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MOVING TOWARDS A NOMINAL CONSTITUTIONAL COURT? CRITICAL REFLECTIONS ON THE SHIFT FROM JUDICIAL ACTIVISM TO CONSTITUTIONAL IRRELEVANCE IN TAIWAN'S CONSTITUTIONAL POLITICS

Ming-Sung Kuo[†]

Abstract: The Taiwan Constitutional Court (TCC, also known as the Council of Grand Justices) has been regarded as a central player in Taiwan's transition to democracy in the late twentieth century. Transforming from a rubberstamp under the authoritarian regime into a facilitator of political dispute settlement, the TCC channelled volatile political forces into its jurisdiction. Thanks to the TCC's judicial activism, the judicialization of constitutional politics was characteristic of Taiwan's democratization in the last two decades of the twentieth century. The TCC scholarship asserts that the TCC has continued to play a pivotal role in Taiwan's constitutional politics in the twenty-first century. Taking issue with this popular view, this article focuses on twenty-first century TCC case law to argue that Taiwan's constitutional politics has moved towards de-judicialization as the TCC has gradually turned away from judicial activism in the face of escalating constitutional conflicts. With the TCC retreating from constitutional politics, this article argues that its constitutional jurisdiction is becoming nominal with the Constitution losing its grip on politics again.

I. INTRODUCTION: JUDICIALIZATION OF TAIWAN'S CONSTITUTIONAL POLITICS IN THE TWENTIETH CENTURY

The role of courts of law in new democracies is one of the most discussed subjects in scholarship on democratic transition and comparative judicial politics. There is disagreement, however, on what that role is and how much power courts in new democracies actually wield. Some scholars point to the fact that dormant, subservient courts awakened to calls for the rule of law and helped democratic movements by reining in state power of authoritarian regimes through judicial rulings;¹ others note the installation

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¹ See, e.g., JENS MEIERHENRICH, THE LEGACIES OF LAW: LONG-RUN CONSEQUENCES OF LEGAL DEVELOPMENT IN SOUTH AFRICA, 1652–2000 219–39, 315–19 (2008); Tom Ginsburg, *Constitutional Courts in East Asia: Understanding Variation*, 3 J. COMP. L. 80, 82–83 (2008).

of nascent courts in post-authoritarian politics as a means of consolidating constitutional democracy.² In terms of this juxtaposition, the story of the TCC³ straddles the line between resurgence and nascence in the study of the judicial role in democratic transition.⁴ On one hand, the resurgent TCC noticeably morphed into the facilitator of democratic transition in the early 1990s, even though it had previously rubberstamped the policies of the Kuomintang (KMT, also known as the Chinese Nationalist Party) party-state regime before.⁵ On the other hand, like nascent courts installed during democratic transitions in other countries, the TCC has been praised as a guardian of Taiwan's new democracy since the 1996 popular presidential election,⁶ which paved the way for the country's first majority ruling party change when Mr. Chen Shui-bian, the candidate of the independence-inclined Democratic Progressive Party (DPP), was elected President.⁷

It should be noted that the TCC did not play its facilitator-guardian role in its own right at the height of Taiwan's transition to democracy during the last two decades of the twentieth century. The TCC's transformation into a facilitator and guardian of democracy began during a period of fundamental constitutional revision in Taiwan.⁸ From 1991 to 2000, there

² See, e.g., Ginsburg, *supra* note 1, at 85–91. See generally MATTHEW C. INGRAM, CRAFTING COURTS IN NEW DEMOCRACIES: THE POLITICS OF SUBNATIONAL JUDICIAL REFORM IN BRAZIL AND MEXICO (2015); WOJCIEC SADURSKI, RIGHTS BEFORE COURTS: A STUDY OF CONSTITUTIONAL COURTS IN POSTCOMMUNIST STATES OF CENTRAL AND EASTERN EUROPE (2d ed. 2014); Theunis Roux, *Constitutional Courts as Democratic Consolidators: Insights from South Africa After 20 Years*, 42 J. S. AFR. STUD. 5 (2016).

³ For the jurisdiction, organization, and procedures of the TCC, see Wen-Chen Chang, *The Role of Judicial Review in Consolidating Democracy: The Case of Taiwan*, 2 ASIA L. REV. 73 (2005) [hereinafter Wen-Chen Chang, *The Case of Taiwan*]; Wen-Chen Chang, *Courts and Judicial Reform in Taiwan: Gradual Transformations towards the Guardian of Constitutionalism and Rule of Law*, in ASIAN COURTS IN CONTEXT 143, 148–49, 155–56 (Jiunn-rong Yeh & Wen-Chen Chang eds., 2015) [hereinafter Wen-Chen Chang, *Gradual Transformations*].

⁴ For an examination of a constitutional court transitioning from a democratic to an authoritarian system, see Eric C. Ip, *The Politics of Constitutional Common Law in Hong Kong Under Chinese Sovereignty*, 25 WASH. INT'L L.J. 565 (2016).

⁵ See Ginsburg, *supra* note 1, at 82–84.

⁶ See Wen-Chen Chang, *Gradual Transformations*, *supra* note 3, at 169–72.

⁷ This article follows the convention in the press that places the Chinese surname before the first name when referring to Taiwanese politicians.

⁸ See generally Jiunn-rong Yeh, *The Cult of Fatung: Representational Manipulation and Reconstruction in Taiwan*, in THE PEOPLE'S REPRESENTATIVES: ELECTORAL SYSTEMS IN THE ASIA-PACIFIC REGION 23 (Graham Hassall & Cheryl Saunders eds., 1997) [hereinafter Jiunn-rong Yeh, *The Cult of Fatung*].

were six rounds of constitutional revision⁹ aimed at reforming the externally imposed Chinese Constitution of 1947 (the Constitution) to fit the emerging island-nation of Taiwan.¹⁰ Moreover, the TCC's transformation was not only synchronized with the democratic driving forces of constitutional reform, but was also an activist institutional player in the theatre of constitutional politics.¹¹ Continuously steering the interrelationship among other constitutional powers within the political branch via a series of constitutional interpretations,¹² the TCC defied the conventional wisdom that courts should avoid such high politics.¹³ Instead of involving itself in the political vortex to the detriment of its independence and institutional integrity, the TCC emerged as the principal arbitrator of disputes between other constitutional powers.¹⁴ For example, in December 1996, the TCC thwarted the political will of President Lee Teng-hui, who had just won a landslide victory in the first presidential election by popular vote early that year, by essentially declaring unconstitutional the retention of his then-heir apparent Vice President Lien Chan for the Premiership of the Administration (Executive Yuan) in Interpretation No. 419.¹⁵

⁹ The Constitution was revised again in 2005, which was the last time it has been amended.

¹⁰ See Ming-Sung Kuo, *W(h)ither the Idea of Publicness? Besieged Democratic Legitimacy Under the Extraconstitutional Hybrid Regulation across the Taiwan Strait*, 7 U. PA. E. ASIA L. REV. 221, 227–30 (2011) (referring to the changed constitutional provision, this article adopts the more popular term “amendment” in place of the official designation “additional article”) [hereinafter Ming-Sung Kuo, *W(h)ither the Idea of Publicness?*].

¹¹ See Albert H.Y. Chen, *Constitutions and Values in Three Chinese Societies*, in AN INQUIRY INTO THE EXISTENCE OF GLOBAL VALUES: THROUGH THE LENS OF COMPARATIVE CONSTITUTIONAL LAW 119, 126–27 (Dennis Davis et al. eds., 2015).

¹² See Ming-Sung Kuo (郭銘松), *Wei Xian Shen Cha Ji Zhi Jie Jue Zheng Zhi Jiang Ju Ke Neng Xing zhi Ping Gu: Yi Si Fa Yuan Da Fa Guan Zhen Dui Zheng Zhi Bu Men Quan Xian Zheng Yi zhi Jie Shi Wei Zhong Xin* (違憲審查機制解決政治僵局可能性之評估：以司法院大法官針對政治部門權限爭議之解釋為中心) [*Judicial Review as a Solution to Political Gridlocks? A Study of Taiwan's Grand Justices Council Interpretations Regarding the Jurisdictional Disputes within the Political Branch*], 30 TAI DA FA XUE LUN CONG (台大法學論叢) [NAT'L. TAIWAN U.L.J.] 251, 251–89 (2001) [hereinafter Ming-Sung Kuo, *Judicial Review*].

¹³ See, e.g., JESSE H. CHOPPER, *JUDICIAL REVIEW AND THE NATIONAL PROCESS: A FUNCTIONAL RECONSIDERATION OF THE ROLE OF THE SUPREME COURT* 60–170 (1980). Cf. ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 111–243 (1986).

¹⁴ See Kuo, *Judicial Review*, *supra* note 12, at 281–35.

¹⁵ J.Y. Interpretation No. 419 (Const. Ct. Dec. 31, 1996); http://www.judicial.gov.tw/constitutional-court/EN/p03_01.asp?expno=419 (I use “Interpretation” rather than “J.Y. Interpretation” to refer to a TCC official ruling. It is true that the TCC stopped short of invalidating Mr. Lien's Premiership. Yet, it is not out of the question that this proved what Jiunn-rong Yeh calls the TCC's deference to President Lee.). Jiunn-rong Yeh, *Presidential Politics and the Judicial Facilitation of Dialogue between Political Actors in New Asian Democracies: Comparing the South Korean and Taiwanese Experiences*, 8 INT'L J.

Yet the foremost example of the TCC's activist approach to constitutional politics was its handling of the so-called unconstitutional constitutional amendments.¹⁶ In March 2000, just days after Mr. Chen was elected President, the TCC declared the fifth round of constitutional revisions unconstitutional and thus null and void, despite the absence of a so-called eternity clause in the Constitution.¹⁷ What made Interpretation No. 499 intriguing was that the all-powerful National Assembly, which had final say on constitutional revision until then and had passed the impugned constitutional amendments, inflicted no severe vengeance on the TCC in the

CONST. L. 911, 933 (2010) [hereinafter Jiunn-rong Yeh, *Presidential Politics*]. See also WEN-CHEN CHANG ET AL., CONSTITUTIONALISM IN ASIA: CASES AND MATERIALS 218 (2014) (discussing the obscurity of Interpretation No. 419 but without noting the TCC's "non-conformity" statement) [hereinafter WEN-CHEN CHANG ET AL., CONSTITUTIONALISM IN ASIA]. Specifically, expecting the TCC's ruling, Lee convened a round table talk from December 23 to 28, 1996, which was aimed at giving the president the unilateral appointment power over the Premiership, among other things, in the next round of constitutional revision. Instead of defying the TCC's "non-conformity" declaration to the effect that his retention of Mr. Lien for the Premiership was "not . . . completely in conformity with the Constitution," Lee simply carried out the conclusion of the foregoing bipartisan meeting in the fourth round of constitutional revision in 1997. Notably, equipped with the new unilateral appointment power, Lee appointed a new Premier instead of retaining Lien, a clear concession to the TCC's entreaty that the dispute be dealt with "in accordance with the ruling" that the retention "will not be completely in conformity with the Constitution." A note on my English rendering of the TCC case law is due. Unless directly quoted, all English renderings in this article are mine to make them more readable.

¹⁶ The question of unconstitutional constitutional amendments has recently resurfaced in constitutional scholarship, especially in English-language works. See, e.g., Richard Albert, *Nonconstitutional Constitutional Amendment*, 22 CAN. J. L. & JURIS. 1 (2009); Aharon Barak, *Unconstitutional Constitutional Amendments*, 44 ISRAEL L. REV. 321 (2011); Yaniv Roznai, *The Theory and Practice of 'Supra-Constitutional' Limits on Constitutional Amendments*, 62 INT'L & COMP. L.Q. 557 (2013); Rosalind Dixon & David Landau, *Transnational Constitutionalism and a Limited Doctrine of Unconstitutional Constitutional Amendment*, 13 INT'L J. CONST. L. 606 (2015). Yet it has long been theoretically contemplated among constitutional lawyers in civil law jurisdictions as well as in Common law countries. See, e.g., CARL SCHMITT, CONSTITUTIONAL THEORY 150–53 (Jeffrey Seitzer ed. & trans., 2008); WILLIAM F. HARRIS II, THE INTERPRETABLE CONSTITUTION 169–72 (1993). Under the influence of German constitutional theories, Taiwanese constitutional scholars had already written prolifically on the various issues surrounding unconstitutional constitutional amendments even when Taiwan was still under the martial-law rule. See, e.g., Ming-Sung Kuo (郭銘松), *Cong Xian Fa Xiu Zheng Tiao Wen zhi Ke Si Fa Xing Lun Zheng Zhi Wen Ti Bu Shen Cha Yuan Ze: Yi Mei Guo Lian Bang Xian Fa Di Er Shi Qi Zeng Bu Tiao Kuan Wei Li* (從憲法修正條文之可司法性論政治問題不審查原則--以美國聯邦憲法第二十七增補條款為例) [*On the Constitutionality of the Twenty-Seventh Amendment to the U.S. Constitution: An Analysis of the Political Question Doctrine and the Justiciability of Constitutional Amendments*], 23 XIAN ZHENG SHI DAI (憲政時代) [CONST. REV.] 1, 1 (1998).

¹⁷ Unlike some countries whose constitutions include the clause that contains explicit restrictions on the substance of constitutional amendment, namely the eternity clause, the Constitution of 1947 provides for no such explicit restriction. See Wen-Chen Chang, *Gradual Transformations*, *supra* note 3, at 170. For a discussion on the eternity clause, see Ulrich K. Preuss, *The Implications of "Eternity Clauses": The German Experience*, 44 ISR. L. REV. 429 (2011).

wake of this constitutional blow.¹⁸ Instead, the National Assembly responded with a sixth round of constitutional revisions that virtually rendered itself defunct, a long-pursued goal of constitutional reform considered unachievable due to its exclusive power to approve bills of constitutional amendment.¹⁹ In a word, Taiwan's experience with democratic transition in the late twentieth century both reflected a broad trend towards the judicialization of politics in new democracies and indicated judicial activism in constitutional politics.²⁰

In this light, the TCC has been seen not only as an activist court, but also as a normative one in two respects: first, as a court, its rulings have been faithfully observed by other constitutional powers and political parties and it has effectively settled politically charged disputes;²¹ and second, as the ordained interpreter of the Constitution, it has helped change Taiwan's "semantic" constitution into a "normative" order with its interpretations.²²

¹⁸ *But see* Wen-Chen Chang, *Gradual Transformations*, *supra* note 3, at 171–72. Notably, the TCC was not affected as an institution even though the sequel constitutional revision of April 2000 provided that justices be treated differentially: those coming from the judicial corps of career judges and prosecutors would receive a better pension plan under Amendment 5, Section 1. *See also* Po Jen Yap, *Constitutional Fig Leaves in Asia*, 25 WASH. INT'L L.J. 421, 441 (2016).

¹⁹ The defunct National Assembly was not completely abolished until the seventh and last round of constitutional revision in 2005, when the power to approve bills of constitutional amendment was placed in the hands of the electorate through referendum. *See* WEN-CHEN CHANG ET AL., CONSTITUTIONALISM IN ASIA, *supra* note 15, at 297.

