)). Lietuvos Respublikos Konstitucija (Constitution of the Republic of Lithuania), art. 139 (1992) (Lith.).

makes them reasonably familiar with the functioning of military institutions due to their first- or second-hand experiences. Accordingly, their understanding of military affairs reduces the informational asymmetries between political departments and courts when balancing national security and civil liberty protections.

My findings regarding the three constitutional courts offer evidence for this claim. In this dissertation, I have defined military disputes as those pertaining to military personnel, materiel, facilities, and institutions. In South Korea, military disputes accounted for nearly 22.73% of the total disputes under examination, ranking second to democratic government disputes (54.55%). In the case of Taiwan, military disputes accounted for 36.84% of the total disputes under examination, making it the largest category body of disputes. Similarly, Lithuania's military disputes accounted for 36.67% of the total number of national security disputes, making it the largest category of disputes accepted for review by the LCC.

The three constitutional courts have all encountered disputes about mandatory military service, an institution that affects at least all males in each jurisdiction. While the LCC only encountered this issue in Case No. 10/2016 (2017) regarding certain categories of priests who were exempted military service obligations, [16] the KCC has reviewed four disputes regarding conscientious objection, accounting for 40.00% of all military disputes (see Appendix 1). In Taiwan, the TCC has made six decisions regarding mandatory military service, accounting for 85.71% of all military disputes. The significant number of military service-related disputes have

[16] Constitutional Court of Lithuania, Case No.10/2016 [On Exempting Priests from Mandatory Military Service] (Jul. 4, 2017).

likely familiarized judges with military considerations, reducing informational asymmetries between courts and political departments.

Furthermore, many constitutional court judges have commented on the problems inherent in the operation of military institutions, demonstrating their familiarity with national security and military affairs.[17] Although I could not find evidence in the LCC's sole dispute regarding obligatory military service, the TCC provided evidence for this argument. In J.Y. Interpretation No. 490, which addressed the constitutionality of conscientious objection, Justice Tieh-Cheng Liu criticized the Ministry of Defense for failing to recognize the costs of imprisoning conscientious objectors, which posed an intolerably significant burden on Taiwan's financial system.[18]

Perhaps this phenomenon is even more evident in the KCC, where judges have articulated the corruption of military service institutions (the majority opinion in the case of 2005 Hun-Ma 1139 (2007))[19] and the challenges of social exclusion faced by those who refused to perform military service on moral or conscientious grounds (the majority opinion in the case of 2011 Hun-Ba 379).[20] In the case of 2005 Hun-Ma 1139, the KCC emphasized the public's interests in learning the operations of military personnel to reduce the corruption of military institutions and enhance their accountability. Nevertheless, the public's right to know should be balanced with military personnel's privacy. Accordingly, personal information of military personnel, such as their

[17] Eugene R. Fidell, *Justice John Paul Stevens and Judicial Deference in Military Matters,* 43 UC DAVIS L. REV. 999, 1018 (2010).

[18] J.Y. Interpretation No.490 (Oct. 1, 1999).

[19] Disclosure of Military Health Records of Public Officials [Const. Ct.], May 31, 2007, 19-1 KCCR 711, 2005 Hun-Ma 1139 (S. Kor.).

[20] *Supra* note 1.

medical records, should not be disclosed.[21] Regarding the case of 2011 Hun-Ba 379, the KCC emphasized that conscientious objectors were seriously discriminated against when being prosecuted and imprisoned; moreover, such discrimination was detrimental to the human dignity of these conscientious objectors.[22] In summary, these pieces of evidence demonstrate that judges in countries with mandatory military services do not refrain from expressing their understanding regarding the daily operations of military institutions.

2.1.2.2 Fundamental Reforms in Military Institutions

Second, South Korea, Taiwan, and Lithuania have undergone fundamental reforms in their military institutions following democratization. These reforms primarily aimed to enhance the accountability and transparency of military institutions that were previously controlled by a single military leader or political party. As these military reforms have garnered widespread public attention, constitutional court judges have likely acquired a certain degree of information about the functioning of military systems in their respective jurisdictions by fulfilling their roles as responsible citizens.

The KCC, TCC, and LCC have centered their attention on various categories of military disputes, considering the unique priorities of their respective governments in the reform of military institutions. The Korean National Assembly and the government have been addressing the challenges of implementing reforms of state intelligence agencies since Korea's democratization. Progressive politicians and activists have frequently criticized the government's monopoly on military secrets during the authoritarian period, while intelligence services continue to maintain

[21] *Supra* note 19.

[22] *Supra* note 1.

their control over confidential security information.[23] Over the past decades, numerous political incidents have involved unauthorized leaks of military secrets by either state intelligence agencies or journalists, increasing the visibility of state secrets-related disputes and providing judges with opportunities to enhance their legal expertise concerning conflicts between confidentiality and public accountability.[24] Against this backdrop, in the case of 89 Hun-Ka 104 (1992), the KCC narrowed the scope of power that the government could use to classify state secrets under the Military Secrets Protection Act. According to the KCC, the purpose of the judgment was to ensure that the handling of military secrets adhered to the rule of law.[25]

In Taiwan, strengthening the accountability of military institutions has been a crucial issue following the KMT's nearly 40-year control of the military system. Since Taiwan has democratized, the Legislative Yuan has amended several military organization laws to ensure that the selection of military personnel and the operation of military institutions are independent of the control of any political parties. Geared toward fostering the administrative accountability of military agencies, these legislative acts shared similar objectives with the TCC's ruling on J.Y. Interpretation No. 436 (1997).[26] As I explored in Chapter 4, J.Y. Interpretation No. 436 focused on military trials, including the selection and protection of judges, and their judicial procedures, in addition to individuals' right to seek remedies for their military trial judgments. The TCC reasoned that the operations of military trials must adhere to fundamental constitutional principles, notably the rule of law and the separation of powers. Based on these principles, the TCC identified several

[23] Kuk Cho, *Tension Between the National Security Law and Constitutionalism in South Korea: Security For What?* 15 B.U. INT'L L.J. 125, 135 (1997).

[24] YONGHO KIM, SOCIAL MEDIA AND SOUTH KOREA NATIONAL SECURITY 38-39 (2017).

[25] Military Secret Leakage Case [Const. Ct.], Feb. 25, 1992, 4 KCCR 64, 89 Hun-Ka 104 (S. Kor.).

[26] J.Y. Interpretation No.436 (Oct. 3, 1997).

elements that the Legislative Yuan must implement in the new military service regime: For example, the TCC demanded that plaintiffs tried by military tribunals be eligible to seek retrial by ordinary courts. With an emphasis on the constitutional oversight of military institutions, J.Y. Interpretation No. 436 revealed the capacity of the TCC to learn and update its comprehension of military accountability amid a series of governmental reforms.

Similarly, the governance of state secrets has posed an extraordinarily critical problem for post-communist Lithuania. During the early period of Lithuania's democratization, discussions on how to ensure the confidentiality of sensitive state information emphasized the government's strategies for envisioning and safeguarding the core interests of the state.[27] Against this backdrop, the LCC has been presented with numerous opportunities to enhance its security-related information. As I explored in Chapter 5, the LCC identified tensions surrounding the protection of state secrets in Case No. 3/96.[28] Understanding the need to reform the handling of state secrets, the LCC invalidated the old State Secrets Law by emphasizing that state secrets regulations must adhere to the rule of law and the separation of powers.[29]

This argument can be countered by suggesting that the judges' familiarity with security issues is a result of democratization, not because the ontological foundations of these countries are contested. Certainly, democratization brings meaningful political competition to the public space and enables courts and individual judges to prioritize constitutional protections over national security. Nevertheless, democratization should be considered a critical factor that contributes to

[27] MONIKA NALEPA, SKELETONS IN THE CLOSET: TRANSITIONAL JUSTICE IN POST-COMMUNIST EUROPE 3-4, 201-202 (2010).

[28] *Supra* note 4.

[29] *Id.*

the existing structure of ontologically contested democracies, and this factor makes national security governance an essentially multilayered task that involves considerations of national consolidation and democratic self-governance. Without considering the multidimensional roles that the contested nature of a country's ontological foundation play in national security governance, it is difficult to recognize the patterns and reasons explaining why national security policies emerge as prominent political topics that consistently provoke public controversies. In other words, national security issues do not simply result from democratization; the contested status of a country's national status is equally—if not more—important.

2.2. Political Schism

The KCC, TCC, and LCC have exercised oversight of national security policies also due to internal divisions within the country ("political schism"). As I summarized in Chapter 2, proponents of NSE argue for the democratic, not legal, oversight of national security policies. At the center of their normative proposition lies the goal of democratic legitimacy. Elected representatives can, through democratic deliberation, devise a collective action endowed with democratic legitimacy that is ill-suited for judicial review as the judiciary is a countermajoritarian institution. This normative proposition is supported by empirical analyses indicating that the judiciary tends to exercise judicial deference when there is a strong consensus among political elites on national security policies.[30] Courts exercise deference in the context of national security, being concerned about potential political backlashes against judicial oversight.

[30] William G. Howell, Kenneth A. Shepsle & Stephane Wolton, *Executive Absolutism: The Dynamics of Authority Acquisition in a System of Separated Powers*, 18 QUARTERLY JOURNAL OF POLITICAL SCIENCE 243, 245 (2023).

However, the NSE's focus on democratic legitimacy, in addition to its supportive empirical claims, overlooks the existence and effects of political schism. Deep political divisions pose challenges for political elites when deciding on national security powers because of these elites' lack of consensus on the government's national security policies. Moreover, legislative members face challenges in exerting democratic oversight over the government's national security power, primarily due to their inability to reach a consensus on the appropriate extent of power granted to the government. As an empirical or descriptive matter, the divided or fragmented political environment does not create the kind of political pressure that dissuades courts from exercising oversight. Faced with plural actors holding different political platforms, courts can exert their power by leveraging disagreements between political actors on national security matters. Consequently, courts have more alternatives than simply deferring to the elected branches of governments.

Political elites in Lithuania, South Korea, and Taiwan disagree on the basis of their national boundaries, measures to safeguard national security, or both. Their disagreements consist of two sorts of disputes: (1) the allocation of national security powers among state institutions and (2) the ideological basis of national security powers. The first category emphasizes conflicts between political departments regarding the scope of national security power, which is manifested in all three countries. The second category concerns ideological disagreements on how to identify the boundaries of the nation and the concept of national security, which are manifest in South Korea and even more sharply in Taiwan.

