Master's Thesis of Political Science

Healthy Deference in the Separation of Powers

Judicial Independence and Accountability of the South Korean Constitutional Court

권력분립의 관점에서 본 건강한 사법적 존중
한국 헌법 재판소의 독립성과 책임성

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Graduate School of Political Science and International Relations
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Abstract

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The role of the judiciary has expanded globally, particularly following the end of the Second World War, as a large number of former authoritarian regimes transitioned to democracies. With this expansion, the courts have become more active in their decision-making. In many democracies, courts are no longer completely restrained by the sword (executive) or the purse (legislature), but they have rather established themselves as a significant, independent and balancing political actor. With this change, scholars have raised their concerns about judicial supremacy and the judicialization of politics while questions about what determines independence in the judiciary and how to measure this independence still remain. In this regard, the central question has become how to balance judicial independence with accountability, as the two concepts appear incompatible.

The co-existence of independence with the act of deference by the court to particular political actors reflects this incompatibility. While deference

appears to be inherent in the understanding of independence, there lacks a concrete definition that resolves their contradictory existence. In order to bridge the gap between these two concepts, this study introduces the idea of healthy deference, which is the court's deference to the separation of powers rather than to any particular political actor or elite. The conditions of healthy deference require that there is generally no distinction between how the court renders its decision between social cases and those of political import. However, in cases involving both the legislature and the executive that concern the separation of powers, the court will take a moderate stance, thereby appear deferent. Yet, this deference is not to the will of one actor over the other. Rather, the decision rendered defers to the separation of powers and ensures that no actor, including the court itself, will gain more power than necessary for the balancing of power between the three primary branches of government.

In order to better explain what healthy deference is and how it is compatible to judicial independence and accountability, this study examines the case of South Korea. Following a long period of Japanese colonial rule, South Korea had been grappling with judicial independence and how to delegate the powers of constitutional adjudication. While the basis for the current constitutional court can be found in the previous republics of Korea, it was only in 1988, following the transition to democracy and the establishment of the constitutional court that the once nominal powers of the judiciary became substantive powers. Following this transition, scholars have positively viewed South Korea's judicial independence. However, in comparison to other countries that transitioned to democracies around the same time, such as those

in Eastern Europe and Latin America, the case of South Korea has not been studied at great lengths.

Therefore, in order to add to the literature on South Korean judicial independence as well as to the literature on judicial independence and accountability, this paper first examines the 395 major case decisions rendered by the South Korean Constitutional Court between 1988 and 2014, to determine whether there is any discrepancy in the decision-making of the court between social and political cases. Then two particular cases that appeared in favor of the executive and were of national importance are also examined. The first case is the impeachment of the late former President Roh Moo Hyun, while the second is the dissolution of the Unified Progressive Party. Looking at these latter two cases, the application of healthy deference is then shown.

The results indicate that while the court has rendered more constitutional decisions than unconstitutional ones, there is no noticeable difference in the decision-making between social and political cases. Even among the handful of cases involving disputes between governmental actors, it does not appear that actors at one level of government are favored in the decision-making of the court over governmental actors at another level of government. Furthermore, in the analysis of two nationally significant cases, it appears that the court rendered its decision based on the principle of healthy deference rather than due to influence from undue external or internal pressures. Therefore, looking at the results, this paper argues that the Constitutional Court of South Korea is judicially independent and defers to the separation of powers in its decision-making.

Lastly, healthy deference also provides the basis for explaining why the executive and the legislature are willing to confer power to the judiciary when it means a decrease to their own powers. The court's application of healthy deference in its decision making gives political actors the basis on which they can determine how their case will fare if filed for review. The court's consistency in its decision-making and its deference to the separation of powers allows these political actors and elites to strategically behave and ensure the decision favors their interests.

Keywords: Judicial Independence, Separation of Powers, Deference, South Korea, Constitutional Court

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Chapter 1. Introduction

1.1. Research Background

An important aspect of a democratic society is a government that is accountable to the public and transparent in its practices. Accountability in policy-making procedures can be measured by the degree of: public knowledge, open processes, government justifications and judicial review (Rose-Ackerman, 2007, p. 34). These four categories measure the requirements of the three main branches of government - the legislature, the executive and the judiciary – in carrying out their duty as independent, policy-making institutions. In this respect, all systems of government, both parliamentary and presidential, need to ensure that the check and balance system is properly functioning since "political constitutions are incomplete contracts and therefore leave room for abuse of power" (Persson, Roland & Tabellini, 1997, p. 1163). In this way, as Madison stated, each branch of government, "should have a will of its own" with "the necessary constitutional and personal means to resist encroachment" (cited by Kihl, 2015, p. 315).

While concern about abuse of power among the branches was once heavily focused on the possibility of legislative supremacy, this concern has expanded to include concerns about the judiciary and its expanding powers. Following the Second World War, the judiciary became increasingly empowered (Helmke & Rosenbluth, 2009, p. 346) as it became more willing

to put "limits on the power of legislative institutions", "regulate the conduct of political activity" and took on the role of policy maker (Ferejohn, 2002, p. 41). Furthermore, with the relatively recent third democratic wave[1] of countries in Latin America, Eastern Europe and Asia, there has been a "global expansion of judicial power" (Ginsburg, 2003, p. 6). This has led to the 'judicialization of politics' or the 'politicization of the judiciary' thereby generating concerns of judicial supremacy contra legislative supremacy. In the contemporary politics of most democracies, the judicial branch of government has arguably become an important political actor, no longer completely restrained by the "sword" (executive) and "purse" (legislature) (Federalist No. 78).

With the expansion of the judiciary as a political actor, scholars have tried to measure and evaluate the level of independence a judiciary has vis-à-vis the other two branches but have been unable to reach a consensus on what it exactly entails (Donoso, 2009; Larkins, 1996; Tiede, 2006). This is because the factors affecting judicial independence are not always observable because they can occur indirectly as well as both internally and externally. Despite the elusiveness of a concrete definition, scholars make continuous attempts to measure judicial independence. On a large scale, Cingranelli, Richards, and Clay (2014), as well as Howard and Carey (2003-2004) measure the level of judicial independence in hundreds of countries by coding indicators of judicial independence by a three-point scale of not independent (0), partially

[1] Huntington, S. P. (1991). *The third wave: Democratization in the late twentieth century*. Norman: University of Oklahoma Press. Huntington categorizes at least 30 countries that transitioned into democracies between 1974 and 1990. This nearly doubled the number of democracies in the world. These countries are categorized under the third democratic wave.

independent (1), and generally independent (2). As part of their study on whether constitutional provisions can decrease the abuse of human rights, Keith, Tate, and Poe (2009) also look at judicial independence. However, instead of categorizing the independence level of the judiciary, they use eight indicators to create a three-point scale that measures the level of constitutional provision provided for judicial independence. Furthermore, organizations such as the World Economic Forum have also conducted similar types of researches through the World Economic Forum's Executive Opinion Survey, which provides a way to compare countries surveyed. Of the components looked at, the measurement of judicial independence is one. Others have tried to evaluate and define judicial independence on a smaller scale by focusing on individual countries or comparing between a handful of countries with similar characteristics, such as those in similar regions or with similar political and judicial histories. The objective of this latter group of scholars has been to focus on court cases to measure judicial independence by analyzing the decision judges have rendered with factors that would affect a judiciary's independence (e.g. Herron & Randazzo, 2003; Donoso, 2009; Cross, 2003).

While the measurement of judicial independence is important to fully understand the political environment or the context of a country, the question of how independent is not fully answered. Burbank (2003) argues that complete decisional independence, without any constraint, is not rational or desirable since courts are human-run institutions that are affected by personal motives and morals (p. 325) therefore require accountability. Accordingly, "it remains for different polities to define what it is that they want from their

courts and the measure (or quality) of judicial independence they believe is necessary or appropriate in order to secure it" (p. 338). In this way, judicial independence and the way of keeping it accountable is subjective to each country and its needs. Vanberg (2015) also emphasizes the problem with simplifying the concept of independence as he distinguishes between the "creation of an independent judiciary (from the) ongoing respect for judicial authority" (p. 169). Giving constitutionally defined powers to the judiciary to establish its independence at the beginning does not necessarily mean the courts have the freedom to continue exercising these powers. In this way, the concept of independence in and of itself is complex and requires a concrete definition to properly understand what it constitutes, particularly within the context of the separation of powers.

One of the ways to measure judicial independence while accounting for accountability is by understanding deference. While most measures of judicial independence implicitly include deference, the context within which this deference should be carried out has been vague. This is also clear as scholars, who argue that independence must be kept in balance with accountability (Burbank, 2003; Cross, 2003; Choi, 2015; Shin, 2009), do not clearly specify how this balance should be reached other than to say that complete independence is detrimental. When deference is defined, it is mainly understood in terms of strategic reasoned deference used by the courts to increase their power without stepping on the toes of significant political actors or elites (Scribner, 2010). In this strategic understanding of deference, the court, by choosing its cases wisely, is able to more freely exercise its powers

and increase its independence in other cases. However, this strategic understanding is limited in that it continues to arguably position the court in a state of undue dependence on the other branches of government. It does this with the implication that the court needs to refrain itself in political cases in order to have the freedom to decide on other cases. In order to address this, I introduce the concept of *healthy deference*, which expands on Scribner's reasoned deference. To fully understand what healthy deference means and how it differs from Scribner's reasoned deference, the following questions need to be answered first: what is the ultimate purpose of judicial independence? Who is it for and why is it necessary? The answer is that the judiciary is there to ensure that the check and balance system of the separation of powers is properly operating by upholding the rule of law and ensuring that no one branch tries to unfairly shift the power in its direction. It is also to protect the basic rights of individuals within a country, while also ensuring the interests of the people as a whole, rather than the interest of an individual or group, are respected.

Based on this answer, healthy deference is defined as the point at which the judiciary can be evaluated as being independent while respecting the separation of powers as well as public opinion. This means that healthy deference is: 1) rarely used in cases that involve rights and freedom cases unless it affects the separation of powers; 2) mainly pertains to political cases, particularly the disputes between governmental agencies and 3) is not only in reference to the decisions of constitutionality but also unconstitutionality dependent on who the decision favors and how it affects the separation of

powers. While the court can have healthy deference to both the legislature and the executive (primarily the President), if a case involves both, the court will rule in accordance with the maintenance of the separation of powers rather than in favor of one particular political actor. Therefore, the court's ruling will prevent the abuse of power by one government over the other. Judicial independence is compatible with healthy deference because the latter does not unnecessarily restrict the ability of the courts to rule on the constitutionality of a case, but rather ensures that the court is rendering decisions with a measure of accountability. Healthy deference bridges together the need for judicial accountability alongside judicial independence.

Accountability is therefore included in how judicial independence is defined in this paper. This is done by taking the two basic conditions of independence that many scholars agree on: impartiality in decision-making and political insularity whereby they are independent of the other political institutions (Donoso, 2009; Staats, Bowler & Hiskey, 2008; Larkins, 1996; Tiede, 2006, Kaufman, 1980, etc.) while keeping in mind that judicial independence cannot mean complete independence of the judiciary (Burbank, 2009; Tiede, 2006; Larkins, 1996). Impartiality and insularity mean that the court can make a decision that can sometimes be counter to the will of the other branches without fear of repercussions. However, this independence is kept in check because the judiciary is a political actor situated within the separation of powers, meaning that while it checks the other branches of government, the judiciary itself must also be checked. Therefore, judicial independence is here defined as: *an impartial judicial body of government*

that is able to freely exercise its powers to determine cases brought before it as constitutional or unconstitutional while also exercising healthy deference to the other two bodies of government – the legislature and the executive – in order to maintain accountability and separation of powers. This definition emphasizes that independence is both the insularity of the judiciary from the arbitrary influence and interference from the other branches of government and accountability to the other branches as well as the rule of law.

1.2. The Purpose of the Study

The main aim of this paper is to contribute to the literature on judicial independence in Asia through the case of South Korea (hereafter often referred to as Korea) and add to the literature on accountability and independence with the concept of "healthy deference." As mentioned earlier, scholars have tried to define judicial independence, but there has been no solid definition given to deference, which is implicitly shown as necessary and compatible to independence, but lacks a clear explanation of how and when it is appropriate. This research shows that part of the problem with the discrepancy in the understanding of judicial independence is due to the lack of a definitive definition given to the act of deference by the court to the other branches of government when making their decisions. Also, while judicial independence and accountability has been studied at length, a large proportion of the literature has been focused on the case of the United States of America and more recently Latin America (Schor, 2009; Scribner, 2010; Frosini &

Pegoraro, 2008; Mujica, 2013; Donoso, 2009) and Eastern Europe (Ackerman, 2005; Albi, 2009; Andreev, 2003; Bond, 2006; Sadurski, 2001; Hartwig, 1992). Studies on Asian countries, such as Korea, have been largely neglected, particularly in terms of evaluating the independence of the judiciary beyond its systemic evaluation and comparison with hundreds of other countries.

Korea proves to be an interesting case due to its relatively recent democratization and the establishment of a constitutional court following its history of nominal constitutional adjudication between 1948 and 1987. However, despite decades of military rule, dictatorships and coup d'états that prevented the formation of an efficient and effective, therefore an independent court for constitutional adjudication, in the last twenty-five years, Korea has been able to establish itself as a court that is "arguably the most important and influential" in comparison to the other constitutional courts in East and Southeast Asia (Ginsburg, 2009, p. 1). Furthermore, Korea has received a positive evaluation of its judicial independence by western scholars, maintaining a score of 2 (the highest score that can be given) for over a decade, according to the report by Cingranelli, Richards, and Clay (2014). Due to its influence and significance, Korea's case for judicial independence provides a good context to examine cases for instances of healthy deference. This is possible since we can evaluate the decision-making of the court by looking at the published case summaries of major decisions by the Korean Constitutional Court. Therefore, while studies on Korea have been lacking, particularly in western literature and in comparison to other countries that democratized around the same time period, this study seeks to provide a base

for further study and examination of judicial independence and accountability in South Korea.

It is important to note that this study does not seek to completely answer the problem of the discrepancy in the definition of judicial independence. Rather, by analyzing the cases that have been decided on by the South Korean Constitutional court, this study attempts to further clarify the definition of judicial independence and provide a basis to build upon. In addition, this paper seeks to address the measurement and evaluation of judicial independence within the field of political science as opposed to law. While intuitively the analysis of the court is in the field of law, the court's significance as a policy making actor and the third balancing power in the separation of powers of Korea's presidential system, requires an analysis of the constitutional court's role and influence as a political actor, much like the legislature or the executive. By studying judicial independence in the context of politics, we will be better able to understand why there is a need for healthy deference. Furthermore, this broadens the study of the constitutional court and the topic of judicial independence so that it can take on an inter-disciplinary approach for a fuller understanding of the concept and its application.

1.3. The Research Question and Assumptions

The main question of this research is in two parts as it seeks to address the question: *How can we measure/understand the judicial independence of the South Korean Constitutional Court in respect to accountability through the*

concept of "healthy deference" and how does healthy deference affect the willingness of the legislative and executive branches to confer their powers to the constitutional court? Accordingly, the assumptions of this paper are: (1) there are no distinct differences between cases involving individuals, those involving political actors as well as cases involving just political actors, particularly the legislature and the executive except in cases affecting the separation of powers; (2) the court enjoys its independence due to their practice of healthy deference, which is compatible to judicial independence as well as accountability and (3) due to the practice of healthy deference, the President and legislature can, to a degree, act as strategic actors to utilize the court to pursue their interests, thereby justifying why the executive would be willing to confer its power to the court when it affects their own power.

Therefore, this paper argues that while de jure aspects such as tenure, appointments and budgets of the judiciary are important to the general measurement of judicial independence, they are limited in that judicial independence is not always observable (Cross, 2003, p. 197; Donoso, 2009, p. 15). In order to get a better measure of judicial independence, we must also have a clear understanding of what deference is and to what degree deference takes place. To set the basis for healthy deference, I first look at the 395 major decision cases rendered by the South Korean Constitutional Court from 1988 to 2014. Through these cases, I try to identify a pattern in the rulings the court has made in respect to the type of case as well as the litigants involved. By doing this, I distinguish the cases that have a pattern of dependent behavior to

determine whether the court practices healthy deference and what this means for the measurement of judicial independence.

1.4. The Structure of the Thesis

Chapter one introduces the background for this research and what the main research question and its assumptions are. It outlines the definition of judicial independence and healthy deference that will be used in this paper and situates the reason why the South Korean case will be looked at

Chapter two provides a brief history of the Korean Constitution and the development of constitutional adjudication from the first to the fifth Republic of Korea. It elaborates on the Yusin period and the establishment of the current Constitution and constitutional court.

Chapter three examines the existing literature on the measurement of judicial independence and why the judiciary is conferred the powers of constitutional adjudication. In relation to this, the chapter looks at the strategic actions of the actors and the influence of the public. Finally, it also looks at the literature on judicial accountability. Through this review of the literature, I set the context for how Korean judicial independence will be analyzed and provide the basis for the development of the concept of healthy deference.

In chapter four, I outline the methodology that will be applied to analyze the judicial independence of the South Korean Constitutional Court by examining the 395 major case decisions it has rendered. This chapter also

explains how two case studies, one on impeachment and the other on party dissolution, will be looked at.

Chapter five looks at the descriptive data of 395 major case decisions as well as some of the patterns that appear when looking at decisions pertaining to certain factors that potentially influence judicial independence. This chapter also provides an analysis of the results

Chapter six looks at two nationally important cases involving the president and the legislature to show how healthy deference is compatible to judicial independence as well as to show how the legislature and the president utilize this healthy deference to pursue their own interests.

Chapter seven concludes the study by providing an overview of the research and by reflecting on the significance of why it was carried out as well as the limitations of the research.

Chapter 2. A Brief History of the South Korean Constitution and the Establishment of the Constitutional Court

The history of the South Korean Constitution starts from the First Republic under President Rhee Syngman following the formal establishment of the Republic of Korea on August 15, 1948 after 35 years of Japanese rule. While the Constitutions of the first five Republics and their respective systems of constitutional adjudications have helped shape the current Constitution, there were significant limitations to the adjudicative powers of the constitutional committees and their level of independence. A brief summary on the development of South Korea's constitutional adjudication according to political period is organized as follows:

Table 1

Constitutional Adjudication by Political Period

Time Period	**Constitutional Adjudication**
First Republic of South Korea (1948-1960)	- Prototype of constitutional adjudication - Establishment of the Constitutional Committee independent from the ordinary courts to review constitutional matter - Committee's review limited only to statutes, leaving other aspects to the final review of the Supreme Court. - Constitutional Committee headed by the VP and composed of five Justices of the Supreme Court and five members of the National Assembly (Article 81(3)). - Authority for adjudication on impeachment vested with the Impeachment Court (Article 47).

Second Republic of South Korea (1961-1963)	- Adoption of the European system (German) where an independent court the final arbiter of the Constitution with expansions on the jurisdiction of the court beyond review of statutes (Article 83-3). - Nine justices with appointment by the President, Supreme Court and National Assembly with 6-year term limits where 3 justices are replaced every 2 years and a majority of six is required to invalidate. - The Constitutional Court Act was enacted on April 17, 1961 but it did not come into effect due to the May 16 Military Coup d'état - This system became an important model for the present system
Third Republic of South Korea (1953-1972)	- Article 102 (1): Supreme Court has the power to make the final review on the constitutionality of the statue and decide on the dissolution of party (Art. 103) - November 1966: the Supreme Court ruled in favor of granting the inferior courts the power of constitutional review (a historical moment for constitutional development because it conferred the power of constitutional review to all levels of the judiciary). This resulted in many decisions of unconstitutionality (mainly in respect to property rights). However, the courts were restricted from independent review of cases with clear political implications. - Due to the military-domination and administration-led period, the Supreme Court was not strong enough to respond to the need of people in respect to their basic rights.

Fourth Republic of South Korea (1972-1979)	- Formation of the Constitutional Committee with jurisdiction over constitutional review of statutes, impeachment and political party dissolution (Article 109 (1)): *Yusin* Constitution - 9 members with term limit of six years: appointed by the President (3 based on nomination of the National Assembly and 3 based on the nomination of the Chief Justice of the Supreme Court). President appoints the Chairperson. - Requirement of supermajority of six for invalidation - Court requests constitutional review →Reviewed first by SC (adds opinion) → forwards to Committee. However, the Supreme Court could cancel the request - System of constitutional adjudication was nominal - Exclusion of "emergency presidential decrees" from judicial review - The Supreme Court did not request any constitutional review of a statute and the Committee did not carry out any proceedings because there was no case of impeachment or political party dissolution. Therefore, no precedent was set.
Fifth Republic of South Korea (1979-1987)	- Retained the constitutional adjudication of the previous Republic by forming the Constitutional Committee. However, it was only a change in phraseology. - The majority of the panel, which was composed of more than two thirds of the Supreme Court justices, had to approve. - The Constitutional Committee was independent only on paper and remained a nominal body - "Supplementary Provisions of the Constitution excluded laws enacted by the National Security Emergency Legislative Council from judicial review" (p.11).