²⁰ *See* Wen-Chen Chang, *The Case of Taiwan*, *supra* note 3. For a discussion on the role of strong judicial review in post-communist central and eastern Europe, see generally RETHINKING THE RULE OF LAW AFTER COMMUNISM (Adam Czarnota et al. eds., 2005).

²¹ *See* Wen-Chen Chang, *Gradual Transformations*, *supra* note 3, at 177. A terminological clarification is due. Formally speaking, the TCC's decision takes the form of interpretation. As its interpretations result from referrals or petitions prompted by constitutional disputes, the TCC effectively rules on disputes through interpretations. For purposes of elegance and simplicity, this article uses "interpretation," "ruling," "judgment," and "decision" interchangeably when referring to TCC case law.

²² Karl Loewenstein, a German émigré and Professor of Jurisprudence and Political Science at Amherst, classified constitutions into three ideal types: normative, nominal, and semantic. A constitution is "normative" not only for its reflection of the values of constitutional democracy in content but also for the implementation of its content in practice. In contrast, if a constitution reflects the values of constitutional democracy in content only but is unenforced, Loewenstein called it "nominal." "Semantic" constitutions are the most intriguing in Loewenstein's tripartite classification. Unlike nominal constitutions, there is no discrepancy between content and practice in semantic constitutions. Yet the content of semantic constitutions simply reflects the political will of dictators, making mockery of constitutionalism. The "constitutional" documents of the Fascist/Nazi regimes in the interwar period are Loewenstein's examples of semantic constitutions. *See* KARL LOEWENSTEIN, POLITICAL POWER AND THE GOVERNMENTAL PROCESS 147–53 (1957). Notably, prior to the first round of constitutional revision in 1991, Taiwan was governed by the so-called Temporary Provisions, which were enacted in accordance with the Constitution's amendment clause, alongside part of the Constitution that was not suspended (or rather replaced) by the former. Also noteworthy is that Temporary Provisions were not formally incorporated into the

Judicial activism and the making of a normative constitutional order seem to have developed simultaneously, which has been the focus of scholarship on the TCC.²³ Simply put, the constitutional order in post-authoritarian Taiwan has taken on the character of “judicial constitutionalism.”²⁴ Focusing either on the unchanged institutional features of the TCC or on the number of statutes and regulations it has struck down, the popular view held by TCC scholars maintains that the TCC has carried over its glorious record of the twentieth century into its operation in the twenty-first century.²⁵ This article takes issue with the assumed continuation of the TCC’s activist and normative role in Taiwan’s constitutional politics at the core of this upbeat view.

Against this optimistic image of judicial politics portrayed in much of the TCC scholarship, this article argues that the TCC’s role in Taiwan’s constitutional politics has been substantially curtailed since 2000. Analyzing TCC case law from 2000 to 2016,²⁶ this article will demonstrate that the TCC’s importance and influence has continuously shrunk during this period. This trend began with the intensified partisan rivalry between the KMT-dominated Pan Blue group and the DPP-led Pan Green camp during President Chen’s tenure, followed by the KMT’s

Constitution. See TOM GINSBURG, *JUDICIAL REVIEW IN NEW DEMOCRACIES: CONSTITUTIONAL COURTS IN ASIAN CASES* 113–15 (2003); John Garver, *Introduction: Taiwan’s Democratic Consolidation*, in *TAIWAN’S DEMOCRACY: ECONOMIC AND POLITICAL CHALLENGES* 1, 19 (Robert Ash et al. eds., 2011). As Temporary Provisions embodied the will of Generalissimo Chiang Kai-shek at the expense of the values of constitutional democracy embraced by the Constitution, Taiwan’s pre-1991 constitutional order evokes what Loewenstein called a semantic constitution. See, e.g., Chang Chia-Yin (張嘉尹), *Taiwan Xian Fa Bian Qian de Xian Fa Xue Kao Cha* (臺灣憲法變遷的憲法學考察) [Constitutional Change in Taiwan: A Constitutional Theoretical Perspective], 3 *TAIWAN MIN ZHU JI KAN* (臺灣民主季刊) [TAIWAN DEMOCRACY Q.] 129, 129–64 (2006).

²³ See, e.g., Wen-Chen Chang, *Gradual Transformations*, *supra* note 3, at 169–72; Jou-Jou Chu, *Global Constitutionalism and Judicial Activism in Taiwan*, 38 *J. CONTEMP. ASIA* 515 (2008); Tom Ginsburg, *Confucian Constitutionalism? The Emergence of Constitutional Review in Korea and Taiwan*, 27 *L. & SOC. INQUIRY* 763, 771–73 (2008).

²⁴ See Mark Tushnet, *The Relationship Between Political Constitutionalism and Weak-Form Judicial Review*, 14 *GER. L.J.* 2249, 2250, 2250 n.1 (2013).

²⁵ See Jiunn-rong Yeh, *Presidential Politics*, *supra* note 15, at 944; Jiunn-rong Yeh & Wen-Chen Chang, *A Decade of Changing Constitutionalism in Taiwan: Transitional and Transnational Perspectives*, in *CONSTITUTIONALISM IN ASIA IN THE EARLY TWENTY-FIRST CENTURY* 141, 167–68 (Albert H.Y. Chen ed., 2014). Cf. Jau-Yuan Hwang, *Taiwan’s Constitutional Court from 2003 to 2011: New Appointments and Different Performance*, 53 *SEOUL L.J.* 41, 51–62 (2013).

²⁶ So far only two interpretations (Interpretations No. 735 and 736) have been promulgated in 2016. Interpretation No. 736 concerned the right of school teachers and university lecturers to judicial remedy while the parliamentary motion of no confidence was at the core of Interpretation No. 735. This article will further discuss Interpretation No. 735 in *infra* Part II.B.

triumphant return to power in 2008.²⁷ Although both the legally defined jurisdiction of the TCC and the institutional guarantee of its independence remained unchanged,²⁸ its rulings failed to settle crucial political disputes when the Pan Blue and the Pan Green were engaged in a political zero-sum game during the DPP's eight-year reign. Later on, the reconstituted TCC retreated from the activist role of its predecessor and became its recent embodiment of being a reluctant player in constitutional politics. Acting with judicial self-restraint, the TCC was sidelined in the arena of constitutional politics after the second party turnover in 2008. As a whole, even though the TCC has continued to hear important constitutional issues in the twenty-first century, its normative role has declined. Using Karl Loewenstein's noted distinction between normative and nominal constitutions as an analogy,²⁹ this article argues that the TCC has latently turned away from its role as an activist and normative facilitator-guardian of constitutionalism, devolving into a nominal court in the midst of ever-increasing political conflicts. Paralleling the TCC's tendency towards de-judicialization, Taiwan appears to have retreated from judicial constitutionalism in favour of a breed of constitutional politics unguided by the Constitution through judicial interpretation, thereby casting doubt on the stability of its constitutional order.

A note on the article's methodology is necessary before turning to case law analysis. Departing from conventional approaches to studying judicial performance in new democracies, which tend to focus on how many rulings (or rather, rulings of unconstitutionality) a court has delivered, especially in the area of fundamental rights,³⁰ this article engages in a "thick description" of the TCC rulings that concern politically charged issues. Under this analysis, each case will be closely inspected in light of its

²⁷ The KMT continued to hold the majority seats of the Parliament (Legislative Yuan) and the Presidency in the 2012 elections.

²⁸ In retaliation for Interpretation No. 585, in early 2005 the Pan Blue-controlled Parliament attempted to cut off the judicial premium from the emolument paid to the TCC Justices by non-statutory means. In this ruling, the TCC effectively set aside the first statute governing the special parliamentary committee, which was tasked with the investigation into the so-called 3/19 Incident. This seemingly pecuniary dispute was considered a shot across the bow, calling the TCC's judicial character into doubt. The impugned non-statutory means was soon struck down in Interpretation No. 601 (2005). This article will further discuss the constitutional controversies generated by the 3/19 Incident in *infra* Part II.A.2.

²⁹ See Loewenstein, *supra* note 22.

³⁰ See, e.g., Kim Lane Scheppele, *Democracy by Judiciary. Or, Why Courts Can Be More Democratic Than Parliaments*, in *RETHINKING THE RULE OF LAW AFTER COMMUNISM*, *supra* note 20, at 25.

pre-referral, post-referral, and post-promulgation political context for three reasons.³¹ First, in light of the TCC's past record of using interpretations to settle political disputes, which "bootstrapped" its legitimacy in playing an activist role to the TCC,³² its interpretations in similar cases in recent times may indicate its overall current performance. Second, as constitutional comparatists have focused on the judicial branch of new democracies as they are situated in the volatile political context of democratic transition,³³ examining the TCC case law on politically charged issues will engage the article's findings with this broad line of scholarship. Third, a "thick description" assesses the effectiveness of the TCC in resolving political disputes more effectively than a numerical study, as the former has greater ability to tease out the intricacies of constitutional politics in a single jurisdiction.³⁴

Apart from Part I, this article comprises of three parts: Part II analyzes TCC case law from 2000 to 2016; Part III explains why de-judicialization is concerning, as it suggests the withering of constitutional normativity; and Part IV summarizes the article's arguments and briefly comments on the constitutional landscape following the presidential election in January 2016.

³¹ Notably, Clifford Geertz's method of thick description extends beyond politics to include the whole cultural context. See CLIFFORD GEERTZ, *Thick Description: Toward an Interpretative Theory of Culture*, in THE INTERPRETATION OF CULTURES 3–30 (1973).

³² See Stuart Minor Benjamin, *Bootstrapping*, 75 L. & CONTEMP. PROBS. 115, 116–17 (2012) (defining the concept of bootstrapping). For a different application of the concept of bootstrapping to the context of constituent assemblies, see Jon Elster, *Constitutional Bootstrapping in Philadelphia and Paris*, in CONSTITUTIONALISM, IDENTITY, DIFFERENCE, AND LEGITIMACY: THEORETICAL PERSPECTIVES 57 (Michel Rosenfeld ed., 1994). The TCC's most representative bootstrapping interpretation is Interpretation No. 261. See Jiunn-rong Yeh, *The Cult of Fatung*, *supra* note 8.

³³ See SADURSKI, *supra* note 2; GINSBURG, *supra* note 22; RAN HIRSCHL, COMPARATIVE MATTERS: THE RENAISSANCE OF COMPARATIVE CONSTITUTIONAL LAW 160–62 (2014); see also Jiunn-rong Yeh, *supra* note 14; Wen-Chen Chang, *Strategic Judicial Responses in Politically Charged Cases: East Asian Experiences*, 8 INT'L J. CONST. L. 885 (2010) [hereinafter Wen-Chen Chang, *Strategic Judicial Responses*].

³⁴ Cf. HIRSCHL, *supra* note 33, at 193, 260–68 (referring to research based on "statistical analyses of a large number of observations, measurements, data sets, etc." as "'large-N' studies," and noting that a "large-N" study is better at analyzing "world constitutions" than a single case). To map the political context in which the TCC case law and constitutional politics were situated, this article examines the online archive of *Taipei Times* (an English-language newspaper published in Taipei, available at <http://www.taipeitimes.com>) for factual reports.

II. DECODING THE MOVE TOWARDS DE-JUDICIALIZATION: AN OVERVIEW OF THE CONSTITUTIONAL COURT'S CASE LAW IN THE TWENTY-FIRST CENTURY

To shed light on the recent tendency towards de-judicialization in Taiwan's constitutional politics, the article shall take a close look at TCC case law in the twenty-first century. Section A includes a survey of the case law during President Chen's reign from 2000 to 2008, which indicated signs were emerging that the TCC was losing its normative grip on constitutional politics in the face of partisan rivalry despite its continued activism. In Section B, the article continues to examine the case law following the KMT's return to power in May 2008. The article will show that the move towards de-judicialization was completed during the second period, as the TCC remained on the sidelines during escalating constitutional conflicts.

A. *An Activist But Failing Court in the Face of Partisan Rivalry: 2000–2008*

In the period from May 20, 2000 to May 19, 2008, the TCC promulgated a total of 135 interpretations.³⁵ 128 (95%) of the total interpretations concerned constitutional disputes. Among these constitutional interpretations, 115 concerned fundamental rights,³⁶ while 13 resulted from what this article terms "political disputes," which either centered on the competence of departments of constitutional powers (especially the Presidency, the Administration, and the Parliament (Legislative Yuan)) or affected the relationship between the central

³⁵ This statistic excludes the nine rulings (from Interpretations No. 499 to No. 507) promulgated prior to May 20, 2000, when President Chen was sworn in. It should be noted that the present selection of case law is based on the date of promulgation, although this may not accurately reflect the role the TCC has played in constitutional politics as the referral or petition may have been made to the TCC long before the case was decided. This is due to the fact that there is no time limit for cases being decided once they are referred or appealed to the TCC. As the present objective is to assess the role of the TCC in the constitutional order through its case law in the twenty-first century, this article uses the TCC interpretations promulgated during the studied period only as the point of access to analyze how they played out in constitutional politics. The discussion of TCC interpretations will thus extend to the pre-and post-promulgation political context in which they were situated. See *supra* note 31 and accompanying text.

³⁶ It is noteworthy that many rulings on fundamental rights centered on the issue of legality rather than on the underlying value and principle of fundamental rights concerned. See Sean Cooney, *The Effects of Rule of Law Principles in Taiwan*, in ASIAN DISCOURSES OF RULE OF LAW: THEORIES AND IMPLEMENTATION OF RULE OF LAW IN TWELVE ASIAN COUNTRIES, FRANCE AND THE U.S. 411, 421–23 (Randall Peerenboom ed., 2004).

government and local governments. During this period, the TCC continued with its activist approach to constitutional disputes. Although the number of constitutional cases peaked with a historical high of thirty-four in 1994, the TCC remained productive from 2000 to 2008, averaging sixteen constitutional interpretations per year during this period.

Apart from its productivity, the TCC continued to play a part in the most contentious political disputes, many of which were attributed to the divided government of the DPP controlling the Government (or rather the executive power comprising the Presidency and the Administration) and the Pan Blue parties dominating the Parliament.³⁷ As noted in the literature, almost all conspicuous constitutional controversies were resolved into constitutional issues.³⁸ Table 1³⁹ indicates that on average, at least one intense partisan confrontation was brought before the TCC as a constitutional issue in each year of President Chen's presidency, with the number growing during his final two years in office. Considering the time it took for the TCC to decide a case, as well as the interval between the genesis of a political dispute and its formal referral thereto, there was almost no respite in the so-called "democratic civil war."⁴⁰ Notably, in most of the cases, the TCC did not resort to jurisdictional or procedural grounds to evade

³⁷ Jiunn-rong Yeh, *Presidential Politics*, *supra* note 15, at 914, 918; Wen-Chen Chang, *Strategic Judicial Responses*, *supra* note 33, at 906-07. Under the so-called semi-presidentialism, both the President, the head of state and of Presidency, and the Premier, who leads the Administration, are vested with the executive power in the Constitution. See WEN-CHEN CHANG ET AL., *supra* note 15, at 127, 144. This article uses the term "Government" to denote the entirety of the executive power comprising the Presidency and the Administration.

