

**Taiwan's Government Secrecy Law Reforms:
The Implications for Executive Privilege and Evolving Presidential Power**

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Abstract

This paper highlights a wide range of issues framed within Taiwan's government secrecy reforms, focusing on the legal origins, scope and applicability of executive privilege and the degree to which the judiciary may intervene in this domain. It examines the evolution of presidential power in Taiwan in two major aspects: legislative history and constitutional interpretations. This paper described that, three legal reforms that gave rise to the expansion of presidential powers in Taiwan: direct elections since 1996, the ROC Amendment Articles revised in 1994 and 1997, and the legalization of national security agencies. The first two legal reforms established a clear implication that the president is the highest executive officer and head of the nation. Furthermore, the intelligence reforms that established the president as leader of the National Security Council extended his leadership as a Commander in Chief and responsibility for the preservation of national security and national interests. A strong, unfettered presidency has been established in the process of democratization.

The extent to which judicial power can regulate the use of executive privilege directly affects whether presidents can abuse the power of government secrecy. In this regard, similar to the rationale crafted in *United States v. Nixon*, J.Y. interpretations No. 585 and No.627 provide implications on the definition and scope of executive privilege, as well as the justiciability of the claim of executive privilege. These two jurisprudences basically present a very similar logic in their interpretations of executive privilege. That is, courts, using their judicial power, may take actions they deem appropriate in this regards, in the exercise of their constitutional responsibility and according to the separation of powers. Yet, the ultimate decision concerning whether to invoke executive privilege to shield the confidentiality of such communication from other government branches is still subject to presidents. The implementation of executive privilege in Taiwan clearly shows that, now as in the past, the president always has determinative decision to conceal information from being access based on his intrinsic role as defender of national interests.

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I. Introduction

After its gradual democratization over two decades, Taiwan underwent a dramatic political and social shift, culminating in the transition to a modern democratic political regime, one that adheres to the rule of law. The principal change replaced the former Cabinet with a semi-presidential system, via an amendment to the ROC Constitution. This also created a basis for the emergence of executive privilege.

The past two decades of constitutional development in Taiwan feature an evolving process of expansion of presidential power.¹ After long decades of authoritarian rule by the Kuomintang Nationalist Party (KMT), constitutional reforms were finally undertaken in the early 1990s to open up elections for the legislature and the presidency.² Direct election of the President and Vice-President by citizens was established by constitutional revision in 1994 and adopted to give the President democratic legitimacy.³ Under the revisions of 1994 and 1997, the promulgation of personnel orders by the President no longer requires the premier's countersignature.⁴ In addition, the 1997 constitutional revision removed the requirement of legislative consent to the President's appointment of the premier.⁵ This indicates that the premier serves at the will of the president.⁶ As a result, the president has become the Commander-in-chief as well as the head of Taiwan.⁷

With the increasing power vested in the president, the way each president exercise his executive privilege based on government secrecy reflects his strategic approach to address

¹ Jiunn-rong Yeh, *The Constitution of Taiwan- A Contextual Analysis*, 60-62 (2016).

² Jiunn-rong Yeh, *Presidential Politics and the judicial facilitation of dialogue between political actors in new Asian democracies: Comparing the South Korean and Taiwanese experiences*, 8 (4) *Int'l J Const L* 911, 912-913 (2010).

³ Yeh, *supra* note 1, at 62.

⁴ Nuno Garoupa Veronica Grembi, and Shirley Ching-ping Lin, *Explaining constitutional review in new democracies: The case of Taiwan*, 20 (1) *PAC. RIM L. & POL'Y J.* 1, 10 (2011).

⁵ Yeh, *supra* note 1, at 62.

⁶ *Id.*

⁷ *Id.*

political matters regarding national security, diplomacy and cross-Strait affairs and interactions with other political actors.

Government secrecy entails internal tension between classification and declassification of government information based on the necessity of protecting state' secrets while still ensuring that the public has access to information on government operation.⁸ Such conflicts can be initially categorized as “clashes over information sought directed by Congress, clashes over information sought by individuals through congressionally enacted public access statutes, and clashes over information sought by congressionally created agencies.”⁹ The “Executive Privilege” is understood as the practice of implementing the government secrecy claimed by the President to resist the disclosure of information disclosure.¹⁰

In support of secrecy, two primary arguments are made. First, government secrecy may prevent bad actors from accessing information that could be used to harm national interests or to reduce the effectiveness of government policies.¹¹ In other words, some secrecy may be necessary for various aspects of administrative matters, such as concealing plans and vulnerabilities from adversaries; acting agilely and decisively against threats; and protecting sources and methods of intelligence gathering.¹² Second, secrecy may improve the quality of governmental deliberations and decision making.¹³ Preventing public access to secrets may provide greater freedom for policymaker to consider and debate different options, take risks, change their minds, consult with experts, and negotiate with outside parties.¹⁴

⁸ Daniel P. Moynihan, Larry Combest, *Secrecy: Report of the Commission on Protecting and Reducing Government Secrecy*, available at <https://fas.org/sgp/library/moynihan/index.html>

⁹ Heidi Kitrosser, *Secrecy and Separated Powers: Executive Privilege Revisited*, 92 IOWA L. REV. 489, 492 (2007).