Source: *The First Ten Years* published by the Constitutional Court of South Korea (p.7-11)

As shown above, the system for constitutional review from 1948 to 1987 left much to be desired with shifts in the scope of jurisdiction for constitutional committees as well as limitations of judicial review in respect to cases involving political issues and actors. This was particularly true during periods of militaristic regimes when the Yusin Constitution "authorized the President to [temporarily suspend] constitutional protection of fundamental rights," and the nine Emergency Decrees imposed by Park Chun-Hee between 1974-1979, were not subject to judicial review (Kim, 2013, p. 179). Due to the emphasis on economic growth during this period, there were significant amounts of infringement against basic human rights as well as substantial influence of the executive and other political actors on judicial adjudication. During this period, the President did not have a limited term and had the power to arbitrarily dissolve the National Assembly. Additionally, infringements on peoples' rights and freedoms were carried out with constitutional backing (Kim, 2013, p. 179). While the Yusin Constitution maintained the separation of power between the branches through Article 102, this was mere formality and the reality was that "the executive controlled the legislature through the ruling party" (p. 182) and the court had no power to limit his actions.

Following the assassination of President Park, Major General Chun Doo Hwan staged a coup-d'état in 1979, resulting in civilian protests by mainly university students and labor unions against authoritarian rule. Shortly after, the infamous Gwnagju Massacre of 1980 occurred, which was the confrontation between protesting students at Chonnam National University

and the armed forces sent out by the martial law established by Chun on May 17, 1980. This led to a nine-day citywide protest ending in the deaths and injuries of hundreds of civilian. Following this, Chun dissolved the National Assembly, and in September of 1980, he was indirectly elected as President followed by a newly revised Constitution. While this constitution limited the presidency to seven years, it still allowed the appointment of military officials to high ranks. During this period, Chun' promise for economic growth materialized but the promise of democratic reforms never came to fruition. The anger of the people, further ignited by the death of a protesting student from Seoul National University and compounded by Chun's refusal for direct elections, led to the anti-government protests of the 1987 June Democracy Movement. In reaction to this, the presidential nominee announced the June 29 Declaration, allowing for direct elections and the restoration of civil rights. The approval of a revised Constitution by national referendum followed this Declaration, thereby ending the Fifth Republic as well as the Yusin Constitution and marking the beginning of the Sixth Republic of South Korea. It is clearly evident that during the first five Republics in Korea's relatively short history, there was a lack of judicial independence and accountability. This is clear when we look at the role of the constitutional committee during the Fourth and Fifth Republics, who did not conduct any proceedings and left no precedents.

The current Constitutional Court of South Korea was established on September 1, 1988 following the establishment of the Sixth Republic in 1987 with the promulgation of the sixth constitution on October 29, 1987, two days

after it was passed by national referendum. This change came about with South Korea's transition into liberal democracy, marked by the first democratically held elections that led to the inauguration of President Roh Tae-Woo, who officially came into office on February 25th, 1988. The revision in the constitution brought about changes in the powers of the President. Part of this change is the limitation of the presidential term to five years as stated in Article 70 of the Constitution, as well as the stripping of the President's power to dissolve the National Assembly. However, "the parties differed on which entity should have the power of constitutional adjudication" (The First Ten Years, 2001, p. 16). The debate was centered around the jurisdiction for reviewing cases of impeachment, party dissolution and competence dispute review. The question was whether to give these powers to the Supreme Court (opinion of the opposing party) or to establish an independent constitutional committee (opinion of the ruling party). In the end, the parties agreed on the establishment of an independent constitutional court, made through the compromise of adding a system of constitutional complaint and protecting basic rights. Therefore, this new independent institution, the current constitutional court, was given the power of constitutional review, along with the power to decide on cases of impeachment, political party dissolution and competence disputes (p. 16-17). Following this decision, the adjudicative powers of the constitutional court were outlined in Chapter VI of the Constitution.

According to this section, the South Korean Constitutional Court has jurisdiction over the constitutionality of laws requested to the courts,

impeachment, dissolution of a political party, competence disputes between state agencies and constitutional complaint as prescribed by Act (Article 111(1)). It is composed of nine justices who are appointed by the President (Article 111(2)) three of whom are appointed from persons selected by the National Assembly and three from those nominated by the Chief Justice of the Supreme Court (Article 111(3)). Furthermore, the president appoints the president of the Constitutional Court with the approval of the National Assembly (Article 111(4)). Article 112 (1) through (3) limits the term of the justices to six years with the possibility of reappointment, prohibits justices from joining a political party or participating in political activities, and prevents the expulsion of a justice from office unless done so through impeachment or a sentence of imprisonment without prison labor or heavier punishment. Lastly, Article 113 (1) through (3) outline the requirements for decisions made by the justices, regulations on its administrative and internal matters and how the organization and function of the court will be carried out. Accordingly, Article 113(1) requires the concurrence of six or more justices regarding decisions on the constitutionality of a law, impeachment, dissolution of a party or regarding constitutional complaints. Article 113(2) states that " the Constitutional Court may establish regulations relating to its proceedings and internal discipline and regulations on administrative matters within the limits of Act" while Article 113(3) states that "the organization, function and other necessary matters of the Constitutional Court shall be determined by Act."

Unlike the nominal constitutional adjudication systems of the previous Republics of Korea, which consisted of formal rules that technically conferred power to the judiciary, the current system has fared much better. Scholars such as Ginsburg (2003) and Stephenson (2003) have positively evaluated the South Korean Constitutional Court as judicially independent. While some of the provisions now regarding constitutional review existed in some form in previous constitutions, it had not translated to de facto judicial independence until the establishment of the Constitutional Court in 1988. This change has led to greater confidence in the court by the public and a proper practice of the separation of powers between the branches of government. In regards to the question of why the government of the time would create such an institution with significant power, Attorney Kim Sang-Chul answered that the ruling party at the time of establishing the new constitutional court may have believed that it would be similar to the way the constitutional committees of the past were managed (The First Ten Years, 2001, p. 17). However, it is clear that the current court differs significantly from the past committees. Therefore, the change that has taken place can be definitively stated as a change in the degree of judicial independency but the question remains whether the court is truly independent.

Chapter 3. Literature Review

This section summarizes some of the pertinent literature in understanding and measuring judicial independence that will help highlight the importance of defining and conceptualizing the act of healthy deference. This overview of the existing literature looks at four components that are necessary to the understanding of judicial independence, which are: what we must look at in order to properly measure judicial independence, the judicial-governmental interaction, the weight and influence of public opinion and last but not least the bridging of judicial accountability and judicial independence. By looking at some of the contrasting theories and models of explanation, we will be able to see that in order to move forward, there needs to be a better understanding of the exact relationship between the judiciary and the other branches of government. This section will also help clarify the methodological approach to this paper.

3.1. Measuring Judicial Independence

Defining judicial independence is no easy task and neither is measuring independence. The problem is primarily that judicial independence is open to endless interpretations (Donoso, 2009, p. 3) and also because there are latent variables that make it difficult to measure the indirect and unobservable aspects of dependence or interference by the other branches of government.

However, while there are diverse ways of defining and understanding judicial independence, scholars, for the most part, agree on two core elements of independence, which are impartiality in the decisions the judges make and the insulation of the judiciary from the pressures of the other branches of government (Kaufman, 1980, p. 691). Accordingly, there are also two primary ways to measure and evaluate independence, which are both important to the understanding of judicial independence. One is de jure judicial independence – formal measures in to create incentives for independent behavior (Rios-Figueroa & Staton, 2012, p.3) – while the other is de facto judicial independence – the fulfillment of the formal measures and influence the judge has in asserting his or her own opinion (p.4). Whether one uses de jure judicial independence or de facto judicial independence "depends on whether [one] is targeting the incentives for independent behavior induced by formal rules or independent behavior itself" (p.1).

3.1.1. De Jure Judicial Independence

De jure judicial independence looks at the existence of the structural and formal rules or laws in place that provide incentives for independence of a judiciary. These variables include selection or appointment systems, budgets, and promotion of judges.

This de jure analysis of judicial independence is particularly useful when conducting cross-national examinations that include hundreds of countries as Howard and Carey (2004); Keith, Tate and Poe (2006); and Cingranelli, Richards and Clay (2014) have done. This way of measuring

independence allows researchers to compare the judicial independence level between countries by formal structural guarantees for independence in these countries that would logically translate to an independent judiciary. These cross-national examinations allow for a trichotonmous measure of judicial independence by categorizing judiciaries as not independent (0), partially independent (1) and generally independent (2). This is done by looking at indicators of independence such as the ability to appoint and dismiss judges at will, lengths of appointments, ability to rule on the constitutionality of legislation or presidential decree, and whether court hearing are open to the public, etc. (Cingranelli, Richards & Clay, 2014). These indicators show that in countries where judges are insulated from repercussions against independent and active behavior, they will be more likely to be autonomous and independent.

This form of measurement is common in the South Korean literature on judicial independence as many of the scholars focus on the appointment system of the judges or judicial reforms as ways to increase the independence of the judiciary. An example of this is the research conducted by Choi and Lee (2014) that reviews the limitations of the existing selection and promotion system in South Korea. While the analysis by Choi and Lee (2014) does not concentrate on the constitutional court specifically, it provides important insight into the habits that are formed in the lower courts of dependency and interference, which may affect the behavior of the judges when they are possibly appointed to the constitutional court at a later date. Choi and Lee (2014) find that formal changes need to be made to ensure public trust

through revision of the judicial selection process by implementing measures such as the unitary system of lawyers that emphasizes experience, which was previously lacking. However, they still find this system to be limited since the standard is unclear and it has potential for political influences during the appointment procedure (p. 144). Furthermore, another critique they give is that there is a concentration of power given to the chief justice of the Supreme Court, who holds the power of both the judicial administration and the authority over the personnel thereby not resolving internal problems that can occur. Therefore, instead of the current system, Choi and Lee (2014) propose a judicial lottery system and a civil verification committee as a new alternative to formally address the infringement on independence in the internal system due to the way the promotion system is structured. They believe that by changing these measures, there will be greater incentive for judges to behave more independently since they will be insulated from the internal interference problem.

Shin (2009) and Kim (2013) also highlight the problems with the judicial reforms that have taken place in South Korea. The former finds fault with the undemocratic way the reforms took place while the latter focuses on the appointment of the nine justices of the Constitutional Court, and finds fault with this system. Shin (2009) argues that the reforms that were made in 2003 were carried out in a top-down fashion, thereby neglecting the input from the people and their desire for impartial or unbiased trials. Kim (2013) argues that the appointment system should be based not on the split appointment between the President, the National Assembly and the Chief

Justice of the Supreme Court. Rather, all nine justices should be appointed based on the two-thirds majority of the National Assembly with changes made in the way the impeachment of judges takes place as well (p. 209). Like Choi and Lee (2014), the emphasis here is on the ways that the judicial system's formal structure can be changed to better protect the independence of the judges. These scholars believe that by effectively reforming the selection and/or appointment process, there can be an increase of insularity from interference by influential elites and political actors.

However, despite the correlation between the lack of structural mechanisms to ensure independence and the problems that can occur internally through mechanisms such as promotion, de jure judicial independence is limited in fully understanding judicial independence. This is because formal indicators do not necessarily match the reality. This is clear in the history of the South Korean Constitution and the respective development of constitutional adjudication. There are disparities between the formal and practical measures of independence (Donoso, 2009, p. 47). The history of the South Korean Constitution shows that while formal rules can exist and the basis for decision-making guaranteed in a legal sense, it is not necessarily correlated to actual independent and autonomous behavior. This is not to completely disregard the importance of these formal guarantees of independence or the need for reforms to better achieve and facilitate independence. However, de jure judicial independence is not enough to decide whether or not a country's judicial system is independent. There is need for measuring and evaluating the actual practice of these rules and what they

imply regarding the matter of judicial independence. While de jure judicial independence is an observable way to measure judicial independence, it is insufficient in that it is unable to account for the latent and indirect ways judicial independence is infringed upon, particularly the manipulation of the formal rules by pressures from vested outside parties.

3.1.2. De Facto Judicial Independence

De facto judicial independence looks at the fulfillment of the formal provisions and actual independent behavior by looking at judicial independence in its actuality, meaning the way in which the rules are applied. Rather than just looking at whether there are formal rules or conditions in place that give the appearance of autonomy, de facto judicial independence measures whether or not these measures actually translate to independent decision-making. However, as noted previously, while rules and conditions are observable in that they are written in the constitution and changed through reforms, aspects of de facto judicial independence are not always clear, therefore difficult to measure.

Despite the difficulty in observing de facto judicial independence, scholars have tried to determine de facto judicial independence by focusing on the decisions the Constitutional Court has made (Rios-Figueroa, 2007; Cross, 2003; Linzer & Staton, 2012; Ramseyer & Rasmusen, 1997). The primary way to measure de facto judicial independence has been to test the decision of the court with factors that can hinder independence such as the type of

litigants, how judges are selected, and the political leanings of the judges. De facto judicial independence has also been tested by looking at the observable consequences of the decisions rendered such as Ramseyer and Rasmusen's (1997) analysis on whether certain decisions on political cases in Japan led to placement in courts located in undesirable areas. Looking at the relationship between decisions and factors that affect it helps us to measure, to a degree, the indirect and somewhat unobservable ways by which independence has been affected.

Rios-Figueroa givens an example of measuring de facto judicial independence in his analysis of the Mexican Supreme Court, the highest court in Mexico. He looks at 301 constitutional cases between the years 1994 and 2002, accounting for the changes that occurred following the 1994 judicial reform. Prior to this reform, the Supreme Court was both legally and politically subservient to the executive power and one party – the Institutional Revolutionary Party (PRI) - held full control. However, following this reform, the PRI started to lose its grip on power as fragmentation increased. Overall, out of the 301 cases examined, 124 instances were found unconstitutional while 177 were found to be constitutional with the PRI as the defendant in 229 of the total number of cases in this time period. At first, these statistics seem to indicate that the court is fairly active and not subservient to the power holder. However, the breakdown of these cases show that it was only after the PRI's loss of the majority in the Chamber of Deputies in 1997 and the presidency in 2000 that the court became more independent and active in its decision-making. In accordance with this, Rios-Figueroa argues that the

increase in the fragmentation of the elected organs of the government results in a more effective judiciary, meaning that the judiciary would be more likely to decide against the power holder and behave independently. To prove this hypothesis, he divides the years between 1994 and 2002 into three periods, where each period had higher levels of fragmentation. He also utilizes the electoral data at three levels: country, state and federal to code the plaintiff and defendant of each case and also codes them according to their level of importance respectively. The statistical models prove Rios-Figueroa's hypothesis. As the PRI lost control and fragmentation increased, first in the legislature then in the executive, more cases of unconstitutionality against the PRI were rendered. In this way, we can measure the level of judicial independence by examining the decisions rendered by the court with the parties involved in the cases rather than simply looking at the laws that were in place that would give the judiciary autonomy.

Another example of de facto judicial independence is found in Ramseyer and Rasmusen's (1997)'s study of the Japanese judiciary. They look at the personal data on 276 judges between the years 1961 to 1965 to explore what determines the judges' career success, and whether the Japanese politicians manipulate those incentives by affecting their careers dependent on the types of decisions they render. While Ramseyer and Rasmusen do not argue that Japanese politicians overtly intervene in the Court's decisions, they show, through the data collected, that judges face incentives to favor the ruling party (LDP – Liberal Democratic Party) due to the party's control of Supreme Court appointments and lower court judicial careers. Ramseyer and

Rasmusen look at factors such as age, the university the judge graduated from, opinions rendered per year, the prestige of the judge's first assignment, and the number of anti-government decisions to make this connection between de jure and de facto judicial independence. They test whether a judge's decision against the government leads to a more unattractive post as well as the political content of a judge's decision with his or her career success. This is done to illustrate the indirect ways judicial independence is infringed upon. The main hypothesis is that rendering decisions unfavorable to the ruling party will lead to less attractive posts. The results of their analysis show that while there is little evidence of influence in the school attended on the initial job assignment, there is significant influence pertaining to political matters. Ramseyer and Rasmusen find that judges who decided against the government received short penalties such as less attractive assignments for several years and judges who joined leftist organizations also received less attractive jobs. The authors draw the conclusion that "the evidence suggests that the LDP [the dominant party for decades] appointees may have created and maintained an incentive structure with a distinct political bias" (p. 285-286). This underlying and indirect way of controlling the judiciary's behavior through self-restraint is indicative of a less independent judiciary and one where judges act on de jure independence rather than de facto judicial independence.

Cross (2003) argues the need for measuring judicial independence by de facto judicial independence and that judicial independence must be kept in balance with judicial accountability, not only based on formalistic guarantees. Accordingly, he tests judicial independence in the United States by analyzing

how the courts decide cases involving governments. Like Ramseyer and Rasmusen, Cross also looks at the method of selection in judges. However, he looks at and controls for several selection methods, pertaining not only to the Supreme Court, but also in regards to the state judiciaries in the United States in order to empirically test "the effect of judicial selection systems on judicial activism," thereby judicial independence (p. 7). He measures for judicial independence by testing the selection method type with the number of statutes declared unconstitutional by the courts between 1981 and 1985. Here the ruling of unconstitutionality is parallel to an active court. The five methods of selection he looks at are: partisan elections, nonpartisan elections, legislative appointment, gubernational appointment and merit plan selection. He tests the frequency of statutes declared unconstitutional by each selection method. Then he tests the relative frequency of statutes rendered as unconstitutional by selection method and the probability of the results being due to change. Before controlling for factors such as urbanization, party competition, public participation and influence of interest groups on the legislature, the only statistically significant result is the merit plan selection, which renders fewer declarations of unconstitutionality, meaning less independence. In this way, Cross measures judicial independence by looking at the relationship between the decision rendered by the court and the selection process. He then controls for the aforementioned variables and finds that the merit plan is still less likely to result in high numbers of unconstitutional decisions. Beyond this empirical research, Cross also argues that by looking at instances of deference by the court, it is apparent that the courts in the U.S. "rarely challenge the

decisions of the legislative and executive branches" (p. 4). He credits the reason for this deference to the discipline of the judiciary through factors such as the threat of impeachment, jurisdiction stripping or resource control. In this way, while there are formal guarantees of independence in the judiciary that make the judges technically autonomous, Cross brings to light latent factors that may make judges more reluctant to make a politically controversial decision despite the rarity of these disciplinary measures being actually used.

There are several limitations to the de facto measurement of judicial independence in general and pertaining to the case of South Korea. First, the majority of these empirical studies restrict the decisions of the courts into a binary form of constitutionality or unconstitutionality. While this method helps to simplify the data, they also need to account for other decisions that can be given such as dismissal, rejection, or cases where the quorum is not met, leading to a ruling of constitutionality despite a majority in favor of unconstitutionality. This is true in the case of South Korea as Ginsburg (2009) argues that there are gradations within these binary decisions, which are important to take into account as they can give flexibility in the handling of politically sensitive issues (p. 3). Furthermore, the fragmentation hypothesis, which is discussed in depth in the following section and used by Rios-Figueroa to determine judicial independence, is limited in examining the case of South Korea. Both the cases on Mexico and Japan deal with the incumbency of one particular party and in the case of Mexico, the weakening of said party and how this fragmentation increased judicial independence. However, as Murjica (2013) argues, in his comparison on Chile and South

Korea's political parties, the latter's political parties are largely underdeveloped with constant shifts, divisions, and name changes that prevent citizens from developing any significant ties. This is further compounded by the fact that "every new election shows new changes, and new parties according with the conflicts and new alignments of personalistic leaders" (p. 28). Therefore, due to the lack of an incumbent party (in a concretely identifiable way) as well as the consistency of fragmentation in terms of Korea's political parties, it is not as easy to test the level of judicial independence vis-à-vis level of fragmentation. While the fragmentation of Korea's political parties have likely contributed to the independence of the judiciary, it is difficult to test for the level of independence relative to a particular degree of fragmentation.

However, much like these examples show, looking at the decision of the constitutional court is a useful way to analyze the level of independence the judiciary has. It allows us to test whether or not the judiciary is deferent to the interests of power holders such as the legislature or the executive and it gives us the chance to see how formal measures such as judicial selection and judicial discipline can affect the level of independence in the judiciary through the way judges make these decisions. By associating the number of cases the court rules as unconstitutional or constitutional with other measures of observable or somewhat observable independence, we are better able to gauge the interference of other branches in the decision-making process of judges and infer what internal factors may affect the judges' independence in the said decision-making. However, it is important to note that while the

decision of constitutionality or unconstitutionality is an effective way of measuring independence in decision-making, the cases should not be regarded as a whole. While scholars have separated cases depending on whether or not the legislature or the executive was a party to the dispute brought before the court, this only gives us a partial understanding of independence. We need to see whether particular types of cases or particular types of actors within the government and their relative position as a respondent or plaintiff affect the way in which the judiciary makes its decision. By determining the affect certain cases or actors have on judicial decision-making, we will also be able to better understand the strategic way all three branches of government interact to pursue their interests.

