

TIGHTWIRE OF NATIONAL INTERESTS AND PUBLICITY IN  
THE EVOLVED PROCESS OF DEMOCRATIZATION AND  
CONSTITUTIONAL TRANSFORMATION: LESSONS FROM  
TAIWAN

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## ABSTRACT

*Achieving an optimal balance between government secrecy and democratic accountability has led to long-standing questions in the discussion of contemporary constitutionalism. To address the complex contemporary phenomenon of government secrecy within a democratic society, a more in-depth understanding of its tension with democratic accountability and transparency is essential. This article provides a descriptive overview of Taiwan's legal system, its legal implications in relation to government secrecy, and its normative implications. The article begins with a historical background of Taiwan's legal system, focusing on legal reform as it relates to government secrecy. The article investigates the complex interactions between the administrative, legislative, and judicial branches with regard to the effective control of government classified information. This article argues that the democratization that began in the late 1980s directly facilitated the institutionalization and legalization of national security and intelligence agencies. The analysis identifies two milestones accomplished by Presidents Lee Teng-hui and Chen Shui-bian, each of whom took actions to dismantle the one party-state of the Kuomintang ("KMT") and to*

*implement democratic accountability under constitutionalism. They achieved this by creating an institutional and proactive balance between the competing interests of national security and public information disclosure and transparency. The judiciary tends to give broad respect to the president's authority on diplomatic affairs and intelligence operations, enabling the president to exercise the doctrine of executive privilege. Such judicial deference to the presidency also extends as far as presidents' discretionary entitlement to establish secret funds to boost overseas intelligence gathering and facilitate diplomacy.*

## I. INTRODUCTION

### A. Government Secrecy, Democratic Accountability, and Law

Is it possible to achieve an optimal balance between government secrecy and democratic accountability? Secret law, defined here as legal authorities that allow government action that is not open to public scrutiny,<sup>1</sup> has been condemned for as long as it has existed. It is commonly linked to oppressive regimes. People in modern democratic societies believe intuitively that excessive secrecy limits access to official information, which impedes public participation in the deliberative process and inhibits citizens and lawmakers from holding governmental agencies accountable for vigorous overreaching of executive power.<sup>2</sup>

Over the past several decades, the use of government secrecy has led to intense disputes over laws and policies.<sup>3</sup> This phenomenon has been associated particularly with various high-profile counterterrorism measures, from drone strikes to surveillance programs. People have questioned these secretive measures and their operations, which seem to be inconsistent with the separation of powers and democratic

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<sup>1</sup> This article focuses on “secret laws and their legal interpretation.” It excludes discussion of secret practices and facts such as the use of covert actions or secretive intelligence operations. Furthermore, this study seeks to characterize government secrecy into three types: executive secrecy, congressional secrecy, and judicial secrecy.

<sup>2</sup> RAHUL SAGAR, SECRETS AND LEAKS: THE DILEMMA OF STATE SECRECY 1 (2013); see HEIDI KITROSSER, RECLAIMING ACCOUNTABILITY: TRANSPARENCY, EXECUTIVE POWER, AND THE U.S. CONSTITUTION 1–4 (2015).

<sup>3</sup> See generally David E. Pozen, *Deep Secrecy*, 62 STAN. L. REV. 257, 286 (2009); SAGAR, *supra* note 2; Dakota Rudesill, *Coming to Terms with Secret Law*, 7 HARV. NAT'L SEC. J. 241 (2015); Jonathan Hafetz, *A Problem of Standards: Another Perspective on Secret Law*, 57 WM. & MARY L. REV. 2141 (2016).

accountability. For instance, some have argued that government secrecy regarding the use of secret prisons, unwarranted surveillance, and numerous other enhanced interrogation activities in the United States prevented members of Congress from acquiring necessary information, undermining meaningful accountability.<sup>4</sup> Furthermore, some fear that it has prevented courts from adopting an active approach to addressing cases brought by citizens and foreigners who have been subject to warrantless wiretaps, detention, and torture by the United States.<sup>5</sup>

At the same time, there is a near-universal presumption that some government secrecy is necessary to ensure national security, as it can “prevent bad actors from accessing information that could be used to harm national interests or to reduce the effectiveness of government policies.”<sup>6</sup> In other words, some secret laws and a degree of interpretive capacity enable governments to employ secrecy when necessary for administrative matters, such as concealing plans and vulnerabilities from adversaries, acting agilely and decisively against threats, and protecting sources and methods used in intelligence gathering.<sup>7</sup> Additionally, secrecy is essential to effective governance.<sup>8</sup> As scholarly literature suggests, if all governance was legally mandated to be fully transparent, entirely conducted out in the open, governments could not conceal the full range of discussions and deliberations that inform alternative potential government actions. Those measures include options considered, debated, or rejected, as well as the standard by which and to what degree governments conduct risk assessments and the full slate of negotiated proposals between government and non-government actors.<sup>9</sup>

To address the complex contemporary phenomenon of government secrecy within a democratic society, a more in-depth understanding of why government secrecy has consistently been regarded as an anti-democratic symbol is required. An understanding of its relationship to the concepts of transparency and democracy is also crucial. If

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<sup>4</sup> See generally Sudha Setty, *Surveillance, Secrecy, and the Search for Meaningful Accountability*, 51 STAN. J. INT'L L. 69 (2015).

<sup>5</sup> DAVID COLE & JAMES X. DEMPSEY, TERRORISM AND THE CONSTITUTION 178–218 (2006); Sudha Setty, *The Rise of National Security Secrets*, 44 CONN. L. REV. 1563 (2012); see generally DAVID RUDENSTINE, THE AGE OF DEFERENCE: THE SUPREME COURT, NATIONAL SECURITY, AND THE CONSTITUTIONAL ORDER (2016).

<sup>6</sup> Pozen, *supra* note 3, at 277.

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

the reality is that some secrecy must exist for the government to function effectively, how can that secrecy be managed to ensure that it is being used only for the purpose of furthering national security and not to undermine democracy through secret actions leaning toward authoritarianism.

### *B. Drawing on Constitutional Experience in Taiwan*

Admittedly, there is a tension between the idea of government transparency and the need to protect vital information. What types of information do governments protect on national security grounds? What factors will trigger a country to adopt an open government information policy as opposed to a closed information policy? By identifying and analyzing the evolved process of democratization in Taiwan, this article examines Taiwan's treatment of national security and transparency to explore how the Taiwanese government fulfills its institutional function of checking the executive branch's use of secrecy. To do so, it addresses issues such as how congressional oversight operates in Taiwan, and how the Grand Justices, Taiwan's judicial organ entrusted to resolve disputes between constitutional actors and preserve democratic principles, leverage the dynamic between presidential power and congressional oversight.

As Taiwan started on its path toward political liberalization and democratization in the 1980s, the administrative branch's approach to government secrecy changed accordingly. As a result of seven rounds of constitutional revision, which altered the scope of presidential and executive authority,<sup>10</sup> the process of classifying information changed

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<sup>10</sup> In the late 1980s, Taiwan began its path toward political liberalization and democratic reform. The democratization of Taiwan began with a series of measures undertaken by President Chiang Ching-kuo, Chiang Kai-shek's successor. The most important first step toward democratization was the lifting of martial law in July of 1987. Upon Chiang Ching-kuo's death, Vice President Lee Teng-hui succeeded him as president in accordance with the Constitution. Owing to his symbolic status as native Taiwanese, Lee's succession faced an "undercurrent of opposition" from the Kuomintang ("KMT") party. Viewing democracy as the most powerful and commonly accepted weapon, both to win international support for Taiwan and to deflect Beijing's demands for unification, Lee implemented three major reforms to thoroughly reshape Taiwan's political environment. President Lee accelerated political reforms and constitutional amendments to implement democracy. Beginning in 1991, Taiwan undertook seven rounds of constitutional revisions. These revisions took place in 1991, 1992, 1994, 1997, 1999, 2000, and 2005. First, the changes re-inforced democratic representation by ending "tenured representatives" and extending full suffrage to Taiwan's residents. The legitimacy of tenured representatives had aroused intense debate again after President Lee took office. In the landmark decision *J.Y. Interpretation No. 261*, the Constitutional Court ordered all tenured

from one that lacked legal authorization to one that was legally authorized and at least partially constrained. Furthermore, the transformation empowered the judicial and legislative branches to hold the executive branch accountable through a series of constitutional interpretations.

Legal reforms of government secrecy and the procedures by which the executive branch classifies and declassifies government documents are closely associated with the political transformation from authoritarian rule to a period of democratization. Due to the high level of state control in Taiwan during the authoritarian period,<sup>11</sup> no statutory constraints regulated the creation of classified information. This phenomenon gradually changed in the late 1980s during the democratic transition. Democratization paved a foundation of law and order in the legalization of government secrecy and raised political leaders' awareness about the significance of balancing publicity and transparency.

In Section II, this article will explore legal reforms undertaken between the late 1980s and the 1990s, during which two transfers of power took place between presidents of different political parties. This will reveal the extent to which presidents' partisanship and their

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representatives to retire by the end of 1991. Notably, in 1994, a constitutional amendment explicitly provided that the president and vice president must be elected directly by the citizens, thus giving the president democratic legitimacy. At the same time, direct elections also entrusted the president with more authority and greater legitimacy to set policy in various areas, including national defense, diplomacy, and cross-strait relations. Under the revisions of 1994 and 1997, the approval of personnel orders by the President no longer required the head of the Legislative Yuan premier's countersignature. In addition, the 1997 constitutional revision removed the requirement of legislative consent for the President's appointment of the premier, allowing the premier to serve at the will of the President. Thus, the President became the commander-in-chief as well as the head of the nation of Taiwan. As Taiwanese constitutional law scholar Jiunn-rong Yeh explains, after three rounds of constitutional revision in four years, the Constitution had undergone a "quiet" reinforcement of representation—necessary for a system of modern Taiwanese democratic governance. Yet in practice, the President retained and even acquired more power under the Constitution. *See generally* JIUNN-RONG YEH, *THE CONSTITUTION OF TAIWAN: A CONTEXTUAL ANALYSIS*, 60–62 (2016); *see also* Nuno Garoupa, Veronica Grembi & Shirley Ching-ping Lin, *Explaining Constitutional Review in New Democracies: The Case of Taiwan*, 20 PAC. RIM L. & POL'Y J. 1, 10 (2011).

<sup>11</sup> The authoritarian regime in Taiwan is generally defined as the period between 1945 and 1986. This period began with Japan's capitulation at the end of the Pacific War in August of 1945 and its termination of its colonization of Taiwan. On July 15, 1987, martial law was declared void. Taiwan began its pathway toward political reform and democratization and cross-strait relations under President Lee Teng Hui. *See* Gunter Schubert, *Taiwan's Political Evolution from Authoritarianism to Democracy and the Development of Cross-Strait Relations*, in *EUROPEAN PERSPECTIVES ON TAIWAN* 66–83 (2012).

political affiliations influence the administrative branch's attitude toward the legalization of government secrecy and classified national security information. Next, treating those democratic transitions as a watershed, Section II also introduces the legal system of classified information, considering its legislative purpose, scope, and substantive and procedural limits. In Section III, this article will identify the existing tools through which the legislature can hold the executive branch accountable. Section IV discusses how the Council of Grand Justices tries to strike an optimal balance between congressional oversight on the one hand, and government secrecy, bolstered by executive privilege, on the other hand. Finally, in Section V, this article will explore current conditions and examples of leaking and whistleblowing in Taiwan. By investigating the complex interactions between the administrative, legislative, and judicial branches imposing the effective control of government classified information, this article will conclude that the democratization that began in the late 1980s directly facilitated the institutionalization and legalization of national security and intelligence agencies.

## II. THE ESTABLISHMENT OF A GOVERNMENT SECRECY SYSTEM IN TAIWAN

Like all aspects of political change in Taiwan, reform of the intelligence and security system has been intimately associated with the shifting of the political landscape and evolving presidential power. Intelligence and security system reform can be separated into three periods corresponding to the political transition.