In reaction to different patterns of political schism within their respective countries, the LCC, KCC, and TCC leverage political schism in different ways. In Lithuania, political elites have

a general consensus on the ideological basis of the government's national security power. Nevertheless, they disagree on the allocation of national security powers among state institutions. As examined in Chapter 5, the LCC frequently reviews cases brought by members of the Seimas as a result of their political disputes. In response, the LCC sometimes strikes down a small section of governmental acts in dispute, rather than the entirety of these acts, to mediate political conflicts among political elites. For instance, the LCC upheld most articles of the Law on International Operations in dispute in Case No. 23/08 (2011) with one exception: the LCC invalidated Article 14, paragraph 5, of the Law on International Operations because it did not explicitly stipulate the conditions for certain categories of foreign military troops to operate on the territory of Lithuania.[31]

Contrary to their Lithuanian counterparts, political elites in South Korea disagree on both the ideological basis of national security powers and the allocation of these powers among state institutions. The two forms of disagreement were manifested in disputes concerning Article 7 of the National Security Law, which prohibited the dissemination of North Korea-related speech and political activities. As discussed in Chapter 3, Article 7 entailed the conservative parties' confrontational approach toward North Korea and their inclination toward enhancing the government's national security authority instead of implementing checks and balances. The conservative coalition's confrontational perspectives on North Korean policies and the increasing extent of national security authority have clashed with those of the more liberal-leaning political elites, leading to intense struggles between the two political factions. In response, the KCC narrowed the conditions for invoking Article 7 in the case of 89 Hun-Ka 113 (1990).[32] Without

[31] Constitutional Court of Lithuania, Case No. 23/08 [On International Military Operations, Exercises, and Other Events of Military Co-operation] (Mar. 15, 2011).

[32] Praising and Encouraging Enemy of the States [Const. Ct.], Apr. 2, 1990, 89 Hun Ka 113 (S. Kor.).

invalidating Article 7, the KCC substantially reconstructed its meaning while maintaining its symbolic importance.

Similar to South Korean elites, Taiwan's political elites also disagree on the ideological bases and scope of national security powers. If anything, the disagreements are even more intense in Taiwan than in South Korea due to the former's ambiguous international status. The TCC has encountered disputes involving these two lines of disagreements in a handful of cases. For instance, J.Y. Interpretation No.445 (1998) dealt with several sections under Article 11 of the old Assembly and Parade Act of 1988, which imposed prior restraints on a wide range of assemblies and parades.[33] In particular, section 1 stipulated that police departments could impose prior restraints on those advocating "secession of the national territory" and "communism," two causes invoked by the KMT government to police Taiwanese independence expression as a form of separatist activity against the entirety of China.

In response, the TCC invalidated the impugned sections of Article 11 because they authorized police departments to conduct content-based prior restraints on citizens' freedom of speech and assembly in the absence of a clear and present danger.[34] The TCC remained silent on the question of whether police departments could prohibit the advocation of communism or secession of the national territory or other political activities, which was in fact prohibited under Article 4 of the old Assembly and Parade Act. In other words, the TCC reformed rules that allocated national security power under Article 11 of the old Assembly and Parade Act.

[33] J.Y. Interpretation No.445 (January 23, 1998).

[34] *Id.*

Meanwhile, it refrained from mediating disputes on the ideological basis of Taiwan's national boundaries as addressed in Article 4 of the same Act.

The mediation of political schisms by the TCC in J.Y. Interpretation No.445 shares both similarities and differences with the rulings of the KCC in the case of 89 Hun-Ka 113 and the LCC's Case No. 23/08. Both the TCC and KCC refrained from questioning the basis of national boundaries that the disputed national security law assumed: the TCC refrained from examining the meanings of communism or secession in J.Y. Interpretation No. 445, and the KCC did not deny the constitutionality of the NSL labelling the two Koreas under a confrontational relationship. Instead, the TCC and KCC consistently focused on constraining the government's, particularly the police department's, exercise of national security power. Nevertheless, the TCC and KCC adopted contrasting methodologies in J.Y. Interpretation No. 445 and in the case of 89 Hun-Ka 113: the former struck down the disputed sections, whereas the latter narrowly interpreted the conditions for invoking Article 7. The TCC's approach appeared closer to that of the LCC, despite facing different political structures.

By arguing that political schisms influence the constitutional courts' rigorous oversight of national security policies, I do not imply that these patterns of schism remain static over time. New political parties or factions may emerge and change the dynamics and relationships with their electorates and the broader citizenry. Naturally, the dynamics between political parties may prompt courts to adjust their behavior. Nevertheless, as long as deep disagreements concerning national security persist, politically sensitive courts will have incentives to maintain a delicate balance in the contentious environment.

2.3. Judicial Reputation

The third reason for the three constitutional courts' exercise of oversight is their desire to acquire reputation. As outlined in Chapter 2, proponents of NSE emphasize the expertise and legitimacy of executive and legislative departments. However, this emphasis overlooks the fact that the judiciary is also driven by reputational motives to operate as a guardian of constitutionalism.[35] In particular, courts may sometimes bravely exercise oversight of national security policies in high-profile cases. In doing so, the courts are possibly motivated to strengthen their institutional authority in the eyes of domestic or even international audiences. As national security disputes frequently stand at the center of political debates in ontologically contested democracies, constitutional courts are likely to exert oversight, not deference, in national security disputes.

All three constitutional courts have exercised oversight in high-profile disputes relative to the constitutional liberties of social or political minorities. In the case of 2011 Hun-Ba 379, the KCC struck down Article 5 of the Military Service Act concerning the prohibition of conscientious objection, a crucial public issue that has garnered widespread attention from domestic and international audiences.[36] In Taiwan, the National Security Law of 1992 required citizens to seek approval from law enforcement entities if they wanted to enter Taiwan. Numerous individuals "blacklisted" by the KMT government were prohibited from returning to Taiwan due to their unpopular political viewpoints, and it became a high-profile issue in the domestic realm that awaited the TCC's response.[37] The TCC invalidated the requirements in J.Y. Interpretation No. 558 (2003). Regarding Lithuania, the LCC invalidated the accommodation process in Case No.10-

[35] *See, e.g.* Shirin Sinnar, *Procedural Experimentation and National Security in the Courts*, 106 CALIF. L. REV. 991, 992, 1000 (2018).

[36] *Supra* note 1.

[37] J.Y. Interpretation No.558 (Apr. 18, 2003).

A/2022 (2023), which allowed the government to accommodate asylum seekers for up to six months amid the 2021 migrant crisis that has attracted worldwide attention.[38]

The high-profile nature of issues regarding conscientious objection in South Korea, entry requirements in Taiwan, and asylum seekers in Lithuania is a likely result of civil society activities. In fact, civil society organizations in South Korea, Taiwan, and Lithuania have mobilized public attention on these issues. Their patterns of mobilization share similarities and differences concerning (1) whether international or domestic civil society organizations are involved and (2) their roles in stimulating public awareness and mobilizing litigation. By engaging with the public and enhancing the visibility of these disputes, civil society activities likely increase the public pressure on courts and prompt them to exercise oversight in a more courageous manner.

In Lithuania, it remains unclear how domestic civil society organizations mobilize public attention and litigation in the literature of comparative judicial politics. Nevertheless, European human rights organizations have endeavored to stay vigilant on the human rights practices of European governments, stimulating public scrutiny of their national security policies affecting individuals' human rights. In South Korea, international and domestic civil society organizations have endeavored to popularize issues about conscientious objectors. Moreover, they also collaborate with human rights lawyers to challenge the Military Service Act in lower courts and the KCC. Similar to South Korea, domestic human rights activists in Taiwan also collaborate with lawyers to publicize public policies, identify victims, and bring their lawsuits into the courtroom. However, unlike South Korea and Lithuania, there is no clear evidence of efforts conducted by

[38] *Supra* note 10.

international human rights organizations to mobilize constitutional disputes in the TCC, at least on the list of cases studied in this dissertation.

By suggesting that courts are motivated to exercise oversight in high-profile disputes, I do not imply that they always act bravely to acclaim institutional authority. After all, these disputes frequently involve a wide array of political and professional considerations. Thus, when courts encounter these disputes for the first time, they may consider urging political departments to correct themselves instead of invalidating their decisions. Nevertheless, courts may be criticized for not acting sufficiently to cure these issues if political departments fail to take the initiative of revising the concerned policies. When public criticism generates sufficiently strong pressure on the courts, judges may exercise oversight to save their reputation rather than passively deferring to the elected branches of government.

As I examined in Chapters 3 and 4, the KCC's ruling on the case of 2011 Hun-Ba 379 and the TCC's ruling on J.Y. Interpretation No. 558 are illustrative of this point. Before the decision of 2011 Hun-Ba 379 was made, the KCC issued the decisions of 2007 Hun-Ka 12 (2011), 2008 Hun-Ka 22 (2011), and 2002 Hun-Ka 1 (2004) upholding Article 5 of the Military Service Act. In these decisions, the KCC also stated that the National Assembly should adopt alternative military services (see Appendix 1). However, the KCC's decisions failed to catalyze the National Assembly's self-correction, creating an impression that the KCC failed to protect the conscientious objectors' constitutional freedoms. The KCC received criticism from various domestic and

international organizations. Consequently, the KCC ruled in favor of prioritizing freedom of conscientiousness over national security 2011 Hun-Ba 379.[39]

Similarly, before the TCC made J.Y. Interpretation No. 558, it instructed the Legislative Yuan to amend without invalidating the old National Security Law (old NSL, adopted in 1987) in J.Y. Interpretation No. 265 (1990).[40] Although the Legislative Yuan adopted the new National Security Law in 1992, it kept many provisions of the old NSL in place, including the requirement of prior approval for citizens to enter and exit Taiwan, the focus of J.Y. Interpretation No. 558. Facing criticisms of the requirement, the TCC invalidated it, possibly out of the motivation to maintain its institutional authority as the genuine guardian of constitutionalism.[41]

The three constitutional courts, particularly the KCC and TCC, demonstrate the dynamics among the judiciary, civil society organizations, and public opinions in the domain of national security law. They show that courts care about their institutional reputation and do not always want to be considered rubberstamps of executive and legislative departments. Their reputational motives are compatible with the efforts of civil society organizations in stimulating public awareness and mobilizing litigation. When confronted with national security litigation brought by individuals or civil society organizations, courts likely exert oversight by assessing different strands of public reactions to these cases.

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[39] Lower courts in South Korea had been increasingly reluctant to rule against conscientious objectors before the case of 2011 Hun-Ba 379 was made. South Korea's Conscientious Objectors Escape Military Conscription, the Economist (Feb. 9, 2019), *available at* https://rb.gy/myi13f (latest review: June 17, 2024).

