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YOUNGJAE LEE*

Law, Politics, and Impeachment:
The Impeachment of Roh Moo-hyun from a
Comparative Constitutional Perspective

In March 2004, the National Assembly of South Korea impeached President Roh Moo-hyun and brought about an immediate suspension of Roh's presidency. Two months later, the Constitutional Court of Korea restored the status quo by dismissing the impeachment and reinstating the President. This episode marks the first time in the history of modern constitutionalism that a president impeached by a legislative body has been reinstated by a judicial body. This article focuses on one slice of this remarkable turn of events: its constitutional dimension from the perspective of comparative constitutional law. After explaining the constitutional court's decision, this article discusses the significance of the ruling for three broad questions of comparative constitutional law: judicial decisionmaking as a distinct form of constitutional interpretation; the dual nature – legal and political – of the impeachment process and the proper role of the courts in it; and historical, political, and institutional factors that lead to the doctrine of judicial supremacy.

INTRODUCTION

Thirty years ago, Charles Black, writing about impeachment in the American context as Richard Nixon was facing a potential impeachment, considered the role of the judiciary in the presidential im-

* Associate Professor of Law, Fordham University School of Law. I would like to thank Jerry Cohen, Richard Fallon, Chaihark Hahm, Yasuo Hasebe, Sam Issacharoff, Benjamin Liebman, Larry Kramer, Thomas Lee, Julie Suk, Mark Tushnet, Frank Upham, and the members of KANUL at NYU School of Law for their helpful comments and conversations, and to Changwan Son for excellent research assistance. Special thanks are due also to Dr. Chee Youn Hwang, Constitutional Research Officer of the Constitutional Court of Korea, for helpful conversations about the Court. Except for the text of the South Korean Constitution and the Constitutional Court Act, for which official English translations are available, all translations are my own. Korean words have been romanized according to the McCune-Reischauer system, except for proper names of public figures and publications, in which case their own preferred romanization has been used.

peachment process.¹ Black imagined a situation in which the House impeaches the President and the Senate convicts, but then the Supreme Court steps in, vacates the conviction, and “puts the impeached and convicted president back in for the rest of his term,” and “we all live happily ever after.”² Black’s take on the scenario was unequivocal. “I don’t think I possess the resources of rhetoric adequate to characterizing the absurdity of that position,”³ he wrote, calling the result “preposterous”⁴ and asking “[w]ith what aura of legitimacy would a thus-reinstated chief magistrate be surrounded?”⁵ Black concluded that when it comes to presidential impeachment, the only rule that “matter[s]” is that “the courts have, in this, no part at all to play.”⁶

Now consider what happened between March 12 and May 14, 2004, in South Korea.⁷ During that period, Koreans experienced a series of events that resembled the scenario that Black described and derided. On March 12, for the first time in Korean history, the National Assembly of Korea passed a motion to impeach the President, which led to an immediate suspension of Roh Moo-hyun’s presidency.⁸ On May 14, after a period of much uncertainty and turmoil in Korean politics—with the usually powerless Prime Minister temporarily assuming the office of the presidency⁹—the Constitutional Court of Korea put an end to the saga by rejecting the impeachment motion and reinstating the President.¹⁰ Koreans then all lived happily ever after. Or, at least according to one poll, 84 percent of the Korean population approved the Constitutional Court’s decision.¹¹

In American constitutional thinking, the view that the judiciary’s role in the presidential impeachment process should be limited dates back to the Founders. Alexander Hamilton argued in the *Federalist Papers* that the Supreme Court should not be endowed with the

1. CHARLES L. BLACK, JR., *IMPEACHMENT: A HANDBOOK* 53-64 (1974).

2. *Id.* at 54 (emphasis in original).

3. *Id.*

4. *Id.* at 55.

5. *Id.* at 54.

6. *Id.* at 63.

7. In this article, both “South Korea” and “Korea” refer to the Republic of Korea.

8. Samuel Len, *South Korean Parliament Votes to Strip President of Powers*, N.Y. TIMES, Mar. 12, 2004.

9. TAEHANMIN’GUK HONBOP [HONBOP] [Constitution] art. 86; 89Hun-Ma221 (Apr. 28, 1994); see also Jeong-ho Roh, *Crafting and Consolidating Constitutional Democracy in Korea*, in KOREA’S DEMOCRATIZATION 191-93 (Samuel S. Kim ed., 2003).

10. James Brooke, *Constitutional Court Reinstates South Korea’s Impeached President*, N.Y. TIMES, May 14, 2004; Anthony Faiola, *Court Rejects S. Korean President’s Impeachment*, WASH. POST, May 14, 2004; Barbara Demick, *South Korean President Is Reinstated: A Court Rules That His Impeachment Was Unjustified. Meanwhile, New National Assembly Is Set to Take Office*, L.A. TIMES, May 14, 2004.

11. Im Sök-kyu & Yi Hwa-ju, *Honjae Kigak Kyölchöng “Charhaeta” 84% [84% Approve the Constitutional Court’s Dismissal]*, HANKYOREH, May 14, 2004; see also Citi-zens, *Civic Groups Welcome Ruling Reinstating Roh*, KOREA TIMES, May 15, 2004.

power to determine impeachments.¹² He doubted “whether the members of that tribunal would at all times be endowed with so eminent a portion of fortitude, as would be called for in the execution of so difficult a task” and whether “they would possess the degree of credit and authority, which might, on certain occasions, be indispensable towards reconciling the people to a decision that should happen to clash with an accusation brought by their immediate representatives.”¹³ Hamilton added, “The awful discretion which a court of impeachments must necessarily have, to doom to honor or to infamy the most confidential and the most distinguished characters of the community, forbids the commitment of the trust to a small number of persons.”¹⁴

The U.S. Supreme Court sounded a similar note in its 1993 case, *Nixon v. United States*, in which the Court was asked by former Judge Walter Nixon to review the Senate’s impeachment trial that led to his removal from office.¹⁵ Nixon argued that the Senate failed to discharge its duty under the Constitution to “try all Impeachments”¹⁶ by delegating factfinding to a committee.¹⁷ The Court declined to rule on the merits, holding that the meaning of the word “try” in the Constitution’s Impeachment Trial Clause was a nonjusticiable political question, there being “a textually demonstrable constitutional commitment of the issue to a coordinate political department” and “a lack of judicially discoverable and manageable standards for resolving it.”¹⁸

American constitutional scholars are nearly unanimous on this issue. As one recently summarized, “commentators frequently cite impeachment as the prototypical example of a political question, if one is to be found at all,”¹⁹ and the recent impeachment and trial of Bill Clinton, according to another, “reinforced the presumption that most scholars accept—that the only role the judiciary has in the impeachment of a President is the role played by the Chief Justice as presiding officer” and that “[j]udicial review is likely to be limited at

12. THE FEDERALIST No. 65, at 441 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

13. *Id.*

14. *Id.* at 441-42.

15. *Nixon v. United States*, 506 U.S. 224 (1993).

16. U.S. CONST. art. II, § 4.

17. *Nixon*, 506 U.S. at 228.

18. *Id.* (quoting *Baker v. Carr*, 369 U.S. 186, 217 (1962)).

19. Rachel E. Barkow, *More Supreme Than Court?: The Fall of the Political Question Doctrine and the Rise of Judicial Supremacy*, 102 COLUM. L. REV. 237, 272 (2002) (citing Erwin Chemerinsky, *Cases Under the Guarantee Clause Should Be Justiciable*, 65 U. COLO. L. REV. 849, 855 (1994)); Michael J. Gerhardt, *Rediscovering Nonjusticiability: Judicial Review of Impeachments After Nixon*, 44 DUKE L.J. 231, 244 (1994); Robert J. Pushaw, Jr., *Justiciability and Separation of Powers: A Neo-Federalist Approach*, 81 CORNELL L. REV. 393, 424 (1996); Ronald D. Rotunda, *An Essay on the Constitutional Parameters of Federal Impeachment*, 76 KY. L.J. 707, 728-32 (1987/1988).

best.”²⁰ Judge Richard Posner, going further, thinks that “it is clear as a matter of political theory,” and not only as “a matter of law,” why the role of the judiciary should be limited in the presidential impeachment context.²¹

For comparative constitutional scholars, then, the Roh impeachment episode in Korea raises a rich set of questions. To be sure, it should be observed at the outset that some of the differences between American and Korean contexts are easy to explain. The two governments are organized differently from each other, and the impeachment processes in the two constitutions have structural differences. For one thing, the Korean Constitution explicitly gives the Constitutional Court jurisdiction over impeachment questions;²² the American Constitution does not. The National Assembly is a unicameral legislature;²³ the American system contemplates impeachment in the House of Representatives and trial in the Senate.²⁴ One can thus draw a rough analogy between the Korean system in which the legislature impeaches and then the Constitutional Court convicts to the U.S. process in which the House impeaches and then the Senate convicts. Finally, given that the impeachment move was highly unpopular in Korea, some of the concerns that Charles Black raised about the legitimacy of a president reinstated after being impeached do not seem to readily apply.

At the same time, the two contexts are not so different as to make comparisons pointless or silly, as similar constitutional issues are at stake. The Constitutional Court of Korea, consisting of justices who are appointed,²⁵ was acting as the final arbiter of a heated political conflict between democratically elected legislators and a democratically elected president. Some of the factors that point American academics in the direction of the view that impeachment is nonjusticiable—for example, that impeachment is an inherently political process and that courts lack “judicially discoverable and manageable standards”²⁶ to resolve impeachment disputes²⁷—are present in the Korean context as well. In addition, the general question of what kind of conduct by the president should constitute grounds for im-

20. Susan Low Bloch, *A Report Card on the Impeachment: Judging the Institutions That Judged President Clinton*, 63 LAW & CONTEMP. PROBS. 143, 166 (2000).