### *A. Government Secrecy During the Martial Law Period*

#### *1. Formation of the National Security Council and the National Security Bureau*

The Political Action Committee became the National Defense Committee in 1955, and the National Defense Committee became the National Security Council ("NSC") in 1967.<sup>12</sup> The NSC is an organ that advises on issues related to Taiwanese national security, under the direct chairmanship of the President.<sup>13</sup>

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<sup>12</sup> Guojia Anquan Huiyi (國家安全會議) [National Security Council], 台湾 [TAIWAN], <https://www.president.gov.tw/NSC/index.html> [<https://perma.cc/7QAY-2AMW>] (last visited Jan. 20, 2022).

<sup>13</sup> *Id.*

The NSC is the executive branch body responsible for coordinating policy on national security issues and advising chief executives on matters related to national security.<sup>14</sup> It consists of the President, the Vice President, the Premier, the heads of key ministries, the Chief of the General Staff, the NSC Secretary-General, and the Director-General of the National Security Bureau (“NSB”).<sup>15</sup> The NSC plays a policy role within a wide variety of areas, including foreign affairs, relations with the Mainland, military defense, foreign intelligence collection and analysis, and domestic security and counter-intelligence.<sup>16</sup> The President serves as the chair of the NSC, and other members are designated by the President, including the Vice President, the President’s Chief of Staff, and the President’s Chief Military Aide.<sup>17</sup> Through control over the NSC, the President can develop and promote policies related to national security and diplomacy.<sup>18</sup> Due to the breadth of offices and organizations represented in its membership, the NSC has become a powerful institution known as the “Upper Executive Yuan,” surpassing the “Executive Yuan”<sup>19</sup> in terms of its perceived influence and power.<sup>20</sup>

The NSB, established in 1955, is directly subordinate to the NSC and is designed to oversee national security and intelligence agencies within the military, the Justice Ministry, and the National Police Administration.<sup>21</sup> More specifically, the NSB, acting as an inter-agency committee, manages and coordinates the intelligence and security activities of the Military Intelligence Bureau, the Military Police Headquarters, the National Police Agency, the Coast Guard Command, the

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<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> MICHAEL D. SWAINE, TAIWAN’S NATIONAL SECURITY, DEFENSE POLICY, AND WEAPONS PROCUREMENT PROCESSES 15–16 (1999).

<sup>17</sup> YEH, *supra* note 10, at 63–64.

<sup>18</sup> *Id.* at 64.

<sup>19</sup> “Yuan” means “branch.” According to the ROC Constitution, the structure of the central government is composed of five primary branches which exercise their authority as prescribed by the Constitution. These five branches, or Yuan (院), are the: Executive Yuan, Legislative Yuan, Judicial Yuan, Examination Yuan, and Control Yuan. The most representative branches, which exercise duties and authority driving the whole government, are the Executive Yuan (the executive branch of the central government), the Legislative Yuan (the unicameral legislature of the central government), and the Judicial Yuan (the highest judicial organ, charged with interpreting the Constitution).

<sup>20</sup> YEH, *supra* note 10, at 64.

<sup>21</sup> National Security Bureau, R.O.C., *About NSB*, TAIWAN, [http://www.nsb.gov.tw/En/En\\_index01.html](http://www.nsb.gov.tw/En/En_index01.html) [<https://perma.cc/YM6T-HVAS>] (last visited Jan. 20, 2022).



Ministry of Justice Investigation Bureau, and other agencies.<sup>22</sup> It reportedly comprises six departments, including Mainland operations, overseas operations, internal-security intelligence, national strategic intelligence, science and technology intelligence, and cryptography.<sup>23</sup>

Between the 1950s and the 1990s, all security and intelligence services answered directly to the President, pursuant to the exigent circumstances authorized by the Temporary Provisions Effective During the Period of National Mobilization for Suppression of the Communist Rebellion (“Temporary Provisions”).<sup>24</sup> Until 1993, the NSC and its subordinate organs had no legislative mandate and no oversight mechanism outside of the executive branch.

In sum, before termination of the Temporary Provisions in 1991, the NSC had functionally replaced the Cabinet and the Executive Yuan, as the NSC consisted of various agencies and served as the key administrative arm of the President for national security issues.<sup>25</sup>

## 2. *Classified National Security Information During the Martial Law Period*

Taiwan announced martial law on May 10, 1948.<sup>26</sup> In the early days, due to confrontation with the People’s Republic of China (“ROC”), anti-infiltration information warfare pervaded the private sector. Political propaganda, which consisted of the so-called “Conceal National Secrets and Keep Alert for Hostile Spies” campaign, was repeatedly promoted through the media.<sup>27</sup> In addition to mobilizing citizens to participate in “anti-spy” work,<sup>28</sup> the Kuomintang (“KMT”)

<sup>22</sup> *Id.*; see Steven E. Phillips, *Identity and Security in Taiwan*, 17 J. DEMOCRACY 58, 62 (2006).

<sup>23</sup> Phillips, *supra* note 22, at 62; David Shambaugh, *Taiwan’s Security: Maintaining Deterrence Amid Political Accountability*, 148 CHINA Q. 1284, 1290 (1996).

<sup>24</sup> See MINGUO XIANFA (1948) (Taiwan).

<sup>25</sup> YEH, *supra* note 10, at 62.

<sup>26</sup> “In the face of the Chinese communist threat, the National Assembly on April 18, 1948, added to the Constitution a set of Temporary Provisions Effective during the Period of Communist Rebellion.” Office of the President Republic of China (Taiwan), *Constitution of the Republic of China (Taiwan)*, <https://english.president.gov.tw/page/93> [<https://perma.cc/KHY4-HC4M>] (last visited Jan. 20, 2022) (also noting that “Temporary Provisions Effective During the Period of National Mobilization for Suppression of the Communist Rebellion” superseded the Constitution and were designed to enhance presidential power).

<sup>27</sup> *Taiwan Talks About Ancient Times: Those Days of “Secrecy and Anti-Espionage, Everyone is Responsible”*, BBC (Jan. 15, 2018), <https://www.bbc.com/zhongwen/trad/chinese-news-42698598> [<https://perma.cc/2AXC-PVFF>].

<sup>28</sup> *Id.*

government also established multiple security and intelligence control organizations that were unified with the Ministry of Defense and staff headquarters in the military command system. To carry out intelligence tasks against the ROC, the KMT-led ROC government promulgated a wide range of new social standards.

### 3. *Criminal Law*

As a primary law governing criminal activities, Article 109 of the Criminal Code provides that, “any person disclosing or delivering a document, plan, information, or another thing of a secrete nature concerning the defense of the [ROC] shall be sentenced to imprisonment for not less than one year but not more than seven years.”<sup>29</sup> This law remains in effect. Article 109’s provisions imposed stricter sanctions when information was leaked to a foreign state or its agent, providing that “[a]ny person disclosing or delivering to a foreign state or to its agent a document, plan, information, or another thing specified in the preceding paragraph shall be sentenced to imprisonment not less than three years but not more than ten years.”<sup>30</sup> Notably, punishable behaviors include “an attempt to commit” as well as “preparing or conspiring to commit an offense specified in paragraphs 1 and 2.”<sup>31</sup>

Article 132 of the Criminal Code imposes special penalties on both civil servants and non-civil servants who leak or deliver confidential documents on subjects other than national defense.<sup>32</sup> The confidential content these articles protect is generally divided into two categories: “confidential documents regarding national defense” and “other confidential documents.”<sup>33</sup> The subjects being regulated can be divided into two categories: “civil servants” and “non-civil servants.”

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<sup>29</sup> FAWUBU FAGUI ZILIAOKU (中華民國刑法) [Criminal Code of the Republic of China] (promulgated by the Ministry of Justice), art. 109 (2021) (Taiwan).

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

Table 1<sup>34</sup>

	Civil Servants	Non-Civil Servants
<b>Confidential Documents Regarding National Defense</b>	Paragraph 1 of Article 109, Criminal Act	Paragraph 1 of Article 109, Criminal Act
<b>Other Confidential Documents</b>	Paragraph 1 of Article 132, Criminal Act	Paragraph 3 of Article 132, Criminal Act

#### 4. *The Prosecution of Espionage Act During the Martial Law Period*

The Prosecution of Espionage Act,<sup>35</sup> enacted in 1950 and abolished in 1991, served as the primary legal basis for the government's authority to prosecute espionage during the martial law period. Espionage was not limited to personnel sent by the Communist Party of China to Taiwan; the "Regulations on Punishment of the Insurgency" refer extensively to so-called traitors or those who collude with traitors.<sup>36</sup> Hence, this Act could also be used to apprehend Taiwanese citizens. Administrative authorities could conduct extensive searches and seizures of persons as well as houses or related premises and were authorized to examine and seize their correspondence, telegrams, print materials, publicity materials, or other books.<sup>37</sup> The authorities also used the Act to authorize arrest, interrogate, and even imprison people without procedural due process. The Act made it easier to arrest

<sup>34</sup> Source: Author.

<sup>35</sup> Kan Luan Shi Qi Jiansu Feidie Tiaoli (戡亂時期檢肅匪諜條例) [Prosecution of Espionage Act] (Taiwan).

<sup>36</sup> Cheng Zhi Pan Luan Tiao Li (懲治叛亂條例) [Regulations on Punishment of the Insurgency], art. 1, 2, 4 (Taiwan).

<sup>37</sup> *Id.* art. 4, 7.

political dissidents, including supporters of freedom of speech and members of opposition parties. When subjects were suspected of espionage by the government, it was highly likely that they would be accused of anti-government crimes.

### 5. *National Secret Protection Measures*

To manage state secrets, the Executive Yuan promulgated the National Secret Protection Measures on February 26, 1960.<sup>38</sup> These measures became invalid in September 2003 after the new Classified National Security Information Protection Act was enacted.<sup>39</sup> The National Secret Protection Measures initially established the central canons of the classification system, including the standards for classifying information, the length of time for which information could be classified, the identity of those who had the authority to classify government information, the maintenance and distribution of confidential information, and remedial measures when information was leaked.<sup>40</sup> Despite the comprehensive scope of these measures, they did not align with the principles of legal authorization required under current judicial interpretation, as indicated above, because they were subject to administrative orders issued by administrative agencies rather than laws enacted by Congress. The Classified National Security Information Protection Act replaced the National Secret Protection Measures in 2003.<sup>41</sup>

#### *B. The Institutionalization and Legalization of the Intelligence Community: President Lee Teng-hui (1993-2000)*

The political geography and the KMT-controlled intelligence and security system began to change in the early 1990s with the advent of

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<sup>38</sup> Guo Jia Ji Mi Bao Hu Ban Fa (國家機密保護辦法) [National Secret Protection Measures] (Taiwan).

<sup>39</sup> *Id.*

<sup>40</sup> *Id.* According to Article 64 of the National Secret Protection Measures, three measures should be taken when government information is leaked: (1) Immediately contact the relevant sectors to take appropriate remedial measures to reduce the damage caused by the leak; (2) inform the sectors that have the responsibility of investigating and handling the leak itself, investigating responsibility for the leak, and investigating the cause of the leak; and (3) research and improve the maintenance measures of confidential data to prevent similar incidents from reoccurring. *Id.*

<sup>41</sup> Guo Jiaji Mibao Hu Fa (國家機密保護法) [Classified National Security Information Protection Act] (promulgated by the Ministry of Justice, Feb. 6, 2003, rev'd June 10, 2020) (Taiwan).

democratization.<sup>42</sup> In the 1990s, President Lee Teng-hui, with the assistance of Taiwanese-born KMT legislators and an increasing number of Democratic Progress Party (“DPP”) lawmakers, took the lead in the institutional reform of intelligence and security agencies.<sup>43</sup> Changing the military hierarchy from the top down, President Lee called for the institutionalization of the intelligence services because he thought institutionalization was the first step toward political liberalization and democratization.<sup>44</sup> In late 1993, the Organic Law of the National Security Council (“NSC Organic Law”)<sup>45</sup> and the Organic Law of the National Security Bureau (“NSB Organic Law”)<sup>46</sup> were enacted to provide a statutory mandate for the conduct of intelligence operations. This was the first time that national security agencies were established upon the norm of legality. As a significant endeavor to legalize national security agencies, the NSC Organic Law provided that the Legislative Yuan would supervise the NSC and NSB.<sup>47</sup> The budgets of both the NSC and NSB are subject to monitoring by the Legislative Yuan’s Intelligence Committee.<sup>48</sup> While a large part of this budget is secret, it has to be reviewed and approved on an annual basis.<sup>49</sup> The structure of Taiwan’s intelligence community, developed through President Lee’s institutionalization and legalization efforts, is illustrated in Figure 1.