[40] J.Y. Interpretation No.265 (Oct. 5, 1990). *See also* my discussion in Chapter 4.

[41] *See* the petition of J.Y. Interpretation No. 558.

In this section I summarized and discussed three conditions for the Constitutional Courts of South Korea, Taiwan, and Lithuania's exercise of oversight: judicial capacity, political schism, and judicial reputation. The three conditions have demonstrated that the assumptions of NSE, namely the judiciary's lack of expertise and lack of democratic legitimacy, are not guaranteed in ontologically contested democracies. In the next section, I delve into the third—and final—research question of this study: What do constitutional courts accomplish when they exercise oversight of national security policies?

3. Research Question 3: The "What Effect?" Question

By exercising oversight, the three constitutional courts have improved the quality of national security governance in three ways: (1) stimulating legal reforms, (2) mediating political conflicts, and (3) enhancing the doctrinal significance of national security. In these ways, the three constitutional courts have facilitated the state-building process of their respective countries as the conditions permit. Below, I elaborate on each point in this section.

3.1. Stimulating Legal Reforms

To begin with, constitutional courts have successfully encouraged legislatures and executive agencies to reform national security policies not only in a timely manner, but also in greater alignment with constitutional principles, encompassing the rule of law, protection of constitutional rights, and the separation of powers. Within the domain of national security, political departments are typically reluctant to update policies based on constitutional principles due to two primary factors: institutional inertia and selective enforcement. First, institutional inertia tends to persist among administrative staff, hindering their adoption of policies and compliance with

constitutional requirements.[42] Numerous national security policies disproportionately impact specific minority groups, who typically have difficulty expressing their interests in public discourse.[43] Therefore, the elected branches of government are unlikely to enact legal changes that reflect their concerns. Consequently, political departments require impetus from the judiciary to revise national security policies in accordance with constitutional values.

The Constitutional Courts of South Korea, Taiwan, and Lithuania have frequently provided guidance to political departments regarding the policies that should be implemented, prompting these departments to enact legal changes based on the courts' rulings in a timely manner. For instance, the KCC has frequently narrowed the legal prerequisites for the government to invoke national security policies. In the case of 89 Hun Ka 113, the KCC expressed that Article 7 of the National Security Law could be invoked only when an individual was found to have the intention of violating Article 7. In essence, police departments were barred from prosecuting individuals on the grounds that they endangered national security without a clear subjective intent. Similarly, in the case of 99 Hun-Ma 480 (2002), the KCC instructed the National Assembly to specify the grounds for invoking Article 53 of the Telecommunications Business Act (TBA).[44] Generalized grounds such as "public peace," "order," "social moral," and "good customs" were deemed

[42] In Ashley Deek's analysis, executive agencies make policy adjustments only when they are uncertain about whether their policies would be invalidated by a court. When executive agencies are one hundred percent certain about their litigation victory, they are reluctant to make any policy change. Ashley S. Deeks, *The Observer Effect: National Security Litigation, Executive Policy Changes, and Judicial Deference*, 82 FORDHAM L. REV. 827, 838-839 (2013).

[43] Cass R. Sunstein, *Fear and Liberty*, 71(4) SOCIAL RESEARCH 967, 968 (2004).

[44] Ban on Improper Communications on the Internet [Const. Ct.], Jun. 27, 2002, 14-1 KCCR 616, 99 Hun-Ma 480 (S. Kor.).

excessively vague. In response to these decisions, the National Assembly refined the requirements of the laws to limit the government's utilization of national security powers.

In contrast to the KCC, which primarily focused on substantive requirements, many rulings by the TCC have specified procedural requirements for the government to implement. For instance, the TCC's ruling on J.Y. Interpretation No. 443 concerning Taiwan's military trial system served as a significant catalyst for the government to reform the Act on Military Justice based on guiding principles of the criminal justice system, in particular emphasizing the separation of prosecution and adjudication and the importance of judicial independence. Similarly, the TCC's rulings on J.Y. Interpretations No. 708 and No. 710 demanded that the government adopt stringent procedures governing the detention and deportation of immigrants. As a result of these decisions, the Taiwanese government incorporated these procedural requirements into the Immigration Act and the Cross-Strait Relations Act.

Regarding Lithuania, the rulings of the LCC encompass both substantive and procedural requirements. However, when comparing these two types of rulings, the Seimas tends to respond more effectively to procedural requirements, possibly because the procedural requirements imposed by the LCC require fewer efforts from the Seimas to craft and change its existing practices. For instance, in Case No. 34/2000-28/01 (2002), the LCC declared that Article 27 of the Law on Operative Activities unconstitutionally mandated operators to collect and supply data to the government in excess of what was "necessary." Nevertheless, the idea of necessity remains

vague, and it is perhaps for this reason that there is no explicit evidence suggesting that the Seimas updated the Law accordingly.[45]

Conversely, the LCC's decision in Case No. 3/96 successfully prompted the Seimas to revise the procedures governing the classification of state secrets under the State Secrets Law.[46] In fact, the procedures imposed by the LCC were essentially the practices that the Seimas had adopted before the decision of Case No. 3/96 was made, which were later formally incorporated into the new State Secrets Law. Furthermore, Case No. 10-A/2022 motivated the Seimas to reform the Law on Foreigners.[47] In the 2023 amendment to the Law on Foreigners, the Seimas mandated immigrant bureaus to investigate whether individual circumstances related to an asylum seeker, such as age, could render the accommodation unsuitable for them. Because investigating the age of an asylum seeker is likely part of the daily practices of the immigrant bureaus, incorporating this requirement does not impose a significant burden on the operation of asylum governance.

Although not all constitutional decisions have successfully triggered legislative reforms, the constitutional courts' exercise of oversight appears to encourage more meaningful reforms than judicial deference based on constitutional principles. As explored elsewhere in this chapter, the KCC's decisions on the cases of 2007 Hun-Ka 12 (2011), 2008 Hun-Ka 22 (2011), and 2002 Hun-Ka 1 (2004), in addition to the TCC's J.Y. Interpretation No. 265, demonstrate political departments' lack of incentives to adopt legal reforms in the absence of judicial oversight. In contrast, when 2011 Hun-Ba 379 and J.Y. Interpretation No. 558 were made, the Korean National

[45] Constitutional Court of Lithuania, Case No.34/2000-28/01 [On the Law on Telecommunications, the Law on Operational Activities, and the Code of Criminal Procedures] (Sep. 19, 2002).

[46] *Supra* note 4.

[47] *Supra* note 5.

Assembly and Taiwan's Legislative Yuan promptly reformed regulations on conscientious objectors and entry requirements respectively, possibly because they were afraid of public criticism. In other words, the three constitutional courts' exercise of oversight played a constructive role in encouraging political departments to review and amend their policies based on the courts' interpretation of constitutional texts.[48]

When stimulating legal changes, the constitutional courts gave political departments flexibility to make policy reforms by adopting the method of "suspension of unconstitutionality." With this method, the courts suspended the declaration of invalidity for a designated period of time to provide sufficient time for legislative and executive deliberation.[49] During the designated period of time, usually one to three years, the disputed act remains valid. Without invalidating the regulations immediately, the constitutional courts allowed the executive and legislative branches to make necessary legal adjustments rather than being forced to address regulatory vacuums that further complicate the enforcement of national security policies. For example, in the case of 2011 Hun-Ba 379, the KCC demanded that the National Assembly adopt alternative military services within one and a half years.[50] In J.Y. Interpretation No.708, the TCC demanded the Legislative Yuan to reform the detention procedures within two years.[51] In response, governmental institutions revised the laws within the period designated by the courts, providing a smooth transition from old practices to newly reformed ones.

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[48] YVONNE TEW, CONSTITUTIONAL STATECRAFT IN ASIAN COURTS 3 (2020).

[49] Stephen Gardbaum, *Are Strong Constitutional Courts Always a Good Thing for New Democracies?* 53 COLUM. J. TRANS. L. 285, 310 (2015).

[50] *Supra* note 1.

[51] *Supra* note 2.

3.2. Mediating Political Conflicts

All three constitutional courts have also served as mediators in conflicts among political elites. As discussed elsewhere in this chapter, political elites in South Korea, Taiwan, and Lithuania frequently clash over the foundations of their national boundaries, encompassing internal identity issues and external security concerns. These disputes frequently escalate into politically charged controversies, prompting the courts to intervene. Faced with such disputes, the three constitutional courts generally refrain from calling into question the ideological assumptions underlying national security laws, such as the territorial boundaries of the state. Instead, they focus on less contentious aspects of these conflicts to delineate the extent and constraints of governmental agencies' authority to invoke such powers, particularly regarding the allocation of national security powers between governmental entities and the limits of national security power over citizens' constitutional rights protection. In doing so, the constitutional courts establish common grounds for ideologically polarized political elites to engage in debates over national security policies. Without touching on the ideological basis of national security powers, these grounds allow political elites to achieve temporary compromises and establish national security practices and institutions.

The Constitutional Courts of South Korea, Taiwan, and Lithuania have mediated various forms of political conflicts. In Lithuania, political elites have grappled with the extent of the president's authority to decide on cross-national military operations within Lithuania's territory. In Case No.23/08, the LCC ruled that the president could only authorize such operations if they aimed to enhance national security. In contrast, political elites in South Korea and Taiwan have also engaged in debates over the ideological underpinnings of their nations, such as the relations

between the two Koreas and the cross-Strait relations. In the case of 89 Hun Ka 113, the KCC struck a balance between progressive and conservative elites by narrowing the requirements for invoking Article 7 of the National Security Law. Following this decision, political elites continued to debate Article 7, focusing on whether and how to constrain the government's power in investigating and prosecuting expressions related to North Korea.[52] Regarding Taiwan, the TCC narrowed the requirements for invoking prior restraints on citizens' freedom of assembly in J.Y. Interpretation No. 445.[53] The TCC avoided examining politically charged issues such as the meaning of communism or territorial secession, shifting the focus to legally debatable matters. In doing so, the TCC redirected attention away from ideologically irreconcilable questions toward legally debatable issues, providing the necessary impetus to the political branches without causing unnecessary upheavals in the political landscape.

By mediating political conflicts in this careful manner, the three constitutional courts maintain a significant degree of political stability in their respective jurisdictions, which is crucial for enhancing the quality of democracy. It could be argued that judicial review is likely to undermine democracy because judicial institutions are democratically illegitimate to override decisions made by the elected branches of government. However, because of the deeply contested nature of national security policies in these jurisdictions, courts might trigger unnecessary political turbulence by taking an entirely deferential stance in a politically charged issue, which could otherwise exacerbate polarization within the domestic atmosphere. After all, those who lose their constitutional disputes may find it difficult to accept the results and even seek to attack the independent authority of the courts. When they do so, it is very likely that the public's trust in

[52] *See* my discussion in Chapter 3.