21. RICHARD A. POSNER, *AN AFFAIR OF STATE: THE INVESTIGATION, IMPEACHMENT, AND TRIAL OF PRESIDENT CLINTON* 130 (1999).

22. HONBOP art. 111 & art. 113.

23. *Id.* art. 41.

24. U.S. CONST. art. I, § 2, cl. 5 & art. I, § 3, cl. 6.

25. HONBOP art. 111.

26. *Baker*, 369 U.S. at 217.

27. See, e.g., Gerhardt, *supra* note 19, at 256-57; Stephen B. Burbank, *Alternative Career Resolution: An Essay on the Removal of Federal Judges*, 76 KY. L.J. 643, 673-77 (1987/1988); Rotunda, *supra* note 19, at 728-32.

peachment is an issue that has come up repeatedly in the U.S.²⁸ Thus, although the context is different, the set of questions is familiar and important.

The significance of the Roh impeachment saga goes beyond the confines of the U.S.-Korea comparisons. First, the Korean Constitution is not unique among constitutions in explicitly designating a judicial body as the final arbiter of impeachment disputes.²⁹ For instance, in Germany, in order to remove the Federal President, the Bundestag or the Bundesrat must bring a motion to impeach to the Federal Constitutional Court.³⁰ The impeachment process in Hungary is similar; the parliament can initiate impeachment proceedings against the President but the final authority to remove the President lies in the Constitutional Court.³¹ In the Czech Republic, too, the senate can remove the President only by charging him for high treason at the constitutional court.³² The Roh impeachment case is notable, then, for marking the first time in modern constitutional history in which a common constitutional mechanism for removal of a president has produced a situation in which a president impeached by a legislature has been reinstated by a judicial body.³³

Second, the Korean example may be studied as part of the global trend towards what Ran Hirschl has recently called the "constitutionalization and the judicialization of mega-politics."³⁴ In the past two decades, Hirschl and others have noted, judicial bodies around the world have come to assume increasingly important roles in resolving some of the most fundamental political conflicts that countries face.³⁵

28. See, e.g., *Background and History of Impeachment: Hearing Before the Subcomm. on the Constitution of the House Committee on the Judiciary*, 105th Cong. (1998); RAOUL BERGER, *IMPEACHMENT: THE CONSTITUTIONAL PROBLEMS* (Enlarged ed. 1974); BLACK, *supra* note 1; MICHAEL J. GERHARDT, *THE FEDERAL IMPEACHMENT PROCESS: A CONSTITUTIONAL AND HISTORICAL ANALYSIS* (2d ed. 2000); POSNER, *supra* note 21; KEITH E. WHITTINGTON, *CONSTITUTIONAL CONSTRUCTION: DIVIDED POWERS AND CONSTITUTIONAL MEANING* (1999); Ronald Dworkin, *The Wounded Constitution*, N.Y. REV. OF BOOKS, Mar. 18, 1999; Keith E. Whittington, "High Crimes" After Clinton: *Deciding What's Impeachable*, POL'Y REV., Feb. & Mar. 2000.

29. See Naoko Kada, *Comparative Constitutional Impeachment: Conclusions, in CHECKING EXECUTIVE POWER: PRESIDENTIAL IMPEACHMENT IN COMPARATIVE PERSPECTIVE* 137, 139-42 (Jody C. Baumgartner & Naoko Kada eds., 2003).

30. GRUNDGESETZ art. 61.

31. A MAGYAR KÖZTÁRSASÁG ALKOTMÁNYA art. 31.

32. ÚSTAVNÍ ZÁKON ČESKÉ REPUBLIKY art. 65. Other countries with similar systems include Albania, Bolivia, Bulgaria, Costa Rica, Croatia, El Salvador, Honduras, and Nicaragua. See Kada, *supra* note 29, at 141-42.

33. The closest analogue is the decision by the supreme court in the Philippines finding that the impeachment of the chief justice of the supreme court was unconstitutional on procedural grounds. Roel Lamingin, *Impeachment Move on Philippine Judge Ruled Unlawful by Court*, FINANCIAL TIMES (Japan Edition), Nov. 11, 2003.

34. RAN HIRSCHL, *TOWARDS JURISTOCRACY: THE ORIGINS AND CONSEQUENCES OF THE NEW CONSTITUTIONALISM* 169 (2004).

35. See *id.* at 169-210; Ran Hirschl, *Resituating the Judicialization of Politics: Bush v. Gore as a Global Trend*, 15 CAN. J.L. & JURISPRUDENCE 191 (2002); Sam Issacharoff, *Constitutionalizing Democracy in Fractured Societies*, 82 TEX. L. REV. 1861,

The most salient example for the American audience is *Bush v. Gore*,³⁶ of course, but there are many other instances, such as the judicialization of the question of "Who is a Jew?" and the meaning of a "Jewish state" in Israel,³⁷ the role of the Supreme Court of Canada in addressing the question of Quebec's secession from Canada,³⁸ and the South African Constitutional Court's active role in the constitution drafting process through the Court's use of its power not to certify proposed constitutions.³⁹

These are large, complex issues, which are mentioned here only to present a global constitutional backdrop against which to view the Roh impeachment case. The scope of this article is more limited. Its aim is to explain the political and legal context in which the Roh impeachment and reinstatement took place, present and analyze the Court's opinion dismissing the impeachment, and situate the impeachment saga in a broader comparative constitutional context. Part I introduces the major political players and describes events that led to the impeachment. Part II gives some basic facts about the institutional features of the Constitutional Court of Korea and discusses the Constitutional Court's ruling. Part III identifies and suggests three significant constitutional themes of the ruling: judicial decisionmaking as a distinct mode of constitutional interpretation; the Court's management of the dual nature—legal and political—of the impeachment process; and the causes behind the doctrine of judicial supremacy in Korea and its role in establishing the rule of law.

I. POLITICAL CONTEXT

Roh Moo-hyun was elected president through a direct popular vote in December 2002. A former human rights lawyer without a college degree, he came to the presidency—which is limited to a single, five-year term under the Korean Constitution⁴⁰—with a compelling personal story and a progressive reformist agenda.⁴¹ However, his

1865 (2004); Russell A. Miller, *Lords of Democracy: The Judicialization of "Pure Politics" in the United States and Germany*, 61 WASH. & LEE L. REV. 587 (2004); Richard H. Pildes, *The Supreme Court, 2003 Term—Foreword: The Constitutionalization of Democratic Politics*, 118 HARV. L. REV. 29, 31-34 (2004); see generally THE GLOBAL EXPANSION OF JUDICIAL POWER (C. Neal Tate & Torbjörn Vallinder eds., 1995).

36. 531 U.S. 98 (2000). For an argument that *Bush v. Gore* raised compelling political question concerns, see Barkow, *supra* note 19, at 242-43; Steven G. Calabresi, *A Political Question*, in BUSH V. GORE: THE QUESTION OF LEGITIMACY 129, 138-42 (Bruce Ackerman ed., 2002); Samuel Issacharoff, *Political Judgments*, in THE VOTE: BUSH, GORE, AND THE SUPREME COURT 55, 56-76 (Cass R. Sunstein & Richard A. Epstein eds., 2001).

37. HIRSCHL, *supra* note 34, at 173-78.

38. *Id.* at 178-82.

39. *Id.* at 184-86. Hirschl mentions more examples from New Zealand, Germany, Russia, Hungary, Turkey, Fiji, and Pakistan. *Id.* at 209.

40. HONBOP art. 70.

41. See, e.g., Barbara Demick, *A "Lincoln" Climbs to Top in Elitist Korea*, L.A. TIMES, Dec. 20, 2002, at 26.

presidency faced a difficult political landscape from his inauguration in February 2003. The rival, conservative opposition Grand National Party (GNP) had the majority in the National Assembly,⁴² the unicameral legislative branch in Korea,⁴³ and Roh's own party, the Millennium Democratic Party (MDP), was paralyzed by a generational rift between those who rose to power under the previous president Kim Dae-jung and a younger generation of legislators who identified themselves more with Roh.⁴⁴ The division within the MDP meant that Roh was not always able to count on the MDP's support in the Assembly, and his support base became even more fragile when the pro-Roh forces left the MDP to form a new party, the Uri Party, in September.⁴⁵

Once the Uri Party members defected, the MDP turned squarely against Roh, forming an anti-Roh alliance with the GNP. The GNP, holding 149 seats, and the MDP, holding 63 seats, formed a supermajority in the National Assembly of 272 members.⁴⁶ Under the Korean Constitution, a vote of two thirds or more of the National Assembly is sufficient to override the President's vetoes on legislation,⁴⁷ expel members of the Assembly,⁴⁸ impeach the President,⁴⁹ and propose constitutional amendments to be put to national referendum.⁵⁰ Therefore, Roh had to manage the weak economy, relations with North Korea, and the strained alliance with the United States while facing a hostile and powerful legislative body.⁵¹

In October 2003, Roh's difficult job became even more difficult, as some of his closest aides were arrested for accepting illegal campaign contributions for Roh's 2002 presidential campaign.⁵² Finding himself in the middle of a political crisis with few allies in the Assembly

42. Kim Hyung-jin, *Assembly Opens Special Session: Lawmakers to Focus on Confirmation Hearing, Payoff Flap*, KOREA HERALD, Feb. 5, 2003.

43. HONBOP chap. III.

44. Hwang Jang-jin, *Post-Election Crisis Deepens in Ruling Party: Roh Supporters, Old Guards Face Off Over Creation of New Party*, KOREA HERALD, Apr. 30, 2003.

45. Lee Joo-hee, *Ruling Party Splits Today: About 40 Pro-Roh Lawmakers to Form New Party*, KOREA HERALD, Sept. 20, 2003; *New Party Changes Name to "Uri Party"*, KOREA TIMES, Oct. 24, 2003.