¹⁰ See generally *Id.*, David E. Pozen, *Deep Secrecy*, 62 STAN. L. REV. 257 (2009); Jonathan Hafetz, *A Problem of Standards: Another Perspective on Secret Law*, 57 WM. & MARY L. REV. 2141 (2016).

¹¹ Pozen, *supra* note 10, at 277.

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

In contrast, critics of government secrecy raise powerful arguments. These critics assert that even though the secret-keepers are perfectly virtuous, important facts and insights may still be overlooked, and preexisting bias may be amplified.¹⁵ To put it in another way, government secrecy creates an “instrument of conspiracy” for officials to pursue personal or partisan interests.¹⁶ Scholars opposed to government secrecy also share the view that the existence of secret laws poses a threat to the separation of powers, democratic accountability and other values of the modern liberal state.¹⁷

As discussed above, government secrecy have provoked intense debate over the extent to which government can conceal certain government information from its citizens, the proper limit of executive privilege and the degree to which the judicial branch may intervene in this domain. More precisely, because they inherently oppose government openness and democratic accountability, government secrecy laws also acts as a valuable markers to evaluate the implementation of separation of powers in constitutional order. Assessing legal systems government secrecy from the perspective of executive privilege is significant for both evaluating bargaining between presidents and the Congress and examining how judicial power engages in these highly-political cases. More importantly, government secrecy always triggers intense debate about if and to what extent is should be allowed in a democratic system. This puzzle becomes even more complex in new democracies like Taiwan, where the boundaries between different political actors and government branches still remains unclear. Any abuse of secrecy may give rise to detrimental effects on immature, developing democratic mechanism.

¹⁵ *Id.*

¹⁶ *Id.* at 278

¹⁷ Hafetz, *supra* note 10, at 2147; See also Christopher Kutz, Secret Law and the Value of Publicity, 22 *RATIO JURIS* 197, 201 (2009).

In this regard, the history of Taiwan from an authoritative regime to a democratic one, the expanding power of presidential power and the flourishing development of judicial review provide valuable insights into the constitutional dialogue between administrative branch, legislative branch and judicial power on government secrecy disputes.

The ROC Constitution does not specifically provide for presidential “executive privilege.”¹⁸ However, this power has been confirmed in interpretations of Constitutional Court in Judicial Yuan (J.Y.), which acts as the highest-judicial body in Taiwan. In J.Y. Interpretation No 627 and 585, the Constitutional Court stated:

[S]ubject to the scope of his executive powers granted by the Constitution and the Amendments to the Constitution, the President has the power to decide not to disclose any information relating to national security, defense and diplomacy if he believes that the disclosure of such information may affect national security and national interests and hence should be classified as state secrets. Such power is known as executive privilege and should be given due respect by the other state organs if the exercise of their official authorities involves any such information.¹⁹

As noted above, some intriguing questions have been raised: Why is it that the president, as head of state and symbol of the people and the nation, utilizes the conception of commander in chief by insisting executive privilege against the Congress? How does the amendment of the ROC Constitution and the construction and reconstruction of government agencies illustrate the evolving power of the presidents, granting them leeway to assert executive privilege? More importantly, what would be a proper role for Taiwan’s courts,

¹⁸ See SIFAYUAN DA FAGUAN JEISHI 627 HAO [The Judicial Yuan No.627 Interpretation] (2007); SIFAYUAN DA FAGUAN JEISHI 585 HAO [The Judicial Yuan No.585 Interpretation] (2004).

¹⁹ *Id.*

particularly the constitutional court, with respect to these highly-political issues? Does the Court, proactively or passively, respond to disputes arising from a tension between different branches?

In an attempt to answer the questions above, this paper assesses the constitutional validity of government secrecy. The paper consists of three main sections, aside from this introduction. Section II begins by discussing how, since 1949 when the KMT retreated from Mainland China, how Presidents and ruling party established a system of government secrecy by creating a series of national security agencies. Section III analyzes how Taiwan's constitutional court has sought to resolve disputes relating to executive privilege, linking it to the separation of powers and checks and balances. Section IV examines how judicial intervention runs in the field of government secrecy which highly related to the executive discretion and presidential power.