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<sup>42</sup> Phillips, *supra* note 22, at 59.

<sup>43</sup> STEVEN E. PHILLIPS, REFORMING INTELLIGENCE: OBSTACLES TO DEMOCRATIC CONTROL AND EFFECTIVENESS 176 (Thomas C. Bruneau & Steven C. Boraz eds., 2007).

<sup>44</sup> *Id.* at 176–78.

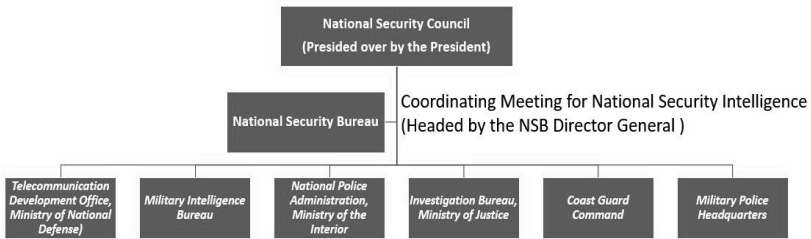
<sup>45</sup> Guo Jia An Quan Hui Yi Zu Zhi Fa (國家安全會議組織法) [Organic Law of the National Security Council] (promulgated by the National Security Conference, Dec. 30, 1982; rev’d June 25, 1992) (Taiwan) [hereinafter NSC Organic Law].

<sup>46</sup> Guo Jia An Quan Ju Zu Zhi Fa (國家安全局組織法) [Organic Law of the National Security Bureau] (promulgated by the National Security Bureau, Dec. 30, 1982) (Taiwan) [hereinafter NSB Organic Law].

<sup>47</sup> NSC Organic Law, art. 8.

<sup>48</sup> *Id.*; NSB Organic Law, art. 20. *See also* Shambaugh, *supra* note 23, at 1289.

<sup>49</sup> *See* Shambaugh, *supra* note 23, at 1289.

Figure 1<sup>50</sup>

### C. *Balancing Secrecy and Transparency Under President Chen Shui-bian (2001-2008)*

In 2000, Taiwan underwent its first shift in political party control.<sup>51</sup> President Chen Shui-bian, a member of the DPP, took office in May and declared that “the institutionalization of the intelligence agencies remains a significant goal undertaken by the government after the transfer of political power.”<sup>52</sup> Notwithstanding that President Chen still confronted the challenges of ideological conflicts within intelligence agencies that were used to being predominantly under the control of the KMT party, he strove to strike an optimal balance between government secrecy and the principle of democratic accountability.

Since President Chen identified himself as a human rights advocate, he was particularly aware that to deepen the democratic transition it was vital to strengthen citizens’ rights to information by expanding open access to government data without threatening national interests or government secrecy. For this reason, in a speech in March of 2002, Chen asserted his determination to promote further intelligence reform.<sup>53</sup> His specific legal initiatives and policies had the goals of

<sup>50</sup> PHILLIPS, *supra* note 43, at 176–77.

<sup>51</sup> Even though Taiwan initiated its path to democratization in 1989, during which President Lee Teng-hui took office and implemented a series of movements toward political liberalization and constitutional revisions, he was still subject to the KMT. The first party alternation of central government occurred in 2000, when Chen Shui-bian, a presidential candidate from the Democratic Progress Party (“DPP”), was elected directly by the people.

<sup>52</sup> PHILLIPS, *supra* note 43, at 180.

<sup>53</sup> *President Chen Attends the National Educational Development Conference*, OFF. PRESIDENT REP. CHINA (TAIWAN) (Sept. 13, 2003), <https://english.president.gov.tw/NEWS/1444> [<https://perma.cc/36GN-48HT>].

implementing greater legislative oversight and strengthening internal discipline within the intelligence community.

Following the announcement of President Chen's new policies, two significant acts regulating government classified documents and information were passed: the Freedom of Government Information Law in 2005,<sup>54</sup> and the Classified National Security Information Protection Act in 2003.<sup>55</sup> The Freedom of Government Information Law, similar to the United States' Freedom of Information Act<sup>56</sup> ("FOIA"), aimed to advance transparency and freedom of government information in pursuit of citizens' participation in the government's activities. Through the disclosure of government documents, this Act was expected to "allow citizens to easily share and use information, guarantee the public's right to know, increase public understanding of trust in, and supervision of, public affairs, and promote participation by citizens in democracy."<sup>57</sup> Further, Article 1 of the Classified National Security Information Protection Act states that its purpose is "to establish the classified national security information protection system for the purpose of safeguarding the national security and national interest."<sup>58</sup>

Additionally, the National Intelligence Work Law was also enacted in 2005,<sup>59</sup> specifying that intelligence activities should be overseen by the legislature and mandating that the chief of the NSB lead the heads of other intelligence agencies, including the Military Intelligence Bureau ("MIB")—an arm of the Ministry of Defense—and the Bureau of Investigation ("MJIB")—an arm of the Ministry of Justice. The law also required the NSB chief to provide the Legislative Yuan with written and oral reports at every session.<sup>60</sup> There are two principal

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<sup>54</sup> Zheng Fu Zi Xun Gong Kai Fa (政府資訊公開法) [Freedom of Government Information Law] (promulgated by the Ministry of Justice, Dec. 28, 2005), art. 18 (Taiwan).

<sup>55</sup> Guo Jia Ji Mi Bao Hu Fa (國家機密保護法) [Classified National Security Information Protection Act] (promulgated by the Ministry of Justice, Feb. 6, 2003, rev'd June 10, 2020) (Taiwan).

<sup>56</sup> See generally Freedom of Information Act, 5 U.S.C. § 552 (1966).

<sup>57</sup> Zheng Fu Zi Xun Gong Kai Fa (政府資訊公開法) [Freedom of Government Information Law] (promulgated by the Ministry of Justice, Dec. 28, 2005), art. 18 (Taiwan).

<sup>58</sup> Guo Jia Ji Mi Bao Hu Fa (國家機密保護法) [Classified National Security Information Protection Act] (promulgated by the Ministry of Justice, Feb. 6, 2003, rev'd June 10, 2020), art. 1 (Taiwan).

<sup>59</sup> Guo Jia Qing Bao Gong Zuo Fa (國家情報工作法) [National Intelligence Work Law] (promulgated by the National Security Conference, Feb. 5, 1994, rev'd Jan. 15, 2020) (Taiwan).

<sup>60</sup> *Id.* art. 4.

legal commands pertaining to the balance between national interests and democratic accountability.

*1. The 2005 Freedom of Government Information Law*

The Freedom of Government Information Act, on the one hand, served as a primary statutory basis for citizens to acquire and use information and guarantee their right to information access, thus increasing public oversight and trust. On the other hand, it served to secure sensitive information. Article 19 of the Freedom of Government Information Act created nine exemptions to information access, restricting public disclosure in the following circumstances:

1. Information classified by law as a national secret, when non-disclosure is required to maintain confidentiality or when the information is prohibited from being provided to the public by other laws, regulations, or orders;
2. Information the disclosure of which will: obstruct the investigation, prosecution, or law enforcement investigation of a crime; impair the fair trial of a criminal defendant; or injure another person's life, body, freedom, or property;
3. A document draft created for internal use or other preparatory works written prior to a government agency making a decision, but such works can be made available to the public or be provided if deemed necessary for the public interest;
4. Government information whose disclosure will make difficult or disrupt the purpose of such works, where the government agency acquired or produced such information to enforce a process of supervision, management, investigation, or prohibition;
5. Information related to the testing or certification of specialized knowledge, skills, or qualifications, whose disclosure will affect the enforcement of fairness and efficiency;
6. Information whose disclosure will invade personal privacy, reveal professional secrets, or result in the unfair use of intellectual property, except where it is necessary to protect the public interest, a person's life, body, or health, or where the person concerned gives consent;
7. Information about trade secrets or business operations of a person, corporation, or group, whose disclosure would hamper the rights, competitive position, or just interests of such a person, corporation, or group, except where the



public interest must protect a person's life, body, or health, or where the person concerned gives consent;

8. Information about cultural heritage that requires special management which might destroy or decrease the value of the subject; and

Information about government-run business entities, whose disclosure would impair the just interest in operating the business, except where it is necessary for the public interest.<sup>61</sup>

## 2. *The 2003 Classified National Security Protection Act*

In contrast, the Classified National Security Information Protection Act,<sup>62</sup> which serves as the primary legal mandate governing state secrets, replaced the previous National Secret Protection Measures in 2003. This Act and the previous measure were similar in content. Notably, this Act was promulgated and enacted by the Legislature rather than imposed unilaterally by the Executive.

Article 1 of the Classified National Security Information Protection Act explicitly specifies the legislative purpose of the Act, which is “to establish the classified national security information protection system for the purpose of safeguarding the national security and national interest.”<sup>63</sup> The structure of the Act can be divided into three major sections: classification and declassification authority, safeguards, and the procedure for declassification. Article 2 emphasizes the general definition of classified national information, referring to information that is “owned by, or under the control of the Government of the [ROC] and that has been determined pursuant to this Act to require protection against unauthorized disclosure, and that is so designated according to its level of classification for the purpose of safeguarding the national security or national interest.”<sup>64</sup>

Under this general umbrella, Article 4 outlines three levels of document classification according to the degree of sensitivity: Top

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<sup>61</sup> Zheng Fu Zi Xun Gong Kai Fa (政府資訊公開法) [Freedom of Government Information Law] (promulgated by the Ministry of Justice, Dec. 28, 2005), art. 18 (Taiwan).

<sup>62</sup> Guo Jiaji Mibao Hu Fa (國家機密保護法) [Classified National Security Information Protection Act] (promulgated by the Ministry of Justice, Feb. 6, 2003, rev'd June 10, 2020) (Taiwan).

<sup>63</sup> *Id.* art. 1.

<sup>64</sup> *Id.* art. 2.

Secret, Secret, and Confidential documents.<sup>65</sup> Article 7 lists the officials who can determine and assign the classification levels of government documents.<sup>66</sup> Specifically, Top Secret may be assigned on a document-by-document basis only by the President, the Prime Minister of the Executive Yuan, or the Ministers authorized by the President or the Prime Minister of the Executive Yuan.<sup>67</sup> Original classification of information as Secret may be assigned on a document-by-document basis only by persons who can classify Top Secret documents or any officials to whom such authority is specifically delegated, including the Minister of the Legislative Yuan, the Minister of the Judicial Yuan, the Minister of the Examination Yuan, and the Minister of the Control Yuan.<sup>68</sup> The General Secretary of the NSC and the Director of the NSB also have authority to approve Secret documents. Moreover, the Minister of National Defense, the Minister of Foreign Affairs, the Commissioner of the Mainland Affairs Council of the Executive Yuan, or any other officials to whom such authority is delegated also have the authority to approve the classification of government documents as Secret.<sup>69</sup>

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<sup>65</sup> Article 4 information may be classified in one of the three designations: Top Secret (“shall be applied only to information, the unauthorized disclosure of which reasonably could be expected to cause exceptionally grave damage to the national security”); Secret: (“shall be applied only to information, the unauthorized disclosure of which reasonably could be expected to cause serious damage to the national security”); and Confidential (“shall be applied to information, the unauthorized disclosure of which reasonably could be expected to cause identifiable damage to the national security”). *Id.* art. 4.

<sup>66</sup> *Id.* art. 7.

<sup>67</sup> *Id.*

<sup>68</sup> *Id.* art. 7(2)(b). The appointment of the positions is promulgated in the ROC Constitution and its Additional Articles. Article 5 provides that, “[t]he Judicial Yuan shall have 15 grand justices. The 15 justices, including a president and a vice president of the Judicial Yuan to be selected from amongst them, shall be nominated and, with the consent of the Legislative Yuan, appointed by the president of the Republic.” MINGUO XIANFA additional art. 5 (2005) (Taiwan). Article 6 provides that, “[t]he Examination Yuan shall have a president, a vice president, and several members, all of whom shall be nominated and, with the consent of the Legislative Yuan, appointed by the president of the Republic.” *Id.* additional art. 6. Article 7 provides that, “[t]he Control Yuan shall have 29 members, including a president and a vice president, all of whom shall serve a term of six years. All members shall be nominated and, with the consent of the Legislative Yuan, appointed by the president of the Republic.” *Id.* additional art. 7. Article 3 of The Organic Act of the Legislative Yuan provides that, “[t]he Legislative Yuan shall have a President and a Vice President, who shall be elected by and from among its members.” *Id.* art. 66.