3.2. Judicial-Government Interaction

An important consideration that must be given in respect to measuring judicial independence is the question of why the legislative and executive branch of government would willingly confer power to the judiciary when it means a decrease in the former's powers. There are several endogenous and exogenous reasons as to why the government allows a strong, independent judiciary to form and be maintained. These factors involve incentives and costs political actors face, directly and indirectly, within the institutional structure and the strategic actions they take in order to attain these incentives while avoiding the costs. Ultimately, the strategies of political actors affect de facto judicial independence.

3.2.1. Fragmentation and Separation of Power

One of the most common explanations given to explain judicial independence vis-à-vis the other branches of government is the fragmentation hypothesis. Simply put, fragmentation means that no single political party controls all three branches of government (Rios-Figueroa, 2007). While there can be degrees of fragmentation depending on whether or not a political party controls more than one branch of government, the main argument is that "increasing fragmentation of power within the political branches…limits their capacity to legislate or to be the place where policy is effectively formulated" (Ferejohn, 2002, p. 55). Therefore, "courts can exercise independent authority to shape policies only when the political institutions are too fragmented to check them" (p. 57). It implies that when the political parties are not self-disciplined or well organized, due to cleavages within the branch, the court has the power to act freely. Not only is fragmentation a concern for the political parties in the legislature but it also concerns the legislature and the executive in that it limits their ability to join forces to overturn the court's policy choice (Ferejohn, Rosenbluth, & Shipan, 2004). In this way the constraint on the judiciary to act according to the interests of the legislative or the executive is lessened if the legislature is less likely to be able to form the majority necessary to overturn the court's decision and the executive and legislature are unable to join forces to overrule and internally discipline the court due to the fragmentation of their interests.

The fragmentation hypothesis serves as an important explanatory framework for explaining judicial effectiveness. It is able to account for the variance in the measure of judicial independence in democratic countries as well as the fluctuation in judicial independence within countries by year. Less fragmentation means less independence of the judiciary since the degree of fragmentation corresponds to the degree of judicial independence. However, the explanation of independence through the fragmentation hypothesis is limited in that it positions the judiciary in a situation where their independence can be arbitrarily taken away depending on the ability of the other branches to act collectively, which makes it difficult to determine the actual independence of the judiciary. This problem is further compounded by the fact that the degree of fragmentation can change dependent on every legislative and executive election, creating unpredictability and inconsistency in the way judges decide on cases, two key components of judicial independence. Fragmentation also implies that the "judiciary depends on the other branches to exercise its power effectively" (Rios-Figueroa, 2007, p. 33) meaning that it does not satisfy the basic conditions of judicial independence, which are impartiality and political insularity. This condition of instability and unpredictability means that citizens cannot depend on a uniform application of the law, which is necessary for upholding the rule of law and therefore the independence of the judiciary (White, 2001, p. 1056). Fragmentation is also problematic in unicameral forms of government since it decreases the number of veto players (Tsebelis, 1995). This problem is particularly present if the country has a strong president, as is the case of South Korea, since the

president has discretion to veto legislation that a fragmented legislature will be unable to overturn with the necessary majority. Even when they rely on the court, the president can choose not to the implement the court's decision. Furthermore, fragmentation is also limited in that it does not look at the judiciary as a political actor that can side with one political branch against another (Bond, 2006). While there may be fragmentation within the legislature, the president can utilize this state of division to utilize the court in its favor. Therefore, there needs to be more than just fragmentation to explain why the court is given the power to adjudicate freely.

3.2.2. Strategic Actions of Political Actors: Insurance and Hegemonic Theory

Insurance theory (Ginsburg, 2003; Stephenson, 2003; Helmke & Rosenbluth, 2009) and hegemonic theory (Hirschl, 2000) address the limitations found in the fragmentation hypothesis by situating the political actors as strategic players. In this way, the discretion of the court is not subject to whether or not the other policy-making branches of government can collectively act but rather creates a more stable and predictable environment of evaluating judicial independence. In this way fragmentation becomes the incentive for the way the government interacts with the judiciary. Insurance theory accepts the fragmentation hypothesis in that "neither party can become so electorally dominant that it no longer values the opposition protection offered by judicial review highly enough to comply" (Vanberg, 2015, p. 174). It also explains why at the beginning of transition a once powerful government willingly

confers its powers to an institution that will limit these powers. Ginsburg (2003) summarizes the core of the theory as follows:

> At the beginning of transition, if the politicians drafting the constitution foresee themselves in power after the constitution is passed, they are likely to design institutions that will allow them to govern without encumbrance. On the other hand, if they foresee themselves losing in post constitutional elections, they may seek to entrench judicial review as a form of political insurance since even if they lose the election, they will be able to have some access to a forum in which to challenge the legislature (p. 18).

Ginsburg maintains that the institutional design of the constitutional court will reflect the interests of powerful politicians at the time of drafting and if there is no dominant political party and politics are more fragmented, judicial review will be more likely. The possibility of politicians utilizing the court as insurance for their uncertain future is reiterated by Bond (2006)'s argument that "contestant parties would have an interest in preserving a more powerful court if they suspected… that they might have to rely on the court as an ally against an oppressive majority" (p. 17). Stephenson (2003) expands on the insurance theory by addressing why the power holders continue to support an independent judiciary. This allows us to account for why certain countries, such as South Korea, have consistently sustained an independent judiciary while other nations that transitioned around a similar time period have been fluctuating in their independence as measured by Cingranelli, Richards and Clay (2014). In Stephenson's insurance game theory model, parties are risk averse, focus on the long-term view and they are competitive. Furthermore, no one party dominates the electoral system. Therefore, uncertain of the results of the next election, where they may not be able to hold a majority, the

legislature continues to confer power to the judiciary so that should they need an ally in combatting policies put forth by the ruling party, they will find one within the judiciary.

Similar to the insurance theory model is Hirschl's hegemonic theory, which increases the judicial independence of the court through the strategic actions of the other branches of government and their attempt to hold onto power vis-à-vis a growing threat to their power. By looking at the constitutional reforms of Israel, Canada, New Zealand and South Africa, Hirschl argues "judicial empowerment is in many cases the consequence of a conscious strategy undertaken by threatened political and economic elites seeking to preserve their hegemony vis-à-vis the growing influence of 'peripheral' groups in crucial majoritarian policymaking arenas" (p. 95). The elites empower the judiciary because they believe that their policy preferences will find greater support there. This transfer of power to the judiciary takes place at the time of reform where the elites and their political representatives, support and initiate the constitutionalization of rights in order to transfer power to the Supreme Court (or whatever is the highest court of constitutional adjudication). An example makes this argument clearer. In Israel, as the country's secular bourgeoisie faced threats to its powers in majoritarian institutions, they empowered the judiciary to protect their political interests against the increasing political power of marginalized groups (p. 105, 107). The secular bourgeoisie was able to combat the rising minority power with the cooperation of economic and legal elites by initiating the 1992 constitutional revolution. This transferred the political struggle between the bourgeoisie and

minority from the majoritarian decision-making arena to the court, where there was less challenge to the bourgeoisie's ideological hegemony (p. 109).

Both the insurance theory and hegemonic theory provide solid grounds as to why the legislature and even the executive would empower the judiciary in spite of losing some of its own power. They emphasize the strategic actions of the power holders who would sacrifice some of the power it has now in order to be able to access this power when it no longer formally has it. However, there are several limitations that need to be resolved before we can fully accept these models as part of the explanatory variables for judicial independence. First, both Ginsburg (2003) and Hirschl (2000)'s models are dependent on a point of transition whether it is in the form of government or in the introduction of constitutional reform, particularly the constitution of rights. This approach does not properly address the fluctuation in judicial independence within a country and amongst countries, therefore highlighting its limited explanatory power. In the case of South Korea, it was not the dominant elite who unilaterally established the constitutional court and conferred onto it the necessary powers. It was rather a compromise between the ruling and opposing parties on what the jurisdiction of the court will be. Secondly, one of the key assumptions here is that the judiciary provides a better forum through which legislative or elite interests can be protected. This inference assumes that a) the courts will still be willing to rule in favor of the elite or legislature that is out of power or that the latter can influence the decisions made by the court and b) that judicial independence is compatible with protecting the interest of these elites or politicians. There is a need for a

clearer picture of what exactly judicial independence entails and whether it can be compatible to this strategic action of elites and politicians. While insurance theory and the strategic behavior of the political actors is prevalent to the understanding of measuring and understanding judicial independence, there also needs to be an explanation as to what would make the elites or the legislature confident that the courts will better reflect their interests. Lastly, these models posit the judiciary as a fairly apolitical and influential political body. However, it does not account for the fact that the judiciary itself may act in a strategic way to enhance its judicial independence by the way it interacts with the other branches of government.

3.2.3. The Strategic Actions of the Judiciary

The Court also acts strategically since it is a political actor who has the power to reject legislation thereby inflicts political consequences through its decisions. Furthermore, judges, with term limits, have reason to be concerned not only about the preferences of their appointers but also about their future once their term on the bench is over (Garoupa and Ginsburg, 2011, p. 541). This is particularly true in South Korea as opposed to countries such as the United States since in the former, the term of judges is limited to six years yet renewable until the age of 65. This creates the incentive for judges to act in a way that will ensure that they do not lose their seat once their term is over. Therefore, the judges and the judiciary as a whole are susceptible to partisan politics and the pressures that come with it (Ferejohn, 2002, p. 52). It is harder

for a judge that has a six-year term limit to freely make decisions that can negatively affect the interests of the other branches since these branches are the ones who will decide the fate of the judges' future career once their term is over. This is particularly true as Landes and Posner (1975) argue, "the ability of courts to maintain their independence from the political branches may depend at least in part on their willingness to enforce the 'contracts' of earlier legislatures according to the original understanding of the 'contract'" (p. 15). This position of the judiciary creates space for the judges to act strategically in order to ensure their long-term survival.

A strategic way in which the judiciary can enhance its independence is to pick its battles when it comes to making decisions on cases. In new democracies, a new court might adopt a strategy of "soft" or semi-deferential review in the beginning and adjust its status quo policy slowly (Epstein, Knight & Shvetsova, 2001, p. 138). Here, the court, at the time of its establishment, complies with the interests of the executive and legislature in order to test the bounds of its jurisdiction before slowly building its ability to decide on cases thereby ultimately enhancing its independence. For example, in Chile, the TC, the high court in the country, used the doctrine of reasoned deference that allows the court to "exercise its powers 'vigorously and creatively' while avoiding extreme politicization or permanent conflict with political powers" (Scribner, 2010, p. 88). Here, the court, when dealing with cases that affect the separation of powers, "may shift the balance of power toward the Executive or the Legislature, and away from or towards themselves" (p. 79). The judges have incentive to stay within the "comfort

zone" of the legislature and executive who can overturn, ignore or refuse to implement the decisions made by the judiciary thereby preventing the judiciary from achieving its objectives (p. 83). The strategy of the court is to comply with the other branches so that they can develop independence in other areas (Rios-Figueroa & Staton, 2012, p. 6).

Another form of strategic judicial action is what Rios-Figueroa and Staton (2012) refer to as strategic judicial deference that they find Simmons, in her book *Mobilizing Human Rights: International Law in Domestic Politics,* alludes to in cases of litigation strategies to advance human rights norms. Simmons writes:

> One of the most important conditions for litigation to be a potentially useful strategy to enforce rights is judicial independence. For courts to play an important enforcement role, they must be at least somewhat independent from political control. The government or one of its agencies, representatives or allies is likely to be the defendant in rights cases, and unless local courts have the necessary insulation from politics, they are unlikely to agree to hear and even less likely to rule against their political benefactors. Anticipating futility, individuals or groups may decide to avoid the courts altogether (as cited in Rios-Figueroa & Staton, 2012, p. 6).

Here, in the context of human rights cases, the courts can choose to dismiss the case or to rule in favor of the power holders because the government is a litigant to the case. In relation to this, Rios-Figueroa and Staton (2012) warn that decision-making by the judiciary can be strategic since the judges can selectively choose cases to review. They can do this by selectively choosing cases to review that will not cause conflict with the other branches of government, thereby creating the appearance of autonomy. Therefore, it is important to look at how the judiciary is influenced by political concerns in its

decision-making. (p. 6).

The strategic actions of judges show that compliance or deference plays an important role in the analysis of the decision judiciaries make and how we can understand their decisions as well as how we can perceive their independence. In particular, the concept of reasoned deference that Scribner utilizes is imperative to finding the balance between judicial independence and judicial accountability. While Scribner points to the separation of powers in reasoned deference, there also underlies an implication that the court will always defer to the legislature rather than only in cases that actually affect the separation of powers. There needs to be measures in place that will prevent the judiciary from becoming less independent by deferring completely to the other branches of government. This is particularly important as observers of the Chilean case of judicial decision-making have evaluated the TC's performance as "fundamentally disappointing," particularly in terms of rights because as Couso (2015) argues, "[the TC has been] largely passive, usually deferring to the legislature's judgment concerning the constitutionality of the laws it passes" (as cited in Scribner, 2010). Deference, or in this case, healthy deference, should not be a complete abdication of power to decide on cases but rather understanding the underlying power struggle and acting accordingly while following the rule of law. In addition to this, public opinion and its role need to be factored in so that we can better understand deference as a measure of accountability that can balance the potential judicial dictatorship that may occur if the independence of the court is not kept in check as well.

3.3. The Public and Strategic Choice

Contrary to Hibbing and Theiss-Morse (2002)'s argument that citizens are apathetic, leaving politicians to do their jobs without concern for disciplining them, Vanberg (2015) argues the importance of public opinion and support as a shield for judicial independence. Public opinion is an important variable that affects the strategic actions of all the actors. It serves as a powerful restraint on the abuse of power within the three policy-making branches of government. This is because public opinion affects all three policy-making branches. While the legislature and executive depend on the public to secure their electoral future, the judiciary, despite being a non-elected branch, requires the public's trust and support in order to maintain its independence. Public opinion can also be utilized as a factor that aids the strategic actions of the three branches of government, particularly the legislature and the executive. While the public's trust and high opinion of the court can make it too costly for politicians to ignore the court's decision or to attack it in an overt manner (Epstein, Knight, & Shvetsova, 2001; Vanberg, 2001), the legislature and executive can also benefit from the public's opinion of this judicial independence for their own benefit. Two ways in which public opinion affects the independence of the judiciary are: policy credibility and blame deflection

For the most part, evidence indicates that public support for the court is higher than their support for any of the other branches of government. This is true for the case of South Korea as the data collected by Asia Barometer indicates that in 2003, 59.6% of the population supported democracy, but the

level of trust in political parties have been constantly dropping since 1996, reaching 14.6% in 2003 (Mujica, 2013, p. 30) while citizens hold the Constitutional Court's decisions in high regard (Ginsburg, 2009, p. 1). This trust in the judiciary, which is related to their perceived independence and effectiveness, gives the other, less popular branches of government an opportunity to use the court as a way to give their policies credibility. The legislature has incentives to increase the permanency of the legislations they put forth and pass legislations that are in line with their own interests and intentions, which they can effectively do through an independent judiciary (Landes & Posner, 1975, p. 882). While the people may not trust the credibility of the policy put through by the legislation, once the courts confirm these policies, they gain more credibility and are less likely to be subject to scrutiny by the public. Therefore, through the influence of public opinion and confidence in the court, the legislature can utilize the independence of the judiciary for their own benefit. This provides an explanation for why the legislature would be willing to have an independent judiciary that reduces their own power. An example of policy credibility is seen in the Japanese case where the judiciary helps add credibility to the promises made by the government, particularly the ruling party (Ramseyer & Rasmusen, 1997, p.262).

Another way in which political actors use the independence of the judiciary is blame deflection, which is a way for these political actors to divert negative attention away from themselves in order to protect their own reputations. They do this by distancing themselves from publicly unpopular

policies. The executive or the legislature can deflect blame for these policies to the court thereby salvaging their own reputation (Salzberger, 1993) and avoid having to make the decisions themselves. According to Salzberger (1993), there is both a blame shift and credit shift that occurs from the legislator, where they can diminish their responsibility for the outcome of a particular policy to those who oppose it, but at the same time claim credit from those who supported it. This way, the policy-maker wins because he or she can blame the court for the decision either way. In this way, by deflecting blame for bad policies, the legislator can maintain political support from the public (p. 362). Popova (2012), in her book, *Politicized Justice in Emerging Democracies,* gives an example of blame deflection through the case of Russia and Ukraine. She writes that the incumbents in these countries had the same incentive to delegate unpopular economic reforms to an independent judiciary in order to avoid taking responsibility for the effects that it would have (p. 54). In this way, it is in the interest of the political actors to delegate to a seemingly independent and trusted court the burden of making unpopular decisions so as to retain their own popularity among the public.

The importance of public opinion is indisputably important, particularly in democracies where the government is responsible to the public and the latter can keep the executive and the legislative branches accountable through their votes. It is clear that in both of the tactics used by the legislature and executive, public opinion plays a significant role in why these two branches require an independent judiciary as well as how public opinion can help the judiciary maintain its independence. However, there are several problems that

arise in regards to these strategic actions that utilize the public. First, as Stephenson (2003) argues, the theories "assume a public sophisticated enough to observe that courts rather than the government made an important policy decision, but not sophisticated enough to realize that the government could manipulate or ignore the courts if it wanted to" (p. 63). Both the blame deflection and political credibility theory underestimate the public's perception and understanding of politics. It assumes that the public will take at face value what is told without questioning the deeper motives. Furthermore, it also depends on a superficially independent judiciary that can be controlled by the will of the policy-makers and completely disregards the interest of the court in protecting itself from being seen as the enabler of bad policies.

Helmke and Rosenbluth (2009) emphasize this point, arguing that the Court is more likely to deny such cases because they also want to protect their future freedom by retaining public support. While the judiciary may be more popular and trusted in comparison to the other two branches of government, this positive evaluation can only be maintained if the judiciary continues to make decisions that prove to be reliable vis-à-vis the other branches as evaluated by the public (Stephenson, 2004). If the judiciary continuously takes on and decides on cases that would put themselves in a bad light, they would be reducing their own reputation, which is not in their interest to do. As an unelected branch of the government, the court does, to a degree, need the support of the public to legitimize their independence to the other branches. Therefore, the public's opinion on a case cannot be completely ignored and its

reactions and opinions need to be taken into account. This is especially true as the purpose of a democratic government is to reflect the will of the people. In order for this to occur, the separation of powers and the judicial decisions made in this respect, through healthy deference, should note whether or not the decision is obviously contrary to the public's opinion. In cases where the parties to the case are two governmental agencies, the assumption is that the public will have some influence on who the court is deferent to as they will legitimize whether the court adhered to the separation of powers. In order to secure proper accountability to the other branches and the public, the court must factor into its decision-making whether a case is brought forth with or without public support. While the court should not completely base their decision on what the public favors, the harm to the public and how the public's opinion affects the view of the separation of powers, should be considered as part of the court's responsibility for accountability as a governmental body, particularly as one that is not composed through democratic vote.

3.4. Accountability and Judicial Independence

There is debate on whether or not accountability and independence are opposing or different sides of the same coin (Burbank, 2003). Those who argue the latter see accountability as a necessary part of independence because giving complete independence to the judiciary without accountability requires that we rely on the judiciary's self-restraint to prevent their own preferences,

ideologies and self-interest from affecting their role as judges (Burbank, 2003; Cross, 2003; Donoso, 2009). However, those who argue that accountability and independence are opposing concepts ground their argument on the basis that judicial independence should be separated because judicial independence is related to the question of separation of powers between the three branches of government while accountability concerns the issue of whether the judicial branch is subject to the rule of law (Staats, Bowler & Hiskey 2008, p. 80; White, 2001, p. 1059). It is clear from these two sides that in order to determine the compatibility between judicial independence and judicial accountability, the question of who the judiciary should be accountable to needs to be addressed.

A significant number of scholars argue that the judiciary cannot be completely independent. Some, such as Landes and Posner (1975), argue that complete independence is not possible because the legislature has control over the judiciary's budget and salaries and the executive can refuse to enforce judicial decrees (p. 13). Here, the need for accountability does not restrict the independence of the court but rather the structural limitations that are placed on the judiciary through formal restrictions. Other scholars such as Cross (2003), argue for the limitation on independence through accountability. He uses the case of the Iranian judiciary to warn against a completely independent judiciary that is free from accountability to the public or the other branches, where the judiciary sacrifices fair judicial processes to further its interests, in this case religious conformity (p. 3). It is clear from his criticism of unaccountability from the public and other branches that Cross advocates

accountability of the judiciary to the public as well as the other branches of government. However, while the power the other branches hold over the judiciary can be seen as a way of ensuring accountability with the ability to check overzealous judges, it can also be a way for the other branches to control the judiciary to advance their own interests. The balance between how much the judiciary should be kept in check before there is an overextension of checking by the other branches is yet unclear.