46. *GNP Flexes Muscle, MDP Reorganizes*, KOREA HERALD, Sept. 29, 2003.

47. HONBOP art. 53, § 4.

48. *Id.* art. 64, § 3.

49. *Id.* art. 65, § 2.

50. *Id.* art. 130, § 1.

51. See, e.g., *Expecting Trouble?*, ECONOMIST, Mar. 14, 2003; John Burton, *S Korea Caught Between Two-Forces: the President-Elect is Under Pressure from Both the US and North Korea*, FINANCIAL TIMES, Jan. 3, 2003, at 6; Andrew Ward, *Paralysis Feared as Lawmakers Snub Roh*, FINANCIAL TIMES (Japan edition), Sept. 27, 2003, at 1.

52. Anthony Faiola, *Crisis Widens for S. Korea Leader: Aides' Arrest in Bribery Scandal is Latest in Roh's Brief Tenure*, WASH. POST, Oct. 24, 2003, at A21; *Roh's Former Top Aide Arrested*, KOREA TIMES, Oct. 16, 2003; Kim Kyung-ho, *Roh's Aide Faces Arrest on Bribery Charges*, KOREA HERALD, Oct. 16, 2003.

and plummeting job approval ratings,⁵³ and anticipating the upcoming General Election in April, Roh made a series of moves to reassert his authority and lay the groundwork for a fresh mandate after the April election. First, in October, he proposed a national referendum to ascertain the nation's confidence in his leadership.⁵⁴ Second, in response to the campaign contribution scandal, he promised to resign if the amount of illegal contributions his 2002 presidential campaign accepted exceeded one-tenth the amount of illegal contributions the opposing GNP accepted for the same election.⁵⁵ Third, he made no secret of his view that his political fortunes were directly aligned with the performance of the Uri Party at the April election. Although he had not formally joined the party, he made his preferences clear, even suggesting that he may quit if the Uri Party did not make a strong showing at the election.⁵⁶

The opposition parties GNP and MDP fiercely criticized every one of these moves by Roh and repeatedly made threats to impeach Roh for these steps and others that Roh had taken. In fact, calls for impeachment were made so frequently—starting in April 2003⁵⁷—that it at times appeared that the opposition parties, realizing that they potentially had the votes needed to remove the President they

53. Barbara Demick, *Even Supporters Complain About S. Korean Leader: Roh is Criticized for Leaving the Party and Other Erratic Moves, and His Ratings Have Plunged*, L.A. Times, Oct. 5, 2003, at 3.

54. Anthony Faiola, *S. Korean President Calls for Vote: Roh Offers to Quit If Referendum Goes Against Him*, WASH. POST, Oct. 13, 2003, at A16.

55. Sim Sung-tae, *Roh Takes Another Political Gamble: President May Resign If Campaign Spent Over 10% of GNP Funds*, KOREA HERALD, Dec. 15, 2003.

56. *President's Gamble Aims for Election Jackpot in April*, KOREA TIMES, Jan. 9, 2004.

57. In April 2003, there was a dispute between Roh and the Assembly over Roh's choice of Ko Young-koo to head the National Intelligence Service, and some members of the National Assembly mentioned impeachment as an option. See Hwang Jang-jin, *NIS Chief Controversy Grows*, KOREA HERALD, Apr. 28, 2003. In June 2003, the GNP adopted a resolution to impeach Roh if he did not apologize for his remark during his visit to Japan that a full democracy cannot be achieved in Korea until the Communist Party is legalized in Korea. *Opposition Threatens to Impeach President*, KOREA TIMES, Jun. 13, 2003. Then, from September 2003 until Roh was in fact impeached in March 2004, the GNP and MDP came up with a different reason to impeach Roh every month. In September 2003, the Assembly passed a bill to dismiss the Government Administration and Home Affairs Minister Kim Doo-kwan, and the GNP again mentioned that it would consider pushing for impeachment if Roh vetoed the bill. See *Roh Faces All-Out War With Opposition Party*, KOREA TIMES, Sept. 9, 2003. In October, with the campaign contribution scandal brewing, the GNP warned that it would attempt to impeach Roh if he turned out to have been personally involved in accepting the illegal contributions. See Joo Sang-min, *GNP Threatens Impeachment: Opposition Calls for Thorough Probe of Scandal*, KOREA HERALD, Oct. 15, 2003. Also in October, the GNP opposed Roh's December referendum proposal and threatened to impeach if he continued to seek the referendum. See Lee Joo-hee, *Politics Rumble and Tumble Over Referendum*, KOREA HERALD, Oct. 20, 2003. And in November, the GNP again threatened to impeach Roh if Roh vetoed the bill passed by the Assembly authorizing the appointment of a special prosecutor to investigate the campaign contribution scandal focusing on Roh's aides. See Joo Sang-min, *Opposition Threatens Impeachment*, KOREA HERALD, Nov. 25, 2003.

did not like, did not hesitate before flexing their muscles at every turn. They also appeared to be mindful of the fact that the strength of their alliance, based on their common dislike of Roh, was not going to last forever, given the upcoming elections in April.

After a quick turn of events in February and March, the opposition parties successfully passed a motion to impeach Roh. On February 24, at a press conference, the President urged voters to support the Uri Party at the April elections.⁵⁸ He again made clear his intention to tie the fate of his presidency to the election, stating that he “wanted to do everything that was legally permitted to help the Uri Party.”⁵⁹ On February 28, the MDP, alleging that Roh’s comments amounted to a violation of the election law, filed a complaint with the National Election Commission.⁶⁰

On March 3, the Commission dispatched a letter to Roh requesting that he, as a public official, remain neutral in the upcoming elections.⁶¹ Although the Commission was (rather inexplicably) vague in its letter to the President about whether he had actually broken any law, its letter to the complainant, the MDP, explicitly stated that the President had violated his duty to maintain his neutrality in elections.⁶² The opposition parties swiftly demanded an apology from Roh and threatened to impeach him.⁶³ In response, Roh held a press conference on March 11. Although he apologized for the various scandals involving his close aides, he refused to apologize for the remarks he made in support of the Uri Party. Instead, he stated that he substantively disagreed with the Commission’s view that his support for the Uri Party was in violation of law.⁶⁴

The opposition parties responded to Roh’s showing of defiance by passing a motion to impeach Roh. The motion listed 21 separate counts as grounds for impeachment, ranging from Roh’s support of the Uri Party to corruption scandals involving Roh’s close aides to Roh’s management of the economy.⁶⁵ Under the Constitution, a mo-

58. *Roh Calls on Nation to Support Pro-Government Party*, KOREA TIMES, Feb. 25, 2004.

59. 2004Hun-Nal.

60. Joo Sang-min, *MDP Takes Roh and Uri Leader to Election Watchdog*, KOREA HERALD, Mar. 1, 2004. The Commission is a constitutionally established body that monitors elections and campaign activities and is composed of nine members, three of whom are appointed by the president, three chosen by the Assembly, and three chosen by the Chief Justice of the Supreme Court of Korea. HONBOP art. 114.

61. Letter from the National Election Commission to President (Mar. 3, 2004) (on file with author).

62. Letter from the National Election Commission to Millennium Democratic Party (Mar. 4, 2004) (on file with author).

63. Joo Sang-min, *Parties Demand Roh Apology for Violating Election Law: Opposition Threatens Impeachment If Demand Is Not Met*, KOREA HERALD, Mar. 5, 2004.

64. Seo Hyun-jin, *Poll Results Will Decide My Fate: Roh; President Rejects Rivals’ Demand to Apologize for Violating Elections Law*, KOREA HERALD, Mar. 12, 2004.

65. *Taet’ongnyŏng (Roh Moo-hyun) T’anhaek Soch’uũikyŏlsŏ* [Motion for Impeachment of President Roh Moo-hyun], Mar. 12, 2004.

tion for impeachment requires the votes of two-thirds or more of the total members of the Assembly to pass.⁶⁶ Out of 272 members in the Assembly, 193 voted in favor of the motion and two voted against it, while all 47 Uri Party members in the Assembly protested the vote and did not participate in it.⁶⁷

The impeachment vote threw the country into a state of turmoil. As provided by the Constitution, Roh's presidency was immediately suspended, and the Prime Minister, traditionally powerless, assumed the duties of the office of the presidency. In the meantime, the impeachment was highly unpopular politically, with the polls indicating that seven out of ten Korean citizens were against the impeachment, and there were demonstrations nationwide protesting the National Assembly's actions.⁶⁸ Under the Constitution, the institution that had the responsibility to resolve this political dispute was the Constitutional Court. As the Constitutional Court deliberated, the impeachment vote became a campaign issue in the General Elections, and, in a result that was widely assumed to have been influenced by the unpopularity of the impeachment, the Uri Party gained a majority, with 152 out of the 299 Assembly seats, while the GNP won 121 seats and the MDP ended up with merely nine seats.⁶⁹ The Constitutional Court's decision rejecting the impeachment motion followed a month later.

II. THE CONSTITUTIONAL COURT'S DECISION

The Constitutional Court of Korea is a specialized body that is charged with adjudicating constitutional matters.⁷⁰ Largely modeled

66. HONBOP art. 65, § 2.

67. Park Song-wu, *National Assembly Impeaches President Roh*, KOREA TIMES, Mar. 12, 2004.

68. Samuel Len, *President's Impeachment Stirs Angry Protests in South Korea*, N.Y. TIMES, Mar. 13, 2004; Ryu Jin, *7 Out of 10 Oppose Impeachment*, KOREA TIMES, Mar. 13, 2004.

