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The Legalization of National Security: State, Society, and the Law on the Use of Force

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The Legalization of National Security: State, Society, and the Law on the Use of Force

By

Joon Seok Hong

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Abstract

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Many states around the world have increasingly turned to the law in addressing and formulating their national security policies. Whether it is the assassination of Osama bin Laden or American action in Libya, much discussion and debate have focused on the legality of such uses of force. Which side is right in such debates is less important than the legal character such discussions have assumed. This is a significant development, especially given the common assumption that because the law constrains, political leaders eschew the law in strategic contexts. So why are states increasingly turning to law in addressing and formulating their national security policies?

From an interdisciplinary perspective, this project argues that the interplay of two main factors has promoted the legalization of national security: the concentration of executive authority and the strength of social movement organizations. First, the growing centralization of executive power, as witnessed through the burgeoning national security bureaucracies and administrative state, has prompted a turn to the law since it is seen as both a valuable instrument in policy promotion in a world of complex threats, as well as an important source of legitimacy. Second, social movement organizations have sought influence in national security through sophisticated litigation strategies that challenge the executive to justify policies through legal argumentation. Therefore, paradoxically, both the expansion of executive authority and pressures against it from below contribute to legalization.

These factors represent what this study posits as the growing structural contradiction between the values of statism (sovereignty) and individualism (human rights) in the international system. This fundamental logic of contradiction operates as an important engine for legal and political change and can manifest in different ways, such as competition, conflict, confusion, and contravention. Both the executive and social movements turn to the law because the inherent indeterminacy of law provides both with resources for justification, and such law-based argumentation has reinforced itself and promoted legalization. This project examines variations in both factors through cases studies involving the U.S., China, Japan, and South Korea.

The implications of the legalization of national security are significant. First, the approach taken in this study opens up the field to examine not only international law, which has predominated questions on the use of force, but also to seriously examine domestic legal developments. By encompassing domestic law, it offers a more holistic and empirically relevant

perspective on a research program that has been overly normative in scope and tone. Second, the focus on domestic law challenges the traditional emphasis on compliance in international legal scholarship. Rather than normatively dismissing non-compliance as simply bad, it is necessary to model and empirically test how violations of certain international rules can promote greater legalization. Executives have used domestic legal arguments and interpretations to try and skirt international obligations, but such non-compliance can have the counter-intuitive result of actually promoting greater legalization and ultimately limiting the use of force.

I dedicate this dissertation to my parents.

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Joon Seok Hong
Albany, California
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Introduction

1. Research Question

The use of force has met the force of law. National security and foreign policy making, traditionally the domain of executive discretion and raw political calculus, has increasingly become formalized and institutionalized through legal argumentation and regulatory mechanisms. From government offices to the front page news, the legality of the use of force both at home and abroad has risen as a focus of concern and active discussion in many countries and across the international community. For example, in June 2010, member states to the International Criminal Court (ICC) finally agreed on a definition of "aggression," clarifying the ICC's jurisdiction over crimes associated with the use of force after more than a decade of debate.[1] Then in May 2011, when Osama bin Laden was killed in Pakistan, some observers questioned whether the U.S. military operation violated domestic laws against political assassinations, while the White House argued that it was a lawful use of force.[2] And finally, when U.S. forces participated in operations in Libya in the summer of 2011, many criticized the legal justifications that administration lawyers put forth and argued that the requirements of the War Powers Resolution were unmet.[3] Which side is right in such debates is less important than the legal character such discussions have assumed. This is a significant development, especially given the common assumption that because the law constrains, political leaders eschew the law in strategic contexts. So why are states increasingly turning to law in addressing and formulating their national security policies?

2. Argument

This study argues that this "legalization of national security" is driven by the interplay of two main factors: the concentration of executive power and the strength of social movement organizations. First, the growing centralization of executive authority in this area, as witnessed by the rise of the national security state in many countries in the latter half of the twentieth century, has been characterized by the proliferation of bureaucratic apparatuses and administrative agencies that give the executive greater institutional control over strategic policy. Rather than viewing law only as a constraint, the government has seen the necessity of law in laying the institutional bases for these executive agencies and bodies. This is especially salient with the rapid advances in technology that have augmented government power and raised concerns about its limits. In addition, presidents and other heads of state have seen the functional value of law as an instrument of policy promotion in a world of complex and multifaceted threats that require better coordination and response. The law allows political leaders to rationalize and institutionalize such complicated government processes. Finally, executive power has

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[1] The ICC members agreed to amend the Rome Statue, defining aggression as "the planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct political or military action of a State, of an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations. See "After Years of Debate, ICC Member States Agree on Definition of Aggression," *UN News Centre* (June 14, 2010), http://www.un.org/apps/news/story.asp?NewsID=35018&Cr=international+criminal+court&Cr1.

[2] Jeffrey Toobin, "Killing Osama: Was it Legal?" *The New Yorker* (May 2, 2011), http://www.newyorker.com/online/blogs/newsdesk/2011/05/killing-osama-was-it-legal.html.

[3] Paul Starobin, "A Moral Flip-Flop? Defining a War," *New York Times* (August 6, 2011), http://www.nytimes.com/2011/08/07/opinion/sunday/harold-kohs-flip-flop-on-the-libya-question.html?pagewanted=all.

increasingly relied on the law because of the legitimacy that it may confer to executive action, especially when it comes to national security policy and the use of force.

This need for legitimacy is related to the second factor contributing to legalization: the strength of social movement organizations. On an increasing scale, social movements and civic organizations have sought more influence in the national security arena through sophisticated litigation strategies and other forms of legal mobilization that have recast discussions of strategic issues and pressured the executive to justify its policies through legal argumentation and responses. The law has provided an important opportunity for such bottom-up forces to have a greater impact in a policy realm that has traditionally been insulated from sustained popular pressure. These social movement organizations have appealed to both international rules and domestic laws in challenging executive action, highlighting the importance of a two-level perspective on the role of law on the use of force question.

Thus, paradoxically, both the growth of executive authority and pressures against it from below have contributed to the legalization of national security. The interplay of these two factors is important since their mutual interaction reinforces the legal dynamic at play; legal argumentation begets more legal justification, which promotes greater formalization and institutionalization of national security policy. Executive authority and social movement organizations are salient representations of what this study posits has been a growing structural contradiction between the values of statism (sovereignty) and individualism (human rights) in the international system. The legalization of national security is driven by the fundamental logic of contradiction, which operates as an important engine for legal and political change.

The implications of such legalization of national security are significant. First, the approach taken in this study opens up the field to examine not only international law, which has predominated questions on the use of force (primarily through the United Nations (UN) Charter Article 2(4)), but also to seriously examine domestic legal developments. By encompassing domestic law, this study offers a more holistic and empirically relevant perspective on a research program that has been overly normative in scope and tone (i.e. states *should* not use force in most situations because the UN Charter prohibits it). The more important and relevant question is: *how* are states trying to justify the use (or non-use) of force? As noted above, justifications offered by states have taken on a distinctly legalistic basis (in domestic law as well as international rules). Second, the focus on domestic law challenges the traditional emphasis on compliance in international legal scholarship. Rather than normatively dismissing non-compliance as simply bad, it is necessary to model and empirically test how violations of certain international rules can actually promote greater legalization. This study examines how states have used domestic legal arguments and interpretations to try and skirt international obligations and argues that such non-compliance can have the counter-intuitive result of actually promoting greater legalization and rule-driven behavior. The qualitative difference is that such legal justifications are mixtures of both international rules and domestic laws.

This study is divided into three sections. Section one lays out the main theoretical argument of the legalization of national security. It examines the interplay of both the top-down and bottom-up dynamics of executive power and social movements, and how they have promoted legalization. These forces illustrate the deeper, structural contradiction between the values of statism and individualism in the international system, which can have different manifestations, such as conflict, contradiction, competition, and contravention. Section two presents qualitative case studies that illustrate the variations on the legalization of national security, based on the differences in the strength of executive authority and social movement

organizations that have risen to challenge growing executive power in the strategic arena. In countries with both strong presidential systems and vibrant social movements, such as in the United States and South Korea, there have been greater degrees of legalization in the national security field. In contrast, countries such as Japan, which have relatively weaker executive power over strategic policy and muted civic responses, there have only been moderate levels of legalization. Relatively more autocratic systems, such as in China, have also witnessed weaker degrees of legalization, since government leaders find less need to rely on the law to pursue national security objectives. Finally, the last section explores the implications of the legalization of national security, especially in terms of emphasizing a multi-level analysis when examining the legality of force, going beyond compliance theory, and examining the impact that formalization of national security policy can have on the use of force at home and abroad.

Chapter 1

The Theory: The Legalization of National Security

Chapter 1. The Theory: The Legalization of National Security

The legalization of world politics is a growing, but under-theorized area of study in both political science and law. This is particularly evident in the field of national security. From an interdisciplinary perspective, this chapter presents the theoretical argument of the study, proposing a model of legalization that demonstrates how the concurrent concentration of executive power and the rise of social movement organizations contribute to increasing formalization of national security policy. It is a paradoxical phenomenon in that greater power is both created and constrained by the law. This chapter further posits that both forces are manifestations of a larger structural contradiction in the international system between the fundamental values of sovereignty and human rights in the post-WWII era. The logic of contradiction may manifest in different ways, but in each scenario, executive power and social movements increasingly turn to the law to attempt to resolve the uncertainties and conflicts that the systemic contradiction produces. The relative indeterminacy of law, especially in the national security context, provides political agents the conceptual resources and justifications for their respective positions. Thus, the logic of contradiction is fundamental in explaining political and legal change.

1. The Legalization of World Politics: A Process-Oriented Perspective

The nexus between law and politics, especially on the international level, has been an area of growing interest to both political scientists and legal scholars.[4] As one prominent study has noted, "the world is witnessing a move to law."[5] While this phenomenon has been witnessed in many issue areas, no widely accepted definition of "legalization" of politics has emerged. One recent attempt to conceptualize legalization, by Kenneth Abbott and his co-authors, defines legalization as a form of institutionalization with a set of particular characteristics or elements, specifically obligation, precision, and delegation.[6] Here, obligation denotes an actor being bound to certain rules or commitments, while precision refers to how those rules "unambiguously" outline and define certain permitted and proscribed behaviors.[7] The third characteristic, delegation, means that a third party has the authority to interpret, apply, and enforce the law.[8]

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[4] See Judith L. Goldstein, Miles Kahler, Robert O. Keohane, and Anne-Marie Slaughter, *Legalization and World Politics* (Cambridge: MIT Press, 2001).; Robert L. Beck, Anthony Clark Arend, and Robert D. Vander Lugt, eds., *International Rules: Approaches from International Law and International Relations* (New York: Oxford University Press, 1996); Anthony Clark Arend, *Legal Rules and International Society* (New York: Oxford University Press, 1999); Francis Anthony Boyle, *Foundations of World Order* (Durham: Duke University Press, 1999); Michael Byers, ed., *The Role of Law in International Politics: Essays in International Relations and International Law* (New York: Oxford University Press, 2000); Beth A. Simmons and Richard H. Steinberg, eds., *International Law and International Relations* (Cambridge: Cambridge University Press, 2006); David Armstrong, Theo Farrell, and Helene Lambert, *International Law and International Relations*, 2nd ed. (Cambridge: Cambridge University Press, 2012); Oona Anne Hathaway and Harold Hongju Koh, eds., *Foundations of International Law and Politics* (Foundation Press, 2004).

[5] Judith Goldstein, Miles Kahler, Robert O. Keohane, and Anne-Marie Slaughter, "Introduction: Legalization and World Politics," *International Organization*, vol. 54, no. 3 (Summer 2000), 385.

[6] Kenneth W. Abbott, et al., "The Concept of Legalization," *International Organization*, vol. 54, no. 3 (Summer 2000), 401.

[7] Ibid.

[8] Ibid.

As the authors acknowledge, such a definition of legalization finds its roots in a positivist notion of law,[9] commonly associated with H. L. A. Hart, which sees law as "out there" and largely determinable, as well as independent from morality or politics.[10] However, such a positivist view of law leads to a narrow, static conception of how law functions and imbues an analytical bias toward examining compliance (thus, the emphasis on delegation, which parallels Hart's Rule of Adjudication) rather than exploring how an agent's interaction with the law can change both. Similarly, Finnemore and Toope have criticized the Abbott group's approach to legalization as particularly limited, since it is overly formal and analytically thin, leaving many questions about what the logic and operationalization of the three characteristics may entail.[11] Furthermore, the notion that law must be "unambiguous" and precise is a particularly narrow view of law, which is at odds with the concept of legalization proposed in this study.

Instead, this study defines legalization of national security as a *process* in which strategic policies are increasingly formulated, articulated, and implemented through legal argumentation, justification, and principles, rather than expressed only as political interests or statements of policy. Process is about the patterns of interaction between actors and the logic of behavior that emerges from practice.[12] Thus, legalization is not only signified by a particular law or court case, as positivists may focus on; rather, it involves examining argumentative strategies and justifications for a policy choice. The emphasis on the *how*, rather on mere description, also opens up the possibility of examining change in the structure of international and domestic politics, as well as the interests of state agents. What does it really mean when White House officials announce that U.S. involvement in Libya in 2011 is or is not in the American national interest,[13] or when China argues that settling the Taiwan question is fundamental to its national interest?[14] Often it is unclear exactly what national interest entails, aside from an executive pronouncement making it so. Neorealists would argue that certain national interests, such as power, security, and wealth are universal to all states.[15] But as constructivists point out, such "black box" categories do not explicate what they entail for a particular state and how it came to acquire specific interests.[16] The focus on process, rather than descriptive criteria, goes a long way in illuminating how political interests form and shift. Legalization is one such process that has increasingly become prevalent in contemporary world politics.

Both the form and substance of the legalization process is important and qualitatively different from an executive's simple proclamation that a certain policy is in the national interest.

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[9] Ibid, 403.

[10] See H.L.A. Hart, *The Concept of Law*, Clarendon Law Series, 3rd ed. (New York: Oxford University Press, 2012).

[11] Martha Finnemore and Stephen J. Toope, "Alternative to 'Legalization': Richer Views of Law and Politics," *International Organization*, vol. 54, no. 3 (Summer 2001), 745.

[12] Wendt defines process as: "how state agents and systemic cultures are sustained by foreign policy practices, and sometimes transformed." Alexander Wendt, *Social Theory of International Politics* (Cambridge: Cambridge University Press, 1999), 313.

[13] See Helene Cooper, "Obama Cites Limits of U.S. Role in Libya," *New York Times* (March 28, 2011), http://www.nytimes.com/2011/03/29/world/africa/29prexy.html?pagewanted=all; Jon Hilsenrath, "Gates Says Libya Not Vital National Interest," *Wall Street Journal* (March 27, 2011), http://online.wsj.com/article/SB10001424052748704308904576226704261420430.html?mod=googlenews_wsj.

[14] The People's Republic of China, *The Taiwan Question and Reunification of China* (Taiwan White Paper), Taiwan Affairs Office & Information Office State Council, (Beiing: August 1993), http://www.china.org.cn/ewhite/taiwan/10-4.htm

[15] Kenneth Waltz, "Reflections on *Theory of International Politics*: A Response to My Critics," in Robert O. Keohane, ed., *Neorealism and its Critics* (New York: Columbia University Press, 1986), 329.

[16] Martha Finnemore, *National Interests in International Society* (Ithaca: Cornell University Press, 1996), 1-2.

Leaders now are increasingly relying on reasoned arguments outside of just national interests, namely legal justifications, to validate a particular policy choice. The need for this justification parallels what Martin Shapiro calls the "giving reasons requirement" of legal and adjudicative argumentation.[17] The legitimacy and acceptance of judicial decisions requires a well reasoned (and often published) articulation for a certain decision beyond a recitation of political preferences or interests. Similarly, Friedrich Kratochwil argues that rules and norms provide the *reasons* for state behavior and decision-making.[18]

This echoes Lon Fuller's notion of the adjudicative process. Fuller defines adjudication as "a process of decision that grants to the affected party a form of participation that consists in the opportunity to present proofs and reasoned arguments."[19] He continues that the party "must therefore, if his participation is to be meaningful, assert some principle...by which his arguments are sound and his proofs relevant...A naked demand is distinguished from a claim of right by the fact that the latter is a demand supported by a principle."[20] In contemporary world politics, the executive faces greater pressure to defend strategic policy beyond the tautology that a national interest is so because it is a national interest. Sovereignty, the root of and blanket justification for national interest, is no longer enough. As Christine Gray notes, "states generally do not claim revolutionary new rights to use force, but try to defend their use of force by claiming self-defense or other legal justifications."[21] The veil of secrecy that often covers strategic policymaking is opened up to challenges from other groups, such as social movement organizations.

This process-oriented perspective takes us beyond a narrow, positivist view of the legal process and places the discussion of national security at the confluence of law and politics. But it begs the question: What is the *nature* of that process? While Finnemore and Toope also point to the importance of viewing legalization as a process, they are curiously silent as to precisely what that process looks like.[22] What law? Who is involved? And why do they turn to the law? Addressing such gaps in the theoretical literature, this study proposes a model of legalization that identifies the "logic of contradiction" as the fundamental driving force of legalization. It encompasses both international and domestic levels of analysis and focuses on the role of executive power and social movement organizations. As noted below, attempts to resolve the contradiction between values encourage a turn to the law by such actors, which promotes legalization and change. This is a dynamic and interactive conception that views law as closely connected to politics and legal argumentation as a distinct and meaningful form of political expression. [23]

Thus, the theory outlined here shares many of the assumptions and foundations of *legal* realism (and the legal process and critical legal studies (CLS) movements it has influenced) in legal academia, which eschew strict formalism and view the law as an extension of politics and a

[17] See Martin M. Shapiro, "The Giving Reasons Requirement," *University of Chicago Legal Forum* (1992), 179-221.
[18] Friedrich V. Kratochwil, *Rules, Norms, and Decisions: On the Conditions of Practical and Legal Reasoning in International Relations and Domestic Affairs* (Cambridge: Cambridge University Press, 1989), 11-12. Emphasis added.
[19] Lon Fuller, "The Forms and Limits of Adjudication," *Harvard Law Review*, vol. 92, no. 2 (December 1978), 369.
[20] Ibid.
[21] Christine D. Gray, ed. *International Law and the Use of Force* (New York: Oxford University Press, 2008), 24.
[22] Ibid, 750.
[23] Martin M. Shapiro, "Political Jurisprudence," *Kentucky Law Journal*, vol. 52 (1963-1964), 294.

creation of judges.[24] In particular, legal process theorists focus on the how law is made through political institutions, both vertically (i.e. federalism) and horizontally (i.e. separation of powers), as well as within judiciaries in a more globalized world.[25] Pioneers of the legal process approach, such as Harold Lasswell, Myres McDougal, and W. Michael Reisman, defined legal process as "the making of authoritative and controlling decisions," rather than a mere application of a set of rules.[26] As Rosalyn Higgins notes, "the role of international law is to assist in the choice between…various alternatives. International law is a process for resolving problems."[27] Similarly, Abram Chayes argued that law affected political behavior by operating "[f]irst, as a constraint on action; second, as the basis of justification or legitimation for action; and third, as providing organizational structures, procedures, and forums" for policymaking.[28] However, while the focus on process was an important turn away from positivism, the international perspectives on the legal process school remained largely descriptively, highly context specific, and unable to precisely model the causal mechanisms or the logic that drove the interactions between various actors and institutions in the international legal system. This study seeks to fill this gap, by modeling a specific and dynamic theory of legalization as process, a process that is fundamentally driven by a logic of contradiction between the values of statism and individualism in world affairs.

Furthermore, the focus on norms and laws in world affairs also closely aligns this study with the study of international regimes and institutions in international relations (IR) scholarship. Krasner defines international regimes as "principles, norms, rules, and decision-making procedures around which actor expectations converge in a given issue-area.[29] Similarly, neoliberal scholars also argue that institutions, or "rules, norms, and decision-making procedures," play important roles in influencing interstate relations by shaping state interests, reducing transaction costs, and promoting cooperation.[30] For example, Kratochwil argues that laws perform an important constitutive function in shaping the nature of the interstate relations and the validity of state goals and actions.[31] Finally, social constructivists have also argued that rules are fundamental in shaping state identities and interests.[32] Examining laws and the legal structure of the international system is incomplete if they are uncritically accepted as static law

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[24] See Karl N. Llewellyn, *Jurisprudence: Realism in Theory and Practice* (Chicago: University of Chicago Press, 1962); Jerome Frank, *Law and the Modern Mind* (New York: Coward-McCann, 1949); Henry M. Hart and Albert M. Sacks, *The Legal Process: Basic Problems in the Making and Application of Law* (Foundation Press, 1994); Roberto Mangabeira Unger, *The Critical Legal Studies Movement* (Cambridge: Harvard University Press, 1983); Duncan Kennedy, *Legal Education and the Reproduction of Hierarchy: A Polemic Against the System: A Critical Edition* (New York: New York University Press, 2004).

[25] See Ernest Young, "Institutional Settlement in a Globalizing Judicial System," *Duke Law Journal*, vol. 54 (March 2005), 1143-261.

[26] Myres S. McDougal and Harold D. Lasswell, "The Identification and Appraisal of Diverse Systems of Public Order," *American Journal of International Law*, vol. 53, no. 1 (January 1959), 1-29.

[27] Rosalyn Higgins, *Problems and Process: International Law and How We Use It* (New York: Oxford University Press, 1995), 267.

[28] Abram Chayes, *The Cuban Missile Crisis: International Crises and the Role of Law* (New York: Oxford University Press, 1974), 7.

[29] Stephen D. Krasner, ed., *International Regimes* (Ithaca: Cornell University Press, 1983), 1. See also Stephan Haggard and Beth A. Simmons, "Theories of International Regimes," *International Organization*, vol. 41, no. 3 (Summer 1987), 491-517.

[30] Goldstein, et al. (2000), 387.

[31] Kratochwil, 251.

[32] See Peter K. Katzenstein, *Cultural Norms & National Security: Police and Military in Postwar Japan* (Ithaca: Cornell University Press, 1996); Wendt (1999).

and principles. Rather, the origin, constitution, and determinants of change in those very rules must be examined and modeled. None of approaches above alone provides an adequate explanation of why national security policy has become increasingly legalized, but an interdisciplinary perspective that combines insights from each is better equipped to do so.

The process-oriented perspective of this study is also important for two reasons. First, it imbues a macro-level view that encompasses both international rules and domestic laws. Literature on the legality of the use of force has predominately been focused on the international level in isolation, when in reality, international rules inevitably encounter and interact with domestic politics and law through ratification, implementation, and enforcement. How both levels of law mutually affect and interact, especially on the political stage, is key to understanding and mapping legal change. Second, focus on process eschews the normative and prescriptive tendencies in much of international legal scholarship on the use of force. Rather than examining what state behavior has been and examining why, many scholars argue what state actions *should* be in context of existing international law. For example, Weiner readily admits that there "are in fact powerful normative and prudential reasons for confining forcible responses to...new security threats to the legal bases set forth in the Charter."[33] Conversely, this study attempts to lay out a more empirically relevant and valid explanation of state behavior by modeling why and how states are increasingly legalizing their national security policies.

2. Law and National Security

The growing literature on the legalization of world politics identifies a wide range of issue areas in which law has increasingly affected inter-state relations. For example, Beth Simmons has argued that post-WWII international monetary affairs imposed significant legal obligations on state parties, and reputational concerns played an important role in their compliance with those obligations.[34] In addition, the field of international trade has witnessed a burgeoning legal regime and institutional development, especially the World Trade Organization (WTO) and its dispute settlement body (DSB) that hears an increasing number of legal disputes between states.[35] Finally, on the domestic front, the burgeoning literature on the "judicialization of politics" in legal academia addresses how some of the most sensitive political questions are increasingly adjudicated through courts rather than strictly resolved through the political arena.[36]

But national security is presumed to be one of the more "difficult" issue areas that resist legalization; when it comes to security, power trumps law. Some assume, and certain historical experiences confirm, that states will disregard legal constraints on the use of force if those commitments run counter to strategic interests. The second Iraq War during the George W. Bush administration is a recent and very controversial example of how states, especially great powers,

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[33] Alan S. Weiner, "The Use of Force and Contemporary Security Threats: Old Medicine or New Ills?" *Stanford Law Review*, vol. 59, no. 2 (2006), 482.

[34] Beth A. Simmons, "The Legalization of International Monetary Affairs," *International Organization* , vol. 54, no. 3 (Summer 2000), 573-602.

[35] See World Trade Organization (WTO), "Chronological List of Dispute Cases," http://www.wto.org/english/tratop_e/dispu_e/dispu_status_e.htm; WTO, *A Handbook on the WTO Dispute Settlement System* (Cambridge: Cambridge University Press, 2004).

[36] See Martin Shapiro and Alec Stone Sweet, *On Law, Politics & Judicialization* (Oxford: Oxford University Press, 2002); Alec Stone Sweet, *Governing with Judges: Constitutional Politics in Europe* (New York: Oxford University Press, 2000); Ran Hirschl, *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism* (Cambridge: Harvard University Press, 2007).

are seemingly getting away with impunity despite their legal obligations and the presence of international rules and principles that forbid the use of force except for limited circumstances. Some neorealists, such as John Mearsheimer, would argue that such actions must be accepted as the "tragedy" of world politics that operates around power and survival.[37] Because of anarchy in the international system, in which no overriding authority is present to enforce rules on all states, what really matters is the structural distribution of power in the system; laws are epiphenomenal.[38]

Thus, the nexus between law and national security has often been a tenuous one, with the former usually being sacrificed in the name of the latter in both international and domestic affairs. On the international level, this weak link is a curious one, since the legality of the use of force has been governed by international law for over a century, going back to at least the Hague Conventions, Kellogg-Briand Pact, and the Geneva Conventions.[39] And of course, the philosophical and historical foundations of the laws of war, whether *jus ad bellum* (resort to force) or *jus in bello* (conduct during war), go back even further.[40] In contemporary politics, the representative legal doctrine on the international use of force is outlined in Article 2(4) of the UN Charter, which states that all member states shall "refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state."[41] The only legal exceptions permitted under the UN Charter is for self-defense (Article 51) or with authorization from the Security Council (Chapter 42).[42] Some may consider such a prohibition on aggression, along with genocide, war crimes, and slavery, a consistent and recognized norm of customary international law, a *jus cogens* or peremptory norm from which deviance is not permitted.[43] But the stark reality is that over a hundred conflicts have occurred since the founding of the UN in 1945.[44] Many states, of varying political character, have resorted to force despite clear and strict limitations imposed by international law. Thus, Thomas Franck famously lamented back in 1970 that Article 2(4) was "dead" in international relations.[45] Michael Glennon echoed such sentiments when he stated that "[i]t seems the Charter has, tragically, gone the way of the 1928 Kellogg-Briand Pact which purported to outlaw war and was signed by every major belligerent in World War II."[46]

Similarly, classical realist thinkers, such as E.H. Carr and Hans Morgenthau, were skeptical and warned that a "legalistic-moralistic approach" to politics was only aspirational and

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[37] John J. Mearsheimer, *The Tragedy of Great Power Politics* (New York: Norton, 2001), 21.
[38] See Kenneth N. Waltz, *The Theory of International Politics* (Reading: Addison-Wesley, 1979).
[39] See Michael Byers, *War Law: Understanding International Law and Armed Conflict* (New York: Grove Press, 2007); Mary Ellen O'Connell, *International Law and the Use of Force: Cases and Materials*, 2nd ed. (New York: Foundation Press, 2009).
[40] See Michael Howard, *The Laws of War: Constraints on Welfare in the Western World* (New Haven: Yale University Press, 1997); Michael Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations* (New York: Basic Books, 2006); David Kennedy, *Of War and Law* (Princeton: Princeton University Press, 2006).
[41] U.N. Charter art. 2, para. 4.
[42] U.N. Charter art. 42 and 51. Self-defense use of force is itself limited under Article 51, which requires that states immediately report the measures taken to the Security Council, and those measures are permitted only until the Security Council acts. Furthermore, self-defense is limited to the doctrine of necessity and proportionality.
[43] M. Cherif Bassiouni, "International Crimes: 'Jus Cogens' and 'Obligatio Erga Omnes,'" *Law and Contemporary Problems*, vol. 59 (Autumn 1996), 68.
[44] Gray, 616.
[45] Thomas Franck, "Who Killed Article 2(4)? Or Changing Norms Governing the Use of Force by States," *American Journal of International Law*, vol. 64, no. 5 (October 1970), 809-37.
[46] Michael K. Glennon, "How War Left the Law Behind," *New York Times* (November 21, 2002), http://www.nytimes.com/2002/11/21/opinion/how-war-left-the-law-behind.html

even be dangerous, given the history of early twentieth century policies that they considered utopian and misguided given the realities of power politics.[47] More recently, neorealist international relations scholars, such as Mearsheimer, have also emphasized that international institutions, including legal institutions, are powerless in a system in which states are predominately concerned with power and national interests. [48] They contend that law only matters as an instrument of state power. Similarly, legal scholars, Jack Goldstein and Eric Posner, have argued that the influence of international law is weaker than others contend and is only a product of state interests.[49] These observations raise not only the valid question about the relevancy of international law in affecting the use of force, but the normative and prescriptive underpinnings of much of international legal scholarship itself.

On the domestic front, similar doubts are raised on the influence of law and legal institutions in the formulation of national security policy. There is lingering uncertainty around the power of courts in foreign affairs, which has traditionally been viewed as limited by constitutional structures that provide the executive with vast powers to conduct war.[50] Most notable is the "unitary executive theory" in American constitutionalism that argues that the president is nearly unconstrained by other branches of government in matters of war and peace.[51] But even in the United States, national security issues have increasingly become legalized, as exemplified by the proliferation of legislation aimed to combat terrorism and with the Supreme Court getting involved in several landmark cases involving the status of detainees.[52]

However, the realm of national security has also witnessed a proliferation of legal mechanisms. Finnemore observes that "interstate uses of force are increasingly shaped by Weberian rational-legal authority structures, specifically legal understandings and the rules or norms of international organizations."[53] Countering Franck's assessment of the demise of Article 2(4) in the UN Charter, Louis Henkin argues that it "has indeed been a norm of behavior and has deterred violations."[54] This study argues that through international legal mechanisms such as Article 2(4) and domestic law, contemporary international politics has witnessed an increasing legalization of national security. Contrary to Cicero's observation that laws have no voice in war (*silent enim leges inter arma*),[55] when it comes to the use of force, the laws are no longer silent. Now, the law both gives voice to and mutes power, revealing a more much complex relationship to politics. In many countries, we are witnessing a fundamental and qualitative change in how national security policies are formulated and implemented both at home and abroad. Questions of

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[47] Edward Hallet Carr, The *Twenty Years Crisis, 1919-1939* (New York: Harper Collins, 1939); Hans J. Morgenthau, *Politics Among Nations: The Struggle for Power and Peace* (Boston: McGraw Hill, [1948] 1993), 12-15.
[48] John J. Mearsheimer, "The False Promise of International Institutions," *International Security*, vol. 19, no. 5 (Winter 1994-1995).
[49] Jack L. Goldsmith and Eric A. Posner, *The Limits of International Law* (New York: Oxford University Press, 2005), 3.
[50] See Louis Henkin, *Constitutionalism, Democracy, and Foreign Affairs* (New York: Columbia University Press, 1990).
[51] See John Yoo, *Crisis and Command: A History of Executive Power from George Washington to George W. Bush* (New York: Kaplan, 2010).
[52] Benjamin Wittes, ed. *Legislating the War on Terror: An Agenda for Reform* (Washington D.C.: Brookings, 2009).
[53] Martha Finnemore, *The Purpose of Intervention: Changing Beliefs about the Use of Force* (Ithaca: Cornell University Press, 2003), 21.
[54] Louis Henkin, "The Reports of the Death of Article 2(4) are Greatly Exaggerated," *American Journal of International Law*, vol. 65, no. 3 (July 1971), 544-8.
[55] Cicero, *Pro Milone*, IV, xi.

legality on the use of force have become more prominent in an area that has traditionally been dictated by executive discretion and dominated by political considerations.

Clausewitz once noted that, "Attached to force are certain self-imposed, imperceptible limitations hardly worth mentioning, known as international law and custom, but they scarcely weaken it."[56] This underlying premise that the law ultimately has no effect in national security policy holds no more. Instead, the effect of law on the use of force is two-fold. The law has been an important instrument of national security policy promotion for the modern executive, as well as a weapon for popular challenges to such government power. This study seeks to explain the reasons and model the process by which such legalization of national security has developed. It argues that there are two main factors that contribute to the legalization of national security: the concentration of executive authority and the strength of social movement organizations. Both factors are inter-related and mutually affect each other in the process of legalization. It is useful to first examine each factor alone and then proceed to model their interaction.

3. The Concentration of Executive Power

The first main factor in the legalization of national security is the growing concentration of executive power over strategic policy. The concentration of executive power speaks to both the increasing centralization of authority around a single executive or office, as well as the expanding power of that leader with respect to matters of national security. The rise of the "national security state" in many countries is the most salient manifestation of this trend, as national security policy has been increasingly centered around executive power, which has grown with the proliferation of administrative agencies, departments, and offices to deal with a vast array of issues ranging from intelligence, defense, law enforcement, immigration, technology, and even finance. The growth of this strategic bureaucracy parallels the general growth in the size of governments and the administrative state in many countries, in which more legislation is now made by agencies rather than legislatures. This trend may even be more pronounced in the national security field, given the tradition and dominance of executive authority on the issue. This concentration of executive power over national security has primarily come at the expense of legislative power, both through voluntary concession or deference by lawmakers and a history of greater usurpation by executive authority in such matters. Courts and judicial actors have also deferred to the expertise and capabilities of executive authority, formulating doctrines such as the "political question doctrine" that self-limit the jurisdiction of courts.[57] While this raises obvious concerns about democratic accountability with respect to national security policy, as noted below, presidential systems in established democracies have witnessed some of the greatest concentration of executive authority when it comes to the questions of use of force both at home and abroad.

A. Measurements of Executive Power

In determining the degree of concentration executive power, this study relies primarily on qualitative measurements that take into consideration the statutory authority of executive

[56] Carl von Clausewitz, *On War*, Michael Howard and Peter Paret, eds. and trans. (Princeton: Princeton University Press, 1989), 75.
[57] See Nada Mourtada-Sabbah and Bruce E. Cain, eds., *The Political Question Doctrine and the Supreme Court of the United States* (Berkeley: Lexington Books, 2007).

agencies and related bodies, whether constitutional or legislative. In addition to these formal indicators, informal and practice-based signs of executive power are also taken into account by examining the historical trends of institutional development in the particular country or region. For example, there may be periodic institutional reforms and shifts in agency functions and responsibilities that signal greater centralization and coordination between different groups and departments. Has authority been unified under a single office or position that reports to the president or prime minister, or has control been split between agencies? If so, how much internal competition and factionalism exist? Furthermore, greater concentration of authority is often accompanied by expansion of power and capabilities. Thus, the proliferation in the number of executive offices and agencies is another qualitative measurement taken into consideration. All of the above factors are analyzed in context of a country's historical development and political character.

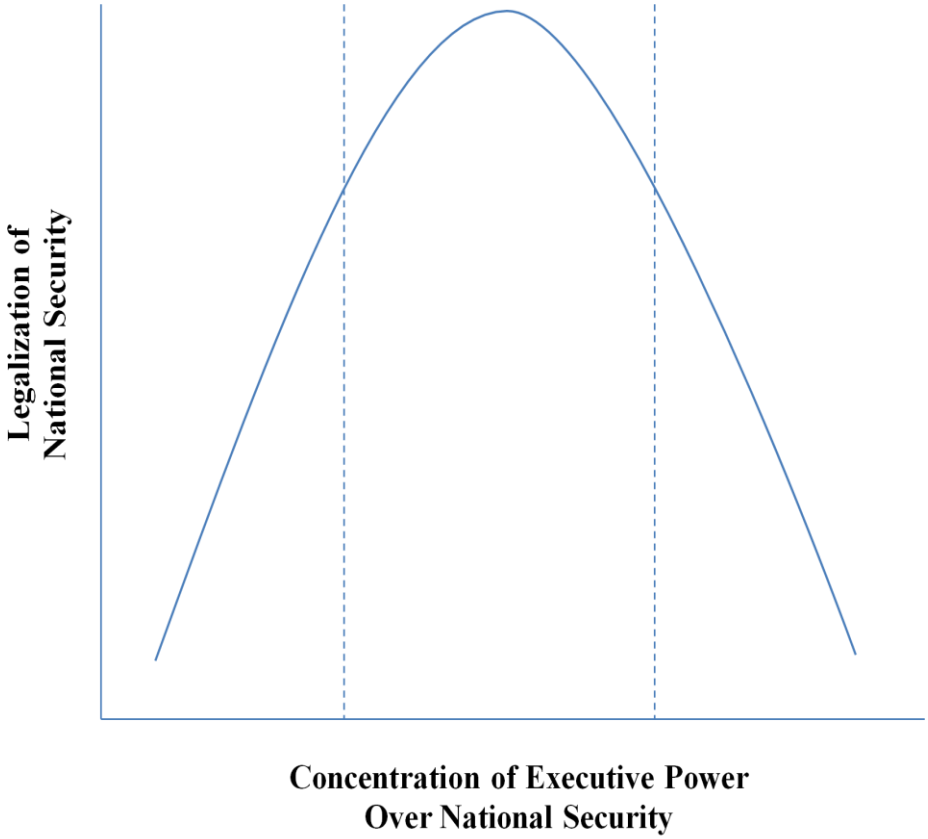
B. Relationship between Executive Power and Legalization

The analytical relationship between the concentration of executive power over national security and legalization is illustrated in Chart 1 below. The graph is a quadratic function demonstrating a non-linear relationship between the two concepts. This study divides the area under the curve into three different sections to show variation in the relationship between executive power and legalization. In the left column, the concentration of executive power is relatively low, which includes failed states that struggle with basic governance let alone the passage and enforcement of legislation. Countries such as Sudan, which have experienced years of internal turmoil, have struggled to construct a stable, operational government. The constitutional bases of such unstable governments are weak and highly in flux. But also included, but higher up in the left column are political systems with a bifurcated executive branch, such as those in many parliamentary systems (i.e. Japan) in which the head of government is separate from the head of state. In such systems, there is moderate level of legalization of national security, since the executive often works through the legislature and his or her party rather expanding through executive agencies. In such situations, questions about national security and foreign policy are often channeled through political institutions such as parliament, which means that legalization is relatively moderate. National security remains predominantly a political issue, rather than being transformed into a legal one. Countries in this situation may experience fluctuations in the legalization trends, but overall, their level of legalization in the national security arena is low or moderate compared to countries in the middle column.

In the middle column, the concentration of executive authority over national security is moderate to high, which results in the highest levels of legalization. The political systems represented in this group are primarily presidential systems (but may include other systems as well) that have a unitary executive over national security and foreign policies. Structurally, the head of state and head of government are fused, and historically, these political systems illustrate the rise of the national security state and the proliferation of administrative agencies dealing with security, foreign affairs, and defense, which are centralized under a singular executive authority. It is interesting to note that many liberal democracies that have strong presidential systems are in this group, such as the United States and South Korea, which illustrates the paradox of strong executives utilizing formal and institutionalized mechanisms for national security policies. The paradox of such strong, centralized executive power in democracies, is that these more open political systems also engender the bottom-up forces of social movement organizations that have

also turned to the law (see below), which overall eventually ends up constraining the executive when it attempts to use force both at home or abroad and legalizing the national security arena.

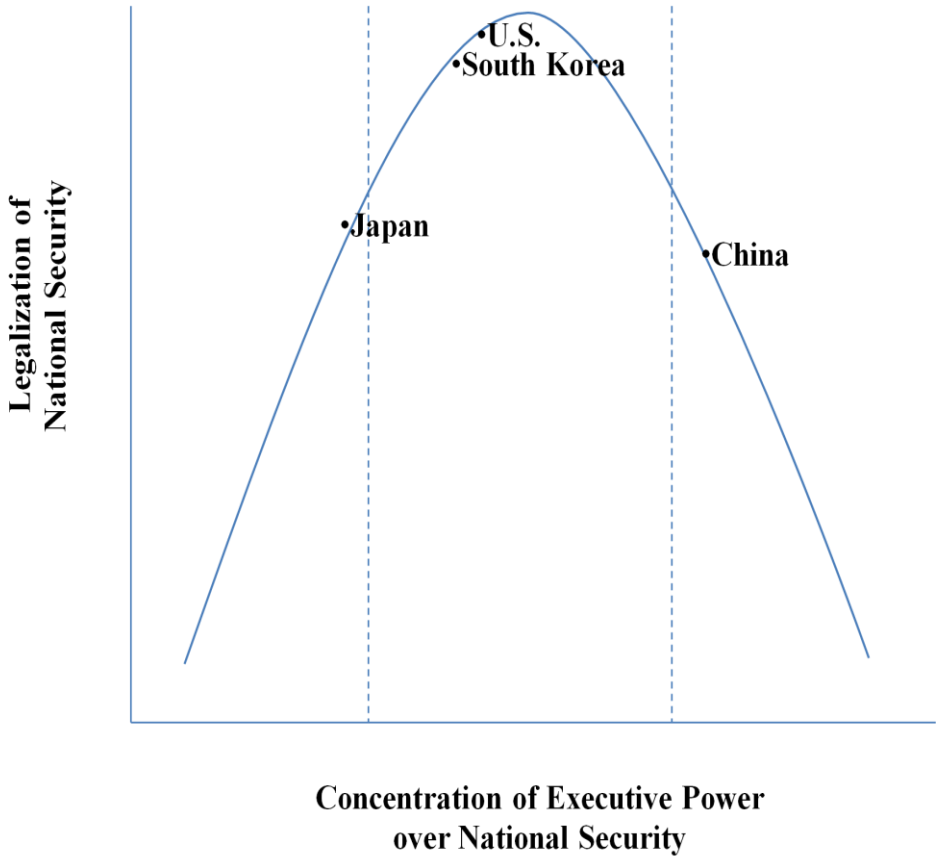
Chart 1. Executive Power and Legalization



Finally, the right column represents the highest concentration of executive power, but a relatively lower level of legalization of national security. More centralized and authoritarian political systems are represented in this group, with dictatorships and totalitarian governments in the far right of the curve. The level of legalization for countries in the right column is low because such regimes see little utility in turning to the law in national security matters since they can resort to outright coercion and suppression given their predominant power position. Any resort to law is relatively superficial, in which "rule *by* law" is paramount. For example, the North Korean legal system is more of an expression of its political ideology and leadership, which is evident in reading just the preamble to its constitution, rather than vice versa, in which legal arguments form the basis of political policies. However, also in the right column are countries that are transitioning away from more autocratic systems. In the course of political reforms, there are modest attempts also at legal reforms and constitutional amendments, in which legal justifications do form the rationale for political policies. In such countries, there are moderate levels of legalization even in the national security field.