³⁸ See Mark A. Graber, *Resolving Political Questions into Judicial Questions: Tocqueville's Thesis Revisited*, 21 CONST. COMMENT. 485 (2004); Ming-Sung Kuo, *Discovering Sovereignty in Dialogue: Is Judicial Dialogue the Answer to Constitutional Conflict in the Pluralist Legal Landscape?*, 26 CAN. J.L. & JURIS. 341, 371-72 (2013); Ming-Sung Kuo, *Reconciling Constitutionalism with Power: Towards a Constitutional Nomos of Political Ordering*, 23 RATIO JURIS. 390, 394 (2010). See also Ginsburg, *supra* note 23, at 770-78 (addressing the case of Taiwan).

³⁹ Among the thirteen interpretations that concerned political disputes during the studied period, two were about the internal administration of the judicial branch (Interpretations No. 530 and No. 539), while one was aimed at harmonizing appointment procedures for the TCC Justices in the wake of the sixth round of constitutional revision (Interpretation No. 541). Due to their limited implications for constitutional politics, this article leaves them out of Table 1. It should be pointed out that the case law listed in Table 1 includes all interpretations that concerned important political disputes during the period May 20, 2000 to March 31, 2016. Ten out of the thirteen cases listed were promulgated by the end of President Chen's tenure.

⁴⁰ Michelle Wang, Editorial, *The need to fight in our "democratic civil war,"* TAIPEI TIMES (Dec. 24, 2007), <http://www.taipeitimes.com/News/editorials/archives/2007/12/24/2003393940/1>.

constitutional issues, but rather tackled them head-on.⁴¹ Moreover, although the TCC seemed to occasionally set out procedural guidelines for different branches of government to work out interdepartmental disputes in the future, the TCC never failed to take a stand on the immediate issue before it.⁴²

⁴¹ Alex Bickel famously noted how the United States Supreme Court may adopt doctrines and techniques to decline exercising its jurisdiction. *See* BICKEL, *supra* note 13, at 127–56, 169–97.

⁴² *But cf.* Jiunn-rong Yeh, *Presidential Politics*, *supra* note 15, at 947–48.

Table 1: Judicial Yuan Interpretations Concerning Important Political Disputes May 20, 2000 – March 31, 2016⁴³

JY No.	Date of Promulgation	Date of Referral/ Petition	Petitioner	Main Constitutional Issues
520	01/15/2001	11/10/2000	Administration	Does the Administration have the unilateral power to discontinue the construction of the Fourth Nuclear Power Plant despite the legislatively-allocated budget for that plan?
543	05/03/2002	12/27/1999	MPs	Does the Parliament-approved presidential emergency decree allow for further statutory instruments issued by the Administration?
550	10/04/2002	03/25/2002	TCG	Is it constitutional that the National Health Insurance Act provides that local governments contribute to the subsidy for premium payable by their registered residents for the centrally-administered national health insurance program?
553	12/20/2002	05/08/2002	TCG	Is it constitutional for the Administration to revoke a TCG decision to postpone the statutorily scheduled election of its borough wardens?
585	12/15/2004	09/15/2004	MPs (Pan Green caucus)	Is the Extraordinary Parliamentary Investigative Committee (EPIC) Act, which provides the EPIC with broad prosecutorial powers among others, constitutional?
601	07/22/2005	01/25/2005	MPs (Pan Green caucus)	Can the Parliament constitutionally cut off the judicial allowance from the TCC Justices' remuneration in vetting the annual government budget?
613	07/21/2006	01/20/2006	Administration	Are the NCC Act provisions concerning the NCC formation constitutional?
627	06/15/2007	01/25/2007	Presidency	What is the scope of the presidential immunity? Does the President have a state secrets privilege under the Constitution? If so, what is the scope of this presidential privilege?
632	08/15/2007	06/16/2005	MPs (Pan Green caucus)	Is it constitutional for the Parliament not to exercise its consent power over the appointment of ombudsmen?
633	09/28/2007	05/01/2006	MPs (Pan Green caucus)	Is the amended EPIC Act unconstitutional?
645	07/11/2008	01/02/2004	MPs (Pan Green caucus)	Is the provision in the Referendum Act concerning the formation of the RRC constitutional?
729	05/01/2015	11/29/2013	Administration (SPO)	Does the Parliament have the constitutional power to access the dossier of criminal cases?
735	02/04/2016	09/17/2012	MPs (Pan Green caucus)	Are the statutory provisions that restrict the introduction of no-confidence motions during a special parliamentary session constitutional?

⁴³ I compiled this information from the online official TCC case reports. See *Interpretations, JUSTICES OF THE CONST. COURT, JUD. YUAN, R.O.C.*, <http://www.judicial.gov.tw/constitutionalcourt/en/p03.asp> (last visited May 7, 2016). For the case reports in Chinese, see <http://www.judicial.gov.tw/constitutionalcourt/p03.asp> (last visited May 7, 2016).

Interpretation No. 520 illustrates this practice of judicial activism. The new DPP Administration referred a case to the TCC due to a bitter battle with the KMT-dominated Parliament resulting from the Administration's unilateral decision to discontinue the construction of Taiwan's Forth Nuclear Power Plant (the Power Plant) despite a legislatively allocated budget for its construction. The TCC suggested four possible solutions, all of which required the challenged decision be subjected to a parliamentary vote.⁴⁴ This decision has been interpreted as evidence of the TCC's strategic reliance on procedure without intervening in substance.⁴⁵ Yet a closer look at Interpretation No. 520 suggests otherwise. First, all of the four seemingly procedural solutions were premised on the compulsory character of the legislatively approved annual government budget. Even the Administration appointed by the newly elected President Chen, who had pledged to stop the construction of the Power Plant in his election manifesto, had no unilateral power to amend the annual government budget by selective execution. Apart from the first suggestion, that the Administration dutifully accept the contrary parliamentary resolution and resume the Power Plant's construction, the other three solutions all led to the conclusion that the Administration had to concede in the face of parliamentary opposition.⁴⁶ This case illustrates the TCC's aggressive approach to resolving political disputes, holding a firm grip on other constitutional powers.

Yet while it is one thing to say that the TCC continued to be an activist court, it is another to conclude that the TCC remained an effective institutional arbitrator of political disputes. To determine whether the TCC

⁴⁴ J.Y. Interpretation No. 520 (Const. Ct. Jan. 15, 2001), http://www.judicial.gov.tw/constitutional-court/EN/p03_01.asp?expno=520.

⁴⁵ See Jiunn-rong Yeh, *Presidential Politics*, *supra* note 15, at 947.

⁴⁶ Under the second solution, the Premier would have to resign. Yet this does not suggest that her replacement could disregard the parliamentary resolution concerned. Regarding the third solution, the Parliament could further pass a motion of no confidence, forcing the President to accept the Premier's resignation or to dissolve the Parliament. Notably, the President could have elected to dissolve the Parliament with the hope that the electorate would return a new Parliament in support of his election pledge. Nevertheless, this only vindicated the binding force of the parliamentary resolution vis-à-vis the Administration. The fourth solution went beyond the execution of the Parliament-approved annual budget. While the Administration had no unilateral power to selectively execute the annual budget, it was under no constitutional obligation to continue to finance the Power Plant plan in the future budget bill. The fourth solution suggested that should the Parliament wish to see the plan, however, the Parliament would have to provide for the completion of the Power Plant in legislation, which would compel the Administration to carry out and finance this legal requirement. J.Y. Interpretation No. 520 (Const. Ct. Jan. 15, 2001).

succeeded in maintaining its status as a normative court by settling political disputes during the relevant period, this article analyzes the cases listed in Table 1 in light of the broader political context. This article first takes up the TCC rulings on the political disputes during Chen's first term.

1. *Shining (Dimmer) Under Gathering Political Storm Clouds: 2000–2004*

A quick look at Table 1 reveals that among the four interpretations promulgated during President Chen's first term, Interpretation No. 543 was petitioned to the TCC by the Members of the Parliament (MPs, also known as Legislators) during the former President Lee's tenure. Although it involved an important constitutional question concerning the exercise of the presidential emergency power provided for in Amendment 2, Section 3 of the Constitution, the ruling did not elicit a reaction, as more than two years had passed since the challenged administrative regulations added to the original presidential emergency decree. In contrast, the listed interpretations concerning political disputes that originated during President Chen's two-term presidency, including the three cases that will be discussed in this part, were more complicated than the constitutional issues in Interpretation No. 543.⁴⁷ Let us begin by taking a second look at the aforementioned Interpretation No. 520.

As suggested above, Interpretation No. 520, by all appearances, concerned whether the Administration had the unilateral power to selectively execute the annual government budget approved by the Parliament. In addition, the decision appeared to provide procedural guidance on the solution to the then-existing political gridlock.⁴⁸ After the TCC's decision, the Premier and the Parliament Speaker made a joint public statement that the Power Plant construction would be immediately resumed.⁴⁹ Based on these outward signs, the TCC appeared to have successfully resolved the political deadlock between the Administration and the Parliament. Yet what triggered Interpretation No. 520 was more than a disagreement over the execution of an annual budget between the Administration and the

⁴⁷ The formulation in Table 1 is an adaptation of the official English version of the Judicial Yuan Interpretations.

⁴⁸ Jiunn-rong Yeh, *Presidential Politics*, *supra* note 15, at 935–36, 947.

⁴⁹ See Joyce Huang & Lin Chieh-yu, *Government gives in on power plant*, *TAIPEI TIMES* (Feb. 14, 2001), <http://www.taipeitimes.com/News/front/archives/2001/02/14/0000073591>.

Parliament. The growing political divisiveness following the inauguration of President Chen underlay the confrontation, which provides an alternate basis for analyzing Interpretation No. 520.

After winning the presidential election unexpectedly on March 18, 2000, then President-elect (and a member of the DPP) Chen Shui-bian soon announced the formation of an all-inclusive “people’s government” and suggested that Mr. Tang Fei, a long-time KMT member and four-star general, would be his choice for the Premier. This proposal was not received positively by the DPP’s supporters,⁵⁰ while the Pan Blue did not reject the idea of a “people’s government” outright.⁵¹ Aspiring to create partisanship-free politics, President Chen appointed Mr. Tang as the Premier when he was sworn in on May 20, while simultaneously rejecting the KMT’s demand to increase ties with the DPP in the Administration.⁵² Initially the experiment of the “people’s government” was well received by the public, and the Pan Green and Pan Blue managed to maintain a working relationship.⁵³ Yet signs emerged that an unbridgeable divide existed between President Chen and Premier Tang over the Power Plant controversy. With the divide widening, Premier Tang resigned on October 3, 2000, ending Chen’s 137-day “people’s government” experiment.⁵⁴ To carry out his election pledge, Chen turned to his DPP comrade Mr. Chang Chun-hsiung, who formed a minority Administration and later announced the discontinuation of the Power Plant plan on October 27.⁵⁵ In reaction, the KMT decided to escalate the confrontation by boycotting all of the government bills and threatening to recall Chen from

⁵⁰ Liu Shao-Hua, *Is the choice of Tang Fei a compromise too far?*, TAIPEI TIMES (Mar. 31, 2000), <http://www.taipeitimes.com/News/local/archives/2000/03/31/0000030352>.

⁵¹ Initially, the KMT was not opposed to the appointment of a KMT member as Premier, expecting that it could dominate the Administration with its parliamentary majority. Yet President Chen was not interested in forming a formal coalition Administration underpinned by an inter-party agreement. After his rejection of a KMT-dominated Administration, the KMT’s attitude towards the Premier-designate Tang gradually changed from reluctant acceptance to boycott. Lin Chieh-yu, *DPP says Cabinet is not the place for factionalism*, TAIPEI TIMES (Mar. 31, 2000), <http://www.taipeitimes.com/News/local/archives/2000/03/31/0000030350>.

⁵² Irene Lin, *Chen stands tough on Cabinet choices*, TAIPEI TIMES (Apr. 1, 2000), <http://www.taipeitimes.com/News/front/archives/2000/04/01/0000030570>.

⁵³ Monique Chu, *Poll gives Tang and Tsai high performance marks*, TAIPEI TIMES (July 29, 2000), <http://www.taipeitimes.com/News/local/archives/2000/07/29/000004570>

⁵⁴ Joyce Huang & Lin Chieh-yu, *Tang bows out with president's blessing*, TAIPEI TIMES (Oct. 4, 2000), <http://www.taipeitimes.com/News/front/archives/2000/10/04/0000055924>.

⁵⁵ Joyce Huang, *Cabinet pulls plug on power plant*, TAIPEI TIMES (Oct. 28, 2000), <http://www.taipeitimes.com/News/front/archives/2000/10/28/0000058926>.

office, virtually bringing the entire Government to a halt.⁵⁶ Against the backdrop of this heated partisan battle, the Administration referred the dispute to the TCC.

It is true that the political gridlock was indeed unblocked after the promulgation of Interpretation No. 520 on January 15, 2001. Nevertheless, it fell far short of resolving the political issues underlying the constitutional dispute. On January 31, the KMT-controlled Parliament resolved to immediately resume the Power Plant construction by a vote of 135 to 70 with only a few abstentions, forcing the Administration to abandon President Chen's campaign pledge.⁵⁷ The working relationship between the KMT-led Pan Blue and the DPP-led Pan Green was never restored, and the idea of partisanship-free new politics was abandoned. Instead, as demonstrated by subsequent cases, Interpretation No. 520 emboldened the parliamentary majority KMT, who found a constitutional citadel in the Parliament in its political confrontation with the DPP Government that would plunge the constitutional order into constant turmoil.

It is no surprise that the Parliament was not the only theater of partisan conflict during this period. Rather, after the KMT lost the presidential election, the Taipei City Government (TCG) became another rallying ground with Mr. Ma Ying-Jeou, who had unseated the incumbent Chen Shui-bian in a landslide mayoral election in 1998, rising as a counterweight to the DPP Government.⁵⁸ Situated in this broad political context, both Interpretations No. 550 and 553 concerned more than the constitutional division of powers between the central government and the local governments. On its surface, Interpretation No. 550 addressed whether

⁵⁶ Lin Mei-chun, *KMT moves to recall the president*, TAIPEI TIMES (Oct. 31, 2000), <http://www.taipeitimes.com/News/front/archives/2000/10/31/0000059288>.

⁵⁷ Lin Mei-chun, *Uncertainty hangs in the air after vote*, TAIPEI TIMES (Feb 01, 2001), <http://www.taipeitimes.com/News/front/archives/2001/02/01/0000071850>. The Pan Blue-sponsored motion included the commitment to a nuclear power-free homeland in the future, which had been a loner-term DPP plank. It was later included in the Environment Basic Law. Yet it left unaddressed the timeline of phasing out the existing three nuclear power plants. It is also noteworthy that Interpretation No. 520 fell far short of settling the controversy over the Power Plant as it had been the flash point of political conflict ever since, until the KMT Government decided to give up on its completion under the enormous public pressure sparked by the former DPP leader Mr. Lin I-hsiung's week-long hunger strike in April 2014. Shih Hsiu-chuan, *Government will never axe plant: Jiang*, TAIPEI TIMES (Apr. 29, 2014), <http://www.taipeitimes.com/News/front/archives/2001/02/01/0000071850>.