<sup>69</sup> Guo Jia Ji Mi Bao Hu Fa (國家機密保護法) [Classified National Security Information Protection Act] (promulgated by the Ministry of Justice, Feb. 6, 2003, rev'd June 10, 2020), art. 7(2) (Taiwan).

To limit the classifying authority's power appropriately, Article 11 specifies the maximum classification duration for each level of secrecy. For example, "the declassification date for Top Secret information shall be no more than thirty years after the original classification."<sup>70</sup> "The declassification date for Secret information shall be no more than twenty years after the original classification."<sup>71</sup> Finally, "the declassification date for Confidential information shall be no more than ten years after the original classification."<sup>72</sup> "If it is necessary to prolong the classification or change the event of declassification, the original classification authority shall submit the matter to the superior agency for determination."<sup>73</sup> The prolonged classification duration thereby established shall not exceed the original classification period, and the classification can only be prolonged twice.<sup>74</sup> In ordinary circumstances, classified information shall be released within thirty years.<sup>75</sup> "If there is a special circumstance requiring information to be protected beyond 30 years, an approval of prolonged classification shall be obtained from the Legislative Yuan."<sup>76</sup>

As for safeguards for the maintenance of classified information, Article 15 provides that, "controls shall be established by each agency to ensure that classified information is used, processed, stored, reproduced, and transmitted only under conditions that will provide adequate protection and prevent access by unauthorized persons."<sup>77</sup> Once classified information is disclosed, the person who is in charge of the information shall immediately notify the agency official and address the leaks in an appropriate manner.<sup>78</sup> Article 22 stipulates the process that the Legislature must follow when it would like to use classified information, demanding that "[t]he Legislative Yuan shall not provide or reply [with] any classified information during [the] legislative process unless such information is properly declassified."<sup>79</sup> "However, if the legislative process is conducted at the closed meeting or in camera, classified information involved may be provided for in camera

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<sup>70</sup> *Id.* art. 11, § 2.

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> *Id.* art. 11, § 3.

<sup>74</sup> *Id.* art. 11, §§ 3, 4.

<sup>75</sup> *Id.* art. 11, § 4.

<sup>76</sup> *Id.*

<sup>77</sup> *Id.* art. 15, § 1.

<sup>78</sup> *Id.*

<sup>79</sup> *Id.* art. 22, § 1.

inspection or replied in a designated place.”<sup>80</sup> The provision continues to delegate the authority to establish detailed rules to the Legislative Yuan, providing that the rules governing the provision referred to in the preceding paragraph shall be enacted by the Legislative Yuan.<sup>81</sup>

Meanwhile, Article 25 addresses the use of classified information in judicial trials, stating that “[a]ny legal proceeding accepted by the prosecution and the court shall not be adjudicated in public if classified information is involved.”<sup>82</sup> Moreover, in accordance with his or her authority, or upon a motion, the prosecutor or judge may deny or restrict the scope of confrontation or cross-examination if confidential documents are “likely to be disclosed during the confrontation or examination process.”<sup>83</sup> This means that someone can be convicted of a crime based on a trial procedure in which the rights to cross-examination and confrontation are not properly and comprehensively guaranteed.

As illustrated above, the Freedom of Government Information Act and the Classified National Security Information Protection Act established the statutory instruments for government secrecy after democratization began. Since the government considered the Freedom of Government Information Act to be the general norm governing information disclosure, the Classified National Security Information Protection Act prevails over the Freedom of Government Information Act when the information at issue is associated with the protection of national security information or other confidential information regarding national defense.

#### *D. Summary*

This section illustrates the ways that the transformation of Taiwan’s political climate and the personality of each individual president have prompted legal reforms of government secrecy. The descriptive observations in this section also illustrate that when the ruling party and leadership are authoritarian, they are highly unlikely to establish a well-functioning and accountable mechanism to oversee the Executive’s use of secrecy. The so-called “quiet revolution” of the early 1990s marked the start of Taiwan’s democratization, as well as its legalization of government secrecy. Each president has been mindful of

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<sup>80</sup> *Id.*

<sup>81</sup> *Id.* art. 22, § 2.

<sup>82</sup> *Id.* art. 25, § 1.

<sup>83</sup> *Id.* art. 25, § 2.

maintaining security interests and national defense. On the other hand, the presidents who believed in democratic values, such as Presidents Lee and Chen, not only initiated a series of legal reforms regarding government secrecy and intelligence operations, but also provided institutional encouragement to the judiciary. These Presidents and the judiciary cooperated positively and proactively in shaping the democratic constitutional order.

### III. CONGRESSIONAL OVERSIGHT

#### A. *Legislative Supervision in the 1990s*

The political shift from authoritarianism to democracy has had a positive influence on congressional oversight of government secrecy in Taiwan. During the martial law period, legislative oversight and monitoring of military and governmental secret activities were non-existent.<sup>84</sup> After the 1992 Legislative Yuan elections, however, “legislative supervision has become an established part of the political process.”<sup>85</sup> With the creation of a Legislative Affairs Office, initiated by the Ministry of National Defense in 1992, a National Defense Committee within the Legislative Yuan began meeting regularly with the Defense Minister for briefing and discussions on national security issues, including security threats to Taiwan and its annual budget.<sup>86</sup> Security briefings and discussions between national security officials and legislators occur frequently and have become increasingly institutionalized.<sup>87</sup>

Despite these initiatives, the Legislature’s role of oversight and its monitoring functions remained constrained.<sup>88</sup> Scholars have summarized the reasons for this as follows. First, there was no effective constitutional basis for the Legislative Yuan to oversee the command

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<sup>84</sup> M. Taylor Fravel, *Towards Civilian Supremacy: Civil-Military Relations in Taiwan’s Democratization*, 29 *ARMED FORCES & SOC’Y* 57, 71 (2002).

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

system<sup>89</sup> and the military system.<sup>90</sup> Although the Legislative Yuan has the authority to supervise the agencies within the Executive Yuan, the scope of supervision does not include military affairs.<sup>91</sup>

The inability of Congress to exercise military system oversight continued until 1998, when *J.Y. Interpretation No. 461* was delivered.<sup>92</sup> In this landmark decision, based on the principles of democracy and accountability, the Council of Grand Justices first made it clear that “[t]he Legislative Yuan, in accordance with Article 67 of the Constitution, is the highest legislative body of the country and has the power to decide by resolution upon statutory and budgetary bills as well as other important matters of the State.”<sup>93</sup> To exercise this power conferred by the Constitution, the Legislative Yuan may establish various committees in which government officials and concerned private parties may be summoned to answer questions.<sup>94</sup> Since the Executive Yuan is accountable to the Legislative Yuan under the Constitution, the heads of ministries and the subordinates thereof . . . are obliged to be present for questioning when invited by those various committees.<sup>95</sup> For this reason, the Council of Grand Justices ruled that,

The Chief of the General Staff is the chief of staff for the Minister of National Defense under the Executive Yuan. The headquarters of the General Staff, Army, Navy and Air Force under his/her command are not agencies outside of the administrative system. Therefore, there is no doubt that although he/she is not a Minister or an agency head under Article 3, Paragraph 2, Subparagraph 1 of the Additional Articles of the Constitution, he/she is a government official as provided in Article 67, Paragraph 2 of the Constitution. In charge of important affairs concerning national defense, including the compilation and execution of budgets, the powers and duties of the Chief of the General Staff are closely related to the jurisdiction of the Legislative Yuan. The Chief of the

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<sup>89</sup> “The command system” and the “military system” should be differentiated. The former refers to “the actual execution of military operations.” The latter refers to the “size, resources and establishment of the military as well as compilation and execution of military budgets.” Before the *J.Y. Interpretation No. 461* was delivered, neither the command system nor the military system was supervised by the Legislative Yuan. SHIZI NO. 461 JIESHI (釋字第 461 號解釋) [Judicial Yuan Interpretation No. 461] (1998) [hereinafter Judicial Yuan Interpretation No. 461].

<sup>90</sup> Fravel, *supra* note 84, at 71.

<sup>91</sup> *Id.*

<sup>92</sup> Judicial Yuan Interpretation No. 461.

<sup>93</sup> *Id.*

<sup>94</sup> *Id.*

<sup>95</sup> *Id.*

General Staff may not reject the invitation by the various committees of the Legislative Yuan to be present in the committees unless there is a justifiable reason that relates to the execution of military activities concerning national security. Nevertheless, the Chief of the General Staff does not have to answer questions involving critical intelligence of national defense.<sup>96</sup>

Another reason for the Legislature's limited role during the 1990s was the imbalance in access to information between the Legislative Yuan and Executive Yuan.<sup>97</sup> Even though the Legislative Yuan would hold closed-door meetings while reviewing military budgets, the Ministry of National Defense would provide "only one detailed copy of the secret portions of the budget for legislators to consult."<sup>98</sup> Additionally, participants in the meeting were prohibited from taking documents away from the meeting, rendering the legislators under-prepared for discussions and reviews of the military budget.<sup>99</sup> In sum, any legislator willing to exercise oversight of government secrecy was unable to access the information needed to oversee the detailed internal operations of secret government activities.

A third reason suggested for limited congressional power concerns the legislative committee system, which often inhibited those with professional expertise from substantially engaging in the process of deliberation or providing effective oversight.<sup>100</sup> Although some KMT and New Party ("NP")<sup>101</sup> members had military backgrounds, most DPP members who were in a position to implement intelligence reforms more proactively did not do so because they were not on the committee.<sup>102</sup> It was not surprising that the supervisory capability of a legislative committee operating under these conditions would be significantly restricted.<sup>103</sup> Additionally, committee assignments are based on a regular round of self-selection and are not tenured; when each new six-month session of the Legislative Yuan begins, committee members change accordingly.<sup>104</sup> These very brief terms also

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<sup>96</sup> *Id.*

<sup>97</sup> Fravel, *supra* note 84, at 72.

<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

<sup>100</sup> *Id.*

<sup>101</sup> The New Party ("NP"), formerly the Chinese New Party ("CNP"), is a Chinese nationalist political party in Taiwan that supports Chinese unification and forms part of the pan-Blue coalition.

<sup>102</sup> Fravel, *supra* note 84, at 72.

<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

constrain the ability of members to keep a legislative eye on complicated domains such as national defense and intelligence activities.<sup>105</sup>

More importantly, the Legislative Yuan's budgetary hold over the executive branch also has its constitutional limitations. According to Article 70 of the Constitution, "the Legislative Yuan shall not make proposals for an increase in the expenditures in the budgetary bill presented by the Executive Yuan."<sup>106</sup> In other words, there is limited flexibility for the Legislative Yuan to constrain the executive branch using budgetary control (the "power of the purse").<sup>107</sup> In sum, the lack of institutionalization in personnel issues and meeting logistics, as well as statutory and constitutional limitations, have rendered congressional oversight ineffective.

## *B. Two Available Tools to Hold the Executive Branch Accountable*

### *1. The Right to Access Documents: J.Y. Interpretation No. 325 (1993)*

In addition to legislative supervision, which is expressly recognized by the Constitution, there are two more tools with which Congress can hold the executive branch accountable. Due to the endorsement of *J.Y. Interpretation No. 325* and *No. 585*, congressional oversight has greatly increased.<sup>108</sup> In *J.Y. Interpretation No. 325*, the Council of Grand Justices first entrusted the Legislative Yuan with the right to access documents so that the legislature could maximize its power.<sup>109</sup> Article 57, subparagraph 1, of the Constitution provides that "[t]he Executive Yuan has the duty to present to the Legislative Yuan a statement of its administrative policies and a report on its administration."<sup>110</sup> Hence, the legislators have the right to question the premier of the Executive Yuan and the ministers of its divisions while a meeting is in session.<sup>111</sup> Various committees may invite government officials and interested parties to attend the meeting and answer

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<sup>105</sup> *Id.*

<sup>106</sup> MINGUO XIANFA art. 70 (2005) (Taiwan).