Taking the analytical relationship between executive power and legalization outlined above, Chart 2 below shows the distribution of the case studies in this study, which include the United States, China, Japan, and South Korea.

Chart 2. Case Study Distribution on Executive Power



First, Japan, which is a parliamentary democracy with a relatively weaker prime minister overseeing national security matters, is in the left column. There has been moderate level of legalization over national security matters in Japan, primarily over the legal status and interpretation of Article 9 of the constitution that renounces the use of force and prohibits the country from maintaining a standing army. In the middle column are South Korea and the United States. Both are presidential systems with strong executive control over strategic policy. These countries have experienced the highest levels of legalization with the rise of the national security state and large strategic policymaking agencies under the president. Finally, China is the right column, which has the highest level of executive power, but moderate levels of legalization. While the National People's Congress, which is a legislative body, holds the highest constitutional authority in China, sensitive matters of national security are highly concentrated in the hands of a few executives who met in private committees. While China has also seen the value of using the law as an important instrument of administration and governance, the level of legalization in national security has only been moderate to low considering the closed nature of the decision-making process and suppression of dissent in sensitive national security matters.

C. Why Executive Power Turns to the Law

So, why has executive power increasingly used legal mechanisms in national security contexts? Executive authority has turned to the law for many reasons, such as the functional

prerogatives inherent to its increasing institutional capabilities, technological advances that have greatly expanded executive power, institutional isomorphism, and the need for legitimacy to justify its use of force at home and abroad.

i. Functional Needs

First, the modern state faces a complex array of threats to national security that requires an expansion of state capabilities in areas that have traditionally been separate from strategic policy. Today, the notion of national security is no longer just territorial or military in nature, but has been broadened to include the ideas of "economic security," "energy security," and others.[58] This increasing multitude of national security issue areas requires the creation of new agencies capable of handling them, as well as coordinating bodies to deal with crosscutting inter-agency issues. For example, in the United States, the Committee on Foreign Investment in the United States (CFIUS) examines the national security implications of incoming investment by foreign firms and governments, and the committee is composed of no less than 16 U.S. departments and agencies.[59] The proliferation of such agencies and coordinating bodies all requires legislation, which legitimizes state intrusion into non-traditional security areas and provides statutory authority and institutional capabilities.

This inherent, functional need in modern government to provide an affirmative legal basis for agencies and other governmental bodies within the national security state exemplifies some of the unintended consequences of turning to the law. While the functional prerogatives may have only been intended to authorize institutional capabilities, these legal bases also provide the very foundations for additional legal challenges whenever an agency is accused of overstepping its authority. And as noted below, many of the social movement organizations do in fact closely examine and reinterpret the very statutory bases for many national security bureaucratic apparatuses and use them to empowered their challenges against governmental use of force both domestically and abroad.

ii. The Role of Technology

Second, paralleling the functional necessities of legally authorizing government agencies is the dramatic advances in technology in the late twentieth century that have greatly expanded government power and executive authority. Because technology has opened new avenues for the state to project its capabilities on the public and private citizens, there are greater demands for legal limits on such power. Recently, in many countries, the issue of government surveillance has become a highly controversial issue, since technological advances have made it possible for the government to monitor private lives very easily. George Orwell's "Big Brother" is no longer only imaginable in science fiction, but it is a realistic governmental capability. Electronic eavesdropping, face recognition software, and the omnipresent closed circuit cameras on our streets can all be utilized by the government and police. For example, the U.S. Supreme Court recently ruled that global positioning system (GPS) tracking devices placed on a suspect's car constituted a search under the Fourth Amendment, and some justices recognized that the law

[58] See Barry Buzan, Ole Wver, and Jaap De Wilde, *Security: A New Framework for Analysis* (New York: Lynne Rienner, 1997).
[59] See Edward M. Graham and David M. Marchick, *U.S. National Security and Foreign Direct Investment* (Washington D.C: Institute for International Economics, 2006).

must catch up to technological progress.[60] In addition, the recent Stuxnet computer worm attack on the computer system in Iran's nuclear program, which many observers suspect may be somehow linked to the American and Israeli government, demonstrates how rapid developments in technology, especially in information technologies, have expanded government power.[61] In turn, the need to limit such authority through the law has also increased.

But of course, technological advances cut both ways. News threats to national security have emerged in cyberspace, such as hacking of sensitive government information and disclosure of classified information online (i.e. Wikileaks). Given the rising prominence of such threats, there are increasing calls in many countries for increased regulation,[62] as well as moves for a multinational or international treaty on cyber security (i.e. London Cyberspace Summit in 2011).[63] At the time of this writing, no such treaty has been finalized, but the moves toward a legal framework illustrate how advances in technology have contributed to the legalization of national security issues.

iii. Rivalry and Institutional Isomorphism

Third, as demonstrated by the classic security dilemma in IR theory,[64] defense and national security issues are inherently competitive in nature, where not only are enemies feared, but allies suspected. Such competition, as expressed through national security apparatuses, can lead to institutional isomorphism in which one states copies the strategic mechanisms of a rival or ally.[65] For example, most countries, even landlocked one without access to the sea, adopt a tripartite military that includes a navy.[66] And during the Cold War, many democratic governments felt compelled to re-organize their national security related government institutions to better compete with communist rivals, which were more highly centralized.

At first glance, this appears to go against conventional wisdom and understanding (at least in the West) that laws exist to constrain power. In many respects, the foundation of the common law tradition rests on the notion that law and courts grew to restrict the power of the monarchy.[67] In conceptualizing the relationship between power and law, traditional "rule of law" approaches see the latter as limiting the former, both empirically and normatively.[68] However, as the literature on comparative administrative state indicates, there has been an expansion of governmental authority in many countries through the growth of executive agencies and related

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[60] *United States v. Jones*, No. 10-1259 (January 23, 2012).
[61] William J. Broad, John Markoff, and David E. Singer, "Israeli Test on Work Called Crucial in Iran Nuclear Delay," *New York Times* (January 15, 2011), http://www.nytimes.com/2011/01/16/world/middleeast/16stuxnet.html?pagewanted=all.
[62] See Richard A. Clarke and Robert Knake, *Cyber War: The Next Threat to National Security and What to Do About It* (New York: Ecco, 2010).
[63] "London Hosts Cyberspace Security Conference," *BBC* (November 1, 2011), http://www.bbc.co.uk/news/technology-15533786.
[64] Robert Jervis, "Cooperation Under the Security Dilemma," *World Politics*, vol. 30, no. 2 (January 1978), 167-74.
[65] Paul J. DiMaggio and Walter W. Powell, "The Iron Cage Revisited: Institutional Isomorphism and Collective Rationality in Organizational Fields," *American Sociological Review*, vol. 48 (April 1983), 147-160.
[66] Martha Finnemore, "Norms, Culture, and World Politics: Insights from Sociology's Institutionalism," *International Organization*, vol. 50, no. 2 (Spring 1996), 337.
[67] John H. Langbein, *History of the Common Law: The Development of Anglo-American Legal Institutions* (Wolters Kluwer, 2009).
[68] Brian Z. Tamanaha, *On the Rule of Law: History, Politics, Theory* (Cambridge: Cambridge University Press, 2004).

governmental bodies.[69] This expansion of executive authority has been accompanied by the proliferation of legislation and regulations, which indicates that the law has been an important instrument of government power and authority.

iv. Legitimacy

Finally, one of the most important reasons why executive power has turned to the law is legitimacy. As used in this study, the term legitimacy is not synonymous with lawfulness, as it may be understood in everyday usage or other contexts. Rather, this study defines legitimacy more broadly to mean the perceived rightness or acceptableness of a policy. The key to being considered "acceptable" is the reasoning offered in support of a decision or action. Decisions based not only on one's opinions or interests, but on reasoned arguments (based on legal principles) that are considered more legitimate, because they offer relatively more transparency and objectivity. Other actors can examine and critique those justifications, which highlights how participation also enhances legitimacy. Therefore, one actor may not necessarily agree with a policy choice of another actor, but the process and the reasons offered to justify that decision may engender greater acceptance. For example, Tom Tyler has found that people follow the law, not out of fear of punishment, but because they consider it legitimate.[70] Thomas Franck argues that the same goes for states in the international system, in which compliance with rules stems from legitimacy.[71] In domestic contexts, the legitimacy of laws stems in part from the legislative process itself, especially in democracies, because the legislature is elected by the people to pass laws and regulations through the institutionalized political process.

In terms of national security, the legitimacy that the executive seeks is vis-à-vis both domestic and international audiences since the use of force can be at home or abroad, and many security issues are inherently both national and international in nature. Thus, it is even more important to take a two-level analysis, as outlined in this study.

Overall, this section has examined the first explanatory variable in the legalization of national security: the concentration of executive power. It has posited a non-linear relationship between executive power and legalization in national security matters, showing how political systems with a unified executive tend to demonstrate a stronger turn to the law.

4. Social Movement Organizations

While the top-down dynamic of executive power is an important factor, it is only half the picture. The legalization of national security is also driven by the bottom-up forces of social movement organizations that have used litigation and other legal strategies to challenge executive authority in the arena of the strategic policymaking from which that are traditionally excluded. The interplay of these two factors exemplifies the process-oriented definition of "legalization" presented above, since argumentation and justifications often involve back and forth dynamics between multiple parties. Therefore, the second main factor involving the strength of civic organizations is a crucial factor in the legalization of national security.

Sidney Tarrow defines social movements as "those sequences of contentious politics that are based on underlying social networks and resonant collective action frames, and which

[69] Susan Rose-Ackerman and Peter L. Lindseth, eds., *Comparative Administrative Law* (Edward Elgar, 2011).
[70] Tom R. Tyler, *Why People Obey the Law* (Princeton: Princeton University Press, 2006), 4.
[71] Thomas M. Franck, *The Power of Legitimacy Among Nations* (New York: Oxford University Press, 1990), 25.

develop the capacity to maintain sustained challenges against powerful opponents."[72] The rise of social movement organizations is often in response to greater aggregations of government power, which signifies the crucial role that play in democratic transitions in many countries, especially in the latter half of the twentieth century, or what Huntington calls the "third wave" of democratization.[73] Therefore, the increasing role of social movement organizations in the national security arena also signifies the democratization of strategic policymaking in many countries. Thus, the examination of social movement organization adds a much more nuanced and focused inquiry into the "democratic peace theory" that has been well-established in IR theory.[74]

A. Measurements of Social Movement Organization Strength

Comparing the strength of different social movement organizations may be difficult to do, especially given the varying political contexts in which they operate and the contrasting purposes and objectives that organizations may espouse. For example, if an organization explicitly aims at informal, disruptive tactics to achieve its goals, focusing on formal measures, such as the number of lawsuits (or lack thereof) filed by the organization may be misleading as indicators of organizational strength or bases of comparison to other social movement organizations. Therefore, this study once again takes a qualitative approach that encompasses both specific (i.e. funding and staffing) and broad, contextual factors. The longevity of an organization may be one measurement of the strength of the group, and such historical examinations also allow the observance of changing agendas, strategies, and campaigns. Organizations with more ad hoc or temporary goals may signal weaker organizational strength, whereas broader ranges of expertise or shifting campaigns may show the institutional flexibility and the adaptive nature of the social movement organization. Finally, the degree of institutionalization of a social movement organization, or the participation in formal and established political structures, may reflect strength of the group. This is important to the study of social movements and law, since laws are often integral to the political structure underpinning a country. However, institutionalization may lead to cooptation by maintain political agents and institutions, which may actually be harmful to the effectiveness and perception of an NGO.[75]

B. Relationship between Social Movement Organizations and the Law

Unlike the relationship executive power and legalization, the link between social movement organizations and legalization is relatively more linear (i.e. stronger social movement groups lead to greater legalization), which tracks the "life cycle" of social movements. Most of

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[72] Sidney Tarrow, *Power in Movement: Collective Action, Social Movements and Politics* (Cambridge: Cambridge University Press, 1998), 2. See also Charles Tilly and Lesley J. Wood, *Social Movements, 1768-2008: Second Edition* (New York: Paradigm, 2009).

[73] Samuel P. Huntington, *The Third Wave: Democratization in the Late Twentieth Century* (Norman: University of Oklahoma Press, 1991).

[74] See Bruce M. Russett, *Grasping the Democratic Peace: Principles for a Post-Cold War World* (Princeton: Princeton University Press, 1993), Michael E. Brown, Sean M. Lynn-Jones, and Steven E. Miller, eds., *Debating the Democratic Peace* (Cambridge: MIT Press, 1996).

[75] Seymour Martin Lipset, Martin Trow, and Stein Rokkan, "Cleavage Structures, Party Systems, and Voter Alignment: An Introduction," in Seymour Martin Lipset and Stein Rokkan, eds., *Party Systems and Voter Algnment: Cross-National Perspectives* (New York: Free Press, 1967), 1-63.

the literature on the development of social movements indicates that the general trend goes from less formal organization to greater institutionalization. For example, Dawson and Getty argue that social movements develop in three stages, from initial popular excitement, through more formal organization, and finally to institutionalization.[76] This study assumes that the reliance on law and legal mobilization is an indication of more formalization and institutionalization of social movements, since litigation and legislation involves the movement's increasing participation in the established structures of a states, rather than informal, disruptive actions such as street demonstrations or protests.[77] This does not, however, necessarily require a positivist conception of the law, which the process-oriented perspective of this study avoids. In addition, the progression from informal to formal collective action by social movement organizations are good indicators about the strength of such groups. This assumption tracks the literature on democratization in general, which sees greater institutionalization of democratic structures as a sign of democratic consolidation.[78]

There is growing literature on the importance of law to social movement organizations, such as the value of legal mobilization to promote social change, shape public discourse, and raise rights consciousness.[79] The regulatory structures and laws that the executive constructs provides opportunity structures for social movement protest and challenge. And as Michael McCann has shown, many of these civic organizations have crafted sophisticated litigation strategies to exert influence and check executive power.[80] Law can serve both as a catalyst for social action and as a "club" to garner concessions from the government or dominant social factions.[81] Scholars point to both the instrumental and constitutive value of law to social movements, and the belief that law can be agent of social change motivates many civic groups and non-governmental organization (NGO) to rely on the law. As McCann notes, law can be conceptualized as "particular traditions of knowledge and communicative practice" with intersubjective power to construct meaning in society.[82] However, others, such as Gerald Rosenberg cast doubt on such interpretativist approaches and the transformative power of law for social movement organizations.[83]

i. Law and Structures of Political Opportunity

Law is also an important element of the "structures of political opportunity," which Eisinger defines simply as the political context that limit or facilitate social movement organizations. These structures of opportunity can be both formal and informal, such as public

[76] C.A. Dawson and W.E. Getty, *Introduction to Sociology* (New York: The Ronald Press Company, 1935).
[77] Of course, social movement organizations may employ several different forms of action or tactics at the same time, and one strategy may reinforce the other.
[78] Juan J. Linz and Alfred Stepan, "Toward Consolidated Democracies," *Journal of Democracy*, vol. 7, no. 2 (1996), 14-33.
[79] Michael W. McCann, "Legal Mobilization and Social Reform Movements: Notes on Theory and Its Application," *Studies in Law, Politics, and Society*, vol. 11 (1991), 225-54.
[80] Michael W. McCann, ed., *Law and Social Movements* (Ashgate, 2006).
[81] Michael W. McCann, *Rights at Work: Pay Equity Reform and the Politics of Legal Mobilization* (Chicago: University of Chicago Press, 1994), 48, 138.
[82] Ibid, xii.
[83] Gerald N. Rosenberg, "Positivism, Interpretivism, and the Study of Law," *Law and Social Inquiry*, vol. 21 (1996), 435-55.

institutions or more general power dynamics between actors in a society.[84] As one manifestation of such opportunity structures, law can serve as impediments to social movement organizations, as well as expedite popular challenges to established centers of power. As noted above, the executive and other governmental entities will seek to promote policy objectives and interests through the law for various reasons. In turn, social movements will seek to check such authority by challenging and reinterpreting those very legal mechanisms. Thus, it is not surprising that the law has become a center and forum for such political and social contestation, even in the national security field.

ii. Role of Lawyers

When discussing social movements and law, it is unavoidable to examine the role of lawyers. In many countries, lawyers have played a pivotal role in democratization and the development of civil society. As Charles Epp argues in his comparative study of the "rights revolution" worldwide, the presence of willing and capable lawyers was a key element of the "support-structure" that contributed to the expansion of rights protection many in countries, including the United States.[85] He recommends that "[s]ocieties should also fund and support lawyers and rights-advocacy organizations - for they establish the conditions for sustained judicial attention to civil liberties and civil rights and for channeling judicial power toward egalitarian ends."[86] In addition, lawyers play an integral in the process of social movement building, from articulating grievances, using or threatening litigation, gaining compliance with court rulings, and leaving a legacy for the social movement itself.[87] Finally, Sarat and Scheingold have written extensively about "cause lawyers" and the benefits as well as challenges that social movement participation poses to lawyers who operate in the political stage for social change.[88] Similarly, McAdam's research focuses on the "biographical consequences" on activist lawyers.[89]

In the national security context, the role of lawyers in social movement organizations is important since a state's application of force at home or abroad may heavily impact the rights of individuals or groups in a society. Often times, it makes the activism of individual lawyers to seek redress and make the legal claims to counter and limit executive authority, which is often unchecked by other political branches or institutions.

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[84] Douglas McAdam, John D. McCarthy, and Mayer N. Zald, "Introduction: Opportunities, Mobilizing Structures, and Framing Processes - Toward a Synthetic, Comparative Perspective on Social Movements," in Doug McAdam and Mayer N. Zald, eds. *Comparative Perspective on Social Movements* (Cambridge: Cambridge University Press, 1996), 1-20.

[85] Charles R. Epp, *The Rights Revolution: Lawyers, Activists, and Supreme Courts in Comparative Perspective* (Chicago: University of Chicago Press, 1998), 5-6.

[86] Ibid, 6.

[87] Michael W. McCann, "Law and Social Movements," in Austin Sarat, ed., *The Blackwell Companion to Law and Society* (London: Blackwell Publishing, 2004), 506-22.

[88] See Austin Sarat and Stuart A. Scheingold, eds., *Cause Lawyering: Political Commitments and Professional Responsibilities* (New York: Oxford University Press, 1998); Austin Sarat and Stuart A. Scheingold, eds., *Cause Lawyering and the State in a Global Era* (New York: Oxford University Press, 2001); Austin Sarat and Stuart A. Scheingold, eds., *Cause Lawyers and Social Movements* (Stanford: Stanford University Press, 2006).

[89] Doug McAdam, "The Biographical Consequences of Activism," *American Sociological Review*, vol. 54, no. 5 (1989), 744-60.

B. Why Social Movement Organizations Turn to the Law

There are many reasons why social movement organizations turn to the law. First, the law is a useful framing device that helps the groups articulate their claims and set their agenda and objectives.[90] John Brigham argues that such framing goes even deeper, in a constitutive sense, in influencing these social movement groups, because legal discourse as "[p]olitical language links legal form to the practices of these interpretative communities, and the practices can be seen in talk about purposes, in the style of discussion, and in political strategies."[91]

In the national security context in which executive power also has increasingly relied on the law to justify its policy objectives, the law further empowers social movement organizations as "re-framing" devices. The ability to reinterpret, challenge, and recast government arguments through the law (and sometimes through the very law promulgated by the government), is a powerful way for these groups to deny the legitimacy that political leadership seeks behind the law, as well as amplify pressure on the executive. This notion of re-framing highlights the dialectic nature of legal argument and the inherent indeterminacy of law that promotes further legalization, as outlined below. Furthermore, it reinforces the "law as process" perspective posited in this study.

In addition to framing, social movements use the law as leverage. While bringing a lawsuit and winning it in court may be an effective method to counter government policies and further the objectives of the civic group, the mere threat of litigation, buttressed with a legal argument may be an even more powerful leveraging tactic.[92] Again, this emphasizes the process of legalization, rather than only looking to results of specific litigation cases. In addition, the focus on leverage mitigates some of the concerns about the role of courts and their reluctance to take certain cases, especially if it relates to national security matters in which judges have traditionally deferred. Therefore, even if courts ultimately do not take a case or rule against the social movement organization, the threat of litigation or the legal arguments that were used in case still carry significance in the political arena that can challenge executive justifications for uses of force.

Finally, the law provides a means of participation for social movement organizations, especially in areas such as national security in which they have traditionally had little say in the policymaking process. In context of administrative agencies, participation has become an important concept, and many governments have developed pathways for citizen involvement in government policymaking and implementation.[93] However, in the realm of national security, such routes for participation are severely curtailed. Therefore, the law is often the last weapon that citizens and social movement organizations have to challenge government policy or seek redress or compensation for injuries or rights violations stemming from the use of force. Even when lawsuits are rejected or barred in certain national security issues, just the threat of litigation and the publicity it generates can be strong political leverage on the government.

Such legal challenges often find social movement groups using the same laws that the government passed to authorize executive action as a basis to challenge the very power. As noted

[90] McCann (2006), xviii.
[91] John Brigham, "Right, Rage, and Remedy: Forms of Law in Political Discourse," *Studies in American Political Development*, vol. 2 (1988), 307.
[92] McCann (1991), 243.
[93] B. Guy Peters, *The Future of Governing: Four Emerging Models* (Lawrence: University of Kansas Press, 2001).

below, the indeterminacy in law produces varying and contrasting legal interpretations that empower agents and produce legal debates and arguments.

5. The Logic of Contradiction as Driver of Legalization

The interplay of the two main factors of legalization in this study reveal a broader structural contradiction in the international system. The legalization of national security is driven by a particular logic, the logic of contradiction, which animates a dialectical relationship between and within the two levels of law. While standard approaches to legalization focus on congruence and coherence between legal systems, this study makes the counter-intuitive proposition that incongruence between laws is the fundamental mechanism that drives legal development and increasing formalization. Such incongruence between international and domestic laws derives from a fundamental contradiction in the international system between the values of statism and individualism. The principle of sovereignty that has undergirded world affairs for centuries is being increasingly challenged by the values of individualism and human rights since the latter half of the twentieth century. Nowhere is this contradiction more salient than in the realm of national security where the authority and application of the use of force by states directly run up against need to protect individual and popular rights. As David Kennedy notes, "the law of peace seems fascinated by force - which it regards as the expression and embodiment of the sovereign authority to which it so constantly defers...This ambiguity, even schizophrenia, is the key to the laws of force."[94]

A. Manifestations of Contradiction

This fundamental logic of contradiction can manifest in various ways. In particular, this study identities four: competition, conflict, confusion, and contravention. In each scenario, the systemic contradiction mobilize various actors, such as political elites and social movement organizations, to attempt to resolve or manage the underlying contradiction. While each is not necessarily synonymous with the notion of contradiction itself, each manifestation is used in this study as a *descriptive* concept and behavioral responses to the underlying logic of contradiction. First, competition is the result of contradictory values seeking dominance over the other. Such contestation may signal that the underlying contradiction is manageable, at least on a temporary basis. Second, conflict occurs when contradictions become antagonistic in a heightened form of competition that seeks to completely resolve the contradiction in favor of one value at the expense of another. Conflict may result in contexts with the fundamental contradiction appears to be mutually exclusive. Third, the inability to deal with contradictions can often lead to confusion. This is a scenario of muddling through, in which actors may be ambivalent or uncertain which value is preferred at any point in time. Finally, contravention can occur from side as a response to systemic contradictions by violating other established values in the system. For example, Finnemore explores how certain types of intervention violate established principles of international law, which in turn "prompts extended normative discussions, both within and among states, about what is right and good in international life."[95] The case studies in this study will illustrate each of the manifestations of contradiction. Under each scenario, whether the

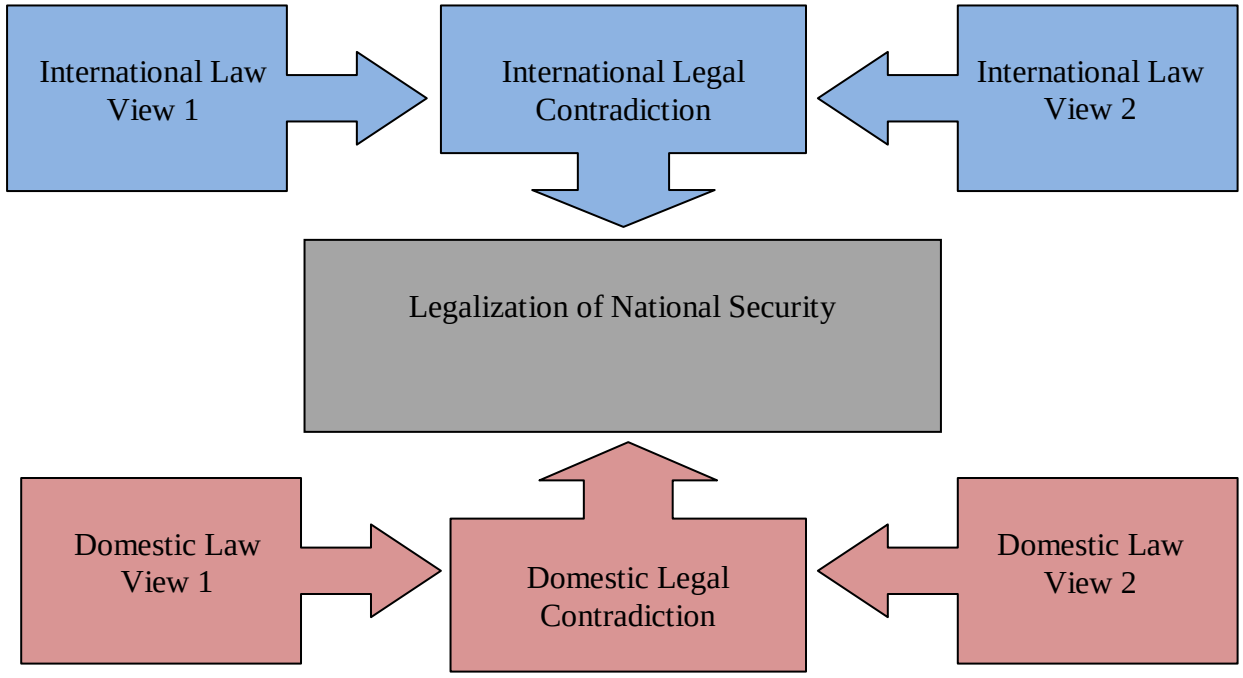
[94] David Kennedy, *International Legal Structures* (Nomos Verlagsgesellschaft, 1987), 245.
[95] Finnemore (2003), 6.

actors actually reach a resolution is less important than the manner in which they seek to reach it, which has increasingly been channeled through a legal process.

The actors turn to the law, rather than just negotiating on the political front, because the law itself is a reflection of the contradictory values at play. Therefore, the law empowers each party (especially those traditionally excluded from strategic policymaking) by providing the forum, resources for justification, and legitimacy to contest or challenge another. Furthermore, the dialectic within law reinforces this process as one legal argument produces a counter-argument, which are synthesized through debate, discussion, or adjudication. Thus, when political elites use a law to promote and justify their use of force, they are simultaneously inviting and empowering a legal challenge from the opposition or public. Similarly, when legal activists sue in court to object to specific national security policy, the government is forced to respond in kind with its own legal argument to defend itself. During this process, both domestic and international laws are invoked, and neither emerge from it unaffected; their interaction involves mutual reinterpretation and change. Overall, this process has contributed to growing formalization and institutionalization of the substance, practice, and even rhetoric regarding the use of force.

The model of the legalization of national security posited in this study is outlined in Chart 3 below. It demonstrates how contradictions in the overall system operate both horizontally (within international and domestic law) and vertically (between international law and domestic law). As the case studies in the second section two below illustrate, in any given context, contradictions may be operating horizontally and vertically simultaneously, or mainly on one level of law. In either situation, the logic of contradiction is central to the dialectic between the laws that promotes increasing legalization. The resulting picture is one of a dense and complex network of inter-dependent relationships between laws.

Chart3: Model of the Legalization of National Security



On the level of international law, the horizontal contradiction between different international rules interestingly tracks the current debate about the "fragmentation" of international law. The proliferation of different and often conflicting rules and various tribunals have prompted some to raise concerns that international law has become internally inconsistent and weakened, while others argue that such diversity is a strength.[96] On the domestic and regional levels, the vertical interactions illustrated in the model in Chart 3 may resemble the federalism in the United States with interactions between and within federal and state laws, or the emerging European Union legal system.

Substantively, the logic of contradiction in the international system is fundamentally driven by two values, statism and individualism. The principle of sovereignty, the notion that a state has full authority within its borders and is immune to external interference has been a pillar of international law and world politics for some time. The UN Charter notes that it is "based on the principle of the sovereign equality of all its Members [,]" (Article 2(1)), and that "[n]othing contained in the present Charter shall authorize the United Nations to intervene in the matters which are essentially within the domestic jurisdiction of any state..." (Article 2(7).[97] Sovereignty has been central to the modern state system since the Treaty of Westphalia in 1648, and it undergirds Max Weber's oft-cited definition of the state as an entity with "a monopoly on the legitimate use of physical force within a given territory."[98] Daniel Philpott has traced the genesis and development of the idea of sovereignty through the centuries, and he states that sovereignty "has come closer to enjoying universal explicit assent than any other principle of political organization in history."[99] However, Stephen Krasner has argued that sovereignty (primarily his notion of Westphalian and international legal sovereignty) has consistently been violated by state practice, a situation that he labels "organized hypocrisy."[100] Given the absence of a central authority in the international system and contradictions in international rules, Krasner argues that international norms and principles are ineffective in limiting state interests.[101]

But this study takes a very different approach to such contradictions. The very contradictions that Krasner recognizes, which may be internal to the principle of sovereignty itself (especially given the varying formulations that he proposes), may serve as engines of legal development and change in the international system. A similar logic is found in a wide range of areas. For example, organizational theory demonstrates that contradiction or "hypocrisy" is actually beneficial to structuring organizations, since the legitimacy of a group stems not only

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[96] See Martti Koskenniemi and Paivi Leino, "Fragmentation of International Law? Postmodern Anxieties," *Leiden Journal of International Law*, vol. 15, no. 3 (2002), 553-79; Gerhard Hafner, "Pros and Cons Ensuing from Fragmentation of International Law," *Michigan Journal of International Law*, vol. 25 (Summer 2004), 849-64; Joost Pauwelyn, "Bridging Fragmentation and Unity: International Law as a Universe of Inter-Connected Islands," *Michigan Journal of International Law*, vol. 25 (Summer 2004), 903-14; Kalypso Nicolaidis and Joyce L. Tong, "Diversity of Cacophony? The Continuing Debate Over New Sources of International Law," *Michigan Journal of International Law*, vol. 24 (Summer 2004), 1349-75.

[97] U.N. Charter, art. 2(1) and 2(7).

[98] Max Weber, *Politics as a Vocation*, in David S. Owen, Tracy B. Strong, and Rodney Livingstone, eds., *The Vocation lectures: Science as a Vocation, Politics as a Vocation* (Indianapolis: Hackett, 2004).

[99] Daniel Philpott, *Revolutions in Sovereignty: How Ideas Shaped Modern International Relations* (Princeton: Princeton University Press, 2001), 3. See also Jens Bartelson, *A Genealogy of Sovereignty* (Cambridge: Cambridge University Press, 1995).

[100] Stephen D. Krasner, *Sovereignty: Organized Hypocrisy* (Princeton: Princeton University Press, 1999), 24.

[101] Ibid, 6.

from cooperation, but conflict as well.[102] Such a Schumpeterian notion of "creative destruction" also informs business organizations, in which a clash of ideas promotes diversity in companies and even harmonization of corporate governance structures throughout the world.[103] Even in the physical sciences, researchers examining the cognitive function of human brains have found that bilingualism promotes intelligence, because the second language creates an "interference" that the brain must resolve, which results in stronger cognitive abilities.[104] With respect to sovereignty, Philpott notes that the has come about through "revolutions in ideas" which produce "crises of pluralism...[in which] [i]conoclastic propositions challenge the legitimacy of an existing international order, a *contradiction* that erupts...that then brings in a new world order."[105]

An important element of the systemic contradiction has been the emergence of individualism in world politics. In the latter half of the twentieth century, there was been a fundamental challenge to the established state-centric principles of sovereignty in international relations. The rise of international humans rights law, encapsulated in the UN Charter and epitomized by the Universal Declaration of Human Rights (UNHR) in 1948, have promoted the principle of individualism in world affairs. The preamble to the UNHR recognizes "the inherent dignity and of the equality and inalienable rights of all members of the human family."[106] That the text of the UNHR tracks the language of the U.S. Declaration of Independence from 1776 is not surprising given the roots of both international law and democracy in liberalism. The impact of human rights law on the international relations has been fundamental in that the traditional inter-*state* system has begun to increasingly recognize the individual as an important player in world affairs. For example, many regional human rights bodies (such as the European Court of Human Rights and the Inter-American Commission on Human Rights) now recognize individual complaints against government action, although the International Court of Justice (ICJ) continues to only give standing to state members.[107] Besides standing, individual responsibility for crimes on the international level has also been recognized since the Nuremburg Trials following World War II and most recently through the establishment of the International Criminal Court (ICC) in 2002.[108]

In both international and domestic politics, the individualist challenge to statism can be seen in the rise of notions of popular sovereignty that try to redefine state authority and understandings of constitutionalism.[109] Furthermore, direct democracy, as expressed through popular referendums and voting initiatives, are seen frequently seen in many countries and

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[102] Nils Brunsson, *The Organization of Hypocrisy: Talk, Decisions, and Actions in Organizations*, trans. Nancy Adler (New York: Wiley, 1998).

[103] Curtis J. Milhaupt and Mark D. West, "Institutional Change and M&A in Japan," in Curtis J. Milhaupt, ed. *Global Market, Domestic Institutions: Corporate Law and Governance in a New Era of Cross-Border Deals* (New York: Columbia University Press, 2003), 295-338.

[104] Yudhijit Bhattacharjee, "Why Bilinguals are Smarter," *New York Times* (March 17, 2012), available online at: http://www.nytimes.com/2012/03/18/opinion/sunday/the-benefits-of-bilingualism.html.

[105] Philpott, 4, emphasis added.

[106] UNHR, preamble, available online at: http://www.un.org/en/documents/udhr/

[107] Henry J. Steiner, Philip Alston, and Ryan Goodman, *International Human Rights in Context: Law, Politics, Morals* (Oxford: Oxford University Press, 2007), 943-5 and 1037-8.

[108] See Kathryn Sikkink, *The Justice Cascade: How Human Rights Prosecutions are Changing World Politics* (New York: Norton, 2011).

[109] See Paul W. Kahn, "Speaking Law to Power: Popular Sovereignty, Human Rights, and the New International Order," *Chicago Journal of International Law*, vol. 1 (2000), 1-19; Larry D. Kramer, *The People Themselves: Popular Constitutionalism and Judicial Review* (New York: Oxford University Press, 2004).

regions throughout the world.[110] As Thomas Franck has argued, we have entered an age of individualism, in which people define themselves as autonomous individuals rather than through the traditional lens of collectivities, such nations and states.[111] Some of these notions of individualism have proved to be controversial precisely because such values are fundamentally challenging the centuries-old state-centric system in world affairs.

B. Turn to the Law: Contradictions and the Indeterminacy of Law

Confronted with contradictions, why have actors increasingly turned to the law? They turn to the law because the law itself is also a reflection of the contradictions. Critical legal scholars have argued that the law is often a weapon of power used by the government or majority to subjugate minority groups and individuals. They also maintain that laws are indeterminate and contradictory in nature, which opposes the positive notion that laws are readily cognizable and independent from politics.[112] Both the instrumental and contradictory view of the law are relevant to the discussion of the legalization of national security in world affairs.

Chart 4. The Causal Logic of the Legalization of National Security

Chart 4 above outlines the causal logic underlying the legalization of national security. The fundamental contradictions in the international system manifest in different forms, which motivate actors to address the contradictions through the law. Legal indeterminacy here is linked to the view that legal argumentation is inherently dialectic (i.e. Hegelian thesis, anti-thesis, and synthesis model); once a legal argument is put forth, it simultaneously provides for its counter-argument, after which a synthesis of those interpretations is reached either by an adjudicative body or by the parties themselves through negotiations. The dialectical nature of law is amplified by reasoned justification, or the "giving reasons requirement," of any adjudicative and legal argumentation.[113] Justifying a decision or policy through the law may not be always possible by referencing only political preferences or opinions alone. Indeterminacy of law means that there are many laws, legislative history, precedence, and secondary scholarly literature that must be cited to justify a legal argument, and that justification is usually transparent and public. All this takes place through a professionalized setting of lawyers and judges, which may give legal argumentation over norms a qualitative distinction from simple political contestation.[114]

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[110] See David Butler and Austin Ranney, eds., *Referendums Around the World: The Growing Use of Direct Democracy* (Washington D.C.: AEI Press, 1994), Thomas E. Cronin, *Direct Democracy: The Politics of Initiative, Referendum, and Recall* (Lincoln: iUniverse, 1999).
[111] Thomas M. Franck, *The Empowered Self: Law and Society in the Age of Individualism* (Oxford: Oxford University Press, 1999).
[112] Mark Tushnet, "Survey Article: Critical Legal Theory (without Modifiers) in the United States," *Journal of Political Philosophy*, vol. 13, no. 1 (March 2005), 108.
[113] See Shapiro (1992).
[114] Martha Finnemore, "Are Legal Norms Distinctive?" *NYU Journal of International Law & Politics*, vol. 32 (1999-2000), 699-705.

Legal contradiction within and between the level of analyses is crucial because once a contradiction is apparent, domestic and international actors must address it and try to resolve it; contradictions are difficult to ignore and may potentially be politically costly. Conversely, actors may raise contradictions directly and indirectly in pursuit of specific interests or policy goals. Here, contradictions would be useful. Both scenarios lead to a process of debate and discussion between different agents and interpretations, which promotes further legalization. This is similar to the "process of claim and response - and in some cases counterclaim" that Steven Ratner observes in recent discussions about *jus ad bellum* and *jus in bello* regarding American reactions to 9/11.[115] Under such a process, parties invoke both domestic and international laws, and both rarely emerge unchanged, as some accommodation and adjustment occurs as the parties push and fight to try and resolve the contradiction in their favor. This model emphasizes the point that legalization of national security is an inter-subjective *process*, not a political or legal endpoint.

Thus, legal indeterminacy in the arena of national security promotes legalization because such contradiction and indeterminism in the law empowers actors who have traditionally be excluded from strategic policymaking to have an impact in the area by using the law to challenge executive power. Uncertainty in law is empowering to these actors, such as social movements organizations and activist lawyers, because any certainty in the constitutional authorization over foreign affairs and national security has usually defaulted to executive power through the deference of other branches of government or assertion by the executive. As for the executive, which has enjoyed greater discretion and authority over security matters, it turns to the law both an as instrument of policy, since the law can be useful in furthering its strategic policies, but also as a source of legitimacy.[116] With the rise of international human rights law and the general prohibition against the use of force under the UN, political elites are increasingly under pressure to justify their actions. The same indeterminacy that empowers social movement organizations also provides cover for executive authority. The key question then for the executive is what are the unintended consequences of using the law to pursue strategic policy? Providing legal justification can only invite further legal opposition, as well as involve courts and other legal institutions to adjudicate the issues, which may further encroach on executive authority. Furthermore, once formalized through the law, a certain national security policy may be difficult to amend or change, and such institutionalization may actually run counter to the flexibility that the executive would prefer in dealing with strategic matters. Overall, the contradictions between the values of statism and individualism in the international system today has been a powerful driver in promoting the legalization of national security.

On an international level, Martti Koskenniemi has also found such contradictions in the structure of international legal argumentation.[117] Thus, he states that international law is "based on contradictory premises, [so] it remains both over- and underlegitimizing: it is overlegitimizing as it can be ultimately invoked to justify any behaviour (apologism), it is underlegitimizing because incapable of providing a convincing argument on the legitimacy of any practices (utopianism)."[118] He links this indeterminacy to what Andrew Levine as identified as an internal

[115] Steven R. Ratner, "*Jus Ad Bellum* and *Jus in Bello* After September 11," Notes and Comments, *The American Journal of International Law*, vol. 96 , no. 4 (October 2002), 905-921.
[116] Franck (1990).
[117] Martti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (Cambridge: Cambridge University Press, 2005), 66-7.
[118] Ibid, 67.

contradiction in liberalism between individualism and collectivism.[119] Similarly, Duncan Kennedy has noted that "the goal of individual freedom is at the same time dependent on and incompatible with the communal coercive action that is necessary to achieve it."[120] While such indeterminacy in law may seem to frustrate legalization, it can actually promote it, as outlined below, especially in an area such as national security policy.

There are parallels of such contradictions in domestic politics as well. In his critique of American politics, Samuel Huntington has argued that there is a lingering cognitive dissonance in the spirit of American democracy that emanates from a gap between certain cherished ideals (the "American Creed") and the failure of institutions to live up to those ideals. He concludes: "Critics say that America is a lie because its reality falls so far short of its ideals. They are wrong. America is not a lie; it is a disappointment. But it can be a disappointment only because it is also a hope."[121] While Huntington's argument is about the disjunction between objectives and performance (which parallels Krasner's critique of sovereignty noted above), the underlying cause for institutional failure are again nested in the liberal roots of American democracy. The important takeaway from Huntington is that contradiction produces disappointment, which imbues a healthy skepticism and constant questioning of government that defines the spirit of American democracy. It is no wonder that de Tocqueville observed that "[t]here is hardly a political question in the United States which does not sooner or later turn into a judicial one."[122] Even today, American society is one of the most litigious, not only because of its adversarial legal system, but also because of the political values that created such a system in the first place and which motivate citizens to seek resolutions to most social and political issues through the law.[123] A similar constant questioning of international law, both by its traditional normative proponents and critics, has played an important role in the development of international law and is illustrated by some of the manifestations of contradiction noted above.