Unlike Cross, White (2001) argues that while independence and accountability are not conflicting principles, judges are not accountable to an individual, party, majority preferences or public pressures. Here, the "who" the judiciary should be responsible to is the rule of law, defined as the fair application of the law (p. 1059). This means that external forces, pressures or threats should not control the judiciary and that the court should only be subject to the law itself. However, the problem with White's argument is that the judiciary is accountable only to the rule of law but not accountable to anybody, such as branches of government or the public. Therefore, as the deciders of how the law is interpreted and what is fair, the court must then become accountable to itself. This once again highlights the limitation that the judiciary is a human construct that is susceptible to the human fallacies of bias and self-interest therefore cannot be completely left to check itself (Burbank, 2003). Therefore, while the rule of law should be respected, there needs to be clear guidelines of how the rule of law should be applied. Accountability to the rule of law and to the decisions made by the government is compatible to Choi (2015)'s criticism of the absolutization phenomenon of judicial

independence in South Korea. He argues that the judiciary should be accountable to the decisions they make and should take responsibility for these decisions. However, unlike White, Choi advocates for a way to monitor the power of the judiciary so that their accountability is kept in check. However, emphasizing the need for a clear understanding of accountability and monitoring of judicial independence, Choi does not go much beyond the argument that accountability is needed.

Shin (2009) also finds problems with the complete independence of the judiciary, using South Korea as an example of the problem that arises. He argues that despite the use of the term "judicial dictatorship" in Korean society, the concept of judicial independence is still held in high regard. He finds that the reforms that took place in 2003 have not addressed the problem that arises from a too independent judiciary and that the current leaning towards independence needs to be balanced by the weight placed on judicial accountability. Shin is more detailed in his specifications for how accountability can be carried out that will balance and not overpower judicial independence. He outlines some structural measures such as improvement on the assessment of judges, a revision of the lawyers' disciplinary system, and the installment of a special investigation institute for high ranking officials who misuse their power. In this way, Shin argues that accountability of the judiciary can be balanced with their independence. However, while the answer to who can keep the judiciary accountable is answered, structural mechanisms for ensuring accountability once again creates the problem that

the judiciary may become too dependent on those that try and keep them accountable.

While these scholars emphasize the need for balance, there is yet a clear understanding of where the line is to be drawn where the judiciary is accountable to the other branches of government without becoming subject to the will and interest of the legislature or the executive. This problem is not easy to resolve because independence emphasizes impartiality and insularity from the other branches of government. Yet accountability demands that the judges be subject to scrutiny of the other branches or the public. Therefore the most controversial features of judicial independence is how to find this delicate balance between independence and accountability, which is reflective of the debate on whether or not accountability and independence are compatible or opposing as well as the debate on who or what the judiciary should be accountable to. One thing that is clear is that while the court is responsible for keeping itself in check to the rule of law, they must do so with respect to the separation of powers.

As this overview of the literature shows, accountability is at the core of understanding judicial independence. Whether it is the measurement of judicial independence or in looking at the strategic action of the political actors, there is an underlying emphasis on accountability. This is particularly true when factoring in the opinion of the public. While judicial independence can be measured in a multitude of ways, if there is no satisfactory explanation for the balance between accountability and independence, we cannot fully understand independence. This is clear as Cross (2003) argues that the United

States of America has the balance between accountability and independence fairly correct, but at the same time, he states that the courts in the United states rarely challenge the decisions of the legislature and executive braches (p. 198). How can we accept this balance when the court appears deferent to the other branches of government? This can be understood if we utilize the concept of reasoned deference that Scribner introduces in the case of Chile with the addition of specified boundaries. These boundaries are given by adherence to the separation of powers where "although it is beyond dispute that one branch cannot exercise the 'whole' power vested in another department, the Constitution does not mandate complete and absolute separation among the three branches but will not tolerate undue or injurious intrusion by one branch into the sphere of another" (Kaufman, 1980, p. 689). Therefore, the concept of healthy deference developed in this paper by adapting reasoned deference and tying it to accountability to the separation of powers, will help us to not only better understand the strategic actions of the political actors but also help us to properly measure judicial independence.

Chapter 4. Research Methods and Data

4.1. Methodology

In order to analyze the decision-making of the South Korean Constitutional Court, we must review the cases that were brought before the court. In order to do this, I look at the case decisions published on the South Korean Constitutional Court's website. Under the 'Decisions' section, there are four categories: Major Decisions, 12 Landmark Cases on Social Integration, 25 Landmark Cases (Cartoons), and Caseload Statistics. According to the overview of caseload statistics, there were a total of 26,781 cases filed between the years 1988 and 2014. Unfortunately, there is a limitation to the statistics on the total number of cases because we are only provided with the numerical data and the type of decision rendered by the full bench. While this data is helpful to see how frequently the court has found cases constitutional or unconstitutional, it is limited in that it cannot factor in other aspects such as the type of case or type of actors involved in the case. While these decisions can be looked at in detail through the case publications by year, due to the large volume of cases, I only look at the cases categorized as major decisions by the court. Under this category, we are able to look at a multitude of factors as it divides the cases into types and provides the proceedings of the case. The cases under the major decisions heading are a selection of cases the court administration has found to be important and significant among the total

number of cases. The cases reviewed include decisions on impeachment, relocation of the capital, dissolution of a political party, and more. The cases found under the major decisions section are used as a sample of the total number of cases in this paper.

While there is actually a total of 407 cases listed at the time of writing between 1988 and 2014 (determined by year of decision rather than by the year the case was filed), some of these have the abstract of cases as well as a case summary therefore duplications were removed to arrive at a total case number of 395. Using these 395 cases, a dataset pertaining to the decision rendered by case was created for the first part of this research. This dataset is constructed primarily in order to set the basis for and the context within which to analyze two particular cases that have had a significant political impact and involved key political actors, as discussed in the second half of this paper. Furthermore, through the creation of this database, we can determine whether or not certain factors produce more instances of activism, defined by rulings of unconstitutionality, from the courts than others, as well as whether the involvement of particular political actors tend to lead to different results.

All 395 cases are reviewed in order to determine whether there are differences between political cases and non-political cases, particularly in cases involving the president and legislature to address the problem in the separation of powers. This is necessary since the court can strategically choose to be deferential to the executive or the legislature, who has formal powers to affect the court's independence, in order to be more active in its decisions on social cases (Scribner, 2010) such as those filed under Article

68(1) and (2) of the Constitutional Court Act. Therefore, while the analysis of the database will look at the general patterns that arise on the whole, after a comparison between these types of cases, the focus will be primarily on disputes between governmental agencies under section 61 of the Constitutional Court Act since the purpose of this research is to analyze judicial independence relative to the separation of powers and to distinguish cases of healthy deference, which, as the literature has shown, is more likely in political cases.

4.1.1. Database of Major Case Decisions

After going through the text of the 395 major case decisions of the Korean Constitutional Court, the information is broken down in order to prevent a lump sum analysis of the information and help distinguish between cases. They are then grouped to establish a pattern in the decision making of the court. Each case is organized into the following nine variables: Type of Case (TC), Case Code (CC), Description (D), Years Lapsed (YL), Respondent (RES), Plaintiff (PL), Decision (DE), Judges (J), and Incumbent President (IPR). These variables are created based solely on the information provided in the summaries of the cases and chosen based on the assumption from the existing literature that political actors, particularly the legislature or the executive, will influence the decision of the judges. By translating the information into data format, we will be better able to look at and compare the judicial independence of the constitutional court and determine whether the

court has a tendency to rule in favor of particular political actors. From this we will be able to set the context by which to examine the two cases that were of political import to South Korean democracy and to the determination of judicial independence in cases involving the president.

The description of the variables and how they are coded as well as the description on why they were chosen are organized as follows. It is important to note that these variables will not be used to create a regression model in order to test the likelihood or probability of a case being decided as constitutional or unconstitutional. Rather, it will create the basis for looking at the percentages and number of cases that pertain to certain variables to see if there are any obvious discrepancies in the decision-making.

Table 2

List of Variables

Variable	*Coding*	*Description*
Type of Case (ToC)	**RF** - Rights of Freedom **PC** - Political Cases **PR** - Property Rights **SR** - Social Rights **PrR** - Procedural Rights **LO** - Legislative Omissions **CD** - Competence Dispute	This categorizes the cases into six different types of cases as shown on the Korean Constitutional Court website. It allows us to measure whether or not the type of case influences the decisions the court renders. We can use this information to compare between cases to see whether political cases, particularly those between governmental agencies, tend to result in less activism (generally defined by a ruling of unconstitutionality) by the court in their decision-making.

Case Codes (CC)	**KA** – Ordinary Courts **BA** – Individual (Art. 68(2)) **MA** – Individual (Art. 68(1)) **RA** – B/T Gov. Agencies (Art. 61) **DA** – Dissolution of Party **NA** – Impeachment **SA** – Various Motions (i.e. preliminary injunction, motion for refusal, etc.) **A** – Various special cases (re-adjudication, etc.)	The case code indicates the parties involved in the case, in terms of identifying who submitted the case for review. According to the Constitutional Court Act: Article 68 (2): "Any person whose fundamental rights guaranteed by the Constitution is infringed due to exercise or non-exercise of the public authority, excluding judgment of the court" Article 68 (1): "If a request made for adjudication on constitutionality of a law under Article 41 (1) is dismissed, the party who has made the request may request adjudication on constitutional complaint" Article 61: (1) "If any controversy over the existence or non-existence or the scope of jurisdiction arises between state agencies, between the state agencies and local governments, or between local governments, the relevant State agencies or local government may request adjudication on jurisdiction dispute. (2) The request for adjudication as referred to in paragraph (1) may be claimed only when disposition or non-performance of the respondent infringes on or is likely to infringe on the jurisdiction of the requesting party granted by the Constitution or laws."
Description (D)	**CPD** – Current Presidential Decree **PPD** – Past Presidential Decree **CNA** – Act passed by current Legislature **PNA** – Act passed by past Legislature **RnF** – General Basic Rights **M** – Mixed **U** – Unknown	This establishes whether the instant provision or statute was passed by the current legislature or the past legislature or by past/current presidential decree. This is calculated by comparing the year the statute or decree of the instant provision was passed or was last amended and whether the year is in line with the current or past legislature or president. The category of RnF indicates instances where an individual's rights and freedoms were infringed upon and not pertaining to a particular statute or decree.

Years Lapsed (YL)	-	Years lapsed subtracts the year the case was filed from the year the case was reviewed by the constitutional court and a decision rendered. It allows us to see whether certain cases involving particular litigants were tried within a quicker time frame than others.
Respondent (RES) and Plaintiff (PL)	**LPG** – Local Government **NG** – National Government **E** – Executive **I** – Individual **C** – Corporations/Businesses **EI** – Educational Institutes **L** – Labor Unions **LP** – Legal Professions **N/A** – None	While case codes provides the overall category of the parties involved, this variable specifies the type of actors that were involved in the case. This helps us distinguish whether particular actors affect the decisions such as those at the federal or local level. N/A pertains to no specific respondent but rather statutes.
Decision (DE)	**C** – Constitutional, compatible, or conforming **U** – Unconstitutional, Incompatible, or non- conforming **D** – Dismissed or denied **M** – Mixed **W** – Withdrawn **I** – Interim Injunction	This categorizes the type of decision that is made by the constitutional court. The decisions were broken down into six categories rather than in binary form because it more accurately reflects the gradations of declarations of constitutionality and unconstitutionality and gives the courts more flexibility in their decision rendering. The mixed category indicates instances where parts of the instant provision are found constitutional while others are not. This can still be reflective of an active court.

Judges (J)	**U** – Unanimous (9 of 9) **M** – Majority (5/6/7/8 of 9) **S** – Split **Q** – Failure to meet Quorum **N/A** – No dissent given	This categorizes how the decisions were divided amongst the 9 Justices. In case of split decisions, only 8 justices rendered a decision whereas failure to meet quorum indicates that because the quorum of 6 was not met for the decision to be unconstitutional, the official decision rendered was constitutional despite a larger number of judges voting in favor of unconstitutionality. No dissent given indicates cases where there is no clear identification of how decisions were rendered but there is no dissenting opinion given.
Incumbent President (IPR)	**R_T** – Roh Tae Woo **K_YS**– Kim Young Sam **K_DJ** – Kim Dae Jung **R_MH** – Roh Moo Hyun **L_MB**– Lee Myung Bak **P_GH** – Park Geun Hye	This variable indicates the incumbent president at the time the decision was rendered. This helps us to also distinguish between cases where the provision in question was put into effect by the current or past presidential decree. Furthermore, this helps us to note during which presidency the most number of major case decisions were made and whether the constitutional court's decision making varied dependent on the presidency.

This is a list of variables and their respective descriptions for analyzing the 395 major case decisions.

First we look at the descriptive frequencies of the variables to determine the general information on decision-making. This helps us distinguish whether there were more of certain types of cases than others that tended to be the most common type of litigant or respondent, how long it generally took for cases to be decided on and the general division of the decisions. After looking at the descriptive aspects of the cases to provide an overview of the 395 cases, I compare these decisions by its relationship with

other factors. This is important because it addresses the core of this research, which is to see whether the court's decisions varied dependent on whether or not the case was political in nature or social and to verify if certain actors seemed to hold more sway over the decision-making. The assumption is that in cases involving the president, the court will be deferential therefore unlikely to render a decision of unconstitutionality. Additionally, the Court will be less likely to rule unconstitutionality in cases where the statute was passed by the current legislature or in cases where the decree in question was given by the current president. While we cannot examine all 395 cases in depth, an overview of the cases and the general patterns observed will provide the backdrop by which we can verify the act of healthy deference through the case studies.

4.1.2. Case Studies: Healthy Deference and Judicial Independence

As we saw in the chapter on the history of the Korean Constitution and the establishment of the constitutional court, one of the most pressing issues concerning the jurisdiction of constitutional adjudication was to which entity the decision of impeachment, the dissolution of a party and the competence dispute between governmental agencies should be given. Therefore, in respect to what is arguably the core reason for the establishment of the constitutional court, I will examine in greater detail how the court has handled cases pertaining to two of the three political jurisdictions and through this

examination bring to light the relevancy of healthy deference to the separation of powers and to judicial independence.

This qualitative portion of this research looks at the two cases involving contentious political problems that led to the potential change in the political landscape of South Korea. The cases that will be looked at are: the impeachment of President Roh Moo-Hyun (2004) and the Dissolution of the Unified Progressive Party (2013). Since there are so few instances where the executive, particularly the president, is involved in major case decisions, these cases will be able to highlight how the court addresses cases that affect the separation of powers. By looking at newspaper reports alongside other literature on these two cases, including perspectives of both western and Korean sources, some in respect to judicial independence and others not, I will re-analyze these cases through the inclusion of healthy deference. By looking at these specific cases, with a detailed review of the political and social context surrounding the decisions of the constitutional court, I verify whether healthy deference exists and how it can be understood in respect to judicial independence.

These cases are important in understanding healthy deference in relation to judicial independence because it illustrates two important instances that drew a lot of attention from the citizens of Korea and involved the question of power amongst the three major branches of the government. After establishing a clearer understanding of healthy deference, this paper seeks to explain why the legislature and the executive are willing to confer its powers to the judiciary when it means a decrease to their own control and power. This

can then be used to supplement the insurance theory as well as the hegemonic theory. By understanding the specific context within which healthy deference occurs and how it affects our understanding of judicial independence, we can better understand how to measure judicial independence, especially in the context of South Korea.

Chapter 5. Results and Analysis: The Data

5.1. A Statistical Overview of the Cases

First we look at the results of the descriptive aspects of the 395 cases to determine the characteristics pertaining to each variable. After setting the foundation for making empirical inferences, I also look at the relationship between variables to determine whether certain factors produced more instances of constitutional or unconstitutional decisions. The goal of analyzing the data of these cases is to show whether there are significant differences in the behavior of the court through their decision-making between social and political cases that would cause speculations that the court is dependent on a particular political actor or actors. After reaching a conclusion on the evaluation of the court's independence, we can look at some examples of seemingly dependent decisions in order to understand the use of healthy deference by the courts.

5.1.1. General Characteristics of Major Case Decisions

To start, I look at the general statistics of the three variables that are most pertinent to this research: the case code, which indicates who filed or referred the case for review; the type of case, which distinguishes the cases by different types of rights and freedoms as well as by political cases; and the

decisions the court has rendered, which looks at the six types of decisions as well as in terms of the binary results of constitutional or unconstitutional.

In examining the case codes, the results show that out of the total 395 major case decisions, almost half (48.10%) of the cases filed for review were individual complaints per Article 68(1) of the Constitutional Court Act, wherein the individual can request for adjudication on the constitutionality of a law to the constitutional court if the constitutionality of the law is a precondition to the adjudication of the case and if the court who originally takes charge of the case does not request the review of constitutionality to the constitutional court. Cases filed by individuals under Section 68(2) of the Constitutional Court Act, where an individual can request adjudication based on the infringement to their fundamental rights, which are guaranteed by the Constitution and when another remedy by other laws is not available, formed about a quarter of the total cases (27.34%). From the remaining 24.56% of cases, 18.99% were those referred by ordinary courts while 4.30% were disputes between governmental agencies. There was only one case (0.25%) of impeachment and one case (0.25%) on the dissolution of a political party. The remaining few cases were special cases such as re-adjudication.

In terms of the type of cases brought before the court, 112 (28.35%) were those concerning rights of freedom, 75 (18.99%) had to do with political and procedural rights respectively, 64 (16.20%) of cases were those dealing with property rights while 44 cases (11.14%) dealt with social rights. Only 7 cases (1.77%) were those concerning legislative omissions whereby the government had failed to provide the necessary provisions for the protection

of rights and freedoms of individuals and 18 (4.56%) cases were competence dispute cases, involving disputes between governmental agencies. The most frequent type of cases filed for review were those concerning rights and freedom. When we combine rights of freedom, property rights, social rights, legislative omissions and procedural rights under the category of rights and freedoms, the majority of the cases (76.45%) belong to this category, totaling 302 of 395 cases. In contrast, political cases, which also include competence disputes, comprise a quarter of the total cases (23.55%) with less than a total of 100 cases. Comparatively, there are fewer political cases than rights and freedom cases.

Next is an examination of the decisions rendered by the court. The decisions are divided into: Constitutional (including decisions of conformity and compatibility), Unconstitutionality (including decisions of nonconformity and incompatibility), Dismissal or Denial, Mixed (where decisions differ due to multiple provisions at hand), Withdrawal and Interim Injunction. Table 3 shows the frequencies of each type of decision. It is clear that on the whole, a larger number of cases were rendered constitutional than unconstitutional. However, the number of constitutional decisions is not disproportionately larger than the number of unconstitutional decisions.

Table 3

Frequency of Decisions Rendered (1988-2014)

Types of Decisions	Cases	Percentage of Cases
Constitutional	**190**	**48.10%**
Unconstitutional	**143**	**36.20%**
Dismissed/Denied	**43**	**10.89%**
Mixed	**17**	**4.230%**
Withdrawn	**1**	**0.25%**
Interim Injunction	**1**	**0.25%**

Looking primarily at the two most prevalent types of decisions, a larger number of cases (48.10%) were found constitutional than unconstitutional (36.20%). This is more so the case if we collapse the other decisions into these two categories. If we combine dismissed and withdrawn cases, due to no changes made in the existing statutes, with constitutional decisions and the interim injunction as well as mixed cases, since it implies changes made to statutes, with unconstitutional decisions, a total of 234 cases out of 395 cases (59.24%) were rendered constitutional while 161 cases (40.76%) unconstitutional.

The larger number of constitutional decisions as opposed to unconstitutional ones may lead one to conclude that the court is not independent. However, an active court does not necessarily have to render more unconstitutional decisions in order to be seen as independent. While unconstitutional decisions help us determine whether the court has the power to overturn legislation, the decision alone cannot be the basis for making assumptions. It will not be the case that every case filed will have an infringement of an individual's right or that only valid cases are brought

before the court. Therefore, we must look at what factors would affect independence and see whether there is a pattern to the way decisions are rendered more so than looking solely at the numerical differences between the decisions.

There are a few more variables whose descriptive data helps us get a better picture of the court's decision-making between 1988 and 2014. One of these variables is the data on when case decisions were made. The data shows that in its infancy, the court only made a handful of major case decisions. In the first ten years, there was a consistent albeit a small increase in the number of decisions rendered. However, starting in 1998, there was a significant increase as the decision on cases doubled. Despite fluctuations in the following years, there was generally a linear pattern of increase in the number of cases reviewed and decided on. In particular, the largest number of cases were decided on between the years 2008 and 2010, with an average of 38 cases reviewed each of those years. This period was followed by a decrease starting in 2011 but the numbers increased again in 2014 (shown in fig. 1).

