Algumas Reflexões sobre as Linhas de Força e as Limitações Constitucionais do Impedimento Presidencial: o caso Sul-Coreano de 2004*

A Few Reflections about the Power Lines and Constitutional Limitations of Presidential Impeachment: the South-Korean case (2004)

Thiago Aguiar Pádua**

Jefferson Carús Guedes***

Resumo

O presente artigo busca refletir sobre o Impedimento do Presidente da República, particularmente a partir da análise de um caso pertencente a tradição Constitucional relativamente parecida com a nossa, qual seja, o caso Sul-Coreano, de 2004. Neste caso a Corte Constitucional Sul-Coreana restabeleceu o Presidente ao cargo, após a suspensão de suas funções determinado pelo Congresso. Diferenças entre as estruturas Constitucionais jogam luzes sobre os limites deste instituto, inclusive com lições valiosas para o Direito pátrio.

Palavras-chave: Impedimento; Presidencialismo; Caso Sul-Coreano (2004).

Abstract

This article aims to reflect about the Presidential Impeachment, particularly from the analysis of a judicial case that is closely to our tradition, i.e., the South-Korean case (2004). In this case, the South Korean Constitutional Court restored the President to his office, after the suspension determined by the Congress. Some differences between the Constitutional structures throw some light on the limits of the institute, bringing valuable lessons for the Brazilian law.

Keywords: Impeachment; Presidentialism; South-Korean case (2004).

1. Introdução

Muito já se escreveu sobre o impedimento presidencial[1], no Brasil e no exterior, devendo ser citado o clássico e incontornável livro do falecido juris-

* Segue anexo a este artigo o inteiro teor do acórdão da Corte Constitucional Sul-Coreana no caso do Impeachment do Presidente Roh Moo-hyun (caso: 2004Hun-Na1, KCCR: 16-1 KCCR 609).

** Doutorando em Direito no Centro Universitário de Brasília. Email: tsapadua@gmail.com

*** Doutor e Mestre em Direito das Relações Sociais (PUC-SP). Professor da graduação e do Programa de Mestrado e Doutorado do UniCEUB. Advogado da União.. Email: professor.carusguedes@gmail.com

1 Neste artigo usaremos indistintamente as expressões “Impedimento” e “Impeachment”.

ta Paulo Brossard[2], e sua manifestação jornalística após o impedimento de Fernando Collor[3]; sobre este fato, recorde-se ainda o fato de que durante o impedimento do Presidente Fernando Collor, houve a judicialização de inúmeros aspectos constitucionais relativos ao instituto.

Nossa historiografia registra que, na referida época, o programa Roda Viva, da TV Cultura, realizou transmissão especial e diferente de sua performance tradicional em que, via de regra, um convidado fica no centro do estúdio e os vários convidados o circundam. Neste programa, no entanto, observou-se a presença da réplica da cadeira presidencial, ao centro e praticamente vazia, exceto pela faixa presidencial dependurada na cadeira, com um debate aberto entre os convidados, pois a temática já estava estabelecida: era um mote.[4]

Tão drástica a medida, que o impedimento é comparado à morte, embora – e, não obstante, a comentarista política (republicana e conservadora) Ann Coulter tenha sido execrada quando sugeriu em 1998 que, uma vez confirmado o fato de que Bill Clinton tivesse mentido sob juramento acerca dos famosos casos Paula Jones e Monica Lewinsky[5], a solução comportaria uma dupla saída: impedimento ou assassinato.[6]

Contudo, a imagem do impedimento como alternativa ao assassinato foi utilizada por Benjamin Franklin, em discurso de 20 de julho de 1787 durante a Convenção da Filadélfia, e tal questão é reconhecida academicamente como significativa do fato de que a Constituição mantém uma vinculação permanente entre o assassinato e o impedimento, na exata medida em que o assassinato também impede a continuação da atividade presidencial, abrindo ensancha para a substituição do presidente.[7]

Em termos gerais, é como se uma imagem (impedimento) substituísse a outra (assassinato), nos permitindo trazer a lume a figura do *iconoclash*, a partir das reflexões de Bruno Latour, que em 2002 participou de uma provocante exposição: "*iconoclash*", "*Beyond the Image Wars in Science, Religion and Art*", realizada no *Center for New Art and Media*, em Karlsruhe[8], a famosa sede do *Bundesverfassungsgericht*, o Tribunal Federal Constitucional da Alemanha[9].

A curadoria da exposição reuniu três ambientes: 1) Religião, 2) Ciência, e, 3) Arte Contemporânea, pois as imagens vinham se apresentando como espécies de "armas culturais" através das quais ocorreria uma luta ambígua, em termos de produção e destruição de imagens, emblemas e ícones.

Escolheu-se o termo "*iconoclash*" (*icon* = 'ícone', *clash* = 'choque'), significando um "embate de ícones, emblemas ou imagens", para definição da temática da exposição, de modo a permitir a reflexão sobre uma espécie de "arqueologia" do ódio e do fanatismo que permeia os diversos níveis da vida cultural, social e política. Com efeito, dirigindo-se a um tipo de "*iconofilia*", além das guerras de imagens, acaba-se por sugerir a suspensão

2 BROSSARD, Paulo. **O impeachment: aspectos da responsabilidade política do presidente da república**. São Paulo: Saraiva, 1992.

3 Embora tenha renunciado no dia em que o Senado julgava seu Impeachment, consideramos efeito decorrente, com efeito idêntico de vacância do cargo. A propósito, recordando e perquirindo sobre a atualidade de sua tese acadêmica, escrita originalmente em 1964, Paulo Brossard observou que: "A conclusão da minha tese não era original, dado que a generalidade dos publicistas, desde o fim do século passado, concluía que o impeachment, com o correr do tempo, se tornara antiquado e inadequado processo de apuração da responsabilidade presidencial, alguma coisa como roupa de menino em corpo adulto, ou como couraça da cavalaria medieval em tempos de armas atômicas; uma velharia a ser recolhida ao museu das antiguidades constitucionais". Cfr. BROSSARD, Paulo. **Depois do impeachment**. Correio Braziliense de 6 de janeiro de 1993, p. 13.

4 Levado ao ar pela TV Cultura em setembro de 1992, um dia antes de a Câmara dos Deputados aprovar o afastamento do presidente Fernando Collor, o programa contou com a apresentação de Marco Antônio Rocha, e com os convidados os juristas Celso Antônio Bandeira de Mello e Miguel Reale Jr., o jornalista Millor Fernandes, o empresário Ricardo Semler, a escritora Lygia Fagundes Telles, o economista João Sayad, o então estudante e presidente da UNE Lindbergh Farias, o então operário Vicente Paulo da Silva (o dirigente sindical Vicentinho).

5 Paula Jones, então servidora estadual do Arkansas, processou o presidente Bill Clinton por assédio sexual (quando à época era Governador daquele Estado, em 1991), e foi durante o seu julgamento que houve o desdobramento do surgimento de outros casos de assédio, como o de Monica Lewinsky, pois durante o processo judicial os advogados de Paula buscaram demonstrar que havia um padrão de conduta, e o então presidente testemunhou sob juramento, negando os fatos, mas não contava com o aparecimento de um vestido que continha traços de seu sêmen. Registre-se a decisão da Suprema Corte Americana no caso "**Clinton v. Jones, 520 U.S. 681 (1997)**".

6 COULTER, Ann H. **High Crimes and Misdemeanors: The Case against Bill Clinton**. Washington, DC: Regnery, 1998, p. 107.

7 CHAFETZ, Josh. Impeachment and Assassination. **Minnesota Law Review**, vol. 95, 2010, p. 421.

8 LATOUR, Bruno. O que é Iconoclash? Ou, há um mundo além das guerras de imagem? **Horizontes Antropológicos**, Porto Alegre, ano 14, n. 29, p. 111-150, jan./jun. 2008.

9 Os curadores foram: Peter Galison, Dario Gamboni, Joseph Leo Koerner, Bruno Latour, Adam Lowe, Hans Ulrich Obrist, Peter Weibel. Informações relevantes e adicionais podem ser encontradas em dois sites específicos; *Iconoclash: Beyond the Image-Wars in Science, Religion and Art*: <http://www.bruno-latour.fr/node/338>; e, *Iconoclash: Beyond the Image Wars in Science, Religion and Art*: <http://hosting.zkm.de/icon/stories/storyReader$3>, acesso à ambos em 10.11.2015.

do gestual iconoclasta, em favor de uma "cascata de imagens em transformação", evitando se ater de maneira obsessiva a imagens congeladas e fixas "fora de seu fluxo[10].

De modo geral, "iconoclasmo" é termo significante de que "*sabemos o que está acontecendo no ato de quebrar, e quais são as motivações para o que se apresenta como um claro projeto de destruição*". Por sua vez, o "*iconoclash*" ocorre "quando não se sabe, quando se hesita, quando se é perturbado por uma ação para a qual não há maneira de saber, sem uma investigação maior, se é destrutiva ou construtiva"[11]. Pergunta-se: "por que as imagens provocam tanta paixão?" A resposta não é simples, e invoca reflexões sofisticadas. Invoquemos Alberto Manguel, que menciona:

> As imagens que formam o nosso mundo são símbolos, sinais, mensagens e alegorias. Ou talvez sejam apenas presenças vazias que completamos com o nosso desejo, experiência, questionamento e remorso. Qualquer que seja o caso, as imagens, assim como as palavras, são a matéria de que somos feitos.[12]

O mesmo autor nos recorda que quando "lemos imagens" acabamos por atribuir a elas o caráter temporal da narrativa, ampliando o que é limitado por uma moldura para um "antes" e um "depois", e através da arte de narrar histórias (de amor ou de ódio), também conferimos a imagem imutável uma vida infinita e inesgotável[13].

Dialogando com o ideário de André Malraux, Alberto Manguel recorda que ao situarmos uma obra de arte entre outras obras, criadas antes e depois dela, estaríamos em condições de ouvir, em primeira mão, o "canto da metamorfose", ou seja, o diálogo que as obras travam entre si, e o acervo de imagens que vai se formando no patrimônio do espectador seria chamado de "museu imaginário"[14].

É dentro deste espírito reflexivo que Mônica Sette Lopes, na introdução do livro que congrega artigos de alunos e professores integrantes de um grupo de pesquisa sobre a evolução e a metodologia da experiência jurídica, do qual foi organizadora, justifica de maneira bastante curiosa a escolha da imagem da capa do referido livro, qual seja, a pintura de Pablo Picasso denominada "A Suplicante", vinculada ao desespero, a dor e à angústia.[15]

Com efeito, certamente influenciado pela brutalidade das imagens, e sobre os efeitos delas decorrentes, Bruno Latour busca escavar a origem de uma distinção absoluta entre "verdade" e "falsidade", vale dizer, a diferença entre "um mundo puro", que seria esvaziado de intermediários criados pelo homem, e "um mundo impuro", repulsivo e repleto de mediadores feitos pelos homens, embora fascinantes. Duas seriam as posições: 1ª) Sem intermediários, seria mais puro – e mais "rápido" o acesso à verdade, à natureza e à ciência. 2ª) Com intermediários, as imagens às quais não se prescinde, seriam a única maneira de se ter acesso à verdade, à natureza e à ciência[16].

A referida construção advém do famoso "jogo de palavras" de Marie-José Mondzain: "A verdade é imagem, mas não existe uma imagem da verdade", num dilema que se procura compreender, documentar e eventualmente, quem sabe, superar. Provoca-se, uma vez mais:

> O que aconteceu, que tornou as imagens (e por imagens queremos dizer qualquer signo, obra de arte, inscrição ou figura que atua como mediação para acessar alguma outra coisa) o foco de tanta paixão? A ponto de destruí-las, apaga-las, desfigura-las se ter tornado a pedra de toque para provar a validade da fé, da ciência, da perspicácia, da criatividade artística de alguém? A ponto de que ser iconoclasta parece ser a mais alta virtude, a mais alta piedade em círculos intelectuais?

10 LATOUR, Bruno. O que é Iconoclash? Ou, há um mundo além das guerras de imagem? **Horizontes Antropológicos**, Porto Alegre, ano 14, n. 29, p. 111-150, jan./jun. 2008, p. 112.

11 LATOUR, Bruno. O que é Iconoclash? Ou, há um mundo além das guerras de imagem? **Horizontes Antropológicos**, Porto Alegre, ano 14, n. 29, p. 111-150, jan./jun. 2008, p. 113.

12 MANGUEL, Alberto. **Lendo imagens: uma história de amor e ódio**. Trad. Rubens Figueiredo, Rosaura Eichemberg e Cláudia Strauch. São Paulo: Companhia das Letras, 2001, p. 21.

13 MANGUEL, Alberto. **Lendo imagens: uma história de amor e ódio**. Trad. Rubens Figueiredo, Rosaura Eichemberg e Cláudia Strauch. São Paulo: Companhia das Letras, 2001, p. 27.

14 MANGUEL, Alberto. **Lendo imagens: uma história de amor e ódio**. Trad. Rubens Figueiredo, Rosaura Eichemberg e Cláudia Strauch. São Paulo: Companhia das Letras, 2001, p. 27-28.

15 Afirma-se: "Trata-se de uma pequena pintura dependurada e quase escondida numa das paredes do Museu Picasso em Paris. No entanto, ela revela o desespero, a dor, a angústia da experiência do conflito, com traços que marcam o modo de sentir de um tempo e as possibilidades amplas da expressão da liberdade humana". Cfr. SETTE LOPES, Mônica. Introdução, in: SETTE LOPES, Mônica (Org.). **O direito e a ciência: tempos e métodos**. Belo Horizonte: Movimento Editorial da Faculdade de Direito da UFMG, 2006, p. 13.

16 LATOUR, Bruno. O que é Iconoclash? Ou, há um mundo além das guerras de imagem? **Horizontes Antropológicos**, Porto Alegre, ano 14, n. 29, p. 111-150, jan./jun. 2008, p. 114.

Há nisso tudo, entretanto, um paradoxo curioso. É que os "destruidores de imagens", verdadeiros "*teoclastas*", "*iconoclastas*", "*ideoclastas*"[17], acabam por gerar igualmente uma espantosa quantidade de "novas imagens" compostas de "ícones frescos" e de "mediadores rejuvenescidos", com "ideias mais fortes" e "ídolos mais poderosos"[18]. São por estas razões que, transitando da noção de assassinato, o impedimento presidencial mantém a sua verve dramática da undécima hora, e talvez até mesmo mais complexa, porque invoca ritual específico e não ameno, levado a cabo por novos mediadores.

Não nos toca realizar abordagem que recorde nosso passado[19], ou nosso presente[20], embora reconheçamos que tal esforço constitui tentativa vã, ao pretender que tais memórias não sejam pontualmente refletidas no espelho argumentativo deste artigo. No entanto, procuraremos analisar um caso da experiência estrangeira relativamente recente: o caso Sul-Coreano de 2004, com vistas a observar algumas questões pontuais relativas ao impedimento presidencial.

Poderíamos ter analisado a decisão da Suprema Corte das Filipinas[21], que em 2003 não apenas invalidou por meio de decisão judicial a segunda tentativa de impeachment contra o então Presidente do Tribunal, Hilario Davide[22], como também anulou vários aspectos da seção das regras procedimentais do processo de impedimento, mas devido a extensão do presente artigo, optou-se por trabalhar apenas com relação a decisão da Corte Constitucional da Coréia do Sul, não obstante seja muito importante e interessante sob vários aspectos a decisão Filipina.

A escolha deste caso se deu de maneira relativamente consciente e não aleatória. A partir de sua reflexão, observaremos como a Corte Constitucional da Coreia do Sul, inspirada no modelo alemão, e similar ao modelo italiano, implementou termos jurídico-constitucionais de modo a discutir o mérito da judicialização, e mais do que isso, ousou enfrentar o Congresso e manter o então Presidente da República no cargo, a despeito da vontade contrária do legislativo. É possível que nos deparemos com questões que à primeira vista possam parecer inconciliáveis com nossa tradição constitucional, mas as aparências podem enganar. Recordemos um destacado pensador como forma de inspiração.

Quando Owenn Fiss escreveu suas memórias sobre o jurista argentino Carlos Nino, fez questão de observar que este último era um pensador que adorava discutir ideias (grandes, abstratas, profundas, algumas até mesmo estranhas, mas acima de tudo amava discutir ideias). Observou, ainda, que aquele pensador não foi o primeiro filósofo a albergar proposições contraditórias em sua carreira, mas como um dos melhores, ele abertamente confrontou tais contradições e tentou conciliá-las.[23]

Sem o mesmo brilho, no entanto, é exatamente o que tentaremos realizar brevemente neste artigo, vale dizer,

17 Veja-se que o autor de "Jamais Fomos Modernos" menciona em entrevista sobre vários e distintos nomes para descrever coisas antigas, ou a mesma coisa: "O colóquio se chamou 'Os mil nomes de Gaia'. Por que é importante discutir o nome ou um novo nome para Gaia? Gaia é um termo repensado por James Lovelock, que tem sido usado por militantes, ativistas, mas quando há muitos nomes para algo, é importante discutir. Acho bom usá-lo, porque falar em Gaia nos obriga a pensar sobre o que é Gaia e sobre o que é a Terra. Quando se fala em gaiapolítica, assim como se fala em geopolítica, as pessoas param e se perguntam: 'o que é isso?' Hoje, fazer as pessoas pensarem e se perguntarem algo é um grande feito". LATOUR, Bruno. Entrevista [O Globo]. Bruno Latour, antropólogo e escritor: 'Temos que reconstruir nossa sensibilidade', por Luiz Felipe Reis, em 29.09.2014. Disponível em: <http://oglobo.globo.com/sociedade/conte-algo-que-nao-sei/bruno-latour-antropologo-escritortemos-que-reconstruir-nossa-sensibilidade-14081447>, acesso em 10.11.2015.

18 LATOUR, Bruno. O que é Iconoclash? Ou, há um mundo além das guerras de imagem? **Horizontes Antropológicos**, Porto Alegre, ano 14, n. 29, p. 111-150, jan./jun. 2008, p. 114.

19 Sem recuar para além do marco temporal anterior à Constituição Federal de 1988, recorde-se dos famosos casos de judicialização do Impedimento de Fernando Collor de Mello: Os Mandados de Segurança n°s. 20.941, 21.564, 21.623 e 21.689, de 1992.

20 Por obviedade, estamos nos referindo aos casos de judicialização do impeachment da atual Presidente da República, através MS 33.837, Rel. min. Teori Zavascki, decisão monocrática de 12.10.2015, e MS 33.838, rel. min^{a}. Rosa Weber, decisão monocrática de 13.10.2015.

21 Caso "**Francisco, Jr. v. Nagmamalasakit na mga Manananggol ng mga Manggagawang Pilipino, Inc. 415 SCRA 44, at 105 (2003)**", disponível em: <http://sc.judiciary.gov.ph/jurisprudence/2003/nov2003/160261.htm>, acesso em 11.11.2015.

22 LARCINA, Franco Aristotle G. Judicial Review of Impeachment: the Judicialization of Philippine Politics. **Ust law review**, vol. L, ay 2005–2006.

23 As recordações de Owen Fiss se referem a uma viagem que um pequeno grupo de filósofos e juristas americanos e ingleses (Owen Fiss, Ronald Dworkin, Thomas Nagel, Thomas Scanlon, e Bernard Williams) fizeram até à Argentina em 1985, a convite do governo do então recém-eleito Raul Alfonsín, de quem Carlos Nino era o conselheiro presidencial, para acompanhar o julgamento da junta militar envolvida nos crimes da ditadura, relativos à morte, ao desaparecimento e a tortura de aproximadamente 9 mil cidadãos argentinos, embora Ronald Dworkin tenha aludido ao relatório "nunca mais", como uma crônica desde o inferno, a mais de 12 mil vítimas. Cfr. FISS, Owen. The Death of a Public Intellectual. **The Yale Law Journal**, vol. 104, 1995, p. 1187; DWORKIN, Ronald. Crónica desde el Infierno. **Revista Argentina de Teoria Jurídica**, vol. 9, nov., 2008.

tentar conciliar ideias aparentemente contraditórias relativas aos limites do impeachment, no que se refere as disposições constitucionais e eventuais limitações para apreciação judicial da matéria. Costuma-se apontar o fato de que questões "*interna corporis*", albergadas pela construção do ideário da "doutrina das questões políticas" tornariam limitada a judicialização de questões envolvendo pedido de impedimento presidencial.[24]

No entanto, o artigo 5º, inciso XXXV da Constituição Federal parece indicar que não há matéria que não possa ser judicializada, e o postulado do devido processo legal e da proporcionalidade indicam que não podemos interpretar a Constituição brasileira de 1988 à luz da constituição americana de 1787. A grande questão a ser refletida relaciona-se à violação à separação dos poderes, eventualmente representativa de matéria a ser suscitada em casos como o que ora se vislumbra. Diferentemente do que pode parecer, não iremos tratar do caso específico dos vários pedidos de impeachment e seus desdobramentos judiciais da atual Presidente da República. Refletiremos sobre a temática a partir de caso distinto, dentro da perspectiva fático-jurídica sobre o impedimento.