Comparative legal scholars have also seen such a trend across different political systems. In his study of comparative constitutionalism, Gary Jacobson argues that "constitutional disharmony is critical to the development of constitutional identity,"[124] which is closely related to this study's premise that incongruence of laws can promote greater legalization. Overall, this study's focus on the legalization of national security policy specifically is a natural extension of such literature in general.

C. Case Selection and the Matrix of the Legalization of National Security

Taking both factors, executive power and social movement organizations, into consideration, Table 1 below outlines the matrix the legalization of national security. The country case studies in Section 2 will illustrate the variations between states along these two variables and how they have contributed to low, moderate, or high levels of legalization (as

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[119] Ibid; see also Andrew Levine, *Liberal Democracy: A Critique of Its Theory* (New York: Columbia University Press, 1982), 16-32; C.B. Macpherson, *Democratic Theory: Essays in Retrieval* (New York: Oxford University Press, 1973), 24-38.
[120] Duncan Kennedy, "The Structure of Blackstone's Commentaries," *Buffalo Law Review*, vol. 28 (1979), 210.
[121] Samuel P. Huntington, *American Politics: The Promise of Disharmony* (Cambridge: Harvard University Press, 1981), 262.
[122] Alexis de Toqueville, *Democracy in America*, George Lawrence, trans. (New York: Harper, 1969), 270.
[123] Robert A. Kagan, *Adversarial Legalism: The American Way of Law* (Cambridge: Harvard University Press, 2003).
[124] Gary Jeffrey Jacobson, *Constitutional Identity* (Cambridge: Harvard University Press, 2010), 4.

indicated by the degree of shading from lightest to darkest, respectively) in the national security policy arena of each country.

Table 1: Matrix of the Legalization of National Security (Case Studies)

	Executive Power Low	**Executive Power Moderate**	**Executive Power High**
Social Movement Strength Low	Low Legalization	Moderate Legalization	Low Legalization
Social Movement Strength Moderate	Moderate Legalization (Japan)	High Legalization	Moderate Legalization (China)
Social Movement Strength High	Moderate Legalization	High Legalization (U.S., South Korea)	Moderate Legalization

The case studies, involving the United States, China, Korea, and Japan were selected for two main reasons. First, given the role that great powers play in influencing the international strategic landscape, any broad theory of legalization of national security would need to address and account for developments in countries such as the United States, China, and Japan. Any theory of security that failed to explain for such great powers would be on weaker ground, given the lack of salience and representativeness to those countries that dominate issues of domestic and international security. The United States and China are particularly relevant and important case studies given what many perceive to be an emerging rivalry between the two great powers on a range of issue areas, including strategic policy. Second, regions and countries that face acute security crisis, such as the Korean peninsula and cross-strait, highlight the prevalence and continuing importance of security issues in world politics. Thus, confirmation of legalization of national security in such countries and areas would lend greater relevance to the significance of the trend toward legalization. The ultimate question of whether legalization constrains the use of force seems especially germane to the security situation in these regions.

Conclusion

Beyond a simplistic understanding of international law itself imposing restrictions on the use of force, this study aims to better chart the dynamic of how domestic law interacts with international law and examine the mechanisms (notably the logic of contradiction) at work on the issue of force. Specifically, this study has argued that two main factors, the concentration of executive power and the rise of social movement organizations, and their interplay have contributed to the legalization of national security. These two forces are manifestations of a larger systemic contradiction in world affairs between sovereignty and human rights, and the clash of values has been the fundamental driver of legal and political change. The widening of analysis, both vertically (between international law and domestic law) and horizontally (across different actors and institutions) offers a much more comprehensive view of the legalization of national security and how the legality of the use of force exists and operates in the world politics today. It encourages scholarship to look beyond compliance (especially compliance focused

solely on international law) and examine how domestic legal developments, even those that initially appear to skirt international legal obligations, ironically contribute to greater legalization and possibly impose further limitations on the use of force both at home and abroad.

Chapter 2

The United States and Military Commissions

Chapter 2: The United States and Military Commissions

In the United States, the legal drama over the treatment of suspected terrorist detainees illustrates the legalization of national security in which executive action, backed by its own legal arguments, contravened established international and domestic rules. However, such actions only invited further legal challenges from below. The case of the United States illustrates how higher concentrations of executive authority in the country coupled with a strong presence of social movement organizations has greatly recast the debates and discussions about national security in the country along legalistic arguments. The fundamental contradiction between state power and protection of individual rights, even those of suspected terrorist detainees who enjoyed little sympathy in the wake of 9/11, manifested as contravention in many of the policies of the George W. Bush administration. Such policies ignited much controversy both at home and abroad, with many observers claiming that American prestige and image were tainted by many policies of the U.S. government. Nevertheless, it was significant and meaningful that many of these policies were articulated through legal arguments and justifications.

Following the 9/11 attacks, President Bush issued a military order that established military commissions to try suspects of war crimes.[125] The procedures for such military commissions were outlined in the military order, but they were challenged in court in the case of *Rasul v. Bush*, which was organized by the Center for Constitutional Rights (CCR), an organization of activist lawyers that has been heavily involved in using litigation to challenge government policies.[126] When the Supreme Court ruled that U.S. federal courts indeed had jurisdiction to hear *habeas* petitions brought by the detainees, President Bush responded by instituting Combatant Status Review Tribunals (CSRTs), and Congress enacted the Detainee Treatment Act of 2005 (DTA), which stripped federal court jurisdiction over *habeas* petitions by detainees at Guantanamo and only permitted the D.C. Circuit to hear appeals of military commission decisions.[127] The Supreme Court responded in *Hamdan v. Rumsfeld* that such military commission procedures violated both the Uniform Code of Military Justice (UCMJ) and the 1949 Geneva Conventions.[128] In response to that decision, President Bush worked with Congress to enact the Military Commissions Act of 2006 (MCA 2006), which largely tracked the previous structure of military commissions authorized by the president, especially the revocation of federal court jurisdiction over *habeas* petitions by terrorist detainees held in Guantanamo.[129] Social movements organizations did not sit still, and CCR again brought a challenge in the case of *Boumediene v. Bush* in 2007, and the Supreme Court ruled that alien unlawful enemy combatants had a right to *habeas*, which was unconstitutionally suspended by the MCA 2006.[130] In response to *Boumediene*, Congress passed the Military Commissions Act of 2009 (MCA 2009), which amended portions of MCA 2006, but still retained the basic structure of military commissions for some alien terrorist detainees.[131]

The case study over the status of terrorist detainees in the U.S. demonstrate how the executive has increasingly resorted to legal argumentations to justify policies related to national

[125] Military Order of November 13, 2001, 66 Fed. Reg. 57,833 (Nov. 16, 2001).
[126] Rasul v. Bush, 542 U.S. 466 (2004).
[127] Thomas M. Franck, et. al, *Foreign Relations and National Security Law: Cases, Materials, and Simulations* (4th Ed.) (West, 2011), 680-1.
[128] Hamdan v. Rumsfeld, 548 U.S. 557 (2006).
[129] Franck, et. al., 685.
[130] Boumediene v. Bush, 553 U.S. 723 (2008).
[131] Franck, et. al., 692.

security, and how social movement organizations, such as the CCR, have been active in challenging those arguments with legal challenges of their own. This legal tit-for-tat and responses by all sides have only contributed to greater legalization of national security policy in the United States. In addition, this also reveal a much more complex and interesting relationship between international and domestic law. Most assume that international law must be incorporated into and supported by municipal law to have effect, and much of the scholarship on the use of force has been heavily concerned only with the international level. However, there are significant legal developments relating to national security at home, which challenges a simplistic top-down notion of international legal constraints on the use of force by governments. If proponents of the democratic peace theory have shown us anything, it is that domestic institutions and internal politics matter greatly when it comes to issues regarding the use of force.[132]

1. Executive Power in the United States

The nature of the U.S. president's power in national security matters has been the focus of intense discussion and debate for decades. Just how much authority does the executive have, and where does such power emanate from? This debate is best illustrated by a pair of modern Supreme Court cases that have laid out opposing conceptions of presidential power in the United States. In *United States v. Curtiss-Wright*, a case involving a ban of arms sales to Bolivia and Paraguay, Justice Sutherland ruled that the president's power not only came from Congressional authorization, but also from the "very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations."[133] This interpretation of absolute, plenary authority was a very broad reading of presidential authority under Article II of the Constitution as the chief executive (Article II, Section 1) and commander-in-chief (Article II , Section 2) of the military.

In a classic study, Arthur Schlesinger tracked the emergence of an "imperial presidency" in which presidents usurped authority, especially during war times, not provided by the Constitution.[134] Schlesinger critiqued such developments, but his historical analysis indicated a trend toward the concentration of executive authority. In contemporary debates, this conception of broad presidential power finds the strongest support in the "unitary executive theory," which argues that the president has complete control over the executive branch of government, with few or no constraints by Congress.[135] John Yoo has argued that a strong presidency is deeply rooted in the political history of the United States.[136]

Conversely, in *Youngstown Sheet v. Sawyer*, a case involving the seizure of American steel mills by President Harry Truman during the Korean War (1950-1953), the Supreme Court ruled that there were constraints on presidential power in the national security and foreign affairs arena. Writing for the Court, Justice Black declared that the "President's power, if any, to issue the order must stem either from an act of Congress or from the Constitution itself[,]" which

[132] See Russett (1993).
[133] United States v. Curtiss-Wright Export Corp., 299 U.S. 304 (1936).
[134] Arthur M. Schlesinger Jr., *The Imperial Presidency* (New York: Mariner Books, 2004).
[135] See Steven G. Calabresi and Christopher S. Yoo, *The Unitary Executive: Presidential Power from Washington to Bush* (New Haven: Yale University Press, 2008).
[136] See John Yoo, *The Powers of War and Peace: The Constitution and Foreign Affairs After 9/11* (Chicago: University of Chicago Press, 2005); Yoo (2011).

seemed to limit the plenary authority expounded under *Curtiss-Wright*.[137] In his famous concurrence, Justice Jackson set out a three-tiered framework for analyzing the boundary of authority in a given situation, but the underlying premise was that Congress could exercise more power over matters of war and peace if it chose to do so.[138] But as Gordon Silverstein has shown, the Supreme Court has been unable or unwilling to assist a Congress that has delegated broad powers to the president.[139]Louis Fisher has countered chronicles of a strong executive presidency, arguing that the framers of the Constitution consciously sought to avoid a monarchical executive, such as the one they were seeking independence from, and envisioned a shared structure of power between the branches of government when it came to national security matters and foreign affairs.[140]

The rise of the modern administrative state has only intensified the debate over presidential power. Since the end of WWII, the United States has witnessed a huge increase in the size of the federal government generally and of the national security bureaucracy specifically. One of the key pieces of legislation that exemplified this was the National Security Act of 1947, which was one of the largest and most sweeping reorganization and expansion of the American intelligence, national security, and military institutions. For example, the 1947 Act created the National Security Council (NSC), the Central Intelligence Agency (CIA), and the Joint Chiefs of Staff.[141] In his detailed history of the law, Douglas Stuart points out that the main motivation behind the law and the overhaul of the government was the Cold War rivalry with the Soviet Union.[142] President Harry Truman and his advisors recognized the need to expand and consolidate executive power in the face of a highly centralized, communist enemy.[143]Thus, the functional need to address threats and the isomorphic tendencies of institutionalization were clearly evident during this time.

This Cold War trend of the concentration and expansion of executive power continues in contemporary American politics. In fact, Posner and Vermeule posit that a strong presidency is inevitable in the modern world.[144] Today, the U.S. federal government employs over 2 million civilian works, and over 98 percent of them do not work in the legislative or judicial branches but in the executive branch and its vast array of agencies, departments, and other governmental bodies.[145] Paralleling the impact of the National Security of 1947 following the bombing of Pearl Harbor, the promulgation of the Homeland Security Act of 2002[146] after the 9/11 attacks constituted the largest reorganization of the federal government and national security-related agencies since the end of the Second World War.[147] Then in 2004, the Intelligence Reform and

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[137] Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952).
[138] Ibid.
[139] Gordon Silverstein, *Imbalance of Powers: Constitutional Interpretation and the Making of American Foreign Policy* (Oxford: Oxford University Press, 1997), 189-191.
[140] Louis Fisher, *Presidential War Power* (Lawrence: University Press of Kansas, 2004).
[141] 50 U.S.C. 15.
[142] Douglas T. Stuart, *Creating the National Security State: A History of the Law that Transformed America* (Princeton: Princeton University Press, 2008).
[143] Michael J. Hogan, *A Cross of Iron: Harry S. Truman and the Origins of the National Security State 1945-1954* (Cambridge: Cambridge University Press, 1998).
[144] Eric A. Posner and Adrian Vermeule, *The Executive Unbound: After the Madisonian Republic* (New York: Oxford University Press, 2010).
[145] Ibid, 5-6.
[146] 116 Stat. 745.
[147] See Dara Kay Cohen, Mariano-Florentino Cuellar, and Barry R. Weingast, "Crisis Bureaucracy: Homeland Security and the Political Design of Legal Mandates," *Stanford Law Review*, vol. 59 (December 2006), 673-759.

Terrorism Prevention Act centralized the various national security state apparatuses, creating the position of Director of National Intelligence (DNI) to better coordinate and facilitate cooperation between different government agencies and the military.[148]

Despite such growth and institutionalization of the U.S. national security state, not everything goes as planned or expected. Amy Zegart outlines a national security agency model of institutions, which argues that such agencies are not well designed to promote national interests, due to bureaucratic infighting between agencies.[149] Since Zegart's institutionalist model is mainly aimed at measuring efficiency of public institutions, it may overlook the fact that such inter-agency competition within the executive branch may promote greater legalization, as agency heads interpret their statutory authorizes and propose law-based arguments and justifications for greater authority.

Like Zegart, Aaron Friedberg qualifies the significance of the growth of the modern American administrative state during the Cold War (what he calls the "garrison state"). Friedberg argues that a powerful anti-statism ethic in the American political culture and the presence of domestic interest groups opposed a hegemonic state, and that such constraints were instrumental in America's eventual success (both economically and technologically) over the Soviet Union at the close of the Cold War.[150] Friedberg's account of the collision between the pressures toward statist expansion and anti-statism in the United States is slightly different from, but nevertheless fits well with this study's argument that there is a fundamental contradiction in the international system between the values of statism and individualism. Whether through globalization or the spread of democracy and liberalism over the past decades, this study would claim the clash that Friedberg recounts is not only an American story, but a worldwide story that is happening in many countries. Furthermore, Friedberg does not specifically model the opposition of domestic interests against the statist forces, while this study's focus on the law demonstrates how such interest groups (in America and other countries) have increasingly relied on the law to challenge the accumulation of executive power.

Overall, whether one agrees with the *Curtiss-Wright* or *Youngstown* model of presidential authority in the United States, what is clear to both sides is that there is much more room for interpretation and debate. The source of such contention is the relative indeterminacy of the U.S. Constitution on the precise contours of presidential authority over national security and foreign affairs. For example, the Constitution expressly enumerates certain powers to both the President (Article II) and Congress (Article I), but many areas of the law are unclear. For example, while Article I, Section 8 explicitly gives Congress the power to "declare war," many presidents in the past have gone to war without the prior authorization.[151] Also, Article II, Section 2's articulation of the president in "commander-in-chief" begs the question of what that "title" authorizes to the executive office.[152]

The range of textual interpretation and Supreme Court decisions is relatively wide. Judges and scholars have offered very different and contrasting interpretations of the same legal text, which has compounded the uncertainties surrounding the constitutional authority over

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[148] 118 Stat. 3638.
[149] Amy B. Zegart, *Flawed by Design: The Evolution of the CIA, JCS, and NSC* (Stanford: Stanford University Press, 1999), 9-10.
[150] Aaron L. Friedberg, *In the Shadow of the Garrison State: America's Anti-Statism and Its Cold War Grand Strategy* (Princeton: Princeton University Press, 2000), 4.
[151] U.S. Constitution, Article I, Section 8.
[152] U.S. Constitution, Article II, Section 2 begins, "The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States"

foreign affairs for the branches of government. An illustrative case is the *Youngstown* steel seizure case, in which Justice Black relied on Article I's commander-in-chief clause to overturn President Truman's takeover of the steel mills.[153] However, Justice Frankfurter, even in concurrence, noted that the legal considerations in Justice Black's opinion were "more complicated and flexible."[154] As Michael Glennon notes, Justice Jackson's influential concurring opinion, "seems implicitly to assume that the constitutional text alone cannot resolve all separation-of-powers disputes.[155] In fact, Philip Bobbitt has aptly demonstrated that no less than six different modes of analysis are involved in *Youngstown*.[156] Granted, different modes of legal analysis can and are used in a variety of cases, but the disparate range of analysis and conclusions increases the overall indeterminacy of a law.

Besides individual cases and the potentially conflicting set of precedents they create, the text of the Constitution on foreign policy matters is very much in dispute, which only aggravates the uncertainty. On one side, there are scholars such as Louis Fisher who put forth a legalistic argument against the preponderance of executive war powers by focusing on the text of the Constitution and framer's intent. Fisher fervently states, "The Constitution was intended to *prohibit* presidential wars."[157] The modern imposition of presidential prerogatives in war and foreign policy, especially since the Korean War, according to Fisher are violations of the constitutional framework of checks and balances and are results of "institutional failings" by the Congress, federal courts, legal academics, and media.[158] John Yoo also examines the text of the Constitution and the framer's intent, but arrives at the opposite conclusion: "If we assume that the foreign affairs power is an executive one, Article II effectively grants to the president any unenumerated foreign affairs power not given elsewhere to the other branches."[159] The polarity of interpretation is immense, which some judges have explicitly recognized. In proposing his three-tier framework in *Youngstown* regarding executive and legislative powers in foreign affairs, Justice Jackson states,

> "A century and a half of partisan debate and scholarly speculation yields no net result but only supplies more or less apt quotations from respected sources on each side of any question. They largely cancel each other. And court decisions are indecisive because of the judicial practice of dealing with the largest questions in the most narrow way."[160]

But some scholars have challenged this very notion of constitutional uncertainty. Most recently, Michael Ramsey has argued that the uncertainty in the Constitution on foreign affairs is much exaggerated and offers a "textual theory" of constitutional delegation of foreign affairs

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[153] Youngstown Sheet & Tube Co. et al. v. Sawyer 343 U.S. 579 (1952).
[154] Ibid.
[155] Michael J. Glennon, *Constitutional Diplomacy* (Princeton: Princeton University Press, 1990), 43.
[156] Philip Bobbitt, "*Youngstown*: Pages from the Book of Disquietude," *Constitutional Commentary*, vol. 19 (2002), 3-35. Bobbitt demonstrates that each of the justices employ variants of historical, textual, structural, prudential, doctrinal, and ethical modes of legal analysis.
[157] Louis Fisher, "Lost Constitutional Moorings: Recovering the War Power," *Indiana Law Journal*, vol. 81 (2006), 1200.
[158] Ibid, 1199.
[159] Yoo (2005).
[160] Youngstown Sheet & Tube Co. et al. v. Sawyer 343 U.S. 579 (1952).

powers. Essentially, Ramsey finds that the Constitution offers a "compromise" by dividing foreign affairs powers horizontally (checks-and-balances) and vertically (federalism). He rejects the notion of inherent executive powers, as conceived by Justice Sutherland in *Curtiss-Wright*, and agrees with some scholars that Article II, Section 1's articulation of "executive power" for the President includes foreign affairs powers.[161] Nevertheless, as Ramsey would probably admit, his reading of the Constitution is not authoritative; rather, it is just one reading amongst many. The "zone of twilight" identified by Justice Jackson seems too wide. As Henkin writes, "as regards foreign affairs, the text [of the Constitution] appears today to be strangely incomplete. The term *foreign affairs* is not in the Constitution: the conception of foreign affairs reflected in the constitutional dispositions seems incredibly limited."[162] He sees the Constitution in foreign affairs as "a strange, laconic document" with "troubling lacunae."[163] Social movement organizations have played a integral role in navigating such competing interpretations and indeterminacies in American law regarding national security and the use of force.

2. Social Movement Organizations in the United States

In the United States, strong social movement organizations have been integral to the strength of American democracy, and along with moderately high concentration of executive power, they have contributed to high levels of legalization of national security. As noted above, while specific cases and legislation are important indicators of the turn to law, this study's concept of legalization is broader, focusing on how an actor's articulation and formulation of interests and policy objectives have increasingly taken on legal arguments and justifications. In this respect, the role of social movement organizations and their activist lawyers have been crucial.

In general, the history of American politics is replete with the achievements of various social movement organizations that have utilized the law to push for political and social changes in many issue areas. As Epp argues, activist lawyers were instrumental in the rights revolution that swept through the United States during much of the twentieth century.[164] For example, the National Association for the Advancement of Colored People (NAACP) was one of the pioneers of a litigation strategy to push for racial equity and social change in America. Individuals and lawyers, such as Walter White, Charles Hamilton Houston, and Thurgood Marshall spearheaded "institutional reform litigation," which culminated in the *Brown v. Board of Education* Supreme Court case that outlawed racial segregation in American schools.[165]

In the national security context, other prominent social movement and civic organizations have been involved for decades in challenging executive power through litigation and other forms of legal mobilization. For example, the National Lawyers Guild (NLG) lawyers were heavily involved in opposing the Vietnam War, and they argued the case of *U.S. v. U.S. District Court*, in which the Supreme Court ruled that the president could not obviate the Bill of Rights in

[161] Michael D. Ramsey, *The Constitution's Text in Foreign Affairs* (Harvard: Harvard University Press, 2007); see also Saikrishna B. Prakash and Michael D. Ramsey, "The Executive over Foreign Affairs," *Yale Law Journal* vol. 231 (2001).
[162] Louis Henkin (1990), 19.
[163] Louis Henkin, *Foreign Affairs and the U.S. Constitution* (Oxford: Oxford University Press, 1997), 13-14.
[164] Epp (1998).
[165] Mark V. Tushnet, *The NAACP's Legal Strategy against Segregated Education, 1925-1950* (Chapel Hill: University of North Carolina Press, 1987), xi-xii; See also Richard Kluger, *Simple Justice* (New York: Alfred A. Knof, 1975).

the name of national security.[166] This case led to the Watergate hearings regarding President Nixon's actions and eventually to his resignation.

In more recent times, two social movement organizations have been heavily involved in many high profile cases related to national security, which have influenced how the executive justifies certain strategic policies. First, the American Civil Liberties Union (ACLU) has a long history of using litigation to protect individual rights and promote political reform and social change.[167] The organization is currently involved in two Freedom of Information Act (FOIA) lawsuits involving the U.S. government's highly controversial drone program, a part of which has targeted American citizens abroad.[168] This case, and the government's reliance on the states secrets doctrine to prevent litigation, signifies the administration's realization that such lawsuits can have an impact on strategic policy. As noted in the final section below, the states secret doctrine is one way that executive power has attempted to obviate legal analysis and argumentation regarding certain national security issues.

Second, the Center for Constitutional Rights (CCR), an organization founded in 1966 by a group of attorneys has been involved in a series of landmark cases involving the status of suspected terrorist detainees at Guantanamo Bay, Cuba. Currently, CCR is staff by approximately twenty lawyers and legal staff.[169] Overall, the role of these groups were fundamental to the legalization of national security in the United States. As Benjamin Wittes observes, following the events of 9/11 and the Bush administration's response, civic organizations played a crucial role challenging executive power and consistently pushing back. For example, he notes that "in a kind of mission creep, the human rights groups refused take 'yes' for an answer."[170] The following section offers a detailed case study of CCR and the legal fight over military commissions.

3. Case Study: The Legal Fight over Military Commissions

The contemporary debate surrounding military commissions has been a contentious one. Trying to balance national security and individual rights in the face of terrorism, the U.S. faces difficult questions that go to the heart of American politics and law. What rights must be accorded enemy combatants? What are the limits of executive power in countering international terrorism? Most importantly, what is the relationship between national and international law? Answers to these questions have animated a fascinating legal drama in Congress and the Supreme Court over the legality of military commissions, and different sides have claimed victories at varying stages. This study aims to model the broader process and character of the legal fight over military commissions, arguing that the development of law in this area has been driven by a dialectical dynamic in which the contradictions between domestic and international law have not resulted in a negation of either, but rather a synthesis of both. The overall process

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[166] National Lawyers Guild, "Our History," http://www.nlg.org/about/history/; See also Ann Fagan Ginger, *The National Lawyers Guild: From Roosevelt Through Reagan* (Philadelphia: Temple University Press, 1988).
[167] Samuel Walker, *In Defense of American Liberties: A History of the ACLU* (New York: Oxford University Press, 1990).
[168] ACLU, "Calling Out the CIA for Its Secrecy Game on Target Killing," http://www.aclu.org/blog/national-security/calling-out-cia-its-secrecy-game-targeted-killing.
[169] Albert Ruben, *The People's Lawyer: The Center for Constitutional Rights and the Fight for Social Justice, From Civil Rights to Guantanamo* (New York: Monthly Review Press, 2011).
[170] Benjamin Wittes, *Law and the Long War: The Future of Justice in the Age of Terror* (New York: Penguin, 2008), 154.

of political debate and legal argumentation, instigated by various actors and channeled through institutions, illustrates the legalization of national security and a more complex and interdependent relationship between national and international law.

Shortly after the 9/11 attacks, on September 18, 2001, Congress passed the Authorization for Use of Military Force (AUMF), which authorized the president "to use all necessary and appropriate force" against those that were involved in the 9/11 attacks.[171] The AUMF formed the basis of the subsequent military action in Afghanistan, but the administration also used that authority to detain suspected terrorists. On November, 13, 2001, President Bush issued an executive order, the "Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism," which authorized the use of military commissions.[172] The president's decision to issue the order itself was notable and important, illustrating how executive power has sought to facilitate its strategic policies through legal mechanisms.

However, the order was sweeping in its authority and constitutionally and legally troublesome on many fronts. The military order essentially gave the president unilateral and unfettered discretion over who would come under the Military Order. For example, Section 2(a)(1) of the Military Order states:

> The Order covers anyone who there is reason to believe
> (i) is or was a member of the organization known as al Qaida;
> (ii) has engaged in, aided or abetted, or conspired to commit, acts of international terrorism, or acts in preparation therefor, that have caused, threaten to cause, or have as their aim to cause, injury to or adverse effects on the United States, its citizens, national security, foreign policy, or economy; or
> (iii) has knowingly harbored one or more individuals described.

Many critics argued that the "reason to believe" standard was so sweeping that it could essentially included anyone from a Basque separatist or an Irish Republican Army member.[173] Other provisions included the authorization for the military tribunals to operate in secrecy (with no threshold requirement for such need), imposition of the death penalty with unanimity, no appeal to any independent court, and no mens rea requirement for many of applicable conduct.[174] Since the Bush administration deemed those terrorists linked to the 9/11 attacks as "unlawful combatants," it argued that the Geneva Conventions did not apply to them.

A. *Rasul v. Bush*

In early 2002, CCR filed the first habeas corpus petitions on behalf individuals at Guantanamo, challenging their indefinite detention and the Bush administration's policy over detainees who were deemed to be unlawful enemy combatants.[175] The two Australians and twelve Kuwaities involved in the case did not have access to counsel or know what charges were

[171] Authorization for Use of Military Force (AUMF), 115 Stat. 224, note following 50 U.S.C. § 1541 (2000 ed., Supp. III).
[172] Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57,833 (Nov. 13, 2001).
[173] Neal K. Katyal and Laurence H. Tribe, "Waging War, Deciding Guilt: Trying the Military Tribunals," *Yale Law Journal*, vol. 111, no. 6 (April 2002), 1261.
[174] Ibid, 1262-3.
[175] Raul v. Bush, 542 U.S. 466 (2004).

lodged against them. Relying on a prior precedent, *Johnson v. Eisentrager*,[176] the government argued that since they were foreign nationals held abroad, they were not entitled to habeas rights.[177] In a notable decision, the Supreme Court sided with CCR, ruling that U.S. district courts had jurisdiction to hear their petitions.[178] The Court differentiated the case from *Eisentrager* and reasoned that even though Guantanamo Bay was not official American territory, the United States nonetheless exercised "exclusive jurisdiction and control" over the territory.[179]

B. *Hamdan v. Rumsfeld*

In November 2001, Salim Ahmed Hamdan, a citizen of Yemen, was captured on the battlefield in Afghanistan during the U.S. military action in the country. He was subsequently taken to Guantanamo Bay, and one year later he was charged with one count of conspiracy in a military commission.[180] Hamdan then filed for a writ of habeas corpus, arguing that the charge of conspiracy was not an offense under the law of war, and that the procedures of the military commission violated both domestic and international law.[181] He conceded that a court martial under the Uniform Code of Military Justice (UCMJ) would have appropriate authority.[182] Separately, a Combatant Status Review Tribunal (CSRT) was convened pursuant to a military order on July 7, 2004, and it decided that Hamdan was an "enemy combatant," which authorized his continued detention in Cuba.[183] The district court granted Hamdan's request for writ of habeas corpus, but the Court of Appeals for the District of Columbia reversed.[184]

In a landmark ruling, the Supreme Court invalidated the military commissions, ruling that "the military commission convened to try Hamdan lacks power to proceed because its structure and procedures violate both the UCMJ and the Geneva Conventions."[185]

C. Detainee Treatment Act of 2005

In response to the *Raul* decision and while the *Hamdan* case was pending, President Bush instituted Combatant Status Review Tribunals (CSRT), and Congress specifically aimed to preempt the Supreme Court from weighing in on such cases. On December, 30, 2005, it enacted the Detainee Treatment Act of 2005 (DTA), section 1005(e)(1) of which specifically stated that "no court, justice, or judge shall have jurisdiction to hear or consider an application for a writ of habeas corpus filed by or on behalf of an alien detained by the Department of Defense at Guantanamo Bay, Cuba"[186] In addition, section 1005(e)(2) and (3) provided that the Court of Appeals for the District of Columbia shall have "exclusive jurisdiction" over the validity of any CSRT determination of an individual as an "enemy combatant" and final decisions of military

[176] Johnson v. Eisentrager, 339 U.S. 763 (1950).
[177] Ibid.
[178] Ibid.
[179] Ibid, 476.
[180] Hamdan v. Rumsfeld, 548 U.S. 557, 566.
[181] Ibid, 567.
[182] Ibid.
[183] Ibid, 570.
[184] See Hamdan v. Rumsfeld, 344 F.Supp.2d 153 (D.C. 2004) and Hamdan v. Rumsfeld, 415 F.3d 33 (D.C. Cir. 2005), respectively.
[185] Hamdan v. Rumsfeld, 548 U.S. at 567.
[186] Detainee Treatment Act of 2005 (DTA), Pub.L. 109-148, 119 Stat. 2739, §1005(e)(1).

commissions, respectively.[187] These two latter subsections were specifically noted as applicable to pending and future cases in section 1005(h).[188]

The government argued that section 1005(h) also applied to section 1005(e)(1), thus barring federal jurisdiction and the Supreme Court's review in *Hamdan*.[189] Attorneys for Hamdan argued that if that were true, Congress had unconstitutionally suspended the writ of habeas corpus.[190] Instead of siding with either argument, the Supreme Court ruled that it indeed had jurisdiction to review the case, relying on a rule of statutory interpretation. It stated that since Congress explicitly cited only subsections (2) and (3), it had rejected the insertion of subsection (1) under section 1005(h): Congress' rejection of the very language that would have achieved the result the Government urges here weighs heavily against the Government's interpretation."[191]

The Supreme Court's interpretation of the DTA was a narrow one, but a necessary one for the Court to hear the case. Otherwise, as Justice Scalia in dissent argued that: "It is simple recognition of the reality that the *plain import* of a statute repealing jurisdiction is to eliminate the power to consider and render judgment in an already pending case no less than in a case yet to be filed."[192]

With respect to Common Article 3 of the Geneva Conventions, the Court reasoned that "Common Article 3 obviously tolerates a great degree of flexibility in trying individuals captured during armed conflict; its requirements are general ones, crafted to accommodate a wide variety of legal systems. But *requirements* they are nonetheless. The commission that the President has convened to try Hamdan does not meet those requirements."[193]

D. Military Commissions Act of 2006

Once again, the president responded, working with Congress to pass the Military Commissions Act of 2006 (MCA 2006), which largely reinstituted the prior military commissions. President Bush's version of the bill (S.3861) provided that "[n]o person in any habeas corpus action or any other action may invoke the Geneva Conventions or any protocols thereto as a source of rights; whether directly or indirectly, for any purpose in any court of the United States or its States or territories."[194] A similar provision was included in Section 948b(g) in MCA 2006, which stated that "No alien unlawful enemy combatant subject to trial by military commission under this chapter may invoke the Geneva Conventions as a source of rights."[195] This was a significant and very controversial move by the executive to limit the reach of international legal principles through domestic legal mechanisms.

One of the most interesting portions of MCA 2006 is Section 948b(f), which states that the "military commissions established under this chapter is a regularly constituted court, affording all the necessary 'judicial guarantees which are recognized as indispensable by civilized peoples' for purposes of common Article 3 of the Geneva Conventions."[196] Here,

[187] Ibid, §§1005(e)(2), (3).
[188] Ibid, §1005(h).
[189] Hamdan, 548 U.S. at 574.
[190] Ibid, 575.
[191] Ibid, 579-80.
[192] Ibid, 657.
[193] Ibid, 635.
[194] S. 3861, 109th Congr. §6(b)(1) (2006); *see also* H.R. 6054, 109th Cong. §6(b)(1) (2006).
[195] MCA 2006, section 948b(g).
[196] 10 U.S.C. §948b(f).

Congress invoked and adopted the language of international law verbatim to address the explicit concern of the Supreme Court in *Hamdan*. To most critics, it amounted to a facile declaration of compliance, rather than a substantive commitment to international principles and law. More interestingly, this use of language is a salient example of the rhetorical battle and direct interaction between international and domestic law.

John Yoo, formerly of the Office of Legal Office, saw the MCA 2006 as a strong message that Congress sent to the Court, "a stinging rebuke to the Supreme Court…which restores to the president command over the management of the war on terror."[197]

E. *Boumediene v. Bush*

But the legal drama over detainees did not end there. The lawyers at CCR once again went to court and challenged the constitutionality of MCA 2006. In the case of *Boumediene v. Bush*, the CCR argued that detainees in Guantanamo had the right to habeas corpus.[198] The Supreme Court agreed, with Justice Kennedy writing for the slim 5-4 majority that the MCA 2006 was an unconstitutional suspension of the right to habeas corpus, which the detainees were entitled to under the Constitution.[199] The Court implied that there was extraterritorial reach of the Constitution: "Even when the United States acts outsides its borders, its power are not 'absolute and unlimited' but are subject 'to such restrictions as are expressed in the Constitution.'"[200] This echoed Justice Black's opinion in *Reid v. Covert*, which affirmed that the United States government "is entirely a creature of the Constitution" and "[i]ts power and authority have no other source. It can only act [at home and abroad] in accordance with all the limitations imposed by the Constitution."[201]

Overall, the case was a significant victory for CCR and ACLU, which had filed amicus briefs on behalf of the detainees. The case represents the only time that the Supreme Court has invalidated a major national security policy of the executive during a time of armed conflict.[202] And while the role of the Court was indeed important, it was the sustained and persistent legal challenges by social movement organizations such as the CCR, which prompted judicial action.

F. Military Commissions Act of 2009

Finally, in response to the *Boumediene*, Congress amended the MCA 2006 with the new Military Commissions Act of 2009 (MCA 2009), which stands today. While changes were made to conform to the Court's ruling, there are indications of continuing pushback from the executive and legislative branches. For example, Section 948b(e) of the new MCA 2009 states that "No alien unprivileged enemy belligerent subject to trial by military commission under this chapter may invoke the Geneva Conventions as a basis for a private right of action."[203] Compared to Section 948b(g) of the MCA 2006, this provision narrows the bar to private rights of action under the Geneva Conventions, as opposed to the previous exclusion of those Conventions as a "source of rights." Nonetheless, the government is still seeking to limit the reach of certain

[197] John Yoo, "Sending a Message," *Wall Street Journal* (Oct. 19, 2006).
[198] Boumediene *v. Bush* , 553 U.S. 723 (2008).
[199] Ibid.
[200] Boumediene, 553 U.S. at 765 (quoting Murphy v. Ramsey, 114 U.S. 15, 44 (1885).
[201] Reid v. Covert, 354 U.S. 1, 5-6 (1957).
[202] Franck, et al., 691.
[203] MCA 2009, Section 948b(e).

international rules and principles, again through implementation of domestic law, even if it must carefully navigate through complicated legal interpretations.

The continuing effort to limit detainee rights under the MCA 2009 may feed lingering doubts, both within the United States and abroad, about the country's commitment to international law. Many have critiqued the United States, especially during the George W. Bush administration, for abandoning the very international legal order that it was critical in constructing following WWII.[204] But as Jack Goldsmith has recently written, international and domestic critiques of American executive power fail to see that there are in fact many constraints on the president's power.[205] He refers to the political structure of checks and balances, media, lawyers in government, and social movement organizations such as ACLU and CCR as significant restraints on presidential authority, which refutes Posner and Vermeule's argument of an unbound executive.[206] Instead, Goldsmith finds that there are "strong legal and constitutional constraints" on the American executive. Similarly, this study's examination of the legalization of nation security has demonstrated an important change how strategic policy is formulated and justified in the United States.

Conclusion

The legal fight over military commissions represent how national security policies in the United States have increasingly become legalized. The presence of a strong executive under the American political system, as well as active social movement organizations, such as the CCR, have contributed to the legalization of national security in the country. The series of lawsuits and legislation surrounding the detainees and military commissions reveals a dense and sophisticated network of legal arguments, justifications, and counterarguments that have changed the nature of national security policymaking in the United States. Animating much of the legal drama is the systemic contradiction between the values of state sovereignty, especially in times of armed conflict, and individualism.

The case study also demonstrates the complex relationship and interplay between international rules, such as the Geneva Conventions, and domestic laws. The simplistic notion of only domestic compliance with international law obfuscates a much more interesting relationship between the two levels of law. In the context of concentrated executive power and strong social movements, domestic legislation and rules that seemingly contravene international rules prompt intense debates that illustrate a dialectic between the two levels of law. On the political stage, there is much interpretation and mutual interaction between domestic and international rules, and the history of the legislation surrounding military commissions in the United States shows how contestation between them changes understandings of both.

[204] Philippe Sands, *Lawless World: America and the Makin and Breaking of Global Rules from FDR's Atlantic Charter to George W. Bush's Ilegal War* (New York: Viking, 2005).
[205] Jack L. Goldsmith, *Power and Constraint: The Accountable Presidency after 9/11* (New York: Norton, 2012).
[206] Ibid, x-xii.

Chapter 3

China and the Anti-Secession Law

Chapter 3: China and the Anti-Secession Law

Cross-strait relations between mainland China and the island of Taiwan have often been very contentious, and on several occasions since division in 1949 both sides have come to the brink of military clashes. But in late 2004, instead of lobbing missiles at each other, China and Taiwan took their rivalry to a different level, fighting law with law. When China formally ratified the Anti-Secession Law (ASL) in March 2005, many observers wondered why Beijing would formalize its existing policy on Taiwan through the law. Although the ASL is relatively short in text, its history and substance carries important implications of how both sides have come to frame and assess their national security policies.

This chapter examines the ASL in greater context of political developments in both Beijing and Taipei, with special focus on the former, since the promulgation of the law represented a broader legalistic approach to governance and policy promotion in the mainland. Overall, China has witnessed a moderate level of legalization of national security. First, national security policymaking is highly centralized in China, especially when it comes to sensitive issues such as Taiwan. However, the strength of social movement organizations in China, particularly in the realm of national security is still relatively weak. While the interplay of high centralization, but weaker social forces has led to moderate legalization of national security in China, there are indications that the trend may increase in the future. The recent ASL is a salient illustration of how such greater formalization may take place, and the events surrounding the law demonstrates the competitive manifestation of the systemic contradiction in the international system.

1. Executive Power in China

In examining the nature of national security policymaking in China, it would be useful to divide the analysis along issue areas. On highly sensitive strategic matters, such as Taiwan, Tibet, and foreign relations, the process is very centralized in China. A small group of leaders, primarily within the Standing Committee of the Politburo of the Chinese Communist Party (CCP) control strategic policy on the mainland.[207] Michael Swaine characterizes this as the "national strategic objectives subarena."[208] Conversely, on other more routine matters related strategic policy, David Lampton notes that there is a trend toward de-centralization involving more government entities and "multiple voices."[209] This trend demonstrates how China may be transitioning up to the left on the curve in Chart 1, as noted in Section one. This may be an emerging break from China's autocratic past and Maoist, as well as a contrast to other centralized, communist countries, such as North Korea, which retains an totalitarian system over most political and military matters.

The Standing Committee of the Politburo is made up of the general secretary of the CCP, chairman of the Central Military Commission (CMC), premier of the State Council, state president, chairman of the Standing Committee of the National People's Congress (NPC), and

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[207] David M. Lampton, "China's Foreign and National Security Policy-Making Process: Is It Changing, and Does It Matter?" in David M. Lampton, ed., *The Making of Chinese Foreign and Security Policy* (Stanford: Stanford University Press, 2001), 2.
[208] Michael Swaine, *The Role of Chinese Military in National Security Policymaking*, rev. ed. (Santa Monica: RAND Center for Asia-Pacific Policy, 1998).
[209] Lampton, 2.

chairman of the Chinese People's Political Consultative Conference.[210] Exemplifying the concentration of executive authority and the importance of a paramount leader in the nuclear circle of Chinese leadership, one individual (Hu Jintao) currently occupies three of the positions represented on the Politburo Standing Committee (general secretary of the CCP, chairman of the CMC, state president).