[53] *Supra* note 33.

governmental institutions will be undermined, posing a critical challenge for the consolidation of democracy in a given society. Consequently, by offering common grounds for political elites to concentrate their debates on legally discernible terms, these constitutional courts have not only resolved the legal issues on the surface; moreover, they have also safeguarded the necessary prerequisite of democratic stability in their respective jurisdictions.

3.3. Enhancing the Doctrinal Significance of National Security

Third, all the constitutional courts have discussed and strengthened the doctrinal significance of national security in their legal systems by (1) specifying national security as a legitimate ground for public governance and (2) identifying national security justification as a legal basis to expand the number of individuals eligible serve in military forces.

Regarding the first point, the most important example is the LCC's decision on Case No. 23/08.[54] Lithuania's geopolitical circumstances required its government to cautiously formulate policies concerned with the operations of CIS countries on the territory of Lithuania. Nevertheless, the Seimas failed to adopt mechanisms to ensure that the Lithuanian government could control these cross-national operations. In Case No.23/08, the LCC demanded that the Seimas revise the Law on International Operations. In response, the Seimas required that military units of the CIS countries only participate in events to ensure the security of Lithuania, and that the Lithuanian government must maintain full control over these operations.[55] In other words, the new amendment required the government to explicitly state its national security grounds for directing operations participated by military units of the CIS countries. Case No.23/08 thus successfully integrated

[54] *Supra* note 31.

[55] *See* my discussion in Chapter 5.

national security considerations into the government's lawmaking and enforcement of cross-national operations.

Second, concerning the number of qualified individuals, South Korea, Taiwan, and Lithuania adopted national security policies that directly or indirectly prohibited individuals from participating in military forces. In response, the constitutional courts invalidated these regulations by recognizing the need for national security. For instance, Article 3 of the Law on National Conscription exempted priests of traditional religious organizations from fulfilling military obligations. In Case No. 10/2016, the LCC invalidated this Article on the ground that it discriminated against different categories of priests and violated Article 131 of the Constitution regarding citizens' military obligations on national security grounds.[56] Similarly, South Korea's Article 5 of the Military Service Act criminalized conscientious objectors, subjecting them to imprisonment for a duration of up to several years instead of allowing for the provision of alternative public services which could contribute to national security. In the case of 2011 Hun-Ba 379, the KCC recognized the national security benefits of alternative military services. Rather than imprisoning conscientious objectors for long periods of time, requiring conscientious objectors to serve alternative services can allocate human resources more efficiently.[57]

J.Y. Interpretation No. 715 (2013) also demonstrated how the TCC has emphasized the importance of national security justifications for protecting the constitutional rights of citizens.[58] J.Y. Interpretation No. 715 invalidated a recruitment guideline of the Ministry of Defense, which prohibited individuals with a criminal record from registering for the examinations of the reserve

[56] *Supra* note 16. *See* my discussion in Chapter 5.

[57] *Supra* note 1.

[58] J.Y. Interpretation No. 715 (made on December 20, 2013).

military forces or reserve military non-commissioned officers. The guideline prohibited individuals with any criminal conviction from registering for an examination, regardless of whether the conviction arose from intentional criminal offenses or a negligent one, whether the individual committed repeated crimes, or whether it was an occasional occurrence with minor consequences of minor offenses.

The TCC declared the guideline in violation of the constitutional right of individuals to serve in public offices under Article 18 of the Constitution.[59] The Ministry of Defense failed to differentiate the impact of various crime convictions on the quality of an applicant and their eligibility for registering for an examination. Consequently, blanket restrictions on the rights of all individuals with a criminal record constituted an excessive limitation on individuals' constitutional right to serve in the armed forces, while undermining the state's military strength.

By invalidating this guideline, the TCC prompted the Ministry of Defense to update its examination rules to safeguard constitutional rights while also enhancing national security. Following J.Y. Interpretation No. 715, the Ministry of Defense amended the eligibility for citizens to register for an examination. Individuals whose sentences are no more than six months—meaning that they may be commuted to a fine at a daily rate of New Taiwan Dollars one thousand, two thousand, or three thousand—are eligible to register for the examination.

In these decisions, the constitutional courts have emphasized that national security justifications and constitutional rights protections are normatively compatible. In other words, they have rejected the oversimplification that national security is always in tension with civil liberties.

[59] *Id.*

Certainly, the courts have invalidated these regulations primarily because they violated individuals' constitutional rights (i.e., the right to serve in public offices [Taiwan], freedom of conscientiousness [South Korea], and equal protections [Lithuania]). Nevertheless, the courts have also invoked national security considerations to strengthen their constitutional reasoning. Perhaps the most interesting case is J.Y. Interpretation No. 715, given that the right to serve public offices intuitively entails considerations about enhancing the quality of public administration. Accordingly, failing to distinguish the implications of various criminal charges for an individual's eligibility to register for an exam not only violated the right to serve public offices, but overlooked national security.

3.4. Synthesis: National Security and State-building

The Constitutional Courts of South Korea, Taiwan, and Lithuania have facilitated the state-building process of their respective jurisdictions. State-building is a multidimensional mission within ontologically contested democracies due to their intricate political, social, and economic circumstances.[60] The contested nature of these jurisdictions' national status makes national security governance an essentially complicated issue: national security governance requires a set of rules and mechanisms to determine the official (or non-official) entities that are authorized to determine national security issues. Furthermore, constitutional institutions have to define and preserve the core interests of the state, which include not only physical security, but also ideologies and principles that are frequently considered part of a given country's national identities. In other words, strengthening state power in front of security threats is not the only consideration for

[60] SAMUEL ISSACHAROFF, FRAGILE DEMOCRACIES: CONTESTED POWER IN THE ERA OF CONSTITUTIONAL COURTS 2 (2015).

building a rigorous national security system. Although a deferential court possibly reduces policy errors or maintains the majority rule of national security policies, it is unlikely to accommodate various constitutional goals regarding national security governance in ontologically contested democracies.

In this regard, the three constitutional courts have integrated intricate considerations necessary for national security governance in an environment surrounded by nuanced international and domestic dynamics. The Constitutional Courts of South Korea, Taiwan, and Lithuania have identified foundational principles of constitutional democracy as the normative guidelines for crafting and enforcing national security policies. For example, these national courts have provided remedies for the government's abuse of national security power. In addition, the constitutional courts have encouraged state institutions to reform national security practices in alignment with constitutional requirements. Furthermore, the constitutional courts have mediated conflicts arising from the struggles of political elites to seek consensus on the use of national security powers in addition to the ideological bases of national security laws. Finally, the three constitutional courts have strengthened the doctrinal relevance of national security in their respective legal systems by requiring their governments to consider national security policies in a more prudential manner. As the case studies have shown, by carefully exercising oversight, courts can foster a constitutional rule that is compatible, or even facilitative of, security-related imperatives.

4. Research Contributions, Limitations, and Future Research Directions

In this dissertation, I have argued that the Constitutional Courts of South Korea, Taiwan, and Lithuania have exercised oversight and facilitated national security governance for three reasons: (1) judicial capacity: the three constitutional courts are familiar with and thus capable of

deciding on particular national security disputes; (2) political schism: political elites in the three jurisdictions have deep disagreements on the nature and bounds of national security power; and (3) judicial reputation: the three constitutional courts are motivated to enlarge their institutional authority in the democratic space. These conditions not only help us better understand the practices of national security adjudication in South Korea, Taiwan, and Lithuania, but each also contributes theoretically to further understanding the general logic of national security law.

Before I conclude this chapter, I wish to illuminate the theoretical contributions that this dissertation can offer to our understanding of national security law and judicial politics, which have not been fully accounted for by scholars of national security exceptionalism. In addition, I identify some questions relevant to these theoretical points but that have been underexplored in this dissertation. In doing so, I lay a foundation for further exploring the nature of national security law and its nuanced applications in diverse contexts in the future.

4.1. The Heterogeneous Nature of National Security Affairs

The first condition for the three constitutional courts' exercise of oversight is judicial capacity. As I explored in this chapter, courts have two categories of expertise related to civil liberties protections and military affairs. With their expertise in civil liberties protections, courts can exercise oversight of national security policies when national security risks are less prevalent. With their expertise in military affairs, judges can invalidate or narrowly construct the substance of regulations related to mandatory military services and fundamental reforms in military institutions. Different categories of expertise help courts wield their power in national security matters.

The theoretical contribution of this finding lies in the heterogeneous nature of national security affairs. Certainly, proponents of NSE typically emphasize the necessity of judicial deference in prioritizing policy accuracy in cases involving secrecy and confidential measures, especially those in response to urgent national security risks.[61] However, the ability of courts to exercise oversight based on their expertise in civil liberties suggests that national security policies do not always involve secrecy and confidential measures that dissuade courts from exercising oversight. In fact, many national security disputes addressed by the KCC, TCC, and LCC are similar to disputes of other public law in the sense that no confidential information is involved, and no fast-moving threats such as terrorism or foreign attacks necessitate the government's shift and uniform responses. For example, in immigration disputes, national security considerations have been factored into the context against which the government screened and determined whether an applicant was eligible to enter the country. Accordingly, national security considerations are integrated into the ordinary framework of state power and institutions. The assumption of informational asymmetries is not applicable in cases that do not involve issues of confidentiality, flexible handling, and rapid response.

Recognizing the heterogeneous nature of national security affairs, scholars can further explore whether courts exhibit different patterns of behavior in various categories of national security affairs due to their varying levels of complexity. In this dissertation, I have developed an eight-part framework categorizing national security affairs based on two dimensions: (1) the sphere of influence, including military, citizenry, economy, and democratic government-based issues, and (2) the inward-looking and outward-looking agendas of national security policies.

[61] ERIC A. POSNER & ADRIAN VERMEULE, THE EXECUTIVE UNBOUND: AFTER THE MADISONIAN REPUBLIC 5-6 (2011).

However, I have not closely compared or explained the judicial behavior of the three constitutional courts in each category of national security affairs. One reason for my hesitation in conducting this research is the limited number of cases in each category, which likely undermines the interpretability of the results. Recognizing the limits, I have instead focused on unpacking the legal and political nuances involved in a small set of national security disputes to emphasize the complicated relationship between courts and politics in the realm of national security.