2. Caso Sul Coreano

Roh Moo-hyun, um defensor dos direitos humanos, mas sem formação acadêmica, foi eleito presidente da Coréia do Sul, através de eleição direta, para um mandato de 5 anos em dezembro de 2002. Tendo elaborado uma agenda progressista, obteve enormes dificuldades opostas por parte do grupo político conservador rival, o GNP - Grande Partido Nacional, que possuía a maioria no Congresso.[25]

A seu turno, o partido do presidente eleito (Partido Democrático Milenar), em minoria, enfrentava também uma divisão interna, entre apoiadores do antigo líder e seus opositores. A situação ficou ainda pior quando no final do ano de 2003, alguns de seus aliados foram presos acusados de receber contribuições de campanha ilegais, deixando-o em meio a uma crise política e com poucos apoiadores no Congresso. Nas eleições parlamentares subsequentes, o apoio que o presidente concedeu a alguns candidatos do Partido Uri, recém-criado (e no qual o presidente iria ingressar algum tempo depois[26]) foi respondido com uma moção de impedimento, alegando que o Presidente eleito havia violado as regras eleitorais de neutralidade.[27]

Entre março e maio de 2004, a Coreia do Sul experimentou conturbados momentos políticos decorrentes de um processo de impedimento, tentado pela primeira vez na sua história. Inicialmente, a Assembleia Nacional Sul Coreana aprovou moção de impedimento em face do Presidente Roh Moo-hyun. A dinâmica se deu da seguinte maneira: após a aprovação do pedido, com a suspensão imediata do presidente de suas funções, o Primeiro Ministro assumiu temporariamente a presidência, quando a Corte Constitucional daquele país colocou um ponto final na discussão ao decidir pela inadequação do pedido de Impedimento, restabelecendo o Presidente em suas funções. Segundo se observou à época, cerca de 84% da população Sul-Coreana teria aprovado a decisão da Corte Constitucional[28], havendo um duplo sentimento da população: enquanto desaprovavam a política do presidente, achavam o impeachment impróprio e também temiam pelo próprio processo democrático do país.[29]

24 Em um denso estudo sobre a "doutrina das questões políticas", e sua evolução perante o Supremo Tribunal Federal, José Elaeres Teixeira observa a inequívoca influência americana (*political questions doctrine*), que inicialmente significavam que em determinados casos os Tribunais não teriam nenhuma competência, e deveriam aceitar como definitivas as decisões políticas do governo, sendo atribuída sua autoria a John Marshall no famoso caso Marbury v. Madson, de 1803. Cfr. TEIXEIRA, José Elaeres Marques. **A Doutrina das Questões Políticas no Supremo Tribunal Federal**. Porto Alegre: Sérgio Antonio Fabris, 2005, p. 25; 235.

25 LEE, Youngjae. Law, Politics, and Impeachment: The Impeachment of Roh Moo-hyun from a Comparative Constitutional Perspective. **The American Journal of Comparative Law**, Vol. 53, 2005.

26 Conforme observado, na realidade o Presidente resolveu criar o Partido Uri, juntamente com 47 de seus mais fiéis apoiadores, em sua maioria advindos do Partido Novo Milênio, assim como o presidente. Algumas outras questões históricas são dignas de nota, como o fato de o presidente Roh Moo-hyun ter tentado uma reconciliação com a Coréia do Norte, bem como ter tentado remover as bases Americanas de Seul, enfurecendo os conservadores, não menos do que sua decisão de enviar tropas ao Iraque e a assinatura do tratado de livre comércio com o Chile. Cfr. CHAIBONG, Hahm. South Korea's Miraculous Democracy. **Journal of Democracy**, vol. 19, n. 3, 2008, p. 137.

27 LEE, Youngjae. Law, Politics, and Impeachment: The Impeachment of Roh Moo-hyun from a Comparative Constitutional Perspective. **The American Journal of Comparative Law**, Vol. 53, 2005.

28 LEE, Youngjae. Law, Politics, and Impeachment: The Impeachment of Roh Moo-hyun from a Comparative Constitutional Perspective. **The American Journal of Comparative Law**, Vol. 53, 2005.

29 CHAIBONG, Hahm. South Korea's Miraculous Democracy.

Em termos gerais, a decisão da Corte Constitucional foi baseada numa espécie de inafastabilidade do controle constitucional sobre o impedimento. Se por um lado o artigo 65 da Constituição Sul-Coreana[30] estabelece que compete à Assembleia Nacional, representativa do Poder Legislativo, suspender o Presidente da República de suas funções, proposta a moção de impeachment pela maioria do total de seus membros, ela ainda deve ser aprovada por pelo menos dois terços daquele total para a suspensão do Presidente de suas funções, não menos verdade é o fato de que cabe à Corte Constitucional, nos termos do artigo 111 da mesma Constituição[31], adjudicar a constitucionalidade das leis, e também arbitrar a Constitucionalidade sobre os temas centrais da democracia Sul-Coreana, considerados o núcleo duro da Constituição.

A Coreia do Sul passou por um processo de redemocratização após longo período de ditadura nos anos 1970 e 1980, sendo neste particular similar ao Brasil, e sua Corte Constitucional é de inspiração alemã, com a presença de 9 juízes, dos quais 3 são indicados pelo Presidente, 3 pelo Congresso e outros 3 pelo Presidente da própria Corte Constitucional, para um período de 6 anos, encarregada de apreciar 5 áreas específicas.[32]

Possui um governo presidencialista aliado a uma república parlamentarista, com um presidente, um primeiro ministro e um gabinete de estado, além de um legislativo unicameral, e um judiciário e uma Corte Constitucional. Especificamente sobre a decisão da Corte Constitucional da Coréia do Sul, relativa ao impeachment do então presidente Roh Moo-hyun, observamos que embora haja a fórmula geral (violação da Constituição), com a determinação de que a última palavra cabe à Corte Constitucional, a Carta Constitucional Sul-Coreana não menciona quais atos concretos ensejariam o impedimento, diferente da Constituição Brasileira de 1988, que estabelece concretos atos atentatórios à Constituição como passíveis de impedimento (art. 85 e art. 86 da CF/88).

Recorde-se que a Assembleia Nacional agrupou as acusações contra o presidente Roh Moo-hyun em três tópicos distintos: **1)** causar distúrbios ao Estado de Direito (*Disturbance of the Rule of Law*), **2)** Corrupção e Abuso de Poder, bem como **3)** administração temerária. No que se refere ao primeiro tópico, a Assembleia Nacional alegou que o presidente apoiou indevidamente o Partido Uri nas eleições gerais, violando as leis eleitorais, que determinavam que os agentes políticos se mantivessem neutros, de modo a não influir no resultado das eleições.[33]

Em segundo lugar, alegou-se ainda que ele havia desrespeitado a Constituição, as comissões eleitorais e os órgãos estabelecidos ao questionar publicamente as suas afirmações sobre as acusações de influência eleitoral, ao propor uma consulta popular para confirmar a confiança do eleitorado em sua administração. No que se refere ao segundo tópico (corrupção e abuso de poder), alegaram que o presidente e seus aliados teriam aceito suborno e dinheiro de financiamento ilegal de campanhas eleitorais. O terceiro tópico (administração temerária) acusava o presidente de negligenciar suas funções, com falta de senso de direção, que geraria problemas e incertezas nos desenvolvimentos político e econômico.[34]

Journal of Democracy, vol. 19, n. 3, 2008, p. 138.

30 Constituição Sul-Coreana: art. 65. [Impeachment] (1) No caso de o Presidente, o Primeiro Ministro, membros do Conselho de Estado, Chefes dos Ministérios, juízes da Corte Constitucional, Juízes, membros do comitê central eleitoral, membros do conselho de Inspeções e Auditoria das contas, e outros oficiais públicos designados pela lei violarem a Constituição ou outras leis no desempenho de suas funções, a Assembleia Nacional pode aprovar moções para seu Impeachment. (2) A moção para o impeachment no parágrafo primeiro, pode ser proposta por um terço ou mais do total dos membros da Assembleia Geral, e requer que pelo menos a maioria concorra para a sua aprovação: Sendo contra o presidente, ela deve ser proposta por metade dos membros da Assembleia Nacional e aprovada por dois terços ou mais do total de membros da Assembleia Nacional. (3) Qualquer pessoa contra quem a moção tenha sido aprovada fica suspensa de suas funções até que o impeachment tenha sido adjudicado. (4) Uma decisão no impeachment não se estende para além de afastar a função pública. Entretanto, ela não exime a pessoa impedida das responsabilidades civil e criminal. (Tradução Livre).

31 Constituição Sul-Coreana: art. 111. [Competência e indicações] (1) A Corte Constitucional é competente para adjudicar as seguintes matérias: 1) A Inconstitucionalidade das leis, a pedido dos Tribunais; 2) o Impeachment; 3) A Dissolução dos Partidos Políticos; 4) As disputas entre as jurisdições entre Agências Estatais, entre estas e os governos locais, e entre os governos locais; 5) Petições relativas a Constituição, na forma da Lei; (Tradução Livre).

32 A Corte foi estabelecida em 1987, e possui jurisdição sobre cinco áreas específicas: **1)** Controle de Constitucionalidade das Leis; **2)** Impedimentos; **3)** Dissolução dos Partidos Políticos; **4)** Disputa judicial entre corpos governamentais, e, **5)** Petição de Direitos. Cfr. LEE, Youngjae. Law, Politics, and Impeachment: The Impeachment of Roh Moo-hyun from a Comparative Constitutional Perspective. **The American Journal of Comparative Law**, Vol. 53, 2005, p. 413; MADDEX, Robert L. **Constitutions of the World**. 3ª Ed. Washington, D. C.: CQPress, 2008, p. 400-403.

33 LEE, Youngjae. Law, Politics, and Impeachment: The Impeachment of Roh Moo-hyun from a Comparative Constitutional Perspective. **The American Journal of Comparative Law**, Vol. 53, 2005, p. 414.

34 LEE, Youngjae. Law, Politics, and Impeachment: The Im-

Após um julgamento que durou trinta dias, envolvendo sete sessões, de 30 de março à 30 de abril de 2004, a Corte Constitucional discordou da Assembleia Nacional, rejeitando sua moção de impeachment, reconduzindo o presidente de volta às suas funções. A decisão da Corte Constitucional possui duas partes.[35]

Analisou inicialmente a questão sobre a alegada conduta temerária do presidente, tal como descrita pela Assembleia Nacional na moção de impedimento, no sentido de que ele "teria violado a Constituição ou outros atos". Sequencialmente a Corte considerou a proporcionalidade das violações, de modo a aferir se eram capazes de resultar em sua remoção do cargo.[36]

O princípio da proporcionalidade[37] foi o principal argumento para a não remoção do presidente de seu cargo, vale dizer, a Corte Constitucional Sul-Coreana estabeleceu que o guia para realizar a análise do caso seria a proporcionalidade para se averiguar se a violação das condutas dos agentes políticos seria grave o suficiente para justificar a suspensão de suas funções, e no contexto do impeachment, as variáveis relevantes seriam a consideração acerca da mensuração do quanto essa medida seria proporcional, tendo a Corte observado oposição comparativa entre "a gravidade da violação" e as "consequências do afastamento de suas funções".[38]

A Corte entendeu que o presidente havia violado o direito em três situações. Primeiro, entendeu que havia violação do dever de neutralidade nas eleições, no caso do apoio ao Partido Uri. Segundo, entendeu que ele também violara seus deveres Constitucionais ao desafiar a validade das leis eleitorais e questionado o Comitê Eleitoral. Em terceiro, o presidente também violou seus deveres ao propor uma consulta popular sem que houvesse base constitucional para tanto. Não obstante, a Corte entendeu que nenhuma dessas violações eram suficientemente gravosas a ponto de justificar sua remoção do cargo.[39]

Foram considerados dois argumentos principais como consequências adversas do afastamento do presidente de suas funções, quais sejam, equivaleria, em primeiro lugar, em reduzir o mandato de um líder democraticamente eleito, violando a vontade do eleitorado, e, portanto, a soberania popular. Segundo, considerou-se como consequência adversa a agitação política que adviria do fato de interromper uma administração até que um novo presidente fosse eleito, influindo no trabalho da administração. Neste sentido, a Corte considerou que a conduta do presidente, embora violadora do direito, e que como tal, deveria ser considerada, concluiu, no entanto, em favor da legitimidade democrática de seu mandato e pela importância da continuidade da administração.[40]

A questão remanescente foi referir-se a que tipo de violação seria considerada séria o bastante para justificar as consequências adversas do afastamento do presidente de suas funções. Com efeito, em razão de o processo de impeachment ser a de proteger e preservar a Constituição, a Corte Constitucional explicou que a gravidade

peachment of Roh Moo-hyun from a Comparative Constitutional Perspective. **The American Journal of Comparative Law**, Vol. 53, 2005, p. 414.

35 LEE, Youngjae. Law, Politics, and Impeachment: The Impeachment of Roh Moo-hyun from a Comparative Constitutional Perspective. **The American Journal of Comparative Law**, Vol. 53, 2005, p. 415.

36 LEE, Youngjae. Law, Politics, and Impeachment: The Impeachment of Roh Moo-hyun from a Comparative Constitutional Perspective. **The American Journal of Comparative Law**, Vol. 53, 2005, p. 415.

37 Um dos argumentos observados, segundo o acórdão, foi o que se segue: "Uma possível interpretação literal é que o artigo 53 (1) da Lei do Tribunal Constitucional prevê que o Tribunal Constitucional deve emitir automaticamente uma decisão de remover o funcionário público do cargo, desde que haja qualquer motivo válido para o impeachment estabelecido no artigo 65 (1) da Constituição. No entanto, sob tal interpretação, o Tribunal Constitucional é obrigado a ordenar a destituição do cargo público sobre qualquer ato do requerido que viole o Direito sem levar em conta a gravidade da ilegalidade. Caso o requerido seja removido de seu cargo por todas e quaisquer violações do Direito cometidos no exercício das suas funções oficiais, isso seria contrário ao princípio da proporcionalidade, que pede punição constitucional que corresponda à proporcionalidade da responsabilidade atribuída ao requerido. Portanto, a existência do 'motivo válido para o pedido de impeachment', do artigo 53 (1) da Lei do Tribunal Constitucional significa a existência de uma violação suficientemente "grave" do direito para justificar a remoção de um funcionário público de suas funções, e não apenas qualquer violação da lei". (Tradução Livre). Cfr. CORÉIA DO SUL. **Corte Constitucional da Coréia do Sul**. 2004Hun-Na1(Mar 14, 2004), View: 7, disponível em: <http://english.ccourt.go.kr/cckhome/eng/decisions/majordecisions/majorList.do>, acesso em 11.11.2015.

38 LEE, Youngjae. Law, Politics, and Impeachment: The Impeachment of Roh Moo-hyun from a Comparative Constitutional Perspective. **The American Journal of Comparative Law**, Vol. 53, 2005, p. 418.

39 LEE, Youngjae. Law, Politics, and Impeachment: The Impeachment of Roh Moo-hyun from a Comparative Constitutional Perspective. **The American Journal of Comparative Law**, Vol. 53, 2005, p. 415.

40 LEE, Youngjae. Law, Politics, and Impeachment: The Impeachment of Roh Moo-hyun from a Comparative Constitutional Perspective. **The American Journal of Comparative Law**, Vol. 53, 2005, p. 419.

da violação deve ser considerada da perspectiva de se proteger a ordem constitucional, significando isso que a questão efetivamente relevante, in caso, seria perquirir "quanto dano relativo a ordem constitucional existente teria sido infligida pela alegada violação legal". Com efeito, a Corte concluiu que o impeachment e o afastamento seriam adequados apenas quando tais atos forem "necessários para reabilitar a ordem constitucional malferida".[41]

Mais precisamente, a Corte Constitucional Sul-Coreana equacionou a "ordem constitucional" como sendo composta por "uma ordem básica livre e democrática", que consistiria no respeito aos direitos humanos fundamentais, na separação dos poderes, na independência judicial, nas instituições parlamentares, no sistema multipartidário e nas instituições eleitorais, tendo a Corte listado dezenas de exemplos de atos que diretamente ameaçavam "uma ordem básica livre e democrática" (como p. ex. a captação de propina, corrupção, fraude, abuso dos poderes presidenciais para atacar a autoridade de outros poderes, a violação dos direitos humanos e a opressão dos cidadãos por meio do uso do poder coercitivo das instituições estatais, o uso do cargo para apoio a campanhas ilegais e manipulação dos resultados eleitorais).[42]

A partir deste ponto de vista, a Corte sustentou que nenhuma das violações cometidas pelo presidente justificavam proporcionalmente sua remoção do cargo, pois o apoio ao Partido Uri não teria equivalido "a um esquema premeditado, ativamente" para o uso da autoridade governamental para minar o processo democrático. Antes, e ao invés disso, teria sido apenas um pronunciamento de apoio que foi incidental a suas respostas a repórteres que indagaram sobre suas predileções políticas durante as eleições.[43]

Do mesmo modo, o desafio a autoridade da comissão eleitoral sobre as acusações que lhe teriam sido feitas não teriam sido sérias o bastante para justificar sua remoção do cargo, pois não equivaleu a uma tentativa de destruição da ordem democrática, e nem arranhava a ideia de estado de direito. E por fim, a Corte entendeu que estaria dentro do escopo dos poderes presidenciais a sugestão de aferição de seu apoio, sem que com isso se buscasse extinguir a oposição, vale dizer, sua conduta não teria sido suficientemente grave para justificar a proporcionalidade da medida.[44]

Quanto as outras acusações (administração temerária e corrupção), pois nem todas elas foram consideradas, a Corte Constitucional compreendeu que elas não se enquadravam na tipicidade constitucional de violação da Constituição, no primeiro caso, e no segundo, que se relacionavam a condutas estranhas ao exercício do cargo, pois supostamente cometidas antes dele assumir a presidência do país, razão pela qual foram sumariamente desconsideradas no julgamento da adequação do impeachment.[45]

Trata-se de uma decisão que seria vista em outros países de maneira estranha, sobretudo nos Estados Unidos da América, em que o *Federalist Paper* n. 65 de Alexander Hamilton obtemperava que a Suprema Corte deveria ficar do lado de fora da tomada de decisão sobre o Impedimento do Presidente da República, em razão de uma decisão como essa ficar a cargo de um reduzido número de pessoas.

O caso do Impedimento do Presidente Sul-Coreano possui uma explicação importante, qual seja, a de que a Constituição daquele país, paradoxalmente influenciada pelos Estados Unidos, explicitamente atribui a Corte Constitucional a jurisdição para que ela decida sobre o processo de impedimento, sendo sua Carta Constitucional diferente da Constituição Americana.[46] O mesmo raciocínio se aplica, ao que nos parece, ao Brasil, pois a simples presença da cláusula da inafastabilidade do controle jurisdicional (art. 5º, XXXV), ausente na

41 LEE, Youngjae. Law, Politics, and Impeachment: The Impeachment of Roh Moo-hyun from a Comparative Constitutional Perspective. **The American Journal of Comparative Law**, Vol. 53, 2005, p. 419.

42 LEE, Youngjae. Law, Politics, and Impeachment: The Impeachment of Roh Moo-hyun from a Comparative Constitutional Perspective. **The American Journal of Comparative Law**, Vol. 53, 2005, p. 419.

43 LEE, Youngjae. Law, Politics, and Impeachment: The Impeachment of Roh Moo-hyun from a Comparative Constitutional Perspective. **The American Journal of Comparative Law**, Vol. 53, 2005, p. 419.

44 LEE, Youngjae. Law, Politics, and Impeachment: The Impeachment of Roh Moo-hyun from a Comparative Constitutional Perspective. **The American Journal of Comparative Law**, Vol. 53, 2005, p. 419.

45 LEE, Youngjae. Law, Politics, and Impeachment: The Impeachment of Roh Moo-hyun from a Comparative Constitutional Perspective. **The American Journal of Comparative Law**, Vol. 53, 2005, p. 419.

46 LEE, Youngjae. Law, Politics, and Impeachment: The Impeachment of Roh Moo-hyun from a Comparative Constitutional Perspective. **The American Journal of Comparative Law**, Vol. 53, 2005, p. 406.

Constituição Americana, permite falar também em uma diferença constitucionalmente estrutural.

Há ainda a presença do mesmo argumento utilizado para legitimar a atuação da Corte Sul-Coreana, no sentido de que ela estava simplesmente arbitrando uma disputa entre um Congresso eleito democraticamente e um Presidente da República igualmente eleito de maneira democrática, muito embora se faça presente o argumento problematizador utilizado pelos acadêmicos dos Estados Unidos para apontar a inadequação da sindicabilidade judicial: o déficit democrático dos Juízes da Corte[47], embora a maneira de indicação dos membros da Corte Constitucional sejam extremamente mais plurais que os da Suprema Corte Americana.

Mas o modelo não é de todo estranho ao mundo Constitucional, bastando recordar que na Alemanha, quando se pretender o impedimento do Presidente, o *Bundestag* ou o *Bundesrat* deverão levar sua moção de impedimento até a Corte Constitucional Alemã[48], sendo similar ao que ocorre na Hungria, em que a palavra final para a remoção do Presidente recai perante a Corte Constitucional, igualmente ao que também ocorre na República Checa e na Croácia.[49] Mencione-se ainda a competência da Corte Constitucional italiana para apreciar as acusações de atentado à Constituição ou de alta traição contra o Presidente, expresso no artigo 135 da Constituição da República Italiana.[50]

Conforme observa Tom Ginsburg, a prática contemporânea nos mostra que geralmente os sistemas constitucionais nascem de atos corajosos impregnados de designes institucionais intencionais, encorpados em um documento político, e tais desenhos envolvem fronteiras, aprendizagem e acomodação, mas também invoca momentos de inovação criativa e experimentalismo institucional.[51] Não é possível discordar da alegação de maneira fácil, parecendo que, ao menos em princípio, se encontra adequada a observação.