But even with respect to the sensitive issues areas, such as Taiwan, this study illustrates an increasingly turn to law in the Chinese government. This reflects a broader pattern of legalization as an integral part of China's political and economic reforms for modernization. The legalization reform effort, termed *fazhihua* in Chinese, is popularly known as "governing the country in accordance with law," increasingly formalized state policy through the law.[211] Furthermore, China's entry into the World Trade Organization (WTO) and the legal reform requirements of the accession protocol have also opened up China to significant legalization.[212]

This trend is also evident in national security and military matters. For example, the most recent 2010 Defense White Paper notes that the Chinese military is undergoing extensive modernization efforts, and an important part of that modernization has been the use of legislation to rationalize and standardize military policy. Specifically, the White Paper notes that the NPC and its Standing Committee have issued legal decisions on 17 military matters, the State Council and the CMC have jointly formulated 97 administrative regulations regarding the military, the CMC has promulgated over 220 military regulations, while various branches of the armed forces have enacted more than 3,000 rules and regulations.[213] One notable example of such modernization of China's military or armed forces is the 2009 People's Armed Police Law, which centralized decision-making in how and when troops would be deployed.[214]

Therefore, the high concentration of executive power in China, and the conscious strategy to increasingly utilized legal mechanisms of governance have contributed to the legalization of national security China. But the mere passage of more laws and regulations is not enough to illustrate the process-oriented view of legalization posited in this study. The promulgation of such rules and laws must also engender law-based argumentation and justifications for policy choices, and this dynamic often requires strong bottom-up forces in society to challenge state policy.

2. Social Movements in China

Popular uprisings and mass mobilizations have been an integral part of China's vibrant and long history. The study of social movements in contemporary China has been growing over the past several years, and the literature demonstrates that the turn to the law in China is not only evident in government policy, but also in other sectors of Chinese society. As noted in one study, the government's legal reforms have created new legal institutions and rights, which have

[210] Lu Ning, "The Central Leadership, Supraministry Coordinating Bodies, State Council Ministries, and Party Departments," in David M. Lampton, ed., *The Making of Chinese Foreign and Security Policy* (Stanford: Stanford University Press, 2001), 42.
[211] Zuo, 456.
[212] People's Republic of China, Protocol of Accession, World Trade Organization, WT/L/432 (December 11, 2001), available online at: http://www.wto.org/english/thewto_e/acc_e/completeacc_e.htm.
[213] White Paper on China's National Defense in 2010 (Full text at: http://www.china.org.cn/e-white/index.htm)
[214] Michael Wines, "China Approves Law Governing Armed Police Force," *New York Times* (August 27, 2009).

empowered segments of society and raised rights consciousness in the country.[215] In addition, Kevin O'Brien and Lianjiang Li have examined increased popular resistance in rural China,[216] while Ching Kwan Lee has studied the emergence of labor protests in the country.[217]

For example, one of the most significant legal developments in China was the passage of the Administrative Litigation Law (ALL) in 1989 that provided individual citizens the right to sue the government for unlawful administrative acts.[218] Since the promulgation of the ALL, there have been approximately 100,000 lawsuits annually against the government.[219] Therefore, there has been progress in empowering the Chinese people with the law in challenging the government.

However, in other issue areas, such as national security, well-organized and persistent social movement organizations have not gained much strength, partly due to the repression by the government in such sensitive matters. For example, the ALL explicitly forbids citizens to sue on cases involving national security and foreign affairs.[220] And there have been many prominent individual human rights lawyers in China, who have braved prison and death to openly and covertly challenge the political system in China. So, while there have been progress in the development of the social movement organizations in China, they still remain relatively under-organized due to both government suppression and the lack of coordination in the public for larger, more coordinated challenges against government authority.

The case study of China's Anti-Secession Law (ASL) below demonstrates an interesting dynamic in cross-straits relations that has promoted a degree of legalization in the China's national security policymaking.

3. Case Study: China's Anti-Secession Law

The longstanding rivalry between China and Taiwan has taken on a legal dimension. In March 2005, China promulgated the Anti-Secession Law (ASL), which formalized the mainland's longstanding policy of rejecting any moves toward de jure independence on the island. While the ASL caused much controversy, it did not really usher in new policy since it maintained Beijing's one-China policy and right to use force to prevent independence[221]; the ASL was old policy in new clothes. Thus, a puzzle emerges: Why did China pass the ASL if it did not fundamentally change its policy on Taiwan?

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[215] Neil J. Diamant, Stanley B. Lubman, and Kevin O'Brien, "Law and Society in the People's Republic of China," in Neil J. Diamant, Stanley B. Lubman, and Kevin J. O'Brien, eds., *Engaging the Law in China: State, Society, and Possibilities for Justice* (Stanford: Stanford University Press, 2005), 3.

[216] Kevin J. O'Brien and Lianjiang Li, *Rightful Resistance in Rural China* (Cambridge: Cambridge University Press, 2006).

[217] Ching Kwan Lee, *Against the Law: Labor Protests in China's Rustbelt and Sunbelt* (Berkeley: University of California Press, 2007).

[218] Kevin J. O'Brien and Lianjiang Li, "Suing the Local State: Administrative Litigation in Rural China," *The China Journal*, no. 51 (January 2004), 75.

[219] Ibid.

[220] Art. 12, Administrative Procedure Law of the PRC, full text available at: http://en.chinacourt.org/public/detail.php?id=2695

[221] See Thomas J. Christensen, "China's Anti-Secession Law and Developments Across the Taiwan Strait," Hearing before the Subcommittee on Asia and the Pacific of the Committee on International Relations, House of Representatives, One Hundred Ninth Congress, First Session (Apr. 6, 2005) (Full text at: http://commdocs.house.gov), 63; White Paper on the Taiwan Question and Reunification of China (P.R.C.)(Aug. 1993), available online at: http://www.china.org.cn/e-white/taiwan/index.htm

This case study demonstrates how the ALS represents the legalization of national security in China, specifically the competitive manifestation of the logic of contradiction. In short, China was fighting law with law; the ASL was China's counter to Taiwan's moves for a referendum, and because it represented existing policy, form presided over substance. The legal form of these policies is itself significant in changing the dynamics of cross-strait relations. Furthermore, the fundamental contradiction between statism and individualism in world politics was clearly at play with mainland China seeking to reassert its sovereign authority over the island, while Taiwan used a popular referendum and direct democracy of the people to underscore the legitimacy of its objectives.

The implications for China and Taiwan are important, since subsequent discussions regarding the possible use of force between them will now involve legal argumentation and interpretation of the ASL. While a recent thaw in relations between the mainland and the island appears to have dampened the controversy over the ASL, the legislation still continues to influence cross-strait relations and will take center-stage if tensions rise again. The drama surrounding China's ASL illustrates the competitive dynamics that were at play in cross-straits relations that ultimately led to the legalization of national security issues between China and Taiwan.

A. The First Salvo: Chen's Moves Toward a Referendum

A study of China's ASL must start with Taiwan's moves for a referendum in 2003-2005. Taiwanese President Chen Shui-bian, who was a member of the pro-independence Democratic Progressive Party (DPP), sought to promote a more formal recognition of the island's independence by seeking a constitutional amendment to clarify the referendum process that was vaguely outlined in Article 136 of the Constitution: "The exercise of the rights of initiative and referendum shall be prescribed by law."[222] In December 2003, Chen successfully passed a new Referendum Law, which authorized a referendum under Article 17 if there was a threat to national sovereignty ("defensive referendum").[223] Chen's strategy of pursuing his independence policy through the referendum demonstrates his desire to use individualism and popular sovereignty to check the territorial sovereignty claims of the mainland, a reflection of the systemic contradictions at play in Cross-Straits relations.

By utilizing the new Referendum Law, Chen sought to push for a popular vote on the independence question simultaneously with his re-election campaign in 2004, which only raised tensions in cross-strait relations, since the mainland did not want to see him back in office for another term. Despite pressure from the U.S. and China, Chen pushed forward with the referendum in March 2004, which was composed of two questions. The first question called for a peaceful resolution to the Taiwan question, and specifically called upon China to renounce the use of force. The second question asked whether Taiwan should engage in negotiations with the mainland for a "peace and stability" framework in the cross-strait.[224] The results of the referendum were a bit anti-climatic (especially compared to the presidential election in which

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[222] Constitution of the ROC, art. 136.

[223] Jacques deLisle, "Legislating the cross-Strait Statute Quo? China's Anti-Secession Law, Taiwan Constitutional Reform and Referenda, and the United States' Taiwan Relations Act," in Peter C.Y. Chow, ed., *Economic Integration, Democratization and National Security in East Asia; Shifting Paradigms in US, China and Taiwan Relations* (2007), 110.

[224] Mily Ming-Tzu Kao, "The Referendum Phenomenon in Taiwan: Solidification of Taiwan Consciousness?" *Asian Survey*, vol. 44, no. 4 (August 2004), 591-613.

Chen won by a slim margin) as both questions failed to garner the required 50% of votes to be valid (45.2% and 45.1%, respectively). Of the votes cast, more than 80% of the votes were in favor.[225] While Chen's referendum failed, it nevertheless served as the catalyst that would result in the China's promulgation of the ASL. Furthermore, the referendum was significant in changing the dynamics of cross-straits relations, since it ushered in the process of legalization that now surrounds the Taiwan question and the legitimacy of the mainland's ability to use force.

B. China Responds in Kind: The ASL

While the referendum events were taking place on the island, mainland Chinese political leaders nervously sought a response. Their answer was the ASL. The ASL was officially adopted on March 14, 2005 by the Third Session of the Tenth National People's Congress (NPC).[226] The official account regarding the impetus for the ASL states that the idea for the law was suggested by an overseas Chinese national living in England to Chinese Premier Wen Jiabo in May 2004, while others indicate that preparations for a similar law began earlier in 2003.[227] Nevertheless, what is clear is that the immediate drive to legislate Taiwan policy came from political developments on the island during that period, in particular President Chen Shui-bian's move toward a referendum on the independence question.[228]

On its face, the ASL itself is a relatively short law, composed of ten articles. The first five articles are mainly aspirational, while the rest of the ASL lay out a series of "carrots" and "sticks" in the mainland's policy toward the island. The opening article of the ASL states that it was formulated "in accordance with the Constitution."[229] Specifically, this legal basis derives from the Preamble to the Chinese Constitution, which states:

> "Taiwan is part of the sacred territory of the People's Republic of China. It is the lofty duty of the entire Chinese people, including our compatriots in Taiwan, to accomplish the great task of reunifying the motherland."[230]

Interestingly, this is the only provision in the Constitution that explicitly mentions Taiwan by name, so promulgating a law specifically on Taiwan and linking it to the Constitution mutually strengthens the legal and political legitimacy of the ASL and the Chinese state.

The ASL lays out five objectives. Under Article 1, the purposes of the ASL are: "opposing and checking Taiwan's secession from China by secessionists in the name of 'Taiwan independence', promoting peaceful national reunification, maintaining peace and stability in the Taiwan Strait, preserving China's sovereignty and territorial integrity, and safeguarding the fundamental interests of the Chinese nation."[231] These objectives coincide with President Hu

[225] Ibid, 610.
[226] Anti-Secession Law (hereafter ASL), Third Session of the Tenth National People's Congress (Mar. 24, 2005) (Full text at: http://www.china.org.cn/english/2005lh/122724.htm).
[227] Susan L. Shirk, *China: Fragile Superpower* (New York: Oxford University Press, 2008), 303 (citing China Daily, May 11, 2004).
[228] Ibid, 205.
[229] ASL, art. 1.
[230] Constitution of the People's Republic of China, preamble (Full text at: http://english.peopledaily.com.cn/constitution/constitution.html).
[231] ASL, art. 1.

Jintao's four-point guidelines (sometimes called the "four-nevers") for "cross-Strait relations under new circumstances," which he announced only ten days before the ASL was officially adopted.[232] Specifically, Hu proposed:

> "First, never sway in adhering to the one-China principle…Second, never give up efforts to seek peaceful reunification…Third, never change the principle of placing hope on the Taiwan people…[and] Fourth, never compromise in opposing the 'Taiwan independence' secessionist activities."[233]

Therefore, the ASL itself was not really breaking new ground on mainland's policy on Taiwan. For example, the 1993 White Paper on Taiwan China's 1993 states: "Peaceful reunification is a set policy of the Chinese Government. However, any sovereign state is entitled to use any means it deems necessary, including military ones, to uphold its sovereignty and territorial integrity."[234] Furthermore, Article 2 of the ASL reiterates that "There is only one China in the world…[and] Taiwan is part of China," which echoes Beijing's position on the 1992 Consensus.[235] Article 3 emphasizes that "Solving the Taiwan question and achieving national reunification is China's internal affair, which subjects to no interference by any outside forces."[236] But while it does not inaugurate new policy, the ASL is significant, as argued below, in the *form* of policymaking it represents and changing dynamics of cross-strait relations. It was not simply a political statement or a set of guidelines, but law, which by its nature and effect hold different and significant implications for Taiwan policy in Beijing.

But in recognition of the threat of a popular vote on independence, the ASL offers a range of incentives and "carrots" to appeal to the Taiwanese people in order to promote cross-strait relations and counter any secessionist impulses on the island. For example, Article 5 calls for peaceful reunification, after which "Taiwan may practice systems different from those on the mainland and enjoy a high degree of autonomy."[237] It is worth noting here that this stops short of explicitly offering Taiwan a "one country, two systems" approach similar to that enjoyed by Hong Kong and Macau, but nevertheless, the reference to autonomy follows the spirit of China's approach to the other two islands. Furthermore, Article 6 lists a series of measures and proposals, such as facilitation of personnel exchanges, economic cooperation (i.e. direct links of trade and air), educational and technological exchanges, and law enforcement cooperation.[238] Besides economic and social exchanges, the ASL also offers a significant political overture to Taiwan. Most notably, Article 7 states that negotiations between the two sides would be conducted "on equal footing" on a range of issues, such as the official end of hostilities, development of cross-strait relations, and political status of Taiwanese authorities.[239]

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[232] "Four-Point Guidelines on Cross-Straits Relations Set Forth by President Hu Jintao," Third Session, 10th National People's Congress and Chinese People's Political Consultative Conference (Mar. 4, 2005) (Full text at: http://www.china.org.cn/english/2005lh/121825.htm).
[233] Ibid.
[234] White Paper on the Taiwan Question and Reunification of China (P.R.C.)(August1993), available online at: http://www.china.org.cn/e-white/taiwan/index.htm.
[235] ASL, art. 2.
[236] ASL, art. 3.
[237] ASL, art. 5.
[238] ASL, art. 6.
[239] ASL, art. 7.

Counterbalancing the calls for cooperation and exchanges is Beijing's reservation of the right to use "non-peaceful means," the most controversial provision in the ASL. Article 8 lists three scenarios under which the mainland would resort to the use of force: 1) if secessionist forces "cause the fact of Taiwan's secession from China;" 2) if "major incidents entailing Taiwan's secession from China should occur"; or 3) if "possibilities for a peaceful reunification should be completely exhausted."[240] While this was not really a radical shift, since Beijing has always refused to renounce the use of force to settle the Taiwan issue (and displayed such threats of force on several occasions), critics of the ASL in Taiwan argued that the law laid the foundation and provided a legal excuse for military invasion.[241] Nonetheless, as noted below, formalizing the conditions under which force may be used under a law may have significant implications for Beijing. In explaining the drafting of the ASL, NPC Standing Committee Vice-Chairman Wang Zhaoguo emphasized that the use of non-peaceful means under Article 8 were a "last resort," and that, "So long as there is a glimmer of hope for peaceful reunification, we will exert our utmost to make it happen rather than give it up."[242] Similarly, Huang and Li have noted that Article 8 does not explicitly mention reunification, but rather vows only to "protect China's sovereignty and territorial integrity," which they interpret as a careful selection of wording to convey limited objectives and the preference for the maintenance of the status quo.[243] They conclude that the ASL "constituted a monumental legalization of Beijing's pro-status quo approach toward Taiwan," and rather than pushing for rapid reunification with the island, "it legally obligates Beijing to leave the door open to Taiwan's secure, separate, and intranationally equal existence alongside Mainland for the foreseeable future, as long as the island remains part of a de jure one China."[244]

C. Motivations for Promulgating the ASL

While the text of the ASL contains several prominent features of mainland's policy on Taiwan, the law itself did not offer fundamentally new policy.[245] Therefore, it is worth asking why China decided to promulgate the ASL. This study argues that Chinese leaders were spurred by competitive motivations to check moves for a referendum by pro-independent forces in Taiwan; the island forced the mainland's hand, and China felt compelled to countering law with law. Support for this logic of legal competition is found in the substance of the ASL and the context of its passage, as well as in the broader Chinese view of the role of law in policymaking. Finally, the development of cross-strait relations along such legalistic lines is important because it signals a changing dynamic between the two countries.

First, the title of the ASL itself is significant. Those with information on the drafting process have indicated that the original title of the law was "Reunification Law," which represented the bolder approach of former President Jiang Zemin who pushed for a timetable on

[240] ASL, art. 8.
[241] Mainland Affairs Council, Republic of China, "ROC Government Q&A on China's Drafted 'Anti-Separation Law,'" (March 1, 2005), available online at: http://www.mac.gov.tw/ct.asp?xItem=50279&ctNode=5910&mp=3&xq_xCat=2005).
[242] Wang Zhaoguo, "Draft China Law Explained," China Daily (February 7, 2011) (Available at: http://www.chinadaily.com.cn/english/doc/2005-03/08/content_422875.htm).
[243] Jing Huang and Xiating Li, *Inseparable Separation: The Making of China's Taiwan Policy* (Singapore: World Scientific, 2010), 304.
[244] Ibid, 305.
[245] Christensen.

the question of reunification with Taiwan.[246] By calling the law an "anti-secession" law, the drafters were emphasizing that the immediate objective was to block any moves for independence in Taiwan, as noted in its Article 1, while implicitly acknowledging that it was a reactive measure to what Chen was doing. In addition, Chinese leaders were rhetorically reinforcing the position that the island has always been a part of one China, thus requiring Taiwanese acts to (illegally) secede from the motherland.

Besides the title, the swift promulgation of the ASL also signals that China was primarily motivated by a desire to check Taiwan's legal moves with a law of its own. Contrary to other legislative measures, the ASL was adopted within four months by the NPC after only one reading in December 2004.[247] Chinese leaders realized that they needed to quickly counter events on the ground in Taiwan, especially in light of Chen's re-election in March 2004 and the tight legislative elections on the island in December 2004. As Vice-Chairman Wang explains:

> "Among their escalating secessionist activities of various types, we should be particularly watchful that the Taiwanese authorities are trying to use so-called 'constitutional' or 'legal' means through 'referendum' or 'constitutional reengineering' to back up their secessionist attempt with so-called 'legality' and change the fact that both the mainland and Taiwan belong to one and the same China separating Taiwan from China."[248]

Even though Chen's pan-green coalition failed to attain a majority in the Taiwanese legislature to push forward with a referendum, it was a close election, and Beijing recognized the threat posed by Chen and those on the island that supported independence through constitutional amendment and referendum. This recognition in the mainland, which was reinforced during Chen's two terms in office, highlighted to the leaders in Beijing that they needed to institutionalize their policy on Taiwan to better deal with domestic audience concerns, Taiwanese public sentiment, and American policy on Taiwan.

i. Domestic Audience Concerns

The logic of legal competition driving the adoption of the ASL involves significant domestic audience costs within mainland China. Internally, the issue of Taiwan is strongly colored by nationalistic overtones, and Chinese leaders face potential backlash at home by both the public and political rivals if they are perceived as being passive or weak on the issue. One Chinese observer noted that "It is far harder for any Chinese decision maker to decide to tolerate Taiwan independence than to decide to wage war."[249] When tensions are low, Chinese leaders can be more conciliatory toward the island, but if events in Taiwan precipitate a "crisis," the Chinese politicians must respond.[250] Therefore, when Chen aggressively pushed the referendum issue throughout his first term, despite reservations even in Washington D.C., the relatively new

[246] Shirk, 205.
[247] Zou Keyuan, "Governing the Taiwan Issue in Accordance with Law: An Essay on China's Anti-Secession Law," *Chinese Journal of International Law*, vol. 4, no. 2 (2005), 455.
[248] Wang Zhaoguo, "Draft China Law Explained," *China Daily* (Feb. 7, 2011) (Available at: http://www.chinadaily.com.cn/english/doc/2005-03/08/content_422875.htm).
[249] Quoted in Shirk, 205.
[250] Chunjuan Nancy Wei, "China's Anti-Secession Law and Hu Jintao's Taiwan Policy," *Yale Journal of International Affairs*, vol. 5, no. 1 (Winter 2010), 112-127.

Hu had to quickly and decisively offer a response. While Hu assumed the presidency in March 2003, he did not obtain the Chairmanship of the Central Military Commission from Jiang Zemin until September 2004, so the timing was especially precarious for Hu who was trying to consolidate his power. As Susan Shirk observes, for Hu to "remain politically viable at home" in the face of a Taiwanese referendum, he had to mount a strong response, even order an attack.[251] But he didn't order missile launches as Jiang did in 1996. This was not only because Hu wanted to distinguish himself from his predecessor and formulate a long-term strategy to stabilize his regime.[252] Rather, Chen's initial move to address the independence question through legal means necessitated a response in kind from the mainland.

This is particularly relevant given the legitimacy concerns at play. Chen decided to use a referendum, a legal approach that holds more political legitimacy since the people of Taiwan had a direct say in the democratic process. As some observers note, in Taiwan's rivalry with Communist China, the island's "best weapon is democracy."[253] Thus, Chinese leaders sought to a means with similar legitimacy (and also compensate for their democratic deficit that international actors would point out since the political system is still relatively closed) by appealing to law and using Taiwan's own strategy against it. In this way, Beijing can increase the legitimacy of its own policy and attack Taipei's actions on a similar level. For example, Vice-chairman Wang emphasized that the process of the drafting of the ASL went through a public comment system, including lawyers, academics, and members of the public.[254] This public comment system is not unfamiliar to China, since the WTO accession agreement also stipulated this. Thus, emphasizing the public comment approach is one way to legitimatize the ASL, just as a democratic Taiwanese referendum would have public appeal.

ii. Appealing to the Taiwanese Citizenry

In addition, the content of the law, especially the "carrots" offered to the Taiwan "compatriots" in the form of mutual economic and social exchanges and cooperation demonstrates that the Chinese leaders were cognizant that they had to also compete for the attention of the Taiwanese people. Since Chen was offering a referendum, mainland China needed to offer an alternative, also in the form of a law, to articulate a contrasting vision and possibly persuade Taiwanese citizens to vote against any referendum. The ASL specifically separates out the "secessionist forces" from the rest of the Taiwanese population (Article 2) and takes pain to assure the Taiwanese that "the state shall exert its utmost to protect the lives, property and other legitimate rights and interests of Taiwan civilians."[255] Article 9 continues, "the state shall protect the rights and interests of the Taiwan compatriots in other parts of China in accordance with law."[256] Unfortunately, the passage of the ASL did not comfort Taiwanese citizens, but rather prompted many to demonstrate in the streets of Taipei against what they perceived as an easier path for China's military takeover of the island under Article 8.

Nevertheless, Chinese leaders' decision to go with a legal "tit-for-tat" rather than a military one indicates that they learned the lessons of 1996 when China fired missiles into the

[251] Shirk, 205.
[252] Christensen, 66.
[253] Wei, 113.
[254] Wang.
[255] ASL, art. 2, 9.
[256] ASL, art. 9.

Taiwan Strait to influence presidential elections on the island and block Lee Teng-hui. That show of missile force not only precipitated a response from the U.S., which sent a carrier group into the area, it also badly backfired and actually helped Lee win the election.

iii. Countering the U.S. Taiwan Relations Act

The logic of legal competition motivating the passage of the ASL also has important external dimensions, particularly involving mainland China's relations with the U.S. In 1979, after the establishment of formal relations between the U.S. and mainland China by President Carter, the U.S. Congress passed the Taiwan Relations Act (TRA) to provide continued support and relations with Taiwan.[257] Even though the TRA was established more than thirty years ago, it still forms an important backdrop and point of contention in Sino-American relations, which must be understood to fully appreciate the implications of the ASL. For example, section 2(4)(2) of the TRA states that it is American policy "to consider any effort to determine the future of Taiwan by other than peaceful means, including by boycotts or embargoes, a threat to the peace and security of the Western Pacific area and of grave concern to the United States."[258] Therefore, while the TRA did not amount to a formal defense treaty with Taiwan, it did provide some flexibility for the U.S. to maintain its relations with the island despite having formally recognized mainland China.

China has viewed the TRA as a violation of its internal affairs and contrary to the Three Communiqués signed by Beijing and Washington. Therefore, the promulgation of the ASL may be interpreted as a legal counterweight to the long-standing TRA that has frustrated Beijing. Interestingly, a discussions (many with legal ramifications) between the U.S. and China ensued in the aftermath of the passage of the ASL. On March 17, 2005, the House of Representatives passed a resolution critical of the ASL and echoed the language of the TRA by expressing "grave concerns" over the law.[259] Beijing responded that it was again "a rude interference in internal affairs."[260] Then in July 2005, the House passed another resolution reiterating American commitments to Taiwan under the TRA.[261] Nevertheless, during the drafting of the ASL, Chinese leaders met with senior U.S. officials to explain the motivations behind the law and mitigate concerns that it was a law to go war, and they tried to mute speculation that the ASL was specifically aimed to counter the TRA.[262]

Overall, underlining China's motivation to use the ASL as a counter to Taiwanese and American legal formulations of policy is an instrumental view of the law. The Chinese view of the law as a weapon has deep historical origins in the late nineteenth century as well as ideological roots in Marxist theory, and memories of national humiliation of dealing with unequal treaties and extraterritoriality are still salient in Chinese politics today.[263] Therefore, it is not difficult to imagine Chinese leaders characterizing the U.S. TRA as just one more imposition of outside interests in Chinese affairs through legalistic means, or to be critical of Taiwan's

[257] Shirk, 185.
[258] Taiwan Relations Act, H.R. 2470, sect. 2(4)(2) (Full text at: http://www.ait.org.tw/en/taiwan-relations-act.html/#Sec6).
[259] "US Resolution on China's Law 'Firmly Opposed'," (Mar. 18, 2005) (Full text at: http://www.china-embassy.org/eng/zt/twwt/t188035.htm)
[260] Ibid.
[261] http://www.china-embassy.org/eng/xw/t143465.htm
[262] Huang and Li, 305.
[263] Jerome Alan Cohen and Hungdah Chiu, *People's China and International Law: A Documentary Study* (1979), 7.

efforts to harness the law through a referendum to push through independence and violate China's goal to unify the motherland. To these threats, China has responded in kind, utilizing the law to counter legal arguments and formal attempts.

D. The Implications of the ASL

While the competitive motivations help to explain China's decision to pass the ASL, it also opens up questions about the consequences of adopting the law. This section explores the implications of the legalization of national security following the ASL. Specifically, the ASL means that the mainland's policy on Taiwan has become increasingly institutionalized through such formal mechanisms, rather than being subject to simple politics or policymaking. In addition, such legalization hold significant implications for the use of force in cross-straits relations. The existence of the law and the likelihood that shifting circumstances will raise legal interpretations and counter-arguments, it may not be as easy for the mainland to use force against Taiwan since the political discussions will be captured by legal rhetoric and the transparency of having formal rules on the question will necessary invite competing and contradictory interpretations, regardless of whether Beijing wants to listen or not.

i. Institutionalization of Taiwan Policy

Once a law is promulgated, it is not always easy to amend or repeal. As new institutionalists argue, both formal and informal institutions follow a certain path dependency once formed, and dismantling such structures is often very difficult.[264] The possibility of greater institutionalization of China's Taiwan policy following the ASL is driven by two main factors. First, as noted above, the ASL is explicitly linked to the Constitution, and this constitutional foundation not only provides greater legitimacy and legal force to the ASL, it simultaneously raises the costs of repeal or significant amendment. If discussions arise questioning the effectiveness or policy value of the ASL, constitutional matters may naturally arise as well, which will pose both significant legal and political questions, a battle that many Chinese political elite may not be willing to fight.

Second, the Article 8 of the ASL specifically authorizes the State Council and the Central Military Commission to select and execute the non-peaceful and other necessary measures laid out in the law.[265] Anytime such specific bureaucratization occurs, vested interested form and formal procedures are adopted if necessary. Therefore, the ASL directly leads to greater institutionalization through the formal allocation of power to specific government bodies or organizations. This is a different allocation of authority to use force than the authority to declare war, which is given to the NPC under Article 67(18). Zou points out that there may be a conflict in these two provisions, but he hypothesizes that Article 67(18) deals primarily with foreign relations, while the ASL clearly indicates that Taiwan is considered a domestic issue in China, which may explain the differing allocation of responsibility.[266] While this explanation has not been confirmed, attempts to resolve such legal conflict, if any, only further institutionalizes the

[264] Paul Pierson and Theda Skocpol, "Historical Institutionalism in Contemporary Political Science," in Ira Ketznelson and Helen V. Milner, eds. *Political Science: State of the Discipline* (New York: Norton, 2003), 693-721.
[265] ASL, art. 8.
[266] Zou, 459.

process and frames the discussion through legal and constitutional terms, rather than simply through political bargaining.

Finally, there may be unintended consequences of such institutionalization. By predelegating the ASL Article 8 powers in the State Council and Central Military Commission, which is chaired by the president, it exposes the Hu and subsequent presidents to individual responsibility for any decisions to use force, which otherwise may have been conducted collectively in the Politburo Standing Committee.[267] This departs from the general flexibility built into the language of the law that provides control for Chinese leaders.

ii. Legalization of the Use of Force in China

China's adoption of the ASL demonstrates how the face of national security policy is changing. Many countries around the world are increasingly turning to the law in formulating and institutionalizing their foreign policies and national security strategies, which is transforming the concept of and parameters on the use of force. Such legalization of national security is not only about passing legislation, such as the ASL, but also about the interplay between domestic and international laws. The legal status of Taiwan in international law is a complicated matter, but regardless of whether China is able to keep it strictly as a domestic matter or whether any crisis in the cross-straits will involve other countries, the likelihood that serious political and legal questions will be raised regarding any use of force in the region is high.

The ASL formally laid out its Taiwan policy and the parameters for the acceptable use of force, or "non-peaceful means." While the UN Charter expressly prohibits the use of force to settle territorial disputes,[268] China has attempted to cast its policy as one of internal politics, rather than of international relations. For example, Article 3 of the ASL states that, "The Taiwan question is one that is left over from China's civil war of the late 1940s."[269] By doing this through the law, not only was China using a legal counter to the calls for referendum on the island, it was attempting to legitimize its policy through domestic law, even though international law questions that very basis. This contradiction between the ASL and international legal norms highlights the process of legalization of national security. While China would argue that there is no contradiction, even its own White Paper on Taiwan sees fit to specifically cite the UN Charter in order to preempt arguments that its policy is illegal under international law. For example, it states: "The Charter of the United Nations specifically stipulates that the United Nations and its Members shall refrain from any action against the territorial integrity or political independence of any of its Members or any State and shall not intervene in matters which are essentially within the domestic jurisdiction of any State."[270]

While the 1993 White Paper is a policy statement, the ASL (which follows the policy within the White Paper) is a law, and its legal form is qualitatively different and important in its implications in the political arena. Because the ASL now represents the legal articulation of Taiwan policy, and debate or discussion about that policy will be encapsulated in legal rhetoric and concepts. The debate will become increasingly legalized as different actors challenge, debate, and try to resolve any contradictions, uncertainties, or conflicts through an institutionalized and formal manner. For example, Article 9 of the ASL clearly indicates that China is cognizant of

[267] Shirk, 303.
[268] UN Charter, art. 2, para. 4.
[269] ASL, art. 3.
[270] White Paper on Taiwan (1993).

international legal protections for civilians during conflict, and its protection of foreign nationals recognizes outsiders who may become involved in the issue.

Conclusion

China represents a moderate case of legalization of national security, mainly due the highly centralized executive power over national security and lower levels of social movement organization activity in the strategic policymaking arena. The hierarchical executive power structure remains for the most sensitive issues, but there have been some reforms to govern through the law. Therefore, executive authority in China is gradually transitioning away from the autocratic, personal rule that dominated most of its communist history. Nonetheless, political reforms on national security issues, such as Taiwan, remain in the hands of a select group of party leaders. In addition, social movement organizations in China have gained some strength in China, but overall, still remain relatively under-organized, as legal challenges to the government are predominantly individually based. Popular challenges in the national security arena are particularly weak.

The case study of the ASL in March 2005 represented a significant shift in the dynamics of cross-strait relations. By playing the "legal game" in countering Taiwanese moves for de jure independence and continued U.S. support for the island under the TRA, Chinese leaders were motivated by a tit-for-tat of legal competition, while highlighting the contradictory positions between China and Taiwan, as well as between international and domestic laws, which have significant implications in the legalization of national security policy in China. The moves for a popular referendum on the island highlight how the values of individualism and direct democracy have begun to play a more prominent role in cross-strait relations, something which the Beijing leadership seems to be keenly sensitive to when it decided to pass the ASL.

Chapter 4

South Korea and the National Security Law

Chapter 4: South Korea and the National Security Law

Since the division of the peninsula in 1945, South Korean politics has been dominated with debates regarding the country's policies toward its northern neighbor. One of the most contentious manifestations of these discussions is the lingering status of the National Security Law (NSL), a highly controversial piece of legislation used by past South Korean leaders to suppress dissent at home and control its rivalry with North Korea. Since democratization in the late 1980s, questions about South Korean strategic policy has increasingly taken on legalistic overtones, as progressive forces in the country have taken up court challenges to the NSL.

The case of the NSL in South Korea is a salient example of how strong executive power and social movement organizations have contributed to the growing legalization of national security. The NSL also demonstrates how South Korean politics is dealing with the contradictions between statism and individualism in international and domestic politics. In the name of state sovereignty and survival in the face of the North Korean threat, the executive has maintained the NSL at the expense of citizen rights at home. Conversely, South Korea's burgeoning social movement organizations have pushed for repeal or revision of the NSL, putting pressure on the government to justify the need for the law in South Korea's well-established democracy. The contradiction has manifested in South Korean politics as intense conflicts between progressives and conservatives. In 2004, there were concerted efforts by the Roh Moo Hyun administration ignited another round of controversy, and today, the NSL still remains on the books as a lightening rod of political contestation in South Korean politics and society.

1. Executive Power in South Korea

Before democratic transition in 1987, South Korean politics was dominated by a very strong, centralized executive power. For over four decades, South Korean citizens lived under the rule of authoritarian and military leaders, including Syngman Rhee, Chun Doo Hwan, and Park Chung Hee. And even after democratization, the South Korean presidency remains a relatively strong institution, placing it in the middle region of Chart 1, as noted in Section 1 above. This concentration of executive power has contributed to the legalization of national security in the country.

Executive power in South Korea has seen the instrumental value of law in politics ever since the founding of the Republic of Korea (ROK) in 1948. Nowhere is this best represented than in the multiple amendments to the Constitution, which has been changed no less than ten times in its relatively short history.[271] Several past South Korean presidents freely amended the Constitution and other laws to extend their rule, setting a pattern of politics over law.[272] Most notorious was Park's Yushin Constitution of 1972, through which he gave himself a third term in office.

The strong South Korean executive also expanded and centralized its power other several agencies and ministries. For example, in June 1961, Park established the Korean Central Intelligence Agency (KCIA), which consolidated the disparate military and other agency

[271] ROK Constitution, http://english.ccourt.go.kr/home/att_file/download/Constitution_of_the_Republic_of_Korea.pdf.
[272] Dae Kyu Yoon, *Law and Political Authority in South Korea* (Boulder: Westview Press, 1990), 70.

intelligence functions in order to more efficiently implement national security policy.[273] The agency underwent two changes, re-naming itself the National Security Planning Agency in 1981 and the National Intelligence Service (NIS) in 1999.[274] Another important government body in South Korean national security policymaking, especially with respect to North Korea, is the Ministry of Unification (MOU). It has its roots in the National Unification Board that President Park created in 1968 to formulate reunification policy, and it was officially raised to the current cabinet status in February 1998 under Kim Dae Jung. However, ten years later, President Lee Myung Bak downsized the MOU and weakened its powers regarding economic cooperation with North Korea.[275] President Lee has advocated a harder line against North Korea compared to his two immediate predecessors.

Interestingly, these shifts in national security and foreign affairs-related agencies and government bodies are an indication of both executive weakness and strengths. The proliferation of agencies with the South Korean government has often led to inter-ministerial conflicts and competition regarding North Korea, most notably between the Ministry of Foreign Affairs and Trade (MOFAT) and MOU. However, these very shifts are a reflection of the power of the South Korean presidency, since the inauguration of a new administration is usually accompanied by institutional changes that reflect the policy preferences and objectives of the current Blue House. While it may reduce institutional stability over the long term, some of these changes indicate the continuity of a relatively strong executive in South Korea, short of the authoritarian regimes that had ruled the country for decades in the past.

2. Social Movements in South Korea

The decades of authoritarian rule in South Korea produced a strong social movement for democracy in the country. Today, the country enjoys a vibrant civil society and is home to thousands of NGOs and social movement organizations that work on a wide range of political and social issues. As noted by Chang and Shin, South Korean social movements have developed and institutionalized, which are signs of their strength.[276] One indicator of such institutionalization has been the entry of past activists, those college students that protested on the streets of Korea to fight authoritarian rule, into mainstream politics and formal institutions of power.[277]

The law has also been important to South Korea's social movement groups. I have argued elsewhere that the role of law has been integral to the institutionalization of South Korean social movement organizations. Activist lawyers have allowed certain groups, such as the People's Committee for Participatory Democracy (PSPD) to mount sustained and sophisticated litigation

[273] National Intelligence Service, "History of NIS: Establishment of the National Intelligence Service," http://eng.nis.go.kr/svc/history.do?method=content&cmid=11915
[274] National Intelligence Service, "History of NIS: Major Milestones," http://eng.nis.go.kr/svc/history.do?method=content&cmid=11918
[275] Ministry of Unification, "Brief History," http://eng.unikorea.go.kr/CmsWeb/viewPage.req?idx=PG0000000629#.
[276] Paul Y. Chang and Gi-Wook Shin, "Democratization and the Evolution of Social Movements in Korea," in Paul Y. Chang and Gi-Wook Shin, eds., *South Korean Social Movements: From Democracy to Civil Society* (New York: Routledge, 2011), 3-18.
[277] See Sookyung Kim and Paul Y. Chang, "The Entry of Past Activists into the National Assembly and South Korea's Participation in the Iraq War," in Paul Y. Chang and Gi-Wook Shin, eds., *South Korean Social Movements: From Democracy to Civil Society* (New York: Routledge, 2011), 117-34.

strategies against the government and business conglomerates.[278] These popular challenges have raised rights consciousness and contributed to the legalization of South Korean politics.

In the national security context, another prominent civic organization, Lawyers for a Democratic Society (*Minbyun*) has defended dozens of individuals prosecuted under the NSL,[279] and worked with other groups such as PSPD in challenging the NSL's constitutionality. Because of the efforts of such groups, the Constitutional Court of Korea (CCK) has heard several cases regarding the NSL. The CCK issued its first ruling on the NSL in April 1990, only two years after the court heard its first case. In its initial 1990 ruling, the court gave a balanced decision, upholding the constitutionality of the NSL and its provisions, but only under a narrowly-tailored reading of the law. Specifically, at issue in the case were Articles 7(1) and (5), which prohibited praising and encouraging of anti-state activities. The former stated that "any person who praises, encourages, sympathizes with, or benefits through other means operation, an anti-state organization, its members, or any person under its direction shall be punished by imprisonment for up to seven years."[280] Article 7(5) stipulated that anyone who "produces, imports, duplicates, possesses, transports, distributes, sells or acquires a document, a drawing or any other expressive article shall be punished by a penalty prescribed in each subsection respectively" of Article 7.[281]

The court stated that such provisions of the NSL were vague, but constitutional, only if they were "narrowly interpreted to cover only those activities posing a clear threat to the integrity and security of the nation and the basic order of free democracy."[282] The court defined such activities as those "communist activities, coming from outside, threatening the independence and infringing on the sovereignty of the institutions and rendering the Constitution and the laws inoperative."[283] The focus on "external" threats is key to the court's narrow ruling, since many of the past convictions under the NSL were targeted at purely domestic dissidents that were not collaborating with North Korea, but were merely opposing the military regimes in South Korea. The Constitutional Court stated that broad, literal interpretations of the law and Section 7 would violate the principle of rule of law, as well as the South Korean constitutionally-embodied objective of national reunification with North Korea, as articulated in Article 4.[284] As for activities that undermine the "basic order of free democracy," the court defined them as "activities undermining the rule of law pursuant to the principles of equality and liberty and that of people's self-government by a majority will in exclusion of rule of violence or arbitrary rule."[285] Overall, the court attempted to give as much guidance as possible on interpretation of the clauses in question, without striking them down.

Some were still unsatisfied by such efforts by the court to clarify and narrow the interpretations of the NSL. On the court itself, Justice Byun dissented on the grounds that the

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[278] Joon Seok Hong, "From the Streets to the Courts: PSPD's Legal Strategy and the Institutionalization of Social Movements," in Paul Y. Chang and Gi-Wook Shin, eds., *South Korean Social Movements: From Democracy to Civil Society* (New York: Routledge, 2011), 96-116.

[279] Patricia Goedde, "Lawyers for a Democratic Society (*Minbyun*): The Evolution of Its Legal Mobilization Process Since 1988," in Paul Y. Chang and Gi-Wook Shin, eds., *South Korean Social Movements: From Democracy to Civil Society* (New York: Routledge, 2011), 224-44.

[280] *Praising and Encouraging under National Security Act case*, 2 *KCCR 49, 89Hun-Ka113*, April 2, 1990. Summary, in The Constitutional Court of Korea, *The First Ten Years of the Korean Constitutional Court* (Seoul: The Republic of Korea, 2001), 135.

[281] Ibid, 135.

[282] Ibid, 136.

[283] Ibid, 136.

[284] Ibid, 135-136.