69. Anthony Faiola, *Korean Vote Shifts Power in Assembly: Turnover May Aid Impeached President*, WASH. POST, Apr. 16, 2004, at A14; James Brooke, *South Korea's Impeached President Gains Support in Vote*, N.Y. TIMES, Apr. 16, 2004, at A6; Barbara Demick, *Supporters of S. Korea's Roh Push Legislature to Left: The Election Results are Seen as Response to Conservative Lawmakers' Vote Last Month to Impeach the President*, L.A. TIMES, Apr. 16, 2004, at A3; Lee Joo-hee, *Crushed MDP on Uncertain Path*, KOREA HERALD, Apr. 17, 2004.

70. See generally TOM GINSBURG, JUDICIAL REVIEW IN NEW DEMOCRACIES 213-17 (2003); Chaihark Hahm, *Law, Culture, and the Politics of Confucianism*, 16 COLUM. J. ASIAN L. 253, 260-65 (2003); James M. West & Edward J. Baker, *The 1987 Constitutional Reforms in South Korea: Electoral Process and Judicial Independence*, in HUMAN RIGHTS IN KOREA: HISTORICAL AND POLICY PERSPECTIVES 221, 241-44 (William Shaw ed., 1991). Because the Constitutional Court remains separate from the rest of the judiciary, its relationship to the Korean Supreme Court has at times been, and remains, uneasy and uncertain. See, e.g., GINSBURG, *supra*, at 239-42; Hahm, *supra*, at 264.

on the Federal Constitutional Court of Germany,⁷¹ the Court was established in 1987, as part of the constitutional amendments of 1987. The 1987 amendments themselves were ratified by the National Assembly as part of the country's democratization process and emergence from its military dictatorships of the seventies and the eighties.⁷² The Court consists of nine justices. Although all nine justices are "appointed" by the President according to the Constitution, the Constitution also provides that three of the nine appointed by the President are to be selected by the National Assembly, and the remaining three appointees are to be designated by the Chief Justice of the Supreme Court.⁷³ Each justice serves for a six-year term, which is renewable.⁷⁴ The Court has jurisdiction over five areas: 1) review of constitutionality of statutes, 2) impeachments, 3) dissolution of political parties, 4) jurisdictional disputes among governmental bodies, and 5) constitutional petitions.⁷⁵

The Constitution provides that "[i]n case the President . . . ha[s] violated the Constitution or other Acts in the performance of official duties, the National Assembly may pass motions for their impeachment."⁷⁶ Other than this requirement of violation of "the Constitution or other Acts," the text of the Constitution is silent on what is impeachable and what isn't. In order for the Court to affirm the National Assembly's vote to impeach, six out of the nine justices must vote in favor of removal.⁷⁷ If the Court so rules, an election to select a new president must take place within sixty days.⁷⁸ Under the Constitutional Court Act, the Court must hold oral arguments in adjudicating impeachments⁷⁹ and abide by "the laws and regulations relating to the criminal litigation *mutatis mutandis*" during the proceedings.⁸⁰ The National Assembly's position was, as required by the Constitutional Court Act, represented by the Chair of the Legislation

71. For comparisons to the Federal Constitutional Court of Germany, see GINSBURG, *supra* note 70, at 218; Chaihark Hahm, *Rule of Law in South Korea: Rhetoric and Implementation*, in ASIAN DISCOURSES OF RULE OF LAW 385, 389 (Randall Peerenboom ed., 2004); see also DONALD P. KOMMERS, THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY 10-15 (1997); DAVID P. CURRIE, THE CONSTITUTION OF THE FEDERAL REPUBLIC OF GERMANY 27-30 (1994).

72. GINSBURG, *supra* note 70, at 218; Hahm, *supra* note 71, at 389; West & Baker, *supra* note 70, at 241-44.

73. HÖNBÖP art. 111.

74. *Id.* art. 112. Although the terms are renewable, Constitutional Court justices have rarely sought renewal and generally serve only for one term.

75. *Id.*

76. *Id.* art. 65, § 1.

77. *Id.* art. 113, § 1.

78. *Id.* art. 68, § 1.

79. Hönböp Chaep'anso Pöp [Constitutional Court Act] art. 30, § 1 (1988).

80. *Id.* art. 40, § 1.

and Justice Committee of the Assembly,⁸¹ whereas Roh retained private counsel.⁸²

The National Assembly organized the alleged instances of impeachable misconduct by Roh under three headings: Disturbance of the Rule of Law, Corruption and Abuse of Power, and Maladministration.⁸³ Under the first heading, the National Assembly had two chief complaints. First, it alleged that Roh's open support for the Uri Party for the General Election was in violation of the election law provisions that require public officials to be politically neutral and to refrain from influencing outcomes of elections.⁸⁴ Second, it alleged that Roh showed contempt for the Constitution and constitutionally established bodies by questioning the National Election Commission's ruling that he was in violation of the requirement of political neutrality and by seeking a national referendum to gauge the citizens' confidence in his leadership.⁸⁵ The second heading, Corruption and Abuse of Power, alleged that Roh and his close aides accepted bribes and illegal campaign contributions.⁸⁶ The third heading, Maladministration, accused Roh of neglecting his duties, lacking direction, and generating an uncertain political and economic environment.⁸⁷

After holding seven bench trial-like hearings starting on March 30 and ending on April 30,⁸⁸ the Court announced its decision rejecting the National Assembly's motion and reinstating Roh on May 14.⁸⁹ The Court's decision had two parts. First, it addressed the question of whether alleged instances of misconduct by Roh, as described in the National Assembly's motion to impeach, "violated the Constitution or other Acts."⁹⁰ Then, the Court considered whether the violations were serious enough to warrant his removal from office.

81. *Id.* art. 49, § 1.

82. Shim Jae-yun, *Big Guns to Join Roh's Defense Team*, KOREA TIMES, Mar. 16, 2004.

83. *Taet'ongnyŏng (Roh Moo-hyun) T'anhaek Soch'uŭikyŏlsŏ* [Motion for Impeachment of President Roh Moo-hyun], Mar. 12, 2004.

84. *Id.*

85. *Id.*

86. *Id.*

87. *Id.*

88. Kim So-young, *Court Ends Roh Hearings, To Rule in Mid-May*, KOREA HERALD, May 1, 2004; Na Jeong-ju, *Court Seeks Fast Impeachment Ruling*, KOREA TIMES, Mar. 30, 2004.

89. 2004 HunNa 1 (May 14, 2004). The Court's opinion was per curiam, and the Court did not disclose the final vote breakdown. Instead, the Court released a statement announcing that it would not reveal individual justices' votes and that no dissenting opinion would be released. *Taet'ongnyŏng T'anhaek Sagŏnŭi Kyŏlchŏngmune Hŏnbŏp Chaep'ansoŭi Ŭigyŏnmanŭl Kijaehan Iyu* [The Reason the Court Released Only the Court's Opinion in the Presidential Impeachment Decision], May 14, 2004.

90. HŒNBŒP art. 65, § 1.

The Court found that Roh was in violation of law in three instances. First, the Court held, Roh violated the law mandating neutrality of public officials by openly advocating for the Uri Party. Second, Roh violated his duty to observe the Constitution by challenging the validity of the election law that he was found to be in violation of by the National Election Commission. Third, Roh violated his duty to observe the Constitution by proposing a national referendum without a constitutional basis. The Court then ruled that none of these violations were serious enough to justify removing him from office.⁹¹

A. *What Laws Did Roh Violate?*

1. Political Neutrality Requirement

The National Assembly claimed that Roh violated the law requiring public officials to be politically neutral. Election for Public Office and Election Malpractice Prevention Act ("the Act"), Article 9 provides that "[p]ublic officials and others who must remain politically neutral shall not improperly influence elections or otherwise engage in behaviors that would influence election results."⁹² The facts were not in dispute. Roh stated at one of the press conferences that "there is no telling what will happen" if the Uri Party does not win at least one-third of the seats in the Assembly in April and that he "would be at a loss as to how to manage the country if the Uri Party ends up a minority party."⁹³ He said that he hoped the citizens would support

91. 2004Hun-Na1 (May 14, 2004). Roh raised various procedural objections to the impeachment, but the Court rejected these challenges, stating that proper procedures were followed. 2004HunNa1, at 11-15.

92. Kongjiksŏn'gŏmit Sŏn'gŏbujŏng Pangjibŏp [Election for Public Office and Election Malpractice Prevention Act], art. 9. The Court explained that this provision was an implementation of the constitutional requirement of political neutrality derived from Article 7, Section 1, Article 41, Article 67, and Article 116 of the Constitution. First, Article 7, Section 1 of the Constitution provides that "[a]ll public officials shall be servants of the entire people and shall be responsible to the people." HŌNBŎP art. 7, § 1. The Court explained that implicit in this provision is the requirement that public officials serve the interests of the public and not just particular parties or organizations and that public officials must not use their office to influence the outcomes of competitions among different political groups. 2004Hun-Na1, at 19. Second, Article 41, Section 1 of the Constitution provides that "[t]he National Assembly shall be composed of members elected by universal, equal, direct and secret ballot by the citizens," and Article 67, Section 1 provides that "[t]he President shall be elected by universal, equal, direct and secret ballot by the people." HŌNBŎP art. 41, § 1 & art. 67, § 1. The Court noted that in order for these elections to take place without improper influence, public officials must remain neutral. 2004Hun-Na1, at 19. Finally, Article 8, Section 1 guarantees "the plural party system" and free "establishment of political parties," Article 11 provides that "[a]ll citizens shall be equal before the law," and Article 116, Section 1 provides that "[e]qual opportunity shall be guaranteed" during "[e]lection campaigns." HŌNBŎP art. 8, § 1, art. 11 & art. 116, §1. These provisions also require, the Court explained, that public officials remain politically neutral. 2004Hun-Na1, at 20.