Em termos similares, invocando John Hart Ely, John Elster recorda que a questão mais importante sobre os Tribunais se refere a limpeza dos canais da mudança política, que está ligada igualmente a limpeza dos canais da criação constitucional, animada esta última, na origem, por três fatores primordiais: interesse, razão e paixão, vale dizer, um ótimo processo constituinte deve ser guiado pela razão, em respeito ao bem comum a longo prazo, bem como deve eliminar, tanto quanto possível, a influência da paixão e dos interesses pessoais.[52]

Isso significa que qualquer decisão posterior, dentro de determinado sistema Constitucional, deve buscar o prosseguimento de tais premissas, ou seja, afastar a paixão política e os interesses pessoais, com a manutenção da razão que a deveria guiar desde sempre. Some-se a esta equação uma clausula que, como na Constituição da Coréia do Sul (e também da Alemanha, na qual o sistema constitucional daquela nação é inspirado), estabelece que o impedimento presidencial deve ficar a cargo de uma Corte Constitucional, ou uma cláusula como a que está prevista no art. 5º, XXXV da CF/88, a inafastabilidade do controle jurisdicional, que são filtros contra o auto interesse e a paixão reinantes no meio político.

47 LEE, Youngjae. Law, Politics, and Impeachment: The Impeachment of Roh Moo-hyun from a Comparative Constitutional Perspective. **The American Journal of Comparative Law**, Vol. 53, 2005, p. 406.

48 Conforme o artigo 61 da Lei Fundamental (*Grundgesetz*). Cfr. "[Acusação perante o Tribunal Constitucional Federal]. (1) O Parlamento Federal ou o Conselho Federal podem acusar o Presidente Federal perante o Tribunal Constitucional Federal por violação intencional da Lei Fundamental ou de uma outra lei federal. O requerimento de acusação deverá ser proposto, no mínimo, pela quarta parte dos membros do Parlamento Federal ou por um quarto dos votos do Conselho Federal. A aprovação do requerimento de acusação necessita da maioria de dois terços dos membros do Parlamento Federal ou de dois terços dos votos do Conselho Federal. A acusação será formalizada por um delegado do órgão que apresentou a acusação. (2) Se o Tribunal Constitucional Federal constatar que o Presidente Federal violou intencionalmente a Lei Fundamental ou outra lei federal, ele poderá declarar a sua destituição do cargo. Por meio de uma disposição provisória, poderá determinar o impedimento do Presidente Federal para o exercício do seu cargo, depois de formalizada a acusação".

49 Modelos similares são apontados, ainda, na Costa Rica, na Croácia, Albânia, Bolívia, Bulgária, Marrocos, Eslovênia, Taiwan, Ucrânia. Cfr. KADA, Naoko. Comparative Constitutional Impeachment: Conclusions, In Checking Executive Power. Apud: LEE, Youngjae. Law, Politics, and Impeachment: The Impeachment of Roh Moo-hyun from a Comparative Constitutional Perspective. **The American Journal of Comparative Law**, Vol. 53, 2005, p. 406; MADDEX, Robert L. **Constitutions of the World**. 3ª Ed. Washington, D. C.: CQPress, 2008, p. 113; 200 e ss.

50 Conjugação dos artigos 90 (estado de acusação pelo Parlamento) e 135 e 136 (julgamento pela Corte Constitucional) da Carta Constitucional italiana, neste caso chamada de único caso de "justiça política" da Corte Constitucional. Cfr. ONIDA, Valerio. **La Costituzione: La legge fondamentale della Repubblica**. 2ª Ed. Bologna: Il Mulino, 2007, p. 111.

51 GINSBURG, Tom. **Comparative Constitutional Design**. New York: Cambridge University Press, 2012, p. 1.

52 ELSTER, John. Clearing and Strengthening the Channels of Constitution Making. In: GINSBURG, Tom. **Comparative Constitutional Design**. New York: Cambridge University Press, 2012, p. 15 e ss.

Ou seja, o papel do Poder Judiciário, do Supremo Tribunal ou da Corte Constitucional é o de verificar se a Constituição Federal foi cumprida, exercendo a contenção, na dificuldade contramajoritária, vale dizer, não importa o que digam as massas, não importando o peso da opinião pública, ou seja, a única estrela guia deve ser apenas e tão somente a Constituição Federal e os valores, regras e princípios que a animam.

Tome-se como reflexão, ainda, o fato de que a Constituição da Coréia do Sul, originária de 1948 (e emendada largamente em 1987) foi profundamente influenciada pelos Estados Unidos, cujo governo militar na Coréia do Sul era conhecido pela sigla USAMGIK, durante o período em que a Coréia do Sul era administrada pelos Estados Unidos, e a Coréia do Norte, pela então União Soviética.[53]

A grande questão em torno disso tudo reside na conformação daquilo que Roberto Gargarella estudou tão densamente, ao resumir a questão da "dificuldade contramajoritária": como pode ser que em uma sociedade democrática, o ramo de poder com credenciais democráticas mais débeis, o poder judiciário, fique encarregado de dar "a última palavra" institucional, e possa, com efeito, dizer e decidir de maneira final e definitiva as controvérsias públicas mais importantes, sobretudo na América Latina?[54]

Exatamente porque deixar a última palavra a cargo de órgãos majoritários resulta aterrador, em contextos como os da América Latina, em que os poderes políticos muitas vezes parecem isentos de amarras e controle, e em alguns casos, pior do que isso, aparecem dominados por poderosas facções e grupos de interesse fanáticos pelo exercício do poder. No entanto, muito embora o questionamento seja válido também para observar e ressaltar uma tendência ao hiperpresidencialismo com poucos controles, um congresso com legitimidade minguada e alto desgaste da representação política, não se pode esquecer também que a tentativa de submeter o poder judicial ao controle de um dos ramos do governo (legislativo ou executivo) representa uma tentativa de se apoderar das chaves fundamentais de nossa estrutura institucional.[55]

Sobre a experiência constitucional da Coréia do Sul, relativa ao interessante caso da tentativa de impeachment do presidente em 2004, temos que observar que é uma importante experiência Constitucional a ser observada pelo Supremo Tribunal Federal, sobretudo porque no Brasil vigora a cláusula de inafastabilidade do controle jurisdicional, aliado a presença do princípio da proporcionalidade, largamente utilizado pela Suprema Corte.

Neste sentido, se a guarda da Constituição é atribuída ao Supremo Tribunal, e se este deve verificar o cumprimento da Carta Constitucional, inclusive com a aplicação do teste da proporcionalidade, é de rigor reconhecer que cabe a este tribunal, assim como coube a Corte Constitucional da Coréia do Sul, julgar sobre a adequação e a proporcionalidade do impedimento presidencial, diferente de quando a Suprema Corte busca traçar os rumos do modelo político, reformando instituições e sistemas eleitorais. Em todo caso, a Corte deve cuidar de sua legitimidade institucional, exercendo suas funções nos estritos limites constitucionais, e com muita parcimônia.

Ressalve-se o fato de que o Supremo Tribunal Federal não é uma Corte Constitucional, conforme afirmado por Paulo Brossard no MS 20.941/DF, discordando de afirmação feita pelo ministro Moreira Alves, no sentido de que o STF estaria acima dos demais poderes, muito embora existam algumas aproximações estritas e pontuais, como o julgamento sobre a constitucionalidade da lei em tese, e a função de exercer a guarda da Constituição, dizendo de atos concretos se eles respeitaram o devido processo legal, a ampla defesa, o contraditório, e se foram proporcionais.

Giovani Sartori nos fornece uma advertência inquietante, ao realizar profunda reflexão sobre o constitucionalismo, dizendo que quando um problema político é despolitizado – "e o constitucionalismo seria, inescapavelmente, uma solução jurídica para um problema político" - as consequências reais de tornar uma atitude jurídica neutra seriam políticas, ainda que inconscientemente, vale dizer, quando estamos diante de um julgamento, se descobre justamente que aquilo que os juristas "puros" realmente tem feito é, homiziar-se embaixo do escudo de sua indiferença judicial para questões me-

53 MADDEX, Robert L. **Constitutions of the World.** 3ª Ed. Washington, D. C.: CQPress, 2008, p. 400.

54 GARGARELLA, Roberto. **La Justicia frente al Gobierno: sobre el caráter contramayoritario del poder judicial**. Quito: Centro de Estudios y Difusión del Derecho Constitucional, 2011, p. 17.

55 GARGARELLA, Roberto. **La Justicia frente al Gobierno: sobre el caráter contramayoritario del poder judicial**. Quito: Centro de Estudios y Difusión del Derecho Constitucional, 2011, p. 17.

PÁDUA, Thiago Aguiar; GUEDES, Jefferson Carús. Algumas Reflexões sobre as Linhas de Força e as Limitações Constitucionais do Impedimento Presidencial: o caso Sul-Coreano de 2004. Universitas Jus, Brasília, v. 27, n. 3, 2016 p. 17-62

tajurídicas, pavimentando a via para permitir que políticos inescrupulosos realizem um uso discricionário do poder sob a camuflagem de uma boa palavra, razão pela qual a "Política não pode ser retirada da política, nem de forma discursiva".[56]

Com isto se quer observar que, diferentemente do que pode parecer, a solução jurídica para um problema político (noção de constitucionalismo balizada acima, a partir de Giovani Sartori) admite a autonomia do direito, conforme obtemperado por Owen Fiss, pois a finalidade do direito é a justiça (e aqui nós observamos: justiça da legalidade constitucional), e não necessariamente compatível com a democracia[57], e, embora devamos tomar a sério também a advertência de Cass Sunstein, de que uma democracia constitucional não deveria se preocupar com a "alma de seus cidadãos"[58], fato é que deve ser preocupar, e muito, com a relação imagética relativa a dualidade "assassinato"/"impeachment" em termos de iconoclash e das consequências possíveis, sobretudo se há percepção de sinais de rupturas institucionais, tais como aqueles refletidos por Gerardo Pisarello.[59]

3. Considerações Finais

A par desta breve incursão de contraste[60] comparativo[61], observamos que não é de todo estranho o envolvimento de uma Corte Judicial no processo de impedimento de Presidentes da República. Deve-se destacar que a Constituição Americana, que não criou o modelo de impedimento, mas o estabeleceu concretamente no sistema presidencialista, é diferente da maioria das Constituições, como a Constituição Alemã, a Constituição Sul-Coreana e a Constituição Brasileira.

Embora a pretensão deste artigo acadêmico não seja referir explicitamente sobre o caso brasileiro, pode-se concluir que a atuação do Supremo Tribunal Federal nos casos de impedimento se destinam a checar a aplicação da Constituição, vale dizer, se foi respeitado o devido processo legal, a ampla defesa e o contraditório, e a proporcionalidade bem como se a tipicidade do crime de responsabilidade se faz presente. Não há aqui nenhuma intrusão democrática.

Aliás, o papel da Suprema Corte é contramajoritário, e, portanto, pode inclusive ir contra dois tipos de maioria no processo de impedimento: uma – da Câmara, relativamente coesa e representativa; e a outra, - do Senado, com possibilidade de distorções tão dramáticas que Paulo Brossard chamou atenção em difundido texto após o julgamento de Fernando Collor, de modo a deixar patente a necessidade de se repensar o modelo.[62]

56 SARTORI, Giovani. Constitutionalism: A Preliminary Discussion. **The American Political Science Review**, vol. 56, n. 4, 1962, p. 864.

57 FISS, Owen. The Autonomy of Law. **Yale Journal of International Law**, vol. 26, 2001.

58 SUNSTEIN, Cass. Preferencias y Política. **Revista Argentina de Teoria Jurídica**, vol. 9, nov., 2008.

59 Este autor faz a mais lúcida e concatenada abordagem já escrita sobre o poder constituinte. Não basta fazer uma descrição metafórica com mera junção de espelhos quebrados da história, como embarcar em Donoso Cortez, maior influenciador de Carl Schmitt, ao dizer que o poder Constituinte é como o raio que atravessa a nuvem, fere a vítima e desaparece, não podendo ser localizada nos livros e nem formulada por filósofos. Não é uma imagem real, e nem tampouco fidedigna. Pode ser formulada pelo filósofo, e o raio não será necessariamente um fato político importante. Como afirma Pisarello, há a importância de se observar o "poder destituinte-instituinte", cujo gatilho catalizador pode ser uma canção de protesto, como aquelas cantadas em frente ao Parlamento Islandês em 2008, ou a imolação de um cidadão nas ruas da cidade, como no caso de Mohamed Bouazizi na Tunísia em 2010. A ideia de um Poder Constituinte Democrático ocorre como um recurso extremo composto de uma série de circunstâncias concretas, como a existência de uma agressão econômica, política e cultural provocada por uma estrutura de poder determinada, passando por uma perda crescente de legitimidade daqueles líderes da referida estrutura, culminando com "percepção entre os grupos subalternos de que a referida situação se tornou injusta e insuportável, aliado a percepção de que é possível empreender exitosamente algum tipo de ação coletiva para acabar com ela". Cfr. PISARELLO, Gerardo. **Procesos constituyentes: caminhos para la ruptura democrática**. Madrid: Trotta, 2014, p. 171 e ss.

60 Conforme observa Marc Ancel, o direito comparado revela a relatividade do direito nacional existente. Cfr. ANCEL, Marc. **Utilidade e Métodos do Direito Comparado**. Porto Alegre: Sérgio Antonio Fabris, 1980, p.141.

61 Neste particular, ressalte-se as reflexões de Arnaldo Godoy, para quem o "direito constitucional comparado problematiza a tese de que a sociedade se vê refletida no direito", vale dizer, "as constituições escritas que vicejam pelo mundo reproduzem ideário único, de matriz racional, iluminista e oitocentista, e que podem divergir dos padrões culturais que as envolvem, em alguns casos". GODOY, Arnaldo Sampaio de Moraes. **Direito Constitucional Comparado**. Porto Alegre: Sérgio Antonio Fabris, 2006, p. 13.

62 Sobre as distorções possíveis, sobretudo no Senado, confira-se as observações de Paulo Brossard: "O absurdo salta aos olhos. Em uma Câmara de 503 deputados, 441 votaram pela instauração do processo, mais de quatro quintos, por conseguinte. Embora esse voto não tenha caráter condenatório, não deixa de possuir formidável carga nesse sentido. Não se autoriza a instauração de um processo, que leva ao afastamento do chefe do Estado, senão em face de situação de fato extremamente grave. Pois bem, instaurado o processo, a condenação só se daria se 54 senadores, em 81, votassem por ela, o que importa em dizer que o voto de 28 senadores pode prevalecer e tornar inconsequente o voto de 441 deputados e de 53 Senadores. Mas pode ocorrer ainda que os 28 senadores dissidentes sejam representantes

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De toda sorte, observa-se nesta parte final e conclusiva que existem boas razões para que a Corte Suprema atue com parcimônia, mas é inegável que ela possui a atribuições Constitucionais de verificar a presença da legalidade constitucional no caso concreto, que de certa forma corresponde a atribuir a ela a última palavra para verificar – ou checar – se a primeira palavra do Constituinte está sendo cumprida, nesta ambiência de expectativas Constitucionais, pois processo é poder[63], e também a estrutura óssea da sociedade democrática[64], e não se admite que qualquer poder seja utilizado de modo a desbordar das limitações da Constituição.

Válida, portanto, a reflexão do tema à luz da experiência Sul-Coreana, no dramático julgamento da Corte Constitucional deste país acerca do impedimento do presidente. Se o impedimento é uma espécie de "assassinato", que pode convulsionar o país e colocar em risco o próprio processo democrático, mister refletir de maneira detida sobre a engenhosa solução construída pela Corte Constitucional da Coréia do Sul, cuja identidade de ação pode ser vislumbrada em várias outras Cortes Constitucionais pelo mundo, como Alemanha, Itália, Croácia, Hungria, Ucrânia, Costa Rica, entre outros.

Por tais motivos, soluções constitucionalmente adequadas são aquelas que permitem a uma Suprema Corte o cumprimento de seu papel institucional, de modo a verificar se a decisão política foi uma decisão jurídica, nos estritos marcos do Constitucionalismo.

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63 WHITEHOUSE, Sheldon. Speech: Opening Address. **University of Pennsylvania Law Review**, vol. 162, n. 7, jun./2014, p. 1518.

64 FORTAS, Abe. **Concerning Dissent and Civil Disobedience**. New York: The New American Library, 1968, p. 60.

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Anexo: decisão da Corte Constitucional da Coréia do Sul

Caso do Impeachment do Presidente Roh Moo-hyun - 2004Hun-Na1(Mar 14, 2004)

[16-1 KCCR 609, 2004Hun-Na1, May 14, 2004]

Contents of the Decision

1. The subject matter to be adjudicated by the Cons-

titutional Court in the impeachment adjudication proceeding.

2. Whether or not the due process principle is directly applicable in the impeachment proceeding at the National Assembly. (negative)

3. The nature of the impeachment proceeding set forth in Article 65 of the Constitution.

4. The meaning of the grounds for impeachment set forth in Article 65 of the Constitution.

5. The constitutional ground for the obligation of political neutrality by public officials concerning elections.

6. Whether or not the President is a "public official" within the meaning of Article 9 of the Act on the Election of Public Officials and the Prevention of Election Malpractices (hereinafter the "Public Officials Election Act"). (affirmative)

7. Whether or not the statements of the President expressing support for a particular political party at press conferences violate the obligation of political neutrality by public officials. (affirmative)

8. Whether or not the statements of the President expressing support for a particular political party at press conferences are in violation of the provision that prohibits electoral campaigns by public officials set forth in Article 60 of the Public Officials Election Act. (negative)

9. The obligation of the President to abide by and preserve the Constitution.

10. Whether or not the act taken by the President toward the National Election Commission's decision finding the President's breach of the election law violates the constitution. (affirmative)

11.Whether or not the President's act proposing a national referendum on whether he should remain in office violates the Constitution. (affirmative)

12.Whether or not the incidents of corruption involving the President's close acquaintances and associates constitute a violation of law by the President. (negative)

13.Whether or not the political chaos and economic disruption caused by the unfaithful performance of the official duties and reckless management of the state affairs can be a subject matter for an impeachment adjudication at the Constitutional Court. (negative)

14.Whether or not the "valid ground for the petition for impeachment adjudication" set forth in Section 1, Article 53 of the Constitutional Court Act is limited to a grave violation of law. (affirmative)

15.The standard of review to be applied in determining the "gravity of the violation of law".

16.Whether or not the President should be removed from office where, as in the instant case, there is no finding of the President's active intent against the constitutional order in his specific acts of violations of law. (negative)

17.Whether or not the separate opinions may be disclosed at the impeachment adjudication proceeding. (negative)

Summary of the Decision

1. The Constitutional Court, as a judicial institution, is restrained in principle to the grounds for impeachment stated in the National Assembly's impeachment resolution. Therefore, no other grounds for impeachment than those stated in the impeachment resolution may constitute the subject matter to be adjudicated by the Constitutional Court at the impeachment adjudication proceeding. However, with respect to the 'determination on legal provisions,' the violation of which is alleged in the impeachment resolution, the Constitutional Court in principle is not bound thereby. Therefore, the Constitutional Court may determine the facts that led to the impeachment based on other relevant legal provisions as well as the legal provisions which the petitioner alleges have been violated. Also, the Constitutional Court is not bound by the structure of the grounds for impeachment as categorized by the National Assembly in its impeachment resolution in determining the grounds for impeachment. Therefore, the question of in which relations the grounds for impeachment are legally examined is absolutely for the Constitutional Court to determine.

2. The principle of due process is a legal principle that, before a decision is made by the governmental power, entitles a citizen who might be prejudiced by such a decision to an opportunity to express his or her opinion and thereby influence the process of the proceedings and the result thereof. In this case, the impeachment proceeding at the National Assembly concerns two constitutional institutions of the National Assembly and the President, and the National Assembly's

resolution to impeach the President merely suspends the exercise of the power and authorities of the President as a state institution and does not impede upon the fundamental rights of the President as a private individual. Therefore, the due process principle that has been formed as a legal principle applicable to the exercise of governmental power by a state institution in its relationship with its citizens shall not be directly applicable in the impeachment proceeding that is designed to protect the Constitution against a state institution. Furthermore, there is no express provision of law concerning the impeachment proceeding that requires an opportunity to be heard for the respondent. Therefore, the argument that the impeachment proceeding at the National Assembly was in violation of the due process principle is without merit.

3. Article 65 of the Constitution provides for the possibility of impeachment of high-ranking public officials of the executive branch and of the judiciary for violation of the Constitution or statutes. It thereby functions as a warning to such public officials not to violate the Constitution and thus also prevents such violations. Further, where certain state institutions are delegated with state authority by the citizenry but abuse such authority to violate the Constitution or statutes, the impeachment process functions to deprive such state institutions of their authority. That is, reinforcing the normative power of the Constitution by holding certain public officials legally responsible for their violation of the Constitution in exercising their official duties is the purpose and the function of the impeachment process.

4. An analysis of the specific grounds for impeachment set forth in Article 65 of the Constitution reveals that the 'official duties' as provided in 'exercising the official duties' mean the duties that are inherent in particular governmental offices as provided by law and also other duties related thereto as commonly understood. Therefore, acts in exercising official duties mean any and all acts or activities necessary for or concomitant with the nature of a specific public office under the relevant statutes, orders, regulations, or administrative customs and practices. As the Constitution provides the grounds for impeachment as a "violation of the Constitution or statutes," the 'Constitution' includes the unwritten Constitution formed and established by the precedents of the Constitutional Court as well as the express constitutional provisions; the 'statutes' include the statutes in their formal meaning, international treaties that are provided with the same force as statutes, and the international law that is generally approved.