[285] Ibid, 136.

majority opinion did not go far enough and he favored declaring the NSL unconstitutional.[286] In addition, some commentators in South Korea felt that the court's ruling and language itself were vague and unproductive in drastically influencing the application of the NSL.[287] Nevertheless, if viewed in context of South Korean political history and the past application and abuse of the NSL, the Constitutional Court's ruling was an important and crucial step in curtailing executive power and promoting the protection of individual rights. Subsequent to the court's ruling, the South Korean National Assembly amended Article 7 of the NSL on May 31, 1991, adopting and incorporating the language of the court's opinion ("knowingly endangering the national integrity and security, or the basic order of free democracy") into the clause of the NSL.[288]

Following the 1991 NSL case, the South Korean Constitutional Court has heard several additional cases concerning the law. In 1992, the court struck down Article 19 of the NSL, which had previously permitted longer pretrial detention of suspects of up to fifty days.[289] This second case was different from the decision of one year prior, since it involved the court declaring a provision of the NSL unconstitutional. In subsequent rulings, the court has largely left the NSL intact, especially after the 1991 revision. In 1996, the Constitutional Court acknowledged that although some portions of the NSL remained vague even after the 1991 revision, a narrow reading of the law consistent with its initial ruling met the test for constitutionality.[290] Most recently in 2004, the Constitutional Court and the Supreme Court both found the NSL constitutional during an intense and protracted political feud over the law between the ruling and opposition parties. A legislative bill introduced by the ruling Uri Party that sought to repeal the NSL failed due to lack of public support and opposition of the conservative Grand National Party.[291]

As these cases indicate, the strength of South Korea's social movement organizations have contributed to the legalization of national security in South Korea, as strategic policy is increasingly recast and justified through legal argumentation.

3. Case Study: South Korea's National Security Law

The NSL has arguably been one of the most powerful and feared piece of legislation in Korea, even after democratization. Since its promulgation in December 1948, the NSL has been deeply controversial and intensely debated. This is true despite the surprisingly fact that today, the NSL affects only a very small portion of South Koreans. This section presents a general background of the NSL and the changing trends of its enforcement. It also examines prosecutions by NSL articles and demographic to give a more detailed picture of the NSL's enforcement history. While the NSL has been enforced relatively consistently over the course of its existence, the most dramatic change occurred shortly after the historic inter-Korean summit in June 2000 with the inauguration of former President Kim Dae Jung, who instituted a policy of engagement with North Korea.

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[286] Ibid.
[287] Kun Yang, "Judicial Review and Social Change in Korean Democratizing Process," *American Journal of Comparative Law*, vol. 41 no. 1 (Winter 1993), 7.
[288] *Praising and Encouraging under National Security Act case*, Summary, 137.
[289] *4 KCCR 194, 90HonMa82*, April 14, 1992.
[290] *Praising and Encouraging under National Security Act case*, Summary, 138.
[291] "Security Law Dispute," *Korea Herald* (December 8, 2004).

A. General Overview of NSL Enforcement (1961-2005)

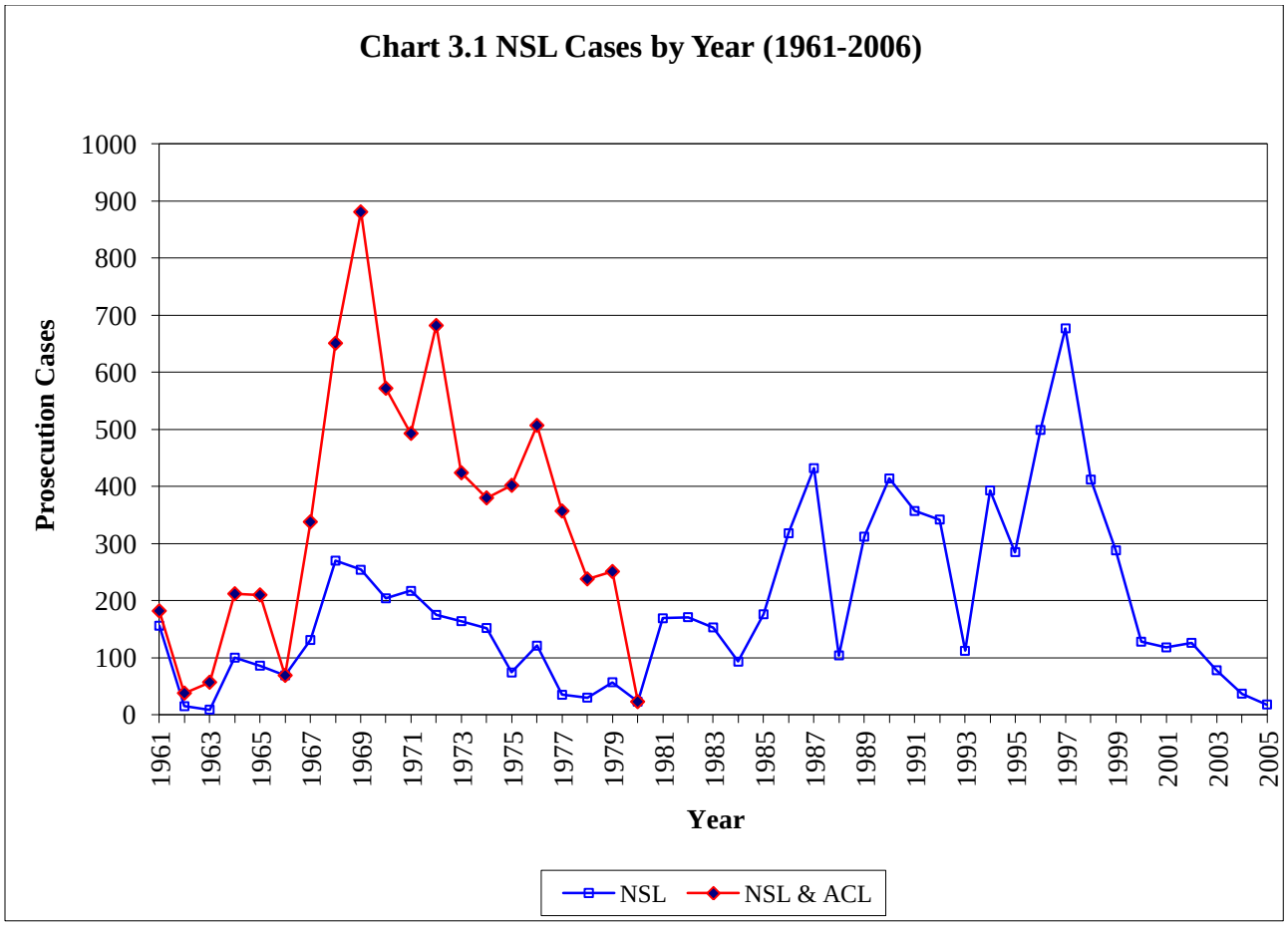
The NSL was promulgated in December 1948, but unfortunately, reliable and comprehensive data on its application is not available for the first dozen years. Therefore, a macro-level overview of NSL enforcement in this study starts on 1961, the first year of former President Park Chung Hee's long tenure. As indicated in Table 3.1, there were a total number of 8,554 cases involving the NSL in South Korea from 1961 until 2005, averaging 190 cases a year:

Table 3.1 NSL Cases by Year (1961-2006)

Year	NSL Cases	Year	NSL Cases
1961	156	**1984**	93
1962	15	**1985**	176
1963	9	**1986**	318
1964	100	**1987**	432
1965	86	**1988**	104
1966	69	**1989**	312
1967	131	**1990**	414
1968	270	**1991**	357
1969	254	**1992**	342
1970	204	**1993**	112
1971	217	**1994**	393
1972	175	**1995**	285
1973	164	**1996**	499
1974	152	**1997**	677
1975	74	**1998**	412
1976	121	**1999**	288
1977	35	**2000**	128
1978	30	**2001**	118
1979	57	**2002**	126
1980	23	**2003**	78
1981	169	**2004**	37
1982	171	**2005**	18
1983	153	**2006**	-
		Total	**8,554**

Source: Derived Adapted from *Human Rights Issues Arising from Application of the National Security Law*, National Human Rights Commission, The Republic of Korea (hereafter NHRC NSL Report) (February 2, 2004)

The number of yearly NSL cases fluctuates widely during the 45 years (Chart 3.1), reaching a peak in 1997 with 677 cases under Kim Young Sam. If the Anti-Communist Law (ACL) is included with the NSL, a higher peak of 881 cases (254 NSL and 627 ACL) occurred under Park Chung Hee. A more detailed analysis by each president below will show why combining the NSL with other laws such as the ACL may be necessary for a fuller description of South Korean politics and repression at the time. Nevertheless, for macro-analytic purposes, a clear dominant pattern is not discernable until after the inauguration of Kim Dae Jung in 1997 when the number of NSL cases begin to fall.



Source: Derived from NHRC NSL Report and Mingahyup

Therefore, a periodic analysis based on average number of NSL cases is more revealing. As noted in Section II, the inter-Korean summit in June 2000 was a historic and unprecedented event in Korean history. Undertaken by Kim Dae Jung and his "sunshine policy" toward North Korea, the summit reflected liberal view of North Korea and ushered in a period of dramatic changes in South Korean perception of its northern neighbor. Over the entire period, the average number of yearly cases is 190.1, but if the 45 years is divided into two separate periods, before and after the 2000 inter-Korean summit, a clear trend emerges. As noted in Table 3.2, Micro A period (1961-2000) yielded 204.4 NSL cases, while Micro B period (2001-2005) is roughly only 1/3 that amount at 75.4 average NSL cases:

Table 3.2 Average Number of NSL Cases by Period

	Macro: 1961-2005	**Micro A: 1961-2000**	**Micro B: 2001-2005**
Average Number of NSL Cases	190.1	204.4	75.4

Source: Calculated from NHRC NSL Report and Mingahyup data

What can explain the pre-summit and post-summit difference in NSL cases? Foremost, it is not likely that there were a fewer number of individuals after the summit committing actions that may fall under the legality of the NSL. Quite to the contrary; due to the open nature of the Kim Dae Jung and Roh Moo Hyun governments that were more lenient on "pro-North Korea" activities, there were probably many more such persons falling under the purview of the NSL. Rather, it was government enforcement, or lack there of, of the NSL that resulted in drastic decline after the summit. Then, the key question centers on why government enforcement became more lax. Although there may be differences across presidential administrations, there are two general explanations.

The first is an interest-based argument, in that the government made a strategic decision that increasing NSL enforcement went against state interests, especially regarding North Korea. For example, Cheong Wa Dae may not have wanted to ruffle the feathers of the Pyongyang regime after the achievement of the inter-Korean summit and the positive atmosphere it created. This argument is obviously relevant because any state policy inherently involves a calculation and defense of state interests. But the interest-based argument does not adequately explain the relatively high number of NSL cases in the early years of the Kim Dae Jung government or during the build-up to the actual summit. It also does not fully explain why if the government was in fact concerned with courting North Korea, it has not used the NSL and its possible abolition as a negotiating tool to achieve its interests, even when it has daggled other carrots at Pyongyang. More generally, as noted in Section II, a strict interest-based perspective cannot explain how a state sensitive to its interests would ignore the fact that a former adversary of war was building up a nuclear arsenal across the border.

These weapons are about threats, and threats are in turn partly about perceptions. The second explanation of the decreasing NSL enforcement focuses on such perceptions and the ideational dynamics also inherent in national policy and inter-state relations. The June summit was an important milestone in bridging the perception gap and distrust between the two Koreas. Seeing Kim Dae Jung welcomed by and shaking hands with Kim Jong Il dramatically altered South Korean images of North Korea, a catalyst for identity change on the peninsula, where now violence with the "other" was unimaginable. Therefore, after the summit, the NSL has become incongruent with the shifting identity dynamics in South Korea. It is not surprising then that in 2004, progressives would make concerted charge to repeal the NSL.

While the NSL has historically been used as an instrument of state power, these recent developments illustrate how the law can also play a constructive social role. Therefore, it is also useful to examine the history of NSL enforcement by administration to highlight its multiple roles in South Korean politics.

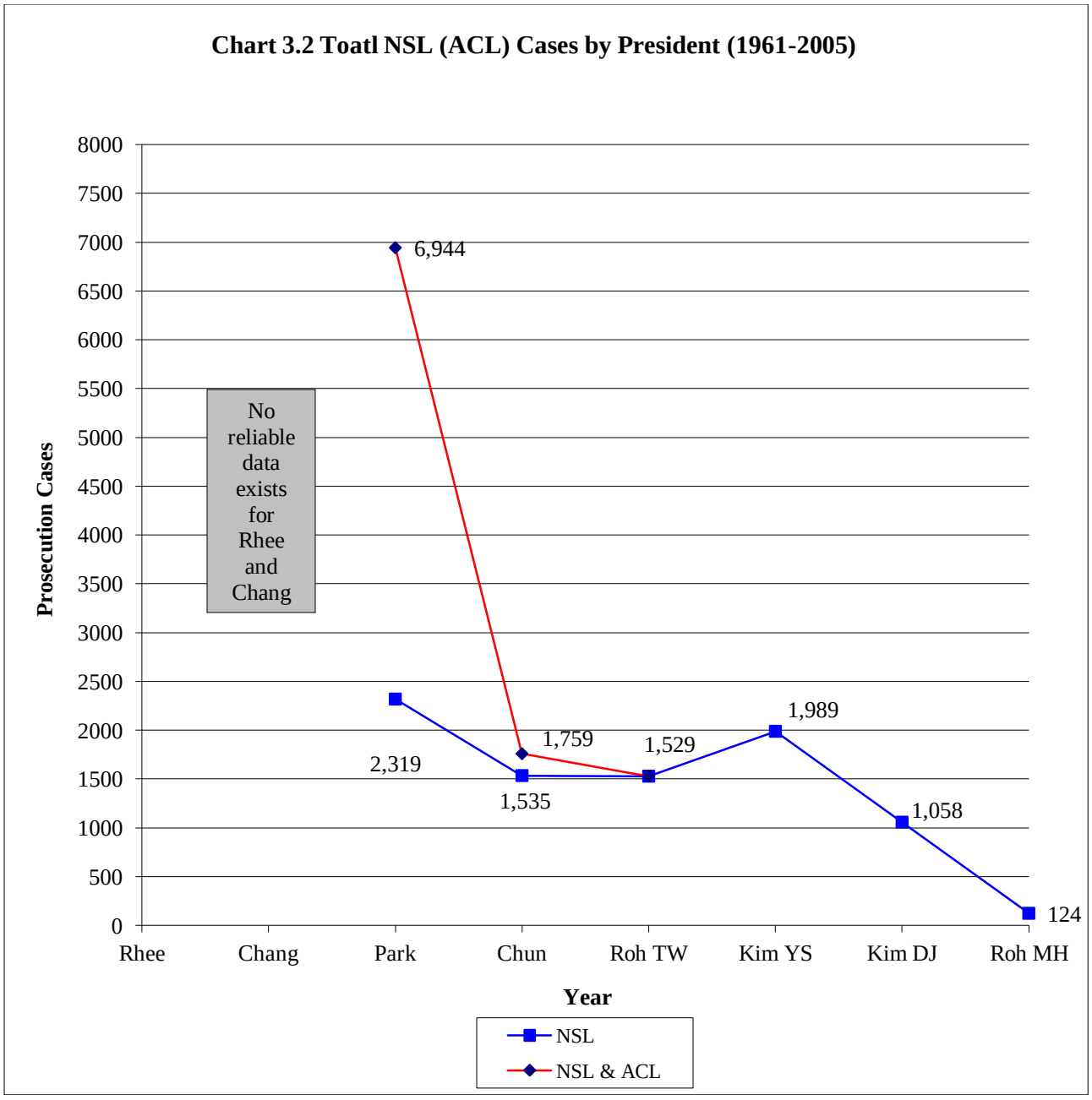
B. Prosecutions by Administration

Table 3.3 below indicates the number of NSL cases by administration. By a large margin, the Park Chung Hee government had the most number of NSL cases since 1961 with 2,319 cases. If the ACL is included, the number drastically increases to 6,944 cases. Although the total number of NSL cases steadily declines with each administration, even the Kim Dae Jung government had over a thousand cases during its tenure. The average number of NSL reached a peak under Kim Young Sam at 331.5 cases a year, while Park Chung Hee's government prosecuted an average of 365.5 NSL and ACL case per year.

Table 3.3 Total NSL Cases by Administration (1961-2005)			
President	**Total NSL Cases (w/ACL)**	**Average/Year (w/ACL)**	**% Change in Cases**
Syngman Rhee	NA	NA	NA
Chang Myon	NA	NA	NA
Park Chung Hee	2,319 (6,944)	122.1 (365.5)	
Chun Do Hwan	1,535 (1,759)	191.9 (219.9)	-33.8
Roh Tae Woo	1,529	305.8	-0.4
Kim Young Sam	1,989	331.5	30.1
Kim Dae Jung	1,058	176.3	-46.8
Roh Moo Hyun	124	41.3	-88.3
Total	**8,554 (17,257)**	**190.1 (383.5)**	

Source: Derived from NHRC NSL Report and Mingahyup.

The number of cases declined roughly one-third under Chun Do Hwan (-33.8%), with little change under his successor, Roh Tae Woo (-0.4%). Then there is a large increase under Kim Young Sam, with the number of NSL cases rising more than 30%. After the inauguration of Kim Dae Jung, NSL cases nearly dropped in half under his administration (-46.8%). Finally, riding the mood of amity on the Korean peninsula, NSL cases further plummeted 88.3% under Roh Moo Hyun, whose government only brought 124 NSL cases up to 2005, for an average of 41.3 cases a year. Compared to Park's combined total, there has been an overall 98.2% decline in the number of NSL cases in the Roh Moo Hyun administration. Chart 3.2 clearly illustrates this dramatic decline across administrations.



i. The NSL under Park Chung Hee

On May 16, 1961, Park Chung Hee came to power via a bloodless coup and proceeded to rule the country with an iron hand. While Park successfully orchestrated rapid economic development in South Korea, his government was brutal in suppressing domestic opposition. Table 3.4 below details legal prosecutions under the Park regime and the various laws it utilized. The sheer number of laws aimed at controlling the South Korean population is testament to Park's appreciation of the law as an instrument of power. During his eighteen years in office, a

total of 11,374 individuals were detained under some form of legal pretext for their political and ideological beliefs and activities.

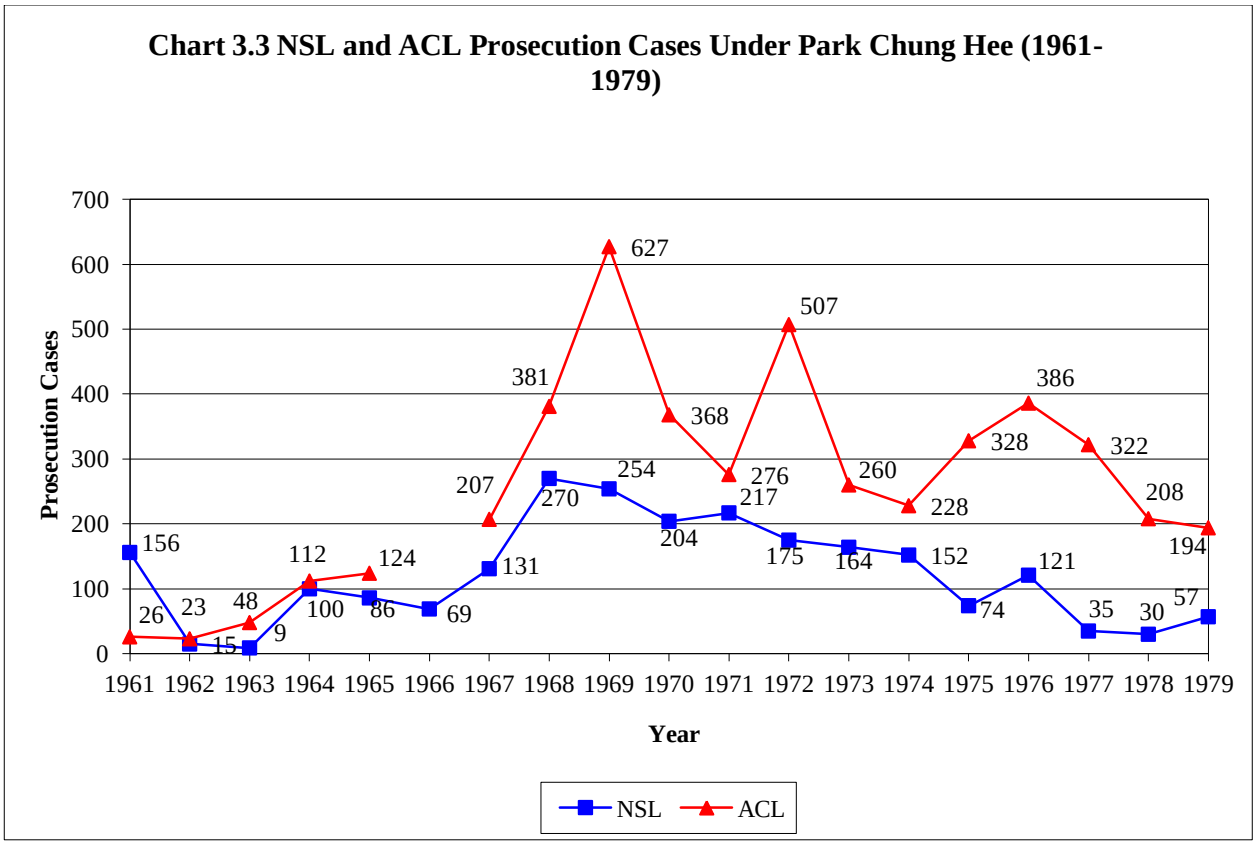
Table 3.4 Various Legal Prosecutions under Park Chung Hee (1961-1979)

Year	NSL	ACL	PA	SSL	AD	SESL	NPSL	ED9	Total
1961	156	26				1			182
1962	15	23	3,038						3,076
1963	9	48			239				296
1964	100	112			18				230
1965	86	124			98	3			311
1966	69	-			7	2			78
1967	131	207			4	6			348
1968	270	381			37	1			689
1969	254	627			27	1			909
1970	204	368			25				597
1971	217	276			49				542
1972	175	507			24	1			707
1973	164	260			37				461
1974	152	228			7				387
1975	74	328		5	13				420
1976	121	386		9	29			198	743
1977	35	322		1				157	515
1978	30	208		3	6		11	215	473
1979	57	194		1	2			160	414
Total	2,319	4,625	3,038	19	622	15	11	725	11,374

Source: Adapted from *Human Rights Issues Arising from Application of the National Security Law*, National Human Rights Commission, The Republic of Korea (hereafter NHRC NSL Report) (February 2, 2004), 23-24.
Note: NSL (National Security Law), ACL (Anti-Communist Law), PA (Political Activity Cleanup Act), SSL (Social Security Law), AD (Act Concerning Assembly and Demonstration), SESL (State of Emergency Special Law), NPSL (National Preservation Special Law), ED9 (Emergency Decree Number 9).

To Park, he was the law. In this context, the NSL clearly served an instrumental purpose. In addition to the NSL, the Act Concerning Assembly and Demonstration (AD) and Emergency Decree Number 9 (ED9) were especially nefarious, as Park used them to violently repress leftists, laborers, students, and opposition political figures. Besides these specific legal measures, Park amended the South Korean Constitution itself to ensure his power under his December 1972 Yushin Constitution.

Chart 3.3 NSL and ACL Prosecution Cases Under Park Chung Hee (1961-1979)



Source: NHRC NSL Report, 24.

While Park's view of the law was instrumentalist, he was also a staunch anti-Communist, and he viewed the law as a medium to eliminate those opposed to him by labeling them as Communists. The Anti-Communist Law (ACL), decreed on July 3, 1961, was Park's main ideological legal hammer, and as Table 3.4 and Chart 3.3 above show, victims of the ACL outnumbered those of any other law that Park used. There were 4,625 people prosecuted under the ACL, representing nearly 41% of the total. Park's version the McCarthy "red scare" was indeed scary, as those labeled "Communist" were often jailed without trial, tortured, or killed.

Similarly, Park used the NSL to generate fear by labeling opposition forces as threats to national security. He used the NSL to create enemies when those individuals were at best his own nemeses and not enemies of South Korea. With memories of the Korean War fresh in the minds of South Koreans, these laws were very effective and held tremendous ideological force. Therefore, while the NSL and other laws were tools of authority and power to control the country, they were also played an important role in reflecting and constructing (often falsely) certain identities in South Korea.

ii. The NSL under Chun Do Hwan

Like Park, Chun Do Hwan also came to power via a military coup on December 12, 1979, and he shared Park's view that the law should be used to protect his power. Unfortunately for Chun, his power was challenged more frequently and openly, as pro-democracy forces became more powerful. Chun responded by utilizing the NSL and other measures of coercion with more frequency. For example, Chun had to violently suppress an uprising in the southwestern city of

Gwangju in May 1980. The ramifications of Gwangju and widespread discontent reached a peak in June 1987.

During Chun's tenure, a total of 1,535 individuals were prosecuted under the NSL for an average of nearly 192 people a year. If ACL prosecutions are included, the total reaches 1,759, representing the third highest total among South Korea administrations (after Park and Kim Young Sam). Following the events of Gwangju, Chun revised the NSL in December 1980 (6th Revision) to integrate provisions of the ACL, which was abolished and effectively absorbed into the NSL in 1987. During the revision session, the National Security Legislative Council spent less than five minutes to discuss the bill and pushed through a vote on its adoption.[292] The integration of the ACL made practical sense for Chun, since he did not use the law as frequently as Park had.

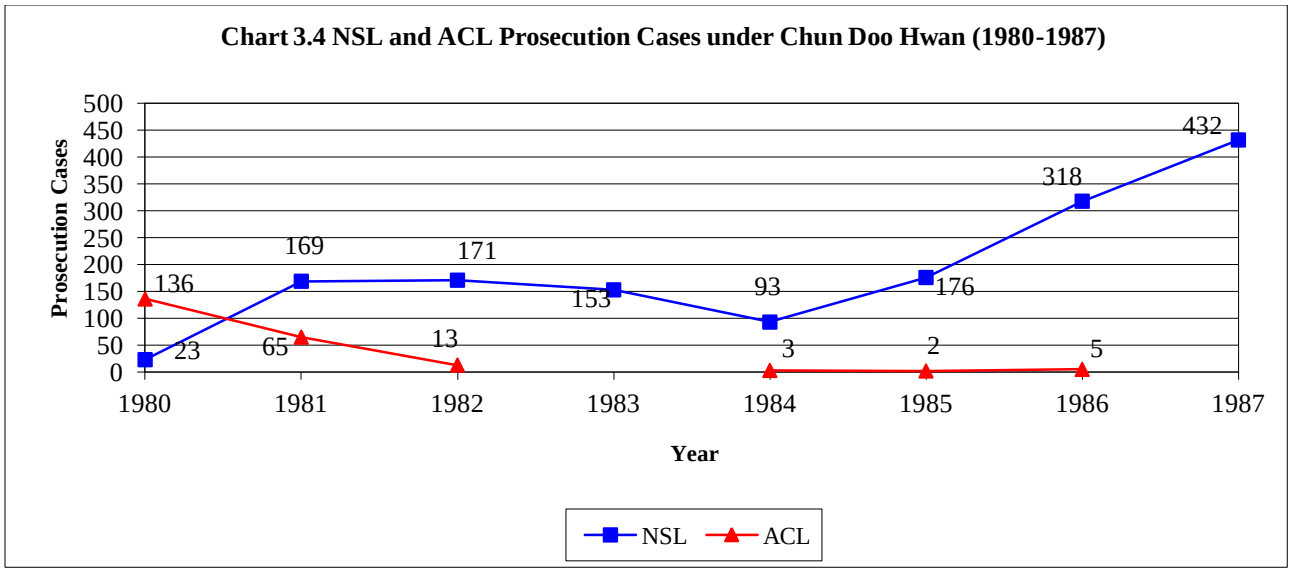
Table 3.5 NSL and ACL Prosecution Cases under Chun Doo Hwan (1980-1987)

Year	NSL	ACL	Total
1980	23	136	159
1981	169	65	234
1982	171	13	184
1983	153	-	153
1984	93	3	96
1985	176	2	178
1986	318	5	323
1987	432	-	432
Total	**1,535**	**224**	**1,759**
Average/Year	191.9	37.3	219.9

Source: NHRC NSL Report, 30.

The record of NSL prosecutions under Chun is interesting because during times of greater public opposition, he responded with greater repression. For example, building on the Gwangju Massacre, public disenchantment exploded into widespread national protests during the summer of 1987. During the June 1987 movement, NSL prosecutions under Chun were highest at 432 cases (Chart 3.4). Despite the repression, Chun would later bow to public pressure and hold open and direct presidential elections. Since the rule of law could not limit political power, the people of South Korea assumed that duty.

[292] Supra NHRC Recommendation.



Source: NHRC NSL Report, 31.

The democratization movement that matured during the Chun administration is also important in highlighting the rise of internal political and identity conflict in South Korea. Underlying the June 1987 protests and Chun's response were warring images of the state, which were manifestations of the larger systemic contradictions between statism and individualism. The state, as personified by Chun, utilized the NSL as a means to crush the public. That experience would be pivotal two decades later when many of these student demonstrators would rise to positions of power and demand that vestiges of this era, such as the NSL, be repealed. These protectors envisioned a state responsible to the public and protective of individual rights.

iii. The NSL under Roh Tae Woo

Benefiting from a split opposition vote, Roh Tae Woo won the December 1987 presidential elections. During his tenure, the NSL continued to operate as a measure of regime security, but opposition forces now could not simply be ignored. In 1991, Roh Tae Woo revised the NSL (7th Revision) incorporating many of the demands set forth by the population. Nevertheless, he railroaded the revision bill through the National Assembly in 35 seconds without giving the opposition part an opportunity to deliberate on the bill.[293]

During Roh Tae Woo's presidency, there were a total of 1,529 prosecutions under the NSL (Table 3.6), which only represented a 0.4% decline from Chun's government, and the NSL was applied relatively consistently, with an average of 306 prosecutions per year.

Table 3.6 NSL Prosecution Cases under Roh Tae Woo (1988-1992)

Year	NSL
1988	104
1989	312
1990	414

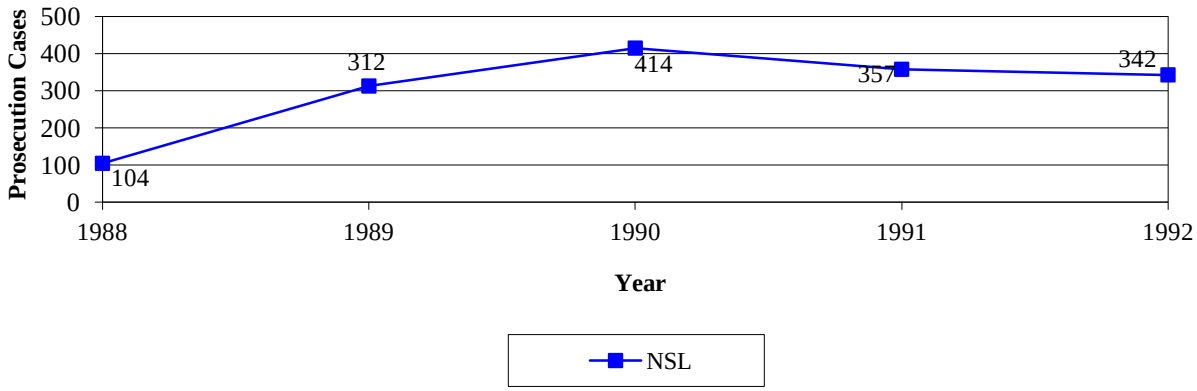
[293] Ibid.

1991	357
1992	342
Total	**1,529**
Average/Year	305.8

Source: NHRC NSL Report, 36.

As shown on Chart 3.5, the peak years of NSL cases under Roh Tae Woo came in 1990 and 1991, with 414 and 357 cases, respectively.

Chart 3.5 NSL Prosecution Cases under Roh Tae Woo (1988-1992)



Source: NHRC NSL Report, 36

These years also coincided with Roh Tae Woo's *Nordpolitk* policy of opening up to communist bloc states and North Korea. On December 13, 1991, South Korea and North Korea signed the Agreement on Reconciliation, Nonaggression, and Exchanges and Cooperation (the Basic Agreement) and the Joint Declaration of the Denuclearization of the Korean Peninsula.

While the domestic scene remained contentious, these developments with North Korea were significant because they stress the evolving relationship between the two Koreas. As South Korea slowly opened up and engaged North Korea, South Korea began to confront the idea of reunification, but the German example provided the harsh realization that the road would be tough, given the differences between the two Koreas. This emerging social dynamic would prove crucial because it would challenge nationalist Korean ideals of homogeneity with notions of difference between the self and other, especially since the NSL depicted the other as the "anti-state."

iv. The NSL under Kim Young Sam

In terms of NSL enforcement, the Kim Young Sam administration poses some interesting paradoxes. First, Kim Young Sam was a long-time opposition figure who masterminded a three-way merger with the ruling party in order to win the December 1992 election against Kim Dae Jung. As a former opposition politician who had fought against past military regimes and personally suffered under them, one would expect Kim Young Sam to implement political reform and drastic changes to the NSL. To the contrary, his government prosecuted the second highest number of individuals under the NSL, behind only Park. During his tenure, NSL cases

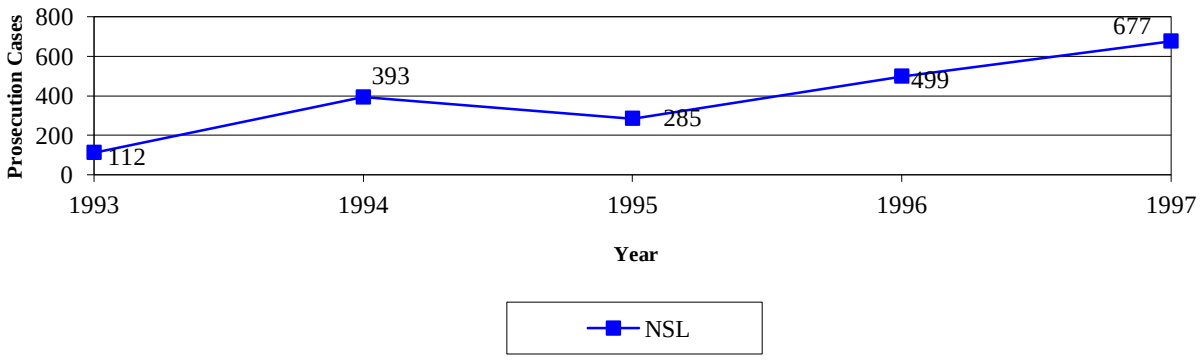
rose more than 30% as compared to Roh Tae Woo's government, and nearly 2,000 people fell victim to the NSL (Table 3.7). On average, more than 331 Koreans were prosecuted:

Table 3.7 NSL Arrest Cases under Kim Young Sam (1993-1998)	
Year	**NSL**
1993	112
1994	393
1995	285
1996	499
1997	677
1998	23
Total	**1,989**
Average/Year	331.5

Source: NHRC NSL Report, 44. Year 1993 figures start on February 25th, and year 1998 figures end on February 24th to coincide with the start and end dates, respectively, of South Korea's five-year presidential terms.

The lower number of prosecutions from 1993 and 1995 (Chart 3.6) may stem partly from Kim Young Sam's 1993 decision to transfer the authority of NSL enforcement to the National Assembly and national police.[294] In addition South Korea's lower courts in 1994 attempted to restrict NSL abuses by applying a doctrine of "constitutionally consistent interpretation" when issuing arrest warrants and acquitting when charges were deemed "untenable"[295]

Chart 3.6 NSL Prosecution Cases Under Kim Young Sam (1993-1998)



Source: NHRC NSL Report, 44. Year 1993 figures start on February 25th, and year 1998 figures end on February 24th to coincide with the start and end dates, respectively, of South Korea's five-year presidential terms.

But the peak period of NSL enforcement came at the end of Kim Young Sam's term in office. As shown in Chart 3.6, there were 499 cases in 1996 and 677 cases in 1997. In December 1996, Kim Young Sam returned the power of NSL enforcement back to the National Security Planning Agency, South Korea's intelligence organ, a retraction from his 1993 decision. In reversing himself, Kim Young Sam stated that "there are still Communist forces in our country

[294] Andrew Pollack, "Seoul Dusts Off an Old Law for a Familiar Threat," *New York Times* (February 25, 1997).
[295] "Renewed Debate on Security Law," *Korea Herald* (July 13, 2002).

and we don't have any effective legal structure to fight against them."[296] The peak of 677 cases in 1997 may have resulted from the greater ease and freedom enjoyed by the intelligence agency in its investigation and prosecution of cases, since legislative oversight no longer existed.

There were several prominent incidents during Kim Young Sam's administration that may have influenced the perception of increased threat from North Korea. On September 18, 1996, a North Korea submarine was discovered off the east coast of South Korea with its crew apparently shot dead after the failed espionage mission.[297] Government officials at the time estimated that there were approximately 40,000 North Korean agents and sympathizers in South Korea, which only increased the sense of threat.[298] A high profile case of one such agent was Professor Chong Soo Il of Yonsei University. An investigation uncovered that Chong was originally from China, had worked in North Korea, and trained as a spy. He later lived in Lebanon, Tunisia, Malaysia, and the Philippines before coming to South Korea in 1984 as a Lebanese-Filipino named Mohammed Ali Kanso. Chong had a South Korean wife even though his first wife and three children were in North Korea. For his twenty years of espionage in South Korea, Chong was sentenced to 15 years in prison.[299] Finally, the first North Korean nuclear crisis in the early 1990's and its threat to turn Seoul "into a sea of fire" only stoked the embers of insecurity in South Korea.

Whether the North Korea was real or fanned by the Kim Young Sam government can be disputed, but its experience only magnified the lingering uncertainties that South Koreans held about North Korea. Such uncertainties are deeply set in the minds of South Koreans, forged through war and decades of division. Therefore, the record NSL cases under Kim Young Sam shows this persistent conflict of identities and the means by which South Korea expresses it in order to ensure its security.

v. The NSL under Kim Dae Jung

During his tenure, Kim Dae Jung forcibly argued that the only way to deal with the North Korea threat was through engagement. His "sunshine policy" of reaching out to the north was a watershed in South Korean politics, ushering in a period of dramatic change not only in state policy, but also in the perception of South Koreans, who followed Kim Dae Jung's call to take the first-mover risk of opening up and promoting change in North Korea in the name of peace and reconciliation.

Central to his policy of engaging North Korea was diluting or erasing the NSL and its negative impact on inter-Korean relations. Kim Dae Jung argued that the NSL should be revised, even if North Korea didn't change: "There are calls that we should amend the security law only after [North Korea's] Workers' Party changes its charter [to communize all of Korea]. But this is unrealistic."[300] Therefore, throughout Kim's administration, the number of NSL cases dropped each year (Table 3.8), from a high of 389 cases in 1998 to 126 in 2002:

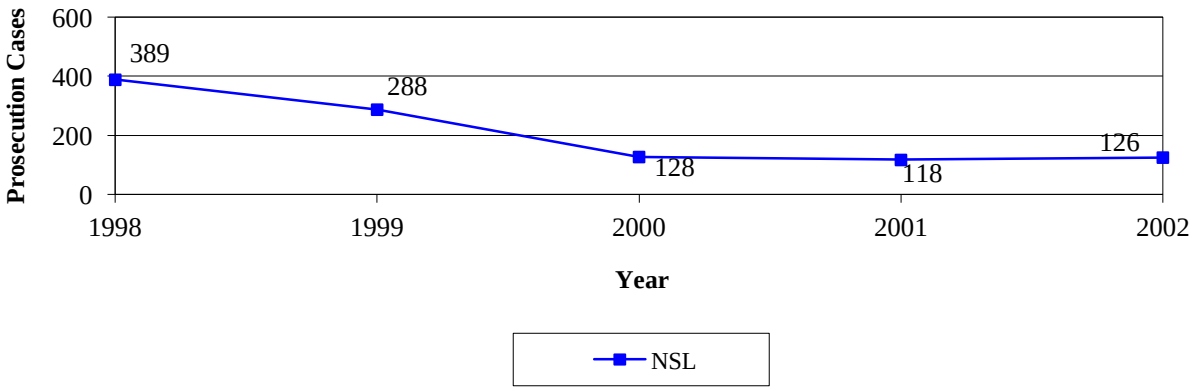
[296] Pollack
[297] Ibid.
[298] Ibid.
[299] Ibid.
[300] Shin Yong Bae, "Kim Vows to Revise Security Law Regardless of NK Policy," *Korea Herald* (January 15, 2001).

Table 3.8 NSL Arrest Cases under Kim Dae Jung (1998-2003)	
Year	**NSL**
1998	389
1999	288
2000	128
2001	118
2002	126
2003	9
Total	**1,058**
Average/Year	176.3

Source: NHRC NSL Report, 66. Year 1998 figures start on February 25th, and year 2003 figures end on February 24th to coincide with the start and end dates, respectively, of South Korea's five-year presidential terms.

Kim's engagement policy culminated in the June 2000 inter-Korean summit, and as noted above, it had great implications for the NSL. As illustrated in Chart 3.7, NSL cases decreased by more than half in 2000 and remained low through the end of Kim's term in 2002.

Chart 3.7 NSL Arrest Cases Under Kim Dae Jung (1998-2003)



Source: NHRC NSL Report, 66. Year 1998 figures start on February 25th, and year 2003 figures end on February 24th to coincide with the start and end dates, respectively, of South Korea's five-year presidential terms.

Criticism of the NSL grew: "The government trying to apply the law to the current environment is like a grown-up trying to put on clothes that he wore as a toddler."[301] And supporters of the Kim Dae Jung government argued for repeal noting that: "The reconciliatory mood should pave the way for the elimination of the anti-democracy law and bring an end to the ordeals that dissidents continue to suffer due to their belief."[302]

[301] Quoted in Hwang Jang Jin, "Calls for Revision of NSL Reflect Improvements in Inter-Korean Relations," *Korea Herald* (June 12, 2000).
[302] Quoted in Hwang Jang Jin, "Calls for Revision of NSL Reflect Improvements in Inter-Korean Relations," *Korea Herald* (June 12, 2000).