The eight-part research framework offers the potential for conducting large-N studies in the future. Expanding the database of court cases and examining how courts behave in different categories of national security affairs seems plausible. For instance, a researcher could study constitutional court decisions from more jurisdictions to provide a cross-national understanding of the general nature of national security affairs. Moreover, they could analyze the behavior of more courts within a single jurisdiction rather than focusing solely on constitutional courts. Constitutional courts typically handle only the most high-profile or constitutionally salient cases, and thus, concentrating solely on constitutional decisions, as I have done in this dissertation, fails to capture the more routine national security concerns affecting the daily lives of ordinary individuals. Further analysis of the daily practices of district courts could contribute to scholars' nuanced understanding of national security and judicial behavior on the ground.

In addition, scholars may consider analyzing the judicial behavior of all disputes reviewed by the court rather than focusing solely on cases that courts have accepted to review, as was the case in this dissertation. In Chapter 1, I acknowledged that my research design, focusing only on cases accepted for review by constitutional courts, was due to the lack of data rather than personal oversight. Future researchers may avoid this issue by examining jurisdictions where they can

access a comprehensive body of court decisions. This approach would likely yield a significant number of court decisions, enabling scholars to compare judicial behavior in different categories of national security law more effectively.

4.2. Political Competition and National Security Politics

The second element contributing to the exercise of oversight by the three constitutional courts is political schism. In ontologically contested democracies, political elites frequently disagree on two main points: (1) the ideological foundation of the state, such as its core interests and relationship with other states, and (2) the extent of national security powers held by governmental departments. These two forms of disagreement are closely interconnected as political elites' perceptions of national security powers are influenced by their views on the ideological foundation of the state. Moreover, reconciling ideological differences among political elites is challenging, particularly when the geopolitical structures of their respective countries provide opportunities for supporting divergent understandings of their national boundaries. Thus, as long as these geopolitical premises remain unchanged, political schisms are likely to persist. In response, constitutional courts must carefully navigate politically discharged disputes. The approaches adopted by the three constitutional courts reflect how they cautiously delineate the bounds of national security powers while refraining from intervening in discussions regarding the ontological foundation of their jurisdictions.

My case studies of the three constitutional courts highlight how courts respond to deeply irreconcilable political elites in ontologically contested democracies. These case studies underscore a significant limitation of NSE, which overlooks the influence of diverse forms and patterns of political competition on judicial behavior. The interaction among various political

actors alters the dynamic between courts and elected representatives. Scholars of NSE typically assume that courts confront a unified body of elected representatives. In other words, they posit only two actors in the scenario: courts and a singular body of elected representatives, with the latter—a cohesive entity with political consensus—significantly stronger than the former. As inherently vulnerable institutions, courts possess limited tools to shield themselves from a potential backlash from the unified body of representatives.[62] Thus, courts are likely to exercise judicial deference to protect themselves from potential attacks.

Nevertheless, if the political body is deeply divided or fragmented in ontologically contested democracies, elected representatives find it difficult to produce a resolution through ordinary negotiation or compromise. As such, the courts face political actors with irreconcilable understandings of the state, not a singular political majority with a rough consensus. Moreover, the extremely high costs for various political actors to agree on a national security policy also prevent them from coordinating an attack on the courts. Thus, courts have more flexibility to navigate between individual political actors than they have in the face of a cohesive body of elected representatives. Accordingly, courts can exercise oversight rather than passively deferring to decisions made by the elected branches of government.

Recognizing the influence of various patterns of political competition on judicial behavior within the realm of national security, the subsequent inquiry pertains to the factors shaping these patterns of political competition. In this dissertation, I have directed my focus to the difficulties associated with political elites' efforts to forge a unified body of political consensus on national security issues in ontologically contested democracies. Beyond geopolitical settings, I have yet to

[62] *See* generally GERALD ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? 65 (1991).

undertake a critical examination of the distinct patterns of judicial politics during national security crises across the three jurisdictions. By exploring whether and how the judiciary operates differently during times of crisis, we can deepen our comprehension of the interplay between judicial behavior and political dynamics within differing national security contexts.

Future research might also expand upon existing studies on national security crises by broadening their geographical scope. While the current literature predominantly focuses on major democracies such as the United States, Canada, and European countries, it has demonstrated that political parties and constituents tend to exhibit less division on national security issues during times of terrorist crises compared to ordinary times. However, it is crucial to recognize that terrorism represents only one aspect of national security.[63] Other categories of crises may also shape judicial behavior in response to the unique dynamics of political elites. How do courts navigate the boundaries and functions of judicial power amid national security crises of different kinds? Do they adopt distinct patterns of judicial behavior during periods of national security crises? By addressing these inquiries through a comparative approach, we can expand and enrich our understanding of judicial politics within the context of national security beyond the scope of major democracies.

4.3. Judicial Reputation, Public Opinion, and Civil Society Organizations

The third factor is judicial reputation. In this dissertation, I have posited that the motives of the three constitutional courts to uphold institutional reputation align with the activities of civil society organizations to identify human rights violations, raise public awareness of governmental

[63] David Dyzenhaus, *Introduction* in CIVIL RIGHTS AND SECURITY xi (David Dyzenhaus eds. 2008).

misconducts, and effectuate legal reforms. In response to the actions of civil society, constitutional courts engage in oversight of national security policies to bolster their institutional reputation as guardians of constitutions.

My case studies illustrate the intricate dynamics among constitutional courts, public opinion, and civil society organizations, which are not adequately addressed by scholars of NSE. Scholars of NSE typically presume that public opinion tends to align with the government's robust responses to national security threats; however, they fail to recognize the diverse strands of public opinion that may endorse alternative forms of governmental actions. Civil society organizations advocating for less coercive governmental measures may pursue legal avenues or grassroots advocacy to effectuate change. By elevating the visibility of national security issues and their libertarian externalities in the public sphere, these organizations afford constitutional courts opportunities to bolster their reputation among domestic audiences by exercising oversight.

Acknowledging the interplay among courts, public opinions, and civil society organizations, future researchers can explore the factors influencing the motives of constitutional courts to enhance institutional reputation within the realm of national security law. For instance, scholars could investigate whether constitutional courts established following democratic transitions exhibit greater motivation to oversee governmental actions. Notably, the three constitutional courts I examined in this dissertation were established following democratic transitions within their respective governments. It is plausible that these constitutional courts engage in oversight to reinforce their reputation in response to the public's demand for constitutional safeguards and democratic governance post-democratization.

Democratization can impact not only judicial reputation but also judicial capacity and political schism, the other two factors contributing to judicial oversight of national security policy. In this dissertation, I have examined the three constitutional courts' understanding of fundamental reforms in military institutions to underscore judges' familiarity with national security affairs. I found that the governments of South Korea, Taiwan, and Lithuania implemented reforms in military institutions following their transitions to democracy. Accordingly, it would be useful to examine how the processes of democratization enable courts to develop a nuanced understanding of the balance between national security, the rule of law, and constitutional protections when addressing issues regarding post-transition military reforms.

Moreover, democratization allows political elites with different understandings of national security authority to engage in political competition, enabling courts to confront more than one political actor in the political sphere. Accordingly, it might be worthwhile to compare judicial behavior before and after democratization through the perspective of political competition to discuss how courts mediate political conflicts in the realm of national security. These are among the questions that I have not fully addressed in this project, and I hope that future studies will continue the discourse on the interplay among courts, national security, and politics.

Appendix 1: The Constitutional Courts of South Korea, Taiwan, and Lithuania's Decisions on National Security Law (1987-2023)

Data has been collected until October 2023.

1. The Constitutional Court of South Korea (27/44=61.36%)

* indirect involvement

Case Number	Date	Category	Issues	Petitioners	Disputed Statute/provision	Results
2020 Hun-Ma 1724	Sep 26, 2023	outward; democracy	restriction on the distribution of leaflets to North Korea	individuals	Development of Inter-Korean Relations Act	unconstitutional
2019 Hun-Ma 423	Sep 26, 2023	inward; military	mandatory military services	individuals	Military Service Act	constitutional
2017 Hun-Ba 42	Sep 26, 2023	inward; democracy	NSL article 7	individuals, courts	National Security Law	constitutional
2019 Hun-Ma 941	Nov 24, 2022	inward; military	compelled attendance at religious ceremonies in the Korean army training center	individuals	Framework Act on Military Status and Service	upheld (unconstitutionality confirmed)
2016 Hun-Ma 388	July 21, 2022	inward; democracy	use of communication data by investigative agencies	individuals	Telecommunications Business Act	dismissed, nonconforming to the constitution

2016 Hun-Ma 364	Jan 27, 2022	outward; economy	suspension of the Kaesong Industrial Complex	individuals	Article 66 of the Constitution; the Inter-Korean Exchange and Cooperation Act	dismissed, rejected
2018 Hun-Ma 1162 et al	Jan 27, 2022	inward; democracy	disclosure of the intelligence committee (national assembly)'s meetings	individuals	National Assembly Act	dismissed, unconstitutional
2020 Hun-Ma 395	Dec 23, 2021	outward; economy	welfare of foreign workers	individuals	The Act on the Employment etc. of Foreign Workers	dismissed, rejected
2016 Hun-Ma 889	Sep 24, 2020	inward; citizenship	requirements for nationality renouncement	individuals	Nationality Act	nonconforming, rejected
2018 Hun-Ka 14	Nov 4, 2019	inward; economy	sale of military uniforms	courts	The Act on the Control of Military Uniforms and Accouterments	constitutional
2016 Hun-Ma 263	Oct 30, 2018	inward; democracy	interception of online data	individuals	The Protection of Communications Secrets Act	dismissed, nonconforming to the constitution
2011 Hun-Ba 379 et al	Jun 28, 2018	inward; military	conscientious objectors	courts	Military Service Act	constitutional; nonconforming to the constitution
2012 Hun-Ma 538	Jun 28, 2018	inward; democracy	collection of data	individuals	The Protection of Communications Secrets Act	dismissed, nonconforming to

						the constitution, rejected
2014 Hun-Ma 346	May 31, 2018	outward; citizenship	habeas corpus claims of foreigners	individuals	Immigration Act	upheld (unconstitutionality confirmed)
2016 Hun-Ba 361	Mar 29, 2018	inward; democracy	articles 7 & 14	individuals	National Security Law	constitutional
2016 Hun-Ma 780	Feb 22, 2018	inward; democracy (?)	security screening of airline passengers	individuals	The "National Aviation Security" Plan	rejected
2012 Hun-Ba 95	Apr 30, 2015	inward; democracy	article 7	individuals	National Security Law	constitutional
2013 Hun-Da 1	Dec 19, 2014	inward; democracy	dissolution of the unified progressive party	ministry of justice	Article 8 of the Constitution, National Security Law	upheld (dissolved)
2012 Hun-Ba 325	Sep 25, 2014	inward; democracy	removal of online posts	individuals	Act on Promotion of Information and Communications Network Utilization and Information Protection	constitutional
2009 Hun-Ma 256 et al	Jul 24, 2014	inward; citizenship	voting rights of overseas electors	individuals	The Referendum Act	dismissed, nonconforming to the constitution, rejected
2010 Hun-Ka 2	Mar 27, 2014	inward; democracy	restrictions on nighttime demonstration	individuals	The Assembly and Demonstration Act	conditionally unconstitutional