93. 2004Hun-Na1, at 2.

the Uri Party at the election and that "he wanted to do everything that was legally permitted to help the Uri Party."⁹⁴ He also said that, at the General Election, the voters would be deciding whether to allow the President they themselves elected to serve as an effective president or whether to let him be driven out by the opposition.⁹⁵

The Constitutional Court agreed with the National Assembly that these statements were in violation of the President's legal duty to be politically neutral. The Court reasoned that his conduct was undesirable for the country's democratic process because he was interfering with the voters' opinion formation and was thwarting the candidates' own efforts to win the voters' confidence. The rules of the process dictate that the candidates compete against each other fairly and on the basis of merits of the candidates themselves and the policies they promote, and if the President is allowed to support one side or another and influence the voters, the Court explained, the basic logic of the competitive democratic process is undermined.⁹⁶ In this instance, the Court pointed out, because Roh actively expressed his support for a particular party and urged the voters to do the same, he improperly used the political weight of his position to influence the outcome of the election. The Court concluded that such conduct by Roh was incompatible with his constitutional duty to be a "servant[] of the entire people and . . . be responsible to the people"⁹⁷ and was in violation of his duty of political neutrality.⁹⁸

2. Respect for the Constitution and Constitutional Bodies

The National Assembly alleged that Roh showed contempt for the Constitution and constitutional bodies by questioning the National Election Commission's ruling that he was in violation of the requirement of political neutrality and by seeking an illegal national referendum.⁹⁹ The Constitutional Court agreed with the National

94. *Id.*

95. *Id.*

96. *Id.* at 25-27.

97. HONBOP art. 7, § 1.

98. 2004Hun-Na1, at 26. The Court's interpretation of the law and the wisdom of applying the law to the president were by no means uncontroversial. Indeed, by the U.S. standards, prohibiting the president from supporting his party appears overly restrictive. Roh apparently felt the same way, as he cited an episode of the popular television drama *West Wing*, in which Martin Sheen's character campaigns for a candidate from his party, to argue that "[t]he President is a politician" and should be allowed to be partisan. *Roh Likens Crisis to "West Wing,"* KOREA TIMES, Mar. 12, 2004. Scholars in Korea actively debated this issue as the impeachment proceedings took place. See, e.g., Reuben Staines, *Presidential Political Neutrality Central Issue in Impeachment Trial*, KOREA TIMES, Mar. 28, 2004. Roh's lawyers (ultimately unsuccessfully) argued that the law in question did not apply to the President and that, if it did apply, it was unconstitutional. Tappyönsö (3) [Brief for Respondent No. 3] at 5-30 (2004Hun-Na1). Part III discusses why such restrictions on campaigning by the president may be perceived to be necessary in Korea. See *infra* Part III.

99. 2004Hun-Na1, at 3-4.

Assembly and found Roh to be in violation of his constitutional duty to uphold the Constitution.¹⁰⁰

The Court scrutinized the way in which Roh reacted to the National Election Commission's decision that Roh's comments in support of a specific party were in violation of the election law. Through his press secretary, Roh had stated that "it should be made clear that the National Election Commission's decision is difficult to comprehend," that "it is time for us to change our system and custom in a way that is more suited to a developed democratic society like ours," that "election laws that accompanied our past presidents' authoritarian institutions should be reformed and updated," and that "interpretation and enforcement of election laws must be revised to reflect the current changes from the past's authoritarian culture."¹⁰¹ In short, the Court concluded, Roh's view was that the election law he was found to have violated was, in his words, "a relic from our dictatorial past."¹⁰²

The Court held that for the President to issue a public statement challenging the legality and legitimacy of an existing law cannot be squared with his duty to observe and uphold the Constitution.¹⁰³ If the President doubts the constitutionality of a law properly enacted by the National Assembly, the Court stated, he should attempt to revise the law by introducing a reform bill to the National Assembly instead of questioning the law that he was found to have violated.¹⁰⁴ The Court further added that the President had to be a role model for all public servants, and his disrespect for the law could have an adverse effect on the willingness of public officials and citizens to obey the law and thus harm the country and its constitutional order.¹⁰⁵

3. National Referendum

The Court also took issue with Roh's proposal for a referendum to determine the country's confidence in his leadership. Article 72 of

100. The Constitutional Court derived Roh's duty to uphold the Constitution from two constitutional provisions, Article 66 and Article 69. 2004Hun-Na1, at 35-36. Article 66, Section 2 of the Constitution provides, "The President shall have the responsibility and duty to safeguard the independence, territorial integrity and continuity of the State and the Constitution." HONBÓP art. 66, § 2. Article 69 provides, "The President, at the time of his inauguration, shall take the following oath: 'I do solemnly swear before the people that I will faithfully execute the duties of the President by observing the Constitution, defending the State, pursuing the peaceful unification of the homeland, promoting the freedom and welfare of the people and endeavoring to develop national culture.'" *Id.* art. 69.

101. 2004Hun-Na1, at 34-35.

102. *Id.* at 34.

103. *Id.* at 35.

104. *Id.* at 36.

105. *Id.* The Court's ruling here, too, appears overly restrictive, at least by the U.S. standards. Part III discusses why there might be such sensitivity on the relationship between the president and the legal system. See *infra* Part III.

the Constitution provides that the President “may submit important policies relating to diplomacy, national defense, unification and other matters relating to the national destiny to a national referendum if he deems it necessary.”¹⁰⁶ The Court observed the risk that the President could use the Article 72 power to call national referenda not as a device to ascertain the will of the people but as a political weapon in partisan conflicts. To prevent such abuses of power, the Court stated, Article 72 should not be read to allow the President to test the public’s confidence in him. Therefore, the Court concluded, Roh’s referendum proposal amounted to an attempted abuse of the constitutional process to enhance his political standing and was in violation of the Constitution.¹⁰⁷

B. Should Roh Be Removed for His Violations?

After finding that Roh “ha[s] violated the Constitution [and an] Act[] in the performance of official duties,” as provided under the impeachment provision of the Constitution,¹⁰⁸ the Court addressed the question whether he should be removed from office. The Court announced that the appropriate guide for making such determination is the principle of proportionality (*pöbikhyöngnyang*) - whether the particular legal violation by the public official is serious enough to justify removal from office. In the impeachment context, the relevant variables in considering whether removal is proportionate are, the Court stated, “the gravity of the legal violation” and “the consequences of removal from office.”¹⁰⁹

There are two main adverse consequences of removing a President from office, the Court noted. The first adverse consequence is that removal results in cutting short the term of a democratically elected leader, thereby thwarting the will of the people. The second adverse consequence is the political turmoil that can be brought about when the country is left without an administration until a new President is elected and the work of the administration is interrupted. Therefore, whether a President’s conduct in violation of law warrants his removal should be considered, the Court concluded, in light of the democratic legitimacy of his tenure and the importance of continuity in administration.¹¹⁰

The question then was what kind of legal violation is sufficient to justify effecting such adverse consequences of removing the President. Because the purpose of the impeachment process is to protect and preserve the Constitution, the Court explained, the gravity of the

106. HÖNBÖP art. 72.

107. 2004Hun-Nal, at 36-38.

108. HÖNBÖP art. 65, § 1.

109. 2004Hun-Nal, at 44.

110. *Id.* at 44-45.

legal violation has to be considered from the perspective of protecting the constitutional order, meaning that the relevant question to ask is how much damage to the existing constitutional order has been inflicted by the particular legal violation. The Court concluded that impeachment and removal are appropriate only when "such steps are necessary to rehabilitate the damaged constitutional order."¹¹¹

More specifically, the Court equated "constitutional order" with "free and democratic basic order" (*chayuminjujök kibonjilsö*). The "free and democratic basic order," the Court explained, consists of respect for fundamental human rights, separation of powers, independence of judiciary, parliamentary institutions, multi-party system, and electoral institutions.¹¹² The Court then listed several examples of acts that directly threaten the free and democratic basic order: acceptance of bribery, corruption, embezzlement, abuse of presidential power to attack the authority of other branches of the government, violation of human rights and oppression of citizens through use of the coercive power of state institutions, use of public office for illegal campaigning, and manipulation of election results.¹¹³

Applying this standard, the Court held that none of the violations by Roh justified removing him from office.¹¹⁴ First, the Court pointed out that the President's support of the Uri Party, while in violation of law, did not involve any "active, premeditated scheme" to use the governmental authority to undermine the democratic process but was instead merely a statement of support that was incidental to his answers to reporters regarding his policy outlook.¹¹⁵ Similarly, the President's defiance facing the National Election Commission's ruling that he had violated the election law, while inexcusable, was not serious enough to justify removal, as his conduct did not rise to the level of attempting to thwart the fundamental liberal democratic order or of challenging the idea of the rule of law. Finally, the Court concluded, given the hitherto uncertainty surrounding the proper scope of the President's power under Article 72 to hold a national referendum and considering the fact that he did not pursue his proposal after facing opposition, his misconduct in this instance was not a violation serious enough to justify his removal.¹¹⁶

111. *Id.* at 45-46.

112. There is some controversy over the proper way to translate the phrase "*chayuminjujök kibonjilsö*." See Hahm, *supra* note 70, at 269 n.60. The word "*chayu*," when used as an adjective, can be translated as either "free" or "liberal." My decision to use "free and democratic basic order," as opposed to, say, "fundamental liberal democratic order," should not be taken to imply an endorsement of one reading of the Korean Constitution over another.

113. 2004Hun-Na1, at 46.

114. *Id.* at 48.

115. *Id.* at 47.

116. *Id.* at 47-48.