Reflecting the changing political and social dynamics, South Korean courts began to ease up on NSL violators, refusing warrants on some students or releasing them.[303] And research from the South Korean NGO, Mingahyup Human Rights Group, showed that 249 NSL violators in 1999, only 5 were actually sentenced to prison terms, displaying the courts' preference for suspended jail terms for NSL violators.[304] Furthermore, the Minbyun Lawyer Group's 2000 National Security Law Report indicated that although 81 of the128 arrested in 2000 occurred after the inter-Korean summit in June, the ratio of those sent to jails declined 66% in 1998, 58.7% in 1999, and 51.5% in 2000. In addition, 117 or nearly 92% of the 128 arrested in 2000 were charged with Article 7 violations (praising North Korea). Finally, the rate of those released on bail rose 0.4% in 1999 to 14.2% in 2000, and arrest warrant rejections rose from 3.81% in 1198 to 3.83% in 1999 and 4.17% in 2000.[305]

While Kim Dae Jung no doubt wanted to move forward rapidly with NSL revision or repeal, he had to first deal with the 1997 financial crisis. And his election promise and coalition with Kim Jong Pil's United Liberal Democrats (ULD) partly handcuffed him, because the conservative ULD didn't support revision of the NSL.[306] Nevertheless, in context of the overall transformation of South Korea's political, economic, and social landscape under Kim Dae Jung, the NSL assumed a greater social role in politics, serving as a symbol of past authoritarianism and an impediment to true reconciliation with North Korea.

vi. The NSL under Roh Moo Hyun

The changes in South Korean politics that began under Kim Dae Jung gained greater resonance under President Roh Moo Hyun. The government of Roh Moo Hyun saw a greater influx of progressive forces in South Korean politics, with the influx of former student protestors from the 1980's democratization movement. Their increased role culminated in the 2004 controversy over the Uri Party's NSL repeal bill (see Section V).

The NSL enforcement numbers from Roh Moo Hyun's government shows a dramatic decline in cases from 69 in 2003 to only 18 in 2005 (Table 3.9). The average number of yearly prosecutions under Roh is 41.3. This rapid fall in NSL cases raises the important question of why the NSL continues to be important in South Korean politics when clearly the law is applied only to a tiny number of cases.

Table 3.9 NSL Cases under Roh Moo Hyun (2003-2006)

Year	NSL
2003	69
2004	37
2005	18
2006	-
Total	**124**

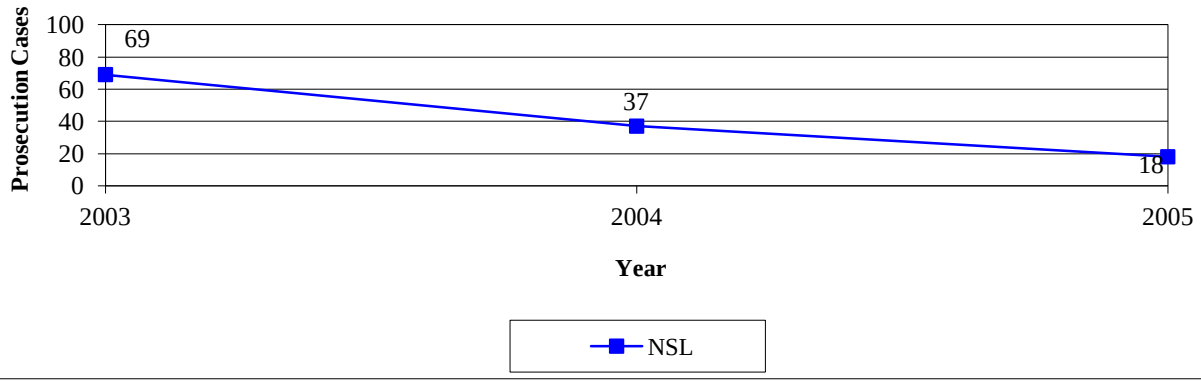
[303] Chang Jae Soon, "Courts Go Easy on National Security Law Violators after Inter-Korean Summit," *Korea Herald* (August 7, 2000).
[304] "Most NSL Violators Given Suspended Terms," *Korea Herald* (October 16, 2000)
[305] Lee Joo Hee, "Security Law Violators on Decrease During Kim Dae Jung Government," *Korea Herald* (June 18, 2001).
[306] Lee Joon Seung, "Ruling Coalition Hits Snag Over Security Law Issue," *Korea Herald* (January 16, 2001).

Average/Year	41.3

Source: Mingahyup. Year 2003 figures start on February 25th, and year 2006 figures end on February 24th to coincide with the start and end dates, respectively, of South Korea's five-year presidential terms.

While the number of cases was not high to begin with, after the 2004 NSL dispute, prosecutions declined even further (Chart 3.8), signaling that the political and social discourse throughout the year had an effect on the government and courts.

Chart 3.8 NSL Arrest Cases Under Roh Moo Hyun (2003-2005)



Source: Mingahyup. Year 2003 figures start on February 25th, and year 2006 figures end on February 24th to coincide with the start and end dates, respectively, of South Korea's five-year presidential terms.

What is surprising is that these declines in NSL enforcement occurred in context of the second North Korean nuclear crisis. In contrast to the first North Korean nuclear crisis under Kim Young Sam when South Korea threat perceptions, as well as NSL cases, were high, the second nuclear crisis has not translated into increased insecurity or NSL prosecutions, despite the north's first nuclear test on October 9, 2006. Rather, South Koreans do not seem alarmed with nuclear developments in the north, which may be a sign that the changing social dynamics on the Korean peninsula have become more stable and institutionalized, even to the point that South Koreans now cannot even "imagine" violence or war with North Korea.

While NSL prosecutions have significantly decreased under Roh Moo Hyun, there have been several cases reported in the media, which shows that the NSL is not entirely dead. On March 31, 2004, Professor Song Du Yul from Germany was sentenced to seven years in prison. Song had been a member of the North Korean Workers' Party since 1973 and a Politburo member since the 1990's.He visited Pyongyang more than 20 times and was subsequently banned from re-entry into South Korea in 1973 for organizing movement against South Korean government. He gained German citizenship and was later allowed to return in October 2003, but arrested and charged upon re-entry. [His sentenced was later commuted and Song was allowed to return to Germany].[307]

In October 2005, Professor Kang Jeong Woo, a professor of sociology at Dongguk University created controversy when he wrote that North Korea's invasion on June 25, 1950 was an attempt to reunify country, and that U.S. intervention interfered with reunification. He also said that U.S. General Douglas MacArthur was a "war criminal." Professor Kang has previously

[307] Joo Sang Min, "Talk Flourishes on Revision of Security Law," *Korea Herald* (April 28, 2004).

been arrested in 2001 under the NSL, after his visit to Mankyongdae, birthplace of Kim Il Sung, where he left the message: "let's achieve the great task of national unification by cherishing the spirit of Mankyongdae."[308]

In December 2006, five members of a group called "Ilsimhoe" (One Heart Society) were arrested under the NSL for making illegal contact with North Koreans, including agents, and distributing information to communists. South Korean prosecutors described the case as the "largest pro-North Korean spy case since the summit of 2000."[309] Most recently on May 1, 2007 a man was arrested for selling the North Korean novel, *The Flower Girl*.[310]

C. Prosecutions – By Article

In addition to examining NSL prosecutions by administration, analyzing the law's application by article also provides important details. Under Kim Young Sam, Article 7 (praising and sympathizing) violations were the largest, accounting for 90% of all prosecution cases under Kim Young Sam (Table 3.10). The only other notable category is Article 5 (forming anti-state groups), which accounted for 5.5%.

Table 3.10 NSL Prosecution Cases by Article Violation under Kim Young Sam (1993-1998)

NSL Article	1993	1994	1995	1996	1997	1998	Total	%
Article 3 (anti-State groups)	30	24	28	28	0	0	110	5.5
Article 4 (anti-State acts)	1	2	1	1	0	0	5	0.2
Article 6 (infiltration and escape)	4	0	4	3	3	0	14	0.7
Article 7 (praising or sympathizing)	69	339	244	450	666	23	1,791	90.0
Article 8 (meeting or corresponding)	8	23	4	15	3	0	53	2.7
Article 9 (aiding)	0	5	0	2	5	0	12	0.6
Article 10 (failure to inform)	0	0	4	0	0	0	4	0.2

[308] Cho Chung Un, "Kang Case Rekindles Debate on National Security Law," *Korea Herald* (October 17, 2005).
[309] Jin Dae Woong, "Five Indicted on Charges of Spying for NK," *Korea Herald* (December 9, 2004).
[310] "Bookstore Hit with National Security Law," *Hankyoreh* (May 4, 2007).

Total	112	393	285	499	677	23	1,989	100.0

Source: NHRC NSL Report, 67. Year 1993 figures start on February 25th, and year 1998 figures end on February 24th to coincide with the start and end dates, respectively, of South Korea's five-year presidential terms.

Under Kim Dae Jung, Article 7 (praising and sympathizing) violations were again the largest, accounting for approximately 92% of all prosecution cases (table 3.11). Article 5 (forming anti-State groups) violations accounted for 2.1%, Article 6 (infiltration and escape) for 2.2%, and Article 8 (meeting and corresponding) for 2.6%. The latter reflects increased border exchanges and cooperation under Kim Dae Jung and his various economic and tourist projects (Mount Kumkang, Kaesong, etc) with North Korea, which increased authorized contacts, which probably concurrently raised the risks and possibilities of unauthorized or illegal contacts with North Korea.

Table 3.11 NSL Prosecution Cases by Article Violation under Kim Dae Jung (1998-2003)

NSL Article	1998	1999	2000	2001	2002	2003	Total	%
Article 3 (anti-State groups)	15	0	5	1	1	0	22	2.1
Article 4 (anti-State acts)	2	5	1	0	0	0	8	0.8
Article 6 (infiltration and escape)	5	10	1	7	0	0	23	2.2
Article 7 (praising or sympathizing)	354	263	117	106	122	9	971	91.8
Article 8 (meeting or corresponding)	9	10	3	4	2	0	28	2.6
Article 9 (aiding)	4	0	1	0	1	0	6	0.6
Article 10 (failure to inform)	0	0	0	0	0	0	0	0
Total	389	288	128	118	126	9	1,058	100.0

Source: NHRC NSL Report, 67. Year 1998 figures start on February 25th, and year 2003 figures end on February 24th to coincide with the start and end dates, respectively, of South Korea's five-year presidential terms.

In debates concerning the status of the NSL, critics of the NSL and those that call for revision or repeal target Article 7 as unnecessarily harsh and arbitrarily enforced. Since Article 7 violations account for an overwhelming portion of prosecutions, if the article is in fact rescinded, what legal force or significance would the NSL have? A revision of take out Article 7 would only buttress the argument that the NSL plays an important social role in Korea by reflecting and constructing identities.

3.4 Prosecutions – By Demographic

Table 3.12 NSL Prosecution Cases by Violator Group Under Kim Young Sam (1998-2003)

Group	1993	1994	1995	1996	1997	1998	Total	%
Student	31	193	102	318	500	15	1,159	58.3
Laborer	5	38	20	38	44	0	145	7.3
Academics	63	128	110	92	89	8	490	24.6
Soldier	13	34	53	51	44	0	195	9.8
Total	112	393	285	499	677	23	1,989	100.0

Source: NHRC NSL Report, 67. Year 1993 figures start on February 25th, and year 1998 figures end on February 24th to coincide with the start and end dates, respectively, of South Korea's five-year presidential terms.

Table 3.13 NSL Prosecution Cases by Violator Group under Kim Dae Jung (1998-2003)

Group	1998	1999	2000	2001	2002	2003	Total	%
Student	295	227	104	91	114	8	839	79.3
Laborer	18	1	2	10	0	0	31	2.9
Academics	63	46	16	15	9	1	150	14.2
Soldier	13	14	6	2	3	0	38	3.6
Total	389	288	128	118	126	9	1,058	100.0

Source: NHRC NSL Report, 69. Year 1998 figures start on February 25th, and year 2003 figures end on February 24th to coincide with the start and end dates, respectively, of South Korea's five-year presidential terms.

The majority of NSL prosecutions involve students, mostly Hancheongyeon, the radical student group. Comparing the Kim Young Sam and Kim Dae Jung governments, the absolute number of NSL cases involving students as steadily decreased, which can reflect several possibilities (although the proportion of student cases as increased under Kim Dae Jung relative to other groups). First, the Kim Dae Jung government has been relatively lenient on students and their activities, which reflects the overall change in the government's view and policy of North Korea (other data support this). Second, Hancheongyeon itself has become weak and marginalized, both in their message and activities. The group has lost favor and legitimacy in the eyes of both young Koreans and the general population (reasons for which are several and complex).Both explanations have important and interesting implications for the question of Korean identity vis a vis North Korea.

Next, Laborers have traditionally been an opposition and critic of the government, but their involvement in NSL cases hasdropped considerably (7.3% of cases under Kim Young Sam to 2.9% of cases under Kim Dae Jung). This may strengthens the argument that the NSL is no longer a tool of authoritarianism, as was used by past military regimes (Park, Chun), but an indicator of ideological conflict and tension.

Soldiers, especially those stationed near the DMZ have always been vulnerable to North Korean propaganda (through loudspeaker announcements and unauthorized contact with North Korean soldiers), which may explain the 195 soldier cases (or nearly 10% of NSL cases) under Kim Young Sam. This figure decreased to only 36 (3.6%) under Kim Dae Jung. This decrease may reflect the policy of both Koreas during the Kim Dae Jung government to cease propaganda across the DMZ.

D. Background of the 2004 Controversy

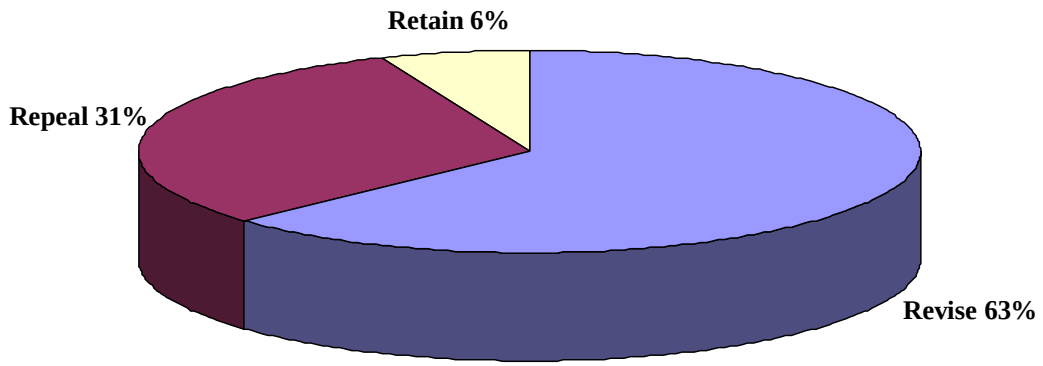
The fight over the NSL is as old as the larger Korean conflict itself. Since its inception in 1948, the NSL drew wide criticism for its draconian nature and brutal application, and during the course of its legislative life, the NSL has been amended to heed some of those calls. In 2004, the dispute heated up once again, as a serious attempt at repeal grew under the President Roh Moo Hyun. The origins of the 2004 controversy stem from the general shift of political power in South Korea toward the left with the election of longtime opposition figure Kim Dae Jung in 1997. Running under a liberal platform, Roh Moo Hyun was elected in 2002, and he continued most of the policies of his predecessor. His Uri Party was formed shortly thereafter in 2003.

The immediate cause of the debate is found in the April 15, 2004 parliamentary elections for the 17th National Assembly, where the progressive Uri Party won 152 of the 299 seats in South Korea's unicameral legislature. The opposition conservative Grand National Party (GNP) was left with only 121 seats; its failed attempt to impeach Roh in March 2004 had backfired. Now, the Uri Party lawmakers, some of whom participated in student protests during the democratization movement during the 1980's viewed the election result as a mandate for change and an opportunity to implement a progressive agenda. Theirs was a reformist political platform, and central to it was rectifying historical injustices and the official recount and redress of South Korea's past authoritarian regimes. Naturally, the NSL stands out one of the prime vestige of this past, and the South Korean political left set its eyes on its abolishment.

Following the April election, talk of repealing or revising the NSL grew louder, revealing a sharp ideological and political divide in South Korea between conservatives and progressives. An opinion poll conducted by the *The Hankyoreh* of the newly elected 17th National Assembly lawmakers (Figure 5.1) revealed that a large majority of lawmakers supported revision (63%), while approximately one-third advocated repeal of the NSL (31%). Only a small minority of lawmakers want to retain the NSL as it stood (6%).[311] While repeal and revision can have very different meanings, the poll results show that 94% of the 17th National Assembly members want some form of change to the existing NSL. At these levels, the figures clearly indicate recognition by the legislature that there are problems with the NSL as it currently stands, and they leave little hope that there will not be any amendments of changes to the NSL. But interestingly, while the opinion of some form of change is clear, the exact nature of change is very much disputed, and it is at this stage that the ideological and identity fissures are felt.

[311] Poll results cited in Joo Sang Min, "Talk Flourishes on Revision of Security Law," *Korea Herald* (April 28, 2004).

Figure 5.1: The 17th National Assembly Opinion Poll on the NSL



Source: *The Hankyoreh* (April 2004)[312]

A more detailed National Assembly member poll, divided along party lines, illustrates such differences. The Donga Ilbo survey (Table 5.2) below shows that 51% of the 51 GNP lawmakers polled wanted revision, 2% desired retention, while none wanted repeal. In addition, the Donga Ilbo poll adds a fourth category - revision contingent on North Korean changes, which can be considered a de facto "retention" category because it implies that North Korea has not changed enough now. Since roughly 47% of GNP lawmakers supported this category, NSL retention preference in the party should be considered higher than the 2% actually reflected in the poll. This contingency factor is important in understanding the conservative rationale regarding the NSL, which is externally-based on developments in North Korea. At the other extreme, all eight members of the small Democratic Labor Party (DLP) wanted an outright repeal of the NSL, regardless of what happens in North Korea. Finally, the Uri Party was more divided on the matter. The majority of Uri Party members supported revision (50.5%), with an additional 11.7% holding revision contingent on North Korean change. But nearly 36% of Uri Party National Assembly members wanted to abolish it, with only 2% advocating retention.

Table 5.1: Donga Ilbo National Assembly Survey by Party

Party	Respondents (no.)	Repeal (%)	Revise (%)	Revise if NK Changes (%)	Retain (%)
Uri	103	35.9	50.5	11.7	1.9
GNP	51	0	51.0	47.1	2.0
Labor	8	100	0	0	0

[312] Poll results cited in Joo Sang Min, "Talk Flourishes on Revision of Security Law," *Korea Herald* (April 28, 2004).

Source: *The Donga Ilbo*

While these opinion polls on the 17th National Assembly seem to indicate that most lawmakers, regardless of party, support revision in some form or another, the polls do not speak to the nature of the revisions envisioned by the parties. The polls also demonstrate that there are some real differences between and within the political parties on the degree of support in each category.

Furthermore, Kang Won Taek's detailed empirical study comparing surveys from the 16th and 17th National Assemblies indicates significant differences between progressives and conservatives.[313] Structuring the ideological divide along four dimensions, Kang found that the "'rejection vs. acceptance of anti-communism ideology' dimension appears to exert a strong influence not only on the political sector, but the general public as well."[314] Next, Kang's data results also demonstrated that the "two parties exhibited the most consistent and significant differences in the 'liberalism vs. authoritarianism' dimension."[315] Specifically on the NSL, he found a growing gap between the two sessions of the National Assembly (Table 5.2)[316]:

Table 5.2 Comparison of the 16th and 17th National Assemblies on the NSL

National Assembly	Uri (MDP) Party	GNP	Difference	t value
16th (2002)	3.28	5.45	2.17	8.24
17th (2004)	1.99	4.28	2.29	8.98
Position Change	1.29	1.17		

Note: For all figures, 0=most progressive, 5=moderate, 10=most conservative

The results indicate while both parties became more liberal on the NSL in the 17th session, their divide widened from 2.17 to 2.29, and the Uri Party turned much more progressive at 1.99. In his analysis of these results, Kang noted that "those who support abolition of the [NSL] stress the fact tat the law can involve violations of human rights and curtailment of individual freedoms, while those who advocate its continuance believe that it is essential for national security and assurance of social order."[317]

It was within this context that President Roh Moo Hyun first publicly announced his strong view that the NSL must be repealed. Speaking during a televised interview with MBC on September 5, 2004, Roh stated that the NSL should be "put into the scabbard and kept in a

[313] Kang Won Taek, "Ideological Clash of Progressives and Conservatives in Korea," *Korea Focus* (September-October 2005), 63-80. Kang's statistical study is based on the 2002 survey of the 16th National Assembly conducted by the Korean Association of Party Study and the *Joongang Ilbo* and the 2004 survey of the 17th National Assembly conducted by the Korean Political Science Association and the *Joongang Ilbo*.
[314] Ibid, 78.
[315] Ibid, 79. His other two dimensions were ""left-right" and "modern and post-modern values," which did not return significantly different results in his statistical analysis.
[316] Ibid, 70. These results were analyzed under his "rejection vs. acceptance of anti-communist ideology" dimension.
[317] Ibid, 75.

museum."[318] The Uri Party backed the president by calling for revisions to the South Korean Criminal Code to absorb the security-related measures in the NSL and vowed to submit a repeal bill in the National Assembly.[319] On September 23, 2004, the Uri Party joined hands with the Democratic Labor Party (DLP) and the liberal Millennium Democratic Part (MDP) to agree to a joint bill to abolish the NSL.[320] With 152 seats, the Uri Party had enough votes to push through with the bill, and the support of the DLP and MDP added to their strength.

But the conservative opposition GNP did not back down. One week later, GNP Chairwoman Park Geun Hye stated that "If the ruling party pushed ahead to abolish the National Security Law, we have no other choice but to use all means to protect the nation's [security] system."[321] She even threatened to appeal to the Constitutional Court if the Uri sponsored repeal bill passed, proudly declaring that she would "risk her whole body" to protect the security law.[322] The battle was on.

On December 6, 2004, the dispute reached its peak when Uri Party members tried to force through their NSL repeal bill during a session of the National Assembly's Legislation and Judiciary Committee. The committee's GNP chairman had tried to block the bill's submission by delaying on numerous occasions, so when he was in an adjoining room, Uri lawmakers took the opportunity to physically submit the bill by banging on the table three times with their hands, while scuffles broke out in the room. They had to use their hands because GNP lawmakers had hidden the official gavel.[323]

The inter-party feud had deadlocked the National Assembly, and with the official close of the legislative session nearing, the two main parties agreed to hold a month-long special session to discuss four reform bills, which included the repeal of the NSL[324]. Unfortunately, negotiations failed to produce a workable compromise on the NSL bill, and the Uri Party ultimately had to postpone consideration of the matter until 2005. As illustrated by the opinion polls above, the Uri Party was split internally on whether to repeal or revise the NSL. While radical Uri lawmakers, some 60 or so who were former student activists, opposed compromises on the repeal bill, other Uri officials noted that "This is exactly what we feared when the party decided to abolish the law – that the decision to entirely scrap the law would cause serious anxiety among the public over a possible vacuum in national security."[325]

Finally, on December 24, 2004, President Roh Moo Hyun realized that he would have to back down.[326] During a reception at the Cheong Wa Dae, President Roh stated that, "There is no need to hurry. Let's solve matters taking time…The security law has been there for years. It would be difficult to scrap it at once."[327] Unfortunately for the Uri Party, it would lose the parliamentary by-elections in 2005, and additional efforts to repeal the NSL were shelved.

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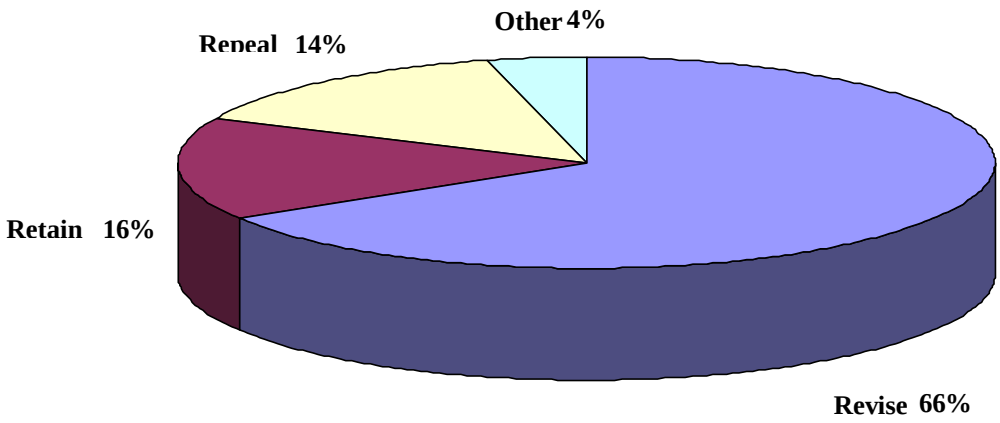
[318] "A Nation-Splitting Law," *Korea Herald* (September 8, 2004).
[319] "Uri Wants Criminal Code to Deal with Security Offenses," *Korea Herald* (September 8, 2004).
[320] Ryu Jin, "Three Parties to Scrap Security Law," *Korea Times* (September 23, 2004).
[321] Lee Joo Hee, "Park Reverts Back to Hard Line on National Security Law Repeal," *Korea Herald* (October 1, 2004).
[322] Shin Hae In, "GNP May Bring Security Law to Constitutional Court," *Korea Herald* (October 23, 2004).
[323] "Security Law Dispute," *Korea Herald* (December 8, 2004).
[324] Shin Hae In, "Can Rui, GNP Meet in Middle on Security Law?" *Korea Herald* (December 27, 2004).
[325] Assistant to Uri lawmaker Ahn Young Keun as quoted in Lee Joo Hee, "Is Uri Having Second Thoughts on National Security Law?" *Korea Herald* (September 16, 2004).
[326] "Uri to Back Down Security Law," *Korea Times* (December 25, 2004).
[327] "Uri May Delay Security Law Repeal to 2005," *Korea Herald* (December 25, 2004).

Besides the internal split within his own party, President Roh Moo Hyun also faced opposition to repeal from other segments of South Korean society. For example, both the South Korean Supreme Court and Constitutional Court did not support repeal of the NSL. Most importantly, however, Roh faced public opposition to his plan to repeal the NSL. Paralleling the National Assembly opinion polls, public surveys also indicated that the general population favored revision over repeal. A September 4, 2004 public opinion poll conducted by *The Joongang Ilbo* (Figure 5.2) indicates that 66% of South Koreans wanted to revise the NSL, compared to 16% in favor of retaining and 14% supporting repeal.[328] The GNP used such figures to oppose the Uri Party repeal bill, with its floor leader Kim Deog Ryong arguing that, "The survey proves that President Roh Moo Hyun has gone against the public view."[329]

The public's overwhelming majority support for revision, but not repeal, has important implications regarding South Korean citizens' perception of security on the peninsula. First, South Koreans evidently recognize that the NSL has many problems and must be changed. But if only a minority of the population wants to retain it as is, why haven't the moves toward amendment been more forceful or effective? Some would argue that the NSL is now useless, and that most South Koreans do not care to take up the cause for its further amendment, but South Korean political history in general and in 2004 show that this is not the case. Instead, hesitance on NSL changes is rooted in sharp ideological rifts in South Korea and lingering uncertainties regarding North Korea. The reality is that there are significant uncertainties regarding North Korea, despite the rapprochement between the two countries during Kim Dae Jung's presidency.

Figure 5.2: Joongang Ilbo 2004 Poll on NSL



Source: *Joongang Ilbo*, September 7, 2004.[330]

[328] Poll results cited in "Uri Wants Criminal Code to Deal with Security Offenses," *Korea Herald* (September 8, 2004).
[329] Quoted in "Uri Wants Criminal Code to Deal with Security Offenses," *Korea Herald* (September 8, 2004).
[330] Poll results cited in "Uri Wants Criminal Code to Deal with Security Offenses," *Korea Herald* (September 8, 2004).

In addition, another public poll on the status of the NSL, divided by demographic also indicates differences within South Korean society. A *Chosun Ilbo* survey of August 18, 2004 (Table 5.2) a majority of those in their 20s through 40s support retention (range from 50-56%), while smaller segment desires repeal of the NSL (range from 35-41%). On the other hand, those in their 50s, the generation that lived through the Korean Way, strongly support retention (66%) and forcibly reject repeal (18%).[331]

Table 5.2: Chosun Ilbo Public Poll on NSL by Demographic

Age Group	Retain (%)	Repeal (%)	No Response (%)
20s	54	41	5
30s	50	40	10
40s	56	35	9
50s	66	18	16[332]

Source: *The Chosun Ilbo*, August 18, 2004.[333]

Overall, the general context of the recent 2004 controversy indicate that there are serious differences within South Korea regarding the NSL. Therefore, it is necessary to examine and analyze each of the positions on the status of the NSL. Those who advocate revision, retention, or repeal each have contrasting logics and rationales.

i. Retain Position

Advocates of retention provided two main justifications for keeping the NSL. First, they claim that the NSL is necessary to ensure South Korean security. Second, they argue that North Korea is rightfully targeted as the enemy because of its communist ideology. For example, GNP lawmaker, Kim Yong Kap summarized these two justifications by arguing that if the NSL was abolished, South Korea would become a "haven of North Korean spy agents." He continued that "Inter-Korean relations have become more active than ever, but the security law is not about bilateral exchanges, but about national defense. There's no change in the North's strategy to communize the Korean Peninsula and it is still reinforcing its army and nuclear weapons."[334] Voices in South Korea advocating strict retention of the NSL are not very strong, representing a minority of ultra-conservatives or the military. Nevertheless, some of those who recognize the need for revision would prefer to maintain the status quo if the alternative is repeal or a radical rewriting of the law.

The retention logic is characterized by both instrumentalist and ideological rationales. The NSL's practical value as protection against North Korean agents operating in South Korea, as well as a deterrent to leftist and communist forces in the country demonstrates an appreciation of the first role of law in politics, as outlined in Section I. But history shows that this

[331] *Chosun Ilbo* (August 18, 2004).
[332] Gi Wook Shin and Kristin C. Burke, "North Korea and Contending South Korean Identities: Analysis of the South Korean Media; Policy Implications for the United States," Korean Economic Institute Academic Paper Series (April 2007) vol. 2 no. 4, 5.
[333] *Chosun Ilbo* (August 18, 2004).
[334] Quoted in Kim So Young, "National Security Law: Repeal of Revision?" *Korea Herald* (September 9, 2004).

instrumentalist view of law not only served for national security, but for regime security for many of South Korea's past authoritarian governments, which used the pretense of national security to violently suppress opposition forces, which is at the core of criticism levied at the NSL. Those who advocate retaining the NSL are surprisingly silent on this issue, which may indicate their complicity of such abuse for the sake of national security, or a strong identification with the State self-image since many members of the political right have direct affiliation or continuing links to members of the past military governments.

Besides its utilitarian value, many conservatives make ideological associations with the NSL. Specifically, the GNP has openly and directly linked the party to the NSL. During the 2004 controversy, a GNP lawmaker, Kim Yong Kap, stressed that "There's no reason for the GNP to exist if it is unable to keep the law," echoing GNP Chairwoman Park Geun Hye's earlier comments that the GNP existed to defend the NSL.[335] Chairwoman Park's father, former President Park Chung Hee, has been accused of abusing the NSL for political purposes, and this connection did not dissuade opponents in associating her with past regimes. It is important to note, however, that Chairwoman Park and the GNP have indicated a willingness to consider revising parts of the GNP. Nevertheless, the conservative party's rationale can be summarized by GNP lawmaker Kim Kyung Han's comment that the South Korean military and the NSL were the "two main pillars defending our liberal democratic nation"[336] In this manner, the NSL has assumed a powerful symbolic status to those conservatives who champion its maintenance, holding it up on a pedestal as the "last fortress of national security"[337]

The rationale of the retention camp is mainly externally-focused on North Korea, driven by strident anti-Communism that paints North Korea and its regime as the main enemy. One editorial noted that "North Koreans are no doubt an enemy to the South Koreans…no other neighbor is posing as great and imminent a threat to South Korean security as North Korea does. That is an undeniable fact."[338] Therefore, those who support retention subscribe to the image of North Korea as the "anti-self," which is clearly present in the NSL, and it is this animosity toward the northern regime that is the principle driving force of their logic. As noted in the above poll of GNP lawmakers, those who support revision do so only on the condition that North Korea changes. However, given the forceful anti-Communist nature of the retention camp, a general self identification of South Korea as a democracy is present, but its contradiction with the history of the NSL brutal application is not fully addressed or resolved.

In addition to the GNP, the conservative groups in South Korea have also called to keep the NSL. For example, Roman Catholic Church Cardinal Stephen Kim Sou Hwan met with GNP Chairwoman Park Geun Hye in September 2004 and stated that he opposed repeal.[339] Furthermore, South Korean courts have also weighed in on retaining the NSL. On September 23, 2004, the Supreme Court of South Korea upheld the convictions of two student members of Hanchongnyon, a radical leftist student organization, on Article 7 violations. In its lengthy opinion, the Supreme Court specifically targeted and criticized the view of those who called for NSL repeal, citing the Korean War and persistent North Korean military provocations.[340] Furthermore, on August 26, 2004, the South Korean Constitutional Court unanimously upheld

[335] Ibid.
[336] Gillian Oak, "Fate of National Security Law," *The Korea Times* (February 18, 2005).
[337] Shin Hae In, "Can Rui, GNP Meet in Middle on Security Law?" *Korea Herald* (December 27, 2004).
[338] "Still the Main Enemy," *Korea Herald* (July 17, 2004).
[339] Lee Joo Hee, "Is Uri Having Second Thoughts on National Security Law?" *Korea Herald* (September 16, 2004).
[340] "A Nation-Splitting Law," *Korea Herald* (September 8, 2004).

the legality of Article 7 in the NSL, which outlaws praising of North Korea.[341] Nevertheless, the Constitutional Court did leave open the possibility of revision, ruling that: "We do not think that the law needs to be abrogated entirely though it has a problem of unconstitutionality."[342]

ii. Repeal Position

At the other extreme, calls for repeal of the NSL have grown stronger, both domestically and internationally, which partly facilitated President Roh Moo Hyun's initial decision to call for abolishment in 2004. Nevertheless, the position to repeal the NSL has run into troubles of its own from its internal inconsistency, public hesitancy, and political opposition from conservatives.

There are two main rationales driving the logic of retention, one internal and another external, both of which are very forceful in the minds of its proponents. First, those who advocate abolition appeal to liberal values that respect individual freedom and human rights. To promoters of repeal, the NSL as law and the process with which it has been maintained have been undemocratic. As Uri Party lawmaker, Lee Hwa Young states, "We all believe South Korea, as a liberal democratic state, has superior military, economy, and ideology to the communist North. Then why do they worry that South Koreans may be lured into communism? Don't you think it's antinomy?"[343] While they do not completely discount the NSL's role in security, progressives point to the history of authoritarian governments that abused the law for regime security instead. For example, during his first public comments during the 2004 dispute, President Roh Moo Hyun strongly argued that the NSL must be repealed. Speaking during a televised interview with MBC on September 5, 2004, Roh stated that:

> "The National Security Law has been used mostly to oppress people who opposed the governments rather than to punish those who threatened to throw the country into crisis. During this process, tremendous human rights abuses and inhumane acts have been conducted. It is past of Korea's shameful history and an old legacy of dictatorships which we are unable to use now…If we are to shift to an era of people's sovereignty and respecting human rights, don't you think it is desirable to scrap the old legacy? We will be able to say we are transforming from a barbarous country into a civilized country only after we abolish the law."[344]

Ideational considerations are also central to the second characteristic of the abolishment rationale, which is outwardly focused on the image of North Korea. Following the recent thaw in relations with Pyongyang under former President Kim Dae Jung's "sunshine policy" of engagement, many progressives argue that the NSL is incongruent with such positive political currents on the peninsula. For example, Uri Party lawmaker, Lee Hwa Young stated that "As long as the National Security Law exists, inter-Korean exchanges will continue to be hampered."[345] His position was echoed by DLP spokesman Kim Jong Chul, whose party had

[341] Joon Sang Min, "Court Upholds Key Clause of Security Law," *Korea Herald* (August 27, 2004).
[342] "Renewed Debate on Security Law," *Korea Herald* (July 13, 2002).
[343] Quoted in Kim So Young, "National Security Law: Repeal of Revision?" *Korea Herald* (September 9, 2004).
[344] Kim So Young, "President Calls for Repeal of Security Law," *Korea Herald* (September 6, 2004).
[345] Quoted in Kim So Young, "National Security Law: Repeal of Revision?" *Korea Herald* (September 9, 2004).

aligned with the Uri Party to submit the 2004 repeal bill: "Defining the North as an anti-state organization itself makes the peninsula unstable."[346] Underlying their views is a nationalist argument that transcends the divide between the two Koreas, instead conceptualizing a united and homogenous Korean nation. In contrast to the enemy image of the retention camp and the spirit of the anti-Self found in the NSL, progressives who call for repeal invoke the image of its northern brethren and the tragedy of a partitioned people. Therefore, they consider the NSL as anathema to this ideal. As one proponent noted, "Repeal is one step toward reunification."[347]

By simultaneously invoking both the ideals of democracy and nationalism, defenders of repeal also invoke a paradox, because North Korea is not a democratic country and does not share their liberal views. The only resolution would be to invoke democracy as the principle reason for NSL repeal, while acknowledging that North Korea must also change and liberalize, a position that is implicit in Kim Dae Jung's policy of engagement, as outlined in Section II. However, the political discourse over the NSL, especially from the defenders of its repeal, has not clearly outlined their rationale, and the public has been sensitive to such inconsistencies, which only compounds its uncertainties over North Korea. Therefore, proponents of repeal find themselves settling for revision.

In addition to the Uri Party and other liberal political parties that fought for repeal in 2004, many other domestic and international parties have also called for abolishment of the NSL. For example, South Korean governmental bodies, such as the Presidential Truth Commission on Suspicious Deaths, recommended repeal of the NSL in July 2002, while investigating the case of student who died while fleeing police officers in 1997.[348] On August 25, 2004, the newly established National Human Rights Commission of Korea (NHRC) recommended to the National Assembly and the Ministry of Justice that the NSL should be abolished, citing the Constitution and its protection of liberties, South Korea's legal commitment to the International Covenants on Civil and Political Rights (ICCPR) and on Economic, Social, and Cultural Rights (ICESCR), and United Nations recommendations.[349] In addition, many South Korean non-governmental organizations (NGO) have been in the forefront on the campaign to abolish the NSL. For example, the Minkahyup Human Rights Group has been active in supporting families of those affected by the NSL, while leading the research, publicity, and education of the public on relevant issues.[350] Also, a legal group called the Lawyers for a Democratic Society (Minbyun) has clearly stated for several years that "The government should scrap the National Security Law"[351] Finally, religious groups, such as The National Council of Churches joined the 2004 campaign for repeal.[352]

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[346] Joo Sang Min, "Talk Flourishes on Revision of Security Law," *Korea Herald* (April 28, 2004).
[347] Kim So Young, "National Security Law: Repeal of Revision?" *Korea Herald* (September 9, 2004).
[348] "Renewed Debate on Security Law," *Korea Herald* (July 13, 2002).
[349] National Human Rights Commission of Korea, "NHRC Recommends Abolishment of the National Security," August 8, 2004; Press release available at http://www.humanrights.go.kr/eng/nhrc/news/nhrc02_01_view.jsp
[350] For example, Minkgahyup assisted the NHRC with its 2004 report, *Human Rights Issues Arising from Application of the National Security Law*, National Human Rights Commission, The Republic of Korea (February 2, 2004). See NHRC press release at http://www.humanrights.go.kr/eng/nhrc/news/nhrc02_01_view.jsp and Minkahyup website at http://minkahyup.org/index_bak.htm
[351] Lee Jae Hee, "Lawyers' Group Headed by Ex-independent Counsel Works to Abolish National Security Law," *Korea Herald* (June 5, 2002).
[352] Lee Joo Hee, "U.N. Official Calls for Security Law Repeal," *Korea Herald* (September 17, 2004).

International and foreign voices have joined the domestic chorus for NSL abolishment. In July 1992, South Korea submitted its initial report to the ICCPR, and the United Nations Human Rights Committee recommended that it:

> ". . . intensify its efforts to bring its legislation more in line with the provisions of the Covenant. To that end, a serious attempt ought to be made to phase out the National Security Law which the Committee perceives as a major obstacle to the full realization of the rights enshrined in the Covenant and, in the meantime, not to derogate from certain basic rights".