5.The obligation to maintain political neutrality at the election owed by public officials is a constitutional request drawn from the status of public officials as 'civil servants for the entire citizenry' as set forth in Article 7(1) of the Constitution; the principle of free election set forth in Articles 41(1) and Article 67(1) of the Constitution; and the equal opportunity among the political parties guaranteed by Article 116(1) of the Constitution. Article 9 of the Public Officials Election Act is a legal provision that specifies and realizes the above constitutional request.

6. 'Public officials' within the meaning of Article 9 of the Public Officials Election Act mean any and all public officials who should be obligated to maintain neutrality concerning elections, that is, more specifically, any and all public officials who are in a position to threaten the 'principle of free election' and 'equal opportunity among the political parties at the election.' Considering that practically all public officials are in a position to exercise undue influence upon the election in the course of exercising official duties, the public officials here include, in principle, all public officials of the national and local governments, that is, all career public officials as narrowly defined, and, further include public officials at offices of political nature who serve the state through active political activities. Here, the exception is that members of the National Assembly and the members of the local legislatures are excluded from 'public officials' within the meaning of Article 9 of the Public Officials Election Act, as no political neutrality concerning elections can be requested from such members of the legislatures due to their status as the representatives of the political parties and the directly interested parties in the political campaign.

Therefore, political neutrality at the election is a basic obligation owed by all public officials of the executive branch and of the judiciary. Furthermore, since the President bears the obligation to over- see and manage a fair electoral process as the head of the executive branch, the President is, as a matter of course, a 'public official' within the meaning of Article 9 of the Public Officials Election Act.

7. If the President makes a one-sided statement in support of a particular political party and influences the process through which the public opinion is formed,

the President thereby interferes with and distorts the process of the independent formation of the public's opinion based on a just evaluation of the political parties and the candidates. This, at the same time, diminishes by half the meaning of the political activities continuously performed by the political parties and the candidates in the past several years in order to obtain the trust of the public, and thereby gravely depreciates the principle of parliamentary democracy. The relevant part of the President's statements at issue in this regard repeatedly and actively expressed his support for a particular political party in the course of performing the President's official duties and further directly appealed to the public for the support of that particular political party.

Therefore, the president's statements toward the entire public at press conferences in support of a particular political party made by taking advantage of the political significance and influence of the office of the President, when political neutrality of public officials is required more than ever before as general elections approach, were in violation of the neutrality obligation concerning elections as acts unjustly influencing the elections and thereby affecting the outcome of the elections by taking advantage of the status of the President.

8. Article 58(1) of the Public Officials Election Act makes it a prerequisite for the electoral campaign 'whether or not a candidate can be specified,' by defining the concept of 'electoral campaign' adopting the standard of 'being elected.' When the statements at issue in this case were made on February 18, 2004 and February 24, 2004, the party-endorsed candidates had not yet been determined. Therefore, the statements in support of a particular political party when the party-endorsed candidates were not yet specified did not constitute an electoral campaign.

Furthermore, considering that the president's statements at issue herein were neither actively made nor premeditated as such statements were made in the form of the President's response to questions posed by the reporters at press conferences, neither was there an active or premeditated element to be found in the President's statements, nor, as a result, a purposeful intention sufficient to find the nature of a political campaign. Therefore, the respondent's statements cannot be deemed as active and intended electoral campaign activities committed with an intention to have a particular candidate or certain identifiable candidates win or lose the election.

9. The 'obligation to abide by and protect the Constitution' of the President set forth in Articles 66(2) and 69 of the Constitution is the constitutional manifestation that specifies the constitutional principle of government by the rule of law in relation to the President's performance of official duties. While the 'obligation to abide by and protect the Constitution' is a norm derived from the principle of government by the rule of law, the Constitution repeatedly emphasizes such obligation of the President in Articles 66(2) and 69, considering the significance of the status of the President as the head of the state and the chief of the executive branch. Under the spirit of the Constitution as such, the President is the 'symbolic existence personifying the rule of law and the observance of law' toward the entire public.

10. The President's acts denigrating the current law as the 'vestige of the era of the government-power--interfered elections' and publicly questioning the constitutionality and the legitimacy of the statute from his status as the President do not conform to the obligation to abide by and protect the Constitution and statutes. The President, of course, may express his or her own position and belief regarding the direction for revising the current statute as a political figure. However, it is of great importance that in which circumstances and in which relations such discussions on possible statutory revisions take place. The President's statements denigrating the current election statutes made as a response to and in the context of the National Election Commission's warning for the president's violation of such election statutes cannot be deemed as an attitude showing respect for the law.

The statements as such made by the President, who should serve as a good example for all public officials, might have significantly negative influence on the realization of a government by the rule of law, by gravely affecting the other public officials obligated to respect and abide by the law and, further, by lowering the public's awareness to abide by the law. To conclude, the act of the President questioning the legitimacy and the normative power of the current statute in front of the public is against the principle of government by the rule of law and is in violation of the obligation to protect the Constitution.

11. The national referendum is a means to realize

direct democracy, and its object or subject matter is the 'decision on issues,' that is, specific state policies or legislative bills. Therefore, by the own nature of the national referendum, the 'confidence the public has in its representative' cannot be a subject matter for a national referendum and the decision of and the confidence in the representative under our Constitution may be performed and manifested solely through elections.

The President's suggestion to hold a national referendum on whether he should remain in office is an unconstitutional exercise of the President's authority to institute a national referendum delegated by Article 72 of the Constitution, and thus it is in violation of the constitutional obligation not to abuse the mechanism of the national referendum as a political tool to fortify his own political position. Although the President merely suggested an unconstitutional national referendum on the people's confidence and did not yet actually institute such referendum, the suggestion toward the public of a national confidence referendum, which is not permitted under the Constitution, is itself in violation of Article 72 of the Constitution and not in conformity with the president's obligation to realize and protect the Constitution.

12. As Article 65(1) of the Constitution provides 'as the President, ... exercises his or her official duties' and thereby limits the grounds for impeachment to the exercise of the 'official duties,' the above provision, as construed, mandates that only those acts of violation of law performed by the President while holding the office of the President may constitute the grounds for impeachment. The alleged grounds for impeachment concerning the unlawful political funds that involved the Sun & Moon corporation and the respondent's presidential election camp are based on facts that arose before the respondent was elected and sworn in on February 25, 2003 as the President. Therefore, such alleged grounds are clearly irrelevant to the respondent's exercise of his official duties as President and do not constitute grounds for impeachment. With respect to the misconducts of the President's close associates and aides that took place subsequent to the respondent's assumption of the office of President, none of the evidence submitted to the bench throughout the entire proceedings in this case supports any finding that the respondent instructed or abetted the acts of Choi Do-sul and others including receiving unlawful funds or was otherwise illegally involved in such acts. Therefore, the alleged grounds for impeachment based on the above facts are without merit.

13. Article 69 of the Constitution provides for the President's 'obligation to faithfully perform the official duties,' as it provides for the obligation of the President to take the oath of office. Although the 'obligation to faithfully perform the official duties' of the President is a constitutional obligation, this obligation, by its own nature, is, unlike the 'obligation to protect the Constitution,' not the one the performance of which can be normatively enforced. As such, as a matter of principle, this obligation cannot be a subject matter for a judicial adjudication.

As Article 65(1) of the Constitution limits the ground for impeachment to the 'violation of the Constitution or statutes' and the impeachment adjudication process at the Constitutional Court is solely to determine the existence or the nonexistence of a ground for impeachment from a legal standpoint, the ground for impeachment alleged by the petitioner in this case concerning the respondent's faithfulness of the performance of the official duties such as the political incapability or the mistake in policy decisions, cannot in and by itself constitute a ground for impeachment and therefore it is not a subject matter for an impeachment adjudication.

14. Article 53(1) of the Constitutional Court Act provides that, "when there is a valid ground for the petition for impeachment adjudication, the Constitutional Court shall issue a decision removing the respondent from office." The above provision may be interpreted literally to mean that the Constitutional Court shall automatically make a decision of removal from office in all cases where there is any valid ground for impeachment as set forth in Article 65(1) of the Constitution. However, if every and any minor violation of law committed in the course of performing official duties were to mandate removal from office, this would offend the request that punishment under the Constitution proportionally correspond to the obligation owed by the respondent, that is, the principle of proportionality. Therefore, the 'valid ground for the petition for impeachment adjudication' provided in Article 53(1) of the Constitutional Court Act does not mean any and all incidence of violation of law, but the incidence of a 'grave' violation of law sufficient to justify removal of a public official from office.

15. The question of whether there was a 'grave violation of law' or whether the 'removal is justifiable' can-

not be conceived by itself. Therefore, the existence of a valid ground for the petition for impeachment adjudication, that is, the removal from office, should be determined by balancing the 'degree of the negative impact on or the harm to the constitutional order caused by the violation of law' and the 'effect to be caused by the removal of the respondent from office.'

On the other hand, a decision to remove the President from office would deprive the 'democratic legitimacy' delegated to the President by the national constituents through an election during the term of the office and may cause political chaos arising from the disruption of the opinions among the people, that is, the disruption and the antagonism between those who support the President and those who do not, let alone a national loss and an interruption in state affairs from the discontinuity of the performance of presidential duties. Therefore, in light of the gravity of the effect to be caused by the removal of the President, the ground to justify a decision of removal should also possess corresponding gravity.

Although it is very difficult to provide in general terms which should constitute a 'grave violation of law sufficient to justify the removal of the President from office,' a decision to remove the President from office shall be justified in such limited circumstances as where the maintenance of the presidential office can no longer be permitted from the standpoint of the protection of the Constitution, or where the President has lost the qualifications to administrate state affairs by betraying the trust of the people.

16. Considering the impact on the constitutional order caused by the violations of laws by the President as recognized in this case in its entirety, the specific acts of the President in violation of law cannot be assessed as a threat to the basic order of a free democracy as there is no finding of an active intent to stand against the constitutional order therein.

The acts of the President violating the laws were not grave in terms of the protection of the Constitution to the extent that it would require the protection of the Constitution and the restoration of the impaired constitutional order by a decision to remove the President from office. Also, such acts of the President cannot be deemed as acts that betrayed the trust of the people to the extent that they would require the deprivation of the trust delegated to the President by the people prior to the completion of the presidential term. Therefore, there is no valid ground sufficient to justify a decision to remove the President from office.

17. Article 34(1) of the Constitutional Court Act provides that the deliberation of the Constitutional Court shall not be public. Therefore, the separate opinions of the individual Justices may be noted in the decision only when a special provision permits an exception to such secrecy of deliberation proceedings. With respect to the impeachment adjudication, no provision for the exception to the secrecy of deliberation exists. Therefore, in this impeachment adjudication, the separate opinions of the individual Justices or the numbers thereof may not be noted in the decision.

However, it should be noted that concerning the above position, there was also a position that the 'separate opinions may be noted in the decision as Article 36(3) of the Act should be interpreted to leave the question of whether to note individual opinions in an impeachment adjudication to the discretion of the participating justices.'

Parties

Petitioner

The Chair of the Legislation and Judiciary Committee of the National Assembly of the Republic of Korea, on behalf of the National Assembly of the Republic of Korea

Counsel of Record: Kang Jae-sup and 66 others

Respondent

Roh Moo-hyun, the President of the Republic of Korea

Counsel of Record: Ryu Hyun-seok and 9 others

Holding

The petition for the impeachment adjudication is rejected.

Reasoning

1. Overview of the Case and the Subject Matter of Review

A. Overview of the Case

(1) Resolution of the impeachment and the petition for impeachment adjudication

The National Assembly of the Republic of Korea proposed the 'motion for the impeachment of the President (Roh Moo-hyun)' presented by Assembly members Yoo Yong-tae and Hong Sa-deok and 157 others before the second plenary session at the 246th session (extraordinary) on March 12, 2004, and passed the motion by 193 concurrent votes out of the entire Assembly membership of 271. The Chair of the National Assembly Legislation and Judiciary Committee, Kim Ki-chun, acting ex officio as the petitioner, requested an impeachment adjudication against the respondent by submitting the attested original copy of the impeachment resolution to the Constitutional Court on the same date pursuant to Article 49(2) of the Constitutional Court Act.

The full text of the National Assembly's impeachment resolution against the respondent is attached hereto as Appendix 3.

(2)Summary of the grounds for the impeachment resolution of the National Assembly

(A) Corrupting the national law and order

1) Act of supporting a particular political party

a) The respondent violated Articles 9(1), 60(1), 85(1), 86(1) and 255(1) of the Public Officials Election and Election Malpractice Prevention Act (hereinafter referred to as the 'Public Officials Election Act'), in (i) stating, at a joint press conference with six news media organizations in the Seoul-Incheon region on February 18, 2004, that "I simply cannot utter what will follow should the quorum to resist the constitutional revision be destroyed; and (ii) stating, as an invited guest at a press conference with the Korean Network Reporters Club on February 24, that "the public will make it clear whether I will be backed to do it well for the four years to come or I cannot stand it and will be forced to step down," "I expect that the public will overwhelmingly support the Uri Party at the general election," and "I would like to do anything that is legal if it may lead to votes for the Uri Party."

b) The respondent violated Articles 9(1), 59, and 87 of the Public Officials Election Act and Article 69 of the Constitution, in (i) stating, on December 19, 2003, when he participated in an event entitled "Remember 1219" hosted by the so-called "Roh-Sa-Mo," that "The citizens revolution is still going on. Let's step forward once again"; and (ii) stating, at a meeting with the journalists in the Gangwon-Do region on February 5, 2004, that "the 'Citizen Participation 0415(Kook-Cham 0415)' members' participation in politics should be permitted and encouraged legally and politically."

c) Pursuant to the report in Joong-Ang Ilbo on February 27, 2004, the document entitled 'the strategic planning of the Uri Party for the 17th General Election' states that it is necessary to 'establish the control tower where the party, the administration, and Cheong Wa Dae (the Office of the President) together participate' in order to invite the candidates for the general election, and lists 'the partyCheong Wa Dae-the administration' in the order of importance in the administration of the state affairs for the general election. This confirms the organizational intervention into the election by Cheong Wa Dae, and the command of the strategy of a particular political party for the general election by the respondent was in violation of Articles 9(1) and 86(1)(ii) of the Public Officials Election Act.

d) The respondent violated Article 9(1) of the Public Officials Election Act and Articles 8(3) and 11(1) of the Constitution, in (i) stating, at a beginning-of-the--year press conference on January 14, 2004, that "there was a split because there were those who supported reform and those who did not support reform fearing it, and I would like to go together with the Uri Party as those who supported me at the presidential election are running the Uri Party"; and (ii) stating, at a gathering with the close associates on December 24, 2003, that "if you vote for the New Millennium Democratic Party, you are helping the Grand National Party."

e) The respondent violated Article 237(1)(iii) of the Public Officials Election Act and Articles 10, 19 and 24 of the Constitution, in inducing the support for a particular political party by threatening the public and in repeatedly making remarks affecting the public's mind concerning the general election.

2) Act in contempt of the constitutional institutions

a) The respondent violated Articles 66(2), 69 and 78 of the Constitution and Article 7(1) of the National Intelligence Service Act, in ignoring the impropriety recommendation by the National Assembly Confirmation Hearing Committee on April 25, 2003, for Ko Young--gu, as the head of the National Intelligence Service.

b) The respondent violated Articles 66(2) and 69

of the Constitution, Article 63 of the National Public Official Act, and Article 311 of the Criminal Code, in describing the then incumbent members of the National Assembly as 'weeds to be mowed' in his open letter to the public via the Internet on May 8, 2003.

c) The respondent violated Articles 63(1), 66(2) and 69 of the Constitution, in taking the position that seemed to refuse the National Assembly resolution of September 3, 2003 that proposed the removal of Kim Doo-kwan from the office of the Minister of Government Administration and Home Affairs, by postponing the acceptance of such resolution.

d) The respondent violated Articles 40, 66(2), and 69 of the Constitution, in (i) expressing regrettableness on March 4, 2004 towards the National Election Commission's decision requesting the President to observe the neutrality obligation concerning elections, through the Senior Secretary to the President for Public Information; (ii) denigrating the current election laws, on the same date, as the 'vestige of the era of the government-power-interfered-elections'; and, (iii) on March 8, devaluating his violation of Article 9 of the Public Officials Election Act as 'miscellaneous' and 'minor and equivocal.'

e) The respondent violated Articles 65(1), 66(2) and 69 of the Constitution, in stating on March 8, 2004 that the National Assembly's moving forward on the impeachment proposal was an 'unjust oppression.'

f) The respondent violated Articles 66(2), 69 and 72 of the Constitution, in stating at a press conference on October 10, 2003 that, with respect to the suspicion as to Choi Do-sul's reception of the secret fund from the SK Group, "when the investigation closes, I will ask the public the confidence in the President concerning the public distrust accumulated during the past including this matter"; and stating at the policy speech on the state affairs at the National Assembly on October 13 that "the vote of confidence will be feasible even under the current law upon reaching a political agreement although there are some legal arguments upon it," "although a way to associate the vote of confidence with certain policies is under discussion, it would rather not be done that way and none of the conditions will be attached," and "if I win the vote of confidence, I plan to reorganize the cabinet and Cheong Wa Dae within this year and to carry out reform to state affairs."

(B) Power-engendered corruption

1) Act of receiving illegal political funds concerning the Sun & Moon Group

a) In June 2002, the respondent had Ahn Hee-jung request the National Tax Service to reduce the taxes for the Sun & Moon Group (CEO, Moon Byung-wook), whereby the taxes for the Sun & Moon Group was reduced to 2.3 billion Korean Won from 17.1 billion Korean Won. This was in violation of Article 129(2) of the Criminal Code and Article 3 of the Enhanced Punishments for the Specified Crimes Act.

b) The respondent had a breakfast meeting with Moon Byung-wook on November9, 2002 at Riz Carlton in Seoul, for which Lee Gwang-jae acted as an agent. Immediately after the respondent left the breakfast meeting, Lee Gwang-jae received 100 million Korean Won from Moon Byung-wook. This was in violation of Article 30 of the Political Fund Act (hereinafter referred to as the 'Fund Act') and Article 32 of the Criminal Code.

c) The respondent violated Article 129 of the Criminal Code, Article 61 of the State Public Officials Act, and Article 30 of the Fund Act, in receiving two packages of money (presumed to be approximately 100 million Korean Won) from Moon Byung-wook at Kimhae Tourists Hotel on July 7, 2002 and forwarding it to his accompanying secretary Yeo Taek-soo.

2) Receiving illegal political fund concerning the presidential election camp

In Roh Moo-hyun's presidential election camp, Chung Dae-chul, the chief of the Joint Election Strategy Committee, received 900 million Korean Won, Lee Sang-soo, the General Affairs Director, received 700 million Korean Won, and Lee Jae-jung, the Campaign Headquarter Director, received 1 billion Korean Won, of illegal political fund, all of which was forwarded to Roh Moo-hyun's presidential election camp. The respondent's involvement in the above transactions was in violation of Article 30 of the Fund Act.

3) Involvement in the corruption of close associates

a) Corruption concerning Choi Do-sul

Choi Do-sul (i) embezzled 250 million Korean Won and delivered the funds to Sun Bong-sul, the CEO of the

Jang-Soo-Cheon company, in May 2002, which were the remaining funds in the account belonging to the New Millennium Democratic Party Election Committee Busan Branch as the balance from the local elections, in order to pay the obligation owed by the respondent concerning the Jang-Soo-Cheon company; (ii) collected illegal funds in the amount of 500 million Korean Won and delivered such funds to Sun Bong-sul for the period of December 2002 to February 6, 2003, in order to pay the obligation owed to Jang-Soo-cheon; (iii) received illegal funds in the amount of 100 million Korean Won through an account under an assumed name for the period of March to April of 2002, in order to create funds for the presidential candidacy nomination of the respondent; (iv) received illegal funds in the amount of 296.5 million Korean Won from the Nexen Tire company and others after the presidential election; (v) received 47 million Korean Won from Samsung and others during his office as the General Affairs Secretary for the President; (vi) received negotiable certificates of deposits from the SK Group in the amount of approximately 1.1 billion Korean Won immediately after the presidential election. The above acts of Choi Do--sul were impossible without the respondent's direction or tacit permission. Therefore, such acts of the respondent were in violation of Article 61(1) of the State Public Officials Act, Article 30 of the Fund Act, Article 3 of the Act of Regulation and Punishment for the Concealment of Criminally Gained Profit, and Articles 31, 32, 129 and 356 of the Criminal Code.

b) Corruption concerning Ahn Hee-jung

(i) Between August 29, 2002 and February 2003, Kang Geum-won provided 1.9 billion Korean Won of illegal funds by way of a disguised sale and purchase of real estate owned by Lee Gi-myung; (ii) Ahn Hee-jung collected 790 million Korean Won of illegal funds from September through December of 2002 and delivered such funds to Sun Bong-sul and others; and (iii) Ahn Hee-jung received 50 million Korean Won of illegal funds at the time of the presidential candidacy nomination process, 3 billion Korean Won of illegal funds from Samsung at the time of the presidential election, and 1 billion Korean Won of illegal funds between March and August of 2003. The respondent violated Article 2 of the Enhanced Punishments for the Specified Crimes Act, Article 61(1) of the State Public Officials Act, Article 30 of the Fund Act, and Articles 31 and 32 of the Criminal Code, as the respondent directed and abetted the above acts.

c) Corruption concerning Yeo Taek-soo

Yeo Taek-soo received 300 million Korean Won of illegal funds from the Lotte Group and provided 200 million Korean Won out of such funds for the formation of the Uri Party during his office as an administrative officer at Cheong Wa Dae. The respondent violated Article 61(1) of the State Public Officials Act, Article 30 of the Funds Act, and Articles 31, 32 and 129 of the Criminal Code, as the respondent was involved in such acts.

d) Corruption concerning Yang Gil-seung

Yang Gil-seung, who was the Chief of Personal Secretary Office for the President, was arrested in June of 2003 for allegedly having requested to suspend the investigation in return for a lavish entertainment at the expense of Lee Won-ho, who was then under investigation for an alleged tax evasion.