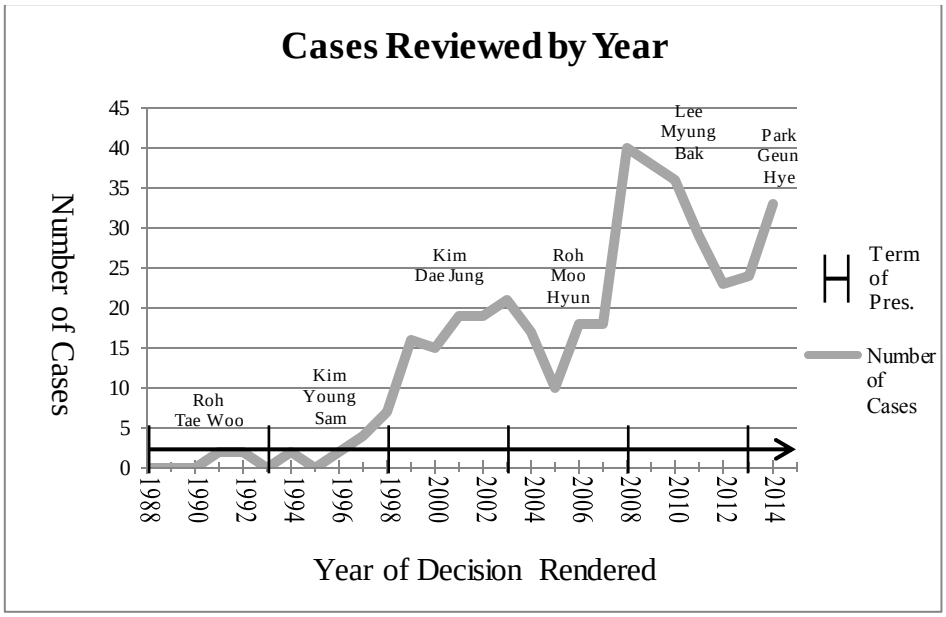

Figure 1. The distribution of the 395 cases by the year they were reviewed. This also reflects the number of cases respective to each presidency.

The distribution of cases over a span of 26 years also allows us to compare the results respective to the six presidencies in order to determine whether there were more cases during a particular presidency than in others. Looking at the frequency, as reflected in figure 1, the largest numbers of cases were decided on during the time of former President Lee Myung Bak with a total of 164 cases (41.51%). The second largest number of cases was reviewed and decided on during the incumbency of former President Roh Moo Hyun with 91 cases (23.04%). However, the number of cases reviewed under the current President Park Geun Hye is comparable to the Presidency of former President Lee Myung Bak when we look at how many cases were decided on within the same timeframe since we only have the data for two years of Park's presidency. Within a span of two years (2013-2014), there were 59 cases

(14.94%) reviewed during Park's presidency in comparison to the average of 68.5 cases for former President Lee and 36.4 cases for former President Roh in the same time span.

Next, keeping in line with the analysis of what the year of the decision can tell us, it is important to look at the number of years lapsed between the filing of the case and the time of review. Analyzing the lapse in the years tells us how long it takes for the court to address an issue on average. This can then be used in comparison to the type of case to determine whether certain cases take lesser number of years than others. Looking at the frequency, the majority of the cases were addressed within two years with very few cases taking five or more years. Amongst the decisions, only 20 (5.06%) of cases were reviewed within the same year of filing with 131 cases (33.16%) lapsing one year and 136 cases (34.43%) lapsing two years. 72 (18.23%) of cases lapsed 3 years while 27 (6.84%) of cases lapsed four years. Generally, in respect to major case decisions, the court has been relatively quick in reviewing and deciding on cases.

In regards to the composition of justices in rendering a decision, the majority of decisions were rendered either unanimously or by majority. While 106 (26.84%) of the cases were decided unanimously, a larger number of cases were decided through a majority decision, although this ranged anywhere from a majority composed of five to eight judges. A total of 196 (49.62%) of the cases were decided on in this manner. Ten (2.53%) of the cases were those where the majority favored a decision of unconstitutionality but the quorum of six judges was not met to render this decision therefore the

case was found constitutional. Additionally, Since a full bench (nine justices) can review a case with the presence of seven or more justices present, there were instances of split decisions (4 to 4), which apply to only 10 cases, which is 2.53% of the total number of cases examined. Among the cases, there were those where it was not explicitly stated that the decision pertaining to the case was unanimously voted on. However, there was no dissenting opinion. 61 cases (15.44%) fall into this category. These cases can be included as a unanimous vote due to its lack of dissenting opinion, thereby bringing a total of cases rendered unanimously to 167 cases, which increases the percentage of cases decided unanimously to 42.28%, which is relatively close to the percentage of cases decided by a majority. The remaining cases were those that had mixed decisions where parts of the provision were found constitutional or unconstitutional or dismissed while other parts were not.

Last, but not least are the statistics regarding the respondent and complainant, which further breaks down the actors involved in the case than the case codes indicate and helps us to better assuage whether certain types of individuals and government agencies influence the frequency of the decisions rendered by the court. Amongst the complainants, the most common type was individuals, small businesses and associations who composed 273 (69.11%) of the cases while the national government and educational institutions, were the second highest type of complainants, composing 35 cases (8.86%) and 31 cases (7.835%) respectively. Following closely were local government members, who were involved in 22 (5.57%) of the cases. The remaining types of complainants comprised a small number of cases involving labor unions

and legal professions, including police officers, prosecutors and wardens. There was only one case involving the executive as the complainant and the rest were those not falling into any of the previous seven categories. In respect to the type of respondent, the most common were cases not against any particular individual or institution, but rather a complaint against a statute, decree or ordinance and in regards to the infringement on an individual's basic rights and freedom. These cases composed 322 (81.52%) of the 395 cases looked at. Following this, the second most common type of respondent was the national government with 26 cases (6.58%) and 18 cases (4.56%) concerning those in the legal professions such as the prosecutor, warden or police. While complaints against the executive, including cabinet ministers, were relatively low, they still comprised 13 cases (3.29%) while an even fewer number of cases involved the local government as a respondent, comprising only 8 cases (2.03%).

5.2. Decision Making and Independence

The descriptive data of the variables provide the basis for examining the decision-making of the court. In summary, the results above show that the majority of decisions are constitutional and that the most common types of cases were those pertaining to rights of freedom and those filed by individuals under section 68 (1) and (2) of the Constitutional Court Act. The number of major cases the court reviews has increased over the years, hitting its highest in the last three presidencies with a large number of decisions made either

unanimously or by majority. However, we cannot rely just on the descriptive data to determine the independence of the court. We must look at the relationship between these variables as well.

As seen in the review of the existing literature, the most common type of interference in the court's decision-making is by key political actors that have control over aspects of the court such as the appointment or budget. Since we are looking at the constitutional court, we can assume that the type of political actors that would most influence the court's decision, if it were dependent, would be the executive, particularly the president, and the legislature. Therefore, to determine that the court is independent, we must look at the outcome of the decisions with the factors that reflect possible interference by these actors. In order to do this, I contrast the cases between those that are political with social as well as between cases involving individuals or other actors with cases that directly involve key political actors.

The most intuitive relationship to look at first is the array of decisional outcomes respective to the type of case as shown in Table 4. The 395 cases are divided into six types of cases that clearly distinguish whether or not the case involves decision pertaining to political issues or social issues. Looking at the data by type of case, 72 of the total 112 (64.43%) rights of freedom cases were rendered constitutional while 30 (26.79%) cases were rendered unconstitutional with a handful of decisions falling into the other categories. In political cases, there was a fairly even division between cases decided as constitutional and unconstitutional with 32 cases of 75 (42.67%) rendered constitutional and 23 (30.67%) cases unconstitutional. However, 17 cases

(22.67%) were dismissed or denied, therefore if we include this into the count for constitutionality, then there is a larger discrepancy between the decisions. Despite this discrepancy, the ratio of decision-making is not significantly different from the ratio of the decision in cases on rights and freedoms. In cases of property rights, there was a fairly narrow split in the two main types of decisions with 30 cases (46.88%) found constitutional and 29 (45.31%) found unconstitutional. There was only one case of dismissal, but four cases (6.25%) where parts of the provision were found constitutional while others were not. In respect to social rights cases, 54.55% or 24 of 44 cases were rendered constitutional with five cases (11.36%) were dismissed and 15 cases (34.09%) were found unconstitutional. In Procedural rights cases, one of the two types of case where more decisions were found unconstitutional than constitutional, 25 (33.33%) of cases were ruled constitutional while 37 (49.33%) of cases were ruled unconstitutional with 6 cases (8.00%) dismissed and 7 cases (9.33%) of mixed decisions. Among the handful of cases concerning legislative omissions, there were an equal number of constitutional cases as unconstitutional with two cases (28.57%) respectively. However, there were three cases of dismissal (42.86%). Lastly, competence disputes were the second type of case where there were more rulings of unconstitutionality than constitutionality. Of the 18 cases, five (27.78%) were found constitutional while seven (38.89%) were unconstitutional and five (27.78%) were dismissed. Unlike the case with procedural rights, the combination of constitutional decisions with dismissed cases outnumbered the unconstitutional cases.

Table 4

Decisions and Type of Case

Decision	Type of Case						
	RF	**PC**	**PR**	**SR**	**PrR**	**LO**	**CD**
Const.	**72** 64.29%	**32** 42.67%	**30** 46.88%	**24** 54.55%	**25** 33.33%	**2** 28.57%	**5** 27.78%
Unconst.	**30** 26.79%	**23** 30.67%	**29** 45.31%	**15** 34.09%	**37** 49.33%	**2** 28.57%	**7** 38.89%
Dismissed/ Denied	**6** 5.36%	**17** 22.67%	**1** 1.56%	**5** 11.36%	**6** 8%	**3** 42.86%	**5** 27.78%
Mixed	**3** 2.68%	**3** 4%	**4** 6.25%	**0** 0%	**7** 9.33%	**0** 0%	**0** 0%
Withdrawn	**0** 0%	**0** 0%	**0** 0%	**0** 0%	**0** 0%	**0** 0%	**1** 5.56%
Interim Injunction	**1** 0.89%	**0** 0%	**0** 0%	**0** 0%	**0** 0%	**0** 0%	**0** 0%

Shows the type of cases in relation to the decision rendered. This gives us a clearer idea of whether certain cases were more likely to be found constitutional.

Next, I look at the relationship between the rendered decision and whether or not the statute or decree in question was passed or revised by the current or past legislature or executive (Table 5). As we saw in the descriptive section, a large number involved cases against a particular statute rather than any one individual or group. Looking first at the legislature, it appears that whether it is the current or past legislature that passed or revised the statute in question, there were more decisions of constitutionality than unconstitutionality. In the case of statutes dealing with the current legislature, out of the 24 cases falling under this category, 11 (45.83%) were found constitutional while 7 (29.17%) were found unconstitutional and 5 (20.83%) dismissed. Statutes passed or revised by the past legislature comprised 251 of

395 cases of which 140 (55.78%) were found constitutional and 85 (33.86%) found unconstitutional and 16 cases dismissed. Looking at the percentage of decisions, statutes passed or revised by the past legislature rendered more outcomes of constitutionality than statutes passed or revised by the current legislature. In the case of the executive, the results differed from the legislature. In respect to the 8 cases of decrees or orders passed or revised by the current executive, three cases (37.50%) were found constitutional, while two cases (25.00%) were found unconstitutional. The number of constitutional decisions increased with the addition of dismissed cases. However, out of the 11 cases involving the decrees or ordinances of past executives, two (18.18%) cases were found constitutional while five (45.45%) were found unconstitutional. Adding the three cases (27.27%) of dismissal to decisions of constitutionality and the 1 case (9.09%) of mixed decisions to the decisions of unconstitutionality still results in a slight tilt towards a higher number of unconstitutional cases. In terms of cases that pertain to basic rights and freedoms, there are more cases of unconstitutionality with 18 of 47 cases (38.30%) compared to the 14 cases (29.79%) of constitutionality. However, there is also a significant number of dismissed cases, totaling 12 cases or 25.53% of the total number of cases.

Table 5

Decisions and Statutes/Decrees

Decision	Statutes and Decrees						
	CPD	**PPD**	**CNA**	**PNA**	**R&F**	**M**	**U**
Const.	**3** 37.5%	**2** 18.18%	**11** 45.83%	**140** 55.78%	**14** 29.79%	**5** 50%	**15** 34.09%
Unconst.	**2** 25%	**5** 45.45%	**7** 29.17%	**85** 33.86%	**18** 38.30%	**3** 30%	**23** 52.27%
Dismissed/ Denied	**3** 37.5%	**3** 27.27%	**5** 20.83%	**16** 6.37%	**12** 25.53%	**1** 10%	**3** 6.82%
Mixed	**0** 0%	**1** 9.09%	**1** 4.17%	**10** 3.98%	**1** 2.13%	**1** 10%	**3** 6.8%
Withdrawn	**0** 0%	**0** 0%	**0** 0%	**0** 0%	**1** 2.13%	**0** 0%	**0** 0%
Interim Injunction	**0** 0%	**0** 0%	**0** 0%	**0** 0%	**1** 2.13%	**0** 0%	**0** 0%

This table shows the decisions made pertaining to whether or not the current or past executive or legislature was involved. This looks at whether decisions were more likely to be constitutional if it was a statute or decree passed by the current executive or legislature to infer the independence of the court.

We must also look at the results of the decisions in respect to the respondents and complainants to see whether the court rendered a decision in favor of certain political actors. This is shown in table 6 and 7 respectively (look at tables in Appendix). While there are eight types of respondents, the focus will be on the local government, the national government, the executive and individuals. These four types of actors are most pertinent to this study to distinguish between political and social cases and to draw conclusions about hierarchy among political actors. Here, the decision of constitutionality would favor the respondent. The results show that the local government was a respondent only in cases regarding rights of freedom, property rights, and

competence dispute. Of these, cases pertaining to the rights of freedom and competence disputes yielded an equal number of constitutional and unconstitutional decisions while the cases involving property rights were found constitutional. In terms of the national government, looking just at the constitutional and unconstitutional decisions, there was a greater number of cases rendered constitutional thereby favoring the national government in cases regarding rights of freedom and political cases. However, in cases involving procedural rights and competence disputes, there was an even number of constitutional and unconstitutional cases. In the case of the executive, a larger number of cases favored the executive with a ruling of constitutionality than unconstitutionality throughout all types of cases except in cases involving social rights, legislative omission and competence dispute, where the ruling is against the executive with the ruling of unconstitutionality. Individuals were generally not a respondent in these cases.

Moving on to the complainants, I still focus on the first four types of actors, which are the local government, the national government, the executive and individual. Here, the largest numbers of complainants were individuals and a decision of unconstitutionality favors the complainant. There was a fairly even number of cases ruled constitutional and unconstitutional except in the case of rights of freedoms where a larger majority of cases were ruled constitutional than unconstitutional. For political cases, property rights, social rights and legislative omissions, while a larger number of cases are ruled constitutional, the difference between constitutional and unconstitutional cases is slight with a difference of two to four cases

between the decisions. Only the cases of procedural rights have a larger number of unconstitutional decisions. Furthermore, there is only one case in which the executive is a complainant. This is the case on the dissolution of a party, where the current President's government filed a case to dissolve a party that was found to be against the values of the constitution. In this case, the court voted in favor of the dissolution thereby favoring the executive. When the national government is the complainant, similar to cases involving individuals, the discrepancy between decisions of constitutionality and unconstitutionality are slight. In political cases, 10 cases were found constitutional while 9 were found unconstitutional. This slight difference is also true for cases on rights of freedom. In addition, in procedural rights cases, there is no constitutional case, but there is one unconstitutional case with four cases dismissed. Lastly, in competence dispute cases, more cases are found unconstitutional than constitutional with four cases for the former and one for the latter. In terms of cases involving the local government, there are more cases of constitutionality. It is only in cases of property rights and legislative omissions that there are a larger number of unconstitutional decisions than constitutional decisions. In the case of competence disputes, there are more unconstitutional decisions than constitutional ones. However, when we look at the number of dismissed cases, the numbers are more even with the number of unconstitutional cases.

Revisiting the data on years lapsed before a decision is reached I look at whether certain types of cases took longer for a decision to be rendered than other cases (look at Table 8 in the Appendix). Looking at this relationship,

political cases were the predominant types of cases to be reviewed within a year in comparison to the other cases. While the majority of political cases were decided on within a year or two, the total number of cases decided on within the year comprised only 13.33% of the total number of cases. In cases of rights of freedom, the vast majority of cases were decided on within two years, but almost a quarter of decisions (24.11%) took three years for a decision to be rendered. For the other types of cases, the number of cases taking one year and two years were relatively equal except in the case of property rights where a larger number of cases took two years for a decision to be given. In the case of competence disputes, only one of the eighteen cases were decided within a year with 38.89% of cases decided on after a year and 27.78% of cases taking three years for a decision. While the results show that political cases seem to receive priority, this could be the case because political issues contain time sensitive issues that need to be resolved relatively quickly in comparison to the other cases. While the relationship between the time lapsed and decision-making does not show whether the court is independent or not, it does allow us to see the general prioritization of cases. Other than in the anomaly of the political cases, it appears that there are no significant differences between the types of cases.

Lastly, I look at the presidency and the decisions rendered in regards to the decision of constitutionality and unconstitutionality respectively. Figure 2 shows the difference between constitutional and unconstitutional decisions respective to each of the six presidencies. It appears that while there was a significant increase in the number of cases starting from the end of the late

President Roh's presidency and continuing into former President Lee's presidency, there is also a large increase in the number constitutional decisions in comparison to the number of unconstitutional decisions.

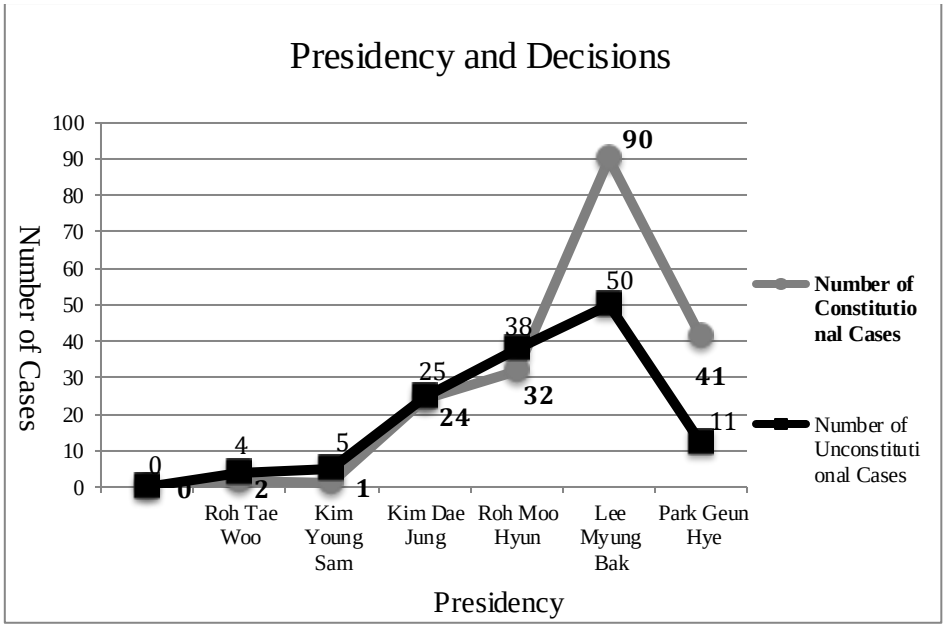

Figure 2. This figure the dispersion of cases that were found either constitutional or unconstitutional comparing these two types of decision to the respective presidencies to see whether or not the court has been more or less active over the years.

While there were relatively slight differences between decisions of constitutionality and unconstitutionality from Roh Tae Woo's presidency to Roh Moo Hyun's presidency, the difference between constiutitonal decisions and unconstitutional decisions increase noticeably during Lee Myung Bak's presidency, continuing on into Park's presidency.

5.3. An Evaluation of the Judiciary

The data seems to indicate that the court is inactive or dependent when we just look at the frequencies on the decisions because it appears that there are a larger number of constitutional decisions. However, this is not necessarily true as one way of explaining this larger number of constitutional decisions is that it indicates a healthy and accountable court rather than one of judicial supremacy. While decisions of unconstitutionality help us determine the level of activism in the court, a disproportionately large number of such decisions can also be an indicator of an all too powerful court. As Cross (2003) and other scholars note, accountability is necessary in the definition of independence. Therefore, while concern about the lack of independence in a court is problematic, so is the potential for judicial supremacy with the expansion in the role of the court. If there were a disproportionately large number of unconstitutional decisions, it would appear that either the legislature is unable to do its job by producing bad laws or it would indicate that the court has expanded its powers beyond adjudication to the realm of lawmaker. This would then be an indication that there is a problem with the separation of powers between governmental branches. Therefore, the results showing a large number of constitutional decisions in contrast to unconstitutional decisions should not be automatically associated with a lack of independence.

Another problem associated with constitutionality that the data shows is the significant increase in constitutional decisions starting from Lee's administration in 2008 and continuing to Park's administration in the present.

In one way, this result can be interpreted as the court losing independence during these administrations. This concern is legitimate considering that Park's administration faces large amounts of criticisms, from both the Korean and international communities, that the leadership is reminiscent of Korea's authoritarian past, as dissenting voices are silenced. However, the increase in constitutional decisions can also be attributed to an increasing trust in the constitutional court as citizens feel that they are able to file cases for review thereby increasing the number of cases filed. Realistically, not all cases brought before the court will be cases of infringement. While the petitioner is at liberty to question the constitutionality of a statute or action, the filing is based on the subjective view that one's constitutional right or freedom has been infringed upon. However, in the eyes of the law, the case can be found to be constitutional without necessary reflecting a weak court. This can explain the higher number of constitutional decisions alongside an increase in cases filed. Once again, decisions of constitutionality can be a mark of a court that is accountable by following and applying the rule of law to its decision-making. This is why we need to look deeper and look at an assortment of factors that can better reflect the decision-making of the court.