By analyzing representative legal reforms and judicial opinions, the paper argues that when addressing government secrecy in legislative-executive relations, Taiwan's constitutional court pursues a compromise between openness and secrecy. This section also elaborates and reaffirms presidential power in accordance with constitutionally established schemes based on the separation of powers. Finally, this paper concludes two primary research results as follows. First, legal reforms implemented at the legislative level in the age of democratization not only successfully demonstrate that law can act as an instrument of organizational change, but also provide valuable insights on how judicial power intervene in the legal domain which is highly involved to national interests. Second, when dealing with highly political legal issues concerning the interaction of presidential, Taiwan's constitutional court recognizes justiciability of executive privilege. The inclination of such judicial

intervention usually acts as a platform to moderate inter-branch power and finally swings favoring presidents.

II. National Security Reforms and Evolving Presidential Power

Taiwan's national security reform is closely related to a shift of political landscape and evolving presidential power. In general, it can be separated into four periods as follows:

A. Nationalist (KMT) Authoritarian Rule (1945-1992)

In the late 1940s, the Nationalist Party (KMT) suffered defeat in the civil war against the Chinese Communists on the mainland and retreated to Taiwan.²⁰ Responding to the nation's emergency state in 1949, the central government, led by KMT leader Chiang Kai-shek, enacted the "Temporary Provisions for the Period of Mobilization for the Suppression of Rebellion."²¹ This Act granted the president dictatorial powers and suspended the Constitution.²² The provisions also stated that the president could ignore the legislature if he deemed it necessary.²³ In May 1949, the island was placed under martial law.²⁴ Arrest and execution of those suspected to be association with Chinese communists or Taiwanese independence groups increased through 1949 and 1950.²⁵

To strengthen social control, Chiang Kai-shek established the Political Action Committee as an ad hoc body to stabilize the regime.²⁶ The Political Action Committee became the National Defense Committee in 1955, and finally the National Security Council

²⁰ Steven E. Phillips, Taiwan's Intelligence Reform in an age of Democratization in REFORMING INTELLIGENCE-OBSTACLES TO DEMOCRATIC CONTROL AND EFFECTIVENESS 170, 173 (Thomas C. Bruneau and Steven C. Boraz ed., 2007).

²¹*Id.* at 171.

²² Steven E. Phillips, Democracy and National Identities on Taiwan, 22 (4) Nations and Nationalism 666, 672 (2016).

²³ Phillips, *supra* note 20, at 171.

²⁴ Phillips, *supra* note 22, at 672.

²⁵ Phillips, *supra* note 20, at 171-172.

²⁶*Id.* at 173.

(NSC) in 1967.²⁷ Also in 1955, the National Security Bureau was established.²⁸ The NSB is directly subordinated to the NSC, and is designed to oversee national security and intelligence agencies within the military, the Justice Ministry and the National Police Administration.²⁹

Between the 1950s and the 1990s, all security and intelligence services answered directly to the President, pursuant to the exigent circumstance authorized by the “Temporary Provisions for the Period of Mobilization for the Suppression of Rebellion” mentioned above.³⁰ Until 1993, the NSC and NSB—the Council and its subordinated organs had no legislative mandate and no oversight.³¹

In sum, before the termination of the Temporary Provisions in 1991, the NSC had functionally replaced the Cabinet and the Executive Yuan, serving as the key administrative arm of the president.³² The president serves as the chair of the NSC, and other members, including the vice-president, the president’s chief of staff, the presidential office chief of staff, the president’s chief military aide, were designated by the President.³³ Through his control over the NSC, the President could develop and promote policies related to national security and diplomacy matters.³⁴ Due to the breadth of offices and organizations represented in its membership, the NSC has become a powerful institution, known as the “Upper Executive Yuan,” surpassing the Executive Yuan in terms of its perceived influence and power.³⁵

²⁷*Id.*

²⁸*Id.*

²⁹*Id.*

³⁰*Id.*

³¹*Id.*

³²Yeh, *supra* note 1, at 62.

³³*Id.* at 63-64.

³⁴*Id.* at 64.

³⁵*Id.* at 64.

B. National Security Reforms Under President Lee Teng-Hui (1993-2000):

Institutionalization and Legalization

During the martial-law years, The Nationalist controlled intelligence, security, and military services, but the political geography began to change in the late of 1980s with the advent of democratization.³⁶ In the 1990s, President Lee Teng-hui took the lead in institutional reform of intelligence and security agencies with the assistance of Taiwanese-born KMT legislators as well as increasing numbers of DPP lawmakers.³⁷ Changing the military hierarchy from the top down, President Lee called for the institutionalization of intelligence services. In late 1993,³⁸ the Organic Act of the NSC³⁹ and NSB⁴⁰ were created to provide a legal mandate for the operation of intelligence operations. In accordance with this act, the NSC and NSB are supervised by the Legislative Yuan, and their budgets are monitored by this body as well.⁴¹

Under this arrangement, the President continues to serve as chairman of the NSC, but with the Vice-President and Premier serving as vice-chairmen.⁴² The reformed NSC includes the president, vice-president, premier, minister of defense, minister of foreign affairs, chiefs of the MJIB (Ministry of Justice Investigation Bureau).⁴³ The current structure enables more oversight to be exercised by the Legislative Yuan.⁴⁴ In accordance with The Organic Act of the NSC and NSB, the budgets of both the NSC and NSB are subject to monitoring by the

³⁶Steven E. Phillips, Identity and Security in Taiwan, 17 (3) Journal of Democracy 58, 59 (2006).