4) Public remarks as to the retirement from politics

The respondent publically made remarks at the party representative meeting at Cheong Wa Dae on December 14, 2003 that the respondent would retire from politics should the amount of illegal political funds on the part of the respondent exceed one-tenth of that of the Grand National Party. The respondent, however, ignored such public promise of political retirement although the result of the public prosecutors office's investigation indicates that the amount reached one seventh as of March 8, 2004. The respondent thereby violated Article 69 of the Constitution, Article 63 of the State Public Officials Act, and Article 30 of the Fund Act.

(C) Disruption of the National Administration

The respondent violated Articles 10 and 69 of the Constitution in disrupting the public and drowning the economy into a rupture, notwithstanding his constitutionally mandated obligation as the head of the state and the ultimately responsible party of the national administration to sincerely endeavor to protect the public's right to pursue happiness and to increase the public welfare by uniting the public and consolidating the whole capacity for the nation's development and economic growth, by failing to maintain integrity in the policy goals between growth and distribution, by increasing uncertainty at the industry from oscillating without clear policy directions regarding the right-obligation relationship of the labor and the management, by exacerbating econo-

mic instability from causing confusion and theoretical enmity among the policy administrators, by having unfaithfully performed his office in, for example, pouring all his authority and effort in for a particular political party's victory at the general election, and by irresponsibly and recklessly administering the national affairs in, for example, making a remark that "the presidency is too damn much trouble to do," proposing a confidence vote, and declaring his retirement from politics.

B. Subject Matter of Review

(1) The subject matters of review in the instant case are whether the President violated the constitution or statutes in performing his duties and whether the President should be removed from office by the issuance of the Constitutional Court's order as such.

(2) The Constitutional Court, as a judicial institution, is restrained in principle to the grounds for impeachment stated in the National Assembly's impeachment resolution. Therefore, no other grounds for impeachment except those stated in the impeachment resolution constitute the subject matter to be adjudicated by the Constitutional Court at the impeachment adjudication proceeding.

However, with respect to the 'determination on legal provisions,' the violation of which is alleged in the impeachment resolution, the Constitutional Court in principle is not bound thereby. Therefore, the Constitutional Court may determine the facts that led to the impeachment based on other relevant legal provisions as well as the legal provisions which the petitioner alleges have been violated. Also, the Constitutional Court is not bound by the structure of the grounds for impeachment as categorized by the National Assembly in its impeachment resolution in determining the grounds for impeachment. Therefore, the question of in which relations the grounds for impeachment are legally examined is absolutely to be determined by the Constitutional Court.

2. Summary of the Impeaching Petitioner's Argument and the Respondent's Answer

A. Summary of the Argument of the Impeaching Petitioner

(1) Not only an act of a public official in violation of the provisions of the Constitution or statutes in the performance of his or her official duties, but also immorality concerning the performance of the office or the political incapability and the error in political decisionmaking, constitutes the grounds for impeachment. The grounds for impeachment are "all" acts in violation of the Constitution and statutes in the performance of his or her official duties and are not limited to only "grave" violations. Even if it is necessary to limit the grounds for impeachment to an 'act of grave violation' in order to prevent abuse of the impeachment system, it is manifest that a violation of the constitutionally mandated obligation or an unfaithful performance of the official duties by the President, unlike other acts of violation, constitutes a grave violation of the Constitution or statutes.

Also, an act prior to inauguration as President may constitute a ground for impeachment.

(2)The authority to determine whether an act of the President in violation of the Constitution or statutes in the performance of his or her official duties is of such gravity to justify the removal from the office lies in the National Assembly directly constituted by the national constituents. The scope of the subject matter in the impeachment adjudication proceeding at the Constitutional Court is limited to the question of the constitutionality and legality of the impeachment procedures and to the question of whether or not the specific violations that allegedly constitute the grounds for impeachment in fact exist.

(3) The respondent, both prior to and following the inauguration as President, continuously and repeatedly made remarks that cast a doubt on his qualification as President and his will to preserve the basic order of free democracy and instigated the disintegration of the national opinions. Also, the respondent impeded the political neutrality and independence of the public prosecutors' office by intervening into or pressuring the investigation process. The respondent continuously performed an illegal election campaign for a particular political party, upon which the constitutional institution of the National Election Commission determined, as unprecedented in the constitutional history for an incumbent president, that the respondent was in violation of the Public Officials Election Act, and the decision and the accompanying warning were announced to the respondent on March 3, 2004. Notwithstanding, ignoring such warning, the respondent has taken an anti-constitutional position directly denying the rule of law by declaring that he would also publicly support a par-

ticular political party in the future irrespective of the election law.

Also, the respondent violated various statutes such as Article 30 of the Political Funds Act (punishing the act of receiving illegal political funds), Articles 123 (abuse of office) and 129 (bribery) of the Criminal Code, in getting directly and indirectly involved with numerous incidents of receiving illegal funds and embezzlement by his close associates prior to and following his winning the presidential election. The respondent violated the Constitution and statutes such as Article 69 of the Constitution (obligation to abide by the Constitution), in suggesting, concerning certain corruption matters involving his close associates, a national referendum whether he should remain in office, which is not permitted under the Constitution, and, concerning illegal funds for the presidential election, in publicly declaring that he would retire from politics had such illegal funds been in excess of certain amount and then ignoring such promise.

Furthermore, although the respondent, as the president of a nation, should endeavor to unify the nation, to develop economy, and to promote public welfare, the respondent, abandoning such constitutionally mandated obligations, disintegrated the national opinions by making statements that instigated antagonism and jealousy among various classes in our society, exacerbated economic instability by uncertain policy goals between 'growth and distribution' and confusion among the policy administrators, and led the national economy and the people's livelihood into distress by causing economic stagnation and large-scale unemployment among the younger generation thus returning to the public agony and misery harsher than that during the IMF foreign-currency crisis, thereby violated Articles 10 (the obligation to protect the public's right to pursue happiness) and 69 (the obligation to faithfully perform the office in order to promote the public welfare) of the Constitution.

The National Assembly, as the above can no longer be tolerated, unavoidably, in order for the happiness of the public and the future of the nation, reached the resolution to impeach the President, which is the sole means under the current Constitution to directly hold responsible and check the President against misrulings in violation of the Constitution and statutes.

B. Summary of the Respondent's Answer

(1) On the Question of Legal Prerequisites

It is the abuse of the impeachment authority by the National Assembly that, in the instant case, the National Assembly hastily resolved to impeach the President while no sufficient grounds or evidence for impeachment existed, thereby suspending the authority of the President, and it attempts to inquire into the grounds and the evidence for impeachment through the adjudication procedure at the Constitutional Court.

The Grand National Party and the New Millennium Democratic Party threatened to oust party-member assemblypersons should they not participate in the impeachment resolution. The assemblypersons who participated in the resolution process did a public vote with no curtain hung at the voting booth, with certain assemblypersons showing their marked votes to the whip of the party to which they belonged. Also, the Speaker of the National Assembly voted by proxy.

The Speaker of the National Assembly unilaterally changed the time when the general meeting would open from 2 o'clock in the afternoon to 10 o'clock in the morning, without consulting the representative member of the Uri Party, which is a negotiating party of the National Assembly.

The Speaker of the National Assembly impeded the voting rights of the assemblypersons who were members of the Uri Party, by hastily declaring the closure of the vote upon completion of vote by the assemblypersons belonging to the Grand National Party, the New Millennium Democratic Party and the United Liberal Democrats, without cautiously assessing the circumstances regarding whether the assemblypersons belonging to the Uri Party would participate in voting.

The Speaker of the National Assembly impeded the right of assemblypersons to inquire and discuss in violation of Article 93 of the National Assembly Act, by foregoing the procedure of explaining the purpose but instead distributing the printed materials, and by forcing the vote without any procedure for inquiry and discussion, in the deliberation process for the impeachment motion.

The National Assembly violated the Constitution by impeding the right of assemblypersons to inquire and discuss, in passing the impeachment motion as a single

PÁDUA, Thiago Aguiar; GUEDES, Jefferson Carús. Algumas Reflexões sobre as Linhas de Força e as Limitações Constitucionais do Impedimento Presidencial: o caso Sul-Coreano de 2004. Universitas Jus, Brasília, v. 27, n. 3, 2016 p. 17-62

measure by way of a single vote, without going through the procedures to inquire and discuss and to vote individually on each of the three stated grounds for impeachment, while the impeachment resolution in the instant case contains three distinct grounds for impeachment against the respondent.

The resolution on the impeachment is in violation of due process as the respondent was not provided with any notice or opportunity to state his opinion at the impeachment process in the National Assembly.

(2) On the Merit of the Case

The authority to impeach the President and the authority to adjudicate thereon should be exercised with utmost caution within the boundary of checks and balances under the principle of separation of powers. The 'violation of the Constitution or statutes in performing official duties' provided in Article 65(1) of the Constitution is too vague to indicate which types of act of violation rendered in which method are subject to impeachment. Considering the systematic and practical dynamics surrounding the constitutional institutions and the fundamental order and the value ordained by the Constitution, the grounds for impeachment against the President should correctly be limited to 'grave and apparent violation of the Constitution and statutes deemed to impede upon the constitutional values and the constitutional fundamental order.'

The impeachment resolution in the instant case was reached by a National Assembly that has practically lost democratic legitimacy, with the termination of its term fast approaching, in pursuit of party interest and impulse beyond its authority delegated by the public; and was hastily processed even though there was no substantive ground that would justify impeachment, without careful investigation and deliberation, democratic discussion, or any process to persuade the public.

With respect to the first alleged ground for impeachment entitled the 'violation of the election law,' the President is a public officer of a political nature who is permitted to be a member of a political party and Article 9 of the Public Officials Election Act cannot be applied to the President. Even if not, the statements at issue herein are not deemed to be in violation of the Public Officials Election Act.

With respect to the second alleged ground for impeachment entitled the 'corruption of the respondent's close associates and aides,' many of the alleged facts occurred prior to the respondent's inauguration as President, and the respondent was neither involved in the alleged corruption by, for example, directing or abetting such alleged acts, nor has the respondent's involvement been proven, therefore, such alleged acts under this count do not constitute a ground for impeachment.

With respect to the third alleged ground for impeachment entitled the 'disruption of the national administration,' the allegation is different from the fact, and, even if true, the political incapacity or the misjudgment in policymaking of the President does not constitute a ground for impeachment.

3. Review of the Legality of the National Assembly's Impeachment

A. National Assembly's Authority to Self-Regulate its Deliberation Proceedings

The National Assembly, as the representative of the public and as the legislative body, possesses vast authority to self-regulate its administration, including its deliberation process and internal regulation. This self-regulating authority should be respected in light of the doctrine of separation of powers and the status and the function of the National Assembly, as long as there is no clear violation of the Constitution or statutes in the deliberative or legislative process of the National Assembly. Therefore, it is not desirable for other state institutions to intervene and judge the legitimacy of a decision reached by the National Assembly upon matters that fall within the scope of its self-regulating authority, and no exception thereto applies to the Constitutional Court (See 10-2 KCCR 74, 83, 98Hun-Ra3, July 14, 1998).

Also, the Speaker of the National Assembly is, in principle, vested with the general and inclusive authority and responsibility concerning the deliberation process of the National Assembly, pursuant to Article 10 of the National Assembly Act. Therefore, in cases of disputes as to the deliberation process at the general meeting or where the normal deliberative process otherwise cannot apply, the method of deliberation and of resolution is to be determined by the Speaker of the National Assembly within the above authority endowed to the Speaker. Such authority of the Speaker to preside over the deliberation process is, widely interpreted, part of the self-regulating authority of the National Assembly, and should be respected as such unless exercised in a

way clearly beyond its limit. As a principle, such authority may not be impeded upon by the Constitutional Court (See 12-1 KCCR 115, 128, 99Hun-Ra1, February 24, 2000).

B. On the argument that the proceedings at the National Assembly lacked sufficient investigation and deliberation

The respondent argues that in order for the National Assembly to petition for the impeachment of the President, the National Assembly must sufficiently investigate the grounds for impeachment and the evidence thereto, to the extent that the Constitutional Court in its impeachment adjudication can readily determine the validity of the alleged grounds for impeachment. It is desirable, as a matter of course, that the National Assembly thoroughly investigate the stated grounds for impeachment prior to its reaching a resolution to impeach. However, Article 130(1) of the National Assembly Act provides that, "upon proposal for the impeachment resolution, ... the National Assembly may, by resolution at the plenary session, assign the matter to the Legislation and Judiciary Committee for investigation," thus subjects the investigation to the discretion of the National Assembly. Therefore, even if the National Assembly did not perform a separate investigation in the instant case, this was not in violation of the Constitution or statutes.

C. On the arguments of the forced voting, the non-secret vote, and the proxy vote for the Speaker of the National Assembly

(1) Even if the Grand National Party and the New Millennium Democratic Party publicly declared that they "will oust from the party those assemblypersons who will not participate in the vote for the impeachment measure," this cannot be deemed as pressure or threat substantively preventing the assemblypersons from exercising their voting right pursuant to their conscience (Article 46(2) of the Constitution, and Article 114-2 of the National Assembly Act) beyond the boundaries of the party control permissible under today's party democracy.

(2) Even if it was true that the screen at the voting booth was not pulled down at the time of voting or certain assemblypersons disclosed the content of their votes to the party whip of their respective party membership, the question of the effect of such on the validity of the voting at the National Assembly is a matter for which the decision of the National Assembly, with its self-regulating authority regarding the deliberation process, should be respected. The Speaker of the National Assembly confirmed the validity of the votes, thereby, declaring the passing of the impeachment resolution, and there is no clear basis or materials indicating a patent violation of the Constitution or statutes. Therefore, the Constitutional Court may not deny the effect of the votes on or the passing of the impeachment resolution, solely on these alleged facts.

(3) With respect to the argument that the Speaker of the National Assembly voted by proxy, voting by proxy means that 'someone does not mark the vote and, instead, has a third party mark the vote on his or her behalf.' The acknowledged facts here merely indicate that the Speaker of the National Assembly, pursuant to the custom within the National Assembly, marked the vote himself from the seat reserved for the Speaker, folded the voting paper to secure the content of the vote from disclosure to others, and forwarded such voting paper to an officer so that the officer put the vote into the ballot box. Therefore, there was no vote by proxy.

D. On the argument that the opening time for the National Assembly general meeting was arbitrarily changed

The National Assembly Act, with respect to the opening time for its meetings and sessions, provides in Article 72 that the "meeting of the plenary session shall be opened at two o'clock p.m. (on Saturday, at ten o'clock a.m.): provided, That the Speaker may change the opening time after consulting with the representative assemblyperson of each negotiating party," thereby providing that a change of the opening time shall be subject to the consultation with the representing assemblyperson of each negotiation party.

The 'consultation' here may occur in various forms, by its nature, as the process for exchanging and receiving opinions, and the Speaker of the National Assembly makes the final judgment and decision upon matters regarding such consultation. In the instant case, considering that a normal deliberation process pursuant to the National Assembly Act was hardly anticipated due to the continuous occupation of the floor for the general meeting by the assemblypersons of the Uri Party notwithstanding the fact that the impeachment motion was to be discarded past March 12, 2004 for the expiration of the time limit, and further considering that the

prevailing majority of the assemblypersons, including the assemblypersons of the Uri Party, were present at the designated venue when the general meeting at issue was opened at approximately 11:22 on March 12, 2004, the mere fact that the Representative Assemblyperson of the Uri Party and the Speaker of the National Assembly did not directly discuss the opening time cannot, by itself, be deemed as a violation of Article 72 of the National Assembly Act or as an infringement on the right of assemblypersons of the Uri Party membership to examine and vote.

E. On the argument that the voting was unilaterally declared to be closed

The respondent alleges that the Speaker of the National Assembly unilaterally declared that the voting was closed disregarding whether or not the assemblypersons of the Uri Party would intend to participate in voting. However, the minutes of the National Assembly general meeting for March 12, 2004 indicate that the Speaker, at that time, urged two or three times those who had not yet voted to participate in voting and declared that the voting would be closed should there be no more votes. It cannot be, then, deemed that the Speaker of the National Assembly obstructed the Uri Party assemblypersons from exercising their voting rights by unilaterally closing the voting.

F. On the argument that the inquiry and discussion process was lacking

The respondent argues that the forcefully performed voting with a mere distribution of the printed materials instead of the explanation of the purpose by the assemblyperson who proposed the impeachment motion, without any inquiry or discussion process, in violation of Article 93 of the National Assembly Act, impeded the assemblypersons' right to inquire and discuss.

Article 93 of the National Assembly Act provides that, 'with respect to such subject matters which have not been examined by a committee, the proponent of such matter should explain its purpose.' The above minutes of the National Assembly general meeting indicate that, in the deliberation process for the impeachment motion in the instant case, a 'document' was substituted for the proponent's explanation of the purpose. There is no legal ground to deem this method as inappropriate.

Next, on the argument that the inquiry and discussion process was lacking, as Article 93 of the National Assembly Act provides that the 'general meeting, in deliberating the subject matters before it, shall vote upon inquiry and discussion,' it would have been desirable, in light of the significance of the impeachment, if the National Assembly had rendered sufficient inquiry and discussion within the National Assembly. However, with respect to the proposed impeachment motion not sent to the Legislation and Judiciary Committee, Article 130(2) of the National Assembly Act stipulating that "a secret vote shall be taken to determine whether to pass an impeachment motion between 24 and 72 hours after the motion is reported to the plenary session" can be deemed as a special provision concerning the impeachment procedure and may be interpreted to mean that the 'impeachment motion may be put to a vote without inquiry and discussion.' With the self-regulating authority and the legal interpretation of the National Assembly to be respected, such interpretation of the law cannot be deemed as arbitrary or incorrect.

G. On the argument that each ground for impeachment was not separately voted on

In voting to decide whether to pass an impeachment resolution, it would be desirable to vote on each of the stated grounds for impeachment separately, in order to appropriately protect the right to vote of the assemblypersons. However, the National Assembly Act does not contain any express provision regarding such and merely provides in Article 110 that the Speaker of the National Assembly should declare the title of the subject matter that is to be voted on. Pursuant to the above provision, the scope of the subject matter to be voted on varies depending upon how the title of the subject matter is determined. Thus, whether or not more than one ground for impeachment may be voted on as a single matter is, basically, up to the Speaker of the National Assembly who has the authority to determine the title of the subject matter that is to be voted on. Therefore, the argument raised by the respondent in this regard lacks merit.

H. On the argument that the principle of due process was violated

The respondent argues that the impeachment resolution in the instant case was in violation of the principle of due process since the respondent had not been officially notified of the facts allegedly constituting the grounds for impeachment nor had the respondent been provided with an opportunity to state his own opinions.

The principle of due process here, as the respondent argues, is the legal principle that before the state authority makes a decision prejudicing its citizen, such citizen should be provided with an opportunity to state his or her own opinions, and should thereby be able to affect the progress of the procedure and the result thereof. The citizen is not a mere object of the state authority but the subject of the process and only when a citizen may state his or her own opinions prior to a decision concerning his or her own right can an objective and fair procedure be guaranteed and the equality of status in the procedure between the parties realized.

In the instant case, however, the impeachment procedures at the National Assembly concern the relationship between two constitutional institutions, the National Assembly and the President, and the impeachment resolution by the National Assembly merely suspends the exercise of the authority vested in the President as a state institution and does not infringe the basic rights of the President as a private individual. Therefore, the due process principle that has been formed as a legal principle applicable in the exercise of the governmental power by the state institution in its relationship with its citizens shall not be directly applicable in the impeachment proceeding that is designed to protect the Constitution against a state institution. Furthermore, there is no express provision of law concerning the impeachment proceeding that requires an opportunity to be heard for the respondent. Therefore, the argument that the impeachment proceeding at the National Assembly was in violation of the due process principle is groundless.

4. Nature of the impeachment adjudication procedure in Article 65 of the Constitution and the grounds for impeachment

A. The impeachment adjudication procedure is a system designed to protect and maintain the Constitution from infringement by highranking public officials of the executive and judicial branches.

Article 65 of the Constitution provides for the possibility of impeachment of high-ranking public officials of the executive branch and the judiciary for violation of the Constitution or statutes. It thereby functions as a warning to such public officials not to violate the Constitution and thus also prevents such violations. Further, where certain public officials are delegated with state authority by the citizenry but abuse such authority to violate the Constitution or statutes, the impeachment process functions to deprive them of such authority. That is, reinforcing the normative power of the Constitution by holding certain public officials legally responsible for their violation of the Constitution in exercising their official duties is the purpose and the function of the impeachment adjudication process.

Article 65 of the Constitution includes the President in the definition of public officials who are subject to impeachment, memorializing a discerned position that even the President elected by the public and thereby directly endowed with democratic legitimacy may be impeached in order for the preservation of the constitutional order and that the considerable political chaos that may be caused by a decision to remove the President from office should be deemed as an inevitable cost of democracy in order for the national community to protect the basic order of free democracy. The system subjecting the President to the possibility of impeachment, thus realizes the principle of the rule of law or a state governed by law that every person is under the law and no possessor of the state power, however mighty, is above the law.