⁵⁸ Jiunn-rong Yeh, *Evolving Central-local Relations in a Contested Constitutional Democracy: The Case of Taiwan*, in CENTRAL-LOCAL RELATIONS IN ASIAN CONSTITUTIONAL SYSTEMS 37, 50–51 (Andrew Harding & Mark Sidel eds., 2015) [hereinafter Jiunn-rong Yeh, *Evolving Central-local Relations*].

a statutory demand on local governments to make financial contributions to the centrally administered national health insurance was constitutional.⁵⁹ In Interpretation No. 553, the Administration's revocation of a TCG decision to postpone the statutorily scheduled election of its subordinate *li* executive officers (borough wardens)⁶⁰ was at issue.⁶¹ In the former, the TCC ruled that the challenged statutory demand was constitutional, but it advised the central government to consult local governments when imposing statutory financial burdens on them in the future. In the latter, the TCC stated that the Administration had the legal power to review the TCG's decision in the administration of its local elections, but did not address the legality of the Administration's revocation as the issue fell within the jurisdiction of administrative courts.⁶² Evidently, Interpretation No. 553 suggested the TCC's embrace of the Bickelian "passive virtues."⁶³ It is also noteworthy that that the seemingly evasive Interpretation No. 553 was decided less than three months after the promulgation of Interpretation No. 550, which resulted in the TCG's pursuance of further legal consideration as Ma was seeking mayoral re-election in 2002.⁶⁴ Even though Ma had won a landslide victory less than two weeks prior and the TCC invoked passive virtues,⁶⁵

⁵⁹ J.Y. Interpretation No. 550 (Const. Ct. Oct. 4, 2002), http://www.judicial.gov.tw/constitutional-court/EN/p03_01.asp?expno=550.

⁶⁰ A *li* is a borough, whose elected executive officer, the warden, is the lowest-level official in the statutory provision for the local self-government in Taiwan.

⁶¹ J.Y. Interpretation No. 553 (Const. Ct. Dec. 20, 2002), http://www.judicial.gov.tw/constitutional-court/EN/p03_01.asp?expno=553.

⁶² For a more complete summary of both interpretations, see Jiunn-rong Yeh, *Evolving Central-local Relations*, *supra* note 58, at 51–53. The TCC has jurisdiction over the interpretation of constitutional provisions and judicial review of the constitutionality of statutes and ordinances, as well as the impeachment of the President and the Vice President. Moreover, it is tasked with issuing so-called "uniform interpretations" of statutes and ordinances. Over non-constitutional public law cases, the Supreme Administrative Court has the final say. Criminal and civil law matters belong to the jurisdiction of the so-called ordinary courts comprising a Supreme Court, several high courts, and dozens of district courts. The TCC has no appellate jurisdiction over the rulings of the Supreme Administrative Court and the Supreme Court. See Wen-Chen Chang, *Gradual Transformation*, *supra* note 3, at 147–48.

⁶³ The concept of passive virtues was made famous by Alex Bickel. In terms of counter-majoritarian difficulty facing the judicial power, he argued that the court should avoid exercising its power of judicial review by resorting to jurisdictional grounds when possible. See BICKEL, *supra* note 13, at 199–200.

⁶⁴ Editorial, *Justices give Ma reason to shutter*, *TAIPEI TIMES* (Oct. 6, 2002), <http://www.taipeitimes.com/News/editorials/archives/2002/10/06/0000171004>. Rather than engaging in dialogue with the central government, the TCG elected to fight a long legal battle, which ended in a Supreme Administrative Court ruling in favor of the central government in 2009. But the TCG continued to defy court rulings. In any event this issue was politically settled after Ma was elected President in 2008. Shih Hsiu-chuan, *Insurance debt to be resolved*, *TAIPEI TIMES* (Aug. 9, 2009), <http://www.taipeitimes.com/News/taiwan/archives/2009/08/09/2003450701>.

⁶⁵ See Jiunn-rong Yeh, *Evolving Central-local Relations*, *supra* note 58, at 53.

Interpretation No. 553's affirmation of the Administration's power to review the TCG's decision further antagonized the TCG.⁶⁶ Eventually, the DPP Administration was unable to recover the unpaid dues the TCG owed on the national health insurance during Ma's eight-year mayoral tenure.⁶⁷

Read together, Interpretations No. 550 and No. 553 show the TCC's reluctance to interpose itself in the political chess game between Mayor Ma's TCG and President Chen's Government, but it did not shy away from taking a firm stand on constitutional principles.⁶⁸ Even so, the two interpretations not only left the wounded relationship between the central and the local governments unhealed, but also failed to resolve the issue at hand as the TCG continued to ignore its statutory duty. If the case law during President Chen's first term suggests that the TCC continued shining in the period between 2000 and 2004, would the TCC's constitutional light shine even brighter in the second half of Chen's presidency when political storm clouds were gathering? It is to this theme this article now turns.

2. *Standing Against Partisan Whirlwinds: 2004–2008*

While political stand-off characterized the relationship between the Pan Blue and the Pan Green during the first term of the DPP Government, constitutional brinkmanship dominated the political landscape after President Chen was re-elected by a razor-thin margin on May 20, 2004. Expecting an uphill battle in the lead-up to the presidential election, President Chen in January 2004 decided to hold a parallel referendum under the recently enacted Referendum Act, despite parliamentary objections.⁶⁹ The thinking behind this controversial decision was to galvanize the pro-independence Pan Green supporters by using a referendum to remind voters of the DPP's long-held goal of an independent Taiwan due to its implications of self-determination.⁷⁰ Yet what made President Chen's

⁶⁶ Jimmy Chuang et al., *Borough-warden vote not our concern, say justices*, TAIPEI TIMES (Dec. 21, 2002), <http://www.taipeitimes.com/News/taiwan/archives/2002/12/21/0000187995>.

⁶⁷ For a discussion, explanation, and summary of how this long-standing controversy ended, see Shih Hsiu-chuan & Loa Iok-sin, *DOH budget unlocked to pay health fees*, TAIPEI TIMES (Dec. 18, 2010), <http://www.taipeitimes.com/News/taiwan/archives/2010/12/18/2003491261>.

⁶⁸ *But see* Jiunn-rong Yeh, *Evolving Central-local Relations*, *supra* note 58, at 52, 53.

⁶⁹ Huang Tai-lin, *Opposition calls referendum 'illegal, a joke'*, TAIPEI TIMES (Jan 18, 2004), <http://www.taipeitimes.com/News/front/archives/2004/01/18/2003091791>.

⁷⁰ The referendum included two questions, both of which only tenuously touched on Taiwan's political identity. While the referendum failed to pass the high threshold to be legally binding, it was seen to have successfully mobilized the DPP's supporters in the presidential election. *See* Mily Ming-Tzu Kao,

re-election toxically divisive was an assassination attempt on the eve of the presidential election (the so-called “3/19 Incident”) during which both President Chen and his running mate were wounded. The DPP’s electoral victory was attributed to the 3/19 Incident, as the party allegedly garnered a substantial number of sympathy votes. Upon the completion of the vote-counting process, the Pan Blue rejected the result and accused the DPP of staging the assassination attempt, setting up a long battle that haunted President Chen’s second term.⁷¹ As part of its attempt to challenge the legitimacy of President Chen’s presidency (which also included litigation challenging the validity of the presidential election and mass protests), the majority Pan Blue passed a special law that created an extraordinary parliamentary investigative committee (EPIC), which was equipped with broad prosecutorial powers to discover the “truth” of the 3/19 Incident.⁷² This set the stage for the long tripartite constitutional saga comprising of Interpretations No. 585, No. 601, and No. 633, which lasted from 2004 to 2007 as President Chen’s second term was winding down.

No sooner had the law creating EPIC (EPIC Act) come into effect on September 24, 2004 than the Pan Green MPs petitioned the TCC to issue an injunctive order, arguing it encroached on the executive’s constitutional powers.⁷³ The TCC did not respond to the plea for an injunction immediately, and meanwhile the DPP Administration ordered all civil servants to ignore any request or order from the EPIC.⁷⁴ On December 15, the TCC promulgated Interpretation No. 585 (EPIC I), circumscribing the scope of the parliamentary investigation vis-à-vis the executive privilege of non-disclosure, and striking down several crucial provisions of the EPIC Act. The EPIC investigation was immediately brought to a halt.⁷⁵ Infuriated by this ruling, the Pan Blue-controlled Parliament cut off the judicial premium from the TCC Justices’ remuneration in January 2005 during the

The Referendum Phenomenon in Taiwan: Solidification of Taiwan Consciousness?, 44 ASIAN SURV. 591, 593–95, 598 (2004).

⁷¹ Huang Tai-lin, *Lien calls election unfair, demands a recount*, TAIPEI TIMES (Mar. 21, 2004), <http://www.taipeitimes.com/News/taiwan/archives/2004/03/21/2003107202>.

⁷² Debby Wu & Ko Shu-ling, *“Monstrous” bill horrifies Cabinet*, TAIPEI TIMES (Aug. 25, 2004), <http://www.taipeitimes.com/News/front/print/2004/08/25/2003200116>.

⁷³ J.Y. Interpretation No. 585 (Const. Ct. Dec. 15, 2004), http://www.judicial.gov.tw/constitutional-court/EN/p03_01.asp?expno=585.

⁷⁴ Jimmy Chuang, *Officials cite law’s many anomalies*, TAIPEI TIMES (Oct. 10, 2004), <http://www.taipeitimes.com/News/taiwan/archives/2004/10/10/2003206280>.

⁷⁵ Jimmy Chuang, *Court reduces powers of 319 committee*, TAIPEI TIMES (Dec. 16, 2004), <http://www.taipeitimes.com/News/front/archives/2004/12/16/2003215297>.

non-statutory process of vetting the annual government budget.⁷⁶ This blatant political revenge was unprecedented. Being a pecuniary dispute on the surface, this non-statutory parliamentary move was a stern warning, challenging the TCC's judicial character.⁷⁷ In response, the Pan Green MPs petitioned the TCC shortly after and the TCC issued Interpretation No. 601 in response to this budget manipulation. The superficially technical change to the annual government budget was invalidated outright not only for its violation of the constitutional ban on any non-statutory reduction of the remuneration of the judiciary, but also for its negative implications on judicial independence.⁷⁸

Pushed back by the TCC, the Pan Blue soon ceased its attack on the TCC, but did not relent on its refutation of the legitimacy of Chen's presidency. Responding reluctantly to Interpretation No. 585, the Pan Blue-dominated Parliament amended the condemned provisions of the EPIC Act with the hope that the EPIC would be brought back to life in order to prove that President Chen's re-election was the work of the DPP's political machinations.⁷⁹ Interpretation No. 633 (EPIC II) was promulgated on September 28, 2007, over sixteen months after the Pan Green referred the amended EPIC Act to the TCC for its violation of the constitutional provisions on the separation of powers. Although the TCC affirmed most of the challenged provisions, it rendered the restructured EPIC effectively impotent by invalidating the crucial stipulation that the EPIC had the power to transfer civil servants to its command without the Administration's consent.⁸⁰ It was no surprise that the Pan Blue subsequently accused the activist TCC of taking sides with the Pan Green, but it took its partisan fight to the electoral battleground as the parliamentary election was just three-and-a-half months away.⁸¹ Moreover, the Pan Blue sensed that the

⁷⁶ Jimmy Chuang, *Judiciary "disappointed,"* TAIPEI TIMES (Jan. 22, 2005), <http://www.taipeitimes.com/News/taiwan/archives/2005/01/22/2003220461>.

⁷⁷ WEN-CHEN CHANG ET AL., *supra* note 15, at 386–87.

⁷⁸ J.Y. Interpretation 601 (Const. Ct. July 22, 2005), http://www.judicial.gov.tw/constitutional-court/EN/p03_01.asp?expno=601.

⁷⁹ Shih Hsiu-chuan & Jewel Huang, *Shooting Amendment Passed by Legislature*, TAIPEI TIMES (Apr. 12, 2006), <http://www.taipeitimes.com/News/taiwan/archives/2006/04/12/2003302264>.

⁸⁰ J.Y. Interpretation No. 633 (Const. Ct. Sept. 28, 2007), http://www.judicial.gov.tw/constitutional-court/EN/p03_01.asp?expno=633.

⁸¹ Jimmy Chuang & Flora Wang, *319 clauses unconstitutional: judges*, TAIPEI TIMES (Sept. 29, 2007), <http://www.taipeitimes.com/News/taiwan/archives/2007/09/29/2003380893>. A notable coincident was that the Parliament rejected half of President Chen's nominees for the TCC Justices the day before.

political winds were shifting, with the KMT-nominated Ma Ying-Jeou emerging as the favorite in the next presidential election set to be held in less than six months.⁸² Taken together, the TCC failed to resolve the controversy resulting from the 2004 presidential election even with the resounding constitutional trio of Interpretations No. 585, No. 601, and No. 633.

The partisan rivalry between the Pan Blue and the Pan Green extended to the issue of controlling independent regulatory agencies. Inspired by the United States' experience with independent regulatory commissions, such as the Federal Communications Commission (FCC) and the Federal Trade Commission (FTC), scholars of communications in Taiwan had long advocated for the establishment of an independent National Communications Commission (NCC). The NCC would be tasked with regulating the telecommunications industry and protecting mass media from falling under the sway of government authorities (including the military) or political parties.⁸³ Yet when the proposal to create the NCC was brought to the foreground, the political landscape was increasingly partisan. Losing control of the Government, the KMT intended to hold onto its remaining influence over mass media out of fear that it might lose more ground to the Pan Green. Thus, control over the prospective NCC became another contentious issue in the long partisan struggle.

In 2005, as part of its comprehensive government reorganization plan, the Administration introduced its legislative bill for the creation of the NCC to Parliament. The DPP Administration and the Pan Green in the Parliament clashed with the parliamentary majority Pan Blue over the NCC's formation. To secure its influence over mass media, the Pan Blue defeated the FCC-inspired government bill and passed its own draft legislative bill.⁸⁴ Under the Pan Blue-sanctioned NCC Act, the formation of the NCC, which would comprise of thirteen commissioners, was essentially placed under the parliamentary auspices. Basically, the appointment of the commissioners

Shih Hsiu-chuan, *Four grand justices approved, four rejected*, TAIPEI TIMES (Sept. 28, 2007), <http://www.taipeitimes.com/News/front/archives/2007/09/28/2003380727>.

⁸² Editorial, *Frank Hsieh runs the gauntlet*, TAIPEI TIMES (Jan. 24, 2008), <http://www.taipeitimes.com/News/editorials/archives/2008/01/24/2003398624>.

⁸³ See Jiunn-rong Yeh, *Experimenting with Independent Commissions in a New Democracy with a Civil Law Tradition: The Case of Taiwan*, in *COMPARATIVE ADMINISTRATIVE LAW* 246 (Susan Rose-Ackerman & Peter L. Lindseth eds., 2010).