The central purpose of this data analysis is to look at the possibility of interference in the court's decision-making by political actors that have power over the court through control over appointment or budget. In line with this, Scribner (2010) found that in the case of Chile, the courts were more deferential in political cases involving actors that affect their careers so that they could be more at liberty to decide on social rights and freedom cases.

Additionally, fragmentation theory, insurance theory and hegemonic theory also focus on the interests of significant political actors, particularly the legislature and the executive, in relation to the court's independence. It is clear that there is distinction between social issues and those that are of political import and affect the power and interests of political actors. Looking at the data that reflects this possible influence, the results show that these is no significant difference between the decision-making pertaining to social issues and those involving political issues or political actors. There is similarity in the ratio of constitutional and unconstitutional decisions for social and political cases. There is also no distinct pattern where political cases result in larger cases of constitutionality to the point that it is discrepant from the decisions of constitutionality in other types of cases. Furthermore, the period of when the statutes were passed or revised also has no affect on the decision-making of the court. This is evident as the decision on cases involving statutes passed or revised by the past legislature is very similar to the decision on cases involving statues passed by the current legislature. Lastly, the data on the type of respondent and complainant also does not indicate notable differences in the pattern of rendered decisions. Similar to the results on type of cases, the ratio of the decisions appears relatively similar regardless of who the respondent or claimant is. Therefore, of the 395 major case decisions examined, the court does not appear more deferential in political cases than in social cases.

Looking at the cases involving only governmental agencies, which compose 18 of the 395 cases, the vast majority of the cases involve the local

or provincial government vis-à-vis the legislature or the executive. While there are more cases of unconstitutionality, if we include the cases that were dismissed as a default of constitutionality, then there are more cases of constitutionality than unconstitutionality. However, this result is no different from the decisions rendered in other cases. It appears that regardless of who the respondent or plaintiff is, the decisions of the court vary with no consistent pattern found on whether a particular actor is more likely to be favored on a consistent basis. This implies that the decision the court makes is not dependent on the actor, but rather on the case itself thereby reflecting de facto judicial independence. This result is in line with the conclusion Ginsburg (2009) draws when he states that the court of South Korea "has demonstrated independence in politically charged cases" (p. 19-20). In this way, the lack of consistency favoring the executive or the ruling party of the legislature is indicative of an independent court.

While the data helps us better understand the general patterns of behavior in the decision-making of the court, it is limited in that it can only give a general description about the outcome of a large number of cases. We must also explain how this is possible in line with accountability. As mentioned before, a court cannot be completely independent, thereby creating murky ground for determining judicial independence. Therefore, in order to bridge judicial independence and accountability, we must look at cases where the decisions seem deferent but are, in fact, a reflection of an independent court. In order to do this, we cannot look at a large quantity of cases, but rather focus on a couple of cases that can be examined in detail.

Chapter 6. Analysis of the Case Studies

6.1. Impeachment, Party Dissolution and Healthy Deference

In choosing the two cases to be further examined, that best reflect the use of healthy deference, I first look at the intentions behind the establishment of the constitutional court. As mentioned in the section on the history of the Korean constitution, there was debate between the opposing and ruling party on whether or not the adjudication of cases involving impeachment, dissolution of political parties and competence dispute should be in the hands of the already existing supreme court or be given to a separate and a newly established entity (The First Ten Years, 2001, p. 16-17). History shows that the decision was made for the latter and subsequently the Constitutional Court was formed. We can infer from this debate that these three types of cases were of political import to the legislature and provide the basis for distinguishing it apart from cases of constitutional complaints by individuals, particularly regarding rights and freedoms. Therefore, looking particularly at these types of cases will help round out the analysis of the court's independence and ascertain the practice of healthy deference. In this regard, there has only been one case on impeachment and the dissolution of a political party respectively and from the 395 major cases examined in this paper, there has only been a total of eighteen competence disputes. While the latter has been discussed in the previous section, the following section looks in detail at how the court has

handled cases regarding the impeachment of a Korean President and the dissolution of the Unified Progressive Party (UPP) to evaluate the independence of the court in politically sensitive cases and through this, introduce the concept of healthy deference. What makes these two nationally and politically important cases more interesting, other than being the only one of each kind in Korea's constitutional history, is that both of the results favored the executive (the president). Therefore, it allows us to fully examine the influence of the executive as well as the legislature on the prerogative of the judiciary to render a decision and show how a court can be independent while it may seem deferent.

6.1.1. Impeachment of President Roh Moo Hyun (2004)

Following the December 2002 results of the presidential elections, the Fourth President of the Republic of Korea was inaugurated on February 25th, 2003. As a Liberal, President Roh took office under the largest minority party, the New Millennium Democratic Party (NMD), of the 16th National Assembly contra the majority, the Grand National Party (GNP). His election to office reflected a turn from the predominantly right-leaning leadership of the past forty-three years and introduced a new left-leaning leadership. However, seven months after entering into office, Roh and his supporters from the NMD as well as a few from the GNP left their respective parties. Following soon after, the campaigning period for the 17th National Assembly took place, during which the still unaffiliated President appeared to be on the verge of

joining the newly formed Uri Party and made public statements expressing his wishes to see the party do well in the upcoming general elections. On March 12,th 2004, the National Assembly passed a bill for the impeachment of President Roh with a two-thirds majority. The charges for impeachment were divided into three issues: violation of the election law provisions where public officials must remain neutrality due to Roh's public support of the Uri Party; charges of corruption on the basis that Roh received illegal campaign funding during his 2002 presidential bid; and lastly on the grounds that despite Roh's campaign promises to revive Korea's weakened economy, he had failed to do so. The case was brought before the constitutional court for confirmation and on May 14th of the same year, nearly two months after the National Assembly's passage of the bill, the court rendered their decision against the impeachment. While they found Roh in violation of the election law provisions, they did not find his actions warranting his removal from office.

This case on the impeachment of President Roh needs to address two questions before evaluating the independence of the court and the relation between its decision making in political cases to the idea of deference, or in this case, healthy deference. The first question is whether the decision was in accordance with the will of the public through its representatives and the second is whether the court was and is the appropriate institution to adjudicate such a case leaving aside its formal powers to do so. In the first instance, the decision of impeachment, reached with a two-third majority in the National Assembly, seemingly indicated that the will of the people, reflected through their representatives, was in favor of impeachment. However, this perspective

is questionable when we examine the political environment surrounding Roh's election and the first year in office as well as the response from the public. In regards to the second question, Article 111(1) of the Korean Constitution confers the power of review on cases concerning impeachment to the constitutional court. Yet, whether the court should have this power to begin with, especially in consideration of the separation of powers is debatable. American constitutional scholars find, nearly unanimously, that there should be a limitation to the role of the judiciary in impeachment cases regarding the President and that the court should not be the final decision-maker in these cases (Lee, 2005, p. 205-406). Unlike the case of America, the Constitution of Korea formally gives the power of this decision to the court. Therefore, to answer this question, we must ask whether allocating this power to the court harms or advances the separation of powers. By analyzing the impeachment of President Roh Moo Hyun with these two questions in mind, we can evaluate the court's role as a balancing actor, particularly in line with the matter of its independence from executive influence.

Looking at the political environment leading up to Roh's bid for the presidency and following through to his first year in office, it is evident that there was a great deal of polarization in ideology as well as generational divisions between the parties and within the party. This polarization is clearly evident in the surprise Roh's nomination as the presidential candidate of the NMD brought ("Off the hook," 2004) as well as by the reaction of the party following his win. Breen (2004) reports, "As the results came in showing that Roh was the sure winner, TV cameras caught the scene in his party's

headquarters not of jubilation but of the party leaders shaking his hand and looking distinctly uncomfortable." From the beginning, Roh lacked support from his own party while also facing opposition from the other parties of the National Assembly, who tried to bring down the President for months with threats of impeachment starting from April 2003, only two months after he took office ("Roh goes, for now," 2004). Clearly, there was lack of cohesion within the main elected body of the Korean government along with evident conflict between the two branches, the legislature and the executive. Due to these tensions and conflicts, the motives of the National Assembly in passing the decision for impeachment are questionable. Park (2005) reflects this suspicion by describing the decision for impeachment as a tactic used by the still dominant conservative powers in the legislature to deal with the expansion in the strength of the liberals by overturning the decision of the 2002 elections through the utilization of a constitutionally guaranteed "weapon" (*mu-gi*)[2] (257). Analysts of the situation agree with this assessment made by Park as they viewed the charges against the former President as relatively minor that had more to do with "jockeying for the [April 15] general elections" on the part of the opposition ("South Korean President Impeached," 2004). Accordingly, the National Assembly tried to utilize the majority of the legislature to justify the overturning of the majority vote of the president through the use of the rule of law (p. 258). Here, there are two ways

[2] Translated from the Korean text which originally reads: 2002 년 12 월 대선 이후 진보세력의 확대에 대한 대응을 모색하던 보수파는 아직 자신들이 장악하고 있던 국회에 허용된 법적 권한인 대통령 탄핵소추 결정이라는 헌법적 무기를 사용하여 2002 년의 결정을 전복하려 시도했던 것이다.

of interpreting representation of the public. One is through the legislature that is supposed to represent the interests of citizens and the second is through the election of the president. Therefore, the question remains: was the action by the National Assembly an act to promote the interests of the constituents or to protect its own power against a potential threatening force?

The answer lies in the fact that the majority of the population did not agree with the National Assembly's decision to impeach President Roh. The impeachment brought a response of outrage as "[t]ens of thousands of people, online and offline, protested the National Assembly's passage of the nation's first impeachment motion filed against the president by the main opposition Grand National Party (GNP) and the minor opposition Millennium Democratic Party (MDP)" by actively denouncing the opposition's actions through comments and articles on Korea's major internet sites such as Daum, Naver and Yahoo (Byun, 2004). In this way, there is clear indication that the conservative factions that dominated the legislature were trying to hold onto their power despite the fact that the public, especially the younger generation, seemed to be heading in a more liberal direction with their vote for President Roh in 2002. While the general public was unhappy with Roh's dismal performance following the election, particularly in reviving the economy, as reflected by the drop in approval ratings to 20-30% ("Off the hook," 2004), this did not equate to the public's desire for impeaching the president. The response of the public was solidified when one month after the decision for impeachment, the voters decided overwhelmingly in favor of the newly formed Uri Party, who won 152 of the 299 seats (Brooke, 2004). The results

of the 2004 general elections show that the public and scholars did not see the opposition's call for impeachment as grounds for warranting such a decision. Making comparisons with the American case of impeaching a president, The Economist ("Roh goes on," 2004) writes, "The transgression that led to the impeachment vote was surprisingly minor. Mr. Roh is not accused of Nixonesque lying or Clintonesque sexual peccadilloes. He is guilty simply of pledging to do his utmost to secure votes for Uri in the general election." To the eyes of the public, both in the western media and to the Korean public, the reasons for impeachment were fairly groundless, enough for a slap on the wrist, but not enough to constitute an abdication or removal from office. There was a distinction to be made between a president being found guilty of a major scandal and the image of a leader giving his support to a party, as the latter case was not seen as serious grounds for making a decision that would put society in an upheaval. This is evident by the fact that the majority of news agencies reporting on the impeachment such as the New York Times, The Economist, The Wall Street Journal and MBC News predicted the outcome of the court as one that will overturn the National Assembly's majority decision.

Given this context, the question of whether the court should be the final arbiter in the impeachment of the president can be answered. There was distinct evidence that the conflict in the National Assembly was not indicative of a democratic and representative system, but rather plagued with the self-interest of the majority parties. Instead of accepting the democratic election of President Roh, the majority in the legislature chose to take matters into their

own hands by utilizing a constitutional measure. This was not a measure taken to prevent the encroachment of an all-powerful executive or based on the actions that would harm Korea's democratic order. Considering that the opposition to Roh existed even before his inauguration, it is clear that the opposition as well as his own party did not support Roh nor did they want him as leader of the country. There existed a bias in the desire to remove Roh from office that went beyond whether or not he had promoted the Uri Party. Furthermore, even the corruption scandal was not the main reason for desiring Roh's impeachment, as it was soon found out that the Lee Hoi-chang, Roh's GNP opponent in the 2002 general elections, had received a greater sum of illicit funds during his campaign ("Roh apologizes for," 2004). Therefore, if the National Assembly could not be entrusted to make a fair decision regarding the impeachment question, who could? In order to balance the power of an overambitious legislature and ensure that the separation of powers was kept in check, the court, who is to have no party affiliation, needed to intervene. Following this logic, the judiciary's role as final arbiter was necessary in this case. The court also acted within the dictates of its key functions, which Stonesweet outlines as: to be a counterweight to an overly strong legislature, calm or cool down political conflict, and decide whether the policy is in the interest of the public (as summarized by Park, 2009, p. 28). However, in regards to the decisions, there is the question of whether or not the court was active or deferent, particularly in relation to the President.

In examining the court's decision, Yeh (2010), argues that this case is an example of the court adopting an approach that diffuses conflicts unlike its

western counterpart, who intervene to the degree that it exacerbates the conflict (p. 914). She sees this case as one of deference by the courts, which she finds is similar to the Court's position regarding other disputes that have to do with presidential jurisdiction (p. 941). She argues that this type of deference or non-affirmative position is in contrast to the court's active intervention in cases affecting socioeconomic welfare, women's rights, etc. (p. 944). Similarly, in his brief analysis, Ginsburg (2009) agrees with Yeh in his evaluation of this case as one where the court responded with greater sensitivity and in which they tried to avoid a constitutional crisis. However, unlike Yeh, Ginsburg (2009) does not view the court's decision as one of deference, but rather "a subtle way in which the Court aggrandized its own power in making the decision" (p. 8) by establishing itself as the final arbiter on the matter and not basing its decision on the findings of the National Assembly. In contrast to Yeh and in partial agreement with Ginsburg, Lee (2005) argues that the court acted in an active manner resembling judicial supremacy. The court had two ways to approach the case: one involving the narrowing down of its own role and deferring to the National Assembly the question of what constitutes the grounds for impeachment or the second route where the court retains this power for itself, as the final arbitrator (p. 425). Given these two options, Lee states that the court chose to do the latter, which he argues is one of the two instances that assert the doctrine of judicial supremacy. The second instance was the Court's rebuke of the President in his attitude towards the National Election Commission, who had found him in violation of the law (p. 428). In this way, instead of the court's moderate and

more deferential behavior, the court is seen here in a position of judicial supremacy. Furthermore, Lee characterizes the court as having an aggressive stance (p. 429) and states that this case allowed the court to "flex its judicial muscles" and increase its power without offending the public and the democratic process due to the unpopularity of the National Assembly's motion for impeachment (p. 431). However, Lee does not find this to be necessarily bad as he concludes that in contrasting the case of Korea to the impeachment of Nixon in America, the American position that the judiciary should have no part in presidential impeachment disputes should not be accepted without question.

From this view, the decision appears as a choice between deference and judicial supremacy. The case positions the court in the middle as the institution that has to decide whether to follow the majority decision of the National Assembly or follow the president (Park, 2005, p. 256). This implies that either the court sides with the "public will" or is deferent to the executive, who has significant power over the appointment of the justices. However, as noted earlier, the seeming majority of the National Assembly was not reflective of the desires of the people. Moreover, the decision that negated the call for impeachment cannot be seen as deference to the executive that Yeh implies by arguing that the court takes a softer stance on cases involving presidential jurisdiction in comparison to social issues. First, this was shown as not necessarily true in the empirical data. Second, in this particular case, the court played a significant role in preventing the over exercise of power by an overzealous legislature that could potentially set a harmful precedence for

future cases concerning impeachment without abusing its powers. In this regard, the court's decision can be seen as evident of an active court but not one reflecting judicial supremacy.

When rendering the decision, the court limited the grounds on which impeachment against the president can be brought before the court for confirmation in future cases. It outlined the three criteria that need to be met, which are: 1) when there is a violation of the law, 2) the conduct in question was carried out while in office and 3) the damage on the free and democratic basic order is so grave that only the removal from office can repair the damage that was done.[3] Furthermore, according to Lee (2005), the court rebuked the President for ignoring the law and stated that despite the president's freedom to express dissatisfaction with the law, it cannot be ignored until the court has found it to be unconstitutional. This is not reflective of a court that is deferential to the president or the legislature as it not only ensures that future legislatures cannot impeach the president based on their personal wants and dissatisfaction with the person but also reiterates that even the president is not above the law. Here, by rendering its opinion on the case, the court was able to ensure that no one branch utilized the rule of law in a manner that tips the check and balance in their favor. This is healthy deference. It does not involve deference of the court to one branch or the other and neither does it seek to empower the court but rather it is deferent to the ideals of the separation of powers whereby the court will take an active stance

[3] This is reflected in the summary of the case (2004Hun-Na1) and the opinions given by the justices on their decisions regarding several grounds for impeachment as indicated by the National Assembly in their Bill for impeachment, as published on the Korean constitutional court website under landmark cases.

in its decisions in order to preserve the balance of power and prevent any abuse by one branch of government. Therefore, the court's ruling against the National Assembly's findings does not paint a picture of a court dependent and catering to those who have power over them, but rather one that has the freedom to decide but also ensures that the decision is in respect to the balance of the government powers, while also respecting the rule of law. This healthy deference is also reflected in the case on the dissolution of the Unified Progressive Party.

6.1.2. Dissolution of the Unified Progressive Party (2013)

The Unified Progressive Party was founded on December 5th, 2011 through the coalition of three minor and liberal parties - the Democratic Labor Party, the People's Participatory Party and a growing party split from the Progressive New Party – ahead of the 2012 general elections ("Minor parties launch," 2011). The party was composed of two factions, the larger faction, called the National Liberalization (NL), was comprised of student activists from the 1980 democratization movement and the smaller People's Democracy (PD) was comprised of labor activists. This unified party went on to win in seven constituencies in the April 2012 general elections and received enough votes to have six proportional representatives. However, discrepancies in the polling led to the revelation that the primary to select its proportional representatives, held earlier in March, had been rigged (Kim, 2012). Following this, there was debate on who should be held responsible for the rigging as well as questions

about who should step down. This led to tensions between the two factions in the party, each accusing the other of the rigging, which consequently led to the resignation of the four co-leaders of the party as well as one of the six proportional representatives, leaving five seats for the UPP in the National Assembly ("Leftist party leaders," 2012). In the subsequent year, the party was accused of sympathizing with North Korea and conducting secret meetings to plan a revolution against the South Korean State. Relatedly, UPP representative Lee Seok-Ki was indicted by the Suwon District Court a few months before the filing for dissolution and sentenced to ten years in prison on charges of treason involving collusion with the North ("Leftist lawmaker gets," 2014).

On December 19, 2014, approximately ten months after Lee's indictment, the Korean Constitutional Court made a momentous and unprecedented decision when it confirmed the dissolution of the UPP. The current President Park Geun Hye's government, through the Justice Ministry, petitioned the case in November 2013. The basis for the petition was that this left-wing party was a threat to Korea's liberal democratic order due to its ties with North Korea and that it accordingly had plans to "subvert the South Korean state through a violent revolution" (Lee, 2014). This accusation against the UPP was based on the recordings by the South Korean Intelligence Service (NIS) on May 12, 2013 that "supposedly captur[ed] [the] UPP and trade union members speaking in favor of attacking the government if war with North Korea began." The Park government argued that 130 people, led by Lee Seok-Ki, formed a pro-North Korean group called the "Revolutionary

Organization" (RO) within the party in order to overthrow the government (McGrath, 2014). In response to this accusation, the UPP argued that it did not seek to undermine the South Korean state, but rather only sought a peaceful reconciliation with North Korea. A long time reunification activist, Kang Jeong Koo, backed this defense by the UPP as he described the party as "… the only political party fully advocating not only democracy but also the core values of peace, reunification, and social justice" (as cited by Lee, 2014). The decision to dissolve the party was met with opposition by critics arguing that the ruling signified damages to the democracy in South Korea. Roseann Rife, Amnesty International's East Asia research director, expressed concern stating that this ban "raises serious questions as to the authorities' commitment to freedom of expression and association." She also argued "security concerns must never be used as an excuse to deny people the right to express different political views" ("South Korea court," 2014). By looking at the debate on why the critics saw the decision to be undemocratic as well as the political environment leading up to the decision, we can determine whether this case, like the impeachment case, was one where the court practiced healthy deference or if it was deferent to the desires of the executive. In this regard, we need to ask whether the decision of the court was against the majority in terms of public opinion and the National Assembly as well as whether the court's decision was in line with the preservation of the separation of powers.