C. *Other Grounds for Impeachment: Corruption and Maladministration*

The National Assembly impeached Roh also on the grounds of "Corruption and Abuse of Power" and "Maladministration." The Court summarily dismissed both charges. The text of the impeachment provision in the Korean Constitution limits impeachable offenses to violations of "the Constitution or other Acts in the performance of official duties."¹¹⁷ Because most of the allegations of bribery and illegal campaign fundraising involved conduct before Roh assumed office, the Court dismissed the corruption claims as being outside the scope of the impeachment provision and thus improper as a basis for impeachment.¹¹⁸ As to the maladministration claim, the Court held that because impeachment was a "legal," not "political," procedure, the National Assembly's accusation that Roh neglected his duties and that his administration lacked direction and created an uncertain political and economic environment were mere policy disagreements that cannot serve as grounds for impeachment and should await resolution through the electoral process instead.¹¹⁹

III. THREE CONSTITUTIONAL THEMES

A. *Courts and Constitutional Meaning*

During the Clinton impeachment saga, a question that was repeatedly raised was whether President Clinton's misconduct was serious enough to justify his impeachment and conviction, leading to his removal from office. There were congressional hearings, academic conferences, editorials, and law review articles that addressed the topic,¹²⁰ but once the impeachment process ran its course, we were arguably at the same level of uncertainty about the meaning of "high Crimes and Misdemeanors" as we were before Clinton was impeached. Clinton's acquittal in the Senate was not accompanied by any official statement of the rationale behind the decision other than the simple fact that there were not enough votes to convict. And nothing that either house of Congress did with regard to Clinton's impeachment case has any binding effect on the future Congresses.

117. HONBOP art. 65, § 1.

118. 2004Hun-Na1, at 40-42.

119. *Id.* at 42-43.

120. See, e.g., *Background and History of Impeachment: Hearing Before the Subcomm. on the Constitution of the House Committee on the Judiciary*, 105th Cong. (1998); Cass R. Sunstein, *Impeaching the President*, 147 U. PA. L. REV. 279 (1998); Akhil Reed Amar, *On Impeaching Presidents*, 28 HOFSTRA L. REV. 291 (1999); Stephen B. Presser, *Would George Washington Have Wanted Bill Clinton Impeached?*, 67 GEO. WASH. L. REV. 666 (1999); John O. McGinnis, *Impeachment: The Structural Understanding*, 67 GEO. WASH. L. REV. 650 (1999); Dworkin, *supra* note 28; Whittington, *supra* note 28.

This is not to say that we start with a blank slate every time there is a new impeachment attempt. The judiciary is not the only source of constitutional meaning; other political actors shape the way we understand the Constitution over time in the political realm, in a process that Keith Whittington¹²¹ has dubbed “constitutional construction.”¹²¹ The ways in which each impeachment episode is debated, understood, remembered, and produces winners and losers in history can define the terms of the debate in future impeachment disputes. Nevertheless, it still remains the case that Clinton’s acquittal is, at this point in time, not much more than one of the few data points in the history of impeachment (or near impeachment) efforts in the U.S.—after President Andrew Johnson’s impeachment and acquittal in 1868 and President Richard Nixon’s resignation in 1974—and its continuing significance for our impeachment process is yet to be settled and likely will remain so, for at least as long as the Clinton couple stays in the public spotlight as highly controversial figures.

By contrast, the constitutional law of impeachment in Korea has gone through an immediate, concrete change as a result of Roh’s impeachment. Because of the Constitutional Court’s institutional feature of giving reasoned analyses of its decisions, what Korea now has is an authoritative, binding statement that: the President can be impeached only for violations of law,¹²² for conduct only while in office,¹²³ and only when the damage he has inflicted on the free and democratic basic order is so grave that only his removal from office can repair the damage.¹²⁴ Parts of the standard remain vague, to be sure, but any future National Assembly contemplating presidential impeachment will be under a legal obligation to consider the standard as articulated by the Constitutional Court. The Roh impeachment case illustrates that one of the consequences of involving judicial decisionmaking in the presidential impeachment process is judicial development of a body of law that defines the terms of debate on the proper use of the impeachment device and binds future generations accordingly.

B. Law, Politics, and Constitutional Order

One of the perennial debates about impeachment, at least in the U.S., is whether it is, or should be, a legal or political process. In the U.S., the topic assumes the form of an interpretive question: What is the meaning of “high Crimes and Misdemeanors”?¹²⁵ The most noto-

121. See generally WHITTINGTON, *supra* note 28.

122. 2004Hun-Na1, at 43-43.

123. *Id.* at 40-42.

124. *Id.* at 45-46.

125. The text provides: “The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.” U.S. CONST. art. II, § 4.

rious answer to this question is the statement made by Gerald Ford when he was a member of the House of Representatives: "[A]n impeachable offense is whatever a majority of the House of Representatives considers it to be at a given moment in history; conviction results in whatever offense or offenses two-thirds of the other body considers to be sufficiently serious to require removal of the accused from office."¹²⁶ Ford's statement has been frequently criticized for permitting an essentially limitless power on the part of Congress to use the impeachment provision as a weapon in partisanship, but its persistence and controversy reflect the dual nature of the impeachment process in our constitutional practice. If Gerald Ford is at one end of the law-politics spectrum on the nature of the impeachment process, at the other end is Raoul Berger, who has argued, while acknowledging that politics is "the nature of the beast," that we should ask "whether Congress is proceeding within the limits of 'high Crimes and Misdemeanors'" as understood by the Framers of the Constitution.¹²⁷

Various commentators have fallen in between the two extremes. Charles Black wrote that we should treat as impeachable "those offenses, and only those, that a reasonable man might anticipate would be thought abusive and wrong, *without reference to partisan politics or differences of opinion on policy*."¹²⁸ Akhil Amar describes impeachment as "sensibly political as well as legal" where "[p]oliticians judge other politicians and impose political punishments."¹²⁹ Richard Posner writes that "political impeachments" are inappropriate,¹³⁰ recognizes that "[n]o Presidential impeachment can fail to be suffused with politics,"¹³¹ but argues that popular justice and legal justice should not be confused.¹³² Michael Gerhardt, who argues that "impeachment is by nature, structure, and design an essentially political process,"¹³³ urges "members of Congress to treat their impeachment authority as one of their most important duties and to undertake *political risks* for the sake of checking the most serious kinds of abuses by certain executive and judicial officers."¹³⁴ Surely there is a problem of definition here—the distinction between law and politics has been problematized at least since the days of legal

126. 116 CONG. REC. 11,913 (daily ed. April 15, 1970). This quote is frequently quoted out of context for effect. The full quotation includes the following assessment: "To remove [the President and Vice President] in midterm . . . would indeed require crimes of the magnitude of treason and bribery." *Id.*

127. BERGER, *supra* note 28, at 102.

128. BLACK, *supra* note 1, at 32-33 (emphasis added).

129. Amar, *supra* note 120, at 294.

130. POSNER, *supra* note 21, at 116.

131. *Id.* at 111.

132. *Id.* at 109-20.

133. Michael Gerhardt, *The Constitutional Limits to Impeachment and Its Alternatives*, 68 TEX. L. REV. 1, 5 (1989).

134. GERHARDT, *supra* note 28, at xiii (emphasis added).

realism—but the debate nonetheless captures the way in which law and politics are intertwined in the impeachment context.

In its decision, the Constitutional Court of Korea carved out one position on the question of the nature of the impeachment process. As noted above, the impeachment provision in the Constitution allows the National Assembly to pass motions only when the public official in question has “violated the Constitution or other Acts.”¹³⁵ The Court inferred from this provision that the purpose of the impeachment process is to protect the Constitution and to prevent the abuse of power by members of the executive and judicial branches. By providing for a mechanism for impeachment and removal from office of high ranking public officials for violations of law, the Court noted, the Constitution is making clear that no one is above the law and that the nation is committed to the rule of law. The Court pointed out that the Constitution limited grounds for impeachment to violations of law and designated the Constitutional Court as the ultimate decisionmaker. The Court concluded from such considerations that the process of impeachment is a *legal*, not political, process and that a President can be impeached only on legal, not political, grounds.¹³⁶

The Court’s syllogism—that the Constitution limits impeachment to legal violations and that impeachment is therefore a legal, not political, process—seems straightforward, but the apparent simplicity is misleading, as the complexities of the Court’s actual position are obscured by the formulation. First, the Court is not entirely consistent on the question of what is “legal” and what is “political.” In a similar debate in the U.S. about the scope of impeachable offenses, the possibility of limiting the scope to indictable offenses is frequently mentioned (and usually rejected).¹³⁷ The scope of the “law,” and thus “legal violations” that are potentially grounds for impeachment, are much broader than that under the Korean Court’s definition. The definition of the “law” the Court gave in its opinion encompasses anything that may be considered the “law,” including the Constitution itself, the body of precedents interpreting the Constitution, domestic legal provisions, international treaties, and customary international law.¹³⁸ In its own opinion, however, the Court was not able to sustain such a broad definition of “law.”

135. HONBOP art. 65, § 1.

136. 2004Hun-Na1, at 15-16.

137. See, e.g., BLACK, *supra* note 1, at 33-36; GERHARDT, *supra* note 28, at 103; POSNER, *supra* note 21, at 98-100.

138. 2004Hun-Na1, at 17. That a president may be impeached for violating customary international law may seem extraordinary, but it is not so far-fetched once one considers that Article 6, Section 1 of the Korean Constitution provides that “[t]reaties duly concluded and promulgated under the Constitution and the generally recognized rules of international law shall have the same effect as the domestic laws of the Republic of Korea.”

Article 66, Section 2 of the Constitution states that the "President shall have the responsibility and duty to safeguard the independence, territorial integrity and continuity of the State and the Constitution."¹³⁹ Article 66, Section 3 states that the "President shall have the duty to pursue sincerely the peaceful unification of the homeland."¹⁴⁰ Article 69 requires the President to take the oath and swear that he "will faithfully execute the duties of the President by observing the Constitution, defending the State, pursuing the peaceful unification of the homeland, promoting the freedom and welfare of the people and endeavoring to develop national culture."¹⁴¹ Although, by the Court's own definition, these are "legal" provisions in the sense that they are in the Constitution, the nature of the enumerated duties makes it difficult to see in what sense applying these provisions involves "legal" as opposed to "political" judgments, and why the Court should be entrusted with determining whether the President has fulfilled these duties of presidency. At the same time, the Court's own definition of the "law" and the Court's duty to evaluate the appropriateness of motions to impeach appear to compel the conclusion that the Court must decide whether these presidential duties have been fulfilled satisfactorily.