2012 Hun-Ba 192	Mar 27, 2014	outward; citizenship	social welfare of North Korean refugees	individuals	The North Korean Refugees Protection and Settlement Support Act	constitutional
2011 Hun-Ka 5*	Dec 27, 2012	inward; democracy	due process of law for persons investigated and tried under the NSL	individuals	Provisional Act on Special Cases concerning Arrest and Others	unconstitutional
2007 Hun-Ma 1083 et al	Sep 29, 2011	outward; economy	foreign workers	individuals	The Act on the Employment etc. of Foreign Workers	rejected
2007 Hun-Ka 12 et al	Aug 30, 2011	inward; military	conscientious objectors	courts	The Establishment of Homeland Reserve Forces Act	constitutional
2008 Hun-Ka 22 et al	Aug 30, 2011	inward; military	conscientious objectors	courts	Military Service Act	constitutional
2009 Hun-Ba 42	Aug 30, 2011	inward; democracy	disclosure of private conversation	a legislative member (in the capacity of a private individual)	The Protection of Communications Secrets Act	constitutional
2009 Hun-Ka 30	Dec 28, 2010	inward; democracy	measures on communicative data	courts	The Protection of Communications Secrets Act	nonconforming to the constitution
2006 Hun-Ma 328	Nov 25, 2010	inward; military	male-based military service requirements	individuals	Military Service Act	dismissed, rejected

2009 Hun-Ma 257*	Jun 24, 2010	inward; democracy	due process of law for persons investigated and tried under the NSL	individuals	Criminal Procedural Act	upheld (unconstitutionality confirmed)
2008 Hun-Ka 25	Sep 24, 2009	inward; democracy	restriction on nighttime outdoor assembly	individuals	The Assembly and Demonstration Act	nonconforming to the constitution
2004 Hun-Ma 644	Jun 28, 2007	inward; citizenship	voting rights of overseas electors	individuals	The Referendum Act	nonconforming to the constitution
2005 Hun-Ma 1139	May 31, 2007	inward; military	disclosure of military health records of public officials	individuals	Act on Reporting and Disclosure of Military Service Records of Public Service Personnel and Others	dismissed, nonconforming to the constitution
2004 Hun-Ma 49*	May 26, 2005	inward; democracy	use of restraints on inmates imprisoned for violating the NSL	individuals	Code of Conduct for Police Officers	unconstitutional, upheld (unconstitutionality confirmed)
2002 Hun-Ka 1	Aug 26, 2004	inward; military	conscientious objectors	courts	Military Service Act	constitutional
2002 Hun-Ma 193	Nov 27, 2003	inward; military	rights of detainees to see visitors	individuals	Military Court Act	unconstitutional
2000 Hun-Ba 67	Oct 30, 2003	inward; democracy	assembly in front of diplomatic institutions	individuals	The Assembly and Demonstration Act	unconstitutional
99 Hun-Ma 480	Jun 27, 2022	inward; democracy	removal of online comments	individuals	Telecommunications Business Act	dismissed, unconstitutional

98 Hun-Ma 425 et al	Apr 25, 2002	inward; democracy	requirements for parole review based on the NSL	individuals	The Act on Parole Review	rejected
99 Hun-Ma 494	Nov 29, 2001	inward; citizenship	social benefits of ethnic Koreans living abroad	individuals	The Act on the Immigration and Legal Status of Overseas Koreans	nonconforming to the constitution
98 Hun-Ba79	Apr 26, 2001	inward; democracy	judicial remedy for victims of security surveillance	individuals	Security Surveillance Act	constitutional, dismissed, unconstitutional
94 Hun-Ma 60*	Nov 27, 1997	inward; democracy	NSL defendants' access to criminal records	individuals	Criminal Procedural Act	upheld (unconstitutionality confirmed)
89 Hun-Ka 104	Feb 25, 1992	inward; military	military secrets	courts	Military Secrets Protection Act	conditionally constitutional
89 Hun-Ka 113	Apr 2, 1990	inward; democracy	article 7	individuals	National Security Law	conditionally constitutional

2. The Constitutional Court of Taiwan (15/19=78.95%)

Case Number	Date	Category	Issues	Petitioners	Disputed Statute/provision	Results
J.Y. Interpretation No. 718	Mar 21, 2014	inward; democracy	incidental assemblies and demonstrations	courts	Assembly and Parade Act	unconstitutional
J.Y. Interpretation No. 715	Dec 20, 2013	inward; military	exam requirements	individuals	The Act on Military Service System; Punishment Act for	unconstitutional

					Violation to Military Service System	
J.Y. Interpretation No. 710	Jul 5, 2013	outward; citizenship	restrictions on Chinese people's entry of Taiwan	individuals	The Act governing Relations between the People of the Taiwan Area and the Mainland Area	unconstitutional
J.Y. Interpretation No. 708	Feb 6, 2013	outward; citizenship	restrictions on foreigners' entry of Taiwan	individuals	Immigration Act	unconstitutional
J.Y. Interpretation No. 644	Jun 20, 2008	inward; democracy	prior constraint on the basis of secession and advocacy of communism	individuals	Civil Associations Act	unconstitutional
J.Y. Interpretation No. 631	Jul 20, 2007	inward; democracy	ex ante warrants of surveillance powers	individuals	The Communication Security and Surveillance Act	unconstitutional
J.Y. Interpretation No. 618	Nov 3, 2006	outward; citizenship	restrictions on mainlanders' participation in politics	courts	The Act governing Relations between the People of the Taiwan Area and the Mainland Area	constitutional
J.Y. Interpretation No. 558	Apr 18, 2003	inward; citizenship	prohibition of citizens' entry of Taiwan	individuals	National Security Act	unconstitutional
J.Y. Interpretation No. 529	Jul 13, 2001	inward; military	exemption for military services	individuals	The Act on Military Service System	unconstitutional
J.Y. Interpretation No. 517	Nov 10, 2000	inward; military	requirements for reservists	courts	The Act on Military Service System; Punishment Act for	constitutional

					Violation to Military Service System	
J.Y. Interpretation No. 490	Oct 1, 1999	inward; military	conscientious objectors	individuals	The Act on Military Service System; Punishment Act for Violation to Military Service System	constitutional
J.Y. Interpretation No. 461	Jul 24, 1998	inward; democracy	obligations of the chief of general to be inquired in the Legislative Yuan	legislative members	Article 3 of the Additional Articles of the Constitution	clarification of legal meanings
J.Y. Interpretation No. 459	Jun 26, 1998	inward; military	conditions for conscriptions	individuals	Judicial Yuan Interpretation Yuan-Tze No. 1850	unconstitutional
J.Y. Interpretation No. 454	May 22, 1998	inward; citizenship	entry of Chinese people in Taiwan	individuals	National Security Act	unconstitutional
J.Y. Interpretation No. 445	Jan 23, 1998	inward; democracy	prior constraint on the basis of secession and advocacy of communism	individuals	Assembly and Parade Act	unconstitutional
J.Y. Interpretation No. 443	Dec 26, 1997	inward; military	regulations for exit of draftees	individuals	The Act on Military Service System; Punishment Act for Violation to Military Service System	unconstitutional
J.Y. Interpretation No.436	Oct 3, 1997	inward; military	due process of military trials	legislative members	The Act on Military Trials	unconstitutional
J.Y. Interpretation No.342	Apr 8, 1994	inward; democracy	organizations of national security bureaus	legislative members	Article 62 of the Constitution	clarification of legal meanings

J.Y. Interpretation No.265	Oct 5, 1990	outward; citizenship	restrictions on mainlanders' entry of Taiwan	individuals	The National Security Law for the Period of National Mobilization	constitutional

3. The Constitutional Court of Lithuania (17/30=56.67%)

Case Number	Date	Category	Issues	Petitioners	Disputed Statute/provision	Results
Case No. 10-A/2022	June 7, 2023	outward; citizenship	temporary accommodation of migrants	individuals	Law on the Legal Status of Foreigners	unconstitutional
Case No. 19-A/2021	Sep 22, 2022	inward; economy	deprivation of remedies certain for objects entailing national security interests	individuals	Law on Companies and Equipment of Strategic Significance for National Security and Other Companies Important for Ensuring National Security	constitutional
Case No. 16/2009	Sep 24, 2009	inward; military	reorganization of the armed forces	legislative members	Article 67 of the Constitution	constitutional
Case No. 13/2013-34/2014	Oct 29, 2015	inward; economy	public interests of the electricity industries	courts	Law on Electricity	constitutional
Case No. 30/03	Dec 21, 2006	inward; democracy	national broadcasters	legislative members	Law on Information to the Public	constitutional

Case No. 2-A/2020-3-A/2020	Mar 4, 2021	outward; economy	criminal prosecution of foreign investors violating provisions of criminal codes on national security grounds	individuals	Law on Companies and Equipment of Strategic Significance for National Security and Other Companies Important for Ensuring National Security	constitutional
Case No. 17/2018	Jun 12, 2020	inward; democracy	investigative power of a commission of the Seimas	legislative members	Article 67	unconstitutional
Case No. 11/2017-5/2018	Apr 18, 2019	inward; democracy	use of criminal intelligence data	courts	Law on Criminal Intelligence	constitutional
Case No. 12/2017	Dec 22, 2017	inward; democracy	impeachment	legislative members	Articles 77, 82 of the Constitution	upheld (grossly violated the constitution)
Case No. 10/2016	July 4, 2017	inward; military	different exemption conditions for different types of priests	courts	Law on National Conscription	unconstitutional
Case No. 2/2014	Nov 4, 2015	inward; military	full-time requirements of military service people	legislative members	Law on the Organisation of The National Defense System and Military Service	constitutional