Our Constitution, in order to fulfill the function of the impeachment adjudication process as a process dedicated to the preservation of the Constitution, expressly provides in Article 65 that the ground for impeachment shall be a 'violation of the Constitution or statutes' and mandates the Constitutional Court to take charge of the impeachment adjudication, thereby indicating that the purpose of the impeachment system lies in the removal of the President 'not for political grounds but for violations of law.'

B. The Constitution, in Article 65(1), provides for the grounds of impeachment that "the National Assembly may resolve to impeach the President, ... upon violation of the Constitution or statutes by the President, ... in performing official duties."

(1) All state institutions are bound by the Constitution. Especially, the legislator should abide by the Constitution in the legislative process and the executive branch and the judicial branch are bound by the Constitution in exercising the state authority vested by and under the Constitution. Article 65 of the Constitution reemphasizes that the state institutions of the executive and the judicial branches are bound by the Constitu-

tion and statutes, and, on this very ground, sets forth the grounds for impeachment to be the violation of the Constitution and statutes, not limiting the grounds merely to the violation of the Constitution. The question of whether the executive branch and the judicial branch abide by the statutes formed by the legislative branch is directly related to the question of their compliance with the doctrine of separation of powers and the principle of the rule of law under the Constitution. Therefore, observance of the statutes by the executive and the judicial branches means, in turn, their compliance with the constitutional order.

(2) An analysis of the specific grounds for impeachment set forth in Article 65 of the Constitution here reveals that the 'official duties' as provided in 'exercising the official duties' mean the duties that are inherent in particular governmental offices as provided by law and also other duties related thereto as commonly understood. Therefore, acts in exercising official duties mean any and all acts or activities necessary for or concomitant with the nature of a specific public office under the relevant statutes, orders, regulations, or administrative customs and practices. Thus, the act of the President in exercising official duties is a concept not only including an act based on pertinent statutes, orders, or regulations, but also encompassing any act performed by the President in his or her office as President with respect to the implementation of state affairs,' and includes any such acts, for example, visiting various organizations and industrial sites, participating in various events such as a dedication ceremony and an official dinner, appearing through the broadcasting media to explain government policies in order to seek the public understanding thereof and to efficiently implement national policies, and agreeing to hold a press conference.

The Constitution sets forth the grounds for impeachment as a "violation of the Constitution or statutes." The 'Constitution' here includes the unwritten constitution formed and established by the precedents of the Constitutional Court as well as the express constitutional provisions; the 'statutes' include not only the statutes in their formal meaning, but also, for example, international treaties that are provided with the same force as statutes, and the international law that is generally approved.

5. Whether the respondent violated the Constitution or statutes in exercising his official duties

Article 53(1) of the Constitutional Court Act provides that the "Constitutional Court shall issue a decision removing the respondent from office should the grounds for the impeachment petition be valid." Therefore, in order to determine whether to issue a decision to remove the President from office, an examination should precede upon the existence of the grounds for impeachment set forth in the Constitution, i.e., whether the 'President violated the Constitution or statutes in the performance of his official duties.' In the immediately following paragraphs, we will examine each of the grounds for impeachment stated in the impeachment resolution of the National Assembly under the respective categories.

A. Act of supporting a particular political party at a press conference (the statements at the press conference with six of the Seoul-Incheon area news media organizations on February 18, 2004, and as an invited guest at the press conference with the Korean Network Reporters Club on February 24, 2004)

Pursuant to the acknowledged facts, the President stated, at a press conference on February 18, 2004 with six of the Seoul-Incheon area news media organizations, that "... I simply cannot utter what will follow should the quorum to resist the constitution revision be destroyed"; and, at a press conference with the Korean Network Reporters Club, as an invited guest, which was broadcasted nationwide on February 24, 2004, in response to a question posed by a reporter concerning the upcoming general election that 'how the respondent would run the political affairs if the Uri Party would remain as a minority party unlike the anticipation of Chung Dong-young, the Chairman of the Uri Party, projecting about 100 seats as a goal,' the respondent stated that "I expect that the public will overwhelmingly support the Uri Party," "I would like to do anything that is legal if it may lead to the votes for the Uri Party," and "when they elected Roh Moo-hyun as the President, the public will make it clear whether I will be backed to do it well for the four years to come or I cannot stand it and will be forced to step down."

On the other hand, no arbitrary amendment to the impeachment resolution by the impeaching party in

order to add new facts not stated in the original resolution is permitted in the impeachment adjudication proceeding. The statement of the President made on March 11, 2004 that 'connected the general election to the matter of confidence of the President' is a fact not included in the original impeachment resolution of the National Assembly and merely stated in the impeaching party's brief submitted to the Court as an additional ground for impeachment subsequent to the National Assembly's resolution of impeachment and, as such, the Court does not examine such additionally stated ground.

(1)Obligation of a public official to maintain political neutrality concerning elections

The political neutrality obligation concerning elections owed by public officials is a constitutional request drawn from the status of public officials set forth in Section 1, Article 7, of the Constitution; the principle of free election set forth in Section 1, Article 41, and Section 1, Article 67, of the Constitution; and the equal opportunity among the political parties guaranteed by Section 1, Article 116 of the Constitution.

(A) Article 7(1) of the Constitution provides that "all public officials shall be servants of the entire people and shall be responsible to the people," thereby setting forth that the public officials shall perform their official duties for the welfare of the public as a whole and should not serve the interest of a particular political party or organization. The status and the responsibility of the state institutions as the servant for the entire citizenry is, in the area of election, realized in concrete terms as the 'obligation of the state institutions to maintain neutrality concerning elections.' The state institutions should serve the entire population, therefore, should act neutrally in the competition among the political parties or political factions. Thus, Article 7(1) of the Constitution mandates that no state institution should exercise influence in the free competition among political factions by identifying itself with a particular political party or a candidate or taking sides with a particular political party or a candidate in electoral campaigns by use of the influence and authority vested in the office.

(B) Articles 41(1) and 67(1) of the Constitution provide for the principles applicable to the general election for members of the National Assembly and the presidential election, respectively. Although such provisions do not expressly mention the principle of free election, in order for any election to properly represent the political will of the public, the voters should be able to form and decide their own opinions through a free and open process without undue extraneous influence. Therefore, the principle of free election is part of the fundamental principles of election as a basic premise to provide legitimacy for the state institutions constituted by and through an election.

The principle of free election not only means that the voters should be able to vote without forceful or undue influence from the state or the society, but also that the voters should be able to make their own judgment and decisions in a free and open process to form their own opinions. The principle of free election, in turn, in the context of state institutions, means the 'obligation of public officials to maintain neutrality,' that is, the prohibition against the state institutions from supporting or opposing any particular political party or candidate by identifying themselves with such particular political party or candidate.

(C) The obligation of public officials to maintain neutrality concerning elections is mandated by the Constitution also from the standpoint of equal opportunity among the political parties. The principle of equal opportunity among the political parties is a constitutional principle derived from the interrelationship of Article 8(1) of the Constitution that guarantees the freedom to form a political party and the multi-party system and Article 11 of the Constitution that sets forth the principle of equality. Particularly, Article 116(1) of the Constitution provides that "an equal opportunity should be guaranteed ... in the electoral campaign," thereby specifying the 'principle of equal opportunity among the political parties' concerning the political campaign. The principle of equal opportunity among the political parties requires state institutions to act neutrally in the competition among political parties at the elections, thus prohibiting the state institutions from either favoring or prejudicing any particular political party or candidate in the electoral campaign.

(2)Whether the respondent violated Article 9 of the Public Officials Election Act (neutrality obligation of a public official)

Article 9 of the Public Officials Election Act provides that "no public official or no one obligated to maintain political neutrality should act in a way unduly influencing the election or otherwise affecting the ou-

tcome of the election," and thereby provides for the 'obligation of public officials to maintain neutrality concerning elections.'

(A) Whether the President is a 'public official' within the meaning of Article 9 of the Public Officials Election Act

The issue here is whether the officials at certain political offices such as the President fall within the definition of a 'public official or anyone obligated to maintain political neutrality' of Article 9 of the Public Officials Election Act.

1) Article 9 of the Public Officials Election Act is a statutory provision that specifies and realizes the constitutionally requested 'obligation of public officials to maintain neutrality concerning elections,' derived from Article 7(1) (status of a public official as a servant for the public as a whole), Article 41, Article 67 (principle of free election) and Article 116 (principle of equal opportunity among the political parties) of the Constitution. Therefore, the 'public official' within the meaning of Article 9 of the Public Officials Election Act means any and all public officials who should be obligated to maintain neutrality concerning elections, that is, more particularly, any or all public officials who are in a position to threaten the 'principle of free election' and 'equal opportunity among the political parties at the election.' Considering that practically all public officials are in a position to exercise undue influence upon the election in the course of exercising through exercise of their official duties, public officials here include, in principle, all public officials of the national and local governments, that is, all career public officials as narrowly defined, and, further include public officials at offices of political nature who serve the state through active political activities (for example, the President, the Prime Minister, the ministers of the administration, and the chief executive officer at various levels of local government such as the governor, the mayor, and the county magistrate).

The possibility of affecting the public's open opinion formulation process and distorting the political parties' competitive relationship through the function and influence of the official duties is particularly greater for the executive institutions at the national or local governments. Therefore, political neutrality concerning elections is even more greatly requested than other public officials for the President and the chief executive officers at the local governments.

2) Obligating public officials to maintain neutrality concerning elections in Article 9 of the Public Officials Election Act is a mere specification of the constitutional request of the principle of free election, the principle of equal opportunity among the political parties, and the 'obligation of public officials to maintain neutrality concerning elections' derived from Article 7(1) of the Constitution, made applicable to public officials in the area of election law. Thus, such provision is constitutional as long as it is interpreted to exclude the members of the National Assembly and the members of the local legislatures from whom political neutrality concerning elections cannot be requested.

The members of the National Assembly and the members of the local legislatures are not 'public officials' within the meaning of Article 9 of the Public Officials Election Act, due to their status as political party representatives and as active figures at the electoral campaign. The state institutions bear the obligation to maintain neutrality concerning elections, in order to provide a 'forum for free competition' where the political parties can compete fairly at the election. In such 'free competition among the political parties' guaranteed by the state's neutrality obligation, the members of the National Assembly play an active role at the electoral campaigns as the representatives of their respective political parties. That is, whereas the state institutions administrate the election and should not affect the election as the institutions that are mandated to guarantee a fair election, the political parties, on the other hand, are premised on the mission to affect the election.

3) Also, a systematic analysis of the meaning of 'public officials' in Article 9 of the Public Officials Election Act in its interrelationship with other provisions of the Public Officials Election Act or with other statutes mandates an interpretation that the concept of 'public officials' in the Public Officials Election Act includes all public officials at political offices with the exception of the members of the National Assembly and of the local legislatures. For example, the Public Officials Election Act uses 'public officials' as a general term to include public officials at political offices in its Article 60(1)(□) that prohibits, in principle, the political campaign of public officials and also in Article 86(1) that prohibits the acts of public officials influencing the election. Furthermore, in such other statutes as the State Public Officials

Act (in Article 2 and other provisions) and the Political Party Act (in Article 6 and other provisions), the term 'public official' is used inclusive of public officials at political offices.

4) Therefore, political neutrality concerning elections is a basic obligation of all public officials of the executive branch and the judiciary. Furthermore, since the President bears the obligation to oversee and manage a fair electoral process as the head of the executive branch, the President is, as a matter of course, a 'public official' within the meaning of Article 9 of the Public Officials Election Act.

(B) The President as a 'constitutional institution of a political nature' and the 'obligation to maintain neutrality concerning elections'

The fact that the President is a 'constitutional institution of a political nature' is a distinct matter and should thus be distinguished from the question of whether the President bears the 'obligation to maintain political neutrality concerning elections.'

The President, in ordinary circumstances, is elected through the electoral campaign endorsed and supported by a political party, as a party member. Therefore, the President generally maintains party membership after being elected as the President and also retains an affiliation with such particular political party. Current law also provides that the President may maintain party membership (Article 6(1) of the Political Party Act) and thus permits party activities, unlike in the case of other career public officials who are not allowed to be a member of a political party.

However, the President is not an institution that implements the policies of the ruling party, but instead, the President is the constitutional institution that is obligated to serve and realize the public interest as the head of the executive branch. The President is not the President merely for part of the population or a certain particular political faction that supported him or her at the past election, but he or she is the President of the entire community organized as the state and is the President for the entire constituents. The President is obligated to unify the social community by serving the entire population beyond that segment of the population supporting him or her. The status of the President as the servant of the entire public is specified, in the context of election, as the status of ultimately overseeing a fair election, and the Public Officials Election Act therefore prohibits a political campaign by the President (Article 60(1)(iv) of the Public Officials Election Act).

Therefore, neither the fact that the President is a public official of a political nature who is elected through nomination and support by a political party nor the fact that certain political and party activities of the President are permitted can serve as a valid ground for denying the obligation owed by the President to maintain political neutrality concerning elections.

(C) The President's 'obligation of political neutrality' concerning elections and 'freedom to express political opinions' Every person in public office is obligated to maintain political neutrality concerning elections; on the other hand, at the same time such person is a citizen of the state and is subject of basic rights who may assert his or her own basic rights against the state. Likewise, in the case of the presidency, the status of the President as a private citizen who may perform party activities for the party of his of her membership and the status of the President as a constitutional institution bearing the obligation to serve the entire population and the public welfare should be distinguished as two distinct concepts.

The mandate that the President should maintain political neutrality concerning elections does not require no political activities or indifference to party politics on the part of the President. Unlike other public officials who are prevented from any party activities, the President, as a member or an officer of a political party, may not only be involved with the internal decision making process of the party and perform ordinary party activities, but also may participate in the party convention to express his or her political opinions and express support for the party of his or her membership. However, at the same time, even when the President exercises his or her freedom of expression as a political figure, the President should restrain and limit himself or herself in light of the significance of the office of the presidency and the potential reflections of his or her remarks and acts, and should not make an impression towards the public that the President may no more fairly exercise presidential duties due to his or her political activities outside the presidential duties. Furthermore, since the ultimate noticeability of the President obscures the President's 'exercise of basic rights as a private citizen' and 'activity within the boundary of the presidential duties,' the President, even in the case where the President

is exercising the freedom of speech as a private citizen and performing party activities, should do so in a way appropriate to a harmonious implementation of the presidency and the maintenance of the functions thereof, that is, in accordance with the request of Article 7(1) of the Constitution that the President should serve the entire public.

Therefore, the President should, in principle, restrain himself or herself from expressing his or her personal opinions towards party politics when exercising duties as the head of the state or the chief executive officer. Furthermore, when the President makes statements concerning elections as the state institution of president and not as a party member or as a mere political figure, the President is bound by the obligation to maintain political neutrality concerning elections.

(D) Violation of Article 9 of the Public Officials Election Act

Article 9 of the Public Officials Election Act provides that "no public official shall exercise undue influence upon the election or otherwise affect the outcome of the election," thereby setting forth acts to be prohibited in order to realize the obligation of public officials to maintain neutrality concerning elections. Specifically, Article 9 of the Public Official Act provides the 'act affecting the outcome of the election' as the violation of the neutrality obligation, and mentions the 'exercise of undue influence upon the election' as a typical example therefor.

Therefore, the question of whether the President violated the neutrality obligation concerning elections depends upon whether the President 'exercised undue influence upon the election,' and should a public servant affect the election by taking advantage of the political weight and influence vested in the official duties in a way not appropriate for the mission to serve and be held responsible for the entire public or residents, such is beyond the boundaries of political activities permitted for a public official at the election, thus constituting an act of exercising undue influence upon the election.

Thus, if a public official is acting in the status of a public servant and taking advantage of the influence vested in the public duties, undue influence upon the election is found to be exercised, thus constituting a violation of the neutrality obligation concerning elections.

(E) Whether the statements of the President violated the neutrality obligation owed by public officials

Whether the statements of the President violated Article 9 of the Public Officials Election Act depends upon the judgment as to 'whether the President affected the election through his statements by taking advantage of the political weight and influence of the public office of presidency in a way that was not appropriate for his status to serve the entire national public' in light of the specific contents of the statements, their timing and frequency, and the specific circumstance thereof.

1) The statements of the President at issue herein should be deemed to have been made in the president's status as a public servant and in implementing the official duties of the President or in relation thereto. The President held the above press conferences not as a private citizen or a mere political figure, but as the President, and the President, in such course, made the statements supporting a particular political party by taking advantage of the political weight and influence vested in his status as the President. Therefore, the statements made by the President at the above press conferences constitute an act 'in the performance of his official duties' within the meaning of Article 65(1) of the Constitution.

2) In the case of the general election to constitute the National Assembly, general parliamentary activities of the individual assemblypersons, the political parties, and the negotiating parties during the four-year term function as an important and meaningful indicator for the voters to form their judgment at the next election. Especially during the period designated for the electoral campaign under the Public Officials Election Act, the political parties, the negotiating parties and the individual candidates are involved in a feverous competition in order to obtain the trust and a vote from the voters in every possible legitimate way, by presenting their policies and political designs and criticizing the policies of the opposing parties or candidates in competition.

Here, if the President makes a statement unilaterally supporting a particular political party and influences the process by which the public forms its opinions, the President thereby intervenes and distorts the process of the independent formation of the public's opinions based on a just evaluation of the political parties and the candidates. This, at the same time, diminishes by

half the meaning of the political activities continuously done by the political parties and the candidates in the past several years in order to obtain the trust of the public, and thereby gravely depreciates the principle of parliamentary democracy. An electoral campaign in a democratic country is a free and open competition for multiple parties and candidates, with a goal to obtain political power, to seek a vote, by emphasizing their political activities and achievements during the past and by convincing the voters of the legitimacy of the policy they pursue. Such free competition relationship among the political parties to obtain the votes through the voters' judgment upon the policies and political activities is significantly perverted by one-sided intervention of the President supporting a particular party.

The relevant part of the President's statements at issue repeatedly and actively expressed his support for a particular political party in the course of performing his official duties and further directly appealed to the public for the support of that particular political party. Therefore, the President's taking advantage of his political weight and influence vested in his public office through the above statements favoring a particular political party, by way of identifying himself with such political party, was an exercise of undue influence in a way not appropriate for his responsibility as a servant for the entire public by the use of his status as a state institution. The President thereby violated his obligation to maintain neutrality concerning elections.

3) The judgment upon whether there was undue influence on the election may also vary depending upon the timing certain statements supporting a particular party were made. Should a statement as such be made at a time where there is no temporally intimate relation to an election, there is only a remote or limited possibility for such statements to affect the outcome of the election. However, as the election approaches, the possibility for the President's statement supporting a particular political party to affect the outcome of the election increases, therefore the President bears during such time period, as a state institution, an obligation to restrain, as much as possible, any and all acts that may unfairly influence the election.

Although it is not possible to clearly discern when an one-sided act of the state institution begins to particularly affect the election, the statements by the President at issue herein were made on February 18, 2004 and February 24, 2004, with approximately two months remaining before the general election for the National Assembly on April 15, 2004. Thus, at that time, there existed a temporal intimacy between the statements and the election as the preparation for the electoral campaign had practically begun and the probability of the act of a state institution to influence the election was relatively high, and there was an increased demand for the political neutrality of state institutions at least during that period of time.

4) The President, then, violated the obligation to maintain neutrality concerning elections, by making the statements at the press conferences toward the entire public in support of a particular political party by taking advantage of the political weight and influence of the presidency, when the political neutrality of public official was highly demanded more than ever due to the temporal proximity to the election, while the President is ultimately responsible to oversee a fair administration of election, since such statements constituted acts performed using the respondent's status as the President unduly influencing the election and thereby affecting the outcome of the election.

(3)Whether the respondent violated Article 60 of the Public Officials Election Act(prohibition of electoral campaign by public official)

(A) Definition of electoral campaign

Article 58(1) of the Public Officials Election Act defines the term 'electoral campaign' as an 'activity for winning an election or for having another person be or not be elected.' The Public Officials Election Act, in a proviso in the same provision, lists certain 'acts not deemed to constitute electoral campaign,' which are: mere expression of opinion toward election, preparatory activity to register as a candidate and for electoral campaign, mere expression of opinion in agreement or disagreement toward the parties' recommendation of the candidates, and ordinary party activities.

Pursuant to the precedents of the Constitutional Court, the 'electoral campaign' under Article 58(1) of the Public Officials Election Act is any and all active and premeditated deeds for a specific candidate's winning the election and obtaining the votes therefore, or any and all active and premeditated deeds to have a specific candidate lose the election, among which there is an objective intent to win or to have win or lose the election (6-2 KCCR 15, 33, 93Hun-Ka4, July 29,

1994; 13-2 KCCR 263, 274; 2000Hun-Ma121, August 30, 2001).

The important standard in determining whether a specific act falls within the definition of electoral campaign is the existence of the required 'intent,' whereas other nature of 'activeness' or 'premeditatedness' is a secondary element that contributes to an objective finding and analyzing of the required 'intent' of the electoral campaign. Since the 'purposeful intent' of the actor is a highly subjective element and it is difficult to discern such element, such element may be found to a certain extent of objectivity through other 'subjective elements that can be objectified' in relative terms of the 'activeness' of the deed or the 'premeditatedness' thereof.