⁸⁴ *Id.*

would proceed in three stages. In the first stage of recommendation, the Administration could only *recommend* three candidates, while the Parliament would make fifteen recommendations allocated in proportion to the parliamentary seats each party held. Following the first stage, all eighteen candidates would be subject to a vetting process overseen and administered by a Parliament-appointed expert committee, whose eleven appointees were again allocated in proportion to each party's parliamentary seats. Only after the second stage of vetting did the Premier's constitutional power of appointment come into play: in the third stage, which involved multiple steps, the Premier would choose his nominees for the commissionership from the vetted candidates and then sign the order of appointment if his nominees received parliamentary consent.⁸⁵ In all, this process stripped the Premier of his influence over the membership of the NCC as his appointment power, which lay at the core of the executive power, was rendered nominal.

As was expected, the Administration referred the NCC Act to the TCC, claiming the Act encroached upon the core executive power of appointment, and requested an injunctive order in January 2006; the formation of the first NCC had already begun according to the foregoing procedure.⁸⁶ Corresponding to its approach to the controversy over the EPIC, the TCC did not respond to the Administration's plea for an injunction. It was not until six months later that the TCC ruled against the Parliament in Interpretation No. 613, declaring part of the NCC Act unconstitutional.⁸⁷ It is noteworthy that the TCC postponed the effect of its declaration of unconstitutionality until the end of 2008, almost a year and a half after the NCC Act was promulgated. It is true that the TCC frequently postpones the effect of its declarations of unconstitutionality by setting a time limit on the repeal of the disputed legislation.⁸⁸ Still, in terms of the immediate impact of the NCC on the regulation of mass media, it is remarkable that the TCC set such a long time limit, as it allowed for the NCC's continuing operation beyond President Chen's tenure. Moreover, departing from its approach to setting a time limit in the case law, the TCC

⁸⁵ J.Y. Interpretation No. 613 (Const. Ct. July 21, 2006), http://www.judicial.gov.tw/constitutional-court/EN/p03_01.asp?expno=613.

⁸⁶ Ko Shu-ling, *Lawmakers reach consensus on nominees for NCC*, *TAIPEI TIMES*, (Dec. 29, 2005), <http://www.taipetimes.com/News/taiwan/archives/2005/12/29/2003286481>.

⁸⁷ J.Y. Interpretation No. 613, *supra* note 85.

⁸⁸ *See* WEN-CHEN CHANG ET AL., *CONSTITUTIONALISM IN ASIA*, *supra* note 15, at 454–56.

was explicit that the validity of all decisions taken by the “unconstitutional” NCC would be unaffected.⁸⁹ In result, Interpretation No. 613 acquiesced to the Pan Blue’s sway over the constitutionality of the NCC, even though it declared part of the NCC Act unconstitutional.

Notably, President Chen, his family, and many DPP officials had been embroiled in a number of conspicuous scandals beginning in the second half of 2005. When Interpretation No. 613 was promulgated in July 2006, President Chen was already at the center of a series of corruption and international money-laundering accusations, leading to the Red Shirt Army’s mass protest in September. In light of this tumultuous political environment, the unusual aspects of Interpretation No. 613 were an indication that the TCC conceded *fait accompli* in the endgame of the DPP Government, despite its ostensibly activist stance on constitutional principles. Acting on the TCC-set timeframe, the Pan Blue could simply wait until after the upcoming elections to reassert its active influence on the NCC in alternative ways following its expected electoral wins.⁹⁰ The political maelstrom that engulfed the entire DPP Government also set the perfect stage for Interpretation No. 627.

On the surface, Interpretation No. 627 primarily concerned the scope of presidential immunity, as provided for in Article 52 of the Constitution, and the so-called “state secrets privilege.” The underlying dispute was a prosecutorial investigation into allegations of embezzlement and other crimes against President Chen, First Lady Wu Shu-chen, and a number of their aides. Article 52 stipulates that the sitting President shall not be subject to any criminal prosecution, trial, or punishment for any crimes other than treason.⁹¹ Yet it was unclear whether the sitting president was also immune

⁸⁹ J.Y. Interpretation No. 613, *supra* note 85.

⁹⁰ Expecting an electoral win, the Pan Blue-controlled Parliament did amend the provision governing the NCC’s formation in response to Interpretation No. 613 in late December just three weeks away from the parliamentary election. Flora Wang, *Cabinet assumes control over the NCC*, TAIPEI TIMES (Dec. 21, 2007), <http://www.taipeitimes.com/News/front/archives/2007/12/21/2003393407>. Even so, new commissioners were not appointed according to the amended procedure until after the KMT’s return to power on May 20, 2008. The commissioners, who were appointed in accordance with the unconstitutional NCC Act, remained in office until August 1, 2008. Shelley Shan, *NCC Inaugurates Bonnie Peng as new chairwoman*, TAIPEI TIMES (Aug. 2, 2008), <http://www.taipeitimes.com/News/taiwan/archives/2008/08/02/2003419232>.

⁹¹ Article 52 provides “The President shall not, without having been recalled, or having been relieved of his functions, be liable to criminal prosecution unless he is charged with having committed an act of rebellion or treason.” TAIWAN CONST. art. 52.

from other criminal proceedings such as the pre-indictment prosecutorial investigation implicating President Chen. Initially, he voluntarily subjected himself to the prosecutorial investigation concerning the First Lady's and her alleged accomplices' suspected crimes in mid-2006. However, when the formal indictment issued on November 3, 2006 intimated President Chen's involvement, he questioned whether the prosecutor had subjected him to constitutionally-forbidden criminal proceedings.⁹² Moreover, President Chen asserted the state secrets privilege and requested that the trial court (the Taipei City District Court) suppress several seized documents offered as evidence against the First Lady and her co-defendants. The privilege was asserted despite the documents not being classified in accordance with the State Secrets Protection Act.⁹³ As the trial continued, the Presidency referred these issues to the TCC in January 2007,⁹⁴ and later, in March, requested an injunction on the trial of the First Lady and her co-defendants.⁹⁵

Again, the TCC did not respond immediately to the Presidency's request for injunctive relief. In mid-June, the TCC issued Interpretation No. 627 and ruled that an unwritten state secrets privilege could be inferred from the president's constitutional roles, such as commander-in-chief of the armed forces and other executive roles, as the Presidency had contended.⁹⁶ Moreover, the TCC suggested that what would be classified under the State Secrets Protection Act was not coterminous with the scope of the presidential state secrets privilege, but rather an instance thereof.⁹⁷

⁹² Rich Chang, *Wu indicted, Chen to come*, TAIPEI TIMES (Nov. 4, 2006), <http://www.taipeitimes.com/News/front/archives/2006/11/04/2003334732> [hereinafter Rich Chang, *Wu Indicted*].

⁹³ Rich Chang, *Judge orders "fund" files opened by Tuesday*, TAIPEI TIMES (Jan. 20, 2007), <http://www.taipeitimes.com/News/front/archives/2007/01/20/2003345553>.

⁹⁴ It is noteworthy that the TCC rejected an early referral made by the DDP MPs with respect to the same issue on January 25, 2007. Yet on the same day, the Presidency made another emergency referral to the TCC. Rich Chang et al., *Grand justices toss out DPP request*, TAIPEI TIMES (Jan. 26, 2007), <http://www.taipeitimes.com/News/front/archives/2007/01/26/2003346357>.

⁹⁵ J.Y. Interpretation No. 627 (Const. Ct. June 15, 2007), http://www.judicial.gov.tw/constitutionalcourt/EN/p03_01.asp?expno=613. <http://www.judicial.gov.tw/constitutionalcourt/uploadfile/C100%E6%8A%84%E6%9C%AC627.pdf> (petition documents only available in the Chinese-language version).

⁹⁶ *Id.*

⁹⁷ *Id.*

Initially, this appeared to give President Chen significant leverage in his legal battle. Moreover, echoing *United States v. Nixon*,⁹⁸ the TCC conflated the common law evidentiary rule of the state secrets privilege with the constitutional doctrine of the executive privilege, extending its application beyond private litigation.⁹⁹ Nonetheless, beneath the surface of the TCC's decision creating an unwritten constitutional doctrine of a general state privilege, the TCC also rendered an absolute privilege justiciable. While the President was entitled to invoke this constitutional "privilege" in the criminal proceedings, such a plea would be subject to judicial review, even if the standard of scrutiny would be the less exacting reasonableness review.¹⁰⁰ In other words, under Interpretation No. 627, the President was only entitled to a qualified reviewable right, not a privilege outright.¹⁰¹ With no existing legal framework for reviewing state secrets claims, the TCC stated that disputes over the President's invocation of the state secrets privilege in judicial proceedings would be heard by an ad hoc tribunal of five sitting appellate judges convened with the Taiwan High Court (THC).¹⁰² Paralleling its assertion of judicial control of the state secrets privilege, it interpreted Article 52 restrictively: except for the purpose of tolling the statute of limitations, prosecutors were prohibited from naming the sitting President as a defendant, and thus the sitting President was immune from any targeted investigation and other criminal proceedings.¹⁰³ Notably, the latter stipulation did not apply to pre-indictment prosecutorial investigations which could incidentally implicate the sitting President in cases with others named as defendants. Yet

⁹⁸ See *United States v. Nixon*, 418 U.S. 683 (1974).

⁹⁹ Given that the executive privilege is invoked when the executive power clashes with other departments of constitutional power, it is qualified and justiciable. Yet the *Nixon* Court also discussed *United States v. Reynolds*, 345 U.S. 1 (1953), which has been viewed as converting the common law evidentiary rule of the state secrets privilege into a constitutional doctrine, in the context of the executive claim of non-disclosure vis-à-vis other coordinate branches in criminal proceedings. It is not clear if it further suggests softening the absolute nature of the state secrets privilege in private litigation. See William G. Weaver & Robert M. Pallitto, *State Secrets and Executive Power*, 120 POL. SCI. Q. 85, 92–93, 98–100 (2005).

¹⁰⁰ See Wen-Chen Chang, *Strategic Judicial Responses*, *supra* note 33, at 890–91.

¹⁰¹ For a discussion on the distinction between the absolute state secrets privilege and the qualified executive privilege, see Weaver & Pallitto, *supra* note 99, at 92, 100.

¹⁰² See Wen-Chen Chang, *Strategic Judicial Responses*, *supra* note 33, at 889.

¹⁰³ *Id.* at 888–89.

this was exactly the case that prompted President Chen to bring a constitutional challenge.¹⁰⁴

Ostensibly, Interpretation No. 627 seemed to strike a balance between presidential executive power and the integrity of criminal proceedings by stating constitutional principles.¹⁰⁵ To this end, it further provided for an institutional framework within which the foregoing conflicting values could be balanced in individual cases. However, the subsequent responses from other constitutional actors rendered Interpretation No. 627 irrelevant. In the immediate wake of Interpretation No. 627, President Chen pleaded with the trial court to return the seized evidentiary documents, as they were protected as state secrets. Receiving no response for over two months, he retrospectively classified those documents according to the State Secrets Protection Act in September 2007 and continued to request that the trial court return them. In October, the trial court defiantly declared President Chen's retrospective classification unlawful and rejected his constitutional claim of the state secrets privilege, in spite of the TCC's ruling that such claims be decided by an ad hoc tribunal of five sitting appellate judges with the THC.¹⁰⁶ This decision added even more complexity to the legal saga, which was ultimately decided by the Supreme Court on May 7, 2009 when it affirmed a THC ruling issued by a *three-judge panel* in mid-February 2009: Interpretation No. 627 was simply inapplicable.¹⁰⁷ By the time the Supreme

¹⁰⁴ Rich Chang, *Wu Indicted*, *supra* note 92.

¹⁰⁵ Wen-Chen Chang, *Strategic Judicial Responses*, *supra* note 33, at 899.

¹⁰⁶ Rich Chang, *Court rejects Chen's request for return of documents*, TAIPEI TIMES (Oct. 6, 2007), <http://www.taipeitimes.com/News/front/archives/2007/10/06/2003381908>.

¹⁰⁷ Following the trial court's preliminary ruling on his state secrets claim, President Chen appealed the ruling to the THC in accordance with the Criminal Procedure Code, resulting in a judicial ping-pong between the Supreme Court and the THC: rescind and remand rulings, redeterminations, and (re)appeals. To make a long story short, each issued four rulings on President Chen's appeals. Notably, in its first two rulings, the THC convened an *ad hoc five-member tribunal* to decide the claim in accordance with Interpretation No. 627. Yet in its ruling on June 26, 2008, the Supreme Court revoked the THC's second ruling and remanded it to the THC with the instruction that the THC apply the Criminal Procedure Code instead of the Interpretation No. 627-directed stopgap measure, as Chen's retrospective classification was unlawful and Interpretation No. 627 applied only to lawful claims of state secrets privilege. Accordingly, the THC ruled against then ex-President Chen by a *three-judge panel* on July 14, 2008 when Chen had already been under investigation. Chen continued to appeal even after President Ma's annulment of his decision to classify the evidentiary documents at issue. Although the Supreme Court later rescinded and remanded the THC's July 14, 2008 ruling for legal technicalities at the end of 2008, it did not reopen the question of whether the THC should determine the claim with an ad hoc five-judge tribunal as alluded to in Interpretation No. 627, or with an ordinary three-judge panel as provided for in the Criminal Procedure Code. The THC ruled against Mr. Chen's moot plea for returning the documents concerned with a *three-judge panel* on February 16, 2009, a decision which was appealed again. The

Court issued its decision, Mr. Chen had stepped down almost one year earlier and had already been taken into custody.¹⁰⁸ Four months later, he was convicted on charges of corruption and other crimes.¹⁰⁹

The Supreme Court and the lower courts were not the only constitutional actors that contributed to neutralizing Interpretation No. 627. While the TCC recognized presidential discretion by categorizing it under the State Secrets Protection Act as an instance of the constitutional state secrets privilege, the newly-inaugurated President Ma of the KMT annulled his predecessor's decision on secret classification in early August, 2008.¹¹⁰ With regard to the legal framework governing the review of state secrets claims to which the TCC alluded, the new Pan Blue-controlled Parliament simply ignored this part of the TCC's decision. The TCC may have sung in unison in a maximalist style in Interpretation No. 627 as it tried to step into the void with the stopgap institutional framework while working to bring the three major constitutional powers together on the administration of state secrets.¹¹¹ In light of subsequent developments, however, Interpretation No. 627 only indicated how helpless the TCC was in the midst of unrelenting partisan rivalry.¹¹²

The last case decided during Chen's Presidency examined by this article, Interpretation No. 632, epitomizes the toxic partisanship present throughout his second term. To begin with, it was promulgated in August 2007, when the DPP Government was plunged into the political whirlwinds noted above, but the political dispute that led to the ruling could be traced back to 2004, soon after President Chen was sworn in for his second

Supreme Court closed the legal saga with its May 7, 2009 decision. All the rulings mentioned above are available at <http://jirs.judicial.gov.tw/FJUD/HISTORYSELF.aspx?SwitchFrom=1&selectedOwner=H&selectedCrmyy=096&selectedCrmid=%E6%8A%97&selectedCrmno=001181&selectedCrtid=TPH>.

¹⁰⁸ Rich Chang & Ko Shu-ling, *Court backflips, detains Chen Shui-bian*, TAIPEI TIMES (Dec. 31, 2008), <http://www.taipeitimes.com/News/front/archives/2008/12/31/2003432521>.

¹⁰⁹ The subsequent legal battles surrounding Mr. Chen's corruption verdict and other charges, his sentence and imprisonment, and his release on medical parole are beyond the scope of this article.