Case No. 23/2012-38/2014-54/2014	Apr 3, 2015	inward; economy	implementation of the natural gas projects	legislative members	Act on the Construction of Liquefied Natural Gas Terminal	constitutional
Case No. 44/2010	Dec 10, 2012	inward; military	judicial review of military affairs	courts	Law on the Organisation of the National Defense System and Military Service	unconstitutional
Case No. 22/2008-31/2008-9/2010-35/2010	Jul 7, 2011	inward; military	state secrets	courts	Law on State Secrets and Official Secrets	partially unconstitutional
Case No. 23/08	Mar 15, 2011	outward; military	international operations	legislative members	Law on International Operations, Exercises and Other Events of Military Co-operation	partially unconstitutional
Case No. 19/2008-25/2009	Feb 26, 2010	inward; military	privatization of public companies	legislative members	Law on Companies and Equipment of Strategic Significance for National Security and Other Companies Important for Ensuring National Security	constitutional
Case No. 28/08	Mar 2, 2009	inward; economy	establishment of a nuclear power plant	legislative members	The Atomic Electricity Law	partially unconstitutional

Case No. 05/07	May 20, 2008	inward; military	allocation of lands for military uses	courts	Law on the Procedure and Conditions of the Restoration of the Rights of Ownership of Citizens To the Existing Real Property	constitutional
Case No. 7/04-8/04	May 15, 2007	inward; military	state secrets	courts	Law on State Secrets and Official Secrets	constitutional
Case No. 20/02	Dec 12, 2005	inward; economy	privatization of public companies	courts	Law on the Reorganisation of the Joint-stock Companies "Būtingės nafta", "Mažeikių nafta" and "Naftotiekis"	unconstitutional
Case No. 43/03-46/03	May 13, 2004	inward; democracy	legislative power over national security matters	legislative members	Law on Seimas Provisional Investigation Commissions	constitutional
Case No. 14/04	Mar 31, 2004	inward; democracy	impeachment	legislative members	Articles 77 & 82 of the Constitution	upheld (grossly violated the constitution)
Case No. 40/03	Dec 30, 2003	outward; citizenship	presidential power on immigration matters	legislative members	Law on Citizenship	unconstitutional
Case No. 36/2000	Oct 23, 2002	inward; democracy	private communications	legislative members	Law on Information to the Public	partially unconstitutional

Case No. 34/2000-28/01	Sep 19, 2002	inward; democracy	use of information	legislative members	The Law on Telecommunications, the Law on Operational Activities, and the Code of Criminal Procedure	unconstitutional
Case No. 29/98-16/99-3/2000	Oct 18, 2000	inward; economy	reorganization of public enterprises	legislative members	The Law on the Reorganisation of the Joint-stock Companies "Būtingės nafta", "Mažeikių nafta" and "Naftotiekis"	partially unconstitutional
Case No. 12/99-27/99-29/99-1/2000-2/2000	May 8, 2000	outward; military	operational activities	courts	The Law on Operational Activities	partially unconstitutional
Case No. 11/99	Jan 7, 2000	inward; democracy	conditions for public conditions	courts	The Meeting Law	constitutional
Case No. 24/98	Mar 4, 1999	inward; democracy	employment of former members of the USSR state security entities in public offices	legislative members	Law on the Assessment of the USSR State Security Committee (NKVD, NKGB, MGB, KGB) and the Current Activities of the Staff Members of this Organisation	partially unconstitutional
Case No. 3/96	Dec 19, 1996	inward; military	state secrets	courts	The Law on State Secrets and Their Protection	partially unconstitutional

Appendix 2: The Constitutional Courts of South Korea, Taiwan, and Lithuania's Decisions on Election Law (1990-2023)

Data has been collected until October 2023.

1. The Constitutional Court of South Korea (44/94 =46.81%)

Case Number	Date	Results
2020 Hun-Ma 1729	Mar 31, 2022	dismissed, rejected
2020 Hun-Ma 895	Jan 27, 2022	nonconforming to the constitution
2018 Hun-Ma 1168	May 27, 2021	dismissed, unconstitutional
2018 Hun-Ma 456	Jan 28, 2021	unconstitutional
2017 Hun-Ma 813	Aug 28, 2020	dismissed, rejected
2017 Hun-Ma 867	May 27, 2020	dismissed, rejected
2019 Hun-Ra 6	May 27, 2020	rejected
2018 Hun-Ma 551	Apr 23, 2020	dismissed, rejected, unconstitutional
2016 Hun-Ma 1071	Feb 27, 2020	upheld (decision nullified)
2018 Hun-Ma 730	Dec 27, 2019	nonconforming to the constitution
2018 Hun-Ma 301	Dec 27, 2019	nonconforming to the constitution
2018 Hun-Ma 222	Nov 28, 2019	dismissed, rejected
2016 Hun-Ma 90	Nov 28, 2019	dismissed, unconstitutional
2018 Hun-Ka 12	May 30, 2019	unconstitutional
2018 Hun-Ma 221	Apr 11, 2019	rejected, unconstitutional
2014 Hun-Ma 189	Jun 28, 2018	rejected
2016 Hun-Ma 292	May 25, 2017	rejected
2016 Hun-Na 1	Mar 10, 2017	upheld (removed from office)
2015 Hun-Ma 509	Dec 29, 2016	nonconforming to the constitution, rejected
2013 Hun-Ka 1	Jun 30, 2016	unconstitutional
2013 Hun-Ba 168	Dec 23, 2015	nonconforming to the constitution
2013 Hun-Ka 8	Jul 30, 2015	unconstitutional
2011 Hun-Ba 163	Apr 30, 2015	constitutional
2013 Hun-Da 1	Dec 19, 2014	upheld (dissolved)
2012 Hun-Ma 190	Oct 30, 2014	nonconforming to the constitution

2013 Hun-Ba 208	Sep 25, 2014	nonconforming to the constitution
2009 Hun-Ma 256	Jul 24, 2014	dismissed, nonconforming to the constitution, rejected
2012 Hun-Ma 913	May 29, 2014	rejected
2012 Hun-Ma 287	Apr 24, 2014	dismissed, rejected
2011 Hun-Ba 17	Apr 24, 2014	constitutional
2011 Hun-Ma 567	Apr 24, 2014	rejected
2011 Hun-Ba 42	Mar 27, 2014	constitutional
2013 Hun-Ba 106	Feb 27, 2014	constitutional
2014 Hun-Ma 7	Feb 27, 2014	rejected
2012 Hun-Ma 431	Jan 28, 2014	constitutional
2012 Hun-Ma 409	Jan 28, 2014	nonconforming to the constitution, unconstitutional
2011 Hun-Ma 267	Nov 28, 2013	dismissed, unconstitutional
2012 Hun-Ma 815	Jul 25, 2013	rejected
2012 Hun-Ma 174	Jul 25, 2013	rejected
2012 Hun-Ba47	Dec 27, 2012	constitutional, dismissed
2010 Hun-Ma 601	Feb 23, 2012	dismissed, nonconforming to the constitution, rejected
2007 Hun-Ma 1001	Dec 29, 2011	conditionally unconstitutional
2010 Hun-Ma 68	Sep 29, 2011	rejected
2010 Hun-Ma 451	May 26, 2011	rejected
2010 Hun-Ba 232	Apr 28, 2011	constitutional
2010 Hun-Ma 474	Apr 28, 2011	rejected
2008 Hun-Ba 89	Dec 28, 2010	constitutional
2010 Hun-Ma 418	Sep 2, 2010	nonconforming to the constitution
2008 Hun-Ba 169	Jun 24, 2010	constitutional
2008 Hun-Ma 491	May 27, 2010	dismissed, rejected
2009 Hun-Ma 170	Mar 25, 2010	rejected
2008 Hun-Ma 324	Feb 25, 2010	dismissed, rejected
2007 Hun-Ma 1412	Dec 29, 2009	unconstitutional
2007 Hun-Ma 1462	Oct 29, 2009	rejected
2007 Hun-Ma 718	Jul 30, 2009	rejected

2007 Hun-Ma 40	Jun 25, 2009	unconstitutional
2008 Hun-Ma 413	Jun 25, 2009	nonconforming to the constitution
2007 Hun-Ba 29	Apr 30, 2009	constitutional
2007 Hun-Ka 22	Mar 26, 2009	nonconforming to the constitution
2007 Hun-Ma 843	Mar 26, 2009	rejected
2006 Hun-Ma 240	Mar 26, 2009	nonconforming to the constitution, rejected
2006 Hun-Ma 626	Feb 26, 2009	dismissed, rejected
2007 Hun-Ma 1024	Nov 27, 2008	nonconforming to the constitution
2006 Hun-Ma 711	Jul 31, 2008	rejected
2005 Hun-Ra 7	Jun 26, 2008	dismissed, rejected
2005 Hun-Ma 506	Jun 26, 2008	unconstitutional
2006 Hun-Ma 1096	May 29, 2008	conditionally unconstitutional
2004 Hun-Ma 41	Jan 17, 2008	dismissed, rejected
2007 Hun-Ma 700	Jan 17, 2008	rejected
2007 Hun-Ma 1468	Jan 10, 2008	rejected, unconstitutional
2004 Hun-Ma 290	Nov 29, 2007	dismissed, upheld (nullified)
2006 Hun-Ma 364	Oct 4, 2007	rejected
2004 Hun-Ma 644	Jun 28, 2007	nonconforming to the constitution
2005 Hun-Ma 1139	May 31, 2007	dismissed, nonconforming to the constitution, rejected
2005 Hun-Ma 985	Mar 29, 2007	nonconforming to the constitution
2004 Hun-Ma 246	Mar 30, 2006	rejected
2005 Hun-Ma 403	Feb 23, 2006	rejected
2004 Hun-Ma 219	Apr 28, 2005	rejected
2004 Hun-Ba 16	Jun 24, 2004	constitutional
2004 Hun-Na 1	May 14, 2004	rejected
2002 Hun-Ma 411	Mar 25, 2004	rejected
2001 Hun-Ma 710	Mar 25, 2004	rejected
2003 Hun-Ma 259	Nov 27, 2003	rejected
2003 Hun-Ma 106	Sep 25, 2003	unconstitutional
2001 Hun-Ka 4	Jan 30, 2003	dismissed, unconstitutional
2000 Hun-Ma 92	Oct 25, 2001	nonconforming to the constitution

2000 Hun-Ma 121	Aug 30, 2001	rejected
2000 Hun-Ma 91	Jul 19, 2001	conditionally unconstitutional
99 Hun-Ra 1	Feb 24, 2000	rejected
98 Hun-Ma 141	Nov 25, 1999	rejected
95 Hun-Ma 154	Nov 25, 1999	dismissed, unconstitutional
98 Hun-Ma 214	May 27,1999	rejected, unconstitutional
97 Hun-Ma 253	Jan 28,1999	dismissed, rejected
93 Hun-K a4	Jul 29,1994	unconstitutional