(B)Whether the statements of the President constituted electoral campaign

1) Article 58(1) of the Public Officials Election Act makes it a prerequisite for the electoral campaign 'whether or not a candidate can be specified,' by adopting the standard of 'being elected' in defining the concept of 'electoral campaign.' Therefore, the concept of electoral campaign is premised upon that it should be an activity to have win or lose a 'specific' or at least 'discernible' candidate. Although a statement supporting a specific political party may satisfy the definition of electoral campaign since an activity intended to obtain votes for a specific political party inevitably means an activity intended to have the candidate nominated by that party in a certain district, even in such circumstances, a candidate intended to have win through such statement must be discernible.

When the statements at issue in this case were made on February 18, 2004 and February 24, 2004, the party-endorsed candidates had not yet been determined. Therefore, the statement supporting a particular political party when the party-endorsed candidates were not specified did not constitute an electoral campaign.

2) Also, whereas an activity requires a 'purposeful intent' to have a certain candidate win or lose an election in order for such activity to constitute an electoral campaign, there was no such purposeful intent in the statements at issue in the instant case.

a) In order for an election to properly represent the political will of the public, the voters should be able to make their decisions in a free and open process to form their own opinions. At the same time, the voters may make truly free decisions as voters only when they are aware of which candidates advocate and intend to implement the policies they support and are correctly informed of the candidates and the policy directions among which they can choose. Therefore, in terms of the public's right to know, it is required, as the election approaches, to provide certain information that may form the basis of the voters' decision or the information as to the parties and the candidates, through various means such as press conferences.

Therefore, strictly including all of the statements at a press conference in the definition of the electoral campaign would excessively limit the freedom of expression of a political figure. Especially, when the current Public Officials Election Act permits electoral campaigns only during a short period designated for such, and even additionally limits the electoral campaigns in various terms such as their subjects and means, defining the term 'electoral campaign' too loosely might mean an even further shrinking of the scope of freedom of political activities given to the public.

Then, a statement at a press conference does not, in itself, constitute an electoral campaign and likewise is not, in itself, excluded from the activities constituting an electoral campaign. Rather, more than anything else, whether a 'purposeful intent of a considerable degree to perform an electoral campaign by taking advantage of such opportunities as press conferences can be found' should be determined on a case-by-case basis, considering the totality of the specific aspects of the activity, such as the timing of the statement, its content, venue, and context. Here, the activeness and the premeditatedness of the statement operates as an important standard in perceiving 'purposeful intent.'

b) In the instant case, although the statements at issue were made in a close temporal proximity to the approaching general election of April 15, 2004, such statements, in terms of the content and the specific circumstance of the statements, were made in the form of a response to the question posed by the reporters at the press conferences, thus in a passive and unintentional way. Considering this, no element of activeness or premeditatedness towards an electoral campaign is found in the statements of the President. Therefore, such statements lacked any purposeful intent of a considerable degree sufficient to constitute an electoral campaign.

3) Therefore, although the statements of the respon-

dent pleaded to the public for their support of the Uri Party, such statements cannot be deemed as an act of an active and intentional electoral campaign to have specific or discernible candidates win or lose the election. Thus, the respondent's act in relevant part did not violate Article 60(1) of the Public Officials Election Act or its punishment provision of Article 255(1) of the Act.

(4)Whether the respondent violated Articles 85(1) or 86(1) of the Public Officials Election Act

Article 85(1) of the Public Officials Election Act prohibits public officials from conducting electoral campaigns using their status as such, and deems electoral campaigns by public officials toward other officers of the same public office or the employees and officers of a particular institution or business as an electoral campaign by way of his or her status as a public official.

However, as discussed above, the statements of the respondent at issue herein do not constitute electoral campaign activities, and therefore such statements did not violate Article 85(1) of the Public Officials Election Act without further reviewing the same.

Article 86(1) of the Public Officials Election Act prohibits various election-related activities of a public official. First, Subdivision (i) prohibits an act publicizing the achievements of a specific party or a candidate towards other officers of the same public office or the constituents within the election district. The respondent's statements do not contain any that publicized the achievements of the Uri Party, thus Subdivision (i) does not apply herein. Next, Subdivisions (ii) through (vii) are clearly inapplicable to the respondent's statements in terms of the constituting elements in themselves. Therefore, there was no violation of Article 86(1) of the Public Officials Election Act.

B. Other remarks concerning the general election

(1)Remark at the Remember 1219 event on December 19, 2003

Pursuant to the acknowledged facts, the President on December 19, 2003, participated in the event entitled "Remember 1219" hosted by the reform netizen front such as the Roh-Sa-Mo, and stated that "your revolution is yet to be concluded," "The citizen revolution is still going on at this very moment," and that "my dear respected members of Roh-Sa-Mo, and citizens, let's step forward once again."

The above statements were made at an event to celebrate the one-year anniversary of President Roh's election as the President, while invited to the event. It was hosted by certain associations that supported President Roh at the election such as Roh-Sa-Mo. Reviewed in the whole context, the above statements were to plead for participation in election reform ('fair election where money is not required') or political reform, or simply to 'generally ask for the support of the President himself,' and, as such, can hardly be deemed as statements seeking the support for a particular political party concerning the election or inciting illegal an electoral campaign by the citizen organizations. Therefore, the above statements of the President were not beyond the boundaries of permissible expression of opinions toward politics and did not constitute a violation of the political neutrality obligation concerning elections or an electoral campaign activity prior to the permitted time period. Also, such statements did not constitute a violation for any other statutes.

However, such an one-sided act of the President toward a specific citizen organization might well cause a division between the groups of citizens supporting the President and the groups of citizens not supporting the President and, thereby, does not conform to the obligation of the President to unify the national community as the President of the entire public, which might lead to the public's distrust against the administration as a whole.

(2)Remark at the luncheon with former presidential aides on December 24, 2003 at Cheong Wa Dae

Pursuant to the acknowledged facts, the President on December 24, 2003, at a luncheon at Cheong Wa Dae with nine others including his former presidential aides who had resigned in order to run for the general election, stated that "the next year's general election will have a polarized structure between the Grand National Party and the President with the Uri Party on the other side," and that "a vote for the New Millennium Democratic Party at next year's election will be conceived as support for the Grand National Party."

In this case of a luncheon at Cheong Wa Dae hosted by the President and the first lady for the former Cheong Wa Dae aides and the administrative officers, the nature of the meeting was private rather than one hosted by the President in his official status as the Presi-

dent. The content of the statements can hardly be deemed as statements intended by the President to unduly influence the election by taking advantage of the political influence of his official status. The above statements of the President, considering altogether the other party of the speech, the context thereof and the motive therefor, were acts justified by the freedom of expression under the Constitution as an exercise of the freedom to express opinion towards politics, and did not exceed the limits on the political activities permitted for public officials of political offices.

(3) Remark at the beginning-of-the-year press conference on January 14, 2004

Pursuant to the acknowledged facts, the President at the beginningof-the-year press conference on January 14, 2004, stated that "there was a split because there were those who supported reform and those who did not support reform fearing it, and I would like to go together with the Uri Party as those who supported me at the presidential election are running the Uri Party."

The above statement was made as a response to a reporter's question asking 'when the President would join the Uri Party,' and, as such, was a mere expression by the President, who is permitted to have party membership, stating the party that he supported and his position as to whether he would join such party and, if so, when. Therefore, since the President did not intend through the above statements to support a particular political party concerning the election or thereby to influence the election, the above statement did not constitute a violation of the neutrality obligation concerning elections owed by public officials or an electoral campaign activity.

(4) Remark at the meeting with the Gangwon-Do region journalists on February 5, 2004

Pursuant to the acknowledged facts, the President at the meeting with the journalists in the Gangwon-Do region on February 5, 2004, stated that "the Citizen Participation 0415 (Kook-Cham 0415) members' participation in politics should be permitted and encouraged both legally and politically."

The above statement was made as a response to the question asking the "President's opinion as to the debate concerning the Citizen Participation 0415's activities declaring to have certain candidates win the election as illegal intervention into the election." As such, the statement is understood to mean that, 'in order to be an advanced electoral culture, we should encourage voluntary participation and activities of the citizenry, and in order to achieve this goal the citizen participation in politics should be legally permitted as widely as possible, and at the least a generous legal interpretation is required as long as it is not against the law.' Therefore, the above statement was a mere expression of the respondent's personal opinion upon the aspect of the public participation in politics, and thereby did not constitute a violation of the neutrality obligation concerning elections or the prohibition of electoral campaign activities.

(5)The "Uri Party Strategy for the 17th General Election" reported in Joong-Ang Ilbo dated February 27, 2004

The Joong-Ang Ilbo reported with respect to a classified document entitled "Uri Party Strategy for the 17th General Election" on February 27, 2004, which posed suspicion as to the organizational intervention of Cheong Wa Dae into the election. However, even under the entire evidence submitted and accepted during the proceedings in this case, there is no finding that the respondent directed or was involved in the election strategy of the Uri Party. Therefore, there is no valid ground for impeachment in this regard.

(6)Act interfering with free election by threatening the public

With respect to the ground for impeachment under this count, there is no specific facts alleged in this regard, instead, the impeachment resolution merely alleges that the respondent interfered with the public's free election by 'inducing support for a particular political party by threatening the public and by repeatedly making statements affecting the public's will concerning the general election.' There is no factual basis to find that the respondent's statements concerning the election had a pervasive effect in the general community of public officials thereby actually affecting negatively upon the neutrality of public officials at the election, that the executive organization of which the respondent is the chief officer intervened in the election for a particular political party, or that the function of the election management commission was impeded upon. Nor is it plausible to deem that the respondent thereby interfered with or distorted the unbridled formation of the public's will concerning the election or interfered with the free exercise of voting rights.

Therefore, the respondent's statements neither interfered with free election nor did such statements violate Article 237(1)(iii) of the Public Officials Election Act providing for the crime of interfering with the election.

C. Acts at issue with respect to the obligation to abide by and protect the Constitution

(Articles 66(2) and 69 of the Constitution)

(1)The President's obligation to abide by and protect the Constitution

Article 66 of the Constitution, in Section 2, 'obligates' the President 'to protect the independence of the state, the preservation of the territorial integrity, the continuity of the state, and the nation's Constitution,' and in Section 3 'obligates' the President 'to faithfully endeavor for the peaceful reunification of the nation.' Article 69 of the Constitution obligates the President to take an oath of office, the content of which corresponds to such obligations. Article 69 of the Constitution not only sets forth the obligation of the President to take an oath of office, but also functions as a substantive provision specifying and emphasizing the constitutional obligations of the President under Article 66(2) and Article 66(3) of the Constitution.

The 'obligation to abide by and protect the Constitution' of the President set forth in Articles 66(2) and 69 of the Constitution is the constitutional manifestation that specifies the constitutional principle of government by the rule of law in relation to the President's performance of official duties. Expressed only in summary, the fundamental element of the principle of the rule of law, which is a basic constitutional principle, is that any and all operation of the state shall be by the 'Constitution' and the 'statutes' enacted by the legislature consisting of the representatives of the people and that any and all exercise of the state authority shall be the object of the judicial control in the form of administrative adjudication for the executive function and constitutional adjudication for the legislative function. Accordingly, the legislature is bound by the constitution, and the executive and the judicial branches of the government implementing and applying the law, respectively, are bound by the Constitution and the statutes. Therefore, the President, as the chief of the executive branch, is constitutionally mandated to respect and abide by the constitution and the statutes.

While the 'obligation to abide by and protect the Constitution' is a norm derived from the principle of government by the rule of law, the Constitution repeatedly emphasizes such obligation of the President in Articles 66(2) and 69, considering the significance of the status of the President as the head of the state and the chief of the executive branch. Under the spirit of the Constitution as such, the President is the 'symbolic existence personifying the rule of law and the observance of law' toward the entire public. Accordingly, the President should not only make every possible effort to protect and realize the Constitution, but also abide by the law and perform no act in violation of any of the valid law. Furthermore, the President should do all acts in order to implement the objective will of the legislator. The obligation of the executive branch of the government to respect and implement the law is equally applicable to the statutes that the executive branch deems unconstitutional. Since the Constitutional Court alone is vested with the authority under the Constitution to remove a statute that is unconstitutional, even if the executive branch suspects a particular statute to be unconstitutional, the executive branch should make every possible effort to respect and implement the law unless and until the Constitutional Court holds such statute unconstitutional.

(2) Acts of the President to the National Election Commission's decision that the President violated the election law

(A) Pursuant to the acknowledged facts, President Roh Moo-hyun stated through Lee Byung-wan, the Senior Secretary to the President for Public Information, on March 4, 2004, as the position of Cheong Wa Dae concerning the National Election Commission's decision warning him of his undue intervention into the election that "I would like to make it clear that the decision of the National Election Commission at this time is not convincing," "Now we should change both the institution and the custom under the standard of advanced democracy," "The election-related law of the past when the president mobilized ... the state institutions should now be reformed rationally," and "The interpretation of the election law and the decision concerning the election law should also be adjusted in conformity with such different culture surrounding the state authority and new trend of the time." Although the above stated position of Cheong Wa Dae on March 4, 2004 to the National Election Commission's decision was, internally, a position reached at a meeting of senior pre-

sidential secretaries, all of the positions of Cheong Wa Dae that are publicly announced revert, in principle, to the President. Particularly in this case, the acknowledged facts indicate that the Office of the President reported the outcome of the meeting to the President and held the briefing at issue upon the President's approval. Therefore, the above statements made by the Senior Secretary to the President for Public Information should be deemed as acts of the President himself. The purport of the above statements announced by the Senior Secretary to the President for Public Information is that the President expressed unsatisfaction toward the National Election Commission's decision and denigrated the current election law as the 'vestige of the era of the government-power-interfered elections.'

(B) The President's acts denigrating the current law as the 'vestige of the era of the government-power--interfered elections' and publicly questioning the constitutionality and the legitimacy of the statute from his status as the President do not conform to the obligation to abide by and protect the Constitution and statutes. Should the President suspect the constitutionality of a bill passed by the National Assembly or suspect that such a bill can be improved, the President should ask for reconsideration by returning such bill to the National Assembly (Article 53(2) of the Constitution), and should the President doubt the constitutionality of a current statute, the President should perform his or her obligation to implement the Constitution by, for example, having the administration review the constitutionality of such statute and thereby introduce a bill to revise such statute or revising the statute in a constitutional manner through the support of the National Assembly (Article 52 of the Constitution). Even if the President suspects the constitutionality of a statute, questioning the constitutionality of such statute itself in front of the national public constitutes a violation of the President's obligation to protect the Constitution. The President, of course, may express his or her own position and belief regarding the direction for revising the current statutes as a political figure. However, it is of great importance that in which circumstances and in which relations such discussions on possible statutory revisions take place. The President's statements denigrating the current election statutes by comparing them to the equivalent foreign legislations as a response to and in the context of the National Election Commission's warning for the violation of such election statutes cannot be deemed as an attitude respecting the law.

The statements as such made by the President, who should serve as a good example for all public officials, might have significantly negative influence on the realization of a government by the rule of law, by gravely affecting the other public officials obligated to respect and abide by the law and, further, by lowering the public's awareness to abide by the law. Namely, it cannot be denied that an obscure attitude or a reserved position of the President toward government by the rule of law gravely affects the nation as a whole and the constitutional order. When the President himself or herself fails to respect and abide by the law, no citizen, let alone no other public officials, can be demanded to abide by the law.

(C) To conclude, the act of the President questioning the legitimacy and the normative power of the current statute in front of the public is against the principle of government by the rule of law and is in violation of the obligation to protect the Constitution.

(3)Act of suggesting a confidence vote in the form of a national referendum on October 13, 2003

Since the National Assembly's impeachment resolution specifically mentions the President's 'unconstitutional suggestion to have a confidence referendum' with respect to its third stated ground for impeachment of 'unfaithful performance of official duties and reckless administration of state affairs' and the National Assembly further specified on this issue in its brief submitted subsequent to the initiation of the impeachment adjudication, we examine this issue as a subject matter of this impeachment adjudication.

(A) The President, during 'his speech' at the National Assembly on October 13, 2003 'concerning the budget for fiscal year of 2004,' stated that "I announced last week that I would submit myself for public confidence. ... Although it is not a matter that I can determine, I think a national referendum is a correct way to do this. Although there are disputes as to legal issues, I think it is feasible even under the current law by interpreting the 'matters concerning national security' more broadly, should there be a political agreement," thereby suggesting a confidence vote to be instituted in December of 2003. Debates concerning the constitutional permissibility of a confidence vote were thereby caused. Finally,

such debates upon the constitutionality of a confidence referendum reached the Constitutional Court through a constitutional petition, but the Constitutional Court, in its majority opinion of five Justices in 2003Hun-Ma694 (issued on November 27, 2003), dismissed such constitutional petition on the ground that the 'act of the President that is the subject matter of the case was not an act accompanying legal effect but an expression of a mere political plan, therefore did not constitute an exercise of governmental power.'

(B) Article 72 of the Constitution vests in the President the authority to institute national referendum by providing that the "President may submit important policies relating to diplomacy, national defense, unification and other matters relating to the national destiny to a national referendum if he or she deems it necessary. Article 72 of the Constitution connotes a danger that the President might use national referendum as a political weapon and politically abuse such device by employing it to further legitimize his or her policy and to strengthen his or her political position beyond as a mere means to confirm the will of the public toward a specific policy, as the President monopolizes the discretionary authority to institute national referendum including the authority to decide whether to institute a national referendum, its timing, and the specific agendas to be voted on and the questions to be asked at the referendum, under Article 72 of the Constitution. Thus, Article 72 of the Constitution vesting within the President the authority to institute a national referendum should be strictly and narrowly interpreted in order to prevent the political abuse of national referendum by the President.

(C) From this standpoint, the 'important policy matters' that can be subjected to a national referendum under Article 72 of the Constitution do not include the 'trust of the public' in the President.

An election is for the 'decision on persons,' that is, an election is to determine the representatives of the public as a premise to make representative democracy possible. By contrast, the national referendum is a means to realize direct democracy, and its object or subject matter is the 'decision on issues,' that is, specific state policies or legislative bills. Therefore, by the own nature of the national referendum, the 'confidence the public has in its representative' cannot be a subject matter for a national referendum and the decision of and the confidence in the representative under our Constitution may be performed and manifested solely through elections. The President's attempt to reconfirm the public's trust in him that was obtained through the past election in the form of a referendum constitutes an unconstitutional use of the institution of a national referendum provided in Article 72 of the Constitution in a way not permitted by the Constitution.

The Constitution does not permit the President to ask the public's trust in him by way of national referendum. The constitution further prohibits as an unconstitutional act the act of the President subjecting a specific policy to a referendum and linking the matter of confidence thereto. Of course, when the President institutes a referendum for a specific policy and fails to obtain the consent of the public concerning the implementation of such policy, the President may possibly resign by regarding such outcome as public's distrust in him or her. However, should the President submit a policy matter to a referendum and declare at the same time that "I shall regard the outcome of the referendum as a confidence vote," this act will unduly influence the decision making of the public and employ the referendum as a means to indirectly ask confidence in the President, therefore will exceed the constitutional authority vested in the President. The Constitution does not vest in the President the authority to ask the confidence in him or her by the public through a national referendum, directly or indirectly.

(D) Furthermore, the Constitution does not permit a national confidence referendum in any other form than the national referendum that is expressly provided in the Constitution. This is also true even when a confidence referendum is demanded by the people as the sovereign or implemented under the name of the people. The people directly exercise the state power by way of the election and the national referendum, and the national referendum requires an express basis therefor within the Constitution as a means by which the people exercise the state power. Therefore, national referendum cannot be grounded on such general constitutional principles as people's sovereignty or democracy, and, instead, can only be permitted when there is a ground expressly provided in the Constitution.

(E) In conclusion, the President's suggestion to hold a national referendum on whether he should remain in office is an unconstitutional exercise of the President's

authority to institute a national referendum delegated by Article 72 of the Constitution, and thus it is in violation of the constitutional obligation not to abuse the mechanism of the national referendum as a political tool to fortify his own political position. Although the President merely suggested an unconstitutional national referendum for confidence vote and did not yet actually institute such referendum, the suggestion toward the public of a confidence vote by way of national referendum, which is not permitted under the Constitution, is itself in violation of Article 72 of the Constitution and not in conformity with the President's obligation to realize and protect the Constitution.

(4) Act of disregarding the opinion of the National Assembly

Pursuant to the acknowledged facts, the President disregarded the conclusion of the National Assembly appointment hearing held on April 25, 2003 that Ko Young-gu was inappropriate for the position as the Director of National Intelligence Service, and did not accept immediately the resolution of removal by the National Assembly of September 3, 2003 to dismiss the Minister of Government Administration and Home Affairs.

(A) The President possesses the authority to appoint and remove the members of the executive branch of the government under his or her direction and supervision (Article 78 of the Constitution). Therefore, the appointment of the head of the Director of National Intelligence Service is part of the President's exclusive authority and the President does not bear any obligation to accept the opinion concluded at the appointment hearing at the National Assembly. Thus, the President did not violate the Constitution by impeding upon the authority of the National Assembly or infringing upon the constitutional doctrine of separation of powers, in disregarding the decision of the National Assembly's appointment hearing.

(B) Notwithstanding the authority of the National Assembly to recommend removal of the Prime Minister or other ministers of the administration (Article 63 of the Constitution), such recommendation is a mere suggestion to remove such public official from office with no legally binding effect, and not the authority to determine the removal binding the President thereto. The meaning of the 'authority to recommend removal from office' is that the President may be subject to an indirect check and control by holding politically responsible the Prime Minister or other ministers of the administration serving the President's administration, instead of the President who may not be held politically responsible during the presidential term. An interpretation understanding the authority to recommend removal of certain public officials of Article 63 of the Constitution as the authority to determine removal of such public officials does not conform to the constitutional provision itself, nor can such interpretation be harmonized with the current constitutional separation of powers order that does not authorize the President to dissolve the National Assembly.