<sup>107</sup> Fravel, *supra* note 84, at 72.

<sup>108</sup> See SHIZI NO. 325 JIESHI (釋字第 325 號解釋) [Judicial Yuan Interpretation No. 325] (1993) [hereinafter Judicial Yuan Interpretation No. 325]. See SHIZI NO. 585 JIESHI (釋字第 585 號解釋) [Judicial Yuan Interpretation No. 585] (2004) [hereinafter Judicial Yuan Interpretation No. 585].

<sup>109</sup> Judicial Yuan Interpretation No. 325.

<sup>110</sup> MINGUO XIANFA art. 57(1) (2005) (Taiwan).

<sup>111</sup> Judicial Yuan Interpretation No. 325.



questions.<sup>112</sup> The Council of Grand Justices announced procedural steps required for the meeting:

In other words, members of the Legislative Yuan may ask or raise questions during sessions and thereby gain information concerning facts or opinions from answers provided by the questioned officials or by the invited attendees. If more information is needed, the Legislative Yuan may request that the relevant authorities provide information concerning the bill under review via a resolution of the Yuan or the respective committee. If necessary, the Legislative Yuan may request review of the original documents via a plenary Yuan resolution. Such arrangements are derived from and pursuant to the Constitutional provisions regarding the assembly and exercise of powers by members of the Legislative Yuan, and the responding authority is obliged to accommodate unless the refusal is warranted by law or can otherwise be justified.<sup>113</sup>

## 2. *Congressional Investigatory Power: J.Y. Interpretation No. 585 (2004)*

In addition to the right to access documents, the Council of Grand Justices has endowed the Legislative Yuan with the power to investigate administrative actions through *J.Y. Interpretation No. 585*.<sup>114</sup> This issue arose from an incident on March 19, 2004, when President Chen Shui-bian and Vice President Annette Lu were shot (but not killed) just one day before the presidential election.<sup>115</sup> The next day, they were re-elected by a margin of 0.22% of the votes.<sup>116</sup> The losing candidates from the KMT and pan-Blue parties<sup>117</sup> claimed that the shooting had been a scheme to arouse sympathy, and consequently

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<sup>112</sup> *Id.*

<sup>113</sup> *Id.*

<sup>114</sup> Judicial Yuan Interpretation No. 585.

<sup>115</sup> Tom Ginsburg, *The Politics of Courts in Democratization: Four Junctures in Asia*, in CONSEQUENTIAL COURTS: JUDICIAL ROLES IN GLOBAL PERSPECTIVE 45, 56–57 (Diana Kapiszewski, Gordon Silverstein & Robert A. Kagan eds., 2013).

<sup>116</sup> *Id.*; See also Wen-Chen Chang, *Strategic Judicial Responses in Politically Charged Cases: East Asian Experiences*, 8 INT'L J. CONST. L. 885, 906 (2010).

<sup>117</sup> The pan-Blue coalition, or pan-Blue force or pan-Blue groups, is a political coalition in Taiwan. The Pan-Blue coalition is composed of the Kuomintang (“KMT”), the People First Party (“PPF”), and the New Party (“CNP”). This coalition tends to favor a Chinese nationalist identity over a separate Taiwanese one and favors a softer policy toward and greater economic linkages with the People’s Republic of China (“ROC”), as opposed to the Pan-Green Coalition, which leans toward Taiwanese identity and pro-independence.

they filed a suit in Taiwan's High Court to dispute the validity of the election results.<sup>118</sup> To investigate this incident, the opposition-controlled legislature enacted the Act of the Special Commission to Investigate the Truth with Respect to the 3/19 Shooting ("SCITA") to legally authorize the establishment of the March 19 Shooting Truth Investigative Commission ("SCIT") four months later.<sup>119</sup> Pursuant to the SCITA, the SCIT, which consisted of legislators from two parties, was granted wide investigatory and prosecutorial powers. On September 15, 2004, legislators from the DPP requested that the Council of Grand Justices assess whether the SCITA violated the principles of separation of powers and democracy.

The key issue for judicial review surrounding the SCITA and SCIT was whether the scope of the investigation or its methods and procedure would exceed the limits of congressional investigatory authority or infringe on other constitutional organs. By supplementing *J.Y. Interpretation No. 325*, the Council of Grand Justices made it clear that,

[f]or the purpose of effectively exercising its constitutional powers, the Legislative Yuan may exercise a certain power of investigation, which is inherent in its legislative powers, to take the initiative in obtaining all relevant information necessary to exercise its powers so that it can fulfill its duties as an elected body of representatives and bring its functions of separation of powers and checks and balances into full play by making informed and prudent decisions after adequate and sufficient deliberations. The Legislative Yuan's investigative power is a subsidiary power necessary for the said Yuan to exercise its constitutional powers and authority.<sup>120</sup>

The Grand Justices, however, shifted their tone significantly on the limitation of exercising congressional investigatory power, reminding the parties that this investigatory power has inherent limitations. The Council of Grand Justices drew a red line demarcating the investigatory power:

Under the principles of separation of powers and checks and balances, the scope of the targets or matters subject to the Legislative Yuan's investigative power does not grow

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<sup>118</sup> Ginsburg, *supra* note 115.

<sup>119</sup> Fagui Mingcheng: Sanyijiu Qiangji Shijian Zhenxiang Diaocha Tebie Weiyuanhui Tiaoli (法規名稱：三一九槍擊事件真相調查特別委員會條例) [Act of the Special Commission to Investigate the Truth with Respect to the 3/19 Shooting] (May 1, 1995) (Taiwan).

<sup>120</sup> Judicial Yuan Interpretation No. 585.

unchecked. The matters to be investigated by the Legislative Yuan must be substantially related to the exercise of its powers under the Constitution. And, in addition, whenever a matter is related to the independent exercise of powers by an organ of the State that is guaranteed by the Constitution, the Legislative Yuan may not extend its investigative power to such a matter. Furthermore, an executive chief, by the authority inherent in his or her executive powers, is entitled to decide not to make public any information that may affect or interfere with the effective operation of the executive branch. This is an executive privilege intrinsic to the executive power. The Legislative Yuan, in exercising its investigation power, should give due respect to such privilege if the matter subject to investigation involves such information.<sup>121</sup>

Thus, according to the Court, the scope of congressional investigatory power: 1) must be substantially related to the exercise of its powers under the Constitution; 2) cannot infringe on a matter related to the independent exercise of powers by another organ of the State that is guaranteed by the Constitution; and 3) can be limited when the Chief Executive, by the inherent authority in his or her executive powers, decides not to make public any information that may affect or interfere with the effective operation of the executive branch.<sup>122</sup> Having identified the scope of investigatory power, the Grand Justices explicitly pointed out the specific powers of the Legislative Yuan:

The manner in which the Legislative Yuan may exercise its investigative power is not limited to the power to request the production of files, under which it may request the agencies concerned to provide reference materials in regard to the matters involving the exercise of the Legislative Yuan's powers or request such agencies to produce the original documents in respect thereof. If and when necessary, the Legislative Yuan may also, by resolution of its plenary session, request the presence of a civilian or government official related to the matter under investigation to give testimony or express opinions, and may impose reasonably compulsory measures upon those who refuse to fulfill their obligations to assist in the investigation within the scope of pecuniary fines.<sup>123</sup>

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<sup>121</sup> *Id.*

<sup>122</sup> *Id.*

<sup>123</sup> *Id.*

Notably, the Grand Justices also emphasized the significance of the requirement of legality while exercising such congressional investigatory power:

The relevant procedures, e.g., the initiation of the investigative power, the organization responsible for the exercise of such power, the scope of the matters subject to investigation in a particular case, the procedures to be followed under various methods of investigation, as well as the judicial relief procedures, should all be adequately prescribed by law. In extraordinary cases, should there exist any necessity of mandating those other than members of the Legislative Yuan to assist in the investigation as to any particular matters, special laws must be enacted, setting forth in detail the purposes of the mandate, the scope of the investigation, the matters relating to personnel and organization, including, without limitation, the qualifications, appointment, term of the mandated persons and the authorities, methods and procedures for the special investigation, which would also serve as the basis of supervision. The organizations and meeting procedures prescribed under the respective laws must conform to the principle of democracy. The scope of the investigation in a specific case shall not be in violation of the principles of separation of powers and checks and balances, nor can it infringe upon the core authority of another constitutional organ or cause material harm to the exercise of powers by another constitutional organ. In respect of the procedures prescribed for the investigation methods, the constitutional principles of proportionality, clarity and definiteness of law, as well as due process of law, must all be complied with where such procedures may involve any restrictions imposed on the rights of the people.<sup>124</sup>

In essence, the Grand Justices recognized that the right to investigate is an auxiliary power that the Legislative Yuan must have to exercise its inherent powers as prescribed by the Constitution. Investigation is not limited to the right to access documents, as explained in *J.Y. Interpretation No. 325*. As a result, the Court recognized that the Legislative Yuan has investigatory power to hold the executive branch accountable in some instances.

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<sup>124</sup> *Id.*

### C. Summary

These SCITA disputes and corresponding judicial interpretation of the SCITA illustrate a remarkable effort by the Grand Justices. Through crafting a comprehensive congressional oversight mechanism based upon the Constitution and fundamental principles, including separation of powers, political accountability, and legal prerequisites, the Grand Justices legitimized the existence of a legislative investigatory power. Admittedly, while *J.Y. Interpretation No. 325* and *No. 585* provide Congress with the legal authority to oversee the Executive in some circumstances, there is little empirical evidence from which to draw to evaluate the effectiveness of these decisions. Therefore, we do not know the extent to which the Legislature would be able to investigate issues that touch on national security. One reason for this uncertainty has to do with the scope of executive privilege, which the Court discussed in its opinion.

## IV. SECRETS IN COURTS

### A. *The Debate About Executive Privilege*

Taiwan's remarkable transformation from authoritarianism to democracy also provides insights into the role that courts can play in democratic politics.<sup>125</sup> As discussed above, in Taiwan, the power of judicial review lies with the Council of Grand Justices of the Judicial Yuan, whose primary functions are to interpret the Constitution and issue uniform interpretations of laws.<sup>126</sup>

*J.Y. Interpretation No. 585* not only provided a constitutional basis for the congressional investigatory power, but it also recognized executive privilege. Three months after the DPP legislators filed their constitutional petition, the Grand Justices issued *Interpretation No. 585*, holding part of the SCITA unconstitutional.<sup>127</sup> Notably, the Council held that provisions granting the SCIT members the exclusive power to investigate the incident violated the principles of separation of powers by interfering with executive privilege.<sup>128</sup> This was the first time that the Grand Justices recognized presidential executive privilege. The Grand Justices stated: “[A]n executive chief, by the authority

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<sup>125</sup> Ginsburg, *supra* note 115, at 56.

<sup>126</sup> Tom Ginsburg, *Confucian Constitutionalism? The Emergence of Constitutional Review in Korea and Taiwan*, 27 L. & SOC. INQ. 763, 768 (2002).

<sup>127</sup> Judicial Yuan Interpretation No. 585.

<sup>128</sup> *Id.*

inherent in his or her executive powers, is entitled to decide not to make public any information that may affect or interfere with the effective operation of the executive branch. This is an executive privilege intrinsic to the executive powers.”<sup>129</sup>

Based on this foundation, the Court further interpreted the boundaries between legislative power and presidential power, asserting that the Legislative Yuan, the highest legislative body in Taiwan, should give due respect to executive privilege in exercising its investigative power.<sup>130</sup>

The Court also elaborated on the scope of executive privilege in *J.Y. Interpretation No. 627*.<sup>131</sup> The issue arose from disputes about whether a president could claim presidential criminal immunity and executive privilege when faced with criminal charges. In September of 2006, special secret funds created by President Chen Shui-bian garnered wide attention, and prosecutors in the Taipei District Court began investigating the case. The question of the constitutional legitimacy of this investigation arose immediately as President Chen sought to claim presidential criminal immunity under Article 52 of the Constitution.<sup>132</sup> On January 25, 2007, the Secretary-General filed a constitutional petition before the Constitutional Court on behalf of President Chen, claiming that any prosecution should have been barred by his constitutionally guaranteed immunity.<sup>133</sup> The petition argued, given the nature of the President’s power dominating national security policy, the disclosure of details regarding the special secret fund was a violation of presidential privileges.<sup>134</sup>

On June 15, 2007, the Constitutional Court released *J.Y. Interpretation No. 627*, holding that presidents are naturally granted executive privilege based on the principles of separation of powers and checks and balances.<sup>135</sup> This Interpretation stated that, in light of his privilege regarding state secrets, the Chief Executive should have the power to

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<sup>129</sup> *Id.*

<sup>130</sup> *Id.*

<sup>131</sup> SHIZI NO. 627 JIESHI (釋字第 627 號解釋) [Judicial Yuan Interpretation No. 627] (2007) [hereinafter Judicial Yuan Interpretation No. 627].