³⁷*Id.* at 62.

³⁸Phillips, *supra* note 20, at 176.

³⁹Guo jia an quan hui yi zu zhi fa (國家安全會議組織法) [The organic Act of the National Security Council] Enacted in December, 1993. Available at at the Republic of China, Ministry of Justice Official Websites, <http://law.moj.gov.tw/LawClass/LawAll.aspx?PCode=A0010021>.

⁴⁰Guo jia an quan hui yi zu zhi fa (國家安全會議組織法) [The organic Act of the National Security Council], Enacted in December, 1993. Available at at the Republic of China, Ministry of Justice Official Websites, <http://law.moj.gov.tw/LawClass/LawAll.aspx?PCode=A0010022>.

⁴¹ Phillips, *supra* note 20, at 176.

⁴²David Shambaugh, Taiwan's Security: Maintaining Deterrence Amid Political Accountability, 148 The China Quarterly 1284, 1289 (1996).

⁴³Steven E. Phillips, *supra* note 36, at 62.

⁴⁴Shambaugh, *supra* note 42, at 1289.

Legislative Yuan's Intelligence Committee.⁴⁵ While a large part of this budget is secret, it has to be reviewed and approved on an annual basis.⁴⁶ The NSC's responsibility includes the coordination of national intelligence, and it is expected to separate intelligence and covert action from law enforcement.⁴⁷ The NSB, acting as an inter-agency committee, manages and coordinate the intelligence and security activities of the MIB, the Military Police Headquarters, the NPA, the Coast Guard Command, the MJIB, and other agencies.⁴⁸ It reportedly comprises six departments including mainland operations, overseas operations, internal-security intelligence, national strategic intelligence, science and technology intelligence, and cryptography.⁴⁹

Generally speaking, the boundaries between counterintelligence, crime fighting, military command, law enforcement and domestic-security duties became clearer through Lee Teng-hui's efforts to implement the institutionalization and legalization of intelligence services, based on the principle of the rule of law.

C. First Transfer of Political Power and Further Reform Under President Chen Shui-bian (2001-2008): Balancing Secrecy and Transparency

In 2000, Taiwan underwent its first transfer of political power. President Chen Shui-bian from the DPP took office in May 2000 and summed up his political agenda by declaring that "the institutionalization of the intelligence agencies remains a significant goal undertaken by the government after the transfer of political power."⁵⁰ Notwithstanding that President Chen still faced the difficult challenges of ideologies and personnel within organizations, he

⁴⁵*Id.*

⁴⁶*Id.*

⁴⁷The Official Website of National Security Bureau, R.O.C. Available at http://www.nsb.gov.tw/En/En_index01.html; See also Phillips, *supra* note 36, at 62.

⁴⁸The Official Website of National Security Bureau, R.O.C. Available at http://www.nsb.gov.tw/En/En_index01.html; Phillips, *Id* at 62.

⁴⁹Phillips, *Id* at 62; Shambaugh, *supra* note 42, at 1290.

⁵⁰Phillips, *supra* note 20, at 180.

attempted to balance reforms, protecting individual's rights with the need to maintain an effective national security system.⁵¹

Following the announcement of President Chen's new policies, two significant acts regulating government classified documents and information were passed—the Classified National Security Information Protection Act in 2003⁵² and The Freedom of Government Information Law⁵³ in 2005. The Freedom of Government Information Law, similar to the FOIA in the U.S., aimed to advance transparency and freedom of government information in pursuit of citizen participation.⁵⁴ Through the release of government data, this Act was expected to “allow citizens to easily share and use the information; guarantee the public's right to know; increase public understanding of, trust in and supervision of public affairs; and promote participation by citizens in democracy.”⁵⁵

Second, the National Intelligence Work Law was also enacted in 2005,⁵⁶ highlighting again that intelligence activities should be overseen by legislative power, and also mandating that the chief of the NSB lead the heads of other intelligence agencies including the MIB (Military Intelligence Bureau, established within Ministry of Defense) and the MJIB (Bureau of Investigation within the Ministry of Justice). The law also required the NSB chief to

⁵¹Phillips, *supra* note 36, at 63.

⁵²Guo jia ji mi bao hu fa (國家機密保護法) [The Classified National Security Information Protection Act], Enacted in 2003, Available at the Republic of China, Ministry of Justice Official Websites, <http://law.moj.gov.tw/Eng/LawClass/LawAll.aspx?PCode=I0060003>.