Most recently, during the 2004 dispute, UN High Commissioner for Human Rights Louis Arbour met with South Korean Prime Minister Lee Hae Chan and stressed that "What has to be done is that this legislation should be repealed."[353] In its 1999 report on South Korea, Amnesty International recommended that the NSL be "substantially amended or abolished."[354] The international NGO continued in 2001 that "Some clauses of the anti-Communist security law can be arbitrarily interpreted and violators could face capital punishment, which runs counter to the spirit of the International Declaration of Human Rights, which South Korea ratified."[355] And on April 1, 2004, Amnesty International Secretary-General Irene Khan wrote to Acting-President Goh Kun to repeal the NSL.[356] Regional NGOs have also called for repeal, with the Asian Human Rights Commission urgently appealing that "the abolition of the NSL has always been at the top of the list of demands in the country's long journey for democratisation and the reunification of Korea. [We] strongly urge [South Korea] to abolish the NSL immediately."[357] Finally, the U.S. State Department has annually released its Country Reports on Human Rights Practices, and in its 2006 report on South Korea, the State Department noted many infringements on basic rights authorized under the NSL.[358] Not surprisingly, North Korea has consistently called for the repeal of the NSL during negotiations with South Korea.

iii. Revise Position

While calls for repeal and retention have been persistent, most moderates and the general public have straddled the middle road, calling for revision of the NSL. As noted in the above opinion polls, more than two-thirds majority of South Koreans desire revision, which indicates that most of them recognize that the law has many problems. But the moves towards actual revision have been halting, and the NSL remains intact since its last major amendment in 1991. The delays in NSL revision, despite strong acknowledgement of needed changes, stem partly from the fractious politics involved. As the 2004 debate demonstrated, parties from across the political spectrum have fought hard to direct changes to the NSL, if any. But on a deeper level,

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[353] Lee Joo Hee, "U.N. Official Calls for Security Law Repeal," *Korea Herald* (September 17, 2004).
[354] Amnesty International, "Republic of Korea: Time to Reform the National Security Law," (February 1999), available at http://web.amnesty.org/library/Index/ENGASA250031999?open&of=ENG-KOR
[355] Kang Seok Jae, "Amnesty International Urges Revision of Security Law," *Korea Herald* (January 18, 2001).
[356] Joo Sang Min, "Talk Flourishes on Revision of Security Law," *Korea Herald* (April 28, 2004).
[357] Asian Human Rights Commission, "South Korea: Seven Activists Detained and Charged with Violating the National Security Law," (August 31, 2001), available at http://www.ahrchk.net/ua/mainfile.php/2001/160/
[358] U.S. Department of State, "Republic of Korea: Country Report on Human Rights Practices 2006," (March 6, 2007), available at http://www.state.gov/g/drl/rls/hrrpt/2006/78778.htm.

such contentious politics are symptomatic of more fundamental tension within South Korea. This study argues that the rationale of the revision camp is one salient manifestation of the internal and external conflict of identities gripping South Korea.

The logic of the revision camps suffers from persistent uncertainties regarding North Korea. The revision rationale is, in effect, an attempt to accommodate and reconcile some of the arguments put forward by both the retention and repeal camps. While recent rapprochement has indeed greatly reduced inter-Korean tensions and improved relations, the increased human exchanges through projects such as the Mount Kumkang tours have highlighted not only what the two Koreas have in common, but also amplified the deep differences that more than a century of division has produced between the two societies. In addition, the northern regime's pursuit of nuclear weapons has made South Korea's attempt to erase the image of the enemy other very difficult. Therefore, the South Korean public resorts to the power of the State to ensure its security, while simultaneously looking to reaffirm its ideals of liberal democracy. Confronted with the possibility for real NSL change, the public hesitates and hedges its bets. It simultaneously realizes that altering the law should be seriously considered with due deliberation, but the reality of the North Korea threat only complicates the situation. It is a precarious situation, one that produces an acute conflict of identities both internally and externally.

In this context, both the retention and repeal camps in South Korean politics have attempted to work to together to try and produce an agenda for reforming the NSL, as demonstrated by the GNP and Uri Party's negotiations in December 2004 under special extended National Assembly sessions. But while both parties recognized that they must address public preferences for revision, the nature and character of revision were very much in dispute. Therefore, it was not a question of whether to revise, but how. The Uri Party's repeal bill and subsequent GNP revision bill agreed on some measures, such as scrapping Article 10, which punishes witnesses and those who commit a "failure to inform" the police or government of offensive actions as delineated by the NSL.[359] But when it came to the core provisions of the NSL, the differing sides could not reach an agreement.

With the majority's preference for revision, the prospect for future change and revision of the NSL initially looks favorable. But the country's inability to implement actual revision encapsulates South Korea's deep uncertainties over the self, and the clash between progressives and conservatives is often described as the "South-South conflict."[360] In addition, the long-lasting "South-North conflict" between the two Koreas is also evident in the differences between the two camps over perceptions of North Korea. Overall, progressives reference the liberal ideals of individualism and conservatives hedge on the strong state for security, while many South Koreans feel that NSL revision should be contingent on North Korean changes. As a legal document, the NSL possess a self-contained debate about Korean identity, as demonstrated by the presence of the dual self and other. As a social and political artifact, the NSL has also served as a forum of identity contention in Korea. In the contentious legal, political, and social discourse surrounding the status of the NSL, the different rationales and justifications given by those who favor retention, repeal, and revision illustrate the deep identity conflicts in South Korea.

[359] Shin Hae In, "Can Uri, GNP Meet in Middle on Security Law?"*Korea Herald* (December 27, 2004).
[360] Kang, 66.

Conclusion

Overall, South Korea's experience with the NSL illustrates how relatively strong and centralized executive power, coupled with vigorous and active social movement organizations, can lead to greater legalization of national security policymaking. Group such as PSPD and *Minbyun* have made several legal challenges to the NSL, which have resulted in changes to the law. More importantly, the NSL cases illustrate how the South Korean government and the public have interpreted their longstanding security situation with North Korea through the lens of both domestic law (under democratization) and international law, such as human rights law. The NSL also highlights how deep ideological conflicts between social groups are manifestations of the larger systemic contradiction between the state and individual in world politics.

Chapter 5

Japan and Article 9 of the Constitution

Chapter 5: Japan and Article 9 of the Constitution

Law and national security in Japan were inextricably linked following the Second World War when the American occupying forces drafted and imposed a new Constitution on the country. Most notably, Article 9 of the Japan's "Peace Constitution" renounced the country's ability to use force abroad. Therefore, over the decades, national debates over security in Japan have taken on a legal and constitutional character, as political leaders and citizens have explored the contours of Article 9 and what it means for the country in a changing world. However, as this chapter argues, while the Constitution has framed the debate around the law, Japan has only witnessed moderate levels of legalization of national security. The reason is that Japan has historically had a relatively moderate concentration of executive authority over national security matters, and social movement organizations have not been strong in making sustained and persistent legal challenges regarding the constitutional provision. In context of the systemic contradiction between statism and individualism, Japan is mired in confusion as to what "statism" means for the country (i.e. Is Japan as "normal" country?) as it struggles to define the full contours of its sovereignty. But recent developments and trends on both factors, such as a stronger prime minister in national security policymaking through consolidation of executive power and the emergence of some coordinated social movement litigation campaigns, signal the potential for greater legalization of national security as political leaders and the citizenry seek to clarify Japan's national security objectives through legal argumentation and principles.

1. Executive Power in Japan

Any assessment of Japanese executive power in national security matters must address Article 9 of the Constitution, which has been a source of debate and contention in Japanese politics since it was promulgated in 1946. Article 9, in its entirety, states:

> (1) Aspiring sincerely to an international peace based on justice and order, the Japanese people forever renounce war as a sovereign right of the nation and the threat or use of force as means of settling international disputes.
> (2) In order to accomplish the aim of the preceding paragraph, land, sea, and air forces, as well as other war potential, will never be maintained. The right of belligerency of the state will not be recognized.[361]

The explicit renunciation of the use of force is not common to many states, and such a prohibition inherently constrains the Japanese prime minister in the conduct of foreign relations and in formulating strategic policy. Thus, the constitutional provision has left a relatively weak executive in Japan when it comes to national security policymaking. For example, for much of the Cold War period, Japan explicitly relied on the United States for its security, a policy that was formalized under the "Yoshida Doctrine," named for the former prime minister who proposed it.[362] In addition to the formal and structural constraints on executive power, Peter

[361] Kenpo [Constitution], art. 9. The full text of the Constitution of Japan is available online at: http://www.kantei.go.jp/foreign/constitution_and_government_of_japan/constitution_e.html (Accessed on Nov. 12, 2010).
[362] David Arase, "Japan, the Active State?: Security Policy after 9/11," *Asian Survey*, vol. 47, no. 4 (July/August 2007), 562.

Katzenstein has argued that norms about security were transformative in post-war Japan, where the memories of a humiliating defeat and the pain of Hiroshima and Nagasaki promoted pacifism in the country.[363] Similarly, Thomas Berger finds antimilitarism in both elite and popular sentiments in Japan.[364] These norms served as important domestic constraints on Japanese executive power, and they continue to do so today.

Given the history of WWII, the constitutional bar was obviously by design. However, considering that the 1946 Constitution was essentially imposed by the postwar American occupation of Japan, some Japanese, such as Ichiro Ozawa, consider Article 9 as a violation of Japan's inherent sovereignty and thus a barrier to Japan becoming a "normal" country.[365] In addition, events such as the North Korean missile launch in 1998 and the country's inability to do more during the first Gulf War prompted calls for reevaluating Article 9 and the need for a more coherent and aggressive national security policy.[366] Overall, competing interpretations of Article 9 exist regarding the authority of the Japanese SDF, depending on whether one views that an inherent right of self-defense exists for Japan, despite what the plain text of Article 9 states. Therefore, some may find it surprising that Japan today has a force of more than a quarter million in the SDF (an administrative agency), which has one of the highest "military" budgets in the world.

Indeed, there have been moves to realign Japan's security policy, despite Article 9. In 2005, the then ruling LDP party under Junichiro Koizmi completed draft amendments to the Constitutional, including an explicit clause that would permit Japan from maintaining self-defense forces.[367] Riding a shift towards constitutional revision, Shinzo Abe enacted the National Referendum Law in 2007 that provided for three years of national discussion and debate.[368] However, after the transfer of power to the Democratic Party of Japan (DPJ), the current status and future of constitutional amendment is uncertain. A referendum on Article 9 looks especially difficult, given public sentiments on amendment. A May 2010 survey by *Asahi Shimbun* indicates that 67% of respondents opposed a constitutional amendment of Article 9, while only 24% supported change.[369] Public support for the maintenance of Article 9 has historically been over 60% through contemporary Japanese history.[370]

In addition, Richard Samuels' study of growing maritime capabilities of the Japanese Coast Guard (JCG) illustrate how Japanese leaders have attempted to avoid the constitutional

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[363] See Peter J. Katzenstein, *Cultural Norms & National Security: Police and Military in Postwar Japan* (Ithaca: Cornell University Press, 1996).
[364] Thomas U. Berger, *Cultures of Antimilitarism: National Security in Germany and Japan* (Baltimore: Johns Hopkins University Press, 1998), 2. See also John W. Dower, *Embracing Defeat: Japan in the Wake of World War II* (New York: Norton, 2000).
[365] See Ichiro Ozawa, *Blueprint for a New Japan: the Rethinking of a Nation* (Tokyo: Kodansha International, 1994); Yoshihide Soeya, David A. Welch, Masayaki Tadokoro, eds., *Japan as a "Normal Country"?: A Nation in Search of Its Place in the World* (Toronto: University of Toronto Press, 2011).
[366] See Richard J. Samuels, *Securing Japan: Tokyo's Grand Strategy and the Future of Asia* (Ithaca: Cornell University Press, 2007); Kenneth B. Pyle, *Japan Rising: The Resurgence of Japanese Power and Purpose* (Cambridge: Public Affairs, 2007).
[367] "Constitution Survey Shows 77% Oppose Changing Article 9" *Japan Times* (May 4, 2006).
[368] Shamshad A. Khan, "Is Japan Ready to Shun the Peace Constitution?" *IDSA Comment* (Institute for Defense Studies and Analysis) (May 19, 2010), available online at: http://www.idsa.in/idsacomments/)
[369] "67% Oppose Changing Pacifist Article 9, Survey Finds" *Asahi Shimbun* (May 4, 2010), available online at: http://www.asahi.com/english/TKY201005030214.html
[370] Ibid.

questions, while still building military power.[371] Furthermore, recent administrative reforms have concentrated greater power in the prime minister to conduct national security. In 1999, the "Law to Amend the Cabinet Law" and the "Law to Establish the Cabinet Office," expanded the prime minister's ability to appoint and dismiss ministers, as well as permit the prime minister to directly submit proposals to the Diet without first consulting with the bureaucracy.[372] These reforms helped to speed up and narrow a policy process that was previously time-consuming and inflexible.

But while these formal changes may indicate a trend toward greater concentration of executive authority, the political instability and high turnover in the prime minister over the past few years demonstrate that executive authority in practice is still relatively weak, as compared to other countries. For example, Japan has had six prime minister between 2006 and 2012.

2. Social Movements in Japan

Despite decades of democratic rule, Japan has a relatively under-development civil society, and sustained social movements have not been common. Some observers again point to the decades dominance of the LDP and the role of the state in Japan's civil society. For example, Pharr observes that, "Perhaps the most striking feature of Japan's civil society over the past century…has been the degree to which the state has taken an activist stance toward civic life, monitoring it, penetrating it, and seeking to steer it with a wide range of distinct policy tools targeted by group or sector."[373] Under these circumstances, Pharr labels the Japanese government as an "activist state."[374] Similarly, Pekkanen finds that the Japanese government has molded civil society in the country by preventing the formation of many independent civic organizations through regulations that bar their legal status and limit tax exemptions.[375] The pervasive role of the state in Japan's nascent civil society is indeed important, but there are other countries that also have strong state controls over society, even authoritarian governments, but nonetheless have witnessed the development of an active civil society. Neighboring South Korea is a great example.[376] Therefore, despite the structural constraints imposed by the state, civil society may still develop through individual activism; agency matters.

The role of social movements is even more important here because various civic organizations have utilized specific litigation strategies to promote social change and political reforms. The law has been an important tool in issue framing, leveraging, and challenging entrenched interests.[377] Whether it is the NAACP or th ACLU in the United States or the PSPD in South Korea, social movement groups have initiated lawsuits, overcome political and

[371] Richard J. Samuels, "'New Fighting Power!' Japan's Growing Maritime Capabilities and East Asian Security," *International Security*, vol. 32, no. 3 (Winter 2007/08), 84-112.
[372] Arase, 570.
[373] Susan Pharr, "Conclusion: Targeting by an Activist State: Japan as a Civil Society Model," in Frank J. Schwartz and Susan J. Pharr, eds., *The State of Civil Society in Japan* (Cambridge: Cambridge University Press, 2003), 325.
[374] Ibid.
[375] Robert Pekkanen, "Molding Japanese Civil Society: State-Structured Incentives and Patterning of Civil Society," in Frank J. Schwartz and Susan J. Pharr, eds., *The State of Civil Society in Japan* (Cambridge: Cambridge University Press, 2003), 116.
[376] See Charles K. Armstrong, *Korean Society: Civil Society, Democracy and the State* (New York: Routledge, 2006).
[377] See McCann (2006).

regulatory barriers, and catalyzed courts and legal institutions into action in their respective countries.[378] Activist lawyers have played crucial roles as agents in such social movements.

In Japan, the enervated agency of social movements and activist lawyering plays an important role in the lack of popular demands on the courts. As Miyazawa notes, public-interest law and legal aid are still weak in Japan.[379] Still, Upham's study of various litigation campaigns on various issues, such as environmental pollution, Buraku Liberation, and equal employment is one example that the potential for social movements and legal strategies in promoting social change in Japan.[380] However, the relative obscurity of activist lawyering in Japan is curious, given the professional mission of all Japanese lawyers, as outlined in the Practicing Attorney Law, which states, "A practicing attorney is entrusted with a mission to protect fundamental human rights and to realize social justice."[381] The small number of lawyers relative to the overall population is one factor why activist lawyers are less common in Japan, and recent reforms have attempted to expand the number and diversify the training of lawyers in the country (see below). Ironically, however, members of the current bar have resisted, arguing that higher salaries from less competition (from more lawyers) actually subsidizes any public interest activities they may undertake for free.[382]

In addition, there are structural barriers that have diluted and limited popular pressures on the courts. For example, Ramseyer and Rosenbluth argue that the LDP has preempted citizens from going directly to the courts for redress by serving various intermediary roles, such as providing ombudsman services in regional districts through candidate support groups.[383] Thus, the gatekeeping function of political parties and administrative agencies is one element in the calculus of factors that have limited the pressure of Japanese citizens on the courts. This of course is subject to the continuing ability of the political actors to resolve public grievances, which cannot be taken as granted, as indicated by the recent ouster of the LDP as the dominant, ruling party in Japanese politics.

Finally, there is something to be said about the tendency for Japanese society to aim for consensus, rather than conflict in dealing with many important national issues. It is a "chicken or egg" problem when trying to determine whether it is the institutional structure or lack of agency in society that accounts for a passive judiciary in Japan, but the observed effect is the same. The level of contentious politics in Japan is quieter relative to other modern established democracies, and this lack of vibrancy in the social and political spheres has translated into a conservative judiciary. So, how will change occur in Japan? This study argues that the vested interests in the political and legal institutions in Japan will work to ensure a conservative reaction and moves for change. Therefore, real reform in the Japanese legal system will come from the demand side, as popular pressure pushes its way or is facilitated into the judiciary to provoke a more active court.

[378] See Tushnet, (1987) and Walker (1991).
[379] Setsuo Miyazawa, "Lawyering for the Underrepresented in the Context of Legal, Social, and National Institutions: The Case of Japan, in Louise G. Trubek and Jeremy Cooper, eds., *Educating for Justice Around the World* (Brookfield: Vt, 1999), 19-50.
[380] Frank K. Upham, *Law and Social Change in Postwar Japan* (Cambridge: Harvard University Press, 1987).
[381] Practicing Attorney Law, Law No. 205 of 1949, Art. 1.1.
[382] Miyazawa (2007), 45.
[383] J. Mark Ramseyer and Frances McCall Rosenbluth, *Japan's Political Marketplace* (Cambridge: Harvard University Press, 1997).

A. Reform Efforts to Catalyze Social Movements

In 1999, the Justice System Reform Council (JSRC) was formed to analyze and recommend comprehensive reforms to the Japanese judicial system. The JSRC proposed sweeping systemic reforms to the judicial system, legal profession, and legal education.[384] The "three pillars" of the reform in the recommendations were: first, build "a justice system that meets public expectations;" second, strengthen "the legal profession supporting the justice system;" and third, "establish a popular basis for the justice system."[385] As Foote notes, these three pillars and the extensive reforms outlined by the JSRC attempted to counter "the perception that the justice system – not only the courts and judges, but all three branches of the legal profession – were too insulated and did not sufficiently respond to or reflect the views of the public."[386] The JSRC explicitly recognized that much of the problems of the judiciary were found in the tenuous link between the public and judiciary system. And as this section has argued, weak public demands on the court, perpetuated through an underdeveloped civil society and reinforced through political structures, has contributed to a passive judiciary in Japan. Therefore, the JSRC attempted to reform the institutional design of the judicial system by changing legal education (graduate law schools) and training, as well as expanding the legal profession.[387]

But most tellingly, the JSRC also attempted to influence popular demand by encouraging greater public participation in the judicial system by recommending a jury system, or *saiban'in*. Since 2009, mixed panels of lay judges and professional judges (as principal) have adjudicated criminal cases in Japan.[388] While initial public surveys before implementation indicated that Japanese citizens were unsure and hesitant to participate, David Johnson's early assessment of the first two trials were cautiously optimistic and positive.[389] He noted that over 2,000 members of the public showed up for only 58 seats in the courtroom for one of the trials, which indicates that public hesitation and aversion to more direct participation may be overstated.[390] Figuratively and literally speaking, the "jury is still out" on this issue in Japan.

The jury system highlights that the public cannot only be a participant, but also an ally to courts in Japan. While courts by their nature lack strong enforcement measures, Haley finds that few formal sanctions and effective enforcement mechanisms for Japanese courts.[391] Therefore, when the court feels constrained and vulnerable to the executive or legislative branches due to its lack of formal enforcement measures, the courts may look to buttress informal sanctions by seeking the support of the population. It can do this by more effectively communicating its positions and rationale to the public through more detailed opinions. The key question is how responsive the Japanese judiciary will be to shifting public views.

Overall, whether it is the jury system or other reforms of the judicial system, the ultimate rationale underlying the JSRC was the recognition of the importance of public participation and

[384] Setsuo Miyazawa, "Law Reform, Lawyers, and Access to Justice," in Gerald Paul McAlinn, ed., *Japanese Business Law* (New York: Kluwer Law International, 2007), 39.
[385] Recommendations of the Justice System Reform Council – For a Justice System to Support Japan in the Twenty-first Century (June 12, 2001), available online at: http://www.kantei.go.jp/foreign/judiciary/2001/0612report.html)
[386] Foote (2007), Introduction, xxiii.
[387] Ibid, xxix-xxx.
[388] Ibid, xxxi.
[389] David T. Johnson, "Early Returns from Japan's New Criminal Trials," (Seminar Paper, 2010), 19.
[390] Ibid, 5.
[391] John O. Haley, "Sheathing the Sword of Justice in Japan: An Essay on Law without Sanctions," *Journal of Japanese Studies*, vol. 8, no. 2 (Summer 1982), 265-81.

popular sovereignty. The JSRC noted that the reforms "assume as a basic premise the people's transformation from governed objects to governing subjects and at the same time seek to promote such transformation. This is a transformation in which the people will break out of viewing the government as the ruler (the authority) and instead will take heavy responsibility for governance themselves, and in which the government will convert itself into one that responds to such people."[392] It is this spirit that is at the heart of this study's popular origins theory of judicial authority in Japan.

It is worth noting that there have been instances in which the public has been roused into action, increasing pressure on the courts, and in some instances, actually initiating real changes and responses from the legal system. Miyazawa's study of the recent rise of populism and victim's movement in criminal justice regarding juveniles and violent crimes in the late 1990s is a salient example.[393] In response to shocking events, Japanese citizens have demanded legislative changes (juvenile death penalty) and put pressure on courts to better heed public concerns about violent crimes.[394] No doubt, extreme populism raises concerns about fairness and constitutionality, especially in criminal law proceedings, but considering the entrenched conservative interests and passive track record of Japanese courts, sometimes more democratic and popular pressure on courts may be required to motivate courts and initiate real reforms in the Japanese legal system.

B. Causes of Weak Social Movements: Culture or Structure?

Why haven't Japanese social movement organizations been better at crafting and promoting their objectives through the law? This reflects the general perception that litigation rates in Japan are relatively low. Scholars have posited both cultural and structural explanations for the low levels of lawsuits. Henderson's seminal two-volume study of conciliation procedures from the days of the Tokugawa to the modern Japanese legal system connects the deep historical roots of conciliation proceedings in pre-modern Japan with more contemporary social preferences for negotiated settlement of disputes, rather than formal litigation, which highlights the relevance of the cultural and social context in which a legal system is imbedded.[395] This is related to the debate surrounding the relative lack of litigation in Japan, which Kawashima attributes to a socio-cultural background of hierarchy that prefers extra-judicial and informal means of dispute resolution.[396] In arguing that Kawashima's cultural argument of Japanese litigation aversion as a "myth," Haley asserts that there have historically been higher rates of litigation in the past (such as during the interwar years), which undermines any cultural propensity.[397] Instead, he finds that a lack of institutional capacity, especially the limited number

[392] Recommendations of the Justice System Reform Council, 4.
[393] Setsuo Miyazawa, "The Politics of Increasing Punitiveness and the Rising Populism in Japanese Criminal Justice Policy," *Punishment & Society*, vol. 10, no. 1 (2008), 47-77.
[394] Ibid.
[395] Dan Fenno Henderson, *Conciliation and Japanese Law: Tokugawa and Modern*, 2 vols. (Seattle: University of Washington Press, 1965).
[396] Takeyoshi Kawashima, "Dispute Resolution in Contemporary Japan," in Arthur Taylor von Mehren, ed., *Law in Japan: The Legal Order in a Changing Society* (Cambridge: Harvard University Press, 1963), 41-59.
[397] John Owen Haley, "The Myth of the Reluctant Litigant," *Journal of Japanese Studies*, vol. 4, no. 2 (Summer 1978), 359-90.

of judges, better accounts for the low rates of litigation.[398] In other words, popular demand is there, but institutional supply is low.

Conversely, Ramseyer and Nakazato argue that demand is low due to the high degree of predictability in the Japanese court judgments.[399] They examine proceedings of traffic accident insurance claims and find that parties usually settle rather than litigate, because of various institutional factors such as the absence of juries, discontinuous trial sessions, standardized decisions, and a unified body of national law.[400] It is questionable whether traffic insurance claims are representative of the broader litigation cases brought Japanese courts, but nevertheless, their analysis does bring up important points about the interaction of public demands for justice (as expressed through litigation) and the institutional capacity to meet those pressures.

3. Case Study: Japan and Article 9

The 2008 Nagoya High Court's decision in *Mori v. Japan* is important because it demonstrates how a concerted and well-organized legal and political campaign by civic groups and citizens can engender greater judicial authority and legalization of national security issues in Japan. Here, the public demands were partly successful, which is even more noteworthy given that Japanese courts are generally deferential in Article 9 cases. *Mori* is also different from other past cases regarding Article 9 in that the Nagoya High Court judges recognized an abstract right to live in peace, which highlights the infusion of individual rights issues into the broader Article 9 debate in Japan. Thus, the systemic values of statism and individualism again operate as powerful background forces as Japan struggles to clarify the contours of its sovereign and constitutional right to use force.

A. Previous Article 9 Cases

The constitutionality of Article 9 has been litigated only a handful of times in Japanese courts. The first major case was the *Sunakawa* case in 1959. In that case, defendants who were charged with destroying property involved in the construction of a runway extension for the United States air force military base challenged the constitutionality of an Administrative Agreement under the U.S.-Japan security treaty. The lower court agreed with the defendants and found the agreement unconstitutional. However, on direct appeal, the Japanese Supreme Court ruled that the political question doctrine barred jurisdiction and reversed the lower court's decision.[401]

Nevertheless, the Supreme Court addressed the Article 9 issue directly, reasoning that Japan retained an inherent right to self-defense: "certainly there is nothing in it which would deny the right of self-defense inherent in our nation as a sovereign power. The pacifism advocated in our Constitution was never intended to mean defenselessness or nonresistance."[402] Furthermore, the court actually argued that Japan's renunciation of war under Article 9 made a

[398] Ibid, 389.
[399] J. Mark Ramseyer and Minoru Nakazato, "The Rational Litigant: Settlement Amounts and Verdict Rates in Japan," *Journal of Legal Studies*, vol. 18, no. 2 (June 1989), 263-290.
[400] Ibid.
[401] Carl F. Goodman, *The Rule of Law in Japan: A Comparative Analysis*, 2nd rev. ed. (New York: Wolters Kluwer, 2008), 225.
[402] Sakata v. Japan, 13 Keisju 3225, Case No. 1959 (A) No. 710 (Dec. 16, 1959), available online at: http://www.courts.go.jp/english/judgments)

right to self-defense even more imperative: "we have determined to supplement the shortcomings in our national defense resulting therefrom by trusting in the justice and faith of the peace loving people of the world, and thereby preserve our peace and existence."[403]

This case was followed by three other cases. In the 1973 *Naganuma* case, residents of Hokkaido argued that the Ministry of Agriculture's withdrawal of preserve status for forest to allow the Japan Defense Agency to build a missile base on the island violated Article 9. The lower court agreed, but the Sapporo High Court reversed, arguing that the plaintiffs lacked standing to sue, a ruling that the Supreme Court affirmed.[404] Sixteen years later in the *Hyakuri Air Base* case (1989), the Supreme Court ruled that a party to a contract for sale of real property can rescind the contract from a non-paying buyer and subsequently sell to the SDF. The original buyer tried to argue that Article 9 created rights in third parties, which the Supreme Court rejected.[405] Finally, the *Okinawa Mandamus* case (1996) involved an SDF expropriation in which the governor of Okinawa tried to resist the stationing of troops on the island. The Supreme Court did not directly address the Article 9 issue, but rather found that the expropriation was for a valid national function and within executive discretion.[406]

This limited set of cases shows a pattern of lower courts challenging executive actions, decisions which were reversed by a Supreme Court that tried to avoid directly confronting the government on the Article 9 issues. The court used the political question doctrine or procedural issues to reach its desired result. However, Article 81 of the Constitution explicitly states that, the Supreme Court has judicial review over "any law, order, regulation or official act."[407] Therefore, the basis for the political questions doctrine is not as solid as it may seem; it may be more of a cover for a reluctant court. In addition, some of these cases show how private parties tried to use Article 9 as an indirect path for specific grievance, whether it involved property rights, contractual obligation, or expropriation, rather than aiming to challenge the constitutionality of SDF or other Article 9-related government policies. Another example of such a strategy is the *Atsugi Base Noise Pollution Case*, a lower court decision in which residents living near military bases sue for damages stemming from the noise pollution of airplanes taking off and landing. These plaintiffs have not been successful in using Article 9 for redress, although the Japanese government has attempted to compensate some of them for the noise.[408]

B. *Mori v. Japan* (2008)

This 2008 Nagoya High Court case is somewhat different from the past cases involving Article 9 on several fronts. First, contrary to some of the previous cases, the plaintiffs in *Mori* directly raised an Article 9 issue by challenging the dispatch of SDF forces to Iraq in 2003 to assist the U.S. in its war there. In the first ruling of its kind, the court agreed that the dispatch of Japanese SDF violated Article 9 of the Constitution. The court states that "such air transport activities of the Air SDF, at least in regards to transporting armed military personnel of the multi-national force to Baghdad…are integrated with the use of military force by another country,

[403] Ibid.
[404] Goodman, 226.
[405] Ibid, 227.
[406] Ibid, 229.
[407] Kenpo, art. 81.
[408] Ibid.

and must be evaluated as our use of military force as well."[409] Therefore, Judge Kunio Aoyama ruled that the SDF dispatch violated both the 2003 Iraq Special Measure Act, as well as Article 9(1) of the Constitution, but he did not issue an injunction to stop the dispatch.

Second, the *Mori* court recognized a "right to live in peace," as a legal right under the Constitution. The court cited the Preamble, Article 9, and Article 13 to emphasize that the right to live in peace was a concrete and fundamental human right under the Japanese Constitution.[410] This recognition of a right specifically related to Article 9 also differentiates this case from other previous cases, which focused mainly on general contract and property rights. This also signals the court's sensitivities to the concerns and grievances of the public; even though the court did not provide for damages as requested by the plaintiffs (in the amount of ¥10,000), the recognition of the right was an important symbolic victory in of itself.[411]

Finally and most importantly, this case demonstrates the potential for public demand and organized pressure on Japan's courts. The *Mori* case itself involved over 1,100 citizens, management of which is inherently difficult in Japan since the country does not have class actions suits. Furthermore, this case was part of a much broader litigation campaign in which 11 total cases were filed in district courts across Japan. In total, these cases involved over 5,700 plaintiffs and 800 attorneys, a campaign which one observer noted as "one of the largest coordinated litigation efforts in modern Japanese history."[412] Therefore, the *Mori* case is a very interesting example of the popular origins of judicial authority, as outlined in this paper.

But such campaigns are difficult and not always successful. For example, plaintiffs in the rest of the ten cases lost. One year after the Nagoya ruling, the Okayama District Court rejected a similar case, noting that the plaintiffs lacked standing; the court did not address the Article 9 claims.[413] This demonstrates the continuing relevance of structural influences of politics and institutions in the Japanese legal system. In this respect, two caveats involving institutional design are worth noting. Because no injunction or damages were provided, this case was a nominal victory for the government, even though the plaintiffs and the media interpreted it as a loss for the executive.[414] The implication is that the government will not appeal the ruling, which means that the Supreme Court cannot reverse its findings about Article 9 violations by the SDF in Iraq. Also, the Nagoya District Court judge (Judge Aoyama) who authored the *Mori* opinion retired before the judgment was delivered (another judge read the ruling), which may have insulated him from concerns about backlash from when he was writing the opinion.[415] Overall, the *Mori* case is important, especially regarding a war in Iraq that was not very popular in Japan. It shows how popular demands can influence courts in Japan and promote the legalization of national security issues.

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[409] Hudson Hamilton (translator), "*Mori v. Japan:* The Nagoya High Court Recognizes the Right to Live in Peace*," Pacific Rim Law & Policy Journal*, vol. 19, no. 3 (July 2010), 559.
[410] Ibid, 560-561.
[411] Ibid, 563.
[412] Ibid, 549.
[413] "Suit on Legality of SDF Iraq Dispatch Rejected," *Japan Times* (Apr. 24, 2009), available at: http://search.japantimes.co.jp/cgi-bin/nn20090424a6.html
[414] "Editorial: Major Ruling on SDF's Iraq Mission," *Japan Times* (Apr. 20, 2008), available at: http://search.japantimes.co.jp/cgi-bin/ed20080420a1.html
[415] Enats Goro, "Court Judged Japanese Forces to Iraq Unconstitutional," AWC International Secretariat (Jun. 1, 2008), available online at: http://www.peaceforlife.org/resources/usmilitarism/2008/08-0601-courtjudged.html

Conclusion

With the imposition of Article 9 in the postwar Constitution, discussions about national security have always been legalistic to some degree. However, for most of the decades following WWII, Japan has experienced moderate levels of legalization of national security, because both of the factors identified in this study, concentration of executive power and strength of social movement organizations, have been relatively weak or moderate in Japan. Because of the constraints of Article 9, the country is still trying to define its sovereignty. Nonetheless, recent developments, both in executive authority and civic organization, with respect to Article 9 show the possibilities of further legalization of national security in Japan.

Chapter 6

Implications of the Legalization of National Security

Chapter 6. Implications of the Legalization of National Security

This study has argued that there is a growing phenomenon in contemporary world politics toward the legalization of national security, which is driven by the interplay of two main factors: the concentration of executive authority and the strength of social movement organizations. There are several significant implications of this argument that challenges common understandings and theories about international law and the use of force, including the tendency to focus on the international level of analysis and compliance.

1. Levels of Analysis: The Internalization of International Law and the Externalization of Domestic Law

First, the increased process of legalization in national security cannot be addressed by examining only one level of analysis. Instead, this study demonstrates that a comprehensive and empirically useful analysis of the legality of the use of force must examine the interactions between the international and domestic spheres. While two-level game approaches have been common in international relations scholarship,[416] examination of the role of international legal norms on domestic politics has predominately been a "top-down" analysis. For example, Beth Simmons' work on the spread of international human rights law emphasizes how international law can affect elite agendas, support litigation, and serve as a catalyst for political mobilization.[417] A similar study examines how international human rights norms affect domestic state policies.[418] In addition, Martha Finnemore and Kathryn Sikkink outline the norm life cycle in three stages of norm emergence, "norm cascade," and internalization.[419] Similarly, Harold Koh argues that transnational actors play an important role in the internalization (i.e. obedience) of international legal norms.[420]

The common assumption of these studies is that international rules provide, and domestic laws receive. It is a passive notion of how domestic politics operates, and an immutable view of international norms. Whether domestic or international, laws are not static. But often times, international legal scholars hold international rules constant. Therefore, many schools of international law and IR theory have a difficult time explaining why and how change occurs in the international system. Descriptive and historical accounts of norm development and change may be instructive, but they are analytically unpersuasive since the precise mechanisms by which change occurs are not modeled. The focus on internalization begs the questions of *what* exactly is internalized and *how*? Internalization of international rules and norms is not doubt important, but it is only half the picture.

It is also important to recognize that domestic laws can have trickle up, or "externalization" effects on international norms, and it is only recently that some legal scholars

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[416] Robert Putnam, "Diplomacy and Domestic Politics: The Logic of Two-Level Games," *International Organization*, vol. 42, no. 3 (Summer 1988), 427-60; Peter Gourevitch, "The Second Image Reversed: The International Sources of Domestic Politics," *International Organization*, vol. 32, no. 4 (Autumn1978), 881-912.
[417] Beth A. Simmons, *Mobilizing for Human Rights: International Law in Domestic Politics* (Cambridge: Cambridge University Press, 2009), 14.
[418] Thomas Risse, Stephen C. Ropp, and Kathryn Sikkink, eds., *The Power of Human Rights: International Norms and Domestic Change* (Cambridge: Cambridge University Press, 1999).
[419] Martha Finnemore and Kathryn Sikkink, "International Norm Dynamics and Political Change," *International Organization*, vol. 52, no. 4 (Autumn 1998), 895-98.
[420] Koh (1997), 2646.

have shifted their focus on the domestic legal influences on international law.[421] This study has argued that one such role for domestic law has been to challenge and contradict international rules. Furthermore, such interaction already takes place when states sign international treaties, many of whom only ratify a treaty after listing reservations and declarations, which essentially permits them to opt-out of specific provisions of the treaty without negating the force of the entire treaty.[422]

As Nijman and Nollkaemper point out, examining how domestic law impacts international law reopens the old debate between monism and dualism in international law.[423] Monism views both levels of law as essentially parts of one coherent legal system, while dualism considers them separate and distinct.[424] This study's position that the question of legalization of nation security must be examined by looking at the relationship between international law and municipal law seems to favor one side of the debate over the other. For example, the call for a comprehensive examination seems to agree with monism, but conversely, the intellectual task itself seems to presuppose dualism and two distinct levels of analysis. However, the argument of this study does not endorse the analytical labels of monism or dualism. Instead, the crucial question is why the debate even exists. The origins of the debate between monism and dualism stem from the deeper tensions between state-centricism and normative commitments to the protection of individual rights. As Nijman and Nollkaemper recount, the debate arose because the dualist's objective of buttressing state sovereignty ran up against the monist's purpose of furthering individual rights and democracy to limit the power of states.[425] This partly explains the moralistic stance of early international legal scholars noted above, which Morgenthau and other realists considered misguided. The key takeaway is that the monism-dualist debate itself is an illustration and manifestation of the fundamental contradiction between statism and individualism that has increasingly driven the legalization of world politics.

This process of legalization involves both domestic and international law, regardless of whether one considers them parts of one comprehensive legal system or distinct systems. This monist-dualist dichotomy is simplistic at best, especially since the history of debate reveals more normative motivations, rather than analytical or theoretical rigor. Instead, this study proposes a dynamic, process-oriented perspective that encompasses both international law and municipal law and argues that a logic of contradiction drives legal change within and between the two levels of law.

2. Beyond Compliance

Another central issue is that of compliance, or more precisely the “compliance-bias” in much of international legal scholarship. Louis Henkin famously stated that "almost all nations observe almost all principles of international law and almost all of their obligations almost all the

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[421] Anne-Marie Slaughter and William Burke-White, "The Future of International Law is Domestic," in Andre Nolkaemper and Janne Nijman, eds., *New Perspectives on the Divide between International and National Law* (Oxford: Oxford University Press, 2007), 110-33.
[422] John King Gamble, "Reservations to Multilateral Treaties: A Macroscopic View of State Practice," *American Journal of International Law*, vol. 74, no. 2 (April 1980), 372-94.
[423] Janne Nijman and Andre Nollkaemper, "Introduction," in Andre Nolkaemper and Janne Nijman, eds., *New Perspectives on the Divide between International and National Law* (Oxford: Oxford University Press, 2007), 1-3.
[424] J.G. Starke, "Monism and Dualism in the Theory of International Law," *British Yearbook of International Law*, vol. 17, no. 66 (1936), 67.
[425] Nijman and Nollkaemper, 8-9.

time."[426] One natural impetus stemming from this observation is the need to examine why such obedience occurs, and several prominent scholars have posited their own arguments why compliance occurs, ranging from self-interest, transnational actor influence, and reputation.[427] However, while some may argue that it is the only a different side of the same coin, the more important and pertinent questions are: Why do states *not* comply with international law? And what are the implications for such non-compliance? In many respects, compliance is the "easy" question, which does not really get to the heart of whether rules and norms matter in influencing state behavior, because many factors may be at play when a state follows up on certain treaty obligation. Non-compliance is the more analytically challenging and empirically relevant question in examining the relevancy of law in context of the use of force.

The compliance bias in international legal scholarship is driven and motivated by normative and prescriptive agendas in favor of supporting international law, which are reformist rather than empirical in scope. Instead, the model of legalization in this study also examines non-compliance and considers how it can actually promote greater legalization. Here, legalization is not synonymous with compliance, because the process-oriented perspective outlined above in Chapter 1emphasizes how the law changes. This approach is different from traditional studies on non-compliance by skeptics and critics of international law, such as neorealists in international relations theory, who argue that international rules and institutions are simply epiphenomenal and have no real force in the world of material power politics and state interests.[428] This study argues the precise opposite, noting that the relationship between law and political power is much more complex in serving as both an instrument and constraint on state interests.

Both the "supporters" of international law who seek to emphasize the strength of international law and focus on compliance and the "skeptics" of international law who point out instances of contravention commit the similar faults. First, there is a strong normative strand running through the academic literature that obfuscates the empirical bases of their approaches. Second, both camps take a positivist perspective on the law. Compliance scholars pitch a stake in the ground on what "the law" states and try to examine a state's conforming behavior in relation to that law. Similarly, skeptics also point out the law, but they do so for the purposes of demonstrating how state interests always trample over such markers drawn in the sand; international rules bend under power. For the former group, the positivist notion is especially troublesome since compliance in one instance does not guarantee continued compliance. Compliance is not static, nor is the law. Historical case studies of one state's adherence to international law (for whatever reason) are empirically limited and theoretically suspect since they can immediately be negated by subsequent behavior that goes the other way.

In contrast to these approaches, this study posits a process-oriented theory to examine how state behavior, especially on the domestic law level, mutually interacts and changes such international rules. For example, confronted with the international ban on aggression, states have

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[426] Louis Henkin, *How Nations Behave: Law and Foreign Policy* (New York: Columbia University Press, 1979), 47 (original emphasis omitted).

[427] See Abram Chayes and Antonia Handler Chayes, *The New Sovereignty: Compliance with International Regulatory Agreements* (Cambridge: Harvard University Press, 1995); Harold Hongju Koh, "Review Essay: Why Do Nations Obey International Law? "*Yale Law Journal*, vol. 106 (1997); George W. Downs and Michael A. Jones, "Reputation, Compliance, and International Law," *Journal of Legal Studies*, vol. 31 (January 2002), S95-S114; Andrew T. Guzman, "A Compliance-Based Theory of International Law," *California Law Review*, vol. 90, no. 6 (December 2002), 1826-87; Oona A. Hathaway, "The Cost of Commitment," *Stanford Law Review*, vol. 55, no. 5 (May 2003), 1821-62.

[428] See Mearsheimer (1994-1995).

resorted to fight law with law to legitimatize their policy by directly contradicting international law. By passing domestic legislation aimed to skirt or neutralize Article 2(4), states have invited challenges to their national security policies, whether by actors citing international law or those countering with other domestic legal arguments. Thus, ironically, states have strengthened the legality of the use of force through an initial contravention of rules. That is the paradox of legalization, which runs counter to the intuition that laws are strengthened through compliance not violations. Similar to the logic of "micro-fracture" surgery in medicine, in which doctors create small breaks and holes in bone to spur bone growth and strength, it is not only through conformity that legal development occurs, but through incongruence as well.