<sup>132</sup> Article 52 of the Constitution provides that “[t]he President shall not, without having been recalled, or having been relieved of his functions, be liable to criminal prosecution unless he is charged with having committed an act of rebellion or treason.” MINGUO XIANFA art. 52 (2005) (Taiwan).

<sup>133</sup> Dennis Engbarth, *Chen Asks for Ruling on Immunity Issue*, TAIWAN NEWS (Jan. 26, 2007), <https://www.taiwannews.com.tw/en/news/375323> [<https://perma.cc/582L-26H6>].

<sup>134</sup> *Id.*

<sup>135</sup> Judicial Yuan Interpretation No. 627.

decide whether or not to disclose classified government information regarding national security, defense, and diplomacy based on the functions and authorities intrinsic to his office.<sup>136</sup> Such power is part of the executive privilege of a chief executive, as was made clear in *J.Y. Interpretation No. 585*.<sup>137</sup> Such privilege, as the Grand Justices have noted, is not only affirmed by the Constitution, but has also been granted under the State Secret Protection Act, which grants the President the power to classify state secrets, unilaterally, on a permanent basis.<sup>138</sup> As discussed above, executive privilege, as recognized by the judiciary, has typically served as a useful shield against congressional requests for disclosure of information.

Based on *J.Y. Interpretation No. 585*, *J.Y. Interpretation No. 627* elaborated on the scope of executive privilege. The Council of Grand Justices stated:

Based on the presidential state secrets privilege, the President should have the right to refuse to testify as to matters concerning state secrets during a criminal proceeding, and refuse to produce the relevant evidence to the extent that the President may refuse to so testify. The legislative should formulate additional provisions regarding the President in respect of the requisite elements and applicable procedures for the refusal to testify and refusal to produce relevant evidence. Prior to the enactment of such law, the President should provide a preliminary showing that the inquiry and statements relating to state secrets would fall within the scope of the presidential state secrets privilege, or the production and submission of the relevant evidence, will jeopardize national interests.<sup>139</sup>

In sum, the Grand Justices entrust the President with great discretion to determine whether to invoke executive privilege. Generally, as the Grand Justices emphasized, the scope of executive privilege should not only provide that the President should have the right to refuse to testify as to matters concerning state secrets, but also could be

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<sup>136</sup> *Id.*

<sup>137</sup> See Judicial Yuan Interpretation No. 585.

<sup>138</sup> Guo Jiaji Mibao Hu Fa (國家機密保護法) [Classified National Security Information Protection Act] (promulgated by the Ministry of Justice, Feb. 6, 2003, rev'd June 10, 2020), art. 7(2) (Taiwan). (“Authority for original classification of information as Top Secret may be exercised personally on a document-by-document basis only by the following persons: a. the President, the Prime Minister of the Executive Yuan or the Ministers authorized by the President or the Prime Minister of the Executive Yuan.”).

<sup>139</sup> Judicial Yuan Interpretation No. 627.

extended to refusing to produce relevant evidence. In addition, presidents have the authority to determine whether certain kinds of testimony, statements, or documents involve state secrets and will jeopardize national security if revealed. As a result, it is clear that the use of state secret privilege is subject to abuse; any president can invoke it to conceal crimes that have nothing to do with Taiwan's security defense as long as he or she can provide a credible explanation about the risks of disclosure.

## V. DEBATES ABOUT LEAKS AND LEAKERS

### A. *Criminal Prosecution and Penalties*

The current statutory scheme allows the government to criminally prosecute those who publicly disclose classified information. In the matter of defense secrets, as described above, a person who leaks secret documents on national defense may be sentenced to a prison term of up to seven years.<sup>140</sup> Furthermore, any direct delivery of confidential documents to a foreigner, a foreign nation, or its agents may lead to a penalty of three to ten years in prison.<sup>141</sup> Article 110 of the Criminal Code states that civil servants who reveal classified information may be sentenced to two years in prison.<sup>142</sup>

Article 132 of the Criminal Code seeks to prohibit government officials from disclosing “non-state secrets.”<sup>143</sup> Pursuant to Article 132, civil servants who leak secret documents other than those regarding national defense shall be sentenced to imprisonment of up to three years.<sup>144</sup> Non-civil servants or those who leak documents through negligence may be sentenced to a term of imprisonment of one year or less.<sup>145</sup>

Given the penalties mentioned above, the most decisive benchmark for punishment in these cases is whether the leaked documents pertain to national defense. However, two questions arise regarding the clarity and predictability of that principle. First, the definition and scope of “secrets concerning national defense” remains unclear. Since the interpretation of “national security information” is vague, this

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<sup>140</sup> FAWUBU FAGUI ZILIAOKU (中華民國刑法) [Criminal Code of the Republic of China] (promulgated by the Ministry of Justice), art. 109(1) (2021) (Taiwan).

<sup>141</sup> *Id.* art. 109(2).

<sup>142</sup> *Id.* art. 110.

<sup>143</sup> *See id.* art. 132.

<sup>144</sup> *Id.* art. 132(1).

<sup>145</sup> *Id.* art. 132(2), (3).



ambiguity allows for too much prosecutorial discretion in deciding whether a certain action should be regarded as leaking. Second, as noted above, the unauthorized release of national defense secrets to “foreigners” is subject to the most serious penalty. However, the question involving whether “foreigners” includes citizens of Mainland China has caused considerable doubt and remains an unresolved issue.

The current statutory mechanism also makes it a crime for military personnel to be involved in the unauthorized acquisition and disclosure of classified information about the government. Article 20 of the Criminal Code of the Armed Forces suggests that a person who delivers or discloses confidential information concerning national defense can be sentenced to between three and ten years in prison.<sup>146</sup> In wartime, these individuals can be convicted of treason and prosecuted with possible imprisonment of seven years or more.<sup>147</sup> More importantly, if the information is leaked to the enemy, the guilty party can be sentenced to life imprisonment or to death.<sup>148</sup> This is the most severe criminal punishment for leaking secrets in the existing legal system governing classified information.

As previously discussed, the National Security Classified Information Protection Act established standards for the classification and declassification of government information. It also imposed several criminal punishments for the unauthorized release of state secrets. In accordance with Article 32, a person who unlawfully releases information classified as a state secret as prescribed by this act may be sentenced to between one and seven years in prison.<sup>149</sup> Even if the action is committed through negligence, the person responsible can still be sentenced to two years in prison.<sup>150</sup> Such a rule does not differentiate between types of classified national security information. In other words, as long as the behavior constitutes the dissemination and release of government documents previously designated as state secrets,

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<sup>146</sup> Criminal Code of the Armed Forces (promulgated by the Ministry of National Defense), art. 20(1) (2019) (Taiwan) (prescribing that a person who discloses or delivers documents, plans, information, electromagnetic records, or other things of a secret nature concerning the defense of the ROC shall be punished with imprisonment for three to ten years, and, if committed in wartime, the offense shall be punished with imprisonment for not less than seven years or imprisonment for life).

<sup>147</sup> *Id.*

<sup>148</sup> *Id.* art. 20(2) (noting that a person who discloses or delivers to an enemy the military secrets in the preceding paragraph shall be punished with death or imprisonment for life).

<sup>149</sup> *Id.*

<sup>150</sup> *Id.*

a sentence of one to seven years of criminal imprisonment will be imposed.

In addition to the above-mentioned penalties, Article 2-1 of the National Security Law prohibits people from carrying out the detection, collection, consignment, or delivery of any confidential documents, pictures, information, or articles for the official use of a foreign country or of Mainland China.<sup>151</sup> However, since there are already corresponding criminal sanctions for the unauthorized leaking of secret documents, the situations falling within this provision are limited to transferring information to the Mainland.

### *B. Counterintelligence Challenge and Real-World Leak Prosecution*

After President Tsai Ing-wen took office, a series of counterintelligence operations was initiated to address Chinese espionage cases. According to Taiwan's MJIB—one of the three main intelligence services in Taiwan—Chinese spies are using exchange activities as a cover to spy on Taiwan, collect intelligence to infiltrate or absorb personnel, or develop organizations in Taiwan.<sup>152</sup> In 2018, the MJIB revealed that it uncovered fifty-two Chinese espionage cases involving 174 individuals.<sup>153</sup>

On the other hand, the media report reveals that “Taiwan’s national security authorities estimate that about 5,000 individuals are collecting state secrets in Taiwan on behalf of the Chinese government, and the nation’s civilian administration is no less vulnerable or compromised than its military.”<sup>154</sup> For this reason, the major concern regarding counterintelligence work in Taiwan would be “that civil servants have low awareness [about espionage] and the offices lack their own information security systems to protect them from communist spies . . . . As they have no mechanisms for reporting suspected

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<sup>151</sup> Guo Jia An Quan Fa (國家安全法) [National Security Law] art. 2-1 (Taiwan).

<sup>152</sup> Zhenpo 174 Ren She Gong Die An Lu Lushi: Qianghua Anquan Guanli (偵破 174 人涉共諜案 陸委會：強化安全管理)

[Investigating 174 People Involved in the International Espionage Case: Mainland Affairs Council: Strengthening Security Management], Zhongyang Tongxunshe (中央通訊社) [CENT. NEWS AGENCY] (Jan. 1, 2018), <https://www.cna.com.tw/news/acn/201901110228.aspx> [<https://perma.cc/Q8AY-ZK8K>].

<sup>153</sup> *Id.*

<sup>154</sup> Chung Li-hua & Jonathan Chin, *5,000 Chinese Spies in Taiwan: Source*, *TAIPEI TIMES* (Mar. 13, 2017), <http://www.taipetimes.com/News/front/archives/2017/03/13/2003666661> [<https://perma.cc/KA6T-VUCP>].

espionage attempts, the risk of vulnerable civil servants being turned or compromised is substantial.”<sup>155</sup>

One representative case is the prosecution of Chinese former student Zhou Hongxu on suspicion of espionage and leaking Taiwan’s state secrets.<sup>156</sup> The defendant, a native of the Mainland, went to Taiwan to study at the National Chengchi University.<sup>157</sup> He returned to the Mainland after graduating in September of 2016, and then he applied for a business appointment as a director of a company in February of 2017.<sup>158</sup> The defendant met with a Mr. Li on the Mainland on a cross-strait exchange event in Shanghai in 2014.<sup>159</sup> During this period, Li repeatedly promised to provide Zhou with monetary rewards.<sup>160</sup> In exchange, Zhou agreed to find and introduce Taiwan’s government officials and socially influential celebrities to Li so that he could solicit them to develop and establish Pro-China Communist Party organizations.<sup>161</sup> These recruited people were to be invited to visit China. Mainland Chinese officials would cover all of these people’s expenses.

In reaching its holding, the Taipei District Court held that, having full knowledge of the very fact that the cross-strait relations are internationally hostile, the defendant still undertook social networking initiatives, introducing and recruiting Taiwan’s government officials to meet Communist Party members for the purpose of assisting the it in developing organizations.<sup>162</sup> These actions jeopardized Taiwan’s national security and endangered national interests. Accordingly, the

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<sup>155</sup> *Id.*

<sup>156</sup> Chris Horton, *Rather Than Talk to Taiwan, China Sends in the Spies*, QUARTZ (Mar. 15, 2017), <https://qz.com/932963/chinese-espionage-an-estimated-5000-communist-spies-are-in-taiwan-and-it-doesnt-know-what-to-do-about-it/> [<https://perma.cc/5SHJ-FMNG>].