⁵³Zheng fu zi xun gong kai fa (政府資訊公開法) [The Freedom of Government Information Law], Enacted in 2005, Available at the Republic of China, Ministry of Justice Official, <http://law.moj.gov.tw/Eng/LawClass/LawAll.aspx?PCode=I0020026>.

⁵⁴National Development Council (Taiwan), An outline of the Government Open Data Promotion Situation in Taiwan, Available at http://www.ndc.gov.tw/en/News_Content.aspx?n=8C362E80B990A55C&sms=1DB6C6A8871CA043&s=09819AC7E099BCD5

⁵⁵*Id.*

⁵⁶Guo jia qing bao gong zuo fa (國家情報工作法) [National Intelligence Work Law], Enacted in 2005, Available at the Republic of China, Ministry of Justice Official, <http://law.moj.gov.tw/LawClass/LawAll.aspx?PCode=A0020041>.

provide written and oral report to Legislative Yuan at every session.⁵⁷

During President Chen's tenure, the Legislative Yuan and Executive Yuan continued to refine the legal system regarding government secrecy enacted under Lee Teng-hui. Regulations were revised in 2002 to restrict the MIB's duties to those of military intelligence, including establishing military intelligence policies, budgets and education; collecting international intelligence; and planning for military needs.⁵⁸ The Organic Act of the NSB was also revised in 2003, defining and limiting the NSB's responsibilities in greater detail than ever before.⁵⁹

In short, President Chen's reforms on government secrecy can be seen up as two pursuing significant agendas. First, he called for "de-Nationalization" policy-reducing the influence of the Nationalist Party without harming the island's security interests.⁶⁰ This propaganda could also be understood as "neutrality," since Taiwan's intelligence networking and crime fighting operations as well as its military command structure would no longer be thoroughly controlled by the Nationalist Party. In a March speech, Chen asserted his determination to promote further intelligence reform to achieve stronger supervision of national security agencies.⁶¹ Thus, another policy focused on the balance between government secrecy and protection of individual rights was established. Since President Chen began his legal career opposing the Nationalists and suffered under their authoritative rule,⁶² he was particularly aware that, to deepen democratic transition, it was vital to strengthen the citizen's right to know, freedom of information and open access to government data, without

⁵⁷ Article 4 of National Intelligence Work Law, Available at the Republic of China, Ministry of Justice Official Websites, <http://law.moj.gov.tw/LawClass/LawAll.aspx?PCode=A0020041>.

⁵⁸ Phillips, *supra* note 36, at 64.

⁵⁹ Guo jia an quan ju zu zhi fa (國家安全局組織法) [The organic Act of the National Security Bureau], Enacted in December, 1993. Available at at the Republic of China, Ministry of Justice Official Websites, <http://law.moj.gov.tw/LawClass/LawAll.aspx?PCode=A0010022>.

⁶⁰ Phillips, *supra* note 36, at 63.

⁶¹ *Id.* at 64.

⁶² *Id.* at 63.

threatening national interests or government secrecy.

D. The Stagnant Pace of Government Secrecy Reform Under President Ma Ying-Jeou

(2008-2015): Dark decades in intelligence war against PRC

When Ma Ying-Jeou was first elected as Taiwan's President in 2008, he was seen as the leader who could improve the economy and create a robust relationship with China. President Ma claimed that rapprochement and a consistent interaction cross trait were expected to maintain long-standing peace and prosperity in Taiwan. However, this policy also brought about some concerns. On the intelligence front, it is argued that Ma Ying-jeou's administration was a "dark decade" in Taiwan's intelligence war with China.⁶³ As a matter of fact, there is growing evidence that rapprochement has not given rise to a decrease of military threat from China.⁶⁴ First, there is currently an unprecedented influx of Chinese visitors in Taiwan. This creates opportunities for Chinese intelligence to conduct surveillance, gather information and cultivate sources.⁶⁵ More specifically, for the previous 60 years, strict rules for Chinese visitors to Taiwan meant that its borders were relatively secure from human intelligence (HUMINT) operations in its soil by Chinese agents. Therefore, the sudden influx of Chinese in Taiwan, leaving the Taiwanese unable to differentiate between visitors and spies, might cause a significant threat to Taiwan's internal intelligence system.⁶⁶

Another severe concern is that more and more retired major recruited by China in order to obtain information regarding Taiwan's government.⁶⁷ Since 2006, more than 40 Taiwanese

⁶³Nadia Tsao, Shih Hsiao-kuang, Jonathan Chin and William Het, In Focus: Ma years "dark decade" in intelligence war, TAIPEI TIMES (October 1, 2017),

<http://www.taipetimes.com/News/taiwan/archives/2016/10/02/2003656368>.

⁶⁴ CSS (Center for Security studies), Paradigm shift: Expanded opportunities for Chinese espionage in Taiwan, (October 9, 2009), Available at <http://www.mcsstw.org/web/content.php?PID=5&Nid=145>.