Remarkably, the Court escaped this tight spot by declaring that some of these provisions are *irrelevant* for the purposes of impeachment. The Court gave its answer in its consideration of the claim that Roh should be removed from office for maladministration. The National Assembly argued that Roh violated Article 66, Section 2 and violated his oath specified in Article 69 by failing to "execute the duties of the President" and bringing about economic and political instability.¹⁴² The Court dismissed this claim. The Court stated that while the President's Article 66 and Article 69 duties are "constitutional duties," whether they have been fulfilled is not something that can be determined as a matter of law, and that the proper forum for such judgment is the political realm. Since Article 65, Section 1 limits grounds for impeachment to violations of the Constitution or other laws, the Court concluded, the President's failure to fulfill his duties under Article 66, Section 2 and Article 68 cannot serve as grounds for impeachment—with one exception. Article 66, Section 2 of the Constitution imposes on the President the duty "to safeguard . . . the Constitution." Because whether the President was fulfilling this particular duty, the Court asserted, was ascertainable through application of the law, failure to fulfill this duty could serve as a ground for impeachment.¹⁴³

139. HÓNBÖP art. 66, § 2.

140. *Id.* art. 66, § 3.

141. *Id.* art. 69.

142. 2004Hun-Na1, at 42.

143. *Id.* at 42-43.

Thus, from the clause providing that a President may be impeached for "violat[ion] of the Constitution or other Acts," the Court inferred that the impeachment process is a legal, not political, process, and when it faced the provisions of the Constitution that clearly seemed to call for political, not legal, judgments, the Court declared them "political," not "legal," and thus outside the scope of the impeachment process. In other words, no offense is impeachable *unless* the judiciary is able to determine that the offense has taken place. If the alleged offense lies outside the scope of offenses that the judiciary can identify, then it might as well not exist for the purposes of impeachment.

An alternative way of drawing the boundaries of impeachable offenses that is consistent with the text of the Korean Constitution is easy to imagine. Instead of limiting the scope of impeachment to what is legally ascertainable, the Court could have gone in the other direction. For instance, because the scope of impeachable offenses is broader than the scope of questions that can be answered by the judiciary by applying legal standards, the Court could have concluded that it should defer to the National Assembly on questions that are not susceptible to resolution through, say, "judicially discoverable and manageable standards," to borrow from the *Baker v. Carr* formulation of the political question doctrine.¹⁴⁴ The Court did not take this path and instead chose to exclude certain reasons from the realm of permitted grounds for impeachment itself.

Although the Constitutional Court's reasoning thus appears simplistic and even arbitrary at times, the motivation is understandable. Given that it is charged under the Constitution to adjudicate impeachments, the Court was likely reluctant to yield its authority to be the final arbiter of impeachment disputes. At the same time, the Court appeared to have recognized the danger of permitting impeachment on the basis of a President's "failure" to satisfy the constitutional aspiration of "pursuing the peaceful unification of the homeland, promoting the freedom and welfare of the people and endeavoring to develop national culture"¹⁴⁵ and the near impossibility of adjudicating the claim that the President's performance falls short of the ideal outlined in the presidential oath. Because the Court sought not to weaken its constitutional status to be the ultimate decisionmaker, the Court narrowed the scope of impeachable offenses only to those that it considered to be within its competence to manage, instead of deciding the proper scope of impeachable offenses first and then narrowing the Court's own role in it. The narrowing of the scope of impeachable offenses, then, may be one consequence of

144. *Baker v. Carr*, 369 U.S. 186, 217 (1962).

145. HONBOP art. 69.

designating a judicial body as the ultimate decisionmaker in the impeachment process.

The complexity of the Court's position on the law-politics distinction does not end there. Even if it is the case that only straightforward "legal" violations can lead to impeachment, it does not necessarily follow that answering the question whether a democratically elected President should be removed from his office midterm calls for legal judgment. As seen above, the Court's ultimate decision—that Roh was in violation of law but that the violations were not serious enough to warrant removal—involved judgment that was more than the narrower question of whether he violated any law. That is, because not every violation of law is considered serious enough to warrant impeachment, the Court had to judge not only whether there had been a legal violation, but also whether it was serious enough to justify removal. In the American context, it is frequently noted that one of the reasons the impeachment process is inescapably political is that the "law" does not supply answers to the kinds of questions the Constitutional Court of Korea was calling "legal"—such as what kinds of violations are grave enough to warrant removal.¹⁴⁶

The National Assembly recognized this, and it argued in its briefs that judging the seriousness of misconduct involved the kind of judgment that the Constitutional Court was not suited to make. The National Assembly thus suggested the following division of labor. The National Assembly, which is the democratically elected body, should be the final arbiter of whether the particular legal violations at issue by the President are grounds for impeachment and removal. The role of the Constitutional Court should be limited to deciding, the National Assembly argued, whether the passage of the impeachment motion followed the correct legal procedure and whether the alleged conduct by the President involved legal violations. Whether particular legal violations justify the National Assembly's attempt to remove the President from his office, the Assembly argued, should be left to the Assembly's discretion.¹⁴⁷

The Assembly's reading was rejected by the Constitutional Court in favor of a broader reading of the Court's power. As noted above, the Court inferred from the text and structure of the Constitution that impeachment is strictly a legal, not political, process. From the Court's view that impeachment is a legal proceeding, the Court drew out the following standard of review. The Court stated that in deciding whether the President should be removed, it could consider only those facts alleged by the National Assembly to constitute grounds for impeachment. However, the Court made clear that it was not con-

146. See, e.g., Amar, *supra* note 120, at 294-95.

147. 2004Hun-Nal, at 7-8.

strained by the Assembly's judgment in any other way. The Court stated that there is no deference to the Assembly in determining whether there has been such a legal violation. The Court also stated that, given the facts alleged by the Assembly, the Court may, *de novo*, find legal grounds other than those identified by the Assembly as grounds for impeachment. In other words, the Court confined the Assembly's role at this stage to delimiting the range of conduct by the President the Court may consider. As to whether such conduct in fact was in violation of law, whether it constituted grounds for impeachment and removal, and which grounds, were entirely up to the Court.¹⁴⁸

The question remains, in what sense is judgment of the seriousness of the President's offense "legal," as opposed to "political," judgment? The Court was in need of a standard that could serve two purposes. First, the standard had to supply a way of ranking legal violations in terms of their seriousness, from trivial to impeachable. In other words, the Court needed a way to discuss a hierarchy of values in order to assess the gravity of the President's legal violations. Second, the standard had to be a "legal" standard the application of which properly belonged, or appeared to belong, to the Constitutional Court.

The Court found its solution in the concept of the "constitutional order." As discussed above, the Court held that impeachment and removal of a President are appropriate only when "such steps are necessary to rehabilitate the damaged constitutional order," and the Court explained that by "constitutional order" it meant "free and democratic basic order."¹⁴⁹ By invoking the concept of the constitutional order in judging whether a President was impeachable, the Court took the impeachability decision outside the realm of politics. However, in doing so, the Court also had to reach outside the Constitution and appeal to something more fundamental than the Constitution itself—the foundational concepts that underlie the Constitution. It is debatable, of course, whether the free and democratic basic order that the Court invokes is to be found "inside," "outside," or in the "penumbras" of the Constitution. The important point is to note the way in which the Constitutional Court of Korea managed its way around the intersection of law and politics in the impeachment context. The legal status of "the constitutional order," the question of who should determine what it consists of, and whether similar invocations of fundamental ideals would be available to, or likely in, other countries facing their own impeachment disputes are questions that, while beyond the scope of this article, should receive further study.

148. *Id.* at 7.

149. *Id.* at 45-46.

C. *Judicial Supremacy, Popular Constitutionalism, and the Rule of Law*

Another striking feature of the impeachment case from the perspective of American constitutional law is the Constitutional Court's unequivocal statement of the doctrine of judicial supremacy when it comes to constitutional interpretation. "Judicial supremacy" in constitutional law refers to the idea that the courts have the final say on the meaning of the Constitution and that no other body—not the legislative branch, not the executive branch, and not "the people" at large—can have a valid interpretation of the Constitution that is inconsistent with the judiciary's view of what the Constitution means.¹⁵⁰ The idea that the Constitutional Court is the ultimate authority on the meaning of the Constitution is not new in Korea and has been generally accepted since the Court decided its first case in 1989.¹⁵¹ Neither is it unfamiliar to the American audience, given that this view of constitutional interpretation is widely accepted in the United States. However, judicial supremacy has been criticized recently in the works of several constitutional scholars, most prominently by Larry Kramer¹⁵² and Mark Tushnet,¹⁵³ who put forward an alternative conception they call "popular constitutionalism" (or "populist constitutional law"), which Kramer defines as a constitutional system in which the people assume "active and ongoing control over the interpretation and enforcement of constitutional law."¹⁵⁴ The impeachment case in Korea, and the role of the Constitutional Court in recent Korean history, present another way of looking at this familiar debate.

The doctrine of judicial supremacy appears in an unequivocal manner in two places in the Court's opinion. The first place is in the Court's discussion of the standard of review of the Assembly's motion to impeach. As discussed above, there were at least two different ways to allocate the impeachment power between the National Assembly and the Constitutional Court. The Court could have assigned itself the narrow role (which is still broader than the role assigned to American courts in similar contexts) of determining whether the im-

150. MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* 7 (1999); Larry D. Kramer, *Foreword: We the Court*, 115 HARV. L. REV. 4, 6 (2000) (defining "judicial supremacy" as "the notion that judges have the last word when it comes to constitutional interpretation and that their decisions determine the meaning of the Constitution for everyone").