In light of this decision, the concern raised by Rife necessitates the question about whether or not the court was deferential to the executive rather than actively protecting the rights of the UPP. Similar to the case on the

impeachment of President Roh, the court played a key role in the final decision-making regarding the fate of this minority leftist party. However, unlike the outcome of the impeachment case, the decision this time was not in favor of the progressive leftist party and the dissolution case took longer than a year before a decision was rendered. In addition to this, while the court did not confirm the findings of the National Assembly for the impeachment of Roh, the findings of the NIS, petitioned by the President's government was accepted and confirmed. This difference in how the case was handled leads one to once again question the independency of the court in this case. This is particularly so as the data has shown that the number of constitutional cases increased significantly during Lee's presidency and remained so during Park's. Also, the decision on the impeachment case filed by the National Assembly favored the President, as did the decision on the dissolution of the UPP, filed by the Justice Ministry, on behalf of the President's government, thereby raising the concern of whether or not the court is deferential to the executive. Hong Sung-Kyu, the spokesperson for the UPP, echoed this concern about the court's fairness and independence addressing the speed at which the court reached a decision as he speculated that,

> It hasn't even been a month since the final defense was made. We can't erase suspicions that the court rushed to set the sentencing date without sufficient discussions…We are seriously concerned that perhaps the Constitutional Court's notice of the sentencing date may be viewed as siding with the rash acts of those who have fundamentally denied the value of the Constitution (Jang and Sim, 2014).

Hong's suspicions and inference regarding the supposed short time period of deliberation after the final defense presupposes that the court was going to

necessarily side with the executive. Since this statement was given before the rendering of the decision and only pertaining to the notice given concerning the date of the decision, for Hong to imply that the decision given in this short period of time to be unfair, appears to be the same as assuming that the court will be deferent to the executive. Therefore, in order to examine the court's role in reaching this decision we must look at the context and the political environment surrounding the decision to better understand why the court favored the opinions of the executive to either confirm or dispute these suspicions of deference.

The final verdict led critics to draw comparisons between the practices of the current government and the practices of the authoritarian regime as reflected by UPP leader Lee Jung-Hee's statement that this outcome "opened a dark age with an authoritarian decision" turning South Korea into a "dictatorial country" ("South Korea court," 2014). She reiterates this sentiment in another interview, stating that this case is a step back in Korea's democracy and a step back to a time when freedom of expression was silenced (Choi, 2014). In line with the accusations of reverting back to authoritarianism and dictatorship, critics pointed out that Park's petition against the UPP was not due to the latter's potential threat to the Korean state and possible relations with North Korea, but rather a way to deflect the attention away from the scrutiny the NIS was facing at the time and focusing the attention on the UPP and their potential communist ties. According to Lee (2014), the need for this arose due to the revelation that the NIS had manipulated the public's opinion on the opposition, in favor of the then

presidential candidate Park, during the 2012 presidential election. NIS Chief Won Sei-hoon, carried out this manipulation as he had NIS agents create multiple aliases to write false information about opposing candidates on numerous websites, totaling over 5000 comments. Won was accordingly indicted of the relevant charges in June 2013, four months before UPP Rep. Lee Seok-Ki's arrest. The problem was that when this misconduct of the NIS came to light and under public scrutiny, the UPP was at the forefront protesting against President Park and her legitimacy as president of South Korea. Therefore, critics argue that Park, in order to prevent further criticism of her presidency and to detract from the NIS scandal, drew attention to the UPP by positioning them as a threat to Korea's democracy (Lee, 2014). There is room for further skepticism about Park's pursuit of this case as the charges against Lee Seok-Ki and other key members of the UPP seemed like "highly unusual charges of treason" (Choe, 2014).

Critics also pointed a finger at Park's tendency to shut down opposition, not only in regards to the UPP but any other criticisms on the government, thereby drawing on the similarities between the current practices of Park and the practices of her father during the Yusin period, when he arbitrarily dissolved Parliament and political groups ("South Korea court," 2014). In support of this claim, Kwaak (2014) writes that, "international watchdogs say South Korea, which in the late 1980s transformed from military rule to one of Asia's freest states for political liberty, is increasingly using legislation for national security and defamation to silence those critical of the government." He continues to give examples of cases where the government has silenced

other individuals, outside of the UPP. An example he gives is on the lawsuits filed by presidential aides against journalists for portraying them in an unfavorable light as well as the case against the former Seoul bureau chief of a Japanese newspaper who was at the time on trial "for allegedly defaming President Park Geun-hye in reporting rumors that she was involved in a tryst during the initial hours after a deadly ferry accident in April" (Kwaak, 2014). Furthermore, critics portray Park as having initially held animosity towards the UPP. This is particularly credited to the 2012 general elections when UPP Chair Lee Jung-Hee "publicly challenged and humiliated Park on national TV", making claims that she (Lee) was running in the presidential elections in order to ensure that Park loses the election as well as referencing Park Chung Hee, Park's father and the previous authoritarian ruler, as Takaki Masao, his adopted Japanese name, to remind the public of his past collaborating with Japanese colonialists (Lee, 2014). This situation, compounded by the UPP's vocal criticism after the NIS scandal was seen as the basis for why Park would seek revenge against the UPP. While within the now established democratic society of South Korea, it is not possible for the President to arbitrarily dissolve a party as was the case during the Yusin Constitution, the possibility remained that Park could potentially have utilized the courts in her favor, especially if the latter is deferent in presidential cases as Yeh (2010) argues. This is what Hong seems to have implied in his suspicions of the court's early decision. However, despite the circumstances that imply that Park's motives were driven by self-interest and to prevent criticism of her government, these accusations are not grounds for assuming that the court was bowing to the

dictates of the president. In order to determine whether the court's decision-making was one of healthy deference or lack of independence vis-à-vis the executive, we must also look at whether the public and the National Assembly supported Park's actions and whether the court abided by the rule of law. This is particularly important, as the ruling party did not hold a comfortable majority in the legislature with only 30 more seats than the main opposing Democratic United Party. Furthermore, we must determine whether the findings against the UPP were serious enough to warrant a precaution, therefore justifying the decision for the dissolution of the party. It is important to note that this paper does not seek to determine whether the court was correct or incorrect in its decision-making, but rather to determine whether their decision was one of healthy deference.

At the time of this writing, South Korea is still technically at war with North Korea and the latter is generally seen as an ongoing threat to the South Korean state. This threat is physically evident by the heavily guarded border between the two countries. While some, including human right activists and former President Carter of the United States (Lee, 2014), believe the measures taken to suppress North Korean support as a violation of freedom of expression and affiliation, it is clear that this measure against North Korea and its potential supporters do not only pertain to Park's administration. This is evident by Lee Seok-Ki's arrest in 2002 for playing a part in a pro-North Korea organization where he was found guilty and sentenced to two years and six months in jail but later released based on the pardon of the president ("Leftist lawmaker gets," 2014). This event occurred ten years prior to Park's

administration under former President Kim Dae-Jung. In this way, the precaution and sensitivity taken with cases involving North Korea has been a long-standing issue, particularly in terms of national security. Furthermore, the dissolution of the party and the legitimization of the decision parallel the 1956 case when the German constitutional court ordered the dissolution of the Communist Party of Germany because it posed a threat to the democracy of the German state. Accordingly, "the German court also found that a political party posting threats to the state's existence and running counter to the constitutional order could not be tolerated at a time of ideological conflicts under the Cold War" ("Court deals hard blow," 2014). Similar to the German case and despite a fifty plus year difference and modernization, Korea currently faces an ideological conflict with North Korea under a temporary truce or cold war. Therefore, if the claims against the UPP were true, the potential threat of the party to the democracy of South Korea was real and serious grounds for filing for dissolution unlike the findings by the National Assembly to impeach the former President Roh.

In addition to the seriousness of the issues underlying the claims against the UPP by the Park administration, there is also the matter of what the public opinion was and how the reaction to the decision was received. The case against UPP representative Lee Seok-Ki and his colleagues were very publicly reported on by various media sources preceding the case against the party as a whole. Whether this was purposely done to detract from the scandal concerning the NIS is secondary, as the fact remains that the media attention on Lee and his associates led to the leakage of unofficial allegations and leaks

that supposedly linked Lee to North Korea, despite the high court dropping this charge due to the lack of evidence. Additionally, within the National Assembly, the ruling party and the opposition joined forces and took measures that preemptively placed guilt on Lee before his trial (Lee, 2014). While the focus was on Lee and his associates, it undoubtedly affected how the public viewed the party as a whole, since these individuals were the representatives and faces of the party, tasked with the duty of representing their constituents' interests in the National Assembly. In addition, Green (2015), a researcher on Asia and North Korean affairs, finds that by looking at the media in 2012, it was not only the conservatives that were "calling for the death of the UPP" but also progressive politicians and the left wing media alike that had abandoned the party. An example he gives is of Hankyoreh, a leftist newspaper who ran an editorial piece questioning the future of UPP saying, "What this incident makes clear is that progressive politics is in desperate need of reorganization that there is no future for it under the current UPP system. No progress can be made without cutting out this festering wound." Green also argues that the UPP had lost its credibility as a political party before the constitutional court decision when it was found guilty of having rigged the elections. Due to the negative portrayal of the UPP and its leaders by the media and the loss of support from the National Assembly, the decision against the UPP did not bring about the expected uproar of outrage from the public despite critics' concerns for democracy in Korea. Rather, it drew support for the decision as:

> An opinion survey recently conducted [after the decision] by Real Meter and published by [an] independent Korean-language daily Hankook Ilbo on Dec. 30, 2014 showed 61 to 64% of the respondents supporting the ruling and 24 to 28% opposing it. A separate survey published by another independent Korean-language daily Joongang Ilbo showed 63.8% supporting the Constitutional Court decision to disband the UPP and 23.7% disagreeing with the decision. In still another survey, which was published by the TV arm of a leading independent Korean-language business daily, Maeil Kyungje, indicated 60.7% supporting the Constitutional Court decision and 28% disapproving it (Lee, 2014).

These polls show similar results and indicate that the public, whether they had been influenced by the media or not, found the grounds for which the court made its decision to be legitimate. While the poll was conducted after the fact, it is still reflective of the way the news on the dissolution was received by the public.

Turning to the actual court proceedings against the UPP, the subject matter for review were "whether the objectivities or activities of the Respondent (the UPP) were against the basic democratic order; whether the dissolution of the Respondent should be ordered and if so ordered, whether seats of the National Assembly members affiliated to the Respondent should be forfeited.[4]" In reviewing this case, the courts held two sets of preparatory proceedings for pleading and eighteen sets of oral argument sessions, during which time the court reviewed the evidence and fact finding. The court heard from an assortment of witnesses presented by both the plaintiff and the respondent as well as from members of government agencies and public organizations along with opinions by experts. With this trial process and

[4] As written in the case summary on case 2013Hun-Da1 regarding the dissolution of the Unified Progressive Party.

looking at the seriousness of the issue at hand in conjunction with public opinion on the case, it does not appear that the constitutional court was deferential in its decision. While the question of whether the court made the correct decision is questionable, to say that the court did not act independently appears untrue. First, unlike the impeachment case, the grounds for filing the charges against the UPP were based on an issue that was of serious concern to the national security problem in regards to an enemy of the state. Second, the grounds for which the case was based had precedence outside of South Korea in the German case where a threat to national security during a contentious time was seen as legitimate grounds for dissolving a party. Thirdly, the composition of the court had both conservative justices as well as justices that were considered moderate or progressive who voted in favor of dissolution ("Court deals hard blow," 2014). Lastly, the court's independence in decision-making is indicative of healthy deference. The case against the UPP was obviously linked to the National Security Law ("South Korea court," 2014) under Article 7, which states that:

> Any person who praises, incites or propagates the activities of an antigovernment organization, a member thereof or of the person who has received an order from it, or who acts in concert with it, or propagates or instigates a rebellion against the State, with the knowledge of the fact that it may endanger the existence and security of the State or democratic fundamental order, shall be punished by imprisonment for not more than seven years.

While the court was not called upon to address the constitutionality of this particular law, it had to ensure that it did not overstep the boundaries of its powers as it decided the case so that a decision did not inadvertently set a precedent that could potentially cause harm to the state's security. Also, the

court followed the rule of law, ensuring that the procedural aspects of the case were followed, outlining the basis for which dissolution of a party would be required. Additionally, in rendering its opinion, the Majority (8 of 9 justices) also indicated Korea's uniqueness, stating, "The ideological confrontation in the Korean peninsula seems somewhat out of sync with the new historical trend of the 21st century. But territorial division, ideological confrontation and possible threat to the regime arising therefrom are undeniable reality for us living in the peninsula.[5]" Pertaining to these circumstances and the leaders of the UPP, the majority continued, stating that "…unlike during the days before the second splitting of the party when a number of factions supporting different ideologies and political lines kept each other in check, the Respondent in its current form is controlled by its leading members sharing the same ideology and leading the major decision-making process.[6]" On these grounds and after a review of the party's platform, which the court found promoted the socialist system of North Korea, thereby contradicting the democratic order of South Korean society and determining the respondent's purposes and activities to be a threat to the democratic order, the court approved the dissolution of the UPP.

There is much criticism on the National Security Law, particularly by the United Nations Human Rights Commission (Kwaak, 2014) due to its history of being used to punish political opponents without basis. The law,

[5] Opinion of the majority in rendering a decision for the dissolution of the Unified Progressive Party as found in the case summary.
[6] Opinion of the majority in rendering a decision for the dissolution of the Unified Progressive Party as found in the case summary.

created by Rhee, was, in the past, used to arrest, detain, and execute opponents and subsequently used by military dictators, Park and Chun, to fabricate cases to suppress the opposition. Lee (2014) argues that this law continues to be used today to suppress progressive voices by making a broad spectrum of actions punishable by law. However, while the contents of the law and possible abuse of its use may be detrimental to the democracy of South Korea, it is not within the appropriate powers of the court to change the law. Rather, it is the responsibility of the legislature, as the law-making branch of the government to alter it, reflecting the interest of the constituents they represent. This responsibility and power is further compounded by the sensitivity of the issue and how the public would react. Therefore, the court, rather than being dependent on the executive, rendered a decision that did not overstep its authority. It abided by the rule of law and addressed the seriousness of the case while taking into consideration the public opinion on this particular case. The public clearly saw the UPP's activity as a viable threat to national security and dissolution to be the appropriate consequence. In this way, the dissolution case is another example of the court's healthy deference to the separation of powers in rendering its decisions.

6.1.3. Judicial Independence in the Constitutional Court: Healthy Deference or Dependence?

It is evident from the analysis of the cases above that the Korean Constitutional Court is independent due its healthy deference to the maintenance of the separation of powers between the branches. However, due

to the court's healthy deference, the executive as well as the legislature can strategically utilize it to manipulate the case in their favor. By presenting the case as one that requires the court to refrain from actively deciding beyond its mandate due to the accountability it has to the separation of powers, the other political actors benefit from this type of judicial independence. This is seen in both the case for impeachment and particularly so in the case regarding the dissolution of the UPP.

It is clear that while the National Assembly attempted to remove Roh from office without any concrete basis for doing so, we cannot completely disregard Roh's own intentions for not abiding by the warning given by the opposition as well as by the National Election Commission. It can be argued that Roh was well aware that his actions would lead to an official call for impeachment. This is because the opposition threatened Roh with the possibility of impeachment starting a couple of months after his inauguration, and he originally faced challenges against his power from the beginning due to the lack of support from his own party as well as due to his position as a leader of a minority party, particularly after leaving the NMD. Additionally, we cannot say that Roh was oblivious to his duties as a public official especially after receiving a letter dispatched by the National Election Commission on March 3, following a complaint filed by the MDP on February 28 to the Commission on Roh's actions, requesting that Roh remain neutrality due to his position as a public official. In spite of this warning, in the press conference held eight days after the letter was dispatched, Roh did not apologize regarding his lack of neutrality and rather stated that he

disagreed with the Commission that his support for the Uri party was a violation of law (Lee, 2005, p. 411). Roh's refusal to appease the obviously discontent National Assembly amid threats against his presidency as well as his attempt to hold a national referendum to validate his leadership during this time are indicative of Roh potentially using the courts as another means to legitimize his power to the public as well as to the National Assembly and to prevent further encroachments and attempts at removing him from power. Roh, who came into power with promises to decrease corruption and is credited with contributing to Korea's democracy with the formal separation between the judiciary and the executive (Breen, 2011), knew that the court would defer to the separation of powers and not render a decision that would over exert its own power or cause the imbalance of power between the branches without just cause. The media validated this confidence preceding the official decision, by its speculation that the court would not confirm the impeachment because the grounds for impeachment were questionable. The practice of healthy deference by the court gave Roh the confidence to risk his presidency and strategically allow the matter to be settled by the highest court, thereby giving his party's win in the 2004 general elections as well as his own presidency the validity and legitimacy it needed to continue. This type of strategic action utilizing the court's healthy deference, also explains the case on the dissolution of the UPP.

While the opposition and critics made clear the criticism of Park and her administration in restricting the freedom of expression and affiliation when they sought the dissolution of the UPP, the case, as shown, is not

indicative of a dependent court. Rather, similar to Roh, Park was able to bank on the healthy deference of the court to push forward a case in her favor. Knowing that the National Security Law was within the jurisdiction of the National Assembly, one could argue that Park ensured that the case would have solid grounds for favoring her interests. Here the reputation the Korean Constitutional Court had built since its establishment in 1988 was at stake as well as the potential backlash the government would face if it did not have justifiable grounds for requesting adjudication of a case. This is particularly so since this type of case had never been brought before the court since the beginning of a democratic Korea and involved a highly contentious matter. In this respect, it is unlikely the court would have decided such an important and controversial case so blatantly in favor of the executive. If it had been the case that the court had no legitimate reasons that could be justified to the public as a whole, it would have avoided its decision-making. However, as evident by the persistent pursuit of the Park administration in ensuring that the public was well aware of the connection between the UPP and pro-North Korean sentiments, Park safeguarded the case against the UPP by wrapping it within a law that the court would not be able to simply dismiss as trivial or insufficient. The National Security Law, established since the time of Rhee and amended in 1991[7], provided Park the grounds to assert the National Assembly's cooperation as well as that of the court. Article 7 of the National Security Act provided legitimate grounds by which to accuse the UPP and its leaders due to South Korea's tension and the circumstances concerning North Korea. How

[7] As it is marked in the National Security Act under Section 7 (1)

the court rendered its decision could have had significant impact both in terms of inadvertently deciding on the constitutionality of Article 7 thereby breaching its powers into the law-making realm as well as by creating further conflict within society.

The data and analysis of two significant cases show that the South Korean Constitutional Court is independent and ensures that while it is active in its decision-making, it does not exceed its powers. This is evident in the examination of the 395 cases where the decisions were not largely unconstitutional but were also not disproportionately constitutional. Furthermore, the court does not appear more active in social cases than political cases and has ruled in favor of minority powers vis-à-vis the majority. In this way, the concept of healthy deference can be added to the insurance theory or the hegemonic theory to address how the elite or political actor assures that the court will be their defender rather than their executioner in a case. The guarantee of the court's independence on the basis of healthy deference gives the executive or a party the point of reference by which they can strategically manipulate the decision making of the court in their favor. Both the judiciary and the executive use this healthy deference strategically, where the former uses it as the basis for going against the latter while maintaining the public's trust through the appearance of accountability. The latter utilizes it to ensure that the case brought before the court is one that affects the separation of powers, thereby keeping in check the breadth of the court's decision-making.

Chapter 7. Conclusion

It is clear that despite the advancement and expansion of judicial power in democracies, a gap exists between judicial independence and accountability. However, this gap can be bridged by the concept of healthy deference. By deferring to the maintenance of the separation of powers rather than in favor of any one actor(s), the court is able to legitimize and check its authority as the adjudicator of the constitution while keeping the powers of the other branches of government in check. Healthy deference also helps answer the question on why the legislature and the executive would be willing to confer its powers to a judiciary that has the potential to restrict their own powers. While the insurance theory by scholars such as Ginsburg (2003) and Stephenson (2003) or the hegemonic theory by Hirschl (2000) provide explanations as to why these actors would want to establish such a court in the beginning of transition and the incentive behind maintaining the court's independence, there lacks an explanation for why these actors would believe the court to be the best institution for protecting their power.

One explanation is that because the courts are deferent in political cases, they are able to exercise freedom in cases involving social issues such as rights and freedom (Scribner, 2010). In this case, the political actors know that if a case involves sensitive political issues, the court will be deferent. However, this produces two problems. The first is that the consistent practice of deference to any one actor undermines the overall independence of the

court. Secondly, there lacks an explanation for why elites or political actors believe the court to better reflect their interests than other majoritarian institutions (hegemonic theory), particularly after they are out of power (insurance theory). This question arises because there is an underlying assumption that the court will be deferent to the current legislature or executive, who have direct influence on the judiciary. If it is the case that the actors bank on the political leanings of the judges sitting on the bench, this once again introduces a problem on independence and further complicates it by having bias justices, who are supposed to be politically neutral, sitting on the bench, which then affects the separation of powers.