⁶⁵*Id.*

⁶⁶*Id.*

⁶⁷Nadia Tsao, Shih Hsiao-kuang, Jonathan Chin and William Het, In Focus: Ma years "dark decade" in intelligence war, TAIPEI TIMES (October 1, 2017),

<http://www.taipetimes.com/News/taiwan/archives/2016/10/02/2003656368>.

have been suspected of assisting Chinese espionage, including retired and active military personnel and businesspeople.⁶⁸ “One might interpret these events as indicating that Taiwanese counterintelligence performed well in capturing so many spies, but it more likely reflects the tip of the iceberg, in terms of the relentless pressure applied by China’s intelligence operations in Taiwan.” according to Peter Mattis, a Jamestown Foundation fellow and former U.S. government analyst.⁶⁹

III. Government Secrecy and Separated Powers

Taiwan’s remarkable transformation from authoritarianism to democracy also provides insights into the role that courts can play in democratic politics.⁷⁰ In Taiwan, the power of the judicial review lies with the Council of Grand Justices of the Judicial Yuan, whose primary functions are to interpret the constitution and to issue uniform interpretation of the laws.⁷¹

While revisions to the Constitution resulted in a gradually expansion of presidential power, executive privilege was not affirmed by the constitutional court until 2004. In 2004, the Legislative Yuan enacted the Special Commission on the Investigation of the Truth with respect to the 319 Shooting, raising the issue of whether the Legislative Yuan had gone beyond the scope of its legislative authorities. The issue arose from an incident on March 19, 2004. The day before the presidential election – President Chen Shui-bian and Vice President Annette Lu were shot while riding in an open jeep in Tainan City.⁷² The next day, they were re-elected by a margin of 0.22% of valid votes.⁷³ The losing candidates, on behalf of KMT (Chinese Nationalist Party), charged that the shooting had been a deliberate scheme to arouse

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ Tom Ginsburg, The Political Courts in Democratization: Four Junctures in Asia in *CONSEQUENTIAL COURTS: JUDICIAL ROLES IN GLOBAL PERSPECTIVE* 45, 56 (Diana Kapiszewski, Gordon Silverstein, Robert A. Kagan ed., 2013).

⁷¹ Tom Ginsburg, Confucian constitutionalism? The emergence of constitutional review in Korea and Taiwan, *LAW & SOCIAL INQUIRY* 27 (4) 763, 768 (2002).

⁷² Ginsburg, *supra* note 70, at 56.

⁷³ *Id.* at 56-57.

sympathy and filed a suit in the Taiwan High Court the next day to dispute the validity of the election results.⁷⁴ Meanwhile, competing investigations were launched to examine the shooting incident.⁷⁵ The opposition-controlled legislature passed a law four months later, in August, to establish a special “March 19 Shooting Truth-Finding Commission.”⁷⁶ Pursuant to this Act, the resulting Commission was granted wide investigatory and prosecutorial power.⁷⁷ On September 15, 2004, legislators from the DPP requested the Council of Grand Justices to assess the constitutionality of the establishment and powers which the act vested to the Committee.⁷⁸

After three months, the Council of Grand Justices issued Interpretation No. 585, holding part of the “Special March 19 Shooting Truth-Finding Commission Act” unconstitutional.⁷⁹ Notably, the Council held that provisions granting the commission members the exclusive power to investigate the incident violated the separation of powers principles by invading executive privilege.⁸⁰ It is worth noting that this is the first time the Constitutional interpretation recognized presidential executive privilege. The court’s Interpretation No. 585 asserted:

[A]n executive chief, by the authority inherent in his or her executive power, is entitled to decide not to make public any information that may affect or interfere with the effective operation of the executive branch. This is an executive-privilege intrinsic to the executive powers.⁸¹

⁷⁴ *Id.* at 57.

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ SIFAYUAN DA FAGUAN JEISHI 585 HAO [The Judicial Yuan No.585 Interpretation] (2004).

Based on this foundation, the Court further interpreted the boundaries between legislative power and presidential power, asserting that the Legislative Yuan, the highest legislative body in Taiwan, should give due respect to executive privilege in exercising its investigative power.⁸²

More specifically, the court elaborated on the scope of executive privilege in subsequent J.Y. Interpretation No. 627.⁸³ The issue arose from the disputes about whether a president can claim presidential criminal immunity and executive privilege when faced with criminal charges.⁸⁴ In September 2006, special secret funds created by former president Chen Sui-bian raised wide attention and prosecutors in the Taipei District court began investigating the case.⁸⁵ The question of the constitutional legitimacy of this investigation arose immediately as President Chen sought to claim presidential criminal immunity under Article 52 of the constitution.⁸⁶ However, prosecutors still contended that the first lady, Ms. Wu Shu-Chen, was subject to embezzlement charges regarding a special presidential secret fund that provided for the president's undisclosed activities in connection with national security and diplomacy.⁸⁷ Since this charge was directed at the first lady instead of the president, it could not be barred by the constitution.⁸⁸

On January 25, 2007, the secretary-general filed a constitutional petition before the Constitutional Court on behalf of President Chen, arguing that all prosecution, including a prosecution based on the actions his wife, should have been barred by his constitutionally guaranteed immunity, and that the disclosure of details regarding the special secret fund was

⁸² *Id.*

⁸³ SIFAYUAN DA FAGUAN JEISHI 627 HAO [The Judicial Yuan No.627 Interpretation] (2007).