<sup>157</sup> *Id.*

<sup>158</sup> *Kyodo, China Suspects Graduate of Taiwan University of Espionage*, JAPAN TIMES (Mar. 15, 2017), <https://www.japantimes.co.jp/news/2017/03/12/asia-pacific/crime-legal-asia-pacific/china-suspects-graduate-taiwan-university-espionage/> [<https://perma.cc/UKF5-W7R6>].

<sup>159</sup> See Xhang Wenchuan (張文川), 周泓旭翻供稱遭陷害 法官不採 [*Zhou Hongxu Denies Confession that He Was Framed and the Judge Does Not Accept It*], 自由時報 [LIBERTY TIMES NET] (Sept. 15, 2017), <https://news.ltn.com.tw/news/society/breakingnews/2194331> [<https://perma.cc/AC79-6ZA5>].

<sup>160</sup> *Id.*

<sup>161</sup> *Id.*

<sup>162</sup> *Id.*

defendant violated Article 2 of the National Security Law.<sup>163</sup> The defendant was sentenced to one year and two months in prison.<sup>164</sup>

Despite the comprehensively established legal framework, Taiwan's government authorities had paid limited attention to it. This was because the determination of these activities is usually closely associated with the political ideology of the ruling party and the party of the President. The prosecution and execution of the Zhou Hongxu case made it clear that Tsai's administration had become aware of substantial intervention by China in Taiwan's political environment and the necessity of undertaking effective counter-intelligence measures.

*C. President Lee Teng-hui's "Slush Fund Scandal" and  
Unauthorized Disclosure*

For any government, the unauthorized release of secret information, and how to respond to such leaks, presents a significant challenge. In Taiwan, one notable case was President Lee Teng-hui's "slush fund scandal" in the 1990s.<sup>165</sup> This secret account, established by President Lee in the NSB in 2000, was used to boost Taiwan's diplomatic relations and enhance intelligence gathering activities, including overseas intelligence, propaganda, and spy networks in China and elsewhere.<sup>166</sup> The allegations about the slush fund are believed to have been leaked to the media by Colonel Liu Kuan-Chun, a former chief cashier at Taiwan's NSB who had firsthand knowledge of the Taiwan's spies and informers; he fled to China in 2000.<sup>167</sup> The media has since revealed that Liu delivered information regarding this secret fund to an opposition party.<sup>168</sup> This party was principally comprised of Mainlanders who despised Presidents Lee and Chen.<sup>169</sup> From there, the damaging documents made their way to *Next*, a weekly news magazine leaning toward the pan-Blue coalition.<sup>170</sup>

In March of 2002, when the outbreak of this scandal significantly undermined the NSB's reputation, the government prevented

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<sup>163</sup> *Id.*

<sup>164</sup> *Id.*

<sup>165</sup> Michael Bristow, *Slush Scandal Blows Taiwan Spies' Cover*, BBC NEWS (Mar. 26, 2002), <http://news.bbc.co.uk/2/hi/asia-pacific/1893971.stm> [<https://perma.cc/X5PB-DPB6>].

<sup>166</sup> *Id.*

<sup>167</sup> *Id.*

<sup>168</sup> *Id.*

<sup>169</sup> *Id.*

<sup>170</sup> Phillips, *supra* note 22.

Taiwanese media outlets, such as *Next* magazine, from publishing reports about the secret fund.<sup>171</sup> At the urging of NSB Director Ting Yuchou, agents from the High Court Prosecutor's Office searched *Next*'s offices and confiscated materials found there.<sup>172</sup> The *Next* reporter, Hsieh Zhong-Liang, was charged with breaching national security and banned from leaving the country.<sup>173</sup> The prosecutors also performed a search and seizure of the magazine's office. As a consequence of this scandal, the Control Yuan impeached two NSB officials for failing to monitor Liu after his retirement and prevent his escape to China. This scandal regarding secret funds not only embarrassed President Chen's administration, but also provoked public debate, dividing those who criticized Lee's extra-legal fund and those who attacked its exposure.<sup>174</sup>

This polarized public discussion raised two issues: (1) whether freedom of the press should extend to the unauthorized disclosure of classified documents and should thus be protected; and (2) to what extent national defense interests can prevail if government insiders who are obligated to withhold information from the public release it to outsiders. A conflict between national security interests and the free flow of information is likely to result in a major ideological dilemma. Because the courts have not had an opportunity to deliver their opinions on these two issues, the executive branch's reaction to the slush fund scandal implied that the revelations of classified information would significantly harm national interests. The executive branch thereby justified allowing the police to search for and seize information from media offices and suspend the circulation of reports.

Later in 2011, President Lee was charged with embezzling \$7.79 million through the use of this secret fund.<sup>175</sup> The indictment alleged

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<sup>171</sup> Crystal Hsu, *Committee Passes State-secrets Bill*, TAIPEI TIMES (Dec. 20, 2002), <https://www.taipeitimes.com/News/taiwan/archives/2002/12/20/0000187858> [<https://perma.cc/NM7Z-UE7G>].

<sup>172</sup> *Id.*

<sup>173</sup> Jimmy Chuang, *'Next' Reporter Defends NSB Story*, TAIPEI TIMES (Mar. 29, 2002), <http://www.taipeitimes.com/News/taiwan/archives/2002/03/29/0000129663> [<https://perma.cc/4AVT-P3A7>]; Jimmy Chuang, *Prosecutors Charge 'China Times' Chief*, TAIPEI TIMES (Mar. 23, 2002), <http://www.taipeitimes.com/News/taiwan/archives/2002/03/23/0000128843> [<https://perma.cc/6RJC-YWHA>].

<sup>174</sup> See David Corn, *Taiwangate? Bush Appointees Linked to Secret Slush Funds Update*, NATION (Apr. 2, 2002), <https://www.thenation.com/article/taiwangate-bush-appointees-linked-secret-slush-funds-update/> [<https://perma.cc/K5FK-V9AD>].

<sup>175</sup> Edward Wong, *Ex-President of Taiwan is Charged with Graft*, N.Y. TIMES (June 30, 2011), <https://www.nytimes.com/2011/07/01/world/asia/01taiwan.html> [<https://perma.cc/9BUC-3SA9>].

that President Lee took money from the NSB fund while he was in office and laundered it to build the Taiwan Research Institute.<sup>176</sup> The Highest Court reaffirmed the verdict of the Taipei District Court, emphasizing the status and relationship between the NSC and the NSB, declaring, in relevant part, that Article 2 of the NSC Organic Act stipulates that the NSC is the advisory body for the President to determine the major policies related to national security; that Article 5 stipulates that the resolution of the NSC serves as a reference for presidential decision-making; and that Article 2 of the NSB Organic Act suggests that the NSB is affiliated with the NSC, which comprehensively plans and implements national security intelligence work.<sup>177</sup>

Pursuant to the above regulations, the Court ruled in favor of the President's authority and actions in facilitating foreign policy, explaining that the President's decision on the NSC determines the policy of national security.<sup>178</sup> The implementation of this major policy involves the national security intelligence workers, who are the responsibility of the National Security Agency.<sup>179</sup> The witness, Ting Yuchou, confessed that the defendant seldom administers the details, testifying that once the President approves the plan, accurate management and execution rests upon the operation by the NSB.<sup>180</sup> For this reason, it is evident that the defendant is not expected to have advance knowledge of each expenditure of the fund.<sup>181</sup> Even though the President may approve a particular task, if there are dozens of expenditures or detailed activities within the task, the President may not have prior knowledge but will be informed afterward by the end of each year or semi-annual period.<sup>182</sup>

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<sup>176</sup> Joe Palazzolo, *Former Taiwanese President Charged with Stealing State Funds*, WALL ST. J. (June 30, 2011), <https://www.wsj.com/articles/BL-CCB-4676> [<https://perma.cc/C8VL-F8KG>].

<sup>177</sup> See Wen Gao, Gonggong Guanxi Shi, Ben Yuan 100 Niandu Jin Zhong Su Zi Di 7 Hao Beigao Lidenghui, Liu Taiying Weifan Tanwu Zhizui Tiaoli Deng Anjian (聞稿, 公共關係室, 本院 100 年度金重訴字第7號被告李登輝、劉泰英違反貪污治罪條例等案件) [Press Release, Public Relations Room, Cases in Which Defendants Li Denghui and Liu Taiying Violated the Corruption and Crimes Regulations in the 100th Year of the Court], Dist. Ct. Taiwan (Nov. 15, 2013), <http://jirs.judicial.gov.tw/GNNWS/NNWSS002.asp?id=140726> [<https://perma.cc/7S2U-L2GG>].

<sup>178</sup> See *id.*

<sup>179</sup> See *id.*

<sup>180</sup> *Id.*

<sup>181</sup> *Id.*

<sup>182</sup> *Id.*

To sum up, the courts, having again shown strong deference to presidents' decisions on national security affairs, have determined that it is lawful to establish secret funds covering a wide range of intelligence and security affairs.

#### D. Summary

Anyone who discloses national security information without authorization faces a broad range of criminal sanctions. Taiwan's current statutory scheme does not do a particularly good job of distinguishing among different forms of leaking. Due to the uncertainty and lack of clarity surrounding this statutory scheme, the definition of "national defense secret" remains obscure and problematic. The standard of measurement for damage to national security—"exceptionally grave damage to the national security," "serious damage," and "identifiable damage"—is also ambiguous. Additionally, in the wake of President Lee's secret account scandal, a wide range of concerns arose pertaining to the proper limits for the authority of the presidency and freedom of the press. Proponents of presidential authority argue that setting up a secret account should fall within the lawful scope of presidential power.

The opposing side has proposed that the media should not be searched arbitrarily by the police in the name of national security. Other critics also point out that allowing the Executive to operate without specific legal command and authorization may encourage embezzlement and financial fraud under the guise of national security. In this regard, the judiciary is inclined to recognize that presidents are entitled to a certain degree of autonomy in national security affairs. As the head of the nation, they are entitled to a certain degree of discretion in the employment of the national budget for improving foreign relations and national defense, but this also means that any abuses in which they engage go largely unchecked by the courts and Legislative Yuan.<sup>183</sup>

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<sup>183</sup> The ROC Constitution envisions the impeachment power of the president both in the Grand Justices and in the Legislative Yuan. Specifically, Additional Article 4 of the ROC Constitution provides that impeachment of the president or the vice president by the Legislative Yuan shall be initiated upon the proposal of more than one-half of the total members of the Legislative Yuan and passed by more than two-thirds of the total members of the Legislative Yuan, whereupon it shall be presented to the Grand Justices of the Judicial Yuan for adjudication. MINGUO XIANFA art. 4 (2005) (Taiwan). Once upon the threshold of the proposal was fulfilled, it shall be presented to the Grand Justices to review the impeachment case. *Id.* It is worthwhile noting that even though the ROC Constitution envisions impeaching the President, it has never been successfully initiated by the Legislative Yuan. For this reason, it is

## VI. LEGAL IMPLICATIONS

The Council of Grand Justices, as the highest organ of constitutional power in Taiwan, not only created the so-called “liberal democratic constitutional order”<sup>184</sup> as a fundamental normative underpinning for interpreting the Constitution, it has also emphasized the principle of administrative unity and accountability. This principle represents that the Executive Yuan must be held responsible for the overall performance of all the agencies subordinate to the said Yuan.<sup>185</sup> Such principles are intended to build and achieve checks and balances between the Executive and Legislative Yuans. The following section will introduce the rationale that the Council of Grand Justices employed in constructing the concepts of political control and accountability, and then use those concepts to measure the practical application of government secrecy in Taiwan.

*A. Accountability Based Upon Liberal Democratic Constitutional Order*

The Council of Grand Justices initially defined accountability in *J.Y. Interpretation No. 387*,<sup>186</sup> indicating that:

Under Article 57 of the Constitution, the Executive Yuan is accountable to the Legislative Yuan. Politics in a democracy essentially involves politics of popularity and accountability politics. The legitimacy of a modern state to establish its government and to implement its administrative affairs is based on the will of the people.<sup>187</sup>

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reasonable to assume that Taiwan’s presidents still have great discretion in the employment of the national budget in the name of national interests.