(C) In conclusion, the question of whether the President accepts the conclusion reached at the National Assembly appointment hearing or the National Assembly's recommendation to remove a certain public official is a question of political reverence towards the decision of the National Assembly as the institution representing the public will, and not one of a legal nature. Therefore, the acts of the President herein were the President's legitimate exercise of his authority within the separation of powers structure under the Constitution, or were in conformity with constitutional norms, thus did not constitute acts in violation of the Constitution or statutes.

(5) Remark disparaging the National Assembly, etc.

(A) Pursuant to the acknowledged facts, the President in his open letter to the public via the Internet dated May 8, 2003 stated that "The farmer, when the time comes for weeding, roots out the weed from the field. ... certain politicians who fall to personal greed and interest and wrongful group selfishness ... certain politicians who disregard the will of the majority of the public for reform and instead hamper such reform effort and harm the future of the nation ...." (note that the President, unlike the allegation of the impeaching petitioner, did not describe the then incumbent members of the National Assembly as the 'weed to be rooted out') and described the movement at the National Assembly of March 8, 2004 to impeach the President as 'unjust abuse of power.'

The above statements fall within the definition of the expression of opinion toward politics permitted to the President as the constitutional institution of a political nature and, as such, were not in violation of the

Constitution or statutes, apart from the possibility of such statements serving as the ground for political criticism notwithstanding.

(B) Although the impeaching petitioner alleges that the President, in his 'address commemorating the 85th anniversary of the March 1st Independence Movement' of March 1, 2004, stated, concerning the move of the U.S. military base out of Yong-San, that "The symbol of interference, invasion, and dependence will return to the bosom of the citizens of the Republic of Korea as a true independent state," such allegation was not included in the original National Assembly impeachment resolution and is thus deemed to have been added subsequent to the National Assembly's resolution to impeach the President. Therefore, such allegation cannot properly be a subject matter in this impeachment adjudication.

D. Political power-based corruption involving the President's intimate associates and aides

(1) Temporal scope of the proximity to the implementation of official duties

Since Article 65(1) of the Constitution limits the ground for impeachment as arising out of the implementation of 'official duties' in providing 'the President, ... , in the performance of the official duties,' the interpretation of the above provision urges that only certain acts violating the law committed while the President was in the office of the President may constitute the ground for impeachment. Therefore, even those acts committed by the President between the time of election and the time of inauguration do not constitute the ground for impeachment. Although the legal status during this period as the 'president-elect' pursuant to the Act on Presidential Succession provides the president-elect with certain authority to perform preparatory acts necessary for the succession of the office of the president, such status and authority of the president-elect is fundamentally different from the official duties of the President and an act violating the law committed during this period by the president-elect such as receiving illegal political funds is subject to criminal prosecution. Therefore, there is no basis to adopt a different interpretation concerning the act of violation committed during this period in terms of the ground for impeachment under the Constitution.

(2) Reception of illegal political funds concerning the Sun & Moon Group and the presidential election camp.

The alleged grounds for impeachment in this regard arose out of the facts that occurred prior to the respondent's inauguration as the President on February 25, 2003, and are thus clearly irrelevant to the respondent's performance of official duties as the President. Therefore, such alleged grounds are invalid without further reviewing the facts as to whether the respondent was involved in the reception of such illegal funds.

(3) Corruption of the respondent's intimate associates and aides

Among the alleged grounds for impeachment in this regard, those based on the facts that occurred after the president's inauguration as President are that Choi Do-sul received 47 million Korean Won from Samsung and others during his office as the General Affairs Secretary for the President, that Ahn Hee-jung received 1 billion Korean Won of illegal fund from March through August of 2003, and the allegations of Yeo Taek-su and Yang Gil-seung.

However, none of the evidence submitted throughout the proceedings in this case supports the allegation that the respondent directed or abetted the above Choi Do-sul and others in receiving the illegal funds or was otherwise illegally involved therein. Therefore, the alleged grounds for impeachment premised on the above are meritless.

The rest of the alleged grounds for impeachment are based on facts that occurred prior to the respondent's inauguration as President and are thus clearly irrelevant to the respondent's performance of official duties as President. Therefore, such alleged grounds are invalid without further reviewing the facts as to whether the respondent was involved in the alleged reception of illegal funds.

(4) Publicly declaring retirement from politics

Pursuant to the acknowledged fact, the respondent publicly declared, at the party representative meeting at Cheong Wa Dae on December 14, 2003, that the respondent would retire from politics should the amount of illegal political funds received by his election camp

exceed one-tenth of that received by the Grand National Party at the time of the presidential election.

However, such statement was made risking his political trustworthiness facing a political situation and, as such, can hardly be deemed as a statement creating any legal obligation or responsibility. The question of whether to keep such promise is merely a matter for political and moral judgment and responsibility on the part of the President as a politician and cannot constitute an act of violating the Constitution or statutes in the President's performance of his official duties.

(5) Remark relating to the investigation by the prosecutors' office

The alleged ground for impeachment contending that the respondent interfered with and obstructed the investigation by the prosecutors' office by, for example, making a statement at the year-end luncheon at Cheong Wa Dae on December 30, 2003 that "I would have been able to twice grind up the prosecution had I meant to kill the prosecution, but I did not." However, this allegation was not included in the National Assembly's original impeachment resolution and is thus deemed to have been added subsequently, therefore it cannot be a subject matter in this impeachment adjudication.

E. Political chaos and economic collapse caused by unfaithful performance of official duties and reckless administration of state affairs

(1) The ground for impeachment in this regard is that the respondent, since his inauguration as President to date, has created extreme hardship and pain on the entire citizenry by breaking down the national economy and the state administration, allegedly caused by the President's unfaithful performance of official duties and reckless administration of state affairs lacking any sincerity or consistency, such as the President's repeatedly improper statements, expression of an anti-war position following the declaration to dispatch military to Iraq, proposition of an unconstitutional confidence referendum, and declaration to retire from politics, and unjust acts such as an illegal electoral campaign pouring all his efforts into the general election prior to the permitted time period therefor. It is alleged that the respondent thereby impeded the right to pursue happiness of the public under Article 10 of the Constitution and violated his 'obligation to faithfully perform official duties as president' as expressly provided under Article 69 of the Constitution.

As various statistical indicators relating to the 'economic breakdown' are presented in this case, although it is true that household debt increased, the unemployment rate among younger generations grew, and the state debt increased in the past year, it would be irrational to hold the respondent entirely responsible for such economic aggravation. Also, there is no evidence in this case that would otherwise support a judgment that the economy of the nation fell to an irrecoverable state or that the administration of state affairs was broken down.

(2) Article 69 of the Constitution stipulates the 'obligation to faithfully perform the official duties' as President while it provides for the oath of office for the President. As stated previously, Article 69 is not a provision that merely obligates the President to take the oath of office, but is a provision that reemphasizes and specifies the obligation mandated by the Constitution in Articles 66(2) and 66(3) for the office of presidency by expressively setting forth the content of such oath of office.

Although the 'obligation to faithfully perform the official duties' of the President is a constitutional obligation, this obligation, by its own nature, is, unlike the 'obligation to protect the Constitution,' not the one the performance of which can be normatively enforced. As such, as a matter of principle, this obligation cannot be a subject matter for a judicial adjudication. Whether the President has faithfully performed his official duties may become the object of the judgment by the public at the next regularly held election. However, under the current Constitution that limits the presidential term to a single term, there is no means to hold the President directly responsible, even politically, let alone legally, toward the public and the President's faithfulness or unfaithfulness in performing his or her official duties may only be politically reflected favorably or unfavorably on the ruling party of which the President is a member.

As Article 65(1) of the Constitution limits the ground for impeachment to the 'violation of the Constitution or statutes' and the impeachment adjudication process at the Constitutional Court is solely to determine the existence or the nonexistence of aground for impeachment from a legal standpoint, the ground for impeachment alleged by the petitioner in this case concerning the respondent's faithfulness of the performance of the official duties such as the political incapability or the mistake in policy decisions, cannot in and by itself

constitute a ground for impeachment and therefore it is not a subject matter for an impeachment adjudication.

F. Sub-conclusion

(1) The President's statements at the press conference with six news media organizations in the Seoul-Incheon region on February 18, 2004 and the statements at the press conference with the Korean Network Reporters' Club on February 24, 2004 were in violation of the neutrality obligation owed by public officials provided in Article 9 of the Public Officials Election Act.

(2) The act of the President in response to the National Election Commission's March 4, 2004 decision that found a breach of election law by the President was in violation of the President's obligation to protect the Constitution as not in conformity with the principle of the rule of law. The act of the President on October 13, 2003 that proposed a confidence referendum violated the obligation to protect the Constitution as not in conformity with Article 72 of the Constitution.

6. Whether to remove the respondent from office

A. Interpretation of Article 53(1) of the Constitutional Court Act

Article 65(4) of the Constitution provides that the "effect of the decision of impeachment is limited to the removal of the public official from office," and Article 53(1) of the Constitutional Court Act provides that the "Constitutional Court shall issue a decision removing the public official from office when there is a valid ground for the petition for impeachment adjudication." Here, the issue is how to interpret the phrase of "when there is a valid ground for the petition for impeachment adjudication."

One possible literal interpretation is that Article 53(1) of the Constitutional Court Act provides that the Constitutional Court shall automatically issue a decision removing the public official from office as long as there is any valid ground for impeachment set forth in Article 65(1) of the Constitution. However, under such interpretation, the Constitutional Court is bound to order removal from public office upon finding any act of the respondent in violation of law without regard to the gravity of illegality. Should the respondent be removed from his office for any and all miscellaneous violations of law committed in the course of performing his official duties, this would be against the principle of proportionality that requests constitutional punishment that corresponds to the responsibility given to the respondent. Therefore, the existence of the 'valid ground for the petition for impeachment adjudication' in Article 53(1) of the Constitutional Court Act means the existence of a 'grave' violation of law sufficient to justify removal of a public official from his or her office and not merely any violation of law.

B. Standard to be adopted in judging the 'gravity of violations'

(1) The question of whether there was a 'grave violation of law'or whether the 'removal is justifiable' cannot be conceived by itself. Thus, whether or not to remove a public official from office should be determined by balancing the 'gravity of the violation of law' by the public official against the 'impact of the decision to remove.' As the essential nature of the impeachment adjudication process lies in the protection and the preservation of the Constitution, the 'gravity of the violation of law' means the 'gravity in terms of the protection of the constitutional order.' Therefore, the existence of a valid ground for the petition for impeachment adjudication, that is, the removal from office, should be determined by balancing the 'degree of the negative impact on or the harm to the constitutional order caused by the violation of law' and the 'effect to be caused by the removal of the respondent from office.'

(2) The President is in an extremely significant status as the head of the state and the chief of the executive branch (Article 66 of the Constitution). Also, the President is an institution representing the public will directly vested with the democratic legitimacy in that the President is elected through a national election (Article 67 of the Constitution). In these regards, there is a fundamental difference in political function and weight between the President and other public officials subject to impeachment. This difference is exhibited as a fundamental discrepancy in the 'impact of the removal.'

A decision to remove the President from office would deprive the 'democratic legitimacy' delegated to the President by the national constituents through an election during the term of the office and may cause political chaos arising from the disruption of the opinions among the people, that is, the disruption and the antagonism between those who support the President and those who do not, let alone a national loss and an interruption in state affairs from the discontinuity of the performance of presidential duties. Therefore, in

the case of the President, the 'directly delegated democratic legitimacy' vested through a national election and the 'public interest in continuity of performance of presidential duties' should be considered as important elements in determining whether to remove the President from office. Therefore in light of the gravity of the effect to be caused by the removal of the President from office, the ground to justify a decision of removal should also possess corresponding gravity.

As a result, a grave violation of law is required for a decision to remove the President from office that can overwhelmingly outweigh the extremely significant impact of such decision of removal, whereas even a relatively minor violation of law may justify the removal from office of public officials other than the President as the impact of removal is generally light.

(3) Although it is very difficult to provide in general terms which should constitute a 'grave violation of law sufficient to justify the removal of the President from office,' that the impeachment adjudication process is a system designed to protect the Constitution from the abuse of public officials' power on one hand and that the decision of removal of the President from office would deprive the public's trust vested in the President on the other hand, can be presented as important standards. That is, on one hand, from the standpoint that the impeachment adjudication process is a procedure ultimately dedicated to the protection of the Constitution, a decision to remove the President from office may be justified only when the President's act of violating law has a significant meaning in terms of the protection of the Constitution to the extent that it is requested to protect the constitution and restore the impaired constitutional order by a decision of removal. On the other hand, from the standpoint that the President is an institution representing the public's will directly vested with democratic legitimacy through election, a valid ground for impeaching the President can be found only when the President has lost the public's trust by the act of violation of law to the extent that such public trust vested in the President should be forfeited while the presidential term still remains.

Specifically, the essential content of the constitutional order ultimately protected by the impeachment adjudication process, that is, the 'basic order of free democracy' is constituted of the basic elements of the principle of government by the rule of law which are 'respect for basic human rights, the separation of powers, and the independence of the judiciary,' and of the basic elements of the principle of democracy which include 'the parliamentary system, the multi-party system, and the electoral system' (2 KCCR 49, 64, 89Hun-Ka113, April 2, 1990). Accordingly, a 'violation of law significant from the standpoint of protection of the Constitution' requiring the removal of the President from office means an act threatening the basic order of free democracy that is an affirmative act against the fundamental principles constituting the principles of the rule of law and a democratic state. An 'act of betrayal of the public's trust' is inclusive of other patterns of act than a 'violation of law significant from the standpoint of protection of the Constitution,' and, as such, typical examples thereof include bribery, corruption and an act manifestly prejudicing state interest, besides an act threatening the basic order of free democracy.

Therefore, for example, in case of the President's act of corruption by abuse of power and status given by the Constitution such as bribery and embezzlement of public funds, the President's act manifestly prejudicing state interest despite the President's obligation to implement public interest, the President's act of impeding upon the authority vested in other constitutional institutions such as the National Assembly by abuse of power, the President's act of infringing upon the fundamental rights of the public such as oppression of the citizenry by way of state organizations, or the President's act of an illegal electoral campaign or fabricating the election by using the state organizations in elections, it may be concluded that the President can no longer be entrusted to implement state affairs since the President has lost the trust of the public that the President will protect the basic order of free democracy and faithfully implement state administration.

In conclusion, a decision to remove the President from his or her office shall be justified in such limited circumstances as where the maintenance of the presidential office can no longer be permitted from the standpoint of the protection of the Constitution, or where the President has lost the qualifications to administrate state affairs by betraying the trust of the people.

C. Whether to remove the President from office in this case

(1) Summary of the violation of law by the President

As confirmed above, the acts of violation of law by the President at issue in this case can be categorized

into the violation of the 'obligation to maintain neutrality' concerning elections owed by public officials by making statements in support of a particular political party at press conferences, and the violation of the obligation to protect the Constitution owed by the President against the principle of rule of law and Article 72 of the Constitution by expressing unsatisfaction towards the National Election Commission's decision that the President violated the election law and making statements denigrating the current election law and by proposing a confidence referendum.

(2) Gravity of the violation of law

(A) The President violated the 'obligation to maintain neutrality concerning elections' by making statements supporting a particular political party, thereby infringing the constitutional request that the state institution should not affect the process through which the public freely forms the opinion or distort the competitive relations among the political parties.

However, such acts by the President do not constitute affirmative acts of violation against the 'parliamentary system' or 'electoral system' constituting basic order of free democracy and, accordingly, it cannot be deemed that the negative impact of the acts in violation of the Public Officials Election Act upon the constitutional order was grave, considering that the above acts of violation of the President were not committed in any affirmative, active or premeditated way by, for example, attempting to have administrative authority intervene through state organization. Instead, they took place in a way that was unaggressive, passive, and incidental, during the course of expressing the president's political belief or policy design in the form of a response to the question posed by the reporters at the press conference. It should also be considered that the boundary between the 'expression of opinion toward politics' constitutionally permissible for the President who is allowed to do political and party activities and the impermissible 'acts of violating neutrality obligation concerning elections' is blurred and there has not been any established clear legal interpretation as to 'in which circumstances it is beyond the scope of political activities permitted for the President with respect to elections.'

(B) The President's statement and act that causes suspicion to the President's willingness to abide by law, even if minor, may greatly affect the legal conscientiousness and the observance of the law of the public. Thus, the President's statement disrespectful of the current election law cannot be deemed as a minor violation of law on the part of the President who bears an obligation to make all the efforts to respect and implement the law.

However, the statement of the President denigrating the current election law as the 'vestige of the era of government-power- interfered election' does not constitute an affirmative violation of the current law. Instead, such statement is an act of violation of law committed during the course of reacting, in an unaggressive and passive way, towards the decision of the National Election Commission. The President, of course, may well deserve criticism as such statement was an expression of disrespectfulness toward the current law, therefore it was in violation of the President's obligation to protect the Constitution. However, considering the totality of the specific circumstance where such statement was made, such statement was made with no affirmative intent to stand against the basic order of free democracy, nor was it an act of grave violation of law fundamentally questioning the principle of the rule of law.

(C) The acts of the President intending to seek sanctuary in direct democracy through directly appealing to the public by proposing a confidence referendum in the state of minority ruling party and majority opposing party rather than administering state affairs in conformity with the spirit of the presidential system and parliamentary system of the Constitution, were not only in violation of Article 72 of the Constitution, but also against the principle of the rule of law.

Also, however, in this regard, the above acts of the President did not constitute an affirmative violation of law against the fundamental rules of the Constitution forming the principle of democracy and accordingly, there was no grave negative impact upon the constitutional order, considering that the President merely proposed an unconstitutional confidence referendum and did not attempt to enforce such and that the interpretation as to whether the 'important policy concerning national security' of Article 72 of the Constitution includes the issue of confidence in the President has been subject to academic debates.

(3) Sub-conclusion

(A) To conclude, reviewing the totality of the impact the violation of law by the President has upon the constitutional order, specific acts of violation of law by

the President cannot be deemed as a threat to the basic order of free democracy since there was no affirmative intent to stand against the constitutional order therein.

Therefore, since the act of violation of law by the President does not have a significant meaning in terms of the protection of the Constitution to the extent that it is requested to protect the Constitution and restore the impaired constitutional order by removing the President from office and, also, since such violation of law by the President cannot be deemed to evidence the betrayal of public trust on the part of the President to the extent that the public trust vested in the President should be deprived of prior to the completion of the remaining presidential term, there is no valid ground justifying removal of the President from office.

(B) The power and political authority of the President is vested by the Constitution and a president who disrespects the Constitution denies and destroys his or her own power and authority. Especially, the importance of a resolute position of the President to protect the Constitution cannot be emphasized enough in today's situation where the constitutional awareness among the public has just begun to sprout in a brief history of democracy and the respect for the Constitution has yet to be firmly established in the consciousness of the general public. As the 'symbolic existence of the rule of law and the observance of law,' the President should make the best effort in order to realize the rule of law and ultimately protect the basic order of free democracy by, not only respecting and abiding by the Constitution and statutes, but also taking a decisive stand toward unconstitutional or unlawful acts on the part of other state institutions or the general public.

7. Conclusion

A. The petition for impeachment adjudication is hereby rejected as the number of the Justices required to remove the President from office under Article 23(2) of the Constitutional Court Act has not been met. It is so ordered, pursuant to Articles 34(1) and 36(3) of the Constitutional Court Act.

B. Article 34(1) of the Constitutional Court Act provides that the deliberation at the Constitutional Court shall not be disclosed to the public, whereas the oral argument and the pronouncement of the decision shall be disclosed. Here, non-disclosure of the deliberation by the Constitutional Court Justices means that neither the separate opinions of the individual Justices nor the numbers thereof shall be disclosed, as well as the course of the deliberation. Therefore, the opinions of the individual Justices may be noted in the decision only when a special provision permits an exception to such secret deliberation procedure. While there is such special provision permitting an exception to the secrecy of deliberation in Article 36(3) of the Constitutional Court Act applicable to the proceedings of constitutional review of a law, competency dispute among state institutions, and constitutional petition, there is no provision permitting exception to the secrecy of deliberation with respect to the impeachment adjudication. Therefore, in this impeachment adjudication, the separate opinions of the individual Justices or the numbers thereof may not be pronounced in the decision.

It should be noted that, concerning the above position, there was also a position that separate opinions may be pronounced and disclosed in the decision, interpreting Article 34(1) of the Constitutional Court Act as a provision merely providing for non-disclosure of the deliberative proceedings in that only the external proceeding or the content of the opinions exchanged therein to reach the conclusion should not be disclosed and the final opinion of the individual participating Justices reached through such deliberative process may be disclosed, and interpreting Article 36(3) of the Constitutional Court Act as a provision permitting disclosure of separate opinions since such provision is based on the consideration to prevent the problem of indiscriminately mandating disclosure of separate opinions where it is improper to disclose separate opinions in impeachment adjudication or political party resolution proceeding, thus leaving the decision to disclose separate opinions in impeachment adjudication to the discretion of the participating Justices.

Justices Yun Young-chul (Presiding Justice), Kim Young-il, Kwon Seong, Kim Hyo-jong, Kim Kyung-il, Song In-jun, Choo Sun-hoe(Assigned Justice), Jeon Hyo-sook, and Lee, Sang-kyung