¹¹⁰ Ko Shu-ling, *Presidential Office opens Chen files*, TAIPEI TIMES (Aug. 7, 2008), <http://www.taipeitimes.com/News/front/archives/2008/08/07/2003419645>.

¹¹¹ See Wen-Chen Chang, *Strategic Judicial Responses*, *supra* note 33, at 900–02, 905–06. Compared to what Cass Sunstein famously terms “judicial minimalism,” the TCC's attempt to create an institutional stopgap was nothing but maximalist. See CASS R. SUNSTEIN, *ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT* (1999).

¹¹² *But see* Wen-Chen Chang, *Strategic Judicial Responses*, *supra* note 33, at 900 (contending that “the [TCC] itself is the biggest winner”).

term.¹¹³ Under the Constitution, the Ombudsmanship (also known as the Control Yuan), a collegiate body of twenty-nine ombudsmen, is one of the five coordinate departments of constitutional powers alongside the Presidency. The Constitution provides that the President appoints ombudsmen with parliamentary consent.¹¹⁴ President Chen did not nominate his choices for new ombudsmen until December 20, 2004, when the Parliament returned to the lame-duck session after the parliamentary election on December 11; the election had given the DPP the most seats but delivered the Pan Blue parliamentary majority.¹¹⁵ At that time, the end of the Third Ombudsmanship (January 31, 2005) was only six weeks away. Despite the tight timeline, the lame-duck Parliament deviated from the parliamentary rules and put the nomination on hold until the end of the parliamentary term on January 31, 2005. After the new Parliament opened on February 1, President Chen re-sent his nomination on April 4, while the ombudsmen had already left office for over two months. The Pan Blue-controlled Parliament continued to hold the nomination by means of parliamentary rules. To break the deadlock, the Pan Green MPs referred the case to the TCC in June.¹¹⁶

The TCC did not respond until August 2007, after the Ombudsmanship had already been left defunct for over thirty months. In Interpretation No. 632, the TCC declared that the Parliament's deliberate inaction amounted to a failure to carry out its constitutional duty. It also noted that both the President and the Parliament should properly fulfill their constitutional role by making a timely nomination and holding a vote without deliberate delay concerning the Ombudsmanship.¹¹⁷ While Interpretation No. 632 stood firm on constitutional principles and even took the parliamentary inaction to task, it stopped short of pointing a clear way out of the political gridlock, such as by setting a deadline for an up-or-down

¹¹³ J.Y. Interpretation No. 632 (Const. Ct. Aug. 15, 2007), http://www.judicial.gov.tw/constitutionalcourt/EN/p03_01.asp?expno=632.

¹¹⁴ Amendment 7, Section 2 provides "[t]he Control Yuan shall have 29 members, including a president and a vice president, all of whom shall serve a term of six years. All members shall be nominated and, with the consent of the Legislative Yuan, appointed by the president of the Republic..." TAIWAN CONST. amd. 7, §2.

¹¹⁵ Jewel Huang, *Chen pledges to accept results with composure*, TAIPEI TIMES (Dec. 12, 2004), <http://www.taipeitimes.com/News/taiwan/archives/2004/12/12/2003214738>.

¹¹⁶ J.Y. Interpretation No. 632, (Const. Ct. Aug. 15, 2007), <http://www.judicial.gov.tw/constitutionalcourt/uploadfile/C100/%E6%8A%84%E6%9C%AC632.pdf> (petition documents only available in the Chinese-language version).

¹¹⁷ *Id.*

vote. Because the TCC took over two years to reach its decision, Interpretation No. 632 can barely be considered a testament to the TCC's effectiveness in settling political disputes, despite its normative stance on the interdepartmental collaboration under the Constitution. Worse still, the Parliament did not bother to respond to the TCC's admonition at all.¹¹⁸ The constitutional crisis of the defunct Ombudsmanship was not resolved until August 1, 2008, when its vacancies were filled with President Ma's nominees.¹¹⁹ It was over three-and-a-half years after the Third Ombudsmanship closed.

In view of all the cases discussed in Part II.A., the TCC continued to fulfill its constitutional role of guarding the constitutional order by setting out normative principles and prescribing procedural guidelines on the resolution of political disputes during the period from 2000 to 2008.¹²⁰ It is also true that as the reasoning or dictum of some Interpretations suggests, the TCC did try to adopt a more strategic stance to navigate through the political storm without compromising the normativity of the constitution.¹²¹ Nevertheless, looking beyond the Justices' grandiose statements and situating the case law in the context of partisan rivalry, the TCC's record during President Chen's eight-year tenure only demonstrates the failure of its activist approach in resolving political disputes in the heat of a democratic civil war.

*B. An Irrelevant Court amid Escalating Constitutional Conflicts:
2008–2016*

During the period of May 20, 2008 to March 31, 2016, there were substantial changes in the personnel of the TCC. With President Chen's appointees gradually replaced by President Ma's,¹²² the reconstituted TCC departed from its predecessor's activist approach to constitutional politics. It rendered 94 interpretations in total, among which were four "uniform interpretations."¹²³ In other words, ninety-six percent of the TCC

¹¹⁸ For a discussion of how judicial admonition functions, see Ming-Sung Kuo, *In the Shadow of Supremacy: Putting the Idea of Judicial Dialogue in Its Place*, 29 *RATIO JURIS* 83, 97–101 (2016).

¹¹⁹ Shih Hsiu-chuan, *New Control Yuan promises neutrality*, *TAIPEI TIMES* (Aug. 2, 2008), <http://www.taipeitimes.com/News/front/archives/2008/08/02/2003419208>.

¹²⁰ See Jiunn-rong Yeh, *Presidential Politics*, *supra* note 15.

¹²¹ See Wen-Chen Chang, *Strategic Judicial Responses*, *supra* note 33.

¹²² See Hwang, *supra* note 25, at 51–54.

¹²³ See *supra* note 61.

interpretations promulgated during this period concerned constitutional disputes. Among the 90 constitutional interpretations, 87 concerned fundamental rights. Only three resulted from political disputes: Interpretations No. 645, 729, and 735. Before analyzing these three interpretations, several features of the TCC's case law during this period should be noted.

First, there was an evident decline in productivity. During the previous period, the TCC made approximately seventeen decisions (constitutional and uniform) each year, whereas the number decreased to approximately twelve per year after 2008. This downward development indicates that the normative voice of the TCC on constitutional principles was less likely to be heard. Second, the TCC paid more attention to tax-related issues in this period than before, to the extent that the TCC could be considered a tax court.¹²⁴ This also suggests that the TCC focused more on the protection of property than on political rights or civil liberties. In terms of the technical character of tax law,¹²⁵ the TCC's self-transfiguration into a tax court suggests its disinclination to hear controversial issues. Third, with respect to the case law on important political disputes, this period saw a steep fall from the previous one: from ten cases to three. Considering the continuing escalation of constitutional conflicts, these features, taken together, suggest that the TCC's role in constitutional politics became increasingly irrelevant. After drawing the TCC's picture in broad strokes, this article will now take up its case law to see if it fits into the portrayal of an irrelevant court.

It is no surprise the first rulings on important political disputes in TCC case law resulted from referrals or petitions made by the preceding government, given the slow pace of judicial decision-making. Interpretation No. 543, promulgated by the TCC during Chen's presidency, was such a case, as was Interpretation No. 645. The political landscape had already seen tectonic changes between the date of referral and promulgation

¹²⁴ This demeaning characterization of the TCC originated in one of Justice Dennis Tang's judicial opinions. J.Y. Interpretation No. 713 9 (Const. Ct. Oct. 18, 2013) (Dennis Tang, J., dissenting in part), <http://www.judicial.gov.tw/constitutionalcourt/uploadfile/C100/713%E9%83%A8%E5%88%86%E4%B8%8D%E5%90%8C%E6%84%8F%E8%A6%8B%E6%9B%B8%EF%BC%88%E6%B9%AF%E5%A4%A7%E6%B3%95%E5%AE%98%E5%BE%B7%E5%AE%97%EF%BC%89.pdf> (only available in Chinese). It should be noted that the TCC didn't technically turn into a tax court, but with its reluctance to intervene in political controversies, its focus on tax issues became salient.

¹²⁵ SHELDON D. POLLACK, *FAILURE OF U.S. TAX POLICY: REVENUE AND POLITICS* 83 (1996).

in both cases. Due to the gap between the time of referral and promulgation, both interpretations bore little on their respective underlying political disputes. Even so, the insignificance of Interpretation No. 543 inflicted no harm on the confident TCC because it had already promulgated Interpretation No. 520 more than a year prior, setting the tone for an activist court.¹²⁶ In contrast, Interpretation No. 645 only reflected the continuing decline of the TCC's role in Taiwan's constitutional politics in the twenty-first century.

The legal issue at the center of Interpretation No. 645 was whether the provision on the formation of the Referendum Review Committee (RRC) in the Referendum Act of 2003 contravened the separation of powers principle. Under that provision, the Premier was under a statutory duty to appoint those nominated by the parliamentary caucuses while its membership was allocated in proportion to each party's parliamentary seats.¹²⁷ In light of the precedent set in Interpretation No. 613, the case was relatively straightforward, with Interpretation No. 645 rendering the RRC provision unconstitutional for depriving the Premier of the appointment power with respect to the RCC,¹²⁸ which was part of the administration of referendum. The TCC thus declared the RRC provision unconstitutional and set a one-year limit on its repeal.¹²⁹ However, taking into account the political climate at the time, this ruling further evidences the TCC's declining role in constitutional politics.

As noted in Part II.A.2., the trouble in President Chen's second term stemmed from his votes-garnering stratagem: pairing a referendum to the 2004 presidential election. The Referendum Act at the center of Interpretation No. 645 was forced through in December 2003 to pave the way for holding the planned parallel referendum. Despite their status as the parliamentary majority, the Pan Blue parties stopped short of killing the bill for fear that doing so would backfire in the coming presidential election. But, to minimize the impact of the prospective referendum and its implications of self-determination, the Pan Blue inserted its own version of

¹²⁶ See *supra* notes 49–60 and accompanying text.

¹²⁷ J.Y. Interpretation No. 645 (Const. Ct. July 11, 2008), http://www.judicial.gov.tw/constitutional-court/EN/p03_01.asp?expno=645 (CONST. CT. INTERP., July 11, 2008).

¹²⁸ See *supra* notes 83–86 and accompanying text.

¹²⁹ Jiunn-rong Yeh, *Presidential Politics*, *supra* note 15, at 937. For a discussion that emphasizes its indirect admonition of party intervention, see WEN-CHEN CHANG ET AL., *supra* note 15, at 540.

the RRC provision into the Referendum Act; the Pan Blue expected that the RRC would filter out most citizen-initiated proposals for referendum, as all proposals were subject to the RRC's vetting.¹³⁰ Furthermore, to ensure the Pan Blue's control over the RRC, it provided that its membership was to be allocated in proportion to each party's parliamentary seats and to be effectively decided by the parliamentary caucuses.¹³¹ It was against this backdrop of partisan calculation that the Pan Green MPs referred the RRC provision to the TCC in early 2004, with the presidential election less than three months away. Yet the TCC did not deliver its final judgment until July 2008.

It is beyond the scope of this article to pinpoint why the TCC failed to deliver a timely response. Nevertheless, it is not a far-fetched suggestion that had the TCC intervened in time, it could have borne heavily on the political debate in early 2004, and even influenced the presidential election.¹³² Even if it would not have intervened in the holding of the referendum and the presidential election, its ruling on the formation of the RRC would have provided constitutional guidance on the controversy over the NCC's creation. As a result of the TCC's failure to intervene in time, however, it was Interpretation No. 613 that shed light on Interpretation No. 645. Moreover, when Interpretation No. 645 was promulgated in July 2008, the Pan Blue had regained its domination of the political landscape, and there had been five unsuccessful referendums since 2004. In terms of the constitutional significance of the introduction of referendums to Taiwan, the TCC had missed its opportunity to voice the constitutional principles concerning referendums in the early stage. By the time it promulgated Interpretation No. 645, it was too late.¹³³ As it turned out, even the amended RRC and new appointment procedures passed in 2009 suffered public criticism for filtering out several citizen-initiated referendum proposals that

¹³⁰ See Mily Ming-Tzu Kao, *supra* note 70, at 594–97.

¹³¹ Fiona Lu, *Legislature passes referendum law*, TAIPEI TIMES (Nov. 28, 2003), <http://www.taipeitimes.com/News/front/archives/2003/11/28/2003077523/1>.

¹³² It is true that the parallel referendum was not subject to the RRC's vetting as it was initiated by the President under the controversial "defensive referendum" clause. Mily Ming-Tzu Kao, *supra* note 70, at 601. Nevertheless, a judicial ruling on the RRC provision could impact the debate surrounding the presidential call for a referendum at that time.

¹³³ Except the defensive referendum held in conjunction with the 2004 presidential election, there were two citizen-initiated referendums held together with the parliamentary and presidential elections in 2008, respectively. Neither passed the statutory threshold to be binding.

were aimed at reversing the KMT Government's China policy.¹³⁴ Instead of prescribing constitutional principles guiding the relationship between the executive and the legislative power in the intensified partisan politics, Interpretation No. 645 reflected the TCC's irrelevance after 2008.

After Interpretation No. 645 was decided in 2008, the TCC did not decide another important political dispute for seven years. On the surface, Interpretation No. 729 concerned the scope of parliamentary investigative power with respect to documents held by the Administration.¹³⁵ It resulted from a referral by the Administration at the behest of the Supreme Prosecutor's Office (SPO) in late November 2013, which disputed the parliamentary request for the dossier of a criminal investigation on October 29 on the grounds that it encroached on the core of the executive power.¹³⁶ The TCC did not respond until May 1, 2015 when it promulgated Interpretation No. 729. Referring to the EPIC I interpretation, the TCC ruled that the dossier of an ongoing case was off-limits to the Parliament, and restrictively delineated the parliamentary investigative power concerning closed cases.¹³⁷ Read on its own, Interpretation No. 729 appeared to be another instance of the TCC's attempts to rein in an uncontrolled Parliament. A different picture emerges, however, when the case is read in light of its root cause: the disputed parliamentary request.

The parliamentary request in question was made when the Parliament was debating private member bills in a proposed amendment of the Communications Privacy Act (CPA), which was prompted by a wiretapping scandal in a high political drama.¹³⁸ At the heart of this political drama was the long-term political antagonism between President Ma and his KMT rival Mr. Wang Jin-pyng, the Speaker of the Parliament, with other supporting actors, including Prosecutor General Mr. Huang Shi-ming and the DPP whip Mr. Ker Chien-ming. The Parliament was prompted into action as a result of

¹³⁴ Loa Lok-sin, *Committee rejects request for referendum on ECFA*, TAIPEI TIMES (Aug. 28, 2009), <http://www.taipeitimes.com/News/front/archives/2009/08/28/2003452214>.

¹³⁵ J.Y. Interpretation No. 729 (Const. Ct. May 1, 2015), http://www.judicial.gov.tw/constitutionalcourt/p03_01.asp?expno=729 (only available in Chinese).