⁸⁴ *Id.*

⁸⁵ Wen-Chen Chang, Strategic judicial responses in politically charged cases: East Asian experiences, 8 (4) Int'l J Const L 885, 887 (2010).

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.*

a violation of presidential privileges and thus constituted a massive encroachment upon the separation of powers.⁸⁹

On June 15, 2007, the Constitutional Court released the decision.⁹⁰ Reaffirmed by J.Y. Interpretation No.627, the court held that presidents are naturally granted executive privilege based on the principles of separation of powers and checks and balances.⁹¹ By virtue of privilege regarding state secrets, the chief executive should have the power to decide whether or not to disclose classified government information regarding national security, defense and diplomacy based on the functions and authorities intrinsic to his office.⁹² Such power is part of the executive privilege of the chief executive, as was made clear in J.Y. Interpretation No. 585. Hence, the chief's executive privilege is recognized under constitutional law.⁹³

Such privilege, the Court noted, is not only affirmed by the Constitution but has also been granted under the State Secret Protection Act, which gives the president the power to classify state secrets, unilaterally, on a permanent basis.⁹⁴ However, the president was reminded that such a privilege is not absolute, and its exercise should be in accordance with the principles of separation of powers.⁹⁵

IV. Judicial Intervention in Executive Privilege

As noted above, executive privilege has typically served as a useful shield against congressional request for disclosure of information. The function of executive privilege in the United States regarding government secrecy has been similar. The most representative

⁸⁹ *Id.* at 887-888.

⁹⁰ SIFAYUAN DA FAGUAN JEISHI 627 HAO [The Judicial Yuan No.627 Interpretation] (2007).

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.*

⁹⁴ Chang, *supra* note 85, at 890 (2010).

⁹⁵ *Id.*

litigation on this issue in the U.S. is *United States v. Nixon*. In this case, President Nixon asserted his executive privilege, based upon five grounds.⁹⁶ He argued that (1) the president has an unlimited power of executive privilege; (2) under the separation of powers system, no other branch of government can question the president's constitutional authority in this area; (3) executive privilege belongs to all executive branches officials; (4) executive privilege was necessary during the Watergate investigation to protect sensitive government secrets and national interests, not his personal interests; and (5) any breach of the president's absolute power of executive privilege would threaten national security.⁹⁷ As a result, Nixon asserted that he was immune from subpoena on the basis of "executive privilege."⁹⁸

Eventually, in *U.S. v. Nixon*,⁹⁹ the Supreme Court issued an historic, unanimous decision on the Nixon tapes controversy,¹⁰⁰ denying the claim of an absolute presidential power of executive privilege, as well as the claim that the president had ultimate authority over all executive branch information.¹⁰¹

Furthermore, the Court affirmed the right of the judicial branch to resolve disputes between the political branches of government.¹⁰² Regarding executive privilege, the Court stated, "to the extent that this interest in confidentiality relates to the effective discharge of

⁹⁶ MARK J. ROZELL, EXECUTIVE PRIVILEGE- PRESIDENTIAL POWER, SECRECY, AND ACCOUNTABILITY 63 (2010).

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *U.S. v. Nixon*, 418 U.S. 683 (1974).

¹⁰⁰ ROZELL, *supra* note 96, at 62 (2010).

¹⁰¹ *Id.*

¹⁰² *Id.*

the president's powers, it is constitutionally based."¹⁰³ In this particular case, the Court states that "the legitimate needs of the judicial process may outweigh Presidential privilege, it is necessary to resolve those competing interests in a manner that preserves the essential functions of each branch."¹⁰⁴ Through applying the Nixon's balancing test above, the Court ruled that to permit a claim of executive privilege that effectively resulted in the withholding of vital evidence "would cut deeply into the guarantee of due process of law and gravely impair the basic function of the courts."¹⁰⁵ With that decision, the president had no choice but to turn over the incriminating tapes that ended his presidency.

As mentioned above, the U.S. Supreme Court made it clear that executive privilege is not an unlimited, unfettered presidential power. The Court further declared that, due to the separation of powers, the president's exercise of power may be questioned by the legislative and judicial branches of government. Through this decision, the Court affirmed its own authority to determine what the law is and to challenge the presidential exercise of power.¹⁰⁶ The Court rejected Nixon's claim that only the president can determine the scope and limits of his own constitutional authority.¹⁰⁷

When it comes to the constitutionality and legitimacy of executive privilege, judicial

¹⁰³ Nixon, 418 U.S. at 711.