This view of legal development abandons a static conception of law, which encompasses the interaction of both domestic and international laws on the use of force. This approach is different from another process-oriented perspective posited by Chayes and Chayes, who argue for a "managerial" approach to the international legal process.[429] While they also argue for an "iterative process" of justifications among the international legal regime actors regarding a treaty or international norm, the endpoint of their analysis once again is state compliance with international law (thus, the need for a "manager" to sustain the regime).[430] As they emphasize, the reputational motivation to "vindicat[e] the state's existence as a member of the international system" is the primary driver of compliance, or what they call the "new sovereignty."[431] Theirs is mainly a descriptive theory, which does not clarify the precise causal mechanisms or the logic that drives such a process.

Conversely, the approach of this study reveals a much more complex and interesting relationship between international and domestic law. Most assume that international law must be incorporated into and supported by municipal law to have effect, and much of the scholarship on the use of force has been heavily concerned only with the international level. However, there are significant legal developments relating to national security at home, which challenges a simplistic top-down notion of international legal constraints on the use of force by governments. If proponents of the democratic peace theory have shown us anything, it is that domestic institutions and internal politics matter greatly when it comes to issues regarding the use of force.[432]

The simultaneous legal contradictions on two levels of law may actually strengthen the original rationale (of monist scholars) of international law, which was to place limits on the use of force by states. But the nature of those limits may have been altered through this process of itself, and the strict prohibitions envisaged by Article 2(4) may be recast or reinterpreted to reflect changing norms in member states or across the international system. For example, the calls for humanitarian intervention (which is not explicitly authorized under Article 2(4)) stems from such clashes of legal interpretations, which may end up shifting what actions are permitted under international law. Such processes of legal development and change are key.

3. Does Law Ultimately Constrain or Promote the Use of Force?

In examining the interplay of law and politics in national security, this study must ultimately address the fundamental question: Does the law constrain or promote the use of force?

[429] See Chayes and Chayes.
[430] Ibid, 25.
[431] Ibid, 119.
[432] See Russett (1993).

Given the continuing centrality and importance of war and peace in the international system, gaining better insights on this question is obviously crucial. However, from the start, this study has eschewed the normative arguments that are so common in studies about the use of force, whether they support or oppose such state behavior. Instead, in proposing an analytical model informed by interdisciplinary thinking and evaluating several empirical case studies, this study has demonstrated that the picture is more nuanced and complex.

First, the identification of two main explanatory variables driving the legalization of national security provides some insight. The moves by executive power to rely on the law to advance policy objectives does indicate that law may promote the use of force, at least only initially. It is telling that in the United States, where the level of legalization is high, presidents have increasingly relied on the state secrets doctrine to try and squash litigation. Of course, there are legitimate reasons for not disclosing strategic information, but the reliance on the doctrine may also indicate executive recognition that any law-based arguments for policymaking do inherently produce counter-arguments and feed opposing interpretations, thus limiting executive discretion and freedom. If getting involved not only in litigation, but public debates about the legality of force constrains the executive, then we can tentatively conclude that ultimately in the long run, law does tend to restrain power rather than serve it. However, this study does not seek to argue for one definitive end result. Rather, it seeks to observe, point out, and explain through a general and coherent theory why a phenomenon is occurring.

4. Over-legalization?

This study does not take a normative stance on whether more law is good or bad. Rather, it seeks to explain the qualitative importance of legalization as a process in a politically significant issue area such as national security. However, if legalization of national security is happening in many countries throughout the world, there is an important issue of whether there can ever be too much law. Can there be "over-legalization" in the national security arena, and if so, what impact would it have? A parallel insight can be drawn from Kagan's work on adversarial legalism in the United States.[433] It is a common assumption or perception, whether confirmed or not, that the United States is over-litigated and over-legislated. The pathologies of adversarial legalism, such as inefficiencies, costs, and overly antagonistic culture are familiar. But some of these negative effects in the national security field may not have the same results, especially if one subscribes to a normative or moral position that using force is "bad." Because if over-legalization results in inefficient policymaking, the application or use of force may be more difficult to achieve, which takes us back to the previous discussion on the constraints of law.

Finally, the issue of over-legalization implies a certain quantitative metric. But as noted in the theoretical section above, this study puts forth a process-oriented argument, rather than a positivist one. This study is about the argumentative strategies and justifications used to promote policies and interests, specifically rationales based on legal principles and norms. So, while there may be concerns about too much law, there is less worry about too much legal argument. And if there is wide latitude in the indeterminacy of law, as legal realism and critical legal studies argue, the concern of too much legal argument is not problematic; indeed that is what is expected.

[433] See Kagan.

Conclusion

This study began with an observation and puzzle: There are increasing moves to addressing strategic policies through the law, but why would states turn to the law if one takes the common assumption that rules constrain political discretion? This study has argued that this "legalization of national security" is driven by the interplay of two main factors: the concentration of executive power and the strength of social movement organizations. The mutual relationship between these top-down and bottom-up forces are crucial to the process. The model of legalization posited here is a process-oriented one, which looks to the argumentative strategies and justifications offered by political actors to provide a rationale for their policies. Furthermore, these two explanatory variables represent a structural contradiction in the international system between the values of statism and individualism, and the fundamental nature of this contradiction explains why many countries and societies around the world are experiencing legalization. The law provides the actors the means to try and resolve the contradiction. The resulting process is what this study identifies as the legalization of national security.

The empirical case studies, involving the United States, China, Japan, and South Korea illustrate variations between countries along both factors. Countries, such as the United States and South Korea, that have moderate or relatively high concentration of executive power and strong social movement organizations, have witnessed higher levels of legalization in national security. Conversely, countries that show relative weaker executive power or social movement groups, such as China and Japan, have low or moderate levels of legalization.

Finally, the implications of the legalization of national security are significant. First, it pushes the literature on the use of force to examine both international and domestic laws. The dual level analysis is both theoretically persuasive and empirically valid. In addition, this perspective requires us to go beyond compliance theory in international law. Rather than normatively favoring compliance or selectively focusing on a narrow set of easy cases, this project seeks to explain how seeming contraventions of law can promote legalization, which is key to understanding many of the "harder" cases represented in the national security arena.

Bibliography

Abbott, Kenneth W, et al. "The Concept of Legalization," *International Organization*, vol. 54, no. 3 (Summer 2000), 401-19.

Amnesty International, "Republic of Korea: Time to Reform the National Security Law," (February 1999), available at: http://web.amnesty.org/library/Index/ENGASA250031999?open&of=ENG-KOR.

Arend, Anthony Clark. *Legal Rules and International Society.* New York: Oxford University Press, 1999.

Armstrong, Charles K., ed. *Korean Society: Civil Society, Democracy and the State*. New York: Routledge, 2006.

Armstrong, David, Theo Farrell, and Helene Lambert. *International Law and International Relations*, 2nd ed. Cambridge: Cambridge University Press, 2012.

Bartelson, Jens. *A Genealogy of Sovereignty*. Cambridge: Cambridge University Press, 1995.

Bassiouni, M. Cherif. "International Crimes: 'Jus Cogens' and 'Obligatio Erga Omnes,'" *Law and Contemporary Problems*, vol. 59 (Autumn 1996), 63-74.

Beck, Robert L., Anthony Clark Arend, and Robert D. Vander Lugt, eds. *International Rules: Approaches from International Law and International Relations*. New York: Oxford University Press, 1996.

Berger, Thomas U. *Cultures of Antimilitarism: National Security in Germany and Japan*. Baltimore: Johns Hopkins University Press, 1998.

Bickel, Alexander M. *The Least Dangerous Branch: The Supreme Court at the Bar of Politics*. New Haven: Yale University Press, 1986.

Bobbitt, Philip. "*Youngstown*: Pages from the Book of Disquietude," *Constitutional Commentary*, vol. 19 (2002), 3-35.

Boyle, Francis Anthony. *Foundations of World Order.* Durham: Duke University Press, 1999.

Brigham, John. "Right, Rage, and Remedy: Forms of Law in Political Discourse," *Studies in American Political Development*, vol. 2 (1988), 303-16.

Brown, Michael E., Sean M. Lynn-Jones, and Steven E. Miller, eds. *Debating the Democratic Peace*. Cambridge: MIT Press, 1996.

Brunsson, Nils. *The Organization of Hypocrisy: Talk, Decisions, and Actions in Organizations*, trans. Nancy Adler. New York: Wiley, 1998.

Butler, David and Austin Ranney, eds. *Referendums Around the World: The Growing Use of Direct Democracy*. Washington D.C.: AEI Press, 1994.

Buzan, Barry, Ole Waever, and Jaap De Wilde. *Security: A New Framework for Analysis*. Boulder: Lynne Rienner, 1997.

Byers, Michael, ed. *The Role of Law in International Politics: Essays in International Relations and International Law*. New York: Oxford University Press, 2000.

----------. *War Law: Understanding International Law and Armed Conflict*. New York: Grove Press, 2007.

Calabresi, Steven G. and Christopher S. Yoo. *The Unitary Executive: Presidential Power from Washington to Bush*. New Haven: Yale University Press, 2008.

Carr, Edward Hallet. The *Twenty Years Crisis, 1919-1939*. New York: Harper Collins, 1939.

Chang, Paul Y. and Gi-Wook Shin. "Democratization and the Evolution of Social Movements in Korea," in Paul Y. Chang and Gi-Wook Shin, eds. *South Korean Social Movements: From Democracy to Civil Society*. New York: Routledge, 2011, 3-18.

----------. eds. *South Korean Social Movements: From Democracy to Civil Society*. New York: Routledge, 2011.

Chayes, Abram. *The Cuban Missile Crisis: International Crises and the Role of Law*. New York: Oxford University Press, 1974.

Chayes, Abram and Antonia Handler Chayes. *The New Sovereignty: Compliance with International Regulatory Agreements*. Cambridge: Harvard University Press, 1995.

Christensen, Thomas J. *China's Anti-Secession Law and Developments Across the Taiwan Strait*, Hearing before the Subcommittee on Asia and the Pacific of the Committee on International Relations, House of Representatives, One Hundred Ninth Congress, First Session (Apr. 6, 2005). Full text at: http://commdocs.house.gov.

Clarke, Richard A. and Robert Knake, *Cyber War: The Next Threat to National Security and What to Do About It*. New York: Ecco, 2010.

Clausewitz, Carl von. *On War*, Michael Howard and Peter Paret, eds. and trans. Princeton: Princeton University Press, 1989.

Cohen, Dara Kay, Mariano-Florentino Cuellar, and Barry R. Weingast. "Crisis Bureaucracy: Homeland Security and the Political Design of Legal Mandates," *Stanford Law Review*, vol. 59 (December 2006), 673-759.

Cohen, Jerome Alan and Hungdah Chiu. *People's China and International Law: A Documentary Study*. Princeton: Princeton University Press, 1974.

Cronin, Thomas E. *Direct Democracy: The Politics of Initiative, Referendum, and Recall*. Lincoln: iUniverse, 1999.

Cumings, Bruce. *Korea's Place in the Sun: A Modern History*. New York: W.W. Norton & Company, 1997.

Dawson, C.A. and W.E. Getty, *Introduction to Sociology*. New York: The Ronald Press Company, 1935.

Diamant, Neil J.. Stanley B. Lubman, and Kevin O'Brien, eds. *Engaging the Law in China: State, Society, and Possibilities for Justice*. Stanford: Stanford University Press, 2005.

DiMaggio, Paul J. and Walter W. Powell. "The Iron Cage Revisited: Institutional Isomorphism and Collective Rationality in Organizational Fields," *American Sociological Review*, vol. 48 (April 1983), 147-160.

Dower, John W. *Embracing Defeat: Japan in the Wake of World War II*. New York: Norton, 2000.

deLisle, Jacques. "Legislating the cross-Strait Statute Quo? China's Anti-Secession Law, Taiwan Constitutional Reform and Referenda, and the United States' Taiwan Relations Act," in Peter C.Y. Chow, *Economic Integration, Democratization and National Security in East Asia; Shifting Paradigms in US, China and Taiwan Relations* (Northampton: Edward Elgar Publishing, 2007), 101-38.

de Toqueville, Alexis. *Democracy in America*, George Lawrence, trans. New York: Harper, 1969.

Downs, George W. and Michael A. Jones. "Reputation, Compliance, and International Law," *Journal of Legal Studies*, vol. 31 (January 2002), S95-S114.

Epp, Charles R. *The Rights Revolution: Lawyers, Activists, and Supreme Courts in Comparative Perspective*. Chicago: University of Chicago Press, 1998.

Finnemore, Martha. *National Interests in International Society*. Ithaca: Cornell University Press, 1996.

----------. "Norms, Culture, and World Politics: Insights from Sociology's Institutionalism," *International Organization*, vol. 50, no. 2 (Spring 1996), 325-47.

----------. "Are Legal Norms Distinctive?" *NYU Journal of International Law & Politics*, vol. 32 (1999-2000), 699-705.

Finnemore, Martha and Kathryn Sikkink. "International Norm Dynamics and Political Change," *International Organization*, vol. 52, no. 4 (Autumn 1998), 895-98.

Finnemore, Martha and Stephen J. Toope. "Alternative to 'Legalization': Richer Views of Law and Politics," *International Organization*, vol. 54, no. 3 (Summer 2001), 743-58.

Fisher, Louis. *Presidential War Power*. Lawrence: University Press of Kansas, 2004.

----------. "Lost Constitutional Moorings: Recovering the War Power," *Indiana Law Journal*, vol. 81 (2006), 1199-254.

Foote, Daniel H., ed. *Law in Japan: A Turning Point*. Seattle: University of Washington Press, 2007.

Franck, Thomas. "Who Killed Article 2(4)? Or Changing Norms Governing the Use of Force by States," American Journal of International Law, vol. 64, no. 5 (October 1970), 809-37.

----------. *The Power of Legitimacy Among Nations*. New York: Oxford University Press, 1990.

----------. *The Empowered Self: Law and Society in the Age of Individualism*. Oxford: Oxford University Press, 1999.

Franck, Thomas M., et. al. *Foreign Relations and National Security Law: Cases, Materials, and Simulations* (4th Ed.). New York: St. Paul: West, 2011.

Frank, Jerome. *Law and the Modern Mind*. New York: Coward-McCann, 1949.

Friedberg, Aaron L. *In the Shadow of the Garrison State: America's Anti-Statism and Its Cold War Grand Strategy*. Princeton: Princeton University Press, 2000.

Fuller, Lon. "The Forms and Limits of Adjudication," *Harvard Law Review*, vol. 92, no. 2 (December 1978), 353-409.

Gamble, John King. "Reservations to Multilateral Treaties: A Macroscopic View of State Practice," *American Journal of International Law*, vol. 74, no. 2 (April 1980), 372-94.

Ginger, Ann Fagan. *The National Lawyers Guild: From Roosevelt Through Reagan*. Philadelphia: Temple University Press, 1988.

Glennon, Michael J. *Constitutional Diplomacy*. Princeton: Princeton University Press, 1990.

Goedde, Patricia Goedde. "Lawyers for a Democratic Society (*Minbyun*): The Evolution of Its Legal Mobilization Process Since 1988," in Paul Y. Chang and Gi-Wook Shin, eds. *South Korean Social Movements: From Democracy to Civil Society*. New York: Routledge, 2011, 224-44.

Goldsmith, Jack L. *The Terror Presidency: Law and Judgment Inside the Bush Administration*. New York: Norton, 2009.

----------. *Power and Constraint: The Accountable Presidency after 9/11*. New York: Norton, 2012.

Goldsmith, Jack L. and Eric A. Posner, *The Limits of International Law*. New York: Oxford University Press, 2005.

Goldstein, Judith L., Miles Kahler, Robert O. Keohane, and Anne-Marie Slaughter, eds. *Legalization and World Politics*. Cambridge: MIT Press, 2001.

Goodman, Carl F. *The Rule of Law in Japan: A Comparative Analysis*, 2nd rev. ed. New York: Wolters Kluwer, 2008.

Gourevitch, Peter. "The Second Image Reversed: The International Sources of Domestic Politics," *International Organization*, vol. 32, vol. 4 (Autumn 1978), 881-912.

Graham, Edward M. and David M. Marchick, *U.S. National Security and Foreign Direct Investment*. Washington D.C: Institute for International Economics, 2006.

Gray, Christine D. *International Law and the Use of Force*, 3rd ed. New York: Oxford University Press, 2008.

Guzman, Andrew T. "A Compliance-Based Theory of International Law," *California Law Review*, vol. 90, no. 6 (December 2002), 1826-87.

----------. *How International Law Works: A Rational Choice Theory*. New York: Oxford University Press, 2010.

Hafner, Gerhard. "Pros and Cons Ensuing from Fragmentation of International Law," *Michigan Journal of International Law*, vol. 25 (Summer 2004), 849-64.

Haggard, Stephan and Beth A. Simmons. "Theories of International Regimes," *International Organization*, vol. 41, no. 3 (Summer 1987), 491-517.

Haley, John Owen. "The Myth of the Reluctant Litigant," *Journal of Japanese Studies*, vol. 4, no. 2 (Summer 1978), 359-90.

----------. "Sheathing the Sword of Justice in Japan: An Essay on Law without Sanctions," *Journal of Japanese Studies*, vol. 8, no. 2 (Summer 1982), 265-81.

----------. "The Japanese Judiciary: Maintaining Integrity, Autonomy, and the Public Trust," in Daniel H. Foote, ed., *Law in Japan: A Turning Point*. Seattle: University of Washington Press, 2007, 99-135.

Hamilton, Hudson, trans. "*Mori v. Japan:* The Nagoya High Court Recognizes the Right to Live in Peace," *Pacific Rim Law & Policy Journal*, vol. 19, no. 3 (July 2010), 549-63.

Hart, H.L.A. *The Concept of Law*, Clarendon Law Series, 3rd ed. New York: Oxford University Press, 2012.

Hart, Henry M. and Albert M. Sacks, eds. *The Legal Process: Basic Problems in the Making and Application of Law.* New York: Foundation Press, 1994.

Hathaway, Oona A. "The Cost of Commitment," *Stanford Law Review*, vol. 55, no. 5 (May 2003), 1821-62.

Hathaway, Oona Anne and Harold Hongju Koh, eds. *Foundations of International Law and Politics*. New York: Foundation Press, 2004.

Henderson, Dan Fenno. *Conciliation and Japanese Law: Tokugawa and Modern*, 2 vols. Seattle: University of Washington Press, 1965.

Henkin, Louis. "The Reports of the Death of Article 2(4) are Greatly Exaggerated," *American Journal of International Law*, vol. 65, no. 3 (July 1971), 544-8.

----------. *How Nations Behave: Law and Foreign Policy*. New York: Columbia University Press, 1979.

----------. *Constitutionalism, Democracy, and Foreign Affairs*. New York: Columbia University Press, 1990.

----------. *Foreign Affairs and the U.S. Constitution*. Oxford: Oxford University Press, 1997.

Higgins, Rosalyn. *Problems and Process: International Law and How We Use It*. New York: Oxford University Press, 1995.

Hirschl, Ran. *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism*. Cambridge: Harvard University Press, 2007.

Hogan, Michael J. *A Cross of Iron: Harry S. Truman and the Origins of the National Security State 1945-1954*. Cambridge: Cambridge University Press, 1998.

Hong, Joon Seok. "From the Streets to the Courts: PSPD's Legal Strategy and the Institutionalization of Social Movements," in Paul Y. Chang and Gi-Wook Shin, eds. *South Korean Social Movements: From Democracy to Civil Society*. New York: Routledge, 2011, 96-116.

Howard, Michael. *The Laws of War: Constraints on Welfare in the Western World*. New Haven: Yale University Press, 1997.

Huang, Jing and Xiating Li. *Inseparable Separation: The Making of China's Taiwan Policy*. Singapore: World Scientific, 2010.

Huntington, Samuel P. *American Politics: The Promise of Disharmony*. Cambridge: Harvard University Press, 1981.

----------. *The Third Wave: Democratization in the Late Twentieth Century*. Norman: University of Oklahoma Press, 1991.

Jacobson, Gary Jeffrey. *Constitutional Identity*. Cambridge: Harvard University Press, 2010.

Jervis, Robert. "Cooperation Under the Security Dilemma," *World Politics*, vol. 30, no. 2 (January 1978), 167-74.

Kagan, Robert A. *Adversarial Legalism: The American Way of Law*. Cambridge: Harvard University Press, 2003.

Kao, Mily Ming-Tzu. "The Referendum Phenomenon in Taiwan: Solidification of Taiwan Consciousness?" *Asian Survey*, vol. 44, no. 4 (August 2004), 591-613.

Katzenstein, Peter J. *Cultural Norms & National Security: Police and Military in Postwar Japan*. Ithaca: Cornell University Press, 1996.

Kawashima, Takeyoshi. "Dispute Resolution in Contemporary Japan," in Arthur Taylor von Mehren, ed. *Law in Japan: The Legal Order in a Changing Society*. Cambridge: Harvard University Press, 1963, 41-59.

Kennedy, David. *Of War and Law*. Princeton: Princeton University Press, 2006.

Kennedy, Duncan, "The Structure of Blackstone's Commentaries," *Buffalo Law Review*, vol. 28 (1979), 205-381.

Kim, Sookyung and Paul Y. Chang. "The Entry of Past Activists into the National Assembly and South Korea's Participation in the Iraq War," in Paul Y. Chang and Gi-Wook Shin, eds. *South Korean Social Movements: From Democracy to Civil Society*. New York: Routledge, 2011, 117-34.

Kluger, Richard. *Simple Justice*. New York: Alfred A. Knof, 1975.

Koh, Harold Hongju. *The National Security Constitution: Sharing Power After the Iron-Contra Affair*. New Haven: Yale University Press, 1990.

----------. "Review Essay: Why Do Nations Obey International Law?" *Yale Law Journal,* vol. 106 (1997), 2599-659.

Krasner. Stephen D., ed. *International Regimes*. Ithaca: Cornell University Press, 1983.

----------. *Sovereignty: Organized Hypocrisy*. Princeton: Princeton University Press, 1999.

Kratochwil, Friedrich V. *Rules, Norms, and Decisions: On the Conditions of Practical and Legal Reasoning in International Relations and Domestic Affairs*. Cambridge: Cambridge University Press, 1989.

Lampton, David M. ed., *The Making of Chinese Foreign and Security Policy*. Stanford: Stanford University Press, 2001.

Langbein, John H. *History of the Common Law: The Development of Anglo-American Legal Institutions*. Wolters Kluwer, 2009.

Law, David S. "The Anatomy of a Conservative Court: Judicial Review in Japan," *Texas Law Review*, vol. 87 (2008-2009), 1545-1593.

Linz, Juan J. and Alfred Stepan, "Toward Consolidated Democracies," *Journal of Democracy*, vol. 7, no. 2 (1996), 14-33.

Lipset, Seymour Martin, Martin Trow, and Stein Rokkan, "Cleavage Structures, Party Systems, and Voter Alignment: An Introduction," in Seymour Martin Lipset and Stein Rokkan, eds., *Party Systems and Voter Alignment: Cross-National Perspectives*. New York: Free Press, 1967, 1-63.

Kahn, Paul W. "Speaking Law to Power: Popular Sovereignty, Human Rights, and the New International Order," *Chicago Journal of International Law*, vol. 1 (2000), 1-19.

Kang, Won Taek. "Ideological Clash of Progressives and Conservatives in Korea," *Korea Focus* (September-October 2005), 63-80.

Karl N. Llewellyn, *Jurisprudence: Realism in Theory and Practice*. Chicago: University of Chicago Press, 1962.

Katyal, Neal K. and Laurence H. Tribe. "Waging War, Deciding Guilt: Trying the Military Tribunals," *Yale Law Journal*, vol. 111, no. 6 (April 2002), 1259-1310.

Kennedy, David. *International Legal Structures*. Nomos Verlagsgesellschaft, 1987.

Kennedy, Duncan, *Legal Education and the Reproduction of Hierarchy: A Polemic Against the System: A Critical Edition*. New York: New York University Press, 2004.

----------. "The Structure of Blackstone's Commentaries," *Buffalo Law Review*, vol. 28 (1979), 205-382.

Koskenniemi, Martti. *From Apology to Utopia: The Structure of International Legal Argument*. Cambridge: Cambridge University Press, 2005.

Koskenniemi, Martti and Paivi Leino. "Fragmentation of International Law? Postmodern Anxieties," *Leiden Journal of International Law*, vol. 15, no. 3 (2002), 553-79.

Kramer, Larry D. *The People Themselves: Popular Constitutionalism and Judicial Review*. New York: Oxford University Press, 2004.

Lee, Ching Kwan. *Against the Law: Labor Protests in China's Rustbelt and Sunbelt*. Berkeley: University of California Press, 2007.

Levine, Andrew. *Liberal Democracy: A Critique of Its Theory*. New York: Columbia University Press, 1982.

Macpherson, C.B. *Democratic Theory: Essays in Retrieval*. New York: Oxford University Press, 1973.

McAdam, Doug. "The Biographical Consequences of Activism," *American Sociological Review*, vol. 54, no. 5 (1989), 744-60.

McAdam, Doug, John D. McCarthy, and Mayer N. Zald, "Introduction: Opportunities, Mobilizing Structures, and Framing Processes - Toward a Synthetic, Comparative Perspective on Social Movements," in Doug McAdam and Mayer N. Zald, eds. *Comparative Perspective on Social Movements*. Cambridge: Cambridge University Press, 1996, 1-20.

McAlinn, Gerald Paul, ed. *Japanese Business Law*. New York: Kluwer Law International, 2007.

McCann, Michael W. "Legal Mobilization and Social Reform Movements: Notes on Theory and Its Application," *Studies in Law, Politics, and Society*, vol. 11 (1991), 225-54.

----------. *Rights at Work: Pay Equity Reform and the Politics of Legal Mobilization*. Chicago: University of Chicago Press, 1994.

----------. "Law and Social Movements," in Austin Sarat, ed., *The Blackwell Companion to Law and Society*. London: Blackwell Publishing, 2004, 506-22.

----------. *Law and Social Movements*. Burlington: Ashgate Publishing, 2006.

McDougal, Myres S. and Harold D. Lasswell. "The Identification and Appraisal of Diverse Systems of Public Order," *American Journal of International Law*, vol. 53, no. 1 (January 1959), 1-29.

Mearsheimer, John J. "The False Promise of International Institutions," *International Security*, vol. 19, no. 3 (Winter 1994-1995), 5-49.

----------. *The Tragedy of Great Power Politics*. New York: Norton, 2001.

Milhaupt, Curtis J. and Mark D. West, "Institutional Change and M&A in Japan," in Curtis J. Milhaupt, ed. *Global Market, Domestic Institutions: Corporate Law and Governance in a New Era of Cross-Border Deals*. New York: Columbia University Press, 2003, 295-338.

Minkahyup Supporters of Prisoners of Conscience. "History of Changes to the National Security Law." My translation from Korean text (*Gukga Boanbop Byunchunsa*), available at: http://www.yangsimsu.or.kr/boanbub/byun_chun.htm.

Miyazawa, Setsuo. "Lawyering for the Underrepresented in the Context of Legal, Social, and National Institutions: The Case of Japan" in Louise G. Trubek and Jeremy Cooper, eds. *Educating for Justice Around the World*. Brookfield: Vt, 1999, 19-50.

----------. "The Politics of Judicial Reform in Japan: The Rule of Law at Last?" *Asia Pacific Law & Policy Journal*, vol. 2, no. 2 (Spring 2001), 89-121.

----------. "Law Reform, Lawyers, and Access to Justice," in Gerald Paul McAlinn, ed. *Japanese Business Law*. New York: Kluwer Law International, 2007, 39-89.

----------. "The Politics of Increasing Punitiveness and the Rising Populism in Japanese Criminal Justice Policy," *Punishment & Society*, vol. 10, no. 1 (2008), 47-77

Morgenthau, Hans J. *Politics Among Nations: The Struggle for Power and Peace*. Boston: McGraw Hill, [1948] 1993.

Mourtada-Sabbah, Nada and Bruce E. Cain, eds. *The Political Question Doctrine and the Supreme Court of the United States*. Berkeley: Lexington Books, 2007.

Nicolaidis, Kalypso and Joyce L. Tong. "Diversity of Cacophony? The Continuing Debate Over New Sources of International Law," *Michigan Journal of International Law*, vol. 24 (Summer 2004), 1349-75.

Nolkaemper, Andre and Janne Nijman, eds. *New Perspectives on the Divide between International and National Law*. Oxford: Oxford University Press, 2007.

O'Brien, Kevin J. and Lianjiang Li. "Suing the Local State: Administrative Litigation in Rural China," *The China Journal*, no. 51 (January 2004), 75-96.

----------. *Rightful Resistance in Rural China*. Cambridge: Cambridge University Press, 2006.

O'Connell, Mary Ellen, ed. *International Law and the Use of Force: Cases and Materials*, 2nd ed. New York: Foundation Press, 2009.

Oda, Hiroshi. *Japanese Law*, 2nd ed. New York: Oxford University Press, 2000.

Ozawa, Ichiro. *Blueprint for a New Japan: the Rethinking of a Nation*. Tokyo: Kodansha International, 1994.

Pauwelyn, Joost. "Bridging Fragmentation and Unity: International Law as a Universe of Inter-Connected Islands," *Michigan Journal of International Law*, vol. 25 (Summer 2004), 903-14.

Pekkanen, Robert. "Molding Japanese Civil Society: State-Structured Incentives and Patterning of Civil Society," in Frank J. Schwartz and Susan J. Pharr, eds., *The State of Civil Society in Japan*. Cambridge: Cambridge University Press, 2003, 116-34.

Peters, B. Guy. *The Future of Governing: Four Emerging Models* (Lawrence: University of Kansas Press, 2001).

Pharr, Susan. "Conclusion: Targeting by an Activist State: Japan as a Civil Society Model," in Frank J. Schwartz and Susan J. Pharr, eds. *The State of Civil Society in Japan*. Cambridge: Cambridge University Press, 2003, 316-36.

Philpott, Daniel. *Revolutions in Sovereignty: How Ideas Shaped Modern International Relations.* Princeton: Princeton University Press, 2001.

Pierson Paul and Theda Skocpol, "Historical Institutionalism in Contemporary Political Science," in Ira Ketznelson and Helen V. Milner, eds. *Political Science: State of the Discipline.* New York: Norton, 2003.

Posner, Eric A. and Adrian Vermeule. *The Executive Unbound: After the Madisonian Republic*. New York: Oxford University Press, 2010.

Putnam, Robert. "Diplomacy and Domestic Politics: The Logic of Two-Level Games," *International Organization,* vol. 42, no. 3 (Summer 1988), 427-60.

Ramsey, Michael D. *The Constitution's Text in Foreign Affairs*. Harvard: Harvard University Press, 2007.

Ramseyer, J. Mark and Minoru Nakazato. "The Rational Litigant: Settlement Amounts and Verdict Rates in Japan," *Journal of Legal Studies*, vol. 18, no. 2 (June 1989), 263-90.

Ramseyer, J. Mark and Eric B. Rasmusen. "Why Are Japanese Judges So Conservative in Politically Charged Cases?" *American Political Science Review*, vol. 95, no. 2 (June 2001), 331-44.

----------. *Measuring Judicial Independence: The Political Economy of Judging in Japan*. Chicago: University of Chicago Press, 2003.

Ramseyer, J. Mark and Frances McCall Rosenbluth. *Japan's Political Marketplace*. Cambridge: Harvard University Press, 1997.

Ratner, Steven R. "*Jus Ad Bellum* and *Jus in Bello* After September 11," Notes and Comments, *The American Journal of International Law*, vol. 96, no. 4 (October 2002), 905-21.

Risse, Thomas, Stephen C. Ropp, and Kathryn Sikkink, eds. *The Power of Human Rights: International Norms and Domestic Change*. Cambridge: Cambridge University Press, 1999.

Rose-Ackerman, Rose and Peter L. Lindseth, eds. *Comparative Administrative Law*. Edward Elgar, 2011.

Rosenberg, Gerald N. "Positivism, Interpretivism, and the Study of Law," *Law and Social Inquiry*, vol. 21 (1996), 435-55.

Ruben, Albert. *The People's Lawyer: The Center for Constitutional Rights and the Fight for Social Justice, From Civil Rights to Guantanamo*. New York: Monthly Review Press, 2011.

Russett, Bruce M. *Grasping the Democratic Peace: Principles for a Post-Cold War World*. Princeton: Princeton University Press, 1993.

Sands, Philippe. *Lawless World: America and the Makin and Breaking of Global Rules from FDR's Atlantic Charter to George W. Bush's Ilegal War*. New York: Viking, 2005.

Satoh, Jun-ichi. "Judicial Review in Japan: An Overview of the Case Law and an Examination of Trends in the Japanese Supreme Court's Constitutional Oversight," *Loyola Law Review*, vol. 41 (Winter 2008), 602-22.

Schlesinger Jr., Arthur M. *The Imperial Presidency*. New York: Mariner Books, 2004.

Schwartz, Frank J. and Susan J. Pharr, eds. *The State of Civil Society in Japan*. Cambridge: Cambridge University Press, 2003.

Shapiro, Martin M. "Political Jurisprudence," *Kentucky Law Journal*, vol. 52 (1963-1964), 294.

----------. *Courts: A Comparative and Political Analysis*. Chicago: University of Chicago Press, 1981.

Shapiro, Martin and Alec Stone Sweet. *On Law, Politics & Judicialization*. Oxford: Oxford University Press, 2002.

Shin, Gi Wook. *Ethnic Nationalism in Korea: Genealogy, Politics, and Legacy*, Stanford: Stanford University Press, 2006.

Shirk, Susan L. *China: Fragile Superpower*. New York: Oxford University Press, 2007.

Sikkink, Kathryn. *The Justice Cascade: How Human Rights Prosecutions are Changing World*

Politics. New York: Norton, 2011.

Silverstein, Gordon. *Imbalance of Powers: Constitutional Interpretation and the Making of American Foreign Policy*. Oxford: Oxford University Press, 1997.

Simmons, Beth A., "The Legalization of International Monetary Affairs," *International Organization* , vol. 54, no. 3 (Summer 2000), 573-602.

----------. *Mobilizing for Human Rights: International Law in Domestic Politics*. Cambridge: Cambridge University Press, 2009.

Simmons, Beth A. and Richard H. Steinberg, eds., *International Law and International Relations*. Cambridge: Cambridge University Press, 2006.

Slaughter, Anne-Marie and William Burke-White. "The Future of International Law is Domestic," in Andre Nolkaemper and Janne Nijman, eds. *New Perspectives on the Divide between International and National Law.* Oxford: Oxford University Press, 2007, 110-33.

Starke, J.G. "Monism and Dualism in the Theory of International Law," *British Yearbook of International Law*, vol. 17, no. 66 (1936), 66-81.

Steiner, Henry J., Philip Alston, and Ryan Goodman, *International Human Rights in Context: Law, Politics, Morals.* Oxford: Oxford University Press, 2007.

Stuart, Douglas T. *Creating the National Security State: A History of the Law that Transformed America*. Princeton: Princeton University Press, 2008.

Swaine, Michael. *The Role of Chinese Military in National Security Policymaking*, rev. ed. Santa Monica: RAND Center for Asia-Pacific Policy, 1998.

Sweet, Alec Stone, *Governing with Judges: Constitutional Politics in Europe*. New York: Oxford University Press, 2000.

Tamanaha, Brian Z. *On the Rule of Law: History, Politics, Theory*. Cambridge: Cambridge University Press, 2004.

Tarrow, Sidney. *Power in Movement: Collective Action, Social Movements and Politics*. Cambridge: Cambridge University Press, 1998.

Tilly, Charles and Lesley J. Wood, *Social Movements, 1768-2008: Second Edition*. New York: Paradigm, 2009.

Tushnet, Mark V. *The NAACP's Legal Strategy Against Segregated Education, 1925-1950*. Chapel Hill: University of North Carolina Press, 1987.

----------. "Survey Article: Critical Legal Theory (without Modifiers) in the United States," *Journal of Political Philosophy*, vol. 13, no. 1 (March 2005), 99-112.

Tyler, Tom R., *Why People Obey the Law.* Princeton: Princeton University Press, 2006.

Unger, Roberto Mangabeira, *The Critical Legal Studies Movement*. Cambridge: Harvard University Press, 1983.

Upham, Frank K. *Law and Social Change in Postwar Japan*. Cambridge: Harvard University Press, 1987.

Walker, Samuel. *In Defense of American Liberties: A History of the ACLU*. Oxford: University of Oxford Press, 1991.

Waltz, Kenneth, *The Theory of International Politics*. Reading: Addison-Wesley, 1979.

----------. "Reflections on *Theory of International Politics*: A Response to My Critics," in Robert O. Keohane, ed. *Neorealism and its Critics*. New York: Columbia University Press, 1986.

Walzer, Michael, *Just and Unjust Wars: A Moral Argument with Historical Illustrations*. New York: Basic Books, 2006.

Weber, Max. *Politics as a Vocation*, in David S. Owen, Tracy B. Strong, and Rodney Livingstone, eds. *The Vocation lectures: Science as a Vocation, Politics as a Vocation*. Indianapolis: Hackett, 2004).

Wei, Chunjuan Nancy. China's Anti-Secession Law and Hu Jintao's Taiwan Policy, *Yale Journal of International Affairs,* vol. 5, no. 1 (Winter 2010), 112-27.

Weiner, Alan S. "The Use of Force and Contemporary Security Threats: Old Medicine or New Ills?" *Stanford Law Review,* vol. 59, no. 2 (2006), 482.

Wendt, Alexander. *Social Theory of International Politics*. Cambridge: Cambridge University Press, 1999.

Wittes, Benjamin. *Law and the Long War: The Future of Justice in the Age of Terror*. New York: Penguin, 2008.

----------., ed. *Legislating the War on Terror: An Agenda for Reform*. Washington D.C.: Brookings, 2009.

Yang, Kun. "Judicial Review and Social Change in Korean Democratizing Process," *The American Journal of Comparative Law,* vol. 41 no. 1 (Winter 1993), 1-8.

Yoo, John. *The Powers of War and Peace: The Constitution and Foreign Affairs After 9/11*.

Chicago: University of Chicago Press, 2005.

----------. *Crisis and Command: A History of Executive Power from George Washington to George W. Bush*. New York: Kaplan, 2010.

Yoon, Dae Kyu. *Law and Political Authority in South Korea*. Seoul: Kyungnam University Press, 1990.

Yoshihide Soeya, David A. Welch, Masayaki Tadokoro, eds. *Japan as a "Normal Country"?: A Nation in Search of Its Place in the World*. Toronto: University of Toronto Press, 2011.

Young, Ernest, "Institutional Settlement in a Globalizing Judicial System," *Duke Law Journal*, vol. 54 (March 2005), 1143-261.

Zegart, Amy B. *Flawed by Design: The Evolution of the CIA, JCS, and NSC*. Stanford: Stanford University Press, 1999.

Zou, Keyuan, "Governing the Taiwan Issue in Accordance with Law: An Essay on China's Anti-Secession Law," *Chinese Journal of International* Law, vol. 4, no. 2 (2005), 455-63.

Legal Documents

Administrative Procedure Law of the People's Republic of China (PRC) (April 4, 1989), (Full text at: http://en.chinacourt.org/public/detail.php?id=2695).

Anti-Secession Law, Third Session of the Tenth National People's Congress (Mar. 24, 2005), (Full text at: http://www.china.org.cn/english/2005lh/122724.htm).

Constitution of the People's Republic of China (PRC), (Full text at: http://english.peopledaily.com.cn/constitution/constitution.html).

Constitution of the Republic of China (ROC). (Full text at: http://english.president.gov.tw/Default.aspx?tabid=1107)

Constitution of the Republic of Korea (ROK). (Full text at: http://english.ccourt.go.kr/home/att_file/download/Constitution_of_the_ Republic_of_Korea.pdf)

Constitution of the United States of America. (Full text at: http://www.archives.gov/exhibits/charters/constitution_transcript.html)

National Security Law of the Republic of Korea. (Unofficial English translations available at: http://www.kimsoft.com/Korea/nsl-en.htm)

Taiwan Relations Act, H.R. 2470, sect. 2(4)(2).

(Full text at: http://www.ait.org.tw/en/taiwan-relations-act.html/#Sec6).

United Nations Charter.
(Full text at: http://www.un.org)

Government and Official Documents

Four-Point Guidelines on Cross-Straits Relations Set Forth by President Hu Jintao, Third Session, 10th National People's Congress and Chinese People's Political Consultative Conference (Mar. 4, 2005), available at: http://www.china.org.cn/english/2005lh/121825.htm.

Mainland Affairs Council, Republic of China, *ROC Government Q&A on China's Drafted "Anti-Separation Law,"* (Mar. 1, 2005), available at: http://www.mac.gov.tw/ct.asp?xItem=50279&ctNode=5910&mp=3&xq_xCat=2005).

National Human Rights Commission of the Republic of Korea. *Human Rights Issues Arising from Application of the National Security Law* (February 2, 2004). My translation from Korean text.

----------. "NHRC Recommends Abolishment of the National Security Law," (August 8, 2004), available at: http://www.humanrights.go.kr/eng/nhrc/news/nhrc02_01_view.jsp.

Recommendations of the Justice System Reform Council – For a Justice System to Support Japan in the Twenty-first Century (June 12, 2001), available online at: http://www.kantei.go.jp/foreign/judiciary/2001/0612report.html)

White Paper on China's National Defense in 2010.
(Full text at: http://www.china.org.cn/government/whitepaper/node_7114675.htm)

White Paper on the Taiwan Question and Reunification of China (P.R.C.)(Aug. 1993).
(Full text at: http://www.china.org.cn/e-white/taiwan/index.htm).

Wang Zhaoguo, *Draft China Law Explained*, China Daily (Feb. 7, 2011).
(Full text at: http://www.chinadaily.com.cn/english/doc/2005-03/08/content_422875.htm).

World Trade Organization (WTO), "Chronological List of Dispute Cases," h ttp://www.wto.org/english/tratop_e/dispu_e/dispu_status_e.htm

----------. *A Handbook on the WTO Dispute Settlement System* (Cambridge: Cambridge University Press, 2004).