¹³⁶ J.Y. Interpretation No. 729 (Const. Ct. May 1, 2015), <http://www.judicial.gov.tw/constitutionalcourt/uploadfile/C100/%E6%8A%84%E6%9C%AC729.pdf> (referral documents) (only available in Chinese).

¹³⁷ *Id.*

¹³⁸ Chris Wang, *DPP proposes a central wiretapping authority*, TAIPEI TIMES (Nov. 4, 2013), <http://www.taipeitimes.com/News/taiwan/archives/2013/11/04/2003576115>.

Mr. Huang's briefing to President Ma in September 2013. Acting on that briefing, President Ma, in his capacity as the KMT Chair, publicly referred the Speaker to the KMT disciplinary committee for his alleged attempt to unduly influence a criminal investigation implicating Mr. Ker by lobbying the Minister of Justice.¹³⁹ This referral could have led to the loss of Mr. Wang's parliamentary seat.¹⁴⁰ Thus, not only were both President Ma and Prosecutor General Huang accused of corrupting the integrity of the SPO, which was supposed to stay clear of political influence, but their collaboration was also seen as a plot to bring down the Speaker.¹⁴¹

Beneath these concerns is another disturbing fact: the charge against the Speaker was based on the transcript of a wiretap that had received a court warrant for a different case in 2010. Based on the 2010 warrant and its continuous renewals issued under the CPA, the SPO extended its wiretap dragnet to include the official phone lines of Parliament.¹⁴² Accusing the SPO of unlawfully wiretapping and intruding on parliamentary privileges, MPs moved to request the case dossier concerning the wiretapping of the Speaker, not only to expose the wayward SPO; the requested dossier was also thought to be potentially informative for the amendment under consideration.¹⁴³

Read in light of this backdrop, Interpretation No. 729 was the opposite of what the TCC suggested. Instead of an uncontrolled Parliament intent on interfering with the prosecution of criminalities, it was the SPO that had run amok. Removed from this political context, the TCC seemed to let the SPO avoid punishment and took the Parliament to task seventeen months after the wiretapping scandal broke. In the meantime, the SPO did not escape from

¹³⁹ Chris Wang, *Majority side with Wang against KMT expulsion: poll*, TAIPEI TIMES (Sept. 12, 2013), <http://www.taipeitimes.com/News/front/archives/2013/09/12/2003571931>.

¹⁴⁰ Part of the parliamentary seats was decided by popular vote with the rest determined according to proportionate representation (PR). Mr. Wang was not elected by popular vote. He was on the KMT party list for the PR MPs, which were allocated according to the votes each qualified party received. His MP seat was contingent on his KMT membership. Although he was expelled from the party, he remained the Speaker until the end of his term with the intervention of the ordinary courts that issued an injunction on the KMT's expulsion resolution. See Yen-tu Su, *The Partisan Ordering of Candidacies and the Pluralism of the Law of Democracy: The Case of Taiwan*, 15 ELECTION L.J. 31, 44 n.18 (2016).

¹⁴¹ Chris Wang, *MA-WANG SHOWDOWN: President accused of using SID as "personal tool,"* TAIPEI TIMES (Sept. 12, 2013), <http://www.taipeitimes.com/News/taiwan/archives/2013/09/12/2003571952>.

¹⁴² Mo Yan-chih et al., *Politicians indignant at new wiretap accusations*, TAIPEI TIMES (Sept. 29, 2013), <http://www.taipeitimes.com/News/front/print/2013/09/29/2003573255>.

¹⁴³ Shih Hsiu-chuan & Rich Chang, *Disclosure of "September strife" probe demanded*, TAIPEI TIMES (Dec. 28, 2013), <http://www.taipeitimes.com/News/front/archives/2013/12/28/2003579956>.

the Parliament's wrath. Receiving no response from the TCC, the Parliament simply resorted to "self-help": the amendment was passed in late January 2014 with the SPO's capacity to conduct wiretapping substantially curtailed.¹⁴⁴ Although the legislative self-help seemed to suggest that the TCC's late intervention made room for the political branches to work out their differences, this was simply an unsubstantiated perception. Had the TCC spoken on the matter in time, Interpretation No. 729 would have been easily read in context. The Interpretation would not have been read to describe the immaculate SPO fighting the unruly parliamentary intervention for the integrity of criminal investigation and for the protection of communications privacy. Moreover, the legislative reaction, unguided by constitutional principles, only plunged the executive-legislative relationship into a downward spiral and cast doubt on the ill-considered amendment.¹⁴⁵ Interpretation No. 729 was another clear example of the TCC willingly turning into an irrelevant spectator of a triangular constitutional play among the President, the SPO (nominally attached to the Administration), and the Parliament.

Less than three weeks after the historical elections on January 16, 2016,¹⁴⁶ the TCC promulgated Interpretation No. 735. In line with its post-2008 practices, the TCC spoke only after the controversy had already been resolved. While Interpretation No. 735 expanded upon the constitutional provision for the vote of no confidence (Amendment 3, Section 2, clause 3) and ruled that the statutory restriction on the motion of no confidence during a special parliamentary session was unconstitutional,¹⁴⁷ the underlying cause of its referral was the Pan Green's no-confidence motion against the Administration on July 25, 2012.¹⁴⁸ Again, the time lag exposes the TCC's lethargy. Yet Interpretation No. 735 itself is the culmination of constitutional anomalies in the midst of declining constitutional influence.

¹⁴⁴ Shih Hsiu-chuan, *Legislature passes wiretap restrictions*, TAIPEI TIMES (Jan. 15, 2014), <http://www.taipeitimes.com/News/front/archives/2014/01/15/2003581314>.

¹⁴⁵ E.g., Rich Chang, *Prosecutors unhappy with wiretapping rule changes*, TAIPEI TIMES (Jan. 16, 2014), <http://www.taipeitimes.com/News/front/archives/2014/01/16/2003581395>.

¹⁴⁶ See *infra* Part IV.

¹⁴⁷ J.Y. Interpretation No. 735 (Const. Ct. Feb. 4, 2016); http://www.judicial.gov.tw/constitutional-court/p03_01.asp?expno=735 (only available in Chinese).

¹⁴⁸ *Id.*

The first anomaly concerns the Administration's unusual tenure. As a consequence of a controversial rescheduling of the presidential election,¹⁴⁹ President Ma was re-elected in January 14, 2012, although he would not be sworn in for his second term until May 20. In the meantime, he had appointed a new Premier, Sean Chen, in early February when he was still serving his first term. Three-and-a-half months later, Premier Chen was reappointed as President Ma officially began his second term.¹⁵⁰ Yet, at that time, Premier Chen's Administration was already embroiled in various policy controversies, including the intractable issues surrounding the proposed lifting of a ban on the importation of American beef, on which domestic politics and foreign relations were intertwined.¹⁵¹ Premier Chen was even unprecedentedly prevented from fulfilling his constitutional duty to introduce his general policy statement before the Parliament within the statutorily prescribed timeline by the combative Pan Green.¹⁵²

The second anomaly was the opposition Pan Green's inconsistent constitutional moves. By the end of the regular parliamentary session in mid-June, it continuously boycotted the Administration but fell short of a motion of no confidence. Pan Green's introduction of the July 25 no-confidence motion was not a result of Premier Chen's policies, but rather the Administration Chief of Staff's corruption scandal in late June when the KMT caucus had moved to convene a four-day special parliamentary session to address many unresolved issues from July 24 to 27.¹⁵³ Acting under the statute governing the exercise of the legislative power, however, the Speaker rejected the Pan Green's no-confidence motion against Premier Chen outright as it was not on the predetermined legislative agenda of the special session.¹⁵⁴ Intriguingly, the Pan Green MPs waited almost two months to

¹⁴⁹ This unprecedented change will be further discussed in *infra* Part III.

¹⁵⁰ Shih Hsiu-chuan, *MA'S RE-INAUGURATION: Despite calls for reshuffle, Cabinet largely unchanged*, TAIPEI TIMES (May 20, 2012), <http://www.taipeitimes.com/News/taiwan/archives/2012/05/20/2003533281..>

¹⁵¹ E.g., Chan Shun-kuei, Editorial, *Lifting beef ban ignores big picture*, TAIPEI TIMES (Mar. 12, 2012), <http://www.taipeitimes.com/News/editorials/archives/2012/03/12/2003527562>.

¹⁵² According to amendment 3 of the Constitution and other legislation, a new Premier must introduce the general policy statement before the Parliament within two weeks following his appointment. Shih Hsiu-chuan, *Opposition block premier's speech*, TAIPEI TIMES (June 2, 2012), <http://www.taipeitimes.com/News/taiwan/archives/2012/06/02/2003534326>.

¹⁵³ Chris Wang & Shih Hsiu-chuan, *No-confidence vote on premier sought*, TAIPEI TIMES (July 25, 2012), <http://www.taipeitimes.com/News/front/archives/2012/07/25/2003538567>.

¹⁵⁴ Chris Wang, *Wang Jin-pyng rejects no-confidence motion*, TAIPEI TIMES (July 26, 2012), <http://www.taipeitimes.com/News/taiwan/archives/2012/07/26/2003538673>.

refer the relevant statutory provisions to the TCC on September 17, after the new ordinary session had already begun.¹⁵⁵ More baffling was that the Pan Green introduced a new no-confidence motion against Premier Chen the next day, which was defeated on September 22.¹⁵⁶ In other words, with its own move on September 18, the Pan Green effectively rendered its referral to the TCC moot.

Even so, the TCC delivered Interpretation No. 735 three-and-a-half years after the referral, when the curtain was being drawn on the KMT Government and the new Parliament had already opened. This is the third anomaly. Removed from its convoluted political context, the terse Interpretation No. 735 reads like an entry on the motion of no confidence in a treatise on constitutional law. It may be praised for its liberal interpretation of the parliamentary power to introduce no-confidence motions in both the regular and special parliamentary sessions.¹⁵⁷ But when it came to the TCC's real-world influence, Interpretation No. 735 epitomized the TCC's irrelevance to political disputes as they had gradually found settlement outside the judicial channel in the years preceding it, a theme to which Part III will turn shortly.

Taken together, the TCC's reluctance to give voice to the constitution during the studied period, especially when it came to controversial issues, resulted in its irrelevance to the development of constitutional politics. If the activist TCC was the linchpin of the judicialization of politics, which underlay the growth of constitutionalism in Taiwan's democratic transition, the TCC's disappearance from the political landscape after 2008 clearly indicates the turn to de-judicialization. To be sure, this may suggest a move from legal or judicial constitutionalism to political constitutionalism.¹⁵⁸ Yet, in terms of escalating constitutional conflicts and political paralysis in this period, the constitutional politics that resulted from de-judicialization did not seem to correspond to what political constitutionalists would have been fond

¹⁵⁵ J.Y. Interpretation No. 735 (Const. Ct. Feb. 4, 2016).

¹⁵⁶ Shih Hsiu-chuan, *Sean Chen survives no-confidence vote 66 to 46*, *TAIPEI TIMES* (Sept. 23, 2012), <http://www.taipeitimes.com/News/front/archives/2012/09/23/2003543440>.

¹⁵⁷ See, e.g., Jason Pan, *Lawmakers' no-confidence motion rights upheld*, *TAIPEI TIMES* (Feb. 6, 2016), <http://www.taipeitimes.com/News/taiwan/archives/2016/02/06/2003638951>.

¹⁵⁸ See generally RICHARD BELLAMY, *POLITICAL CONSTITUTIONALISM: A REPUBLICAN DEFENSE OF THE CONSTITUTIONALITY OF DEMOCRACY* (2007).

of. If it is not political constitutionalism, then what is it? Part III will try to answer this question.

III. W(H)ITHERS THE CONSTITUTION: FROM JUDICIAL CONSTITUTIONALISM TO CONSTITUTIONAL POLITICS?

As the preceding analysis has shown, the TCC has been gradually losing its normative grip on constitutional politics since 2000. If constitutional politics work in a way in which constitutional principles are carried out through political dynamics taking place outside judicial channels, it means that the constitution continues to thrive in the face of the abatement of judicial activism. It may thus be argued that Taiwan has bid farewell to judicial constitutionalism while the normative constitution keeps shining even brighter under political constitutionalism.¹⁵⁹ Yet the problem is that while the constitutional order in Taiwan may be moving out of such judicial channels, the political landscape has not become a fertile ground for the Constitution, but rather turned into an unconstrained battlefield of unruly partisan politics.

The foremost example of the Constitution's weakening grip on the political order is that the Constitution has been invisible on the most important constitutional issue—the relationship between Taiwan and China (also known as the “cross-strait relationship”)—since the TCC began to retreat from the stage of constitutional politics.¹⁶⁰ Because Taiwanese society has long been divided on its political relationship with China—independence or union—whether to build stronger bilateral relations has been the most sensitive subject on the political agenda.¹⁶¹ Apart from the strategic choice between further economic and political union or ultimate independence, the parliamentary role in the Government's dealings with

¹⁵⁹ *Id.* at 145–75.

¹⁶⁰ Some interpretations tackle human rights issues resulting from the cross-strait relations, such as Interpretations No. 497, 618, 710 and 712. These interpretations do not, however, deal with the relationship itself or the political disputes it concerns. See J.Y. Interpretation No. 497 (Const. Ct. Dec. 3, 1999); http://www.judicial.gov.tw/constitutionalcourt/en/p03_01.asp?expno=497; J.Y. Interpretation No. 618 (Const. Ct. Nov. 3, 2006); http://www.judicial.gov.tw/constitutionalcourt/en/p03_01.asp?expno=618; J.Y. Interpretation No. 710 (Const. Ct. July 5, 2013); http://www.judicial.gov.tw/constitutionalcourt/en/p03_01.asp?expno=710; J.Y. Interpretation No. 712 (Const. Ct. Oct. 4, 2013), http://www.judicial.gov.tw/constitutionalcourt/en/p03_01.asp?expno=712.

¹⁶¹ See Weixing Hu, *Prospects of Cross-Taiwan Strait Relations: Toward an Involutional Process?*, in *NEW DYNAMICS IN CROSS-TAIWAN STRAITS RELATIONS: HOW FAR CAN THE RAPPROCHEMENT GO?* 218, 226–27 (Weixing Hu ed., 2013).

China has been at the center of political debates. With a series of bilateral agreements signed and their impact percolating through numerous aspects of everyday life in the first two years of President Ma's first term, the calls for more robust parliamentary oversight of Taiwan-China relations became stronger. This issue came to a head when the Cross-Straits Economic Cooperation Framework Agreement (ECFA), the equivalent of a free trade agreement, was signed in June 2010 due to fears that it would set an irreversible course towards further economic integration and ultimately political union.¹⁶²

One of the primary issues motivating the ECFA debate was whether it required parliamentary approval. While the KMT Government contended that it did not and would come into force if it received no up-or-down vote from the Parliament within three months, the opposition Pan Green insisted that it required legislative ratification and the Parliament had the right to revise its content.¹⁶³ Although it received parliamentary approval in mid-August, the constitutional question as to the parliamentary oversight of the Taiwan-China relations was left unanswered. On the other hand, even if it was passed (despite the Pan Green objection), its contents were still controversial and continued to raise constitutional concerns.¹⁶⁴ Notably, even before both sides of the Taiwan Strait formally signed the ECFA, several proposals had been initiated to block it by referendum. Yet none of them passed the RRC's vetting, calling the constitutional status of the RRC in implementing referendums into question again.¹⁶⁵ It is also noteworthy that petitions for the TCC to intervene and exercise judicial review of the RRC decision by the administrative courts were also considered.¹⁶⁶

To be clear, there is a clear distinction between the constitutional question of the parliamentary oversight of Taiwan-China relations and the issues surrounding the reconstituted RRC and its vetting procedures: the

¹⁶² See Ming-Sung Kuo, *W(h)ither the Idea of Publicness?*, *supra* note 10, at 233–37.