<sup>184</sup> See SHIZI NO. 499 JIESHI (釋字第 499 號解釋) [Judicial Yuan Interpretation No. 499] (2000) [hereinafter Judicial Yuan Interpretation No. 499] (stating that the concept of a “liberal democratic constitutional order” refers to the way in which the Constitutional Court in Taiwan addresses constitutional disputes. It encompasses a series of fundamental indicators, which can be used to measure whether the use of government secrecy is in line with democratic principles. In *J.Y. Interpretation No. 499*, the Grand Justices categorized the fundamental essence of the Constitution as the “liberal democratic constitutional order,” which encompasses a series of fundamental principles of democracy, such as the principle of the democratic republic, the sovereignty of and by the people, the principle of protection of human rights, and the checks and balances of government powers).

<sup>185</sup> SHIZI NO. 387 JIESHI (釋字第 387 號解釋) [Judicial Yuan Interpretation No. 387] (1995) [hereinafter Judicial Yuan Interpretation No. 387].

<sup>186</sup> Judicial Yuan Interpretation No. 387.

<sup>187</sup> *Id.*



As indicated above, the Council of Grand Justices elaborated on the normative implication of democratic accountability. Democratic accountability acts as a mechanism to guarantee legitimacy within a modern democratic state and is derived from the implementation of the politics of popularity and accountability. To be specific, the politics of popularity reflect the choice made by citizens with respect to democracy, with the intention of maximally satisfying both the representativeness of electoral constituency and diversity of political parties and perspectives.<sup>188</sup> With respect to accountability politics, in *J.Y. Interpretation No. 613*, the Council of Grand Justices elaborated that the legislative branch and its legislators reflect an institutional design to oversee the executive branch under the Constitution:

Democracy consists essentially in politics of accountability. A modern rule-of-law nation, in organizing its government and implementing its government affairs, should be accountable to its people either directly or indirectly. According to Article 3, Paragraph 2 of the Additional Articles of the Constitution, the Executive Yuan shall be responsible to the Legislative Yuan, which is an institutional design under our constitution based on the doctrine of political accountability. Therefore, the principle of administrative unity as revealed by Article 53 of the Constitution is also intended to hold the Premier responsible for all the administrative affairs under the direction and supervision of the Executive Yuan, thus making into a reality the constitutional requirement that the Executive Yuan answers to the people via the Legislative Yuan.<sup>189</sup>

Applying the aforementioned doctrine to Taiwan's intelligence community, theoretically, the institutionalization and legalization of intelligence agencies enables the Legislative Yuan to hold the intelligence apparatus accountable to some degree. However, in practice, does the current system stipulated by laws considerably "improve" the oversight and hold the NSC—this "Upper Executive Yuan"—accountable? I argue that it is not.

### B. The "Black-Box" of the NSC

Article 2 of the Additional Articles of the ROC Constitution stipulates that to determine major policies for national security, the

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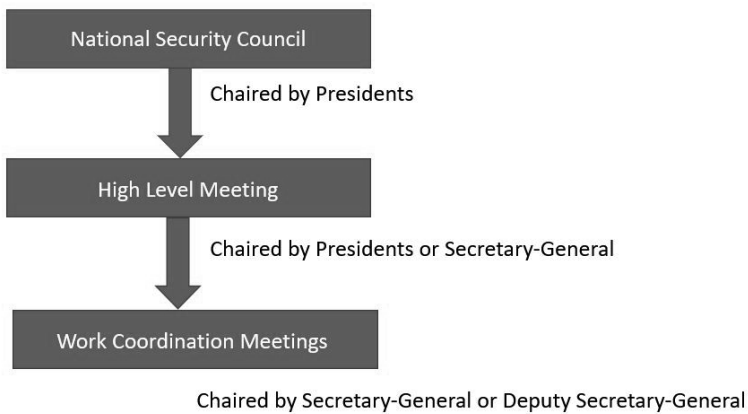
<sup>188</sup> SHIZI NO. 721 JIESHI (釋字第 721 號解釋) [Judicial Yuan Interpretation No. 721] (2014) [hereinafter Judicial Yuan Interpretation No. 721].

<sup>189</sup> Judicial Yuan Interpretation No. 613.

President may establish a national security council and a subsidiary national security bureau. The organization of said organs shall be stipulated by law.<sup>190</sup> Furthermore, Article 2 of the National Security Council Organization Act explicitly provides that the NSC will be the *advisory body* for the President when determining major policies related to national security.<sup>191</sup> The term “national security” as mentioned refers to matters related to national defense, foreign affairs, cross-strait relations, and major national accidents.<sup>192</sup> More importantly, Article 8 of the National Security Council Act provides that the NSC and its affiliated National Security Agency shall be subject to the supervision of the Legislative Yuan.<sup>193</sup>

**Figure 2**<sup>194</sup>

**Top-Down System of National Security Agencies (Taiwan)**



Although there is specific legal command prescribed by laws, in practice, the national security realm is filled with several organizational pitfalls. First, the NSC is an indispensable apparatus in national security policymaking and interagency coordination. However, even after the 2003 changes embedded in the National Security Council Organization Act, the NSC continues to experience problems of institutional

<sup>190</sup> MINGUO XIANFA art. 2 (2005) (Taiwan).

<sup>191</sup> *Id.*

<sup>192</sup> Organic Act of the National Security Council art. 2 (Taiwan).

<sup>193</sup> *Id.* Art. 8.

<sup>194</sup> Jianli Quan Ze Xiangfu De Guojia Anquan Huiyi (建立權責相符的國家安全會議) [An Accountable National Security Council], Xin Jingjie Wenjiao Jijin Hui (新境界文教基金會) [NEW FRONTIER FOUND] (2013), [http://www.dppnff.tw/uploads/20140305230133\\_2899.pdf](http://www.dppnff.tw/uploads/20140305230133_2899.pdf) [<https://perma.cc/4DJA-XD6R>].

competency and has difficulty managing the growing complexities of an increasing range of national security issues. Second, the lack of accountability and poor supervision from the legislatures also pose a threat to the implementation of accountability.

There may be multiple layers of institutional insufficiency. First, compared with other policy areas, the national security policymaking community in Taiwan is composed of a very small elite group. The Secretary General, Deputy Secretary General, and the NSC advisors are usually personally assigned by the President from his close network of reliable associates.<sup>195</sup>

*C. The Organization and Personal Arrangement of National Security Council (2008)*

**Table 2**<sup>196</sup>

<i>Title and Responsibility</i>	<i>Numbers of the Advisory Members</i>
<i>Secretary General</i>  <i>(the U.S.-Taiwan Relations, Cross-Strait Relations)</i>	5
<i>Deputy Secretary General</i>  <i>(the Cross-Strait Affairs, Counter-China Affairs)</i>	4
<i>Deputy Secretary General</i>  <i>(International Organizations)</i>	4
<i>Deputy Secretary General</i>	3

<sup>195</sup> *Id.*

<sup>196</sup> *Id.*

*(Presidential Speech, Political Outreach)*

*Advisor*

4

*(International Trade, European Union Affairs)*

*Advisor*

4

*(Natural Disasters, Epidemics, Anti-terrorism)*

*Advisor*

4

*(Taiwan-Japan Affairs, Diplomacy, and Ocean Affairs)*

*Advisor*

4

*(Non-diplomatic Relationship)*

*Advisor*

4

*(Military Defense)*

Such a closed-end system could also hinder legislative supervision and facilitate the abuse of power. That is, even though the National Security Council Act explicitly stipulates the personal composition and numbers of these personnel arrangements, they are actually centered around the President and his absolute appointment authority.<sup>197</sup>

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<sup>197</sup> Wen-Chang Chen, *Modernization of Taiwan's National Security Council: Context, Process, Content, and Strategy*, JAMESTOWN FOUND. (Nov. 5, 2010), <https://jamestown.org/program/the-modernization-of-taiwans-national-security-council/> [<https://perma.cc/P9QL-3EM3>].

Scholarly literature suggests that this padlocked decision-making system restricts the existing mechanisms within a very small group of elites.<sup>198</sup> As Wright Mills suggests in his “elite theory,” a unified elite may challenge the foundation of democratic pluralism.<sup>199</sup> The hidden basis of elite political power does not lie in its ability to develop and execute any particular collective project, but in its ability to monopolize positions of power, and could eventually lead citizens to believe that this form of politics is the “normal” way democratic institutions work.<sup>200</sup> Echoing this elite theory, scholarly literature argues that the ruling elites within the NSC may reproduce their acts without any legal mandate or oversight.<sup>201</sup>

Another major concern of Taiwan’s national security agencies is that they lack an overarching internal supervision and task-oriented organization in charge of legal accountability like the U.S. Department of Justice’s Office of Legal Counsel. This is true even though some advisory consultants have legal training or background. That is, there is no specific mechanism or body that makes a final determination about whether certain programs and political decisions regarding national security affairs are legal.

Institutional incompetence is reflected in the formation of policy-making and policy decisions. It is worthwhile noting that during the period of President Lee, the NSC’s main tasks focused on diplomacy and cross-border affairs. Although it is the Lee administration that established and implemented the institutionalization and legalization of the national security system, President Lee, a dominant figure, centralized absolute legal authority in his political leadership and decision-making powers. President Lee personally exercised absolute political leadership and decision-making power and left the Secretary General with no substantial authority to determine affairs, which implies that the unitary presidential power squarely dominated the decision-making process in the core domain of national security.<sup>202</sup> In other words, there were extremely limited internal constraints on the presidency.

Notably, rules became more predictable after President Chen took office in 2000. President Chen created an internal decision-making process that required that documents submitted to him by the Advisory

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<sup>198</sup> *Id.*

<sup>199</sup> C. Wright Mills, *The Power Elite*, in OXFORD HANDBOOK CLASSICS IN PUBLIC POLICY AND ADMINISTRATION 70 (2015).

<sup>200</sup> *Id.* at 70–71.

<sup>201</sup> See NEW FRONTIER FOUND., *supra* note 194.

<sup>202</sup> See *id.*

Committee must first pass through the Secretary General. The Deputy Secretary General and the Advisory Committee were also subject to the command and supervision of the Secretary General, who substantially shouldered the task of coordinating and integrating the heads of the relevant ministries.<sup>203</sup> In other words, the Secretary General gradually became a critical hub in addressing national security affairs, and now takes orders from the President.<sup>204</sup> Although it is not so evident that the NSC really affects the President's absolute control of national security, to an important extent, the NSC also began to create a more holistic and dynamic circulation of policymaking processes to create meaningful accountability.<sup>205</sup>

Given this discussion, serious accountability concerns remain because of the continued existence of a set of ruling elites, which might cause the Executive to deploy power arbitrarily, without sufficient oversight.

## VII. CONCLUSION

By identifying and analyzing the evolved process of democratization in Taiwan, this article provides a more accurate account of Taiwan's treatment of national security interests and transparency. It also explores how Taiwanese government sufficiently fulfills their institutional functions of checking and balancing the executive branch's use of secrecy and guarantees that the treatment of information aligns with the norms of legality. This article found that the democratization that began in the late 1980s directly facilitated the institutionalization and legalization of national security and intelligence agencies.

The analysis of these legal reforms identified two milestones accomplished by Presidents Lee and Chen. These Presidents took action to dismantle the KMT's one-party state and pursued an institutional balance of competing interests between national security and open government. In an effort spearheaded by President Lee, the Legislative Yuan passed the National Security Council Act as well as the National Security Bureau Act to formally legalize two major intelligence agencies that had no previous mandate or oversight. President Chen's promulgation of the Freedom of Government Information Act and the Classified National Security Information Protection Act gave the

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<sup>203</sup> *Id.* at 6.

<sup>204</sup> *Id.* at 8.

<sup>205</sup> *Id.*

impression of public participation as an element of democratic deliberation, but still maintained a firm commitment to national interests.

The judiciary tends to give broad respect to the President's authority on diplomatic affairs and intelligence operations, enabling the President to exercise the doctrine of executive privilege. Such judicial deference to the presidency also extends as far as the discretionary entitlement of presidents to establish secret funds in order to boost overseas intelligence gathering and to facilitate diplomacy.