Healthy deference addresses these problems by concretely establishing the boundaries within which the court may act deferentially without affecting its independence, particularly in the eyes of the public. Through this, the court is able to protect itself from interference by deciding cases in accordance with the separation of powers. However, due to the boundaries within which the court operates, this deference to the separation of powers also allows the legislature and the executive to cater the cases they bring to the constitutional court in their favor. Political actors can utilize the assurance that the court will respect the separation of powers in their decision-making so long as it is in line with the rule of law, to shape the cases they bring to the court along those lines, thereby tying the hands of the court in its decision-making.

This is clear in the case of South Korea. While the initial descriptive data may appear as though the court is not very independent due to the larger number of constitutional decisions, we must also keep in mind that a larger

number of unconstitutional decisions can also be problematic as it can be reflective of a judiciary that acts beyond its designated powers. The larger number of constitutional decisions in the 395 cases examined here can be seen as an indication that the court is not on the precipice of judicial supremacy, but rather accountable and independent. The results indicate that the decision-making of the court does not differ by type of case or by the parties involved. The distribution of its decision-making is similar for both social cases as well as those dealing with political issues or political actors. This de facto judicial independence of the court is clear when we look at the two cases that were of national importance.

The two case studies examined in this paper appear at first to be deferent to the executive, but are in fact, reflective of healthy deference by the court. In the impeachment case, it was clear that there was a great deal of polarization within and among the parties of the National Assembly. Both the former party of the President and the opposition, who dominated the legislature, wanted Roh removed from office. In order to carry this out, the legislature voted, for the first time since the establishment of the current constitution, on the impeachment of the president. This act proved to be undemocratic, as it did not serve the interests of the public who had voted for Roh a year earlier, as shown by the public's negative response following the vote. This was further compounded by the fact that the grounds for impeachment were not substantial, as shown by the predictions given by the media and scholars that the court would not pass the impeachment vote. Accordingly, the court rendered a decision favoring the president.

The second case, the dissolution of the Unified Progressive Party, is complicated as it brought a lot of backlash and criticism regarding the freedom of expression and affiliation along with accusations that the Park administration was reverting to the authoritarian practices of the past. The decision was met with disapproval from within Korea as well as from the international community such as the United Nations Human Rights Commission. However, despite the criticism on the final decision, looking at the proceedings of the case as well as the seriousness of the accusations against the UPP, we can argue that the constitutional court rendered a decision in line with healthy deference. Without challenging and changing the National Security Law, which would have been beyond the appropriate power given to the judiciary, as it is a matter that needs to be resolved in the legislature, the court adhered to the rule of law and the separation of powers to make its decision. In respect to both these cases, the court was independent by practicing healthy deference thereby accountable to the public as well as the rule of law. Therefore, we can conclude that one of the highest courts in South Korea and the only one that can review the cases of politically sensitive matters such as impeachment, dissolution of a party and disputes between governmental actors, is independent and accountable due to the inclusion of healthy deference in its decision-making.

One of the biggest limitations to this study is that it only looks at a small portion of the total cases reviewed by the court. While the constitutional court reports a caseload of 26,781 cases that have been filed between 1988 and 2014, this study only looks at 395 of these cases. Furthermore, the court

chose the cases looked at as major decisions. Therefore the results may not be reflective of the whole and may rather reflect the problem Simmons identified early on. Another limitation of this paper is that it only focuses on the constitutional court and does not look at the independence of the lower courts or the other highest court in South Korea, the Supreme Court. It also does not look at the constitutional court's interaction with these other courts.

Despite these limitations, it appears that this small number of cases is reflective of the general patterns of the total cases when looked at generally. The court provides only the types of decisions that were rendered and when we compare the statistics of these decisions to the statistics of the decisions of the 395 cases, a similar pattern is observable. Additionally, when we collapse the gradation of decisions the court provides into decisions of constitutionality or unconstitutionality, there is a larger number of cases that were decided as constitutional than unconstitutional in the 26,781 cases, as was the case for the smaller set of cases looked at here. Furthermore, while ordinary courts and the Supreme Court is also important to look at in terms of judicial independence, the jurisdiction the constitutional court has as well as its role as the main adjudicator of constitutional cases, particularly pertaining to sensitive political conflicts and issues, provides the best grounds for comparison between social and political cases.

As mentioned earlier, the purpose of this paper is not to provide the ultimate answer between accountability and judicial independence. Nevertheless, I have tried to look at a small yet significant part of South Korea's judicial system to better understand the positive evaluation it has

received in terms of its judicial independence by looking at the concept of healthy deference. With the increase in concern about the judicialization of politics as the role and actions of the judiciary expand worldwide, it is important that we continue to update and monitor the decision-making of the South Korean Constitutional Court, particularly as the current government has faced accusations of authoritarianism and silencing of dissenting voices. The aim of this paper, with its limitations, is to continue the dialogue on judicial accountability and independence, and to draw attention to South Korea, as it has potential to affect the judicial systems elsewhere in Asia by setting an example of what independence and accountability look like.

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Appendix

Table 6

Decisions by Party Involved in Type of Case (Respondent)

Decision	ToC	Respondent								
		LPG	NG	E	I	C	EI	L	LP	N/A
Constitutional	RF	1 25%	2 20%	0 0%	0 0%	-	1 50%	0 0%	1 33.33%	67 41.10%
	PC	0 0%	4 40%	4 66.67%	0 0%	-	0 0%	0 0%	0 0%	24 14.72%
	PR	2 50%	0 0%	1 16.67%	0 0%	-	0 0%	0 0%	0 0%	27 16.56%
	SR	0 0%	0 0%	0 0%	0 0%	-	0 0%	1 100%	0 0%	23 (14.11%
	PrR	0 0%	1 10%	0 0%	1 100%	-	1 50%	0 0%	2 66.67%	20 12.27'%
	LO	0 0%	0 0%	0 0%	0 0%	-	0 0%	0 0%	0 0%	2 1.23%
	CD	1 25%	3 30%	1 16.67%	0 0%	-	0 0%	0 0%	0 0%	0 0%
Unconstitutional	RF	1 50%	0 0%	0 0%	0 0%	2 100%	0 0%	-	1 9.09%	26 23.01%
	PC	0 0%	1 12.5%	0 0%	0 0%	0 0%	0 0%	-	0 0%	22 19.47%
	PR	0 0%	3 37.5%	0 0%	0 0%	0 0%	0 0%	-	1 9.09%	25 22.12%
	SR	0 0%	0 0%	1 20%	0 0%	0 0%	0 0%	-	0 0%	14 12.39%
	PrR	0 0%	1 12.5%	0 0%	1 100%	0 0%	1 100%	-	9 81.82%	25 22.12%
	LO	0 0%	0 0%	1 20%	0 0%	0 0%	0 0%	-	0 0%	1 0.88%
	CD	1 50%	3 37.5%	3 60%	0 0%	0 0%	0 0%	-	0 0%	0 0%
Dismissed/Denied	RF	0 0%	0 0%	0 0%	-	-	-	-	1 50%	5 16.13%
	PC	0 0%	1 16.67%	0 0%	-	-	-	-	0 0%	16 51.61%
	PR	0 0%	0 0%	0 0%	-	-	-	-	0 0%	1 3.23%
	SR	0 0%	0 0%	2 100%	-	-	-	-	0 0%	3 9.68%
	PrR	0 0%	0 0%	0 0%	-	-	-	-	1 50%	5 16.13%
	LO	0 0%	2 33.33%	0 0%	-	-	-	-	0 0%	1 3.23%
	CD	2 100%	3 50%	0 0%	-	-	-	-	0 0%	0 0%
Mixed	RF	-	-	-	-	-	-	-	0 0%	3 20%
	PC	-	-	-	-	-	-	-	0 0%	3 20%
	PR	-	-	-	-	-	-	-	0 0%	4 26.67%
	SR	-	-	-	-	-	-	-	-	-
	PrR	-	-	-	-	-	-	-	2 100%	5 33.33%
	LO	-	-	-	-	-	-	-	-	-
	CD	-	-	-	-	-	-	-	-	-

Withdrawn	**RF**		-	-	-	-	-	-	-	-
	PC	-	-	-	-	-	-	-	-	-
	PR	-	-	-	-	-	-	-	-	-
	SR	-	-	-	-	-	-	-	-	-
	PrR	-	-	-	-	-	-	-	-	-
	LO	-	**1** 100%	-	-	-	-	-	-	-
	CD	-	-	-	-	-	-	-	-	-
Interim Injunction	**RF**	**1** 100%	-	-	-	-	-	-	-	-
	PC	-	-	-	-	-	-	-	-	-
	PR	-	-	-	-	-	-	-	-	-
	SR	-	-	-	-	-	-	-	-	-
	PrR	-	-	-	-	-	-	-	-	-
	LO	-	-	-	-	-	-	-	-	-
	CD	-	-	-	-	-	-	-	-	-

This table looks at the type of respondent pertaining to each type of case. This is then compared by the type of decision the court made. The four main actors that this paper looks at are highlighted in gray. This is done to distinguish between the type of actors involved and type of case that could influence the decision-making of the court.

Table 7

Decisions by Party Involved in Type of Case (Plaintiff)

Decision	**ToC**	**Planitiff/Complainant**								
		LPG	**NG**	**E**	**I**	**C**	**EI**	**L**	**LP**	**N/A**
Constitutional	**RF**	**1** 11.11%	**2** 15.38%	**0** 0%	**56** 42.42%	**5** 35.71%	**4** 50%	**2** 28.57%	**1** 25%	**1** 50%
	PC	**3** 33.33%	**10** 76.92%	**1** 100%	**12** 9.09%	**0** 0%	**2** 25%	**2** 28.57%	**1** 25%	**1** 50%
	PR	**0** 0%	**0** 0%	**0** 0%	**22** 16.67%	**7** 50.00%	**1** 12.50%	**0** 0%	**0** 0%	**0** 0%
	SR	**1** 11.11%	**0** 0%	**0** 0%	**17** 12.88%	**2** 14.29%	**1** 12.50%	**2** 28.57%	**1** 25%	**0** 0%
	PrR	**0** 0%	**0** 0%	**0** 0%	**23** 17.42%	**0** 0%	**0** 0%	**1** 14.29%	**1** 25%	**0** 0%
	LO	**0** 0%	**0** 0%	**0** 0%	**2** 1.52%	**0** 0%	**0** 0%	**0** 0%	**0** 0%	**0** 0%
	CD	**4** 44.44%	**1** 7.69%	**0** 0%	**0** 0%	**0** 0%	**0** 0%	**0** 0%	**0** 0%	**0** 0%
Unconstitutional	**RF**	**0** 0%	**0** 0%	-	**26** 26%	**4** 26.67%	**0** 0%	**0** 0%	**0** 0%	**0** 0%
	PC	**1** 14.29%	**9** 64.43%	-	**10** 10%	**0** 0%	**1** 50%	**1** 100%	**0** 0%	**1** 50%
	PR	**1** 14.29%	**0** 0%	-	**19** 19%	**8** 53.33%	**0** 0%	**0** 0%	**0** 0%	**1** 50%
	SR	**1** 14.29%	**0** 0%	-	**14** 14%	**0** 0%	**0** 0%	**0** 0%	**0** 0%	**0** 0%
	PrR	**0** 0%	**1** 7.14%	-	**30** 30%	**3** 20%	**1** 50%	**0** 0%	**2** 100%	**0** 0%
	LO	**1** 14.29%	**0** 0%	-	**1** 1%	**0** 0%	**0** 0%	**0** 0%	**0** 0%	**0** 0%
	CD	**3** 42.86%	**4** 28.57%	-	**0** 0%	**0** 0%	**0** 0%	**0** 0%	**0** 0%	**0** 0%

Dismissed/Denied	**RF**	**0** 0%	**0** 0%	**0** 0%	-	-	-	-	**1** 50%	**5** 16.13%
	PC	**0** 0%	**1** 16.67%	**0** 0%	-	-	-	-	**0** 0%	**16** 51.61%
	PR	**0** 0%	**0** 0%	**0** 0%	-	-	-	-	**0** 0%	**1** 3.23%
	SR	**0** 0%	**0** 0%	**2** 100%	-	-	-	-	**0** 0%	**3** 9.68%
	PrR	**0** 0%	**0** 0%	**0** 0%	-	-	-	-	**1** 50%	**5** 16.13%
	LO	**0** 0%	**2** 33.33%	**0** 0%	-	-	-	-	**0** 0%	**1** 3.23%
	CD	**2** 100%	**3** 50%	**0** 0%	-	-	-	-	**0** 0%	**0** 0%
Mixed	**RF**	-	-	-	-	-	-	-	**0** 0%	**3** 20%
	PC	-	-	-	-	-	-	-	**0** 0%	**3** 20%
	PR	-	-	-	-	-	-	-	**0** 0%	**4** 26.67%
	SR	-	-	-	-	-	-	-	-	-
	PrR	-	-	-	-	-	-	-	**2** 100%	**5** 33.33%
	LO	-	-	-	-	-	-	-	-	-
	CD	-	-	-	-	-	-	-	-	-
Withdrawn	**RF**		-	-	-	-	-	-	-	-
	PC	-	-	-	-	-	-	-	-	-
	PR	-	-	-	-	-	-	-	-	-
	SR	-	-	-	-	-	-	-	-	-
	PrR	-	-	-	-	-	-	-	-	-
	LO	-	**1** 100%	-	-	-	-	-	-	-
	CD	-	-	-	-	-	-	-	-	-
Interim Injunction	**RF**	**1** 100%	-	-	-	-	-	-	-	-
	PC	-	-	-	-	-	-	-	-	-
	PR	-	-	-	-	-	-	-	-	-
	SR	-	-	-	-	-	-	-	-	-
	PrR	-	-	-	-	-	-	-	-	-
	LO	-	-	-	-	-	-	-	-	-
	CD	-	-	-	-	-	-	-	-	-

This table looks at the type of complainant pertaining to each type of case. This is then compared by the type of decision the court made. The four main actors that this paper looks at are highlighted in gray. This is done to distinguish between the type of actors involved and type of case that could influence the decision-making of the court.

Table 8

Years Lapsed by Type of Case

Years Lapsed	Type of Case						
	RF	**PC**	**PR**	**SR**	**PrR**	**LO**	**CD**
0	**2** 1.79%	**10** 13.33%	**2** 3.13%	**2** 4.55%	**3** 4%	**0** 0%	**1** 5.56%
1	**35** 31.25%	**25** 33.33%	**17** 26.56%	**10** 22.73%	**35** 46.67 %	**2** 28.57%	**7** 38.89%
2	**32** 28.57%	**22** 29.33%	**31** 48.44%	**17** 38.64%	**27** 36%	**3** 42.86%	**4** 22.22%
3	**27** 24.11%	**10** 13.33%	**11** 17.19%	**11** 25%	**6** 8%	**2** 28.57%	**5** 27.78%
4	**12** 10.71%	**6** 8%	**1** 1.56%	**4** 9.09%	**3** 4%	**0** 0%	**1** 5.56%
5	**1** 0.89%	**2** 2.67%	**1** 1.56%	**0** 0%	**0** 0%	**0** 0%	**0** 0%
6	**2** 1.79%	**0** 0%	**0** 0%	**0** 0%	**0** 0%	**0** 0%	**0** 0%
7	**0** 0%	**0** 0%	**0** 0%	**0** 0%	**1** 1.33%	**0** 0%	**0** 0%
8	**0** 0%	**0** 0%	**1** 1.56%	**0** 0%	**0** 0%	**0** 0%	**0** 0%
9	-	-	-	-	-	-	-
10	**1** 0.89%	**0** 0%	**1** 1.56%	**0** 0%	**0** 0%	**0** 0%	**0** 0%

This table looks at the lapsed years for a decision to be made in respect to the type of case. This shows whether certain types of cases took longer for a decision to be rendered.

국문초록

제 2 차 세계대전의 종결 이후 많은 권위주의 국가가 민주주의 체제로 이행하면서 사법부의 역할은 확대 되었으며, 이로 인해 법원, 특히 고등 법원은 이전보다 더 적극적인 결정을 내리기 시작하였다. 이로인해 많은 민주주의 국가의 사법부는 행정부와 입법부에 의해 일방적으로 견제되지 않고 중요하고 독립적인 정치적 행위자로서 자신의 위치를 공고히 하게 되었다. 이러한 변화에 대해 몇몇 학자들은 사법부의 우월성 또는 정치의 사법화 현상에 대한 우려를 표하였으며, 동시에 무엇이 사법부의 독립성을 결정하며, 사법부의 독립성을 어떻게 측정할 것인지에 대해 논의하기 시작하였다. 이와 관련하여, 본 연구는 어떻게 사법부가 양립불가능해보이는 독립성과 책임성을 균형있게 추구할 수 있을 것인가를 질문한다.

사법적 존중(Deference)은 독립성에 내재되어 있는 개념이지만, 기존 연구에는 사법부의 독립성과 사법적 존중이 모순적으로 양립하는 현상을 설명하기 위한 구체적인 개념이 없다. 따라서 본 연구는 사법부의 독립성과 사법적 존중 간의 개념적 격차를 줄이기 위해 입법부나 행정부 어느 한쪽의 행위자에 대해서가 아닌, 권력분립 그 자체에 존중을 표하는 사법부의 행위를 '건강한 사법적 존중'으로 개념화하고자 한다. 이 '건강한 사법적 존중'은 인권 또는 자유에 관한 사회적 문제의 소송과 정치적인 문제에 대한 소송을 구분한다. 객관적으로 이 두 소송에 대에 차이가 없으나 권력분립의 문제가 있을 경우에만 존중적인 태도가 나타난다고 주장한다. 입법부와 행정부가 동시에 관련된 경우에는 사법부가 그들의 권력에 가장 큰 영향을 주는 쪽에게 존중을 보일

수 있다. 그러나 건강한 사법적 존중은 행정부나 입법부의 어느 한 행위자를 위한 판결이 아닌 권력분립을 존중하는 결정을 뜻하며 어떤 행위자가 자신의 권력을 지나치게 확대하려는 것을 견제하는 목적의 판결을 뜻한다.

본 연구는 건강한 사법적 존중의 개념을 설명하고, 사법부의 독립성과 책임성이 어떻게 양립될 수 있는지를 보여주기 위해 한국의 사례를 분석한다. 한국은 일본의 식민 지배로부터의 해방 이후, 사법부의 독립성의 보장하고 헌법재판제도를 설립하고자 노력해왔다. 현재의 헌법재판제도의 기반은 과거 대한민국 공화국의 역사에서 그 흔적을 찾을 수 있지만, 1988 년의 민주화와 헌법재판소의 설립 이후에야 비로소 사법부는 명목적 권력이 아닌 실질적 권력을 갖게 되었다. 민주화 이후의 사법부의 독립성에 대해 서구의 학자들은 긍정적인 평가를 내리지만, 동유럽과 남미와 같은 민주화 이행 국가와 비교했을 때 한국 사례에 대한 연구는 많이 이루어지지 않았다.

따라서, 한국 사법부의 독립성과 더불어 사법부의 독립성과 책임성에 대한 연구를 심화시키기위해, 본 연구는 한국 헌법재판소의 395 개의 판결 사례를 검토하고 사회적 문제에 대한 판결과 정치적 문제에 대한 판결, 또는 일반 시민과 정치적 행위자가 관련된 사건들 간에 차이가 있는지를 살펴보고자 하였다. 이와 더불어, 2004 년 노무현 대통령 탄핵과 2013 년 통합진보당 해산에 대한 판결 사례를 건강한 존중의 개념을 적용해 심층적으로 분석하고자 한다.

연구 결과, 헌법 재판소는 헌법에 위배되는 결정보다 헌법에 합치되는 결정의 판결을 더 많이 내린 것으로 나타나지만, 시민과 인권에 관련된 사회적 이슈의 사건과 주요 정치행위자와 관련된

정치적 이슈의 사건에 대한 판결은 유의미한 차이를 보이지 않았다. 또한, 정부 행위자들간의 분쟁 사례는 적었으나 판결이 전국단위의 정부 행위자를 지자체 단위의 정부 행위자보다 지지하지는 않는 것으로 나타난다. 전 국가적으로 중요한 정치적 의미를 지녔던 노무현 대통령 탄핵과 통합진보당 해산사례의 경우, 헌법 재판소는 건강한 사법적 존중의 원칙에 따른 판결을 내린 것으로 보인다.

마지막으로 건강한 사법적 존중을 나타내는 이 두 사례들은 왜 행정부와 입법부가 자신들의 영향력(power)이 감소하는 상황에서도 그들의 권력을 사법부에 부여하려고 하는지에 대해 건강한 사법적 존중이 설명을 제공할 수 있음을 보여준다. 정치 행위자들은 헌법재판소에게 위헌 법률 심사권을 받고자 할 때, 헌법재판소가 건강한 사법적 존중을 적용함으로써 자신들의 이해관계에 부합하도록 판결이 내려지게끔 하고자 한다. 결과적으로, 정치 행위자들은 판결이 그들의 이해관계에 부합할 수 있도록 건강한 사법적 존중의 기준에 맞게 전략적으로 행위할 것으로 분석된다.

주요어: 사법독립, 권력분립, 사법적 존중, 대한민국, 헌법 재판소
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