151. 89Hun-Ma117 (Jul. 3, 1989).

152. LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* (2004).

153. TUSHNET, *supra* note 150, at 177.

154. Larry D. Kramer, *Popular Constitutionalism, Circa 2004*, 92 CAL. L. REV. 959, 959 (2004); *see also* TUSHNET, *supra* note 150, at 182 ("Populist constitutional law . . . treats constitutional law as not something in the hands of lawyers and judges but in the hands of the people themselves.").

peachment vote followed the proper procedures in the National Assembly and whether there was a violation of "the Constitution or other Acts," as specified by Article 65, Section 1 of the Constitution.¹⁵⁵ The National Assembly urged the Court to accept the narrow role,¹⁵⁶ but the Court opted for a broader reading of its role and limited the National Assembly's role to identifying which facts the Court could consider in its decision.¹⁵⁷

The second time the doctrine of judicial supremacy is asserted is in the Court's rebuke of Roh's attitude towards the National Election Commission's decision that he was in violation of law. The Constitutional Court pointed out that the President had the duty to uphold the Constitution, but it is clear that the Constitution the President is to uphold is the version that has been endorsed by the Constitutional Court only. As discussed above, the Court thought it was of no moment that Roh questioned the legitimacy of the law as a "relic from the country's authoritarian past." This is because the President's duty to follow the law, the Court asserted, includes the duty to follow even the law he considers unconstitutional unless and until the Constitutional Court pronounces the law unconstitutional.¹⁵⁸ Although the President is free to hold and express his own views about reforming the law, how he does so is of paramount importance, the Court added, and it is not appropriate for him to raise questions about the law that he himself was found to have violated. Such stringent restrictions on the President's ability to discuss constitutionality of laws may raise the eyebrows of American constitutional scholars. However, there are several factors that drive the Constitutional Court of Korea toward a strong position of judicial supremacy.

First, the effect of having a specialized court for constitutional matters on the Court's attitude toward other branches of the government should not be ignored as a factor. Victor Ferreres Comella recently argued that constitutional courts specializing in constitutional questions have an incentive to be "activist."¹⁵⁹ The reason for this is that it is difficult for a constitutional court to justify its existence as an institution if it regularly defers to the legislature and denies constitutional challenges.¹⁶⁰ Putting aside the question of whether this is normatively desirable, the Constitutional Court of Korea's aggressive stance may be seen as an institutional feature that is typical of constitutional courts generally.

155. HONBOP art. 65, § 1.

156. 2004Hun-Na1, at 7-8.

157. *Id.* at 7.

158. *Id.* at 34-35.

159. Victor Ferreres Comella, *The Consequences of Centralizing Constitutional Review in a Special Court: Some Thoughts on Judicial Activism*, 82 TEX. L. REV. 1705, 1732-36 (2004).

160. *Id.* at 1728.

Second, the history of modern Korea is a history of authoritarianism of Syngman Rhee, Park Chung Hee, and Chun Doo Hwan from the end of the Korean War in 1953 to the constitutional amendments in 1987.¹⁶¹ There was no independent judiciary during this period, and when a judicial body, in a few instances, went against the President's wishes, it was either quickly overruled or dismantled.¹⁶² The 1987 constitutional amendments that gave birth to the current constitution was a byproduct of a conscious political liberalization effort, backed by popular demand, that sought to repudiate this model of politics.¹⁶³ Because the main image of governance that the country rejected in the reform process was that of a lawless, oppressive, all-powerful dictator, one possible way to control the President was through the judiciary. At the time of the amendment, however, very few people anticipated the Constitutional Court to play a strong role in restraining the governmental exercise of power.¹⁶⁴ Yet the Court has performed well beyond everyone's expectation in curbing the governmental authority since then.¹⁶⁵ It appears then that the Court has been able to draw on the strong sentiment of the population that the executive branch is not always to be trusted and that its power should be restrained by the rule of law. From this historical and political perspective, a statement from the Constitutional Court that concedes to the President the power to speak against the Constitutional Court's reading of the Constitution or challenge a legal provision that is in effect could appear to be an alarming retreat to the authoritarian era.

Third, the institutional structure of the Constitutional Court itself may enable it to be aggressive without being vulnerable to the charge that it is not politically accountable. The composition of the Constitutional Court itself—three chosen by the Chief Justice of the

161. For good overviews, see BRUCE CUMINGS, *KOREA'S PLACE IN THE SUN: A MODERN HISTORY* 337-93 (1997); DAVID I. STEINBERG, *THE REPUBLIC OF KOREA: ECONOMIC TRANSFORMATION AND SOCIAL CHANGE* 48-68 (1989); ROBERT E. BEDESKI, *THE TRANSFORMATION OF SOUTH KOREA: REFORM AND RECONSTITUTION IN THE SIXTH REPUBLIC UNDER ROH TAE WOO, 1987-1992* (1994); SUNHYUK KIM, *THE POLITICS OF DEMOCRATIZATION IN KOREA: THE ROLE OF CIVIL SOCIETY* (2000).

162. GINSBURG, *supra* note 70, at 208-13; DAE-KYU YOON, *LAW AND POLITICAL AUTHORITY IN SOUTH KOREA* 150-99 (1990); Roh, *supra* note 9, at 196-97; Dae-kyu Yoon, *New Developments in Korean Constitutionalism: Changes and Prospects*, 4 PAC. RIM L. & POL'Y J. 395, 400-04 (1995); Kyong Whan Ahn, *The Influence of American Constitutionalism on South Korea*, 22 S. ILL. U. L.J. 71 (1997).

163. STEINBERG, *supra* note 161, at 59-66; Kim, *supra* note 161, at 77-104; GINSBURG, *supra* note 70, at 218; Hahm, *supra* note 71, at 389; West & Baker, *supra* note 70, at 241-44.

164. See, e.g., Hahm, *supra* note 71, at 395; James J. West & Dae-kyu Yoon, *The Constitutional Court of the Republic of Korea: Transforming the Jurisprudence of Vortex?*, 40 AM. J. COMP. L. 73, 115 (1992).

165. See, e.g., GINSBURG, *supra* note 70, at 221-26; Hahm, *supra* note 71, at 395; Kyu Ho Youm, *Press Freedom and Judicial Review in South Korea*, 30 STAN. J. INT'L L. 1 (1994).

Supreme Court, three by the President, and three by the National Assembly—gives the appearance that the Constitutional Court is designed to be a place where different perspectives of the government are represented.¹⁶⁶ In addition, although the justices of the Constitutional Court are not elected, each justice serves only for a six-year term. The term is renewable, but the norm in the recent past has been for the justices to serve for single terms only. The Constitution itself is much easier to amend than it is in, say, the United States, as a supermajority in the National Assembly combined with a national referendum can amend the Constitution.¹⁶⁷ Some have argued recently that similar structural elements in European nations may make the institution of judicial supremacy more palatable from the perspective of popular constitutionalism.¹⁶⁸ A similar dynamic may be at play in Korea.

Finally, the impeachment case has turned out to be a perfect vehicle for flexing judicial muscles and enhancing the Court's power and status without offending Korean democratic sensibilities, as the National Assembly's decision to impeach was overwhelmingly unpopular, and the Court's decision was applauded nationwide.¹⁶⁹ It is difficult to imagine the Court invoking the vague concept of "constitutional order" while ignoring the citizens' strong disapproval of the National Assembly's behavior and the results of the General Election, which gave a majority of the Assembly seats to the very party that Roh was impeached for supporting. In other words, behind the Court's statement of judicial supremacy is its confidence that its decision is strongly supported by a large segment of the population. In this vein, one can only speculate how the Court would have come out had the National Assembly been able to turn the public sentiment against Roh after the impeachment or had the public shown its support for the parties that impeached Roh in the April General Election.

CONCLUSION

The Roh impeachment episode, as the first case in which a president impeached by a legislature has been reinstated by a judicial

166. HONBOP art. 111.

167. *Id.* art. 130.

168. KRAMER, *supra* note 152, at 250; *see also* KOMMERS, *supra* note 71, at 56 ("Despite its democratic legitimacy, or perhaps because of it, the [German] Constitutional Court has developed into a fiercely independent institution and has struck down large numbers of statutory provisions and administrative regulations."); Comella, *supra* note 159, at 1733.

169. James Brooke, *Constitutional Court Reinstates South Korea's Impeached President*, N.Y. TIMES, May 14, 2004; Anthony Faiola, *Court Rejects S. Korean President's Impeachment*, WASH. POST, May 14, 2004; Barbara Demick, *South Korean President Is Reinstated: A Court Rules That His Impeachment Was Unjustified. Meanwhile, New National Assembly is Set to Take Office*, L.A. TIMES, May 14, 2004.

body, is a landmark event not only in modern Korean history but also in the history of modern constitutionalism generally. The historical importance of the case is far-reaching and multi-faceted, but in this article I limited my discussion to only those aspects that strike me as most significant as a scholar of comparative constitutional law. However, because impeachment cases are rare, and every case is different, it is difficult to draw firm comparative lessons, and many of the observations made in this article necessarily remain suggestive and impressionistic. If nothing else, the Roh impeachment case prompts us to rethink the consensus in the United States about the proper role of the judiciary in presidential impeachment disputes and to consider whether the firm American position on the question is due to factors that are specific to American constitutional tradition, to reflect on how "clear" the position is as a matter of "political theory" as Judge Posner would have it,¹⁷⁰ and ask what difference it makes to have the Senate, as opposed to the Supreme Court, have the final word on the impeachment question.

170. POSNER, *supra* note 21, at 130.