2. The Constitutional Court of Taiwan (10/18 =55.56%)

Case Number	Date	Results
112 Hsien-Pan-Tze 18	Nov 17, 2023	unconstitutional
112 Hsien-Pan-Tze 11	Jul 18, 2023	constitutional
J.Y. Interpretation No.769	Nov 9, 2018	constitutional
J.Y. Interpretation No.721	Jun 6, 2014	constitutional
J.Y. Interpretation No.645	Jul 11, 2008	partially unconstitutional
J.Y. Interpretation No.553	Dec 20, 2002	clarification of legal meanings
J.Y. Interpretation No.546	May 31, 2002	narrow interpretation of a judicial interpretation
J.Y. Interpretation No.499	Mar 24, 2000	unconstitutional
J.Y. Interpretation No.498	Dec 31, 1999	clarification of legal meanings
J.Y. Interpretation No.481	Apr 16, 1999	constitutional
J.Y. Interpretation No.468	Oct 22, 1998	constitutional
J.Y. Interpretation No.442	Dec 12, 1997	constitutional
J.Y. Interpretation No.401	Apr 26, 1996	clarification of legal meanings
J.Y. Interpretation No.388	Oct 27, 1995	clarification of legal meanings
J.Y. Interpretation No.340	Feb 25, 1994	unconstitutional
J.Y. Interpretation No.331	Dec 30, 1993	constitutional
J.Y. Interpretation No.290	Jan 24, 1992	constitutional
J.Y. Interpretation No.261	Jun 21, 1990	unconstitutional

3. The Constitutional Court of Lithuania (13/23 =56.52%)

Case Number	Date	Results
Case No. 13/2019	Apr 19, 2021	at least a statute deemed unconstitutional
Case No. 10/2015	Oct 20, 2015	at least a statute deemed unconstitutional
Case No. 10/2014	Oct 13, 2014	at least a statute deemed unconstitutional
Case No. 24/2013	May 27, 2014	at least a statute deemed unconstitutional
Case No. 15/2012-16/2012	Nov 10, 2012	at least a statute deemed unconstitutional
Case No. 14/2012	Oct 26, 2012	constitutional
Case No. 8/2012	Sep 5, 2012	at least a statute deemed unconstitutional
Case No. 21/2010-30/2010	Mar 29, 2012	constitutional
Case No. 14/2011-35/2011	Nov 17, 2011	at least a statute deemed unconstitutional
Case No. 136/2010-17/2011-18/2011-19/2011	May 11, 2011	at least a statute deemed unconstitutional
Case No. 26/2009	Nov 9, 2010	at least a statute deemed unconstitutional
Case No. 32/08	Nov 7, 2008	constitutional
Case No. 26/08	Oct 1, 2008	constitutional
Case No. 06/07	Feb 9, 2007	at least a statute deemed unconstitutional
Case No. 23/2003	Jan 19, 2005	at least a statute deemed unconstitutional
Case No. 42/04	Nov 5, 2004	constitutional
Case No. 27/04	May 26, 2004	constitutional
Case No. 24/04	May 25, 2004	at least a statute deemed unconstitutional
Case No. 21/2003	May 30, 2003	at least a statute deemed unconstitutional
Case No. 17/96	Nov 11, 1998	constitutional

Case No. 15/96	Nov 23, 1996	constitutional
Case No. 13/93	Jun 30, 1994	constitutional
Case No. 6	Aug 11, 1993	constitutional

Appendix 3: The Constitutional Courts of South Korea, Taiwan, and Lithuania's Decisions on Education Law (1985-2024)

Data has been collected until February 2024.

1. The Constitutional Court of South Korea (18/47=38.30%)

Case Number	Date	Results
2019 Hun-Ma 941	Nov 24, 2022	upheld (unconstitutionality confirmed)
2020 Hun-Ma 895	Jan 27, 2022	nonconforming to the constitution
2017 Hun-Ma 416	December 23, 2020	others, upheld (unconstitutionality confirmed)
2018 Hun-Ma 551	Apr 23, 2020	dismissed, rejected, unconstitutional
2018 Hun-Ma 222	Nov 28, 2019	dismissed, rejected
2017 Hun-Ma 1038	Jul 25, 2019	rejected (constitutional)
2016 Hun-Ma 754	Jul 25, 2019	dismissed, rejected
2018 Hun-Ma 221	Apr 11, 2019	rejected, unconstitutional
2016 Hun-Ba 217	Dec 27, 2018	constitutional
2015 Hun-Ka 38	Aug 30, 2018	nonconforming to the constitution
2014 Hun-Ma 274	Apr 26, 2018	dismissed, unconstitutional
2012 Hun-Ma 1002	Sep 29, 2016	rejected (constitutional)
2015 Hun-Ma 236	Jul 28, 2016	dismissed, rejected
2015 Hun-Ma 98	Apr 28, 2016	dismissed, unconstitutional
2012 Hun-Ma 940	Nov 26, 2015	unconstitutional
2011 Hun-Ma 769	Jun 25, 2015	unconstitutional
2013 Hun-Ma 671	May 28, 2015	dismissed, rejected
2011 Hun-Ba 32	Aug 28, 2014	constitutional
2012 Hun-Ma 515	May 29, 2014	rejected
2011 Hun-Ma 659	Apr 24, 2014	dismissed, rejected
2007 Hun-Ma 1189	Nov 28, 2013	dismissed, rejected
2012 Hun-Ma 365	Sep 26, 2013	dismissed, rejected
2009 Hun-Ma 514	May 30, 2013	dismissed, rejected
2012 Hun-Ba 47	Dec 27, 2012	constitutional, dismissed
2010 Hun-Ba 220	Aug 23, 2012	dismissed, unconstitutional

2010 Hun-Ba 164	Apr 24, 2012	constitutional
2008 Hun-Ka 2	Jul 30, 2009	constitutional
2006 Hun-Ma 618	May 28, 2009	dismissed, rejected
2005 Hun-Ma 514	Apr 30, 2009	rejected
2008 Hun-Ma 370	Feb 26, 2009	dismissed, rejected
2007 Hun-Ka 9	Sep 25, 2008	constitutional, nonconforming to the constitution
2007 Hun-Ma 1105	May 29, 2008	dismissed, nonconforming to the constitution
2006 Hun-Ba 60	Apr 24, 2008	constitutional
2003 Hun-Ma 947	Apr 26, 2007	dismissed, rejected
2004 Hun-Ba 67	Dec 28, 2006	constitutional
2005 Hun-Ma 11	May 25, 2006	dismissed, rejected
2003 Hun-Ma 282	Jul 21, 2005	dismissed, rejected
2003 Hun-Ka 20	Mar 31, 2005	unconstitutional
2003 Hun-Ka 1	May 27, 2004	nonconforming to the constitution, unconstitutional
2001 Hun-Ma 710	Mar 25, 2004	rejected
2002 Hun-Ma 573	Mar 27, 2003	rejected
2000 Hun-Ba 26	Feb 27, 2003	nonconforming to the constitution
2000 Hun-Ma 278	Nov 29, 2001	dismissed, rejected
99 Hun-Ma 112	Dec 14, 2000	rejected
98 Hun-Ka16	Apr 27, 2000	unconstitutional
99 Hun-Ma 481	Jan 27, 2000	upheld (nullified)
92 Hun-Ma 68	Oct 01, 1992	rejected

2. The Constitutional Court of Taiwan (15/25=60.00%)

Case Number	Date	Results
J.Y. Interpretation No. 784	Oct 25, 2019	partially altered J.Y. Interpretation No. 382
J.Y. Interpretation No. 783	Aug 23, 2019	partially unconstitutional
J.Y. Interpretation No. 717	Feb 19, 2014	constitutional
J.Y. Interpretation No. 707	Dec 28, 2012	unconstitutional
J.Y. Interpretation No. 702	Jul 27, 2012	partially unconstitutional

J.Y. Interpretation No. 692	Nov 4, 2011	unconstitutional
J.Y. Interpretation No. 684	Jan 17, 2011	partially altered J.Y. Interpretation No. 382
J.Y. Interpretation No. 659	May 1, 2009	constitutional
J.Y. Interpretation No. 626	Jun 8, 2007	constitutional
J.Y. Interpretation No. 563	Jul 25, 2004	constitutional
J.Y. Interpretation No. 501	Apr 7, 2000	constitutional
J.Y. Interpretation No. 462	Jul 31, 1998	unconstitutional
J.Y. Interpretation No. 405	Jun 7, 1996	unconstitutional
J.Y. Interpretation No. 382	Jun 23, 1995	unconstitutional
J.Y. Interpretation No. 380	May 26, 1995	unconstitutional
J.Y. Interpretation No. 373	Feb 24, 1995	unconstitutional
J.Y. Interpretation No. 348	May 20, 1994	constitutional
J.Y. Interpretation No. 346	May 6, 1994	constitutional
J.Y. Interpretation No. 333	Jan 14, 1994	constitutional
J.Y. Interpretation No. 308	Nov 13, 1992	constructed the substance of a regulation
J.Y. Interpretation No. 301	Jul 24, 1992	constitutional
J.Y. Interpretation No. 278	May 17, 1991	constructed the substance of a regulation
J.Y. Interpretation No. 258	Apr 6, 1990	constructed the substance of a regulation
J.Y. Interpretation No. 207	Jul 18, 1986	constructed the substance of a regulation
J.Y. Interpretation No. 203	Feb 28, 1986	constitutional

3. The Constitutional Court of Lithuania (11/17=64.71%)

Case Number	Date	Results
Case No. 7/2022	Apr 26, 2023	unconstitutional
Case No. 9/2019	Dec 03, 2020	constitutional
Case No. 11/2018	Oct 31, 2019	unconstitutional
Case No. 12/2018	Sep 19, 2019	partly unconstitutional
Case No. 19/2013	Sep 29, 2015	unconstitutional
Case No. 24/2012	Nov 10, 2014	partly unconstitutional
Case No. 24/2008	Sep 2, 2011	constitutional

Case No. 25/01	Dec 18, 2009	construe meaning
Case No. 28/07-29/07	Oct 28, 2009	construe meaning
Case No. 05/07	May 20, 2008	constitutional
Case No. 28/07-29/07	Mar 20, 2008	partly unconstitutional
Cases Nos. 10/95, 23/98	Dec 6, 2007	interpretation / construe the meaning of provision
Case No. 09/05	May 31, 2006	constitutional
Case No. 49/01	Jul 11, 2002	unconstitutional
Case No. 18/2000	Feb 5, 2002	constitutional
Case No. 23/98	Jun 13, 2000	partly unconstitutional
Case No. 2/94	Jun 27, 1994	constitutional

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