¹⁶³ Shih Hsiu-chuan, *Ma, Wang disagree on ECFA review*, TAIPEI TIMES (July 3, 2010), <http://www.taipeitimes.com/News/front/archives/2010/07/03/2003477022/1>. See also Sung Kuo, *W(h)ither the Idea of Publicness?*, *supra* note 10, at 248–49.

¹⁶⁴ Compare Ming-Sung Kuo, *W(h)ither the Idea of Publicness?*, *supra* note 10, at 254 (questioning the ECFA's extraconstitutional character), with Jiunn-rong Yeh & Wen-Chen Chang, *supra* note 25, at 165 (noting the lack of public participation in the approval of the ECFA).

¹⁶⁵ See, e.g., Huang Kuo-chang, Editorial, *Overhaul of Referendum Act Can Be a Rallying Cry*, TAIPEI TIMES (Aug. 14, 2010), <http://taiwantt.org.tw/taipeitimes/2010/08/20100814-06.htm>.

¹⁶⁶ Jenny W. Hsu, *DPP firm on changing referendum law*, TAIPEI TIMES (Aug. 29, 2009), <http://www.taipeitimes.com/News/taiwan/archives/2009/08/29/2003452244>.

former concerns the separation of powers between the Parliament and the Government, whereas the latter resulted from individual political rights. Nevertheless, beneath this doctrinal distinction was a fundamental issue concerning Taiwan's political future. It was the existential question of Taiwan as a constitutional polity that was at the root of the various attempted constitutional petitions. Without going into detail about the reasons why the TCC failed to intervene, it should be noted that this fundamental political issue and its derivatives were fought outside of institutional channels and its impact on constitutional politics would be felt beyond the ECFA itself.

Soon after the ECFA was ratified, further negotiations on the liberalization of service sectors began in February 2011 and the resulting "Cross-Straits Service Trade Agreement" (STA) was formally signed in June 2013.¹⁶⁷ As its impact on economy and society was expected to be even broader and deeper than the ECFA, it elicited strong objections from citizens, political groups, and the media.¹⁶⁸ Viewing the STA as the cornerstone of his policy to move Taiwan even closer to China, however, President Ma and his Government threatened that the STA would come into force if the Parliament failed to give the STA an up-or-down vote within three months.¹⁶⁹ Thus, the unanswered constitutional question as to the parliamentary role in the dealings with China came to the surface again.

Moreover, Speaker Wang of the Parliament, President Ma's long-time political rival, sympathized with public concerns and delayed parliament passing the STA by subjecting it to close legislative scrutiny.¹⁷⁰ At this juncture, the issue of the parliamentary role in the Taiwan-China relations was intertwined with political vendettas. The Speaker's parliamentary maneuver was considered the root cause of President Ma's surprising move to unseat him in September 2013.¹⁷¹ Seen in this light, the constitutional question as to the parliamentary role in the Taiwan-China relations was not

¹⁶⁷ Mo Yan-chih, *Cross-strait service trade pact signed*, TAIPEI TIMES (June 22, 2013), <http://www.taipeitimes.com/News/front/archives/2013/06/22/2003565371>.

¹⁶⁸ Loa Iok-sin & Rich Chang, *Groups Voice PRC Trade Pact Concerns, Cross-Strait Service Trade Pact Signed*, TAIPEI TIMES (June 22, 2013), <http://www.taipeitimes.com/News/taiwan/archives/2013/06/22/2003565390>.

¹⁶⁹ Shih Hsiu-chuan, *Legislature to vote on new pact item-by-item: speaker*, TAIPEI TIMES (June 27, 2013), <http://www.taipeitimes.com/News/taiwan/archives/2013/06/27/2003565772>.

¹⁷⁰ Shih Hsiu-chuan & Mo Yan-chih, *Cabinet approves cross-strait service trade pact*, TAIPEI TIMES (June 28, 2013), <http://www.taipeitimes.com/News/taiwan/archives/2013/06/28/2003565848>.

¹⁷¹ Su Yung-yao & Jake Chung, *Wang row ploy to push through trade deal: DPP*, TAIPEI TIMES (Sept. 21, 2013), <http://www.taipeitimes.com/News/taiwan/archives/2013/09/21/2003572669>.

resolved by judicial means. Nor was it settled in political channels under the guidance of constitutional principles. Instead, it was addressed by anti-constitutional political stratagems underpinned by a series of constitutionally dubious wiretapping and palace politics.¹⁷²

Determined to push the STA through Parliament, President Ma, again in his capacity as KMT Chair, gave orders to the KMT MPs to close the parliamentary debate on the STA despite street demonstrations and the parliamentary reaction to his failed political maneuverer against the Speaker.¹⁷³ When the STA was forced through the committee stage on March 17, 2014, it immediately provoked mass protests, leading to the occupation of the Parliament Building the next day.¹⁷⁴ At this point, constitutional order was on the verge of breakdown. Although constitutional order did not fail and the STA was shelved for the time being,¹⁷⁵ the fact that the constitutional dispute over the Parliament's role in the Taiwan-China relations culminated in the three-week occupation of the Parliament Building reflected the withering of the Constitution in the move towards de-judicialization.¹⁷⁶

The relationship between Taiwan and China was not the only issue that was fought extra-constitutionally. The unprecedented decision to move the conventional presidential election day from March 20 (or the preceding or ensuing Saturday) ahead to January 14, 2012 was another example of raw politics unbound by the Constitution in the midst of de-judicialization. Although the Constitution does not expressly provide for the beginning and end of a presidential term or the date of a presidential election, it had been a settled convention until 2011 that the election should be held on the preceding or ensuing Saturday of March 20 of the election year and then the

¹⁷² See Yen-tu Su, *supra* note 140, at 43–45, 44 n.18 (suggesting the constitutional implications of party internal rules in light of the Ma-Wang Strife).

¹⁷³ Shih Hsiao-kuang et al., *KMT steps up efforts to promote pact*, TAIPEI TIMES (Mar. 16, 2014), <http://www.taipeitimes.com/News/taiwan/archives/2014/03/16/2003585772>.

¹⁷⁴ Chris Wang, *Opposition, groups protest trade pact*, TAIPEI TIMES (Mar. 19, 2014), <http://www.taipeitimes.com/News/front/archives/2014/03/19/2003586009>.

¹⁷⁵ Alison Hsiao & Loa Lok-sin, *Wang vows monitoring law before pact*, TAIPEI TIMES (Apr. 7, 2014), <http://www.taipeitimes.com/News/front/archives/2014/04/07/2003587457>.

¹⁷⁶ *But cf.* Chia Ming Chen, *Searching for Constitutional Authority in the Sunflower Movement*, 45 HONG KONG L.J. 211 (2015) (suggesting the occupation action as an exercise of self-constituting authority by the occupants).

President should be sworn in on May 20.¹⁷⁷ In terms of the impact of an electoral calendar on a campaign and even election results, the idea of moving the election day two months ahead was extraordinary and controversial when it was first proposed in 2010.¹⁷⁸ Under the pretext of saving administrative costs by holding the 2012 presidential election on the same day as the next parliamentary election, which must take place in mid-January at the latest, this extraordinary proposal was regarded as part of the KMT's political maneuvering for its own gain. Considering President Ma's low approval ratings, the opposition believed that he could benefit from the KMT MP candidates who were seen as commanding grassroots political support if the presidential and parliamentary elections were held on the same day.¹⁷⁹

When the Central Election Commission (CEC)—an independent agency within the Administration responsible for the administration of elections, including the selection of election dates—took up this proposal in early 2011, serious concerns were raised.¹⁸⁰ In addition to the election date's impact on the elections, it also raised concerns over thousands of new voters being excluded from the voter register.¹⁸¹ But the more concerning problem was that it would double the length of the interval between the presidential election day and the inauguration day,¹⁸² increasing government instability and the political risk inherent during the so-called "presidential transition."¹⁸³ In terms of its deviation from the established constitutional convention and its grave consequences for the entire constitutional order, it was argued that a constitutional amendment would be required to change constitutional conventions regarding the presidential election date.¹⁸⁴

Immediate reactions to the CEC's decision on April 19, 2011 that both the presidential and parliamentary elections were to be held on January 14,

¹⁷⁷ Chen In-chin, Editorial, *Polls merger may be undemocratic*, TAIPEI TIMES (Apr. 12, 2011), <http://www.taipeitimes.com/News/editorials/archives/2011/04/12/2003500517>.

¹⁷⁸ Loa Iok-sin & Vincent Y. Chao, *Election merger plan sparks debate*, TAIPEI TIMES (Dec. 6, 2010), <http://taipeitimes.com/News/front/archives/2010/12/06/2003490218>.

¹⁷⁹ *Id.*

¹⁸⁰ See Chia Ming Chen, *supra* note 176.

¹⁸¹ Hawang [*sic*] Shiow-duan, *Understanding combined elections*, TAIPEI TIMES (Apr. 9, 2011), <http://www.taipeitimes.com/News/editorials/archives/2011/04/09/2003500271>.

¹⁸² See Chia Ming Chen, *supra* note 176.

¹⁸³ See generally Jack M. Beermann & William P. Marshall, *The Constitutional Law of Presidential Transitions*, 894 N.C.L. REV. 1254 (2006).

¹⁸⁴ See Chia Ming Chen, *supra* note 176; Hawang [*sic*] Shiow-duan, *supra* note 181.

2012 were angry, strongly condemning the CEC's submission to the ruling KMT.¹⁸⁵ Calls for the TCC's intervention were also voiced.¹⁸⁶ Yet the vociferous criticisms of this anti-constitutional political gambit were eventually drowned out by boisterous campaign rhetoric as both the KMT and the DPP shifted attention from the constitutional argument to the judgment of the election day. President Ma won a landslide re-election on January 14, 2012, and the issue of a deliberately extended presidential transition and its potential constitutional crisis seems to have become a moot point for the time being.

In light of the election result, the change of the presidential election date may be interpreted as an instance of extra-constitutional amendment instead of anti-constitutional action. The problem is that this action neither enhanced the government's stability nor strengthened the fundamental right to vote. Its only consequence was to establish precedent that a self-created lengthened period of the presidential transition is no longer inconceivable under the Constitution. Notably, this prophecy was fulfilled on January 16, 2016 when the DPP presidential candidate Ms. Tsai Ing-wen defeated the KMT, igniting calls for shortening the term of President Ma's lame-duck presidency by legislation to minimize the constitutional risk inherent in the extended presidential transition.¹⁸⁷

In sum, the controversies over the parliamentary role in the Taiwan-China relationship and the presidential election date illustrate declining constitutional normativity, with the TCC retreating from the constitutional stage. As it turns out, what has taken the place of judicial constitutionalism is untamed constitutional politics that work against the ideal of political constitutionalism and thus withers the normative constitution.

¹⁸⁵ Lin Shu-hui & Chen Hui-ping, *CEC approves simultaneous elections*, TAIPEI TIMES (Apr. 20, 2011), <http://www.taipeitimes.com/News/front/archives/2011/04/20/2003501206>.

¹⁸⁶ Ceng Wei Zhen (曾章禎), *Fa Xue Xue Zhe: Bing Xuan Kong Wei Xian Zheng Guan Lin* (法學學者：併選恐違憲政慣例) [*Legal Scholars: Election Merger Contravenes Constitutional Convention*], *Zi You Shi Bao* (自由時報) [LIBERTY TIMES] (May 1, 2011), <http://news.ltn.com.tw/news/politics/paper/488799>.

¹⁸⁷ Abraham Gerber, *NPP urges shorter transitions of power*, TAIPEI TIMES (Feb. 20, 2016), <http://www.taipeitimes.com/News/taiwan/archives/2016/02/20/2003639790>.

IV. CONCLUSION

This article has argued that, contrary to the popular view among TCC scholars that the TCC has continued to be an activist and authoritative player in constitutional politics, the influence of the TCC has been waning since 2000. The decline of the TCC cannot be attributed to shifting judicial philosophy alone. As the TCC case law during President Chen's eight-year tenure indicates, the TCC remained an activist court, although it failed to be an effective constitutional player. The TCC did not become more active after the KMT's return to power in 2008. Reluctant to give voice to constitutional principles, the TCC became less and less relevant to constitutional politics. Unfortunately, what has accompanied this move towards the de-judicialization of politics has not been robust political constitutionalism aimed at the implementation of constitutional norms outside the judicial channel. Instead, looming from the political landscape where the TCC has been invisible is an unconstrained politics that plays with, instead of playing by, the Constitution. Thus, although the TCC has remained the ordained interpreter of constitutional norms, constitutional normativity has been chipped away on its watch. With judicial constitutionalism displaced by untamed constitutional politics, the TCC is reduced to a nominal court while the Constitution withers.

Juxtaposed with its record during the twentieth century, the TCC's overall performance in the twenty-first century tells us that a constitutional court is not a master of politics, but rather thrives or withers in the delicacy of constitutional politics. Taiwan's political landscape is shifting again. The DPP and its candidate Ms. Tsai significantly outperformed the KMT in both the presidential and parliamentary elections on January 16, 2016. The DPP's electoral victory is historical. Not only did its candidate win the presidency by a wide margin, but it also became the majority party in the Parliament for the first time.¹⁸⁸ The long-time political behemoth KMT has been plunged into intense infighting ever since.¹⁸⁹ Constitutional

¹⁸⁸ Ms. Tsai received approximately 56% of popular votes in a three-way race, while the DPP won 68 out of 113 parliamentary seats. Lo Lok-sin, et al., *ELECTIONS: Madam President*, TAIPEI TIMES (Jan. 17, 2016), <http://www.taipeitimes.com/News/front/archives/2016/01/17/2003637385> (reporting the result of the presidential election); Alison Hsiao, *ELECTIONS: DPP to control Legislative Yuan*, TAIPEI TIMES (Jan. 17, 2016), <http://www.taipeitimes.com/News/taiwan/archives/2016/01/17/2003637414> (reporting the parliamentary elections).

¹⁸⁹ Stacy Hsu, *Tensions mount at KMT forum*, TAIPEI TIMES (Mar. 21, 2016), <http://www.taipeitimes.com/News/taiwan/archives/2016/03/21/2003642084>.

discussions abound in this new political landscape.¹⁹⁰ At the dawn of a new political era, it remains to be seen whether the TCC will be able to reclaim its past glory by reinvigorating the withered Constitution.

¹⁹⁰ See, e.g., Chang Hsiao-ti & Jonathan Chin, *Alliance touts constitutional reforms* (Mar. 16, 2016), <http://www.taipeitimes.com/News/taiwan/archives/2016/03/16/2003641702>.