¹⁰⁴ *Id.* at 707.

¹⁰⁵ *Id.* at 712.

¹⁰⁶ ROZELL, *supra* note 96, at 71.

¹⁰⁷ *Id.*

power always plays a vital role to determine whether such claim is legitimate. Comparing the U.S. Supreme Court decision with Taiwan's Constitutional Court, both systems of jurisprudence faced two critical issues concerning executive privilege. First, they had to determine whether the issues surrounding the claim of executive privilege were justiciable. Second, they had to decide in which circumstance, to what extent, and by which standard judicial power could intervene in legal fields, which involves highly political issues regarding government secrecy. With respect to the first issue, both U.S. courts and Taiwan's Constitutional Court made it clear that since executive privilege is relevant to legal issues arising from the separation of powers, it does indeed concern constitutional law and allocations of authority between different political actors as well as government branches.¹⁰⁸ Accordingly, the courts are entitled to intervene in this field and make decisions, which implies that the issue is not barred by any "political questions" doctrine, as described by the U.S. Supreme Court in *Baker v. Carr*.¹⁰⁹ Nevertheless, whenever addressing the second question regarding the degree of judicial intervention, jurisprudence in the U.S. and Taiwan exhibited strong judicial deference to the cases when executive privilege claims are raised by presidents.

It is worth considering that although the U.S. Supreme Court upheld the decision to deny

¹⁰⁸ See *generally* *Nixon*, 418 U.S. 683 (1974); SIFAYUAN DA FAGUAN JEISHI 627 HAO [The Judicial Yuan No.627 Interpretation] (2007); SIFAYUAN DA FAGUAN JEISHI 585 HAO [The Judicial Yuan No.585 Interpretation] (2004).

¹⁰⁹ *Yeh*, *supra* note 2, at 941.

president's motion to quash a subpoena and rejected his argument for absolute executive privilege, the Nixon case still benefited presidential power.¹¹⁰ It validated a qualified executive privilege to withhold information, and it established that privilege in constitutional law.¹¹¹ Likewise, in J.Y. Interpretations No. 585 and No. 627, executive privilege has been highlighted as a constitutional-level authority owned by presidents, although there is no explicit reference in ROC Constitution.¹¹² Based upon the executive privilege, the Constitutional Court further elaborated that such privilege includes the right to refuse to testify about matters concerning state secrets during a criminal proceeding. To the extent that he may refuse to so testify, he may also refuse to produce the relevant evidence.¹¹³

V. Conclusion

This paper highlights a wide range of issues framed within government secrecy, focusing on the proper scope of executive privilege and the degree to which the judiciary may intervene in this domain. It examines the evolution of presidential power in Taiwan in two major aspects: legislative history and constitutional interpretations. This paper attempts to illustrate executive privilege in Taiwan, in terms of its legal origin, scope and applicability. This paper described that, three legal reforms that gave rise to the expansion of presidential

¹¹⁰ Adam M. Samaha, Government Secrets, Constitutional Law, and Platforms for Judicial Intervention, 53 UCLA L. REV. 909, 933-934 (2005).

¹¹¹ *Id.* at 934.

¹¹² SIFAYUAN DA FAGUAN JEISHI 627 HAO [The Judicial Yuan No.627 Interpretation] (2007)

¹¹³ *Id.*

powers in Taiwan: direct elections since 1996, the ROC Amendment Articles revised in 1994 and 1997, and the legalization of national security agencies. The first two legal reforms established a clear implication that the president is the highest executive officer and head of the nation. Furthermore, the intelligence reforms that established the president as leader of the National Security Council also extended his leadership as a Commander in Chief and responsibility for the preservation of national security and national interests. A strong, unfettered presidency has been established in the process of democratization.

The extent to which judicial power can regulate the use of executive privilege directly affects whether presidents can abuse the power of government secrecy. In this regard, similar to the rationale crafted in *United States v. Nixon*, J.Y. interpretations No. 585 and No.627 provide implications on the definition and scope of executive privilege, as well as the justiciability of the claim of executive privilege. These two jurisprudences basically present a very similar logic in their interpretations of executive privilege. That is, courts, using their judicial power, may take actions they deem appropriate in this regards, in the exercise of their constitutional responsibility and according to the separation of powers. Yet, the ultimate decision concerning whether to invoke executive privilege to shield the confidentiality of such communication from other government branches is still subject to presidents. Overall, executive privilege presents a platform to evaluate the interplay of diverse different political

actors in the legal domain, which is deemed to be highly-secretive and political. The implementation of executive privilege in Taiwan clearly shows that, now as in the past, the president always has determinative decision to conceal information from being access based on his intrinsic role as defender of national interests.